

Age 26+ Sentence*	
Bench	Jury
14.7	30.1
20.7	36.2
23.4	34.1
29.0	39.9
22.4	36.1
28.6	37.6
27.5	42.9
33.7	44.4

y. Blacks con-
ber or not they
ounsel available.
yher age group
most plausible
ishing effect of
d prior record.
ounsel are con-
d counsel. For
ive of type of
y trials, in all

INTENTIONAL HARMS

RICHARD A. EPSTEIN*

INTRODUCTION

THROUGHOUT the history of our law, intentional harms have formed a category of wrongs separate and apart from the rest of the law of tort. The reason for treating intentional harms differently from accidental ones is not difficult to see. With the intentional infliction of harms, it is not necessary to decide which of two innocent persons should be required to bear the loss in question. The element of intention makes the case an easy one, by allowing the loss to be placed upon the person who willed it, upon the person who is "bad" in the strongest sense of the word. The importance of *mens rea* in the criminal law reinforces that dominant impression: the man who harms another and who does so intentionally is in general a person worthy of punishment, and if he is worthy of punishment, why should he not be required to pay the injured party for the harm which he has wilfully inflicted? The theme of special treatment for deliberate harms also echoes in other corners of the law. Thus proposals for schemes of no-fault insurance to compensate victims of traffic accidents often exclude deliberate harms from their coverage.¹ And the workmen's compensation law, although designed to remove the "fault principle" from the field of industrial accidents, likewise gives special attention to the deliberate infliction of harm.²

There is also popular and intuitive support for a special treatment of deliberate harms. We do not need utilitarian analysis to decide that it is generally

* Professor of Law, University of Chicago. I wish to thank Walter J. Blum, Robert C. Ellickson, John H. Langbein, and J. Jerry Wiley for their helpful comments on earlier drafts of this paper. I should also like to thank the American Bar Foundation for the support it has given for my work. The views here are of course my own, not those of the Foundation.

¹ The isolation of intentional harms has been clear since the first definitive proposal for compulsory insurance, the Columbia Plan, was published in 1932. Columbia Univ., Council for Research in the Social Sciences, Comm. to Study Compensation for Automobile Accidents, Report 237 (1932). See also Robert E. Keeton & Jeffrey O'Connell, Basic Protection for the Traffic Victim: A Blueprint for Reforming Automobile Insurance 304-05 (1965).

² Thus the "wilful misconduct" rule limits recovery in the event of the deliberate violation of a safety rule by an employee. See generally Arthur Larson, The Law of Workman's Compensation § 32 (1973).

a bad thing for one person deliberately to maim or kill another, or to take or destroy his property.³ What offends the moral sense is that one person deliberately uses his own power to deprive another of the very rights which he claims and defends for himself. The objection is not to the costs and benefits of the thing, but to the willingness of one person to exercise his dominance over another without his consent. The belief that every person is entitled to be free of purposive invasions of his person or property need not (and cannot) be reduced to lower terms.

The importance that is attached to deliberate harms makes it necessary to determine what harms are deliberate and what harms are not. In the easy case, the harm in question is the specific end desired by the person who inflicts it. But the category of deliberate harms extends beyond this case to two other situations. In the first of these the actor has a substantial or certain knowledge that one consequence of his conduct will be the harm in question, even though he might not wish for it to occur. In the second, the actor knows that his acts might well cause harm, but is recklessly or consciously indifferent to their consequences. There are some difficult cases of degree at the edge of both of these categories, for example, where foreseeability of harm shades into knowledge that harm will occur as a consequence of certain acts. But even within these gray areas, the basic distinction between deliberate and accidental harms retains much of its original force. A manufacturer may know from experience that a certain fraction of his output will be dangerously defective, but it does not follow that he *intended* to cause the harm resulting from a particular defective unit where he did not know that it was defective before he allowed it out of his control.⁴

It is possible, then, to identify a class of deliberate harms. The question I address in this paper is how the law should treat that class of harms. The law of tort has from its earliest times sought to harmonize three distinct legal theories of liability for the infliction of harm: strict liability, negligence, and deliberate harms. While the theory of deliberate harm is the easiest to accept, its very acceptance raises serious questions about the total structure

³ An attempt to explain in utilitarian terms the law's condemnation of deliberate harms may be found in Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 Harv. L. Rev. 1089, 1125-27 (1972); Richard A. Posner, *Economic Analysis of Law* 67-68, 358 (1973).

⁴ But see Richard A. Posner, *supra* note 3, at 66: "Most accidental injuries are intentional in the sense that the injurer knew that he could have reduced the probability of the accident by taking additional precautions. The element of intention is unmistakable when the tortfeasor is an enterprise which can predict from past experience that it will inflict a certain number of accidental injuries every year." Nonetheless, defective products cases always have been regarded as concerned with accidents, and not intentional harms, no matter whether liability has been hotted on negligence or strict causal principles. The distinction between accidental and deliberate harm may for some purposes be immaterial, but it is not unintelligible.

of the law of tort once we shift our focus from the particular case to the general theory that decides it. If the element of intention is crucial to plaintiff's case, why should he ever recover for accidental harm? Why is a suit for deliberate harms not only the easiest case in tort but the only case as well? Or to reverse the point, if we allow recovery under any circumstances for accidental harms, why should the plaintiff ever be required both to plead and to prove that the defendant intended to harm him? What intelligible grounds are there for having three theories of tort instead of a single theory of tort?

In attempting to answer these questions, I shall employ the same analytical framework that I have developed for accident cases.⁵ Briefly, that framework assumes that at the first round of pleading in a law suit the plaintiff must give some good reason for upsetting the initial balance in favor of the defendant. The reasons that he gives, even if sufficient to state a cause of action (and here we are concerned with formal structure, not with what reasons will count as sufficient in the given case), do not conclude the lawsuit in the plaintiff's favor. They only create a substantive presumption (the word having in this context no evidentiary importance) in favor of recovery. One response open to the defendant is to concede the strength of the prima facie case but to allege in avoidance good reasons of his own to restore, in whole or in part, the original balance. These reasons, like the plaintiff's, again do not conclude the case, but only raise a presumption that the defendant has defeated or diminished the plaintiff's claim. The plaintiff can revive his case by alleging at a third stage of argument new matter which, though immaterial to the prima facie case, now works to reestablish his claim in whole or in part. The process of new pleas continues until one of the parties chooses to join issue on a question of law or fact. The use of this system with its multiple stages both allows and requires us to establish the appropriate relationships among those concepts regarded as relevant to the tort law, and to do so in a manner which makes clear the role of the intention to harm.

With this formal framework firmly in mind, the overall plan is as follows. In the first three parts of this paper, I examine the way in which deliberate harms are treated in physical injury cases. In the first part I deal with the explication of the concept of intention to harm offered in the tort law, and, briefly, with its relationship to the criminal doctrine of *mens rea*. In it I conclude that the existing tort law extends the concept of intention to harm far beyond its proper limits, and in so doing robs it of the explanatory power

⁵ See Richard A. Epstein, Pleading and Presumptions, 40 U. Chi. L. Rev. 556 (1973) [hereinafter cited as Epstein, Pleadings and Presumptions], for a more detailed account of the method. For its application, see Richard A. Epstein, A Theory of Strict Liability, 2 J. Leg. Studies 151 (1973) [hereinafter cited as Epstein, Strict Liability], and Richard A. Epstein, Defenses and Subsequent Pleas in a System of Strict Liability, 3 J. Leg. Studies 165 (1974) [hereinafter cited as Epstein, Defenses].

that it might otherwise have. In the second part I review the causal theories of strict liability and then propose a set of rules that allows us to accommodate both accidental and intentional harms (now properly defined) within the framework of a single theory. The essence of the accommodation is that the defendant's intention to harm, while insufficient to state a prima facie case, is nonetheless sufficient at the third stage of argument to override any affirmative defense that the defendant might properly raise to allegations of merely accidental harm. After noting the consequences of treating the intention to harm in this manner, I examine in the third part of the paper some of the most common excuses and justifications offered for the infliction of intentional harm, with special attention to necessity, self-defense, and consent. Each of these issues can be raised in the fourth round of the pleadings, and each is in principle subject to important qualifications which can be set out in subsequent rounds.

Once the role of intention to harm is established in physical injury cases, I then consider its place in connection with economic losses apart from physical injury. In this context, I try to show in the fourth part of the paper that it is a mistake to adopt the common approach that creates a prima facie tort for the intentional infliction of economic harm, subject to a justification based upon the defendant's self-interest, applicable except when he behaves maliciously. Instead I conclude that the general pattern of arguments raised in physical injury cases requires with only limited exceptions that there shall be no action for the infliction of economic losses no matter what the defendant's mental state. With both physical and economic harms thus examined, it is then possible to conclude that the intention to harm has a secure place within a properly formulated law of torts, but one subordinate to the places occupied by liberty, property, and causation.

I. *Mens Rea* AND THE INTENTION TO HARM

The current treatment of intentional harms derives its moral force from the fact that the tort law demands compensation only for the very acts for which the criminal law demands punishment. With that basis for judgment we might expect the treatment of the intentional element in the intentional tort to draw its inspiration from the account of *mens rea* developed with such patience in the criminal law. As a general proposition, a person will be held criminally responsible only for consequences he intended to bring about. The doctrine is softened, to be sure, by taking into account the closely related concepts of recklessness and substantial knowledge of harm.⁶ But even with

⁶ For a much more detailed account of *mens rea*, see generally H. L. A. Hart, *Punishment and Responsibility* chs. 5 & 6 (1968). The doctrine is qualified, and rightly so, to the extent that if a person intends some grievous bodily harm and commits some greater

these modifications, *mens rea* operates as a limitation on criminal responsibility that is independent of causation. Thus if a man accidentally sets a ship on fire when he lights a match in the course of a theft of rum, he has committed theft, but not arson.⁷ Likewise, if he throws a stone at another person with whom he has a running fight, and breaks a window of a nearby building, he cannot be held criminally for the destruction of the window that he did not intend to break.⁸ In both cases the accused caused the harm in question; only the doctrine of *mens rea* stands between him and criminal responsibility.

Within the tort law, however, the mental element does not work to restrict liability otherwise called for on causal grounds, but operates in quite a different manner. Consider *Vosburg v. Putney*,⁹ a case of assault and battery brought by one schoolboy against another, for damages inflicted by a kick just below the knee. At the time of the kick, the plaintiff had nearly, but not completely, recovered from a prior injury. Given the weakened condition of his leg, the defendant's kick, which otherwise would have been harmless, caused the plaintiff permanent injury, for which the jury assessed damages of \$2500. One point of law before the Wisconsin court concerned the precise nature of the defendant's mental state necessary to make out the plaintiff's prima facie case of assault and battery. If the criminal standard of *mens rea* controls in the tort context, then the plaintiff fails to make out a cause of action. The jury found by special verdict that the defendant, in kicking the plaintiff with his foot, intended to do him no harm. The court, however, held that the action could be maintained even if it were shown only that the intention to commit the act was "unlawful." Moreover, it ruled that "if the intended act is unlawful, the intention to commit it is necessarily unlawful."¹⁰ The sentence is enigmatic, but the most sensible interpretation that can be impressed on it is that, as it is prima facie criminal to touch someone else deliberately, it is prima facie tortious to do that same thing.¹¹ Yet once

harm than he intends, the doctrine of *mens rea* will not shield him from the consequences. "If a man once begins attacking the human body in such a way, he must take the consequences if he goes farther than he intended when he began." *Reg. v. Serné*, 16 Cox Crim. Cas. 311, 313 (1887). One exception to the general rule that has enjoyed support holds that the accused who kills another person in the course of the commission of a felony will be held for murder even if he did not intend to kill his victim. That doctrine represents an uncomfortable departure from the traditional requirements of *mens rea*, and has been effectively criticized on that ground. See, e.g., Thomas B. Macaulay, A Penal Code Prepared by the Indian Law Commissioners, Note M, 64-65 (1837), as cited in Monrad G. Paulsen & Sanford H. Kadish, *Criminal Law and Its Processes* 226 (1962); Report of the Royal Commission on Capital Punishment, 1949-1953, 36 (1953).

⁷ *Reg. v. Faulkner*, 13 Cox Crim. Cas. 550 (1877).

⁸ *Reg. v. Pembilton*, 12 Cox Crim. Cas. 607 (1874).

⁹ 80 Wis. 523, 50 N.W. 403 (1891).

¹⁰ *Id.* at 527, 50 N.W. at 403.

¹¹ There is an alternative account of the opinion whose logic is even more difficult to

the proposition is put in that fashion, the cleavage between the tort and criminal law on the question of intention becomes apparent, as the doctrine of *mens rea* insulates the defendant from punishment for aggravated assault.

The same cleavage is found in *Mohr v. Williams*.¹² There the defendant performed an operation on the plaintiff's left ear after he received the plaintiff's permission to perform a similar operation on the right ear. Under anesthesia it turned out that the left ear was more diseased than the right. The defendant made the medical judgment to tend first to the left ear and performed an operation on it that was both skilfully and successfully done. Again the legal issue concerned the precise mental state of the defendant essential to the plaintiff's prima facie case. The court held that the above facts disclosed a good cause of action for assault and battery, even with the total lack of evidence of an "evil" intent. The way in which the court finessed the requirement of deliberate harm is, moreover, of great importance.

[T]he act of defendant amounted at least to a technical assault and battery. If the operation was performed without plaintiff's consent, and the circumstances were not such as to justify its performance without, it was wrongful; and if it was wrongful, it was unlawful. . . . [A]ny unlawful or unauthorized touching of the person of another, except it be in the spirit of pleasantry, constitutes an assault and battery. In the case at bar, as we have already seen, the question whether defendant's act in performing the operation upon plaintiff was authorized was a question for the jury to determine. If it was unauthorized, then it was, within what we have said, unlawful. It was a violent assault, not a mere pleasantry; and, even though no negligence is shown, it was wrongful and unlawful. The case is unlike a criminal prosecution for assault and battery, for there an unlawful intent must be shown. But that rule does not apply to a civil action, to maintain which it is sufficient to show that the assault complained of was wrongful and unlawful or the result of negligence. . . . *Vosburg v. Putney*, 80 Wis. 523, 50 N.W. 403.¹³

The court appears to have read the intentional element out of the intentional tort. In its stead we find the pale requirement of "unlawfulness," here taken to show that the defendant has no good affirmative defense to a prima facie case that can easily be made strict in form—to wit, you cut into my left ear.¹⁴

follow. The defendant kicked the plaintiff after the class had been called to order, and the defendant's acts could be regarded as unlawful because they were in defiance of a school rule. Yet here the violation of the school rule is quite complete whether or not the defendant hurt the plaintiff. In either case (harm or no harm), school discipline is the appropriate sanction for the violation of the school rule. The reliance on that rule, moreover, does not make the harm intentional. It does, however, make it difficult to decide the case where the injury is inflicted in the classroom seconds before the teacher calls the class to order.

¹² 95 Minn. 261, 104 N.W. 12 (1905).

¹³ *Id.* at 270-71, 104 N.W. at 16.

¹⁴ On the distinction between ultimate issues of fact and conclusions of law see Epstein,

Yet even that view of the case is not uniformly followed, for the court makes explicit reference to the defendant's mental state by noting that there can be no assault and battery where the touching is done in "a spirit of pleasantry." It then treats all touchings that are not so motivated as though they were "violent," even though done with the intention to help the plaintiff. That logic could not be defended if the *mens rea* requirement were taken seriously. The defendant only meant to perform an operation knowing that he did not have the requisite consent; by no stretch of the imagination did he intend to harm the patient in a manner that would make him criminally responsible for any harm that might ensue.

In *Garratt v. Dailey*¹⁵ the defendant was a five-year-old child who pulled out the chair of the plaintiff, an elderly and arthritic woman, just as she was about to sit down. The woman fell to the ground and suffered serious injury. If the case were tried on the theory that the defendant deliberately inflicted an injury upon the plaintiff, then recovery should be barred; the defendant did not intend to hurt the plaintiff and did not have specific knowledge that such harm was likely to result. Nonetheless, the court was prepared to let the plaintiff recover if she could show that defendant's act was done "with the intent of causing the plaintiff's bodily contact with the ground."¹⁶ Again, the defendant is held liable in tort for consequences for which he is not criminally responsible.

The last case of this sort to be considered involves the doctrine of "transferred intent," by which the defendant in a tort action will be held prima facie responsible for the harm he has inflicted upon the plaintiff by virtue of the fact that he intended to harm someone else. In *Talmage v. Smith*¹⁷ the defendant threw a stick at some boys, intending to frighten them off his land. He was held liable when his stick put out the eye of the plaintiff who was on the defendant's roof with the other boys, though unseen by the defendant. If we treat the criminal law as the appropriate model for decision, there should be no recovery at all because the particular harm caused was wholly unintended. At worst, the defendant would be subject to prosecution for the attempted assault on the boys at whom he threw the stick. Instead the court allowed the plaintiff's action for the full damages because the defendant would have committed an intentional tort if he had struck one of the boys whom he intended to frighten.

Pleadings and Presumptions 561-66. Each of the substantive pleas considered in this paper satisfy all of the formal tests for ultimate issues of fact.

¹⁵ 46 Wash. 2d 197, 279 P.2d 1091 (1955).

¹⁶ That point of view is hinted at in Charles O. Gregory & Harry Kalven, Jr., *Cases and Materials on Torts* 23 (1969), where the authors note that the defendant "hit her with the ground," a heroic attempt to force the case into the trespass mold.

¹⁷ 101 Mich. 370, 59 N.W. 656 (1894).

battery

)

ween the tort and
nt, as the doctrine
aggravated assault.
here the defendant
received the plain-
right ear. Under
sed than the right.
o the left ear and
successfully done.
of the defendant
ld that the above
ery, even with the
the court finessed
importance.

ault and battery. If
circumstances were
ful; and if it was
zed touching of the
stitutes an assault
e question whether
s authorized was a
it was, within what
easantry; and, even
The case is unlike a
vful intent must be
aintain which it is
and unlawful or the
.W. 403.¹³

of the intentional
ness," here taken
e to a prima facie
into my left ear.¹⁴

called to order, and
were in defiance of
plete whether or not
hool discipline is the
on that rule, more-
it difficult to decide
ore the teacher calls

is of law see Epstein,

II. ACCIDENTS AND INTENTIONAL HARMS

Before we can solve the puzzles raised by these four cases, we must answer the questions already posed with respect to the relationship of intentional harms to accidents. That task in turn requires the development of a unified theory of tort. I believe that it is possible to develop such a theory, but in order to do so I must retrace ground that I have canvassed in two recent articles devoted to the proper treatment of accidents.¹⁸

These articles deal with the perennial tension between theories of negligence and those of strict liability. The basic conflict between these two theories is illustrated by the divergent treatment they require when the defendant has taken reasonable (but unavailing) steps to avoid harming the plaintiff. The general principle of the law of negligence is that the defendant should never be held liable in a case of this sort. Being reasonable, his conduct is not blame-worthy in any moral sense. Given that its expected benefits exceeded its expected costs, it is conduct that is beyond economic criticism as well. As there is no theory that makes the defendant's conduct wrongful, the plaintiff must go without compensation.

The negligence approach ignores the fact that a lawsuit is always a comparative affair. The defendant's victory ensures the plaintiff's defeat. Why then should it be decisive that the defendant acted reasonably? Perhaps the plaintiff acted reasonably as well, if indeed he acted at all. Why should we prefer the injurer to his victim in a case where one must win and the other lose? Once a defendant is allowed to excuse himself on the grounds that he acted with due regard for the plaintiff, it follows that he will be able to keep for himself the benefits of his own actions even as he imposes their costs upon a stranger. The crucial question is whether or not the defendant should be allowed to force (and here the words should be taken literally) others to bear his costs because prior to the accident he made a decision that was rational in the case. The major premise of the theory of strict liability is that, prima facie, he should not be allowed to help himself by taking or destroying the plaintiff's person or property. If in the course of activity conducted for his own gain, the defendant had harmed himself or damaged his own property, he would be required to bear that loss himself even if the expected gains were worth the risk involved, and there is no reason why that result should not be sought by the legal system as well when the initial harm is to the person or property of another. As a matter of fairness between the parties, the defendant should be required to treat the harms which he has inflicted upon another as though they were inflicted upon himself. The question of his negligence or intention is at the outset of the suit quite immaterial.

In order to make good on the promise of a system of strict liability, it is

¹⁸ Epstein, *Strict Liability* 151; Epstein, *Defenses* 165.

still necessary to accomplish three distinct tasks. The first is to give an account of the notion of causation implicit in the general argument of fairness made on behalf of a theory of strict liability.¹⁹ The second is to work out in detail the exceptions to the initial causal premise, for the proposition that the defendant must always be held liable when he has hurt the defendant is not capable of principled defense. The third—and main concern of this paper—is to show how the notion of intention to harm can be made an integral part of a system of tort law that begins with an initial concern about causation.

A. Causation Revisited

It is necessary to consider four basic causal paradigms in order to account for the use of causal language in most common cases of physical harm. The approach used here does not begin with the loose test of "but for" causation, which is then cut down to size by the "policy" considerations of proximate cause. Instead we begin with the simplest model of causation and then extend it by degrees to more complex situations.

The first paradigm of causation—one accepted in all legal systems—is the direct and immediate application of force by one person against the person or property of another: it is the case of A hits (wounds, kills, etc.) B. The second paradigm involves the common case where A frightens (shocks, terrifies) B. Here the element of force is also prominent but only in its threatened application as viewed from the standpoint of B, whose reactions to A's conduct must be taken into account to complete the causal chain. Although the causal link is thus attenuated, it is by no means broken, as the grammatical parallel between the propositions "A bit B" and "A frightened B" reveals. The third paradigm of causation takes the form "A compelled B to hit C," where the acts of a third person, B, must be taken into account to complete the causal chain between A and C. Nonetheless, despite this complication, the use of force or the threat thereof again shows the closeness between this paradigm and the two that precede it.²⁰

The fourth major paradigm of causation applicable to most tort cases concerns the creation of dangerous conditions which then result in harm, harm immediately caused in any of the three above senses. Since the harm to the plaintiff can be completed only upon the occurrence of some subsequent act or event that works upon the condition that the defendant created, all of the situations to be mentioned are best regarded as instances of indirect (but not remote) harm. The first of the cases to be noted concerns things which are made dangerous on account of their position. The simplest case of this

¹⁹ Epstein, *Strict Liability* 160-89.

²⁰ For an analysis of the actions among A, B and C, see Epstein, *Strict Liability* 174-77.

Handwritten mark: a vertical line with a horizontal bar at the top, and a large, stylized 'D' or 'O' shape to the right.

Handwritten note: "Blich" written vertically, with "epine" written below it.

sort is one in which A drops a brick upon B's head: the release of the brick alone is sufficient to allow the force of gravity to work upon it. And it is only a short extension to the case where A places that brick on the edge of a table where a gentle push will allow the force of gravity to pull it down.

A second common instance of dangerous conditions involves the manufacture of defective products which cause (by force) harm when used in their ordinary manner. A weak bolt on an industrial machine may give way and release a piece of wood that strikes its operator. The intermediate act of the plaintiff does not break, but rather completes, the causal connection between the defendant's act and the plaintiff's injury.

A last instance of dangerous conditions concerns cases where the defendant has blocked the plaintiff's right of way. Again the element of force becomes prominent when harm results after the plaintiff crashes into the blockade. And again the plaintiff's application of force only provides the last causal link between the defendant's act and his own harm.

B. *Defenses in Accident Cases*

The second task of the law of tort concerns the evaluation of the excuses or justifications that the defendant might urge on his own behalf. Of those that should be rejected, the one most relevant to our concerns here is that of private necessity, whereby the defendant inflicts harm upon the plaintiff in order to protect himself against the harm threatened by some natural event.²¹ As with prima facie cases, effective defenses should show not only that the defendant is not to blame (in any moral sense) but also that he should be preferred to the plaintiff, who may be as blameless as himself, in any contest between them. On the question of liability we must choose between the plaintiff who had no option at all and the defendant who had at least the option—hard as it may be—between suffering the harm himself and inflicting it upon another. If, under conditions of necessity, a defendant had damaged his own property, he could not call upon a stranger to compensate him for his loss. If under those same conditions he harms the third party instead of himself, he should be required to make compensation for the loss suffered. The arguments just made apply with equal force to infancy and insanity, and to compulsion by the acts of third parties.

The three principal types of valid defense are causal defenses, assumption of risk, and plaintiff's trespass. In connection with each of these three defenses, we again encounter the traditional conflict between strict and negligence

²¹ For discussion, see Francis H. Bohlen, *Incomplete Privilege to Inflict Intentional Invasions of Interests of Property and Personality*, 39 *Harv. L. Rev.* 307 (1926) [hereinafter cited as Bohlen, *Incomplete Privilege*], reprinted in his *Studies on the Law of Torts* 614 (1926) [hereinafter cited as Bohlen, *Studies*]; Epstein, *Strict Liability* 157-60; Epstein, *Defenses* 169.

theories. Assumption of risk, for example, might be a sufficient defense in and of itself; or it might be a defense only if the plaintiff's conduct were unreasonable. The appropriateness of the reasonableness requirement is thus called into play in connection with defenses based upon plaintiff's conduct. Given the preference for the strict formulation of the prima facie case, the same treatment should be accorded affirmative defenses. There is no reason why the defendant's conduct should be judged by one standard and the plaintiff's conduct by another. A strict standard for defenses will indeed bar plaintiff's recovery in cases where it might otherwise be allowed, but the result in question need not be improper for that reason alone. The purpose of the tort law is not to provide the plaintiff, at defendant's expense, with compensation in every case of injury. It is to determine whether the compensation is warranted on the facts of each case, where the same standard of judgment is applied to the conduct of both parties.

A theory of strict liability, then, has as one of its elements the development of a strict theory of defenses. We turn first to the causal arguments open to the defendant.²² Suppose the defendant had struck the plaintiff, causing him harm. Under the paradigms already developed, he would have a good cause of action on the strength of the causal argument. If now the defendant alleges that the plaintiff struck him as well, that affirmative defense (also strict in form) should be sufficient to require an apportionment of the loss, since neither party demonstrates a causal priority over the other. Similarly, if A struck B, and could show that C compelled him to do so, A would have an action against C even though he remains liable to B. In the special case where B and C are the same person, the action over against B can be dispensed with and an affirmative defense substituted in its place.

The same line of argument applies to the other causal paradigms. For example, suppose A drives into B's car when B has blocked A's right of way. B has a good prima facie case based upon the paradigm of force, but A has a good affirmative defense because B blocked his right of way. The same principle applies as well to objects dangerous because of the potential force that they contain. Take a case where A strikes an object which explodes, harming B. B's prima facie case—that A set off the explosion—could be met by the affirmative defense that B created the dangerous condition in question. Parallel examples can of course be constructed for cases of objects dangerous because of internal defects or dangerous because of position. Indeed one great strength of the causal analysis developed here is that it permits a principled (and predictable) resolution of the troublesome problems of proximate cause even in those frequent cases of accidents that involve multiple causation.

There is no need to dwell at great length upon the other affirmative defenses.

²² See, for a more complete discussion, Epstein, Defenses 174-85.

case of the brick
it. And it is only
e edge of a table
down.

es the manufac-
en used in their
y give way and
mediate act of the
nection between

re the defendant
of force becomes
to the blockade.
the last causal

n of the excuses
behalf. Of those
s here is that of
the plaintiff in
natural event.²¹
t only that the
at he should be
, in any contest
between the plain-
ast the option—
inflicting it upon
amaged his own
im for his loss.
ead of himself,
ered. The argu-
ty, and to com-

, assumption of
three defenses,
and negligence

Inflict Intentional
307 (1926) [here-
the Law of Torts
Liability 157-60;

We have already noted that assumption of risk is a defense that is strict in form. The issue is much the same with respect to the plaintiff's trespass: the strict form of that defense is made out by showing the plaintiff entered the defendant's land. The stage is now set to take into account the defendant's intention to harm the plaintiff.

C. *The Third Stage: The Place of the Intention to Harm*

The defendant's intention to harm, I contend, becomes relevant in the third stage of argument only after the defendant has interposed a sufficient affirmative defense to the prima facie case. It is true that this approach will not eliminate all the vagueness created by the use of the language of intention. But this approach does reduce substantially the number of cases in which the difficulties with the language of intention will have to be confronted. In most tort cases, it is the causal language that will bear the tensions of the system, for the mental element, which bears the stress at the outset in criminal cases, becomes relevant only at a later stage in the tort analysis. In order to show the importance of reserving the intentional element to the third stage of a case, it is necessary first to show how the defendant's intention to harm ties in with each of the affirmative defenses already discussed, and second to show the consequences that follow once the element of intention is no longer regarded as part of the prima facie case.

Let us first examine cases in which the plaintiff's conduct raises one of the causal defenses previously mentioned. Take first the case of a head-on collision between A and B in which the paradigm of force alone is operative. Here B should be allowed to recover in full over A's partial causal defense where he can show that A intended to cause him harm. The sequence of pleas is: (1) A hit B, (2) B hit A, (3) A intended to harm B.²³ Given the causal involvement of both parties, the intention to harm decides the case. Straightforward extensions of the position are also possible where more than one causal paradigm is involved. Suppose B could show that A struck him, and is then met with A's defense that B blocked his right of way. B again will have the benefit of a good reply over this complete defense if he can show that A intended to cause him harm. The sequence of pleas is as before, except that "B blocked A's right of way" is substituted for "B hit A." The same arguments apply, moreover, regardless of which of the causal paradigms—be it defective products, unstable position, or whatever—is applicable to the plaintiff's (B's) conduct.

The familiar doctrine of last clear chance contains a strong suggestion of

²³ In those cases in which the harm is deliberate on both sides, apportionment is again the preferable solution. "B intended to harm A" is a good rejoinder in the fourth stage of the action, subject to the same pleas in defeasance discussed in the next part of this article.

this position, especially if the elements of knowledge and conscious indifference prominent in some formulations of the rule²⁴ are given adequate attention. One case, close to the line, that illustrates the approach is *Kumkumian v. City of New York*.²⁵ The plaintiff's decedent had made his way onto the city's subway tracks. The defendant's train ran over his body and set off the tripping mechanism that stopped the train. The motorman twice reset the device without looking under the train before the deceased's mangled corpse was found "steaming" between the third rail and the running rail. The court permitted the jury to find for the plaintiff if it believed that the death "did not come about through mere lack of vigilance in observing the tracks, but rather as a result of . . . [defendant's agents'] own willful indifference to the emergency called to their attention by the automotive equipment, to which clear warning they paid no heed."²⁶ Even on these facts, the plaintiff's case is a difficult one because the defendants knew that there were many ways of setting off the tripping mechanism that did not signal danger to human life. There would have been no doubt about a judgment for the plaintiff, however, if the motorman had decided to restart the train knowing that the decedent was beneath it, for then his decision would have been tantamount to a decision to inflict an intentional harm. For the harm caused after the discovery of the decedent's peril, that intention should override any defense resting upon the decedent's blocking the train's right of way.

In applying the doctrine of last clear chance, however, the courts do not always pay sufficient attention to the defendant's mental state. The consequences of this view are unfortunate; where the harm in question is accidental, the plaintiff should at best be allowed to recover for some portion of the loss on causal principles alone, but not for the full extent of his losses, as he does when the last clear chance rule is applied.²⁷ The point is illustrated by *Peter-*

²⁴ In the language of Cardozo:

The doctrine of the last clear chance, however, is never wakened into action unless and until there is brought home to the defendant to be charged with liability a knowledge that another is in a state of present peril, in which event there must be reasonable effort to counteract the peril and avert its consequences. . . . Knowledge may be established by circumstantial evidence, in the face even of professions of ignorance . . . but knowledge there must be, or negligence so reckless as to betoken indifference to knowledge. *Woloszynowski v. New York Central R.R.*, 254 N.Y. 206, 208-09, 172 N.E. 471, 472 (1930).

²⁵ 305 N.Y. 167, 111 N.E.2d 865 (1953).

²⁶ *Id.* at 176, 111 N.E.2d at 869.

²⁷ Within the negligence system, the doctrine of last clear chance is used to get around the complete bar that contributory negligence raises to the plaintiff's action. The avoidance of the one unjust result is offset, however, by the creation of another, for the plaintiff is by no means entitled to full recovery. Even within the negligence system, there is no need for a last clear chance rule if a thoroughgoing system of comparative negligence is adopted. The same is true in the causal system I have put forward, even if apportionment is in accordance with somewhat different principles. Epstein, *Defenses* 179-84.

son v. Burkhalter.²⁸ The defendant was driving his car in a northerly direction toward an intersection. Fifty feet from the crossing, he noticed the plaintiff looking backwards over his shoulder while riding his motorcycle easterly toward the intersection. The defendant continued on his way through the intersection (where he had the right of way), taking no further notice of the plaintiff until the plaintiff was within six feet of his car, still looking backwards. On the causal question, the defendant could claim both that he had the right of way and that the plaintiff hit him. The only arguments for the plaintiff would have to stem from some statutory duty to look out for the plaintiff after he was noticed. If the only choice were between full recovery and no recovery, the strength of the defendant's causal case suggests that the latter is the better result. The dissent appears to have much the better of the argument when it protests:))

The majority require that the defendant in entering and crossing a street intersection at a lawful rate of speed, and having the right of way over plaintiff, should have looked right, looked left, looked ahead (all of which he did do) *and have anticipated that plaintiff riding a motor scooter approaching and entering the same intersection from the defendant's left at a speed not over 30 miles per hour would for more than 75 feet of his travel look neither right or left nor ahead but only behind him, would violate the law by failing to yield the right of way to defendant, and crash into defendant's car.* For failing to anticipate all these things and avoid the accident defendant is liable to plaintiff in damages on the theory of last clear chance.²⁹

Thus far we have examined the way in which the plaintiff's plea of the defendant's intention to harm ties in with causal pleas that the defendant can raise on his own behalf. Analogous arguments apply when we consider either of the noncausal defenses—plaintiff's trespass or his assumption of risk—that are open to defendants. The position with respect to assumption of risk was hinted at by the court in *Vosburg v. Putney* when it stated:

Had the parties been upon the play-grounds of the school, engaged in the usual boyish sports, the defendant being free from malice, wantonness or negligence, and intending no harm to plaintiff in what he did, we should hesitate to hold the act of the defendant unlawful, or that he could be held liable in this action. Some consideration is due to the implied license of the play-grounds.³⁰

²⁸ 38 Cal. 2d 107, 237 P.2d 977 (1951).

²⁹ *Id.* at 114, 237 P.2d, at 981.

³⁰ 80 Wis. 523, 527, 50 N.W. 403, 403-04 (1891). In this context, the use of negligence to defeat the defense of assumption of risk could not refer to the poor execution of maneuvers in the course of the game, as for example, by a badly timed block in football. But it could well cover the use of dangerous equipment, for example an unpadded steel knee guard, prohibited by the applicable regulations.

In effect the argument could be formulated as asserting that once the defendant is able to prove (even if only by inference from custom or conduct) that the plaintiff assumed the risk of accidental injury, the plaintiff makes out a good reply by showing that the defendant intended to harm him. The appropriate sequence of pleas is (1) A kicked B, (2) B assumed the risk of harm from A, (3) A intended to harm B. The defense of assumption of risk indicates that the defendant has agreed to bear the risk of the accident he might suffer even if the accident was caused by the plaintiff. Where there is such an agreement, the appropriate reply is that, prima facie, deliberate harm was not in the class of risks the plaintiff agreed to assume. Where the risk assumed by the plaintiff rests solely on his decision to run the known hazard in order to enjoy some gain, the implication is perhaps somewhat more difficult to draw; but it seems only fair to conclude that the plaintiff did not issue an invitation for the defendant to harm him at his own pleasure.

Why if it was?

Parallel arguments apply to the case of plaintiff's trespass, where the general rule has been that the defendant is liable for any harm that he inflicts wilfully or wantonly.³¹ Suppose the defendant could deliberately inflict some harm upon the plaintiff *solely* because he was a trespasser. How then could we limit the application of the principle? There is no ready limitation that can be placed upon the defendant's conduct once we have decided that his intention to harm is not relevant to the case. If his intentions are indeed irrelevant, it makes no sense even to ask for any justification, no matter what its form, for the harm intended. How does one justify an accident? If the intention to harm is immaterial, why is not an owner at liberty to kill a trespasser? And if he could kill him, then he could spare him as an act of mercy, only to condemn him to a life of slavery instead. It is difficult to know what counts as an argument in support of the owner's private right of conquest

³¹ This view of the problem has long been adopted at common law. William L. Prosser, *Handbook of the Law of Torts* 361-64 (4th ed. 1971) [hereinafter cited as Prosser, *Torts*]. Once the trespasser is discovered, many jurisdictions require the owner to conduct himself with reasonable care. That approach is somewhat broader than the position taken in the text, but, since it does not abandon the subjective requirement of knowledge, it occupies a halfway place between intention to harm and negligence, even if it is not tantamount to recklessness. In any event, it does show that a test of strict liability is inapplicable once the defendant is able to interpose the plaintiff's trespass as a defense. There is, of course, a clear parallel between the tests here and those used under the doctrine of last clear chance.

There are, however, a number of recent decisions that have tended to eliminate the mental element entirely by using a straight negligence approach in the case of the trespassing plaintiff. See, e.g., *Smith v. Arbaugh's Restaurant*, 469 F.2d 97 (D.C. Cir. 1973); *Rowland v. Christian*, 69 Cal. 2d 108; 70 Cal. Rptr. 97, 443 P.2d 561 (1968). It is difficult to know how far the trend will go, as the cases in which the issue has been raised have not in general involved trespassers. *Rowland v. Christian* was a case of a residential visitor, and *Smith v. Arbaugh's Restaurant* was a case of a health inspector who entered private premises under public authority. For criticism of the straight negligence approach see Epstein, *Defenses* 202-04.

a northerly direc-
g, he noticed the
ig his motorcycle
n his way through
no further notice
; car, still looking
aim both that he
ly arguments for
o look out for the
reen full recovery
suggests that the
ich the better of

ing a street inter-
er plaintiff, should
did do) and have
and entering the
30 miles per hour
left nor ahead but
right of way to
te all these things
es on the theory

iff's plea of the
t the defendant
hen we consider
sumption of risk
sumption of risk
ted:

ged in the usual
ss or negligence,
itate to hold the
e in this action.
unds.³⁰

use of negligence
oor execution of
block in football.
n unpadded steel

over trespassers and difficult in consequence to know what beyond a simple conception of liberty could be urged against it. The issue is that of individual autonomy, of the degree of sacrifice that one individual can demand as of right from another. On that question, the defendant's intention to harm plays a crucial role in the formation of the law of torts. The plaintiff's trespass should *excuse* the defendant in a case of simple accident, but it does not *justify* his actions where the harm is deliberately inflicted. (A)

The plaintiff's reply based on the intention to harm has important substantive ramifications. In the first place, this sequence of pleas explains why at common law contributory negligence has never been regarded as a good defense to an intentional harm.³² Contributory negligence has the same role in the negligence system that causal pleas and assumption of risk occupy in a system of strict liability. It serves in accident cases as the comprehensive affirmative defense based on plaintiff's conduct. Pleading the defendant's intention to harm in the prima facie case anticipates and forecloses any affirmative defense that is appropriate only to accident cases. However, while the inclusion of the intentional element in the prima facie case may yield the correct result on the question of liability, it is not without its drawbacks, as it raises a false conflict between the theory of strict liability and that of intentional harms. Suppose that the defendant hurt the plaintiff, that no affirmative defense was available, and that the defendant did not intend to hurt the plaintiff. If the prima facie case required the allegation of an intentional harm, the plaintiff would fail, and there would be no need to consider the problems that might otherwise be raised by the absence of an affirmative defense. Yet if we treat the case as initially one of strict liability, the plaintiff has a good prima facie case to which the defendant has no response. Where issues are raised in their proper sequence, the plaintiff will be able to recover; where he is forced to raise the issue of intention in the prima facie case, he cannot. ✓

Another advantage of reserving the issue of intention until the third stage of the argument is that it helps clarify the relationship between rules of liability and those of the remoteness of damage. Seavey's famous aphorism, "prima facie at least, the reasons for creating liability ought to limit it,"³³ appeals to a principle of symmetry to explain why "reasonable foresight" is the appropriate test of proximate cause under a general law of negligence. Within a system of strict liability, however, the symmetry principle cuts in the opposite direction and demands the rejection of the foresight test; if causation is prima facie the test of liability, so too should it be the test of damage.³⁴

³² Prosser, Torts 426.

³³ Warren A. Seavey, Mr. Justice Cardozo and the Law of Torts, 52 Harv. L. Rev. 372, 48 Yale L.J. 390, 404, 39 Colum. L. Rev. 20, 34 (1939).

³⁴ Epstein, Strict Liability 162 n.34.

If, however, the case is pleaded out to the plaintiff's reply, then that principle of symmetry now requires that the plaintiff be allowed to recover for the harm only if it is both caused and intended by the defendant. It will no longer be sufficient to rely on the causal connection alone. The intention to harm may make the case easy in an intuitive sense, but the need to plead and prove it serves to restrict, not expand, the scope of the defendant's liability. Thus if the defendant strikes a plaintiff who is in an extrasensitive condition, he will normally be prima facie liable for all the harm he caused whether or not he intended it. The maxim is that the tortfeasor takes his victim as he finds him. But after some affirmative defense, say assumption of risk, is established, the plaintiff should be able to recover only for the harm that the defendant intended to inflict upon him. He should therefore be restricted to nominal damages when the defendant intended to touch him in ignorance of his delicate condition. Where the intentional element is incorporated into the prima facie case, it is difficult to reach this result. If liability depends on both intention and causation, why should remoteness of damages depend on causation alone when the conditions that create liability also limit it?³⁵ Yet the departure from theory is countenanced in order to allow the courts to reach the proper results on remoteness of damages obtained as a matter of course when strict causal principles are allowed to govern the prima facie case.³⁶

We are now in a position to resolve the puzzles created by the four cases of "intentional" harm set out earlier in the paper.

In *Vosburg v. Putney*, the prima facie case is strict; the plaintiff says that the defendant kicked him below the knee. Assumption of risk cannot, as the court notes, be made out on the facts, and the plaintiff's weakened condition is not an issue, owing to the maxim that the defendant must take his victim as he finds him. Having forestalled the affirmative defense, there is no occasion to consider a reply based upon the intention to harm.

Similar observations dispose of *Mohr v. Williams*, the case of an operation without proper consent. The prima facie case is strict. There is no need to worry about whether the defendant touched the plaintiff in a spirit of pleas-

³⁵ Thus: "There is a definite tendency to impose greater responsibility upon a defendant whose conduct has been intended to do harm, or morally wrong. More liberal rules are applied as to the consequences for which he will be held liable." Prosser, Torts 30. See also *Derosier v. New England Telephone & Telegraph Co.*, 81 N.H. 451, 463-64, 130 A. 145, 152 (1925); Ralph S. Bauer, *The Degree of Moral Fault as Affecting Defendant's Liability*, 81 U. Pa. L. Rev. 586 (1933).

³⁶ Note, too, that the exclusive use of a causal test on the issue of remoteness of damages will lead to errors in those cases in which the defendant has a good affirmative defense, for then the allegation of intention is necessary to revive the plaintiff's case and cannot, accordingly, be fictionalized. See the discussion of *Talmage v. Smith*, *infra*, at 408.

beyond a simple
that of individual
in demand as of
on to harm plays
plaintiff's trespass
but it does not

important substan-
explains why at
as a good defense
e role in the neg-
up in a system
nsive affirmative
nt's intention to
/ affirmative de-
le the inclusion
he correct result
s it raises a false
tentional harms.
tive defense was
plaintiff. If the
rm, the plaintiff
lems that might
Yet if we treat
ood prima facie
e raised in their
he is forced to

the third stage
een rules of lia-
mous aphorism,
t to limit it,"³³
le foresight" is
/ of negligence.
rinciple cuts in
t test; if causa-
st of damage.³⁴

antry, and no need to characterize his conduct as violent in order to make out the prima facie case. Once the touching and consequent harm is shown, the plaintiff wins because the defendant has no affirmative defense. The question of intention to harm never arises.

There is no need either to dwell on the question of intent in *Garratt v. Dailey* either. That case differs from *Vosburg v. Putney* only in that the causal paradigm of dangerous conditions (defendant took plaintiff's chair out from under her) is involved in the statement of the prima facie case. Since the case does not give rise to any affirmative defense the question of deliberate harm is not reached and need not be considered.

The most difficult case to evaluate is *Talmage v. Smith*. The appropriate prima facie case is that the defendant put out plaintiff's eye when he hit him with a stick. The defendant could respond by pointing to the plaintiff's trespass, and the plaintiff could prevail only if he could show that the defendant had the requisite intention to harm him. Since the element of intention is now in the reply, the extended notions of intention used in the three cases just considered are no longer applicable. On the facts of the case, the plaintiff must build his own case on what the defendant intended to do to a third party stranger, as no harm was intended him.⁸⁷ Under the criminal law, the defendant could be held for his attempt to harm the third person (and pleas as well any defenses applicable to attempts), but could not, given the rules of *mens rea*, be held responsible for the harm suffered by the plaintiff.⁸⁸ As a tort matter, if the third party had been injured by the defendant, he could no doubt have raised the defendant's intention to harm him in the reply if that were necessary for his recovery. And if the case had not been complicated by the plaintiff's trespass, he could recover on a causal theory and need not rely on the fiction of transferred intent. But where the plaintiff's trespass is part of the case, that fiction is inappropriate, not because it is unnecessary but because it is insufficient. The plaintiff must fail because he cannot make out the sufficient reply that the defendant intended to harm him.

⁸⁷ The analysis in the text hearkens back to some of the language used in *Palsgraf v. Long Island R. Co.*, 248 N.Y. 339, 162 N.E. 99 (1928), where Cardozo in his articulation of the duty concept speaks of "the futility of the effort to build the plaintiff's right upon the basis of a wrong to someone else." *Id.* at 343, 162 N.E. at 100. Again: "What the plaintiff must show is a 'wrong' to herself, i.e., a violation of her own right, and not merely a wrong to someone else." *Id.* at 343-44; 162 N.E. at 100. Indeed, the rejection of strict liability led Cardozo to view the doctrine of transferred intent with some caution. "Under this head [of acting at one's own peril], may fall certain cases of what is known as transferred intent, an act wilfully dangerous to A resulting by misadventure in injury to B (*Talmage v. Smith*, 101 Mich. 370, 374). These cases aside, wrong is defined in terms of natural or probable, at least when unintentional." *Id.* at 344, 162 N.E. at 101.

⁸⁸ A criminal version of the doctrine of transferred intent had been urged by Coke. *E. Coke*, 3d Institute 56. It has not found much acceptance in the modern law. See, e.g., *Reg. v. Serné*, 16 Cox Crim. Cas. 311 (1887).

III. EXCUSES AND JUSTIFICATIONS

Once the defendant's intention to harm the plaintiff is recognized as an appropriate reply to an affirmative defense, a host of other substantive issues may be raised, as the defendant may introduce in the fourth stage of argument new matter in the nature of excuse or justification either to defeat or to diminish the plaintiff's claim. The common tendency today is to treat excuses and justifications together under the single rubric of "privilege."⁸⁹ But that usage is unwise. The two words, excuse and justification, are as a matter of common usage by no means verbal equivalents. A defendant will point to the weaknesses of his personal condition in order to excuse himself for harm intentionally caused. He will, however, point to the plaintiff's conduct when he wishes to justify the intentional infliction of harm. As excuses and justifications raise quite different problems, and have quite different consequences, they are best considered separately.

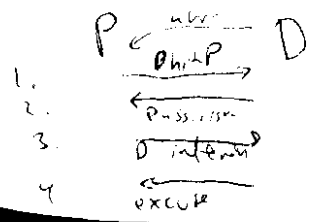
A. Excuses

The most common excuses to be considered are those of infancy and insanity on the one hand, and that of private necessity on the other. In response to a prima facie case based on causal allegations alone, each of these excuses is insufficient, as indeed they are treated (with some difficulty) even within the framework of negligence law. Even if they are insufficient at the second stage of a case, they need not be rejected as well at the fourth. To the contrary, they could be raised at the fourth stage of the argument only if immaterial at the second. Thus in order to reach the problem of personal excuses, it must necessarily be shown first that the defendant has a good defense at the second stage of the argument (based upon defenses already discussed) and then that the defendant intended to cause the harm in question. Deliberate harms are given special treatment because they mark off, as a first approximation, the class of bad acts. The introduction of an excusing condition in the fourth stage weakens the nexus between deliberate harms and bad conduct.

The identification of these excuses is best made, now that the intention to harm is in issue, by following the lead of the criminal law, such as it is. Thus infancy looks as though it should be given no effect at all, except perhaps for children of very tender years. Those of insanity or compulsion on the other hand should be given at least partial and, perhaps, full effect. Suppose there is a head-on collision between two cars, one driven by A, and the other by B, where A deliberately harms B in order to escape from personal peril. With B as plaintiff, the sequence of pleas is as follows: (1) A hit B, (2) B hit A, (3) A intended to harm B, (4) A intended to harm B only to escape

⁸⁹ Bohlen, Incomplete Privilege 307-08, reprinted in his Studies 614-15 (1926).

Deliberate
harm
is
not
excused
by
infancy
(B)



2)

in order to make
at harm is shown,
defense. The ques-
tent in *Garratt v.*
in that the causal
f's chair out from
se. Since the case
of deliberate harm

The appropriate
when he hit him
the plaintiff's tres-
that the defendant
of intention is
in the three cases
case, the plaintiff
to do to a third
the criminal law,
third person (and
ld not, given the
by the plaintiff.⁸⁸
re defendant, he
him in the reply
l not been com-
ausal theory and
re the plaintiff's
ot because it is
fail because he
ed to harm him.

used in *Palsgraf v.*
in his articulation
aintiff's right upon
Again: "What the
wn right, and not
eed, the rejection
with some caution.
of what is known
fventure in injury
ong is defined in
12 N.E. at 101.
urged by Coke.
ern law. See, e.g.,

from a private necessity. At best the necessity neutralizes intention; as such it follows not that there is a complete defense to the plaintiff's case, but that the case should be decided on the strength of the first two pleas, with apportionment of damages the indicated solution. Alternatively, if necessity has only partial effect, then A should be charged with some additional portion of the damages, not his on causal principles alone, in order to reflect the intentional element of the case.

The modern rules of tort liability, being predicated upon negligence or intent, require different results. In the first place, pleas (1) and (2), being strict in form, are insufficient. B, however, could cure this defect by alleging in his prima facie case that A meant to harm him.⁴⁰ At this point, if private necessity is allowed to operate as a complete defense, the plaintiff is barred from recovering any fraction of his damages on causal principles alone, contrary to the result required above. If, alternatively, private necessity is treated as a partial defense, damages are apportioned, but not in accordance with the rules developed under the staged system. To illustrate the point, suppose that the necessity plea when given partial effect requires that 80 per cent of the harm be treated as accidental and 20 per cent of it as deliberate. Under the current rules of law, the plaintiff will be able to recover for only 20 per cent of his loss, as he has no case with respect to the accidental portion of the harm. With the alternative system, the plaintiff will be able to recover that same 20 per cent for deliberate harm, *plus* that portion of the accidental harm for which the defendant should be held accountable on causal principles alone. The staged mode of argumentation therefore allows us to give full effect to each of the four features of the case, whereas the modern system denies all independent significance to the causal contentions.

B. Justifications

When we move to the class of justifications, two pleas are of central importance: self-defense and consent. Neither of these pleas could arise in the absence of the deliberate infliction of harm, and for that reason alone they too must be reserved to the fourth stage of argument. In each of these cases, the defendant argues that the plaintiff's conduct itself provides a reason that makes it right and proper for the defendant to act as he did, even though his intention appears to make his conduct wrongful. Both these justifications function as complete if defeasible, bars to the plaintiff's entire case. Their consequences therefore are quite unlike those which are attached to personal

⁴⁰ The consequences of rejecting private necessity as a defense are different, moreover, within the framework of the two systems. Under the current law the plaintiff recovers for all of the harm inflicted; in the staged alternative developed here, he recovers only for that harm which is both caused and intended. On the relationship between the measure of damages and the system of staged pleading see Epstein, Pleadings and Presumptions 569.

These are the "same in substance"

excuses, which when given full effect only requires the apportionment of loss in accordance with the principles, largely causal, applicable to accident cases.

There is little that need be said to support the recognition of either justification by the law of torts. The argument for self-defense, that it is proper to meet force with force, has a strong intuitive appeal that antedates any utilitarian justification that might be given it. Its acceptance vindicates the importance attached to both liberty and property, for it allows the use of force against those who threaten to take them away. The case for the recognition of consent as a defense in case of the deliberate infliction of harm can also be made in simple and direct terms. The self-infliction of harm generates no cause of action, no matter why inflicted. There is no reason, then, why a person who may inflict harm upon himself should not, prima facie, be allowed to have someone else do it for him.⁴¹ Individual autonomy, the organizing principle of the tort law, is not violated when one person inflicts harm upon another at the latter's insistence.

The problems with both self-defense and consent do not concern their sufficiency; instead, they concern first their scope and second the qualifications that must be attached to them.

1. *Self-Defense*. The sequence of pleas with B as plaintiff and A as defendant that raises the question of self-defense is as follows:

- (1) A hurts B (in any of the causal senses already developed);
- (2) B attacks or frightens A;⁴² — or frightens
- (3) A intends to harm B;
- (4) A does so in order to defend himself from B's attacks.

The requirement of B's attack or threat will sometimes involve issues of characterization. Has A "read into" B's conduct a threat that is not present, or has B acted in a suggestive, even if harmless, manner? How, for example, do we treat the common case where a man reaches inside his pocket when approaching another person on a dark and empty street? On this type of question, there tends to be a marked convergence between the theories advanced here and the traditional law of negligence, but there are still differences

⁴¹ There will of course be questions of the effectiveness of the consent under the criminal law. There one could view, though in a somewhat formal sense, the function of the system as being to monopolize the use of force in the hands of the state save in those rare instances, such as self-defense, where it is not possible for the state to protect the individual. On that view of the subject, it is clear, for example, why attempts are a category of actionable wrongs under the criminal law even though they create no liability under the tort law. It also explains why the criminal law in many jurisdictions views suicide as a crime. If it is so viewed, moreover, then it follows that the consent of the victim should be no defense to a criminal prosecution, even where it is in tort an effective justification for the intentional infliction of harm.

⁴² The allegation in the text is applicable only to cases of defense of the person. Where the defense of real property is at stake, the analogous allegation is that the plaintiff entered the defendant's land.

✓

(A)

?) ✓

— ? NO ?

) ? NO ?

□

between the two points of view. For example, the negligence law will take into account the defendant's fears generated by the conduct of third parties, whereas a system of strict liability will not.⁴³ But even with differences of this sort to one side, it is clear that the evaluation of the defendant's response presents irreducible questions of fact no matter what theory of liability is adopted.

The requirement of the actual or apparent threat to the defendant does raise, however, an important question of principle, especially in connection with the use of various mechanical devices for the protection of person or property. In some cases, the defendant may surround his premises with a high wall, which he may then top with broken glass or barbed wire. In still others he may take the extreme measure of setting up spring guns or similar devices that are triggered by some act of the intruder himself. In all of these cases, the harm is deliberate; in some, in the strong sense that the harm to the intruder was the defendant's sole object when he set the device; in others in the sense that he knew of the substantial probability that harm would result from their use, even though the prime object was to frighten intruders away.⁴⁴ The crucial question therefore is whether the defendant can justify his conduct. In cases of actual invasion with the threat of harm, the issue of self-defense, coupled with its possible exceptions, is squarely raised. It is not raised, however, when the defendant's mechanical apparatus harms the "innocent" trespasser, one whose entry threatens harm to neither person nor property.⁴⁵ At this point the argument shifts from a justification of the deliberate infliction of harm to a (cost) justification of the decision to install the mechanical device in the first instance. The acceptability of this economic justification in turn rests on the initial choice between the principle of negligence and that of strict liability.

Within the framework of a negligence system, the defendant should be able to justify his decision to use a mechanical device by showing that it is a reasonable decision. That inquiry can be undertaken in the usual common sense terms characteristic of the common law approach to negligence, or with the explicit comparison of costs and benefits required by an economic ap-

⁴³ See Epstein, *Strict Liability* 173.

⁴⁴ It makes no difference whether the specific purpose for setting the device was to injure or to deter. There have, of course, been cases where that distinction has been made (see, e.g., *Bird v. Holbrook*, 4 Bing. 628, 130 Eng. Rep. 911 (C.P. 1828)) but it is of no importance once we accept the broader accounts of intention to harm, discussed *supra* at note 4.

⁴⁵ *Bird v. Holbrook*, *supra* note 44, allowed the plaintiff to recover in the classic case of this sort. The plaintiff climbed into the defendant's garden in order to recover a peaben for a woman who had lost it. While in the garden, he triggered the wires of a spring gun and was injured in consequence. The defendant set the gun to protect his tulip crop from loss by theft, and posted no notice of the gun's presence because he wished to apprehend the thief.

proach. The first approach was taken by Bohlen and Burns in their classic article on the subject,⁴⁶ and the second in Posner's recent article.⁴⁷ But the results are much the same,⁴⁸ in that both are prepared to allow the cost justification where it is made out on its facts. Thus high walls and exposed barbed wire may be used as a matter of course because they are efficient deterrents that hold out little chance of harm to innocent persons, be they trespassers or not. Spring guns and similar mechanical devices of course present more complex questions, raising as they do the prospect of deadly harm. With respect to them, no *per se* rule can capture the range of relevant considerations. The authors look to the place in which the devices are used. Thus a dwelling house merits greater protection than a warehouse, which in turn merits more protection than an unused shack. They look as well to the time of their use—night is more acceptable than day because of the greater difficulty in the prevention of dangerous or felonious entry at night. The alternative means of protection are also material: cheap and easy alternatives reduce the likelihood that the use of a spring gun should be privileged. The question of notice also plays a role:⁴⁹ the defendant who posts signs is in a better position than one who does not, because he has taken reasonable steps to enable potential victims to avoid harm. This analysis will, of course, lead to the conclusion that there will in principle be times in which the defendant could escape liability for the harm he has deliberately inflicted upon a bare trespasser.⁵⁰

The pattern of argument that produces this result is, however, unacceptable under a system of strict liability. In this context, as in all others, the reasonableness of the defendant's antecedent conduct is the defendant's concern alone. He should, of course, make the cost-benefit analysis, as he will, if he is rational. But the calculations are of no concern to the plaintiff. If the original decision to set the gun was unwise, but the plaintiff is a person against whom the use of force is justified in self-defense, there is no reason to give the plaintiff a windfall by disallowing the plea. The defendant's act might be

⁴⁶ Francis H. Bohlen & John J. Burns, *The Privilege to Protect Property by Dangerous Barriers and Mechanical Devices*, 35 *Yale L.J.* 525 (1926) [hereinafter cited as Bohlen & Burns].

⁴⁷ Richard A. Posner, *Killing or Wounding to Protect a Property Interest*, 14 *J. Law & Econ.* 201 (1971).

⁴⁸ The central points of the position are, in Posner's view: (1) the avoidance of a "blanket permission or blanket prohibition" on the use of force, *id.* at 221; (2) the rejection of such formulas as no man should be allowed to do by indirection (mechanical devices) what he could not do directly, *id.* at 225; (3) whether the plaintiff's entry was felonious under state law should not determine whether the defendant is entitled to the privilege, *id.* at 221. These results were for the most part reached by the common law, if not by the Restatement. *Id.* at 205-08.

⁴⁹ See, e.g., *Bird v. Holbrook*, *supra* note 44.

⁵⁰ See Bohlen & Burns 546, for a hint of this position.

imprudent at the outset, but it is justified in the end. If, on the other hand, that original decision was prudent, but the act unjustified because the plaintiff threatened no harm to the defendant, then the defendant should be held liable. He should not be allowed to force on others the costs of his own mistakes, however reasonable. Bohlen and Burns rightly note the parallel to the case where a defendant injures the plaintiff in an effort to protect himself from the attacks of a third party.⁵¹ But once the defendant is held liable in that situation, as he is in a system of strict liability, then it follows that he should be held liable here as well.⁵² The defendant who uses mechanical devices will no longer be in a position to discriminate between dangerous and innocent intrusions, as he was when he defended his land in person. It may be wise to take that risk in order to minimize the possibility of personal injury. It does not follow, however, that as between himself and the simple trespasser, the latter should take the risk of his miscalculations.⁵³

One caveat must still be entered. Questions of reasonableness of the sort suggested seem quite appropriate when the question at hand is whether general legislation should prohibit the use of spring guns and the like where they are apt to do more harm than good.⁵⁴ As with injunctions sought by private parties, there is no hard and fast rule of decision and utilitarian considerations must play some part in a decision that covers a vast multitude of possible cases. But these considerations are not relevant after the event to determine whether the facts in the very case justified the use of force. Indeed, even where the defendant's conduct does not comply with the statutory requirements, he still should not be deprived of his justification of self-defense in the particular case. The better approach is to treat the decision in the case as independent of the statutory scheme, allowing the defense in the private action while at the same time subjecting the landowner to the statutory penalties.

Many cases involving the defense of property will be decided in the same way regardless of the view taken towards cost-justifications and the defense of property. Thus Bohlen and Burns are, I believe, correct in suggesting that there should be a *per se* rule that denies recovery to a plaintiff who falls while

⁵¹ *Id.* at 535.

⁵² Epstein, *Strict Liability* 158-60.

⁵³ See, Bohlen & Burns 526. The same argument was made by counsel for the defendant in *Bird v. Holbrook*, 4 Bing. 628, 637-38, 130 Eng. Rep. 911, 914-15 (C.P. 1828). The concern just raised supports the position taken both by Bohlen and Burns and by Posner that it is proper to reject the maxim that one cannot proceed by indirect means where direct means are prohibited. Given a theory of strict liability, however, that maxim makes sense, because it says in effect that the degree of risk created by the defendant's conduct is his own concern and does not have any effect upon the outcome of the case.

⁵⁴ See An Act to Prohibit the Selling of Spring Guns . . . , 7 & 8, George IV, c. 18 (1827). That statute drew the kinds of distinctions appropriate to the legislative function. It allowed the use of spring guns only between sundown and sunrise, and then only for the protection of dwelling houses upon the posting of adequate notice.

bu
451. of risk?

attempting to scale a high wall that the defendant has erected to protect his property.⁵⁵ That result, however, need not rest on the asserted reasonableness of the defendant's conduct; indeed the logic of any reasonableness test is not easily invoked to support the *per se* results required here. Instead, the case for the defendant should be made out on causal grounds. The only causal paradigm of aid to the plaintiff is that of conditions made dangerous by virtue of position.⁵⁶ Yet here it was the plaintiff who placed himself in the position from which he could fall when he climbed the wall. Hence, the plaintiff's causal argument must fail, and the defendant wins not because he can justify the use of the wall to protect his property in economic terms, but because the plaintiff fails to state a *prima facie* case in causal terms.

It is also possible in cases involving the defense of property for the defendant to prevail in a system of strict liability even after the plaintiff has made out a *prima facie* case on causal grounds. For example, if the plaintiff cuts himself on the defendant's barbed wire as he tries to scale the wall, there is, perhaps, the *prima facie* case of dangerous conditions, but there is also the affirmative defense of assumption of risk, in those frequent cases where the plaintiff knew of the wire when he chose to scale the wall.

Let us turn now to the limitations applicable once self-defense is made out. It is often said that the force used in self-defense must be "reasonable," a term that conceals far more than it reveals. To systematically approach the problem, it is better to consider each individual factor that in an intuitive sense bears on the question of reasonableness. To facilitate that analysis we shall consider first the insufficient and then the sufficient exceptions to the plea of self-defense.

The first possible but insufficient limitation concerns the case of the "innocent attacker," one whose attack is neither negligent nor wilful. The Restatement of Torts in its treatment of self-defense takes no position on whether the defendant can assert the privilege of self-defense in cases of this sort.⁵⁷ The reason for this hesitation is clear within the framework of the negligence law. If the plaintiff had harmed the defendant, he could not have

⁵⁵ Bohlen & Burns 528.

⁵⁶ The causal arguments could never be thrown into such sharp relief with the "but for" test of causation: but for the erection of that wall, there would have been no harm. Since that test does not yield a clear result, it leaves an open invitation to ask the "policy" question of proximate cause, from which it is a short step to the issue of cost justification raised by the negligence formula.

⁵⁷ "The Institute expresses no opinion as to whether there is a similar privilege of self-defense against conduct which the actor recognizes, or should recognize, to be entirely innocent." Restatement (Second) of Torts § 64. For an excellent discussion of the problems of self-defense and the innocent aggressor, see George P. Fletcher, Proportionality and the Psychotic Aggressor: A Vignette in Comparative Criminal Theory, 8 *Israel L. Rev.* 367, 375 (1973) [hereinafter cited as Fletcher, Proportionality]. Although Fletcher discussed the question in the context of the criminal law, his conclusions are easily transferred to the tort law governing intentional harms.

been held responsible for the harm he caused. One way to reach this result is to say that a person (here the plaintiff) can escape liability in the ordinary case by showing that he did not act with negligence or intent. If that premise is accepted, as it is in the modern law, it is not difficult to argue that the same showing should rebut the defendant's justification of self-defense, thereby limiting the scope of the plea solely to cases of "wrongful" attack. The view is unfair, however, because it requires the defendant to surrender his own personal integrity to the force of the plaintiff, the sort of sacrifice that it is hard to ask, and impossible to demand, of any person. Though fairly required by the law of negligence, it is not difficult to see why the Restatement shies away from it.

This problem of the "innocent aggressor" cannot arise at all under a system of strict liability. Here the plea of self-defense no longer turns on the moral wrong of the plaintiff's attack; at this stage we need not trouble ourselves with the distinctions amongst wilful, negligent and innocent aggressors that pervade the Restatement.⁵⁸ Instead it rests on the judgment that as between a victim and his assailant, the victim is prima facie to be preferred in any action between them. That judgment allows the injured party his prima facie case as plaintiff for the harm inflicted. Likewise, it prima facie allows him to meet force with force, and thus to invoke as defendant the plea of self-defense. The issue is not one of punishment of the assailant. His moral innocence is immaterial both to the prima facie case based on causal principles and to the justification of self-defense.

A second qualification to the plea of self-defense—one based on defendant's improper motive—likewise deserves rejection.⁵⁹ The plaintiff should not be allowed to argue that the defendant is not entitled to the privilege because the plaintiff is a person whom the defendant disliked and wished to harm in any event. If there is no obligation to make a gift of services to a friend, why should it be required on behalf of an enemy?⁶⁰ Malice itself cannot be the source of a duty. The plaintiff fails in the Good Samaritan case because of his inability to satisfy the causal requirement of the tort law, even where the defendant refuses to give aid out of malice alone.

The case of self-defense raises a direct parallel. It is of course possible that a person entitled to use force on his own behalf will decide not to exercise that right. But there is no way in which a plaintiff whom the defendant hates should be able to compel the waiver of privilege which could not be demanded by the defendant's closest friend. The traditional maxim often quoted on the question of motive is "malicious motives may make a bad case worse, but they

⁵⁸ Restatement (Second) of Torts § 63-66.

⁵⁹ It is indeed rejected by the Restatement (Second) of Torts § 63, comment e.

⁶⁰ On the question of the Good Samaritan, see generally, *The Good Samaritan and the Law* (James M. Ratcliffe ed. 1966). For my own views, see Epstein, *Strict Liability* 189-204.

cannot make that wrong which is in essence lawful."⁶¹ As stated, the proposition amounts only to a conclusion of law because it does not enable us to determine what conduct is "in essence lawful."⁶² But if it is agreed that a man is entitled, *prima facie*, to use force in self-defense, what counts as conduct which is in essence lawful has already been established by independent means. The only issue then left is whether that plea of self-defense can in turn be overridden by pointing to the defendant's motive. On the arguments already advanced, they cannot.

There are of course good exceptions (at the fifth stage of argument) to the plea of self-defense. One of the most important allows the plaintiff to show that the defendant used excessive force in the defense of his person or property. The plea recognizes that self-defense, which legitimates the use of force, also limits its use; retaliation is not permitted under the guise of self-defense. The defendant is, however, allowed to put himself first, and need concern himself with the plaintiff's welfare only after he has vindicated his own interests, as here the law maintains, as indeed it should, the sharp distinction between aggressor and victim. No close cost-benefit analysis is invoked in order to insure that the defendant's use of force will advance the social good; no requirement is imposed upon him to minimize the total harm to the two parties.⁶³ Indeed the defendant is allowed to use force even though the resulting harm to the plaintiff is greater than the benefit to himself, as when he must kill the plaintiff in order to save himself from a serious but not deadly attack that is by no means certain of success. And where the defendant exceeds his justification, the appropriate measure of damages is no longer the total harm caused, or for that matter the harm both caused and intended. It is only the harm caused in excess of that necessary for self-defense.⁶⁴

The argument has not been drawn to a close. It is still possible in a sixth stage of argument for the defendant to override the plaintiff's last plea. As stated, the plea of excessive force is strict: it demands of the defendant that he use the best conceivable means to protect himself from attack, and holds him responsible for all harm to the plaintiff that could have been avoided if that standard had been met. As such it demands that the defendant be required to choose the best alternative on behalf of a person whose conduct has made it most difficult for him to do so.⁶⁵ As a matter of fairness between the parties, the defendant should be able to show that he did all within

⁶¹ Prosser, Torts 24. The maxim also has great importance in connection with cases of harm to trade or advantageous relations. See *infra*, at 437-38.

⁶² Prosser, Torts 24.

⁶³ The same anti-utilitarian bias is also found in Fletcher, Proportionality 374.

⁶⁴ See Restatement (Second) of Torts § 63, comment 1, § 82, for the same rule.

⁶⁵ For a parallel argument in connection with the exceptions to the plea of assumption of risk, see Epstein, Defenses 195-97.

his power to minimize the harm to the plaintiff once he protected his own interests. The plea as stated is subjective, and allows the defendant to take into account all of his personal weakness and problems that would be of no consequence in a simple case in which he inflicted harm, not upon his attacker, but upon a stranger. Rejected at the second stage of argument, these personal excuses are material for now they show why the defendant should not be held for using means not generally adopted in self-defense.⁶⁶

The position just taken is not uniformly accepted. Many accounts of the limitations on self-defense insist that the defendant act as a "reasonable" man, as a man of "ordinary firmness," in response to an attack.⁶⁷ The reasonable man of the law of negligence becomes the model victim in cases of self-defense. But the preferred result surely must be that the victim of an attack must do, as against his attacker, only that which is within his power to do. The reasonable conduct of the reasonable man might offer one guide to the question whether the defendant tried to avoid unnecessary harm to the plaintiff, but the ultimate judgment should be on the subjective standard, leaving the defendant free to show why *he* could not behave like the reasonable man. With good-faith effort as the appropriate standard, the defendant's motive, though immaterial in itself, now counts as relevant evidence on the question of whether the defendant sought to avoid the use of excessive force.

⁶⁶ This approach allows the latter-day reconciliation of two early English cases that are of great importance on the question whether the early common law adopted a theory of negligence or strict liability. In the *Thorns* case, Y.B. Mich. 6 Ed. 4, f. 7, pl. 18 (1466), as reprinted in C. H. S. Fifoot, *History and Sources of the Common Law* 195 (1949), the defendant cut some thorns that fell on the plaintiff's land, and was held for the damage he caused both by their cutting and by his entrance on defendant's land to recover them. During the argument of the case, Choke, J. suggested that the defendants plead that they did all within their power to hold the thorns in, the kind of excuse rejected by his fellow judge, Littleton. Littleton is right, I believe, on the facts, because the excuse suggested by Choke can be raised only in the second stage of the argument, there being no independent ground of defense. On the insufficiency of that plea see Epstein, *Defenses* 172. That excuse, however, does have much more appeal in *Mitten v. Faudrye*, Popham 161, 79 Eng. Rep. 1259 (K.B. 1626), where the defendant was not held liable when his dogs chased away sheep that had trespassed upon his land, because he did all that was within his power to keep them in. This case can be read to support the more "lenient" interpretation of *Thorns* urged by Choke. See C. H. S. Fifoot, *supra*, at 190. That line is indeed hinted at by Crew, C.J., who calls the *Thorns* case a "hard" case. Popham 162, 79 Eng. Rep. 1260. Yet the two cases can be clearly distinguished, because only *Mitten v. Faudrye* involves the use of excessive force in the defense of property to which the response of "best efforts" can be raised in the sixth stage of argument. The point is important because the use of staged pleadings allows a defender of the basic principle of strict liability (in the *prima facie* case) to place principled limitations upon its scope.

⁶⁷ Restatement (Second) of Torts § 63, comments i & j. The Restatement does hedge the position somewhat by taking into account "the fact that the other's conduct has put the actor in a position in which he must make a rapid decision." *Id.* § 63, comment j. But there is still no complete shift to the subjective position because the next sentence demands that we evaluate the defendants against "what a reasonable man in such an emergency would believe permissible. . . ." *Id.* § 63, comment j.

protected his own defendant to take at would be of no upon his attacker, ent, these personal ent should not be e.⁶⁶

y accounts of the is a "reasonable" an attack.⁶⁷ The victim in cases of the victim of an within his power offer one guide to sary harm to the ojective standard, like the reasonable the defendant's evidence on the of excessive force.

English cases that w adopted a theory f. 7, pl. 18 (1466), aw 195 (1949), the eld for the damage id to recover them. endants plead that use rejected by his use the excuse sug- ument, there being e Epstein, Defenses . Faudrye, Popham . eld liable when his e did all that was the more "lenient" at 190. That line case. Popham 162, use only *Milten v.* erty to which the ent. The point is the basic principle ns upon its scope. tement does hedge 's conduct has put § 63, comment j. the next sentence : man in such an

But even on this view the defendant's motive is not an ultimate issue on the question of liability. It becomes material only if the plaintiff can first establish that the defendant's force was excessive. Even then it only helps raise an uneasy inference that the defendant yielded to his worst instincts when he used excessive force in self-defense.⁶⁸

The questions about the excessive use of force are, I think, susceptible to a straightforward solution because they do not require us to "balance" the interests of the plaintiff against those of the defendant. The problems of balance create, however, grave difficulties when the question shifts to whether the defendant may use "deadly force" required in self-defense. Take the simple case where the defendant is able to defend some odds and ends of little value only by killing or maiming the plaintiff, who wants to take them.⁶⁹ Excessive force is not the issue, but deadly force is. Here it is quite possible to take the position that defendant should be entitled to use deadly force. The principle that controls is that right need never yield to wrong, where the justification of self-defense has shown the defendant to be in the right and the plaintiff in the wrong.⁷⁰ To deny the use of deadly force necessarily allows the plaintiff to profit from his own wrong even when the defendant is able to stop him.

To be sure, in this extreme case it is most awkward and disagreeable to argue for the use of deadly force.⁷¹ Yet the utilitarian argument at the root of the discontent lacks a cutting edge. It cannot be generalized to cover the cases that arise as the value of the defendant's interests continue to increase in value. We could try to "balance" the interests of the parties in question, but that balance is not a straight economic one, as the defendant is not required to yield to force whenever the benefits to his aggressor outweigh the costs to him, even if he retains an action for damages of uncertain worth. Thus while the rule that allows the defendant to use deadly force in defense of his dwelling house (*any dwelling house*) might be taken to represent only the

⁶⁸ In certain situations, moreover, it is possible to carry the argument a step further. Suppose the defendant was a police officer required by statute to take particular steps in response to a violent attack. In that case, it may well not be dispositive that he acted in the best of faith, given his duty to conform to particular standards. Here, therefore, it is proper to allow the plaintiff to show that all or some of the harm could have been avoided if the defendant had complied with the appropriate standards of care. The case thus turns on a kind of negligence standard after the argument winds its way through seven stages. Here the appropriate duties in question are not judicially created under the general foresight doctrines, but are derived instead from specific statutes or regulations. As the theory of the case has thus changed, the plaintiff's appropriate measure of damage is that harm which could have been avoided had the requisite care been taken.

⁶⁹ Cf. *Katko v. Briney*, 183 N.W. 2d 657 (Ia. 1971).

⁷⁰ See *Fletcher*, 378-79, for a comparative law discussion of the position.

⁷¹ In *Katko v. Briney*, 183 N.W. 2d 657 (Ia. 1971), the jury not only found for plaintiff, but also awarded punitive damages.

utilitarian judgment as to the total costs and benefits of the rule, more likely it rests at least in part on the general principle that no assailant should be able to force his victim to sacrifice his own substantial interest for the sole benefit of the assailant. The rule that a man may stand and fight to protect his honor, although often rejected in recent years, stems from that same basic principle.

The problem is insoluble in general terms because there is no common measure by which to reconcile two concerns. The calculus of costs and benefits does not take into account the rights and the wrongs of the case, and the strictures against sacrifice do not take into account its costs and benefits. We must proceed therefore with caution to identify (in the sixth stage of argument) the kinds of interests that may be protected by deadly force. The distinction between protection of a dwelling house and of an empty shack, or that between serious personal injury and personal honor, raise questions of degree now transmuted into distinctions in kind. There is little we can expect by way of general theory once the easy paradigms are set out. To "balance" may be the distinctive feature of negligence law; but the few cases in which it is truly unavoidable show its weakness as a general technique for solving legal problems.

One other possible limitation upon the plea of deadly force deserves special mention. The justification of self-defense does not require a showing that the plaintiff's attack was meant to cause harm. Therefore the issue of plaintiff's mental state still may be introduced into the argument (at the sixth stage) to justify the use of deadly force in defense of property even in cases where the property is not of substantial worth. Here the defendant in effect seeks to imitate the plaintiff's argument, which in the third stage rested on the defendant's intention to harm him. Yet the plaintiff's use of the defendant's intention only justified a money judgment for the harm deliberately caused. In this context the defendant's use of the plaintiff's intention is seized upon, not to sanction a money judgment, but to justify the killing of another person, and then for acts which in themselves constitute but minor offenses under the criminal law. In the end therefore the plaintiff's intention does not have much weight in this context, but should at best serve as a minor offset to the plaintiff's recovery once the plea of deadly force is incorporated into the system.

2. *Consent.* The second principled justification for the intentional infliction of harm is consent. In the usual case it is made out in accordance with the general principles applicable to all consensual arrangements, such that the overt expression of consent will be sufficient, unless it is known by the other party that the consent was not intended.⁷² Those cases which raise difficulties

⁷² See, e.g., *Cunard Lines v. O'Brien*, 154 Mass. 272, 28 N.E. 266 (1891), where the court found that the defendant had consented to a vaccination when she held out her arm to an immigration official who administered the shot, even though she did not want it.

arise when the defendant tries to establish the plaintiff's consent by referring not to an agreement between the parties but to the combination of the plaintiff's action and knowledge.

Let us return to the case where the defendant sets a spring gun that is set off by an intruder who knows of its use. The issue of consent arises in the following manner. The plaintiff first alleges that the defendant created a dangerous condition that caused him harm, a case to which the plaintiff's setting off the device is no defense. The defendant could now plead in his defense either that the plaintiff assumed the risk or trespassed against his land. In either event he could be met with the successful reply that the harm was deliberately inflicted, given his knowledge of the substantial prospect that harm would be caused. Nonetheless the plaintiff could be met with the justification of consent if he had actual notice of the gun's use.⁷³ Knowledge alone is not the equivalent of consent but the knowledge coupled with the plaintiff's own decision to enter that land after he knew of its dangerous condition could well be treated as consent. In their treatment of the question Bohlen and Burns argue that there is no consent to the injury because the trespasser merely braves a danger. As such, they continue, he does not "deliberately encounter" the certainty of danger necessary to make out consent by implication.⁷⁴ But the point about certainty cannot be decisive in this context. When the defendant hurts the plaintiff with his mechanical device, he does so deliberately, even though the outcome is not certain; assume otherwise, and the plaintiff's trespass or assumption of risk will be sufficient defense to the prima facie case, and one to which the plaintiff has no reply. If the substantial knowledge of the defendant establishes his intention to harm, it is certainly arguable that the same degree of knowledge should make out the plaintiff's consent, if he continues with his trespass.

The plaintiff's consent, once established, still may of course be overridden by misrepresentation or duress.⁷⁵ As with assumption of risk, duress or misrepresentation does not deny the fact of consent, but only gives a reason why the consent should not be operative in the particular case. The distinction between the denial and the exception is not merely verbal. Consider the case where a third party is the source of the duress or misrepresentation. Suppose X told the plaintiff that he had to submit to the defendant's medical experi-

⁷³ If the notice were posted, but not seen, the issue of consent (or for that matter assumption of risk) would have to be decided for the plaintiff. Note, too, that notice itself is immaterial in terms of our general theory of tort because it looks only to the reasonableness of the defendant's conduct, and not to the way in which that conduct affects, as a matter of fact, the relationship between the parties. Where the notice is prominent, however, or the dangerous condition apparent, it will be most difficult for the plaintiff to show that he did not have the requisite knowledge.

⁷⁴ Bohlen & Burns, at 538.

⁷⁵ See, e.g., *Fowler V. Harper & Fleming* James Jr., *The Law of Torts* 40 (1956) [hereinafter cited as *Harper & James*].

(A)
(A)

(A)
But what if
diff. beh.
Ass. risk
consent?

rule, more likely
assailant should be
interest for the sole
and fight to protect
in that same basic

re is no common
costs and benefits
the case, and the
costs and benefits.
the sixth stage of
deadly force. The
empty shack, or
raise questions of
title we can expect
out. To "balance"
new cases in which
unique for solving

e deserves special
showing that the
issue of plaintiff's
(the sixth stage)
in cases where
in effect seeks
not in effect seeks
ge rested on the
f the defendant's
liberately caused.
n is seized upon,
g of another per-
rior offenses under
on does not have
a minor offset to
rporated into the

entional infliction
ordance with the
s, such that the
own by the other
raise difficulties

(1891), where the
n she held out her
she did not want it.

ments certain to result in physical harm or suffer in the alternative some greater harm at X's hands. After the plaintiff submits to the defendant's experiments, he brings an action for assault and battery, to which the defendant responds with the defense of assumption of risk. Once the plaintiff alleges that the defendant intended to harm him, the case will then turn on the plea of consent. If the issue of duress could be raised on a general denial, then the plaintiff would prevail. (Indeed the case would never reach the fourth stage because the plaintiff could deny as well the plea of assumption of risk.) But once it is recognized that the source of the compulsion is crucial, the plaintiff has no exception to the plea of consent, even though he has an action against X for compelling the consent to the experiment in question.⁷⁶

Duress and misrepresentation are not the only exceptions to the defense of consent. Indeed, in many consensual situations the defendant is under a duty not only to tell the truth, but to disclose to the plaintiff all material facts that may influence his decision to give consent.⁷⁷ The most important context of this duty to disclose is that of medical malpractice. There the basic legal position is that the patient is generally entitled to know about all material risks inherent in the proposed course of treatment.⁷⁸ The duty is said to rest upon the autonomy of the patient, upon his right to control what is done with his body, no matter how unwise.⁷⁹ So defended, the principle of "informed consent" has a strong appeal, particularly to those who believe that the protection of an individual autonomy is the first end of tort law. But there are dangers as well. Viewed as a tort question, the physician's duty to disclose is but one outgrowth of the general duty of care imposed by the law of negligence. There is, however, another view of the question that restricts application of the doctrine of informed consent. The relationship between physician and patient is at bottom consensual, much like that between the buyer and seller of goods. The appropriate function of the law in consensual arrangements is to approximate those terms which the parties themselves would have chosen if they had specified all of the incidents of their relationship. On this view, the

⁷⁶ For parallel arguments with assumption of risk, see Epstein, *Defenses* 192.

⁷⁷ Logically, the discussion that follows should be viewed as concerning the possible exceptions to the defense of assumption of risk, since there is, it is clear, no intention to harm the patient. See the discussion of *Mohr v. Williams*, *supra* at 396, 407. Yet it is universally discussed under the heading of informed consent, a term justified only because attention is placed on the consent to the operation and not to the injury.

⁷⁸ For the early recognition of the doctrine, see *Schloendorff v. Society of the New York Hospital*, 211 N.Y. 125, 105 N.E. 92 (1914). For recent cases that strongly support this general position, see, e.g., *Canterbury v. Spence*, 150 U.S. App. D.C. 263, 464 F.2d 772 (1972); *Natanson v. Kline*, 186 Kan. 393, 350 P.2d 1093, rehearing denied, 187 Kan. 186, 354 P.2d 670 (1960); *Wilkinson v. Vesey*, 110 R.I. 606, 295 A.2d 676 (1972). See generally *Informed Consent and the Dying Patient*, 83 Yale L.J. 1632 (1974), [hereinafter cited as *Informed Consent*], and material cited at *id.* 1633 n.8.

⁷⁹ See, e.g., *Natanson v. Kline*, 186 Kan. 393, 406-07, 350 P.2d 1093, 1104 (1960).

physician-patient relationship differs from other consensual arrangements precisely because the parties to it generally have a different view of their legal relations. The rules requiring disclosure in medical cases represent a good first approximation of the respective rights and duties of physician and patient, and do so in a way in which the regime of caveat emptor does not. Most patients want to know the relevant facts, and most physicians doubtless want them to know them.

The crucial point, however, concerns the relationship between the rules of tort and contract. The approach here allows the parties to individuate their relationship and thereby to supplant the "tort" rules fashioned by the courts;⁸⁰ and it does not matter that the private agreement between physician and patient restricts the scope of the duty of disclosure. The autonomy of the physician is at stake every bit as much as that of the patient; and it is violated whenever a duty he has disavowed is imposed upon him for his patient's benefit. It has been said that waivers of the right to the appropriate disclosure should be viewed with suspicion, given that the patient stands in awe of his physician.⁸¹ Yet as stated the argument surely proves too much. If the physician has such power, then why will he be unable to obtain the patient's consent, even if he makes all of the necessary disclosures? If anything, it seems more likely that a patient can ask for the information even if unable to evaluate it once received. The relationship between physician and patient is difficult enough as matters now stand; it is only made more difficult if treated as a problem of public policy, and not of private arrangement.

IV. ECONOMIC HARMS

A. *The Prima Facie Tort*

Thus far our inquiry has focused upon the intention to harm only in cases of physical harms. Its place in the law of tort, in particular its relationship to the problems of causation and justification, can be better understood if studied in yet another context, that of deliberate infliction of economic losses wholly apart from physical injury. In cases of this sort it is often said that the intentional infliction of economic loss gives rise to a "prima facie" tort, one that bears close resemblance to the intentional infliction of physical harm or of emotional distress. In this part I hope to show that this resemblance is false

⁸⁰ In this context, it is possible to use the standard of who can "best avoid the costs" associated with the illness or injury to formulate the standard set of implied terms, as it is not difficult to assume that the patient and physician enter into their relationship for their mutual benefit. See *Informed Consent* 1645-47. See generally Guido Calabresi, *The Cost of Accidents* (1970).

⁸¹ *Canterbury v. Spence*, 150 U.S. App. D.C., 263, 274 n.36, 464 F.2d 772, 783, n.36 (1972).

alternative some
the defendant's ex
which the defendant
plaintiff alleges that
on the plea of
denial, then the
the fourth stage
ion of risk.) But
cial, the plaintiff
e has an action
question.⁷⁸
to the defense of
t is under a duty
ll material facts
important context
e the basic legal
out all material
ty is said to rest
of what is done
ple of "informed
believe that the
law. But there
duty to disclose
he law of negli-
restricts applica-
n physician and
buyer and seller
arrangements is
ld have chosen
n this view, the

es 192.
ming the possible
r, no intention to
96, 407. Yet it is
ified only because
y.

of the New York
ngly support this
63, 464 F.2d 772
ed, 187 Kan. 186,
(1972). See gen-
(1974), [hereinafter

104 (1960).

at every crucial point, at least if the approach taken toward physical injuries in this series of articles is sound.

The classic case of *Mogul v. McGregor*⁸² provides a convenient vehicle for examining the common law principles governing economic harms. There the defendant shipowners entered into an agreement among themselves, the object of which was to obtain exclusive control of the "tea harvest" shipped on the China-to-England run. Their agreement called for the firms to carry tea at a very low rate in order to make it unprofitable for outsiders to compete successfully with them. As an additional part of their scheme, the defendants offered a five per cent rebate on each shipment.⁸³ Under the terms of their offer the entire rebate was, however, to be forfeited in the event that the customer at any time shipped his tea by a carrier not a member of the defendant's association. The plaintiff was a shipping firm that was denied entrance to the defendants' association. It commenced its action for loss of trade after the defendant's strategy had made it impossible for it to conduct its own trade at a profit. As the suit was for harm between strangers, the plaintiff could recover, if at all, only in tort. The case went to the House of Lords, where it was unanimously decided that the plaintiff's complaint stated no cause of action at common law. The most famous exposition of the governing principles, however, is contained in the judgment of Bowen, L.J., in the Court of Appeal:

All personal wrong means the infringement of some personal right. "It is essential to an action of tort," say the Privy Council in *Rogers v. Rajendro Dutt*, "that the act complained of should under the circumstances be legally wrongful as regards the party complaining; that is, it must prejudicially affect him in some legal right; merely that it will, however directly, do a man harm in his interest, is not enough." . . . Now, intentionally to do that which is calculated in the ordinary course of events to damage, and which does, in fact, damage another in that other person's property or trade, is actionable if done without just cause or excuse. Such intentional action when done without just cause or excuse is what the law calls a malicious wrong. The acts of the defendants which are complained of here were intentional, and were also calculated, no doubt, to do the plaintiffs damage in their trade. But in order to see whether they were wrongful we have still to discuss the question whether they were done without any just cause or excuse. Such just cause or excuse the defendants on their side assert to be found in their own positive right (subject to certain limitation) to carry on their own trade

⁸² 23 Q.B.D. 598 (1889), aff'd, [1892] A.C. 25.

⁸³ The plaintiff tried to call these provisions "penalties" in order to cast the pall of illegality over them. But Bowen rightly noted that they could not be accurately described as such, as they represented inducements to customers that the defendants were not obligated in the first instance to make. 23 Q.B.D. 598, 611 (1889).

freely in the mode and manner that best suits them, and which they think best calculated to secure their own advantage.⁸⁴

Bowen then accepted the defendants' account of just cause, particularly since "there was here no personal intention to do any other or greater harm than such as was necessarily involved in the desire to attract to defendants' ships the entire tea freight of the ports, a portion of which would otherwise have fallen to the plaintiff's share."⁸⁵

The general actionability for the deliberate infliction of harm makes apparent sense if the intentional tort is treated as the archetypical tort in physical injury cases. Yet that parallel fails once we adopt the position, urged here, that the defendant's intention to harm the plaintiff forms no part of the prima facie case, but becomes material only in reply to a good affirmative defense. It might be argued that the general rule should be displaced in *Mogul v. McGregor* because it involves the protection of trade, a species of intangible property. Yet that is not the case. Patents and copyrights, for example, create property rights in their owners that cannot be reduced to physical possession. Yet once their subject matter is identified, they share the essential features of tangible property in that they too create rights of exclusive use and control good against the entire world. These interests, moreover, are protected by actions against infringement that are strict in form, as the defendant's intention to appropriate plaintiff's copyright or patent for his own use forms no part of the prima facie case.⁸⁶ Again, the recent proposals to create a system of private property rights in the electromagnetic spectrum contemplate actions that are strict in form, although here too only intangibles are involved.⁸⁷

Bowen's version of the prima facie tort also requires us to give an accurate account of the interest in trade to be equated with an interest in property. In the sense already mentioned, the right of property gives to its owners the exclusive possession or use of the subject matter in question, a right negative in form that imposes upon strangers only the correlative duty to forbear,

⁸⁴ 23 Q.B.D. 598, 613 (1889). For a sympathetic restatement of Bowen's position see Harper & James § 6.12. The same line is taken by Holmes, in his *Privilege, Malice and Intent*, 8 Harv. L. Rev. 1 (1894). He argues that the trade cases are all cases of "temporal damages" that turn on the question of justification. *Id.* at 2-3. He finds that justification in the "policy" of "privilege," based upon the belief that the defendant's activity did in general more harm than good. *Id.* at 3-7. Holmes' position is subject to the general criticisms made of the Bowen opinion.

⁸⁵ 23 Q.B.D. 598, 614 (1889).

⁸⁶ Anthony W. Deller, *Deller's Walker on Patents* § 507-514 (1972); Melville Nimmer, *Nimmer on Copyright* § 148 (1964).

⁸⁷ See Arthur S. De Vany, Ross D. Eckert, Charles J. Meyers, Donald J. O'Hara & Richard C. Scott, *A Property System for Market Allocation of the Electromagnetic Spectrum: A Legal-Economic-Engineering Study*, 21 Stan. L. Rev. 1499, 1540-42 (1969).

and not an affirmative duty to act. The right to trade, if it means only the right to *offer* one's property or labor to another on whatever terms he sees fit, conforms as well to this pattern of negative rights, for it too does not impose upon a stranger the correlative duty to accept the offer as stated. Yet if the right to trade is so construed, then the defendants in *Mogul v. McGregor* collectively have not infringed upon or interfered with the plaintiff's interest in trade. It can still make whatever offers for carriage it chooses even after the defendants have formed their combination to control the China tea trade. It is true that they will not be accepted, but of that the plaintiff cannot complain as no one is bound to accept them on his behalf.

In *Mogul v. McGregor*, however, Bowen proceeded on the assumption that there was a good prima facie case. That assumption requires us to redefine both the nature of the plaintiff's right to trade and the acts that constitute actionable interference with it. To turn first to the definition of the right, it is best understood as the right to trade successfully, the right to trade at some sort of profit. Where the right is defined in this manner, however, it is no longer possible to preserve the close parallel between rights of property and rights of trade which Bowen took for granted in his articulation of the prima facie tort. In order to vindicate the right to trade in this second and broad sense, it is necessary to identify some class of individuals under a correlative duty, not to forbear, but to contract with the plaintiff, for without that guaranteed custom it is difficult to see how the plaintiff can make the profit assured him under the broader definition of the right. It is therefore no longer possible to say that this form of property right is negative in form and good against the entire world. In truth it imposes upon part of the world (though there is no easy account of which part of the world) an affirmative duty to contract.⁸⁸

The uneasiness with the right in its new and broad form is furthered, moreover, when we ask the kinds of act that must be taken to constitute actionable interference with it. *Mogul v. McGregor*, as Bowen was careful to point out, does not involve the threat or the use of force; defamation or misrepresentation; or the inducement of breach of contract.⁸⁹ The only source of inter-

⁸⁸ 23 Q.B. 598, 614 (1889). It is possible to develop an alternative account that gives the plaintiff the exclusive right to make offers of carriage on that particular run, one that gives it, as it were, an exclusive franchise at common law. That formulation allows us to escape the problem of identifying those who are under an affirmative duty to deal with the plaintiff, but it is in turn subject to insuperable objections of its own. First, why should the plaintiff be entitled to that franchise? Why not the defendants, or some of them, or some third party? Second, assume that we can decide which of those who desire it should receive it, how then do we justify restrictions placed upon those who might prefer to deal with other carriers? Both of these objections point out the havoc that is done to any semblance of the equal distribution of rights amongst private persons. The franchise argument was not pressed in *Mogul v. MacGregor*.

⁸⁹ 23 Q.B.D. 598, 614.

ference with the plaintiff's rights is the *offers* they have made to attract people who might otherwise have done business with the plaintiff, rightly characterized by Bowen as "competition to the bitter end." Yet that formulation of interference demands that the plaintiff show why those persons to whom the two offers are directed should be bound to accept that offer which they wish for whatever reason to reject. It also raises in stark form the fundamental question of formal equality of rights between traders, indeed between all private parties. To see the point one must ask how the plaintiff would wish to treat the case if the roles of the parties were reversed, say in a counterclaim by the defendant for the loss of his trade to the plaintiff. Can the defendant turn the plaintiff's case against him and argue that his right to trade at a profit is protected by the law, while the plaintiff's offers to third parties constitute acts of actionable interference?

Given the broad definition of the right to trade and the kinds of action which must be held to constitute interference with it, some limitations must be placed upon the plaintiff's case if trade itself is to flourish without a constant stream of lawsuits. The first limitation Bowen suggests forms part of the prima facie case: the defendant must deliberately interfere with the plaintiff's trade. While that requirement could serve, if desired, as an effective limitation on recovery in cases of physical injury, it is doubtful that it can perform that same role in the trade cases. The very object of trade is to take customers away from a rival. It is difficult, therefore, even to conceive of a case in which the defendant acted without specific intention to win the plaintiff's customers away or, at least, without the knowledge that his success is certain to insure that result.

The second limitation—the one that really matters—upon the prima facie tort is contained in the justification open to the defendants. According to Bowen, they can establish "just cause" by showing that they sought to advance their own self-interest by carrying on their own business at a profit. Admit, however, that the plaintiff has stated a good prima facie case, and the justification offered is insufficient. Self-interest is a good (the best) reason to search for legal arguments to support one's position, but it is not a substitute for those legal arguments. The defendant cannot justify inflicting physical harm upon the plaintiff in order to advance his own self-interest. The existence of a private necessity does not excuse the defendant from paying for the harm he has caused, even if he has profited thereby. A man cannot take another's goods to better his own lot. Every thief could say "nothing personal" to his victim. Likewise, it is immaterial if the taking was for the benefit of society at large and not the defendant alone. It will not help a thief to give the stolen property as alms to the poor. In such a case its owner has two causes of action, one in trespass for the taking, and the other in conversion or restitution against the subsequent takers.

The weakness of Bowen's framework is further revealed when we examine his treatment of the question of malice. In the physical injury cases, the plaintiff could not override the justification of self-defense, for example, by showing that the defendant acted out of spite or ill will. In that context malice was material only as evidence on the question of whether the defendant did all that was in his power to avoid harm to the plaintiff, once it was established that the force used was in excess of that necessary for the task of self-defense. In this context, however, malice is said to play a different role, as an exception to a justification premised upon the plaintiff's self-interest. Yet if the arguments about malice in the physical injury cases are correct, the malice should be an immaterial issue in connection with economic harms as well. Once it is settled that there is justification for whatever reasons to harm someone the defendant likes, it is impossible to see why the defendant should be stripped of that justification when the plaintiff is someone whom he despises.

B. *The Causal Analysis*

There is to my mind no doubt that the result reached in *Mogul v. McGregor* is correct. The task is to show why it is correct given the principles of liability developed for both accidents and deliberate harms. In order to do that we must make a radical shift in orientation. We must not, as did Bowen, consider the case as turning on the justification for harm deliberately inflicted. Instead we must undermine the prima facie case,⁹⁰ by showing in causal terms that the plaintiff cannot make out the invasion of a protected interest, here the right to trade only in its narrow sense, as the right to make offers on whatever terms the plaintiff sees fit.

1. *Causation and the Narrow Right to Trade.* It requires only an easy extension of the basic causal paradigms to move from the protection of property to the protection of trade, when that term refers only to a person's right to make offers to the world on whatever terms and conditions he chooses. In the famous case of *Tarleton v. McGawley*,⁹¹ the defendants fired shots at some canoes occupied by African natives who were heading toward the plaintiff's ships intent upon trade. Several of the natives were killed, and the others retreated to land, causing the plaintiffs to lose the benefits of the expected exchanges, not only for that day but for the entire trading season.

⁹⁰ "[E]xcuse or justification' is only needed where an act is prima facie wrongful." *Allen v. Flood* [1898] A.C. 1, 128 (per Lord Herschell).

⁹¹ Peake 270, 170 Eng. Rep. 153 (K.B. 1793). Indeed, the identification of the plaintiff's protected interest was taken for granted in the case. The defendant rested his case in large measure on a plea in avoidance, that the plaintiffs' action was barred because they had not first obtained the permission from the local king to trade with his natives. That plea was rejected on the ground that the law in question was a *jus positivum* that should be enforced by the king, not the defendant.

The plaintiff's interest in trade here only involves his right to make offers on terms he thinks fit but, given the arguments made in connection with *Mogul v. McGregor*, it is still an interest entitled to protection. With his interest established, the plaintiff has a cause of action based on the theory that the defendant used force to drive away those who wanted to trade with him. Lord Kenyon in *Tarleton v. McGawley*, asserted that the action lay only because the harm inflicted was deliberate.⁹² There is, however, no reason why the cause of action should not be strict, even if few cases of the forceful interference with trade take place by accident. The intention to harm forms, as with physical injuries, no part of the prima facie case; it is material only by way of reply to override a valid affirmative defense.

The position just taken clashes with the current law, which denies the plaintiff recovery for economic losses even where the defendant acted negligently. The result is sometimes defended on the causal ground that the damage is too remote.⁹³ The negligence test of "reasonable foresight," however, suggests the opposite conclusion, as it is most common for parties with expensive plant or equipment to enter into contracts for its use. If the "foresight" test is conveniently put aside, the remoteness question can be approached on explicit causal grounds. Yet the causal arguments applicable in *Tarleton v. McGawley* still decide the case for the plaintiff. The conclusion of remoteness is, therefore, perhaps best understood as a covert policy judgment in favor of barring recovery, based upon the fear of exposing the defendant to multiple lawsuits each time he damages the person or property of another.

The different contentions are well illustrated in the Georgia case of *Byrd v. English*.⁹⁴ There, while the defendant's servants were excavating on the defendant's land, they (negligently) built up an unstable wall of earth (causation by creation of dangerous conditions), which fell upon and broke the wires of the electric company that carried electric current to the plaintiff's plant. The plaintiff was forced to suspend the operation of his plant for several hours until the wires could be repaired, no alternative source of power being available. He then sued the defendant for the economic loss suffered on account of the delay.

Of crucial importance in the case is that the plaintiff's contract with the electric company exempted it from liability for the loss of service caused by the acts of a third party. The case therefore is not one of the inducement by force of a *breach* of contract. Instead, the situation, as in *Tarleton v. McGawley*, is one where the defendant's acts make it impossible for the plaintiff to deal with a third party on terms that work to their mutual benefit. Given

⁹² Peake 270, 273, 170 Eng. Rep. 153, 154 (1793).

⁹³ See, e.g., *Anthony v. Slaid*, 52 Mass. (11 Metc.) 290 (1846); *Byrd v. English*, 117 Ga. 191, 43 S.E. 419 (1903); *Harper & James* 509.

⁹⁴ 117 Ga. 191, 43 S.E. 419 (1903).

this identification of the plaintiff's protected interest in *Tarleton v. McGawley*, the case cannot be decided for the defendant on narrow causal grounds. The force applied by the defendant caused the plaintiff's economic losses, no matter what he intended.

The case must therefore be argued on the assumption that the liability in question should be denied in order to spare the defendant from the crushing burdens that would follow in cases of this sort. To examine that claim, assume that the electric company had obligated itself unconditionally to provide the plaintiff with power. In that case, as the court conceded,⁹⁵ the electric company could recover consequential damages from the defendant for the amount it had to pay the plaintiff pursuant to their contract. If that burden will not crush the defendant, then why cannot the plaintiff now sue him for those same losses in his own right? The court distinguished the two cases on the ground that the plaintiff here only has rights under his contract with the electric company, to which the defendant is in no way connected.⁹⁶ But the plaintiff's claim does not rest on the contract. *His* protected interest is the right to offer to purchase power from the electric company on whatever terms he sees fit. The history of past agreements, discharged to their mutual satisfaction, is needed only to establish that the loss flowed from the defendant's interference with the plaintiff's right. Indeed, if the electric company had been liable for the power failure occasioned by the defendant's acts, that would mean only that either the plaintiff or the company could have sued for the loss,⁹⁷ with the recovery of the one barring the action of the other.⁹⁸

Even if this is all correct, we must still contend with the specter of multiple suits if actions for economic loss were allowed. One protection against that possibility is to require the plaintiff, as in all cases, to mitigate his damages by seeking alternative means of supply, a possibility which was not open in this particular case. That single rule will in most cases eliminate or reduce to nominal amounts recovery for economic loss, given the few situations in which the plaintiff has but one source of supply.⁹⁹ Again, if mitigation is not sufficient, a convenient dollar minimum could bar those trivial cases which in all

⁹⁵ *Id.* at 194, 43 S.E. at 420.

⁹⁶ *Id.* at 194, 43 S.E. at 420.

⁹⁷ The situation is that raised by *Robin's Dry Dock and Repair Company v. Flint*, 275 U.S. 303 (1927). The plaintiff was the time charterer of a ship owned by a third party. The defendant had (negligently) damaged the ship in a manner that made him liable to its owner. The court held that the plaintiff could not recover because its damages were too remote. See, for excellent criticism, Harper & James 500-06.

⁹⁸ *Id.* at 504.

⁹⁹ Note, too, that this result will follow even in cases of inducement of breach of contract, for there too mitigation should be possible where the plaintiff has numerous alternatives. This explains, perhaps, why so much of this kind of litigation involves opera singers or movie stars, each of whom can be regarded as a unique sort of good.

likelihood will not be brought in any event because of the high costs of their prosecution. Finally, as was mentioned above, the defendant should be able to implead all possible plaintiffs in a single lawsuit to protect himself from the risk of double payment for a single economic loss. Once these precautions are observed, the "policy" arguments used in *Byrd v. English* lose their force. Strict liability extends with perfect symmetry to it and *Tarleton v. McGawley*, and there is no reason why the legal results should not be altered to conform to the theory.

2. *Causation and the Broad Right to Trade.* The causal principles applicable to physical injuries are of no further assistance to the plaintiff once we shift to the second account of the right to trade—the right to trade at a profit. True, the plaintiff in *Mogul v. McGregor* could say that "the defendant deprived him of his business," as in one sense happened in *Tarleton v. McGawley*. Yet that account of the two cases only conceals the essential difference between them, the difference between force and persuasion. No victim can "walk away" from the threat or use of force and still retain his full complement of rights. Where there is only competition in trade (whether between individual firms or by firms acting in concert) the situation is much more complex. The defendant intent upon "destroying his competition" cannot do so by his own physical acts. He must persuade those persons, who are entitled to do business with whomever they choose, that it is better to do business with him than with the plaintiff. On strict causal terms, the necessary presence of these possible customers means that the case does not involve the simple two-party situation implied by the phrase "defendant drove plaintiff out of business." The case, therefore, presents no parallel whatsoever to the straightforward trespass case of "A hit B" even though the plaintiff may speak, however earnestly, of what the defendant has done to him.

The plaintiff's causal case must therefore rest, if it is to succeed at all, on the three-party causal models applicable to cases of physical injury. Yet here there is surely no case of compulsion; the defendant gave the third party a choice which he preferred to the plaintiff's, but did not force him to accept it. Likewise, the paradigm of dangerous conditions is of no assistance to the plaintiff. Under that paradigm, the plaintiff has a cause of action against either the third party or the defendant, with the former having an action over in the event that he is required to compensate the plaintiff. Here, of course, the plaintiff has no action against the third party, who is under no duty to contract with him; thus the need for an action over never arises. Indeed, the logic of that action, while clear in the case of physical injury, makes little sense in this context. The defendant gave the third party a choice which he preferred to those otherwise available to him; he did not subject him to a set of external constraints not of his own making. We can decide the causal question for the plaintiff only if the rational response of a third party in the

Arleton v. McGawley,
causal grounds. The
economic losses, no matter

that the liability in
from the crushing
that claim, assume
ally to provide the
the electric company
for the amount it
at burden will not
sue him for those
two cases on the
contract with the
connected.⁹⁸ But the
ted interest is the
on whatever terms
their mutual satis-
m the defendant's
company had been
acts, that would
have sued for the
other.⁹⁸

specter of multiple
ction against that
te his damages by
s not open in this
ate or reduce to
ituations in which
ation is not suffi-
cases which in all

company v. Flint, 275
d by a third party.
made him liable to
se its damages were

ment of breach of
ntiff has numerous
litigation involves
nique sort of good.

usual trade case is part of the causal chain. But that response, being both deliberate and independent, is a *novus actus interveniens*, and the plaintiff's causal case is no longer tenable.¹⁰⁰ The damage is too remote.

This discussion of causation and economic harm does not imply that causal arguments (and hence tort recovery) can be successful only where the plaintiff has used force. But it does give us the necessary clue as to the circumstances in which the tort law can be extended beyond cases involving force. The essential point is that the causal paradigms in all situations in which actionability is warranted involve the nonreciprocal causal relation between the defendant's conduct and the plaintiff's protected interest, be it of person, property, or trade. So long as that intimate relationship between causation and property is preserved, actions should be allowed, even with intangibles, and even without the threat or use of force. In the case of patents or copyrights the causal question is nonreciprocal as the defendant infringes upon the plaintiff's interest, and not the other way around. Likewise, it is the defendant who passes off his own goods as though they were those of the plaintiff. It is the defendant who misleads the plaintiff by his false representations.¹⁰¹ The defendant induces breach of contract between the plaintiff and a third party. In all these cases the causal relations are nonreciprocal.

The use of nonreciprocal causal arguments cannot, however, be extended to the "right" of trade in its broad sense at stake in *Mogul v. McGregor*. The plaintiff has no right to demand that third parties do business with him. He cannot show therefore that the defendant's offers invaded his protected interests, be they of property or trade. All that is established is that he is left worse off by virtue of the agreements that the defendant reached with third parties.

The common law captured the difference between being worse off and

¹⁰⁰ See Epstein, *Strict Liability* 177-89. H. L. A. Hart & A. M. Honoré, *Causation in the Law* 129-51 (1959). It is, of course, these causal arguments which explain why it is that the protection against intentional physical invasions was recognized at an early point in the development of the law, whereas the judicial examination of the intentional infliction of economic harms only developed in the late part of the nineteenth century. Hart and Honoré do not appear to grasp the importance in causal terms of the shift from physical to economic harms. *Id.* at 173-74. Indeed these separate patterns of historical development should warn us against treating the assault and battery cases like the economic harms cases.

¹⁰¹ Indeed, the misrepresentation cases can be made quite a bit more complex, as for example, where the defendant makes a misrepresentation to a third party that induces him not to deal with the plaintiff. Nonetheless, a quite straightforward extension of the rules of misrepresentation is sufficient to cover the three-party situation. See, *Allen v. Flood* [1898] A.C. 1, 141-43, where the House of Lords held the plaintiff stated a good cause of action where misrepresentations were made to a third party in order to induce him not to contract with the plaintiff. Note, too, that where there is a material misrepresentation there is no need to place reliance upon some undifferentiated notion of "unfair" competition to permit the plaintiff his recovery.

the invasion of a protected interest in the Latin expression *damnum absque iniuria*, harm without legal injury. Properly understood, the phrase is not double talk; it refers to those cases in which a party is worse off economically even though he has suffered no invasion of his protected interests. The cleavage between the ordinary and legal use of harm and causation is, of course, the source of endless problems. The legal system cannot be in total harmony with the popular sentiment that uses these broad causal expressions invoked by losers in the competitive struggle. But unless the distinction between legal and economic harm is observed, there will be no principled way to maintain the parallel between actions for the invasion of physical and economic interests, and no principled way to avoid the endless political questions of deciding whose economic self-interest the law must serve. We must therefore shun the causal arguments tailored to the extended right to trade. In all their particulars they bear no relationship to the general arguments applicable to the physical injury cases and, for that matter, to those which are applicable to the right to trade in its narrow sense.

C. *The Two Views of Economic Harms Compared*

In the examination of the trade cases we have thus far distinguished between two approaches. The first of these, that propounded by Bowen in *Mogul v. McGregor*, concedes the causal question to the plaintiff, and then decides the case on the defendant's justification of self-interest and the exception to it based upon his malice or ill-will. The alternative approach treats the causal question—the question of what legal right of the plaintiff was involved¹⁰²—as decisive and, resolving that in defendant's favor, never reaches the twin issues of privilege and malice. The two approaches yield the same result in *Mogul v. McGregor* but require quite different results in other situations. To show further the consequences that flow when one course is adopted instead of the other, it is useful to consider several cases, mostly English, that could be decided on either approach.¹⁰³

In *The Mayor of Bradford v. Pickles*,¹⁰⁴ the defendant gathered rainwater that was percolating through his own land. If he had let the water take its natural course, it would have been drawn by gravitational forces to the city's land, where the city could have collected it for use in its water supply. The House of Lords held that the city's complaint did not state a cause of action even though it alleged that the defendant gathered the water "maliciously."

¹⁰² That was the point of the language of the Privy Council in *Rogers v. Rajendro Dutt*, 13 Moore, P.C. 209 (1860), quoted by Bowen in *Mogul v. McGregor*, *supra*, at 424.

¹⁰³ The English cases are discussed because they, more than the American cases, raise the basic issues in the area. The recent American cases, moreover, turn in large measure on statutory provisions that have reduced the importance of common law principles.

¹⁰⁴ [1895] A.C. 587.

The opinion noted that it made no difference whether the defendant had acted out of sheer spite or out of a desire to collect the water in order to sell it to the city. That assertion is not consistent with Bowen's approach to the prima facie tort. On his view, we must first concede both the damage to the plaintiff from the defendant's act and its justification founded upon the defendant's self-interest. At that point the case could turn on the question of malice, and as such it is crucial whether the defendant acted out of sheer spite or a desire for economic gain.

Since the defendant's motive was regarded as immaterial by the House of Lords, its decision is consistent with the alternative view, argued here, that allows the defendant to prevail on causal grounds alone. On that view, plaintiff can succeed only where the defendant took the plaintiff's property. That could be shown if the water in question had become part of a stream in which definite rights of appropriation had been established. But percolating rain-water when it falls belongs to neither plaintiff nor defendant until taken under control; yet the plaintiff's cause of action for diversion requires it to show the diversion of *its* water. Where it makes that showing, malice is immaterial, since the prima facie case is, here as elsewhere, in principle strict. True, the defendant is worse off without the water than he is with it; but the same can be said of the plaintiff as well. To avoid the problem of reciprocal harm, ownership first must be established to decide which economic harm is compensable and which is not.¹⁰⁵ Once that interest is identified, the defendant's intention to harm (bound up in the issue of malice) becomes relevant only as a reply to a valid affirmative defense. It cannot make up the defect in a prima facie case that fails because it cannot identify the plaintiff's proprietary interest.

The importance of the legal interest is also revealed in the analysis in the earlier case of *Keeble v. Hickeringill*.¹⁰⁶ There the plaintiff used duck decoys to attract wild fowl to his lands, fowl he wished to capture and sell. The defendant constantly discharged firearms in order to drive the fowl away from the plaintiff's decoy, and was successful in that end. The plaintiff brought his cause of action for the intentional infliction of harm, and the court, speaking through Holt, C.J., held that he had a right to recover. Under the theory of prima facie tort, the decision is correct. The plaintiff is able to show in a broad sense the intentional infliction of harm, given that the defendant's action has made him worse off. The justification of self-interest is weak on the facts, and in any event arguably is rebutted by malice.

¹⁰⁵ To return to the electromagnetic spectrum for a moment, ask who interferes with whom when two parties broadcast on the same frequency. That question can be answered only after some system of property rights is established in the spectrum. At that point, one party can say of the other that he broadcast on *my* frequency. See generally R. H. Coase, *The Federal Communications Commission*, 2 J. Law & Econ. 1 (1959).

¹⁰⁶ As reported 11 East 573, n.(a), 103 Eng. Rep. 1127 (Q.B. 1706).

The case, however, assumes a different complexion if the plaintiff is required to show the defendant's invasion of his protected interest. True, an action lies if the plaintiff owned the fowl driven off by the defendant. Indeed the theory of recovery should be strict: "defendant frightened away plaintiff's fowl" states a good prima facie case, and references to defendant's mental state are quite beside the point. The difficulty in *Keeble* is that the plaintiff has only an economic interest, an economic desire to capture the fowl, not a proprietary interest because he has captured them.¹⁰⁷ Holt was aware of the difference, for he noted the plaintiff would have no action if the defendant had used his own lure to attract the fowl that otherwise would have gone to plaintiff's land. Yet doubtless even that tactic would have been improper if the plaintiff had already taken possession of the birds. Holt also tried to defend his position by reference to the schoolmaster cases.

One schoolmaster sets up a new school to the damage of an antient school, and thereby the scholars are allured from the old school to come to his new. (The action was held there not to lie.) But suppose Mr. Hickeringill should lie in the way with his guns, and fright the boys from going to school, and their parents would not let them go thither; sure that schoolmaster might have an action for the loss of his scholars.¹⁰⁸

But here too the analogy is imprecise. The case of the young scholars is reminiscent of *Tarleton v. McGawley*: it involves forceful interference with the right to do business with those who will do business with you. But in the case at hand, the fowl did not deal with the plaintiff on a contractual basis, much less want to do so.

The same general problem is illustrated by the important and difficult

¹⁰⁷ On this point there would be a question whether defendant's shooting amounted to a nuisance, such that the loss of the fowl could be regarded as consequential damages. But while that approach might be accepted on the facts to support a judgment for the plaintiff, it makes it unnecessary to treat the case as a cause of action based on malice alone. See *Allen v. Flood*, [1898] A.C. 1, 133. See also *Hollywood Silver Fox Farm, Ltd. v. Emmett*, [1936] 2 K.B. 468. Here the plaintiff had an ongoing dispute with the defendant over the placement of a large sign on the plaintiff's land. When the plaintiff would not remove his sign as the defendant requested, the defendant had his son shoot his gun near the property line in a manner which was calculated to, and which did in fact, frighten the plaintiff's vixen such that they were unable to breed. The court relied on *Keeble v. Hickeringill* and allowed the plaintiff's action. Here, however, as the animals in question were the property of the plaintiff, the prima facie case could well be strict in form: defendant's shooting frightened the plaintiff's fowl. The question of the intention to harm, moreover, could be crucial to the case if we accepted, at least with respect to animals, an excuse based on the extrasensitive nature of the plaintiff's vixen. At that point, the specific intention to harm, on the model developed earlier, could well override this affirmative defense; and, as the defendant would be hard pressed to show any justification for his conduct (self-interest not being an adequate justification), the plaintiff could recover. On this view of the case, the defendant's intention to harm moots the importance of the extrasensitive condition of the plaintiff's vixen.

¹⁰⁸ 11 East at 576, 103 Eng. Rep. at 1128.

he defendant had
ter in order to sell
s approach to the
the damage to the
founded upon the
on the question of
acted out of sheer

l by the House of
argued here, that
that view, plaintiff
property. That could
stream in which
percolating rain-
until taken under
quires it to show
malice is immaterial,
e strict. True, the
it; but the same
of reciprocal harm,
omic harm is com-
d, the defendant's
s relevant only as
defect in a prima
f's proprietary in-

he analysis in the
used duck decoys
ure and sell. The
e fowl away from
plaintiff brought
1, and the court,
recover. Under the
plaintiff is able to
en that the defen-
of self-interest is
malice.

who interferes with
tion can be answered
trum. At that point,
See generally R. H.
1 (1959).

case of *Allen v. Flood*.¹⁰⁹ The defendant Allen was the representative of the ironworkers union, forty of whose members were in the employ of the Glengall Iron Company. The ironworkers had long opposed having members of the rival shipwrights union doing any ironwork on the ships on which they worked. The plaintiffs, Flood and Taylor, were members of the shipwrights union who were hired by the Glengall Company to do woodwork on its ships. When the ironworkers learned of that fact, they became quite upset because the plaintiffs shortly before had done ironwork for another firm on other ships that the ironworkers claimed to be theirs. Allen, as their representative, told Glengall that all of his men would walk off the job unless the plaintiffs were fired.¹¹⁰ The continued service of the ironworkers was essential to Glengall's economic survival; that of the plaintiffs was not. The firm complied with the demands and dismissed the plaintiffs, and the action against Allen followed. It was agreed that all of the men, both shipwrights and ironworkers, worked on contracts terminable at will. The ironworkers did not threaten breach of contract when through Allen they said that they would walk off the job, and the Glengall Company committed no breach of contract when it dismissed the plaintiffs. The theory of the plaintiff's cause of action was that the defendant "maliciously" induced the Glengall Company not to enter into contractual relationships beneficial to the plaintiffs. The trial court allowed the case to go to the jury on the strength of that theory, without taking it upon itself to give an account of "malice." The jury returned a verdict of £20 for each plaintiff, and a judgment in that amount was affirmed by the Court of Appeal.¹¹¹ The House of Lords then took the unusual step of asking eight judges of the Queen's Bench for advisory opinions on the question whether the plaintiff's allegation is disclosed a good cause of action. These judges, by a margin of six to two agreed with the courts below.¹¹² The House of Lords then took its own counsel, reversed the decisions below, and gave judgment to the defendant by a six to three vote.

The opinion of Lord Halsbury best reveals the logic of those who voted to sustain the plaintiff's cause of action. The first question that he addressed is whether any legal right of the plaintiff was infringed. His answer is clear enough: "I think the right to employ their labour as they will is a right both recognized by the law and sufficiently guarded by its provisions to make any undue interference with it an actionable wrong."¹¹³ He then defended the

¹⁰⁹ [1898] A.C. 1. For the statement of facts in the reports, see [1898] A.C. 1, 2-4.

¹¹⁰ The threat was even broader in that ironworkers were prepared to walk off the job whenever the shipwrights were allowed to do ironwork [1898] A.C. 1, 3.

¹¹¹ *Flood v. Jackson*, [1895] 2 K.B. 71.

¹¹² [1898] A.C. 1, 11-67.

¹¹³ [1898] A.C. 1, 71. In support of this position, he quotes Sir William Erle: "Every person has a right under the law, as between him and his fellow subjects, to full freedom

"right of the plaintiffs to pursue their calling unmolested" as part of that "liberty of action" basic to the principles of the common law.¹¹⁴ The right thus established, he then concluded that the defendants infringed that right by "intimidation and coercion" by threatening to walk off their jobs at a time when their employer could ill afford to do without their services.¹¹⁵ On this view of the case, the prima facie tort is made out, and given Halsbury's characterization of the defendant's acts, the presence of malice overrides any justification based upon self-interest. The problem with this argument rests in its characterization of the plaintiff's right as the right to dispose of his labor as he will. As stated, it corresponds to the right of trade in the broad sense discussed in connection with *Mogul v. McGregor*. Accept, however, that the right to trade, or the right to work, only comprehends the plaintiff's right to offer services on whatever terms he sees fit, and the case collapses.¹¹⁶ The plaintiffs are unable to show the invasion of a legal right of any sort or description, as the employer was under no affirmative duty to provide them with jobs.

Even though it deals with unions and not firms, *Allen v. Flood* is but an instant replay of *Mogul v. McGregor*. Stripped to its essentials, the plaintiff's case alleges only that Glengall Iron Company, which was entitled in its own self-interest to deal with either union, chose not to deal with the plaintiffs as the price of dealing with the defendant's union. Glengall could not complain because the terms were no longer as attractive as before, because it could not dictate the terms on which the defendant's men must work when they owed it no obligation to work at all. The plaintiff's men could not complain because their right was only to make whatever offers they saw fit, not to have them accepted by those who find it in their self-interest to reject them. On this view of the case, we do not have to consider the question whether the defendant could justify his conduct in terms of his self-interest or whether the plaintiff could prove it malicious in any of the protean senses of that term. The model of the prima facie tort put forward by Bowen plays no part in the case,¹¹⁷ and the decision of the House of Lords is correct on all its points. One might argue that the proposition "an act lawful in itself is not made unlawful because it is actuated by a bad motive" is not the most elegant way to defend

in disposing of his own labour or his own capital according to his own will." [1898] A.C. 1, 75, quoting Erle on Trade Unions 12 (1869).

¹¹⁴ [1898] A.C. 1, 72.

¹¹⁵ [1898] A.C. 1, 80, 83.

¹¹⁶ The point was anticipated quite well in counsel's argument for Allen: "What is there unlawful in telling an employer that if he continues to employ A, B will leave his service? It is said that A has a right to employment. What he has is a right to make a contract of employment if the employer desires it. . . . He has a right to sell his labour—but only to someone who wishes to buy it." [1898] A.C. 1, 4.

¹¹⁷ Noted by Lord Herschell, [1898] A.C. 1, 139-40.

representative of the
employ of the Glengall
ing members of the
which they worked.
e shipwrights union
k on its ships. When
e upset because the
firm on other ships
representative, told
s the plaintiffs were
sential to Glengall's
n complied with the
inst Allen followed.
ronworkers, worked
threaten breach of
alk off the job, and
hen it dismissed the
that the defendant
er into contractual
allowed the case to
ng it upon itself to
ct of £20 for each
r the Court of Ap-
asking eight judges
stion whether the
These judges, by a
ouse of Lords then
re judgment to the

f those who voted
that he addressed
His answer is clear
will is a right both
sions to make any
hen defended the

398] A.C. 1, 2-4.
l to walk off the job
l, 3.

William Erle: "Every
acts, to full freedom

the result. But if that proposition is understood as saying that the causal defects in the prima facie case cannot be cured by alleging malice, or at least the intention to harm, then its application is entirely proper. With both physical and economic harms, the defendant's mental state should be material only if the legal argument progresses to its third stage.

*Tuttle v. Buck*¹¹⁸ presents in a somewhat different setting the same questions about causation, privilege, and motive raised in *Allen v. Flood*. The plaintiff was a barber by trade, who for many years did a profitable business in the village of Howard Lake, Minnesota. The defendant was a banker and a man of large means, who out of his dislike of the plaintiff installed a succession of rival barbers in town, his purpose being to take away the plaintiff's trade. To achieve that end he subsidized his barbers so that they could operate at a profit even though they charged lower rates than the plaintiff. In addition, "by threats of his personal displeasure," he persuaded the plaintiff's former patrons not to have the plaintiff cut their hair.

The court allowed the plaintiff's action, holding that "when a man starts an opposition place of business, not for the sake of profit to himself, but regardless of loss to himself, and for the sole purpose of driving his competitor out of business, and with the intention of retiring upon the accomplishment of his malevolent purpose, he is guilty of a wanton wrong and an actionable tort."¹¹⁹ That result is correct given Bowen's account of the prima facie tort, with malice the crucial issue. On the theory advanced here, however, the case is wrongly decided because the plaintiff could not identify his protected interest. The case is one in which both parties have made offers to third persons, where those of the defendant's barbers generally have been accepted.

Judge Elliott, who wrote the opinion for the court, regarded the complaint as insufficient because it did not allege that "the defendant intentionally ran the business at a loss to himself, or that after driving the plaintiff out of business the defendant closed up or intended to close up his shop."¹²⁰ But even if the defendant wanted to lose money, there is still no prima facie case, because there is no interference with the plaintiff's right to offer his services on whatever terms he sees fit. Again the parallels to the physical injury cases are instructive. With both physical and economic harms the question of motive and the question of costs and benefits are immaterial to the prima facie case, on which the causal issue remains decisive. Only if we are prepared to accept two theories of tort, one for physical injury and one for economic harm, is it possible to allow the plaintiff to recover in *Tuttle v. Buck*.

One further variant of the problem of economic harm requires mention. It is that of combination or, more ominously, conspiracy. Where there is no

¹¹⁸ 107 Minn. 145, 119 N.W. 946 (1909).

¹¹⁹ *Id.* at 151, 119 N.W. at 948.

¹²⁰ *Id.* at 151, 119 N.W. at 948.

invasion of a protected interest, plaintiffs have sought to close the gap in their claim by arguing that, although the act of a single defendant is not actionable in itself, that same act becomes actionable when done by many in concert, particularly if done to hurt the plaintiff. There are hints of that position in Bowen's opinion in *Mogul v. McGregor*,¹²¹ and it is at the root of the decision of the House of Lords in *Quinn v. Leatham*.¹²²

In that case, the plaintiff (Leatham) was a butcher, and the defendants (Quinn and others) were officers in a trade union. In order to promote their cause in a trade dispute with the plaintiff, the defendants approached one Munce, a buyer of the plaintiff's goods, and told him that he must not do business with the plaintiff during the dispute,¹²³ if he did not want the defendants to call Munce's employees, all union members, off the job. Here, as in *Allen v. Flood*, these contracts of employment were at will, thus ruling out any action for inducement of breach of contract.¹²⁴ The House of Lords decided for the plaintiff, holding that the defendants acted in a conspiracy that interfered with the plaintiff's right of trade. *Allen v. Flood* was treated as a wholly different case because "all that Allen did was to inform the employers

¹²¹ 23 Q.B.D. 598, 616 [1889]. It is quite clear, however, that Bowen did not think that conspiracy should play the role that it enjoys today in the antitrust law. Thus, for example, he notes that the contract among the defendants was illegal on grounds of public policy, but holds that the only consequence of illegality is that the contract could not be enforced by the parties to it in the event of breach. *Id.* at 619-20. It did not represent the kind of "unlawful end" that the tort law renders actionable as conspiracy in restraint of trade. Indeed, the late nineteenth century trade cases show in the main little concern with modern antitrust-type issues. Of particular interest is Lord Herschell's observation: "I am aware of no ground for saying that competition is regarded with special favor by the law; at all events, I see no reason why it should be so regarded." *Allen v. Flood* [1898] A.C. 1, 140-41.

¹²² [1901] A.C. 495.

¹²³ The dispute concerned, among other issues, the question whether the plaintiff could satisfy the union's demands by having his nonunion workers become members of the union, with the plaintiff paying all of their membership fees. The defendants did not accept these terms, both because they were displeased that the plaintiff's workers did not join the union at some earlier time, and because their own members stood in need of jobs. Their refusal to accept these terms was described as "reprehensible" and "malicious," but it is difficult to see, however much they inconvenienced both the plaintiff and his employees, why they were not in the rational self-interest of the defendants and their union members. One should well remember Bowen's warning that "malice" is one of the most slippery of legal concepts. *Mogul v. McGregor*, 23 Q.B. 598, 612-13 (1889), and Lord Herschell's warning that the use of the term without definition represents one of the greatest threats to individual liberty. [1898] A.C. 1, 118.

¹²⁴ Note, however, that if the defendants had threatened the inducement of breach of contract by Munce's employees, we would have a different case, because now more than persuasion is used to secure a favorable settlement with the plaintiff. The case is like *Tarleton v. McGawley*, with only one difference: the threat of inducement of breach of contract takes the place of the use of force. It is as though the defendant said, "I will take your property if you deal with the plaintiff," conduct that gives both a good cause of action.

of the plaintiffs that most of their workers would leave them if they did not discharge the plaintiffs."¹²⁵ The characterization of Allen as an "informant," however, makes that case a trivial one that could have been decided at trial on a narrow question of fact, namely, that he had not *procured* the Glengall Iron Company to dismiss the plaintiffs. Yet the jury found that such procurement was the precise effect of Allen's warnings to Glengall, thereby giving the case its great importance on a point of law.¹²⁶

Quinn v. Leathem, therefore, is distinguishable from *Allen v. Flood* only if the defendants' combination made tortious those acts otherwise lawful if done by each individually.¹²⁷ The allegation of malice in *Allen v. Flood*, even if taken in the sense of the specific intention to harm born only of ill will, was not sufficient to make good the causal defects in the plaintiff's case. So here the allegation of combination is insufficient to make good that same defect in *Quinn v. Leathem*, even if coupled with an allegation of malice. Lord Halsbury, who was on the Court in *Quinn v. Leathem*, had a much better sense of the problem when in *Mogul v. McGregor* he wrote: "I think this question is the first to be determined: What injury, if any, has been done? What legal right has been interfered with? Because if no legal right has been interfered with, and no legal injury inflicted, it is vain to say that the thing may have been done by an individual, but cannot be done by a combination of persons."¹²⁸ Thus, suppose one person told Munce that he would not deal with him if he, Munce, dealt with the plaintiff. Is the plaintiff's harm any less if Munce complies with that demand? If not, why no action in the one case, but an action in the other?

The point is again made clear if we make the obvious comparisons to the physical injury cases. There the fact of combination only works to make two or more defendants joint tortfeasors. Proof that two defendants acted in concert does not enable the plaintiff to dispense with his causal allegations, even if it allows him to charge each defendant for the harm jointly caused. Combination does not create liability in a physical injury case precisely because the causal paradigms do. Those paradigms, moreover, depend solely on the nature of the acts in question, not the number of people who perform

¹²⁵ [1901] A.C. 495, 532. See also, for Lord Halsbury's similar views, [1901] A.C. 495, 506-07.

¹²⁶ *Id.* at 534. With this reinterpretation of its facts, there is no wonder that Lord Halsbury (who dissented in *Allen v. Flood*) took a very narrow view of the scope of precedent. [1901] A.C. 495, 506. The very point raised by Lord Halsbury had been discussed and dismissed in *Allen v. Flood*. [1898] A.C. 1, 117. Indeed, the distinct nature of Allen's threats was the basis for liability in the Court of Appeal. *Flood v. Jackson*, [1895] K.B. 21, 37 (per Lord Esher, M.R.).

¹²⁷ Even this point of distinction is odd. *Allen v. Flood* looks like a clear case of combination, as Allen had the full support of the ironworkers.

¹²⁸ [1892] A.C. 25, 38.

them. Persuasion (which includes the threat *not* to do those things which you are *not* obligated to do) is not transmuted into coercion because many use it to achieve their common end, even if it becomes more effective thereby. Is speech to be banned *because* it persuades? Similarly, inducement of persons not to deal with plaintiffs does not become inducement of breach of contract when done by many instead of one. Statements of fact do not become misrepresentations when asserted by many instead of one. In all cases the causal allegations form an indispensable part of the prima facie case.

CONCLUSION

This article is the last of three in which I have sought to give a coherent account of the tort law that allows us to approach all cases, from the simple trespass to trade regulation, from a single point of view. The major assumption of these articles is that, as a substantive matter, the tort law should be seen as a system of corrective justice that looks to the conduct, broadly defined, of the parties to the case with a view toward the protection of individual liberty and private property. The first demand of that inquiry is to identify the class of interests, be they of liberty or property, that are entitled to public protection. The second problem is to give an account of the permissible "moves" that allow private parties to switch from one set of entitlements to another.¹²⁹ On that point, my implicit presupposition is that the permissible moves are the consensual arrangements between the parties whose entitlements will be changed by the switch, as for example, by contract, by gift, by inheritance and the like.¹³⁰ The role of the law of tort in this scheme is to police, as it were, this system of moves by rectifying changes in entitlements brought about by impermissible means. In order to develop the appropriate rules of rectification, it is, I believe, best to articulate the rules of torts in terms of the pleas that each party involved might urge on his own behalf. The first of the particular tasks of the tort law is developing a workable account of the concept of "causing harm" which identifies the means of invasion of the individual interests already defined. The second portion is to set out the limitations on causation that operate both by way of defense and subsequent plea, including those which relate to the intention to harm. The theory of justice which is necessarily invoked in the case is necessarily historical in that it looks to what given individuals have done to upset the initial equilibrium between themselves and others in order to determine if redress is in order. As

¹²⁹ See, for use of this term, Robert Nozick, *Distributive Justice*, 3 *Phil. & Pub. Affairs* 45 (1973), reprinted in his *Anarchy, State, and Utopia* 149 (1974), whose entire historical theory of justice is consistent with the set of rules developed here.

¹³⁰ The law of contracts, gifts, and wills has as one of its major functions the identification of those consensual arrangements that should *not* be treated as moves of the game, for reasons of fraud, duress, incapacity and the like.

such, it does not turn upon any preconceived notion of what should be the appropriate end-state distribution of goods and services, and indeed it will accept any such end-state so long as there is no defect in the process in which it was reached.

I have given my view of the legal results that are required once these premises are accepted, and it is quite clear that they conflict, often in result and always in manner, with those results that are required by utilitarian principles. A defense of the initial premise of a system of corrective justice against its utilitarian alternative is, of course, difficult to make because there is no common measure of ethical discourse that allows the two to be compared with each other. I do not know how to examine the basic conflicts between the two systems within the compass of a single page or paragraph and will close with but a single observation. The view that makes torts the study of resource allocation has not as yet developed any straightforward set of rules consistent with its own initial premises to govern even routine cases of harm. Instead it gives us a list of considerations to be taken into account before the definitive answer can be reached in a given case or class of cases.¹³¹ Every legal system must take them into account at some point in its development, but it is, I believe, a grave mistake to suppose that tort questions can be argued only in utilitarian terms. There is an irreducible ethical base to the tort law, one that compels us to recognize that hard choices and unpleasant results cannot be avoided by arguing that further empirical research is needed to resolve the traditional conflicts within the law of tort in a principled matter.¹³² Most of the positions which I have defended rest upon belief in the importance of individual autonomy within the social order. Those conclusions are, of course, subject to attack, but only within the framework of an alternative theory of corrective justice, and not by an economic theory of social control.

¹³¹ See Peter A. Diamond, *Single Activity Accidents*, 3 *J. Leg. Studies* 107 (1974), to get some sense of the incredibly complex mathematical apparatus needed to formalize a model of the accident law designed to minimize accident costs, even under the most restrictive set of assumptions.

¹³² "The question whether a general substitution of strict for negligence liability would improve efficiency seems at this stage hopelessly conjectural; the question is at bottom empirical and the empirical work has not been done." Richard A. Posner, *Strict Liability: A Comment*, 2 *J. Leg. Studies* 205, 211-12 (1973).