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DISCRIMINATION AND OUTRAGE: THE MIGRATION FROM CIVIL RIGHTS TO TORT LAW

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ABSTRACT

It is not always appreciated that proven discrimination on the basis of race or sex may not amount to a tort and that even persistent racial or sexual harassment may not be enough to qualify for tort recovery. This Article explores the question of whether discriminatory and harassing conduct in the workplace is or should be considered outrageous conduct, actionable under the tort of intentional infliction of emotional distress. In recent years, courts have taken radically different approaches to the issue, from holding that such claims are preempted to treating the infliction tort as a reinforcement of civil rights principles. The dominant approach views tort claims as mere "gap fillers" that should come into play

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only in rare cases that do not fit comfortably under other recognized theories of redress.

To place the current approaches in perspective and determine the proper location for harassment claims, this Article analyzes the respective domains of torts and civil rights, discussing the prototypical harms and animating philosophies behind the two regimes. It provides a history of the intentional infliction tort—with particular emphasis on how early courts and commentators treated issues of gender, race, and sexuality—and explains a new scholarly turn toward universalism and protection through common law. The Article identifies major innovations in the development of the hostile environment claim to ascertain which basic principles could be transported to tort law. This Article concludes with a critique of the "gap filler" approach and an argument for adapting the limited migration approach of the new Restatement of Torts *to allow emerging norms from civil rights to influence the adjudication of tort claims.*

INTRODUCTION

What was once called the "new" tort of outrage or intentional infliction of emotional distress is now well enough established to consider it a permanent fixture of the common law of torts. Its main features have recently been reaffirmed in the latest draft of the new *Restatement of Torts*, including the key threshold requirement that the plaintiff prove that the defendant's behavior is "extreme and outrageous."[1] Despite its secure status, however, the tort still has a curiously ambivalent quality, representing at once tort law's most expansive protection of "pure" mental disturbance, yet combined with a considerable reluctance on the part of courts to intrude upon other areas of law or to interfere with what is perceived to be an exercise of the defendant's legal rights.[2]

This ambivalence is particularly pronounced in the employment context—in cases in which employees sue their employers, supervisors, and coworkers for intentional infliction of emotional distress based on harassing, oppressive, or discriminatory behavior. In many such cases, the employee also has a cause of action for a violation of civil rights, under the Title VII federal statutory scheme and parallel state statutory actions.[3] The most obvious question arising from the juxtaposition of these two claims is whether discriminatory and harassing conduct should also be considered outrageous conduct and actionable in tort. For the most part, however, the two types of claims have evolved separately, with courts engaging in a case-by-case screening of tort claims for indicia of outrageousness,[4] while developing elaborate frameworks of proof for civil rights claims of harassment[5] and

1. Section 45 in the latest draft of the new *Restatement* provides: "An actor who by extreme and outrageous conduct intentionally or recklessly causes severe emotional disturbance to another is subject to liability for that emotional disturbance, and if the emotional disturbance causes bodily harm, also for the bodily harm." RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 45 (Council Draft No. 6, 2006).

2. *See infra* notes 35-52 and accompanying text.

3. *See infra* notes 102-21 and accompanying text.

4. *See infra* notes 40-49 and accompanying text.

5. In hostile environment cases, harassment plaintiffs generally must prove that the conduct complained of was (1) unwelcome, (2) severe or pervasive, (3) based on sex or some other prohibited basis, and (4) afforded a basis for employer responsibility for the acts of

discrimination.[6] The particular focus of this Article is on the intersection of torts and civil rights law, the place where outrage and discrimination meet. It is part of a larger inquiry into the degree to which the concepts and values of civil rights law have migrated or can be expected to migrate into tort law.

From a practical perspective, the migration of legal concepts and values from civil rights to torts is important because it opens up an additional avenue for employees to seek redress for workplace injuries[7] and exposes employers in some cases to greater amounts of damages. The advantage of torts to plaintiffs is that it offers the prospect of uncapped compensatory and punitive damages, in contrast to federal Title VII law that imposes caps on such damages[8] and state civil rights laws with similar restrictions.[9] Indeed, a recent empirical study of sexual harassment cases conducted by Professor Catherine Sharkey concluded that including state law claims for harassment has had the effect of increasing

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supervisors or coworkers. *See* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 752-54, 763 (1998).

6. Under Title VII, plaintiffs are allowed to proceed under either a disparate treatment (intentional discrimination) or a disparate impact (unintentional discrimination) theory. The courts have developed a number of specialized frameworks to govern litigation under each theory. HAROLD S. LEWIS, JR. & ELIZABETH J. NORMAN, EMPLOYMENT DISCRIMINATION LAW AND PRACTICE 164-259 (2d ed. 2004).

7. Because the statute of limitations for filing tort claims for intentional infliction is somewhat longer than for statutory civil rights claims, in some cases, tort may be the only remedy available. The most common statutes of limitations for intentional infliction claims are two or three years. Jennifer Wriggins, *Domestic Violence Torts*, 75 S. CAL. L. REV. 121, 139 (2001). Title VII requires plaintiffs to file suit within either 180 or 300 days of the discriminatory act, depending on the state. 42 U.S.C. § 2000e-5(e) (2000).

8. Title VII places a total cap on the amount of compensatory and punitive damages at between $50,000 and $300,000, depending on the size of the employer. 42 U.S.C. § 1981a(b)(3) (2000).

9. This advantage, however, depends on whether the state has capped noneconomic damages in tort actions as well. Most states have imposed caps on noneconomic compensatory damages only in medical malpractice actions. Catherine M. Sharkey, *Unintended Consequences of Medical Malpractice Damages Caps*, 80 N.Y.U. L. REV. 391 app. at 496-500 (2005). An even greater number of states have caps on punitive damages in all tort cases. *See* Catherine M. Sharkey, *Dissecting Damages: An Empirical Exploration of Sexual Harassment Awards*, 3 J. EMPIRICAL LEGAL STUD. 1, 42 (2006) [hereinafter Sharkey, *Dissecting Damages*]. When caps exist for common law torts, they are generally more liberal than caps under Title VII. *Id.* Fewer than half the states authorize recovery of punitive damages under state civil rights acts. *See* JOHN F. BUCKLEY IV & RONALD M. GREEN, STATE BY STATE GUIDE TO HUMAN RESOURCES LAW §§ 2-102 to -112 tbls. 2.4-3 (2006).

awards for sexual harassment plaintiffs, despite limitations on damages under federal law.[10]

Beyond this immediate practical impact, however, the degree of migration is also a significant index of cultural transformation, a marker of whether new understandings of categories such as "sexual harassment" and "hostile environment" have become mainstream and have altered traditional thinking about the proper domain of tort law. As one leading commentator on the subject has stated, when a court declares that a recurring type of conduct is "outrageous[,] ... it is making an official determination of the moral seriousness of that conduct."[11]

That civil rights would migrate from its "home" in constitutional and antidiscrimination law into other areas of law, such as tort law, should not be surprising. The antidiscrimination principle—the principle that rejects legal expressions of racism, sexism, and similar ideologies[12]—is a widely shared cultural norm that we would expect to see reinforced in private law, particularly in the articulation of duties owed by persons who are in a position to inflict serious harm and to restrict the opportunities and potential of others. Additionally, in the last thirty years the harms of discrimination and harassment have been extensively catalogued and theorized, both in the criminal law debate over "hate" crimes[13] and through the development of various theories of discrimination under the U.S. Constitution,[14] Title VII,[15] and related statutes. What has emerged is a multifaceted injury—with both a personal and social dimension—that can more readily be transported and absorbed into preexisting bodies of law.

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10. Sharkey, *Dissecting Damages*, *supra* note 9, at 4-5.

11. 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, 53 (1982).

12. *See* ANDREW KOPPELMAN, ANTIDISCRIMINATION LAW AND SOCIAL EQUALITY 1 (1996).

13. *See generally* Lu-in Wang, *The Transforming Power of "Hate": Social Cognition Theory and the Harms of Bias-related Crime*, 71 S. CAL. L. REV. 47, 108-28 (1997) (discussing psychological and social consequences of hate crimes).

14. *See generally* R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803, 836-48 (2004) (cataloguing harms of racial stigma on groups and individuals).

15. *See generally* Kathryn Abrams, *The New Jurisprudence of Sexual Harassment*, 83 CORNELL L. REV. 1169, 1205-20 (1998) (discussing multiple harms of sexual harassment).

Predictably, however, given the strong countervailing social forces, the migration from civil rights to torts has also been vigorously resisted.[16] A variety of legal and policy arguments from preemption to renewed demands for legal recognition of "management prerogative" have been deployed to keep civil rights in its place and preserve tort law for more traditionally framed dignitary harms divorced from considerations of equality. The contemporary legal picture of the tort of intentional infliction of emotional distress reflects this struggle. There is considerable variation in treatment among the states, ranging from hefty migration in New Jersey[17] to a cutoff of tort claims in Iowa through preemption.[18] For some courts, the tort is treated as an independent cause of action that provides mutual reinforcement for civil rights and other important public policies.[19] For other courts, it is a mere "gap filler" that generally should come into play only when no other legal remedy is available.[20]

This Article traces the migration and influence of civil rights on the development of the tort of intentional infliction of emotional distress in the employment context. It builds upon a rich literature on the subject that has sprung up recently, calling for a variety of specific reforms, including changes in the courts' approach to outrageousness, more expansive common law and statutory protection against "bullying,"[21] and the development of a common law of the workplace.[22] Although I start from the premise that some migration is desirable and that the development of Title VII harassment law is generally positive, my goal in this Article is principally descriptive. My interest lies in looking more deeply into the domain of tort law to see just how much has changed in the courts' basic views on outrage and its connection to discrimination in the generation or so

16. *See infra* notes 53-84, 102-21 and accompanying text.

17. *See* Taylor v. Metzer, 706 A.2d 685, 700 (N.J. 1998) (allowing tort suit based on alleged use of a racial epithet to proceed).

18. *See* Greenland v. Fairtron Corp., 500 N.W.2d 36, 38 (Iowa 1993) (holding that civil rights statutes preempted tort claim based on sexual harassment).

19. *See infra* notes 87-94 and accompanying text.

20. *See infra* notes 53-74, 81-84 and accompanying text.

21. *See* David C. Yamada, *The Phenomenon of "Workplace Bullying" and the Need for Status-blind Hostile Work Environment Protection*, 88 GEO. L.J. 475, 477-78 (2000).

22. *See* William R. Corbett, *The Need for a Revitalized Common Law of the Workplace*, 69 BROOK. L. REV. 91, 96 (2003).

that has elapsed since the new tort became established and civil rights law matured into its current state.

Since its inception, the tort of intentional infliction of emotional distress has been knee-deep in issues relating to gender, sexuality, and personal morality.[23] This Article describes how the tort was created in part to provide protection for vulnerable persons—often women—when older causes of action, notably assault and slander, failed to capture and respond to their injuries.[24] It chronicles the ebb and flow of feminist criticism of, and attraction to, the tort, reflecting the perennial struggle to find the right "location" for claims of sexual exploitation and demands for recognition of sexual autonomy.[25] The imprint of race is less visible in the history of the tort. In its early days, the tort principally provided a vehicle for protecting white racial privilege by allowing claims of white plaintiffs who alleged injury arising from contacts with blacks that they found objectionable.[26] After the civil rights era, the tort was deployed successfully by black plaintiffs in cases involving racial harassment[27] or threats of racial violence.[28]

These investigations into the treatment of gender and race through the intentional infliction tort suggest that the migration of civil rights into tort law has so far been limited and erratic, although aggressive attempts to abruptly halt the migration have also faltered. Although the courts have controlled the migration process, they have not often reflected on the normative significance of holding that discriminatory conduct does or does not amount to a tort. Whether an equality gloss can be placed on the tort concept of outrageousness is the critical open question at the heart of many of the recent proposals for change. The Article concludes with my reflections and hopes for this process.

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23. *See infra* Parts I, III.

24. *See infra* notes 195-205 and accompanying text.

25. *See infra* Part IV.

26. *See* O'Connor v. Dallas Cotton Exch., 153 S.W.2d 266, 267-68 (Tex. Civ. App. 1941) (white female plaintiff recovered for being compelled to ride with blacks on an elevator); Gulf, C. & S.F. Ry. Co. v. Luther, 90 S.W. 44, 46-48 (Tex. Civ. App. 1905) (white female plaintiff recovered for being insulted by a black female attendant).

27. *See* Alcorn v. Anbro Eng'g, Inc., 468 P.2d 216, 217-19 (Cal. 1970).

28. Ruiz v. Bertolotti, 236 N.Y.S.2d 854, 855-56 (N.Y. Sup. Ct. 1962) (Puerto Rican plaintiffs threatened with bodily harm if they moved into a neighborhood).

Part I of this Article sets the framework for discussing the intersection of civil rights and torts and, more specifically, the migration of civil rights concepts and values into the intentional infliction tort in employment cases. It explains how most courts handle intentional infliction claims centered on workplace harassment and discrimination, focusing on the high bar often set for meeting the standard of outrageousness and the still-raging debate over whether tort claims should be preempted, leaving only civil rights or workers' compensation remedies. The range of judicial responses is discussed, culminating in an analysis of the two competing visions of the tort as either a "mutual reinforcement" of civil rights or a "gap filler" that offers a remedy only when there is no alternative basis for suit.

To understand why courts might disagree about the proper location for cases alleging injuries from employment discrimination, Part II examines the respective domains of tort and civil rights, discussing the prototypical harms and animating philosophies behind the two legal regimes. Part II concludes with a catalogue of the various harms of discrimination to explain why it has not been easy to position discrimination claims—principally those involving sexual and other forms of workplace harassment—solely on one side of the divide.

Part III looks into the history of the intentional infliction tort prior to the development of modern civil rights law, that is, before the 1970s. The history highlights cases implicating issues of gender, race, or social inequality, and develops a picture of the kinds of behavior courts were most likely to regard as outrageous. In this formative period, the intentional infliction tort was viewed as filling an important gap or deficiency *within* tort law to provide a remedy for serious nonphysical injury caused by behavior that seemed unquestionably immoral to judges.[29] The history discusses how the highly influential academic commentary of the period, even more so than the courts, was careful to protect male sexual initiative from the reach of the new tort, as typified by Professor Magruder's

29. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 45 cmt. a (Council Draft No. 6, 2006) ("The outrage tort originated as a catchall to permit recovery when an existing tort claim was unavailable but in the narrow instances when an actor's conduct exceeded all permissible bounds of a civilized society.").

notorious oft-quoted assertion "that there is no harm in asking."[30] It analyzes early claims implicating race to chart how courts were inclined to protect white racial pride and privilege, while refusing to regard the discriminatory treatment of African Americans as outrageous.

Part IV explores the nature of reform of tort law after civil rights. It first analyzes feminist arguments for relocating claims of sexualized injury within the framework of civil rights through new definitions of sex-based discrimination and a status-based approach to legal remedies.[31] As an example of a tort-based, universalist approach to discriminatory harm, Part IV provides a retrospective view of the now-classic article by Professor Regina Austin imagining an equality-centered intentional infliction tort that would reach indignities caused by subordination in the workplace.[32]

Part IV then canvasses developments in civil rights law most relevant to the intentional infliction claim. In particular, it evaluates the Title VII concepts of "sexual harassment" and "hostile environment" to see just which innovations might be exported to tort law. It explores the doctrinal limitations of Title VII law as it has matured in the last two decades that have prompted some scholars to press for a migration of discrimination claims to tort law.[33] It discusses tort law's potential to reach forms of bias—including same-sex harassment, multidimensional discrimination, and bias directed at persons because of how they perform their identity—not covered by current civil rights law. The Part ends with a sober reminder of the limited capacity of law—whether

30. Calvert Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033, 1055 (1936).

31. The most prominent case for relocating claims for sexualized injuries out of tort law and into civil rights law was made by Catharine A. MacKinnon in her influential book, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION 172-73 (1979).

32. Regina Austin, *Employer Abuse, Worker Resistance, and the Tort of Intentional Infliction of Emotional Distress*, 41 STAN. L. REV. 1, 5 (1988).

33. *See* Brady Coleman, *Pragmatism's Insult: The Growing Interdisciplinary Challenge to American Harassment Jurisprudence*, 8 EMP. RTS. & EMP. POL'Y J. 239, 251-52 (2004); Rosa Ehrenreich, *Dignity and Discrimination: Toward a Pluralistic Understanding of Workplace Harassment*, 88 GEO. L.J. 1, 5 (1999); Catherine L. Fisk, *Humiliation at Work*, 8 WM. & MARY J. WOMEN & L. 73, 83-84 (2001); Debra Parkes, *Targeting Workplace Harassment in Quebec: On Exporting a New Legislative Agenda*, 8 EMP. RTS. & EMP. POL'Y J. 423, 432-33 (2004).

torts or civil rights—to produce changes "on the ground" and to transform the meaning of behavior in everyday life.

The Article concludes with my reflections on the migration process. Part V discusses the limited migration position taken by the *Third Restatement of Torts* and what it might mean for the prospects for migration in the future. It offers a critique of the dominant "gap filler" approach to the infliction tort and gives suggestions for reshaping the tort concept of "outrage" by borrowing innovations from civil rights law. I speculate whether the infliction tort can be refashioned to capture the equality dimension of dignity and dignitary harms and bring civil rights into the mainstream of private law.

I. THE INTERSECTION OF TORTS AND CIVIL RIGHTS[34]

The connection between tort law—the premier system designed to protect against civil wrongs—and civil rights is an under-theorized topic that only sporadically attracts the attention of scholars.[35] Nonlawyers may be surprised to learn that proven discrimination on the basis of race or sex does not always amount to a tort and that even persistent racial or sexual harassment may not be enough to qualify for a tort recovery. Conversely, law students often presume incorrectly that the domains of tort and civil rights are mutually exclusive, in line with the discrete categories assigned to those subjects in the law school curriculum. And because of the complexity of the current state of the law, even experts in the two areas cannot adequately capture the connection in a few simple propositions or statements about respective scope.

Part of the disconnect between torts and civil rights stems from the fact that the older intentional tort causes of action—particularly

34. Part I of this Article appeared in an earlier form as an essay in Martha Chamallas, *Shifting Sands of Federalism: Civil Rights and Tort Claims in the Employment Context*, 41 WAKE FOREST L. REV. 697, 702-12 (2006).

35. Regarding the controversy over hate speech, see, for example, JUDITH BUTLER, EXCITABLE SPEECH: A POLITICS OF THE PERFORMATIVE 52-54 (1997); Richard Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-calling*, 17 HARV. C.R.-C.L. L. REV. 133, 134 (1982); Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 435-37; and Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2321 (1989).

battery, assault, and defamation—were designed to address harms far removed from the injuries caused by discrimination and are ill-suited to fit the prototypical bias injury. Thus, for example, although some forms of sexual harassment include offensive touchings and are actionable in tort as batteries,[36] many other cases of harassment involve either no physical contact or physical contacts that the defendant asserts were not intentionally offensive or harmful.[37] Similarly, although the tort of assault protects against conduct that interferes with a plaintiff's mental equilibrium, it requires proof of apprehension of imminent physical contact[38] and, as a practical matter, is limited to physical forms of harassment. Moreover, for bias-centered claims caused by a defendant's negligence, strict limitations have often been placed on recovery for pure emotional or economic harms, again making it difficult to reach discriminatory conduct that does not produce a physical injury.[39]

For quite some time, the best candidate for situating a tort claim for discriminatory behavior has been the tort of intentional infliction of emotional distress. The influential section 46 of the *Second Restatement of Torts* required only four elements of proof to establish a claim: (1) intent or recklessness, (2) extreme and outrageous conduct, (3) causation, and (4) severe emotional distress.[40] The latest version of the new *Restatement* reiterates the four required elements and reaffirms that a finding of "outrageousness" is the centerpiece of the intentional infliction claim.[41] The commentary to the latest draft of the *Restatement* acknowledges

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36. *See, e.g.*, Burns v. Mayer, 175 F. Supp. 2d 1259, 1269-70 (D. Nev. 2001) (finding that snapping the plaintiff's bra strap, putting hands on her waist, and hitting her buttocks constituted harassment and battery); Kanzler v. Renner, 937 P.2d 1337, 1343 (Wyo. 1997) (considering physical touchings as part of pattern of harassing conduct).

37. *See, e.g.*, Harris v. Forklift Sys., Inc., 510 U.S. 17, 19-20 (1993) (noting that the plaintiff's supervisor had repeatedly disparaged women and made unwelcome, sexually suggestive comments).

38. *See* RESTATEMENT (SECOND) OF TORTS § 21(1) (1965).

39. For example, many states that permit recovery of negligent infliction of emotional distress still require plaintiffs to prove that the distress resulted in physical injury or produced physical manifestations. *See* DAN B. DOBBS, THE LAW OF TORTS § 308, at 836-39 (2000).

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

41. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 45 (Council Draft No. 6, 2006).

that a finding of outrageousness is "as much a normative judgment as it is a finding of historical fact"[42] and accepts that proof of "outrageousness" is the most potent element in screening cases and does "most of the important normative work."[43]

Tellingly, the *Restatements* have never attempted to provide a definition of "outrageous" conduct. The concept that emerges from the case law is extremely fluid and invariably responds to changing cultural sensibilities.[44] All agree that liability is reserved only for the worst cases. The boilerplate language from the *Restatement* commentary often recited by the courts is that, to qualify as outrageous, the conduct in question must be such as "to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community."[45] The most concrete guidance offered by the *Restatement* is that courts have been more willing to declare conduct outrageous if it exploits an existing power disparity between the parties, for example, in cases in which the defendant abuses the authority of his position or knowingly takes advantage of a vulnerable or powerless plaintiff.[46]

At first blush, the intentional infliction tort might seem well suited to capture harassment and other discriminatory harms because it dispenses with the need to prove physical harm or fear of physical harm and goes beyond cases of malice or ill will, covering situations in which defendants either desire or know to a substantial certainty that distress will result from their actions—the rather broad "intent" standard in tort law[47]—or disregard the high probability that such distress will occur—the

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42. *Id.* § 45 cmt. f.

43. *Id.* § 45 reporter's note cmt. c.

44. *See infra* notes 189-287 and accompanying text.

45. RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965). The commentary also added this oft-cited unhelpful piece of advice to identify outrageous conduct: "Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous!'" *Id.*

46. *See* RESTATEMENT (SECOND) OF TORTS § 46 cmts. e, f. Professor Dobbs has identified four "markers" of outrage: (1) abusing a position of dominance, (2) taking advantage of a plaintiff known to be vulnerable, (3) repeating offensive acts in situations in which plaintiff cannot avoid harm, and (4) committing or threatening violence or serious economic harm to a person or property of special interest to the plaintiff. DOBBS, *supra* note 39, § 304, at 827.

47. *See* RESTATEMENT (SECOND) OF TORTS § 8A (providing that "intent" means "that the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it").

"recklessness" standard.[48] Equally as important, the intentional infliction tort seems tailor made to respond to an abusive course of conduct over a period of time, rather than simply to discrete tortious acts.[49] In this sense, it looks like a tort uniquely capable of comprehending the kind of pervasive and repeated harassment that characterizes a hostile workplace environment.

Despite these features, however, in most jurisdictions proof of discriminatory workplace harassment—the kind of employment discrimination that looks most like a tort—is not sufficient to guarantee tort recovery. For the most part, courts do not equate discrimination with outrageous conduct. With the notable exception of California,[50] courts have refused to classify discrimination as per se outrageous and have even hesitated to declare the "severe" or "pervasive" harassment required to prove a Title VII claim of hostile environment sufficient to satisfy the threshold tort requirement of "extreme and outrageous" conduct.[51] The bar of outrageousness is occasionally set so high that even the plaintiff who succeeds in proving a constructive discharge, with evidence that working conditions were so "intolerable" that a reasonable person would have quit the job, may not be confident of recovery in tort.[52]

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48. *See id.* § 500 (providing that "reckless" conduct involves "knowing or having reason to know of facts" that "would lead a reasonable man to realize" that his conduct created a "risk ... substantially greater than that which is necessary to make his conduct negligent").

49. *See* Jennifer B. Wriggins, *Domestic Violence in the First-year Torts Curriculum*, 54 J. LEGAL EDUC. 511, 518-19 (2004) (making a similar argument with respect to domestic violence and the intentional infliction tort).

50. Intermediate appellate courts in California have taken the position that harassment that violates the state's antidiscrimination laws is per se outrageous and gives rise to a tort action for intentional infliction of emotional distress. *See* Fisher v. San Pedro Peninsula Hosp., 262 Cal. Rptr. 842, 858 (Cal. Ct. App. 1989) ("Given an employee's fundamental, civil right to a discrimination free work environment, by its very nature, sexual harassment in the work place is outrageous conduct as it exceeds all bounds of decency usually tolerated by a decent society." (citations omitted)); *see also* Toran v. Jones, No. HO25568, 2003 Cal. App. LEXIS 4887, at **14-18 (Cal. Ct. App. May 19, 2003) (holding that discrimination based on disability and denial of medical leave is per se outrageous); Kovatch v. Cal. Cas. Mgmt. Co., 77 Cal. Rptr. 2d 217, 230-31 (Cal. Ct. App. 1998) (holding that harassment based on sexual orientation is per se outrageous).

51. *See, e.g.*, Hoy v. Angelone, 720 A.2d 745, 748, 753-55 (Pa. 1998) (holding that a sexually hostile work environment is not outrageous).

52. *See* Wilson v. Monarch Paper Co., 939 F.2d 1138, 1143 (5th Cir. 1991) (providing dicta in an age discrimination case indicating that constructive discharge should be regarded as "outrageous" conduct only in "the *most* unusual cases").

A fairly typical case is *Pucci v. USAIR*,[53] a sexual harassment case decided by a federal district court in Florida after removal from state court on diversity grounds. Valerie Pucci was the only woman employed on her shift at the airline's maintenance department in Orlando.[54] At an initial meeting with her supervisor, Pucci was warned that she would be exposed to profanity because "USAIR's employees did not know how to act around female coworkers."[55] For approximately ten months, she was subjected to a persistent campaign of harassment against her by her male coworkers.[56] Much of the harassment consisted of repeatedly placing pornographic pictures on and inside her desk in her absence, even though her work area was just outside the supervisor's office.[57] The court's opinion recites five such separate incidents.[58] After each incident, Pucci complained to a supervisor, but nothing was ever done to discover or punish those responsible.[59] Instead, Pucci was told by USAIR's manager that she was to blame and that she had been warned to expect "industrial language" when working with a group of men.[60] At times the harassment also took a more personal turn. For example, Pucci found a note on the attendance board stating that a coworker was "Sick—Due to lack of blow jobs from Valerie" and a homemade card placed on her desk stating that "Val's Weight Soars to 200 Lbs!"[61] She recounted that she overheard one employee

53. 940 F. Supp. 305 (M.D. Fla. 1996). Courts in Arkansas, Kansas, Maryland, Michigan, New York, Ohio, Oklahoma, Pennsylvania, and Texas also apply a very strict standard which bars most intentional infliction claims in the employment context. *See* Hartliep v. McNeilab, Inc., 83 F.3d 767, 777 (6th Cir. 1996) (applying Michigan law); Greenwood v. Delphi Auto. Sys. Inc., 257 F. Supp. 2d 1047, 1073 (S.D. Ohio 2003); Arbabi v. Fred Meyers, Inc., 205 F. Supp. 2d 462, 466 (D. Md. 2002); Hollomon v. Keadle, 931 S.W.2d 413, 415 (Ark. 1996); Aaron v. Werne, 807 P.2d 161 (Kan. 1991) (unpublished table decision); McIntyre v. Manhattan Ford, Lincoln-Mercury, Inc., 682 N.Y.S.2d 167, 169 (N.Y. App. Div. 1998); Miner v. Mid-Am. Door Co., 68 P.3d 212, 223 (Okla. Civ. App. 2002); *Hoy*, 720 A.2d at 754; Hoffmann-La Roche Inc. v. Zeltwanger, 144 S.W.3d 438, 447 (Tex. 2004).

54. *Pucci*, 940 F. Supp. at 307.

55. *Id.*

56. *Id.* at 307-08.

57. *Id.*

58. *Id.*

59. *See id.*

60. *Id.* at 308.

61. *Id.* at 307-08.

telling another that he had been sent in to see her and jokingly said, "What are we suppose [sic] to do? Stick her then lick her?"[62]

Pucci documented that her harassment caused her to suffer in and outside of work.[63] To cut down on the barrage of pornography, she was moved into a secured office, which was kept locked when not in use and which Pucci described as "a cage, and not an office."[64] The stress reached a point that Pucci sought treatment from a physician, who prescribed two drugs for her anxiety and depression and finally admitted her on an outpatient basis for all-day treatment at a hospital for two consecutive weeks.[65] Because of the numerous incidents, Pucci even feared that her coworkers would attack or stalk her, and claimed that her fear caused her to fall down the stairs one day when leaving work.[66] Ultimately, her request to transfer out of Orlando was granted, a move she claimed proved to be disruptive for her marriage and the lives of her three children.[67]

In many respects, *Pucci* is a classic case of hostile environment sexual harassment. There was no dispute that she was targeted for harassment because she was the only woman in a male-dominated job. Her harassment was persistent, sexualized, and calculated to make her feel ostracized and humiliated. When she complained to management, the problem was not corrected, but in fact was made worse by the belief that harassment was something that she should endure as part of the job.[68] Lastly, the harassment caused her a variety of damages, including medical bills, mental distress, and employment-related expenses.[69] Pucci's complaint summed up her case with allegations "that USAIR created an extraordinarily hostile, sexually-poisoned work atmosphere ... and that USAIR purposely exposed [her] to vile acts of depravity, rather than take simple and cost-effective measures to stop the harassment."[70]

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62. *Id.*
63. *Id.* at 308.
64. *Id.* at 307.
65. *Id.* at 308.
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.* at 307.

It is telling that Pucci's complaint of intentional infliction of emotional distress did not even survive a motion to dismiss.[71] For the Florida trial court, the distinction between discriminatory harassment and outrageous conduct was so great that it had little difficulty reciting the boilerplate limitations on recovery for intentional infliction and moving on to the next issue in the case.[72] Quoting commentary to the *Second Restatement of Torts*, the court simply concluded that, although the conduct directed at Pucci was "not civilized behavior," her harassment was not "so extreme in degree, as to go beyond all possible bounds of decency and to be regarded as atrocious, and utterly intolerable in a civilized community."[73] It instead presumably fell into the nonactionable realm of "mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities."[74]

It should be pointed out that the court never reached the issue of vicarious liability of USAIR for the acts of the harassers in this case.[75] Instead, by knocking out the case for failure to prove "outrageous" conduct, the court implied that Pucci would have lost the case even if she had known the identity of her harassers and sued them individually.[76] As a practical matter, this point is important when analyzing the intersection of tort and civil rights because individual supervisors and coworkers generally may not be sued under Title VII[77] or under many of the parallel state civil

71. *See id.* at 309.

72. *Id.*

73. *Id.* (quoting Metro. Life Ins. Co. v. McCarson, 467 So. 2d 277, 278-79 (Fla. 1985)).

74. *Id.* (quoting Scheller v. Am. Med. Int'l, Inc., 502 So. 2d 1268, 1271 (Fla. App. 1987)).

75. Whether an employer will likely be held vicariously liable for harassment by a supervisor in a tort action for intentional infliction also depends on the jurisdiction. Some courts apply a liberal standard and impose liability if the alleged acts took place on the job and resulted from or were an outgrowth of employment duties. *See* Harris v. Pameco Corp., 12 P.3d 524, 530 (Or. Ct. App. 2000). Other courts apply a restrictive standard, refusing to impose vicarious liability if the supervisor was acting for purely personal reasons disconnected from the employer's business. *See* Travis Pruitt & Assocs., P.C. v. Hooper, 625 S.E.2d 445, 448 (Ga. Ct. App. 2005). The liberal standard focuses on the overall context of the supervisor's action, whereas the restrictive standard places emphasis on the supervisor's motivation.

76. *See Pucci*, 940 F. Supp. at 309.

77. *See, e.g.*, Lissau v. S. Food Serv., Inc., 159 F.3d 177, 180-81 (4th Cir. 1998) (holding that individual employees are not liable under Title VII); Huckabay v. Moore, 142 F.3d 233, 241 (5th Cir. 1998) (accord); Cross v. Alabama, 49 F.3d 1490, 1504 (11th Cir. 1995) (accord); Tomka v. Seiler Corp., 66 F.3d 1295, 1313 (2d Cir. 1995) (accord); Miller v. Maxwell's Int'l

rights acts.[78] However, no such restriction exists under tort law, which permits suits against both individual actors and employers.[79] Thus, the tort claim is often the only way to pursue a claim against the harasser individually, and plaintiffs, if defeated for lack of proof of outrageousness, may have no other legal recourse against individual harassers.[80]

As *Pucci* illustrates, many courts need something more than discrimination or even persistent harassment to establish outrageousness in the employment context. To date, however, most courts have been unable to articulate precisely what constitutes that extra element.[81] For example, the Pennsylvania Supreme Court rejected a lower court's view that a showing of retaliation, in

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Inc., 991 F.2d 583, 587-88 (9th Cir. 1993) (accord). *But see* Wyss v. Gen. Dynamics Corp., 24 F. Supp. 2d 202, 207, 209-10 (D.R.I. 1998) (holding an individual supervisor liable under Title VII and the Rhode Island fair employment statute).

78. *See, e.g.*, Reno v. Baird, 957 P.2d 1333, 1343-47 (Cal. 1998) (holding that a supervisor may not be sued individually for discrimination under the state fair employment and housing act).

79. *See, e.g.*, White v. Monsanto Co., 585 So.2d 1205, 1207 (La. 1991) (involving a claim against both employer and supervisor).

80. The choice of defendant may also affect the all-important issue of whether liability insurance will be available to cover the claim. Employers have increasingly purchased Employment Practices Liability Insurance (EPLI) to cover claims of discrimination, sexual harassment, or wrongful discharge. These policies are being expanded to cover claims of intentional infliction of emotional distress. *See* Nancy H. Van der Veer, Note and Commentary, *Employment Practices Liability Insurance: Are EPLI Policies a License To Discriminate? Or Are They a Necessary Reality Check for Employers?*, 12 CONN. INS. L.J. 173, 190 (2005). If the employer is held vicariously liable for such conduct, most EPLI policies will generally cover the claim, if permitted under state law. James B. Dolan, Jr., *The Growing Significance of Employment Practices Liability Insurance*, 34 BRIEF 30, 34 (2005). Only some policies, however, cover individual supervisors who are sued for harassment. There is greater resistance to allowing such intentional wrongdoers to insure against personal liability. One observer notes that because EPLI policies will generally cover defense costs, even if the insurer does not have to indemnify the policy holder, "[u]nfortunately for many employees subjected to discrimination on the job, the result of EPLI coverage will be that claims will be defended more vigorously without providing a pool of funds for paying those claims that succeed." Jan W. Henkel, *Discrimination by Supervisors: Personal Liability Under Federal Employment Discrimination Statutes*, 49 FLA. L. REV. 767, 797 n.184 (1997).

81. Some courts, while acknowledging that each claim must be decided on its own merits, have listed aggravating factors that have generally been present in "outrageous" cases of harassment. *See* Guthrie v. Conroy, 567 S.E.2d 403, 409 (N.C. Ct. App. 2002) (listing as indicia of outrageousness "an unfair power relationship between defendant and plaintiff; explicitly obscene or 'X-rated' language; sexual advances towards plaintiff; statements expressing desire to engage in sexual relations with the plaintiff, or; defendant either touching plaintiff's private areas or touching any part of the plaintiff's body with his private parts").

addition to proof of discrimination or harassment, was a prerequisite to establishing the outrageousness of an employer's conduct.[82] Although the Pennsylvania Supreme Court was willing to impose liability "for only the most clearly desperate and ultra extreme conduct" and thus took an extremely narrow view of the intentional infliction tort, it still clung to a holistic approach, judging each case on its particular facts.[83] Not surprisingly, decisions in this area often lack analysis: as in *Pucci*, courts tend to recite the facts of the instant case, indicate that recovery was denied in other cases of bad conduct, and rule that the conduct in the instant case does not meet the demanding standard for outrageousness.[84]

Nor is the employment context clearly what is driving the courts' narrow view of outrageousness. Although opinions will sometimes state that courts are "particularly hesitant" to allow an infliction claim within an employment setting, they rarely explain why this is the case and cite to non-employment precedents as well as general principles of law to justify their decisions.[85] The courts' silence on this score is confusing, given that the traditional reluctance to interfere with management prerogative by altering the longstanding rule of "at will" employment would not seem to be particularly relevant in cases of sexual or racial harassment. Rather, these cases typically are "working conditions" cases not premised on unlawful discharges. In any event, employers clearly no longer have the right or prerogative to discriminate on grounds such as race or sex.[86] What emerges from these cases—particularly if the courts are to be taken at their word—is the view that harassment and discrimination are not intolerable conduct under prevailing cultural standards, or at least are not within the proper domain of tort law.

A very different portrait of the intersection of torts and civil rights comes from a minority of jurisdictions that allow intentional

82. *See* Hoy v. Angelone, 720 A.2d 745, 754 (Pa. 1998).

83. *Id.*

84. *See, e.g.*, Jackson v. Blue Dolphin Commc'ns of N.C., L.L.C., 226 F. Supp. 2d 785, 793-94 (W.D.N.C. 2002); Pucci v. USAIR, 940 F. Supp. 305, 307-09 (M.D. Fla. 1996).

85. *See, e.g.*, *Jackson*, 226 F. Supp. 2d at 794; Hollomon v. Keadle, 931 S.W.2d 413, 417 (Ark. 1996) ("[W]e will take a strict view in recognizing a claim for the tort of outrage in employment relationship situations.").

86. *See* 42 U.S.C. § 2000e-2(a) (2000) (prohibiting employment discrimination against any individual because of race or sex).

infliction claims to proceed in cases not markedly different from the *Pucci* sexual harassment case. A good example is *Coates v. Wal-Mart Stores, Inc.*,[87] a sexual harassment case decided by the Supreme Court of New Mexico in 1999. The harasser in that case was a supervisor at Sam's Club who persistently targeted women employees, including the two plaintiffs in the case, while management stood by and did nothing.[88] In addition to complaining about the supervisor's obscene gestures and "lewd and vulgar suggestions," the plaintiffs in *Coates* also pointed to two incidents of physical harassment in which the supervisor grabbed the breasts of one of the plaintiffs and pulled open the blouse of another woman employee.[89] Wal-Mart managers observed some of this behavior, yet did not reprimand or discipline the offending supervisor and at one point told one of the plaintiffs that she could quit if she did not like their decisions.[90]

The state trial court allowed the intentional infliction claim and another state law claim to proceed against Wal-Mart.[91] The jury was apparently of the view that defendant's conduct was indeed outrageous, as evidenced by the size of the verdict for each of the two plaintiffs, particularly the portion for punitive damages—one plaintiff received $1.2 million, the other, $555,000.[92] In marked contrast to the Florida court, the New Mexico Supreme Court upheld the judgment, using the same *Restatement* framework of liability for intentional infliction of emotional distress.[93] Rather than drawing a contrast between discrimination and outrageous

87. 976 P.2d 999 (N.M. 1999). Courts in Alaska, the District of Columbia, New Jersey, North Dakota, Oregon, Tennessee, Utah, Washington, and Wyoming have also taken a more liberal approach to the intentional infliction tort in the employment context. *See* Pollard v. E.I. DuPont de Nemours, Inc., 412 F.3d 657, 664-65 (6th Cir. 2005) (applying Tennessee law); Wal-Mart, Inc. v. Stewart, 990 P.2d 626, 634-36 (Alaska 1999) (race discrimination); Norcon, Inc. v. Kotowski, 971 P.2d 158, 172-73 (Alaska 1999); Estate of Underwood v. Nat'l Credit Union Admin., 665 A.2d 621, 640 (D.C. 1995); Taylor v. Metzger, 706 A.2d 685, 699-700 (N.J. 1998); Swenson v. N. Crop Ins., Inc., 498 N.W.2d 174, 181-86 (N.D. 1993); Harris v. Pameco Corp., 12 P.3d 524, 529 (Or. Ct. App. 2000); Retherford v. AT & T Commc'ns of Mountain States, Inc., 844 P.2d 949, 977-78 (Utah 1992); Robel v. Roundup Corp., 59 P.3d 611, 620 (Wash. 2002); Kanzler v. Renner, 937 P.2d 1337, 1341-44 (Wyo. 1997).

88. *Coates*, 976 P.2d at 1002-03.

89. *Id.* at 1002.

90. *Id.* at 1002-03.

91. *Id.* at 1003.

92. *Id.*

93. *Id.* at 1009.

conduct, however, the New Mexico Supreme Court stressed the compatibility between civil rights and tort law, declaring that "[a]llowing a worker subjected to sexual harassment to seek civil damages 'not only vindicates the state's interest in enforcing public policy but also adequately redresses the harm to the individual naturally flowing from the violation of public policy.'"[94]

There are ways, of course, to distinguish *Pucci* and *Coates*. The supervisor in *Coates* committed a battery against one of the plaintiffs and physically assaulted another woman employee, while the harassment in *Pucci* was solely of the nonphysical variety, that is, humiliating comments and the use of pornography. Nevertheless, the New Mexico Supreme Court in *Coates* also upheld the jury's verdict in favor of one of the woman employees who did not suffer any physical harassment and stressed that all incidents should be "viewed cumulatively" under the intentional infliction tort.[95] Significantly, the plaintiff in *Coates* who was physically harassed did not assert a claim for battery and did not otherwise emphasize the physical aspect of her harassment. While undoubtedly each incident in *Coates*, including the two incidents of physical harassment, was important in proving the persistent and serious nature of the harassment, it was also very important that the harassment lasted for approximately a year and that Wal-Mart's management was callously indifferent to the plaintiffs' plight.[96] In these last two respects, *Coates* and *Pucci* are quite similar.[97] Finally, it is not irrational to regard the harassment in *Pucci* as even more damaging than that endured by the Wal-Mart employees in *Coates*: at least the women at Wal-Mart were able to band together to resist their harassment, while Pucci's status as the only woman on her shift increased her isolation and arguably worsened her predicament.[98]

As I read the cases, the widely disparate results in *Coates* and *Pucci* cannot be explained simply by a judgment that the harass-

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94. *Id.* at 1005 (citing Michaels v. Anglo Am. Auto Auctions, Inc., 869 P.2d 279, 281 (N.M. 1994)).

95. *Id.* at 1009-10.

96. *See id.* at 1002-03.

97. *See* Pucci v. USAIR, 940 F. Supp. 305, 307-08 (M.D. Fla. 1996); *Coates*, 976 P.2d at 1002-03.

98. *See Pucci*, 940 F. Supp. at 307-08; *Coates*, 976 P.2d at 1002-03.

ment in *Coates* was worse than that in *Pucci*. Instead, the courts in the two cases apparently used two different approaches to the intentional infliction tort, although each purported to adhere to the *Restatement* elements. The Florida court approached the intentional infliction tort as a gap filler to be used sparingly in the employment context, presumably only in exceptional cases of harassment or discrimination that stand apart from the typical civil rights case.[99] In contrast, the New Mexico court approached the infliction tort on more equal grounds: it viewed the claim as reinforcement of the state's public policy against discrimination and harassment and was willing to shape the tort concept of outrageousness along the lines of antidiscrimination law.[100] In other words, migration from civil rights to torts was encouraged in New Mexico and strongly discouraged in Florida.

The debate over the role of the intentional infliction tort has also been played out even more explicitly in cases raising preemption challenges. The essence of a claim of preemption, after all, is that no overlap can exist between the two domains of law. Thus, proponents of preemption assert that the intentional infliction tort may only fill gaps when it comes to civil rights claims, whereas opponents of preemption leave more room for overlap and migration from civil rights. The two general approaches described above resurface in the preemption cases dealing with harassment claims in the workplace, although resolution of preemption challenges often requires courts to grapple with issues of statutory interpretation beyond simply deciding the proper role of the intentional infliction tort.[101] Those courts denying preemption stress the state's strong public policy against discrimination and encourage its reinforcement through tort law, while those upholding preemption strive to make sure that tort law does not duplicate or encroach upon other legal domains.

Title VII itself contains an express provision indicating that it does not preempt state law claims.[102] As a result, in workplace torts, preemption challenges have generally been made on one of

99. *See Pucci*, 940 F. Supp. at 309.

100. *See Coates*, 976 P.2d at 1005, 1009-10.

101. *See infra* notes 105-23 and accompanying text.

102. *See* 42 U.S.C. § 2000e-7 (2000).

two bases:[103] either the tort claim is preempted by the state civil rights statute[104] or the tort claim is barred by the exclusivity provision of the state workers' compensation statute.[105] The former claim maps quite closely onto the view that the infliction tort is only a gap filler and should disappear whenever a state statutory claim for civil rights violation is available. In fact, it is often difficult to tell whether this ground for precluding the intentional infliction claim lies in the gap filling nature of the tort itself or is based on preemption, that is, the determination that the state legislature intended the civil rights remedy to be exclusive. For example, the Texas Supreme Court recently held that the claim for intentional infliction could not be brought "[i]f the gravamen of a plaintiff's complaint is the type of wrong that the statutory [civil rights] remedy was meant to cover."[106] The holding of the Texas Supreme Court sounds like the claim is preempted by the civil rights statute and indeed subsequent courts have used the language of preemption in applying the Texas rule.[107] However, a concurring justice on the Texas Supreme Court insisted that the rule was "not based on the exclusive or preemptive nature of another remedy but on the nature of the [intentional infliction] tort itself."[108] The subtle difference here is that a preemption analysis focuses more on the legislature's intent when passing the civil rights act and on the actual existence of an alternative statutory remedy, whereas, in the gap-filling view of the intentional infliction tort, the court disallows the tort claim because of its own view that the intentional infliction tort should be restricted to unusual cases that do not fit comfortably under other recognized theories of redress.

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103. In organized workplaces, courts may also have to determine whether a tort claim is preempted by section 301(a) of the Labor Management Relations (Taft-Hartley) Act. *See, e.g.*, Chung v. McCabe Hamilton & Renny Co., 128 P.3d 833, 846-47 (Haw. 2006) (holding that a tort claim was not preempted because it arose from the particularly abusive manner in which discrimination was accomplished); Retherford v. AT & T Commc'ns of Mountain States, Inc., 844 P.2d 949, 971-72 (Utah 1992) (holding that a tort claim is preempted unless it "is purely personal and does not implicate the exercise of supervisory authority").

104. *See infra* notes 109-10 and accompanying text.

105. *See infra* notes 111-15 and accompanying text.

106. Hoffmann-La Roche Inc. v. Zeltwanger, 144 S.W.3d 438, 448 (Tex. 2004).

107. *See, e.g.*, Garza v. Univision, Inc., No. Civ.A. 3:04CV1905-K, 2005 WL 1107374, at *3 (N.D. Tex. May 6, 2005) (holding an intentional infliction claim preempted because it was based on the same facts that supported of the Title VII claim).

108. *Hoffmann-La Roche*, 144 S.W.3d at 451 (Hecht, J., concurring).

So far, only a handful of courts have held that the intentional infliction claim is preempted by state civil rights acts.[109] More courts reject preemption on this ground, ruling that the state civil rights legislation was designed to increase remedies for victims of discrimination and is not inconsistent with allowing common law claims.[110]

The other quite distinct preemption challenge is based on state workers' compensation statutes that bar plaintiffs from suing employers in tort.[111] In these cases, employers argue that tort claims based on sexual harassment cannot be brought because the employee's sole remedy is to receive compensation under the prevailing state workers' compensation scheme.[112] In this genre of preemption challenges, the contest is not between tort and civil rights, but rather between tort and workers' compensation. The discussion of civil rights laws and the policies animating them comes up only indirectly as the courts grapple with whether victims of sexual harassment would be ill-served by channeling their claims into the workers' compensation system, well known for its ungenerous awards and designed principally to respond to industrial accidents and occupational disease.[113] Amidst technical discussions of whether the sexual harassment claim "arises out of" and "in the course" of employment or falls within one of the enumerated exceptions to workers' compensation coverage, courts are also called upon to decide whether preserving a tort claim for harassment and

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109. *See* Quantock v. Shared Mktg. Servs., Inc., 312 F.3d 899, 905 (7th Cir. 2002) (applying Illinois law); Greenland v. Fairtron Corp., 500 N.W.2d 36, 38 (Iowa 1993); Arthur v. Pierre Ltd., 100 P.3d 987 (Mont. 2004); *see also* Wilson v. Lowe's Home Ctr., 75 S.W.3d 229, 239 (Ky. Ct. App. 2001) (holding that the claim against the employer was preempted, but the claim against the individual supervisor was not preempted).

110. *See* Burns v. Mayer, 175 F. Supp. 2d 1259, 1267-68 (D. Nev. 2001); Funk v. F & K Supply, Inc., 43 F. Supp. 2d 205, 218 (N.D.N.Y. 1999); Cronin v. Sheldon, 991 P.2d 231, 241 (Ariz. 1999); Rojo v. Kliger, 801 P.2d 373, 382 (Cal. 1990); Helmick v. Cincinnati Word Processing, Inc., 543 N.E.2d 1212, 1216 (Ohio 1989); Retherford v. AT & T Commc'ns of Mountain States, Inc., 844 P.2d 949, 967 (Utah 1992); *see also Wilson*, 75 S.W.3d at 235 (allowing the plaintiff to *elect* whether to proceed under tort or civil rights against an individual harasser).

111. *See infra* notes 112-15 and accompanying text.

112. *See infra* note 120 and accompanying text.

113. *See* Jane Byeff Korn, *The Fungible Woman and Other Myths of Sexual Harassment*, 67 TUL. L. Rev. 1363, 1418 (1993) (discussing the inadequacy of a workers' compensation award for sexual harassment claims).

discrimination serves an important state interest.[114] On this point, the workers' compensation preemption decisions have tended to reiterate the "gap filler" versus "reinforcement of civil rights" debate discussed above and have produced sharp splits in the jurisdictions.[115]

Some of the strongest statements in favor of allowing civil rights principles to migrate into tort law have come in the workers' compensation preemption cases.[116] A leading decision from the Supreme Court of Florida in 1989 took a broad view of that state's commitment to eradicating sexual harassment, declaring that the state's workers' compensation scheme did not bar tort actions based on harassment and insisting that "[p]ublic policy now requires that employers be held accountable in tort for the sexually harassing environments they permit to exist, whether the tort claim is premised on a remedial statute or on the common law."[117] Similar sentiments about the importance of allowing "cumulative remedies" for harassment victims to reinforce "the strong public policies against sexual harassment" have been echoed more recently by the Supreme Court of Colorado in a same-sex harassment case alleging intentional infliction and other tort claims against an employer.[118] For these states, preservation of a tort remedy serves to vindicate the "intangible injury to personal rights" caused by harassment that "robs the person of dignity and self esteem."[119]

The states that have barred tort claims for harassment in favor of state workers' compensation coverage do not deny a public policy against harassment, but instead feel comforted by the fact that harassment victims can sue under state and federal civil rights

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114. *See infra* notes 116-19 and accompanying text.

115. *See* cases cited *infra* notes 116, 120.

116. *See* Ford v. Revlon, Inc., 734 P.2d 580, 588-89 (Ariz. 1987); Horodyskyj v. Karanian, 32 P.3d 470, 479 (Colo. 2001); Byrd v. Richardson-Greenshields Sec., Inc., 552 So. 2d 1099, 1103-04 (Fla. 1989); Coates v. Wal-Mart Stores, Inc., 976 P.2d 999, 1004-05, 1006 (N.M. 1999); Kerans v. Porter Paint Co., 575 N.E.2d 428, 435 (Ohio 1991); *see also* Busby v. Truswal Sys. Corp., 551 So. 2d 322, 324-25 (Ala. 1989) (holding that an intentional infliction claim for sexual harassment was not barred by a workers' compensation exclusivity provision); Hogan v. Forsyth Country Club Co., 340 S.E.2d 116, 120 (N.C. Ct. App. 1986) (accord); Anderson v. Save-A-Lot, Ltd., 989 S.W.2d 277, 288-89 (Tenn. 1999) (accord); Middlekauff v. Allstate Ins. Co., 439 S.E.2d 394, 396-97 (Va. 1994) (accord).

117. *Byrd*, 552 So. 2d at 1104.

118. *Horodyskyj*, 32 P.3d at 479.

119. *Byrd*, 552 So. 2d at 1104.

acts.[120] These courts see no pressing need for a common law tort claim, even if the workers' compensation remedy is inadequate or ill-designed to address intangible injuries like harassment. In their view, as long as harassment is addressed by civil rights statutes, the state's public policy is vindicated and needs no reinforcement through the common law.[121] Beneath discussion of the technical issues seems to be the view that common law claims, such as the intentional infliction tort, are mere gap fillers, and that harassment claims are properly located as statutory civil rights claims.

II. THE DOMAINS OF TORTS AND CIVIL RIGHTS LAW

The two contrasting views of the intentional infliction tort are linked to judgments about the respective domains of torts and civil rights and the proper location for a claim of harassment. Whether a court permits an intentional infliction claim to proceed depends in part on whether the court believes that it "fits" within torts or is better handled under the theories and remedies civil rights statutes provide. The choice of approach thus may hinge on categorization.

One dilemma surrounding the proper handling of claims alleging harassment in the workplace is that, conceptually, the harassment claim does not fit particularly well under either torts or civil rights. In some respects, it is an interloper into both domains. Despite its prevalence, harassment is neither the prototypical tort, nor the prototypical Title VII claim. Instead, each field of law has had to adjust to accommodate claims of harassment within its frameworks and the adjustment has not always been smooth.

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120. *See* Hardebeck v. Warner-Jenkinson Co., 108 F. Supp. 2d 1062, 1064-65 (E.D. Mo. 2000); Konstantopoulos v. Westvaco Corp., 690 A.2d 936, 940 (Del. 1996); Gordan v. Cummings, 756 A.2d 942, 945 (Me. 2000); Green v. Wyman-Gordon Co., 664 N.E.2d 808, 813 (Mass. 1996); Fernandez v. Ramsey County, 495 N.W.2d 859, 862 (Minn. Ct. App. 1993); Nassa v. Hook-SupeRx, Inc., 790 A.2d 368, 373-74 (R.I. 2002); Jenson v. Employers Mut. Cas. Co., 468 N.W.2d 1, 7-8 (Wis. 1991); *see also* Dickert v. Metro. Life Ins. Co., 428 S.E.2d 700, 701-02 (S.C. 1993) (holding that workers' compensation barred a tort claim against the employer but not against the supervisory employees).

121. *See, e.g.*, *Fernandez*, 495 N.W.2d at 862 ("[S]exual harassment claims will ordinarily be brought under [state civil rights statutes], and it could be argued that creating exceptions for categories of injuries that occur in the workplace undermines the ultimate effectiveness of the Workers' Compensation Act in compensating injured workers.").

Since its inception, Title VII law has primarily been directed to workplace injuries that result in direct economic harm.[122] Discriminatory terminations, demotions, refusals to promote, and other tainted decisions affecting employment status are the primary harms addressed by the statute.[123] Additionally, because it was enacted in response to the civil rights movement for racial equality, Title VII has a built-in group-based focus. The "equal employment opportunity" promised by the law has most often been associated with eliminating race or sex-based animus, regarded as the driving force behind discriminatory employment decisions and the principal cause of harm to the protected class.[124] Although individual claims far outnumber class actions under Title VII,[125] the search for group-based animus often projects litigation beyond individual, discrete incidents into an evaluation of treatment of the group and requires plaintiffs to situate themselves as members of a protected group to secure relief.[126] Finally, as originally conceived, a principal aim of Title VII was to dismantle longstanding patterns of segregation and exclusion in the workplace and to stimulate businesses to take action to prevent discrimination.[127] Under the Act, courts have imposed liability solely upon employers, and not upon the individual supervisors or managers who make the discriminatory decisions.[128] Title VII thus embraces a form of enterprise liability that reflects the view that employers are in the best position to deter

122. Some scholars debate whether plaintiffs must prove that they suffered "materially adverse effects" to recover for disparate treatment. *See* Theresa M. Beiner, *Do Reindeer Games Count as Terms, Conditions or Privileges of Employment Under Title VII?*, 37 B.C. L. REV. 643, 656-63 (1996); Rebecca Hanner White, *De Minimis Discrimination*, 47 EMORY L.J. 1121, 1142-47 (1998).

123. *See* 42 U.S.C. § 2000e-2(a) (2000) (prohibiting race and sex discrimination specifically in "compensation, terms, conditions, or privileges of employment").

124. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973) ("The language of Title VII makes plain the purpose of Congress to assure equal employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens.").

125. *See* John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 984 & n.2 (1991).

126. This group-based focus also justifies the award of attorney's fees to prevailing Title VII plaintiffs who are said to act as "private attorneys general" in their enforcement of the Act. *See* 42 U.S.C. § 2000e-5(k) (2000).

127. *See* United Steelworkers of Am. v. Weber, 443 U.S. 193, 208 (1979) (describing Title VII's purpose "to break down old patterns of racial segregation and hierarchy").

128. *See supra* note 77 and accompanying text.

future discriminatory acts and to restore plaintiffs to their rightful employment status.

When harassment claims first surfaced in the mid-1970s, a decade after Title VII was enacted, they posed a challenge for existing theories of liability. In particular, hostile environment harassment claims did not fit well into the Title VII framework because they frequently involved repeated abusive conduct that did not translate into direct economic harm.[129] Harassment victims tended to complain of psychological and intangible injury that ripened into loss of pay only in cases of constructive discharge.[130] Additionally, harassment victims had a much harder time proving that their mistreatment was both group based and predicated on sex. Traditionalist notions about the harmless and inevitable nature of sexual propositioning, teasing, hazing, and other forms of sexualized conduct persisted. Many courts continued to view such interactions as personal in nature and as stemming from sexual attraction or some other individualized motivation, rather than from group-based animus.[131] Moreover, this privatized, individual view of sexual harassment did not sit well with the imposition of enterprise liability. For many, it seemed strange to let the offending harasser off the hook, while requiring employers to reign in supervisors and coworkers for everyday interactions that sometimes took place beneath an employer's radar screen. Despite strenuous arguments by feminist scholars and litigators that sexual harassment was a virulent form of sex discrimination that harmed women and other targets as much as unequal pay or lost promotions,[132] the

129. *See, e.g.*, Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 63-64 (1986) (rejecting the defendant's contention that direct economic harm was needed to prove Title VII violation).

130. *See* Martha Chamallas, *Title VII's Midlife Crisis: The Case of Constructive Discharge*, 77 S. CAL. L. REV. 307, 315-21 (2004) (discussing the relationship between hostile environment and constructive discharge claims).

131. *See* Cheryl L. Anderson, *"Thinking Within the Box": How Proof Models Are Used To Limit the Scope of Sexual Harassment Law*, 19 HOFSTRA LAB. & EMP. L.J. 125, 137-38 (2001); Eric Schnapper, *Some of Them Still Don't Get It: Hostile Work Environment Litigation in the Lower Courts*, 1999 U. CHI. LEGAL F. 277, 292-93.

132. *See, e.g.*, Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1207-09 (1989); Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 820 (1991); Martha R. Mahoney, *Exit: Power and the Idea of Leaving in Love, Work, and the Confirmation Hearings*, 65 S. CAL. L. REV. 1283, 1291 (1992).

claim has always been treated as somewhat suspect and as qualitatively different from core violations of Title VII.[133]

The passage of the Civil Rights Act of 1991 in the wake of the Anita Hill/Clarence Thomas controversy eased the way somewhat for sexual harassment suits, but it did not erase the basic tension between harassment claims and the prototypical discrimination suit. The most important change came with respect to remedies: for the first time, Title VII plaintiffs were permitted to obtain jury trials and to recover compensatory and punitive damages, in addition to monetary awards for backpay.[134] This meant that harassment victims could recover a monetary award for mental anguish and psychological harm, even if they stayed on their jobs and did not allege constructive discharge. However, the 1991 Act also placed a total cap on the amount of compensatory and punitive damages at between $50,000 and $300,000, depending on the size of the employer.[135]

Despite some complaints that the 1991 amendments "tortified" the Civil Rights Act by introducing jury trials and tort-like damages,[136] sexual harassment has remained a disfavored claim within Title VII and has not yet redirected the Act away from its primary focus on economic loss caused by a change in employment status.[137] The disfavored status of the sexual harassment claim can be seen in the various specialized elements of the claim. As a threshold for imposing liability, plaintiffs alleging harassment are subject to heightened proof requirements: they must prove that they suffered "severe or pervasive" harassment,[138] compared to other discrimination claimants who can prevail upon proof of a single, discriminatory decision with economic consequences.[139] The standard for

133. *See* Chamallas, *supra* note 130, at 355-56 (2004) (discussing "special requirements and onerous burdens of proof" attached to Title VII sexual harassment actions).

134. 42 U.S.C. § 1981a(a)(1), (c) (2000).

135. *Id.* (b)(3).

136. *See* Dennis P. Duffy, *Intentional Infliction of Emotional Distress and Employment at Will: The Case Against "Tortification" of Labor and Employment Law*, 74 B.U. L. REV. 387, 398-99 (1994).

137. *See* Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993).

138. *See id.* (stating that conduct must be "severe or pervasive enough to create an objectively hostile or abusive work environment").

139. *See, e.g.*, McDonald v. Santa Fe Transp. Co., 427 U.S. 273, 276-85 (1976) (holding that the racially discriminatory discharge of the plaintiffs violated Title VII).

holding employers liable for the acts of supervisors is also more demanding in sexual harassment cases: strict liability is imposed in cases of discriminatory firings or demotions, but in harassment cases employers may often escape liability if they prove that they acted reasonably.[140] Finally, as mentioned above, recovery of the noneconomic damages that typically flow from sexual harassment are capped at relatively modest amounts that may be far below the plaintiff's injuries, but there is no cap on the key economic components of damage awards, that is, backpay or frontpay.[141] For the most part, courts interpreting state civil rights statutes have followed the lead of Title VII courts, treating harassment claims in a similar disfavored fashion.[142] Although a few states provide for individual liability of supervisors[143] and are a bit more liberal with respect to threshold requirements and vicarious liability, most approach harassment claims guardedly, adopting the skepticism that characterizes the Title VII courts.[144]

Although civil rights law can still possibly be refashioned to lessen the privilege afforded economic injury and to provide more secure relief for harassment victims, there is little sign of such a movement.[145] Instead, to a considerable extent, Title VII and the parallel state statutory schemes appear fixed on a model of

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140. Many employers are successful in proving an affirmative defense to liability in hostile environment sexual harassment cases premised largely on the employer's reasonable response to harassment complaints. *See* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998).

141. *See* Pollard v. E.I. du Pont de Nemours & Co., 532 U.S. 843, 852-54 (2001) (holding that backpay and frontpay are equitable remedies not subject to the cap). Frontpay is loss of pay from the time of judgment to reinstatement.

142. *See, e.g.*, Meyers v. Chapman Printing Co., 840 S.W.2d 814, 820-21 (Ky. 1992) (using Title VII to interpret a state statute to include "severe or pervasive" requirement); Downer v. Detroit Receiving Hosp., 477 N.W.2d 146, 148 (Mich. Ct. App. 1991) (recognizing an employer's affirmative defense for reasonably responding to reports of sexual harassment by another employer).

143. *See, e.g.*, Tomka v. Seiler Corp., 66 F.3d 1295, 1317 (2d Cir. 1995) (holding individual managers who participated in unlawful conduct liable under the New York Human Rights Law). *But see* Foster v. Shore Club Lodge, Inc., 908 P.2d 1228, 1232-33 (Idaho 1995) (finding no individual liability under the Idaho Human Rights Act).

144. *See supra* note 142.

145. Indeed, the trend may be the opposite. Recently, the U.S. Supreme Court differentiated between constructive discharges prompted by sexual harassment and those prompted by discrete, discriminatory acts, such as demotions. Employers are permitted an affirmative defense to liability in the sexual harassment situation, but not in the demotion context. *See* Pa. State Police v. Suders, 542 U.S. 129, 146-49 (2004).

economic harm/group-based animus/enterprise liability that sets harassment claims apart from the core of civil rights. For this reason, it is not clear that civil rights is the natural home for harassment litigation or that all claims should be located exclusively in that domain.

With respect to tort law, claims alleging harassment are also marginalized, principally because they do not resemble the classic personal injury. As the recent *Restatement of Torts* has made clear, claims of physical injury—rather than claims for emotional or economic loss—are situated at the core of tort law.[146] When a cause of action is characterized as an emotional distress claim, the ordinary rules of liability tend not to apply. Instead, similarly to other "stand alone" claims for emotional distress, tort claims for harassment sit precariously at the margins of recovery, with considerable variation among the states in the specific rules applied and the prospects for success.[147]

Admittedly, the privileging of claims for physical injury under tort law is not total. There is a long history of protecting some dignitary interests against tortious intentional invasion. However, before the development of the "new" tort of intentional infliction of emotional distress, the dignitary interests protected were exceedingly narrow in scope and highly gendered along traditional lines. The torts of assault and slander, for example, were best suited to securing older conceptions of male honor and female chastity and need to be stretched to fit contemporary claims of workplace harassment. Thus, the tort of assault affords recovery only for physically threatening conduct and was originally designed to reduce the incentive for retaliation and escalation of physical violence.[148] To warrant recovery, the physical harm threatened

146. In fact, the new *Restatement* project was initially called "Restatement (Third) of Torts: Liability for Physical Harm" to underscore its central focus on physical harms, rather than on emotional distress or economic loss. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM xiii (Council Draft No. 6, 2006). However, the project was later renamed and revised to include key sections relating to emotional disturbance. For a critique of the new *Restatement*'s structure, see generally Martha Chamallas, *Removing Emotional Harm from the Core of Tort Law*, 54 VAND. L. REV. 751 (2001).

147. *See supra* notes 51-100 and accompanying text.

148. Charles E. Carpenter, *Intentional Invasion of Interest of Personality*, 13 OR. L. REV. 227, 237 (1933) (stating that a cause of action for assault will discourage breaches of the peace); *see* RESTATEMENT (SECOND) OF TORTS § 24 (1965) ("[T]he other must believe that the

must be imminent, and it was sometimes said that words alone do not constitute an assault.[149] These limitations have meant that a claim for assault is generally unavailable in contexts where it is perceived that targets would be unlikely to fight back, but might respond passively by internalizing the pain. Most notably, "mere" solicitation to have sex was not generally regarded as actionable, no matter how insulting or offensive to the target.[150]

Similarly, the tort of slander has so far proved incapable of responding to the harms of harassment. Traditionally, slander actions were designed to provide redress for damage to reputation, including sexual reputation, and often centered on a female plaintiff's reputation for chastity.[151] In the nineteenth and early twentieth centuries, women plaintiffs often prevailed in defamation suits when they alleged that defendants made false statements impugning their reputation for sexual propriety.[152] Many courts even adopted the view that such claims amounted to slander per se, and dispensed with the need to prove special damages.[153] However, when the locus of slander suits changed from the private sphere to the more public sphere of work, women had far less success convincing courts that the kind of sexual slurs and taunts that characterize a hostile working environment amounted to actionable defamation. According to Professor Lisa Pruitt's extensive history of defamation cases, contemporary courts are now apt to deny recovery and to regard the offending statements as utterly lacking in content and incapable of being judged as either true or false.[154]

Because the older, particularized torts have not been reshaped to capture harassment, liability will often depend on the scope courts

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act may result in imminent contact unless prevented from so resulting by the other's self-defensive action ... or by the intervention of some outside force.").

149. *See, e.g.*, Johnson v. Sampson, 208 N.W. 814, 815 (Minn. 1926); Prince v. Ridge, 66 N.Y.S. 454, 455 (N.Y. Sup. Ct. 1900) (ruling that a solicitation to have sex was not an assault, relying on the "[m]ere words" doctrine).

150. *See* Reed v. Maley, 74 S.W. 1079, 1080-81 (Ky. 1903); *Prince*, 66 N.Y.S. at 455.

151. Lisa R. Pruitt, *Her Own Good Name: Two Centuries of Talk About Chastity*, 63 MD. L. REV. 401, 419-45 (2004).

152. *See* Lisa R. Pruitt, *"On the Chastity of Women All Property in the World Depends": Injury from Sexual Slander in the Nineteenth Century*, 78 IND. L.J. 965, 968 (2003).

153. Andrew J. King, *Constructing Gender: Sexual Slander in Nineteenth-century America*, 13 LAW & HIST. REV. 63, 72-73 (1993); Pruitt, *supra* note 152, at 968 (discussing the origin of the slander per se rule).

154. Pruitt, *supra* note 151, at 461.

are willing to give to the intentional infliction tort and on whether they regard harassment claims as otherwise a good fit for tort law. In key respects, the conceptual domain of torts contrasts sharply with the description provided above of the domain of civil rights, but this does not mean that torts is a natural home for harassment claims. In addition to its focus on physical harm, tort law is highly individualistic and cast in universal terms. Far from carving out protected classes, tort law is uncomfortable treating claimants as members of social groups or expressly taking account of status distinctions. Particularly in the dominant corrective justice account of tort law, considerable emphasis is placed on injurers' moral responsibility to compensate for the harm they cause,[155] a responsibility that maps easily onto individual liability but is less compatible with broader notions of enterprise liability.

If qualms about allowing recovery for pure emotional distress could be allayed, tort claims based on harassing conduct might be poured into such a model, particularly if the claim is brought only against an individual supervisor, not the employer, and is made universally available to all employees, regardless of their social group. Many harassment claimants, however, do not wish to circumscribe their harassment claim to fit this universal focus/individual liability model. Instead, victims frequently elect to press claims against their employers for failing to prevent or eliminate hostile environments[156] and stress that their harassment is qualitatively different from other kinds of abusive behavior because it implicates an important dimension of their social identity.[157]

The lack of a perfect fit for claims of workplace harassment in either civil rights or tort law reflects the multidimensional quality

155. *See generally* JULES L. COLEMAN, RISKS AND WRONGS (1992) (building a theory of corrective justice around morally based claims for repair or rectification by parties in a relationship to one another); ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW (1995) (building a theory of corrective justice on the "special morality" of the relationship between injurer and injured). *See also* Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L.J. 695, 695-709 (2003) (explaining the principal features of the corrective justice approach to tort law).

156. *See, e.g.*, Coates v. Wal-Mart Stores, Inc., 976 P.2d 999, 1002 (N.M. 1999); Robel v. Roundup Corp., 59 P.3d 611, 614 (Wash. 2002) (pressing tort claim only against employer).

157. *See infra* text accompanying notes 178-81 (discussing social dimension of the harm of harassment).

of the harm that defies categorization under traditional headings. One reason courts have so much trouble positioning claims of harassment is because such claims often articulate a type of injury—disproportionately experienced by members of subordinated groups—that cannot be pinned down as psychological, economic, or physical in nature, or as either individual or group based.

Early on, grassroots activists identified the multiple injuries harassment could inflict,[158] followed by studies by social scientists that documented the incidence of harassment and the various features of this newly "discovered" phenomenon.[159] Perhaps easiest to see was the psychological dimension of harassment, which produced mental anguish, humiliation, and shame in targets who were forced to confront harassment on a regular basis as part of their jobs.[160] Surveys of employees indicated that harassment was widespread and often regarded as a very troubling aspect of the job.[161]

Moreover, both the narratives of working women who were victims of harassment and the empirical studies showed how easily psychological distress translated into economic or physical harm. In many cases of severe harassment, a common response for victims was to quit their jobs, with the resulting loss of pay, seniority, and depressed chances for advancement that interruption of employment brings.[162] Even when victims stuck it out and stayed on the job, harassment often flattened their aspirations for mobility, with negative economic consequences.[163] Women were often reluctant to seek transfers or promotions to more lucrative male-dominated jobs for fear of increased harassment when they entered such hostile domains,[164] or they turned their desires and motivations away from

158. *See* Martha Chamallas, Essay, *Writing About Sexual Harassment: A Guide to the Literature*, 4 UCLA WOMEN'S L.J. 37, 39-43 (1993); Reva B. Siegel, *A Short History of Sexual Harassment*, *in* DIRECTIONS IN SEXUAL HARASSMENT LAW 1, 11-18 (Catharine A. MacKinnon & Reva B. Siegel eds., 2004).

159. *See* Joanna L. Grossman, *The First Bite Is Free: Employer Liability for Sexual Harassment*, 61 U. PITT. L. REV. 671, 671-73 (2000); Barbara A. Gutek, *Understanding Sexual Harassment at Work*, 6 NOTRE DAME J.L. ETHICS & PUB. POL'Y 335, 343-45 (1992).

160. Gutek, *supra* note 159, at 348-49.

161. *See id.* at 343-45, 348-49.

162. *See* Abrams, *supra* note 15, at 1197.

163. *See id.*

164. *See id.*

their jobs in an attempt to minimize the importance of working in their lives and reduce the pain of being ostracized and ridiculed at work.[165] Additionally, accounts of harassment victims detailed how the mounting stress of harassment could produce physical harm. Like the plaintiff in *Pucci*, who was hospitalized for anxiety and claimed she fell down the stairs at work because she believed coworkers were stalking her,[166] harassment victims often end up seeking treatment for medically recognized conditions and post-traumatic stress disorders that fall into the category of physical harm. Because any and all of the three types of harms may figure prominently in an individual case, classifying a harassment claim as quintessentially a claim for emotional distress, economic injury, or physical harm is artificial. To be sure, within each domain courts or legislatures have set limits on compensation for particular types of injury or damages, and thereby have encouraged litigants to frame their claims strategically to maximize chances of recovery.[167] But such strategic framing does not tell us much about either the nature of the harassment claim or whether it properly belongs in civil rights, torts, or both domains.

In addition to the problem of reducing harassment to either physical, emotional, or economic injury, it is often difficult to express or specify the extra harm that results when harassment is premised upon or exploits a person's sex, race, or other aspect of identity. Scholars have written extensively about the social and political aspects of identity-based harassment and discrimination, explaining why such conduct is often worse, or at least different from, more randomly imposed abuse or personally motivated conduct.[168] Literature focusing on race and ethnicity often empha-

165. *See* Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749, 1802 (1990).

166. *See supra* text accompanying notes 65-66.

167. For example, to offset the Title VII caps on compensatory damages, plaintiffs in hostile working environment cases often assert claims for constructive discharge in order to entitle themselves to uncapped awards for backpay. *See* Chamallas, *supra* note 130, at 315-21. Tort claimants resisting claims of preemption often stress the personal, psychological quality of the harassment suffered, to differentiate it from either group-based harms addressed by civil rights laws or physical injuries addressed by workers' compensation. *See* Kryeski v. Schott Glass Techs. Inc., 9 Pa. D. & C.4th 399, 402-03 (Pa. Ct. Com. Pl. 1991); Anderson v. Save-A-Lot, Ltd., 989 S.W.2d 277, 289-90 (Tenn. 1999).

168. *See* Lenhardt, *supra* note 14, at 836.

sizes how harassing conduct can operate simultaneously to stigmatize and dehumanize the target and the social group to which the target belongs.[169] Similar to the impact of hate crimes, the impact of harassment often reverberates beyond the specific target, causing distress and vulnerability to other members of the group,[170] such as women employees who witness a female coworker being groped or abused sexually. Even persons who are not specifically targeted for harassment must often expend extra work and emotional energy to devise strategies to avoid harassment.[171]

Scholarship on the distinctive harms of sexual harassment—both from an antisubordination[172] and a gender-stereotyping perspective[173]—have shown how harassment can devalue its target and reinforce that person's inferior status in the realm of work. Through harassment, women workers are sexually objectified and reminded of their subordinate status in the family and the private sphere of sexual relationships; male victims of harassment are punished for not conforming to gender norms or for being gay or perceived to be gay or effeminate.[174] Harassment of this sort can produce a special sense of alienation, social isolation, and vulnerability that impedes individual efforts to cope with future harassment and saps collective energies for agitating for social change.[175] Perhaps most importantly, the ubiquity and everyday nature of sexual and other forms of harassment may make it particularly hard for individuals to define and contest their harassment, the more it is naturalized and seems indistinguishable from just the way things are.[176]

The social and political damage inflicted by sexual or racial harassment has been variously described as a citizenship harm,[177]

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169. *See id.*

170. *See* Wang, *supra* note 13, at 119-20.

171. *See* Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1260-62 (1999-2000).

172. *See* Abrams, *supra* note 15, at 1217-20.

173. *See* Katherine M. Franke, *What's Wrong with Sexual Harassment?*, 49 STAN. L. REV. 691, 696 (1997).

174. *Id.* at 696, 698.

175. *See* Wang, *supra* note 13, at 119.

176. *See* Beth A. Quinn, *The Paradox of Complaining: Law, Humor, and Harassment in the Everyday Work World*, 25 LAW & SOC. INQUIRY 1151, 1167-71 (2000).

177. *See* Lenhardt, *supra* note 14, at 844-47.

a harm of subordination,[178] or harm to identity.[179] Each of these descriptions attempts to capture the significance of the injury occurring within a social environment and details how the social meaning of victimization may differ depending on the identity of the victim, the hierarchies in the working group, and the larger cultural setting. This social dimension of claims of harassment also means that characterizing it as focused on the individual or the group is tricky. Although the harm can only be understood in relation to the status and social meaning attached to the targeted group, it is ultimately visited on individuals and inevitably experienced by such individuals differently. Thus, some people exposed to repeated harassment cope by trying not to take it personally and resigning themselves to the inevitability of the treatment,[180] whereas others respond by complaining to sympathetic coworkers, and less frequently, to company officials.[181] Perhaps more so than other injuries, the harm produced by harassment is a function of both the quality and degree of the harasser's conduct and the target's response.[182] For that reason, the claim does not fit comfortably in either torts or civil rights, which concentrate on more determinate economic and physical harms. Moreover, because harassment claims traverse traditional boundaries, they risk being shut out or stripped down in each domain: for many Title VII courts, harassment claims are too personal and lack the job relatedness of other discrimination claims; for many common law courts, harassment claims are not claims for personal injuries, but for violations of public regulations of employment.

Rather than attempt to discover the best conceptual fit for harassment claims, it may be more productive to focus directly on questions of whether the degree of protection offered by civil rights law is enough and whether there should be a place for litigating harassment claims in tort law as well. Before making a choice

178. *See* MACKINNON, *supra* note 31, at 174.

179. Martha Chamallas, Lucky*: The Sequel*, 80 IND. L.J. 441, 467-71 (2005) (discussing the harm to identity from the trauma of rape).

180. Quinn, *supra* note 176, at 1167-68.

181. *See* Deborah L. Brake, *Retaliation*, 90 MINN. L. REV. 18, 25-32 (2005); L. Camille Hébert, *Why Don't "Reasonable Women" Complain About Sexual Harassment?*, 82 IND. L.J. (forthcoming 2007) (discussing victims' reluctance to report sexual harassment).

182. *Cf.* John C.P. Goldberg & Benjamin C. Zipursky, *Unrealized Torts*, 88 VA. L. REV. 1625, 1676-85 (2002) (discussing victim responsibility for emotional distress injuries).

between the "gap filler" versus "reinforcement of civil rights" approaches, it is worthwhile to consider the history of the tort of intentional infliction of emotional distress and how common law courts addressed issues implicating race and gender before the advent of modern civil rights law in the 1960s and 1970s.

III. THE TORT OF OUTRAGE BEFORE CIVIL RIGHTS

The intentional infliction tort has the dubious distinction of being known as a tort created by academics. This reputation stems from the enormous influence of William Prosser and Calvert Magruder, the two law professors most responsible for theorizing and shaping the new cause of action. Although each professor purported merely to report on what the courts were doing,[183] Prosser, in particular, effectively championed the tort in his writings and in his role as Reporter for the *Second Restatement of Torts*.[184] The tort's official birth was probably in 1948, when the American Law Institute first recognized its existence as a separate tort.[185] By the mid-1950s, the tort had taken its current shape and courts increasingly began labeling conduct as "outrageous" to qualify for recovery under the new formulation.[186]

Notably, the infliction tort did not arise in response to a social movement, in contrast to the statutory civil rights claims that reflected the black civil rights and women's liberation movements. Instead, recognition of the intentional infliction claim was part of a gradual legal reform movement, starting in the 1930s, which sought to liberalize recovery for claims of emotional distress more generally.[187] Even before recognition of the intentional infliction tort, many states had been convinced by reformers, for example, to

183. The first line of Prosser's initial article on the subject declares that "[i]t is time to recognize that the courts have created a new tort." William L. Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874, 874 (1939).

184. *See* G. EDWARD WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY 161 (expanded ed. 2003).

185. *See* William L. Prosser, *Insult and Outrage*, 44 CAL. L. REV. 40, 41 (1956).

186. *See id.* at 43-53 (discussing cases that illustrated the "outrageousness" component of the tort).

187. *See* N.Y. Law Revision Comm'n, *Act, Recommendation and Study Relating to Liability for Injuries Resulting from Fright or Shock*, *in* SECOND ANNUAL REPORT OF THE LAW REVISION COMM'N 375, 379-82 (1936).

discard the old "impact rule" in negligence cases that had required plaintiffs to prove some physical impact upon their persons before qualifying for a damage award.[188] Establishing the intentional infliction tort was thus part of a larger realist project aimed at rejecting formalist limitations on tort recovery and providing compensation for serious injuries, regardless of categorization.

Because the infliction tort had little to do with social equality, it is not surprising that the canonical intentional infliction cases arose in contexts far removed from gender and race discrimination. In the conventional history of the tort, the line of cases starts with the 1897 English case, *Wilkinson v. Downton*.[189] The defendant in *Wilkinson* played a cruel practical joke on a woman by telling her that her husband had been smashed up in an accident and that she should go at once with two pillows to fetch him.[190] In allowing recovery, the court was clearly sympathetic to the plaintiff, who alleged that she suffered severe physical and mental injuries as a result of the joke, a claim made believable by the fact that she had no history of ill health, weakness of constitution, or other predisposition to nervous shock.[191] In the United States, the most influential case was *State Rubbish Collectors Ass'n v. Siliznoff*, involving threats of future violence made against a male plaintiff who had allegedly taken business away from union members.[192] Writing for the California Supreme Court, Chief Justice Traynor had little difficulty endorsing the new tort, especially given the extortionate behavior of the defendants that came very close to assault.[193] As these two classic cases suggest, the intentional infliction tort could range over highly disparate ground, with only the defendant's reprehensible behavior tying the claim together.

Despite its broad, elastic nature, however, the tort of intentional infliction seemed especially well suited to claims by women, and several of the early cases also involved sex-related injuries. Prosser noticed this gendered aspect of the tort early on, remarking that "[n]early all of the plaintiffs have been women, usually in that

188. *Id.* at 381.
189. [1897] 2 Q.B. 57.
190. *Id.* at 57.
191. *See id.* at 58.
192. 240 P.2d 282 (Cal. 1952).
193. *Id.* at 286.

delicate condition whose standardized consequences have typified mental suffering cases with the 'customary miscarriage.'"[194] Prosser's allusion to miscarriages here likely referred to a recurring line of cases in which pregnant plaintiffs alleged that they suffered shock, miscarriages, and stillbirths after witnessing their husbands, close relatives, or others being brutally attacked by defendants.[195] In such third-party attack cases, the outrageous act of physical violence was not directed at the plaintiffs and the theory of recovery for such bystanders uncomfortably straddled the line between negligence and intentional torts. These cases presented additional doctrinal difficulties for the courts and did not tell us much about the kind of actions—short of physical attacks—courts would consider "outrageous."

Instead, Prosser's remark about the predominance of female plaintiffs is interesting because he used it to support his broader claim that courts in intentional infliction cases had permitted recovery only in cases of "extreme" mental disturbance in which there was "convincing objective testimony to attest its genuineness."[196] By conjuring an image of a fragile, female plaintiff easily hurt by callous or brutal behavior, Prosser's rhetoric allayed fears that the courts would be misused by deceitful plaintiffs seeking money for fictitious injuries. He had confidence that judges, in their case-by-case adjudication, would be sensitive to context and could tell the "difference between violent and vile profanity addressed to a lady, and the same language to a Butte miner and a United States Marine."[197] Additionally, it was self-evident to Prosser that ladies and other vulnerable persons suffered disproportionately from emotional distress and should have their claims acknowledged as "real wrong[s] entitled to redress."[198]

This solicitude for the fragile, female plaintiff also surfaced in Magruder's seminal article on emotional disturbance.[199] Magruder indicated that he was troubled by a line of slander cases in which

194. Prosser, *supra* note 183, at 888 (footnote omitted).

195. Prosser cited an article by Leon Green, *"Fright" Cases*, 27 ILL. L. REV. 873, 876-77 (1933), which discussed the third-party attack cases. Prosser, *supra* note 183, at 888 n.81.

196. Prosser, *supra* note 183, at 888.

197. *Id.* at 887.

198. *Id.*

199. *See* Magruder, *supra* note 30, at 1047-48

female plaintiffs falsely accused of unchastity failed to recover because they could not prove special damages, that is, pecuniary damages stemming from injury to their reputation.[200] One old case, for example, involved a defendant's false claim of having had sexual intercourse with the plaintiff, a married woman.[201] When the plaintiff heard about the false rumor, she suffered humiliation and physical illness, but lost her case because she could not show pecuniary loss.[202] Magruder considered the result unjust and an example of the undue formalism of defamation law.[203] More importantly, he declared that if the false statements had been made in the plaintiff's presence, she ought to be able to recover for intentional infliction of emotional distress.[204] Apparently, Magruder believed that accusing a woman of adultery was clearly intolerable conduct that could be expected to result in severe mental distress and illness. Under this view, in matters of sexual propriety, the relational and social harm of defamation and the individual harm of mental distress converged. Magruder seemed willing to allow a claim for both.

The commentators' sympathetic attitude shifted, however, when the female plaintiff's claim of injury rested not on an accusation of unchastity, but on a solicitation to have sex. Magruder started off the scholarly discussion with a rather tentative assertion about the state of the law. His famous "no harm in asking" statement was actually embedded in a paragraph indicating that there was no clear judicial position on the issue.[205] Thus, Magruder observed,

> [w]omen have occasionally sought damages for mental distress and humiliation on account of being addressed by a proposal of illicit intercourse. This is peculiarly a situation where circumstances alter cases. If there has been no incidental assault or battery, or perhaps trespass to land, recovery is generally denied, the view being, apparently, that there is no harm in asking.[206]

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200. *See id.*
201. Allsop v. Allsop, [1860] 157 Eng. Rep. 1292, 1292 (Exch. Div.).
202. *Id.*
203. *See* Magruder, *supra* note 30, at 1047-48 & n.61.
204. *Id.* at 1047-48.
205. *See id.* at 1055.
206. *Id.* (footnotes omitted).

Magruder's "no harm in asking" statement was somewhat cryptic: he did not directly endorse the view that such solicitations were harmless, but merely speculated as to why courts might deny recovery in such cases. For a formal law review article, however, use of the phrase was a bit flippant, and perhaps memorable for that reason.[207] It certainly left the impression that Magruder agreed with the courts in their apparent belief that such conduct was harmless and distinguishable from more condemnable conduct, such as a false imputation of unchastity.

In a later article, Prosser reiterated the "no harm in asking" phrase and left no doubt that he also agreed with its substance.[208] He classified a solicitation to have sex as a mere insult or indignity which "amount[ed] to nothing more than annoyances" and contrasted it to "flagrant and outrageous" conduct that justified legal recovery.[209] Prosser's demarcation line between "extreme and outrageous" conduct on the one hand, and "mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities" on the other, would subsequently play a major role in the tort's development, when it was included in the *Restatement* commentary[210] and cited by a number of courts.[211]

In addition to minimizing defendants' conduct in solicitation cases, Prosser also faulted the responses of plaintiffs. He argued that if a plaintiff genuinely suffered as a result of such behavior, her suffering should be regarded as "exaggerated, unreasonable, and beneath the notice of the law."[212] By 1956, Prosser's tone grew sarcastic. In his notable article, *Insult and Outrage*, he discussed how courts in different jurisdictions had treated "the dire affront of inviting an unwilling woman to illicit intercourse,"[213] clearly signaling that he did not regard such situations as "dire" at all. He was particularly worried that the "chivalry of the southern courts"

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207. Prosser characterized Magruder's prose as pungent. *See* Prosser, *supra* note 183, at 889 n.87 ("'The view being, apparently,' as Professor Magruder has so pungently put it, 'that there is no harm in asking.'").

208. *See id.*

209. *Id.* at 888-89.

210. *See* RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965).

211. *See, e.g.*, Pucci v. USAIR, 940 F. Supp. 305, 309 (M.D. Fla. 1996); Roth v. Wiese, 716 N.W.2d 419, 432 (Neb. 2006); Yeager v. Local Union 20, 453 N.E.2d 666, 671 (Ohio 1983).

212. Prosser, *supra* note 183, at 889.

213. Prosser, *supra* note 185, at 46.

would lead them to grant recovery.[214] After relating what he took to be the majority—and more modern—approach to refuse recovery, he expressed concern "that it is not altogether certain how long some of our highly moral tribunals will continue to stand the strain, and there are some indications of a tendency to allow recovery."[215]

When they wrote in the mid-1930s to the mid-1950s, Prosser and Magruder were in an unusual position to shape the law, precisely because there was no settled doctrine or clear trend. The case law that the professors analyzed was sparse, inconclusive, and itself reflected conflicting attitudes toward sexual conduct and the limits of tort law. Some courts displayed hostility toward plaintiffs who sued for damages related to a solicitation of sex. In one early New York case, for example, a trial court brusquely dismissed a plaintiff's complaint, stating that there could be no recovery for "words of persuasion" that were meant "to induce the plaintiff to grant [the defendant] the favor of sexual intercourse with her."[216] The plaintiff's complaint stated that the defendant had taken hold of her arm as she was about to get on a car and had asked her to step aside because he wanted to see her.[217] The plaintiff's complaint then alluded to the sexual solicitation without elaboration, stating only that the defendant's acts and words caused her "great shame, injury and suffering."[218] The plaintiff's legal theory was assault and battery, perhaps based on the defendant's action in holding her arm and offending her by his proposition.[219] The court was clearly not impressed, however, and dismissed the plaintiff's "so-called complaint" because it amounted only to "words of illicit solicitation" or "unscientific rigmarole."[220] The court was not inclined to explore whether the law might afford a remedy for injury stemming from sexual propositions or overtures that did not meet the traditional definition of battery or assault.

As Prosser suggested with his southern chivalry remark,[221] however, the issue was not so easy for a 1903 Kentucky appellate

214. Prosser, *supra* note 183, at 889.
215. Prosser, *supra* note 185, at 47.
216. Prince v. Ridge, 66 N.Y.S. 454, 455 (N.Y. Sup. Ct. 1900).
217. *Id.*
218. *Id.*
219. *Id.*
220. *Id.*
221. *See* Prosser, *supra* note 185, at 45.

court, which gave a more serious and thorough examination of a plaintiff's claim that she had been injured by a solicitation to have sex, although this court also denied recovery.[222] In that case, a married woman alleged that she was sitting near the window in her house when the defendant approached and proposed that she have sexual intercourse with him.[223] She claimed "that she indignantly refused the proposal" and suffered fright, humiliation, mortification, and shame from the incident.[224] Apparently, the defendant did not enter the plaintiff's house or come within physical reach of her person.[225] The complaint was dismissed because it did not meet the traditional requirements for an assault.[226]

On appeal, the majority of the court characterized the case as presenting the "novel" issue of whether a cause of action will lie in favor of a woman against a man who solicits her to have sexual intercourse with him.[227] Two legal arguments in favor of recovery seemed most plausible to this turn-of-the-century court. The first was whether a solicitation to have sex ought to be treated as equivalent to charging a woman with lack of chastity, even if it did not technically amount to a libel.[228] The argument hinged on viewing the solicitation itself as offensive and harmful because it implied that the plaintiff was the kind of woman who might accept the offer and thereby impugned her reputation for sexual propriety.

This libel-sounding argument, however, did not persuade the court, which drew a distinction between accusations of unchastity and sexual advances. In the court's view, "the defendant did not accuse the plaintiff of the want of chastity, but showed a purpose to seduce her from the path of virtue."[229] Interestingly, the court did not quarrel with the fact that women who had been solicited to have sex might suffer anguish and humiliation from being so approached. Instead, it denied recovery because it was unwilling to recognize a claim solely for women based on male sexual overtures, and refused to endorse a more universal cause of action. To support its ruling,

222. Reed v. Maley, 74 S.W. 1079, 1080 (Ky. 1903).
223. *Id.*
224. *Id.*
225. *See id.*
226. *Id.*
227. *Id.*
228. *Id.*
229. *Id.* at 1080-81.

the court reversed the gender roles and offered the following hypothetical case:

> Suppose a bawd should solicit a man upon a public street to have sexual intimacy with her; he certainly could not maintain a civil action against her. If an action could be maintained by a woman against a man for such solicitation, the same right to maintain one would exist in his favor.... [even if] he might not suffer the same anguish and humiliation on account of such solicitation as the woman ....[230]

Thus, the court did not premise its denial of recovery on the view that there was no harm in asking, but on the narrower notion that this particular gender-related harm should not be recognized in law. It did not explain, however, why framing any new emotional distress tort in a gender-neutral way was necessary, especially given then-prevailing rules of libel and other tort doctrines that sometimes limited recovery to one sex only.[231]

The court also rejected the argument that recovery was justified because solicitation to have sex amounted to the common law offense of solicitation to commit adultery.[232] Under this theory, permitting a tort action would perform the dual function of reinforcing the criminal law while compensating for the special harm suffered by the plaintiff, much in the same way that allowing a tort action for battery reinforces criminal proscriptions against the same act. Although the majority was unpersuaded,[233] a dissenting judge was attracted to the theory, particularly because he viewed adultery as "a grave offense under the moral law"[234] and regarded soliciting sex from a married woman as an attack on "[t]he

230. *Id.* at 1081.

231. *See* Pruitt, *supra* note 152, at 968.

232. *Reed*, 74 S.W. at 1081.

233. The court reasoned that because there was no statute against adultery, a tort cause of action could not be implied from a statute. *Id.* The court indicated that even though the plaintiff might have suffered special damage as a result of the defendant's conduct, in addition to the public harm caused by adultery, she could not recover because there was no preexisting tort cause of action encompassing her claim. *Id.* at 1081-82. The court distinguished the case from cases of felonious intent to convert property and cases of assault, which carried both criminal and tort sanctions. *Id.* at 1081.

234. *Id.* at 1083 (Hobson, J., dissenting).

purity of woman and the sanctity of the marriage relation."[235] Echoing traditional rationales for recognizing the tort of assault, the dissent worried that if a cause of action were not granted in solicitation cases, it would "leave[] such offenses to be punished wholly by the relatives of the injured woman," and would lead to "bloodshed and disregard of the law itself."[236] Additionally, like the majority, the dissent did not question the genuineness of the woman's injury in solicitation cases. Far from believing that there was no harm in asking, the court thought that "[t]he natural effect of an indecent proposal ... would be to" make a virtuous woman as "sick as the administration of a nauseate drug," and render her "unfit for discharging ... her domestic duties."[237]

Despite these early rejections of claims premised on sexual solicitations, some later courts did allow plaintiffs to recover, particularly when there was something special in the facts of the case, relating either to the vulnerability of the plaintiff or the aggravated nature of the defendant's conduct. Thus, in 1934, the Supreme Court of Arkansas allowed a pregnant woman to recover after being accosted by a man who offered her money if she would "be a friend" to him and warned that her husband might suspect she had done something wrong if she told him about the incident.[238] Similarly, a Georgia appellate court in 1948 upheld a suit against a bill collector who directed abusive and profane language against a pregnant plaintiff and threatened "that if he couldn't get the money any other way he was going to 'take it out in trade.'"[239]

By the early 1960s, however, the courts seemed pretty much inclined to accept Prosser's view that, absent other evidence of "extreme and outrageous" conduct, there was indeed no harm in asking. One gauge of how far courts had come from earlier days of professed concern for the mental sensibilities of women is evident in the 3-2 decision of the Supreme Court of Utah in *Samms v. Eccles*,[240] a case involving obscene phone calls and, by today's standards, stalking. The plaintiff in *Samms* alleged that, for a

235. *Id.*
236. *Id.*
237. *Id.* at 1084.
238. Erwin v. Milligan, 67 S.W.2d 592, 593-94 (Ark. 1934).
239. Digsby v. Carroll Baking Co., 47 S.E.2d 203, 205, 208 (Ga. Ct. App. 1948).
240. 358 P.2d 344 (Utah 1961).

period of approximately seven months, the defendant repeatedly called her on the phone at all hours, including late at night, and solicited her to have sex with him.[241] On one occasion, he showed up at her house "and made an indecent exposure of his person."[242] In her complaint, the plaintiff alleged that she was "a respectable married woman" who regarded the proposals as insulting and obscene, and that she feared for her personal safety.[243] The trial court dismissed her complaint, for failure to allege an actionable tort.[244]

The majority of the Utah Supreme Court in *Simms* did allow the claim to proceed and generally endorsed the *Restatement*'s "outrageousness" approach to the intentional infliction tort.[245] But the court made clear that, in less aggravated cases, "solicitation to sexual intercourse would not be actionable even though it may be offensive to the offeree."[246] Citing Magruder's "no harm in asking,"[247] the court declared that the law assumed that most cases of solicitation were harmless and wryly characterized the behavior as "a custom of long standing and one which in all likelihood will continue."[248] The two dissenting justices would have denied the plaintiff any remedy. In their view, because the defendant's repeated conduct was for the avowed purpose of inducing the plaintiff to have sexual relations with him, it could not form the basis of a claim.[249] In other words, if the motive was sex, the dissent thought it should be treated solely as "a moral, rather than a legal or actionable, wrong."[250]

By the middle of the twentieth century, most courts and the leading commentator thus treated solicitation cases as exceptional and were content to excise them from the emerging tort of intentional infliction of emotional distress. The earlier view that sometimes linked solicitation to have sex to a libel-like claim for

241. *Id.* at 345.
242. *Id.*
243. *Id.*
244. *Id.*
245. *Id.* at 346-47 & n.14.
246. *Id.* at 347.
247. *Id.* at 347 n.15.
248. *Id.*
249. *Id.* at 347-48 (Callister, J., dissenting).
250. *Id.* at 348.

impugning a woman's virtue disappeared from the case law and left plaintiffs with no specific legal arguments to support recovery, save an allegation that defendants conduct was outrageous in the particular case. Moreover, in Prosser's conception of the new tort, the cause of action of intentional infliction was designed to fill a specified gap within tort law, namely, to provide recovery in cases of extreme behavior that justifiably caused severe mental distress to victims. Before the era of civil rights, there was no special concern for gender neutrality in the application of tort rules. Indeed, both the courts and Prosser thought it appropriate to consider the gender and any resulting vulnerability of the plaintiff in determining both the egregiousness of the defendant's behavior and the likelihood that it would cause severe distress. However, when it came to solicitations of sex, Prosser and the courts were unwilling to view male sexual initiative as either extreme conduct or the type of conduct that would reasonably cause a woman severe distress.

The story told thus far of the intentional infliction tort makes no mention of race and how it affected the courts' understanding of what qualified as outrageous or extreme behavior. Indeed, with one notable exception, the solicitation of sex cases analyzed by Magruder and Prosser all involved white plaintiffs and, although cast in general terms, necessarily triggered cultural stereotypes and understandings of *white* womanhood of the era. In the one early case Prosser discussed that involved a black woman's claim,[251] he was even more resistant to permitting recovery and sadly mischaracterized the facts of the case. The case involved an allegation of rape by a porter on an interstate railway.[252] Cora Scruggs "was the only passenger in the women's compartment of the colored coach."[253] She claimed that while she was on the midnight train leaving from Memphis, "the porter made indecent proposals to her, offer[ed] her money and attempt[ed] familiarity with her person."[254] She testified that she refused his advances, but that just before the train reached its destination, the porter confronted her coming out of the lavatory, pushed her back into the

251. Dickinson v. Scruggs, 242 F. 900 (6th Cir. 1917).
252. *Id.* at 901.
253. *Id.*
254. *Id.*

room, and forcibly raped her there, despite her active resistance.[255] She alleged that her back was badly injured as a result.[256] When she sued in 1917, courts embraced what was then known as the "common carrier" rule, which allowed recovery against railroads for gross insults and offensive behavior by railroad employees.[257] This special tort doctrine provided recovery for nonphysical injuries, even if the defendant's conduct could not be classified as outrageous or extreme.[258]

Scruggs won her jury trial for "assault" and was awarded $1800 in damages.[259] The trial court directed a verdict on liability in her favor because it regarded Scruggs's testimony as essentially uncontradicted.[260] Tellingly, the porter who had allegedly raped the plaintiff did not testify.[261] In its defense, the railroad tried to prove that "plaintiff [had] yielded for a consideration," based solely on the testimony of a different porter who had spoken with the plaintiff on the return trip back to Memphis.[262] Over the plaintiff's denials, he testified that Scruggs told him that she had given in to the porter because she was afraid of him and added that the porter never paid her the $10 and breakfast he had promised and that she would make the company pay for it.[263] By this testimony, the railroad hoped to show the plaintiff to be a loose woman or prostitute who had agreed to have sex for money.

On appeal, the Sixth Circuit reversed Scruggs's award and ordered a new trial.[264] Because it viewed the testimony of the porter on the return trip as contradicting the plaintiff's testimony, it ruled that the issue of liability should have been submitted to the jury.[265] Most importantly, the appellate court rejected the trial court's view that, even standing alone, the "improper advances" made to the plaintiff while she was a passenger in the defendant's car would be

255. *Id.*
256. *Id.*
257. *See* Prosser, *supra* note 185, at 59-64.
258. *Id.* at 61-62.
259. *Scruggs*, 242 F. at 901.
260. *Id.*
261. *Id.*
262. *Id.*
263. *Id.* at 902.
264. *Id.*
265. *Id.*

enough to sustain the verdict.[266] It disagreed with the trial court's view that the solicitations by the porter were actionable, even if the plaintiff eventually submitted to him and even if she were offered money for her submission.

For the appellate court, the plaintiff could not recover if it turned out that she submitted to intercourse, not out of fear alone, but also for money. It held that "lascivious proposals, if later voluntarily accepted, would not create liability upon defendant's part."[267] Its holding implicitly endorsed the view that, in this case, there was no harm in asking, the plaintiff's fear notwithstanding. The court did not mention the common carrier doctrine that allowed recovery for insults and offensive behavior.

In *Insult and Outrage*, Prosser referenced *Scruggs* in his discussion of the "no harm in asking" doctrine and in support of the majority view that solicitation for sex does not lead to liability.[268] However, Prosser apparently misread the appellate court's opinion as containing a finding that Cora Scruggs had voluntarily agreed to have sex, rather than as a contested case in which the issue should have gone to the jury. In a footnote to *Scruggs*, Prosser stated that "[i]t is worthy of note that there is at least one case in which the lady accepted the invitation and then sued for the insult."[269] He did not remark on the race of the plaintiff, nor did he discuss how the case might relate to the common carrier doctrine.

Prosser's casual and perhaps intentionally humorous mention of *Scruggs* is disturbing to the contemporary eye because it appears to play into pernicious stereotypes of black women as promiscuous by nature and thereby "unrapable."[270] Prosser apparently misinterpreted the court's opinion as determining that Scruggs was a loose woman who had the impertinence to sue when her "customer" did not pay up. His cursory classification of the case as one in which an "invitation" was "accepted" gave no hint that the plaintiff had

266. *Id.*

267. *Id.*

268. Prosser, *supra* note 185, at 46 n.33.

269. *Id.*

270. *See* Nell Irvin Painter, *Hill, Thomas, and the Use of Racial Stereotype*, *in* RACE-ING JUSTICE, EN-GENDERING POWER: ESSAYS ON ANITA HILL, CLARENCE THOMAS, AND THE CONSTRUCTION OF SOCIAL REALITY 200, 209-10 (Toni Morrison ed., 1992) (discussing the stereotype of the "oversexed-black-Jezebel"); Jennifer Wriggins, Note, *Rape, Racism, and the Law*, 6 HARV. WOMEN'S L.J. 103, 117-23 (1983).

alleged that she had been raped, that her account had been believed by the trial court, and that the alleged rapist never appeared to give testimony for the defense.[271] Prosser's classification of the case effectively erased the plaintiff's uncontradicted allegations of fear and coercion and greatly minimized her injury. Although it is possible to read the case as simple support for the proposition that the courts believed that there was no harm in asking, Prosser seemed to go further by using the case as a warning that some unscrupulous plaintiffs may attempt to misuse the infliction tort for their own economic gain. Prosser's hostile reading of *Scruggs* suggests that the plaintiff's race can affect one's understanding of the offensive nature of the "solicitation" and might further decrease the chances of prevailing when an intentional infliction claim is brought by an African American woman.

Like most legal commentators in the pre-Civil Rights Era, Prosser did not offer a critique of how race affected judicial treatment of claims for emotional distress. Instead, he took the more "neutral" position of noticing race as merely one of several cultural factors that might enter into the decision-making process of courts—in particular, southern courts—when they assessed the quality of a defendant's conduct.[272] Prosser treated segregation as a fact of life and noted that a defendant could not be "liable for doing no more than he has the legal privilege to do, even though he may do it with very bad manners, and in doing it cause acute mental distress."[273] He reported that in the absence of some applicable state civil rights statute, there could be no liability for refusing to admit a black person to a school, restaurant, or shop.[274] Recovery for the wounded pride and humiliation of excluded minorities was not cognizable under existing law and customs that sanctioned such discriminatory treatment. However, Prosser was aware that many courts did recognize and place a value on white racial privilege. He noted that, pursuant to the common carrier rule, white plaintiffs had recovered for their distress at being put

271. *See supra* text accompanying notes 251-63.
272. *See* Prosser, *supra* note 185, at 49-50.
273. *Id.* at 49.
274. *Id.* at 50.

in a Jim Crow car, characterizing such conduct as a "gross" insult "of a kind highly offensive to the ordinary reasonable man."[275]

The racial double standard of pre-Civil Rights Era common law courts can be seen by comparing *Scruggs* with a 1905 "common carrier" decision from a Texas appellate court involving a claim for insult by a white female plaintiff.[276] The case arose from an incident in the "ladies' waiting room" of a railway station, reserved at that time for white women, their children, and their white male escorts.[277] The incident occurred when one of Mrs. Luther's children spilled water from a cup onto the floor. Luther, a white married woman, claimed that the black female attendant insulted her by insinuating that her child had purposefully spilled the water and that the attendant had looked at Luther in a "vicious and angry" manner.[278] Mrs. Luther alleged that she was afraid of the attendant and suffered great mental distress as a result of the disturbing encounter.[279] The appellate court upheld a $2500 jury verdict, reaffirming the common carrier doctrine that entitled the plaintiff to be "treated with respect and kindness."[280] In striking contrast to *Scruggs*, Luther's allegations of fear and distress were not erased or diminished. In this case, white racial privilege served to validate her claim of injury and justify an award, despite the fact that she suffered no physical assault or direct physical harm.[281]

Seen through a lens of gender and race, the history of the tort of intentional infliction of emotional distress tort presents a picture of limited protection against intentionally cruel and offensive behavior, largely reflective of dominant cultural attitudes toward women and racial minorities. Before the Civil Rights Era, courts were willing to use the new tort to protect "respectable" women against conduct that threatened their reputation for sexual propriety and moral rectitude. By expanding the protection of the law to cover false allegations of immorality that could not be proven

275. *Id.* at 59, 62.

276. Gulf, C. & S.F. Ry. Co. v. Luther, 90 S.W. 44 (Tex. Civ. App. 1905); *see* Jennifer B. Wriggins, *Toward a Feminist Revision of Torts*, 13 AM. U. J. GENDER SOC. POL'Y & L. 139, 143-48 (2005) (discussing *Luther*).

277. *Luther*, 90 S.W. at 45.

278. *Id.* at 46.

279. *Id.*

280. *Id.* at 48.

281. *Id.*

to cause economic harm, for example, courts used the emerging tort to reinforce prevailing standards of moral purity and to redress "wounded female honor"[282] in cases in which women claimed that they were inaccurately portrayed as whores. Seen in this way, tort law helped to police what historian Judith Walkowitz describes as the boundary between "the fallen and the virtuous" and to assure women in the latter category did not suffer in "[c]ases of mistaken identity."[283]

The limited protection afforded female chastity and honor, however, did not generally extend to women who claimed that male solicitation of sex caused them harm. Early cases did not perceive the potential for coercion, threat, or pressure behind such solicitations, and tended to treat them uncritically as mere offers or invitations that plaintiffs were free to accept or refuse. Either way, there was generally no recovery. The Catch-22 logic of the traditionalist sexual ideology played out in this way: if a woman accepted the solicitation, she proved she was not respectable and did not deserve legal protection; if she rejected the solicitation, she established herself as respectable, but could not be heard to complain that she suffered cognizable harm by being required to do so. In effect, when courts refused to regard offensive solicitations, without more, as actionable behavior, they placed a higher value on male sexual initiative than on female injury in cases of "mistaken identity," and required respectable women to prove their virtue in everyday encounters. Only in cases involving pregnant plaintiffs or other aggravating circumstances did courts occasionally provide a civil remedy, acknowledge harm stemming from a "mere" solicitation for sex, and thus implicitly exempt such women from the burden of resistance.

Not surprisingly, the early cases did not use the intentional infliction tort as a means to protect an individual woman's sexual autonomy or right to self-determination. The courts were not inclined to plumb the facts of a case to see whether a woman "welcomed" the particular sexual advance or whether particular attentions were "unwanted," to borrow from the vocabulary of

282. Judith R. Walkowitz, *Going Public: Shopping, Street Harassment, and Streetwalking in Late Victorian London*, 62 REPRESENTATIONS 1, 9 (1998).

283. *Id.* at 7.

contemporary sexual harassment law. For the most part, tort law reflected what Orit Kamir describes as an "honor culture," a cultural system highly dependent on one's relative standing in society in which "reputation is all."[284] In such cultures, Kamir explains, a person's honor "can be easily lost through the slightest social error, or stolen by another," and requires "specific, daily (sometimes ritualistic) behavior" to police the boundary between the honorable and the disreputable.[285] In the early days of the infliction tort, the assumption seemed to be that although virtuous women would, by definition, be offended by sexual overtures, men should nevertheless be given leeway to test the virtue of women, at least to some degree.[286] This simple equation did not allow much room to investigate the meaning to be ascribed to the "solicitation" in question—whether it was a display of power, a sign of disrespect, or a show of affection—or even whether the defendant's conduct could fairly be described as a solicitation of sex. Nor did it lead courts to question the validity of the madonna/whore dichotomy that attempted to lock women's identities into stagnant sexual categories.

By the early 1960s, moreover, the leeway given to defendants in solicitation cases expanded considerably, as the notion that respectable women were offended by sexual solicitations came to seem quaint. The earlier view that had linked solicitations to have sex to a libel-like claim for impugning a woman's virtue disappeared, without yet being replaced by a new understanding of the dignitary harms that could be caused by aggressive sexual conduct. At this point in the pre-Civil Rights Era, the intentional infliction tort provided a "safe haven" for male sexual initiative.

In its early days, the abuses of power addressed by the infliction tort did not encompass the power of white racial privilege. The infliction tort provided little protection against severe emotional distress inflicted by racist behavior, nor was it used to recognize the extreme vulnerability of racial minorities to suffering at the hands of whites. During this period, the protection against racial insult or

284. ORIT KAMIR, FRAMED: WOMEN IN LAW AND FILM 6 (2006).

285. *Id.* at 9. Kamir asserts that "[i]n honor cultures, honor serves as an effective disciplinary tool, and the behavioral code under which members achieve and maintain honor is, therefore, a structure of social power." *Id.* at 7.

286. *See* Walkowitz, *supra* note 282, at 7.

race-based humiliation was more likely to be afforded to white rather than minority plaintiffs. The mantle of respectability that allowed some white women to claim protection against emotional distress was typically denied to women of color, in line with prevailing racial stereotypes of black women as promiscuous by nature and impervious to sexualized injury. On issues of race, tort law tended to reinforce white supremacy by providing white claimants damages for the "outrage" of being treated with insufficient deference by black attendants or for mistakenly being assigned to a "colored" facility. Until the injustice of racial hierarchy was challenged by the civil rights movement, few recognized that discriminatory treatment of racial minorities might qualify as intolerable and outrageous conduct and form the basis of a tort claim for emotional distress. Before civil rights, tort law was more engaged in vindicating wounded feelings of white racial pride than in compensating for harms of racial subordination.

IV. REFORMING TORT LAW AFTER CIVIL RIGHTS

Given the historical limitations of the infliction tort, it is not surprising that when Catharine MacKinnon and other activists first agitated for a legal remedy for sexual harassment in the mid-1970s, they steered clear of tort law.[287] MacKinnon crafted her legal argument for a civil rights remedy for harassment at a time when courts were rejecting plaintiffs' Title VII harassment claims as beyond the scope of the statute and suggesting that any relief should come from tort law.[288] Importantly, MacKinnon set out to demonstrate that tort law was no substitute for a civil rights remedy and did not focus on the question whether recovery should be located in both domains.[289]

MacKinnon's case for a civil rights remedy for sexual harassment was predicated on what she regarded as the fundamental inadequacy of tort law to redress systemic harms of sexual

287. *See* MACKINNON, *supra* note 31, at 164-74.

288. *Id.* at 164 ("[S]everal recent sexual harassment cases have suggested—usually as a reason for holding sexual harassment not to be sex discrimination—that sexual harassment should be considered tortious.").

289. *Id.* at 171-74.

coercion.[290] She saw a need for legal protection specifically linked to sex discrimination, arguing that tort law inevitably missed the crux of the "group-defined injury which occurs to many different individuals regardless of unique qualities or circumstances, in ways that connect with other deprivations of the same individuals, among all of whom a single characteristic—female sex—is shared."[291]

By locating sexual harassment claims under Title VII—with its required nexus to sex—MacKinnon hoped to redirect the law away from the "disabling (and cloying) moralism"[292] of tort law to a more equality-centered jurisprudence that comprehended harassment's role in maintaining women's inferior status in the workplace.[293] When MacKinnon's *Sexual Harassment of Working Women* was published in 1979, the time was ripe for law reform centered around identity-based concepts of discrimination, in line with the newly acquired consciousness of the pervasiveness of sex discrimination forged by the women's movement. Rather than try to remake tort doctrines to accommodate sexual harassment claims, MacKinnon thought it best to free sexual harassment from tort law, give it its own name, and provide it a home in civil rights law.[294] At the time, there was little awareness or discussion of same-sex harassment or other forms of abusive conduct beyond the paradigmatic male/female model of quid pro quo and hostile environment harassment through which female employees were victimized by male supervisors and coworkers.[295] Proving that harassment was based on sex was then seen as giving litigants an opportunity to focus the law's attention in the right place, that is, on how women's sexuality was used to force women out of jobs and deny them promotions and other benefits of employment. For the most part, feminist energies in the 1980s and early 1990s were poured into establishing sexual harassment as a violation of Title VII.[296]

290. *Id.*
291. *Id.* at 172.
292. *Id.*
293. *Id.* at 2.
294. *Id.* at 173.
295. *See* CAROLINE A. FORELL & DONNA M. MATTHEWS, A LAW OF HER OWN: THE REASONABLE WOMAN AS A MEASURE OF MAN 25-26 (2000) (describing evolution of quid pro quo and hostile environment harassment claims).
296. *See* MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 237-45 (2d ed. 2003) (discussing feminist critiques of Title VII doctrine in harassment cases).

Concern for the difficulty of addressing other forms of harassment under the status bound scheme of civil rights law tended to surface only later, after courts and scholars began struggling with the definition of "sex discrimination" under Title VII.[297]

An early argument for revising tort law to address harassment on a more universal basis, however, came from Regina Austin in her 1988 article, *Employer Abuse, Worker Resistance, and the Tort of Intentional Infliction of Emotional Distress*.[298] The article was prescient in identifying multidimensional harassment as a major problem that tort law should target. Austin was mainly concerned with abuse suffered by low-income workers that disproportionately affected racial and ethnic minorities.[299] She described how the law imposed few penalties on supervisors who routinely intimidated and ridiculed workers under their control, provided only that they refrained from doing so in transparently racial or sexual terms.[300] She maintained that because class oppression was not included among Title VII's prohibited bases, supervisory "[m]istreatment that would never be tolerated if it were undertaken openly in the name of white supremacy or male patriarchy is readily justified by the privilege of status, class, or color of collar."[301]

Austin was not sanguine about the prospects for meaningful tort reform, given her view that tort relief had so far been limited to "the extraordinary, the excessive, and the nearly bizarre in the way of supervisory intimidation."[302] She was not willing to give up completely on tort law, however, because of its distinctive capacity to create a norm of respectful treatment by supervisors premised on the dignity of all workers. Her article was one of the first to show how multidimensional harassment could fall through the cracks of

297. *See* Charles R. Calleros, *The Meaning of "Sex": Homosexual and Bisexual Harassment Under Title VII*, 20 VT. L. REV. 55 (1995); L. Camille Hébert, *Sexual Harassment as Discrimination "Because of ... Sex": Have We Come Full Circle?*, 27 OHIO N.U. L. REV. 439 (2001); Ramona L. Paetzold, *Same-sex Sexual Harassment: Can It Be Sex-related for Purposes of Title VII?*, 1 EMP. RTS. & EMP. POL'Y J. 25 (1997); David S. Schwartz, *When Is Sex Because of Sex? The Causation Problem in Sexual Harassment Law*, 150 U. PA. L. REV. 1697 (2002).

298. Austin, *supra* note 32.

299. *Id.* at 3-4.

300. *Id.* at 8-12.

301. *Id.* at 4.

302. *Id.* at 18. *See also* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 45 cmt. c (Council Draft No. 6, 2006) (noting that defendant's conduct must be "extreme" in the sense of "sufficiently unusual" to be actionable).

Title VII and how "racism and sexism obscure and are obscured by the perniciousness of class oppression."[303] Later scholars would expand on Austin's identification of a class "loophole" under Title VII, and analyze how the omission of sexual orientation as a prohibited basis for discrimination under Title VII insulated sex-inflected forms of discrimination from civil rights coverage and operated as another loophole against liability for harassment in the workplace.[304]

The arguments MacKinnon and Austin first presented set the stage for contemporary scholarly debates about the virtues of status-based versus universal approaches to harassment. Reflecting MacKinnon's legacy, there is still skepticism that tort law is so inherently individualistic and tied to outmoded gender ideologies that attempts to reshape it along civil rights lines are bound to be futile.[305] However, as the limitations of status-based civil rights protection have been realized in recent years, legal commentators have shown a renewed interest in universalism.[306] Now that the Title VII claim for harassment looks firmly enough established so that it will not be eliminated, the debate has shifted to what supplemental protection torts might provide and how the norms of tort law might be influenced by civil rights.[307] The recent calls for reform are tempered, however, by a realization of the limits of law to effect cultural change, especially in the minefield of gender and racial politics.[308]

Oddly enough, the case in favor of migration of civil rights to tort law derives from both the positive and negative aspects of current

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303. Austin, *supra* note 32, at 4.

304. *See* Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CAL. L. REV. 1, 147 (1995).

305. See particularly Ann Scales, *Nooky Nation: On Tort Law and Other Arguments from Nature*, *in* DIRECTIONS IN SEXUAL HARASSMENT LAW, *supra* note 158, at 307, 309-12.

306. *See* Orit Kamir, *Dignity, Respect, and Equality in Israel's Sexual Harassment Law*, *in* DIRECTIONS IN SEXUAL HARASSMENT LAW, *supra* note 158, at 561, 565; *supra* note 33. *See generally* Anita Bernstein, *Treating Sexual Harassment with Respect*, 111 HARV. L. REV. 445 (1997) (proposing more universal dignity-oriented standards within civil rights law).

307. *See generally* Ehrenreich, *supra* note 33 (advocating a pluralistic approach to remedying workplace discrimination).

308. *See* Anita Bernstein, *How to Make a New Tort: Three Paradoxes*, 75 TEX. L. REV. 1539, 1544-59 (1997) (discussing disinclination of courts to recognize novel tort claims not solidly grounded in established precedents).

civil rights law. The positive side consists of identifying innovative aspects of Title VII harassment law worthy of importing to torts.[309] The idea is that if the concept of outrage is to evolve in a way that captures some of worst forms of injustice and intentional injury, it should be linked to the most current understandings of equality and nondiscriminatory treatment. The negative side highlights the current limitations of Title VII, as interpreted by unreceptive federal judges intent on holding the line on coverage. It focuses on the need to provide redress for egregious cases of harassment that fall through the cracks of Title VII categories.[310]

In large part due to the development of the hostile environment claim, tort law now has something to borrow to give meaning to outrageous conduct in intentional infliction cases. In some respects, the development of Title VII sexual harassment law in the last thirty years has been remarkable, contributing to a transformation in the way sexualized conduct in the workplace is understood and evaluated, at least in some quarters.[311]

Simply put, the emergence of sexual harassment law has challenged the belief that there is no harm in asking. The entire body of sexual harassment law is premised on the view that solicitations for sex and other sexualized conduct in the workplace can produce harm, most notably in instances when they are backed by economic coercion or pressure or serve to reinforce the subordinate status of a group of workers.[312] In marked contrast to the attitude of early torts cases that presumed that women were always free to accept or refuse sexual solicitations,[313] sexual harassment law now recognizes how disparities in power and status can produce offers that cannot be refused and can construct unequal working conditions for targeted workers. This deprivatization of the injury of sexual harassment and separation of sexual harassment from the category of consensual sex was the pivotal move toward legal recognition of the claim under Title VII. The change in vocabulary

309. Ehrenreich, *supra* note 33, at 39.

310. Fisk, *supra* note 33, at 83-85.

311. *See* Catharine A. MacKinnon, *Afterword*, *in* DIRECTIONS IN SEXUAL HARASSMENT LAW, *supra* note 158, at 672.

312. *See* MACKINNON, *supra* note 31, at 33-55.

313. *See supra* notes 216-33 and accompanying text.

from "solicitation" to "harassment" effectively conveys the distance traveled, from harmless offer to form of abuse.

In evaluating the importance of these developments for tort law, three innovations of Title VII harassment law stand out. They relate to the dynamic character of harassment as a pattern of abusive conduct, to its plastic or multipurpose nature, and to the incorporation of perspectival approaches for determining the existence and severity of the harm imposed.

The first innovation goes to the heart of the concept of a hostile environment. From the beginning, courts were careful to point out that not every instance or incident of harassment was actionable under Title VII.[314] The requirement that plaintiffs prove that the harassing conduct was "severe or pervasive"[315] as a key element of the claim was meant not only to screen out less serious cases, but to ensure that the defendant's conduct had altered the "terms, conditions or privileges of employment," as stated in the statutory language.[316] Recurring conduct that met the threshold requirement for severity or pervasiveness was said to amount to a constructive term or condition of work, of equal significance to the explicit terms and conditions set by the employer.[317] Importantly, this conceptualization of the claim made the employment-related harms of harassment more visible, by focusing on how seemingly personal everyday interactions can add up to a deterioration of the working environment for some employees, which is not qualitatively different from other work-related disadvantages, such as lower pay or failures to promote. The claim also presupposes that informal power of supervisors and coworkers may sometimes be as harmful as the deployment of formal power,[318] an acknowledgment that pushes the law a bit closer to the social realities that face subordinated workers. Under Title VII law, harassment has been reenvisioned as a recurring feature or condition of work—a dynamic

314. *See* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986).

315. *Id.*

316. 42 U.S.C. § 2000e-2(a) (2000) (prohibiting "discriminat[ion] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin").

317. *Vinson*, 477 U.S. at 66.

318. Susan D. Carle, *Acknowledging Informal Power Dynamics in the Workplace: A Proposal for Further Development of the Vicarious Liability Doctrine in Hostile Environment Sexual Harassment Cases*, 13 DUKE J. GENDER L. & POL'Y 85, 104-06 (2006).

pattern of behavior—rather than discrete acts of sexual solicitations. By definition, the hostile environment claim recognizes that the sum may be worse than its parts when it comes to harassment, and that context is all important.

The second innovation of hostile environment/harassment law is a newfound appreciation for how harassment can be used to accomplish different ends. A common theme in the cases and scholarship has been that sexual harassment in the workplace is not always or principally an expression of sexual desire or sexual attraction,[319] but can also serve a number of other purposes related to maintaining hierarchy in the workplace. Harassment can function as a tool of workplace segregation by discouraging women from taking "men's jobs,"[320] as a way of reinforcing the power of abusive supervisors, and as a means of policing gender norms and preserving the gendered character of the job itself.[321] This attention to how harassment can operate as means of subordination prevents minimizing the harm and opens up the range of potential injuries beyond the realm of hurt feelings or annoyances. It encourages litigants and courts to examine how harassers' reliance on sex, race, or other social identities of the targets can deepen the wound and become an especially effective way to ostracize, demean, and demoralize. The plasticity of harassment also suggests that the seriousness of a defendant's conduct cannot be judged abstractly apart from its effects.

The third innovation of harassment law of potential relevance to tort law is the incorporation of perspective into the analysis of the harmful quality of the conduct in question. The staple of the "reasonable person" standard has undergone considerable reworking in the Title VII case law.[322] In determining doctrinal questions, such as whether conduct is "unwelcome," or whether it should be regarded as "severe or pervasive," some courts have been receptive to a "multiple perspectives" approach that acknowledges that the meaning of an action may differ, depending on the perspective from

319. *See* L. Camille Hébert, *The Economic Implications of Sexual Harassment for Women*, KAN. J.L. & PUB. POL'Y 41, Spring 1994, at 47-50.

320. *See* Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1687 (1998).

321. *See* Franke, *supra* note 173, at 693.

322. *See* FORELL & MATTHEWS, *supra* note 295, at xvii-xxii.

which the action is viewed. To varying degrees, the cases have taken into account the social position of both the harasser and the target to assess the seriousness of the challenged behavior, considering, for example, the fact that the plaintiff was the only woman in a male-dominated working group when deciding whether hazing and taunting is actionable.[323] Although there is still no consensus about the particular standpoint that ought to govern in Title VII harassment cases—as evidenced by the continuing debate over use of a "reasonable woman" standard[324]—the relevance of the victim's perspective has clearly gained ground. In addition to attending to the "totality of the circumstances" in a particular case, room has been cleared for factfinders to consider the background social identities of the actors and power dynamics at the workplace before they decide whether actionable harm has occurred.

These innovations could be transported to tort law to help make the transition from an honor-based to a dignity-based concept of outrageous conduct. In the early intentional infliction cases, the severity of sexualized conduct directed at women was judged by its capacity to sully the reputation of a respectable woman.[325] Under a dignity-based system informed by civil rights, the inquiry would shift to whether the defendant's conduct, as a whole, had the effect of seriously harming the plaintiff by targeting her as a second-class employee who did not deserve to be treated with equal respect and consideration. Under this approach, the discriminatory aspect of the harassment is part of what qualifies it as outrageous conduct and

323. *See* Burlington N. & Santa Fe Ry. v. White, 126 S. Ct. 2405, 2409, 2415-16 (2006) (adopting a reasonable person standard in plaintiff's position as the standard for retaliation cases, and noting that plaintiff was the only woman in her department). Justice Alito's concurring opinion stated that the Court's standard suggested that some of plaintiff's individual characteristics—including "age, gender, and family responsibilities"—would be taken into account in considering the case from a person in plaintiff's position. *Id.* at 2421 (Alito, J., concurring in the judgment). In assessing equality claims, Canadian courts are committed to a perspectival approach that assesses the purpose and effect of a challenged law or action from the perspective of the claimant. "The relevant point of view is not solely that of a 'reasonable person,' but that of a 'reasonable person, dispassionate and fully apprised of the circumstances, possessed of similar attributes to, and under similar circumstances as, the group of which the rights claimant is a member ...." Halpern v. Canada (Att'y Gen.), [2003] 65 O.R.3d 161, 183 (Ont. C.A.).

324. *See* CHAMALLAS, *supra* note 296, at 242-45 (discussing the debate over a reasonable woman standard).

325. *See supra* text accompanying notes 196-237.

sets it apart from less virulent forms of incivility, rudeness, or disrespect.

The kind of transition from honor to dignity I envision in the concept of outrageous conduct is similar to the approach of Canadian law, which has successfully woven equality principles into its fundamental notion of human dignity. Canadian courts see equal treatment as an essential component of human dignity, in contrast to the dominant approach in the United States that tends to separate the two concepts, assigning to civil rights the task of protecting equality, while tort law is assigned to protect dignitary interests. Thus, the Canadian Supreme Court has defined human dignity along civil rights lines by declaring that

> [h]uman dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued ....[326]

Under the Canadian vision of human dignity, it is far easier to characterize persistent racial, sexual, or other group-based forms of harassment as serious harms that warrant protection under both statutory and common law.

In addition to capturing a larger number of harassment cases also actionable under Title VII, revising the tort of outrage along civil rights lines could also provide redress in some cases that currently fall outside the Title VII categories. As Title VII has

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326. Law v. Canada (Minister of Employment & Immigration), [1999] 1 S.C.R. 497, 530 (Can.); *Halpern*, 65 O.R.3d at 161; *see also* ANN SCALES, LEGAL FEMINISM: ACTIVISM, LAWYERING, & LEGAL THEORY 74-76 (2006) (discussing the Canadian vision of equality). For discussions of dignity-based approaches to harassment in Japan and Europe, see Yukiko Tsunoda, *Sexual Harassment in Japan*, *in* DIRECTIONS IN SEXUAL HARASSMENT LAW, *supra* note 158, at 618, 618-26; Susanne Baer, *Dignity or Equality? Responses to Workplace Harassment in European, German and U.S. Law*, *in* DIRECTIONS IN SEXUAL HARASSMENT LAW, *supra* note 158, at 582, 582-95.

matured, it has become increasingly complex and rigid. Compared to the universal principles of tort law, Title VII is a status-based or identity-based law, protecting only against discrimination based on certain specified bases. Thus, there are perennial struggles over what constitutes "sex-based" discrimination[327] or what qualifies as discrimination based on race[328] or national origin.[329] Because equally harmful and related forms of discrimination, such as discrimination based on sexual orientation or language, are not covered by Title VII,[330] litigators often attempt to shoehorn their claims into one of the protected categories. Additionally, many contemporary forms of bias are hard to fit under the traditional Title VII categories. There is little space, for example, for same-sex harassment,[331] multidimensional discrimination[332]—such as race- and class-inflected claims—or discrimination against subgroups.[333]

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327. *See supra* note 297 and accompanying text.

328. *See, e.g.*, Rogers v. Am. Airlines, Inc., 527 F. Supp. 229, 232-33 (S.D.N.Y. 1981) (rejecting African American woman's race discrimination claim based on employer's prohibition of braided hairstyles); Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365 *passim* (discussing *Rogers*); *see also* Angela Onwuachi-Willig & Mario L. Barnes, *By Any Other Name?: On Being "Regarded As" Black, And Why Title VII Should Apply Even If Lakisha and Jamal Are White*, 2005 WISC. L. REV. 1283, 1283-84 (discussing discrimination against persons with black-sounding names and voices).

329. *See* Fragante v. City & County of Honolulu, 888 F.2d 591, 596-99 (9th Cir. 1989) (holding that accent discrimination does not constitute discrimination based on national origin).

330. *See* Garcia v. Spun Steak Co., 998 F.2d 1480 (9th Cir. 1993) (upholding employer's English-only rule); DeSantis v. Pac. Tel. & Tel. Co., 608 F.2d 327 (9th Cir. 1979) (ruling that Title VII does not cover discrimination based on sexual orientation).

331. Although the Supreme Court opened the door for same-sex harassment claims in *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), there is still great uncertainty as to how plaintiffs in such cases can establish that their harassment was based on sex. *See generally* Schwartz, *supra* note 297.

332. Courts often have difficulty dealing with "intersectional" claims in which it is impossible to separate the different strands of discrimination, for example, when an individual experiences distinctive discrimination as a low-income woman of color. *See generally* Kimberle Crenshaw, *Race, Gender, and Sexual Harassment*, 65 S. CAL. L. REV. 1467 (1992). Compare Austin, *supra* note 32, at 12-15, which discusses multidimensional discrimination against workers.

333. Early on, the Supreme Court acknowledged that discrimination against subgroups of a protected class is actionable under Title VII. *See* Phillips v. Martin Marietta Corp., 400 U.S. 542, 543-44 (1971) (rejecting sex-plus doctrine). However, plaintiffs still have difficulty proving discrimination when other members of the protected class are not targeted. *See* Martha Chamallas, *Feminist Constructions of Objectivity: Multiple Perspectives in Sexual and Racial Harassment Litigation*, 1 TEX. J. WOMEN & L. 95, 132 (1992) (discussing

Title VII's focus on the victim's group status, moreover, makes it difficult to reach bias directed at persons because of how they perform their identity[334]—for example, the effeminate man[335]—or against persons who refuse to cover their identity and resist assimilation[336]—for example, the African American woman who wears corn rows.[337] Although scholars such as Kathryn Abrams[338] have called for expanding the meaning of race and sex discrimination to reach such complex claims and complex claimants, for the most part, the federal courts have not bought these arguments.[339]

Given the limitations of Title VII, not surprisingly there has been a turn to tort law, in which plaintiffs are not required to pinpoint the motivation behind their harassment or mistreatment in order to recover. Tort law has the potential for reaching multidimensional forms of harassment and harassment based on such categories as sexual orientation, class, or language, not presently covered by Title VII. The availability of tort law could prove particularly important, for example, in a case of same-sex harassment in which one of the forms of abuse consisted of forbidding the plaintiff from speaking Spanish in the presence of the harasser.[340] To prevail on a claim for intentional infliction of emotional distress, the plaintiff in such a case would be spared from having to establish that the harassment was based on sex or national origin—and actionable under Title VII—rather than being based on sexual orientation or language and thus not covered by the federal law. Instead, the main focus in the tort action would be on whether the defendant's conduct was outrageous. Because tort law would permit plaintiffs to cumulate incidents of different types of harassment, it could also relieve women of color and other multiply burdened claimants from having

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employers' use of testimony by nontargeted members of the protected class).

334. Carbado & Gulati, *supra* note 171, at 1293-98.

335. Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 31 (1995).

336. *See* Kenji Yoshino, *Covering*, 111 YALE L.J. 769 (2002).

337. *See supra* note 328.

338. *See generally* Kathryn Abrams, *Complex Claimants and Reductive Moral Judgments: New Patterns in the Search for Equality*, 57 U. PITT. L. REV. 337 (1996); Kathryn Abrams, *Title VII and the Complex Female Subject*, 92 MICH. L. REV. 2479 (1994) [hereinafter Abrams, *Title VII*].

339. *See* Abrams, *Title VII*, *supra* note 338, at 2493-502.

340. *See* Lucero-Nelson v. Wash. Metro. Area Transit Auth., 1 F. Supp. 2d 1 (D.D.C. 1998) (involving same-sex sexual harassment mixed with language discrimination).

to split their identity and separate out conduct directed at them "as women" from behavior taken against them on the basis of their race or ethnicity.[341]

Tort law's potential benefits to harassment victims, of course, are only speculative and depend largely on whether judges and juries would regard defendants' conduct in such "complex" harassment cases as outrageous, if freed from the constraints of the "gap filler" approach to the infliction tort. MacKinnon's early reservation that, in the hands of judges interpreting tort law, protection against harassment might be stunted by traditional moralism and honor-based ideologies,[342] remains a live issue, especially in same-sex harassment cases or cases brought by plaintiffs who do not conform to contemporary models of respectability.

Concerns about the possible "domestication" of harassment law, however, extend beyond fears of judicial interpretation of tort doctrines. After more than three decades of enforcement of Title VII, it has become clear that conservative cultural forces can and will influence the meanings placed on the law, regardless of whether the claim carries the label of torts or civil rights. Thus, one compelling complaint of feminist scholars is that enforcement of sexual harassment law in everyday life can serve to reinscribe old ideologies, rather than to empower women to resist discrimination. For example, in her ethnography of an industrial electronics plant in southern California, sociologist Beth Quinn explained how male employees interpreted sexual harassment law mainly as a requirement to use "appropriate language" when they were in the presence of "ladies," while retaining the traditional belief that any woman who "put up with" crude behavior was, by inference, not a lady.[343] Quinn saw little evidence that the existence of sexual harassment law operated as an incentive for women to resist sexist behavior in this male-dominated workplace. Instead, most female employees

341. *See* Regina Austin, *Sapphire Bound!*, 1989 WIS. L. REV. 539, 540 (discussing the difficulty of splitting gender and racial identities).

342. *See* Martha C. Nussbaum, *The Modesty of Mrs. Bajaj: India's Problematic Route to Sexual Harassment Law*, *in* DIRECTIONS IN SEXUAL HARASSMENT LAW, *supra* note 158, at 633, 646 ("[O]ffensiveness and outrage themselves look to the wrong core categories for sexual harassment law.... The notion of outrage directs the mind only to grossness, and possibly also to unwelcomeness."); *see also supra* notes 289-96 and accompanying text.

343. *See* Beth A. Quinn, *The Paradox of Complaining: Law, Humor, and Harassment in the Everyday World*, 25 LAW & SOC. INQUIRY 1151, 1166 (2000).

took a skeptical view of the benefits of sexual harassment law, believing that filing a complaint was a risky and ineffectual tactic, likely to reinforce their "outsider" status without appreciably reducing the incidence of sex-based insults, demeaning "jokes," or physical aggression.[344] When harassment law is seen in this sobering light, it is easy to understand why most contemporary feminists doubt that reform of harassment law will likely produce immediate changes "on the ground." Instead, the focus tends to be on the more modest goal of providing sufficient protection to those few victims who decide to buck the conventional wisdom by resorting to law.

Since MacKinnon first argued against using tort law to remedy sexual harassment, the legal landscape has changed considerably. There is now less concern that association with tort law will contaminate sexual harassment law, especially given the danger that the claim might well be stripped of its radical elements even if it stays within Title VII. Instead, there is a growing sense that locating harassment claims solely within civil rights law may now serve to further marginalize the claim. Confined within civil rights, it can look like a claim that has no place in the core curriculum, describes only a particularized harm, and imposes only a special statutory duty that does not reflect a widely shared social norm.

V. REFLECTIONS ON THE MIGRATION PROCESS

Currently, civil rights principles have migrated into torts to the extent that tort law now operates as a modest supplement to civil rights protection provided by state and federal statutes. Except in those states that have preempted tort claims,[345] tort law already functions as more than a gap filler because it offers a remedy for harassment and abuse in some cases when there are other sources of legal redress. Interestingly, it is the perception of the intentional infliction tort as a mere gap filler—and the correspondingly high bar set for proving outrageousness—that has so far constrained the migration and continued the separation of torts and civil rights. In the minority of states that view the infliction tort as a

344. *Id.* at 1179.

345. *See supra* notes 109, 120 (listing twelve states total).

reinforcement of civil rights, however, the concept of outrage is incrementally being reshaped to encompass discriminatory treatment that simultaneously inflicts dignitary harm.[346] In line with the case-by-case approach to the intentional infliction tort, however, courts have not yet articulated a theory regulating the intersection of torts and civil rights beyond noting the important public policies underlying civil rights law.

The most recent draft of the *Third Restatement of Torts* recognizes this supplementary role for the intentional infliction tort. In addition to reciting the familiar language that the defendant's conduct must go "beyond the bounds of human decency," and be considered "intolerable in a civilized community,"[347] the comments to the *Restatement* indicate that the infliction tort plays some role in the employment context. The primary focus of the *Restatement* comments continues to underscore that the intentional infliction tort is not intended to change the at-will employment doctrine or interfere with management's prerogative to terminate such employees. However, the limited migration approach of the new *Restatement* does authorize a claim in cases where an employer "goes so far beyond what is necessary to exercise the right [to fire an at-will employee]" and "unnecessarily humiliates a fired employee."[348] Most significantly, the latest draft contains a comment explicitly mentioning harassment, the effect of civil rights law, and the preemption controversy and indicates that common law courts are free to apply the elements of the outrage tort in the employment context and to provide relief for extreme and outrageous behavior directed at employees.[349] The Reporter's Note, addressing claims in the employment context,[350] cites to a law review article by Mark Gergen, which stresses the "significant moral element" underlying the infliction tort and expresses the view that the history of sexual harassment "shows how the outrage standard allows new moral values to be woven into the fabric of the common law."[351] In keeping

346. *See supra* notes 87-94 and accompanying text.

347. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 45 cmt. c (Council Draft No. 6, 2006).

348. *Id.* cmts. d & m (stating that "[n]othing in this Restatement provides any categorical limitation to claims arising in the workplace").

349. *Id.* cmt. m.

350. *See id.* reporter's note cmt. d.

351. Mark P. Gergen, *A Grudging Defense of the Role of the Collateral Torts in Wrongful*

with its restating mission, the draft of the new *Restatement* does not indicate a preference for the "gap filler" or "civil rights reinforcement" approach, but leaves that important question up to state courts.[352]

With respect to the normative question of which approach states should adopt, I do not believe that characterizing the infliction tort as a "gap filler" is enough to decide the migration question. Calling the infliction tort a "gap filler" seems only to beg the question of whether there is a gap in tort law that should be filled. The history of the infliction tort indicates that, as originally conceived, the tort was viewed as filling an important gap or deficiency *within* tort law to provide a remedy for serious, nonphysical injury caused by behavior that seemed unquestionably immoral to judges.[353] Tellingly, when the tort was developed, there was no discussion of exempting certain behavior because it was already penalized by some other body of law, such as criminal or regulatory law. Instead, the "gap filler" description of the infliction tort seems to have arisen in response to concerns that the malleable modern tort could theoretically usurp or take over older particularized causes of action, such as libel and battery, that protected interests other than the interest in emotional tranquility. The label "gap filler" thus tells us little about how broad tort protection for nonphysical harms should be or how courts should treat cases that clearly meet the requisites of the outrage tort when there is also a remedy available outside of tort law. Although the term "gap filler" might suggest a minimal role for the infliction tort, that depends upon how large the gap is perceived to be and whether the focus is on the contours and scope of tort law or, rather, on the entire body of legal protection.

Because claims of harassment cannot be adequately addressed within tort law without resort to the infliction claim,[354] and because harassment results in serious injury that serves no socially useful purpose, there is a potential gap in tort law to fill. The pressing question becomes whether state courts will determine that

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Termination Litigation, 74 TEX. L. REV. 1693, 1709-10 (1996).

352. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 45 cmt. m ("Those matters, peculiar to a jurisdiction's statutory provisions, are left to local law.").

353. *See supra* Part III.

354. *See supra* text accompanying notes 146-57.

protecting individuals against discriminatory harms—like tort protection against violence and fraud—is of sufficient importance that it needs to be reinforced through state common law. Put another way, courts are faced with a difficult question of whether the concept of outrage can adequately perform the "important normative work"[355] of signaling the most despicable types of behavior if it remains divorced from principles of civil rights.

Because the tort of intentional infliction of emotional distress is now firmly established in the law, there is no need to resort to civil rights statutes to imply a new cause of action in tort. When a harassment victim seeks tort relief against outrageous treatment in the workplace, he or she is not asking the court to adopt a common law remedy for a federal statutory violation,[356] but rather is invoking or borrowing civil rights concepts to inform judicial understandings of outrageous behavior.[357] The migration of civil rights law into tort law that this Article envisions is an interpretive process by which courts selectively borrow from the statutory domain to give more concrete meaning to tort standards. The closest analogy may be to the judicial practice of borrowing safety standards from statutes in negligence actions to concretize the "reasonable person" standard under the negligence per se doctrine.[358] The underlying idea is that it is beneficial that statutory norms find their way into tort law to insure that common law adjudication reinforces legislative priorities and responds to changing cultural sensibilities.

Once a determination is made that courts in tort actions may appropriately borrow from civil rights, however, there remains the difficult question of precisely which concepts should be borrowed and how much overlap there should be between the two domains. Taking a page from the negligence per se doctrine, an initial

355. *See supra* note 43 and accompanying text.

356. *See* Cort v. Ash, 422 U.S. 66, 79-80 (1975).

357. *See* DOBBS, *supra* note 39, § 136, at 321-22 (discussing the adoption of federal statutes in state-law torts). *See generally* Michael Traynor, *Public Sanctions, Private Liability, and Judicial Responsibility*, 36 WILLAMETTE L. REV. 787 (2000) (discussing the difference between implying a right of action and borrowing statutory norms).

358. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 14 (Proposed Final Draft No. 1, 2005) (finding negligence per se if the actor violates a statute without excuse that is designed to protect against "the type of accident the actor's conduct causes, and ... the accident victim is within the class of persons the statute is designed to protect").

question is whether courts should follow California's lead and adopt a per se approach that automatically regards the creation of a hostile environment actionable under civil rights law as outrageous conduct in tort.[359] In such per se states, moreover, how should a court approach a case of harassment that does not amount to a civil rights violation because the ground for the harassment is not covered under the statute, as in the case of harassment based on language or sexual orientation?

Although there is something to be said for the simplicity of the per se approach, I do not regard it as the most desirable approach to migration. If one of the ultimate goals of migration is to reshape basic concepts and norms in tort—and not simply to provide an additional remedy for discrimination victims—selective borrowing rather than wholesale incorporation of civil rights law seems preferable. There is value in encouraging courts and litigants to articulate just which aspects of a civil rights violation are crucial to a tort determination of outrageous treatment of employees.

I would jettison the practice of searching for the unusual or bizarre feature of a case that sets it apart from recurring hostile environment cases, as some courts now do under the "gap filler" approach. Instead, under a "mutually reinforcing" approach to migration, courts should consider whether the defendant's conduct should be classified as outrageous in part because it conforms to a pattern common to civil rights violations, thus creating the potential for cumulative harm of targeted victims and the continuation of persistent social inequalities. Under such an approach, that the defendant's conduct amounted to a clear violation of civil rights law would make it more likely that the plaintiff would satisfy the threshold requirement of proof of outrageousness, but would not guarantee recovery or even submission of the case to the jury. In this respect, the approach is comparable to the "some evidence of negligence" approach to statutory violations in negligence cases,[360] in that courts and juries in individual cases would still be called on to make an independent determination of "outrageousness" focusing on the totality of the evidence in the case. And, like the current

359. *See supra* note 50.

360. *See* DOBBS, *supra* note 39, § 134, at 316-17 (discussing "some evidence of negligence" approach).

process for trying negligence cases, such a flexible approach to the infliction tort would have the virtue of promoting individualized justice, with the downside of producing some unpredictable and inconsistent results.

As discussed earlier, what I regard as the most innovative and transportable aspects of civil rights law relate to three basic features of the hostile environment claim.[361] Because these three features map quite easily onto current judicial approaches for determining outrageousness, as described in the *Restatement*[362] and by tort scholars,[363] they can be absorbed into the mainstream of tort law without much disruption.

The first feature places the focus of the claim on the dynamic pattern of the defendant's behavior, rather than on discrete acts. Looking to see whether the defendant's course of conduct over an extended period created a "constructive" condition of work fits the framework of the intentional infliction tort, which, in marked contrast to torts like battery or assault, does not presuppose that the specified injurious "conduct" can be fixed at a given point in time. The hostile environment claim, like the infliction tort, allows the plaintiff considerable leeway to select those events that cumulatively amount to an oppressive environment, and the opportunity to prove outrageousness by showing that the sum is worse than its parts. Similar to the requirement in civil rights litigation, in many torts cases the plaintiff will attempt to prove the outrageous quality of the defendant's conduct by emphasizing its severe or pervasive quality.

The second feature of the hostile environment claim that could inform judicial determination of outrageous behavior is an inquiry into the purpose and effect of the defendant's behavior.[364] In civil rights/hostile environment litigation, litigators are not restricted to showing that the defendant's purpose was to inflict psychological

361. *See supra* text accompanying notes 314-24.

362. *See supra* text accompanying notes 42-46.

363. *See* DOBBS, *supra* note 39, § 304, at 827; Givelber, *supra* note 11, at 52-54.

364. See the Equal Employment Opportunity Commission's definition of a sexually hostile environment, which focuses on both purpose and effect. 29 C.F.R. § 1604.11(a) (2004) (describing "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature ... [which have] the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment").

distress on the plaintiff or that the defendant's conduct had such an effect. Instead, the inequality lens of civil rights litigation encourages plaintiffs to demonstrate that the hostile environment created by the defendant also served some other harmful purpose, such as discouraging the integration of male-dominated jobs or preserving the character of a job as unsuitable for "outsiders" like the plaintiff. This capacity of hostile environments to perpetuate existing hierarchies in the workplace resembles the emphasis on exploiting a power disparity between the parties, long noted as a marker of outrageous behavior in infliction cases.[365] Although civil rights law has historically been more attuned than tort law to disparities between social groups—rather than simply between individual plaintiffs and defendants—there is no reason why courts could not consider the social effects of defendants' conduct in making a determination of outrageousness. Indeed, the migration of civil rights norms to tort law depends on just such an infusion of a group-based perspective.

Lastly, the feature of hostile environment litigation that potentially could have the greatest impact on determinations of outrageousness is the incorporation of perspective. As mentioned earlier, courts in Title VII cases have begun to consider events from the perspective of the target of the action, as well as from the perspective of the actor or a disinterested third party.[366] This attempt to look at a case from the perspective of a "reasonable person in the plaintiff's position" often highlights salient individual characteristics of the plaintiff—such as gender and race—and focuses attention on the impact of culturally significant factors, such as the plaintiff's token status or the inferior position of her social group within the particular organization.[367] In intentional infliction cases, courts have often noted that "taking advantage of a plaintiff known to be vulnerable" enhances the likelihood that the action will be deemed outrageous.[368] Civil rights law adds the important insight that race, gender, and other markers of outsider status can operate as vulnerabilities in the context of the workplace, especially as experienced from the perspective of the targeted group.

365. *See supra* note 46.
366. *See supra* text accompanying notes 322-24.
367. *See supra* note 323.
368. *See supra* note 46.

If not stunted by barriers such as preemption or the gap-filler approach, each state can decide for itself the degree to which concepts first developed under civil rights law should be universalized and brought into the mainstream of tort law. Leaving harassment and discrimination out of tort law strikes me as a bad idea that artificially distorts the concept of "outrageous" conduct and minimizes the importance of civil rights to individuals and to society as a whole. Concerns that relate to the amount or type of damages recoverable in such intentional infliction actions need not defeat the claim, but can be addressed directly by allocation of damages to the various claims[369] or though tort reform legislation at the state level.

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For quite some time, scholars in diverse fields have envisioned a core concept of individual dignity that would find expression in every area of law, guaranteeing freedom from torture, humiliation, and outrage. My hope is that courts will allow the migration process from civil rights to torts to proceed so that a more concrete and contemporary understanding of dignitary harm can emerge in tort law, divorced from antiquated notions of honor and status. The tort of outrage should be more than just a repository for the bizarre; it should mark the place where the law struggles to define and redefine the meaning of decency, humanity, and equality.

369. For example, to prevent double recovery, courts have exercised their discretion to develop methods for allocating damages to state and federal claims when both are presented. *See* Channon v. United Parcel Serv., Inc., 629 N.W.2d 835, 850 (Iowa 2001); *see also* Sharkey, *supra* note 9, at 40-43 (discussing allocating jury awards between federal and state claims and between compensatory and punitive damages).