

### *Symposium on The Civil Rights of Public School Students*

## Intent in Tort Law

Keith N. Hylton

Follow this and additional works at: <https://scholar.valpo.edu/vulr>



Part of the [Law Commons](#)

---

### Recommended Citation

Keith N. Hylton, *Intent in Tort Law*, 44 Val. U. L. Rev. 1217 (2010).  
Available at: <https://scholar.valpo.edu/vulr/vol44/iss4/8>

This Monsanto Lecture is brought to you for free and open access by the Valparaiso University Law School at ValpoScholar. It has been accepted for inclusion in Valparaiso University Law Review by an authorized administrator of ValpoScholar. For more information, please contact a ValpoScholar staff member at [scholar@valpo.edu](mailto:scholar@valpo.edu).



# 2009 Monsanto Lecture

## INTENT IN TORT LAW

Keith N. Hylton\*

### I. INTRODUCTION

Prosser's *Handbook of the Law of Torts* says that intention in tort law "is not necessarily a hostile intent, or a desire to do any harm. Rather it is an intent to bring about a result which will invade the interests of another in a way that the law will not sanction."<sup>1</sup> The problem with this description is that it is circular, at least if we view the statement as an attempt to set out in general terms the type of intent that must be established to hold a defendant liable in tort. How do we know that someone has the intent necessary to find his conduct unlawful? According to Prosser, we see if the actor intended to bring about an unlawful invasion; where the definition of such an invasion depends on the actor's intent.

This Lecture avoids the circularity problem in defining intent. I argue that intent standards in tort law are objective and serve important regulatory functions. The intent standards can be explained on the basis of the incentive effects of tort liability rules.<sup>2</sup> Intent standards are easier to understand if we work backwards from an understanding of the desired impact of the rules to the language of the rules themselves.

The core of my argument is that intent rules work primarily as pricing mechanisms that internalize costs optimally, in the sense that they induce potential tortfeasors to choose the option that is least costly to society. The intent standard for battery discourages socially undesirable acts and at the same time avoids discouraging socially beneficial activity. The intent standard for assault is more difficult to satisfy than that for battery, and because of this, it encourages (or avoids discouraging) the speech that is often intermixed with potentially threatening conduct. The intent standards for cases of economic

---

\* Honorable Paul J. Liacos Professor of Law, Boston University, knhylton@bu.edu. This Lecture was prepared for the 2009 Monsanto Lecture, Valparaiso University, April 23, 2009. I thank Ken Simons for detailed comments on an early draft.

<sup>1</sup> WILLIAM L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 31 (West, 4th ed. 1971).

<sup>2</sup> This Lecture's focus on incentives and regulatory function can be contrasted with non-economic theories of intention in tort law. See John Finnis, *Intention in Tort Law*, in *PHILOSOPHICAL FOUNDATIONS OF TORT LAW* 229 (David G. Owen ed., 1995); Peter Cane, *Mens Rea in Tort Law*, 20 *OXFORD J. LEG. STUD.* 533 (2000); Kenneth W. Simons, *Rethinking Mental States*, 72 *B.U. L. REV.* 463 (1992).

predation (inducement of breach of contract, unfair competition) reflect the same effort to discourage socially harmful acts without deterring desirable activity. In addition to the optimal internalization goal, transaction costs play a role in the specification of intent requirements. The subtle difference between the intent requirements for trespass and battery can be explained on the basis of transaction costs.

As a preliminary matter, internalization for its own sake is not a desirable goal for the law.<sup>3</sup> Internalization is desirable because it discourages socially harmful conduct, or in other words, contributes to the ideal level of deterrence.<sup>4</sup> My argument means the same if one were to substitute “optimal deterrence” or “optimal regulation” in place of “optimal internalization” wherever the words occur below. I focus on the word internalization because that is the easiest way to think about the immediate effects of intent rules.

## II. INTENTIONAL TORTS: REVIEW OF THE LITERATURE

Theories of intent in tort law are either subjectivist or objectivist. The subjectivist approaches, which have been explored more seriously in the criminal law than in the torts literature, appear to be grounded ultimately in Kantian theory.<sup>5</sup> Under the subjectivist approach to intentional torts, the law aims to punish tortfeasors for intentionally or at least knowingly violating norms that are implicit in the law. Those

---

<sup>3</sup> I especially want to distinguish the approach taken here from one version of the corrective justice approach, that of Jules Coleman. Coleman’s view of corrective justice is that it requires nothing more than the annulment of unjust gains and losses. See Jules L. Coleman, *Tort Law and the Demands of Corrective Justice*, 67 *IND. L.J.* 349, 357 (1992). While it might be unfair to describe this approach as internalization for its own sake, it lacks a functional basis for the internalization goal. The basis for internalization in Coleman’s theory is the Aristotelian premise that unjust impositions should be cancelled. Since only unjust impositions are to be cancelled (not all impositions) it follows that the core problem in Coleman’s theory is determining the meaning of justice.

<sup>4</sup> The ideal or optimal level of deterrence is assumed to be determined by the familiar Hand Formula (or Learned Hand analysis), evaluated with complete accuracy. Under the Hand Formula, forbearance on the part of the injurer is socially desirable whenever the burden of forbearance is less than the loss that would otherwise be imposed on victims. See *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947). I assume below that intentional torts do not confer a long run evolutionary benefit, as they may have in the distant past. See generally KONRAD LORENZ, *ON AGGRESSION* (Marjorie Kerr Wilson trans., 1963). If intentional torts conferred a long run evolutionary benefit, then punishment appears to be less desirable. However, whatever long-run benefits were secured through the aggressive instinct, those benefits have tapered off quite substantially by now. Treating the external evolutionary benefits of aggression as essentially zero is not a serious error.

<sup>5</sup> See generally R.A. DUFF, *INTENTION, AGENCY & CRIMINAL LIABILITY: PHILOSOPHY OF ACTION AND THE CRIMINAL LAW* (1990); MICHAEL S. MOORE, *ACT AND CRIME: THE PHILOSOPHY OF ACTION AND ITS IMPLICATIONS FOR CRIMINAL LAW* (1993).

norms, in turn, reflect the view that it is morally objectionable if an actor uses others as a means to his own ends or fails to respect their autonomy.<sup>6</sup> It follows that the actor's true mental state is important in determining the appropriateness of liability.

The objectivist approach, in contrast, views mental state as having a weak relevance at best to the appropriateness of punishment. Legal standards are external to or exogenous with respect to the actor's mental state. The characterization of an actor's mental state plays a role, if necessary, in designing an optimal regulatory system, but there is certainly no requirement under the objective approach to identify the true mental state of the actor as a primitive input in the process of determining liability.

The objectivist literature in tort law begins with Holmes's treatment of the legal standards governing intent in the first three chapters of *The Common Law*.<sup>7</sup> The first chapter, on criminal law, examines intent standards for crimes. Holmes argues that intent is reducible to knowledge of facts that allows the average person to foresee the harm his actions will inflict on another. Thus, a criminal defendant could be found to have had intent to murder even though he did not really intend to kill. For example, if an individual leaves an infant out in the cold alone without food, he could be deemed to have acted with intent to murder even though he may have sincerely hoped that someone would find and care for the infant.

In addition to the objectivist *definition* of intent, which reduces it to knowledge of certain facts, the intent standard *functions* according to Holmes as an index of the probability of harm, in the sense that it allows courts to convict actors for otherwise innocent acts on the theory that those acts were likely to lead to immediate serious injury. For example, an actor can be convicted for attempted murder when the facts indicate an intent to follow through to the point of committing murder.

---

<sup>6</sup> Richard Epstein, in his early period as a corrective justice proponent, argued that tort liability is presumptively strict because most torts involve an invasion (i.e., without consent) of autonomy. See Richard A. Epstein, *Intentional Harms*, 4 J. LEGAL STUD. 391, 391-92 (1975). Charles Fried, a corrective justice proponent, took the view that liability should be presumptively based on negligence because an effort to use others for your purposes inevitably necessitated an unfair extraction from a hypothetical aggregate social risk budget. See CHARLES FRIED, *AN ANATOMY OF VALUES: PROBLEMS OF PERSONAL AND SOCIAL CHOICE* 137 (1970). Ernest Weinrib's corrective justice theory is centered, like Fried's, on the existence of an implicit social contract. See ERNEST J. WEINRIB, *TOWARD A MORAL THEORY OF NEGLIGENCE LAW*, IN *JUSTICE, RIGHTS, AND TORT LAW* 123 (Michel D. Bayles & Bruce Chapman eds., 1983); Ernest J. Weinrib, *Understanding Tort Law*, 23 VAL. U. L. REV. 485, 491 (1989). However, while Fried's theory draws heavily on Rawls, Weinrib is more faithful to Kantian theory.

<sup>7</sup> OLIVER WENDELL HOLMES, *THE COMMON LAW* (A.B.A. 2009) (1881).

1220 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 44

*The Common Law's* second and third chapters, both on torts, continue with the argument that intent can be reduced to knowledge of facts that allows the ordinary person to foresee the harm his actions could cause. The intent standard necessary to trigger liability for trespass is especially low, or even trivial, Holmes suggests, because all that is necessary for liability is an act that interferes with someone else's property rights. And to refer to something as an act implies that it is done with intent. One does not ordinarily refer to the involuntary contraction of muscles observed in a seizure as an act.

One important position from Holmes that I adopt is that intent standards are objective, in the sense that they do not depend on what was actually in the mind of the defendant when he acted. It is clear in the case of trespass that one can be found liable for it even though there was no intent to trespass. The double-effect problem is a concern to subjectivist scholars, but has not had any impact on the law of intentional torts.<sup>8</sup> The standard for assault requires intent to harm or to put someone in fear of immediate harm. This can also be satisfied by an actor who did not really intend to harm or to frighten anyone. For example, if *A* points an unloaded gun at *B*, he could be held liable for assault even though he sincerely, though erroneously, believed that *B* knew that the gun was unloaded.

After Holmes, utilitarian analysis of intent standards does not appear in the literature again until Posner's article on wounding to protect property and Epstein's article on intentional harms.<sup>9</sup> Posner's article provided a cost-benefit (efficiency) justification for the law governing privileges to use deadly force to protect property. Epstein's article, in part a reaction to Posner, rejects any attempt to use cost-benefit analysis to understand the law on intentional torts. Though Epstein's approach, grounded in Kantian theory, is quite different from that taken here, his discussion is one of the first efforts to provide a rationale for the variation in intent standards observed in tort law. Under Epstein's analysis, a prima facie case for strict liability is established by the defendant's unauthorized or nonconsensual touching of the plaintiff.

---

<sup>8</sup> See, e.g., James A. Henderson, Jr. & Aaron D. Twerski, *Intent and Recklessness in Tort: The Practical Craft of Restating Law*, 54 VAND. L. REV. 1133, 1140 (2001). The double-effect problem arises when someone takes an action that may harm the victim but also may produce another effect, such as the brush-back pitch in baseball. The pitcher may not want to harm the batter at all, but is aware that the batter might be injured as a result of this effort to prevent the batter from encroaching on the strike zone. See Kimberly Ferzan, *Beyond Intention*, 29 CARDOZO L. REV. 1147, 1147 (2008).

<sup>9</sup> See generally Epstein, *supra* note 6; Richard A. Posner, *Killing or Wounding to Protect a Property Interest*, 14 J.L. & ECON. 201 (1971).

Posner returned to the intent question in an article with William Landes in 1981.<sup>10</sup> They used the Hand Formula's comparison of the burden of precaution with avoided harms to explain why tort law imposes strict liability for intentional torts. Under the Hand Formula, a failure to adopt a specific precaution is unreasonable if the burden of the precaution is less than the harms that would have been avoided by its adoption. According to Landes and Posner, the burden of avoiding the harm is especially small in the case of intentional torts—in fact, negative, since the tortfeasor saves on effort by doing nothing rather than attempting to kill his neighbor. Since the burden of precaution is extremely low (negative) and the likelihood of harm substantial, they argued that it follows that strict liability should apply as a general rule to intentional torts.

An important potential flaw in Landes and Posner's reasoning was later exposed by Dorsey Ellis.<sup>11</sup> When you choose not to take your neighbor's property, Ellis suggested, the burden of precaution (forbearance) is not negative. The burden of precaution is the disutility you experience by forgoing the taking. If you had expected to enjoy great benefits as a result of expropriating your neighbor's property then the burden of precaution is positive after all. And if you expected unusually great benefits from the expropriation, say because his property is much more valuable in your hands than in his, then the burden of precaution may exceed the avoided losses. Hence, it does not follow immediately from the Hand Formula, according to Dorsey, that all intentional torts are instances of inefficient conduct.

Landes and Posner returned to the intentional torts question in their book *The Economic Structure of Tort Law*.<sup>12</sup> Rather than refer to the burden of precaution, they say that liability for an intentional tort is implied by two factors: the likelihood of harm, and the burden of avoiding it. Intent is inferred, according to Landes and Posner, when the probability of harm is very high or when the cost of avoiding the harm, for a given probability of occurring, is extremely low. One clear case of intent is where the actor punches the victim in the nose; the probability of harm is high, and given that the actor must have been aware of it, we should infer intent. The other case of intent involves a low probability of harm but also a very low cost of avoidance; for example, someone stands

---

<sup>10</sup> See generally William M. Landes & Richard A. Posner, *An Economic Theory of Intentional Torts*, 1 INT'L REV. L. & ECON. 127 (1981).

<sup>11</sup> See generally Dorsey Ellis, *An Economic Theory of Intentional Torts: A Comment*, 3 INT'L REV. L. & ECON. 45 (1983).

<sup>12</sup> WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* (1987).

1222 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 44

over a highway dropping bricks down toward the pavement. If the traffic is sparse, his actual probability of hitting a car may be low. On the other hand, since it was easy to avoid any harm to a driver in this setting, the actor should be said to have intended the harm if it occurs even though the probability was low.

Landes and Posner's second description of their rationale for the intent standard, as a basis for strict liability, avoids Dorsey's criticism and remains consistent with the Hand Formula as it has been applied by courts.<sup>13</sup> However, as a theory of strict liability for intentional torts, it remains incomplete. If a man suffering from starvation steals bread from his neighbor after the neighbor refuses to give it to him, he is still guilty of a trespass even though the burden of avoiding the intentional tort is very high.<sup>14</sup> Moreover, unlike Holmes, and unlike Epstein, Landes and Posner make no effort to justify the different intent standards observed in tort law. Their treatment of intentional torts makes no distinctions between the intent necessary to trigger liability under trespass, battery, and assault.

Landes and Posner's approach might be seen as consistent with Holmes's because Holmes claimed that intent could almost always be reduced to knowledge of facts. But the facts necessary to trigger liability differ among the various types of intentional tort. For example, to be liable for trespass, one need only know that he is walking on land – there is no need for the plaintiff to prove that the defendant knew that he was on someone else's land. Assault, on the other hand, requires the defendant to know more facts to be liable. The defendant must know facts that would allow the ordinary person, if carrying out the same acts, to infer that his conduct would harm someone or put someone in immediate fear of harm.

Intent requirements vary in substance as well as form across intentional tort categories. I will explain the variations in those requirements, starting with the minimal intent standard for trespass, and the close, though somewhat higher, standard for battery. I will then explain the standards for assault and other torts involving intent to harm. However, before launching into these explanations, I describe the levels of intent implied by the cases.

---

<sup>13</sup> This is not the same as the perfectly accurate evaluation referred to in note 4 *supra* because it makes no attempt to take individual idiosyncratic features into account. In other words, the Hand analysis is not quite the same thing as an unalloyed efficiency test.

<sup>14</sup> The theft-of-bread example cannot be treated, in an effort to rescue the Landes-Posner theory, as a case of high subjective disutility, where the objective social cost of avoidance is low (or negative). In any moderately responsible accounting of objective costs, the cost of death from starvation would be incorporated.

## III. LEVELS OF INTENT

There are essentially four levels of intent in tort law. They can be arranged along a spectrum from involuntary conduct to acts carried out with the sole purpose of harming someone.

A. *Involuntary*

The involuntary conduct category consists of acts that are not planned or controlled by the actor or injurer. For example, a sudden seizure causes the injurer to punch the victim in the nose. Or, the injurer is riding on a horse, the horse throws him, and he flies into the air and lands on the victim, or lands on the victim's property. In these examples, the injury is not the result of some planned, intended, or controlled act.<sup>15</sup> It is the result of a force, internal or external, that the injurer could not control.

B. *Primary Volitional*

Primary volitional conduct involves acts that are controlled by the actor, but in which the actor is not aware of or cannot foresee the immediate physical consequences of his action.<sup>16</sup>

How could this happen? Consider the battery context first. One example is where the actor suffers from some form of insanity that makes him unaware of his immediate surroundings.<sup>17</sup> Suppose, for example, he grabs the arm of a bystander, thinking he is actually in the process of opening a door. In this case, the actor is aware of his own physical movements; he is aware and intends to be in the process of grabbing something and moving it. However, he is unable to determine accurately the object that is being affected by his action. Another example is that of a child too immature to know the immediate

---

<sup>15</sup> See, e.g., *Cordas v. Peerless Transp. Co.*, 27 N.Y.S.2d 198, 199–200 (N.Y.C. Ct. 1941) (defendant jumped out of cab to avoid armed robber, cab ran into plaintiff); *Lobert v. Pack*, 9 A.2d 365, 366 (1939) (defendant, asleep in back seat of car, kicked seat causing plaintiff to crash). See generally *Smith v. Stone*, 82 Eng. Rep. 533 (K.B. 1647) (defendant carried onto plaintiff's property by others); MARK F. GRADY, *CASES AND MATERIALS ON TORTS* 97–103 (1994).

<sup>16</sup> "Immediate physical consequences" should be distinguished from "incapacity to realize the probable consequences" used by Bohlen. See Francis H. Bohlen, *Liability in Tort of Infants and Insane Persons*, 23 MICH. L. REV. 9, 9 (1924). The "incapacity to realize probable consequences" description could apply to someone who understands the immediate physical consequences (physical contact) but not the likely result (injury).

<sup>17</sup> *Fitzgerald v. Lawhorn*, 294 A.2d 338, 338 (1972) (defendant shot plaintiff while suffering from insane delusion that the plaintiff was not a person and that plaintiff was assaulting him).



## 1224 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 44]

consequences of certain physical conditions.<sup>18</sup> For example, the child is unaware of the laws of gravity, so he does not know that he will fall from a table as he runs off the side of it. Or suppose the child pulls the chair away as a person is about to sit, but the child is too immature to foresee the immediate consequence that the victim will fall to the ground.

Yet another example is the case of someone who yawns, stretching his hands out, unaware that his fist will hit a passerby. If the actor is not aware of anyone near him,<sup>19</sup> then this falls within the primary volitional category. If the actor is aware that others are nearby and may be hit by his fist, then this is clearly a case of foreseeable harm and outside of the primary volitional category.

In the trespass setting, primary volitional conduct involves a crossing of the boundary to someone's property in which the actor is aware that he is walking but does so without an awareness of his physical surroundings. Suppose, for example, the actor is sleepwalking or walking under some hypnotic trance. The actor sees a completely different landscape from that which is really before him.

### C. Secondary Volitional

Secondary volitional conduct involves actors who are aware of and can foresee the immediate physical consequences of their acts. It helps to distinguish the battery and trespass cases.

In the battery case, a secondary volitional actor knows that as he stretches his fist toward the victim's nose, it will come into contact with the victim. If he knows this and nothing else, he is at the secondary volitional level and this is so even if he cannot foresee that the contact will cause an injury such as a broken nose. *Vosburg v. Putney* provides an example of a defendant whose intent was at the secondary volitional level.<sup>20</sup> When George Putney kicked Andrew Vosburg in the knee, he apparently did not intend or foresee any harm, especially not the severe damage later attributed to the kick by the plaintiff.

<sup>18</sup> See, e.g., *Walker v. Kelly*, 314 A.2d 785, 788 (Conn. Cir. Ct. 1973) (upholding trial court's finding that, although five-year-old girl threw rock that hit plaintiff's forehead, she did not intend to strike plaintiff with rock); see also *Horton v. Reaves*, 526 P.2d 304, 306 (Colo. 1974) (defendants, three- and four-year-old children, apparently pushed a five-week-old baby off a bed, causing severe head injuries). In *Horton*, the court held that the defendants were not liable for battery. *Id.* at 308.

<sup>19</sup> See, e.g., *Brown v. Kendall*, 60 Mass. 292, 292 (1850) (defendant, walking backwards as he tried to separate fighting dogs, hit plaintiff in eye with stick); *Moe v. Steenberg*, 147 N.W.2d 587, 588 (Minn. 1966) (defendant, skating backward, ran into plaintiff).

<sup>20</sup> 50 N.W. 403 (Wis. 1891).

Another example is the act of pulling a chair away as the victim is trying to sit in it. The secondary volitional actor knows the immediate physical consequence: the victim will fall. Thus, in *Garratt v. Dailey*, the five-year old boy who pulled the chair from under Ms. Garratt before she sat down probably understood that Ms. Garratt would suffer some contact with the ground.<sup>21</sup> It does not matter that he may not have foreseen that Ms. Garratt would fracture her hip. It is sufficient for the secondary volitional intent level that the injurer was aware that there would be some possibly unpleasant physical contact.

In the trespass setting, secondary volitional conduct means being aware of the physical surroundings. A secondary volitional actor need not know that he has crossed the boundary to another's property. However, he is aware of his physical surroundings. Unlike the primary volitional, he sees what is really before him.

#### *D. Tertiary Volitional: Foresight and Intent*

An actor who meets the tertiary volitional level of intent foresees or intends the immediate harm or ultimate physical consequence of his actions. This statement is obviously unclear and needs to be fleshed out with examples. Consider the foresight case first. In the battery context, a tertiary volitional actor foresees that his punch will harm the victim. He does not necessarily foresee that his punch will lead through a complex chain of events to some great loss, such as death. However, he is aware of some plausible injuries that are likely to occur, such as a bruised face. In the trespass context, a tertiary volitional actor is aware that he is crossing the boundary of another's property. He knows that the property owner will regard his crossing as a trespass.

A more extreme case is where the tertiary volitional actor wants or intends to harm the victim. For example, the actor foresees that his punch in the nose will lead to immediate physical injury to the victim and wants this to occur. Or the actor pulls the chair away as the victim is about to sit, hoping to cause injury to the victim. In the trespass context, a tertiary volitional actor may not only foresee that his actions will result in a trespass, but also aim to trespass on the victim's property. For example, in *Jacque v. Steenberg Homes*,<sup>22</sup> the defendant was warned

<sup>21</sup> 279 P.2d 1091, 1092 (Wash. 1955), *appeal after remand*, 304 P.2d 681 (Wash. 1956).

<sup>22</sup> 563 N.W.2d 154, 156-57 (Wis. 1997). *Jacque* returns us to the distinction between subjectivist and objectivist inquiries. To a subjectivist, it is important that the defendant in *Jacque* did not have a desire to harm the plaintiffs; he only wanted to save money by cutting across their property. To the objectivist, this distinction is irrelevant because the defendant knew that the intentional ("in your face") trespass was a direct by-product of his decision to save money by cutting across the plaintiff's property.

1226 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 44

against trespassing on the plaintiff's property but did so anyway in order to reduce the costs of delivering a mobile home to a customer.

E. *Implementation of Intent Standards*

In defining the terms primary volitional and secondary volitional, I implicitly assume that courts have no way of determining the thoughts inside someone's head. In every case, the level of intent is inferred from the facts. If the facts are such that the average person would not have acted in the way the defendant did, knowing what the defendant must have known, unless he intended to harm the victim or at least was content with harming the victim as a step toward some other goal, then a court will infer intent to harm. In this sense, all of the intent standards defined so far are assumed to be objective.

IV. EXPLAINING INTENT REQUIREMENTS

When we say that liability for intentional torts is strict, the first question that must be answered is: what sort of intent? *If we regard intentional conduct as equivalent to voluntary conduct, then it is clear from the foregoing that liability is not strict for every intentional tort. Strict liability applies only to those intentional torts that fall in the secondary and tertiary volitional categories.*

In general, tort liability requires as a minimum the secondary volitional level of intent, which means knowledge or foresight of the immediate physical consequences of an act. Actors who satisfy the secondary and tertiary volitional levels may be held liable for compensatory damages under tort law, and those who satisfy the tertiary level may be held liable in addition for punitive damages. Criminal law, on the other hand, requires the highest intent level in order to punish. The distinctions between intent levels can also be described in terms of the familiar labels "general intent" and "specific intent," where secondary volitional describes cases of general intent, which is sufficient for tort liability, and tertiary volitional includes cases of specific intent, which is a requirement for criminal liability.

Among the standard intentional tort claims, the level of intent necessary to hold a defendant liable varies according to the type of claim. Battery, trespass, and false imprisonment require awareness of immediate physical consequences—the secondary volitional level.<sup>23</sup> Assault requires intent to harm or to put one in fear of harm, which

---

<sup>23</sup> Recent developments in tort doctrine have not altered this long-standing feature of the case law. For a review with interesting observations on theory, see Kenneth W. Simons, *A Restatement (Third) of Intentional Torts?*, 49 ARIZ. L. REV. 1061, 1061 (2006).

implies the tertiary volitional level of intent. The same holds for an “offensive battery,” of the sort that might subject the actor to punitive damages.<sup>24</sup> Defamation and intentional infliction of emotional distress claims also require the highest level of intent.<sup>25</sup>

*Why does tort law require awareness of immediate physical consequences as a minimum component of an intentional tort claim, and why do intent standards vary according to the type of intentional tort, and even within some categories of intentional tort (e.g., battery)?* These questions are addressed below.

A. *Secondary Volitional Conduct as a Minimum Requirement for Intentional Tort Liability: Trespass and Battery*

Awareness of immediate physical consequences, which I have described as secondary volitional conduct, is necessary and in most cases sufficient for tort liability because the law of intentional torts serves primarily as a pricing mechanism or collection of pricing rules that internalizes costs optimally. The basic intuition was described by Holmes in the context of trespass.

When a man goes upon his neighbor’s land, thinking it his own, he intends the very act or consequence complained of. He means to intermeddle with a certain thing in a certain way, and it is just that intended intermeddling for which he is sued . . . . One who diminishes the value of property by intentional damage knows it belongs to somebody. If he thinks it belongs to himself, he expects whatever harm he may do to come out of his own pocket. It would be odd if he were to get rid of the burden by discovering that it belonged to his neighbor.<sup>26</sup>

This passage suggests that cost internalization is the aim of the intent standard for trespass. However, cost internalization is also arguably the goal of the negligence rule, yet in the case of negligence the law does not require awareness of immediate physical consequences. The law

---

<sup>24</sup> *Meadows v. Guptill*, 856 F. Supp. 1362, 1365 (D. Ariz. 1993) (offensive sexual harassment and touching); *Catlett v. Catlett*, 388 S.E.2d 14, 15 (Ga. Ct. App. 1989) (battery and false imprisonment); *Alcorn v. Mitchell*, 63 Ill. 553, 553 (1872) (spitting in face); *Draper v. Baker*, 21 N.W. 527, 528 (Wis. 1884) (same); *Jones v. Fisher*, 166 N.W.2d 175, 177 (Wis. 1969) (pulling out plaintiff’s dentures).

<sup>25</sup> See HOLMES, *supra* note 7, at 138–40 (on defamation and intent); PROSSER, *supra* note 1, at 49–62 (on intentional infliction of emotional distress).

<sup>26</sup> HOLMES, *supra* note 7, at 97.

1228 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 44

requires foreseeability of harmful consequences. What explains the different knowledge requirements under trespass and negligence?

The reason awareness of immediate physical consequences is necessary and generally sufficient for liability under the law of intentional torts, and not so under negligence law, is that the law triggers liability at the point at which you become aware, or should become aware, of the cost that your act will impose on someone. In the case of intentional conduct, you are aware of the fact that a cost will be imposed on someone as long as you are aware of the immediate physical consequences of your act. If you kick someone on the leg, you are aware that there is a potential cost that will be borne by the person kicked. The only case where you would be unaware of that potential cost is when you are not aware of the fact that you are kicking a person. Assuming you are aware that you are kicking a person, Holmes's argument applies directly: if that person is yourself, you will bear the cost yourself; if that person is another individual, you should not escape the cost, if internalization is indeed the goal of the law, by discovering that fact.

One might argue that the costs of intentional torts would be internalized just as well by a rule that triggers liability for battery at the primary volitional level, when the actor is in control of his physical motions though unaware of any immediate physical consequences. For example, suppose the actor, for all he can see, is standing alone in the desert. He yawns, stretching out his hand, and punches a sudden visitor in the nose. In this case, his intent level satisfies the primary volitional standard but not the secondary volitional standard. Because a rule triggering liability at the primary volitional level would clearly lead to liability in the secondary volitional level cases as well, all of the costs of intentional conduct would be internalized under it.

While it is true that the costs of intentional conduct would be internalized under the primary volitional standard, those costs would not be internalized *optimally*. A primary volitional actor has no reason to perceive that his action will impose a cost on anyone. Given this, liability would have no effect on his actions, other than to encourage him to stay inside his home alone. Because such a general discouragement of activity is undesirable, using the primary volitional level as the triggering point for liability under the law of intentional torts does not internalize costs optimally. The same argument obviously applies if the law provided no exemption for involuntary conduct.

The tertiary volitional standard also fails to internalize costs optimally. The reason is that under the tertiary volitional standard, the actor would not be held liable unless the facts suggested that he was aware that he would harm or intended to harm the victim. Under this

rule, there would be a vast set of batteries and trespasses that would be excused from liability. For example, the five-year-old boy in *Garratt v. Dailey* who pulled the chair from under Ms. Garratt could not be held liable under the tertiary volitional intent standard because he was not aware that he would harm Ms. Garratt. The same holds in the double-effect scenario: for example, an orange rolls out of a door onto the sidewalk and the injurer, in order to get the orange and worried that the victim would get it first, pushes the victim out of the way. Similarly, the trespasser who digs up your property, thinking it his own, would avoid liability under the tertiary volitional standard. Since it would be far cheaper to reduce the value of someone else's property rather than your own, we should expect frequent "unintended" trespasses under this rule. Many of them would reduce society's wealth because the trespasser's gain would be less than the loss imposed.<sup>27</sup>

The upshot is that of the four potential intent standards identifiable in the case law—involuntary, primary volitional, secondary volitional, and tertiary volitional—the secondary volitional standard appears to be the only one capable of internalizing the costs of intentional torts such as battery and trespass in a manner that induces actors to choose the least costly option to society. The secondary volitional standard regulates (or deters) optimally because it holds the injurer strictly liable for costs he imposes on others when he is aware of their imposition, and therefore, leaves the injurer with an incentive to impose those costs only when his benefits exceed them. The secondary volitional standard avoids over-internalization, or over-deterrence, by excusing the injurer from liability for the costs his acts impose on others when he is not (and has no reason to be) aware of their imposition and thereby avoids general discouragement of benign activity.

Now consider negligent conduct. You are shooting your arrow at a target. The immediate target of your action is not another individual. But an individual runs across the path of your arrow as you shoot. By assumption, you were not aware when you shot the arrow that there would be an immediate physical consequence to another individual. However, the question that arises in the negligence context is whether you should have foreseen the risk of a third party running across the path of your arrow. If so, then you should have foreseen that a cost would be imposed on a third party. Negligence law allows you to avoid liability only under the condition that the burden of avoiding that harm

---

<sup>27</sup> To be sure, the negligence rule would remain in the background to be used against the injurer in these cases, but it would be a strange and unstable regime if the injurer had valid defenses against the obvious intentional tort, but could still be found liable on a negligence theory for the same conduct.

to a third party was extremely high. Of course, in this example, the burden is low (simply aim your arrow in a different direction or hold your fire) so foreseeability will be sufficient for liability.

My point in comparing negligent conduct to intentional conduct is not to reexamine the benefit-burden balancing of the Hand Formula.<sup>28</sup> It is to show that foreseeability of harm, a more demanding knowledge requirement than “awareness of immediate physical consequences,” is a necessary condition (though not always sufficient in view of the Hand Formula) for liability under negligence law. The foresight of harm standard is more demanding because it requires the actor to know a more complicated set of facts about the circumstances surrounding his conduct. This is not to say that the actor who foresees the harm is necessarily aware of the immediate physical consequences; he may not be. An actor may be able to foresee the harm to a third party without being aware of the immediate physical consequences of his act, as in the arrow shooter example just discussed.

This comparison between intentional and negligent conduct illustrates the connection between the theory presented here and Holmes’s theory of intent standards. Recall that Holmes said that intent reduces to knowledge of facts that allows the typical person to foresee the harm resulting from his actions. It follows from this, and Holmes demonstrated, that when the likelihood of harm is very high (approaching one), as in the case of an intentional tort, the requisite knowledge of facts (necessary to foresee harm) is correspondingly low. When the likelihood of harm is not very high, the requisite knowledge of facts is correspondingly high, which applies to the case of negligence. The argument presented here is consistent with Holmes. The key innovation in this argument is the explanation for the intent standard.

---

<sup>28</sup> However, my argument has implications for the interpretation of the Hand Formula. The argument implies that the Hand Formula can be broken into a two-part analysis that begins with foreseeability and then considers burden. It often ends with foreseeability too. The question of burden becomes relevant only when it is clear that the defendant foresaw or should have foreseen harm to a third party or to property. The analysis often ends with foresight because plaintiffs bring negligence claims only in those cases where the burden of the proposed precaution is relatively small. One implication of this argument is that there will be relatively few cases, in the sample of those reaching judgment, that actually examine the burden of precaution. It follows that claims that the role of burden is exaggerated in the Hand analysis are of questionable validity. Weinrib, for example, has made this assertion. See ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 148-50 (1995). I find unpersuasive Weinrib’s claim that the English and Commonwealth approaches to negligence reveal a reluctance, in contrast to the American approach, to consider the burden of precaution. The American and English approaches appear to be the same. And the screening process that rational parties will implement in the litigation process will produce a sample of cases in which the burden of precaution is rarely considered.

The foregoing account of the intent standard provides a way of reconciling the seemingly conflicting results in the battery cases involving children as defendants.<sup>29</sup> In *Vosburg v. Putney*, George Putney was held liable to Andrew Vosburg for the unexpectedly severe harm attributed to his kick. One lesson often drawn from *Vosburg v. Putney* is that intent to harm or foresight of harm is not a requirement for liability under battery doctrine. However, in *Horton v. Reaves*, the infant defendants, three- and four-year-old children, were not held liable for severe head injuries to a five-week old baby that they had rough-handled while the baby's mother was away.<sup>30</sup> These seemingly conflicting results can be reconciled under the view that liability for battery requires awareness on the part of the injurer that his act will impose a cost on someone (secondary volitional intent). George Putney was almost twelve years old when he kicked Andrew Vosburg, old enough to know that a kick could harm someone. The infant defendants in *Horton v. Reaves*, though aware of their own physical acts, were not aware of the potential harm to the baby.

*B. Variation of Intent Standards within the Class of Basic Intentional Torts: The Role of Transaction Costs*

Secondary volitional conduct, in the sense of being aware of the immediate physical consequences of one's action, is a necessary condition for liability for intentional conduct. The reason is that tort law functions as a pricing mechanism that internalizes costs optimally. The intent standard that serves this pricing role best in the intentional torts case is the secondary volitional level. In this part, I argue that transaction costs play a role in determining whether the secondary volitional requirement is a sufficient as well as necessary condition for liability.

Although secondary volitional conduct is generally necessary for liability in the intentional torts context, it is not always sufficient. In general, the intent requirement is a little higher for battery than for trespass. There is a well understood exception for liability in the case of a touching that is generally treated as a pleasantry.<sup>31</sup> For example, if a

<sup>29</sup> See, e.g., *Horton v. Reaves*, 526 P.2d 304, 308 (Colo. 1974); *Walker v. Kelly*, 314 A.2d 785, 788 (Conn. Cir. Ct. 1973); *Vosburg v. Putney*, 50 N.W. 403, 404 (Wis. 1891).

<sup>30</sup> The apparent conflict between *Vosburg v. Putney* and *Horton v. Reaves* is noted in GRADY, *supra* note 15, at 108.

<sup>31</sup> E.g., *Mohr v. Williams*, 104 N.W. 12, 16 (Minn. 1905) (“[A]ny unlawful or unauthorized touching of the person of another, except it be in the spirit of pleasantry, constitutes assault and battery.”). However, the pleasantry exception does not extend to the case in which the defendant acts against the objections of the plaintiff in order to do something that he thinks is best for the plaintiff. See, e.g., *Clayton v. New Dreamland*



1232 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 44

law partner pats an associate on the back to congratulate the associate for her work, most people would regard that touching as a pleasantry. If, by some bizarre chain of events, the associate's shoulder fell off after the touch, the associate would have a difficult time prevailing on a battery claim because of the pleasantry exception. In short, the secondary volitional standard is necessary for batteries, but not always sufficient.

I am aware of no such pleasantry exception in trespass law. If *A* wanders over to *B*'s property and rearranges his flowers on the theory that the new arrangement will be more to *B*'s liking, *A* will be found guilty of trespass. This is so even if *A* knows *B*'s preferences and is correct in his view that his arrangement will be preferred by *B* over the old flower arrangement. The level of intent required by trespass is just an intention to have the immediate physical consequence, which is to be on *B*'s land. There is no requirement that *A* intend to hurt *B* in any way and no exception for "pleasant trespasses." As a result, the secondary volitional requirement is both necessary and sufficient for trespass liability.

Why do we observe this subtle difference between the intent standards for trespass and battery? The reason is transaction costs, which are higher in the battery than in the trespass context. Think of what happens in the battery context. Many batteries arise in the course of spontaneous social interaction. The law partner walks over to the associate and pats him on the back. *B* taps *C* on the shoulder to get his attention. Although the conduct is intentional, there is no time for the actor to seek permission from the person acted on. To seek such permission in all cases would ground a good deal of social interaction to a halt.

Trespasses to real property, in contrast, do not typically arise out of the context of spontaneous social interaction. It is much easier, in general, than in the battery context for the actor to seek permission from the property owner before crossing the boundary. Nothing requires *A* to act immediately to rearrange the flowers on *B*'s property. *A* can contact *B* first and seek permission.

Of course, trespass law makes exceptions in the cases where *A* had to act quickly with good reasons. A ship owner who ties his boat to *B*'s dock in order to prevent it from being blown away in a storm does not have time to seek permission before using *B*'s property. The law makes an exception by giving the ship owner a necessity defense to the trespass

---

Roller Skating Rink, Inc., 82 A.2d 458, 463 (N.J. Super. Ct. 1951) (defendant liable for battery when defendant, over objections of plaintiff, manipulated plaintiff's broken arm with the intention of aligning it correctly).

charge.<sup>32</sup> The necessity argument typically arises in settings where transaction costs prevent negotiation from taking place before the actor uses another person's property. However, the exception provided by the necessity defense does not affect the liability of the actor who uses another person's property. The existence of a necessity defense does not absolve the actor from liability.<sup>33</sup>

Because the transaction costs of seeking permission are lower in the trespass than in the battery context, the intent standard is also lower in the trespass context. The reason is that the law encourages potential trespassers to seek permission and, if necessary, bargain for access rather than invading someone's property. Overall social costs are lower if people seek consent and if necessary pay for access to private property, rather than invade and compel property owners to litigate in order to enforce their entitlements.

Even within the battery context, intent standards vary. In *Mohr v. Williams*,<sup>34</sup> a doctor was held liable for battery for operating on the patient's left ear, when he had told the patient that he would operate on the right. One could make the case that the doctor's conduct should fall within the pleasantries exception for batteries. The doctor's decision took place under a high-transaction cost setting, since the patient had been anesthetized, and it was intended to leave the patient better off than she was before the operation. That these arguments were insufficient to avoid liability for battery suggests that the triggering point for liability in medical intervention cases is lower than that for ordinary batteries. The secondary volitional standard—awareness of immediate physical consequences—is both necessary and sufficient for liability in the medical invasion case.

The transaction cost rationale serves as an adequate explanation for the relatively low intent standard for medical invasions. In general, the costs of seeking permission for the precise invasion intended are low in the medical context. The physician simply has to disclose his plans to the patient and seek consent. Given the low cost of seeking consent, the intent standard sufficient for liability should also be low, as in the trespass setting. Setting the intent standard low gives doctors, as well as trespassers, incentives to bargain first rather than invade, or to use the

---

<sup>32</sup> *Vincent v. Lake Erie*, 124 N.W. 221, 222 (Minn. 1910); *Ploof v. Putnam*, 71 A. 188, 189 (Vt. 1908).

<sup>33</sup> *Vincent*, 124 N.W. at 222.

<sup>34</sup> 104 N.W. 12, 16 (Minn. 1905).

1234 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 44

market rather than take, which is a central goal of much of the common law.<sup>35</sup>

As in the trespass setting, there are events that justify medical invasions where the physician has not received consent. The most common is the case of emergency, which traditionally required a risk of death or serious injury to justify the nonconsensual invasion. The emergency exception was expanded in *Kennedy v. Parrot*<sup>36</sup> to allow a specific type of nonconsensual invasion, extensions of surgical operations within the area of the original incision, when the benefits of the operation clearly outweighed the costs of postponing it. In both its traditional form and in the *Kennedy v. Parrot* version, the emergency defense involves a setting where transaction costs prevent the physician from gaining consent before the invasion. The patient is typically under anesthesia already and the physician discovers that some nonconsensual invasion is necessary in order to prevent a serious injury to the patient.

Although the transaction cost theory helps explain both the low intent standard for battery liability in the medical context, and the existence of the emergency defense, it also implies that the emergency defense should narrow in the present and future. As medical technology progresses, the cost of gaining consent to all possible invasions connected to any planned surgery falls. Physicians can use x-rays, magnetic resonance imaging, and ultrasound to see inside a patient's body and obtain the information necessary to foresee all of the surgical procedures that might be desirable. Because the costs of gaining consent to all foreseeable surgical procedures are falling, the courts should be less forgiving of nonconsensual invasions that are claimed by the physician to be justified under the emergency defense.<sup>37</sup>

---

<sup>35</sup> See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1098 (1972); Richard A. Posner, *An Economic Theory of Criminal Law*, 85 COLUM. L. REV. 1193, 1229 (1985). See generally Keith N. Hylton, *Property Rules and Liability Rules, Once Again*, 2 REV. L. & ECON. 137 (2006).

<sup>36</sup> 90 S.E.2d 754, 760 (N.C. 1956) (during appendectomy, physician discovered cysts on plaintiff's left ovary, which he punctured without plaintiff's consent.)

<sup>37</sup> However, there is a factor that operates to increase transaction costs, even as technology works to reduce uncertainty. As medical technology permits physicians to better foresee all desirable surgical procedures, it also gives them the ability to foresee all of the possible problems and contingencies. The result could be an "information overload" in which physicians find it prohibitively costly to both predict and explain all of the sequences of events that might arise during surgery.

*C. Tertiary Volitional Conduct as a Minimum Requirement of Tort Liability*

The tertiary volitional intent requirement—foreseeability of or intent to harm—applies to a broad class of intentional torts including assault, defamation, and intentional infliction of emotional distress. Foreseeability of harm or intent to harm is a necessary condition for liability within this class of torts. This is a higher intent standard than that for trespass. For simplicity, I focus on the standard for assault.

The reason that the intent standard for assault requires more in terms of knowledge and awareness than that for battery is to avoid over-internalization of costs (or, equivalently, over-regulation, or over-deterrence). Over-internalization means a level of internalization that over-deters or over-regulates the underlying activity by pushing it to a level such that the benefits forgone by constraining the activity exceed the costs avoided.

To see the argument, compare the standard for assault to the standard for battery. Recall that the assault standard requires intent to harm or to put one in fear of immediate harm. Why not simply require the same intent level as battery—namely, the secondary volitional (or “awareness of immediate physical consequences”) standard?

Suppose the intent standard for assault were the same as that for battery. The first difficulty is determining what it would mean to apply the secondary volitional standard to assault. It would be unworkable if a court held that intent to have immediate physical consequences were satisfied by a person who stretched his arms out, unaware of anyone else in his presence, when the other person was put in fear of harm by that action. At a minimum, the secondary volitional intent level requires some awareness of an effect on a third person. The only workable version of the secondary volitional standard in the context of assault would be one that finds the intent requirement satisfied when the defendant does an act that invades the plaintiff’s “zone of danger.”<sup>38</sup> If we imagine a line drawn around the plaintiff beyond which he is safe from an immediate battery by the defendant, a defendant would invade that zone of danger by entering into that space in full awareness that the plaintiff perceives the invasion.

Suppose, then, that the intent standard for assault required only an intent to invade the plaintiff’s zone of danger, as just defined. Under this

---

<sup>38</sup> The zone-of-danger test has been developed in the context of claims for damages connected to the negligent infliction of emotional distress. See *Amaya v. Home Ice, Fuel & Supply Co.*, 379 P.2d 513, 514 (Cal. 1963); *Dulieu v. White & Sons*, 2 K.B. 669 (1901). These cases permit the plaintiff to recover damages caused by the negligent infliction of emotional distress if the plaintiff was in the zone of danger, in the sense of being personally at risk of serious physical injury.

## 1236 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 44]

standard, the plaintiff in *Tuberville v. Savage*<sup>39</sup> probably would have been guilty of assault, which may have justified the defendant's battery of the plaintiff. The plaintiff put his hand on his sword and said to the defendant, "if it were not assize time, I would not take such language from you."<sup>40</sup> The court found that the plaintiff had not assaulted the defendant, so the defendant was held liable for his battery of the plaintiff.

Although *Tuberville* supports the proposition that mere words are insufficient to constitute an assault, we have more than mere words in the case. We also have the plaintiff putting his hand on his sword while speaking to the defendant. If the plaintiff had been physically close enough to the defendant to strike him with the sword, the defendant may have felt threatened by the combination of words with a hand on the sword. This presumably satisfies the invasion-of-personal-danger-zone standard hypothesized here. Under an intent standard that required proof that the defendant intended to invade the victim's zone of personal danger, the plaintiff in *Tuberville* would have been guilty of assault.

The over-deterrence risk becomes clear once we see that a lower intent standard for assault—specifically, one approximating the secondary volitional level by triggering liability when the defendant violates the plaintiff's zone of danger—probably would have led to a different result in *Tuberville*. The plaintiff's conduct in *Tuberville* is expressive. He wanted to emphasize his point that he found the defendant's language insulting by saying that he should not tolerate it and at the same time putting his hand on his sword. The combination of emphatic speech and gestures that could be viewed as threatening is common in ordinary social interaction. A rule that imposed liability on such conduct would chill a good deal of ordinary speech.

For example, many people have a habit of approaching the opposing party in the course of a heated argument, as if the physical closeness would force the opponent to shrink from his position. This combination of speech and conduct is designed to get the attention of the other party, but it does so by making him think that there is at least a slight risk of an assault. A colleague emphasizes his points in arguments at close range by putting his hand into the shape of a gun and aiming it at the target of his speech as he makes each of his points. No one is fooled into thinking that he is about to be shot, but the technique does get the attention of the listener. These examples involve—for better or for worse—common

---

<sup>39</sup> 86 Eng. Rep. 684 (K.B. 1669).

<sup>40</sup> *Id.* at 684.

methods of argument that could result in liability under a low intent standard for assault.

It remains to explain why it would be undesirable to chill speech, though the point will be uncontroversial to most and the reason familiar from the literature. Speech, as a form of information provision, is a public good. As such, it delivers benefits that are non-rivalrous, in the sense that they can be shared by many. One standard result of economics is that non-rivalrous goods tend to be underprovided in normal market conditions. The law can help to correct this market failure by adopting liability standards that steer clear of imposing costs on the provision of information.<sup>41</sup> This is the economic case for adopting liability standards that avoid burdening speech.

Again, the function of liability is to set up a pricing mechanism that internalizes costs. But there is a background reason for internalizing costs. That reason is to generate activity that approximates what would result in an ideal market. I have suggested so far that battery and assault differ in the sense that speech is a significant component of the activity that could give rise to assault charges. Because speech is an important component of the activity, an intent rule that raises the triggering point for liability under assault higher than that for battery avoids over-deterrence of speech.

Now one could argue on the basis of the foregoing that since battery often has an expressive component, the tertiary volitional (intent to harm) standard should be applied to battery in order to avoid overinternalizing costs. After all, war is simply politics carried out by other means. I described assault as intermingled with speech, rather than expression, in order to avoid suggesting that the law should subsidize any conduct that can be described as expressive.

The problem with the war-as-politics argument is that battery, if it can be described accurately as expression, is an extremely unproductive and costly form of it. A person who says "I hate the New York Yankees," communicates the idea to others more effectively than someone who beats up Yankees fans. Battery, as a form of expression, is so much less effective and more costly than speech that arguments for subsidizing speech cannot be carried over to the case of expressive battery.

#### 1. Defamation and Intentional Infliction of Emotional Distress

The argument presented so far for applying the tertiary volitional (intent to harm) standard to assault applies also to the torts of

---

<sup>41</sup> RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* 262 (1981).

1238 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 44

defamation and intentional infliction of emotional distress. Both torts involve speech. Defamation involves speech that damages the reputation of the victim. Intentional infliction of emotional distress involves speech that harms the victim directly. In both cases, the intent to harm standard applies.

To be sure, there are differences in the way the intent-to-harm standard is described in the legal tests for defamation and for intentional infliction of emotional distress. These differences seem to suggest that the standards differ from each other and that they perhaps should not be described as intent-to-harm tests. Still, if one cuts to the core function of the standards in both cases, it appears fair to treat them as intent-to-harm standards.

Defamation, for example, has been described as a strict liability tort (e.g., Prosser) and by others as requiring proof of malice (e.g., Holmes). The strict liability position asserts that the defendant is strictly liable for defamation, but has defenses available based on truth and privilege.<sup>42</sup> The malice view asserts that the defendant is liable for defamation only if no defense based on privilege or truth can be successfully asserted, and in that case, the defendant is deemed to have acted with malice.<sup>43</sup> Both positions say the same thing about defamation, describing the glass as either half-empty or half-full.

Whether one describes defamation as a strict liability tort or one based on fault or malice is unimportant. Under either description, the intent standard that triggers liability is the tertiary volitional (intent to harm) standard. To see this, suppose it is established that the defendant has no credible defense based on truth or privilege. The absence of a privilege means that there is no objective benefit deriving from the defendant's defamatory statement to himself, the victim, or some third party. The reasonable inference is that the defendant made his defamatory statement for the sole purpose of imposing a loss on the victim. This is the kind of intent that the tertiary volitional standard requires.

Suppose a defendant in a defamation action does have a credible defense based on privilege. That means that even though there was a substantial and foreseeable harm to the plaintiff, there was also a substantial benefit to someone. For example, a prospective employer may have been warned about the plaintiff's propensity to steal. Since the defendant was aware of the cost imposed on the plaintiff, the defendant's intent level satisfies the secondary volitional standard because he was aware that a cost would be imposed on someone. Since

---

<sup>42</sup> PROSSER, *supra* note 1, at 772-74.

<sup>43</sup> HOLMES, *supra* note 7, at 138-40.

defamation law holds that mere knowledge that a cost would be imposed on someone is insufficient for liability, it rejects the secondary volitional standard applied in the cases of battery and trespass.

Now consider intentional infliction of emotional distress. The Restatement says that in addition to malice or intent to harm, the law requires extreme or outrageous conduct.<sup>44</sup> But these additional requirements appear to be designed to provide an objective standard or barrier that prevents unusually sensitive or timid plaintiffs from flooding the courts with claims of emotional distress. The outrageousness requirement does not change the intent standard from the tertiary volitional level to some higher intent level. It is merely an effort to make the standard administrable.

## 2. Economic Harms

This framework applies to the economic harm cases as well. The tertiary volitional or intent-to-harm standard applies, in the sense that the actor will not be found liable unless the facts imply that the sole purpose for his acts was to harm the victim. The reason the tertiary volitional standard applies is the same as in the case of assault: in order to avoid deterrence of socially beneficial activity.

Consider tort law's treatment of economic predation. The most common types of claims in this area are inducement of breach of contract, interference with prospective advantage, and unfair competition. To illustrate the point that the tertiary volitional standard applies, I consider two of the economic harm cases examined by Epstein in his study of intentional torts.

In *Mogul Steamship Company v. McGregor Gow & Company*, the defendant shipowners formed a conspiracy for the purpose of gaining exclusive control over the shipping of tea from China to England.<sup>45</sup> The defendants offered a rebate on each shipment, which the customer would forfeit for the entire year if he shipped tea with a firm that was not a member of the cartel. They also agreed that if any shipper outside the cartel attempted to compete with them, they would drive the freight rate to a level that would make it unprofitable. The plaintiff, one of the firms excluded from the cartel, claimed that the defendants had intentionally deprived him of his right to ship tea on the China-England route. The plaintiff's claim was dismissed because:

---

<sup>44</sup> RESTATEMENT (SECOND) OF TORTS § 46 (1966) (noting that one who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm).

<sup>45</sup> 23 Q.B.D. 598, 598 (1889), *aff'd*, [1892] A.C. 25.



1240 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 44

there was here no personal intention to do any other or greater harm to the plaintiffs than such as was necessarily involved in the desire to attract to the defendants' ships the entire tea freights of the ports, a portion of which would otherwise have fallen to the plaintiff's share.<sup>46</sup>

This was a zero sum game, in the sense that all of the trade would either go to the defendants or some of the trade would go to the plaintiff. The court's conclusion suggests that the defendants would not be held liable as long as they were trying to ensure that they got all of the trade. On the other hand, if they took actions that went beyond simply trying to garner all of the business, the court would have decided in favor of the plaintiff.

*Mogul v. McGregor* can be understood as establishing the tertiary volitional (intent to harm) standard as a requirement for liability in economic predation cases. The court clearly rejected the secondary volitional (knowledge of potential harm) standard, since its decision would allow the defendants to impose a cost on the plaintiff (losing his business) as long as it was a necessary byproduct of trying to gain as much business as they could. *Mogul v. McGregor* implies that defendants would be held liable for competitive conduct only if the facts suggest that the sole purpose of the conduct is to harm the plaintiff.

The intent to harm standard is the optimal standard for cases of predatory competitive conduct. The reason is that a lower standard, specifically one triggering liability on the basis of knowledge of harm (secondary volitional), risks imposing liability on every act of competition. Competition, like speech, is activity that provides spillover benefits beyond the particular customer who happens to find an item at an unusually cheap price. Competition pushes a commodity's price toward marginal supply cost, which maximizes the difference between the social benefits of consumption and the resource costs of supply. The intent standard adopted in *Mogul v. McGregor* provides a subsidy of a sort to competitive market activity.

*Keeble v. Hickeringill* is an example where the defendant was held liable for economic predation.<sup>47</sup> The plaintiff used duck decoys to lure fowl to his land, to capture and sell. The defendant turned the fowl away by shooting his gun and was held liable.

Under the hypothesis that the tertiary volitional standard is required for cases of economic predation, *Keeble v. Hickeringill* is easily reconciled

---

<sup>46</sup> 23 Q.B.D. at 614.

<sup>47</sup> 103 Eng. Rep. 1127 (Q.B. 1706).

with *Mogul v. McGregor*. In *Mogul v. McGregor*, the defendants' interference with the plaintiff's business was a necessary byproduct of their effort to secure all of the trade to themselves. In *Keeble v. Hickeringill*, the defendant set out to destroy the plaintiff's business; destruction was the sole purpose of his conduct.

#### V. ECONOMICS VERSUS CONSENT AS EXPLANATIONS FOR INTENTIONAL TORT DOCTRINES

As noted, Epstein's consent-based analysis is the only piece in the law and economics journals that looks closely at the intent standards articulated in tort law. His analysis rejects economics as a way of understanding the law of intentional torts. My effort has been to show that the economic approach can indeed be used to explain the intent standards of tort law at a high level of detail.

The consent-based approach seems to have a great deal of explanatory power when we first focus on the intent standard for battery. Because the intent level required for liability under battery is only the secondary volitional level (awareness of contact), one could argue that liability for battery is based on lack of consent. In other words, since intent to do harm is not a necessary condition for liability, one could argue that the essential feature triggering liability is failure to gain consent.

However, the consent-based approach does not seem to provide an explanation for the secondary volitional level as the necessary condition for liability for intentional torts. If lack of consent is the key reason for liability, then why not hold someone liable for battery even when they are unaware of the cost imposed on the victim? Why should a person who stretches out his arm while yawning, and hits another person, be able to avoid liability for battery if consent is the key to understanding intentional tort doctrine? If consent is at the source of the law on battery, why should a person who is thrown from his horse and lands on someone else be able to avoid liability? Once these questions are answered, the consent theory needs to explain why intent to harm (tertiary volitional) is the necessary condition for liability for assault.

In order for a theory based on consent to serve as an adequate rationale for intentional tort doctrine, it must be coupled with a theory of fundamental rights, which is part of Epstein's analysis to be sure. A theory of fundamental rights, however, forces us to inquire into the source of these rights, which has been controversial since Bentham. In the end, there may very well be a good explanation for their source. The economic approach has the advantage of providing an explanation for

1242 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 44

the rules while avoiding the controversial and daunting task of specifying a set of a priori fundamental rights.

VI. CONCLUSION

Economic analysis of law has expressed puzzlement at the intent rules in the law, beginning with Becker's discussion of criminal law in 1968.<sup>48</sup> Under the standard economic approach, which focuses on internalization of external costs, the actor's intent would appear to be irrelevant. External costs should be internalized, or shifted back to the source, whether or not the actor intended to externalize them.

This Lecture advances the literature by using economic reasoning to explain the legal rules governing intentional torts. The main lesson is that if one's goal is to internalize costs in an optimal manner, intent does matter. The intent rules of tort law function as a pricing mechanism that ensures optimal regulation of injury-causing activity. Optimal regulation avoids underdeterrence of harmful conduct and overdeterrence of beneficial activities. A careful look at the various intent levels identified in tort law suggests that the ones actually used by courts as necessary conditions for liability appear to perform better than available alternatives as regulatory devices.

---

<sup>48</sup> See generally Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. & ECON. 169 (1968).