

## RETHINKING INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

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### INTRODUCTION

A malicious defendant creates a fictional boyfriend on the internet for a thirteen-year-old girl and then has the boyfriend reject her, prompting her to commit suicide.<sup>1</sup> A group of hooligans carries signs in the middle of a funeral accusing the deceased of various unsavory acts, simply as a means of getting revenge against the surviving spouse.<sup>2</sup> A man surreptitiously videotapes his girlfriend having sex with him and shows the video to others where she goes to school.<sup>3</sup> These situations, or events close to them, have actually occurred. The tort of intentional infliction of emotional distress is a claim that may provide redress in cases like these.

But the issue is not simple; there are cases that arguably do not merit redress. A plaintiff is upset over a political cartoon about him and files suit under the banner of the intentional infliction claim.<sup>4</sup> A wife sues her husband for divorce and adds a claim for intentional infliction based upon communications within the marital relationship.<sup>5</sup> A law firm suing under recognized employment law torts routinely adds intentional infliction claims covering the same alleged conduct.<sup>6</sup> These situations also describe cases that have occurred.

Intentional infliction of emotional distress is an established tort. Like most torts, it allows redress to victims of seriously harmful conduct. The problems that it creates, however, are also serious. In the first place, there have been advocates of claims that rest upon lesser mental states than intent. For example, negligent infliction of emotional distress has been proposed as a general-purpose tort and accepted by some courts,<sup>7</sup> even though it creates inappropriate and sometimes indefinite liability.<sup>8</sup> Likewise, there are

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<sup>1</sup> These facts resemble those in *United States v. Drew*, 259 F.R.D. 449, 452 (C.D. Cal. 2009).

<sup>2</sup> This hypothetical case is loosely based on *Snyder v. Phelps*, 562 U.S. 443, 448 (2011), but the proximity of activity and motivation are different.

<sup>3</sup> These facts resemble these in *Boyles v. Kerr*, 855 S.W.2d 593, 594 (Tex. 1993).

<sup>4</sup> These facts resemble those in *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 48 (1988).

<sup>5</sup> These facts resemble those in *Twyman v. Twyman*, 855 S.W.2d 619, 620 (Tex. 1993).

<sup>6</sup> See *infra* Part III.A.

<sup>7</sup> See, e.g., *Osborne v. Keeney*, 399 S.W.3d 1, 17–18 (Ky. 2012); *Vincent v. DeVries*, 72 A.3d 886, 897 (Vt. 2013) (“[a]ssuming without deciding” but appearing to favor claim).

<sup>8</sup> See *infra* Part I.A.

authorities that advocate a reckless infliction tort.<sup>9</sup> The intentional infliction claim suffices, however, to cover the kinds of serious cases to which it ought to apply, such as the ones described above. But there are also contexts in which the costs of the intentional infliction tort can exceed its value, particularly in cases involving employment, marital, and professional relationships.<sup>10</sup>

Part I of this Essay distinguishes claims for intentional infliction of emotional distress from negligent infliction claims, and it argues that while intentional infliction is a legitimate and valuable theory of recovery, negligent infliction is not. Part II proposes that the infliction of emotional distress in a merely reckless way should not authorize recovery, despite being advocated by the Restatement of Torts.<sup>11</sup>

Part III deals with particular contexts, including employment, marital, and professional situations, in which the intentional infliction tort should not be allowed if it overlaps other traditional claims, although it should be viable if it is independent. Part IV proposes a model statute defining intentional infliction of emotional distress and limiting it appropriately in light of these considerations. Part V sets out the author's conclusions, which include a justification of the model statute.

## I. DISTINGUISHING INTENTIONAL AND NEGLIGENT INFLECTION TORTS

It is important to distinguish the intentional infliction from the negligent infliction tort. Negligent infliction of emotional distress properly exists in at least two contexts: first, when a serious physical injury is threatened or is inflicted on another, and second, when a contractual or contract-like relationship creates a basis for the claim.<sup>12</sup> Otherwise, jurisdictions that have thought through the problem have abolished the negligent infliction tort so that it does not function as a freestanding claim.<sup>13</sup> The intentional infliction tort is different. Although not free from potential misuse, the intentional tort exists as a general-purpose claim in most jurisdictions.

### A. *Negligent Infliction of Emotional Distress*

A widely accepted use of negligent infliction of emotional distress allows what is sometimes called bystander recovery. A person who perceives another who is physically injured by the negligence of a tortfeasor may suffer

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<sup>9</sup> For example, this position is adopted by the Restatement (Third) of Torts. *See infra* Part II.A.

<sup>10</sup> *See infra* Part III.

<sup>11</sup> RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 104 (AM. LAW INST., Discussion Draft 2014).

<sup>12</sup> *See, e.g.*, *Dillon v. Legg*, 441 P.2d 912, 917–18 (Cal. 1968); *Lunsford v. Cravens Funeral Home, Inc.*, No. 14-1065, 2015 WL 3875753, at \*3 (W. Va. June 22, 2015).

<sup>13</sup> *See, e.g.*, *Boyles v. Kerr*, 855 S.W.2d 593 (Tex. 1993).

emotional harm from the exposure and may be able to recover in damages.<sup>14</sup> Jurisdictions vary in the requirements imposed on this kind of recovery. California, for example, limits recovery to persons in close family relationships with negligently injured parties and who are actually present at the time and place of injury. Thus, for example, California denies recovery to a “de facto spouse” who lives with a partner but is not married.<sup>15</sup> Some other jurisdictions do not contain the claim so narrowly.<sup>16</sup> In addition, some authorities allow recovery for a “near miss”: a negligent act that causes severe fright to the claimant because of a close encounter that does not cause injury. Jurisdictions differ about whether contact is required for this kind of claim.<sup>17</sup>

Negligent infliction of emotional distress can support a claim when a contractual, or contract-like, relationship creates a duty to care for a person’s emotional condition and that duty is breached. Cases in which a dead body is mishandled by a person entrusted to care for it are an example.<sup>18</sup> In most of these cases, a claim based upon breach of contract would be appropriate, and perhaps more appropriate than a tort claim. But a negligence claim is often the basis of recovery instead, and it seems to make little difference.<sup>19</sup> In tort, the claim turns upon negligence; in contract, the breach would be of the implied covenant of workmanlike performance,<sup>20</sup> and these two standards would tend to produce the same result.<sup>21</sup>

Outside of these areas lies the possibility of an uncontainable general-purpose claim for negligent infliction of emotional distress. This alleged tort would allow a plaintiff to recover against a defendant because “you carelessly hurt my feelings badly.”<sup>22</sup> The trouble with this kind of claim can be understood if one imagines the dilemma of a girlfriend breaking up with a boyfriend or vice versa—a common kind of human interaction that usually

<sup>14</sup> See *Dillon*, 441 P.2d at 917.

<sup>15</sup> *Elden v. Sheldon*, 758 P.2d 582, 588 (Cal. 1988).

<sup>16</sup> E.g., *Bowen v. Lumbermens Mut. Cas. Co.*, 517 N.W.2d 432, 444–45 (Wis. 1994) (allowing recovery to mother of accident victim although she did not perceive the event).

<sup>17</sup> The Restatement would allow recovery for a near miss. See RESTATEMENT (SECOND) OF TORTS § 313(1) (AM. LAW INST. 1965); RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 47 cmt. e (AM. LAW INST. 2012); cf. *Bowen*, 517 N.W.2d at 446 (denying recovery for lack of evidence of emotional distress but suggesting that claim exists).

<sup>18</sup> E.g., *McDonald v. Vill. of Corning*, No. 14-CA-00027, 2015 WL 4549900, at \*1, \*6 (Ohio Ct. App. 2015); *Lunsford v. Cravens Funeral Home, Inc.*, No. 14-1065, 2015 WL 3875753, at \*2–3 (W. Va. June 22, 2015).

<sup>19</sup> *McDonald*, 2015 WL 4549900, at \*1; *Lunsford*, 2015 WL 3875753, at \*1.

<sup>20</sup> See, e.g., *Moglia v. McNeil Co.*, 700 N.W.2d 608, 614 (Neb. 2005).

<sup>21</sup> The implied covenant requires a contracting party to perform work “of good quality.” *Id.* This standard probably would produce similar results to a negligence standard even though the two are not precisely the same.

<sup>22</sup> This statement essentially reproduces the elements of the alleged tort: negligence, causation, and severe emotional distress. See *infra* notes 38–47 and accompanying text. See generally David Crump, *Evaluating Independent Torts Based upon “Intentional” or “Negligent” Infliction of Emotional Distress: How Can We Keep the Baby from Dissolving in the Bath Water?*, 34 ARIZ. L. REV. 439 (1992) (setting out early arguments against a negligent infliction tort).

cannot be managed without emotional hurt and, sometimes, without severe emotional hurt. There are many ways in which the one doing the breaking up may be accused of being wrong no matter what he or she does. By providing an explanation, the actor could cause emotional harm if the explanation is deemed unnecessary and unduly hurtful. On the other hand, the actor arguably owes the other an explanation and is careless and callous if she abruptly severs the connection without saying, in detail, why.

Does this hypothetical girlfriend-boyfriend situation seem farfetched? It is not. There are such cases. *Twyman v. Twyman*,<sup>23</sup> for example, involved a husband and wife who finally broke up by way of divorce proceedings.<sup>24</sup> The wife cited “devastation” because of statements from the husband about their sex life.<sup>25</sup> The Supreme Court of Texas held that a claim for intentional infliction was viable.<sup>26</sup> One can hope that most such cases will result in holdings of nonliability because mutual husband-wife infliction of distress is common—indeed, it is often unavoidable—and because it would be disastrous if every breakup involved these kinds of lawsuits in addition to divorce proceedings.<sup>27</sup> The problem would be compounded if the uncontainable negligent infliction tort were possible.

Yet another disadvantage of the negligent infliction tort is that it is a get-the-insurance device.<sup>28</sup> The most common kind of personal general liability insurance, which covers most homeowners for negligent acts, does not cover intentional wrongdoing.<sup>29</sup> Litigants have been known to cast their lawsuits as claims for negligent, rather than intentional infliction of emotional distress to reach the defendant’s insurance.<sup>30</sup> This strategy would work even if the conduct was itself intentional, because the intentional includes the negligent.

There are advocates of the negligent infliction tort who have argued for its viability. They either fail to recognize the breadth of the tort or urge inadequate solutions. For example, the emotional distress tort usually is said to contain an element of “severe” injury, of a kind that “no reasonable [person] could be expected to endure.”<sup>31</sup> This element would not remove the boyfriend-girlfriend breakup from the coverage of the tort.<sup>32</sup> The coverage of the

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<sup>23</sup> 855 S.W.2d 619 (Tex. 1993). The case is lurid because of husband’s alleged desire for “deviate sexual acts,” *id.* at 620, but it fit the described pattern.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 641 (Spector, J., dissenting).

<sup>26</sup> *Id.* at 621–22.

<sup>27</sup> See *id.* at 626–27 (Phillips, C.J., concurring in part and dissenting in part) (“Married couples share an intensely personal and intimate relationship.”).

<sup>28</sup> See *Boyles v. Kerr*, 855 S.W.2d 593, 603–04 (Tex. 1993) (Gonzalez, J., concurring).

<sup>29</sup> See Paul R. Rambow, *A Practical Guide: On Emerging Issues in Insurance Policy Language*, 27 WM. MITCHELL L. REV. 1105, 1116 (2000).

<sup>30</sup> See *Boyles*, 855 S.W.2d at 603–04.

<sup>31</sup> See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 46 cmt. j (AM. LAW INST. 2012).

<sup>32</sup> See Crump, *supra* note 22, at 467–68.

tort becomes subject to the skill of the plaintiff as an actor portraying the plaintiff's own "severe" hurt. It is not that the severity requirement is not a salutary inclusion; the trouble, instead, is that it does not contain the tort.

Others have suggested limiting recovery to "direct victims."<sup>33</sup> These advocates fail to recognize that their approach still leaves the potential cast of victims open indefinitely because negligence is not "directed." The jilted boyfriend's or girlfriend's mother and father are potential plaintiffs too, as they see the harm inflicted on their child.<sup>34</sup> Bystander recovery has allowed this kind of claim. And why not include the original plaintiff's brothers and sisters, too? They may be hurt as badly as the plaintiff. In the same way, it is possible to expand the group of plaintiffs to an "explosion" of people with potential claims, as one writer has suggested.<sup>35</sup> And finally, there are advocates of the negligence tort who would rather the jury decide.<sup>36</sup> The problem with that position is both that the decision will be standardless and that the variety of cases and defendants is infinite and includes ordinary situations that should not be put through expensive proceedings.

These considerations also raise questions about the claim for intentional infliction of emotional distress. This tort covers the most serious kinds of claims that are likely to be asserted under the heading of the negligence tort, but is more readily containable to situations that should create liability.<sup>37</sup> The problem is that the intentional tort also has some drawbacks, and in particular, it should not be the subject of adjudication that expands it to the coverage of the negligent infliction tort.

### B. *Intentional Infliction of Emotional Distress*

The intentional infliction tort is limited in several ways that mostly keep it from becoming applicable to conduct that should not be regarded as tortious. Like the negligent infliction tort, it requires severe emotional distress. As the Restatement puts it, the harm must be a kind that "no reasonable [person] could be expected to endure."<sup>38</sup> The conduct against which the tort is directed must be "extreme and outrageous,"<sup>39</sup> not just rude or callous. As an intent-based claim, it can be directed toward someone, as the negligence

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<sup>33</sup> See Robert J. Rhee, *A Principled Solution for Negligent Infliction of Emotional Distress Claims*, 36 ARIZ. STATE L.J. 805, 811–12 (2004) (suggesting that "direct victims" can recover).

<sup>34</sup> *Id.* at 12 (suggesting that more remote victims, whom the author calls "collateral" victims, receive lesser remedies; asking, "How large should the pool of [plaintiffs] be?").

<sup>35</sup> Peter G. Land, *The Unintentional Expansion of Negligent Infliction of Emotional Distress?*, 86 ILL. B.J. 82, 86 (1998).

<sup>36</sup> See Betsy J. Grey, *The Future of Emotional Harm*, 83 FORDHAM L. REV. 2605, 2605 (2015) (arguing that cases should just be "entrusted to juries").

<sup>37</sup> See *infra* Part I.B.

<sup>38</sup> RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 46 (AM. LAW INST. 2012).

<sup>39</sup> *Id.*

claim is not, and therefore, there is sensible basis for saying that it does not provide a claim to indirect victims. It is, after all, limited to intentionally inflicted harm—or it should be.<sup>40</sup> Therefore, it is unlikely to be applicable to the situation of the boyfriend-girlfriend breakup, at least if it is properly interpreted.

There is good reason for the existence of this claim. As the Supreme Court of the United States has said, the relevant conduct is harmful and not usually socially useful, and so most states have not regarded it with “much solicitude.”<sup>41</sup> Without this tort, there might be no claim for a situation in which a defendant has created an elaborate romantic hoax only to reject the victim (conduct that on at least one occasion has precipitated suicide), for a serious and lengthy course of harassment, or for a cruel practical joke.<sup>42</sup> There might be no claim for the conduct shown in *Boyles v. Kerr*, where the defendants videotaped one of the defendants and a woman having sexual intercourse without the woman’s knowledge and showed the film to others.<sup>43</sup>

But the usefulness of this tort depends on its proper interpretation. It is a claim that depends on and impliedly threatens expression.<sup>44</sup> It is capable of being applied according to its terms to socially desirable behavior. For example, lawyers frequently cause serious emotional distress to others, including clients to whom they deliver bad news, and they do so sometimes in situations in which the necessity of the harm is debatable.<sup>45</sup> Husbands and wives do this too in circumstances in which communications are the harmful medium but arguably should not be the subject of court proceedings.<sup>46</sup> The requirement of severe, rather than moderate distress is an imperfect limit on these effects because severity depends on unmeasurable judgment and because skillful acting by the plaintiff can manipulate it. Likewise, the requirement of outrageousness is ambiguous.<sup>47</sup> The element of intent usually needs to be inferred indirectly from the conduct itself, as a subjective mental state, and thus it is ambiguous too. Even though it is needed to redress types of seriously antisocial conduct that should have a remedy, the intentional infliction tort is difficult to contain.

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<sup>40</sup> *Id.*

<sup>41</sup> *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 53 (1988).

<sup>42</sup> See *supra* notes 1–3 and accompanying text.

<sup>43</sup> See *Boyles v. Kerr*, 855 S.W.2d 593, 594 (Tex. 1993).

<sup>44</sup> *Hustler Magazine, Inc.*, 485 U.S. at 53.

<sup>45</sup> *Cf. Kunau v. Pillers, Pillers & Pillers, P.C.*, 404 N.W.2d 573, 574–76 (Iowa App. 1987) (discussing a lawyer accused of malpractice and also intentional infliction for missing deadlines but exonerated by jury).

<sup>46</sup> See *Twyman v. Twyman*, 855 S.W.2d 619, 620 (Tex. 1993).

<sup>47</sup> *Cf. Lyons v. U.S. Bank Nat’l Ass’n*, 336 P.3d 1142, 1152 (Wash. 2014) (en banc) (stating that merely “problematic, troubling, or even deplorable” conduct is not “outrageous” (quoting *Vawter v. Quality Loan Serv. Corp.*, 707 F. Supp. 2d 1115, 1128 (D. Wash. 2010))).

## II. INTERPRETING THE INTENTIONAL INFLICTION TORT: WHAT DOES INTENT MEAN?

### A. *Intentional Infliction as Satisfied by Recklessness: The Restatement Approach*

A careful consideration of the concept of intent reveals considerable complexity.<sup>48</sup> The Restatement of Torts is one document that undertakes this task.<sup>49</sup> For example, intent can be supplied by knowledge in some circumstances. A tortfeasor who knows the consequences of an act can sensibly be said to intend those consequences even if his objective in committing the act is something else. For example, it makes sense to assign intent to an arsonist who knows that his burning of a building to collect insurance proceeds will kill people who are inside. The principle applies even if the actor regrets the consequence. The arsonist is not exonerated from a claim requiring intent merely because he says, “I wish I hadn’t had to kill those poor folks.”

It is for this reason that the Model Penal Code (MPC) includes conduct that is knowing, as well as conduct that is purposeful or intentional.<sup>50</sup> Intent (or, as the MPC puts it, purposefulness) is a state of mind, the result of which is the actor’s “conscious object.”<sup>51</sup> Knowledge is present when the actor is “practically certain” of causing the result.<sup>52</sup>

The claim recognized in the Restatement of Torts is usually called “intentional” infliction of emotional distress.<sup>53</sup> But, contrary to that label, the Restatement allows the tort to exist when the actor’s state of mind is only “reckless.”<sup>54</sup> The Restatement defines recklessness in a way that distinguishes it technically from negligence but that is not easy to distinguish as a practical matter. Recklessness is a state of mind that realizes the existence of a risk but undertakes the risk without good reason.<sup>55</sup> This definition does not allow recovery when the act is inadvertent, or, in other words, when the actor

<sup>48</sup> See generally David Crump, *What Does Intent Mean?*, 38 HOFSTRA L. REV. 1059 (2010) (discussing varying interpretations of the word).

<sup>49</sup> “The word ‘intent’ is used . . . to denote that the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it.” RESTATEMENT (THIRD) OF TORTS: APPOINTMENT OF LIABILITY § 12 cmt. b (AM. LAW INST. 2000).

<sup>50</sup> MODEL PENAL CODE § 210.2 (AM. LAW INST. 1962).

<sup>51</sup> *Id.* § 2.02(2)(a)(i).

<sup>52</sup> *Id.* § 2.02(2)(b)(ii).

<sup>53</sup> *Cf. supra* notes 4, 5, and 7 and accompanying text (referring to “intentional” infliction).

<sup>54</sup> RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 46 (AM. LAW INST. 2012).

<sup>55</sup> *Id.* § 2. Specifically, the definition states:

A person acts recklessly in engaging in conduct if:

(a) the person knows of the risk of harm created by the conduct or knows facts that make the risk obvious to another in the person’s situation, and

(b) the precaution that would eliminate or reduce the risk involves burdens that are so slight relative to the magnitude of the risk as to render the person’s failure to adopt the precaution a demonstration of the person’s indifference to the risk.

does not realize that the risk exists. This differentiates recklessness from negligence, which can arise from inadvertence whenever a reasonable person would recognize the risk.<sup>56</sup> The distinction is useful in some contexts. Nevertheless, a recklessness standard would be broad enough to label as tortious conduct that should not be so considered, or at least would exonerate that conduct after a lengthy fact finding.

Consider again the boyfriend-girlfriend breakup, which is accomplished in the unfortunately clumsy manner that often characterizes these situations.<sup>57</sup> The person who rejects the other knows the risk of emotional harm. In fact, that person may realize that the harm will be severe. In other words, a misstep is accompanied by a state of mind in which the actor recognizes the risk but goes ahead anyway. The actor can therefore be alleged to have been reckless. A jury may decide that the defendant is not reckless after expenditure of thousands of dollars in pretrial proceedings and discovery, but that result seems hardly desirable. And if the jury decides that the actor was reckless, there is no principled way to distinguish this case from others in which the intentionally-named-but-merely-reckless tort should be recognized.

B. *Intentional Infliction as Requiring Actual Intent or Knowledge: A Conscious Desire or Objective*

The tort of intentional infliction of emotional distress should require an element of intent. This statement seems intuitive, but warrants attention in light of the Restatement.<sup>58</sup> The situations in which this claim should exist do not arise unintentionally. They include the elaborate romantic hoaxes, the cruel practical jokes, the serious courses of harassment, and the surreptitious videotapes mentioned above.<sup>59</sup> On the other hand, a requirement of intentional causation of harm eliminates the many instances of ordinary social clumsiness that should not become tortious.<sup>60</sup>

But then, what is intent? The MPC defines it as “conscious object,”<sup>61</sup> which is a fair conception of the core mental state at issue. But here, there is a paradox. Sometimes in tort law it is necessary to impute intent where knowledge of consequences is coupled with indifference to those consequences or even regret that they occur. A bank robber who shoots and wounds a security guard is guilty of assault, for example. The plan that he had with his co-conspirators may not have included assaulting anyone because the objective was to take money from the bank. In fact, the conspirators

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<sup>56</sup> See *id.* cmts. a, d (stating that even “gross” negligence is a lesser standard than recklessness; negligence is “failure to exercise reasonable care”).

<sup>57</sup> See *supra* notes 23–27 and accompanying text.

<sup>58</sup> See *supra* Part II.A.

<sup>59</sup> Cf. *supra* notes 1–3 and accompanying text (describing several cases).

<sup>60</sup> Cf. *supra* notes 4–6 and accompanying text (describing several cases).

<sup>61</sup> MODEL PENAL CODE § 2.02(2)(a)(i) (AM. LAW INST. 1962) (although the MPC labels this mental state as “purposely” rather than “intentional”).

may have decided that shooting at a person was a last resort—a step to be regretted and avoided unless absolutely necessary. In this situation, the robber does not avoid liability for the intentional tort of assault by the claim that shooting the security guard was not his conscious desire or objective. The Restatement of Torts conforms to this concept of intent.<sup>62</sup>

In a similar way, there may be situations in which the actor accused of intentional infliction of emotional distress may not have had actual intent in the sense of a conscious desire or an objective to elicit distress, but he still should be liable for it. The extortionist who threatens to expose an embarrassing secret unless his mark pays him a sum of money does not act because he enjoys causing emotional distress. He may even wish to obtain the funds while causing the least amount of harm (and with the least amount of work and risk). Nevertheless, he should be liable for intentional infliction of emotional distress if he knows, as he surely does, that his conduct harms the victim, even if he is merely indifferent to that result or actually regrets it.

There should be instances, therefore, when something less should suffice than the MPC's standard of intent as a conscious object. There should be situations in which knowledge of the likely result should be enough. The MPC defines this kind of knowledge as "practically certain" that the result will occur,<sup>63</sup> because a requirement of absolute knowledge might be unworkable. The trouble is, while a conscious object for harm to an individual should be enough by itself, knowledge of likely results should not always be. A lawyer, for example, sends an unexpected demand letter to an individual she thinks is liable to her client. The lawyer knows that the recipient of the letter will suffer severe emotional harm as a result, but proceeds to send the letter anyway. Many people who have not received such letters are unaware that they can precipitate severe distress. The lawyer should not be liable even though he knows the emotional harm will occur.

There are many variations of this kind of case. The day before these words were first written, professional football teams across the nation were required to trim their rosters by cutting more than twenty hopeful players, many of whom were then without employment in their field. The team managers are unenviably responsible for this action, and they know how much emotional distress they cause. A physician who tells a patient about a disappointing prognosis is in the same position. And consider the lawyer who inflicts emotional distress on her own client, rather than on the opposition, by informing her client that, after all, he does not have a sound claim and must therefore accept a poor settlement.

Each of these situations has two characteristics that distinguish them from the cases in which intentional infliction of emotional distress should be recognized. First, there is no intent to cause emotional harm in the sense of any conscious desire or objective to do so. Second, although the actor has the

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<sup>62</sup> RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 1 (AM. LAW INST. 2005) (intent exists not only when the actor desires the result but also when the actor "know[s] that the consequence is substantially certain to result").

<sup>63</sup> MODEL PENAL CODE § 2.02(2)(b)(ii) (AM. LAW INST. 1962).

knowledge that severe emotional harm may result, the actor proceeds to do it because there is a legitimate reason for doing so.

In summary, intentional infliction of emotional distress should exist when, in addition to other required elements, the actor has a conscious desire or objective to cause severe emotional harm to an individual and, in that sense, intends it. In addition, the intentional infliction tort should exist when the actor is substantially certain of causing severe emotional harm and lacks any other legitimate purpose. In this sense, the actor knows of the harm and therefore intends it.

### III. WHERE THE INTENTIONAL INFLECTION TORT SHOULD BE LIMITED

#### A. *Overlapping Claims About Employment, Marital, and Professional Relationships*

A large percentage of intentional infliction claims are asserted in employment situations.<sup>64</sup> But the claim often is not the plaintiff's primary, or even secondary complaint. The claim, instead, is generally a traditional employment law cause of action. For example, the first claim may be an assertion of retaliation against a report of or refusal to commit a legally prohibited act, or of discrimination, or of contract violation.<sup>65</sup> The intentional infliction claim in this situation will ordinarily involve allegations of the same or closely related conduct.<sup>66</sup> Meanwhile, the employer insists that the alleged conduct did not occur or that the demotion or termination of the employee was motivated not by a desire on the employer's fault to commit illegal acts, but rather by the plaintiff's poor performance.<sup>67</sup>

Intentional infliction claims also appear in family law litigation. A divorce or custody case may include a secondary claim of intentional infliction of emotional distress.<sup>68</sup> A wife or husband may have a particularly hurtful affair, use the children in an inimical way, or simply engaged in hurtful communications.<sup>69</sup> Again, the conduct covered by the claim is likely to be closely related to or coincident with the conduct involved in the underlying divorce

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<sup>64</sup> A Westlaw search for ["intentional infliction" & employment] produced more than 10,000 court opinions.

<sup>65</sup> See, e.g., *Guzman v. Evans Auto Care Inc.*, No. B263378, 2016 WL 5372802, at \*1–2 (Cal. Ct. App. 2016) (claiming discrimination against injured workers, breach of covenant of good faith, and intentional and negligent infliction of emotional distress).

<sup>66</sup> *Id.*

<sup>67</sup> Cf. *Santos v. Kisco Senior Living, LLC*, 205 Cal. Rptr. 3d 585 (2016) (disclosing employer's position that employee of senior residence committed thefts from residents).

<sup>68</sup> A Westlaw search for ["intentional infliction" & divorce] produced more than 2,000 court opinions.

<sup>69</sup> Cf. *Christians v. Christians*, 637 N.W.2d 377, 383 (S.D. 2001) (both husband and wife claimed intentional infliction, she for his disclosing of information to her employer); *Twyman v. Twyman*, 855 S.W.2d 619, 620 (Tex. 1993) (alleging offensive communications).

or other family law claim and the issues may be redundant, or even contradict, the divorce remedy.<sup>70</sup>

A third common area in which the claim is asserted is professional relationships. A plaintiff may sue a physician or attorney for malpractice and assert in the same suit a claim for intentional infliction of emotional distress.<sup>71</sup> Again, this claim may overlap the primary claim—the one based on professional responsibilities.

### B. *Misuse of the Claim*

In these situations, the intentional infliction claim is likely to be added as a kind of vituperative epithet. It adds little that can be the subject of a separate or additional recovery, but creates battles over the pleadings, complicates discovery, and makes it more expensive. The claim may even be a stalking horse—that is, a claim that the plaintiff really does not believe in but that is cheap to assert while expensive to defend. The addition of the claim may be motivated by considerations of increasing settlement prospects by the creation of unpleasant litigation or diversion of the opponent's resources.<sup>72</sup>

On the other hand, one can easily imagine situations in which the intentional infliction tort should exist in employment, marital, or professional circumstances. The defendant may have acted intentionally to inflict emotional distress in ways that do not implicate the relationship. An employer may harass an employee by causing the employee severe embarrassment or emotional hurt without acting adversely to the employee's interests as an employee.<sup>73</sup> Or a physician may build up such antipathy to the survivors of a deceased patient as to prompt him to embark on a course of harassment toward them.<sup>74</sup>

There is an obvious solution to this dilemma, but it is imperfect. The law could simply disallow any use of the intentional infliction tort that duplicates a recognized claim in employment, marital, or professional cases. The reason this solution is imperfect is that plaintiff's lawyers are strategic, and

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<sup>70</sup> The divorce proceeding itself involves monetary awards in the form of property division, and other issues, such as alimony and child support, too. Should the court, then, withhold tort damages on the ground that they are duplicative of these monetary awards, especially if fault is a consideration in division? *Cf. Twyman*, 855 S.W.2d at 627 (Phillips, C.J., concurring in part and dissenting in part) (arguing against the tort in divorce).

<sup>71</sup> *Cf. Christian v. Tohmeh*, 366 P.3d 16, 31 (Wash. Ct. App. 2015) (intentional infliction claim against physician included alleged failure to inspect injured structure, which was redundant of malpractice claim).

<sup>72</sup> *Cf. Brown v. Shaffer*, 942 S.W.2d 162, 166 (Tex. Ct. App. 1997) (holding that a physician who was sued by a patient for postponing non-emergency surgery was not liable for intentional infliction of emotional distress, but only after trial court proceedings and appeal).

<sup>73</sup> *Cf. GTE Sw., Inc. v. Bruce*, 998 S.W.2d 605, 620 (Tex. 1999) (upholding judgment for intentional infliction by harassment; no other claim asserted).

<sup>74</sup> *Cf. Gragg v. Calandra*, 696 N.E.2d 1282, 1289–90 (Ill. App. Ct. 1998) (upholding intentional infliction claim against physician allegedly for repeated abuse and insults to family members).

properly so. They may throw in additional facts that appear to provide independent grounds for the intentional infliction claim. This action will require the court to expend its and the parties' resources to determine whether the intentional infliction claim is truly independent or whether the added facts are pretextual, and there will be cases in which the question is close enough to require the claim to be carried throughout the case. The proposed solution will, however, provide some benefits. And there are, in fact, some jurisdictions that disallow intentional infliction claims when they overlap traditional employment law claims.<sup>75</sup>

#### IV. A MODEL STATUTE DEFINING THE INTENTIONAL INFLICTION CLAIM

These considerations suggest that a reform-minded legislature could undertake to rethink the intentional infliction claim. The Restatement definition of the claim provides a useful starting point because it is based on actual doctrine—supplemented, of course, by judgments about the most workable alternatives. But the redefinition of the claim would take into account the difficulties discussed here. A statute like the following would carry out these objectives:

(a) The cause of action for intentional infliction of emotional distress is recognized in this state as it is defined in the current Restatement of Torts, as modified by this statute. In case of conflict between the Restatement definition and the provisions of this statute, this statute shall control.

(b) In addition to other elements required by the Restatement, the claim shall require either:

(1) Intent to cause severe emotional distress to a person, or

(2) Knowledge that severe emotional distress is likely to result to a person, coupled with a lack of any legitimate objective.<sup>76</sup>

(c) Intent shall be defined as the actor's conscious desire or objective to bring about the result. Knowledge shall be defined as substantial certainty that the result will occur.<sup>77</sup>

(d) The cause of action for intentional infliction of emotional distress does not exist in situations in which the facts on which it would be based are substantially duplicated by the facts underlying a recognized claim that can be asserted in employment, family, or professional liability cases. This provision does not prohibit the assertion of a cause of action for intentional infliction of emotional distress in an employment, family, or professional

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<sup>75</sup> See, e.g., cases cited *supra* notes 65–67.

<sup>76</sup> See *supra* Parts I.B, II.B.

<sup>77</sup> See *id.*

liability case if the facts underlying the cause of action are independent of recognized claims based on those relationships.<sup>78</sup>

(e) There is no cause of action for negligent infliction of emotional distress or reckless infliction of emotional distress except in cases of effects upon bystanders or in cases based upon contractual or other special relationships.<sup>79</sup>

## CONCLUSION

The tort of intentional infliction of emotional distress poses a dilemma. It allows recovery against a person who maliciously causes emotional harm to another person without justification. But it is difficult to define in such a way that it does not threaten positive conduct with liability.

The emotional distress tort becomes particularly problematic if it allows recovery on proof of mere negligence. Many appropriate kinds of conduct would risk liability under this standard. A girlfriend who causes severe emotional harm to her counterpart by breaking up with him could be mulcted in damages. The act of ending a relationship, even if necessary, puts the putative defendant into a situation where any course of conduct can be criticized as negligent, and it may be difficult to undertake such an unpleasant task without some degree of clumsiness—or in other words, some amount of negligence. A skeptic should be aware that similar cases have been brought.

Furthermore, the claim for negligent infliction is uncontainable. It applies, as the example shows, to ordinary human conduct, and it can create an indefinitely large class of claimants. Negligence is inadvertence, and it is not directed, so that there is no prospect of identifying direct victims as there would be with intentional infliction. A course of conduct that negligently harms one person may also negligently harm her spouse and children—and perhaps others.

Yet another disadvantage of a negligent infliction claim is that it would function as a get-the-insurance device, and thus it would undermine the insurance relationship. A negligent infliction tort would not include the element of outrageousness, which functions as a limit, however imperfect, upon the intentional infliction tort because negligence is not outrageous in the way that intent is.

For related reasons, recklessness should not be sufficient to support the emotional distress tort. The Restatement is wrong in this regard. Even if it is defined so that it differs in theory from negligence, as it would if it required actual awareness of the risk, recklessness would be indistinguishable on the facts from negligence in too many cases. Most human conduct is accompanied by risk. Even driving down a city street can result in an accident. And the ever-present risk of ordinary life often is recognizable. Thus, for example, an employer who disciplines or terminates an errant employee knows that

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<sup>78</sup> See *supra* Part III.

<sup>79</sup> See *supra* Parts I.A., II.A.

she may cause severe emotional distress and also knows that there is a risk that the employment action may be seen as mistaken or excessive. These conditions would cause the action to be characterized as reckless as easily as negligent.

Intentional infliction of emotional distress should require intent as an element. Intent should mean a conscious desire or objective to cause the result, or should be defined by some similar formulation. This state of mind is present in the kind of hard-core conduct that should be subject to liability under an intentional infliction tort. But there are some circumstances in which knowledge should suffice, where knowledge is defined as substantial certainty that the consequence will result without any legitimate purpose. An actor may know that he is causing severe distress but may simply be indifferent, and this state of mind should not exonerate the putative defendant. An extortionist who creates severe emotional distress to cause the victim to pay money does not desire the distress, as such, but rather seeks to extract funds. The extortionist's knowledge, coupled with his lack of any legitimate purpose, should be regarded as the same as intent for intentional infliction purposes.

A large number of intentional infliction cases arise in situations involving employment, marital, and professional relationships. In these cases, the intentional infliction tort usually duplicates other traditional claims. The claim is piled on as a kind of vituperative epithet. It adds little if anything to the plaintiff's prospects of recovery most of the time. It is easy to assert but expensive for both the defendant and the court to deal with. The intentional infliction tort should not exist in employment, marital, or professional contexts if it is substantially duplicative of a claim that is traditionally viable in these areas. But there are cases in which the intentional infliction of distress is independent of any other claim. In those cases, the intentional infliction tort should be recognized.

The model statute set out in this Essay offers a way for a reform-minded legislature to enact these ideas into law. The statute requires intent, defined as conscious desire or objective, as an element of the intentional infliction tort. As an alternative, it allows knowledge, defined as substantial certainty, to suffice if the actor has no legitimate objective. The statute abolishes any claim for negligent or reckless infliction of emotional distress. It also provides that in cases involving employment, marital, or professional relationships, the intentional infliction claim cannot substantially duplicate other traditional claims suited to these contexts. With these provisions, the intentional infliction tort is more likely to cover those cases that it should cover, without applying to those it should not.