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The Case for a Criminal Law Theory of Intentional Infliction of Emotional Distress

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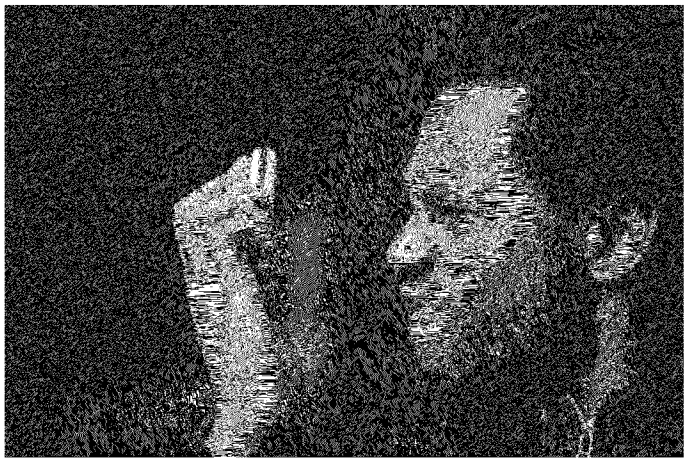
Words hurt! Recent cyber bulling news stories show that a word can be as painful as a punch.[1] Unfortunately, the law redresses those who suffer injury from harmful speech through a series of innocuous remedies, including financial remuneration or retribution through minimal criminal penalties.[2] However, the law does not criminally sanction those who intentionally inflict verbal emotional harm to the same degree as those who intentionally inflict physical harm.[3] In other words, the legislature and the courts are have not yet elevated an actor's intentional inflictions of verbal harm to the same jurisprudential echelon as intentional inflictions of physical force.[4]



Consider the first federal cyber bullying case of Ms. Lori Drew.[5] Ms. Drew, a forty-nine-year-old woman, was charged for using a fake "MySpace" account to torment a thirteen-year-old girl.[6] The girl committed suicide as a result of the hoax.[7] Initially, Ms. Drew was found guilty of three counts of unauthorized access to a web site—misdemeanors that carry minimal punishment.[8] The verdict was subsequently overturned by a federal judge.[9] The conduct that Ms. Drew was charged with was one that "millions of people" engaged in, and the judge was reluctant to establish a precedent on which any person may be convicted for a mere violation of MySpace's terms of service.[10]

Society does not impose criminal sanctions for the intentional infliction of severe mental anguish; instead, such acts are punished civilly as the intentional infliction of emotional distress (IIED). Interestingly, IIED is the only intentional tort involving harm to a person that does not share a criminal counterpart.[11] Every state has imposed criminal penalties for the intentional torts of assault, battery, and false imprisonment.[12] It appears that the intentional infliction of emotional distress is accorded a lesser punitive status than the choice to threaten or use physical force against another.

The same elements are used to prove both IIED and the criminal charges for assault, battery and false imprisonment. IIED, like assault and false imprisonment, is largely a mental anguish offense.[13] A prima facie case for IIED requires, among other elements, proof that the plaintiff suffered severe emotional harm.[14] Similarly, assault and false imprisonment require proof that a victim suffered a similar type of cognitive distress, such as a fear of harm or loss of liberty.[15] In contrast, battery requires proof of physical harm.[16]

At first blush, one might argue that IIED, which is a harm of severe emotional distress, does not share the requirement that the plaintiff suffered some physical pain. However, according to recent biological and neurochemical studies, one can experience physical pain in response to a tone or a particular set of harsh words.[17] If one accepts these findings as true, the physical harm requirement of battery may be equally prevalent among those who are subject to severe and outrageous conduct. Given that IIED presents the same types of harm as the criminalized intentional torts, society would be well-served by assigning IIED the same criminal status.

Some modern theorists may argue that, given the current state of the law, it is unnecessary to criminalize IIED.[18] According to these scholars, tort law has effectively absorbed the theories of retribution and deterrence through the use of large civil sanctions.[19] These sanctions serve a utilitarian purpose by regulating human behavior and satisfying the need for vengeance.[20] Others, however, argue that tort law primarily "prices" harm, whereas criminal law serves to prohibit socially harmful behavior.[21] Consequently, the assignment of monetary penalties as both retributive and deterrent in nature will never compensate for the larger threat to individual liberty.[22] According to those in the latter camp, in order to safeguard against physical harm, it is important to instill in society "a general fear which cannot be adequately

remedied by compensation."[23] Therefore, an issue arises as to the appropriateness of extending criminal sanctions to a harm that the law already redresses.[24]

This article will explore the appropriateness of criminalizing IIED. Part I will discuss the historical context of civil and criminal remedies and evaluate their modern application to intentional acts. Part II will explore the limitations of IIED and analyze whether the harm caused by IIED parallels the harm caused by intentional criminalized torts. Part III will evaluate the appropriateness of criminalizing IIED. The article will conclude that, given recent neuroscientific findings, IIED should be criminalized.

I. Intentional Wrongs - The Crime/Tort Distinction

The common law distinction between modern criminal law and tort law was predicated on the victim's desire for retribution.[25] In the early common law, a victim could pursue justice for the same wrongful act either through what is now considered tort law or through criminal law.[26] Forbidden actions were punishable by the crown, as the King was said to have been wronged by every impermissible act.[27] In addition, individuals could independently seek retribution from impermissible acts through the legal system, which was intended to deter private physical retaliation.[28] As such, whether an action was brought in tort or in criminal law was largely a function of the wronged parties' preference.[29]

A. Punishing Civil and Criminal Wrongs

The present distinctions between criminal and tort law vary little from their early predecessors. Criminal wrongs harm society while civil wrongs harm individuals.[30] Although, most jurisdictions have codified criminal wrongs and enumerated specific punishments, torts remain largely uncodified.[31] Damages can be nominal, compensatory, or punitive,[32] and the assignment of each is left to the complete discretion of a judge or jury.[33]

Tort damage awards seek to achieve three fundamental goals: (1) to make the victim whole or as near to whole as possible;[34] (2) to compensate the victim for additional pain or suffering inflicted by the wrong;[35] and (3) to deter wrongdoers from engaging in the same conduct in the future.[36] Thus, tort damages do not solely serve to regulate human conduct, but rather to place the injured party in the same position he or she was in before the wrong occurred.

In contrast, criminal punishment serves to curtail future undesirable conduct by reshaping societal norms.[37] In certain instances, criminal punishment may result in the loss of liberty or finances. The legislature is largely responsible for determining the range of punishment that may be assigned for a specific criminal act.[38] As such, judges have a degree of discretion within these ranges to determine the punishment that is warranted in a given criminal case.[39]

During this process, a judge may consider several theories of punishment, including retribution and deterrence. Retribution imposes punishment as a means of societal revenge.[40] Deterrence imposes individual punishment as a disincentive to the individual and to others from engaging in the same harmful conduct in the future.[41] These theories are designed to satiate a community's need for revenge and to assure conformity to desirable social mores.

This judicial embrace of retribution and deterrence has blurred the line between criminal and tort law, particularly within the area of damages awards. In recent years, tort law has incorporated the criminal theories of retribution and deterrence.[42] Courts have been more inclined to use tort awards to sanction undesirable conduct and to help shape societal norms. For example, in *TXO Production Corp. v. Alliance Resources Corp.*,[43] the Supreme Court upheld the jury's award of $19,000 in compensatory damages and $10 million in punitive damages for slander, reasoning that "a substantial [civil] award was required in order to serve the goals of punishment and deterrence."[44] The Court's rationale has been recognized by scholars as a bourgeoning relationship between civil and criminal law.[45] John Coffee recently noted that "the dominant development in substantive federal criminal law over the last decade has been the disappearance of any clearly definable line between civil and criminal law."[46]

Thomas Koenig and Michael Rustad have explicitly recognized that the criminal law principles of retribution and deterrence have been assimilated into tort law, ultimately coining the term "crimtort."[47] Crimtort is generally used to advance the notion that civil sanctions can serve to regulate corporate wrongdoers.[48] Financial deterrence at the corporate level is of great value since loss of monies can threaten the financial health, or even existence, of a particular business entity.[49]

Theorists have posited the existence of a retributive factor within the assignment of tort awards.[50] George P. Fletcher's notion of corrective justice supports

this theory. Under corrective justice theory, "wrongful acts create an imbalance in the equilibrium established under criteria of 'the geometric proportionality' of distributive justice."[51] The wrongdoer "creates a shift in resources from victim to the injurer."[52] In turn, "the injurer should be required to give half the imbalance as payment to the victim" to restore the status quo.[53] From a purely economic perspective, corrective justice suggests that the wronged party is responsible for making the injured party whole.[54] According to this definition, it is hard to see how the use of a civil award—viewed from a corrective justice perspective—provides any deterrent effect. However, to the extent that a victim feels satisfied that he or she is now whole again, corrective justice has a large retributive aspect.[55]

Theorists' evaluation of the use of punitive damages to support criminal theories of punishment has played out in the courts, which, after the *TXO Productions Corp.* decision, have routinely assessed punitive damages against defendants in civil cases as a means of satiating a plaintiff's need for retribution.[56] In *BMW of North America, Inc. v. Gore*,[57] the Supreme Court "emphasized the constitutional need for punitive damages awards to reflect (1) the 'reprehensibility' of the defendant's conduct, (2) a 'reasonable relationship' to the harm the plaintiff (or related victim) suffered, and (3) the presence (or absence) of 'sanctions,' *e.g.,* criminal penalties, that state law provided for comparable conduct."[58]

The Court, however, has recently begun to halt the use of damage assessments as a means to punish. Although the Court has yet to use the Eight Amendment Excessive Fines Clause to limit punitive awards,[59] the Court has announced a series of cases that, under the Due Process Clause, curtail a state or individual's right to collect unreasonably huge punitive awards. For example, in *Honda Motor Co. v. Oberg*,[60] the Court ruled that due process principles require judicial review of punitive damage awards.[61] In *BMW of North America, Inc. v. Gore*, a 5-4 majority ruled that the Constitution prohibits "grossly excessive punishment on a tortfeasor."[62] Most recently, in *Philip Morris v. Williams*,[63] a widow brought a suit against Philip Morris for negligence and deceit on behalf of her dead husband, a heavy cigarette smoker.[64] The Court considered the appropriateness of a large jury award and ruled in a 5-4 decision that the Constitution's Due Process Clause prohibits the use of punitive damage awards to punish defendants for harm inflicted on persons who are not parties to the suit.[65] Courts at the state level have rendered similar decisions. For example, the New Jersey Supreme Court recently ruled that the Punitive Damages Act ("PDA") did not permit a jury to consider general deterrence to others when awarding punitive damages.[66]

This limitation on punitive damage awards as a means of retribution or deterrence tacitly acknowledges that its place lies most firmly within the confines of criminal rather than civil law. Regardless of the use of civil sanctions, a need remains for using criminal penalties to achieve the societal goals of conformity. Under the theory that individuals are most likely to regulate their behavior out of fear of humiliation or loss of liberty, criminal sanctions are an appropriate means to assure that individuals behave within the rules of society.

Robert Nozick has posited that in order to safeguard against physical harm, society must maintain "a general fear which cannot be adequately remedied by compensation."[67] Nozick's notion is primarily based on the retributive model.[68] According to Professor Nozick, criminal punishment is deserved under certain instances, if not demanded.[69] Professor Nozick demonstrates this theory through a formula; punishment deserved = $r * H$, where H is the magnitude of the wrongness or harm, and r is the degree of responsibility.[70] Blameworthiness is a function of the value of the wrong done by the agent (H) and the degree of the agent's responsibility for the wrongdoing (r).[71] The value of r may range from no responsibility (0), as when a criminal defendant is not guilty by reason of insanity, to full responsibility (1), as when the defendant intentionally committed the crime.[72]

Professor Nozick's theory is particularly applicable to intentional wrongs. According to the theories of corrective justice and crimtort, the redistribution of wealth from the intentional wrongdoer to the victim can arguably coerce the wrongdoer into behaving properly.[73] However, what is absent from both theories is the stigma that is attached to criminal punishment; Prof. Nozick's theory properly accounts for the coercive value of stigma. His formula indicates that the more responsible the wrongdoer is, the greater the punishment deserved.[74] To the extent that punishment is viewed on a sliding scale—from probation to monetary obligations to a loss of liberty—certainly the latter is the most compelling to ensure social conformity. Defendants who commit torts must balance the financial penalty against the personal value gained from committing the wrong. In contrast, criminal punishment stigmatizes the individual, thereby imposing a larger punishment and a greater disincentive to engaging in those particular acts.[75]

According to Professor Nozick, criminal punish-

ment is "a communicative act transmitting to the wrongdoer . . . how wrong his conduct was";[76] punishment will communicate clearly to the community that such conduct is intolerable.[77] The deterrent value served by an individual's fear of stigmatization is often appropriate as it may serve as a "system for public communication of values."[78]

Like two branches from the same trunk, the law has provided for criminal and civil relief from intentional harms to the individual. The sanctions for both criminal and civil wrongs are understandably blurred as similar theories are often used to attribute blame and assess compensation. Huge tort awards continue to usurp the role of retribution and deterrence, both of which were previously reserved for criminal punishment. However, while tort law can effectively prohibit individuals from repeating particular types of conduct, the non-codified ad hoc nature of tort law does little to accomplish the most important role of communicating a system of shared values that define the boundaries within which individuals should live their lives. Tort law sanctions cannot match the reputation of criminal punishment as an effective means of regulating behavior. For this reason, society is well-served by the existence of both criminal and civil definitions for the same intentional wrongs.

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B. The Criminalized Torts: Assault, Battery and False Imprisonment

William Prosser identified four "dignitary torts," which are intentional harms against the individual: assault, battery, false imprisonment, and intentional infliction of emotional distress.[79] These wrongs all require proof that the defendant chose to engage in the tortious conduct and that, by engaging in such conduct, intended or knew with substantial certainty that the conduct would invade an individual's right to quiet enjoyment.[80] Three of these torts—assault, battery, and false imprisonment—also exist in criminal law.[81]

Much has been written about the conduct or elemental act of intentional torts.[82] Unlike criminal law, the act itself is not merely an element of the tort.[83] Instead, proof of the plaintiff's injury is mandatory, and as such, is a prerequisite to liability.[84] The act must be a voluntary act—one in which the actor chooses to engage.[85] An involuntary act—conduct engaged in while one is otherwise unconscious—is not sufficient.[86] Thus, an individual who hits a child while driving a car due to an epileptic fit does not commit a conscious act[87] whereas one who makes a conscious choice to swing a fist does.[88]

Perhaps the most confusing aspect of this process is proving the actor's desire to engage in the conduct such that it subsequently brings about the intended result, as opposed to intending the result itself. The Restatement (Second) of Torts provides the best illustration of the element act. "[I]f the actor, having pointed a pistol at another, pulls the trigger, the act is the pulling of the trigger and not the impingement of the bullet upon the other person."[89] If the act is to pull the trigger, the intent would be the actor's desired goal that he or she wishes to achieve by pulling that trigger. According to Prosser, intent in this context means

> (1) . . . a state of mind (2) about consequences of an act (or omission) and not about the act itself, and (3) it extends not only to having in the mind a purpose (or desire) to bring about given consequences but also to having in mind a belief (or knowledge) that given consequences are substantially certain to result from the act.[90]

In order to prove intent, the actor must show that the defendant chose to commit a particular action, and in so doing, intended or knew with substantial certainty that such an action would bring about the undesired result.[91] The actor who pulls the trigger for the desired purpose of causing harm to a particular person is said to intend such conduct.[92] The actor who pulls the trigger for enjoyment purposes only, but does so in a crowded area, is also said to have intended such conduct for purposes of proving intentional torts since the actor knew with substantial certainty that such conduct would bring

about the undesired wrong.[93] This requirement of intent is the prerequisite for all intentional torts.[94]

i. The Intentional Tort of Assault

An actor is liable for tortious assault if "he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such contact, and (b) the other is thereby put in such imminent apprehension."[95] In other words, an assault is the threat of harmful or offensive contact coupled with the present ability to commit a harmful or offensive contact. Assault occurs in the absence of contact; therefore, assault would be actionable on the basis of a mental, rather than physical, type of harm.[96]

Proof of assault merely requires some apprehension of fear on the part of the plaintiff; physical harm is not an element of the tort. The fear need not be extreme; proof of fright or humiliation suffices to support a cause of action.[97] For example, standing within striking distance of another while shaking a stick is assault; shaking that same stick with the same force behind the victim, who is therefore unaware of such actions, is not.

Even the most offensive and off-putting words, alone, are never sufficient to support an assault claim, regardless of the mental anguish the words may impose.[98] Thus, in *Lay v. Kremer*,[99] the defendant, while fighting over a parking spot, called a woman a "motherfucking nigger"* and a "bitch"; the trial court acquitted the defendant under the premise that "mere words [did] not constitute assault."[100] Assault actions are generally successful, it seems, when there is proof that the plaintiff suffered some degree of fear or mental anguish resulting from his or her belief that the defendant had a present capacity to inflict physical harm.[101]

ii. The Intentional Tort of Battery

Battery is an assault coupled with contact that is harmful or offensive.[102] The Restatement (Second) of Torts has divided battery into two categories: one in which harmful contact results, and another in which fensive contact results.[103] According to the Restatement, an actor is liable for battery if:

> (a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person or an imminent apprehension of such a contact and (b) a harmful contact with the other person directly or indirectly results,[104] or (c) he acts intending to cause a harmful or offensive contact with another or third person or an imminent apprehension of such a contact,[105] and (d) an offensive contact with the other person directly or indirectly results.[106]

Battery requires proof of the exact same intent as assault.[107]

The difference lies in the contact. Assault occurs in the absence of contact, whereas battery requires some sort of contact in order to be actionable.[108]

Another relevant distinction exists between the two wrongs. In order for assault to be actionable, the plaintiff must be aware of the threat.[109] However, battery requires no awareness on the part of the plaintiff. Thus, if a defendant raises a stick behind a plaintiff's back and the stick hits the plaintiff, even if the plaintiff did not realize the stick was raised, the defendant's conduct is actionable under battery.

Battery is not necessarily considered a crime of mental anguish, primarily because the element of harm—or at least contact—is required for the crime.[110] Courts have, however, considered offensive contact actionable when the plaintiff suffered humiliation or embarrassment.[111] This recovery for embarrassment has extended the boundaries of battery to include emotional injury, in addition to physical injury.

iii. The Intentional Tort of False Imprisonment.

False imprisonment, sometimes referred to as false arrest, is the intentional deprivation of another's liberty. According to the Restatement (Second) of Torts, false imprisonment occurs when an actor intends to "confine another within boundaries fixed by the actor, and his act directly or indirectly results in such a confinement of the other, and the other is conscious of the confinement or is harmed by it."[112]

While common law cases permitted an action for false imprisonment in instances where the plaintiff was unaware of his confinement, the current formulation requires proof that the plaintiff realize his liberty is restrained.[113] Thus, false imprisonment, which is an infringement on the plaintiff's belief that he is not free to exercise his will to move about—like assault—is a wrong against mental anguish.[114]

The intent element of false imprisonment is very

*The author and the editors deliberated whether to redact language from cases that many people will find offensive. We decided to pubish the words in full, as best support for the articles's larger claims.

similar to that of assault and battery.[115] In order to be responsible for false imprisonment, the defendant must know that he is confining another or be substantially certain that his conduct will result in confinement.[116] Mental anguish is, in essence, the chief component of false imprisonment. Under the Restatement formulation, the plaintiff is not required to suffer any type of physical harm; rather, the defendant must only instill in the plaintiff a sense of loss of freedom to move about.[117] There must only be a sense of boundaries. Such boundaries may be "large or small, visible or tangible, or through real, still conception only."[118] Thus, in *Allen v. Frome*,[119] the court held that false imprisonment occurred in a city in which the defendant felt unable to leave town.[120] Similarly, courts have found that one can be falsely imprisoned in a car that moves about.[121]

C. The Corresponding Crimes

Criminal law assigns blame to those who engage in intentional conduct. Like tort law, criminal convictions require proof that the defendant chose to engage in conduct and that, by engaging in that conduct, intended or knew with substantial certainty that the conduct would result in a wrong against society.[122] While criminal law also assigns punishment to those who acted recklessly or negligently,[123] the law seems to reserve the greatest punishment for those who engage in intentionally wrongful conduct.[124]

Much has been made of the intent levels in criminal law. Early on—and still in many jurisdictions—intent was divided between specific and general intent.[125] Courts define specific intent as an actual purpose or goal to engage in a particular type of conduct or a deliberate choice to ignore a certainty of harm.[126] General intent translates into a sense of risk-taking or carelessness on the part of the defendant.[127]

The *Model Penal Code* ("MPC") has created four classifications of an actor's mindset as a means to better delineate between specific and general intent: purposeful, knowing, reckless, and negligent.[128] "Purposeful" is defined as a conscious goal to engage in particular conduct,[129] while "knowing" requires proof that the defendant was substantially certain that such a result would occur from a particular type of conduct.[130] The torts of assault, battery, and false imprisonment require proof of intent similar to general intent in that the actor is responsible if he or she intended the conduct or knew with substantial certainty that such an outcom would occur.[131] The Restatement's definition of *intent* corresponds quite closely with the MPC's definition of purposeful and knowingly. Thus, proof of the actor's awareness is virtually identical in each instance.

i. The Crimes of Assault and Battery

Assault and battery—common law misdemeanors—exist today as statutory crimes in all American jurisdictions.[132] Although the two crimes are generally said in one breath, it is important to note that they are actually distinguishable and are divided in the same way as their tort counterparts.[133] Like the tort, the crime of battery requires an injury or offensive touching,[134] whereas assault requires no physical contact.[135]

a. The Crime of Assault

Various statutory formulations of the crime of assault exist.[136] These statutes can be divided into two general categories: assault as an intentional scaring or assault as an attempted battery.[137] Assault, as an intentional scaring, is the true codification of civil assault.[138] For this type of assault, one is criminally responsible when he or she carries out some behavior that causes an apprehension of immediate bodily harm with the intent to cause such apprehension.[139] Pointing a gun at another individual is sufficient to establish common law assault.[140] Under this formulation, assault criminalizes the imposition of mental fear or anguish.

In some states, evidence of mental anguish can support the personal injury requirement of assault[141] and can include evidence that the victim was upset during or after the assault, needed subsequent psychological treatment, was unable to conduct a normal life, feared for the his or her safety, and maintained continuing feelings of vulnerability.[142]

The MPC formulation of assault constitutes a misdemeanor in three circumstances: where the actor attempts to cause or purposely, knowingly, or recklessly causes bodily injury; negligently causes bodily injury with a deadly weapon; and attempts by physical menace to put another in fear of imminent serious bodily harm.[143] This third circumstance incorporates the civil notion of assault into the criminal law, as had been done in a majority of jurisdictions at the time the MPC was drafted.[144]

b. The Crime of Battery

Just as in tort law, the common law crime of battery requires harmful or offensive touching.[145] Battery,

like assault, requires proof of an act or an omission and a mental state.[146] Many jurisdictions allow for both intentional and unintentional battery.[147] Intentional battery typically requires proof of purposeful conduct.[148] For example, one who—with intent to injure—acts or omits to act when he has a duty to act, which is the legal cause of an injury, is guilty of criminal battery.

Battery is not a separate crime under the MPC, which has synthesized the common law crimes of mayhem, battery, and assault into a single offense.[149] One who attempts to cause serious bodily injury or one who causes such injury purposely, knowingly, or recklessly, and under circumstances manifesting an extreme indifference to the value of human life is said to commit battery.[150]

The MPC codifies civil battery and calls it "aggravated assault."[151] According to the MPC, a person is guilty of aggravated assault if he "attempts to cause serious bodily injury to another, or causes such injury purposely, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life."[152] The level of harm necessary to show "serious bodily injury" varies by jurisdiction, and can range from "reddish marks around the neck" from a potential choking[153] to extreme physical pain and disfigurement.[154]

The tort of IIED is relatively new, as compared to the traditional common law torts of assault, battery and false imprisonment, all of which date back to before the sixteenth century.

c. The Crime of False Imprisonment

False imprisonment is the unlawful restraint of another's liberty.[155] At common law, the offense could be committed by mere words.[156] The gravamen of the crime is that the victim believes he is unable to remove himself from the control of the defendant.[157] Mere words are insufficient to constitute false imprisonment if the person to whom they are spoken is not deprived of freedom of action.[158]

II. The Non-Criminalized Tort: Intentional Infliction of Emotional Distress (IIED)

According to the Restatement, one who intentionally causes severe emotional distress to another is liable "(a) for such emotional distress, and (b) for bodily harm resulting from it."[159] Stated another way, IIED occurs when "[o]ne who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm."[160] IIED sanctions those whose conduct is so outrageous that it brings about mental and/or physical pain and suffering.[161] Additionally, IIED is the only intentional tort that allows recovery from one whose goal is limited to creating emotional havoc.

The tort of IIED is relatively new, as compared to the traditional common law torts of assault, battery and false imprisonment, all of which date back to before the Sixteenth Century.[162] *Wilkinson v. Downton,*[163] a late nineteenth century case, presented the first instance when a court allowed recovery for a woman, against whom a mean-spirited practical joke was played. As a consequence of the joke, the woman suffered "violent shock to her nervous system, producing committing and other more serious and permanent physical consequences entailing weeks of suffering and incapacity . . . ."[164] The court allowed the plaintiff to recover for the harm she suffered as a result of the defendant's practical joke.[165]

Almost 150 years after *Wilkinson*, the tort of IIED appeared in a 1948 supplement of the Restatement of Torts.[166] The California Supreme Court first applied the Restatement's definition four years later when it decided the landmark case of *State Rubbish Collectors Ass'n v. Siliznoff*.[167] Courts across the country followed California's lead, and today every state has recognized the independent IIED tort and "adopted [the] Restatement (Second) of Torts section 46 in some form."[168]

Like assault, battery, and false imprisonment, an individual is responsible for IIED if it is his intention to inflict severe emotional distress or he knows with substantial certainty that severe emotional distress will arise as a result of such conduct.[169] Under the Restatement approach, the defendant must not only intentionally cause severe emotional distress, but such conduct must also be deemed "extreme and outrageous."[170] The Restatements have never attempted to provide a definition of "outrageous" conduct, stating rather that something

is outrageous if "the recitation of the facts to an average member of the community would . . . lead [the person] to exclaim, "Outrageous!"[171] Scholars and courts, however, agree that liability for this tort is reserved for the severest cases where the defendant's conduct goes "beyond all possible bounds of decency . . . to be regarded as atrocious, and utterly intolerable in a civilized community."[172] "Liability. . . does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities."[173] As a result, severe emotional distress can be found only when "the distress inflicted is so severe that no reasonable person could be expected to endure it."[174]

III. A Call to Criminalize Intentional Infliction of Emotional Distress

The modern formulation of IIED permits a plaintiff to recover for injuries resulting from a defendant's intentional use of extreme and outrageous conduct if that conduct results in mental anguish or physical harm. A logical formulation of the proposed crime would be patterned after the 1948 Restatement of Torts. Thus, an actor would be subject to criminal prosecution if he purposely or knowingly caused emotional distress through extreme and outrageous conduct thereby causing mental anguish or psychic injury. The conduct must be so extreme as to go "beyond all possible bounds of decency," and "the mental anguish suffered by plaintiff [must be] serious and of a nature that no reasonable person could be expected to endure it."[175]

Like the criminalized torts of assault and false imprisonment, the criminalized version of IIED would penalize a defendant when a victim suffers emotional or psychic damage as a consequence of the defendant's intentional conduct. Criminalized IIED would also result in the same type of physical harm that is required for proof of the prima facie elements of the criminalized tort of battery. The commonality of the harm caused by a different type of conduct supports criminal punishment for IIED.

Neuroscientific evidence supports the conclusion that verbal assaults can manifest themselves in physical pain.[176] Thus, where one assaults another with outrageous verbal comments, the plaintiff might ultimately experience physical pain. This intentional infliction of physical pain is the type of harm that society seeks to punish through the crime of battery.

Since IIED creates the same type of harm as society has sought to redress through criminalization of the other intentional torts, it would seem consistent to criminalize IIED. Criminalizing IIED would further the retributive and deterrent goals of punishment, particularly at a time when new technology communicates outrageous and even horrendous conduct for which there seems no viable punishment in criminal law. Society will benefit from criminalizing the intentional use of extreme and outrageous conduct. Such conduct is rare, but to the extent that it results in intolerable wrongs, it is worthy of criminal punishment.

A. Similarities Between IIED and the Criminalized Intentional Torts

The proposed criminalization of IIED would require proof of the same type of intent as the other criminalized intentional torts.[177] Like assault, battery, and false imprisonment, the state can only seek punishment for IIED, and a plaintiff can only recover for the IIED, upon proof that the defendant intended to cause the harm or was substantially certain that harm would result from his conduct.[178] But while the intent and the harm are the same, the act of IIED, use of extreme and outrageous conduct, is distinct from the other criminalized intentional torts.

Once the conduct is proven, it is incumbent upon the prosecution to prove that harm resulted from that conduct. Harm can be both mental and physical. The mental anguish that is punishable through the criminalized torts of assault and false imprisonment is equally present in intentional infliction of emotional distress.[179] A tortfeasor is only responsible for IIED if his actions were the proximate cause of a psychic injury.[180] Prosser calls both assault and false imprisonment crimes of mental anguish. It seems, then, that mental anguish, which the law seeks to curb, is equally present in IIED.[181]

The pain inflicted through IIED can result in the type of harm criminalized in battery. The crime of battery involves proof of direct physical harm.[182] Harm can include a gunshot wound,[183] a kick upon another,[184] or something as slight as intentionally blowing smoke in another's face.[185] When recovering for IIED, many jurisdictions require proof of severe physical manifestations of emotional harm.[186] In doing so, the law recognizes that extreme and outrageous conduct can indeed cause the type of harm that is recoverable through the other criminalized torts.

New scientific research supports the conclusion that the extreme and outrageous verbal conduct meted

out through verbal assaults can inflict the same type of physical harm that is prohibited by criminal battery. Neuroscientific studies show that verbal abuse can bring about physical symptoms, which in turn cause physical pain.[187] Actual measurable neurochemical changes can occur in the amygdala—the part of the brain that performs a primary role in processing emotional reactions—when an individual is verbally assaulted or experiences some other type of emotional trauma.[188] The amygdala instantly responds by inducing a series of physiologic reactions including rapid heart rate, palpitations, sweating and increased blood flow to large muscle groups.[189] These physiological changes in the brain, which occur congruently with emotional harm, become a form of physical pain, from which the victim clearly suffers.[190]

Studies demonstrating the relationship between psychological and verbal abuse and disorders such as depression, anxiety, and post-traumatic stress disorder (PTSD) further support the conclusion that IIED can result in the type of physical harm which criminal law seeks to curb by punishing for battery or aggravated assault. A person suffering from depression may also suffer from "persistent aches or pains, headaches, cramps or digestive problems . . ." according to the National Institute of Mental Health.[191] Exacerbating this disease through a verbal assault can result in more severe physical symptoms that often accompany anxiety disorders include "fatigue, headaches, muscle tension, muscle aches, difficulty swallowing, trembling, twitching, irritability, sweating, nausea, lightheadedness, having to go to the bathroom frequently, feeling out of breath, and hot flashes."[192]

In other instances, while the outrageous conduct of IIED might not immediately cause physical pain, specific studies confirm that, despite the non-physical nature of verbal abuse, abuse from IIED can be as damaging as physical harm.[193] In 1990, Psychologists Nicole M. Capezza and Ximena B. Arriaga conducted a study, in which they found that seventy-two percent of 234 female victims of both physical and psychological abuse indicated that they were more negatively impacted by the psychological abuse than the physical abuse.[194] Regarding their findings, the authors stated, "[t]he results obtained in the present study clearly indicate that psychological [abuse] is, with some variations, as detrimental to women's mental health as is physical violence."[195]

The seemingly similar requirements of intent and harm beg the question of why it would be necessary to criminalize IIED. The need for punishment lies in the fact that the act element of IIED is markedly different from assault, battery and false imprisonment; more importantly, punishment for this type of act does not really exist in most jurisdictions.[196]

Assault and battery penalize the actor who intends to cause direct physical harm. Pointing a gun and missing satisfies the act element of assault. Pointing a gun and hitting satisfies the act element of battery or aggravated assault. The act element of false imprisonment is satisfied by the actor who voluntarily chooses to confine another or to make one feel confined. For example, locking car doors and speeding can satisfy the act element of false imprisonment.[197]

The act element of IIED requires proof of extreme and outrageous conduct. In *Rissman v. Chertoff*, a transportation safety expert whose superiors constantly screamed at him for being too thorough and "scolded [him] for hours as if he were a terrorist in a poorly written 'B' movie script" provided sufficient evidence to prove IIED.[198] With this fact pattern, the courts could not find an actionable claim for assault, battery or even false imprisonment. Only if IIED were criminalized could the TSA supervisors be punished for their behavior.

In *Gomez v. Hug*,[199] a supervisor at a county fairgrounds, upon seeing an employee enter his office, said "[w]hat is that fucking spic doing in the office?"[200] "A fucking Mexican greaser like you, that is all you are. You are nothing but a Mexican greaser, nothing but a pile of shit."[201] The badgering continued and, as a consequence, the victim suffered mental anguish that resulted in "serious medical problems" that precluded him from working.[202] Under these facts, a state would be unable to punish for assault. It is long held that assault is not actionable unless the victim is placed in imminent apprehension of immediate bodily harm. Here, the verbal lashings and demeaning behavior does not give rise to a fear of harm. Battery would also not be actionable since defendant did not touch or intend to touch the victim. Nor would false imprisonment apply as there is no evidence that the victim was unable to escape. In this scenario, the defendant could not be criminally punished. If IIED were criminalized, however, the defendant could be subjected to penalties, as a reasonable jury might conclude that his conduct was extreme, outrageous and beyond the bounds of decency.

B. Advancing the Goals of Punishment

Criminalizing IIED would advance the goals of society's interest in curbing harmful conduct. By adopting the newest criminalized intentional tort, jurisdictions would be sending a message that conduct which mentally infringes on others' freedom from harm is intolerable. Punishment would allow society to seek just deserts from those who engage in acts that are outrageous by traditional standards. Moreover, punishing IIED would send a message to individuals and the general population that such conduct is intolerable.

i. What to Punish

Applying the proposed criminal statute for IIED, the perpetrators in *Rissman* and *Hug* could be subject to criminal punishment. In the first hypothetical, the supervisor hurled racial epithets at the employee to the point where the employee suffered physical and emotional harm.[203] A significant number of states and federal courts have held that racial epithets shouted by one in a position of power over another are evidence of extreme outrageous conduct.[204] In *Alcorn v. Anbro Engineering, Inc.*,[205] the Supreme Court of California held that an employee had sufficiently alleged IIED because his supervisor shouted racial epithets and fired him.[206] The court found it significant that the person harassing the plaintiff was "standing in a position or relation of authority over plaintiff."[207] In *Shuman v. American Home Assurance Co.*,[208] a federal district court found that a defendant who "repeatedly made racial slurs directed at Plaintiff based upon his Arab ancestry, calling him names such as "Fucking Arab" and "Fucking Carpet Salesman," which slurs "caused, and were intended by to cause, Plaintiff's emotional distress" committed IIED.[209] Under this analysis, the defendant in *Hug* used language outrageous enough to be actionable.

By adopting the newest criminalized intentional tort, jurisdictions would be sending a message that conduct which mentally infringes on others' freedom from harm is intolerable.

The plaintiff in *Hug* also presented evidence of serious medical problems. Many jurisdictions require proof of a physical manifestation of emotional harm.[210] Assuming there was significant medical evidence to show a manifestation of physical harm,[211] the state would be able to prove IIED.

Criminalizing IIED would also permit punishment in other instances, including verbal domestic abuse or cyber bullying. Criminalizing the use of spoken and written words that cause severe damage to another would fall within society's goal to provide citizens with a reasonable expectation of quiet enjoyment and liberty.

Verbal abuse is not afforded the same treatment under the criminal law as physical abuse.[212] Many jurisdictions do not criminalize verbal abuse. In those that do, it is under the guise of harassment.[213] Yet verbal abuse is a serious assault on one's personal well-being.[214] Additionally, studies confirm that verbal abuse often leads to physical abuse.[215] Criminalizing verbal abuse would serve to prevent the commission of a greater crime.[216]

Jurisdictions criminalize a variety of acts as a means to prevent that future harm. Conspiracy, stalking, and loitering are all inchoate crimes that allow police to constitutionally intervene potentially greater criminal activity.[217] For instance, an agreement to commit a criminal act, which is conspiracy, can be prosecuted on its own, even if the agreed-upon, contemplated crime never comes to fruition.[218] When considering punishing verbal abuse, IIED could be seen as a similar inchoate act, allowing police intervention before the verbal violence translates into physical harm.

Criminalizing IIED would also provide meaningful punishment to the crime of cyber stalking. In Lori Drew's case, the defendant imparted words, that on their face, were seemingly innocuous. The defendant secured a "My Space" page under a false name and then pretended that she was a teenage boy with a crush on the 13 year-old girl.[219] The woman later sent spiteful messages to the girl, including one that said "the world would be a better place without you."[220] A reasonable jury could find under the circumstances that Ms. Drew's conduct went beyond the bounds of decency. In fact, new accounts report that the jury wanted to convict Ms. Drew of felonies that would allow punishment of up to twenty years in prison.[221] However, the available laws did not support their desired goal.[222]

While internet communication is not criminalized under IIED, internet communication can lead to a claim for a criminal case of harassment. For example, in the instance where a woman posted a call for sexually explicit favors and listed a neighbor's phone number,

the Suffolk County New York police filed charges of harassment against the woman.[223] Under New York state law, "[a] person is guilty of aggravated harassment in the second degree when, with intent to harass, annoy, threaten or alarm another person, he or she . . . (b) causes a communication to be initiated by mechanical or electronic means or otherwise with a person, anonymously or otherwise, by telephone, by telegraph, or by mail, or by transmitting or delivering any other form of written communication, in a manner likely to cause annoyance...."[224] Here, the woman could be successfully prosecuted for harassment since she initiated phone calls likely to cause annoyance. The maximum punishment for this crime is up to one year in prison. [225] However, the permissible penalty should be more severe.

The type of harm caused in this instance, assuming that the harm resulted in severe mental harm, would be more on par with New York's second degree assault statute, which criminalizes conduct when a person intends to and actually causes serious *physical* injury and causes such injury. Second degree assault is punishable as a class D Felony, for a term not to exceed seven years.[226] Thus, even though the mental anguish caused by the harassing phone calls could be the equivalent to physical harm, New York's second degree assault statute would not allow for such conduct to be prosecuted as a second degree assault. Absent criminalization of IIED, the offender in this case would only be sentenced to a maximum of one year in prison, no matter how severe the mental harm.

Criminalizing IIED would provide a means to impose a similar punishment in this similarly harmful situation. If the harassing phone calls caused the neighbor to suffer from either emotional trauma or a physical manifestation of that trauma on a level as contemplated by second degree assault, then the offender could be prosecuted under a scheme of criminal IIED. Punishing this kind of intentional conduct to the same degree as second degree assault for intentional conduct that inflicts a similar type of harm, would serve to further the principles of our criminal justice system by communicating that this type of conduct is so intolerable that it carries with it a threat of significant punishment.

ii. Why Punish

Given that IIED causes the same type of harm as assault, battery, and the other intentional torts, the issue becomes whether criminalizing IIED would further the principles of punishment that drive the American criminal justice system. Two theories largely govern the reasons for assessing punishment: retribution and deterrence.[227] Criminalizing IIED would advance each of these theories.

a. Retribution

Application of Professor Nozick's equation for evaluating the instances appropriate for retribution supports the criminalization of IIED. As previously noted, criminal punishment deserved = $r \times H$, where H is the magnitude of the wrongness or harm and r is the degree of responsibility.[228] The high magnitude of harm and the defendant's responsibility in the intentional outrageous conduct of IIED highlight the well-deserved need for retribution against such conduct.

The r is this equation is easily satisfied. People are responsible for IIED only if they intend to commit the outrageous conduct that causes harm or they know with substantial certainty that such conduct will cause another to suffer from IIED.[229] This intent translates into a conscious or willful desire to bring about a harmful result.[230] That they chose to engage in such conduct reflects the high level of responsibility on their part.

The law tends to increase the severity of punishment based on a defendant's willfulness.[231] Homicides illustrate this point most clearly. One who intends to kill by design is guilty of murder, a crime punishable by life in prison or even death.[232] Thus, an individual who aims his car at someone standing on the street with an intention of killing that person is said to be the most responsible and therefore the most deserving of punishment. Similarly, one who speeds through a crowded school zone at three o'clock in the afternoon is also, in many jurisdictions, responsible for the and deserving of the charge's maximum punishment for the death of another.[233] Although this person had no intent of killing a particular person, he knew with substantial certainty that he would likely kill someone as a result of his conduct.[234] In contrast, one who speeds through a school zone at three o'clock in the morning is likely to be held only responsible for manslaughter or reckless homicide.[235] In this instance, the individual is said to have only been aware of a slight risk that someone could die as a result of his conduct. Because he only engaged in a risk, society is willing to mete out less punishment.[236] In most jurisdictions, manslaughter is punishable by five to fifteen years in prison.[237]

IIED also imposes the same type of harm as the other intentional torts, thus the H in Nozick's equation

is as compelling for IIED as it is in other tort-based crimes. Particularly, IIED shares the sense of mental anguish that assault and false imprisonment criminalize.[238] As noted above, psychological or verbal abuse can be as damaging as any physical type of harm.[239] Developments in neuroscience indicate a strong link between verbal assault and emotional harm.[240] This high degree of provable physical harm meets the *H* prong of Nozick's formula. Therefore, the high magnitude of harm to the victim and the strong degree of responsibility on the part of the defendant compel criminalization of IIED.

Nozick's theory is ideal for cyber-stalkers. Individuals who write directed e-mails or set up false accounts do so with the highest level of intention. The harm cyber-stalkers cause can go far beyond annoyance and may rise to the level of death. Under Nozick's theory, such conduct is most suitable for punishment because *H*, or harm, is at its greatest.

b. Deterrence

Criminalizing IIED is equally supported by the theory of deterrence. Deterrence advocates that an individual be punished as an example either to himself or to others because the individual's conduct cannot be tolerated. Ms. Drew intentionally caused a child to suffer by creating a fake internet "friend" to lure the girl in and then trick her, acting in a way that society should discourage. Her actions caused horrible public outcry, in part because of the unnecessary and irreversible consequences of her actions and in part because there were few criminal laws under which she could be punished.[242] To the extent that one assumes that deterrence works to encourage members to conform to society's laws,[243] punishing this woman at the criminal level could deter others from committing similar harmful acts.

Criminalizing IIED as an inchoate crime would serve the same deterrent value as assault. As noted above, the law criminalizes many inchoate crimes as a means of preventing more serious crimes that could result from an individual's conduct. The MPC's formulation of assault and battery is an example of the use of criminalization as prevention. The law permits the punishment of those who attempt to cause the physical injury required for proof of battery by criminalizing an attempted batterer (for example, assault).[244] Those who subscribe to the theory of crimtort, and even many who do not, might argue that over-criminalization already exists and that there is no need to create new crimes. Crimtort has merit, particularly as it applies to a defendant corporation, where one is unable to single out an individual for punishment. However, a loss of liberty is much harsher than a loss of finances. The criminal justice system can, through imposition or threat of jail time, serve to curb individuals' conduct to a much greater degree than pecuniary punishment.

IV. Conclusion

Scientific and technological advances in the way we currently live our lives mandate that jurisdictions should grant IIED the same criminal status that it grants other criminalized intentional torts. Words hurt. The law punishes those who inflict pain. The punishment should be meted out regardless of whether the pain originates through a physical force or through verbal or written words.

Criminalizing IIED provides the retributive value of satiating those who are injured by others' choice to bully, and it serves the deterrent value of warning others that the use of words, whether typed or shouted, is intolerable and prevents words from escalating to a more serious physical harm. There is a void in our current criminalization scheme, left empty by the failure to recognize that technology makes it easier to harm and that a word can cause as much pain as a punch. Criminalizing IIED would fill that void.

Addendum

On January 5th, the BBC reported that members of French President Nicolas Sarkozy's ruling party proposed a measure that would criminalize intentional infliction of emotional distress.[245] The proposed measure would assess criminal penalties including jail time against those who psychologically or verbally abuse their spouse or live-in partner by insult, including repeated rude remarks about a partner's appearance, false allegations of infidelity, and threats of physical violence.[246] The French parliament is expected to approve the legislation in February. If passed, the law should be in place six months later. If passed, the bill would be the first of its kind.[247]

[1] *See* Office of Minnesota Attorney General Lori Swanson, Prevent Cyberbullying and Online Harassment, http://www.ag.state.mn.us/Brochures/pubCyberbullyingOnlineHarassment.pdf.

[2] Prezioso v. Thomas, No. 991675, 2000 WL 472874 (4th Cir. Apr. 25,

2000); Erwin v. Milligan, 67 S.W.2d 592 (Ark. 1934); Daluiso v. Boone, 71 Cal. 2d 484 (1969); Emden v. Vitz, 198 P.2d 696 (Cal. Dist. Ct. App. 1948); Tate v. Canonica, 5 Cal. Rptr. 28 (Ca. Ct. App. 1960); Ford v. Hutson, 276 S.E.2d 776 (S.C. 1981).

[3] Jennifer Wriggins, *Domestic Violence Torts,* 75 S. CAL. L. REV. 121, 136 (2001) (citing to Merle H. Weiner, *Domestic Violence and the Per Se Standard of Outrage,* 54 MD. L. REV. 183, 189 n.16 (1995)) ("[S]ome activity that is tortious, such as conduct causing intentional infliction of emotional distresses, is not criminal.").

[4] *See generally* Kenneth Mann, *Punitive Civil Sanctions: The Middle Ground Between Criminal and Civil Law,* 101 YALE L.J. 1795, 1806 n. 36 (1992) (quoting WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 22 (5th ed. 1984) (citations omitted)) ("Empirically, as opposed to paradigmatically, civil and criminal law overlap. Civil law includes causes of action for intentional acts; criminal law includes strict and negligent liability. Therefore, no true empirical difference exists between civil and criminal law with respect to the range of mental states resulting in liability. However, most criminal cases require proof of subjective and objective liability, whereas most civil cases require proof only of objective liability. Therefore, we say that the paradigmatic task of the civil law is to compensate for damages caused in the normal conduct of everyday life, usually without regard to actual knowledge or intent. Thus, the distinctive character in the division in the paradigms lies in the requirement of attention to the subjective state of mind in the conventional criminal type.").

[5] Kim Zetter, *Lori Drew Not Guilty of Felonies in Landmark Cyberbullying Trial*, WIRED, Nov. 26, 2008, *available at* http://www.wired.com/threatlevel/2008/11/lori-drew-pla-5.

[6] United States v. Drew, 259 F.R.D. 449, 452 (C.D. Cal. 2009).

[7] *Id.*

[8] *Id.* at 452–53.

[9] *Id.* at 468.

[10] *See* Alexandra Zavis, *Judge Tentatively Dismisses Case in MySpace Hoax That Led to Teenage Girl's Suicide*, LOS ANGELES TIMES, July, 2, 2009, *available at* http://latimesblogs.latimes.com/lanow/2009/07/myspace-sentencing.html.

[11] *See* WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS (West Publishing Co. 4th ed. 1971) (1941); *see also* FOWLER V. HARPER & FLEMING JAMES, JR., THE LAW OF TORTS (2d ed. 1956).

[12] *See* Prosser, *supra* note 11.

[13] *Id.*

[14] *See* RESTATEMENT (FIRST) OF TORTS § 46 (1948).

[15] *See id.* at §§ 21, 35.

[16] *See id.* § 13.

[17] *See infra* note 187.

[18] *See* Richard A. Epstein, *The Tort/Crime Distinction: A Generation Later*, 76 B.U. L. REV. 1 (1996) (citing RICHARD EPSTEIN, CRIME AND TORT: OLD WINE IN NEW BOTTLES, ASSESSING THE CRIMINAL: RESTITUTION, RETRIBUTION AND THE LEGAL PROCESS, 231 (Randy Barnett & John Hagel III, eds., 1977)); s*ee also* Erik Luna, *The Over Criminalization Phenomenon,* 54 AM. U. L. REV. 703 (2005).

[19] *See* Luna, *supra* note 18, at 712.

[20] *See* Andrew R. Klein, *Causation and Uncertainty: Making Connections in a Time of Change,* 49 JURIMETRICS J. 5, 8 (2008) (quoting H.L.A. Hart & Tony Honoré, CAUSATION IN THE LAW (2d ed. 1985)).

[21] *See* John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law,* 71 B.U. L. REV. 193, 193–94 (1991) (discussing the inherent purpose of criminal law to embody society's moral values and its incompatibility with the balancing between public and private interests in which tort law engages).

[22] *See* Epstein, *supra* note 18, at 8.

[23] *See* Kenneth W. Simons, *Retributivists Need Not and Should Not Endorse the Subjectivist Account of Punishment,* 109 COLUM. L. REV. SIDEBAR 1 (2009), *available at* http://www.columbialawreview.org/Sidebar/volume/109/1_Simons.pdf.

[24] *See* Coffee, *supra* note 21. *See also* Luna, *supra* note 18, at 703.

[25] *See* Epstein, *supra* note 18, at 11–12. For a good understanding of the evolution of criminal and tort law, see FOWLER V. HARPER ET AL., HARPER, JAMES AND GRAY ON TORTS 304 (Aspen Publishers 3d ed. 2006).

[26] *See* Epstein, *supra* note 18, at 14.

[27] 4 WILLIAM BLACKSTONE, 4 COMMENTARIES *2, *5.

[28] *See* Epstein, *supra* note 18, at 12–13.

[29] *See id.* at 11; David J. Seipp, *The Distinction Between Crime and Tort in the Early Common Law,* 76 B.U. L. REV. 59, 59–60 (1996).

[30] *See* Mann, *supra* note 4, at 1796.

[31] *See* Gail Heriot, *An Essay On The Civil-Criminal Distinction With Special Reference To Punitive Damages,* 7 J. CONTEMP. LEGAL ISSUES 43, 54 (1996). The criminal law was one of the first major areas of the law to be heavily codified, and at least when compared to most civil law subjects, its codes tend to be somewhat more detailed. In contrast, the civil law remains heavily common law, particularly in the area of torts. Unlike criminal law, civil law is generally doctrinally thin and heavy in discretion by the trier of fact.

[32] ALBERT P. MELONE & ALLAN KARNES, THE AMERICAN LEGAL SYSTEM: PERSPECTIVES, POLITICS, PROCESSES AND POLICIES 197–98 (2d ed. 2007).

[33] *See* Michael E. Weinzierl, *Wisconsin's New Court-Ordered ADR Law: Why it is Needed and its Potential for Success*, 78 MARQ. L. REV. 583, 589 (1995) (stating that many large damages awards are attributed to emotional juries who may not understand the law but award such large damages because they are sympathetic to the plaintiff).

[34] *See, e.g.*, MARC A. FRANKLIN & ROBERT L. RABIN, TORT LAW AND ALTERNATIVES 613 (The Foundation Press, Inc. 6th ed. 1996)

[35] *See generally* Joseph P. King, Jr., *Pain and Suffering, Noneconomic Damages, and the Goals of Tort Law*, 57 SMU L. REV. 163, 165 (2004).

[36] *See* Sam B. Edwards, *Damage to Ceremonial Property in the State of Yap: Theories of Recovery*, 7 INT'L LEGAL PERSP. 119, 150 (1995) (quoting Frederick S. Levin, *Note, Pain and Suffering Guidelines: A Cure for Damages Measurement "Anomie,"* 22 U. MICH. J.L. REF. 303 (1989)) ("[D]isparate awards send confused signals concerning the appropriate levels of accident avoidance.").

[37] *See* WAYNE R. LAFAVE, CRIMINAL LAW 26 (Thompson West 4th ed. 2003) (1972) (emphasizing that criminal law focuses on punishing and preventing improper conduct rather than rewarding socially desirable conduct).

[38] *See* Heriot, *supra* note 31, at 54 (noting that criminal law must be codified and publicized before it is applied to the public, as compared to civil law which is primarily based in the common law).

[39] *Id.* at 63 n.75 (citing Lord Camden, L.C.J., *Case of Hindson and Kersey,* 8 Howell's State Trials 57 (1816)) ("The discretion of a judge is the law of tyrants: It is always unknown: It is different in different men: It is casual, and depends upon constitution, temper and passions.—In the best it is often times caprice: In the worst it is every vice, folly, and passion, to which human nature can be liable.").

[40] The Bible embraced the idea of "eye for eye, tooth for tooth, hand for hand, foot for foot, burning for burning, wound for wound, stripe for stripe." *Exodus* 21:2425 (King James).

[41] *See* SANFORD H. KADISH, ET AL., CRIMINAL LAW AND ITS PROCESSES (8th ed. 2007).

[42] *See* Heriot, *supra* note 31, at 66 (stating that punitive damages may be used to punish the defendant above and beyond the level necessary to compensate plaintiff). *But see* Joseph P. King, Jr., *Pain and Suffering, Noneconomic Damages, and the Goals of Tort Law*, 57 SMU L. REV. 163, 181 (2004) (opining that modern tort law has moved away from the historic tort law goal of vindication for violent conduct).

[43] 509 U.S. 443 (1993).

[44] *Id.* at 469.

[45] *See generally* Coffee, *supra* note 21.

[46] *Id.* at 193.

[47] *See* Thomas H. Koenig, *Crimtorts: A Cure for Hardening of the Categories*, 17 WIDENER L.J. 733 (2008).

[48] *See id.*

[49] *Id.* at 742.
[50] *See id.* at 768 (citing Benjamin C. Zipursky, *A Theory of Punitive Damages*, 84 TEX. L. REV. 105, 107 (2005)). *See also* Ronen Perry, *The Role of Retributive Justice in the Common Law of Torts: A Descriptive Theory*, 73 TENN. L. REV. 177, 180 (2006) ("The law punishes wrongdoers even when the wrong shows no affront to the victim's value, and it can hardly be said that doing so is inherently unfair in the retributive sense.").
[51] George P. Fletcher, *Corrective Justice for Moderns*, 106 HARV. L. REV 1658, 1667–1168 (1993) (acknowledging Aristotle as the earliest proponent of corrective justice).
[52] *Id.* at 1668.
[53] *Id.*
[54] *Id.* at 1676.
[55] Thomas B. Colby, *Clearing the Smoke from Philip Morris v. Williams: The Past, Present and Future of Punitive Damages,* 118 YALE L.J. 392, 422 n. 125 (2008) (citing RICHARD W. WRIGHT, RIGHT, JUSTICE AND TORT LAW 175 (David G. Owen ed., 1997)) (making the "[argument] that the 'notion of punitive damages as retribution 'for the discrete wrong done to a particular individual' accords with corrective justice'").
[56] *See id.* at 439 ("Punitive damages . . . are all about private vengeance.").
[57] 517 U.S. 559 (1996).
[58] Philip Morris USA v. Williams, 549 U.S. 346, 351 (2007) (citing BMW of North America v. Gore, 517 U.S. 559, 575–76 (1996)).
[59] U.S. CONST. AMEND. VIII. ("Excessive bail shall not be required, not excessive fines imposed, nor cruel and unusual punishments inflicted."); *see also* Michael P. Allen, *Of Remedy, Juries, and State Regulation of Punitive Damages: The Significance of Philip Morris v. Williams,* 63 N.Y.U. ANN. SURV. AM. L. 343, 346 n.5 (2008) (citing Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 260 (1989)) ("[T]he Court left open whether the Excessive Fines Clause is applicable to the states through the Fourteenth Amendment and whether it is applicable to corporate entities at all.").
[60] 512 U.S. 415 (1994).
[61] *See id.* at 432.
[62] *See BMW*, 517 U.S. at 562; *see also* State Farm Mut. Auto. Inc. v. Campbell, 538 U.S. 408, 416 (2003) (holding that there are "substantive constitutional limitations" on punitive damage awards and that "[t]he Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor."). For a good discussion of the use of constitutional limitations of jury awards see Allen, *supra* note 59.
[63] 549 U.S. 346 (2007).
[64] *Id.* at 349.
[65] *Id.* at 348, 354.
[66] The New Jersey Supreme Court affirmed the Appellate Division's recently vacated award of punitive damages to a woman who prevailed at trial against her former employer in a hostile work environment claim under the New Jersey Law Against Discrimination ("LAD"). *See* Tarr v. Bob Ciasulli's Mack Auto Mall, Inc., 943 A.2d 866 (N.J. 2008).
[67] *See* Robert W. Drane & David J. Neal, *Is the Tort/Crime Distinction Valid?*, 4 LITERATURE OF LIBERTY (1981), *available at* http://oll.libertyfund.org/?option=com_staticxt&staticfile=show.php%3Ftitle=1300&chapter=100976&layout=html&Itemid=27.
[68] ROBERT NOZICK, PHILOSOPHICAL EXPLANATIONS 363 (Harvard University Press 1981).
[69] *Id.*
[70] S*ee id.* at 363–97; *see also* Youngjae Lee, *The Constitutional Right Against Excessive Punishment,* 91 VA. L. REV 677, 703 (2005).
[71] *See* NOZICK, *supra* note 68, at 363.
[72] *Id.*
[73] *See id.* at 364–365 (using the example that restitution for a millionaire who steals $100 from an indigent person should not be a corresponding loss of $100 but a deprivation equal to the loss of the $100 to the indigent person).
[74] *See id.*
[75] *Id.*
[76] Leigh Goodmark, *The Punishment of Dixie Shanahan: Is There Justice for Battered Women Who Kill?*, 55 U. KAN. L. REV. 269, 289 (2007) (citing C.L. TEN, CRIME, GUILT, AND PUNISHMENT: A PHILOSOPHICAL INTRODUCTION 42 (1987)).
[77] *See id.* at 291–292.
[78] *See* Coffee, *supra* note 21, at 197; *see also* Leslie Yalof Garfield, *A More Principled Approach to Criminalizing Negligence: A Prescription for the Legislature*, 65 TENN. L. REV. 875, 914 (1998).
[79] PROSSER, *supra* note 11
[80] *Id.*
[81] *Id.*
[82] *See also* Richard W. Wright, *Causation in Tort Law*, 73 CAL. L. REV. 1735 (1985); Jane Stapleton, *Choosing What We Mean By "Causation" in the Law,* 73 MO. L. REV. 433 (2008); *See generally* H.L.A. HART & TONY HONORÉ, CAUSATION IN THE LAW (2d ed. 1985).
[83] Wright, *supra* note 82, at 1762.
[84] *Id.*
[85] *See* W. PAGE KEETON, PROSSER AND KEETON ON THE LAW OF TORTS 34–35 (West Publishing Co. 5th ed. 1984) (1941); *see also* CRIMES AND PUNISHMENTS 231 (Jules L. Coleman, ed., Garland Pub. 1994).
[86] Keeton, *supra* note 85, at 34-35
[87] *See* People v. Decina, 138 N.E.2d 799, 807 (1956).
[88] Similarly, an individual who hits another while in a psychotic state does not engage in a voluntary act.
[89] RESTATEMENT (SECOND) OF TORTS § 2 cmt. c (1965).
[90] *See* PROSSER, *supra* note 11, at 34 (emphasis omitted) (citations omitted).
[91] *See* RESTATEMENT (FIRST) OF TORTS §13 cmt. d (1934). *See generally* C. R. McCorkle, Annotation, *Civil Liability of Insane or Other Mentally Disordered Person for Assault or Battery,* 77 A.L.R.2d 625 (1961).
[92] *See* KEETON, *supra* note 85, at 34.
[93] *See id.* at 35. The classic example of substantial certainty appears in the case of Garrett v. Dailey, 279 P.2d 1091 (Wash. 1955), in which seven-year-old Billy Dailey chose to pull a chair away from an elderly Mrs. Garrett. *Id.* No evidence existed at the time that Billy wanted to hurt Mrs. Garrett—in fact, he probably did not choose for her to come to any harm at all. He just wanted to sit down. *Id.* However, in the case against Billy for battery, the court found that Billy had the intent necessary to prove the intentional tort of battery as Billy knew with substantial certainty that pulling the chair out from under Mrs. Garrett could cause Mrs. Garrett harm. *Id.*
[94] *See* RESTATEMENT (THIRD) OF TORTS- PH § 1 cmt. B (2005) (noting that the intent required in intentional torts is an intent to bring about harm).
[95] *See* RESTATEMENT (SECOND) OF TORTS § 21(1) (1965); *see also* RESTATEMENT (SECOND) OF TORTS § 21(2) (1965) ("An action which is not done with the intention stated in Subsection (1, a) does not make the actor liable to the other for an apprehension caused thereby although the act involves an unreasonable risk of causing it and, therefore, would be negligent or reckless if the risk threatened bodily harm.").
[96] KEETON, *supra* note 85, at 43. One of the earliest examples of assault occurred in the case of I de S et. Ux v. W de S, Y.B. Lib. Ass. folio 99, placitum 60 (Assizes 1348), reprinted in WILLIAM L. PROSSER & JOHN W. WADE, CASES AND MATERIALS ON TORTS 36 (5th ed. 1971).
[97] *See* KEETON, *supra* note 85, at 876.
[98] *See* Jenson v. Employers Mut. Cas. Co., 468 N.W.2d 1, 1 (Wis. 1991) (stating that mere words are not enough for liability under Wisconsin's workman's compensation statute, Wis. Stat. Ann. §102.03 (2004)); *see also* Kramer v. Ricksmeier, 139 N.W. 1091, 1091 (Iowa 1913) (ruling that no action lay against the defendant who caused the relapse of a convalescent woman through threatening and abusive language over the telephone unless the defendant knew that the condition of the plaintiff was so enfeebled that she could not endure such speech).
[99] 411 So.2d. 1347 (Fl. Dist. Ct. App. 1982).
[100] *See id.; see also* Waag v. Thomas Pontiac, Buick, GMC, Inc., 930

F.Supp 393, 409 (D. Minn. 1996) (holding that a defendant who threatened a plaintiff by saying, "[c]ome on. Let's take a ride and I will show you what life is about," did not provide sufficient evidence of assault, even though there was substantial proof that the plaintiff was sufficiently frightened). While threats coupled with an ability to perform the harm is sufficient to support a finding of assault, gestures are also sufficient to constitute assault. KEETON, *supra* note 85, at 43, 45. The origin of this rule lay in nothing more than the fact that in the early days, the king's courts had their hands full when they intervened at the first threatening gesture; or in other words, when the fight was about to start and taking cognizance of all of the belligerent language which the foul mouths of merry England could dispense was simply beyond their capacity. Mere words are not assault, regardless of their violent nature. A defendant who uttered threats, clenched his fist, and started toward plaintiff has committed assault. *See* Dahlin v. Fraser, 288 N.W. 851, 852 (Minn. 1939). *But see* Atkinson v. Bibb Mfg. Co., 178 S.E. 537, 538–39 (Ga. Ct. App. 1935) (Guerry, J., dissenting) (commenting that "[i]t seems to the writer that the right of a person to be secure in his freedom from unjustified and unwarranted public cursing and insult by words is as valuable a legal right as is the right to be free from physical assault or trespass on person, property, or reputation, or the violation of a contractual right. The law itself recognizes that a private insult or a humiliation inflicted by words alone may justify the infliction by the person so insulted or abused of an assault and battery not disproportionate to the insult offered").

[101] *See* RESTATEMENT (SECOND) OF TORTS § 21 cmt. c (1965).

[102] *See id.* at § 13.

[103] *Id.*

[104] *See id.; see also* RESTATEMENT (SECOND) OF TORTS 1, 2, 1 Sc. Nt. (1965) (stating that at common law, the appropriate form of action for bodily harm directly resulting from an act done with the intention stated in Clause (a) was trespass for battery).

[105] RESTATEMENT (SECOND) OF TORTS § 13 (1965).

[106] Early English law defined "battery" as "the infliction of physical injury." *See* Cole v. Turner, 90 E.R. 958 (1704) (providing the earliest formulation of the modern rule: "the least touching of another in battery is anger." The defendant must have carried out some positive or affirmative act in order to be liable for battery. However, the actor is only responsible if the defendant intended to cause harmful or offensive contact upon the plaintiff. In this respect, the intent element is exactly the same as the intent for assault. Offense to the dignity involved in the unpermitted and intentional invasion of the person is the gravamen of the complaint of battery. For example, a doctor's decision to operate on a patient without obtaining consent first is a classic example of battery, as is the equivalent of spitting in the patient's face); *see also* PROSSER, *supra* note 72, at 35, 37; *see also* W.S. HOLDSWORTH, A HISTORY OF THE ENGLISH LAW 422–23 (3d. ed. 1922).

[107] PROSSER, *supra* note 11, at 41 (discussing how the similarity of the intent element seems to be why Prosser said that "assault and battery go together like ham and eggs").

[108] *See* RESTATEMENT (SECOND) OF TORTS § 13 (1965).

[109] *See id.* at § 21.

[110] *See, e.g.*, Szydlowski v. City of Philadelphia, 134 F.Supp.2d 636, 639 (E.D. Pa. 2001).

[111] *See* Fisher v. Carrousel Motor Hotel, Inc., 424 S.W.2d 627, 629 (Tex. 1967); *see also* Prezioso v. Thomas, 211 F.3d 1265, 1267 (4th Cir. 2000); Erwin v. Milligan, 67 S.W.2d 592 (Ark. 1934); Daluiso v. Boone, 455 P.2d 811, 812 (Cal. 1969); Emden v. Vitz, 198 P.2d 696, 699 (Cal. Dist. Ct. App. 1948); Tate v. Canonica, 5 Cal. Rptr. 28 (Dist. Ct. App. 1960); Ford v. Hutson, 276 S.E.2d 776 (S.C. 1981).

[112] RESTATEMENT (FIRST) OF TORTS § 35 (1948).

[113] *See* PROSSER, *supra* note 79, at 42; *see also* RESTATEMENT (SECOND) OF TORTS §§ 1, 35, 42 (requiring that plaintiff knew he was confined).

[114] PROSSER, *supra* note 11, at 47 (stating that the typical original false imprisonment involved battery since it was a "laying of the hands on another and depriving him of his liberty."); *see also* W.S. HOLDSWORTH, A HISTORY OF THE ENGLISH LAW 423 (maintaining that false imprisonment was one of the first trespasses recognized by common law; in medieval times, battery extended to instances in which no physical contact occurred).

[115] However, false imprisonment only requires that the defendant intend to confine, not that he intend to cause physical or emotional harm to the plaintiff. *See* Dan B. Dobbs, *A Restatement (Third) of Intentional Torts?*, 48 ARIZ. L. REV. 1061, 1067 (2006).

[116] RESTATEMENT (SECOND) OF TORTS §35 cmt. f (1965).

[117] *Id.*

[118] HARPER, *supra* note 25, at 287 (quoting Bird v. Jones, 115 Eng. Rep. 668 (1845)).

[119] 141 A.D. 362 (N.Y. 1910).

[120] *Id.* at 363–64.

[121] *See* KEETON, *supra* note 85, at 47.

[122] Mann, *supra* note 4, at 1808–09 (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *2, which states that "a *public* mischief" is punished "to secure to the public the benefit of society, by preventing or punishing every breach and violation of those laws").

[123] *See* MODEL PENAL CODE § 2.02 (1985); *see also* Kenneth W. Simons, *Should the Model Penal Code's Mens Rea Provisions be Amended?,* 1 OHIO ST. J. CRIM. L. 179, 187 (2003).

[124] *Id.*

[125] *See generally* Martin R. Gardner, *The Mens Rea Enigma: Observations on the Role of Motive in the Criminal Law Past and Present*, 1993 UTAH L. REV. 635 (1993) (discussing the history of the criminal law).

[126] *See* BLACK'S LAW DICTIONARY 712 (7th ed. 1999) (defining "specific intent" as "[t]he intent to accomplish the precise criminal act that one is later charged with. At common law, the specific-intent crimes were robbery, assault, larceny, burglary, forgery, false pretenses, embezzlement, attempt, solicitation, and conspiracy").

[127] *See id.* (defining "general intent" as "[t]he intent to perform an act even though the actor does not desire the consequences that result. This is the state of mind required for the commission of certain common-law crimes not requiring a specific intent or not imposing strict liability").

[128] *See* MODEL PENAL CODE § 2.02 (1985).

[129] *Id.*

[130] *Id.*

[131] Note that there is a burden of proof issue but that is beyond the scope of this article.

[132] *See* LAFAVE, *supra* note 37, at 814–15.

[133] *See* Alafair S. Burke, *Domestic Violence as a Crime of Pattern and Intent: An Alternative Reconceptualization,* 75 GEO. WASH. L. REV. 552, 558, n. 33 (2007) (citing WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 16.1 (2d ed. 2003)).

[134] LAFAVE, *supra* note 37, at 816.

[135] *Id.* at 823.

[136] *See* SANFORD H. KADISH, ET AL., CRIMINAL LAW AND ITS PROCESSES, 562 (8th ed. 2007).

[137] LAFAVE, *supra* note 37, at 823, 825.

[138] *See* Matthew J. Gillian, *Stalking the Stalker: Developing New Laws to Thwart Those Who Terrorize Others,* 27 GA. L. REV. 285, 295 n. 69 (1992) (citing WAYNE R. LAFAVE & AUSTIN W. SCOTT, CRIMINAL LAW §7.16 at 691 (2d ed. 1986)) ("Generally, the crime of assault is divided into two types: (1) attempted battery, requiring an actual attempt to cause physical injury to the victim and not just a mere apprehension of injury; and (2) intentional scaring, requiring only an intent to cause the victim a reasonable apprehension of immediate bodily harm.")

[139] *See, e.g., id.* at 296 n. 71 (citing Commonwealth v. White, 110 Mass. 407, 409 (1872)) (holding that defendant committed assault when he pointed unloaded gun at victim, intending to cause apprehension of battery but not to injure); People v. Johnson, 284 N.W.2d 718, 718–19 (Mich. 1979) (finding that the defendant committed assault when he pointed gun at victim and did not fire but intended to scare, placing victim in reasonable apprehension); State v. Baker, 38 A. 653, 654 (R.I. 1897) (holding that defendant committed assault when he fired a gun to-

ward victim, intending to miss but intending to scare victim).
[140] *See* State v. Kier, 194 P.3d 212 (Wash. 2008) (citing State v. Waldon, 841 P.2d 81, 83 (Wash. Ct. App. 1992)); *see also* State v. Wilson, 883 P.2d 320, 323 (Wash. 1994) (noting that one common law form of assault involves "putting another in apprehension [or fear] of harm whether or not the actor intends to inflict or is capable of inflicting that harm").
[141] *See, e.g.*, People v. Petrella, 380 N.W.2d 11, 16 (Mich. 1985). In *People v. Petrella*, the victim's boyfriend testified that the victim was the "most frightened [he] had ever seen her." The victim experienced nightmares, had difficulty sleeping, and sought constant protection from her boyfriend. She also feared that the defendant and his friends—who knew where she lived—would return; therefore, she wanted to move out of her house. Consequently, the victim and her boyfriend moved to California, but the incident continued to affect her up until the defendant's trial. At the time of defendant's trial, the victim had not visited a doctor for counseling, but had called a rape hotline. Given these facts, there was sufficient evidence for a jury to find beyond a reasonable doubt that the victim suffered personal injury in the form of mental anguish.
[142] *Id.* at 34.
[143] *See* MODEL PENAL CODE § 2.11 (1985).
[144] *See id.* (stating that "[a] person is guilty of assault if he: (a) attempts to cause or purposely, knowingly or recklessly causes bodily injury to another; or . . . (c) attempts by physical menace to put another in fear of imminent serious bodily injury").
[145] LAFAVE, *supra* note 37, at 816.
[146] For a good description of the similarities between assault and battery; *see* People v. Thurston, 84 Cal. Rptr. 2d 221 (Ct. App. 1999) (where the trial mistakenly instructed the jury that battery was a general intent crime).
[147] *See* MODEL PENAL CODE § 2.11 (1985).
[148] *See* Dobbs, *supra* note 115, at 63 (stating that Section 1 of the Restatement (Third) of Torts provides for a "new general definition of intent. An 'intent' to produce a consequence means either the purpose to produce that consequence or the knowledge that the consequence is substantially certain to result").
[149] *See* MPC PART II COMMENTARIES, VOL. 1, at 174. The commentary for § 211.1 and § 211.3 have consolidated "mayhem."
[150] *See* MODEL PENAL CODE § 2.11 (B) (1985) (stating that "battery" is "negligently caus[ing] bodily injury to another with a deadly weapon; or . . . Simple assault is a misdemeanor unless committed in a fight or scuffle entered into by mutual consent, in which case it is a petty misdemeanor").
[151] *See id.*
[152] *Id.*
[153] *See* Harris v. State, 164 S.W.3d 775, 785 (Tex. Ct. App. 2005) (holding evidence was sufficient to show bodily injury because victim had "reddish marks around [her] neck" and scratch on her collarbone). *See also* North Dakota v. Saulter, 764 N.W.2d 430 (N.D. 2009) (where the defendant lifted the victim off the ground by her neck).
[154] *See* Scott v. United States, 954 A.2d 1037, 1046 (D.C. Cir. 2008) (saying serious bodily injury sufficient to affirm an aggravated assault conviction means the victim sustained life-threatening or disabling injuries involving grievous stab wounds, severe burnings, or broken bones, lacerations and actual or threatened loss of consciousness); *see also* Reynolds v. State, 668 S.E.2d 846, 849 (Ga. Ct. App. 2008) (ruling that evidence was sufficient to show injury when victim testified that she was thrown to the ground, was bruised on multiple parts of her body, experienced soreness, and "saw stars" when defendant struck her in the head with a plank); Arzaga v State, 86 S.W.3d 767, 780 (Tex. Ct. App. 2002) (holding State proved bodily injury by legally sufficient evidence because victim had at least one abrasion on inside of upper lip and her mouth was swollen and bruised after being punched by the defendant); Hubert v. State, 652 S.W.2d 585, 588 (Tex. Ct. App. 1983) (holding victim's testimony that appellant struck his face and scratched his neck, which caused swelling and tenderness, was sufficient to prove bodily injury); Allen v. State, 533 S.W.2d 352, 354 (Tex. Crim. App. 1976) (holding evidence was sufficient to show bodily injury where appellant kicked police officer in nose and officer testified his nose hurt, swelled, and was sore for three or four days).
[155] *See* WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW §18.3(2), 3 SUBST. CRIM. L. § 18.3 (2d ed.).
[156] *See* CHARLES E. TORCIA, 2 WHARTON'S CRIMINAL LAW § 206 (15th ed. 2009) (stating that false "imprisonment need not be accomplished by violence or even a touching; it may be accomplished by mere words, accompanied by a show of force or authority, to which the victim submits").
[157] *See* MODEL PENAL CODE § 2.12.2; *see also* N.J. STAT. ANN.§2C:13-2 (West 2005).
[158] *See* Grayson Variety Store, Inc. v. Shaffer, 402 S.W.2d 424, 425 (Ky. 1966) (finding no false imprisonment where a store manager suspected the plaintiffs of stealing, stopped the plaintiffs after they left the store, and asked him to return to store for discussion of the matter).
[159] RESTATEMENT (SECOND) OF TORTS § 46 (1965).
[160] *Id.*
[161] Sherry Honicutt Everett, *The Law of Alienation of Affections After McCutchen v. McCutchen: In North Carolina, Breaking Up Just Got Harder to Do*, 85 N.C. L. REV. 1761, 1779 n.114 (2007) (quoting CHARLES E. DAYE & MARK W. MORRIS, NORTH CAROLINA LAW OF TORTS §5.31 (2d ed. 1999)).
[162] See George P. Smith, *Re-Validating the Doctrine of Anticipatory Nuisance*, 29 VT. L. REV. 687, 687 n. 18 (2005) (citing WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW 2 (1987)) (stating that the "first cause of action in tort that arose in the twelfth century as the intentional tort, which allowed damages to be recovered through the writ of trespass vi et armis in cases of battery").
[163] Wilkinson v. Downton, 2 Q.B. 57 (1897). For a detailed discussion of IIED and its history; see John J. Kircher, *The Four Faces Of Tort Law: Liability for Emotional Harm,* 90 MARQ. L. REV. 789 (2007).
[164] Kircher, *supra* note 164, at 795 (quoting Wilkinson v Downton, 2 Q.B. 57 (1897)). Before intentional infliction of emotional distress its own separate tort, United States courts allowed recovery for mental distress if it was associated with one's intentional mistreatment of dead bodies or burial rights. *Id.* In 1999, the Alabama Supreme Court, reviewing past history of this old tort, noted that "[i]t has long been the law of Alabama that mistreatment of burial places and human remains will support the recovery of damages for mental suffering." *Id.* (quoting Gray Brown-Service Mortuary, Inc. v. Lloyd, 729 So.2d 280 (Ala. 1999)). Prosser has also noted that recovery for the intentional infliction of emotional distress had been allowed for "common carriers, telegraph companies, and innkeepers." *Id.* (citing W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 43 (West Publishing Co. 5th ed. 1984) (1941)). The reason why this was the case, it is opined, was that these entities were "'the only game in town'" and were the equivalent of a "monopoly as to the services they provided to many communities." *Id.* Due to this, people had no choice but to use these services, whereby the actions of such services had to be scrutinized quite closely. *Id.* Thus, allowing for such a cause of action against common carriers, telegraph companies, and innkeepers. *Id.*
[165] *Id. Wilkinson v. Downton*, a late nineteenth century case, presents one of the earliest recognitions of IIED. The defendant in *Wilkinson* played a practical joke on the victim, telling her that her husband's leg had been broken and that, in response, he had been taken for urgent care. *Id.* at 795. A particular sense of urgency was included in the defendant's tale, and he urged the plaintiff to quickly rush to her husband's side. Consequently, the plaintiff was thrown into a violent shock [in] her nervous system, producing vomiting and other more serious and permanent physical consequences at one time threatening her reason, and entailing weeks of suffering and incapacity to her as well as expense to her husband for medical attendance. These consequences were not in any way the result of previous ill-health or weakness of constitution, nor was there any evidence of predisposition to nervous shock or any other idiosyncrasy. *Id.* The court allowed the plaintiff to recover for the harm she

suffered.

[166] *See* RESTATEMENT (FIRST) OF TORTS § 46 (1948). The first Restatement of Torts curtailed the seemingly broad sweep of *Wilkinson* by generally prohibiting individual responsibility for emotional distress or bodily injury that resulted from conduct intended or likely to cause emotional disturbance. *Id.* The only exceptions were for breach of the duty to exercise civility that common carriers, innkeepers, and telegraph companies owed to their customers, as well as recovery in cases involving the mishandling of dead bodies. *Id.*

[167] 240 P.2d 282, 284–85 (Cal. 1952) (holding "a cause of action is established when it is shown that one, 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").

[168] *See* Kircher, *supra* note 164, at 806.

[169] RESTATEMENT (SECOND) OF TORTS § 46, cmt. F. IIED allows for conduct that goes beyond intention to include those acts in which the actor deliberately disregards a high degree or probability that his or her conduct will cause emotional distress. *See id.* The difference between one who is substantially certain that one will suffer from emotional distress and one who knows of a high probability of such distress is really a matter of degree. Thus, the drafters of the Restatement allow for recovery from one who is less than almost certain, but more than just guessing, that this conduct will cause such distress. *See id.* If an individual were to view intent in a linear fashion, with intentional awareness at the outer left end of the line and unawareness to the right, then the degree of awareness necessary to prove assault, battery, and false imprisonment might move slightly to the right of the end of the line while the degree of awareness allowed to prove IIED would pass that point slightly further to the right.

[170] RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965) ("Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.")

[171] *Id.*

[172] *Id.*; *see also* Smallzman v. Sea Breeze, Inc., 1993 WL 15904 (D. Md. Jan. 7, 1993) (ruling that the defendant reached this threshold when he shouted "you goddamn 'niggers' are not going to tell me about the rules" at the victims).

[173] Kircher, *supra* note 163, at 800 (citation omitted).

[174] *Id.* at 800 n. 56. (citing RESTATEMENT (SECOND) OF TORTS SEC. 46 cmt. d (1965)). Prof. John Kircher identified four categories of conduct that support a finding of outrage when the defendant intentionally inflicts emotional harm: "(1) abusing a position of power; (2) emotionally harming a plaintiff known to be especially vulnerable; (3) repeating or continuing conduct that may be tolerable when committed once but becomes intolerable when committed numerous times; and (4) committing or threatening violence or serious economic harm to a person or property in which the plaintiff is known to have a special interest." *Id.*

[175] *See, e.g.*, Smullen v. Interfact Polygraphs, Inc., 1991 WL 199495, at *6 (Ohio Ct. App. 1991) (citing Pyle v. Pyle, 463 N.E.2d 98 (Ohio Ct. App. 1983). This footnote refers to the case syllabus prepared by the Reporter of Decisions.

[176] *See infra* notes 187-96.

[177] *See supra* note 154 and accompanying text.

[178] *Id.*

[179] *See supra* note 114.

[180] *See* RESTATEMENT (THIRD) OF TORTS § 33 (1985).

[181] *Id.*

[182] *See, e.g.*, TORCIA, *supra* note 157, § 177, *decision approved,* 783 So. 2d 967 (Fla. 2001) (citing Clark v. State, 746 So. 2d 1237 (Fla. Dist. Ct. App. 1999)). Under Florida's battery statute, "the degree of injury caused by an intentional touching is not relevant; any intentional touching of another person against such person's will is technically a criminal battery." *Id.*

[183] *See, e.g.*, Bentley v. Kentucky, 354 S.W.2d 495 (Ky. Ct. App. 1962).

[184] *See, e.g.*, Sloan v. Indiana, 42 Ind. 570 (1873).

[185] *See, e.g.*, Leichtman v. WLW Jacor Commc'ns, Inc., 634 N.E.2d 697 (Ohio Ct. App. 1994).

[186] *See* Minch Family Ltd. P'ship v. Buffalo-Red River Watershed Dist., 2007 WL 93084, at *3 (Minn. Ct. App. 2007) (agreeing that the plaintiff's distress did not rise to the level required for intentional infliction of emotional distress); *see also* Gaspard v. Beadle, 36 S.W.3d 229, 234 (Tex. Ct. App. 2001) (declining to find plaintiff's behavior "extreme and outrageous" where evidence showed that she suffered headaches, depression, and loss of sleep).

[187] *See* National Institute for Mental Health, *What are the Symptoms of Depression?*, DEPRESSION 4, *available at* http://www.nimh.nih.gov/health/publications/depression/nimhdepression.pdf [hereinafer *Symptoms of Depression*]. As for posttraumatic stress disorder ("PTSD"), which can occur after a person experiences some type of trauma, the American Psychological Association states, "Untreated posttraumatic symptoms not only have tremendous mental health implications, but can also lead to adverse effects on physical health. Female survivors [of abuse] may encounter physical symptoms including headaches, gastro-intestinal problems, and sexual dysfunction." American Psychological Association, *Facts About Women and Trauma*, *available at* http://www.apa.org/about/gr/issues/women/trauma.aspx. *See also* National Institute for Mental Health, *Generalized Anxiety Disorder (GAD)*, ANXIETY DISORDERS 12, *available at* http://www.nimh.nih.gov/health/publications/anxiety-disorders/nimhanxiety.pdf [hereinafter *Generalized Anxiety Disorder*].

[188] *See* Generalized Anxiety Disorder, *supra* note 188, at 21.

[189] *Id.*

[190] *See supra* note 114.

[191] Symptoms of Depression, *supra* note 188, at 4.

[192] Generalized Anxiety Disorder, *supra* note 188, at 12.

[193] *See* Facts About Women and Trauma, *supra* note 188 (noting that victims of emotional abuse can develop PTSD).

[194] Diane.R. Follingstad et al., *The Role of Emotional Abuse in Physically Abusive Relationships*, 5 J. FAM. VIOLENCE 107, 107–119 (2005).

[195] *Id.* at 609. After reviewing the literature on the psychological abuse of women, Dr. Virginia A. Kelly noted, "[c]ertainly, there is strong evidence to support a claim that victims of psychological abuse are likely to exhibit increased levels of both anxiety and depression."

[196] *See infra* note 213.

[197] *See* State v. Cobbins, 21 S.W.3d 876 (Mo. Ct. App. 1994) (holding that, although the victim entered the car voluntarily, there was sufficient proof that she was restrained without her consent so as to substantially interfere with her liberty because defendant began to drive in the wrong direction, locked the doors, and told the victim, after she asked to be let out, she would not be hurt and he only needed money).

[198] 2008 WL 5191394 (S.D.N.Y. Dec. 12, 2008).

[199] 645 P.2d 916 (Kan. Ct. App. 1982).

[200] *Id.* at 918.

[201] *Id.*

[202] *Id.*

[203] *Rissman,* 2008 WL 5191394 at *3.

[204] *See, e.g.*, Robinson v. Hewlett-Packard Corp., 228 Cal. Rptr. 591, 604 (Cal. Dist. Ct. App. 1986) (quoting Alcorn v. Anborn Eng'g Inc., 468 P.2d 216, 219 n.4 (Cal. 1970)) (stating that "the slang epithet 'nigger' . . . has become particularly abusive and insulting.").

Indeed, racial slurs perpetuated by police officers can, of themselves, be sufficient evidence of extreme and outrageous conduct. *See* Mejia v. City of New York, 119 F. Supp. 2d 232, 286 (E.D.N.Y. 2000) (reasoning that ethnically "disparaging remarks" uttered by a police officer may well fall within the Restatement's definition of outrageous conduct, even if the same remarks by a private citizen would not); *see, e.g.*, Kelly v. City of Minneapolis, 598 N.W.2d 657, 663 (Minn. 1999) (upholding a

jury verdict on an IIED claim in favor of the plaintiff/arrestees where the officers used justifiable force but also used racial epithets and disparaging names).
Such slurs by an employer can also be sufficient evidence of extreme and outrageous conduct. *See* Jones v. Fluor Daniel Services Corp., 959 So.2d 1044 (Miss. 2007) (ruling in favor of the employees in an IIED claim when the employees' supervisor told them "you monkeys can go to work or go to the rope."); *see also* Alcorn v. Anborn Eng'g Inc., 468 P.2d 216, 216 (Cal. 1970) (holding that an employee had sufficiently alleged IIED because his supervisor shouted racial epithets and fired him).
[205] 468 P.2d 216 (Cal. 1970).
[206] *Id.* at 219.
[207] *Id.* at 218.
[208] 2005 WL 3113100 (N.D. Cal. Nov. 21, 2005).
[209] *Id.* at *2.
[210] *See, e.g.*, Reeves v. Middletown Ath. Ass'n, 866 A.2d 1115, 1123 (Pa. Super. Ct. 2004); Fulton v. United States, 198 Fed. App'x 210, 215 (3d Cir. 2006).
[211] In many states, courts require that the plaintiff must suffer some type of physical harm. Pennsylvania law requires that a plaintiff suffer "some type of resulting physical harm due to the defendant's outrageous conduct" in order to satisfy the "severe emotional distress" element of this claim. *See Reeves*, 866 A.2d at 1122–23 (affirming dismissal of intentional infliction of emotional distress claim because plaintiff's complaint only alleged "serious and permanent physical injury" without specifying the type of injury); *see also id.* (citing Fewell v. Besner, 664 A.2d 577, 582 (Pa. Super. Ct. 1995) ("[P]laintiff must also show physical injury or harm in order to sustain a cause of action for intentional infliction of emotional distress."); *Fulton*, 198 Fed. App'x at 215 (non-precedential) ("[I]n Pennsylvania, both intentional and negligent infliction of emotional distress requires a manifestation of physical impairment resulting from the distress.").
[212] *See* Burton Caine, *The Trouble with "Fighting Words": Chaplinsky v. New Hampshire is a Threat to First Amendment Values and Should be Overruled*, 88 MARQ. L. REV. 441, 444 (2004) (stating that Chaplinsky v. New Hampshire, 315 U.S. 568 (1942), a case where the Court upheld a conviction based on New Hampshire "fighting words" statute was wrongly decided. Furthermore, Caine contends that fighting words, as opposed to physical attacks, are protected by the First Amendment and therefore should never be a basis for a conviction.); *see* Eleanor Beardsley, France *Moves To Outlaw Mental Abuse In Marriages*, NPR, Jan. 8, 2010, http://www.npr.org/templates/story/story.php?f=1001&ft=1&storyId=122362876 (noting that the French Parliament is considering criminalization of verbal abuse between spouses or co-habitating partners)
[213] *See* N.Y. PENAL LAW § 240.25 (McKinney 2008). *See also* 18 U.S.C. § 245(b)(2); MODEL PENAL CODE § 250.4.
[214] *See* ELAINE M. JOHANNES, WHEN WORDS BECOME WEAPONS: VERBAL ABUSE (Kan. State U. 1995), *available at* http://www.ksre.ksu.edu/library/FAMLF2/GT346.PDF.
[215] *See id.*
[216] *See* Larry Alexander & Kimberly D. Kessler, *Mens Rea and Inchoate Crimes*, 87 J. CRIM. L. & CRIMINOLOGY 1138 (1997); *see also* TORCIA, *supra* note 157, at § 182 (supporting the principle of conditional intent).
[217] *See* MODEL PENAL CODE §§ 5.01-.07 (1985).
[218] *See* MODEL PENAL CODE §§ 5.03 (1985).
[219] Victoria Kim, *Mother Convicted in Internet Hoax Case Scheduled for Sentencing Today*, L.A. TIMES, May 18, 2009, *available at* http://latimesblogs.latimes.com/lanow/2009/05/mother-convicted-in-internet-hoax-that-led-to-suicide-will-be-sentenced-today.html.
[220] *Id.*
[221] *Id.*
[222] *Id.*
[223] *See* Zachary R. Dowdy & Sophia Chang, *Web Ad Spurs Mom's Arrest*, NEWSDAY, May 9, 2009.
[224] N.Y. PENAL LAW § 240.30 (McKinney 2008).
[225] N.Y. PENAL LAW § 70.15 (McKinney 2009).
[226] N.Y. PENAL LAW § 70.00 (McKinney 2007).
[227] KADISH, *supra* note 41.
[228] *See* Lee, *supra* note 70, at 703.
[229] *See id.*
[230] *See id.*
[231] *See* Lee, *supra* note 70.
[232] *See id.*
[233] *See generally* Mark Perlman, *Punishing Act and Counting Consequences*, 37 ARIZ. L. REV. 227, 232 (1995) (citing Richard Parker, *Blame, Punishment, and the Role of Result*, 21 AM. PHIL. Q. 269 (1984)).
[234] *Id.*
[235] *Id.*
[236] *See generally* Joel Feinberg, *Equal Punishment for Failed Attempts: Some Bad But Instructive Arguments Against It*, 37 ARIZ. L. REV. 117 (1995).
[237] *See* Russell Covey, *Reconsidering the Relationship Between Cognitive Psychology and Plea Bargaining*, 91 MARQ. L. REV. 213, 229 n. 60 (2007) (citing U.S. Sent'g Comm'n, Statistical Information Packet tbl. 7 (2006), *available at* http://www.uscs.gov/JUDPACK/2006/1cB6.pdf) (showing that national federal median sentence for manslaughter is thirty-seven months); *see also* Celia Goldwag, *The Constitutionality of Affirmative Defenses After* Patterson v. New York, 78 COLUM. L. REV. 655, 658 n. 29 (1978) (stating that the maximum sentence for manslaughter in Maine is $1,000 or twenty years).
[238] *See* RESTATEMENT (FIRST) OF TORTS §§ 21, 35 (1948).
[239] *See supra* note 187; *see also* Nicole M. Capezza & Ximena B. Arriaga, *You Can Degrade But you Can't Hit: Differences in Perceptions of Psychological Versus Physical Aggression*, 25 J. SOC. & PERS. RELATIONSHIPS 225, 240 (2008).
[240] *See supra* note 187.
[241] Kim, *supra* note 220.
[242] *Id.* This article does not propose to argue for or against the theories of deterrence. For an interesting argument on the value of deterrence, see Michael Tonry, *Learning from the Limitations of Deterrence Research*, 37 CRIME & JUST. 279 (2008).
[243] *See* MODEL PENAL CODE § 2.11 (B) (1985).
[244] David Chasen, *France Mulls 'Psychological Violence' Ban*, BBC NEWS, Jan. 5, 2010 http://news.bbc.co.uk/2/hi/europe/8440199.stm.
[245] Eleanor Beardsley, *France Moves To Outlaw Mental Abuse In Marriages*, NPR, Jan. 8, 2010 http://www.npr.org/templates/story/story.php?f=1001&ft=1&storyId=122362876.
[246] *Id.*

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