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Reformulating Outrage: A Critical Analysis of the Problematic Tort of IIED

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I. INTRODUCTION

The intentional infliction of emotional distress ("IIED"), also known as the tort of outrage, is a relatively new cause of action, first appearing in the legal academic literature during the 1930s.[1] Since that time, IIED has gained widespread acceptance and is now

1. The two seminal articles hastening development in this area of the law are Calvert Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033 (1936), and William L. Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874 (1939).

recognized in all U.S. jurisdictions,[2] with most courts invoking the definition set forth in the *Restatement (Second) of Torts*.[3] Despite this general acceptance of the tort, courts routinely assert that IIED is a disfavored cause of action.[4] Courts appear wary of holding defendants liable for plaintiffs' emotional injuries and therefore seek to discourage such claims.

In their efforts to cabin the application of IIED while preserving it as a valid cause of action, the *Restatement* authors and the courts have created a confused tort that means entirely different things to different judges and thus serves disparate functions in the courts of various states. In a minority of jurisdictions, courts express disfavor by limiting IIED claims to instances of outrageous and blatantly wrongful conduct for which the plaintiff has no other viable theory of redress. For example, if a defendant's conduct can support a defamation claim, these courts will not allow the plaintiff to maintain an IIED claim for the same conduct.[5] In effect, these courts define IIED such that it never overlaps with any other tort. Recent formulations of this position characterize IIED as a "gap-filler," or a "residual" tort.[6]

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2. A recent draft revision to the *Restatement of Torts* lists cases from all fifty states plus D.C. and the Virgin Islands. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM 22-23 (Council Draft No. 6, 2006).

3. RESTATEMENT (SECOND) OF TORTS § 46 (1965). The basic elements are: (1) extreme and outrageous conduct that (2) intentionally or recklessly (3) causes severe emotional distress. The draft revision *Third Restatement* finds that forty-five jurisdictions, including D.C. and the Virgin Islands, expressly follow § 46, while three states (Oregon, Pennsylvania, and Tennessee) follow a modified version, two states (Hawaii and Wisconsin) follow an earlier version, and two states (Mississippi and Montana) reject the *Restatement* approach altogether.

4. *E.g.*, Denny v. Elizabeth Arden Salons, 456 F.3d 427, 436 (4th Cir. 2006) ("[IIED] is 'not favored' under Virginia law." (quoting Ruth v. Fletcher, 377 S.E.2d 412, 415 (Va. 1989))); Williams v. City of Mount Vernon, 428 F. Supp. 2d 146, 160 (S.D.N.Y. 2006) ("Claims for intentional infliction of emotional distress are 'highly disfavored' . . . under New York law." (quoting Torres v. Village of Sleepy Hollow, 379 F. Supp. 2d 478, 482 (2005))); Hill v. McHenry, 211 F. Supp. 2d 1267, 1284 (D. Kan. 2002) ("The tort of outrage . . . 'is not a favored cause of action under Kansas law.' " (quoting Gillum v. Fed. Home Loan Bank of Topeka, 970 F. Supp. 843, 854 (D. Kan. 1997))); Thomas v. BSE Indus. Contractors, 624 So. 2d 1041, 1044 (Ala. 1993) ("[Under Alabama law,] the tort of outrage is a very limited cause of action that is available only in the most egregious circumstances."); McQuay v. Guntharp, 963 S.W.2d 583, 585 (Ark. 1998) ("[The Supreme Court of Arkansas] gives a narrow view to the tort of outrage . . . .").

5. *See, e.g.*, Slue v. N.Y. Univ. Med. Ctr., 409 F. Supp. 2d 349, 371 n.16 (S.D.N.Y. 2006) ("[P]laintiff must allege extreme conduct that is not already an independent tort."); Moser v. Roberts, 185 S.W.3d 912, 916 (Tex. App. 2006) ("Because the plaintiff's claims for slander, libel, and malicious prosecution afforded her a remedy for any resulting emotional distress . . . the tort of IIED was not available to her based on the facts supporting those causes of action.").

6. *See Slue*, 409 F. Supp. 2d at 371 n.16 ("Intentional infliction of emotional distress is a residual tort . . . ."); *Moser*, 185 S.W.3d at 915 ("[T]he tort of IIED is first and foremost a 'gap filler . . . .' ").

Most courts reject this limitation and accord IIED full status as an independent tort. They allow an IIED claim to coexist with other claims that arise from identical acts of a defendant.[7] This overlap can extend both to common law claims such as assault, battery, false imprisonment, defamation, and conversion, and to statutory claims such as violations of antidiscrimination laws.[8] In many of these cases, IIED in effect becomes an aggravated version of one or more other torts,[9] and the courts' evaluation of an IIED claim can be indistinguishable from the determination of whether to assess punitive damages.[10]

In many situations, the minority and majority approaches will tend toward identical results because a plaintiff can recover compensatory damages only once, regardless of how many theories apply. Where the plaintiff prevails on another theory and receives compensation for her psychological harm, the IIED claim is superfluous, and it makes no difference whether the court considers IIED to be an independent cause of action. However, in some situations, the viability of an IIED claim has important ramifications for the litigation. Depending on the limitations that apply to the alternative cause of action, the availability of IIED can determine the maximum damages allowable, the range of losses or injuries that can be compensated, and even the potential for any legal recourse at all.

To explain the conflicting IIED jurisprudence, Part II of this Note traces the emergence and evolution of IIED in the American legal system. What began as an assortment of anomalous cases in which courts broke the traditional rule against compensating purely emotional injuries gained the recognition of prominent scholars, who then announced the arrival of "a new tort."[11] To narrow the impact of this act of scholarly creativity, IIED's proponents imposed strict limitations on the tort, particularly on the signature injury, which

7. *E.g.*, Kant v. Altayar, 704 N.W.2d 537, 540 (Neb. 2005) ("The same wrongful conduct may support a civil action based on a theory of battery as well as an action based upon the independent tort of intentional infliction of emotional distress.").

8. *See, e.g.*, Littlefield v. McGuffey, 954 F.2d 1337, 1342-43 (7th Cir. 1992) (allowing plaintiff to recover under both the federal Fair Housing Act and Illinois common law IIED for the same course of conduct); Stockett v. Tolin, 791 F. Supp. 1536, 1552-56 (S.D. Fla. 1992) (sustaining IIED claim in addition to claims of battery, invasion of privacy, false imprisonment, and sexual harassment).

9. *E.g.*, *Stockett*, 791 F. Supp at 1556 ("An ordinary prudent person, viewing [defendant's] *cumulative behavior*, would be compelled to find this outrageous. The *sum total of [his] conduct* therefore also constituted an intentional infliction of emotional distress." (emphasis added)).

10. *See, e.g.*, *Littlefield*, 954 F.2d at 1347-50 (stating that, for awarding damages for IIED, the court disallows punitive damages because the same standard exists under Illinois common law, so granting both IIED and punitive damages would result in duplicative recovery).

11. Prosser, *supra* note 1.

they defined as *severe* emotional distress. In practice, this limitation distorts the common law antecedents of IIED and artificially restricts this intentional (i.e., conduct-based) tort. Many courts have followed suit and sought to narrow the application of IIED. Part II concludes with a discussion of the narrowest view: that IIED is a "gap-filler" available only when the injury is severe and no other theory of redress is available.

Part III explores the position of IIED in the analytical framework of tort law. Section III.A discusses several practical and theoretical problems that account for the judicial impulse to curtail the availability of IIED to plaintiffs. Most of the problems derive from the nature of the injury, emotional distress, in being both intangible and common, if not ubiquitous, in society. Section III.B discusses the implications of the general doctrinal restriction against providing compensation for emotional harm—a restriction to which IIED is an apparent exception. In general, American tort law does not compensate injuries in the absence of a violation of a recognized interest—a wrong—that is causally prior to the emotional harm. This observation suggests that, to remain consistent with the rest of tort law, IIED must protect such an interest: specifically, an interest in freedom from extreme and outrageous emotional attack. Thus, a violation of this interest makes the resultant emotional harm compensable in damages. Section III.C discusses the significance of recognizing IIED as a cause of action—in identifying a protected interest in freedom from emotional attack. Understanding IIED in this way is inconsistent with the view that it is a gap-filler: by making one protected interest conditional on others, the gap-filler approach has the counterintuitive effect of creating gaps between IIED and other torts.

Section III.D analyzes the relationship between IIED and punitive damages. Even under the existing definition of IIED, requiring both outrageous conduct and severe injury, courts inevitably focus on the outrageous conduct element. This focus is natural considering that the injury is common and difficult to assess. Because the standards for IIED and punitive damages are expressed similarly—in terms of outrageousness or reprehensibility—some courts and other observers have found them to be redundant or interchangeable, which leads to the conclusion that IIED is merely a peculiar form of punitive damages. While a singular emphasis on the reprehensibility of the defendant's conduct concededly blurs the line between IIED and punitive damages, the apparent redundancy is illusory. IIED is a doctrine of compensatory liability that remains

distinct from punitive damages despite the similarity in their standards.

Part IV argues that reformulating IIED as a purely intentional tort will resolve much of the doctrinal confusion and judicial inconsistency discussed in this Note. This section advocates removing the severe injury requirement from the prima facie case and replacing it with an objective test of injury like that used for assault. This change would focus judicial attention on the nature of the defendant's conduct and its sufficiency to cause severe emotional distress, eliminating the threshold inquiry into the severity of the harm caused to the plaintiff. This Note concludes with a corollary proposal to rename the reformulated tort "harassment"—a name that clearly designates the proscribed conduct, gives notice to potential defendants, and clarifies the nature of the interest that the IIED tort protects. This proposal is not intended to expand the scope of liability under IIED as currently applied, but instead to "restate" the existing tradition in an analytically sound form that should result in more consistent application of the tort.

II. BACKGROUND

A. Adding Injury to Insult: The Invention of IIED

Throughout most of the history of Anglo-American tort law, courts did not treat the infliction of emotional distress as an independent cause of action. Recovery for such an injury generally was unavailable unless the plaintiff's psychological harm had arisen from a prior, "predicate" injury—an injury that itself was recoverable under an established tort. In the late 1800s and early 1900s, courts increasingly awarded damages for emotional distress unaccompanied by another actionable injury. Some of these courts attempted to conceal the doctrinal irregularity by citing an established tort, such as assault, as the nominal cause of action.[12] Observing this trend, several

12. *See, e.g.*, Interstate Life & Accident Co. v. Brewer, 193 S.E. 458, 463 (Ga. Ct. App. 1937) (holding that an insurance adjuster who berated a sick woman in a hospital and insultingly tossed a coin on her bed was liable for emotional distress damages as a result of the physical injury caused by the coin); Johnson v. Hahn, 150 N.W. 6, 6 (Iowa 1914) (referring to indecent proposal as an assault); Adams v. Rivers, 11 Barb. 390 (N.Y. Gen. Term 1851) (holding that verbal insults delivered from the sidewalk in front of plaintiff's house supported an action for trespass); Leach v. Leach, 33 S.W. 703, 703 (Tex. Civ. App. 1895) (allowing recovery for assault where an indecent proposal was considered "an outrage to her feelings"); *see also* William L. Prosser, *Insult and Outrage*, 44 CAL. L. REV. 40, 43 (1956) (commenting that, in such cases, the nominal tort merely "served as a peg upon which to hang the mental damages").

commentators from the legal academy published articles that advocated enhancing the status of emotional distress to a cognizable predicate injury.[13] Nevertheless, the original *Restatement of Torts*, published in 1934, explicitly denied liability for any claim based solely on emotional or psychological harm, even when the emotional harm caused additional, physical injuries.[14]

In response to the *Restatement* position, a series of influential articles published over the next five years argued for recognition of IIED,[15] with William Prosser announcing its arrival as "a new tort."[16] Evidently persuaded, the American Law Institute ("ALI") rewrote § 46 in a 1948 supplement to the *Restatement*, reversing its earlier position. This first "official" formulation of the tort of IIED assessed liability to "[o]ne who, without a privilege to do so, intentionally causes severe emotional distress to another . . . ."[17]

Courts and commentators consistently have observed that emotional distress is common, and the vast majority of it, even when inflicted intentionally, cannot be a basis for tort liability. In Prosser's original article, he took pains to exclude "trivialities and mere bad manners" from liability, noting that "[i]f the plaintiff is to recover every time that her feelings are hurt, we should all be in court twice a week."[18] To account for this danger, he qualified his proposed definition of the new tort as "the intentional, *outrageous* infliction of mental suffering in an extreme form."[19] The inclusion of outrage as a defining term has remained inextricably linked with IIED ever since—even to the point of usurping the name.

As the ALI's Reporter for the *Restatement (Second) of Torts*, Professor Prosser continued his husbandry of IIED and added

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13. Francis H. Bohlen, *Right to Recover for Injury Resulting from Negligence Without Impact*, *in* STUDIES IN THE LAW OF TORTS 252, 252 (1926); Herbert F. Goodrich, *Emotional Disturbance as Legal Damage*, 20 MICH. L. REV. 497 (1922); Archibald H. Throckmorton, *Damages for Fright*, 34 HARV. L. REV. 260 (1921).

14. "[C]onduct which is intended or . . . likely to cause *only* a mental or emotional disturbance to another does not subject the actor to liability (a) for emotional distress resulting therefrom or (b) for bodily injury unexpectably [sic] resulting from such disturbance." RESTATEMENT OF TORTS § 46 (1934) (emphasis added).

15. Fowler V. Harper & Mary Coate McNeely, *A Re-examination of the Basis for Liability for Emotional Distress*, 1938 WIS. L. REV. 426 (1938); Magruder, *supra* note 1; Prosser, *supra* note 1; Lawrence Vold, *Tort Recovery for Intentional Infliction of Emotional Distress*, 18 NEB. L. BULL. 222, 222 (1939).

16. Prosser, *supra* note 1, at 874.

17. *See* Nancy Levit, *Ethereal Torts*, 61 GEO. WASH. L. REV. 136, 142-43 (1992) (quoting RESTATEMENT OF TORTS § 46 (Supp. 1948)).

18. Prosser, *supra* note 1, at 877.

19. *Id.* at 874 (emphasis added). Thus, the two potentially divergent concepts of outrageousness and psychological attack have been tied together in IIED from the start.

"extreme and outrageous conduct" as a necessary element of the prima facie case.[20] The commentary elaborates on the meaning of outrageousness by explaining that it "does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities."[21] While this list of excluded trivialities reinforces the requirement of *extremity*, it provides little guidance to either courts or potential defendants as to the forms of conduct that produce liability.

To amplify the definitional confusion, many of the cases cited in the influential articles on tort recovery for emotional distress actually fit neatly within the listed exceptions. In other words, the early common law exemplars of IIED were in fact insults, indignities and threats—although the *Restatement (Second)* disclaimed them and modern courts have followed suit. Passengers insulted by railway and ship employees were the first large class of successful plaintiffs.[22] Courts recognized these claims early enough that the original *Restatement*, alongside its general denial of liability for mere emotional distress, added a special exception for insults to passengers.[23] Courts initially split on the characterization of these claims as sounding in contract or tort,[24] with the tort theory based on a special duty of carriers toward their passengers.[25] In many of the reported cases, liability attached to verbal attacks that clearly rose to the level of insult, but not beyond.[26] Some courts went so far as to

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20. Prosser, *supra* note 12, at 43. With Prosser serving as its Reporter, the ALI incorporated this language into the *Second Restatement* version of IIED that controls the discussion through the present day.

21. RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965).

22. *E.g.*, Chamberlain v. Chandler, 5 Fed. Cas. 413, 413-14 (No. 2575) (C.C.D. Mass. 1823); Gillespie v. Brooklyn Heights R.R. Co., 70 N.E. 857, 858-63 (N.Y. 1904); Lipman v. Atl. Coast Line R.R. Co., 93 S.E. 714, 714-16 (S.C. 1917); Lamson v. Great N. Ry. Co., 130 N.W. 945, 945-46 (Wis. 1911). The first *Restatement* acknowledged the liability of common carriers for their passengers' emotional distress as a special exception to the general rule denying liability. RESTATEMENT OF TORTS § 48 (1934).

23. RESTATEMENT OF TORTS § 48 cmt. e.

24. The decision in the original passenger-insult case was based on the theory that the carrier had contracted for "decency of demeanor" in addition to transportation. *Chamberlain*, 5 Fed. Cas. at 413-14; *cf.* Bleecker v. Colorado & So. Ry. Co., 114 P. 481, 484 (Colo. 1911) (same); Frewen v. Page, 131 N.E. 475, 475 (Mass. 1921) (same); Knoxville Traction Co. v. Lane, 53 S.W. 557, 558-60 (Tenn. 1899) (use of contract as a basis for insult liability).

25. This included prospective passengers—who therefore had no contractual basis for their claims. *E.g.*, Texas & Pac. Ry. Co. v. Jones, 39 S.W. 124, 124-25 (Tex. Civ. App. 1897). The evolution of "carrier cases" is discussed in detail in John W. Wade, *Tort Liability for Abusive and Insulting Language*, 4 VAND. L. REV. 63, 66-71 (1950).

26. *See* Southern Ry. Co. v. Carroll, 70 So. 984, 984 (Ala. Ct. App. 1915) ("rascal" and "person in need"); Bleecker v. Colo. & So. Ry. Co., 114 P. 481, 481 (Colo. 1911) ("damn little cur"); Cole v. Atlanta & W. Point R.R. Co., 31 S.E. 107, 108 (Ga. 1897) ("dead-beat"); Gillespie v. Brooklyn Heights R.R. Co., 70 N.E. 857, 858 (N.Y. 1904) ("swindler"); Huffman v. S. Ry. Co., 79 S.E. 307, 308 (N.C. 1913) ("cheap skate").

impose liability for the mere use of profane language in the presence of a genteel plaintiff.[27] Common carrier liability for verbal affronts subsequently expanded into other public contexts, including hotels, theaters, telegraph offices and elevators, and has been captioned the "Special Liability of Public Utility for Insults by Servants."[28]

While courts acknowledged that the common carrier and public utility insult cases constituted a special exception to the no-liability rule,[29] many contemporaneous cases recognized pure emotional distress as a valid injury and found liability for insults and indignities suffered far from any public utility. Several such cases involved defendants who shouted obscenities at people in their homes, even when the defendant made no direct contact with either the plaintiff or his property.[30] In the late 1800s, some courts allowed women who received unwanted propositions to recover for the indignity or insult to their virtue—generally under a nominal, but defective claim of assault.[31] Although the common law precedents cited by Prosser and his colleagues in the academic literature were replete with examples of liability imposed for emotionally distressing insults, the *Restatement* has always excluded such cases from the scope of IIED.

One of the most prominent lines of cases in the evolution of IIED arose from the development of the modern credit and insurance industries. Specifically, the pressure tactics of humiliating debtors into repayment and intimidating claimants into accepting low compensation for insured losses became a fertile source of abusive

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27. *See, e.g.*, Birmingham Ry. Light & Power Co. v. Glenn, 60 So. 111, 112 (Ala. 1912); Louisville & Nashville R.R. Co. v. Bell, 179 S.W. 400, 400-01 (Ky. 1915); Fort Worth & Rio Grande Ry. Co. v. Bryant, 210 S.W. 556, 556 (Tex. Civ. App. 1918); St. Louis Sw. Ry. Co. of Tex. v. Wright, 84 S.W. 270, 270-71 (Tex. Civ. App. 1904) ("[S]he was a girl of about 18 years of age, was the only lady in the coach, and by reason of the vulgar and indecent language she was greatly alarmed and frightened, and her sense of modesty was shocked . . . .").

28. RESTATEMENT (SECOND) OF TORTS § 48 (1965).

29. Their exceptional status is emphasized by their continued separate treatment in RESTATEMENT (SECOND) OF TORTS § 48.

30. *See, e.g.*, Voss v. Bolzenius, 128 S.W. 1, 1 (Mo. Ct. App. 1910) (holding defendant liable for calling plaintiff offensive names while driving past his house); Adams v. Rivers, 11 Barb. 390 (N.Y. Gen. Term 1851) (holding that verbal insults delivered from the sidewalk in front of plaintiff's house supported an action for "trespass"); Matheson v. Am. Tel. & Tel. Co., 135 S.E. 306, 307 (S.C. 1926). A larger number of cases found liability where the defendant insulted or otherwise affronted the plaintiff and also entered the plaintiff's property. *See, e.g.*, Kurpgeweit v. Kirby, 129 N.W. 177, 178 (Neb. 1910) (neighbor deceived woman and questioned her moral character); Buchanan v. W. Union Tel. Co., 106 S.E. 159, 159 (S.C. 1920) (courier propositioned plaintiff at her home); Levine v. Trammell, 41 S.W.2d 334, 334-35 (Tex. Civ. App. 1931) (landlord verbally abused tenant during eviction).

31. *See, e.g.*, Johnson v. Hahn, 150 N.W. 6, 6 (Iowa 1914) (indecent proposal); Leach v. Leach, 33 S.W. 703, 703 (Tex. Civ. App. 1895) ("intent to have carnal knowledge" of a married woman); Craker v. Chi. & N.W. Ry., 36 Wis. 657 (1875) (unwanted kiss).

behavior that had no home in the community of recognized torts. Some collection cases involved conduct readily assignable to established tort categories like defamation and assault, but in others the courts either lacked these options or chose to identify the infliction of emotional distress as the predicate for recovery.[32] It has been suggested that the courts in these cases were especially willing to compensate plaintiffs for purely emotional injuries because the abusive treatment was a deliberate and premeditated element of a commercial strategy.[33] The claims adjustment cases presented courts with the compelling scenario of a powerful insurance company bullying a physically infirm and/or financially vulnerable victim.[34] In recent years, the existence of a special relationship, particularly one of authority or economic dependence, between the plaintiff and defendant often has been an important factor in rendering liability for IIED.[35]

Rarer in the case law, but equally emblematic of what became IIED, were practical jokes that caused the victim to suffer a nervous breakdown. In the famous "pot of gold" case, *Nickerson v. Hodges*, an eccentric woman with a history of mental instability believed that dead relatives had buried a treasure on a neighbor's property and she made a project of digging for it.[36] The defendants planted a false treasure, a closed pot filled with "rocks and wet dirt," with instructions to open the pot in the presence of all the heirs. A crowd gathered for the unveiling, and when the woman revealed the pot's contents, she was thoroughly humiliated. She suffered a mental breakdown and never recovered, dying two years later, still convinced that she had been robbed of her family's gold. The Louisiana Supreme Court held that, despite the defendants' lack of intent to cause such grievous harm to the victim, the defendants were liable for her injuries. Without invoking any named cause of action, the court

32. *See, e.g.*, Clark v. Associated Retail Credit Men, 105 F.2d 62 (D.C. Cir. 1939); Barnett v. Collection Serv. Co., 242 N.W. 25, 28 (Iowa 1932) (granting recovery for mental anguish resulting from intentional conduct absent physical harm); La Salle Extension Univ. v. Fogarty, 253 N.W. 424, 424-26 (Neb. 1934).

33. Wade, *supra* note 25, at 72.

34. Saks & Sons v. Ivey, 157 So. 265, 265-66 (Ala. Ct. App. 1934); Continental Cas. Co. v. Garrett, 161 So. 753, 754-55 (Miss. 1935); Pac. Mut. Life Ins. Co. v. Tetirick, 89 P.2d 774, 775-76 (Okla. 1938).

35. "The extreme and outrageous character of the conduct may arise from an abuse by the actor of a position, or a relation with the other, which gives him actual or apparent authority over the other, or power to affect his interests." RESTATEMENT (SECOND) OF TORTS § 46 cmt. e (1965). Another important antecedent to authority-based IIED claims is *Johnson v. Sampson*, in which a high school principal threatened a girl with various legal consequences to secure her confession of promiscuous behavior. 208 N.W. 814, 815-16 (Minn. 1926).

36. For relevant facts of the case, see 84 So. 37, 37-39 (La. 1920).

awarded damages to her estate. As in the claims adjustment cases, the plaintiff's known vulnerability factored in the finding of liability.[37]

The contemporary application of IIED draws on these disparate common law traditions of assigning liability for extreme insults and threats, abusive commercial practices, and the exploitation of authority, special relationships, and peculiar vulnerabilities, where the principal impact is psychological. Although courts have discarded insult from the mix, sexual voyeurism and degradation have risen to fill this vacancy. Faced with facts ranging from surreptitious candid photography to coerced self-exploration, courts have shown a recent willingness to protect this sphere of the psyche from invasive misconduct.[38] This has been a selective enterprise, as the courts have left other avenues to emotional distress free from judicial intervention. In particular, romantic interference (once covered by the now-defunct "amatory" torts) and litigation are firmly outside the realm of IIED liability. Nevertheless, courts sometimes find liability in areas considered privileged. No matter the context, an outrageous set of facts or severe injury can suffice for liability. The appearance of being a judicial grab bag, a miscellaneous assortment of examples lacking any consistent principle, has contributed to the perception of IIED as an all-purpose tool that courts can reserve for special occasions, granting or denying claims with only their own sense of outrage to guide them.[39]

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37. "The extreme and outrageous character of the conduct may arise from the actor's knowledge that the other is peculiarly susceptible to emotional distress, by reason of some physical or mental condition or peculiarity." RESTATEMENT (SECOND) OF TORTS § 46 cmt. f. Prosser describes an unreported case in which a landlady had a grudge against a tenant who she knew had an abnormally weak heart. She confronted him over a disagreement, hurling verbal abuse at him until he suddenly died of a heart attack. Although the case was settled prior to court proceedings, the likely result was obvious. Prosser, *supra* note 12, at 50.

38. *E.g.*, Am. Guarantee & Liab. Co. v. 1906 Co., 273 F.3d 605, 612-14 (5th Cir. 2001) (holding that, under Mississippi law, photography studio was liable to models for distress caused by employee's use of a hidden video camera in the dressing room); Jackson v. Carlos Supermarket, LLC, No. CV000599734, 2002 WL 378317, at *2 (Conn. Super. Ct. Feb. 14, 2002) (holding that grocery store employee who coerced shoplifter into fondling herself to avoid arrest was liable for IIED); Coates v. Wal-Mart Stores, 976 P.2d 999, 1002-03, 1009 (N.M. 1999) (finding IIED liability for supervisor's numerous incidents of "lewd and vulgar suggestions," breast-groping, and other sexual harassment of subordinates).

39. 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, 74-75 (1982).

B. A Hybrid Tort: Severe Injury and Extreme Conduct as Required Elements

The *Restatement* classifies IIED as an intentional tort, along with assault and battery. However, unlike other intentional torts, it is predicated on the causation of objective harm to the plaintiff. In this feature, IIED resembles negligence. The common law antecedents discussed above both reflect and contradict this dual nature. On one hand, they fit within IIED precisely because each is founded on the intentional causation of an emotional injury. On the other hand, most of the cases emphasize outrage at the defendant's conduct above the severity of the injury—even where the severity of the injury is primarily what makes the conduct seem outrageous.[40]

The "restating" of this emerging body of common law did more than simply recapitulate the observed trend: it transformed it. In the process of defining the "new tort," ALI Reporter Prosser and his colleagues selectively decided which of the precedent cases would qualify. Their selectivity was problematic because, as in any unsettled area, the cases conflicted with one another. For most of the cited cases supporting liability, one could find a similar case opposing it. Thus, while boldly announcing the discovery of an emerging tort protecting an interest in emotional tranquility, Prosser and his colleagues tailored their definitions to address the objections they anticipated, limiting the new tort to the most extreme examples.[41] As discussed in Part III, IIED is controversial in part because it potentially imposes liability for a lot of ordinary behavior. For such an invasive doctrine to survive, it needed strong limitations. To this end, the *Restatement* definition places high bars on both the injury and conduct elements, consciously limiting the tort to doubly exceptional cases. These restrictions have resulted in the schizophrenic interpretation of IIED as being primarily injury-based or conduct-based.

One of the paradigmatic IIED cases illustrates the decisive role that the injury requirement can play in a court's analysis. In *Wilkinson v. Downton*, a prankster persuaded a woman that her husband had been injured in an accident and was hospitalized with two broken legs.[42] Upon hearing the news, the woman went into a

40. For example, the "pot of gold" case discussed in Section II.A, *see supra* text accompanying note 36, would probably be viewed as a very clever and elaborate practical joke if it had not also destroyed the life of an evidently vulnerable woman. With the benefit of hindsight, the element of cruelty predominates over the jokers' creativity and craftsmanship.

41. "The law intervenes only where the distress inflicted is so severe that no reasonable man could be expected to endure it." RESTATEMENT (SECOND) OF TORTS § 46 cmt. j.

42. [1897] 2 Q.B. 57, 57.

state of nervous shock, "producing vomiting and other more serious and permanent physical consequences."[43] The prank may have been thoughtless or unkind, but it was only the woman's exaggerated reaction that made the episode notorious enough for the court to hold the defendant liable. Without a severe injury, it would be hard to categorize the *Wilkinson* prank as either extreme or outrageous, let alone both.

As to precisely which types of conduct should meet the § 46 criteria, courts are mostly left to their own devices. The widely cited commentary supplements the definition as conduct "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community."[44] Framed in this way, the threshold of liability under IIED is nothing other than the degrees of opprobrium and hyperbole that the defendant's behavior inspires. Nevertheless, courts routinely hear cases of indecent and intolerable behavior and reject the resulting IIED claims.

The *Restatement* commentary effectively concedes the impossibility of precise definition, summarizing the valid IIED claim in terms that are both amusingly quaint and absurdly vague: "Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous!' "[45] One scholar referred to this as "a standard in search of a context . . . the hermit crab of the law of torts."[46] The definition also may be understood as a yardstick in search of a ruler—just as deciding what "huge" means requires that we know the relationship of normal to big, "outrageous" derives its meaning from the proportional relationship between normal and bad. Courts apply this conclusory language broadly, sometimes relying on the inference that *ordinary* bad behavior, by definition, could not be considered both extreme and outrageous.[47]

Unlike the more established intentional torts, outrageous conduct has no clear definitional verb. Of course, the operative verb in "intentional infliction" is *inflict*, but this is little more than *to cause*

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43. *Id.* at 58.

44. RESTATEMENT (SECOND) OF TORTS § 46 cmt. d.

45. *Id.* This portion of the commentary first appeared in the 1948 Supplement. Taking this statement literally, the gauge of liability resides entirely in the beholder, and its application in the present day depends on the use of a word that has lost most of its currency.

46. Givelber, *supra* note 39, at 69.

47. *E.g.*, Lowe v. Philip Morris USA, 142 P.3d 1079, 1092 (Or. Ct. App. 2006) (holding that IIED requires violation of a duty beyond that of ordinary care).

pain or injury,[48] which in turn is indistinguishable from generic tortiousness. The only feature specific to IIED is the nature of the injury—emotional distress, mental suffering, psychological pain, etc.—itself notoriously difficult to define, verify, or quantify. Because IIED requires a *severe* emotional injury, there is a risk that an essentially quantitative measure of the injury may substitute for qualitative guidance as to the conduct.

For potential tortfeasors, this definitional ambiguity raises the problem of the "eggshell" victim: if outrageous conduct is indefinable except by the magnitude of its effect, then another person's emotional fragility can be the essential determinant of liability.[49] Contingency on injury is consistent with negligence but exceptional among the intentional torts. This is one of the doctrinal inconsistencies that this Note addresses in Part IV by proposing to eliminate injury as a formal element of IIED.

The *Restatement* implies that severity of injury can substitute for extremity of conduct and vice-versa. Whereas the formal definition of IIED includes causation of severe emotional distress as an element, and courts routinely dismiss claims for failing to show the requisite severity, the official comments provide that "in many cases the extreme and outrageous character of the conduct" will satisfy most, if not all, of this burden.[50] Conversely, as discussed above, in some widely cited IIED cases with eggshell victims, it is precisely the severity of the emotional distress renders the conduct extreme and outrageous.[51] Requiring a severe injury as an offset for less outrageous conduct, or more outrageous conduct when the injury is unproven, furthers the perception that IIED is an unprincipled doctrine.[52] The apparent sliding scale of outrage leads to the question of whether IIED truly contains two independent elements, or instead effectively merges conduct and injury into a "totality of the facts" standard. The

48. A representative dictionary definition of *inflict*: "to cause (something damaging or painful) to be endured." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY (1983).

49. Both the *Wilkinson* and *Nickerson* cases, discussed in the text accompanying *supra* notes 42-43 and 36, respectively, illustrate the problem of the eggshell victim under IIED.

50. RESTATEMENT (SECOND) OF TORTS § 46 cmt. j (1965). At least one state, Mississippi, has shown a willingness to omit the traditional inquiry into the severity of the emotional injury. Funderburk v. Johnson, 935 So. 2d 1084, 1099 (Miss. Ct. App. 2001) ("In Mississippi, the standard for the tort of intentional infliction of emotional distress is very high, and focuses on the defendant's conduct rather than on the plaintiff's emotional condition.").

51. Section 46 requires knowledge of the victim's vulnerability as a precondition to this form of IIED liability—that is, where outrage is based on the injury alone. RESTATEMENT (SECOND) OF TORTS § 46 cmt. f.

52. *See* Givelber, *supra* note 39, at 75 ("[T]here is little evidence that [IIED] will ever provide the basis for principled adjudication . . . .").

Restatement's guidance can be interpreted either way, leaving the door open to broad judicial interpretation of IIED.

C. The Tort of Last Resort

The inherently imprecise nature of "outrageousness" encourages the widely held conclusion that IIED is a gap-filler designed to capture behavior that a court finds troublesome, but which slips through the cracks between the well-defined, traditional tort categories. While the description of IIED as a gap-filler may be historically accurate, as a tenet of legal doctrine it is problematic. As discussed in detail in Part III, relegating IIED to secondary status creates an incoherent account of which rights and interests the law recognizes. Incoherence undermines the legitimacy of judicial proceedings, sends mixed signals to society, and grants or denies redress arbitrarily.

Courts disagree as to whether IIED constitutes an independent tort. In the majority of U.S. jurisdictions, judicial opinions recognizing IIED impute no limitation relative to other potentially applicable torts.[53] These courts entertain IIED claims for conduct that is actionable under alternative theories of liability.[54] The *Restatement* implicitly agrees that IIED is an independent cause of action.[55] However, in a significant minority of jurisdictions, courts relegate IIED to an inferior status, finding that it cannot overlap with other torts or statutory wrongs.[56] There is a further problem of consistency

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53. An incomplete list of jurisdictions that have unambiguously expressed the majority position in recent decisions includes Alabama, Arkansas, Colorado, Connecticut, the District of Columbia, Florida, Georgia, Illinois, Maine, Michigan, Mississippi, Nebraska, Ohio, Oregon, Pennsylvania, Rhode Island, and Virginia.

54. *E.g.*, Kant v. Altayar, 270 Neb. 501, 505 (2005) ("The same wrongful conduct may support a civil action based on a theory of battery as well as an action based upon the independent tort of [IIED].").

55. Section 46 contains no restriction of IIED claims to conduct not covered by other sections. The most recent draft revision for the upcoming *Restatement (Third)* goes further in explicitly endorsing the permissibility of overlapping tort claims based on the same conduct. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM 7, 10-11 (Council Draft No. 6, 2006). The draft revision also lends support to a gap-filler interpretation, however, noting that IIED "can readily be added whenever the real gravamen of the case is a different tort," and approving "aggressive judicial policing of this tort." *Id.* at 13. The draft revision does not explore the tension between these points of view—although its approval of "aggressive judicial policing" can be read as rationalizing the gap-filler doctrine by justifying the impulse to restrict overlapping claims without explicitly engaging the doctrinal argument.

56. An incomplete list of jurisdictions that have expressed the minority position, in at least some recent reported opinions, includes Florida, *see* cases cited *infra* note 57; Kentucky, Messick v. Toyota Motor Mfg., Ky., Inc., 45 F. Supp. 2d 578, 582 (E.D. Ky. 1999) (holding that the availability of alternative avenue of recovery for emotional distress invalidates an IIED claim);

within jurisdictions; many states have some opinions dismissing IIED claims on the basis that other claims are available and other opinions that permit IIED claims in cases where other theories of redress certainly would apply.[57] It is unclear whether these courts would rule out all overlap, or whether the exclusion is particular to certain types of claims.[58]

In many situations, the classification of IIED as a gap-filler is academic: as long as the court permits recovery of the emotional distress damages, the label that courts attach to the theory of liability is of little concern to the parties. Presumably, when IIED overlaps with another tort, the other tort will have a lower standard of "outrageousness" and lack a rigid severe injury requirement, so the other claim will present an easier case to win. Courts and observers have noted that the IIED standard is equal to or more stringent than the standard for punitive damages, so any plaintiff seeking additional recovery under IIED would be entitled to punitive damages under the alternative cause of action.[59] Thus, as long as the conduct clearly fits into the other tort category and there is no incidental barrier to

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Missouri, Rice v. Hodapp, 919 S.W.2d 240, 245 (Mo. 1996) ("A cause of action for intentional infliction of emotional distress 'does not lie when the offending conduct consists *only* of a defamation.' " (quoting Nazeri v. Missouri Valley College, 860 S.W.2d 303, 316 (Mo. 1993)); New Hampshire, DeMeo v. Goodall, 640 F. Supp. 1115, 1116 (D.N.H. 1986); New York, Moore v. City of New York, 219 F. Supp. 2d 335, 339 (E.D.N.Y. 2002) ("IIED is a theory of recovery that is to be invoked only as a last resort, when traditional tort remedies are unavailable; accordingly, no IIED claim will lie where the conduct underlying the claim falls within the ambit of traditional tort liability."); North Carolina, Dickens v. Puryear, 276 S.E.2d 325, 336-37 (N.C. 1981), discussed in the text accompanying *infra* notes 60-62; and Texas; Moser v. Roberts, 185 S.W.3d 912, 915 (Tex. App. 2006) ("[IIED] is first and foremost a 'gap-filler' tort which was created for the limited purpose of allowing recovery in those rare instances where a defendant inflicts severe emotional distress in a manner so unusual that the victim has no other recognized theory of redress.").

57. Florida provides an example of this inconsistency. *Compare* Stockett v. Tolin, 791 F. Supp. 1536, 1560-61 (S.D. Fla. 1992) (holding the sum total of actionable battery, invasion of privacy, and false imprisonment, combined with other behavior, provided the basis for a valid IIED claim), *with* Trujillo v. Banco Cent. del Ecuador, 17 F. Supp. 2d 1340, 1344-45 (S.D. Fla. 1998) (holding that a cause of action for intentional infliction of emotional distress could not be maintained under Florida law where it was based on the same publication as was involved in a dismissed defamation claim against the defendant). Other states with apparently inconsistent recent decisions include California, Kentucky, Missouri, and South Dakota.

58. The judicial opinions examined in research for this Note suggest the latter interpretation: that certain causes of action, such as defamation and alienation of affection, are so closely related to IIED that any judicial or legislative determinations that apply to the other causes of action should be taken as governing all claims for emotional distress that are essentially similar—i.e., all claims that are essentially defamatory or amatory. This is an attractive position, but it raises a conundrum: if sophisticated practitioners of IIED want to evade liability, they need only engage in behavior that approximates, say, defamation, but in a way that gives rise to a defective claim.

59. *See infra* notes 116-117 and accompanying text.

recovery under the other tort, the unavailability of IIED has no practical significance to the parties.

In certain circumstances, however, the decision to permit an IIED claim when another tort could apply will determine the plaintiff's potential for recovery. This is most often the case when differing statutes of limitations apply to the claims or when the availability of punitive damages for the claims differs. In the dramatic case of *Dickens v. Puryear*, an adult man had an intimate relationship with the defendants' teenage daughter.[60] The defendants lured the plaintiff to a remote location, where they captured him and subjected him to a harrowing series of beatings and threats, including a credible threat of castration. The encounter concluded with the plaintiff's release and instructions that he must "go home, pull his telephone off the wall, pack his clothes, and leave the state of North Carolina; otherwise he would be killed."

The plaintiff filed suit more than a year later, after the statutes of limitations for assault, battery and false imprisonment had elapsed, but within the three-year period allowed for IIED; so he attempted to classify the entire episode as "extreme and outrageous." The lower courts ruled that all of the defendants' conduct fell within the realm of assault and battery, which preempted the IIED claim.[61] On appeal, the North Carolina Supreme Court agreed that the majority of the conduct sounded in assault or battery and therefore was barred; however, it also found that the defendants' parting threat, conditional on future compliance with their demands, could not properly be considered assault.[62] Finding that this threat alone, in context of the evening's events, was sufficient to cause the plaintiff's subsequent emotional distress, the high court allowed the IIED claim to proceed, but only on this narrow portion of the abuse. The plaintiff could recover for his fear of future ambush, but North Carolina's strict gap-filler doctrine precluded recovery for the pain and suffering that he had endured while in the defendants' captivity.

The characterization of IIED as a gap-filler can be fatal to the plaintiff's case when any available alternative claims prove to be defective. In *Rockhill v. Pollard*, the plaintiff was in a car accident and sought medical treatment for herself and her infant daughter shortly afterward.[63] Although the baby was unresponsive and appeared

60. For relevant facts of this case, see 276 S.E.2d 325, 327-28, 336 (N.C. 1981).

61. *Id.* at 328. The omission of false imprisonment is inexplicable.

62. *Id.* at 336. The prima facie case for assault requires that the threat of harmful contact be imminent. When, as in this case, the threat is conditional, this threshold is not met. Thus, the court held that this threat did not sound in assault. *Id.*

63. For relevant facts of this case, see 485 P.2d 28, 29-33 (Or. 1971).

lifeless, the doctor gave only a cursory examination, not noticing a fracture of the baby's skull that required immediate treatment. Rather than provide medical attention, he declared their injuries to be insignificant, berated the plaintiff for disturbing him, and ordered the pair back outside in wet clothing on a freezing night, with no means of transportation. Several hours later, a hospital in another town treated the pair—the mother required stitches for her wounds and the baby was hospitalized for a week. The plaintiff suffered from insomnia and loss of appetite and received treatment for nervous exhaustion for two years afterward. The action could have been in medical malpractice, although it probably was deficient due to the lack of a cognizable injury as they were treated elsewhere the same day. Nevertheless, the Oregon Supreme Court found that her IIED claim could proceed, reversing a lower court's dismissal. If Oregon's IIED doctrine had been the same as North Carolina's, her case would have had to succeed or fail under medical malpractice alone.[64]

In a case of this nature—where a strong IIED claim overlaps with a more questionable alternative claim—the gap-filler doctrine dramatically affects the parties. A plaintiff in this situation may or may not be permitted to re-litigate the IIED claim. This question itself may require an appeal, which would add to the uncertainty of the outcome. Even if ultimately permitted to proceed with the IIED claim, the plaintiff would have wasted considerable time and effort on the defective claim—not to mention both the defendant's and the court's time and effort concerning the matter. There is a strong possibility that barring the IIED claim in the first instance prevents all but the most dedicated plaintiff from ever bringing the claim. Even if an exceptional plaintiff were able to persevere through the subsequent litigation, she would have suffered a grueling, costly, and ultimately meaningless ordeal merely because her state's courts regarded IIED as a gap-filler.

The gap-filler doctrine represents the fullest expression of a widely shared judicial skepticism toward IIED. This skepticism may result from the tort's unusual origin as an essentially academic creation, selectively crafted and even more selectively applied. The fact remains that the courts have adopted § 46 and approved it as a basis for liability in a broad range of factual scenarios. Yet there seems to be little agreement as to the proper place for IIED in the law

64. This is not the only possibility. The court alternatively could decide the medical malpractice case and make the IIED claim contingent on its outcome. However, by increasing the duration and complexity of the litigation, even this alternative approach would run a high risk of impairing the plaintiff's chances of recovery.

of torts. The following sections identify several reasons for this confusion in the overlap between IIED and various features of tort theory, each of which presents potential pitfalls that courts may prefer to avoid, and which collectively impede courts from following their official recognition of IIED to its logical conclusion.

III. ANALYSIS: SEARCHING FOR THE LOST TORT OF OUTRAGE

The courts of all fifty states recognize IIED as a valid cause of action and cite § 46 with approval, but they disagree about its status as an independent tort. Those states that have relegated it to secondary status have opened an exception to the general rule that common law causes of action are independent, so their position requires further explanation. While these courts on occasion have found IIED to be a useful device for compensating the victims of extreme antisocial behavior, they also demonstrate a strong reluctance to allow these claims to proliferate. Their concerns may rest on some special features of IIED that flow from its signature injury, emotional distress—especially in that it is both uniquely intangible and ubiquitous in society. These are essentially the same reasons that led the original *Restatement* authors to find a judicial consensus that emotional distress alone could not amount to a cognizable predicate injury.

In the broader context of American tort law, the unusual doctrine of "gap-filler IIED" creates troubling inconsistencies. These inconsistencies are more than academic, as they undermine the coherence of a system premised on the dispassionate application of logic, principles, and values to human affairs, a system for which doctrinal consistency is central to its legitimacy. The following sections explore the justifiable concerns that underlie judicial efforts to marginalize IIED either as a gap-filler or as an otherwise disfavored claim, then examine some unresolved tensions between IIED and other tort doctrines.

A. Why Courts Are Afraid of Outrage: the Problem of Compensating Emotional Injuries

Why do some courts insist on the exceptional position that IIED claims can never overlap with other claims? Perhaps some judges oppose the proliferation of this emotion-based tort and therefore seek to cabin its application as narrowly as possible. Numerous opinions from various jurisdictions reiterate the position that IIED is "disfavored," "given a narrow view," "treated as a limited

cause of action," etc.[65] *Disfavor* is hardly an analytical term, but instead connotes a visceral skepticism of IIED, a reluctance to allow the claims into court. Such disdain may rest on any of several justifiable concerns over the possible consequences of endorsing IIED. Without pretending to be exhaustive, this section identifies and briefly discusses seven such concerns: spurious claims; floodgates; indulgence; vagueness; entrepreneurship in the plaintiffs' bar; erosion of other torts; and pervasiveness.

Spurious Claims. Critics initially worried that a tort based on invisible injuries to the soul or psyche would invite unprincipled abuses in the form of falsified symptoms coupled with exaggerated allegations of offensive conduct.[66] In an early opinion rejecting a (pre-IIED) claim for emotional distress, the Kentucky Supreme Court encapsulated this concern: "The damages sought to be recovered are too remote and speculative. The injury is more sentimental than substantial. Being easily simulated and hard to disprove, there is no standard by which it can be justly, or even approximately, compensated."[67] The *Restatement* acknowledges courts' concern for falsified or exaggerated injuries as justifying limitations on IIED recovery.[68] This position recognizes that IIED provides an abnormally fertile environment for litigious creativity.

Floodgates. Courts may worry that full recognition of IIED would tap into a vast reservoir of antisocial behavior that normally goes un-litigated but meets the standard articulated in § 46.[69] Because everyone faces emotional distress at some time or another, potentially valid IIED claims seem to lurk in every emotionally charged human encounter.[70] In contrast to the concern for spurious claims, there is the

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65. *See supra* note 4.

66. *See, e.g.*, Prosser, *supra* note 1, at 876-78 (addressing the intangibility of emotional injuries).

67. Reed v. Ford, 112 S.W. 600, 601 (Ky. 1908); *see also, e.g.*, Langeslag v. KYMN, Inc., 664 N.W.2d 860, 866 (Minn. 2003) ("To prevent fictitious and speculative claims we limit [IIED] 'to cases involving particularly egregious facts.' " (quoting Hubbard v. United Press Int'l, 330 N.W.2d 428, 439 (Minn. 1983))).

68. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM 2 (Council Draft No. 6, 2006) (noting courts' historical concern that "emotional disturbance is less objectively verifiable than physical harm and therefore easier to feign, exaggerate, or self-deceive").

69. Prosser considered floodgates to be the "most valid objection to the protection of 'mental' interests" and contrasted it with what he perceived to be the more readily avoidable problem of "fictitious and fraudulent claims." Prosser, *supra* note 1, at 877-78.

70. The *Restatement* raises and addresses this concern frequently in its comments on emotional distress. *E.g.*, RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM 6 (Council Draft No. 6, 2006) ("Because emotional harm often is predictable . . . this tort could be too expansive."); *id.* ("A great deal of conduct may cause

potential that even claims made in good faith would widen the range of favorable IIED precedent and progressively lower the standards for both the outrageousness and the degree of emotional distress sufficient to maintain a claim. Therefore, some courts may fear that liberal application of IIED would open a flood of arguably valid claims, and they are compelled to preempt this deluge by enforcing rigid limits.

Indulgence. There is a related concern that allowing widespread recovery for emotional distress would send socially deleterious signals and encourage the weaker side of human nature, endorsing a thin-skinned response to the abrasive exchanges inherent in interpersonal relations.[71] Like permissive parents who spoil their children by kissing away every bump or bruise, the concern is that courts would be "enabling"[72] a decadent culture of complaint, blame, and self-pity. Instead, like responsible parents who dispassionately instruct their tearful, knee-scraped kids to "brush it off," courts that limit IIED claims are sending the character-building message: "Life is hard; deal with it."[73] This "indulgence" concern overlaps with the "floodgates" concern. Both rest on the idea that by allowing IIED litigation to evolve to its logical conclusion, the result would be a dramatic reformulation of the courts' role in the regulation of social interaction.[74]

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emotional disturbance, but the requisite conduct for this claim is a very small slice of human behavior . . . ."); *id.* at 12 ("[C]ourts are properly reluctant to adopt a potentially wide ranging tort . . . without safeguards against abuse."); *id.* at 16 ("[S]ome degree of emotional disturbance, even significant disturbance, is part of the price of living in a complex and interactive society.").

71. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM 6 (Council Draft No. 6, 2006) ("[For courts] to give legal credence to and permit recovery for emotional disturbance may increase its severity . . . .").

72. This term is meant in the sense that prevails in contemporary addiction literature—essentially, this amounts to encouraging decadent behavior. *See, e.g.*, Addiction Recovery Basics, Codependency: Enabling Addiction, http://addictionrecoverybasics.com/2007/04/07/codependency-enabling-addiction/ (last visited Mar. 5, 2008) ("Enabling behaviors are acts by those surrounding the substance abuser which contribute towards the maintenance of the addictive behavior.").

73. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM 2 (Council Draft No. 6, 2006) ("[S]ome minor or modest emotional harm is endemic in living in society and individuals must learn to accept and cope with such harms."); Magruder, *supra* note 1, at 1035 (arguing that "[a]gainst a large part of the frictions and irritations and clashing of temperaments incident to participation in a community life, a certain toughening of the mental hide is a better protection than the law could ever be").

74. *See* RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965) ("The rough edges of our society are still in need of a good deal of filing down, and in the meantime plaintiffs must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind. There is no occasion for the law to intervene in every case where some one's feelings are hurt.").

Vagueness. As discussed in Part II, the "extreme and outrageous conduct" element is remarkably ill defined. This vagueness in itself may motivate courts to cabin potential IIED liability. Additionally, the lack of definition amounts to a lack of notice to potential tortfeasors. Schoolyard bullies, romantic partners, drill sergeants, Socratic law professors, and ultimately almost everyone treats someone else cruelly, callously, or inconsiderately enough to cause severe mental suffering. Whether this treatment subjects the actor to liability for IIED might depend on whether someone in his community, on hearing some version of the story, would be moved to exclaim "Outrageous!"[75] Courts may further mistrust their ability to interpret and apply such a loose standard, especially in borderline cases or when the parties each offer convincing but conflicting stories. The concern over vagueness fixes upon the lack of effective notice and potential arbitrariness of liability in light of the flexibility and imprecision of the standard of conduct.[76]

Entrepreneurship. The tort's lack of clear substantive boundaries presents an open invitation to plaintiffs' attorneys to file frivolous IIED claims. As most cases turn on evidence of emotional distress and the moral indignation of the fact-finder, the disposition of borderline cases would be unpredictable. This uncertainty could produce an escalating cycle wherein a certain class of defendants would be motivated to settle to avoid expending time, money, and reputation on a public trial, and plaintiffs' lawyers would find an increasing incentive to continue seeking IIED clients[77]—potentially leading to the birth of a cottage industry akin to ambulance-chasing. Among other problems, such an IIED proliferation would contribute to the common perception of plaintiffs' lawyers, the tort system, and "runaway" juries as promoting absurd lawsuits and exorbitant recoveries.

Erosion of Other Torts. Plaintiffs may use IIED strategically to avoid the obstacles to recovery under traditional torts that have better-defined rules of liability and substantive protections for

75. *Id.* ("Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous!' ").

76. For a pertinent example, see Nickerson v. Hodges, *supra* notes 36, 49 and accompanying text. It seems clear that the *Nickerson* defendants thought of their actions as a harmless practical joke.

77. *See* Givelber, *supra* note 39, at 64-65 ("[T]he plaintiff's claim has settlement value, particularly given the relatively small economic stakes for which a typical defendant is playing.").

defendants.[78] Defamation, in particular, would be at risk of significant erosion if courts allowed plaintiffs to proceed with overlapping IIED claims because defamation often results in emotional harms and often can be cast as "outrageous."[79] This legitimate concern does not necessarily lead to the conclusion that IIED should be restricted generally. To the contrary, it can be addressed through specific provisions for the established substantive rules to apply when the same issues are at stake.

Pervasiveness in Litigation. Finally, there is a concern that IIED could become a routine filing, appended to any and all litigation.[80] In a regime of permissive joinder of parties, claims and counterclaims, there is little structural restraint on such a practice. Adversarial legal proceedings generally entail considerable emotional distress for most litigants and often stem from disputes that were uncomfortable long before they reached the courthouse, so it would seem that the sole bulwark against an avalanche of vexatious claims and counterclaims is the thin reed of "outrageousness."[81] While the concern over pervasiveness may appear to be reducible to a floodgates problem, it potentially can encompass all of the problems that courts might anticipate to flow from an undisciplined approach on IIED—in addition, this concern arises from a peculiarity of contemporary American civil procedure. Whether claims are spurious or legitimate, permissive joinder creates an open avenue for all forms of proliferation. Moreover, as a practical matter, the majority of IIED

78. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM 12 (Council Draft No. 6, 2006) ("Some emotional disturbance ordinarily accompanies most unpleasant episodes. Thus, a claim for [IIED] can readily be added whenever the real gravamen of the case is a different tort, such as invasion of privacy, malicious prosecution, defamation, or employment discrimination. That open-textured quality, which makes [IIED] readily adaptable to be asserted as a supplemental claim[,] has required more aggressive judicial policing of this tort.").

79. *See* Chaiken v. VV Pub. Corp., 119 F.3d 1018, 1034 (2d Cir. 1997) (holding that, under New York law, plaintiffs "cannot avoid the obstacles involved in a defamation claim by simply relabeling it as a claim for intentional infliction of emotional distress").

80. *See* Givelber, *supra* note 39, at 64 ("Modern procedure makes it a simple matter to add a claim of outrageousness to a suit that would be brought in any event, or to interpose it as a counterclaim if one has been sued.").

81. The *Restatement* addresses this concern through the provision that where an actor "has done no more than to insist upon his legal rights in a permissible way, even though he is well aware that such insistence is certain to cause emotional distress," conduct that "would otherwise be extreme and outrageous, may be privileged under the circumstances." RESTATEMENT (SECOND) OF TORTS § 46 cmt. g. (1965). This would seem to encompass litigation generally as privileged conduct. However, the comment does not state an absolute privilege and, most importantly, it inexplicably presupposes that the conduct in question was "permissible" in the first place, which would seem to nullify its effect when applied to any arguably "extreme and outrageous" conduct between adversaries in litigation. *Id.*

claims in fact are joined to other claims, so courts have reason to perceive this as an issue.

It follows from these generally legitimate concerns that courts are justified in taking a skeptical approach to IIED claims and in seeking methods to cabin their acceptance of the tort. Considering the Pandora's Box of excesses that courts may anticipate if they allow IIED claims to proliferate, the "gap-filler" doctrine provides one sturdy nail to keep the lid on. However, it does not automatically follow that courts should relegate the tort to secondary status as a "residual" cause of action that can be maintained only when nothing else applies. An alternative response to this entire suite of concerns is to strengthen the doctrinal consistency of IIED.

The above-listed concerns share as an implicit assumption the observation that emotional injuries are remarkably common, which likely leads courts to fear that "too much" recognition of IIED claims would encourage a flood of litigation in all the forms discussed. The alternative proposed in Part IV addresses this general problem by eliminating the focus on emotional injury and placing it instead on a clearer articulation of the conduct that produces liability. Shifting the judicial analysis in this way should enable courts to apply IIED consistently and conservatively without having to impose artificial constraints.

B. The Predicate Injury Requirement for Recovery for Emotional Distress

The landscape of recoverable emotional harms in American tort law is an archipelago: irregularly shaped patches of solid ground with miles of empty ocean in between. Certain torts allow for routine recovery of emotional distress damages, framed variously as pain and suffering, mental anguish, or loss of enjoyment of life. Emotional damages are a typical component of personal injury judgments in negligence and battery, and they predominate in assault and false imprisonment cases. In such circumstances, the bar is set relatively low: when the defendant is liable under any of these theories, emotional damages are expected and awards often seem generous in comparison to the suffering. These are the traditional cases in which the emotional damages are "parasitic" on a cause of action that has an accepted, non-psychological predicate injury.

Away from the established predicates, recovery for emotional distress is rare. Even after the adoption of § 46, the *Restatement* still provides a general rule that there is no liability for pure "emotional distress, without resulting bodily harm or any other invasion of the

[plaintiff's] interests."[82] The only established doctrines that allow emotional distress as a predicate injury are IIED and its "cousin," negligent infliction of emotional distress ("NIED"). However, unlike IIED, NIED does not allow recovery of emotional distress damages; instead, it allows recovery for any *physical* harm that results from a negligently inflicted predicate emotional injury.[83]

A confusingly intermediate doctrine falls between negligence-based NIED and the intentional tort of IIED. It is, essentially, negligent IIED ("NIIED"), or IIED without the outrage.[84] Like NIED, NIIED denies recovery for intentionally caused emotional distress, but permits recovery for physical injuries that result from intentionally caused emotional distress. The *Restatement* classifies NIIED as a negligence theory because a liable defendant, by intentionally distressing the plaintiff, would have been negligent for causing the resultant bodily harm.[85] As the *Restatement* notes, this cause of action can overlap with both IIED and NIED.[86] In theory, once there is a predicate injury of unrecoverable emotional distress that results in a recoverable physical injury, any further emotional distress that results from that physical injury should be recoverable as pain and suffering damages of the type commonly awarded to victims of negligence.

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82. RESTATEMENT (SECOND) OF TORTS § 436A.

83. *Id.* § 313. A traditionally cited example is that of a defendant who negligently upsets a pregnant woman and her distress results in miscarriage. In *Mitchell v. Rochester Railway Co.*, a plaintiff injured in this way was denied recovery because of the lack of any contact—which was necessary for recovery under the doctrine of the time. 45 N.E. 354, 355 (N.Y. 1896). The legitimacy of her claim seems obvious by contemporary mores. The *Restatement* addresses the failure of the New York court by defining NIED proactively as a means to recover under similar circumstances. RESTATEMENT (SECOND) OF TORTS § 313.

84. *See* RESTATEMENT (SECOND) OF TORTS § 312 ("If the actor intentionally and unreasonably subjects another to emotional distress which he should recognize as likely to result in illness or other bodily harm, he is subject to liability to the other for an illness or other bodily harm of which the distress is a legal cause, (a) although the actor has no intention of inflicting such harm, and (b) irrespective of whether the act is directed against the other or a third person."). The abbreviation NIIED is not standard—I coin it here both for the sake of efficiency and to emphasize the apparent similarity of these three doctrines, with NIIED being the natural hybrid of IIED and NIED.

85. The *Restatement (Second)* places § 312 within "Division 2: Negligence," under the heading, "Topic 6: Conduct Negligent Because Intended or Likely to Cause Physically Dangerous Emotional Distress." *Id.*

86. *Id.* cmt. b ("There is a considerable degree of duplication between the rule stated in this Section [§ 312] and that stated in § 46 . . . . This Section permits the alternative of a negligence action in [cases that are also actionable under § 46]. The rule stated here extends, however, somewhat further than the rule of § 46. It permits the negligence action in any case where it may be found that the conduct, although intended to inflict emotional distress, amounts to something less than extreme outrage . . . .").

Some courts have blurred the already indistinct lines that separate these doctrines further by interpreting IIED liability as requiring "medically significant" emotional injuries.[87] The dual purposes of emphasizing the necessary element of *severe* emotional distress and filtering out spurious claims likely explain this requirement. Nevertheless, the addition of this requirement eliminates the practical distinction between IIED and its corollaries in negligence because "medically significant" can be read as requiring some form of bodily harm. Even when the medical opinion in question is psychiatric, a case of complete nervous collapse requiring hospitalization (i.e., such that it is "medically significant") would test the boundary between mental and physical injury. That is, the distinction between the two classes of injuries depends on where one draws the line between mind and body, a line that medical science has yet to draw. Thus, this interpretation of the severe injury requirement renders the range of harms recoverable under IIED indistinguishable from that recoverable under the negligent infliction doctrines.

The apparent unequal treatment of emotional distress that results from an actionable physical injury as opposed to that which results directly from conduct requires explanation. Professors John Goldberg and Benjamin Zipursky present the example of two sets of workers exposed to asbestos and fearing future cancer.[88] One set of workers showed no physical symptoms, while the others had been diagnosed with benign mesothelioma.[89] Although both groups had suffered equivalent exposure and carried approximately the same measurable risks of future cancer, courts were more likely to award fear-based damages to those manifesting the benign condition.[90] The authors observe that "[i]t is a mistake to suppose that, where there is the same act and the same consequence, there must be the same possibility of recovery."[91] The question, which act and consequence alone do not answer, is whether there has been an actionable tort. In negligence, this entails that the breach of a duty has caused a cognizable injury. The courts in the mesothelioma example concluded

87. *E.g.*, Bogan v. Gen. Motors Corp., 437 F. Supp. 2d 1040, 1045 (E.D. Mo. 2006) (stating that under Missouri law, to support an IIED claim, plaintiff's "emotional distress or mental injury must be medically diagnosable and must be of sufficient severity so as to be medically significant") (citing Bass v. Nooney Co., 646 S.W.2d 765, 772 (Mo. 1983)).

88. John C.P. Goldberg & Benjamin C. Zipursky, *Unrealized Torts*, 88 VA. L. REV. 1625, 1674 (2002).

89. *Id.*

90. *Id.*

91. *Id.* at 1675.

that even a harmless physical manifestation of disease was cognizable, whereas the purely emotional impact was not.

To remain consistent with American tort law's treatment of recovery for emotional harms, the availability of an emotional-distress-based cause of action, either IIED or NIED, depends on the court's understanding of the plaintiff's legally protected interests and the defendant's concomitant duties. Once the defendant is found to have breached a duty or violated an interest, the threshold is crossed and liability ensues for the resulting harm—as long as the harm is compensable under the applicable doctrines. This is equally true of both intentional and negligent torts. Thus, claims for personal injury, assault, and false imprisonment trigger liability for emotional distress, whereas claims for other injuries that can cause equivalent or greater degrees of emotional distress typically do not trigger this liability. As the *Restatement* articulates, there is no liability for "pure" emotional distress injuries.[92] Instead, IIED liability ensues once a court finds that the defendant has violated the dignitary interest in being free from extreme and outrageous behavior; it is the "injury" to this interest (the "predicate injury") that enables recovery for the emotional distress that results.[93]

What distinguishes IIED from NIED or NIIED and all of these from otherwise recoverable or unrecoverable emotional damages is how we define the underlying violation. As argued in Part IV, the doctrinal confusion surrounding IIED arises largely from its dual focus on both injury and conduct. Confusion results because this dual focus obscures the nature of the violation, sending courts on a negligence-like inquiry into the severity of the emotional injury as a threshold question. To the extent that the severity inquiry takes precedence over the conduct inquiry, IIED becomes an anomaly in tort law in that the emotional injury itself (or its severity) becomes the predicate for its recovery. In contrast, IIED becomes a clearer doctrine when treated as analogous to assault—in which the conduct alone defines the violation and predicate for recovery, and the severity of the harm it causes is relevant only to the calculation of damages.[94] This

92. RESTATEMENT (SECOND) OF TORTS § 436(1) (1965).

93. *See, e.g.*, Clark v. Estate of Rice, 653 N.W.2d 166, 169-70 (Iowa 2002) ("[E]motional distress can be a proper element of damages in a tort action . . . when there has been an invasion of some legally protected interest by way of willful and malicious conduct. In such instances, emotional distress lies at the very core of the tort itself, and becomes an element of damages because it arises from the violation of the legally protected interest itself." (internal citations omitted)).

94. In assault, the conduct is defined partially in reference to the plaintiff. RESTATEMENT (SECOND) OF TORTS § 21 ("An actor is subject to liability to another for assault if (a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person,

treatment, proposed in Section IV, has the benefit of maintaining consistency with IIED's classification as an intentional tort and with tort law's otherwise uniform approach to recovery for emotional injuries.

C. The Right to Be Free from Extreme and Outrageous Psychological Attack

The most significant judicial restriction of IIED is its classification in some jurisdictions as a gap-filler, relegating it to the status of a "pseudo-tort" that courts may freely disregard or accept as they deem appropriate. This approach is at least unusual and possibly unique in the field of tort law. Moreover, the gap-filler approach to IIED is analytically problematic in at least two ways. First, in recognizing a distinct cause of action, complete with a name and a prima facie case, courts recognize the existence of both a protected interest and a legal right to redress violations of the interest. When courts qualify that right as enforceable only under rare and peculiar scenarios, they deny protection of the underlying interest and, in effect, deny the existence of a legal right recognized in their jurisprudence. This denial raises a problem of internal consistency between the courts' words and behavior. Second, compared to the alternative approach of treating IIED as an independent tort, the gap-filler theory has the unexpected result of *creating* gaps between IIED and the other torts with which it potentially overlaps. When a court rules out an overlapping IIED claim but the other, established tort claim fails, the court has created a legal gap.

Section 870 of the *Restatement* provides an official gap-filler for all intentional harms not captured under established torts under the heading of "Liability for Intended Consequences." Also known as "innominate tort" or "prima facie tort," § 870 imposes liability on anyone who "intentionally causes injury to another . . . if his conduct is generally culpable."[95] According to the commentary, the ALI recognized that the common law governing intentional torts developed as a disparate set of independent wrongs without a general unifying

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or an imminent apprehension of such a contact, and (b) *the other is thereby put in such imminent apprehension.*" (emphasis added)). The distinction is that "imminent apprehension" of contact does not amount to a tangible injury. *Id.* The prima facie case for assault does not require that the plaintiff suffer fear or any other detrimental effect other than mere awareness of the imminent contact. JOHN C.P. GOLDBERG, ANTHONY J. SEBOK & BENJAMIN C. ZIPURSKY, TORT LAW: RESPONSIBILITIES AND REDRESS 562 (2004).

95. RESTATEMENT (SECOND) OF TORTS § 870. Note that "injury" is broad enough to encompass emotional harm; thus, in the absence of § 46 this section would capture at least some IIED cases.

principle.[96] Section 870 "is intended to supply that unifying principle and to explain the basis for the more recently created intentional torts [such as IIED]."[97] Thus, all intentional torts, including the most paradigmatic, like assault and battery, can be conceived as "crystallizations" of this general principle.[98]

As a cause of action, § 870 is expressly limited to "conduct [that] does not come within a traditional category of tort liability."[99] The true catchall of the *Restatement*, § 870 covers any situation where one person intentionally harms another, but manages to do so outside the orderly categories that predominate throughout most of tort law. Thus, the section is devised to account for "incipient" torts—new ways of causing harm that arise with the continuing evolution of society, or injuries to interests only recently recognized as eligible for legal protection.[100] Over time, if a particular doctrine were to emerge, the next *Restatement* might define such wrongs, with specific elements, among the recognized "nominate" torts. In effect, the tort of IIED developed in this way—out of a common law tradition of granting recovery to victims of acts that were generically tortious and caused primarily psychological injuries.[101] For example, in the landmark case

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96. *Id.* cmt. a.

97. *Id.*

98. *Id.* cmt. d. This is not to imply that prima facie tort is a well-developed doctrine with an elaborate jurisprudential pedigree. In fact, invocations of § 870 in the reported case law are rare. The *Restatement* identifies it as an afterthought to the development of tort law, although it may be viewed more accurately as a forerunner—from the long gone time when "wrongs" were not subject to precise substantive doctrines.

In the American system, one of Justice Holmes' opinions apparently initiated formal recognition of a traditional generic tort. *See* Aikens v. Wisconsin, 195 U.S. 194, 204 (1904) ("It has been considered that *prima facie*, the intentional infliction of temporal damage is a cause of action, which as a matter of substantive law, whatever may be the form of pleading, requires a justification if the defendant is to escape . . . ."). Citing Holmes, the New York state courts characterized the doctrine as "prima facie tort" and have applied it infrequently to atypical cases of intentional harm since the 1940s. The first New York case to formally recognize the doctrine was Opera on Tour v. Weber, 34 N.E.2d 349 (N.Y. 1941). It is ironic that New York is the leading state on prima facie tort doctrine, as its courts also are the most resolute in asserting that IIED must be no more than a gap-filler. These courts risk redundancy: with the availability of prima facie tort, where is the gap that remains to be filled?

99. RESTATEMENT (SECOND) OF TORTS § 870 cmt. a.

100. *Id.* Prima facie tort also can encompass situations that would fall into exceptions to traditional torts. For example, "the tort of false imprisonment requires the setting of boundaries confining the plaintiff. It has been held that [prima facie tort] may permit recovery for restraining a person from going into a place where he has a right to go." *Id.* cmt. j; *see also* Cullen v. Dickenson, 144 N.W. 656 (S.D. 1913) (holding that prevention of entry from a public event does not amount to false imprisonment but is actionable nonetheless). Thus, plaintiffs can pursue instances of apparently tortious restraint that escape the rigid definition of false imprisonment under a theory of prima facie tort.

101. Lord Bowen expressed the traditional view that "intentionally to do that which is calculated in the ordinary course of events to damage, and which does, in fact, damage another

of *Nickerson v. Hodges*, the court awarded damages for a woman's mental deterioration and death evidently caused by a humiliating practical joke.[102] The court cited no defined cause of action to permit this recovery, but compensated the decedent's estate nevertheless.[103] At the time of its decision, *Nickerson v. Hodges* was the kind of exceptional case that today would fall under § 870.

To the extent that courts treat IIED as a gap-filler, it is effectively a subspecies of prima facie tort: a flexible liability doctrine that is available for judicial emergencies and special circumstances. These courts reserve IIED for circumstances where a victim has been injured by an evidently culpable defendant and the injury is otherwise uncompensable. This is the scenario that IIED describes: severe emotional distress (a traditionally uncompensable injury) and a defendant who has caused this injury intentionally through extreme and outrageous conduct (conduct the court cannot bring itself to excuse). The principal distinctions between IIED and prima facie tort are that IIED is "nominate" and that the ALI, legal scholars, and the courts of all U.S. jurisdictions have recognized a common law tradition of providing recovery.

In recognizing any tort—ascribing liability to a category of conduct and providing compensation for the harms it causes—courts establish a legally protected interest. The *Restatement* goes further in classifying the intentional torts, including IIED, as "invasions of interests in personality," sometimes known as dignitary interests.[104] Just as the tort of battery establishes a protected interest in bodily integrity,[105] the tort of IIED establishes a protected interest in psychological integrity.[106] In both cases, the right to enforce the interest is subject to various conditions, waivers, and privileges that

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in that person's property or trade is actionable if done without just cause or excuse." Mogul S.S. Co. v. McGregor Gow & Co., 23 Q.B.D. 598, 613 (1889).

102. 84 So. 37, 39 (La. 1920). For discussion of this case, see *supra* text accompanying note 36.

103. *Id.*

104. RESTATEMENT (SECOND) OF TORTS div. 1, ch. 2.

105. *See id.* § 18 cmt. c (noting that, in a battery action, "the essence of the plaintiff's grievance consists in the offense to the dignity involved in the unpermitted and intentional invasion of the inviolability of his person").

106. Published opinions that straightforwardly proclaim the recognition of this protected interest are concededly difficult to find. In most cases, the recognition of such an interest would be an implicit feature of the court's judgment taken in combination with generally accepted theories of law. One case that makes it explicit is *Huntingdon Life Sciences v. Stop Huntingdon Animal Cruelty USA*, 129 Cal. App. 4th 1228, 1259 (2005) ("Peace of mind is now recognized as a legally protected interest, the intentional invasion of which is an independent wrong, giving rise to liability without the necessity of showing the elements of any of the traditional torts." (citing 5 BERNARD E. WITKIN, SUMMARY OF CALIFORNIA LAW, TORTS § 403 (9th ed. 1988))).

may negate the right or otherwise render particular invasions of the interest non-actionable. In the case of IIED, as defined by § 46, the boundaries of the right and its underlying interest are peculiarly vague, but despite this vagueness, when a state's court system endorses § 46, it affirms the existence of a cause of action when this interest is violated.

Thus, the view that IIED is at once a "named" intentional tort (corresponding to an acknowledged dignitary interest) and a gap-filler is difficult to reconcile. In taking the position that an accompanying claim under another tort should negate a valid IIED claim, courts in effect say: "We recognize a person's right not to be attacked psychologically—but only if the method of attack does not appear to violate any other rights." An alternative, more sustainable formulation is that the courts acknowledge both rights but, whenever possible, prefer to redress simultaneous violations under the more clearly defined doctrinal rules that govern most, if not all, other established torts. In either case, the court assumes that protection from psychological attack is *subsumed* under other rights—that the interests the courts protect under the labels of defamation, assault, battery, and false imprisonment incorporate the associated psychological interests. To the extent that judicial vindication of an assault victim also vindicates the right not to be attacked psychologically by means of assault, this formulation may be a defensible understanding of the relationship between IIED and assault.

The problem with the gap-filler understanding is that the vindication of one right by means of another occurs only when the assailant's conduct actually fits within the definition of the other tort. For example, if A threatens B repeatedly in a campaign of intimidation calculated to make B a nervous wreck, and A succeeds, but technically never creates "an imminent apprehension" of "harmful or offensive contact,"[107] then A may commit IIED without committing assault.[108] In a gap-filler jurisdiction, the courts probably would analyze A's conduct under the template of assault and conclude that B has no legitimate claim under this theory and that IIED is unavailable because threats are actionable only when they constitute assault. The result is that any defect in B's assault claim effectively nullifies a

107. RESTATEMENT (SECOND) OF TORTS § 21.

108. That is, as long as the threats are severe and believable but the contact is never precisely *imminent*—as the courts of A and B's jurisdiction interpret this requirement—the conduct may fall within the ambit of the tort of assault, but imperfectly. At the same time, the conduct may fit perfectly within the definition of IIED.

legitimate IIED claim. While some courts may reason that this scenario presents precisely the sort of gap that IIED should fill, many courts instead would conclude that B merely has raised a defective assault claim. The gap-filler theory of IIED can lead to either conclusion, depending on a particular court's view of what constitutes a gap in the applicability of other torts.

In recognizing IIED as a gap-filler tort, courts create an interest that has gaps. The gaps arise at the outer limits of all potentially overlapping torts, in any case in which another tort could be claimed. In an effort to maintain a disciplined approach to the other tort, these courts impose doctrinal confusion and inconsistency on IIED: by creating a right that may be recognized or disregarded for reasons unrelated to the underlying interest that it represents. Such confusion is unnecessary and can be avoided simply by recognizing that IIED is predicated on a distinct interest in not being attacked psychologically. By the terms of § 46, only *extreme and outrageous* violations of this interest will be vindicated. Because there is a universal rule against duplicative recoveries, the theory of independent IIED does not create any additional liability beyond that created under "gap-filler IIED."[109] Instead, it merely acknowledges that § 46 creates a legally protected interest that coexists alongside other distinct interests—and that courts decide upon the violation of each interest as a separate question.

D. IIED as Outrage: A Punitive Tort?

In one of the few scholarly articles on IIED published since the *Restatement (Second)* defined it, Professor Daniel Givelber observed that the extreme and outrageous conduct element of § 46 dominates the definition of the tort such that "there is no liability simply for the intentional infliction of emotional distress."[110] Another way of saying this is that *IIED is not IIED—IIED is outrage.* While this may be a jarring observation (that somehow the bizarre notion of "outrage"

109. This is true even if some additional defendants are held liable under the independent IIED theory. As argued in this section, a problem with the gap-filler theory is that it creates inherent uncertainty about the boundaries of the gaps. However, neither theory of IIED categorically rules in or rules out particular conduct for liability that would be impermissible under the other theory: the only categorical difference is that gap-filler courts would not hold a defendant liable for both IIED and another tort for the same conduct.

110. Givelber, *supra* note 39, at 46.

hijacked the modest protection of emotional tranquility), case law and common sense support Professor Givelber's observation.[111]

Common sense dictates that, without something more, the mere "intentional infliction of emotional distress"[112] should not be actionable. Conduct that intentionally distresses another is not only common but arguably intrinsic to human interaction. Likewise, the "emotional distress" cannot define the tort—as Prosser noted, if recovery were based on hurt feelings alone, "we should all be in court twice a week"[113] As both the conduct and the injury are to some degree mundane facts of daily life, the IIED tort simply cannot exist without strict limitations. The *Restatement*'s primary limitation is to require that actionable conduct be extreme and outrageous. Thus, with hurt feelings and other emotional disturbance being so abundant, but "outrageousness" being rare by definition, the natural focus of inquiries under § 46 is outrage.

Outrageousness is the requirement that keeps run-of-the-mill cases out of court and, not coincidentally, it is typically the primary focus of judicial attention in reported cases. Courts facing similar facts sometimes reach different conclusions as to what behavior qualifies as outrageous[114]—an inevitable by-product of the fact that outrage is intrinsically subjective and that courts are presented with a large volume of bad behavior. However, the basic guidance is clear: outrage is extraordinarily bad behavior, limited to the most extreme cases. Determining the application of IIED, then, is a question of gauging community standards of "normal" versus excessive bad behavior.

The inevitable emphasis on outrageousness leads to yet another problematic area of overlap between IIED and the rest of tort

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111. Mississippi is the only state whose highest court has announced the primacy of outrage over injury expressly. Sears, Roebuck & Co. v. Devers, 405 So. 2d 898, 902 (Miss. 1981) ("Where there is something about the defendant's conduct which evokes outrage or revulsion, done intentionally . . . it is the nature of the act itself—as opposed to the seriousness of the consequences—which gives impetus to legal redress."). Nevertheless, review of large volumes of IIED cases shows that, regardless of the jurisdiction in which they sit, courts' primary inquiry is invariably into the outrageousness of the conduct. *E.g.*, Breeden v. League Servs. Corp., 575 P.2d 1374, 1377 (Okla. 1978) ("The court, in the first instance, must determine whether the defendant's conduct *may* reasonably be regarded *so extreme and outrageous* as to permit recovery, or whether it is necessarily so." (citing RESTATEMENT (SECOND) OF TORTS § 46 cmt. j)).

112. Here, the phrase "intentional infliction of emotional distress" is used for its literal meaning alone—as distinct from the tort claim IIED specified under § 46.

113. Prosser, *supra* note 1, at 877.

114. For example, in two very similar cases decided in different jurisdictions, ex-husbands' claims of IIED for the revelation that children they presumed to be their own biological offspring were, in fact, the children of their wives' paramours have received opposite results. *Compare* Bailey v. Searles-Bailey, 746 N.E.2d 1159 (Ohio Ct. App. 2000) (recovery), *with* Day v. Heller, 653 N.W.2d 475 (Neb. 2002) (no recovery).

law: the standard for outrage bears a striking resemblance to the standard of "egregiousness" or "reprehensibility" that qualifies a defendant for punitive damages. The *Restatement* makes this relationship explicit in defining punitive damages as applicable to "conduct that is outrageous."[115] Some courts also have found IIED and punitive damages to be duplicative, in effect holding that the same criterion cannot lead to two independent recoveries.[116] The overlap in standards has the apparent effect of rendering IIED redundant whenever it coincides with another tort: if the other tort allows for punitive damages, then IIED becomes unnecessary, whereas if the tort does not allow for punitive damages, these courts may find that IIED should be unavailable a fortiori. However, any such redundancy is limited to scenarios in which the plaintiff's other cause of action: (a) was winnable; (b) allowed for emotional damages; and (c) was one for which punitive damages were not precluded or otherwise discouraged. In all other cases, IIED has a unique role independent of punitive damages, despite the noted congruence of their standards.

In light of the similarity between the standards for conduct that creates IIED liability and conduct that earns punitive damages, courts sometimes conclude that an IIED plaintiff is ineligible for punitive damages.[117] These courts reason that it would be unfair for the same modicum of misconduct that created the initial liability to automatically subject the defendant to extra punishment. This move reflects an understanding that punitive damages by definition should be exceptional within any given category of tort. Courts can differ on this point, and some have awarded punitive damages on top of IIED awards, finding, in effect, that there is such a thing as "extra-bad" outrageousness.[118]

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115. RESTATEMENT (SECOND) OF TORTS § 908(2).

116. *E.g.*, Westview Cemetery v. Blanchard, 216 S.E.2d 776, 780-81 (Ga. 1975) (observing that the test "for a purely mental injury is essentially the same as the test for punitive damages," and holding, therefore, that awarding both forms of damages would be duplicative); Knierim v. Izzo, 174 N.E.2d 157, 165 (Ill. 1961) (finding that the standard of outrageousness for IIED renders the compensatory damages "sufficiently punitive" and therefore disallowing punitive damages for any IIED claim under Illinois law).

117. *See supra* note 116.

118. *See, e.g.*, State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 415, 429 (2003) (vacating an award of $145 million in punitive damages as excessive in relation to $1 million in compensatory damages, and remanding for a moderate punitive damage award, although the only significant compensatory damages were for IIED); Stockett v. Tolin, 791 F. Supp. 1536, 1560-61 (S.D. Fla. 1992) (awarding $1,055,001 in punitive damages where an unspecified portion of the $308,284 in compensatory damages was awarded for an IIED claim; justifying the punitive damages by the egregiousness, wantonness, and continuousness of defendant's outrageous conduct; and citing similar cases in which courts of several states had sustained punitive damages in addition to IIED claims); Henricksen v. State, 84 P.3d 38, 54 (Mont. 2004) (upholding

Although the *Restatement* language quoted above appears to support the view that IIED is by its nature punitive, closer inspection reveals distinctions both within the *Restatement* and in courts' treatment of the two issues. Notwithstanding its reference to outrageousness in defining punitive damages,[119] the *Restatement* distinguishes the outrageousness that qualifies for recovery under § 46 as something beyond "the degree of aggravation which would entitle the plaintiff to punitive damages for another tort."[120] Without such a distinction, IIED would merge into punitive damages.

Punitive damages are, by definition, distinct from compensatory damages in terms of both their theoretical justification and the manner in which they are calculated. Whereas tort causes of action impose liability for the harm caused to the plaintiff, punitive damages are expressly intended to punish and deter the defendant.[121] A recent series of Supreme Court cases has clarified the methods of calculation that state courts assessing punitive damages may employ without violating defendants' substantive due process rights under the U.S. Constitution.[122] A common theme at the "outer limits" of punitive damages is the proportionality of the penalty to factors present in the case: in particular, the reprehensibility of the conduct and the severity or value of the plaintiff's injury must be proportionate.[123] IIED damages, however, are limited to the "value" of the plaintiff's injury.

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both compensatory and punitive damages for IIED because their purposes are distinct); Coates v. Wal-Mart Stores, 976 P.2d 999, 1003, 1009 (N.M. 1999) (affirming trial court's awards to two plaintiffs of $30,000 and $15,000 in compensatory damages for their respective IIED claims, $84,000 and $48,000 in other compensatory damages, and $1,200,000 and $555,000 in punitive damages; articulating the standard of "extreme and outrageous" for IIED and a separate standard of "malicious, willful, reckless, wanton, fraudulent, or . . . bad faith" misconduct for punitive damages).

119. *See supra* text accompanying note 115.

120. RESTATEMENT (SECOND) OF TORTS § 46 cmt. d.

121. *See, e.g.*, Cooper Indus. v. Leatherman Tool Group, 532 U.S. 424, 432 (2001) ("Although compensatory damages and punitive damages are typically awarded at the same time by the same decisionmaker, they serve distinct purposes. The former are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct. The latter, which have been described as 'quasi-criminal,' operate as 'private fines' intended to punish the defendant and to deter future wrongdoing." (quoting Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 19 (1991) (internal citations omitted))).

122. BMW of Am. v. Gore, 517 U.S. 559, 574-75 (1996) (announcing three "guideposts" for courts to consider when reviewing potentially excessive punitive damage awards: "the degree of reprehensibility . . . ; the disparity between the harm or potential harm suffered by [the plaintiff] and his punitive damages award; and the difference between this remedy and the civil penalties authorized or imposed in comparable cases").

123. *Id.* at 575 ("[T]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct."); *Campbell*, 538 U.S. at 426 ("[C]ourts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered.").

In an IIED analysis, the court's reprehension is a threshold determination for compensatory liability, whereas for punitive damages, the court's reprehension is a multiplier.[124]

With the respective analyses dissected in this way, the problem of applying the same standard for both compensatory IIED liability and punitive damages is diminished greatly, if not entirely. In both situations, the court applies a moral judgment to the defendant's conduct, but the questions are different: for an IIED claim, the question is, "Did the defendant cross the line?" whereas for punitive damages, the question is, "How far past the line did the defendant go?" There is no requirement that these questions even refer to the same "line." The mere fact that the two determinations can be summarized in similar words does not make them interchangeable, and the distinctness of their respective functions indicates that they should not be treated as such.

Nevertheless, some observers have found overlap between IIED and punitive damages and concluded that IIED therefore is either superfluous or subject to limitation. If the two doctrines truly share the same standard, IIED becomes a species of punitive damages that courts may award whenever the otherwise unrecoverable emotional injury is severe enough. The opinions of some courts indicate their conclusion that this is precisely what IIED is or should be.[125]

Following a similar line of reasoning, Professor Givelber concluded that the IIED doctrine serves a valuable function for courts: it compensates the victims of horrible behavior, unrestrained by particular rules of application.[126] It is a handy judicial tool that is always available for the occasional case in which the defendant's conduct exceeds all reasonable bounds of decency, but would otherwise escape censure. When a court decides that someone has "gone too far," it can invoke IIED to "achieve [situational] justice without the costs . . . of dissembling and distorted rules."[127] Givelber also doubted that IIED "will ever provide the basis for principled adjudication."[128]

An alternative view is possible and, as argued in Part IV, preferable to the unprincipled, ad hoc doctrine that Givelber described. While Givelber may have been correct in discerning the

124. *See, e.g.*, Henricksen v. State, 84 P.3d 38, 54 (Mont. 2004) (holding that Montana law allows for both compensatory and punitive damages for an IIED claim—the former to compensate for the harm to the plaintiff and the latter "to address the culpability of a defendant's conduct").

125. *See supra* note 116.

126. Givelber, *supra* note 39, at 75.

127. *Id.*

128. *Id.*

predominance of outrage in defining the tort, his conclusion as to the inherent subjectivity of its application remains questionable. The quality of outrageousness is in the eye of the beholder, but IIED's conduct element has another, more objective facet: the intent to inflict emotional harm. The final part of this Note proposes that refinement of the conduct element and elimination of the severe injury requirement could provide courts with a consistent approach to IIED.

IV. SOLUTION: A NEW RESTATEMENT OF THE LAW OF OUTRAGE

IIED is a troubled tort. As discussed in the foregoing sections, its problems of definition and inconsistent application arise from: its questionable origins in common law; its hybrid nature under the *Restatement*; and its analytical convergence with other areas of tort law.[129] Moreover, IIED coincides with a wide variety of other tort claims, especially assault, battery, and defamation. These overlaps produce confusion over both the appropriate boundaries of IIED and its status as either superfluous or a gap-filler.

This Note proposes reformulating IIED as a purely intentional tort, the "tort of harassment," and eliminating its severe injury requirement. In keeping with the *Restatement*'s overall effort to "restate" the law, this proposal does not radically reform the courts' approaches to the cases they decide, but instead aims to improve consistency of the doctrine's application. Thus, this suggested alteration to IIED would maintain the same prohibition of "extreme and outrageous conduct" and retain essentially the same lines of exemplary cases that currently are covered under § 46. The tort of harassment proposed here would not widen the existing net of IIED liability, but instead would patch some of its holes.

A. Eliminating the Severe Injury Requirement

The proposal to remove severe injury as an element of the prima facie case for IIED need not amount to a dramatic change in either the definition or the practical application of the tort. To the contrary, as an effort to achieve analytical rather than normative reform, it would leave the essential determinants of liability undisturbed. What the proposal would alter, and emphatically so, is the necessity of an initial factual inquiry into the extent and severity

129. For discussions of IIED's convergence with recovery for pain and suffering, negligent infliction of emotional distress, prima facie tort, and punitive damages, see *supra* Sections III.B-D.

of the plaintiff's actual emotional distress to establish the validity of the claim. Doubtless, there are several possible ways to accomplish this. The revision suggested here replaces the *actual causation* of the harm with the concept of *sufficiency to cause* the harm, changing the existing definition from:

> One *who by extreme and outrageous conduct intentionally or recklessly causes* severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.[130]

to:

> One *whose extreme and outrageous conduct, intentionally or recklessly, is sufficient to cause* severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.[131]

Such a change does not disrupt the underlying substance of the definition with respect to the types of conduct that create liability. Under either version, the scope of liability is the same: the emotional distress (and consequent bodily harm) actually caused by the intentional outrageous conduct.

The change proposed here amounts to shifting the inquiry into the plaintiff's injury from a subjective standard to an objective one. Under the existing language, a court must investigate the plaintiff's mind to determine whether the defendant's conduct was tortious, whereas under the revised language, the investigation would not require this degree of mental penetration. In the interest of doctrinal consistency, the proposed change would reinforce the *Restatement*'s classification of IIED as an intentional tort. As is the case for the "classic" intentional torts such as assault and battery, the factual inquiry into the extent of the plaintiff's harm would inform the court's judgment of the remedy, but not its initial finding of liability.

Section 46 already intimates such a revision through two of its comments. Comment H describes the role of the court as "to determine, in the first instance, whether the defendant's conduct *may*

130. RESTATEMENT (SECOND) OF TORTS § 46 (1965) (italics indicate the portion to be revised).

131. The italicized portion contains all of the suggested revisions necessary to incorporate sufficiency into the definition.

reasonably be regarded as so extreme and outrageous as to permit recovery, or whether it is *necessarily* so."[132] In the latter instance (when "the defendant's conduct" is "necessarily" "so extreme and outrageous as to permit recovery"), Comment H permits a court to find outrageousness as a matter of law without assessing the plaintiff's actual harm—just as in the revision proposed here. Although § 46 formally requires an additional finding of severe injury, the natural implication of Comment H is that the extremity and outrageousness of the defendant's conduct can amount to the sufficiency to cause emotional distress.[133] Moreover, in guiding the court's inquiry into the requisite severity of the plaintiff's injury, Comment J observes that "in many cases the extreme and outrageous character of the defendant's conduct is in itself important evidence that the distress has existed."[134] Thus, in defining the injury element, § 46 already suggests that a court should look to the sufficiency of the defendant's conduct to cause emotional distress and allows the court to determine that the conduct was *necessarily* outrageous. In this sense, the revision proposed in this Note does not conflict with § 46 as written, but instead incorporates the clear implications of its comments directly into its primary definition of IIED.

As discussed above, the bulk of IIED case law already has gravitated to the conduct inquiry and away from the injury inquiry.[135] Removing the severe injury requirement from the prima facie case would confirm and reinforce this natural trend. Nevertheless, it remains common for courts to dismiss IIED claims on the basis that the plaintiffs' injuries were not shown to be severe enough.[136] While

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132. RESTATEMENT (SECOND) OF TORTS § 46 cmt. h (emphasis added).

133. The logic here is as follows: IIED requires extreme and outrageous conduct that inflicts emotional distress, *id.* § 46, so to say that conduct that was *necessarily* so extreme and outrageous as to permit IIED liability is to say that it must have been extreme and outrageous to a degree that would cause the requisite injury—that is, that the conduct was clearly sufficient to cause the injury that gives rise to liability.

134. *Id.* § 46 cmt. j.

135. *See* discussion *supra* Section III.D.

136. *E.g.*, Kalantar v. Lufthansa German Airlines, 402 F. Supp. 2d 130, 146 (D.D.C. 2005) (holding that, in the absence of "objectively verifiable evidence" to corroborate them, allegations of sleeplessness, stress-induced eczema, and other debilitating emotional responses were insufficient to satisfy the "severe emotional distress" element of IIED, despite expert witness psychiatrist's diagnosis of severe "posttraumtic stress syndrome"; also applying Virginia law's "heavier evidentiary burden" standard for IIED). More typical examples of alleged emotional injuries that fail the severe injury requirement are far less compelling than that in *Kalantar* and often contain a hint or more of skepticism about the claims' veracity or severity. *E.g.*, Bowling v. Lawson, 122 F. Supp. 2d 693, 696 (S.D.W.V. 2000) ("[Plaintiff] fails . . . to substantiate any claim of emotional distress beyond his self-serving declarations just noted. . . . [His] statement that he has been unable to do research and writing on Shakespearean plays due to worry is belied by the quality of the research and writing he has undertaken as a *pro se* litigant in this case.").

clearly in conflict with such decisions, the proposed revision would not entirely reject their analysis—consistent with the guidance from comments H and J quoted above, evidence of a severe injury still would be relevant to the conduct inquiry.[137] The nature of the question would change slightly: courts still would be free to consider the severity of plaintiffs' injuries as supporting the sufficiency of the defendants' conduct to cause severe distress. This is analogous to the well-established inquiry in an assault case wherein the court must determine whether the defendants' conduct reasonably caused the plaintiff to apprehend imminent harmful or offensive contact. As in this Note's proposed revision of IIED, assault also lacks a severe injury requirement, yet the impact of the defendant's conduct on the plaintiff is central to the assessment of whether a reasonable person in the plaintiff's situation would have apprehended imminent contact.

Under the proposed revision, courts should approach IIED claims similarly to assault claims. The court can consider the apparent extent of the plaintiff's distress as part of its sufficiency analysis, but it is not required to do so. The court also is not required to conclude that a lack of severe distress implies insufficiently outrageous conduct, although this would be the natural inference in most cases. Thus, courts that have dismissed claims based on insufficient harm could continue to evaluate the same facts, but dismissals would have to be based instead on the insufficiency of the conduct.

If removing the severe injury requirement has so little practical impact on the disposition of cases, then would this revision have any significance? The severe injury requirement is central to the doctrinal problems that plague IIED. The view of IIED as a gap-filler or subordinate tort arises from the perception that it is an ad hoc device created solely to compensate severe injuries that are not covered by the "nominate" torts.[138] Such a view immediately becomes impossible if severe injury is no longer required. As a matter of formal consistency, IIED's classification as an intentional, dignitary tort strongly implies (and perhaps entails) a proscription of *conduct*. The additional requirement of severe injury undermines this logical implication and thereby undermines legal recognition of the interest in being free from the proscribed conduct. Moreover, the requisite

137. *See supra* text accompanying notes 132-134.

138. *See, e.g.*, *Montemayor v. Ortiz*, 208 S.W.3d 627 (Tex. App. 2006) ("Intentional infliction of emotional distress is, first and foremost, a 'gap-filler' tort, judicially created for the limited purpose of allowing recovery in those rare instances in which a defendant intentionally inflicts severe emotional distress in a manner so unusual that the victim has no other recognized theory of redress.")

injury of emotional distress encompasses a class of harms that naturally arise in any number of ways, blurring the distinction between IIED and other torts causing the same harms. The proposed revision eliminates each of these problems, but does so without dramatic alteration of the scope of liability under IIED as courts currently apply it.

B. The Tort of Harassment

IIED's current definition, with its reference to outrage, has been absorbed into the jurisprudence of all the states as well as the federal system. This Note proposes that the familiar definition should be retained in essence, but modified to focus judicial inquiry on the defendant's conduct. As an extension of the proposed emphasis on conduct, this Note proposes further clarification in the form of a more precise caption: the tort of harassment.[139] The fact that IIED/outrage already is known by two names both reveals and perpetuates the schizophrenic nature of the tort: one name focuses on the injury, the other on the standard by which courts assess the actor's conduct. The foregoing sections describe problems that arise from emphasizing the injury component—problems to which the name IIED, through its reference to the injury, undoubtedly contributes. With respect to the conduct, however, "outrage" is a remarkably deficient description, not only in being antiquated and vague, but because it focuses attention on the response of a hypothetical third party.[140]

The matter of labeling may seem a cosmetic concern but, to the contrary, the name attached to a legal claim can affect its social impact. If people do not understand the basis for liability, they are unlikely to respond to the law's normative message.[141] Considered in this context, changing the name to "harassment" has some likely benefits. First, it is a more natural description of the conduct:

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139. The British Parliament established its own tort of harassment in the Protection from Harassment Act of 1997. NICHOLAS J. MCBRIDE & RODERICK BAGSHAW, TORT LAW 307 (2d ed. 2005). Like the proposal in this Note, it omits injury as a formal element, although it implies that the conduct must cause distress. *Id.* The principal differences are that it sets a very low bar of severity (merely "alarming" someone may be sufficient) and it requires at least two separate instances to amount to a "course of conduct" sufficient to be considered harassment. *Id.* Still, in its early years of judicial interpretation, the standard of conduct has been criticized as overly inclusive and vague in comparison with § 46. *Id.* at 307-08.

140. As a syntactical proposition, A "commits" the tort of outrage against B when C thinks that A's actions exceeded the bounds of acceptability. In so doing, A *outraged* C and therefore is liable to B.

141. *See, e.g.*, Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2050 ("For law to perform its expressive function well, it is important that law communicate well.").

compared to either "outrage" or "IIED," "harassment" articulates the essential nature of the offense more clearly and leaves less room for doubt as to the nature of the claim. Second, "to harass" is a direct transitive verb, which clarifies the intentional nature of the tort: as an action that A takes against or upon B.[142] Third, if courts were to alter their treatment of § 46 claims as discussed here—by either deleting the severe injury requirement or elevating the tort's status as an independent cause of action—the new name would help signal the change.

Black's Law Dictionary defines harassment as "[w]ords, conduct, or action . . . that, being directed at a specific person . . . *causes substantial emotional distress* . . . and serves no legitimate purpose."[143] This is in itself a viable definition of IIED: with only minor adjustments, it can apply to nearly every IIED case.[144] Renaming IIED as harassment would indicate the elimination of severe injury as an element and thereby support the effort to impose doctrinal consistency on this troubled patch of tort law. The name harassment would recast the natural formulation and analysis of claims in terms of a straightforward question: *did the defendant harass the plaintiff?* With the question presented in these terms, it would make little sense to condition the answer on the potential availability of alternative remedies.[145] Perhaps the most important benefit of a change of names would be to highlight the significance of naming a tort in the first place. It means that one incurs liability by engaging in conduct that violates a protected interest, an interest with a name. By extension, once a person has violated that named interest,

142. "A harassed B" (A *did something to* B) presents a logical basis for holding A liable to B, especially compared to the grammatical mess discussed in *supra* note 140.

143. BLACK'S LAW DICTIONARY 733 (8th ed. 2004) (emphasis added).

144. The primary exception would be IIED claims based on recklessness, a category into which *Rockhill v. Pollard* (the callous physician case discussed in the text accompanying *supra* note 63) would fit. There is active development in the case law on the question of reckless IIED, much of which hinges on interpretation of the "directed at" language in § 46. Interestingly, the *Black's Law Dictionary* definition of harassment also contains "directed at." While this Note does not focus on recklessness, that standard also is consistent with the solution proposed here. In fact, the archetypal scenario of sexual harassment, where a man propositions a woman in inappropriate ways, is closer to recklessness than intentionality—typically, the causation of emotional distress is not the principal motive for the conduct.

145. It still might make sense to say, for instance, that the availability of a defamation claim limits the availability of a harassment claim, but this would be because the particular claim of defamation would be held to subsume the potential harassment claim as a matter of substantive law. What would not make sense is to say that the mere potential for any other relief answers the harassment question, as in: "Did A harass B?" "No, because B should have complained about something else instead." The alternative claim provides no answer to the question.

the possible violation of other protected interests cannot negate the original violation.

A potential objection to the name change is that it might seem to extend IIED too broadly.[146] The term "harassment" as it is generally used can apply to many situations expressly excluded from IIED liability. For example, lawsuits between quarreling neighbors or former business partners may be viewed as a form of harassment, but as a matter of law they cannot support an IIED claim.[147] Likewise, a great deal of regular behavior in romantic relations fits under the common conception of harassment. It is fair to wonder whether the new tort of harassment, no longer limited by the severe injury requirement, might cast its net over any field of human relations in which passions, grudges and bad behavior frequently occur. Such an expansion could happen if courts were not mindful of the possibility, but courts are inherently expert both in evaluating bad behavior and in making distinctions. The record of judicial skepticism and restraint in applying IIED, discussed earlier, demonstrates courts' independence in this regard.

Critics may object that the new name would create confusion with statutory prohibitions of workplace and sexual harassment. Confusion might arise because the name is "already being used," because the concepts might blur together, or because a single fact pattern might produce both tort and statutory claims under the same name.[148] Some legal academics have proposed that courts should permit the use of IIED claims to supplement existing Title VII prohibitions of employment discrimination.[149] In her recent article on this topic, Professor Martha Chamallas observes that workplace harassment generally falls into the ambits of both civil rights and tort law, but that many particular cases fit uncomfortably into the precise

146. The British tort of harassment clearly invites this criticism. *See supra* note 139.

147. RESTATEMENT (SECOND) OF TORTS § 46 cmt. g (1965) ("The actor is never liable . . . where he has done no more than to insist upon his legal rights in a permissible way, even though he is well aware that such insistence is certain to cause emotional distress.").

148. *But see, e.g.*, Coates v. Wal-Mart Stores, 976 P.2d 999, 1004-06 (N.M. 1999) (affirming lower courts' judgments that sexual harassment in the workplace can support a claim for IIED regardless of potentially overlapping statutory schemes).

149. Regina Austin, *Employer Abuse, Worker Resistance, and the Tort of Intentional Infliction of Emotional Distress*, 41 STAN. L. REV. 1 (1988); Martha Chamallas, *Discrimination and Outrage: The Migration from Civil Rights to Tort Law*, 48 WM. & MARY L. REV. 2115 (2007). Title VII expressly allows for supplementary tort claims, 42 U.S.C. § 2000e-7 (2000); however, state civil rights statutes vary widely in both their express terms and their construction in the courts, with some preempting tort claims and others permitting overlap. *See* Chamallas, *supra*, at 2120, 2137-38 (summarizing inter-jurisdictional disparities on the question of state civil rights statutes' preemption of tort claims, ranging from total preemption in Iowa to judicially approved blending of civil rights and tort claims in states such as New Jersey, Florida, and Colorado).

terms or doctrines of either alternative.[150] She argues that the most promising means of vindicating public policies against this class of discrimination is for the courts to accept a broader application of IIED in the employment context.[151] Compared to statutory civil rights protections, the IIED tort is a relatively flexible doctrine that can be adapted to address misconduct by employers that slips through the cracks between the more rigidly defined statutory prohibitions.[152] Chamallas refers generically to "claims of harassment" as including both civil rights and tort claims that arise from a hostile work environment and are based on features of a person's identity, such as race, sex, or subtler characteristics not presently recognized as protected categories under civil rights law.[153]

The potential problems of imprecision and inadvertent misapplication that may accompany this flexibility are readily resolvable, as courts are experienced in precise application of legal theories, concepts, and terminology. One need look no further than assault to find a parallel example: the *tort of assault* requires only the apprehension of harmful or offensive contact, whereas *criminal assault* is specifically "attempted battery" and (statutory) *sexual assault* always requires physical contact.[154] As with the different species of assault, there is room in the law for more than one type of harassment. The respective legal authorities are discrete and unlikely to be confused, and overlap between IIED and both workplace and sexual harassment already exists in the case law.[155]

"Harassment" is a clear, simple predicate that captures the essence of the wrongful conduct described in the phrase "intentional infliction of emotional distress." With adequate stewardship, the concept can encompass the same classes of behavior covered in the IIED case law and the various articles that have informed the tort's development. Adopting this simple reformulation would promote a more rigorous conceptual clarity as to what interest the tort protects

150. Chamallas, *supra* note 149, at 2139-51.

151. *Id.* at 2178-88.

152. *Id.* at 2139-51, 2177-80.

153. *Id.* at 2139-51 (discussing the potential for "locating" harassment claims in either civil rights or tort law, and explaining why such claims do not fit perfectly into either field); *id.* at 2177-78 (identifying the potential of IIED to protect against harassment based on characteristics not protected under existing anti-discrimination law, such as "the effeminate man," "the African American woman who wears corn rows," and other nuanced "bias directed at persons because of how they perform their identity").

154. BLACK'S LAW DICTIONARY 122-23 (8th ed. 2004).

155. *E.g.*, Wilson v. Monarch Paper Co., 939 F.2d 1138 (5th Cir. 1991); Stockett v. Tolin, 791 F. Supp. 1536 (S.D. Fla. 1992).

and what conduct it prohibits, which in turn should suppress the judicial inclination to impose artificial restrictions.

V. CONCLUSION

The doctrine of IIED, as set forth in the *Restatement* and applied in courts today, occupies an uncomfortable position in the scheme of tort law, as it appears simultaneously redundant with some established principles and inconsistent with others. Despite its recognition as a legitimate cause of action in all U.S. jurisdictions, IIED bears the stigma of official disfavor in the courts, which often treat IIED claims with undisguised skepticism and hostility. The doctrinal confusion and controversy surrounding IIED are traceable in part to its peculiar evolution in the legal academy. In transforming IIED from an occasional exception to the general rule against recovery for purely emotional damages into a distinct cause of action, its proponents sought to limit its effect by imposing stringent standards on both the conduct and injury elements. The resulting definition of IIED deviates from the intentional tort model by creating a dignitary interest encumbered by an additional condition: the severity of the injury. The problem with this chimerical creation is that it leads courts to view IIED as something different from the traditional intentional torts. By focusing attention on the principal feature of IIED that is exceptional and controversial—the emotional injury—the existing doctrine perpetuates its exceptional status and the controversy surrounding it. As argued here, a minor alteration to the prima facie case, eliminating the severe injury requirement, would align IIED with other intentional torts. Defining IIED in this way—as fundamentally a question of the conduct it proscribes—would remove the justification for treating it as a disfavored exception and thereby enable this area of tort law to develop naturally.

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