

RETHINKING TORT DOCTRINE: VISIONS OF A RESTATEMENT (FOURTH) OF TORTS

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Tort doctrine is both unduly complex and insufficiently developed. Here are some examples. Intentional wrongdoing and product injuries are now treated as discrete areas of the law, rather than being folded into the basic fields of fault-based liability and strict liability. General criteria for determining when one does or doesn't owe another a "duty" in tort are underdeveloped. Inadequate attention is given to whether a party should merely warn of a danger or instead take steps to reduce or eliminate that danger. The law of causation deals with the very different purposes served by the requirements of historical connection and proximate connection. This Article envisions a Restatement (Fourth) of Torts that would address all of these shortcomings and more. This vision is presented as a further step in the process of rethinking tort doctrine begun by UCLA Professor Gary Schwartz through his work on the Restatement of Torts (Third) in which he was engaged at the time of his death.

INTRODUCTION	586
I. BACKGROUND ON THE RESTATEMENT OF TORTS	586
II. ARCHITECTURE FOR A RESTATEMENT (FOURTH) OF TORTS	591
III. SOME PROBLEMS WITH EXISTING TORT DOCTRINE	591
IV. THE CORE PRINCIPLE: FAULT-BASED LIABILITY	594
A. Including Intentional Torts	594
B. Characteristics and Circumstances of Individual Defendants	596
C. Types of Unreasonable Conduct	597
1. Disclosure: How Much?	597
2. Is Disclosure Enough, or Must the Actor Also Take Precautions? ..	599
D. Disputes over Wrongdoing	601
1. Disputes over What Happened	601
2. Disputes over Foreseeability	602
3. Disputes over Wrongfulness	603
E. Cause in Fact	605
V. THE EXCEPTION: STRICT LIABILITY	607
A. The Major Existing Exceptions	607
B. Additional Categories?	609
VI. DEFENSES	611
A. Victim Fault	611

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B. Harms Outside the Scope of the Risk Taken (No "Proximate Cause")	612
C. Policy Arguments Trumping Liability ("No Duty")	613
VII. REMEDIES	618
CONCLUSION: A RESTATEMENT (FOURTH) OF TORTS AND THE TEACHING OF TORTS	618

INTRODUCTION

The American Law Institute (ALI) is currently at work on the *Restatement (Third) of Torts*, portions of which have already been adopted. Some important changes from the *Restatement (Second)*¹ have been approved, and more are in the works. In many respects the *Restatement (Third)*, on which UCLA Professor Gary T. Schwartz was working at the time of his death, represents a step forward. Yet, I believe that we in the torts field would be better served if the entire way we structure, discuss, and analyze tort doctrine were altered. Although I do not have this restructuring completely worked out yet, the main features are reasonably clear in my mind. For now, I call it Visions of a Restatement (Fourth) of Torts. Were the Restatement (Fourth) of Torts to evolve in the direction I elaborate here, it would, in my view, be a suitable extension of the work Professor Schwartz began for the *Restatement (Third)* and provide a fine tribute to our lasting memory of him.

I. BACKGROUND ON THE *RESTATEMENT OF TORTS*

The original *Restatement of Torts*² and its subsequent revisions have been monumental undertakings. University of Pennsylvania Professor Francis H. Bohlen was appointed by the ALI as the original Reporter in 1923, and he served until he became ill in 1937. Most of the original *Restatement of Torts* was the product of his efforts (aided by a distinguished group of advisers). It was adopted by the ALI at meetings held over the course of the years 1934–1939.

Berkeley's then-Dean William L. Prosser was appointed as the Reporter to revise the *Restatement of Torts* in 1954, and he presented a preliminary draft to his advisers in 1955. It was not until meetings in May of 1963 and 1964, however, that the first two volumes of what have become the *Restatement (Second) of Torts* were adopted by the ALI. Prosser continued to serve until 1970 (and died in 1972). He was replaced as Reporter by Vanderbilt Professor John Wade, who saw the remaining volumes three and four of the *Restatement (Second)* through to their approval in 1977.

1. RESTATEMENT (SECOND) OF TORTS (1965).

2. RESTATEMENT OF TORTS (1934).

Because the first *Restatement of Torts* project took sixteen years and the *Restatement (Second)* took more than two decades, it was perhaps understandable that in 1986 the ALI adopted a different strategy. Rather than then launching a *Restatement (Third)* project, it instead commissioned a major, nondoctrinal policy review of the way that U.S. society handles, and should handle, the problem of personal injuries caused by enterprises. Moreover, rather than turning directly to scholarly giants from within "torts" (like Bohlen and Prosser), the ALI instead recruited to lead the project very distinguished scholars whose fame lay in adjacent fields. New York University Professor Richard Stewart (then of Harvard) was the first Chief Reporter of this project, and in 1989, when Stewart was called to serve in Washington, the mantle was passed to his Harvard colleague, Professor Paul C. Weiler. Weiler had been serving as one of the Associate Reporters, most of whom, like Stewart and Weiler, were at that time best known for research other than doctrinal work in torts. The Reporters' Study titled *Enterprise Responsibility for Personal Injury*³ (in two volumes) was presented for discussion by the ALI in 1991. Although this ambitious project importantly advanced our understanding of where torts fits in the wider context of other compensatory and regulatory systems, and although it offered several novel and insightful suggestions for tort reform, it received a hostile reception at the ALI meetings and the effort was essentially abandoned.⁴

Thereafter, the ALI promptly reverted to its old ways. But concluding that a comprehensive revision of the *Restatement (Second)* was too large an effort for a single project with a single Reporter, it decided instead to break up the next round into several parts. The ALI first appointed frequent coauthors Professors James A. Henderson, Jr. and Aaron D. Twerski, of Cornell and Brooklyn Law Schools, respectively, as co-Reporters to deal with the topic of products liability. Although their efforts were sharply criticized by some as pro-defendant,⁵ this first segment of the *Restatement (Third) of Torts*⁶ was adopted by the ALI in 1997. Alongside this project on product injuries, the ALI commissioned now-Dean William C. Powers, Jr. of the University of Texas School of Law and Wake Forest School of Law's Professor Michael D. Green (then at the University of Iowa College of Law) as co-Reporters for a segment of the *Restatement (Third)* covering apportionment of liability.⁷ This effort was adopted by the ALI in 1999.

3. AMERICAN LAW INSTITUTE, REPORTERS' STUDY, ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY (1991).

4. For my extensive review of the Reporters' Study, see Stephen D. Sugarman, *A Restatement of Torts*, 44 STAN. L. REV. 1163 (1992).

5. See, e.g., Howard A. Latin, *The Preliminary Draft of a Proposed Restatement (Third) of Torts: Products Liability*, 15 J. PRODS. & TOXICS LIAB. 169, 177, 182 (1993).

6. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY (1998).

7. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY (2000).

While these two other efforts were underway, the ALI appointed Professor Schwartz as Reporter for a project intended to set forth general principles concerning tort liability for accidental physical harm to people and property. It remains unclear precisely how much and which sections of the *Restatement (Second)* are intended to be supplanted by this effort. However, it is clear that, even when the general principles project is combined with the completed projects on products liability and apportionment, a great deal of material covered in the *Restatement (Second)* remains to be addressed.

Professor Schwartz produced a partial discussion draft in 1999 and a longer and revised Tentative Draft Number 1⁸ for discussion by the ALI in May 2001. Alas, by the time of that meeting Professor Schwartz had become ill. He eventually died in the summer of 2001.

Professor Schwartz's effort was the subject of the John W. Wade Conference on the Third Restatement of Torts, held in September 2000 at Vanderbilt University Law School, and the papers presented there now appear in the April 2001 issue of the *Vanderbilt Law Review*.⁹ Moreover, all three ALI projects concerning the *Restatement (Third)* were the subject of an academic conference held at the University of Kansas School of Law, and overviews of those presentations appear in the fall 2000 issue of the *Kansas Journal of Law and Public Policy*.¹⁰

Even before Professor Schwartz's illness, Professor Green had been appointed as a co-Reporter to work primarily on certain forthcoming sections of the project concerning causation; after Professor Schwartz's death, Professor Green was joined as co-Reporter by Dean Powers, his collaborator on the apportionment project. In response to discussions at the ALI meeting in May 2001 and in the academic literature, Green and Powers have produced both revisions to some of Professor Schwartz's principles and new sections (primarily on topics conventionally termed "cause in fact" and "proximate cause"). This Tentative Draft Number 2¹¹ was discussed by the ALI in May 2002, when most of it won tentative approval.

A simple explanation for the ALI's products liability project is readily apparent. When Dean Prosser convinced the ALI in 1964 to adopt section 402A¹² concerning product liability, it appeared that a regime of strict liability in tort might be in the process of taking over an entire area of the law

8. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (BASIC PRINCIPLES) (Tentative Draft No. 1, 2001) [hereinafter Draft No. 1].

9. Symposium, *The John W. Wade Conference on the Third Restatement of Torts*, 54 VAND. L. REV. 639 (2001).

10. Symposium, *The Restatement (Third) of Torts: and the Future of Tort Law*, 10 KAN J.L. & PUB. POL'Y 1 (2000).

11. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (BASIC PRINCIPLES) (Tentative Draft No. 2, 2002) [hereinafter Draft No. 2].

12. RESTATEMENT (SECOND) OF TORTS § 402A (1965).

previously dominated by a combination of negligence in tort and the intricacies of warranty on the contract side. As it turned out, this has not occurred. Although defendants are now generally strictly liable in tort for so-called “manufacturing defects,” in most jurisdictions the negligence principle, in effect, applies to all other product injuries. One important purpose of this portion of the *Restatement (Third)* is to reinforce that idea—although, oddly enough, Henderson and Twerski (who openly champion the negligence principle over the strict liability principle in their own scholarship) have actually clouded the point, by having the *Restatement (Third)* declare defendants liable for product “defects”¹³ and then by defining so-called “warning” and “design” defects in ways that require proof of fault.¹⁴ Products liability was also seen by the ALI as ripe for attention both because, as a practical matter, product injury lawsuits had become extremely important since 1964, and because new doctrine had developed to deal with many important peripheral issues not contemplated by Dean Prosser’s language (or by his Reporter’s comments to section 402A). Add to this the fact that many torts casebooks, scholars, litigators, and judges seem to treat product injuries as a reasonably self-contained area of the law, and the appeal to the ALI of updating the law on this specific topic becomes self-evident. Yet, it remains to be seen whether commissioning this project was actually a good idea. As I will explain below, the *Restatement (Fourth)* of Torts that I envision contains no separate portion on products liability.

It is also readily understandable why the ALI would create a project on apportionment of liability, even though it combines the two very different matters of (1) the sharing of damages between plaintiffs and defendants and (2) the sharing of damages among defendants. Nonetheless, the law in both areas has changed sharply since 1964. First, the principle of contributory negligence as a complete bar to the plaintiff’s recovery, which is the clear “black-letter law” in the *Restatement (Second)*,¹⁵ has by now been abrogated in nearly all U.S. jurisdictions. Second, the issue of how multiple defendants do and should share liability has gained a great deal of judicial, legislative, and scholarly attention of late, with the law becoming far more detailed than it had been. Moreover, the law in this latter area seems to be increasingly different from state to state (a problem that caused the Reporters for the apportionment of liability project to include several different “tracks” rather than a single dominant or preferred position).¹⁶

13. See *RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY* § 1 (1998).

14. See *id.* § 2(b)–(c).

15. See *RESTATEMENT (SECOND) OF TORTS: PRODUCTS LIABILITY* § 467 (1965).

16. See *RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY* §§ A18–E21, at 160–271 (1999).

Professor Schwartz's project is something rather different, however. The idea seemed to be to let one of America's most distinguished torts scholars loose over a vast terrain of tort doctrine to see if he could come up with fewer and better-presented basic principles that could come to replace a great number of the sections scattered throughout the four volumes of the *Restatement (Second)*. Yet, even Professor Schwartz recognized that there had to be limits on the scope of his undertaking, so he largely restricted himself to thinking about general principles that would cover accidental physical injuries to people and property. This meant, for example, excluding other injuries such as emotional harm, dignitary harm, and pure economic loss.

Interestingly enough, Professor Schwartz actually gives brief attention to nonaccidental physical injuries, offering up a basic principle that calls for the imposition of tort liability on one who intentionally causes physical harm¹⁷ (and in section 1 of his draft he goes to great lengths to define and discuss the meaning of "intent"¹⁸). However, as for any further details concerning liability for such intentional harms (including both defenses and other qualifications), Professor Schwartz simply refers the reader to the existing and elaborate provisions of the *Restatement (Second)*.

The upshot is that this project, now renamed Liability for Physical Harm (Basic Principles), as augmented by Green and Powers, primarily addresses (1) the law of negligently caused physical injury and property damage and (2) some special areas of the law where strict liability is imposed on those who cause physical injury or property damage. Yet, because this effort does not call for the abandonment of the Henderson and Twerski project, product injuries apparently are not to be absorbed into these basic principles,¹⁹ even though there are some references to product injury examples in Professor Schwartz's discussions.²⁰

Professor Schwartz's project decidedly represents a step in the right direction. But, in my view, it does not go far enough. Hence, my vision is that however these basic principles become incorporated into a *Restatement (Third)*, this piecemeal effort will eventually be replaced by a more comprehensive *Restatement (Fourth)* of Torts rooted in the broad thinking that underlies Professor Schwartz's effort.

17. See Draft No. 1, *supra* note 8, § 5.

18. See *id.* § 1 & cmts.

19. See *id.* ch. 4 scope note, at 291–92.

20. See, e.g., *id.* § 18 reporters' note.

II. ARCHITECTURE FOR A RESTATEMENT (FOURTH) OF TORTS

I envision four major divisions in my Restatement (Fourth) of Torts. First would come the fault liability division, and the core principle of my Restatement (Fourth) is that, in general, someone suffering an injury because of another person's failure to act reasonably is entitled to compensation for the injury in the form of monetary damages. In terms of conventional doctrinal categories, this division would cover "breach of duty" and "cause in fact."

Next would come the strict liability division, which carves out an exception to the core principle. Covered here would be a few special instances in which there is a strongly felt social understanding that injurers should be held responsible for the consequences of their conduct, even if it has not been unreasonable.

The third division would contain a series of defenses that either reduce or eliminate the liability that the prior principles would otherwise impose. The three main subparts of this division would cover topics that currently are addressed under the doctrinal headings of "plaintiff's fault," "proximate cause," and "no duty."

The fourth and final division would concern remedies. This division would focus primarily on the nature of the monetary (or other) damages that victorious plaintiffs may recover and from whom they may be recovered amongst possible defendants (thereby borrowing heavily from the second half of the apportionment of liability project). But it would also include provisions on enhanced fault—encompassing those special situations in which an injurer's unreasonable conduct amounts to reckless disregard for the interests of the victim (or worse). In such instances, the victim additionally is entitled to punitive damages.

III. SOME PROBLEMS WITH EXISTING TORT DOCTRINE

Before discussing these four divisions in more detail, I want to address what I see as the main problems with tort doctrine today. This should help to explain why my vision for a Restatement (Fourth) of Torts would be very different from both the *Restatement (Second)* and what is emerging as the *Restatement (Third)* and why I favor the particular approach that I have just briefly introduced.

First, in my view, there are simply too many separate "torts." Rather than starting from the civil law notion that there is one basic principle of "delict" (or liability for what might be termed fault), the common law approached and developed the field now known as torts in a piecemeal fashion. This is especially vivid in Volume 1 of the *Restatement (Second)*, which con-

tains a laundry list of some of the classic intentional torts, such as battery,²¹ assault,²² and false imprisonment.²³ Further torts, such as misrepresentation,²⁴ defamation,²⁵ invasion of privacy,²⁶ unjustifiable litigation,²⁷ and interference in domestic relations,²⁸ appear in Volume 3 and still others such as nuisance,²⁹ interference with contractual relations,³⁰ interference with water use,³¹ and interference with dead bodies,³² appear in Volume 4. Partly, this proliferation of separate torts was the product of the writ system.³³ Partly, it was a result of the very nature of the common law, in which judges create new law by recognizing new torts as they address new problems.

One undesirable consequence of this "many torts" approach, however, is that several of the different torts have their own special language, even though the doctrinal words seem to be trying to convey the same essential ideas expressed in other torts through other language. The principle of "consent" used for intentional torts, for example, seems to be intended to convey much the same idea as that of "assumption of risk," which is sometimes used in negligence cases; yet, both actually turn out to mean one of several other things, such as "no duty" or "no breach."³⁴

A second undesirable consequence (as I will illustrate below) is that seemingly similar problems appear to be resolved differently, perhaps with judges not even being aware of the inconsistency, as they approach the terrain covered by each of the separate torts with blinders on as to tort law generally. Third, when addressing new problems, judges tend to draw from analogies and experience in prior cases in the same narrow doctrinal area, when a fuller understanding of the matter might be gained by looking to how other parts of tort law have addressed this matter.

Hence, my vision of the Restatement (Fourth) of Torts would include but two principles of liability. Plaintiffs could only hope to win if either (1) they demonstrate the fault of the defendant, or (2) they show that their injury was one of those special cases that should attract liability in the ab-

21. RESTATEMENT (SECOND) OF TORTS §§ 13-20 (1965).

22. *Id.* § 21.

23. *Id.* § 35.

24. *Id.* § 525-557A.

25. *Id.* § 558-581A.

26. *Id.* § 652A-652I.

27. *Id.* § 653-682.

28. *Id.* § 683-707A.

29. *Id.* § 821A-821F.

30. *Id.* § 762-774A.

31. *Id.* § 841-864.

32. *Id.* § 868.

33. Gary T. Schwartz, *The Character of Early American Tort Law*, 36 UCLA L. REV. 641, 648-53 (1989).

34. See generally Stephen D. Sugarman, *Assumption of Risk*, 31 VAL. U. L. REV. 833 (1997).

sence of defendant fault. Professor Schwartz moves somewhat in this direction by adopting three categories of liability for physical harm: intentional physical harms in section 5,³⁵ negligent physical harms in section 6,³⁶ and strict liability in chapter 4.³⁷ But as already noted, a great deal of tort law is excluded from his project. Moreover, it is important to emphasize that my vision contains no separate category of intentional harm.

Furthermore, I believe that current tort doctrine is not sufficiently detailed regarding those types of things that at-fault defendants should have done differently, or those types of precautions that are required of different sorts of defendants. Hence, my vision of the Restatement (Fourth) of Torts would spell out due care obligations in more detail. Professor Schwartz addresses this topic a bit in his comments and notes to section 3,³⁸ which defines negligence, and to section 18,³⁹ which explores the notion of the negligent failure to warn.

Additionally, I believe that, in addressing whether or not a defendant exercised due care, courts often undesirably interchange the words “breach” and “duty”—concepts that I believe should be carefully separated. I would break up these ideas in a Restatement (Fourth) of Torts. Besides, current doctrine, in my judgment, is much too thin in setting out the types of reasons why one should have, or not have, a duty to exercise due care towards another. Hence, my vision of the Restatement (Fourth) of Torts would more thoroughly articulate and defend the “no-duty” categories. Professor Schwartz and his successors have begun to elaborate upon this topic in section 7.⁴⁰

Finally, as I see it, tort law today confusingly uses the word “cause” to encompass the very different ideas of historical causation and what is now often termed “proximate cause.” Moreover, some problems are dealt with under the “duty” label (or elsewhere) that should be handled with a renamed “proximate cause” analysis (a misstep largely resulting from the way that Judge Benjamin Cardozo handled the famous *Palsgraf v. Long Island Railroad Co.*⁴¹ case). Hence, my vision of a Restatement (Fourth) of Torts would address these matters quite differently. Powers and Green have helpfully separated the two “causation” ideas, by covering what they term “fac-

35. Draft No. 1, *supra* note 8, § 5.

36. *Id.* § 6.

37. *Id.* §§ 20–25.

38. *Id.* § 3 cmts. & reporters’ note.

39. *Id.* § 18 cmts. & reporters’ note.

40. *Id.* § 7; Draft No. 2, *supra* note 11, § 7.

41. 162 N.E. 99 (N.Y. 1928).

tual cause" in their Chapter 5,⁴² and by putting the proximate cause topic in their Chapter 6,⁴³ where it has been re-titled "scope of liability."

I now elaborate on my vision of a Restatement (Fourth) of Torts, describing each of my four "divisions" in some detail, and explaining, among other things, how I would attempt to deal with the problems of existing tort doctrine that I have just described.

IV. THE CORE PRINCIPLE: FAULT-BASED LIABILITY

Division 1 is where, in practice, most of tort law fits. That is, liability is usually imposed on those who engage in unreasonably dangerous conduct that causes harm. Hence this division would express the core principle that one is (provisionally) liable if one unreasonably fails to act in a way that would have prevented the injury suffered by the victim.

Therefore, this division would apply to most carelessly caused medical injuries, transportation injuries, injuries on the premises of another, product injuries, most nuisances, and all of the other injuries that now lead to claims sounding in negligence (including not only physical injuries, but also harms to other interests of the victim, such as emotional distress, economic loss, and more). This means that product injury claims based on fault with respect to warning or design, now appearing in the separate provisions of the *Restatement (Third) on Products Liability*, would be folded into my Division 1 under the core fault principle.

A. Including Intentional Torts

In addition to ordinary negligence cases, most of the cases that might today be brought as so-called intentional torts would also be covered in my Division 1 on fault-based liability. Professor Schwartz, as noted above, would continue the separate treatment of intentional torts.⁴⁴

Consider, battery, for example. I reject the idea that we benefit from having a separate tort for unconsented-to, offensive, physical touching. Rather, I believe we should ask whether the touching of one by another was reasonable or not. If it was reasonable, then generally there should be no liability, and certainly not fault-based liability. On the other hand, if the conduct was unreasonable, then the defendant should normally be liable. Thus, for example, when two prize fighters box, it is unwise in my view to claim that each consents to blows inflicted by the other, as the law now appears to do. After all, they are in fact trying their best to prevent such

42. Draft No. 2, *supra* note 11, § 26–28.

43. *Id.* §§ 29–34.

44. See Draft No. 1, *supra* note 8, § 5 & cmt. c.

blows. Instead, the real reason they cannot sue for harms received by punches to the nose is that, under the circumstances, it is reasonable to deliver such punches.

So, too, if one brushes against another while moving down the aisle of a crowded bus, or if one gently taps a stranger on the shoulder to ask the time, and we think these defendants should not be liable for their conduct, then the reason is that such behavior—unlike spitting on another's shoe in contempt, for example—is reasonable. This is exactly what the *Restatement (Second)* is saying when it deems such conduct not “offensive.”⁴⁵ Similarly, when battery doctrine now allows a defense of self-defense,⁴⁶ it is basically saying that when self-defense is properly exercised, the actor, who has inflicted harm, has acted reasonably. My vision of the *Restatement (Fourth)* of Torts would express this directly, without requiring the complexities of a *prima facie* case plus a defense.

Consider next a reasonable effort made in self-defense that causes harm to an innocent victim. Imagine bank guards who reasonably exchange bullets with bank robbers and, without fault, shoot an innocent bystander. It is somewhat awkward to arrive at a defense victory under the conventional doctrine governing battery. Nonetheless, the *Restatement (Second)* appears to reach that result by introducing considerations of the reasonableness of the guards' conduct.⁴⁷ But, when this problem is addressed under my fault-based liability division, the guards win in a straightforward way. This is because we judge their conduct not to be wrongful.

In the same vein, consider the reasonable but mistaken detention of suspected shoplifters. I have in mind here a defendant who engages in self-help to protect his own property and makes a reasonable mistake, briefly detaining someone who is quickly determined to be an innocent party after all. The basic provisions of the *Restatement (Second)* would normally impose strict liability on such a defendant, on the ground that his actions constitute false imprisonment⁴⁸ and/or a false arrest.⁴⁹ And, there is reason to believe that this was indeed the traditional common law result.⁵⁰ However, some courts have created a special exception for such situations⁵¹ that (very much like special statutes enacted in many states) permits businesses that reasonably believe someone is a shoplifter to detain the person on the premises for a reasonable time. Once more, if there is to be no liability in this setting, then

45. See RESTATEMENT (SECOND) OF TORTS § 19 (1965).

46. See *id.* § 63.

47. See *id.* §§ 18, 63, 75.

48. See *id.* § 35.

49. See *id.* § 129.

50. For a thorough discussion, see DAN B. DOBBS, *THE LAW OF TORTS* 196–98 (2000).

51. See RESTATEMENT (SECOND) OF TORTS § 120A (1965).

under my Division 1, this result would be straightforwardly achieved on the ground that the defendant acted reasonably.

Although I will not elaborate on the details here, it should be evident that other separate intentional torts also readily would be folded into my Division 1. One good example is defamation, which now, as a matter of constitutional law, requires proof of fault as a pre-condition of liability. The requirement of proof of even graver fault in defamation cases brought by public figures would be handled in my Division 3, as discussed below. Another example is the intentional infliction of emotional distress, which, along with the negligent infliction of emotional distress, would simply illustrate fault-based liability under my Division 1. The extra exemplary damages for which one is eligible when the conduct causing his emotional distress is "outrageous," along with the availability of such additional damages for many of what are now termed intentional torts would be covered in my Division 4 in the section on punitive damages. The unavailability of recovery for certain instances of wrongful infliction of emotional distress would be covered in my Division 3, as discussed below.

B. Characteristics and Circumstances of Individual Defendants

Torts casebooks and Professor Schwartz's Tentative Draft Number 1 deal thoroughly with the question of the extent to which tort law should formally take into account features of the individual defendant in deciding whether he or she acted unreasonably. The main topics usually addressed include emergencies, child defendants, defendants with physical or mental disabilities, and special knowledge or talents that the defendant may possess or lack.⁵²

I do not object to including this topic in my Division 1, and I would generally be content to embrace what Professor Schwartz has said on the topic in his draft. Moreover, as will become clear shortly, I especially approve of the way that tort law doctrine, when considering children, now generally takes into account the "social role" that the child was playing at the time—that is, distinguishing between children acting in adult roles, such as driving a car, and those acting in children's roles, such as playing hopscotch on the sidewalk.

But while they appropriately pay attention to these individual characteristics, tort doctrine and the *Restatement (Second)* do not, as I stated earlier, pay sufficient attention to the ways in which one might, as a general matter, have acted to avoid harm to another or to which of those ways are required of people in various social roles. In my view, *Restatement (Second)*

52. See, e.g., Draft No. 1, *supra* note 8, §§ 9–12.

sections 300 and 301, which vaguely address this issue as a general matter, are woefully inadequate. Instead, if these matters are dealt with at all by tort doctrine, this tends to be done on an ad hoc basis in separate doctrinal areas, without an effort to synthesize what is common among or different among those areas. Hence, while the *Restatement (Second)* has special rules for possessors of land,⁵³ doctors,⁵⁴ and product sellers,⁵⁵ my vision is to approach these complexities from the opposite end.

C. Types of Unreasonable Conduct

It is ordinarily up to the plaintiff to specify how the defendant should have acted, and to convince us that a reasonable person in the defendant's position would have acted this way and that, had the defendant so acted, the victim would not have been injured. As I see it, in specifying how the defendant should have acted, the plaintiff basically has two general ways of characterizing the defendant's conduct as wrongful:

First is the failure to have said the right thing—either because the defendant said nothing, or because the defendant did not say enough, or because the defendant said the wrong thing. Simply put, the plaintiff in these instances is complaining about the failure of the defendant to have properly disclosed dangers about which the defendant knew or reasonably should have known.

Second is the unreasonable failure to have acted differently. Either the defendant failed to make safer his or her activity, product, service, property, or the like, or the defendant carried out its conduct in the wrong place, or the defendant should not have engaged in its activity at all.

An important feature of my vision for a *Restatement (Fourth)* of Torts is that, in determining what disclosures should reasonably have been made, or whether precautions beyond disclosure should have been undertaken, it would be clear that it is not only proper, but crucial, to take the injurer's *social role* into account.

1. Disclosure: How Much?

Consider first the obligation to disclose. My broad point is that it is unwise to treat quite separately, as we generally do today, the obligation of doctors to obtain the informed consent of their patients, the responsibility of product sellers to warn of product dangers, and the necessity of land occupiers to notify those who come on to the land of the hazards lurking there. For

53. See RESTATEMENT (SECOND) OF TORTS §§ 328E–387 (1965).

54. See *id.* § 299A.

55. See *id.* §§ 388–402B.

me, these obligations are all part of the obligation to disclose risks and should initially be gathered under that single broad heading. But, and here is the next key point, the precise contours of the disclosure obligation further depend, in my view, upon the social role the defendant plays with respect to the victim.⁵⁶

I believe, for example, that doctors are understood in today's society to be fiduciaries and that, as such, they should disclose to their patients not only the risks of the treatment they propose, but also the risks of nontreatment, as well as a range of benefits and risks associated with reasonably plausible alternative treatments that might be tried, if there are any. This is because a fiduciary is someone we turn to in order to obtain the full range of information that is needed to make a sound decision. If we understand doctors in that way, then this will help us think through the range of disclosure obligations of others who we might conclude are also serving in a fiduciary capacity.

By contrast, I believe that most commercial actors—like product makers and land occupiers—are not viewed by society as fiduciaries. Hence, their disclosure obligations are appropriately more limited. It seems rather that our social expectation for ordinary enterprises is that they should let us know about dangers associated with their products, or their land, or their commercial activity—including both nonobvious dangers they are aware of, and dangers they could have been aware of if they had made reasonable efforts to discover them (for example, through inspection). Hence, we should think about a range of similarly situated enterprises when we address the disclosure obligations of supermarkets with respect to debris on their floors, machinery sellers as to the dangers of their products, and spectator sports promoters as to the risks of watching from the stands.

However, there are perhaps yet different social expectations for non-commercial actors with whom we have a relationship of the guest/host sort. In such relationships, it is perhaps quite appropriate for this social role to carry with it the obligation to disclose only those nonobvious dangers actually known to the host (that is, inspecting for dangers is not viewed as a reasonable requirement). In any event, the more general point is that it is appropriate to focus on whether there is something about the social relationship of the parties that makes it acceptable for this defendant not to have provided the sort of warning that we would have expected from a normal commercial provider. Professor Schwartz less explicitly acknowledges the importance of social role in his discussion of warnings in section 18 of his Tentative Draft Number 1. There, he explores the question of the extent of

56. For a more general appraisal of the role of social expectations in determining common law rights, see MELVIN A. EISENBERG, *THE NATURE OF COMMON LAW* 14–19 (1988).

the effort that a defendant must take to acquire information about risks and states that some of the relevant criteria are "the status of the defendant, the relationship between the parties, and the expectations which that relationship occasions."⁵⁷

Notice that, in emphasizing the importance of social role, I do not mean, for example, to embrace the classifications of invitee, licensee, and trespasser that used to dominate the law of occupier liability (and which still reign in many jurisdictions).⁵⁸ Yet, I do want to acknowledge that, at least in some respects, the different obligations said to be owed to these different classes of persons injured on the premises of another reflect the different sorts of social expectations that I have in mind. The problem with these traditional categories is that they soon became misaligned with social expectations in many important cases, thereby forcing the development by the courts of numerous so-called "exceptions."

2. Is Disclosure Enough, or Must the Actor Also Take Precautions?

A related key area for me concerns the question of when merely disclosing (or warning) of dangers suffices, and when someone additionally is required to take precautionary actions to reduce or eliminate the risk. This, too, is a problem that runs through all sorts of factual settings that tend to be treated quite distinctly today. These separate doctrinal areas would also be gathered together under my vision of a Restatement (Fourth) of Torts.

But again, for me one's social role is central. Consider first commercial actors such as supermarkets, hotels, landlords, and the like. They should not be able to get away with merely warning their customers, tenants, and so on about reasonably avoidable dangers on their premises. That is, it just will not do for a Safeway store to put up a sign saying that it is not bothering to clear up broken glass in its aisles, or for landlords to ignore staircases with broken treads and hand railings even after all the tenants in the building know of the danger. Rather, parties occupying those social roles are expected to take reasonable steps to prevent dangers in the first place and to eliminate dangers once they have developed.

By contrast, however, ordinary homeowners might well be viewed as appropriately satisfying their full obligation to act reasonably when they warn their guests of similar hazards in their homes. That is, because of the different social relationship, we might find it appropriate for the host fully to shift the responsibility to the guest for safely negotiating his or her way down a staircase once the danger has been clearly pointed out, whereas we no

57. Draft No. 1, *supra* note 8, § 18 cmt. g, at 263.

58. See RESTATEMENT (SECOND) OF TORTS §§ 329–32 (1965).

longer tolerate commercial providers completely escaping responsibility for dangers merely because these hazards are open and obvious (that is, well warned about but not fixed). Professor Schwartz also recognizes that sometimes warnings are sufficient,⁵⁹ but he does not link the question of when a warning may suffice to one's social role.

This, of course, does not mean that commercial actors must always take every feasible step to eliminate all dangers associated with their activity or product. Plainly, some risk reduction will deprive those served by the activity or product of important benefits that society does not want people to have to forego. For example, with respect to recreational activities in particular (whether the victim is a participant or spectator), warnings of modest dangers generally will suffice, and additional precautions generally will not be *required*. This explains why baseball stadium owners need not screen all of the seats or why it is was permissible for an amusement park to operate something called "the Flopper."⁶⁰ A similar point applies to various products used for recreational purposes.

Were similar levels of risk to arise in the work context, however, it might well be deemed unacceptable merely to warn employees, even if investment in precaution implied a minor reduction in wages. That trade-off, in the end, is no different from the one made when tort law imposes obligations to "fix" obvious dangers on hotels and supermarkets—tort law insists on safety even though that might imply a minor increase in price. In the case of these workplace or commercial property dangers, this insistence on safety precautions is a reflection of a societal determination that there are risks that we simply do not want potential victims to run. This determination is based on a judgment that, in fact, most potential victims indeed would prefer to pay for the risk reduction and/or a decision to paternalize them and avoid the danger in the name of the greater social good. By contrast, in the recreational activities examples noted above, society has decided not to paternalize consumers once it is determined that the socially approved benefit that comes with the danger is one the potential victim class is eager to enjoy.

Another example of where the nature of the social relationship between the parties apparently leads judges to decide that a warning suffices is the case of professional rescuers, such as firefighters who arrive to put out

59. See Draft No. 1, *supra* note 8, § 18(b).

60. These injuries to recreational participants and spectators, illustrated by cases such as *Murphy v. Steeplechase Amusement Co.*, 166 N.E. 173 (N.Y. 1929), which involved a ride called "The Flopper," and *Davidoff v. Metropolitan Baseball Club*, 463 N.E.2d 1219 (N.Y. 1984), are sometimes unhelpfully characterized as involving "assumption of risk." Better understood, they are simply examples of no breach, i.e., the defendant exercised due care. More precisely, they are examples of situations in which the defendant acted reasonably merely by warning, rather than by reducing or eliminating the risk.

fires negligently set by landowners or electricians who come to fix careless wiring jobs started by do-it-yourself homeowners. Indeed, the overriding point of all the examples given here is that the social relationship between injurer and victim is critical in determining the question of whether a warning is sufficient.

D. Disputes over Wrongdoing

In easy cases, there is no dispute over either what happened or what should have happened. We know what the defendant did or what the defendant said, and it is clear whether that is how a reasonable defendant should have behaved. Cases become difficult when the parties are in conflict over one or more of these matters. I envision that Division 1 would attend systematically to the different types of disputes.

1. Disputes over What Happened

First are disputes over what happened. The victim may claim that the defendant was speeding or drove his/her car across the center line, but the defendant may deny the allegation (and perhaps claim some specific alternative behavior). The same goes for a victim's claim that he/she was never warned, when the defendant argues, "But I told you" These factual disputes are classically matters for juries in the United States, with ordinary rules of procedure and evidence determining whether either side would be entitled to a directed finding (if requested) on the matter at issue.

There is nothing terribly special about torts cases in this respect, although it is perhaps worth emphasizing that judges through the years have been especially attentive to the ability of personal injury victims to prove their cases by circumstantial evidence, in view of the requirement that they may win merely with a preponderance of the evidence and need not prove what happened beyond a reasonable doubt, as in criminal cases.

The doctrine of *res ipsa loquitur* has been drawn into this question but, probably having done more harm than good, it would be better if it were retired. Instead, two very different situations should be distinguished. In one, common sense and/or common experience tells us that the defendant acted in a wrongful manner, even if we cannot know precisely how the defendant acted and therefore the precise nature of the defendant's misconduct. The famous case of the flour barrel falling out of a warehouse window and onto a passerby that ushered in the *res ipsa* expression is a good example.⁶¹ We do not know whether the defendant and his/her employees care-

61. See *Byrne v. Boadle*, 159 Eng. Rep. 299 (Ex. Ch. 1863).

lessly pushed the barrel out of the window, they carelessly tied it down and it somehow rolled away, they carelessly knocked against it, or what. But we are reasonably confident that the explanation for the falling barrel was some wrongful behavior of that sort, and not alternatives that we can imagine. Even when added together, we understand those alternatives, such as a criminal seeking to harm the plaintiff sneaking into the building and throwing the barrel at the victim, or an earthquake shaking the barrel down, to be rather unlikely.

Very different are those cases in which common sense and common experience will not carry the day for the victim, but there is something special about access to the evidence as to what did happen. In such circumstances, judges sometimes conclude that it would be unjust to impose the ordinary burden of proof on the victim. In such cases, the courts should openly state that (and justify why) the burden is being placed on the defendant(s). *Res ipsa* is altogether the wrong expression for these situations, because, unlike in the flour barrel case, the facts by no means speak for themselves. Examples of this second sort of case might include those in which young children come home from day care settings with unexplained injuries, those of exploding soda bottles that the victim thinks occurred because of carelessness at the bottling plant, and the famous *Ybarra v. Spangard*⁶² case, in which the plaintiff awoke from surgery with an injury that was almost surely caused by one of the independent contractors involved in the surgery but in which the patient had no way of knowing which medical professional was responsible.⁶³ Some believe that modern rules of discovery make it no longer necessary for courts to shift the burden in such circumstances. This appears to be Professor Schwartz's viewpoint; however, he still retains the phrase of "*res ipsa*" in his heading.⁶⁴

2. Disputes over Foreseeability

A quite different type of dispute between the litigants concerns whether the defendant knew or should have known that his/her behavior had endangered the victim. This raises the general issue of foreseeability. It is widely agreed that one cannot really be blamed for harming someone when, at the time one acted, one did not anticipate and could not reasonably have anticipated, that acting in the way one did risked harm to another. This is because, in such circumstances, it seems unfair to say the defendant should have acted differently. Disputes about foreseeability also broadly concern facts—what the defendant knew and, by reference generally to

62. 154 P.2d 687 (1944).

63. *Id.* at 688.

64. See Draft No. 1, *supra* note 8, § 17.

what others knew, what the defendant should have known. Again, this is normally a matter for the jury, and the main concern here is preventing juries from being too heavily influenced by hindsight. Just because it turns out that the defendant injured the victim, that does not prove that the defendant should have realized the dangerousness of his conduct at the time he acted. Yet, it is all too easy to project knowledge of what has happened backwards and perhaps draw an improper conclusion as to what should have been known at the time. This concern, I believe, must simply be handled by the proper admonishing of the jury by the trial judge and by the advocacy skills of the defense lawyer.

3. Disputes over Wrongfulness

Still different, and much more difficult, are disputes over whether the defendant's conduct was wrongful or not. The victim's initial and perhaps simple-minded position could usually be stated in a straightforward way: You knew (or should have known) that your conduct endangered me, and you should not have done that. Or perhaps somewhat more subtly, the victim's position could initially be put: You knew (or should have known) that I was at risk of harm and that by your doing or saying something different I would not have been hurt; thus, you should have acted differently.

The problem is that there are all sorts of circumstances in which the social judgment dictates that it was all right for the defendant to subject the victim to that risk of harm after all (for example, striking back in self-defense) and, therefore, that it was all right for the defendant to have acted as he/she did and not in the way the plaintiff says he/she should have acted. Determining those circumstances is not a matter of fact finding. The jury can find as a matter of fact what the defendant alternatively might have done that would have prevented harm to the victim—although this is more of a finding of hypothetical fact, rather than a finding of fact as to what actually happened.

Yet it is not really a question of fact whether the defendant was wrong in failing to act in an alternative way. Rather, I believe, answering that question requires making a social judgment. This perhaps explains why some term the issue of breach (that is, whether or not the defendant's behavior was wrongful) something of a mixed question of law and fact. It may also explain why judges often find themselves intruding into aspects of the breach question in various ways, thereby managing to take back for themselves this question of what would have been reasonable conduct under the circumstances.

Unfortunately, judges sometimes do this by seemingly terming the matter a question of duty, and I find that confusing. For example, in a famous

case in which a boy was injured when a wire he was swinging struck the electric power line of a trolley company, Judge Cardozo held that the trolley company had no duty to place the wires underground.⁶⁵ It would have been better had he made clear that it was not a breach to have failed to put them underground. The "duty" term, in my view, should be left for matters that I take up below in my Division 3. I do not object to courts declaring that, as a matter of law, there was a breach of the duty to behave reasonably, or that there was no breach of that duty. Indeed, I believe that judges have an obligation to make such a finding (when asked by the relevant party) if, in a particular case, no jury reasonably could find otherwise.

Perhaps more important than the question of allocating functions to judge and jury is consideration of the reasons why it might indeed be all right for a defendant to have endangered a victim. Much attention has been given in the past thirty years to the so-called "Hand formula" set out in *United States v. Carroll Towing*.⁶⁶ Judge Hand presents a kind of cost-benefit algebraic formula, in which he says that determining whether or not the defendant acted reasonably is a matter of balancing the risk to the victim (comprised of the probability of harm or "P," multiplied by the likely loss that the victim will suffer if the risk comes to pass or "L") against what he terms the "burden of adequate precautions" on the defendant (or "B").⁶⁷ As Judge Hand saw it, if the burden on the defendant of avoiding the risk is too great in comparison to the risk to the victim, it is acceptable for the defendant to proceed and run the risk and not pay for the consequent harm when it occurs.⁶⁸

I want to emphasize, however, that whether or not the burden on the defendant of avoiding the harm to the victim is too great is very much a social judgment, albeit one that a jury is probably reasonably well-suited to make. In short, we look to the legal system to tell us whether the defendant's injury-causing behavior was socially acceptable or not. And society's view of the burden may be markedly different than the defendant's view. In turn, this means that when the jury finds that the burden of avoidance is something the defendant should have born, but the defendant attaches much higher value to doing what he/she did, we should appreciate that, while tort law may punish the defendant, threatening such liability may well not prevent this sort of injury from occurring in the future.

It is also important to appreciate that, while the burden on the defendant might be money or something readily converted into a dollar value, frequently it is not (for example, driving more carefully). Perhaps even more

65. *Adams v. Bullock*, 125 N.E. 93, 94 (N.Y. 1919).

66. 159 F.2d 169 (2d Cir. 1947).

67. *Id.* at 173.

68. *See id.*

significantly, one should not understand this “burden” always to be a matter of the defendant advancing his/her exclusively selfish interests against those of the victim. To be sure, sometimes the defendant succeeds in convincing us that the financial cost of the precaution the victim proposes that the defendant should have taken is so great as compared with the small nature of the risk run that the jury will conclude that it was all right for the defendant not to have spent his/her money on that precaution. But often the burden of avoiding the injury will be deemed by society to be too great (and hence the defendant’s conduct in causing the injury to be not wrongful) because of the social benefit the defendant’s conduct brings about. As a simple example, it is reasonable for companies to offer airplane passenger service even if they know that there are going to be some unavoidable crashes (for example, from totally unexpected changes in weather). Of course, allowing this commercial venture permits airline companies to make profits. But, the real point is that the burden on our society would be too much if we had to give up air travel. Just because the passengers are aware of the risks and choose to take them hardly ends the inquiry. There are also involuntary victims on the ground. Moreover, it can often be unreasonable from society’s viewpoint for the defendant to have acted in a certain manner, even if the victim earlier had been happy for the defendant to have done so. Consider, for example, a friend who goes out for a joy ride in a car with an intoxicated buddy and who is injured when the buddy crashes the car into a tree. Professor Schwartz deals with several of these matters, including the roles played by statute and custom in helping the tort system to decide whether or not conduct was wrongful.⁶⁹

E. Cause in Fact

Although my Division 1 would include provisions on what has been called “cause in fact” and what Green and Powers call “factual causation,”⁷⁰ I will address this topic only briefly here. Generally, I support the Green and Powers approach of including under the heading of “factual causation” both cases in which the defendant can be shown to be the “but-for” cause of the plaintiff’s loss⁷¹ and certain other very special cases in which that cannot be demonstrated and yet the defendant is nonetheless held liable.⁷²

This latter category is comprised of what Green and Powers call “multiple sufficient causal sets”⁷³ or what many others call the problem of overde-

69. Draft No. 1, *supra* note 8, §§ 3, 13–16.

70. Draft No. 2, *supra* note 11, §§ 26–28.

71. *Id.* § 26.

72. *Id.* § 27.

73. *Id.*

terminated causation. I certainly agree that when there are two independently negligent actors and each of their acts, absent the act of the other, would have sufficed to injure the plaintiff, it is morally unacceptable to allow each to point the finger at the other and thereby allow both to escape liability because neither is technically the "but-for" cause of the harm. To be sure, each may show that the plaintiff would have been no better off had he (and he only) not been negligent. But, just as clearly, had there been no negligence at all, the victim would not have been injured at all. And so, in my view, just as surely the victim should not lose completely because of the coincidence of two simultaneous negligent acts. Of course, it is a policy choice to reject the "but-for" test in such settings, but it is widely considered the correct choice, as Powers and Green make clear.⁷⁴

A much more difficult case involves the combination of the negligence of a defendant and some concurrent act of nature/fate/God, either of which would have sufficed to injure the victim. In such a setting, in the absence of negligence, the victim still would have been injured. Therefore, to hold the negligent party liable for the loss would mean putting the victim back in a better position than he/she would have been in absent the defendant's negligence. Cutting the other way, of course, are (1) the misconduct of the defendant toward the victim and (2) the actual harm to the victim. Yet, these factors alone are normally insufficient to impose tort liability. Indeed, the central purpose of also requiring the plaintiff to show "but-for" causation is to further the conventional "corrective justice" understanding of tort law as a mechanism for righting individual wrongs. In their Tentative Draft Number 2, however, Powers and Green conclude that the weight of current authority favors the imposition of liability in at least some simultaneous cause settings, even when one cause is nontortious—although they present arguments on both sides of this issue.⁷⁵ I will not explore this matter further in this Article.

Earlier, I mentioned a role for courts in shifting the burden in special cases in which proof of breach is difficult because of the victim's inability to muster all of the relevant evidence. This problem exists with respect to the issue of proving historical causation as well, and Division 1 would address those situations in which, for a number of policy reasons, it has been thought appropriate to shift the onus of negating the evidentiary connection to the defendant.⁷⁶

74. See *id.* § 27 reporters' note (discussing cmt. a).

75. See RESTATEMENT (THIRD) OF TORTS: APPOINTMENT OF LIABILITY § 4 (2000); Draft No. 2, *supra* note 11, § 27 cmts.

76. See, e.g., *Summers v. Tice*, 199 P.2d 1 (Cal. 1948).

V. THE EXCEPTION: STRICT LIABILITY

A. The Major Existing Exceptions

I next turn to my Division 2, governing cases of liability without fault. So far, I see this division as clearly including three important categories: (1) dangerous activities that are not commonly carried out in the place where they were performed, (2) the production or sale of commercial products containing manufacturing defects, and (3) the vicarious liability of employers for the torts of employees. In each of these situations, the defendant is held liable without requiring the victim to show that the defendant in any way acted unreasonably (although admittedly in the last category, the victim must demonstrate that the employee acted unreasonably).

Coverage of these three matters is now strewn around the *Restatement (Second) of Torts* as well as the *Restatement (Second) of Agency*.⁷⁷ Moreover, each of them is taken up by a separate one of the three projects that so far comprise the *Restatement (Third)*. Strict liability for what are called “abnormally dangerous activities” is dealt with by Professor Schwartz’s basic principles;⁷⁸ strict liability for manufacturing defects is in the products liability portion;⁷⁹ and strict vicarious liability is treated briefly in the apportionment of liability portion.⁸⁰

This divided treatment suggests that these three matters are quite unrelated and does little to help us to understand why there are important sets of cases on both sides of the fault/no-fault gulch or to decide whether newly identified problems should go on one side or another. As Chicago Professor Harry Kalven noted long ago, although the twentieth century saw a dramatic simplification of negligence law and the elimination of all sorts of difficult-to-justify inconsistencies, it also made more vivid the stark contrast between requiring proof of unreasonable conduct as a prerequisite for recovery in some situations and not in others.⁸¹ I prefer to put these three major categories of strict liability cases together in the hopes that we can thereby better discern their similarities and better decide whether, in the future, additional matters should be resolved on a strict liability, rather than on a fault liability, basis.

Moreover, I believe there is a common theme connecting these three main examples of strict liability in tort. Namely, in each of these instances, commercial actors are viewed by society, because of the social role they play,

77. RESTATEMENT OF AGENCY (1958).

78. See Draft No. 1, *supra* note 8, § 20.

79. See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(a) (1998).

80. See RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 13 (2000).

81. See Harry Kalven, Jr., *Tort Watch*, 34 J. AM. TRIAL LAW. ASS'N 1, 2 (1972).

as having special responsibilities to pay for harms they caused, even if their conduct was not blameworthy. But I admit that this something of a conclusory theme. It points to the combination of commercial activity and special obligations arising from the particular commercial role being played. Yet it hardly explains what precisely creates different social expectations in these settings as contrasted with other commercial settings. To dig further into that requires a closer look at each of these three problems.

The basic criteria for the “abnormally dangerous activities” category are that the activity is both quite dangerous and uncommon. This simplified and improved characterization of the doctrine, as compared with the confusing multiple criteria set out in the *Restatement (Second)*, is well-captured by Professor Schwartz in his Tentative Draft Number 1, section 20. More precisely, in these situations a commercial actor has come to the type of location where this sort of dangerous thing is not normally done. And, although we are not saying he should not have done what he did, his violation of the expectations of substantial dangers that are ordinarily run in that sort of location is seen to thrust on him the obligation to compensate his faultless victims. Professor Schwartz, by contrast, appears to emphasize administrative reasons over the alteration of social expectations as the explanation for strict liability for abnormally dangerous activities.⁸² In my view, these administrative reasons would at best justify shifting the burden of proof to the defendant to show that its dangerous and uncommon activity nonetheless was reasonably carried out in the location where it took place.

For the second category—products with manufacturing defects—expectations are also key in my view. Our social understanding of today’s packaged and highly advertised products is that they will be safe. Unlike humans, who of course sometimes cause unavoidable injuries in the delivery of services, our society somehow has infused commercial products (i.e., objects) with a different meaning. And when our expectations about those products are violated, then strict liability is imposed. Again, the society is not saying that the defendant was at fault in selling such a product (or in making the product), but rather that, in view of consumers’ expectations, the defendant is obliged to compensate the victim. The *Restatement (Third)* portion on products liability instead emphasizes administrative, economic, and deterrence objectives in justifying strict liability for manufacturing defects.⁸³ In my view, these arguments would apply equally to the provision of many sorts of commercial services, such as airline transportation, and hence do not really justify tort law’s special treatment of products.

82. See Draft No. 1, *supra* note 8, § 20 cmt. b.

83. See *RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY* § 2 cmt. a (1998).

Finally, for the third category—vicarious liability for the torts of one's employee (and in some cases, one's independent contractor)—social expectations once more are critical. Simply put, our social understanding is that when someone acting on behalf of, and for the benefit of, an enterprise carelessly harms us, the enterprise will take responsibility for that actor. Otherwise, it would be viewed as quite unacceptable for enterprises to hire judgment-proof employees, to set them to work in ways that predictably will cause them on occasion to harm others negligently, and then to wash their hands of any responsibility for the resulting injury.

In short, I suggest that the existence of special social expectations is the common justification for imposing strict liability in each of these three important areas, in which the law contains exceptions to the normal rule that one may be held liable only on the basis of one's own fault.

B. Additional Categories?

Beyond these three categories of cases, there are additional candidates for inclusion in my Division 2 covering strict liability. Let us, for example, reconsider both the case of the reasonable but mistaken shooting of a bystander by bank guards and the case of the reasonable but mistaken detention of a suspected shoplifter by store security guards. An important issue, in my view, is whether the enterprise defendants in these instances should be strictly liable for the harm caused by their employees to innocent victims. These problems, and the issue they raise, might be characterized even more generally: Should an individual who acts reasonably in self-defense for his own benefit be liable in a situation like this? I am not certain what the right answer to this question should be. I am confident, however, that trying to answer this question by applying the complex rules of battery and false arrest law is not helpful.

I would prefer instead to address the question by exploring the social expectations theme I advanced to explain strict liability in the categories of abnormally dangerous activities, manufacturing defects, and vicarious liability. In the same vein, perhaps it could be argued that victims of the conduct of the bank guards and the security guards cannot really imagine they might be accidentally singled out for the injury they suffer. So, when such mistakes occur, our violated social expectations demand victim compensation. On the other hand, we might decide instead that these experiences are no more than bad luck to which no special expectations attach. If so, they are rightly understood simply as instances of the much wider default category of not-reasonably-avoidable accidents, the financial consequences of which fall on victims, not injurers.

Were we to decide to keep these bank guard and security guard cases in Division 1, requiring proof of fault before the victims may recover, this might force us to reexamine the common law rule concerning private necessity, now set out in the *Restatement (Second)* in section 197⁸⁴ and section 263.⁸⁵ According to the *Restatement (Second)*, unlike bank guards acting in self-defense or security guards acting to detain suspected shoplifters, reasonable conduct by a defendant in the private necessity setting does not suffice to avoid liability for harm reasonably imposed. This rule rests on the classic case of *Vincent v. Lake Erie Transportation Co.*,⁸⁶ which Professor Bohlen explicitly drew upon to set out the *Restatement* position on private necessity. There, because the defendant had a self-protection privilege to tie its ship to the plaintiff's dock in order to avoid its ship being damaged badly by a tremendous storm, it was not liable for trespass.⁸⁷ Nevertheless, the Minnesota Supreme Court held the defendant strictly liable to the dock owner for the damage the boat did to the dock when pounded by a storm.⁸⁸ Just why the innocent dock owner can recover, but the innocent yet suspected shoplifter and the innocent victim of the bank guard's bullets cannot, is something of a mystery to me. Clearly, in each of these cases, the defendants acted reasonably in self-defense of person or property, and each of the defendants, in furtherance of his own interests, imposed a loss on an innocent party. And it is even more troubling to me that the successful plaintiff in *Vincent* is a commercial actor, whereas the losing plaintiffs in the other examples are ordinary citizens. Perhaps there are different social expectations that attach to the private necessity situation. At least my approach should force a more consistent evaluation of these problems, rather than leave them scattered about the *Restatement* as though they were altogether different matters.

As for other possible inclusions in my Division 2, I leave for another occasion any consideration of Professor Schwartz's remaining and somewhat exotic categories of wandering livestock,⁸⁹ wild animals,⁹⁰ and abnormally dangerous animals.⁹¹ Also, there are other examples of what, in effect, is the imposition of strict liability in the intentional tort area (beyond the private necessity example already discussed). These matters also would be covered in my Division 2 and thereby clearly would be separated from most intentional torts, which rest upon wrongful conduct and would be covered under my Division 1.

84. RESTATEMENT (SECOND) OF TORTS § 197 (1965) deals with entry into land.

85. *Id.* § 263 (dealing with the conversion of chattels).

86. 124 N.W. 221 (Minn. 1910).

87. *Id.* at 221; accord *Ploof v. Putnam*, 71 A. 188, 189 (Vt. 1908).

88. 124 N.W. at 221-22.

89. Draft No. 1, *supra* note 8, § 21.

90. *Id.* § 22.

91. *Id.* § 23.

VI. DEFENSES

As noted earlier, there are three main defenses in my Division 3. I will set out their general terms, and then I will discuss each in turn. As a preliminary matter, however, I want to emphasize what I mean by a defense. My main point is that a defendant who has otherwise been shown (or alleged) to have either wrongfully injured the victim or injured the victim through conduct to which strict liability attached needs to offer a convincing reason why he/she should not be held fully liable for the loss. I do not mean for now to attend to the niceties of pleading or the order in which the various issues in a case should be addressed.

First, in general, if the victim also could have avoided or reduced his or her injury by acting reasonably, then the damages that the victim might otherwise have been awarded are appropriately reduced based upon an appraisal of the victim's share of the responsibility for his or her own loss.

Second, if the victim's injury is not fairly understood to be part of the risk taken by the injurer's conduct, then the injurer is not liable at all for the victim's loss.

Finally, injurers are not liable in tort for certain consequences of their conduct, when the judiciary concludes that the overall social benefits of exempting a particular injurer and similar injurers from liability clearly outweigh the social benefits of holding that injurer responsible for the consequences of his or her unreasonable (or otherwise strict liability-attaching) conduct.

A. Victim Fault

As for victim fault, I am merely including in my Division 3 the general principle of comparative fault. This has been set out in Topic 1 of the apportionment of liability project for the *Restatement (Third)*.⁹² And, I am generally in accord with what is presented there. Of course, in their details, the rules of comparative fault vary considerably from state to state, and I have my own personal preferences as to which regime is the most just (largely in line with the choices made in the Uniform Comparative Fault Act⁹³). But this is not the occasion to address those differences.

Rather, for now I will address only one issue. Consider, for example, the situation in which you wrongfully attack me with your fists and I respond in self-defense but use unreasonably excessive force, injuring you. You then sue me. Under my approach, your lawsuit would be covered under Division

92. See RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY §§ 1-9 (2000).

93. UNIF. COMPARATIVE FAULT ACT, 12 U.L.A. 123 (1996 & Supp. 2002).

1, which deals with my wrongful behavior, that is, my unreasonable use of force that causes you injury. But the following question would then vividly arise: Why should I not be able, under the defenses provided by Division 3, to reduce your damages because of your fault in attacking me in the first place?

The very separate structure of the law of intentional torts in the United States long seems to have stood in the way of assimilating the comparative fault regime into such lawsuits. Clearly, the *Restatement (Second)* rejects considering the fault of the initial aggressor in his/her lawsuit against the person who was attacked but responded with excessive force.⁹⁴ But under my reformulation, we could readily do that. Powers and Green in their apportionment of liability project are thoughtfully alert to this issue.⁹⁵ Moreover, they helpfully point out several situations in which courts are now beginning to apply comparative fault principles in cases brought as intentional torts.⁹⁶

B. Harms Outside the Scope of the Risk Taken (No "Proximate Cause")

In the second defense in my Division 3, rather than speaking in terms of legal cause or proximate cause or superceding cause or other phrases that use the word "cause," I adopt a different approach. Instead, I provide a defense for an injurer who can persuade the court that the injury that occurred is not fairly understood to be part of the risk he took.

In a variety of circumstances the defendant may be able to convince the court that the victim's injury is most fairly attributable to something other than the defendant—perhaps another party, or fate, or nature, or the like. Examples of these circumstances are spelled out in the elaboration of this defense. They include the defendant persuading us that (1) this injury was not the result of the hazard that the defendant created, (2) this was not the victim that the defendant endangered, (3) the defendant did not enhance the victim's risk of being injured as he was, or (4) some other party unexpectedly came between the defendant and the victim and his act eclipsed the defendant's responsibility. The thrust of the argument in each of these circumstances is captured in the master principle of this part of my Division 3—namely, that the defendant has demonstrated that what happened is not fairly part of the risk he took.

Although I have used somewhat different language here, my views are largely in accord with those of Powers and Green.⁹⁷ They want to get away

94. See RESTATEMENT (SECOND) OF TORTS §§ 63, 70 (1965).

95. See RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 1 cmt. c (2000).

96. See *id.* § 1 reporters' note.

97. See Draft No. 2, *supra* note 11, §§ 29–34.

from both the word “cause” and an obsession others have to use special language to express the moral sentiment applicable to these cases. Their proposal is that a defendant is not liable for “harm different from the harms whose risk made the actor’s conduct tortious,”⁹⁸ leaving it for the comments and notes to try to spell out what constitutes a “different harm.”⁹⁹

I want to emphasize further that casting this defense in terms of the “scope of the risk taken” (or as a “different harm,” as Powers and Green would) might also help courts to better articulate than the *Restatement (Second)* just why it is that defendants are liable in certain cases and not others. For example, liability is avoided in “unexpected hazard,”¹⁰⁰ “unexpected plaintiff,”¹⁰¹ or “superceding cause”¹⁰² cases, and yet defendants are usually fully liable in so-called “unexpected extent,”¹⁰³ “unexpected manner,”¹⁰⁴ and mere “intervening cause”¹⁰⁵ cases. Powers and Green maintain these distinctions.¹⁰⁶ It is less clear whether they have yet offered a convincing reason why it should be that some defendants are not liable for certain “unforeseen” harms, because they are characterized as “different harms,” whereas other defendants are liable for other “unforeseen” harms, which somehow are not viewed as “different harms.” I leave this very thorny topic for another occasion.

C. Policy Arguments Trumping Liability (“No Duty”)

Turning finally to what are typically called the “no-duty” rules, I cover in my Division 3 those situations in which the defendant is not held liable because, even if he were at fault, there is some overriding policy reason for his escaping liability after all. My goal is to capture and articulate, in one place, the range of policy arguments that may be used to let individual defendants escape having to pay for harm they impose on individual victims. These are situations that, if narrowly judged in terms of this one injury, might well seem to be ripe for the imposition of liability, but that, when viewed in the wider context, are instances in which judges are convinced that broader social values preclude tort liability.

98. *Id.* § 29.

99. *See id.* § 29 cmts. & notes.

100. *Overseas Tankship (U.K.) Ltd. v. Morts Dock & Eng’g Co., (Wagon Mound I)* [1961] 1 A.C. 388 (P.C.) (appeal taken from Austl.).

101. *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99 (N.Y. 1928).

102. *Stultz v. Benson Lumber Co.*, 59 P.2d 100 (Cal. 1936).

103. *Benn v. Thomas*, 512 N.W.2d 537 (Iowa 1994).

104. *McLaughlin v. Mine Safety Appliances Co.*, 181 N.E.2d 430 (N.Y. 1962).

105. *Hines v. Garrett*, 108 S.E. 690 (Va. 1921).

106. *See* Draft No. 2, *supra* note 11, § 30 (dealing with “unexpected extent” or the “eggshell skull”); *id.* § 33 (dealing with “intervening/superceding” causes).

Below, I set out five important policy arguments. For each type, I will give a general statement of the reason why tort liability should be denied and then an example that arguably illustrates the reason. I want to make clear at the outset, however, that for some of my specific examples the denial of liability might actually be justified by more than one of the policy arguments I will set out, a point I will subsequently expand with further examples.

- (1) A well-functioning alternative justice system, itself providing deterrence, punishment, and compensation, is available. This system makes providing tort remedies not only superfluous but also unwise, as it would interfere with the alternative and its socially effective governance structure. This is a good reason for judges to decide that tort law will not provide a remedy for a victim of unreasonable conduct. This reason may explain, for example, why professional athletes in the United States (who have generous disability insurance coverage and are subject to penalties by both on-the-field and league officials) are generally not permitted to sue each other for ordinary negligence that occurs during the course of their sporting event.
- (2) Were liability imposed, then administrative burdens (that is, a "flood of cases") would be imposed on the judiciary that would be so large as to preclude the courts from providing prompt justice in other, more compelling cases. If this fear is well-grounded, then it, I believe, provides another good reason for judges to deny recovery to victims of wrongful conduct. This reason might justify precluding lawsuits for the negligent infliction of emotional distress upon strangers, which courts apparently think would unleash a potentially huge number of small injury claims.
- (3) Imposing liability will generate perverse behavioral responses that will be even more undesirable than denying recovery. Again, if this fear is truly well-grounded, it is perhaps just for judges to keep tort law from doing more harm than good, even at the expense of an otherwise deserving victim. This appears to be the justification in many states for denying recovery to those who suffer recreational injuries at the hands of careless fellow participants.¹⁰⁷ That is, the courts that reject plaintiffs in these cases seem convinced that imposing liability would dramatically discourage participation in such activities. I must confess, however, that I have substantial doubts about the correctness of the predicted behavioral response to im-

107. See, e.g., *Knight v. Jewett*, 834 P.2d 696, 710–12 (Cal. 1992) (finding no duty for injury suffered during a touch football game).

posing liability on carelessly dangerous recreational activity. In short, I doubt whether the fear expressed by the courts is truly well-grounded.

- (4) If the victim is allowed to win here, then crushing liability might well follow that genuinely risks depriving the public of essential goods and services. Again, if this fear is truly well-grounded, it is probably just for judges to keep tort law from causing more harm than good in this particular way, even at the expense of individual victims. This reason perhaps explains why New York's highest court, in the well-known Consolidated Edison case, limited the public utility's liability in connection with New York City's famous "blackout."¹⁰⁸ However, I must again confess that I find highly dubious the underlying empirical argument, here concerning the risk to the provision of essential services. I find it unlikely that allowing suits like the plaintiff's truly jeopardized the provision of electrical services. (This policy reason might help to explain limits that many states impose on the responsibilities of lawyers, accountants, and other financial actors for economic losses that their careless conduct imposes on people who are not their own clients.)
- (5) There are important and trumping social values at stake that otherwise might be trampled were the decision in an individual case made with a focus precisely on the events of the case instead of on the wider systemic consequences of liability. This may be the most difficult reason to justify the denial of recovery because it means that judges are making a social judgment about what values are of paramount importance. However, in the U.S. system, which relies upon juries to determine the reasonableness of one's conduct in individual cases, judges may well be justified in precluding what they appropriately fear might be the narrow focus of individual juries. Moreover, if the identification by the courts of certain trumping values is viewed as inappropriate, then, at least in the ordinary case, it can be overturned by the legislature, which perhaps is a more legitimate body for identifying such values. This reason may explain why courts would deny recovery to a child who is suing his or her mother for injuries suffered because of alleged misconduct by the mother during pregnancy.¹⁰⁹ Courts might wisely conclude that the strong social value favoring the mother's autonomy with respect to her own body trumps all other considerations and that

108. See *Strauss v. Belle Realty Co.*, 482 N.E.2d 34, 38 (N.Y. 1985).

109. See, for example, the Supreme Court of Canada's decision in *ex rel. Dobson v. Dobson* [1999] D.L.R. 148, in which no duty was found. But see *Bonte v. Bonte*, 616 A.2d 464, 466 (N.H. 1992) (finding a duty).

juries should not be asked to weigh that value in general against the specific risk to the plaintiff in the individual case. This reason also may explain why in the United States the media is not liable for merely negligently defaming public figures.¹¹⁰ Simply put, the First Amendment free speech value is thought to trump consideration by the jury of the alleged careless reporting in the individual case. (Of course, in this setting, because the U.S. Supreme Court has rested the media's rights on the U.S. Constitution, no legislative overruling is available.)

This list of five reasons is meant to be only illustrative, not comprehensive. Other reasons that might be added to the list include, for example:

- (6) Allowing a tort action for the conduct in question would unwisely interfere with the handling of the dispute between the parties in a different judicial forum.
- (7) The facts to be uncovered and/or matters to be resolved are of a sort such that the judiciary is as likely to decide the case wrongly as rightly, so that to allow lawsuits of this sort to proceed will probably bring about widespread disrespect for the judiciary with accompanying detriment to the society in general.
- (8) Allowing lawsuits like these will unleash collusion between plaintiffs and defendants that will so unfairly involve the courts in injustice as to make it socially more desirable to disallow such claims altogether.
- (9) Permitting recovery would run afoul of separation-of-powers concerns, leading to the judgment that complaints, for example, about policy judgments made by executive and administrative actors should be brought, not as torts to be resolved in court, but rather through legislative, rule making, or other political processes instead.¹¹¹

Before completing this discussion of what are usually termed "no-duty" rules, let me briefly address three more examples. One concerns the question of whether therapists should be obligated to take reasonable steps to protect third-party potential victims from threats to their lives made by the therapists' clients. This matter was addressed by the California Supreme Court in *Tarasoff v. Regents of the University of California*,¹¹² where a duty to act was imposed. But suppose a court were to rule that the therapist had no

110. N.Y. Times Co. v. Sullivan, 376 U.S. 254 *passim* (1964).

111. For an even longer list of possible reasons for denying a victim the right to recover in tort, see Jane Stapleton, *Duty of Care Factors: A Selection from the Judicial Menus*, in THE LAW OF OBLIGATIONS: ESSAYS IN CELEBRATION OF JOHN FLEMING 59, 92-95 (Peter Cane & Jane Stapleton eds., 1998).

112. 551 P.2d 334 (Cal. 1976).

obligation to act even in a situation in which a jury would have concluded that the threat was so clear, and the readily available warning to the police so easy to give, that it was decidedly unreasonable for the therapist to have remained silent—a result reached in jurisdictions that reject *Tarasoff*.¹¹³ Several of the many reasons set out above might justify such a result. One would be the trumping value of therapist/client privacy. A second would be the risk of perverse behavioral responses. For instance, dangerous clients may no longer seek counseling or no longer make disclosures in counseling that would promote helpful therapy. Or, therapists may involuntarily commit too many patients to mental hospitals. It might even be believed by some courts that therapist liability in these sorts of cases would drive all too many high-quality therapists from the profession—although common experience in California after *Tarasoff* strongly suggests the opposite.

Consider next possible claims by one divorcing spouse against the other (or both against each other) for the infliction of emotional distress. Although liability for this sort of wrongful conduct is allowed by some jurisdictions, it is rejected in others.¹¹⁴ Again, more than one of the policy reasons earlier presented in support of “no-duty” rules might explain why courts would follow the latter route. One might be that allowing lawsuits risks upsetting the state’s no-fault divorce regime by turning most divorces into fault-based tort contests. Another might be that the private understandings between spouses as to what is legitimate conduct in their marriage are so impenetrable that allowing such lawsuits threatens either a high proportion of erroneous decisions or the imposition of external standards that unwisely trump the autonomy of the parties to have the marital arrangement they created for themselves.

Finally, I turn to the still solid U.S. rule that there is no duty to go to the aid of “strangers.” This rule means that affirmative assistance owed to another must rest upon a relationship that the courts view as more than a stranger relationship—a relationship that appropriately calls upon one to act for the benefit of another. The justification for the basic rule, however, is by no means self-evident, and it arguably rests upon one or more of the “no-duty” policy reasons set out above. Perhaps the broad liberty value not to get involved with others trumps a specific determination in this case that a trivial and evident effort was reasonably available to the defendant. Or perhaps this rule is based on the reason that imposing liability would lead to perverse behavioral responses—by unleashing unwanted and officious intermeddlers, or by causing clumsy rescuers who now hold back to join in and do more harm than good, or by causing people undesirably to withdraw from

113. See, e.g., *Nasser v. Parker*, 455 S.E.2d 502 *passim* (Va. 1995).

114. See generally Ira Mark Ellman & Stephen D. Sugarman, *Spousal Emotional Abuse as a Tort?*, 55 MD. L. REV. 1268 (1996).

social interaction with others. Or perhaps there are overriding concerns in the administration of justice that it will often be unclear toward whom the finger of responsibility to help the victim actually has been pointed. This would thereby lead to lawsuits either against an army of defendants or against one who is arbitrarily and unfairly singled out. I note that when a duty to aid another is imposed, it is because of the social relationship that the defendant has to the victim, a third party, or some property or the like of the defendant's. Hence, it might be argued that this consideration of social role should go with my discussion of social role under my Division 1. However, because the lack of any recognized social role grounds the denial of liability as a policy matter, I am content for that to be an issue for the defendant to assert and convince us about for one or more of the reasons that count under my Division 3.

VII. REMEDIES

I will say little here about my vision of Division 4, concerning remedies. I want only to emphasize that this would cover punitive damages. Traditionally, one of the main benefits of alleging and proving an intentional tort is that there is a good chance that punitive damages will be awarded (although clearly not for all such torts). Today, punitive damages are increasingly available for highly wrongful conduct that is not intentional in the traditional sense. Hence, my preference is to have initial liability based upon fault of whatever degree and to cover that liability, as noted already, in Division 1. Then for Division 1 cases of grave wrongdoing, the possibility of additional punitive damages would be addressed by the standards set out in Division 4.

CONCLUSION: A RESTATEMENT (FOURTH) OF TORTS AND THE TEACHING OF TORTS

In closing, I want to point out that were my approach adopted, it might alter considerably the way law professors would teach torts. I can envision a time when professors would first talk about cases in which victims claim that injurers should have said something different and then about cases in which victims claim that injurers should have done something different. Under both headings, a variety of injury contexts would be addressed, not limited only to physical harm to person or property. Next we would examine cases in which victims seek recovery without claiming that injurers should have acted differently at all. The two main heads of liability having been addressed, we would then examine cases in which defendants seek to reduce or eliminate their legal obligations for the sorts of defense reasons I discussed

earlier. Last would come cases concerning the nature of the recovery that winning plaintiffs could obtain. With this much simplified structure, tort law, in my view, would be much easier to teach and to learn.

Experienced instructors will have noticed already that my approach eliminates several concepts, doctrines, and categories that are today commonly part of tort law. These include such matters as “immunity,” the right to “informed consent,” “assumption of risk,” “the firefighter’s rule,” “occupier liability,” and the like.

This simplification of tort doctrine would also give those who teach torts more time to focus on other topics, including alternatives to tort. Those topics are now all too often placed, if at all, in the back part of the casebooks and treatises. Often, they are not addressed in the first-year class, or only lightly covered. With more time, not only could we teach about alternative compensation mechanisms (both focused and general compensation schemes), but we could also give at least some attention to alternative means of serving the other goals of tort law (like promoting safety and punishing wrongdoing) through social interventions, including regulatory regimes, criminal law, and more.
