EMOTIONAL DISTRESS IN TORT LAW: THEMES OF CONSTRAINT

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INTRODUCTION

There is a standard story about the recognition of emotional distress as a stand-alone tort claim. Although foundational elements can be detected in earlier, isolated cases of compensation for both intentional outrageous behavior and negligent conduct of a particularly grievous sort, the torts gained respectability only with the adoption in 1948 of section 46 in the *Restatement (Second) of Torts*, which addressed intentionally inflicted emotional distress ("IIED"),[1] and the surmounting of the physical-contact barrier, beginning around 1960, in negligent-infliction cases ("NIED").[2]

On reflection, the historical roots of recovery for "pure" emotional distress run much deeper and are considerably more complicated to disentangle. The intentional torts of assault and false imprisonment can be traced back at least to medieval times, relational torts such as alienation of affections and criminal conversation offer a distinctly Victorian flavor, and defamation claims can be located prior to the sixteenth century in the English ecclesiastical courts.[3] Without exception, these sources of liability required no showing of related physical injury.[4]

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

2. Section 46 provides: "One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress . . . ." *Id.*

For illustrative early cases of particularly outrageous behavior where the courts groped for a theory on which to ground recovery, preceding the recognition of IIED, see *Nickerson v. Hodges*, 84 So. 37 (La. 1920); *Wilkinson v. Downton*, [1897] 2 Q.B. 57.

For leading cases in turning the corner on NIED, see *Falzone v. Busch*, 214 A.2d 12 (N.J. 1965), overruling *Ward v. West Jersey & S.R. Co.*, 65 N.J.L. 383 (Sup. Ct. 1900); *Battalla v. State*, 176 N.E.2d 729 (N.Y. 1961), overruling *Mitchell v. Rochester Railway Co.*, 45 N.E. 354 (N.Y. 1896).

3. I have discussed these historical matters earlier in Robert L. Rabin, *Pain and Suffering and Beyond: Some Thoughts on Recovery for Intangible Loss*, 55 DEPAUL L. REV. 359, 362–64 (2006).

4. As distinguished from recovery for pain and suffering, which is the

If the emergent torts of more recent vintage—IIED and NIED—reflect a broader-based sensitivity to emotional security, they nonetheless offer a narrative of expansive tendencies in tension with strong constraints—constraints both pragmatic and normative.[5] These constraints shape the doctrine of emotional distress as it has crystallized and as it is reflected both in the *Restatement (Second)* and the successor sections in the *Restatement (Third) of Torts*,[6] which together create a patchwork of liability rules that would appear puzzling to an unschooled, outside observer.

Whether the overall design of these rules hangs together in a satisfying way is a principal question I address in this Article. But my discussion is organized around the larger themes, both pragmatic and normative, that run through the crosscurrents of doctrine, making reference along the way to the superstructure of rules and limitations that rise above the surface. Then, I turn to a brief discussion of emotional distress associated with *protracted* loss of companionship or anxiety—as contrasted with claims focused on immediate reactions to unexpected, traumatic events—to consider whether these scenarios make out a special case for recovery. Finally, I offer a concluding comment.

I. THEMES OF CONSTRAINT

In my view, limitations on recovery for emotional distress reflect both instrumental concerns and the reinforcement of social norms—two distinct but at times convergent functions. In the following two subparts, I discuss each in turn, offering my thoughts on how they have played out in the doctrinal structure of emotional distress.

A. Theme #1: Liability Limits Enforcing Instrumental Concerns

1. Floodgates and Crushing Liability

Early in the twentieth century, the common law of torts still reflected a pervasive caution about opening the proverbial floodgates of litigation to unconstrained claims of responsibility for negligent conduct. This theme was prominent in personal injury and economic-loss cases, ranging from product and workplace accidents

noneconomic-loss component of physical injury.

5. A similar tension is found in the common-law and constitutional privileges limiting the privacy torts and defamation, which I will also briefly discuss *infra* p. 1203–04.

6. The *Restatement (Third)* section 46 carries forward the provision for IIED adopted in section 46 of the *Restatement (Second)*. But the NIED torts, protection against both direct infliction of emotional distress (section 47) and third-party infliction from observing physical harm to another (section 48), are new provisions in the *Restatement (Third)*, reflecting the developing case law. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM ch. 8 scope note (Preliminary Draft No. 5, 2005).

to loss associated with professional services.[7] And it constituted an absolute barrier to claims for stand-alone NIED.[8]

The initial inroads in the latter area were modest: the doctrinal recognition of two scenarios—mishandling of a corpse and erroneous announcement by telegraphic communication of a death in the family—in which recovery was allowed.[9] These scenarios, of course, reflected built-in assurances of both genuineness of distress and infrequency of claims.[10]

After the mid-twentieth century, when the barrier to recovery was further lowered, the courts continued nonetheless to harbor the same concerns. By limiting recovery in spatial terms to victims of emotional distress within the "zone of danger" of serious physical harm—a far narrower conception, it should be noted, than locationally unconstrained fear or fright—the courts remained committed to a predisposition against widespread litigation rights.[11]

The limitation is most strikingly apparent in toxic exposure, or "cancerphobia," cases where the courts have been particularly resistant to allowing recovery.[12] From a doctrinal perspective, when the toxic exposure poses substantial risks of long-latency physical harm, it would take only a modest degree of metaphorical thinking to treat the victim as figuratively within a zone of danger.

Moreover, it almost certainly would strike the lay observer as odd to deny recovery to the toxic exposure victim destined, perhaps, to live twenty to thirty years with anxiety about contracting a life-threatening cancer, while affording recovery to the "victim" of near-miss careless driving or indeed even the commercial airline passenger subjected to a nose-diving airplane that is brought under pilot control.[13] In these near-miss situations, a lay response to a

7. The erosion of privity in the personal injury area culminates in the landmark case *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916); the narrative of the workers' compensation movement sweeping aside an uncharitable tort system in workplace-accident cases is told in Lawrence M. Friedman & Jack Ladinsky, *Social Change and the Law of Industrial Accidents*, 67 COLUM. L. REV. 50, 59–72 (1967); the early cautionary approach to tort liability for economic loss associated with personal services is reflected in *Ultramares Corp. v. Touche*, 174 N.E. 441 (N.Y. 1931).

8. *See* Mitchell v. Rochester Ry. Co. 45 N.E. 354 (N.Y. 1896), *overruled by* Battalla v. State, 176 N.E.2d 729 (N.Y. 1961).

9. DAN B. DOBBS, THE LAW OF TORTS § 308, at 836–37 (2000).

10. For a present day variant, see *Gammon v. Osteopathic Hospital of Maine, Inc.*, 534 A.2d 1282, 1285 (Me. 1987).

11. *See* DOBBS, *supra* note 9, § 309, at 839–40. Moreover, the zone-of-danger limitation, as a practical matter, has a built-in threshold that further constrains the floodgates concern: most near-miss claims would be regarded as de minimis by a trier of fact and hence are very unlikely to be brought.

12. *See, e.g.*, Metro-N. Commuter R.R. v. Buckley, 521 U.S. 424, 432–34 (1997); Dobbs, *supra* note 9, § 311, at 845–47.

13. *See, e.g.*, Quill v. Trans World Airlines, Inc., 361 N.W.2d 438 (Minn. Ct. App. 1985).

claim of continuing serious trauma might well be "get over it."[14] Few, if any, would respond similarly to the sustained anxiety experienced by the individual discovering that she had been unknowingly subjected to long-term, seriously health-compromising prospects from a toxic brew of chemicals in her supply of drinking water.[15] But the zone-of-danger requirement has not been read figuratively; to the contrary, it has served as a near-absolute barrier to NIED cases based on environmental or drug-related long-latency claims.[16]

Moreover, these cases rest on a second instrumentally based policy consideration: the concern about crushing liability.[17] This has been a principal takeaway from the asbestos litigation. Not too far into the tidal wave of bankruptcies, it became apparent that prioritizing claims was an absolute necessity if depletion of the limited pool of available funds was to reflect fairness considerations, namely, recognizing the compelling claims for "most deserving" on the part of those suffering the most serious physical consequences.[18]

The principle can be generalized. When a design defect in a life-sustaining medical device generates a mass tort episode of physical injury claims, legions of other implant recipients suffer quite reasonable anxiety that they are walking time bombs.[19] But their

14. In this regard see comments *supra* note 11.

15. For a representative scenario, see *Potter v. Firestone Tire & Rubber Co.*, 863 P.2d 795 (Cal. 1993). *Potter* in fact adopted a slightly more receptive approach to stand-alone toxic exposure NIED claims than the dominant no-duty approach, allowing recovery if "plaintiff's fear [of developing cancer] stems from a knowledge, corroborated by reliable medical or scientific opinion, that it is more likely than not that the plaintiff will develop the cancer in the future due to the toxic exposure." *Id.* at 816. In reality, this is taking away with one hand what is given with the other, since it is virtually never the case that a long-latency cancer risk reaches the more-likely-than-not threshold.

16. The cases concerning negligently induced fear of contracting AIDS, whether a needle-prick or erroneous-diagnosis variant, could be taken as an intermediate area between zone-of-danger and long-latency claims because of the relatively narrow temporal window of anxiety (and perhaps the vivid character of the anxiety). In fact, some courts have been receptive to claims in these cases. *See, e.g.*, Chizmar v. Mackie, 896 P.2d 196 (Alaska 1995); Williamson v. Waldman, 696 A.2d 14, 21–22 (N.J. 1997) (establishing a test for what a reasonably informed person would fear in a needle-prick case).

17. Crushing liability and floodgates are distinct concerns, even if often convergent. The latter concern is about serial litigation of a particular repetitive type of claim, extending out indefinitely once recognized, while the former could involve a relatively contained number of claims, possibly from a single isolated incident but of enormous aggregate magnitude.

18. For discussion, see, for example, Peter H. Schuck, *The Worst Should Go First: Deferral Registries in Asbestos Litigation*, 15 HARV. J.L. & PUB. POL'Y 541, 560–62 (1992).

19. *See, e.g.*, Barry Meier, *Medtronic Links Device for Heart to 13 Deaths*, N.Y. TIMES, Mar. 14, 2009, at B1. In addition to reporting the thirteen deaths linked to the Sprint Fidelis defibrillator (due to a failed electrical cable connecting the medical device to a patient's heart), the article states that some

claims compete with those unfortunately destined to have their fears come to fruition at a later date. A similar scenario unfolds when unanticipated hazards of a prescription drug or chemical exposure put multitudes at risk—an exposed class endures severe distress; a subset is fated to experience life-threatening physical harm.[20]

The asbestos litigation has also generated an intermediate situation testing the limits of these instrumentally oriented barriers to recovery. Suppose the emotional-distress claimant is already suffering from a defendant-induced "gateway" physical disability at the point when she seeks recovery for anxiety at the prospect of the condition ripening into a life-threatening disease. Should this heightened sense of anxiety be sufficient to trigger recovery?

Perhaps unsurprisingly, in this intermediate zone the courts are divided. In a much-noted pair of Supreme Court decisions involving worker claims under the Federal Employers Liability Act for asbestos exposure, the Court in *Metro-North Commuter Railroad v. Buckley* first adopted the now-conventional position that stand-alone cancerphobia cases are not actionable.[21] But just six years later, in a claim by a worker suffering from asbestosis—a nonfatal pulmonary impairment—who feared the likelihood of a later-developing cancer, the Court distinguished the *Buckley* decision and recognized a claim for "genuine and serious" emotional distress and anxiety arising from latency-based health concerns in *Norfolk and Western Railway Co. v. Ayers*.[22]

In this latter precursor-disease context, the courts are in fact divided over recognizing a duty to compensate for emotional distress. The position contrary to *Ayers* is articulated as the "two-disease rule" and holds that the exposure victim's long-latency emotional distress is only recoverable retrospectively when the cancerous condition is manifested.[23] The two-disease rule is supported by the same instrumental considerations as the no-duty

150,000 people have the leads in their bodies. *Id.* Each might understandably be quite distressed by the news reports that they may be the next to experience sudden death.

20. I limit discussion here to the crushing-liability concern in emotional-distress cases. Reliance on a crushing-liability limitation in other contexts, such as mass claims for physical injuries, triggers somewhat different insolvency concerns beyond the scope of this Article. *See, e.g.*, Strauss v. Belle Realty Co., 482 N.E.2d 34, 35 (N.Y. 1985) (involving the 1977 New York City blackout).

21. 521 U.S. 424, 432 (1997).

22. 538 U.S. 135, 156–57 (2003).

23. *See, e.g.*, Simmons v. Pacor, Inc., 674 A.2d 232, 238–39 (Pa. 1996). The deferral of emotional-distress claims until physical harm is manifested must be conceptually distinguished from claims for probabilistic recovery for prospective physical harm itself. But under the two-disease rule both types of claims receive the same unwelcome treatment until the physical harm is actually manifested.

rule invoked in pure stand-alone emotional-distress cases; in particular, prioritizing a limited pool of funds.[24] But of course, both the floodgates and crushing-liability concerns are diminished to a considerable extent by a threshold requirement of a gateway precursor disease. Indeed outside the etiology of asbestos-related diseases, discrete precancerous physical conditions are likely to be relatively infrequent occurrences. It should not be especially surprising, then, that one finds no consensus in these precursor scenarios on recognizing claims for toxics-induced emotional distress.

2. Disproportionality

The bystander cases offer an interesting variation on the theme of constrained recovery for emotional distress. The typical scenario is a claim by a distraught parent who has witnessed the death or serious injury of his or her child as a consequence of defendant's negligence (often, driving).[25]

The instrumental considerations counseling restraint in "direct" emotional-distress cases in fact play out differently here. Floodgates considerations are absent because bystander claims would generally be handled through joinder with the claim on behalf of the physically injured "primary" victim. Crushing-liability considerations are similarly absent because of the confined exposure ordinarily characterizing these third-party claims; mass third-party witnessing of scenes of fatal injuries is the exception rather than the rule.[26]

Yet recovery is nonetheless sharply circumscribed, generally through articulated requirements of a close family relationship, direct observation, and serious physical injury to the "primary" victim.[27] As many commentators have pointed out, these limitations cannot be explained by reference to the sometime liability threshold of "foreseeability."[28] Surely, it is foreseeable that a parent informed ex post of a child's death by accidental injury or a close friend witnessing the horrific event will experience serious emotional distress. But if one puts aside as de minimis theoretically conceivable claims of bystander-strangers, even adoption of a

24. *See Ayers*, 538 U.S. at 168–70 (Kennedy, J., concurring in part and dissenting in part); *id.* at 185–87 (Breyer, J., concurring in part and dissenting in part).

25. *See, e.g.*, Dillon v. Legg, 441 P.2d 912 (Cal. 1968).

26. But consider eyewitnesses to the calamitous events of 9/11, or more broadly, mass eyewitnessing of catastrophic physical harm.

27. And in some states, recovery is further circumscribed by the conceptually odd and perhaps overkill additional requirement of bystander location within the zone of danger. *See, e.g.*, Bovsun v. Sanperi, 461 N.E.2d 843, 847–49 (N.Y. 1984).

28. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 47 cmt. f (Tentative Draft No. 5, 2007).

foreseeability test would not engender crushing-liability concerns.

Instead, the bystander limitations express what superficially might be regarded as a softer version of crushing liability; more specifically, a fairness concern about disproportionality between responsibility for accidentally imposed harm and "stacked claims"—that is, multiple claims by distressed family members in virtually every case of negligently caused serious injury or death of a primary victim.[29] But even this weak resemblance to the policy considerations undergirding the crushing-liability limitation is superficial. At their root, the latter constraints express, as indicated above, concerns about prioritizing claims from the *victims'* perspective and maintaining an adequate pool of funds to recompense the most "deserving" injuries. By contrast, the focal point of the fairness consideration expressed in the disproportionality constraint is on the *injurers'* perspective, taking account of the elementary moral principle that the punishment should fit the crime.

3. Chilling Effect

A less frequently observed form of instrumentalism is outside the scope of the *Restatement (Third)* coverage of emotional distress. A cluster of constitutional, common-law, and statutory limitations mark the border between recognizing the threat to emotional harm from hurtful speech and affording protection to widespread public dissemination of ideas and information. The rationale for protective measures is frequently expressed as a concern about the "chilling effect" of tort liability, in essence, a close cousin of the crushing-liability concern discussed earlier.[30]

Thus, in the defamation area, beginning with the landmark Supreme Court decision in *New York Times Co. v. Sullivan*,[31] First Amendment protection has been extended to media defendants in a series of cases adopting restrictions on tort claims brought by government officials and public figures through a privilege requiring the establishment of "actual malice" (and likewise, in cases of private figures involving matters of public concern, a requirement of negligence and "actual damages").[32] These restrictions, constituting a superstructure imposed on a more limited set of common-law privileges to defame, were adopted in an era of heightened

29. *See* Thing v. La Chusa, 771 P.2d 814, 828 (Cal. 1989); Gain v. Carroll Mill Co., 787 P.2d 553, 557 (Wash. 1990).

30. Although here the focal point of the solvency concern is the impact on media defendants (and concomitantly on protecting robust criticism), not inadequate compensation for seriously injured plaintiffs.

31. 376 U.S. 254 (1964).

32. The leading case on private-figure privilege is *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). For discussion of the constitutional developments generally since *New York Times Co. v. Sullivan*, see DOBBS, *supra* note 9, §§ 417–420, at 1169–87.

recognition of the media's role in disseminating information about current events triggered by the civil-rights movement.[33] Restrictions on emotional distress from reputational harm came to be seen as a necessary price to pay for a relatively unfettered marketplace of ideas and information—albeit a high price, based on the data revealing strikingly low plaintiff success rates in the years succeeding the *New York Times v. Sullivan* case.[34]

Similarly, the privacy tort animated by the classic Samuel Warren and Louis Brandeis article, *The Right to Privacy*,[35] has floundered despite superficially widespread judicial recognition by state courts.[36] Newsworthiness—a common-law defense—has, if anything, proven to be an even more substantial barrier to claims for emotional distress from public disclosure of private facts than the counterpart *New York Times v. Sullivan* privilege in the defamation area.[37] Once again, a highly public-sensitive conception of the social value of access to cultural developments and current-events information has trumped individual claims for a restricted zone of revelations about private conduct.[38]

A final illustration comes from the sea change in access to information and expansive networks of communication associated with the growth of the Internet. At a relatively early point in the short history of this technological phenomenon, it became clear that along with its window-to-the-world benefits in conveying information and promoting communications came a new potential for doing mischief to personality interests in freedom from emotional distress and reputational harm.[39]

One particularly insidious form of Internet malevolence has been identity theft coupled with the false attribution of loathsome ideas or loose morals to innocent victims.[40] A logical counter by the

33. *See* ANTHONY LEWIS, MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT 156–60 (1991).

34. *See* Press Release, Media Law Resource Center, MLRC Annual Study of Media Trials in 2005 (Mar. 2, 2006) (on file with author).

35. *See* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

36. *See, e.g.*, Sidis v. F-R Publ'g Corp., 113 F.2d 806, 808–10 (2d Cir. 1940); Gates v. Discovery Commc'ns, Inc., 101 P.3d 552, 555–56 (Cal. 2004), *overruling* Briscoe v. Reader's Digest Ass'n, 483 P.2d 34 (Cal. 1971).

37. For a thoughtful discussion, see *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1232–35 (7th Cir. 1993).

38. The Warren and Brandeis article was the germinating influence for the tort of public disclosure of private facts. Subsequently, privacy branched off into four discrete torts, the other three being false light, intrusion, and appropriation. *See generally* William L. Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960). Each has been influenced, in varying degrees, by concerns about promoting newsworthiness and protecting creativity.

39. *See, e.g.*, Stratton Oakmont, Inc. v. Prodigy Servs. Co., 23 Media L. Rep. (BNA) 1794, 1795 (N.Y. Sup. Ct. 1995).

40. *See, e.g.*, David Margolick, *Slimed Online*, PORTFOLIO, Feb. 11, 2009, http://www.portfolio.com/news-markets/national-news/portfolio/2009/02/11

victim was a personality-based claim for emotional distress—defamation, invasion of privacy, and/or NIED—against the Internet Service Provider ("ISP") that offered the channel of communication to the malevolent (and anonymous) content generator.[41] Concerned that potentially unlimited numbers of claims might choke off unconstrained access to the Internet, Congress took quick remedial action, enacting section 230(c)(1) of the (perhaps ironically entitled) Communications Decency Act of 1996.[42]

The provision, which states that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider,"[43] has been very broadly interpreted to immunize ISPs under virtually all circumstances other than highly proactive contribution to the malicious content.[44] The statutory immunity reflects unparalleled deference to the chilling-effect concern. Repeatedly, the courts opine that freedom of communication and exchange of information would grind to a halt if ISPs were obligated to monitor and edit a virtually limitless stream of postings in order to weed out veiled malice.[45] The result has been a good deal of extraordinarily harmful character assassination with very limited recourse to redress.[46]

B. Theme #2: Liability Limits Addressing Social Norms: Defining and Delimiting Civility Obligations

In the preceding discussion of redress for emotional distress, I suggested that the limitations on recovery could best be regarded as serving instrumental liability-limiting functions. In this subpart, I focus on scope-of-duty limitations that play a different role: policing the boundary between aberrant and acceptable social behavior. The prime example is the IIED tort. Here, the limitation on recovery—that the tortious conduct must be "extreme and outrageous" to be actionable—articulates a social norm, a rule of conduct defining the boundary between tolerable and socially unacceptable behavior in interpersonal relations.[47]

In a series of articles discussing, respectively, the torts of defamation, privacy, and IIED, Robert Post expressed this notion as "civility rules," drawing on the earlier work of sociologist Erving Goffman.[48] In the context of the right to privacy, but with clear

/Two-Lawyers-Fight-Cyber-Bullying.

41. *See, e.g.*, Zeran v. Am. Online, Inc., 129 F.3d 327, 328 (4th Cir. 1997).

42. 47 U.S.C. § 230(c)(1) (2006).

43. *Id.*

44. See, e.g., *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1122–24 (9th Cir. 2003) and cases cited in the opinion.

45. *Id.* at 1123–24.

46. *See* Margolick, *supra* note 40.

47. *See* RESTATEMENT (SECOND) OF TORTS § 46 cmt. a (1965).

48. Robert C. Post, *The Constitutional Concept of Public Disclosure:*

applicability to the IIED tort, Post later observed that:

> [S]ocial life is thick with territorial norms. For obvious reasons, however, the law can protect only a small subset of these norms. The common law itself claims to enforce only the most important of them, only those whose breach would be "highly offensive." This selection criterion serves the interest of legal institutions, which otherwise would be inundated with trivial lawsuits. It also, and somewhat less obviously, preserves the flexibility and vitality of social life, which undoubtedly would be hardened and otherwise altered for the worse if every indiscretion could be transformed into formal legal action.[49]

In the context of IIED, the flip side of the proscribed offensive behavior is that below the "extreme and outrageous" threshold, putting up with occasional conduct that is harsh and hurtful is part of the normal course of life.[50] Beginning in early youth, the child is asked to internalize the adage that "sticks and stones may break my bones, but names can never hurt me." The lesson, of course, is the necessity of developing a thick skin to deal with the inevitable unpleasantries that come one's way from time to time.[51]

Until the mid-twentieth century, the difficulty in demarcating this boundary gave the common-law courts pause about recognizing even a circumscribed verbal standard establishing liability for aberrant and overly aggressive social misconduct.[52] *Wallace v. Shoreham Hotel Corp.*,[53] a mid-1940s case, is illustrative of the concern. Plaintiff paid his cocktail lounge check with a twenty-dollar bill and after protesting the waiter's return of change for a ten-dollar bill, was greeted with a loud and public denunciation, "We

Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell, 103 HARV. L. REV. 601 (1990); Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 CAL. L. REV. 957 (1989); Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CAL. L. REV. 691 (1986). *See also* ERVING GOFFMAN, *The Nature of Deference and Demeanor*, *in* INTERACTION RITUAL: ESSAYS ON FACE-TO-FACE BEHAVIOR 47, 56 (1967).

49. Robert C. Post, *Tort Law and the Communitarian Foundations of Privacy*, RESPONSIVE COMMUNITY, Winter 1999/2000, at 19, 26.

50. The classic article on this point is Calvert Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033 (1936).

51. It is interesting to compare the imagery of developing a "thick skin" with protecting the "thin-skulled" plaintiff. The reconciliation involves the interplay between liability and damages: once a victim satisfies the liability threshold by establishing sufficiently offensive conduct (beyond what a thick skin would require), then his or her personal harm is recoverable, notwithstanding idiosyncratic sensitivity.

52. In this regard consider also the threshold on recovery for offensive battery. *See, e.g.*, Wishnatsky v. Huey, 584 N.W.2d 859 (N.D. Ct. App. 1998).

53. 49 A.2d 81 (D.C. 1946).

have had people try this before."[54]

In rejecting the plaintiff's subsequent claim for humiliation and embarrassment, the court noted that:

> If insults beyond the bounds of decency, causing serious mental disturbance, give rise to legal liability, and if there are no rules or standards by which courts may be guided in determining whether the evidence warrants submitting the case to the jury, and no rules or standards for the jury in determining whether the evidence sustains the charge, then every case of fancied insult and hurt feelings must be submitted to the jury and its verdict must stand. This . . . would make life intolerable.[55]

While both the *Wallace* case and the Post excerpt evince concern about the floodgates prospect of loose limitations on compensation for intentionally inflicted emotional harm, there is more at stake here. What is distinctive about the IIED tort is the *normative* character of the boundary, fencing out the trivial abuses that, once recognized, would undermine an expressive social life. In fact, failed intrusion-of-privacy claims frequently support a correlative proposition: the dynamic character of social life would be compromised if the domain of the privacy tort were extended to include recovery against the inordinately curious for every annoying effort to secure information that an individual would rather keep confidential.[56]

Similarly, the limitations on recovery for emotional distress in the workplace reflect normative rather than exclusively instrumental concerns. For sexual-harassment claims to succeed under Title VII of the Civil Rights Act of 1964—putting aside "quid pro quo" claims—a claimant must establish an "abusive working environment."[57] The Supreme Court has struggled to sort out what constitutes proscribed conduct, with an eye to avoiding suppression of incidentally rude, playful, and/or flirtatious behavior that has long been regarded as socially acceptable.[58] Correlatively, work-related stress claims arising in the workers' compensation system screen out subjective sensibilities to high-pressure work

54. *Id.* at 81.

55. *Id.* at 83. Doubts remain about the resolution of the borderline issue reached in the *Restatement (Second)* section 46 "extreme and outrageous" standard. *See, e.g.*, 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, 42–43 (1982).

56. *See, e.g.*, Nader v. Gen. Motors Corp., 255 N.E.2d 765, 770 (N.Y. 1970).

57. *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 66–67 (1986), is the leading case.

58. *See, e.g.*, Clark County Sch. Dist. v. Breeden, 532 U.S. 268, 271 (2001) ("[S]imple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment.") (internal quotation marks omitted).

environments through reliance on some version of a "reasonable person" standard designed to maintain equilibrium between acceptable profit-maximizing conduct and abusive performance demands.[59]

II. PROTRACTED EMOTIONAL HARM: A SPECIAL CASE FOR RECOVERY?

In a critical sense, the categorical emotional-distress claims that have attained legitimacy over the past half century—IIED and NIED (both direct and bystander versions)—rest on a prima facie liability claim that can be likened to a dagger thrust into the victim's emotional stability. Consider, in this regard, the prima facie case for outrageous interpersonal misconduct, for a near miss of serious physical injury, or for the witnessing of serious or fatal harm to a loved one. Traumatic shock (or affront) is a common theme.[60] Surely, there is a longitudinal element to the distress. Traumatic shock has reverberating overtones. But the sustained aspect of these claims addresses the issue of damages, not liability.

Suppose instead, the essence of the stand-alone claim is long-term loss: a sense of sustained grief or what perhaps can be best described as existential angst, rather than the reverberations (and recollection) of a shocking episode. Does this "protracted" (for lack of a better term) emotional-distress claim make out a special case for compensation? In the relationally based claims for loss of

59. *See, e.g.*, CAL. LAB. CODE § 3208.3 (Deering 2006) (requiring that "actual events" be the predominant cause of a mental injury and overriding the subjective test established in *Albertson's, Inc. v. Workers' Compensation Appeals Board,* 182 Cal. Rptr. 304, 307–08 (Ct. App. 1982)); *see also* Wolfe v. Sibley, Lindsay & Curr Co., 330 N.E.2d 603, 606–07 (N.Y. 1975) ("It is enough to say that the claimant was an active participant in the tragedy and as a result suffered disablement, albeit psychological, for which she should be compensated.").

In another domain, consider also the near consensus among the state courts that there is generally no recovery for emotional distress resulting from property loss. *See, e.g.*, Lubner v. City of L.A., 53 Cal. Rptr. 2d 24, 29 (Ct. App. 1996). *See generally* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 46 cmt. j (Tentative Draft No. 5, 2007) (adopting this restriction). Hawaii has long been an outlier. *See, e.g.*, Rodrigues v. State, 472 P.2d 509, 519 (Haw. 1970) ("We believe that the preferable approach is to adopt general standards to test the genuineness and seriousness of mental distress in any particular case."). As in the workplace scenarios, there is undoubtedly a background floodgates concern here. But the dominant consideration in withholding recovery, as I see it, is a normative view that pecuniary redress is a sufficient marker of being made whole, from a legal perspective, for property loss.

60. There are exceptions, of course. Consider, for example, an abusive course of workplace sexual harassment, which may lead both to an IIED claim and to its statutory counterpart, a Title VII claim for creating a hostile and abusive work environment. *See, e.g.*, Kanzler v. Renner, 937 P.2d 1337, 1341–44 & n.3 (Wyo. 1997). Even here, however, the claim generally arises out of a relatively brief and oppressive course of conduct.

consortium (better thought of, in its modern guise, as diminished or lost companionship) and wrongful-death noneconomic loss, there is support for this conclusion, in my view.[61]

How does the special character of these claims manifest itself? There are, of course, limitations on the scope of responsibility in claims for loss of consortium and wrongful-death noneconomic loss. In loss-of-consortium cases, the common-law duties run only to close family relations: in some states, only to spouses; in others, they are extended to children of the physically injured victim as well.[62] In statutory actions for wrongful death, although many states still preclude recovery by retaining a limitation to economic loss,[63] in recent years a growing number of states have extended intangible-loss recovery to designated beneficiaries (limited generally to dependents).[64] But notably, the more arbitrary limitations imposed in NIED cases—zone of danger, direct observance, and physical consequences (let alone, the restrictive IIED standard of extreme and outrageous conduct)—have no counterpart in these protracted loss-of-companionship scenarios.

What of toxic exposure claims? In cancerphobia cases, as discussed earlier, instrumental concerns have been taken to overwhelm the salience of long-latency-related harm. In these cases, categorical denial of recovery can be seen as a notable exception to the recognition of the special character of protracted emotional distress. And as discussed earlier, it is an arguably disconcerting exception: Living with the prospect of cancer from ingestion of toxic chemicals in one's water supply strikes me as a different order of anxiety from experiencing a near-miss accident situation. Yet it is the latter that is actionable and not the former.[65] But the protracted fear and sustained anxiety generated by toxic exposure does pose the instrumental floodgates and crushing-liability concerns that have systematically undercut the recognition of a duty to compensate. And critically, these concerns are not present in the loss-of-consortium and wrongful-death settings where protracted loss is given special recognition.

61. For a discussion of loss of consortium, see DOBBS, *supra* note 9, § 310, at 841–43.

62. *See* Borer v. American Airlines, Inc., 563 P.2d 858, 860–61 (Cal. 1977) (limiting recovery to spouses only); Ferriter v. Daniel O'Connell's Sons, Inc., 413 N.E.2d 690, 696 (Mass. 1980) (extending the claim to children).

63. For example, New York limits wrongful-death recovery to "fair and just compensation for the *pecuniary injuries* resulting from the decedent's death." N.Y. EST. POWERS & TRUSTS LAW § 5-4.3 (McKinney 1999) (emphasis added). Consider the anomalous outcomes in a state like New York, where witnessing the death or serious injury of a close relation (albeit from within the zone of danger) is afforded unconstrained recovery but suffering loss of companionship from negligently inflicted fatal injury of a close relation is afforded no intangible-loss recovery at all.

64. *See* DOBBS, *supra* note 9, § 298, at 813–15.

65. *See supra* notes 12–24 and accompanying text.

A FINAL WORD

Putting aside IIED, no one would argue that emotional distress is inconsequential for those who fall just short of the various recovery thresholds I have discussed. Consider eyewitnesses to the 9/11 catastrophe, bearers of a life-threatening medical implant, unwitting victims of online character assassination, and life-long friends of a wrongful-death victim. These are all "deserving victims." There is no social disapproval of their claims. Rather, they are the unfortunate among us whose emotional suffering is simply overridden in the courts (and in the legislatures as well) by a conception of the "greater good" achieved by precluding their claims for liability. Instrumental limitations abound, and at times normative judgments about what constitutes de minimis harm provide correlative support, as in the IIED cases, where the excluded grievants are *not* regarded as "deserving victims."

There is, in my view, no grand scheme that pulls together this patchwork of duties and limitations that define the universe of compensation for emotional distress. But why should there be? This patchwork design simply mirrors the larger world of tort, which reflects a multiplicity of values.