EVALUATING INDEPENDENT TORTS BASED UPON "INTENTIONAL" OR "NEGLIGENT" INFLICTION OF EMOTIONAL DISTRESS: HOW CAN WE KEEP THE BABY FROM DISSOLVING IN THE BATH WATER?

David Crump*

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* A.B. Harvard 1966; J.D., University of Texas 1969; Professor of Law, University of Houston. The author has represented both the plaintiff's side and the defendant's side in appellate litigation that has developed the law governing emotional distress claims. Specifically, among other cases, the author was counsel to defendant (on appeal and discretionary review only) in Boyles v. Kerr, No. D–0963 (Tex. appeal docketed June 19, 1991), *see infra* note 10, and also was counsel to plaintiffs (both at trial before a jury and on appeal) in Clark v. Smith, 494 S.W.2d 192 (Tex. Civ. App.—Dallas 1973), *writ ref'd n.r.e.*, *see infra* note 107.

INTRODUCTION

The litigation between Sandra Jameson and John Overholtzer started in an unusual way: They had sexual intercourse together.

The problem was that John (not his real name)[1] had arranged with three other young men to videotape this event, without Sandra's knowledge. He showed the resulting tape to several additional persons. When she learned of these facts, Sandra Jameson understandably suffered emotional distress. And when she decided to file suit against Overholtzer, there were several well-established traditional torts that Jameson could plead, including invasion of privacy[2] and intentional infliction of emotional distress.[3]

But we do not live in traditional times. In the first place, today's emotional distress litigation often has more lurid facts than the genteel cases of a bygone era. If one wants to study emotional distress theories, one cannot wish away claims such as Jameson's suit against Overholtzer. Instead, the scholar often must concentrate carefully on cases with disturbing facts, because many of the landmark decisions concern conduct that is uncomfortable to discuss.[4]

In the second place, and perhaps more importantly, the litigation tactics in these suits are no longer traditional. They involve hardball. For example, when *Jameson v. Overholtzer* went to trial, the plaintiff's lawyer suddenly waived all of the established intentional torts that he had asserted. He instead elected to proceed on a single, more novel (and hence more risky) theory: that John

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1. *See infra* note 10 (explaining pseudonyms).

2. *See* RESTATEMENT (SECOND) OF TORTS § 652B (1965) (setting out claim for invasion of privacy); *see also, e.g.*, Nader v. General Motors Corp., 255 N.E.2d 765 (1970); Billings v. Atkinson, 489 S.W.2d 858 (Tex. 1973).

3. *See* RESTATEMENT (SECOND) OF TORTS § 46 (1965) (setting out claim for intentional or reckless infliction of emotional distress); *see also, e.g.*, Hustler Magazine v. Falwell, 485 U.S. 46 (1988). *See generally infra* part I.A. (discussing establishment of claim and its elements).

4. For example, Missouri recently declared its law in a case with several striking factual similarities to *Jameson v. Overholtzer*. In Turner v. General Motors Corp., 750 S.W.2d 76 (Mo. App. 1988), security guards at a General Motors facility secretly videotaped a young man masturbating as he waited in a vehicle to pick up his father. The security guards, who knew the father was a General Motors employee, later showed the film to other people at the plant. The father sued for both intentional and negligent infliction of emotional distress. But like the plaintiff in *Jameson v. Overholtzer*, he waived the intentional tort and submitted only his negligent infliction claim to the jury. The appellate court reversed a judgment for plaintiff on the ground that there was no general duty to avoid negligent infliction of emotional injury. The facts were "tragic and devoid of any semblance of good judgment," said the court; but "there is no necessary nexus between a legal right or duty and a moral or humane right or duty." *Id.* at 79. This reasoning parallels the analysis *infra* part II.A.

Many other groundbreaking cases based upon negligent-infliction claims have involved uncomfortable facts. *E.g.*, Marlene F. v. Affiliated Psychiatric Medical Clinic, Inc., 770 P.2d 278 (Cal. 1989) (action by mothers against psychotherapist who allegedly molested sons while both mothers and sons were patients; rejecting independent negligent-infliction tort); Allstate Ins. Co. v. Mugavero, 589 N.E.2d 365 (N.Y. 1992) (action to determine insurance coverage for sexual abuse of children in babysitter's care; denying coverage for claims based on negligence); Twyman v. Twyman, 790 S.W.2d 819 (Tex. Ct. App.—Austin 1990), *writ granted* (negligent infliction claim appended to divorce petition for husband's alleged insistence on bondage and sadomasochistic activities as a condition of continuation of the marriage; recovery allowed) (currently pending on review in Texas Supreme Court). Numerous other examples could be given.

Overholtzer was guilty only of "*negligent* infliction of emotional distress" against Sandra Jameson.

The motivation for this seemingly odd strategy, when understood, makes the strategy itself easier to understand. Overholtzer was covered by his parents' homeowner's insurance policy. The policy contained a typical general-liability provision. (In fact, "homeowner's" insurance is a misnomer, in that the coverage actually indemnifies against all claims, whether incurred at the insured's home or not.)[5] But the policy also contained certain standard exclusions. One of these exclusions denied coverage for intentional injuries.[6] Positive jury findings on the intentional tort claims might have established the defendant's liability, but plaintiff's attorney could have feared that it also would exonerate the deepest pocket, which was the insurance company.

Thus, a suit that many people might consider justifiable if targeted at intentional conduct was contrived instead, through the device of the negligent-infliction claim, to target an insurer that had not contemplated insuring such a risk.[7] Finally, the case came full circle: Sandra Jameson offered not to execute on any of John Overholtzer's personal assets in exchange for his assignment to her of his rights against his insurance company.[8]

There can be little question today that legal protection against emotional harm is appropriate in some cases. But the hardball tactics and get-the-insurance strategies in *Jameson v. Overholtzer* bring into sharp focus the question, *how* should this protection be provided? Should it be limited to recovery for intentional infliction of emotional distress? If negligent (or merely careless) emotional slights also create liability, how can that liability appropriately be limited? What

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5. *See Mugavero*, 589 N.E.2d at 365; Heyden Newport Chem. Corp. v. Southern Gen. Ins. Co., 387 S.W.2d 22, 26 (Tex. 1965). Indeed, the typical policy requires the insurer to "pay all sums" for which the insured is held legally liable (the "pay all sums" clause). *Cf.* RICHARD A. EPSTEIN, ET AL., CASES AND MATERIALS ON TORTS 889–90 (5th ed. 1990) (reproducing typical clause from automobile policy; indicating that many clauses are similar in other kinds of policies).

6. *See* authorities cited *supra* note 5; *see also* Rodriguez v. Williams, 713 P.2d 135, 137 (Wash. Ct. App.), *aff'd*, 729 P.2d 627 (Wash. 1986) (minor incest victim cannot recover on insurance policy for sexual intercourse by stepfather-insured on theory injury was not intended). The *Mugavero* case, for example, involved allegations of "negligent" sexual abuse of plaintiffs' children by one of the defendant insureds. The policy excluded damages for bodily injury "intentionally caused by an insured person." *Mugavero*, 589 N.E.2d at 367. The plaintiff's theory was that coverage existed because although the acts of the insured were intentional, the harm was not; the court, however, held that harm was "inherent in the act of sexually abusing a child." *Id.* at 369.

It is, of course, entirely possible for an insured to be liable for an intentional tort and yet to be within the coverage of the insurance. Intentional tort liability does not necessarily require intentional injury; the intent to commit the act may be sufficient. But exclusion under the policy requires intent to injure, which normally must be specific and subjective. *See* Rodriguez v. Williams, 729 P.2d 627, 629–30 (Wash. 1986).

7. That is, it should not have charged policyholders premiums to cover the risk of insuring either for intentional injury (because of the exclusion) or for negligent infliction of emotional distress (because of the thesis of this Article). Notwithstanding the exclusion, it *is* possible for an insurer to be liable for an intentional tort if the *injury* (as distinguished from the tort) was unintentional. *See supra* note 6.

8. Whether this event occurred was not documented in the underlying case. The assignment to the plaintiff of defendant's negligence or bad-faith settlement claim against defendant's insurer sometimes occurs in such instances. *Cf. supra* note 6 (describing plaintiff's efforts to avoid defendant's noncoverage under defendant's homeowner's policy).

consideration should be given to the insurance effects of the liability? And finally, how should the courts react to the hydraulic pressure of disturbing facts, by reason of which—as Justice Holmes said—hard cases sometimes make bad law?[9]

A. The Uses of the Negligent-Infliction Claim

The facts of the *Jameson* case (fortunately) are unusual. But the problem it poses is not. Circumstances analogous to those of *Jameson v. Overholtzer* have made the theory of "negligent infliction of emotional distress" a celebrated issue at the forefront of today's tort law. In fact, the *Jameson* scenario is adapted from a real case called *Boyles v. Kerr*[10] that was tried in a state court and reviewed by that state's appellate courts. And beyond *Jameson*, there is a mass of factually distinct but analytically similar cases, covering an infinite variety of situations.

In Florida, for example, a commercial airliner bound for the Bahamas lost three engines shortly after takeoff. Although the pilot managed to land safely, the passengers naturally experienced severe fright. They sued for negligent infliction of emotional distress.[11] In Arizona, residents downwind of an asbestos manufacturing firm sued for redress of their fear of someday contracting asbestosis, even though they had no present injuries or even symptoms. They, too, claimed negligently inflicted emotional distress.[12] In California, a man sued for the death of his live-in companion in an automobile accident, but since he would not have been a proper claimant under the wrongful death statute because she was not his spouse, he based his claim instead on negligent infliction of emotional distress.[13]

In similar fashion, a diverse series of litigants has asserted this negligence theory, with varying results. The claimants have included employees suing their employers,[14] wives suing husbands for divorce,[15] a parent suing a person who inadvertently facilitated a child abduction,[16] a person who was the target of

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9. *See infra* note 463 and accompanying text.

10. No. D-0963 (Tex. appeal docketed June 19, 1991). The author was counsel to defendant (on appeal only). The record evidence in *Boyles v. Kerr* was more complex than the factual narrative of *Jameson v. Overholtzer* introducing this article. *Compare* Petitioner's Application for Writ of Error at 3–8, Boyles v. Kerr, No. D-0963 (Tex. appeal docketed June 19, 1991) (Defendant's Statement of Facts) *with* Brief for Respondent at 1–2, Appendix A, Boyles v. Kerr, No. D-0963 (Tex. appeal docketed June 19, 1991) (Plaintiff's Statement of Facts). It is for this reason, as well as to preserve non-public information and protect interests of the actual parties, that this article uses the substituted names and adapted facts of *Jameson v. Overholtzer*

Much of the analysis contained in this article originated in the appellate briefs in *Boyles v. Kerr*, including theories developed by co-counsel. Those theories are presented here, however, in a non-litigation context.

11. Eastern Airlines, Inc. v. King, 557 So.2d 574 (Fla. 1990) (rejecting claim). *See also infra* parts II.C., IV.C. (containing further discussion of this case).

12. Burns v. Jaquays Mining Corp., 752 P.2d 28 (Ariz. Ct. App.), *pet. for review dism'd*, 781 P.2d 1373 (Ariz. 1989) (rejecting claim). *See also infra* parts II.C., IV.C. (containing further discussion of this case).

13. Elden v. Sheldon, 758 P.2d 582 (Cal. 1988) (rejecting claim).

14. Havens v. Tomball Community Hosp., 793 S.W.2d 690 (Tex. Ct. App.—Hou. [1st Dist.] 1990), *writ denied*; *In re* Continental Airlines Corp., 64 Bankr. 858, 861 (S.D. Tex. 1986).

15. *Twyman*, 790 S.W.2d at 823.

16. Weirich v. Weirich, 796 S.W.2d 513 (Tex. Ct. App.—San Antonio 1990), *writ granted.*

nonobstructive picketing suing his picketers,[17] contract beneficiaries suing for allegedly negligent conduct related to contract breaches,[18] on-scene viewers of an accident suing because of fear that a careless driver (with whom they were not acquainted) might injure himself,[19] and even a mother suing her doctor for her disappointment because she delivered a single healthy infant after he had diagnosed twins.[20] The insurance ramifications also have been curious. For example, insurers have been forced to furnish defense attorneys even in divorce cases, when the petitioning spouses have added claims for negligent infliction of emotional distress.[21]

The trouble with this use of the negligence theory is that it typically is motivated, as it was in *Jameson v. Overholtzer*, by a desire to avoid limits that public policy has placed upon the intentional torts that one would expect to be the claimant's first resort. Often, the plaintiff's lawyer seeks to "get the insurance" by recasting intentional harm as negligence.[22] Alternatively, he may seek to create a new avenue of recovery when he cannot prove intent in a situation in which the law traditionally has required it.[23] Plaintiff's lawyers who attempt to use these strategies cannot be faulted, because they thus discharge their duty to seek the lawful ends of their clients competently and diligently.[24]

On the other hand, the established limits of the intentional torts have evolved by painstaking analysis over generations.[25] The limits represent important public policy judgments, based upon countervailing considerations such as the protection of valuable activities[26] or the avoidance of litigation that costs more than its objectives are worth.[27] The potential destruction of these limits raises the question whether, and to what extent, an independent claim for negligent infliction of emotional distress should be recognized.

B. Analyzing the Intentional- and Negligent-Infliction Theories: The Scope of This Article

This Article evaluates the potential negligent-infliction tort and its intentional-infliction counterpart. It begins by comparing negligent infliction to the intentional torts for which it might substitute. This part of the Article explores the possibility that an independent negligence theory might supersede many of

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17. Valenzuela v. Aquino, 800 S.W.2d 301 (Tex. Ct. App.—Corpus Christi 1990), *writ granted.*

18. Seidenbach's, Inc. v. Williams, 361 P.2d 185, 187–88 (Okla. 1961) (disallowing recovery of emotional distress damages based on late delivery of wedding gown).

19. Kaufman v. Miller, 414 S.W.2d 164, 170 (Tex. 1967) (fear for safety of defendant in minor automobile accident); Williamson v. Bennett, 112 S.E.2d 48, 54–55 (N.C. 1960) (fear for safety of imaginary third party in minor automobile accident).

20. Woodell v. Pinehurst Surgical Clinic, P.A., 336 S.E.2d 716, 717–18 (N.C. App. 1985). *See also, e.g.*, Asuncion v. Columbia Hosp. for Women, 514 A.2d 1187, 1188–90 (D.C. App. 1986) (suit based upon gauze, left in vaginal canal after delivery, passing from body).

21. *See* Petitioner's Application for Writ of Error at 33, Boyles v. Kerr, No. D–0963 (Tex. appeal docketed June 19, 1991).

22. *See supra* notes 5–8 and accompanying text (*Boyles* and *Mugavero* cases).

23. *See supra* notes 11–13 and accompanying text (*Eastern Airlines*, *Burns*, and *Eldon* cases).

24. This duty is imposed by many professional codes applicable to lawyers. *E.g.*, TEX. DISC. R. PROF. CONDUCT 1.01 & cmt. 6 (West 1991).

25. *See generally infra* part I.A. (development of intentional-infliction tort).

26. *See infra* part I.A.3. (deterrence of valuable activities by imperfectly limited tort).

27. *See infra* part II.D.1. (disadvantages of allowing jury trials of claims based upon mere social rudeness, as opposed to defining claim so as to permit summary judgment).

the established intentional torts and nullify their public policy limits. It also considers the argument that this result is unnecessary because the established intentional torts already provide redress in those cases in which pure emotional distress should be compensated.

Next, the Article considers the relationship between negligent infliction of emotional distress and traditional negligence theory. In this section, the Article explores the liability that would result from basing the tort upon pure foreseeability concepts, replacing bystander limits with compensation of direct victims, and basing recovery upon inadvertently inflicted psychic harm. It considers the argument that the ambiguity in the limits of the claim and the indefiniteness of the measure of damages would combine to produce a tort theory that would be bounded only by the discretion of jurors. Finally, this section considers the arguments of proponents and analyzes the extent to which these arguments can support an appropriately limited negligent-infliction tort.

The third section of the Article deals with the collateral effects of the negligent infliction claim. As *Jameson v. Overholtzer* demonstrates, a negligence theory may cause a different result in the insurance context. In turn, it affects the indemnity relationship that is the foundation of all insurance. This section also explores the argument that the claim may be misused in ways that have caused public policy rejections of similar kinds of torts.

Then, the fourth section of the Article explores the efforts to find limits to the negligent-infliction claim. The *Restatement (Second) of Torts*, for example, rejects the tort outright; it instead uses a standard of intent or recklessness.[28] Different states have adopted solutions ranging from an impact rule, to a requirement of gross negligence, to outright abolition of the negligent infliction tort.[29] A few states have purported to recognize a general purpose negligent-infliction tort, but then most of those states have struggled inconsistently to define limits.[30]

The final section sets out the Author's conclusions. Briefly stated, the author's proposed approach is that negligent infliction should not be recognized as a general purpose tort, and that damages for negligently caused emotional distress should be recovered only when a duty can be based upon the established foundations of a contractual relationship, an independent tort, or a properly limited bystander claim. This approach would prevent Sandra Jameson from successfully asserting a pure negligence theory against John Overholtzer or his insurer. But she still could assert a claim for her full damages, based upon established intentional torts such as intentional infliction of emotional distress or invasion of privacy.[31]

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28. RESTATEMENT (SECOND) OF TORTS § 46 (1965).

29. *See generally infra* part IV ("Finding Limits").

30. *Id.*

31. For invasion of privacy, it appears that the intent to intrude is sufficient to trigger liability. *See* RESTATEMENT (SECOND) OF TORTS § 652B (1965). *See also, e.g., Billings*, 489 S.W.2d at 858 (recognizing claim for surreptitious wiretap). For intentional infliction of emotional distress, it appears that the "intent to act outrageously" is sufficient. *See infra* note 64 and accompanying text. Neither tort appears to require specific intent to inflict harm. Furthermore, the actor's "belie[f] that the consequences are substantially certain" to result from his conduct is sufficient under § 8A of the Restatement to constitute "intent."

Thus, the Article concludes that an independent, negligence-based claim is unnecessary to reach the just result in those cases in which liability for pure emotional distress should attach. And if a generally applicable negligent-infliction theory were adopted, it would apply to circumstances in which the disadvantages of liability outweigh the justifications. To put the matter in terms of a familiar metaphor, the negligence theory in this context would make it impossible to separate the baby from the bath water, because the two would become one and the same.

I. COMPARING THE NEGLIGENT-INFLICTION THEORY TO THE INTENTIONAL TORTS: EFFECTS UPON LIMITS THAT REFLECT PUBLIC POLICY

A. The Intentional-Infliction Tort: Rationale, Evolution, and Limits

Most jurisdictions today recognize the tort of intentional infliction of emotional distress.[32] As the United States Supreme Court has observed, the intentional and outrageous infliction of emotional distress rarely advances social welfare, and therefore it is understandable that most states do not afford the underlying conduct "much solicitude."[33] The modern formulation of the tort reflects a draft written by no less a scholar than Dean Prosser himself.[34]

There have been strenuous efforts, however, to place limits on the intentional-infliction tort.[35] And although the crystallization of its elements occurred in relatively modern times,[36] recent decades have seen major changes to make the limits reflect public policy.[37] The simple fact is that a broad intentional-infliction tort would discourage socially desirable activities, and a careful weighing of costs and benefits is required to avoid this result.

1. The Benefits of the Intentional-Infliction Tort.

The principal benefit of the intentional-infliction tort is obvious: it results in the elimination, or at least the reduction, of undesirable emotional distress. Economic theory tells us that by requiring actors in a market system to pay the costs they externalize, we can discourage their dysfunctional conduct.[38] The optimum amount of deterrence is reached, in theory, when the damages extracted

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32. *See* Daniel Givelber, *The Right to Minimum Social Decency and the Limits of Evenhandedness: Intentional Infliction of Emotional Distress by Outrageous Conduct*, 82 COLUM. L. REV. 42, 43 n.9 (1982) (collecting cases).

33. *Falwell*, 485 U.S. at 53.

34. Dean Prosser was the Reporter for the RESTATEMENT (SECOND). His notes reflect that the new formulation reflected the "need for a more limited statement [than the First Restatement] which will set some boundaries to the liability." RESTATEMENT (SECOND) OF TORTS § 46, Reporter's Note (Tent. Draft No. 1, 1957). In an article written almost twenty years earlier, Dean Prosser had advocated the "outrageousness" formula. William L. Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874 (1939).

35. *See infra* part I.A.2.

36. Specifically, in the RESTATEMENT (SECOND) OF TORTS § 46 (1965).

37. *See infra* part I.A.2.

38. *See generally* RICHARD A. POSNER, AN ECONOMIC ANALYSIS OF LAW ch. 6 (3d ed. 1986). *See also, e.g.*, P. SAMUELSON & W. NORDHAUS, ECONOMICS 718-21 (12th ed. 1985).

from the actor precisely equal the externalized costs.[39] The intentional-infliction tort provides us a way to approximate this economic condition in the case of emotional distress.

Until relatively recently, however, mental and emotional disturbances generally were not compensated at common law in the absence of physical harm. Lord Wensleydale set out the black letter law in 1861: "Mental pain or anxiety the law cannot value, and does not pretend to redress, when the unlawful act complained of causes that alone."[40] As late as 1934, the Restatement of the Law of Torts essentially reflected Lord Wensleydale's dictum.[41] There was no recovery for emotional injury, even if intentionally inflicted, in the absence of an independent tort.[42]

Then, in 1936, Professor Calvert Magruder wrote a highly influential article in the *Harvard Law Review*, in which he argued for a more balanced approach.[43] On the one hand, the normal slights of every day could not be compensated even if intentionally inflicted. This result was a practical necessity, said Magruder: "Against a large part of the frictions and irritations and clashing of temperaments incident to participation in a community life, a certain toughening of the mental hide is a better protection than the law could ever be."[44] On the other hand, Magruder argued, the law should develop a principle that severe "mental distress purposely caused is actionable unless justified."[45]

To support his proposal, Professor Magruder pointed out that the law recognizes a wide variety of circumstances in which emotional distress is compensable. Assaults and false imprisonments, for example, allow recovery of emotional distress damages, even in the absence of economic loss or physical harm.[46] And defamation per se was invented largely to enable the outrageously treated plaintiff to recover even if he has no economic loss, and sometimes when only his own emotional distress is the basis of recovery (as distinguished from harm to reputation).[47] Even in the typical negligence case involving an automobile collision or similar variety of everyday carelessness, the law imposes damages for emotional pain and suffering as well as for economic damages.[48]

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39. *See* POSNER, *supra* note 38, at 176–77. Punitive damages may, however, correct for underdeterrence owing to nondetection, proof deficiencies, etc. *Id.* at 194; *see also* DAVID CRUMP ET AL., CASES AND MATERIALS ON CIVIL PROCEDURE 982–83 (2d ed. 1992).

40. Lynch v. Knight, 9 H.L. Cas. 577, 598 (1861).

41. RESTATEMENT OF TORTS § 46 (1934) (even if the result is intended, "conduct ... does not subject the actor to liability for ... emotional distress resulting therefrom ...."). Indeed, this was the RESTATEMENT position until 1948. *See infra* note 56 and accompanying text.

42. RESTATEMENT OF TORTS § 46 (1934).

43. Calvert Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033 (1936).

Other early articles advocating the same basic concept include, *e.g.*, Prosser, *supra* note 34; J. L. Borda, *One's Right to Enjoy Mental Peace and Tranquility*, 28 GEO. L.J. 55 (1939); Lawrence Vold, *Tort Recovery for Intentional Infliction of Emotional Distress*, 18 NEB. L. BULL. 222 (1939).

44. Magruder, *supra* note 43, at 1035.

45. *Id.*

46. *Id.* at 1033–34.

47. *Id.* at 1034–35.

48. *Id.* at 1036–37.

Without Magruder's principle, a defendant could inflict severe emotional distress by a cruel practical joke such as that in *Wilkinson v. Downton*,[49] and yet be beyond the reach of the law. A bill collector, such as the defendant in *LaSalle Extension University v. Fogarty*,[50] would have positive motivation to harass his target by means just short of assault, even if (perhaps especially if) the victim presents a reasonable dispute to the charge. And Sandra Jameson would have no recourse against John Overholtzer even if she convinced a jury that his conduct in videotaping her was intentional and outrageous.[51] But most importantly, without a principle similar to the intentional-infliction tort, our society would have no legal means of deterring these and other kinds of conduct.

2. The Costs of the Intentional-Infliction Tort.

For all its benefits, however, the intentional-infliction tort also is the source of serious social costs. In the first place, the Supreme Court's dictum—that the intent to inflict emotional distress does not merit "much solicitude"[52]—cannot be taken literally. In fact, there are many socially desirable human activities of which the intentional causing of emotional distress is an essential part.

When a fire-and-brimstone preacher excoriates his parishioners from the pulpit, his intent is to cause sufficient emotional distress to deter them from future lives of sin, and he knows that at least some parishioners may suffer severe emotional distress as a result. When an honest business owner contacts a customer defaulting in payment of purchases bought on credit, his intent is to make his customer feel a responsibility to pay the bill, or in other words, to inflict at least a reasonable quantum of emotional distress. When a lawyer conducts a vigorous cross-examination of an ostensibly truthful child who has testified that her father sexually abused her, his intention is to induce confusion and denial in the child's testimony, which is likely to cause severe and lasting emotional distress.[53] Finally, to give an example that is all too familiar to readers of this Article, law professors unavoidably inflict considerable emotional distress upon students in their classes, and we have only recently begun to appreciate the duration and severity of the result.[54]

But it would not be appropriate for the lawyer, the business owner, the professor and the preacher to be mulcted in damages for these instances of emo-

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49. 2 Q.B. 57 (1897) (imposing liability for practical joke in which defendant told plaintiff that her husband had been severely injured in an accident, that he had two broken legs, and that she was to go with two pillows in a cab to bring him home, causing violent stroke to plaintiff's nervous system).

50. 253 N.W. 424, 425 (Neb. 1934) (imposing liability on school for more than thirty letters, containing "accusations of dishonesty and moral turpitude and threats," sent to applicant and his employer and neighbors in an effort to collect on promissory note after applicant had denied liability; school sued unsuccessfully upon note, and applicant successfully counterclaimed for his emotional distress).

51. The common law claim for invasion of privacy, however, would provide an alternate claim. *See supra* notes 2, 31.

52. *See supra* note 33 and accompanying text.

53. *Cf.* Alayne Yates, *Should Young Children Testify in Cases of Sexual Abuse?*, 144 AM. J. PSYCHIATRY 476, 478 (1987) (harm to child from cross examination and confrontation of the accused).

54. *See* G. Andrew H. Benjamin et al., *The Role of Legal Education in Producing Psychological Distress among Law Students and Lawyers*, 1986 AM. B. FOUND. RES. J. 225 (1986); G. Andrew H. Benjamin et al., *The Prevalence of Depression, Alcohol Abuse and Cocaine Abuse Among United States Lawyers*, 13 INT'L J.L. & PSYCHOL. 233 (1990).

tional distress, even though deliberately caused. One can only imagine the jury's reaction if it were to learn, in assessing damages against the criminal defense lawyer, that he entertained the belief that his client was guilty and the child was truthful, but he did his job anyway. Perhaps these examples embody the real reasons that Lord Wensleydale and the 1934 Restatement denied recovery for intentionally inflicted emotional injury, notwithstanding the former's too-facile explanation that the law "cannot value" anxiety.[55] The imposition of mental distress simply is an indispensable part of many valuable human activities.

When the *Restatement of Torts* was revised in 1948, it contained a newly recognized intentional-infliction tort, and the search for limits upon its scope already was underway. Specifically, the 1948 *Restatement* provided that the tort applied only in cases in which the defendant acted "without a privilege."[56] This approach, however, proved inadequate to limit the tort. Rather than providing a systematic demarcation of the reach of the newly-imposed liability, the "privilege" defense depended upon categorizing each individual area of beneficial activity, all by common-law evolution.[57] Therefore, in 1965, the *Restatement (Second)* discarded the privilege approach of the 1948 *Restatement*. Dean Prosser, who was the reporter for the *Restatement (Second)*, explained that the expansion of the tort had "indicated the need for a more limited statement which will set some boundaries to the liability."[58] Thus the *Restatement (Second)* added a requirement that the tortious conduct be not only intentional, but also "outrageous."[59]

It was with this "outrageousness" limitation that the tort crystallized in its modern form. As defined in the *Restatement (Second)*, the intentional-infliction tort has four essential elements: The defendant engages in (1) "extreme and outrageous conduct," (2) committed "intentionally or recklessly," (3) which "causes" (4) "severe" emotional distress.[60] The outrageousness limitation reflected Professor Magruder's concern not only that the conduct producing the liability should be intentional but also that it should transgress "beyond all the bounds of decency,"[61] because intentionally inflicted emotional distress sometimes is socially desirable. As we shall see, it is important to recognize that this outrageousness element is the principal means we have of delimiting the tort. In

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55. As Professor Magruder put it, the denial of recovery "can hardly be based upon the reason indicated [by Lord Wensleydale], namely, that the law cannot put a monetary value upon the interest" in avoiding emotional distress. Magruder, *supra* note 43, at 1033. Magruder suggested that the real reason was that infliction of emotional distress can be "justified"; further, legal redress would "open up a wide vista of litigation in the field of bad manners." *Id.* at 1035.

56. RESTATEMENT OF TORTS § 46 (1934) (Supp. 1948).

57. *Cf.* Givelber, *supra* note 32, at 61 (suggesting that privilege approach would "force courts to be specific about when a defendant's interest justifies the deliberate infliction of distress and when it does not," and in the absence of existing authority containing specific holdings, might "make it difficult for courts to dispose of cases on the pleadings").

58. RESTATEMENT (SECOND) OF TORTS § 46, Reporter's Note (Tent. Draft No. 1, 1957). But *cf.* Givelber, *supra* note 32, at 62 (questioning whether existing decisions supported Dean Prosser's conclusion and suggesting that the new test "might reflect nothing more than a change in the identity of the Reporter").

59. RESTATEMENT (SECOND) OF TORTS § 46 (1965).

60. *Id.*

61. Magruder, *supra* note 43, at 1058.

fact, the *Restatement (Second)* compressed several decades of controversy about the outer limits of the tort into this single vaguely-defined word.[62]

Actually, some scholars persuasively argue that outrageousness is the *only* real requirement for recovery under the intentional-infliction tort. As Professor Daniel Givelber has demonstrated in an excellent article,[63] all of the other elements tend to collapse into the outrageousness requirement. If the defendant's conduct was so bad that it can be labelled outrageous, it is improbable that it merely was inadvertent; therefore, the courts normally use the same evidence that shows outrageousness to prove intent as well.[64] As for the requirement of "serious" mental disturbance, the courts sometimes have reviewed evidence that showed relatively mild distress only to find that the very outrageousness of the defendant's conduct supplied proof of this otherwise missing "seriousness" element.[65] Perhaps this approach has a certain rhetorical justification, since the concept of outrageousness implies risk of grossly unacceptable harm. Finally, for similar reasons, evidence of outrageous conduct often supplies the element of causation.[66] In summary, it appears that when one has proved outrageousness, in practical effect one has proved the entire tort.

But what an unusual legal concept it is, that is condensed into the term "outrageous"! The *Restatement* defines the word with such redundant phrases as "so extreme in degree, as to go beyond all possible bounds of decency," "atrocious," and "utterly intolerable in a civilized community."[67] But when it comes to the nub of the problem, the *Restatement* throws up its hands by explaining that an outrageous case is "one in which the recitation of the facts to an aver-

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62. Professor Givelber suggests that the controversy is masked by the concept of "outrageousness" and that the resulting confusion actually may be useful. The intentional infliction of emotional distress is sometimes socially desirable, but it nevertheless is unpalatable, and courts might be reluctant to approve of it. The outrageousness formula allows them to avoid doing so, while reaching appropriate results for hidden reasons. "The outrageousness test may be attractive, then, precisely because it obscures issues such as the legitimacy of coercion whereas the privilege approach does not." Givelber, *supra* note 32, at 62.

63. Givelber, *supra* note 32, at 45–51.

64. *Id.* at 46–47. Courts "have interpreted the intent or recklessness element of the tort as referring to whether defendant intended to act towards plaintiff in a manner that can be considered outrageous." Thus, "intention to cause distress" is not required. Once plaintiff has shown intent to engage in the outrageous conduct, "a reasonableness standard will be applied with respect to the issue of whether the defendant should have known that the conduct would cause emotional distress to the plaintiff." And the required intent is inferred, of course, from the conduct, or in other words, from its outrageousness. *Id. See also* Agis v. Howard Johnson Co., 355 N.E.2d 315, 318 (Mass. 1976); Samms v. Eccles, 358 P.2d 344, 346–47 (Utah 1961); Womack v. Eldridge, 210 S.E.2d 145, 148 (Va. 1974).

65. *E.g.*, Fletcher v. Western Nat'l Life Ins. Co., 89 Cal. Rptr. 78 (1970) (although plaintiff's testimony showed him arguably to be only "mildly upset," court found sufficient evidence of severe distress from all the circumstances, which primarily reflected defendant's concededly outrageous conduct). *See also* RESTATEMENT (SECOND) OF TORTS § 46, cmt. j (1965) ("defendant's conduct is in itself important evidence that the [severe] distress has existed"); State Rubbish Collectors Ass'n v. Silzinoff, 240 P.2d 282, 286 (Cal. 1952) (similar); Givelber, *supra* note 63, at 47–48 (analyzing these authorities).

66. *See* Givelber, *supra* note 32, at 49 (analyzing authorities to demonstrate that evidence of outrageousness frequently suffices to prove causation as well, even though "[c]ausation should be a particularly difficult issue in section 46 cases ...." *See also infra* part II.D.2.–3. (analyzing problems of damage and causation that result from ambiguity in the negligent-infliction claim).

67. RESTATEMENT (SECOND) OF TORTS § 46, cmt. d (1965).

age member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous!'"[68]

The Restatement's endorsement of "resentment against the actor" is particularly strange—and indeed, it arguably is dangerous. As Professor Givelber points out, it invites pretextual or selective prosecution.[69] Such a definition enhances the likelihood that courts will hold persons or classes of people liable simply because they are unpopular objects of social "resentment," even though their conduct is relatively inoffensive or even socially desirable. The example cited above, of the lawyer cross-examining the abused child, is an example. Insurers, financial institutions, small entrepreneurs, and major employers all are frequent objects of community "resentment." This resentment may be quite strong notwithstanding the community's dependence on the beneficial conduct of these actors; indeed, the resentment may come about partly *because* of this dependence.

3. Deterrence of Useful Activities Because of Deficiencies in the Outrageousness Limit.

The point is that, even with the limits imposed by the requirement of intent and outrageousness, the intentional-infliction tort may backfire and deter socially necessary activities. Two real-world examples can be given to illustrate the point.

The first example involves a conscientious employer's response to sexual harassment. What should an employer do if he has received and investigated a complaint from a distraught female employee, and if his investigation leads him to believe that harassment did occur? One might expect that the employer would terminate or demote the offending male supervisor. At least one influential employment law publication, however, advises the conscientious employer *against* taking such decisive action—because it "may subject you to a suit from the supervisor for intentional infliction of emotional distress ..."![70]

Some cautious employers probably will consider this don't-get-involved advice to be prudent (after all, it comes from a management lawyers' publication). They might even follow it; obviously, a jury may not agree with the employer's own conclusion about the right and wrong of the situation. The employer thus faces the all too real prospect of liability by second-guessing (or at the least, expensive litigation) for his sincere efforts in an ambiguous case to root out sexual harassment.[71] Since the outrageousness requirement invites the jurors to consider whether the employer's conduct "arouse[s] [their] resentment against the actor,"[72] since employers often are resented, and since employment termination easily can be depicted as "outrageous," many employers may shrink from redressing what they believe is deplorable conduct by the supervisor—with

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68. *Id.*

69. Givelber, *supra* note 32, at 51–53.

70. *A Beginner's Guide to Investigating Sexual Harassment Complaints*, TEX. EMPL. L. NEWSL. (Clark, West, Keller, Butler & Ellis, Dallas, Tex.), Aug. 1991, at 3.

71. Compare such a case to the actual facts of Wal-Mart Stores, Inc. v. Medina, 814 S.W.2d 71 (Tex. Ct. App.—Corpus Christi 1991), *no writ*, which also is discussed *infra* part I.C. of this article. There, the employer turned over to the district attorney information showing the employee guilty of theft. When the employee sued, the jury found that there was probable cause—but the jury also found that the employer had acted in a grossly negligent manner in furnishing it to the district attorney!

72. *See supra* notes 67–69 and accompanying text.

the result that the *Restatement* may have the unintended effect of becoming a protective act for sexual harassers.

In fact, the emotional distress tort has seen explosive growth in the employment arena.[73] For this and related reasons, employers hesitate to address the problem of unproductive or even dysfunctional workers.[74] Although the cost to other employees, to firms, and to the economy is incalculable, there has been at least one attempt to quantify the increase in unemployment that results from such litigation. Two Rand Corporation investigators concluded that in states where broad doctrines make it easiest for terminated employees to sue, long-term employment is two to five percent less than it would be under traditional law. In states that allow punitive damages and recovery for emotional distress in such cases, the loss of employment is about half again as much as in states that allow only for lost wages.[75]

The second example is *Hustler Magazine v. Falwell.*[76] In this case, the defendant published a "parody" of an advertisement for Campari Liqueur that contained the name and picture of evangelist Jerry Falwell. In reality, the parody was a political cartoon that lampooned Falwell for his "Moral Majority" views.[77] Although it was in poor taste, it fulfilled the speech-related function of advancing an idea, and a political one at that; as such, it arguably occupied a position near the top rung of the ladder of speech protection,[78] if one could view its tastelessness in a content-neutral manner.[79]

The "recitation of the facts" of this case to the jurors, however, was sufficient to "arouse [their] resentment against" the cartoon, and it led them (at least implicitly) to exclaim, "'Outrageous!'"[80] The trial court entered a $150,000 judgment against the defendant, based on the jury's verdict. But the Supreme Court reversed, holding that the judgment violated the First Amendment. And in so doing, the Court pointed out important shortcomings of the "outrageousness" requirement:

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73. For recent examples, collected from a single jurisdiction, of employees suing employers, *see, e.g., Wal-Mart Stores, Inc.*, 814 S.W.2d at 71 (rejecting claim that employer negligently inflicted emotional distress through initiation of criminal proceedings against employee for theft); McAlister v. Medina Elec. Coop., Inc., 830 S.W.2d 659 (Tex. Ct. App.—San Antonio 1991), *reh'g denied* (rejecting claim that employer negligently inflicted emotional distress by terminating employee, unless employee could base claim on contractual duty after remand); *Havens*, 793 S.W.2d at 690 (upholding intentional-infliction claim against employer for enabling rumors to spread before employee's termination); Bushell v. Dean, 781 S.W.2d 652 (Tex. Ct. App.—Austin 1990), *rev'd in part on other grounds*, 803 S.W.2d 711 (Tex. 1991) (upholding recovery on intentional-infliction claim where supervisor's outrageous conduct was that he rubbed employee's neck but stopped when she asked, told her he loved her on a later occasion, playfully poked her ribs, and shouted at her on one occasion).

74. *See supra* notes 70–71 and accompanying text.

75. *See generally* JAMES N. DERTOUZOS & LYNN A. KAROLY, LABOR-MARKET RESPONSES TO EMPLOYER LIABILITY (Rand Corporation Institute for Civil Justice 1992).

76. 485 U.S. at 46.

77. The Court of Appeals opinion contained an excerpt from the testimony of the publisher, demonstrating his intent to derogate these views. Hustler Magazine v. Falwell, 797 F.2d 1270, 1273 (4th Cir. 1986).

78. *See, e.g.*, DAVID CRUMP ET AL., CASES AND MATERIALS ON CONSTITUTIONAL LAW 782 (1988).

79. *Id.* at 783.

> Were we to hold otherwise, there can be little doubt that political cartoonists and satirists would be subjected to damages awards. ... The art of the cartoonist is often not reasoned or evenhanded, but slashing and one-sided. ... Several famous examples of this type of intentionally injurious speech were drawn by Thomas Nast, probably the greatest American cartoonist to date. ... [One] writer explains that the success of the Nast cartoon was achieved "because of the emotional impact of its presentation. It continuously goes beyond the bounds of good taste and conventional manners."[81]

The Court considered and rejected Falwell's argument that his claim was different because the defendant's treatment of him was "outrageous."[82] The Court almost seemed willing to accept that characterization;[83] indeed, many reasonable people probably would accept it. But the label "outrageous" left the trier of fact unable to separate the baby from the bath water:

> Respondent contends, however, that the caricature here in question was so "outrageous" as to distinguish it from more traditional political cartoons. ... If it were possible by laying down a principled standard to separate the one from the other, public discourse would probably suffer little or no harm. But we doubt there is any such standard, and we are quite sure that the pejorative description "outrageous" does not supply one. "Outrageousness" ... has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' taste or views, or perhaps on the basis of their dislike of a particular expression.[84]

The plaintiff in *Falwell*, of course, was subjected to greater-than-normal proof requirements, because the defendant could claim the protection of the First Amendment.[85] Nevertheless, the case is instructive. It is a reminder that, even though we recognize the advantages of retaining the intentional-infliction tort, that tort will result in a net benefit only if we also recognize that it has real and serious costs, which require its proper delimitation. The "resentment" formula that the drafters used to explain the amorphous "outrageousness" requirement makes this claim particularly subject to abuse.

B. Superseding the Intentional Torts and Their Limits: Would Negligent Infliction of Emotional Distress Become an "All-Purpose Tort"?

Thus far, our discussion has focused upon the *intentional*-infliction tort. But in *Jameson v. Overholtzer*, it should be remembered, the plaintiff strategically waived this and all other intentional torts, and she elected instead to assert the theory of "*negligent* infliction of emotional distress."[86] In so doing, she obviously bypassed the intent requirement of the traditional tort. In addition, and perhaps more importantly, the negligent-infliction claim bypasses the

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80. The jury had been instructed in accordance with the standards of RESTATEMENT (SECOND) OF TORTS § 46 in this respect, and it found liability on that basis. *Falwell*, 485 U.S. at 52–53.

81. *Falwell*, 485 U.S. at 53–54.

82. *Id.* at 54.

83. *Id.*

84. *Id.*

85. The Court applied the "reckless disregard" standard of New York Times Co. v. Sullivan, 376 U.S. 254 (1964), to the intentional-infliction tort under the circumstances. *Falwell*, 485 U.S. at 56.

86. *See supra* notes 5–8 and accompanying text.

"outrageousness" requirement, the only practical limit on the emotional distress tort. In fact, the creation of an independent action for negligent infliction of emotional distress would create an all-purpose tort, which would render superfluous a variety of well-established theories of intentional tort liability.

Having rarely been recognized as an independent tort in the absence of duties created by other principles,[87] the negligent-infliction tort has not been subjected to development in definition and application as the intentional torts have. Furthermore, by labelling the defendant's conduct merely as "negligent" or "careless,"[88] this concept contradicts the threshold requirement of "outrageousness" that is the principal limit upon the intentional tort. "Negligent" conduct, by definition, is not as culpable as intentional conduct,[89] and it is not as serious as conduct that is not only intentional but also "outrageous."[90] Thus, Jameson's theory, again, permitted her to bypass all of these requirements.

In summary, if the negligence theory were adopted, the intentional-infliction tort would be obliterated. There simply would be no need or incentive for a plaintiff ever to resort to the greater trouble of proving intent or outrageous conduct, if mere negligence were sufficient.[91] Thus the costs of the tort, described in the preceding section, would grow out of proportion to the benefits. Indeed, if the negligent-infliction theory were taken seriously, the honest businessperson who attempts to collect a debt could not avoid liability merely by avoiding outrageous conduct. The same would be true of the clergy member or lawyer, described as doing their jobs in the preceding section.[92] And the employer, already somewhat

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87. A few states have recognized such a claim, but they then have been forced to struggle with limiting it. The result often is inconsistency, and occasionally, as in the example of Hawaii's "same island" rule, the courts' efforts to explain their principles are amusing. *See infra* part IV.E. of this article.

88. Courts usually define negligence in terms of a want of ordinary care, and plaintiffs' lawyers explaining the concept to juries often translate the legalese into plain English by calling it "carelessness." David Crump, *Attorneys' Goals and Tactics in Voir Dire Examination*, 43 TEX. B.J. 244 (1980). The description is apt: negligence is carelessness, with only a little oversimplification.

89. A striking example of the difference is furnished by the criminal law of homicide. Intentional homicide, if unexcused and unjustified, may qualify as murder. Indeed, in some states, it qualifies for capital punishment under certain circumstances. *E.g.*, TEX. PENAL CODE §§ 19.02, 19.03 (West 1991) (murder and capital murder). Simple negligence, on the other hand, cannot be the basis of any homicidal offense in some states even if it causes the death of another person (although "grossly" negligent conduct is an element of criminally negligent homicide, *Id.* § 19.07).

90. *Cf.* Givelber, *supra* note 32, at 47 n.22, 55–56 (comparing outrageousness, of which "punishment is a central feature" and which "functions like the criminal law," to negligence, for which "there is no strong moral condemnation").

91. *Cf.* Hancock v. Northcutt, 808 P.2d 251 (Alaska 1991) (intentional-infliction tort would become "meaningless" if the law permitted independent recovery for negligently caused emotional distress).

92. By way of analogy, a state official who intentionally deprives another of civil rights is afforded a complete defense if he acted in subjective good faith. This principle is necessary if we are to avoid forcing a police officer to choose between dereliction of duty and being "mulcted in damages" if he vigorously performs what he perceives his job to be. Pierson v. Ray, 386 U.S. 547, 555 (1967). A negligence principle, of course, imposes liability irrespective of good faith; mere inattentiveness is sufficient to create liability.

The civil rights immunity analogy is apposite for another reason as well. The ambiguity of the governing law in civil rights cases has made the exoneration of immune defendants more difficult, prompting the courts to introduce procedural devices to prevent the necessity of jury trials. *E.g.*, Siegert v. Gilley, 111 S. Ct. 1789 (1991) (concerning stricter pleading

deterred by the intentional-infliction tort from disciplining his subordinate who he suspects is a sexual harasser, would be doubly deterred if a jury's after-the-fact finding of mere carelessness in inflicting emotional distress on the subordinate were sufficient to make him liable to that subordinate for very large damages.

But the obliteration of the intentional-infliction tort would not be the extent of the disadvantages. In fact, the negligent-infliction tort could serve as a replacement for virtually every intentional tort known to our jurisprudence. Every intentional tort—from trespass to unfair trade practices—involves an act in which a reasonable person would not engage.[93] Thus, every tort could be recast as negligence, under the same "lesser included" logic that recognizes the negligent-infliction tort in the first place.[94] Furthermore, almost every intentional tort is likely to cause emotional distress. Thus, the negligent-infliction theory becomes an all-purpose tort: there would be no need for the torts of assault and battery, no need for false imprisonment, no need for libel or slander. Every such intentional tort would be replaced by the all-encompassing negligence theory, whose only elements would be fully satisfied by a showing that a defendant carelessly caused emotional distress.

The case of *Wal–Mart Stores, Inc. v. Medina*[95] provides an example. Wal–Mart provided evidence to the local district attorney showing that Medina had participated in a systematic series of thefts while acting as a store employee. The district attorney declined to prosecute, but Medina testified in her civil suit that she had suffered severe emotional distress as a result of the issuance of an arrest warrant. The jury refused to find that Wal–Mart had acted maliciously or without probable cause;[96] this finding, of course, was sufficient to eliminate the traditional intentional tort of malicious prosecution.[97] However, Medina had pled a second claim that charged Wal–Mart with the negligent-infliction tort. The jury responded by finding that Wal–Mart had, indeed, caused Medina's emotional distress by negligent and grossly negligent conduct. Based on this jury verdict, the trial court awarded significant damages and punitive damages against Wal–Mart for negligent infliction of emotional distress.[98]

The appellate court reversed, because it recognized the public policy limits of the malicious prosecution tort as well as the explosive potential of the negligent-infliction theory. The court began by pointing out that the tort of malicious prosecution sets "stringent standards for recovery."[99] To recover, a plaintiff was required to show: (1) commencement of a criminal prosecution, (2) with malice,

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requirements). A negligent-infliction tort would compound these difficulties of ambiguity. *See infra* part III.D. of this article.

93. This result follows by definition, since the actor intentionally has engaged in conduct that not only has caused harm to another but also is legally sufficient to create liability for that harm.

94. *Cf. Mugavero*, 589 N.E.2d at 365 (rejecting effort to recast sexual abuse of child as merely "negligent" injury); Fulmer v. Ryder, 635 S.W.2d 875 (Tex. Ct. App.—Tyler 1982), *writ ref'd n.r.e.* (rejecting effort to recast intentional shooting as merely "negligent" act of pointing rifle and permitting it to discharge).

95. 814 S.W.2d at 71.

96. *Id.* at 72.

97. *Id.*

98. *Id.*

99. *Id.* at 73.

(3) without probable cause, (4) that the prosecution ended in an acquittal, and (5) that defendant's conduct was causally connected to plaintiff's damages.[100] Further, the burden of proof, in this jurisdiction, was higher than for most civil cases; it required clear and convincing evidence.[101] The court explained the policy reasons for these restrictions as follows:

> [R]ecovery under malicious prosecution in criminal cases is greatly limited ... because public policy strongly favors exposure of crime. ...
>
> Regarding negligence, however, the threshold question is whether the defendant has breached a duty to the plaintiff. ... On one hand all citizens have a duty to report criminal activity to the police. Reasonable persons do so. On the other hand, Wal–Mart has a duty not to cause foreseeable injury to Medina. Conflicting duties may arise in a malicious prosecution case when police are given information reasonably implicating a person of a crime, and that person is subsequently exonerated. In such a case it is foreseeable that attorneys' fees, severe emotional distress, and other injuries will result. ...
>
> Indeed, the tort of malicious prosecution balances a citizen's duty to assist the police against the potential for injury to an innocently accused person. Based on the twin public policies in favor of detecting crime and punishing criminals, and to encourage parties to submit disputes to the courts without taking the law into their own hands, the high burdens of proof and rigorous elements of proof insure that there will be no liability for citizens who, in good faith, assist the police. [102]

With this analysis of the malicious prosecution tort, and the court's recognition that the restrictive elements of the tort actually had "the function ... to afford a privilege ... to engage in conduct which would ordinarily subject the actor to liability,"[103] the court proceeded to reject the negligence theory as well:

> [T]he evidence shows that Wal–Mart had a statement from [another implicated employee] indicating that Medina was involved in the [theft] scheme and statements from independent witnesses indicating that Medina had been through [the same co-worker's] line that day. This information reasonably implicated Medina in the [theft] scheme. The jury apparently agreed; it found that the prosecution was instituted with probable cause or without malice. ...
>
> The gist of Medina's case was clearly to seek recovery for injuries caused by the prosecution. ... In light of the public policy considerations and the law of malicious prosecution as described earlier, it would be improper for us to apply principles of negligence here.[104]

The court concluded: "Under the circumstances of this case, we hold that there is no evidence that Wal–Mart breached a duty of care to Medina. The damages Medina suffered are *damnum absque injuria*."[105]

The court necessarily had to reach this result, if it was to preserve any meaning for the tort of malicious prosecution, serve the important policy of

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100. *Id.*
101. *Id.*
102. *Id.* (citations omitted).
103. *Id.*
104. *Id.* at 74.
105. *Id.* (footnote and citations omitted).

encouraging citizen disclosure of crime, and avoid creating a monster—in the form of an all-purpose tort called negligent infliction of emotional distress. To put the matter another way, recognizing negligent infliction of emotional distress would throw out both the baby and the bath water, in this case and in others. The very generality of the negligence concept that makes it such a useful legal tool for redress of accidental injuries in other contexts is also the disadvantage that makes it inappropriate for general redress of pure emotional distress—because it destroys the limits that have been so carefully built around the torts invented for that purpose.[106] The baby cannot be separated from the bath water because, in a manner of speaking, the negligent-infliction theory makes the baby indistinguishable from the bath water.

C. The Established Uses of the Negligent-Infliction Theory: Duties Based upon Contract, Independent Tort, or Bystander Claims

There are, however, at least three circumstances in which the law traditionally has compensated negligently inflicted emotional distress. First, there is a series of cases in which a duty of emotional solicitude arises from a contractual relationship between the plaintiff and the defendant. Second, emotional distress damages are recoverable upon proof of a completed, recognized tort. Third, most jurisdictions recognize bystander claims, although many place strict limits upon them.

The first category of appropriate negligent-infliction cases, then, involves contractual relationships in which the defendant has assumed a contractual duty with respect to the mental well-being of the plaintiff. Cases dealing with mishandling of corpses,[107] mistreatment of passengers by common carriers,[108] and negligent telegraph companies[109] are classic examples. Strictly speaking, these

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106. *Cf.* Givelber, *supra* note 32, at 47 n.22:

> [The intentional-infliction tort] is both much broader and much narrower than traditional negligence doctrine. Conduct can be outrageous without posing any threat to anyone's physical safety, which makes it much broader than traditional negligence doctrine, but the conduct must either be intended to affect the plaintiff or come under § 46(2), which makes its reach much narrower than negligence.

Substitution of negligence for the outrageousness element would remove the latter limit on the reach of the tort, while leaving it "much broader" than traditional negligence doctrine in its coverage.

107. One of the leading historical cases is Larson v. Chase, 50 N.W. 238 (Minn. 1891), in which the court found a kind of "property" interest in the corpse, which had been invaded by the defendant's dissection of it. Often, the duty basis is not analyzed, but it is present in the form of contract when the body has been entrusted for a particular purpose to the defendant. *E.g.*, St. Elizabeth Hosp. v. Garrard, 730 S.W.2d 649, 650–54 (Tex. 1987) (hospital's mishandling of infant's corpse; liability imposed for negligence); Clark v. Smith, 494 S.W.2d 192, 197 (Tex. Civ. App.—Dallas 1973), *writ ref'd n.r.e.* (funeral home failed to embalm body, causing it to putrefy; liability imposed for negligence) (case tried on behalf of plaintiffs by the author of this Article).

108. Gulf, C. & S.F. Ry. v. Luther, 90 S.W. 44, 47–48 (Tex. Civ. App. 1905) (verbal abuse of passenger by railroad employee); *cf.* Davis v. Tacoma Ry. & Power Co., 77 Pac. 209 (Wash. 1904) (proprietor of public amusement park liable for insults to patrons).

109. Western Union Tel. Co. v. Shaw, 177 S.W.2d 52, 54–55 (Tex. 1944) (failure timely to deliver death telegram); *cf.* Dunn v. Western Union Tel. Co., 59 S.E. 189 (Gal. 1907) (telegraph agent insulted plaintiff). *See also* Johnson v. New York, 334 N.E.2d 590 (N.Y. 1975) (imposing liability for hospital's negligently informing patient that her mother had died; using analogy of corpse cases). *But see infra* note 124.

cases involve breaches of contract, but courts often analyze them in the rhetoric of negligence because the contractual duty is usually vaguely implied and subordinate to the main contractual relationship. Moreover, the plaintiff's emotional suffering usually resembles tort damages more closely than the usual economic loss associated with contract breach.

Some of the most expansive opinions, erroneously appearing to legitimize negligent infliction as a general-purpose tort, can be found in these contract-based cases. The defendant's breach of its obligations and the clear causal link to foreseeable damages both follow from the contractual nature of the arrangement, and they tend to elicit strong condemnation from the courts. The case of *St. Elizabeth Hospital v. Garrard*[110] is an instructive example: A hospital's careless handling of a deceased patient's corpse not only caused severe emotional distress to relatives but also prompted the court to expand upon the allegedly "traditional" role of the negligent-infliction tort.[111] There probably is little harm in analyzing such a case in negligence terms, rather than in the rhetoric of breach-of-contract cases. It is important, however, not to lose sight of the contractual relationship between hospital and patient as the source of the underlying duty, and therefore of the limits that prevent the negligence concept in this context from becoming an all-purpose tort.[112]

The second category of cases is that of established, completed torts. This category really involves emotional distress as an element of damage, rather than as a part of the cause of action. If, for example, the defendant assaults the plaintiff, the law allows recovery of damages for emotional distress even if no other damages exist. This principle was established as long ago as the ancient case of *I. de S. & W. v. W. de S.*[113] Finally, emotional distress damages are recoverable upon proof of malicious prosecution, defamation, false imprisonment, and (of course) intentional infliction of emotional distress.[114] Similarly, a traditional negligence claim such as one arising from an automobile accident allows recovery not only of economic losses and physical pain, but emotional distress as well.[115]

These traditional tort cases sometimes are used as the basis for arguments supporting the negligent-infliction tort. But again, they involve traditional elements transcending the mere negligent causing of emotional distress. For that reason they, too, avoid the all-purpose tort phenomenon.

Some commentators have recognized a degree of confusion, however, when a negligently caused emotional injury in turn leads to a physical impact.

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110. 730 S.W.2d at 649.

111. *Id.* at 650–54.

112. In fact, the controversy in *St. Elizabeth* concerned not whether the duty existed, but whether the plaintiff could recover without a showing of actual physical manifestation of the injury. The court abolished the physical manifestation requirement. In doing so, it did not analyze the contractual basis of the relationship between the parties. It did, however, require "traditional" elements of recovery, presumably including duty. *Id.*

113. 22 Edw. III, f. 99, pl. 60 (1348) (plaintiff, a tavernkeeper's wife, successfully avoided physical injury by dodging hatchet cast at her by defendant, an irate customer; recovery allowed).

114. *Cf.* text accompanying *supra* notes 32–34, 95–105 (discussing intentional infliction and malicious prosecution torts).

115. *E.g.*, Sanchez v. Schindler, 651 S.W.2d 249, 253 (Tex. 1983) (mental suffering damages recoverable in wrongful death action).

For example, imagine that the defendant's swerving automobile frightens a pedestrian, who then runs into a building and inflicts physical injuries upon himself. May the injured person then recover his physical and emotional damages, if he shows only negligence on the defendant's part? Professor Magruder, among others, showed that the confusion caused by this kind of case was easily resolved. Using the example of a runaway truck that collides with one plaintiff and frightens another so that he falls and injures himself, Magruder demonstrates that both cases really are the same.[116] The issue actually is one regarding the acceptable length of the chain of causation.[117] If one recognizes that the negligence of the automobile driver has caused the impact to the second plaintiff just as foreseeably and just as directly as the first, the right to recover follows from traditional negligence theory.[118] Thus, the "fright-impact" cases are a part of the group of cases involving completed traditional torts. They do not depend upon mere negligent infliction of emotional distress.

The third and final group of appropriate negligent-infliction cases concerns bystanders. California recognized the theory of bystander recovery in the landmark case of *Dillon v. Legg*,[119] and since then most other jurisdictions have endorsed variations of the concept.[120] This third category really is a special case of the second category of cases: The bystander is a victim of a completed traditional tort, usually negligence, with the only difference being that the tort was completed against somebody else. Thus, bystander claims are limited to some degree by the requirement that the defendant must have injured some third person by a completed traditional tort. In addition, the jurisdictions that have recognized bystander claims have used a variety of other theories to limit them—including requirements that the claimant be in the zone of physical danger[121] or that she demonstrate proximity, contemporaneous perception, and relationship to the direct victim.[122] Although often criticized as arbitrary, these limits serve the function of preventing bystander claims from becoming an unlimited tort.[123]

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116. Magruder, *supra* note 43, at 1036–37. Actually, Magruder lists seven different scenarios, including these two, arranged in ascending order of remoteness of the injury from impact with the truck. *See also* Francis H. Bohlen & Harry Polikoff, *Liability in New York for the Physical Consequences of Emotional Disturbance*, 32 COLUM. L. REV. 409 (1932); Leon Green, *"Fright" Cases*, 27 ILL. L. REV. 761 (1933); John E. Hallen, *Damages for Physical Injuries Resulting from Fright or Shock*, 19 VA. L. REV. 253 (1933).

117. "[T]he only question is whether ... it is expedient to allow the plaintiff to trace the causal connection through a psychic link in the chain of causation." Magruder, *supra* note 43, at 1036.

118. Provided, that is, that proximate causation doctrine can be satisfied. *Id.* at 1037.

119. 441 P.2d 912 (Cal. 1968).

120. See Richard N. Pearson, *Liability to Bystanders for Negligently Inflicted Emotional Harm—A Comment on the Nature of Arbitrary Rules*, 34 U. FLA. L. REV. 477, 478 (1982).

121. This is the RESTATEMENT approach. RESTATEMENT (SECOND) OF TORTS § 313(2), 436(3) (1965). *See also* Andrew J. Simons, *Psychic Injury and the Bystander: The Transcontinental Dispute Between California and New York*, 51 ST. JOHN'S L. REV. 1 (1976) (tracing zone of danger limit; comparing that limit to limits based on proximity, perception and relationship).

122. This approach was pioneered by *Dillon*, 441 P.2d at 912, and has been accepted widely, with some variations. *E.g.*, Dziokonski v. Babineau, 380 N.E.2d 1295 (Mass. 1978); Corso v. Merrill, 406 A.2d 300 (N.H. 1979); Reagan v. Vaughn, 804 S.W.2d 463 (Tex. 1990), *reh'g overruled in part. See generally* Pearson, *supra* note 120, at 490–501.

123. *See* Pearson, *supra* note 120, at 501–15.

All but a few of the cases[124] purporting to recognize a claim for "negligent infliction of emotional distress" actually fall into these three categories. That is, they involve either (1) contract-based duties, (2) completed independent torts, or (3) properly limited bystander suits.[125] Without recognition of claims in these circumstances, serious and avoidable harm would go uncompensated, and the redress can be appropriately limited. Therefore, negligence can be a legitimate basis for recovery in these instances. The thesis of this article, developed below, is that negligence-based recovery should be limited to these three categories of cases.[126]

D. The General Requirement of a Physical Element in Negligence Claims for Personal Injury

As a general proposition, except in bystander cases, courts historically have denied recovery for negligently inflicted emotional distress in the absence of any physical link between plaintiff and defendant.[127] Specifically, some courts have denied negligence recovery without actual impact (although they tend to

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124. There are a few decisions that purport to impose negligent-infliction liability purely upon foreseeability. *E.g.*, Hunsley v. Giard, 553 P.2d 1096 (Wash. 1976). "But ... [Hunsley] is a maverick case, and has attracted little recognition." Pearson, *supra* note 120, at 501 n.147. Furthermore, courts typically have been forced to retreat from these "maverick" positions, including the Hunsley court. Gain v. Carroll Mill Co., Inc., 787 P.2d 553, 555–57 (Wash. 1990) (rejecting earlier pure foreseeability test of Hunsley and reinstating requirement that bystander plaintiff personally witness accident). *See generally infra* part IV.E. (discussing cases allowing, then retreating from, pure foreseeability dictum).

In addition, there are a few situations in which duties properly might be imposed on other rationales. For example, if a good Samaritan drives an injured person to a hospital and negligently frightens her by his careless driving, so that her physical injury is aggravated by the fright, a basis for liability might exist in the principle that an otherwise nonresponsible person can voluntarily assume a duty of care. *Cf.* Magruder, *supra* note 43, at 1041–42 (analyzing a slightly different case involving contract-based duty derived from employment of driver by injured individual). Also, Professor Pearson points out that the mishandled telegraph cases (*see supra* note 109 and accompanying text) do not rest upon a contractual duty of the telegraph company to the injured recipient; the contract is with the sender. Pearson, *supra* note 120, at 513 n.198. Perhaps so, but duty can be based on a third-party-beneficiary contract without much stretching of that theory. Furthermore, as Professor Pearson indicates, most jurisdictions deny recovery in these cases. *Id.*

125. For an interesting and valuable "compromise" proposal, *see* Julie A. Davies, *Direct Actions for Emotional Harm: Is Compromise Possible?*, 67 WASH. L. REV. 1 (1992). Professor Davies substitutes the concept of a "special relationship" between plaintiff and defendant for the narrower requirement of a contractual duty advocated by this Article. This concept is both broader and more vague than the contractual duty requirement herein suggested, and therefore Professor Davies' approach entails a larger share of the disadvantages described in this article than might be achieved by a more narrow and specific duty limit. Professor Davies recognizes that her proposal would require evolution of a body of law defining the approved "special relationships" and that the courts would need to engage in "policy-balancing ... , but to use it sparingly." If the duty created by special relationships could be defined and limited, however, Professor Davies' proposal might resemble the approach of this article.

126. *Cf.* Pearson, *supra* note 120, at 513:

> [C]ourts have not recognized emotional harm as an independent basis of recovery in negligence. Admittedly, there are pockets of liability for negligently inflicted emotional harm. ... Apart from the zone of danger rule, most pockets of liability, such as the negligent handling of corpses, arise out of relationships that precede the act which causes the emotional harm.

Such "relationships" usually involve contractually created duties, as Professor Pearson's examples show. *Id.* 513–514.

127. *See* Davies, *supra* note 125, at 5–14.

injury).[128] Others have allowed recovery if the plaintiff is in the zone of danger of physical harm, an approach that takes account of the emotional damage done by a "near miss."[129]

The physical link requirement may be direct and close, or it may be attenuated, depending upon the jurisdiction; in general, however, these kinds of requirements serve the valid purpose of limiting the duty of the defendant. The underlying assumption is that defendants can more efficiently trim their behavior to avoid physically endangering others than they can conform to the emotional demands of others.[130] The abolition of these impact (or threat of impact) requirements might expand the duties of defendants to the point of overkill unless some other duty is substituted. Therein lies the foundation of the objections to a general negligent-infliction theory, which are considered in the section of this article that follows.

II. COMPARING THE NEGLIGENT-INFLICTION THEORY TO THE ORDINARY NEGLIGENCE CLAIM: THE QUEST FOR LIMITS

A. The Duty Limit—and the Indefinite Reach of Foreseeability

The key ingredient in negligent-infliction cases involving contractual relationships, independent torts or bystander claims is the satisfaction of duty requirements that impose limits on the negligence concept. Duty is an essential element of the traditional negligence claim.[131] It is the tangible expression of a balance between costs and benefits, just as is the negligence concept itself. Duty is an amalgamation, therefore, of factors such as foreseeability, recognition of traditional relationships, and economic policy, that reflects a need for limits on liability.[132] The creation of a general-purpose claim for negligent infliction of emotional distress, and the elimination of the other requirements that traditionally have limited the recovery of emotional distress damages would reduce the duty element to a pure question of foreseeability.

If duty were based solely upon foreseeability, however, liability would be unlimited for all but the rarest kinds of harm. The economic balance that protects actors engaged in generally beneficial activities would be lacking. Thus, for example, as one appellate court has pointed out, every individual who saw news stories about the Challenger space shuttle disaster on television was subjected to emotional distress.[133] For every such individual, the emotional distress was

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128. *Id.*
129. *Id.*
130. *Id.* at 15–20.
131. W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS ch. 9 (5th ed. 1984).
132. It is "an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection." As such, it may reflect "[v]arious factors ..., including convenience of administration, capacity of the parties to bear the loss, a policy of preventing future injuries, the moral blame attached to the wrongdoer, and many others." *Id.* at 356–57. See also RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW ch. 6 (3d ed. 1986) (economic soundness of common law).
133. Hinojosa v. South Texas Drilling & Exploration, Inc., 727 S.W.2d 320, 324 (Tex. Ct. App.—San Antonio 1987) *no writ*, quoting Gates v. Richardson, 719 P.2d 193, 198 (Wyo. 1986).

emotional distress.[133] For every such individual, the emotional distress was foreseeable. An application of the negligence concept, coupled with a finding of duty based solely upon foreseeability, would have created a right of recovery in every one of these millions of individuals.[134] The arguable result would be overdeterrence of contractors that the government needs for the development of its space program.[135] As a further consequence, our society might suffer a diminished ability to prevent weather disasters, detect Iraqi nuclear weapons, and produce network news broadcasts.

The California Supreme Court wrote an elegant summation of these concepts: "[F]oreseeability, like light, travels indefinitely in a vacuum."[136] The Texas Supreme Court, following the California bystander cases, had the same concern in mind when it recognized that those California authorities "never suggest[ ] ... leaving the due care/foreseeability issue totally within the jury's discretion."[137] The Texas court thus concluded: "We decline to extend a duty of due care" to permit recovery by all foreseeable plaintiffs.[138]

In fact, the rules for bystander recovery are an expression of these searches for limits on liability. The rules understandably are criticized as arbitrary because they use artificial constructs to limit recovery for an injury whose severity is not closely related to these factors. But the rules actually are not always arbitrary (except insofar as all line-drawing is arbitrary).[139] Instead, they are an expression of duty components other than foreseeability, particularly the need to limit liability for the protection of socially useful activities.

The advocates of a general-purpose claim for "negligent infliction of emotional distress" support a pure foreseeability approach.[140] Even if they do not do

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133. Hinojosa v. South Texas Drilling & Exploration, Inc., 727 S.W.2d 320, 324 (Tex. Ct. App.—San Antonio 1987) *no writ*, quoting Gates v. Richardson, 719 P.2d 193, 198 (Wyo. 1986).

134. *Cf. Gain*, 787 P.2d at 557 (denying recovery for family of deceased who saw aftermath of fatal accident on evening television news); *see also* Sanders v. Air Florida, Inc., 558 F. Supp. 1233, 1235–36 (D.D.C. 1983) (denying recovery for parents who, after the fact, viewed scene of airport-automobile accident in which their son had been killed).

135. *But cf. infra* notes 267–271 and accompanying text (discussing economic argument made by Professor Bell in favor of full recovery for all such "bystanders").

136. Thing v. LaChusa, 771 P.2d 814, 823 (Cal. 1989) (quoting Newton v. Kaiser Hospital, 228 Cal. Rptr. 890, 893 (Ct. App. 1986)).

137. Freeman v. City of Pasadena, 744 S.W.2d 923, 924 (Tex. 1988).

138. *Id.*

139. *See generally* Pearson, *supra* note 120; Davies, *supra* note 125; *cf.* Richard S. Miller, *The Scope of Liability for Negligent Infliction of Emotional Distress: Making "The Punishment Fit the Crime,"* 1 U. HAW. L. REV. 1 (1979) (demonstrating this flaw in Hawaii's approach, which purported to allow full recovery but then retrenched; suggesting limitation of emotional distress negligence claims to recovery of economic losses). *See also* John L. Diamond, Dillon v. Legg *Revisited: Toward a Unified Theory of Compensating Bystanders and Relatives for Intangible Injuries*, 35 HASTINGS L.J. 477 (1984); Stanley Ingber, *Rethinking Intangible Injuries: A Focus on Remedy*, 73 CAL. L. REV. 772 (1985); Virginia E. Nolan & Edmund Ursin, *Negligent Infliction of Emotional Distress: Coherence Emerging from Chaos*, 33 HASTINGS L.J. 583, 620 (1982); Robert L. Rabin, *Tort Recovery for Negligently Inflicted Economic Loss: A Reassessment*, 37 STAN. L. REV. 1513, 1524–26 (1985); John David Burley, Comment, Dillon *Revisited: Toward a Better Paradigm for Bystander Cases*, 43 OHIO ST. L.J. 931, 948 (1982); Claudia J. Wrazel, Note, *Limiting Liability for the Negligent Infliction of Emotional Distress: The "Bystander Recovery" Cases*, 54 S. CAL. L. REV. 847 (1981).

140. *See infra* part III.E. (analyzing the work of Professor Bell).

so explicitly, they unavoidably make their argument depend upon a foreseeability approach by abandoning traditional bases of liability in contractual relationships, independent torts, or properly limited bystander claims.[141] They thus reduce the effectiveness of limits on liability based upon the remoteness of the plaintiff. Furthermore, as we shall see in the next section, they contradict the rules for bystander recovery, because a pure foreseeability approach obliterates the distinction between bystanders and so-called direct victims. Every bystander becomes a direct victim if foreseeability is the only test of duty. For example, the emotional injury to a television viewer of the Challenger disaster[142] is just as foreseeable as the injury to surviving relatives of the astronauts; it differs only in degree. Therefore, if foreseeability is the only criterion, the television bystander's claim has the same legal basis as that of a deceased astronaut's relative. Once again, the baby dissolves in the bath water.

B. The Elusive Bystander-Direct Victim Distinction: Every Bystander Becomes a Direct Victim

Advocates of recognition of the pure negligent-infliction claim often argue for distinguishing "direct victims" from "bystanders" as a means of limiting liability. While recognizing that bystander claims might require delimitation (to avoid the problem of universal recovery for the Challenger disaster, for example), they argue for a pure form of full recovery for "direct" victims based solely on foreseeability of injury.[143] But the chain of causation of emotional harm simply does not logically support such a distinction between "bystanders" and "direct" victims, and it prevents this theory from properly limiting the negligent-infliction claim.

Freeman v. City of Pasadena[144] provides a typical example. The plaintiff, whose stepsons were involved in an automobile accident, did not qualify for recovery as a bystander under state law, because he did not contemporaneously observe the accident and was not sufficiently related to the injured stepsons. He argued that he nevertheless should recover, because his stepsons' deaths were the result of the defendant's negligence and because mental suffering by those who learn of the wrongful death of a person in a close relationship is an entirely foreseeable consequence. In other words, Freeman sought to be treated not as an unqualified bystander, but rather as a direct victim of the negligent conduct. Since the *Freeman* court had held in an earlier case that mental suffering to relatives was a foreseeable consequence of negligently caused deaths,[145] Freeman's claim to be a "direct" victim was based on sound logic. Nevertheless, the court

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141. For example, the dissents of Justices Mosk and Broussard in *Thing* adopt a flexible test of duty, which the majority rejects for indefiniteness. *Thing*, 771 P.2d at 836, 839 (Mosk, J., dissenting; Broussard, J., dissenting).

142. *See supra* notes 133–135 and accompanying text.

143. *E.g.*, Jean S. Gallagher, Note, Molien v. Kaiser Foundation Hospital: *California's New Tort of Negligent Infliction of Serious Emotional Distress*, 18 CAL. W. L. REV. 101, 112 (1982) (justifying recovery in so-called "direct victim" case because bystander cases assertedly are different); Thomas C. Zaret, Note, *Negligent Infliction of Emotional Distress: Reconciling the Bystander and Direct Victim Causes of Action*, 18 U.S.F. L. REV. 145, 166 (1983) (attempting to explain distinction based on victim toward whom negligent conduct is "directed"; failing to recognize that while intentional conduct is directed at particular persons, negligent conduct involves inadvertence of risk, is measured only by foreseeability, and is not "directed"). *See also* authorities cited *supra* note 139.

144. 744 S.W.2d at 923. *See also Reagan*, 804 S.W.2d at 463 (reaffirming *Freeman*).

145. Moore v. Lillebo, 722 S.W.2d 683, 684 (Tex. 1986), *reh'g denied.*

applied bystander rules and denied recovery. A concurring judge pointed out that, if negligent infliction of emotional distress were to be recognized as an independent tort with foreseeability as its only limit, the bystander-direct victim distinction would disappear, and Freeman would have recovered.[146]

These problems would not exist if recovery were limited to traditional theories. Thus, if duty were recognized only in cases where it is created by a contractual relationship, a completed independent tort, or a properly limited bystander claim, it would not be based upon pure foreseeability.[147] The established tort of intentional infliction of emotional distress operates within these confines. Both the existence and the reach of the tort are limited (albeit imperfectly) by the concepts of intent and of outrageousness, which prevent it from becoming an all-purpose theory. But if mere careless inattention suffices (as it would in the negligence claim) to extend recovery to all who suffer foreseeable emotional distress, "bystanders" suffer the same injury and stand in the same relation to the alleged tortfeasor as "direct victims." Simply put, intentional conduct is "directed" at a particular victim; inattention is not similarly "directed" at a chosen victim.

Under the bystander theory, liability is based on the defendant's ability to foresee that his conduct will cause the *bystander* himself to suffer emotional distress. And a "direct victim" of negligence presumably is any plaintiff who suffers unintentionally caused, foreseeable emotional distress. Therefore, a "bystander" plaintiff, once again, is simply one kind of "direct victim."[148] The only unusual aspect of the bystander cause of action is that the defendant owes no duty to the plaintiff other than the duty to avoid inflicting the emotional injuries. This factor is the reason for the seemingly arbitrary limits that most courts have placed upon bystander recovery.[149]

In a few cases, courts have expressly followed this line of reasoning. For example, in *Robinson v. Chiarello*,[150] the plaintiffs endured undeniable emotional distress as a result of watching their nephew suffer the effects of medical malpractice throughout an extended course of treatment. The continuing nature of the tort and the plaintiffs' intertwined relationship with the treatment make the case unusually illustrative of the principle that, when the issue is pure foreseeability of emotional distress, the plaintiffs logically must be direct victims at the same time that they are bystanders. Seeking to exploit the rhetorically elevated status of direct victims, the plaintiffs in *Robinson* sought recovery for a "pure form of negligent infliction of mental anguish."[151] The harm to these plaintiffs was as foreseeable and as directly caused by the defendant's negligence as the harm to the nephew himself; nevertheless, the court required the plaintiffs to proceed only as bystanders.

The experience of the California courts has been particularly instructive on the bystander-direct victim identity. In *Molien v. Kaiser Foundation Hospitals*,[152]

146. *Freeman*, 744 S.W.2d at 924 (Ray, J., concurring).
147. *See supra* notes 107–126 and accompanying text.
148. *See Thing*, 771 P.2d at 815.
149. *See supra* notes 119–123 and accompanying text.
150. 806 S.W.2d 304 (Tex. Ct. App.—Ft. Worth 1991), *writ pending*.
151. *Id.* at 308.
152. 616 P.2d 813 (Cal. 1980). The court held that the defendant hospital and doctor owed a "direct" duty to the husband of a patient who had been diagnosed erroneously as

the California Supreme Court purported to recognize a general claim for negligent infliction of emotional distress to "direct victims," based purely upon foreseeability.[153] The courts of appeal promptly found that the tort was unlimited because the effort to distinguish direct victims from bystanders was illusory. In *Newton v. Kaiser Foundation Hospitals*,[154] for instance, the court of appeals complained that the "unenviable task of distinguishing bystander from direct victim cases" would lead to a "'foreseeable' diversity of results." In *Andalon v. Superior Court*,[155] another court of appeals observed that the "cryptic" distinction between bystanders and direct victims had created a "quagmire of novel claims" and an "amorphous nether realm" of suits for negligent infliction. Professor Pearson observed that the distinction was "analytically unsound."[156] Finally, reacting to liability that had become "like the pebble cast into the pond ... creat[ing] ever widening circles of liability,"[157] the California Supreme Court rejected its own creation. In *Marlene F. v. Affiliated Psychiatric Medical Clinic, Inc.*,[158] the court flatly held that negligent infliction of emotional distress "is not an independent tort," but that the only cognizable theory of recovery was traditional negligence claims involving physical impact or physical injury.[159] More recently, a California court of appeals said expressly what had been implicit: that "the supreme court intends to dismantle entirely the 'direct victim' distinction."[160]

C. The Contours of Carelessness in Inflicting Emotional Hurt: Expanded Liability in Social, Marital, and Business Contexts

Beyond the effects of limiting duty to foreseeability and the ineffectiveness of the bystander-direct victim distinction, another problem arises: Recovery for negligently inflicted emotional distress would entail a considerable expansion of liability from that imposed by traditional torts. The negligent infliction claim does not seek recovery for the intentional acts of the defendant, but rather seeks recovery for mere negligence or "carelessness."[161] But carelessly imposed emotional harm is unavoidable in our society, and it occurs in a wide variety of situations. As the California Supreme Court has put it, "[t]he overwhelming

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having syphilis and had been told to advise the husband in order that he could receive testing and, if necessary, treatment.

153. The result in *Molien* probably could have been reached by the alternate (and perhaps superior) reasoning that the duty was based upon contract theory, since the plaintiff husband was treated as a patient, or upon third-party beneficiary contract theory, since the wife was a patient and the contact with the husband was made by virtue of that relationship for the husband's benefit. Under this analysis, the case is controlled by such decisions as those analyzed in *supra* notes 107–109 and accompanying text and the telegram cases considered in *supra* note 124.

154. 228 Cal. Rptr. 890, 892 (Ct. App. 1986).

155. 208 Cal. Rptr. 899, 904 (Ct. App. 1984).

156. Pearson, *supra* note 120, at 515, *cited in Thing*, 771 P.2d at 823 n.5.

157. *Thing*, 771 P.2d at 826–27.

158. 770 P.2d 278, 281 (Cal. 1989).

159. Which could include bystander claims derived from such an impact or injury, but did not include "a cause of action for the negligent infliction of emotional distress based solely upon the foreseeability that serious emotional distress might result." *Id.* at 282.

160. Schwarz v. Regents of University of California, 276 Cal. Rptr. 470, 476 (Cal. App. 1990); *see also* Goldstein v. San Francisco Superior Court, 273 Cal. Rptr. 270, 278 n.4 (Ct. App. 1990) (refusing to make distinction between bystanders and "direct victims").

161. *See supra* note 88.

majority of emotional distress which we endure ... is not compensable."[162] The context makes clear that the court had in mind even severe mental distress, foreseeably caused by the defendant's conduct.[163]

For example, recognition of an independent claim for negligent infliction would impose liability upon individuals and business firms in the following situations, many of which involve claims that have been litigated and rejected:

> *1. The employer who fires a bad employee—but does it in a clumsy manner.*
>
> Assume that an employer has a legal right to terminate an employee. But he does it clumsily—in a way that severely hurts the employee emotionally. Thus, his handling of this delicate situation is careless or "negligent" and would create liability.

In *In re Continental Airlines Corporation*,[164] the court refused to allow recovery for this unavoidable kind of distress. The employer otherwise would be in the classic Catch–22 or damned-if-he-did-and-damned-if-he-didn't situation:[165] A flat announcement of the firing might later be viewed as negligent by a jury, but so might the conduct of an employer who beats around the bush. In fact, this circumstance is so explosive, so susceptible to second-guessing, and so prone to be misused to create illegal liability for the termination itself, that some courts have refused to allow recovery even for intentional infliction of emotional distress in the employment-termination context.[166]

> *2. The airline in-flight emergency that frightens passengers.*
>
> A commercial airline flight experiences a routine emergency that frightens passengers. The pilot skillfully masters the situation and lands safely. But the passengers promptly sue for negligently inflicted emotional harm. Because the airline could foresee that the emergency would distress passengers, the negligent-infliction claim would result in liability if it were recognized.

In *Eastern Airlines, Inc. v. King*,[167] the Florida Supreme Court rejected liability on the basis of state law requiring physical impact as a predicate for recovery of emotional distress damages caused by pure negligence. This claim, however, seems different from some of the others discussed in this section, because there is a contractual relationship between the airline and its passengers that might be conceived as creating a duty. Furthermore, this contractual relationship extends an implicit requirement of the airline's solicitude for the passenger's comfort, convenience, and emotional well-being. This concern is sec-

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162. *Thing*, 771 P.2d at 829.
163. *Id.*
164. 64 Bankr. at 861.
165. In *Boyles v. Kerr*, a tort reform coalition in fact argued that "the negligent infliction claim ... could be used to whipsaw an employer." Brief of Amicus Curiae Texas Civil Justice League at 7, Boyles v. Kerr, No. D–0963 (Tex. appeal docketed June 19, 1991).
166. *E.g.*, *Havens*, 793 S.W.2d at 690 (in employment situation, recovery allowed only if intentional infliction events are separate from events of discharge). Since employment discharges are intentional, and since they entail a high likelihood of severe emotional distress, a different holding would have subjected employers making proper employee terminations to suit under the emotional distress tort.
167. 557 So. 2d at 574.

ondary to the main object of the contract, which is transportation; nevertheless, the situation is not completely dissimilar from the cases authorizing recovery for negligent mishandling of corpses by hospitals or funeral homes.[168] Perhaps a negligence recovery based upon this implicit duty is more justifiable in this situation than in most negligent-infliction cases.

3. The person who uses strong or insulting language to another over the telephone.

A person uses profanity, or calls another a "liar," over the telephone. Because the speaker could reasonably foresee that his harsh words would cause the listener to suffer emotional distress, a negligent-infliction theory would create the prospect of liability.

In the pre-*Restatement* case of *Brooker v. Silverthorn*,[169] the court refused to allow recovery on an intentional tort theory for defendant's calling plaintiff profane names and using other insulting language on the telephone. Today, if the circumstances fit the definition of "outrageous," the intentional-infliction tort would apply. It is there that the line should be drawn, rather than authorizing recovery for merely negligent rudeness.[170]

4. The girlfriend who breaks up with her boyfriend (or vice versa) in a careless manner and causes severe emotional distress by doing so.

A boyfriend and girlfriend have a longstanding relationship with deep personal commitment. The girlfriend finally comes to the decision that she wishes to terminate the relationship. She carries out this intention by informing the boyfriend in person and in more extravagant language than hindsight would deem necessary. In the context of the relationship and the expectations built up in the other party, this conduct causes severe emotional distress. The girlfriend could reasonably foresee that her actions would do so, and a negligent-infliction theory would hold her liable.

This potential claim illustrates the worst aspects of the vagueness, intrusion into personal freedom, and vindictiveness that the negligent-infliction claim can exhibit. It is unlikely that there is any conduct by the girlfriend, in fact, that can guarantee freedom from an analysis that would attribute negligence to her. If she simply cuts off all communication without explanation, she risks the prospect that a later jury would find this conduct unreasonable. On the other hand, if she provides an express explanation, that approach too might be characterized as

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168. *Cf. supra* notes 107–109 and accompanying text (discussing contractually based duty as legitimate ground for use of negligent-infliction tort).

169. 99 S.E. 350 (S.C. 1919).

170. The insult cases indicate that a negligence tort would produce suits and require jury trials in trivial cases. *E.g.*, Boyd v. Boyd, 82 S.E. 110 (Va. 1914) (upholding verdict of $3,000 in favor of stepmother against stepson for calling her a "damn bitch"); Republic Iron & Steel Co. v. Self, 68 So. 328, 329 (Ala. 1915) (customer remarked "in a mannerly way" that Mr. Wall, the store clerk, "would take a nickel off a dead man's eye," to which he responded that she was "a dirty liar" and "no lady," whereupon she sued him for her resulting emotional distress; recovery ultimately denied); Gilardino v. Patorno, 53 So. 556 (La. 1910) (parties "applied to each other language which, [the court was] quite sure, neither of them deserved;" recovery ultimately denied). *See also infra* part III.D.1. and authorities therein cited (jury trials would be required rather than summary judgments in cases of mere social rudeness, if negligent-infliction tort were recognized).

unreasonable. Finally, a middle course that communicates the termination together with a deliberate refusal to give reasons, even if motivated by the desire to avoid negligently inflicted emotional distress, risks the response that it too is unreasonable, because "You owe me an explanation." Accusations of carelessness, in other words, easily are made in this situation.[171]

And lest it be argued that these actions are not the kind of conduct that should create liability, that is precisely the point. But the standard for negligence recovery is not intent or even outrageousness; instead, it is simple carelessness,[172] and thus a general negligent-infliction tort based on foreseeable emotional injury easily could subject a girlfriend-boyfriend breakup to jury trial scrutiny. In fact, some of the divorce cases in which negligent infliction has been asserted sometimes have allowed recovery on grounds precisely analogous to this hypothetical.[173] Of course, it is true that a girlfriend *should* be permitted to terminate her relationship with an abusive, unhygienic, or simply undesired boyfriend, even in a clumsy manner, without the intervention of the courts—but again, that is precisely the point.

5. The manufacturing plant that is sued for "fear" of disease.

Residents in a given area dislike a nearby manufacturing plant. They can demonstrate no link between the plant and any disease; in fact, let us assume that none exists. However, the state of mind of the residents is such that they fear the disease nevertheless. If this fear is predictable, the manufacturer arguably could be negligent in not adopting a different manufacturing method. The residents sue—not for physical harm, but for their foreseeable emotional distress in the form of an unfounded fear of disease. If a jury later decides that the manufacturer's choice of a process that distresses neighbors is unreasonable, the negligent-infliction theory would authorize recovery.

In *Burns v. Jaquays Mining Corporation*,[174] the Arizona Supreme Court held that this kind of claim is unauthorized in the absence of bodily harm.[175] The

171. *Cf.* authorities cited *supra* note 170 (social insults); *see also infra* part III.D.1. (same); *supra* notes 164–165 and accompanying text (employment terminations); *infra* note 173 (divorce cases).

172. *See supra* note 88 and accompanying text.

173. *E.g.*, Massey v. Massey, 807 S.W.2d 391 (Tex. Ct. App.—Houston [1st Dist.] 1991) (recovery by wife against husband for emotional harm allowed, in addition to fault-influenced property division, where husband's misconduct consisted of such commonplace marital conduct as belittling his wife and disallowing her from managing finances). If the Massey facts are actionable, few spouses will be free from crushing liability, and the same probably could be said for many social relationships short of marriage. *See also Bushell*, 781 S.W.2d at 652 (allowing recovery for intentional infliction of emotional distress against employment supervisor who attempted to rub employee's neck but stopped when she asked, told her he loved her, and shouted at her on one occasion).

174. 781 P.2d at 1373.

175. These so-called "fear of cancer" or fear of exposure cases are a continuing source of controversy in toxic tort litigation. They involve plaintiffs who have no injury or disease but who experience anxiety—undeniable, understandable and severe anxiety in some cases—from the fear that their exposure will lead to injury or disease in the future. The issue is whether such distress is compensable. In addition to *Burns*, *see, e.g.*, Ball v. Joy Technologies, Inc., 940 F.2d 651 (4th Cir. 1991) (denying recovery; applying Virginia and West Virginia Law); Berry v. Armstrong Rubber Co., 780 F. Supp. 1097 (S.D. Miss. 1991) (denying recovery for diminution in real estate market value owing to public perception of pollution, in the absence of any threat of physical damage; applying Mississippi law). If the negligent-infliction tort

result seems justifiable on the ground that the claim otherwise would transgress the carefully developed complex of restrictions that prevented the common law nuisance claim from generating economic disaster.[176] If the negligent infliction claim were valid, for example, a supplier of military weapons or strategic asbestos products could be excluded from economically viable locations merely because of uninformed community reaction,[177] despite a national consensus that they were necessary.

6. The creditor who unintentionally causes severe emotional distress in trying to collect a debt.

A collection agency, attempting to recover sums rightfully due from a debtor, sends a demand letter. The debtor has a congenital heart defect; the collection agency is ignorant of this fact and does not know (although arguably it should have found out) that the debtor might suffer a coronary embolism upon reading the letter. A negligence claim would hold the agency liable for his wrongful death.

The classic case to compare with this situation is *Duty v. General Finance Company*,[178] in which the court recognized a claim but took pains to restrict it to intentional outrageous conduct, so as to avoid discouragement of legitimate bill collection.

Other examples of situations to which the negligence theory would apply are careless suggestion of sexual intimacy (even in the absence of intentional offense or outrageous conduct),[179] careless failure to agree to a contract or fund a loan,[180] minor medical mistakes not resulting in physical injury,[181] fear for the

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were generally available, these cases presumably would result in recovery. For another example in a different context, see Ordway v. Suffolk County, 583 N.Y.S.2d 1014 (N.Y. Sup. Ct. 1992) (rejecting negligent-infliction tort in fear-of-AIDS context in absence of factors such as physical invasion by needle; using reasoning resembling that advocated in this Article).

176. *See* KEETON, *supra* note 131, at ch. 15.

177. *Cf.* City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985) (unjustified public fear cannot furnish rational basis for zoning decision effectively excluding residence for mentally retarded). *See also* the *Berry* case discussed *supra* note 175.

178. 273 S.W.2d 64 (Tex. 1954) (recognizing claim based upon facts that could be labelled intentional and outrageous, but limiting it to avoid discouragement of bill collection). *See also, e.g., Fogarty*, 253 N.W. at 424 (similar holding).

179. *Cf. Samms*, 358 P.2d at 344 (upholding liability under intentional tort for repeated solicitations of sexual intercourse with plaintiff); *but cf.* Reed v. Maley, 74 S.W. 1079 (Ky. 1903) (no liability in absence of an independent tort). Of course, if such events occur in the course of a relationship such as employment, other laws may create liability. *See Bushell*, 781 S.W.2d at 652 (claim for such acts as supervisor's attempting to rub employee's neck and ceasing when she asked, telling her he loved her, and shouting at her on one occasion held sufficient to support intentional infliction claim against supervisor as well as sexual harassment claim against employer) (*semble*).

180. *Cf.* Federal Land Bank Ass'n v. Sloane, 825 S.W.2d 439 (Tex. 1991) (reversing emotional distress award based on negligent misrepresentation where bank refused to agree to construction loan that plaintiffs expected to obtain; recognizing negligent misrepresentation claim but confining it in conformity to RESTATEMENT (SECOND) OF TORTS § 522 (1977) to claims for economic damages, which plaintiffs could not demonstrate). Recognition of a general claim for negligent infliction of emotional distress would reverse the Sloane holding and contradict this section of the RESTATEMENT.

181. *Cf. Asuncion*, 514 A.2d at 1188–90 (gauze left in vaginal canal after delivery caused alleged emotional distress when it passed from plaintiff's body); Woodell v. Pinehurst Surgical Clinic, P.A., 336 S.E.2d 716, 717–18 (N.C. Ct. App. 1985) (doctor diagnosed twins,

safety of the defendant (or of an unrelated or imaginary third person),[182] distress at the death of a family pet,[183] distress caused solely by injury to property with no economic loss,[184] and viewing of a traumatic accident on television.[185] Several of these situations properly would authorize recovery if accompanied by a contractual relationship, a completed independent tort or violation of consumer legislation, or intentional and outrageous conduct.[186] But when liability in these cases is analyzed on a pure negligence basis, the breadth of the claim exceeds all apparent limits.

Finally, an egregious but common example is provided by divorce cases in which the plaintiff spouse's first count (for dissolution of the marriage) is followed by a second count for negligent infliction of emotional distress upon her by the defendant spouse.[187] In jurisdictions in which fault is not a permissible consideration for property division, the claim is contrary to the state's announced policy. In states that take account of fault in property division, recognition of the claim conflicts with the statutory system by providing a double recovery.[188]

But more importantly, recognizing the negligent infliction claim in the divorce context would be bad social policy. Whatever the case for allowing recovery for intentional and outrageous infliction of emotional distress, it is inevitable that even the most saintly of spouses will carelessly, or in other words negligently, inflict a certain quantum of emotional distress on each other.[189] The last thing the law should be doing on termination of a marriage is to encourage spouses to count up, collect, publicize, and seek vindication for these universal

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allegedly causing emotional distress when mother was in fact carrying—and delivered—single healthy infant).

182. *Cf.* Kaufman v. Miller, 414 S.W.2d 164, 170 (Tex. 1967) (plaintiff feared for safety of defendant in minor automobile accident and therefore sued defendant for emotional distress); *Williamson*, 112 S.E.2d at 54–55 (plaintiff feared for safety of imaginary third party in minor automobile accident).

183. *Cf.* Campbell v. Animal Quarantine Station, 632 P.2d 1066, 1067–69 (Haw. 1981) (affirming recovery under Hawaiian rule establishing negligent infliction of emotional distress, confined to persons within reasonable distance of accident; finding reasonable distance because claimants and dog were both in Honolulu). For analysis of Hawaii's amusing "same island" or "same city" analysis, *see infra* part IV.E. Of course, negligent injury to a chattel typically allows recovery of economic (as opposed to emotional) damages.

184. *Cf.* Cooper v. Superior Court, 200 Cal. Rptr. 746, 748–49 (Ct. App. 1984) (rejecting claim).

185. *Cf.* authorities cited *supra* notes 133–134 (Challenger disaster and other accidents in which putative claimants saw televised reports of incident or saw accident scene).

186. *See, e.g.*, authorities cited *supra* note 179.

187. *E.g.*, Chiles v. Chiles, 779 S.W.2d 127 (Tex. Ct. App.—Houston [14th Dist.] 1989), *writ denied* (denying claim for either intentional or negligent infliction in marriage context); *Twyman*, 790 S.W.2d at 819 (allowing claim for negligent infliction; currently pending in state supreme court); *Massey*, 807 S.W.2d at 391 (allowing negligent-infliction claim). *See also* Wiener v. Wiener, 444 N.Y.S.2d 130, 131 (N.Y. App. Div. 1981) (disallowing intentional-infliction claim based on "garden variety" domestic disputes).

188. *Cf. Chiles*, 779 S.W.2d at 127 (analyzing conflict with law of divorce).

189. In the *Massey* case, for example, recovery was allowed for such conduct as one spouse belittling the other and disallowing her from managing finances. This recovery was over and above the marital property division, in a jurisdiction that allows fault to influence the division. While there may be room for criticism of such marital conduct, it is so universal in marriages that recognition of such a claim would inject negligence litigation into literally every divorce.

but unintended emotional slights.[190] Finally, there are the insurance effects of these claims; insurers have been forced to provide attorneys to divorcing spouses in their divorce cases, because if the negligent-infliction claim ultimately is recognized in this context the terms of their policies require them to do so—as well as to pay the claims.[191]

D. The Consequences of Ambiguity

The preceding analysis has focused upon the breadth of the negligent-infliction claim caused by the destruction of the duty limit. But there is another disadvantageous aspect of the negligent-infliction theory: It is uncommonly vague, even when compared to other torts that reflect various degrees of ambiguity. In this section, we shall consider the vagueness of the negligent-infliction claim with respect to the definition of liability, the measure of damages, and the limits of causation.

1. Vagueness in the Definition of Liability: Jury Trials Rather than Summary Judgments for Cases of Social Rudeness?

The negligence claim is useful in cases of personal injury or economic loss. The deficiencies attributed to its vagueness are overcome by its utility in fulfilling the need for a general principle of liability for dangerous conduct. But the utility of the negligence concept often obscures the reality that negligence is an exceedingly indefinite concept. As a result of this vagueness, individuals and firms cannot plan with assurance that they are avoiding illegality, injured persons cannot know whether they are suing on valid claims until they have run the entire course of litigation, and those who are sued cannot know whether they are liable. The resulting economic loss, transaction costs of litigation, and oppression of innocent defendants are incalculable, even though the offsetting benefits of the negligence claim may make it worthwhile to recognize it in many cases.[192]

The costs of vagueness, however, are carried to a higher order of magnitude when the claim is for pure negligent infliction of emotional distress. To put it simply, most social blundering, rudeness or indiscretion can be characterized as negligent, and this characterization could be sorted out only by a full-scale jury trial—because there would be no legally enforceable limit that would justify a dismissal or summary judgment.[193] For example, in *Jameson v. Overholtzer*,[194] which was a negligent-infliction claim for the allegedly surreptitious videotaping of an act of sexual intercourse, defendants' counsel argued that a negligence

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190. *Cf. infra* part III.B. (discussing public policy underlying abolition of certain marital torts).

191. *See supra* note 21.

192. *Cf.* David Crump, *Economic and Political Effects of Vague Business Regulation: The Lessons of* E.I. Du Pont de Nemours & Co. v. FTC, 38 RUTGERS L. REV. 1 (1985) (analyzing costs in regulatory statute context, but most considerations applicable here also).

193. *Cf. Samms*, 358 P.2d at 344 (upholding liability under intentional tort for repeated solicitations of sexual intercourse, but disallowing recovery for mere negligence). *See also supra* note 189. The RESTATEMENT's threshold of "extreme and outrageous" as well as "intentional or reckless" conduct may not be free from ambiguity, *see supra* note 84 and accompanying text; that standard, however, would enable the trial court at least to dismiss or grant summary judgment in many of the "social blunder" cases when a simple negligence standard would not.

194. *See supra* note 10.

theory should be rejected because it would make a person liable even if all she did was tell a third person truthfully about a sexual encounter the next day. The plaintiff's response was that liability indeed *could* attach to this kind of locker-room gossip if it happened to be "negligent" and if it caused the other participant severe emotional distress.[195] That response left open the question how negligence, causation and severity of the emotional distress were to be determined. The plaintiff's response, at oral argument, was that a jury would determine factually whether the particular gossip at issue was negligent and whether its results were severe.[196]

The problem is that jury trials to determine questions of social rudeness are expensive. Attorneys' fees to plaintiffs' and defendants' counsel already amount to a large percentage of tort reparations,[197] and they are increased by the costs to society of providing courts, clerks and facilities to hear such claims.[198] Our courts already experience severe problems of cost and delay,[199] and they have difficulty, today, in giving appropriate attention to the most serious cases on their dockets.[200] Furthermore, indemnification by homeowner's insurance would provide solvency for many defendants who otherwise might not be targets, and the insurance effects would increase the attractiveness of claims for locker-room braggadocio or similar indiscretions.[201] As Professor Pearson puts it, these disadvantages would be attached to a litigation threshold so low that the negligent-infliction theory would "make most of us plaintiffs one day and defendants another."[202]

By contrast, the intentional-infliction claim would avoid these difficulties. Although the line drawn by the intent and outrageousness requirements is not as bright as one might desire, the intentional-infliction approach would allow summary judgment to be granted in the locker-room gossip case while providing a

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195. *See supra* note 10; Petitioner's Application for Writ of Error at 27–28, Boyles v. Kerr, No. D–0963 (Tex. appeal docketed June 19, 1991). In fact, the argument was that the plaintiff herself could be liable on this theory: "[Plaintiff] admitted before the Court of Appeals in oral argument that, because she told her girlfriend about her first sexual encounter with [defendant], she could have been sued for negligent infliction, if [defendant] had been embarrassed or humiliated by the revelation." *Id.* at n.11.

196. *See supra* note 10; Oral Argument of Respondent, Boyles v. Kerr, No. D–0963 (Tex. appeal docketed June 19, 1991).

197. *E.g.*, ABA, REPORT OF THE ACTION COMMISSION TO IMPROVE THE TORT LIABILITY SYSTEM 32–33 (1987) (high litigation costs of fault system owing to individualized determination and use of juries).

198. *See* Pearson, *supra* note 120, at 507–08. In fact, the result of these costs probably is that smaller claims are overcompensated: the larger the claim, the lesser the compensation compared to actual loss, and vice versa, because of settlement efforts induced by litigation costs. *Id.* (citing Robert L. Bombaugh, *The Department of Transportation's Auto Insurance Study and Auto Accident Compensation Reform*, 71 COLUM. L. REV. 207, 214 (1971)).

199. *See generally* Civil Justice Reform Act of 1990, 28 U.S.C. § 471–82 (West Supp. 1991) (mandating adoption of expense and delay plans by all district courts).

200. "We won't have time for ordinary crimes like rapes and robberies," said State District Judge Miron Love of Harris County [Houston], Texas, in response to an increase in death penalty murder cases in that jurisdiction. "If it continues at this rate, before long we'll be doing nothing but capital cases." John Makeig, *Rise in Capital Cases May Put County in Jam*, HOUS. CHRON., Apr. 9, 1992, at A25, col. 5. Another judge suggested shortening jury selection in capital cases by abolition of that jurisdiction's requirement of individual voir dire. *Id.*

201. *See infra* part III.A.

202. Pearson, *supra* note 120, at 508.

jury question in the surreptitious-videotaping case.[203] Thus the balance is better struck by the intentional tort, because it allows workable legal principles to separate the baby from the bath water without disproportionate cost.

2. Vagueness in the Measure of Damages: The "Battle of the Psychiatrists."

The negligent-infliction theory also is vague in another way: It involves damages that are uncommonly subjective, unverifiable and (more importantly) unbounded. In fact, the entirety of the damage issue frequently is subject to no real measure in a case tried under such a theory.[204]

Proponents of the tort argue that mere uncertainty of damages is not an economic justification for nonrecognition of a cause of action,[205] and this argument is correct insofar as it goes. In theory, "uncertainty" merely means that some cases result in overdeterrence while some result in underdeterrence, with the entire mass of cases averaging out to a proper level unless the damage instructions are tilted one way or the other. Thus, in theory, cutting off a claim merely because the measure of damages is uncertain has the effect of removing useful deterrents.[206] In this discussion, however, it is important to keep in mind that the level of theoretical abstraction is high. That is to say, the assertion that there is "mere uncertainty in damages" may really mean that there are loaded or manipulable damages, coupled with an uncertain definition of the culpable conduct itself.

The actual testimony in a case such as *Jameson v. Overholtzer*,[207] the videotape case, is instructive. One can predict that the principal damage evidence would involve family and friends testifying to the plaintiff's felicitous and unblemished childhood (the plaintiff's witnesses in *Jameson* did testify substantially in this manner)[208] and denying that the plaintiff ever suffered severe emotional harm from any major life event *until* the incident at issue (the witnesses in *Jameson* denied that the plaintiff had suffered emotionally from going through her parents' divorce).[209] This kind of damage evidence is particularly

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203. *See supra* note 193.

204. *See* Pearson, *supra* note 120, at 509–10.

205. *See* Peter A. Bell, *The Bell Tolls: Toward Full Tort Recovery for Psychic Injury*, 36 U. FLA. L. REV. 333, 353–56 (1984); Comment, *Negligently Inflicted Mental Distress: The Case for an Independent Tort*, 59 GEO. L.J. 1237, 1258–59 (1971).

206. For example, recognition of damages for injury to reputation in defamation cases may be economically sound in spite of the absence of an accurate measure. *See generally*, RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (3d ed. 1986). The underlying claim is carefully restricted and reviewed, however, to prevent its misuse.

207. *See supra* note 10.

208. *See supra* note 10; Petitioner's Application for Writ of Error at 6–8, 26, Boyles v. Kerr, No. D–0963 (Tex. appeal docketed June 19, 1991) (Defendant's Statement of the Case and Argument regarding damages); Brief for Respondent in Response to Petitioner's Application for Writ of Error at 1–2, 12–14, Appendix A, Boyles v. Kerr, No. D–0963 (Tex. fappeal docketed June 19, 1991) (Plaintiff's Statement of the Case and Argument regarding damages).

209. *See* authorities cited *supra* note 208. For another example of the subjectiveness of this kind of damage evidence, *see Falwell*, 797 F.2d at 1276–77, in which the principal damage witness in addition to the plaintiff was a close friend and associate who testified that defendant's publication had caused Reverend Falwell to experience anger, loss of "enthusiasm and optimism," and diminished ability to concentrate on his work. The court held that this evidence was sufficient to support a finding of "severe" distress. The Supreme Court reversed

susceptible to manipulation by the plaintiff and difficult for the defendant to rebut even if untrue. The evidence can be argued by such a plaintiff with equal force to support recoveries of one thousand dollars, or ten thousand, or one million, or $100 million, even though lesser amounts might be recovered in some wrongful death cases.

Recognizing this uncontainable-damages problem, one proponent argues: "Expert testimony and objective symptoms will give the jury a reasonable understanding of the injury."[210] The most sympathetic evaluation that can be made of this assertion is that it is naive.[211] Again, *Jameson v. Overholtzer* provides an example. The plaintiff's experts were psychiatrists to whom the plaintiff's attorney had referred the plaintiff.[212] They testified that the plaintiff suffered from "post-traumatic stress syndrome," a mental disease that was recognized in battlefield veterans of the Vietnam War who had seen intolerable violence inflicted at close quarters. The defendants' experts, who were specialists in post-traumatic stress disorder, firmly maintained that the disease could not be contracted from embarrassment of the kind that the plaintiff claimed.[213] The proponents' hope that "expert testimony" and "objective symptoms" will give the jury a "reasonable understanding of the injury" simply is unjustified under these circumstances.[214]

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on the ground that the publication was protected by the First Amendment. *Falwell*, 485 U.S. at 46.

210. Bell, *supra* note 205, at 355; *see also* Comment, *supra* note 205, at 1258–59.

211. Professor Bell's remark about expert testimony on damage amounts is not qualified by any recognition of the potential for manipulation. Compare with Professor Bell's assertion the following remarks of Professor Pearson:

> That, however, assumes that doctors who testify are neutral and singlemindedly pursue the "truth." However, there is real doubt that that is an accurate view of medical testimony. *See, e.g.*, Logan Ford & James H. Holmes, III, *The Professional Medical Advocate*, 17 SW. L.J. 551 (1963); David W. Peck, *Impartial Medical Testimony: A Way to Better and Quicker Justice*, 22 F.R.D. 21 (1959). The pressure on experts to "sell" their testimony may be even greater if expert witnesses are paid on a contingent fee basis. ... Thus, most plaintiffs could be expected to reach the jury, under circumstances in which the jury would have little guidance to enable it to rationally choose between the conflicting expert testimony.

Pearson, *supra* note 120, at 509 n.178. For a striking example of the pressures toward partisanship, *see* WILLIAM A. BARTON, RECOVERING FOR PSYCHOLOGICAL INJURIES (1985). This publication by the American Trial Lawyers Association begins, "This is a plaintiff's cookbook filled with proven recipes ...," and it contains such advice as: "Use the treating doctor to introduce the causation expert, thereby legitimizing the specialty." *Id.* at ch. XV, 6.

Professor Bell also fails to distinguish between expert evaluation of the genuineness of injury and evaluation of the nature and extent of injury. He correctly points out that mental health professionals can display "sophistication" in detecting a litigant who is "feigning" an injury. Bell, *supra* note 205, at 351. But the "false claims" problem is not the same as the "manipulation of damages" problem, and Professor Bell does not acknowledge the latter in his remarks about experts. To take a concrete example, in *Jameson v. Overholtzer* (the surreptitious videotaping case), no one argued that the plaintiff was "faking" the fact that she had experienced some degree of distress. The experts as well as the parties, however, had widely divergent views of the nature and extent of the distress. *See supra* note 208 and accompanying text.

212. *See* authorities cited *supra* note 208.

213. *See* authorities cited *supra* note 208.

214. Furthermore, emotional distress claimants can usually dispense with experts. The plaintiff's own assertion of injury, or that of lay persons who are friends, ordinarily suffices to reach a jury. *Cf. supra* note 209 (setting out the very slight lay testimony that the Falwell court

Instead, if negligent infliction became a general-purpose tort, one should expect to see the creation of a cottage industry of psychiatrists who testify for plaintiffs or for defendants.[215] Psychiatrists agree in a much smaller percentage of diagnoses than most other kinds of health-related professionals.[216] Diagnostic criteria are numerous, diffuse and extraordinarily malleable.[217] Accordingly, diagnoses of psychic injuries are subject to ready manipulation by partisan witnesses.[218] Although the same sort of partisan cottage industries exist in a wide variety of other cases (at great cost),[219] the manipulation of the resulting psychiatric evidence could be expected vastly to exceed the distortions in most other cases.

These disadvantages might be tolerable if liability were confined to the kind of outrageous conduct involved in the tort of intentional infliction of severe emotional distress.[220] But when the underlying tort itself is unbounded, as the negligent infliction tort is, the danger arises that a skillful, motivated attorney can contrive very large damages for conduct not really demarcated as culpable.

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found sufficient to support a finding of "severe" injury). "In contrast, cases involving physical injuries typically require an expert to prove both the cause and [the] extent of the injuries." Givelber, *supra* note 32, at 49 (citing JON R. WALTZ & FRED E. INBAU, MEDICAL JURISPRUDENCE 56 (1971)).

215. *See supra* note 211 and authorities cited therein.

216. For example, a diagnosis that a person is HIV-positive, or even that she has a compression fracture at the fourth lumbar vertebra, involves chemical, biological or mechanical tests that would be repeatable from one professional to the next with a high degree of specificity. But a diagnosis of borderline personality disorder, post-traumatic stress disorder, or chronic undifferentiated schizophrenia will not be physically verifiable and requires both interpretation and subjective weighing of multiple simultaneous criteria. *See* AMERICAN PSYCHIATRIC ASS'N, QUICK REFERENCE TO THE DIAGNOSTIC CRITERIA FROM DSM-III-R 194–95, 146–48, 113–18 (1987). Furthermore, the diagnostic criteria usually concern manifestations that also are present in mentally healthy persons to some degree (unlike the antibodies that correlate with HIV infection). Thus, the obsessive-compulsive personality disorder is diagnosed by criteria that are present in some classes of healthy people to a marked degree (e.g., lawyers.) *See id.* at 199–200 (summarizing criteria, such as "perfectionism," "preoccupation with details [and] rules," "excessive devotion to work," "overconscientiousness," and "restricted expression of affection," that are virtual survival characteristics for lawyers in high-pressure practices). While the distinction can be overstated—diagnosis of physical illness often involves matters of interpretation subject to professional judgment—the point is that the manipulability of diagnostic criteria in psychiatry is of a much greater order of magnitude. *See also* ALEXANDER D. BROOKS, LAW, PSYCHIATRY AND THE MENTAL HEALTH SYSTEM chs. 1–3 (1974) (describing psychiatry as it relates to law, as it defines mental illness, and as a behavioral science).

217. *See supra* note 216.

218. *See supra* notes 211, 216 and authorities therein cited.

219. Even in less manipulable fields, some courts have begun to impose highly restrictive requirements upon the qualification of expert witnesses to reduce the exploitation of "junk science" by parties in certain kinds of cases. *Cf.* Christopherson v. Allied Signal Corp., 939 F.2d 1106 (5th Cir. 1991) (four-part test for experts imposed in case involving novel opinion testimony about causation from allegedly toxic substances); Susan A. Allinger & Charles Bailey, *High Noon at the Fifth Circuit Corral: "Battle of the Experts" Meets "Junk Science"*, HOUS. LAW., Jan.-Feb. 1992, at 10 (commentary on Christopherson). *See generally* PETER W. HUBER, GALILEO'S REVENGE: JUNK SCIENCE IN THE COURTROOM (1991).

220. *Cf. supra* note 206 and authorities cited therein (example of uncertain damages in defamation cases, which nevertheless can be economically sound given the relatively rigorous limits of the underlying tort).

3. Vagueness and the Issue of Causation.

Jameson v. Overholtzer suggests yet another vagueness problem that is related to, but distinct from, damages: the issue of causation. The plaintiff's witnesses' description of the plaintiff as suffering serious long-term harm, all of it attributable to the liability event because she suffered none before it, is illustrative.[221] Again, proponents minimize this concern. "Because there probably will be few significant psychic injury cases where the injuries would have occurred regardless of the defendant's conduct," says one such proponent, "psychic injury recovery should not be denied on [this] basis ...."[222] Again, this conclusion suffers from both naivete and failure to recognize that the vagueness of causation is compounded with the vagueness of damages and, most importantly, unbounded liability.

Indeed, the problem lies deeper. In *Jameson*, the plaintiff testified to bad grades in school and linked them causally to the liability event. Defense counsel showed that her grades overall were quite acceptable.[223] The plaintiff, likewise, produced evidence that she had difficulty creating relationships with men, and again created a general causal link between this symptom and the liability event. Defense counsel showed that, notwithstanding these claims, she had had several stable relationships.[224] By way of contrast, a traditional negligence case involving the injury of an arm or leg or other physical faculty frequently concerns results clearly variant from the norm, with only the measurement of the variation to be considered, rather than its relationship to the liability-producing event.[225] But psychic abnormalities are present in every normally healthy person, and tracing the causal roots of such claims as those of the plaintiff in *Jameson* involves a greater order of magnitude in difficulty.

Again, these deficiencies might be tolerable if the definition of the culpable conduct were clearer, as it is in the tort of intentional infliction of emotional distress.[226] And mere uncertainty in the proof of causation, like uncertainty in proof of damages, should not determine the legal rule.[227] But when the manipulability of both causation and damages is added to liability for vaguely defined or even ostensibly nonculpable conduct, these incremental problems strengthen the argument against recognizing the tort. They especially do so when one remembers that the intentional torts can provide redress.

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221. *See supra* notes 208–09 and accompanying text.

222. *See* authorities cited *supra* note 208. (The evidence also included plaintiff's testimony of disadvantageous academic performance during the semester in question, such as that she "failed every final," *id.*; this relatively specific statement, however, was not the extent of plaintiff's causation claim).

223. *See* authorities cited *supra* note 208.

224. *See* authorities cited *supra* note 208.

225. There are, of course, some traditional tort cases in which causation issues are treated by diffuse evidence and manipulable opinion. The responses of some courts to these cases, however, have included the imposition of restrictions designed to curb abuses. *See supra* note 219.

226. *See supra* notes 206, 220 and accompanying text.

227. *See supra* notes 205–06 and accompanying text.

E. The Case for Recognizing a General Negligent-Infliction Tort: Analyzing the Arguments of Proponents

Most arguments supporting the negligent infliction tort have recognized the need for limits other than foreseeability. Apparently, the most significant scholarship that supports full recovery for negligently inflicted emotional distress, with no limit other than foreseeability, is an article by Professor Peter A. Bell.[228] Professor Bell's work is interesting because it attempts thoroughly to defend the destruction of barriers that the law has labored mightily to build for clearly articulated purposes.[229] Even to the extent that it is unpersuasive to a given reader, Professor Bell's argument nevertheless is useful, because it facilitates the evaluation of the countervailing arguments.

The most notable response to Professor Bell was offered by Professor Richard N. Pearson. In rejecting a general-purpose negligent-infliction tort, Professor Pearson concludes that "recovery for emotional harm not resulting from physical impact should be limited to those in the zone of danger of physical impact," as in bystander cases.[230] Professor Pearson's response is reasoned and thorough, and this article therefore addresses only certain other major criticisms of Professor Bell's argument.

1. The Poetic Argument for the Negligent-Infliction Tort: An Appeal to Literature.

Professor Bell's first argument is an appeal to literature. He quotes John Donne: "Any Mans death diminishes me, because I am involved in Mankinde; And therefore never send to know for whom the bell tolls; it tolls for thee."[231] He then argues for a "full recovery rule" in psychic injury cases, "one which will more fully heed John Donne's tolling bell, so as to acknowledge man's involvement in mankind."[232]

This "literary" argument is a legitimate starting point. Tort law ultimately is anchored in moral values; it seeks to provide incentives to individuals against acting in their narrow self-interest, in instances in which the common good outweighs those interests.[233] Professor Bell's logic is flawed, however, in that he fails to recognize limits to "Mans involvement in Mankinde." He could have

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228. Bell, *supra* note 205. *See also*, Comment, *supra* note 205. *But cf.* Richard S. Miller, *The Scope of Liability for Negligent Infliction of Emotional Distress*, 1 U. HAW. L. REV. 1 (1981) (advocating liability for emotional distress only to the extent that it results in economic damages). Professor Miller's proposal is more readily defensible from the criticisms that have been directed to Professor Bell's work. *See* Pearson, *supra* note 120, at 512 ("Professor Miller's proposal would appear to be an acceptable compromise of the conflicting policies: it both compensates foreseeable plaintiffs and avoids the process difficulties involved in permitting recovery"); *see* discussion *infra* part IV.F.

229. *Cf.* Bell, *supra* note 205, at 336–41 (discussing what Professor Bell calls "the existing restrictive rules").

230. Richard N. Pearson, *Liability for Negligently Inflicted Psychic Harm: A Response to Professor Bell*, 36 U. FLA. L. REV. 413 (1984). For another response to Professor Bell, *see* Davies, *supra* note 125, at 15–20.

231. JOHN DONNE, *Seventh Mediation*, *in* DEVOTIONS UPON EMERGENT OCCASIONS 87 (1975), *quoted in* Bell, *supra* note 205, at 333.

232. Bell, *supra* note 205, at 335.

233. *Cf.* KEETON, *supra* note 131, § 4 at 21–23 (comparing moral principles and tort law).

found equally compelling examples of literature that oppose this passage from John Donne.[234]

For example, Henry David Thoreau championed the lone individual who "does not keep pace with his companions ... because he hears a different drummer."[235] This approach extols the virtues of solitude, or of *un*involvement in mankind.[236] These were among the virtues that allowed Thoreau to make Walden Pond the cradle of the American environmental movement, among other accomplishments. From such notions, a philosopher could construct a powerful argument for the interests of the individual in acting and thinking independently, and even for the proposition that this interest may serve the common good.[237] Such a philosopher would reject liability for incidentally or inadvertently caused emotional distress attributable to beneficial activities of these independent persons.[238] The point is not that Thoreau's model of the different drummer is "right" or that Donne's insistence on involvement in mankind is "wrong"; rather, it is that both are "right"[239]—and that by failing to recognize limits to the values underlying his theory, Professor Bell robs his analysis of balance.

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234. In addition to the works considered *infra* notes 235–239, consider that of Robert Frost, who "took the road less traveled by,/And that has made all the difference." ROBERT FROST, *The Road Not Taken, in* THE POETRY OF ROBERT FROST 105 (1969). *See also* John Wilmot, *A Satire Against Mankind, in* HAZELTON SPENCER, 1 BRITISH LITERATURE: FROM BEOWULF TO SHERIDAN 533–35 (1951) [hereinafter SPENCER I] (Seventeenth Century poem rejecting the influences of both humankind and reason: "I'd be a dog, monkey, or a bear/Or anything, but that vain animal/Who is so proud of being rational"); William Wordsworth, *Lines Written in Early Spring, in* HAZELTON SPENCER ET AL., 2 BRITISH LITERATURE: FROM BLAKE TO THE PRESENT DAY 46–47 (1952) [hereinafter SPENCER II] (Eighteenth Century poem suggesting return to nature rather than attention to humankind: "Have I not reason to lament/What man has made of man?")

In fact, John Donne himself sometimes contradicted the metaphor of the tolling bell—by works that advocated a separation from the rest of humankind. *See infra* note 244.

235. HENRY DAVID THOREAU, WALDEN OR, LIFE IN THE WOODS 216 (New American Library ed. 1960).

236. In fact, Thoreau was more explicit than the famous "different drummer" metaphor. "Let everyone mind his own business ...," he said. "Say what you have to say, not what you ought." *Id.* at 216–17. This suggestion, unfortunately, may amount to a formula for incurring liability under the negligent-infliction tort, which imposes liability for deviation from ordinary care (or, in other words, from what one "ought" to do).

237. This independence also has value in and of itself. The right to insist upon uninvolvement in the affairs of the rest of humankind, and to seek a degree of disconnectedness from social regulation, is the value that we sometimes call "autonomy," or more often, "privacy." A principle that insists instead upon forcing connectedness, by emphasizing the duty to consider the emotions of others, threatens this value unless it is limited (just as the privacy principle threatens other values unless it is limited).

238. Thus, the law reformers who laid the foundation for the RESTATEMENT version of the intentional-infliction tort rejected negligence as the basis for it. *See supra* part I.A.2. (recapitulating the development of the outrageousness formula).

239. In fact, poets sometimes have juxtaposed poems extolling fellowship and connectedness with the rest of humankind, on the one hand, with contradictory poems that equally praise solitude and uninvolvement, on the other hand. *Compare, e.g.*, John Milton, *L'Allegro, in* SPENCER I, *supra* note 234, at 556–58 (praising fellowship in "towered cities" with "the busy hum of men") *with* John Milton, *Il Penseroso, in id.* 558–60 (companion poem, praising instead the inner joys of solitary scholarship and "hermitage: ... These pleasures, Melancholy, give/And I with thee will choose to live"). *See also* William Wordsworth, *Expostulation and Reply and the Tables Turned: An Evening Scene on the Same Subject, in* SPENCER II, *supra* note 234, at 47 (similar pair of poems, the first praising aloneness and the second connectedness).

Nor is this deficiency merely symptomatic. The flaw in his treatment of Donne's meditations pervades Professor Bell's analysis. When he speaks of "culpable" conduct,[240] it is without recognition that the lack of a clear definition of the underlying tort will in many instances treat nonculpable conduct as culpable, as the preceding section of this article shows.[241] When he assumes that a hypothetical omniscient lawgiver would not tolerate psychic injury,[242] he does so without acknowledging that precisely such injury, even sometimes that which is deliberately inflicted, is an essential component of many desirable activities, as the first section of this article shows.[243] Centering one's work on an elaborate conceit often gives metaphysical poetry its strength,[244] but the exclusion of visions contrary to John Donne's tolling bell does not do the same for Professor Bell's analysis of the negligent-infliction tort.

2. The Argument from the "Original Position" for a Claimed Entitlement to Psychic Well-Being.

Next, Professor Bell turns to the philosophy of justice. For example, he looks to the thinking of the originalist school, exemplified by John Rawls' monumental *A Theory of Justice*.[245] He concludes that these philosophers' writings support recognition of his negligent-infliction theory.[246]

The original position methodology assumes that hypothetical "founders" of a society would arrive at a consensus about values.[247] These hypothetical persons "in the original position" are fully sentient and intelligent persons able to foresee the developments and interactions of the society, but unable to predict their own roles or status in the society their values will design.[248] Thus, the originalists use this elaborate fictitious device of the original position to hypothesize, in turn, a group of expert but completely impartial lawgivers;[249] and then they infer, as a theory of justice, those principles that these hypothetical lawgivers would develop.[250] In Professor Bell's hands, the originalist's method has a simple if largely unexplained conclusion: "These persons would be unlikely to give others the right to cause them significant psychic injury."[251]

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240. *See, e.g.*, Bell, *supra* note 205, at 335, 341, 361.

241. *See supra* part I.

242. Bell, *supra* note 205, at 342. Professor Bell's conclusion in this regard is apparently categorical and unqualified, so long as the psychic injury is "significant." *Id.* at 342–43.

243. *See supra* part I.

244. *Cf.* John Donne, *A Valediction Forbidding Mourning*, *in* SPENCER I, *supra* note 234, at 427 (metaphor of compass expresses relationship of husband to wife after her death). Ironically, this poem implicitly contradicts the metaphor of the tolling bell; for example, it describes the disclosure of spiritual love between husband and wife to the rest of humankind ("the laity") as "profanation."

245. JOHN RAWLS, A THEORY OF JUSTICE (1971).

246. Bell, *supra* note 205, at 341–43.

247. RAWLS, *supra* note 245, at 11–22

248. *Id.* 136–50.

249. They are expert because they foresee and understand all developments and interactions within the society. But they also are impartial, because they cannot infer the roles that they personally will assume within the society that their rules will design. Professor Rawls refers to this latter device as "the veil of ignorance." *Id.* at 136–50.

250. *Id.* at 54–114.

251. Bell, *supra* note 205, at 342. Professor Bell explains that "psychic well-being is ... too important to the individual to surrender," that only a "broad entitlement to psychic well-being" will suffice to protect it, and that persons in the original position therefore would "give

Professor Bell's conclusion rapidly reduces to illogic, however, when the person in the original position contemplates real choices involving psychic injury. For example, originalists would be forced to reject any sanction for crime if they followed the Bell analysis.[252] The very purpose of imprisoning a criminal for a serious crime is to cause him what Professor Bell calls "significant psychic injury" as a means of specific and general deterrence.[253] But contrary to Professor Bell's reasoning, originalists would be entirely likely to create an enforceable regime of criminal law.[254] Since they would not know whether they would be members of the small class of persons who would benefit from tolerating criminal conduct or the much larger class of persons who would be injured by that approach, they would develop rules according to the probabilities.[255] In summary, persons in the original position would not universally prohibit even the deliberate causing of emotional distress. It is quite possible that, instead, they would come up with a formulation somewhat like the current *Restatement (Second)*'s prohibition of intentional and outrageous infliction of emotional distress.[256] Thus, Dean Prosser would become the incarnation of the fictitious societal founders whom Professor Bell borrowed from Professor Rawls.[257]

And insofar as negligent infliction of emotional distress is concerned, one might guess at the possibility that the originalists would make less of Donne's tolling bell than of Thoreau's right to march to the beat of a different drummer. The originalist might choose not to adopt a principle that would require him, on pain of damages, to live his life without ever inadvertently causing anyone else emotional distress. The originalist would not know whether he would be a small business owner needing to collect a debt or the client of a lawyer needing to con-

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each person an entitlement to psychic well-being." *Id.* at 342–43. This explanation is inadequate because even the most fundamental values (*e.g.*, to life or to freedom of speech) are not unlimited, and Professor Bell's treatment of the originalist philosophy gives no hint of any limits to this "entitlement to psychic well-being." Since it does not provide any basis for distinguishing between cases in which the "entitlement" exists from those in which it does not, the reasoning is not useful.

252. Professor Bell's statement of the "entitlement to psychic well-being" is categorical and ostensibly admits of no limits. *See supra* note 251.

253. *See* Bell, *supra* note 205, at 342. Together with purposes such as rehabilitation, incapacitation and retributive justice, deterrence is a major purpose of the penal sanction. *See generally, e.g.*, ARNOLD H. LOEWY, CRIMINAL LAW IN A NUTSHELL §§ 1.02–1.06 (2d ed. 1987). Of course, all of these purposes involve intentional infliction of emotional distress; in the case of rehabilitation, it is for the defendant's own good, whereas in the case of retributive justice, it is so that other members of society can appreciate the defendant's just desserts. Professor Bell's categorical reasoning leads to the dubious conclusion that originalists would reject these purposes.

254. *Cf.* RAWLS, *supra* note 245, at 241 (the originalist theory of justice "requires ... penal sanctions as a stabilizing device").

255. *See supra* notes 248–49 and accompanying text.

256. *See supra* part I.A.2. This is particularly so since Professor Rawls reserves severe penal sanctions for cases in which the actor knowingly violates clearly defined laws, *see* RAWLS, *supra* note 228, at 239–41, and since the intentional infliction tort focuses upon "punishment rather than compensation" and "functions like the criminal law," *see* Givelber, *supra* note 32, at 54–55.

257. Dean Prosser was the reporter when the "outrageousness" formula was adopted and had long advocated it. *See supra* note 58 and accompanying text. Ideally, he should have been imitating the impartial-but-expert lawgivers of the original position, according to the originalists. *See supra* notes 248–249 and accompanying text.

duct a vigorous cross-examination, each of which can be expected to cause significant emotional distress by conduct that cannot be so finely calibrated as to admit of liability for mere carelessness.[258] Again, Professor Bell has neglected the other side of the story: the limits on his theory.[259]

3. Arguments Based upon Distributive Justice.

Professor Bell next argues that distributive justice supports a broad negligent-infliction tort. He reasons that plaintiffs using the tort likely will be poorer (and more emotionally sensitive) than the defendants whom they sue, so that the result will be a more equal distribution of wealth.[260] The major premise is dubious: There is no reason to suppose that a Sandra Jameson will be poorer than a John Overholtzer on the average, and intuitively, one might infer that sophisticated plaintiffs will be more adept at reaching insurance supported disproportionately by the premiums of less sophisticated policyholders.

But even if the truth of the premise were conceded, Professor Bell's ultimate conclusion—which is that his proposal would lead to "greater wealth among the sensitive"—would remain fallacious. This argument confuses equal distribution with economic efficiency. Some rules might "equalize" the distribution of wealth at the cost of reducing the wealth of everyone in the society.[261] For example, a law authorizing arbitrary confiscation of property could be administered to "equalize" wealth, but it might simultaneously impair economic efficiency so extensively that every member of society would be worse off than before.

Thus, it is entirely possible that the "equality" of "the sensitive" obtainable under Professor Bell's proposal (if indeed it is obtainable) would be purchased at the expense of a net loss of wealth by "the sensitive"—and everyone else. In any event, a redistribution based upon a policy of taxation combined with transfer payments could accomplish the political goal of distributive justice with less cost

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258. *See supra* part I.A.2.

259. Professor Bell also considers other philosophies of justice, with the same deficiencies. For example, he likewise concludes that the instrumentalists (a school of thought that uses a different methodology from the originalists) also would outlaw the infliction of emotional distress. Bell, *supra* note 205, at 343–44. But Professor Pearson demonstrates that the Bell methodology does not properly use the instrumentalists' logic, *see* Pearson, *supra* note 230, at 414–17 (labelling this "[t]he most puzzling argument Professor Bell makes"); and in addition, the Bell analysis makes the more fundamental error of failing to recognize any values that would counterbalance the "entitlement to psychic well-being"—a defect that affects his instrumentalist argument just as it does his originalist one. *See supra* notes 251–52 and accompanying text.

Professor Bell also analyzes the neo-originalist theory of Professor Epstein, who analyzes ordinary linguistic usage to derive entitlements that the founders of a just society would originate. Richard A. Epstein, *Causation and Corrective Justice: A Reply to Two Critics*, 8 J. LEGAL STUDIES 477, 499–500 (1979). Professor Bell concludes that, given the importance of emotional well-being, "the psychically injured plaintiff's cry, 'you injured me' ... would convince Epstein to acknowledge the entitlement to psychic well-being." Bell, *supra* note 205, at 343. Perhaps so, but in light of the ordinary linguistic rejoinder, "I didn't intend to," together with opposing values and the traditional requirement of duty as a predicate to the assertion "you injured me," one cannot thus infer an absolute entitlement, protected against negligent (as opposed to intentional) invasion.

260. Bell, *supra* note 205, at 344.

261. *See generally* ARTHUR M. OKUN, EQUALITY AND EFFICIENCY: THE BIG TRADEOFF (1975) (explaining the tradeoff between these two goals); *see also* PAUL A. SAMUELSON & WILLIAM D. NORDHAUS, ECONOMICS 749–51 (12th ed. 1985) (same).

in terms of economic efficiency than Professor Bell's proposal.[262] In summary, distributive justice does not furnish attractive arguments for adoption of a broad negligent-infliction theory.

4. Professor Bell's Economic Arguments, Based upon His Conclusion That Overdeterrence Would Be Unlikely.

The heart of Professor Bell's argument, appropriately, is an economic analysis. "For tort liability to provide the proper incentive for safety," Professor Bell writes, "it should cause actors to pay the full cost of all injuries proximately caused by their culpable conduct."[263] That proposition is theoretically sound.[264] It depends, however, upon accurate separation of culpable from non-culpable conduct. As we have seen, the negligent-infliction tort blurs the distinction.[265] Furthermore, the economic principle is equally violated by overdeterrence, or by the deterrence of socially desirable activity.[266]

Professor Bell's conclusion is that overdeterrence is "unlikely" to result from full recognition of the negligent-infliction tort.[267] His reasoning, however, is based almost entirely upon bystander cases, and thus he analyzes costs, insurance effects, overdeterrence, and beneficial activities primarily in the bystander situation.[268] In this context, Professor Bell's theory is interesting: It is that the defendant's culpable conduct, which has been so defined by its having caused *physical* injury to a primary victim, results in psychic injury to others which can be efficiently compensated.[269] These injuries, he argues, are less serious than those to the primary accident victim, and compensatory damages are correspondingly smaller. As he puts it:

> Only in the extraordinary case will more than a few very close persons suffer serious psychic injury from physical injury to a loved one. ... In some few cases the additional weight of psychic injury liability might make an otherwise bearable liability burden unbearable. The likelihood that bystander psychic injury liability will so tip the scales, however, seems no greater than the likelihood that liability from other physical injuries from the same accident would do so.[270]

This analysis assumes that transactional costs of unlimited bystander claims—litigation costs, the administration costs associated with insurance, and the like—will not detract from the efficiency gains. This assumption may be unjustified, for reasons given in the next section of this Article.[271] Still, at least for psychic

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262. *Cf.* SAMUELSON & NORDHAUS, *supra* note 261, at 49–50, 391–95, 751–56 (describing use of transfer payments; criticizing intervention in markets as a method of wealth redistribution; describing tax and transfer payment systems as methods of redistribution).

263. Bell, *supra* note 205, at 361.

264. *See, e.g.*, POSNER, *supra* note 206, at ch. 6.

265. *See supra* part II.C. Indeed, even the intentional-infliction tort has this effect, though to a lesser degree. *See supra* parts I.A.2.–3.

266. *See, e.g.*, POSNER, *supra* note 206, at ch. 6; CRUMP ET AL., *supra* note 39, at 1022–23.

267. Bell, *supra* note 205, at 361.

268. *Id.* at 347–91.

269. Bell, *supra* note 205, at 362–70.

270. *Id.* at 366.

271. Indeed, Professor Bell may have it backward. By emphasizing that most injuries will be small, he imports into his analysis the probability that transaction costs will be disproportionately large. He solves this problem in two ways: by the assumption that people

injuries of significant size, Professor Bell's arguments provide a theoretical basis for an attack on the artificial limits of recovery in bystander cases.

The difficulty is that Professor Bell does not limit his conclusions to bystander cases. He apparently argues for full recognition of the negligent-infliction theory as a general-purpose tort.[272] This analysis overlooks the difference between bystander situations and other cases. Bystander recovery is inherently limited to situations in which there already is a completed tort, manifested in physical consequences.[273]

Professor Bell does not analyze the effect that his arguments would have upon the traditional tort of intentional infliction of emotional distress.[274] As is indicated above, that tort itself entails serious social costs.[275] Its development reflects a history of struggle for limitation to avoid those costs. Some intentional infliction of emotional distress (in non-outrageous circumstances) is socially desirable, and others cannot be distinguished without deterring desirable activities. Professor Bell's analysis reflects none of the historical struggle to develop an intentional infliction tort that would allow lawyers, political cartoonists, and small businesses (among others) to perform their functions.[276] Yet it would obliterate those carefully developed limits by substituting negligence for intent and outrageousness. The result of the omission of these considerations is that, even assuming Professor Bell's analysis has any value in bystander cases, it has no validity outside the bystander context.

Thus, for example, Professor Bell answers the argument that there is a threat of unlimited liability with the following analysis:

> [T]hose long wedded to the fear of unlimited liability may be reluctant to abandon the idea that bystander psychic injury recovery will suppress at least some socially useful activities. An onerous burden of liability, however, is probably just what is needed to encourage a reduction in overall accident costs. Even an oppressive liability burden should be imposed on defendants if it represents an accurate evaluation of the psychic injuries proximately caused by their culpable conduct. Such liability will send the proper message, discouraging actors from activities which risk such psychic injury. The actors retain the option of engaging in any activity they choose. The threat of large damage awards simply means that some actors will not engage in activities the expected benefits of which, they have decided, do not outweigh their expected costs.[277]

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will be less likely to sue upon trivial claims and by imposing a $400–500 threshold for recovery. *Id.* at 385, 388. Aside from the unlikelihood of judicial adoption of the $400–500 threshold, it would provide little protection from transaction costs in a system in which a $10,000 claim is "small" compared to most litigation. *See* Pearson, *supra* note 230, at 426–29. Professor Pearson convincingly refutes Professor Bell's argument for self-screening by demonstrating that it is a dubious means of eliminating trivial claims. *Id.* at 428–29. Moreover, the inefficiency of litigation over small non-trivial claims is a disadvantage to be added to a theory that already carries the baggage of numerous other disadvantages.

272. *See* Bell, *supra* note 205, at 334–35, 412.

273. Thus, it is not unlimited; for example, it would not displace existing intentional torts as an all-purpose theory. *See supra* parts II.B.–C.

274. *Cf. Hancock*, 808 P.2d at 251 (observing that the negligent infliction theory would make the intentional tort "meaningless").

275. *See supra* parts I.A.2.–3.

276. *Id.*

277. Bell, *supra* note 205, at 367–68.

Outside the bystander context, however, the imposition of liability would mean that these "actors [would] not engage in activities" that involve any degree of conflict, because conflict leads to psychic injury.[278] The recognition of the negligent-infliction theory generally, then, would deter people from engaging in activities as diverse as business management, commercial lending and the legal profession.[279]

5. The Transaction Costs of the Negligent-Infliction Tort: The Coase Theorem and the "Anti-Coase Theorem."

Finally, Professor Bell analyzes transaction costs associated with his proposal. His conclusion is that "[t]he full recovery rule would not be unusually costly" to litigate.[280] This conclusion is based, first, upon his inference that "[i]t would not increase the probability that cases will go to trial, because the rule is readily comprehensible."[281] This inference, according to Professor Bell, leads to the further inference that the negligent-infliction tort has "sufficiently formal guidelines for jury decision." Indeed, Professor Bell sees his theory as "not so informal or unclear" as the *Dillon* guidelines for bystander recovery, apparently concluding that the general-purpose negligent infliction tort compares favorably to *Dillon* in terms of specificity.[282]

The difficulty with this analysis is that there is a difference between asking whether a theory is "comprehensible" and asking whether it has sufficient "formal guidelines" to limit the costs attributable to decisions made under it. For example, the maxim that "equity abhors a forfeiture" is comprehensible, but it lacks formal guidelines for application (because there are many situations in which equity permits a forfeiture and yet the maxim does not give much help to the decisionmaker in identifying those situations). Similarly, the negligent-infliction tort may be comprehensible, in that the elements of duty, due care, causation, foreseeability, injury and severity of damages are understandable to lawyers; nevertheless, such concepts as that of due care for another person's emotional state, and of severity of injury, create a level of vagueness in measurement that is uncommon even in the tort law.[283] The *Wal–Mart* case, which involved a suit by an accused criminal against the crime victim, demonstrates that the limits of duty can be ascertained in this context only on a case-by-case basis.[284] Furthermore, Professor Bell's analysis centers on jurors' abilities to make factual distinctions; he neglects the need for a rule that allows for screening mechanisms, such as dismissal or summary judgment, to remove unmeritorious cases without large costs. By way of contrast, the *Dillon* rule (at least as

278. Indeed, even in the bystander cases the result may be overkill if damages are not limited to appropriate amounts. *See supra* note 266 and accompanying text.

279. *Cf. supra* parts I.A.2.–3. (describing deterrence of beneficial activities).

280. Bell, *supra* note 205, at 379. Professor Bell also considers the problem of trivial claims in his analysis of transaction costs. *See supra* note 271 (analyzing Professor Bell's asserted solutions to this problem and Professor Pearson's refutation of them).

281. Bell, *supra* note 205, at 379.

282. *Id.* at 379-80.

283. *See supra* part II.A.–E.; *see also infra* part IV.F.

284. *See supra* part I.B., which discusses *Wal–Mart Stores, Inc.*, 814 S.W.2d at 71. There, the court refused to infer a duty to exercise due care to prevent emotional distress because it would have conflicted with the duty to report crime.

construed by subsequent cases) results in the relatively inexpensive screening of most claims that do not fit its guidelines.[285]

One of the weakest points in Professor Bell's argument is his assertion that "[a]s a practical matter, the uncertainty may help the settlement process because it will probably make both parties feel they have something to lose by going to trial and give both room for negotiation."[286] This is true only if one believes that it is desirable for a plaintiff with an otherwise unmeritorious case (or for that matter, a defendant who has engaged in conduct that clearly should lead to liability) to be able to tilt the scales away from that conclusion by a fuzzy rule whose very fuzziness increases the cost of its enforcement. Such a roulette-wheel concept of litigation may be accurate as a description, but it is not an argument that limits transaction costs. Instead, it is rhetoric that blurs recognition of the misallocation of resources that would result.[287] This misallocation inevitably occurs when unclear rules make innocent defendants pay more (or plaintiffs with meritorious claims settle for less) than the results they would reach—more cheaply, in fact[288]—by negotiations under clearer rules.

Professor Bell also argues that "trials will be no more costly" under his theory.[289] Here, as in other places in his article, Professor Bell centers his argument on bystanders. Since "the primary victim would be in court seeking redress for his injuries anyway," he argues, "the incremental costs of determining whether bystanders were in fact psychically injured," and to what extent, would be "much less than if separate trials were needed."[290] Again, whatever the truth of this proposition, it cannot support the general-purpose negligent infliction claim that Professor Bell seeks to establish. To generalize his argument, therefore, he compares the claim to medical malpractice and product liability cases, which he correctly describes as "particularly costly to handle," yet which continue to be heard by the courts.[291] What is missing from this analysis is an answer

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285. *E.g.*, *Thing*, 771 P.2d at 814 (rejecting bystander claim as a matter of law based upon undisputed fact that claimant was not present at the time of injury); Elden v. Sheldon, 758 P.2d 582 (Cal. 1988) (rejecting bystander claim as a matter of law based upon undisputed fact that claimant was not related to the injured person).

The *Dillon* case itself does not make a fair point of comparison because it was a seminal decision that established only the general principle. The *Dillon* court left the precise guidelines to be developed in later cases, and hence the court has tightened the rule by such decisions as *Thing* and *Elden*. Professor Bell's use of the undeveloped principle in *Dillon* as a yardstick for specificity is a little bit like comparing modern principles of justiciability to *Marbury v. Madison*.

286. Bell, *supra* note 205, at 380.

287. This is so because misallocation results whenever there is either overdeterrence or underdeterrence. *See supra* note 266 and accompanying text. Deviations from efficiency occur naturally as the system varies from optimal deterrence levels, but that deviation does not furnish a reason for characterizing a source of misallocation as a benefit and deliberately incorporating it into the system. *See also* POSNER, *supra* note 206, at 513–14 (analyzing costs associated with vagueness). Elsewhere in his article, Professor Bell recognizes these concerns. *See infra* note 300.

288. *Cf.* POSNER, *supra* note 206, at 528–29 (simplification of liability rules enhances predictability of outcome and thereby reduces litigation costs). In concrete terms, an uncertain rule tends to increase the number and contestability of fact issues, leading to more expensive discovery, fact-gathering, litigation about evidence rules, litigation about the composition of the factfinder, etc., as well as more posturing in negotiation.

289. Bell, *supra* note 205, at 381.

290. *Id.*

291. *Id.*

to the question whether the high transaction costs associated with negligent infliction cases can be justified as well as those in medical malpractice or product liability cases in terms of other costs and benefits.[292] More importantly, it remains unclear why a general-purpose negligent infliction claim should be preferred over the intentional infliction tort, which entails lower transaction costs and less misallocation.[293]

Transaction costs are a focal point of the theory known as the Coase Theorem, which often is described as a central principle of the law-and-economics movement.[294] The Coase Theorem is not directly applicable to the problems raised by the negligent-infliction tort, because the Theorem concerns the allocation of resources by assignments of legal entitlements among firms in a world free of transaction costs.[295] In other words, it assumes ready and cost-free transferability of clearly defined entitlements such as property rights in a marketplace in which they can be accurately valued in accordance with opportunity costs. These conditions are as theoretical as the analogous assumption of a friction-free environment by physicists to analyze certain problems of mechanics; nevertheless, the Coase theorem has proved to be an extraordinarily useful tool of economic analysis.[296] In its most widely accepted form, the Theorem posits that under the stipulated conditions of zero transaction costs, the efficient allocation of resources will occur irrespective of the legal rule, or in other words, without regard to which actor is the holder of the property right or legal entitlement.[297] The conditions for the Theorem are not present in most

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292. *See, e.g.*, POSNER, *supra* note 206, at 152–54 (comparing costs and benefits of medical malpractice and product liability claims if custom is not recognized as a defense).

293. *See supra* part I (comparing misallocations from intentional tort to those of negligent-infliction tort); part II.D. (comparing vagueness).

294. Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960). The theory generally is traced to this work by Coase. *See also* A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 11–14 (1983) (explaining the theorem by example as well as definition; referring to it as "[o]ne of the central ideas in the economics analysis of law"); Stephen Calkins, *Do Pigs Need Wings? Introductory Thoughts on Law Reviews, Errors and the Coase Theorem*, 38 WAYNE L. REV. 1, 5–9 (1991).

295. *See generally* authorities cited *supra* note 294.

296. George J. Stigler, *The Law and Economics of Public Policy: A Plea to the Scholars*, 1 J. LEGAL STUD. 1, 11–12 (1972) (observing that "the world of zero transaction costs turns out to be as strange as the physical world would be with zero friction").

297. For a compilation of different statements of the Theorem, *see* Calkins, *supra* note 294, at 5–6. Calkins points out that Reginald Coase's famous 1960 article "never set forth a theorem as such." *Id.* at 5. Differences in technical statements of the theorem by Coase's followers can lead to differences in application. *Id.* at 7.

The version of the Theorem stated here is the "efficiency claim," as opposed to the "invariance claim." Professor Zerbe explains both versions as follows: "In a world of zero transaction costs, the allocation of resources will be [1] efficient, and [2] invariant with respect to legal rules of liability, income effects aside." Richard O. Zerbe, *The Problem of Social Cost in Retrospect*, 2 RES. L. & ECON. 83, 84 (1980). The efficiency claim is much more widely accepted, and indeed some scholars criticize the invariance claim as untenable. *See* Calkins, *supra* note 294, at 6.

Furthermore, there have been assertions that the Coase Theorem is erroneous. One of the most dramatic debates of this proposition was triggered by an article that offered an example "refuting" Coase. Daniel Q. Posin, *The Coase Theorem: If Pigs Could Fly*, 37 WAYNE L. REV. 89 (1990). It developed that Professor Posin's "refutation" itself contained an error in that he had failed to account for all of the opportunity costs implicated by his example. Barry A. Currier & Jeffrey L. Harrison, *Pigs with Wings: A Comment on Posin's "Refutation" of the Coase Theorem*, 38 WAYNE L. REV. 21 (1991). The result was a flood of articles critical

contexts involving recovery for emotional distress, because the claimants usually are not firms confronting opportunity costs that can be priced in a market, and the threshold condition of zero transaction costs is inapplicable.

Nevertheless, the Coase Theorem may provide one insight into this problem. One of its incidental benefits is that it focuses attention on transaction costs and demonstrates the undesirability of legal rules that unnecessarily increase them.[298] The Coasian perspective therefore should make us suspicious of choosing a legal rule allowing recovery for negligent infliction of emotional distress in light of its higher transaction costs, and dubious additional benefits, as compared to its intentional-infliction counterpart.[299]

In particular, the Coase Theorem should lead us to reject Professor Bell's argument that uncertainty in the governing rule is beneficial in causing both parties to negotiate with an awareness that they have more to lose by a trial. This reasoning, ironically, is based on logic that might be termed the Reverse Coase Theorem, or even the Anti-Coase Theorem. For all of its rhetorical appeal, it is an argument for high transaction costs as a means of diverting the allocation of resources away from efficiency.[300] In summary, Professor Bell's call for a

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of Posin's analysis of his own example, although some of the critics shared Posin's concerns about the Coase Theorem. Forum, *A Response and a Reply to Whether Pigs Can Fly*, 38 WAYNE L. REV. 1 (1991). Posin himself confessed the error in his example, but he maintained his anti-establishment conclusion: The critics "still have not refuted my core argument regarding the fallacy of the Coase Theorem." Daniel Q. Posin, *Bringing Home the Bacon: A Response to Critics*, 38 WAYNE L. REV. 108 (1991).

298. Professor Polinsky, for example, derives from the Coase Theorem the principle that if there are positive transaction costs, "the preferred legal rule is the rule that minimizes the effects of transaction costs." POLINSKY, *supra* note 294, at 13. This formula is useful, although it may overstate the case under some conditions. For one thing, the instant that one assumes positive transaction costs, the Coase Theorem no longer holds. One can no longer assume, then, that a change in the legal rule will maintain efficiency; in fact, the Coase Theorem does not guarantee that efficiency losses in such circumstances will not exceed any reductions in transaction costs. Furthermore, as Professor Polinsky points out, this formula does not take into account the income effects of a change in entitlements (because the Coase Theorem does not speak to income effects). *Id.* Thus, a particular rule with lower transaction costs may not be preferred by some participants if it produces a lopsided distribution of wealth.

Professor Polinsky's principle is extremely valuable, however, as a rule of thumb (one that is likely to be comprehensible to a wider audience, and hence more readily applied, than the Coase Theorem). We might hypothesize that it holds for the case in which transaction costs approach zero as a limit. And if efficiency losses and income effects are small, the rule that minimizes transaction costs indeed is the preferred one. In order to avoid assuming this set of conditions for the case of the negligent-infliction tort, this Article merely takes the position that we should take transaction costs into account and consider their minimization in formulating the legal rule.

299. *See supra* part I (comparing allocative effects); part II.D. (comparing vagueness).

300. The argument, in other words, is that a party holding a legal entitlement will be unable to rely completely on its enforcement and will compromise it to avoid transaction costs that exceed the value of what the entitled party gives up. This effect, in turn, alters the deterrence imposed by the legal rule and thereby prevents the rule from producing efficiency in the allocation of resources. *See also* POSNER, *supra* note 206, at 513–14 ("If a law is unclear, prospective violators will discount the punishment cost of the violation ... by the additional probability, significantly less than one, that the rule will be held applicable to the conduct in which they engaged. Thus the deterrent effect of the law will be reduced").

To his credit, Professor Bell recognizes these principles elsewhere in his article. He states that jury decisions about psychic injuries are "more like flipping a coin" than are evaluations of economic losses, and "that too is a cost of the transaction," whether it is evaluated as a process cost or as "decreas[ing] the effect of legal rules on behavior." Bell, *supra* note 205, at 382 & n.194. He discounts this effect, however, because "society should

general-purpose negligent-infliction tort bounded only by foreseeability is unpersuasive.

III. COLLATERAL EFFECTS: THE IMPACT ON INSURANCE, PUBLICITY SUITS, PRIVACY AND AUTONOMY

Preceding sections of this Article have dealt with emotional distress claims as they affect liability and damages. But the potential disadvantages of the negligent-infliction claim go beyond those issues. They include collateral effects on concerns as diverse as insurance, publicity, and individual privacy and autonomy. This section considers these effects, beginning with insurance.

A. "Divorce Insurance" and Other Insurance Effects

Many standard insurance policies exclude indemnity for intentional harm.[301] A person who commits a deliberate homicide is not entitled to the proceeds of a policy of insurance on the life of his victim. An arsonist who burns her own building is not entitled to recover on a fire policy. If this kind of exclusion were not part of these insurance policies, recovery for intentionally caused harm would be subject to such incentives that the indemnity principle that is the foundation of all insurance would be undermined.[302] Policyholders could not support by their premiums the "risk" thus spread.[303]

Spouses suing for divorce have begun to demand that their homeowner's carriers furnish them attorneys in their divorce actions based upon the inclusion of negligent infliction of emotional distress claims in the divorce actions.[304] In fact, divorcing spouses have great incentive to persuade each other to include negligent infliction claims, because even if the claims are not viable and never result in any recovery, both spouses thus can obtain payment of their attorneys' fees for the negligent infliction claims.[305] These claims will overlap the issues in controversy in many divorce actions.[306] The concern is not hypothetical: insurers

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accept seemingly arbitrary damage assessments as the best the system can achieve while acting against culpable defendants only through money damages awards." *Id.* at n.194. The assumption of "culpability" in this assertion has been analyzed in previous sections of this article, and in any event the discussion undercuts the argument that uncertainty is beneficial.

301. *See supra* notes 6–8 and authorities therein cited. Such policies may, however, cover liability for intentional torts, since the intent required for liability is not always coextensive with the intent to cause harm.

302. *See* J. APPLEMAN & J. APPLEMAN, 6B INSURANCE LAW AND PRACTICE § 4252 at 7 (rev. ed. 1979).

303. As the New York Court of Appeals put it, "[T]he ordinary person would be startled, to say the least, by the notion that [an insured] should receive insurance protection for sexually molesting ... children, and thus, in effect, be permitted to transfer the responsibility for his deeds onto the shoulders of other homeowners in the form of higher premiums." Allstate Ins. Co. v. Mugavero, 589 N.E.2d 365, 369 (N.Y. 1992).

304. *See* Petitioner's Application for Writ of Error at 33, Boyles v. Kerr, No. D-0963 (Tex. appeal docketed June 19, 1991).

305. An insurer must furnish a defense whenever the complaint potentially states a cause of action that may be covered by the policy, *see* Hayden Newport Chem. Co. v. Southern Gen. Ins. Co., 387 S.W.2d 22, 26 (Tex. 1965), even if the claim is clearly ancillary or alternative to a covered claim, *see* Maryland Cas. Co. v. Moritz, 138 S.W.2d 1095 (Tex. Civ. App.—Austin 1940), *writ ref'd*. This benefit to the insured may in some cases be worth as much as, or more than, the indemnification of liability.

306. At least, they will overlap in states in which fault is a criterion for property division or support.

already have been faced with actual demands that they furnish attorneys in divorce cases, and they have in some instances furnished them.[307]

Furthermore, this divorce-insurance phenomenon is but one example of the insurance effects of the negligent-infliction claim. Bitter litigation often extends to post-divorce disputes, such as those concerning custody, and claimants have begun to use the negligent-infliction claim in this context as well.[308] Furthermore, the litigation in *Jameson v. Overholtzer*, the videotape case described in the introduction above, was structured to "get the insurance."[309] Even if emotional distress claims ultimately are prohibited in divorce cases, there will be an infinite range of other litigation that can be structured to reach insurance not designed to cover the risk, if the negligent-infliction claim is viable.[310]

Today, in fact, it is not uncommon for plaintiff's attorney to contact defendant's attorney for the specific purpose of determining whether the pleadings adequately invoke the defendant's insurance coverage. An insured claim has greater settlement value to the plaintiff than an uninsured one, regardless of the solvency of the defendant—simply because of the legal status of insurers.[311] The plaintiff's incentives include the duties of the insurer to act in good faith and to handle settlement negotiations reasonably.[312] These duties make the insurer peculiarly liable to excess judgments upon failure to settle.[313] If the negligent-infliction claim exists, a vast array of cases in which coverage should be excluded will instead be cases in which these insurance effects upon settlement can be invoked.

A tempting solution to this problem would be to redraft the standard insurance policy to exclude coverage for negligently inflicted emotional distress. But insurers normally cannot take such a step unilaterally; instead, they must obtain regulatory approval through the state insurance commissions, which have the duty to safeguard the public interest. And from the commissions' standpoint, the exclusion of this particular coverage might well be seen as having disastrous results for the insurance consumer. The recognition of the negligent-infliction

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307. *See* authority cited *supra* note 304.

308. *Cf.* Weirich v. Weirich, 769 S.W.2d 513 (Tex. App.—San Antonio 1990), *writ granted* (negligent-infliction claim asserted against defendant alleged to have unintentionally facilitated interference with child custody) (pending in state supreme court).

309. *See supra* notes 5–8 and accompanying text.

310. For example, in the *Mugavero* case, the opinion of the New York Court of Appeals details the efforts of the claimants to argue that their negligent-infliction complaint was not excluded from coverage, even though the liability-producing acts concerned sexual abuse of the claimants' children—a type of harm that the court deemed intentional. *See supra* note 303 and authority therein cited.

311. At least one researcher has concluded that, in certain kinds of high-stakes litigation, insurance effects contribute to a situation in which settlement amounts typically are unaffected by the merits of the claim (or lack thereof)(!). Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497, 567 (1991).

312. See G.A. Stowers Furniture Co. v. American Indem. Co. 15 S.W.2d 544, 547 (Tex. Civ. App. 1929) (holding approved) (duty to settle reasonably; liability for negligent failure to settle); Vail v. Texas Farm Bureau Mut. Ins. Co., 754 S.W.2d 129 (Tex. 1988) (insurer's liability under consumer legislation and regulatory laws); Arnold v. National County Mut. Ins. Co., 725 S.W.2d 165, 167 (Tex. 1987) (liability of insurer based upon general duty of good faith and fair dealing). *See also* Kent D. Syverud, *The Duty to Settle*, 76 VA. L. REV. 1113, 1115–17 (1990) (settlement behavior in tort cases "is a product of the interaction between liability insurance and the law and procedure of tort litigation").

313. *See* authorities cited *supra* note 312.

tort would create expanded liability for the average individual, which, since it concerns emotional distress, would be difficult to value.[314] Liability would be triggered not by intentional acts, but by mere carelessness. A state insurance commission might conclude that it would not be in the public interest to deprive consumers of all possibility of insurance for a kind of liability that can be created by mere inadvertence, in ruinous amounts.[315] Thus, this "solution" would rob Peter to pay Paul: It would avoid the insurance effects of the negligent-infliction claim only by requiring consumers to "go bare" with respect to an easily triggered, unpredictable kind of liability.

Effects on insurance are not always a reason for rejecting liability. If the underlying claim is legitimate in the sense that it redresses harm to an important societal interest at otherwise reasonable cost, some adverse insurance effects may be tolerable. But the probability of widespread manipulation of litigation for the primary purpose of creating insurance effects, including "divorce insurance," is a strong factor in evaluating a novel claim. Together with the other disadvantages of the general-purpose negligent-infliction tort, these insurance effects indicate the need for limitation.

B. Publicity Suits

Many states once recognized a common law cause of action for "criminal conversation," which is a euphemism for adultery.[316] Most, however, have abolished this cause of action, which often was used as a form of legalized blackmail in divorce actions, backed by the threat to convert the proceedings into a lurid trial by newspaper.[317] Likewise, the common law recognized a cause of action for tortious interference with marital relations or alienation of affections, but most jurisdictions have abolished the claim.[318] Recently, the Kentucky Supreme Court explained the reasons:

> Such suits invite abuse. Because courts cannot properly police settlements, these actions are "often characterized by the plaintiff-spouse blackmailing the defendant into a high-priced settlement with the threat of a lawsuit that could destroy the defendant's reputation." Frequently the end result of these cases is essentially the plaintiff's sale of his spouse's affections. Not only is a defendant in these suits victim to vindictive or purely mercenary motives of the plaintiff, but such suits are likely to expose "minor children of the marriage to one of [their] parent's extramarital activities, and may even require the children to testify to details of the family relationship in open court."[319]

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314. *See supra* part III.D.

315. *Cf. supra* part III.C. (citing examples of extension of liability in social, marital and business contexts).

316. KEETON, *supra* note 131, § 124 at 917.

317. *Id.* at 930. At least 31 jurisdictions expressly have abolished the claim either by statute or by decision (and from this fact one may infer that its status in the other States is doubtful). Hanover v. Ruch, 809 S.W.2d 893 (Tenn. 1991); Marshall L. Davidson, III, Comment, *Stealing Love in Tennessee: The Thief Goes Free*, 56 TENN. L. REV. 629 (1989).

318. *See* Kay Kavanagh, Note, *Alienation of Affections and Criminal Conversation: Unholy Marriage in Need of Annulment*, 23 ARIZ. L. REV. 323 (1981); Gregory L. Thompson, Note, *The Suit for Alienation of Affections: Can Its Existence Be Justified Today?* 56 N.D. L. REV. 239, 254 (1980). *See also infra* note 319.

319. Hoye v. Hoye, 824 S.W.2d 422, 427 (Ky. 1992) (collecting cases and statutes rejecting claim).

Similarly, many legislatures or courts have abolished claims for "palimony" between cohabiting couples or limited them to claims based upon written instruments.[320] These actions often involve thinly-based but extensive claims, high potential for blackmail, unpredictable liability, and little control over the imagination of the jury.[321] "Fault" elements in divorce cases provide another example of often-abused claims that many states have abolished.[322]

In some instances, the claim for negligent infliction of emotional distress provides the kind of ambiguous and blackmail-prone device that many states have rejected by abolishing criminal conversation, interference with marriage relations, and palimony, and by allowing no-fault divorce.[323] The videotape case, *Jameson v. Overholtzer*,[324] was the basis of an extensive trial by newspaper.[325] The publicity included plaintiff's negotiation of motion picture rights for a fee estimated to be in "six figures," with the major issue being plaintiff's attorney's wish to have artistic control.[326] The motion picture might not have been financially viable without the underlying suit, which created the publicity that supported it.[327]

Not all applications of the negligent-infliction tort entail the problem of the publicity suit, but the very ambiguity of the claim makes it a potential instrument of oppression in emotionally charged disputes.[328] When the legal basis of a claim is dubious but the potential for embarrassment and titillation is high, disputing parties could readily use a negligent-infliction theory for this purpose.[329]

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320. *E.g.*, TEX. BUS. & COM. CODE ANN. § 26.01(3) (Vernon 1987) (abolishing claim unless based upon writing).

321. In fact, the celebrated *Marvin* case, which established the viability of such claims in California, ultimately resulted in a judgment of no liability—but only after lengthy and lurid proceedings that generated two separate appeals and massive publicity. Marvin v. Marvin, 176 Cal. Rptr. 555 (Cal. Ct. App. 1981).

322. *See generally* HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 13 (2d ed. 1988). Fault grounds "have been largely abolished or ignored today in those states in which the non-fault grounds for divorce prevail," and "no-fault divorce is ... widely accepted ...." *Id.* at 496–97.

323. *See supra* note 4 and authorities therein cited (noting lurid facts underlying many landmark cases). Not all of the cases have such facts, *see supra* notes 11–13 and accompanying text, but the negligent-infliction claim does seem to be disproportionately applicable to lurid cases.

324. *See supra* notes 1–8 and accompanying text.

325. *Cf. supra* note 10; Brief of Appellant in Court of Appeals at 38–39 & Appendix A, Boyles v. Kerr, No. D–0963 (Tex. appeal docketed June 19, 1991) (describing publicity and participation of plaintiff's attorney, as well as plaintiff herself, in such publicity in that case; reproducing examples).

326. *Id.*

327. *Cf. id.* (citing HOUS. CHRON., Feb. 21, 1990, at A13, col. 6 (reporting negotiations for motion picture; stating that plaintiff "got national attention ... after winning" judgment in her negligent-infliction suit).

328. *Cf. supra* note 10; Petitioner's Post-Submission Brief and Reply to Amicus Curiae at 11–12, Boyles v. Kerr, No. D–0963 (Tex. appeal docketed June 19, 1991) (theory "would allow men accused of sexual assault or harassment to counter-claim against their victims"; giving example of William Kennedy Smith, tried for rape based upon probable cause but acquitted, hypothetically suing alleged victim; providing other examples of potential use of claim for oppression).

329. *Cf. supra* note 319 and accompanying text (describing abuse of marital torts in similar circumstances).

C. Interference with Individual Privacy and Autonomy

Most social interactions are governed today by private custom and morality, and they should remain that way.[330] Practical jokes, for example, are a source of entertainment and a stimulus to relationships for some, even though others may dislike them—and even though they can cause serious distress if carried too far.[331] President Ronald Reagan was known even to those who disagreed with him as a great communicator who made citizens feel good about themselves, partly because of the human warmth engendered by his sense of humor—a sense of humor that occasionally miscarried and caused emotional distress to some people.[332] Likewise, wide-ranging discussions between husband and wife (or between live-in companions) about problems in the relationship usually are beneficial, even though they concern hurtful subjects. The negotiations for a prospective contract should frankly explore the interests of both parties and the potential deficiencies of the proposed arrangement, even if touchy issues raise either party's anxiety level.[333] In each of these areas, the intervention of the law should be carried out by a sensitive instrument—one that leaves private interactions largely undisturbed.

In fact, the privacy of some of these interactions, and the autonomy that we afford individuals in arranging them, reflect values among those that our society regards as most fundamental. The courts occasionally have invalidated laws that have regulated similar kinds of interactions.[334] Those decisions are among the most controversial known to the judiciary, but they nevertheless mark the importance of the privacy considerations that weigh against broad tort remedies for emotional distress.

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330. Thus, in Turner v. General Motors Corp., 750 S.W.2d 76, 79 (Mo. Ct. App. 1988), the court "emphasize[d] ... that there is no necessary nexus between a legal right or duty and a humane right or duty. ... The latter are principles which are dictated by good morals and conscience but are not necessarily within the boundaries of the law." The court found the private conduct in question to be "tragic and devoid of any semblance of good judgment," but it nevertheless denied recovery under a negligent-infliction theory. *Id.*

331. *Cf.* Wilkinson v. Downton, 2 Q.B. 57 (1897) (imposing intentional-tort liability for cruel practical joke). *See supra* note 49 (describing facts).

The Wilkinson holding could itself be subjected to legitimate debate. Many readers will have experienced practical jokes that are difficult to separate from Wilkinson in severity, tastelessness or elaboration except as a matter of degree, yet that are commonplace today among the denizens of colleges, social clubs and law firms. Whether the blunt instrument of the law can effectively distinguish them from Wilkinson without harmful results is an open issue.

332. For example, the President once announced to subordinates that he had formulated a plan to deal with the Soviet Union: "We start the bombing in five minutes." He did not realize until later that he was speaking into an open microphone. This practical joke resulted in an international incident and undoubtedly caused distress to Soviet citizens. If the President were held liable for negligence in causing that distress, however, the liability could be imposed only at the cost of generally deterring the President from giving effect to his sense of humor. And by extending that result to every citizen, one can obtain a mental picture of the extent to which the negligent-infliction claim would interfere with individual privacy.

333. *See generally* ROGER ASHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN (1981) (suggesting wide-ranging exploration of interests, options, and objective criteria).

334. *E.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965) (marital sexual relationship is a "relationship lying within the zone of privacy created by several fundamental constitutional guarantees"); Eisenstadt v. Baird, 405 U.S. 438 (1972) (extending *Griswold* holding to unmarried persons); *cf.* Moore v. East Cleveland, 431 U.S. 494 (1977) (protecting family living arrangements as private without identifying degree to which they are fundamental).

The negligent-infliction claim has the potential to interfere in individual privacy and autonomy to an unprecedented degree. In at least one case, for example, a court used the negligent-infliction claim to penalize a husband for discussing with his wife their sexual relations, together with the fact that these discussions "devastated" her.[335] The husband's sexual orientation happened to reflect preferences that the majority of jurors would find tasteless or even repulsive,[336] but the point is that there is no principled reason why the court's holding cannot be applied to marital discussions about more widely accepted sexual practices, if they "devastate" one partner by what is judged in hindsight as an excess of frankness. Another court held a husband liable under the negligent-infliction theory for conduct that included belittling his wife and controlling the marital finances.[337] And at least one court has imposed liability for the conduct of a lawyer during contract negotiations when he predicted that his clients would use a lawful remedy, on the ground that the clients had not definitely decided, yet, on the use of that particular remedy.[338]

Widespread enforcement of these principles, of course, would alter the behavior of the actors. Wives and husbands would be deterred from frank discussion of marital difficulties; negotiating parties would be forced to withhold discussion of their most serious problems.[339] In fact, this is the very purpose of legal intervention: to deter people from conduct in which they otherwise would wish to engage. But when the affected conduct begins to include legitimate activities that otherwise would be autonomously and privately performed—such as spouses' discussions of marital problems or employers' discipline of sexual harassers—we should begin to ask whether the law has gone too far.

Even the intentional-infliction tort has the unintended effect of penalizing (and thus deterring) some beneficial conduct that otherwise would remain in the sphere of privacy and autonomy.[340] Nevertheless, the intentional tort results in far less incursion into those areas than the negligent-infliction theory. Again, the issue is one of balance—it is that of preventing the most egregious cases of emotional distress while respecting the most sensitive areas of privacy, or of reconciling John Donne's tolling bell with Henry David Thoreau's different drummer.[341] The intentional-infliction tort simply strikes the balance better.

IV. FINDING LIMITS

Efforts to provide protection for emotional well-being, without the serious problems of an unlimited negligence tort, have produced responses as many and

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335. *Twyman*, 790 S.W. 2d at 819.

336. *Id.* The husband's preferences included bondage, but the wife's did not.

337. *See supra* notes 187–89.

338. State Nat'l Bank of El Paso v. Farah Mfg. Co., 678 S.W.2d 661 (Tex. Ct. App.—El Paso 1984), *no writ*. The holding was based not on negligent infliction but on fraud, economic duress, and tortious interference with a business relationship. The negligent infliction theory, however, would provide an even less restrictive route to recovery for individual negotiators on a theory of liability that already has significant disadvantages. *See infra* note 339.

339. *Cf.* David Keyes, State National Bank of El Paso v. Farah Manufacturing Co., THE TEXAS BANK LAWYER, Dec. 1984, at 9, 10–11 (advising banks, because of decision set out *supra* note 338, not to negotiate with defaulting borrowers by "lobbying" them; instead, "the bank should either waive a default ... or declare a default," apparently without discussion).

340. *See supra* parts I.A.2.–3.

341. *See supra* notes 231–43 and accompanying text.

varied as the fifty states. Indeed, some states' responses are difficult to characterize, either because they have not squarely confronted the issue or because their decisions are inconsistent.[342] The one consistent factor is the recognition of recovery for emotional harm caused by outrageous and intentional conduct. Virtually all states would allow recovery for the traditional torts of intentional infliction of emotional distress or invasion of privacy that plaintiff's attorney waived in *Jameson v. Overholtzer*.[343]

A. The Restatement Approach: Intent or Recklessness

Section 46 of the *Restatement (Second) of Torts* recognizes the claim for intentional infliction of emotional distress. The *Restatement* allows the claim to be based on either intent or "recklessness." Subsection 1, which embodies the general rule, provides as follows:

> One 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.[344]

The formula clearly declines to recognize the negligent-infliction tort. This conclusion is reinforced by the comments to § 46, which emphasize "the difficulty of setting up any satisfactory boundaries to liability" other than those in this approved draft.[345]

The extension of the claim to cover "reckless" infliction of emotional distress, however, creates new issues. For example, this formula appears to have been chosen without regard to insurance effects.[346] Presumably, a jury finding of recklessness, although it would suffice to create liability, would not satisfy the requirement of intentional injury that triggers the insurance exclusion.[347] For this reason, reckless-infliction and negligent-infliction might have the same result in destroying the indemnity relationship and shared risks that are necessary to the viability of insurance.[348] To prevent this result, state courts and legislatures should decline to adopt the recklessness portion of the *Restatement* formula, or they should define recklessness in a manner that embodies an intentional disregard of the victim's interests.[349] Precedent for such an interpretation can be found in the cases construing the reckless disregard standard for libel of a public figure that is required under the First Amendment.[350]

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342. *Cf. infra* part IV.E. (inconsistent decisions of Hawaii and other states).
343. *See supra* notes 32–33 and accompanying text.
344. RESTATEMENT (SECOND) OF TORTS § 46 (1965).
345. *Id.* at cmt. b.
346. *Cf. supra* part III.A. (describing insurance effects).
347. *But cf. infra* notes 349–50 and accompanying text (recklessness can be construed as tantamount to intent).
348. *See supra* part III.A.
349. *See infra* note 350. *See also* authorities cited *supra* note 6 (citing cases construing conduct with close connection to probable result as intentional, irrespective of actual subjective intent).
350. *See* Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 667 (1989) (reckless disregard means publication with a "*high degree of awareness* of probable falsity"; neither gross negligence nor any lesser standard of recklessness can suffice) (emphasis added). This concept corresponds closely to the RESTATEMENT definition of intent, which includes even undesired consequences if the actor "believes that the consequences are substantially

In fact, the *Restatement*'s "recklessness" formula has induced some plaintiffs to make the argument that gross negligence is so close to recklessness that it should be sufficient for recovery.[351] Although the *Restatement* does not support this view,[352] there are some authorities that confuse recklessness and gross negligence,[353] just as there are cases that confuse ordinary negligence with gross negligence.[354] Gross negligence, as one court has said, "is nothing more than negligence 'with the addition of a vituperative epithet.'"[355] This line of reasoning would automatically entail all of the disadvantages of straightforward adoption of the negligent-infliction tort discussed in the preceding sections. For this additional reason, courts and legislatures should avoid the recklessness formula, or at least they should construe it as tantamount to a requirement of intentional misconduct.

B. California: Recognition, Followed by Abolition, of the General Tort of Negligent Infliction

In California, negligent infliction of emotional distress "is not an independent tort."[356] In *Thing v. LaChusa*,[357] the California Supreme Court said:

> [F]oreseeability proves too much .... Although it may set tolerable limits for most types of physical harm, it provides virtually no limit on liability for nonphysical harm. ... It is apparent that reliance on foreseeability of injury alone in finding a duty, and thus a right to recover, is not adequate when the damages sought are for an intangible injury. In order to avoid limitless liability out of all proportion to the degree of a defendant's negligence, and against which it is impossible to insure without imposing unacceptable costs on those among whom the risk is spread, the right to recover for negligently caused emotional distress must be limited.[358]

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certain to result from it." RESTATEMENT (SECOND) OF TORTS § 8A (1965). *See also* sources cited *supra* note 6.

351. *See* Brief for Respondent in Response to Petitioner's Application for Writ of Error at 15–17, Boyles v. Kerr, No. D–0963 (Tex. appeal docketed June 19, 1991). *See also* Petitioner's Post-Submission Brief and Reply to Amicus Curiae at 16–18, Boyles v. Kerr, No. D–0963 (Tex. appeal docketed June 19, 1991).

352. *See* RESTATEMENT (SECOND) OF TORTS § 500 cmt. g (1965) (recklessness differs not only from ordinary negligence, "but also from that negligence which consists in intentionally doing an act with knowledge that it contains a risk of harm to others, in that the actor to be reckless must recognize that his conduct involves a risk substantially greater in amount than that which is necessary to make his conduct negligent").

353. *E.g.*, Deerings West Nursing Ctr. v. Scott, 787 S.W.2d 494, 496 (Tex. Ct. App.—El Paso 1990), *writ denied* (using term "reckless" in explaining gross negligence); *cf.* Woolard v. Mobile Pipe Line Co., 479 F.2d 557, 565 (5th Cir. 1973) (gross negligence contemplates fault just short of intentional harm). These decisions are subject to criticism because they implicitly would destroy any separate status for recklessness as a standard. *See* Mooney v. Wabrek, 27 A.2d 631 (Conn. 1942) (recklessness by definition is a more culpable level of misconduct than either negligence or gross negligence).

354. *E.g.*, Travelers Ins. Co. v. Reed Co., 135 S.W.2d 611, 617 (Tex. Civ. App.—Beaumont 1939), *writ dism'd judgmt cor.*

355. *Id.*

356. *Marlene F.*, 770 P.2d at 281.

357. 771 P.2d at 814.

358. *Id.* at 826–27 (quoting Robert L. Rabin, *Tort Recovery for Negligently Inflicted Economic Loss: A Reassessment*, 37 STAN. L. REV. 1513, 1526 (1985)) (citation omitted).

The court added, "[i]f the consequences of a negligent act are not limited, an intolerable burden is placed on society."[359] A "bright line in this area of the law is essential."[360]

On this basis, the California court in *Thing* determined that a bystander to an automobile accident could recover only if the bystander "(1) [was] closely related to the injury victim; (2) [was] present at the scene of the injury-producing event at the time it occur[red] and [was] then aware that it [was] causing injury to the victim; and (3) as a result suffer[ed] serious emotional distress."[361] The California court went on to hold that a mother who received an overwhelming shock from seeing her "bloody and unconscious child, whom she believed was dead, lying in a roadway" after an automobile accident, could not recover because she came to the accident scene after it had already happened, notwithstanding the genuineness of the emotional harm she suffered because of defendant's negligence, and notwithstanding the probability of recovery if California had recognized a pure form of the negligent-infliction tort.[362]

Before reaching its present position that negligent infliction "is not an independent tort," however, California tried and rejected the broad negligent-infliction theory. In *Molien v. Kaiser Foundation Hospitals*,[363] the California Supreme Court created a general "duty to refrain from the negligent infliction of serious mental distress," based purely on foreseeability, with no accounting for the harm that would be done by this expansive theory of liability.[364] The problems were so severe that the modern California cases have now rejected the tort.

Thus, in *Thing v. LaChusa*, the California court criticized its prior decisions for giving "[l]ittle consideration ... to the importance of avoiding the limitless exposure to liability."[365] The amorphous nature of the negligent-infliction claim, after *Molien*, had become "like the pebble cast into the pond, ... creat[ing] ever widening circles of liability."[366] It was in this context that the court added the aphorism, "foreseeability, like light, travels indefinitely in a vacuum."[367] In *Andalon v. Superior Court*,[368] the court referred to *Molien* as leading to a "quagmire of novel claims," and as "unacceptable," because it "[did] not provide criteria which delimit" the claim.[369] The logical extension of California's reasoning was its current position, which is the abolition of negligent infliction as an independent, general-purpose tort. Several other states have adopted similar reasoning in abolishing the theory.[370]

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359. *Thing*, 771 P.2d at 827.
360. *Id.* (quoting *Elden*, 758 P.2d at 582).
361. *Id.* at 829–30.
362. *Id.* at 815, 829–30.
363. 616 P.2d 813, 819 (Cal. 1980).
364. *Id.* at 820 (quoting Rodrigues v. State, 472 P.2d 509 (Haw. 1970)).
365. *Thing*, 771 P.2d at 821.
366. *Id.* at 819. *See also* Tobin v. Grossman, 249 N.E.2d 419, 424 (N.Y. 1969) ("Every injury has ramifying consequences, like the ripplings of the waters, without end.").
367. *Thing*, 771 P.2d at 823 (quoting *Newton*, 228 Cal. Rptr. at 893).
368. 208 Cal. Rptr. 899, 904 (Ct. App. 1984).
369. *Id.*
370. *See, e.g.*, Harpy v. Nationwide Mut. Fire Ins. Co., 545 A.2d 718, 725 (Md. 1988); Horace Mann Ins. Co. v. Leeber, 376 S.E.2d 581, 587 (W. Va. 1988). *See also Turner*, 750 S.W.2d at 79 (moral duty exists, but legal duty does not).

On the eve of publication of this Article, the California Supreme Court decided *Burgess v. Superior Court*,[371] in which it confirmed its narrowing of the negligent-infliction tort to traditional bases of duty. The plaintiff was the mother of an infant injured during delivery. She sued her physician, who owed her a traditional tort duty as his patient. On this established basis, founded in the patient-physician contract, the court upheld recovery of the patient's emotional distress damages.[372] At the same time, the court squarely rejected the patient's attempt to distinguish between direct victims and bystanders, emphasizing that it was allowing recovery only because the plaintiff had demonstrated a "pre-existing duty" of due care.[373] This holding can be seen to be consistent with the other California cases and with the thesis of this Article when one realizes that this pre-existing duty arose in *Burgess* from the patient-physician contract.

C. Florida and Other States: Limitation via the "Impact Rule"

In *Eastern Airlines, Inc. v. King*,[374] an airline flight from Miami to the Bahamas lost three engines but was able to land, causing severe emotional distress to passengers. The Florida court held that the passengers could not recover for negligent infliction of emotional distress because there had been no physical impact to them.[375] Florida follows the "impact rule," under which a plaintiff cannot recover for negligently caused emotional harm unless she actually is "'impacted' or physically injured by a product—like a Mustang or a Dalkon Shield."[376]

This "impact" formula is not precisely the same as abolishing the negligent-infliction tort altogether. It would allow recovery in circumstances in which the impact causes no physical injury but causes severe emotional distress. A plaintiff who was severely frightened by a swerving Mustang could not recover for pure emotional distress, but a plaintiff touched by the Mustang's bumper *could* recover for emotional distress, even if the contact was so slight that it caused no physical injury.[377] Sandra Jameson could not recover in a negligence action against James Overholtzer under the impact rule, although she could recover the same damages by proving any one of the relevant intentional torts.[378]

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371. 831 P.2d 1197 (Cal. 1992).

372. *Id.* at 1204.

373. *Id.*

374. 557 So. 2d 574 (Fla. 1990). *See also* Eastern Air Lines, Inc. v. Floyd, 111 S. Ct. 1489 (1991), in which the United States Supreme Court denied recovery for the same incident under applicable international agreements relating to air travel. Specifically, the Court held that mental distress was not compensable under the Warsaw Convention and related agreements in the absence of "death, physical injury, or physical manifestation of injury. ... Recovery for mental distress traditionally has been subjected to a high degree of proof, both in this country and others," the Court reasoned. *Id.* at 1502. It also pointed out that "American courts require extreme and outrageous conduct by the tort-feasor." *Id.*

375. *Id.*

376. *Id.*

377. *Cf. supra* notes 116–18 and accompanying text (discussing the "fright-impact" cases). Because those cases do involve actual impact, the relevant question is the acceptable length of the chain of causation rather than whether pure negligent infliction of emotional distress is a cognizable tort.

378. *See supra* notes 2, 3, 31 and accompanying text.

The impact rule thus prevents all-purpose use of the negligent-infliction tort, and, arguably, it provides an appropriate limit. Although it extends recovery to another class of cases—those in which impact occurs, even without physical injury—it seems unlikely that this theory could be misused as a broader negligent-infliction tort could, and if the resulting emotional distress in a "slight impact" case is severe, perhaps recovery is justifiable. A number of other jurisdictions appear to follow similar rules based upon impact.[379]

D. Arizona and Other States: Limitation via "Bodily Injury" Requirements

In *Burns v. Jaquays Mining Corp.*,[380] the plaintiffs were residents on land adjacent to an asbestos-producing mill, and they brought an action for negligent infliction of emotional distress because of their alleged exposure to asbestos fibers. The Arizona Court of Appeals followed the established Arizona law that damages for negligent infliction of emotional distress could not be sustained absent "actual physical injury," even though the emotional distress "had manifested itself in chronic physical symptomology."[381] The Arizona Supreme Court left this holding intact, although it regarded as open the question whether recurrent physical invasion by asbestos fibers constituted "the type of bodily harm which would sustain a cause of action for emotional distress."[382] The Arizona Rule obviously would not support a negligence-based recovery by Sandra Jameson against John Overholtzer, although Arizona would allow recovery to be proved under the intentional torts recognized in most states.[383]

One court has justified this rule by stating that: "[t]he 'physical injury' requirement is designed to provide some guaranty of the genuineness of the claim in the face of the danger that claims of mental harm will be falsified or imagined."[384] Although the physical injury requirement fulfills this function (at least if injuries resulting from the emotional distress itself are excluded as a basis), there is reason to question this approach as a means of limiting the claim.[385] On the one hand, it may deny recovery in impact situations producing severe emotional harm, when the impact merely threatens injury but does not

379. *See, e.g.*, Williams v. Baker, 572 A.2d 1062 (D.C. App. 1990); Ob-Gyn Assoc. of Albany v. Littleton, 386 S.E.2d 146 (Ga. 1989); Charlie Stuart Oldsmobile, Inc. v. Smith, 357 N.E.2d 247 (Ind. Ct. App. 1976); Anderson v. Scheffler, 752 P.2d 667 (Kan. 1988).

This impact requirement is not inconsistent with reasoning that rejects negligent infliction as an independent tort or refuses to find a duty to support it, and thus, for example, Maryland and West Virginia courts appear to use both justifications. *See* sources cited *supra* note 370.

380. 752 P.2d 28 (Ariz. Ct. App.), *pet'n for review dism'd*, 781 P.2d 1373 (Ariz. 1989). *See also supra* note 175 and sources cited therein (other "pure fear" cases).

381. *See* Burns v. Jaquays Mining Corp., 781 P.2d 1373 (Ariz. 1989) (supreme court's summary of court of appeals holding). This bodily injury rule should be sharply distinguished from the "physical manifestation" approach discussed *infra* part IV.F., because it requires that the emotional distress follow from the bodily injury and not the other way around. It thus provides a realistic and workable limit on the tort.

382. *Burns*, 752 P.2d at 32.

383. *See, e.g.*, Savage v. Boies, 272 P.2d 349 (Ariz. 1954) (adopting formulation of intentional-infliction tort set forth in RESTATEMENT (SECOND) OF TORTS § 46).

384. Czaplicki v. Gooding Joint Sch. Dist. No. 231, 775 P.2d 640 (Idaho 1989).

385. The real issue is not the genuineness or falsity of emotional harm, but whether it should give rise to a claim against the defendant for merely negligent conduct when the damages amount only to that. *Cf. supra* note 211 (opinions about nature and extent of injury are highly manipulable, even though experts are reasonably adept at detecting malingering or "faked" claims of severe emotional injury).

cause it.[386] At the same time, the physical injury requirement rewards the litigant who is able to claim a soft-tissue or other injury that is readily put in issue by the plaintiff's interested testimony and refuted only with difficulty. Nevertheless, this approach does provide an arguably workable limit in most cases, and states such as Connecticut,[387] Massachusetts,[388] Minnesota,[389] Missouri,[390] Nevada,[391] North Dakota,[392] Idaho,[393] Rhode Island,[394] Tennessee,[395] and Wisconsin[396] have all followed the physical injury requirement.

E. Hawaii and Other States: Recognition of an Independent Negligent-Infliction Tort, Followed By Retrenchment; The Amusing Example of the "Same Island" Rule

Eight states have decisions containing language indicating that they arguably have adopted, at one time or another, an independent negligent-infliction tort.[397] Five of those states (including California)[398] have reimposed traditional limitations on recovery for emotional distress or have adopted other arbitrary limits. Hawaii provides a striking example.

In *Rodrigues v. State*,[399] the Hawaii Supreme Court in 1970 recognized an independent cause of action for negligent infliction of emotional distress. The plaintiffs claimed that the defendant had negligently failed to maintain a drainage culvert, causing the flooding of their new home with resulting emotional distress. The court could have based its holding on the defendant's traditional tort duty to

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386. *See supra* text accompanying notes 378–79.
387. Maloney v. Conroy, 545 A.2d 1059 (Conn. 1988).
388. Nancy P. v. D'Amato, 517 N.E.2d 824 (Mass. 1988).
389. Stadler v. Cross, 295 N.W.2d 552 (Minn. 1980).
390. Bass v. Nooney Co., 646 S.W.2d 765 (Mo. 1983) (en banc).
391. State v. Eaton, 710 P.2d 1370 (Nev. 1985).
392. Muchow v. Lindblad, 435 N.W.2d 918 (N.D. 1989).
393. *Czaplicki*, 775 P.2d at 640.
394. Reilly v. United States, 547 A.2d 894 (R.I. 1988).
395. Laxton v. Orkin Exterminating Co., Inc., 639 S.W.2d 431 (Tenn. 1982).
396. Meracle v. Children's Serv. Soc., 437 N.W.2d 532 (Wis. 1989).
397. In addition to those discussed *infra* in notes 398–420 and accompanying text, *see* Taylor v. Baptist Medical Ctr., Inc., 400 So. 2d 369, 373–74 (Ala. 1981); Johnson v. Ruark Obstetrics & Gynecological Assocs., P.A., 395 S.E.2d 85, 89 (N.C. 1990); Gammon v. Osteopathic Hosp., 534 A.2d 1282, 1284–85 (Me. 1987); Paugh v. Hanks, 451 N.E.2d 759, 761 (Ohio 1983).

It is doubtful, however, that even these jurisdictions really recognize a general negligent-infliction claim. In the first place, there are traditional tort duties present in most of the cases. For example, the *Taylor* (Alabama) and *Johnson* (North Carolina) cases involved medical malpractice based upon contractual duties, and the *Gammon* (Maine) case concerned negligence based upon a contractual duty as well. *See supra* part I.C. (justifying decisions basing duty on contractual relationships because they do not lead to an unlimited, general-purpose tort). The broad rhetoric of these cases, therefore, may be no more than misleading dictum. *Cf.* St. Elizabeth Hosp. v. Garrard, 730 S.W.2d 649 (Tex. 1987) (expansive rhetoric amounting only to dictum since liability based upon traditional duty of contracting party mishandling corpse and since only issue was whether physical manifestation was required). Furthermore, subsequent decisions have "fudged" the limits of the negligent-infliction tort as a means of retreat from it. Thus, the Maine court recently held that a plaintiff defrauded by a promise of continued employment could not foreseeably have suffered emotional distress upon being fired(!), Boivin v. Jones & Vining, Inc., 578 A.2d 187, 189 (Me. 1990), and Ohio's lower courts have not embraced the negligent-infliction tort described in *Paugh*. *See, e.g.*, Reeser v. Weaver Bros., Inc., 560 N.E.2d 819 (Ohio Ct. App. 1989); Criswell v. Brentwood Hosp., 551 N.E.2d 1315 (Ohio Ct. App. 1989).
398. *See supra* part IV.B.
399. 472 P.2d 509 (Haw. 1970).

avoid unreasonable interference with the flow of surface water or on trespass concepts, but it declined to do so. Instead, the court addressed the issue whether the plaintiffs could recover for emotional distress in the absence of any "host cause of action."[400] The Hawaii court answered this question by announcing that that state would thenceforth recognize and enforce a general "duty to refrain from the negligent infliction of severe emotional distress."[401]

The *Rodrigues* opinion contained, and indeed recognized, the seeds of its own destruction. The court acknowledged that emotional distress is an inevitable function of community life; that social morality may be a more appropriate mechanism for controlling that distress; that society is in fact benefitted by certain kinds of emotional distress; and that the "law should not penalize the 'prime mover' in society nor curry to neurotic patterns in the population."[402] The court seemed to expect that the negligence formula itself would protect these values by its emphasis on the reasonableness of the actor's conduct.[403] Hawaii soon found, however, that the general duty created in *Rodrigues* was unmanageably broad.

Specifically, in *Kelley v. Kokua Sales and Supply, Ltd.*,[404] an automobile-truck collision in Hawaii injured several people. The father of one of the victims was informed of the accident by telephone from Hawaii, while he was in California. He died of a heart attack shortly thereafter. The father's estate, wife and children sued the owners and driver of the truck for negligent infliction of the father's emotional distress, including his resulting death. Upon these facts, the Hawaii court found itself forced to concede that the *Rodrigues* approach did not "realistically and reasonably limit the liability" of the defendants and that it would create "unmanageable, unbearable and totally unpredictable" exposure.[405] The court held that the *Rodrigues* tort would thenceforth require that the plaintiff be located within a "reasonable distance" from the accident.[406]

This "reasonable distance" approach also proved to be an ill-fitting limit. A person informed by telephone of a relative's death would appear to suffer identical emotional distress whether located in Honolulu or San Francisco, and thus the Hawaii court's reasoning bears no relationship to any of the policies upon which it could purport to be based, except perhaps that of limiting liability by the most haphazard of methods. The later decisions in which the Hawaii Supreme Court struggled to follow the "reasonable distance" rule showed it to be absurdly arbitrary. For example, one case permitted recovery for the negligent death of plaintiffs' dog "since plaintiffs and their dog were located within Honolulu."[407] Another decision permitted recovery because plaintiffs and their injured son "resided on the same island."[408] This "same island" rule was the

400. *Id.* at 519.
401. *Id.* at 519–20.
402. *Id.* at 520.
403. *Id.*
404. 532 P.2d 673 (Haw. 1975).
405. *Id.* at 676.
406. *Id. But cf.* Leong v. Takasaki, 520 P.2d 758, 762–65 (Haw. 1974) (purporting to reject "artificial" tests for bystander recovery because of general *Rodrigues* duty).
407. Campbell v. Animal Quarantine Station, Etc., 632 P.2d 1066, 1069 (Haw. 1981).
408. Masaki v. General Motors Corp., 780 P.2d 566, 567 (Haw. 1989).

consequence of the inevitable need for retrenchment[409] after the adoption, in *Rodrigues*, of a theory that otherwise would have defied limitation.

Other states have managed to retrench without producing quite such dysfunctional results. For example, the Connecticut Supreme Court, in 1978, appeared to hold that emotional distress damages could be recovered whenever the defendant should have foreseen an unreasonable risk of emotional harm.[410] Later, however, in *Maloney v. Conroy*,[411] a plaintiff sought emotional distress damages suffered because of her observation of her mother's declining condition and ultimate death resulting from medical negligence. Emphasizing a concern "not to 'open up a wide vista of litigation in the field of bad manners,'" the court held that despite its earlier holding it would not permit recovery in cases where the distress was claimed as a result of observing the commission of malpractice upon another.[412]

The Missouri Supreme Court in 1983 likewise held that recovery of emotional distress damages would be permitted if the defendant should have foreseen that its conduct would create an unreasonable risk of harm.[413] Later, however, in *Asaro v. Cardinal Glennon Memorial Hospital*,[414] the court observed that the threshold inquiry was duty, that no court had actually defined duty purely in terms of foreseeability, and that the few courts that had purported to base duty on foreseeability in emotional distress cases had "retreated."[415] With this reasoning, the Missouri court limited bystander recovery by zone-of-danger and proximity requirements.[416]

The Washington Supreme Court adopted a broad duty to avoid unintentional infliction of emotional distress in 1967.[417] Later, however, in *Gain v. Carroll Mill Co.*,[418] the court retreated, finding it necessary to adopt the admittedly "arbitrary" requirement that a bystander plaintiff witness the accident.[419] Thus, the Washington court's retrenchment, like those in Missouri and Connecticut, parallels the experience of California, which also adopted but later rejected a general negligent-infliction claim.[420]

Finally, one of the most interesting cases recognizing a right of recovery for negligently inflicted emotional distress is the decision of a panel of the Fifth Circuit in *Plaisance v. Texaco, Inc.*[421] The decision actually was based upon the Federal Employer's Liability Act and Jones Act, which adopt negligence standards. The two-judge majority relied on such authorities as Professor Bell's work and Hawaii's *Rodrigues* decision to recognize a full recovery rule for negligent infliction of emotional distress. Judge Jones dissented from this holding,

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409. *But cf. supra* notes 267–312 and accompanying text (discussing Professor Bell's rejection of restrictions on bystander recovery).
410. Montinieri v. Southern New England Tel. Co., 398 A.2d 1180 (Conn. 1978).
411. 545 A.2d at 1059.
412. *Id.* at 1062–64.
413. *Bass*, 646 S.W.2d at 772–73 (en banc).
414. 799 S.W.2d 595 (Mo. 1990) (en banc).
415. *Id.* at 598.
416. *Id.* at 600.
417. Hunsley v. Giard, 553 P.2d 1096 (Wash. 1976).
418. 787 P.2d 553 (Wash. 1990).
419. *Id.* at 555.
420. *See supra* part IV.B.
421. 937 F.2d 1004 (5th Cir. 1991).

arguing that the recognition of liability conflicted with a prior decision of the Circuit, which had rejected liability.[422]

The entire Fifth Circuit then undertook the unusual step of granting en banc review of *Plaisance* on its own motion.[423] Such a rehearing en banc is granted to correct "a precedent-setting error of exceptional public importance or an opinion which directly conflicts with prior Supreme Court or Fifth Circuit precedent."[424] The en banc court ultimately rejected full recovery for negligently inflicted emotional distress in this statutory context.[425] It cited a previous decision in which a panel of the court had discussed the policy reasons: "potentially ruinous liability," "feigned injuries and bogus claims," "exponential damages" awarded in a "random and wayward fashion," and the difficulty of insuring excessive levels of unpredictable liability.[426] The facts of the *Plaisance* case are themselves a strong argument against the negligent-infliction tort: The plaintiff claimed psychic injury from merely seeing an explosion and fire that neither caused nor threatened injury to anyone.[427] His psychiatrist diagnosed post-traumatic stress disorder, a diagnosis that the Fifth Circuit panel described as "baffl[ing]."[428] The necessity of three different levels of review to decide *Plaisance*—district court, appellate panel, and en banc appeals court—demonstrates the disproportionate costs, manipulable damages and difficulty of screening out unmeritorious claims that would result if the negligent-infliction tort were recognized.

F. Restrictions Based upon the Nature or Extent of Plaintiff's Damages

Some jurisdictions have attempted to screen emotional distress claims by imposing requirements of "physical manifestation" or of "severity." Most, however, have found these requirements insufficient to distinguish claims that should not result in recovery. The commentators have covered most of the reasons thoroughly,[429] and only a brief treatment is called for here.

The requirement of a physical manifestation as a prerequisite to emotional distress damages[430] has been criticized as arbitrary.[431] It *is* arbitrary, but since all linedrawing in the law is artificial to some degree,[432] better reasoning would criticize the physical manifestation requirement as inconsistent with the policy

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422. *Id.* at 1012–13 (Jones, J., dissenting), citing Gaston v. Flowers Transp., 866 F.2d 816 (5th Cir. 1989).

423. Plaisance v. Texaco Inc., 954 F.2d 266 (5th Cir. 1992).

424. 5TH CIR. R. 35 (Internal Operating Procedures).

425. Plaisance v. Texaco, Inc., 966 F.2d 166, (5th Cir. 1992).

426. *Id.* at 169 (citing *Gaston*, 866 F.2d at 820 & n.3).

427. *Plaisance*, 937 F.2d at 1006–09 (panel opinion).

428. *Id.* at 1011.

429. *See, e.g.*, Pearson, *supra* note 230, at 426–30; Miller, *supra* note 228, at 37–43; Pearson, *supra* note 120, at 507–13.

430. For example, California adopted this requirement in *Dillon* when it first recognized liability to bystanders. Dillon v. Legg, 441 P.2d 912 (Cal. 1968); Pearson, *supra* note 120, at 509.

431. Pearson, *supra* note 120, at 510; *see also, e.g., Garrard*, 730 S.W.2d at 649 (rejecting rule by 5–4 majority).

432. *See* Pearson, *supra* note 120, at 478–85, 510.

goals of objective verification and reasonable restriction of the claim.[433] A plaintiff typically can supply the missing element by testifying to such "manifestations" as headaches, dizziness, stomach upsets or soft-tissue pains.[434]

Consequently, this rule rewards the plaintiff who manipulates the description of her subjectively experienced symptoms (as well as the lawyer who coaches her to do so).[435] Since objective verification is impractical, so is disproof. Furthermore, even if it were practical to verify these kinds of symptoms, their presence is so common in uninjured persons that the physical manifestation requirement would remain useless as a device for differentiating meritorious emotional distress claims from unmeritorious ones. In fact, the courts understandably respond to such a "technical" requirement by stretching to find that it is satisfied in marginal cases in which the emotional distress seems genuine, and thus they compound the problem by a kind of "fudging" that engenders disrespect for law.[436]

The alternative requirement of "severe" injury is one of the elements of the intentional-infliction tort.[437] Even there, however, it does not serve as a very effective screening mechanism; that function is performed instead by the outrageousness requirement.[438] The negligent-infliction tort lacks this element of outrageousness, and indeed, as we have seen, the negligence concept is fundamentally inconsistent with it.[439] Under these circumstances, attempting to use the severity requirement as the principal restraint on the negligent-infliction theory would be as futile as attempting to restrain a 747 with a bicycle brake.

In the first place, as this Article already has demonstrated, emotional distress damages not only are extraordinarily uncertain, they also are extraordinarily subject to manipulation.[440] Heavily contested cases commonly would lead to an array of potential verdicts ranging from a few dollars to millions, all with equal evidentiary support.[441] In the second place, the courts have not been able to administer the severe distress requirement as a meaningful discriminant even when they have propped it up with stringent and objective-sounding rhetoric.[442]

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433. *Cf.* Pearson, *supra* note 120, at 515–16 (criticizing bystander rule of *Dillon* as inferior to zone-of-danger rule because of differences in achieving policy goals rather than because of asserted arbitrariness of either).

434. *Cf.* Vance v. Vance, 408 A.2d 728, 733 (Md. 1979) ("physical injury" in these contexts does not require "an external condition or ... a pathological or physiological state"); Thoms v. McConnell, 207 N.W.2d 140, 145 (Mich. Ct. App. 1973) (physical manifestation requirement satisfied by symptoms described as withdrawal, inability to function and depression).

435. *Cf. Molien*, 616 P.2d at 820 (rejecting requirement because it "encourages extravagant pleading and distorted testimony" and can be satisfied in every case "with a little ingenuity").

436. *See* Pearson, *supra* note 120, at 509–10; *see also supra* notes 434–35.

437. *See supra* note 53 and accompanying text.

438. *See supra* notes 63–66 and accompanying text.

439. *See supra* notes 88–90 and accompanying text.

440. *See supra* parts II.D.2.–3. *See also* Pearson, *supra* note 120, at 511–12; Miller, *supra* note 228, at 37–43.

441. *See supra* text accompanying notes 207–13.

442. For example, the Hawaii Supreme Court attempted to restrict its full-recovery rule by a requirement of harm so severe that a "reasonable [person], normally constituted, would be unable to adequately cope" with it. *Rodrigues*, 472 P.2d at 520. This formula introduces an ostensibly objective test. Furthermore, it is a stringent test, one that rarely would allow recovery: most "normally constituted" persons find that they are "able to cope" even with such

Finally and perhaps most significantly, the severity test is quintessentially a question of degree that is peculiarly unsuited to summary judgment or dismissal. Therefore, it cannot serve even a minimal screening function unless a jury trial is contemplated for every case.[443]

As yet another alternative, Professor Miller has proposed a rule that would allow an emotional distress plaintiff to recover only economic damages.[444] For example, if psychic injuries prevented the plaintiff from working, she might recover her lost wages, but she would not recover any mental anguish damages for the psychic injuries themselves.[445] Perhaps this restriction could be justified economically as a means of "making the punishment fit the crime," as Professor Miller argues.[446] It rests upon criteria that are objectively determinable.[447] And there is precedent in the *Restatement* for restricting certain kinds of negligence claims to economic damages.[448] Therefore, it might be argued that Professor Miller's proposal would provide recovery to a class of deserving plaintiffs without inviting the full panoply of serious disadvantages that would follow from the general-purpose negligent-infliction theory.[449]

On the other hand, proper administration of this approach might not extend benefits to a significantly larger class of plaintiffs than those who would recover under existing torts. If the defendant's conduct foreseeably causes emotional distress so severe that it results in a significant amount of foreseeable economic

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disturbing events as deaths of loved ones or discharges from employment, and so the Hawaii test would permit no damages for distress even of that severity.

But the test has not restrained recovery in Hawaii. In *Campbell*, 632 P.2d at 1066, the Hawaii court affirmed a *Rodrigues*-based judgment for the negligent death of the family pet. The "severe" mental distress was valued in amounts of $150 and $275 for each of five plaintiffs, with the sum of all five amounting to $1,000. *See* Alan T. Kido & Elizabeth Quintal, Note, *The Animal Quarantine Station: Negligent Infliction of Emotional Distress*, 4 U. HAW. L. REV. 207, 208 n.11 (1982). Just as Hawaii has made an absurdity of its own "reasonable distance" rule, *see supra* part IV.E., it has reduced its own serious injury requirement to meaninglessness. *See* Pearson, *supra* note 230, at 430.

443. *See supra* part III.D.

444. Miller, *supra* note 228, at 38–43. *See also* Diamond, *supra* note 139; Ingber, *supra* note 139 (similarly advocating recognition of liability but restriction of damages to economic loss).

445. *Cf.* Miller, *supra* note 228, at 40 (if negligently caused traumatic neurosis results in hospitalization and disability, Professor Miller would compensate "[a]ll the economic losses engendered by these conditions," including lost earnings, lost future earning capacity, and past and future medical expenses).

446. *Id.* at 1, 33–36 (describing problem as one of "fit" or "proportionality").

It is doubtful, however, that proportionality really is the only, or even the primary, concern that underlies the need to limit the theory. This article has described the deterrence of beneficial activities that would result from recognition of a negligent-infliction theory (and indeed that already results from the intentional-infliction tort). *See supra* parts I.A.2.–3. Even "proportionality" limits would not remove this effect.

447. *Id.* at 39.

448. For example, the cause of action for negligent misrepresentation is limited by the RESTATEMENT to economic damages. RESTATEMENT (SECOND) OF TORTS § 552B (1977). *See* Federal Land Bank Ass'n v. Sloane, 825 S.W.2d 692 (Tex. 1991) (adopting RESTATEMENT approach; denying recovery for mental anguish but allowing damages for proven pecuniary loss). Professor Miller provides other examples of allowable economic, but not emotional, recovery; *see* Miller, *supra* note 228, at 39.

449. *But see supra* note 446 (deterrence of beneficial activities).

damages, this conduct likely can be presented to a jury as "outrageous."[450] Perhaps for this reason, no court has had to decide about Professor Miller's proposal. It might be inferred that claimants do not advance it because, in the relevant cases, they consider recovery of their emotional distress damages so much more valuable that it really amounts to the whole ball game.[451]

G. Back to the Basics: A Requirement of Duty, Based upon Traditional Concepts of Contract or Tort

The difficulty with expansive recognition of the negligent-infliction tort is that it is based upon the reduction of duty concepts to pure foreseeability concerns.[452] As we have seen, duty should involve more than foreseeability; it is the reflection of economic limitations, desirable social activity, traditional relationships, and personal autonomy.[453] By the same token, when duty can be found in a contractual relationship, an independent tort, or a properly limited bystander claim, the problem of limiting the negligent-infliction tort disappears.[454]

One of the most recent negligent-infliction decisions, that of the Alaska Supreme Court in *Hancock v. Northcutt*,[455] reflects these considerations. The plaintiff had sued for breach of contract in connection with the construction of a house, with a second claim for negligent infliction of emotional distress. In the trial court, he failed to recover on the contract but recovered on his negligent-infliction claim. The Alaska Supreme Court reversed, holding that absent a physical injury, bystander claim, or breach of contract that is particularly likely to cause emotional distress, the plaintiff could not recover damages for negligently caused emotional distress under Alaska law.[456] The court recognized that the intentional infliction tort would be rendered "meaningless" if the law permitted independent recovery for negligently caused emotional distress.[457] The Alaska court also expressly considered but refused to adopt the independent negligent infliction tort created in Hawaii in *Rodrigues v. State*.[458]

Hancock represents the rule that negligently inflicted emotional distress damages are not independently actionable, although they may be recovered on other bases, such as breaches of certain kinds of contracts, completed independent torts, and bystander claims. This approach allows intentional-infliction recovery in outrageous cases. It also allows recovery for negligence when duty limits imply a reasonable balance between benefits and costs. But it avoids the insurance effects, the publicity suits, the oppression of innocent persons, and the

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450. *Cf.* Pearson, *supra* note 120, at 512 (concluding that Professor Miller's rule "will not add much to existing compensation regimes").

451. The proposal is "unresponsive to the primary concern of [such litigation], which [is] ... emotional harm, not economic loss." *Id.* at 513. Professor Miller does not neglect this point; his argument, in substance, is that half a loaf is better than none. Miller, *supra* note 228, at 40 (recognizing "irony" of proposal, but maintaining that it provides "reasonable, if not full" recovery). For whatever reason, plaintiffs apparently have not argued his theory to the courts.

452. *See supra* part II.A.

453. *Id.*

454. *See supra* part I.C.

455. 808 P.2d at 251.

456. *Id.* at 257–59.

457. *Id.* at 257–58.

458. 472 P.2d at 509. *See Hancock*, 808 P.2d at 257–58; *see also Williams*, 572 A.2d at 1062 (similarly rejecting *Rodrigues* tort).

problems of liability limited only by jury discretion, that would result from a general negligent-infliction tort.[459]

CONCLUSION

Today there is little question that mental tranquility is a proper object of legal protection in some cases. But there is equally little question that emotional distress is an inevitable product of many socially desirable activities. The law has struggled for centuries to compensate claimants for emotional distress in proper cases while at the same time avoiding the imposition of damages (or crushing defense costs) on persons engaged in innocent or even beneficial activities. Our courts have found it surprisingly difficult to declare rules of law that separate the baby from the bath water when emotional distress is the only injury at stake. In some cases, in fact, the baby almost seems to dissolve in the bath water. For example, this metaphor particularly seems to fit legal rules based upon pure foreseeability or upon the elusive bystander-direct victim distinction.[460]

There has been pressure in recent years for recognition of a general-purpose tort of negligent infliction of emotional distress. In certain kinds of hard cases, plaintiff's attorneys can make arguments for its adoption that have considerable initial appeal. Often, these cases involve lurid facts or conduct that no reasonable person would seek to justify.[461] Plaintiffs in such cases may plead the negligence theory as a means of reaching otherwise unavailable insurance; alternatively, they may seek to avoid requirements for proof of intent. *Jameson v. Overholtzer*,[462] the case with which this article began, is one example. To follow the aphorism of Justice Holmes, the facts of such cases exert a kind of "hydraulic pressure" by reason of which hard cases may make bad law.[463]

The trouble is that recognition of the general tort of negligent infliction of emotional distress would impose liability not merely upon John Overholtzer, but upon a wide variety of ostensibly innocent activities. It would affect the conduct of a broad spectrum of individuals and businesses, as indeed the tort law is supposed to do; in this instance, however, it would have unintended and dysfunctional results. As this Article demonstrates, for example, a negligent-infliction tort would deter employers from rooting out sexual harassment.[464] It would impinge upon professionals ranging from lawyers to cartoonists, whose work by definition involves conflict. These actors' conduct cannot be so finely calibrated as to prevent all careless imposition of emotional distress, since it frequently involves the deliberate infliction of emotional distress in situations in which that result is socially necessary.[465]

Furthermore, a negligent-infliction tort would force all of these businesses and individuals to face the defense costs of jury trials in almost every case in which they were sued for emotional distress, because the negligent-infliction tort

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459. *See supra* parts III–IV.
460. *See supra* parts III.A.–B.
461. *See supra* note 4 and accompanying text.
462. *See supra* notes 1–8 and accompanying text.
463. Northern Sec. Co. v. United States, 193 U.S. 197, 400–01 (1904) (Holmes, J., dissenting).
464. *See supra* part I.B.
465. *Id.*

is unsuited to summary judgment or dismissal rules.[466] In fact, since it substitutes a test of mere carelessness for requirements of intent and outrageousness, the negligent infliction tort would require jury trials for claims based upon mere social rudeness.[467] The ambiguity of the negligence theory, as well as the absence of a clear measure of damages or of causation, makes the damage evidence peculiarly subject to manipulation before a jury.[468]

These disadvantages are unnecessary in view of the existence of intentional torts that cover much of the same ground. These established torts have been shaped by careful development to avoid precisely the harm that would be done by the blunderbuss negligent infliction theory. For example, Sandra Jameson could have submitted to her jury a claim based upon intentional infliction of emotional distress and recovered upon findings of intent and outrageousness.[469] She could have submitted a common law invasion of privacy claim and recovered upon a finding of intent to intrude.[470] By recovering upon those claims, she might fear that she conceivably could lose the deep pocket of the homeowner's insurer.[471] But after all, if the insurance was not written to cover the risk, that result would be correct.[472]

By the same token, the negligent-infliction tort would swallow its intentional-infliction counterpart if it were recognized as a general-purpose theory. No plaintiff should wish to plead her case so as to require proof of "intent" as well as "outrageousness," if mere "negligence" or "carelessness" would suffice. In fact, the negligent-infliction tort would obliterate the limits of virtually all of the intentional or quasi-intentional torts—from assault to slander, from malicious prosecution to false imprisonment.[473] Every such tort includes an ingredient of unreasonable conduct that can be recast as negligence, and virtually all intentional torts can cause emotional distress. The abolition of public policy limits on all of these torts would follow, even though these limits have evolved through long experience to protect sound societal values.[474]

In cases involving clear basis for duty, on the other hand, the negligent infliction tort is subject to proper limits. Thus, most jurisdictions have permitted recovery of pure emotional distress damages in cases in which duty can be based upon contractual relationships, independent torts, or properly-limited bystander claims.[475] The thesis of this Article is that recovery for negligent infliction of emotional distress should be limited to those situations.

For that outcome to prevail, the courts will need to resist the hydraulic pressures of hard cases based on lurid facts. They also will need to keep in sharp focus the availability of other avenues of relief for emotional distress. These

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466. *See supra* part II.D.
467. *Id.*
468. *Id.*
469. *See supra* note 3 and accompanying text.
470. *See supra* note 2 and accompanying text.
471. *See supra* notes 5–8 and accompanying text. Of course, these fears would be unfounded if John Overholtzer had only the intent required for the respective torts, as opposed to the specific intent to cause injury. *See supra* note 6 and authorities therein cited.
472. *But see supra* note 471.
473. *See supra* part I.B.
474. *Id.*
475. *See supra* parts I.C., IV.G.

avenues, after all, exist in most lurid cases—in the form of the intentional torts that were crafted for precisely that purpose.