DEFENSE AGAINST OUTRAGE AND THE PERILS OF PARASITIC TORTS

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Sometimes words are harder than blows.  

Can a person use physical force in self-defense when threatened with severe emotional distress resulting from another's intentional extreme or outrageous conduct?

Torts scholars tell two narratives about the development of American tort law in the postwar era of relevance to this question. First, scholars describe American law as evolving to recognize emotional harm as on par with physical harm. Second, scholars describe—often with some misgivings—a growing trend to afford a privilege of self-defense in connection with the use of physical force.

The first narrative describes the rising recognition of emotional harm as a legitimate basis for a tort claim. The universal acceptance of the Restatement version of intentional infliction of emotional distress (IIED), the expansion of IIED into new contexts, such as family relations, and employment that its

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2 See, e.g., John McLaren, The Intentional Torts to the Person Revived? Protecting Autonomy, Dignity and Emotional Welfare in a Pluralistic Society, in 17 SUP. CT. L. REV. 2D 67, 85 (2002) ("[T]he modern law of the intentional torts appears a more hospitable home for actions to redress the ... mental, emotional and even spiritual harms cause [sic] by a range of ... threats, confinements, pranks, harassments and slurs than previously.").
4 See Berman v. Allan, 404 A.2d 8, 15 (1979) ("[C]ourts have come to recognize that mental and emotional distress is just as real as physical pain . . ."); see also Peter A. Bell, The Bell Tolls: Toward Full Tort Recovery for Psychic Injury, 36 U. FLA. L. REV. 333, 334 (1984) ("Tort law has significantly relaxed restrictions on recovery for psychic injury in the past fifteen years."); Eugene Kontorovich, The Mitigation of Emotional Distress Damages, 68 U. CHI. L. REV. 491, 493 (2001) (noting that the availability of recovery for emotional distress claims has expanded greatly).
5 See infra Part II.A; Meredith L. Taylor, Comment, North Carolina's Recognition of Tort Liability for the Intentional Infliction of Emotional Distress During Marriage, 32 WAKE FOREST L. REV. 1261, 1264 (1997) ("Overall, the law regarding the tort of intentional infliction of emotional distress continues to expand.").
6 See, e.g., Mary Kate Kearney, Child Witnesses of Domestic Violence: Third Party Recovery for Intentional Infliction of Emotional Distress, 47 LOY. L. REV. 283, 284, 294–95 (2001) (arguing that children who live in a home where abuse occurs should be able to recover for IIED even if they do not witness every event of abuse); Bradley A. Case, Note,
creators may have only imagined, the development of causes of action for negligent infliction of emotional distress (NIED), and the gradual erosion of the requirement of a "physical manifestation" of emotional trauma in both IIED and NIED claims are but a few examples of this developmental trajectory. Over time, tort scholars maintain, the law has legitimized emotional harm and expanded the range of claims (and damages) available to those who suffer mental injury even in the absence of physical contact or harm.

The second narrative describes the expansion of the privilege of self-defense in tort law, which has largely paralleled the treatment of self-defense in the criminal law. Self-defense has come to


8 Prosser speculated that IED claims could lie in cases of outrageous practical jokes, common carriers and innkeepers, evicting landlords, collecting creditors, mishandling of dead bodies, and abuse of official position. William L. Prosser, Intentional Infliction of Mental Suffering: A New Tort, 37 MICH. L. REV. 874, 881-86 (1939); see also RESTATEMENT (SECOND) OF TORTS § 46 (1965) (outlining the elements of the tort of IIED).

9 See Partlett, supra note 7, at 186 ("The expansion of emotional distress liability has come about because of pragmatic and non-pragmatic reasons.").

10 See Jody David Armour, Interpretive Construction, Systemic Consistency, and Criterial Norms in Tort Law, 54 VAND. L. REV. 1157, 1161-62 (2001) (noting that such parallel treatment is "appropriate because there are no moral norms, social policies, or empirical
enjoy "virtually undisputed acceptance." This expansion continued even as the authors of the *Restatement* sought to cut back on the tort law embodiment of this nation's frontier tradition. The duty to retreat before using deadly force proposed by the *Restatement* authors was rejected roundly by jurisdictions from Maine to Texas, Puerto Rico to Hawaii. So-called "castle" doctrines, adopted by statute or judicial decree, have upended traditional burdens of proof in the self-defense context and created more room for loose trigger fingers in affected jurisdictions. One can use force to defend oneself, to defend even unrelated third parties, and to defend against negligent acts. Over time, torts scholars admit, often with regret, the law has come to tolerate the deployment of force in self-defense to a far greater degree.

Against this backdrop, return to the question of whether force is privileged in defense against intentional extreme or outrageous conduct calculated to cause emotional distress. Would a battery or a false imprisonment be a privileged action against conduct amounting to IIED? A close reading of the doctrinal articulation in the *Restatement*’s discussion of self-defense and a consideration of how the doctrine has been applied in the case law suggest that propositions that justify any difference in the treatment of self-defense concepts in tort as against criminal law). The treatment of self-defense in tort law and criminal law have evolved together, with tort law conceptions being influential in the codification of criminal law standards, and vice versa. See Michael Andrew Tesner, Note, *Racial Paranoia as a Defense to Crimes of Violence: An Emerging Theory of Self-Defense or Insanity?*, 11 B.C. THIRD WORLD L.J. 307, 313 & n.38 (1991) (stating that many states have used the *Restatement (Second)* of Torts as a model for criminal code self-defense standards and giving Kansas as an example).

12 See infra Part II.B (detailing the differences between state courts and legislatures' view of self-defense and that of the *Restatement* authors).
13 See infra notes 222–57 and accompanying text.
16 Cf. id. at 5 (addressing the conflict between the expansion of the use of force in self-defense and the basic principle "that the force used must be proportional to the harm threatened").
the answer is "no." Force, it seems, can be used to defend against force, and the threat of force, but is not privileged as a defensive action against an IIED. Without invoking the childhood maxim per se, American law seems to adhere to the notion that "sticks and stones may break my bones, but words will never hurt me." Physical responses to emotional harms are viewed as categorically unacceptable.

This reading of the law, however, exposes a tension between the two narratives told by scholars about tort law. If force cannot be used to defend against IIED, what does that say about the growing recognition of emotional harm as a legitimate basis for a tort claim and about the expanded privilege to use force in self-defense? Either we are not as serious as we claim about treating emotional harm on par with physical harm, or we are not as serious as we appear about affording a privilege of self-defense. In this Article, I use the problem of "defense against outrage" to ascertain which of the two narratives is overstated. In addition to exposing tension between the two tort doctrines, this study can better illuminate each one in turn.

This Article aims to help fill an important gap in the literature on tort law. Ironically, although it is a tort largely created by law professors, IIED has since received relatively scant scholarly attention. The tort has now been universally recognized, but its

17 See RESTATEMENT (SECOND) OF TORTS § 63 (1965) (setting forth privilege of self-defense in response to "harmful or offensive contact or other bodily harm" (emphasis added)).

18 See infra Part III.A.1.


20 This phrase has been part of folk idiom for more than a century. E.g., G.F. Northall, FOLK PHRASES OF FOUR COUNTIES 23 (1894). Northall's book is reportedly the first recorded use of the phrase. WILLIAM MORRIS & MARY MORRIS, MORRIS DICTIONARY OF WORD AND PHRASE ORIGINS 551 (1988). The medieval expression, "Thise grete wordis shall not flay me," expressed the same idea several hundred years prior. The Phrase Finder, http://www.phrases.org.uk/eng/bulletin_board/43/messages/720.html (last visited May 28, 2009); see also id. (noting that this phrase was used in a medieval mystery play).

21 See infra Part II.A.1.

22 See Denise G. Réume, Indignities: Making a Place for Dignity in Modern Legal Thought, 28 QUEEN'S L.J. 61, 65 (2002) ("[T]here has been little academic debate about this tort, possibly because the foolish practical joker is not considered much of a pressing social
contours and limitations and its relationship to other "intentional" torts have remained obscure. In particular, except in the area of constitutionally protected speech, it has never been clear to what extent, if any, the defenses and privileges applicable to other intentional tort claims apply to IIED as well. This Article explores that notion and suggests that the law has not resolved the issue. This Article also adds to the discussion of the role of force in self-defense. The right to act in self-defense is "typically presumed rather than explained," and "many accounts as to why self-defense is justified seem to be unsatisfactory." Although the subject of self-defense has been extensively discussed in both scholarly and public circles, such discussions typically focus on the "kill to avoid being killed" hypothetical, and neglect and distort the role of defense in contexts other than homicide.

Part I of this Article presents five animating examples concerning the potential use of force in self-defense against IIED. Part II describes the standard narratives on the actionability of emotional harm and the privilege of self-defense. Part III engages in a close reading of the doctrine and an analysis of the structure of IIED to reveal whether force could be used in defense of an IIED against oneself or others. Part IV considers the three dominant theoretical accounts of tort law—economic analysis, corrective justice, and civil recourse theory—to search for an explanation for

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23 See Nicholas J. Mullaney & Peter R. Handford, Tort Liability for Psychiatric Damage: The Law of "Nervous Shock" 308 (1993) ("[I]n terms of doctrinal maturation, psychiatric damage law is still, after over a century, to some degree in its embryonic stages.").

24 The drafters of the Restatement (Third) of Torts have acknowledged that "current American law bounds recovery for emotional harm with rules that seem arbitrary when studied by law students and certainly when discovered by potential plaintiffs." Restatement (Third) of Torts: Liability for Physical and Emotional Harm, forward at xv (Tentative Draft No. 5, 2007).


26 See generally Sangero, supra note 11 (exploring the right of private defense).


28 See, e.g., id. at 438 (discussing two authors' use of the hypothetical).
the law's reluctance to privilege force in defense of emotional tranquility. Part V draws lessons from the search for an answer to this tort law puzzle, exploring its implications both for the continued dichotomy in tort law's treatment of physical and emotional security and for the process and difficulties associated with creating new tort law causes of action to fill the gaps between existing torts. Part VI concludes.

It may seem that the question posed in this Article is narrow, but its implications are not. Most students of the law would be skeptical of affording a privilege to use force in self-defense against purely emotional harm. Such a defense has rarely been offered by those who are sued after inflicting harm through the use of force. No theoretical or intellectual justification, however, appears to explain the law's reluctance to afford such a privilege. In that sense, the negative and unsurprising answer to the tort puzzle explored in this Article calls into question the law's commitment to emotional tranquility as a protected interest and to the private privilege to use force in self-defense. In other words, solving the IIED—self-defense problem can tell us just how serious we are about protecting against emotional harm and how serious we are about the increasingly expansive views of self-defense.

In still other words, the problem poses two serious questions. First, how can we maintain that emotional injury can sometimes be worse than physical injury and yet deny the privilege of self-defense for the most egregious forms of the former while permitting it for the most trivial instances of the latter? Second, what does it reveal about the justification for the increasing tolerance of self-defensive force that we entirely deny it to this important class of injuries? Discomfort with permitting force in defense of emotional well-being should lead us to rethink our commitment to privileging defensive force in tort law generally.

More importantly and more generally, the puzzle explored in this Article reveals the hazards inherent in tort lawmaking. IIED has been arguably the most "successful" new tort of the twentieth century. While courts have been able to define—sometimes to the dissatisfaction of observers—the essential elements of IIED, the place of this tort within the broader framework of tort law remains unclear. In practice, if not in doctrine, IIED continues to be a
parasitic tort, one that is pled and alleged in circumstances where other, better-established tort or contract claims could also have been put forward. Moreover, it is a tort deliberately left amorphous. These factors have prevented courts from articulating the doctrinal limitations of IED and should be a warning to any proposing a new tort cause of action. Those who advocate new sex torts, \(^{29}\) torts based on harassment, \(^{30}\) or expanded economic torts, \(^{31}\) should understand that even where accepted as valid claims, such torts will remain murky and ill-situated in the broader context of tort law.

That a new tort may take time to unpack may not seem particularly surprising. But two things are. First, even though IED is “new” compared to five-century-old torts like battery or trespass, it is perhaps 100, and at least sixty, years old. The length of time the tort has remained amorphous is striking. Second, the degree to which the muddle of IED has infected other tort doctrines is notable. Self-defense is thought to be a fairly stable, well-established doctrine. Yet the murkiness of IED has prevented application of this far more “predictable” tort doctrine to the hypothetical explored in this Article.


I. ANIMATING EXAMPLES

This section frames the Article’s discussion by introducing five examples to animate the consideration of the role of self-defense in response to outrageous conduct amounting to actionable IIED. These examples are meant to structure the discussion of when and how force might be justified to prevent outrageous conduct from inflicting severe emotional distress. Importantly, none of these examples specify the precise kind of force used in defense. The proportionality principle would continue to apply were self-defense authorized, so it might be that deadly force could never be used to defend against outrageous conduct. Imagine instead that the kind of force used is nondeadly and limited to that necessary to cause the actor engaging in outrageous oppression to cease his course of conduct.

A. KITTEN KILLER

Suppose a mean-spirited father decides to torment his ex-wife and children. This father purchases, at his own expense, an adorable kitten, which he proudly unveils when his ex-wife comes to pick up her children at the end of the father’s custodial weekend. The father calls to his ex-wife and children, removes the living kitten from its box, and then slices its neck with a hunting knife.32

If the children’s mother had known of her ex-husband’s intention, would she have been permitted to use force to restrain him from assassinating the kitten? No claim for defense against battery or assault could be offered, since the father did not threaten the children of his ex-wife, brandishing his knife a safe distance away. Nor could the mother claim a privilege associated with defense of property, since the kitten was a chattel owned by the father. Perhaps some citizen’s arrest would be permitted under an animal cruelty statute, but prior to actually bringing knife to neck, the father may not have violated such statutes.

Pet owners have successfully brought IIED actions against the killers of their pets.\textsuperscript{33} Although the father in fact owned the murdered kitten, the fact of ownership is not decisive unless it removes the social outrage associated with the conduct or the likelihood that a witness would suffer emotional harm.\textsuperscript{34} Surely, one is more likely to experience the emotional trauma required for an IIED claim when witnessing the death of a companion animal, but it is hard to imagine that children who witness the cruel death of any "cute" animal would not also be profoundly affected.\textsuperscript{35} So long as the father's actions are directed towards his ex-wife and children,\textsuperscript{36} using the kitten as a tool to achieve his outrageous ends,\textsuperscript{37} a valid IIED claim would be available, as the authors of the \textit{Restatement} recognize.\textsuperscript{38} Would such a claim justify the use of force?

B. THE HANGMAN'S NOOSE

In the summer of 2006, white students at Jena High School in Jena, Louisiana, "hung two nooses from a tree in the school's courtyard—apparently as a signal to black students not to gather near the tree."\textsuperscript{59} Racial tensions in the town rose, and six African-

\begin{footnotesize}
\begin{enumerate}
\item See \textit{Restatement (Second) of Torts} § 46 (1965) (setting forth requirements of IIED claim, including outrageous conduct and likelihood of witness distress).
\item Cf. Daniel M. Warner, \textit{Environmental Endgame: Destruction for Amusement and a Sustainable Civilization}, 9 S.C. ENVTL. L.J. 1, 49 (2000) ("One of the things abusive men do is threaten, batter, or kill pets in the presence of their partner or their children, or both, in order to threaten the humans or control them . . . .").
\item See Warner, \textit{supra} note 35, at 48–49 (asserting a relationship between animal abuse and domestic abuse, with animals as tools).
\item See \textit{Restatement (Second) of Torts} § 46 illus. 11 (1965) ("A, who knows that B is pregnant, intentionally shoots before the eyes of B a pet dog, to which A knows that B is greatly attached. B suffers severe emotional distress, which results in a miscarriage. A is subject to liability to B for the distress and for the miscarriage.").
\end{enumerate}
\end{footnotesize}
American students were subsequently arrested for beating a white student.\footnote{Id. at 622.}

Suppose that the beating had been more restrained, or that it had simply involved “laying on hands” of a white student hanging a noose on a tree in an effort to cause emotional trauma to his African-American classmates. Would any physical intervention be privileged on the grounds that it was necessary to protect the emotional autonomy and tranquility of African-American students?

Racist “speech” like the display of nooses in Jena—when it goes unpunished—may exacerbate racial tension within a community, causing it to “stew, boil, and eventually spill into a national controversy.”\footnote{Allison Barger, Note, Changing State Laws to Prohibit the Display of Hangman’s Nooses: Tightening the Knot Around the First Amendment?, 17 WM. & MARY BILL RTS. J. 263, 292 (2008).} Racial harassment can be “so traumatic” that it constitutes a “very real threat” to its victims’ well-being.\footnote{See Joshua S. Press, Comment, Teachers, Leave Those Kids Alone? On Free Speech and Shouting Fiery Epithets in a Crowded Dormitory, 102 NW. U. L. REV. 987, 1016 (2008) (suggesting that “discriminatory acts might bar access to educational opportunities” and that students might withdraw to avoid discrimination).} Like cross burning, the hanging of a noose involves “the orchestration of fear.”\footnote{Camille A. Nelson, Considering Tortious Racism, 9 DePaul J. Health Care L. 905, 912 (2005).} It can have long-term psychological impacts and may impose physical consequences on its victims.\footnote{See Delgado, supra note 30, at 139 (discussing how insults can raise a person’s blood pressure and noting that blood pressure levels are higher in American blacks than in whites).}

Because of the long and unattractive history of racial discrimination in the United States, racial insults are qualitatively different and potentially more harmful than other types of insults.\footnote{Josephine Chow, Comment, Sticks and Stones Will Break My Bones, but Will Racist Humor?: A Look Around the World at Whether Police Officers Have a Free Speech Right to Engage in Racist Humor, 14 Loy. L.A. INT’L & COMP. L. REV. 851, 859 (1992) (footnote omitted).}

While “mere” racial insults have not generally been considered sufficient to meet the “extreme or outrageous” requirement for IIED,\footnote{Aaron Goldstein, Note, Intentional Infliction of Emotional Distress: Another Attempt at Eliminating Native American Mascots, 3 J. GENDER RACE & JUST. 689, 702 (2000).} where “something additional” is present,\footnote{Id. at 622.} IIED can be
proven. One doctrinal feature of IIED, perhaps better characterized as a flaw, is its focus on what might arouse resentment in the “average” member of the “community.” In that sense, IIED is majoritarian; thus, claims involving conduct that causes distress to minority groups but would not shock the conscience of the majority are rejected. Here, the hanging of a noose is a message that seems clearly more than insulting, and, given the popular response, no doubt shocked the conscience of the community. Outrageous! Since 2001, the Equal Employment Opportunity Commission has filed two dozen lawsuits alleging racial harassment in cases involving nooses. California considered criminalizing the hanging of nooses in workplaces and schools; the legislature stated in its preamble:

Hanging a noose is directly correlated with America’s history of racial hatred and murder, representing not only a threat to African American life and safety, but causing further psychological and emotional trauma as well. . . . [T]o a reasonable person, the display of a noose at a school, park, place of employment or other public venue amounts to a direct and immediate threat of force to intimidate persons based on racial characteristics.

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47 Id. at 702.
49 See Nelson, supra note 43, at 943 (“[T]he ordinary person is often not perturbed by racial animus, certainly not to the extent of the subjectivized reasonable person, i.e. the reasonable Black child confronted with racially derogatory imagery.”); see also Goldstein, supra note 46, at 709 (“[T]he ‘face’ of a reasonable person appears to be white . . . .”).
50 But see Vance v. S. Bell Tel. & Tel. Co., 983 F.2d 1573, 1575 n.7 (11th Cir. 1993) (finding that hanging a rope noose over employee’s work station did not constitute IIED).
52 Vikram David Amar & Alan Brownstein, If California Passes Its Bill Criminalizing the Hanging of a Noose on Someone Else’s Property or Public Property with Intent to Terrorize, Would This Anti-Hate Law Be Constitutional?, FINDLAW’S WRIT (Apr. 23, 2009), http://writ.news.findlaw.com/amar/20090423.html.
The legislature’s view that a noose constitutes an immediate threat of force is unlikely to persuade a court applying the common law of assault’s immediacy requirement. If, however, reasonable persons find the hanging of a noose shocking, then an IIED claim could lie. Could force be used to stop such conduct?

C. CUSTOMER HARASSMENT

In Zalnis v. Thoroughbred Datsun Car Co., an IIED case that has found its way into law school tort casebooks and commentaries, a Colorado Datsun dealer realized it had miscalculated the price of a car sold to the plaintiff. Several days after the sale, a sales representative called the plaintiff and told her falsely that the car had been recalled. Although plaintiff demanded to see a work order explaining the need for a recall, the dealer took her car and allegedly “yelled, screamed, used abusive language, grabbed her by the arm in a threatening manner, and continually threatened and intimidated her by telling her to ‘shut up’” when she attempted to secure the return of her automobile. The dealer’s employees called the plaintiff a “French whore” and accused her of sleeping with a salesperson. The dealer had knowledge that the plaintiff’s husband had recently committed suicide in her presence. The court found that a cause of action for IIED could lie, opining that:

[T]he defendants did not merely threaten and insult Zalnis; they took away her car and repeatedly harassed her. . . . Zalnis has sufficiently alleged that [defendants] acted with the intent to bully her into

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54 E.g., ARTHUR BEST & DAVID W. BARNES, BASIC TORT LAW: CASES, STATUTES, AND PROBLEMS 73–75 (2d ed. 2007).
56 Zalnis, 645 P.2d at 293.
57 Id.
58 Id.
59 Id.
60 Id.
giving up her car. In view of their knowledge of her emotional susceptibility, they could be considered to have acted intentionally or recklessly in causing her severe emotional distress.\(^6\)

If Ms. Zalnis had used force to escape from the dealer’s clutches, would her actions have been privileged as a defense against IIED?

D. SCHOOL BULLYING

School bullying has long been a rampant problem in education settings around the world. Teasing, insult, and aggravation of the victims of bullying can mount over the course of months and years of abuse. Bullying can lead to severe emotional distress, manifesting itself in the victim’s depression and sometimes even suicide. One author suggested the term “bullycide” be applied “to label acts of suicide when those who feel that they have no other solution to their torment except via ‘escaping’ personal pain kill themselves.”\(^6\)

Certainly, some element of rough play is a part of growing up. But where bullying consists of particularly shocking and long-term abuse, it might rise to the level of extreme emotional distress. Would the victim of a bully be permitted to use force to stop such outrageous behavior? The law and disciplinary codes seem to deny the victims of bullying a privilege of self-defense. A student can be punished for resisting, and:

\[\text{I}t \text{ is predictable that that student will feel righteous indignation at the fundamental unfairness of such treatment. Further, such a policy would provide even greater incentive for a bully to assault his victim, if the bully did not care about a suspension. In that case, the bully would be rewarded by the provision of a victim who may not fight back, because the victim will be punished if he or she does. Alternatively, one can}\]

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\(^6\) Id. at 294; see also Kenneth W. Simons, A Restatement (Third) of Intentional Torts?, 48 ARIZ. L. REV. 1061, 1086 (2006) (stating that IIED “can be satisfied if the defendant recklessly causes severe emotional distress; intention is not required”).

imagine the bully laughing at his victim, who might want to stay in school, for being suspended for engaging in self-defense. Such perverse incentives, which tilt in favor of a bully, cannot be rationally related to the legitimate interest of preventing and punishing fighting among students.63

Left unchecked, some victims of bullying allow resentment and distress to build to the point where they lash out not against their particular assailants, but against the school community as a whole: “[w]hen victims strike back at their tormentors and when bullying goes unabated, the whole school loses.”64 Michael Kimmel and Matthew Mahler found that peer harassment is one of the most significant causes of school shootings65 and noted that “[n]early all [school shooters] had stories of being mercilessly and constantly teased, picked on, and threatened.”66 While the school is hardly a place where violent self-defense should be encouraged, it might very well be that preventive self-defense against IIED could help interrupt the dynamics that lead to tragic school shootings.

E. PICKETING MILITARY FUNERALS

The Snyder family gathered in 2006 for the funeral of twenty-year-old Matt, who was killed in the line of duty while serving as a Marine in Iraq.67 During the funeral, members of the Westboro Baptist Church used the event to promote their anti-gay-rights agenda.68 Although picketing members of the church complied with local ordinances and police direction, remaining a certain distance from the funeral site, they displayed shocking signs and

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64 ROBERTS, supra note 62, at 15.
66 Id. at 1445.
68 Id.
shouted highly offensive messages: "God hates you," "You're going to hell," "Fag troops," and "Thank God for dead soldiers." These events led to legal action:

In June 2006, a soldier's father filed a lawsuit against Westboro Baptist Church, claiming defamation, invasion of privacy, and intentional infliction of emotional distress from the March 10, 2006, picketing of his son's military funeral. The lawsuit is the first of its kind filed by the family of a fallen soldier.

The plaintiff ultimately prevailed on three claims, including an IIED claim, and won a $10.9 million verdict against the defendants, including $2.9 million in compensatory damages and $2 million in punitive damages relating to the plaintiff's IIED claim. The verdict was upheld on appeal to a federal district court based on a First Amendment challenge. A federal appellate court reversed that holding, and to the surprise of many observers, the Supreme Court recently granted certiorari in the case.

Could Mr. Snyder and his family have used force to stop the protesters from committing their apparently outrageous acts?

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69 Snyder v. Phelps, 533 F. Supp. 2d 567, 572 (D. Md. 2008); Dorsky, supra note 67, at 236, 238.
71 Dorsky, supra note 67, at 238.
73 Snyder v. Phelps, 580 F.3d 206, 226 (4th Cir. 2009).
74 Snyder v. Phelps, 130 S. Ct. 1737 (2010). The Supreme Court only rarely uses federal law to comment on the substance of common law tort. While the case is unlikely to speculate on what defenses might have been available to the plaintiff had he chosen to use force, it will no doubt provide an illuminating discussion of the intersection between common law torts and First Amendment protections.
II. TWO NARRATIVES OFTEN TOLD ABOUT POST-WWII DEVELOPMENTS IN AMERICAN TORT LAW

A. EXPANSION OF LIABILITY FOR EMOTIONAL HARM

At one point, plaintiffs had very few legal avenues for pursuing strictly emotional harms.\(^{75}\) The law protected physical security\(^{76}\) and property\(^{77}\) above all, and reputation\(^{78}\) and intimate relations to a lesser extent.\(^{79}\) The law had little regard for emotional harm except, as in the case of assault,\(^{80}\) where that harm hinged on the fear of physical contact.\(^{81}\) Indeed, "[t]he early common law was reluctant to protect the right to be free from the infliction of emotional distress."\(^{82}\) In an oft-quoted passage\(^{83}\) in the 1861 case of Lynch v. Knight, Lord Wensleydale opined, "Mental pain or anxiety the law cannot value, and does not pretend to redress, when the unlawful act complained of causes that alone."\(^{84}\) Courts

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\(^{75}\) See Nancy Levit, *Ethereal Torts*, 61 GEO. WASH. L. REV. 136, 140 (1992) ("Historically, tort law compensated only direct and tangible injuries to persons or property.").


\(^{77}\) See DAN B. DOBBS, *THE LAW OF TORTS* 3–4 (2000) (stating that law not only protects property but allows a plaintiff to recover damages for tortious harm to her property).

\(^{78}\) Cf. Pollard, supra note 29, at 770 (noting that sex tort law protected plaintiffs against reputational injury "resulting from unfair or fraudulently induced seduction").


\(^{80}\) The tort of assault was "dismissed" as an "exceptional case[.]", with the law "provid[ing] protection against only the narrowest range of harms (e.g., . . . fear of imminent physical injury)." Martha Chamallas, *The Architecture of Bias: Deep Structures in Tort Law*, 146 U. PA. L. REV. 463, 491 (1998); see also Partlett, supra note 7, at 187 ("Although the traditional causes of action, battery, assault, and false imprisonment, protected one's dignity (or psychological tranquility), they did so within the narrowest lines of those causes of action.").

\(^{81}\) Tort claims such as assault, invasion of privacy, and interference with spousal consortium "protect distinct aspects of the interest in emotional tranquility." *RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM* ch. 8, scope note (Tentative Draft No. 5, 2007).


at the turn of the twentieth century "categorically denied recovery for infliction of emotional injury alone."  

The drafters of the Restatement identify five distinct concerns that led courts to be "restrictive and cautious" in recognizing claims for "pure emotional disturbance." First, courts expressed concern that emotional harm is less verifiable and objective than physical harm and possibly subject to bogus claims by fakers and nuisance plaintiffs. Emotional distress claims could be "easily feigned and exaggerated." This justification struck tort scholars as unpersuasive. In his famous Michigan Law Review piece, Prosser wrote that "mental suffering is scarcely more difficult of proof, and certainly no harder to estimate in terms of money, than the 'physical' pain of a broken leg, which never has been denied compensation; nor is there any physiological reason for regarding 'physical pain' as any less a 'mental phenomenon.'" Noting that courts had long awarded and permitted valuation of mental anguish accompanying physical injury, Prosser and Keeton argued that no sensible ground existed for denying recovery for purely emotional harm. As the science of psychiatry and psychology has increased in sophistication, "successfully feigning psychic injury is not an easy matter."

Second, courts expressed concern that liability for emotional harm could expose defendants to suits by numerous plaintiffs based on a single wrongful act. In circumstances in which many bystanders or onlookers suffer emotional harm in a single moment, the scope of liability could easily come to far exceed the value of

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85 Levit, supra note 75, at 141.
86 RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM ch. 8, scope note (Tentative Draft No. 5, 2007) (emphasis added).
87 Id.
89 Prosser, supra note 8, at 875 (footnote omitted). Prosser reaffirmed his opinion when he published a majority of this quotation in his now-famous hornbook. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 12, at 55 (5th ed. 1984).
90 KEETON ET AL., supra note 89, § 12.
91 Bell, supra note 4, at 351.
92 See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM ch. 8, scope note (Tentative Draft No. 5, 2007) ("[E]motional disturbance can be widespread—a single act can affect a substantial population . . . .").
the activity carried out by the defendant.93 Courts cite a concern that liability could be disproportionate to culpability—indeed, that it could be unlimited—if emotional distress alone could be the basis for a tort claim.94 This argument has been described as "deeply flawed" and "inconsistently applied, which suggests that it is really only a convenient excuse for limitations which in fact address other concerns."95 No one has satisfactorily articulated why unlimited liability should, as a matter of policy, be a major concern.96 Particularly where a defendant has acted willfully or intentionally in creating emotional distress, the argument of disproportionate liability struck scholars as unconvincing.97

Third, courts expressed the view that emotional harm is the natural result of social existence, and that those who suffer it should grin and bear it.98 Recognizing a cause of action for "trivialities" and "bad manners" would be "absurd."99 However, this justification provides little basis for "denying recovery for any genuine, serious mental injury."100

Fourth, courts expressed concern that recognizing emotional harm claims could actually and perversely increase the severity of emotional harm suffered.101 This could occur in one of two ways. First, litigation may aggravate existing psychic injuries.102 By forcing plaintiffs to relive their trauma—and creating a financial incentive for them to do so—emotional harm torts could actually

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94 See id. at 431–35 (discussing flaws in the argument that liability will be disproportionate to negligence); see also Bell, supra note 4, at 362–63 (discussing the threat of unlimited liability as it relates to loss bearing).
95 Handsley, supra note 93, at 431.
96 Bell, supra note 4, at 363.
97 See Ingber, supra note 88, at 776 & n.16 (calling disproportionality "anomalous" and locating its source in distinction between "property" and "liability" rules of evaluation).
98 See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM ch. 8 scope note (Tentative Draft No. 5, 2007) ("[S]ome minor or modest emotional harm is endemic in living in society . . . ").
99 KEETON ET AL., supra note 89, § 12, at 56.
100 Id.
101 See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM ch. 8, scope note (Tentative Draft No. 5, 2007) ("[G]iving legal credence to and permitting recovery for emotional disturbance may increase its severity . . . ").
102 Bell, supra note 4, at 370.
intensify and lengthen the duration of discontent.\textsuperscript{103} Second, more favorable legal treatment for psychic injuries may "encourage a greater sensitivity to psychically disruptive events in the general population, which will result in more overall psychic injury."\textsuperscript{104} The very recognition of a cause of action for emotional distress could increase the level of emotional distress experienced by victims of outrageous conduct.\textsuperscript{105} Each of these concerns invites response. First, litigation rarely determines one's psychological reaction to serious injury or other traumatizing events\textsuperscript{106} and may in fact have therapeutic benefits for plaintiffs.\textsuperscript{107} Second, even if psychic trauma rises in society at large, a beneficial increase in value of human relationships might result.\textsuperscript{108} Finally, courts expressed concern that there would be little the law could do in pure emotional harm cases to encourage mitigation by plaintiffs.\textsuperscript{109} The standard mitigation tools available in tort law are a poor fit in claims involving emotional distress\textsuperscript{110} because of privacy concerns\textsuperscript{111} and autonomy rights of victims.\textsuperscript{112} Perversely, denying recovery for emotional distress may limit the ability of a victim to seek professional care because of the absence of any assurance that such costs can be passed on to a wrongdoer through

\textsuperscript{103} See id. at 373–74 (considering why psychically injured persons may recuperate faster when not faced with litigation).

\textsuperscript{104} Id. at 370.

\textsuperscript{105} See Ingber, supra note 88, at 807–08 ("Were the legal system to deny recovery for . . . mental distress, the level of suffering perceived by individuals likewise might decrease in response to this reduction in societal support.").

\textsuperscript{106} See Bell, supra note 4, at 373 (stating that research on and analysis of whether litigation exacerbates or relieves psychic injury has been inconclusive).

\textsuperscript{107} See id. at 375 ("Even the process of formally describing the injurious experience may be psychologically beneficial, both as a catharsis and as a constructive channeling of anger.").

\textsuperscript{108} See id. at 371 (positing that a tort law emphasizing the value of human relationships is not necessarily undesirable).

\textsuperscript{109} See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM ch. 8, scope note (Tentative Draft No. 5, 2007) ("[T]here is little a legal system can do to encourage or enforce mitigation.").

\textsuperscript{110} See Kontorovich, supra note 4, at 520 (concluding that the mitigation defense cannot control the problems of moral hazard that are created by emotion distress liability).

\textsuperscript{111} See id. at 512 ("[P]sychiatric treatment as mitigation would become part of a public record.").

\textsuperscript{112} See id. at 508–10 (discussing courts' hesitance to force plaintiffs to mitigate psychic injuries).
litigation.\textsuperscript{113} The availability of a cause of action \textit{increases}, rather than \textit{decreases}, the chances that victims of emotional distress will visit a mental health professional who can help mitigate such victims' harm.\textsuperscript{114} These five policy concerns were the source of pronouncements that there was no duty to conform one's behavior to a particular standard of conduct arising from the risk of inducing emotional harm in others.\textsuperscript{115} Ultimately, however, competing policy considerations favoring the recognition of liability in cases of pure emotional harm came to outweigh these criticisms.

The tide turned in the postwar era,\textsuperscript{116} as courts came to recognize the \textit{realness} of emotional harm.\textsuperscript{117} Personal security has both external and internal components, and "the development of external rights against violence naturally [led] to a recognition of internal rights."\textsuperscript{118} "Courts . . . abandoned many of the doctrinal limitations, and gradually moved closer to recognizing a general legally protected 'interest in personal emotional stability.'"\textsuperscript{119} Sometimes doctrinal changes have been subtle, but they nonetheless reflect a growing value afforded to dignitary and autonomy interests.\textsuperscript{120} The proposed \textit{Restatement (Third)} describes this trend in the law as reflecting a "liberalization of recovery for pure emotional disturbance."\textsuperscript{121} The universal

\textsuperscript{113} Cf. Bell, supra note 4, at 396 & n.245 (noting deterrence of professional counseling based on cost considerations not present with physical injuries).

\textsuperscript{114} See id. at 396–97 (recognizing the role litigation may play in facilitating victims' access to professional psychological assistance).

\textsuperscript{115} See \textit{Restatement (Third) of Torts: Liability for Physical and Emotional Harm} ch. 8, scope note (Tentative Draft No. 5, 2007) ("These policy concerns often led courts to declare that actors had 'no duty' to prevent pure emotional harm, except in some narrow areas.").


\textsuperscript{117} See, e.g., Berman v. Allan, 404 A.2d 8, 15 (N.J. 1979) ("[C]ourts have come to recognize that mental and emotional distress is just as 'real' as physical pain, and that its valuation is no more difficult.").


\textsuperscript{119} Kontorovich, supra note 4, at 494.

\textsuperscript{120} Levit, supra note 75, at 179 n.220.

\textsuperscript{121} \textit{Restatement (Third) of Torts: Liability for Physical and Emotional Harm} ch. 8, scope note (Tentative Draft No. 5, 2007).
recognition of the tort of intentional infliction of emotional distress that followed the postwar era embodies this liberalization.

Nor has this trend towards greater recognition of plaintiffs’ rights to recover for mere emotional harm abated. “[T]ort law continues to expand its coverage”; the postwar era witnessed “significant movement toward recognizing ‘intangible’ interests by more fully protecting against the infliction of ‘emotional distress.’”122 Society has come to “perceive[] intangible injuries as real” and to recognize that “the tort system should provide some method of redress to victims of such injuries.”123

The sharpest signs of expanded protection for emotional interest are in the growth of the IIED cause of action—arguably the twentieth century’s most successful “new” tort—in the emergence of NIED, and the watering down of requirements that emotional distress manifest itself physically in order to be the basis for recovery.

1. IIED. Originally, intentionally caused mental injuries were not recoverable unless accompanied by physical harm or, at a minimum, physical contact,124 and “early cases refused all remedy for mental injury, unless it could be brought within the scope of some already recognized tort.”125 In large part through the work of legal scholars and the authors of the tort Restatements, however, the law changed to recognize a new tort permitting recovery for solely emotional harm even in the absence of physical injury.126 IIED has the rare and “dubious distinction of being known as a tort created by academics.”127 It has been recognized at some time, in one form or another, by every state.128

122 Ingber, supra note 88, at 772–73.
123 Id. at 773.
124 See KEETON ET AL., supra note 89, § 12, at 54–55 (“[T]he law has been slow to accept the interest in peace of mind as entitled to independent legal protection . . . .”).
125 Id. at 56.
128 See John J. Kircher, The Four Faces of Tort Law: Liability for Emotional Harm, 90 MARQ. L. REV. 789, 806 (2007) (noting recognition of IIED in some form in all states). Professor Kircher’s article includes an appendix analyzing each state’s IIED tort law. Id. at 852–82.
The first *Restatement of the Law of Torts*, published in 1934, “took the position that there was no recovery for emotional injury, even when intentionally inflicted, if the defendant’s conduct did not otherwise amount to a tort.” In drafts of the first *Restatement* circulated during the 1920s, the authors recognized as one of the “rights of personality” the “[r]ight to freedom from disagreeable emotions” but opined that the “interest in freedom from disagreeable emotions is not . . . sufficiently important to make even its intentional invasion actionable unless the act [complained of] . . . also constitutes an invasion of some more perfectly protected interest.”  Conduct “intended or likely to cause only mental or emotional distress is not tortious.”

In the 1930s, scholars began to note that the *Restatement’s* categorical denial of the existence of a tort claim based on emotional harm in the absence of physical impact was inaccurate. Legal scholars provided much of the stimulus

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130 *RESTATEMENT OF TORTS* pt. 2, at 5 (Tentative Draft No. 1, 1925).

131 *RESTATEMENT OF TORTS* ch. 16, intro. note (1934).

132 *RESTATEMENT OF TORTS* § 46 cmt. c (1934). The authors of the first *Restatement* provided three illustrations of the “no liability” principle which demonstrate how little seriousness was afforded the interest in emotional tranquility. In Illustration 1, A invites B to a fancy dress dance, and B shows up in a “dress appropriate for a masquerade but utterly inappropriate for an ordinary dance.” In Illustration 2, A tells his enemy B that B’s neighbors think he is guilty of “grossly immoral conduct” (unspecified by the authors of the *Restatement*). In Illustration 3, A tells a rival professional violinist B that he played a particular piece “in an extremely bad manner.” Unsurprisingly, given how these examples belittle emotional responses and involve relatively banal offenses, no liability would result even if the “victims” were to manifest physical symptoms of their emotional distress. *Id.* at 87–88.

133 See Calvert Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033, 1067 (1936) (“All in all, it is fair to say that the courts have already given extensive protection to feelings and emotions. . . . No longer is it even approximately true that the law does not pretend to redress mental pain and anguish ‘when the unlawful act complained of causes that alone.’”). The famous English case, *Wilkinson v. Downton*, [1897] 2 Q.B.D. 57, where the court allowed a woman to recover from the practical joker who told her that her husband had been severely injured in an accident, led the way in permitting recovery for purely emotion harm, and “somewhere around 1930 it began to be recognized that the intentional infliction of mental disturbance by extreme and outrageous conduct constituted a cause of action in itself.” KEETON ET AL., *supra* note 89, § 12, at 60.
towards the recognition of IIED. Three key articles inspired the birth of a new tort: Dean Prosser offered *Intentional Infliction of Mental Suffering: A New Tort*, in the pages of the *Michigan Law Review*; Judge Magruder offered *Mental and Emotional Disturbance in the Law of Torts* in the *Harvard Law Review*; and Professors Harper and McNeely offered *A Re-examination of the Basis for Liability for Emotional Distress* in the *Wisconsin Law Review*. These articles recognized the emerging tort of IIED, justified its incorporation in subsequent Restatements, and provided a cogent argument for what the preliminary boundaries of the tort should be. While the tort of IIED is sometimes described as one invented by scholars, a more subtle historical reading is that “Prosser and his academic colleagues did not so much ‘invent the principle of compensation for emotional distress’ as simply ‘expand the locus of that principle from isolated “exceptional” cases to an established doctrine of tort law.’”

Confronted by academic criticism, the Restatement authors changed their tune a decade later. A supplement was offered to the first Restatement in 1948 which recognized a “separate and independent tort for [IIED].” The 1948 revision provided that a person “who, without a privilege to do so, intentionally causes severe emotional distress to another is liable (a) for such emotional distress, and (b) for bodily harm resulting from it.”

The change in tune between the 1934 and 1948 doctrinal articulations was “reflective of the advances in depth psychology...”

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134 See Givelber, *supra* note 129, at 42 (“[T]he modern tort was introduced in the pages of law reviews...”).
135 Prosser, *supra* note 8, at 874.
136 Magruder, *supra* note 133, at 1033.
138 Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 45, rep. note.
141 Restatement of Torts § 46 (Supp. 1948).
The scientific evidence both verified the significance of emotional harm and provided courts the tools to weed frivolous claims from real ones. A categorical denial of IIED as a cause of action was no longer defensible.

The 1948 revision is interesting because of its focus—subsequently abandoned in the next version of the Restatement—on the notion of privilege. The concept was likely incorporated from defamation law, which makes the question of privilege a judicial issue and the award of damages one for the jury. Under the 1948 revision, courts could “gatekeep” emotional distress claims using the concept of privilege, evaluating whether a defendant’s interest in the conduct “justifies the deliberate infliction of [emotional] distress and when it does not.”

Because the subsequent Restatement abandoned the notion of privilege in connection with IIED, there was little exploration of when conduct that intentionally harms the emotional tranquility of another should in fact be privileged. An “abuse of privilege might occur when the defendant is not furthering a legitimate interest, or is employing excessive means to further that interest, or is acting out of hatred for the plaintiff.” The demarcation of the scope of IIED liability using the concept of privilege provided inadequate limits for the tort, and thus, the Restatement (Second) embraced the “requirement that the tortious conduct be not only intentional, but also ‘outrageous.’”

The Restatement (Second) formalized the law’s recognition of IIED in 1965. Generally speaking, the re-imagined IIED tort

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142 Levit, supra note 75, at 143.
143 See Danuta Mendelson, The Interfaces of Medicine and Law: The History of the Liability for Negligently Caused Psychiatric Injury (Nervous Shock) 2 (1998) (discussing courts’ fears arising from the nature of psychiatric illness as “an experiential phenomenon which may be open to abuse by fraudulent claims and courts’ attempts to limit recovery”).
144 See Givelber, supra note 129, at 61 (“The existence of a qualified privilege is typically a question of law.”).
145 Id. at 61.
146 The privilege approach “was replaced by the outrageousness test” in the second Restatement. Id. at 62.
147 Id. at 61.
148 Crump, supra note 7, at 449.
149 See Restatement (Second) of Torts § 46 (1965) (setting forth IIED elements).
required a plaintiff to demonstrate that the defendant: (1) acted in an extreme or outrageous manner; (2) intentionally or recklessly caused emotional harm; and (3) that the plaintiff's resulting emotional harm was severe.\textsuperscript{150}

The traditional concern expressed in Wilkinson and thereafter associated with recognizing emotional harm-based torts in the absence of physical contact (or assault) was that claims would be too easy to allege.\textsuperscript{151} Courts would find the "floodgates" open to plaintiffs bringing specious emotional harm claims and to avoid this floodgates problem, the Restatement (Second) required harm to be "severe" and established the "outrageousness" element as the gatekeeper of the tort.\textsuperscript{152} No mere insult, indignity, or petty oppression could be the basis for IIED.\textsuperscript{153} Instead, the conduct must exceed all bounds of decency, must be "utterly intolerable in a civilized community."\textsuperscript{154} Although this concept is delineated, it is not all that clear: the tort "fails to define the proscribed conduct beyond suggesting that it is very bad indeed."\textsuperscript{155} The requirement of "extreme or outrageous conduct" has been called the "extraordinary feature" of IIED and its "essential fact," which to many comes to constitute "the entire tort."\textsuperscript{156}

The authors of the Restatement famously described the kind of conduct sufficient to trigger IIED as the kind that, if related ex post "to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous!'"\textsuperscript{157} IIED "requires more than simply doing something which may make another suffer."\textsuperscript{158} It requires doing something shocking to the conscience of the community.

\textsuperscript{150} Id. § 46(1).
\textsuperscript{151} See supra note 133 and accompanying text.
\textsuperscript{152} See McNamara, supra note 116, at 574 & n.18.
\textsuperscript{153} See Keeton et al., supra note 89, § 12, at 59 ("There is virtually unanimous agreement that such ordinary defendants are not liable for mere insult, indignity, annoyance, or even threats, where the case is lacking in other circumstances of aggravation.").
\textsuperscript{154} RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965).
\textsuperscript{155} Givelber, supra note 129, at 43 (emphasis added).
\textsuperscript{156} Id. at 46–47.
\textsuperscript{157} RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965).
\textsuperscript{158} Givelber, supra note 129, at 73.
Daniel Givelber described this as “a strange description of a rule of law.” Civil liability comes to “turn on the resentments of the average member of the community,” which threatens “to turn the passions of the moment into law.” The “outrage” element, first proposed by Prosser in the 1930s, replaced the 1948 focus on “privilege” with a far more obscure concept. Rather than confront explicitly whether the conduct was privileged, courts would instead gatekeep IIED claims by evaluating the nature of the conduct rather than its appropriateness. Importantly, “the Restatements have never attempted to provide a definition of ‘outrageous’ conduct.” As a result, the extent of “[l]iability for emotional distress is more akin to literature and poetry,” used by courts as a “purposely fuzzy category in order to extend the remedial reach of our tort law.”

In 1952, California courts first formally recognized the tort of IIED. In State Rubbish Collectors Ass’n v. Siliznoff, the state supreme court permitted a businessman to proceed on an IIED claim against defendants who had threatened to shut down his business and “beat [him] up.” The victim could not state a claim for assault because the threats were of future violence, not immediate violence, but the court recognized a cause of action against a person who “in the absence of any privilege, intentionally subjects another to the mental suffering incident to serious threats to his physical well-being, whether or not the threats are made under such circumstances as to constitute a technical assault.”

Between the 1930s and 1950s, “the stark distinction between physical and psychic injuries dissipated, at least for emotional injuries that were intentionally inflicted.” The Restatement

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159 Id. at 52.
160 Id.
161 See id. at 62 (discussing the replacement of the privilege approach with the outrageousness test).
162 Chamallas, supra note 127, at 2126.
163 Partlett, supra note 7, at 173.
164 Rustad & Koenig, supra note 48, at 49.
165 240 P.2d 282 (Cal. 1952).
166 Id. at 284.
167 Id. at 284–85.
168 Levit, supra note 75, at 142.
(Second) position has now been recognized in most jurisdictions,\textsuperscript{169} and section 46 is now fairly described as the majority rule in this country.\textsuperscript{170} In spite of this widespread adoption, courts have done little to tease out the elements of IIED claims or to situate IIED in the broader family of intentional torts: “Courts normally do not articulate why the conduct is or is not outrageous or even suggest why other decisions are not relevant.”\textsuperscript{171} Courts’ opinions typically “involve[,] little more than a recitation of the various comments to section 46 of the Restatement, the citation of a few cases, and a decision.”\textsuperscript{172} Courts interpreting the “outrageousness” requirement of IIED have produced a body of law that “is extremely fluid and invariably responds to changing cultural sensibilities.”\textsuperscript{173}

Even as courts came to recognize IIED, the flood of litigation predicted by the cause of action’s critics never materialized.\textsuperscript{174} During the 1980s, there were only 600 reported cases citing the Restatement section, averaging slightly more than one case per state each year.\textsuperscript{175} Empirical evidence demonstrated “that the volume of litigation in response to the judicial recognition” of the new tort was not “overwhelming.”\textsuperscript{176} Although no flood resulted, IIED has flourished as a cause of action in the United States.\textsuperscript{177}

\textsuperscript{169} Givelber, supra note 129, at 45.
\textsuperscript{171} Givelber, supra note 129, at 74.
\textsuperscript{172} Id.
\textsuperscript{173} Chamallas, supra note 127, at 2126.
\textsuperscript{175} See id. (noting the number of cases that had cited section 46 in the 1980s).
\textsuperscript{176} Delgado, supra note 30, at 171.
\textsuperscript{177} See F.A. Trindade, The Intentional Infliction of Purely Mental Distress, 6 OXFORD J. LEGAL STUD. 219, 223 (1986) (analyzing the acceptance of the tort in several countries). By comparison, IIED claims have rarely been litigated in the United Kingdom or Australia. Id.; see also Résumé, supra note 22, at 73 (“[C]ourts outside the U.S. have been slow to pick up the idea.”). In recent years, this may be explained by the expansion of civil remedies for harassment under statutory reforms. Cf. Joanne Conaghan, Enhancing Civil Remedies for (Sexual) Harassment: S.3 of the Protection from Harassment Act 1997, 7 FEMINIST LEGAL STUD. 203, 204 (1999) (discussing the role of courts in interpreting the United Kingdom’s Protection from Harassment Act and noting that “victims of harassment need no longer push the limits of the common law to create a tort of harassment ‘by the back door’”); Mark Lunney, Practical Joking and Its Penalty: Wilkinson v. Downton in Context, 10 TORT L. REV. 168, 187 (2002) (“[T]he need for [IIED], at least in the United Kingdom, might have diminished in light of the Protection from Harassment Act 1997 . . . .”). Other explanations
While the clear trajectory across American jurisdictions indicates expansion of IIED as a valid cause of action, there have been setbacks for advocates of the tort. Texas has recently restricted IIED claims, barring plaintiffs who could articulate other cognizable theories of recovery from slapping on additional assertions regarding IIED. These courts envision IIED as a "mere 'gap filler' that generally should come into play only when no other legal remedy is available."

The proposed Restatement (Third) simplifies the language of the section, and modifies its section number and title:

§ 45. Intentional (or Reckless) Infliction of Emotional Disturbance
An actor who by extreme or outrageous conduct intentionally or recklessly causes severe emotional disturbance to another is subject to liability for that emotional disturbance and, if the emotional disturbance causes bodily harm, also for the bodily harm.

This preserves the essence and nature of the Restatement (Second)'s version of IIED. The authors, revisiting the tort, found that the "extreme and outrageous conduct" element was "employed satisfactorily" by courts in weeding out inappropriate cases.
2. NIED and the "Impact Rule." Other examples of the expansion of rights in tort law vindicating emotional interests include the widespread recognition of claims for NIED\(^\text{183}\) and the elimination of the traditional rules requiring a plaintiff claiming emotional injury to document a physical manifestation of that injury.\(^\text{184}\) The Restatement (Second) provided no general remedy for negligently caused emotional harm.\(^\text{185}\) However, even in the absence of Restatement guidance, courts came to recognize the possibility of recovery for emotional harm resulting from negligence in two sets of circumstances: the "near miss" case and the "bystander" case,\(^\text{186}\) with the latter far more controversial than the former.\(^\text{187}\) The development of NIED "represents the current wave of expansion... in emotional distress liability."\(^\text{188}\) Gradually, courts incorporated their view of the recoverability of emotional harm from IIED and turned away from a rigid focus on the intent of the defendant, paving the way for "compensation for emotional pain alone" in the context of negligent misconduct.\(^\text{189}\) Only two states continue to prohibit recovery categorically in cases of NIED.\(^\text{190}\)

Under the nineteenth-century "impact" rule,\(^\text{191}\) "a plaintiff could recover for a fright-based injury only if [it] were coupled with a direct physical impact."\(^\text{192}\) The "near miss," regardless of the severity of the harm" caused, was not actionable.\(^\text{193}\) The initial

\(^\text{183}\) See Kircher, supra note 128, at 809 (noting that although most states permit the NIED claim, they vary in their approach).
\(^\text{184}\) See Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 46 cmt. g (Tentative Draft No. 5, 2007) (rejecting requirement of physical manifestations for restatement rule).
\(^\text{185}\) Id. ch. 8, scope note.
\(^\text{187}\) See id. at 822 ("Courts have been less willing to jettison the bystander rule than they were to reject the impact rule.").
\(^\text{188}\) Kontorovich, supra note 4, at 495.
\(^\text{189}\) Levit, supra note 75, at 144.
\(^\text{190}\) See Kircher, supra note 128, at 809 & n.110 (noting that Arkansas and New Mexico do not recognize claims for NIED).
\(^\text{191}\) "Impact," in this sense, has meant a slight blow, dust in the eye, a trifling burn, or the inhalation of smoke. See Ingber, supra note 88, at 816 n.212 (citing cases which discuss the meaning of "impact").
\(^\text{192}\) Chamallas & Kerber, supra note 186, at 814.
\(^\text{193}\) Id. at 814–15.
erosion of this rule occurred as common law courts found the “requisite impact in trifles, such as dust in ones eyes.”

With time, however, plaintiffs were relieved of the requirement of trumping up some impact to recover for fright-based injuries. A “strong majority” of courts had come to recognize the “zone of danger” NIED action by 1965. Under this form of NIED, “a victim who suffers a near miss of a physical impact negligently caused by the defendant can be compensated for mental distress arising from the incident . . . .”

Nearly half of jurisdictions now allow recovery for bystanders even where those victims were outside of the “zone of danger” and not directly threatened with physical injury. In those cases, “a bystander who witnessed an accident outside the zone of danger” can “recover under certain circumstances.” Many courts limit recovery to bystanders who share a close family relationship with an injured person. Moreover, the victim must generally contemporaneously observe the injury to a close family member, and some jurisdictions limit recovery for “latecomers to the event.” The recognition of “bystander” actions following the landmark California case of Dillon v. Legg has been the “most dramatic contemporary expansion of liability for emotional distress.”

This judicial expansion of NIED occurred in spite of the fact that the authors of the Restatement have provided little guidance on the matter (until the most recent draft). Although the
Restatement (Second) recognized “zone of danger” actions, it refrained from permitting the more controversial bystander action, yet courts continued to expand the range of liability along that dimension. The authors of the proposed Restatement (Third) view reliance by courts recognizing bystander NIED actions on section 46 comment c to be misplaced. That section was meant only to distinguish physical harm from emotional disturbance. Instead, the Restatement (Third)'s authors drafted a new section 46, which recognizes NIED claims in the “zone of danger” context and in connection with any other “specified categories of activities, undertakings, or relationships in which negligent conduct is especially likely to cause serious emotional disturbance.” The “specified...relationships” concept may prove broad enough to authorize “bystander” actions for close family members.

3. Watering Down the Requirement of a Physical Manifestation of Emotional Trauma. As with IIED claims, many early decisions recognizing NIED imposed a requirement that emotional disturbance manifest itself in the form of bodily harm. Early courts required physical illness as a manifestation of mental damage, sometimes considering proof of physical manifestation solely from harm or peril to a third person, unless the negligence of the actor has otherwise created an unreasonable risk of bodily harm to the other.” (citation omitted)).

Cf. MENDELSON, supra note 143, at 167 (noting that the Restatement would deny recovery for a person who was outside the zone of danger and not a relative of the injured person, even if the first person suffered bodily harm).

RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM ch. 8, scope note (Tentative Draft No. 5, 2007).

Id.

Id.

RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 46 (Tentative Draft No. 5, 2007).

Id. § 46(b).

Id.

See Diamond, supra note 36, at 144 (“While [IIED] originally required physical manifestation of the emotional distress, modern jurisdictions generally dispense with that requirement.”).

See Kontorovich, supra note 4, at 494 (“[E]motional distress was likely to be real and substantial when it resulted from a physical injury.”).
essential to the existence of the tort.\textsuperscript{212} Mental distress was recoverable but only for plaintiffs who suffered physically.\textsuperscript{213}

With time, however, this requirement has been watered down in both IIED and NIED, giving further support to the narrative told about the rising importance of emotional harm in the law of torts.\textsuperscript{214} The requirement that a victim of emotional distress experience slight physical injury to recover was "blatantly arbitrary" and did not "assure the genuineness of an emotional distress claim."\textsuperscript{215} The Restatement authors' 1948 release rejected an absolute necessity for physical results, a position echoed two decades later by the Restatement (Second).\textsuperscript{216} The authors of the proposed Restatement (Third) recognize the erosion of this requirement.\textsuperscript{217}

The courts have generally joined in this steady erosion of the requirement of a physical manifestation: "[T]he modern judicial trend is to abolish the physical manifestation requirement and permit a general negligence cause of action for the infliction of serious emotional distress without regard to whether the plaintiff suffered any physical injury or illness as a result."\textsuperscript{218} One observer noted that "[a]n ebbing majority of jurisdictions adhere to the traditional rule requiring some form of physical injury in order to obtain NIED . . . damages."\textsuperscript{219} Even in those jurisdictions, the rule has been significantly weakened as jurisdictions allow the "mere

\begin{itemize}
\item \textsuperscript{212} See Keeton et al., supra note 89, § 12, at 64 (noting some courts have "said flatly" that some kind of "nonmental damage" is necessary for an emotional harm claim).
\item \textsuperscript{213} Levit, supra note 75, at 144.
\item \textsuperscript{214} See Diamond, supra note 36, at 144, 147 (describing IIED's and NIED's transition from torts that had "some basis in physical context" to ones that "now stand[ ] without any nexus with physical impact").
\item \textsuperscript{215} Ingber, supra note 88, at 815.
\item \textsuperscript{216} Keeton et al., supra note 89, § 12, at 64.
\item \textsuperscript{217} See Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 45 cmt. k (Tentative Draft No. 5, 2007) ("If the conduct is extreme and outrageous and results in severe emotional disturbance alone, without any accompanying physical manifestation, liability is appropriate under this Section.").
\item \textsuperscript{219} Id. at 1.
\end{itemize}
ingestion of a toxic substance" to be the basis for a cause of action "even though a significant physical effect cannot be shown."\textsuperscript{220}

The Supreme Court of California, in *Molien v. Kaiser Foundation Hospitals*, eliminated the requirement, finding it no longer justified in light of changing societal understandings of mental injury.\textsuperscript{221} The court explained that the "manifestation" requirement:

supposedly serves to satisfy the cynic that the claim of emotional distress is genuine. Yet we perceive two significant difficulties with the scheme. First the classification is both overinclusive and underinclusive when viewed in the light of its purported purpose of screening false claims. . . . [T]he classification is underinclusive because it mechanically denies court access to claims that may well be valid and could be proved if the plaintiffs were permitted to go to trial.

The second defect in the requirement of physical injury is that it encourages extravagant pleading and distorted testimony . . . .\textsuperscript{222}

To *Molien* and other similar courts,\textsuperscript{223} "the field of psychiatry had advanced to the point where fraudulent claims could be detected."\textsuperscript{224}

The essential question is one of proof; whether the plaintiff has suffered a serious and compensable injury should not turn on this artificial and often arbitrary classification scheme.\textsuperscript{225}

\textsuperscript{220} Id. at 1–2.
\textsuperscript{221} See 616 P.2d 813, 821 (Cal. 1980) (crediting improvements in modern psychology as the reason for the shift away from the physical injury requirement).
\textsuperscript{222} Id. at 820.
\textsuperscript{223} See, e.g., St. Elizabeth Hosp. v. Garrard, 730 S.W.2d 649, 654 (Tex. 1987) (eliminating the manifestation requirement and determining the issue is one of proof best left to the jury), overruled by Boyles v. Kerr, 855 S.W.2d 593 (Tex. 1993); Gates v. Richardson, 719 P.2d 193, 200 (Wyo. 1986) (holding manifestation as an outdated "artificial line").
\textsuperscript{225} See Gates, 719 P.2d at 200 (rejecting use of "vague phrases such as 'serious emotional harm' or 'objectively determinable' " to limit recovery).
B. EXPANSION OF THE PRIVILEGE OF SELF-DEFENSE

The privilege of self-defense is an ancient concept dating to the earliest moral teachings of Rabbinical law.\textsuperscript{226} The privilege has been recognized in Anglo-American law for more than 500 years,\textsuperscript{227} and "it is now undisputed in the law of torts, as well as in the criminal law . . . ."\textsuperscript{228} Over recent decades, "American law has been moving in the direction of an expansion of the right of private individuals to use lethal force in self-defense."\textsuperscript{229} The expansion of self-defense has been "dramatic," though perhaps "unheralded."\textsuperscript{230}

In general, an actor is privileged to commit an otherwise tortious act in self-defense where the actor "honestly and reasonably believes that" it was (1) necessary to use force to (2) stop an imminent attack and (3) the amount of force used was proportional to the threatened force.\textsuperscript{231} The Restatement (Second) authorized the use of force in defense of person, land, and chattels, and against wrongful arrest and crime, and the Restatement (Third) leaves in place those rules.\textsuperscript{232}

The clearest indication of the expansion of the privilege of self-defense in American tort law concerns the use of force to defend against those who invade protected property interests even without directly threatening physical harm.


\textsuperscript{227} Although the right to use force in self-defense has been recognized since the Middle Ages, it was not until the nineteenth century that a person who used force in self-defense was relieved of financial responsibility for the consequences of his actions. Frederic S. Baum & Joan Baum, Law of Self-Defense 3 (1970).

\textsuperscript{228} Keeton et al., supra note 89, § 19, at 124; see also Donald H. Henderson, Eugene L. Golanda & Nancy C. Johnson, The Use of Force by Public School Teachers as a Defense Against Threatened Physical Harm, 54 EDUC. L. REP. 773, 774 (1989).

\textsuperscript{229} Cottrol, supra note 3, at 1068.


\textsuperscript{232} Restatement (Third) of Torts: Liability For Physical and Emotional Harm § 5 cmt. b (2005).
Traditionally, one had a privilege to use deadly force only when faced with "an imminent threat to life or basic bodily integrity." The common law imposed a duty to retreat, but the traditional "castle doctrine" exempted a homeowner from the obligation to retreat when in her own dwelling at the time of the attack. Under the traditional castle doctrine, however, the defender who used force must still carry the burden of proof that there was a threat.

A series of statutory reforms has expanded the privilege of self-defense beyond the scope of traditional common law. Broadly speaking, such statutes authorize shooting trespassers, felonious intruders, violent intruders, or dispossession. Although the majority of such statutes offer expanded rights of defense only for one's home or domicile, Louisiana has led the way in extending the castle doctrine to the use of force against carjackers. Most courts often reverse the traditional burdens of proof, allowing the defender of a home to rely on the presumption that she is threatened with death or serious bodily harm. The courts have shown "a tendency to enlarge the 'castle' concept . . . to mean all places from which the innocent victim of a murderous assault is not required to retreat, before resorting to deadly force, in a retreat rule jurisdiction."

A further indication of the expansion of the privilege of self-defense concerns the "duty to retreat." Traditionally, the common

233 Green, supra note 15, at 7.
234 Id. at 9.
235 See Young v. Warren, 383 S.E.2d 381, 383 (N.C. Ct. App. 1989) (stating that self-defense and defense of family are affirmative defenses to assault); see also J. David Jacobs, Privileges for the Use of Deadly Force Against a Residence-Intruder: A Comparison of the Jewish Law and the United States Common Law, 63 TEMP. L. REV. 31, 45 (1990) ("Defense of habitation similarly is not applicable to a little threat situation.").
236 See Green, supra note 15, at 5 (listing and describing four kinds of defense of premises statutes).
237 Id.
238 See id. at 12–14 (discussing Louisiana's statute permitting a person to use force against someone trying to enter a vehicle unlawfully and stating that it is "an immediate extension of its defense of habitation law").
239 See Jacobs, supra note 235, at 50–51 (discussing the status approach for residence-related felonies).
At common law, self-defense only excused the use of force when a victim had retreated “to the wall” to avoid a serious encounter. Unless the party claiming self-defense had “giveth back until he cometh to a hedge, wall, or other strait, beyond which he cannot pass,” he was not permitted to use force to defend himself.

The requirement of retreat, however, “ha[s] become increasingly controversial, and in some jurisdictions . . . [has] been legislated away.” The duty to retreat was never easy to rationalize in light of America’s frontier tradition. The modern law’s “rejection of the common law duty to retreat is an expansion of self-defense . . . .” As one court noted, “[i]t is generally agreed that one who can safely retreat is not required to do so before using nondeadly force”; the controversy concerns whether a person has an obligation to retreat before using deadly force.

The beginnings of the erosion of the common law duty to retreat came as courts endorsed the “True Man” justification for the failure to retreat before deploying defensive force. The “true man” is afforded a right to stand his ground when he is the target of force; he need not retreat. The Ohio Supreme Court’s articulation of the rule was quoted with approval by the U.S.
Supreme Court: "[A] true man who is without fault, is not obliged to fly from an assailant, who by violence or surprise maliciously seeks to take his life or do him enormous bodily harm." In imposing no duty to retreat before using nondeadly force, the authors of the first Restatement opined that "[r]etreat from aggression involves a loss of personal dignity, and in many parts of the country is regarded as carrying with it a stigma of cowardice which entails a risk, if not a certainty, of social and even business ostracism." 

At various times, law reformers, acting through the American Law Institute and the Uniform Law Commission, have sought to push American law towards requiring retreat before the use of deadly force. The Model Penal Code and the first and second Restatements each proposed that the privilege to use deadly force only apply where a person could not retreat safely, except that the duty to retreat was not present for a person attacked in his own dwelling place. Law reformers argued that "the interest of society in the life and efficiency of its members and in the prevention of the serious breaches of the peace involved in bloody affrays" justified imposing a duty to retreat before using deadly force.

It is fair to describe these law reform efforts as wildly unsuccessful. "A majority of jurisdictions [now] reject the common law duty to retreat" before using force in self-defense. Much of this liberalization has been through statutory reform; since 2005, "thirteen... states have radically liberalized their self-
defense statutes” to allow claims of privilege even where retreat was possible.257

A third sign of expansion in the law of defensive force concerns who can be protected by such force. Force may be used to defend another person threatened with “any kind of felonious invasion.”258 Initially, the privilege to defend others was confined to the defense of family members or other persons an actor owed a legal or social “duty to protect.”259 The authors of the first Restatement viewed their own articulation of defense of others—limited to family members and special relationships—as an expansion from traditional rules limiting defense of others to family members alone.260

The Restatement (Second) dramatically expanded the privilege to use force to defend others; the limitation found in the first Restatement to family members or special relationships was simply deleted from the relevant section.261 Force was now privileged “even though there is no relation which imposes a legal duty to act for the protection of another,”262 and even in the absence of family relation.263 Restrictions on the right to defend others were deemed “obsolete” and the Restatement now endorsed the position that “every man has the right of defending any man by reasonable force against unlawful force.”264

Finally, force can be used to defend against bodily contacts resulting not merely from intentional misconduct, but also from negligence on the part of the person against whom force is used.265

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258 See KEETON ET AL., supra note 89, § 20, at 130 (giving examples of felonious invasions, such as rape or serious bodily injury).
259 RESTATEMENT OF TORTS § 76(b) (1934).
260 Id. § 76 cmt. e.
261 See RESTATEMENT (SECOND) OF TORTS § 76 (1965) (laying out privilege of defending a third person).
262 Id. § 76 cmt. f.
263 Id. § 76 cmt. e.
264 Id. § 76 cmt. f, at 132 (quoting JOHN WILLIAM SALMOND, SALMOND ON THE LAW OF TORTS 375 (11th ed. 1935)) (internal quotation mark omitted); see also id. (recognizing that individuals may defend themselves against negligent misconduct but only where they reasonably believe that another’s conduct will cause them death or serious bodily harm).
265 See id. § 66 (establishing privilege of self-defense against some negligent conduct).
The first *Restatement* recognized that a privilege exists to protect oneself from bodily harm even where an actor "recognizes as merely negligent" the conduct of the person against whom force will be used. In the negligence context, however, the authors of the *Restatement* imposed an obligation to retreat where retreat would eliminate the necessity of using force in self-defense and restricted the kind of force used to nondeadly force where negligence did not threaten the actor with death or serious bodily harm. There is scant case law exploring this concept. This may be because in many instances, the use of force to defend against negligence is justified under the related privilege of private necessity. That privilege, however, is an incomplete one and would impose on the actor who destroys the property of another an obligation to compensate the property owner. Under section 63 and section 66, no such compensation obligation would result when force is used to defend against negligence.

Remarkably, the *Restatement's* position that force can be used to defend against bodily harm resulting from negligence means that force can be used to defend against both the zone of danger and bystander NIED claims. Since near-miss NIED involves a threatened physical contact, an actor who uses force in defense would be privileged even where the contact did not result and the near-miss inflicted only emotional harm. Similarly, since one can use force to defend third parties, a bystander would be privileged (in effect) to protect himself from emotional harm by

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266 *Restatement of Torts* § 64 (1934).
267 See id. § 64 cmt. b ("[N]o reasonable man would feel that he loses dignity or caste by stepping out of the way of danger to which another's negligence exposes him, nor could there be any imputation of cowardice in such a case.").
268 See id. § 66 (prohibiting the use of deadly force in self-defense unless the person reasonably believes the other's conduct will cause death or serious bodily harm).
269 *Restatement (Second) of Torts* § 197 (1965) (discussing the privilege of a person to enter the land of another to prevent serious harm to himself, to someone else, or to land or chattels).
270 See id. (creating liability to the property owner for "any harm done in the exercise of the privilege").
271 *Id.* § 76.
intervening forcefully to stop another person from suffering bodily contact as a result of a third person’s negligence. 272

III. IIED AND DEFENSIVE PHYSICAL FORCE

A. SITUATING IIED AND SELF-DEFENSE AMONG THE INTENTIONAL TORTS

1. Can One Use Force to Defend Against Emotional Harm? One explanation for why force could not be used to defend against IIED would be that the law never recognizes the right to use force to defend purely emotional or dignitary interests.

Such an explanation, however, is contradicted by the ready availability of forcible self-defense against assault and “offensive battery.” 273 Although battery can encompass contacts causing heinous physical injury, it can also “extend[] to protect purely dignitary interests”: “spitting in a person's face, cutting their hair, or kissing them without consent” can all be actionable in battery without proof of “injury.” 274 Indeed, the medieval origins of the tort of battery “only required unwanted physical contact, not injury, with compensation for mental distress being justified as a by-product of the interference with physical integrity.” 275

Though battery can often be viewed as a purely dignitary tort protecting emotional tranquility from disruption caused by unpleasant contact, it is also a tort against which defensive force is clearly justified. According to the Restatement, an actor has a privilege to use nondeadly force “to defend himself against unprivileged . . . offensive contact . . . which he reasonably believes that another is about to inflict intentionally upon him.” 276

Similarly, the common law tort of assault—against which self-defense may be deployed—is clearly a tort designed to protect an

272 See id. §§ 63, 66, 76 (setting forth the privileges of self-defense, self-defense of negligent conduct, and defense of a third party).
273 Cf. id. § 63 (permitting actor to use reasonable force to defend against harmful or offensive contact).
274 MULLANY & HANDFORD, supra note 23, at 46 n.157.
276 RESTATEMENT (SECOND) OF TORTS § 63(1) (1965).
actor's emotional well-being and dignity.\textsuperscript{277} Since its fourteenth-century origins, "the tort of assault has extended protection to a person's right to be free of emotional disturbance brought about by intentional threats of physical violence."\textsuperscript{278}

2. Can One Use Outrageous Conduct to Defend Against Physical Harm? One answer to the question of why force cannot be used against conduct amounting to IIED might be that IIED is simply not subject to the ordinary principles surrounding other intentional torts. But a second hypothetical seems to suggest that is not the case. Consider a person likely to be the victim of physical violence, amounting to a battery. Could that person use extreme or outrageous conduct designed to prompt severe emotional distress to defend against a physically harmful contact? The answer would appear to be "yes," as the authors of the Restatement have recognized.\textsuperscript{279} It may be that the "self-defense" claim simply defeats a finding of "outrageousness" against a person using extreme conduct to respond to a threat of physical harm.\textsuperscript{280} But "[a] fortiori, [self-defense] could excuse ... intentional infliction of emotional distress."\textsuperscript{281} Justification is said to be a "complete defense to a plaintiff's claim of [IIED],"\textsuperscript{282} and although privilege is "generally ... invoked as a defense to a charge of assault, battery, ...

\begin{itemize}
\item \textsuperscript{277} See MULLANY \& HANDFORD, \textit{supra} note 23, at 46 n.157 ("Assault, since its essence is causing an apprehension of imminent hostile or offensive contact, protects a purely dignitary interest.").
\item \textsuperscript{278} MENDELSON, \textit{supra} note 143, at 8.
\item \textsuperscript{279} See \textit{RESTATEMENT (SECOND) OF TORTS} § 46 cmt. g (1965) ("[T]here may perhaps be situations in which the actor is privileged to resort to extreme and outrageous words, or even acts, in self-defense against the other . . . ."); MASS. CONTINUING LEGAL EDUC., INC., \textit{CIVIL CAUSES OF ACTION IN MASSACHUSETTS, Intentional Infliction of Emotional Distress} 401 n.1516 (2008) ("There may, argues the commentary, be situations in which a defendant is privileged to resort to extreme and outrageous words, or even acts, in self-defense . . . .").
\item \textsuperscript{280} See \textit{RESTATEMENT (SECOND) OF TORTS} § 46 cmt. g (1965) (noting that there may be "circumstances of extreme provocation which minimize or revoke the element of outrage"); \textit{see also} House v. Hicks, 179 P.3d 730, 736 (Or. Ct. App. 2008) ("Any 'judgment of social standards' requires, in the first instance, an evaluation of whether the conduct in question is favored or made privileged by law, or disfavored or made unlawful by the legislature.").
\item \textsuperscript{281} See Daniel Austin Green, \textit{Gulliver's Trials: A Modest Proposal to Excuse and Justify Satire}, 11 CHAP. L. REV. 183, 201–02 (2007) (suggesting that a victim of emotional distress can respond in kind and claim a privilege of self-defense).
\end{itemize}
or false imprisonment, it also constitutes a defense to a charge of intentional infliction of emotional distress."\textsuperscript{283}

It is inaccurate to say that \textit{none} of the defenses to intentional torts are available in IIED claims. Clearly, \textit{consent} is a valid defense to IIED.\textsuperscript{284} A party that consents to conduct that would otherwise seem intolerable would have no cause of action. Consider the "hip hop battle," in which would-be rap stars hurl outlandish insults about one another's most vulnerable characteristics in an effort to please a crowd.\textsuperscript{285} The kind of insult that would be outrageous in the ordinary course of affairs is entirely acceptable—even if unwanted and aimed to wound\textsuperscript{286}—in this context.\textsuperscript{287} Perhaps such conduct would not be actionable because the context renders the conduct "non"-outrageous,\textsuperscript{288} but it seems equally plausible to view the weakness of such a claim as grounded in the defense of consent.

B. DOCTRINAL SYNTHESIS: CAN ONE USE FORCE TO DEFEND AGAINST OUTRAGE?

Traditional tort defenses like consent and self-defense are said to apply to IIED,\textsuperscript{289} and defendants have sought to raise self-

\begin{footnotes}
\item[284] See Schieffer v. Catholic Archdiocese of Omaha, 508 N.W.2d 907, 911 (Neb. 1993) (holding that consent is a valid defense against IIED).
\item[285] The "insult contest" of a rap battle has its origins in traditional insult games such as the "dozens," played for nearly a century in some parts of the American South. See \textit{generally} NEU, supra note 244, at 59–62 (describing "dozens").
\item[286] See id. at 61 ("In the movie rap battle [in rapper Eminem's biopic, \textit{8 Mile}], the insults aim at truth, indeed aim to wound through their accuracy—as well as through superior flair of statement and originality of rhyme.").
\item[287] See id. at 15 ("Sometimes a context may defang what might otherwise be biting insults, as in ritual insult contests between friends.").
\item[288] Cf. id. at 13 (suggesting that consent and special contexts, such as "friendly insult rituals," may render conduct innocuous).
\item[289] See, \textit{e.g.}, \textit{CAROLYN MCKINNEY GARRETT, 7 CAUSES OF ACTION} 663 (2008) (numerous cases recognize that "there will be no liability if the defendant's conduct consists of the assertion of a legal right in a permissible way"); Cavico, \textit{supra} note 7, at 161–62 ("[T]he traditional intentional tort defenses of consent and self-defense can form valid affirmative defenses."); Nancy L. Cook, \textit{In Celia's Defense: Transforming the Story of Property Acquisition in Sexual Harassment Cases into a Feminist Castle Doctrine}, 6 VA. J. SOC. POL'Y \& L. 197, 246 (1999) (noting that where sexual harassment constitutes a tort, it "could form the basis for a defensive response").
\end{footnotes}
defense against claims of IIED.\textsuperscript{290} There are, however, relatively few published cases analyzing the application of the self-defense privilege against conduct claimed to amount to IIED, and in nearly all of those cases, the claim of IIED was "bundled" together with traditional torts like battery and assault, to which the self-defense claim clearly applies.\textsuperscript{291} Even those cases that exist fail to confront the issue directly.\textsuperscript{292} That is, they may seem to address the use of

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\textsuperscript{291} See, e.g., Swann v. City of Richmond, 498 F. Supp. 2d 847, 873–74 (E.D. Va. 2007) (holding that the police officers acted in self-defense when shooting at a passenger in a moving vehicle and were not liable for assault, battery, gross negligence, or IIED, because "[t]he defendants were acting not with an intention to inflict emotional harm, but with an intention to defend themselves from what they reasonable [sic] perceived to be a danger of death or serious bodily injury"); Thomson v. Salt Lake Cnty., No. 2:05-CV-352 TS, 2006 WL 3254471, at *8 (D. Utah Nov. 7, 2006) ("Because [the defendant]'s actions [were] taken in self-defense, they cannot be extreme and outrageous . . . "); aff'd, 584 F.3d 1304 (10th Cir. 2009); Carter v. Cnty. of Orange, No. G032419, 2005 WL 1871119, at *6 (Cal. Ct. App. Aug. 9, 2005) (recounting jury's decision that the sheriff's deputies' actions in self-defense rendered them not liable for negligence, battery, or IIED); cf. Allstate Ins. Co. v. Devlin, 913 A.2d 1174, 1176, 1179 (Conn. Super. Ct. 2006) (holding that factual issues concerning an insured's altercation and his claim of self-defense with an alleged victim precluded summary judgment in an action where the homeowner's insurance company sought declaratory judgment that it had no duty to defend the insured in the alleged victim's underlying suit).

\textsuperscript{292} I have identified only one published case where a court awarded damages to a person who used force to defend himself from an alleged intentional infliction of emotional distress. In Larsen v. Uriona, plaintiff Larson sued defendant Uriona for assault and battery after he was shot by the defendant. 693 P.2d 1127, 1128 (Idaho Ct. App. 1985). The defendant successfully counterclaimed for intentional infliction of emotional distress and assault, and damages were awarded against the plaintiff for assault and IIED, in spite of the defendant's use of violent force. \textit{Id.} According to the court's recitation of the facts:

At approximately 12:30 a.m. on October 24, 1980, respondent, Uriona, heard his dog barking and went out into his backyard to investigate. Uriona was barefooted and wearing only a bathrobe. He carried with him a flashlight and a loaded pistol. Uriona heard a rustling noise and shone his flashlight in that direction. The flashlight revealed appellant, Larsen. Larsen ordered Larsen to come out into the open and lie down on the ground. When Larsen did not respond, Uriona fired two shots into the ground. Larsen then moved into the open and laid face down on the ground. Uriona claims that at this point Larsen shouted, "Jim, get the rifle on him." Larsen denies making the statement. Uriona shouted to his wife to call the police, and when Larsen started to get up, Uriona shot him in the foot. Uriona then fired two more shots into the ground. Larsen turned and started away from Uriona. Uriona fired two more shots, hitting Larsen in the arm and back. Larsen exited Uriona's backyard, got on his bicycle, and
\end{footnotesize}
force in response to outrageous conduct, but typically—because of
the presence of other potential torts against which force could be
legally deployed—they do not focus on the role of outrageous
conduct in justifying defensive force.\textsuperscript{293}

The absence of litigated cases, however, should not be
interpreted to mean that no such cases exist or that they could not
arise.\textsuperscript{294} Rather, it may reflect an ongoing “responsiveness of the
legal system to certain types of injuries,” with doctrinal
formulations affecting the number of suits filed under various
characterizations.\textsuperscript{295}

More importantly, the absence of discussion of the issue in the
litigated cases to date is striking evidence of the failure of courts to
integrate IIED into the broader doctrines of modern tort law.\textsuperscript{296}
Two threads run through many of the doctrinal objections
described in this section to permitting force to be used to defend
against outrageous conduct. In practice, if not in doctrine, the tort
of IIED is parasitic in nature, and as such, it usually is pled
alongside other longstanding and well-established torts.\textsuperscript{297} Courts
focus any discussion of self-defense on those torts, rather than on
the conduct amounting to IIED.\textsuperscript{298} Second, the key elements of
IIED—in particular, the definition of “extreme or outrageous

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rode a short distance before collapsing. Uriona returned to his house and
waited for the police to arrive.
\end{flushleft}
\textit{Id.} The jury awarded damages to Uriona, which were upheld on appeal, in spite of the fact
that Uriona had used physical force against plaintiff Larsen. \textit{Id.} at 1128, 1130. Again,
however, it is not clear whether the damages awarded were for assault or for IIED. Clearly,
the jury could have found that Uriona placed Larsen in apprehension of imminent harmful
or offensive contact, and thus the self-defense claim may have been predicated as defense
against assault rather than defense against IIED.

\textsuperscript{293} See \textit{supra} note 291 (discussing the cases that do not address the precise issue).

\textsuperscript{294} See Martha Chamallas, \textit{Removing Emotional Harm from the Core of Tort Law}, 54
\textit{VAND. L. REV.} 751, 755 (2001) ("[T]he number of lawsuits not only affects what is considered
to be the 'core' of tort law, but what is regarded as 'core' affects the number of suits filed.").

\textsuperscript{295} \textit{Id.}

\textsuperscript{296} Cf. Russell Fraker, Note, \textit{Reformulating Outrage: A Critical Analysis of the
IIED a disfavored cause of action and "appear wary of holding defendants liable for
plaintiffs' emotional injuries").

\textsuperscript{297} See discussion \textit{infra} Part III.B.2.d (analyzing reasons for the tort's parasitic nature).

\textsuperscript{298} See \textit{supra} note 291.
conduct," are deliberately amorphous and indefinite. This can give courts room to deny the application of self-defense even where it would seem to be appropriate. These two factors mean that the precise limitations and contours of the new tort remain shrouded in mystery.

Most IIED cases litigated to the point of published opinion involve efforts at self-help by creditors to get debtors to pay a debt or otherwise comply with the terms of a contract. An IIED claim may be easier for a debtor to litigate than a breach of contract or products liability claim, and certainly it is a simple matter to add a claim of IIED in a counterclaim to a formal claim of breach of contract. The moral nature of IIED makes the claims relatively ambiguous and cheap to argue, and an IIED counterclaim can help augment the settlement value of the case for an otherwise clearly defaulting contract party. The fact that so much of the published doctrine in this area comes from existing commercial relationships—in which outrage is committed over the phone or by letter—may help explain why it rarely surfaces in contexts where physical violence might be an appropriate, likely, or proportional response.

Because IIED has been structured in such an indefinite fashion and because of its parasitic nature, the bottom line is that finding a clean case in which to test the theory that a self-defense

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299 See Chamallas, supra note 127, at 2126 (noting the fluidity of the outrageousness element).
300 See Givelber, supra note 129, at 63–64 & nn. 102–03 (giving examples of cases of this kind). Such cases may also be the kind in which courts are most likely to recognize valid IIED claims because it is easiest to set out standards of behavior that aggressive conduct can be found to exceed from within the boundaries of well-understood social and commercial relationships. See id. at 63 (stating that courts in these cases “require a basic level of fair procedure and decency”). It is easier in existing relationships to identify the appropriate rules of fair play and thus spot those instances in which a party has deviated in particularly shocking fashion from those established norms. See id. at 69 (cases reflect “a court’s need to at least appear to ground decisions in the context of a broader social response to an identified social problem”).
301 See id. at 64 (noting that a claim of IIED is “a relatively easy suit to bring in its own right”).
302 See id. (noting that a plaintiff can bring this claim cheaply because he does not need to rely on expert witnesses or exhaustive discovery).
303 Id. at 65 (indicating the small stakes for which a defendant is usually playing and stating that such claims can lead to settlements well over the contractual obligation).
privilege applies has proven virtually impossible.\textsuperscript{304} The doctrinal formulation of IIED and the practical circumstances in which it tends to be alleged mean that clear resolution of the limits of the tort (and the legal obligations of one who uses force to defend against outrageous conduct) will likely continue to prove difficult for courts.

1. \textit{Restatement Language, Self-Defense Laws, Court Articulation.} Philosopher Jerome Neu poses the question, "Does the privilege of self-defense extend to provocation by verbal taunts?"\textsuperscript{305} He responds, "I think the answer in the United States is generally no. Here the distinction between words and sticks and stones takes legal hold."\textsuperscript{306} Prosser and Keeton explain that the privilege of self-defense allows the use of "all reasonable force to prevent any threatened harmful or offensive bodily contact, or any confinement, whether intended or negligent"\textsuperscript{307} and that the defendant "is not privileged to vindicate his outraged personal feelings at the expense of the physical safety of another."\textsuperscript{308} A person whose "honor and pride have been outraged has redress in the courts"\textsuperscript{309} and need not use force in self-defense.

The \textit{Restatement} follows this articulation: force is privileged "against unprivileged harmful or offensive contact or other bodily harm."\textsuperscript{310} The authors of the \textit{Restatement} have long held the view that force cannot be used to prevent "words or conduct not amounting to an offensive bodily contact or an apprehension of a harmful or offensive bodily contact."\textsuperscript{311}

In the criminal law context, courts have repeatedly held that "one may not use force in self-defense from verbal assaults . . . "\textsuperscript{312} Courts have held that "no provocative act which does not amount to a threat or attempt to inflict injury, and no conduct or words, no matter how offensive or exasperating, are sufficient to justify a

\textsuperscript{304} See \textit{supra} notes 258–303 and accompanying text (broadening discussion of these issues).
\textsuperscript{305} NEU, \textit{supra} note 244, at 148.
\textsuperscript{306} \textit{Id.}
\textsuperscript{307} KEETON ET AL., \textit{supra} note 89, \S\ 19, at 124 (emphasis added).
\textsuperscript{308} \textit{Id.} at 126.
\textsuperscript{309} BAUM & BAUM, \textit{supra} note 227, at 27.
\textsuperscript{310} RESTATEMENT (SECOND) OF TORTS \S\ 63(1) (1965) (emphasis added).
\textsuperscript{311} RESTATEMENT OF TORTS ch. 4, topic 1, scope note (Tentative Draft No. 1, 1925).
\textsuperscript{312} State v. Riley, 976 P.2d 624, 629 (Wash. 1999).
battery." The defense of self-defense is limited to circumstances in which a person is threatened with the use of force; for a court to permit self-defense arguments where the defense was against "mere words or conduct without force" has been ruled reversible error. Using force to stop another from continuing to dispense insult and epithet is not permitted. As one court stated, "a 'victim' of words is not permitted to respond with violence based on the words alone." Model jury instructions provide:

No words of abuse, insult or reproach addressed to a person or uttered concerning him, howsoever insulting or objectionable the words may be, if unaccompanied by any threat or apparent threat of great bodily injury or any assault upon the person or trespass against lands or goods, will justify him in an assault with a deadly weapon, and the provocation only of such words will not constitute a defense to a charge of having committed any assault.

Although words and conduct might be extreme or outrageous, if they do not amount to a threat of physical injury the criminal law does not afford a privilege of self-defense. Even "[t]he circulation of the most outrageous, mendacious, and slanderous reports against another, will not justify such other in murderously assaulting the slanderer in resentment." The law seems clear:

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313 People v. Mayes, 68 Cal. Rptr. 476, 478 (Ct. App. 1968).

314 See Gibbs v. State, 789 So. 2d 443, 445 (Fla. Dist. Ct. App. 2001) (holding that the lower court erred when it did not make the jury aware that the word "provoked" did not refer to verbal taunts without force).


316 Riley v. Payne, 352 F.3d 1313, 1320 n.5 (9th Cir. 2003).

317 See People v. Martin, 162 Cal. Rptr. 133, 139 (Ct. App. 1980) (quoting CAL. JURY INSTRUCTIONS § 9.07 (2010)); see also 4 OHIO JURY INSTRUCTIONS § 421.23(1) (2010) ("Resort to such force is not justified by abusive language, verbal threats, or other words, no matter how provocative.").

318 MODEL PENAL CODE § 3.041 (Proposed Official Draft 1962) (stating that only the threat of "unlawful force" can justify the use of force in self-defense).

“One cannot attack without first being attacked.”\textsuperscript{320} Although at one point in time a party who invites an attack through provocation could not later claim self-defense,\textsuperscript{321} the law in nearly every state has moved away from that proposition.\textsuperscript{322}

Similarly, state laws regulating the use of force in self-defense spell out that it is permitted only in response to physical violence or threats. For example, Colorado's law provides that "a person is justified in using physical force upon another person in order to defend himself or a third person from what he reasonably believes to be the \textit{use or imminent use of unlawful physical force} by that other person."\textsuperscript{323} To justify the use of force, a person must be under a threat of violence. In its current conceptualization, tort law does not consider emotional assaults to rise to that level.

2. \textit{Explanations.}

\textbf{a. \textit{Is Force Ever Proportional to Emotional Harm?}} One of the cornerstone principles of self-defense law is that force is only privileged to the extent that it is proportional to the threat posed. The proportionality principle limits the use of force to "that which the actor correctly or reasonably believes to be necessary for his protection."\textsuperscript{324} This is not precisely the same as saying that force can only be met with equivalent force. Tort law privileges bringing a gun to a knife fight if that is what is necessary to avoid serious bodily harm or death.\textsuperscript{325} Where an actor exceeds the scope of force

\begin{footnotes}
\item[320] \textit{Lawrence v. Womack}, 23 S.W.2d 190, 192 (Mo. Ct. App. 1930).
\item[321] \textit{See, e.g.}, \textit{Jones v. Commonwealth}, 216 S.W. 607, 608 (Ky. Ct. App. 1919) ("It is settled law that one who brings on the difficulty by his own wrongful act forfeits his right to plead self-defense . . . .").
\item[322] Generally, the aggressor doctrine holds that a person who initiates an aggressive interaction must retreat before claiming a privilege of self-defense. \textit{State v. Pigott}, No. 54437-3-I, 2005 WL 2716555, at *2 n.7 (Wash. Ct. App. Oct. 24, 2005) ("[T]he aggressor cannot claim self-defense because the victim of the aggressive act is entitled to respond with lawful force."). States have moved away from or severely limited this rule. \textit{See, e.g.}, \textit{Landry v. Bellanger}, 851 So. 2d 943, 953 (La. 2003) (deciding that the aggressor doctrine no longer has a place in Louisiana law).
\item[323] \textit{COLO. REV. STAT. ANN.} § 18-1-704(1) (West 2004) (emphasis added).
\item[324] \textit{RESTATEMENT (SECOND) OF TORTS} § 70(1) (1965).
\item[325] \textit{Cf. id.} § 70(1) cmt. b (listing the factors to be considered in deciding whether force is excessive, such as the amount of force exerted, the means by which it is applied, and the circumstances under which it is applied).
\end{footnotes}
One possible explanation for the doctrinal articulation limiting the use of force to situations in which a person is threatened with bodily harm is that force—which imposes bodily harm—can never be proportional to emotional distress. One question to ask is: "Should society ever expect individuals to engage in physical ‘self-defense’ against verbal insults?" Or, would such a response always be considered disproportionate to the emotional interest protected?

Proportionality is objective, in the sense that the level of force deployed in self-defense must be deemed reasonable. It may be that social understanding—the core of reasonableness—demands that verbal assaults be responded to, at most, with other verbal assaults: “Existing conventions may suggest that one should respond to assaults, including verbal assaults, on things which one holds sacred, but there is little reason to think that the response should be in terms more violent than the mode of assault.”

The suggestion that the interest threatened by IIED (emotional tranquility) can never be proportional to the interest threatened by defensive force (physical security) seems contrary to prevalent patterns of damage awards in tort cases. In measuring the “proportionality” of emotional and physical harm, it may seem that we are trying to compare apples and oranges, but we have a ready measure available for making that comparison: money. Emotional distress claims are vindicated with substantial direct monetary compensation. In the military funeral picketing case, actual emotional damages were assessed at nearly $3 million. Surely some manner of battery or false imprisonment of the outrageous picketers—even if unprivileged—would not result in the same level of damages. To say that a $50,000 battery is not

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326 See id. § 71(a) ("[T]he actor is liable for only so much of the force . . . as is excessive . . . .").
327 NEU, supra note 244, at 145.
328 Id. at 146.
329 See supra Part I.E.
330 Battery cases frequently award damages well below the $100,000 threshold. See, e.g., Correa v. Stevens, No. CV054012470, 2008 WL 3852417, at *4 (Conn. Super. Ct. July 18, 2008) (awarding $21,812 to a battery victim stabbed in the leg by the sharp end of a stick);
proportional to a $3 million IIED requires deliberately ignoring the law’s faith in monetary measures of human suffering.\textsuperscript{331}

It may be that concern over escalation of hostile interactions explains a reluctance to deem force proportional to emotional harm: “[T]here is no reason why the state should encourage violence rather than restraint in the face of taunts.”\textsuperscript{332} Concern about escalation, however, would seem to be equally applicable in any instance of self-defense. A person could escalate a situation by responding to blows with a more damaging weapon, such as a cane or a stone.\textsuperscript{333} Traditional self-defense principles—necessity, proportionality, and immediacy—are considered sufficient in other contexts to prevent inappropriate conflict escalation.\textsuperscript{334} There is no reason in principle to assume that the same tests could not prevent real escalation in cases where force is used to defend against emotional attack. To say that nondeadly force inevitably represents an escalation when used to defend against emotional harm implies that emotional harm can never be as serious as nondeadly force.

Moreover, there may be times when the use of force to stop IIED could reduce the overall level of violence. Consider the case of school bullying. The victim of bullying may suppress his rage, until the point that he “blows up” and directs force not just at the instigator of his oppression, but at his entire school or community. The prevalence of victimization by bullies among the perpetrators of school shootings is tragic testimony to the potential for emotional distress—if unchecked—to spur violence. While escalation is a legitimate concern, on balance, the authorization to

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\item Craige v. Broome, 869 So. 2d 242, 243, 246 (La. Ct. App. 2004) (affirming trial court’s award of $15,000 in damages to a victim whose attorney slammed her head against a wall).
\item It might also be that the law denies the right to use force in self-defense against emotional harm out of a belief that where particularly severe, the IIED will lead to damages that will more than offset the plaintiff’s liability exposure for the use of modest amounts of force.
\item See People v. Francis, 719 N.E.2d 335, 340 (Ill. App. Ct. 1999) (holding that swinging a knife at the companion of a pipe-wielding potential assailant would justify jury instructions for self-defense).
\item See Eyal Benvenisti & Ariel Porat, Implementing the Law by Impartial Agents: An Exercise in Tort Law and International Law, 6 THEORETICAL INQUIRIES L. 1, 24 (2005) (stating that these principles can “reduce the likelihood of un-called-for escalation”).
\end{itemize}
use force to stop outrageous emotional assaults might reduce the rate of violence in settings such as the schoolhouse.

b. Difficulty of Distinguishing Force Used to Prevent Emotional Harm from Retaliation. The law of self-defense has long emphasized that force cannot be used in retaliation, only to prevent harm: "Revenge is not a defense; for compensation the plaintiff must look to the law." The Restatement (Second) warns that the privilege of self-defense "does not extend to acts done as a punishment or in retaliation for a past aggression or attempt at aggression or as a warning against the repetition thereof." The purpose of an act of self-defense must always be "to repel" an initial attack.

One explanation for why force is not permitted to defend against IIED may be the difficulty courts would have in distinguishing when force was used to prevent emotional harm from when force was used to avenge it. An actor seeking to justify the use of force to defend against outrage would need to demonstrate that the force was deployed as a preventative measure, rather than a response. The difficulty of evaluating evidence on such a claim might lead to a preference for a doctrine that categorically denies the availability of the self-defense privilege to defend against IIED.

This may be compounded by the physiological aspects of human responsiveness during periods of emotional distress. An actor suffering from the kind of emotional distress needed to state a claim for IIED may be sufficiently slowed by that very trauma so that any response aimed at preventing harm actually appears to be retaliatory. Studies have demonstrated that emotional distress slows reaction times by as much as 100%. It is likely that any response to IIED would appear, ex post, to be too late to constitute prevention rather than retaliation.

c. Temporal Considerations. A person using force against outrageous conduct to stop the imposition of emotional harm

335 Keeton et al., supra note 89, § 19, at 126.
336 Restatement (Second) of Torts § 63 cmt. g (1965).
337 See Fletcher & Ohlin, supra note 226, at 46 (disagreeing with the idea that a victim of aggression has the right to kill in response to an attack).
would also face a twofold challenge arising from the timing of the use of force. To be effective in stopping an emotional assault, force might be deployed too soon, in the sense that the initial wrongdoer's actions may not yet have clearly manifested themselves as amounting to IIED. In particular, even where it is clear that a wrongdoer is committed to a course of extreme and outrageous conduct (one element of IIED), it may not yet be clear that the victim will suffer severe emotional distress (a second element). A court would need to be convinced that the outrageous conduct would have caused severe distress were it permitted to continue unabated; yet, if a person has used defensive force, it might be hard to know for sure that this result was preordained.

This problem, however, arises in ordinary self-defense cases as well, since one cannot always be sure that a person committing a physical attack will succeed in actually inflicting a contact on his chosen victim. “[S]elf-defense contains both objective and subjective aspects,” writes Kimberly Kessler Ferzan. A “defender’s action is only justified when the aggressor would have carried through with her intention and her bullet would have hit the defender.” Since self-defense that succeeds in preventing an attack means the attack never occurred, the law focuses on the subjective beliefs of the victim that harm was likely to occur absent defensive measures. But the law also requires those beliefs to be objectively reasonable: “Justifiable self-defense requires both (1) the existence of objective triggering conditions and (2) the prediction that harm will occur.” Where reasonable people would think that a claim for IIED would likely lie and that force could prevent it, the objective–subjective requirement for the use of self-defense would arguably be met.

A second temporal problem concerning the use of force to defend against emotional harm arises even where a user of force can demonstrate severe emotional distress. This problem occurs where a person is the victim of a completed IIED but uses force to stop the continuation of the outrageous conduct or exacerbation of

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340 Id. at 716.
341 See id. at 714 (“[T]he limitations on self-defense’s use are assessed subjectively.”).
342 Id. at 747.
emotional harm. But once a person has used force, it might prove impossible to say for sure which components of his demonstrated emotional distress came before the use of force and which came after. It might very well be that even though an actor feels justified in using force, the use of force itself could cause emotional distress. Courts would be forced to evaluate whether IIED justified the use of force but perhaps are ill-equipped to isolate the guilt and shock that come from being the aggressor even where aggression was justified by the need for defense.

d. Because IIED May Always Be Accompanied by Batteries, Trespasses, and Conversions Where One Might Be Inspired to Use Force, the Force May Be Privileged in Defense of Another Interest. Some courts have rejected IIED claims, even where the elements of IIED seem provable, where another tort claim could also have been brought (or was brought) against the wrongdoer. In this view, IIED is seen as a “parasitic” tort—something only pled where another valid tort claim exists. This reading of IIED might prohibit a defendant from invoking outrage as the basis for self-defense where another tort could also be presented. More significantly, it reinforces the idea that defendants who use force might never bring up the fact that they were the target of IIED because of a more accessible, “traditional” tort against which self-defense privileges clearly apply.

There are numerous examples of IIED claims that could also have been (or were also) pled using traditional battery or trespass principles: improper fondling of a patient’s breasts by a physician; sexual abuse of a minor by stepfather over a three-year period; sexual abuse of a minor; 150–200 episodes of

343 See Cavico, supra note 7, at 162 (pointing to New York courts that will not recognize a claim for IIED where the conduct causing the IIED “falls within the ambit of traditional tort liability” (citations omitted) (internal quotation mark omitted)).

344 See Fraker, supra note 296, at 1018 (observing that the overlap between IIED and other tort claims “produce[s] confusion over both the appropriate boundaries of IIED and its status as either superfluous or a gap-filler”).

345 See McQuay v. Guntharp, 986 S.W.2d 850, 850 (Ark. 1999) (deciding that a complaint filed by a group of female patients stated a claim for outrage separately from a claim for battery).

sexual abuse of a minor by an uncle over a decade-long period;\textsuperscript{348} prolonged physical and sexual abuse;\textsuperscript{349} physical and mental abuse of a spouse;\textsuperscript{350} breaking in to another's house and installing a hidden camera.\textsuperscript{351} Were the victims in scenarios such as these compelled to use force in self-defense, they might simply prefer to claim defense against battery or trespass rather than against IIED in justifying their actions.

In Zalnis, the case in which a car dealer harassed a customer in an effort to retrieve a car sold at a loss, for instance, the defendants both laid hands on the plaintiff and wrongfully took possession of her chattel.\textsuperscript{352} Perhaps any force used by the plaintiff in defense would have been justified as preventing battery, false imprisonment, or as reasonable self-help to reclaim a chattel. Even though the court found an IIED action to lie, self-defense could have been justified without reference to the IIED claim. Because the actor has a clear privilege to defend her bodily integrity and property, her psychic tranquility may be indirectly protected even though never formally recognized as a basis for self-defense.\textsuperscript{353} Similarly, many victims of school bullying are tormented not just psychologically but physically and could hang their hopes of a valid self-defense claim (were they to use responsive force) on the physical, rather than emotional, torment with which they were threatened.

While the "parasitic" nature of IIED may explain why it is rarely offered as a source of justification or excuse for physical


\textsuperscript{348} See Roth v. Wiese, 716 N.W.2d 419, 425 (Neb. 2006) (stating that plaintiff asserted several claims, including IIED).

\textsuperscript{349} See Curtis v. Firth, 850 P.2d 749, 752 (Idaho 1993) (reviewing a case where the jury awarded the victim $225,000 for IIED but only $50,000 for battery).

\textsuperscript{350} See Feltmeier v. Feltmeier, 777 N.E.2d 1032, 1034 (Ill. App. Ct. 2002) (deciding whether a former wife could go forward with an IIED claim alleging "a pattern of physical and mental abuse" where the abuse had gone on for the eleven years of their marriage).

\textsuperscript{351} See Miller v. Brooks, 472 S.E.2d 350, 352–53 (N.C. Ct. App. 1996) (recounting that plaintiff filed action alleging "invasion of privacy, [IIED], trespass, and damage to real property").

\textsuperscript{352} See supra Part I.c.

\textsuperscript{353} See Bell, supra note 4, at 342 ("One might argue to those in the original position that they could simply protect themselves against most significant psychic injuries simply by entitling themselves to their own bodily integrity and physical possessions.").
force, it does a poor job of explaining why it should not be available. If courts are in fact encouraging plaintiffs to point to trivial "physical" threats to justify defensive force, they are merely repeating the pretense that early advocates of the IIED tort found in an excessive focus on "technical battery" and "trivial" touching.\textsuperscript{354} IIED law itself evolved so that "the real interest which is being protected" would "stand[ ] forth very clearly."\textsuperscript{355} IIED emerged so that "the entire cargo of technical torts with which the real cause of action has been burdened" could be jettisoned.\textsuperscript{356} If self-defense users must make reference to such technical torts, we truly have not progressed.

On a related note, one might not see IIED offered as an excuse in criminal self-defense claims because of the availability of an alternative means of introducing evidence of victim distress to rebut criminal charges.\textsuperscript{357} Where a victim has suffered "extreme emotional distress," a claim of diminished capacity or insanity might be available against a criminal charge. The distress caused by an action amounting to IIED could negate the culpability\textsuperscript{358} of the defender's use of force, without requiring the defender to explicitly claim self-defense. However, in tort law insanity is not generally a defense. No diminished-capacity defense would be available in the tort claim against a defender, unless the law recognizes a privilege to use force to defend against IIED.

e. \textit{Does the Use of Force by a Victim Remove the \textit{"Outrage"} from the Story or Contradict a Suggestion of Severe Distress?} The "heart" of the tort of IIED is the "quality of [the] defendant's

\textsuperscript{354} See Prosser, supra note 8, at 880–87 (making this same argument in 1939).
\textsuperscript{355} Id. at 887.
\textsuperscript{356} Id. at 892.
\textsuperscript{357} See People v. Mejia-Lenares, 38 Cal. Rptr. 3d 404, 409–11 (Ct. App. 2006) (discussing role of diminished capacity defense in connection with self-defense).
conduct,” specifically whether it can be judged sufficiently beyond the ordinary course of human interaction to be deemed "outrageous." A number of factors have been identified by courts in helping to draw the distinction between outrage and petty oppression called for by section 46 of the Restatement (Second). The more control or dominance the defendant has in a relationship, the more likely a finding of outrage. Extreme conduct sometimes "smacks of extortion" and involves abuse of a position of power or authority over the victim. Indeed, at the "heart" of the modern tort of IIED is "the sense that the tortious conduct consists of the abusive exercise of power that the defendant holds over the plaintiff."

Perhaps the use of physical force by the target of an IIED helps remove the outrage from the underlying sequence of events. A physical response, in a sense, demonstrates that the "victim" of outrageous conduct had some power to resist. Moreover, once a victim uses force to defend himself, the aggressor, of course, has a corresponding privilege of self-defense, and some courts have opined that "actions taken in self-defense cannot be extreme and outrageous." Where conduct is legally justified, it is "always tolerable under the circumstances that justify it." Once an IIED victim has used force, it may be hard for courts to find the conduct that amounted to IIED itself intolerable.

A physical response is, in a sense, a sign of strength. In practice, courts have seemed more willing to find "outrageousness"
in the context of existing commercial relations between "people who occupy unequal bargaining positions and are bound (or apparently bound) by voluntary agreements."\textsuperscript{368} Doctrine has not developed with similar clarity in cases where parties are not bound by contract.\textsuperscript{369} It would be in precisely this latter kind of case, however, where self-defense might be offered as a claim; in such cases, the very fact that a party has chosen violent recourse may demonstrate that her "bargaining position" was not so unequal. IIED as currently structured typically requires plaintiffs to present themselves to courts "as beaten and broken victims in order to be credible candidates for redress."\textsuperscript{370} Where an IIED victim has used force, she has arguably demonstrated her equality with her attacker, and the circumstances read as a whole might no longer strike a court as "outrageous."

The outrage element is not doctrinally well-developed; instead, "[c]ourts are literally left to their own devices to figure out whether conduct qualifies as outrageous. . . . [A] court can believe that any given decision represents a response to particularly egregious facts and not a general statement respecting legal rights."\textsuperscript{371} But in a well-crafted hypothetical, outrageous conduct could temporally precede a victim's response, and on the narrow question of whether force could be used to preempt outrageous conduct, the doctrine has no convincing explanation for why force could not be deployed.

The use of physical violence by an IIED victim may also affect a court's assessment of whether the victim's emotional distress is significant enough to meet that requirement of the tort. Courts have been reluctant to award IIED damages to plaintiffs that appear "tough" or "strong."\textsuperscript{372} IIED's requirement of severe emotional distress penalizes the plaintiff "who display[s] greater resourcefulness and adaptability."\textsuperscript{373} Ironically, of course, the fact

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\textsuperscript{368} Givelber, supra note 129, at 63.
\textsuperscript{369} See id. (noting that fewer cases exist in this field and the results are less predictable).
\textsuperscript{370} Réaume, supra note 22, at 91.
\textsuperscript{371} Givelber, supra note 129, at 74–75.
\textsuperscript{372} See Love, supra note 174, at 158 (concluding that such victims have difficulty proving emotional distress, even though they suffer a "real harm").
\textsuperscript{373} Regina Austin, Employer Abuse, Worker Resistance, and the Tort of Intentional Infliction of Emotional Distress, 41 STAN. L. REV. 1, 17 (1988).
that a person has been driven to respond physically to an ongoing IIED may serve to verify the level of distress involved. On the other hand, that a person is capable of responding to outrageous conduct by physical means might show a level of mental acuity (awareness of a threat and the means to respond to it) that contradicts the "severe distress" element of IIED.

f. IIED Is Rarely Actionable for "Single" or Isolated Events, and Force May Only Be Needed to Stop a Single Incident of Oppression. A common refrain in IIED cases is that the cause of action is not available for "single" or "isolated" events. Even though conduct may seem shocking, if it "stand[s] alone or as an isolated incident," it is unlikely to be considered sufficiently "outrageous" to trigger IIED liability. Instead, only repeated behavior, conduct over an extended duration, or conduct that is part of a pattern of abusive behavior, is said to be sufficient to merit the law's attention. The conduct's "severity and regularity" can give rise to IIED claims, but conduct of a less permanent nature is not likely to support an IIED claim. A single statement is not actionable. Only prolonged or repeated conduct generally gives rise to an IIED claim.

This may explain why the kind of conduct amounting to IIED is unlikely to trigger the privilege to use force in self-defense. Force, by its nature, is applied in discrete and particular measure. It cannot be spread judiciously against an abuser over the course of a relationship characterized by outrageous treatment. Self-defense law invokes what has been called the "temporality principle": "the

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374 See, e.g., Howard Univ. v. Best, 484 A.2d 958, 980 (D.C. 1984) (requiring that, for a sexual harassment claim under Title VII and an IIED claim to lie, "[m]ore than a few isolated incidents must have occurred").

375 See Cavico, supra note 7, at 137 (discussing courts' rejection of IIED claims for isolated incidents).

376 See id. (indicating that conduct that would not support an IIED claim if it only happened once might "rise to the tortious level" if repeated).

377 E.g., GTE Sw., Inc. v. Bruce, 998 S.W.2d 605, 617 (Tex. 1999).


379 See, e.g., Champlin v. Wash. Trust Co., 478 A.2d 985, 988 (R.I. 1984) (finding that a creditor's conduct generally must be prolonged in order to support a claimant's IIED recovery).
self-defense situation is limited almost exclusively to the moment of its occurrence—it generally does not include a significant history of what has happened before the encounter or what may likely happen afterwards. The common law’s “immediacy” requirement requires that the threat posed be immediate to justify the use of force in self-defense, but because IIED ordinarily requires an extended sequence of events, it may be hard to identify appropriate instances for defense against outrage.

Again, however, this explanation may not be entirely satisfactory. At some point, isolated conduct repeated over time becomes repetitive and sufficiently outrageous to trigger clear IIED liability. Moreover, there may be critical moments at which the defensive use of force could interrupt a sequence of events likely to culminate in actionable IIED. The plaintiff in Zalnis, had she knocked her keys out of the salesperson’s hand and removed her car from the premises, would likely have been liable for battery even though she could thereby have avoided suffering severe distress.

g. Signposts and the Lesser Importance of Intent. Intent is far less crucial in IIED than in other intentional torts. Indeed, it is not even required, in that recklessness will satisfy the elements of the tort; by contrast, in battery, assault, and trespass claims, intent is typically the key factor in determining liability. In emotional harm settings, however, actors often intend to inflict emotional distress, yet they avoid liability because their conduct is not “intolerable” to civilized society. Trash-talking and the “Bronx Cheer,” if issued at a sporting contest, are aimed to harm the psyche of athletes so as to interfere with their play, but these

381 See supra Part I.C.
383 See id. (highlighting the importance of the intent requirement for intentional torts that involve physical harm).
384 Such conduct, though intentional and leading to severe disturbance, is not actionable if “perfectly proper.” See id. (giving examples of a doctor telling a patient of a life-threatening disease or a police officer telling a parent of the death of a child as conduct that is “perfectly proper”).
certainly are not actionable in the vast majority of circumstances.\textsuperscript{385}

Perhaps doctrinal reluctance to permit force to be used against outrageous conduct arises because IIED has less certain signposts than traditional intentional torts, such as battery and assault.\textsuperscript{386} Intent is often thought to be observable, or at least, subject to inference. For the torts of battery, trespass, and assault, a potential victim may be trusted more to decide whether the elements of the potential tort are likely to be present before using force. With IIED, intent is less critical than the more subtle and uncertain question of outrageousness.\textsuperscript{387} The law might resist recognizing self-defense against IIED because of uncertainty concerning whether offensive conduct actually is sufficient to constitute IIED; by contrast, once a violent action and intent are demonstrated, a self-defender is far more certain of justification to avoid battery. Unlike other intentional torts, IIED lacks clear “definitional verb[s],”\textsuperscript{388} such as intent to cause a contact, intent to cause apprehension of a contact, or intent to restrain without legal authority.

This is ultimately an unsatisfying explanation, however, when discussing ex post efforts to avoid liability by citing the privilege of self-defense. Where a person has chosen to use force to defend against the tort of outrage, a court should be equipped to decide ex post whether the victim of emotional distress could in fact have stated a claim for IIED had the wrongdoer been permitted to carry on the outrageous conduct.


\textsuperscript{386} See Hayden, supra note 139, at 591 (arguing that IIED is “unlike other intentional torts such as battery, assault, and false imprisonment, which all provide clearer definitions of prohibited conduct”).

\textsuperscript{387} See Martha Chamallas, *Shifting Sands of Federalism: Civil Rights and Tort Claims in the Employment Context*, 41 WAKE FOREST L. REV. 697, 699 (2006) (“[O]utrageousness” is the center piece of the intentional infliction claim and does the ‘most important normative work’ in screening cases.” (citation omitted)).

\textsuperscript{388} Fraker, supra note 296, at 994.
h. Effectiveness. A consequentialist justification for self-defense focuses on how it affects aggression. Where self-defense would not actually deter (specifically or generally), a threatened person would not be allowed to use self-defense. 389 Self-defense is only permitted where it “is reasonably likely to be effective in its goal of preventing harm.” 390

Perhaps we deny self-defense against IIED because of a concern that it will be ineffective. Even where a victim of extreme or outrageous conduct could state a valid cause of action for IIED, the use of force might not be effective in preventing the consequences of an ongoing emotional attack. An IIED victim might use force against an emotional attacker, only to have the emotional attack continue in spite of the administration of violence. Similarly, an IIED victim might use force and succeed in stopping the outrageous conduct, but continue to suffer the emotional harm that would have been the basis for the IIED action. The emotional damage may have already been done, and force might not marginally decrease the victim defender’s level of distress. Additionally, if force is not effective in actually mounting a defense, according to consequentialist theory it would not be permitted in the first instance. 391

By contrast, in the typical use of self-defense to protect against bodily harm there may be more certainty that a disabling blow could prevent an attack and the physical injuries or dignitary harms that the attack would have caused. To offer an extreme example: Killing one’s batterer will stop further battery; killing the person who commits IIED, by contrast, may stop the conduct while not stopping the harm, which can develop through the continuation of psychic processes initiated by the wrongdoer.

i. First Amendment Concerns. Courts and commentators often mention concerns about “chilling” constitutionally protected expression through overly accommodating treatment of IIED

391 See supra note 389 and accompanying text.
Typically the expression at issue involves some artistic creation, hurtful parody, or "obscenity."

It may be argued that the tort of intentional infliction of emotional distress presents too great a chance of censoring unpopular ideas. Because extreme and outrageous language will often be associated with unpopular ideas, it would be too difficult to discern if the trier of fact disapproves of the language rather than the message.

The Supreme Court has recognized that alleging the tort of IIED does not put "outrageous" speech "outside the scope of constitutional protection." Other times the constitutionally protected expression relates to freedom of religious exercise. For instance, in Pleasant Glade Assembly of God v. Schubert, handed down in June 2008, the Texas Supreme Court rejected an IIED claim by a former adherent of a religious denomination who was subjected to an exorcism and "laying of hands" by members of the group. Imposing "tort liability for engaging in religious activity to which the church

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392 See, e.g., LeBel, supra note 364, at 321 ("The relationship between the general category of conduct addressed by the emotional distress action and the kind of activity protected as part of the relevant first amendment freedoms frequently is fairly close."); Logan, supra note 82, at 524 ("[E]motionl distress claims may raise first amendment questions because the requisite 'conduct' arises out of a defendant's speech."); see also Battles, supra note 83, at 262 ("[P]rotecting emotional tranquility must at times give way, when doing so would abridge another's constitutional rights."); Richard D. Bernstein, Note, First Amendment Limits on Tort Liability for Words Intended to Inflict Severe Emotional Distress, 85 COLUM. L. REV. 1749, 1784 (1985) (emphasizing that some applications of IIED "fit . . . uneasily with first amendment principles").

393 See, e.g., Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 53–54 (holding that cartoon caricature "in the area of public debate about public figures," though obviously offensive, is a protected parody under the First Amendment).

394 Catherine E. Smith, Intentional Infliction of Emotional Distress: An Old Arrow Targets the New Head of the Hate Hydra, 80 DENV. U. L. REV. 1, 58 (2002) (footnote omitted); see also Partlett, supra note 7, at 189 n.87 ("The tort touches First Amendment interests as it sometimes implicates speech.").


396 264 S.W.3d 1 (Tex. 2008).

397 Id. at 12–13.
members adhere would have an unconstitutional 'chilling effect' by compelling the church to abandon core principles of its religious beliefs.”

The tort of IIED “threatens both defendants' right of religious freedom and society's important interest in tolerating differing religious views”;

it could be used “as a weapon of religious bigotry, invading the defendant's free exercise rights and society’s interest in religious toleration.”

Arguably, permitting forceful self-help against IIED might further chill free expression in areas that seem outrageous. The threat of tort liability raises the costs of outrageous expression, but the fear of privileged violence would increase those costs even further and might deter some speech at the margins of IIED. For example, a defender of “hate speech” on constitutional grounds might object to the greater chilling effect the threat of force would have on those who hang nooses in front of schools and engage in other arguably actionable racist speech. If “in the final analysis, society is better served by protecting our cherished right to free speech, even at the cost of tolerating speech that is outrageous, offensive, and demeaning,” any additional sanction, such as the privileged use of force on top of potential civil liability, could deter such speech.

398 Id. at 10. The court in the case emphasized the distinction between the plaintiff's "secular" claims involving physical injury and her claims for emotional damages, which were "religious in nature." Id. at 7. The First Amendment "barred" an "award of damages for [plaintiff's] emotional injury." Id. at 7, 13.

399 Hayden, supra note 139, at 581.

400 Id. at 663.


403 While one might be tempted to answer, “So what?,” a robust defense of free speech focuses on the potential “slippery slope” associated with sanctioning offensive and harmful speech. Although few would defend the social value of hanging nooses, other types of controversial speech that may offend and hurt, such as flag burning, are considered to have value in the “marketplace of ideas.” See Michael J. Kelly, Note, Falwell v. Flynt: An Emerging Threat to Freedom of Speech, 1987 UTAH L. REV. 703, 721 (1987) (“Allowing the expression of ideas to be prohibited because they are outrageous is fundamentally at odds with the Constitution's guarantee of free speech.”).
 Nonetheless, the Supreme Court has opined that words which "by their very utterance inflict injury or tend to incite an immediate breach of the peace" are entitled to no First Amendment protection.\(^4\) Where words and conduct rise to the level of IIED, they would not be protected by the First Amendment. The right to self-defense is viewed by liberal theory as a more important right than free speech.\(^4\) Arguably, even though the Supreme Court has never articulated self-defense as a constitutional right, it is an "essentially universal value that the Court... ha[s] used as a foundational principle to ground and illuminate other constitutional rights."\(^4\) Even though privileging the use of force to respond to IIED would threaten rights of free expression, it could better protect the equally fundamental right to self-defense. If our tort system in fact embraces the ideals of liberal philosophy,\(^4\) it would be hard to defend a rule that self-defense against emotional harm should be trumped by concerns about free expression.

\textit{j. Jury Nullification.} A final explanation for the doctrinal reluctance to permit force to defend against IIED may be found in an institutional form. Even where doctrine refuses to permit self-defense to stop emotional attacks, juries might "nullify" and "interpret self-defense more liberally than the law specifies."\(^4\) Law might maintain a façade that force can only be used to defend force because of the role of a jury as a safety valve: "[A] juror might sympathize with a person who acted in self-defense by taking into account such factors as the amount of harassment, insults, or


\(^{405}\) See Nelson Lund, \textit{The Second Amendment, Political Liberty, and the Right to Self-Preservation}, 39 \textit{Ala. L. Rev.} 103, 118 (1987) ("In liberal theory, the right to self-defense is the most fundamental of all rights—far more basic than the guarantees of free speech, freedom of religion, jury trial, and due process of law.").


\(^{407}\) See Alan Calnan, \textit{Strict Liability and the Liberal-Justice Theory of Torts}, 38 \textit{N.M. L. Rev.} 95, 97 (2008) ("[E]arly tort law was directly adapted from the liberal-justice ideas of Aristotle, Justinian, Aquinas, and a host of other ancient and medieval thinkers.").

provocation." Even where a self-defense claim could not be clearly articulated, juries have been reluctant to impose liability on those whose conduct seems provoked by outrageous conduct on the part of those against whom force is used.

Although the law may not afford a full privilege of self-defense to protect emotional harm and dignity, juries may. Jurors could “use self-defense to endorse the valuation of honor and dignity expressed when an enraged person uses deadly force to avenge non-life-threatening transgressions.” Yet, crafting doctrine based on the notion that juries will ignore doctrine seems misguided and threatens the integrity of the legal process.

IV. THEORETICAL CONSIDERATIONS

In this section, I explore the three leading theories of tort law, considering the place of self-defense generally in each of these theories. I explore whether the legal framework prohibiting the use of defensive force against emotional assault is consistent with the theoretical explanations for tort liability.

A. LAW AND ECONOMICS AND THE PRIVILEGE OF SELF-DEFENSE

The dominant theory of tort law is, without question, law and economics. This theory suggests that tort rules should strive to

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409 Id.; see also Andrew D. Leipold, Rethinking Jury Nullification, 82 VA. L. REV. 253, 309 n.216 (1996) ("[A] jury may acquit or reduce the charge against a defendant who claims self-defense after suffering harassment or insulting provocation, even though the legal requirements for the defense are not met.").

410 See Binny Miller, Teaching Case Theory, 9 CLINICAL L. REV. 293, 299–300 (2002) (describing a jury's rejection of a battery claim against a person provoked by the racist attitudes of a neighbor, in spite of the fact that the defendant shoved the neighbor during a merely verbal confrontation and had a weak argument of self-defense).

411 See Dan M. Kahan & Martha C. Nussbaum, Two Conceptions of Emotion in Criminal Law, 96 COLUM. L. REV. 269, 330 (1996) (asserting that juries are often prepared “to endorse the valuing of dignity and honor” shown when people refuse to submit to wrongful acts that subordinate them to another's will).

412 Id. at 330–31.

achieve economic efficiency\textsuperscript{414} and that, from a positive perspective, common law tort rules do evolve to achieve efficiency.\textsuperscript{415} Tort law is structured largely for its deterrence benefits:\textsuperscript{416} liability exposure is thought to lead potential defendants to calibrate risky behavior. Tortious conduct should be reduced to an efficient or cost-justified level; tort law seeks to achieve that goal by imposing the burden of liability on an actor whose conduct imposes social costs that are not outweighed by its benefits.\textsuperscript{417}

Although law and economics sometimes leaves out intentional torts—like the deliberate use of force—entirely,\textsuperscript{418} its deterrence rationale can also be applied in this context. “[O]ne who intends harm is almost never providing a social benefit.”\textsuperscript{419} Intentional tort law can be envisioned as “an extreme set of negligence cases.”\textsuperscript{420} The kinds of conduct amounting to intentional tort are “so inefficient and so easily controlled by the actor, that, although labelled intentional, they are really examples of negligence to which no contributory negligence defense is applicable.”\textsuperscript{421}

An economic view of intentional tort also condemns most intentional torts as amounting to a failure to bargain where

\textsuperscript{414} See John C.P. Goldberg & Benjamin C. Zipursky, Tort Law and Moral Luck, 92 CORNELL L. REV. 1123, 1141 n.58 (2007) (describing law and economics as “arguably the dominant theoretical paradigm today” in tort scholarship).


\textsuperscript{416} See Goldberg & Zipursky, supra note 414 (noting that “the law and economics approach to tort theory . . . is based largely on the deterrence capacity of tort law”).

\textsuperscript{417} See Bell, supra note 4, at 347–48 (explaining that tort law attempts to keep accident prevention cost-effective by imposing liability on actors only when the cost of “avoiding [an] accident [is] lower than [an] accident’s expected cost”).

\textsuperscript{418} See Jennifer B. Wriggins, Toward a Feminist Revision of Torts, 13 AM. U. J. GENDER SOC. POL’Y & L. 139, 154 (2005) (noting law and economics sometimes omits intentional torts from the definition of torts in general); see also Jennifer Wriggins, Domestic Violence Torts, 75 S. CAL. L. REV. 121, 183 n.370 (2001) (“Law and economics has not ignored intentional torts, but intentional torts have not been a central [sic] focus.”).

\textsuperscript{419} Simons, supra note 61, at 1085.


\textsuperscript{421} Id.
market resolution of the rights of the parties could be obtained with little difficulty. In the case of intentional torts, such as battery or IIED, law and economics views wrongful conduct as "a coerced transfer of wealth to the defendant" that is "inefficient." Since the transaction costs of a negotiated transaction in most intentional tort cases are low (e.g., "How much would it cost for you to let me punch you?"), an economic viewpoint calls for negotiation rather than coercion and seeks to deter intentional torts on efficiency grounds. The law and economics view penalizes the intentional tortfeasor "for failing to resort to the market to seek contractual authorization for his conduct."

In this paradigm, self-defense is authorized even though it causes harm because it offers a net reduction in harm by deterring aggression. Over the long run, permitting the use of force in self-defense operates as a deterrent against unlawful assaults. While the threat of a tort judgment might adequately deter in a perfect system, our civil liability system is far from perfect. A tort judgment may "undervalue the true social cost of the conduct and hence fail to deter it sufficiently." Moreover, where effective, the use of force in self-defense relieves society of the burden of subsequent litigation needed to resolve intentional tort cases. Professor Epstein explains:

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423 Id. at 208.
424 See id. (describing intentional torts as inefficient due to their violation of certain market principles).
426 See Lawrence Crocker, Justification and Bad Motives, 6 OHIO ST. J. CRIM. L. 277, 287 (2008) ("We need not buy too far into the 'deterrence' theory of the defenses of self-defense, defense of others, and defense of property to conclude that, other things being equal, it is better that an unlawful aggressor fear that he will be the target of defensive counter-measures.").
427 Green, supra note 15, at 20; see also RICHARD A. EPSTEIN, TORTS § 2.10, at 51 (1999) ("Since aggressors know that their victims can respond in kind, the cost of aggression rises, and thus self-help reduces the likelihood that it will be committed in the first place.").
428 Richard A. Posner, Killing or Wounding to Protect a Property Interest, 14 J.L. & ECON. 201, 225 (1971); see also LANDES & POSNER, supra note 415, at 173 ("[Self-defense] reduces the probability of injury to the intended victim and raises the costs to the injurer of inflicting the injury.").
[T]he central point is that there would be no need for any privilege of self-defense if the tort damage system worked flawlessly. In each case the aggressor would be captured after inflicting the harm and subjected to a damage award that left him worse off for inflicting the harm than from never acting at all. Aggression would never pay, so no one would ever attempt it. Who worries about the scope of a self-defense privilege if it need never be exercised? But once we recognize that legal remedies are always imperfect, self-help remedies become critical to the success of the system, which now has to sort through these questions as best it can. Better that we run the risk of undue retaliation and concealed aggression than eliminate the privilege altogether.429

Law and economics does a somewhat poor job of explaining the precise contours of the modern tort privilege of self-defense. This is likely due to the fact that self-defense became a well-established component of the law of torts without formal consideration of efficiency or utilitarianism.430 Most notably, law and economics has trouble explaining the dominance of the proportionality principle; “If we simply want to deter violence, we might prefer a far broader rule [of self-defense], allowing for retaliation and other punitive acts.”431 Conversely, no efficiency calculation surfaces when a victim uses force causing more harm than the victim herself would likely have suffered:432 proportionality permits the

430 See Richard A. Epstein, Intentional Harms, 4 J. LEGAL STUD. 391, 411 (1975) (“The argument for self-defense, that it is proper to meet force with force, has a strong intuitive appeal that antedates any utilitarian justification that might be given it.”).
431 Grabczynska & Ferzan, supra note 389, at 238; see also David Wasserman, Justifying Self-Defense, 16 PHIL. & PUB. AFFAIRS 356, 360 (1987) (“It is quite possible that a rule permitting victims to kill aggressors even when it is not, or is no longer, necessary to do so might be a more effective deterrent, with more lives saved by its in terrorem effect than lost by its execution.”).
use of force to the point where it is necessary to prevent harm even where that force results in a net social loss. In tort law, a potential victim may very well be privileged to kill an attacker to prevent serious harm to herself, even where the attack was serious but may not have been "certain of success." Still, law and economics offers no theoretical foundation for denying an IIED victim the same rights of self-help as a victim of battery or assault. Economics measures efficiency in terms of social utility—roughly, aggregated "happiness"—and does not distinguish between emotional or physical harm (though it recognizes that physical harm may be easier to quantify in monetary terms than emotional harm). IIED cases provide a strong application of the economic justification for intentional tort liability. Extreme or outrageous conduct is rarely utility maximizing, except in defense of other threatened interests. It is quite possible that in many IIED cases involving creditor disputes and debt collection, wrongful actors could have resorted

the losses caused to the initial assailant exceed the losses that he could have caused to the victim, the defense is often accepted.

See Epstein, supra note 430, at 417 ("No close cost–benefit analysis is invoked in order to insure that the defendant's use of force will advance the social good; no requirement is imposed upon him to minimize the total harm to the two parties.").

Id.

See Richard A. Posner, The Concept of Corrective Justice in Recent Theories of Tort Law, 10 J. LEGAL STUD. 187, 187 (1981) (suggesting that most tort scholars in the past 100 years "have thought that tort doctrines were, and should be, based on utilitarian... concepts").

See John Bronsteem et al., Welfare as Happiness, 98 GEO. L.J. 1583, 1586 (2010) ("[A] person's well-being is the aggregate of how she feels throughout her life.").

See Ingber, supra note 88, at 799 ("Unless the full costs of physical and emotional distress are properly internalized through tort law, the price of the activities that generated such injuries will insufficiently reflect their actual costs." (emphasis added)).

Cf. Andrew J. Oswald & Nattavudh Powdthavee, Death, Happiness, and the Calculation of Compensatory Damages, 37 J. LEGAL STUD. (SUPPLEMENT) S217, S222–S223 (2008) (noting that discussion of emotional harm in terms of microeconomic theory has "an inhuman sound to it").

Cf. Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 45 cmt. d. (Tentative Draft No. 5, 2007) (explaining that exercising a legal right in an extreme and outrageous manner may subject actor to liability). But see Hakkila v. Hakkila, 812 P.2d 1320, 1324 (N.M. Ct. App. 1991) (noting that behavior causing emotional distress may serve the greater good). Even if some outrageous behavior causing emotional distress serves useful social purposes (such as traumatizing political caricature arguably does), it is unlikely to do so in any of the hypotheticals where the use of force in self-defense might be proportional.
to civil litigation but chose instead a malicious and outrageous course. Unless emotional harm is taken into account in sketching the boundaries of tort liability, an economic account of tort law fails to reduce the injury costs of wrongful conduct to the "efficient" level.\textsuperscript{440} Given that psychic injuries are "real and significant," any tort scheme that ignores their costs will improperly calibrate behavior that threatens psychic injury.\textsuperscript{441}

Actually, IIED may stake a strong claim for self-defense under an economic framework because of the confessed ambiguity associated with measuring emotional harm: "Tort law has high transaction costs because it requires the precise measurement of damages. . . . [I]n situations with high transaction costs, property rules enforced by criminal law are preferable to liability rules enforced by tort law."\textsuperscript{442} Emotional distress claims may be particularly costly to litigate, leading to trial rather than settlement.\textsuperscript{443} Because of the uncertainty associated with both the damages valuation and the underlying elements in IIED cases, litigation of emotional distress claims may not be preferable to authorizing self-help use of defensive force against emotional attack.\textsuperscript{444}

B. CORRECTIVE JUSTICE AND THE PRIVILEGE OF SELF-DEFENSE

A second theoretical conception of tort law has come to be known as "corrective justice" theory. "Corrective justice demands that wrongful (or unjust) gains and losses be rectified, eliminated, or annulled."\textsuperscript{445} Under this theory, "[t]ort law makes good the legitimate claims of victims by imposing the costs on their

\textsuperscript{440} Bell, supra note 4, at 349.
\textsuperscript{441} Id.
\textsuperscript{443} Bell, supra note 4, at 379 (discussing cost critiques of such claims).
\textsuperscript{444} See Crump, supra note 7, at 485 n. 288 ("In concrete terms, an uncertain rule tends to increase the number and contestability of fact issues, leading to more expensive discovery, fact-gathering, litigation about evidence rules, litigation about the composition of the factfinder, etc., as well as more posturing in negotiation.").
Corrective justice theory “treats an injury as disturbing the equilibrium that existed before the injury and tort law as the mechanism for ‘correcting’ or restoring the normative equilibrium.”

Corrective justice explains self-defense in one of two ways. First, corrective justice views tort remedies as generally available only where an actor has committed a “wrong.” If a victim inflicts harm in self-defense, it may be that we are reluctant to “condemn” her act by labeling it wrongful. Even if a corrective justice theorist admits wrongfulness associated with the use of force in self-defense, she might suggest that a comparative consideration of the wrongfulness of aggressor and self-defender yields the conclusion that the initial aggressor is the more wrongful party.

Two explanations for why a harmful act in self-defense is not “wrong” may be offered. First, when a person acts in self-defense, she acts (typically) against a culpable person. Self-defense is “rightful” because a wrongful actor’s culpability renders the act

446 Id. at 352.
448 See Calnan, supra note 407, at 106 (“Corrective justice applies only where there is a wrongful gain and a wrongful loss.”); Coleman, supra note 445, at 356 (“The absence of wrongfulness is a bar to recovery in some cases, so that the right to compensation depends on wrongdoing or fault.”). But see Solomon, supra note 447, at 1759 (“[C]orrective justice theories are generally agnostic on what precisely it means to wrong another . . . .”).
449 See Michael C. Harper, Comment on The Tort/Crime Distinction: A Generation Later, 76 B.U. L. Rev. 23, 27 (1996) (claiming that the privilege of self-defense exists, not because of under-deterrence, but because we are not willing to condemn those who inflict such harm).
451 See Shlomit Wallerstein, Justifying the Right to Self-Defense: A Theory of Forced Consequences, 91 Va. L. Rev. 999, 1005 (2005) (“[H]arm should fall on the person whose fault it is that someone will be harmed. This justification of self-defense focuses . . . on the aggressor’s moral responsibility for forcing the defender to make a choice between lives; this permits the defender to direct harm against the aggressor.”).
452 See Michael Moore, Placing Blame: A General Theory of the Criminal Law 712–13 (1997) (“Such culpability is variously said to forfeit, override, or specify out of existence the aggressor’s right to life or to discount the value of his life, either entirely or in part.” (footnotes omitted)).
of self-defense free of the same culpability.\textsuperscript{453} The value of the life or bodily integrity of the initial aggressor is “discounted” in a moral sense.\textsuperscript{454} When the aggressor has violated the rights of his target, his own inalienable right to life is thought to be forfeited.\textsuperscript{455}

This view suffers from some philosophical challenges. Tort law, unlike criminal law, focuses on harms.\textsuperscript{456} Criminal law is concerned primarily with culpability:\textsuperscript{457} self-defense in criminal law can be justified on the ground that a wrongful actor has behaved in a culpable manner (relieving the victim’s response of any culpability), even though the initial wrongdoer has suffered. Legal scholars and philosophers wrestle with the problem of how then to permit self-defense in the case of the “innocent aggressor,”\textsuperscript{458} who causes harm but lacks culpability. Explaining why self-defense would be permitted by a corrective justice theorist in that context poses particular challenges\textsuperscript{459} but is outside the scope of the hypotheticals raised in this Article, which all require the intentionality, or at least recklessness, sufficient for intentional infliction of emotional distress.

An alternative explanation for why self-defense is not “wrong” is that the right of self-defense emanates from the autonomy of the attacked person.\textsuperscript{460} Self-defense is justified because of the “absolute right of the victim of the attack to defend her personal

\begin{itemize}
\item \textsuperscript{453} See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 186 (2d ed. 1995) (explaining how otherwise criminal or wrongful conduct may be justifiable if in self-defense).
\item \textsuperscript{454} See Green, supra note 15, at 19 (discussing the assumption that the aggressor is morally at fault for threatening the person acting in self-defense as reason for why the value of aggressor’s life is discounted).
\item \textsuperscript{455} Id. at 20.
\item \textsuperscript{456} But see Sangero, supra note 11, at 498 (discussing how criminal law divides behaviors into criminal offenses (conduct that usually causes damage) and justification (conduct that does not cause damage)).
\item \textsuperscript{457} Cf. id. at 499 (noting the differences society senses between routine behavior and behavior that is prima facie “wrong”).
\item \textsuperscript{458} See, e.g., id. at 511–12 (discussing legal and philosophical treatment of the innocent aggressor).
\item \textsuperscript{459} See Epstein, supra note 430, at 415–16 (discussing the problem of the innocent aggressor); Gerald J. Postema, Risks, Wrongs, and Responsibility: Coleman’s Liberal Theory of Commutative Justice, 103 YALE L.J. 861, 887 n.111 (1993) (book review) (“The moral question is more complex when the supposed aggressor is innocent, and I have no ready solution for the innocent aggressor problem.”).
\item \textsuperscript{460} See Sangero, supra note 11, at 521 (“Under this theory, individual autonomy and the right to defend it together constitute the essence of private defense.”).
\end{itemize}
legitimate interests—her autonomy—against the attack.\textsuperscript{461} This view explains the "just" use of force in self-defense, based not on the wrongfulness of the initial aggressor, but on the rights and interests of the defender.\textsuperscript{462} Taken to its extreme,\textsuperscript{463} however, a focus on the rightfulness of defensive force might challenge existing elements of self-defense, such as proportionality, since the right to defend one's autonomy is absolute and "autonomy and proportionality are incompatible with one another."\textsuperscript{464}

A second way in which corrective justice explains the privilege of self-defense is that the act of self-defense itself provides the necessary correction of injustice. The theory of "corrective justice specifies grounds of recovery and liability; it does not specify a particular mode of rectification."\textsuperscript{465} "Any mode of rectification that does not create wrongful gains and losses is compatible with corrective justice."\textsuperscript{466} Since self-defense prevents unjust harm, it provides the necessary level of correction.

Under these views, there is little intellectual ground to deny an actor the right to use force to defend against an outrageous course of conduct threatening severe emotional harm. IIED liability is designed to protect the autonomy of the victims of outrageous conduct:

By causing severe mental or emotional distress (or in some cases lasting psychological damage), such conduct inflicts harm to the determined self, and thereby violates the rights of the autonomous self. In this way, intentional infliction [of emotional distress]

\textsuperscript{461} Id.
\textsuperscript{462} Green, \textit{supra} note 15, at 21.
\textsuperscript{463} See id. at 24 ("Under the absolute form of the autonomy theory \ldots proportionality plays no role. When a person has aggression used against him, even aggression that does not actually pose a threat to his life or physical well-being, his personal autonomy is violated, and he may use whatever means he can to protect that autonomy, including deadly force.").
\textsuperscript{464} Sangero, \textit{supra} note 11, at 523.
\textsuperscript{465} Coleman, \textit{supra} note 445, at 358.
\textsuperscript{466} Id.
constitutes a substantive injury to personality, analogous to harmful battery against the body.\textsuperscript{467}

IIED undermines one's capacity for "self-possession and ability to control [one]'s own thoughts and feelings."\textsuperscript{468} The idea of corrective justice "has been central" in the expansion of IIED liability: "There are some wrongs that are sufficiently invasive of the core values of autonomy or responsibility and equality, in the sense that persons must be treated with equal respect, that the correlative right is forged."\textsuperscript{469} A person who commits IIED is culpable and bears responsibility for the existence of any conflict.\textsuperscript{470} To respond to "relentless insults and harassments" with force may be to act rightfully because of the culpability of one who pursues outrageous conduct.\textsuperscript{471}

If IIED is in fact a "wrong," then from a moral perspective—a central aspect of corrective justice theory—the actor who uses force against outrage has not committed a wrong.\textsuperscript{472} Only were society to deny its members a moral right to be free of psychic injury would force against a psychic attacker be morally condemned.\textsuperscript{473} Under a corrective justice theory, self-defense should be permitted against assaults against one's dignity to the extent that such assaults threaten the subordination of the victim to the assailant.\textsuperscript{474}

\textsuperscript{467} Heyman, supra note 118, at 1330.
\textsuperscript{468} Id. at 1330–31.
\textsuperscript{469} Partlett, supra note 7, at 186 (footnotes omitted).
\textsuperscript{470} Segev, supra note 27, at 424.
\textsuperscript{471} Id.
\textsuperscript{472} See Leo Katz, Villainy and Felony: A Problem Concerning Criminalization, 6 BUFF. CRIM. L. REV. 451, 472–73 ("To be sure, as a matter of non-criminal morality, the use of preventive force [to stop a verbal onslaught] might not seem so bad. . . . [N]ote that we have now constructed a case of morally acceptable physical self-defense against mere insult.").
\textsuperscript{473} Bell, supra note 4, at 342 n.46 ("If a person does not have an entitlement to psychic well-being, others have an entitlement to invade that well-being, assuming that the law will protect all persons from the use of physical force against them of the sort which would be necessary to thwart an invasion of one's psychic well-being.").
CIVIL RECOURSE THEORY AND THE UNCIVIL RECOURSE

A third explanation for tort law has recently emerged under the title “civil recourse theory.” This explanation aims to build on corrective justice theory and address some of the limitations of corrective justice’s explanation for tort norms. Civil recourse theorists explain tort rules as emanating from a state’s decision to remove from members of the social order the right to engage in violent self-help.

Civil recourse theorists opine that “an earmark of our civil legal system is that it does not involve violent remedies, but civil remedies.” The “important function” of our tort system is that it “does, in a sense, provide a civil alternative to getting even.” The tort system provides a means for the state “to empower a plaintiff with a claim.” Tort “rights of action can be understood as an avenue of recourse to which we are entitled in lieu of self-help.” IIED itself can be viewed as a tort that emerged to provide an alternative to self-help retribution, rather than a tort designed actually to prevent interference with the emotional tranquility of victims. Civil recourse theory explains the IIED tort as one meant to provide an alternative to the use of violence, suggesting that the law seeks to channel redress into nonviolent forms.

Arguably, self-defense is permitted only where civil recourse is not an alternative because of the immediacy of the harm and the possibility that the results of a tort cannot be “repaired” through damages alone. As part of the social contract, the state agrees to provide a civil recourse in exchange for individuals’ surrendering their rights to engage in self-help violence, but where the state

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476 Id. at 737.
477 Id. at 739.
478 Id. at 746.
479 See Ingber, supra note 88, at 788 n.78 (chronicling the evolution of IIED from 1897 to the Restatement (Second) and positing that “the Restatement’s focus is on situational justice and punishment rather than on the preservation of emotional tranquility and compensation”).
480 Cf. Zipursky, supra note 475, at 737 (discussing states’ obligation “to provide plaintiffs with an avenue of recourse”).
cannot fulfill its role, it, in effect, agrees to preserve the right to resort to violence.\textsuperscript{481}

The weakness of civil recourse is that, in theory, if recourse becomes the normative goal of tort law, then there is no reason why a person threatened with violence should not be legally compelled to "turn the other cheek," submit to the violence, and then seek compensation. Civil recourse theory may provide a descriptive account of the structure of tort law. In particular, it may do a better job than law and economics of explaining standing issues (why is the defendant forced to pay even where some other social actor might be the "cheapest cost avoider"?), a better job than corrective justice theory by explaining the law's reluctance to impose on a defendant an obligation to repair harm done, and a better job explaining the law's preference for civil litigation even where self-help might render a prompt corrective result.\textsuperscript{482} As a normative prescription of how to structure tort law, however, civil recourse theory does a poor job of explaining why, sometimes, an uncivil recourse should be permitted.

Indeed, self-defense has long been defended on the grounds that it \textit{enhances} the social–legal order.\textsuperscript{483} Self-defense serves the "social interest in protecting the public order in general and the legal system in particular, as the social–legal order is shaken by the maliciousness inherent in the illegal action of the aggressor."\textsuperscript{484} Tortious conduct interfering with an "individual's rights causes harm not only to him but also to the rights of the public at large, since a stable social–legal order is required to maintain a normal social life—i.e., to protect the basic rights of individuals."\textsuperscript{485} The self-defender "acts as the representative and protector of society, the public order, and the legal system because his actions are

\textsuperscript{481} Green, \textit{supra} note 233, at 22 ("When a society emerges from a state of nature, the state recognizes a person's fundamental right to self-preservation, and agrees to protect that right from violation by others. When the state is unable to fulfill its responsibility to the citizen, the right to use deadly, defensive force remains with the citizen.").

\textsuperscript{482} Cf. Zipursky, \textit{supra} note 475, at 739 (noting that litigation formally determines whether a defendant owes the victim a duty and that this is why the law favors trial over self-help).

\textsuperscript{483} See \textit{infra} notes 484–90 and accompanying text.

\textsuperscript{484} Sangero, \textit{supra} note 11, at 527.

\textsuperscript{485} \textit{Id.} at 546.
directed at neutralizing a violation of the law."\(^{486}\) The social–legal order rationale for self-defense explains both its scope and its limitations.\(^{487}\) A person can use self-defense to preserve the social–legal order but is limited to proportional self-defense because the right "endures only so long as the social function that it fulfills exists."\(^{488}\) Excessive force, out of proportion to the threat posed, challenges the social–legal order and would not be permitted.\(^{489}\) Where the force deployed in self-defense is excessive, it "should be seen as harming the social–legal order and shaking law-abiding citizens' sense of confidence and trust in the legal system."\(^{490}\)

Locke and Hobbes offered distinct views on self-defense in response to emotional harm as a threat to the social order: "Interestingly, there is an apparent discrepancy between the scope of self-defense that Hobbes and Locke would each permit to individuals within civil society. Hobbes explicitly denies a right to self-defense when the attack threatens one's dignity, rather than one's body. . . ."\(^{491}\) Hobbes writes,

\begin{quote}
[A] man receives words of disgrace, . . . and is afraid, unless he revenge it, he shall fall into contempt, and consequently be obnoxious to the like injuries from others; and to avoyd this breaks the Law, and protects himselfe for the future by the terror of his private revenge. This is a Crime: For the hurt is not Corporeall, but Phantasticall . . . .\(^{492}\)
\end{quote}

Locke, by contrast, would permit the use of self-defense by "anyone who risks subordination."\(^{493}\) He writes:

\(^{486}\) Id. at 527.
\(^{487}\) See id. at 529 (discussing how the "combination of individual defensive action with social maintenance of law and order leads, on the one hand, to expansion of private defense and, on the other hand, to its restriction").
\(^{488}\) Id.
\(^{489}\) Id. at 530.
\(^{490}\) Id. at 547.
\(^{491}\) Sepinwall, supra note 474, at 381.
\(^{493}\) Sepinwall, supra note 474, at 381.
I have reason to conclude, that he who would get me into his Power without my consent, would use me as he pleased, when he had got me there, and destroy me too when he had a fancy to it... To be free from such force is the only security of my Preservation... [I]t is Lawful for me to treat him, as one who has put himself into a State of War with me, i.e. kill him if I can; for to that hazard does he justly expose himself...494

IIED is by definition a threat to the social order.495 Could it be said that physical responses to emotional harms are never consistent with the social order? Personal autonomy, “first and foremost,” involves protection of “life, bodily integrity, liberty and property,” but it also may encompass “less important, personal interests such as... honor.”496 If honor is part of autonomy, is not freedom from mental anguish? Private defense is “concurrently the defense of the autonomy of the person attacked and the defense of the social-legal order, by means of using force against an aggressor who is... responsible for his attack.”497 Given the importance of psychic well-being to “human existence,” it is hard to envision that individuals would surrender their right to be free of psychic trauma—and to use appropriate mechanisms to defend their psychic well-being—in forming a society.498

Civil recourse theory may be forced to invoke utilitarian concerns in an ultimate effort to deny the right to self-defense to the victims of IIED. The goal of tort law is to provide a civil recourse and thereby to diminish aggression overall.499 Self-defense has been justified because a rule permitting defensive actions works “to suppress aggression, or at least reduce it, while a

495 See RESTATEMENT (SECOND) OF TORTS § 46(1) (1965) (defining IIED as causing severe emotion distress to an individual).
496 Sangero, supra note 11, at 548.
497 Id. at 550.
498 Bell, supra note 4, at 342.
rule that prevents defensive actions encourages aggression." 500 We know what responses incivility tends to promote. We are concerned about freedom from IIED because it helps "reduce aggression." 501 Recognizing self-defense against IIED defeats, perhaps, the central purpose of recognizing IIED as a means of civil recourse.

V. IMPLICATIONS

This Article is a fairly long and involved discussion of the viability of self-defense claims based on the threat of extreme or outrageous conduct, which presents admittedly a narrow, if novel, set of problems. It seems fair to ask, "So what?" What do the developments in IIED and self-defense have to say about torts, or even more generally, about law? What, in other words, is the moral of the story? Actually, there are two. First, the law, as others have observed, continues to favor physical security over emotional well-being in the hierarchy of values protected by tort actions. Second, new tort lawmaking is a challenging venture, particularly where tort claims are crafted in a parasitic manner, deriving their key elements from existing claims while attempting to fill gaps between such existing claims or causes of action.

A. THE CONTINUED PREFERENCE FOR PHYSICAL OVER EMOTIONAL SECURITY

The law ultimately adheres to the playground maxim: "Sticks and stones may break my bones, but words will never hurt me." 502 This expression is meant to suggest that one is "supposedly... harmless, the other not." 503 The law preserves a categorical distinction between bodily harm and emotional tranquility in the context of self-defense, even though the damages from emotional harm may far outweigh minor physical injuries. 504

500 Sangero, supra note 11, at 528 n.150.
501 See Givelber, supra note 129, at 57 (emphasizing the importance of personal liberty).
502 See supra note 20 and accompanying text.
503 NEU, supra note 244, at 142.
504 See TEFF, supra note 275, at 9 (discussing the disabling effect of emotional harm and the inconsistency of the "law's relative failure to provide redress").
Despite protestations to the contrary, the law is simply not as serious about recognizing the significance of emotional harm.\footnote{See Betsy J. Grey, Neuroscience and Emotional Harm in Tort Law: Rethinking the American Approach to Free-Standing Emotional Distress Claims 1 (Nov. 4, 2009) (unpublished manuscript), http://ssrn.com/abstract=1499989 ("[E]motional harm [is] treated as a second class citizen.").} Where we award damages for IIED, it seems like we equate the interest in the preservation of emotional tranquility—at least in monetary terms—with the right to physical security.\footnote{Mental injury may in fact be “more devastating than physical because a physically disabled person can still enjoy life and make a positive contribution to society, whereas a mentally injured person is unlikely to have any such ability.” Handsley, supra note 93, at 426.}

When we are forced, however, to choose between an IIED tortfeasor’s physical security and the emotional well-being of his victim, we value the former rather than the latter.\footnote{See id. at 139 (proposing devaluation as “the principle impediment to recognition of emotional . . . injuries”); see also Chamallas, supra note 294, at 752 (noting that the article’s author has “come to expect” this reaction from the legal community).} Society and the courts, it seems, continue to devalue emotional injuries and marginalize the discussion of emotional harm.\footnote{For a discussion of the philosophical dimensions of the mind-body problem, see generally Harry G. Frankfurt, Freedom of the Will and the Concept of a Person, 68 J. PHIL. 5 (1971).} This reflects an institutional proclivity for form over substance. Even where, in substance, science can document the legitimacy of emotional harm and can call into question the clear line of distinction between the physical and the emotional,\footnote{Levit, supra note 7, at 174.} tort law “reverts to the comfortable certainty of legal rules and forms.”\footnote{Id. at 191.} That force can be deployed only against the threat of force has a formalistic appeal, even though it ignores that emotional harm avoided can be just as damaging as physical harm threatened by defensive force. Tort law seeks to simplify, “to draw sharp lines,”\footnote{Cf. Chamallas, supra note 294, at 759 (describing the law’s unsuccessful “attempts to separate physical from mental harms”).} by differentiating those interests that are legitimately worth protecting through the use of force from others that are not.\footnote{512 Cf. Chamallas, supra note 294, at 759 (describing the law’s unsuccessful “attempts to separate physical from mental harms”).}
Of course, the law always makes choices. Some are favored by the structure of legal rules, and others are disfavored. But the continued preference for tort rules that protect physical interests—and those potential defendants who use force to defend such interests—raises three troubling considerations. First, the preference for physical over emotional well-being favors classes of defendants who have traditionally controlled property and the physical world, in particular, male self-defenders rather than female self-defenders. Second, this continued preference runs counter to a strong scientific consensus challenging the legitimacy of the dichotomy between physical and emotional injury. Third, categorical distinctions cast in terms of what kinds of threats entitle a victim to deploy force in self-defense encourage self-defenders to craft pleadings creatively and manipulatively in order to fit their facts into recognized categories where the law clearly allows force to be used in self-defense.

1. The Preference for Physical Security over Emotional Well-Being Favors Classes of Plaintiffs More Likely to Possess Property and Exert Control over the Physical World. The first pernicious consequence of tort law’s refusal to allow force to be used to defend against emotional harm while allowing it to be used to protect against even relatively modest physical intrusions is the privileging of classes of self-defenders more likely to exert control over the physical world. Other authors, particularly Martha Chamallas and Linda Kerber, have detailed at length how the law’s traditional preference for physical security over emotional well-being favors male and disfavors female litigants. Chamallas envisions the standard tort law narrative, concerning expanded recognition of emotional well-being as an interest worthy of protection, as a significant step in the direction of gender equality.

Thus, the failure of the law to recognize emotional well-being as an interest worthy of protection by force continues to perpetuate

513 See Chamallas & Kerber, supra note 186, at 814 (arguing that the “gender neutral” hierarchy of values in tort law disfavors women who suffer emotional, rather than physical, harm).
514 See id. at 816 (stating that recognizing female fright cases will pressure the legal system to recognize women’s rights and value the interests of women).
hierarchies between the genders. These hierarchies are not present on the face of tort law, which purports to be gender-neutral. Instead, they arise from what Chamallas describes as the "Deep Structures" of tort doctrine: "[D]evaluation [of female litigants] is accomplished by subtle means, through the social construction of legal categories that purport to describe types of injuries and types of damages." To the extent that women are traditionally regarded as the protectors of emotional well-being, the categorical preference for defense against force rather than defense against outrage may represent an example of this devaluation at work. Self-defense law is structured to allow the use of force to protect against the threats men fear most—annihilation—but ignores a significant class of threats of oppression that strike closest to home for female victims.

In particular, battered spouses and the victims of outrageous patterns of stalking—far more likely, in statistical terms, to be female than male—are left without a self-help defense when threatened with conduct amounting to IIED. Instead, they are told, by tort law at least, to remain passive, to hope that law enforcement authorities respond appropriately before their oppressors’ conduct produces serious or lasting damage. Where such victims respond to threats using force, they may claim defenses of justification but are forced to cabin their claims by asserting a perception of imminent physical harm. Tort law would still hold liable a self-defender who strikes out at a stalker or an

515 Chamallas, supra note 80, at 467.
516 See Robin West, Jurisprudence and Gender, 55 U. CHI. L. REV. 1, 41–42 (1988) (arguing that liberal legal philosophy treats annihilation, a masculine concept, as the greatest harm to be avoided, while ignoring oppression).
emotionally abusive spouse to prevent outrageous conduct from causing serious emotional disturbance.

Interestingly, however, the law's failure to allow force to be used in defense against outrage also penalizes certain victims for acting in traditionally "masculine" ways. Consider the father of the slain Iraq war veteran confronted by protesters displaying homophobic attacks on the deceased soldier. What would the traditional conception of "masculinity" demand of such a father? Many would likely answer that the father in question should physically attack the leader of the protest group, or at least, should be forgiven for doing so. Indeed, motorcycle supporters of war veterans have responded to the protests at GIs' funerals with traditionally masculine showings of aggression—loud engines, leather jackets, chain wallets, and tattoos. These kinds of aggressive displays, of course, are privileged, but any actual threat of force, or use of force, would not be forgiven so easily, even where the protesters' conduct would be deemed actionable IIED.

2. The Categorical Distinction Between Physical and Emotional Injuries Ignores Powerful Scientific Evidence. Emergent psychiatric understanding of the "realness" of emotional injury in the early part of this century helped break down the traditional limitations on recovery for fright-based and other forms of emotional harm. A second wave of scientific advances is upon us, as scientists have gained the ability to map the emotional centers of the human brain and the biochemical bases—and lasting effects—of emotional trauma. This new science offers strong evidence that any categorical distinction between physical and emotional injury is misplaced. The law, by allowing force to be used to protect against physical injury but not many emotional harms, has lagged behind the science.

The new science suggests clearly that mental pain is a physical process. It is virtually impossible "to distinguish in essential

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522 See infra notes 523–32 and accompanying text.
nature and critical characteristics” physical and psychic injury.\textsuperscript{523}

“As more becomes known about the biochemical bases of psychic harm and the psychological roots of physical harm, the indivisibility of the two becomes clearer.”\textsuperscript{524}

Only in recent years have researchers been able to “carry out comparative and reproducible studies in respect of chronic or repeated stress.”\textsuperscript{525} When the DSM-III gave post-traumatic stress disorder (PTSD) academic imprimatur nearly three decades ago, “little was known about biological concomitants of this condition.”\textsuperscript{526} Since then, however, significant advances in brain science have facilitated exploration of the psychological and physiological effects of emotional trauma.\textsuperscript{527} Neuroimaging—exploiting technologies such as the electroencephalogram (EEG), computed tomography (CT), magnetic resonance imaging (MRI), and positron-emission tomography (PET)—have identified a group of brain cells called the \textit{locus coeruleus} as “the neurophysiological ‘trauma center’ of the brain.”\textsuperscript{528} Emotional distress can permanently alter the level of neurotransmitters in various brain regions,\textsuperscript{529} can cause life-threatening emotional illness, and may also cause alterations in gene expression.\textsuperscript{530} “Advances in neuroscience have progressively demonstrated how closely physical and mental processes are related.”\textsuperscript{531} Courts are fully aware of these advances, frequently “acknowledging the potential gravity of psychiatric harm and bemoaning the unscientific nature of the legal framework,”\textsuperscript{532} and yet they do not appear to have taken the lesson to heart when evaluating self-defense claims.

\textsuperscript{523} Bell, \textit{supra} note 4, at 401; \textit{see also} Grey, \textit{supra} note 505, at 1, 12–17 (discussing neuroscientific aspects of mental pain and anguish).

\textsuperscript{524} Bell, \textit{supra} note 4, at 401.

\textsuperscript{525} MENDELSON, \textit{supra} note 143, at 211.

\textsuperscript{526} \textit{Id.} at 212.

\textsuperscript{527} \textit{Id.}

\textsuperscript{528} \textit{Id.} at 212–13.

\textsuperscript{529} \textit{See J. Douglas Bremner, Does Stress Damage the Brain?, in UNDERSTANDING TRAUMA: INTEGRATING BIOLOGICAL, CLINICAL, AND CULTURAL PERSPECTIVES} 118, 122 (Lawrence J. Kirmayer et al. eds., 2007) (“Animal studies show that stress has lasting effects on brain circuits and systems.”).

\textsuperscript{530} \textit{See Mendelson, \textit{supra} note 143, at 214 (presenting studies that suggest that PTSD may affect gene expression but noting the uncertainty as to whether this change is permanent).}

\textsuperscript{531} TEFF, \textit{supra} note 275, at 11.

\textsuperscript{532} \textit{Id.} at 34.
The new knowledge about physical consequences of emotional injuries may justify liberalizing rules regarding the use of force against emotional attacks. At a minimum, that the law allows force to be used to defend against force but not emotional injury cannot be justified by any supposed scientific difference between physical and psychic trauma.

3. Categorical Distinctions Foster Doctrinal Pigeonholing and "Creative Pleading." A third pernicious feature of the law's reluctance to allow defense against outrage is that it encourages parties to find some way, any way, to argue that they were acting in defense of physical security, even where the facts would seem to make clear that the defender's true motivation was to avert or arrest outrageous conduct amounting to IIED. Litigants likely will plead creatively, pointing to trivial physical threats, instead of making arguments that, were the law to allow them, would be far more applicable to the facts in question.

Such creative pleading undercuts the process of common law development. Where parties attempt to contort a claim of self-defense into existing doctrinal pigeonholes, courts are not confronted with the harder questions of whether and how tort law should evolve to privilege defense against outrage. Even where a litigant might be inspired to claim defense against outrage, she is instead encouraged by the lack of clarity about whether force is permitted in such a setting to claim that she was threatened with contact of some form, no matter how insignificant. Offering up outrage as the basis for the deployment of force in self-defense would risk a quick rejection of a defendant's pleading.

This problem is not unique to the hypothetical of defense against outrage explored in this Article. Instead, it has plagued the development of torts protecting emotional interests for a century. Perhaps the strongest example concerns the "impact rule," which previously prohibited "near miss" plaintiffs from recovering for fright-based injuries in the absence of some physical

533 See Garfield, supra note 358, at 1–5 (providing a preliminary sketch of an argument that criminal law should allow defensive force against those who use harmful words).

534 See FED. R. CIV. P. 12(f) ("The court may strike from a pleading an insufficient defense . . . .").
contact. Prior to the law's evolution towards recognition of near-miss NIED, plaintiffs pointed to impacts such as "a slight blow, an electric shock, a trivial jolt, a forcible seating, dust in the eye, inhalation of smoke, and a horse's defecation on the victim," to position themselves within recognized categories of injury. Courts allowed plaintiffs to proceed on such claims, but "strained logic" led to the denial of claims involving severe emotional injury where the requisite physical contact could not be identified. The process of doctrinal pigeonholing—in which plaintiffs are compelled to "fit[] the facts of each case in the pigeon-hole of an existing tort"—both "involve[s] strained constructions" and "may also leave a deserving plaintiff without a remedy." The law allows force to be used to defend against assault or battery, even where serious physical injury may not be threatened, but denies justification to those who use force to defend against outrageous conduct even where it threatens lasting psychological damage. Unless, that is, plaintiffs can point to some kind of physical threat to provide a doctrinally acceptable basis for the use of defensive force. This result leads litigants to point to somewhat flimsy physical threats in order to justify the use of force. Even a minimal physical threat provides more comfort for a self-defender in explaining her actions, and thus litigants shoehorn defenses into recognized doctrinal patterns.

B. NEW PARASITIC TORTS AND DIFFICULTIES IN DOCTRINAL INTEGRATION

The second, more important, and more general lesson to be drawn from this study pertains to tort lawmaking. IIED has been the most successful of the "new" torts inaugurated in the twentieth

536 Id.
537 See id. (criticizing the impact rule as "underinclusive because other victims who did not suffer an impact are clearly foreseeable, but remedy is denied").
538 B.S. MARKESINIS, A COMPARATIVE INTRODUCTION TO THE GERMAN LAW OF TORTS 318 (2d ed. 1990) (comparing the English and the German tort laws).
539 See discussion, supra Part III.
It has been universally—at least at one point or another—accepted by American jurisdictions. The adoption of IIED clearly makes tort law more humane, expresses norms about civility and oppression, and represents an important avenue for plaintiffs otherwise left without the possibility of recovery. Yet those contributions come with a cost. IIED’s parasitic nature—that is, its practical overlap with existing potential tort or contract claims—has left courts free to decide cases without defining the exact scope of the tort itself. Moreover, its indefinite nature, with liability hinged on the key determination of the “outrageousness” of a defendant’s conduct, has left courts free to focus on that element without clear resolution of the place of the tort in existing dominant doctrinal structures. The indeterminacy and parasitic nature of IIED means that it has proven difficult to obtain crisp and concrete guidance on the scope of the tort. Courts simply have not been forced to think through the thorny, problematic expanse of the IIED action; a prime example of this is the courts’ failure to grapple with self-defense in the IIED context.

Maybe all new torts are subject to this potential hazard. New torts may be defined in imprecise or amorphous terms for one of two reasons. First, indefinite torts leave to the courts the job of crafting the tort in the evolutionary, case-by-case fashion which is the embodiment of the common law tradition. Second, proponents of new torts may be deliberately vague in articulating the doctrine in order to obscure its potentially broad reach and thus avoid policy objections. Furthermore, new torts are often framed in ways that are parasitic in nature. They are frequently designed to fill gaps where existing causes of actions nearly, but do not, provide a remedy. Parasitic torts are easier to understand and support because they resemble claims with which the law has

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541 See discussion supra Part II.A.
542 In common tort law development, “judges are not authorized to do anything other than understand and apply tort law as it is.” John C.P. Goldberg, Unloved: Tort in the Modern Legal Academy, 55 VAND. L. REV. 1501, 1516 (2002).
543 See Bernstein, supra note 540, at 1545–47 (explaining how new tort advocates typically downplay the novelty of their proposals).
544 Cf. id. at 1545 (discussing Prosser’s embrace of formalism in “implying that [IIED] formed and grew without deliberate cultivation”).
developed a comfortable familiarity. Where new torts succeed, they often owe a debt to analogies with existing claims. Yet, new torts adopted on the basis of judges' experience with existing claims are plagued by the difficulty associated with distinguishing the new and old and identifying the extent to which defenses and other rules applicable to the old also apply to the new. Even though American judges may have used "a considerable measure of creativity" to expand tort claims, they have left such claims in need of "sharpen[ing] and clarif[ication]."

Because such torts often are indefinite and parasitic, clear resolution of their limits is difficult. Moreover, even as new torts gain acceptance in the courts, it still takes time to resolve precise issues at the outer edges of those torts and to fit them within broader doctrine. Wary of the obstacles to stating claims using newly recognized torts, parties may choose to seek the comfort of more familiar theories of recovery and privilege.

The IIED experience indicates that large lacunae may exist within newly accepted torts, even as the essential elements of the tort seem to be well-understood. It takes time for isolated, clean cases to emerge allowing courts to discuss the details of new torts, and where those new torts are parasitic in nature—linked to, in some fashion, conduct actionable in other ways—it will take even more time.

1. New Twentieth-Century Torts and Problems in Doctrinal Integration. Tort law in the twentieth century saw the emergence

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545 By claiming to be "correcting and tinkering," proponents of new torts can deny the novelty of their proposed causes of action. See id. at 1545-46 (explaining ways in which new tort advocates repudiate novelty).
546 See id. at 1561 (discussing the analogies available to the torts of sexual fraud and suppression).
548 The "new tort" notion describes the "process of identification, classification, and analysis of emerging legal interests that are purportedly ripe for judicial recognition." Robert F. Blomquist, "New Torts": A Critical History, Taxonomy, and Appraisal, 95 DICK. L. REV. 23, 23-24 (1990). "The phrase 'new tort' appears to be a signal, or marker, for addressing the ramifications and implications of judicial creativity in responding to cases that seek to change existing tort doctrine." Id. at 36-37. Missing from Professor Blomquist's definition is the process of postrecognition integration within existing doctrinal structures, something this Article has revealed can be the most challenging part of a new tort's evolution.
of many new causes of action. Some are not truly "new torts," but more precisely, modifications of existing torts. For instance, the "near miss" form of NIED represents a relaxation of the requirement of contact traditionally present in negligence; the controversial birth torts\(^5\) represent a relaxation of traditional concepts of duty and foreseeable harm.\(^5\) A truly new tort offers a separate set of elements that presents the possibility of recovery to a category of plaintiffs that, under traditional tort rules, would have been denied compensation for their injuries.\(^5\)

The landscape of truly new torts is littered with torts that, like IIED, are parasitic in nature. A tort is parasitic if it attempts to fill gaps between existing torts, allowing plaintiffs to recover without engaging in excessively creative pleading to place their claims within the existing doctrinal framework. Often, these parasitic torts will borrow elements from existing tort or even contract forms of recovery. In addition to IIED, parasitic new torts welcomed in this century in varying degrees include reckless disregard of the safety of another, strict or special liability for manufacturing and design defect claims, bystander recovery for NIED, wrongful discharge, spoliation of evidence, and the inchoate or "prima facie" tort.\(^5\)

As with IIED, many of these new torts have forced courts to confront difficult questions of doctrinal integration. Separating these new torts from preexisting causes of action and identifying the role that traditional tort defenses would play in connection with these new claims has proven challenging. In part, doctrinal integration difficulties arise because "new" torts are often recognized through appellate court opinions,\(^5\) with later

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\(^{549}\) See id. at 101–03 (discussing cases involving wrongful birth and wrongful life causes of action).

\(^{550}\) See Bernstein, supra note 540, at 1540 (excluding from "new torts" those torts that merely expand the range of recoverable damages or allow new plaintiffs to sue). Also excluded from this subsection's discussion are new torts created entirely by statute.

\(^{551}\) Id. (defining a "new tort" as a "tort claim generally identified by scholars and practitioners as both novel and free-standing").

\(^{552}\) See id. at 1541, 1546 (identifying as new torts IIED, strict products liability, invasion of privacy, wrongful discharge from employment, and spoliation).

\(^{553}\) See George L. Priest & Benjamin Klein, The Selection of Disputes for Litigation, 13 J. LEGAL STUD. 1, 1 (1984) (suggesting that appellate cases provide a good view of doctrinal developments but shed little light on how rules affect parties' decisions).
development left to lower courts evaluating particular claims of fact and seeking to determine whether such claims fit into the categories of wrong authorized by the earlier appellate rulings. Declaring a new tort a success simply because it was recognized by an appellate court can “create misleading impressions as to how the legal system actually responds to large numbers of accidents and claims.”

TABLE ONE describes the new torts in question and the recognized claims with respect to which they are considered parasitic. While each of these torts serves important policy goals and has helped modernize the landscape of tort doctrine, they generally have been accompanied by a high relative degree of difficulty associated with integration into the existing structure of tort doctrine.

Table One: New Parasitic Torts and Doctrinal Integration

<table>
<thead>
<tr>
<th>New Tort</th>
<th>Existing Claim From Which New Tort Derives</th>
</tr>
</thead>
<tbody>
<tr>
<td>IIED Intentional Tort (Battery/Assault)</td>
<td>Intentional Tort/Defamation</td>
</tr>
<tr>
<td>Invasion of Privacy</td>
<td>Intentional Tort/Defamation</td>
</tr>
<tr>
<td>NIED—Bystander Claims</td>
<td>Negligence</td>
</tr>
<tr>
<td>Reckless Disregard of Safety</td>
<td>Negligence/Intentional Tort</td>
</tr>
<tr>
<td>Products Liability—Design Defect</td>
<td>Contract/UCC Implied Warranty</td>
</tr>
<tr>
<td>Products Liability—Manufacturing</td>
<td>Contract/UCC Implied Warranty</td>
</tr>
<tr>
<td>Defect</td>
<td></td>
</tr>
<tr>
<td>Prima Facie Tort</td>
<td>Intentional Tort</td>
</tr>
<tr>
<td>Spoliation of Evidence</td>
<td>Intentional Tort</td>
</tr>
<tr>
<td>Wrongful Discharge from Employment</td>
<td>Intentional Tort/Breach of Contract</td>
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</table>

a. Invasion of Privacy. Beginning in 1905, American courts began to recognize an independent tort for invasion of privacy, providing clear protection for the kinds of informational concerns that have become incredibly valuable in the modern economic

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555 Blomquist, supra note 548, at 31.
landscape. By 1960, shortly before the tort of invasion of privacy was recognized by the Restatement (Second), the majority of jurisdictions had acknowledged the existence of some form of the claim. The privacy tort encompasses four causes of action—intrusion, public disclosure of private facts, false light, and appropriation of likeness. Though recognized, these new torts have remained extremely ambiguous. Indeed, their early advocates may have deliberately avoided crafting doctrine in any precise ways to avoid potential objections and criticism.

The various privacy torts have proved doctrinally troublesome, leading one court to refer to them as a "haystack in a hurricane." In particular, the close overlay between privacy torts and existing defamation causes of action have led courts to disfavor the new privacy claims. The appropriation avatar of privacy claims—which includes the common law right of publicity claim—has also caused confusion in the courts and a wide variety of articulations across jurisdictions.

b. Bystander NIED. The California case of Dillon v. Legg led the way toward recognition of a new tort claim for bystander NIED. The claim authorized was clearly parasitic of the underlying negligence claim of the victim of an accident producing physical injury, but the court extended recovery rights to a close family member present at the scene of an accident who suffered

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556 See id. at 30 (noting that tort scholars then recognized "a specific tort cause of action to protect invasions of privacy that occurred through new inventions and business methods").
557 See RESTATEMENT (SECOND) OF TORTS § 652A(1) (1965) ("One who invades the right of privacy of another is subject to liability for the resulting harm to the interests of the other.").
558 Blomquist, supra note 548, at 31.
560 Cf. Bernstein, supra note 540, at 1545-55 (noting that new tort advocates often argue that "their new tort derives naturally from prior common law rules").
562 See James B. Lake, Restraining False Light: Constitutional and Common Law Limits on a "Troublesome Tort," 61 FED. COMM. L.J. 625, 641 (2009) (stating the principle that many states' common law "disfavors reliance upon novel causes of action as alternatives to more developed torts").
563 Jacqueline D. Lipton, Celebrity in Cyberspace: A Personality Rights Paradigm for Personal Domain Name Disputes, 65 WASH. & LEE L. REV. 1445, 1488 (2008) (acknowledging confusion regarding the interplay between the rights of publicity and privacy, and regarding "the modern day tort" that covers elements of both).
564 441 P.2d 912 (Cal. 1968).
emotional harm as a result of witnessing a doubtlessly traumatic event. While early formulations of bystander NIED as a cause of action suggested that courts should be flexible in developing the contours of the doctrine, significant resistance developed in later decisions. Flexibility was “gutted” by subsequent decisions limiting NIED to the precise facts of Dillon. The resistance to this tort essentially ended the process of doctrinal integration with no effort to situate bystander NIED claims within the broader framework of foreseeability and negligence. For instance, emotional trauma to an unmarried cohabitant witnessing the death of a partner could certainly be said to be the foreseeable result of negligence, yet courts have generally resisted any expansion of NIED action beyond the legally recognized contours of immediate family relations. The result is a “tangled array of rules” designed to balance the need to provide injured plaintiffs compensation and to limit liability to “socially tolerable levels.”

c. Reckless Disregard of Safety. Recklessness is an ancient concept, dating back to Roman law, but its doctrinal formulation and recognition as a separate cause of action is attributable to the efforts of the American Law Institute’s various twentieth-century Restatement projects. Recklessness is parasitic of both intentional tort and negligence; its awkward linguistic formulation in the Restatement (Second) includes language drawn from both traditional claims. In practice, recklessness may be the ultimate “gap-filling” parasitic tort, defined as a midpoint along some unspecified scale between negligence and intentional tort. The parasitic nature of the reckless misconduct tort is apparent in the paradigmatic case of Hackbart v. Cincinnati Bengals, Inc., which

565 Id. at 914 (allowing the mother to recover damages where she saw her child killed in a car collision).
566 Schwartz, supra note 547, at 657.
567 See, e.g., Elden v. Sheldon, 758 P.2d 582, 588 (Cal. 1988) (refusing to extend NIED claims to unmarried cohabitants).
568 Rhee, supra note 535, at 807.
569 Cf. Geoffrey Christopher Rapp, The Wreckage of Recklessness, 86 WASH. U. L. REV. 111, 111 (2008) (noting that while recklessness is an old concept, it is one of the “most poorly understood” and that this poor understanding was not due to the American Law Institute’s work).
570 Id. at 116.
involved facts that are virtually identical to the black-letter law definition of battery. The plaintiff filed his claim as recklessness apparently only to avoid the shorter statute of limitations (which had run) for intentional tort.\textsuperscript{572}

The problems integrating recklessness within the framework of substantive tort law have proven severe. Courts have been unable to identify the borders between recklessness, negligence, and intentional tort.\textsuperscript{573} They have rendered inconsistent and unpredictable decisions in cases in which finding recklessness—as opposed to “mere” negligence—is a threshold for recovery.\textsuperscript{574} In practice, the doctrinal distinctions have proven so elusive that courts seem to render decisions based on little more than the sympathy felt for a particular victim.\textsuperscript{575}

d. Products Liability—Manufacturing Defect. The strict liability provision of the Restatement (Second) for product injury cases was explicitly modeled on the existing contract and UCC warranty claims.\textsuperscript{576} Among new parasitic torts, strict liability in manufacturing defect claims has experienced relatively low levels of difficulty in doctrinal integration.\textsuperscript{577} Although the legal formulation of strict liability for manufacturing defects has changed from “unreasonable danger”\textsuperscript{578} to a kind of absolute liability in the Restatement (Third),\textsuperscript{579} this change was not

\textsuperscript{572} Rapp, supra note 569, at 136.

\textsuperscript{573} Id. at 134.

\textsuperscript{574} See id. at 135 (discussing how courts use recklessness to allow plaintiffs to get around guest statutes’ bar against claims of negligence).

\textsuperscript{575} See id. at 134 (“Courts seem to decide whether a defendant’s conduct falls under the label reckless . . . based on whether the denial of relief to a particular plaintiff would be wrong.”).

\textsuperscript{576} For an insightful look into the origins of section 402A in the Second Restatement, see Herbert W. Titus, Restatement (Second) of Torts Section 402A and the Uniform Commercial Code, 22 STAN. L. REV. 713, 752–52 (1970) (arguing that the UCC and section 402A are complementary rather than conflicting).

\textsuperscript{577} See Richard O. Faulk & John S. Gray, Alchemy in the Courtroom? The Transmutation of Public Nuisance Litigation, 2007 MICH. ST. L. REV. 941, 948 (arguing that “creative counsel” are using public nuisance theories against product manufacturers “to sidestep comprehensive statutory schemes created by . . . legislatures”).

\textsuperscript{578} RESTATEMENT (SECOND) OF TORTS § 402A (1965).

responsive to the courts' discomfort in processing manufacturing defect claims, but rather an attempt to simplify judicial analysis.

Two factors explain the ease with which the new strict liability for manufacturing defect claims have been integrated into existing tort doctrines. First, as manufacturing processes and internal controls have improved, the rate of injuries resulting from manufacturing errors has declined.\(^5\) Second, since under both the new strict liability and prior *res ipso* analysis manufacturing defect claims were relatively easy to win for plaintiffs, most defendants will acknowledge responsibility and offer settlement long before such claims reach the point of a published judicial decision.\(^5\)

In sum, manufacturing defect claims are "conceptually easy."\(^2\)

e. **Products Liability—Design Defect.** The line of products liability cases culminating in section 402A of the *Restatement (Second)'s* embrace of "special liability" in products cases also established a new cause of action for design defect.\(^3\) As with manufacturing defect doctrine, the new strict liability claim for products injuries was parasitic of existing contract and UCC remedies for implied warranty.\(^4\) Design defect claims have

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\(^8\) See Hildy Bowbeer et al., *Timmy Tumble v. Cascade Bicycle Co.: A Hypothetical Case Under the Restatement (Third) Standard for Design Defect*, 30 U. MICH. J.L. REFORM 511, 527 (1997) ("The Restatement (Third) effectively looks beyond the nomenclature and captures the intent of the vast majority of courts that have struggled to articulate a more meaningful approach to evaluating the design of a product.").

produced more serious integration difficulties than manufacturing defect claims. The contract origins of the Restatement formulation stand in sharp contrast to traditional tort law analysis, and courts have, in the years since the Restatement (Second), aggressively pushed back against the new doctrine and "applied the negligence-like risk–benefit standard to complex questions of product design." The "intricacies of the law of sales" were rejected by courts as irrelevant in the "formulation of proper products liability doctrines." Principles that one would have expected to be applied in a tort landscape shaped by warranty doctrines, such as "the enforcement of disclaimers of liability that consumers accept," were given little weight in the development of tort products claims.

f. Prima Facie Tort. Although the "prima facie," "inchoate," or "innominate" tort dates to the end of the nineteenth century, it did not receive its rather chilly welcome in American jurisprudence until the past century. Section 870 of the Restatement (Second) provides a cause of action against one who "intentionally causes injury to another" if her conduct "is generally culpable and not justified under the circumstances" if her conduct "is generally culpable and not justified under the circumstances," even if the wrongdoer’s "conduct does not come within a traditional category

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585 See James A. Henderson, Jr. & Aaron D. Twerski, A Proposed Revision of Section 402A of the Restatement (Second) of Torts, 77 CORNELL L. REV. 1512, 1525 (1992) ("In cases involving design . . . defects, the issue [of comparative fault] takes on an added dimension because the defect is often the manufacturer's failure to account for foreseeable (albeit arguably unreasonable) conduct on the part of the plaintiff.").

586 Schwartz, supra note 547, at 606.

587 Id. at 617.

588 Id.

589 Id., The Prima Facie Tort Doctrine, 52 COLUM. L. REV. 503, 503 (1952).

590 Justice Holmes was a leading advocate of the prima facie tort in his scholarly works and judicial opinions. Blomquist, supra note 548, at 27. To read some of Justice's Holmes's prima facie tort opinions, see Aikens v. Wisconsin, 195 U.S. 194, 201, 207 (1904) (upholding judgments against defendants for "wilfully or maliciously injuring another in his reputation, trade, business, or profession"); Moran v. Dunphy, 59 N.E. 125, 126 (Mass. 1900) (recognizing that inducing a third person to end his employment of the plaintiff is an actionable tort); Plant v. Woods, 57 N.E. 1011, 1016 (Mass. 1900) (Holmes, C.J., dissenting) (classifying peaceful labor strikes as not actionable in tort); and Vegelahn v. Gunter, 44 N.E. 1077, 1080 (Mass. 1896) (Holmes, J., dissenting) (expressing disagreement with majority's decision to grant an injunction against defendant which denied the right to speak with customers entering a store).
of tort liability." The prima facie tort is the consummate gap-filler, a "legal theory of last resort," and it is therefore not surprising that its place in established doctrine is extremely difficult to define. The framework's limitations resulted in its adoption in very few states.

For instance, while the traditional articulations of prima facie tort required intent to do harm, several cases have expanded such claims to include situations where the defendant lacked an intent to injure. At the same time, other courts have required intent to do harm to state a claim for prima facie tort. Difficulties have also emerged regarding the scope of a justification defense in prima facie tort claims. Because only wrongful conduct is actionable in tort, any justified intentional harm would need to be excluded from the boundaries of the prima facie tort. The tort's doctrinal breadth, however, makes this problematic: Ellen Bublick refers to it as a "whale taking in plankton," which would potentially "ingest too much."

**g. Spoliation of Evidence.** The new tort of spoliation of evidence has been adopted in very few states. The tort of intentional spoliation requires an unreasonable interference with the opportunity of a plaintiff to pursue a lawsuit caused by the defendant's intentional "destruction or significant alteration of..."
discoverable evidence in the face of 'pending, imminent or reasonably foreseeable litigation.'”

Where it has received limited support, spoliation as tort has faced obstacles in terms of doctrinal integration. The extent to which a cause of action depends on intent, or could be based on mere negligence, is unclear. Whether the intent required is intent to act to spoil evidence, or intent to interfere with a plaintiff's suit by spoiling evidence, is also unclear.

h. Wrongful Discharge from Employment. Wrongful discharge claims are derivative of both contract breach and intentional interference with economic relations theories. Though widely recognized, wrongful discharge doctrine has been characterized by considerable confusion due to the parasitic origins of the tort.

One state supreme court went so far as to admit that its earlier articulation of the tort of wrongful discharge was “vague” and confusing. The tortious interference origins of wrongful discharge have left courts wondering whether each of the elements of that claim should be required in wrongful discharge actions. Another court described wrongful discharge opinions as evincing “ambivalence, if not confusion, as to the legal basis for recovery.”

2. Proposed Torts and Potential Problems in Doctrinal Integration. Experience indicates that new parasitic torts appear highly likely to face difficulty in terms of integration into existing

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602 See Pati Jo Pofahl, Case Comment, Smith v. Superior Court: A New Tort of Intentional Spoliation of Evidence, 69 Minn. L. Rev. 961, 968 (1985) (noting that the California Supreme Court has implicitly recognized negligent spoliation of evidence as a tort).
603 See id. at 974 (“[T]he court could have required the plaintiff to prove that defendant actually intended to interfere with [the plaintiff's] prospective civil action by spoliating the evidence, or that defendant acted with knowledge that its conduct would result in such an interference.”).
604 See John Alan Doran, It Takes Three to Tango: Arizona's Intentional Interference with Contract Tort and Individual Supervisor Liability in the Employment Setting, 35 Ariz. St. L.J. 477, 477 (2003) (noting that “[i]n the ordinary course of a wrongful discharge” lawsuit, it is common to have other claims “tag-along,” such as breach of contract).
606 See, e.g., id. at 633 (discussing the court's earlier misleading references to tortious interference in the context of a wrongful discharge claim).
doctrine. This subsection considers several proposed new torts and attempts to predict likely difficulties associated with their introduction into American tort law. TABLE Two identifies three new proposed torts and the existing claims to which they are parasitic. Again, each of these proposed torts offers strong potential policy advances. Yet each is likely to face significant doctrinal integration problems.

**TABLE Two: Proposed New Parasitic Torts and Predicted Doctrinal Integration**

<table>
<thead>
<tr>
<th>Proposed New Tort</th>
<th>Existing Claim From Which New Tort Derives</th>
</tr>
</thead>
<tbody>
<tr>
<td>Hate Speech</td>
<td>Intentional Tort/Assault</td>
</tr>
<tr>
<td>Sexual Fraud</td>
<td>Fraud</td>
</tr>
<tr>
<td>Sexual Harassment</td>
<td>Negligence</td>
</tr>
</tbody>
</table>

**a. Hate Speech.** Richard Delgado’s proposed new action would allow recovery where a defendant acts with intent to demean through reference to race. 608 This tort has failed to gain adherents among common law judges. Even a more cautious version advocated by John Nockleby, limited to race-based references to violence, 609 still has few defenders on the bench. Such torts may be viewed as too liberal or too radical, 610 and have also drawn opposition from civil libertarians. If adopted, however, such torts would no doubt confront significant difficulties with doctrinal integration. Would consent be a valid defense? What showing of causation would be required? Would concert-of-action principles allow for imposition of liability against those who support or assist the hateful speakers (in ways that might contradict developments in defamation law’s treatment of distributors and publishers)?

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608 Delgado, supra note 30, at 179.


610 See Bernstein, supra note 540, at 1544 (remarking on the resistance to the expansion of tort liability).
b. Sexual Fraud. Jane Larson has proposed a new common law action for sexual fraud.\textsuperscript{611} This proposed cause of action would allow recovery against a defendant who "fraudulently makes a misrepresentation of fact, opinion, intention, or law, for the purpose of inducing another to consent to sexual relations in reliance upon it."\textsuperscript{612} The overlap between existing battery theories premised on deceit or fraud\textsuperscript{613} and the proposed sexual fraud tort would present integration difficulties.

c. Sexual Harassment. A proposed new tort of sexual harassment in the workplace would create a cause of action for "unreasonable interference with an individual employee's right to work in an environment free from sex-based intimidation or hostility."\textsuperscript{614} A "reasonable woman" standard would be used to determine whether a violation occurred,\textsuperscript{615} and an affirmative duty would be placed on employers to "prevent and eliminate sexual harassment in the workplace."\textsuperscript{616} This proposed tort is explicitly designed to fill gaps between existing tort claims for negligence and IIED and statutory remedies available under Title VII.\textsuperscript{617} As even its proponents point out, such a tort would face significant impediments in terms of integration within existing common law doctrine and applicable statutory frameworks. How to distinguish such claims from workplace injuries limited by statute to the workers' compensation process,\textsuperscript{618} for example, would prove difficult. Common law doctrinal integration could also present problems. For instance, how to isolate employer failures from intervening employee wrongdoing for proximate cause purposes, and how to define appropriate cost–benefit analysis for "reasonableness" determinations, would likely challenge courts.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{611} See Larson, supra note 29, at 453.
\item \textsuperscript{612} Id.
\item \textsuperscript{613} See Hogan v. Tavzel, 660 So. 2d 350, 352–53 (Fla. Dist. Ct. App. 1995) (deciding as a matter of first impression that the defendant could be liable for battery for infecting another with a sexually transmitted disease).
\item \textsuperscript{614} Schoenheider, supra note 30, at 1485–86.
\item \textsuperscript{615} Id. at 1486.
\item \textsuperscript{616} Id. at 1488.
\item \textsuperscript{617} Id. at 1474–85.
\item \textsuperscript{618} Id. at 1490–95.
\end{itemize}
\end{footnotesize}
This Article should not be interpreted as support for the idea that force should be used in defense of emotional harm. The pacifist approach—turning the other cheek—is attractive from a moral and pragmatic perspective. My aim is not to increase the amount of violence deployed in self-defense, but rather to promote intellectual coherence and consistency in the law.

Is it just silly to use force to defend one's emotional tranquility? That such force simply cannot be licensed would be an understandable reaction. But if that is in fact the natural reaction to the puzzle explored in this Article, it is equally silly to allow force to be used to stop a glove slap, a loogie in the face, or another harmless but certainly offensive contact. The law is inconsistent in that shocking and extremely harmful emotional attacks cannot be defended against by using physical force, while minor and trivial bodily contacts—even if they result from negligence, rather than intentional misconduct—can. Perhaps consistency would be better achieved by restricting the right to use self-defense against minor contacts rather than by expanding it to permit protection against emotional harm.

Force may be used to defend against bodily harm, whether intentionally or negligently caused. It may also be used to defend against insulting or offensive contacts and to protect the interest in freedom from apprehension of such contacts. Force can be used to defend against NIED, in that bystanders may intervene to protect any other person from harm and persons in the zone of danger of a physical contact can defend against it. Yet force does not seem to be permitted to prevent extreme or outrageous conduct intentionally designed to inflict severe emotional distress. This runs counter to the broad trends in American tort law expanding liability for emotional distress and permitting force to be used in self-defense.

The small conundrum posed at the outset of this Article is a key to two locks. First, it helps reveal critical categorical preferences in tort law, both in terms of what interests merit protection and
what categories of litigants the law favors. Second, it tells us a 
great deal about the process and perils of new tort lawmaking. 
Although a tort may gain widespread acceptance, when it is 
deefined in amorphous terms, derives critical elements from 
eexisting claims, and is meant to fill gaps between more recognized 
theories, it will find its place in the broader doctrine ill-defined for 
decades, if not longer. Though new torts offer important 
advantages and help advance our law’s compensation goals, they 
cannot be expected to fall immediately and effectively into place 
within existing doctrinal structures. This is certainly not to say 
that new torts should not be created and embraced, but when 
creating new torts, attention must be paid to doctrinal integration.