Journal of Law and Health

Volume 36 | Issue 2 Article

5-1-2023

Emotional Distress Claims, Dignitary Torts, and the Medical-Legal Fiction of Reasonable Sensitivity

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EMOTIONAL DISTRESS CLAIMS, DIGNITARY TORTS, AND THE MEDICAL-LEGAL FICTION OF REASONABLE SENSITIVITY

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Abstract: Can individuals with a highly sensitive temperament recover in tort for intentional infliction of emotional distress (IIED)? In 2019, an article in the *University of Memphis Law Review* raised this question, referring to the "Highly Sensitive Person" (HSP) construct in psychology and asking whether the IIED tort's 'reasonable person' standard discriminates against highly sensitive plaintiffs. Following up on that discussion, the present article considers how the law of IIED has historically treated plaintiffs with diagnosed psychiatric vulnerabilities that are either known or unknown to the defendant. The article also extends this discussion to the law's treatment of temperaments, such as high sensitivity, which are distinct from diagnosed psychiatric disorders; presents hypothetical scenarios with respect to undiagnosed but inferred or predicted vulnerabilities; and explores the history of the dignitary IIED tort and the origins of its reasonableness requirement. This discussion acknowledges that scientific advances can allow uniquely vulnerable plaintiffs to assert harm in new ways—while also (1) pointing out that scientific uncertainties regarding the mind and temperamental sensitivity persist today and (2) touching on clinical and criminal law approaches to intentionally inflicted harms, which can emphasize the defendant's conduct as opposed to the plaintiff's subjective traits or experience for victim-protecting reasons. The purpose of raising these considerations is not to suggest particular reforms or strategies but, rather, to encourage readers to consider the potential impact of focusing on the plaintiff's biology on the one hand, or the defendant's conduct on the other, when deciding how to remedy intentionally inflicted mental harms.

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> "Is it not desirable that . . . individuals and institutions [who] may indulge in overreaching and harassing tactics be restrained by the law—without regard to whether their victims are persons of . . . resilient nature?"
>
> --Willard Pedrick,
> *Pepperdine Law Review*, 1985[1]

INTRODUCTION

In 2019, an article in the *University of Memphis Law Review* asked how a Highly Sensitive Person (HSP) plaintiff would likely fare when suing for intentional infliction of emotional distress (IIED).[2] The author predicted that a highly sensitive plaintiff would be left without a remedy, as IIED contemplates what would be harmful and offensive to the average, "reasonable" person—and an HSP is, by definition in the field of Psychology, more emotionally reactive than average.[3] The author suggested that the IIED tort's reasonableness standard may actually be un-reasonable for around 20% of the human population[4] and that expert witness testimony regarding high sensitivity could play a role in securing remedies for HSP plaintiffs.[5]

The author's analysis with respect to HSPs raises broader questions about IIED claims and plaintiffs with non-apparent emotional vulnerabilities, defined for the purposes of this article as pre-existing, diagnosed mental conditions that are not known to the defendant.[6] What are the prospects for a successful suit when an underlying, formally diagnosed psychiatric disorder heightens the plaintiff's vulnerability to harm? What about a trait or temperament that—similar to high sensitivity—falls short of a diagnosed psychiatric disorder, and what about inferred or genetically predicted vulnerabilities

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[1] Willard H. Pedrick, *Intentional Infliction: Should Section 46 Be Revised?*, 13 PEPP. L. REV. 1, 12 (1985).

[2] Sean O'Brien, *The Highly Sensitive Person's Redress for Intentional Infliction of Emotional Distress: Utilizing Experts in the Courtroom*, 49 U. MEM. L. REV. 533, 533-34 (2018-2019) (presenting a scenario where a senior partner at a large law firm publicly berates a new associate, who then experiences severe emotional distress but is unable to recover damages because "a person of reasonable sensitivities would not undergo such emotional distress from being publicly berated"); *but see* Pedrick, *supra* note 1, at 6-12 (considering the opposite scenario, suggesting that a barrier to recovery may exist for individuals who are less sensitive than average and therefore "strong enough to bear [an] intentional attack without succumbing to severe emotional distress").

[3] *See infra* Part I (discussing the "high sensory processing sensitivity" trait, studied first, and perhaps most famously, by psychologist Elaine Aron since the 1990s).

[4] O'Brien, *supra* note 2, at 548.

[5] *Id.* at 567-68 ("[I]f courts utilize experts to aid the judicial analysis of the HSP's reasonably severe emotional distress, HSPs and other similarly sensitive plaintiffs will have access to the courts to litigate an IIED claim.").

[6] *See, e.g.*, Shaun Cassin, *Eggshell Minds and Invisible Injuries: Can Neuroscience Challenge Longstanding Treatment of Tort Injuries*, 50 HOUS. L. REV. 929 (2013) (referring to a mental counterpart to the eggshell skull rule of liability for physical injury, see *infra* Section II.B); Stanley McQuade, *The Eggshell Skull Rule and Related Problems in Recovery for Mental Harm in the Law of Torts*, 24 CAMPBELL L. REV. 1 (2001).

whose significance is not scientifically certain.[7] The purpose of this article is to revisit the medical-legal fiction[8] of reasonable sensitivity with respect to both HSP plaintiffs and plaintiffs with other diagnosed and undiagnosed vulnerabilities, including suspected genetic predispositions to psychiatric illness.

Part I briefly reviews psychological and biological research on the HSP construct, which describes a temperament (personality type), as opposed to a diagnosed psychiatric disorder. While research on this temperament has come a long way as of 2023, and the HSP has gained mainstream attention in popular news outlets, the psychologist who coined the 'HSP' term and first described the trait in the 1990s points out that many studies are flawed, and the trait is subject to misinterpretation.

Part II discusses the reasonable person standard applied in IIED claims, how tort law might account for highly sensitive plaintiffs, and how the law has historically accounted for plaintiffs with mental conditions or other vulnerabilities to mental injury that are either known or unknown to the defendant. Early approaches to IIED reflected the difficulty of evaluating emotional harm and the resulting need to add safeguards to the tort, such as reasonableness and injury-related requirements, to avoid overburdening the courts. Over the years, various commentators have opined that the safeguards historically used to weed out frivolous or falsified claims have resulted in a confused hybrid tort that imperfectly remedies inflicted distress.

Part III addresses considerations that may arise with continued progress in psychiatric genetics and research on the brain, presenting two hypothetical variations on the classic IIED scenario: first, cases where the plaintiff's vulnerability is not known to the defendant, and the plaintiff wishes not to publicize it (even if they could hire experts and make a science-backed argument); and second, where the defendant infers or predicts and strategically exploits the plaintiff's non-apparent vulnerability. I present these scenarios in order to draw attention to potential plaintiff privacy concerns, the increasing potential sophistication of defendants, and the increasing research efforts to predict and infer individuals' health status, which could all be taken into account when deciding how to address intentionally inflicted emotional distress in the future.

Finally, Parts IV and V return to the legal fiction of a "reasonable" or "ordinary" person and its purpose in tort law,[9] raising considerations that embracing the medical-

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[7] *See, e.g.*, Lily Hoffman-Andrews, *The known unknown: the challenges of genetic variants of uncertain significance in clinical practice*, 4 J.L. & BIOSCIENCES 648, 648, 650 (Dec. 2017) (discussing "variants of unknown significance" (VUSs), ambiguous genetic test results whose meaning has not yet been resolved and that are routinely reclassified); *Polygenic Prediction in Psychiatry: A ONLINE Public Conference*, COLUMBIA UNIV. MED. CENTER (Mar. 10, 2020, 8:30 am), http://braingenethics.cumc.columbia.edu/polygenic-prediction-in-psychiatry/ (referring to the "highly probabilistic and uncertain nature of" polygenic risk scores, which "demands a careful assessment of their safe and responsible use in clinical settings"); Corina U. Greven et al., *Sensory Processing Sensitivity in the context of Environmental Sensitivity: A critical review and development of research agenda*, 98 Neuroscience & Biobehavioral Rev. 287, 295 (2019) (noting that "[o]nly two molecular genetic studies of [the highly sensitive personality] ha[d] been conducted" at the time that Greven et al. wrote their article, and that one of these studies reported an association between sensitivity and the serotonin transporter-linked polymorphic region 5-HTTLPR); Scott Alexander, *5-HTTLPR: A Pointed Review*, SLATE STAR CODEX (May 7, 2019), https://slatestarcodex.com/2019/05/07/5-httlpr-a-pointed-review/ (observing that 5-HTTLPR had become a "psychiatric sensation" linked to various psychiatric disorders but then been cast into doubt).

[8] See *infra* Part IV (discussing "legal fictions" as a term of art and coining a term "medical fiction" with respect to high sensitivity (other authors may be using the same term in different ways in other contexts), given persisting biological unknowns regarding the highly-sensitive trait).

[9] *See* Pedrick, *supra* note 1, at 16.

legal fiction of 'reasonable sensitivity' can serve a plaintiff-protecting function; keep IIED true to its roots as a dignitary tort;[10] and mirror trends in the clinical assessment of– and criminal prosecutions related to – private-actor cruelty such as domestic violence and intra-familial child torture.[11]

The purpose of raising these considerations is not to propose or advocate for specific reforms or strategies. Instead, the goal is to encourage readers to think about the impact that shifting the focus of the IIED tort—either toward the experience and biology of the plaintiff or toward the conduct of the defendant—might have on litigants and the way that society views and remedies emotional harms in the interest of individual corrective justice.[12]

I. THE HIGHLY SENSITIVE PERSON ACCORDING TO PSYCHOLOGY

The Highly Sensitive Person continues to be an imperfectly understood concept in psychology that is subject to misinterpretation, according to Elaine Aron, the researcher who coined the term in the 1990s.[13] However, as of 2023, Aron still unambiguously emphasizes that 'being an HSP' is a personality trait and not a disorder. "High sensory processing sensitivity" is not a psychiatric diagnosis,[14] and it does not appear in the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-5)[15] or the International Classification of Diseases (ICD).[16]

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[10] *See infra* Part IV.

[11] *Id*.

[12] *See, e.g.*, Cristina Carmody Tilley, *Rescuing Dignitary Torts from the Constitution*, 78 BROOK. L. REV. 65, 65 (2012) ("[A] recent version of the corrective justice theory of torts—civil recourse—suggests that a tort forum is crucial for injuries to personality in a way that might not be true for injuries to property or body.").

[13] Greven et al., *supra* note 7, at 288; Elaine, *2021 Research on HSPs*, Highly Sensitive Person (Feb. 9, 2022), https://hsperson.com/2021-research-on-hsps/ [hereinafter *2021 Research on HSPs*] ("[R]esearch . . . is sometimes tending to lead to a more negative impression . . . than is correct."); HIGHLY SENSITIVE PERSON, https://hsperson.com/ (last visited Mar. 30, 2023) (describing the trait as "misunderstood," noting that it occurs in 15% to 20% of the population, and cautioning against conflating high sensitivity with "inhibitedness, fearfulness, or neuroticism," given that "[s]ome HSPs behave in these ways, but it is not innate to do so and not the basic trait"*)*; *see also* Elaine N. Aron & Arthur Aron, *Sensory-Processing Sensitivity and Its Relation to Introversion and Emotionality*, 73(2) J. PERSONALITY & SOC. PSYCHOL. 345, 345-68 (1997); Marwa Azab, *Are You a Highly Sensitive Person? Should You Change?*, PSYCHOL. TODAY (July 27, 2017), https://www.psychologytoday.com/us/blog/neuroscience-in-everyday-life/201707/are-you-highly-sensitive-person-should-you-change; Loren Soeiro, *Are You a Highly Sensitive Person?*, PSYCHOL. TODAY (Sept. 23, 2019), https://www.psychologytoday.com/us/blog/i-hear-you/201909/are-you-highly-sensitive-person.

[14] HIGHLY SENSITIVE PERSON, https://hsperson.com/books/the-highly-sensitive-person/ (last visited Mar. 30, 2023) [hereinafter HIGHLY SENSITIVE PERSON—BOOKS] (stating that Elaine Aron was "the first therapist to tell HSPs how to identify their trait and make the most of it in everyday situations"); *see also 2021 Research on HSPs*, *supra* note 13 **(**"Sensory processing sensitivity [the technical term that Aron uses for high sensitivity] . . . has nothing do with Sensory Processing Disorder.").

[15] *Diagnostic and Statistical Manual of Mental Disorders (DSM-5),* AM. PSYCHIATRIC ASS'N, https://www.psychiatry.org/psychiatrists/practice/dsm (last visited May 24, 2020); McQuade, *supra* note 6, at 5 (noting that, in practice, recognized mental disorders may be defined as disorders listed in the *DSM*).

[16] Sudha R. Raminani, *International Classification of Diseases*, ENCYC. BRITANNICA, https://www.britannica.com/topic/International-Classification-of-Diseases (last visited Mar. 30, 2023) (describing the International Classification of Diseases (ICD) as a "diagnostic tool that is

The HSP construct[17] arose out of research started by Aron, a Stony Brook psychologist, in the 1990s.[18] In 1997, Aron and co-author Arthur Aron published a paper defining the trait and presenting the Highly Sensitive Person Scale, a diagnostic checklist based on a series of exploratory, questionnaire-based studies they had carried out with university students and the general public.[19] Today, Aron offers a "self-test" based on the same checklist on her website, with the caveat that "[t]he contents . . . are not meant to diagnose or exclude the diagnosis of any condition."[20]

Aron and her co-authors have long emphasized that when they talk about the HSP, they are talking about a temperament or personality category,[21] not a mental disorder.[22] However, an individual could conceivably both carry a formal diagnosis such as depression or bipolar disorder and identify as an HSP based on taking an online self-test. And although researchers have identified neural correlates of high sensitivity in fMRI studies[23] and proposed genetic associations in a limited number of papers,[24] relatively little is actually known about sensory processing sensitivity or its biological basis.[25]

Aron and her co-authors explored the possibility of a link between the HSP construct and psychopathology in 2018. They recognized that aspects of the trait, such as environmental sensitivity and hyper-responsiveness to stimuli, seemingly overlap with aspects of clinical disorders including autism, schizophrenia, and post-traumatic stress disorder (PTSD). The authors compared fMRI findings from studies on these disorders to findings from studies on the HSP and concluded that there were observable differences between the highly sensitive brain and the brain in autism, schizophrenia, or PTSD with respect to reward processing, memory, empathy, and other functions.[26] Aron was joined by new co-authors across different disciplines in 2019 and called for further study on the

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used to classify and monitor causes of injury and death and that maintains information for health analyses," and that is "designed to promote international compatibility in health data collecting and reporting").

[17] *What Is… a Psychological Construct?*, MENTAL HEALTH @ HOME (Jan. 22, 2021), https://www.mentalhealthathome.org/2021/01/22/what-is-psychological-construct/ (explaining that in psychology, a "construct" is a means "to describe patterns of behaviour or experiences so that they can be explored, investigated, and discussed," and asserting that constructs are not necessarily "valid or useful").

[18] HIGHLY SENSITIVE PERSON—BOOKS, *supra* note 14 (explaining that Elaine Aron did not intend to write books about the HSP but found that many people who self-identified as HSPs seemed to "gain a great deal from knowing about" this trait).

[19] Aron & Aron, *supra* note 13.

[20] *Self-Tests*, HIGHLY SENSITIVE PERSON, http://hsperson.com/test/ (last visited May 24, 2020).

[21] Thomas A. Widiger, *Personality and psychopathology*, 10 WORLD PSYCHIATRY 103, 103 (June 2011) ("Personality is the characteristic manner in which one thinks, feels, behaves, and relate[s] to others. Mental disorders are clinically significant impairments in one or more areas of psychological functioning."); *but see* Geoffrey Miller, *Personality traits are continuous with mental illness*, EDGE, https://www.edge.org/response-detail/10936 (last visited Mar. 29, 2023) ("Psychology, psychiatry, and behavior genetics are converging to show that there's no clear line between 'normal variation 'in human personality traits and 'abnormal 'mental illnesses.").

[22] *See, e.g.*, HIGHLY SENSITIVE PERSON, *supra* note 13 ("Your trait is normal.").

[23] *See, e.g.*, Greven et al., *supra* note 7, at 296.

[24] *Id.*

[25] *Id.* at 288 (asserting in 2019 that "basic, translational and applied scientific research on SPS [was] lagging behind").

[26] B.P. Acevedo et al., *The functional highly sensitive brain: a review of the brain circuits underlying sensory processing sensitivity and seemingly related disorders*, 373(1744) PHIL. TRANSACTIONS B 1, 4 (Apr. 19, 2018).

HSP to clarify various biological unknowns.[27]

Despite relatively limited attention from researchers, the public has embraced the HSP construct with enthusiasm in recent years. Along with introverts,[28] HSPs began to experience a moment in the pop-culture limelight five to ten years ago, gaining widespread coverage in various mainstream outlets such as the *Wall Street Journal* and *Psychology Today*,[29] though even now in 2023, it is not clear how many psychologists would actually "diagnose" a client as highly sensitive and treat them on that basis, given that high sensitivity in and of itself is not a mental condition.[30]

II. IIED TODAY: CONSIDERATION OF KNOWN OR UNKNOWN VULNERABILITIES

> "[T]he rule which seems to be emerging is that there is liability . . . for conduct exceeding all bounds which could be tolerated by society, of nature especially calculated to cause mental damage of a very serious kind."
>
> --William Prosser,
>
> *Michigan Law Review*, 1939[31]

The story of IIED is one of various attempts, over time, to ensure that unacceptable attacks on plaintiffs' mental tranquility do not go unpunished—without leaving too much room for frivolous claims. Striking the right balance has not been easy given the ambiguous and subjective nature of mental harms.

As a result, just as the science of high sensitivity has been muddled at times,[32] the law of IIED has developed to be somewhat muddled and incoherent over the years. As Russell Fraker wrote in 2008: "[i]n their efforts to cabin the application of IIED while preserving it as a valid cause of action, the [law 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."[33]

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[27] *See generally* Greven, *supra* note 7.

[28] *See, e.g.*, Elizabeth Bernstein, *Why Introverts Make Great Entrepreneurs*, WALL ST. J. (Aug. 24, 2015), https://www.wsj.com/articles/why-introverts-make-great-entrepreneurs-1440381699; Melissa Dahl, *Apparently There Are 4 Kinds of Introversion*, THE CUT (Aug. 11, 2020), https://www.thecut.com/article/apparently-there-are-four-kinds-of-introversion.html; Michael Godsey, *When Schools Overlook Introverts*, THE ATLANTIC (Sept. 28, 2015), https://www.theatlantic.com/education/archive/2015/09/introverts-at-school-overlook/407467/.

[29] Elizabeth Bernstein, *Do You Cry Easily? You May Be a 'Highly Sensitive Person'*, WALL ST. J. (May 18, 2015, 1:45 pm ET), https://www.wsj.com/articles/do-you-cry-easily-you-may-be-a-highly-sensitive-person-1431971154.

[30] HIGHLY SENSITIVE PERSON, *supra* note 14 (asserting that Elaine Aron was the first therapist "to tell HSPs how to identify their trait and make the most of it in everyday situations"); *see also* Deidre M. Smith, *An Uncertain Privilege: Implied Waiver and the Evisceration of the Psychotherapist-Patient Privilege in the Federal Courts*, 58 DEPAUL L. REV. 79, 113 (2008) ("[I]t is highly unusual for an individual receiving psychotherapy of some kind to not be diagnosed with a condition from in the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders*.").

[31] William L. Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874, 889 (1939).

[32] *2021 Research on HSPs*, *supra* note 13.

[33] Russell Fraker, *Reformulating Outrage: A Critical Analysis of the Problematic Tort of IIED*, 61 VAND. L. REV. 983, 984 (2008).

The tort of intentional infliction of emotional distress, or "outrage,"[34] first appeared in legal academic literature in the 1930s[35] and gained formal recognition in the *Restatement of Torts* in 1948,[36] after having long appeared in cases as an add-on to other actionable injuries in the late 1800s and early 1900s.[37] Eventually, the independent tort would be recognized in all U.S. jurisdictions, with most courts adhering to the definition found in the *Restatement (Second) of Torts*.[38]

The basic idea underlying IIED claims is that a plaintiff may recover when they suffer emotional harm due to the defendant's intentional, outrageous conduct.[39] Note that IIED–unlike its cousin tort, negligent infliction of emotional distress–is not focused on a "medically significant" (physical) emotional injury.[40] Instead, the focus of IIED is on mental and emotional disturbance itself. As explained by Professor Calvert Magruder in 1936:

> [O]ne who, without just cause or excuse, and beyond all the bounds of decency, purposely causes a disturbance of another's mental and emotional tranquility of so acute a nature that harmful physical consequences might be not unlikely to result, is subject to liability in damages for such mental and emotional disturbance even though no demonstrable physical consequences actually ensue.[41]

Given the difficulties of evaluating emotional harms, incorporation of a

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[34] *See, e.g.*, Clay Calvert, *Tort Transformation in the Cultural Quicksand of Language and Values*, 39 LITIG. 30, 30 (2013) (noting that IIED is sometimes known as the tort of outrage).

[35] *See, e.g.*, Prosser, *supra* note 31, at 874 (presenting his paper at a meeting of the Association of American Law Schools in December 1938, giving credit to contemporaneous work by Professor Calvert Magruder and others); *see also* Calvert Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV.
1033 (1936).

[36] Diane A. Lebedeff, *Intentional Infliction of Emotional Distress: A Trial Perspective*, 19 LITIG. 5, 5 (1993); Prosser, *supra* note 31, at 875 (noting that the law had previously been reluctant to recognize mental anguish as a basis for recovery on its own and listing reasons for past "unwillingness to redress mental injuries," but noting willingness to compensate emotional pain when accompanied by even a slight physical injury).

[37] Fraker, *supra* note 33, at 984-85 (noting varying approaches to IIED as a "gap-filler" or "residual" tort, on the one hand, or an independent tort, on the other hand); Pedrick, *supra* note 1, at 1-2 (observing that the courts were historically "nervous [and] skittish" about emotional distress claims and "the abrasions from living in our rough-edged society [were] not commonly thought of in terms of legal rights and wrongs," though compelling cases eventually surfaced); RESTATEMENT (SECOND) OF TORTS § 46 cmt. b (AM. LAW INST. 1965) ("Because of the fear of fictitious or trivial claims, distrust of the proof offered, and the difficulty of setting up any satisfactory boundaries to liability, the law has been slow to afford independent protection to the interest in freedom from emotional distress standing alone.").

[38] Fraker, *supra* note 33, at 984, 1019 (noting that the *Restatement (Second)*, § 46 provided that "[o]ne 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").

[39] *See, e.g.*, Fraker, *supra* note 33, at 994; Lebedeff, *supra* note 34, at 5 **(**noting that plaintiffs still have prevailed where juries appeared less than inflamed by the allegations of outrageousness).

[40] Fraker, *supra* note 33, at 1005-7 (stating that "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," granted "[s]ome courts have . . . interpret[ed] IIED liability as requiring 'medically significant' emotional injuries").

[41] Magruder, *supra* note 35, at 1058.

'reasonableness' standard was deemed necessary from IIED's earliest days to prevent plaintiffs from going to court over trivial insults and offenses.

When presenting the new tort to the Association of American Law Schools in the 1930s, William Prosser[42] expressed concern that it might open the floodgates to plaintiffs with frivolous claims, noting that if everyone filed suit whenever their feelings were hurt, "we should all be in court twice a week." Prosser provided the example of potential claims by the "hypersensitive" person thrown into convulsions by the sound of church bells. Foreseeing such cases, he felt it would be necessary to separate out the legitimate emotional distress cases from the illegitimate cases.[43] Thus, the concept of "outrage" came to be "inextricably linked" with IIED,[44] in that only distress inflicted by means of truly outrageous behavior would give rise to liability. Outrage would come to be judged based on the sensibilities of the average, reasonable person.[45]

A second controversial[46] historical safeguard against frivolous IIED claims was the requirement that plaintiffs must in fact have experienced severe emotional distress as a result of the defendant's conduct.[47] Granted, comment j on section 46 of the *Restatement (Second) of Torts* notes that "in many cases the extreme and outrageous character of the defendant's conduct is in itself important evidence that the distress has existed."[48]

A. IIED and the Highly Sensitive Plaintiff

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[42] *See* Christopher J. Robinette, *The Prosser Letters: 1917-1948*, 101 IOWA L. REV. 1143, 1143 (2016) (identifying Prosser as one of the most influential legal scholars of the 20th century, particularly with respect to torts).

[43] Prosser, *supra* note 31, at 877-78 (citing Rogers v. Elliott, 146 Mass. 349, 15 N. E. 768 (1888)); *see also* KEITH N. HYLTON, TORT LAW: A MODERN PERSPECTIVE 291, 309 (2016) (noting that in the late 1800s, the plaintiff in *Rogers v. Elliott* had failed to recover in a nuisance suit because "the ringing of a church bell, though painful to the plaintiff, was not a nuisance because it did not annoy the average member of the community").

[44] *See* Fraker, *supra* note 33, at 988-89 (internal quotation marks omitted) (citing RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965)) (explaining that the purpose of requiring outrageousness was so that the tort would not "extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities," though the *Restatement (Second)*'s commentary offered little guidance as to what types of conduct might be outrageous); Pedrick, *supra* note 1, at 4 (noting that the 1957 revision of the *Restatement (Second)* added a requirement that the defendant's conduct must be classed as outrageous by the judge and jury).

[45] 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, 48 (1982) (noting that the reasonableness standard may have been devised to account appropriately for "variations in emotional responsiveness among individuals, and variations in their ability and willingness to articulate their hurt [that] would, in theory, permit different results for different plaintiffs although the defendant behaved similarly towards each and although each may have suffered substantially").

[46] *See* Fraker, *supra* note 33, at 987, 996 (advocating for removal of the severe injury requirement in order to resolve "doctrinal confusion and judicial inconsistency" with respect to IIED, and opining that "[i]ncoherence [in the law] undermines the legitimacy of judicial proceedings, sends mixed signals to society, and grants or denies redress arbitrarily").

[47] *See* Pedrick, *supra* note 1, at 6 ("[C]oncerns over a feared avalanche of claims moved the American Law Institute to deny liability for extreme and outrageous conduct where the particular victim was strong enough to bear the intentional attack.").

[48] *Id.* at n.36 (stating that, at the 34th Annual Meeting of the American Law Institute in 1957, Prosser explained regarding the 1965 revision that physical consequences may not be essential to a successful claim if the defendant's conduct was sufficiently outrageous).

Of the above-mentioned safeguards, the concern raised in 2019 in the *University of Memphis Law Review* had to do with IIED's reasonableness standard.[49] The author noted that, in practice, courts have widely construed the reasonableness limitation to refer to a person of "ordinary sensitivity,"[50] foreclosing remedies to plaintiffs who experience an unreasonable distress response (e.g., hypothetically, HSP plaintiffs).[51] With that concern in mind, how does tort law generally account for plaintiffs' pre-existing vulnerabilities or heightened susceptibility to injury?

In different areas of tort law, courts have generally contemplated the existence of uniquely vulnerable plaintiffs, who can experience and should recover for the unexpected fallout of a *physical* injury. This is the so-called "eggshell skull" or "eggshell plaintiff" rule. According to this rule, the defendant takes the victim as the defendant finds them, regardless of the defendant's prior knowledge of the plaintiff's pre-existing conditions, and the defendant is liable for the "eggshell" plaintiff's entire injury. However, application of this rule has limitations and has not been straightforward with respect to *mental* harms (Part II.B, *infra*, provides a more detailed discussion on this point).[52]

With respect to IIED, comment f on section 46 of the *Restatement* also contemplates that the outrageousness of a defendant's conduct can come from their knowing the plaintiff is susceptible to emotional harm[53]—but this still leaves a gap with respect to cases where a unique susceptibility, such as high temperamental sensitivity, was unknown to the defendant.[54]

Meanwhile, in the hypothetical *Memphis* scenario (see *supra* n.2), the HSP plaintiff's IIED suit is dismissed for failure to state a claim, due to the unreasonableness of the plaintiff's distress. The author, O'Brien, asserts that foreclosing IIED claims for sensitive people in this way is discriminatory. He argues that courts should permit plaintiffs to present expert testimony about the HSP trait and instruct jurors to consider the reaction of a "reasonable HSP"—as opposed to a reasonable person—to the defendant's conduct.[55]

What might be the challenges of presenting evidence to that effect?[56] What are

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[49] *See generally* O'Brien, *supra* note 2; RESTATEMENT (SECOND) OF TORTS § 46 cmt. j (AM. LAW INST. 1965) ("The law intervenes only when the distress inflicted is so severe that no reasonable man could be expected to endure it.").

[50] *Compare* O'Brien, *supra* note 2, at 535 (referring to examples in Louisiana, Illinois, and Florida) *with* RESTATEMENT (SECOND) OF TORTS § 46 cmt. j (AM. LAW INST. 1965).

[51] O'Brien, *supra* note 2, at 547-48.

[52] Cassin *supra* note 6, at 933-34 ("[U]nder the eggshell skull rule, it is irrelevant how a reasonable person would react to a physical injury."); O'Brien, *supra* note 2, at 556-57, n.160 (citing Kennedy v. Town of Billerica, 617 F.3d 520, 530 (1st Cir. 2010)) (discussing the eggshell plaintiff rule with respect to physical and mental conditions); *infra* Section II.B (discussing the eggshell plaintiff rule with respect to mental conditions).

[53] RESTATEMENT (SECOND) OF TORTS § 46 cmt. f (AM. LAW INST. 1965) ("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.").

[54] *Id.* ("B is subject to liability to A if he knows of A's condition, but is not liable if he does not have such knowledge.").

[55] O'Brien, *supra* note 2, at 536-37.

[56] *See, e.g.*, Deidre M. Smith, *The Disordered and Discredited Plaintiff: Psychiatric Evidence in Civil Litigation*, 31 CARDZO L. REV. 749, 751 (2009) (noting: "Scholarship and case law have extensively examined and considered the role of psychiatric testimony in criminal law," but "the approaches to the admissibility of such evidence in the civil and criminal context are not interchangeable; the role of a party's psychiatric history in civil litigation is far less clear and has

the relevant standards?[57]

One immediately foreseeable challenge is that, while the idea of 'being an HSP' has gained notoriety among the general public, high sensory processing sensitivity is not a mental disorder with a corresponding formal diagnosis.[58] Studies on the highly sensitive person originated in the realm of personality research, with a few studies coming out of other fields. So, despite a recent push for further study of the biology underlying this trait, litigants may still encounter challenges obtaining reliable evidence in this particular area.[59]

B. IIED and Non-Apparent Mental Conditions

Turning to the broader question of IIED and non-apparent mental vulnerabilities,[60] tort law has long asked fact finders to take into account the health and temperament of the plaintiff in determining whether a defendant's conduct was outrageous or "within the bounds of decency."[61]

With respect to liability for harms exacerbated by underlying physical conditions, the eggshell plaintiff rule states that a defendant takes the plaintiff as they are, regardless of the defendant's prior knowledge.[62] However, the status of this rule is "far from clear" with respect to mental harms, "even in jurisdictions that have sought to treat mental and physical harms in the same manner."[63]

Courts in various jurisdictions have extended the eggshell plaintiff rule to psychological conditions,[64] but this expansion "has not been without controversy,"[65] with

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been the focus of minimal scholarship"); *see infra* Section III.A (discussing the challenges posed by the psychotherapist-patient privilege in court).

[57] *See, e.g.*, O'Brien, *supra* note 2, at 568-69 (discussing factors for assessing the reliability of expert evidence); Cassin, *supra* note 6, at 949-50 (discussing the general acceptance test).

[58] *See supra* Part I.

[59] *See, e.g.*, Tess M. S. Neal et al., *Psychological Assessment in Legal Contexts: Are Courts Keeping "Junk Science" Out of the Courtroom?*, APS (Feb. 12, 2020), https://www.psychologicalscience.org/publications/psychological-assessment-in-legal-contexts-are-courts-keeping-junk-science-out-of-the-courtroom.html (noting that a third of the psychological assessment tools used in courts are "clearly not accepted" by the psychological community at large); James E. Needell, *Psychiatric Expert Witnesses: Proposals for Change*, 6 AM. J. L. & MED. 425, 430 (1980) ("[S]ince a jury cannot always readily distinguish between plausible and implausible scientific reasoning, it may give credence not to the most accurate and objective expert, but rather to the expert with the most self-confidence and the best courtroom demeanor."); *2021 Research on HSPs*, *supra* note 13 (opining that, while research on the HSP has "gone big time," many studies are flawed, and "poor studies are coming out all the time").

[60] *See, e.g.*, Cassin, *supra* note 6, at 962; McQuade, *supra* note 6, at 21.

[61] *See, e.g.*, Magruder, *supra* note 35, at 1046; Fraker, *supra* note 32, at 989-90 & n.27 (citing St. Louis Sw. Ry. Co. of Tex. v. Wright, 84 S.W. 270, 270-71 (Tex. Civ. App. 1904)).

[62] McQuade, *supra* note 6, at 2.

[63] *Id.*; O'Brien, *supra* note 2, at n.95, 558 (noting that, per comment j, liability may result if an individual is particularly susceptible to a severe emotional reaction and the defendant was aware of that susceptibility, "[y]et when there is no knowledge of the non-apparent mental condition, the law's purpose . . . becomes muddled").

[64] *See, e.g.*, Steve P. Calandrillo & Dustin E. Buehler, *Eggshell Economics: A Revolutionary Approach to the Eggshell Plaintiff Rule*, 74 OHIO ST. L.J. 375, 385, n.68 (2013) ("[P]laintiffs in most jurisdictions may now invoke the eggshell plaintiff rule to recover for physical and emotional harms resulting from preexisting psychological conditions.") (citing examples from Fifth, Eighth, and Ninth Circuits, as well as Iowa, Louisiana, and Massachusetts, and a contrasting example from the Fifth Circuit "refusing to extend the eggshell plaintiff rule to preexisting mental conditions").

[65] *Id.* at 386.

scholars arguing that psychological trauma is almost always the result of a predisposing condition,[66] or that psychological injuries result from a "complex constellation of interdependent factors that contribute to actual, as well as alleged, mental damages."[67]

In 2010, the *Restatement (Third) of Torts* proposed extending the eggshell plaintiff rule to cover unforeseeable harm due to an underlying mental condition, though as of 2019 it appeared that "no jurisdiction ha[d] extended this provision to IIED."[68]

III. IIED IN THE FUTURE: CONSIDERATION OF INFERRED OR PREDICTED VULNERABILITIES

As discussed in Part II, both apparent and non-apparent mental vulnerabilities can already help determine the success of an IIED claim. The fact that a defendant exploited a known vulnerability can help the plaintiff's case, whereas non-apparent vulnerabilities are not necessarily as helpful in this regard.

What about a case where the plaintiff does not struggle with their mental health or have a diagnosis leading up to the time of inflicted distress, but the defendant is nevertheless able to infer or predict (and maybe deliberately exploit, exacerbate, or elicit) a mental condition or vulnerability strategically, based on other information about the plaintiff?

The scenario may initially seem far-fetched, but the United States and countries around the world are seeing a big push for research on genetics and population health,[69] including efforts to gather large amounts of detailed information and develop tools to make inferences and predictions about individuals' health.[70] In recent years, these efforts were already being spearheaded by industry and public-private partnerships,[71] and in 2020

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[66] *Id.*

[67] *Id.* at 386-87; *see also* Scott M. Eden, Note, *I Am Having a Flashback . . . All the Way to the Bank: The Application of the "Thin Skull" Rule to Mental Injuries*—Poole v. Copland, Inc., 24 N.C. CENT. L.J. 180, 181 (2001) ("mental injury may be completely subjective in its diagnosis, origin, and treatment"); Mark I. Levy & Saul E. Rosenberg, *The "Eggshell Plaintiff" Revisited: Causation of Mental Damages in Civil Litigation*, 27 MENTAL & PHYSICAL DISABILITY L. REP. 204, 204 (2003) (noting that potential eggshell plaintiffs could undergo thorough investigation of their lives before and after injury).

[68] O'Brien, *supra* note 2, at 556.

[69] *See, e.g.*, BIOBANK UK, https://www.ukbiobank.ac.uk (last visited Mar. 30, 2023); Sara Reardon, *Giant study poses DNA data-sharing dilemma*, NATURE (Sept. 14, 2015), https://www.nature.com/articles/525016a (referring to the Precision Medicine Initiative, a $215 million initiative aiming to collect genetic and medical data from 1 million people).

[70] *See, e.g.*, Alina Skiljic, *The status quo of health data inferences*, IAPP (Mar. 19, 2021), https://iapp.org/news/a/the-status-quo-of-health-data-inferences/ ("An example of inferences . . . 'inspired' by COVID-19 is that someone could be thought to have the virus based on their origin of travel."); *The mobile game that can detect Alzheimer's risk*, NEUROSCIENCENEWS (Apr. 24, 2019), https://neurosciencenews.com/alzheimers-risk- game-12049/ ("[T]hose with a genetic risk factor for Alzheimer's perform worse on the spatial navigation tasks in the game, taking more time and less efficient routes to checkpoint goals."); *Eye-tracking and Health*, IRISBOND, https://irisbond.com/en/eye- tracking-technology/eye-tracking-and-health/ (last visited Mar. 30, 2023) ("[E]ye movement monitoring . . . has aroused much interest . . . because it is an effective tool for the diagnosis of psychological, neurological, or eye diseases and can be used in the treatment of many conditions for both the elderly and children.").

[71] *See, e.g.*, Peter Alexander et al., *White House pitches brain mapping project*, NBC NEWS (Apr. 2, 2013, 6:00 AM EDT), https://www.nbcnews.com/health/health-news/white-house-pitches-brain-mapping-project-flna1C9170589 ("The public-private initiative . . . aims to find a way to take pictures of the brain in action in real time.").

the opportunity to gather large amounts of health data dramatically expanded during the COVID-19 emergency.[72]

Meanwhile, the scientific and medical communities have come to understand or hypothesize various circumstances where a person's mental state and susceptibility to emotional distress might be influenced by everything from the side effects of a medication,[73] to genetic variation,[74] to a physical disease state,[75] sleep deprivation,[76] or even cumulative exposures to past stress.[77]

Like the HSP discussed in the *Memphis* scenario, numerous potential (perhaps transient)[78] eggshell plaintiffs may exist in the world at any given time, without any

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[72] *See, e.g.*, *Scientific research on the coronavirus is being released in a torrent*, THE ECONOMIST (May 7, 2020), https://www.economist.com/science-and-technology/2020/05/07/scientific-research-on-the-coronavirus-is-being-released-in-a-torrent.

[73] *See, e.g.*, Rodrigo Casagrande Tango, MD, *Psychiatric side effects of medications prescribed in internal medicine*, 5(2) DIALOGUES CLINICAL NEUROSCIENCE 155, 155 (2003) ("Several pharmacological treatments used in internal medicine can induce psychiatric side effects (PSEs) that can mimic diagnoses seen in psychiatry."); Stuart Wolpert, *Chronic opioid treatment may raise risk of post-traumatic stress disorder, study finds*, UCLA NEWSROOM (Dec. 3, 2019), https://newsroom.ucla.edu/releases/chronic-opioid-treatment-ptsd.

[74] *See, e.g.*, Pamela Sklar, *Psychiatric Genomics Consortium: Past and Present*, 27 EUR. NEUROPSYCHOPHARMACOLOGY S359, S359 (2017) ("We have unified much of the field to enable rapid progress in elucidating the genetic basis of psychiatric disorders."); *but see* Steven E. Hyman, *The genetics of mental illness: implications for practice*, 78(4) BULL. WORLD HEALTH ORG. 455, 455 (2000) ("Gone is the notion that there is a single gene that causes any mental disorder or determines any behavioural variant."); Alicia R. Martin et al., *Predicting Polygenic Risk of Psychiatric Disorders*, 86(2) BIOLOGICAL PSYCHIATRY 97, 97 (2019) ("[I]t is absolutely critical that polygenic risk prediction is applied with appropriate methodology and control for confounding to avoid repeating some mistakes of the candidate gene era.").

[75] *See, e.g.*, Megan McIntyre, *How COVID Has Affected Mental Health*, PSYCOM, https://www.psycom.net/coronavirus-mental-health (last visited Mar. 30, 2023); *Thyroid deficiency and mental health*, HARVARD HEALTH PUB. (May 2007), https://web.archive.org/web/20150707000517/https://www.health.harvard.edu/diseases-and-conditions/thyroid-deficiency-and-mental-health ("The interest for mental health is that thyroid deficiency may be associated with cognitive and emotional disturbances, and thyroid hormones may be useful in the treatment of depression.").

[76] Lauren Geall, *Lack of sleep effects: why do we get more emotional when we're tired?*, STYLIST (2020), https://www.stylist.co.uk/health/sleep/sleep-deprivation-affects-emotional-health-sensitivity-stress-cycle/367278 ("[A]s soon as I miss out on sleep, all of my emotions become amplified."); Marie Vandekerchove & Raymond Cluydts, *The emotional brain and sleep: an intimate relationship*, 14 SLEEP MED. REV. 219, 219 (2010) ("[D]eprivation of sleep makes us more sensitive to emotional and stressful stimuli and events in particular.").

[77] *See, e.g.*, Chunhui Chen et al., *Contributions of Dopamine-Related Genes and Environmental Factors to Highly Sensitive Personality: A Multi-Step Neuronal System- Level Approach*, 6 PLOS ONE e21636 (2011) ("Recent stressful life events accounted for an additional 2% of the variance [in the Highly Sensitive Personality]."); *Preventing Adverse Childhood Experiences (ACEs) to improve U.S. health*, CDC, https://www.cdc.gov/media/releases/2019/p1105-prevent-aces.html#:~:text=CDC%20scientists%20analyzed%20data%20from%20more%20than%20144%2C000,heart%20disease%2C%20cancer%2C%20respiratory%20disease%2C%20diabetes%2C%20and%20suicide (last visited Mar. 30, 2023) ("ACEs are linked to chronic health problems, mental health, substance misuse, and reduced educational and occupational achievement.").

[78] *See, e.g.*, Mashal Khan, MD, *Substance Use Disorders*, MERCK MANUAL, https://www.merckmanuals.com/professional/psychiatric-disorders/substance-related-disorders/substance-use-disorders (Oct. 2022) (discussing substance-induced psychiatric disorders).

formal psychiatric diagnosis or treatment history.

As it becomes easier to infer and exploit innate or transient and inferred or predicted vulnerabilities without actual knowledge, what kinds of scenarios might courts see in the future with respect to IIED? How might plaintiffs want these cases to be handled?

Sections III.A and III.B consider the potential challenges posed by two hypothetical scenarios. First III.A addresses a plaintiff's non-apparent vulnerability that is unknown to the defendant, the plaintiff, and/or the broader public—and the plaintiff would prefer to keep it that way. III.B considers a case where the plaintiff's vulnerability is perhaps generally non-apparent but was strategically predicted and exploited by the defendant in order to inflict distress.

The reason for raising these considerations is to emphasize that, while scientific understanding of the mind has progressed significantly since the 1930s, today's society may actually know just enough science to cause new kinds of trouble for prospective plaintiffs—but not enough to truly make things right in the courts.

A. Scenario 1: The Privacy-Conscious Plaintiff

Undisclosed and non-apparent vulnerabilities may present challenges in the IIED context if a plaintiff wishes to maintain privacy with respect to their genetic or medical information while seeking a remedy. Litigation is very public by nature,[79] and individuals often assert an interest in the privacy of their health information.[80]

One proposed solution for ensuring highly sensitive plaintiffs get their day in court is to call expert witnesses to testify to the plaintiff's HSP status.[81] However, this raises the question: What if the HSP plaintiff does not wish to have their status or health information broadcast in court[82]—if not for their own sake, then maybe for the sake of

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[79] *See, e.g.*, Dennis J. Drasco, *Public Access to Information in Civil Litigation vs. Litigant's Demand for Privacy: Is the "Vanishing Trial" an Avoidable Consequence?*, 2006 J. DISP. RESOL. 155, 157 (2006) ("Courts have generally acknowledged a common law right of access to judicial proceedings and judicial records.").

[80] *See, e.g.*, *Mental health privacy*, THE BLADE (May 28, 2020, 12:00 AM), https://www.toledoblade.com/opinion/editorials/2020/05/28/mental-health-privacy-telehealth-coronavirus-healthcare/stories/20200528013 ("Health care, mental or otherwise, is among the most sensitive information available, to be guarded as privately as possible."); *Republicans and Democrats Introduce Competing Privacy Bills to Protect Consumers' Health Information Related to the COVID-19 Pandemic*, NAT'L L. REV. (May 28, 2020), https://www.natlawreview.com/article/republicans-and-democrats-introduce-competing-privacy-bills-to-protect-consumers ("[T]he privacy and security of consumers' personal health information remains a top concern of lawmakers."); *see also* Alex Webb, *To Escape Lockdown, Don't Be Creepy With Health Data*, WASHINGTON POST (May 6, 2020, 10:04 a.m. EDT), https://www.washingtonpost.com/business/to-escape-lockdown-dont-be-creepy-with- health-data/2020/05/05/1ac58fc2-8edf-11ea-9322-a29e75effc93_story.html; Jessica Davis, *UW Medicine Hit with Lawsuit for Breach Impacting 974K Patients*, HEALTH IT SECURITY (Feb. 21, 2020), https://healthitsecurity.com/news/uw-medicine-hit-with-lawsuit-for-breach-impacting-974k-patients (describing lawsuits that followed data breaches exposing patient information).

[81] O'Brien, *supra* note 2, at 567-68.

[82] Smith, *supra* note 30, at 87-88 ("[A] plaintiff may be horrified to learn that her psychotherapy history will be made available, not only to the opposing counsel, but also to . . . the general public.").

genetic relatives (e.g., biological parents, siblings) who might share their vulnerability?[83]

Consider, for example, that "by filing suit in federal court seeking any form of compensation for psychic injury, a plaintiff runs a substantial risk that her current and past mental health treatment will become a focus of discovery and perhaps of the defense theory at trial." Making an IIED claim can "greatly expand the scope of discovery, including intrusive inquiry into the mental health of the plaintiff and psychiatric examinations," which itself could be traumatizing.[84]

With this in mind, plaintiffs in civil litigation may choose to introduce only some part of their health information, or they may choose not to offer this evidence at all. Some may want to keep all treatment records out of the defendant's hands.[85] Giving the defendant access to these records may even be counterproductive for the plaintiff, as disclosure of treatment records tends to be "of high value to defendants and correspondingly high cost to plaintiffs" in litigation.[86]

As Professor Deidre Smith explains in an article discussing the psychotherapist-patient privilege (which gives a right to prevent the disclosure of confidential health information):

> The operation of the psychotherapist-patient privilege is at issue most often and most contentiously when a *defendant* in a civil action involving claims for emotional distress damages seeks records, testimony, and other information regarding a plaintiff's current and past mental health treatment.[87]

In litigation, mental health records can be "tools for defendants seeking to limit damages." Defendants can argue that anything in a plaintiff's life (e.g., childhood abuse, marital discord) may have contributed to their emotional condition or take advantage of material in the records to paint a negative picture of the plaintiff or cause embarrassment to improve chances of settlement. In fact, "[d]efendants who plan to use mental health professionals as either testifying or consulting experts are particularly motivated to access as much information as possible about a plaintiff's mental health history and present condition."[88]

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[83] *See, e.g.*, PJ Randhawa & Erin Richey, *'A very, very scary thought': Could looking at your past with an at-home DNA test cost you in the future?*, KSDK (Feb. 13, 2020), https://www.ksdk.com/article/news/investigations/dna-testing-home-kit-privacy-concerns-problems/63-94f3845f-5a38-43b5-bb35-267c5ee5da36 ("Kathy Smith worries now that [her DNA] test could cost her family more in the future, if her data has an impact on her descendants.").

[84] Lebedeff, *supra* note 36, at 8; Smith, *supra* note 30, at 81; *see also* Holger Furtmayr & Andreas Frewer, *Documentation of torture and the* Istanbul Protocol*: applied medical ethics*, 13 MED., HEALTH CARE & PHIL. 279, 283 (2010) (noting the risk of re-traumatization when asking victims to revive painful memories); *see infra* Part V (taking a more extensive look at approaches to addressing inflicted harm in the criminal law and clinical contexts).

[85] Smith, *supra* note 30, at 88, 114 ("Indeed, once litigation is inevitable, a plaintiff may decide to discontinue psychotherapy for the very reason that her records would be subject to discovery."); *see also* Helen A. Anderson, *The Psychotherapist Privilege: Privacy and "Garden Variety" Emotional Distress*, 21 GEO. MASON L. REV. 117, 144 (2013) ("Potential plaintiffs may not seek the help they need if there is uncertainty about confidentiality.").

[86] Smith, *supra* note 30, at 81, 89.

[87] *Id.* at 83 (emphasis added).

[88] *Id.* at 86-88; *cf.* Lloyd B. Chinn & Thomas M. Mullins, Jr., *Psychiatric Expert Witnesses in*

The Supreme Court's recognition of a psychotherapist-patient privilege in *Jaffee v. Redmond*[89] already acknowledged that individuals with mental illness should be able to enforce their legal rights without concern that their mental health histories will become a central issue in litigation.[90] In that decision, the Court gave great weight to the fact that all 50 states and the District of Columbia had already enacted a form a psychotherapist-patient privilege into law.[91]

It is also worth noting that, in the case of a hypothetical privacy-conscious HSP plaintiff, not only could the information brought to light in court be invasive—it could also be wrong.

In reality, not much is known about this particular trait, even today.[92] It is not discussed, studied, or understood in mainstream psychology or psychiatry in the same way as, for example, depression, bipolar disorder, or schizophrenia. (Though some would argue that much remains unknown about these conditions, as well.[93]) This could be especially problematic, considering that already "[i]n . . . courtrooms, the quality of scientific testimony can vary wildly, making it difficult for judges and juries to distinguish between solid research and so-called junk science."[94]

Sexual Harassment Litigation, 48 PRAC. LAW. 11, 12 (2002) ("[D]efendants may proffer psychiatric expert testimony to assist in explaining what may have caused the plaintiff's problems in the workplace."); Eric Bachman, *New Ruling Examines Emotional Distress Damages In Employment Cases*, FORBES (Feb. 16, 2022, 11:13 a.m. EST), https://www.forbes.com/sites/ericbachman/2022/02/16/new-ruling-examines-emotional-distress-damages-in-employment-cases/?sh=5811e4b95cc4 (echoing this possibility in the context of employment cases where the plaintiff seeks emotional distress damages, and where "[a]n employer may dig up painful past events (divorce, death in the family, child custody issues) to argue that these factors—rather than the employer's actions—caused the plaintiff's emotional suffering"); Anderson, *supra* note 85, at 148 (noting that "almost every state recognizes some kind of implied waiver" of the psychotherapist-patient privilege).

[89] Smith, *supra* note 30, at 98-100 ("the [psychotherapist-patient] privilege should be recognized . . . based upon the minimal probative value of the therapy records as compared with [the defendant's] substantial privacy interests"); *see also* Anderson, *supra* note 85, at 147-51 (summarizing, in 2013, state-level approaches to the psychotherapist-patient privilege).

[90] Smith, *supra* note 30, at 80; *see also* Anderson, *supra* note 85, at 145 (citing Ruhlmann v. Ulster Cnty. Dep't of Soc. Servs., 194 F.R.D. 445, 451 (N.D.N.Y. 2000)) ("To condition recovery for emotional distress . . . upon the surrender of the protection of the psychotherapist privilege is . . . antithetical to the purpose of the laws that provide redress for such violations.").

[91] Smith, *supra* note 30, at 100; Anderson, *supra* note 85, at 127 ("At the time of the 1996 *Jaffee* decision, psychotherapy was becoming increasingly important to Americans. Legislatures in all fifty states had by then recognized a psychotherapist-patient privilege by statute.").

[92] O'Brien, *supra* note 2, at 568; *supra* Part I.

[93] *See, e.g.*, Adrian Woolfson, *The biological basis of mental illness*, NATURE (Feb. 11, 2019), https://nature.com/articles/d41586-019-00521-2 ("[C]ommon genetic variations with large effects on mental disorders are elusive. The various incarnations of the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders (DSM)* have enabled diagnostic consistency and the objectification of mental illnesses. But the *DSM* has resulted in overlapping diagnoses and contrived symptom-cluster checklists. At times, it impinges on the territory of healthy mental function. Allen Frances, chair of the task force that wrote the manual's fourth edition in 1994, revolted against out-of-control mental diagnosis in his 2013 book *DSM: Saving Normal*.").

[94] Ass'n for Psychological Sci., *The Verdict Is In: Courtrooms Seldom Overrule Bad Science*, APS (Feb. 15, 2020), https://www.psychologicalscience.org/news/releases/2020-02-pspi-court-data.html.

B. Scenario 2: Exploitation of a Predicted Vulnerability

Section III.A considered the hypothetical case of a plaintiff with a mental vulnerability who, given the option to introduce evidence of that vulnerability, might prefer not to do so. What can be said for hypothetical cases where the plaintiff has an underlying vulnerability that is specifically predicted and exploited by the defendant?

In this scenario, comment f to section 46 already contemplates that the defendant's exploitation of a *known* vulnerability can itself be outrageous.[95] But the potential ambiguity of an inferred or predicted vulnerability could present a twist.

One can imagine a hypothetical variation on the unsuccessful claim by Carl Bailey, Sr., in *Bailey v. Bayer CropScience L.P.*, where Mr. Bailey had experienced an extreme distress reaction to his employer's falsified sexual assault allegation. Mr. Bailey failed to obtain a remedy when the Eighth Circuit held that his "emotional reaction [to the false accusation] was not congruent to that of a reasonable person."[96]

What if Mr. Bailey's employer had, through an in-house wellness program, obtained detailed genetic and medical information suggesting a trauma history or other stress vulnerability of which Mr. Bailey himself was unaware? What if the employer had intentionally exploited this information, for some strategic retaliatory purpose,[97] to provoke a disabling psychiatric reaction? Could the employer's conduct in that scenario reach a level of outrageousness that justifies recovery?

Or, to imagine a more complex hypothetical scenario: Sam, an undergraduate student, is recruited as a research assistant by a laboratory that collaborates on biomedical research with XYZ Technologies (XYZ), a global technology corporation with a consumer genomics division. Years earlier, Sam had submitted a spit sample to the consumer genomics division through routine testing,[98] and they now have his full genome sequence. During his undergraduate years, Sam has become actively critical of XYZ's business practices, and this is evident from his social media accounts, recent academic publications, and popular blog posts. He is unaware of his new employer's relationship with the company. Thanks to Sam's sample, XYZ has unique knowledge of a predicted psychiatric vulnerability in his genome.[99] XYZ asks Sam's new employer to exploit that vulnerability to drive Sam to a disabling nervous breakdown and thwart his credibility as an activist. XYZ thus nips in the bud any threat that Sam's activism might have posed in the future. Incidentally, XYZ also hopes that this process might reveal biological insights

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[95] RESTATEMENT (SECOND) OF TORTS § 46 cmt. f (AM. LAW INST. 1965).

[96] O'Brien, *supra* note 2, at 559-60 (citing Bailey v. Bayer CropScience L.P., 563 F.3d 302 (8th Cir. 2009)).

[97] Bailey, 563 F.3d at 305-6 (describing the backstory behind this case, where Bailey "assert[ed] the confrontation which led to [the] lawsuit occurred forty-five minutes after Bailey received his test score" on an aptitude test, which he believed had earned him a demotion in August 2001, whereas Bailey's employer contended that Bailey was actually transferred "because there was not enough work on the production line").

[98] *See, e.g.*, Ifeoma Ajunwa, *Workplace Wellness Programs Could Be Putting Your Health Data at Risk*, HARVARD BUS. REV. (Jan. 19, 2017), https://hbr.org/2017/01/workplace-wellness-programs-could-be-putting-your-health-data-at-risk; Sally Wadyka, *Are Workplace Wellness Programs a Privacy Problem?*, CONSUMER REP. (Jan. 16, 2020), https://www.consumerreports.org/health-privacy/are-workplace-wellness-programs-a-privacy-problem-a2586134220/.

[99] *See, e.g.*, Gloria W. C. Tam et al., *The role of DNA copy number variation in schizophrenia*, 66(11) BIOLOGICAL PSYCHIATRY 1005 (2009) ("[S]chizophrenia susceptibility CNV loci demonstrate that schizophrenia is, at least in part, genetic in origin and provide the basis for further investigation of mutations associated with the disease.").

about Sam's genotype that they and their partners can turn into profitable, marketable therapies for psychiatric disorders.[100]

Should Sam have a remedy in tort for XYZ's conduct? To obtain it, should he be required to publicize his genetic information or other health information about himself or his family; seek a psychiatric diagnosis for the first time; or ask a psychologist or psychiatrist to diagnose him or testify to his speculative genetic vulnerability in court?

Arguably if he does this, XYZ gets what they wanted, and the litigation only adds insult to injury for Sam. Moreover, the process risks further traumatizing Sam and his genetic relatives and risks opening the door to further exploitation of his and their now-public health information by other unscrupulous actors.[101] This cannot be the outcome contemplated for IIED—traditionally a path to recourse for the underdog.[102]

Alternatively, what if plaintiffs like Sam had an opportunity to move away from the status quo, where "[d]ecisions in the vast majority of successful mental distress claims refer to testimony by mental health professionals who have treated or examined the plaintiff"?[103]

Rather than asking healthcare professionals to testify as experts to the unique vulnerabilities of each plaintiff, could expert testimony be better used to analyze the defendant's unique position to know and exploit the plaintiff's vulnerabilities, or to focus on establishing the strategy behind the defendant's conduct when judging outrageousness?[104] I leave it to other authors to consider and comment on these possibilities.

Arguably, while approaches putting a plaintiff's biology under a microscope risk further eroding their dignity, conduct-focused approaches keep IIED true to its intended purpose: an opportunity to remedy "a dignitary hurt appropriately classified with the old common law actions for assault, battery, false imprisonment and invasion of privacy."[105]

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[100] *See, e.g.*, Jeanette Beebe, *What you don't know about your health data will make you sick*, FAST COMPANY (Mar. 22, 2019), https://www.fastcompany.com/90317471/what-you-dont-know-about-your-health-data-privacy-will-make-you-sick ("Healthcare providers can legally sell their data to a now-dizzyingly vast spread of companies, who can use it to make decisions, from designing new drugs to pricing your insurance rates to developing highly targeted advertising.").

[101] *Id.*

[102] Lebedeff, *supra* note 36, at 5 ("Some suggest that the tort may be used to secure recourse for an underdog and that may be part of the reason for its popularity.").

[103] *Id.* at 7.

[104] *See* Prosser, *supra* note 31, at 879 ("What we are dealing with . . . is outrageous conduct, of a kind especially calculated to cause serious mental and emotional disturbance."); *see also* Pedrick, *supra* note 1, at n.36 ("The next step . . . is to dispense with the requirement of actual severe emotional distress . . . in favor of the objective standard of outrageous conduct or a nature that would be expected to inflict serious emotional distress on a person of ordinary sensibility."); RESTATEMENT (SECOND) OF TORTS § 46 cmt. e (AM. LAW INST. 1965) (contemplating that exploitation of a position of power could support a finding of outrageousness).

[105] Pedrick, *supra* note 1, at 14 ("[C]ommon-law courts traditionally have vindicated deprivations of certain 'absolute' rights that are not shown to have caused actual injury through the award of a nominal sum of money. By making the deprivation of such rights actionable for nominal damages without proof of actual injury, the law recognizes the importance to organized society that those rights be scrupulously observed; but at the same time, it remains true to the principle that substantial damages should be awarded only to compensate actual injury or, in the case of exemplary or punitive damages, to deter or punish malicious deprivations of rights.") (quoting Carey v. Piphus, 435 U.S. 247, 266 (1978))).

IV. DIGNITARY TORTS AND THE MEDICAL-LEGAL FICTION OF REASONABLE SENSITIVITY

A reasonably sensitive person may well be a "legal fallacy,"[106] and a scientific one as well,[107] and so it is worth considering how the legal fiction[108] of the reasonable person originally made its way into tort law.

A legal fiction is something assumed in law to be a fact, regardless of the truth or accuracy of the assumption.[109] There are many such fictions in the law,[110] including a cast of personalities such as the 'reasonable person' in torts and the 'person having ordinary skill in the art' in patent law.[111]

The reasonable person is "the longest established of the . . . personalities who inhabit [the] legal village and are available to be called upon when a problem arises that needs to be solved objectively." This fictional person is said to have first appeared in tort law–more specifically negligence law–in 1837,[112] to distinguish negligence from intentional torts such as assault and battery.[113]

For example, whereas a plaintiff proving an intentional tort needs to show that the defendant deliberately acted to injure the plaintiff, a plaintiff seeking to establish negligence needs to show that the defendant injured the plaintiff by failing to act as a *reasonable person*.[114] Expert witnesses play a role in negligence cases to help determine whether the defendant acted reasonably, or, for example, "as a reasonable person would in their particular line of work," in a professional negligence claim.[115]

In IIED cases, the role of the reasonable person has been, instead, to help avoid a deluge of frivolous or fraudulent cases, in the face of historical uncertainty about what takes place in the human mind and how to measure it. This purpose of this fictional

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[106] O'Brien, *supra* note 2, at 536, 572.

[107] *See generally supra* Part I.

[108] *See generally* Sidney T. Miller, *The Reasons for Some Legal Fictions*, 8 MICH. L. REV. 623 (1910); *see also* Sydney Smith, *The Ideal Use of Expert Testimony in Psychology*, 6 WASHBURN L.J. 300, 301 (1967) ("The legal game is full of fictions . . .").

[109] Miller, *supra* note 108, at 623 (defining a legal fiction as a legal assumption that something is true, even if it is or may be false, and noting that legal fictions may be valuable in terms of overcoming rigidity in the legal system).

[110] L. L. Fuller, *Legal Fictions*, 25 ILL. L. REV. 363, 363 (1930-1931).

[111] *See generally* Jonathan J. Darrow, *The Neglected Dimension of Patent Law's PHOSITA Standard*, 23 HARVARD J. L. & TECH. 227, 227 (Fall 2009).

[112] John Gardner, *The Many Faces of the Reasonable Person*, JOHN GARDNER AT HOME, https://johngardnerathome.info/pdfs/reasonableperson2013.pdf (last visited Mar. 29, 2023).

[113] *Negligence: The Reasonable Person*, LAW LIBRARY – AM. LAW AND LEGAL INFO, https://law.jrank.org/pages/8780/Negligence-Reasonable-Person.html (last visited Mar. 30, 2023); *but see* Kenneth W. Simons, *The Hegemony of the Reasonable Person in Anglo-American Tort Law*, *in* OXFORD STUDIES IN PRIVATE LAW THEORY: VOLUME 1 45 (Paul B. Miller & John Oberdiek eds., 2020), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4245150 ("The reasonable person plays a significant role even in intentional torts: apparent consent precludes liability when the defendant reasonably (though mistakenly) believes that plaintiff consented; putative self-defense precludes liability when the defendant reasonably (though mistakenly) believes facts that would establish that privilege; and offensive battery requires that the contact be offensive to a 'reasonable 'sense of dignity.").

[114] *Negligence: The Reasonable Person*, *supra* note 113.

[115] *See, e.g.*, Anjelica Cappellino, *What is the Role of an Expert Witness in a Negligence Claim?*, EXPERT INST. (Apr. 27, 2022), https://www.expertinstitute.com/resources/insights/what-is-the-role-of-an-expert-witness-in-a-negligence-claim/.

character is to provide an objective standard for judging outrageous behavior,[116] so that only the most egregious cases of emotional harm reach the court system.

Unfortunately, according to various authors, the result of this and IIED's other limiting safeguards appears to be a hybrid tort[117]—not quite an intentional tort (despite typically being classified as such[118]), and not quite negligence—which puts the focus not (entirely) on whether the defendant acted reasonably in inflicting distress, but (also) on whether the plaintiff experienced distress reasonably.[119]

Over the years, authors have questioned whether this approach is desirable and suggested reforms. For example, in 2008, Russell Fraker argued for "reformulating IIED as a purely intentional tort" by "removing the severe injury requirement from the prima facie case and replacing it with an objective test of injury like that used for assault."[120] In the 1980s, Professor Willard Pedrick asserted that "[t]here should be no requirement that the plaintiff must, as an element of the claim, establish suffering of severe emotional distress in fact."[121] In 2019, Sean O'Brien pointed to research suggesting that one in five prospective plaintiffs might be susceptible to a legitimate distress response that courts nonetheless deem unreasonable.[122]

Ultimately, authors periodically appear to decide that the law's approach to emotional distress claims is flawed or confused in some way.[123]

Meanwhile, significant uncertainty about the workings of the human mind persists today, scientific advances notwithstanding. While science increasingly suggests that any given plaintiff, at any given time, may be more or less susceptible to emotional distress, whether due to their inherent genetic makeup or more transient circumstances.[124] Even the scientific community continues to face the uncomfortable truth that it deals in

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[116] Givelber, *supra* note 45, at 48.

[117] Givelber, *supra* note 45, at 56 ("Outrageousness . . . is a hybrid tort: it resembles intentional torts in that the distinction between behavior and injury is blurred, and it resembles negligence in that the defendant's conduct is evaluated in terms of a vague standard."); Fraker, *supra* note 33, at 993 ("The *Restatement* classifies IIED as an intentional tort, along with assault and battery. However . . . it is predicated on the causation of objective harm to the plaintiff. In this feature, IIED resembles negligence.").

[118] *See, e.g.*, Jonathan Rosenfeld, *What Are Intentional Torts?*, ROSENFELD INJURY LAWYERS LLC (July 5, 2021), https://www.rosenfeldinjurylawyers.com/news/what-are-intentional-torts/ (listing intentional torts: battery, false imprisonment, assault, trespass, conversion, and intentional infliction of emotional distress).

[119] Pedrick, *supra* note 1, at 5 (explaining, in 1985: "The continuing insistence in section 46 that the particular plaintiff in fact have suffered severe emotional distress, indicates that the tort, even though based on the defendant's especially outrageous conduct, was nevertheless assimilated to negligence law in its requirement that actual damage be suffered to ground the action. Thus, intentional infliction of mental suffering is not treated in section 46 as a dignitary hurt to the individual in the way that assault and battery, false imprisonment and invasion of privacy are treated. In those cases, there is no necessity for a showing of actual damage. It is enough that the defendant has intentionally violated the individual's legal right to be protected in one's sense of security.").

[120] Fraker, *supra* note 33, at 987.

[121] Pedrick, *supra* note 1, at 22.

[122] O'Brien, *supra* note 2, at 537.

[123] *See, e.g.*, Fraker, *supra* note 33, at 984; Givelber, *supra* note 45, at 75 ("In sum, we have a doctrine that defies consistent definition, and presents all the problems inherent in that lack of definition compounded by a prominent punitive component."); O'Brien, *supra* note 2.

[124] Prosser, *supra* note 31, at 876 (recognizing, in 1938, that mental injury depends significantly on the individual).

uncertainties and medical "fictions" of its own with respect to the brain and behavior,[125] for reasons ranging from the intractable nature of biology[126] to the influence of incentives to produce flawed or fraudulent findings in order to publish papers and climb the career ladder.[127] Even assembling a collection of formal diagnoses is an exercise in shuffling the deck and re-shuffling as necessary,[128] and the chair of the task force responsible for one edition of the *DSM* may denounce its successor as significantly flawed.[129]

At the same time, a great deal *is* known about the intentional tactics that people use to harass, wear down, and retaliate against their counterparts,[130] and the outrage that these tactics can elicit when brought to light.[131] Arguably, it is easier to point to a scientifically informed strategy employed by a defendant (for example, a well-known or professionally validated psychological torture technique[132]), than to try to evaluate a plaintiff's personal susceptibility to that strategy using expert testimony.

With that in mind, perhaps a more defendant-focused approach to IIED avoids adding insult to injury for the plaintiff and keeps IIED true to its origin as a dignitary

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[125] *See, e.g.*, Irineo Cabreros, *MODERN SCIENTISTS ARE WRONG FAR MORE THAN YOU THINK*, PAC. STANDARD. (Nov. 24, 2017), https://psmag.com/education/scientists-are-wrong-a-lot ("Statisticians have shown that many scientific findings are wrong, and without an increase in statistical know-how for scientists it'll continue happening."); Ron Wasserstein, *George Box: a model statistician*, SIGNIFICANCE (Sept. 2010), https://rss.onlinelibrary.wiley.com/doi/pdf/10.1111/j.1740-9713.2010.00442.x (quoting statistician George Box regarding the fallibility but usefulness of statistical models).

[126] Rama S. Singh & Bhagwati P. Gupta, *Genes and genomes and unnecessary complexity in precision medicine*, NPJ GENOMIC MED. (May 4, 2020), https://www.nature.com/articles/s41525-020-0128-1 ("[R]elationships among mutations (termed 'risk factors'), biological processes, and diseases have emerged to be more complex than initially anticipated.").

[127] *See generally* Jeffrey Brainard & Jia You, *What a massive database of retracted papers reveals about science publishing's 'death penalty'*, SCIENCE (Oct. 25, 2018), https://www.science.org/content/article/what-massive-database-retracted-papers-reveals-about-science-publishing-s-death-penalty (stating that a decade ago, a "surge in retractions led many observers to call on publishers, editors, and other gatekeepers to make greater efforts to stamp out bad science"); RETRACTION WATCH, https://retractionwatch.com ("Tracking retractions as a window into the scientific process").

[128] *See, e.g.*, James H. Hardisty, *Mental Illness: A Legal Fiction*, 48 WASH. L. REV. 735 (1973); *Study finds psychiatric diagnosis to be 'scientifically meaningless'*, NEUROSCIENCE NEWS (July 8, 2019), https://neurosciencenews.com/meaningless-psychiatric-diagnosis-14434/ ("Researchers conclude many psychiatric diagnoses are scientifically worthless as tools for identifying discrete mental health disorders.").

[129] *See* Woolfson, *supra* note 93.

[130] *See, e.g.*, E. Christine Reyes Loya, *Low-Wage Workers and Bullying in the Workplace: How Current Workplace Harassment Law Makes the Most Vulnerable Invisible*, 40 HASTINGS INT'L & COMP. L. REV. 231 (2017); *Retaliation – Making it Personal*, U.S. Equal Emp't Opportunity Comm'n, https://www.eeoc.gov/retaliation-making-it-personal (last visited Mar. 30, 2023).

[131] *See, e.g.*, *Google employees sit-in to protest retaliation, Facebook staff also join*, MINT (May 2, 2019, 08:46 a.m. IST), https://www.livemint.com/companies/news/google-employees-stage-sit-in-to-protest-against-retaliation-facebook-staff-also-joins-1556766097751.html.

[132] *See* Tania Tetlow, *Criminalizing "Private" Torture*, 58 WM. & MARY L. REV. 183, 194 (2016) (noting that "CIA . . . experiments in the 1950s . . . found that mental torture and sensory deprivation worked surprisingly well," and noting that "[b]atterers also . . . frequently make use of sleep deprivation . . . to incapacitate their victims").

tort[133]—part of the subset of torts geared toward invasions of an individual's sense of worth and dignity[134]—while avoiding bogging litigants down in uncertain science.[135]

Writing in 2019 on the "forms of tort liability . . . imposed in order to protect individual dignity," Professors Kenneth Abraham and G. Edward White referred to IIED as an "emotional analog" to physical battery. "Just as every person has a right not to be intentionally touched without consent, every person has a right not to be subjected to emotional distress."[136] When distilled down to its essence in this way, IIED's added requirements that "the conduct causing distress be extreme and outrageous" and that "the resulting distress be severe" start to appear secondary—like add-on reflections of "pragmatic concerns regarding the risk of fraudulent claims and excessive litigation."[137]

In other words, at its core, the IIED tort recognizes that the plaintiff has a dignitary interest in mental tranquility, and the defendant acted intentionally to disturb it. The point is not how or how much the plaintiff suffered as a result of the defendant's conduct but that the defendant intentionally acted to invade the plaintiff's dignitary interest in mental tranquility.

The focus of the IIED tort is on the defendant. To what extent can or does the law reflect that? As discussed below in Section V, looking for comparison to the clinical and criminal law contexts, different authors and courts have identified a potential for defendant-focused approaches to deter various types of private-actor cruelty.

V. LESSONS FROM CLINICAL AND CRIMINAL-LAW APPROACHES TO PRIVATE-ACTOR CRUELTY

In determining the best approach to mental vulnerabilities—diagnosed, undiagnosed, temperamental, suspected, predicted—to take when dealing with IIED claims, one could take cues from the discussions surrounding clinical and criminal law approaches to private-actor cruelty, such as domestic violence (DV) and intra-familial child torture. In particular, a few points from a 2016 article in the *William & Mary Law Review*, on DV and the criminalization of private-actor torture, could be taken into account.[138]

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[133] Kenneth S. Abraham & G. Edward White, *The Puzzle of the Dignitary Torts*, 104 CORNELL L. REV. 317, 335 (2019) ("[W]e identify . . . the characteristic features of the torts that have sometimes been identified as dignitary. These include battery, defamation, intentional infliction of emotional distress (IIED), and the various forms of invasion of privacy."); Fraker, *supra* note 31, at 988 (noting the first formulation of the IIED tort assessed liability for "[o]ne who, without a privilege to do so, intentionally causes severe emotional distress to another," for both emotional distress and resulting bodily harm) (internal quotation marks omitted); *see also* Nancy Levit, *Ethereal Torts*, 61 GEO. WASH. L. REV. 136, 142-43 (1992).

[134] Tilley, *supra* note 12, at 65-66, 69, 83 (explaining that, since the time of Greek and Roman law, the purpose of the dignitary torts has been to provide a "state-sanctioned forum for adjudication of private disputes").

[135] *See supra* notes 124-29 and accompanying text.

[136] Abraham & White, *supra* note 133, at 338.

[137] *Id.*

[138] Tetlow, *supra* note 132, at 183 (pointing out commonalities between torture and domestic violence, and that "serious domestic violence routinely involves the use of torture techniques . . ."); *see also* Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 1, Dec. 10, 1984, 1465 U.N.T.S. 85 (echoing the definition of inflicted distress in the private-actor context: "[T]he term 'torture' means any act by which severe pain or suffering . . . is intentionally inflicted on a person . . ."); David Luban & Henry Shue, *Mental Torture: A*

In the 2016 article, Professor Tania Tetlow refers to "fixation on the victim's culpability rather than the perpetrator's cruelty" as a flawed approach to addressing DV.[139] The author suggests that choosing a correctly focused definition can improve the public's understanding of the patterns and motives involved in DV.[140]

Similarly, emphasizing a defendant's intentional behavior in IIED could help the public understand the nature of the cruelty involved, whereas emphasizing the plaintiff's vulnerability risks—to adopt language from the *William & Mary Law Review*—encouraging "fixation on the [plaintiff's] culpability."[141]

Defendant-focused approaches might have beneficial results in terms of deterrence. Tetlow writes that countries "with the lowest rates of intimate partner violence are those with cultures that thoroughly condemn it and shame the perpetrator instead of the victim."[142] Maybe likewise "put[ting] the focus . . . on the perpetrator instead of the victim"[143] with respect to IIED claims can likewise help to foster a society with lower rates of private-actor cruelty in various contexts.

A second, incidental point worth mentioning: Tetlow notes that telling a victim they are "merely overly sensitive" is itself a known psychological torture technique.[144] With that in mind, arguably requiring an IIED plaintiff to hire experts to prove that they are "merely overly sensitive" in legal proceedings risks adding to their harm in pursuit of redress. The law should not, in this way, make itself another potential weapon in the defendant's hands—particularly given that perpetrators of abuse may already deliberately weaponize benevolent institutions against victims.[145]

Critique of Erasures in U.S. Law, 100 GEO. L.J. 823, 836 (2012) (referring to torture as "deliberate infliction of mental suffering").

[139] Tetlow, *supra* note 132, at 188; *see also* Claire Wright, *Torture at Home: Borrowing from the Torture Convention to Define Domestic Violence*, 24 HASTINGS WOMEN'S L.J. 457, 489 (2013) ("Some theorists . . . posited that a victim . . . likewise possesses a physical brain abnormality or serious mental illness, which others have attributed to researchers mistaking a victim's resulting mental injuries for a rationale explaining why she would choose to remain in an abusive relationship in the first place.").

[140] Tetlow, *supra* note 132, at 188.

[141] *Id.; but see supra* note 37 and accompanying text (noting that the limitations developed for IIED claims were created because of a concern about culpable plaintiffs who might burden the courts with fraudulent or frivolous cases); Adam P. Rosen, *Emotional Distress Damages in Toxic Tort Litigation: The Move towards Foreseeability*, 3 VILL. ENVTL. L.J. 113, 117 (1992) ("American courts traditionally have been wary about permitting recovery for emotional distress.").

[142] Tetlow, *supra* note 132, at 228.

[143] *Id.* at 219.

[144] *Id.* at 195-96.

[145] *See, e.g.*, Michael Nedelman, *A 'disorder of deception': When a mom makes her child sick*, CNN (Sept. 25, 2017, 10:10 AM EDT), https://www.cnn.com/2017/08/15/health/munchausen-proxy-mental-illness-child-abuse/index.html (discussing Munchausen syndrome by proxy or medical child abuse, an example of perpetrators of abuse weaponizing benevolent institutions against a victim); *see also* Jessica Klein, *HOW DOMESTIC ABUSERS WEAPONIZE THE COURTS*, THE ATLANTIC (Jul. 18, 2019), https://www.theatlantic.com/family/archive/2019/07/how-abusers-use-courts-against-their-victims/593086/ (providing an example of perpetrators weaponizing the legal system against victims, noting that "[m]any abusers misuse the court system to maintain power and control over their former or current partners, a method sometimes called 'vexatious' or 'abusive' litigation, also known as 'paper' or 'separation' abuse, or 'stalking by way of the courts'"); Caitlin O'Kane, *More than 130 organizations sign open letter in support of Amber Heard*, CBS NEWS (Nov. 16, 2022, 2:32 PM), https://www.cbsnews.com/news/amber-heard-johnn-depp-trial-open-letter-in-support-

Echoing the defendant-focused approach discussed by Tetlow, California courts assessing torture in general "stress that the focus should not be on the injuries the victim suffered, but rather on the actions of the defendant," granted "courts do look at the victim's injuries to establish intent."[146]

Meanwhile, in the clinical context when addressing abusive behavior healthcare professionals sometimes choose to emphasize perpetrators' conduct, as opposed to its effect on the victim. In a 2022 policy report on intra-familial child torture, the Center for Child Policy noted that the most recent update of *The Diagnostic Classification of Mental Health and Developmental Disorders of Infancy and Early Childhood* provided a new diagnostic category of Relationship Specific Disorder of Infancy/Early Childhood (RSD).[147] By recognizing that disordered responses can be a product of abuse as opposed to the victim's innate biology, this diagnostic category arguably shifts the emphasis from victim to perpetrator in addressing inflicted distress in a clinical context. In other words, it shifts to focus on the perpetrator's conduct and away from the victim's response.

These are only a few examples.[148] Ultimately, tort law stands alongside criminal law and healthcare in seeking the most appropriate ways to remedy inflicted harms, and there is an opportunity to look to developments in these fields when determining the best approach.[149]

CONCLUSION

In summary, the law of IIED has long grappled with the mysteries of the human mind and the best ways to measure and prove injuries to a plaintiff's emotional wellbeing. The law has also long recognized the importance of providing a remedy for these injuries, both for the sake of the individual and for the sake of maintaining stable societies, where would-be plaintiffs do not need to resort to violent forms of self-help to vindicate offenses.[150]

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end-online-harassment-signed-by-womens-rights-abuse-organizations-months-after-defamation-trial/ (providing an example of perpetrators weaponizing the legal system against victims, stating that "if a survivor has already reported, their abuser can misuse defamation law to force them to recant, punish them for coming forward, or continue the cycle of abuse") (internal quotation marks omitted).

[146] Christopher G. Browne, *Tortured Prosecuting: Closing the Gap in Virginia's Criminal Code by Adding a Torture Statut*e, 56 WM. & MARY L. REV. 269, 276 (2014).

[147] PAMELA J. MILLER ET AL., INTRAFAMILIAL CHILD TORTURE: VICTIM IMPACT AND PROFESSIONAL INTERVENTIONS 10 (MAY 2022).

[148] DEBRA WHITCOMB, WHEN THE VICTIM IS A CHILD 111, 117-119 (2nd ed. 1992) (writing, with respect to another category of cases involving inflicted harm and expert testimony, that reliance on expert witnesses in these types of cases can be "disturbing for several reasons," e.g., given a "relatively new and inexact field of study" with "many areas of controversy," and given that victims may be "subjected to a series of psychological examinations by opposing experts" that would be "intrusive and potentially stressful," yield "conflicting findings," and increase the cost of litigation).

[149] *See, e.g.*, Levit, *supra* note 133, at 186-88 (emphasizing that good legal remedies can even have a therapeutic benefit for victims, noting that "[i]t is important in a therapeutic context for individuals and social structures to respond appropriately to the experience of emotional injury").

[150] Tilley, *supra* note 12, at 66 ("Indeed, the provision of a state-sponsored forum for vindicating the dignitary interests invaded by these wrongs coincided with the decline in violence in [Greek and Roman] societies."); *see also* Bruce A. Jacobs, *A Typology of Street Criminal Retaliation*, 41 RES. J. CRIME & DELINQUENCY 295, 295 (2004) ("The street criminal underworld is a context where law is unavailable as a matter of course. Criminals lose legal protections when violated and must retaliate to restore balance."); Hassing v. Wortman, 333 N.W.2d 765 (1983) (White, J.,

However, the challenges of providing a remedy without leaving the door open to frivolous or falsified claims have resulted in a confused hybrid tort, with multiple scholars identifying areas for improvement over the years.

Given society's progressing—but still imperfect—scientific understanding of the mind and mental injury, future challenges with respect to IIED could include plaintiff privacy concerns; difficulty identifying junk science; defendants' strategic use of inferred or predicted, as opposed to actual, knowledge of the plaintiff's mental susceptibilities. Future opportunities include the chance to learn from criminal law and clinical approaches that emphasize the defendant's (or, e.g., perpetrator's) conduct, as opposed to the plaintiffs' (victim's) response, when addressing inflicted harms.

dissenting) ("The law must and should provide protection from this absurd conduct and not be seen to stand helplessly by, wringing its hands.").