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THE INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS: A NEED FOR LIMITS ON LIABILITY

William H. Theis*

Although the common law long has accepted emotional harm as an element of damages recoverable under traditional tort theories, the Second Restatement established the intentional infliction of emotional distress as an independent tort. Professor Theis argues that the Restatement has generated, rather than restated, the law, and has created liability ranging over a broad and unpredictable variety of interests. This Article examines the development of case law before and after the adoption of the Restatement doctrine, concluding that the law should protect emotional tranquility only as it relates to interests themselves worthy of legal protection.

The common law long has compensated for the infliction of emotional distress arising from intentional torts.¹ For example, the victim of a false imprisonment may recover, in addition to other items of damages, for the emotional distress effected by the confinement.² Yet for some time the common law resisted the adoption of a general principle of liability.³ It refused to grant damages for intentionally inflicted emotional distress unless they were a consequence of behavior tortious on independent grounds.⁴ After much struggle,⁵ the

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1. See Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033 (1936).

2. See, e.g., *Whittaker v. Sandford*, 110 Me. 77, 85 A. 399 (1912).

3. In other legal systems, liability for emotional distress has had a broader base. See W. BUCKLAND, *A TEXT-BOOK OF ROMAN LAW FROM AUGUSTUS TO JUSTINIAN* 589-92 (2d ed. 1950); F. LAWSON, A. ANTON & L. BROWN, *INTRODUCTION TO FRENCH LAW* 209-10 (2d ed. 1963); M. PLANIOL, *TREATISE ON THE CIVIL LAW* § 868A (11th ed. 1939) (La. State Law Inst. English trans.); Catala & Weir, *Delict and Torts: A Study in Parallel*, 38 TUL. L. REV. 663, 677-82 (1964); Wade, *Tort Liability for Abusive and Insulting Language*, 4 VAND. L. REV. 63, 64 & nn. 9-10 (1950) (ancient Germanic law); Note, *Injuria in Corpus Juris Civilis*, 50 B.U.L. REV. 271 (1970).

4. *Lynch v. Knight*, 9 H.L. Cas. 577, 11 Eng. Rpts. 854 (1861) sets out the common law view of recovery for emotional distress: "Mental pain or anxiety the law cannot value, and does not redress, when the unlawful act complained of causes that alone." *Id.* at 598, 11 Eng. Rpts. at 863.

5. Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033 (1936) and Prosser, *Insult and Outrage*, 44 CAL. L. REV. 40 (1956), set out the pertinent background.

Restatement (Second) of Torts (hereinafter referred to as *Restatement*) has come to recognize such a general principle.⁶ Although it relies on prior cases, the *Restatement* in this area has generated the law more than it has restated it. The *Restatement* position is a healthy one to the extent that it focuses on general principles not dependent on the plaintiff's bringing himself within one of the traditional common law writs. However helpful generalizations may be in bringing order into a common law once fragmented by the writ system, generalization has its perils too. The *Restatement*, and especially the more recent cases influenced by it, give insufficient attention to some fundamental limitations which should attach to any generalizations about recovery for emotional distress.

The *Restatement* visits liability on one who, by outrageous conduct, intentionally or recklessly causes another person severe emotional distress. In theory, the doctrine contains serious hurdles for the plaintiff to overcome. He must establish that the defendant's conduct went beyond "all possible bounds of decency,"⁷ and that the defendant was at least indifferent to the emotional consequences of such conduct.⁸ Moreover, the plaintiff must prove that his emotional distress was severe; that is, that the distress went beyond the momentary annoyance that all of us suffer every day as a result of trivial unpleasantness or disappointment.⁹ Although in practice, the potential for

5. RESTATEMENT OF TORTS § 46 (1934 & Supp. 1948) provided:

Except as stated in §§ 21 to 34 [assault] and § 48 [special liability of common carriers for insult], conduct which is intended or which though not so intended is likely to cause only a mental or emotional disturbance to another does not subject the actor to liability (a) for emotional distress arising therefrom, or (b) for bodily harm unexpectedly arising from such disturbance.

An interim version of 1948 had provided: One who, without a privilege to do so, intentionally causes severe emotional distress to another is liable (a) for such emotional distress, and (b) for bodily harm resulting from it.

6. The RESTATEMENT (SECOND) OF TORTS (1965) [hereinafter cited as RESTATEMENT] provides:

(1) 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.

(2) Where such conduct is directed at a third person, the actor is subject to liability if he intentionally or recklessly causes severe emotional distress

(a) to a member of such person's immediate family who is present at the time, whether or not such distress results in bodily harm, or

(b) to any other person who is present at the time, if such distress results in bodily harm.

Id. § 46.

7. *Id.*, Comment d.

8. *Id.*, Comment i.

9. *Id.*, Comments j, k.

sham claims is great, the *Restatement* indicates confidence in the judiciary's ability to separate fact from fiction.¹⁰

EMOTIONAL DISTRESS AS AN INDEPENDENT TORT

The *Restatement* represents a triumph for the long-embattled proposition that emotional harm is just as "real" as the physical harm of, for example, a broken arm.¹¹ Emotional distress had long been suspect because of the fear that it could be feigned too easily. In the past, it was compensable only as an incident of behavior tortious on traditional grounds, because the traditional grounds¹² were thought to assure the legitimacy of the claimed emotional distress. The *Restatement* solidly recognizes that the law should protect a person's emotional integrity just as broadly as his physical integrity.¹³ According to the *Restatement*, both physical and emotional integrity are capable of invasion and, when invaded, essentially similar loss is caused to the plaintiff, regardless of the means employed to effect the invasion.¹⁴

In this generalization, the *Restatement* has ignored important limitations. Although emotional distress may be just as "real" as physical injury, it is somewhat more variegated than physical harm. Bodily injury has a unitary nature in the sense that an injury resulting in a broken arm is no more nor less worthy of compensation than an injury resulting in a broken leg. Emotional distress lacks this unitary quality. One may worry about his physical safety or the safety of his family, or may be beset with anxiety over an insurance policy not honored. He may be horrified that someone has committed suicide in his presence. He may be emotionally wounded from insults to his honor or dignity, effected by crude, unflattering comments. In all these instances, the individual may suffer emotional distress, and the courts may be able to verify its existence as well as its severity. Although the genuineness of emotional distress may have long troubled the courts, their confidence in their ability to sort out fact from fiction leaves open the question of whether any and all emotional distress should be compensable. The *Restatement* answers in the affirmative,

10. See W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 12, at 51 (4th ed. 1971).

11. See, e.g., Goodrich, *Emotional Disturbance as Legal Damage*, 20 MICH. L. REV. 497 (1922); Smith, *Relation of Emotion to Injury and Disease: Legal Liability for Psychic Stimuli*, 30 VA. L. REV. 193 (1944); Throckmorton, *Damages for Fright*, 34 HARV. L. REV. 260 (1921).

12. See RESTATEMENT, *supra* note 6, § 46, Comment b.

13. "This section may be regarded as an extension of the principle[s] involved in . . . the tort of assault." *Id.*

14. *Id.*, Comment k.

at least when the defendant's conduct is outrageous and intentional and when the plaintiff's injury is severe.

This broad protection, even with the limitations just noted, cannot be supported. Although the law may protect emotional tranquility on a great range of interests, it cannot and should not promote emotional tranquility as to any and all interests. Rather, the law should protect emotional tranquility only as it relates to interests themselves worthy of legal protection.

An interest in honor is a key area drawing into question the generality embodied in the *Restatement*. The cases from which the *Restatement* is drawn do not support protection of honor and dignity as independent interests. More importantly, no adequate justification exists for such protection. Indeed, compelling reasons stand opposed to this protection.

HONOR AND DIGNITY OF THE INDIVIDUAL

A. Pre-Restatement Cases

The classic cases upon which the *Restatement* relies protected emotional tranquility in some important respects, but they did not protect emotional tranquility with respect to honor or dignity. For example, in *Wilkinson v. Downtown*,¹⁵ the plaintiff recovered for emotional distress when the defendant told her, as a prank, that her husband was seriously injured.¹⁶ In *State Rubbish Collectors Association v. Siliznoff*,¹⁷ the defendants threatened the plaintiff with bodily harm, but their threats lacked the immediacy to bring the case within the traditional confines of assault.¹⁸ If the court in *Wilkinson* had confined its analysis narrowly to a theory of misrepresentation, the plaintiff would have received only minimal damages—the cost of her transportation to the hospital to make inquiries of her husband. In *Siliznoff*, the plaintiff would have been awarded no damages, since no assault took place. Yet in both cases, an important interest was made

15. 2 Q.B. 57 (1897).

16. A number of cases recognize the plaintiff's interest in the well-being of his family. A defendant who interferes with peace of mind on this score subjects himself to liability. *Savage v. Boies*, 77 Ariz. 355, 272 P.2d 349 (1954); *Korbin v. Berlin*, 177 So.2d 551 (Fla. App. 1965); *Knierim v. Izzo*, 22 Ill.2d 73, 174 N.E.2d 157 (1961); *Ruiz v. Bertolotti*, 236 N.Y.S.2d 854 (Sup. Ct. 1962); *Rockhill v. Pollard*, 259 Ore. 54, 485 P.2d 28 (1971); *Schurk v. Christensen*, 80 Wash.2d 652, 497 P.2d 937 (1972); *Bielitski v. Obadiak*, 61 Dom. L. Rep. 494 (1921).

17. 38 Cal.2d 330, 240 P.2d 282 (1952).

18. *Accord*, *Wilson v. Wilkins*, 181 Ark. 137, 25 S.W.2d 428 (1930); *Great Atlantic & Pacific Tea Co. v. Roch*, 160 Md. 189, 153 A. 22 (1931); *Johnson v. Sampson*, 167 Minn. 203, 208 N.W. 814 (1926); *Seidel v. Greenberg*, 108 N.J. Super. 248, 260 A.2d 863 (1969); *Janvier v. Sweeney*, [1919] 2 K.B. 316.

the object of emotional distress: the safety of oneself or of a loved one. In those cases, recovery protected legitimate, fundamental interests not included in the traditional forms of action.

Nickerson v. Hodges,¹⁹ the famous Louisiana "pot of gold" case, is often thought to grant broad protection for emotional tranquility. Yet even that case does not go so far as to protect assault on the dignity and honor of the individual. In *Nickerson*, the defendants perpetrated a crude practical joke on a woman who honestly believed that she could find buried treasure left behind by her relatives. The defendants buried a sack of rocks which they helped the woman to find. The unopened sack was put into a bank overnight for safekeeping and was to be opened the next morning before the entire town. After the deposit and outside the woman's presence, the bank officers opened the sack that night to verify its contents. When they discovered the rocks, they resealed the sack. When the sack was opened the next morning, the woman became greatly distraught. Her distress did not arise from the realization that she had been made the butt of a practical joke. Rather, seeing that the sack had been opened and resealed, she thought that someone had stolen the gold and replaced the contents with worthless rocks. Although the whole town knew what had actually happened and laughed at her expense, the woman's distress resulted from her deeply held conviction that her property had been stolen. She regarded herself as the victim of a theft, not of a practical joke. Her emotional distress over this loss of property underlies the finding of liability.²⁰

One case relied upon by the *Restatement* does not appear to tie emotional distress to a legally protected interest. In *Blakeley v. Estate of Shortal*,²¹ the court granted recovery to a homeowner whose neighbor committed suicide in the plaintiff's home and thereby created emotional distress for the plaintiff homeowner. Although the emotional distress may have been quite real, it is difficult to pinpoint the interest protected in this case. The plaintiff evidently had no fear for her own safety. The opinion hints that the emotional distress impaired full enjoyment of her home.²² This case, more than any

19. 146 La. 735, 84 So. 37 (1920).

20. Admittedly, the court's opinion in this case is not clearly written and has created confusion. The opinion characterized the plaintiff's petition as seeking, among other elements, recovery for "humiliation" and "injury to . . . social standing." Yet the court's recitation of the evidence makes it clear that the plaintiff steadfastly believed, even until her death that the gold existed and that it had been stolen. (The plaintiff died before trial, and her survivors were substituted.)

21. 236 Iowa 787, 20 N.W.2d 28 (1945).

22. *Id.* at 789, 20 N.W.2d at 30.

other, suggests that compensable emotional distress need not be tied to some independent interest of the plaintiff. Yet even this case does not suggest that insult or affront to honor can support recovery.

Indeed, the cases have stressed for some time that one may not be held liable for emotional distress caused by insults or attacks on another's honor.²³ To this general rule there was an exception. Public carriers and innkeepers were liable to patrons and guests for rude and insulting conduct.²⁴

This exception does not give much indication of a general judicial attitude toward emotional distress. The first American case granting recovery against a common carrier for insulting language²⁵ stressed that a captain of a ship, by virtue of the ship's peculiar isolation from the rest of the world, has a special responsibility toward his passengers. The captain has them in his physical control, and they cannot escape his influence. Hence, the law implies in the contract of carriage a condition of kind and courteous treatment toward the passengers.²⁶

Although one may characterize recovery in the innkeeper or in the common carrier situation as sounding in "tort," not in "contract,"²⁷ it would be simplistic to overlook the special contractual nature of the relationship.²⁸ The patron or passenger expects that he will receive courteous service. First, he has paid for that amenity. Second, even when not at sea, the most extreme case, he often has no realistic opportunity to avoid unpleasantness directed at him. To extrapolate from these cases a general rule that all persons have a right to a courteous treatment of their sensibilities ignores these special circumstances. The innkeeper and common carrier cases go very far in imposing a duty, even when fellow guests or passengers engage in insulting behavior.²⁹ If these cases are not "isolated phenomena," but examples of a general rule, then everyone has a duty to shield others from whatever insults may be offered in his presence. Since no

23. See, e.g., *Bartow v. Smith*, 149 Ohio St. 301, 78 N.E.2d 735 (1948).

24. See *Wade*, *supra* note 3, at 66-70.

25. *Chamberlain v. Chandler*, 5 F. Cas. 413 (C.C.D. Mass. 1823) (No. 2575).

26. See 1 F. HARPER & F. JAMES, *THE LAW OF TORTS* § 9.3 (1956).

27. See *Magruder*, *supra* note 1, at 1052.

28. Modern cases increasingly recognize performance of a contractual obligation by the defendant as a legitimate object of the plaintiff's emotional tranquility. See *Hanke v. Global Van Lines, Inc.*, 533 F.2d 396 (8th Cir. 1976); *Eckenrode v. Life of America Ins. Co.*, 470 F.2d 1 (7th Cir. 1972); *Crisei v. Security Ins. Co. of New Haven*, 66 Cal.2d 425, 426 P.2d 173, 58 Cal. Rptr. 13 (1967); *Johnson v. Women's Hospital*, 527 S.W.2d 133 (Tenn. App. 1975).

29. See, e.g., *Gillespie v. Brooklyn Heights R.R. Co.*, 178 N.Y. 347, 70 N.E. 857 (1904).

one has been willing to press these cases so far,³⁰ one must question whether they do, as claimed, have a general significance.

B. Post-Restatement Cases

The *Restatement* clearly embodies the proposition that if an insult is outrageous and causes severe emotional distress, then liability will result. In theory, only "petty" or "trivial" insults will escape liability.³¹ But since outrageousness and severity of the distress are jury questions, the court has little control over the extent of protection. It is erroneous to assume that, by definition, insults cannot meet the requirements for *Restatement* liability. Two cases inspired by the *Restatement* illustrate that insult or affront to honor may result in a liability more expansive than previously recognized.

In *Halio v. Lurie*,³² the defendant wrote taunting letters to a former sweetheart, in which he reminded her of unfulfilled expectations of marriage. Defendant's conduct was of an insulting, derisive sort in which most persons would not care to indulge. The plaintiff alleged that she could not sleep or eat, and was obliged to consult a physician. In reliance on the *Restatement*, the court held that the complaint stated a cause of action.

Likewise, in *Alcorn v. Albro Engineering, Inc.*,³³ the court held that the plaintiff had stated a cause of action for insults effected through the use of racial epithets. The plaintiff strengthened the case by alleging that the defendant knew or should have known that members of the plaintiff's race are peculiarly susceptible to emotional stress resulting from the use of such epithets.³⁴ The plaintiff's allegations of shock, nausea, and insomnia were held to establish a cause of action for the intentional infliction of severe emotional distress.³⁵

30. To do so would create a curious exception to the "Good Samaritan" doctrine.

31. Comments to the RESTATEMENT seem to support the traditional rule:

The liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. 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 someone's feelings are hurt. There must still be freedom to express an unflattering opinion, and some safety valve must be left through which irascible tempers may blow off relatively harmless steam.

RESTATEMENT, *supra* note 6, § 46, Comment d.

32. 15 App. Div. 2d 62, 222 N.Y.S.2d 759 (1961).

33. 2 Cal.3d 493, 468 P.2d 216, 86 Cal. Rptr. 88 (1970).

34. See RESTATEMENT, *supra* note 6, § 46, Comments f, j.

35. *Accord*, *Conteras v. Crown Zellerbach Corp.*, 88 Wash.2d 735, 565 P.2d 1173 (1977). See generally Note, *Torts—Mental Distress Damages for Racial Discrimination*, 49 N.C.L. REV. 221 (1970).

Of course, it is not sufficient to say that emotional distress over insults or attacks on honor was not traditionally compensable and, therefore, that it never should be compensable. *Alcorn* indicates at least one situation in which the invocation of the traditional rule would seem hardhearted and, indeed, racist. Thus, support of the traditional rule on insults must be subject to further analysis.

C. Critique of the Restatement View

The analysis of the *Restatement* view begins with a more general proposition: that the law should protect against the infliction of emotional distress only to the extent that it stands willing to protect the object of the emotional distress. Since the law protects personal security, property, and relations with others,³⁶ it protects emotional tranquility as to those objects. But if the law does not protect a particular interest, it should not attempt to secure emotional tranquility as to that interest. Consider a case recently reported in the newspapers,³⁷ in which parents sued their daughter for sending out wedding invitations under their name. They claimed emotional distress because they did not approve of the proposed marriage. No doubt their emotional distress was severe, as claimed, but no one would suggest that the parents have a protectable interest in preventing third parties from believing or erroneously inferring that they approved their daughter's choice of spouse. Their emotional distress over the daughter's generation of this inference should stand on no better footing.

The *Restatement* implicitly treats emotional tranquility as an interest in and of itself, exempting only minor breaches of that tranquility.³⁸ It is temptingly erroneous for the law to equate emotional health with physical health, especially when the two are so intertwined on a clinical level. If the plaintiff has a protectable interest in his physical integrity, then it might seem to follow that this interest includes emotional tranquility, regardless of the source of distur-

36. See L. GREEN, W. PEDRICK, J. RAHL, E. THODE, C. HAWKINS, A. SMITH & J. TREECE, *CASES ON THE LAW OF TORTS* 2-3 (2d ed. 1977).

37. *Baton Rouge Sunday Advocate*, Sept. 4, 1977, at 17-A, col 4.

38. Comment j provides:

Complete emotional tranquility is seldom attainable in this world, and some degree of transient and trivial emotional distress is a part of the price of living among people. The law intervenes only where the distress inflicted is so severe that no reasonable man could be expected to endure it. The intensity and the duration of the distress are factors to be considered in determining its severity. Severe distress must be proved; but in many cases the extreme and outrageous character of the defendant's conduct is in itself important evidence that the distress has existed.

RESTATEMENT, *supra* note 6, § 46, Comment j.

bance. If one disturbs that tranquility in any respect, he will be liable for the distress.

It must be noted, however, that emotional tranquility covers a wide range of interests, some of which are independently actionable while others are not, as the example of the outraged parents should indicate. If the plaintiff experiences emotional distress over a nonactionable concern, he shares with the defendant responsibility for his own misery. Of course, the law cannot stop the plaintiff from experiencing such distress, but neither should it compensate him. Otherwise, any plaintiff who can claim substantial mental distress might conveniently obtain damages for a claimed wrong to which the law ordinarily denies recovery. Not even a requirement that the emotional disturbance be foreseeable avoids this difficulty.

*Wood v. United Air Lines, Inc.*³⁹ illustrates the weakness of the general position found in the *Restatement*. The plaintiffs were a surviving husband and children of a passenger killed when the defendant's airplane crashed. After news of the crash had been made public, the plaintiffs contacted the defendant's agents to determine whether their family member had been on that flight, as they suspected. The defendant's agents responded that the woman had not been on the flight. When pressed for further confirmation, these agents suggested that perhaps she had missed the flight in order to rendezvous with a lover. The Tenth Circuit Court of Appeals suggested that this statement might be actionable as an intentional infliction of emotional distress.⁴⁰

It is well-established that one may not be liable for defamation of the dead.⁴¹ Even if the decedent had lived, her reputation would not be a legally protectable interest of the plaintiffs. They may have been emotionally distressed, but they were distressed over a matter with which the law says they should not have been concerned. If the law grants recovery for emotional distress, it makes ultimately futile its limitations on recovery for defamation.

The legitimate objects of emotional tranquility should not be viewed in a narrow or traditional fashion.⁴² Nevertheless, unless the

39. 404 F.2d 162 (10th Cir. 1968).

40. *Id.* at 166.

41. See W. PROSSER, *supra* note 10, at 745.

42. See *Rockhill v. Pollard*, 259 Ore. 54, 485 P.2d 28 (1971), in which the defendant, a medical doctor, gave wholly inadequate treatment to the plaintiff's unconscious daughter, a victim of an automobile accident. The defendant told the plaintiff that nothing was wrong with her daughter, even though the child was ill and vomiting a great deal. After a cursory examination of the plaintiff's daughter, the defendant forced the plaintiff, her daughter, and her mother-in-law to wait outside his office in freezing weather until the plaintiff's husband arrived to drive them home.

broad view is taken that the law should protect emotional tranquility in any and all respects, rational choices must be made as to the scope of emotional tranquility.

D. Is Honor A Legitimate Interest?

In examining the scope of emotional tranquility, one question that arises is whether honor or dignity may be a legitimate object of emotional tranquility. The following discussion will assume that an insult or attack on honor causes severe emotional distress. A further assumption will be that the emotional distress extends only to insults or attacks on honor, and not to emotional distress concerning some other interest of the plaintiff.⁴³

What values should be advanced by liability for the intentional infliction of emotional distress? No less an authority than Dean Pound stated that the law in its earliest stages protected the physical integrity of the person, but not because it recognized the individual's interest. Rather, injury to a person was thought to be an affront to his kinsmen. The law protected a group interest against insult and, accordingly, diminished the opportunity for, and the attractiveness of, retaliation by the group. Pound noted that in a later stage of legal development, an individual interest in honor was recognized, but remained tied to a social interest:

Again, when the individual interest is recognized, it is regarded at first as an interest in one's honor, in one's standing among brave men regardful of their honor, rather than an interest in the integrity of the physical person. In Greek law every infringement of the personality of another is . . . *contumelia*. . . ; the injury to honor, the insult, being the essential point, not the injury to the body. In Roman law, injury to the person is called *iniuria*, meaning origi-

Although the child suffered no permanent harm from the defendant's conduct, expert testimony revealed that it was hazardous to take a child outside in freezing weather in clothing wet from vomit. Testimony also revealed that vigorous medical treatment should have been rendered immediately upon presentation of the plaintiff and her family to the defendant.

The court found that the plaintiff had experienced severe emotional distress as a result of the defendant's conduct. It held that a jury could find the doctor's actions to be "outrageous in the extreme." *Id.* at 31. The court reversed the trial court judgment of nonsuit, noting in particular that defendant was under a professional obligation to plaintiff and her family, who came to him for the express purpose of receiving emergency treatment after an accident.

43. *Alcorn v. Anbro Engineering, Inc.*, 2 Cal.3d 493, 468 P.2d 216, 86 Cal. Rptr. 88 (1970), discussed in the text accompanying notes 33-35 *supra*, sanctioned recovery for racial epithets. It is also arguably a case of racial discrimination under 42 U.S.C. §§ 1981, 2000e-2000e-17 (1970 & Supp. V 1975), in which racial epithets played an incidental role. This discussion covers only those cases which involve attack on honor and no additional invasion of mental tranquility with respect to a clearly legitimate object.

nally insult, but coming to mean any willful disregard of another's personality. In consequence the beginnings of law measure composition not by the extent of injury to the body, but by the extent of injury to honor and the extent of the desire for vengeance thus aroused, since the interest secured is really the social interest in preserving the peace.⁴⁴

Thus, tort law is viewed as primitive in its roots. Civil liability is said to have been substituted for reprisal and feud.⁴⁵ If one may bring suit for injury, he, appeased, may be less likely to seek bloody retaliation or, at the least, be unable to expect any sympathy for this conduct. Liability promoted a basic, vital social interest in freedom from chaotic bloodshed.

Certainly, the intentional infliction of emotional distress can create lust for revenge and violence. Perhaps it does not always promote other values, like freedom of speech and of association. But the point is that one should not draw a correlation between anger and conduct disfavored under the law. Society should not create tort liability whenever violence is threatened, because violence is too erratic an indicator of legitimate values.⁴⁶

44. Pound, *Interests of Personality*, 28 HARV. L. REV. 343, 357 (1915).

45. See Wigmore, *Responsibility for Tortious Acts: Its History*, 7 HARV. L. REV. 315 (1894).

If appeasement from anger or violence producing conduct is truly a goal of tort law, then we must consider whether conduct may become objectionable merely because a substantial number of persons might resort to violence in order to register their disapproval of, or to retaliate for, such conduct. Unless a society is to be ruled by the savage instincts of less than a majority of the populace, the latent violence to be suppressed through a substituted tort action must reflect a grievance legitimate on grounds other than its potential for evoking violence. One can easily imagine regions of the country in which a person might revile or even cogently criticize religious beliefs and expose himself to the threat of physical violence. In the not too distant past, one's eating a meal in public with a member of a different race might expose him to the threat of serious violence. See, e.g., *Nesmith v. Alford*, 318 F.2d 110 (5th Cir. 1963). Obviously, neither form of conduct is considered tortious, since the law is unwilling to condemn the conduct on grounds other than its potential for generating reactive violence. Appeasement offers guidance only when we have determined with reference to other values that certain conduct should be discouraged. Tort liability reflects a judgment that law, not violence, should stamp out or express disapproval of undesirable conduct. Mindless violence should itself be stamped out by the law, not shape the content of the law.

46. In theory, the criminal law may punish the use of "fighting words." *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). However, the criminalization of "offensive" words is not permitted. *Cohen v. California*, 403 U.S. 15 (1971). The Supreme Court's manipulation of this distinction suggests that the scope of the "fighting words" doctrine is quite narrow. For a collection of the cases and commentary, see N. DORSEN, P. BENDER, & B. NEUBORNE, I EMERSON, HABER & DORSEN'S POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 392-95, 401-12, 621-46 (4th ed. 1976).

In any event, a criminal sanction provides the means to remove the speaker and his fighting words from the immediate scene of possible confrontation. Tort liability provides no such effective remedy.

Even when separated from its potential for reactive violence, honor has a tenuous claim for legal protection. Honor or dignity can be considered in two senses. The first is an internal sense, which we call self-respect—a conviction that one possesses the qualities which he or she considers the equipment of an admirable person. An insult can affect self-respect in two ways. If *A* attacks *B*'s honor, but is unable to dislodge *B*'s self-respect, *B* has of course suffered no loss. At worst, *B* will be aware of *A*'s enmity or *A*'s belief that *B* does not possess certain admirable qualities. *B* may be better off for having an indication of *A*'s attitude toward him. *B* might come to even worse suffering at a later time were he to remain unaware of *A*'s attitude toward him.

If, on the other hand, *A*'s conduct causes *B* to cease to regard himself favorably, it is difficult to say that *A* has inflicted a loss on *B*. True, *B* has changed, and *A* is in part responsible for that change. But if self-respect is to have meaning, then *B* is the ultimate arbiter of that quality and can hardly hold *A* responsible for his change in position. Alternatively, if *B*'s previous self-respect had been based on illusion, and *A* has punctured *B*'s illusion, then the law would be placed in the position of compensating for lost illusion.

The law cannot protect self-respect, which by its nature is not dependent on outside protection. If self-respect is not a legitimate object of protection by the law, then mental distress relating to attacks on self-respect cannot create legal liability.

The second sense in which honor or dignity can be considered is an external sense. Viewed externally, honor represents the deference and respect shown a person as the holder of various qualities, attributes or beliefs. Obviously, *A*'s insult, if he communicates it to others, must assert a lack of such qualities as to lead the others to hold *B* in less esteem. This presupposes that society has a consensus on those qualities worthy of esteem. Many insults lack this quality. If, in a public setting, *A* hurls the epithet "bastard" at *B*, he may gravely wound *B*'s sensibilities; but it is most unlikely that others will think less of *B*. Indeed, they may think less of *A*. At present, even were this epithet generally taken as an assertion of fact, the illegitimate status of a person is not regarded as bearing on the esteem or deference due that individual.⁴⁷ Furthermore, if understood in its normal, non-literal sense, the epithet reflects so much of a subjective, possibly unfounded opinion, that few would consider it and even fewer would uncritically accept it.

In this latter sense, much of the billingsgate unloosed upon others causes no injury to their honor. When the insult does call into ques-

47. See *Walker v. Tucker*, 220 Ky. 363, 295 S.W. 138 (1927).

tion the respect due the plaintiff, the question arises whether the plaintiff actually merits respect on this score. The law hardly could compensate the plaintiff when he does not possess the honorable qualities called into question by the defendant. The natural emotional distress occasioned should not add to his claim.⁴⁸ If the defendant falsely calls these qualities into question, plaintiff must look to the law of defamation for redress.

Thus, protection should depend on the sense in which "honor" is employed. Only if honor is taken in an external sense may the plaintiff hope for protection, and then within the general limits set out by the law of defamation.

DISINTERESTED MALEVOLENCE AS A BASIS OF LIABILITY

Although the plaintiff may have no legitimate interest in honor, perhaps the defendant should not be allowed to make life unpleasant for others without any legitimate gain for himself. Indeed, the defendant may even be harming himself and should be preserved from his own malevolent influence.⁴⁹

Modern law increasingly recognizes, at least in situations that are not yet well-defined by existing legal rules, that a motive to harm another may color an otherwise neutral act.⁵⁰ The situation, then, is this: the plaintiff experiences an unpleasant, annoying disturbance of his mental tranquility. No other interest of his is invaded. The defendant has created this situation because he delights in the discomfort of others, and has no justification such as the freedom to speak his mind.

Although this situation may be conceivable, it seems at best exceedingly rare in actual experience. Very seldom are we likely to encounter such "disinterested malevolence." Freedom to have an opinion of another and to manifest that opinion are ever present as justification for much conduct that is considered rude and annoying. The law should not attempt to deal with unlikely situations.

Consider a case which involved a cruel and heartless act, but which was hardly a gratuitous infliction of mental distress. In *Swanson v. Swanson*,⁵¹ the plaintiff and the defendant were brothers. They had

48. A number of cases give protection under the guise of a right to privacy. They hold defendant liable for the publication of true facts, if those facts were private before defendant's publications. See *Brents v. Morgan*, 221 Ky. 765, 299 S.W. 967 (1927) (public posting of debt notice). The theory is effectively criticized in Kalven, *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROB. 326 (1966). Not even the right to privacy gives protection when third parties know the true facts before the plaintiff's publication.

49. But see J.S. MILL, ON LIBERTY ch. IV (1859).

50. See W. PROSSER, *supra* note 10, § 5.

51. 121 Ill. App.2d 182, 257 N.E.2d 194 (1970).

an invalid mother, toward whom neither willingly accepted total responsibility for care. The defendant placed the mother in a nursing home and gave only his own name as the nearest relative to be notified in case of emergency or death. The plaintiff visited his mother at this home, but never left his telephone number with the management nor indicated a desire to be contacted in case of emergency or death. When the mother died, the defendant arranged for her burial without informing his brother of her death. The plaintiff discovered his mother's death only after her burial and suffered emotional distress as a result of not being able to attend her funeral. The court upheld a directed verdict for the defendant because the plaintiff's distress was not severe enough. He experienced some sleepless nights and nightmares, but nothing so serious as to cause him to seek medical assistance. Perhaps, had the plaintiff's distress been more severe, the court would have allowed the imposition of liability.

Undoubtedly, the defendant through his conduct indicated that he felt that his brother had shown insufficient interest in their mother and had left the defendant with a disproportionate share of the responsibility for her care. Perhaps the defendant's beliefs on this subject were erroneous and misplaced, but a court should be unwilling to resolve these questions in order to hold that defendant had inflicted mental distress solely to satisfy sadistic impulses.

INHERENT INEFFECTIVENESS OF RESTATEMENT LIMITATIONS

A. The "Outrageousness" Requirement

The limitations in the *Restatement* do not overcome the previously noted difficulties. For example, a requirement of outrageousness provides no adequate limitation of liability, since it is in no way tied to the legitimacy of the object of mental tranquility. Outrageousness can be relevant only if mental tranquility, divorced from its objects, is itself a value. If applicable, the outrageousness limitation might severely limit liability, but at great administrative expense; the concept has little meaning except in extraordinary cases.⁵² For that reason, moreover, its invocation often would take the defendant by surprise.

The *Restatement* imposes liability for "outrageous" conduct; that is, conduct to which the average member of the community would respond by exclaiming, "Outrageous!"⁵³ This circular definition tells

52. See *Rockhill v. Pollard*, 259 Ore. 54, 60, 485 P.2d 28, 31-32 (1971), in which the court briefly lists the types of cases falling into the category of outrageous conduct, including outrageous practical jokes, oppressive behavior in credit collection and business relations, threats of physical harm, and abusive or alarming behavior toward ill persons or pregnant women.

53. RESTATEMENT, *supra* note 6, § 46, Comment d.

us very little except that the defendant's fate hangs upon the emotional reaction of the twelve jurors who hear his case. Of course, the judge maintains his traditional control over the jury through the use of a directed verdict or judgment notwithstanding the verdict. But in the most difficult cases, the ones in which there is not unanimous agreement about typical, recurring situations, this control by the judge will be meaningless or capricious. On what basis may the judge conclude that the average member of the community would be clearly wrong in exclaiming, "Outrageous!"?

A supporter of the "Outrageous!" test might argue that tort law is permeated with concepts such as "unreasonable" and "defective," which are no less ambiguous. This argument overlooks the essentially residual nature of the "Outrageous!" test, which attempts to cope with conduct untouched by rules of a comparatively high degree of particularity. If one examines negligence as a basis of liability, itself a fairly recent development,⁵⁴ one realizes that from the beginning the law has attempted to give specific content to the negligence concept. Although the *Restatement*⁵⁵ and various judges⁵⁶ have offered generalized definitions of negligence, the term has summed up a standard of increasing particularity. Rather than a lapse from the behavior of the mythical "reasonable man," negligence more accurately consists of breach of statutes,⁵⁷ breach of customs,⁵⁸ breach of standards established by professional associations,⁵⁹ and breach of standards established by leaders of the relevant industry,⁶⁰ to name just a few facets of negligence.⁶¹ The courts would have broken long ago under the weight of automobile collision litigation if rules of the road, first established by custom⁶² and later enacted by the legislature,⁶³ had not been established to supply the content for a concept of a reasonable man as automobile driver.

The emotional distress cases present too many one-of-a-kind situations. No expert can set up a standard of outrageousness. Indeed, the

54. *Brown v. Kendall*, 60 Mass. 292 (1850) is commonly thought the seminal American negligence case.

55. *RESTATEMENT*, *supra* note 6, §§ 282-284.

56. *E.g.*, *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947).

57. *E.g.*, *Martin v. Herzog*, 228 N.Y. 164, 126 N.E. 814 (1920).

58. *E.g.*, *The T.J. Hooper*, 60 F.2d 737 (2d Cir. 1932).

59. *E.g.*, *Brune v. Belinkoff*, 354 Mass. 102, 235 N.E.2d 793 (1968).

60. *See* 2 F. HARPER & F. JAMES, *THE LAW OF TORTS* § 17.4 (1956).

61. To name one other important example, the federal government now has authority to set detailed standards through the administrative process for consumer products. 15 U.S.C. §§ 2051-2081 (Supp. III 1973).

62. *See* *Clay v. Wood*, 170 Eng. Rep. 732 (K.B. 1803).

63. *See* *Martin v. Herzog*, 228 N.Y. 164, 126 N.E. 814 (1920).

Restatement even disavows reliance on criminality as a possible determinant of outrageousness.⁶⁴ One can easily imagine the chaos that would result if, in product liability cases, the jury were called upon as average members of the community, after hearing the primary facts, to decide whether they would exclaim "Defective!" One might maintain that the most imaginative inflictions of emotional distress would go unremedied if the outrageousness requirement were rejected. Nevertheless, one must consider the price exacted when a vague, ambiguous standard is retained as a catch-all for a small class of cases.

In practice, the bounds of outrageousness have quickly broken down to include conduct not nearly so colorful or wicked as, for example, sending a woman a dead rat wrapped in a newspaper.⁶⁵ In one recent case, *Stanard v. Bolin*,⁶⁶ the defendant broke his engagement to marry the plaintiff. Unlike the defendant in *Halio v. Lurie*,⁶⁷ he did not take the occasion to make biting personal comments. No doubt the plaintiff's emotional distress was real and severe, and her reaction must be considered as quite normal. One wonders, though, whether failure to enter a contemplated marriage is, as the court presumably viewed it, conduct intolerable in a civilized community.⁶⁸

Two factors account for this breakdown in the meaning of outrageous conduct. First, if the fact-finder determines that the plaintiff has suffered severe emotional distress, it can hardly avoid a finding of outrageousness, unless it finds a severe reaction to be abnormal or unforeseeable.⁶⁹ As in *Stanard*, severe emotional distress is quite normal or foreseeable in the wake of a broken engagement. Once this relationship is established, outrageousness follows quite naturally. *Alcorn* further illustrates that to deny a finding of outrageousness in the face of severe emotional injury would put the court in the unattractive position of appearing to condone racial epithets.

Second, in cases in which the plaintiff claims emotional distress with respect to a legitimate object of concern, he may often recover on a showing of negligence.⁷⁰ Once a court grants independent legitimacy to emotional tranquility as such, it need have little hesita-

64. RESTATEMENT, *supra* note 6, § 46, Comment d.

65. *Great Atl. & Pac. Tea Co. v. Roch*, 160 Md. 189, 153 A. 22 (1931).

66. 88 Wash.2d 614, 565 P.2d 94 (1977).

67. 15 App. Div.2d 62, 222 N.Y.S.2d 759 (1961).

68. *Stanard* eliminated recovery for lost social standing or financial position. Thus, plaintiff's recovery rested on the mental anguish caused by not marrying the plaintiff.

69. RESTATEMENT, *supra* note 6, § 46, Comment j.

70. See *Dillon v. Legg*, 68 Cal.2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968); *Rodrigues v. State*, 52 Haw. 156, 472 P.2d 509 (1970); *Johnson v. State*, 37 N.Y.2d 378, 334 N.E.2d 590, 372 N.Y.S.2d 638 (1975); *Ferrara v. Galluchio*, 5 N.Y.2d 16, 152 N.E.2d 249, 176 N.Y.S.2d 996 (1958).

tion in predicating liability on a finding of negligent—or at least non-outrageous—conduct. The outrageousness of defendant's conduct may be an indicator of severe emotional distress. However, if severity may be otherwise established to the court's satisfaction, it has little need to require more than proof of negligence.

B. The Severity of Distress Requirement

In practice, severity of distress is not a significant limitation on liability. Nausea, sleepless nights and lack of appetite are a familiar litany which, even when substantiated, would have seemed trivial to an earlier generation. Under the modern view, however, they are the touchstones of this exceptional liability.⁷¹

As observed earlier in this Article, the existence of severe emotional distress may dilute the requirement of outrageousness. The *Restatement* comments also contemplate that the outrageous character of the defendant's conduct may substantiate the severity of the plaintiff's emotional distress.⁷² As the meaning of outrageousness is diluted, the requirement of severe emotional distress is also diluted. The courts have held that once a defendant has been found liable on the basis of emotional distress, the plaintiff's distress, if genuine, is severe enough to be compensable.

*Rockhill v. Pollard*⁷³ is illustrative of this development in the area of emotional distress. The plaintiff was the mother of an injured child to whom the defendant, a physician, gave inadequate treatment. The child was taken to another doctor and suffered no permanent damage from the claimed malpractice. The mother alleged that the defendant's rudeness caused her severe emotional distress. She became nervous, was unable to sleep, lost her appetite, and took tranquilizers. These symptoms were claimed to have extended over a two-year period. With some misgiving, the court ruled that the symptoms were sufficient to make a case for the jury on the issue of severe emotional distress. Perhaps a more realistic appraisal would have recognized that worry over the safety of one's child would be genuine and that severity of the worry would relate to the amount of damages, not to liability.

71. See, e.g., *Alcorn v. Albro Engineering, Inc.*, 2 Cal.3d 493, 468 P.2d 216, 86 Cal. Rptr. 88 (1970); *Halio v. Lurie*, 15 App. Div.2d 62, 222 N.Y.S.2d 759 (1961).

72. The *RESTATEMENT* provides that: "Severe distress must be proved; but in many cases the extreme and outrageous character of the defendant's conduct is in itself important evidence that the distress has existed." *RESTATEMENT*, *supra* note 6, § 46, Comment j.

73. 259 Ore. 54, 485 P.2d 28 (1971). See note 42 *supra*.

CONCLUSION

The *Restatement (Second) of Torts* makes a helpful contribution to tort law by broadening liability beyond the traditional forms for intentionally inflicted emotional distress. The difficulty with the *Restatement* approach lies in the protection of emotional tranquility for interests not themselves worthy of legal protection. Recovery for insult or affront to honor represents the most important area in which this parting from the common law doctrines works an undesirable result. Not even the *Restatement* requirements of outrageousness or severity of distress can adequately hold in check this impermissibly broadened liability. Compelling reasons, such as the inability to define the scope of compensable injuries and unfair surprise to the defendant, stand opposed to such broad protection of the individual's interests.