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CONCEPTUALIZING THE INTENTIONAL TORTS

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Abstract. According to the most recent draft of the Restatement (Third) of Torts: Intentional Torts to Persons, the intentional torts protect the rightholder’s interests differently from negligence-based rules and strict liability, placing them into a distinct substantive category. This conceptualization, however, does not provide courts with adequate guidance on how to formulate the element of intent. Different formulations can protect the rightholder’s interests differently from negligence and strict liability, so something else must determine the appropriate way to formulate the element of intent.

The draft Restatement’s reasoning can be easily extended to provide a more useful conceptualization of the intentional torts. The practice of tort law involves the enforcement of behavioral norms, and so the substantive categories of tort law should correspond to normatively distinguishable categories of behavior. For tort purposes, three different paradigmatic forms of social behavior are relevant: aggressive interactions; interactions of mutual advantage; and the remaining nonaggressive, risk-creating interactions that are not motivated by an expectation of mutual benefit. Within this normative framework, the category of intentional torts is defined by aggressive interactions, which involve intentional harms that are normatively different from accidental harms. The intentional torts accordingly protect different interests in a distinctive manner as per the rationale in the draft Restatement.

This normative framework straightforwardly explains a number of established rules while also resolving two questions of intent that have vexed courts and commentators. Difficult issues of intent involve hard questions about how the conduct is best categorized for tort purposes. Once the categories have been conceptualized in behavioral terms, the element of intent has a clear substantive purpose: it determines whether or not an interaction is aggressive and properly governed by the intentional torts.
INTRODUCTION

Tort law is conventionally categorized in terms of the intentional torts, negligence-based rules, and strict liability. The categories are defined by basic differences among the elements. The element of intent distinguishes the intentional torts from the rules of negligence and strict liability, and the element of fault distinguishes negligence from strict liability. These differences are obviously important, but they mask a fundamental and surprisingly understudied question. Are the substantive differences that are most relevant for categorizing the rules of tort law adequately captured by differences among their elements?

Consider the intentional torts. Why does the element of intent stake out a distinct substantive category of tort law? According to the Restatement (Third) of Torts: Liability for Physical and Emotional Harms, “tort law must distinguish between intentional and nonintentional consequences and harms” because “[h]arms that are tortious if caused intentionally may not be tortious if caused unintentionally; affirmative defenses available in negligence cases may not be available when the underlying tort is intentional; [and] the limitation period may vary depending on whether the tort is one of intent or instead one of negligence.” The element of intent can have substantive implications, but the question remains: Why?

In one respect, the answer seems obvious. One who intentionally harms another would seem to be more culpable than one who accidentally injures another. Culpability provides an evident reason for placing the intentional torts into a category that substantively differs from the accidental harms governed by negligence and strict liability, each of which also apparently differ in terms of culpability (fault versus no-fault).

The intentional torts, however, cannot be grouped on this basis. One can be liable for an intentional tort without fault or the blameworthy intent to harm the victim, and so culpability does not unify the intentional torts. Why, then, does the element of intent define a distinct substantive category of tort law?

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1 The modern conception of tort law has been profoundly shaped by Oliver Wendell Holmes, whose contributions include “the placement of liability for negligence at the doctrinal and practical center of the law of torts”; and “the division of tort law into three parts: intentional, negligence-based, [and] strict liability.” Thomas C. Grey, Accidental Torts, 54 Vand. L. Rev. 1225, 1257 (2001). “His account of the subject happened to fit with the flow of events and so took hold, and now it strikes us almost as common sense rather than theory.” Id. at 1254.

2 Restatement (Third) of Torts: Liability for Physical and Emotional Harms § 1 cmt. a (Am. Law Inst. 2010).

3 See infra Part I.
The issue is addressed by the most recent draft of the \textit{Restatement (Third) of Torts: Intentional Torts to Persons}, which substantively distinguishes the intentional torts in terms of the interests they protect.\footnote{\textsc{Restatement (Third) of Torts: Intentional Torts to Persons,} Scope Note to Project (AM. LAW INST. Tent. Draft No. 1, April 8, 2015).} The intentional tort of assault, for example, protects “an individual’s interest in freedom from anticipation of a harmful or offensive bodily contact.”\footnote{\textit{Id.} § 105 cmt. b.} By legally protecting this interest, the tort of assault creates both an individual right with respect to the interest, and a correlative duty requiring others not to invade or otherwise interfere with it. Consequently, “[t]he tort of assault recognizes a person’s legal right not to suffer intentional and unwanted anticipation of imminent harmful or offensive bodily contacts.”\footnote{\textit{Id.}}

Though sound, this reasoning is largely definitional; it reframes the tort of assault in terms of the underlying tort right without otherwise explaining why tort law enforces the right in the first instance.

Recognizing as much, the draft \textit{Restatement} also provides a substantive rationale for the intentional tort of assault:

That right . . . is rooted in a fundamental interest in emotional security or well-being. While the right recognized by the tort of assault is not as broad as freedom from all types of unjustified emotional harm, the tort nonetheless directly protects a particular and important dimension of emotional well-being. The tort also protects interests in physical security, dignity, and autonomy. The tort singles out acts that intentionally invade a person’s freedom from mental disturbance in a particular way—by causing the person to anticipate an impending harmful or offensive bodily contact.\footnote{\textit{Id.}}

This rationale, though instructive, is not adequately developed. Why does the tort of assault “single out” in a “particular way” one’s conduct that interferes with another’s “freedom from mental disturbance”? Does the element of intent single out this conduct in a manner that coheres with the other types of conduct singled out by the other intentional torts? More generally, why do normative concerns about security, dignity, and autonomy justify the intentional torts as a distinct substantive category of tort law, given that these same concerns can also justify negligence and strict liability?

True to the nature of its project, the draft \textit{Restatement} in this respect is largely reflective of the current state of case law and associated legal
commentary. “Comparatively little scholarship has explored the appropriate
distinction between the intentional torts, such as battery, assault, and false
imprisonment, and the non-intentional torts, such as the negligent infliction
of physical or emotional harm and strict liability for defective products and
abnormally dangerous activities.”

Though relatively neglected, the reasons for distinguishing the
intentional torts have implications both for the structure of tort law and for
doctrinal issues. The element of intent determines whether conduct is
governed by an intentional tort. Unless these torts are adequately
categorization as a distinct substantive category, courts will not have
sufficient guidance for resolving hard issues of intent that arise in cases for
which it is unclear whether the conduct is properly governed by the
intentional torts or one of the other substantively different categories.

As I will argue, the intentional torts comprise a substantive category for
well-established reasons that are recognized though not fully developed by
the draft Restatement. This conceptualization shows why tort law relies on
the element of intent to define a distinct category of tort law, which in turn
clarifies what is at stake when courts must decide whether any particular
form of conduct falls within this category.

The argument proceeds in three parts. Part I more fully explains why the
draft Restatement categorizes the intentional torts in terms of the individual
interests protected by these torts. In contrast to the rules of negligence and
strict liability, the intentional torts protect certain interests in distinctive
ways for reasons of security, dignity, and autonomy. A court that recognizes
these differences, however, will not know why they justify formulating the
element of intent in one way rather than in other ways that would also
protect these interests differently from the rules of negligence and strict
liability. Though helpful, the draft Restatement’s rationale for the
intentional torts is incomplete.

Part II shows how the draft Restatement’s reasoning can be easily
extended to provide a more useful conceptualization of the intentional torts.

8 Nancy J. Moore, Intent and Consent in the Tort of Battery: Confusion and Controversy, 61 AM.
U. L. REV. 1585, 1587 (2012). In addition to this article, for other exceptions to “the general lack
of interest among contemporary torts law scholars concerning the intentional torts,” id. at 1589,
see Ellen M. Bublick, A Restatement (Third) of Torts: Liability for Intentional Harm to Persons—Thoughts,
44 WAKE FOREST L. REV. 1335 (2009); James A. Henderson, Jr. & Aaron D.
Twerski, Intent and Recklessness in Tort: The Practical Craft of Restating Law, 54 VAND. L.
REV. 1133 (2001); Joseph H. King, The Torts Restatement’s Inchoate Definition for Battery, and
Reflections on the Province of Restatements, 33 PEPP. L. REV. 623 (2011); Craig M. Lawson, The
Puzzle of Intended Harm in the Tort of Battery, 74 TEMP. L. REV. 355 (2001); Anthony J. Sebok,
Purpose, Belief, and Recklessness: Pruning the Restatement (Third)’s Definition of Intent,
54 VAND. L. REV. 1165 (2001); Kenneth W. Simons, A Restatement (Third) of Intentional Torts?, 48
This framework is not based on a claim that tort law is best understood in terms of some substantive rationale like efficiency or fairness, a problematic foundation for a Restatement given the ongoing disagreement about the matter. It instead categorizes tort rules by reference to the paradigmatically different types of social interactions that have shaped the common law: interactions of aggression, interactions of mutual advantage, and nonaggressive interactions between individuals who are not otherwise cooperating for purposes of expected mutual benefit. For all three types of interactions, one of the parties can suffer injury or harm that is redressed by tort law. Each type, though, is normatively different and accordingly requires different types of tort rules. Aggressive interactions are governed by the intentional torts, each of which protects the rightholder’s interests in security, dignity, and autonomy for reasons that are normatively distinct to this type of interaction. As per the reasoning of the draft Restatement, the intentional torts substantively differ from the rules of negligence and strict liability for normative reasons that can be traced to the individual interests protected by these rules.

Part III then shows how this normative framework straightforwardly explains a number of rules in both the Restatement and draft Restatement, while rendering problematic their solutions to two questions of intent that have vexed courts and commentators. Difficult issues of intent involve hard questions about how the conduct is best categorized for tort purposes. Once the categories have been clearly conceptualized in behavioral terms, the issues can be clearly resolved. This framework is easily justified by the draft Restatement’s substantive rationale for the intentional torts, but the project would bring greater clarity to this body of tort law by expressly conceptualizing the intentional torts in these terms.9

I. THE INTENTIONAL TORTS AS A SUBSTANTIVE CATEGORY OF TORT LAW

To fully understand the substantive categories of tort law, we must begin with legal history. Although the common law originated within the writ system during medieval times, the modern tort system did not fully emerge until the writ system was abolished in the latter half of the nineteenth century.10 Legal actions no longer could be categorized in the procedural terms of writs; they had to be categorized in substantive terms,

9 Cf. Bublick, supra note 8, at 135-36 (“Attempts to structure varied doctrines into a broader framework of meaning force the collective of judges, scholars, and practitioners involved in the Restatement process to wrestle with problems that might otherwise be finessed—a virtue of the approach.”).

10 See Grey, supra note 1, at 1231 (explaining why the Field Code and subsequent abolishment of the writ system led to the emergence of the modern tort system).
yielding the different fields of the common law, such as contracts, property, and torts. The writs that first defined the early common law could have shaped the substantive categories of modern tort law.

To compensate the victim of a crime with a damages remedy levied against the criminal wrongdoer, the writ system centuries ago adopted rules that are now part of tort law. Legal claims based on these rules continued to be quasi-criminal until the late seventeenth century. Consequently, the early common-law courts “approach[ed] the field of tort through the field of crime.”

Due to the historical influence of the criminal law on tort law, the basic categories of criminal law may have also largely defined the basic categories of tort law. The criminal law relies on a hierarchy of culpability or fault that “ranges from intent, down to recklessness, then to negligence, then to strict liability.” Intentional crimes entail greater culpability than the other types of crimes, placing each into substantively different categories. These categories of the criminal law correspond to the conventional categories of tort law, and so the hierarchy of culpability within the criminal law could logically extend to tort law.

Thus, assume an actor has caused a particular type of injury, such as death or the loss of a limb. Holding constant the harm caused, this hierarchy of fault ranks different types of torts as follows. A strictly liable actor has done nothing wrongful, but still should pay if his actions cause the harm. A negligent act that causes the same harm is minimally culpable or wrongful. A reckless actor commits a more serious wrong. And an intentional actor commits the most serious type of wrong.

Although the hierarchy of culpability could define the categories of tort law for these reasons, closer analysis shows otherwise. “Contrary to such a construct, some intentional torts properly involve what amounts to strict liability for the intended consequences of reasonable, well-meaning conduct.” For example, if I take your umbrella on the mistaken belief that

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11 See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 2, at 8 (5th ed. 1984) (“[A]s late as 1694 the defendant to a writ of trespass was still theoretically liable to a criminal fine and imprisonment.”).
13 Simons, supra note 8, at 1088; see also MODEL PENAL CODE § 2.02 (1985) (defining the different types of culpability required by the criminal law).
14 Simons, supra note 8, at 1088.
15 Henderson & Twerski, supra note 8, at 1136-37 (citations omitted); see also Simons, supra note 8, at 1089 (“[T]he hierarchy is simply inaccurate with respect to a significant portion of intentional tort doctrine.”).
it is my own, I am liable for an intentional tort (trespass to chattels or conversion). Though liable for an intentional tort, I did not engage in culpable or morally blameworthy conduct. I honestly believed the umbrella was mine. As a matter of culpability, the intentional torts function like a form of no-fault liability in these cases; in effect, I am strictly liable for mistakenly taking your umbrella. The intentional torts do not always require culpability, unlike the intentional crimes. The hierarchy of culpability that defines the basic categories of criminal law does not apply to tort law.

Instead of being based on culpability, the intentional torts could be a category of particularized rules derived from more general rules of negligence and strict liability. For example, in cases of physical battery the defendant engaged in objectively unreasonable conduct that caused another to suffer physical harm, thereby satisfying the baseline rule of negligence liability. So, too, the intentional torts that function as a form of no-fault liability could be more particularized rules derived from the general rule of strict liability. The intentional torts could be a category of rules for intentional harms based on the underlying principles of negligence and strict liability that govern cases of accidental harms.

Consider in this regard the draft Restatement’s rationale for placing the intentional torts into a distinct category: “[I]ntentional torts protect fundamental interests in autonomy, dignity, and security. Their shape is more rule-like and more precise than negligence doctrines, which often take the form of flexible and general standards of reasonableness.”16 Like the intentional torts, negligence and strict liability can also protect interests in autonomy, dignity, and security. Consequently, the rule-like structure of the intentional torts might make them sufficiently different from the more generalized standards of negligence and strict liability governing accidental harms, justifying a distinct category of tort law.

This rationale for the intentional torts is rejected by the draft Restatement, which observes that “unlike negligence doctrines,” the intentional torts

frequently permit tort recovery—in the form of at least nominal damages—even absent proof of physical harm or emotional harm. At the same time, the different intentional torts to persons developed differently as a historical matter, and are distinct in their structure and in the interests they protect. They do not simply amount to arbitrary

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16 Restatement (Third) of Torts: Intentional Torts to Persons, Scope Note to Project (AM. LAW INST. Tent. Draft No. 1, April 8, 2015).
categories within a broader umbrella tort of intentionally causing physical harm or intentionally causing emotional harm.\textsuperscript{17}

The reasoning behind this conclusion is more fully developed by Kenneth Simons in an article published before the American Law Institute decided to restate the intentional torts to persons.\textsuperscript{18} As the Reporter for this project, his views about the intentional torts have understandably shaped the draft \textit{Restatement}.

According to Simons, the intentional torts protect interests that are “often quite different” from those protected by negligence and strict liability. Consequently, “we cannot confidently say that intentionally invading the first interest reflects greater fault than negligently invading the second. And in other cases, even if the interests are similar, the way in which the interests are protected or vindicated is quite different.”\textsuperscript{19} The intentional torts do not necessarily protect the same set of interests in the same manner as negligence or strict liability. Hence the intentional torts are not necessarily particularized, rule-like derivations of negligence or strict liability and must be grouped on some other basis.

Simons illustrates this point with the intentional tort of false imprisonment, concluding that

false imprisonment is a tort that most directly safeguards the interest in freedom from physical confinement, and only incidentally secures the more general interest in avoiding physical and emotional harm. Its protections cannot readily be compared with the protections afforded by negligence doctrine’s prohibition on causing physical harm by creating unreasonable risks.\textsuperscript{20}

This reasoning is now incorporated into the draft \textit{Restatement}, which substantially distinguishes the intentional torts from negligence (and by extension, strict liability) in terms of the interests they protect.\textsuperscript{21} The intentional torts protect fundamental interests in autonomy, dignity, and security in a manner that differs from the protection afforded by negligence and strict liability. These differences provide the reasons for defining the intentional torts as a substantive category of tort law.

To test this rationale for the intentional torts, we can apply it to the element of intent. This element formally distinguishes the intentional torts

\begin{footnotesize}
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\item \textsuperscript{17} Id.
\item \textsuperscript{18} Simons, \textit{supra} note 8.
\item \textsuperscript{19} Id. at 1080.
\item \textsuperscript{20} Id. at 1082.
\item \textsuperscript{21} See \textit{supra} notes 7-8 and accompanying text.
\end{itemize}
\end{footnotesize}
from negligence and strict liability. Difficult issues of intent, therefore, implicate the categorical question of whether the conduct is properly governed by an intentional tort or should instead be governed by negligence or strict liability. To resolve these issues, courts must rely on the categorical rationale for the intentional torts, leading to the question of whether the draft Restatement provides courts with adequate guidance on these matters.

Consider Simons’ discussion of false imprisonment:

Although false imprisonment is an “intentional tort,” it requires only that the defendant intend to confine, not that he intend to cause physical or emotional harm to the plaintiff. Thus, if a merchant detained a customer in the honest but incorrect belief that the customer has shoplifted an item from the store, at common law the merchant was liable, even if his mistake was reasonable. This is, of course, a form of strict liability.22

How can the element of intent categorically define the intentional torts when it takes the form of strict liability, the defining attribute of a different substantive category? Why not instead define false imprisonment so that it requires an intent to confine a customer who the merchant knows has not stolen anything? Under this formulation, false imprisonment would be clearly distinguishable from both ordinary negligence and strict liability, while also protecting an interest—freedom of movement—that is not otherwise protected by these other tort rules. Why isn’t the element of intent formulated in this categorically distinguishable manner?

Of course, tort law has already determined how the element of intent should be formulated for purposes of false imprisonment. The question, however, is whether this formulation can be adequately explained by the draft Restatement’s categorical rationale for the intentional torts. If not, then the rationale is incomplete, leaving courts without a clear understanding of why the element of intent is formulated in particular ways in particular contexts like false imprisonment. Without that understanding, courts will not have adequate guidance on how to formulate the element of intent for other cases in which the prior case law is not sufficiently clear.

As false imprisonment illustrates, the intentional torts can protect individual interests differently from the protections supplied by negligence and strict liability. Based on these differences, a court would not be able to determine why conduct is appropriately governed by an intentional tort. What, exactly, is the substantive role of intent that justifies the differential treatment of interests? Why does this element take the form of negligence in

22 Simons, supra note 8, at 1081.
some cases, and strict liability in others? Is intent derived from either negligence or strict liability, or is the element instead based on some other substantive concern? Different answers to these questions will justify different formulations of intent, as illustrated by our alternative definition of intent for false imprisonment. A court would not be able to resolve these issues and justify a particular formulation of intent, however, by simply recognizing that the intentional torts protect interests in autonomy, dignity, and security differently from the rules of negligence and strict liability. 23

A substantive rationale for the intentional torts should guide courts on the appropriate way to interpret the element of intent, enabling them to determine whether conduct belongs in the category of the intentional torts or instead in the distinct categories of negligence or strict liability. The guidance offered by the draft Restatement, while helpful, is incomplete.

II. PARADIGMATIC FORMS OF SOCIAL BEHAVIOR AND THE CATEGORIES OF TORT LAW

The draft Restatement’s reasoning can be easily extended to provide a more useful categorization of the intentional torts. To see why, we need to reconsider how the early common law developed. The common law was first based on customary norms of behavior that specified how individuals should interact with one another. These norms governed behavior across paradigmatically different types of social interactions, generating different rules for each of them. These behavioral paradigms still have normative relevance and make it easy to conceptualize the intentional torts, placing them into a normatively distinct category for reasons that directly follow from those invoked by the draft Restatement.

A. Normative Development of the Early Common Law

The first forms of the common law “simply codified existing custom” that governed behavior in the state of nature (or society not governed by centralized governmental authority). 24 The customs were often based on

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23 See Moore, supra note 8, at 1639-45 (showing why the element of intent for purposes of battery liability is not adequately defined by the different manner in which the torts of battery and negligence protect a rightholder’s interests, because that difference does not answer the question of how far the law should go in protecting these interests).

24 James Q. Whitman, At the Origins of Law and the State: Supervision of Violence, Mutilation of Bodies, or Setting of Prices?, 71 CHI.-KENT L. REV. 41, 53 (1995); see also J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 1–2 (4th ed. 2002) (“Given the many vicissitudes of the tribes and peoples which inhabited Britain before the Normans, any search for the laws or customs of England before the emergence of the nation itself is bound to fail. To the extent that
norms of reciprocity that sought to attain equitable balance between interacting parties. In general, “the principle of reciprocity . . . pervade[d] every relation of primitive life and is exemplified in many other ways.” Of the myriad reciprocity norms that governed behavior in the state of nature, three different types were particularly important for the early common law. Each governed a paradigmatically different form of social interaction, ranging from hostile aggressions to cooperative endeavors undertaken for reasons of expected mutual benefit. Each reciprocity norm and its underlying behavioral paradigm then framed an important field of the early common law.

The state of nature as famously depicted by Thomas Hobbes was “solitary, poore, nasty, brutish, and short.” The latter adjectives describe the social conditions that predictably ensue from the constant threat of aggression and the induced responses of fear and the concomitant desire to maintain one’s honor to deter future aggression—the principal causes of “quarrel” in the state of nature according to Hobbes. These hostilities define the paradigm of aggressive interactions.

The state of nature, however, was not “solitary” as Hobbes had claimed. “People in nonstate societies cooperate extensively with their kin and allies,” involving activities such as “foraging, feasting, singing, storytelling, childrearing, tending to the sick, and the other necessities and pleasures of life.” These cooperative activities define the paradigm of mutual advantage, in which individual interactions are a source of expected mutual benefit.

These two types of social interactions are paradigmatically different for obvious reasons. Aggressive interactions are inherently noncooperative; they necessarily involve one individual (the attacker) who can benefit from the interaction only by taking something owned by the other (the victim). In contrast, interactions of mutual advantage are inherently cooperative because they require the voluntary participation of each party to attain the expected benefits.

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25 See generally William Ian Miller, Eye for an Eye 22 (2006) (explaining that for individuals in the state of nature, “[r]eciprocity, paying back what you owe, means everything to your moral standing, to your character”).
26 Richard Thurnwald, Economics in Primitive Communities 106 (1932).
28 Id. at 88.
This paradigmatic difference generated different reciprocity norms recognized by the moral code of the talion (or *Lex Talionis*). Aggressive interactions spawned the norm of talionic revenge, captured by the biblical passage commonly paraphrased as “an eye for an eye, a tooth for a tooth.”\(^{30}\) Whereas aggression merited the negative reciprocity of punishment in kind (the eye for an eye), mutual advantage involved the positive reciprocity of giving in kind, such as “the reciprocal exchange of vegetables and fish between inland communities and fishing villages.”\(^{31}\) The paradigm of mutual advantage was governed by a norm of positive reciprocity different from the norm of negative reciprocity that governed the paradigm of aggressive interactions.

The two extremes of aggression and cooperation effectively carve out another normative category of social interactions—those that are neither aggressive nor ones of mutual advantage. Whether cooperating with others or acting for their own nonaggressive purposes, individuals can accidentally harm someone else. These injuries are an unintended byproduct of the behavior rather than its object, and so the interaction in this respect is not inherently noncooperative. These nonaggressive interactions are also not inherently cooperative. They can involve individuals who are each acting independently and each pursuing his or her own purposes that do not require the other’s participation. For example, the benefit that one expects to gain from traveling on a public road does not require the presence of an oncoming traveler. These interactions are only socially problematic if they cause injury, which in turn must be accidental rather than intentional (the product of aggressive interactions). Individuals engaged in nonaggressive risky behaviors who are not otherwise cooperating for reasons of expected mutual benefit, therefore, are situated within a normatively distinct type of social interaction—the paradigm of accidental injury.

For interactions in which one party accidentally injured the other, the talion attained the equitable balance of reciprocity through compensatory exchange—the “value of an eye for an eye.”\(^{32}\) This reciprocity norm relied on compensation to restore equitable balance between the interacting parties by ensuring that the injurer did not benefit at the expense of the victim’s person or property, thereby avoiding the outcome characteristic of aggressive interactions.

These three paradigmatic forms of social interactions and their associated reciprocity norms then shaped the development of the early

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\(^{30}\) *Exodus* 21:24. For insightful discussion of these talionic practices, see Miller, *supra* note 25.


\(^{32}\) See, e.g., Miller, *supra* note 25, at 24-25 (discussing the “compensation principle” recognized by the talionic moral code).
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common law. Within the state of nature, the paradigm of mutual advantage was governed by a norm of positive reciprocity that was subsequently incorporated into the early common law of contracts. “In medieval law informal contracts were enforceable only if they were reciprocal: the debtor must have received something in exchange, quid pro quo . . . . In popular etymology this was the very essence of the idea of contract.”

The early criminal law, by contrast, was shaped by aggression and the associated normative concern for punishment. Tort law, which is conventionally defined as civil liability not based on contract, also applies to both aggressive interactions and those of mutual advantage. But unlike either contract or criminal law, tort law governs behavior within the paradigm of accidental injury, providing tort law with a distinct normative concern for compensation. Like the talionic reciprocity norms that preceded them, these three fields of the common law depend on a shared conception of ownership—the common law of property.

As I have argued at length elsewhere, modern tort law continues to enforce the reciprocity norm of compensation, but that argument is not necessary for present purposes. The important point is that the common law was initially based on customs that normatively distinguished three forms of social interaction, respectively defined by aggression, mutual advantage, and accidental injury. These paradigmatic forms of social interaction are still normatively distinguishable, regardless of whether tort law still enforces the compensatory norm.

B. Aggression and the Intentional Torts

One who intentionally harms another through criminal misconduct acts aggressively, as starkly illustrated by murder and theft. As a consequence of its prohibited behaviors and the associated punishments, the criminal law focuses on the actor’s culpability. An intentional crime involves greater culpability that merits more punishment than crimes committed by negligence or (more controversially) without any fault at all (strict

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34 BLACK'S LAW DICTIONARY 1717 (10th ed. 2014) (defining tort as “[a] civil wrong, other than breach of contract, for which a remedy may be obtained, usually in the form of damages”).
36 “By as early as the thirteenth century . . . English courts had begun to require proof that the person charged with a criminal offense had a culpable state of mind.” JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 10.01, at 117 (5th ed. 2009).
liability).\textsuperscript{37} Acts of aggression entail the greater culpability required by the intentional crimes.

As we have found, even though the early common-law courts “approached the field of tort through the field of crime,” this hierarchy of culpability does not apply to tort law.\textsuperscript{38} Culpable acts of aggression can be equated with intentional crimes but not the intentional torts. Though this conclusion is sound with respect to questions of culpability, it does not rule out other reasons for categorizing the intentional torts in terms of aggressive interactions.

Unlike the criminal law, tort law addresses the \textit{interaction} between the plaintiff and defendant. This relational inquiry is not limited to the defendant’s conduct and associated state of mind, eliminating culpability as a necessary requirement for the intentional torts. In addition to explaining why the criminal law’s hierarchy of culpability does not apply to tort law, the interaction provides normative reasons for placing the intentional torts into a distinct substantive category of tort law.

The relational nature of aggression was manifest in the state of nature. As previously discussed, Thomas Hobbes maintained that the three principal causes of “quarrel” in the state of nature involved aggression for self-gain, fear of being victimized by such aggression, and defense of one’s honor in order to ward off future attacks.\textsuperscript{39} The resultant dynamics of social violence have been further developed by Steven Pinker, who has explained that the incentives for violence stem from the evolutionary advantages to be gained by taking scarce resources (like food, water, land, and reproductive capacity) from other individuals (competitors).\textsuperscript{40} This “competition breeds fear. If you have reason to suspect that your neighbor is inclined to eliminate you from competition by, say, killing you, then you will be inclined to protect yourself by eliminating him first in a preemptive strike.” To avoid the resultant “Hobbesian trap,” you can engage in another form of behavior: “Don’t strike first; be strong enough to survive a first strike; and retaliate against any aggressor in kind.” To make such a threat of deterrence credible, however, you must be “committed to disprove any suspicion of weakness, to avenge all trespasses and settle all scores. Thus we have an explanation for the incentive to invade for trifles: a word, a smile, and any other sign of undervalue.”\textsuperscript{41} As shown by these dynamics of social violence, aggression is a relational matter that requires consideration of how each interacting party is situated relative to the other.

\textsuperscript{37} See \textit{supra} note 13 and accompanying text.
\textsuperscript{38} See \textit{supra} notes 14-16 and accompanying text.
\textsuperscript{39} See \textit{supra} note 28 and accompanying text.
\textsuperscript{40} See PINKER, \textit{supra} note 29, at 33–34.
\textsuperscript{41} \textit{Id.} at 34.
Consistent with this social dynamic, psychologists commonly define human aggression as “any behavior directed toward another individual that is carried out with the proximate (immediate) intent to cause harm. In addition, the perpetrator must believe that the behavior will harm the target, and that the target is motivated to avoid the behavior.”\textsuperscript{42} The same basic definition can be derived from a much wider range of disciplines, including tort law.\textsuperscript{43} “Tort law insists that aggression is always a relational function.”\textsuperscript{44} Aggression is interactive; it depends both on the actor’s intent to cause another harm, and on how the target would presumably respond if he or she were aware of the actor’s behavior.\textsuperscript{45}

The connection between aggressive interactions and the intentional torts can now be easily drawn. By definition, aggressive interactions are limited to intentional harms. Within tort law, harm is defined by the invasion of or interference with one’s legally protected interests. The legal protection of one’s interests is embodied in a tort right. These varied rights, as per the reasoning of the draft Restatement, are established by each of the intentional torts—assault, battery, and so on, each of which protects fundamental interests differently from the protections supplied by other tort rights.\textsuperscript{46} A defendant who commits an intentional tort, therefore, intentionally invades or otherwise interferes with one of the plaintiff’s protected interests and necessarily intends to harm the plaintiff in this respect.\textsuperscript{47} The intentional torts \textit{all} require the intentional harms characteristic of aggressive

\textsuperscript{42} Craig A. Anderson & Brad J. Bushman, \textit{Human Aggression}, 53 ANN. REV. PSYCH. 27, 28 (2002) (citations omitted); see also ROBERT A. BARON, \textit{HUMAN AGGRESSION} 7 (1977) (describing different definitions and concluding that “many social scientists have now moved toward acceptance of defining aggression as “any form of behavior directed toward the goal of harming or injuring another living being who is motivated to avoid such treatment”).

\textsuperscript{43} See Anita Bernstein, \textit{Reciprocity, Utility, and Aggression}, 54 VAND. L. REV. 1, 29-35 (2001) (surveying the treatment of aggression across different disciplines and concluding that “[i]n relational terms, aggression contains two types of feelings: a sense of having been wrongfully invaded and an intentional trespass into the domain or space of another”).

\textsuperscript{44} \textit{Id}. at 12.

\textsuperscript{45} Murder is perhaps the paradigmatic instance of an aggressive act, and one can commit murder by intentionally killing a sleeping victim. Aggression, therefore, does not depend on whether the victim was motivated to resist when the conduct occurred. It instead depends on whether the victim’s knowledge of the other’s conduct would have induced such resistance, as it obviously would have for the sleeping victim.

\textsuperscript{46} See \textit{supra} notes 16-21 and accompanying text.

\textsuperscript{47} In some cases, tort law presumes compensable injury and awards nominal damages in order to make available the extracompensatory remedy of punitive damages, which may be necessary for adequately vindicating the rights-violation while also deterring future violations. \textit{See} MARK A. GEISTFELD, \textit{TORT LAW: THE ESSENTIALS} 130-34 (2008) (employing this reasoning to show why the intentional tort of trespass to land presumes damages, unlike trespass to chattels). An award of nominal damages, therefore, does not mean that the defendant caused no legally cognizable harm through the intentional rights-violation; it only means that the intentional harm or rights-violation is not adequately redressed by the compensatory damages remedy.
interactions, creating a substantive category that is normatively distinct from tort rules governing paradigmatically different types of social interactions.

This conceptualization of the intentional torts is not merely semantic or a matter of formal definition. Within this normative framework, the element of intent has a clear substantive purpose: it determines whether or not an interaction is aggressive and properly governed by the intentional torts.

Consider again the question of culpability. Because the tort inquiry addresses the interaction between the parties and not only the defendant’s state of mind, one who is not blameworthy or morally culpable can still be legally responsible for aggressively interacting with another. For example, when I take your umbrella based on the mistaken belief that it is my own, you perceive my conduct to be an aggressive act (theft) and are entitled to do so (as the right of ownership, after all, is yours). Your reasonable expectation, in turn, justifies certain self-help measures that you can take to protect your property from being stolen, measures that you could not otherwise justifiably take if the interaction were not aggressive. The manner in which we interact—created both by my nonculpable taking of the umbrella, and by your reasonable motivation to avoid that outcome by retaining your umbrella—makes the interaction aggressive. I am then subject to liability for an intentional tort (trespass to chattels or conversion). As this example illustrates, the aggressive interactions that are governed by the intentional torts do not necessarily require culpability; they instead depend on whether the defendant intentionally invaded or interfered with one of the plaintiff’s legally protected interests.

By reorienting the inquiry from the defendant’s culpability to the interaction created by the defendant’s behavior, tort law formulates the element of intent differently from the criminal law. For criminal purposes, a defendant must intend to commit the crime in question. Consequently, I did not have the requisite criminal intent for larceny when I took your umbrella because of my sincere belief that it was mine—I did not intend to steal your umbrella. For tort purposes, by contrast, the relevant intent involves my decision to take the umbrella. I do not get to unilaterally determine your property rights. The law instead makes that determination. Because the law places ownership of the umbrella in your hands, I intentionally violated your right by intentionally taking your umbrella. Having intentionally caused you legally cognizable harm, I am responsible for an aggressive interaction that subjects me to liability for the intentional tort, even though my conduct was not culpable and subject to criminal liability.

Lacking culpability or blameworthiness, I also would not be subject to punitive damages, further illustrating why the intentional torts do not conform to the criminal law’s definition of intent and resultant hierarchy of
culpability. The availability of punitive damages solely depends on the actor’s culpability, not on whether the interaction was aggressive and subject to liability for an intentional tort.  

Accidental harms can also be caused by blameworthy behavior that is subject to punitive damages. Such an interaction, however, is not aggressive because the defendant does not intend to invade any of the plaintiff’s legally protected interests. A reckless actor consciously disregards the substantial risk and foreseeable harms threatened by the intentional behavior. In this regard, a reckless defendant intentionally imposes an unreasonable risk of harm on the plaintiff, but that conduct does not intentionally invade the plaintiff’s legally protected interests. Within risky interactions, the tort right protects individuals from certain types of harms proximately caused by the risky behavior. The mere exposure to risk is not ordinarily a harm of this type. The plaintiff must instead suffer injury to a legally protected interest in order to establish negligence or strict liability, as in cases of physical harm, emotional distress, or economic loss. A reckless actor only intentionally creates an unreasonable risk or possibility of these legally cognizable harms. Unless the actor has the desire or purpose to cause such a harm, its uncertain occurrence is accidental and not intentional, removing the conduct from the paradigm of aggressive interactions. To be sure, the reckless conduct is quite blameworthy and properly subject to a punitive response, but the reasons are normatively different from those that make an act of aggression blameworthy.

Intentional harms normatively differ from accidental harms for reasons that can be explained by the doctrine of “double effect.” For tort purposes, a particularly useful formulation of this doctrine distinguishes desired or

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48 “In the great majority of states, punitive (or “exemplary”) damages may be awarded when the plaintiff has suffered legally recognized harm and the tortfeasor has committed quite serious misconduct with a bad intent or bad state of mind such as malice.” Dan B. Dobbs et al., 1 Dobbs’ Law of Torts § 483 (2d ed. 2011).

49 In this respect, “the duties imposed by tort law are duties of noninjury. For example, the duty of care in negligence, on this view, is not correctly described as a duty to act with ordinary care toward others. It is instead a duty not to injure others by conduct that is careless as to them.” John C.P. Goldberg & Benjamin Zipursky, Torts as Wrongs, 88 Tex. L. Rev. 917, 935 (2010) (footnote omitted).

50 “[T]he reckless actor, while exercising his will in the world, is not wrongful because he aims to impose his will on another [as in the case of aggression]. He is wrongful because he imposes his will on the world without regard for the consequences of its imposition. . . . [H]e does not care enough to address that risk.” Sebok, supra note 8, at 1179.

“directly” caused harms from undesired or “indirect” harms. An actor may have the desire or purpose to injure another in order to attain some objective, as illustrated by theft. In contrast to these direct, intentional harms, one can foreseeably injure another without having the desire or purpose of doing so. These indirect harms include accidents. For example, an automobile driver indirectly harms a pedestrian, as the driver has neither the desire nor purpose to cause that injury. According to the doctrine of double effect, whether one causes another to suffer a direct or an indirect harm is normatively relevant.

The agent of direct harm . . . has something in mind for his victims—he proposes to involve them in some circumstance that will be useful to him precisely because it involves them. He sees them as material to be strategically shaped or framed by his agency. . . . But indirect harming is different. Those who simply stand unwillingly to be harmed by a strategy—those who will be incidentally rather than usefully affected—are not viewed strategically at all and therefore not treated as for the agent’s purposes rather than their own.

Why does this difference matter? It “rests on the strong moral presumption that those who can be usefully involved in the promotion of a goal only at the cost of something protected by their independent moral rights (such as their life, their bodily integrity, or their freedom) ought, prima facie, to serve the goal only voluntarily.”

This normative reasoning applies to the intentional torts. One who intentionally violates the “independent” tort right of another uses that person’s legally protected interests as “material to be strategically shaped or framed by his agency.” In these contexts, the rightholder “ought, prima facie, to serve that goal only voluntarily.” Without such consent, the intentional rights-violation implicates normatively distinct concerns for the rightholder’s interests in autonomy, dignity, and security—the same type of rationale for the intentional torts as the one adopted by the draft Restatement.

To be sure, the doctrine of double effect addresses the culpability of the dutyholder. All else being equal, one who causes direct harm is more culpable than one who causes indirect harm. Culpability is not a necessary requirement for intentional tort liability, but the doctrine is nevertheless normatively relevant. 

53 Id. at 348-49 (paragraph structure omitted).
54 Id. at 349.
relevant because it identifies the normative difference between intentional and accidental harms for the rightholder.

As illustrated by our fiasco with your umbrella, one can intentionally harm another without having the desire or purpose of doing so. When I mistakenly took your umbrella, I did not intend to directly harm you and was not culpable in that respect. Nevertheless, our interaction was still aggressive. You reasonably perceived that I was stealing your umbrella. In order for me to obtain the ownership right to your umbrella, you must voluntarily agree to make that transfer. Without your consent, my conduct caused you the same normative harm as would otherwise exist in cases of theft—a direct harm. Regardless of culpability, the intentional torts redress the same normative harms that the doctrine of double effect attributes to direct harms.

Accidental injuries are normatively different. From the potential victim’s perspective, the threat of accidental injury is only a foreseeable consequence of the other party’s risky behavior—an indirect harm. Moreover, risky interactions do not ordinarily require mutual consent for normative reasons that distinguish the paradigm of accidental injury from the paradigm of mutual advantage. Consequently, the dutyholder’s failure to obtain the rightholder’s consent in the event of accidental injury does not cause the same normative harm as would otherwise occur in an identical case of intentional or direct harm. Accidental injuries involve the same normative harms that the doctrine of double effect attributes to indirect harms.

Due to the normative difference between direct and indirect harms, the intentional torts are normatively distinguishable from tort rules governing accidental injuries. In cases of direct or intentional harm, the victim experiences a distinct type of normative harm. Consequently, the intentional torts protect a distinct set of interests as per the reasoning in the draft Restatement, justifying a distinct substantive category of tort law defined in terms of aggressive interactions.

This rationale finds further support in tort theories of fairness or corrective justice. According to these theories, a normative relationship is disrupted when a dutyholder violates the correlative right of another, justifying a legal remedy to correct or redress the wrongdoing. The injurious interactions that are corrected or reversed by the intentional torts are normatively different from those that are redressed by the rules of

55 See supra notes 29-31 and accompanying text (explaining why the paradigm of mutual advantage is inherently limited to cooperative interactions, unlike the paradigm of accidental injury).
negligence and strict liability. The normative difference can be explained by the manner in which the intentional torts correct for aggressive interactions, distinguishing these torts from those governing accidental harms.

The aggressive nature of an interaction is also relevant to the efficiency rationale for tort liability. An aggressive interaction ordinarily involves two parties who are in close (or actual) contact. Given that proximity, the interaction could be governed by voluntary exchange in which the rightholder agrees (for a price or some other benefit) to transfer his tort entitlement that is required by the dutyholder to achieve her intended objective. As compared to the involuntary transfer of entitlements that are the consequence of aggressive interactions, voluntary exchanges are based on expectations of mutual benefit and are more likely to be efficient. Consequently, autonomy—defined now as the right against the involuntary transfer of one’s property and other tort entitlements—also provides an efficiency rationale for subjecting aggressive interactions to intentional tort liability. Conceptualizing the intentional torts in terms of aggressive interactions does not require one to choose between the efficiency and fairness rationales for tort law.

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56 The corrective-justice rationale for the intentional torts is most fully developed by Arthur Ripstein, who maintains that “[t]ort law concerns itself with . . . the idea that no person is in charge of another.” ARTHUR RIPSTEIN, PRIVATE WRONGS 18 (2016). This concern justifies tort liability for “use-based” harms that involve one’s intentional use of another’s resources. Id. at 46 (“Intentional torts against bodies and property involve using something of which you are not in charge.”). In addition, “[a]s you do things using your body and property, you also must limit the side effects of your actions, so that every other person’s body and property remains available for their purposes.” Id. at 30. Accidental harms, therefore, are governed by “damage-based torts” like negligence that “involve the side effects of the defendant’s use of his or her means” on another person’s body or property. Id. at 49. “Use- and damage-based torts differ in kind.” Id. at 45.

57 According to Ripstein, the “harm principle” shows why intentional harms are normatively different from accidental harms, because that principle is not satisfied by the intentional torts that permit awards of nominal damages, unlike the damage-based torts like negligence that require proof of compensable harm. Id. at 45-46. In my view, this distinction is not persuasive. See supra note 47 (explaining why nominal damages do not imply the absence of legal harm). Instead, the two types of liability rules differ with respect to their associated behavioral paradigms. Based on Ripstein’s definitions, use-based torts are necessarily limited to aggressive interactions, whereas the damage-based torts are necessarily limited to the accidental harms caused by the other types of social interactions. Categorizing the intentional torts in terms of aggressive interactions, therefore, can be justified by Ripstein’s formulation of corrective justice. See also Gregory C. Keating, The Priority of Respect Over Repair, 18 LEGAL THEORY 293, 315 (2012) (describing the intentional torts involving the body and property as “sovereignty-based torts” that “protect important boundaries against unauthorized crossings”).

III. DOCTRINAL IMPLICATIONS OF THE CATEGORIES

Social interactions have different paradigmatic forms that provide normative reasons for categorizing the rules of tort law. Aggressive interactions are governed by the intentional torts. The remaining paradigms—nonaggressive interactions between individuals who are not cooperating for reasons of expected mutual benefit, and interactions of mutual advantage—are governed by rules of negligence and strict liability that are shaped by the type of interaction. Rules governing strangers who interact in risky ways normatively differ from rules governing parties in contractual relationships. These categories have doctrinal implications for reasons illustrated by the intentional torts.

A. Aggression and the Element of Intent

The element of intent establishes that the defendant intentionally invaded or otherwise interfered with one of the plaintiff’s legally protected interests—an intentional harm that makes the interaction aggressive. To be aggressive, the interaction cannot be a different type of social interaction, such as a consensual interaction that occurs within the normatively distinct paradigm of mutual advantage. Consequently, to establish the element of intent, the plaintiff must prove that the interaction was not based on consent, for otherwise it would be one of mutual advantage and not aggressive.

“For example, consent turns trespass into a dinner party; a battery into a handshake; a theft into a gift; an invasion of privacy into an intimate moment; a commercial appropriation of name and likeness into a biography.” Consent distinguishes the category of mutual advantage from the other behavioral categories, requiring the plaintiff to establish the lack of consent in order prove intent and thereby situate the defendant’s conduct within the paradigm of aggressive interactions, where it is properly governed by the intentional torts.

Consistent with this reasoning, the draft Restatement places “the burden of proof . . . on plaintiff to demonstrate the absence of actual consent” for all “intentional torts to persons.” The same approach was adopted by the earlier Restatements. As the Restatement (Second) explains, “[t]he absence

59 Tort rules governing behavior in the paradigm of mutual advantage protect the rightholder’s expectation interest, unlike tort rules governing nonaggressive interactions not motivated by expected mutual benefit. See Geistfeld, Normative Source, supra note 35, at 1568-69.
61 RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 111 cmt. e (AM. LAW INST. Tent. Draft No. 1, April 8, 2015).
of consent is inherent in the very idea of those invasions of interests of personality which, at common law, were the subject of an action of trespass for battery, assault, or false imprisonment."\(^{62}\)

In addition to actual consent, the plaintiff “effectively consents if appearances created by her words or acts lead the defendant reasonably to believe she consented, even if the plaintiff did not subjectively intend to consent.”\(^{63}\) The plaintiff’s apparent consent immunizes the defendant from liability for reasons made clear by the normative nature of the interaction. The plaintiff does not get to unilaterally set the terms of the interaction. If the plaintiff’s conduct causes the defendant to reasonably expect that the interaction is consensual, then as an objective matter, the interaction is not aggressive and not properly governed by the intentional torts, regardless of the plaintiff’s subjective intent.\(^{64}\)

Having established the absence of consent, the plaintiff must then show that the defendant acted with the requisite intent. “Intent itself is a neutral word that does not imply wrong. This is so first because intent by itself is never a tort and second because many intents are perfectly honorable.”\(^{65}\) To identify the requisite intent, courts in the nineteenth century commonly described the requirement “as the intent to commit ‘an unlawful act.’”\(^{66}\) An act is “unlawful” for tort purposes only if it violates another’s tort right. One who intends to commit “an unlawful act,” therefore, intends to invade or interfere with the legally protected interests of another, thereby violating the associated tort right. Proof of such intent necessarily shows that the interaction was aggressive.\(^{67}\)

The element of intent has since been modified to expressly account for two different types of behavior. According to the Restatement (Third) of Torts: Liability for Physical and Emotional Harms, one intends a consequence either by acting with the purpose of producing that outcome, or by acting with knowledge “that the consequence is substantially certain to result.”\(^{68}\)

The two types of conduct that satisfy the element of intent correspond to two different types of aggressive behaviors. Aggression can be dichotomized “along several different dimensions,” including “hostile and

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\(^{62}\) \textit{Restatement (Second) of Torts} § 13 cmt. d (Am. Law Inst. 1965).

\(^{63}\) \textit{Dobbs et al., supra} note 48, § 105(1).

\(^{64}\) \textit{Cf. id.} § 106 (“The defendant is entitled to rely in good faith upon the reasonable appearance of consent created by the plaintiff.”).

\(^{65}\) \textit{Id.} § 29.

\(^{66}\) Moore, \textit{supra} note 8, at 1601 (quoting Vosburg v. Putney, 50 N.W. 403, 403 (Wis. 1891)).

\(^{67}\) See \textit{supra} Part II.B.

\(^{68}\) \textit{Restatement (Third) of Torts: Liability for Physical and Emotional Harms} § 1 (Am. Law Inst. 2010).
“instrumental aggression.” Each type of aggression satisfies the element of intent and properly subjects the actor to liability for an intentional tort.

Hostile aggressions occur when “the primary or major goal sought by aggressors is that of causing the victim to suffer.” One whose goal or purpose is to intentionally harm the legally protected interests of another engages in an act of hostile aggression. The conduct also satisfies the purpose-based definition of intent and subjects the actor to liability for an intentional tort.

In contrast, instrumental aggressions occur when “aggressors assault other persons not out of a strong desire to see them suffer but primarily as a means of attaining other goals.” In pursuing some goal other than harming the plaintiff, the defendant can know that a particular consequence is substantially certain to occur. Based on this knowledge, the defendant intends the consequence as per the substantial-certainty definition of intent. If the intended consequence necessarily invades or interferes with one of the plaintiff’s legally protected interests, then by intending that consequence, the defendant intentionally violates the plaintiff’s tort right. The substantial-certainty definition of intent subjects these instrumental aggressions to liability for the associated intentional tort.

To be sure, the two types of intent differ with respect to the defendant’s culpability—hostile aggression is more culpable than instrumental aggression for reasons entailed by the doctrine of double effect. Culpability, however, is not a necessary requirement for the intentional torts, which instead consider how the defendant interacts with the plaintiff. In cases of instrumental aggression, the defendant only acts with knowledge that a consequence is substantially certain to occur; the defendant does not otherwise have the desire or purpose to violate the plaintiff’s tort right as in cases of hostile aggression. But if the intended consequence necessarily violates the plaintiff’s tort right, then the plaintiff will reasonably perceive the interaction to be aggressive. As an objective matter, the defendant is responsible for aggressively interacting with the plaintiff, a form of responsibility that does not depend on the defendant’s subjective culpability. Instrumental aggression is less culpable than hostile aggression, but both are still properly governed by the intentional torts.

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69 BARON, supra note 42, at 13.
70 Id.
71 Id.
72 Sebok, supra note 8, at 1172-78 (relying on the doctrine of double effect to identify the normative differences between the two types of intent and concluding that the one based on substantially certainty involves a form of culpability “much more clearly described by the concept of recklessness”).
The *Restatement*, however, expresses concerns about the substantial-certainty definition of intent:

Consider, for example, the company engaged in the mass production of products, which are distributed to consumers nationwide. The company may well know that in light of the inevitable limits of quality control, over time some number of its products will end up containing manufacturing defects of the sort that will cause physical injuries. 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. Yet that liability, when imposed, is understood as a form of strict liability, not as liability for anything that can properly be regarded as an intentional tort. Moreover, in many situations a defendant’s knowledge of substantially certain harms is entirely consistent with the absence of any liability in tort. For example, an owner of land, arranging for the construction of a high-rise building, can confidently predict that some number of workers will be seriously injured in the course of the construction project; the company that runs a railroad can be sure that railroad operations will over time result in a significant number of serious personal injuries; the manufacturer of knives can easily predict that a certain number of persons using its knives will inadvertently cut themselves. Despite their knowledge, these actors do not intentionally cause the injuries that result. Moreover, despite their knowledge, none of the companies—absent further facts—can even be found guilty of negligence; nor does the knowledge possessed by the knife manufacturer subject it to liability under products-liability doctrines.\(^{73}\)

Concerned that the substantial-certainty test does not always identify conduct that should be governed by the intentional torts, the *Restatement* recommends that the test “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.” Otherwise the test “loses its persuasiveness.”\(^{74}\)

The *Restatement* does not sufficiently explain why the substantial-certainty test “loses its persuasiveness” when applied to large number of potential victims spread across a large geographic area. To see why the test can still be persuasive under these conditions, consider a soda manufacturer

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\(^{73}\) *Restatement (Third) of Torts: Liability for Physical and Emotional Harms* § 1 cmt. e (Am. Law Inst. 2010).

\(^{74}\) *Id.*
that discovers a defect in a newly made bottle. The manufacturer knows that the bottle is substantially certain to explode when opened by a consumer. Nevertheless, in the pursuit of profits the manufacturer commercially distributes the bottle into the national market comprised of millions of consumers. A consumer is then badly injured by the exploding soda bottle. The manufacturer’s tortious conduct applies to a large number of consumers across the country, vastly exceeding the limitations for the substantial-certainty test recommended by the Restatement. Nevertheless, the manufacturer’s conduct is normatively equivalent to shooting a bullet into a small crowd in a localized area, not knowing who will be hit. Like the bullet, the exploding soda bottle is substantially certain to cause injury upon impact. The manufacturer’s conduct is normatively equivalent to the shooter’s conduct, but only the latter satisfies the Restatement’s recommended limitations for the substantial-certainty test. The difference in outcomes is unjustified, illustrating a problem with the Restatement’s proposed limitations.

The Restatement apparently falls into the trap of culpability, concerned that a defendant rendered liable under the substantial-certainty test is much less culpable than one who purposefully causes harm. The relevant inquiry for the element of intent, however, is not based on culpability; it instead asks whether the defendant is responsible for aggressively interacting with the plaintiff. An interactive inquiry clearly reveals the logic of liability in these cases.

One who shoots a bullet into a crowd interacts differently with each individual in the crowd. The bullet threatens everyone in the group, but only one is substantially certain to be injured. Thus, by shooting the bullet, the actor knows that as a consequence, there will be one interaction with some other individual that is substantially certain to harm that person. For this particular interaction, the shooter has knowledge of a substantial certainty of injury, even if the shooter does not otherwise know the victim’s identity or exact location. The shooter accordingly intends this particular harm and is liable for battery.

For these reasons, a manufacturer that commercially distributes a soda bottle that it knows will explode is also liable for battery. By commercially distributing the bottle into the national market, the manufacturer knows that there will be one transaction—the one involving the explosive bottle—that is substantially certain to injure the consumer. Within the confines of this

75 Cf. Kenneth W. Simons, Statistical Knowledge Deconstructed, 92 B.U. L. Rev. 1, 58 (2012) (evaluating the substantial-certainty test in terms of culpability and concluding that the Restatement (Third’s recommended limitation “is essentially sound” though it must be “expanded slightly to include unusual cases”).
CONCEPTUALIZING THE INTENTIONAL TORTS

particular interaction, the manufacturer knows that the consumer is substantially certain to be injured, even if the manufacturer does not otherwise know the identity or location of the consumer. The manufacturer, therefore, intends this particular injury and is subject to battery liability. When evaluated on an interaction-by-interaction basis, the manufacturer and shooter are indistinguishable.

By contrast, a soda manufacturer would not incur battery liability simply because it commercially distributes soda bottles that it knows might explode. If the aggregate sales are large enough, someone is substantially certain to be injured (as a matter of statistics). But for each individual transaction within that group, the manufacturer only knows that the bottle has some chance of exploding. Hence there is no individual transaction involving a soda bottle that the manufacturer knows is substantially certain to explode. Lacking the requisite intent for any individual transaction, the explosion of any given soda bottle is accidental, subjecting the manufacturer to strict products liability for the consumer’s physical harms proximately caused by the defect in the soda bottle.

When conceptualized in terms of aggressive interactions, the intentional torts are clearly framed in relational terms. The conduct in question must be evaluated within each particular interaction, not across a related series of similar interactions. As applied to each particular interaction, the substantial-certainty test properly identifies one’s conduct that results in the intentional rights-violation of another—an aggressive interaction. The relevant limitations of the substantial-certainty test are wholly supplied by this substantive rationale for the intentional torts, providing courts with reasons for not following the Restatement’s recommendation to limit the test to conduct threatening a small number of victims in a localized area.

As these issues illustrate, the substantive rationale for the intentional torts—the normative reasons for placing these torts into a distinct category—can affect the resolution of doctrinal problems. Adequately identifying the rationale for the category can be necessary for determining whether the defendant’s conduct satisfies the element of intent and is properly subject to liability for an intentional tort.

B. Aggression and the Intent Required for Battery Liability

To be liable for an intentional tort, the defendant must intend to produce a consequence that necessarily invades or otherwise interferes with the plaintiff’s legally protected interests, which in turn are defined by the different intentional torts. By intending such a consequence, the defendant necessarily violates one of the plaintiff’s rights—an intentional harm that
makes interaction aggressive. Liability for the intentional torts is inherently limited to aggressive interactions, yet this normative framework has not adequately guided legal inquiry for reasons further illustrated by the intent required for battery liability.

Under the Restatement (Second) of Torts, a defendant commits a battery if he or she intends “to cause a harmful or offensive contact” with the “person” of the plaintiff or another, and such contact with the plaintiff “directly or indirectly results.” This ancient tort directly protects the individual interest in physical security, and its origins stem from the problem of violence. As in cases of physical attacks, scuffles or affronts to honor and dignity predictably produce violent responses to deter future attacks. “Keeping the peace” required the early state to prohibit such conduct. The tort of battery plainly illustrates the paradigm of aggressive interactions.

The formulation adopted by the Restatement (Second), however, is ambiguous.

What specific consequence must the actor intend to bring about (in either the purpose or knowledge sense of intention)? There are two main alternatives that courts have taken seriously. The first is single intent: the actor must intend to cause a physical contact with the person of the plaintiff [without necessarily intending the subsequent offense or bodily harm]. The second option is dual intent: the actor not only must (1) possess that single intent (i.e., intend to cause a contact), but also must (2) intend, by that contact, either to offend the other or to cause the other bodily harm.

Courts are “divided on the choice between the single-intent and dual-intent rules, with most apparently favoring single intent.” Tort scholars also disagree about the respective merits of the two rules.

The single-intent rule can function like a rule of strict liability in some cases, as when a defendant intentionally touches the plaintiff but does not intend the resultant harm or offense. Because the defendant intends to

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76 Restatement (Second) of Torts § 13 (harmful contact), § 18 (offensive contact) (Am. Law Inst. 1965).
77 See supra notes 39-42 and accompanying text (discussing the importance of maintaining one’s honor or dignity in the state of nature in order to deter others from aggressive attacks).
79 Id.
80 See generally Moore, supra note 8 (discussing the different positions taken by tort scholars in casebooks, treatises, and legal journals).
contact the plaintiff’s person, and that contact is in fact harmful or offensive, the Restatement (Second) rule is literally satisfied—the defendant intends a contact that is harmful or offensive. This formulation of battery has been justified on the ground that “the principle of ‘bodily integrity’ demands fuller protection than that afforded under the dual-intent rule.”

The plaintiff, after all, suffers either physical harm or offense as a consequence of the defendant’s unpermitted contact. Nevertheless, the defendant would avoid liability under the dual-intent rule, as there is no secondary intent to cause the harm or offense that actually occurs. By making the defendant strictly liable for these harms, the single-intent rule more strongly protects the plaintiff’s interest in bodily integrity.

Defenders of the dual-intent rule, by contrast, worry about the manner in which the single-intent rule can function as a form of strict liability. Under the dual-intent rule, the defendant must have both the intent to contact the plaintiff’s person, and the additional intent to cause harm or offense as a consequence of that contact. The secondary intent limits battery liability to culpable conduct and can be justified by “the moral fault principle that underlies much of modern tort law.”

Recognizing that the intentional torts do not necessarily require culpable misconduct, the draft Restatement “endorses” the single-intent rule for a number of other reasons:

First, it is the approach most consistent with the case law, especially medical-battery cases. Second, the single-intent rule is more consistent with the view that a person’s right to avoid a nonconsensual touching that causes harm or offense is an entitlement resting on fundamental interests in autonomy, dignity, and security. Third, concerns that this rule would impose unduly burdensome liability are exaggerated in light of the many other tort doctrines that limit battery liability . . . .

This reasoning does not adequately justify the single-intent rule. For cases in which the rule functions as a form of strict liability, the defendant is not culpable. Why doesn’t the imposition of liability for such behavior unduly restrict the defendant’s autonomy? Focusing solely on the plaintiff’s fundamental interests ignores the principle that “the law can have no

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81 Id. at 1595.
82 Id.
favorites." Without some explanation for why the requirement of equal treatment is satisfied, the draft Restatement’s rationale for the single-intent rule is incomplete.

The problem is illustrated by medical cases. Suppose a physician gives information to a patient about the risks and benefits of a proposed course of surgical treatment, but mistakenly fails to disclose all foreseeable risks that would be material to the patient’s decision. The patient then consents to the treatment. By not obtaining the patient’s informed consent, the physician is potentially subject to malpractice liability for performing the surgery—a form of negligence.

Under the single-intent rule, however, the physician would be liable for battery. Even if the physician honestly believes that the patient apparently consents, that belief would be unreasonable. A reasonable person in the position of the physician would understand that to gain the patient’s consent, the physician must disclose all foreseeable risks that would be material to the patient’s decision. Thus, by failing to obtain the patient’s informed consent, a physician cannot reasonably believe that the patient apparently consents to the treatment. The patient’s inadequately informed actual consent would also be ineffective as a matter of law. By performing the surgery in question, the physician would accordingly commit battery under the single-intent rule. The physician would have the single intent of touching the patient’s person, and lacking the requisite consent, that intended contact would be offensive to the patient. Instead of incurring malpractice liability for the negligent failure to obtain the patient’s informed consent, the physician would be liable for the intentional tort of offensive battery under the draft Restatement.

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84 Restatement (Second) of Torts § 283 cmt. c (Am. Law Inst. 1965) (justifying the formulation of negligence liability in terms of objective fault rather than the actor’s own subjective culpability).
86 Id. at 738 (“Whether a physician failed to disclose certain risks and, therefore, whether the patient’s consent is truly “informed” is a matter that sounds in negligence.”).
87 See Restatement (Third) of Torts: Intentional Torts to Persons § 115 (Am. Law Inst. Tent. Draft No. 1, April 8, 2015) (“An actor is not liable to another if a reasonable person in the position of the actor would believe that the other actually consents to the actor’s otherwise tortious conduct.”).
88 Cf. Simons, supra note 8, at 1069 (arguing that “if we believe that the apparent-consent restriction actually accomplishes something, we are implicitly committed to the single-intent view”).
89 See Restatement (Second) of Torts § 18 cmt. c (Am. Law Inst. 1965) (explaining that in cases of offensive battery, “the essence of the plaintiff’s grievance consists in the offense to the dignity involved in the unpermitted and intentional invasion of the inviolability of his person and not in any physical harm done to his body”).
In these cases, most courts have concluded that the physician is liable only for negligence, not battery. The patient consented to treatment, and so the claim that the consent was not informed involves a breach of the physician’s standard of care—negligence constituting medical malpractice. The single-intent rule, by contrast, turns these claims into ones for battery and is inconsistent with this case law.

By focusing exclusively on the plaintiff’s interests, the single-intent rule fails to adequately consider the defendant’s conduct. The element of intent makes the defendant responsible for an aggressive interaction, which is normatively different from conduct taking place within mutually advantageous interactions such as the doctor-patient relationship. The intentional tort of battery accordingly differs from medical malpractice. Each rule protects different interests, has different purposes, and can require different procedures at trial. Moreover, “in the battery action, the patient can recover for any harm caused by the treatment, whereas in the negligence action, the patient can recover only when the harm results from the undisclosed risk.” The two rules protect the patient’s interests differently for reasons that stem from the physician’s conduct. Culpability is not a necessary requirement for the intentional torts, and so how the physician interacts with the patient must provide the basis for determining whether the patient’s interests should be protected in one way (battery) or another (malpractice). The single-intent rule does not consider the normative nature of the interaction, resulting in liability for interactions that are not aggressive.

In the medical cases, the physician and patient agree to interact within the paradigm of mutual advantage. The physician receives the patient’s

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90 Mayer, 795 S.E.2d at 738 (“When a patient has consented to surgery but complains that the physician has not disclosed certain risks, [under the majority rule] the dispositive question is whether the physician breached the standard of care by failing to disclose those risks. Breach of the standard of care falls within the realm of negligence and does not constitute an intentional tort.”); see also, e.g., Bradley v. Sugarbaker, 809 F.3d 8, 15 (1st Cir. 2015) (rejecting medical battery claim “where a surgery and its purpose were agreed to, and where the actual extent of the surgery [exceeded the scope of actual consent but nevertheless] was in keeping with the [agreed-upon] purpose”). The rule distinguishing battery from negligence in the medical cases should be distinguished from the different rule that renders the physician’s helpful intent irrelevant to the liability question. Cf. Lawson, supra note 8, at 360 (stating that for cases in which the defendant physician had a purpose to help and not to harm or to offend, the courts “agree that unauthorized medical treatment, unless rendered under the urgent necessity of treating an incapacitated patient in an emergency, subjects the doctor to liability for battery”).

91 Mayer, 795 S.E.2d at 735-37 (observing that expert testimony is required in cases of informed consent but not battery).

92 Moore, supra note 8, at 1647.

93 See supra notes 21-23 and accompanying text (explaining why a court that only recognizes the different ways in which two tort rules protect the plaintiff’s interests does not have sufficient grounds for choosing between them).
consent to proceed. A mistake in judgment or inadvertent failure to obtain informed consent subjects the physician to negligence liability, but the conduct does not intentionally violate the patient’s right to informed consent—it is not aggressive. The physician’s interaction with the patient instead resides within the paradigm of mutual advantage. This normative difference explains why courts and commentators have recognized that in these cases, “the negligence theory ‘better accords with the nature of the physician-patient relationship and avoids the apparent harshness of liability for assault and battery.’”

To act aggressively, a physician must know that he or she is violating the plaintiff’s right to make an informed decision about the treatment in question. By engaging in such conduct, the physician rejects the norms that are constitutive of the doctor-patient relationship. The interaction is not one of mutual advantage and necessarily satisfies the dual-intent rule, as the physician has the intent to contact the patient’s person and the additional intent to do so in an offensive manner. Battery liability does not unduly interfere with the doctor-patient relationship and is not “harsh” in these cases. Consistent with this rationale, the majority rule limits medical battery to cases of this type.

As illustrated by the medical cases, the element of intent must be formulated to ensure that the interaction is aggressive and properly governed by an intentional tort. By ignoring normatively important aspects of the defendant’s conduct, the single-intent rule can subject physicians to battery liability for conduct that occurs within the paradigm of mutual advantage and properly governed by the normatively different negligence rules of medical malpractice.

This problem is not limited to medical cases. The single-intent rule creates the same problem for other interactions that are initially situated within the paradigm of mutual advantage and implicate issues of informed consent.

For example, product transactions between consumers and manufacturers are initially ones of expected mutual advantage. To protect the consumer’s reasonable expectations of safe product performance, tort law obligates the manufacturer to provide warnings that would enable the ordinary consumer to make informed decisions about the purchase and safe

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94 Mayer, 795 S.E.2d at 738 (quoting Gordon L. Ohlsson, Medical Malpractice § 8.06[2] (David W. Louisell & Harold Williams, eds. 2016)).
95 Id. (“[M]ost courts now reserve the battery theory for cases where the treatment was completely unauthorized . . . .”) (quoting Leonard J. Nelson III, Medical Malpractice § 22.03[1] (David W. Louisell & Harold Williams, eds. 2016)).
use of the product. 96 By not providing an adequate warning, the manufacturer is subject to strict products liability for the physical harms proximately caused by the warning defect. 97

Under the single-intent rule, however, a manufacturer would incur battery liability. Like the physician who inadvertently fails to obtain the patient’s informed consent, the manufacturer cannot reasonably believe that a consumer gives informed consent to face product risks that are not adequately disclosed in the warning. Lacking the consumer’s apparent or otherwise legally effective consent, the manufacturer’s desire or purpose to have the consumer come into contact with the product (by using it) would satisfy the single intent of intending to contact the plaintiff’s person. If that contact (product use) then causes the consumer to suffer bodily injury, the manufacturer would have intended an unpermitted contact that turns out to be harmful, establishing battery liability under the single-intent rule. The important rule of strict products liability for defective warnings would be swallowed up by battery liability. 98

The single-intent rule creates these problems by ignoring normatively important aspects of the defendant’s conduct, but the dual-intent rule goes too far in the other direction by exclusively focusing on the defendant’s culpability. Due to the requirement of equality, the defendant cannot unilaterally determine whether any given contact is offensive. Otherwise, a physician could subject a patient to any course of unwanted treatment that he or she honestly believes is in the patient’s best interests. An offensive contact must instead be objectively determined, and so the Restatement (Second) defines an offensive contact as a “bodily contact” that “offends a reasonable sense of personal dignity.” 99 By intending to make such a contact, a defendant also intentionally causes the plaintiff to suffer an objectively defined offensive contact. The objective component of the liability rule renders irrelevant the defendant’s actual motive or subjective belief about the offensive nature of the contact. Culpability is not required, and so the requirements for offensive battery are fully satisfied without requiring an additional intent to offend the plaintiff. The dual-intent

96 Restatement (Third) of Torts: Products Liability § 2 cmt. i (Am. Law Inst. 1998) (“Warnings alert users and consumers to the existence and nature of product risks so that they can prevent harm either by appropriate conduct during use or consumption or by choosing not to use or consume.”).
97 Id. §§ 1 & 2(c).
98 See also Lawson, supra note 8, at 364 (showing why the single-intent rule would result in battery liability for cases in which an automobile with defective brakes crashes and physically harms the occupants of the vehicle, and concluding that this rule of battery liability “would consume large portions of the law of automobile products liability”.
99 Restatement (Second) of Torts § 19 (Am. Law Inst. 1965).
requirement would inappropriately limit liability for these aggressive interactions, whereas the single-intent rule yields the correct result.

In these cases, the parties are not initially situated within the paradigm of mutual advantage. Instead of acting pursuant to a cooperative undertaking of expected mutual benefit, the defendant for some other reason intentionally makes an unpermitted contact on the plaintiff’s person. Even if the defendant does not intend to offend the plaintiff, if the nonconsensual contact would be offensive to a reasonable sense of dignity, the plaintiff would reasonably perceive the contact to be offensive and the interaction to be aggressive. Once again, there is no “harshness” about battery liability in these cases, as it does not interfere with interactions of mutual advantage.

We can now see why courts and commentators have struggled with the question of whether battery liability is properly defined in terms of the single- or dual-intent rules. As currently formulated, neither rule attains the correct result across the full range of cases, producing an ongoing debate about their respective merits.

The problem with each rule stems from its failure to adequately consider how the defendant and plaintiff interacted with one another. Once formulated within this normative framework, the single-intent rule becomes the appropriate inquiry.

The single-intent rule asks whether the defendant intended to invade or interfere with one of the plaintiff’s legally protected interests. To ensure that the intentional rights-violation satisfies the categorical requirements for the intentional torts, the single-intent rule must address the categorical question: Did the defendant’s conduct cause an objectively defined aggressive interaction with the plaintiff? An affirmative answer satisfies the single-intent rule, but does so by situating the inquiry within the interactive framework that normatively distinguishes the intentional torts from the other forms of tort liability.

As illustrated by the medical and product cases, the parties can be initially situated in the paradigm of mutual advantage—they agree to interact for reasons of expected mutual benefit. These interactions can also accidentally harm the plaintiff’s legally protected interests, but the associated rights are not defined by the intentional torts. A defendant who inadvertently violates one of these rights is only responsible for an accidental harm and not properly subject to liability for an intentional tort. For the interaction to be aggressive, the defendant must intentionally violate one of these rights, such as a patient’s right to informed consent. By intending such a rights-violation, the defendant rejects the consensual relationship (doctor-patient) that initially existed with the plaintiff. The interaction is not one of expected mutual advantage, leading to the question
of whether the conduct makes the defendant responsible for an aggressive interaction. In the medical cases, it does. A physician’s intentional violation of a patient’s right to informed consent necessarily harms the patient’s interests that are protected by the intentional tort of offensive battery, justifying liability for that intentional tort. In cases of this type, the defendant’s single intent to commit an unlawful act satisfies the liability rule, but the intentional rights-violation (involving informed consent) is not defined by battery in the first instance.

In the remaining cases, the parties are not initially cooperating for reasons of expected mutual benefit. The rules governing consensual interactions, such as the right to informed consent, are not relevant, eliminating the concern about battery liability interfering with the paradigm of mutual advantage. Whether the defendant intends “an unlawful act” is wholly defined by the intentional tort of battery. A defendant intends to violate this right by intending a consequence that necessarily invades or otherwise interferes with the plaintiff’s interests that are legally protected by the right. As an objective matter, these interactions are aggressive and properly subject to battery liability.

When situated within the normative framework for the intentional torts, the single-intent rule can be defined in terms of the rule that courts adopted long ago—whether the defendant intends to commit “an unlawful act.” This rule, according to critics, requires further elaboration because the “‘intent to make the type of contact which the law forbids’ begs the question. Before such a rule can be enforced, it remains to specify what sorts of contact the law forbids.” As we have found, the requisite specification depends on the type of interaction for which the defendant is legally responsible.

C. Aggression, Transferred Intent, and the Prima Facie Intentional Tort

Under the doctrine of transferred intent, even if the defendant does not intend to commit a battery, the element of intent would still be satisfied if the defendant instead only intends an assault.

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100 The product cases are different. A manufacturer that intentionally violates the consumer’s right to make an informed decision about product use only creates a risk of physical harm, and so the occurrence of such harm is accidental and not subject to battery liability.

101 See supra notes 64-67 and accompanying text.

102 Lawson, supra note 8, at 365.

103 RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 110(b) (AM. LAW INST. Tent. Draft No. 1, April 8, 2015).
The doctrine is a rule of law to the effect that one who possesses intent A is treated, for legal purposes, as possessing intent B, and thus is subject to liability for the tort of which intent B is a necessary element. Although sometimes redundant, the doctrine sometimes does result in imposing liability that would not, or might not, be imposed in its absence.104

The rationale for this doctrine is not obvious. “If taken literally, [the doctrine] can lead to mechanical analysis and unjustified imposition of liability upon defendants who have been guilty of no wrong at all.”105

Proper guidance about the matter is provided by the normative framework that categorizes the intentional torts in terms of aggressive interactions. Within this framework, the element of intent determines whether the conduct in question makes the defendant responsible for aggressively interacting with the plaintiff. The defendant’s intent to violate one of the plaintiff’s tort rights, under certain conditions, can make the interaction aggressive as applied to a different rights-violation. For example, in confronting the defendant’s conduct threatening either assault or battery, the plaintiff cannot determine whether the defendant has one intent or the other. Each one involves the intentional violation of the plaintiff’s tort right. The interaction as reasonably perceived by the plaintiff is aggressive, explaining why the element of intent can justifiably be transferred from the one tort (assault) to the other (battery).

The doctrine of transferred intent is an artifact of the writ system; its applicability is “coextensive with that of the old action of trespass.”106 The doctrine, therefore, may be artificially restricted for historical reasons. It may not adequately address contemporary instances in which the defendant intends consequences that cause the plaintiff to reasonably perceive the interaction as being aggressive. This lacuna is addressed by a different doctrine—the prima facie intentional tort.

Under the Restatement (Second) of Torts, the prima facie intentional tort governs any actor “who intentionally causes injury to another . . . if his conduct is generally culpable and not justifiable under the circumstances. This liability may be imposed although the actor’s conduct does not come within a traditional category of tort liability.”107 According to the draft Restatement, “few jurisdictions have endorsed [the Restatement (Second)
rule] and those that have done so have interpreted it quite narrowly.”

The difficulty, once again, involves inadequate guidance on how the intentional tort should be conceptualized. “The potential breadth of the prima facie tort, and the worry that it would swallow up individual traditional torts that have distinctive criteria and limitations, helps explain why courts have been reluctant to employ it widely.”

The role of the prima facie tort becomes evident once the intentional torts are conceptualized in terms of aggressive interactions. Instead of swallowing up the other intentional torts, the prima facie tort justifiably fills in the gaps by redressing aggressive interactions not governed by the other intentional torts. To apply the prima facie tort in this manner, a court must first determine whether the plaintiff’s interests are adequately protected by one of the other intentional torts. If so, then that tort governs, not the prima facie tort. But if the interest is inadequately protected, then the prima facie tort fills the gap. When applied in this limited manner, the prima facie intentional tort ensures that tort law comprehensively governs the paradigm of aggressive interactions. Like other difficult issues involving the intentional torts, this one can also be resolved with the normative rationale for placing these torts into a distinct substantive category of tort law.

CONCLUSION

The substantive differences that are most relevant for categorizing the rules of tort law are not adequately captured by the elements that distinctly define the intentional torts, negligence-based rules, and strict liability. The element of intent often functions as either a form or negligence or strict liability. So, too, the element of fault within negligence-based rules often functions as a form of strict liability. When the elements that are supposed to categorically distinguish two types of tort rules are functionally indistinguishable within an individual rule, the purportedly different categories collapse into one another and do not provide different bases for conceptualizing the rule.

109 Id.
110 Cf. id. § 104 & Rptrs’ Note a (adopting the prima facie tort for intentionally caused bodily harm that does not satisfy the physical contact requirement for battery and observing that this particular tort “is arguably an exemplar of the desirable use of the principles underlying” the more general prima facie intentional tort).
111 See supra notes 15-23 and accompanying text.
112 See Geistfeld, Tort Law, supra note 47, at 180-91 (explaining why the objective requirements of reasonable care can create both pockets of strict liability and immunities from that form of liability).
For example, when the element of intent functions as a form of strict liability, why is the associated tort categorized as an intentional tort rather than a rule of strict liability? By itself, the element does not supply a substantive answer. The element of intent only formally distinguishes the intentional torts from those of negligence or strict liability; it does not otherwise provide a substantive reason for placing particular rules into one category (the intentional torts) rather than another (strict liability).

To be sure, the categories could be defined functionally rather than by reference to the formal differences among their elements. An intentional tort would then be placed into the categories of negligence or strict liability, depending on how the element of intent functions for the tort in question. This approach, however, would eliminate the intentional torts as a distinct substantive category of tort law.

For these reasons, the intentional torts pose fundamental questions about the appropriate way to categorize the rules of tort law. According to the most recent draft of *The Restatement (Third) of Torts: Intentional Torts to Persons*, “the intentional torts are categorically distinct from other torts such as negligence or products liability.” The categorical distinction cannot be based on the elements that formally distinguish these torts from one another, making it necessary to determine why the intentional torts comprise a distinct substantive category of tort law.

The practice of tort law involves the enforcement of behavioral norms, and so the different categories of tort law should correspond to normatively distinguishable categories of behavior. Tort law is solely concerned about behavior as a relational matter: how did one individual interact with another? For tort purposes, three different paradigmatic forms of social interaction are relevant: aggressive interactions; interactions in which the two parties cooperate for reasons of expected mutual benefit; and the remaining nonaggressive interactions that are not motivated by an expectation of mutual advantage. Each type of interaction can result in harms that are redressed by tort liability. Each type, though, is normatively distinct, and these differences shape the tort rules that govern them.

Within this normative framework, the category of intentional torts is defined by aggressive interactions. According to the *Restatement (Third) of Torts: Liability for Physical and Emotional Harms*, “[i]n general, the intent required in order to show that the defendant’s conduct is an intentional tort is the intent to bring about harm (more precisely, to bring about the type of harm to an interest that the particular tort seeks to protect).”

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114 Id. cmt. b.
defendant’s intent to harm one of the plaintiff’s legally protected interests is simply the intent to violate one of the plaintiff’s tort rights, which are respectively defined by the different intentional torts of assault, battery, and so on. By intending such a legal harm or rights-violation, the defendant aggressively interacts with the plaintiff. Instead of merely providing a formal definition of the intentional torts, the element of intent has a substantive rationale—it determines whether the defendant is responsible for aggressively interacting with the plaintiff.

For tort purposes, a defendant can be responsible for an aggressive interaction and incur liability for an intentional tort without behaving in a culpable manner. The liability in this regard is strict, yet normatively distinguishable from the rules of strict liability that govern either interactions of mutual advantage (such as strict products liability) or nonaggressive risky interactions between strangers (such as strict liability for abnormally dangerous activities). Categorizing the intentional torts in terms of aggressive interactions can explain why the rules at times function either as forms of strict liability or negligence, unlike the conventional categories that are simply defined in terms of the formal differences among the elements.

The draft Restatement does not expressly conceptualize the intentional torts in this manner, explaining why it does not persuasively resolve some difficult questions involving the element of intent, as in cases of medical battery. The draft Restatement focuses on the different interests protected by the intentional torts without otherwise paying sufficient attention to the normative nature of the interaction between the defendant and plaintiff.

This normative framework, however, can be justified by the draft Restatement’s rationale for treating the intentional torts as a distinct substantive category of tort law. Aggressive interactions cause normative harms that differ from the accidental injuries caused by other types of social interactions. Thus, when limited to aggressive interactions, the intentional torts protect individual interests in a manner that normatively differs from rules of negligence and strict liability as per the reasoning in the draft Restatement.

Categorizing the intentional torts in terms of aggressive interactions is a small step that can be easily defended in terms of the normative differences between aggressive interactions and the other paradigmatic forms of social behavior. Though modest, this reframing of the intentional torts would provide a substantive rationale for the element of intent that is not otherwise

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115 See supra notes 85-95 and accompanying text.
116 See supra Part II.B.
provided by the conventional approach of relying on formal differences among the elements to distinguish the intentional torts from negligence-based rules and strict liability.