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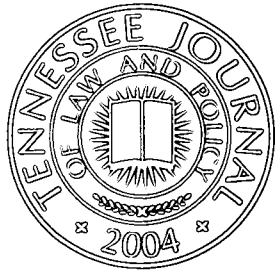

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2004-2005 Editorial Staff

Editor's Note

In our Fall 2004 Issue, the JOURNAL included a Note analyzing *Cone v. Bell*, 359 F.3d 785 (6th Cir. 2004). *See* 1 TENN. J.L. & POL'Y 153 (2004). On January 24, 2005, the U.S. Supreme Court reversed the Sixth Circuit's decision in *Cone*. The Court held that the Tennessee Supreme Court's affirmance of a death sentence imposed based on the jury's finding that murders were "especially heinous, atrocious, or cruel" was not contrary to clearly established Supreme Court precedent. *See* Bell v. Cone, 125 S. Ct. 847 (2005).

Contents

Anomalies in Intentional Tort Law

*Alan Calnan**

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I. Introduction

All intentional torts are governed by three basic principles: (1) intent is a necessary and sufficient basis for holding someone liable; (2) each intentional tort must

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violate its own specific behavioral rule; and (3) all intentional torts require proof of the defendant's fault. Together, these principles appear to make intentional tort law both unique and self-contained. The first principle justifies creating an intentional tort theory of recovery. The second principle distinguishes that theory from negligence, which bases liability on the fixed standard of reasonable care. The third principle separates intentional torts from the no-fault theory of strict liability.

Of course, this jurisprudential scheme has never been as perfect as it sounds. Like any classification system, it contains some obvious anomalies. For example, the concept of tortious intent, defined as scienter, includes behavior which is clearly not purposeful.[1] In addition, the doctrine of transferred intent creates a legal fiction that artificially shifts intent from one person to another.[2] More discretely, the mistake doctrine imputes intent to persons whose conduct clearly is unintentional.[3]

Until now, these anomalies have been viewed as rather trivial blemishes on an otherwise healthy *corpus juris*. In this article, however, I intend to show that the flaws in intentional tort law are far greater in number, and far more serious, than previously imagined. Indeed, they are so numerous and substantial, they actually undercut each of the law's three sustaining tenets.

The truth, I shall argue, is that intent is *never* a sufficient basis for imposing liability. Instead, liability is *always* based on the "negligence" concept of reasonableness. Since unreasonableness is presumed from intent, proof of fault is *never* required. Rather, *all* intentional torts actually impose a form of *strict liability*.

Unlike the anomalies mentioned above, these observations cannot be casually dismissed; in fact, they

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[1] The scienter anomaly is discussed *infra* in Part III.B.1 & 2.

[2] The doctrine of transferred intent is addressed *infra* Part III.A.1.

[3] The mistake anomaly is analyzed *infra* Part III.A.2.

could hardly be more important or timely. Obviously, all jurisprudential regimes are expected to be both accurate and comprehensible. However, the expectations for intentional tort jurisprudence are even higher. Intentional torts represent one-third of tort law's theoretical paradigm. They are both defined by and distinguished from their theoretical counterparts, negligence and strict liability. Thus, if intentional tort jurisprudence contains any serious conceptual flaws, they could not be easily isolated or neatly cabined from the whole. Instead, they would threaten tort law's entire supporting structure.

Today that structure is under review. In its mission to restate tort law, the American Law Institute currently is reconsidering all of the law's basic principles, including those contained in the jurisprudence of intentional torts.[4] Thus, if something *is* fundamentally wrong with that jurisprudence, now would be the time to fix it. In fact, if the flaws run as deep as I suspect, the time would be ripe to shift the law toward a new theoretical paradigm.[5]

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[4] The ALI's reanalysis is part of its ongoing project to develop a third restatement of torts. To date, that project has gone through several drafts. *See* RESTATEMENT (THIRD) OF TORTS: GENERAL PRINCIPLES (Discussion Draft) (1999); RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (BASIC PRINCIPLES) (Tentative Draft No. 1, 2001); RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (BASIC PRINCIPLES) (Tentative Draft No. 2, 2002). Sections 1 and 5 of the RESTATEMENT (THIRD) deal specifically with intentional torts. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (BASIC PRINCIPLES) §§ 1, 5 (Tentative Draft No. 1, 2001).

[5] Thomas Kuhn first explained the notion of a scientific paradigm shift in his groundbreaking book, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (3d ed. 1996). In science, paradigms follow a predictable pattern of thesis and antithesis. Someone discovers a natural phenomenon, develops a hypothesis to explain the discovery and initiates testing to determine if the hypothesis is accurate. If the hypothesis withstands the rigors of empirical analysis, the scientist declares the hypothesis to be "true." If that "truth" becomes generally accepted, a paradigm on that subject is established.

In the remainder of this article, I will show how the many anomalies in intentional tort law create the need for such a shift, and will suggest at least one option for change. I will begin, in Part II, by examining the current theoretical paradigm of tort law. This paradigm defines the avowed interrelationship among intentional tort theory and the theories of negligence and strict liability. In the next three parts, I will show how these theoretical distinctions break down in practice. Specifically, Part III demonstrates the misfit between intentional tort theory and the cases falling both within and beyond its reach. Part IV then reveals the

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Other scientists invariably question this "truth" and subject it to further testing. Not infrequently, the additional testing discloses anomalies in the existing paradigm. If that paradigm cannot resolve these anomalies, someone may offer a new hypothesis that does. *See id.* at 84-85. If the new hypothesis explains the old anomalies without creating any significant anomalies of its own, a new "truth" is recognized, and a new paradigm is born. *Id.* at 17-18, 23.

Like science, jurisprudence is a truth-seeking discipline. As a science of law, jurisprudence undertakes to uncover the principles and values which underlie a body of legal rules and to accurately explain, differentiate and classify them. *See* BLACK'S LAW DICTIONARY 854-55 (6th ed. 1990). Theories which succeed in these tasks may acquire the status of a legal paradigm. Over time, however, a legal paradigm may cease to adequately explain the law's substance or structure, losing its hold on the truth. It then stands vulnerable to replacement by a more convincing theory.

A paradigm—legal or otherwise—cannot be eliminated unless another stands ready to take its place, and a new paradigm cannot commence without completely destroying its predecessor. As Thomas Kuhn has noted, "[t]he decision to reject one paradigm is always simultaneously the decision to accept another, and the judgment leading to that decision involves the comparison of both paradigms with nature and with each other." KUHN at 77.

The anomalies of intentional tort law seem to indicate that tort law in general is nearing this point of eclipse. If so, we could not preserve the law's integrity by making a few piecemeal changes. Instead, we would have to completely alter the way we think about and analyze liability issues. In short, we would have to shift toward a brand new "postmodern" paradigm of tort law.

overlap between intentional tort theory and the theory of negligence. To round out this discussion, Part V uncovers the remarkable and ironic affinities between intentional torts and strict liability. Finally, in the Conclusion and Proposal, I offer a new theoretical paradigm based on the concept of reasonableness which not only captures the spirit of intentional tort law, but also eliminates its most enervating anomalies.

II. The Theoretical Paradigm of Tort Law

The prevailing theoretical paradigm of tort law, depicted diagrammatically in Figure 1 below, divides all torts into one of three theories of liability: intent, negligence, or strict liability. Each theory is then classified as either fault-based (negligent and intentional torts) or fault-free (strict liability) and arranged along a fault continuum. Intentional torts, which are extremely faulty, fall at one end of this continuum. Negligent acts, which are only moderately faulty, lie in the middle. Strict liability activities, which are fault-free by definition, sit at the opposite end of the continuum. [6]

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[6] Oliver Wendell Holmes Jr. created the first version of this paradigm. Holmes, too, placed all torts into three categories and arranged them along a fault continuum. Clearly culpable torts—which were committed with scienter—fell on one end of this continuum. *See* Oliver Wendell Holmes, Jr., *The Theory of Torts*, *reprinted in* 1 THE COLLECTED WORKS OF JUSTICE HOLMES: COMPLETE PUBLIC WRITINGS AND SELECTED JUDICIAL OPINIONS OF OLIVER WENDELL HOLMES 327 (Sheldon M. Novick ed., 1995)[hereinafter 1 WORKS]. Inculpable torts—which were based on public policy—fell on the opposite end of the continuum. *See Id.* Most negligence cases fell in the middle. *See id.* at 327. All torts, however, were supposed to adhere to the same objective, external standard. *See* OLIVER WENDELL HOLMES, JR., THE COMMON LAW 86-87 (1881)[hereinafter HOLMES, COMMON LAW].

Holmes' paradigm was not premised on the theories of intentional tort, negligence and strict liability. According to Holmes, the clearly culpable or scienter category of his paradigm covered both intentional

Intentional torts and negligence make up the paradigm's fault matrix. Within this matrix, fault has two roles. Procedurally it is a unifier, requiring plaintiffs in both negligence and intentional tort actions to prove their offenders acted wrongfully. Substantively, however, fault is a divider. It imposes different standards of liability for negligence and intentional torts. Specifically, while intentional torts are based on the subjective concept of intent, negligence is based on an objective standard of reasonable care.

At first, the fault matrix seems to require no explanation. It has been around so long, and has been used so widely, that it is simply taken for granted. Yet it is neither as simple nor as straightforward as it may appear. Within this matrix are a number of principles and assumptions—some overt and familiar, others hidden or overlooked—that impact the very structure and content of contemporary tort law. Thus, before we can understand intentional tort law, or begin to deconstruct it, we must first take a closer look beneath its familiar surface.

Holmes' paradigm was not premised on the theories of intentional tort, negligence, and strict liability. According to Holmes, the clearly culpable, or scienter, category of his paradigm covered both intentional torts *and* certain acts of

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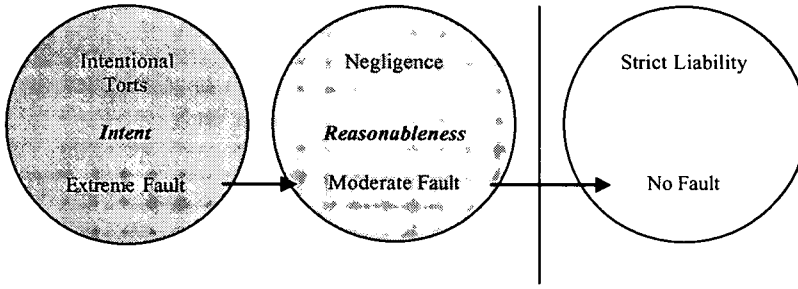
torts *and* certain acts of negligence. *See* 1 WORKS, *supra,* at 327. In addition, inculpable torts were not restricted to "extrahazardous" activities, but included as well some "mistaken" intentional torts. *See id.* at 331.

Holmes' paradigm was misinterpreted and eventually modified by his followers. For example, John Wigmore mistakenly read Holmes' structured continuum as creating a tripartite division among intentional torts, negligence and strict liability. *See* John H. Wigmore, *The Tripartite Division of Torts*, 8 HARV. L. REV. 200, 206 (1894). Wigmore's misinterpretation of Holmes was later adopted and spread by Edwin Jaggard. *See* EDWIN A. JAGGARD, HANDBOOK OF THE LAW OF TORTS 48 (1895).

negligence. In addition, inculpable torts were not only restricted to "extrahazardous" activities, but also included some "mistaken" intentional torts. Holmes' paradigm was misinterpreted and eventually modified by his followers. Most notably, John Wigmore, an admirer of Holmes, mistakenly read Holmes' structured continuum as creating a tripartite division among intentional torts, negligence, and strict liability, a misinterpretation that was adopted and spread by Edwin Jaggard.

Figure 1: The Theoretical Paradigm of Tort Law

The Fault Matrix



The Fault Continuum

A. The Form and Function of the Fault Matrix

The first principle of the fault matrix is to treat like theories alike and different theories differently. By separating negligence from intentional torts, the fault matrix emphasizes the individuality and independence of each theory of recovery. However, this line-drawing also sends another, more subtle, message: the two theories actually have different substantive bases. This message is

reinforced by the concepts and terminology used to litigate each action. In negligence cases, the defendant's conduct is compared to an objective behavioral standard and evaluated for reasonableness or unreasonableness. Conversely, in intentional torts, the defendant's subjective mental state is placed in question and is scrutinized for characteristics of intentionality. These differences in perspectives and standards are depicted in Figure 2 below.

Figure 2: The Fault Element in Negligence and Intentional Torts

	Negligence	Intentional Torts
Perspective	Objective	Subjective
Standard	Reasonable Care	Intent

By these criteria, negligence and intentional torts appear to be no more than distant cousins. However, even a cursory review of these theories reveals far deeper ties. Both intentional torts and negligence examine the extent of the defendant's knowledge of risk. Negligence asks whether the defendant knew or should have known of the danger posed by his conduct,[7] while intentional torts ask

[7] The "should have known" inquiry is really a question of foreseeability. Foreseeability enters the negligence analysis in three places: duty, breach and proximate causation. In the duty element, forseeability is just one of several factors used to determine the scope of a defendant's legal obligations. *See* J.S. v. R.T.H., 714 A.2d 924, 928 (N.J. 1998):

> In determining whether a duty is to be imposed, courts must engage in a rather complex analysis that weighs and balances several, related factors, including the nature of the underlying risk of harm, ...[specifically,] its foreseeability and severity, the opportunity and ability to exercise care to prevent the harm, the comparative interests of, and the relationships between or among, the parties, and, ultimately, based on considerations of public

whether the defendant knew to a substantial certainty that her act would produce a forbidden consequence.[8]

Additionally, both negligencis and intentional torts assess the defendant's motives for acting and weigh the benefits of that action against its attendant dangers. Negligence balances motive, benefit, and risk in the familiar B < P x L formula for determining breach.[9] Intentional torts weigh these factors in the analysis of privilege, typically to measure the appropriateness of the defendant's response to a provocative or threatening act or condition.[10]

In balancing these factors, both negligence and intentional torts also attempt to determine whether the

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policy and fairness, the societal interest in the proposed solution.

Regarding the breach element, forseeability is part of the balancing process which weighs the risks of action against the burdens of acting differently. *See* DAN B. DOBBS, THE LAW OF TORTS §§ 143-45 (2000) (discussing the role of forseeability in the determination of breach). For the causation element, forseeability is the test which determines whether a negligent act is "proximate" enough to a resulting injury to warrant holding the actor civilly liable. *See* Valcaniant v. Detroit Edison Co., 679 N.W.2d 689, 693 (Mich. 2004) ("A defendant's breach of duty is said to have proximately caused a plaintiff's injury only where the defendant reasonably could have foreseen the kind of harm that befell the plaintiff.").

[8] *See* RESTATEMENT (SECOND) OF TORTS § 8A(1965) (defining intent to mean that "the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it.").

[9] *See* United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947) (developing and explaining this formula).

[10] To establish a privilege, the defendant generally must prove that his actions were reasonable under the circumstances. *See infra* text accompanying notes 111-19. To prove that his actions were reasonable, the defendant must show that his conduct was a well-measured response to the risks at hand; or stated differently, that he could not act in a less risky fashion without incurring an undue burden to his own interests.

defendant's own risk-benefit judgment comports with society's objective standard of reasonableness. Negligence employs its objective standard overtly in the breach element,[11] while intentional torts sneak the reasonableness analysis in through the back door, usually in the guise of a privilege or defense.[12] Although these issues may arise in different ways, their appearance in both theories suggests that there are more similarities here than meets the eye. Finally, the fault-based torts bear certain structural affinities. For example, in both negligence and intentional torts, the fault issue is binary—meaning, it depends not just on the nature of the defendant's act, but also on the nature of the consequences its brings about. In negligence, it is not enough that someone behaves in a careless manner. To be found liable for his negligence, the actor must also cause some harm to an unwitting victim.[13] The same holds true for intentional torts. No one is held liable simply for thinking bad thoughts or even for acting with improper motives; to commit an intentional tort, the actor must also bring about a consequence forbidden by law.[14]

In both theories, the relationship between act and injury is governed by a principle of inverse proportionality. The more blameworthy the act, the less serious the injury needs to be for the offense to be considered wrongful. Conversely, the less culpable the act, the more egregious the harm must be to hold the actor liable. Negligent acts, for example, carry only a moderate degree of culpability. Thus, they are actionable only if they cause some actual damage.[15] Intentional torts, because of their willfulness,

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[11] *See* DOBBS, *supra* note 7, at 269-70, 275, 280.
[12] *See infra* text accompanying notes 111-19.
[13] *See* DOBBS, *supra* note 7, at 269.
[14] The consequence need not result in an actual injury. It is enough if it produces a dignitary invasion, like the offensive touching of battery, which is prohibited by a specific intentional tort. *Id.* at 79-80.
[15] *Id.* at 271.

usually carry a very high degree of culpability. As a result, they normally do not require proof of actual injury.[16]

There are exceptions, however. Where an intentional act falls lower on the scale of opprobrium, the harm requirement increases in kind. This is true of most property torts. Because property interests are less valuable than interests in mental tranquility and bodily integrity, trespass to chattels rates as a rather trivial infraction. Thus, it is not deemed faulty unless it inflicts upon its victim some measure of actual financial damage.[17]

B. Seeing Beyond the Matrix

Beyond these visible features, the fault matrix contains other characteristics that are much harder to spot. These *de facto* features, though unexplained and underappreciated, are no less important to the structure and content of tort law. Indeed, they may have even more influence over issues of fault and liability than all of the visible features combined.

On the fault issue, the matrix says that negligence and intentional torts create substantive reasons for holding someone liable. However, these reasons are not, in themselves, definitive. Invariably, they can be met with affirmative defenses. These defenses explain or justify the questioned conduct, or they point to other possible causes of the victims' harm.

Ideally, defenses should have as great a role in defining a particular liability regime as the theories of fault they combat. For example, a fault theory that permitted no

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[16] *Id.* at 79-80. *See also* W. PAGE KEETON ET AL, PROSSER AND KEETON ON TORTS 37 (5th ed. 1984) [hereinafter PROSSER] (discussing the "irregular and poorly defined sliding scale" that ranges from intentional torts, which carry extensive liabilities, to inadvertent acts, which do not).

[17] *See* DOBBS, *supra* note 7, at 122, 124.

defenses at all would look a lot like strict liability.[18] By the same token, a theory that allowed an endless number of easy defenses would create virtual immunity.[19] Either way, the fault analysis would be skewed. In the first scenario, the analysis would be incomplete because it would prevent even a faultless defendant from demonstrating the reasonableness of his actions. In the second scenario, it would be misleading since it might allow even a blameworthy defendant to escape liability on grounds of public policy.

Unfortunately, tort law's theoretical paradigm neither acknowledges the nexus between theory and defense nor assesses the impact this nexus may have on the law's substantive personality. Instead, tort law's theoretical paradigm simply defines all torts by the theories used to describe them and assumes these theories remain true to their substantive descriptions, regardless of the number of defenses allowed or the grounds on which they are proffered.

The theoretical side of this duality harbors secrets of its own. Each theory within the fault matrix consists of several predetermined elements of proof. Negligence always consists of four substantive elements: (1) the existence of a duty of care; (2) breach of that duty; (3) damage; and (4) a

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[18] *Id.* at 331-32 (noting that jurisdictions which refuse to permit defenses in negligence *per se* actions effectively impose strict liability).

[19] For example, a landowner sued for negligence by a trespasser may escape liability by arguing, among other things, that he did not create the danger which caused the trespasser harm, did not willfully harm the trespasser, or did not know of the trespasser's presence on his property. He may also argue that he gave adequate warning of the danger on his property, that the danger was open and obvious, or that the trespasser assumed the risk of injury. *See generally* Fleming James, Jr., *Tort Liability of Occupiers of Land: Duties Owed to Trespassers*, 63 YALE L.J. 144 (1953) (surveying the limited duties owed by landowners to trespassers).

causal connection between the damage and the breach.[20] The elements of intentional torts, however, vary by theory. For example, battery requires proof that an actor intentionally inflicted a harmful or offensive contact upon another.[21] False imprisonment, on the other hand, occurs when someone intentionally and unlawfully places another under confinement or restraint.[22] On a surface level, these elements seem quite different. In reality, however, they are very much alike. In fact, all fault-based torts share a similar substantive structure, and that structure always serves the same normative functions.

Because these structural commonalities are not openly acknowledged, seeing them requires a good bit of extrapolation and synthesis. The elements of negligence can be distilled down to the familiar litany of duty, breach, causation, and damage.[23] While intentional torts as a whole do not share the same elements of proof, they do seem to display the same elemental structure. Generally speaking, to establish *any* intentional tort, the plaintiff must prove that (1) the defendant committed an act; (2) with an illicit intent; and (3) caused him to suffer a wrongful consequence. In short, he must establish act, intent, causation and consequence.[24]

Comparing this elemental structure to the structure for negligence, three common elements emerge. First, both require a duty violation or, stated differently, the breach of a standard or rule which prohibits or prescribes that activity. For negligence, the duty violation is contained in the elements of duty and breach. For intentional torts, it arises from the elements of act and intent, with the intent element carrying an implicit duty to refrain from willing

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[20] *See* DOBBS, *supra* note 7, at §§ 114, 115.
[21] *See* RESTATEMENT (SECOND) OF TORTS § 13 (1965).
[22] *Id.* at § 35.
[23] *See* DOBBS, *supra* note 7, at 269-73.
[24] *See* ALAN CALNAN, JUSTICE AND TORT LAW 166 (1997).

certain forbidden consequences.[25] Second, both require that the plaintiff sustain some harm, either actual or presumed.[26] As noted earlier, negligence routinely demands proof of actual harm or damage. While only some intentional torts contain an actual harm requirement, the remainder readily presume harm from particular acts, like touching another in an offensive manner or treading across his property. Third, both theories require some causal connection between the duty violated and the harm claimed.[27]

Despite their prominence, these obvious elements do not complete the law's structural profile. Neither negligence nor intentional torts impose absolute liability. Rather, both place various limits on the defendant's responsibility. Negligence's limits appear in the elements of duty and causation. Duty limits exist for special types of actors and special types of harm,[28] and can be grounded in either fairness or public policy.[29] Causation is limited by the concept of proximate cause, which excludes harmful effects that are highly extraordinary or too remote.[30] Intentional tort limits are fewer in number, narrower in scope, and harder to find, but they do exist. Most often, they appear in the causation element, when the intentional act is diluted by time and space, or overpowered by intervening forces.[31]

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[25] *Id.* at 166-67.
[26] *Id.* at 132.
[27] *Id.* at 135.
[28] Actors receiving limited duties include owners and occupiers of land and public entities. *See* DOBBS, *supra* note 7, chs. 13, 15. The harms receiving limited duties include emotional distress, wrongful birth and pure economic loss. *See* JOHN L. DIAMOND ET AL., UNDERSTANDING TORTS §§ 10.01, 10.02, 10.04 (2000).
[29] *See* DOBBS, *supra* note 7, at §§ 229, 230.
[30] *Id.* at §§ 180, 181.
[31] *Id.* at 120 ("[L]iability for trespass would not extend to indirect injuries that were also unintended and unforeseeable").

However, they also can be found in the intent element, as intentions become distanced from their effects.[32]

Because both negligence and intentional torts recognize restrictions on liability, one must add a limitation element to the list of common features. With this fourth element in place, the internal structure of the fault matrix takes final form. To analyze any case for tortious fault, one must, at a minimum, consider the issues of duty limitation, duty violation, causation, and harm.[33] These structural elements, and their counterparts under the fault matrix, are depicted in Figure 3 below.

Figure 3: Elements of Negligence and Intentional Torts; Common Elements of Fault-Based Torts

Negligence	Intentional Torts	Common Elements
Duty/Limits	Act	Limitations
Breach	Intent/Limits	Duty Violation
Causation/Limits	Causation/Limits	Causation
Damages	Consequence	Actual/Presumed Harm

Although these elements are not openly acknowledged, they have not come together by accident. Each element serves a very specific purpose, and all elements work in unison to achieve a greater objective.[34] The responsibility and limitation elements establish the defendant's duty of care; the harm element establishes the plaintiff's right of

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[32] *Id.* at 77 (explaining that the doctrine of transferred intent or extended liability "may well be limited to cases of conscious wrongdoing and to those in which harm...results directly from an intended intervention.").

[33] *See* KENNETH S. ABRAHAM, THE FORMS AND FUNCTIONS OF TORT LAW 2-3 (2d ed. 2002) (recognizing all but the limitation element).

[34] The moral and political dynamic of these elements is explained more fully in my book JUSTICE AND TORT LAW, *supra* note 24, at 121-23.

redress; and the causation element links the defendant's duty to the plaintiff's right, establishing both the defendant's liability and the plaintiff's power to enforce it.

In the end, each unique element defines a new theory of fault. Conventional wisdom holds that fault-based torts are harder to prove than strict liability. This conclusion is premised on the fact that both negligence and intentional torts have a duty-based culpability element, while strict liability does not. However, the presence or absence of a culpability element does not necessarily determine a tort's substantive identity. Rather, its identity is defined by the overall concatenation of its conceptual elements.

This truth is no more apparent than in the theory of strict liability itself. In some cases, strict liability imposes requirements that fault-based torts do not. For example, the theory of *respondeat superior* requires the plaintiff to prove *both* that the defendant's employee was at fault *and* that the employee was acting within the scope of employment.[35] In other cases, strict liability makes a one-for-one swap, replacing the fault requirement with another that is equally difficult to satisfy. For instance, the theory of strict products liability trades the issue of manufacturer fault for a complex and burdensome calculus of product defectiveness.[36] In each situation, the strict liability label says one thing, but the elemental structure of the tort suggests something almost entirely different.

Even in fault-based theories, the fault element does not always provide a reliable description of the underlying tort. Duties may be onerous or relaxed.[37] Limitations upon duty

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[35] *See* DOBBS, *supra* note 7, at 906.

[36] *Id.* at 980-81, 985-87.

[37] *Id.* at 581. Negligence law recognizes heightened duties in a variety of fields. *See, e.g.*, Lasley v. Shrake's Country Club Pharm., Inc., 880 P.2d 1129, 1132-33 (Ariz. 1994) (professionals acting in their area of expertise).

For example, product manufacturers are expected to be "experts"

in their fields. *See* O'Hare v. Merck & Co., 381 F.2d 286, 291 (8th Cir. 1967) ("A manufacturer is held to the skill of an expert in its particular field of endeavor, and is obligated to keep informed of scientific knowledge and discoveries concerning that field."); Guffie v. Erie Strayer Co., 350 F.2d 378, 381 (3rd Cir. 1965) ("While a manufacturer is not required to be clairvoyant he is rightly held to the standard of an expert in regard to his own product."); Lopez v. Chicago Bridge & Iron Co., 546 So. 2d 291, 294 (La. Ct. App. 1989) ("The standard of knowledge, skill, and care in regard to the failure to use alternative products or designs is that of an expert, including the duty to test, inspect, research, and experiment commensurate with the danger."); McEwen v. Ortho Pharm. Corp., 528 P.2d 522, 528 (Or. 1974) (holding a drug manufacturer to an expert standard).

Although innkeepers normally owe their guests "a high degree of care," Kraaz v. La Quinta Motor Inns, Inc., 410 So. 2d 1048, 1053 (La. 1982), in some cases they bear "the highest standard of care—strict liability—for the safekeeping of the personal property of a guest." Cook v. Columbia Sussex Corp., 807 S.W.2d 567, 568 (Tenn. Ct. App. 1991). Likewise, common carriers must exercise "the utmost care" toward their passengers. *See* Rozmajzl v. Northland Greyhound Lines et al., 49 N.W.2d 501, 504 (Iowa 1951) (noting that the common carrier's duty extends "as far as human care and foresight will go."); Nelson v. Flathead Valley Transit, 824 P.2d 263 (Mont. 1992) (holding that a common carrier must exercise the utmost care and diligence in the care of its passengers); Markwell v. Whinery's Real Estate, Inc. 869 P.2d 840, 845 (Okla. 1994) (adopting an utmost care standard). Finally, adults who deal with children must use "extraordinary care" to protect "infants too young to take care of themselves." Crosswhite v. Shelby Operating Corp., 30 S.E.2d 673, 674 (Va. 1944).

Heightened standards also apply to people engaged in hazardous activities, imposing an added degree of responsibility for every degree of risk the defendant creates. *See* Winfrey v. Rocket Research Co., 794 P.2d 1300, 1303 (Wash. Ct. App. 1990) ("[T]he amount of care necessary varies with the danger which is incurred by negligence, for a prudent and reasonable man increases his care with the increase of danger."). *See also* Halliburton v. Public Serv. Co. of Colo., 804 P.2d 213, 215-16 (Colo. Ct. App. 1990) (manufacturers and sellers of natural gas held to higher duty of care); Waters v. S. Farm Bureau Cas. Ins. Co., 212 So. 2d 487, 490 (La. Ct. App. 1968) (holding those who handle gasoline to "a very high duty of care"); Kuhns v. Brugger, 135 A.2d 395, 400 (Pa. 1957) (one who carries a loaded weapon "is bound to exercise extraordinary care"); *Winfrey*, 794 P.2d at 1303 (those who

may be numerous or few.[38] Standards of persuasion may be robust or trivial.[39] Without considering these additional

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maintain high voltage equipment "must exercise the highest degree of care to avoid injuries"). Indeed, anyone who uses "substances or instrumentalities" that "might endanger persons or property [is] held to a high degree or an extraordinary degree of care." *Waters*, 212 So. 2d at 490.

On the other end of the spectrum, relaxed standards emerge in a number of places. Landowners often owe trespassers only the duty to avoid willful or wanton injury. *See* DOBBS, *supra* note 7, at 592. Unless engaged in adult activities, children are expected only to behave like a reasonable child of like age, intelligence and experience. *Id.* at 293. Additionally, all people thrust into emergencies "may conduct themselves ... in ways that would not be reasonable if time permitted more thoughtful decision-making." *Id.* at 304.

[38] Early negligence law was replete with duty limitations and immunities, but since the latter half of the nineteenth century these obstacles have steadily fallen. Gone are the charitable, spousal, parental and sovereign immunities. *See id.* at 695, 716, 752, 754-55, 763. Gone, too, are privity limitations. *See* RESTATEMENT (SECOND) OF TORTS § 402A (2)(b) (1965) (products liability applies even though "the user or consumer has not bought the product from or entered into any contractual relation with the seller."); *but see* H.R. Moch Co. v. Rensselaer Water Co., 159 N.E. 896 (N.Y. 1928) (upholding the privity limitation). *See also* DOBBS, *supra* note 11, at 803-04 (limits on recovery for wrongful death); *id.* at 836 (emotional distress). The entrant classification system of premises liability is in decline. *See id.* at 615-16, 619-20. Even proximate cause limits such as unforeseeable consequences and superseding cause are in jeopardy of extinction. *See* Michael D. Green, *The Unanticipated Ripples of Comparative Negligence: Superseding Cause in Products Liability and Beyond*, 53 S.C. L. REV. 1103 (2002) (noting that comparative fault has brought about a decrease in superseding cause arguments cutting off defendants' responsibility).

In each case, the defunct or near-defunct rule has been replaced or eroded by the more flexible concept of foreseeability. Unlike duty rules, foreseeability knows no temporal bounds, protecting people months or years after the commission of a tortious act. *See* Sindell v. Abbott Labs., 607 P.2d 924 (Cal. 1980) (drug manufacturer held liable to the daughter of a consumer who ingested plaintiff's drug decades earlier); Tarasoff v. Regents of the University of California, 551 P.2d 334 (Cal. 1976) (holding a psychologist liable for a murder committed

two months after his last consultation with the perpetrator). Foreseeability is also unlimited by space, protecting people in the most distant and remote places. *See* Petition of Kinsman Transit Co., 338 F.2d 708 (2d Cir. 1964) (holding transit company liable for damage to a bridge nearly three miles downstream from where it improperly moored a ship); Atchison, T. & S.F.R. Co. v. Stanford, 12 Kan. 354 (1874) (holding railroad liable for fire damage to a barn four miles away from where the railroad started the fire). Furthermore, forseeability is unlimited by theory, protecting victims of both negligence and of strict liability activities. *See* Moran v. Faberge, Inc., 332 A.2d 11, 15-16 (Md. 1975) (applying a forseeability analysis in a strict products liability case); Klein v. Pyrodyne Corp., 810 P.2d 917, 925 (Wash. 1991), *amended*, 817 P.2d 1359 (Wash. 1991) (applying a forseeability analysis in an abnormally dangerous activity claim).

Although applications of forseeability vary, its range does not – it can stretch as far as justice or policy requires. In the words of one court, "there are clear judicial days on which a court can foresee forever...." Thing v. La Chusa, 771 P.2d 814, 830 (Cal. 1989). On such days, the duties of negligence law can reach the limits of strict liability and even go beyond.

[39] To obtain punitive damages or state a case of fraud, the plaintiff generally must present clear and convincing evidence. *See* Linthicum v. Nationwide Life Ins. Co., 723 P.2d 675 (Ariz. 1986) (punitive damages); Marriage of Cutler, 588 N.W.2d 425, 430 (Iowa 1999) (fraud). In some situations, however, plaintiffs can prevail with little or no proof of fault, relying instead on presumptions created by the court. *See* Cofield v. Burgdorf, 115 So. 2d 357, 358 (La. 1959) (recognizing a "presumption that where one is in the possession of...a vehicle of another and is using it in the service of such other, he is the servant or agent of the owner."); Nationwide Mutual Ins. Co. v. Stroh, 550 A.2d 373, 375 (Md. 1988) ("[W]here an automobile owner-passenger grants permission to another to drive his car, and the permissive operator drives negligently, the owner has presumptively consented to the negligence."); Tidewater Stevedore Co. v. Lindsay, 116 S.E. 377, 380 (Va. 1923) (recognizing a presumption of negligence where a bailee returned property in damaged condition). Other times, courts aid plaintiffs by shifting burdens of proof to defendants. *See* Sindell v. Abbott Labs, 607 P.2d 924, 937 (Cal. 1980) (shifting the burden of proof in a market share liability case); Summers v. Tice, 199 P.2d 1, 5 (Cal. 1948) (shifting the burden of proof in an alternative liability case); Jones v. Blair, 387 N.W.2d 349, 352 (Iowa 1986) (shifting the burden of proof in a negligence *per se* action).

factors, one simply cannot tell whether a given theory is lenient or strict, or is fault-heavy or fault-light.

Such uncertainty derives not just from an over-reliance on substance, but also from an underestimation of procedure. In the modern paradigm, plaintiffs generally must prove the substantive elements of the theories they wish to raise. Sometimes, however, courts shift part of this burden to defendants. For example, in cases of negligence *per se*, proof of a statutory violation often creates a presumption of negligence. This presumption forces the defendant to produce evidence excusing or justifying the violation.[40] Likewise, a prima facie showing of *res ipsa loquitur* typically compels the defendant to prove that her conduct was not unreasonable.[41]

Each theory is classified as negligence because it contains the requisite culpability element. However, both negligence *per se* and *res ipsa loquitur* are markedly different from the average negligence claim. Although duty and breach still appear as elements of proof, plaintiffs can satisfy these elements with little or no effort. For negligence *per se*, the plaintiff must merely produce facts indicating that the defendant's actions were inconsistent with the literal terms of a statute.[42] For *res ipsa*, he need only present the facts surrounding his accident—facts which "speak for themselves" in pointing the finger of

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[40] *See* Zeni v. Anderson, 243 N.W.2d 270, 276 (Mich. 1976) (creating a rebuttable presumption in a negligence *per se* action).

[41] *See* DOBBS, *supra* note 7, at 377 ("It is possible to imagine that the plaintiff's evidence creates an inference so strong that, unless the evidence is simply not credited, it should carry the case for the plaintiff in the absence of rebuttal."). In some jurisdictions, *res ipsa* evidence creates a presumption of fault, while in others it shifts to the defendant the burden of disproving his fault. *See* Sullivan v. Crabtree, 258 S.W.2d 782, 785 (Tenn. Ct. App. 1953) (describing these approaches).

[42] Specifically, the plaintiff must show that (1) the defendant violated an applicable statute, regulation or ordinance, and (2) that violation caused the plaintiff's harm. *See* DOBBS, *supra* note 7, at 315-16.

blame at the defendant.[43] In each case, the plaintiff does not *prove* fault; rather, fault is *presumed* from proof of just a few facts.

In this way, such "negligence" actions bear a striking resemblance to the theory of strict liability. Granted, they may not purge fault references like strict liability, but neither do they frame fault issues like other fault-based torts. If anything, they seem to create a category all their own. At the very least, they strongly suggest that the substantive identity of any theory may be based less on *what* elements it contains and more on *how* those elements are allocated between the parties.

III. Unintentional and Unrecognized Intentional Torts

With the current paradigm's principles and assumptions laid bare, it is easier to find its flaws, including those infecting the jurisprudence of intentional tort law. Here, the problems begin with the concept of intent itself. Indeed, as I shall demonstrate below, the conventional view of intent is both over- and under-inclusive. It is over-inclusive because many "intentional" torts are not intentional at all. In cases of transferred intent and mistake, the defendant either *lacks the intent* to harm the plaintiff or

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[43] *Res ipsa loquitur* requires proof of just three facts: (1) there was an accident, (2) the accident normally would not happen without negligence, and (3) the defendant controlled the instrumentality that brought it about. *See* Larson v. St. Francis Hotel, 188 P.2d 513, 514 (Cal. Ct. App. 1948). When all three facts are present, they create a presumptive inference of fault—sometimes an inference so powerful it precludes any other conclusion. *See* Imig v. Beck, 503 N.E.2d 324, 329-30 (Ill. 1986) ("[I]n exceptional cases the plaintiff may be entitled either to a directed verdict or to a judgment notwithstanding the verdict because the unrebutted *prima facie* proof of negligence is so strong that all of the evidence, when viewed in its aspect most favorable to the defendant, so overwhelmingly favors the plaintiff that no contrary jury verdict based on that evidence could ever stand.").

his intent is *completely innocent*, yet he is labeled as an intentional tortfeasor nonetheless. These are, in effect, *unintentional intentional torts*. Tortious intent also is under-inclusive because some actions that *are* intentional simply are not classified as such. For example, conduct performed with knowledge of its harmful effects is by definition intentional, yet it often is covered by other theories like negligence or strict liability. These are really *unrecognized intentional torts*.

A. Unintentional Intentional Torts

Tort law defines intent in two ways: as a desire or purpose,[44] and as knowledge that something is substantially certain to occur.[45] To be intentional, the desire or knowledge must be linked to a specific consequence.[46] To be actionable, that consequence must be wrongful. If the actor brings about a consequence different from the one he had in mind, his conduct may be wrongful but not intentional. If the actor intends a lawful consequence, his conduct is not wrongful at all, even if it causes serious harm.

Modern intentional tort law fails to grasp these truths. Under the doctrine of transferred intent, it classifies as intentional any conduct which lacks a specific intent to harm. In cases of mistake, it treats as intentional even conduct which lacks a wrongful intent. If such conduct is ill-considered or irresponsible, there may be good reasons

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[44] *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (BASIC PRINCIPLES) § 1(a) (Tentative Draft No. 1, 2001) (purpose); RESTATEMENT (SECOND) OF TORTS § 8A (1965) (desire).

[45] *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (BASIC PRINCIPLES) § 1(b) (Tentative Draft No. 1, 2001); RESTATEMENT (SECOND) OF TORTS § 8A (1965).

[46] RESTATEMENT (SECOND) OF TORTS § 8A cmt. a (1965) ("'Intent'... has reference to the consequences of an act rather than the act itself.").

for holding the perpetrators liable. But those reasons, whatever they may be, are not adequately explained or openly acknowledged by the current theory of intentional torts.

1. Transferred Intent: No Intent to Commit the Resulting Wrong

Transferred intent is a legal fiction. Generally speaking, it applies when an act intended to wrong one person winds up harming another.[47] In these situations, the actor does not plan or even desire to harm the actual victim, nor does he know to a substantial certainty the victim will be injured by his conduct. Indeed, he may not even know the victim is present. Without a desire, plan or knowledge the offending act cannot be considered intentional – at least not in relation to the actual victim. In fact, from the actor's standpoint, any impact her act may have on the victim is purely accidental.

Nevertheless, transferred intent treats the actor as if he were an intentional tortfeasor. It transfers the actor's intent from one party to another—specifically, from the "intended" victim to the "actual," unexpected victim. In doing so, it does not simply switch one culpable mental state for another; rather, it creates a mental state the actor

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[47] *See* DOBBS, *supra* note 7, at 75-76. Professor Dobbs describes transferred intent as a type of "extended liability." *Id.* at 75. Besides the mistaken victim scenario noted in the text, extended liability applies in two other scenarios. In one, the defendant intends to offend the victim, but harm results. *Id.* In the other, the defendant intends to commit one tort, but a different tort results. *Id.* at 76. In this latter scenario, however, the resulting tort may actually define its intent in a way such that encompasses the intent to commit the original tort. For example, the RESTATEMENT SECOND defines battery to include the intent to assault, and defines assault to include the intent to the batter. *See* RESTATEMENT (SECOND) OF TORTS §§ 13, 21 (1965). Thus, no "transfer" of intent between these torts is required.

did not actually possess and connects it to someone he did not actually seek to injure.

This does not mean that transferred intent always reaches the wrong conclusions. It merely means that it reaches its conclusions in the wrong way. There certainly are situations where an actor should be held liable for the consequences of a deliberative, though unintentional, act. For example, if the harm the actor causes is the same as the harm she intends, she deserves the same amount of blame even if that harm is suffered by a person she did not expect to injure.[48] Here, the actor really does have the intent to commit the resulting tort, at least in a general and unspecified sense. Although the victim is different, the wrong is not. Thus, it is fair to hold the tortfeasor accountable. However, it does not make sense to say that he intentionally injured the actual victim. It makes more sense to say that he engaged in a suspect act that required him to act at his peril.[49]

The case of *Talmage v. Smith*[50] illustrates the point. In *Talmage*, several boys climbed atop the roof of the defendant's shed. The defendant ordered the boys to get down, but they refused. The defendant retrieved a stick and threw it at one of the boys. The stick struck the plaintiff, who was standing on the opposite side of the roof. The plaintiff sued the defendant for battery. At trial, the defendant testified that he could not see the plaintiff and did not know he was there. The trial judge instructed the jury on transferred intent, stating that the defendant's intent

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[48] *See* DOBBS, *supra* note 7, at 77 ("[T]he doctrine [of transferred intent] may well be limited to cases of conscious wrongdoing and to those in which harm ...results directly from an intended intervention.").

[49] Professor Vincent Johnson reached the same conclusion, but recommended that such cases be handled as accidents, and not as cases of act-at-peril liability. *See* Vincent R. Johnson, *Transferred Intent in American Tort Law*, 87 MARQ. L. REV. 903, 937 (2004).

[50] 59 N.W. 656 (Mich. 1894).

to commit battery against one boy could be applied to the battery against the plaintiff. Guided by this instruction, the jury returned a verdict for the plaintiff. On appeal, the Supreme Court of Michigan upheld the verdict and the instructions which supported it, noting that "[t]he right of the plaintiff to recover was made to depend upon an intention on the part of the defendant to hit somebody, and to inflict an unwarranted injury upon someone."[51]

Talmage reached the right result but did so for the wrong reason. The defendant clearly did not intend to strike the plaintiff; indeed, the facts proved he was not even aware the plaintiff was on the roof. However, the facts also depicted a man out of control. By picking up the stick, the defendant armed himself with a potentially dangerous weapon. By hurling that weapon in the direction of several young boys, he created a high probability that one of them would be seriously injured. Since the defendant himself was not threatened, his chosen response was both unjustified and inexcusable, even if it was not directed at any particular boy. Under these circumstances, the defendant *should* have been held accountable for the consequences of his act, just not as an intentional tortfeasor.

This take on *Talmage* might be different if the defendant's intended tort was not the tort inflicted—say, if the defendant had attempted to strike the plaintiff's house but struck the plaintiff instead. In that case the resulting harm would not match the one expected or desired. Because the harm in fact would transcend the harm in mind, the outcome itself would be unintentional. Even if the act was deliberate, the consequence would be purely unplanned. Indeed, the harm would proceed not *from* the actor's will, but in *spite* of it. To transfer intent under these circumstances would be to concoct an intent that never

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[51] *Id.* at 657.

actually existed.

This disjunction between intent and consequence could occur in two types of cases. In one, the defendant brings about the same general kind of harm as the type he originally intended—say, a harm to another person—but the actual injury far exceeds his reasonable expectations.

Such was the case in *Brown v. Martinez.*[52] In *Brown*, three boys entered the defendant's property for the purpose of stealing some watermelons. After the defendant warned the boys to leave, they started to run from the southeast to the southwest corner of the property. To scare the boys, the defendant fired his rifle into the southeast corner, away from where they were running. Unexpectedly, the defendant's bullet struck the plaintiff in the leg. Although the defendant had no intent to harm the boys, the New Mexico Supreme Court held him liable for an intentional tort.

The *Brown* court based its decision on the concept of transferred intent. By firing his rifle, the defendant had attempted to commit an assault.[53] The court linked this relatively benign intent to the boy's more serious injury, thereby manufacturing a case of battery. In doing so, however, the court did not merely transfer the defendant's intent from one person to another, it changed the very nature of the defendant's act. In effect, it changed a reckless act into a purposeful event.

The second type of disjunction between intent and consequence produces even more disturbing results. It arises when an actor intends to cause one type of harm—like property damage—but actually inflicts a completely different, and far more serious, type of harm—like physical injury to a person.

This was the case in *Corn v. Sheppard.*[54] In that case,

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[52] 361 P.2d 152 (N.M. 1961).
[53] *Id.* at 159-60.
[54] 229 N.W. 869 (Minn. 1930).

the defendant-homeowner fired a revolver at some dogs congregating near his garage. Unbeknownst to the defendant, the plaintiff was standing nearby. The defendant's bullet missed the dogs and struck the plaintiff in the arm and abdomen. As in *Brown*, the defendant here harbored no intent to harm. In fact, he had no intent to even threaten another human being. His only purpose was to disperse a pack of dogs. Nevertheless, the Minnesota Supreme Court held him liable for the plaintiff's loss.

Although the court did not employ the term "transferred intent," it clearly applied the same concept.[55] The defendant had intended to commit a trespass to chattels. By chance, he actually inflicted a battery upon the plaintiff. This mismatch of intent and consequence was of no moment to the court, which noted: "Where a person intentionally discharges a firearm for a wrongful purpose and another is hit, he is liable for the injuries inflicted, although he did not intend to hit the other nor even know that any person was within range."[56]

If this is what is meant by tortious intent, however, that concept has little meaning. *Corn* presents a classic mishap. Through a stroke of bad luck, an ill-advised act turned into an awful nightmare. No matter what label one uses to describe this incident, it certainly was neither planned nor predicted; and the harm, though unfortunate, was clearly neither comparable to nor commensurate with the result intended.

This is not to say the homeowner was completely

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[55] Specifically, the Court held the defendant strictly liable for using a dangerous instrumentality—in this case, a firearm. *Id.* at 870-71. This aspect of *Corn* is addressed more fully below. *See infra* text accompanying notes 57-60. The concepts of transferred intent and strict liability are so similar that Prosser's casebook includes the *Corn* case in its coverage of transferred intent. *See* VICTOR E. SCHWARTZ ET AL., PROSSER, WADE AND SCHWARTZ'S TORTS 29 (10th ed. 2000).

[56] *Corn*, 229 N.W. at 871.

innocent or should escape all liability. If she suspected people were present, she should be adjudged reckless for firing in their direction. If he could have dispersed the dogs in a safer manner, he should be found negligent for firing the gun at all. The goal is not to find a way to fit these cases into the unreceptive theory of intentional tort, but rather to find the right theory for each set of facts.

Interestingly, the *Corn* court did just that. Rather than dwelling on the defendant's intent, the court focused on his activity—firing a gun. The court deemed guns "dangerous instrumentalities,"[57] and found that discharging them is an abnormally dangerous activity. Such activities are presumptively unreasonable and should be undertaken only rarely and with great caution. As the Court observed,

> [W]here a person has a gun in his hands and it is discharged, even accidentally and unintentionally, he is held liable for the injuries caused thereby, unless he shows that he took all reasonable precautions to guard against accidents, and that the discharge of the weapon did not result from any careless act on his part.[58]

The defendant in *Corn*, however, had failed to carry this burden. He could not show either that he needed to fire his gun or that he took to "all reasonable precautions" before doing so.[59] Because his decision was deliberate, his act dangerous, and his purpose illegal, he was responsible for any harm that resulted from his conduct. The fact that "he did not intend to hit [the plaintiff] or even know that any person was within range" was no excuse.[60]

Ultimately, the defendant's liability was based on the

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[57] *Id.* at 870.
[58] *Id.*
[59] *Id.*
[60] *Id.* at 871.

principle that one who intentionally fires a weapon acts at his own peril. This principle has a name, but it is *not* intentional tort; it is strict liability, or at least something very closely akin to it. Stripped of its "intentional" façade, transferred intent is, in the parlance of the current theoretical paradigm, really a no-fault concept.[61] It imposes liability irrespective of knowledge or purpose and shifts to the defendant the burden of exculpation. Later on, I shall argue that all intentional torts impose a form of strict liability, even without the doctrine of transferred intent. For now, it is enough to see that the intentional tort moniker is not always appropriate, and in many instances, may seriously obscure the true basis of liability.

2. Mistake: No Intent to Commit Any Wrong

A mistake occurs when an actor acts upon misinformation. In some cases the actor may be mistaken about the facts, and in others he may be mistaken about the law. Under the current paradigm, neither type of mistake is a saving grace. Because a mistaken act proceeds from a deliberate choice, the mistaken actor is considered an intentional tortfeasor and is liable for all of the unexpected consequences that flow from his conduct.[62]

In a mistake of fact, the actor does not realize who or what he is acting upon. These are cases of mistaken identity. For example, in *Ranson v. Kitner*,[63] some hunters shot and killed a dog they believed to be a wolf. The

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[61] In his discussion of transferred intent, Professor Dobbs notes that "[i]t is possible to think of liability in excess of moral fault as a species of strict or absolute liability." *See* DOBBS, *supra* note 7, at 78 n.2.

[62] *See* PROSSER, *supra* note 16, at 110 ("[I]f one intentionally interferes with the interests of others, he is often subject to liability notwithstanding the invasion was made under an erroneous belief as to some fact or legal matter that would have justified the conduct.").

[63] 31 Ill. App. 241 (1889).

plaintiff sued for the value of his dog.[64] Judgment was entered for the plaintiff, and the defendants appealed. In affirming the judgment, the Appellate Court of Illinois concluded that the defendants "are clearly liable for the damages caused by their mistake, notwithstanding they were acting in good faith."[65]

In a mistake of law, the actor misunderstands his own rights or the rights of others. These are cases of mistaken ownership. For instance, in *Perry v. Jefferies*,[66] the defendant removed timber from land he believed to be his own. The property, in fact, belonged to the plaintiff. The plaintiff alleged trespass, and a jury agreed. On appeal, the defendant argued his mistake should negate his liability. Unpersuaded, the Supreme Court of South Carolina affirmed the judgment, reasoning that it would not be "sound law that a mistaken belief as to ownership in a trespasser will entitle him to go unharmed by the law for an actual invasion of the property rights of another."[67] According to the Court, "[w]hen the title and right of possession of land is in one man, any other man must *at his peril* invade such lands, no matter what he honestly believes."[68]

In mistakes of law or fact, the mistaken defendant is held liable for an intentional tort even though the criteria for intent are conspicuously absent. The hunters who intended to shoot a wild animal did not desire to harm anyone's property, nor did they know to a substantial certainty they were about to do so. Likewise, the landowner who believed he was on his own property clearly had no designs on the land of his neighbor. Perhaps

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[64] The plaintiff presumably asserted the intentional tort of conversion, but the case report does not disclose the plaintiff's theory of recovery.
[65] *Ranson*, 31 Ill. App. at 241.
[66] 39 S.E. 515 (S.C. 1901).
[67] *Id.* at 523.
[68] *Id.* (emphasis added).

one could condemn these defendants for acting without adequate information. If so, their sin would be rashness, not harboring a tortious intent to harm.

Besides mischaracterizing certain unintentional acts, the mistake doctrine also produces inconsistent results. If intent truly were unaffected by a mistake of fact or law, then every mistaken intentional act should be actionable. Yet this is not the case. In certain scenarios, such mistakes are readily excused.

In *Smith v. Delery*,[69] for example, the defendant-landowner shot the plaintiff-newspaper boy under a mistaken belief the plaintiff was a prowler. Instead of holding the defendant liable for battery, the Louisiana Supreme Court dismissed the action against him. The Court explained that, notwithstanding the defendant's intent, he "had acted as a reasonable and prudent man in the belief that he and his family were in immediate danger."[70]

A similar result was reached in *Boyer v. Waples*.[71] In *Boyer*, the defendant shot the plaintiffs because he mistakenly believed they carried dynamite which they intended to use to blow up his house. Although the defendant clearly possessed the intent to fire at the plaintiffs, the trial court rejected the plaintiffs' battery claim. The California District Court of Appeals affirmed, noting that "the defendant justifiably acted in defense of his family and his home and ... the force employed by him was not excessive."[72]

The most surprising thing about these mistake cases is not that intentional tort law treats them so inconsistently, but that the law is so consistently incorrect in its descriptive analysis. In cases such as *Ranson* and *Perry*, defendants are held liable for an intentional tort even though they do not

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[69] 114 So.2d 857 (La. 1959).
[70] *Id.* at 859.
[71] 24 Cal. Rptr. 192 (Cal. Dist. Ct. App. 1962).
[72] *Id.* at 194.

actually intend to wrong anyone. Instead, they are subject to the strict liability principle that a man acts at his peril. In cases such as *Smith* and *Boyer*, defendants who intend to harm someone nevertheless get off scot-free. Here, salvation comes in the form of "negligence" concepts like "justifiability" and "prudence."

In reality, these mistake scenarios are not as contradictory and irrational as they first appear. As I will demonstrate below, they are easily explained by the pervasive ethic of reasonableness. The confusion comes in attempting to stuff round pegs (unintentional torts) into square holes (intent-based theories).

B. Unrecognized Intentional Torts

Transferred intent and mistake present errors of over-inclusion. That is, they characterize some acts as intentional, when they really are not. Other times, however, intentional tort law commits errors of under-inclusion. In these situations, the law fails to apply the intent moniker to acts which really are intentional, at least under the definition used in the current paradigm.

1. The Scienter Conundrum

The under-inclusion problem arises most often in scienter cases. Here, the defendant does not desire to cause harm but still knows to a substantial certainty that harm will result from his act. This knowledge—or scienter—is tantamount to tortious intent, even though it does not carry the same connotation in everyday usage.

Like the purposeful form of intent, scienter is a subjective concept. This concept knows virtually no external boundaries. It is circumscribed by only two things: epistemology and statistical probability. If an actor actually knows that harm is a virtually inevitable

consequence of his conduct, his conduct should be deemed intentional, no matter how far it might reach or how many people it might injure. In practice, however, courts rarely interpret scienter so broadly. Rather, they tend to construe it quite narrowly. Such pigeonholing seems to be based on two concerns: (1) fairness and (2) manageability.

First, because scienter torts intuitively are less wrongful than purposeful misconduct, there is a fear that full enforcement will produce unjust results. This fear is well-founded. The primary and immediate objective of a purposeful intentional tort is to cause someone harm. Such conduct threatens the bonds of political association and disturbs the parties' moral equilibrium. However, the same is not necessarily true of a scienter tort. Scienter torts are not committed out of a desire to inflict harm. Although harm is a known side effect, the motive for a scienter tort is usually more self-directed. This motive, whatever it may be, is not presumptively bad. In some cases it can be socially and morally neutral, and in other cases quite good. Because the motive cannot be known in advance, scienter torts—unlike their purposeful counterparts—cannot be prejudged. Instead, they must be analyzed on a case-by-case basis to determine whether their motives justify their risks.

Intentional nuisance cases prove this point quite clearly. Like all intentional torts, intentional nuisance requires proof of intent.[73] However, unlike in other cases, proof of intent is not sufficient to prove intentional nuisance. To recover, the plaintiff has to prove *both* that the defendant intentionally interfered with the use or enjoyment of his property *and* that this interference was *unreasonable*.[74] In such cases, the defendant rarely acts with the exclusive purpose of harming the plaintiff's interests. Instead, the

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[73] *See* RESTATEMENT (SECOND) OF TORTS § 822 (1979).
[74] *See id.*

defendant acts to promote his own interests, albeit with the knowledge that those around him will be affected. Because the defendant enjoys his own usage rights, his conduct, even if knowingly harmful, is not necessarily wrongful. It becomes wrongful only when it has an unreasonable effect on others.

According to the *Restatement (Second) of Torts*, an interference with property is unreasonable only if "the gravity of the harm outweighs the utility of the actor's conduct," or "the harm caused by the conduct is serious and the financial burden of compensating for this and similar harm to others would not make the continuation of the conduct not feasible."[75] In this context, liability cannot be reduced to a bright-line rule. Instead, it must be found in the balance of conflicting interests—a balance that only the concept of reasonableness can provide.[76]

Second, beyond these fairness concerns, the scienter form of intent is difficult to manage. Unlike a plan or design, which has definite parameters, knowledge is not necessarily defined by time or space. If I emit pollutants from my factory smokestack for a period of twenty years, my knowledge of the resulting danger to the community, barring any changes in operation, is no less on the last day than it was on the first. In fact, given the wisdom of experience, it most likely will be greater. Similarly, if I make a product that I know will harm some of my customers and I still choose to sell that product all over the world, my knowledge of its harmful legacy is in no way diminished by the reach of my enterprise. If anything, the ambition of my marketing only ensures more people will be injured.

Fearful of scienter's vast scope, courts increasingly

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[75] *Id.* § 826 (a)-(b).

[76] *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (BASIC PRINCIPLES) § 5 reporter's note to cmt. a (Tentative Draft No. 1, 2001).

have increasingly attempted to reign it in, either by construing it in ways that defy its plain meaning or by invoking public policy. The opinion in *Shaw v. Brown & Williamson Tobacco Corp.*[77] provides striking proof of both tendencies. In *Shaw*, the plaintiff, a nonsmoker, brought a battery action against Brown, a cigarette manufacturer. The plaintiff claimed he had been injured by exposure to second-hand smoke emitted from Brown's cigarettes. To support his claim, the plaintiff alleged that, during the eleven-year period between 1973 and 1984, he regularly rode in an enclosed truck with a co-worker who smoked the defendant's cigarettes and, as a result of inhaling the ambient smoke, he eventually developed lung cancer. Brown filed a motion to dismiss the claim, arguing the plaintiff was unable to prove Brown had the requisite intent. The United States District Court for the District of Maryland agreed with Brown and dismissed the plaintiff's battery action.

Tellingly, however, the court danced around the scienter issue. In the late seventies and early eighties, when there were few regulations limiting the places where people could smoke, it was common knowledge that nonsmokers frequently came into contact with ambient cigarette smoke. Moreover, construing the facts in the light most favorable to the plaintiff, as was required on a motion to dismiss, the court could have found that tobacco companies, like Brown, knew second-hand smoke was harmful or offensive to nonsmokers.[78] If so, the plaintiff's case should have

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[77] 973 F. Supp. 539 (D. Md. 1997).

[78] The first petitions to ban smoking on airplanes were submitted as early as 1969. *See* K. Neilsen & S. A. Glantz, *A Tobacco Industry Study of Airline Cabin Air Quality: Dropping Inconvenient Findings*, *at* http://tc.bmjjournals.com/cgi/content/full/13/suppl_1/i20 (last visited July 29, 2004). These petitions were based on the grounds that smoking was both an annoyance and a health hazard to nonsmokers. *Id.* Studies specifically linking secondhand smoke to lung cancer began to appear in the medical literature in 1981. *Id.*

gone forward. However, the court clearly did not want this to happen. As the court explained, a finding that Brown "ha[d] committed a battery by manufacturing cigarettes would be tantamount to holding manufacturers of handguns liable in battery for exposing third parties to gunfire."[79] "Such a finding," the court warned, "would expose the courts to a flood of farfetched and nebulous litigation concerning the tort of battery."[80]

To avoid this problem, the court narrowed the definition of scienter. Scienter, by itself, contains no identity restriction. A person who explodes a megaton bomb in an occupied building certainly knows he will cause harm even if he is unaware of the *names* or the *exact number* of his victims. Nevertheless, the *Shaw* court expected both forms of prevision. Contradicting the doctrine of transferred intent, which permits recovery by victims unknown to the tortfeasor, the court required proof that Brown actually knew the identities of the persons exposed to and injured by its second-hand smoke. The plaintiff was unable to prove the two requirements. In the court's own words, "Brown ... did not know with a substantial degree of certainty that second-hand smoke would touch any particular non-smoker."[81] Although the court acknowledged Brown "may have had knowledge that second-hand smoke would reach some non-smokers," it summarily concluded that "such generalized knowledge is insufficient to satisfy the intent requirement for battery."[82]

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[79] *Shaw*, 973 F. Supp. at 548.
[80] *Id.*
[81] *Id.*
[82] *Id.*

2. The *Restatement (Third)* "Solution"

Sparked by cases like *Shaw*, the American Law Institute (ALI) recently reconsidered scienter's scope problems. In its *Restatement (Third) of Torts: Liability for Physical Harm (Basic Principles)*,[83] the ALI tentatively adopted the traditional definition of scienter, stating that "[a] person acts with intent to produce a consequence if ... [t]he person knows to a substantial certainty that the consequence will ensue from the person's conduct."[84]

Standing alone, this definition contained no inherent restrictions—just the requirement that the defendant's knowledge be linked to some forbidden consequence. Nevertheless, the ALI substantially qualified its definition in a comment, stating that "[t]he substantial-certainty definition of intent requires an appreciation of its limits."[85] According to the ALI, "the substantial-certainty test should be limited to situations in which the defendant has knowledge to a substantial certainty that the conduct will bring about harm to a particular victim, or to someone within a small class of potential victims within a localized area."[86]

The first limit—which requires knowledge of a particular victim—is the same one recognized in *Shaw*. Indeed, the ALI used *Shaw* for authority to support its position.[87] To back up *Shaw*, the ALI observed that "[t]he test loses its persuasiveness when the identity of potential victims becomes vaguer, and when in a related way the time frame involving the actor's conduct expands and the

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[83] RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (BASIC PRINCIPLES) (Tentative Draft No. 1, 2001).
[84] *See id.* § 1(b).
[85] *Id.* § 1 cmt. e.
[86] *Id.*
[87] *Id.* reporter's note to cmt. e.

causal sequence connecting conduct and harm becomes more complex."[88]

Like *Shaw*, however, the ALI did not explain its reasoning. It merely went on to note that "the company's knowledge of the certainty of harm, at some undefined time and place, does provide an argument in favor of the company's liability."[89] "[T]hat liability," it argued, is best "understood as a form of strict liability, not as a liability for anything that can properly be regarded as an intentional tort."[90] Yet, once again, it failed to support its contention. It simply assumed, without discussion, that such cases naturally fit the theory of strict liability and that its identity restriction naturally fit the definition of intent.

The ALI's second scienter limit is more expansive than the first. Although the ALI agreed with *Shaw*, it recognized that *Shaw*'s "victim identity" requirement sometimes could be unduly restrictive. For example, an employer might create a work site so dangerous that he knows eventually it will cause injury to one of his employees. Yet because the employer cannot predict *which* employee will be harmed, his conduct, under *Shaw*, could not be characterized as intentional.[91] Likewise, an aluminum smelting company that emits high levels of particulate fluorides may actually know its activities will harm its neighbors. But because it does not know the identities of its victims, the company could not be held liable for an intentional tort.[92]

Finding these results unacceptable, the ALI added an alternative to the victim identity requirement. Under this alternative, scienter could exist, irrespective of the defendant's knowledge of the victim's identity, so long as

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[88] *Id.* cmt. e.
[89] *Id.*
[90] *Id.*
[91] *See id.* cmt. e & reporter's note to cmt. e.
[92] *See id.*

the defendant knew he would harm some members of a small class of people located within a small geographic space. These "class" and "space" restrictions broadened the definition of scienter by extending it from individuals to groups. As redefined, scienter could now cover the situations mentioned above. The employer would be an intentional tortfeasor because he knowingly jeopardized the safety of a definite group of people working in a narrowly defined area. Similarly, the smelter would be liable for an intentional tort, at least to its immediate neighbors, because it consciously placed this finite class of potential victims into a finite danger zone.

In the end, however, neither the class and space restrictions, nor the victim identity limit they are supposed to complement, provide a fully satisfactory definition of intent. As even the ALI concedes, intent can be directed against either individuals or groups. Thus, any conception of intent that encompasses only specific individuals is both inaccurate and counterintuitive. Changing the limiting criteria to include ideas of class and space does nothing to make things better. In fact, it only seems to make matters worse.

No doubt, there are cases in which time and distance can disconnect an act's intent from its consequences. In the smelting example mentioned above, the plant owner might release pollutants on a single occasion. In that case, the owner's knowledge of harm will decrease over time, since the pollutants will gradually dissipate and eventually disappear into the atmosphere. Even if the plant continues to emit the pollution, the owner may reasonably expect its effects to diminish as it continues to drift farther away.

In many cases, however, intent will be unaffected by class or space considerations. Take the ALI's employer example. A single person or corporate entity could run thousands of workplaces all over a particular state or in many different states. That person or entity could establish

a company-wide policy that requires all such workplaces to maintain the same deplorably bad working conditions, knowing that some employees at each location will eventually be injured. Under the *Restatement Third* approach, the multi-workplace employer presumably would not be liable for an intentional tort—even though he possesses the same risk information and the same motive as the single workplace employer—simply, and quite ironically, because he endangers a far greater number of people over a much wider territory.

The problem here is not simply that intentional tort law excludes some torts that truly are intentional. After all, all tort theories have limits that cut off liability at a certain point. Rather, the problem is that the law's limits are imposed in an arbitrary fashion. In negligence, liability is limited primarily by foreseeability. Because foreseeability is a flexible concept, it can often support various, seemingly contradictory, interpretations. Still, no matter how it is construed, foreseeability always retains a normative grounding.[93] A person who can foresee a risk has the power to control it. This power gives him the normative responsibility to exercise that control with reasonable care. By contrast, a person who cannot foresee danger has no such power. He is just as surprised by, and vulnerable to, the risk as anyone else. Thus, he bears no responsibility to do anything about it.

The limits of intentional tort law lack such a normative foundation. The person who gives an identified acquaintance a product that he knows will cause injury when put to its normal use acts in a way that is no more or less intentional or culpable than the one who raffles off that same product to an unidentified ticket-holder in a group of complete strangers. Likewise, the manufacturer that sells a

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[93] *See* CALNAN, *supra* note 24, at 69-70, 131-32 (explaining the normative basis of foreseeability).

defective product to a small organization in a single location—say a corporate office—is no worse a wrongdoer than the manufacturer that sells the same item to consumers all over the country. In fact, because the mass-distributor knowingly inflicts harm on many more people, his culpability seems that much greater. In each case, the scienter limits do not track our moral sensibilities, as does the concept of foreseeability; rather, they actively operate to steer those sensibilities off course.

Admittedly, even the normative concept of foreseeability occasionally gives way to other considerations. This is particularly true in cases of emotional distress[94] and pure economic loss[95] where the harms are relatively modest, easy to fake, and difficult to authenticate.[96] In addition, the precipitating conduct, though careless, is not designed to harm.[97] If such conduct should have a ripple effect—injuring vast numbers of people over an extended period of time or across a broad geographic area—the person who commits the act can sustain a crushing liability burden far in excess of his culpability.[98]

The scienter limits are much harder to justify. Unlike

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[94] For instance, a negligent actor who induces emotional distress in bystanders is not necessarily liable to all of his foreseeable victims. Instead, his liability is limited to bystanders who are present when he misbehaves, who contemporaneously perceive the calamitous event he creates, and who are closely related to those he physically endangers. *See* Dillon v. Legg, 441 P.2d 912, 920-21 (Cal. 1968) (adopting a foreseeability test based on these three factors). *See generally* DOBBS, *supra* note 7, at 840-41 (discussing *Dillon* and its progeny).

[95] Tortfeasors who inflict pure economic loss enjoy similar protections. In some jurisdictions, they have no responsibility at all. *See* DOBBS, *supra* note 7, at 1283-85. In others, they are liable only to victims who are particularly foreseeable or with whom they share a special relationship. *See id.* at 1285-87.

[96] *See* DIAMOND, *supra* note 28, at 173, 189-90.

[97] *See id.* at 189-90.

[98] *See id.* at 173, 189-90.

negligence, which is based on an ambiguous and unrestricted normative standard, intentional torts are based on the subjective and factual concept of intent—a concept that is circumscribed only by the breadth and depth of one's actual knowledge. Moreover, whereas the negligence limits clamp down on moderate and suspicious harms, the class and space limits of intentional tort law deny recovery for all forms of harm, including serious physical injuries. Worse still, while the negligence limits protect inadvertent tortfeasors from bearing disproportionate liabilities, the scienter limits protect intentional tortfeasors, inarguably the worst kind of tortious offenders, from the consequences of their deliberate misdeeds. Ironically, even when these limits *do* permit a finding of intent, they catch only small-time tortfeasors and let the big-time operators go free, affording the latter a liberty of action that may or may not be abated by some other theory of recovery.

In pointing this out, I do not mean to suggest that intentional torts should have no limits or that all large-scale actors should be considered intentional tortfeasors. I would not support either proposition. What I do mean to show, however, is that the concept of scienter itself contains few limits; and when it is applied as currently defined, and not capriciously limited, it is dangerously broad and potentially unfair. Moreover, because scienter covers situations already addressed by other theories, it may also be redundant and unnecessary.

The problems alone are not news. Indeed, they have been flagged by previous commentators, who have called for scienter's reconsideration or abolition.[99] The real news,

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[99] *See* James A. Henderson, Jr. & Aaron D. Twerski, *Intent and Recklessness in Tort: The Practical Craft of Restating the Law*, 54 VAND. L. REV. 1133, 1138-43 (2001) (proposing changes to the *Restatement Third*'s definition of "scienter"); Anthony J. Sebok, *Purpose, Belief, and Recklessness: Pruning the Restatement (Third)'s Definition of Intent*, 54 VAND. L. REV. 1165, 1180 (2001) (advocating

as we shall see below, is that such flaws are symptomatic of a far worse malady that cannot be cured by any quick-fix solution.

IV. Unreasonable Intentional Torts

The transferred intent, mistake, and scienter anomalies reveal at least a partial misalignment between the concept of intent and the conduct it now describes. However, a closer look reveals something even more pernicious. It shows that intentional tort liability is not, as the name implies, actually based on intent. Rather, it is *always* based on the concept of reasonableness. This conclusion rests on three important findings: (1) intent is a species of reasonableness; (2) intent creates a presumption of unreasonableness; and (3) reasonable intentional acts are not actionable.

These findings create yet another paradox for the current paradigm. If, as that paradigm suggests, reasonableness is a hallmark of negligence theory, then intentional torts and negligence are not theoretical strangers, but are actually fraternal twins within the same theoretical family.

A. The Reasonableness in Intent

According to the conventional paradigm, intentional torts are *sui generis*. They do not impose strict liability because they are based on fault. They are not a form of negligence because they are based on intent, not reasonableness. In fact, intent and negligence are supposed to be entirely separate and distinct concepts.[100] Intent is willful; negligence is accidental. Intent's consequences are

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the abolishment of scienter).

[100] DOBBS, *supra* note 7, at 50.

calculated; negligence's are unexpected and unwanted. Although intent can be based on knowledge without a purpose, the knowledge threshold for intent never overlaps that of negligence. A substantial certainty of harm is intent; anything less is merely a reckless or negligent disregard of a probable risk.[101]

Like any classificatory system, tort law's theoretical paradigm is only as strong as its conceptual dividing lines.[102] Unfortunately, these lines are frequently fuzzy, pliable, or poorly drawn. This is especially true of the fault matrix. When that matrix is removed from the body of tort law, the law's true structure becomes readily apparent. Intent, we learn, is not an independent basis of liability. Rather, it is merely a subspecies of the broader concept of reasonableness.

As noted above, the test of intent is subjective. To meet this test, the defendant must *actually* desire to bring about a harmful consequence, or he must, at the very least, *actually* know to a substantial certainty that such a consequence will follow from his actions.[103] The test of negligence, however, is objective. It holds people to a standard of reasonable care.[104] If the current paradigm were correct, these tests would never overlap. The test for intent would not capture any acts of negligence, and the test for negligence would not cover any intentional misdeeds.

However, nothing could be farther from the truth. In fact, *every* intentional tort *always* fails the objective test of reasonableness. Reasonableness is simply a heuristic

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[101] *See id.* at 52.

[102] Categorical integrity is not only a constraint of jurisprudence, but also a requirement of all taxonomies. Reptiles are by definition cold-blooded and scaly; mammals are warm-blooded and hairy. Thus, no snake could ever be a mammal, and no dog could ever be a reptile. The classifications of "reptile" and "mammal" work because their defining criteria are clear and accurate.

[103] *See* DOBBS, *supra* note 7, at 49.

[104] *See id.*

device designed to capture a community's sense of right and wrong.[105] When directed at intentional torts, this moral instinct is clear and unwavering.[106] A reasonable person does not batter, imprison, or trespass unless he has a good excuse or justification. She does not deliberately interfere with the interests of others without their consent. And he certainly does inflict harm with a malicious motive. Because intentional tortfeasors always act counter to reason, their conduct always offends society's objective standard of reasonable behavior.

Once this fact is recognized, it quickly becomes apparent that intent and reasonableness are more alike than different. Reasonableness is the concept that explains liability judgments in *both* theories.[107] Their difference is

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[105] *See* PROSSER, *supra* note 16, at 7 ("[T]he law of torts is concerned not solely with individually questionable conduct but as well with acts which are unreasonable, or socially harmful, from the point of view of the community as a whole."); *see also* Patrick G. Kelley, *Who Decides: Community Safety Conventions at the Heart of Tort Liability*, 38 CLEV. ST. L. REV. 315 (1990) (emphasizing the role of community conventions in the determination of reasonableness).

[106] As the *Restatement (Second) of Torts* notes:

> For the established intentional torts, this balancing process [that is, the balancing process used in negligence and strict liability] has been already worked out and developed in the form of a set of rules. The individual torts have been set up to protect interests of the injured party, with their individual attributes designated by legal rules. The interests of the actor are protected by a set of established privileges, with their individual attributes also established by legal rules. There is thus no need of using the balancing process afresh for each case in which as established tort exists; and the task is merely to apply the legal rules to the facts.

RESTATEMENT (SECOND) OF TORTS § 870 cmt. c (1979).

[107] In my recent book, *A Revisionist History of Tort Law: From Holmesian Realism to Neoclassical Rationalism*, I show how all tort theories, including the earliest intentional torts, arose from the classical, natural law concept of reasonableness. *See* ALAN CALNAN, A

one of degree, not kind. Because intentional torts are deliberative, they often appear more unreasonable than mere acts of carelessness. Yet in the end, all tortious acts are wrongful for the same basic reason: they are unfair.

According to Aristotle, who first recognized reasonableness as both a source of law and a standard of legal decision-making, reason demands justice and justice demands fairness.[108] Specifically, justice dictates that people should receive their fair share of liberty and security. Both intentional tortfeasors and negligent actors violate this mandate. They exercise excessive freedom, and unduly inhibit the freedom of others.[109] Granted, they do so in different ways. The intentional tortfeasor flouts the general social proscription against doing harm to others.[110] The negligent actor, on the other hand, assumes a liberty of self-absorption not enjoyed by others.[111] Nevertheless, each offending act is inequitable, and each offender is a cheater. The fact that the act is intentional does not free it from the constraints of reasonableness. Rather, it merely places that act into a subset within this broader normative universe.

In saying this, I certainly do not wish to suggest that negligence and intentional torts are morally equivalent or that each claim must be litigated in the exact same way. In fact, in the next section, I shall explain how intentional tort law shifts evidentiary burdens in accordance with the dictates of reasonableness. All I mean to suggest is that the classificatory structure of the current paradigm is fundamentally flawed, and its depiction of the law's

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REVISIONIST HISTORY OF TORT LAW: FROM HOLMESIAN REALISM TO NEOCLASSICAL RATIONALISM (2005).

[108] *See* ARISTOTLE, THE NICOMACHEAN ETHICS 24, 55, 144-49 (J.E.C. Welldon trans., Prometheus Books 1987).

[109] *See* CALNAN, *supra* note 24, at 72, 129, 167, 188-89.

[110] *See id.* at 167.

[111] *See id.* at 188-89.

intrinsic nature is seriously distorted.

B. Intent as a Presumption of Unreasonableness

What makes the interrelationship between intent and reasonableness so elusive is its clandestine nature. Reasonableness is not identified as an element of any intentional tort except nuisance. It certainly is not acknowledged as a basis of liability. In fact, it is rarely even discussed. This omission, however, does not mean, as the modern paradigm suggests, that reasonableness and intent are irreconcilable concepts. Rather, it means that the notion of reasonableness is already ingrained in the element of intent.

The determination of reasonableness depends in each case upon the characteristics of the conduct under scrutiny. Acts that are common, self-directed, or useful are difficult to judge. They are not inherently unreasonable, but become unreasonable only if they are poorly performed.[112] For example, there is nothing wrong with driving a car, but driving fast in heavy traffic on a wet, windy road is clearly inappropriate. Here, fault is a function of context.[113] Since licensed adults are permitted to drive cars, the act of driving cannot be condemned without looking at the time, place, and manner in which it is conducted.

Other acts are wrongful *per se*. These acts are inherently unreasonable—meaning, they are socially inappropriate most of the time.[114] Certainly, *purposeful* intentional torts fall into this category. To live in a liberal democracy, each citizen must relinquish her natural freedom and must agree to respect the freedoms of others. Specifically, she must agree to respect the freedoms of everyone else. Laws are created to enforce this restraint.

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[112] *See id.* at 178.
[113] *See id.*
[114] *See id.* at 166-67.

They make individual will subordinate to group equality. Purposeful torts disrupt this scheme. The deliberate tortfeasor shows no restraint. Acting at will, he ignores the wills of others. In so doing, he not only repudiates the notion of equality, he thumbs his nose at the rule of law.

Indeed, this message is so powerful, it requires no further elaboration. Unreasonableness is embodied in the desire to harm. Thus, the victim of a purposeful tort does not have to prove unreasonableness; unreasonableness is automatically presumed from proof of intent.

This presumption is based on both fact and policy. As a factual matter, experience shows purposeful harms are both highly dangerous and socially disruptive. Thus, in most cases, the presumption of unreasonableness answers the question of liability correctly. From a policy standpoint, the presumption of unreasonableness serves the goals of education and deterrence. It both teaches and warns future actors that intentionally harmful behavior is strongly discouraged and must be undertaken with great circumspection.

Despite its accuracy and social utility, this presumption is not absolute. There may be instances where intentionally harmful acts are permissible or even desirable. To rebut the presumption of unreasonableness, however, one must be able to identify extraordinary circumstances that warrant relief from the strict letter of the law.[115] In the next section, we shall see that tort law routinely entertains such rebuttals, usually as affirmative defenses. Although these defenses take many forms, they all find support in the same principle. The only thing that can rebut a presumption of unreasonableness is proof of reasonableness itself.

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[115] *See id.* at 169.

C. Unactionability of Reasonable Intentional Acts

Intentional tort law recognizes a number of privileges and defenses. Some, like self-defense and defense of others, apply to torts against persons. Others, like defense of property and recovery of property, apply only to property torts. Still others, like consent and necessity, have general application. Nevertheless, all of these defenses have two things in common: they ensure that liability is grounded in reasonableness, and they prove that reasonable intentional acts are not actionable.

With the exception of consent, every intentional tort privilege contains the same two elements of proof. The first element determines whether the defendant's decision to act was justified. I shall call this the "decision element." The second element determines whether the defendant performed that act in an appropriate way. I will refer to this as the "performance element." In each case, reasonableness is used as the standard of evaluation.[116]

For defenses to personal injury torts, courts openly base the decision element on reasonableness. In all cases of self-defense, and many cases of defense of others, the defendant's right to act depends on whether he had a reasonable belief that there was a need for action.[117]

We saw examples of this decision-based reasonableness analysis in the mistake cases discussed earlier. In *Smith*, the landowner who reasonably mistook the paperboy for a prowler was justified in trying to stop him.[118] Likewise, in *Boyer*, the homeowner who reasonably feared for the safety of his family was permitted to defend them against some

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[116] *See* DOBBS, *supra* note 7, at 156-57 (noting that "[j]ustifications tend to invoke objective standards of reasonableness to modify the flat rules of trespassory torts.").

[117] *See id.* at 163 n.3.

[118] *Smith*, 114 So.2d at 849.

suspected trespassers.[119] Given the gravity of the interests at stake, the imminence of the danger, and the absence of time for deliberation, reasonableness gave these actors a right to act on their instincts, even if those instincts later proved to be mistaken.

Some privileges, such as recovery of property, routinely eschew reasonableness in the decision element.[120] Other privileges, such as defense of land or third persons, occasionally display the same tendency.[121] These privileges authorize a response when there is an *actual* need for such action, and not when the actor reasonably believes this to be the case. Nevertheless, reasonableness remains important to the ultimate determination of liability. Its role is just more understated.

In property cases, reasonableness accounts for the actual need standard itself. Here, as elsewhere, reasonableness balances risk and benefit. In a hierarchy of value, property interests rank relatively low on the scale, certainly lower than an interest in bodily integrity. Thus, they deserve less protection. On the other hand, the defense and recovery of property pose a high risk of mistake. Personal property is often easy to steal and even easier to conceal or transfer. Thus, self-help repossessors may easily go after either the wrong person or wrong property.

Similarly, real property is often easy to invade and even easier to escape. Thus, a landowner may easily misinterpret or overreact to the intrusion. In these

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[119] *Boyer*, 24 Cal.Rptr. at 195.

[120] PROSSER, *supra* note 16, at 138. An exception is made for merchants. Under the shopkeeper's privilege, "a merchant who reasonably believes that a person has committed a theft or has attempted a theft may detain the person for a limited period of time and for the limited purpose of the investigating the facts." DOBBS, *supra* note 7, at 196.

[121] PROSSER, *supra* note 16, at 130, 131-32.

situations, the need for precaution is greater. Where the facts are clear, it is reasonable to act on perception. But where the property or the perpetrator is in doubt and the danger of overreaching is palpable, reasonableness requires the property owner to think before he acts.

Reasonableness works the same way in defense of others. In this scenario, a bystander witnesses an encounter between two or more individuals. Although the bystander himself is not in danger, he may believe one of the combatants is. Here, too, the chances of mistake are great. Because the bystander is not involved in the confrontation, he may not know how it started or who holds the upper hand. Also, because such events unfold rapidly, he may not have time for investigation or rational deliberation. If he is correct, he may save the day. But if he is wrong, he may place himself in jeopardy, violate the rights of others, and expand the altercation. In such cases, reasonableness counsels caution before action.

Unlike the decision element, the performance element always rests on reasonableness. Once invoked, this second tier of reasonableness continues the search for proportionality and balance. Since balance measures actions and reactions, a reasonable privilege-holder may not exceed his right to respond.[122] Specifically, he may not seize the opportunity to punish his adversary or teach him a lesson. Rather, he must use only the force necessary to end the threat to his rights. Once that threat is gone, he must desist from further action.

To illustrate, in *Andrepont v. Naquin*,[123] two teenage boys were engaged in a fistfight. During the struggle, the defendant retrieved a baseball bat and struck the plaintiff. The plaintiff sued for battery. In response, the defendant argued that the plaintiff had consented to the fight. The

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[122] DOBBS, *supra* note 7, at 156.
[123] 345 So.2d 1216 (La. Ct. App. 1977).

jury returned a verdict for the plaintiff and the defendant appealed. In upholding the judgment, the Louisiana Court of Appeals found that the defendant had used unreasonable force. Here, the risk posed by the defendant's bat far exceeded the risk posed by the plaintiff's fists. This excessive force, in turn, negated the plaintiff's consent. As the court explained, "The force employed by the defendant was not used in defense, was in excess of what was reasonably necessary to repel the advances of the plaintiff or his group, and was an implementation of force to which the plaintiff did not consent."[124]

In this and every other case of privilege, the defendant's intentional act creates a presumption of unreasonableness. This presumption can be rebutted only by its conceptual opposite. Thus, the defendant must show both that he made a reasonable decision to act, and that his chosen response was reasonable under the circumstances. By meeting this burden, he overcomes the presumption that his conduct was unreasonable. This may be true even though his act was designed to harm or was committed with the knowledge that it would injure someone else. Whether the defendant is defending his person or protecting his property, proof of his intent never ends the discussion of liability. It merely shifts that discussion to the ultimate issue of reasonableness.

V. Strict Intentional Tort Liability

The discovery that intentional tort liability is not necessarily based on intent significantly weakens the current paradigm's fault matrix, since it repudiates one-half of that matrix's two-sided structure. The additional revelation that intentional torts are really based on reasonableness only makes matters worse. If all intentional

[124] *Id.* at 1220.

torts are unreasonable, then they are not unlike acts of negligence, and if negligence and intentional torts are basically the same, then the matrix is wrong to keep them apart.

This being said, the fault matrix still serves to separate negligence and intentional torts from the theory of strict liability. Operating on the assumption that fault and strict liability are antithetical concepts, it creates a veritable firewall between the two. With this barrier in place, the two concepts are supposed to remain independent. Strict liability should never include intentional misconduct, and no intentional tort should ever impose strict liability. Yet, as I will discuss below, this is not the case. Intentional torts and strict liability are kindred spirits, not opposite extremes. In fact, they are more than close relatives; they are virtually one and the same.

A. The Characteristics of True Strict Liability

Admittedly, such a claim is hard to substantiate—but not because of a lack of proof. Rather, the difficulty lies in the theory of strict liability itself. Strict liability is not a clear concept. It has no definite rationale and recognizes no anchoring principle.[125] It employs no uniform standard of evaluation and maintains no fixed elemental structure.[126]

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[125] Unlike intentional torts and negligence, strict liability does not reveal its *ratio decedendi*. Intentional torts have intent. Negligence has reasonableness. Strict liability has no stated norm. At best, it merely describes a policy-based aspiration or conclusion that liability should be more certain or rigorous than usual. Because policy is in the eye of the beholder, and shifts like grains of sand, strict liability is an empty phrase. Indeed, "strictness" detached from a fixed reference point is nothing but vacuous relativity.

[126] In fact, strict liability is not really even a single, cohesive theory of recovery. Rather, it is an eclectic group of disjointed tests, elements and approaches lumped together under the same theoretical moniker. Among all strict liability "theories," there is no uniform liability

trigger. For animals, strict liability depends on "wildness" or "viciousness." *See* DOBBS, *supra* note 7, at 945, 947-49. For activities, liability depends on "ultrahazardousness" or "abnormality." *Id.* at 952-54. For products, liability depends on "defectiveness" and/or "unreasonable danger." RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 (1998); RESTATEMENT (SECOND) OF TORTS § 402A (1965). For agency relationships, liability depends on "scope of employment" and "control." Fruit v. Schreiner, 502 P.2d 133, 139-41(Alaska 1972). There certainly may be common principles underlying these disparate standards. In fact, I believe such principles do exist. However, these commonalities, whatever they may be, are neither recognized by the current paradigm nor proposed by the ALI in its new restatement.

Within each liability theory, liability triggers have not remained constant. The standard for animals has shifted from incitement to scienter. *See* ROBERT C. PALMER, ENGLISH LAW IN THE AGE OF THE BLACK DEATH, 1348-1381; 230-45 (1993). The standard for activities has shifted from unnaturalness to ultrahazardousness to abnormality. *See* DOBBS, *supra* note 7, at 950-54. The standard for products has shifted from consumer expectations to risk-utility analysis to reasonable alternative designs. *See id.* at 981-82, 985-87. Even the standard for agency relationships has shifted from command/ratification to control to enterprise liability. *See* PROSSER, *supra* note 22, at 500-01.

Finally, even where the same standards are used, they often are inconsistently interpreted and applied. Some courts have interpreted strict liability to mean absolute liability (this tendency is especially apparent in cases involving the storage of explosives). *See* Exner v. Sherman Power Const. Co., 54 F.2d 510 (2d Cir. 1931); Yukon Equip., Inc. v. Fireman's Fund Ins. Co., 585 P.2d 1206 (Alaska 1978). Others have interpreted the concept to mean reasonableness (this interpretation often appears, albeit begrudgingly, in products cases). *See* Phipps v. Gen. Motors Corp., 363 A.2d 955, 962 (Md. 1976)("The doctrine of strict liability is really but another form of negligence per se, in that it is a judicial determination that placing a defective product on the market which is unreasonably dangerous to a user or consumer is itself a negligent act sufficient to impose liability on the seller."). Still others peg the standard somewhere in between (this approach also shows up frequently in products cases, usually in the form of imputed knowledge or hindsight balancing tests). *See* Sperry-New Holland, a Div. of Sperry Corp. v. Prestage, 617 So.2d 248, 253 (Miss. 1993)("The extent of strict liability of a manufacturer for harm caused by its product is not

In short, it lacks most of the attributes necessary to identify it as a distinctive theory of recovery.

Nevertheless, it is possible, without getting mired in too much detail, to identify two defining characteristics of strict liability and to use these characteristics as the basis for our comparison. According to its legal definition, strict liability is liability without fault.[127] This means, at the very least, the plaintiff is not required to present evidence of the defendant's fault in order to recover for his loss. However, it also has a broader meaning. It suggests that, the fault element aside, the plaintiff generally should enjoy an easier road to recovery, and the defendant generally should find it harder to escape liability.

These related objectives could be achieved in various ways. As noted earlier, all fault-based torts contain a number of elements other than fault.[128] Specifically, they include a limitation element, a causation element and a damage element. They also admit one or more affirmative defenses.

Within this scheme, there presumably is a norm—some standard combination of elements and defenses that applies in most situations most of the time. According to the current paradigm, that norm is the theory of negligence, which sits in the middle of the fault continuum, half way between the theories of intentional torts and strict liability.[129] If negligence is the proper benchmark, then liability becomes "stricter" anytime any part of its liability scheme is slanted in the plaintiff's favor.

This means true strict liability can be achieved in a variety of ways. One way is to relax the standards set for

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that of an insurer.... However, strict liability does relieve the plaintiff of the onerous burden of proving negligence (i.e. fault). Fault is supplied as a matter of law.").

[127] *See* BLACK'S LAW DICTIONARY 1422 (6th ed. 1990).

[128] *See supra* note 34 & Figure 3.

[129] *See* MARSHALL S. SHAPO, PRINCIPLES OF TORT LAW 6 (2003).

establishing responsibility, causation and damages. Another is to shift the burden of proof on one or more of these elements. Still another is to reduce or eliminate the limitations on liability and/or the defendant's available defenses. Each alteration and shift is significant because it releases the law from its liability norm and moves it farther and farther towards a normative extreme. Indeed, the greater the number of these changes, and the more dramatic the change in each area, the stricter the resulting liability theory will be.

Amazingly, intentional torts—the supposed polar opposite of strict liability—contain many of these plaintiff-friendly characteristics. Indeed, as a group, intentional torts are decidedly strict in both substance and procedure. They take a broad focus, presumptively condemning all intentional harms regardless of the specific manner in which they occur. They create expansive duties, extending their protection to remote and even unforeseeable victims. Most important, they actively champion the plaintiff's cause, shifting to the defendant the burden of excusing his behavior and limiting his affirmative defenses.

B. The Strictness of Intentional Tort Law

1. Categorical, Activity-Based Focus

According to the current paradigm, strict liability is unique because it regulates activities, not acts.[130] For example, keeping a wild or vicious animal is an inherently

[130] *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (BASIC PRINCIPLES) § 20 cmt. b (Tentative Draft No. 1, 2001)("[A] prerequisite for the strict liability rule...is not merely a highly significant risk associated with the activity itself, but a highly significant risk that remains with the activity even when all actors exercise reasonable care.").

dangerous activity.[131] Thus, if the animal escapes, the keeper is liable for the resulting loss, even if he took extraordinary measures to keep the animal contained.[132] Likewise, detonating explosives is an abnormally dangerous activity.[133] Thus, should the blast cause harm to another, the blaster remains responsible for the damage, no matter how much care he took to prevent it.[134] In each case, the law looks not at the activity's performance, but at its inherent risk characteristics.

Intentional torts are no different. Though cast in the form of fault, they too judge behavior at the broadest level of generality.[135] In fact, all intentional torts evaluate the "activity" of intentionally harming others. Such calculated behavior is presumptively suspect, regardless of how it is conducted, because it jeopardizes the rights of unwitting victims, subverts the rule of law, and disturbs the peace and order of society. Thus, to recover for an intentional tort, a plaintiff never has to prove the defendant acted in a wrongful manner. He need only prove the defendant engaged in a suspect activity while motivated by the requisite intent.

Battery actions makes this plain. In many situations, a battery victim can prove his offender behaved in an inappropriate way. However, he is not required to do so in order to recover. As we saw earlier, a plaintiff injured by mistake can prevail on his intentional tort action without

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[131] DOBBS, *supra* note 7, at 945, 947-48.
[132] *Id.* at 945, 947.
[133] *Id.* at 955.
[134] RESTATEMENT (SECOND) OF TORTS § 520 cmt. h (1977).
[135] Of course, a defendant may narrow this focus by asserting a privilege. In effect, the privilege shifts the focus from the mere commission of the intentional activity to the specific details of the defendant's behavior, thus initiating a determination as to whether the defendant's performance of that activity was reasonable under the circumstances.

proving the perpetrator did anything wrong.[136] Similarly, someone victimized by an overzealous act of self-defense need not demonstrate his attacker used an unreasonable amount of force.[137] Indeed, in each case, the plaintiff's only normative burden is to show that the defendant desired to cause a harmful or offensive contact or that he knew to a substantial certainty that such contact would result from his act.

Once this burden is met and causality is demonstrated, the defendant is held liable unless he can establish some excuse or justification for his actions. In this way, intentional acts are like any other kind of strict liability activity. They are *categorically* actionable because of their inherent characteristics and, until justified, are presumed to inflict unfair losses on their victims.

2. Expansive Duties

In addition to taking a categorical approach to intentional activity, intentional tort law casts a protective safety net that is perhaps even *more* expansive than that of strict liability. Granted, the theories of strict liability cover a wider variety of high-risk activities, but on an individual basis, the duties of intentional tort law appear as tough and far-reaching as any found in the law of torts.

Strict liability duties are limited by concepts of forseeability and abnormality.[138] The duty to refrain from

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[136] *See Ranson*, 31 Ill. App. at 241 (holding that a dog owner could sustain a conversion action against hunters despite the hunters' claim that they shot the dog by mistake).

[137] *See Andrepont*, 345 So.2d at 1220 (holding that a participant in a fistfight could sustain a battery action against his co-combatant despite the latter's claim that he wielded a bat in self-defense).

[138] *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 (b), (c) (1998) (providing that liability for design and warning defects is limited to the foreseeable risks posed by the offending product); RESTATEMENT (SECOND) OF TORTS § 519 (1977)(stating that the

intentionally harming others, however, is free of virtually all temporal or spatial constraints. In fact, it may not even be circumscribed by the motive of the actor. The doctrines of transferred intent and mistake make this apparent. If the defendant shoots a gun at one person but the bullet strikes some unseen passerby, the concept of transferred intent still holds him liable for committing a battery.[139] In this scenario, the duty not to deliberately shoot at people is so important and unrelenting it follows the bullet and attaches intent wherever it goes. Similarly, if the defendant believes he is shooting at a wild animal which turns out to be someone's pet, the defendant, and not the pet owner, bears responsibility for the mistake.[140] Here again, the duty to control the gun is so onerous and expansive, it protects virtually anyone injured by the intentional discharge of that weapon.

Besides protecting many people, intentional tort law also protects many interests. All traditional strict liability theories secure tangible interests. Thus, as a precondition to recovery, they require proof of actual injury. However, most intentional torts also secure intangible interests like freedom, equality, and dignity. When one person willfully intrudes upon the seclusion of another, these interests are compromised and harm is presumed. Thus, the victim can institute a lawsuit and recover nominal damages, even if he

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abnormally dangerous activity theory of "strict liability is limited to the kind of harm, the possibility of which makes the activity abnormally dangerous.").

[139] *See Corn*, 229 N.W. at 871; *see also* Manning v. Grimsley, 643 F.2d 20 (1st Cir. 1981)(imposing liability against a defendant who threw a ball at a heckler but hit another spectator); Singer v. Marx, 301 P.2d 440 (Cal. 1956)(imposing liability against a defendant who threw a rock at one child but hit another); Talmage v. Smith, 59 N.W. 656 (Mich. 1894)(imposing liability against a defendant who threw a stick at one boy but hit another).

[140] *See Ranson*, 31 Ill. App. at 241 (imposing liability against defendants who shot a dog believing it to be a wolf).

suffered no discernable injuries.[141] Here, the tortfeasor's duty to pay is not conditioned on the victim's loss, but arises automatically upon the completion of his tort. Such a duty, though presumably fault-based, appears to "out-strict" even the strictest of strict liability duties.

3. Proof of Facts, Not Fault

If there is a weakness in the analogy between strict liability and intentional torts, it seems to be in their respective bases of liability. At first, it sounds strange to think of an intentional tort as a no-fault liability vehicle. Indeed, what could be worse than deliberately trying to hurt another person or ignoring a near certain risk that one's act would cause him harm?

Yet the more closely we examine intentional tort law, the more uncertain its substantive basis becomes. In my judgment, *all* tort law is,[142] or at least was and should be,[143] grounded in *some* notion of fault. Therefore, the very idea of a faultless tortfeasor is hard for me to accept. But if we interpret strict liability to mean the plaintiff need not *prove* the defendant's fault, then, in this sense at least, any intentional tort could be described as a no-fault liability

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[141] *See* Neely v. Coffey, 410 N.E.2d 839 (Ill. 1980) (holding a trespasser liable for nominal damages); Dougherty v. Stepp, 18 N.C. 371 (1835)("From every ...entry against the will of the possessor, the law infers some damage...."); RESTATEMENT (SECOND) OF TORTS §158 (1965)(stating that an actor may be "subject to another for trespass, irrespective of whether he thereby causes harm to any legally protected interest of the other....").

[142] *See generally* CALNAN, *supra* note 24 (explaining the moral foundations of all tort law, including the supposedly fault-free theory of strict liability).

[143] *See* CALNAN, *supra* note 109 (revealing that all tort theories, including the theory of strict liability, arose from a classical, fault-based conception of reasonableness).

theory.[144]

This idea only sounds incongruous under the artificial and misleading constraints of the current paradigm. Once these constraints are removed, the connection between intentional torts and strict liability becomes surprisingly clear.

Intent, we see, is not necessarily synonymous with fault. Rather, it is merely a factual description of a person's state of mind—a description that may or may not fit the definition of culpability. When intent is malicious, proof of this fact can create a conclusive inference of fault. However, when intent is not malicious, it may have almost no probative value at all. Indeed, if the defendant's motive is innocent or even commendable, his conduct may be intentional but not wrongful. The defendant's motive, however, is not the plaintiff's concern. So long as the plaintiff can establish the defendant's intent, he need not worry about whether that intent was also faulty.

We saw evidence of this paradox in the mistake cases discussed earlier. Whether the mistake is one of identity or ownership, the plaintiff's only burden is to show the defendant acted with volition.[145] Once he carries this burden, he has nothing left to prove and nothing left to fear. The defendant cannot counter by saying that he did not

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[144] Two "intentional" torts—private nuisance and intentional infliction of emotional distress (IIED)—actually do require some proof of "fault." In "intentional" nuisance cases, the plaintiff must prove that the defendant's interference was unreasonable. *See* RESTATEMENT (SECOND) OF TORTS § 822 (a) (1979). In IIED cases, the plaintiff must prove that the defendant's behavior was not only extreme and outrageous, but also intentional or reckless. *See* RESTATEMENT (SECOND) OF TORTS § 46 (1) (1965).

[145] *See Ranson,* 31 Ill. App. at 241 (holding defendant liable for voluntarily shooting a domestic pet mistaken even though he mistook it for a wild animal); *Perry,* 39 S.E. at 523 (holding defendant liable for voluntarily entering plaintiff's property even though he mistook that property for his own).

desire to commit a tort or know that one would occur. He also cannot disprove his fault by arguing that he acted under a reasonable misapprehension of the circumstances. Because his decision was deliberate and his conduct unprovoked, he is strictly liable for his mistake. Even if the defendant raises a privilege, it is not the plaintiff's burden to prove he was at fault. In these scenarios, evidence of the defendant's intent merely triggers the fault issue; it does not actually resolve it.

Battery actions drive home this point. Most batteries are not random occurrences. Rather, they are bilateral encounters that arise out of preexisting relationships or prior events. Frequently, the defendant reacts to some threat posed by the plaintiff.[146] This reaction, though intentionally harmful, is not necessarily tortious. It becomes tortious only if the defendant acted unreasonably, either by responding without adequate provocation or by using excessive force. However, the reasonableness issue is not the plaintiff's problem. The plaintiff may prevail without offering any proof on this subject. Instead, the entire burden of proving reasonableness, or the lack thereof, belongs to the defendant. After the plaintiff establishes intent, the defendant must prove that his response was reasonable under the circumstances. If he does not, he is liable regardless of his guilt or innocence.

For both parties, intentional tort liability is far from ordinary. From the defendant's standpoint, it is especially onerous. From the plaintiff's perspective, it is all but fault-free. Granted, fault may infiltrate the facts, but it does so only from the defendant's side, and only if he is unable to provide some reasonable justification for his actions.

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[146] *See* Bennett v. Dunn, 507 So.2d 451 (Ala. 1987)(defendant shot the plaintiff as he attempted to steal his truck); Crabtree v. Dawson, 83 S.W. 557 (Ky. 1904)(defendant struck the plaintiff in the belief that the plaintiff was about to attack him with bricks); *Andrepont,* 345 So.2d at 1220 (plaintiff was injured during a scuffle with the defendant).

4. Few and Narrow Defenses

In addition to limiting the plaintiff's burden of proof, intentional torts also restrict the substantive defenses available to the defendant. As noted above, the goal of strict liability is to make it harder for a defendant to avoid liability. One of the best ways to do this is by sealing off the conceptual exits to the plaintiff's theory of recovery. Strict liability traps a defendant in the liability maze by taking away or eviscerating defenses like contributory negligence,[147] comparative fault,[148] or assumption of risk.[149] Intentional torts go to the same extreme, and then go one step further.

Most jurisdictions which have adopted comparative fault have refused to apply it to intentional torts.[150] As a

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[147] *See* Shield v. Morton Chem. Co., 518 P.2d 857 (Idaho 1974) (holding that "the better reasoned view is that contributory negligence in the sense of the failure to discover the defect or to guard against its existence is not a defense to strict liability in tort."); Sandy v. Bushey, 128 A. 513 (Me. 1925)(rejecting a contributory negligence defense in a vicious animal case); Abbott v. Am. Honda Motor Co., 682 S.W.2d 206 (Tenn Ct. App. 1984)(rejecting a contributory negligence defense in a strict products liability case).

[148] *See* Lutz v. Nat. Crane Corp. 884 P.2d 455 (Mont. 1994)(refusing to apply comparative fault in a strict products liability case); Kimco Dev. Corp. v. Michael D's Carpet Outlets, 637 A.2d 603 (Pa. 1993)(refusing to apply comparative fault in a strict products liability case); Phillips v. Duro-Last Roofing, Inc., 806 P.2d 834 (Wyo. 1991)(refusing to apply comparative fault in a strict products liability case).

[149] *See* Heil Co. v. Grant, 534 S.W.2d 916, 920 (Tex. Civ. App. 1976) (stating that "[t]he doctrine of assumed risk is harsh and will not be extended" in a strict products liability action).

[150] *See* Whitlock v. Smith, 762 S.W.2d 782 (Ark. 1989)(holding that comparative fault does not mitigate liability for an intentional tort); Terrell v. Hester, 355 S.E. 2d 97 (Ga. Ct. App. 1987)(holding that comparative fault does not mitigate liability for an intentional tort); Carman v. Heber, 601 P.2d 646 (Colo. Ct. App. 1979)(holding that comparative fault does not mitigate liability for an intentional tort); *see*

matter of both policy and logic, it makes little sense to relieve intentional tortfeasors of liability because their victims may have carelessly exposed themselves to the deliberate machinations of others.[151]

Many jurisdictions also severely curtail the use of consent and assumption of risk in intentional tort actions.[152] For example, express assumption of risk clauses which disclaim responsibility for intentional torts are routinely dismissed on public policy grounds.[153] Moreover, when two intentional tortfeasors injure one another in mutual combat, courts often prohibit either participant from raising the privilege of consent.[154] In each case, the defendant's conduct is so dangerous or exploitative, and the plaintiff's acquiescence so questionable, courts simply foreclose any argument that the parties' encounter was truly consensual.

Even where intentional tort privileges are recognized, there is no guarantee the defendant will be relieved of

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generally DOBBS, *supra* note 7, at 517-21 (discussing the reasons for the rule).

[151] However, some courts apply comparative fault principles in multiple defendant scenarios, where at least one defendant is an intentional tortfeasor. *See* DOBBS, *supra* note 7, at 518.

[152] *See* Blankinship v. Duarte, 669 P.2d 994 (Ariz. Ct. App. 1983) (holding that the trial court erred by giving an assumption of risk instruction in a intentional tort case); Navarre v. Ostdiek, 518 P.2d 1362 (Colo. Ct. App. 1973) (stating that "[a]ssumption of risk as a defense in a negligence action is not a proper defense to the intentional torts of assault and battery.").

[153] *See* PROSSER, *supra* note 16, at 484 (stating that "such agreements generally are not construed to cover the more extreme forms of negligence...or to any conduct which constitutes an intentional tort.").

[154] *See* Hudson v. Craft, 204 P.2d 1 (1949)(adopting the majority view which nullifies consent in such cases); *see also* RESTATEMENT (SECOND) OF TORTS § 892C (1979)("If the conduct is made criminal in order to protect a certain class of persons irrespective of their consent, the consent of members of that class to the conduct is not effective to bar a tort action.").

liability. Some privileges, such as public[155] or private necessity,[156] are conditional only. They do not cut off liability. They merely permit defensive action. If the act causes injury, the privilege-holder remains responsible for the entire loss. Certainly, having this privilege is better than having no privilege at all, but it is far less protective than the defenses permitted in most other tort actions.

5. Procedural Advantages for Plaintiffs

All of the characteristics addressed so far are substantive. They determine what an intentional tort litigant must, may, or may not prove. However, the procedural format of these torts is important as well. It determines who has the burden of proof and how much evidence he must produce. In each case, intentional tort law is not even-handed. Instead, it stacks the deck of procedural burdens to help plaintiffs and hinder defendants. Thus, even though these torts speak the language of fault, they actually operate on principles of strict liability.

Strict liability attempts to assist plaintiffs in obtaining relief for their injuries. It does this by eliminating fault

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[155] Although the public necessity privilege is usually absolute, some courts require public privilege-holders to pay compensation to their victims. *See* Wegner v. Milwaukee Mutual Insurance Co., 479 N.W.2d 38 (Minn. 1992)(holding a city liable to a homeowner for damage caused during the attempted apprehension of a criminal suspect); *see also* DOBBS, *supra* note 7, at 254 ("When the destroyed property presented no dangers to others and would not have been destroyed anyway, it is hard to see the difference between cases of "taking" for which compensation must be paid and cases of public necessity (or police power) for which no compensation is due.").

[156] *See* Protectus Alpha Navigation Co. v. N. Pac. Grain Growers Inc., 585 F. Supp. 1062 (D. Or. 1984)(holding dock owner liable for damage to a boat that was released out of private necessity); Vincent v. Lake Erie Transp. Co., 124 N.W. 221 (Minn. 1910)(holding boat owner liable for damage to a dock after the boat owner refused to release his boat during a storm).

from their causes of action, increasing the number of issues assigned to defendants, and making those issues more difficult to prove. This procedural scheme, however, is not unique to the theory of strict liability. It is also evident in almost all intentional torts.[157] In fact, it is permanently ingrained in their elemental structure.

In an ordinary intentional tort case, the plaintiff has a relatively easy burden of proof, and this burden is relatively easy to satisfy. Unlike a negligence claimant, an intentional tort plaintiff does not have to prove the defendant owed him a duty of care. He also does not have to identify or present evidence establishing the applicable standard of care. Accordingly, she has no obligation to prove the defendant breached any such standard. In some cases, he may even be relieved of the burden of proving damage.[158] Her only responsibilities are to show the defendant acted with the intent to cause a forbidden consequence, and as a result of such action, that consequence occurred.

This burden is often negligible. For instance, in an action for trespass to land, the plaintiff is required to show only two things: (1) the defendant entered the premises and (2) did so voluntarily and without consent.[159] These elements of proof almost never call for expert testimony but can be met merely by presenting the testimonies of lay witnesses. While the defendant's subjective mental state may be difficult to pin down, it normally can be gleaned from a variety of sources, including the defendant's

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[157] Private (intentional) nuisance and intentional infliction of emotional distress are possible exceptions. *See supra* note 144.

[158] Assault, battery, false imprisonment, and trespass to land all permit recovery of nominal damages in the absence of any actual loss. *See* DOBBS, *supra* note 7, at 53, 64, 75, 95.

[159] *See id.* at 95 ("One who intentionally enters or causes direct and tangible entry upon the land in possession of another is a trespasser and liable for the tort of trespass, unless the entry is privileged or consented to.").

testimony, the accounts of other witnesses, the surrounding circumstances and the jury's own common sense.

Once the plaintiff has satisfied the elements of his cause of action, the burden then shifts to the defendant to establish some excuse or justification for his behavior. Whether he relies on self-defense, defense of others, protection of property, or necessity, the defendant invariably will have to show that his conduct was reasonable under the circumstances.[160] To meet this burden, the defendant must prove she was privileged to react to the situation as she did.[161] The proof required here is very much like that is demanded of a negligence plaintiff, only in reverse. More specifically, while a negligence plaintiff must demonstrate fault, the intentional tort defendant must disprove his fault or even justify his actions.

Theoretical purists might argue that the existence of such no-fault defenses is exactly what distinguishes intentional torts from strict liability. However, this argument does not hold true. Strict liability also permits reasonableness "defenses," even if it is not particularly candid about doing so.[162] Sometimes the defense is openly

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[160] *See id.* at 156-57 (noting that all justifications tend to invoke objective standards of reasonableness).

[161] *See* PROSSER, *supra* note 16, at 124 ("The privilege extends to the use of all reasonable force to prevent any threatened harmful or offensive bodily contact, or any confinement, whether intended or negligent. Since it originated as a defense, the burden is upon the defendant to establish the facts creating the privilege.").

[162] For example, in abnormally dangerous activity cases, the defendant may argue that his activity, though dangerous, is highly useful for the surrounding community, and thus is reasonable under the circumstances. *See* RESTATEMENT (SECOND) OF TORTS § 520 (f) & cmt. k (1977); *see also* DOBBS, *supra* note 7, at 953 (noting that an abnormally dangerous activity analysis "look[s] like a poorly disguised negligence regime."). Likewise, in products liability actions involving design or marketing defects, the defendant can offer cost-benefit or risk-utility evidence to demonstrate that its product was reasonably

accepted but its exculpatory effect is hidden. This occurs

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safe. *See id.* at 985-87.

Products liability defendants often may assert a number of other, verbally camouflaged, fault-based defenses. These defenses take the following forms. The product design met the state of the art. *See* ARIZ. REV. STAT. ANN. § 12-683(1) (West 2003); COLO. REV. STAT. § 13-21-403(1)(A) (2002); IND. CODE ANN. § 34-20-5-1 (West 1999); IOWA CODE ANN. § 668.12 (West 1998); KY. REV. STAT. ANN. § 411.310(2) (Banks-Baldwin 2003); MO. ANN. STAT. § 537.764 (West 2000); NEB. REV. STAT. § 25-21,182 (1995); N.D. CENT. CODE § 38-01.4-04 (2001) (aircraft); S.D. CODIFIED LAWS § 20-9-10.1 (Michie 1995). The product was unforeseeably altered or modified after it was sold by the defendant. *See* ARIZ. REV. STAT. ANN. § 12- 683(2) (West 2003); ARK. CODE ANN. § 16-116-106 (Michie 1987); CONN. GEN. STAT. ANN. § 52-572(p) (West 1991); IND. CODE ANN. § 34-20-6-5 (West 1999); KY. REV. STAT. ANN. § 411.320 (Banks-Baldwin 2003); MICH. COMP. LAWS ANN. § 600.2947(1) (West 2000); N.C. GEN. STAT. § 99B-3 (2003); N.D. CENT. CODE § 28-01.3-03 (Supp. 2003); OR. REV. STAT. § 30.915 (1988); R.I. GEN. LAWS § 9-1-32 (1997); S.D. CODIFIED LAWS § 20-9-10 (Michie 1995); TENN. CODE ANN. § 29-28-108 (2000); UTAH CODE ANN. § 78-15-5 (2002). The product complied with state or federal statutes or regulations regarding design, testing, manufacture, instructions, warnings, or labeling. *See* ARK. CODE ANN. § 16-116-105(a) (Michie 1987); COLO. REV. STAT. § 13-21-403(1)(b) (2002); FLA. STAT. ANN. § 768.1256 (West Supp. 2004); IND. CODE ANN. § 43-20-5-1 (West 1999); KANSAS CODE ANN. § 60-3304 (Supp. 2003); MICH. COMP. LAWS ANN. § 600.2946 (West 2000); N.D. CENT. CODE § 28-01.3-09 (Supp. 2003); TENN. CODE ANN. § 29-28-104 (2000); TEX. CIV. PRAC. & REM. CODE ANN. § 82.008 (Vernon Supp. 2004); UTAH CODE ANN. § 78-15-6(3) (2002); WASH. REV. CODE ANN. § 7.72.050 (West 1992). The product complied with industry standards. *See* N.D. CENT. CODE § 28-01.4-02(1) (Supp. 2003). The product was sold, with adequate warnings, to a sophisticated user. *See* MICH. COMP. LAWS ANN. § 600.2947(4) (West 2000). The product contains a characteristic that cannot be eliminated without compromising its function. *See* MICH. COMP. LAWS ANN. § 600.2947 (West 2000); N.C. GEN. STAT. § 99B-6(c) (2003). The product is inherently unsafe and this characteristic is commonly known by consumers. *See* CAL. CIV. CODE § 1714.45 (West Supp. 2004); TEX. CIV. PRAC. & REV. CODE ANN. § 82.004 (Vernon 1997). The product contains an obvious risk that should be recognized by consumers. *See* N.C. GEN. STAT. § 99B-5 (2003); TENN. CODE ANN. § 29-28-105(d) (2000).

when a strict liability action admits a comparative fault defense.[163] Comparative fault is supposed to allow the defendant to assign blame to others. However, by comparing the actions of all parties to a lawsuit, it also invites the jury to subconsciously assess the reasonableness of the defendant's conduct.[164]

Even when reasonableness is not framed as a strict liability defense, it often shows up as a limit to liability. For example, strict products liability supposedly seeks to determine whether products are defective, not whether their manufacturers have acted reasonably.[165] Nevertheless, a manufacturer often can escape liability merely by proving that his product was not *unreasonably* dangerous[166] or by

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[163] Most jurisdictions now permit the assertion of a comparative fault defense in strict products liability actions. *See* DOBBS, *supra* note 7, at 1021 ("[C]ourts and legislatures have now usually said that the plaintiff's comparative negligence can be raised as an affirmative defense and applied to reduce damages, both when the plaintiff asserted negligence and when she asserted strict liability.").

[164] After examining jury decision-making psychology in accident cases generally, Neil Feignenson concluded that:

> [w]hen people use their common sense to think about responsibility for accidents, they tend to think in simplified, personalized, moralized, and dichotomized terms. In general, people prefer monocausal explanations to multicausal ones;...people are prone to single out as the cause of events the preceding conduct that is most morally blameworthy; and people tend to divide their simplified world of personal agency into good guys and bad guys. In short, bad outcomes such as accidents are attributed to bad behaviors, which are thought to emanate from bad people; and if one bad person caused the accident, then it follows from the principle of monocausality that no one else did.

NEIL FEIGNENSON, LEGAL BLAME 14 (2000).

[165] *See* DOBBS, *supra* note 7, at 977-78.

[166] *See id.* at 980-81 (noting that the unreasonable danger concept invites an analysis evocative of negligence).

showing that it lacked a *reasonable* alternative design.[167] It seems, therefore, that despite all protestations to the contrary, strict liability neither forbids exculpatory arguments, nor forestalls the consideration of reasonableness. In these respects, at least, it is virtually indistinguishable from an intentional tort.

In the final analysis, the intentional tortfeasor, like the strict liability actor, faces an uphill battle in the fight to defend herself in court. The plaintiff may sustain his case by proving just a few facts. The defendant then bears the burden of disproving his responsibility. Should the defendant fail to meet this burden, the defendant may be found liable for the plaintiff's loss, even though his intentions were pure and his actions sensibly suited to the prevailing conditions. Innocence, without sufficient proof, is simply no defense. If this is not the epitome of strict liability, it is hard to imagine what is.

VI. Conclusion and Proposal

At the very least, this survey shows that things in intentional tort law are not as they seem and certainly are not as they are portrayed. Contrary to popular belief, many intentional torts are not intentional at all. Conversely, some torts that *are* intentional, at least under the legal definition of that term, are not classified as intentional torts. Finally, tortious intent, standing alone, never provides a sufficient basis for holding someone liable. At best, it creates a presumption of unreasonableness which initiates, but does not necessarily resolve, the issue of fault.

These anomalies, in turn, permit an additional

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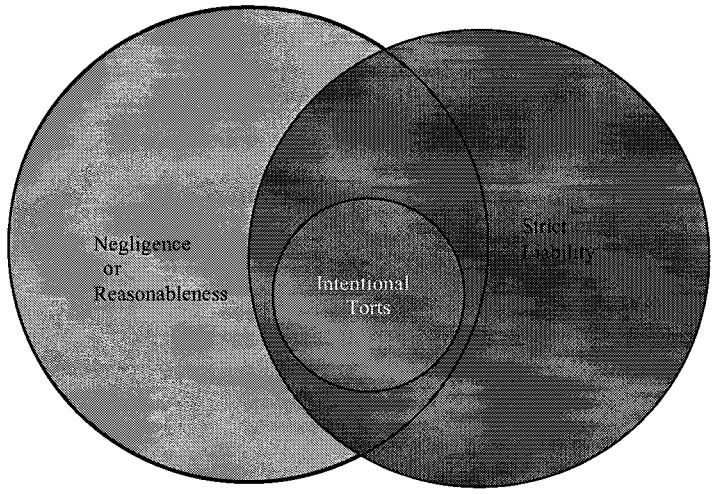
[167] *See* Ellen Wertheimer, *Unknowable Dangers and the Death of Strict Products Liability: The Empire Strikes Back*, 60 U. CIN. L. REV. 1183, 1243 (1992) ("Like the state of the art doctrine, the alternative feasible design doctrine transforms products liability law into a negligence-based doctrine.").

observation. The current theoretical paradigm of tort law—which separates torts into three mutually exclusive categories—does not accurately describe the interrelationship between intentional tort theory and the theories of negligence and strict liability. Negligence and intentional torts are not governed by different liability standards. Instead, each is animated by the common concept of reasonableness. Likewise, intentional torts and strict liability do not fall on opposite ends of the liability spectrum. Rather, they mostly overlap, with both theories restricting entire activities, imposing expansive duties, limiting defenses, and creating procedural advantages for plaintiffs.

Placed in diagrammatic form, the structure of tort law actually looks more like the image depicted in Figure 4. Since all intentional torts are based on reasonableness, it appears that they *must* be *completely subsumed* within a theory grounded in that concept, whether we call that theory "reasonableness," "negligence," or something else. On the other hand, since all intentional torts impose a form of strict liability, they too *must* be *completely subsumed* within that theory as well. If one accepts the notion that negligence also contains some enclaves of strict liability—such as negligence *per* se or *res ipsa loquitur*, among others—this "overlap" matrix becomes complete.

Figure 4: The "Overlap" Paradigm of Tort Law



From these observations, it is possible to draw one final conclusion. To faithfully represent the actual relationship among intentional torts, negligence, and strict liability, we cannot retain the law's current tripartite structure. Instead, we eventually will *have* to do at least *some* conceptual reorganization. The paradigm offered in Figure 4 provides just one model for effecting this change. However, this model is not necessarily the only, or even the best, candidate for the job.

If, as I have suggested, strict liability is not a substantive concept restricted to a single theory of recovery, but rather is a complex regimen of elements, defenses, and procedural burdens that can be created in any theory, then there may be no need to characterize it as an independent tort. Moreover, if negligence's reasonableness standard has the capacity to make its liability regimes lenient or strict, a capacity which it has already demonstrated, then that standard could do all of the conceptual work now being done by the theory of strict liability. Finally, if both of these assumptions are correct,

then it would seem possible to integrate all torts into a single paradigm of reasonableness—a progression that actually carries the convergence principle evident in the overlap paradigm to its logical extreme.

Although time and space limitations prevent extended discussion here,[168] I will close by suggesting what such a "full integration" paradigm might look like. As depicted in Figure 5, reasonableness would serve as the sole standard for all torts. In most cases, the reasonableness paradigm would impose a standard of ordinary care and would implement an ordinary liability regime—much like a garden-variety negligence case.[169] However, in certain "special" cases—specifically those involving special actors, activities, or relationships—the reasonableness paradigm would adjust its standard up or down, create certain fixed rules, and either relax or toughen its liability regime.

These special cases would fall into two different classes, each forming a separate subset within the larger reasonableness paradigm. The "Limited Liability" class would cover actors, activities, and relationships that the law already seeks to protect—including, for example, public and quasi-public agents and entities, landowners, and children—and would afford them substantive and procedural advantages not available to those covered by the

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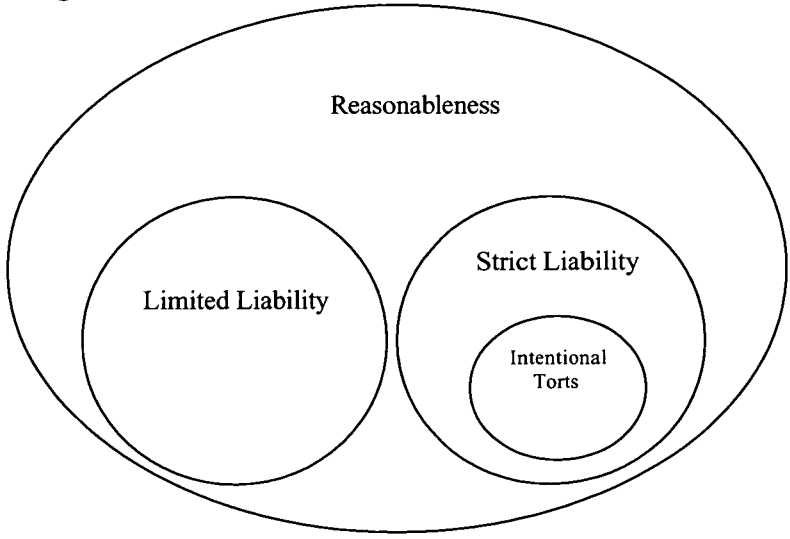
[168] I currently am working out the details of this paradigm, which I intend to present in future scholarship.

[169] Presumably, the plaintiff would have to prove the elements of duty, breach, causation and damages. The duty element would include a duty to act reasonably, but no duty to aid (unless a traditional exception applied). The standard of care would be one of ordinary reasonable care, to be determined by weighing the burden of precaution against the risk of harm. The causation element would require proof of cause-in-fact and proximate cause (or scope of liability). And the damage element would require proof of a legally recognized loss. The defendant, on the other hand, would be able to assert defenses of comparative fault and assumption of risk.

"ordinary" liability regime.[170] Conversely, the "Strict Liability" class would cover actors, activities, and relationships that currently receive more rigorous treatment. This group would include not only traditional strict liability subjects—like abnormally dangerous and ultrahazardous activities, vicious and wild animals, and defective products—but also *de facto* strict liability subjects now covered by other tort theories—like children engaged in "adult" activities, folks with mental disabilities, statute violators, dominant partners in imbalanced (special) relationships, and, most importantly for our purposes, intentional tortfeasors. Depending on the subject, the law would then expand its substantive requirements, reduce its affirmative defenses, and/or intensify its procedural burdens.

Figure 5: The "Full Integration" Paradigm of Tort Law



[170] Because special harms—like emotional distress and pure economic loss—arise episodically, they would not fall within the fixed Limited Liability class, but could be used as a special circumstance in any class to shape the appropriate liability scheme.

Obviously, such a paradigm requires a lot more thought and far greater explication. However, even at this inchoate stage, it stands to eliminate many of the anomalies plaguing current intentional tort jurisprudence. It openly recognizes the reasonableness roots of all intentional torts. It continues to treat intentional torts as a special category of wrongs. It retains the strict liability approach now hidden behind the law's terminology. But perhaps most importantly, it melds these ideas in a way that is theoretically consistent, conceptually accurate, and intellectually honest.

Policy Changes Needed in the Federal Rules of Evidence

Donald Paine[*]

Let's start with how federal sausage is made. Recently, I read that the chief policymaking body supervising rule drafting has 26 federal judges and no practicing lawyers. None. The committees voting on revisions have few practitioners and many judges, professors, and government employees. The legal geniuses in Congress made significant revisions in the evidence package sent over from the Court in 1972, delaying the effective date until January 2, 1975. It's little wonder that the Federal Rules of Evidence need changing. Here are some suggestions.

Rule 103(a)(2) should require the lawyers making an offer of proof to state the specific evidence principle justifying the offer. Part (a)(1) contains such a requirement for objections.

Should Rule 404(b) be amended to specify whether "person" applies only to the accused in a criminal trial? The Circuits are split, as outlined in the recent Sixth Circuit decision, *United States v. Lucas*.[1] If the other crimes exclusion is limited to accused defendants, then defense counsel is free to prove criminal conduct of other suspects to prove character conforming conduct tending to exonerate the accused client. Also, civil trials would not be covered by the exclusionary rule. "Person" would seem to include folks other than the accused, but either a rule change or a Supreme Court ruling is needed.

Whether a claim is "disputed" under Rule 408 at the time of a compromise offer is unclear. If I am in a car

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[*] The author is a Knoxville lawyer who teaches Evidence each fall at the University of Tennessee College of Law. He served as President of the Tennessee Bar Association and has been elected to membership in the American College of Trial Lawyers.

[1] 357 F.3d 599 (6th Cir. 2004).

wreck and offer to settle on the spot, is the claim disputed? There probably will be threats and a lawsuit later. Why should the policy to ban evidence of settlement offers not apply to my situation?

Meet the Honorable Susan Molinari and her pet Rules 413, 414, and 415.[2] When she was in Congress, her vote was sorely needed on some languishing legislation. In exchange for that vote, Molinari required the passage of rules allowing unconditional admissibility of other crimes to prove character and conforming conduct in criminal and civil trials involving sexual assault or child molestation. Her silly rules became the federal law of the land. Note, sausage lovers, that the Supreme Court had no involvement whatsoever. A delicious critique can be found in 159 F.R.D. 95 (1994). Luckily most of these criminal prosecutions are brought in state courts, but Rule 415 affects many federal and civil trials.

Rule 606(b) could use some work. Assume the jury is hung on liability or guilt. A juror suggests a coin toss to break the deadlock, and all agree. The choice is heads for the plaintiff and tails for the defendant, or heads for the United States and tails for the accused. Despite wringing of academic hands in treatises and law review articles, the trial judge is forbidden to even consider juror testimony or affidavits at a motion for new trial hearing. The rule bars inquiry into "any matter . . . occurring during the course of the jury's deliberations." The same would apply if a civil jury hung on damages reached a quotient verdict as a compromise.

There's not much wrong with Rule 609(a) as written, although it's poorly drafted, but the Supreme Court wrote two ridiculous opinions that need reversal through a redrafted rule. In *Luce v. United States*, the United States

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[2] Susan Molinari was a Member of Congress representing New York from 1990 to 1997.

Supreme Court held that an accused who does not take the witness stand has no appellate standing to complain of a trial judge's flat out wrong in limine ruling that a conviction is admissible to impeach.[3] So post-*Luce* I should put my willing client on the stand and bring out the erroneous impeaching conviction on direct to soften the blow, right? Nope, said the Court in *Ohler v. United States*.[4] I must let the government introduce the conviction on cross; otherwise I have no standing to complain on appeal.

Speaking of the dearth of trial lawyers on federal rules committees, compare the brief time in the legal trenches of Supreme Court justices. A colleague of mine places the average at around seven years in real law practice. Reckon I was qualified for the highest bench after only seven years of combat? Not hardly.

Why should the scope of cross-examination be limited to issues raised on direct, as required by Rule 611(b)? The cross-examiner can later call the witness at the next stage of proof, although that may cause problems via witness hostility. But a witness with knowledge of facts relevant to material issues should be required on cross to tell the jury about them then and there.

Rule 612 is not even a rule of evidence, but rather a discovery rule. It needs radical redrafting to codify the common law technique for refreshing recollection. Moreover, the provision permitting court-ordered production of a document shown the witness "before testifying" is unfair. If a Rule of Civil or Criminal Procedure permits discovery, so be it, but remove this language from the Federal Rules of Evidence.

Of all the policy decisions made by the judicial and legislative drafters, the most wrongheaded was to classify

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[3] 469 U.S. 38, 43 (1984).
[4] 529 U.S. 753 (2000).

some hearsay statements as "not hearsay." The following are listed in Rule 801(d):

* inconsistent statements sworn to at a hearing,
* consistent statements not to rehabilitate,
* statements of identification,
* opposing party admissions.

Each of these fits the definition of hearsay in Rule 801(c): "...a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." So why call hearsay "not hearsay"? The sainted Irving Younger was probably correct in guessing that the drafters wanted the world to know they read Wigmore, who argued that admissions don't trigger hearsay dangers.[5] How precious. These exceptions should be moved to Rule 803.

Lingering on admissions a moment longer, consider Rule 801(d)(2)(D) on statements by agents and "servants." For these to be trustworthy offers against the party/principal, the assertion should be against the agent's interest. Statements by employees that drip with self-serving motive and cast blame on coworkers or the boss should be excluded as untrustworthy. They come marching in, however, under the only two rule requirements: existence of the agency relationship and subject matter within the scope of agency.

Before we leave "not hearsay," let us compare Rules 803(7) and 803(10) with Rule 801(d). These exceptions cover the *absence* of an entry in a business record of public record to prove that an alleged fact never existed. But how is the absence of a statement a "statement" under the

[5] 5 J. Wigmore, Evidence § 1476, 352, and n. 9 (J. Chadbourn rev. ed. 1974).

hearsay definition? It is not, and these two bogus "exceptions" should be eliminated.

Rule 803(1) contains an unnecessary untrustworthy exception for statements of present sense impression. The declarant describes an event while perceiving it "or immediately thereafter." Until 1975, only Texas bought into this theory through *Houston Oxygen Co. v. Davis*,[6] which was once in all evidence casebooks. There Sally Cooper was heard to say as a Plymouth sped past her on the highway: "They must be drunk; we'll find them somewhere on the road wrecked if they keep that rate of speed up."[7] The two passengers who heard the words testified. Sally also testified. Aside from the dubious relevance, there was utterly no need for the hearsay, as jurors had the nonhearsay testimony of three witnesses concerning speed. But the court held reports of "present-sense impression" should be admissible as an exception to the hearsay rule. Academics loved the holding and added this ingredient to federal sausage.

Subparts (B) and (C) of Rule 803(8) are in need of tinkering or elimination. Statements in public records are admissible to prove matters where a public official had a legal duty to observe and report. So far so good. Then there is an exception in (B) for criminal cases, where reports containing matters observed by police and "other law enforcement personnel" are inadmissible hearsay. Why should those same reports be admissible in a civil trial? If they are untrustworthy in criminal trials, they are untrustworthy, period.

Rule 803(8)(C) has been construed to apply to official investigative findings that are far from "factual." *Beech Aircraft Corporation v. Rainey*[8] held admissible a JAG report opining that the cause of a Navy plane crash was

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[6] 161 S.W.2d 474 (Tex. 1942).
[7] *Id.* at 476.
[8] 488 U.S. 153, 170 (1988).

pilot error. Surely the plaintiff, widower of the allegedly negligent pilot, would like an opportunity to cross-examine. Even purely "factual" findings of government flunkies are often based on multiple hearsay from declarants not under an official duty to report truthfully. This part of Rule 803 should be deleted. If it is kept, it should be amended to conform to *Beech Aircraft*.

The common law limited the ancient documents exception to statements in 30-year-old property documents. Not so in Rule 803(16). Now any document, not just a property document, that is at least 20 years old can be introduced to prove the truth of statements therein. That is loony. Take the pre-Jayson Blair rag of record way back on January 2, 1894, two years before Adolph Ochs rescued it from the brink of bankruptcy. The headline on page 1 screamed, "Hillmon Tells His Story: The Murderer Found in the Mountains of Utah." That false statement would be admissible as true in a federal trial 110 years later. If getting to the truth depends on the accuracy of such a world class joke as *The New York Times*, heaven help us.

A frequently used ground of unavailability is that the declarant's trial attendance cannot be procured by a summons. Rule 804(a)(5) contains a silly difference for three exceptions, primarily the declaration against interest exception. In order for us to introduce a statement against interest, we must demonstrate that we were unable to subpoena the declarant for trial or to depose the declarant ("the declarant's attendance *or* testimony"). Since we can depose folks nationwide in federal suits, the two-pronged requirement eliminates this type of unavailability for the exception unless the declarant simply can't be located. That's why virtually all federal precedents involve declarations against interest by declarants who invoked the first unavailability ground by taking the Fifth.

Language in Rule 804(b)(1) defining former testimony allows a civil litigant to introduce a transcript against a

party who was not present at the prior hearing if a predecessor in interest was present. Some circuit courts have construed "predecessor in interest" to include anyone who had a similar motive to examine the declarant. An example of this construction is found in one of my appellate losses, *Clay v. Johns-Manville Sales Corp.*[9] Such a holding ignores both the language in the Rule and the legislative history. As Justice Thomas emphasized in *United States v. Salerno*,[10] courts are not at liberty to ignore what a rule plainly states. The person or entity at the former hearing must indeed be a predecessor in interest and must have had *both* an opportunity *and* a similar motive to examine the declarant. *Clay* is therefore no longer good law, but the predecessor in interest garbage should still be thrown out.

Finally, we have the residual exception in Rule 807. It allows federal judges to let in hearsay that goes beyond even the goofy exceptions discussed above. This rule should be stricken from the books. While it does exist, however, the objecting lawyer should remind liberal jurists that the final sentence conditions the use of this exception on pretrial notice of intention to offer the statement, the "particulars" of the statement, and name and address of the declarant. Consequently, it is illegal to use this exception as a last-minute fallback position.

Federal practice would be a better world if all or most of the changes suggested above were made. Do I think that will happen? Not unless the manufacturing process for sausage is radically altered. It won't be. Too many egos would get hurt.

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[9] 722 F.2d 1289 (6th Cir. 1983).
[10] 505 U.S. 317, 322 (1992).

Tenth Anniversary of University of Tennessee Pro Bono*

*The Honorable E. Riley Anderson***

Dean Galligan,[1] thank you for that overly generous introduction and for the honor of allowing me to speak at this reception celebrating the tenth anniversary of the University of Tennessee's Pro Bono program. But most of all, thank you for your strong leadership of this excellent law school.

I want to begin by recognizing the truly outstanding work performed by U.T. Pro Bono over its ten years of existence under the forceful and energetic leadership of Doug Blaze[2] and the more recent able assistance of April Hart[3] as student director; and to talk about the critical importance of providing legal services and representation to the poor and the disadvantaged.

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* U.T. Pro Bono is a student-directed community service organization at the University of Tennessee College of Law. It was founded in 1994. The reception was held April 1, 2004 in Knoxville, Tennessee.

** E. Riley Anderson is a Justice of the Tennessee Supreme Court. In addition to his numerous honors, Justice Anderson received the Tennessee Bar Association's William M. Leech, Jr. Public Service Award in 2001. He is a graduate of the University of Tennessee College of Law.

[1] Thomas C. Galligan, Jr. is the Dean and Elvin E. Overton Distinguished Professor of Law at the University of Tennessee College of Law.

[2] Douglas A. Blaze is the Art Stolnitz and Elvin E. Overton Distinguished Professor of Law at the University of Tennessee College of Law. Professor Blaze is also Director of Advocacy and Clinical Programs.

[3] April Hart is a 2004 graduate of the University of Tennessee College of Law. While a law student, Ms. Hart directed the U.T. Pro Bono program.

In the last ten years, U.T. Pro Bono has become an invaluable and irreplaceable part of our legal landscape. It has helped more than 2,000 low-income citizens in East Tennessee to receive legal services that would not have been available. It has provided that legal representation while also providing valuable training and experience annually for approximately 150 future members of the legal profession. Indeed, U.T. Pro Bono has become a model for providing legal services to low-income citizens and a reminder of the vital importance of promoting pro bono services.

The idea of pro bono publico – "free legal services to the poor" – dates back to early English jurisprudence and has for centuries distinguished the legal profession from all others. As Dean Roscoe Pound said some 60 years ago, "Historically, there are three essential ideas involved in a profession – organization, learning, and a spirit of public service. These are *essential.* The remaining idea, that of gaining a livelihood, is incidental."[4]

The importance our profession continues to place on providing services to the poor and the disadvantaged has become a fundamental principle grounded in our ethical rules. The comments to ABA Model Rule 6.1, which was adopted by the Tennessee Supreme Court in 2002,[5] state: "Every lawyer, regardless of professional prominence or professional work load, has a responsibility to provide legal services to those unable to pay, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer."[6]

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[4] Roscoe Pound, *What is Profession?*, 19 NOTRE DAME L. REV. 203, 204 (1944) (emphasis added).

[5] *See* TENN. RULES OF PROF'L CONDUCT R. 6.1 cmt. (2004).

[6] MODEL RULES OF PROF'L CONDUCT R. 6.1 (2004).

This extraordinary University of Tennessee Pro Bono program, which is guided by these principles, has become even more important because of a number of negative trends which affect access to justice:

First, Congress recognized in the Legal Services Corporation Act of 1964 that there was a need to provide equal access to justice; and that to preserve its strength, the program had to be free from the influence of political pressure, and attorneys must have full freedom to protect the best interests of their clients.[7]

From that highly principled beginning, we all are aware of the continuing battle in Congress year after year over restrictions on the program and constant cuts in funding. The local result in federally funded legal services programs is that only five percent of the needy are served and that priority must be placed on survival issues—*i.e.* health, housing, income, and safety.

Second, the Tennessee Alliance for Legal Services,[8] chaired by Dean Galligan, recently surveyed the needs of the state's one million poor (18 percent of our population of 5.7 million) and identifies the key issue as a difficult policy choice of who to serve since so many cannot be served.[9]

Third, in the pro bono hey-day of the 1980s and 1990s, law students were encouraged to ask employers about their contribution to pro bono. When the economy faltered, competition turned fierce and the dynamic changed in

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[7] *See* 42 U.S.C. § 2996 (2004).

[8] "The Tennessee Alliance for Legal Services (TALS) is a statewide non-profit organization that seeks to build partnerships to support the delivery of effective civil legal services for low income and elderly Tennesseans." *See* http://www.tals.org/PublicWeb/About/ (last visited Feb. 19, 2005).

[9] *See* TENN. ALLIANCE FOR LEGAL SERV., THE TENNESSEE STATE PLAN FOR CIVIL LEGAL JUSTICE (updated Oct. 2002), *available at* http://www.tals.org/PublicWeb/About/StatePlanOct2002.pdf.

many big law firms to limiting pro bono time and types of cases (no more environmental protection, reproductive or prayer cases, among others).

Fourth, bar-sponsored pro bono programs are excellent, but despite our best effort, the rate of participation is low. As of 2003, the rate in our metropolitan counties is as follows:

County	Total Lawyers	Participation Rate[10]
Davidson	3,657	11.4%
Hamilton	1,039	14.5%
Knox	1,600	17.4%
Shelby	3,026	4.3%

It is arguably lower in more rural counties with less organized programs.

To respond to the problem, the conference of chief justices in the late 1990s recommended judicial involvement in promoting pro bono delivery of civil legal services. As a result, a number of states have revised their ethical rules to specify the amount of recommended pro bono service. The Florida Supreme Court has gone further and ordered mandatory pro bono reporting, which has been controversial, but effective – attorney participation increased by 36 percent. The Tennessee Supreme Court actively encourages participation through outreach programs. It has considered mandatory reporting, but rejected it on the basis that pro bono work is an ethical duty and we expect attorneys to fulfill their duty without compulsion.

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[10] *See* Terry Woods, *How the Knoxville Bar Stacks Up*, DICTA, Feb. 2004, at 15, 15, *available at* http://www.knoxbar.org/PDF/2004/DictaFebruary.pdf.

Our history has shown that a commitment to pro bono and public service is essential in our quest for justice and equality. Our state and federal constitutions promise due process, fairness, and equal treatment under the law for *all*. There are no exceptions and no conditions in these words. As Justice John Marshall Harlan wrote in dissent years ago in *Plessy v. Ferguson*,[11] "[I]n the eye of the law there is, in this country, no superior or dominant ruling class of citizens. There is no caste here. Our Constitution is color-blind. All citizens are equal before the law. The humblest is the peer of the most powerful under the law."[12]

Our history also demonstrates, however, that the goal of equal justice under law is attainable only when *all* citizens are provided equal *access*. Ensuring that everyone has that vital access is the very essence of pro bono and public service.

As a profession and as a society, we should be measured by how we treat the downtrodden and the disadvantaged among us. As Winston Churchill is often quoted as saying, "We make a living by what we get, and we make a life by what we *give*."

That is why it is important to recognize and congratulate U.T. Pro Bono for its exceptional accomplishments as it marks its tenth anniversary. We must all follow the example set by U.T. Pro Bono and renew our commitment to public service and to the fulfillment of the promises of equal justice under law.

I look forward to a time when exceptional programs such as U.T. Pro Bono are expanded, and to a time when legal services programs are fully and liberally funded, and to a time when criminal defense appointments are fully funded, and to a time when all lawyers will dedicate more

[11] 163 U.S. 537 (1896).
[12] *Id.* at 559 (Harlan, J., dissenting).

time to the service of the poor, and to a time when everyone will have full access to the courts. And it is only when that time comes that we will truly achieve the promise of equal justice under law.

Thank you.

NOTE

The Unborn Victims of Violence Act: Addressing Moral Intuition and the Right to Choose

Pub. L. No. 108-212, 118 Stat. 568 (2004).

Amid heated political rhetoric from both sides of the abortion debate, President Bush signed the Unborn Victims of Violence Act ("the Act")[1] into law on April 1, 2004.[2] The Act, also referred to as "Laci and Connor's Law,"[3] makes the killing of a fetus during the commission of certain Federal crimes a separate offense punishable in varying degrees.[4] Pro-life campaigners maintain that the Act is necessary to reduce the ever-increasing numbers of violent attacks against pregnant women.[5] Pro-choice advocates, on the other hand, argue that the Act is nothing more than an attempt to "erode the foundations of the right to choose as recognized by the Supreme Court in *Roe v. Wade*."[6]

In analyzing the ramifications of the Act, both critics and advocates are quick to bring abortion into the discussion. However, given the explicit language of the statute and its legislative history, appealing to abortion is an

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[1] Pub. L. No. 108-212, 118 Stat. 568 (2004) (to be codified at 18 U.S.C. § 1841).

[2] *See* Nat'l Right to Life Comm., *Key Facts on the Unborn Victims of Violence Act, available at* http://www.nrlc.org/Unborn_Victims/keypointsuvva.html (last updated Apr. 1, 2004).

[3] In memory of Laci Peterson and her unborn child, Connor, who disappeared Christmas Eve, 2002. Ms. Peterson and Connor were later found dead. *See* H.R. REP. NO. 108-420 pt. 1, at 8, *reprinted in* 2004 U.S.C.C.A.N. 533, 538.

[4] *See* Unborn Victims of Violence Act, § 2(a).

[5] H.R. REP. NO. 108-420, at 4.

[6] H.R. REP. NO. 108-420, at 81; *Roe v. Wade*, 410 U.S. 959 (1973).

unnecessary, unsupported step. It is a misunderstanding of the Act for either side of the abortion debate to use the Act's language as a tool to advance any position on abortion or fetal rights. Despite an express exception to cases of medically legal abortion[7], many continue to attack the Act because they feel that the Act infringes dangerously on the constitutionally guaranteed right to choose.

Although an overwhelming majority of Americans polled expressed support for a fetal crime law,[8] abortion rights groups have propounded four main arguments in their opposition to the Act.[9] First, they argue that the Act's lack of a *mens rea* requirement violates principles of due process. Second, they claim the Act will lead to extensive litigation concerning the fetus. Third, they argue the Act does not address the crimes against pregnant women, which it set out to remedy. Finally, abortion rights groups argue that the Act is an attack on a woman's right to choose.[10]

This note defends the Unborn Victims of Violence Act in an attempt to reconcile the need for a fetal homicide law with a woman's constitutionally protected right to choose. The analysis addresses each of the four above-mentioned arguments and demonstrates why each is without merit. A fetal homicide law is not inconsistent with the principles set forth in *Roe v. Wade*[11] concerning a woman's right to choose.

At common law, the "born alive" rule governed

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[7] *See* H.R. REP. NO. 108-420, at 4.
[8] Michael Holzapfel, Comment, *The Right to Live, The Right to Choose, and the Unborn Victims of Violence* Act, 18 J. CONTEMP. HEALTH L. & POL'Y 431, 436 (2002)(stating 2001 poll revealed 90 percent of Americans would support a fetal crime law).
[9] *See* H.R. REP. NO. 108-420, at 81-88.
[10] *Id.*
[11] 410 U.S. 959 (1973).

conviction for the death of an unborn child.[12] This rule was articulated by Sir Edward Coke, who wrote:

> If a woman be quick with childe, and by a potion or otherwise killeth it in her wombe; or if a man beat her, whereby the childe dieth in her body, and she is delivered of a dead childe, this is a great misprision, and no murder; but if the childe be borne alive and dieth of the potion, battery, or other cause, this is murder: for in the law it is accounted a reasonable creature, in *rerum natura*, when it is born alive.[13]

Thus, under this rule, one who caused the death of an unborn fetus was punished only if the fetus was born alive and later died from the injuries sustained while in the womb.[14] The punishment for this offense was the same as the punishment for killing another person.[15] The killing of a quickened fetus before birth, however, was considered only a "great misprision," or misdemeanor, while the killing of a fetus before quickening was not a punishable offense at all.[16]

Over time, state legislatures began changing their laws on fetal homicide in response to what many viewed as moral deficiencies in current homicide statutes. Perhaps the most famous instance of this phenomenon was the California legislature's response to *Keeler v. Superior*

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[12] Hilary A. Converse, Note, *The Fetal Homicide Fallacy: A Comparison of California's Inconsistent Statutes to Other States*, 25 T. JEFFERSON L. REV. 451, 453 (2003).

[13] Holzapfel, *supra* note 8, at 443 (quoting E. COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND (1628)).

[14] Converse, *supra* note 12, at 453.

[15] *Id.*

[16] Alan S. Wasserstrom, *Homicide Based on Killing of Unborn Child*, 64 A.L.R. 5TH 671, 686 (2004) (stating that quickening was generally held to occur between the sixth and eighth week of pregnancy).

Court.[17] Keeler became enraged after discovering that his ex-wife was pregnant by another man.[18] Keeler followed his ex-wife on a mountain road, blocked her vehicle, and told her to get out of her car.[19] He told her he knew she was pregnant, and after looking at her stomach, became visibly upset.[20] Referring to the unborn child, Keeler said he was going to "stomp it out of [her]."[21] He then pushed her against her car, kneed her in the abdomen, and hit her in the face several times.[22]

The fetus was delivered stillborn via Caesarian section; it had severe skull fractures and was devoid of air in the lungs.[23] A doctor testified with reasonable medical certainty that the fetus had reached the stage of viability.[24] Keeler was charged with the murder of the fetus; however, at that time the California homicide statute required the "unlawful killing of a human being with malice aforethought."[25] The court held that, because the California legislature's definition of murder applied only to those who were born alive,[26] Keeler could not be convicted for the murder of the fetus. Such a conviction, the court reasoned, would deny Keeler's due process rights since it would require a construction of the homicide statute which Keeler did not anticipate.[27]

In response to *Keeler,* the California legislature amended its homicide statute to include the killing of a

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[17] 470 P.2d 617 (Cal. 1970).
[18] *Id.* at 623.
[19] *Id.* at 618.
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *Id.* at 619.
[25] *Id.* (quoting CAL. PENAL CODE § 187).
[26] *Id.* at 622.
[27] *Id.* at 630.

fetus.[28] Since *Keeler,* other states addressed similar cases of intentional fetal homicide, and many of them responded with similar statutory amendments.[29] Currently, 31 states have homicide laws that make it a crime to kill a fetus.[30] Eighteen of these states punish the killing of a fetus at any prenatal stage of development; however, 12 of these states recognize the fetus as a victim only after a certain stage of prenatal development.[31] The prenatal stage at which the fetus is recognized as a victim varies by state. Of the 19 states that do not have fetal homicide statutes, 13 adhere to the common law "born alive" rule.[32] The remaining six

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[28] CAL. PENAL CODE § 187(a) (West 2004).

[29] *See* Nat'l Right to Life Comm., *A Vote for the Lofgren "One-Victim" Substitute is a Vote Against Protection for Unborn Victims of Violence, available at* http://www.nrlc.org/Unborn_Victims/ShiwonaPaceStandard.pdf (statement by Shiwana Pace discussing how she was attacked by hit-men hired by her ex-boyfriend to kill her unborn baby. As she was being beaten, the attackers said to her, "Your baby is dying tonight." An Arkansas court convicted the ex-boyfriend of murdering the baby based on a state law enacted just one month earlier).

[30] *See* Nat'l Right to Life Comm., *available at* http://www.nrlc.org/Unborn_Victims/Statehomicidelaws092302.html (listing 31 states with laws which recognize the killing of a fetus, at varying stages of development, as homicide: Arizona, Arkansas, California, Florida, Georgia, Idaho, Illinois, Indiana, Kentucky, Louisiana, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New York, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, & Wisconsin).

[31] *Id.*

[32] *See* Ala. Code § 13A-6-1(2) (1994); Alaska Stat.§ 11.41.140 (Michie 22000); Colo. Rev. Stat. § 18-3-101(2) (32001); Conn. Gen. Stat. Ann.§ 53(a)-3(1) (West 2001); Haw. Rev. Stat. Ann. § 707-700 (Michie 1999 & Supp. 2001); Md. Code Ann., Criminal Law § 1-101(h) (year) Code, art. 27 407 (1996); Me. Rev. Stat. Ann. tTit. 17-A, §§ 2(20), 201 (West 1993); Mont. Code Ann. § 45-2-101(28) (2001); N.J. Stat. Ann. § 2C:1-14(g), :11-2 (West 1995); N.C. Gen. Stat. § 14-17 (1999); Or. Rev. Stat. § 163.005(3) (1999); Vt. Stat. Ann. tit. 13, § 5301(4) (Supp. 1998); W. Va. Code § 61-2-1 (1997).

states follow the "born alive" rule, but still criminalize actions that cause injury or death to a fetus.[33] This rule has been referred to as the "born alive with a caveat" rule.[34] States in this category avoid the question of whether a fetus can be classified as a separate victim by punishing, as a crime against the mother, the act of injuring or killing her fetus.[35]

Until passage of the Act, federal criminal law followed the common law "born alive" rule.[36] In an effort to keep federal law on pace with quickly evolving state laws by following the legal trend of "dismantling the common law born alive rule,"[37] Representative Melissa Hart[38] proposed the Unborn Victims of Violence Act. The argument for passing the Act is congruent with the rationale behind the adoption of similar laws by 31 state legislatures. Moral intuition seems to suggest that the killing of a fetus, when done maliciously and without the mother's permission, should not go unpunished merely because the fetus is not "born alive."[39]

Five years after it was first introduced, the bill was signed into law, to recognize fetuses as separate and distinct victims of crime for the first time under federal

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[33] *See* Del. Code Ann. tit. 11, § 222(22) (Supp. 19992002); Iowa Code Ann.§ 707.8 (West Supp. 2000); Kan. Stat. Ann. §§ 21-3440, 21-3441 (1995); N.H. Rev. Stat. Ann. §§ 631:1(I)(c), 631:2(I)(e) (1999); N.M. Stat. Ann. § 66-8-101.1 (Michie 1998); Wyo. Stat. Ann. § 6-2-502(a)(iv) (Michie 1999).

[34] Holzapfel, *supra* note 8, at 457 (creating a category for states who do not have fetal homicide laws, but punish the act of killing a fetus as a crime against the mother).

[35] *Id.*

[36] H.R. REP. NO. 108-420, at 5.

[37] *Id.* at 5-6.

[38] Melissa Hart is a Member of Congress representing the 4th Congressional District of Pennsylvania. She sponsored the proposed Unborn Victims of Violence Act in the U.S. House of Representatives.

[39] H.R. REP. NO. 108-420, at 8-13.

law.[40] On April 1, 2004, H.R. 1997 became Public Law 108-212.[41] Following passage of the Act, the killing or injuring of a fetus, under certain circumstances, became punishable as a federal crime. In so doing, Congress also filled the void in the 19 states that do not have state laws recognizing a fetus as a potential homicide victim. Feticide also became a crime in federal jurisdictions—such as the military—that previously adhered to the "born alive" rule.[42]

As mentioned above, the Unborn Victims of Violence Act aligns federal law with the homicide statutes of 31 states.[43] The law amends the United States Code and the Uniform Code of Military Justice to make it a federal crime to cause the injury or death of a fetus during the commission of any of 68 enumerated federal offenses.[44]

While the Act filled what many viewed as a moral void, its passage stirred up issues within the broader abortion debate. Pro-choice and pro-life advocates agreed that the Act as a small step towards attacking the legality of

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[40] *Id.* at 434. In fact, two Congressional sessions passed before the Act began to move through the House of Representatives. *Id.* at 437-38.

[41] Nat'l Right to Life Comm., *supra* note 2, *available at* http://www.nrlc.org/Unborn_Victims/keypointsuvva.html.

[42] H.R. REP. NO. 108-420, at 1-4.

[43] *See* Nat'l Right to Life Comm., *supra* note 30.

[44] 118 Stat. 568 § 1841. If a fetus is killed during the commission of one or more of sixty-eight enumerated Federal crimes, criminal homicide liability for the death of the fetus may attach to the actor. Among the more common of those specifically listed sixty-eight crimes are: drug related drive by shootings, 18 U.S.C.A. § 36; deprivation of Constitutional rights under color of law, 18 U.S.C.A. § 242; possession of firearms or dangerous weapons in a Federal facility, 18 U.S.C.A. § 930; murder, 18 U.S.C.A. § 1111; manslaughter, 18 U.S.C.A. § 1112; attempted murder, 18 U.S.C.A. § 1113; kidnapping, 18 U.S.C.A. § 1201; bank robbery, 18 U.S.C.A. § 2113; aggravated sexual abuse, 18 U.S.C.A. § 2241; section 408(e) of the Controlled Substance Act of 1970, 21 U.S.C. 848(e); and section 202 of the Atomic Energy Act of 1954, 42 U.S.C. 2283.

abortion.[45] Ultimately, however, each side is mistaken as to the legal and moral effects the Act will have on abortion rights.

In an attempt to protect constitutional rights guaranteed in both the Fourteenth Amendment[46] and under *Roe v. Wade*,[47] pro-choice supporters presented various arguments to reveal what they feel are inadequacies and legal flaws within the Act.[48] While both the constitutional and practical arguments attacking the Act are without merit, such arguments are nonetheless unnecessary because the Act suggests nothing about the nature of the fetus that would make the Act inconsistent with current abortion rights.

I. Due Process Implications

Opponents of the Act argue that the lack of a *mens rea* requirement renders it unconstitutional.[49] Because the Act requires neither knowledge of a woman's pregnancy nor intent to cause injury or death to a fetus, opponents argue that an accused's due process rights are violated because there is no criminal intent element and no knowledge of whether one is actually committing a violation of the Act.[50]

Supporters of the Act look to the familiar criminal law doctrine of transferred intent, which, they argue, saves the constitutionality of the Act by supplying the requisite *mens*

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[45] *Id.*

[46] U.S. CONST. amend. XIV, § 1 ("No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws").

[47] 410 U.S. 113 (1973).

[48] H.R. REP. NO. 108-420, at 81-88.

[49] *Id.*

[50] *Id.*

rea element.[51] Under this approach, if one intends to injure person A, but instead injures person B, the actor can be punished for the crime against person B even though he had no intention to harm person B. The intent to injure person A transfers to person B. Thus, the actor can be punished for committing a crime against a person who was never an intended victim.

The theory, as applied to a fetus, is that the intent to commit one or more of the 68 enumerated federal crimes upon *anyone* transfers to the fetus of an expectant mother.[52] Under this transferred intent analysis, the appropriate *mens rea* exists to convict a person for injuring or killing a fetus without a violation of the perpetrator's due process rights.

Opponents argue that transferred intent fails to remedy the due process issues in the Act because such intent can be transferred only to another person, thus a fetus would be given the classification of a distinct victim of homicide.[53] But this is precisely what the Act does – it legally recognizes the fetus as an independent victim of crime.[54] To argue that transferred intent does not apply to the Act ignores the fact that the Act was to *make* transferred intent to apply to a fetus.

Opponents also argue that transferred intent applies only to a "person;" but classifying a fetus as a "person" is inconsistent with *Roe v. Wade*.[55] Again, this argument misses an important linguistic point. If the language of a homicide statute is properly worded, there is no reason that transferred intent could not apply to a person and a fetus as

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[51] *Id.*

[52] H.R. REP. NO. 108-420 (stating that transferred intent was recognized at common law as early as the 16th century).

[53] H.R. REP. NO. 108-420, pt. 1, at 85 (2004), *reprinted in* 2004 U.S.C.C.A.N. 533, 559.108-420.

[54] Holzapfel, *supra* note 8, at 434.

[55] H.R. REP. NO. 108-420, pt. 1, at 85 (2004), *reprinted in* 2004 U.S.C.C.A.N. 533, 559.108-420.

a separate category. This would prevent the need to force a "fetus" into the classification of "person." For instance, a statute could be worded, "Murder is the intentional killing of another person or fetus with malice aforethought. If one intends to kill another person with malice aforethought and, in the commission of that act, kills a fetus, such malicious intent will transfer from the intended other person to the fetus."

While this is not how most current homicide statutes are worded, there is nothing to prevent a future homicide statute from being so worded. In fact, this is exactly what the Act did. Given the current shift in fetal homicide laws from the old common law "born alive" rule towards the recognition of a fetus as a victim, crafting such a statute would not only be permissible, it would be logically consistent with the current jurisprudential shift.

However, invoking the doctrine of transferred intent may not be necessary. The framework for convicting such actors already exists under many homicide statutes without recourse to transferred intent. For example, many homicide statutes follow some variation of the common law definition of murder as "the intentional killing of another with malice aforethought."[56] Thus, if one has "malice aforethought" and intentionally kills another, he has committed murder. The language of such statutes does not require the actor to maliciously intend to kill the person who is actually killed. This language only requires that the actor maliciously intend to kill someone, and that someone be killed during the *actus reus* of the crime. The person killed need not be the object of the malicious intent. Thus, a linguistic analysis of many homicide statutes makes transferred intent an unnecessary tool.

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[56] *See, e.g.*, Cal. Penal Code § 187(a) (West 1999) stating that "murder is the unlawful killing of a human being, or a fetus, with malice aforethought").

Furthermore, the lack of *mens rea* is not necessarily crucial since criminal law recognizes strict liability offenses. For example, most states' statutory rape laws make it a crime to engage in sexual acts with someone under the age of consent, regardless of whether the perpetrator actually knows the victim's age.[57] The fact that a person can commit one of the sixty-eight enumerated offenses within the Act without ever knowing that he or she is committing a second crime bears great similarity to conviction under a statutory rape law.[58]

For example, a 19-year-old man can be convicted for having sex with a 14-year-old girl, even though the man had no intention of committing statutory rape. In fact, even if the girl told the man that she was 18, he could still be convicted. Analogously, a man can be convicted for killing a fetus, even though he had no intention of committing fetal homicide. If mistake of fact and mistake of law are no defense to strict liability offenses such as statutory rape, then why not interpret fetal homicide laws as strict liability offenses as well. Not only would this negate the need for a *mens rea* requirement, but given the harsh punishment that could attach without any intent to injure the fetus, it would greatly advance the underlying purpose of the Act – to prevent violent attacks against women. Most men are cognizant of statutory rape laws, and the fear of such prosecutions often provides the basis for refraining from sex with a partner of questionable age. Many men may also fear a fetal homicide law, and would thus refrain from carrying out violent acts against women.

In short, the lack of a *mens rea* requirement is not fatal to the Unborn Victims of Violence Act. In fact, from a criminal law standpoint, it is far less of an issue than the Act's opponents allege. The argument that the Act is

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[57] *See, e.g.*, Tenn. Code Ann. § 39-13-506 (West 2000).

[58] *See* H.R. REP. NO. 108-420, pt. 1, at 13, 85 (2004), *reprinted in* 2004 U.S.C.C.A.N. 533, 543.

unconstitutional because it violates due process rights is simply not compelling.

II. Potential for Excessive Litigation

Opponents of the Act also argue that it will open the door to a flood of litigation concerning the nature and rights of the fetus.[59] One of the main arguments is that the Act confers upon a fetus legal rights equivalent to those of the mother, and litigation over those rights could result in fetal rights surpassing those of the mother.[60] This trumping of women's rights, they fear, could one day lead to a system in which legally responsible, mentally intact women are civilly committed for no other reason than to protect the rights of a fetus.[61] There is no indication that courts are ready to deprive women of their Fifth and Fourteenth Amendment due process rights in order to protect a fetus.

First, nothing in the Act attempts to confer upon a fetus rights equal to those of the mother. While the Act may confer *some* rights upon a fetus, it does not, nor could it, confer rights equal to that of the mother without violating *Roe v. Wade.* Thus, while the mother's rights may, at some point, come into conflict with the rights of the fetus, *Roe v. Wade* has already mandated that the mother's rights prevail, and *Roe* is controlling precedent.[62] The Act does,

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[59] *Id.* at 86.
[60] *Id.*
[61] *Id.* (arguing that "[a] future statute might require a woman to be prosecuted for any act or 'error' in judgment during her term, for her consumption of wine or cigarettes, or for her decision to fly during pregnancy. When expanded to cover fetuses, child custody provisions may be used as a basis for allowing a biological father awarded custody of the fetus to control the women's behavior, or in some cases, civilly commit pregnant women to protect their fetuses.").
[62] *See Roe v. Wade*, 410 U.S. 113 (1973).

however, confer upon a fetus the right not to be injured or killed without the mother's consent.[63]

Second, many argue that the judiciary could view the rights of a fetus as so important that they must protect them under every circumstance. The fact is, however, that if the justice system should ever reach the point where judges, at the request of a biological father, civilly commit an otherwise sane woman in order to protect her fetus, then our legal system will have far more serious issues than the legal status of a fetus. If that day should ever arrive, the Constitution and the freedoms it once granted will be in desperate need of resurrection.[64]

Thus, the argument that fetal rights will one day trump mothers' rights relies on a misinterpretation of the rights conferred upon a fetus by the Act. In addition, proponents of the argument paint an irrational, worst-case scenario picture of the justice system, which makes the argument entirely unconvincing. For theoretical purposes, one may argue that, if a fetus is given *any* protections, our Constitutional system of justice will decline to a point where judges imprison women in violation of due process – a degeneration to a 16th Century English royal prerogative without support in and contrary to established law.

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[63] *See* 18 U.S.C. § 1841. (2004).

[64] Having said that, opponents point to two cases as examples of this kind of judicial overreaching. In the first, a federal case, a judge ordered a pregnant woman refusing medical care because of her religious convictions into custody in an attempt to ensure that the baby be safely born. In the second, a judge sent a student to prison to prevent her from obtaining a midterm abortion. *See* H.R. REP. NO. 108-420, pt. 1, at 87, n.27 (2004), *reprinted in* 2004 U.S.C.C.A.N. 533, 560 (citations omitted). While these instances are disturbing, they should be addressed as violations of the tenets of *Roe v. Wade* as well as Due Process. It should also be noted that these instances occurred prior to the passage of the Act, meaning that these cases were in no way affected by the new law. If this type of occurrence is a problem, it is one that pre-dated the Act and, thus, cannot be said to have been a product of the Act.

However, for practical purposes, this argument is based on fallacy. It reveals a grossly pessimistic view of American criminal procedure. Further, it ignores an important point – that the Act was not created for the purpose of endowing rights upon a fetus, it was created for the purpose of protecting pregnant women who want to carry their fetuses to full term birth. Given that endowing the fetus with rights is not the purpose of the Act, there is no reason to assume that, if fetal rights ever conflict with a mother's rights, *Roe* will not be followed.

III. Failure to Address Violence Against Women

Opponents of the Act next argue that it does not address the problem it was intended to cure.[65] The Act was designed in response to the ever-increasing occurrences of violence against pregnant women.[66] However, opponents argue that the Act "[f]ails to recognize that an injury to a fetus is first and foremost an injury to the woman."[67] Specifically, they argue that the Act "[f]ails to address the vast number of domestic violence acts perpetrated against women and prosecuted under state statutes."[68] Thus, according to those opposing a federal fetal homicide law, the Act altogether fails in its attempt to address or reduce the problem it was created to remedy.

This argument's primary flaw is its failure to consider the deterrent effect that the Act will have on potential perpetrators of crimes against pregnant women. While the Act does not discuss the problem in its express language, it does provide a means for reducing the number of crimes against women. The case of Tracy Marciniak provides an

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[65] *See* H.R. REP. NO. 108-420, at 87.
[66] *Id.* at 5.
[67] *Id.* at 87.
[68] *Id.*

example of the possible deterrent effect the Act may have on potential offenders.[69]

Tracy Marciniak was four days from delivering her son, Zachariah, when she was brutally attacked by her then-husband, Glendale Black.[70] Black was fully aware that Tracy was pregnant and that she wanted to have the child.[71] In a successful attempt to end the pregnancy, Black punched Tracy twice in the abdomen.[72] He refused to call for paramedics and prevented Tracy from obtaining help for herself.[73] Eventually, he relented and permitted Tracy to go to the emergency room, where Zachariah was delivered stillborn by Caesarian section.[74] Tracy herself was given only 48 hours to live.[75]

Despite the loss of her child, Tracy managed to survive the incident and went on to press charges against Black.[76] At the time, Wisconsin did not have a fetal homicide statute, so Black could be charged only with assault on his wife. Ultimately, he was convicted on that charge, but he was not punished in any way for Zachariah's death,[77] even though his sole purpose was to cause the death of the fetus.

After recovering from her attack, Tracy spoke at a hearing before the Subcommittee on the Constitution of the House Committee on the Judiciary. In her testimony, Tracy said, "Before his trial, my attacker said on TV that he would never have hit me if had thought that he could be charged with the killing of his child."[78] Black's statement

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[69] *Id.* at 9.
[70] *Id.*; Holzapfel, *supra* note 8, at 431.
[71] *Id.;* H.R. REP. NO. 108-420.
[72] *Id.*
[73] *Id.*
[74] *Id.*
[75] *Id.*
[76] *Id.* at 9.
[77] *Id.*
[78] H.R. REP. NO. 108-420, pt. 1, at 534 n.3 (2004).

reveals that he was more concerned with being *punished for* killing his child than with actually *killing* his child.

While there are cases in which fetuses are killed unintentionally,[79] the cases in which fetuses are intentionally killed[80] spark in many a desire to punish such reprehensible behavior. It is this type of violence against women – violence that intentionally harms the fetuses and the mother – that proponents of the Act seek to prevent through the enforcement of a federal fetal homicide law.

Thus, certain types of violence against women likely will be reduced with the passage of the Act. As Tracy Marciniak's attacker confessed, he would not have "hit [Tracy]" if he thought he could have been punished for the death of "his child."[81] Black did not say that he would not have killed his child if he knew he could be punished – he said he would not have *hit his wife* if he knew he could be punished. Thus, had the Act been in existence and within Black's knowledge in 1992, he may well not have attacked Tracy. This is the deterrent effect that proponents of the Act are quick to point out.

The success of this deterrent effect seems to rest on the unfortunate fact that attackers are more worried about being punished than about killing a fetus that the mother wants to carry to delivery. Because some attackers fear punishment, at least some may refrain from committing acts that would otherwise result in death or serious bodily injury to a pregnant woman. Inasmuch as this deterrent effect exists,

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[79] For example, on April 19, 1995, Carrie Lenz, a Drug Enforcement Agency employee, was killed in the Oklahoma City bombing. The day before, Carrie and her husband had chosen the name "Michael" for the child she was carrying. H.R. REP. NO. 108-420, pt. 1, at 539 (2004). In this case, it is probable that the death of the fetus was not within the specific intent of the bomber.

[80] For others, *see* Nat'l Right to Life Comm., *supra* note 8; H.R. REP. NO. 108-420, pt. 1, at 545.

[81] H.R. REP. NO. 108-420, pt. 1, at 534 n.3 (2004).

the argument that the Act fails to address its goal of preventing violence against women is without merit.

IV. The Assault on a Woman's Right to Choose

Finally, opponents of the Act argue that it is inconsistent with *Roe v. Wade* in that it impinges on a woman's right to choose.[82] In *Roe,* the Supreme Court held that "the unborn have never been recognized in the law as persons in the whole sense" and concluded that "person," as used in the 14th Amendment, does not include the "unborn."[83] Opponents argue that state legislatures have made every effort to "secure the recognition of fetuses as full legal persons,"[84] and that the Act is a further attempt to confer rights upon the fetus equal to those of the woman.[85] This, they feel, is at direct odds with *Roe.*[86]

Such opponents also argue that the term "unborn child," as used in the Act, "implies that personhood begins prior to birth or viability, as early as the moment of conception."[87] According to this argument, the use of the term "unborn child" in the Act is in conflict with both the Constitution and *Roe*, in which the Supreme Court held that "the use of the word 'person' is such that it has application only post-natally."[88] While opponents of the Act have correctly interpreted *Roe,* they have misinterpreted the nature and metaphysical implications of the Act.

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[82] *Id.* at 547.
[83] *Roe*, 410 U.S. at 158, 162.
[84] H.R. REP. NO. 108-420, pt. 1, at 555 (2004) (listing two state court cases where the court held that 1) a human being exists from the moment of fertilization and implantation, and 2) a viable fetus is, biologically speaking, a presently existing person and a living human being). H.R. REP. NO. 108-420, pt. 1, at 555 n.5 (2004).
[85] *Id.* at 557.
[86] *Id.*
[87] *Id.*
[88] *Roe,* 410 U.S. at 157.

Here, opponents of the Act are essentially making three distinct arguments in suggesting that the Act conflicts with *Roe*. First, they argue that the Act is an attempt to confer personhood upon fetuses. Second, they argue that the Act attempts to confer rights upon fetuses equal to the rights of the mother. Third, they argue that by attempting to confer personhood on fetuses, the Act is at odds with *Roe*, which says that unborn children are not persons for purposes of the 14th Amendment.[89]

As to the first argument, nothing in the Act attempts to confer personhood upon a fetus. In section (d) of the Act, "unborn child" is defined as "a child in utero," and "a child in utero" is further defined as a "member of the species *homo sapiens*, at any stage of development, who is carried in the womb."[90] Thus, for the purpose of the Act, a fetus is a member of the species "homo sapiens." This does not imply personhood.

While the philosophical discussion of "personhood" is far beyond the scope of this analysis, one should note that personhood implies characteristics beyond mere classification as a particular species. For example, many philosophers argue that "personhood" is contingent upon moral agency. Others argue that personhood is contingent upon conscious self-awareness as a subject in the objective world. Both moral agency and subjective self-awareness are themselves contingent upon rational thought. Thus, for many philosophers, the ability to think rationally is a prerequisite for "personhood."

To say that an "unborn child" is a member of the species *homo sapiens* merely recognizes that a fetus has a diploid genome consisting of forty-six chromosomes and is the reproductive progeny of *homo sapien* parents.[91] Such

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[89] *Id.*

[90] Unborn Victims of Violence Act, § 2(d).

[91] University of Washington, *Chromosomes*, *available at*: http://www.park.edu/bhoffman/courses/bi231/recaps/chromosomes.htm

nominalization and classification of a fetus in no way implies the characteristics of personhood. In fact, given the abovementioned characteristics of "personhood," many philosophers would argue that even infants and young toddlers are not "persons." If infants and young toddlers are not "persons," in the philosophical sense, then certainly a fetus is not a "person." To say that something has the capacity for personhood is not to say that it is *currently* a person. Thus, to say that the Act confers or attempts to confer "personhood" upon a fetus is a misunderstanding of the metaphysics of personhood and a misinterpretation of the language in the Act.

As to the second argument, the Act does not attempt to confer rights upon a fetus which are equal to the rights of the mother. This was discussed earlier in this analysis. To confer upon a fetus the right not to be killed except at the election of the mother under medically legal abortion procedures in no way suggests that such a fetus has rights equal to or greater than those of the mother. In fact, as discussed earlier, *Roe* still controls when the rights of the fetus conflict with the rights of the mother.[92] Thus, the Act simply makes it a crime to injure or kill a fetus during the commission of one of the sixty-eight listed offenses, which only confers upon a fetus a limited right not to be injured or killed without the mother's consent.

As to the third argument, if the Act does not confer "personhood" upon a fetus, then it cannot be at odds with the proposition in *Roe*, which stated that an "unborn child" is not a person for purposes of the 14th Amendment. As discussed two paragraphs above, the Act does not attempt to confer personhood upon a fetus. Thus, there is nothing inconsistent in classifying a fetus as a member of the species *homo sapiens* while respecting the Supreme Court's holding that "unborn" children are not persons. The Act

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[92] *See Roe*, 410 U.S. 113 (1973).

and *Roe* are completely consistent on this point.

Finally, an affirmative argument can be made in defense of the Act. In 1987, Richard Smith appealed his conviction under Georgia's fetal homicide statute to the 11th Circuit.[93] He argued that the fetal homicide law conflicted with *Roe v. Wade*.[94] The court rejected this argument, saying, "The proposition that Smith relies upon in *Roe v. Wade* – that an unborn child is not a 'person' within the meaning of the Fourteenth Amendment – is simply immaterial in the present context to whether a state can prohibit the destruction of a fetus."[95] Thus, a fetal homicide statute can prohibit the destruction of a fetus without ever addressing issues of personhood or fetal rights.

The Supreme Court has also upheld a state conviction under a fetal homicide law in *Webster v. Reproductive Health Services*.[96] This case discussed the constitutionality of Missouri's fetal homicide law.[97] The law declared that "the life of each human being begins at conception," that "unborn children have protectable interests in life, health, and well-being," and that all state laws "shall be interpreted and construed to acknowledge on behalf of the unborn child at every stage of development, all the rights, privileges, and immunities available to other persons, citizens, and residents of this state," to the extent permitted by the Constitution and U.S. Supreme Court rulings.[98] The Court refused to invalidate the law and held that states are free to enforce such laws as long as they do

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[93] Smith v. Newsome, 815 F.2d 1386 (11th Cir. 1987).
[94] *Id.* at 1388.
[95] *See id.* at 1388.
[96] 492 U.S. 490 (1989).
[97] *Id.*
[98] Mo. Rev. Stat. §§ 1.205.1(1), (2) (1986).

not restrict abortion in a manner forbidden by *Roe.*[99]

Thus, the Act does not confer rights upon a fetus that are equal in any way to those of the mother, nor does it confer personhood upon a fetus. In fact, the Act does not go as far as some states' fetal homicide laws that were upheld by the Supreme Court. Given this, there is no reason why the Act cannot co-exist with *Roe v. Wade.* The Act prohibits the unwanted destruction of a fetus by a third person without the mother's consent during the commission of certain federal crimes. *Roe* protects a mother's right to medically terminate a fetus with her permission and within the parameters of the law. Thus, the argument that the Act is an assault on a woman's right to choose is misguided.

The Unborn Victims of Violence Act offers needed protection to both fetuses and expectant mothers. Past cases reveal the shocking trauma suffered by women at the hands of men seeking to terminate their wanted pregnancies. While abortion is divisive on a normative level, most would agree that wrongful acts against a fetus such as those described above should be punished. In fact, an overwhelming majority of Americans agree that fetal homicide laws are needed.[100]

These laws, however, should not be mistakenly interpreted in such a way as to threaten current abortion rights. The Act is not only consistent with the tenets of *Roe v. Wade,* it also unequivocally excludes abortion from its scope of prosecution by express language.[101] Thus, while

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[99] *See* Nat'l Right to Life Comm., at http://www.nrlc.org/Unborn_Victims/statechallenges.html (*quoting Webster v. Reproductive Health Svcs.*, 492 U.S. 490 (1989)).

[100] H.R. REP. NO. 108-420, pt. 1, at 535 (2004) (quoting a survey in which 84 percent of Americans polled believe that "prosecutors should be able to bring a homicide charge on behalf of an unborn child killed in the womb").

[101] Unborn Victims of Violence Act § 2(c) (stating that abortion for which consent of pregnant woman has been obtained is exempt from prosecution).

pro-choice advocates should not feel threatened by the Act, pro-life advocates should not exaggerate its influence. In fact, both parties should be content with the purposeful results of the Act: for pro-lifers, the Act punishes the unwanted destruction of a fetus; for pro-choice advocates, the Act further preserves a woman's right to choose because, if the right to choose includes the right to terminate an unwanted pregnancy, it should also include the right to protect and preserve a wanted pregnancy.

In closing, the Act is logically and legally consistent with all of the propositions set forth in *Roe v. Wade*. For that reason, the abortion debate should turn attention away from the Act itself, and activists' efforts should focus a unified effort on carrying out the Act's intended purpose – the prevention of injury and death to people like Tracy and Zachariah Marciniak.

- W. DEREK MALCOLM