SHIFTING SANDS OF FEDERALISM: CIVIL RIGHTS AND TORT CLAIMS IN THE EMPLOYMENT CONTEXT*

*Martha Chamallas***

This Essay discusses a very different kind of tort reform that is occurring largely under the radar screen. It is not the familiar kind of tort reform that imposes a limitation on liability or damages through a specific piece of legislation or a major court decision. Instead, it takes the form of a gradual change that subtly channels cases into state or federal courts and shapes whether litigators frame their clients' cases as violations of state or federal law.

At the outset, I should tell you that I teach in two areas: torts and civil rights law, principally Title VII law. For quite some time, I have been plagued by the fact that I cannot formulate a simple answer to a seemingly simple question: when does discriminatory behavior amount to a tort?

In fact, the connection between tort law—the premier system designed to protect against civil wrongs—and civil rights is an under-theorized topic that surfaces only sporadically—for example, in the debate over hate speech.[1] Non-lawyers may be surprised to learn that proven discrimination on the basis of race and sex does not always amount to a tort and that even persistent racial or sexual harassment may not be enough for tort recovery. Law students, on the other hand, often presume incorrectly that the domains of torts and civil rights are mutually exclusive, in line with the discrete categories assigned to those subjects in the law school curriculum.

So I have set for myself the following project: to map and analyze the degree of overlap between torts and civil rights. I think of the project as investigating the degree to which civil rights principles have migrated into tort law.[2] This Essay addresses one

** Robert J. Lynn Chair in Law, Moritz College of Law, The Ohio State University. I wish to thank Brett Taylor for his valuable research assistance with this Essay.

1. *See, e.g.*, Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 181 (1982); Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 478.

2. For a related discussion of the connection between torts and civil rights

piece of that migration project, focusing on my favorite tort—intentional infliction of mental distress—and claims of sex or race harassment in the workplace. This is the intersection of torts and civil rights, the place where outrage and discrimination meet.

The story starts in the 1970s, when plaintiffs' attorneys wanted to bring their discrimination claims in federal courts under federal law, where presumably the judges were better trained in civil rights principles and the juries were more cosmopolitan. As you are well aware, however, things have changed dramatically. Today, many plaintiffs' attorneys prefer state forums and, perhaps more importantly, plaintiffs very much want to assert and retain state law claims. It is now employers who often seek out federal forums and wish to eliminate state claims for harassment and discrimination.

In cases of workplace harassment, there are typically at least three potential claims: a Title VII claim for discrimination, a state statutory civil rights claim, and a tort claim for intentional infliction of mental distress. From a practical perspective, the advantage of a tort claim to plaintiffs is that it offers the prospect of uncapped compensatory and punitive damages. Particularly in cases in which the plaintiff has not been terminated from her job—and thus cannot assert a constructive discharge claim[3]—recovery for non-economic damages is critical. Since the passage of the 1991 Civil Rights Act, Title VII has allowed compensatory and punitive damages, but the caps on such damages under Title VII are low: the total cap on combined compensatory and punitive damages is set between $50,000 and $300,000, depending on the size of the employer.[4] In contrast, many states impose caps on compensatory damages *only* in medical malpractice actions,[5] and the greater number of states that have caps on punitive damages are generally more liberal than the Title VII caps.[6]

in the context of damages for economic loss, see Martha Chamallas, *Civil Rights in Ordinary Tort Cases: Race, Gender, and the Calculation of Economic Loss*, 38 LOY. L.A. L. REV. 1435 (2005).

3. Under the general law of constructive discharge, a plaintiff may recover for economic loss, including backpay and frontpay, that stems from loss of the job. *See* Martha Chamallas, *Title VII's Midlife Crises: The Case of Constructive Discharge*, 77 S. CAL. L. REV. 307, 315 (2004). To establish constructive discharge, however, the plaintiff must generally prove that the employer had rendered the employee's working conditions so intolerable that a reasonable person would have quit her job. *Id*. at 316.

4. 42 U.S.C. § 1981a(b)(3) (2000).

5. *See* Catherine M. Sharkey, *Unintended Consequences of Medical Malpractice Damage Caps*, 80 N.Y.U. L. REV. 391 app. 1 (2005).

6. Catherine M. Sharkey, *Dissecting Damages*: *An Empirical Exploration of Sexual Harassment Awards*, 3 J. EMPIRICAL LEGAL STUD. 1, 42 (2006).

Indeed, a recent empirical study of sexual harassment cases, conducted by Professor Catherine Sharkey of Columbia Law School, found that the inclusion of state law claims for harassment had the effect of increasing awards for sexual harassment plaintiffs.[7] Sharkey calculated the median award in harassment cases that included a tort claim ($221,263) compared to those without a tort claim ($150,250).[8] After controlling for myriad independent variables that might affect the level of damages (such as whether there was physical contact, evidence of a pattern involving other employees, etc.), she found that including a tort claim increased an award on average by $137,176 in total damages and by $136,021 in what she called outrage damages, i.e., the combination of compensatory and punitive damages.[9] Her study shows why plaintiffs might want to hang onto their tort claims and why defendants might like to keep civil rights principles from migrating into tort law.[10]

Aside from the possibilities of upping a damage award, tort law is attractive to some claimants because of its universal character and its looser formulation of required elements. The influential section 46 of the Second Restatement of Torts required only four elements to prove a claim of intentional infliction: (1) intent or recklessness; (2) extreme and outrageous conduct; (3) causation; and (4) severe mental distress.[11] The latest version of the new Restatement reiterates these four elements and reaffirms that a finding of "outrageousness" is the centerpiece of the intentional infliction claim and does the "most important normative work" in screening cases.[12] In making this threshold determination of outrageousness on a case-by-case basis, courts often consider a variety of factors, including whether the defendant has abused a position of power, the special vulnerability of the plaintiff, and the repeated nature of the defendant's conduct in situations the plaintiff cannot easily avoid.[13] Although it is impossible to capture the breadth of the malleable notion of outrage in tort, Dan Dobbs, in his

7. Sharkey's data set consisted of 232 cases in which plaintiffs won compensatory damages from trial and appellate decisions in both federal and state courts from 1982-2004, published either in official reporters or on Westlaw. *Id*. at 3.

8. *Id*. at 38-39.

9. *Id*. at 39.

10. *Id.* at 44.

11. RESTATEMENT (SECOND) OF TORTS § 46 (1965).

12. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 45 cmt. c, p.10 (Preliminary Draft 2005).

13. DAN B. DOBBS, THE LAW OF TORTS § 304, at 827 (2000) (discussing markers of outrageous conduct).

influential treatise, sums up the caselaw by noting that "[i]n none of these instances are the parties in a position of equality; in each of these instances the defendant uses the inequality to inflict emotional harm without regard for the plaintiff's interests."[14]

In contrast, as Title VII has matured, it has become increasingly complex and rigid. Compared to the universal principles of tort law, Title VII is a status-based or identity-based law, protecting only against discrimination based on certain specified bases.[15] Thus, there are perennial struggles over what constitutes "sex-based" discrimination or what qualifies as discrimination based on race or national origin. Because equally harmful and related forms of discrimination, such as discrimination based on sexual orientation or language are not covered by Title VII, litigators often attempt to shoehorn their claims into one of the protected categories. Additionally, many contemporary forms of bias fall through the cracks of the Title VII categories. There is little space, for example, for same-sex harassment,[16] multi-dimensional discrimination,[17] such as race and class inflected claims, or discrimination against sub-groups.[18] Title VII's focus on the group status of the victim, moreover, makes it difficult to reach bias directed at persons because of how they perform their identity[19] (e.g.,

14. *Id.*

15. 42 U.S.C. § 2000e-2(a)(1) (2000) (listing race, color, religion, sex, and national origin as bases for protection).

16. Although the Supreme Court opened the door for same-sex harassment claims in Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79 (1998), there is still great uncertainty as to how plaintiffs in such cases can establish that their harassment was based on sex. *See, e.g.*, David S. Schwartz, *When Is Sex Because of Sex? The Causation Problem in Sexual Harassment Law*, 150 U. PA. L. REV. 1697, 1793 (2002).

17. Courts often have difficulty dealing with "intersectional" claims where it is impossible to separate the different strands of discrimination, e.g., where an individual experiences distinctive discrimination as a low-income woman of color. *See* Kimberle Crenshaw, *Race, Gender, and Sexual Harassment*, 65 S. CAL. L. REV. 1467, 1472 (1992). *Cf.* Regina Austin, *Employer Abuse, Worker Resistance, and the Tort of Intentional Infliction of Emotional Distress*, 41 STAN. L. REV. 1, 58 (1988) (discussing multi-dimensional discrimination against workers).

18. Early on, the Supreme Court acknowledged that discrimination against subgroups of a protected class is actionable under Title VII. *See* Phillips v. Martin Marietta Corp., 400 U.S. 542, 544 (1971) (rejecting the sex-plus doctrine). However, it is still difficult for plaintiffs to prove discrimination when other members of the protected class are not targeted. *See* Martha Chamallas, *Feminist Constructions of Objectivity: Multiple Perspectives in Sexual and Racial Harassment Litigation*, 1 TEX. J. WOMEN & L. 95, 132 (1992) (discussing employers' use of testimony by non-targeted members of the protected class).

19. Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L.

the effeminate man)[20] or against persons who refuse to cover their identity and resist assimilation[21] (e.g., the African American woman who wears corn rows).[22] Although scholars have called for expanding the meaning of race and sex discrimination to reach such complex claims and complex claimants,[23] for the most part, the federal courts are not buying these arguments.[24]

It is not surprising then that there has been a turn to tort law, where plaintiffs are not required to pinpoint the motivation behind their harassment or mistreatment in order to recover. The availability of tort law could prove particularly important, for example, in a case of same-sex harassment in which one of the forms of abuse consists of forbidding the plaintiff from speaking Spanish in the presence of the harasser.[25] To prevail on a claim for intentional infliction of mental distress, the plaintiff in such a case would be spared from having to establish that the harassment was based on sex or national origin—and thus actionable under Title VII—rather than being based on sexual orientation or language—and thus not covered by the federal law. Instead, the main focus in the tort action would simply be whether the defendant's conduct was outrageous.

Let me pose a descriptive and a normative question about this topic. First, to what extent have courts allowed plaintiffs with workplace harassment claims to bring claims for intentional infliction of mental distress? Second, how much overlap should there be between torts and civil rights law, or put another way, should migration be encouraged or discouraged? Because of the constraints of space, I will be long on description and make only a few brief comments about the difficult policy question.

The short answer to the descriptive question is that there is currently considerable variation among the states. There are basically two approaches: the majority of courts treat the claim of

REV. 1259, 1298 (2000).

20. Mary Ann C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 33 (1995).

21. *See* Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 837 (2002).

22. *See* Paulette M. Caldwell, *A Hair Piece*: *Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365.

23. *See* Kathryn Abrams, *Complex Claimants and Reductive Moral Judgments: New Patterns in the Search for Equality*, 57 U. PITT. L. REV. 337, 361 (1996); Kathryn Abrams, *Title VII and the Complex Female Subject*, 92 MICH. L. REV. 2479, 2540 (1994).

24. Judge v. Marsh, 649 F. Supp. 770, 780 (D.D.C. 1986).

25. *See* Lucerno-Nelson v. Wash. Metro. Area Transit Auth., 1 F. Supp. 2d 1, 4 (D.D.C. 1998) (examining same-sex harassment mixed with language discrimination).

intentional infliction of mental distress as a mere "gap filler" that comes into play only when no other remedy is available;[26] a minority of courts treat it as an independent cause of action that provides mutual reinforcement for civil rights and other important public policies.[27]

Let me explain how this "gap filler" versus "reinforcement of civil rights" debate plays out in the cases. At first blush it might seem that the intentional infliction tort would be well-suited to capture harassment and other discriminatory harms. It dispenses with the need to prove physical harm or fear of physical harm, and it goes beyond cases of malice and ill will under the broad "intent" standard in tort law.[28] Equally as important, the intentional infliction tort seems tailor-made to respond to an abusive course of conduct over a period of time, rather than simply to a discrete act. In this sense, it is a tort uniquely capable of comprehending the kind of pervasive and repeated harassment that characterizes a hostile workplace environment.

Despite these features, however, in most jurisdictions proof of discriminatory workplace harassment—the kind of discrimination that looks most like a tort—is not sufficient to guarantee tort recovery. For the most part, courts do not equate discrimination with outrageous conduct.[29] With the notable exception of California,[30] courts have refused to classify discrimination as per se outrageous conduct and have even hesitated to declare the "severe

26. *See infra* note 33.

27. *See infra* note 61.

28. To establish intent, a tort plaintiff need only prove that the tortfeasor acted either with the purpose of producing the consequence or with knowledge that the consequence was substantially certain to result. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 1 (Proposed Final Draft 2005). Additionally, courts have allowed intentional infliction claims to proceed when the defendant's state of mind was merely reckless. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 45 cmt. f (Preliminary Draft 2005).

29. *See infra* note 33.

30. Intermediate appellate courts in California have taken the position that harassment that violates the state's antidiscrimination laws is per se outrageous and gives rise to a tort action for intentional infliction of emotional distress. *See* Toran v. Jones, No. H025568, 2003 Cal. App. Unpub. LEXIS 4887, at *15-16 (Ct. App. May 19, 2003) (finding discrimination based on disability and denial of medical leave is per se outrageous); Kovatch v. Cal. Casualty Mgmt. Co., 77 Cal. Rptr. 2d 217, 230-31 (Ct. App. 1998) (holding that harassment based on sexual orientation is per se outrageous); Fisher v. San Pedro Peninsula Hosp., 262 Cal. Rptr. 842, 858 (Ct. App. 1989) ("Given an employee's fundamental, civil right to a discrimination free work environment . . . by its very nature, sexual harassment in the work place is outrageous conduct as it exceeds all bounds of decency usually tolerated by a decent society.").

or pervasive" harassment required to prove a Title VII claim of hostile environment[31] as sufficient to meet the threshold tort requirement of "extreme and outrageous" conduct. The bar of outrageousness is occasionally set so high that even the plaintiff who succeeds in proving a constructive discharge, with evidence that working conditions were so "intolerable" that a reasonable person would have quit the job, may not be confident of recovery in tort.[32]

A fairly typical case is *Pucci v. USAIR*,[33] a sexual harassment case decided by a federal district court in Florida after removal from state court on diversity grounds. Valerie Pucci was the only woman employed on her shift at the airline's maintenance department in Orlando.[34] At an initial meeting with her supervisor, Pucci was warned that she would be exposed to profanity because "USAIR's employees did not know how to act around female coworkers."[35] For approximately ten months, she was subjected to a persistent campaign of harassment by her male co-workers.[36] Much of the harassment consisted of repeatedly placing pornographic pictures on and inside her desk in her absence, even though her work area was just outside the supervisor's office.[37] The court's opinion recites five such incidents.[38] After each incident, plaintiff complained to a supervisor, but nothing was ever done to discover or punish those

31. In hostile environment cases, harassment plaintiffs generally must prove that the conduct complained of was (1) unwelcome, (2) severe or pervasive, and (3) based on sex or some other prohibited basis, while also demonstrating a basis for imposing employer responsibility for the acts of supervisors or co-workers. *See* Burlington Indus. v. Ellerth, 524 U.S. 742, 747-54 (1998).

32. *See* Wilson v. Monarch Paper Co., 939 F.2d 1138, 1143 (5th Cir. 1991) (indicating in dicta that constructive discharge should be regarded as "outrageous" conduct only in "the *most* unusual cases").

33. 940 F. Supp. 305 (M.D. Fla. 1996). Courts in Ohio, Pennsylvania, Texas, Oklahoma, Arkansas, Kansas, Maryland, and Michigan also apply a very strict standard which bars most intentional infliction claims in the employment context. *See* Hartleip v. McNeilab, Inc., 83 F.3d 767, 777 (6th Cir. 1996) (applying Michigan law); Greenwood v. Delphi Auto. Sys., Inc., 257 F. Supp. 2d 1047, 1073-74 (S.D. Ohio 2003); Arabi v. Fred Meyers, Inc., 205 F. Supp. 2d 462, 466 (D. Md. 2002); Holloman v. Keadle, 931 S.W.2d 413, 416 (Ark. 1996); Aaron v. Werne, No. 65,060, 1991 Kan. LEXIS 57, at *9-11 (Kan. Mar. 1, 1991); Miner v. Mid-Am. Door Co., 68 P.3d 212, 223 (Okla. Civ. App. 2002); Hoy v. Angelone, 720 A.2d 745, 754 (Pa. 1998); Hoffmann-La Roche Inc. v. Zeltwanger, 144 S.W.3d 438, 447 (Tex. 2004).

34. *Pucci*, 940 F. Supp. at 307.

35. *Id.*

36. *Id.* at 307-08.

37. *Id.* at 307.

38. *Id*. at 307-08.

responsible.[39] Instead, Pucci was told by USAIR's manager that she was to blame and that she had been told to expect "industrial language" when working with a group of men.[40] At times, the harassment took a more personal turn: for example, Pucci found obscene notes tacked onto the attendance board referring specifically to her and her anatomy.[41]

To cut down on the barrage of pornography, she was moved into a secured office, which was kept locked when not in use and which Pucci described as a "cage and not an office."[42] Her stress reached a point where she finally sought medical treatment for anxiety and depression and was admitted to the hospital on an outpatient basis.[43] Pucci even feared that her co-workers would attack or stalk her and claimed that her fear caused her to fall down the stairs one day when leaving work.[44] Ultimately, her request to transfer out of Orlando was granted, a move she claimed was disruptive for her marriage and children.[45]

In many respects, *Pucci* is a classic case of hostile environment sexual harassment. There was no dispute that she was targeted for harassment because she was the only woman working on her male-dominated shift.[46] Her harassment was persistent, sexualized, and calculated to make her feel ostracized and humiliated.[47] When she complained to management, the problem was not corrected, but in fact was made worse by the belief that harassment was something that she should endure as part of the job.[48] Lastly, the harassment caused her a variety of damages, including medical bills, mental distress, and employment-related expenses.[49]

It is telling that Pucci's complaint of intentional infliction of mental distress did not even survive a motion to dismiss.[50] For the Florida trial court, the distinction between discriminatory harassment and outrageous conduct was so great that it had little

39. *Id.*

40. *Id*. at 308.

41. Pucci found a note on the attendance board stating that a co-worker was "Sick—Due to lack of blow jobs from Valerie" and a homemade card placed on her desk stating, "Val's Weight Soars to 200 Lbs." She recounted that she overhead one employee telling another that he had been sent in to see her and joked, "What are we suppose to do? Stick her then lick her?" *Id*. at 307-08.

42. *Id*. at 307.

43. *Id.* at 308.

44. *Id.*

45. *Id*.

46. *Id.* at 307.

47. *Id.* at 307-08.

48. *Id.* at 308.

49. *Id.*

50. *Id.* at 309.

difficulty reciting the boilerplate limitations on recovery for intentional infliction and moving on to the next issue in the case.[51] The court simply concluded that, although the conduct directed at Pucci was "not civilized behavior," her harassment was not "so extreme in degree, as to go beyond all possible bounds of decency" and presumably fell into the nonactionable realm of "mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities."[52]

It should be pointed out that the court never reached the issue of vicarious liability of USAIR for the acts of the harassers in this case.[53] Instead, by knocking out the case for failure to prove outrageous conduct, the court implied that even if Pucci had known the identity of her harassers and had sued them individually, she still would have lost the case.[54] As a practical matter, this point is important when analyzing the intersection of tort and civil rights because individual supervisors and co-workers generally may not be sued under Title VII[55] or under many of the parallel state civil rights acts.[56] However, no such restriction exists under tort law which prohibits suits against both individual actors and employers. Thus, the tort claim is often the only way to pursue a claim against the harasser individually and, if defeated for lack of proof of outrageousness, employees may have no other legal recourse against individual harassers.

51. *Id.*

52. *Id*.

53. *Id*. Whether an employer will likely be held vicariously liable for harassment by a supervisor in a tort action for intentional infliction also depends on the jurisdiction. Some courts apply a liberal standard and impose liability where the acts complained of took place on the job and resulted from or were an outgrowth of employment duties. *See* Harris v. Pameco Corp., 12 P.3d 524, 530 (Or. Ct. App. 2000). Other courts apply a restrictive standard, refusing to impose vicarious liability if the supervisor was acting for purely personal reasons disconnected from the employer's business. *See* Travis Pruitt & Assocs. v. Hooper, 625 S.E.2d 445, 448 (Ga. Ct. App. 2005). The liberal standard focuses on the overall context of the supervisor's action, while the restrictive standard places emphasis on the supervisor's motivation.

54. *Pucci*, 940 F. Supp. at 309.

55. *See, e.g.*, Lissau v. S. Food Servs., Inc., 159 F.3d 177, 180 (4th Cir. 1998) (holding individual employees are not liable under Title VII); a*ccord* Huckabay v. Moore, 142 F.3d 233, 241 (5th Cir. 1998); Cross v. Alabama, 49 F.3d 1490, 1504 (11th Cir. 1995); Tomka v. Seiler Corp., 66 F.3d 1295, 1313 (2d Cir. 1995); Miller v. Maxwell's Int'l Inc., 991 F.2d 583, 587 (9th Cir. 1993). *But see* Wyss v. Gen. Dynamics Corp., 24 F. Supp. 2d 202, 204 (D.R.I. 1998) (holding individual supervisors liable under Title VII and Rhode Island fair employment statute).

56. *See, e.g.*, Reno v. Baird, 957 P.2d 1333, 1335-36 (Cal. 1998) (finding supervisor may not be sued individually for discrimination under state fair employment and housing act).

As *Pucci* illustrates, for many courts, something more than discrimination or even persistent harassment is needed to establish outrageousness in the employment context. To date, however, most courts have been unable to articulate precisely what constitutes that extra element.[57] For example, the Pennsylvania Supreme Court rejected a lower court's view that a showing of retaliation, in addition to proof of discrimination or harassment, was a prerequisite to establishing the outrageousness of an employer's conduct.[58] Although the Pennsylvania Supreme Court was willing to impose liability only for "the most clearly desperate and ultra extreme conduct"[59] and thus took an extremely narrow view of the intentional infliction tort, it still clung to a holistic approach, judging each case on its particular facts.[60] Not surprisingly, decisions in this area often lack analysis: similar to *Pucci*, courts tend to recite the facts of the instant case, indicate that recovery was denied in other cases of bad conduct, and rule that the conduct in the instant case does not meet the demanding standard for outrageousness.

A very different portrait of the intersection of torts and civil rights comes from a minority of jurisdictions which allow intentional infliction claims to proceed in cases not markedly different from the *Pucci* sexual harassment case. A good example is *Coates v. Wal-Mart Stores, Inc.*,[61] a sexual harassment case decided by the

57. Some courts, while acknowledging that each claim must be decided "on its own merits," have listed aggravating factors that have generally been present in outrageous cases of harassment. *See* Guthrie v. Conroy, 152 N.C. App. 15, 22-23, 567 S.E.2d 403, 409 (2002) (listing as indicia of outrageousness: (1) unfair power relationship between defendant and plaintiff; (2) explicitly obscene or "X rated" language; (3) sexual advances toward the plaintiff; (4) statements expressing sexual desire to engage in sexual relations with plaintiff; and (5) defendant touching plaintiff's private areas or touching any part of the plaintiff's body with his private parts).

58. *See* Hoy v. Angelone, 720 A.2d 745, 754 (Pa. 1998).

59. *Id*.

60. *Id.* at 754-55.

61. 976 P.2d 999 (N.M. 1999). Courts in Alaska, North Dakota, Tennessee, New Jersey, Washington, Oregon, Utah, Wyoming and the District of Columbia have also taken a more liberal approach to the intentional infliction tort in the employment context. *See* Pollard v. E.I. Dupont De Nemours, Inc., 412 F.3d 657, 664-65 (6th Cir. 2005) (applying Tennessee law); Wal-Mart, Inc. v. Stewart, 990 P.2d 626, 634-36 (Alaska 1999); Underwood v. Nat'l Credit Union Admin., 665 A.2d 621, 640 (D.C. 1995); Taylor v. Metzger, 706 A.2d 685, 700 (N.J. 1998); Swenson v. N. Crop Ins., Inc., 498 N.W.2d 174, 181-86 (N.D. 1993); Harris v. Pameco Corp., 12 P.3d 524, 529 (Or. Ct. App. 2000); Retherford v. AT & T Commc'ns of the Mountain States, Inc., 844 P.2d 949, 978 (Utah 1992); Robel v. Roundup Corp., 59 P.3d 611, 621 (Wash. 2002); Kanzler v. Renner, 937 P.2d 1337, 1345 (Wyo. 1997).

Supreme Court of New Mexico in 1999. The harasser in that case was a supervisor at Sam's Club who persistently targeted female employees, including the two plaintiffs in the case, while management stood by and did nothing.[62] In addition to complaining about the supervisor's obscene gestures and "lewd and vulgar" suggestions, the plaintiffs in *Coates* also pointed to two incidents of physical harassment in which the supervisor grabbed the breasts of one of the plaintiffs and pulled open the blouse of another female employee.[63] Wal-Mart managers observed some of this behavior, yet did not reprimand or discipline the offending supervisor and, at one point, told one of the plaintiffs that she could quit if she did not like their decisions.[64]

The state trial court allowed the intentional infliction claim and another state law claim to proceed against Wal-Mart.[65] The jury was apparently of the view that defendant's conduct was indeed outrageous, as evidenced by the size of the verdict for each of the two plaintiffs, particularly the portion for punitive damages (one plaintiff received $1.2 million, the other $555,000).[66] In marked contrast to the Florida court, the New Mexico Supreme Court upheld the judgment, using the same Restatement framework of liability for intentional infliction of mental distress.[67] Rather than drawing a contrast between discrimination and outrageous conduct, however, the New Mexico Supreme Court stressed the compatibility between civil rights and tort law, declaring that "[a]llowing a worker subjected to sexual harassment to seek civil damages 'not only vindicates the state's interest in enforcing public policy but also adequately redresses the harm to the individual naturally flowing from the violation of public policy.'"[68]

There are ways, of course, to distinguish *Pucci* and *Coates*. The supervisor in *Coates* committed a battery against one of the plaintiffs and physically assaulted another women employee, while the harassment in *Pucci* was solely of the nonphysical variety, i.e., humiliating comments and the use of pornography. Nevertheless, the New Mexico Supreme Court in *Coates* also upheld the jury's verdict in favor of one of the female employees who did not suffer any physical harassment and stressed that all incidents should be

62. *Coates*, 976 P.2d at 1002.
63. *Id*.
64. *Id.* at 1002-03.
65. *Id.* at 1003.
66. *Id.*
67. *Id.* at 1009-10.
68. *Id*. at 1005 (quoting Michaels v. Anglo Am. Auto Auctions, Inc., 869 P.2d 279, 281 (N.M. 1994)).

viewed "cumulatively" under the intentional infliction tort.[69] Significantly, the plaintiff in *Coates* who was physically harassed did not assert a claim for battery and did not otherwise emphasize the physical aspect of her harassment.[70] While undoubtedly each incident in *Coates*, including the two incidents of physical harassment, were important in proving the persistent and serious nature of the harassment, it was also very important that the harassment lasted for approximately a year and that Wal-Mart's management was callously indifferent to plaintiffs' plights.[71] In these last two respects, *Coates* and *Pucci* are quite similar. Finally, it is not irrational to regard the harassment in *Pucci* as even more damaging than that endured by the Wal-Mart employees in *Coates*: at least the women at Wal-Mart were able to band together to resist their harassment, while Pucci's status as the only woman on her shift increased her isolation and arguably worsened her predicament.

As I read the cases, the widely disparate results in *Coates* and *Pucci* cannot be explained simply by a judgment that the harassment in *Coates* was worse than that in *Pucci.* Instead, it appears that the courts in the two cases used two different approaches to the intentional infliction tort, although each purported to adhere to the Restatement elements. The Florida court approached the intentional infliction tort as a "gap filler," to be used sparingly in the employment context, presumably only in exceptional cases of harassment or discrimination that stand apart from the typical civil rights case.[72] In contrast, the New Mexico court approached the intentional infliction tort on more equal grounds: it viewed the claim as reinforcement of the state's public policy against discrimination and harassment and was willing to shape the tort concept of outrageousness along the lines of anti-discrimination law.[73] In other words, migration from civil rights to torts was encouraged in New Mexico and strongly discouraged in Florida.

The debate over the role of the intentional infliction tort has also been played out even more explicitly in cases raising preemption challenges. The essence of a claim of preemption, after all, is that there can be no overlap between the two domains of law. Thus, proponents of preemption assert that the intentional infliction

69. *Id.* at 1009.

70. *Id.* at 1003 (asserting only claims of negligent supervision and intentional infliction of emotional distress).

71. *Id.* at 1009.

72. Pucci v. USAIR, 940 F. Supp. 305, 309 (M.D. Fla. 1996).

73. *Coates*, 976 P.2d at 1005.

tort may only fill gaps when it come to civil rights claims, while opponents of preemption leave more room for overlap and migration from civil rights. The two general approaches described above resurface in the preemption cases dealing with harassment claims in the workplace, although resolution of preemption challenges often require courts to grapple with issues of statutory interpretation beyond simply deciding the proper role of the intentional infliction tort. Those courts denying preemption stress the state's strong public policy against discrimination and encourage the policy's reinforcement through tort law, while those upholding preemption strive to make sure that tort law does not duplicate or encroach upon other legal domains.

Title VII itself contains an express provision indicating that it does not preempt state law claims.[74] As a result, in workplace torts, preemption challenges have generally been made on one of two bases:[75] either that the tort claim is preempted by the state civil rights statute or that the tort claim is barred by the exclusivity provision of the state workers' compensation statute. The former theory is consistent with the view that the intentional infliction tort is only a gap filler and should disappear whenever a state statutory claim for civil rights violation is available. In fact, it is often difficult to tell whether this ground for precluding the intentional infliction claim lies in the gap filling nature of the tort itself or is based on preemption, i.e., the determination that the state legislature intended the civil rights remedy to be exclusive. For example, the Texas Supreme Court recently held that the claim for intentional infliction could not be brought "[i]f the gravamen of a plaintiff's complaint is the type of wrong that the statutory [civil rights] remedy was meant to cover."[76] The holding of the Texas Supreme Court sounds like the claim is preempted by the civil rights statute and indeed subsequent courts have used the language of preemption in applying the Texas rule.[77] However, a concurring justice on the Texas Supreme Court insisted that the rule was "not based on the exclusive or preemptive nature of another remedy but

74. *See* 28 U.S.C. § 2000e-7 (2000).

75. In organized workplaces, courts may also have to determine whether a tort claim is preempted by § 301(a) of the Labor Management Relations (Taft-Hartley) Act. *See, e.g.*, Retherford v. AT & T Commc'ns of the Mountain States, Inc., 844 P.2d 949, 971-92 (Utah 1992) (holding tort claim preempted unless it is purely personal and does not implicate supervisory authority).

76. Hoffmann-La Roche Inc. v. Zeltwanger, 144 S.W.3d 438, 448 (Tex. 2004).

77. Garza v. Univision, No. Civ.A. 3:04CV1905-K, 2005 WL 1107374, at *3 (N.D. Tex. May 6, 2005) (finding intentional infliction claim preempted because it was based on same facts that support Title VII claim).

on the nature of the IIED tort itself."[78] The subtle difference here is that a preemption analysis focuses more on the intent of the legislature when passing the civil rights act and on the actual existence of an alternative statutory remedy, whereas in the gap filling view of the intentional infliction tort, the court disallows the tort claim because of its view that intentional infliction tort should be restricted to unusual cases that do not fit comfortably under other recognized theories of redress.

So far, only a handful of courts have held that the intentional infliction claim is preempted by state civil rights acts.[79] More courts reject preemption on this ground, ruling that the state civil rights legislation was designed to increase remedies for victims of discrimination and is not inconsistent with allowing common law claims.[80]

The other quite distinct preemption challenge is based on state workers' compensation statutes that bar plaintiffs from suing employers in tort. In these cases, employers argue that tort claims based on sexual harassment cannot be brought because the employee's sole remedy is to receive compensation under the prevailing state workers' compensation scheme. In this genre of preemption challenges, the contest is not between tort and civil rights, but rather between tort and workers' compensation. The discussion of civil rights laws and the policies animating them comes up only indirectly as the courts grapple with whether victims of sexual harassment would be ill-served by channeling their claims into the workers' compensation system, well-known for its ungenerous awards and designed principally to respond to industrial accidents and occupational disease. Amidst technical discussions of whether the sexual harassment "arises out of" and is "in the course of" employment or falls within one of the enumerated exceptions to workers' compensation coverage, courts are also called

78. *Hoffmann-La Roche*, 144 S.W.3d at 451 (Hecht, J., concurring).

79. *See* Quantock v. Shared Mktg. Servs., Inc., 312 F.3d 899, 905 (7th Cir. 2002) (applying Illinois law); Greenland v. Fairtron Corp., 500 N.W.2d 36, 38 (Iowa 1993). *See also* Wilson v. Lowe's Home Ctr., 75 S.W.3d 229, 239 (Ky. Ct. App. 2001) (holding claim against employer preempted, but claim against individual supervisor not preempted); Arthur v. Pierre Ltd., 100 P.3d 987, 994 (Mont. 2004).

80. *See* Burns v. Mayer, 175 F. Supp. 2d 1259, 1267-68 (D. Nev. 2001); Funk v. F & K Supply, Inc., 43 F. Supp. 2d 205, 218 (N.D.N.Y. 1999); Cronin v. Sheldon, 991 P.2d 231, 241 (Ariz. 1999); Rojo v. Kliger, 276 Cal. Rptr. 130, 140 (Sup. Ct. 1990); Helmick v. Cincinnati Word Processing, Inc., 543 N.E.2d 1212, 1216 (Ohio 1989); *Retherford*, 844 P.2d at 967. *See also Wilson*, 75 S.W.3d at 232 (holding a plaintiff may *elect* whether to proceed under tort or civil rights against individual harasser).

upon to decide whether preserving a tort claim for harassment and discrimination serves an important state interest. On this point, the workers' compensation preemption decisions have tended to reiterate the "gap filler" versus "reinforcement of civil rights" debate discussed above and have produced sharp splits in the jurisdictions.

Some of the strongest statements in favor of allowing civil rights principles to migrate into tort law have come in the workers' compensation preemption cases.[81] A leading decision from the Supreme Court of Florida in 1989, for example, took a broad view of that state's commitment to eradicating sexual harassment, declaring that the state's workers' compensation scheme did bar tort actions based on harassment and insisting that "[p]ublic policy now requires that employers be held accountable in tort for the sexually harassing environments they permit to exist, whether the tort claim is premised on a remedial statute or on the common law."[82] Similar sentiments about the importance of allowing "cumulative remedies" for harassment victims to reinforce the "strong public policies" against sexual harassment have been echoed more recently by the Supreme Court of Colorado in a same-sex harassment case alleging intentional infliction and other tort claims against an employer.[83] For these states, preservation of a tort remedy serves to vindicate the "intangible injury to personal rights" caused by harassment which "robs the person of dignity and self esteem."[84]

The states that have barred tort claims for harassment in favor of state workers' compensation coverage do not deny a public policy against harassment, but instead feel comforted by the fact that harassment victims can sue under state and federal civil rights acts.[85] These courts see no pressing need for a common law tort

81. *See* Ford v. Revlon, Inc., 734 P.2d 580, 589-91 (Ariz. 1987) (Feldman, J., concurring); Horodyskyj v. Karanian, 32 P.3d 470, 479 (Colo. 2001); Byrd v. Richardson-Greenshields Sec., Inc., 552 So. 2d 1099, 1103-04 (Fla. 1989); Coates v. Wal-Mart Stores, Inc., 976 P.2d 999, 1006 (N.M. 1999); Kerans v. Porter Paint Co., 575 N.E.2d 428, 431 (Ohio 1991). *See also* Busby v. Truswal Sys. Corp., 551 So. 2d 322, 325 (Ala. 1989) (holding that claim for intentional infliction was not barred by workers' compensation exclusivity provision); *accord* Hogan v. Forsyth Country Club Co., 79 N.C. App. 483, 489, 340 S.E.2d 116, 120 (1986); Anderson v. Save-a-Lot, Ltd., 989 S.W.2d 277, 288-89 (Tenn. 1999); Middlekauff v. Allstate Ins. Co., 439 S.E.2d 394, 396-97 (Va. 1994).

82. *Byrd*, 552 So. 2d at 1104.

83. *Horodyskyj*, 32 P.3d at 479.

84. *Byrd*, 552 So. 2d at 1104.

85. *See* Hardebeck v. Warner Jenkinson Co., Inc., 108 F. Supp. 2d 1062, 1064-65 (E.D. Mo. 2000); Konstantopoulos v. Westvaco Corp., 690 A.2d 936, 940 (Del. 1996); Gordan v. Cummings, 756 A.2d 942, 945 (Me. 2000); Green v. Wyman-Gordon Co., 664 N.E.2d 808, 813 (Mass. 1996); Fernandez v. Ramsey County, 495 N.W.2d 859, 862 (Minn. Ct. App. 1993); Nassa v. Hook-SupeRx,

claim, even if the workers' compensation remedy is inadequate or ill-designed to address intangible injuries like harassment.[86] In their view, as long as harassment is addressed by civil rights statutes, the state's public policy is vindicated and needs no reinforcement through the common law.

Only a minority of states bar intentional infliction claims on either preemption basis.[87] When added to states like Florida,[88] which, while not preempting claims, impose a high bar of proof of outrageousness, the "gap filler" approach clearly wins out. It would be inaccurate, however, to report that there is a clear trend. The law in this area is still quite a mess.

Finally, it should be noted that even if plaintiffs succeed in asserting a state tort claim for intentional infliction based on workplace harassment, they still may not be able to keep the case in a state court in all circumstances. Because employers have the right to remove the case to federal court on federal question grounds if the plaintiff also asserts a Title VII claim,[89] to preserve a state forum, a plaintiff must be willing to give up the federal claim.[90] Additionally, even cases involving only state claims may be removed if there is at least $75,000 in controversy and complete diversity of citizenship between the parties.[91] Thus, if a corporate defendant is incorporated or has its principal place of business in a state other than the state of the plaintiff's domicile, it has the option to remove to federal court.[92] To defeat complete diversity and prevent removal, a plaintiff may decide to press intentional infliction claims against individual supervisors who are more likely to live in the same state as the plaintiff.[93]

With respect to the normative question of which approach states

Inc., 790 A.2d 368, 373-74 (R.I. 2002); Jenson v. Employers Mut. Cas. Co., 468 N.W.2d 1, 10 (Wis. 1991); *see also* Dickert v. Metro. Life Ins. Co., 428 S.E.2d 700, 701-02 (S.C. 1993) (holding that workers' compensation statute bars tort claims against employer but not against supervisory employee).

86. *See* cases cited *supra* note 85.

87. *See* cases cited *supra* notes 79 and 85 (listing twelve states).

88. *See* cases cited *supra* note 33.

89. *See* 28 U.S.C. § 1441(c) (2000).

90. *See* Caterpillar Inc. v. Williams, 482 U.S. 386, 392 (1987) (holding a plaintiff can avoid federal jurisdiction by exclusive reliance on state claim); Ethridge v. Harbor House Rest., 861 F.2d 1389, 1395 (9th Cir. 1988) (finding a plaintiff can avoid removal by relying exclusively on state law claim).

91. *See* 28 U.S.C. § 1332(a) (2000); 28 U.S.C. § 1441(b) (2000).

92. 28 U.S.C. § 1332(c)(1) (2000).

93. *See* Hawkins v. Bon Appetit Mgmt. Co., No. CV-01-1152-ST, 2001 U.S. Dist. LEXIS 22192, at *5, *10-19 (D. Or. Oct. 22, 2001) (remanding case to state court because joinder of individual supervisor was not fraudulent and defeated complete diversity).

should adopt, I wish to make three quick points. First, I do not believe that a choice can be made simply by looking at the respective domains of torts and civil rights and deciding which is the better "fit" for harassment claims. Second, I do not believe that characterizing the intentional infliction tort as a "gap filler" is enough to decide the migration issue. Finally, I believe that courts cannot escape deciding the important policy question of whether tort law should be used to reinforce social norms against discrimination and harassment, much like it is used to reinforce norms against violence and fraud.

First, the "domain" issue. The two contrasting positions on the intentional infliction tort seem to be linked to judgments about the respective domains of torts and civil rights and the proper location for a claim of harassment. Whether the court permits an intentional infliction claim thus may hinge on a question of categorization: is it by nature a tort claim or a civil rights claim?

The problem with framing the question this way, however, is that harassment does not fit particularly well under either torts or civil rights and is, in some respects, an interloper in both domains. Despite its prevalence, harassment is neither the prototypical tort nor the prototypical Title VII claim. Because the concept of "sexual harassment" was developed through Title VII litigation, it is widely regarded as a civil rights violation. However, within Title VII law, harassment is a disfavored cause of action,[94] primarily because it departs from the prototypical form of discrimination: namely, discrete employment decisions, such as hiring and firing decisions, which cause direct economic harm. When it comes to tort law, moreover, intentional infliction harassment claims are also marginalized, principally because they do not resemble the classic personal injury. As the recent Restatement of Torts has made clear, it is claims of physical injury—rather than claims for emotional or economic loss—that are situated at the core of tort law.[95]

This lack of a perfect fit for claims of workplace harassment in either civil rights or tort law reflects the multi-faceted quality of the harm; harassment has both a group-based and an individual aspect,

94. *See* Chamallas, *supra* note 3, at 355-56 (discussing special requirements and onerous burdens of proof attached to Title VII sexual harassment actions).

95. In fact, the latest Restatement project is called "Restatement of the Law: Torts: Liability for Physical Harm" to underscore its central focus on physical harms, rather than emotional distress or economic loss. Interestingly, however, the project includes revisions of key sections relating to emotional disturbance. For a critique of the new Restatement's structure, see Martha Chamallas, *Removing Emotional Harm from the Core of Tort Law,* 54 VAND. L. REV. 751, 765 (2001).

and it cannot be pinned down as solely psychological, economic, or physical in nature. As the quick description of the *Pucci* case demonstrates,[96] harassment often produces indirect physical harms and economic consequences, as well as psychological effects. Additionally, the group-based nature of the harm, similar to that of hate crimes,[97] has been described variously by scholars as a citizenship harm,[98] a harm of subordination,[99] or a harm to identity.[100] Each of these descriptions tries to capture the idea that, although harassment can only be fully understood in relation to the status and social meaning attached to the targeted group, ultimately the harm is visited on individuals and inevitably experienced by individuals differently. Because harassment, by its nature, is neither fish nor fowl, a court could logically determine that harassment does not fit in either civil rights or torts, or it could decide that it fits into both, depending on its viewpoint. The issue of assigning a proper domain to the harassment claim is one of policy, not principle.

Second, a word about "gap fillers." By torts standards, the intentional infliction tort is a relatively new tort designed originally by William Prosser and other academics in the late 1940s.[101] In this formative period, the intentional infliction tort was viewed as filling an important gap or deficiency *within* tort law to provide a remedy for serious, nonphysical injury caused by behavior that seemed unquestionably immoral to judges.[102] There was a felt need to create a new tort because the older torts—such as battery, assault, and slander—did not capture some of the worst forms of intentional behavior.[103] Perhaps even more so than the older, particularized

96. *See supra* text accompanying notes 33-52.

97. *See* Lu-in Wang, *The Transforming Power of "Hate": Social Cognition Theory and the Harms of Bias-Related Crime*, 71 S. CAL. L. REV. 47, 49-50 (1997).

98. *See* R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803, 930 (2004).

99. CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 172-73 (1979).

100. Martha Chamallas, *Lucky: The Sequel*, 80 IND. L.J. 441, 467-71 (2005) (discussing harm to identity from trauma of rape).

101. The key foundational articles were Calvert Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033, 1067 (1936); William L. Prosser, *Insult and Outrage*, 44 CAL. L. REV. 40, 40 (1956); William L. Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874, 892 (1939) [hereinafter Prosser, *Intentional Infliction*].

102. *See* Prosser*, Intentional Infliction*, *supra* note 101, at 874, 892.

103. While championing the new claim, Prosser cautioned that the intentional infliction tort would likely be used only in serious cases of a "real wrong entitled to redress." *Id.* at 887.

intentional torts, the new tort performed a normative function, singling out morally objectionable conduct that served no socially useful purpose as the proper subject of tort liability.[104] As one leading commentator on the subject has stated, when a court declares that a recurring type of conduct is "outrageous" it is making an "official determination of the moral seriousness of that conduct."[105] Beyond its moral character, the intentional infliction tort was also designed to be a flexible claim whose scope could easily change as cultural understandings of outrageous conduct shifted and evolved.[106]

Tellingly, when the tort was developed, there was no discussion of exempting certain behavior because it was already penalized by some other body of law, such as criminal or regulatory law. Instead, the "gap filler" description of the intentional infliction tort seems to have arisen in response to concerns that the malleable modern tort could theoretically usurp or take over particularized causes of action, such as libel or battery, which protected interests other than the interest in emotional tranquility. Calling the intentional infliction tort a "gap filler" thus only begs the question of whether there is a gap in tort law that should be filled.

There is little doubt that, if they could not sue for intentional infliction, many harassment victims would be left without a tort remedy. Although some forms of sexual harassment include offensive touchings and are actionable in tort as batteries, many other cases of harassment involve either no physical contact or physical contacts that the defendant asserts were not intentionally offensive or harmful. Similarly, the torts of assault and slander are too narrow in scope and provide only spotty protection against harassment. Before recognition of the tort of intentional infliction of mental distress, the dignitary interests protected by tort law were highly gendered along traditional lines. The torts of assault and slander, for example, were best suited to securing older conceptions of male honor and female chastity, rather than the newer conception of female autonomy characteristic of contemporary claims of workplace harassment.[107] Thus, the tort of assault affords recovery

104. *Id.* at 889.

105. *See* Daniel Givelber, *The Right to Minimum Social Decency and the Limits of Evenhandedness: Intentional Infliction of Emotional Distress by Outrageous Conduct*, 82 COLUM. L. REV. 42, 53 (1982).

106. Prosser, *Intentional Infliction*, *supra* note 101, at 887-89.

107. Indeed, it was the perceived inadequacy of tort law to protect against sexually harassing behavior that first led Catharine MacKinnon to propose a civil rights remedy in the early days of the anti-sexual harassment campaign. *See* MACKINNON, *supra* note 99, at 171-73 (1979). Her concerns that tort law would be unable to appreciate and respond to the inequality dimension of

only for physically threatening conduct and was originally designed to reduce the incentive for retaliation and escalation of physical violence.[108] To warrant recovery, the physical harm threatened must be imminent, and it was sometimes said that words alone do not constitute an assault.[109] These limitations have meant that a claim for assault is generally unavailable in contexts, such as the workplace, where it is perceived that targets would be unlikely to fight back and would respond passively by internalizing the pain. Most notably, "mere" solicitation to have sex was not generally regarded as actionable, no matter how insulting, offensive, or threatening to the target.[110]

Likewise, the tort of slander has so far proved incapable of responding to the harms of harassment. Traditionally, slander actions were designed to provide redress for damage to reputation, including sexual reputation, and often centered on a female plaintiff's reputation for chastity.[111] In the nineteenth and early twentieth century, female plaintiffs often prevailed in defamation suits when they alleged that defendants made false statements impugning their reputation for sexual propriety.[112] Many courts even adopted the view that such claims amounted to slander per se and dispensed with the need to prove special damages.[113] However, when the locus of slander suits changed from the private sphere to the more public sphere of work, women had far less success convincing courts that the kind of sexual slurs and taunts that characterize a hostile working environment amounted to actionable defamation.[114] According to Professor Lisa Pruitt's extensive history of defamation cases,[115] contemporary courts are now apt to deny

harassment have been echoed by contemporary feminists. *See* Ann Scales, *Nooky Nation: On Tort Law and Other Arguments from Nature, in* DIRECTIONS IN SEXUAL HARASSMENT LAW 307, 315 (Catharine A. MacKinnon & Reva B. Siegel eds., 2004).

108. Johnson v. Sampson, 208 N.W. 814, 815 (Minn. 1926).

109. *Id.* at 815. *See also* Prince v. Ridge, 66 N.Y.S. 454 (Sup. Ct. 1900) (holding that solicitation to have sex not an assault because of "mere words" doctrine).

110. *See* Reed v. Maley, 74 S.W. 1079, 1082 (Ky. Ct. App. 1903); *Prince*, 66 N.Y.S. at 455.

111. Lisa R. Pruitt, *Her Own Good Name: Two Centuries of Talk About Chasity*, 63 MD. L. REV. 401, 419-31 (2004).

112. *Id*. at 431-45.

113. Most U.S. jurisdictions have considered statements that impugn a woman's chastity to be slander per se. *See* Lisa Pruitt, *"On the Chastity of Women All Property in the World Depends": Injury from Sexual Slander in the Nineteenth Century*, 78 IND. L.J. 965, 968 (2003).

114. Pruitt, *supra* note 111, at 458-89.

115. *Id.*

recovery and to regard the offending statements as utterly lacking in content and incapable of being judged as either true or false.

Because claims of harassment cannot be adequately addressed in tort without resort to the intentional infliction claim, and because harassment results in serious injury that serves no socially useful purpose, there is a potential gap for tort law to fill. The real question becomes whether state courts will determine that protecting individuals against the harms of discrimination—like the tort protection afforded against violence and fraud—is of sufficient importance that it needs to be reinforced through state common law. Because the tort of intentional infliction of mental distress is now firmly established in the law, there is no need to resort to civil rights statutes to imply a new cause of action in tort.[116] Instead, the migration of civil rights law into torts this Essay envisions is an interpretive process by which courts borrow from civil rights law to inform and give more concrete meaning to tort standards, such as the standard of outrageous conduct. The closest analogy may be to the judicial practice of borrowing safety standards from statutes in negligence actions to concretize the "reasonable person" standard under the negligence per se doctrine.[117]

In the end, each state must decide whether it is time to "mainstream" and universalize concepts first developed under civil rights law and to declare that severe and pervasive harassment of workers can indeed be outrageous. Leaving harassment and discrimination out of tort law strikes me as a bad idea that artificially distorts the notion of outrageous conduct and minimizes the importance of civil rights to individuals. Concerns that relate to the extent and nature of damages recoverable in such intentional

116. The harassment victim is not asking that the court adopt a common law remedy for a federal statutory violation, as in Cort v. Ash, 422 U.S. 66, 68-69 (1975), but rather invokes or borrows civil rights concepts as a norm to inform judicial understandings of outrageous behavior. For a discussion of the difference between implying a right of action and borrowing statutory norms, see Michael Traynor, *Public Sanctions, Private Liability, and Judicial Responsibility*, 36 WILLAMETTE L. REV. 787, 809-11 (2000).

117. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 14 (Proposed Final Draft No. 1 2005) (finding negligence per se if the actor violates a statute without excuse that is designed to protect against "the type of accident the actor's conduct causes, and . . . the accident victim is within the class of persons the statute is designed to protect"). The negligence per se doctrine presents an analogy only, however. It does not apply in the civil rights/intentional infliction context because it pertains to cases in which a statute is "silent as to civil liability and that cannot be readily interpreted as impliedly creating a [cause] of action." *Id*. at 181 cmt. c. Because both Title VII and state civil rights actions provide for civil liability, they present additional questions of possible preemption and concerns for multiple remedies.

infliction actions need not defeat the claim, but can be addressed directly by judicial allocation of damages[118] or through tort reform legislation at the state level.

118. To prevent double recovery, foe example, courts have exercised their discretion to develop methods for allocating damages to state and federal claims when both are presented. *See* Channon v. United Parcel Servs., Inc., 629 N.W.2d 835, 850-51 (Iowa 2001). *See also* Sharkey, *supra* note 6, at 40-44 (discussing allocating jury awards between federal and state claims and between compensatory and punitive damages).