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## Purpose, Belief, and Recklessness: Pruning the "Restatement" (Third)'s Definition of Intent

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# Purpose, Belief, and Recklessness: Pruning the *Restatement (Third)*'s Definition of Intent

*Anthony J. Sebok\**

I.	THE PLACE OF INTENT IN THE <i>RESTATEMENTS</i> .....	1165
II.	HENDERSON AND TWERSKI'S CRITIQUE .....	1168
III.	THE PROBLEM WITH BELIEF.....	1172
IV.	INTENT AND RECKLESSNESS.....	1178
V.	HOW REALITY EMBARRASSES THEORY: THE SHIFTING BORDERLINE BETWEEN INTENT AND RECKLESSNESS IN THE CASELAW .....	1180
V.	CONCLUSION.....	1185

## I. THE PLACE OF INTENT IN THE *RESTATEMENTS*

The concept of intent has always been at the root of some of tort law's most basic categories. The primitive action for trespass, for example, assumed that, at the very least, the trespasser *intended* to perform the act that resulted in the touching about which the plaintiff complains; a man thrown into another's close is not a trespasser. After the development of the modern categories of tort law, trespass helped form the foundation of the category of intentional torts. Sometimes, though, the very fact that a great deal of effort is required to do something is evidence of controversy or at least confusion. One might draw this conclusion from looking at the

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treatment of intent—and its close cousin, “recklessness”—in the *Restatements*.

It is interesting to note, for example, that the *Restatement (First)* did not define “intent.” The *Restatement (First)* referred to intent in the course of defining battery.<sup>1</sup> In Section 13, at Comment (d), the Reporter noted that, in addition to purposeful contact, battery may include contacts performed with “the knowledge on the part of the actor that such contact . . . is substantially certain to be produced.”<sup>2</sup> This commentary is the only clue that the concept of intent assumed by the *Restatement* may not be identical to that contained in laypersons’ use of the term. On the other hand, the *Restatement (First)* did define “recklessness.” To what can we attribute this differential treatment? It seems that, in contrast to recklessness, the American Law Institute (“ALI”) seemed to think that the concept of “intent” was so well-understood, so deeply a part of the language, that it was no more necessary to define the word “intent” than it would have been to define the word “person.”

Unlike the *Restatement (First)*, the *Restatement (Second)* did define “intent” in a section devoted to just that purpose: Section 8A. As the Reporter noted, 8A represented an expansion of the *Restatement (First)*’s Section 13, Comment d. Apparently, by 1965 the ALI had recognized the need to clarify the definition of intent, and they did so by offering a generic definition—one which intended to govern the entire *Restatement*. Unlike comment d, 8A was to serve modularly: its abstract definition was designed to work as well in battery as in defamation. Nonetheless, like Comment d, 8A had been designed as a response to a need that had arisen in the context of a battery case, *Garrett v. Dailey*.<sup>3</sup> In order to explain why the eight year old boy in *Garrett* could have been found liable for battery, the Washington Supreme Court explained that intent means not only having a desire to do harm, but also knowing with “substantial certainty” that one will do harm, even if one does not desire to do harm. Without doubt, the “substantial certainty” prong is one solution to the problem posed by *Garrett*.<sup>4</sup> The purpose of this Essay is to point out that the solution adopted in the *Restatement (Second)*

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1. See RESTATEMENT (FIRST) OF TORTS § 13 (1934) (“(a) the act is done with the intention of bringing about a harmful content . . .”).

2. *Id.* § 13, cmt. d.

3. *Garret v. Dailey*, 279 P.2d 1091 (Wash. 1955).

4. As the Reporters for *Restatement (Third)* note, the facts of *Garrett* do not really support the theoretical structure that 8A is supposed to illustrate. See RESTATEMENT (THIRD) OF TORTS: GENERAL PRINCIPLES § 1 (Discussion Draft Apr. 5, 1999) [hereinafter Discussion Draft].

is not optimal, and that it should not be carried forward into the *Restatement (Third)*.

The *Restatement (Third)* not only defines "intent," it promotes what was once a mere comment to the most prominent position: it is now Section 1. Its cousin, "recklessness" has also received a promotion. It has been moved from Section 500 to Section 2. The Reporters of the *Restatement (Third)* seem to be saying that not only is the definition of intent (and its distinction from recklessness) part of the *Restatement's* mission, but also that the two definitions are fundamental. Furthermore, the definition of intent has grown. In the *Restatement (Second)* the two-pronged definition required only a single, structurally simple sentence:

§ 8A. Intent

The word "intent" is used throughout the *Restatement* of this Subject to denote that the actor desires to cause the consequence of his act, or that he believes that the consequences are substantially certain to result from it.

In the current draft of *Restatement (Third)*, the same two-pronged definition is broken up into two clearly defined sections:

§ 1. Intentional

An actor's causation of harm is intentional if the actor brings about that harm either purposefully or knowingly.

(a) Purpose. An actor purposefully causes harm by acting with the desire to bring about that harm.

(b) Knowledge. An actor knowingly causes harm by engaging in conduct believing that harm is substantially certain to result.

The definition of reckless is similarly divided into two distinct prongs, although not to provide two independently sufficient conditions, but to provide two jointly necessary conditions:

§ 2. Reckless

An actor's conduct is reckless if:

(a) the actor knows of the risk of harm created by the actor's conduct, or knows facts that make that risk obvious to anyone in the actor's situation, and

(b) the precaution that would eliminate or reduce that risk involves burdens that are so slight relative to the magnitude of the risk as to render the actor's failure to adopt the precaution a demonstration of the actor's indifference to the risk.

The increasing centrality and complexity of the definitions of intent and recklessness over the past century have paralleled the

increasing complexity of the issues necessitating their application. Whether an act is characterized as intentional, reckless, or negligent may determine whether punitive damages are available, whether contribution is permitted in comparative fault, whether a tort judgment will be dischargeable in bankruptcy, whether liability insurance will cover an insured's tortious conduct, whether a worker will be able to exit the workman's compensation system and sue her employer in tort, whether emotional distress will be available to a bystander, whether a municipality can be sued in tort, whether affirmative defenses are available, and whether the statute of limitations applicable to a given action. In each of these areas, one can imagine that predictable struggles emerge between plaintiffs and defense-oriented advocates over the effects on liability of labeling an action "intentional," "reckless," or "negligent."

## II. HENDERSON AND TWERSKI'S CRITIQUE

In their contribution to this symposium, Professors Henderson and Twerski offer a generally positive assessment of *Restatement (Third)*'s approach to the problem of defining intent and recklessness. They approve of the idea that these concepts can be defined "generically" for the entire universe of torts contained in the *Restatement*. Within the construction of the definitions themselves, they approve of the Reporters decision to retain *Restatement (Second)*'s focus on "consequences." The definition should, they claim, turn on the actor's mental state with regard to the results of her act, not on the mental state that produced the act itself, which they note, correctly, captures merely the concept of volition.<sup>5</sup>

On the other hand, Henderson and Twerski disapprove of the way in which the *Restatement (Third)* builds the concept of "harm" into the definition of intent.<sup>6</sup> As they point out, the *Restatement (Second)* merely requires that an actor intend a consequence. A few intentional torts, such as intentional interference with economic advantage and intentional infliction of emotional distress, require that the actor intend a consequence that is in itself harmful (and

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5. See James A. Henderson, Jr. & Aaron D. Twerski, *Intent and Recklessness in Tort: The Practical Craft of Restating the Law*, 54 VAND. L. REV. 1133, 1137 (2001) ("[T]he concepts of intent and recklessness [should] focus on the consequences of acts, rather than on the acts themselves.").

6. See *id.* at 1135, 1153.

known to be so), while many others, such as battery, do not.<sup>7</sup> It may be that the difference is without consequence. Under the *Restatement (Second)* approach, the task of narrowing the range of intended consequences for which an actor may be held liable in a tort such as intentional interference with economic advantage is handled by additional elements within the tort. According to the *Restatement (Second)* Section 766, Comment j, any act that, according to 8A's definition of intent, was *intended* to produce an interference with another's contract satisfies the "intent" element of the prima facie case under Section 766. Whether an intended interference is within the scope of the tort's protection depends on further conditions within the prima facie case, such as whether the interference was improper.<sup>8</sup> The *Restatement (Third)* approach would seemingly expect one to look ahead to the definition of "harm" within a given tort: the definition of intent in Section 1 presumes that one already knows whether the *Restatement* rules for that tort require intent to bring about a harmful consequence. I suspect that this difference will turn out to be nothing more than a terminological dispute.

There is one area of disagreement between the Discussion Draft's definition of intent and Henderson and Twerski's that is not merely terminological, in which they have identified a real problem with *Restatement (Third)*'s definition of intent. As I will argue below, however, the solution they offer is insufficient to meet their own concerns since, in my opinion, the problem with which they are concerned is rooted in *Restatement (Second)*'s Section 8A.

Henderson and Twerski raise the problem to which I refer on pages 1138-1143 of their article. As they note, Section 1 retains and expands Section 8A's two-prong definition of intent. The first prong, based on an actor's desires, has never raised

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7. A battery may occur if the actor merely intends a contact that turns out, because of unknowable and unpredictable circumstances, to be harmful. In such a case, the intended contact is tortious not because of any harmful quality of the contact intended, but because of other circumstances which, having been set out by the tort of battery, were satisfied by the defendant independent of the content of his intent. See W. PAGE KEETON ET. AL., PROSSER AND KEETON ON THE LAW OF TORTS § 9 (5th ed. 1984) (Battery) [hereinafter PROSSER]. This is not true in most economic torts, for example. In intentional interference with economic advantage, the actor interfering with a contract must intend to interfere with a contract: at the very least, he must know that there is a contract and that his act, whether in his own mind justified, innocent, or spiteful, will produce the specific result of a contract interference. See *id.* § 129 (Interference with Contractual Relations), especially the text accompanying notes 42-50. This is also true of injurious falsehood, as interpreted by the *Restatement (Second)*. See RESTATEMENT (SECOND) OF TORTS § 623A (1965).

8. See RESTATEMENT (SECOND) OF TORTS § 767.

much controversy.<sup>9</sup> The second prong, based on the actor's knowledge or beliefs about the results of her actions, has always been the source of confusion, and not only to first year torts students trying to decipher *Garrett v. Dailey*. The second prong relies on what I will refer to as the "belief theory" of intent: that one intends consequence C if one, when choosing to act, is *substantially certain* that one's action will cause C, even if one does not want C to occur. The question of whether to attribute intent to an actor under such circumstances has been discussed in theological circles under the rubric of "double effect."<sup>10</sup>

Henderson and Twerski's concern with the belief theory is not rooted in wholesale skepticism. Regardless of what they may think of it from a theological or philosophical perspective, they think that it played a useful role in *Restatement (Second)* and was properly retained in *Restatement (Third)*. Their concern is at the retail level: they want to make sure that the second prong of section 1 is not misunderstood or abused by the courts. Section 1 (b) refers to an actor "engaging in conduct believing that harm is substantially certain to occur." Henderson and Twerski are concerned that this would allow a court to find intent in cases where the actor either (1) engages in a repetitious activity that, over time, produces an almost certain risk of injury, or (2) commits a single act, that, over repeat encounters with various possible victims, produces an almost certain risk of injury. An example of Henderson and Twerski's first concern is a baseball player who knows, over the course of an entire season, that he will hit at least one ball into the stands which will hit a spectator. We can call this a case of an "iterated low risk act." An example of Henderson and Twerski's second concern is a factory owner who removes a guard from a machine, knowing that (assuming 100 workers encounter the machine) one of the workers will be injured. We can call this a case of an "iterated low risk victim." Henderson and Twerski believe that the American Law Institute does not want to imply that either the baseball player "intended" to hit the spectator, or that the factory owner "intended" to injure the worker.

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9. Although some people may find disquieting the degree to which both Sections 8A and 1 allow 'moral luck' to play a role in attributing intent to irrational desires, comment d's Illustration 2 allows an actor to be held as "intending" a result which she simultaneously desires and believes is unlikely to occur. See Discussion Draft, *supra* note 4, § 1.

10. See, e.g., Philippa Foot, *The Problem of Abortion and the Doctrine of the Double Effect*, in *VIRTUES AND VICES AND OTHER ESSAYS IN MORAL PHILOSOPHY* 19-32 (1978).

As currently written, Section 1 might certainly run afoul of the concerns raised by Henderson and Twerski. Comment f of the Discussion Draft vaguely acknowledges the problem, it but does not suggest a solution other than calling on courts to "appreciate the limits" of substantial certainty in the second prong. Henderson and Twerski call for a change in the language, and (I think) a clearer statement by the Reporters in the comments. First, they call on the Institute to replace the expression "engaging in conduct" with the word "act" in 1(b). Second, they insist that the *Restatement* be understood to mean that "for a consequence to be intended in the 'belief with certainty' sense, not only must the act producing the consequence be discrete, but the consequence complained of must result directly and proximately (both temporarily and spatially) from the act."<sup>11</sup> I assume that this "understanding" would be contained in Comment f.

While I sympathize with Henderson and Twerski's concerns, I think that their proposed solution is inadequate to solve the problem they have identified. For example, while changing the terminology *might* prevent a court from finding intent in the case of the iterated low risk act, I am skeptical that the change in language suggested by Henderson and Twerski, even conjoined with an expanded Comment f, will provide a principled guide for judges or lawyers. This is easiest to see in the case involving an iterated low-risk victim. The Discussion Draft's Illustration 3 describes an actor whose smelter sends particulate into the air. Depending on the direction of the wind, the particulate will land on some, but not all of the landowners' property surrounding the actor.<sup>12</sup> The actor does not desire the particulate to land on anyone's property, and he certainly does not intend that it fall on the property of any specific landowner, but he is substantially certain it will land on *someone's* property. The *Restatement (Third)* says that this satisfies section 1(b), and it would still satisfy it even if Henderson and Twerski's terminological change were adopted. In what way is Illustration 3 distinguishable from a case in which an actor refuses to repair a piece of machinery, which, used by various employees over the course of a month, inevitably injured one of them?<sup>13</sup> Or a case in

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11. Henderson & Twerski, *supra* note 5, at 1143.

12. The example is based on *Bradley v. American Smelting & Refining Co.*, 709 P.2d 782 (Wash. 1985).

13. This example is based on the facts of *Noonan v. Spring Creek Forest Products, Inc.*, 700 P.2d 623 (Mont. 1985), in which an employee lost four fingers on a planing machine that his employer refused to repair. The Supreme Court of Montana held that the employee could not sue in tort for battery but instead was entitled to workman's compensation because the employer



which an actor ordered his employees, as a group, to perform a certain unsafe act that carried with it a measurable risk, until one of the employees was injured by the realization of that risk?<sup>14</sup>

In both Illustration 3 and the two examples I offer, the actor is not engaged in a "course of conduct": the single spew of particulate, the single refusal to repair, and the single command, all pose a 100% chance that *someone* will suffer harm. Furthermore, in Illustration 3, no more and no less than the latter examples, we assume that the actor did not desire the harm to occur but, knowing all the facts, was "substantially certain" it would occur. It is difficult to see how any instruction concerning directness or proximate cause could help distinguish between Illustration 3 and the latter examples. The injuries, resulting from the defective machine or the risky instructions, were caused directly. Moreover, the injuries could just as easily have occurred within 24 hours of the creation of the risk as within a month; the time the injuries occurred is a function of the operation of the probabilities and not evidence of the remoteness of the injury.<sup>15</sup>

### III. THE PROBLEM WITH BELIEF

I share Henderson and Twerski's (and the *Restatement (Third) Reporters'*) anxiety that cases involving iterated low risk acts and iterated low risk victims should not be considered "intentional" under Section 1. As I have argued above, none of the changes suggested by Henderson and Twerski resolve this anxiety.

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was not substantially certain that his act (the failure to repair the planer) would harm the employee. *Id.* at 625-26.

14. This example is based on the facts of *Suarez v. Dickmont Plastics Corp.*, 639 A.2d 507 (Conn. 1994), in which an employee lost two fingers in the feeding chute of a plastics injection mold because the employer ordered all the employees to clean the chute without turning the machine off (to save time). The Supreme Court of Connecticut held that a jury could find that the employer was substantially certain that his act (ordering the machine to be cleaned while in operation) would harm the employee, in which case the employee would be allowed to leave the workman's compensation system and sue the employer for battery. *Id.* at 515-16. On remand, a jury found that the employer had in fact *not* been substantially certain. *See Suarez v. Dickmont Plastics Corp.*, 698 A.2d 838 (Conn. 1997).

15. This may explain why, as is noted in Comment b to Section 1, many courts have simply refused to adopt the belief prong in workman compensation cases. *See Discussion Draft, supra* note 4, at § 1 (listing cases that require "something like purposeful harm on the part of the employer" in determining whether an employer has acted with intent). While I agree with the intuition behind these courts' resistance to adopting the belief prong in these cases, I find the *ad hoc* solution adopted by these courts disturbing. If "intent" is to be a generic and modular term-warranting its primary position as the first defined term in the *Restatement*—then either it does or does not include the belief prong. The term cannot switch between a narrow and broad definition of 'intent' without any principled rationale. *See infra* text accompanying nn. 29-32.

The reason why they will not be able to solve the problem they raise with a "quick" terminological fix is because the problem is not with the words selected to express Section 1(b). The problem is Section 1(b) itself. The belief prong is not compatible with our governing intuitions about the meaning of the word intent, and any attempt to accommodate them will lead to frustration.

I am well aware that the philosophical literature concerning the concept of intent is vast, and this brief Essay is not the place to begin to canvas the various positions that have developed over the years. I will just point out that the position adopted in *Restatement (Second)*'s Section 8A is not without its critics in the realm of philosophy and law.<sup>16</sup> As John Finnis argues, it is strange, as a matter of ordinary language philosophy, to treat belief as if it were the same as desire. For example, imagine that my only hope on the eighteenth hole at the end of a round of golf in which I am badly losing is to hit the ball as hard as I can to a green surrounded by water, hoping for a freak accident to produce a hole-in-one (as opposed to hitting the ball less hard and hoping to reach the hole while avoiding the water, in three or four strokes). It would be absurd to say that, having chosen to try for the hole-in-one, that my *intent* is to hit the water. Yet, that is just what the belief prong of Section 1 requires us to say, since, although my desire is to hit the cup, I am substantially certain that I will hit the water.<sup>17</sup>

Finnis' observation is simply a clever way of expressing what anyone who has taught *Garrett v. Dailey* has experienced firsthand: that any serious application of the belief prong requires us to engage in strange verbal contortions. The strangest of all, of course, is the concept of "substantial certainty" itself, which, like Voltaire's God, seems to have been invented out of necessity, since it resembles no intuitively familiar mental state and is famously difficult to explain to skeptical first year students who have not yet checked their common sense at the law school's front door. It is something less than certainty (which would be too strong) and more than highly probable (which would be too weak, and would collapse the whole category into recklessness). It is a concept, which, having no fixed meaning, can, as the workman's compensation cases discussed above show, mean whatever a judge wants.

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16. See, e.g., G. E. M. ANSCOMBE, INTENTION 41-45 (1957) (citing §§ 644 and 659 of LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS); John Finnis, *Intention in Tort Law*, in PHILOSOPHICAL FOUNDATIONS OF TORT LAW 229-48 (David G. Owen ed., 1995)

17. Finnis, *supra* note 16, at 243.

If Finnis is right, then there is something fishy about the belief prong in tort law.<sup>18</sup> As Henderson and Twerski state in their article, there is no reason to adopt the vocabulary of nonlegal disciplines in law; just because philosophers like Anscombe and Wittgenstein would find the two-pronged definition of intent problematic, this does not mean that it cannot serve, however imperfectly, the practical needs of litigation.<sup>19</sup> The caution, however, goes in the other direction as well. The two prongs of section 1 seem to be modeled after sections 2.02(a) and 2.02(b) of the Model Penal Code, which distinguish between acting with a purpose to bring about a harm and acting with knowledge that a harm will result.<sup>20</sup> This distinction may serve useful ends in the course of crafting rules for the criminal law, but it is not clear that it helps in tort law, which, after all, has somewhat different goals and mechanisms.

It therefore may be of value to ask a heretical question: do we even need the belief prong in the definition of intent in the *Restatement of Torts*? What would happen if it were removed and intent was defined by the desire prong alone? My contention is: nothing. The goals of tort law would still be achieved, more or less, but we will have gained some not-insignificant conceptual order.

The primary function of the belief prong in tort law is to provide a way for certain wrongs to be brought under the rubric of "intentional tort." As a practical matter, almost all of the wrongs, which are captured by the belief prong that would escape capture by the desire prong, would probably also be the sort of acts for which one could sue in negligence.<sup>21</sup> I alluded at the beginning of

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18. Sometimes the disconnect between our ordinary language and "intent" in tort is revealed by encounters with other parts of our own law. For example, it is standard practice in insurance contracts to state that the insurer will not indemnify the insured for damage that is "expected or intended" by the insured. See *Shell Oil Co. v. Winterthur Swiss Ins. Co.*, 12 Cal. App. 4th 715, 745 (Cal. Ct. App. 1993). As the court in *Shell* explained, the expression "expected," which is standard in the insurance industry, would have no meaning if the word "intended" was interpreted to include a belief prong. *Restatement (Second)*'s definition of intent, from the perspective of insurance law, is "specialized" and inconsistent with how laypersons use English. *Id.*; see also *infra* text accompanying nn. 37-40. See also Peter Cane, *Mens Rea in Tort Law*, 20 OXFORD J. L. STUD. 533, 535 (2000) (belief prong "blurs" the distinction between intention and recklessness).

19. Henderson & Twerski, *supra* note 5, at 1136.

20. See Kenneth W. Simons, *Rethinking Mental States*, 72 B.U. L. REV. 463, 470 (1992) (discussing Model Penal Code's distinction between acting with a purpose and acting with knowledge).

21. The one set of cases which Henderson and Twerski discuss which I will not are the cases they classify as "mental breakdown" cases: "an actor may believe that a consequence is certain to follow from an act, but nevertheless not subjectively desire that result." Henderson & Twerski, *supra* note 5, at 1140. I leave for another time why, as a matter of policy, we would want to hold

this Essay to the many important distinctions that lay on either side of the intent/negligence divide (punitive damages, insurance coverage, workman's compensation, etc.). Assuming that this divide is important for our current system, it is worth asking whether too many cases that would currently be considered intentional torts would be reclassified as negligence if the belief prong were eliminated.

Fewer cases would be moved across the border than one might suspect. This is because, unlike criminal law, tort law does not recognize subtle distinctions between different levels of wrongful desires. Under criminal law, the difference in years spent in jail may vary depending on whether an actor desired to kill someone and did so or whether an actor desired to kill a dog, but accidentally killed its master. This is not so in tort. According to the doctrine of transferred intent, an intentional tort involving trespass to chattel or assault that results in battery is treated as a battery.<sup>22</sup> This means that many of the "double effect" cases that inspired *Restatement (Second)*'s adoption of the belief prong are actually pretty simple desire cases. Take for example, a version of the "regretful bomber" illustration: imagine that actor D bombs V's house because D desires to destroy the house. Assume further that D knows that V is in the house. D is "kind of" certain that V will die if the house is bombed, but does not desire V to die. As a matter of criminal law, it might make a great deal of difference if we could charge that D killed V "knowingly" since, as Ken Simons points out, the Model Penal Code sometimes draws many practical distinctions between desire and belief.<sup>23</sup> This distinction, however, is irrelevant in tort law. There is no need to delve into the metaphysics of whether "kind of" certain is "substantially" certain. If D desired to destroy another's property without privilege, that is trespass to chattel. If his trespass also is the proximate cause of a battery, then, according to the doctrine of transferred intent, D is also liable for battery. Transferred intent may strike criminal law theorists as indefensibly crude (lacking the subtlety of felony murder) but their incom-

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mentally defective actors liable in tort at all; I take it is as obvious that there is little reason to insist on holding them liable in intentional tort.

22. See PROSSER, *supra* note 7, § 8 (Meaning of Intent), especially text accompanying nn. 32-44 ("Transferred' Intent"). Of course, there may be a predictable difference in the manner in which juries award punitive damages between "purposeful" battery cases and cases of transferred intent.

23. Simons, *supra* note 20, at 470. The Model Penal Code equates purpose and knowledge in its definition of homicide; it exploits the distinguishability of Sections 2.02(2)(a) and 2.02(2)(b) in criminal conspiracy, solicitation, attempts, and burglary. See *id.* at n.23.

prehension only reinforces my conviction that even if certain areas of the law—such as criminal law—need to worry about whether the belief prong (and its standard, “substantial certainty”) can ever be rendered coherent, tort law does not.

Once the doctrine of transferred intent is brought back into the equation, the compelling need for the belief prong begins to shrink. It must be conceded, though, that it will not shrink to zero. A handful of cases remain that will not be captured by the desire prong plus transferred intent, which the courts have traditionally treated as intentional torts, because they are pure “double effect” cases that can only be called intentional torts if the belief prong is retained. For example, assume that D wants to burn his own house down. Further assume that D knows that V is inside D’s house, that D is “kind of” certain that V will die if the house is burned, but that D does not desire V to die. If D burns his house and V dies, it would be difficult to hold D liable in intentional tort unless we retained the belief prong.

The case just described—which I would call a case of “NontRESPASSATORY Double Effect”—will be very rare. Nonetheless, does their very existence warrant the retention of the belief prong in Section 1? I think not. There is certainly something awful about cases of NontRESPASSATORY Double Effect, and D, in such a case, should be viewed as more wrongful than if he had killed V by negligently burning his own property.<sup>24</sup> But that does not mean that the wrong, which motivates our censure of D, is that D *intended* to kill V. I would hold, with Finnis and Anscombe, that this characterization of D’s conduct inaccurately describes D’s conduct.

If one reflects on the example of NontRESPASSATORY Double Effect described above, one sees that it is similar in some respects to a case involving certain iterated low risk victims. It is not too different, for example, from a case involving a conscious design choice by a manufacturer of 1000 units of a product, which is known by the manufacturer to violate reasonable care (e.g. risk/utility) and is guaranteed to injure or kill 0.001% of its users.<sup>25</sup> Such products

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24. See *Vaughn v. Menlove*, 132 Eng. Rep. 490 (1837) (actor with less-than average intelligence negligently burned neighbor’s property; some evidence that he knowingly accepted the risk).

25. This is a highly stylized version of the sort of claim alleged in many products liability suits. See, for example, the (erroneous) characterization of Ford’s conduct in manufacturing the Pinto in Marc Galanter and David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 AM. U. L. REV. 1394, 1436 (1993) (discussing *Grimshaw v. Ford Motor Co.*, 174 Cal. Rptr. 348 (Cal. 1981)). For a better understanding of Ford’s conduct, see generally Gary Schwartz, *The Myth of the Ford Pinto Case*, 43 RUTGERS L. REV. 1013 (1991).

liability cases, if proven, result in the award of punitive damages because the manufacturer acted recklessly or demonstrated conscious indifference to the rights of the victims. They are not brought as intentional torts.<sup>26</sup> In a products case where the defendant is found to be reckless or consciously indifferent, the wrong, which warrants exemplary damages, is not that the defendant *intended* to harm the victim, but that he knowingly imposed a risk on the victim, which could have been eliminated with minimum effort. The wrong at the heart of an act of NontRESPASSATORY Double Effect is the same: whatever D's reasons for burning his house down, they cannot justify the knowing imposition of the (large) risk of injury on V. The fact that D does not desire to harm V matters to the same extent that it matters that a manufacturer does not desire to harm the one consumer out of a thousand whom it knows will be harmed by its product. Neither D nor the manufacturer are guilty of intending harm, but they are guilty of acting recklessly: that is, with conscious and willful indifference to the risk imposed on the unlucky victim.

It might seem strange to equate a case of NontRESPASSATORY Double Effect and products liability. But there really is no difference between the two from the perspective of the definition of recklessness contained in the *Restatement (Second)* section 500, which has been adopted, relatively unchanged, in the *Restatement (Third)* Section 2. One might object that in the NontRESPASSATORY Double Effect example above, D cannot be acting "recklessly" because in choosing to burn his own house down with V inside, D is not imposing a "risk" (willfully, grossly, or otherwise) on V; rather, D is imposing a *harm* on V. This seems to be an odd reading of the Discussion Draft's definition of recklessness, which does not distinguish between large (close to 100%) and small (close to 0%) risks. According to Section 2, D is reckless when he knowingly imposes an *unreasonable* risk on his victim, and when the magnitude of that risk is *disproportionate* to the cost of acting reasonably.<sup>27</sup> Just as

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26. There have been attempts to bring criminal charges on the basis of conscious indifference in product design and manufacture. After the a handful of civil cases were tried against Ford because of alleged defects in the Pinto, a district attorney's office charged Ford with reckless homicide. Ford was acquitted. See Schwartz, *supra* note 25, at n.11 (describing *Indiana v. Ford Motor Co.*, Cause No. 11-431 (1980)).

27. It might be objected that in this discussion I have downplayed the fact that Section 2 does not require subjective knowledge of either the fact that D is imposing a risk on V, or that the risk is disproportionate to the burden of reducing the risk. Section 2 only requires that D knows facts that "make the risk obvious to anyone" in D's situation. This would certainly be the case had the language from the *Restatement (Second)* Section 500 been retained ("knowing or having reason to know of facts"). But, as Comment c to Section 2 of the *Restatement (Third)*

one can act recklessly by imposing a slight risk that has been "gratuitously" created,<sup>28</sup> one can act recklessly by imposing a great risk—one so large that the actor is "substantially certain" it will be realized and that the magnitude of the risk is disproportionate to the cost of removing the risk.

There is no reason why all of the remaining belief prong cases that would not otherwise be captured by the desire prong plus transferred intent would not easily fit under Section 2's definition of recklessness. In a typical Nontrespasatory Double Effect case, like the one described above, the person accused of intending to harm the victim really has displayed an outrageous degree of *indifference* toward his victim. Rather than harm his victim out of an excess of wrongful desire to harm, he has harmed his victim out of an obscene lack of concern. The actor wants the thing he wants so much that he does not care whether another person gets harmed in the course of obtaining the desired object. In this way, the man who burns down his house knowing that V is inside, the employer who refuses to spend money to repair a machine knowing that an employee will be hurt, or a manufacturer who refuses to change a design in order to save money knowing that a consumer will be injured are all acting *recklessly* according to the *Restatement (Third)* Section 2. This fits with our conventional intuitions as well. While it seems strange to say in these cases that the wrong with which the tort law should be concerned is the wrongful *intent* to harm, we know that the actors have done something worse than mere carelessness. The vocabulary of recklessness gives us a way to express, in a nuanced way, our sense that someone who knowingly causes harm without desiring to cause harm has acted more wrongfully than someone who unknowingly causes harm.

#### IV. INTENT AND RECKLESSNESS

It is a mystery to me why we would want the definition of intent to capture states of affairs that seem so much more clearly described by the concept of recklessness. If we step back from the *Re-*

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notes, the latter definition of recklessness is designed to push it away from an objective standard and towards a subjective standard. See Discussion Draft, *supra* note 4, § 2. Unlike under Section 500, Section 2 requires knowledge at some level: the actor must "have knowledge of the danger or have knowledge of facts which would make the danger obvious to anyone in the actor's situation." And see Cane, *supra* note 18, at 538 (criticizing effort to define recklessness without reference to a conscious mental state).

28. Henderson & Twerski, *supra* note 5, at 1152, 1155-56.

*statement* for a moment, we should reflect on *why* we would want to adopt a critical attitude towards someone (1) who believed that his act would produce a certain proscribed and injurious consequence, (2) who did not desire to bring that consequence about, and (3) who nonetheless took steps that brought about that consequence. I contend that our reasons have less to do with the wrongfulness of that person's ends (what they wanted) and more to do with the wrongfulness of *how* that person achieved their ends (how they got what they wanted). This is exactly what makes us treat recklessness differently from mere negligence.<sup>29</sup> Taking the NontRESPASSATORY Double Effect actor as the "hardest" case (since it cannot be brought under transferred intent), I would argue that we should be skeptical of the *Restatement's* hasty assumption that substantial certainty is the conceptual equivalent of desire. To desire and choose an other-regarding consequence in tort is to exercise one's will over another. It is more than valuing one's ends over another (which is bad enough); it is to act with the end of affecting another. Part of the point (not necessarily the pleasure, for there may be none) of achieving what one desires in intentional tort is to see the achievement of one's desires made material *in the world* and *by affecting another's rights in tort*.<sup>30</sup> On the other hand, the reckless actor, while exercising his will in the world, is not wrongful because he aims to impose his will on another. He is wrongful because he imposes his will on the world without regard for the consequences of its imposition. Rather than the intentional wrongdoer, for whom the consequences that flow from his act are part of the point of

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29. It is interesting to note that Comment f of Section 500 in the *Restatement (Second)* ("Intentional misconduct and recklessness contrasted") has been removed from Section 2, which has no Comment analogous to Comment f or Comment g ("Negligence and recklessness contrasted"). I think this is significant in at least the case of comment f, which made little or no sense: it described a major difference between recklessness and intent as lying in the fact that an actor who realizes that there is a "strong probability" that his act may harm, "even though he hopes" that his act will prove harmless is acting recklessly, not intentionally. The difference between this characterization of recklessness and the belief prong of Section 8A is difficult to see, and the fact that the Discussion Draft does not retain it is a step in the right direction.

30. As Finnis puts it, "When one intends some harm to (an)other human person or persons . . . one is shaping oneself as one who, in the most straightforward way, exploits others . . . in each case the reality and the fulfillment of those other persons is radically subjected to one's own reality and fulfillment." Finnis, *supra* note 16, at 244. This is very similar to Jean Hampton's account of "moral injury" which she used to explain the role of retribution in tort law: that is, retribution is warranted when an actor falsely elevates his moral worth above another by wrongfully exercising his will upon them. See Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 UCLA L. REV. 1659, 1677 (1992); Anthony J. Sebok, *Legal Culture and the Desire for Retribution: Punishment in German and American Private Law* (unpublished manuscript on file with author) (applying the concept of "moral injury" to punitive damages in tort law).



acting, the reckless actor is blameworthy because he knows that there is a disproportionate risk of harm flowing from the consequences of his act *but he does not care enough to address that risk*. In this regard, the Nontrespasatory Double Effect actor is just like the reckless actor: the Nontrespasatory Double Effect actor's will would not be thwarted or diminished—his sense of himself in the world would remain unaltered—if, as a result of a miracle, the fire that was “substantially certain” to kill V was extinguished, and V lived. The moral root of our desire to treat the Nontrespasatory Double Effect actor with the elevated concern in tort that accompanies the label “intentional tort” seems to grow, beneath the surface of the *Restatement*, out of the same branch as the moral intuitions that lead us to treat reckless acts with elevated concern.

V. HOW REALITY EMBARRASSES THEORY: THE SHIFTING  
BORDERLINE BETWEEN INTENT AND RECKLESSNESS IN THE  
CASELAW

My argument therefore, is straightforward: we do not need the belief prong to construct a sufficient and practical definition of intent in tort. The desire prong plus the doctrine of transferred intent can handle all but a few cases, which are otherwise clear under intentional tort doctrine. For those few cases that cannot fit under the desire prong, I have argued that they are probably better seen as cases of recklessness as defined by the new Section 2. In making this argument, I realize that there are important consequences to classifying a tort as arising from intentional wrongdoing as opposed to recklessness. I want to conclude this Comment by considering these consequences. In so doing, it may turn out that, were recklessness to become the new home for the remaining Nontrespasatory Double Effect cases that have no natural home under the desire prong, we might have to rethink the differential doctrinal treatment of intentional torts and recklessness. This might be, I suggest, a very fruitful research project for the future.

There is no obvious pattern to when and under what circumstances intentional torts are treated differently from torts arising from recklessness. Generally speaking, recklessness is seen as another term for “gross negligence” and has, for that reason, often been unreflectively viewed as a branch of negligence. One ought to be suspicious of any equation between recklessness and negligence given the prominent role that subjective knowledge plays in the

definition of recklessness.<sup>31</sup> For this reason, recklessness has sat on the borderline between intent and negligence, playing a limited role. One might see recklessness as a gatekeeper: sometimes it allows the practical and moral consequences of intentional tort to be visited on certain actors who otherwise were innocent of harboring a specific desire of harming anyone.

The one place where recklessness and intentional tort are treated the same is in the award of punitive damages. This is a profound and important fact: to the extent that the tort system's foundations are laid bare in its structure of damages, the equation of intent with recklessness suggests that our intuition in the area of civil wrongs is that conscious indifference may sometimes be as bad as malice. On the other side of the ledger, the tort system generally treats intentional torts and recklessness differently in the areas of bankruptcy, workman's compensation, insurance, and contribution. In bankruptcy, except for drunk driving, recklessly caused tort liability is dischargeable; intentionally caused tort liability is not. In workman's compensation, recklessly caused injury is compensated by the statutory insurance scheme; intentionally caused injury is not. In insurance, most policies do not cover "expected" or intended injuries caused by the insured, but they will cover injuries caused by the reckless conduct of the insured. In contribution, courts will generally allow a defendant who has acted recklessly to sue for contribution from another joint tortfeasor, but not if the defendant injured the victim intentionally. There are similar differences in other, less active areas of doctrine, such as municipal liability and statutes of limitations, but the foregoing should be enough to give a flavor of the enduring doctrinal importance of whether a court concludes that a defendant has acted intentionally or recklessly.

I am not sure whether the subset of cases that I argue ought to be seen as properly covered by the category of recklessness rather than intent (cases of Nontrespasatory Double Effect) ought not to be treated differently than intentional torts when it comes to the question of dischargeability, workman's compensation, and insurance. This would require a more general theory about when and why, in each of these doctrinal categories, the legal system ought to sanction differential treatment of parties based on the defendants' culpability or state of mind. It is clear that, were my argument to

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31. Subjective knowledge of circumstances that would lead someone in the same situation to recognize the risk is necessary under Section 2. Neither actual recognition of the risk nor subjective understanding of the wrongfulness of imposing the risk is necessary, however. *See supra* note 27.

be accepted and some cases which are currently treated as intentional torts were treated differently once they were "reclassified" as recklessness, does not in itself argue against my position. It might just as much counsel a review of the doctrines that require the differential treatment.

Before we take that step, however, it should be pointed out that it is possible that current doctrine already recognizes that the current definitions of intent and recklessness do not conform to the goals of the doctrines, whatever they may be. Thus, in workman's compensation, we see that many courts refuse to adopt the *Restatement's* current definition of intent (thereby allowing fewer employees to sue their employers in tort than the *Restatement's* definition would otherwise suggest). Further, where courts have accepted the *Restatement* definition, there is debate among judges as to whether a knowing imposition of substantial risk upon a group of workers should be classified as acting with substantial certainty so that, in the interests of justice, the injured worker can avail himself of a tort remedy outside of the workman's compensation insurance scheme.<sup>32</sup> Among each group of judges (the former, who think that it should be harder for workers to sue in tort, and the latter, who think it should be easier), it is clear that behind their analysis is a concern that the legal consequences of placing the employer's act on one or another side of the reckless/intent divide should fit our intuitions about the basic justice of allowing employees to opt out of the workman's compensation insurance bargain.

Similarly, among those courts who have agreed that Congress amended the Bankruptcy Code's 11 U.S.C. § 523 (a)(6) to insure that tort liability resulting from reckless acts could be discharged, there is still a debate over the point at which the knowing imposition of an unreasonable risk satisfies the belief prong of the *Restatement's* definition of intent. Thus, in *Geiger v. Kawaauhau*, the dissent pointed out that the majority, in holding that the debt could be discharged because the knowing provision of substandard medicine is not equivalent to acting with substantial certainty of causing harm, had made the belief prong a nullity.<sup>33</sup> The bank-

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32. See the dissenting opinions in *Suarez v. Dickmont Plastics, Corp.*, 698 A.2d 838, 852-58 (Conn. 1997); *Suarez v. Dickmont Plastics, Corp.*, 639 A.2d 507, 515-19 (Conn. 1994); and *Fisher v. Shenandoah General Construction Co.*, 498 So. 2d 882, 884-88 (Fla. 1986). In *Wells v. IFR Engineering, Co.*, 617 N.E.2d 204 (Ill. App. Ct. 1993), the court upheld the dismissal of plaintiff's complaint because the plaintiff had alleged that the employer knew that there was a "strong possibility" of employee's death as a result of breathing toxic fumes, not a "substantial certainty."

33. *Geiger v. Kawaauhau*, 113 F.3d 848, 859 (8th Cir. 1997).

ruptcy court from which this appeal had been taken had not allowed the debt to be discharged on the theory that 11 U.S.C. § 523 (a)(6) applied to both intentional and reckless acts.<sup>34</sup> The Eighth Circuit reversed on the theory that the bankrupt's right to discharge included liabilities resulting from reckless acts. The real issue at the heart of the appeal, as the dissent pointed out, was whether the court should have decided the issue of dischargeability by looking at what the bankrupt did, as opposed to whether what he did was technically recklessness or intent. According to the dissent, what should have mattered most to the court was that the bankrupt doctor's "admitted administration of substandard care show[ed] an *almost certain* likelihood of harm;" hence, the doctor should not be shielded by the bankruptcy code.<sup>35</sup> The pressure to decide whether the doctor acted intentionally, and whether intent includes the belief prong, results from the idea that only harms caused by intentional wrongs cannot be discharged. In fact, however, bankruptcy law is of two minds on this point. For example, where an actor causes harm while drunk, his debts to his victim will not be dischargeable, even though injury resulting from drunkenness seems to be a paradigm example of recklessness, not intent.<sup>36</sup>

The same refusal to allow definitional formalism to drive substantive results can be seen in cases concerning insurance coverage. Since most homeowners insurance excludes coverage of the consequences of intended or expected tortious acts, one often sees insurance companies endeavoring to convince courts to classify as many of their insured's acts as possible as "intended or expected" (while, conversely, the insured—and, sometimes, the insured's victim—consistently tries to convince the court of just the opposite). The application of the *Restatement* definitions is clearly abandoned in certain extremely compelling cases. So, for example, while in cases involving chemical leaks, courts have held that "expected" cannot mean "what [the insured] should have known" would occur if, for 31 years, it willfully stockpiled chemical wastes on top of, and next to, the local water table and aquifer.<sup>37</sup> "Expected" can apply to "[s]ome actions [which are] so likely to result in injury that, as a matter of law, the court will find that the injury did not result from an *accident regardless of the actor's subjective intent or expecta-*

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34. *Geiger v. Kawaauhau*, 172 B.R. 916 (Bankr. E.D. Mo. 1994).

35. *Geiger*, 113 F.3d at 859.

36. See *Ray v. Ray*, 51 B.R. 236, 240 (B.A.P. 9th Cir. 1985) ("[O]ne who voluntarily embarks upon a course, which a reasonable person knows, or should know, may significantly impair ability to exercise reasonable care, should be held to have intended the consequences which occur").

37. *Shell Oil Co. v. Winterthur Swiss Ins. Co.*, 12 Cal App. 4th 715, 748 (Cal. Ct. App. 1993).

tions.”<sup>38</sup> This latter group of cases involves, for example, cases in which the insured intentionally fires a gun at someone,<sup>39</sup> or cases of an adult’s molestation of a minor.<sup>40</sup> It is clear, for a variety of reasons, that an insurance company can refuse to pay for the harmful consequences of its insured’s pointing a gun at someone and pulling the trigger or of molesting a minor. It is less clear that the reason for this is because in every such episode, it must have been the case that the insured was *actually* substantially certain that he was making a contact (in the gun case) or a harmful contact (in the molestation case). In fact, if one were to ignore the outcomes at stake (whether the shooter or molester are held personally liable for their acts), one might naturally describe the shooter’s, or molester’s, state of mind as one of conscious indifference or recklessness. One who points a gun at another and pulls the trigger, but who sincerely and subjectively does not desire to harm the other, is acting without regard to the very large risk that he is imposing on his victim. Similarly, one who forces a sexual encounter upon a minor, but who sincerely and subjectively does not desire to harm the other, is acting without regard to the very large risk he is imposing on his victim. Even if these actors truly desire that no harm result from their acts, they are nonetheless reckless. As such, they are subject to the moral opprobrium that attaches to that legal conclusion. They are subject to punitive damages, just as if they had satisfied the *Restatement* definition of intent. Whether they should, in addition, be able to turn to their insurance companies for coverage is something which should be decided according to our views about whether, as a matter of substantive policy, these sorts of reckless actors should expect coverage. Deciding the question by reclassifying their reckless acts as intentional is an ad hoc and unprincipled solution that

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38. *Allstate Ins. Co. v. Patterson*, 904 F. Supp. 1270, 1280 (D. Utah 1995) (emphasis added).

39. See, e.g., *Hawaiian Ins. & Guar. Co. v. Blanco*, 804 P.2d 876, 878 (Haw. 1990); *State Farm Fire & Cas. Co. v. Geary*, 869 P.2d 952 (Utah Ct. App. 1994). In neither of these cases did the court rely upon the not unreasonable observation that the insured may have intended a contact but not a *harmful* contact. Instead the courts simply concluded that, as a matter of law, “the intentional firing of a gun in the direction of an individual qualifies as an act which carries with it the *reasonable foreseeability* of harm, from which we may infer the intent to injure.”

40. See, e.g., *Patterson*, 904 F. Supp. at 1281 (citing *Wiley v. State Farm Fire & Casualty Co.*, 995 F.2d 457 (3d Cir. 1993); *Allstate Ins. Co. v. McCranie*, 716 F. Supp. 1440 (S.D. Fla. 1989)). Again, in these cases, the intent to make an unpermitted touching is not enough to provide an inference of harmful intent; in cases of sexual molestation between two adults or a minor molesting an adult, harmful intent will not be inferred from an intent to make an unpermitted sexual contact. See *id.* at 1282 n.11 (citing *R.W. v. T.F.*, 510 N.W.2d 231 (Minn. Ct. App. 1994) (two adults)); see also *Aetna Life & Casualty Co. v. Barthelemy*, 33 F.3d 189 (3d Cir. 1994) (molester was a child and victim was an adult).

only underscores the deep incoherence of the *Restatement* definitions.

## V. CONCLUSION

Henderson and Twerski have done the Reporters of *Restatement (Third)* a tremendous service by reminding them and the larger academic community of the role of definitions in the crafting of a *Restatement* (or, for that matter, any serious common law project). It is in the spirit of this larger project that I have suggested that their specific comments on the *Restatement's* Section 1 do not go far enough or serve their ultimate goals. The definition of intent has grown in a haphazard manner throughout the history of the *Restatement* project. While sensitivity to history is one part of the practical craft of *Restatement* writing, so is sensitivity to coherence and a willingness to step back and reevaluate familiar structures. In the past 70 years, the desire prong of the *Restatement's* definition of intent has grown in importance without a clear mandate. In the meantime, recklessness has also become an increasingly important means of expressing society's outrage at a certain form of anti-social conduct. My proposal is that, in the interest of approaching the *Restatement* from a holistic and practical perspective, we should ask whether the belief prong is necessary.

I have argued that the belief prong is unattractive from a conceptual point of view, and that from a practical point of view, most of the cases it covers can be handled either by the desire prong of *Restatement* Section 1 (through transferred intent) or *Restatement* Section 2, which defines recklessness. I recognize that, except for punitive damages, there remains a complex pattern of doctrinal differences between intentional torts and torts resulting from recklessness or conscious indifference. I am not sure yet whether my suggestion—to eliminate the belief prong—counsels a further “harmonization” of doctrinal treatment in statutes of limitations, insurance, bankruptcy, workman's compensation, etcetera, or between Sections 1 and 2 of the *Restatement*. The persistence of the differential treatment of intent and recklessness is itself prima facie evidence that the tort system (that is to say, the judges who apply its rules) recognizes important differences between the states of mind captured by these culpable yet varied categories that exist beyond the borders of negligence. I would take this messy state of affairs as an invitation to look more closely at the acts that we treat differentially under these doctrines and argue that the differences could be made more coherent and explicable if they tracked a distinction

that placed intent (meaning desire) on one side and recklessness (meaning conscious indifference), as well as acting with "substantial certainty," on the other.