
A RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR
INTENTIONAL HARM TO PERSONS—THOUGHTS

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INTRODUCTION

With two *Restatement (Third) of Torts* projects neatly situated in leather-bound volumes and a third project freshly adopted by the American Law Institute membership this year, the goal of a completed *Restatement (Third) of Torts* is already in view. Yet further challenges, no doubt large ones, lie in wait. For illustration, one need look no further than the now-stalled *Restatement (Third) of Torts: Economic Torts and Related Wrongs*. Although the need for particular Restatement projects may be clear, attempts to bring those projects to fruition may be more tangled. Before substantive doctrinal disputes can be addressed, the scope and structure of each new project must be charted. This Article maps one possible step along the path towards a completed *Restatement (Third)*. It discusses ideas for a *Restatement (Third) of Torts: Liability for Intentional Harm to Persons*.

Perhaps the most encouraging prospect for a *Restatement* concerning liability for intentional harms to persons is that the central foundation for such a project has already been laid by existing *Restatement* provisions. Indeed, if a project on liability for intentional harm to persons were undertaken, one central task of the project would be to meld existing *Restatement* provisions with supplemental rules in order to create a coherent whole—to attend to those parts of the project that are already living.¹

Of course, a Restatement cannot create a grand scheme that unites all disparate tort doctrines into a single uniform framework.²

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1. T.S. ELIOT, *Tradition and the Individual Talent*, in *SELECTED ESSAYS 1917–1932*, at 3, 11 (1932) (“And [the poet] is not likely to know what is to be done unless he lives in what is not merely the present, but the present moment of the past, unless he is conscious, not of what is dead, but of what is already living.”).

2. Robert L. Rabin, *Emotional Distress in Tort Law: Themes of Constraint*, 44 WAKE FOREST L. REV. 1197, 1210 (2009) (discussing the impossibility of

Nor can the drafting process unearth an essential taxonomy of the subject.³ Yet when designing a system of liability, a Restatement need not be sanguine about adopting a patchwork of liability rules that cannot be reconciled on any principled basis. Attempts to structure varied doctrines into a broader framework of meaning force the collective of judges, scholars, and practitioners involved in the Restatement process to wrestle with problems that might otherwise be finessed⁴—a virtue of the approach. Moreover, if the law of torts has been disorderly and contentious, it has not been static. The *Restatement (Third)* writes new thoughts about civil responsibility for injury into the perpetual development of the field.⁵

Toward the aim of articulating a principled and useful (if imperfect and impermanent) structure, this Article outlines some preliminary ideas for a *Restatement (Third) of Torts: Liability for Intentional Harm to Persons*. The first chapter of this new project would address liability for intentional physical harms to persons. The chapter would establish an umbrella rule of liability for intended physical harms to persons that would be both broader and narrower than the existing trespassory torts. The chapter would recognize exceptions to liability as well as a mechanism through which judges could create additional exclusions. Finally, the chapter would establish the guidelines under which torts would be considered “intentional” for the purpose of various extended-liability rules.

Subsequent chapters of a *Restatement (Third) of Torts: Liability for Intentional Harm to Persons* could address emotional harms related to intended and threatened physical harm and restraint as well as stand-alone intentional emotional harms. A later project might add rules pertaining to negligent emotional harms to persons alongside rules governing liability for dignitary injuries. It is the structural design of the main chapters of a new *Restatement* project to which this article now turns.

CHAPTER 1: LIABILITY FOR INTENTIONAL PHYSICAL HARM TO PERSONS

In the *Restatement (Second) of Torts*, Reporter and famed torts luminary William Prosser introduced the chapter on liability for

uniting existing doctrines into a single framework in the emotional-distress area).

3. As one author of an intellectual history of tort law concludes, “[F]or all the impressive scholarly energies directed at the unification, simplification, and ordering of tort law, the field seems to have an inherent capacity to lapse into disorderliness, inconsistencies and complexities.” G. EDWARD WHITE, *TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY* 243 (1980).

4. Gregory C. Keating, *Is Negligent Infliction of Emotional Distress a Freestanding Tort?*, 44 WAKE FOREST L. REV. 1131, 1133 (2009).

5. See *id.* at 1134 (discussing how Restatement taxonomies can shape the path of the law going forward).

intentional invasions of interests in personality with the note that of all these varied interests, “the interest in freedom from bodily harm is given the greatest protection.”⁶ Prosser illustrated this principle by reference to the law’s protection against bodily harm not only from intentional invasions, but also from negligent and sometimes unintentional non-negligent invasions as well.⁷ The *Restatement (Third) of Torts: Liability for Physical Harm* illustrates the heightened legal protection afforded to protect against physical harm with a slightly different reference to scope. “[T]ort law treats the intentional infliction of physical harm differently than it treats the intentional causation of economic loss or the intentional infliction of emotional disturbance. In cases involving physical harm, proof of intent provides a basic case for liability.”⁸ However, in cases of intent to cause economic or emotional harm, courts may attach additional requirements.⁹ For instance, intended conduct in cases of economic harm must also be “improper” to warrant liability.¹⁰ Intended conduct in the context of emotional injury must be accompanied by “severe” disturbance to merit recovery.¹¹ Despite controversy over which doctrines should be recognized as core, freedom from intentional bodily harm has been a mainstay of tort-law protection.¹²

Whether the interest in freedom from intentional bodily harm has become more salient in recent times presents an interesting cultural question.¹³ In any event, given the centrality of the interest, its historically protected status, and its continued resonance with contemporary norms, freedom from intended physical harm affords an appropriate starting point for liability.

The *Restatement (Third) of Torts: Liability for Physical Harm* eloquently establishes the key principle of liability for intended physical harm. Section 5 provides: “An actor who intentionally

6. RESTATEMENT (SECOND) OF TORTS ch. 2 introductory note (1965).

7. *Id.*

8. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 5 cmt. a (Proposed Final Draft No. 1, 2005).

9. *Id.*

10. *Id.*

11. *Id.*

12. See Oscar S. Gray, Jacob A. France Professor Emeritus of Torts, The University of Maryland School of Law, Commentary at the Wake Forest Law Review Symposium: Third Restatement of Torts (Apr. 2, 2009). See generally Martha Chamallas, *Unpacking Emotional Distress: Sexual Exploitation, Reproductive Injury and Intimate Relationships*, 44 WAKE FOREST L. REV. 1109 (2009) (discussing the controversy over which doctrines should be recognized as core in the context of sexual and reproductive harms).

13. Perhaps longer life expectancy, greater healthcare spending, and reductions in accidental-death rates reflect a greater expectation of freedom from harm. Large public-health campaigns to stem physical harms may both reflect these expectations and fuel them.

causes physical harm is subject to liability for that harm.”¹⁴ “Physical harm” is defined as “physical impairment of the human body” as well as physical impairment “of real property or tangible personal property.”¹⁵ “Intent to harm” is defined as a purpose or substantial certainty of producing that result.¹⁶

This simple but central foundation established by the *Restatement (Third)*—that those who intentionally cause physical harm are subject to liability for it—is critical to the development of a *Restatement (Third) of Torts: Liability for Intentional Harm to Persons* for two reasons. First, it provides a normatively acceptable baseline from which to organize a structure of liability. Second, that baseline provides a conceptual framework that can be made to mirror the style and structure of the *Restatement (Third)*’s negligence doctrine.

On the first point, the normative acceptability of duty as a baseline cannot be taken for granted. The issue of a baseline duty was amply debated with respect to the *Restatement (Third)*’s negligence provisions.¹⁷ In the context of negligent physical injuries, a baseline duty of reasonable care ultimately prevailed. This new baseline arguably expands legal protection for interests in freedom from bodily harm.

However, a broad baseline duty of care would not be normatively viable in all circumstances. In the proposed *Restatement (Third) of Torts: Economic Torts and Related Wrongs*, for example, a baseline rule of duty to avoid economic loss, even intentionally inflicted economic loss, would have been untenable.¹⁸ A declaration that intended economic harm is prima facie tortious would render actionable a wide swath of ordinary commercial activity. For example, a business owner might know that opening a pharmacy would harm the economic interests of a competing pharmacy and even wish that it would do so, and yet the law would not and should not sanction this ordinary competition. Although an extensive exception could be crafted for a privilege to compete, treating economic competition as the exception rather than the rule might ultimately subject too much desirable commercial activity to legal scrutiny.¹⁹

14. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 5 (Proposed Final Draft No. 1, 2005).

15. *Id.* § 4.

16. *Id.* § 1.

17. See generally John C.P. Goldberg & Benjamin C. Zipursky, *The Restatement (Third) and the Place of Duty in Negligence Law*, 54 VAND. L. REV. 657 (2001).

18. See Kenneth W. Simons, *A Restatement (Third) of Intentional Torts?*, 48 ARIZ. L. REV. 1061, 1087 & n.93 (2006).

19. If, for example, person A opens a pharmacy with the certainty or even desire that nearby pharmacy B will suffer economic harm but does not charge anticompetitive prices or engage in other prohibited practices, person A may

In the context of intended physical harms to persons, by contrast, the liability/no-liability structure is likely to be both normatively acceptable and practically useful. Doctrines proscribing harms to persons are based on property-like entitlements to bodily integrity.²⁰ Intentionally causing “physical injury, illness, disease and death”²¹ to other human beings is widely recognized as wrongful conduct in the United States and beyond.²² Intended physical harms may be the subject of criminal as well as civil sanctions. On the civil side, intentional physical harms form a frequent foundation of punitive-damage awards.²³ Recent research suggests that even pain produced by physical harms is experienced as more severe if the harm is perceived as intentionally inflicted.²⁴ Significant examples of intended physical harm, such as murder, rape, and beating, abound and are actually quite frequent scenarios in recorded tort decisions now that comparative-apportionment rules often include intentional torts alongside third-party negligence.²⁵

On the issue of structure and style, a baseline rule of liability for intended physical harm provides the framework for a parallel conceptual structure between a *Restatement (Third) of Torts: Liability for Intentional Harm to Persons* and other significant portions of the *Restatement (Third)*. This stylistic match would comport with advice from an American Law Institute working group that discussed completion of the *Restatement (Third)*. Specifically, in the fall of 2007, a working group of Restatement reporters and advisors attended a coordination meeting in Austin, Texas. The

have intended economic harm to pharmacy *B* and yet may suffer no liability whatsoever. The difficulty with employing intent as a meaningful criterion on the intentional-economic-tort side would be reduced but not eliminated by defining the requisite intent in economic torts as purpose only, rather than substantial certainty as well. Although it may be possible to look at the purpose of an entity's actions through various agency rules, the approach seems to focus undue attention on motives rather than conduct. That so few states have adopted the prima facie tort may also suggest limitations of the framework. See DAN B. DOBBS & ELLEN M. BUBLICK, *CASES AND MATERIALS ON ADVANCED TORTS: ECONOMIC AND DIGNITARY TORTS—BUSINESS, COMMERCIAL AND INTANGIBLE HARMS* 422 n.70 (2006).

20. William Powers, Jr., *Border Wars*, 72 TEX. L. REV. 1209, 1213 (1994).

21. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 4 (Proposed Final Draft No. 1, 2005).

22. See EUROPEAN GROUP ON TORT LAW, *PRINCIPLES OF EUROPEAN TORT LAW* (2005).

23. Theodore Eisenberg et al., *The Decision to Award Punitive Damages: An Empirical Study*, in CORNELL LAW SCHOOL LEGAL STUDIES RESEARCH PAPER SERIES 11 (2009), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1412864.

24. Eric Nagourney, *Behavior: Pain Is Greater if Harm Seems Intentional*, N.Y. TIMES, Dec. 23, 2008, at D6.

25. See Ellen M. Bublick, *Tort Suits Filed by Rape and Sexual Assault Victims in Civil Courts: Lessons for Courts, Classrooms and Constituencies*, 59 SMU L. REV. 55, 56, 58–62 (2006) (discussing the increased number of civil cases brought by sexual-assault victims).

group discussed the possibility of carrying forward *Restatement (Second)* provisions concerning intentional torts (with updates and modifications), rather than creating new provisions.²⁶ The group rejected this idea, dubbed “Restatement light,” in part due to pronounced stylistic differences between the two *Restatement* projects.²⁷ Specifically, the *Restatement (Second)* contains myriad detailed doctrines, while the *Restatement (Third)* provides a somewhat broader conceptual framework. A hope among group members was that future Restatement provisions might be matched to the *Restatement (Third)*’s more conceptual sketch.²⁸

This wish for a more conceptual approach reflects more than a desire for an aesthetic match between Restatement projects. The compendious depiction of tort doctrines in the *Restatement (Second)* functioned to provide courts and litigants with definitive fixed answers to tort questions. By contrast, the more conceptual framework of the *Restatement (Third)* is built on a slightly different premise. It is focused on exposing principles and creating processes to guide the development of judicial responses to policy-oriented questions.²⁹ This election to unshroud necessary principle and policy choices in the development of common-law tort actions may be welcome by jurists who desire a more transparent legal process.³⁰ It may equally be viewed as a risk to the tort enterprise as the process admits to instrumental concerns.³¹ But whether the *Restatement (Third)*’s more conceptual structure is welcomed or feared, no doubt it differs from the preceding *Restatement* project.

In the broader conceptual framework of the *Restatement (Third)*, the baseline principle of liability for intended physical harms provides a perfect opportunity to marry the structure of *Restatement (Third)* provisions on intentional harm to the structure of *Restatement (Third)* provisions concerning negligent harm. The negligent-harm provisions have at their heart a binary arrangement. Actors who negligently cause physical harm are

26. Ellen Pryor, *Restatement (Third) of Torts: Coordination and Continuation*, 44 WAKE FOREST L. REV. 1383, 1385 (2009).

27. *Id.*

28. *Id.*

29. Deborah A. DeMott, *A Revised Prospectus for a Third Restatement of Agency*, 31 U.C. DAVIS L. REV. 1035, 1041 (1998) (“[T]he intellectual style evident throughout much of *Restatement (Second)* emphasizes detailed treatment at the occasional expense of a general articulation of principles. This propensity may at times sacrifice the opportunity that generalization presents to explore underlying rationales more fully.”).

30. Andrew D. Hurwitz, Vice Chief Justice, Arizona Supreme Court, *Commentary at the Wake Forest Law Review Symposium: Third Restatement of Torts* (Apr. 2, 2009).

31. John C.P. Goldberg, Professor of Law, Harvard Law School, *Panel Questions and Answers at the Wake Forest Law Review Symposium: Third Restatement of Torts* (Apr. 3, 2009).

subject to liability for harm within the scope of liability.³² However, in cases of countervailing principle or policy, those actors may not be liable.³³ This binary framework of duty (to use reasonable care with respect to risks of physical harm) and no duty (in special cases of policy or principle) provides both a default rule and a meaningful avenue for creating exceptions. Using a similar principle of liability for intentional physical harms and pairing it with a rule outlining exceptions would provide both a clear underlying obligation and a relief valve for cases in which the default rule is unsatisfactory.

To be clear, the viability of this binary structure results not only from the structure's baseline rule and enumerated exceptions, but also from the mechanism through which courts can craft additional exceptions to allow for growth and change in the law. The *Restatement (Third) of Torts: Liability for Physical Harm* built precisely this sort of relief valve into section 7, which allows courts to specify no-duty rules for plaintiffs and defendants based on articulated issues of principle or policy.³⁴ By contrast, the *Restatement (Third) of Torts: Economic Torts and Related Wrongs* had not yet established a structure through which courts might forge exceptions. The initial draft of the *Restatement (Third) of Torts: Economic Torts and Related Wrongs* started with the economic loss rule—a baseline rule of no liability for economic loss. The project then sought to specify all of the many exceptions to that rule (and then exceptions to those exceptions).³⁵ However, the draft did not contain an adequate mechanism through which courts themselves might expand the list to recognize new doctrines of liability.³⁶ This led some to worry that liability for economic loss would be frozen into historical pockets of litigation that had been recognized before the drafting date, although those pockets of liability might not differ in principle from other doctrines yet to be developed.³⁷ Fashioning a mechanism to construct departures from a fixed baseline creates a process for court-generated development in the law and provides flexibility for future growth in substantive legal rules.³⁸

32. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 6 (Proposed Final Draft No. 1, 2005).

33. *Id.* § 7(b).

34. *Id.*

35. RESTATEMENT (THIRD) OF TORTS: ECON. TORTS & RELATED WRONGS § 8 (Council Draft No. 1, 2006).

36. *See id.*

37. *See generally* Ellen M. Bublick, *Economic Torts: Gains in Understanding Losses*, 48 ARIZ. L. REV. 693 (2006) (summarizing concerns of some participants at the Dan B. Dobbs Conference on Economic Tort Law and echoing them as well).

38. *Cf.* Kenneth S. Abraham, *The Trouble with Negligence*, 54 VAND. L. REV. 1187, 1191 (2001) (noting that negligence law creates a process for discretionary-norm creation). However, the discretionary-norm creation that concerned Professor Abraham in negligence was norm creation by varied juries,

While a mechanism for crafting exceptions to the rule of liability for intentional physical harms is important to preserve flexibility, exceptions to the liability rule in the context of intentional physical harm to persons will likely be quite narrow. Those exceptions might be considerably narrower, for example, than exceptions drawn with respect to liability for negligent physical harm. In part, this difference in scope is attributable to the stronger moral norm to avoid intentional physical harm to others.³⁹ Traditional exceptions in the intentional-harm context include apparent consent, self-defense, defense of third persons, and crime prevention.

At the beginning of a chapter on intended physical harms then, the project should include four sections: a definition of intent,⁴⁰ a definition of physical harm,⁴¹ the principle of liability for intentional physical harm,⁴² and a new provision for exceptions to liability. These four sections would lay the main framework of the chapter.

With three of the four provisions already enshrined in the existing *Restatement (Third)*, it might seem that a future project could simply add the final provision (for exceptions to liability), import *Restatement (Second)* provisions regarding trespassory torts, and be finished. However, conceptual problems make this most minimal view of the anticipated work untenable. The main difficulty is that the *Restatement (Third)*'s definition of actionable intentional physical harm overlaps with but is not identical to the *Restatement (Second)*'s definition of the trespassory torts.⁴³ Existing tort actions such as battery, assault, false imprisonment, trespass, and conversion *sometimes* proscribe intentional physical harms. However, in many cases, the trespassory torts proscribe harms that are neither intended nor physical.

To start, not all trespassory torts involve intentional harm. Trespassory torts concerning interests in property provide the clearest illustration. With the tort of trespass, for instance, intentional entry onto the land of another is enough to satisfy the tort, whether or not the trespasser intends to harm the land or its inhabitants.⁴⁴ Two examples illustrate the range of the tort. First, if a burglar enters a home with the purpose of damaging goods and injuring people inside, the tort of trespass is established and intent to cause physical harm exists as well. By contrast, in a second scenario, if a person enters the yard of another mistakenly believing

rather than norm creation by judges subject to stare decisis and judicial review.

39. See Powers, *supra* note 20, at 1213.

40. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 1 (Proposed Final Draft No. 1, 2005).

41. *Id.* § 4.

42. *Id.* § 5.

43. Simons, *supra* note 18, at 1063–64 (“[T]his claim, that the umbrella concept [of the *Restatement (Third)*] literally encompasses certain other torts, is false or at least misleading.”).

44. DAN B. DOBBS, THE LAW OF TORTS 95 (2000).

that the land is hers without a purpose or certainty of causing harm (and perhaps causes none), the tort of trespass might equally be found, although no intent to harm is present. Trespassory torts involving interests in land contain broad intent requirements that dictate liability irrespective of an intent to harm.

Although liability without intent to harm occurs much more frequently in property-related trespassory torts than in other trespassory torts, even trespassory torts involving harm to persons can sometimes subject a party to liability absent intent to harm. In the context of battery, for instance, some courts recognize liability in cases in which the defendant has an intent to contact, but not an intent to harm. This is particularly true in single-intent jurisdictions in which intent to harm is not recognized as a necessary element of the battery tort.⁴⁵

While the trespassory torts proscribe harm that is not always intentional, the more difficult issue of fit when trying to overlay the *Restatement (Third)*'s umbrella rule of intentional harm to persons over the trespassory torts is that many of the trespassory torts do not involve physical harm at all, at least as physical harm is defined in the *Restatement (Third)*. A primary example is the tort of assault. Suppose a person puts another in reasonable apprehension of a harmful touching but does not deliver the blow. The resulting valid claim for assault would redress the plaintiff's mental peace, not any physical impairment. The tort of false imprisonment also might be seen as protecting mental and not physical interests, for example, when a plaintiff is confined without privilege by nonphysical means and is not physically harmed by the confinement.⁴⁶ The tort of battery too can protect mental state, particularly in cases in which offense, not harm, results from the contact.

The main dilemma of matching the trespassory torts with the *Restatement (Third)*'s umbrella principle then is that the trespassory torts encompass a far broader category of harms. It is possible, though, that the *Restatement (Third)*'s umbrella rule would recognize liability in some instances that would extend beyond the conduct proscribed by the trespassory torts. The development of the trespassory torts is instructive. The original common-law action of trespass protected only against direct harms. The early *Restatements* provided expanded protection—declaring directness “immaterial” to recovery for the tort of battery.⁴⁷ Despite this

45. *Id.* at 58 n.2; see, e.g., *Wagner v. State*, 122 P.3d 599, 604–05, 610 (Utah 2005). This point tends to be most salient in cases in which the defendant has diminished capacity such that the defendant herself might not have intended harm or offense from conduct that a reasonable person would recognize was destined to produce it.

46. W. PAGE KEETON ET AL., *PROSSER & KEETON ON THE LAW OF TORTS* § 11, at 47 (5th ed. 1984) (noting that “the interest in a sense is a mental one”).

47. *RESTATEMENT (SECOND) OF TORTS* ch. 2 introductory note (1965).

expansion for indirect harms, the *Restatement (Second)* did not purport to extend liability to all conduct intended to cause physical harm that does so. The *Restatement (Third)* stakes out this slightly larger claim. Consider a case in which intended physical harm is achieved without contact by the defendant. For instance, suppose the defendant lifeguard was about to save the plaintiff from drowning until the lifeguard discovered that the plaintiff was a neighbor who was having an affair with her husband. The lifeguard thereafter did nothing and happily watched while the plaintiff drowned. Doctrinally, this omission, which produced harm without direct or indirect contact by the defendant, might not count as a battery, and yet the lifeguard's conduct might satisfy the *Restatement (Third)*'s umbrella rule.

In the vast majority of cases, physical harm is produced by actual contact, whether direct or indirect, so the distinction between the battery doctrine and the umbrella rule would be of little practical import. This is particularly true given the *Restatement (Second)*'s comprehensive view of what constitutes an act for purposes of battery.⁴⁸ Moreover, current courts already stretch existing battery, conspiracy, and vicarious-liability rules to provide liability for defendants who intend to cause harm to another and do so even in the absence of direct contact.⁴⁹ Battery liability of the physician who does not herself intubate the unwilling patient but directs a junior employee to do so is but one example.⁵⁰

The imperfect alignment between the *Restatement*'s umbrella rule and the trespassory torts necessitates choices between these two organizing principles. If the *Restatement (Third)*'s umbrella rule of liability defines the field of intentional physical injury, the trespassory torts must be reconfigured. The reconfiguration would have the virtue of fitting the trespassory-tort doctrines ideologically within the deeper structure of the new *Restatement (Third)*. To suggest such a reconfiguration, however, is not to say that all liability recognized by the trespassory torts but not encompassed in the umbrella rule ought to be abolished. Instead, the trespassory-tort rules themselves could be formulated to segregate the portions of the torts that encompass intended physical harms from the portions of those rules that encompass intended emotional harms, unintended physical injuries, or other types of invasion of interests.

In fact, reconfiguration of the torts may enhance development of tort doctrines beyond intentional physical injuries. When the

48. *Id.* § 14 cmt. b.

49. *See, e.g.,* *Holleman v. Aiken*, 668 S.E.2d 579, 591–92 (N.C. Ct. App. 2008) (affirming that an author of a book about a celebrity singer had stated a battery claim against the singer when the singer's bodyguard touched the author in an offensive way).

50. *Mullins v. Parkview Hosp., Inc.*, 865 N.E.2d 608, 609–10 (Ind. 2007) (a patient had given consent for a doctor but not a student to perform the procedure; however, the doctor instructed the student to perform it).

Restatement (Second) identified its short list of protected interests of personality—interests in freedom from apprehension of a harmful or offensive contact, confinement, and emotional distress—those interests were protected only against intentional invasion.⁵¹ Even that protection was “comparatively recent[]” in its development.⁵² Since the time that the *Restatement (Second)* was adopted, however, tort protections in the area of emotional harm have been created or at least considered in a far wider array of cases.⁵³ Countries as diverse as Israel, Singapore, and Ghana have developed tort protections against varied forms of emotional and dignitary harm.⁵⁴ In many instances, torts that protect against emotional harms play an important role in defining cultural norms.⁵⁵ Realigning offensive battery, some types of assault, and false imprisonment alongside torts expressly designed to redress emotional harms might foster a more coherent structure for affording recovery to victims of emotional injury.

The benefit of regrouping is not simply that existing trespassory torts will stand alongside more related analogues, but also that in the regrouping, new intersections will be seen and a more coherent configuration of these liabilities can be fashioned. For example, while an intentional touching intended to harm another counts as battery, an intentional touching that is negligent with respect to harm currently may not be recognized as an actionable tort.⁵⁶ Once torts intended to inflict harm are separated from torts that are not, perhaps there is room for a cause of action that protects bodily integrity, as battery does, but sounds in negligence. At times, for example, commentators have suggested a tort of negligent rape.⁵⁷

The *Restatement (Third)* has already confronted in at least one context the need to reconfigure the large category of trespassory torts to set apart different types of actionable misconduct. Specifically, the *Restatement (Third)* dealt with this issue when it formed landowner duties to trespassers. The category “trespasser” contained actors as dissimilar as a night-time arsonist and a child cutting through a backyard to get to a park. Rather than treat the trespasser category as a single, undifferentiated unit for the purpose

51. RESTATEMENT (SECOND) OF TORTS ch. 2 introductory note (1965). Certain limited exceptions apply to the interest in freedom from confinement. *Id.*

52. *Id.*

53. See generally Chamallas, *supra* note 12; Rabin, *supra* note 2.

54. See Ellen M. Bublick, *Forward* to 2009 AALS Symposium Panel—*Foreign Tort Law: Beyond Europe*, 26 ARIZ. J. INT'L & COMP. L. 271, 271 (2009). See generally Megan K. Donovan, *Editorial Forward* to 2009 AALS Symposium Panel—*Foreign Tort Law: Beyond Europe*, 26 ARIZ. J. INTL & COMP. L. 269 (2009).

55. Donovan, *supra* note 54; see also Rabin, *supra* note 2, at 1198.

56. See *Weldon v. Rivera*, 754 N.Y.S.2d 698, 699 (App. Div. 2003).

57. See Dahlia Lithwick, *Rape Nuts*, SLATE, July 30, 2003, <http://www.slate.com/id/2086422>.

of landowner duties owed to them, the Reporters created the new category “flagrant trespasser[].”⁵⁸ The new category facilitates differential treatment for actors who infringe on the possessor’s rights in a way that is highly culpable or entitlement destructive.⁵⁹ The category facilitates this differential treatment not by creating detailed rules about who is a flagrant trespasser—for example, a person who enters the property to commit arson and burglary as defined in criminal statutes—but by employing a flexible category of decision. The flexible category allows judges to develop the content of the category over time, which is a benefit of the rule vis-à-vis the rigid requirements of the criminal law.⁶⁰

Introducing the new category “flagrant trespasser” into the law was a subject of concern precisely because the category created a division where none had previously been, requiring new common-law development of the concept by judges. The need for the division stemmed from issues of principle or policy—the need for a no-duty rule in some trespasser cases but not others—not from a need to update a Restatement project to match new doctrines that had been developed by common-law courts.⁶¹ A Restatement seeking to realign the trespassory torts across categories of intended physical harm and other sorts of prohibited conduct would face precisely the same criticism: it would alter neatly settled law. As Reporter Gary Schwartz noted, few judicial opinions applying the physical-harm intentional-tort doctrines have called the doctrines into question.⁶² From the outset then, another challenge for a new Restatement project would be stakeholder acceptance of the project’s need to create divisions in historically calm areas based on needs of principle and function.

An alternate route would preserve the historical shape of the trespassory torts, if not enhance the logic of the division between those causes of action and others. The *Restatement (Third)* could retain the trespassory torts in their historically defined categories but, for functional purposes, ask a second-level question after the trespassory tort is established: should the established trespassory

58. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 52 & cmt. a (Council Draft No. 7, 2007).

59. *Id.* § 52 cmt. c.

60. *See* Bublick, *supra* note 25, at 72–73 (arguing that statutes meant to assist tort victims by making certain specifically defined criminal misconduct actionable in tort might instead import the rigid inquiries from criminal-law categorization into the civil law). For an example, a New Jersey statute that provides a civil remedy for sexual abuse requires the victim to prove that the intentional touching was “for the purpose of sexually arousing or sexually gratifying the actor,” a requirement absent from common-law actions. N.J. STAT. ANN. § 2A:61B-1(2) (West 2000).

61. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 52 cmt. b (Preliminary Draft No. 6, 2007).

62. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 5 cmt. c (Proposed Final Draft No. 1, 2005).

tort count as intentional physical harm for the functional purposes of the *Restatement (Third)*'s umbrella rule? If so, the defendant's conduct would be subject to the differential treatment accorded intentional torts.

It is, after all, functional considerations that dictate the need for a definition of intentional, as distinguished from negligent, physical injuries. The need is for a more concentrated and consistent category of conduct than the trespassory torts. Over and over, the existing *Restatement (Third)* addresses special doctrines warranted for intentional but not negligent torts. The articulated distinctions are most frequent in the *Restatement (Third) of Torts: Apportionment of Liability*. That *Restatement* took the controversial step of including intentional torts within a comparative-responsibility framework.⁶³ However, it made this break from prior law with an understanding that special rules would be warranted to reflect the entitlement nature of the intentional torts. For example, the very first section of the project counsels that "courts [have] flexibility to fashion appropriate special rules for victims of intentional torts."⁶⁴ Section 3 of the same project permits courts to fashion special plaintiff no-duty rules for "plaintiffs injured by intentional tortfeasors."⁶⁵ A later section of the project retains joint and several liability for intentional torts.⁶⁶

Restatement (Third) rules that address intentional torts are not confined to the *Restatement (Third) of Torts: Apportionment of Liability*. The *Restatement (Third) of Torts: Liability for Physical Harm* appropriately suggests that the scope of liability might be defined more broadly for "[a]n actor who intentionally or recklessly causes physical harm."⁶⁷ Consequently, there are a number of functional reasons that the category of "intentional torts" in the *Restatement (Third)* needs to be identified.

The primary functional need for the category of intentional torts in the existing *Restatement (Third)* provisions is to identify a core of culpable, entitlement-destructive torts that warrant extended liability for defendants and diminished requisites for avoidance by plaintiffs. Not every case of trespass might be one in which this extended liability of the defendant or diminished avoidance by the plaintiff would be desired. A court might conclude both that a defendant homeowner has no duty to protect an entering burglar from a fall on a slippery floor and also that the defendant homeowner does have a duty to exercise care for other nonflagrant

63. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § 1 (2000).

64. *Id.* § 1 cmt. c.

65. *Id.* § 3 cmt. d.

66. *Id.* § 12.

67. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 33(b) (Proposed Final Draft No. 1, 2005).

trespassers.⁶⁸ These same distinctions that influence a defendant's duty toward the actors might also pertain to the way in which a plaintiff should approach these two sets of actors. Differentiation between flagrant trespassory torts and less-culpable and entitlement-violative torts is a functional need of the intentional-tort categorization.

A section defining "intentional torts" for expanded-liability purposes is essential to the *Restatement*. Differentiation among tort causes of action themselves may be a necessary but not a sufficient factor for categorization. Even within the category of battery with intent to cause physical harm, for example, a court might feel differently about the appropriate scope of defendant liability and plaintiff responsibility in various contexts. For example, consider the liability of a six-year-old child who kicks his teenaged babysitter after she makes a rude comment to him versus the liability of a thirty-six-year-old parent who kicks the babysitter under the same circumstances. Even when physical harm is intended, if it is intended by a person with limited ability to appreciate the wrongfulness of the conduct because of infancy, dementia, mental retardation, or other socially recognized limitations, courts may want to fashion exceptions. These exceptions may not be exceptions to liability entirely, but rather exceptions to rules of extended liability. Accordingly, intentional torts that merit differential treatment may be characterized both by cause of action and by reference to additional factors.

A section that creates a core of culpable entitlement-effacing intentional torts is needed on a functional level not only for situations in which the *Restatement (Third)* treats intentional torts differently, but also in some circumstances in which intentional torts are treated in the same way as negligence. Although many *Restatement (Third)* references to intentional torts establish special rules for those actions, some *Restatement (Third)* references to intentional torts also hold out the possibility that where special rules for intentional torts historically called for differential treatment, those rules now might be abolished. For example, could contributory negligence operate as a defense to an intentional tort?⁶⁹ Could an exculpatory clause waive liability for future harm from an intentional tort?⁷⁰ Courts might feel differently about upholding an exculpatory clause in which a guest on a television show disclaims the right to sue for an intentional tort and two different battery scenarios ensue: On one show the defendant-host intentionally blows smoke in the plaintiff's face. On the other, the defendant-host

68. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 52 cmt. a (Preliminary Draft No. 6, 2007).

69. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § 1 cmt. c (2000).

70. *Id.* § 2.

intentionally shoots the plaintiff with a gun. Even though both cases involve express assumption of risk in the context of battery, upholding a waiver in the latter case would pose far more troubling issues than in the former, even if the waiver was clear and unambiguous. Again, the fact that both of the defendants' acts constitute the trespassory tort of battery may be an insufficient basis on which to accept or reject the exculpatory clause and its enforcement.

In order to identify a core set of culpable entitlement-effacing intentional harms that would be subject to an alternate paradigm from negligence, harms to persons must be distinguished from harms to property. Although both the current definition of trespassory torts and the *Restatement (Third)*'s umbrella liability rule for intended physical harms encompass physical harm to property as well as physical harm to persons, there are reasons to segregate the two different types of harm in a future Restatement project. One reason is that physical harm to property is not of the same order as physical harm to persons. It is sometimes said that society ascribes higher value to bodily integrity than to property. So, for example, a homeowner may refuse to push a burning lawnmower out of his garage even though his inaction risks loss of a home to fire because "[t]he law values human life above property."⁷¹ In part, the categorically lesser value ascribed to harms to property stems from the fact that harms to property can often (though not always) be redressed fully by money damages.⁷² Consequently, although tort liability may be desirable for both a defendant who uses an ax to chop apart a boat and one who uses it to injure a person, the two acts produce harm that is differently culpable and differently subject to remedy.⁷³ Because of these differences, liability rules in the context of intended harms to persons can and should differ from those enacted with regard to property and warrant separation of the two forms of physical harm.

Separating intended harms to property from intended harms to persons would allow other profitable realignments. For example, although the tort of conversion began with conversion of tangible assets, conversion actions today may involve intangible property like domain names.⁷⁴ Intended harms to property could be dealt with

71. *Ind. Consol. Ins. Co. v. Mathew*, 402 N.E.2d 1000, 1003 (Ind. Ct. App. 1980).

72. Richard A. Posner, *Killing or Wounding to Protect a Property Interest*, 14 J.L. & ECON. 201, 214 (1971) (arguing that personal injury and death should be weighed against purely economic costs and benefits, but that in this weighing, "[d]eadly force should not be privileged in situations where the owner of property has an adequate legal remedy").

73. Steven P. Croley & Jon D. Hanson, *The Nonpecuniary Cost of Accidents: Pain-and-Suffering Damages in Tort Law*, 108 HARV. L. REV 1785, 1909-10 (1995).

74. *See, e.g., Kremen v. Cohen*, 337 F.3d 1024 (9th Cir. 2003).

alongside other property concepts or even alongside purely economic harms (whether to highlight similarities or differences).

Overall then, a first chapter of a *Restatement (Third) of Torts: Liability for Intentional Harm to Persons* would concern liability for intentional physical harm to persons. It would include definitions of intentional harm and physical harm, establish an umbrella rule of liability, and create specific exceptions to the rule as well as a process for judicial expansion of those exceptions. The chapter would also include a section with guidelines for when torts should be considered “intentional” for the functional purpose of various extended-liability and entitlement-respecting rules. The chapter and project would not address intentional physical harms to property. It would leave to development in subsequent chapters the issue of nonphysical harm occasioned by the trespassory torts.

CHAPTER 2: LIABILITY FOR INVASIONS OF INTERESTS IN EMOTIONAL
WELL-BEING RELATED TO FREEDOM FROM INTENTIONAL
PHYSICAL HARM OR RESTRAINT

A new *Restatement (Third)* project could begin and end with the enumerated first chapter—intentional physical harms to persons. The narrow project scope would not be meant to slight intentional harms to emotional and dignitary interests, but rather to recognize the category of physical harm as a more salient divisor than the category of intentional harm. Liability provisions for intentional physical harm could be followed directly by liability provisions concerning negligent physical injury. For example, a complete *Restatement (Third)* might be arranged to address liability for intentional physical harm to persons; negligent physical harm to persons; special contexts of negligent physical harm such as the liability of land possessors, medical malpractice, and products liability; and strict liability for physical harm, and only then turn to invasion of interests in emotional well-being through intentional physical harm or restraint, intentional infliction of mental distress, negligent infliction of emotional distress, and dignitary injuries. Property-related harms and economic harms could then be introduced.

One torts project that deemphasizes the divide between intentional and negligent torts even further than a seriatim listing of the two is the European Group on Tort Law’s *Principles of European Tort Law* (“PETL”). The PETL project assigns liability when a defendant’s fault causes harm to a plaintiff’s legally protected interest.⁷⁵ “Fault” as described by the project may consist of either “intentional or negligent violation of the required standard of conduct.”⁷⁶

75. EUROPEAN GROUP ON TORT LAW, *supra* note 22, at arts. 1:101, 2:101.

76. *Id.* at art. 4:101.

While PETL does not differentiate sharply between intentional and negligent fault, neither can it be said to contain a sharp separation between physical and emotional harms. The project provides that the “scope of protection of an interest depends on its nature” and that “[l]ife, bodily or mental integrity, human dignity and liberty enjoy the most extensive protection.”⁷⁷ Acknowledging the considerable variations in different European systems on the nature of protected interests, the project leaves the issue of normative development of protected interests to the various legal systems.⁷⁸

While an umbrella rule can be stated to protect the interest in avoiding intentional physical harm, normative development of interests in avoiding nonphysical harms is a more complex matter. Not all intended emotional harm to persons is or should be actionable.⁷⁹ Nor is all harm proscribed under traditional trespassory torts like assault and false imprisonment properly categorized as intentional emotional harm. For example, in the false-imprisonment context, a shop employee may have intended to confine a shopper but may have thought that there was a privilege to do so and may not have had either the purpose or substantial certainty of harming the customer.⁸⁰

If the Restatement project addresses intentional harms to persons (not merely intentional physical harms) after a first chapter assigning liability for intended physical harm to persons, a Restatement could include two additional chapters on liability for intended harm to interests in emotional well-being. The first of these additional chapters would recognize liability for emotional harm that stems from intended or threatened physical harm or restraint. For example, assault liability often protects against mental distress from a threat of physical harm. Similarly, the tort of false imprisonment can protect against physical restraint, even restraint that does not cause physical harm. The emotional harms in this section would generally stem from threatened physical harm to the plaintiff herself. A classic case would be one in which a defendant points a gun at the plaintiff without justification. However, liability for emotional harms in this section might also involve threatened or actual physical harm or restraint to another person. The infant abducted from a hospital but unaware of his confinement could be one illustration. Even if the infant were unharmed by the abduction, a parent might be compensated under this section for emotional distress related to the intentional physical restraint of the child. To the extent that cases of interference with

77. *Id.* at art. 2:102(1)–(2).

78. *Id.* at art. 2:102 cmt. 5.

79. Simons, *supra* note 18, at 1085.

80. *See, e.g.*, *McCann v. Wal-Mart Stores, Inc.*, 210 F.3d 51, 52–54 (1st Cir. 2000).

child custody involve child abduction, these torts may also belong within the category. Loss of consortium stemming from intended physical harm to another might be considered here as well.

Unlike the umbrella-rule concept with physical injuries in chapter one, in this chapter it might be said that there is no single rule of intentional-tort liability, but rather a “range of specific intentional torts.”⁸¹ Moreover, the intent at issue in these torts would not necessarily be to harm but to invade a protected interest related to freedom from intentional physical harm or restraint. In recognition of the need for normative development of the area over time, flexible standards would illustrate types of permissible actions while leaving room for courts to develop the law in an appropriate way.

Although a division would be drawn between physical injuries in chapter one and these nonphysical injuries in chapter two, the boundaries of the two categories should remain fluid. For example, some reproductive injuries might fall into the category of nonphysical injuries, while cases of physical injury to reproductive organs might also qualify as physical harm.⁸² Mental disorders too might sometimes qualify as physical harm. For example, traumatic brain injury that occurs when a person is near a bomb blast should qualify as physical harm even though the bomb itself did not contact the plaintiff.⁸³

To ease the importance of precise line drawing and to acknowledge that severe emotional harm from threatened physical injury may warrant extended liability, a judge should be able to determine that some actions in this category constitute highly culpable, entitlement-destructive intentional torts for functional purposes.

CHAPTER 3: LIABILITY FOR INTENTIONAL EMOTIONAL HARM TO PERSONS (AND BEYOND)

The final component of a *Restatement (Third) of Torts: Liability for Intentional Harm to Persons* would be to import the section concerning intentional infliction of emotional disturbance from the *Restatement (Third) of Torts: Liability for Physical and Emotional Harm*. Because that *Restatement* project already examined at length the standards for actionable conduct, the chapter can be imported in its entirety from the existing *Restatement* project. Of

81. Kenneth W. Simons, *The Restatement Third of Torts and Traditional Strict Liability: Robust Rationales, Slender Doctrines*, 44 WAKE FOREST L. REV. 1355 (2009).

82. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 45 cmt. b, illus. 3 (Tentative Draft No. 5, 2007).

83. Alan Schwarz, *A Chance for Clues to Brain Injury in Combat Blasts*, N.Y. TIMES, June 24, 2009, at D5, available at <http://www.nytimes.com/2009/06/23/health/23brai.html>.

course, as the new rules in chapter two are configured, minor adjustments may be required to ensure compatibility between the new rules and the existing intentional infliction of emotional harm doctrines.

A logical next step in the *Restatement* development might then be to add the *Restatement (Third)*'s section on dignitary harms prior to or in tandem with a section on negligent infliction of emotional injuries. Although dignitary torts such as defamation and invasion of privacy have been traditionally grouped with economic torts, in terms of the interests they protect, some bear a stronger relationship with the stand-alone emotional harms. The tort of false light provides a particularly salient example.⁸⁴ However, pairing torts that protect emotional interests and those that protect dignitary interests is a full subject in itself. It is perhaps the appropriate starting point not only for a separate article to map its contours, but for one more project of the *Restatement (Third)*.

84. See generally, e.g., *Solano v. Playgirl, Inc.*, 292 F.3d 1078 (9th Cir. 2002).