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Robert L. Rabin

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STAND ALONE EMOTIONAL HARM: OLD WINE IN NEW BOTTLES

*Robert L. Rabin**

Prologue

In their contribution to this *New Torts* symposium, Professors Kenneth Abraham & G. Edward White advance the interesting thesis that the ancient tort of offensive battery, initially recognized under the writ of trespass, and later substantiated in the three iterations of the Restatement of Torts, has experienced a newfound popularity in its linkage to federal statutory claims of sex discrimination under Title VII and constitutional deprivation of civil rights in Section 1983 cases.[1]

In Part I of this Essay, I will provide a broader context on the long history of misconduct generating a tort claim for "offensive" behavior without physical harm. Then, in Part II, I will indicate the many pathways of a far more expansive conception of recoverable stand-alone emotional harm that rests on cultural change in a distinctly modern-day setting. Finally, I will offer some concluding observations.

I. Historical Perspectives: "Offensive" Misconduct without Physical Harm

Offensive battery does not stand alone in the early common law origins of recovery for intangible harm. The recognized wrongs of assault and false imprisonment date back to similarly early origins.[2] Consider the famous case of *I de S. v. W de S.*,[3] decided in 1348, in which the defendant, thirsting for wine, swung his hatchet at the plaintiff tavern keeper, who from her window, refused to reopen the pub for him. She suffered

* A. Calder Mackay Professor of Law, Stanford Law School.

1. *See* Kenneth S. Abraham & G. Edward White, *How an Old Tort Became New: The Case of Offensive Battery*, 73 DePaul L. Rev. 185 (2024). The language of the offensive battery tort appears in its modern guise in the Restatement (First) of Torts § 19 (Am. L. Inst. 1934); Restatement (Second) of Torts § 19 (Am. L. Inst. 1965), and the Restatement (Third) of Intentional Torts §3 (Am. L. Inst. 2013). Federal statutory claims of sex discrimination in the workplace are brought under Title VII of the Civil Rights Act of 1964. Federal civil rights claims of deprivation of constitutional rights arise under 42 U.S.C. § 1983.

2. As do claims of defamation, similarly sounding in intangible harm.

3. Y.B.Lib.Ass. folio 99, placitum 60 (Assizes 1348).

no physical injury; yet the court concluded that an actionable assault had occurred. Similarly, in *Bird v. Jones*,[4] a noted early English case of false imprisonment, plaintiff suffered only intangible harm.[5]

Notably, however, these claims rest on a different theoretical foundation than offensive battery. In both assault and false imprisonment cases, the underlying harm is *fear* related to physical circumstances, rather than dignitary distress. By contrast, the foundation of offensive battery claims—in its more modern twentieth century articulation—appears to rest on Professor Francis Bohlen's characterization in his 1915 torts casebook of offensive battery as contact "offensive to a reasonable sense of personal dignity."[6]

A classic instance, more than a quarter century before Bohlen, is found in the leading case of *Alcorn v. Mitchell*,[7] in which the disappointed suitor, after losing his case, spat in the face of his winning-party opponent—in the courthouse, no less. The court allowed nominal compensatory damages but awarded fairly substantial punitive damages for this "greatest indignity."[8]

One might conclude from the reiteration of the Bohlen characterization in the three iterations of the Restatement of Torts[9] that the offensive battery tort—sounding in protection of a dignitary interest—now thrives as a stand-alone claim. But Abraham & White offer a more complicated rendition in which offensive battery provides background—almost as a makeweight—for more foregrounded, prominent claims; in particular, Title VII claims of sexual misconduct and Section 1983 civil rights claims of constitutional protection.[10]

In a follow-up article, Abraham & White treat the offensive battery claim as congenial to a broader conception of offensiveness found in the privacy torts of public disclosure of private facts and intrusion—a shared conception of offensiveness, which they define as "protection for personal inviolability."[11]

My thesis is that cultural change is in evidence here that reflects a still more capacious sensitivity to serious emotional distress, forged

4. 115 Eng. Rep. 688 (1845). Although not of the hoary vintage of *I. de S. v W. de S.*, the long-standing category of liability for false imprisonment was taken for granted.

5. The court dismissed plaintiff's claim as insufficient in establishing the necessary element of constraint—a threshold requirement in false imprisonment cases.

6. Kenneth S. Abraham & G. Edward White, *The Offensiveness Torts*, J. Tort L. (forthcoming 2024) (manuscript at 30) [hereinafter Abraham & White, *The Offensiveness Torts*] (citing Francis H. Bohlen, Cases on the Law of Torts 23 n.1 (1915)).

7. 63 Ill. 553 (1872).

8. *Id.* at 554.

9. *See* sources cited *supra* note 1.

10. Abraham & White, *supra* note 1, at 15–17.

11. Abraham & White, *The Offensiveness Torts*, *supra* note 6 (manuscript at 29). Each of these torts, as the authors note, are singularly premised on an invasive intent.

in a diverse range of pathways, that expand the boundaries of protection of personality beyond dignitary and personal inviolability interests. In Part II, I will attempt to illuminate these pathways, which range from revamping more modest, earlier-recognized doctrinal categories, to establishing new claims that achieved recognition only in the post-World War II era.[12]

II. A Contemporary Phenomenon: Emergent Pathways to Recovery for Serious Emotional Harm

In this Part, I will briefly discuss a cluster of distinct doctrinal areas in which claims for serious emotional harm have flourished—in some instances coinciding with protection of personal inviolability, but in other scenarios reflecting more subtle aspects of intangible loss.

A. Consortium and Wrongful Death

Recovery for loss of consortium—better conceptualized as loss of companionship—has a long and checkered history.[13] From its early days as a claim exclusively recognized in a husband's loss of services when his wife was incapacitated by negligent injury, a parallel interest in wives came to be recognized in the Victorian era with the enactment of Married Women's Acts.[14] Modern sensibilities highlight the anachronistic (and sexist) character of the origins of the claim. Indeed, even as a grounding in loss of services came to expand beyond household maintenance to loss of sexual capacity, a more embracing conception of loss of companionship—the desolation experienced in a greatly diminished expressive relationship—was wanting.

With a broader conception of lost companionship came a questioning of the limitation to spousal relations. What of the lost capacity for meaningful expression of affection to a parent when a child suffers devastating injury? Or, the similar intangible loss to a child when deprived of parental affection? Even today, courts remain split in their willingness to recognize these extensions.[15]

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12. In this Essay, I will not be giving full-blown treatise or text treatment to each of these tort categories. More modestly, my purpose is to be illustrative of the expansive range of doctrinal responses in tort to deeper currents of transformative cultural change.

13. A succinct account of the historical development can be found in Diaz v. Eli Lilly & Co., 302 N.E.2d 555 (1973).

14. Married Women's Property Act of 1870, 33 & 34 Vict. c. 93 (Eng.); Married Women's Property Act of 1882, 45 & 46 Vict. c. 75 (Eng.).

15. *See, e.g.*, Borer v. Am. Airlines, Inc., 563 P.2d 858, 866 (Cal. 1977) (rejecting a claim on behalf of children for their mother's incapacitation); *but see* Campos v. Coleman, 123 A.3d 854, 857 (Conn. 2015) (allowing a claim on behalf of children for a parents' incapacitation).

Perhaps the most dramatic example of the re-conception of the emotional harm associated with lost companionship is the recognition in negligently caused loss of life cases—so clearly the ultimate loss of companionship—in which the traditional limitation of damages to economic loss grossly underappreciated the critical impact of the harm suffered. Now, in many states, loss of companionship is recognized as a recoverable head of damages in a wrongful death case.[16]

The interest recognized here is more elusive than protection of personal inviolability. Rather, loss of consortium constitutes a recognition that the expressive bonds of affection may be severed when the third party to a severely injured person is deprived of fully meaningful companionship—or in wrongful death cases, deprived of *any* continuing relationship at all. Grief and despair seem better suited conceptually to capturing the essence of the harm here, rather than a dignitary interest or a concern for respecting personal inviolability.

B. Intentional Infliction of Emotional Distress

In 1965, the Restatement (Second) of Torts crystallized a disparate range of particularly grievous instances of uncivil conduct through recognition of a new tort, Intentional Infliction of Emotional Distress (IIED).[17] Earlier claims of outrageous misconduct had not necessarily been met with indifference, but there was a failure of coherence into a doctrinal category.

Two illustrations (among many that might be offered) will suffice. In a noted English case, *Wilkinson v. Downton*,[18] defendant, as a practical joke, told plaintiff that her husband had been horribly injured by a horse-drawn vehicle and was lying in the street waiting for her to come to his aid. She suffered extreme nervous shock and was seriously incapacitated; recovery was allowed despite the absence of physical injury. A particularly egregious case from Louisiana, *Nickerson v. Hodges*,[19] featured a group of defendants taking advantage of an especially vulnerable plaintiff, telling her that a pot of gold had been buried for her; and then, staging a grand opening at the town bank, where the pot of gold turned out to be collected earth and stones. Plaintiff raged out of control at her humiliation, totally broke down, and suffered lasting emotional harm.

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16. This recognition has come through both legislative action and common law development. *See* DAN B. DOBBS, ET. AL, HORNBOOK ON TORTS 692–93 (2d ed. 2016).
17. RESTATEMENT (SECOND) OF TORTS § 46 (AM. L. INST. 1965).
18. [1897] 2 Q.B. 57.
19. 146 La. 735 (1920).

The dividing line between outrageous conduct in cases like *Wilkinson v. Downton* and *Nickerson v. Hodges*, on the one hand, and rude behavior that one encounters from time to time in everyday life, long restrained the courts from recognizing a new tort aimed at establishing rules of civility.[20] But in the decades since 1965, the notion of unacceptably abusive behavior has taken on broader meaning—animated in part by greater cultural sensitivity to racial and gender-related misconduct.[21]

C. Negligent Infliction of Emotional Distress

1. *Direct Claims*

Interestingly, the tort of negligent infliction of emotional distress (NIED)—which attained recognition in the same period as IIED—reflects concerns that harken back to the long-established torts of assault and false imprisonment; namely, serving as a buttress against fear of physical injury. The consensus among the courts is expressed in the zone of danger threshold that is widely recognized as a requisite for establishing an actionable claim.[22]

Leading cases from New York and New Jersey vividly illustrate the point, rejecting the preexisting requirement that physical impact have been experienced in conjunction with a claim for negligently inflicted emotional harm. In New York, the tort was first recognized in *Battalla v. State*,[23] where the negligent employee of a ski resort failed to buckle in a child who was traumatized by fear of falling to her death. In New Jersey, the plaintiff, in *Falzone v. Busch*,[24] experienced a near miss from an out-of-control car driver whose carelessness in fact seriously physically injured her near-by husband.

2. *Bystander Claims*

In a sense, it was a short step from recognition of direct NIED to adopting bystander NIED. In the leading case of *Dillon v. Legg*,[25] a mother eye-witnessed the negligent running down of her child by the

20. See, for example, Bartow v. Smith, 78 N.E.2d 735 (Ohio 1948), in which defendant repeatedly, on a crowded street, referred to the pregnant plaintiff as a "god-damned son of a bitch" and "a dirty crook." Relief was denied on the ground of "bad manners."

21. Revealingly, *Bartow* was overruled in Yeager v. Loc. Union 20, Teamsters, 453 N.E.2d 666 (Ohio 1983).

22. Dobbs et al., *supra* note 16, at 715.

23. 176 N.E.2d 729, 729–30 (N.Y. 1961).

24. 214 A.2d 12,13 (N.J. 1965).

25. 441 P.2d 912, 914 (Cal. 1968).

defendant. In *Portee v. Jaffee*,[26] a mother stood helplessly by as her child was crushed between the door and the outer wall of a malfunctioning elevator.[27]

Notably, however, this category of NIED rests on a distinctly different foundation than the direct claims. There is no fear of physical harm here.[28] And indeed, the baseline protection for physical inviolability is again not at the heart of the protection being afforded. Rather, the core protection here is against pure unadulterated distress and grief, by contrast to dignitary and individual autonomy protections central to more traditional stand-alone emotional harm claims.

D. The Privacy Torts

As Abraham & White indicate in *The Offensiveness Torts*, two of the privacy torts—public disclosure of private facts and intrusion—share a common objective with offensive battery; namely, the protection of personal inviolability.[29] And, I would add, the dignitary interest as well.

1. *Intrusion*

Protective interests are most evident in the tort of intrusion. Consider by way of illustration, *Shulman v. Group W Publications, Inc.*,[30] in which the plaintiff, seriously injured in a car accident, was helicoptered to a hospital. In the course of the rescue, while still trapped in the overturned car, plaintiff was interrogated and recorded by video camera and wireless microphone; and then once again recorded in the course of the

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26. 417 A.2d 521, 522–23 (N.J. 1980).

27. Beginning with *Dillon v. Legg*, courts adopting NIED have generally limited recovery to close family relations, present on the scene of the accident, and consequently experiencing direct emotional impact. In an interesting reflection of technological change, consider Ko v. Maxim Healthcare Servs., Inc., 272 Cal. Rptr. 3d 906 (Ct. App. 2020). There, the trial court dismissed the plaintiffs' complaint, reasoning that the parents "were not physically present when Landon was abused." *Id.* at 908. In order to keep tabs on the caregiver, the parents periodically checked a "nanny cam" in their home on their smartphone, which livestreamed audio and video in real time. *Id.* at 909. To their horror, the livestream showed the caregiver physically assaulting their disabled two-year-old son. *Id.* Reversing, the appellate court held that, even though the parents were some distance from their home at the time of the attack, they were "virtually present at the scene . . . sufficient for them to have a contemporaneous sensory awareness of the event." *Id.* at 919.

28. While this is obvious on its face, a minority view—based simply on a straightforward desire to limit the number of claims—adds zone of danger as a threshold requirement to establishing a bystander liability claim. *See* Bovsun v. Sanperi, 461 N.E.2d 843 (N.Y. 1984) (allowing plaintiff to recover damages for emotional distress resulting from contemporaneous observation of serious physical injury or death inflicted by defendant's conduct on member of plaintiff's immediate family in his or her presence).

29. Abraham & White, *The Offensiveness Torts*, *supra* note 6 (manuscript at 38).

30. Shulman v. Group W Publications, Inc, 955 P.2d 469, 474–75 (Cal. 1998).

helicopter rescue effort—recordings for broadcast on defendant's news program.

In her opinion for the court, Justice Werdegar, succinctly states what is at stake in intrusion claims like *Shulman*:

> Of the four privacy torts identified by Prosser, the tort of intrusion into private places, conversations or matter is perhaps the one that best captures the common understanding of an "invasion of privacy." It encompasses unconsented-to physical intrusion into the home, hospital room or other place the privacy of which is legally recognized, as well as unwarranted sensory intrusions such as eavesdropping, wiretapping, and visual or photographic spying . . . . It is in the intrusion cases that invasion of privacy is most clearly seen as an affront to individual dignity.[31]

This passage from the opinion nicely picks up the coalescence of the deeply-rooted and the recently-recognized—that is, the long-established concern over unwarranted intrusions into a private domain (recognized as early as the Fourth Amendment), and the distinctly contemporary anxiety over high-tech tracking technologies.[32] Intrusion is something of a late comer to the tort/privacy field.[33] But in an ever-expanding public domain, a safeguard against wholesale penetration of private affairs has come to be regarded as paramount.

2. *Public Disclosure of Private Facts*

The heritage of this privacy interest dates back to the widely-noted law review article by Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*.[34] Interestingly, the first case featuring serious argument for adoption of the Warren & Brandeis tort, *Roberson v. Rochester Folding Box Co.*,[35] rejected the claim, finding no precedent for recognizing such

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31. *Id*. at 489.

32. Josephine Wolff, *Losing Our Fourth Amendment Data Protection*, N.Y. TIMES (Apr. 28, 2019), https://www.nytimes.com/2019/04/28/opinion/fourth-amendment-privacy.html.

33. In Pearson v. Dodd, 410 F.2d 701, 704 (D.C. Cir. 1969), giving recognition to the intrusion tort, the court remarked: "We approve the extension of the tort of invasion of privacy to instances of intrusion . . . into spheres from which an ordinary man in a plaintiff's position could reasonably expect that the particular defendant should be excluded." The intrusion tort received its label in the foundational article of William Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389 (1960), setting out and categorizing the four privacy torts which would be incorporated into the Restatement (Second) of Torts under Prosser's guidance as Reporter. *See infra*, note 39.

34. *See generally* 4 HARV. L. REV. 193, 195 (1890).

35. 64 N.E. 442, 443 (N.Y. 1902).

a tort.[36] For the moment, stand-alone emotional harm remained wedded to its pre-existing categorical origins.[37]

But a privacy tort sounding in public disclosure of private facts would relatively soon after be recognized.[38] By a half-century later, when Prosser organized the four privacy claims for inclusion in the Restatement (Second) of Torts,[39] he carved out a public disclosure tort in terms that would have evoked satisfaction from Warren and Brandeis:

> One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.[40]

In fact, the public disclosure tort has long-foundered on a broad conception of "legitimate concern to the public."[41] But it nonetheless is generally recognized as providing baseline protection against emotional harm from revelation of intimate aspects of a person's private life. A vivid illustration of its potency is the contemporary success of claims for revenge porn—explicit photos posted by ex-boyfriends, husbands, and lovers frequently accompanied by disparaging descriptions and identifying details.[42] Cultural change is self-evident here, reflecting respect for personal inviolability and dignity resonating to present-day concerns for sexual privacy.

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36. The New York legislature subsequently endorsed right to privacy claims. N.Y. Civ. Rts. Law §§ 50–51 (McKinney 2023). But in a notable paradox, the legislature enacted a statute that established what would later come to be categorized as an appropriation privacy tort, which in its modern guise, as right of publicity claims, is far-removed from emotional harm claimed by the *Roberson* plaintiff—encouraging, by contrast, the right of celebrities to claim for financial loss of endorsement value.

37. *Supra* note 2 and accompanying text.

38. *See, e.g.*, Melvin v. Reid, 297 P. 91, 93 (Cal. Ct. App. 1931) (upholding invasion of privacy claim where intimate details of plaintiff's buried past as a prostitute were revealed in a movie using her maiden name).

39. *See* Restatement (Second) of Torts § 652B (Am. L. Inst. 1977) (intrusion upon seclusion); *id.* § 652C (appropriation of name or likeness); *id.* § 652D (publicity given to private life); *id.* § 652E (publicity placing a person in a false light).

40. *Id.* § 652D.

41. *Id.*; *see, e.g.*, Haynes v. Alfred A. Knopf, Inc., 8 F.3d 1222, 1229–30 (7th Cir. 1993) (barring recovery where book describing plaintiff as a drunk and cheater was newsworthy and the details divulged were not overly intimate or shocking). A leading earlier case is Sidis v. F-R Publ'g Corp., 113 F.2d 806, 809 (2d Cir. 1940) (barring recovery for a magazine's feature of a former child prodigy because there is genuine public interest in how child prodigies change over the years).

42. *See, e.g.*, Amanda Holpuch, *Woman is Awarded $1.2 Billion in 'Revenge Porn' Lawsuit*, N.Y. Times (Aug. 15, 2023), https://www.nytimes.com/2023/08/15/us/houston-texas-revenge-porn.html. *See generally*, Erica Goode, *Once Scorned, but on Revenge Sites, Twice Hurt*, N.Y. Times (Sept. 24, 2013) at A11. "Deepfakes," created by artificial intelligence, graft real person's faces onto bodies engaged in sexual acts, highlighting an emerging concern from the perverse effects of new technology. *See generally* Rebecca L. Delfino, *Pornographic Deepfakes: The Case for Criminalization of Revenge Porn's Next Tragic Act*, 88 Fordham L. Rev. 887, 889–90 (2019).

E. Informed Consent

The tort-related aspect of this broad-gauged requirement in scientific studies involving human subjects is found in claims against medical providers for failing to adequately disclose the risks associated with treatment options.[43] Until recently, this is another domain of stand-alone emotional harm in which dignitary and individual autonomy interests of the individual were given short shrift.

The traditional prevailing view was that the medical provider was the best judge of the risks of treatment that needed to be communicated to the patient.[44] But as cultural concerns for dignitary interests and respect for individual autonomy have taken on new valence, many states now recognize the patient's interest as paramount, requiring medical providers to offer full disclosure of material risks of treatment options from a patient's perspective.[45]

It remains the case that damages in informed consent cases customarily are measured in pecuniary terms; more particularly, the medical expenses associated with undisclosed risks that come to fruition.[46] But a persuasive case can be made for reconceptualizing damages as a stand-alone nonpecuniary harm of failing to respect the individual autonomy—in matters of choice—of the patient.[47] This, indeed, is the underpinning for the shift in perspective to the patient's expectations.

F. Mental Distress in the Worker's Compensation System

The worker's compensation movement had its origins in the Progressive Era; between 1910 and 1917, thirty-seven states adopted worker's compensation legislation.[48] As originally conceived, the legislation recognized a trade-off. Injured workers recovered for all injuries suffered in the course of employment without a requirement of establishing

43. For discussion, see Christine Grady, *Enduring and Emerging Challenges of Informed Consent*, 372 New Eng. J. Med. 855 (2015); Peter H. Schuck, *Rethinking Informed Consent*, 103 Yale L.J. 899 (1994).

44. New York remains illustrative. *See* N.Y. Pub. Health Law § 2805–d (McKinney 2023) (framing the disclosure standard as that which would be made by "a reasonable medical, dental or podiatric practitioner under similar circumstances.").

45. *See, e.g.*, Matthies v. Mastromonaco, 733 A.2d 456 (Mass. 1999) (holding that informed consent should apply not only to invasive but also to noninvasive procedures and physicians do not adequately discharge their responsibility by disclosing only the treatment alternatives that they recommend).

46. *See* Dan B. Dobbs, The Law of Torts 654 (2000) (elements of the claim include "actual damage").

47. *See* Aaron D. Twerski & Neil B. Cohen, *Informed Decision Making and the Law of Torts: The Myth of Justiciable Causation*, 1988 U. Ill. L. Rev. 607 (1988).

48. *See* Orin Kramer & Richard Briffault, Worker's Compensation: Strengthening the Social Compact 16 (1991).

fault-based harm; but recovery was limited to medical expenses and (generally) two-thirds of lost income—subject to threshold caps.[49] Tort liability was abolished and pain and suffering damages were no longer recoverable.[50]

The paradigm cases involved physical harm, such as loss of a limb, serious back-strain, and slip-and-fall injuries. Stand-alone emotional harm, resulting in medical expenses and lost income only came to be recoverable at a later date. The earliest cases came to be categorized as "physical/mental"—an example would be a scenario in which the claimant, once recovered from a physical injury (say severe back-strain) suffered such continuing depression over the episode as to be immobilized for work purposes.[51]

A second category that similarly came to be recognized at an early stage of stand-alone recovery came to be categorized as "mental/physical"—illustrated by a construction worker on a high rise building who is physically incapacitated by witnessing his co-worker's fall to his death.[52]

The third, and most elusive category, in which there is disagreement among the states on the appropriate threshold for benefits, is the so-called "mental/mental" claims. An illustrative scenario is *Matter of Wolfe v. Sibley, Lindsay & Curr Co*.[53] Plaintiff was secretary to the head of security at a large department store. As his mental condition deteriorated under the stress of the job—particularly during the Christmas holiday season—she increasingly became his confidante and assumed many of his responsibilities in an effort to shore him up. Tragically, his mental decline eventually led to suicide by gunshot in his office and plaintiff discovered his body. Deeply traumatized by the experience, she found it impossible to continue working and successfully claimed for benefits for her own mental deterioration.

These claims generate an array of emotional harms. My initial illustration (the after-effects of disabling back strain in the physical/mental case) is characterized by incapacitating depression. The disabled high-rise construction worker scenario is perhaps best characterized as physically overwhelming fear. And the distraught special assistant to the suicide victim suffers dominantly from an overriding sense of guilt.

But the purpose of my rendition of the workplace cases is not to engage in arm-chair psychologizing. Rather, I have in mind to underscore and expand on my underlying theme: Recovery for emotional

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49. 1 Lex K. Larson & Thomas A. Robinson, Larson's Workers' Compensation § 1.03 (Rev. ed. 2000 & Supp. 2023).

50. *Id.*

51. *Id.* § 56.03.

52. *See, e.g.*, Bailey v. Am. Gen. Ins. Co., 279 S.W.2d 315 (1955).

53. 330 N.E.2d 603 (N.Y. 1975).

harm has taken many pathways, some forged recently, and others veering off expansively from earlier recognized categories—in sum, revealing the sensitivity of tort law to cultural and social change.

Concluding Observations

There is a widely-shared consensus among legal historians that tort came into its own as a coherent field of law in the early years of the Industrial Revolution.[54] The mass injury toll associated with the burgeoning growth of railroads and factory-based manufacturing made it seemingly inevitable that the *physical* injury—the loss of limb, fracture of bone—would dominate the accident scene and generate claims for redress.

More elusive psychic harms went unrecognized. Indeed, in a rough-and-tumble society, these personality interests hardly counted as harms. But in an urbanizing society, it was perhaps equally inevitable that cultural norms would be transformed, and gradually rules of civility would emerge animating obligations to respect the personality of others. As a consequence, conceptions of harm only marginally recognized, if at all—loss of companionship, respect for privacy, avoidance of egregiously discriminatory misconduct—came to the foreground and fashioned new torts (along with reconfiguring established torts) to reflect revised legal guidelines on acceptable social behavior.

54. *See, e.g.*, Lawrence M. Friedman, A History of American Law 350 (3d ed. 2005); Morton J. Horwitz, The Transformation of American Law, 1780–1860 99 (1977).