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# Innocent Threats, Concealed Consent, and the Necessary Presence of Strict Liability in Traditional Fault-Based Tort Law

Marin Roger Scordato\*

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## I. INTRODUCTION

One of the most interesting aspects of the common law of torts is the way in which it necessarily combines what are often separate and fundamental aspects of other areas of jurisprudence. For example, two of the widely accepted goals of tort law are the provision of increased compensation to those who are injured and the generation of a deterrent to discourage harm-producing behavior.<sup>1</sup> While these are both critically important social goods produced by a properly functioning tort law system, the law of torts is not the optimal legal approach to pursuing either goal alone.

With its unique access to penal sanctions and the nearly guaranteed mismatch in power and resources enjoyed by the government as prosecutor as compared to the defense, criminal law is unquestionably a superior system for deterring antisocial harm-producing behavior than the civil law of tort.<sup>2</sup> Similarly, most observers agree that reasonably well-designed systems of social insurance and no-fault liability provide compensation to injured individuals on a more reliable basis and in a more efficient manner than does traditional tort law.<sup>3</sup>

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1. DAN B. DOBBS, *THE LAW OF TORTS* 17, 19 (2000) (“Compensation of injured persons is one of the generally accepted aims of tort law. . . . Courts and writers almost always recognize that another aim of tort law is to deter certain kinds of conduct by imposing liability when that conduct causes harm.”); W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, *PROSSER AND KEETON ON THE LAW OF TORTS* 6 (5th ed. 1984) (“The purpose of the law of torts is to adjust these losses, and to afford compensation for injuries sustained by one person as the result of the conduct of another.”) (quoting Cecil A. Wright, *Introduction to the Law of Torts*, 8 *CAMB. L. J.* 238 (1944)).

2. See *RESTATEMENT (THIRD) OF TORTS* §19 cmt. b (Proposed Final Draft No. 1 2005) (stating that “the punishments imposed by the criminal law on people convicted of crime produce a powerful deterrent effect”); see also ALBERT J. HARNO, *CASES AND MATERIALS ON CRIMINAL LAW AND PROCEDURE* 1 (Callaghan and Co., 1939) (“The statement is commonly made and accepted that criminal law began as private vengeance.”); 1 CHARLES E. TORCIA, *WHARTON’S CRIMINAL LAW* § 3 (15th ed. 1993) (explaining two theories of deterrence, termed “special deterrence” (designed to deter only the individual offender) and “general deterrence” (designed to deter the public as a whole by making an example of the offender)). Compare with *RESTATEMENT (SECOND) OF TORTS* § 901 (1965) (stating that the primary purpose of tort law is to “give compensation, indemnity, or restitution for harms”) and Mitchell N. Berman, *The Evidentiary Theory of Blackmail: Taking Motives Seriously*, 65 *U. CHI. L. REV.* 795, 863 (1998) (“In contrast t[o] the criminal law, victim compensation is the chief purpose of tort law.”). See KEETON ET AL., *supra* note 1, at 7. While the purpose of criminal law is to protect the public interest by punishing the criminal defendant through such methods as permanent or temporary segregation from society, tort law is focused on compensating the injured plaintiff at the expense of the defendant by imposing a money judgment. *Id.*; Peter Cane, *Using Tort Law to Enforce Environmental Regulations?*, 41 *WASHBURN L.J.* 427, 442 (2002) (“The importance of reparation in tort law and of punishment in criminal law partly explains why deterrence is widely viewed as a goal of the criminal justice system, but only as a by-product of the tort system.”); Markus Dirk Dubber, *Making Sense of the Sense of Justice*, 53 *BUFF. L. REV.* 815, 844 (2005) (noting how in criminal law, “the power differential between the state and the accused is notoriously steep . . . given the radically unequal bargaining positions of prosecutors and defendants.”).

3. *Willis v. Redfish Renovations, LLC*, 2004-0968, pg. 3 (La. App. 4 Cir. 12/15/04); 891 *So.2d* 748, 750 (explaining how workers’ compensation legislation was enacted as a form of social insur-

After repeated attempts over many years, however, criminal law has proven to be exceptionally resistant to including any meaningful compensation for the victims of crime in its regular processes.<sup>4</sup> Thus, while criminal law is clearly the superior legal system for generating effective deterrence, it is a very poor means of providing victim compensation.<sup>5</sup> Similarly, while systems of risk-pooling and social insurance generally offer compensation in a more efficient fashion, they frequently fail to generate much effective deterrence to harm producing behavior.<sup>6</sup> When techniques like the adjustment of premiums based on risk rating and loss experience are employed in an effort to increase deterrence, efficiency rapidly declines. In general, the com-

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ance “to compensate victims of industrial accidents because it was widely believed that the limited rights of recovery under tort law were inadequate to protect these individuals.”); Timothy J. Murphy, *A Policy Analysis of a Successor Corporation's Liability for its Predecessor's Defective Products When the Successor Has Acquired the Predecessor's Assets for Cash*, 71 MARQ. L. REV. 815, 837 (1988) (“Social insurance would be more efficient in cost-spreading than our tort system, because social insurance simplifies the plaintiff's burden of proof to merely that of proving the extent of its accidental injuries.”); Edward L. Rubin, *On Beyond Truth: A Theory for Evaluating Legal Scholarship*, 80 CAL. L. REV. 889, 922 (1992) (noting how “imprecise and expensive tort law is as a compensation scheme, and how many more people could be compensated through social insurance.”).

4. See Berman, *supra* note 2, at 863 (“The purpose of the criminal law is not principally compensatory. It serves retributive, deterrent, incapacitative, and rehabilitative goals that are not comparably well served by monetary . . . settlement between offender and victim.”); Jay Tidmarsh, *A Process Theory of Torts*, 51 WASH. & LEE L. REV. 1313, 1338 (1994) (“[A] concern for loss allocation distinguishes torts from criminal law, which deals with societal punishment for actual or threatened harm . . .”).

5. See *J.R. v. State*, 62 P.3d 114, 119 (Alaska Ct. App. 2003) (explaining how criminal law “emphasizes punishment, deterrence, and rehabilitation of the individual criminal defendant, rather than focusing on compensation for the injured victim”); *State v. Newman*, 623 A.2d 1355, 1358 (N.J. 1993) (noting how over time, “the significance of victim compensation [has] diminished as a goal of the criminal law and [has] bec[o]me instead a principal focus of the civil law.”); KEETON ET AL., *supra* note 1, at 7 (“[A] criminal prosecution is not concerned directly with compensation of the injured individual against whom the crime is committed, and the victim's only formal part in it is that of an accuser and a witness for the state. So far as the criminal law is concerned, the victim will leave the courtroom empty-handed.”); Pamela S. Karlan, *Discriminatory Purpose and Mens Rea: The Tortured Argument of Invidious Intent*, 93 YALE L.J. 111, 116–17 (1983) (“[C]riminal law does not attempt to restore victims to the position they occupied before the commission of the crime; rather, it leaves such attempts to civil tort actions or victim compensation statutes.”); Peter Tiersma, *The Language of Silence*, 48 RUTGERS L. REV. 1, 57 (1995) (highlighting that the primary difference between tort law and criminal law is that “tort law awards compensation to the victim, while criminal law seeks to punish the wrongdoer on behalf of society.”).

6. James A. Henderson, Jr., *Extending the Boundaries of Strict Products Liability: Implications of the Theory of the Second Best*, 128 U. PA. L. REV. 1036, 1041 n.19 (1980) (“[W]hen cost spreading in the form of social insurance is pursued as an end in itself, it undermines the general deterrence objective.”); Antoinette D. Paglia, *Taking the Tort Out of Court—Administrative Adjudication of Medical Liability Claims: Is it the Next Step?*, 20 SW. U. L. REV. 41, 65 n.176 (1991) (explaining how, in the context of healthcare litigation, social insurance would result in “the evaporation of whatever deterrence the tort process provides”).

pensatory superiority of such systems compared to tort law is only clearly maintained so long as deterrence is either weakly generated or not generated at all.<sup>7</sup>

Thus, while tort law is not the superior legal system for generating either compensation or deterrence alone, one of its special virtues is the way in which it combines both compensation and deterrence in the simple act of forcing a transfer of assets from the harm producer to the victim.<sup>8</sup> Arguably, no other legal regime so effectively provides both compensation and deterrence in such an elegant fashion. Indeed, the scheme of liability created by the common law of torts can be characterized as largely attaching to situations, and only those situations, in which both compensation and deterrence are likely to result from the imposition of liability.

There is another very interesting way in which traditional tort law combines two different types of fundamental legal approaches that are, in isolation, most typically associated with other areas of jurisprudence. These two approaches can be labeled as unilateral analysis and bilateral analysis.

The second section of this article describes unilateral, or one-party, analysis and its traditional association with criminal law.<sup>9</sup> It also illustrates the use of classic unilateral analysis in the law of torts, specifically in the definition of intent for the intentional torts.<sup>10</sup>

In Part III, the limitations of unilateral analysis in tort law are demonstrated.<sup>11</sup> While important and valuable in dealing with some tort law issues, unilateral analysis is an inadequate basis for approaching other critical doctrinal issues. One such issue involves the regulation of an essentially communicative, even if entirely nonverbal, transaction between the plaintiff and the defendant, as in cases of consent and self-defense.<sup>12</sup>

When confronted with these kinds of problems, tort law must abandon classic unilateral analysis and instead adopt a two-party, or bilateral, analysis

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7. See Frank B. Cross, *America the Adversarial*, 89 VA. L. REV. 189, 222 (2003) (“[T]here is strong reason to expect to find deterrence benefits from tort law, benefits that would be reduced by a shift to compensation from social insurance.”); Michael J. Trebilcock, *The Social Insurance-Deterrence Dilemma of Modern North American Tort Law: A Canadian Perspective on the Liability Insurance Crisis*, 24 SAN DIEGO L. REV. 929, 971–72 (1987) (“Deterrence objectives with respect to employers and employees are not central to [workers’ compensation] systems.”); Ralph A. Winter, *The Liability Crisis and the Dynamics of Competitive Insurance Markets*, 5 YALE J. ON REG. 455, 465 (1988) (arguing that “the trend in the U.S. tort system [has been] towards the pursuit of the compensation or social insurance objective of tort law and away from the deterrence objective”).

8. See Mark A. Geistfeld, *Necessity and the Logic of Strict Liability*, in ISSUES IN LEGAL SCHOLARSHIP, *Vincent v. Lake Erie Transportation Co. and the Doctrine of Necessity*, Article 5 (2005), <http://www.bepress.com/ils/iss7/art5> (noting “the now conventional notion that tort law serves the purposes of deterrence and compensation”).

9. See *infra* text accompanying notes 22–28.

10. See *infra* text accompanying notes 30–38.

11. See *infra* text accompanying notes 39–58.

12. See *infra* text accompanying notes 39–78.

of the sort traditionally associated with contract law.<sup>13</sup> This blending of unilateral and bilateral analysis, even within the relatively circumscribed world of the intentional torts, is an essential characteristic of tort law, just like the composite of deterrence and compensation that constitutes its basic goals.

Part IV of this article introduces the notion of a second kind of bilateral analysis that also exists and serves as an important component of tort law.<sup>14</sup> This second kind of bilateral analysis arises from the fact that the dominant legal remedy in tort law—the involuntary transfer of assets from the defendant to the plaintiff—both imposes an unwelcome burden upon the defendant and confers a material benefit on the plaintiff. Thus tort law, in contrast to criminal law, must be concerned with imposing liability not only in situations where the defendant's behavior is worthy of deterrence, but also in situations in which the plaintiff is deserving of compensation.

This need to be mindful of both the defendant's and the plaintiff's statuses with respect to the appropriate imposition of a legal remedy creates considerable complexity in the proper design of some tort law doctrine. This aspect of tort law is illustrated through an analysis of situations in which a plaintiff subjectively consented to a defendant's otherwise intentionally tortious behavior but did not effectively communicate that consent to the defendant.<sup>15</sup> This second kind of bilateral analysis also has a powerful influence on the doctrinal treatment of cases in which the defendant has reasonably responded in self-defense to a threat of imminent bodily harm that was innocently generated by the plaintiff.<sup>16</sup>

Because of the inherently bilateral nature of the legal remedy in tort law, it is not appropriate to simply adopt the general principle that liability will never be imposed unless the defendant is fully deserving of liability and the plaintiff is also fully deserving of compensation.<sup>17</sup> After all, a decision not to impose liability is a detriment to a deserving plaintiff in much the same way as a decision to impose liability is a detriment to the defendant. Recognizing this, tort law has developed doctrines that impose liability on defendants who have not engaged in antisocial or blameworthy behavior.<sup>18</sup>

One such doctrine operates in circumstances in which the defendant has intentionally harmed the plaintiff in a reasonable response to a threat of im-

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13. See *infra* text accompanying notes 59–60.

14. See *infra* text accompanying notes 81–105.

15. See *infra* notes 82–88 and accompanying text.

16. See *infra* notes 89–105 and accompanying text.

17. See *infra* notes 39–65 and accompanying text.

18. See *infra* notes 106–34 and accompanying text.

minent bodily harm posed by someone other than the plaintiff.<sup>19</sup> Another example is the limited privilege offered by the doctrine of private necessity.<sup>20</sup> In both of these instances, one can clearly see the presence of strict liability, not as a modern movement fundamentally challenging the fault-based paradigm of traditional tort law, but instead existing comfortably within the context of the intentional torts; a natural consequence of tort law's unique blend of unilateral and bilateral analysis.<sup>21</sup>

Part VI concludes the article.

## II. UNILATERAL ANALYSIS IN TORT LAW

Unilateral analysis refers to basic problems of regulating the legal status of a single person, be it a natural or a legal person. The classic area of law that deals in unilateral analysis is criminal law, where the liability and punishment of the criminal defendant is the primary focus.<sup>22</sup> This does not mean that criminal law looks only to the defendant when engaging in its task. Often, the effect of the defendant's behavior on another will play a critical role in the determination of the particular crime for which the defendant may be liable—as in the difference between attempted homicide and homicide—or driving under the influence and negligent manslaughter.<sup>23</sup> Sometimes the behavior of another will determine the criminal quality of the defendant's actions, as in the case of a defendant engaging in what would otherwise be an assault while in the process of protecting another from imminent attack.<sup>24</sup>

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19. See *infra* notes 110–12 and accompanying text.

20. See *infra* notes 113–21 and accompanying text.

21. See *infra* notes 110–21 and accompanying text.

22. JEROME HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 9 (1947). In discussing the rules of criminal law, Hall states “[t]he union of these elements results in judgments signifying that upon the occurrence of the described harms, the specified punishments must be applied to the offenders.” *Id.*; see JUSTIN MILLER, *HANDBOOK ON CRIMINAL LAW* 18–19 (1934) (“It has been said that the purpose of criminal law is to punish offenders.”); TORCIA, *supra* note 2, § 1 (“The criminal law attempts to force obedience . . . by punishing offenders.”).

23. See, e.g., VA. CODE ANN. §18.2-36.1(A) (2009) (stating that “[a]ny person who, as a result of driving under the influence . . . unintentionally causes the death of another person, shall be guilty of involuntary manslaughter”) (emphasis added). Under Virginia law, “[i]nvoluntary manslaughter is punishable as a Class 5 felony.” VA. CODE ANN. §18.2-36. Compare with *id.* §18.2-266 (stating “[i]t shall be unlawful for any person to drive or operate any motor vehicle . . . while such person has a blood alcohol concentration of 0.08 percent or more by weight by volume or 0.08 grams or more per 210 liters of breath as indicated by a chemical test administered as provided in this article”) (emphasis added). Under Virginia law, driving under the influence is a Class 1 misdemeanor. *Id.* §18.2-270. See generally TORCIA, *supra* note 2, at 7 (“[I]f a person operates his motor vehicle recklessly or while intoxicated, he is guilty of a crime and may be imprisoned, but if there is no victim . . . the driver is not liable in tort.”).

24. See WILLIAM LAWRENCE CLARK & WILLIAM L. MARSHALL, *A TREATISE ON THE LAW OF CRIMES* § 259 (3d ed. 1927) (“It is well settled that a parent has the right to use necessary force in defense of his child, and vice versa. The same is true of husband and wife, brothers and sisters, and

In each of these cases, though, criminal law looks to the consequences suffered, or the actions taken, by someone other than the criminal defendant in an effort to establish the criminal liability of the defendant.<sup>25</sup> What does the extent of the harm suffered by the victim mean for the degree of criminal culpability of the defendant?<sup>26</sup> And, to what extent does the threat posed by the victim to another, whom the defendant sought to protect, exonerate the defendant for the assault on the victim?<sup>27</sup> In these circumstances, the inquiry as to others is only relevant to the extent that it sheds light on the legal status of the criminal defendant.<sup>28</sup> This is classic unilateral legal analysis.

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master and servant.”); *see also* Vera Bergelson, *Victims and Perpetrators: An Argument for Comparative Liability in Criminal Law*, 8 BUFF. CRIM. L. REV. 385, 405 (2005) (“A whole group of defenses (self-defense, defense of another and defense of property) are based on the unlawful harm about to be inflicted on the defendant by the putative victim. . . . What a person may do in self-defense depends to a large degree on what the aggressor attempted to do to that person; i.e., the scope of justified behavior is fundamentally determined by the acts of the victim.”).

25. *See* WAYNE R. LAFAVE, CRIMINAL LAW 14 (3d ed. 2000) (“[A]n injured party may condone the tort committed against him; but a victim of crime may not normally obliterate the commission of the crime by forgiving the criminal. . . . [I]n the case of crimes based on negligence (e.g., criminal homicide, battery) the contributory negligence of the victim is no defense (although . . . the conduct of the victim is often important in determining whether the defendant was culpably negligent).” (footnote omitted)).

26. For example, the Model Penal Code defines criminal homicide—which includes murder, manslaughter, and negligent homicide—in terms of the severity of the harm inflicted on the victim: “A person is guilty of criminal homicide if he purposely, knowingly, recklessly or negligently causes the death of another human being.” MODEL PENAL CODE § 210.1(1) (1985). Similarly, “[a] person is guilty of assault if he: (a) attempts to cause or purposely, knowingly or recklessly causes bodily injury to another; or (b) negligently causes bodily injury to another with a deadly weapon; or (c) attempts by physical menace to put another in fear of imminent serious bodily injury.” *Id.* § 211.1(1).

27. *See* LAFAVE, *supra* note 25, at 501. (“The prevailing rule is that one is justified in using reasonable force in defense of another person, even a stranger, when he reasonably believes that the other is in immediate danger of unlawful bodily harm from his adversary and that the use of such force is necessary to avoid this danger.”); MODEL PENAL CODE § 3.05 (Use of Force for the Protection of Other Persons).

28. *See* HARNÓ, *supra* note 2, at 6 (“No account whatever is taken of what are now referred to as extenuating circumstances . . . . Consequences alone are considered.”). Similarly, the “guilt” of the victim is not a bar in finding the defendant liable. *See* State v. Crace, 289 N.W.2d 54, 59 (Minn. 1979) (“It is well settled that the contributory negligence of the victim is never a defense to a criminal prosecution.”); MILLER, *supra* note 22 at 22–23 (explaining that “neither the guilt of the injured person nor his contributory negligence avoids criminal liability upon the part of the accused. . . . On the other hand, each of the considerations just mentioned may avoid liability in tort.” (footnotes omitted)); Bergelson, *supra* note 24 at 397 (“Criminal law . . . has explicitly rejected the idea of contributory fault. Courts are unanimous that, unless it is the sole proximate cause of the resulting harm, the victim’s conduct is irrelevant.”); Aya Gruber, *Righting Victim Wrongs: Responding to Philosophical Criticisms of the Nonspecific Victim Liability Defense*, 52 BUFF. L. REV. 433, 439–40 (2004) (“In fact, criminal law is devoid of many of the formal legal mechanisms contained in tort law that address the complex nature of victims’ contributions to injurious transactions.”).



Given their mutual history in English common law and the fact that both areas of jurisprudence are fundamentally about identifying undesirable harm producing behavior and imposing an unwanted legal consequence on those who engage in it, one might expect tort law to share with criminal law a dominant focus on unilateral analysis.<sup>29</sup> Criminal law doctrine is designed to answer the questions: Should the defendant be found guilty and, if so, what should be the appropriate punishment imposed upon him? Similarly, tort law doctrine could be expected to be designed to answer the questions: Should the defendant be found liable and, if so, how much should he be required to pay?

It is therefore unsurprising to find, upon inspection, that tort law does in fact engage in classic unilateral analysis. An example of unilateral analysis in tort law is the requirement of intent that exists in all of the intentional torts.<sup>30</sup> In order to satisfy this intent requirement for any intentional tort, a plaintiff must establish that the defendant engaged in harm-producing behavior with the purpose of violating the plaintiff's interest or with knowledge to a substantial certainty that such a violation would result.<sup>31</sup>

The first option offered by the definition of intent is straightforward but not always easy. The purpose or desire that the defendant entertained while engaging in the harm-producing act is, after all, a deeply internal state of mind possessed by him alone.<sup>32</sup> The defendant has little incentive to confess

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29. See KEETON ET AL., *supra* note 1, at 29 ("The action of trespass, which first emerged in the thirteenth century, had a basic criminal character . . . . It was in connection with this criminal proceeding that damages first came to be awarded incidentally to the injured plaintiff. What similarity remains between tort and crime is to be traced to this common beginning.").

30. Alan Calnan, *The Fault(s) in Negligence Law*, 25 QUINNIPIAC L. REV. 695, 726 (2007) ("Intentional torts are premised on the display of a wrongful subjective intent."); Scott Fruehwald, *The Boundary of Personal Jurisdiction: The "Effects Test" and the Protection of Crazy Horse's Name*, 38 J. MARSHALL L. REV. 381, 429 (2004) ("All the intentional torts . . . contain the necessary element of intent . . . .").

31. *Reeves v. Structural Pres. Sys.*, 98-1795, pg. 3 (La. 3/12/99); 731 So. 2d 208, 211 (explaining how intent means that "the person who acts either . . . consciously desires the physical result of his act, whatever the likelihood of that result happening from his conduct; or . . . knows that the result is substantially certain to follow from his conduct, whatever his desire may be as to that result" (quoting *Bazley v. Tortorich*, 397 So. 2d 475, 481 (La. 1981))); RESTATEMENT (SECOND) OF TORTS § 8A (1965) (stating that use of the word intent "denote[s] that [an] actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it"); KEETON ET AL., *supra* note 1, at 35 (discussing how intent "extends not only to those consequences which are desired, but also to those which the actor believes are substantially certain to follow from what the actor does"); William R. Corbett, *Of Babies, Bathwater, and Throwing Out Proof Structures: It Is Not Time to Jettison McDonnell Douglas*, 2 EMP. RTS. & EMP. POL'Y J. 361, 389 (1998) ("[I]t is basic blackletter law that the intent that is necessary to prove an intentional tort can be established by proving either that the tortfeasor had the purpose to produce the results . . . or that the tortfeasor knew to a substantial certainty that the results would be produced . . . .").

32. KEETON ET AL., *supra* note 1, at 35 (describing intent as a state of mind); Adam Candebur, Comment, *Motive Crimes and Other Minds*, 142 U. PA. L. REV. 2071, 2075 (1994) (describing intent and purpose, in the context of criminal law, as a "psychological qualit[y] that require[s] inquiry into

to such a purpose in the context of pending or active litigation if any plausible alternative explanation is available.<sup>33</sup>

Given this, a plaintiff facing the burden of satisfying the intent element of an intentional tort is provided an alternative to directly proving the purpose or desire of the defendant.<sup>34</sup> Pursuant to the substantial certainty branch of the definition, a plaintiff may satisfy the intent element by making use of a circumstantial syllogism.<sup>35</sup> The major premise of the syllogism is that a reasonable person in the position of the defendant would have known to a substantial certainty that the actions engaged in by the defendant would cause harm to the plaintiff.<sup>36</sup> The minor premise is that the defendant is not significantly different from a reasonable person.<sup>37</sup> The conclusion of the syllogism is that the defendant therefore knew to a substantial certainty that, under the circumstances, the defendant's actions would result in harm to the plaintiff.<sup>38</sup>

the internal state of a defendant's mind"); Ruth Gana Okediji, *Status Rules: Doctrine as Discrimination in a Post-Hicks Environment*, 26 FLA. ST. U. L. REV. 49, 69 (1998) (stating how one branch of the intent definition "refers to a state of mind regarding an act or omission with a purpose or desire to bring about given consequences").

33. KEETON ET AL., *supra* note 1, at 36 ("Since intent is a state of mind, it is plainly incorrect for a court to instruct a jury that an actor is presumed to intend the natural and probable consequences of the actor's conduct . . .").

34. DOBBS, *supra* note 1, at 48 ("The defendant has an intent to achieve a specified result when the defendant either (1) has a purpose to accomplish that result or (2) lacks such a purpose but knows to a substantial certainty that the defendant's actions will bring about the result."); see *Frey v. Kouf*, 484 N.W.2d 864 (S.D. 1992); *Garratt v. Dailey*, 279 P.2d 1091 (Wash. 1955).

35. *Estep v. Rieter Auto. N. Am., Inc.*, 148 Ohio App. 3d 546, 774 N.E.2d 323, 326-27 (explaining how proof that a defendant knew with substantial certainty that harm to the plaintiff would result "often must be demonstrated through circumstantial evidence and inferences drawn from the evidence"); *City of Keller v. Wilson*, 86 S.W.3d 693, 704 (Tex. App. 2002), *rev'd*, 168 S.W.3d 693 (Tex. 2005) ("Because defendants will rarely admit knowing to a substantial certainty that given results would follow from their actions, triers of fact are free to discredit defendants' protestations that no harm was intended and to draw inferences necessary to establish intent."); KEETON ET AL., *supra* note 1, at 36 ("[I]t is correct [for a court] to tell the jury that, relying on circumstantial evidence, they may infer that the actor's state of mind was the same as a reasonable person's state of mind would have been.").

36. *Bakerman v. Bombay Co.*, 961 So. 2d 259, 262 (Fla. 2007) ("Under an objective test for the substantial certainty standard, an analysis of the circumstances in a case would be required to determine whether a reasonable person would understand that the [defendant's] conduct was 'substantially certain' to result in injury or death to the [plaintiff]." (quoting *Turner v. PCR, Inc.*, 754 So. 2d 683, 688 (Fla. 2000))); KEETON ET AL., *supra* note 1, at 36 (explaining how one element of the substantial certainty syllogism is that "given the circumstances disclosed in the evidence, a reasonable person in the actor's position would have known that the consequence in question was substantially certain to follow the act").

37. KEETON ET AL., *supra* note 1, at 36 (describing the minor premise as being that "the actor was even brighter and shrewder than most others.").

38. *Id.* at 36 (stating that if a finder of fact accepts the inferences of the syllogism, then the intent

Use of this substantial certainty syllogism allows the plaintiff to introduce evidence of the defendant's behavior, move the judge or jury to an inference about the defendant's knowledge, and finally move the trier of fact to the desired conclusion regarding the defendant's intent. In this manner, the plaintiff has a plausible path from the external and observable—the defendant's actions—to the wholly internal—the defendant's intent.

### III. THE LIMITS OF UNILATERAL ANALYSIS AND THE ADOPTION OF BILATERAL ANALYSIS

#### A. Consent

A similar issue arises in the area of the intentional tort privilege of consent.<sup>39</sup> It is a well-established doctrine of tort law that a plaintiff shown to have consented to the defendant's otherwise intentionally tortious behavior may not subsequently obtain legal damages from the defendant for the harm caused by that behavior.<sup>40</sup> In other words, the consent of the plaintiff serves as a privilege, or a defense, to an intentional tort claim.<sup>41</sup>

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element of an intentional tort is satisfied); see Kathy Seward Northern, *Battery and Beyond: A Tort Law Response to Environmental Racism*, 21 WM. & MARY ENVTL. L. & POL'Y REV. 485, 574 (1997) (“[W]hen a reasonable person in the actor's position would believe that a harmful or offensive contact was substantially certain to follow, he will be dealt with as though he had intended that result.”).

39. This is reflected in the Latin maxim “*volenti non fit injuria*,” meaning “to one who is willing, no wrong is done.” See RESTATEMENT (SECOND) OF TORTS § 892A, cmt. a (1965); 1 EDWIN A. JAGGARD, *HAND-BOOK OF THE LAW OF TORTS ON TORTS* 199 (St. Paul, Minn., West 1895).

40. See RESTATEMENT (SECOND) OF TORTS § 892A (“One who effectively consents to conduct of another intended to invade his interests cannot recover in an action of tort for the conduct or for harm resulting from it.”); KEETON ET AL., *supra* note 1, at 112 (“Consent ordinarily bars recovery for intentional interferences with person or property.”); FOWLER VINCENT HARPER, *A TREATISE ON THE LAW OF TORTS* 79 (The Bobbs-Merrill Co. 1933) (“[T]here exists a general policy of the law that one who has himself given full and complete assent to a course of conduct on the part of another and thus, in a sense, participated in bringing about his damage, has sustained no legal wrong by harms resulting from such conduct.”).

41. See *McAdams v. Windham*, 94 So. 742, 743 (Ala. 1922) (“It is a general rule of law that a blow thus inflicted in a friendly, mutual combat—a mere sporting contest—is not unlawfully inflicted, the parties being engaged in the violation of no law. ‘Harm suffered by consent is not, in general, the basis of a civil action.’” (quoting 1 JAGGARD, *supra* note 39, at 199)); *McNeil v. Mullin*, 79 P. 168, 169 (Kan. 1905) (“‘Consent is generally a full and perfect shield, when that is complained of as a civil injury which was consented to. A man cannot complain of a nuisance, the erection of which he concurred in or countenanced.’” (quoting THOMAS M. COOLEY, *A TREATISE ON THE LAW OF TORTS* 187 (CHICAGO, CALLAGHAN & CO. 1888)); *Howland v. George F. Blake Mfg. Co.*, 31 N.E. 656, 658 (Mass. 1892) (“If the defendant is guilty of no wrong against the plaintiff except a wrong invited and procured by the plaintiff . . . it would be most unjust that the procurer of the wrongful act should be permitted to profit by it.”). See generally *Ford v. Ford*, 10 N.E. 474, 475 (Mass. 1887) (“A desertion consented to is not a desertion. . . . On like principles, the absence of lawful consent is part of the definition of an assault . . . .” (internal citations omitted)).

The plaintiff's consent to what would otherwise be an intentional tort can come in the form of an explicit statement by the plaintiff, either written or oral.<sup>42</sup> Consent in this form is generally referred to as express consent.<sup>43</sup> Consent can also occur in the absence of any explicit statement by the plaintiff.<sup>44</sup> In these circumstances, it is the non-verbal behavior of the plaintiff that triggers consent, and consent in this form is generally referred to as implied consent.<sup>45</sup>

How can implied consent be established? At one level, the challenge of designing a doctrinal test for implied consent is quite similar to the task of designing a doctrinal test for the existence of intent. Both undertakings involve crafting a test that permits a party to establish what is essentially an interior mental state of another.<sup>46</sup> As such, one might think that the approach used successfully in the area of intent could also be effectively employed with respect to implied consent.

Such an approach would provide the party seeking to establish implied consent with a syllogism similar to the one available for intent based on substantial certainty. The major premise would be that a reasonable person in the position of the plaintiff who engaged in the same behavior under the same circumstances as did the plaintiff, would have been indicating consent to the defendant's otherwise harm producing behavior.<sup>47</sup> The minor premise

42. See RESTATEMENT (SECOND) OF TORTS § 892, cmt. b ("Normally [consent] is manifested directly to the other by words or acts that are intended to indicate that it exists."); see also *Quinn v. Ltd. Exp., Inc.*, 715 F. Supp. 127, 130 (W.D. Pa. 1989) ("Consent may be manifested by an individual's words and/or affirmative actions which indicate a willingness for another's conduct to occur.").

43. See *Barnes v. Am. Tobacco Co.*, 161 F.3d 127, 148 (3d Cir. 1998) ("Express consent may be given by words or affirmative conduct . . ."); *Schall v. Vazquez*, 322 F. Supp. 2d 594, 601-02 (E.D. Pa. 2004) (stating same).

44. See RESTATEMENT (SECOND) OF TORTS § 892, cmt. b ("[Consent] may equally be manifested by silence or inaction, if the circumstances or other evidence indicate that the silence or inaction is intended to give consent."); see also *Escue v. N. Okla. Coll.*, 450 F.3d 1146, 1158 (10th Cir. 2006) ("[C]onsent does not always need to be verbal . . ."); *McNeil*, 79 P. at 169 ("Consent to engage in mutual combat may be inferred from circumstances."); KEETON ET AL., *supra* note 1, at 113 ("Consent may therefore be manifested by words, or by the kind of actions which often speak louder than words.").

45. See *Barnes*, 161 F.3d at 148 ("[I]mplied consent may be manifested when a person takes no action, indicating an apparent willingness for the conduct to occur."); *Schall*, 322 F. Supp. 2d at 602 (stating same); *Quinn*, 715 F. Supp. at 130 ("Consent also may be indicated by inaction which indicates to another an implied or apparent willingness for conduct to occur. In effect, the individual's actions speak louder than words." (emphasis added) (citation omitted)).

46. See *supra* text accompanying notes 30-38.

47. See RESTATEMENT (SECOND) OF TORTS § 892, cmt. c. ("[Implied consent exists] when the words or acts or silence and inaction, would be understood by a reasonable person as intended to indicate consent and they are in fact so understood by the other. . . . [This] manifestation of apparent consent . . . justifies the other in acting on the assumption that consent is given and is as effective to

would be that the plaintiff is not significantly different from such a reasonable person.<sup>48</sup> The conclusion of the syllogism would be that the plaintiff therefore consented to the defendant's actions under the circumstances.<sup>49</sup>

By this inferential means, much like in intent, a defendant can begin with an account of the plaintiff's external, observable behavior and end with a conclusion regarding the plaintiff's internal mental state. In this case, the desired conclusion is that the plaintiff consented to the defendant's otherwise tortious actions.

Experience and reflection, however, indicate that this straightforward translation of the syllogism for intent does not work as well with respect to the issue of consent. Consider a situation in which a man makes an appointment and then shows up at the physician's office at the agreed upon time. The patient proceeds to an examination room and describes his symptoms to the doctor. The doctor tells the patient, "I believe that you need a shot of penicillin. That should work just fine. Are you allergic to penicillin?" The patient replies, "No." The doctor then leaves the room.

Once the doctor leaves, the patient begins to doubt his answer. He vaguely remembers being told of a bad reaction that he suffered as a child to an injection of an antibiotic, but he is unable to remember the name of the drug. He grows increasingly uncertain and anxious. He tells himself that he must mention this to the doctor before the doctor injects him with penicillin.

As the patient is lost deep in thought, a nurse enters the room carrying a tray with a syringe. The patient vaguely notices the nurse and the syringe and absently rolls up his sleeve to present his arm to the nurse. The nurse injects him with penicillin. The patient experiences a severe allergic reaction to the penicillin and requires hospitalization before he recovers.

The patient subsequently sues the physician for the intentional tort of battery. When asked about his possible consent to the penicillin injection,

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prevent liability in tort as if there were consent in fact."); *see also* *Dubbs v. Head Start, Inc.*, 336 F.3d 1194, 1219 (10th Cir. 2003) ("If words or conduct are reasonably understood by another to be intended as consent, they constitute apparent consent and are as effective as consent in fact." (quoting RESTATEMENT (SECOND) OF TORTS § 892(1) (1965))); *O'Brien v. Cunard S.S. Co.*, 28 N.E. 266, 266 (Mass. 1891) (holding that by waiting in line where women were being vaccinated, and in holding out her arm to the surgeon administering the vaccinations, a plaintiff in any other situation would be thought to have consented); *KEETON ET AL.*, *supra* note 1, at 113 ("The defendant is entitled to rely upon what any reasonable man would understand from the plaintiff's conduct."); *HARPER*, *supra* note 40, at 81 ("The consent may be given either by word or conduct of such a character as to lead a reasonable person to believe that an assent was expressed. The defendant may rely upon and be guided by the overt acts and conduct of the plaintiff." (footnote omitted)).

48. *See O'Brien*, 28 N.E. at 266 (holding that the defendant was justified in believing that plaintiff, in line with arm exposed, consented to receiving the vaccination); *KEETON ET AL.*, *supra* note 1, at 113 ("The defendant is entitled to rely upon what any reasonable man would understand from the plaintiff's conduct.").

49. *See Escue*, 450 F.3d at 1158 ("[Defendant] could have proved consent by showing that [plaintiff] led him reasonably to believe that she consented to his contact . . ."); *see also* discussion *supra*, notes 46–48.

the patient, now the plaintiff, explains that he was trying to probe his memory about the earlier incident and was lost deep in thought. He was anxious and confused. He had assumed, and it was fixed in his mind, that it was the doctor who would return to the room and give him the penicillin shot. He was focusing on the doctor's return and reminding himself to tell the doctor about his concerns before the doctor gave him the injection. He was not sure what he thought the nurse was doing—maybe a vitamin shot or some sort of anesthetic—but he certainly did not think that it was penicillin. He would never have rolled up his sleeve and offered his arm if he thought that it was penicillin.

The plaintiff is sincere and credible. Many persons who hear his explanation are likely to believe him.

Under these circumstances, would it be appropriate to read to the jury an instruction on consent similar to the translated intent syllogism described above? Should the jury be asked to determine if a reasonable person in the position of the plaintiff, plagued with doubts about his allergic status to penicillin, nervous and confused, preoccupied with the return of the doctor, and feeling physically ill, might have rolled up his sleeve and presented his arm to the nurse without intending to consent to a penicillin injection?

The answer is no. The use of the translated intent syllogism is not appropriate here because a neutral decision-maker might well decide that, based on this doctrinal test, consent did not exist in these circumstances and that consent should clearly be found to exist. In fact, this should be a relatively easy case of consent to a claim of battery brought by the patient against the doctor.<sup>50</sup>

Why is this such an easy case? Because a finding that consent did not exist in these circumstances would result in the defendant physician being liable to the patient for the intentional tort of battery.<sup>51</sup> And while the physi-

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50. See *O'Brien*, 28 N.E. at 266–67. In *O'Brien*, the plaintiff brought a charge of assault against the Cunard Steam-Ship Company after having been vaccinated while traveling from Queenstown to Boston. *Id.* at 266. Relying on the doctrine of implied consent to dismiss the plaintiff's claim, the court found it necessary to examine the defendant doctor's conduct "in connection with the surrounding circumstances," stating that "[i]f the plaintiff's behavior was such as to indicate consent on her part, [the surgeon] was justified in his act, whatever her unexpressed feelings may have been." *Id.* This implied consent could be obtained by the surgeon "only by [observing] her overt acts and the manifestations of her feelings." *Id.*

51. See *Armstrong ex rel. Armstrong v. Brookdale Univ. Hosp. & Med. Ctr.*, 425 F.3d 126, 134 (2d Cir. 2005) (holding that under New York law, "battery applies in the medical context only where the patient or her guardian gives no consent"); *Bonner v. Moran*, 126 F.2d 121, 122 (D.C. Cir. 1941) ("We think there can be no doubt that a surgical operation is a technical battery, regardless of its results, and is excusable only when there is express or implied consent by the patient; or, stated somewhat differently, the surgeon is liable in damages if the operation is unauthorized."); see also

cian, through the nurse as an agent, did in fact intentionally inject the patient with penicillin and thereby caused him significant harm, the physician did not engage in the kind of intentional antisocial behavior that typically triggers intentional tort liability.<sup>52</sup> The physician and the nurse reasonably believed that the patient consented to the injection of penicillin and reasonably responded. They were understandably unaware of the lack of genuine consent by the patient and as a result they should not be held liable to him.<sup>53</sup>

The underlying difference between the problem of determining the existence of intent and determining the existence of consent is the difference between unilateral analysis and one kind of bilateral analysis. The search for intent is an attempt to determine as accurately as possible the actual internal mental state of the defendant at a particular time and place.<sup>54</sup> Because an admission of intent in the context of an intentional tort action is obviously against the defendant's self-interest, the defendant's report as to his intent is inherently unreliable.<sup>55</sup> Thus, inferential devices like the substantial certainty syllogism are required. Nevertheless, the use of the inferential syllogism remains in service in an effort to be accurate about the actual existence of intent by the defendant.

In contrast, the problem of determining whether the plaintiff consented to the defendant's actions is less an attempt to accurately determine the ac-

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Van Leeuwen v. Nuzzi, 810 F. Supp. 1120 (D. Colo. 1993) (holding that under Colorado law, battery cannot occur unless a physician obtained no consent for the procedures); Schloendorff v. Soc'y of N.Y. Hosp., 105 N.E. 92, 93 (N.Y. 1914) ("[A] surgeon who performs an operation without his patient's consent commits an assault, for which he is liable in damages."); Anthony Szczygiel, *Beyond Informed Consent*, 21 OHIO N.U. L. REV. 171, 184-85 (1994) ("[W]here the surgeon operated on a part of the body other than one discussed with the patient, there was liability for battery. The central issue is whether an intentional 'touching' occurred. If so, and there was no express or implied consent, there is liability." (footnotes omitted)).

52. See HARPER, *supra* note 40, at 38-39. Harper states that the illegality of battery stems not only from an interest in the freedom from bodily harm, but also in the freedom from "offensive" touching, regardless of whether or not it results in harm. *Id.* An action is offensive, according to Harper, if it "offends the reasonable sense of personal dignity usually respected in a civilized community." *Id.* at 38. Generally, the administration of penicillin by a doctor is not considered offensive to one's personal dignity. See also Courtney v. Kneib, 110 S.W. 665, 667 (Mo. Ct. App. 1908) ("[Merely laying one's hands on another does] not constitute an assault and battery. In order to have made it such, the act must have been accompanied with anger or some other circumstance of the kind evincing hostility."); 1 THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS 232 (CHICAGO, CALLAGHAN & CO. 1888) ("The wrong here consists, not in the touching, so much as in the manner or spirit in which it is done . . .").

53. See Mink v. Univ. of Chi., 460 F. Supp. 713, 718 (N.D. Ill. 1978) (holding that if a "patient has assented to the doctor's treatment, he may not later maintain an action in battery").

54. In articulating the meaning of intent, the Restatements focus on the conduct of an individual, rather than on interactions between individuals, stating that "[t]he word 'intent' is used throughout the Restatement . . . to denote that the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it." RESTATEMENT (SECOND) OF TORTS § 8A (1965) (emphasis added).

55. See discussion *supra* Part II.

tual internal state of mind of the plaintiff than it is an effort to regulate a communicative interaction between the plaintiff and the defendant—a classic bilateral problem.<sup>56</sup> Unlike the intent element, the privilege of consent deals with situations in which the defendant claims that his otherwise tortious behavior was undertaken in response to and in reliance upon the plaintiff's consent to that behavior.<sup>57</sup> Thus, the focus of analysis in consent is not solely the internal state of one party, as with intent, but the two-party interaction between the plaintiff and the defendant.<sup>58</sup>

This shift from a unilateral to a bilateral analysis can make all the difference. Consider a situation in which the plaintiff's actual internal state of mind with respect to consent—the plaintiff's subjective consent—is fairly determinable, but the communication of that consent to the defendant is im-

56. See *Barnes v. Am. Tobacco Co.*, 161 F.3d 127, 148 (3d Cir. 1998) (“Express consent may be given by words or affirmative conduct and implied consent may be manifested when a person takes no action, indicating an apparent willingness for the conduct to occur.”); *Quinn v. Ltd. Exp., Inc.*, 715 F. Supp. 127, 130 (W.D. Pa. 1989) (“Consent may be manifested by an individual's words and/or affirmative actions which indicate a willingness for another's conduct to occur. Consent also may be indicated by inaction which indicates to another an implied or apparent willingness for conduct to occur. In effect, the individual's actions speak louder than words.”); *McNeil v. Mullin*, 79 P. 168, 169 (Kan. 1905) (“Consent . . . may be inferred from circumstances. Conduct may have much more weight than profanity in determining the actual attitude of the parties toward each other . . .”); see also RESTATEMENT (SECOND) OF TORTS § 892, cmt. b.

57. This is frequently seen in athletics. The defendant, the athlete that caused the injury, alleges that the plaintiff, the injured athlete, consented to the contact that caused the injury. The plaintiff claims that, while he consented to some otherwise tortious conduct, he did not consent to the conduct which caused his injury. Thus, the question becomes to what level of conduct has the injured athlete given his consent? What was acceptable conduct for the defendant to engage in, relying on that consent? See *Tavernier v. Maes*, 51 Cal. Rptr. 575, 588 (Cal. Ct. App. 1966) (“The consent is to the plaintiff's conduct, rather than to its consequences. If the plaintiff willingly engages in a boxing match . . . he does consent to the defendant's striking at him, and hitting him if he can; and if death unexpectedly results, his consent to the act will defeat any action for the resulting invasion of his interests.”); *Kabella v. Bouschelle*, 672 P.2d 290, 292 (N.M. Ct. App. 1983) (“Voluntary participation in a football game constitutes an implied consent to normal risks attendant to bodily contact permitted by the rules of the sport.”); Christo Lassiter, *Lex Sportiva: Thoughts Towards a Criminal Law of Competitive Contact Sport*, 22 ST. JOHN'S J. LEGAL COMMENT. 35, 74–78 (2007) (discussing the defense of implied consent, and its problematic application to sports); see also Jeffrey M. Schalley, *Eliminate Violence from Sports Through Arbitration, Not the Civil Courts*, 8 SPORTS LAW. J. 181, 184 (2001) (stating that “[b]oxing is a good example of where the participants consent to conduct that would normally be considered assault and battery”).

58. See, *O'Brien v. Cunard S.S. Co.*, 28 N.E. 266, 266 (Mass. 1891) *supra* note 41, at 266 (contemplating both the behavior of the plaintiff and the defendant in dismissing the plaintiff's claim). Compare RESTATEMENT (SECOND) OF TORTS § 8A (“The word ‘intent’ is used throughout the Restatement[s] . . . to denote that the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it.”) with RESTATEMENT (SECOND) OF TORTS § 892(2) (“If words or conduct are reasonably understood by another to be intended as consent, they constitute apparent consent and are as effective as consent in fact.”).



perfect, as in the case of the penicillin injection described above. What if it appears that the plaintiff did not subjectively consent to the defendant's actions, but acted in a way that caused the defendant to believe that he did?

To properly handle this kind of situation, tort law must abandon the classic unilateral approach of criminal law that works so well in determining intent and instead seek analysis analogous to the classic bilateral jurisprudence of contract law. The key insight here is that consent to an intentional tort that is imperfectly communicated by a plaintiff to a defendant is analogous to an offer to enter into a contract that is imperfectly communicated by an offeror to an offeree.<sup>59</sup> Fundamentally, both involve the regulation of a communicative act by one party to another regarding the internal state of mind of the active communicating party.

Just as contract law has come to understand the importance of honoring and protecting the reasonable expectations of the offeree created by the communicative acts of the offeror, so too does tort law ultimately protect a reasonable defendant who is objectively incorrect about the plaintiff's actual desire to consent to the defendant's otherwise tortious behavior.<sup>60</sup> Tort law protects the defendant's reliance interest in these circumstances by crafting the test for the existence of the plaintiff's implied consent from the defendant's point of view rather than the plaintiff's.

Thus, the basic test for the existence and scope of the plaintiff's implied consent in an intentional tort action is whether a reasonable person in the position of the defendant would have thought the plaintiff had consented to this specific behavior.<sup>61</sup> The focus is placed on the receiver of, and the audience

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59. For more than a century, contract law has approached this problem from a perspective that has come to be known as the objective theory of contracts. From this perspective, the intent of each contracting party—and their subjective “meeting of the minds”—is largely irrelevant. What matters are the objective manifestations of intent displayed by the parties to one another. See *Hotchkiss v. National City Bank*, 200 F. 287, 293 (S.D.N.Y. 1911) (“A contract has, strictly speaking, nothing to do with the personal, or individual, intent of the parties.”); Joseph M. Perillo, *The Origins of the Objective Theory of Contract Formation and Interpretation*, 69 *FORDHAM L. REV.* 427 (2000); Samuel Williston, *Freedom of Contract*, 6 *CORNELL L. Q.* 365 (1921).

60. See JOSEPH M. PERILLO, *CALAMARI AND PERILLO ON CONTRACTS* 157 (5th ed. 2003) (“Contract law is permeated by the notion that the law should take into account the reasonable expectations of contracting parties.”).

61. See *Escue v. N. Okla. Coll.*, 450 F.3d 1146, 1158 (10th Cir. 2006) (holding that “[the defendant] could have proved consent by showing that [the plaintiff] led him reasonably to believe that she consented to his contact, and that the contact was the same or substantially similar to the contact to which she consented.”); *Dubbs v. Head Start, Inc.*, 336 F.3d 1194, 1219 (10th Cir. 2003) (“If words or conduct are reasonably understood by another to be intended as consent, they constitute apparent consent and are as effective as consent in fact.” (citing *RESTATEMENT (SECOND) OF TORTS* § 892(2) (1965))); *Ford v. Ford*, 10 N.E. 474, 475 (Mass. 1887) (“[W]ithout the consent’ means without the manifested consent, and that the undisclosed emotions of the deserted party do not affect his rights.”); *Curtin v. Curtin*, 97 N.Y.S. 771, 772 (N.Y. App. Div. 1906) (“Of course, her mental state would naturally aid the conclusion that she did show consent by words or acts, but such mental state is no substitute for acts or words.” (emphasis added)); see also HARPER, *supra* note 40, at 81 (“The consent may be given either by word or conduct of such a character as to lead a reasonable

for, the plaintiff's communicative act. This reasonable person test allows that receiver—the defendant—to be reasonably wrong about the actual consent of the plaintiff and yet still benefit from the consent privilege.<sup>62</sup> Just as in contract law, the burden of accurate communication, and thus the risk of innocent miscommunication, is placed upon the active communicating party. Here, the active communicating party is the consenting plaintiff. When properly applied, this test protects the doctor and the nurse in the penicillin shot scenario from liability to the patient, through the consent privilege, despite the absence of genuine consent on the part of the patient.<sup>63</sup>

The rationale for a defendant-centered reasonable person test for implied consent as described above is primarily concerned with the allocation of burden and risk between two interacting parties—the potentially consenting plaintiff and the defendant who interprets the plaintiff's behavior and thereafter acts in reliance upon that behavior.<sup>64</sup> The structure of this problem is the same as the contract law problem of an inaccurately communicated offer from an offeror to an offeree.<sup>65</sup> It is what could be called a bilateral analysis, and it is fundamentally different in nature from the unilateral analysis used to determine the possession of intent by a defendant or the existence of *mens rea* in a criminal prosecution.

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person to believe that an assent was expressed. The defendant may rely upon and be guided by the *overt acts and conduct* of the plaintiff.” (emphasis added) (footnote omitted)).

62. See *O'Brien*, 28 N.E. at 266 (finding for the defendant-doctor that plaintiff consented to the vaccination and stating “[t]here was nothing in the conduct of the plaintiff to indicate to the surgeon that she did not wish . . . to be vaccinated . . . . Viewing his conduct in the light of the surrounding circumstances, it was lawful.”).

63. This has become incorporated into emergency situations where a doctor cannot receive consent from a patient. See *Kennedy v. Parrott*, 90 S.E.2d 754, 759 (N.C. 1956). In discussing the history of consent as applied to the medical field, Chief Justice Barnhill notes that during early common law, surgeries were typically performed in the patient's home and without any form of anesthesia, so the doctor was able to obtain verbal consent from the patient. *Id.* at 758. However, with advances in modern medicine, this is no longer the case. *Id.* Affirming the lower court's judgment in favor of the doctor, Barnhill states that in these cases, “the consent . . . will be construed as general in nature and the surgeon may extend the operation.” *Id.* at 759; see also HARPER, *supra* note 40, at 83 (“In such situations [instances in which the patient is in no position to give consent] . . . the consent is implied from the circumstances.”).

64. See *supra* notes 56–63 and accompanying text.

65. See MELVILLE MADISON BIGELOW, *THE LAW OF TORTS* 41 (8th ed. 1907). In questioning the extent to which one's consent extends, Bigelow states, “[t]hat question will, it seems, be of the same nature as the question of agreement, in the sense of an actual ‘union of minds,’ in contract.” *Id.*

## B. Self-Defense

Once this difference between unilateral problems and bilateral problems in tort law is recognized, the structure of a doctrine or a doctrinal test in a given area of tort law can often be anticipated. For example, in addition to consent, the law of intentional torts provides to a defendant in an intentional tort action a formal privilege of self-defense.<sup>66</sup> This means that a defendant who engages in what would otherwise be an intentional tort will not be held liable if he can establish that he acted reasonably<sup>67</sup> in response to an imminent bodily<sup>68</sup> threat posed by the plaintiff.<sup>69</sup> Thus, a defendant who reasonably defends himself by roughly blocking a punch thrown by the plaintiff and forcefully pushing the plaintiff away will not be held liable to the plaintiff for a battery.<sup>70</sup>

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66. The concept of self-defense as a privilege is a common theme in the Restatement of Torts. See, e.g., RESTATEMENT (SECOND) OF TORTS § 63(1) (1965) (“An actor is privileged to use reasonable force . . . to defend himself against unprivileged harmful or offensive contact or other bodily harm which he reasonably believes that another is about to inflict intentionally upon him.”). The privilege of self-defense also extends to an actor who reasonably believes he is threatened by negligent conduct of another. See *id.* § 64(1); see also William L. Prosser, *Transferred Intent*, 45 TEX. L. REV. 650, 655 (1967) (describing that self-defense was a privilege originally conceived in criminal law and now incorporated into tort law). Richard Epstein suggests that the privilege of self-defense would be unnecessary if tort law worked flawlessly because each “aggressor would be captured after inflicting the harm and subjected to a damage award that left him worse off for inflicting the harm than from never acting at all.” Richard A. Epstein, *The Tort/Crime Distinction: A Generation Later*, 76 B.U. L. REV. 1, 14 (1996). Since the tort system does not capture all aggressors, the tort system makes the decision to accept a certain degree of risk of unwarranted retaliation against the initial aggressor rather than force the victim to resort only to compensation. *Id.*

67. RESTATEMENT (SECOND) OF TORTS § 63(1); see also *Wilson v. Dimitri*, 138 So. 2d 618, 621 (La. Ct. App. 1962) (“The yardstick of the reasonable, prudent man is, generally speaking, the judicial tool used to measure whether the force used to repel the attack was excessive.”); Rollin M. Perkins, *Self-Defense Re-Examined*, 1 UCLA L. REV. 133, 134 (1953) (“The question is not whether the jury believes the force used was necessary in self-defense, but whether the defendant, acting as a reasonable man, had this belief.”).

68. RESTATEMENT (SECOND) OF TORTS § 63 (indicating that the actor must perceive an immediate infliction of harmful contact in order to invoke the self-defense privilege); see also *Goldfuss v. Davidson*, 679 N.E.2d 1099, 1105 (Ohio 1997) (providing that defendant seeking instructions on self-defense must show a bona fide belief that the alleged danger was imminent); Perkins, *supra* note 67, at 134 (stating that self-defense requires that the “danger must be, or appear to be, pressing and urgent. A fear of danger at some future time is not sufficient”).

69. When these prerequisites for self-defense are met, an actor has a valid self-defense claim. See, e.g., *Roberson v. Bethlehem Steel Corp.*, 912 F.2d 184, 188 (7th Cir. 1990) (providing that a defendant acting with reasonable force in response to a perceived imminent threat has a complete defense in a tort action); *State v. Bradley*, 10 P.3d 358, 360 (Wash. 2000) (finding that a defendant need not be correct that the threat is imminent as long as the defendant honestly believes the threat is imminent).

70. The Restatement explains that where an actor is acting in self-defense, his harmful conduct against the initial aggressor is privileged regardless of whether the actor is motivated by “personal dislike or hostility to the [initial aggressor].” RESTATEMENT (SECOND) OF TORTS § 63, cmt. e. The Restatement illustrates this principle by proposing a situation in which actor A plays a “rough practical joke upon [actor] B” and explaining that B is privileged to use self-defense even though B “has

What should the basic doctrinal test be for the existence of a self-defense privilege? The appropriate answer begins with the recognition of this as an essentially bilateral problem. The paradigmatic set of circumstances in which the self-defense privilege is invoked involve the defendant observing, interpreting, and reacting to the plaintiff's behavior.<sup>71</sup> The structure of the regulatory problem is the same as it is in the case of the implied consent privilege<sup>72</sup> and in the case of an inaccurately communicated offer in contract law.<sup>73</sup> The difference is simply that in the case of self-defense, the plaintiff is communicating a certain kind of threat to the defendant rather than communicating consent or an offer to enter into a contract.<sup>74</sup>

tolerated similar jokes . . . and objects to A's conduct because of personal dislike of A." *Id.* Commentators have also described that a defender is privileged by self-defense when his harmful conduct is based on a reasonable but mistaken belief. *See, e.g.*, David W. Robertson, *The Aggressor Doctrine*, 1 S.U. L. REV. 82, 84 (1975) (stating that the defendant's use of force "is privileged when his belief that [the force] is necessary is reasonable but mistaken").

71. Parties commonly dispute over whose actions initiated the aggression and who thereafter reacted in self-defense. *See, e.g.*, *Hanauer v. Coscia*, 244 A.2d 611, 613 (Conn. 1968) (indicating that the plaintiff and defendant provided conflicting accounts of who initiated the aggression after one parent approached another parent to discuss that his child was being bullied by the other parent's child); *People v. George*, 540 N.W.2d 487, 488–89 (Mich. Ct. App. 1995) ("Defendant was charged with felonious assault stemming from an altercation with a co-worker . . . . It was the prosecution's theory that the [plaintiff] was merely walking toward defendant to retrieve a tool from his toolbox when defendant suddenly grabbed a pipe and hit the [plaintiff] without provocation. Defendant contended that the [plaintiff] first shoved him and then walked toward him while swearing and in a menacing manner such that defendant picked up the nearest available object and hit the complainant in self-defense.").

72. *See* RESTATEMENT (SECOND) OF TORTS § 892D (establishing that an actor shall not be held liable for unconsented conduct that injures another if "the actor has no reason to believe that the other, if he had the opportunity to consent, would decline."). In *Sullivan v. Montgomery*, for example, the issue of implied consent arose when a father sued a doctor for anaesthetizing his son without the father's consent. 279 N.Y.S. 575, 576 (N.Y. City Ct. 1935). The court held that the father's consent was not necessary because implied consent was given when the treatment was administered in an emergency situation. *Id.* at 576–77.

73. Inaccurate communication can still lead to formation of a contract under the objective theory of contract formation. *See* Perillo, *supra* note 59, at 427 (2000) ("[T]he objective theory of contract formation and interpretation holds that the intentions of the parties to a contract or alleged contract are to be ascertained from their words and conduct rather than their unexpressed intentions."). Under the objective theory, the offeror bears the risk of inaccurate communications. *See, e.g.*, *Ayer v. W. Union Tel. Co.*, 10 A. 495, 497 (Me. 1887) (holding that when an error in the transmission of a offer occurs, the offeror, as master of the communication and the means of that communication, must bear the loss for an inaccurately transmitted offer).

74. *See, e.g.*, *State v. Edwards*, 661 A.2d 1037, 1041–42 (Conn. 1995) (holding that a defendant in a homicide prosecution was entitled to a jury instruction on self-defense when the victim had previously communicated a verbal threat to defendant's sister and approached defendant aggressively as defendant was backing away); *McMurrey Corp. v. Yawn*, 143 S.W.2d 664, 667 (Tex. Civ. App. 1940) (holding that defendant was entitled to a claim of self-defense if at the time defendant shot the deceased, the action and conduct of the deceased induced defendant to believe that the deceased was

Having observed this underlying similarity, it should come as little surprise to learn that tort law's basic test for the existence of the self-defense privilege is whether a reasonable person in the position of the defendant would have believed that the plaintiff posed to him a threat of imminent bodily harm.<sup>75</sup> Again, and for the same reasons as the consent doctrine, the focus is on the receiving, interpreting party who must act in response to and rely upon the overt actions of another.<sup>76</sup> The test is not whether a reasonable person in the position of the plaintiff, having acted as the plaintiff did under the circumstances, would have meant to inflict imminent bodily harm on the defendant.<sup>77</sup> Reasonable mistakes by the defendant in interpreting the actual threat posed to him by the plaintiff are honored, and again, the burden of such reasonable mistakes is placed on the plaintiff, the party who engaged in the initial active behavior.<sup>78</sup> This is the consistent doctrinal result of this kind of bilateral analysis in tort law.

#### IV. A SECOND KIND OF BILATERAL ANALYSIS

There is present in tort law a second kind of bilateral analysis that importantly distinguishes tort law from the classic unilateral analysis of criminal law. In criminal law, the fundamental question is whether an unwelcome

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about to initiate a deadly attack).

75. RESTATEMENT (SECOND) OF TORTS § 63(1). Conversely, a defendant's unreasonable belief will preclude him from justifying his actions as self-defense. *See, e.g.,* *Smith v. Lauritzen*, 356 F.2d 171, 176 (3d Cir. 1966) (requiring defendant to show that at the moment defendant responded he was acting upon a reasonable fear of harmful bodily contact and finding that "nothing evidences that [defendant] acted at the moment of the attack with a reasonable fear of bodily harm"); *Silas v. Bowen*, 277 F. Supp. 314, 318 (D.S.C. 1967) ("[I]n determining whether there was reasonable cause for the apprehension of serious bodily harm, the difference in age, size, and relative physical strength of the parties to the controversy is a proper matter for consideration."); *Bell v. Smith*, 488 S.E.2d 91, 93 (Ga. Ct. App. 1997) (finding defendant's conduct of firing a gun at a truck that had swerved toward defendant, but subsequently passed, as not justified under the self-defense privilege).

76. *See supra* notes 56–63 and accompanying text.

77. *See Perkins, supra* note 67, at 134 (arguing that tort law does not ask whether the self-defense was necessary under the circumstances, but whether "the defendant, acting as a reasonable man, had this belief"). As Perkins describes, "One who has knocked down another, in the reasonable belief that this was necessary to prevent being stabbed, is not guilty of battery because it is later learned that the other intended no harm but was merely playing too realistic a joke with a rubber dagger." *Id.*

78. The Restatement states that only one case fails to recognize the privilege of self-defense when a defendant reasonably, but erroneously believes he is about to be harmed. RESTATEMENT (SECOND) OF TORTS § 63; *see, e.g.,* *Courvoisier v. Raymond*, 47 P. 284, 287 (Colo. 1896) (finding that defendant was entitled to self-defense when he shot a police officer, incorrectly believing that the officer was one of the attacking rioters); *Paxton v. Boyer*, 67 Ill. 132, 132–33 (Ill. 1873) (determining that defendant was entitled to self-defense when he struck an innocent bystander, thinking that the bystander was the person who had assaulted defendant); *Landry v. Hill*, 94 So. 2d 308, 311 (La. Ct. App. 1957) (providing that self-defense was justified when plaintiff was acting aggressively and led defendant to believe that plaintiff was about to draw a weapon even though plaintiff claims he carried no weapon).

legal remedy, a criminal sanction of some sort, will be imposed upon the defendant.<sup>79</sup> In a sense, the same stakes are at play in any tort action, although the unwelcome legal remedy is limited to the involuntary confiscation of some of the defendant's assets and the relatively rare imposition of an injunction.<sup>80</sup>

However, where the imposition of an injunction is not at stake, as in the great majority of tort actions, the defendant's assets are not merely seized by the state—as they would in a successful criminal prosecution resulting in a fine—but are instead transferred to the plaintiff. Thus, as noted earlier, tort law liability results in both a punishment to the defendant and a reward of sorts to the plaintiff (in the form of compensation for the harm suffered).<sup>81</sup> Therefore, tort law, unlike criminal law, must strive to fashion its doctrines so that liability is created not only in those situations in which it is appropriate to punish the defendant but also appropriate to compensate the plaintiff. This is a second, and also very significant, kind of bilateral analysis that exists in tort law. This type of bilateral analysis is not often present in the predominately unilateral, defendant-centered, punish-or-not analysis of most of criminal law.

#### A. *Subjective Consent in the Absence of Objective Consent*

The need for this second kind of bilateral analysis can considerably complicate the design of some tort law doctrines. For an example, consider again the problem of fashioning a proper test for the existence and scope of implied consent as a privilege to an intentional tort claim. As described above, the basic test for consent in this context is whether a reasonable person in the position of the defendant would have believed that the plaintiff was consenting to the defendant's otherwise tortious conduct, given the behavior of the plaintiff under the circumstances.<sup>82</sup> As discussed, this test allows a defendant to successfully invoke the consent privilege and thereby

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79. See LAFAYE, *supra* note 25, at 7 (“The substantive criminal law is that law which, for the purpose of preventing harm to society, declares what conduct is criminal and prescribes the punishment to be imposed for such conduct.”); Paul H. Robinson, *A Functional Analysis of Criminal Law*, 88 NW. U. L. REV. 857 (1994) (identifying the primary functions of criminal law as “rule articulation, liability assignment, and grading”).

80. See MILLER, *supra* note 22, § 21 (“[Civil and criminal] proceedings are distinct, however, and have a different object, the one being to punish, while the other is to obtain redress for the injury.”); TORCIA, *supra* note 2, at 7 (“As a result of the criminal prosecution, the offender may be imprisoned; as a result of the civil action, the injured individual may recover money damages.”).

81. See *supra* note 8 and accompanying text.

82. See discussion *supra* Part III.A.

avoid liability in some circumstances in which the plaintiff very likely did not actually consent to the complained-of behavior.<sup>83</sup>

What, however, should be done in circumstances in which the plaintiff does not effectively communicate consent to the defendant but can nevertheless be shown to have actually possessed it? In other words, what if a reasonable person in the position of the defendant observing the plaintiff's behavior would not conclude that the plaintiff was consenting to a tortious invasion of his interest, but the defendant nevertheless engages in the harm producing behavior and is able, *ex post facto*, to establish that the plaintiff did in fact subjectively consent? This is, in a sense, the flip side of the consent problem considered earlier, challenging the law to respond to the absence of objective consent but the presence of subjective consent.

Suppose, for example, that one friend convinces another to attend a concert by a particular rock band. Knowing that his friend's taste in rock music is typically more aggressive than the style of this band, he tells his friend that the lead singer of the band loves to dive off the front of the stage and fall into the crowd below, and that he can be counted on to do this multiple times during every concert. Furthermore, he tells his friend that their tickets will place them in the second row of seats in front of the stage where the lead singer is very likely to fall. Encouraged and excited by this prospect, the friend agrees to attend the concert later that night, and they sit in the second row.

In actuality, the lead singer of the band in question has no reputation for diving off the stage and no history of having done so. A reasonable person sitting in front of the stage during the band's performance would not expect to be touching the band members in any way, and no member of the band could reasonably expect that the presence of a patron in front of the stage signaled any sort of consent to being touched by a member of the band. Nevertheless, on this particular night, the lead singer of the band, for the first time ever, dives off the stage. The singer lands heavily on the friend seated in the second row of seats in front of the stage and severely injures him.

The injured friend sues the lead singer for battery. Upon learning during discovery of the nature of the conversation between the two friends before the concert, the singer, now the defendant, pleads consent as a complete privilege. Should the defendant singer avoid liability as a result of the plaintiff's subjective consent when the existence of that consent was in no way communicated to the defendant?

From the perspective of unilateral analysis, this is an easy problem. The antisocial quality of the defendant's behavior is unchanged by the subsequent discovery that the plaintiff possessed subjective consent unbeknownst to the defendant at the time the harm occurred. So far as the defendant

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83. *Id.*

knew, the plaintiff was not consenting to this harmful contact and, from the defendant's perspective, the act of diving onto the plaintiff was socially unacceptable and without justification. Thus, the defendant does not deserve the consent privilege under these circumstances.

Suppose that the patron seated immediately adjacent to the plaintiff was also struck and injured by the defendant when the defendant dove off the stage, and no evidence of any sort exists that this second patron subjectively consented to the contact. In such circumstances, the law of battery would characterize the defendant's conduct as sufficiently antisocial to justify imposing upon him liability for this plaintiff's injuries.<sup>84</sup> From the perspective of the defendant singer at the time the harm producing behavior occurred, there was no meaningful difference between these two plaintiffs. So far as the defendant knew, neither of the plaintiffs had impliedly consented to being touched by the defendant in this manner just by being seated close to the front of the stage.

Therefore, the defendant is just as deserving of the imposition of liability in the first case as he is in the second, and the presence of subjective consent by the plaintiff in the first case should make no difference. Thus, under a unilateral analysis, the presence of subjective consent by a plaintiff when the consent is not effectively communicated to the defendant should be irrelevant to whether the defendant can benefit from the consent privilege.<sup>85</sup>

However, the bilateral nature of the legal remedy in tort law does not permit the analysis to end here. Though no convincing argument may exist against imposing liability on the defendant, it could well be argued that the plaintiff in this situation—the friend who attended the concert in anticipation of being struck by the lead singer diving from the stage—is not an appropriate beneficiary of the legal remedy, compensation paid by the defendant.<sup>86</sup>

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84. Under the Restatement, a person is liable to another for battery "if (a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and (b) a harmful contact with the person of the other directly or indirectly results." RESTATEMENT (SECOND) OF TORTS § 13 (1965).

85. In criminal law, "[c]onsent of the victim is a defense only when it negates an element of the offense or precludes infliction of the harm to be prevented by the law defining the offense. . . . Likewise, the victim's subsequent condonation or ratification of the crime or acceptance of restitution is not a defense. . . ."). LAFAVE, *supra* note 25, at 516.

86. See John H. Mansfield, *Informed Choice in the Law of Torts*, 22 LA. L. REV. 17, 72–73 (1961) ("The defendant argues that it is unjust to require him to compensate the plaintiff. After all, the defendant did not have to act in the first place, and if he had not acted the plaintiff would have stood no chance of obtaining the advantage he desired. The plaintiff was satisfied enough with the defendant's conduct when he hoped to gain by it. Only when things have gone badly does he complain that the defendant has violated a duty owing him and demand compensation for the consequences.").



The plaintiff experienced no more at the concert than he had expected and desired. Given this, it would be perverse to allow him to subsequently invoke the power of the state to receive an involuntary transfer of assets from the defendant in the guise of compensation for the experience.<sup>87</sup>

Though clearly appropriate in the context of unilateral analysis, imposition of liability on the defendant in this kind of case becomes far more problematic in the context of bilateral analysis. And because tort law, unlike criminal law, imposes a legal remedy that is both a detriment to the defendant and a benefit to the plaintiff, tort law must operate within the context of the second kind of bilateral analysis. Thus, courts that have been presented with the issue have held that the consent privilege is in fact available to a defendant in an intentional tort case if it can be established that the plaintiff subjectively consented to the defendant's harm-producing behavior, even if the defendant was not aware of the plaintiff's subjective consent.<sup>88</sup>

### B. *Self-Defense in Response to an Innocently Generated Threat*

The influence of this second kind of bilateral analysis on the design of tort law doctrine can also be seen in the self-defense privilege. As with all of the privileges to intentional torts, one motivating factor in the development of the self-defense privilege is a desire to keep the privilege as modest and limited as possible.<sup>89</sup> After all, the granting of a formal privilege to en-

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87. See *id.* at 75 (“[W]hen as a result of his choice the plaintiff has realized the very . . . thing he considered an advantage, then there is no reason why the machinery of the law should be set in motion . . . to take money from the defendant and give it to the plaintiff.”).

88. See KEETON ET AL., *supra* note 1, at 113 (“Actual willingness, established by competent evidence, will prevent liability; and, if it can ever be proved, will no doubt do so even though the plaintiff has done nothing to manifest it to the defendant.”); RESTATEMENT (SECOND) OF TORTS § 892 cmt. b (“Consent . . . need not, however, be so manifested by words or by affirmative action . . . . Even without a manifestation, consent may be proved by any competent evidence to exist in fact, and when so proved it is as effective as if manifested.”); see also Kenneth W. Simons, *Assumption of Risk and Consent in the Law of Torts: A Theory of Full Preference*, 67 B.U. L. REV. 213, 248 (1987) (“Consent is the right term to use when the plaintiff was willing that a certain event occur . . . because he desired an invasion of a normally protected interest.” (citing Mansfield, *supra* note 86, at 31–32)). Simons, in comparing the doctrine of consent in intentional torts to assumption of the risk in non-intentional torts, states that “[c]onsent should imply relative certainty that the risk will materialize.” *Id.*

89. Punitive damages may be seen as a way to discourage self-defense. See Charles Calleros, *Punitive Damages, Liquidated Damages, and Clauses Penales in Contract Actions: A Comparative Analysis of the American Common Law and the French Civil Code*, 32 BROOK. J. INT'L L. 67, 79 (2006) (“Punitive damages . . . supplement compensatory damages as a means of substituting for, and thus discouraging, violent or otherwise antisocial self-help remedies.”). One of the principal limitations is the use of deadly force. See RESTATEMENT (SECOND) OF TORTS § 65 (providing that an actor may only use deadly force in response to the threat of deadly force or serious bodily harm). Commentators have also explained that self-defense in response to non-deadly force is limited to the extent that three preconditions are satisfied:

The first is that he reasonably believes the other intends to commit a battery upon him, or unlawfully to imprison him, and this belief has been induced by the other's conduct. The

gage in what would otherwise be an intentional tort means that harm can be intentionally inflicted upon another without the fear of being forced, through a subsequent tort action, to involuntarily compensate the victim.<sup>90</sup> In a sense, intentional tort law pays for its formal privileges in the currency of undeterred harm and uncompensated injury.<sup>91</sup> While there are good and sufficient reasons for the existence of privileges—like consent, self-defense, defense of others, and necessity—to an intentional tort, the larger goals of deterring harmful behavior and compensating injury are best served when these reasons are satisfied as narrowly as possible.

In self-defense, as noted earlier, the basic test for the availability of the privilege is whether a reasonable person in the defendant's position would have believed that the plaintiff posed to him a threat of imminent harmful bodily contact.<sup>92</sup> From the defendant's perspective, this privilege permits the defendant to engage in immediate self-help against the threat without fear of subsequent liability, so long as the defendant's response, though intentionally harm-producing, was reasonable under the circumstances.<sup>93</sup>

second is that the defensive force used is not unreasonable in view of the harm which it is intended to prevent. And the third is that the defender reasonably believes he cannot avoid the threatened harm without either using defensive force or giving up some right or privilege.

Perkins, *supra* note 67, at 135. Additionally, self-defense is not available when the harmful conduct is used as retaliation or revenge. See Robertson, *supra* note 70, at 84 (“[T]he privilege of self-defense is based on the prevention of harm to the actor, not on the desire to extract payment for it, no matter how understandable that desire.”).

90. See Epstein, *supra* note 66, at 14. Epstein indicates that the privilege of self-defense is essentially a recognition that society would rather accept some amount of undue aggression permitted by self-defense rather than leave the potential victim only the option of later recovery. *Id.*

91. *Id.* In *Paxton v. Boyer*, for example, an innocent bystander went uncompensated for injuries suffered when defendant reasonably but incorrectly believed that the bystander was the aggressor. 67 Ill. 132 (1873). Similarly, in *Crabtree v. Dawson*, the court reversed a judgment for a plaintiff who was struck by defendant with the butt of a musket and pushed down a flight of stairs because the court found defendant had a reasonable but incorrect belief that plaintiff was a third party who defendant had previously quarreled with. 83 S.W. 557 (Ky. 1904).

92. See *supra* note 75 and accompanying text.

93. Self-help is essentially an extra-judicial means of addressing a wrong. See Jason M. Solomon, *Judging Plaintiffs*, 60 VAND. L. REV. 1749, 1788 (2007) (“When we think of self-help in the law, we generally think about means of self-help that the law authorizes or condones. For example, an act of violence that might normally be a battery in tort, and aggravated assault in crime, might be considered lawful as self-defense depending on the circumstances.”). Solomon goes so far as to argue that where self-help is available, a plaintiff should be precluded from having a cause of action. *Id.* at 1793–94. Another formulation of self-help provides that self-help is “legally permissible conduct that individuals undertake absent the compulsion of law and without the assistance of a government official in efforts to prevent or remedy a legal wrong.” Douglas Ivor Brandon, et al., *Self-Help: Extrajudicial Rights, Privileges and Remedies in Contemporary American Society*, 37 VAND. L. REV. 845, 853 (1984). Early medieval formulations of tort law provided self-help against a tort-

Apart from supporting the basic value of self-help under such circumstances, it could be argued that the existence of the privilege may often result in less total harm than would occur in the absence of a self-defense privilege.<sup>94</sup>

From the perspective of the plaintiff, the self-defense privilege, when available to the defendant, will result in the plaintiff being intentionally injured by the defendant without the prospect of receiving forced compensation from the defendant for that harm.<sup>95</sup> In cases in which the plaintiff acted intending to imminently strike the defendant or to at least cause the defendant to think so, the withdrawal of a subsequent opportunity to receive forced compensation for the defendant's harm-producing response to that imminent threat—the privilege of self-defense—is justifiable based on the antisocial nature of posing such a threat to another.<sup>96</sup> In a sense, so long as the defendant's self-defense response is reasonable, the plaintiff suffers no more than he deserves in the way of uncompensated harm, given that he intentionally threatened another. Thus, the existence of such a self-defense privilege under these circumstances can be said to be appropriate under both a unilateral and a bilateral analysis.<sup>97</sup>

The same conclusion holds in cases where the plaintiff does not intentionally pose a threat to the defendant, but does so negligently. For example, the plaintiff has just finished a meal in a restaurant, during which he ingested too many alcoholic beverages. He stands from his seat to leave the restaurant and is light-headed and disoriented. On his way to the door, he trips over a service cart and lurches at a fairly high speed toward another patron seated at a nearby table. The other patron sees the plaintiff coming and pushes him away at the last moment, causing the plaintiff to fall heavily onto the floor and severely injure his shoulder.

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feasor as the exclusive remedy because plaintiffs often lacked access to courts or the courts were too limited in jurisdiction. *Id.* at 852 (citing J. JEUDWINE, *TORT, CRIME, AND POLICE IN MEDIEVAL BRITAIN* 24–25 (1917)).

94. See Brandon, *supra* note 93, at 855 (arguing that self-defense is a way to fight “fire with fire” and “often is the most effective method of minimizing the total personal and societal harm that is possible”).

95. See *id.* (“In tort law this [self-defense] privilege shields the defending person from liability for acts that ordinarily would result in liability.”).

96. Examples of an aggressor bringing suit against a self-defender are rare. See Brandon, *supra* note 84, at 855 (“Tort actions by an instigator against his intended victim, however, are relatively rare.”). The justification for self-defense is not that the initial aggressor deserves to be harmed, but that the self-defender is justified under the circumstances. See *People v. Minifie*, 920 P.2d 1337, 1344 (Cal. 1996) (“[T]he law recognizes the justification of self-defense not because the victim ‘deserved’ what he or she got, but because the defendant acted *reasonably* under the circumstances. Reasonableness is judged by how the situation appeared to the *defendant*, not the victim.”).

97. In criminal law, “one who is not the aggressor in an encounter is justified in using a reasonable amount of force against his adversary when he reasonably believes (a) that he is in immediate danger of unlawful bodily harm from his adversary and (b) that the use of such force is necessary to avoid this danger.” LAFAVE, *supra* note 25, at 491; MODEL PENAL CODE § 3.04 (Use of Force in Self-Protection).

So long as pushing the plaintiff away in that fashion was part of a reasonable effort to avoid the impending collision,<sup>98</sup> the other patron should not be liable to the plaintiff for a battery due to the availability of the self-defense privilege, despite the fact that he clearly intentionally pushed away the plaintiff.<sup>99</sup> As in the case of an intentionally posed threat, this result can be justified from the plaintiff's perspective inasmuch as the plaintiff was at fault in creating the threat to the defendant. As between the at-fault plaintiff and the innocent and reasonable defendant, it should be the plaintiff who absorbs the cost of his injury.<sup>100</sup> Thus, the existence of a self-defense privilege in the case of a negligently, as well as an intentionally, generated threat can be said to make sense under both a unilateral and a bilateral analysis.<sup>101</sup>

The problematic class of cases, of course, are the ones in which the plaintiff does in fact pose a threat of imminent bodily harm to the defendant, but does so innocently.<sup>102</sup> For example, in the restaurant setting above, sup-

98. See RESTATEMENT (SECOND) OF TORTS § 63 cmt. c (“[T]he important fact in determining whether the employment of a particular means of self-defense is privileged . . . is the harm which the actor intends to inflict, or which a reasonable man in his position would realize that it is likely to cause, and not that which it actually causes.”).

99. It is immaterial that the self-defender intends harm or thinks that his actions may be likely to cause harm to the negligent actor. See *id.*

100. Therefore, a plaintiff is excluded from recovery because of his own wrongdoing. See Ronen Perry, *The Role of Retributive Justice in the Common Law of Torts: A Descriptive Theory*, 73 TENN. L. REV. 177, 211–12 (2006) (“In recent decades, courts employed *ex turpi causa* to exclude recovery by plaintiffs whose conduct was perceived to be extremely grievous. For example, in *Barker v. Kal-lash* a teenager was injured when a pipe-bomb that he was constructing using material supplied by the defendants exploded. The Court of Appeals of New York reasoned that, when the plaintiff's injury is a direct result of his knowing and intentional participation in a criminal act, he cannot seek compensation for the loss when the criminal act is judged to be *so serious an offense* as to warrant denial of recovery.” (footnotes omitted)).

101. Contract law is consistent with this approach inasmuch as the acts of the contracting parties manifesting their assent must be either intentionally or negligently done. See Clarke B. Whittier, *The Restatement of Contracts and Mutual Assent*, 17 CAL. L. REV. 441, 447–48 (1929).

102. Some commentators argue that the test for situations where an innocent actor is harmed by a party reasonably acting in his own interest should depend on whether the harm caused to the innocent actor “violated social expectations.” See Stephen D. Sugarman, *Rethinking Tort Doctrine: Visions Of A Restatement (Fourth) Of Torts*, 50 UCLA L. REV. 585, 609 (2002) (providing the example of a bank security guard mistakenly shooting an innocent bystander). Sugarman proposes two possible outcomes:

[P]erhaps it could be argued that victims of the conduct of the bank guards and the security guards cannot really imagine they might be accidentally singled out for the injury they suffer. So, when such mistakes occur, our violated social expectations demand victim compensation. On the other hand, we might decide instead that these experiences are no more than bad luck to which no special expectations attach. If so, they are rightly understood simply as instances of the much wider default category of not-reasonably-avoidable accidents, the financial consequences of which fall on victims, not injurers.

*Id.* (emphasis added).

pose that the plaintiff has ingested no alcohol during the meal and he is completely clear headed as he stands to leave. Rather than tripping, the plaintiff is struck hard from behind by a service cart and as a result lurches at high speed toward the patron at the other table. Again, the other patron sees the plaintiff coming and pushes him away at the last moment, causing him to hit the floor and seriously injure his shoulder.

If the self-defense privilege is made available to the other patron—the defendant in a subsequent battery action—the plaintiff will not be able to receive compensation from him and the plaintiff will be left to absorb the costs of his own severely injured shoulder.<sup>103</sup> This despite the fact that it was the defendant who intentionally inflicted the harmful bodily contact upon the plaintiff without any plausible argument that the plaintiff was complicit in having created the threat that he posed to the defendant. In contrast to the cases of an intentionally or negligently created threat, the plaintiff in this class of cases in no way deserves the withdrawal of the opportunity to receive forced compensation occasioned by the operation of the self-defense privilege.<sup>104</sup> Being on the receiving end of the defendant's privileged infliction of bodily harm cannot in this case be characterized as the plaintiff's just desert.

On the other hand, from the defendant's perspective, a genuine but innocently created threat by the plaintiff is often indistinguishable from an intentionally or a negligently generated threat. In all of these situations, the defendant reasonably believes that the plaintiff poses a threat of imminent harmful bodily contact. Given the requirement of imminence, it is unrealistic to expect that most defendants facing such a situation would be able to ascertain whether the threat posed by the plaintiff was intentionally, negligently or innocently generated and to distinguish the former two from the latter.

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103. Cf. Solomon, *supra* note 93, at 1787–88 (providing that self-defense permits a defendant to carry out an act of violence that would otherwise be considered battery).

104. This result contrasts with the well-known case of *Vincent v. Lake Erie Transportation Co.* in which the court held the defendant liable to the plaintiff for damages caused when the defendant docked his boat to the plaintiff's dock during a powerful storm. 124 N.W. 221, 221–22 (Minn. 1910). Some commentators have argued that it is not clear why the plaintiff in *Vincent* is permitted to recover while tort law refuses to compensate other plaintiffs, such as innocent bystanders in a bank robbery mistakenly shot by the security guard:

Just why the innocent dock owner can recover, but the innocent yet suspected shoplifter and the innocent victim of the bank guard's bullets cannot, is something of a mystery to me. Clearly, in each of these cases, the defendants acted reasonably in self-defense of person or property, and each of the defendants, in furtherance of his own interests, imposed a loss on an innocent party. And it is even more troubling to me that the successful plaintiff in *Vincent* is a commercial actor, whereas the losing plaintiffs in the other examples are ordinary citizens. Perhaps there are different social expectations that attach to the private necessity situation.

Sugarman, *supra* note 102, at 610.

Moreover, even if the defendant could somehow determine that the imminent threat to his person posed by the plaintiff was generated innocently and not intentionally or negligently, why should the law alter its basic scheme of behavioral incentives? Does the defendant have less of a right to engage in self-help against a threat posed to his physical safety if that threat is innocent? Why should the defendant be expected to react any differently in response to the rapidly approaching plaintiff, whether the plaintiff was sent lurching in his direction as a result of being struck by a service cart, tripping over the service cart, or maliciously lunging at him? In all of these situations, so long as the defendant reasonably perceives the threat and reasonably responds to it, the defendant can be said to have acted in a socially acceptable manner that should not trigger tort liability.

The difficult nature of bilateral analysis in tort law is illustrated here, in the problem of appropriately fashioning the privilege of self-defense in response to an innocently generated threat. In such situations, it is not justifiable to withdraw the purely innocent plaintiff's opportunity to receive compensation for an intentionally inflicted physical injury. Nothing that the plaintiff did warrants this dramatic change in the likely outcome of his battery claim. On the other hand, it is also not justifiable in such situations to withhold from the defendant the formal privilege of self-defense. All of the reasons for providing to the defendant the privilege in the cases of intentional and negligent threats, at least from his perspective, apply with equal force to the case of an innocently generated threat.<sup>105</sup>

#### V. BILATERAL ANALYSIS AND THE PRESENCE OF STRICT LIABILITY IN INTENTIONAL TORT LAW

Tort law does not have the luxury enjoyed by criminal law and by many administrative schemes of regulation that are also based primarily upon unilateral analysis to respond to difficult issues by deciding that, in the face of insufficient justification, no formal legal action should be taken.<sup>106</sup> Where

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105. See *supra* notes 71–78 and accompanying text.

106. See, e.g., ROLLIN M. PERKINS, CRIMINAL LAW 1–3 (2d ed. 1969). Perkins describes how, upon arrest for any particular criminal offense, there is still a great likelihood that a trial and subsequent conviction will never take place. *Id.* at 1–2. He gives the example of a poor orphan who, after spending days looking for work, and having had very little to eat, steals half a loaf of bread from an open window. *Id.* at 2. As a result, he is arrested for burglary, a felony with no opportunity for probation as punishment. *Id.* at 3. However, the prosecuting attorney realizes that sending the orphan to the penitentiary would be a “gross injustice” and lowers the charge to larceny, a felony with the possibility of probation as punishment. *Id.* Perkins notes that “[n]othing in the code of criminal procedure of that state mentions any such step as [lowering the charge]. It is merely one of the mul-

criminal law can conclude that no sanction should be imposed upon a defendant in the face of reasonable doubt about the antisocial quality of the defendant's behavior, tort law operates much differently. In tort law, the choice to impose a detriment upon the defendant almost always results in the conferring of a benefit upon the plaintiff, and a decision to forego imposing a legal remedy on the defendant results in the withdrawal of an opportunity for the plaintiff to receive compensation for harm he already experienced. In this respect, tort law is very similar to contract law. Generally, when dealing with problems involving bilateral analysis, giving the benefit of the doubt to one party usually means burdening the other party with that same benefit of the doubt.

The discussion in Part IV.B. above illustrates this feature of bilateral analysis in tort law in the context of the privilege of self-defense.<sup>107</sup> Where the threat posed to the defendant by the plaintiff is genuine but innocently generated, neither party has acted in a blameworthy manner that justifies their losing the subsequent intentional tort action.<sup>108</sup> The plaintiff has experienced intentional bodily harm at the hands of the defendant and has done nothing to justify the withdrawal of his opportunity to receive compensation through the operation of the self-defense privilege. Similarly, the defendant reacted to an imminent threat in a reasonable manner and did nothing to warrant the imposition of intentional tort liability. Again, one might say that in the face of an insufficient justification, tort law should choose not to formally act and abstain from imposing liability. However, such a principle necessarily chooses between the competing sides of the argument and is therefore not neutral.

In fact, tort law does not regularly respond to difficult bilateral problems of this sort by choosing not to impose liability, even in the area of intentional torts. Intentional tort law will sometimes react to this kind of bilateral problem by instead imposing liability on the relatively blameless defendant.<sup>109</sup>

#### A. *Self-Defense in Response to a Third-Party Threat*

An example of this approach can be found within the self-defense privilege itself. Suppose that the defendant is a patron in a bank alongside other patrons when armed gunmen enter and attempt to rob the bank. One of the gunmen points a loaded weapon at the defendant, throws him a coil of rope,

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titute of *administrative devices* which play a leading role in the actual administration of criminal justice." *Id.*

107. See *supra* text accompanying notes 89–105.

108. See *supra* notes 104–05 and accompanying text.

109. See *infra* text accompanying notes 110–21 (discussing the privileges of self-defense in response to a third-party threat and private necessity and their impact on liability in intentional torts).

and demands that he tightly bind and gag some other patrons, including the plaintiff. The defendant complies with the gunman's request. Subsequently, the plaintiff brings a claim against the defendant for battery.

In this situation, the defendant is reasonable in perceiving an imminent threat of bodily harm<sup>110</sup> and is also reasonable in deciding to bind and gag the plaintiff rather than risk being shot and killed by the gunman. The basic requirements of the self-defense privilege are clearly satisfied.<sup>111</sup> The general issue raised for intentional tort law, in this case, is the extent to which the privilege of self-defense should be available to the defendant when the threat to which the defendant is responding comes from someone other than the plaintiff. It is relatively well-settled that in such a circumstance the defendant is liable to the plaintiff for all but very minor violations of the plaintiff's bodily interests.<sup>112</sup> Thus, in this bank robbery scenario, the defendant would be liable to the plaintiff for the battery of binding and gagging him.

110. RESTATEMENT (SECOND) OF TORTS § 63 cmt. k (1965) (clarifying that a self-defense privilege exists only if one reasonably believes that bodily harm can be prevented by immediate infliction of harm upon another, meaning that one is faced with the threat of immediate attack); Kimberly Kessler Ferzan, *Defending Imminence: From Battered Women to Iraq*, 46 ARIZ. L. REV. 213, 223 (2004) ("A threat is imminent if it will occur 'immediately' or 'at once.'").

111. *Touchet v. Hampton*, 2006-1120, p. 5 (La. App. 3 Cir. 2/7/07); 950 So. 2d 895, 899 ("[A] defendant's actions can be justified as self-defense if there was an actual or reasonably apparent threat to his safety and the force employed was not excessive in degree or kind."); *Martin v. Estrella*, 266 A.2d 41, 46 (R.I. 1970) ("[A] person who reasonably believes that he is in imminent danger of harm at the hands of another may defend himself. He does not have to wait for the first blow to land."); RESTATEMENT (SECOND) OF TORTS § 63. Pursuant to the self-defense privilege, one may "use reasonable force, not intended or likely to cause death or serious bodily harm, to defend himself against unprivileged harmful or offensive contact or other bodily harm which he reasonably believes that another is about to inflict intentionally upon him." *Id.*; Cynthia K.Y. Lee, *The Act-Belief Distinction in Self-Defense Doctrine: A New Dual Requirement Theory of Justification*, 2 BUFF. CRIM. L. REV. 191, 205 n.39 (1998). One may use force in self-defense to oppose the force of an adversary if the adversary's force is unlawful or if one reasonably believes that it is unlawful, meaning that the adversary's use of force is a crime or tort. *Id.*

112. KEETON ET AL., *supra* note 1, at 129. While "[i]t may be that there is no liability in such a case for the mere technical tort, . . . it seems reasonable to say that the privilege is qualified, and that [the defendant] should be required to pay for it by making compensation for any actual damage." *Id.*; see Francis H. Bohlen, *Incomplete Privilege to Inflict Intentional Invasions of Interests of Property and Personality*, 39 HARV. L. REV. 307, 316 (1925) ("Society has an interest in saving human life and property from destruction, but its only concern with the cost of salvage is that it shall be put upon him who, as between individuals concerned, should bear it. . . . [I]t is obviously just that he whose interests are advanced by the act should bear the cost of doing it rather than that he should be permitted to impose it upon one who derives no benefit from the act."); Julia A. Harden, *Dramshop Liability: Should the Intoxicated Person Recover for His Own Injuries*, 48 OHIO ST. L.J. 227, 243 (1987). One basis for holding the defendant liable in such a situation is the least cost avoider theory, which states that the party who can prevent a harmful situation at the least cost to society should bear liability if the situation occurs. *Id.* The reason for holding the least cost avoider liable is that it will encourage that person to avoid the harmful situation in the first place. *Id.*; see also *Jackson v. PKM*



## B. *The Private Necessity Privilege*

Another instance where intentional tort law imposes liability on the defendant in the face of a difficult, conflicted bilateral analysis is illustrated by the facts of the famous case of *Vincent v. Lake Erie Transportation Co.*<sup>113</sup> In that case, the defendant, the owner of a ship, responded to reports of an impending storm by having the ship lashed tightly against the plaintiff's dock.<sup>114</sup> When the storm arrived, the defendant's ship was repeatedly thrown against the dock, causing significant damage.<sup>115</sup> The owner of the dock subsequently sued the owner of the ship for the damage done, claiming that the harm to the dock was substantially certain to occur given the oncoming storm and the defendant's decision to secure the ship to the dock<sup>116</sup> and that a trespass to chattels had therefore taken place.<sup>117</sup>

The court held that the owner of the ship was liable to the dock owner for damage caused.<sup>118</sup> This case illustrates the intentional tort privilege of private necessity.<sup>119</sup> This privilege is available to a defendant who reasona-

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Corp., 422 N.W.2d 657, 665 (Mich. 1988) (Archer, J., concurring in part) (adopting the least cost avoider theory).

113. *Vincent v. Lake Erie Transp. Co.*, 124 N.W. 221 (Minn. 1910); see George C. Christie, *The Unwarranted Conclusions Drawn from Vincent v. Lake Erie Transportation Co. Concerning the Defense of Necessity*, in ISSUES IN LEGAL SCHOLARSHIP, *Vincent v. Lake Erie Transportation Co. and the Doctrine of Necessity*, art. 7, at 1 (2006), available at <http://www.bepress.com/ils/iss7/art7> ("Few cases have captured more attention from philosophers interested in the law than *Vincent v. Lake Erie Transportation Co.* . . . . [T]he case has become the starting point for nearly all scholarly discussions of the propriety of taking or destroying the property of others to save life . . . ." (footnote omitted)).

114. *Vincent*, 124 N.W. at 221.

115. *Id.*

116. See *id.*; Scott Hershovitz, *Two Models of Tort (and Takings)*, 92 VA. L. REV. 1147, 1166 n.54 (2006).

117. See *Prentzel v. State Dep't of Pub. Safety*, 169 P.3d 573, 583 (Alaska 2007) ("Trespass to chattels is a lesser form of conversion: it 'can be committed when a party intentionally dispossesses another of the chattel or intentionally uses or interferes with a chattel in another's possession.'" (quoting *K&K Recycling, Inc. v. Alaska Gold Co.*, 80 P.3d 702, 717 n.26 (Alaska 2003))); *Intel Corp. v. Hamidi*, 71 P.3d 296, 302 (Cal. 2003) (explaining that trespass to chattels allows recovery for a defendant's interference with another's possession of personal property that has "caused some injury to the chattel or to the plaintiff's rights in it"); RESTATEMENT (SECOND) OF TORTS § 217(b) (1965) ("A trespass to a chattel may be committed by intentionally . . . using or intermeddling with a chattel in the possession of another."); *id.* at § 218(b) ("One who commits a trespass to a chattel is subject to liability to the possessor of the chattel if, but only if, . . . the chattel is impaired as to its condition, quality, or value . . . ."); KEETON ET AL., *supra* note 1, at 85 (explaining that a trespass to chattels includes damaging or destroying the goods of another); Dr. Georgios I. Zekos, *State Cyberspace Jurisdiction and Personal Cyberspace Jurisdiction*, 15 INT'L J.L. & INFO. TECH. 1, 11 (2007). The basic requirements to prove trespass to chattels are interference or meddling with a chattel, causing damage to the chattel. *Id.*

118. *Vincent*, 124 N.W. at 222.

119. An extended description of the factual background of the *Vincent* case can be found in Stephen D. Sugarman, *The "Necessity" Defense and the Failure of Tort Theory: The Case Against Strict Liability for Damages Caused While Exercising Self-Help in an Emergency*, in ISSUES IN

ably perceives an imminent threat to himself or to his property and who then reacts to that threat reasonably and in a way that intentionally violates another's property interests.<sup>120</sup> The good news for the defendant is that the formal privilege of private necessity is available to him in such circumstances. The bad news is that it is a limited privilege that requires the defendant to compensate the plaintiff for the harm that the defendant causes to the plaintiff's property.<sup>121</sup>

### C. *The Case for Strict Liability*

Both the limited privilege of private necessity and the self-defense privilege in response to a third-party threat present very similar and very difficult problems of bilateral analysis in tort law. Much of tort law, and almost all of the traditional doctrines such as the intentional torts, are considered fundamentally fault-based, requiring some undesirable or antisocial act by a

LEGAL SCHOLARSHIP, *Vincent v. Lake Erie Transportation Co. and the Doctrine of Necessity*, Article 1, at 7–10 (2005), available at <http://www.bepress.com/ils/iss7/art1>.

120. *Protectus Alpha Navigation Co. v. N. Pac. Grain Growers*, 585 F. Supp. 1062, 1067 (D. Or. 1984) *aff'd*, 767 F.2d 1379 (9th Cir. 1985) (explaining private necessity as a defense that allows a defendant to reasonably interfere with the property of another in order to protect person or property); *Guzman v. Barth*, 552 N.W.2d 299, 301 (Neb. 1996) (explaining that according to the doctrine of private necessity, “one is privileged to enter on the land of another if the entry is necessary to prevent serious harm to the actor, [or] his or her land or chattels”); RESTATEMENT (SECOND) OF TORTS § 197(1)(a) (“One is privileged to enter or remain on land in the possession of another if it is or reasonably appears to be necessary to prevent serious harm to . . . the actor, or his land or chattels . . . .”); *id.* § 263(1) (“One is privileged to commit an act which would otherwise be a trespass to the chattel of another or a conversion of it, if it is or is reasonably believed to be reasonable and necessary to protect the person or property of the actor . . . from serious harm . . . .”); KEETON ET AL., *supra* note 1, at 145–48. If one faces an emergency that is sufficiently great, then “he may trespass upon the property of another to save himself or his own property . . . from harm.” *Id.* at 147 (footnotes omitted); Calnan, *supra* note 30, at 712–13 (“Private necessity allows a party in imminent danger of losing her own property to appropriate, use or destroy the property of someone else, even if the owner contests the taking. . . . In each case, the persons subject to these privileges cannot resist the intrusion.” (footnote omitted)).

121. *Vincent*, 124 N.W. at 222 (holding that where defendants reasonably take advantage of the property of plaintiffs for the purpose of protecting their own property, then the plaintiffs are entitled to compensation for any injury done to their property); RESTATEMENT (SECOND) OF TORTS § 197(2) (“Where the entry is for the benefit of the actor . . . he is subject to liability for any harm done in the exercise of the privilege . . . to any legally protected interest of the possessor in the land or connected with it . . . .”); *id.* § 263(2) (“Where the act is for the benefit of the actor . . . he is subject to liability for any harm caused by the exercise of the privilege.”); KEETON ET AL., *supra* note 1, at 147–48. The private necessity defense is an incomplete and partial privilege which does not apply to substantial harm inflicted upon the plaintiff by the defendant. *Id.*; Bernard W. Bell, *The Wide World of Torts: Reviewing Franklin & Rabin’s Tort Law and Alternatives*, 25 SEATTLE U. L. REV. 1, 42 n.187 (2001) (explaining that under the defense of private necessity, “the actor must nevertheless compensate the property owner for his intrusion”).

party in order to justify imposing liability upon them.<sup>122</sup> Notwithstanding this perception, both private necessity and self-defense from third-party threats confront tort law with defendants who have not acted in an undesirable manner, yet tort law nonetheless holds them liable.<sup>123</sup>

In the case of the bank robbery, neither the defendant nor society would prefer that the defendant choose death by the gunman instead of binding and gagging the plaintiff—a much less severe harm. Similarly, both the defendant and society would prefer that damage be intentionally caused to the dock by lashing the ship to it if the likely alternative would be much greater harm inflicted upon the undocked ship during the storm. Why, then, has tort law created liability for the defendants in both situations and, as a result, generated a deterrence for them to act in the preferred manner?

Explanations of the results in these cases may begin with the recognition that both cases present classically difficult problems of bilateral analysis in tort law. That is to say that neither the defendants nor the plaintiffs in these cases acted in an antisocial or blameworthy manner that could serve as a justification for them losing the lawsuit. Thus, the question becomes less a matter of arguing why the defendant or the plaintiff, in isolation, should win or lose, but instead becomes a matter of determining who, as between the plaintiff and the defendant, should pick up the costs for the harm or damage caused. One must remain mindful that this harm has already occurred and that one or the other of the parties will inevitably pay for that harm.

From the perspective of bilateral analysis, a number of arguments on behalf of the plaintiff can be identified. One argument is that a rule that held the defendants were not liable in both of these situations would, in effect, allow the defendants, by their conscious choice and voluntary act, to transfer some of the costs of responding to an external threat from themselves to the plaintiffs.<sup>124</sup> Though it may not have been of their own making or due to their own fault, fate placed both of these defendants in the path of significant

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122. See DOBBS, *supra* note 1, at 2 (“[T]orts are traditionally associated with wrongdoing in some moral sense. In the great majority of cases today, tort liability is grounded in the conclusion that the wrongdoer was at fault in a legally recognizable way. It is not ordinarily enough to impose liability that the defendant has merely caused harm by accident or happenstance; he must also be at fault.”).

123. See Geistfeld, *supra* note 8, at 2 (“[T]he doctrine [of private necessity] has foundational importance because it involves liability without fault: the self-help actor can reasonably use another’s property and still incur liability for the property damage.”).

124. See Gregory C. Keating, *Property Right and Tortious Wrong in Vincent v. Lake Erie*, in ISSUES IN LEGAL SCHOLARSHIP, *Vincent v. Lake Erie Transportation Co. and the Doctrine of Necessity*, art. 6, at 2 (2005), available at <http://www.bepress.com/ils/iss7/art6> (“*Vincent v. Lake Erie* fascinates in part because it involves just this surprise: Reasonable, justified, conduct forms the basis of liability. Because the conduct is both intentional and reasonable the liability in *Vincent* is, paradoxically, both intentional and strict. Liability is predicated not on criticism of the defendant’s conduct—lashing the ship to the dock is regarded as the right and reasonable thing to do—but on criticism of the defendant’s failure to make reparation for the harm that its reasonable conduct deliberately inflicted.”).

danger, one from the human agency of the gunman inside the bank and the latter from the impending storm.<sup>125</sup> Though it may have been reasonable and even socially desirable for the defendants in each of these cases to inflict harm upon the plaintiffs in their efforts to escape from danger, it is another thing altogether to say that the unwilling plaintiffs should also absorb the costs of these reasonable escape efforts. Why should the consumption of resources by the defendants in their efforts to respond to the danger that they faced be involuntarily subsidized by the plaintiffs, especially when these plaintiffs were in no way responsible for the creation of that peril?

In addition, the plaintiffs could argue that a rule that did not hold the defendants in these cases liable would create a less desirable set of behavioral incentives for those persons who in the future found themselves in a similar position to that of the defendants than would a rule that held the defendants liable.<sup>126</sup> This argument begins with the assertion that society's primary interest in these situations is that the danger faced by the defendant be responded to at the least total cost. In other words, society should be relatively indifferent as to whether it is the defendant or the plaintiff who experiences the battery in the bank, or whether it is the ship or the dock that suffers damage in the storm, and should instead be concerned that the total damage inflicted during the incident be minimized.<sup>127</sup>

Having established this benchmark, the plaintiffs could go on to argue that a rule that provided a defendant with a complete privilege, available as long as the defendant reasonably perceived the imminent threat and reasonably responded to it, would frequently allow for excessive harm to be inflicted by the defendant on the plaintiff's person or property. Excessive harm in this context would mean more harm than is objectively necessary in order for the defendant to avoid or minimize the threat. Operating under such a complete privilege, defendants facing a threat would be tempted to violate the plaintiff's legal interests aggressively in an attempt to absolutely minimize the possibility of harm to themselves or their property. While the scope of the complete privilege offered to the defendants would still be bounded by reasonableness, finders of fact operating *ex post facto* would have a difficult time calibrating and second guessing the judgments of a defendant operating under the pressure of a significant imminent threat.

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125. See *supra* text accompanying notes 110–12, 113–17.

126. See CLARENCE MORRIS, *MORRIS ON TORTS* 39–42 (2d ed. 1980) (1953).

127. See Dale W. Broeder, *Torts and Just Compensation: Some Personal Reflections*, 17 *HASTINGS L. J.* 217, 228 (1965); Geistfeld, *supra* note 8, at 9 (“In a regime of strict liability . . . [t]he duty-holder’s desire to minimize her costs—the cost of precaution and injury compensation—leads her to choose precautions that satisfy the cost-benefit test.”).

For example, suppose that the defendant in the bank robbery scenario responded to the gunman's demand to bind and gag some of the other patrons by engaging in the task with exceptional vigor, binding the other patrons very tightly in an effort to impress the gunman with his compliance and to thereby minimize the risk of being shot.<sup>128</sup> As the result of these very tight bindings, some of those tied up by the defendant suffer more severe injuries than they otherwise would. While it may have been true under the circumstances that the defendant did not need to bind the patrons so tightly in order to satisfy the gunman, this would be a very tough judgment for a jury to make in a subsequent action for battery when applying a reasonableness standard to the scope of a complete self-defense privilege. One would instead expect most finders of fact to be quite sympathetic to the plight of the defendant and to find that the scope of a complete privilege was exceeded in only the most extreme circumstances.

Thus under a complete privilege, one would expect, over time, significant harm to be imposed upon the interests of the plaintiffs by threatened defendants seeking to minimize their exposure to the imminent threat. The doctrine itself would provide little effective deterrence to the infliction by these defendants of excessive harm.

This observation leads to a third possible argument. Plaintiffs could argue that a doctrine of limited privilege in these circumstances, which would hold the defendant liable for all of the meaningful harm that the defendant intentionally inflicted upon the plaintiff, regardless of the reasonableness of the defendant's reaction to an imminent threat, would both create the proper set of behavioral incentives and also impose those incentives on the appropriate decision-maker and actor in such circumstances.<sup>129</sup> In doing so, imposition of liability on the defendant would distinguish itself as the more attractive legal doctrine.

In the class of cases under consideration, involving a defendant who is facing an imminent threat of harm and who responds to that threat by intentionally harming the person or property of the plaintiff, it is the defendant who is the fulcrum of judgment and action. It is the defendant who must evaluate the nature and seriousness of the threat, identify and consider possible responses and then ultimately act in one way or another. Thus, any legal rule that attempts to minimize the total harm arising from such situations must make as its primary audience the defendant. Incentives and deterrents aimed at other actors, such as the plaintiff, are merely secondary.

By holding the defendant liable for all of the significant harm that he intentionally causes to others in these situations, a rule of limited privilege would focus all of the stakes on the defendant. If the defendant chooses to

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128. See *supra* text accompanying notes 110–12.

129. See GUIDO CALABRESI, *THE COSTS OF ACCIDENTS* 162–69 (1970).

minimize the harm that he inflicts upon others, thereby increasing the risk that he faces from the threat, and that risk ripens into injury, then the defendant will absorb the cost. Conversely, if the defendant chooses to increase the harm that he inflicts upon others in an effort to minimize his own risk of harm, then he will pay for that cost as well. Under a rule of limited privilege, most of the costs stemming from the defendant's response to the threat are in fact borne by him.

Thus, under a rule of limited privilege, the owner of the ship in the case of *Vincent v. Lake Erie Transportation Co.* can expect to absorb the harm to the ship caused by the storm if he chooses not to lash to the dock and instead takes his chances on the water, and he can expect to pay for the damage done to the dock by the ship if he chooses to secure it to the dock.<sup>130</sup> In such circumstances, the owner of the ship, the person in the best position to evaluate the relative cost of various responses to the threat and who in the end must act, is encouraged to identify and pursue the least costly response to the imminent threat.

By adopting a rule of limited privilege, society has aligned the self-interest of the primary decision-maker and actor with its own larger interests.<sup>131</sup> In this way, over time, one can expect less harm to be inflicted and incurred in these situations than would be the case under a rule of complete privilege.

Finally, plaintiffs could argue that it is the defendant who is usually in the superior position to recover the costs of his escape from the threat when the cause of the threat is a viable source of recovery. In many cases, of course, the cause of the threat to the defendant will not be a viable source of recovery, as in both the bank robbery situation (since the gunman is not likely to be responsive to judgment)<sup>132</sup> and in situations similar to *Vincent v. Lake Erie Transportation Co.* (where the source of the threat to the defendant was a storm).<sup>133</sup> This is why resolution of the tort action between the plaintiff and the defendant is important.

In those cases where the source of the threat is a person who might be recovered from, the plaintiff could argue that as between defendants and plaintiffs in these situations, defendants will generally have the cleanest path of recovery. This is the case because when the plaintiff seeks recovery in

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130. See William M. Landes & Richard A. Posner, *Salvors, Finders, Good Samaritans, and Other Rescuers: An Economic Study of Law and Altruism*, 7 J. LEGAL STUD. 83, 113 (1978); Richard A. Posner, *Can Lawyers Solve the Problems of the Tort System*, 73 CAL. L. REV. 747, 753 (1985).

131. See *supra* note 129 and accompanying text.

132. See *supra* text accompanying notes 110–12.

133. See *supra* text accompanying notes 113–17.

tort from the source of the threat, he will have to contend with the problem of the defendant's voluntary actions being part of the chain of causation. The plaintiff may also have more difficulty establishing that he was a reasonably foreseeable victim of the threat.

When the defendant seeks recovery from the source of the threat, he faces no such problem with potential superseding actual cause arguments and he is more likely to have been a reasonably foreseeable victim of the threatening behavior. Moreover, the defendant is more likely to be able to establish intent by the source of the threat and thus successfully sue for the intentional torts of battery or assault.

In those cases where the threat posed to the defendant was in fact tortious and the source of the threat is available for recovery, the optimal resolution from a liability perspective is for the blameworthy source of the threat to pay for the harm caused to both the blameless defendant and the blameless plaintiff. This is best accomplished, where at all possible, by holding the defendant liable to the plaintiff and allowing the defendant to include this liability among the damages that he recovers from the source of the threat.

For the reasons described above, tort law holds the defendant liable to the plaintiff in situations like the bank robbery, where the defendant has intentionally harmed the plaintiff in a reasonable effort to respond to a threat of imminent bodily harm posed by someone other than the plaintiff, and in private necessity cases like *Vincent v. Lake Erie Transportation Co.* where the defendant has intentionally harmed the property of the plaintiff in reasonable response to an external threat.<sup>134</sup>

## VI. CONCLUSION

The above discussion has tried to describe and to illustrate a fascinating and insufficiently appreciated feature of American tort law—the way in which it necessarily combines and integrates fundamental goals and analytical perspectives that are more typically associated with other areas of jurisprudence. Tort law combines, in a unique and elegant way, the deterrence to engage in harmful antisocial behavior that is the hallmark of criminal law with the provision of compensation to the injured that is the more specialized province of systems of social insurance.

At a more technical level, in order to successfully fulfill its mission and generate appropriate deterrence and compensation, tort law must fully engage in both unilateral and bilateral analysis. Unilateral analysis, typical of

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134. This general approach is mirrored in criminal law, where the Model Penal Code characterizes otherwise criminal conduct as justified, as long as it satisfies the "lesser of evils" test. MODEL PENAL CODE § 3.02 (1985).

criminal law and modern schemes of administrative regulation like income tax, is characterized by a tight focus on the legal status of a single legal person.<sup>135</sup> The behavior of parties other than the focus of the inquiry and the effect that the focus of the inquiry has had on other parties may be relevant to the analysis. Such considerations, however, are typically relevant only to the extent that they clarify the legal status of that one party who is the focus of the inquiry.<sup>136</sup>

Since tort law shares with criminal law both a deep history and an essential social interest that involves identifying, defining, and deterring undesirable harm producing behaviors, one would expect tort law to be fully engaged in unilateral analysis. And it is.<sup>137</sup> Tort law notably engages in classic unilateral analysis through the intent element of all of the intentional torts.<sup>138</sup> There the focus of the inquiry is the internal state of mind of the defendant at the time that he engaged in the harm producing behavior.<sup>139</sup> The basic doctrinal tests that have developed around the concept of intent are designed to resolve this unilateral problem. The examination and determination of the defendant's possible negligent breach of the legal duty of care is another important example of unilateral analysis in tort law.<sup>140</sup>

Bilateral analysis is required where the larger legal remedy at stake will, if imposed, have significant practical consequences for more than one party, and the specific legal issue to be decided involves the relative merits of those parties to either receive or suffer that legal remedy. The classic area of bilateral jurisprudence is contract law, which must be constantly concerned with both the appropriateness of imposing damages for breach upon the defendant and the corresponding appropriateness of granting those same damages to the plaintiff.<sup>141</sup>

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135. See LAFAVE, *supra* note 25, at 10 ("The broad aim of the criminal law is, of course, to prevent harm to society—more specifically, to prevent injury to the health, safety, morals and welfare of the public. This it accomplishes by punishing those who have done harm, and by threatening with punishment those who would do harm, to others.").

136. See *supra* text accompanying notes 23–28.

137. See *supra* notes 30–31 and accompanying text.

138. See *supra* text accompanying notes 30–38.

139. See *supra* note 32 and accompanying text.

140. See RESTATEMENT (SECOND) OF TORTS § 282 (1965) ("[N]egligence is conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm."); *id.* § 298 ("[T]he care which the actor is required to exercise to avoid being negligent in the doing of the act is that which a reasonable man in his position, with his information and competence, would recognize as necessary to prevent the act from creating an unreasonable risk of harm to another.").

141. See *supra* notes 59–60 and accompanying text.



Similar to contract law, the dominant remedy in tort law is an involuntary transfer of assets from the defendant to the plaintiff. Since this consequence significantly alters the economic status of both the defendant and the plaintiff, one would expect tort law to also engage in bilateral analysis—and it does.<sup>142</sup> In fact, tort law is engaged in at least two different kinds of bilateral analysis.<sup>143</sup>

One kind of bilateral analysis in tort law is required where the doctrine at issue focuses not just on the status of a single person, as in intent or breach of duty, but instead regulates a bilateral interaction between the defendant and the plaintiff. An example of this kind of bilateral analysis in tort law is the basic test for the intentional tort privilege of consent, which places the traditional reasonable person analysis not in the position of the potentially consenting party, the plaintiff, but instead places it in the position of the defendant who is observing and interpreting the plaintiff's behavior.<sup>144</sup> Another example is the privilege of self-defense, which determines the existence of a valid threat, not from the perspective of the source of that threat, but again from the perspective of the observing and interpreting party.<sup>145</sup>

A second kind of bilateral analysis in tort law is required to insure that liability is imposed not only when the defendant is an appropriate target of deterrence, but also only when the plaintiff is an appropriate recipient of compensation. An example of this second kind of bilateral analysis is the problem of a plaintiff who can be shown to have subjectively consented to the defendant's otherwise intentionally tortious behavior but who did not effectively communicate this consent to the defendant.<sup>146</sup> In such cases, the behavior of the defendant is fully worthy of intentional tort liability, but the plaintiff, having actually consented, is not an appropriate recipient of damages.<sup>147</sup>

Though it might be anticipated, tort law does not consistently respond to difficult bilateral problems of this second type by simply refraining from imposing liability. Sometimes, tort law responds to situations in which neither the plaintiff nor the defendant has acted in a way that justifies their losing the tort claim by holding the defendant liable. One example is the allowance to the defendant of only a very limited privilege in the case of intentional harm inflicted upon a plaintiff in reasonable response to a threat

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142. See *supra* notes 56–121 and accompanying text.

143. See discussion *supra* Part III.

144. See *supra* text accompanying notes 60–65.

145. This is consistent with the bilateral analysis employed in contract law, where “objective manifestations of intent of the party should generally be viewed from the vantage point of a reasonable person in the position of the other party.” PERILLO, *supra* note 60, at 27; see also *Ricketts v. Pa. R.R.*, 153 F.2d 757, 760–61 (2d Cir. 1946) (Frank, J., concurring).

146. See *supra* text accompanying notes 82–88.

147. See *supra* text accompanying notes 86–87.

of imminent harm posed to the defendant by someone other than the plaintiff.<sup>148</sup> The limited privilege provided to a defendant under the doctrine of private necessity is another.<sup>149</sup>

In both of these circumstances, the defendant has acted reasonably and in a manner that society at large would clearly have preferred him to act. Nevertheless, tort law imposes liability upon the defendant. It does so through the operation of doctrines that reside deep in the thicket of old, traditional, fault-based intentional tort law.

While numerous good reasons exist for these intentional law doctrines to operate as they do, interestingly, they represent clear instances of strict liability within the context of intentional tort law. This suggests that rather than being only a relatively modern and philosophically radical alternative to fault based liability, strict liability may also be an inevitable product of tort law's need to engage in both unilateral and bilateral analysis.

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148. *See supra* text accompanying note 110–12.

149. *See supra* text accompanying notes 113–21.

