

The class is Law 140 (Torts), Mondays 10:30 to 12:10, Tuesdays and Wednesdays 10:50 to 12:05, room 1420. The review session will be Thursday, December 3, 10:30 to 11:45, in our usual room.

The teacher is Eugene Volokh, volokh@law.ucla.edu, (310) 206-3926, room 2113.

The exam will be 4 hours, open book, open notes, Tuesday, December 8, in the afternoon. The exam will likely be part multiple choice and part essay, perhaps with some short answer questions.

The readings are Farnsworth & Grady, *Torts* (2d ed. 2009), plus this syllabus. You'll be asked to read on average about 30-35 pages per week. This is relatively light for a 5-unit class, but note that there'll be a lot going on in those 6 to 7 pages per unit. Read carefully, and answer for yourself the questions asked in the readings.

Many students find that law school reading is much more taxing than much undergraduate readings. Reading 30 to 35 pages per week for a law school class is more demanding than reading a 300-page novel each week for an English class. This is because every sentence in the opinion potentially matters (especially when you're reading opinions that have been edited down carefully by textbook editors, to include the most important parts of the case). If you skim over a paragraph or two in a novel, you probably won't miss that much. But if you do the same in a legal case, you could miss the key fact or the key argument.

We will sometimes quickly summarize the facts of a case or a problem before discussing it in class. But often we will not. You will be expected to know and remember the key facts from the reading assigned for the day.

You are responsible for everything in the assigned readings, including the notes, problems, and footnotes. We will often spend a good deal of class time on the notes and problems, and not just on the main cases.

The cases in this class will generally be given in shorter excerpts than in other classes. Still, you must read the cases carefully, and pay close attention to the facts of the case, the procedural posture of the case (see pp. xli-xlvi), the legal principles that the case sets forth, the way it applies the legal principles to the facts, and the arguments it gives to justify the legal principles. Where there's a concurrence or dissent, pay close attention to the arguments given in those opinions.

Notations in assignments: p. 19 = page 19 in the textbook.

p. xix = page xix in the introductory material in the textbook.

p. S19 = page 19 in the syllabus.

¶ 19 = numbered item 19 on whatever page we're talking about.

§ 19 = Restatement (Second) of Torts § 19; whenever I cite a Restatement section without a page number, that means that the section is in the day's readings.

pp. 19-22 = the first full item that is on p. 19 (or that starts on p. 19) to the last full item that is on p. 22 (or that starts on p. 22).

p. 19 (¶ 3) = only numbered item 3 on p. 19.

This syllabus is much more detailed than most you'll see in law school. It includes some extra cases, and some discussion of various things you'll be asked to do in class—analyze and distinguish cases, make policy arguments, and the like. It also explains the broader pedagogical goals behind the class in general, and behind each assignment in particular.

This material can be important, and is often necessary to understand what we'll be doing in class. The syllabus is thus just as much required reading as are the readings in the book.

If you have **questions** about any of the materials or class discussions, please ask them, in class, after class, at my office during office hours, at my office during other times by appointment, or by e-mail (volokh@law.ucla.edu). E-mail is often the best medium, because it lets you think through your question more carefully as you write it, and lets you get an an-

swer in writing. The formal office hours are 11 to 12 Thursdays, but I strongly suggest you make an appointment even then, in case someone else is already booked for that slot.

Always feel free to **tape class**, or ask your classmates to tape it for you if you're out. You can use the tape recorder that's on the podium (or your own recorder, or your computer, if you prefer). You can also get free tapes from the Records Office.

But please have the taping (including the starting of the recorder) be done by a classmate, or do it yourself. Students sometimes ask me to do it, but I'm usually preoccupied at the start of class, and in the past when I've agreed to help with the taping, I've often forgotten to get the tape, put it in, or start the recorder. So I'm sorry to say that I can't be counted on for help with this.

Class discussion: As with law school generally, talking in class is part of your obligation. I won't grade you on class discussion (partly because I'm a big believer in anonymous grading, whenever possible), but I will expect you to participate. As I'll note a few pages below, such participation (both by you and by your classmates) is an important part of your legal education.

As you might gather, much of the material in law school involves bad people doing bad things to others. This is less so for tort law than for criminal law, but you might still find it here. You should expect that some of the behavior described in the cases, and some of the arguments made in the cases, might be offensive to you. Also, people have lots of disagreements on the subject, so you should expect that some of the ideas expressed by your classmates will be offensive to you, just as in practice some of the ideas expressed in court (by fellow lawyers, witnesses, or even judges) will be offensive to you.

Our task in this class will be to discuss all the ideas and the facts, channeling our disagreements into substantive analysis and not letting those disagreements—or even our justifiable revulsion—get in the way of that analysis. Remember that when in a courtroom or in a negotiation people on the other side have gotten you angry enough that you respond non-substantively, they have won and you and your ideas have lost. So speak and listen carefully and politely, and respond substantively rather than through personal criticism or invective.

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About This Class

What will you be asked to learn in the next three years, and in this class in particular?

1. **The Law:** Many class sessions—both in torts and in other classes—will be spent learning particular legal rules. And these rules may well prove useful in your future practice, even if you don't become what most people think of as a "tort lawyer," which is to say someone who does personal injury law. Lots of business litigation involves torts, such as misrepresentation, interference with business relations, trade libel, and the like. And many of the concepts from traditional personal injury torts cases apply to business torts cases as well.

2. **Concepts:** A second answer is *basic legal concepts*, reusable modules that come up in many contexts: negligence, causation, joint liability, mental state, and the like. You'll see them again in criminal law, in First Amendment law, in the law of copyright damages and contributory infringement, and elsewhere.

3. **Skills:** You will also be learning legal *skills*.

a. **Reading cases:** One important skill is *reading cases*. This is what you need to do to figure out what the rules are. We can teach you California tort law as it is in 2009; but what if you need to give legal advice ten years from now, in another state, about some subject matter you never studied in law school (for instance, employee benefits law)? Learning the skill of reading cases is therefore more important than just learning the rules.

Moreover, even if you think you know the rule, you'll need to read the cases to figure out what the elements of the rule really mean in a particular situation. We can teach you that the tort of "disclosure of private facts" consists of "giv[ing] publicity to a matter concerning the private life of another ... if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public." But what do those terms actually mean? Would, for instance, an 11-year-old girl's giving birth to a child be "of legitimate concern to the public"? You can only answer the question by looking at how cases have interpreted the vague "legitimate concern" language.

And you'll need to read the cases to figure out how best to argue in the direction that your client needs you to argue. Sometimes there might not be a clear answer given by the cases. You'll therefore need to argue by comparing your scenario with those in past cases.

b. **Analogy and distinction:** The last point about reading cases leads us to a separate skill: making analogies, and drawing distinctions, between the case before you and past precedents. This is a quintessentially lawyerly skill (at least in countries which use the Anglo-American legal system). Math classes, for instance, generally call on you to solve a problem by applying basic mathematical principles, or deriving the principles and then applying them. It's helpful to see the similarities and differences between this problem and past ones, but chiefly because seeing them can help point you towards the right principles to apply.

But in law, there sometimes won't be a basic principle you can appeal to, or the principle may be so abstract (*e.g.*, "breach of duty") that it won't give you much guidance. That's when drawing analogies and making distinctions between your case and the precedents becomes very important. Often, the strongest argument you have is not "My client should win because defendant's conduct satisfied the elements of the test for liability," but "My client should win because defendant's conduct is very close [for these reasons] to what led to liability in *X v. Y*, and very far [for these other reasons] to what led to a finding of no liability in *Z v. W*."

Torts classes are especially focused on teaching analogy and distinction, and this is especially true for this class in particular. You'll be reading many more cases (though in shorter chunks) in this class than in most of your other classes; and often the questions you'll have to answer are—to quote the textbook—"What is the superficial similarity between [these two cases]?" and "What is the distinction between them?"

I'll say some more on analogy and distinction at p. S7.

c. **Reading statutes:** Reading statutes is also a very important legal skill. We won't focus on it much in this class, since torts is a mostly nonstatutory field. But pay close attention

to learning how to read statutes in your other classes (such as contracts, criminal law, and civil procedure). Much of a lawyer's life is spent reading statutes.

d. Thinking about how the law affects prospective litigants (and others): In law school classes, we'll often talk about the results in particular cases, and about whether those results seem right. But most people don't view the law looking backward this way. They need to view it looking forward, by asking what they should do to avoid liability.

This is how you'll need to advise them when they ask you for advice. "What, if any, security precautions should I take to prevent my being held liable if my customers are attacked by a criminal?" a business owner might ask you. "Juries award liability if reasonable precautions aren't taken" isn't very helpful. Neither is "In this case, which had the following facts, a jury awarded liability." On the other hand, "if there have been no criminal attacks on your property yet, and you don't hire a security guard, you will almost certainly be able to get the case thrown out of court before trial even if there is a later criminal attack" would be pretty useful advice (assuming it's accurate, of course).

Relatedly, when you're arguing about what the law ought to be, you should be ready to explain how the law will affect people's incentives up front, rather than just explain why the law seems fair in apportioning liability after the fact.

Imagine, for instance, a proposed legal rule which simply says, "act reasonably." One problem with the rule is that juries might not do a good job of applying something this vague. But even if we're sure that juries will usually properly sort the reasonable (who will properly be found not liable) from the unreasonable (who will properly be found liable), this will give little guidance to people who need to know up front how they should be acting.

Such absence of guidance is a good argument—though not always a dispositive argument—against the proposal. And you can't think of this argument if you don't think about how the law will practically affect people in the future.

e. Making policy arguments: A lawyer must sometimes advise a client whether certain conduct would lead to liability. We can call this the lawyer's *predictive* function, because it involves predicting (whether confidently or tentatively) what a court would do.

But often a lawyer must *make arguments* about how a court should interpret a legal rule, which legal rule the court should apply, and sometimes even which legal rule the court should create or adopt. This is the lawyer's *persuasive* function, and to perform it, a lawyer needs to know how to argue (1) why a court should adopt one or another reading of a precedent, (2) why some precedent is closer to or further away from a particular fact pattern, (3) why some statutory language should be interpreted one way or another, and (4) why a court should or should not adopt some rule that is within the court's power to adopt or reject. Lawyers arguing outside court will also often have to argue (5) why a legislature should or should not adopt some rule, and (6) why executive agencies or other administrative agencies should or should not adopt some rule.

Arguments that fall within categories 4, 5, and 6 are often called *policy arguments*, as opposed to caselaw arguments (1 and 2) and statutory construction arguments (3). Many class sessions will be devoted to talking about policy arguments—what kinds of policy arguments have been made and accepted by judges and legislators in the past, what standard responses there are to those arguments, and so on.

Some people get impatient with those arguments, because they think they want to know what the law *is*, not what it should be. But that's a mistake: The law is often vague, and sometimes unsettled; judges often have some flexibility in deciding which rules to adopt, or how to apply a rule. In such situations, judges may well be swayed by policy arguments.

I'll say some more about making policy arguments at p. S8.

f. Talking in front of others. All lawyers have to be good at this. Even if you plan on being a transactional lawyer, you'll have to give presentations to clients and potential clients. Moreover, many lawyers find they have to give talks to lawyer and business groups in order to spread their names and thus get more clients (or more referrals from other lawyers).

We don't teach you this skill formally, outside a few clinical oral advocacy classes. But we do ask you to learn the skill by doing—by speaking in class.

Yes, speaking in class can be frightening, but remember that all you're risking is a little embarrassment. How frightening will it be when your job prospects, your client's money, or your client's liberty is at stake? The way to reduce this fear is practice, which is what you'll get by speaking in class. So please don't ask me to exempt you from class participation, which is a requirement of this class. If speaking in public troubles you—as it troubles many people—you need to speak more, so as to overcome the fear.

We also often ask you to speak without advance notice, by calling randomly on you. This is not quite like practice, but it's still helpful, because the possibility of being called on tends to focus students' attention. In this class, I also try to make the experience easier for students by calling on two students at the same time. That way, if one student stumbles a little at the outset, the other can take the lead, and by the time I return to the first student, that student is likely to be ready to take up the challenge.

4. **Habits and attitudes:** So far, we've talked about knowledge and skills. But law school is also aimed at teaching you certain habits and attitudes that can help you succeed as a lawyer. Let me mention a few, which are closely tied to what we've said before.

a. **Think dispassionately, and always examine the other side of the argument.** You can't be good at making arguments (caselaw arguments, statutory construction arguments, or policy arguments) if you aren't willing to step away from your ideological and even moral commitments, and see the best argument that can be made on both sides.

You might think that big companies routinely profit by injuring consumers, that products liability law should be more plaintiff-friendly than it is, and that nearly all tort defendants are morally culpable. Or you might think that plaintiff's medical malpractice lawyers are low-lives who are ruining the lives and reputations of innocent doctors, and making good medical care much more expensive. You might be right, on either or both of these scores. But you can't be an effective advocate for your perspective if you don't fully grasp the strongest version of the other side's arguments, and objectively see the possible weaknesses in yours.

Sometimes as a lawyer you'll be obligated to argue in court for a position you disagree with. But even if you always argue for the side you believe in, you need to have earlier—in your head or in conversations with your colleagues—made the best argument for the other side. Don't ignore your passions; they can energize you to work more effectively, and can help you derive satisfaction from your work. But don't let them blind you.

In particular, you'll often be called on in class to argue a particular position, even if you don't believe in it, or sometimes even to argue against the very point you had just made. Don't resist. Rather, cherish the opportunity to cultivate this important lawyerly habit.

b. **Marry the abstract arguments and the concrete arguments.** Effective legal arguments tie abstract rules to the concrete facts of a particular case. It's not enough to present the concrete facts; however emotionally appealing the facts may be, you can't persuade a court to give your client what your client wants unless you explain how the facts fit within a legal rule. But in my experience, most law students (and many lawyers) are good at pointing to legal rules—or to broad philosophical abstractions—but not as good at explaining why those rules or abstractions apply in this particular context.

For a concrete illustration of this, see the policy argument discussion at p. S8.

* * *

So keep in mind that this class is about learning many different things. If a class session is light on the legal rules, it may be heavy on the policy arguments. If we spend a lot of time with one doctrinal question that only rarely comes up in practice, the reason might be that we're using it to study some broader principle, which comes up all the time. My hope is that by the time the semester is over, you will have learned a lot on all these topics.

Analogizing and Distinguishing Cases

As I mentioned, analogizing and distinguishing cases is an important skill. Its basics are pretty intuitive, but let me offer this simple framework:

A. To distinguish cases, you need to (1) identify the differences between the cases, and (2) explain why the differences should be legally significant. The explanations called for in step 2 are often based on (3) particular policy arguments that point in different directions for the two cases and (4) analogies to other legal rules in which a similar distinction is drawn.

For instance, say that a precedent concludes that it can't be a tortious disclosure of private facts to publish accurate information (for instance, a person's criminal record) that one has gotten from government records (for instance, court documents). And say that you want to argue that it *is* a tortious invasion of privacy to publish accurate information about a person's past misdeeds if one gets the information from witnesses to the misdeed. (Perhaps the misdeed never led to a prosecution.)

You need to point to the difference between the cases—the precedent involved court records and the new case doesn't. But you also need to explain why that difference should be legally significant. After all, presumably both sorts of disclosure are equally intrusive on people's privacy, and are potentially equally newsworthy (newsworthiness is a defense to a disclosure of private facts claim). What sorts of arguments can you think of to support the distinction, whether or not you yourself think those arguments carry the day?

B. To analogize cases, you need to (1) identify the cases to which you want to analogize, (2) point to the similarities and explain why they should be legally significant, and (3) explain why the differences should not be legally significant.

When you distinguish cases, you often know which precedent you need to distinguish (sometimes because it's the one your opponent has already pointed to as a good precedent for him). But when you want to support your position with an analogous precedent, it often won't be clear exactly what precedent is analogous. It might take a good deal of research, as well as creative thinking about how certain seemingly different cases are actually analogous in an important way. Such thinking is one thing that we'll be trying to train in this class.

Policy Arguments Generally, and in Torts Cases in Particular

Throughout the class you'll be asked to make policy arguments—arguments about the way the law should be, not just about the way it is. And in fact tort lawyers often make such arguments in court, for several reasons:

1. Tort law is judge-made law, adopted by judges who—deliberately or unconsciously—accepted certain arguments about the way it ought to be. And in tort law (as opposed to much of criminal law, evidence law, and civil procedure), the judicial development continues. Courts are generally free to adopt new theories, or even overrule old ones.

2. As you'll see throughout the semester, some states adopt one approach to certain legal questions, others adopt another, and still others haven't yet adopted any. Thus, for instance, different states take different views of the right to stop appropriation of name or likeness. Courts considering the question for the first time in their state need to choose one or another approach. And even courts that have chosen one might be persuaded to choose the other. This choice necessarily involves policy judgment.

3. Even the settled legal rules, as you'll see, often have less settled aspects, on which there might be no precedent in your jurisdiction. There too policy arguments can help courts decide how to resolve the matter.

4. As I noted in the discussion of analogizing and distinguishing cases, whether cases are “similar” or “different” often depends on policy considerations. For instance, for most legal rules I take it we'd say that white cars and black cars are “similar,” but white cars and white trucks may be “different.” But those aren't judgments of physics; color differences are real differences. Rather, they are judgments that for nearly all the policies that the law cares about, the size of a car might matter (e.g., because its weight damages the road more, or because its height might not fit under bridges, or because its fuel consumption can cause environmental problems) but the color would not.

On the other hand, if there is a difference between white cars and black cars that's relevant to some policy of tort law—for instance, if white cars were much easier to see at night than black cars and thus were less likely to be involved in accidents—then we might consider white cars and black cars importantly “different.”

So how does one make an effective policy argument? A few thoughts:

1. The best policy arguments are generally ones that go beyond the abstract, and *tie the abstract arguments to concrete realities of how people act* (and how the law operates). Say, for instance, that you are arguing about when newspapers should be held liable for publishing articles about political officials that make false claims and that hurt the official's reputation as a result. You could argue that “people should be liable for the harm they cause,” or “the freedom of the press means that the press can't be held liable for criticizing the government.” And it's possible that these high-level abstractions will persuade some of your listeners.

But others will be skeptical about each of these generalities. Often we don't hold people liable for certain kinds of harm that they cause. And sometimes we do hold the press liable for its statements, even if the statements criticize the government. It's certainly not obvious that the freedom of the press should include complete immunity from all liability. As Justice Holmes put it, “General propositions do not decide concrete cases.”

So to make the arguments more persuasive, you need to marry the generalities with more concrete observations about your particular problem. For instance, you might point out that a publisher faced with the risk of liability may decline to publish even true statements, if it's not sure the statements are true, or if it thinks a jury might wrongly conclude that they're false. Imposing liability for false and defamatory statements will thus deter socially valuable true statements, and not just the harmful and socially valueless false statements.

Or you might point out that false statements about officials not only hurt the officials, but also mislead voters, and deter some people from running for office. They might even especially deter those people who we most want to serve in office: those who cherish their repu-

tation for honesty and integrity, and who are most likely to be turned off from public life if defamatory falsehoods repeatedly go unpunished.

You might also point out that false statements are routinely punished in other contexts, such as in-court perjury, commercial fraud, and the like. If we trust courts to accurately decide whether an in-court statement (including one about a political official) was a lie, even when a person's liberty is at stake—as in a perjury prosecution—why shouldn't we trust them equally when all that is at stake is a newspaper's money?

Naturally, there are counterarguments to these concrete arguments as well as to the abstract ones. If you want a field in which an argument, once correctly made, will persuade all reasonable observers, there are doubtless spots open in Mathematics Ph.D. programs (and I say this as someone whose first great love was mathematics). But the arguments that combine the concrete and the abstract are ones that are more likely to persuade than the abstract arguments alone would be.

2. The best policy arguments consider *indirect consequences as well as direct ones*: They look beyond how a decision will affect the parties to the case (e.g., causing one party to become poorer and the other richer), and whether it will encourage potential defendants to comply with the legal rule in the future. They also ask how people will react in more complex ways to the risk of liability, what conduct they will substitute for the liability-producing conduct.

Say, for instance, that the question is whether people should be held liable for failing to call 911 when they hear someone being attacked. One should certainly ask whether it's fair to impose such liability on a particular defendant, and whether such liability will encourage people to call 911 in the future.

But one should also ask about other effects. Say, for instance, that you witness a crime but fail to report it right away; and say that you are then approached by the police who are going door to door looking for witnesses who might help with the investigation. Would the prospect of liability for the initial failure to report *discourage* you from cooperating with the police? After all, the safest bet for you, once you've failed to call 911 when you needed to, is to clam up and pretend that you didn't witness the crime in the first place.

Likewise, say that the question is whether employers should be held liable for hiring employees with records of criminal violence, if the employee then violently attacks a customer of the employer. Such liability will encourage employers to hire employees who are on balance less likely to attack customers.

But this liability may make it even harder for ex-convicts to find a job after they're released from prison. This lack of a job might increase the risk that the convict will turn back to crime, and might thus increase the overall rate of violent crime.

Now despite this, liability in such situations might still be a good idea. But to figure out if it's a good idea—and, more importantly for lawyers, to figure out the best arguments against it (the defense lawyer's job), or anticipate the arguments against it in order to rebut them (the plaintiff's lawyer's job)—you need to think about the full range of consequences.

3. The best policy arguments generally *combine moral and practical arguments*. As pp. xlvi-xlviii point out, people often debate whether the law should be aimed at efficiency or at justice. But whatever you think is the right answer, your audience (for instance, a multi-member court) will often have mixed views. Some might think the law should be aimed chiefly at one, some at the other, and some (perhaps most) will care about both. So try to reach both, by arguing that your proposal is better along both dimensions.

Also keep in mind that economic arguments are not an antonym to moral arguments. Economic arguments can often be relevant to figuring out how a moral argument applies: For instance, if our moral argument is that "everyone should be free to exclude others from their property, so long as this doesn't cause unreasonable harm to others," the question of what is "reasonable" harm may well be informed by economic analysis.

Moreover, economic efficiency itself has a moral dimension: As society gets richer, people

on average tend to get more of the things (education, health care, and such) that we may think they morally deserve. Nor is this just true of system-wide economic effects; if, for instance, imposing liability on cities for accidents in public swimming pools leads to closing such pools, poor children will have less opportunity to enjoy the activities that middle-class and rich children (who have access to private swimming pools). That may itself have moral relevance—though one can of course also argue that it's morally good for poor children to be protected from dangerous pools by the deterrent effects of liability.

Likewise (though this example isn't directly relevant here), an economic analysis of whether some policy will cause aggregate social harm or benefit will often be premised on moral judgments about whose interest count: Should you aggregate the harm or benefit to all Americans? To all humans? To all humans, born and unborn? To all primates?

* * *

Now a few words about the specific kinds of policy arguments that we'll often see in torts cases. People often talk about tort law as being aimed at *compensating* those who are injured, and *detering* future injuries. And that's true as far as it goes. But let's get a bit more detailed, and point to some (often interrelated) questions that you might ask yourself with regard to any proposed tort law rule:

A. Questions Focused Immediately on What Has Happened:

1. *Does the plaintiff deserve to be compensated?* Sometimes the answer seems obviously "yes," for instance if the plaintiff was hit and injured by a drunk driver. Sometimes it's less clearly "yes," for instance if the plaintiff had his past drunk driving conviction revealed to the public, and is now suing for the disclosure of private facts.

2. *Does the defendant deserve to pay compensation to the plaintiff?* Again, sometimes the answer seems obviously "yes," for instance if the defendant is the drunk driver who hit the plaintiff. But sometimes it's less clearly "yes," or perhaps even clearly "no," even when the defendant was one of the but-for causes of the plaintiff's injury (i.e., but for the defendant's actions, plaintiff would not have been injured)—for instance, if the plaintiff is suing the company that manufactured the drunk driver's car, simply because it manufactured the car.

Note, though, that "deserve" here need not mean that the defendant is *culpable*, only that we think he has incurred an obligation as a result of his action. For instance, one might conclude that a mining company should be strictly liable for all damage that its blasting does to neighboring properties—because it bears the profit from the mining and should thus also bear the loss—even though the mining company isn't morally at fault for blasting.

B. Questions Focused on What Will Happen in Litigation:

3. *Are there particular reasons to think this proposed rule will cause problems in actual litigation, such as undue litigation expense, undue intrusion on privacy, or undue risk of error on the part of the judge or jury?* Some such expense, intrusion, and risk is inevitable; but sometimes the cost or risk might be so high—especially compared to the alternatives—that it's worth shifting to a different rule. For instance, some argue that no-fault insurance is a better way than negligence liability of dealing with auto accidents, both because it's cheaper and because many auto accident lawsuits devolve into swearing matches in which it's very hard to tell who's telling the truth. Likewise, one argument against "alienation of affections" lawsuits (in which a cheated-on spouse sues the person with whom the other spouse was unfaithful) could be that it's unusually hard or intrusive to get at the truth of such allegations.

C. Questions Focused on How the Risk of Liability May Change Future Behavior:

4. *How would this rule affect behavior by this defendant and similar defendants—for better and for worse?* If a business is told that it will be held liable for injuring people, it's likely to take precautions that diminish the risk of such injury. These precautions may well be good for society generally.

At the same time, some of these precautions may cause social harm. To return to a classic example given above: If you hold newspapers strictly liable for false and reputation-injuring

statements that they publish about people, they might be deterred not just from publishing false (and thus socially harmful) statements but also from publishing true (and thus socially valuable) statements. Your task in evaluating an argument, and in thinking about policy arguments for and against it, is to consider all of its possible effects, good and bad.

5. *How would this rule affect behavior by this plaintiff and potential future plaintiffs—for better and for worse?* Might imposing or increasing liability on the defendant diminish potential plaintiffs' incentives to behave safely, or encourage plaintiffs to fake injuries or exaggerate their extent?

On the other hand, might giving defendants free rein to do something dangerous cause plaintiffs to be more cautious than we want them to be? An example from contract law: If certain kinds of defendants could easily evade their contracts without liability, other people might choose not to do business with those defendants at all, or only do it on a cash-up-front basis. Such caution would be rational from those other people's perspective, but that would be bad for society as a whole. Assuring potential plaintiffs that they can recover damages if the defendant breaches a contract thus advances social efficiency.

6. *How would this rule affect behavior by people other than prospective defendants, again for better and for worse?* Rules also affect not just prospective defendants, but others whose behavior will be affected by the prospective defendants' behavior. That could often be good: For instance, imposing liability on bars for accidents by their customers may prevent misconduct by the customers. Or it could be bad: For instance, as I suggested above, if employers are deterred from hiring ex-felons, then ex-felons might end up unable to get jobs, and thus might end up more likely to turn to a life of crime.

7. *Would this rule unduly interfere with defendants', prospective defendants', or others' liberty or privacy?* Deterrence of some behavior may be bad not because the behavior is socially useful, but because we think the behavior is an important aspect of political liberty or personal liberty. For instance, if libel law unduly deters even accurate reporting, then that might affect newspapers' freedom of the press.

And these liberty concerns need not be limited to constitutional rights. For instance, say liability on skydiving companies were imposed on the grounds that skydiving is so dangerous and so lacking in social value that it's inherently unreasonable to offer such services. (I don't think that's the legal rule, but say such a legal rule is proposed.) This might make skydiving so expensive that most people couldn't afford it, and this would in turn affect their liberty to choose to engage in this risky behavior. Perhaps the intrusion on liberty is justified, for instance on the grounds that people shouldn't risk their lives in such activities—but the intrusion has to be recognized, and considered in analyzing the merits of the proposed rule.

Likewise, if parents who are hosting a party for teenagers are held liable for negligence if two teenagers have sex in a bathroom (see *Doe v. Jeansonne*, 704 So. 2d 1240 (La. Ct. App. 1998)), parents would have to more closely patrol such parties, and check the bathrooms in case they have reason to think something might be amiss. Again, that might be a reasonable privacy cost, given the harms that teenage sex can cause, but we should consider it as a cost.

8. *Are there policy choices involved in this rule that we'd feel uncomfortable having made by juries and judges? Or might we prefer that they be made by juries, rather than by legislators?* Say a plaintiff who was hit by a 21-year-old drunk driver sues a store for selling alcohol to the 21-year-old. Because 21-year-olds are more dangerous drivers than 25-year-olds (though not as dangerous as 18-year-olds), the plaintiff argues, it's unreasonable for the store to sell to 21-year-olds, even though there's no criminal statute prohibiting such sales. The store—and all other sellers of alcohol—should (the argument would go) set a cutoff age at 25.

One might object to this proposal on various grounds (and endorse it on various grounds). But one possible objection might be that the tradeoff between liberty and safety involved in setting the drinking age should be made by the elected representatives of the people, and not by judges or juries. On the other hand, some might argue that unelected judges and (more or less) randomly selected juries are better decisionmakers than legislators, who are more likely to be captured by special interests or distracted by other matters on their legislative agenda.

1-2. Wed., Aug. 19; first half of Mon., Aug. 24: Trespass

Read pp. xxxv-xlviii (background), 29-38 (to the end of ¶ 9); ignore the opening question on p. 35 ¶ 7 (the one that refers to battery).

For an analogous situation as to battery, read §§ 18, 892, 892A, 892B, at pp. 4-5, 23-25.

We begin by discussing the so-called “intentional” torts: Torts in which the case for requiring defendant to compensate the plaintiff is especially strong, because the defendant knowingly or purposefully does something that is forbidden. Later in the semester, we’ll spend even more time talking about negligence-based torts and strict liability torts.

Pedagogical goals—skills: (1) This is our first introduction to *reading cases*, and to drawing analogies and distinctions between a fact pattern and the precedents.

(2) It is also an introduction to the skill of *seeing the complexity and uncertainty in what seem like simple terms*. “Trespass” may seem easy to define—it’s (pretty much) entering or staying on land without the owner’s consent. And what constitutes “consent” is often clear. But sometimes it’s far from clear, not just because it’s hard to prove the facts (did the owner say he agreed, or didn’t he?), but because what constitutes “consent” needs further definition. *Desnick* is all about that question.

This is why we’ll spend a good deal of time on dogs, golf balls, lying broadcasters, and the like: not primarily to learn trespass law, but to get a sense of how we can spot the vagueness and ambiguity in legal rules, and how that vagueness and ambiguity can be clarified (in some measure) by precedents.

Note that this skill corresponds to an important lawyerly habit and attitude: *skepticism towards seemingly clear and rule-like formulations*. Such formulations are indeed often helpful; but lawyers learn to look for the limits of the formulations, and for the ambiguities behind the apparent clarity.

(3) Finally, it is an introduction to one other important skill: Figuring out how to *counsel clients* about how to avoid liability.

Pedagogical goals—concepts: We’ll discuss here two especially important and recurring concepts: consent, and intention.

Always keep in mind, by the way, that the term “intent” is used in different ways in different areas of the law. In tort law, saying that someone acted “intentionally” generally means that “the actor desires to cause [the] consequences of his act, or that he believes that the consequences are substantially certain to result from it” (§ 8A, not in our readings, emphasis added). In the Model Penal Code, a defendant is said to have acted “intentionally” only if he desires to cause certain consequences. If he believes that his action still nearly certainly cause some result, he is said to act merely “knowingly.”

Questions to ask yourself, in addition to the ones in the readings:

(1) When we say that a person has committed an intentional tort, which is to say has acted knowingly or purposefully, what must the person have known, or have had the purpose to do? Are there some aspects of the intentional tort for which this knowledge or purpose doesn’t matter?

(2) What part of the Restatement definition does *Pegg v. Gray* shed light on? How would you summarize the holding of *Pegg* as a rule (and not one limited to dogs or foxes)? What are the ambiguities in *Pegg*’s articulation of its principle?

(3) If you were the lawyer for the Rochester Telephone Corporation in 1937, what would you recommend to it in order to diminish its risk of liability?

3. End of Mon., Aug. 24; Tue., Aug. 25: Private Necessity as a Defense

Read pp. 94-95 ¶ 10 (from the self-defense section), 97-106.

Here we will consider the circumstances under which, despite what we learned in the first unit, trespass is actually permitted because it's seen as "necessary." (Similar defenses may sometime arise as to other intentional torts as well.)

Concepts: Necessity is also an important and recurring concept in the law. You might see it in your criminal law class, though again recognize that it is defined somewhat differently in criminal law than it is in tort law.

Skills: This will likely be our first brush with the skill of crafting concrete and persuasive policy arguments. (We might get into this in some measure in the preceding unit, but probably not as much as in this one.) In particular, we will do a little bit of back-of-the-envelope law and economics, and will ask how such economic analysis should interact with various moral arguments that we can identify.

Questions:

(1) Imagine someone knocks on your door at night in a snowstorm and asks for shelter. It's pretty clear why you might say "yes." Why might you say "no"? If you say "no," and the person is injured or killed, would you be liable under the cases cited in the section? What would be the policy arguments for and against a rule under which you would be held liable?

(2) Should it matter that the person walked into the house through an open door, and you forcibly pushed him back? (Assume that the general rule is that you are privileged to use force to eject a trespasser; the question is whether this rule should be modified by the presence of the snowstorm.)

4. Wed., Aug. 26: Negligence—the Basics

Read pp. 122 (§ 283 only), 132-33 (¶ 9, ignore questions at the end), 156 (¶10).

Read pp. 140-46 (to the end of ¶ 2), 151-52 (¶ 7), 156-57 (¶ 11, ignore questions about the Wright arguments).

Concepts: We turn now to *negligence*-based torts. Say that someone damages your property not because he knowingly or purposefully travels on it or uses it (as with the people who tied their boat to someone else's dock), but because he accidentally hits it, for instance if he loses control of his boat and hits your dock. When would he be liable?

The general answer is “when he acted negligently,” or “when he didn't exercise reasonable care.” But what exactly does that mean? How can we tell a negligent accident in which the defendant is at fault from a nonnegligent accident that is not the defendant's fault? (An example of an accident in which harm is caused with no negligence at all: You're driving at a normal speed with ordinary care. I'm standing at a crosswalk, and have an unexpected seizure and fall into the street. You have no reasonable opportunity to swerve to avoid me, so you hit me and injure me.)

Negligence is probably the most important and most litigated of torts. Negligence concepts also arise in other torts that we won't study in class, such as negligent misrepresentation (which commonly arises in business litigation). And talk of negligence comes up in statutory claims as well, from securities claims to copyright damages and more.

Negligence is also a classic example of a seemingly simple principle—a defendant is liable if their *failure to exercise reasonable care* damages a plaintiff—that proves to be extremely complex in practice. In this unit, we'll begin to explore what counts as “reasonable care.”

We are also continuing to discuss liability based on *culpability*. In negligence cases, we are still asking whether the defendant is culpable, though his culpability (his guilt) stems from carelessness rather than knowing or intentional disregard of someone else's rights. Several weeks from now we'll talk about strict liability, under which the defendant may be liable even if he is no way culpable. But for now we're not discussing strict liability: We're having to distinguish those people who cause harm in ways through lack of reasonable care from those who cause harm even though they exercised reasonable care.

It's not enough, then, to say “Defendant caused the harm, so he must pay.” You must also explain why this defendant is different from the many people who cause a harm without negligence, and thus don't have to pay.

Skills: Many legal rules have vague terms such as “reasonable” in them. (Some legal terms are quite precise, but some are not.) A big part of a lawyer's craft is marshaling facts, precedents, and policy arguments to explain why a particular vague term should be interpreted in his client's favor. Another big part is predicting for a client—again given the facts, precedents, and the likely success of various policy arguments—how a particular term might be applied in the future (if the client is deciding what to do to avoid liability).

This can be frustrating, because we want clarity and certainty, not vagueness and ambiguity. But get used to it: You'll have to deal with such terms often; this unit is a good way to get started on that.

5. Mon., Aug. 31: Negligence and the Quest for Clearer Rules—Custom and Negligence Per Se

Read pp. 158-60 (to the end of *T.J. Hooper*), 162-64 (¶ 3), 165-66 (¶ 5), 170-78 (to the end of ¶ 8).

Be reasonable! Exercise reasonable care. Sage advice, but not very helpful, because many reasonable people disagree about what it is reasonable for people to do.

This disagreement causes several problems.

(1) It makes it hard for juries to render fair and consistent decisions. It's human nature to think the best of people whom you like, or who are like you, and the worst of people whom you dislike, or who are different from you in ways that make you uneasy. This includes people of other races, ethnicities, or religions, but also out-of-towners, people of a different social class, people of a profession that you envy or that you view with suspicion, and so on.

It's hard enough to overcome this when you're being asked to render purely factual decisions (was the defendant the one who injured the plaintiff?), since even such factual decisions may require subjective judgment about whose testimony is to be trusted. But it's harder still when one is asked to apply subjective normative standards, such as whether a defendant acted "reasonably."

(2) It makes it hard for litigants to predict how a jury will decide, which may sometimes (though not always) prevent settlement and lead people to fight the case out in court, spending a lot of their money and the court's time. An example: If I hit your car, causing \$10,000 in damage, and the only question is whether I hit it, I probably won't see much reason to reject your claim (unless I'm dishonest and think I can get away with pretending that someone else hit it). As between paying you \$10,000 now, or paying you \$10,000 after trial plus paying my lawyer \$5,000 to litigate, I'll probably pay you \$10,000 now.

But if the question is whether I drove unreasonably, I might sincerely believe that I was acting quite reasonably (most people tend to give themselves the benefit of the doubt in such cases), while you might sincerely believe the opposite. What's more, I might assume that jurors will see things my way, and you might assume they'll see things your way. (That too is human nature.) So because of our different estimations of the likelihood of success—estimations that are especially likely when success turns on subjective factors such as "reasonableness"—both of us might be reluctant to settle.

Note, though, that this anti-settlement effect of subjective standards isn't always present. For instance, if both you and I are likely to be realistic or unduly pessimistic about our chances of success, rather than unduly optimistic about our chances, we will settle even if the bottom-line result is not clear. So if I think you're 30% likely to succeed, and you think the same, then the case will probably settle for (as a first approximation) 30 cents on the dollar, even if the actual probability is hard to know precisely.

(3) It makes it hard for people to figure out how to behave in order to avoid liability-causing conduct. Say that you're a doctor and you're trying to minimize the risk of malpractice liability. You might order tests that you don't think are reasonably needed, just to avoid the expense (and the reputational injury) of malpractice liability—or even of a malpractice lawsuit in the first place.

You might think that a reasonable doctor wouldn't order the tests, and you might be right. But because you're worried that future litigants and juries will come to a different view of reasonableness, you'll practice not just "defensive medicine" but excessively defensive medicine, and thus waste money (which means excessive cost to policyholders or taxpayers).

(4) All this is potentially exacerbated by "hindsight bias," which is the human tendency to overestimate how likely an event was after it has indeed happened: Even if the statistics suggest that there's only a 0.01% chance that some treatment will lead to death, in a case in which that does happen, people might—looking backwards—assume that the death was more likely than it actually was. So, to give one example, if doctors anticipate hindsight bias on the part of juries who are applying a "reasonable precautions" test, the doctors might take more precautions than are actually reasonably called for.

(5) Finally, in certain contexts what is "reasonable" and what isn't is hard for lay jurors to decide, because it requires a good deal of knowledge about medicine, engineering, or what have you. Jurors could be educated on the subject by experts, but such education is likely to be flawed. Among other things, a true education on what constitutes reasonable behavior in a field may take many years, and it's hard to effectively compress it into several hours or even days of testimony.

For all these reasons, there's much appeal in coming up with clearer rules to decide what is "reasonable" behavior and what isn't. This unit looks at two such proposed rules—looking to what is *customary* among people in defendant's profession or trade, and looking to what *statutes or regulations* require or forbid.

Questions: (1) What are the arguments for using custom (beyond the ones I noted above) as a measure of reasonableness, and against it?

(2) What exactly is the law's view as to custom in torts cases?

(3) **Concepts:** In the second half of the unit, we'll be looking here at statutes, something you'll do rarely in this class but often in other classes. In particular, we'll be asking not just whether a statute applies, but also what the *purpose of the statute* is. (The same question will arise in a different context in other classes, for instance when you're doing statutory interpretation, or when you're applying intermediate or strict scrutiny in a constitutional challenge to a statute.) Can you think of possible difficulties with identifying what a statute's purpose is or is not?

6-7. Tue., Sept. 1; Wed., Sept. 2: Negligence—Res Ipsa Loquitur

Read pp. 192-98 (to the end of ¶ 6), 204-05 (¶ 3), 208-15 (to the end of ¶ 5).

Concepts: (1) *Presumptions:* In most law school classes, we take the facts for granted and ask what the legal implications of those facts should be. But in the real world, the facts are often unknown, and either unknowable or at least hard to figure out with precision.

One whole second- or third-year class, Evidence, is focused entirely on rules related to proving fact. But occasionally other subjects include rules that expressly recognize the difficulty of figuring out the facts, and that define the law in light of that difficulty.

One common tool for dealing with this difficulty is the *presumption*: Under certain circumstances, a certain fact or legal conclusion is presumed, and it's up to one or the other side to rebut that presumption. This is especially important when the presumption favors the plaintiff. Usually it's up to the plaintiff to prove the facts, and if he can't, he loses. But if the plaintiff has the benefit of a presumption, then that presumption might (depending on the nature of the presumption) *shift the burden of proof* to the defendant, so that the defendant would have to disprove his liability.

Res ipsa loquitur is a classic example of such a presumption. Ask yourself, though, just what must be shown for the presumption to operate, and what is presumed as a result? When the thing speaks for itself, what must that thing be, and what does it say?

(2) "*Not an insurer*": The *Connolly* dissent on p. 197 uses a common argument in torts cases: "It is difficult to speculate as to what further precautions should reasonably have been required of defendant without making it an absolute insurer." This is a good opportunity to remind ourselves that we're in the *negligence* section, where the question is whether a defendant is culpable because it acted unreasonably.

The "not an insurer" argument routinely serves as such a reminder. Insurance companies must pay for an accident not because they're somehow culpable, but because they promised to pay (in exchange for being paid a premium up front). In a standard insurance lawsuit, we don't ask whether the insurance company is negligent, but only whether the loss is within the terms of the insurance contract. The injury to the plaintiff (coupled with the contract) is enough to lead to liability for the insurer.

But in a negligence lawsuit against someone who caused a loss, injury to the plaintiff isn't enough, no matter how sympathetic the plaintiff might be: The defendant must have acted unreasonably, which is to say that there was a reasonable alternative action that the defendant could have taken that would likely have prevented the injury (without unreasonable burden on the defendant or on others). "Not an insurer" is a way of reminding readers that plaintiff's injury alone does not suffice for negligence liability.

8. Tue., Sept. 8 (first 2/3 of the class): Negligence and the Duty To Help; no class Labor Day, Mon., Sept. 7

Read pp. 217-22, 231-33 (§§ 3, 4), 236-37 (§§1, 2).

Concept—action vs. inaction, causing harm vs. not preventing harm: Generally speaking, people have no duty to prevent harm to others, or to help others avoid harm. (You’ll see the same in your criminal law class.) There are, of course, exceptions; for instance, parents have a legal duty to protect their children from various harms. But the general rule is no duty to help. Another way of putting it is that while you might be held civilly or criminally liable for your actions, you generally aren’t liable for your failure to act.

Now sometimes this distinction is quite clear. For instance, if you’re walking on the public beach and see a drowning stranger, and fail to rescue him, you can’t be liable—except in a very few states that impose such a duty under criminal law, see the Vermont statute on p. 221—even if some jury might conclude that your actions were “unreasonable.” (Whether you’re morally culpable may turn on various factors, such as how good a swimmer you are, whether you thought others were already trying to rescue him, and so on. But a jury won’t have to decide that, since you are legally immune regardless of your culpability.)

Sometimes, though, the line between harming and not helping it’s not clear. For instance, say that you’re criminally attacked in a restaurant parking lot, and sue the restaurant as a result. Is your lawsuit based on the restaurant’s failure to protect you (which sounds like inaction), or on the restaurant’s providing a facility that includes unreasonable dangers (which sounds like action)? In this unit, we’ll explore how the law deals with this question.

Skills and concepts—policy arguments: We’re also going to explore the policy arguments for and against a different approach, under which people would be required to help strangers, on pain of criminal liability or tort liability (again, see the Vermont statute). Think back on the policy arguments discussed starting on p. S8, in light of this problem:

John is sitting at home at 11 pm, and hears a woman screaming outside. Fifteen seconds later, the screaming stops. He neither goes to help her, nor calls 911. Is he criminally guilty of violating the Vermont statute? Is he civilly liable under it? What are the costs and benefits of imposing either form of liability on him?

9-10. End of Tue., Sept. 8; Wed., Sept. 9; Mon., Sept. 14: Negligence and the Duty to Protect Against Third Parties

Read pp. 222-23 (§ 3), 241-49 (to the bottom of the page), 251-53, *Giggers v. Memphis Housing Authority*, *Underberg v. Southern Alarm, Inc.*, *Corbally v. Sikras Realty Co.*, and the Kozinski excerpt below. (You’ll see an express statement of a view opposite that of Kozinski’s in the *Kentucky Fried Chicken* dissent two units below; but for now, you can infer some of the counterarguments yourself.)

Concepts:

Liability of multiple parties: Some of the most controversial questions in tort law deal with people’s duties to protect against the conduct—often the criminal conduct—of third parties. As the last unit pointed out, people don’t have a general duty to protect strangers from other strangers. But negligence law sometimes impose a duty to reasonably protect those with whom one has a special relationship (e.g., a landlord’s duty to protect one’s tenants) or to protect against those with whom one has a special relationship (e.g., a psychotherapist’s duty to warn people whom a patient might have threatened).

Now one standard criticism of such duties to protect is that “the injury was the injurer’s fault, not the defendant’s”—e.g., “the attack on Tarasoff was Poddar’s [the patient’s] fault, not the psychotherapists’ fault.”

But by itself, this doesn’t prove much, since injuries could properly be seen as the fault of

more than one party. This is clearest when it comes to contract law: If you hire a security guard who promises to protect you, and he fails to show up for work one day and you're attacked, the guard is at fault (for breaching his promise) even though the attacker is much more at fault. The attacker's fault doesn't erase the guard's. Nor does it matter that you're suing the guard's company because it has money, and not the attacker, who lacks money. You might be going for the "deep pockets," but there's nothing wrong with that if they are the deep pockets of someone who is properly held responsible for the action.

The question, then, is whether even in the absence of a contract that promises protection, the defendants (e.g., the psychotherapists and their employer) are culpable, so that they should be held liable *as well as* the immediate attacker—or whether they aren't culpable, so that only the attacker is held liable.

Duty to protect: At the same time, it's also a mistake simply to say that the defendant is acting "unreasonably," that the defendants' failure to protect "caused" the harm, and that the harm was foreseeable. As we saw in the last unit, people generally aren't required to rescue others from criminal attack, or prevent such criminal attacks by third parties.

The question is whether the legal system should impose certain duties on this class of defendants: A psychotherapist's duty to take reasonable steps to warn prospective victims of the threat posed by a patient (even though you or I have no duty to warn prospective victims of the threat posed by a friend of ours who confides in us); a landlord's duty to take reasonable steps to protect their tenants from criminal attack; an employer's duty not to unreasonably hire employees who then commit crimes against customers and others; and so on.

Who decides? But when we say that the question is whether the legal system should impose certain duties to protect, there are actually two questions. One question is what the rule should be, and the other is who should make the rule: legislators, judges, or jurors.

1. *Leaving the matter entirely to the legislature.* One answer to "who decides?"—both here and as to other matters, such as what constitutes a defective design, or when behavior that causes emotional distress should be legally actionable—is the legislature (or some other rulemaking body, such as a state psychiatry regulation board). Legislatures sometimes do impose such requirements: Consider statutes requiring some professionals to report evidence of child abuse that they see, or ordinances requiring that certain mass gatherings provide security guards. And one could imagine such requirements being left entirely to legislatures.

2. *Letting judges announce—in the absence of legislative direction one way or the other—that certain kinds of failure to protect against others' criminal conduct is "unreasonable" and thus actionable.* Another answer to "who decides?" is "courts, unless the legislature has spoken." Courts would be free to create common-law rules under which certain failures to protect others could lead to legal liability (if a jury concludes that the conduct was unreasonable), or even that certain circumstances must lead to legal liability. The legislature would still be free to impose other obligations, or to overrule the judicially imposed obligations. But in the absence of legislative guidance, courts could create such rules. That is generally speaking the direction in which the law has taken.

3. *Letting juries decide, in a wide range of cases, that failure to protect against others' criminal conduct may lead to legal liability.* Another answer to "who decides?" is "jurors, applying their own judgment of what's reasonable" (again, unless there's specific legislative judgment to the contrary). This could potentially apply to all cases where the defendant is the property owner, all cases where the defendant is the employer, all cases in which the defendant learns any information about possible risk to third parties, or even all cases in which the defendant could have "reasonably" protected the plaintiff against a third party but didn't.

What would be the concrete effects of each of the models? What would be the advantages or disadvantages of each? Are there any reasons to think that one or another of the models is more or less legitimate in our democracy than the others?

Skills—policy argument, and looking to indirect effects of proposals: This unit thus gives us another opportunity to practice making effective tort law policy arguments

(and policy arguments more generally), including by looking to the indirect effects of various proposals. What are the possible effects—not just on prospective defendants, such as psychotherapists, landlords, or employers, but also on third parties—of liability in *Tarasoff*, *Kline*, and the three cases quoted below? If psychotherapists, landlords, and employers learn of the risk of liability, and change their actions in light of the risk, what would they likely do? What effect would that have on prospective patients, tenants, and employees? What effects might that have on society, and in particular on the incidence of attacks on other potential victims?

***Giggers v. Memphis Housing Auth.*,
277 S.W.3d 359 (Tenn. 2009)**

On February 18, 2003, [relatives of Charles Cornelius Brown, Sr.] filed a wrongful death suit against the City of Memphis and MHA The Plaintiffs contended that the City and MHA were negligent in several ways: by failing to adequately investigate Miller’s background prior to allowing him to lease a unit in the high rise Jefferson Square Apartments; by failing to enforce internal policies which would have affected Miller’s status as a tenant; by allowing Miller to possess a rifle on the premises; and by failing to properly assess the risk Miller presented to the other tenants on the property....

When Miller filed an application to reside in the apartment complex in 1996, MHA investigated his credit history and performed a home visit. It was the responsibility of MHA’s department of security to conduct background checks for prospective tenants. Howard Terry, who had served as an MHA employee since 1994 but as the department head only since 2000, administered security for Jefferson Square and three other high rise buildings at the time this suit was filed. As a part of his responsibilities, he directed investigations and received reports of any incidents on the various premises that relate to security. Records in Terry’s office indicated that on January 27, 1996, MHA asked the Sheriff’s Department to conduct a background check on Miller. The investigation, which extended over the three years prior to the application, did not “uncover information that prohibit[ed] his ... being housed ... pursuant to MHA admission policies.”

On May 8, 1998, well after Miller had taken occupancy of an apartment unit, he inflicted a pocket knife wound upon another tenant after a verbal exchange. A report filed with MHA indicated that Mil-

ler, agitated by James Tiplett, who was another tenant at the apartments, threatened to kill Tiplett unless he “stop[ped] singing in my ear.” Shortly thereafter, Miller “jumped out of some bushes swinging a knife, scratching [Tiplett] on the arm.” The report established that Tiplett refused medical treatment and that he originally declined to press charges, but did so afterwards when Miller continued to make verbal threats. Miller was arrested for aggravated assault as a result of the incident and a second report was filed by MHA.

While the ultimate disposition on the criminal charge is not a part of the record, MHA placed Miller on probationary status for one year, warning that future violations would be basis for a termination of his lease. When questioned during a pre-trial deposition, Terry professed that he had no recollection of the 1998 incident but he did acknowledge that MHA had a “one-strike” policy in effect at that time, calling for eviction for the first instance of disruptive behavior. He explained that Derwin Jackson, the operations manager for MHA, had the responsibility of determining whether to evict based upon the report filed. Jackson served in that position in 1998 but left in 2000, some two years before the shooting incident. The following exchange took place during the course of the Terry deposition:

Q. From a security perspective, if you know we have a tenant who has assaulted another tenant with a knife, do you believe from a security perspective it is a good idea for that tenant who assaulted the other tenant to remain a tenant on the property or should that tenant’s lease be terminated?

A. The tenant’s lease should be terminated.

In response to the motion for summary judgment by MHA, the Plaintiffs submit-

ted exhibits establishing that Miller had been charged with aggravated assault in 1979 and, in 1977, had pled guilty to firing a weapon within the city limits. There was no indication that MHA was aware of either incident. Further, the Plaintiffs also provided documentation of the 1998 altercation that resulted in the charge of aggravated assault against Miller. They also alleged that there had been between ten and twenty shooting incidents on the various MHA properties and numerous other assaults prior to the May 7, 2002 murder of Charles Cornelius Brown, Sr. Based upon the 1998 incident, the Plaintiffs argued that MHA had notice of Miller's propensity for violence and reiterated their contention that MHA had failed to maintain a safe premises. They asserted that MHA had failed to observe its own internal policies which were designed to prevent violence on the part of its tenants.

The trial court held that neither the internal policies of MHA nor the contents of the criminal background check of Miller created any duty to the Plaintiffs under these circumstances. Moreover, after observing that a policy excluding those with prior records would result in "a massive underclass of ex-convicts homeless due to an inability to find housing," the trial court rejected the Plaintiffs' argument that there was an affirmative duty on the part of MHA to conduct a criminal background check on prospective residents....

In order to establish a prima facie claim of negligence, basically defined as the failure to exercise reasonable care, a plaintiff must establish the following essential elements: "(1) a duty of care owed by defendant to plaintiff; (2) conduct below the applicable standard of care that amounts to a breach of that duty; (3) an injury or loss; (4) cause in fact; and (5) proximate, or legal, cause." The first element, that of duty, and the dispositive issue in this case, is the legal obligation of a defendant to conform to a reasonable person's standard of care in order to protect against unreasonable risks of harm. In general, an individual has a duty to others to refrain from engaging in misfeasance, affirmative acts that a reasonable person "should recognize as involving an unrea-

sonable risk of causing an invasion of an interest of another" or acts "which involve[] an unreasonable risk of harm to another."

Under our common law, however, courts were reluctant to impose liability for nonfeasance, a course of inaction, as opposed to an act risking harm to others. As a means of mitigating the harshness of the common law rule, exceptions have been created for circumstances in which the defendant has a special relationship with either the individual who is the source of the danger or the person who is at risk....

The relationship between a landlord and a tenant is one of those relationships deemed special, placing an obligation on landlords to use reasonable care to protect tenants against unreasonable risk of foreseeable harm. This relationship creates an affirmative charge to either control the source of the danger or to protect an endangered tenant. Thus, a landlord, while not an insurer, owes a tenant the duty "to take reasonable precautions to protect [his or her] tenants from criminal acts of third parties on the leased premises," among other foreseeable dangers.

Traditionally, the question of whether a defendant owes a duty of care to the plaintiff is a question of law to be determined by the courts. In its determination of the legal issue, "[a] decision by the court that, upon any version of the facts, there is no duty, must necessarily result in judgment for the defendant. A decision that if certain facts are found to be true, a duty exists, leaves open the other questions [as to the presence of negligence]." ... "[A] risk is unreasonable and gives rise to a duty to act with due care if the foreseeable probability and gravity of harm posed by defendant's conduct outweigh the burden upon defendant to engage in alternative conduct that would have prevented the harm." "[T]he imposition of a legal duty reflects society's contemporary policies and social requirements concerning the right of individuals and the general public to be protected from another's act or conduct." ...

In order to determine whether a duty is owed in a particular circumstance, courts must first establish that the risk is foreseeable, and, if so, must then apply a balancing test based upon principles of fairness to identify whether the risk was unreasonable.... While not exclusive, the factors are as follows:

[T]he foreseeable probability of the harm or injury occurring; the possible magnitude of the potential harm or injury; the importance or social value of the activity engaged in by defendant; the usefulness of the conduct to defendant; the feasibility of alternative, safer conduct and the relative costs and burdens associated with that conduct; the relative usefulness of the safer conduct; and the relative safety of alternative conduct.

When and if the trial court determines that the foreseeability of the harm and its particular gravity outweigh the burden of taking reasonable protective measures, the question “of duty and of whether defendants have breached that duty ... is one for the jury to determine based upon proof presented at trial.” ...

As noted, the landlord and tenant qualify as having a special relationship. Further, violence in a housing project is, generally speaking, foreseeable. Poverty is common in such areas. In consequence, precautions are warranted. The record establishes that MHA, aware of this potential danger, took some measures to guard against violence. In 1996, criminal background checks extending over a period of three years, a credit history report, and a home visit were warranted for a variety of reasons, including safety.

The question, of course, is whether MHA, with some general knowledge of criminal activity within its housing complexes and a particular knowledge of Miller’s altercation with another tenant four years earlier, could have reasonably foreseen the probability of a violent act. We think so. Indeed, the risk of violent attack at a housing project is nothing new. The potential for violence in the Jefferson Square Apartments was, therefore, generally foreseeable by the landlord. Under our law, of course, it is only when the injury is not foreseeable that a criminal act

by a third party constitutes “a superseding, intervening cause of the harm, relieving the landlord of liability.”

Because of competing social concerns, the application of the balancing test to determine whether a duty existed presents a particularly difficult question in this instance. Miller, some four years prior to the shooting, had assaulted another tenant with a pocket knife and was charged with felony assault. These events were documented by MHA and presented a recognizable, potential risk to other tenants within the facility. That MHA was aware of Miller’s conduct establishes a prima facie case of specific foreseeability, the first factor in the balancing test. The second factor, the possible magnitude of the harm, also supports the existence of a duty on the part of MHA. A violent act by the use of a weapon obviously presents a risk of significant injury. Armed with a rifle, Miller fired a shot which proved to be fatal to another tenant who just happened to be in the security office area at the time.

The third factor in the balancing test favors MHA. Initially, a public housing facility is designed to provide affordable housing to low income tenants. The importance of the social value of affordable public housing in Tennessee cannot be overstated. Figures from the United States Census Bureau indicate that in 2007, over 900,000 Tennesseans, or nearly 15 percent of the state’s population, subsisted at or below the federal poverty guidelines. Shelby County is the largest of the ninety-five counties in Tennessee, and its largest city, Memphis, is the most populated city in the state and the 18th-largest in the nation. Public housing is particularly useful as a tool to alleviate a growing population of homeless people.⁹ There is much truth in the trial judge’s observation that the exclusion of those with prior records of criminal conduct from federal housing would create a “massive underclass [of the] ... homeless.”

⁹ In August of 2002, it was estimated that 2,000 individuals in Shelby County were without a residence on any given night, and that 7,000 people were homeless for some period of time during 2001....

MHA operated Jefferson Square Apartments pursuant to its authorization under Tennessee's Housing Authorities Law, which grants broad powers for furthering the public purpose of providing affordable housing to Tennesseans. The value of this service extends to the provision of affordable housing to individuals with some history of misconduct. As President George W. Bush explained in the last State of the Union address of his first term: "This year, some 600,000 inmates will be released from prison back into society. We know from long experience that if they can't find work, or a home, or help, they are much more likely to commit crime and return to prison.... America is the land of second chance, and when the gates of the prison open, the path ahead should lead to a better life." According to the Bureau of Justice Statistics, 2,807 prisoners were released from state prison in Shelby County in 2001, including 916 violent offenders—the 24th highest release number and 22nd highest violent release numbers, respectively, among all the counties in the 37 states for which data was available (by comparison, Davidson County had 1,911 releases and 588 violent releases, ranking within the top 40 in both categories). Thus, in addition to serving the public by providing affordable housing generally, housing authorities often provide appropriate housing opportunities to those individuals who face the task of reintegrating into society. In short, the third factor weighs heavily in favor of MHA.

The fourth factor, the usefulness of stricter, alternative conduct, is neutral. While more careful scrutiny of potential tenants might serve to limit the risks of harm to current tenants, enforcing a more aggressive policy of identifying and excluding potentially dangerous tenants would force MHA to deny housing to some individuals who present indications of future risk but who, if provided with housing, might never harm anyone. Moreover, preventive policies will inevitably result in a further intrusion on the privacy of tenants, rendering public housing a less attractive option for many of the blameless

individuals whom MHA is charged to serve.

The fifth factor, like the first and second, favors, by a small margin, the imposition of a duty on MHA. Although some preventive policies might be expensive and onerous, simply evicting Miller following the knife attack would undoubtedly have been feasible. The one-strike policy, if consistently enforced, would naturally produce a safer environment. Housing authorities routinely deny housing to individuals based on factors indicating their potential risk of violence. According to information received by Human Rights Watch in response to a Freedom of Information Act Request to the U.S. Department of Housing and Urban Development, public housing authorities required to provide data to HUD denied admission into project-based public housing to 46,657 applicants under "one strike" tenant screening procedures in 2002. As previously stated, MHA was aware of Miller's attack on Tiplett and took steps to reprimand him. Even though Miller successfully completed his period of probation as a tenant and some four years had passed since the 1998 incident, there is no credible suggestion that the additional step of evicting him was not a feasible option.

The sixth factor, the costs and burdens of safer conduct, slightly favors the Plaintiffs. Some steps, such as evicting tenants following violent confrontations, might have low costs and affect a small number of tenants. In this instance, for example, taking the additional step of evicting Miller may have resulted in minimal administrative expense. Other preventive measures, on the other hand, such as more closely monitoring the activities of tenants or probing their backgrounds more aggressively, would likely create both greater costs to MHA and greater burdens on tenants and potential tenants. At this stage, however, because the menu of potential safer measures includes some less expensive steps, this factor favors submission of the liability question to the jury.

The seventh and eighth factors—the usefulness and safety of the alternative conduct—do not strongly favor either con-

clusion. On one hand, the facts of this case alone demonstrate that evicting tenants after violent confrontations may increase the safety of other tenants in that same building. It is less clear, however, whether these evictions would serve the safety of the public as a whole or simply export risk from one place to another.¹¹ Eviction is not incarceration. An individual who is evicted because he poses a risk must relocate somewhere else and pose the same risk there.... [D]ense areas of violent crime exist in neighborhoods surrounding large housing projects in Memphis, and subsequent “hot spots” of crime have arisen in areas of Memphis where former public housing residents had relocated when their projects were demolished[]. The costs associated with providing a more secure facility and the need to accommodate low-income tenants are competing forces. A housing authority provides a valuable societal purpose. Nevertheless, on balance, closely monitoring tenants with prior criminal records or subjecting tenants to a re-certification process by use of [National Crime Information Center background checks] or other available means to ascertain violent propensities does not appear to be overly burdensome.

For a duty to exist, the conduct of a defendant must create a recognizable risk to either a plaintiff or a class of persons, such as tenants in an apartment building. Consideration of foreseeability necessarily involves an assessment of the likelihood of harm serious enough in nature to take precautionary steps. In making this determination, courts must ascertain whether the defendant had the obligation of vigilance.

By viewing the complaint of the Plaintiffs in the light most favorable to the validity of their claims, we must conclude

¹¹ At times, evictions may even inflame violence. For example, the Knoxville News-Sentinel reported that 19-year-old alleged gang member Kojak Lewis’ “criminal convictions got his family evicted from a housing project in Northwest Knoxville, and he moved with his family to East Knoxville, home of rival gang, the East Side, according to police. Lewis was shot as he stood on a sidewalk.” ...

that tenants within the Jefferson Square Apartments could, with reasonable foreseeability, have been exposed to a risk of violent attacks resulting in physical harm. At this stage in the proceedings, MHA has offered no explanation why a duty to act with reasonable care to reduce its tenants’ unreasonable risk of physically injurious attack would have an impermissible adverse effect on its ability to provide affordable housing to low income tenants....

Our ruling does not foreclose the possibility that the Plaintiffs will be unable to present sufficient evidence to support the claim or that MHA will successfully defend the propriety of its actions under all circumstances. All landlords—whether public housing authorities or the owners of luxury high-rises—have a duty to use reasonable care to protect their tenants from unreasonable risks of physically injurious attacks by third parties, if those risks are foreseeable and public policy considerations do not militate otherwise. However, the question of what steps, if any, are required by the duty of reasonable care will inevitably depend on the facts of individual cases and should be left to the finder of fact, not the courts....

***Underberg v. Southern Alarm, Inc.*, 643 S.E.2d 374 (Ga. Ct. App. 2007)**

[Note: An employer is strictly liable for torts committed by its employees when they are acting within their scope of employment, for instance when delivery people hit someone on their delivery runs; that’s the “*respondeat superior*” principle, which we’ll study later in the semester. But such strict liability doesn’t apply when someone is on a “frolic and detour” of his own, for his own personal reasons, for instance if he gets upset at a customer and punches him. In such situations, the employer would only be liable on the theory that it negligently hired, retained, or supervised the employee.—ed.]

Kelly Underberg appeals from the grant of summary judgment to ADT Security Services South, Inc., ... and its authorized dealer, Southern Alarm, Inc., in her negligent hiring action. Underberg was

kidnapped at gunpoint by Bert Fields, a convicted violent felon who had once worked for Southern Alarm as a “promotions representative” selling home security systems door-to-door. Southern Alarm did not perform a background check before hiring Fields, which would have revealed that he had been convicted of burglary and kidnapping in South Carolina in 1979, sentenced to life in prison, and paroled in 1995....

[This is] an appeal of a grant of summary judgment Summary judgment is proper when the court, viewing all the facts and evidence and reasonable inferences from those facts in a light most favorable to the non-movant, concludes that the evidence does not create a triable issue as to each essential element of the case.... Giving Underberg the benefit of all favorable inferences, we are persuaded that she has presented some evidence, however slight, that Southern Alarm’s failure to perform a background check on Fields was a proximate contributing cause of her kidnapping.

Viewed in its proper light, the evidence shows that Southern Alarm hired Fields as a “promotions representative” in November 2001. Kelley Clements, Southern Alarm’s president and sole owner, deposed that promotions representatives were part-time employees who “turned over constantly” and worked on commission. After two or three days of training, sometimes assisted by an individual from ADT’s national office, these representatives were transported in a Southern Alarm van to large neighborhoods where they conducted door-to-door sales of ADT security systems.

Terry Wayne Beach, Jr., a former employee of Southern Alarm, testified that these workers were trained for one and one-half days. Beach, who accompanied the representatives in the van, testified that they were given a script to read to potential customers in order to gain entrance into their homes. They also were provided contracts, yard signs, and t-shirts. According to Beach, these workers were given the paperwork to close the sale themselves, although they had to call the office to run a credit check on the potential buy-

er. Beach testified that no background checks were performed on them because they were considered independent contractors and not employees. Beach recalled taking Fields and his wife in the van once or twice in November 2001 to canvass neighborhoods in Savannah, although he testified that he never made sales calls in Clyo, a town near Savannah where both Fields and Underberg resided.

Beach also submitted an affidavit in which he averred that promotions representatives were encouraged to contact friends and neighbors on their own time to sell the systems, and that Fields and his wife brought in at least one contract. There was no evidence, however, that Fields was paid a commission.

Mitchell Glenn Payne, who was Southern Alarm’s general sales manager at the time of Underberg’s abduction, testified that members of the promotions team were not authorized to enter a prospective buyer’s home absent a background check; that ADT advised Southern Alarm that background checks were not required unless the worker was entering a home; that when Southern Alarm first opened in Savannah, background checks were conducted on promotions representatives; and that the practice was discontinued due to the “tremendous turnover” in those positions.

Underberg deposed that in the summer of 2001, she filled out a form at a National Night Out in Springfield and placed it in a box at a booth operated by Southern Alarm and ADT, although she was not positive that the box belonged to Southern Alarm. Underberg wrote her name, address, and telephone number on the form, which asked whether she was interested in having someone contact her about installing a security alarm system. According to Payne, Southern Alarm twice participated in National Night Out in Savannah, but not in Springfield.

Underberg further testified that on two occasions in November and early December, Fields knocked on her door and asked to come in and speak with her about an ADT system. She declined both times, explaining that she was busy, and asked him to return another time. Fields left

what Underberg described as a “general ADT form” during the first visit. Fields came to Underberg’s home a third time, in December, but she was not at home. Underberg testified that during this period of time, Southern Alarm’s name and telephone number appeared on her caller identification system “a lot,” and Southern Alarm was the only ADT franchise that ever tried to contact her.

On the day of the kidnapping, February 6, 2002, Underberg ... went home from work in the early afternoon to pick up medicine for her daughter. As usual, she parked in her garage and entered the house through an unlocked door, leaving the garage door up. While Underberg was straightening up her bedroom, she noticed Fields standing in the doorway. Underberg asked if she could help him. Fields responded by pulling out a gun and pointing it at her. He told her to sit on the bed. Fields asked Underberg whether she recognized him. She did not remember him until he identified himself as “the ADT salesman.” Fields bound her with duct tape, placed her in her own car, and took her to South Carolina. After Underberg promised to give him \$6,000, he drove her home to Clio, and she took him to his house.

1.... “The appropriate standard of care in a negligent hiring/retention action is whether the employer knew *or should have known* the employee was not suited for the particular employment.” ... “[A] defendant employer has a duty to exercise ordinary care not to hire or retain an employee the employer knew or should have known posed a risk of harm to others where it is reasonably foreseeable from the employee’s ‘tendencies’ or propensities that the employee could cause the type of harm sustained by the plaintiff.”

Moreover, “[w]hether or not an employer’s investigative efforts were sufficient to fulfill its duty of ordinary care is dependent upon the unique facts of each case.” ... Here, a jury could find that Southern Alarm owed a heightened duty to ascertain whether individuals it hired, even briefly, to enter homes of unsuspecting persons for the purpose of selling security systems were suited for this purpose. Generally, the determination of whether

an employer used ordinary care in hiring an employee is a jury issue. In the case at bar, “[w]e cannot say that the evidence adduced was sufficient to demand a finding as a matter of law that the defendant had exercised due care in screening the employee in question.”

In addition, a question of fact concerning Southern Alarm’s duty to perform background checks on promotions representatives is raised by its Dealer Agreement with ADT. The Agreement states that Southern Alarm “represents and warrants that all of its employees utilized to perform services under this Agreement have successfully passed a drug screen and a criminal background check.” “Representatives” are defined in the Agreement as “officers, directors, employees, and agents.” Underberg argues that, as a promotions representative, Fields was an employee who was required to undergo a background check. Southern Alarm contends that promotions representatives are independent contractors, not employees, so that no duty to screen them arises under the Agreement.

We need not resolve the issue of Fields’s employment status, however, because the deposition testimony of Timothy W. Breeden, southeast regional director for the ADT authorized dealer program, shows that even if promotions representatives were considered independent contractors, a jury question still exists as to whether they were properly screened. Although Breeden testified that he was unsure whether background checks had to be performed on independent contractors, he also testified that an individual who was empowered to sell ADT systems on behalf of an authorized dealer and had been given ADT promotional materials and sales contracts “probably” would be required to undergo one. In addition, when asked why ADT requires background checks, Breeden testified:

A. Obviously we would want to filter out anyone that should not be selling security systems and putting folks at risk that should not be in a home. ...

Q. Would you agree that ADT would object to an individual with a prior conviction for kidnapping being provided

training and materials and allowed to go door to door attempting to sell ADT home security systems? ...

A. Yeah, ... if the dealer had knowledge of that, absolutely, we would object to that.

Q. And the reason ADT requires background checks is so the dealer will have that type of knowledge, correct?

A. That's correct.

Payne testified, in fact, that Southern Alarm did perform background checks on promotions representatives, until the turnover in those positions became too great. A jury might find from the testimony of Breeden and Payne both the existence of a duty and a breach thereof....

2. The gravamen of this appeal is whether a jury could find that the failure to investigate Fields's background is a proximate cause of Underberg's abduction. We find that, although causation is attenuated, a genuine issue of material fact remains.

"The causation element requires showing that, given the employee's dangerous propensities, the victim's injuries should have been foreseen as the natural and probable consequence of hiring the employee." Causation is usually a jury question, except in plain, palpable and undisputable cases....

"[L]iability does not attach if the employee committed the tort in a setting or under circumstances wholly unrelated to his employment." ... [A]n employer may be held liable for torts committed outside the scope of employment, at least where a relationship exists between the employer and the tort victim. "The question is not whether the servant was acting within the scope of his authority, but whether in view of his known characteristics such an injury by him was reasonably to be apprehended or anticipated." Still, the act must be committed "within the tortfeasor's working hours or under the color of employment."

In the case at bar, it is undisputed that the act was not committed within the tortfeasor's working hours. Therefore, the issue is whether the abduction of Underberg was committed "under the color of

employment," or, on the other hand, under circumstances "wholly unrelated" to Fields's employment. Southern Alarm and ADT urge us to hold, as a matter of law, that the incident was "wholly unrelated" because the master-servant or agency relationship had ended and because Fields did not use his association with Southern Alarm and ADT as a ruse to gain entry into her home on the date he abducted her....

[But w]e are persuaded by cases from other jurisdictions that neither the termination of the employment relationship nor the passage of time break the causal connection as a matter of law. In *Tallahassee Furniture Co. v. Harrison*, 583 So.2d 744 (Fla. Ct. App. 1991), for example, a furniture deliveryman brutally assaulted a customer in her home nearly three months after delivering her couch by gaining entry on a pretext about a receipt. The assailant was a paranoid schizophrenic, a drug addict, and had an extensive criminal history. He was not asked to complete a job application. In affirming the \$ 2.5 million verdict returned for the plaintiff, the Florida court concluded that

there *can* be a causal connection between an employment-related contact in the home by an unfit or dangerous employee and an injury inflicted on the occupant during a later, non-employment related entry into the home. Whether the employment-related contact and the later event in which the injuries occur are so separated by time or other circumstances that the former cannot reasonably be said to be a substantial factor in producing the result complained of depends upon the facts in each case. The issue of proximate cause is generally one for the jury unless reasonable persons cannot differ, in which case it becomes a matter of law for the court.

In *McGuire v. Arizona Protection Agency*, 609 P.2d 1080 (Ariz. 1980), the defendant employer had contracted to install a burglar alarm in the plaintiff's home. The employee who installed the alarm had a history of criminal activity. After the alarm was installed and after the employee's job with the defendant had been terminated, the employee returned to the plaintiff's home, disconnected the alarm, and burgled the home. The appeals court

reversed the trial court's order dismissing the negligent hiring action, commenting as follows:

In light of the sensitive nature of the work and the temptations and opportunity attendant thereto, defendant owed a duty to plaintiff to employ a responsible and trustworthy person, without a criminal proclivity that could reasonably be determined, to install the alarm system.

We apply the reasoning of *Tallahassee Furniture Co.* and *McGuire* to the case at bar. Circumstantial evidence exists from which a jury could infer that Fields's contact with Underberg was employment-related. Promotions representatives were encouraged to contact friends and neighbors on their own time to sell ADT security systems. Underberg and Fields resided in the same small town, and the policy empowered him to contact her. Also, Underberg filled out a form with personal information that she placed in a box earmarked for Southern Alarm and/or ADT.... A jury could infer that Southern Alarm had given this information as a potential lead to Fields.

Nor does the fact that Fields entered Underberg's home through an unlocked garage door instead of using his alleged status as an ADT salesman to gain entry render the abduction "wholly unrelated" to his employment. "It remains to be seen in the development of the facts whether the surreptitious entry ... was the result of the employment of the felon; whether the felon's background projected the risk; and whether defendant[s] had any knowledge of this background or could have acquired such knowledge. It remains to be determined whether defendant[s] took the precautions ... reasonable [persons] would be required to take under the circumstances." *McGuire*.

A jury must determine whether Fields was acting under the color of his employment at the time of the kidnapping.

***Corbally v. Sikras Realty Co.*, 161 N.Y.S.2d 839 (App. Div. 1990)**

[In this case, defendant's employee apparently attacked the plaintiff, a tenant of defendant's. Here's the entirety of the

court's opinion:—ed.]

In this personal injury action arising out of the allegedly negligent hiring and retention of an employee, the record reveals factual questions concerning the employee's immediately prior employment, and the circumstances surrounding his termination there, which information was apparently never explored in even a routine background check at the time of his hiring. Furthermore, defendant's affiant, who claims to have been the employee's supervisor for two and a half years, was himself identified by plaintiffs as the recipient of numerous complaints about the employee's "rude, uncooperative and at times scary" demeanor toward the tenants, as well as his apparent affinity for Nazi memorabilia and knives, which decorated his apartment walls. Plaintiffs have identified witnesses who will testify at trial as to the employee's abusive and unprofessional demeanor toward others. A question of fact is raised concerning the hiring of this employee without benefit of the most routine check of references. The question whether defendant's conduct amounts to negligence is inherently one for the trier of fact.

Judge Alex Kozinski, *The Case of Punitive Damages v. Democracy*, Wall St. J., Jan. 19, 1995, at A18

[This article is about punitive damages, but consider its critiques as they apply to other damages as well. Is the analysis an apt criticism of jury discretion for torts cases generally? An inapt criticism of jury discretion for torts cases generally? An apt criticism as to punitive damages but not compensatory damages?—ed.]

Join me for a cup of coffee and a slice of pizza as we contemplate the workings of democracy. I'm afraid the coffee's tepid, though, the pizza won't be here for a while, and democracy is headed for trouble. McDonald's has lowered the temperature of its coffee because powerful government policy makers have ruled that "the coffee is too hot out there," and Domino's has canceled its 30-minute delivery guarantee because those same decision makers have concluded it causes too many accidents. Vote the bums out, you say?

Sorry, the policy makers here were unelected, unaccountable, temporary tyrants: juries imposing often staggering punitive damages.

Put to one side the host of other arguments about punitive damages, and consider a more fundamental issue: their impact on the way we govern ourselves.

While punitive damages date back at least to the 18th century, until recently the awards were small and rarely even sought. But as Justice Sandra Day O'Connor has noted, "Recent years ... have witnessed an explosion in the frequency and size of punitive damages awards." What was once a very limited legal tool used in cases of intentional torts like battery and slander has become, in the words of the president of the California Trial Lawyers Association, a means "to deter despicable acts by corporate America."

Consistent with this view, jurors across the country are regularly urged to impose punitive damages large enough to "send a message" to the defendant and others similarly situated. Consider the following jury instruction, approved in 15 states: "[I]f you believe that justice and the public good require it, you may ... award an amount which will serve to punish the defendant and to deter others from the commission of like offenses." Elsewhere, the same message is conveyed by plaintiffs' lawyers in their jury arguments.

Interviews with jurors in case after case reveal that they have taken these admonitions to heart and have imposed punitive damages to "teach 'em a lesson" or "send a message." The message juries send is basically "Stop." Implicit in this is a judgment that the conduct in question is not merely tortious, meaning that those engaging in it should pay compensation when someone gets injured, but so wrongful that it should be abandoned altogether.

There is an important difference. When juries award compensatory damages, they force manufacturers to internalize the cost to society of their activities; the price of the product may go up, but it will generally still be available to those willing to pay the higher price. Using punitive damages to demand that a product be tak-

en off the market altogether, or changed in ways that will make it less useful, reflects a judgment that the benefits derived by those who use the product don't justify the risk of injury.

Of course, we make judgments like these all the time, but normally we do so through legislation or regulation. Having such judgments made by juries, in the emotion-laden atmosphere of personal injury trials, raises issues that deserve careful exploration.

[1] Legislators are popularly elected and represent a variety of geographic and other interests. The political process ensures that those making important policy decisions at least roughly reflect the views of those who will be bound by them. By contrast, it is often very difficult to tell the policy views of jurors until they actually render a verdict; any group of six or 12 individuals may have views wholly unrepresentative of the community at large.

[2] Legislative judgments are made in a public arena and are subject to political checks. If a legislature were considering whether to prohibit restaurants from selling coffee hotter than 160 degrees, all concerned—coffee-machine vendors, coffee distributors, restaurant operators and the coffee-drinking public—could provide input.

Trials are much different. Only the parties before the court are allowed to present their views; jurors are instructed to disregard input from newspapers or outside parties—including parties that may have a legitimate interest in the outcome. Jury deliberations are kept secret until after the verdict, so it's difficult to tell what factors—legitimate or not—influenced the decision.

[3] Legislators are repeat players in the political process, so no single vote determines the degree of influence they will exercise. An unsuccessful legislative initiative can be taken up again in future years. Jurors are brought together to consider only the issues raised by a single case. If they fail to act, their influence is forever lost. The pressure to over-legislate, or to legislate based on incomplete information, is great. While most juries will

resist the pressure, it only takes a single runaway jury to send shock waves through an entire industry.

[4] Legislative judgments are geographically bounded. If New Mexico limits coffee temperatures to 160 degrees, coffee-drinkers in New York can still get their java piping hot. It is a strength of our federal system that states can serve as laboratories for experimenting with various legislative judgments. Over time, we can compare the experience of states and see whether the reduction in burns merits forcing consumers to suffer lukewarm coffee. Punitive damage awards know no borders: As the McDonald's coffee case illustrates, jurors are encouraged to base the punitive damages award on the defendant's nationwide revenues for an activity, a measure obviously designed to force a change in policy well beyond the locality or state where the lawsuit is brought.

[5] Legislatures issue relatively precise edicts—for example, “You may not sell coffee hotter than 160 degrees.” Jury verdicts are elliptical in the extreme. After the award in the Liebeck case, McDonald's is painfully aware that 180 degrees is too hot, but how can it tell what temperature is OK? Will it be insulated from punitive damages by turning its pots down to 175 degrees, 170, 165? There's no telling. McDonald's isn't safe even if the next jury says 170 is fine, since that jury's verdict isn't binding on future juries.

[6] It is often devilishly hard to decide whether to ban an activity altogether, or to permit it subject to payment of compensation for those it hurts. The sad reality is that many very useful activities and commodities—airplane and automobile travel, gas and electricity in the home, to name only a few—carry the risk of injury and death for many people. Nevertheless, such activities are allowed, even encouraged, because we as a society have decided that our lives would on the whole be far worse without them. Such “tragic choices,” as my colleague on the Second Circuit, Judge Guido Calabresi, calls them, are an inevitable aspect of modern life; legislators and regulators make them on a continuing basis, often adjusting prior judgments in

light of new information.

Punitive damage awards, imposed on activities that are permitted—often approved—by legislators and regulators, run at cross purposes with those regulatory judgments. Tort litigation in general, and punitive damages in particular, have made unavailable in the U.S. products that regulatory bodies have found safe, such as medicines approved by the Food and Drug Administration and small airplanes approved by the Federal Aviation Administration. Moreover, even when the product isn't entirely prohibited, legislation by juries tends to stifle innovation: Manufacturers are extremely wary of introducing improvements to product designs that have survived a barrage of litigation, lest they invite a new wave of lawsuits.

None of this calls into question the constitutionality of punitive damages—a matter the Supreme Court has taken up on various occasions over the past several years. It does, however, pose serious questions about the workings of our government. Juries can be remarkably efficient at sorting out the often complicated facts presented during the course of a trial, and jury service gives ordinary citizens an opportunity to participate in the administration of justice. However, the emerging trend of empowering juries to act as mini-legislatures is at odds with the central democratic principle that policy questions are decided by the people's elected representatives, while small groups of citizens—drawn essentially at random—apply those judgments to individual cases.

Far from carrying out the will of the people, juries imposing punitive damages may be usurping the role of the legislature, thereby benefiting a few plaintiffs and their lawyers, but denying the large majority of the people goods and services that make life safer, easier and more enjoyable. To those of us who believe that, despite its faults, democracy is the best way to govern ourselves, this should be a matter of profound concern.

11. Tue., Sept. 15: Negligence and Landowners' Obligations to Trespassers, Licensees, and Invitees

Read pp. 255-57 (to the end of ¶ 2), 258-65, 266-67 (¶ 3), 267 (start of ¶ 5)-70; ignore the question about *Ehret* in ¶ 1 on p. 262.

We're moving away here from the action/omission distinction. Some of these cases clearly involve allegedly negligent action (e.g., *Haskins* and *Herrick*, on p. 256). Others involve failure to act coupled with action (e.g., the deliberate maintaining of a railroad turntable coupled with failure to fence the turntable, *Keffe*, p. 259).

The real issues here are something else; here are a few of the most important ones:

(1) One recurring point is that a person is potentially liable for damages caused by inanimate things on his property (e.g., the faucet in *Rowland*, p. 267) to the same extent as for damages directly caused by himself or his agents (e.g., the clown in *Herrick*, p. 256).

(2) Another recurring question is the extent to which people are responsible for damage to others who shouldn't have been there in the first place—trespassers. What are the policy arguments for not obligating people to look out for the welfare of trespassers? What are the policy arguments for indeed imposing such an obligation?

12. Wed., Sept. 16: Negligence and the Duty Not To Provoke Criminal Reactions by Others

Read pp. 265-66 (¶2), and the three cases below. Note that *Kentucky Fried Chicken* seems to represent the general view, though of course three of the seven Justices disagreed on that. Whether *Kelly* and *Touchette* represent a general view is not clear.

Today we'll review some of the issues we've discussed—and deal with some new policy arguments—in a particular context: A criminal robs a store and the store's employees, either using force or just by shoplifting. The store owner or an employee either acts in self-defense or at least refuses to comply with the criminal's demand. The criminal then attacks a customer, who sues the store owner for the owner's alleged negligence in dealing with the situation.

Questions:

(1) Say a robber comes up to two pedestrians on the street, puts a knife to A's throat and tells B, "Give me your money or I'll kill A." B runs away, the robber kills A, and A's heirs sue B. What result? How is this case different from the cases in this unit?

(2) Now let's turn to the cases in this unit. What are the legal and policy arguments behind the positions staked out in the opinions?

(3) As the policy argument material (p. S8 and on) mentions, many people discuss tort policy as being chiefly concerned with compensation and deterrence. What are the deterrence arguments for and against the various positions noted here? What kind of socially valuable behavior would liability encourage? What kind of socially valuable behavior would absence of liability encourage?

(4) As the policy argument material also discusses, tort law is also in some measure about liberty, though that's rarely discussed explicitly. How does the possibility of tort liability constrain people's liberty in these situations? (Don't just focus on the impact of liability on the owner's property, but also on the owner's and employees' liberty.) What is the benefit that proponents of liability seek to gain at the expense of this loss of liberty? How should we

think about this tradeoff?

***Kelly v. Kroger Co.*, 484 F.2d 1362 (10th Cir. 1973)**

... [D]ecedent was a customer in defendant's store in Kansas City, Kansas, when a holdup took place. The robbers entered the front of the store with guns, took money from the checkout stands, and then ordered the store manager to open the safe in his office. The opening of the safe caused an alarm to sound at the Kansas City police department, but not at the store.

Several police officers responded immediately to their alarm, and when they entered the front door, the robber ran to the rear part of the store. The police fired a shot at one of the robbers at this time in the store. The decedent was in the rear of the store, and a robber seized her as a hostage or a shield. As the robber left the store at the front, he forced her with him up the street a block or so as he attempted to escape. The police followed and the robber then shot and killed the decedent. The police then shot at the robber as he ran some distance, and captured him.

The attempted robbery took place about 1:30 in the afternoon. During the course of the robbery, the store employees did not sound any other alarm nor attempt to direct or assist the police. This store had been robbed about a month before. Some fourteen robberies of grocery stores in the northeastern part of the city, where the store here concerned is located, had taken place in the prior eighteen-month period. An armed guard had been stationed in this store from time to time.

The complaint is based on the theory that the defendant was negligent in store procedure it had adopted to be followed during the course of such a robbery. The negligence alleged is thus the action taken once the holdup was in progress. The allegations are directed particularly to the silent alarm attached to the store safe....

The trial court, in granting summary judgment for the defendant, held in effect that no negligence was stated in the allegations, and even had there been it could not have been the proximate cause of the

injury because the consequences could not reasonably have been foreseen....

The standard of care owed to business invitees [under Kansas law] is ... one of "due care to keep the premises reasonably safe" for their use, but the proprietor is not an insurer of their safety.... The defendant had issued a pamphlet to its employees telling them what to do in the event of a holdup. The particular emphasis in the pamphlet was to do nothing to excite or startle the robbers. It stated in part that many robberies are by young persons who might start shooting if something unexpected should happen. The employees were warned particularly not to give any verbal alarm in the street because this would greatly increase the probability of injury. Thus the plaintiff asserts that the triggering of the silent alarm was not in accordance with the instructions given employees, was not a prudent act, and did not show an exercise of due care for the safety of the customers....

[Under Kansas law, it] is perhaps an aspect of "foreseeability," not so much that a particular incident may occur, but once one is in progress, when the danger to the customer is evident. Thus under this standard if there is an opportunity to comprehend the danger, negligence can then become a jury question.... The same theory is advanced by the plaintiff in his complaint, that is, that the danger to customers and employees of the store during the course of the robbery was apparent, and that the wrong action was taken—action which served to increase the hazard and which in fact caused the injury. Under this theory of the case, the granting of summary judgment was error.

***Kentucky Fried Chicken of Cal., Inc. v. Superior Court*, 927 P.2d 1260 (Cal. 1997)**

BAXTER, J. [A] shopkeeper does not have a duty to comply with the unlawful demand of an armed robber that property be surrendered.... Recognition of a duty to comply with an unlawful demand would

be contrary to public policy as it would encourage similar unlawful conduct....

This mandamus proceeding arises out of the denial of KFC's motion for summary judgment in a negligence action. Real party in interest Kathy Brown named KFC a defendant in a complaint seeking general and special damages for emotional distress, hospital and medical expenses, loss of wages, and loss of earning capacity. Brown alleged that she was a customer at a Redondo Beach restaurant operated by KFC when she was seized and held at gunpoint by an unidentified person who threatened to seriously injure Brown if employees of KFC did not give him the money in the cash register. The complaint alleged that an employee did not comply promptly with the robber's demands and that her delay and other actions caused further injury to plaintiff and resulted in additional threats of grave injury to Brown....

It appears from documents offered in support of the motion for summary judgment that Brown was the only customer in the KFC restaurant when she was accosted by the robber, who put a gun to her back. She complied with his demands and surrendered her cash and her wallet to him. He then demanded that a clerk open the cash register and give him all of the money. The clerk did not do so. Instead, she said she would have to go to the back of the restaurant for a key. The robber then became extremely agitated, shoved his gun harder into Brown's back, and told the employee he would shoot Brown if the employee did not "quit playing games" and open the cash register immediately.

Brown, who believed she was going to die because of the employee's actions, then "screamed" at the clerk to open the drawer and give the money to the robber, at which point the clerk complied and opened the cash register drawer. The robber seized the money and fled. The robber did not become agitated and angry until the cashier told him that she would have to get the keys to the register. KFC was unaware at that time of any prior similar crimes or any crimes at this store....

The rule which plaintiff asks us to refine and apply here was set out more than

30 years ago in the Restatement Second of Torts [§ 314A (*italics added*)]:

"(1) A common carrier is under a duty to its passengers to take reasonable action

"(a) to protect them against unreasonable risk of physical harm, ...

"(3) *A possessor of land who holds it open to the public is under a similar duty to members of the public who enter in response to his invitation.*"

Section 314A identifies "special relations" which give rise to a duty to protect another. Section 344 of the Restatement Second of Torts expands on that duty as it applies to business operators.

"A possessor of land who holds it open to the public for entry for his business purposes is subject to liability to members of the public while they are upon the land for such a purpose, for physical harm caused by the accidental, negligent, or intentionally harmful acts of third persons or animals, and by the failure to the possessor to exercise reasonable care to

"(a) discover that such acts are being done or are likely to be done, or

"(b) give a warning adequate to enable the visitors to avoid the harm, or otherwise to protect them against it."

Comment f to section 344 further explicates its intent: "Since the possessor is not an insurer of the visitor's safety, he is ordinarily under no duty to exercise any care until he knows or has reason to know that the acts of the third person are occurring, or are about to occur. He may, however, know or have reason to know, from past experience, that there is a likelihood of conduct on the part of third persons in general which is likely to endanger the safety of the visitor, even though he has no reason to expect it on the part of any particular individual. If the place or character of his business, or his past experience, is such that he should reasonably anticipate careless or criminal conduct on the part of third persons, either generally or at some particular time, he may be under a duty to take precautions against it, and to provide a reasonably sufficient number of servants to afford a reasonable protection."

Where a warning of danger is not adequate to protect a patron from intentional harmful acts of a third party, a landowner must “exercise reasonable care to use such means of protection as are available.” When criminal conduct is ongoing, that duty requires that the landowner or occupier take such appropriate action as is reasonable under the circumstances to protect patrons.

The Restatement rule continues to be the generally accepted test of liability of a business owner for injuries on the business premises caused by third party criminal conduct. A land occupier “must act as a reasonable person to avoid harm from the negligence of contractors and concessionaires as to activities on the land, as well as that of other persons who have entered it, and even from intentional attacks on the part of such third persons. He is required to take action when he has reason to believe, from what he has observed or from past experience, that the conduct of the other will be dangerous to the invitee, but not if there is no reason to anticipate a problem.”

It is true as the dissent notes, that the standard of a “reasonable prudent person under the circumstances” is the general standard of care. It is also true, however, ... that in particular situations a more specific standard may be established by judicial decision, statute or ordinance....

While this court has not expressly considered the duty of a landowner or occupier whose premises are open to the public when faced with an armed robber, no state has held that the law imposes a duty to comply with a robber’s demands. While some hold that a shopkeeper may actively resist the robbery attempt only if the resistance is reasonable in light of the threat to third persons, none hold that the duty to avoid harm to patrons or others on the premises is breached if the shopkeeper simply refuses to surrender property....

[An] Indiana appellate court concluded that resistance was in the public interest even in situations where it resulted in harm to third parties. “There is, and must continue to be, a great public interest in the prevention of crime and in the speedy apprehension of criminals. To that end the

victim of a crime, as vicious as armed robbery, during the course of such criminal act, is excused, justified and to be held privileged from ordinary resistance which might otherwise cause actionable damage.” ...

[An] Arizona court held ... that “no duty to accede to criminal demands should be imposed.... [Defendant bartender] was faced with two alternatives. He could either yield the right and privilege of protecting his property, or he could assert that same right and privilege by attempting to resist the crime being perpetrated upon him.”

In [a Texas case], a patron was shot when a storekeeper resisted an armed robbery. Liability was not imposed because, in the view of that court, the defendant’s actions were not the proximate cause of plaintiff’s injury and it was not foreseeable that his conduct would lead to the injury. The court recognized that liability might be found in other circumstances. “Acts of self-defense or in defense of one’s property have always been in accord with the public policy of Texas, and those persons having sufficient courage to so act legally enjoy the privilege. It is only when acts in self-defense or in defense of one’s property are committed under circumstances where the actor should realize that such acts create an unreasonable risk of causing harm to innocent third parties that such third parties may subject the actor to liability.”

[A] Kentucky Court of Appeals [decision] ... [reasoned] that compliance with the demands of a criminal does not offer sufficient assurance that the risk to an invitee will be substantially reduced. Therefore, only the criminal would benefit from imposition of a duty to comply. Finally, it concluded ... “that to hold otherwise would abandon or so weaken the objective of social utility that the store owners and proprietors would be coerced into offering total acquiescence to armed robbers for fear of civil litigation which, in effect, furnishes a criminal with an additional coercive advantage.” ...

KFC ... argue[s] that ... [imposing] a duty to comply would be contrary to the public interest as it would encourage hos-

tage taking by robbers who become aware that such conduct assures compliance with their demands.

We agree with KFC that no duty to comply with a robber's unlawful demands should be imposed on a shopkeeper on the theory that compliance may lessen the danger to other persons on the premises. Both article I, section 1 of the California Constitution² and Civil Code section 50³ recognize the right of any person to defend property with reasonable force.

We are not faced here with a situation in which KFC's employee engaged in active resistance to the robbery. Therefore, we need not decide if that right is qualified by the duty to avoid injury to third persons or if a duty exists to avoid physical resistance that might provoke a robber into carrying out a threat to harm third persons. It is enough to observe that recognizing a duty to comply with an unlawful demand to surrender property would be inconsistent with the public policy reflected in article I, section 1 of the California Constitution and Civil Code section 50.... Simple refusal to obey does not breach any duty to third persons present on the premises....

[T]he public interest would not be served by recognition of a duty to comply with a robber's demands.... [W]e are not satisfied that persons who commit armed robbery would not become aware of and be encouraged by the existence of such a duty. Moreover, we have no basis upon which to conclude that compliance actually pre-

² "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and *protecting property*, and pursuing and obtaining safety, happiness, and privacy." (Italics added.)

³ "Any necessary force may be used to protect from wrongful injury the person or property of oneself, or of a wife, husband, child, parent, or other relative, or member of one's family, or of a ward, servant, master, or guest." Penal Code section 197, subdivision 2 also recognizes a privilege to use reasonably necessary force in resisting crime in the defense of property against a person "who manifestly intends or endeavors, by violence ... to commit a felony."

vents injury to robbery victims. The public as a whole is much better served if would-be robbers are deterred by knowledge that their victims have no legal duty to comply with the robber's demands and are under no duty to surrender their property in order to protect third persons from possible injury....

MOSK, J., dissenting.... [A] business proprietor may or may not be under a duty to accede to the demands of a robber when his customers are present. Perhaps more correctly, he may or may not breach his duty to exercise reasonable care for their safety by refusing. *Each case depends on its own facts.* To be sure, in many if not most, as law enforcement authorities counsel, he should yield. But, in some perhaps, he need not.

Today, the majority announce a harsh and unjust rule that ... a business proprietor is *never* required to subordinate any of his own property interests—no matter how insignificant the object and no matter how slightly it is jeopardized—to his customers' safety—no matter how many they are and no matter how gravely they are threatened. To expose such a conclusion is to prove its unsoundness.

In support of their harsh and unjust rule, the majority invoke "public policy," but to no avail. Whether the immunity they grant to business proprietors will indeed deter robbers, as they assert by ipse dixit without empirical support, depends on whether street criminals are in fact rational decisionmakers—a proposition that they themselves effectively reject when they imply that "[r]obbers are unpredictable."

In support of their harsh and unjust rule, the majority also invoke article I, section 1 of the California Constitution and section 50 of the Civil Code, also to no avail.... [S]ection 43 of the [Civil Code] makes plain that such a "personal right[]" [to protect property] IS NOT ABSOLUTE: rather, it is "subject to the qualifications and restrictions provided by law" One such "qualification" or "restriction" is found in [the] common law rule that a business proprietor owes a duty to exer-

cise reasonable care for the safety of his customers against criminal conduct by third persons....

[A]rticle I, section 1 declares: “All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.” “[I]nalienable rights” are not ipso facto absolute rights. That is true of all the enumerated rights—including those relating to property...

KENNARD, J., joined by WERDEGAR, J., dissenting.... “[T]he duty to take affirmative action to control the wrongful acts of third persons which threaten invitees” does not end once an attack on a patron is in progress. This duty obligated KFC not only to take reasonable care to protect against such wrongful acts by third persons but also, if such acts occurred nonetheless, to take reasonable care to avoid increasing the risk of injury to its patrons from those acts....

Given the existence of KFC’s duty to use reasonable care to prevent harm to Brown during the robbery, whether it and its employees met the standard and acted reasonably is a question for the jury, unless reasonable minds could not differ on the question.

The answer to that question depends on the circumstances of the particular case, and cannot be determined as a rule of law that, regardless of the surrounding circumstances, applies to all defendants presented with a similar risk of harm to another. “Because application of [the reasonable person standard] is inherently situational, the amount of care deemed reasonable in any particular case will vary, while at the same time the standard of conduct itself remains constant, i.e., due care commensurate with the risk posed by the conduct taking into consideration all relevant circumstances.”

Accordingly, the reasonable person standard of care may require less care during a robbery, or other criminal event, than it does under calmer and more com-

posed circumstances. Robberies are stressful and unpredictable encounters, frequently fast paced, in which those being robbed are forced to decide and act, often instantaneously, upon necessarily incomplete information about the situation that confronts them. Under such circumstances, the scope of what is reasonable is necessarily wide, and often there may be a number of alternative courses of action that, given the circumstances, will be equally reasonable.

The standard California jury instructions on negligence include an instruction recognizing that a person confronting a sudden danger “is not expected nor required to use the same judgment and prudence that is required in the exercise of ordinary care in calmer and more deliberate moments.” The instruction explains: “[His] [Her] duty is to exercise the care that an ordinarily prudent person would exercise in the same situation. If at that moment [he] [she] does what appears to [him] [her] to be the best thing to do, and if [his] [her] choice and manner of action are the same as might have been followed by any ordinarily prudent person under the same conditions, [he] [she] does all the law requires of [him] [her]. This is true even though in the light of after-events, it should appear that a different course would have been better and safer.” ...² ...

² The majority here, however, does not create a fixed rule of reasonable conduct for juries to apply. It does not claim that robberies are so stereotypical and judicial experience with them so vast that it is feasible to define reasonable conduct during a robbery by a fixed rule. It does not purport to conclude that there are no circumstances in which a reasonable business proprietor would ever comply with a robber’s demands (nor is there any basis on which it could reach such a conclusion). Rather, it decides that the reasonableness of the proprietor’s conduct is irrelevant because the proprietor has no duty to act to protect its innocent patrons during a robbery. Duty, not reasonableness, is the analysis the majority adopts in this case.

Moreover, as a leading torts treatise observes, most attempts to create such judicial rules of reasonable conduct have failed: “Almost invariably the rule has broken down in the face of the necessity of basing the standard

There are at least three good reasons why negligence law has allocated the judgment of the reasonableness of a defendant's conduct to the jury as a matter for case-by-case determination, rather than having courts, under the rubric of "duty," establish as a matter of law fixed and unvarying rules of conduct for various categories of human activity.

[1. Because of] the irreducible variety of circumstances which may surround an event that causes harm to someone ..., an individualized rather than categorical determination of what constitutes reasonable care to avoid a particular type of harm usually will provide a more precise measure of what conduct is reasonable under the circumstances.

This court in the past has repeatedly recognized that judging the reasonableness of a defendant's conduct on a case-by-case basis provides a more precise determination of the contours of liability: "Standards of care are typically relative; rules of law are basically absolute. Hence, in regard to negligence, any attempt to screen factual conduct into legal classifications through a sieve of absolute law will be impracticable whenever the related circumstances admit of materially conflicting inferences. In other words, the actor's conduct must always be gauged in relation to all the other material circumstances surrounding it"

"If the term 'negligence' signified an absolute quantity or thing to be measured in all cases in accordance with some precise standard, much of the difficulty which besets courts in the solution of this class of cases would be at once dissipated. But, unfortunately, it does not. Negligence is not absolute, but is a thing which is always relative to the particular circumstances of which it is sought to be predicated. For this reason it is very rare that a set of circumstances is presented which enables a

[of reasonable conduct] upon the particular circumstances, the apparent risk, and the actor's opportunity to deal with it." Because the duty imposed by negligence law "requires only conduct proportionate to the circumstances and the risk[, it] seldom, if ever, can be made a matter of absolute rule." ...

court to say as matter of law that negligence has been shown. As a very general rule, it is a question of fact for the jury—an inference to be deduced from the circumstances"

The greater accuracy that results from determining the propriety of the defendant's conduct by application of the reasonable person standard of care advances the economic function of tort law. The reasonable person standard of negligence liability, by asking whether a reasonable person would have taken additional precautions under the circumstances, examines how the risk of harm from the defendant's activity and the benefits of conducting the activity vary depending upon the precautions taken to avoid the harm.

In economic terms, it encourages the optimal level of care on the part of both victims and injurers, optimal being defined as the point at which the cost of any additional precautions will be greater than the benefit of avoiding additional injury. An individualized determination of reasonableness increases efficiency because it allows for the optimal level of care to be determined under the circumstances of each case; it asks not whether in general the cost of additional precautions would be greater than the cost of additional injuries but whether, under the specific circumstances of the case at hand, additional precautions would have been cost effective. (It asks this question, of course, not formally but intuitively by asking whether a reasonable person would have taken additional precautions to avoid the accident.) To fix the conduct required to avoid a given harm as an absolute standard that does not vary with the accompanying circumstances, as the majority does here, inevitably means that in numerous cases the law will require something other than optimal care....

[2.] [A case-by-case reasonableness standard] allows successive juries to reassess what precautions are reasonable as social, economic, and technological conditions change over time: "[R]oom is left for a change of standard when a change in the physical conditions of life, or a change in the public valuation of the respective interests concerned, require it."

Accordingly, the reasonable person standard of care, because it does not dictate a fixed course of conduct to avoid the harm in question, encourages innovations that reduce the cost of precautions and substitutions of less costly preventative measures that are equally or more effective in avoiding the harm. By contrast, locking defendants forever into a strait-jacket of prescribed conduct removes the incentive for them to lower the cost and increase the level of precautions they provide....

[3. The jury] has the potential to bring a wider array of practical experience and knowledge to that task than could a single individual such as a judge. The jury is a repository of collective wisdom and understanding concerning the conditions and circumstances of everyday life that it can bring to bear on the determination of what conduct is reasonable. As the conscience of the community, the jury plays an essential role in the application of the reasonable person standard of care. Accordingly, “the questions of the reasonableness of the risk of harm and the application of the standard of due care to particular facts are mixed questions of law and fact (or questions of ‘law application’ [citation]) which we have traditionally regarded as better answered by juries,” rather than judges.

Indeed, this court long ago recognized the value that a jury adds to the determination of reasonable care in a negligence case: “Our ideas as to what would be proper care vary according to temperament, knowledge, and experience. A party should not be held to the peculiar notions of the judge as to what would be ordinary care. That only can be regarded as a standard or rule which would be recognized or enforced by all learned and conscientious judges, or could be formulated into a rule. In the nature of things no such common standard can be reached in cases of negligence, where reasonable [persons] can reach opposite conclusions upon the facts. In such cases ... ‘It is said to be the highest effort of the law to obtain the judgment of twelve [persons] of the average of the community, comprising [individuals] of learning, [individuals] of little education, [individuals] whose learning consists only

of what they have themselves seen and heard, the merchant, mechanic, the farmer, and laborer, as to whether negligence does or does not exist in the given case.”

...

The majority here, in the course of ignoring the boundary that our decisions have established between issues of duty to be determined by the court and issues of the reasonableness of the defendant’s conduct to be determined by the jury, asserts that its holding will result in fewer robberies and is therefore preferable as a matter of policy. This assertion lacks merit. It rests on the premise that in the absence of any potential liability to patrons, business proprietors will not only refuse the demands of robbers more frequently but that their refusal to cooperate will in many cases discourage robbers by successfully denying the robbers whatever thing of value they seek.

As the ultimate success of the robber in this case illustrates, however, it is unlikely that in most cases a proprietor’s refusal to cooperate will deny the robber what he seeks. It also seems unlikely that the majority’s decision will embolden business proprietors or their employees to refuse the demands of an armed robber at a greater rate than they would if they were under a duty to use reasonable care, for they too are in the robber’s zone of danger....

It would seem likely that in most cases a business proprietor’s initial refusal to comply with a robber’s demand followed by immediate compliance with the demand when the robber reiterated it would not be unreasonable, in light of the stress, surprise, and uncertainty that would attend the proprietor’s decision as to how to respond to the robber. But neither I nor the majority can answer that question categorically with assurance, for none of us can anticipate all of the myriad variations in circumstance in which the issue may arise.

Just as it cannot be said that as a matter of law it is always (or never) negligent for a doctor to fail to give penicillin to a patient with a fever, it cannot be said as a matter of law that it is never (or always) negligent for a business proprietor to in-

crease the peril to a customer by failing to comply with a robber's demand. Having determined that business proprietors must act reasonably to protect their customers from harm caused by third parties, this court should leave for the jury the determination of whether the conduct of KFC and its employees in this particular instance conforms to that standard....

***Touchette v. Ganal*, 922 P.2d 347 (Haw. 1996)**

[Plaintiffs] appeal from the First Circuit Court's order granting defendant-appellee Mabel Ganal's motion to dismiss. For the following reasons, we vacate the circuit court's order and remand for further proceedings....

In early 1991, allegedly due to a work-related injury, Orlando T. Ganal, Sr. became unable to work at his job at Young Laundry and was having difficulty obtaining workers' compensation. At roughly the same time, Mabel, Ganal's wife, began having an extra-marital affair with ... David Touchette, a co-worker at her part-time job. Mabel and Ganal's marriage steadily deteriorated, and Mabel moved out of the house she shared with Ganal and moved into her parents' home in Waipahu.

During the late evening of August 25, 1991, Ganal broke into Mabel's parents' Waipahu home, shot and killed Mabel's parents, and shot and injured Mabel and Orlando T. Ganal, Jr., Mabel and Ganal's son.

Immediately thereafter, Ganal drove to the [Touchette family's] Kailua residence, where Ganal knew David to have stayed, blocked the outer doors shut, broke several windows, doused the interior rooms with gasoline, and set the house on fire. [David wasn't in the house, but four Touchette family members, not including David, were killed, and one was severely burdened and scarred.] ...

Immediately after starting the fire at the Touchettes' home, Ganal drove to the Young Laundry premises near the airport, poured gasoline in a second-floor office and started another fire. Although Young Laundry employees were present on the

premises at the time of the fire, no one was injured.

On July 7, 1993, appellant filed a civil complaint against, among others, Ganal and Mabel, alleging the following facts and claims for relief: ...

11. On August 25, 1991, defendant Orlando T. Ganal, Sr., because of severe and extreme emotional distress and depression resulting from the conduct of the defendants to be more fully described in this complaint, set fire to [the Touchettes' house.]

14. For a period of months before August 25, 1991, defendant Mabel Ganal was involved in an extra marital love affair with David Touchette ...

15. Defendant Mabel Ganal initiated and maintained a course of conduct which involved taunting and humiliating defendant Orlando T. Ganal, Sr. by flaunting her extra marital love affair with David Touchette.

16. Defendant Mabel Ganal's extra marital love affair with David Touchette, and her conduct of taunting and humiliating defendant Orlando T. Ganal, Sr. with respect to that affair, caused defendant Orlando T. Ganal, Sr. to suffer severe and extreme emotional and mental distress and depression.

17. Prior to the August 25, 1991 incident ..., defendant Mabel Ganal, the wife of defendant Orlando T. Ganal, Sr., knew, or in the exercise of reasonable diligence should have known of, defendant Orlando T. Ganal, Sr.'s severe and extreme emotional and mental distress and depression, and/or instability and/or propensity and/or tendency to cause injury, even death to plaintiffs.

18. Prior to the August 25, 1991 incident ..., defendant Mabel Ganal had the opportunity and ability to warn plaintiffs of defendant Orlando T. Ganal, Sr.'s severe and extreme emotional and mental distress and depression, and/or instability and/or propensity and/or tendency to cause injury, even death, but, nevertheless negligently failed to do so.

19. Even though defendant Mabel Ganal knew or should have known that her husband, defendant Orlando T. Ganal, Sr., was in need of supervision for the protection of others, defendant Ma-

bel Ganal, nevertheless, failed to exercise reasonable care and/or to take other appropriate actions to prevent the injury and death to the plaintiffs....

47. As a direct and proximate result of defendant Mabel Ganal[s] ... actions described above, on August 25, 1991, defendant Orlando T. Ganal, Sr., because of severe and extreme emotional and mental distress and depression arising out of the above described conduct of defendant Mabel Ganal ..., set plaintiffs[] house ... on fire. Defendant Mabel Ganal[s] ... actions described above, under the totality of the circumstances, caused and/or substantially contributed to cause defendant Orlando T. Ganal, Sr.'s action

60. The above actions and/or omissions of defendant Orlando T. Ganal, Sr. and defendant Mabel Ganal described above, were so grossly negligent, outrageous, willful, wanton and/or reckless and done in conscious disregard of the rights and safety of the plaintiffs and the public, as to justify the imposition of punitive and/or exemplary damages. Plaintiffs ask leave of this Court to assert and recover such damages should the evidence warrant such damages....

[A.] [T]he circuit court concluded that Mabel did not owe appellant a duty pursuant to *Restatement (Second) of Torts*, §§ 315 and 314A (1965), because Mabel lacked a requisite "special relationship" with both appellant and Ganal. We agree....

With respect to a duty to control the conduct of others, Hawaii law follows the *Restatement (Second) of Torts* § 315 (1965), which provides:

There is no duty so to control the conduct of a third person as to prevent him [or her] from causing physical harm to another unless

(a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or

(b) a special relation exists between the actor and the other which gives to the other a right to protection.

The "special relations" referred to in § 315 are defined in *Restatement (Second) of Torts* § 314A (1965) to include [a common

carrier, an innkeeper, a land possessor who "holds [the land] open to the public," and "one who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his [or her] normal opportunities for protection is under a similar duty to the other."] ...

Section 314A contains a caveat stating that "[t]he Institute expresses no opinion as to whether there may not be other relations which impose a similar duty[.]" and this court has also recognized that the list of relationships delineated in section 314A is not exclusive or exhaustive.... Although this issue is one of first impression in Hawaii, the few other jurisdictions that have had occasion to consider the issue to date have held that a marriage relationship does not fall within the scope of the "special relations" contemplated by section 315.... For example, in *Rozycki v. Peley*, 489 A.2d 1272 (N.J. Super. 1984), the parents of a group of young boys who were victims of sexual and physical assault by the defendant brought an action against the defendant and the defendant's wife, alleging, *inter alia*, that the defendant's wife had a duty to warn the boys of her husband's pedophilia because her marriage to her husband constituted a "special relation" within the scope of section 315. The Superior Court of New Jersey declined to impose a duty on the defendant's wife, holding in pertinent part that:

Requiring [the wife] to report on her husband's activities in this manner violates the public policy of encouraging and fostering the marital relationship.... [T]he public interest involved is one of the key factors in determining whether a duty should be imposed.

There is a strong public interest in protecting the marital relationship. The spouse of an accused in a criminal action, for example, shall not testify except in very limited circumstances....

Thus, requiring a wife to inform her neighbors of her husband's alleged sexual proclivities, while not violative of the requirements of these evidentiary privileges, would certainly denigrate their underlying policy considerations of promoting and encouraging marriage. A spouse's duties include being loyal to

their husband or wife and giving them the benefit of their companionship and society.... To require one spouse to inform on the other strikes at the very heart of this obligation of loyalty. Imposing a duty to warn of this nature would require a spouse to tell the world at large that one's husband or wife is, in a sense, "unfit" or dangerous. The spouse is put in the untenable position of either remaining silent out of a sense of loyalty or protection and thereby incurring civil liability, or warning the neighbors (or whatever third party may be involved) and incurring their spouse's anger, disappointment or shame....

We ... likewise hold that, without more, a marital relationship does not alone constitute a "special relation" under section 315 so as to merit the imposition of a duty to warn others or control the actions of a spouse. We therefore hold that the circuit court's order granting Mabel's motion to dismiss was correct insofar as it held that Mabel did not owe a duty to appellant under sections 315 and 314A because Mabel did not bear a "special relation" to either appellant or Ganal as contemplated by the language of section 315....

[B.] Appellant next argues that the circuit court erred in granting Mabel's motion to dismiss because the circuit court failed to consider whether, pursuant to the *Restatement (Second) of Torts*, §§ 302, 302A, and 302B, Mabel had a duty to refrain from conduct that would create an unreasonable risk of harm to another through Ganal's conduct. We agree.

Restatement (Second) of Torts, § 302 (1965) sets out the general rule regarding a risk of direct or indirect harm ...:

A negligent act or omission may be one which involves an unreasonable risk of harm to another through either

(a) the continuous operation of a force started or continued by the act or omission, or

(b) the foreseeable action of the other, a third person, an animal, or a force of nature.

Sections 302A and 302B are "special application[s] of Clause (b) of [section 302]," ... Section 302A provides: ...

An act or an omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the negligent or reckless conduct of the other or a third person.

Section 302B provides: ...

An act or an omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the conduct of the other or a third person which is intended to cause harm, even though such conduct is criminal.

The duty described under sections 302, 302A, and 302B differs from the duty described under sections 315 and 314A in that sections 302, 302A, and 302B posit a duty based on negligent acts or omissions, whereas sections 315 and 314A address only negligent omissions, or failures to act. Comment a to section 302 provides:

This section is concerned only with the negligent character of the actor's conduct, and not with his [or her] duty to avoid the unreasonable risk. In general, anyone who does an affirmative act is under a duty to others to exercise the care of a reasonable [person] to protect them against an unreasonable risk of harm to them arising out of the act. The duties of one who merely omits to act are more restricted, and in general are confined to situations where there is a special relation between the actor and the other which gives rise to the duty.

This distinction has also been phrased in terms of "misfeasance" and "nonfeasance." Comment c to section 314 provides:

The origin of the rule lay in the early common law distinction between action and inaction, or "misfeasance" and "nonfeasance." In the early law one who injured another by a positive affirmative act was held liable without any great regard even for his [or her] fault. But the courts were far too much occupied with the more flagrant forms of misbehavior to be greatly concerned with one who merely did nothing, even though another might suffer serious harm because of his [or her] omission to act. Hence liability for non-feasance was slow to receive any recognition in the law. It appeared first in, and is still largely confined to, situa-

tions in which there was some special relation between the parties, on the basis of which the defendant was found to have a duty to take action for the aid or protection of the plaintiff....

[T]he misfeasance/nonfeasance distinction central to the dispositive issue in the present case is perhaps most exhaustively discussed in the California Court of Appeal's decision in *Pamela L. v. Farmer*, 112 Cal. App. 3d 206 (1980).

In *Pamela L.*, the three minor plaintiffs, who were allegedly sexually molested, brought suit against the alleged molester and his wife. The Superior Court of California sustained the wife's demurrer, and the children appealed. Rejecting the wife's argument that she owed no duty to the minors, the California Court of Appeal held: ...

Respondent cites the principle that generally a person has no duty to control the conduct of a third person, nor to warn those endangered by such conduct, in the absence of a "special relationship" either to the third person or to the victim. However, this rule is based on the concept that a person should not be liable for "nonfeasance" in failing to act as a "good Samaritan." It has no application where the defendant, through his or her own action (misfeasance) has made the plaintiff's position worse and has created a foreseeable risk of harm from the third person. In such cases the question of duty is governed by the standards of ordinary care. (*Weirum v. R.K.O. General, Inc.*; see also *Tarasoff v. Regents of University of California.*)

This latter principle is embodied in Restatement Second of Torts section 302B which provides: "An act or an omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the conduct of the other or a third person which is intended to cause harm, even though such conduct is criminal."

Here respondent did not merely fail to prevent harm to plaintiffs from Richard. Respondent by her own acts increased the risk of such harm occurring. According to the allegations in paragraph V, respondent "encouraged and

invited" the children to play in her swimming pool, prepared refreshments to "entice" the children, and "encouraged the parents ... to permit" the children to come to her premises by telling them it would be perfectly safe for the girls to swim when respondent was not there, because her husband would be there. This was done, it is alleged, with knowledge that Richard had molested women and children in the past and that it was reasonably foreseeable he would do so again if left alone with the children on the premises. By encouraging and inviting the children to be alone with Richard under circumstances where he would have peculiar opportunity and temptation to commit such misconduct, respondent could be held to have unreasonably exposed the children to harm.

We agree with the reasoning of *Pamela L.* and adopt it

Similar to *Pamela L.*, appellant's complaint against Mabel in the present case alleges affirmative conduct, or alleged "misfeasance" on the part of Mabel, in that "defendant Mabel Ganal *initiated and maintained a course of conduct which involved taunting and humiliating defendant Orlando T. Ganal, Sr. by flaunting her extra marital love affair with David Touchette,*" (emphasis added), and that "*defendant Mabel Ganal's extra marital love affair with David Touchette, and her conduct of taunting and humiliating defendant Orlando T. Ganal, Sr. with respect to that affair,* caused defendant Orlando T. Ganal, Sr. to suffer severe and extreme emotional and mental distress and depression," (emphasis added), thereby implicating the duty described by sections 302, 302A and 302B....

[T]he allegations state a claim that potentially could warrant relief under a theory based on the duty stated in sections 302, 302A and/or 302B.... [W]e vacate the circuit court's order granting Mabel's motion to dismiss and remand for further proceedings consistent with this opinion.

[The case later settled for an undisclosed amount.—ed.]

13. Mon., Sept. 21: Negligence, the Privity Limitation, and the Economic Loss Rule

Read pp. 272-78 (to the end of ¶ 4), 279 (¶ 6), 280-81, 283-85 (¶ 5), 286-90 (¶ 9, 10).

Negligent acts (whether torts or breaches of contract) that harm one person will often harm many others as well. If I negligently hit your car on the road, I can slow down thousands of other people.

But beyond that, if I injure you, I'm also injuring your employer, who will lose the value of your services. (Presumably if the employer is paying you \$10,000 per month, that means you're providing more than \$10,000 per month of value; if you're out for a month, the employer will lose the value of your services, plus incur various other costs in covering for you.)

Say you're a key employee, perhaps the star of a forthcoming movie. If you're out of commission for a month or two, this can cause millions of dollars in losses to the businesses that are involved in making the movie. (If their losses are entirely covered by "key employee" insurance," then that just means the millions of dollars in losses will fall on an insurance company.) People who are working on the movie may also lose money. So will the people from whom they buy goods, or to whom they owe money. And that's just if one employee is injured; imagine that the initial damage was to a factory. What should the law do about that? That's what we'll discuss in this section.

Concepts: We'll also discuss the perennial worry in many torts cases about having potentially unbounded liability. It does seem odd that accidentally killing Brad Pitt in an auto accident might lead to hundreds of millions of dollars in liability, to everyone—whether movie studio, studio employee, exhibitor, exhibitor employee, or whoever else—who has suffered any indirect economic loss as a result of the cancellation of his new blockbuster. (Nor would the verdict necessarily be uncollectable; imagine that the negligent driver responding to the accident was an employee on a job-related errand, so that the employer would be liable under respondeat superior.) But should the law worry about this seeming oddness, or should it conclude that tortfeasors should indeed be liable for all the harm they cause? What are the likely economic effects of having an economic loss rule and the privity limitation vs. not having them?

14. Tue., Sept. 22: Negligent Infliction of Emotional Distress

Read pp. 290-96, 299-301, plus the Restatement excerpt below.

Read pp. 303-05 (afterword about duty).

Later in the semester, we'll discuss the tort of "intentional infliction of emotional distress." That tort often covers behavior that is otherwise not tortious, so the legal rule directly limits people's liberty. (For instance, if all intentional infliction of emotional distress—which, as you may recall, would cover both purposeful and knowing infliction—were actionable, then any romantic breakup could lead to court-imposed financial ruin.) The tort has therefore been controversial, and limited to a usually narrow set of "outrageous" actions.

The negligent infliction of emotional distress tort might in principle be even more troublesome, because it would cover even situations where a person didn't know that his actions would cause emotional distress to someone else. (Perhaps just "negligently" not noticing another's unrequited love, and causing emotional distress as a result?) Nor is "outrageousness" a suitable limitation, because outrageousness usually refers to deliberately distressing conduct, and is thus generally out of place in a negligence claim. (One can imagine extraordinarily grossly negligent actions being seen as "outrageous," and the negligent infliction of emotional distress tort being limited to such actions, but the law has not developed this way.)

So as a result the negligent infliction of emotional distress tort has been limited to par-

ticular kinds of emotional distress. Most obviously, ordinary negligence covers (as an element of damages) pain and suffering as a result of physical injury, though those are literally forms of emotional distress. The tort has also covered fear and trauma caused by the apprehension of likely imminent bodily injury, even if the bodily injury is averted. (Note that here we don't need to worry about imposing liability for otherwise legal behavior, such as romantic cruelty, since the behavior will have already carried a risk of liability had physical harm actually materialized.) And it has, in some states, covered grief caused by physical harm to a close family member or a bystander's distress caused by witnessing physical harm to someone else.

In this unit, we'll discuss the boundaries of this theory, and the policy arguments for and against broad liability.

Comments to Restatement (Third) of Torts § 46 (tentative draft) (quoted on p. 295)

d. *Specific activities or undertakings.* Under the rule stated in Subsection (b) [see p. 295—ed.], an actor who negligently performs specified undertakings or activities is subject to liability for emotional disturbance caused by negligence in conducting the undertaking or activity. Unlike Subsection (a), recovery under this Subsection does not require that the defendant have created a risk of bodily harm to the plaintiff. Early cases were of two types: 1) delivering a telegram or other communication erroneously announcing death or illness; and 2) mishandling a corpse or body remains. More recently, courts have recognized the awkwardness of relying on “impact” or “zone of danger” in cases involving consumption of a food that is then found to have been contaminated with repulsive foreign objects, such as a condom or a rodent, and instead have recognized these cases as falling within the rule of Subsection (b).

Illustrations:

1. ABC Hospital negligently misidentifies a corpse, causing it to be cremated rather than sent to a funeral home for burial as directed by the family. Members of the family suffer serious emotional disturbance upon learning about the mistake. ABC Hospital is subject to liability under Subsection (b).

2. The Jonestown morgue negligently determines the identity of a corpse brought to it by the police department. Sadie, the sister and next of kin of the person who was erroneously determined to be the corpse, is contacted by the morgue, told of the death, and provided instructions about making final arrange-

ment for disposal of the body. Sadie, who lives out of town, does so. Upon viewing the deceased, Sadie discovers that the deceased is not her sister. As a result of this episode, Sadie suffers serious emotional disturbance. Jonestown is subject to liability to Sadie under Subsection (b).

Some jurisdictions have also applied the rule stated in Subsection (b) to circumstances in which, for example, a physician negligently diagnoses a patient with a dreaded or serious disease; a physician negligently causes the loss of a fetus; a hospital loses a newborn infant; a person injures a fetus; a hospital (or other person) exposes a patient to HIV infection; an employer mistreats an employee; or a spouse mentally abuses the other spouse.

Courts have not provided clear guidelines to identify precisely which activities, undertakings, or relationships will support liability. Even for undertakings in which there is a risk of infecting another with HIV—a circumstance fraught with the risk of emotional harm—there is considerable variation in the scope of this category, including whether there is a scientifically valid or plausible source of infection and whether the plaintiff must demonstrate that the source was actually contaminated with HIV. Typically, the undertaking or relationship is one in which serious emotional harm is likely or where one person is in a position of power or authority over the other and therefore has greater potential to inflict emotional harm. Courts appropriately identify such categories of activities, undertakings, or relationships as giving rise to liability for emotional harm. Courts do not address liability on the mere fact that serious emotional disturbance was foreseeable under the facts of the specific case. There is little

consensus in the case law and a lack of case development. Thus, the Institute does not express a position on which specific activities, undertakings, or relationships give rise to liability under this Section.

Courts sometimes inquire whether a plaintiff is a “direct victim” of the defendant’s negligent conduct. This approach is employed when plaintiff has not been placed at risk of physical harm (and thus Subsection (a) is unavailable) and is unable to make out a claim for emotional harm as a bystander under § 47. The inquiry framed by Subsection (b) of this Section and this Comment addresses the same issue and may be more helpful than the “direct victim” approach.

e. Relationship between undertakings and contracts. Liability under the undertaking rule stated in Subsection (b) can sometimes be explained as an appendage to contract law. A court might hold that, although damages for emotional disturbance normally are not recoverable for breach of contract, some contracts—such as burial contracts—are so intimately tied to emotional issues that they call for an exception to the general rule.

However, an explanation based solely on contract law cannot explain all of the cases. For example, the person who receives a negligently directed telegram or who sees a mishandled corpse usually is not a party to a contract with the tortfeasor. Regardless of whether a contractual relationship exists, courts should rely on tort law, not contract law, to explain these cases. Nevertheless, courts should be cognizant of the close relationships between tort and contract in these cases to ensure that the rules in each area are compatible.

f. Relationship between Subsection (b) and foreseeability. Courts often state that the test for determining whether negligently caused emotional disturbance is recoverable is whether the actor reasonably should have foreseen the emotional disturbance. Whatever courts say about foreseeability in these cases, foreseeability cannot appropriately be employed as the standard to limit liability for emotional harm. For example, a doctor who negli-

gently (and incorrectly) diagnoses a popular movie star or professional athlete as having terminal cancer is not liable to the star’s fans who suffer emotional disturbance upon hearing the diagnosis, even though such harm is clearly foreseeable. Indeed, the rules stated in this Section and in § 47 are exceptions to a general rule that negligently caused pure emotional disturbance is not recoverable even when it is foreseeable.

Instead of relying on foreseeability to identify appropriate cases for recovery, the policy issues surrounding specific categories of undertakings, activities, and relationships must be examined to determine whether, as a category, they merit inclusion among the exceptions to the general rule of no liability....

i. Serious emotional disturbance. The rule stated in this Section applies only when the person seeking recovery has suffered serious emotional disturbance. In addition, the stimulus must be one that would cause reasonable persons to suffer serious emotional disturbance. Thus, there is a subjective and objective component to this requirement. An unusually susceptible person may not recover if an ordinary person would not have suffered serious emotional disturbance. A person may nevertheless recover for all harm caused, even if more serious because of the predisposition or special vulnerability of the person, if the stimulus is sufficient to cause a reasonable person to suffer serious emotional disturbance.

The requirement that emotional disturbance be serious in order to be recoverable ameliorates two concerns in providing a claim for negligent infliction of emotional disturbance. It eliminates claims for routine, everyday distress that is a part of life in a modern society, thereby avoiding a multitude of claims that might otherwise be brought. A seriousness threshold also assists in ensuring that claims are genuine, as the circumstances can better be assessed by a court and jury as to whether emotional disturbance would genuinely be suffered.

15. Wed., Sept. 23: Cause in Fact: But-For Causation

Read pp. 307-12, 317-24, 330-32 (¶¶ 7 & 8).

Concepts: This unit also deals with a common legal issue: *causation*, which you'll see in criminal law as well, and then in many tort and criminal law doctrines throughout the second- and third-year classes.

When we say someone “caused” an injury, we usually mean two things. First is “cause-in-fact,” which usually means “but for” causation: If it hadn't been for the defendant's actions, the injury likely wouldn't have happened. (As we'll see, sometimes this requirement is relaxed, but usually the “but for” test is good enough.) That's what we'll discuss here; in a few days, we'll talk about “proximate cause,” a very different matter.

16. Mon., Sept. 28: Cause in Fact: Liability When the Defendant Probably Didn't Cause the Injury

Read pp. 332-43. Note: The *Sindell* decision relied heavily on a law-student-written article, Naomi Sheiner, *DES and a Proposed Theory of Enterprise Liability*, 46 *Fordham L. Rev.* 963 (1978), which has been cited in over 35 cases and over 120 law review articles—a reminder of how influential student-written scholarship can be.

Cause-in-fact doctrine generally reflects a moral premise at the heart of tort law: Even if you act unreasonably—or even deliberately wrongfully—and if I am injured, I am entitled to compensation from you only if you are the one who caused my injury. That's not true for punishment under criminal law or under various business regulations. People are often punished for mere *attempts* or *conspiracies* to cause harm, or mere reckless creation of a risk of harm, even though no person is actually harmed as a result. But in tort law, you're supposed to be held liable to the plaintiff only for harm you actually cause.

We saw some arguments for modifying that principle in the previous unit, when we discussed liability for loss of a chance of survival (or loss of a chance of avoiding injury). But there the defendant was still known to be the party who caused the loss; the question is whether loss of a chance should be enough, when chances are the injury would have happened in any event.

In this unit, we'll discuss situations where it's likely that the defendant did *not* cause plaintiff's injury, though it's possible that defendant did. How compelling in such situations is the moral claim mentioned above? What other arguments support it, or run against it? Also, returning to the **skill** of synthesizing rules from cases—what is the actual rule that we learn from this unit and the preceding one for what constitutes “but-for causation”?

17. Tue., Sept. 29: Proximate Cause—Remoteness and Foreseeability

Read pp. 351-62 (to the end of ¶ 6), 363 (¶ 9), 364-65 (¶¶ 11, 12).

As I mentioned in the past unit, when we say “cause” we’re sometimes making a factual claim: But for defendant’s behavior, plaintiff wouldn’t have been injured, so defendant caused plaintiff’s behavior.

But we’re sometimes also making a normative claim about whether defendant should be seen as responsible for plaintiff’s injury, even if there’s no doubt that defendant was the but-for cause. That’s the “proximate cause” concept, which (like “cause-in-fact”) arises not just in tort law but also in criminal law and in other fields.

For instance, say that Joe Schmoe, a 20-year-old, firebombs a university building at which research that uses animal subjects is conducted. It turns out that Schmoe was taught from an early age that animal research is morally tantamount to murder, and that it should be fought by whatever means are available. (If you’d prefer, imagine a similar scenario where Schmoe firebombs an abortion clinic, because he was taught something similar about abortion.) The university sues not just Schmoe, who has no money, but also Schmoe’s parents, who are rich.

Is it “unreasonable” for parents to teach a child that violence is morally proper? A jury might so conclude. Was the parents’ teaching a but-for cause of the harm? Again, a jury might so conclude, on the grounds that most people don’t engage in such conduct, so that one likely cause (even though not the only possible cause) for the behavior is the parents’ teaching, and so that if the parents had taught the child not to take his views that far, he probably wouldn’t have committed the firebombing. But I take it that many people would balk at treating the parents’ actions as even one *legally significant* cause of the tort. Their place in the chain of causation might be seen as so “remote” that they shouldn’t be labeled as legal causes of the harm. But why, and exactly under what circumstances?

In this unit, we’ll discuss these concepts. (We’ll also practice the important lawyerly **skill** of keeping two similar and similarly named but different concepts separate in our heads, and on our tongues.) One important thing to keep in mind: The cause in fact question is, true to its name, mostly an inquiry about what likely *would* have happened but for the defendant’s actions; it’s thus mostly a factual (though counterfactual) inquiry. The proximate cause question is an inquiry about when it is *proper* to hold someone responsible even though he is likely the factual cause of a harm; it’s thus mostly a normative inquiry.

18. Wed., Sept. 30: Ninth Circuit Chief Judge Alex Kozinski Guest-Speaking (room 1357)

Judge Kozinski, for whom I had the honor of clerking, is one of the most prominent court of appeals judges in the country, and the author of many important opinions on tort law.

19. Mon., Oct. 5: Proximate Cause—Intervening Causes

Read pp. 368-76 (to the end of ¶ 8(d)).

The issue here is related to one we studied a few weeks ago: When should a defendant be liable for crimes or torts committed by third parties? **Question:** How, if at all, do the readings here affect the result in such cases, for instance if an apartment building owner is found to be negligent for failing to properly secure the building to prevent criminal attacks on its tenants? Would the owner be able to say that, even if he was negligent in that respect, his negligence is nonetheless not the proximate cause of the attack, because the attack was an intentional intervening act that cut off the chain of causation?

20. Tue, Oct. 6: Catch-Up Day

21. Wed., Oct. 7: Strict Liability—Starting with Animals

Read pp. 395-402 (to the end of ¶ 4), 403-05 (¶¶ 6, 7).

We've studied intentional torts, under which defendants are held liable for knowingly or purposefully causing a harm. We've studied negligence, under which defendants are held liable for causing harm because they failed to use reasonable care. We're now shifting into the third model of tort liability, which is liability regardless of the care one has used.

Thus, as we'll see in this unit, if you own a wild, dangerous animal and the animal escapes, you can generally be held strictly liable for the harm that the animal has caused. But this is *not* because keeping such an animal is inherently unreasonable and therefore negligent (i.e., this isn't just the application of *res ipsa loquitur*). Keeping dangerous animals, for instance in zoos and circuses, is seen as perfectly reasonable—we'll see this even more clearly in the later strict liability units, where the defendant's behavior could be socially very important. Nor can the defendant get off the hook because he can show that he took the utmost of precautions to avoid the harm. So long as the harm happens (and is caused, in fact and proximately, by defendant's conduct), the defendant is liable.

Relatedly, holding someone strictly liable doesn't have the same element of moral condemnation as does holding someone liable on a negligence theory. Negligence is careless and unreasonable behavior, which involves lack of due attention to the interests of others. But strict liability is conceptualized as just the cost of doing business. The message is often "keep on doing what you're doing, and we might even say you're an important contributor to the community for doing it, so long as you compensate people who are harmed by your actions."

In this unit, we're going to focus on the doctrine, and we'll save the policy discussion chiefly for the next unit.

22-23. Mon., Oct. 12; Tue., Oct. 13: Strict Liability—*Rylands v. Fletcher* and Abnormally Dangerous Activities

Read pp. 406-11 (to the end of ¶ 4), 413-16 (¶¶ 8-10).

Read pp. 416-29 (to the end of ¶ 6).

There are many rationales supporting strict liability, and many opposing it. Here's a classic example, which you read earlier (on pp. 94-95 ¶ 10), and will read again in the next unit (on p. 752), from Baron Bramwell in *Bamford v. Turnley* (Exch. Ch. 1862):

It is for the public benefit that there should be railways; but it would not be unless the gain of having the railway was sufficient to compensate the loss occasioned by the use of the land required for its site; and accordingly, no one thinks it would be right to take an individual's land without compensation, to make a railway. It is for the public benefit that trains should run, but not unless they pay their expenses. If one of these expenses is the burning down of a wood of such value that the railway owners would not run the train and burn down the wood if it were their own, neither is it for the public benefit that they should if the wood is not their own. If, though the wood were their own, they still would find it compensated them to run trains at the cost of burning the wood, then they obviously ought to compensate the owner of such wood, not being themselves, if they burn it down in making their gains.

Even eminently socially useful activity, the argument goes, is socially useful only because the net benefit of the activity to everyone in society exceeds the net harm of the activity. So

the way to make sure that people act in a way that is indeed socially useful is by requiring them to bear the costs of the activity as well as getting the benefits. And, the argument goes, it's also fair that those who profit from an activity should compensate those who are harmed by it. (What other policy arguments are there, by the way, for strict liability?)

Given this, then, why not impose strict liability in all situations? As the book asks (p. 395), "why should fault *ever* be considered necessary to justify liability when the defendant is causally responsible for a plaintiff's injuries?" Hint: Imagine that you and I are driving, and our cars collide into each other. What, if any, problems would be caused by imposing strict liability on everyone who was "causally responsible" for your and my injuries?

Another policy question: Why limit strict liability to "abnormally dangerous activities"? What is it about the *abnormal* danger that justifies strict liability, even if the danger is abnormal but *not unreasonable*? (Recall that if the concern were about unreasonably dangerous activities, we'd only need negligence liability to handle that.)

24-25. Wed. Oct. 14; Thu., Oct. 15, 11 to 12:15 (rescheduled from Wed., Oct. 21): Strict Liability, Negligence, or Intentional Tort?—Nuisance

Read pp. 749-65 (nuisance generally), 765-69 (coming to the nuisance).

Nuisance law gives us another perspective on some of the arguments about strict liability; compare, for instance, *Rylands* (or the blasting example discussed on p. 418) and Baron Martin's prevailing opinion in *Bamford*. The premise behind nuisance law is that you may be liable to a neighbor if your activity harms his use of his property, even if you engaged in that activity as reasonably and carefully as possible. That sounds like strict liability for inflicting harm.

At the same time, such strict liability is often limited in situations where the use of the property is "unreasonably" injurious (see p. 761)—though the unreasonableness rests in undertaking the activity in the first place, rather than in any lack of care with which the activity is undertaken.

Note also that nuisance is formally defined as an intentional tort (see pp. 760-61), in the sense that the defendant always knows that he is causing harm to the plaintiff. At the same time, in many strict liability contexts, the defendants know that their actions cause some predictable amount of harm. Someone who is engaged in abnormally dangerous activity such as blasting, for instance, may know that his blasting will cause some damage to neighboring property over the course of the operation. Likewise, a manufacturer whose products unavoidably have some manufacturing defect rate may know that over the lifespan of the product some people will be injured by the defective units.

We therefore won't spend much time here talking about which box nuisance should be fit into; rather, we'll see what the boundaries of the tort are, what the disputes are about those boundaries, and how they connect to the strict liability torts that we're discussing here.

Concepts: We will also spend some more time talking, in our usual informal way, about *law and economics*. Many of the arguments we'll see in this unit have to do with figuring out what is likely to be the most efficient rule.

By the way, Ronald Coase's *The Problem of Social Cost* (discussed at pp. 758-59) is the fifth most cited law review article in history, counting by law review citations, and not even including citations in economics articles. It was also cited in the Royal Swedish Academy of Sciences' explanation of why it gave Coase the Nobel Prize in Economics.

26. Mon., Oct. 19: Strict Liability—Respondeat Superior

Read pp. 433-47 (up to the end of ¶ 10).

Say you're hit by a car that's delivering food from a restaurant, which is driven by the restaurant owner's employee; and say that the driver is negligent. You can then sue not only the driver but also the restaurant owner.

Any lawsuit against the driver must be based on a negligence theory, since drivers aren't strictly liable for car accidents. But if the driver was negligent, then the restaurant owner is strictly liable for his employee's tort—the owner is liable even though the owner himself may have acted entirely reasonably (e.g., screened his driver reasonably, made sure the car was maintained reasonably, and so on). So the basis for liability is *someone's* negligent conduct, but not the *defendant's* negligent conduct; the *defendant* is being held strictly liable.

Concepts: (1) This is also called “*vicarious liability*,” a concept that arises in various fields, even when employees aren't involved. (In copyright law, for instance, it is one of the means through which bars may be held liable if bands that play in the bar sing other people's songs without getting a proper copyright license.) “Vicarious” simply means “based on the actions of another”; the employer is liable to the same extent as its employee. Again, you should distinguish this from negligent hiring or negligent supervision liability, in which the restaurant owner would be liable for his own negligence in improperly selecting or supervising the driver.

(2) An employer is strictly liable for its employee's torts, but only when the torts are within the *scope of employment*. Obviously, if I hit you in the car while driving to the beach from my home on Saturday, the University isn't going to be responsible. Nor would it be responsible even if I'm driving during “working hours,” but on a “frolic and detour” of my own. (That's why lawsuits over intentional attacks by employees on customers are based on a negligent hiring or supervision theory, and not on a vicarious liability theory.) Where the line is drawn is one of the things that we'll discuss in this unit.

(3) We're also going to be touching on the common and important distinction between *employees and independent contractors* (relevant in, among other things, tax law, copyright law, and more).

27. Tue., Oct. 20: Products Liability—Manufacturing Defects (no class Wed., Oct. 21)

Read pp. 462 (from the start of ¶ 2)-73, 477-79 (to the end of ¶ 9).

Read this passage from Restatement (Third) of Torts, Product Liability § 2: “A product is defective when, at the time of sale or distribution, it contains a manufacturing defect, is defective in design, or is defective because of inadequate instructions or warnings. A product: (a) contains a manufacturing defect when the product departs from its intended design even though all possible care was exercised in the preparation and marketing of the product.”

There are three different forms of products liability—liability for manufacturing defects (which is strict liability), liability for design defects (which turns out to be in some measure negligence-based), and liability for failure to warn (which also turns out to be in some measure negligence-based). Keep them separate in your minds.

Historically, products liability evolved from breach of warranty law. If I sell you a car, I’m implicitly warranting the car doesn’t have broken parts, or possibly even design defects that make it unreasonably unsafe. What’s more, breach of contract (once the terms of the contract are found to have been violated) is a strict liability matter. If the car turns out to have brakes that don’t work, you can sue me for not delivering what I promised: a safe car, or at least one with working brakes. (This is an oversimplification, but sufficient for our purposes.)

But breach of warranty can generally be raised only by a party to a contract. If I sell you a defective car, and the defect causes you to injure Joe Schmo, Schmo generally can’t sue me for breach of warranty. Over time, this requirement of “privity of contract” for a product defect lawsuit was eroded, which was a step in the direction of modern product liability.

Products liability also evolved in some measure from *res ipsa loquitur* principles of negligence law. If a bottle of Coca-Cola explodes in your hand, *res ipsa loquitur* suggests that the reason for the accident was negligence on Coca-Cola’s part in filling the bottle. (Again, an oversimplification.) But this works only if there was some reasonably cost-effective way of avoiding all manufacturing defects. If it turns out that even a nonnegligent bottle filling mechanism will cause some number of exploding bottles, the negligence theory doesn’t work. Over time, this requirement of a showing of negligence was also eroded, which again was a step in the direction of modern product liability.

I say all this to give you a brief historical summary; if you want to learn more, feel free to read pp. 449-62 of the textbook. But to save time, I’m assigning you only this quick synopsis.

28-29. Mon., Oct. 26; Tue., Oct. 27: Products Liability—Design Defects

Read pp. 479-94.

Read these passages from the Restatement (Third) of Torts, Product Liability:

§ 2: A product ... (b) is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe.

§ 4 ... (a) [A] product’s noncompliance with an applicable product safety statute or administrative regulation renders the product defective with respect to the risks sought to be reduced by the statute or regulation

(b) [A] product’s compliance with an applicable product safety statute or administrative regulation is properly considered in determining whether the product is defective with respect to the risks sought to be reduced by the statute or regulation, but such compliance does not preclude as a matter of law a finding of product defect.

With manufacturing defects, even entirely reasonable behavior on the manufacturer’s

part won't prevent liability: If even the best manufacturing process produces glass jars that shatter one time in a million, an injury caused by such a shattering jar would lead to liability even though the manufacturer acted perfectly reasonably. What constitutes a "defect[ive]" item is determined with reference not to what's reasonable behavior, but to how normal copies of the item behave.

But such strict liability doesn't apply to design defects: People can be seriously injured in any car, but this doesn't mean that all car designs are defective. Rather, strict liability for design defects is in large measure negligence-based, because a "design defect" is something that "renders the product not reasonably safe" (p. 479). Consider also the consumer expectations test, pp. 487-89 (§§ 2, 3), which is something of an alternative to the risk-utility balancing approach, accepted by some courts: In what way is it also negligence-based?

Do not be lulled, though, into a false sense of security by language such as "balancing" or "reasonableness." Behind many design defect claims are attempts to "balance" things that are incommensurable or at least conceptually hard to compare; and it's not clear exactly how a jury is to predictably determine whether the "risk" of a design exceeds its "utility." We'll explore this in the following problem:

Drunk driving likely causes about 5000-10,000 deaths per year, *excluding* deaths of the drunk drivers themselves. It also causes many more injuries.

A car manufacturer could produce all cars with "ignition interlock devices" that can test the driver's breath alcohol level, and prevent the car from being started if the driver appears to be drunk. The devices may be evaded (for instance, if the driver gets a sober friend to blow into the device when the driver starts the car), but let's assume that in practice the devices do a pretty good job of preventing drunk driving. And let's also assume that they begin to cost only about \$200. (They seem to cost about \$1000 right now, but there's no reason why the price might not decline over time, especially if they become more broadly used.)

Paula Poe, who is injured by a drunk driver who is driving a Toyota at 90 miles per hour, sues Toyota for two things: (1) failing to include an ignition interlock device as standard equipment on the car, and (2) designing a car that can drive 90 miles per hour.

When pressed about the possibility that someone might, under rare emergency circumstances, need to drive 90 miles per hour to save someone's life, Poe's lawyers point out that modern cellular telephone technology would allow a car to automatically notify the local police station whenever it's being driven above a certain speed. Then the police could track the car and either give the driver a ticket (or even arrest him), or, if there is an emergency, protect the driver (if the driver is fleeing criminals) or escort him safely to the hospital. How would this be analyzed under the principles we're studying? How should it be analyzed?

Concept—should certain decisions be made by legislators, judges, or jurors?

Among other things, we'll return here to a matter we discussed in the negligence and the duty to protect against third parties (see p. S17)—should these design decisions be made exclusively by legislatures and regulatory agencies, should they also be made by judges, or should they generally be delegated to juries as well in a broad range of cases?

Are there reasons why you might support statutes mandating ignition interlock devices, or radio warnings to the police when one is driving over 90 mph, but oppose decisions by juries (in the absence of a statute) imposing liability in such situations? Are there reasons why you might prefer jury decisionmaking here to legislative decisionmaking? Or should our only concern be with the substance of the rule being applied, rather than with who is making the decision?

30. Wed., Oct. 28: Products Liability—Failure to Warn

Read pp. 499-502 (¶¶ 1-3), 509-15. “Section 402” near the bottom of p. 501 should read “Section [402A].”

Read this passage from Restatement (Third) of Torts, Product Liability § 2:

A product: ... (c) is defective because of inadequate instructions or warnings when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the instructions or warnings renders the product not reasonably safe.

Concept: A *duty to warn* (which is to say liability for failure to warn) is commonly urged in a wide range of cases. Some aspects of “negligent misrepresentation” law, for instance, rest on a failure to reveal information that should have been revealed; likewise for securities law.

And a duty to warn is appealing, because it seems relatively cheap and thus reasonable. It may be very expensive for a manufacturer to *mitigate* many possible dangers of a product, by implementing all safety measures that the manufacturer might fear a jury would find to be required under a “reasonableness” standard.” But how expensive can it be to warn about the dangers?

Well, how expensive is it, if you take a *broad view of “expense”*? What are the possible practical costs of warnings? How should these costs be considered in deciding whether instructions or warnings are “reasonable”? (A broad view of “cost” or “expense” is itself an important concept applicable to a wide range of legal and economic analysis.)

31. Mon., Nov. 2: Damages

Read

- as to lost earnings, pp. 526-30,
- as to punitive damages, pp. 552 (only the paragraph between the section heading and *Murphy*), 555-58 (*Kemezy*), 558-61 (§§ 2, 3), 565 (§ 9), and
- as to joint and several liability, pp. 345-47 (to the end of section 2).

Concept—types of damages: How much a plaintiff can recover is often as important as whether he can make out the elements of the case. For instance, if the available damages (multiplied by the probability of success) are lower than the costs of litigating, a plaintiff might not be willing to sue at all. (That’s an oversimplification, but let’s go with it for now.) Likewise, if the available damages multiplied by the probability of success are lower than some threshold, a lawyer might not be willing to take the case on contingency.

Damages often vary from field to field. In Contracts class, you’ll learn about the limits of contract damages. Copyright law lets successful plaintiffs recover “statutory damages”—damages in a statutorily fixed range that can be gotten even without proof of actual damages. Some fields of law allow one to recover up to three times one’s actual damages, if the defendant’s behavior was bad enough.

In tort law, the basic available damages are these:

- (1) Any loss of value to injured property (e.g., the cost of your car if the defendant totally destroyed it).
- (2) Loss of future earnings in case of personal injury (we’ll discuss this more in this unit).
- (3) The cost of medical care and other remedial care needed to “make the plaintiff whole” (or as close to whole as possible).
- (4) Money to compensate plaintiff for his pain and suffering as a result of the injury.
- (5) Money to compensate plaintiff for his pain and suffering as a result of fright when anticipating the injury (e.g., as the plane was plummeting to the ground).
- (6) Wrongful death damages, which compensate a dead person’s close relatives for the damages (including emotional distress) caused by the loss of their loved one.
- (7) “Loss of consortium,” which compensates plaintiff’s spouse for the loss of spousal help and enjoyment (including but not limited to loss of sexual relations) as a result of the injury. In some states, but not in California, it also includes money to compensate plaintiff’s parents or children for the loss of help and affection as a result of the injury.
- (8) Usually out-of-pocket court costs (filing fees, deposition transcript fees, and the like), but not the plaintiff’s attorney fees. Likewise, a losing plaintiff must generally pay defendant’s court costs but not the defendant’s attorney fees.
- (9) Possible punitive damages (again, we’ll discuss this more in this unit).

Many state “tort reform” statutes have capped noneconomic damages (i.e., categories 4, 5, 6, and 7) in some cases, especially medical malpractice cases, at some amount in the hundreds of thousands of dollars. For instance, Cal. Civil Code § 3333.2, provides that in actions “against a health care provider based on professional negligence,” “noneconomic losses to compensate for pain, suffering, inconvenience, physical impairment, disfigurement and other nonpecuniary damage” are capped at \$250,000.

Plaintiff’s insurance: If the plaintiff has insurance, that does *not* diminish the damages defendant must pay. If you drive a \$20,000 car, and the defendant destroys the car, he must pay you the full \$20,000, even if you’ve gotten \$19,000 (the value of the car minus a \$1000 deductible) from your insurance company. The premise is that the defendant shouldn’t get a windfall as a result of plaintiff’s prudence—and that the plaintiff paid the insurance pre-

miums, and therefore the benefit of the insurance should flow to the plaintiff and not the defendant. This is called the “collateral source rule”: Compensation that the plaintiff gets from a “collateral source” (usually the insurance company) doesn’t offset plaintiff’s recovery from the defendant.

But under the principle of “subrogation,” an insurance company will be able to sue the defendant based on your injury (since it has paid for the injury), get reimbursed for its costs, and then pass along to you any remaining amount. Thus, in the car example, the insurance might pay you the \$19,000 up front, and then sue on your behalf; when they get the \$20,000, they’d keep the \$19,000 and pay you the remaining \$1000. (Of course, this example ignores attorney fees, which are almost sure to eat up any excess.)

Defendant’s insurance: Defendants’ losses, and attorney fees, will also often be covered by defendants’ liability insurance policies, whether under auto insurance, homeowner’s insurance, professional liability insurance, or business liability insurance. Business insurance policies often have high deductibles, though, so much of the loss will have to be borne by the defendant. (Why, by the way, does it make sense for big business defendants to have high deductibles on their liability insurance policies?)

In many states, punitive damages are not insurable, when they are imposed on the defendant because of the defendant’s own fault. (Why wouldn’t they be insurable?) But in other states, they are insurable. And in most states, punitive damages that are imposed because the defendant is vicariously liable for someone’s actions (for instance, the actions of an employee that weren’t prompted or ratified by the employer) are insurable.

Concept—Joint and several liability: See pp. 345-47 for a discussion of this important concept.

32. Tue., Nov. 3: Contributory & Comparative Negligence

Read pp. 571-573 (¶¶ 1-2), 577-84 (to the end of ¶ 4), 586-87 (¶ 10).

Contributory negligence, while historically very important, is now the law only in Alabama, Maryland, North Carolina, Virginia, and D.C. But even California lawyers can't ignore it. To see why, answer this question: Why did *Holman v. McMullan Trucking*, 684 So. 2d 1309 (Ala. 1996), discuss comparative negligence principles, even though Alabama is a contributory negligence state? The case is not in the readings, so you need to look it up; and try to guess the explanation first, before finding the case.

Concepts: We talk here about *defenses*. A typical cause of action has certain elements that must be shown to result in liability. But the defendant can then raise defenses, which have their own elements; if those are shown, then there is no liability.

A classic example: If A deliberately injures B, that could be both a crime and a tort (the elements of which are, roughly, intentionally injuring someone). But if B raises and proves the *defense* of self-defense, then B will be off the hook. (In case you're curious, the elements of self-defense when B is using nonlethal force are generally that the force was (1) necessary to prevent a (2) reasonably apprehended risk of (3) unjustified (4) injury (5) by A to B.)

What are the consequences of labeling something a defense?

1. It shifts *the burden of introducing evidence*: While the plaintiff has the burden of introducing evidence to show the elements of the tort, the defendant has the burden of introducing evidence to show the defense. If the defendant introduces no evidence to support the claim of the defense, then the court will refuse to instruct the jury to consider the defense.

2. It generally shifts *the burden of persuasion*: While the plaintiff has the burden of proving the elements of the tort by a preponderance of the evidence (so that if the evidence is evenly balanced, defendant should win), the defendant has the burden of proving his defense, also by a preponderance of the evidence. (This is generally *not* so for in criminal law.)

3. It requires lawyers to tie their factual arguments to the right elements: For instance, say you want to argue that your client (the defendant) isn't liable because the plaintiff expressly assumed the risk. You need to tie the facts to the elements of the express assumption of risk defense, rather than to the elements of the underlying negligence cause of action.

Indeed, if you prevail, the defendant will be held not liable on the plaintiff's negligence claim. But this might be on the grounds that defendant was negligent but plaintiff assumed the risk, rather than on the grounds that defendant wasn't negligent. You need to make sure that your argument is crafted to fit those grounds, rather than mixing up the elements of negligence and express assumption of risk.

On the other hand, sometimes the same evidence might show *both* that the defendant wasn't negligent *and* that, even if he was negligent, plaintiff expressly assumed the risk. Then you need to tie the evidence separately to the elements of the negligence cause of action and to the elements of the defense. Remember that the two are conceptually different, even if they may sometimes be shown using the same facts.

There are also two other concepts in play here. First, we'll see the possibility of *partial defenses*, in our discussion of comparative negligence—this defense doesn't completely relieve the defendant of liability, but rather mitigates defendant's liability. (Compare, in criminal law, the view in some states that "extreme emotional disturbance" is a defense that mitigates murder to voluntary manslaughter, or that unreasonable self-defense likewise mitigates murder to involuntary manslaughter.)

Second, we'll see it's generally legally permissible to argue *in the alternative*, e.g., "We weren't negligent, and, even if we were, so was the plaintiff," or *conditionally*, e.g., "Even assuming for purposes of this particular summary judgment motion that we were negligent, we aren't liable because so was the plaintiff." Sometimes such arguments may be rhetorically less effective than other arguments. But in principle they are logically and legally available.

33. Wed., Nov. 4: Express Assumption of Risk

Read pp. 587-95 (to the end of ¶ 6).

Concepts: This unit lets us see *the importance of contracts*, everywhere and not just in your Contracts class. For instance, they're important in copyright law, where copyright interests are often contractually assigned. They're important in criminal procedure, where plea bargains are generally treated under contract law principles. And they're important in many torts cases, both to litigators, and to lawyers who are trying to prevent litigation.

The unit also lets us see *the limits on contract*. As you'll see, express waivers of liability are often effective, but sometimes not. Ask yourself: Why might we (as disinterested observers, rather than lawyers for the parties) want such contracts to be enforced? Why might we not want it? What are sensible lines to be drawn?

One common proposed limit has to do with situations of "*disparity of bargaining power*." But what exactly does that mean? How do we know whether there is such a disparity?

Say, for instance, that you're renting an apartment. You might not be able to bargain about any waivers of liability that you're asked to sign, and you might say, "Aha! That's because the landlady has more bargaining power than I do." But you might well be able to bargain about the rent (especially if the apartment has been sitting vacant for some months, or if you are especially creditworthy or otherwise desirable as a tenant), or about the minimum lease term. See, e.g., <http://djcoregon.com/news/2009/07/28/concessions-to-renters-could-prove-costly/>. What does that do to the theory that "disparity of bargaining power" explains the inability to get concessions on the liability waiver? Might there be some other reason why the landlady would be unwilling to bargain over the liability waiver even if she's willing to bargain over other items? The same point can be made as to employment agreements.

Relatedly, should we focus on just the bargaining power of the particular person involved, or of people (such as consumers) as a class? For instance, if you try to bargain about the price of apples with a supermarket employee, you'll almost certainly get nowhere, though you might be able to bargain with a car dealer, or over salary with an employer. Yet if the price of apples is too high, the supermarket owner knows people won't buy, so supermarkets (and other stores) are quite sensitive to consumer price preferences. Should we view this as a situation of low or high consumer bargaining power? Would this generalize to other terms of a contract besides price, such as liability? We'll have a chance to discuss all these questions.

Finally, we'll talk more about *incentive effects*, a topic we've discussed often. What are the incentive effects of allowing waivers in each of these cases? Of rejecting waivers?

34. Mon., Nov. 9: Primary Assumption of Risk

Read pp. 596-603.

In this unit, we talk about risks that a plaintiff can be said to have accepted as an inherent part of the game or profession in which he's engaged, even if there was no express waiver. It's easy to talk about this as a matter of "implied" assumption of risk, but that assumes the conclusion: The question is when voluntarily engaging in a certain kind of behavior should indeed be seen as "implying" agreement to run a certain risk.

And we'll ask again about *incentives*. How would imposing liability in each of these cases affect the behavior of the people who are likely to be injured, and of the people who are likely to be responsible for the injury? How would rejecting liability affect people's behavior?

35. Tue., Nov. 10: Elaine Mandel and Sandra Barrientos Guest-Speaking; no class Veterans' Day, Wed., Nov. 11

Elaine and Sandra are both UCLA School of Law classmates of mine; Elaine is a tort plaintiffs' lawyer at Kiesel, Boucher & Larson LLP, and Sandra is a tort defense lawyer for the state of California.

36. Mon., Nov. 16: Intentional Infliction of Emotional Distress

Read pp. 70-76, 79-83, and *Citizens Publishing* below.

We are done with the torts that generally focus on physical injury and injury to property—trespass, negligence, and strict liability—and we’re about to deal with torts that deal with less tangible injuries. And in these units, we’ll return to a question we’ve touched on before: When should some behavior, even when it inflicts harm, be seen as part of a person’s liberty—whether constitutionally protected liberty, such as the freedom of speech, or simply a liberty to do what one pleases (at least in many situations) even when that seriously distresses others?

In principle, intentionally or recklessly inflicting serious emotional distress on someone through outrageous means sounds like pretty bad behavior. Yet “outrageous” is a pretty subjective term. (Is it more subjective than “reasonable care,” by the way? Less subjective? Differently subjective?) What’s more, as cases such as *Hustler* shows, a good deal of public debate involves behavior that at least some see as outrageous. And it seems likely that an “outrageousness” standard for such speech would often turn in large part on whether the jury sympathizes with the ideas that the speech expresses.

Is it proper to restrict liberty—either the liberty of speech, or people’s liberty more broadly—because people’s conduct is recklessly or purposefully seriously emotionally distressing, and “outrageous”? Is it proper to have standards that are defined in terms of “outrageousness”? Do you like the results in the cases that we’ve read? If you think they are basically right, does it suggest that “outrageousness” is an acceptable standard?

First Amendment note: Note that parts of this unit raise obvious First Amendment questions. There’s a whole upper-division class on First Amendment law, and we obviously won’t try to cover all that material in part of one class session. Our class discussion will be focused on tort law policy arguments, rather than on free speech doctrine. But many common free speech policy arguments can also be easily turned into tort law policy arguments, so think back on free speech arguments you’ve heard in the past, and see how you can apply them here. In particular, let me note several well-established free speech principles that are uncontroversial enough that we can take them for granted for purposes of class discussion:

(1) Speech can be deterred by the threat of civil liability, and not just by the threat of criminal punishment. It’s certainly plausible to argue that some speech should indeed be deterred, notwithstanding the social value of free speech generally. But it’s hard to go far by denying that civil liability can deter speech (in fact, that’s often its point), or that free speech issues are therefore legally in play in civil cases.

(2) Though you may have heard that First Amendment law offers less protection to “commercial speech,” that exception to full protection applies basically to commercial *advertising*. Arguments for free speech protection (and for speech restriction) generally apply to material that is *commercially distributed* no less than to material that is distributed for free. In fact, most valuable speech, such as books, newspapers, magazines, movies, and the like is commercially distributed.

***Citizens Publishing Co. v. Miller*, 115 P.3d 107 (Ariz. 2005)**

On December 2, 2003, the *Tucson Citizen* published a letter on its Op-Ed page from Emory Metz Wright, Jr. In its entirety, the letter stated:

We can stop the murders of American soldiers in Iraq by those who seek revenge or to regain their power. When-

ever there is an assassination or another atrocity we should proceed to the closest mosque and execute five of the first Muslims we encounter.

After all this is a “Holy War” and although such a procedure is not fair or just, it might end the horror.

Machiavelli was correct. In war it is more effective to be feared than loved and the end result would be a more

equitable solution for both giving us a chance to build a better Iraq for the Iraqis.

The letter prompted immediate adverse reaction. From December 4 through 6, 2003, the *Citizen* published twenty-one letters from readers who criticized Wright's letter....

On January 13, 2004, [Aly W.] Elleithe and Wali Yudeen S. Abdul Rahim filed a complaint in superior court ... against the *Citizen* and Wright for assault and intentional infliction of emotional distress, seeking damages and injunctive relief. Plaintiffs sought to represent a putative class of "all Islamic-Americans who live in the area covered by the circulation of the *Tucson Citizen*, including the reach of the Internet website published by the *Tucson Citizen*." ...

The superior court ... declined to dismiss Plaintiffs' claim for intentional infliction of emotional distress, holding that "reasonable minds could differ in determining whether the publication of the letter rose to the level of extreme and outrageous conduct" needed to establish the emotional distress tort. The court also rejected the *Citizen's* First Amendment argument for dismissal, reasoning that "a public threat of violence directed at producing imminent lawlessness and likely to produce such lawlessness is not protected." ...

For present purposes, we assume *arguendo* that the superior court correctly held that Plaintiffs' complaint stated a claim for intentional infliction of emotional distress.

However, our assumption that the complaint states a claim for relief under Arizona tort law merely begins the inquiry.... [T]he enforcement of state tort law through civil litigation may "impose invalid restrictions on ... constitutional freedoms of speech and press" and thus constitute state action [violating the First Amendment]....

While speech involving private matters "is not totally unprotected by the First Amendment," in most such cases a state's interest in compensating its citizens for injuries arising from tortious

speech will outweigh any First Amendment concerns. "Generally speaking the law does not regard the intent to inflict emotional distress as one which should receive much solicitude, and it is quite understandable that most if not all jurisdictions have chosen to make it civilly culpable where the conduct in question is sufficiently 'outrageous.'" *Hustler Magazine v. Falwell*.

But when speech involves a matter of public concern, the balance changes significantly. "In the world of debate about public affairs, many things done with motives that are less than admirable are protected by the First Amendment." When speech is about a matter of public concern, state tort law alone cannot place the speech outside the protection of the First Amendment. This is because "at the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern."

Even when speech involves matters of public concern, the protections afforded by the First Amendment are not absolute. But those seeking to impose liability for speech about matters of public concern—so-called "political speech"—must establish some "exception to ... general First Amendment principles." ...

The letter to the editor upon which Plaintiffs' complaint is based involves a matter of undeniable public concern—the war in Iraq. Thus, the question is whether the letter to the editor in this case fell within one of the "well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem." Only three such exceptions to the general rule of First Amendment protection of political speech have been suggested in this case. The trial court held that the speech at issue here was not protected because it could incite imminent lawless action. Plaintiffs argue alternatively that the statement at issue here constituted either "fighting words," or a "true threat." ...

In order to qualify as incitement ..., challenged speech must not only be aimed at producing "imminent lawless action"

but must also be “likely” to do so.... The suggestion in the letter to the editor that the intentional murder of innocent civilians is an appropriate response to the deaths of American soldiers is no doubt reprehensible, and Plaintiffs’ allegation that publication of the letter caused them and other members of the Islamic community considerable apprehension has much force. But, however offensive, the letter did not advocate “imminent lawless action.” The suggestion that “we” execute Muslims was premised on the occurrence of some future “assassination or another atrocity.”

Nor were the words likely to produce imminent lawless action. The statement was made in a letter to the editor, not before an angry mob. Indeed, the complaint was filed more than a month after the challenged statements were made and did not allege that a single act of violence had ensued from the publication nor that such violence was imminent.

Rather, the only thing that appears to have resulted from the challenged speech was *more* speech, in the form of numerous critical letters to the editor, including one from one of the Plaintiffs. This is precisely what the First Amendment contemplates in matters of political concern—vigorous public discourse, even when the impetus for such discourse is an outrageous statement.

“Fighting words” are “those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction.” Such words are “those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.”

Fighting words must be “directed to the person of the hearer.” The fighting words doctrine has generally been limited to “face-to-face” interactions.... The statements at issue [in this case] were made in a letter to the editor, not in a face-to-face confrontation with the target of the remarks. While the letter expresses controversial ideas, it contains no personally abusive words or epithets. The letter is neither directed toward any particular individual nor likely to provoke a violent reac-

tion by the reader against the speaker.

Given both the content and the context of the statement at issue here, we conclude that it is not a constitutionally proscribable true threat. First, the letter involved statements with a plainly political message. Indeed, the comments arose in the context of a discussion about a central political issue of the day: the conduct of the war in Iraq. Such statements are far less likely to be true threats than statements directed purely at other individuals.

Second, this expression occurred in the letters to the editor section of a general circulation newspaper, hardly a traditional medium for making threats, and a public arena dedicated to political speech. Speech that is part of this sort of public discourse is far less likely to be a true threat than statements contained in private communications or in face-to-face confrontations.

Third, the action “threatened” in the letter was that “we” should take deadly measures in response to *future* assassinations and other atrocities. The letter is unclear as to whom “we” refers—it could be read as referring to the United States armed forces or to the public at large. It is similarly unclear whether the letter advocates violence against Muslims in Iraq, against Muslims worldwide, or against Muslims in Tucson. Given the letter’s conditional nature and ambiguity, we do not believe that a reasonable person could view that letter as “a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.”

In short, we conclude that this letter does not fall within one of the well-recognized narrow exceptions to the general rule of First Amendment protection for political speech. It therefore follows that the *Citizen* cannot be held liable under Arizona tort law for publishing this letter. The superior court erred in not dismissing the Plaintiffs’ claim for intentional infliction of emotional distress, and we remand this case to the superior court with instructions to dismiss that portion of the complaint with prejudice.

37-38. Tue., Nov. 17; Wed., Nov. 18: Intentional Interference with Contract, and with Prospective Economic Advantage

Read the material below—the Restatement sections, *Della Penna v. Toyota Motor Sales, U.S.A., Inc.*, and *Alyeska Pipeline Serv. Co. v. Aurora Air Serv., Inc.*

In this unit, we discuss the torts of intentional interference with contract and intentional interference with prospective economic advantage (often called intentional interference with business relations). These torts are tremendously important to business litigators; if you're going to go into business law, I highly recommend that you take our course on Business Torts, which covers these torts and many others. In fact, the largest damages award and largest settlement in American history was in a tortious interference with contract case, *Pennzoil v. Texaco*—\$7.53 billion in compensatory damages and \$3 billion in punitive damages, eventually settled for \$3 billion.

They also let us deal with several important doctrinal and policy **concepts**:

1. *Motive*: As you'll see, some jurisdictions impose liability for intentional interference with prospective economic advantage based on the defendant's *motive*—not just what the defendant knew or should have known, but whether the defendant's goals were laudable (profit, public safety, and so on) or not (sheer malice or hostility). Most torts and most crimes, even ones in which mental state is important, don't focus on motive; rather, they focus on what the person knew, or should have known. But some do ask what the defendant's motivations were. What are the advantages of this approach? What are the disadvantages?

2. *Good faith*: Related to motive is the notion that people must exercise their contractual rights in "good faith." You might have seen this in your Contracts class; you'll see it discussed in *Alyeska*. What exactly does it mean? Should it be the basis for legal distinctions?

3. *Adding potential plaintiffs for otherwise wrongful conduct vs. making otherwise permitted conduct wrongful*: Sometimes the intentional interference with prospective economic advantage tort simply lets some people sue for behavior that's already tortious as to other people. A classic example (*Tarleton v. McGawley*): I am your customer, and Joe Schmoe attacks me to keep me buying from you. Schmoe is acting tortiously towards *me* (likely committing assault or battery). In that situation, the intentional interference with prospective economic advantage tort simply lets *you* sue Schmoe as well, because his injuring me is injuring you, too.

But sometimes the tort may make wrongful conduct that would otherwise be legal: For instance, say that banker Cassius Buck dislikes barber Edward Tuttle, and funds his own barbershop to compete with Tuttle. (Say also that Buck tries to persuade customers to switch from Tuttle to Buck's barbers, through means that would not otherwise be tortious.) If Buck is held liable for intentional interference with Tuttle's prospective economic advantage, that would be making tortious something that would otherwise be legal competition. See *Tuttle v. Buck*, 119 N.W. 946 (Minn. 1909) (a controversial decision imposing liability in such a case).

It's important to distinguish these two roles of the tort. The first category (adding potential plaintiffs) is not very controversial, largely because it doesn't affect prospective defendants' liberty, but merely increases the deterrent effect on such defendants. The second category is much more controversial, because it does indeed constrain people's liberty. Perhaps that constraint is sound, but it requires extra justification beyond the justification needed just to broaden the scope of potential plaintiffs.

4. *The relationship between contract law and tort law*: The intentional interference with contract tort is often defended on the grounds that (a) breach of contract is wrong, and (b) inducing someone else breach a contract must therefore likewise be wrong, just as inducing someone to commit a crime is itself a crime. Can you think of some problems with this rationale, both given the definition of the tort, and given what you have studied about breach of contract in your Contracts class?

§ 766. Intentional Interference With Performance Of Contract By Third Person

One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.

Comment: ...

b. The rule stated in this Section does not apply to a mere refusal to deal. Deliberately and at his pleasure, one may ordinarily refuse to deal with another, and the conduct is not regarded as improper, subjecting the actor to liability.

One may not, however, intentionally and improperly frustrate dealings that have been reduced to the form of a contract. There is no general duty to do business with all who offer their services, wares or patronage; but there is a general duty not to interfere intentionally with another's reasonable business expectancies of trade with third persons, whether or not they are secured by contract, unless the interference is not improper under the circumstances. When the interference is with a contract, an interference is more likely to be treated as improper than in the case of interference with prospective dealings, particularly in the case of competition

c. Historical development. Historically the liability for tortious interference with advantageous economic relations developed first in cases of intentional prevention of prospective dealings, by violence, fraud or defamation—conduct that was essentially tortious in its nature, either to the third party or to the injured party.

In 1853, the decision in *Lumley v. Gye*, 118 Eng. Rep. 749, began the development of inducement of breach of contract as a separate tort. In that case a singer under contract to sing at the plaintiff's theatre was induced by the defendant, who operated a rival theatre, to break her contract with the plaintiff in order to sing for the

defendant. No violence, fraud or defamation by the defendant was alleged. The decision in favor of the plaintiff was rested largely on the analogy of the rules relating to enticement of another's servants. This case differed from earlier cases in that the means of inducement used by the defendant were not tortious toward the singer. Subsequent cases extended the rule of *Lumley v. Gye* to contracts other than contracts of service and to interference with advantageous business relations even when they were not cemented by a contract....

The liability for inducing breach of contract is now regarded as but one instance, rather than the exclusive limit, of protection against improper interference in business relations. The added element of a definite contract may be a basis for greater protection; but some protection is appropriate against improper interference with reasonable expectancies of commercial relations even when an existing contract is lacking. The improper character of the actor's conduct and the harm caused by it may be equally clear in both cases. The differentiation between them relates primarily to the scope of the justification or the kind and amount of interference that is not improper in view of the differences in the facts.

Likewise, the importance of the means of inducement relates primarily to the issue of whether the interference is improper or not. The predatory means in the early cases, intimidation and fraud, were tortious toward the plaintiff because they were calculated to, and did, affect the conduct of third persons to the plaintiff's damage. But other means may be equally calculated and effective to produce that result; and primarily the plaintiff is concerned with that result rather than with the means by which the third persons were caused to act.

The plaintiff's interest in his contractual rights and expectancies must be weighed, however, against the defendant's interest in freedom of action. If the defendant's conduct is predatory the scale on his side may weigh very lightly, but if his conduct is not predatory it may weigh

heavily. The issue is whether in the given circumstances his interest and the social interest in allowing the freedom claimed by him are sufficient to outweigh the harm that his conduct is designed to produce. In deciding this issue, the nature of his conduct is an important factor.

g. Contracts terminable at will. [The tort applies to] a contract that, by its terms or otherwise, permits the third person to terminate the agreement at will. Until he has so terminated it, the contract is valid and subsisting, and the defendant may not improperly interfere with it. The fact that the contract is terminable at will, however, is to be taken into account in determining the damages that the plaintiff has suffered by reason of its breach.

One's interest in a contract terminable at will is primarily an interest in future relations between the parties, and he has no legal assurance of them. For this reason, an interference with this interest is closely analogous to interference with prospective contractual relations. (See § 766B). If the defendant was a competitor regarding the business involved in the contract, his interference with the contract may be not improper. (See § 768, especially Comment *i*)....

i. Actor's knowledge of other's contract. To be subject to liability under the rule stated in this Section, the actor must have knowledge... that he is interfering with the performance of [a] contract....

j. Intent and purpose. The rule stated in this Section is applicable if the actor acts for the primary purpose of interfering with the performance of the contract, and also if he desires to interfere, even though he acts for some other purpose in addition... [But it] applies also ... [when] the actor ... [merely] knows that the interference is certain or substantially certain to occur as a result of his action....

The fact that this interference with the other's contract was not desired and was purely incidental in character is, however, a factor to be considered in determining whether the interference is improper. If the actor is not acting criminally nor with fraud or violence or other means wrongful in themselves but is endeavoring

to advance some interest of his own, the fact that he is aware that he will cause interference with the plaintiff's contract may be regarded as such a minor and incidental consequence and so far removed from the defendant's objective that as against the plaintiff the interference may be found to be not improper.

k. Means of interference.... The interference is often by inducement. The inducement may be any conduct conveying to the third person the actor's desire to influence him not to deal with the other. Thus it may be a simple request or persuasion exerting only moral pressure. Or it may be a statement unaccompanied by any specific request but having the same effect as if the request were specifically made. Or it may be a threat by the actor of physical or economic harm to the third person or to persons in whose welfare he is interested. Or it may be the promise of a benefit to the third person if he will refrain from dealing with the other.

On the other hand, it is not necessary to show that the third party was induced to break the contract. Interference with the third party's performance may be by prevention of the performance, as by physical force, by depriving him of the means of performance or by misdirecting the performance, as by giving him the wrong orders or information.

l. Inducement by refusal to deal. A refusal to deal is one means by which a person may induce another to commit a breach of his contract with a third person. Thus A may induce B to break his contract with C by threatening not to enter into, or to sever, business relations with B unless B does break the contract.

This situation frequently presents a nice question of fact. While, under the rule stated in this Section, A may not, without some justification induce B to break his contract with C, A is ordinarily free to refuse to deal with B for any reason or no reason. The difficult question of fact presented in this situation is whether A is merely exercising his freedom to select the persons with whom he will do business or is inducing B not to perform his contract with C. That freedom is not restricted by the relationship between B and C; and A's

aversion to C is as legitimate a reason for his refusal to deal with B as his aversion to B. If he is merely exercising that freedom, he is not liable to C for the harm caused by B's choice not to lose A's business for the sake of getting C's.

On the other hand, if A, instead of merely refusing to deal with B and leaving B to make his own decision on what to do about it, goes further and uses his own refusal to deal or the threat of it as a means of affirmative inducement, compulsion or pressure to make B break his contract with C, he may be acting improperly and subject to liability under the rule stated in this Section.

Illustrations:

1. Upon hearing of B's contract with C, A ceases to buy from B. When asked by B to explain his conduct, A replies that his reason is B's contract with C. Thereupon B breaks his contract with C in order to regain A's business. A has not induced the breach and is not subject to liability to C

2. Upon hearing of B's contract with C, A writes to B as follows: "I cannot tolerate your contract with C. You must call it off. I am sure that our continued relations will more than compensate you for any payment you may have to make to C. If you do not advise me within ten days that your contract with C is at an end, you may never expect further business from me." Thereupon B breaks his contract with C. A has induced the breach and is subject to liability

m. Inducement by offer of better terms. Another method of inducing B to sever his business relations with C is to offer B a better bargain than that which he has with C. Here, as in the situation dealt with in Comment *l*, a nice question of fact is presented. A's freedom to conduct his business in the usual manner, to advertise his goods, to extol their qualities, to fix their prices and to sell them is not restricted by the fact that B has agreed to buy similar goods from C. Even though A knows of B's contract with C, he may nevertheless send his regular advertising to B and may solicit business in normal course. This conduct does not constitute inducement of breach of the contract. The illu-

stration below is a case of solicitation that does constitute inducement.

Illustration: 3. A writes to B: "I know you are under contract to buy these goods from C. Therefore I offer you a special price way below my cost. If you accept this offer, you can break your contract with C, pay him something in settlement and still make money. I am confident that you will find it more satisfactory to deal with me than with C." As a result of this letter, B breaks his contract with C. A has induced the breach....

r. Ill will. Ill will on the part of the actor toward the person harmed is not an essential condition of liability under the rule stated in this Section. He may be liable even when he acts with no desire to harm the other.

But the freedom to act in the manner stated in this Section may depend in large measure on the purposes of his conduct. Although the actor is acting for the purpose of advancing an interest of his own, that interest may not be of sufficient importance to make his interference one that is not improper and avoid liability.

Satisfying one's spite or ill will is not an adequate basis to justify an interference and keep it from being improper. The presence or absence of ill will toward the person harmed may clarify the purposes of the actor's conduct and may be, accordingly, an important factor in determining whether the interference was improper.

s. "Malice." There are frequent expressions in judicial opinions that "malice" is requisite for liability in the cases treated in this Section. But ... what is meant is not malice in the sense of ill will but merely "intentional interference without justification." ...

§ 766B. Intentional Interference With Prospective Contractual Relation

One who intentionally and improperly interferes with another's prospective contractual relation (except a contract to marry) is subject to liability to the other for the pecuniary harm resulting from loss of the benefits of the relation, whether the

interference consists of

(a) inducing or otherwise causing a third person not to enter into or continue the prospective relation or

(b) preventing the other from acquiring or continuing the prospective relation.

Comment:

b. Historical development and rationale. As early as 1621 the court of King's Bench held one liable to another in an action on the case for interfering with his prospective contracts by threatening to "mayhem and vex with suits" those who worked for or bought from him, "whereby they durst not work or buy." *Garrett v. Taylor*, 79 Eng. Rep. 485. In 1793, the same court held one similarly liable who shot at some African natives in order to prevent them from trading with the plaintiff until the debts claimed by the defendant were paid. *Tarleton v. McGawley*, 170 Eng. Rep. 153.... [I]n 1410 it was said that "if the comers to my market are disturbed or beaten, by which I lose my toll, I shall have a good action of trespass on the case." 11 Hen. IV 47. An action for threatening plaintiff's tenants in life and limb "so that they departed from their tenures to the plaintiff's damage" was not uncommon, and there was a special writ adapted to this complaint....

In 1853 the decision in *Lumley v. Gye*, 118 Eng. Rep. 749, which involved inducement of the breach of an existing contract, imposed liability when the means of inducement were not tortious in themselves, and it was the intentional interference with the relation that was the basis of liability. Later English decisions, and notably *Temperton v. Russell*, [1893] 1 Q.B. 715, extended the same principle to interference with business relations that are merely prospective and potential.

d. Intent and purpose.... The interference with the other's prospective contractual relation is intentional if the actor desires to bring it about or if he knows that the interference is certain or substantially certain to occur as a result of his action.

The interference, however, must also be improper. The factors to be considered in determining whether an interference is improper are stated in § 767. One of them

is the actor's motive and another is the interest sought to be advanced by him. Together these factors mean that the actor's purpose is of substantial significance. If he had no desire to effectuate the interference by his action but knew that it would be a mere incidental result of conduct he was engaging in for another purpose, the interference may be found to be not improper.

Other factors come into play here, however, particularly the nature of the actor's conduct. If the means used is innately wrongful, predatory in character, a purpose to produce the interference may not be necessary. On the other hand, if the sole purpose of the actor is to vent his ill will, the interference may be improper although the means are less blameworthy. For a more complete treatment see § 767, especially Comment *d....*

§ 767. Factors In Determining Whether Interference Is Improper

In determining whether an actor's conduct in intentionally interfering with a contract or a prospective contractual relation of another is improper or not, consideration is given to the following factors:

- (a) the nature of the actor's conduct,
- (b) the actor's motive,
- (c) the interests of the other with which the actor's conduct interferes,
- (d) the interests sought to be advanced by the actor,
- (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other,
- (f) the proximity or remoteness of the actor's conduct to the interference and
- (g) the relations between the parties.

Comment: ...

b. Privilege to interfere, or interference not improper. Unlike other intentional torts such as intentional injury to person or property, or defamation, this branch of tort law has not developed a crystallized set of definite rules as to the existence or non-existence of a privilege to act in the manner stated in §§ 766 ... or 766B. Because of this fact, this Section is expressed

in terms of whether the interference is improper or not, rather than in terms of whether there was a specific privilege to act in the manner specified.

The issue in each case is whether the interference is improper or not under the circumstances; whether, upon a consideration of the relative significance of the factors involved, the conduct should be permitted without liability, despite its effect of harm to another. The decision therefore depends upon a judgment and choice of values in each situation. This Section states the important factors to be weighed against each other and balanced in arriving at a judgment; but it does not exhaust the list of possible factors. The comments in the Section deal with the significance of each of the listed factors.

Since the determination of whether an interference is improper is under the particular circumstances, it is an evaluation of these factors for the precise facts of the case before the court; and, as in the determination of whether conduct is negligent, it is usually not controlling in another factual situation. On the other hand, factual patterns develop and judicial decisions regarding them also develop patterns for holdings that begin to evolve crystallized privileges or rules defining conduct that is not improper. The rules stated in §§ 768-774 shows the results of the balancing process in some specific situations that have been the subject of judicial decision; but they do not constitute an exhaustive list of situations in which it has been determined that an intentional interference with contractual relations is not improper.

Ambiguity as to the scope of the privileges available for the tort of intentional interference with an existing or prospective contractual relation has meant that at least some of the factors listed in this Section are sometimes treated as going to the culpability of the actor's conduct in the beginning, rather than to the determination of whether his conduct was justifiable as an affirmative defense. This bears on the issues of whose responsibility it is to raise the question of culpability or justification—that is, whether the interference was improper or not—in the pleadings and

who has the burden of proof in the sense of the risk of nonpersuasion.

Justification is generally treated as a matter of defense, but not always in the tort of interference with contractual relations. Thus a court that calls the tort “malicious interference” and defines this as interference without justification, often decides that it is a part of the plaintiff's case to plead and prove lack of justification. (See § 766, Comment s)...

c. Nature of actor's conduct. The nature of the actor's conduct is a chief factor in determining whether the conduct is improper or not, despite its harm to the other person. The variety of means by which the actor may cause the harm are stated in § 766, Comments *k* to [*m*]. Some of them, like fraud and physical violence, are tortious to the person immediately affected by them; others, like persuasion and offers of benefits, are not tortious to him. Under the same circumstances interference by some means is not improper while interference by other means is improper; and, likewise, the same means may be permissible under some circumstances while wrongful in others. The issue is not simply whether the actor is justified in causing the harm, but rather whether he is justified in causing it in the manner in which he does cause it. The propriety of the means is not, however, determined as a separate issue unrelated to the other factors. On the contrary, the propriety is determined in the light of all the factors present.

Thus physical violence, fraudulent misrepresentation and threats of illegal conduct are ordinarily wrongful means and subject their user to liability even though he is free to accomplish the same result by more suitable means. A, C's competitor for B's business, may justifiably induce B by permissible means not to buy from C (see § 768); he is not justified in doing so by the predatory means stated above.... The nature of the means is, however, only one factor in determining whether the interference is improper. Under some circumstances the interference is improper even though innocent means are employed.

Physical violence. Threats of physical violence were the means employed in the

very early instances of liability for intentional interference with economic relations; and interference by physical violence is ordinarily improper....

Misrepresentations. Fraudulent misrepresentations are also ordinarily a wrongful means of interference and make an interference improper....

Prosecution of civil suits.... The use of these weapons of inducement is ordinarily wrongful if the actor has no belief in the merit of the litigation or if, though having some belief in its merit, he nevertheless institutes or threatens to institute the litigation in bad faith, intending only to harass the third parties and not to bring his claim to definitive adjudication. A typical example of this situation is the case in which the actor threatens the other's prospective customers with suit for the infringement of his patent and either does not believe in the merit of his claim or is determined not to risk an unfavorable judgment and to rely for protection upon the force of his threats and harassment.

Criminal suits.... Causing or threatening to cause, in bad faith, the institution of criminal prosecution is ordinarily a wrongful method of interference

Unlawful conduct. Conduct specifically in violation of statutory provisions or contrary to established public policy may for that reason make an interference improper. This may be true, for example, of conduct that is in violation of antitrust provisions or is in restraint of trade or of conduct that is in violation of statutes, regulations, or judicial or administrative holdings regarding labor relations.

Economic pressure. Economic pressure of various types is a common means of inducing persons not to deal with another, as when A refuses to deal with B if B enters into or continues a relation with C, or when A increases his prices to B or induces D not to deal with B on the same condition. Or the pressure may consist of the refusal to admit B to membership into a trade association or a professional organization, as a medical or legal association. The question whether this pressure is proper is answered in the light of the circumstances in which it is exerted, the ob-

ject sought to be accomplished by the actor, the degree of coercion involved, the extent of the harm that it threatens, the effect upon the neutral parties drawn into the situation, the effects upon competition, and the general reasonableness and appropriateness of this pressure as a means of accomplishing the actor's objective.

Business ethics and customs. Violation of recognized ethical codes for a particular area of business activity or of established customs or practices regarding disapproved actions or methods may also be significant in evaluating the nature of the actor's conduct as a factor in determining whether his interference with the plaintiff's contractual relations was improper or not.

Other aspects of actor's conduct. It is often important whether the defendant was acting alone or in concert with others to accomplish his purpose. In a case in which other factors are otherwise evenly balanced, less censurable aspects of the actor's conduct may sometimes tip the scales.

Thus the manner of presenting an inducement to the third party may be significant. There is an easily recognized difference between (1) A's merely routine mailing to B of an offer to sell merchandise at a reduced price, even though A knows that B is bound by an existing contract to purchase the goods from C, and (2) A's approaching B in person and offering expressly to sell the merchandise at such a low price that B can "pay any costs of getting out of his contract with C and still profit." The question of who was the moving party in the inducement may also be important. A's active solicitation of B's business is more likely to make his interference improper than his mere response to an inquiry from B.

d. The actor's motive. Since interference with contractual relations is an intentional tort, it is required that in any action based upon §§ 766 ... or 766B the injured party must show that the interference with his contractual relations was either desired by the actor or known by him to be a substantially certain result of his conduct.

Intent alone, however, may not be sufficient to make the interference improper, especially when it is supplied by the actor's knowledge that the interference was a necessary consequence of his conduct rather than by his desire to bring it about. In determining whether the interference is improper, it may become very important to ascertain whether the actor was motivated, in whole or in part, by a desire to interfere with the other's contractual relations. If this was the sole motive the interference is almost certain to be held improper. A motive to injure another or to vent one's ill will on him serves no socially useful purpose.

The desire to interfere with the other's contractual relations need not, however, be the sole motive. If it is the primary motive it may carry substantial weight in the balancing process and even if it is only a casual motive it may still be significant in some circumstances. On the other hand, if there is no desire at all to accomplish the interference and it is brought about only as a necessary consequence of the conduct of the actor engaged in for an entirely different purpose, his knowledge of this makes the interference intentional, but the factor of motive carries little weight toward producing a determination that the interference was improper.

Motive as a factor is often closely interwoven with the other factors listed in this Section, so that they cannot be easily separated. There is obviously a very intimate relation between the factors of motive and of the interests that the actor is trying to promote by his conduct. So close is the relationship that the two factors might well be merged into a single one. The basis for the separation in this Section is that the factor of motive is concerned with the issue of whether the actor desired to bring about the interference as the sole or a partial reason for his conduct, while the factor of the actor's interests is concerned with the individual and social value or significance of any interests that he is seeking to promote.

The relation of the factor of motive to that of the nature of the actor's conduct is an illustration of the interplay between factors in reaching a determination of

whether the actor's conduct was improper. If the conduct is independently wrongful—as, for example, if it is illegal because it is in restraint of trade or if it is tortious toward the third person whose conduct is influenced—the desire to interfere with the other's contractual relations may be less essential to a holding that the interference is improper. On the other hand, if the means used by the actor are innocent or less blameworthy, the desire to accomplish the interference may be more essential to a holding that the interference is improper.

A similar interplay exists between the factor of motive and that of the proximity of the actor's conduct to the actual interference. If the relationship is direct and immediate, as when A induces B to sell a particular article to him, knowing that B is under contract to sell it to C, it makes no difference that A did not desire to have the contract broken between B and C or that he is quite sorry that this was a necessary consequence of his action. On the other hand, if in the same situation A also knows that C has contracted to sell the chattel to D and that his conduct will also prevent that contract from being carried out, this result is so consequential and indirect that a motive or purpose to accomplish that interference may be necessary to a finding that the interference was improper.

e. The interests of the other with which the actor's conduct interferes. Some contractual interests receive greater protection than others. Thus, depending upon the relative significance of the other factors, the actor's conduct in interfering with the other's prospective contractual relations with a third party may be held to be not improper, although his interference would be improper if it involved persuading the third party to commit a breach of an existing contract with the other. The result in the latter case is due in part to the greater definiteness of the other's expectancy and his stronger claim to security for it and in part to the lesser social utility of the actor's conduct.

Again, the fact that a contract violates public policy, as, for example, a contract in unreasonable restraint of trade, or that its

performance will enable the party complaining of the interference to maintain a condition that shocks the public conscience (see § 774), may justify an inducement of breach that, in the absence of this fact, would be improper. Even with reference to contracts not subject to these objections, however, it may be found to be not improper to induce breach when the inducement is justified by the other factors stated in this Section. (See, for example, § 770).

f. The actor's interest. The correlative of the interest with which the actor interferes (see Comment *e*) is the interest that his conduct is intended to promote. Both are important in determining whether the interference is improper. And both are to be appraised in the light of the social interests that would be advanced by their protection.

Usually the actor's interest will be economic, seeking to acquire business for himself. An interest of this type is important and will normally prevail over a similar interest of the other if the actor does not use wrongful means. (See § 768). If the interest of the other has been already consolidated into the binding legal obligation of a contract, however, that interest will normally outweigh the actor's own interest in taking that established right from him. Of course, the interest in gratifying one's feeling of ill will toward another carries no weight. Some interests of the actor that do carry weight are depicted in §§ 770-773.

In some cases the actor may be seeking to promote not solely an interest of his own but a public interest. The actor may believe that certain practices used in another's business are prejudicial to the public interest, as, for example, his maintenance of a gambling den in the rear room of his cigar store and in plain sight of his patrons, or his despoiling the environment by polluting a stream or strip-mining an area without restoring the natural conditions, or his racial or sexual discrimination in his employment policy.

If the actor causes a third person not to perform a contract or not to enter into or continue a contractual relation with the other in order to protect the public interest affected by these practices, relevant

questions in determining whether his interference is improper are: whether the practices are actually being used by the other, whether the actor actually believes that the practices are prejudicial to the public interest, whether his belief is reasonable, whether he is acting in good faith for the protection of the public interest, whether the contractual relation involved is incident or foreign to the continuance of the practices and whether the actor employs wrongful means to accomplish the result.

g. The social interests. Appraisal of the private interests of the persons involved may lead to a stalemate unless the appraisal is enlightened by a consideration of the social utility of these interests. Moreover, the rules stated in §§ 766-766B deal with situations affecting both the existence and the plan of competitive enterprise. The social interest in this enterprise may frequently require the sacrifice of the claims of the individuals to freedom from interference with their pursuit of gain. Thus it is thought that the social interest in competition would be unduly prejudiced if one were to be prohibited from in any manner persuading a competitor's prospective customers not to deal with him. On the other hand, both social and private interests concur in the determination that persuasion only by suitable means is permissible, that predatory means like violence and fraud are neither necessary nor desirable incidents of competition. (See further § 768)....

i. Relations between the parties. The relation between the parties is often an important factor in determining whether an interference is proper or improper. In a case where A is the actor, B is the injured party and C is the third party influenced by A's conduct, the significant relationship may be between any two of the three parties. Thus A and B may be competitors, and A's conduct in inducing C not to deal with B may be proper, though it would have been improper if he had not been a competitor. (See § 768). Or, if A is C's business advisor, it is proper for him to advise C, in good faith and within the scope of C's request for advice, that it would be to his financial advantage to

break his contract with B, while it would be improper if he were a volunteer. (See § 772). Again, it is important whether the relationship between B and C is that of a prospective contract, an existing contract or a contract terminable at will. (See § 768).

j. Determination of whether the actor's conduct is improper or not. The weighing process described in this Section does not necessarily reach the same result in regard to each of the ... forms of interference with business relations stated in §§ 766 ... and 766B. As indicated in Comment *e*, for example, greater protection is given to the interest in an existing contract than to the interest in acquiring prospective contractual relations, and as a result permissible interference is given a broader scope in the latter instance. (See § 768). In some situations the process of weighing the conflicting factors set forth in this Section has already been performed by the courts, and incipient privileges and rules defining conduct as not improper are developing. When this has been accomplished and the scope of the more or less crystallized rule or privilege has been indicated by the decisions, the responsibility in the particular case is simply to apply it to the facts involved; and there is no need to go through the balancing process afresh. Some of the situations in which this development has occurred are stated in §§ 769-773.

When no crystallized pattern is applicable, however, the balancing process must be followed for the individual case. Though consideration must be given to the factors stated in this Section, generalizations utilizing a standard are sometimes offered. Thus, it has been suggested that the real question is whether the actor's conduct was fair and reasonable under the circumstances. Recognized standards of business ethics and business customs and practices are pertinent, and consideration is given to concepts of fair play and whether the defendant's interference is not "sanctioned by the 'rules of the game.'" The determination is whether the actor's interference is "improper" or not. But an attempt to apply these broad, general standards is materially helped by breaking the conflicting elements into the fac-

tors stated in this Section....

§ 768. Competition As Proper Or Improper Interference

(1) One who intentionally causes a third person not to enter into a prospective contractual relation with another who is his competitor or not to continue an existing contract terminable at will does not interfere improperly with the other's relation if

(a) the relation concerns a matter involved in the competition between the actor and the other and

(b) the actor does not employ wrongful means and

(c) his action does not create or continue an unlawful restraint of trade and

(d) his purpose is at least in part to advance his interest in competing with the other.

(2) The fact that one is a competitor of another for the business of a third person does not prevent his causing a breach of an existing contract with the other from being an improper interference if the contract is not terminable at will.

Comment: ...

c. Competition between actor and the person harmed. The rule stated in this Section applies whether the actor and the person harmed are competing as sellers or buyers or in any other way, and regardless of the plane on which they compete. Thus the rule applies whether the actor and the other are competing manufacturers or wholesalers or retailers or competing banks, newspapers or brokers. It applies when they are competing for the purchase of a farmer's tobacco crop or cattle as well as when they are competing for the sale of the crop or cattle. It applies also to the indirect competition between a manufacturer whose goods are marketed by independent retailers and a retailer who markets the competing goods of another manufacturer.

d. The diverted business. The rule stated in this Section applies only in the situation in which the business diverted from the competitor relates to the competition between him and the actor. It does

not apply when the business diverted by the actor does not relate to his competition with his competitor.

Illustrations:

1. A and B are competing distributors of shoes. A induces prospective customers of B to buy shoes from A instead of from B. A's interference with B's prospective business is not improper under the conditions stated in this Section.

2. A and B are competing distributors of shoes. A induces C not to purchase B's dwelling. A's interference with B's prospective business is improper under the rule stated in this Section.

3. A is B's employer and C is the carrier of A's employer's liability insurance. B, having been injured in the course of his employment, presents his claim. He rejects an offer of settlement made by C on the ground of its inadequacy and brings suit on his claim. C informs B that unless he will accept the settlement he will lose his job with A. Upon B's refusal, C causes A to discharge B by threatening to cancel all A's insurance with C. C is subject to liability to B and the interference is improper under the rule stated in this Section.

B and C, in Illustration 3, are in a bargaining struggle resembling competition. But their competition has no relation to B's continued employment by A. Other reasons may also make for a holding that the interference was improper under these circumstances. C's conduct may contravene the public policy expressed in worker's compensation legislation, or, in view of the relative positions of C and B, C's conduct may be deemed otherwise unduly oppressive and unreasonable. The case might be different if the reason for C's procuring B's discharge were that B was a hypochondriac and a chronic claimant of work accident compensation. (See § 769)....

e. Means of inducement.... The rule stated in this Section rests on the belief that competition is a necessary or desirable incident of free enterprise. Superiority of power in the matters relating to competition is believed to flow from superiority in efficiency and service. If the actor succeeds in diverting business from his competitor by virtue of superiority in matters

relating to their competition, he serves the purposes for which competition is encouraged. If, however, he diverts the competitor's business by exerting a superior power in affairs unrelated to their competition there is no reason to suppose that his success is either due to or will result in superior efficiency or service and thus promote the interest that is the reason for encouraging competition. For this reason economic pressure on the third person in matters unrelated to the business in which the actor and the other compete is treated as an improper interference....

g. The actor's purpose. The rule stated in this Section developed to advance the actor's competitive interest and the supposed social benefits arising from it. If his conduct is directed, at least in part, to that end, the fact that he is also motivated by other impulses, as, for example, hatred or a desire for revenge is not alone sufficient to make his interference improper.

But if his conduct is directed solely to the satisfaction of his spite or ill will and not at all to the advancement of his competitive interests over the person harmed, his interference is held to be improper. The limitation stated in Clause (d) overlaps that stated in Clause (a). If the business diverted by the actor relates to his competition with his competitor, his conduct will ordinarily be directed, at least in part, to the improvement of his position in the competition. And if his conduct is directed to some other end, the diverted business will ordinarily not be related to that competition. (Compare § 767, Comment *d*)....

§ 769. Actor Having Financial Interest In Business Of Person Induced

One who, having a financial interest in the business of a third person intentionally causes that person not to enter into a prospective contractual relation with another, does not interfere improperly with the other's relation if he

(a) does not employ wrongful means and

(b) acts to protect his interest from being prejudiced by the relation.

§ 770. Actor Responsible For Welfare Of Another

One who, charged with responsibility for the welfare of a third person, intentionally causes that person not to perform a contract or enter into a prospective contractual relation with another, does not interfere improperly with the other's relation if the actor

(a) does not employ wrongful means and

(b) acts to protect the welfare of the third person....

Comment ... *b*.... The responsibility may exist in such relationships as those of parent, or person standing in loco parentis, and child, of minister and member of his congregation, attorney and client, teacher and pupil or of employer and employee. The rule stated is frequently applicable to those who stand in a fiduciary relation toward another, as in the case of agents acting for the protection of their principals, trustees for their beneficiaries or corporate officers acting for the benefit of the corporation.

§ 771. Inducement To Influence Another's Business Policy

One who intentionally causes a third person not to enter into a prospective contractual relation with another in order to influence the other's policy in the conduct of his business does not interfere improperly with the other's relation if

(a) the actor has an economic interest in the matter with reference to which he wishes to influence the policy of the other and

(b) the desired policy does not unlawfully restrain trade or otherwise violate an established public policy and

(c) the means employed are not wrongful.

Comments ... *c*. *Actor's purpose*. The rule stated in this Section applies to protect the actor's interest in the business policy of the person harmed. Accordingly, his conduct is not protected by this rule if his purpose is something else. But if he has the proper purpose, the fact that he

also delights in the incidental harm caused to the other is not controlling.

The purpose required under the rule stated in this Section is, then, a purpose to alter the other's policy in the conduct of his business, such as his hours of business, his wage policy, his sales policy, his employment or credit policy and so forth. Thus if A induces B not to sell to C in order to influence C not to cut his prices below his purchase price, or not to employ child labor, or not to be open for business on Wednesday afternoon during the summer, and if the conditions stated in Clauses (a), (b) and (c) are satisfied, A's conduct is not improper.

d. Actor's interest.... Even when they are not competitors [so that § 768 doesn't apply], the actor may have an interest in the other's business policy. All retailers in a community, whether competitors or not, may have an interest in each other's policy relative to hours of business. A wholesale grocer has an interest in the food manufacturer's marketing policy with respect to direct marketing to retailers, or discounts to chain stores, and so forth. And the employees of one retailer may have an economic interest in the hours of employment maintained by a competing retailer.

§ 772. Advice As Proper Or Improper Interference

One who intentionally causes a third person not to perform a contract or not to enter into a prospective contractual relation with another does not interfere improperly with the other's contractual relation, by giving the third person

(a) truthful information, or

(b) honest advice within the scope of a request for the advice.

§ 773. Asserting Bona Fide Claim

One who, by asserting in good faith a legally protected interest of his own or threatening in good faith to protect the interest by appropriate means, intentionally causes a third person not to perform an existing contract or enter into a prospective contractual relation with another does not interfere improperly with the other's

relation if the actor believes that his interest may otherwise be impaired or destroyed by the performance of the contract or transaction.

§ 774. Agreement Illegal Or Contrary To Public Policy

One who by appropriate means causes the nonperformance of an illegal agreement or an agreement having a purpose or effect in violation of an established public policy is not liable for pecuniary harm resulting from the nonperformance.

Della Penna v. Toyota Motor Sales, U.S.A., Inc., 11 Cal. 4th 376 (1995)

ARABIAN, J. We granted review to reexamine, in light of divergent rulings from the Court of Appeal and a doctrinal evolution among other state high courts, the elements of the tort variously known as interference with “prospective economic advantage,” “prospective contractual relations,” or “prospective economic relations,” and the allocation of the burdens of proof between the parties to such an action. We conclude that those Court of Appeal opinions requiring proof of a so-called “wrongful act” as a component of the cause of action, and allocating the burden of proving it to the plaintiff, are the better reasoned decisions; we accordingly adopt that analysis as our own, disapproving language in prior opinions of this court to the contrary.

Such a requirement, incorporating the views of several other jurisdictions, much of the Restatement Second of Torts, the better reasoned decisions of the Court of Appeal, and the views of leading academic authorities, sensibly redresses the balance between providing a remedy for predatory economic behavior and keeping legitimate business competition outside litigative bounds. We do not in this case, however, go beyond approving the requirement of a showing of wrongfulness as part of the plaintiff’s case; the case, if any, to be made for adopting refinements to that element of the tort—requiring the plaintiff to prove, for example, that the defendant’s conduct amounted to an independently tortious act, or was a species of anticompe-

titive behavior proscribed by positive law, or was motivated by unalloyed malice—can be considered on another day, and in another case....

[A.] John Della Penna, an automobile wholesaler doing business as Pacific Motors, brought this action for damages against defendant Toyota Motor Sales, U.S.A., Inc., and its Lexus division, alleging that certain business conduct of defendants ... constituted an intentional interference with his economic relations. The impetus for Della Penna’s suit arose out of the 1989 introduction into the American luxury car market of Toyota’s Lexus automobile. Prior to introducing the Lexus, the evidence at trial showed, both the manufacturer, Toyota Motor Corporation, and defendant, the American distributor, had been concerned about the possibility that a resale market might develop for the Lexus in Japan. Even though the car was manufactured in Japan, Toyota’s marketing strategy was to bar the vehicle’s sale on the Japanese domestic market until after the American rollout; even then, sales in Japan would only be under a different brand name, the “Cel-sior.”

Fearing that auto wholesalers in the United States might reexport Lexus models back to Japan for resale, and concerned that, with production and the availability of Lexus models in the American market limited, reexports would jeopardize its fledgling network of American Lexus dealers, Toyota inserted in its dealership agreements a “no export” clause, providing that the dealer was “authorized to sell [Lexus automobiles] only to customers located in the United States. [Dealer] agrees that it will not sell [Lexus automobiles] for resale or use outside the United States. [Dealer] agrees to abide by any export policy established by [distributor].”

Following introduction into the American market, it soon became apparent that some domestic Lexus units were being diverted for foreign sales, principally to Japan. To counter this effect, Toyota managers wrote to their retail dealers, reminding them of the “no-export” policy and explaining that exports for foreign resale could

jeopardize the supply of Lexus automobiles available for the United States market. In addition, Toyota compiled a list of “offenders”—dealers and others believed by Toyota to be involved heavily in the developing Lexus foreign resale market—which it distributed to Lexus dealers in the United States. American Lexus dealers were also warned that doing business with those whose names appeared on the “offenders” list might lead to a series of graduated sanctions, from reducing a dealer’s allocation to possible reevaluation of the dealer’s franchise agreement.

During the years 1989 and 1990, plaintiff Della Penna did a profitable business as an auto wholesaler purchasing Lexus automobiles, chiefly from the Lexus of Stevens Creek retail outlet, at near retail price and exporting them to Japan for resale. By late 1990, however, plaintiff’s sources began to dry up, primarily as a result of the “offenders list.” Stevens Creek ceased selling models to plaintiff; gradually other sources declined to sell to him as well...

[Footnote moved into text.—ed.: The standard instruction governing “intentional interference with prospective economic advantage,” BAJI No. 7.82, describes the essential elements of the claim as (1) an economic relationship between the plaintiff and another, “containing a probable future economic benefit or advantage to plaintiff,” (2) defendant’s knowledge of the existence of the relationship, (3) that defendant “intentionally engaged in acts or conduct designed to interfere with or disrupt” the relationship, (4) actual disruption, and (5) damage to the plaintiff as a result of defendant’s acts.

The modification sought by defendant and adopted by the trial court consisted in adding the word “wrongful” in element (3) between the words “in” and “acts.” The trial court also read to the jury plaintiff’s special jury instruction defining the “wrongful acts” required to support liability as conduct “outside the realm of legitimate business transactions The trial court also read to the jury plaintiff’s special jury instruction defining the “wrongful acts” required to support liability as conduct “outside the realm of legitimate

business transactions Wrongfulness may lie in the method used or by virtue of an improper motive.”] [The jury held for Toyota, and Della Penna appealed.—ed.]

[B.] Tracing the origins and the current status of the two interference torts [interference with contract and interference with business relations] in 1923, Francis Sayre concluded that “a somewhat uncertain law has resulted. [¶] [¶] Courts still punctiliously repeat the well-known formula which requires ‘malice,’ or ‘without just cause’ ... as one of the requirements of the tort; but there has been such a lack of agreement as to what constitutes ‘malice’ or ‘absence of justification’ that such words are becoming little more than empty phrases Is it not time to formulate the problem of what these worn phrases mean?” The nature of the wrong itself seemed to many unduly vague, inviting suit and hampering the presentation of coherent defenses. More critically in the view of others, the procedural effects of applying the prima facie tort principle to what is essentially a business context led to even more untoward consequences.

Because the plaintiff’s initial burden of proof was such a slender one, amounting to no more than showing the defendant’s conscious act and plaintiff’s economic injury, critics argued that legitimate business competition could lead to time consuming and expensive lawsuits (not to speak of potential liability) by a rival, based on conduct that was regarded by the commercial world as both commonplace and appropriate. The “black letter” rules of the Restatement of Torts surrounding the elements and proof of the tort, some complained, might even suggest to “foreign lawyers reading the Restatement as an original matter [that] the whole competitive order of American industry is prima facie illegal.” ...

[In following decades,] an increasing number of state high courts ... redefin[ed] and otherwise recast[] the elements of the economic relations tort and the burdens surrounding its proof and defenses. In *Top Service Body Shop, Inc. v. Allstate Ins. Co.*, 582 P.2d 1365 (1978), the Oregon Supreme Court, assessing this “most fluid and rapidly growing tort,” noted that “ef-

forts to consolidate both recognized and unsettled lines of development into a general theory of 'tortious interference' have brought to the surface the difficulties of defining the elements of so general a tort without sweeping within its terms a wide variety of socially very different conduct."

Recognizing the force of these criticisms, the court went on to hold in *Top Service* that a claim of interference with economic relations "is made out when interference resulting in injury to another is wrongful by some measure beyond the fact of the interference itself. Defendant's liability may arise from improper motives or from the use of improper means. They may be wrongful by reason of a statute or other regulation, or a recognized rule of common law, or perhaps an established standard of a trade or profession. No question of privilege arises unless the interference would be wrongful but for the privilege; it becomes an issue only if the acts charged would be tortious on the part of an unprivileged defendant." ...

Over the past decade or so, close to a majority of the high courts of American jurisdictions have imported into the economic relations tort variations on the *Top Service* line of reasoning, explicitly approving a rule that requires the plaintiff in such a suit to plead and prove the alleged interference was either "wrongful," "improper," "illegal," "independently tortious" or some variant on these formulations....

In searching for a means to recast the elements of the economic relations tort and allocate the associated burdens of proof, we are guided by an overmastering concern articulated by high courts of other jurisdictions and legal commentators: the need to draw and enforce a sharpened distinction between claims for the tortious disruption of an existing contract and claims that a prospective contractual or economic relationship has been interfered with by the defendant. Many of the cases do in fact acknowledge a greater array of justificatory defenses against claims of interference with prospective relations. Still, in our view and that of several other courts and commentators, the notion that the two torts are analytically unitary and derive from a common principle sacrifices

practical wisdom to theoretical insight, promoting the idea that the interests invaded are of nearly equal dignity. They are not.

The courts provide a damage remedy against third party conduct intended to disrupt an existing contract precisely because the exchange of promises resulting in such a formally cemented economic relationship is deemed worthy of protection from interference by a stranger to the agreement. Economic relationships short of contractual, however, should stand on a different legal footing as far as the potential for tort liability is reckoned. Because ours is a culture firmly wedded to the social rewards of commercial contests, the law usually takes care to draw lines of legal liability in a way that maximizes areas of competition free of legal penalties.

A doctrine that blurs the analytical line between interference with an existing business contract and interference with commercial relations less than contractual is one that invites both uncertainty in conduct and unpredictability of its legal effect. The notion that inducing the breach of an existing contract is simply a sub-event of the "more inclusive" class of acts that interfere with economic relations, while perhaps theoretically unobjectionable, has been mischievous as a practical matter. Our courts should, in short, firmly distinguish the two kinds of business contexts, bringing a greater solicitude to those relationships that have ripened into agreements, while recognizing that relationships short of that subsist in a zone where the rewards and risks of competition are dominant.

[C.] Beyond that, we need not tread today. It is sufficient to dispose of the issue before us in this case by holding that a plaintiff seeking to recover for alleged interference with prospective economic relations has the burden of pleading and proving that the defendant's interference was wrongful "by some measure beyond the fact of the interference itself." ... It follows that the trial court did not commit error when it modified BAJI No. 7.82 to require the jury to find that defendant's interference was "wrongful." And because the instruction defining "wrongful conduct" giv-

en the jury by the trial court was offered by plaintiff himself, we have no occasion to review its sufficiency in this case. The question of whether additional refinements to the plaintiff's pleading and proof burdens merit adoption by California courts—questions embracing the precise scope of “wrongfulness,” or whether a “disinterested malevolence,” in Justice Holmes's words, is an actionable interference in itself, or whether the underlying policy justification for the tort, the efficient allocation of social resources, justifies including as actionable conduct that is recognized as anticompetitive under established state and federal positive law—are matters that can await another day and a more appropriate case.

MOSK, J., concurring in the judgment....

[A.] [T]he premise of the tort [of intentional] interference with prospective economic advantage] seems to be that, “[i]n a civilized community which recognizes the right of private property among its institutions, the notion is intolerable that a man should be protected by the law in the enjoyment of property once it is acquired, but left unprotected by the law in his efforts to acquire it.”

The tort's “protectionist” premise, however, is at war with itself. For the person who deserves protection in the acquisition of property is not only the interfered-with party but also the interfering party. Why then should the interfered-with party receive favor, while the interfering party is disfavored, by virtue of their respective statuses? Why should the interfered-with party's acquisitive efforts be elevated to a kind of property interest, good against the world, while those of the interfering party are deemed illegitimate?

It is “often assumed ... that interference ... should produce liability because it is wrong to interfere. This is, however, very much the same as saying it is wrong because it is wrong.” ... Reason supports the conclusion that, even when there is a breach of contract, the interfered-with party should not be preferred over the interfering party: the breach may be “effi-

cient.”

[B.] Further, liability under the tort may threaten values of greater breadth and higher dignity than those of the tort itself.

One is the common law's policy of freedom of competition. “The policy of the common law has always been in favor of free competition, which proverbially is the life of trade. So long as the plaintiff's contractual relations are merely contemplated or potential, it is considered to be in the interest of the public that any competitor should be free to divert them to himself by all fair and reasonable means.... In short, it is no tort to beat a business rival to prospective customers. Thus, in the absence of prohibition by statute, illegitimate means, or some other unlawful element, a defendant seeking to increase his own business may cut rates or prices, allow discounts or rebates, enter into secret negotiations behind the plaintiff's back, refuse to deal with him or threaten to discharge employees who do, or even refuse to deal with third parties unless they cease dealing with the plaintiff, all without incurring liability.”

Another of these values expresses itself in the guaranty of freedom of speech in the First Amendment to the United States Constitution. “The First Amendment presupposes that the freedom to speak one's mind is not only an aspect of individual liberty—and thus a good unto itself—but also is essential to the common quest for truth and the vitality of society as a whole.” The interfering party, however, often interferes by means of words. It has been said that, “so far as tort liability is imposed for the communication of facts, opinions or arguments, that liability is simply inconsistent with the law's long commitment to free speech.” It matters not that the words in question may amount only to so-called “commercial speech.” That is because “commercial speech is not ‘wholly outside the protection of the First Amendment[.]’”

A related value is found in the First Amendment's guaranty of freedom of association. “[O]ne of the foundations of our society is the right of individuals to combine with other persons in pursuit of a

common goal by lawful means.” But when individuals join with each other to achieve an objective and undertake to act in the economic sphere, they run the risk that they will collectively be deemed an interfering party. Thus it happened to labor unionists, in the decades before and after the turn of the century, as they engaged in struggle over the terms and conditions of employment. And thus it has happened in the present day as members of minority groups have sought to secure and exercise their political and civil rights. It follows that associational freedom, too, calls for the limitation of liability under the tort.

Still another value inheres in the First Amendment’s guaranty of the people’s right to petition the government for redress of grievances. This protection is one of our “great, ... indispensable democratic freedoms,” and occupies a “preferred place ... in our scheme.” The interfering party, however, may interfere by raising his voice and expressing his views to governmental authorities. To be sure, the “grievances for redress of which the right of petition was insured” include “religious [and] political ones” and others of that stature. But they may embrace as well even such as relate merely to “business or economic activity.” Thus, the right of petition also calls for the limitation of liability under the tort.

[C.] A third reason for the common law’s near incoherence on the tort of intentional interference with prospective economic advantage may be discovered in its focus on the interfering party’s motive, that is, why he seeks whatever it is that he seeks through his interference, and on his moral character as revealed thereby.... In spite of the many words devoted to the topic, the focus on the interfering party’s motive is simply inappropriate. That is because, for present purposes, motive is altogether immaterial....

“It is a truism of the law that an act which does not amount to a legal injury cannot be actionable because it is done with a bad intent; that what one has a right to do another cannot complain of. It is conceded that one may lawfully persuade or procure another to break his contract with a third person, ‘if it be done

from good motives.’ We think the qualification has no place in the proposition. If it is right, and the means used to procure the breach are right, the motive cannot make it a wrong any more than a good motive would justify fraud, deceit, slander, or violence to effect the same purpose. Suppose A, by fraudulent representations, induces B to sell him a large quantity of goods upon credit, intending to defraud B of the entire value of the goods. C, knowing that the representations are false, and not caring whether B shall lose his goods or not, but of unmixed malice and ill-will toward A, procures B to refuse to deliver the goods by truthfully informing B of the falsity of the representations made by A, will it be said that C is liable in an action brought by A? ...

“Bad motive, by itself, then, is no tort. Malicious motives make a bad act worse, but they cannot make that a wrong which in its own essence is lawful. When in legal pleadings the defendant is charged with having wrongfully done the act complained of, the words are only words of vituperation, and amount to nothing unless a cause of action is otherwise alleged.” ...

Even if it were not inappropriate, the focus on the interfering party’s motive surely has a tendency to yield untoward results. To understate the point, “ambiguities [are] inherent in the motive inquiry ...” ... “[P]roblems” are “inherent in proving motivation.” ...

It may be hard for a trier of fact to discern the interfering party’s motive because of factors peculiar to the latter. That is true when the interfering party is an individual: a person’s mind and heart typically reveal themselves and conceal themselves at one and the same time. It is truer still when the interfering party is a group of individuals: many minds and hearts are then involved, and they cannot simply be added up. And, of course, it is truest when the interfering party is a corporation or similar entity: the “mind” and “heart” of such a one is purely fictive.

It may also be hard for a trier of fact to discern the interfering party’s motive because of factors peculiar to itself. Certainly, motive may be spoken of as a fact. But it implicates a rich variety of values. As a

result, it allows and perhaps even invites the trier of fact to pass a kind of moral judgment on the interfering party as such—a judgment that, whether scrupulously fair and strictly impartial, on the one side, or passionately sympathetic or blindly prejudiced, on the other, is simply of no consequence here. For the “law has no roving commission to root out bad people or people whose minds may harbor bad thoughts.” Neither does it undertake to select for reward people of the opposite sort. Indeed, it has “generally shared” “the belief ... that it is impermissible for” it “to judge one’s person rather than one’s conduct.” Thus, it treats all as equal before its bar, whether some may seem to be “small dealers and worthy men” and others “rapacious monopolists.”

The untoward results of the focus on the interfering party’s motive may present themselves in individual cases in the form of arbitrary and capricious outcomes. In matters in which the trier of fact believes it has discerned good motive or at least persuades itself it has, an interfering party who has both engaged in objectively bad conduct and produced objectively bad consequences may evade liability for injury. By contrast, in matters in which it adopts a contrary view, an interfering party who has neither engaged in such conduct nor produced such consequences may be made to pay for what is simply *damnum absque injuria*. In a word, much may depend on mere appearances and perceptions and on nothing more.

Such untoward results, however, will not confine themselves to individual cases but will spread generally to deter what should be encouraged and also to encourage what should be deterred. The example of the interfering party who has both engaged in objectively bad conduct and produced objectively bad consequences, but has nevertheless evaded liability, may lure others to follow in his steps, and thereby cause detriment to society as a whole.

Conversely, the example of the interfering party who has neither engaged in such conduct nor produced such consequences, but has still been made to pay, may serve to turn aside others, and thereby deny the community the benefit of good

acts and good effects or at least the freedom to do as one chooses when he does no injury. Moreover, the example of both may lead to further social costs, as “properly motivated actors” take “precautions ... to avoid liability” that they should not be exposed to, and actors otherwise motivated fabricate schemes to escape responsibility that they deserve. ...

[We should reformulate the tort to require] objective, and unlawful, conduct or consequences.⁹ ... [T]he tort may be satisfied by intentional interference with prospective economic advantage by independently tortious means.... “For instance, fraudulent misrepresentations made” by the interfering party to a “third party are improper means of interference ... whether or not the third party can show reliance injurious to himself.”

It also follows that the tort may be satisfied by intentional interference with prospective economic advantage through restraint of trade, including monopolization....

So reformulated, the tort can be distinctly stated and consistently applied. The independently tortious means that commonly appear in this context, including assault and battery, defamation, and fraud and deceit, are well defined and long settled. Surely, one would not be left to the scant “guidance” of the so-called “business ethics’ standard,” which presupposes that “[t]he nature of the conduct which is acceptable today may ... prove unacceptable tomorrow.” Also, restraints of trade may be “measured by objective economic criteria.” Decisions under federal antitrust statutes ... prove the point beyond question....

[Unlike the majority,] I would not adopt the “standard” of “wrongfulness.” As I have noted, the term and its cognates are inherently ambiguous. They should probably be avoided. They should surely not be embraced....

⁹ [We need not address] whether the related tort of intentional interference with contract should be reformulated to require objective, and unlawful, conduct or consequences....

[Note: *Korea Supply Co. v. Lockheed Martin Corp.*, 63 P.2d 937 (Cal. 2003), later concluded that an act is “independently wrongful” for purposes of interference with prospective economic advantage “if it is unlawful, that is, if it is proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard,” as opposed to “merely a product of an improper, but lawful, purpose of motive.”—ed.]

***Alyeska Pipeline Serv. Co. v. Aurora Air Serv., Inc.*, 604 P.2d 1090 (Alaska 1979)**

On May 14, 1974, Alyeska and RCA executed a contract which provided that RCA would construct, operate, and maintain a communications system along the Trans-Alaska Pipeline. The contract set forth that RCA would furnish all supervision, engineering, labor, and transportation necessary to perform the contract. In fulfilling the transportation requirements of the Alyeska-RCA contract, RCA executed a contract on October 3, 1974, with Aurora.

The Aurora-RCA contract, in part, provided:

Contractor hereby agrees to furnish one (1) Cessna 207 aircraft with pilot, parts, and accessories to provide aircraft service to transport RCA-Alascom equipment, supplies, and personnel along the pipeline route as designated by RCA-Alascom.

Article 13 of the contract, “Optional Termination,” provided that the contract could be terminated at RCA’s option.¹

Prior to the execution of the Aurora-RCA and Alyeska-RCA contracts, Aurora and Alyeska had a contractual relationship under which it was agreed that Aurora would provide non-exclusive air service to Alyeska. In the spring of 1975 a payment dispute arose under this contract between Aurora and Alyeska. Shortly after

¹ ... “Should RCA Alascom determine that its best interest will be served by terminating the work outlined in the Scope of Effort, then it may be terminated in whole or in part by written notice to Contractor....”

Aurora commenced a suit seeking recovery, Alyeska paid Aurora the sum it claimed was due.

In October, 1975 Alyeska took over the transportation requirements of its contract with RCA pursuant to a provision in the contract which provided:

Engineer [Alyeska] shall have the right at any time, to make changes in Work. To the extent that these affect the contractor price, and scheduled completion date, appropriate adjustments will be made. Engineer shall prepare all changes in writing and shall have the option of requiring contractor to suspend any affected work pending preparation by CONTRACTOR [RCA] and valuation by ALYESKA of the effect of the proposed CHANGES on cost and schedule.

Shortly thereafter RCA, prompted by Alyeska’s election to take over the air transportation service, exercised its option to terminate its contract with Aurora.

The present controversy centers around the intentions of Alyeska in interfering with the Aurora-RCA contract. Alyeska claims that it had an absolute right under its contract with RCA to take over the air transportation function. Alternatively, it argues that it was justified in doing so by economic and safety considerations. Aurora contends that Alyeska was motivated by spite, resulting from the earlier dispute between Aurora and Alyeska....

[The trial] court agreed that Alyeska could change the transportation requirements under the Alyeska-RCA contract,² but it held that a jury question was presented as to whether Alyeska had done so in good faith. Therefore, the motion for summary judgment was denied. Alyeska challenges this ruling.

[A.] The unilateral right to modify the

² ... Aurora argued that the provision of the Alyeska-RCA contract permitting Alyeska to unilaterally change the scope of the “work” was not intended to cover the transportation function, and that this could only be altered by mutual agreement between Alyeska and RCA. The trial court rejected this argument and a determination of that question is not necessary to the decision of this appeal.

Alyeska-RCA contract, accepting the superior court's ruling that there was no ambiguity in regard to the interpretation of "work," was vested in Alyeska, but it had to be exercised in good faith. We reject Alyeska's contention that a privilege arising from a contractual right is absolute and may be exercised regardless of motive. It is a recognized principle that a party to a contract has a cause of action against a third party who has intentionally procured the breach of that contract by the other party without justification or privilege. The weight of recent authority holds that even though a contract is terminable at will, a claim of unjustifiable interference can still be made, for "(t)he wrong for which the courts may give redress includes also the procurement of the termination of a contract which otherwise would have (been) continued in effect." We choose to follow this trend and thus adopt the view espoused by Prosser:

Since *Lumley v. Gye* there has been general agreement that a purely 'malicious' motive, in the sense of spite and a desire to do harm to the plaintiff for its own sake, will make the defendant liable for interference with a contract. The same is true of mere officious intermeddling for no other reason than a desire to interfere. On the other hand, in the few cases in which the question has arisen, it has been held that where the defendant has a proper purpose in view, the addition of ill will toward the plaintiff will not defeat his privilege.... [T]he court may well look to the predominant purpose underlying the defendant's conduct.

[B.] Alternatively, Alyeska asserts that its overriding economic and safety interests constituted a sufficient privilege to require dismissal of Aurora's action as a matter of law. One is privileged to invade the contractual interest of himself, others, or the public, if the interest advanced by him is superior in social importance to the interest invaded. However, if one does not act in a good faith attempt to protect his own interest or that of another but, rather, is motivated by a desire to injure the contract party, he forfeits the immunity afforded by the privilege.

The question of justification for invading the contractual interest of another is

normally one for the trier of fact, particularly when the evidence is in conflict. In the case at bar, the central factual issue, as to which there was evidentiary conflict, was whether Alyeska was genuinely furthering its own economic and safety interests or was using them as a facade for inflicting injury upon Aurora. There was sufficient evidence upon which the jury could properly find that Alyeska was acting out of ill will towards Aurora, rather than to protect a legitimate business interest.⁵ The trial judge correctly denied Alyeska's motion for summary judgment and submitted this issue to the jury....

Alyeska [also] argues that Aurora's evidence of the termination of its contract, intentionally procured, made out a prima facie case, that the burden of proof shifted to Alyeska to show justification, and that Alyeska satisfied that requirement by producing evidence of its contract with RCA and its primary interest in the performance of the RCA contract. It is urged that if, in spite of such evidence, the good faith of Alyeska was still a valid issue, the burden of proving Alyeska's lack of good faith should have shifted back to Aurora....

[W]hen a prima facie case is made out by showing that a breach was intentionally procured, it is incumbent upon the defendant to show justification.... The issue presented here was whether Alyeska really did exercise its rights in good faith or whether it acted from an ulterior motive. We think that such proof goes to the question of justification, and that it was not part of Aurora's prima facie case, which only requires a showing that a breach was intentionally procured. Nor do we think that Alyeska has submitted sufficient proof of justification to trigger another shifting of the burden of proof and to require Aurora to rebut such evidence....

⁵ Alyeska maintains that its primary consideration in taking over the air transportation was safety. Aurora presented evidence that its safety record was far better than that of the Alyeska contracted aircraft that replaced it.

39. Mon., Nov. 23 (first 2/3 of the class): Alienation of Affections and Criminal Conversation

Read *Fitch v. Valentine* below.

Alienation of affections basically consists of a defendant's (1) wrongfully (2) causing plaintiff (3) to lose the affection and often company of the plaintiff's spouse. In principle, it could apply to supposedly meddling in-laws, and has sometimes been applied that way, though if the in-laws are looking out for their married child's best interest such behavior might not be "wrongful." In practice, it has generally been applied to lovers who seduce one spouse away from the other (if it can be shown that they caused the alienation, rather than that a preexisting alienation of the spouses caused one spouse to be interested in the defendant's attentions). The related tort of criminal conversation basically consists of a defendant's having adulterous sex with plaintiff's spouse; but for our purposes, we'll treat that as a subset of alienation of affections (which is indeed the approach in some states).

These torts have been largely abolished, but remain recognized in Hawaii, Illinois, Mississippi, New Mexico, North Carolina, South Dakota, and Utah. And they are not infrequently litigated, especially in North Carolina: A 2006 article in the *Greensboro News & Record* reports that "People filed an average of 245 such suits per year in North Carolina between 2000 and 2005, according to data provided by the state Administrative Office of the Courts."

By way of comparison, the well-established right of publicity tort seems to be litigated much less often (2 cases since 2000 in the NC-CS and NC-TRIALORDERS Westlaw databases, as opposed to 38 for the alienation of affections). Even on a national basis, an ALLCASES search for *sy("right of publicity" ((misappropriat! appropriat!) +5 (name likeness image))) & date(> 1/1/2000)* yielded 150 cases, while *sy((alienat! +3 affection) "criminal conversation") & date(> 1/1/2000)* yielded 66, of which 50 were in jurisdictions that still recognize one or both of those torts. So there's life in this old tort yet, though query whether there should be.

Pedagogical goals: (1) Throughout most of the class, we've discussed how tort law has substantively *expanded*, so that formerly nontortious behavior is now treated as tortious. It's easy to assume, even unconsciously, that this trend is natural, irreversible, and right. But these torts help illustrate that torts could also be abrogated, either through judicial or statutory decision. (This has also happened in narrower contexts as to negligence and strict liability—consider, for instance, some tort reform proposals that have capped damages.) And considering the rejection of these torts might lead us to ask, especially in the coming units: Should any other torts be rejected or dramatically narrowed as well?

(2) The rejection of these torts also leads us to ask: Why would courts or legislatures reject liability for behavior that is pretty clearly wrongful (which adultery is, even if some forms of alienation of affections might not be), and that is pretty clearly emotionally damaging to the victim? Did they conclude that the damage wasn't real enough, because it isn't physical? (That would also bear on some of the other torts we've been discussing in the last few units, and that we'll discuss in the coming units.)

Did they conclude that the behavior should be within people's zone of liberty? (Why would that be so, about adultery? Also, should the same rationale apply to some of the other torts we discuss below?) Did they conclude there were especially severe problems of proof for these torts but not others? Did they have any other reasons?

(3) And we should be open to the possibility that the progress of the law here has been mistaken, and should be reversed. Should states readopt the torts. Why, or why not?

***Fitch v. Valentine*, 959 So. 2d 1012 (Miss. 2007)**

RANDOLPH, J. [A.] ... Johnny Valentine filed a civil complaint against Jerry Fitch,

Sr. in the Circuit Court of Marshall County, Mississippi, averring various causes of action, including alienation of affections. Valentine is a plumber, Fitch is a millio-

naire [worth nearly \$22 million] who owns various businesses, primarily involving oil and real estate. At the conclusion of a trial on the merits, a jury unanimously rendered a verdict against Fitch and awarded Valentine \$642,000 in actual damages and \$112,500 in punitive damages....

The record reflects that Valentine and Sandra Day were married on February 12, 1993. In 1995, the couple had a son together, J.V. In the spring of 1997, Sandra began working as a realtor for the Fitch Realty division of Fitch Oil Company and earned around \$400 a week in cash, based upon her commissions, according to Fitch. Sandra testified that the adulterous affair with Fitch began in late 1997 or early 1998. According to Fitch, the relationship commenced in 1998. Fitch testified to knowing that Sandra was married to Valentine and that the couple had a child together. It was established at trial that Fitch testified at his deposition that he did not care if his affair with Sandra might affect her marriage to Valentine.

Valentine testified that his marriage to Sandra was “normal” prior to late 1998 and early 1999. The couple shared a joint checking account, ate meals together, and engaged in sexual relations “[l]ike normal couples” until that time. In June of 1998, Sandra became pregnant. During the fall of 1998, Valentine suspected Sandra was having an affair, but she denied any such wrongdoing.⁴ In February 1999, a daughter, K.V., was presumptively born to the marital union. Valentine testified that, at that time, he believed K.V. was his child. He was present at the hospital for K.V.’s delivery and was listed as K.V.’s father on her birth certificate; and he loved and cared for K.V. According to Valentine, “a few weeks after [K.V.] was born” he began to notice changes in Sandra....

One night in August 1999, Sandra was not home by 10:30 p.m., and Valentine drove toward Fitch’s cabin looking for her. After observing Sandra driving on Highway 4, Valentine flagged her down. Valentine testified that upon being confronted

about an affair, Sandra once again denied any wrongdoing and came home with him. Thereafter, Valentine repeatedly requested that Sandra quit her job at Fitch Realty, but she consistently refused to do so.

During this time frame, Valentine testified to finding “[t]wo or three hundred here and three or four hundred there, a thousand, \$1,100 in different places” around their home. Sandra claimed she made this money at work. Valentine testified that the cash was more than he had previously observed her earning. Sandra’s co-worker Susan Fleming testified that, prior to the divorce, Sandra told her that Fitch had given her \$8,000 to buy a new Jeep Cherokee, which she acquired soon thereafter. Fleming also testified that shortly after K.V. was born, Sandra told her that Fitch had purchased a baby bed, high chair, baby seat, baby clothes and other baby items for K.V. Fitch readily admitted to giving money to Sandra between February 1999 and August 1999. Fitch, however, testified that he never paid Sandra to date or marry him, or to entice her away from Valentine.

On August 28, 1999, Valentine and Sandra separated. In September 1999, DNA testing conclusively excluded Valentine as K.V.’s biological father. Nonetheless, Valentine still offered to raise K.V. as his own child if Sandra would end the adulterous affair with Fitch. Sandra refused.

Valentine filed for divorce on October 28, 1999, and the divorce decree was entered on November 23, 1999. The decree specifically stated that “[t]he evidence presented in open [c]ourt clearly establishes that [Valentine] is entitled to a divorce on the grounds of *adultery*.” Prior to the divorce, Valentine testified that Sandra never told him that she did not love him or that she wanted a divorce. He further testified that the marriage failed because Sandra “couldn’t resist all the money[.]” and that absent Fitch’s interference, the marriage would have remained intact.

As can be expected, Sandra denied “selling [her] affections” and testified that her affections for Valentine were absent before the adulterous affair with Fitch commenced. According to her testimony,

⁴ Conversely, Sandra testified that Valentine knew of her affair with Fitch at this time and knew that the child may have been Fitch’s.

she loved Valentine when they first married. By the time J.V. was born, however, Sandra said the marriage was only “okay.” She stated: “[b]efore his gambling problem, Johnny loved to be with his buddies. He would not come home from work. He would drink. There’s been occasions where I’ve gone looking for Johnny when he was with his buddies, and his remark was, I embarrassed him by coming to where he was to try to get him to come home to be the husband that he should be.”⁶

Sandra further testified that, at that time, she “was still, obviously, in love with him. I tried to get him to change and be different, but ... he didn’t.” Sandra said the breaking point came in January 1996, when she went to a casino looking for Valentine. She claims to have told him that if he did not leave the casino at that moment then their marriage was over. When he did not leave, Sandra states that “I didn’t care if he went every night, and that’s when our marriage was over[.]”⁷ although she further testified that their sexual relationship did not effectively end until 1997 or 1998. According to Sandra, the couple “separated [on] several occasions about [gambling], and he would promise that he would get help, and he didn’t....” Valentine denied having a gambling problem or that the couple ever separated.

Sandra asserted that the adulterous relationship with Fitch, which she claims to have initiated, was caused by her unhappy marriage to Valentine. Furthermore, while she and Fitch engaged in sex two or three times a week, she maintained that the adulterous sexual activity had no effect on her alleged nonexistent desire to have sex with Valentine.

On December 21, 1999, Valentine filed

⁶ Valentine denied drinking to an extent that it interfered with his marriage or job, and further testified that he did not recall Sandra confronting him about going out with his friends.

⁷ Valentine testified that he did not recall Sandra confronting him about gambling in this, or any other, instance. Despite the claim that Valentine’s gambling instigated Sandra’s loss of affection, she failed to offer any evidence of gambling debts.

suit against Fitch alleging various causes of action, including alienation of affections....

[B.] Without question, Mississippi’s recognition of the tort of alienation of affections places it among the minority of states. Chief Justice (then Justice) Smith wisely responded [in an early case] to the “everybody else is doing it, so should I” view, by stating: “[w]hile I agree that it appears society’s moral values have changed during modern times, I do not believe Mississippi should get aboard this runaway train. I would also not take away an offended spouse’s only legal means to seek redress in our courts for the wrongful conduct of a third party who wilfully and intentionally interferes in and aids in destroying a marriage.”¹¹

In retaining the tort, this Court has stated that “the purpose of a cause of action for alienation of affection is the ‘protection of the love, society, companionship, and comfort that form the foundation of a marriage....’”¹⁰ ... Justice Smith’s special concurrence in [an earlier case] explained the justification and need for continued recognition of the tort of alienation of affections, stating:

[S]hould an individual be allowed to intrude upon a marriage to such an extent as to cause it to come to an end? Does a spouse have a valuable interest in a marriage that is worthy of protection from the intruding third party? In my view, the answer to both questions is in the affirmative. *The traditional family is under such attack both locally and nationally these days that this Court should not retreat now from the sound view of*

¹¹ I cannot adopt the position of a majority of states and minimize this activity which the legislature has defined as a crime against public morals and decency, and declared its penalty comparable to similar conduct between a teacher and pupil or a guardian and ward. The Legislature has not seen fit to join the throngs who say these are only “affairs of the heart,” “flings,” or “stepping out,” as a means of attaching validity to such conduct.

¹⁰ The tort of alienation of affections is equally applicable to women as men, avoiding any archaic notion that a wife is the property of her husband. [Footnote moved.—ed.]

the tort of alienation of affections espoused by this Court ... as entitling a spouse to “protection of the love, society, companionship, and comfort that form the foundation of a marriage.” I do not believe that under the compelling facts of this particular case this Court should hold that the doctrine of alienation of affections has outlived its usefulness as a deterrent protecting the marital relationship of a husband and wife in cases where the facts clearly warrant.

In addition to protecting the marriage relationship and its sanctity, the tort of alienation of affections also provides an appropriate remedy for intentional conduct which causes a loss of consortium.... “[I]n tort cases where a spouse is injured, the other spouse often has a separate claim for loss of consortium. Most of these losses are caused by a defendant’s negligence. In alienation of affection—an intentional tort—a defendant’s intentional conduct causes the loss. It is inconsistent [if] the law compensates for negligent conduct causing a loss of consortium, but ... does not compensate for intentional conduct causing the same loss.” Therefore, in the interest of protecting the marriage relationship and providing a remedy for intentional conduct which causes a loss of consortium, this Court declines the invitation to abolish the common law tort of alienation of affections in Mississippi.¹² Alienation of affections is the only available avenue to provide redress for a spouse who has suffered loss and injury to his or her marital relationship against the third party who, through persuasion, enticement, or inducement, caused or contributed to

¹² One dissent suggests that “these suits inevitably do more to hurt families than to help them.” I find more persuasive the counterargument that damage actually arises from the adulterous conduct which first violates, and then destroys, the trust of not only the participants, but also of their respective families. To minimize and cast as theoretical the obvious negative consequences, such as the erosion of the marital relationship and the disruption to family unity ignores these empirical truths. The dissent’s fatalistic presupposition that marriages experiencing affairs will “crash and burn,” fails to recognize the reality of forgiveness and reconciliation.

the abandonment of the marriage and/or the loss of affections by active interference....

[C.] The commonly stated elements of the tort of alienation of affections are “(1) wrongful conduct of the defendant; (2) loss of affection or consortium; and (3) causal connection between such conduct and loss.” This Court has recognized that persuasion, enticement, or inducement which causes or contributes to the abandonment is a necessary component of “wrongful conduct.” ... [I]n order “to maintain this action it *must* be established that the husband [wife] was *induced* to abandon the wife [husband] by some active interference on the part of the defendant.” ...

[V]iewing the testimony and evidence presented at trial “in the light most favorable” to Valentine, a reasonable juror could conclude that all elements of the tort of alienation of affections were met. The “wrongful conduct of the defendant” ... was satisfied by introduction of evidence supporting a finding that Fitch’s acts of persuasion, enticement, or inducement caused or contributed to an adulterous relationship between Fitch and Sandra, which subsequently was admitted. The judgment of divorce provided that “[t]he evidence presented in open [c]ourt clearly establishes that [Valentine] is entitled to a divorce on the grounds of adultery.”

Furthermore, Valentine testified that after K.V. was born he began finding large sums of money throughout the home, which Sandra claimed to have made at work. The amount of cash he found far exceeded what he had previously observed Sandra earning. Fitch testified to giving Sandra money between February 1999 and August 1999. Moreover, Fleming testified that Sandra told her she was given \$8,000 by Fitch with which to buy a new Jeep Cherokee. Soon thereafter, Sandra acquired a new Jeep Cherokee. Finally, Fleming testified that Sandra told her “that if she did quit [working for Fitch], she was afraid that Mr. Fitch would have [the child] taken away from her.” Valentine testified his marriage failed because Sandra “couldn’t resist all the money [.]” and, absent Fitch, his marriage would have remained intact. This satisfies the

additional element of persuasion, enticement, or inducement, when viewed “in the light most favorable,” to Valentine.

The key issue is the “causal connection between such conduct and loss.” In short, when did the loss of society, companionship, aid, services, support, and the remaining components of loss of affection and consortium occur? Was it before or after Sandra became involved with Fitch? If after, did Fitch’s wrongful conduct lead to Sandra’s loss of affection or consortium?

Again, the testimony must be viewed “in the light most favorable,” to Valentine. Even though the marriage may have been “on the rocks,” there is no proof that aid, services, support, or the right to live in the same house and eat at the same table had been lost until after the wrongful conduct, even though Sandra asserted that she lost affection for Valentine in January of 1996. Around that time, she allegedly went to the casino, told Valentine that if he did not leave with her their marriage was over, and he did not leave. From that point on, which predated her introduction to Fitch, she claims not to have “care[d] if he went every night, and that’s when our marriage was over.” However, Valentine testified that, prior to K.V.’s birth, his marriage to Sandra, while not perfect, was “normal.” He stated that they had regular sexual relations prior to K.V.’s birth, shared a joint checking account, ate meals together, never separated, and that he loved Sandra. Only after K.V. was born did Valentine begin to notice changes in Sandra. The “loss of affection or consortium” was unquestionably present.

DICKINSON, J., concurring in the judgment.... The tort called alienation of affections originated in the English common law, when wives were considered their husbands’ property. A third party who actively interfered with a marriage by persuading a wife to leave her husband was considered to have deprived the husband of his property. A brief overview of the development of common law alienation actions is in order to explain and provide an historical backdrop for the discussion to come.

In order to maintain pure bloodlines and discourage adultery, Teutonic tribes required a wife’s lover to compensate the husband for his wife’s infidelity, allowing the husband to buy a new wife and ensure the legitimacy of his offspring. The Anglo-Saxons later allowed actions for marital interference on the premise that wives were valuable servants to their husbands. The action was analogous to a master’s claim “against one who enticed away his servant, in whose services the master held a quasi-property interest.” Thus, in keeping with this belief, a husband could “vindicate” his loss in the marital relationship through an action for alienation of affections, but a wife was not afforded the same right.

Two centuries ago, in *Hutcheson v. Peck*, 5 Johns. 196 (N.Y. 1809), the Supreme Court of Judicature of New York applied the common law tort to an action by a husband who sued his wife’s father for attempting to alienate his wife’s affection. Although at first agreeable to his daughter’s marriage, the father-in-law began to question the Plaintiff’s ability to provide for his daughter, and changed his mind. He threatened his daughter’s husband, going so far as to “strike” him, and then took his daughter into his home and threatened that, if she returned to her husband, he would not support them.

In analyzing the claim, the court stated that “[i]f it was the duty of the wife to return to her husband, the defendant did an unlawful act by persuading her to violate that duty. If the wife was unjustifiable in abandoning the plaintiff, the defendant is responsible for having *enticed* and *persuaded* her to abandon him.”

The court went on to state that, had the defendant “not been instrumental in procuring his daughter to live apart from her husband, and had he gone no further than to receive and support her,” the plaintiff would have no recovery. The court then stated, “[v]ery different, however, will be the conclusion, when the parent unlawfully produces the separation by sowing the seeds of discord and hatred; thereby poisoning the sources of domestic harmony and enjoyment.”

In *Winsmore v. Greenbank* (1745), the

... English court declared, “[t]o be sure, it must be an unlawful *procuring* ... and by means of [insinuations] the defendant [must have] *persuaded* the plaintiff’s wife to do an unlawful act....” When Mississippi became one of the United States, it recognized and adopted most of the English common law. Thus, the civil cause of action for alienation of affections traveled with our ancestors from England to Mississippi. Over the past two hundred years, however, the cause of action has fallen into disfavor for several reasons. In the late nineteenth and early twentieth centuries, the Married Women’s Property Acts were passed, giving women the same rights to own property as men. This shift in the perception of a wife’s role in the marriage forced the courts to consider the continued viability of alienations actions.

But instead of allowing the tort—along with its wife-as-chattel premise—to fade away, some courts began to justify alienation of affection actions as a means to preserve marriages and discourage interference by third-parties.... “[A] common phenomenon ... familiar to the students of history, is this. The customs, beliefs or needs of a primitive time establish a rule or a formula. In the course of centuries the custom, belief, or necessity, disappears, but the rule remains. The reason which gave rise to the rule has been forgotten, and ingenious minds set themselves to inquire how it is to be accounted for. Some ground of policy is thought of, which seems to explain it and to reconcile it with the present state of things and then the rule adapts itself to the new reasons which have been found for it, and enters a new career. The old form receives a new content and in time even the form modifies itself to fit the meaning which it has received.”

As the Missouri Supreme Court astutely noted, “When the reason for a rule of law disappears, so too should the rule.” In Mississippi, though, the legal fiction that the common law tort of alienation of affections preserves a spouse’s right to the mind and body of a partner continues to this day, only now it is masked as the means to stabilize the marital union.

Right to abolish common law actions

Because I favor strict observance of the constitutional separation of powers, reserving unto the Legislature the prerogative to legislate, and claiming for this Court the power and duty to attend to all things judicial, I feel somewhat obligated to justify my preference that this Court, rather than the Legislature, abolish the tort.

It appears that this Court first recognized the tort of alienation of affections in [1927]. Notably, the Mississippi Legislature has never codified any of the so-called “heart balm torts,” including alienation of affections, and the actions remain exclusively creatures of the common law.... “[T]he creation of common law is not a one-way street.... What the court gives it can take away....” Thus, because the common law is a creature of the courts, English and American, this Court and other courts are free to change it at will, recognizing that the legislative bodies of the various states are also free to enact into statutory law any provision of the common law they think appropriate.

A woman is not property, and her decision to engage in and consent to extramarital affairs—although abhorrent to the majority (and to me)—should not be relegated to the musings of an inferior spouse, incapable of making such decisions....

Spousal affection is incapable of theft

[T]he tort is continued because “spousal affection” is characterized as “property” capable of theft. However, that premise is simply illogical. “To posit that one person possesses rights to the feelings of another is an anachronism.” Even though courts today do not call the alienated affection “property” or “a possession,” that is how it is treated, just as it was when courts created the cause of action to compensate husbands for the loss of their wives’ “services.” In the end, the successful plaintiff engages in what is essentially a “sale” of his or her spouse’s affections.

Additionally, “theft” implies the taking of property from an unwilling owner by an outsider. However, the fact is that actions for alienation of affections arise from the willing participation of one spouse. While

the tort purportedly exists to discourage third-parties from disturbing the marital relation, in reality the marriage is unlikely to weaken without one spouse actively consenting to the “wrongful interference.” “Human experience is that the affections of persons who are devoted and faithful are not susceptible to larceny no matter how cunning or stealthful.”

Importantly, I do not advocate for the abolition of this tort because I feel defendants in such suits deserve protection, or because I view promiscuity as harmless. I merely find the foundation for such suits—that someone should recover for an injury to “property” which they cannot own—completely erroneous.

No evidence the tort deters wrongful interference with or preserves marriage

As the Washington Supreme Court noted when abolishing the tort of alienation of affections, “[t]he underlying assumption of preserving marital harmony is erroneous.” The tort is inherently unplanned, especially where sexual activity is involved, so the idea that the parties would contemplate the possibility of a lawsuit and be deterred is unrealistic. The truth remains that a spouse inclined to engage in an extramarital affair will do so, and even if “a would-be paramour would be thereby dissuaded [by the threat of suit], a substitute is likely to be readily found.”

The theory that alienation actions must be retained as a means of preserving marriages and protecting families must fail for lack of support. While an admirable sentiment, these suits inevitably do more to hurt families than to help them. In my view, when a marriage has crashed and burned, the law should not provide an imprimatur to fan the coals of anger and resentment, extending further into the future the time when healing can begin. This is particularly true where children are involved. Enough difficulty exists already in the development of a civil relationship among divorced parents and the children of the marriage.

Cause of action is primarily punitive and brought to gain revenge

Despite the fact that an action for

alienation of affections is a civil suit and theoretically compensatory, the true nature of the claim is punitive. “The third party is seen as a malicious seducer wreaking havoc upon the harmonious marital couple. These common law actions thus reason that the third-party must be punished for his [or her] misdeeds by payment to the aggrieved spouse.”

Undeniably, the primary motives in bringing an action for alienation of affections are to gain revenge on the unfaithful spouse and the defendant and to force outrageous settlements. Alienation of affection claims have become prime tools for extortion or blackmail. Such vexatious lawsuits can make contentious divorce proceedings even more bilious. The action can also rearrange the marital assets, making it difficult for a court to properly assess the needs and abilities of the individual spouses. These suits are never used to achieve reconciliation or preserve the marriage; rather, they are fueled by vindictiveness and a desire to destroy reputations and relationships.

Injuries to parties’ reputations and dignity

No party involved in an action for alienation of affections emerges unscathed. While the harm to the defendant and unfaithful spouse is clear, “the action [also] diminishes the plaintiff’s dignity and injures his [or her] own reputation through the process of seeking money damages.” The intimate details of the marriage, and its breakdown, are revealed for all to see as the parties attempt to assassinate the character of their adversaries.

Often lost in this bitter fight is the effect the suit can have on children of the marriage. Even beyond the mere exposure to the airing of their parents’ dirty laundry, children can be required to testify for one parent or another in open court. Clearly, any injuries that might have been caused by the wrongful conduct are exacerbated by alienation of affections actions.

Difficulty of juries to properly evaluate alienation actions

Alienation of affections cases present a

particularly difficult challenge for juries. As the Iowa Supreme Court observed, “[o]ur system of establishing facts, however, has a strong, sometimes it seems an irresistible, tendency to break down in alienation cases. This is because of the incendiary effect of the usual evidence in such cases. Under the established theory of recovery, the jury should first undertake to decide which came first, the marriage breakdown or the misconduct. But juries necessarily face the first determination after learning of conduct of which they strongly disapprove and which society condemns.”

The element of “inducement” often proves perplexing, as the factfinder must determine whether the defendant or the alienated spouse was primarily responsible for the other spouse straying. The Idaho Supreme Court cited a case to illustrate the dilemma where the plaintiff and spouse were separated, the spouse willingly engaged in an affair, and yet the jury still found for the plaintiff. The jury in this case fell into the same trap. The majority accurately points out that there was no evidence that Fitch “induced” Valentine’s estranged wife to engage in an illicit affair with him. Nevertheless, the jury awarded Valentine \$754,500, plus interest, for his alleged loss.

The awarding of damages presents another distinct problem in these actions, as no clear standards for compensating the plaintiff exist. This opens the door for quasi-punitive damage awards, disguised as actual damages, which are usually tainted by passion and prejudice. Of course, I can hardly blame jurors for struggling with this cause of action. The theory of recovery, itself, is flawed.

Abolition will have no effect on right to recover for loss of consortium

Abolition of the common law tort of alienation of affections will in no way restrict the right to recover for loss of consortium. “The right to recover for loss of consortium is a factor in assessing damages when the underlying liability has been established in a personal injury suit. Renunciation of the right to recover for alienation proceeds from the belief there is no basis for the underlying liability.” Given

the specific attributes of an alienation action and the right to recover for loss of consortium, it is not inconsistent to abolish the former and continue to recognize the latter.

Comparison with actions for tortious interference with a contractual relationship is misplaced

A claim of tortious interference with a contractual relationship is not comparable to a claim of alienation of affections. In contract suits, the aggrieved party can sue both the interferer and the other party to the contract. However, in alienation actions, the “other party” to the “contract” is the spouse (whose affection was allegedly alienated from the plaintiff) who is not subject to suit, as in true contract cases. As the Kentucky Supreme Court pointed out, “[t]his logical asymmetry has prompted the majority of jurisdictions to eliminate these marital torts.” ...

Having failed to gain agreement from a majority of Justices on elimination of the cause of action, I must now analyze the case before us. Despite my view that the cause of action for alienation of affections should be eliminated in Mississippi, a majority of this Court wishes it to remain viable. Since my oath of office requires me to follow the law as it exists, not as I think it should be, I cannot deprive the plaintiff of my vote simply because my personal view is that the law should be changed. A vote to dissent would be justified in this case only if I conclude that the existing law has been improperly applied. In my view, Justice Randolph’s analysis of the law and his application of the law to this case is exactly correct....

EASLEY, J., dissenting.... I agree that the Court should decline the invitation to abolish the tort of alienation of affections....

The majority correctly recognizes that inducement is a specifically required element to establish alienation of affections, rather than alienation of affections being established solely from the fact that an affair or sexual relationship occurred. However, the majority’s reasoning remains fatally flawed. The majority focuses its rea-

soning to establish inducement from the undisputed fact that Fitch is a wealthy man, and Sandra could not resist his money.

The majority misses the point that there must be established some “wrongful conduct” on the part of Fitch that amounted to the direct and intentional interference with the marriage relationship and resulted in the inducement of Sandra to abandon Valentine by some active interference on the part of Fitch. Sandra testified that Fitch did not ask her to leave Valentine, and she was the initiator of the eventual relationship.

Here, the majority bases the inducement on *Sandra’s* alleged inability to resist Fitch’s money and the fact that Sandra had a lot of money in cash when she worked for Fitch. However, both Sandra and Fitch testified that Fitch did not give Sandra any money above and beyond what she earned in her salary from working for Fitch Oil Company and in commissions from the sale of real estate for Fitch Realty. According to the record, Sandra began working at Fitch Oil Company sometime in 1997. Sandra testified that her relationship with Fitch did not start until sometime in the spring of 1998. She testified that she believed that she had worked there approximately sixteen months before *she initiated* flirtation and the affair with Fitch. Fleming, who worked as the bookkeeper for Fitch Oil Company testified as to how Sandra was paid her salary. Fleming verified that Fitch paid all his employees in cash.

Fitch testified regarding the money he gave to Sandra before they were married. He stated that Sandra worked out of Fitch Oil Company, but she also worked in Fitch Realty as a realtor. Fitch stated that Sandra, like all of his employees, was paid in cash for her weekly salary plus commissions on what she sold. According to Fitch’s testimony, he never gave Sandra any extravagant gifts nor took any trips with her. He further denied that he ever gave Sandra \$8,000 in cash to purchase a Jeep Cherokee. Fitch testified that he did not recall giving Sandra any money over

and above her salary and commissions.

Further, Sandra and Fitch both denied that Fitch had ever made any threats against Sandra that he would take her child away from her. Sandra also denied any physical threats from Fitch. Sandra testified that Fitch never asked her to leave Valentine. Sandra subsequently married Fitch after she divorced Valentine, and she was still married to Fitch at the time of the trial. Further, Sandra met Valentine under similar circumstances.

Prior to trial, Valentine filed a motion in limine to prevent Fitch from introducing any evidence that Valentine and his former wife, Sandra, engaged in and participated in a lengthy adulterous relationship prior to their marriage while Sandra was still married to a prior husband, Tracey Hughey. After Sandra’s divorce from her husband, Hughey, she married Valentine. The trial court granted the motion in limine to exclude the testimony regarding Valentine’s adulterous affair with Sandra....

Sandra testified that she was the initiator of the relationship with Fitch. This fact is completely ignored in its reasoning by the majority which acknowledges that the spouse must have been induced to abandon the marriage. It is hard to imagine how Sandra was the one induced when she testified that she pursued Fitch, who was married at the time, and she was the initiator of their eventual relationship.... [Factual details omitted.—ed.]

Here, according the record, the Valentines’ marriage had deteriorated before Sandra began a relationship with Fitch. Nothing contradicted Sandra’s assertion that she was the initiator of the relationship with Fitch. She testified that she had no affection left for Valentine for Fitch to have alienated. There is a lack of evidence that Fitch directly and intentionally interfered the Valentines’ marriage by inducing Sandra’s affections. While Fitch’s and Sandra’s conduct is clearly not admirable, the evidence fails to support a claim of alienation of affections....

40. End of Mon., Nov. 23 and Tue., Nov. 24: Invasion of Privacy—Disclosure of Embarrassing Facts

Read pp. 696-705, 706-09, plus the *Gates* case below.

Concept—arguing about what should count as legally cognizable harm: In nearly all the cases that we've discussed in this class, the plaintiff had been injured in a way that we recognize as at least unfortunate, and usually wrongful. (That's probably true even as to alienation of affections, where the chief debate is about whether the tort system is the right way to deal with that wrong.) The controversy has been controversy about whether the defendant should be held responsible for the injury, and whether holding defendant liable will properly deter (as opposed to overdetering) the injury-causing conduct. But in this unit and the next, we'll look at arguments about whether some injury should be seen as in need of deterrence in the first place—whether it should be seen as the sort of harm that the law should treat as regrettable.

Of course, a plaintiff's hurt feelings, or sense of loss of privacy, or loss of business and social opportunities when people shun him, are "harms" in the strictly descriptive sense of leaving the plaintiff worse off than he would have been without the conduct. But the same could be said about a plaintiff's loss of business opportunities because a competitor outcompetes him, or a plaintiff's hurt feelings when his lover decides to leave. Such descriptive being-worse-off-as-a-result-of-defendant's-actions is generally a necessary condition for liability, but not a sufficient one.

The question rather is whether the law should treat the harms as legally actionable harms. And the answer turns on the answers to some subsidiary questions: Do we think that banning certain kinds of disclosures will help society as a whole, as opposed to just helping the people about whom the disclosures are made? Do we think that the disclosers have some sort of right, whether constitutional or moral, to speak about others? Do we think the subjects have some sort of moral right not to have certain details of their lives revealed? (This would not be a federal constitutional right, since rights under the federal constitution generally constrain only government action.) Do we think that the disclosers' prospective listeners—e.g., Briscoe's daughter and friends, whose scorning of Briscoe was seen as a big part of the harm to Briscoe—have some sort of right to hear such revelations, without interference from the legal system?

Note, by the way, that a few states have expressly refused to recognize this tort. See *Brunson v. Ranks Army Store*, 73 N.W.2d 803 (Neb. 1955); *Howell v. New York Post Co.*, 612 N.E.2d 699 (N.Y. 1993); *Hall v. Post*, 372 N.E.2d 711 (N.C. 1988); *Anderson v. Fisher Broadcasting*, 712 P.2d 803 (Or. 1986); *Evans v. Sturgill*, 430 F. Supp. 1209 (W.D. Va. 1977); see also *Doe v. Methodist Hospital*, 690 N.E.2d 681 (Ind. 1997) (splitting 2-2-1 on whether the tort should be recognized, with one Justice expressing no opinion).

First Amendment note: As with the free speech issues under the intentional infliction of emotional distress, our class discussion will be focused on tort law policy arguments, rather than on First Amendment doctrine. But, as I mentioned, many common free speech policy arguments can also be easily turned into tort law policy arguments, so think back on free speech arguments you've heard in the past, and see how you can apply them here.

In addition to the doctrinal observations made in the readings for the intentional infliction of emotional distress, also keep in mind that free speech law generally protects "entertainment" as much as it protects "political speech," partly because it's often hard to draw the line between the two. *Winters v. New York*, 333 U.S. 507 (1948). One can argue against that generally, or in particular contexts, but keep in mind that the argument is likely to be an uphill one.

Terminological note: The right we're discussing here is sometimes labeled the "right to privacy," but we should try to avoid that as much as possible. (I know it's hard—I often slip up on this myself.) The reason is that "privacy" means so many different things in the legal

system.

Even in tort law, “the right to privacy” can refer to (1) the right not to have embarrassing facts about oneself disclosed, (2) the right not to have intrusions upon one’s seclusion (e.g., eavesdropping or high-magnification photography into one’s home), (3) the right not to be put in a false light, and (4) the right not to have one’s name and likeness used for (certain) commercial purposes. The right to privacy is also a common label for (5) a federal constitutional right not to have the government interfere with certain actions involving one’s body (e.g., to get an abortion, to use contraception, to have sex, and so on). It is sometimes used to refer to (6) a rather ill-defined federal constitutional right to not have the government disclose certain facts (embarrassing or otherwise damaging) about you. It is also (7) often talked about as an aspect of the Fourth Amendment right not to have the government engage in certain kinds of searches and seizures of you or your property. And it is (8) an expressly recognized state constitutional right, of broad but uncertain scope, under several state constitutions, including California’s.

What’s more, not only are these rights different in scope, they are in large measure different in theoretical justification; the right to have an abortion, for instance, is conceptually quite different from the right not to have people talk about certain embarrassing facts from your life. So let’s try to talk about the tort we’re discussing here as the “disclosure tort” or perhaps the “private facts tort,” and not the “right to privacy” more broadly.

Question: Read *Gates*, and think about the footnote at the end. Say that Gates had never been tried for the crime, and the documentary makers learned the facts about his participation from Gates’ friends or coworkers. Would the result be the same? Should it be?

***Gates v. Discovery Communications, Inc.*, 101 P.3d 552 (Cal. 2004)**

Plaintiff served a prison sentence of three years (with time off for good behavior) that was imposed after he was convicted upon pleading guilty in 1992 to being an accessory after the fact to a murder for hire that occurred in 1988. The victim was an automobile salesman who was shot and killed by hired “hitmen” at the door of his Southern California home. A prominent automobile dealer was convicted of masterminding the murder in order to deter a class action lawsuit the victim had filed against an automobile dealership owned by the dealer’s parents.

Plaintiff, who was employed as the automobile dealer’s assistant manager at the time of the murder, originally was charged as a coconspirator, but the charges were later reduced. Defendants are television production and transmission companies that aired an account of the crime in 2001—more than a dozen years after the crime occurred.

After defendants’ documentary was broadcast, plaintiff filed this action, ... alleg[ing] he was damaged by “the revelation that Plaintiff pleaded guilty to being an accessory after the fact to a murder for

hire plot and the airing by Defendants of Plaintiff’s photograph.” ... On the ground that “there is no authority which precludes civil liability for truthful publication of private facts regardless of whether the information is newsworthy,” ... the [trial] court overruled the demurrer to the invasion of privacy cause of action.... The Court of Appeal reversed, ... [holding] that, as a matter of law, plaintiff could not prevail on his invasion of privacy cause of action because defendants’ disclosures were of truthful information contained in the public official records of a judicial proceeding and were, accordingly, protected under the First Amendment....

[As the Court of Appeal accurately said,]

“After *Briscoe v. Reader’s Digest* the United States Supreme Court decided a series of cases dealing with the same broad issue of the tension between the right to privacy and the rights of free speech and free press.

“In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), a 17-year-old woman was killed during a rape in Georgia. The crime received wide press coverage but the name of the victim was not disclosed because of a Georgia law making it a crime

to publish or broadcast such information. A reporter became aware of the name of the victim when shown an indictment in the case made available to him in the courtroom. It was undisputed that the indictment was a public record available for inspection. The reporter's employer broadcast the name of the victim. The victim's father brought a privacy action. Cox argued its broadcast was privileged under the [First Amendment]. The Georgia trial court rejected the argument, stating the Georgia statute gave a civil remedy to those injured by its violation.

"The Supreme Court stated the issue was whether consistent with the [First Amendment] 'a State may extend a cause of action for damages for invasion of privacy caused by the publication of the name of a deceased rape victim which was publicly revealed in connection with the prosecution of the crime.'

"The court first acknowledged a growing body of law recognizing a right to privacy. Cox argued the press could not be held criminally or civilly liable for publishing information that was neither false nor misleading. The court noted that in defamation actions truth was generally viewed as a defense. The court stated, however, it had 'carefully' left open the question of whether the Constitution required that truth be recognized as a defense in a defamation action brought by a private person rather than a public figure. The court stated the same degree of caution should exist in dealing with the issue of the effect of truth on the tort of invasion of privacy.

"In this regard, the court stated: 'Rather than address the broader question whether truthful publications may ever be subjected to civil or criminal liability consistently with the [First Amendment], or to put it another way, whether the State may ever define and protect an area of privacy free from unwanted publicity in the press, it is appropriate to focus on the narrower interface between the press and privacy that this case presents, namely, whether the State may impose sanctions on the accurate publication of the name of a rape victim obtained from the public records—more specifically, from judicial records which are maintained in connec-

tion with a public prosecution and which themselves are open to public inspection. We are convinced that the State may not do so.'

"The court explained that the reporting of information concerning the operation of every part of government, including the judiciary, was of great importance and entitled to strong protection. The court noted that the law of privacy recognized that the interest in privacy fades when the information involved was already in the public record.

"The court emphasized that by putting information in an official court record, the state must presume that the public interest was being served. It stated that public records by their very nature are of interest to the public and an important benefit is performed when they are published. The court stated such reporting was important to our form of government and then concluded: 'In preserving that form of government the [First Amendment] command nothing less than that the States may not impose sanctions on the publication of truthful information contained in official court records open to public inspection.'

"The court stated it was reluctant to embark on a course that would make public records available to the press but forbid their publication if offensive to the sensibilities of some supposed reasonable man. The court stated this would make it difficult for the press to report public business and also stay within the law. Such a rule would invite timidity and self-censorship and would lead to the suppression of matters that would otherwise be published.

"In *Oklahoma Publishing Co. v. District Court*, 430 U.S. 308 (1975), delinquency charges arising from a murder were brought against an 11-year-old boy. Members of the media were present in the courtroom during the detention hearing and learned the boy's name. The name appeared in newspaper stories and in radio and television broadcasts. At a later closed hearing the trial court entered an order enjoining the press from revealing the boy's name. Oklahoma Publishing's petition for a writ to quash the order was denied by the Oklahoma Supreme Court on the basis that Oklahoma law required ju-

venile proceedings be held in private unless ordered open by the trial court.

“The United States Supreme Court reversed ... [holding] that the existence of a state statute requiring closed juvenile hearings was irrelevant since members of the press had lawfully been present at a hearing where the boy’s name was revealed. The court noted the name was revealed in connection with “the prosecution of the crime,” much as the name of the rape victim in [Cox] was placed in the public domain.’ The Supreme Court found the trial court’s order unconstitutional.

“In *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979), a 15-year-old student was shot and killed by a 14-year-old classmate in West Virginia. Newspaper reporters learned the classmate’s name from eyewitnesses to the crime. The assailant’s name was published in the newspaper. Indictments were returned, alleging that the publication of the assailant’s name violated a West Virginia statute making it a crime to publish the name of any child connected with a juvenile proceeding without court permission....

“The United States Supreme Court ... stated that ... [as to any] sanction for the publication of lawfully obtained truthful information, any justification required a showing that the state’s action furthers a state interest of the ‘highest order.’ The state argued its interest was maintaining the juvenile’s anonymity as a means of promoting rehabilitation. The court concluded this was not an interest of the highest order.

“In *The Florida Star v. B.J.F.*, 491 U.S. 524 (1989), the court again visited the issue of the criminalization of the disclosure of the name of sex crime victims. A Florida statute made it unlawful to publish the name of the victim of a sexual offense. A report of a rape including the name of the victim was inadvertently released to the press by the police department and *The Florida Star* newspaper printed it. The rape victim sued the newspaper for printing her name in violation of the nondisclosure statute. The trial court found the newspaper negligent per se and a jury awarded the plaintiff \$100,000 in damages....

“The [Supreme Court] rejected any rule that truthful publications may never be punished. It noted the court had carefully avoided such a pronouncement, concluding that given the issues involved, it was better to treat situations as they arose and not declare categorical directives. Instead, the court crystallized a flexible rule first suggested in *Daily Mail*, “[I]f a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order.”

“The court stated such a rule giving great protection to the publication of lawfully obtained truthful information was justified by at least three considerations. First, the government has sufficient means in most cases to sufficiently protect confidential information without punishing its publication. Next, it does little to protect the right of privacy to punish the publication of information already available to the public. In this regard, the court stated: ‘It is not, of course, always the case that information lawfully acquired by the press is known, or accessible, to others. But where the government has made certain information publicly available, it is highly anomalous to sanction persons other than the source of its release.’

“The court continued: ‘[I]t is a limited set of cases indeed where, despite the accessibility of the public to certain information, a meaningful public interest is served by restricting its further release by other entities, like the press. As *Daily Mail* observed in its summary of *Oklahoma Publishing*, “once the truthful information was ‘publicly revealed’ or ‘in the public domain’ the court could not constitutionally restrain its dissemination.”’ Finally, the court noted that punishing truthful information lawfully obtained could result in a harmful “timidity and self-censorship” on the part of the press.

“In finding that allowing damages against *The Florida Star* for publishing the sex crimes victim’s name was unconstitutional, the court addressed the issue of what is a ‘public interest of the highest order.’ It noted that the plaintiff claimed

three interests advanced by Florida's non-disclosure law, the privacy of victims, the physical safety of victims and the encouragement of victims to report offenses. The court found these interests highly significant but, under the facts of the case before it, not of the highest order. The court noted the information was provided to the newspaper by the government, under Florida law the publication amounted to per se negligence and the nondisclosure was underinclusive in that it applied only to "instruments of mass communication."

"In *Bartnicki v. Vopper*, 532 U.S. 514 (2001), the court dealt with the protection, if any, given by the First Amendment to the disclosure of the contents of an illegally intercepted communication. In that case the media was provided and published the contents of illegally intercepted cellular telephone conversations between a teacher's union president and the union's labor negotiator concerning collective bargaining matters. The officials sued various members of the media who published the intercepted communications, noting that such interceptions were illegal under state and federal law and that it was illegal for anyone to disclose the content of such communication who knew or has reason to know it was illegally intercepted.

"In addressing the issue the court began by assuming that the media defendants were aware the recordings were of illegally intercepted communications and that disclosing their content was illegal. The court also noted that the media defendants lawfully obtained tapes of the conversation even though they knew the information was itself illegally intercepted. The court further found that the content of the tapes was of public concern.

"The court noted the rule that absent a need of the highest order a state may not punish the publication by a newspaper of truthful information lawfully obtained. It was argued that the state had two such interests, removing the incentive to intercept conversations and the interest in minimizing harm to persons whose conversations were intercepted. The court stated these interests met the constitutional test with regard to the person who illegally intercepted the conversation. It quickly re-

jected, however, the argument that an interest in removing the incentive to intercept applied to one who later lawfully obtained and disclosed ... the information.

"The court stated that the issue of whether the states had a sufficiently high interest in protecting the privacy of those whose conversation was intercepted was a more difficult question. The court noted that allowing the disclosure of such intercepted conversations might have a chilling effect on private speech. The court concluded, however, under the facts before it, criminalizing disclosure of the conversations implicated the core purpose of the First Amendment because it punished the publication of truthful information of public concern."

We conclude that the high court's decision in *Cox* and its subsequent pronouncements in *Oklahoma Publishing*, *Daily Mail*, *The Florida Star*, and *Bartnicki* have fatally undermined *Briscoe's* holding that a media defendant may be held liable in tort for recklessly publishing true but not newsworthy facts concerning a rehabilitated former criminal, insofar as that holding applies to facts obtained from public official court records....

It is true that in subsequently articulating the more general principle of which *Cox's* rule is an instance—viz., that "state officials may not constitutionally punish publication of [truthful] information" that "a newspaper lawfully obtains ... about a matter of public significance"—the high court excepted circumstances involving "a need to further a state interest of the highest order." But in light of the needs and interests the high court, as previously noted, has determined *not* to be "of the highest order" for these purposes, we conclude, contrary to plaintiff's suggestion, that any state interest in protecting for rehabilitative purposes the long-term anonymity of former convicts falls similarly short.

Plaintiff requests that we distinguish *Cox* and its progeny on their facts, principally the fact that "all of these cases involve situations in which the events reported on occurred within a few days, weeks or months of the offending publication, not years after the fact as in *Briscoe*

...” But as the Court of Appeal below recognized, the high court has never suggested, in *Cox* or in any subsequent case, that the fact the public record of a criminal proceeding may have come into existence years previously affects the absolute right of the press to report its contents....

Neither that defendants’ documentary was of an historical nature nor that it involved “reenactments,” rather than firsthand coverage, of the events reported, diminishes any constitutional protection it enjoys. “[T]he constitutional guarantees of freedom of expression apply with equal force to the publication whether it be a news report or an entertainment feature.” And ... “[t]here is no indication that the First Amendment provides less protection to historians than to those reporting current events.” ...

We, like the high court, are “reluctant to embark on a course that would make public records generally available to the media but forbid their publication if offensive to the sensibilities of the supposed reasonable man. Such a rule would make it very difficult for the media to inform citizens about the public business and yet stay within the law. The rule would invite timidity and self-censorship and very likely lead to the suppression of many items that would otherwise be published and that should be made available to the public.” ...

[Footnote:] [W]e have no occasion to consider the extent to which invasion of privacy claims based on publication of *non* record facts linking the plaintiff to a past crime, or on facts obtained from *non* public records, remain viable.

41. Wed., Nov. 25: Catch-Up Day

I recognize that this is the last class the day before a four-day weekend, and that many people like to turn Thanksgiving into a five-day weekend. But the law school has an express policy that classes should *not* be canceled or rescheduled simply because it is the day before Thanksgiving.

42. Mon., Nov. 30: The Right of Publicity (Also Sometimes Known as the Misappropriation of Name or Likeness)

Read the materials below—the Restatement sections, *Doe v. TCI Cablevision*, and *C.B.C. Distribution & Marketing, Inc. v. Major League Baseball Advanced Media*. Note that *Doe v. TCI* is probably a minority position, and one California case that it cites, *Winters v. D.C. Comics*, took a very different approach on very similar facts. So you should recognize that there are different views of the scope of this tort, which *Doe* in some measure lays out.

Concepts: Here again we'll see a dispute about whether the allegedly tortious behavior *should be legally treated as wrongful* in the first place; and here again we'll also see *free speech policy arguments*.

Restatement (Third) of Unfair Competition § 46

One who appropriates the commercial value of a person's identity by using without consent the person's name, likeness, or other indicia of identity for purposes of trade is subject to liability

Comment: ... *b*.... Proof of deception or consumer confusion is not required for the imposition of liability under this Section [though it is required for some other trademark-related causes of action—ed.]....

d. Appropriation of identity. The right of publicity protects the commercial value of a person's identity. The right is most often invoked to protect the value associated with the identity of a celebrity, and a few cases appear to require some minimum degree of fame or notoriety as a prerequisite for relief. However, the identity of even an unknown person may possess commercial value. Thus, an evaluation of the relative fame of the plaintiff is more properly relevant to the determination of appropriate relief....

In most cases an appropriation of identity is accomplished through the use of a person's name or likeness. The person can be identified by a real name, nickname, or professional name, or by a likeness embodied in a photograph, drawing,

film, or physical look-alike. In the absence of a narrower statutory definition, a number of cases have held that the unauthorized use of other indicia of a person's identity can infringe the right of publicity. Thus, the use or imitation of a person's voice or an imitation of a person's performing persona such as Charlie Chaplin's "Little Tramp" or Julius Marx's "Groucho" may violate the right of publicity if used for purposes of trade under the rule stated in § 47. The use of other identifying characteristics or attributes may also infringe the right of publicity, but only if they are so closely and uniquely associated with the identity of a particular individual that their use enables the defendant to appropriate the commercial value of the person's identity....

Restatement (Third) of Unfair Competition § 47

The name, likeness, and other indicia of a person's identity are used "for purposes of trade" under the rule stated in § 46 if they are used in advertising the user's goods or services, or are placed on merchandise marketed by the user, or are used in connection with services rendered by the user. However, use "for purposes of trade" does not ordinarily include the use of a person's identity in news reporting,

commentary, entertainment, works of fiction or nonfiction, or in advertising that is incidental to such uses.

Comment: *a. Use in advertising.* The use of a person's identity for the purpose of advertising goods or services marketed by the user is a use "for purposes of trade" under the rule stated in § 46.... Unauthorized use of a person's identity in solicitations for contributions or memberships by nonprofit entities such as charitable, educational, governmental, fraternal, and religious organizations also constitutes a use for purposes of trade.

In some circumstances the use of another's identity in advertising may not be actionable because of consent or other privilege. For example, use of a person's name or likeness for the purpose of identifying that person as the author or creator of the advertised goods is ordinarily permissible. Thus, a bookstore may include in its advertising the name and photograph of the author of an advertised book, and a movie theater may display the names and photographs of the actors appearing in the advertised motion picture. Use of another's name for the purpose of responding to statements made by that person about the user or the user's goods or services is also permissible.

The use of a person's identity in news reporting, commentary, entertainment, or works of fiction or nonfiction is not ordinarily an infringement of the right of publicity. See Comment c. Use of the person's identity in advertising or promoting such uses is also not actionable. Thus, the use of a celebrity's name or photograph in an advertisement for a biography of the celebrity or for a magazine containing an article about the celebrity will not subject the advertiser to liability for infringement of the celebrity's right of publicity.

The rule allowing use of a person's identity to advertise a permissible use of the identity has been extended beyond advertisements for the particular work or issue in which the identity is used to general advertising for the medium in which the use appears. A magazine soliciting subscriptions, for example, may refer to a past article about a particular celebrity as an illustration of the magazine's customary

content. Use of another's identity in a manner that falsely suggests an endorsement by the identified person, however, will subject the user to liability for deceptive marketing

b. Use on merchandise. The sale of merchandise bearing a person's name or likeness ordinarily constitutes a use of the identity for purposes of trade under the rule stated in § 46. An unauthorized appropriation of another's name or likeness for use on posters, buttons, or other memorabilia is thus ordinarily actionable as an infringement of the right of publicity.... In some circumstances, however, the informational content of the particular merchandise or its utility to purchasers as a means of expression may justify the conclusion that the use is protected under the first amendment. A candidate for public office, for example, cannot invoke the right of publicity to prohibit the distribution of posters or buttons bearing the candidate's name or likeness, whether used to signify support or opposition....

c. Use in news, entertainment, and creative works. The right of publicity as recognized by statute and common law is fundamentally constrained by the public and constitutional interest in freedom of expression. The use of a person's identity primarily for the purpose of communicating information or expressing ideas is not generally actionable as a violation of the person's right of publicity.

The scope of the activities embraced within this limitation on the right of publicity has been broadly construed. Thus, the use of a person's name or likeness in news reporting, whether in newspapers, magazines, or broadcast news, does not infringe the right of publicity.

The interest in freedom of expression also extends to use in entertainment and other creative works, including both fiction and nonfiction. The use of a celebrity's name or photograph as part of an article published in a fan magazine or in a feature story broadcast on an entertainment program, for example, will not infringe the celebrity's right of publicity. Similarly, the right of publicity is not infringed by the dissemination of an unauthorized print or broadcast biography. Use

of another's identity in a novel, play, or motion picture is also not ordinarily an infringement. The fact that the publisher or other user seeks or is successful in obtaining a commercial advantage from an otherwise permitted use of another's identity does not render the appropriation actionable.

However, if the name or likeness is used solely to attract attention to a work that is not related to the identified person, the user may be subject to liability for a use of the other's identity in advertising. See Comment a. Similarly, if a photograph of the plaintiff is included in the defendant's publication merely for the purpose of appropriating the plaintiff's commercial value as a model rather than as part of a news or other communicative use, the defendant may be subject to liability for a merchandising use of the plaintiff's identity. See Comment b....

Illustration[]: 5. A is a well-known actress. B, a magazine publisher, places a photograph of A on the cover of an issue of the magazine. An article about A, consisting of several photographs and brief commentary, is included in the magazine. One of the photographs is taken from a scene in a recent movie in which A appeared partially unclothed. B has not infringed A's right of publicity....

d. Limits of liability. The right of publicity has been extended in a few cases beyond advertising and merchandising uses to other substantial appropriations of a person's identity. Liability has been imposed, for example, in connection with an unauthorized broadcast of the plaintiff's performance or a sustained imitation of the plaintiff's performing style or performing persona that is marketed by the defendant as a simulation of the plaintiff's performance....

Broader restrictions on the use of another's identity in entertainment, news, or other creative works threaten significant public and constitutional interests. In an effort to balance the personal and proprietary interests recognized by the right of publicity with the public interests in free expression and in the creation of original works, some courts have engaged in an analysis analogous to the determina-

tion of fair use in copyright law. The substantiality and market effect of the appropriation have been analyzed in light of the informational or creative content of the defendant's use. In cases of imitation, the public interest in competition and in avoiding the monopolization of successful styles, together with the interest in the production of new works including parody and satire, will ordinarily outweigh any adverse effect on the plaintiff's market.

When the defendant's appropriation consists, not of an imitation, but of an unauthorized broadcast or other reproduction of an actual performance by the plaintiff, the greater likelihood of commercial injury to the plaintiff and the reduced public interest in permitting the use may justify relief in exceptional circumstances....

Illustration[]: 7. B, the operator of a television station, broadcasts on its local news program a videotape of a "human cannonball" act performed by A, with favorable commentary. The videotape was made despite A's objection at one of a series of performances by A scheduled throughout the duration of the local county fair. The broadcast by B includes A's entire performance. A court may properly conclude in light of the substantiality and likely market effect of the appropriation that B is subject to liability to A for infringement of A's right of publicity under the rule stated in § 46. [*Zacchini v. Scripps-Howard Broad.*, 433 U.S. 562 (1977).]

***Doe v. TCI Cablevision*, 110 S.W.3d 363 (Mo. 2003)**

Tony Twist began his NHL career in 1988 playing for the St. Louis Blues, later to be transferred to the Quebec Nordiques, only to return to St. Louis where he finished his career in 1999, due to injuries suffered in a motorcycle accident. During his hockey career, Twist became the League's preeminent "enforcer," a player whose chief responsibility was to protect goal scorers from physical assaults by opponents. In that role, Twist was notorious for his violent tactics on the ice. Describing Twist, a *Sports Illustrated* writer said: "It takes a special talent to stand on skates and beat someone senseless, and no

one does it better than the St. Louis Blues left winger.” The article goes on to quote Twist as saying, “I want to hurt them. I want to end the fight as soon as possible and I want the guy to remember it.”

Despite his well-deserved reputation as a tough-guy “enforcer,” or perhaps because of that reputation, Twist was immensely popular with the hometown fans. He endorsed products, appeared on radio and television, hosted the “Tony Twist” television talk show for two years, and became actively involved with several children’s charities. It is undisputed that Twist engaged in these activities to foster a positive image of himself in the community and to prepare for a career after hockey as a sports commentator and product endorser.

Respondent Todd McFarlane, an avowed hockey fan and president of Todd McFarlane Productions, Inc. (TMP), created *Spawn* in 1992. TMP employs the writers, artists and creative staff responsible for production of the comic book. *Spawn* is marketed and distributed monthly by Image Comics, Inc., which was formed by McFarlane and others.

Spawn is “a dark and surreal fantasy” centered on a character named Al Simmons, a CIA assassin who was killed by the Mafia and descended to hell upon death. Simmons, having made a deal with the devil, was transformed into the creature Spawn and returned to earth to commit various violent and sexual acts on the devil’s behalf. In 1993, a fictional character named “Anthony ‘Tony Twist’ Twistelli” was added to the *Spawn* storyline. The fictional “Tony Twist” is a Mafia don whose list of evil deeds includes multiple murders, abduction of children and sex with prostitutes. The fictional and real Tony Twist bear no physical resemblance to each other and, aside from the common nickname, are similar only in that each can be characterized as having an “enforcer” or tough-guy persona.

Each issue of the *Spawn* comic book contains a section entitled “Spawning Ground” in which fan letters are published and McFarlane responds to fan questions. In the September 1994 issue, McFarlane admitted that some of the *Spawn* charac-

ters were named after professional hockey players, including the “Tony Twist” character: “Antonio Twistelli, a/k/a Tony Twist, is actually the name of a hockey player of the Quebec Nordiques.” And, again, in the November 1994 issue, McFarlane stated that the name of the fictional character was based on Twist, a real hockey player, and further promised the readers that they “will continue to see current and past hockey players’ names in my books.”

In April 1996, *Wizard*, a trade magazine for the comic book industry, interviewed McFarlane. In the published article, “Spawning Ground: A Look at the Real Life People Spawn Characters Are Based Upon,” McFarlane is quoted as saying that he uses the names of real-life people to create the identities of the characters. Brief biographies and drawings of the *Spawn* characters follow the McFarlane interview. The paragraph devoted to the “Tony Twist” character contained a drawing of the character accompanied by the following description:

First Appearance: *Spawn* # 6

Real-Life Persona: Tony Twist.

Relation: NHL St. Louis Blues right winger.

The Mafia don that has made life exceedingly rough for Al Simmons and his loved ones, in addition to putting out an ill-advised contract on the Violator, is named for former Quebec Nordiques hockey player Tony Twist, now a renowned enforcer (i.e. “Goon”) for the St. Louis Blues of the National Hockey League.

Below the character description was a photo of a Tony Twist hockey trading card, in which Twist was pictured in his St. Louis Blues hockey jersey.

In 1997, Twist became aware of the existence of *Spawn* and of the comic book’s use of his name for that of the villainous character. On one occasion, several young hockey fans approached Twist’s mother with *Spawn* trading cards depicting the Mafia character “Tony Twist.” Subsequently, at an autograph session Twist was asked to sign a copy of the *Wizard* article in which McFarlane was interviewed

and Twist's hockey trading card was pictured.

In October 1997, Twist filed suit against McFarlane and various companies associated with the *Spawn* comic book (collectively "respondents"), seeking an injunction and damages for, *inter alia*, misappropriation of name and defamation, the latter claim being later dismissed. McFarlane and the other defendants filed motions for summary judgment asserting First Amendment protection from a prosecution of the misappropriation of name claim, but the motions were overruled.

At trial, McFarlane denied that the comic book character was "about" the real-life Tony Twist despite the fact that the names were the same. McFarlane also denied that he or the other defendants had attained any benefit by using Twist's name. Twist, however, presented evidence that McFarlane and the other defendants had indeed benefited by using his name. For example, Twist introduced evidence suggesting that in marketing *Spawn* products, McFarlane directly targeted hockey fans—Twist's primary fan base—by producing and licensing *Spawn* logo hockey pucks, hockey jerseys and toy zambonis.

On cross-examination, McFarlane admitted that on one occasion defendants sponsored "Spawn Night" at a minor league hockey game, where McFarlane personally appeared and distributed *Spawn* products, including products containing the "Tony Twist" character. Another "Spawn Night" was planned to take place at a subsequent NHL game, but the event never occurred. On the issue of damages, Twist, through purported expert testimony, offered a formula for determining the fair market value that McFarlane and the other defendants should have paid Twist to use his name. In addition, Twist introduced evidence that his association with the *Spawn* character resulted in a diminution in the commercial value of his name as an endorser of products. To that end, Sean Philips, a former executive of a sports nutrition company, testified that his company withdrew a \$100,000 offer to Twist to serve as the company's product endorser after Philips learned that Twist's

name was associated with the evil Mafia don in the *Spawn* comic book.

As noted, at the conclusion of the trial, the jury returned a verdict in favor of Twist and against the defendants jointly in the amount of \$24,500,000....

[A.] [T]he elements of a right of publicity action include: (1) That defendant used plaintiff's name as a symbol of his identity (2) without consent (3) and with the intent to obtain a commercial advantage.

Respondents' initial contention that Twist did not prove that his name was used as a "symbol of his identity" is spurious. To establish that a defendant used a plaintiff's name as a symbol of his identity, "the name used by the defendant must be understood by the audience as referring to the plaintiff." In resolving this issue, the fact-finder may consider evidence including "the nature and extent of the identifying characteristics used by the defendant, the defendant's intent, the fame of the plaintiff, evidence of actual identification made by third persons, and surveys or other evidence indicating the perceptions of the audience."

Here, all parties agree that the "Tony Twist" character is not "about" him, in that the character does not physically resemble Twist nor does the *Spawn* story line attempt to track Twist's real life. Instead, Twist maintains that the sharing of the same (and most unusual) name and the common persona of a tough-guy "enforcer" create an unmistakable correlation between Twist the hockey player and Twist the Mafia don that, when coupled with Twist's fame as a NHL star, conclusively establishes that respondents used his name and identity. This Court agrees. Indeed, respondent McFarlane appears to have conceded the point by informing his readers in separate issues of *Spawn* and in the *Wizard* article that the hockey player Tony Twist was the basis for the comic book character's name.

Arguably, without these concessions, some *Spawn* readers may not have made the connection between Twist and his fictional counterpart. However, other evidence at trial clearly demonstrated that, at some point, *Spawn*'s readers did in fact

make the connection, for both Twist and his mother were approached by young hockey fans under the belief that appellant was somehow affiliated with the *Spawn* character. On this record, respondents cannot seriously maintain that a good many purchasers of *Spawn* did not readily understand that respondents' use of the name referred to appellant. Accordingly, this Court holds that Twist presented sufficient evidence to prove that his name was used as a symbol of his identity....

[B.] [T]he evidence admitted at trial was sufficient to establish respondents' intent to gain a commercial advantage by using Twist's name to attract consumer attention to *Spawn* comic books and related products.... "The first step toward selling a product or service is to attract the consumers' attention." At a minimum, respondents' statements and actions reveal their intent to create the impression that Twist was somehow associated with the *Spawn* comic book, and this alone is sufficient to establish the commercial advantage element in a right of publicity action.

But this is not all. At trial, Twist introduced evidence that respondents marketed their products directly to hockey fans. For example, respondents produced and distributed *Spawn* hockey jerseys and pucks and sponsored a "Spawn Night" at a minor league hockey game where other *Spawn* products were distributed, including products featuring the character "Tony Twist." Additionally, Twist points to McFarlane's statement in the November 1994 issue of *Spawn*, in which he promised readers that "they will continue to see current and past hockey players' names in [his] books." This statement, Twist correctly contends, amounts to an inducement to *Spawn* readers, especially those who are also hockey fans, to continue to purchase the comic book in order to see the name Tony Twist and other hockey players. This is evidence from which the jury could infer that respondents used his name to obtain a commercial advantage.

In support of the court's ruling that the evidence presented was insufficient to show that Twist's name was used to ob-

tain a commercial advantage, respondents cite *Nemani*, *Haith*, and *Munden* [three earlier cases] to demonstrate the kind of commercial advantage that must be shown and to highlight that Twist's evidence was dissimilar. In *Nemani* and *Haith*, the defendants used the plaintiffs' names in grant applications for money; in *Munden*, the defendant used a picture of the plaintiff in an advertisement. Though it is true that respondents' intent to obtain a commercial advantage is not as obvious as that found in *Nemani*, *Haith*, and *Munden*, the fact remains that to the extent that the evidence suggests that respondents used Twist's name to attract attention to their product, they did so to obtain a commercial advantage. Therefore, this Court holds that Twist presented sufficient evidence to establish that respondents used his name for a commercial advantage....

[C.] [T]he right of publicity is not always trumped by the right of free speech.... "[T]he rationale for protecting the right of publicity is the straightforward one of preventing unjust enrichment by the theft of goodwill. No social purpose is served by having the defendant get free some aspect of the plaintiff that would have market value and for which he would normally pay."

Right to publicity cases ... focus ... on the threshold legal question of whether the use of a person's name and identity is "expressive," in which case it is fully protected, or "commercial," in which case it is generally not protected. For instance, the use of a person's identity in news, entertainment, and creative works for the purpose of communicating information or expressive ideas about that person is protected "expressive" speech. On the other hand, the use of a person's identity for purely commercial purposes, like advertising goods or services or the use of a person's name or likeness on merchandise, is rarely protected.

Several approaches have been offered to distinguish between expressive speech and commercial speech. The Restatement of Torts, for example, employs a "relatedness" test that protects the use of another person's name or identity in a work that is

“related to” that person. The catalogue of “related” uses includes “the use of a person’s name or likeness in news reporting, whether in newspapers, magazines, or broadcast news ... use in entertainment and other creative works, including both fiction and nonfiction ... use as part of an article published in a fan magazine or in a feature story broadcast on an entertainment program ... dissemination of an unauthorized print or broadcast biography, [and use] of another’s identity in a novel, play, or motion picture ...” The proviso to that list, however, is that “if the name or likeness is used solely to attract attention to a work that is *not related* to the identified person, the user may be subject to liability for a use of the other’s identity in advertising....”

California courts use a different approach, called the “transformative test,” that was most recently invoked in *Winters v. D.C. Comics*, 69 P.3d 473 (Cal. 2003), a case with a remarkably similar fact situation. In that case, Johnny and Edgar Winters, well-known musicians with albino complexions and long white hair, brought a right of publicity action against defendant D.C. Comics for its publication of a comic book featuring the characters “Johnny and Edgar Autumn,” half-worm, half-human creatures with pale faces and long white hair. On appeal, the California Supreme Court considered whether the action was barred by the First Amendment and employed “what is essentially a balancing test between the First Amendment and the right of publicity based on whether the work in question adds significant creative elements so as to be transformed into something more than a mere celebrity likeness or imitation.” Concluding that the comic book characters “Johnny and Edgar Autumn” “are not just conventional depictions of plaintiffs but contain significant expressive content other than plaintiffs’ mere likenesses,” the Court held that the characters were sufficiently transformed so as to entitle the comic book to full First Amendment protection.

The weakness of the Restatement’s “relatedness” test and California’s “transformative” test is that they give too little

consideration to the fact that many uses of a person’s name and identity have both expressive and commercial components. These tests operate to preclude a cause of action whenever the use of the name and identity is in any way expressive, regardless of its commercial exploitation. Under the relatedness test, use of a person’s name and identity is actionable only when the use is solely commercial and is otherwise unrelated to that person. Under the transformative test, the transformation or fictionalized characterization of a person’s celebrity status is not actionable even if its sole purpose is the commercial use of that person’s name and identity. Though these tests purport to balance the prospective interests involved, there is no balancing at all—once the use is determined to be expressive, it is protected. At least one commentator, however, has advocated the use of a more balanced balancing test—a sort of predominant use test—that better addresses the cases where speech is both expressive and commercial: “If a product is being sold that predominantly exploits the commercial value of an individual’s identity, that product should be held to violate the right of publicity and not be protected by the First Amendment, even if there is some ‘expressive’ content in it that might qualify as ‘speech’ in other circumstances. If, on the other hand, the predominant purpose of the product is to make an expressive comment on or about a celebrity, the expressive values could be given greater weight.”

The relative merit of these several tests can be seen when applied to the unusual circumstances of the case at hand. As discussed, Twist made a submissible case that respondents’ use of his name and identity was for a commercial advantage. Nonetheless, there is still an expressive component in the use of his name and identity as a metaphorical reference to tough-guy “enforcers.” And yet, respondents agree (perhaps to avoid a defamation claim) that the use was not a parody or other expressive comment or a fictionalized account of the real Twist.

As such, the metaphorical reference to Twist, though a literary device, has very little literary value compared to its com-

mercial value. On the record here, the use and identity of Twist's name has become predominantly a ploy to sell comic books and related products rather than an artistic or literary expression, and under these circumstances, free speech must give way to the right of publicity....

[D.] [The jury instructions at trial read,]

Your verdict must be for plaintiff and against defendant Todd McFarlane if you believe:

First, defendant Todd McFarlane intentionally used or published plaintiff's name, and

Second, defendant Todd McFarlane derived advantage from the use or publication of plaintiff's name, or plaintiff suffered harm as a result of defendant Todd McFarlane's use of publication of plaintiff's name, and

Third, plaintiff did not consent to the use of publication, and

Fourth, as a direct result thereof, plaintiff sustained damage....

By requiring that the jury find only that respondents "derived advantage from the use or publication of plaintiff's name," as opposed to a finding that respondents used plaintiff's name "with the intent to derive" or "for the purpose of deriving" an advantage, the jury was allowed to render a verdict that could have been based on the mere incidental result of the use rather than the intentional result. Here, this seemingly fine distinction could well have borne different results. Although the evidence supported a finding that respondents used Twist's name and identity "with the intent to obtain a commercial advantage," alternatively, the jury could have found that respondents had no intent to obtain a commercial advantage—that there was a different purpose for using the name—and to the extent that some advantage was obtained, it was merely incidental.

In fact, respondent McFarlane so testified in his defense, adding that the real reasons he used Twist's name were "one, it's a pretty cool name, and, two, it's easy to remember, it's an easy thing—cause I create a lot of characters, you need sort of

easy ways to remember names.... And again, ... [with] Twist, you always sort of have a Twist ending. You just sort of come up with stuff that sort of, you know, semi-clever, if you will."

Because the verdict director allowed the jury to render a verdict for plaintiff without a finding that respondents *intended* to obtain a commercial advantage, and because the jury may well have determined that respondents obtained a commercial advantage even though they did not intend to do so, the verdict must be set aside.

[On retrial, Twist was awarded \$15 million. McFarlane went into bankruptcy, and the case settled in bankruptcy. Because of the settlement, no petition for certiorari in the case could be filed.—ed.]

C.B.C. Distribution & Marketing, Inc. v. Major League Baseball Advanced Media, 505 F.3d 818 (8th Cir. 2007)

CBC sells fantasy sports products via its Internet website, e-mail, mail, and the telephone. Its fantasy baseball products incorporate the names along with performance and biographical data of actual major league baseball players. Before the commencement of the major league baseball season each spring, participants form their fantasy baseball teams by "drafting" players from various major league baseball teams. Participants compete against other fantasy baseball "owners" who have also drafted their own teams. A participant's success, and his or her team's success, depends on the actual performance of the fantasy team's players on their respective actual teams during the course of the major league baseball season. Participants in CBC's fantasy baseball games pay fees to play and additional fees to trade players during the course of the season....

In 2005, ... the [Major League Baseball] Players Association licensed to Advanced Media, with some exceptions, the exclusive right to use baseball players' names and performance information "for exploitation via all interactive media." Advanced Media began providing fantasy baseball games on its website, MLB.com,

the official website of major league baseball. It offered CBC, in exchange for a commission, a license to promote the MLB.com fantasy baseball games on CBC's website but did not offer CBC a license to continue to offer its own fantasy baseball products. This conduct by Advanced Media prompted CBC to file the present suit, alleging that it had "a reasonable apprehension that it will be sued by Advanced Media if it continues to operate its fantasy baseball games." ...

[A.] In Missouri, "the elements of a right of publicity action include: (1) That defendant used plaintiff's name as a symbol of his identity (2) without consent (3) and with the intent to obtain a commercial advantage." *Doe v. TCI Cablevision*.... Here, we entertain no doubt that the players' names that CBC used are understood by it and its fantasy baseball subscribers as referring to actual major league baseball players....

It is true that with respect to the "commercial advantage" element of a cause of action for violating publicity rights, CBC's use does not fit neatly into the more traditional categories of commercial advantage, namely, using individuals' names for advertising and merchandising purposes in a way that states or intimates that the individuals are endorsing a product. *Cf.* Restatement (Third) of Unfair Competition § 47 cmt. a, b. But the Restatement, which the Missouri Supreme Court has recognized as authority in this kind of case, also says that a name is used for commercial advantage when it is used "in connection with services rendered by the user" and that the plaintiff need not show that "prospective purchasers are likely to believe" that he or she endorsed the product or service.

We note, moreover, that in Missouri, "the commercial advantage element of the right of publicity focuses on the defendant's intent or purpose to obtain a commercial benefit from use of the plaintiff's identity." Because we think that it is clear that CBC uses baseball players' identities in its fantasy baseball products for purposes of profit, we believe that their identities are being used for commercial advantage and that the players therefore of-

fered sufficient evidence to make out a cause of action for violation of their rights of publicity under Missouri law.

[B.] The Supreme Court has directed that state law rights of publicity must be balanced against first amendment considerations, *see Zacchini v. Scripps-Howard Broad.*, 433 U.S. 562 (1977), and here we conclude that the former must give way to the latter. First, the information used in CBC's fantasy baseball games is all readily available in the public domain, and it would be strange law that a person would not have a first amendment right to use information that is available to everyone. It is true that CBC's use of the information is meant to provide entertainment, but "[s]peech that entertains, like speech that informs, is protected by the First Amendment because '[t]he line between the informing and the entertaining is too elusive for the protection of that basic right.'" We also find no merit in the argument that CBC's use of players' names and information in its fantasy baseball games is not speech at all. We have held that "the pictures, graphic design, concept art, sounds, music, stories, and narrative present in video games" is speech entitled to first amendment protection. Similarly, here CBC uses the "names, nicknames, likenesses, signatures, pictures, playing records, and/or biographical data of each player" in an interactive form in connection with its fantasy baseball products. This use is no less expressive than the use that was at issue in *Interactive Digital*.

Courts have also recognized the public value of information about the game of baseball and its players, referring to baseball as "the national pastime." A California court, in a case where Major League Baseball was itself defending its use of players' names, likenesses, and information against the players' asserted rights of publicity, observed, "Major league baseball is followed by millions of people across this country on a daily basis ... The public has an enduring fascination in the records set by former players and in memorable moments from previous games ... The records and statistics remain of interest to the public because they provide context that allows fans to better appreciate (or depre-

cate) today's performances." ... "[R]ecitation and discussion of factual data concerning the athletic performance of [players on Major League Baseball's website] command a substantial public interest, and, therefore, is a form of expression due substantial constitutional protection."

[C.] In addition, the facts in this case barely, if at all, implicate the interests that states typically intend to vindicate by providing rights of publicity to individuals. Economic interests that states seek to promote include the right of an individual to reap the rewards of his or her endeavors and an individual's right to earn a living. Other motives for creating a publicity right are the desire to provide incentives to encourage a person's productive activities and to protect consumers from misleading advertising. But major league baseball players are rewarded, and handsomely, too, for their participation in games and can earn additional large sums

from endorsements and sponsorship arrangements. Nor is there any danger here that consumers will be misled, because the fantasy baseball games depend on the inclusion of all players and thus cannot create a false impression that some particular player with "star power" is endorsing CBC's products.

Then there are so-called non-monetary interests that publicity rights are sometimes thought to advance. These include protecting natural rights, rewarding celebrity labors, and avoiding emotional harm. We do not see that any of these interests are especially relevant here, where baseball players are rewarded separately for their labors, and where any emotional harm would most likely be caused by a player's actual performance, in which case media coverage would cause the same harm....