INTANGIBLE DAMAGES IN AMERICAN TORT LAW: A ROADMAP

Robert L. Rabin*

Introduction
I. Intangible Harm: Accidental Physical Injury Torts
    A. The Common Law Approach: Pain and Suffering
    B. Legislative Approaches
        1. Wrongful Death and Survival Statutes
        2. No-Fault Compensation Statutes
        3. Tort Reform in the Late Twentieth Century: State Legislative Constraints on Pain and Suffering
    C. Pain and Suffering in Physical Injury Cases: Concluding Thoughts
II. Intangible Harm: Stand-Alone Emotional Distress
    A. Intentional Harms
    B. Accidental Harm Cases
        1. Negligent Infliction of Emotional Distress: Direct Harm Cases
        2. Negligent Infliction of Emotional Distress: Eyewitness Cases
    C. Stand-Alone Emotional Distress: Concluding Thoughts
III. Defamation
    A. Introduction and Exposition
    B. Defamation: Concluding Thoughts
IV. Right of Privacy
    A. Public Disclosure of Private Facts
    B. Intrusion
    C. Privacy: Concluding Thoughts

INTRODUCTION

Most textual treatments of American tort law focus primarily on the liability rules that have evolved over time. The story begins with the development of the writ system in medieval England. The narrative then turns to the dominant impact of the Industrial Revolution in fashioning the conceptual apparatus of negligence liability (duty, breach, cause in fact, proximate cause, and defenses). And finally, the doctrinal analysis moves to our modern era, featuring an expanded version of negligence liability rules, supplemented by strict liability for both ultra-hazardous activities and a hybrid version for defective products.

* A. Calder Mackay Professor of Law, Stanford Law School. My appreciation to Nora Engstrom for helpful suggestions and to David Watnick for excellent research assistance. An earlier version of this paper was presented at the Workshop on Non-Pecuniary Damages in Contracts and Tort, Erasmus School of Law, Rotterdam, March 2015, and was subsequently published as Robert L. Rabin, *Non-Pecuniary Damages in Tort and Contract*, 3 Chinese Journ. of Comp. Law 226 (2015). This version is substantially revised.

The fundamental divide between liability and damages is not ignored in this account. But a systematic treatment of damages, across the expansive domain of tort law, runs counter to the top-down association of rights with remedies. It follows from this liability-driven perspective that a de-coupling of intangible harm for stand-alone, across-the-board treatment runs still more against the grain.

This paper is designed to fill that gap by providing a succinct roadmap of the many pathways taken in providing recovery for intangible harm in tort. The paper was initially prepared for a comparative law conference, and in that setting, I assumed a lack of close familiarity with the historical origins and surprisingly broad expanse of recovery for intangible harm in American tort law. While succinctly presented, the present revised treatment, for those conversant with the US system, is meant to be comprehensive, addressing defamation and privacy, no-fault and tort reform, as well as the more conventional common law topics of intangible damages in cases of intentional and accidental harm.

I. INTANGIBLE HARM: ACCIDENTAL PHYSICAL INJURY TORTS

A. The Common Law Approach: Pain and Suffering

Modern American tort law traces its origins back to the beginning of the twentieth century. A generation earlier, with the growth of railroad transport and the corresponding expansion of industrial activity, tort had emerged as a unified field.[1] But it struggled to achieve legitimacy as a source of redress for accidental harm. Railroad grade-crossing injuries were frequently dismissed by harsh application of the contributory negligence defense. Industrial injuries similarly faced major roadblocks to recovery because of the imposition of a trinity of defenses: contributory negligence, the fellow servant rule, and most prominently, assumed risk. And recovery for product-related injuries was similarly narrowly confined by the requirement of privity of contract between product manufacturer and injury victim.[2]

As long as *liability* for accidental harm under the fault principle remained a highly contested threshold for establishing a right of recovery, the corresponding principle of *damages*—characterized generally as making the victim whole for losses suffered—eluded careful attention. Out-of-pocket losses for medical expenses and lost wages were taken to be defining features of compensatory damages from the outset. Perhaps less self-evidently, it appears from the early case law that intangible loss was similarly regarded as a baseline element of redress.

Revealingly, in the mid-nineteenth century case of *Morse v. Auburn & Syracuse Railroad Co.*,[3] when the defendant objected to the trial court's having instructed the jury that it should award damages for pain and suffering—and not just for pecuniary loss—Judge Johnson, in his opinion for the New York Court of Appeals, responded that "I am not aware that this point [the legitimacy of pain and suffering] has ever been distinctly adjudged, and probably it is because no

[1] *See* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 350-52 (3d ed. 2005).
[2] *See* Robert L. Rabin, *The Historical Development of the Fault Principle: A Reinterpretation*, 15 GA. L. REV. 925, 946 (1981).
[3] 10 Barb. 621 (N.Y. 1851). The plaintiff in *Morse* had "his right hand and wrist injured, and his face and hands badly scalded" after a locomotive engine crashed into the rail car he was seated in. *Id.* at 622.

one before ever raised the question, or stated a doubt as to its forming a proper subject for compensation in damages in actions for negligence."[4]

This confident assessment of the established linkage between pecuniary and nonpecuniary recovery in the tort law of damages rested on an equally forthright statement by the *Morse* court of a rationale that would sound familiar to any present-day American tribunal assessing common law tort damages:

> The bodily pain and suffering is part and parcel of the actual injury, for which the injured party is as much entitled to compensation in damages, as for loss of time or the outlay of money. It is true the footing for a precise and accurate estimate of damages may not be quite as sure and fixed in regard to it, as where a loss has been sustained in time or money; and yet the actual damage is no less substantial and real.[5]

And indeed, more than a century later, "the footing for a precise and accurate estimate" of pain and suffering damages remained as ill-defined as ever. Consider, in this regard, the quite representative California Model Jury Instruction, first defining the concept and then prescribing the jury's role in determining an award:

> Reasonable compensation for any pain, discomfort, fears, anxiety and other mental and emotional distress suffered by the plaintiff and caused by the injury . . . .
>
> No definite standard [or method of calculation] is prescribed by law by which to fix reasonable compensation for pain and suffering. Nor is the opinion of any witness required as to the amount of such reasonable compensation. . . . In making an award for pain and suffering you should exercise your authority with calm and reasonable judgment and the damages you fix must be just and reasonable in the light of the evidence.[6]

Clearly, the jury, as the dominant focal point of damage assessment in accidental harm cases, has been ceded threshold power to exercise vast discretion in translating intangible loss into a quantifiable figure. But, of course, the jury does not exercise *final* authority in determining the size of a damage award. In the first instance, the trial court judge has recourse to the power of additur or remittitur to either increase or decrease the size of a jury award. In reality, however, this power is only infrequently exercised.[7]

The greater potential constraint on jury discretion would be at the appellate level, where the state supreme courts could articulate standards for reviewing trial court assessments of pain and suffering that would narrow the parameters of traditionally-recognized jury discretion. But the generally recognized appellate standard for reviewing pain and suffering awards is extremely narrow.

A leading California Supreme Court case, *Seffert v. Los Angeles Transit Lines*,[8] is illustrative. Plaintiff suffered severe injuries to her foot, requiring repeated surgical interventions and leaving her crippled for life, when the doors on the defendant's bus closed in untimely

---

[4] *Id.* at 623-24.
[5] *Id.* at 623.
[6] BAJI 14.13 (2014) (alteration in original).
[7] Additur isn't an option in the federal courts because the Supreme Court has ruled that it violates the Seventh Amendment. Dimick v. Scheidt, 293 U.S. 474 (1935).
[8] 364 P.2d 337 (Cal. 1961).

fashion as she sought entry, dragging her for some distance along the street and throwing her to the pavement. Defendant's negligence and plaintiff's out-of-pocket expenses were uncontested on appeal. But the bus company challenged the pain and suffering damages awarded on the grounds that it was prejudicial and excessive.

The Court recounted the horrific (and permanent) nature of the plaintiff's injuries. But what standard was to be relied on in determining whether the monetized amount of $134,000 for pain and suffering was excessive?[9] In upholding the award, the majority responded that the test was whether the sum "shocks the conscience and gives rise to the presumption that it was the result of passion and prejudice."[10] This strikingly narrow formulation of the standard of review is, in fact, adhered to in most American jurisdictions.

Interestingly, there was a dissenting opinion filed by Justice Roger Traynor, the distinguished judicial figure who provided intellectual leadership to the California court throughout the 1960-70s era—an era in which the court was at the forefront in expanding the scope of liability for accidental harm. Justice Traynor would have opted for a more cabined approach that would have taken account of intangible loss awards in previous cases involving "similar injuries"; in particular, injuries to legs and feet.[11] But Justice Traynor's nod in the direction of capping or scheduling the size of pain and suffering awards was not found persuasive by the California court or elsewhere at the time.[12]

A related issue, which would trigger controversy a generation later, turned on the question of whether a distinctive element within the pain and suffering concept—loss of enjoyment of life—should be afforded special recognition in monetizing intangible loss. There are two facets to this question, well-discussed (and debated) in the leading case of *McDougald v. Garber*.[13] First, the court confronted the issue of whether an injury victim who was rendered comatose by the defendant doctor's malpractice could recover pain and suffering in light of her lack of consciousness. In an opinion that generated a strong dissent, the majority held that intangible loss served a restorative function, and consequently, since the plaintiff was unaware of her condition, she could experience no loss of enjoyment of life. To the contrary, the dissent argued that plaintiff had been robbed of years of meaningful existence—a singular and cognizable harm.[14] Interestingly, both opinions focus exclusively on the compensation goal of

---

[9] In 2015 dollars, this amount would be about $1.06 million.

[10] *Seffert*, 364 P.2d at 343 (citation omitted).

[11] *Id*. at 346 (Traynor, J., concurring).

[12] Scholarly discussion of methodologies for constraining virtually unchecked trial court discretion has been plentiful; see e.g. Ronen Avraham, *Putting a Price on Pain-and-Suffering Damages: A Critique of the Current Approaches and a Preliminary Proposal for Change*, 100 Nw. U. L. Rev. 87 (2006); Mark Geistfeld, *Placing a Price on Pain and Suffering: A Method for Helping Juries Determine Tort Damages for Nonmonetary Injuries*, 83 Cal.L.Rev. 775 (1995); James F. Blumstein, et al., *Beyond Tort Reform: Developing Better Tools for Assessing Damages for Personal Injury*, 8 Yale J.Reg. 171 (1991); Frederick F. Levin, *Pain and Suffering Guidelines: A Cure for Damages Measurement "Anomie,"* 22 J.L. Reform 303 (1989).

[13] 536 N.E.2d 372 (N.Y. 1989).

[14] The dissent's approach has seen minimal embrace in other states. *See* DAN B. DOBBS, THE LAW OF TORTS 1052 (2000).

tort law, and ignore discussion of the deterrence perspective, on which the dissent would seem to have the upper hand.[15]

The second facet of the loss of enjoyment of life issue addressed in *McDougald* assumed instead a conscious injury victim. The question then was whether more generally this component of pain and suffering should be broken out—presumably through a specifying jury instruction—for separate quantification apart from the more general jury consideration of harm from pain and suffering. On this broader question, the majority—again over a vigorous dissent—refused to depart from the traditional single-category approach, remarking that "the estimation of nonpecuniary damages is not amenable to such analytical precision and may, in fact, suffer from its application."[16] While a handful of states are in accord with the dissent, the majority view is that loss of enjoyment of life—like other identifiable components of pain and suffering such as grief, anxiety, and humiliation—cannot profitably be broken out for separate valuation.

There is yet another important dimension to intangible loss recovery in physical injury cases; namely, the right of consortium—a third-party claim. At early common law, this recovery was framed as a loss of services to an aggrieved husband whose wife was so disabled by tortious injury that she could no longer service the husband's domestic and sexual needs. With the enactment of women's rights legislation this asymmetry was removed; and the consortium claim was broadened in scope to encompass loss of companionship to either spouse.[17]

The current division among American courts is on the question of whether loss of consortium claims should be extended beyond spouses to claims on behalf of children and/or parents. In a leading California case, *Borer v. American Airlines, Inc.*,[18] a mother of nine children suffered catastrophic injuries from a falling light fixture in the defendant airline's terminal. The court refused to extend the duty to compensate for loss of companionship beyond spouses, expressing a concern for crushing liability—highlighted in the case by the circumstance that the injured mother had nine children. But this limitation is not universally recognized. A Massachusetts case decided roughly contemporaneously with *Borer* extended the consortium claim, stating that the child's dependence "must be rooted not only in economic requirements but also in filial needs for closeness, guidance, and nurture."[19]

B. Legislative Approaches

1. Wrongful Death and Survival Statutes

At early common law, there was no recovery in cases of accidental harm resulting in death of the victim. The claim was viewed as personal to the injured party, rather than one where a survival interest was recognized. By the modern era, however, every American jurisdiction had come to recognize two discrete interests: A wrongful death claim on behalf of survivors for loss of economic dependency earnings, and a survival claim on behalf of the decedent's estate for

[15] See *infra* text at note 40.
[16] *McDougald* at 536 N.E.2d at 376.
[17] For discussion, see Diaz v. Eli Lilly & Co., 302 N.E.2d 555 (Mass. 1973).
[18] 563 P.2d 858 (Cal. 1977).
[19] Ferriter v. Daniel O'Connell's Sons, Inc., 413 N.E.2d 690 (Mass. 1980) (superseded by statute on other grounds by MASS. GEN. LAWS ch. 152 § 24 (2014)).

tangible and intangible loss experienced by the decedent if there was a window of time between the fatal injury and death.[20]

Until the mid-twentieth century, American wrongful death statutes were explicitly limited to pecuniary loss; that is, the loss of economic support stemming from the decedent's demise.[21] But the picture today is notably different. In most American jurisdictions, wrongful death statutes recognize loss of companionship—intangible loss paralleling the long-recognized loss of consortium claim in serious injury cases—as a component of the damages award.[22]

Survival statutes present a more complicated picture. Here, the statutory provisions in most jurisdictions have traditionally recognized conscious pain and suffering experienced by the decedent between injury and death as an element of the claim by the estate of the decedent against the defendant—along with pecuniary loss (medical expenditures and lost income)—in that generally brief period of time. But the case for recognizing intangible loss here is arguably not as clear as in the wrongful death claim. In the latter case, it is the grieving and loss by survivors that is the foundation for redress. By contrast, pain and suffering in the survival action scenario involves awarding damages to the estate (and consequently, to the beneficiaries)—since, by definition, a decedent cannot be recompensed for this intangible loss.

Some critics have viewed survival statute recovery of intangible harm as anomalous, and a minority of states have reached the same conclusion. Thus, in California, for example, pain and suffering damages are not available in survival actions.[23]

From another perspective, however, the traditional majority American view of recognizing intangible loss in the window of time between injury and death can be viewed as *under-inclusive*, rather than over-inclusive. Here the reference point can be taken as the debate between the majority and dissent in *McDougald v. Garber*, the comatose victim case, discussed above.[24] As I indicated, the majority opinion in *McDougald* rested on the "make whole" principle of tort recovery, and argued for the implausibility of recognizing loss of enjoyment of life in an insensate victim. The logic of that viewpoint would carry over to the accidental death scenario—or at least, to the scenario where death follows immediately upon injury and there is no possibility of conscious reflection by the victim about the future.[25] But in recent years, a handful of states have, in effect, taken the deterrence perspective that is implicit in the *McDougald* dissent, and recognized that the untimely death of an injury victim constitutes a social welfare loss—the lost years of enjoying life's pleasures—and that consequently,

---

[20] These statutes were modelled on the English wrongful death legislation initially enacted in 1846. DOBBS, *supra* note 14, at 803.

[21] Initially, many states also capped the pecuniary damages that could be obtained, often between $3,000 and $5,000. See John F. Witt, The Long History of State Constitutions and American Tort Law, 36 Rutgers L.J. 1159, 1166-71 (2005).

[22] *Id.* at 812.

[23] Cal. Code Civ. Proc. § 377.34.

[24] *See supra* text at notes 16 and et seq.

[25] Arguably, the logic of *McDougald* would allow for loss of enjoyment of life recovery in cases where a brief time period of consciousness occurred before the decedent expired. Interestingly, neither the common law courts nor state legislators felt compelled to deal with the paradox that fatal injury victims were afforded lesser recognition than non-fatal injury victims in these circumstances.

prospective injurers are under-deterred from engaging in optimal risk prevention if loss of enjoyment of life goes unrecognized in survival recoveries.[26]

Conceptually, the case for recognizing intangible loss recovery in these two categories of claims arising in fatal accident cases is quite distinct. In the wrongful death statutory claim, it is the *survivor's* loss of companionship that is being recognized. In the survival statute claim, it is the *decedent's* loss of opportunity to experience life in its fullest measure that is being recognized. Hence, there is no duplicative recovery if both interests are compensated.

2. No-Fault Compensation Statutes

In the early twentieth century, a Progressive Era movement swept the United States, replacing tort with workers' compensation legislation in virtually every state. As mentioned at the outset, nineteenth century industrial injury accident law was a harsh regime in which employers were frequently successful in interposing defenses to claims of negligence in the workplace. Workers' compensation legislation overturned these barriers to redress, abolishing tort in industrial injury cases and providing for liability without the need to show fault ("no-fault liability") for injury claims arising out of the workplace.[27]

But there was a trade-off: While workers no longer had to establish fault (or freedom from contributory fault) to recover for accidental injuries, the state statutory compensation schemes typically constrained damages by limiting recovery to medical costs and two-thirds of lost income; i.e. recovery was measured exclusively in pecuniary terms.

The second major no-fault movement in American accident law came a half-century later when roughly half of the states enacted no-fault motor vehicle injury statutes between 1970 and 1975.[28] Like workers' compensation, these statutory schemes made no provision for intangible loss recovery. But in sharp contrast to the industrial injury statutes, even the most generous of the auto no-fault schemes retained the tort option for more serious injuries—and the less generous schemes simply added on a measure of no-fault recovery without eliminating tort at all. Thus, the universe of accidental harm in which intangible loss recovery was abolished remained largely limited to workplace injuries.[29]

A different pathway is evident in statutory no-fault legislation enacted in more recent years. At the national level, there is now a no-fault legislative compensation scheme for vaccine-related injuries, and at the state level there are two states, Florida and Virginia, which have enacted no-fault schemes for birth-related neurological injuries.[30] Under the vaccine act, intangible loss recovery is capped at $250,000; under the Florida scheme lump-sum recovery is

---

[26] *See* Durham v. Marberry, 156 S.W.3d 242, 243 (Ark. 2004) (allowing recovery for loss of enjoyment of life in a survival action, even where the victim has "no period of life between injury and death").

[27] *See* Lawrence M. Friedman & Jack Ladinsky, *Social Change and the Law of Industrial Accidents*, 67 COLUM. L. REV. 50, 69-72 (1967).

[28] *See* Nora Freeman Engstrom, *An Alternative Explanation for No-Fault's "Demise"*, 61 DEPAUL L. REV. 303, 319 (2012).

[29] In the more generous version of auto no-fault out-of-pocket recovery, where tort is available only after the statutory compensation threshold has been met—e.g. New York, which reimburses under the no-fault statute for the first $50,000 of basic economic loss—recourse to tort for intangible loss beneath the threshold is not precluded if the injury falls within a statutorily defined definition of "significant" injury.

[30] Robert L. Rabin, *The Renaissance of Accident Law Plans Revisite*d, 64 MD. L. REV. 699, 706-09 (2005).

capped at $100,000.[31] The virtually unbounded discretion characteristic of tort recovery for noneconomic loss is sharply constrained under these no-fault schemes, but intangible loss recovery is nonetheless available under the compensation system itself—unlike workers' compensation and auto no-fault.

Still another pathway to recovery for intangible loss was marked out in the national no-fault scheme enacted to cover the loss of life and injuries associated with the victims of the September 11 catastrophe. Here, in singular fashion, the no-fault scheme mirrored tort itself by placing no defined bounds on noneconomic recovery. The September 11 Victim Compensation Fund allowed for "losses for physical and emotional pain, suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of enjoyment of life, loss of society and companionship, loss of consortium (other than loss of domestic services), hedonic damages, injury to reputation, and all other nonpecuniary losses of any kind or nature."

Notably, this strikingly broad proviso was subsequently diminished in dramatic fashion by Kenneth Feinberg, the program benefits administrator, who decreed in his implementing regulations that non-economic loss would be "presumed" to be $250,000 for decedents, plus $100,000 for the surviving spouse and each dependent of the deceased. In his later reflections on the program, Feinberg commented: "I refused to exercise Solomonic judgment in calibrating individual degrees of pain and suffering. Who was I to determine whether the victim had been killed instantly when the planes hit the World Trade Center or had died a slow death from suffocation, burns, or the collapse of the tower?"[32]

3. Tort Reform in the Late Twentieth Century: State Legislative Constraints on Pain and Suffering

Beginning in the mid-1970s, the common law's remarkably open-ended approach to monetizing pain and suffering harm came under serious attack—particularly on the grounds of unpredictability—resulting in vigorous efforts in the legislative forum by defense interests to scale back on the size of awards.[33] The critical turning point came in California with the enactment of the Medical Injury Compensation Reform Act (MICRA) in 1975, which placed a ceiling on pain and suffering damages in medical malpractice cases of $250,000.[34]

---

[31] Virginia has no provision for intangible recovery loss. *Id.* at 709. "Although both schemes aspired to make no-fault an exclusive remedy against participating physicians apart from exceptional situations, the Florida statute has been judicially interpreted to leave the tort option open under many circumstances," and a small number of Virginia plaintiffs have continued to file in tort." *Id.*

[32] KENNETH R. FEINBERG, WHAT IS LIFE WORTH? 35, 77 (2005).

[33] The unpredictability argument, as spelled out by the American Tort Reform Association (ATRA), goes like this:

> These damages involve no direct economic loss and have no precise value. It is very difficult for juries to assign a dollar value to these losses, given the minimal guidance they customarily receive from the court. As a result, these awards tend to be erratic and, because of the highly charged environment of personal injury trials, excessive.

See ATRA (American Tort Reform Association), *Noneconomic Damages Reform*, http://www.atra.org/issues/noneconomic-damages-reform.

[34] CAL. CIV. CODE § 3333.2. The ceiling has never been revised; forty years later, it remains $250,000. The Act included a number of other limitations on tort recovery in medical malpractice cases. In any case in which the award of future damages exceeded $50,000, the judge was required, at the request of either party, to direct that the money be paid periodically. If the victim died before the judgment was satisfied, the defendant might be relieved of paying for future medical expenses. (The payments for future lost earnings would not be affected by death.) Maximum

Since the mid-1970s, there have been a succession of waves of state legislative tort reform, in which limitations on recovery for pain and suffering have been a focal point. In the mid-1980s, a second wave occurred: Between 1985 and 1988, 23 states placed some type of ceiling on pain and suffering awards—frequently, without limit to medical malpractice cases.[35] Maryland, for example, enacted a flat cap on pain and suffering of $350,000 applicable across the board in accidental harm cases. A third wave of reform commenced in the early 1990s, adding a handful of additional state legislative ceilings on pain and suffering awards. In 2003, Texas adopted a package of tort limitations on medical malpractice, including a ceiling of $250,000 in pain and suffering on medical malpractice and hospital facilities liability—coming full circle to MICRA (and relying on this earlier effort as a model).[36]

A related tort reform strategy, again featuring pain and suffering as a prospective candidate for special treatment, addresses the allocation of damages in cases of joint defendants. The traditional common law rule has been joint-and-several liability, under which any jointly responsible defendant can be held responsible for the entire award of damages—thus providing a measure of protection to a plaintiff against the risk of an insolvent defendant. In the new era of tort reform, joint-and-several liability, along with pain and suffering, has been singled out for curtailment.

Some states have replaced joint-and-several with several only liability; so that a victim of a joint tort can only recover a proportionate share of fault from any individual defendant. California, however, has adopted an interesting middle-ground approach, which bears directly on intangible harm. Under California law, responsibility for out-of-pocket loss remains joint-and-several. But responsibility for pain and suffering loss is several only, thus creating a hierarchy of damages in which full recovery of a victim's economic loss is given priority over recovery for pain and suffering loss.

In recent years, the legislative tort reform movement has encountered rocky sailing. An organized counter-movement by plaintiffs' attorney has challenged the constitutionality of the tort reform measures just discussed—and has realized a considerable amount of success in getting the measures (and in particular the ceilings on pain and suffering damages) struck down on a variety of grounds. In 2014, the Florida Supreme Court struck down a cap on wrongful death noneconomic damages recoverable in medical malpractice actions on the grounds of violation of the state constitution equal protection clause.[37] In the past decade, legislative efforts to limit pain and suffering damages similarly have been invalidated on constitutional provisions guaranteeing right to jury trial, right to obtain damages, and right of access to courts, among

---

percentages for contingent fees were set. Finally, the Act provided that if all or part of the victim's medical bills had been paid by the victim's own insurance or some other source unrelated to the defendant, the jury should be told this but not told what to do with the information. Subrogation was eliminated. MARC A. FRANKLIN, ROBERT L. RABIN & MICHAEL D. GREEN, TORT LAW AND ALTERNATIVES: CASES AND MATERIALS 823 (9th ed. 2011).

[35] As in the case of MICRA, these pain and suffering limitations were generally incorporated in a broader package of limitations. For discussion, see generally Joseph Sanders & Craig Joyce, *"Off to the Races": The 1980s Tort Crisis and the Law Reform Process*, 27 HOUS. L. REV. 207 (1990).

[36] See generally, ATRA, *Noneconomic Damages Reform*, *supra* note 33.

[37] Estate of Michelle Evette McCall, 134 So.3d 894 (Fla. 2014).

others.[38] Clearly, the push and pull between legislatures and courts shows no indication of abating.

C. Pain and Suffering in Physical Injury Cases: Concluding Thoughts

Since the mid-twentieth century, if not earlier, disenchanted commentators have questioned the very legitimacy of pain and suffering recovery. Writing in 1953, Louis Jaffe argued that:

> It is doubtful that past pain figures strongly as present outrage. And even granting these arguments there must be set over against them the arbitrary indeterminateness of the evaluation. Insurance aside, it is doubtful justice seriously to embarrass a defendant, though negligent, by real economic loss in order to do honor to plaintiff's experience of pain. And insurance present, it is doubtful that the pooled social fund of savings should be charged with sums of indeterminate amount when compensation performs no specific economic function.[39]

These academic arguments levelling a wholesale attack on the concept of pain and suffering have failed to gain purchase in the American courts.[40] As indicated above, however, efforts in the political arena to limit the size of pain and suffering awards through legislative caps have realized far greater success. But this does not mean, of course, that they are immune from criticism on the merits.

At least four points must be weighed against the unpredictability argument. In a direct challenge to the economic attack on pain and suffering, Judge Richard Posner, himself a leading figure in the law and economics field, has responded:

> We disagree with those students of tort law who believe that pain and suffering are not real costs and should not be allowable items of damages in a tort suit. No one likes pain and suffering and most people would pay a good deal of money to be free of them. If they were not recoverable in damages, the cost of negligence would be less to the tortfeasors

---

[38] *See, e.g.*, Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt, 691 S.E.2d 218 (Ga. 2010) (holding that a cap on medical malpractice damages infringed the right to a jury trial); Lebron v. Gottlieb Mem'l Hosp., 930 N.E.2d 895 (Ill. 2010) (holding that a cap on noneconomic damages in medical malpractice cases violated Illinois' separation of powers doctrine); Ferdon v. Wisconsin Patients Comp. Fund, 701 N.W.2d 440 (Wis. 2005) (holding that a cap on medical malpractice actions violated equal protection).

[39] Louis Jaffe, *Damages for Personal Injury: The Impact of Insurance*, 18 LAW & CONTEMP. PROBS. 219, 224-25 (1953). Jaffe is more equivocal when he addresses the loss of enjoyment of life component of pain and suffering: "…though money is not an equivalent it may be a consolation, a solatium. These arguments, however, are most valid for disfigurements or loss of a member giving rise to a continuing sense of injury." *Id.* at 224. For a later commentary in the same skeptical vein about the legitimacy of pain and suffering, see Joseph King, *Pain and Suffering, Noneconomic Damages, and the Goals of Tort Law*, 57 SMU L. REV. 163 (2004). An elaborate treatment of the case against pain and suffering damages is Richard Abel, *General Damages are Incoherent, Incalculable, Incommensurable, and Inegalitarian (But Otherwise a Great Idea)*, 55 DePaul L. Rev. 253 (2006).

Perhaps Jaffe concedes too much: There is more recent empirical literature supporting the thesis that serious injury victims are far more adaptable to living with their continuing handicaps than the loss of enjoyment of life approach presumes. See Cass Sunstein, *Illusory Losses*, 37 J. of Legal Studies S157 (2008).

[40] Civil jury trial recovery data compiled in 2005 by the Bureau of Justice Statistics and National Center for State Courts showed a median ratio of noneconomic to economic compensatory damages of 1.19, and a median ratio of 6.35. Herbert M. Kritzer et al., *An Exploration of Noneconomic Damages in Civil Jury Awards*, 55 WM. & MARY L. REV. 971, 988-89, 1004 (2014).

and there would be more negligence, more accidents, more pain and suffering, and hence higher social costs.[41]

A second, more pragmatic argument for pain and suffering damages rests on a distinctive feature of the American tort system, the contingency fee. In common law tort cases, American plaintiffs' attorneys base their compensation on a contingency fee: If the case is lost, they recover nothing; if it is won, their fee is a percentage of the tort award (generally one-third). Unless the American fee-assessing system were to be reconstituted, the consequence of eliminating pain and suffering damages would generally be that the injury victim would not even recover out-of-pocket economic loss (an example: $60,000 in medical expenses + $60,000 in lost wages *reduced by one-third for the attorney's fee* = a net recovery to the victim of $80,000; considerably less than baseline economic loss suffered).

A third argument challenges in more subtle fashion the notion that pain and suffering addresses no cognizable economic consequences. In particular, when a victim suffers massive lifetime disabling injuries, it can be argued that pecuniary redress is in fact the most effective way of achieving some restoration of a meaningful life: Perhaps by developing new interests in technology or culture, engaging in travel, pursuing educational goals, or developing some other new pathway to vitality. Ordinary out-of-pocket recovery would not address these ends.

These arguments challenge the wholesale attack on pain and suffering. A fourth argument challenges the fairness of caps per se; in particular, since a ceiling on pain and suffering regressively limits full recovery for those who are most seriously injured. More generally, of course, any given cap—whether it be $100,000 or $250,000—is in a real sense an arbitrarily-drawn line above which redress is precluded.

Against these various arguments one has to weigh the conceded unpredictability of virtually open-ended discretionary pain and suffering awards. And relatedly, the fairness argument, from a horizontal equity perspective, that like injuries should be treated in like fashion. As a final note, then, one can return to Justice Traynor's dissent in the *Seffert* case, discussed earlier, suggesting the possibility of creating discrete categories of harmful injuries and scheduling a range of acceptable damages within each category.[42] Commentators have offered recommendations along these lines.[43] But so far this intermediate zone between common law, largely unchecked discretion and legislatively-mandated ceilings has gone unheeded in the political forum.

II. INTANGIBLE HARM: STAND-ALONE EMOTIONAL DISTRESS

The preceding section discusses recovery for intangible harm in cases where it is linked to physical injury—hence, it is sometimes referred to, perhaps disparagingly, as "parasitic

[41] Kwasny v. United States, 823 F.2d 194, 197 (7th Cir. 1987). For an elaborate scholarly response to the law and economics attack on pain and suffering, see Steven P. Croley & Jon D. Hanson, *The Nonpecuniary Costs of Accidents: Pain-and-Suffering Damages in Tort Law*, 108 Harv. L. Rev. 1785 (1995).

[42] Compare workers' compensation schedules in permanent partial disability cases. N.Y. WORKERS' COMP. LAW § 15 (McKinney Supp. 2013).

[43] *See, e.g.*, Blumstein et al., *supra* note 12 (proposing that juries be provided on past awards in similar cases, and that they be made to justify awards on the high or low side of the established range); Levin, *supra* note 12 (proposing that pain and suffering damages follow an approach similar to criminal sentencing guidelines).

damages." In this section, I address the categories of tort law in which the victim's claim is *solely* for intangible harm: A variety of emotional distress-based claims that stand on their own.

I begin with a departure from the accidental harm scenarios that have served as a common feature in the earlier coverage, because the historically most long-standing tort-type recoveries were grounded in *intentional* harm—recoveries for assault and false imprisonment.[44] Next, I discuss a twentieth-century development, the tort of intentional infliction of emotional distress (IIED), which reflects evolving social norms—again, apart from accidentally caused harm—that are distinctly modern in character. Then, I return to the world of accidental harm, addressing two types of negligently inflicted emotional distress (NIED): directly experienced emotional distress and eyewitness distress over physical harm to a third-party.

A. Intentional Harms

The intentional tort of assault is based on the apprehension of a battery; in other words, the immediate fear of physical injury. Notably, it is fear, or apprehension alone, that is the core harm recognized in an assault claim. This tort traces its origins far back in Anglo-American law. Thus, in 1348, in the oft-cited case of *I de S. v. W de S.*,[45] the defendant came to the plaintiff's tavern demanding entry. When she responded that the tavern was closed, he swung his axe at her as she stuck her head out of the window. The court recognized the tort of assault based on her apprehension of physical harm. Now, almost seven centuries later, the case—and the tort claim it recognized—remains a fixture of Anglo-American intentional tort law.

A second intentional tort of ancient vintage is the claim of false imprisonment, based on an unjustified detention of the plaintiff. Once again, this tort action is grounded in intangible harm without any corresponding physical injury; in particular, it rests on a reasonable belief that the plaintiff's individual autonomy is being unreasonably constrained. Here, the modern cases have particular salience in shoplifting scenarios, where the shopkeeper's belief that plaintiff is engaging in a clandestine effort to take goods without payment leads to an effort at constraint—and perhaps a call to the police—followed by a false imprisonment (or false arrest) claim by the indignant shopper. The dilemma here for the shopkeeper is evident. A failure to engage in immediate self-help measures means the goods are taken with no apparent redress available. At the same time an erroneous defensive effort may lead to a vengeful lawsuit by an innocent victim.[46]

If indignation is the key to these latter claims, it is the cornerstone of an intentional tort that traces its origins only as far back as the mid-twentieth century. At that point, a cluster of ill-defined insults, practical jokes, and other egregious antisocial behavior had, at times, led to

---

[44] For discussion, see Robert L. Rabin, *Pain and Suffering and Beyond: Some Thoughts on Recovery for Intangible Loss*, 55 DePaul L.Rev. 359 (2006). One might also add nuisance law, which involves invasion of interests in the use and enjoyment of land—and which cuts across the categories of strict liability, negligence and intentional harm, at the intersection of tort and property law. The classical cases, involving continuing exposure to industrial pollutants, noxious odors, or excessive noise, typically are based on economic loss of market value often combined with allegations of pain and suffering.

[45] Y.B. Lib. Assis. f. 99, pl. 60 (1348).

[46] A private party's privilege to undertake a citizen's arrest at common law was exceedingly narrow; in essence, allowing no room for mistake in judgment. See Dobbs, *supra* note 14 at 196-98. Most states have enacted protective legislation covering circumstances where the shopkeeper had a reasonable belief that a theft had taken place. See e.g., New York, General Business Law § 218 (1960).

redress in court without any clear doctrinal foundation.[47] In 1948, the American Law Institute added a provision in the Second Restatement of Torts aimed at addressing this doctrinal gap in the law. Section 46 enunciated the tort of intentional infliction of emotional distress (IIED):

> One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.[48]

Note the conjunctive "and"; liability does not require bodily harm if the severe emotional distress is a consequence of "extreme and outrageous conduct."

This relatively recent intentional tort has been widely accepted in American law; albeit, with clear judicial understanding that the threshold requirement of extreme and outrageous misconduct is a substantial barrier to providing tort relief for merely rude and repugnant conduct that is viewed as a sometime consequence of everyday life.[49]

More recently, the U.S. Supreme Court has added its voice in qualifying the scope of the IIED tort in two interesting cases. In *Hustler Magazine v. Falwell*,[50] the plaintiff, a nationally known minister was viciously satirized in an off-color magazine by a fake advertisement containing demeaning sexual innuendoes. Plaintiff sued on a variety of theories, the most prominent being IIED. The Supreme Court denied the claim on First Amendment freedom of speech grounds reciting the long history of parody and caricature of public figures as central features of American political and social culture. In the second case, *Snyder v. Phelps*,[51] the plaintiff was the father of a dead soldier, whose funeral was allegedly disrupted by an unorthodox fundamentalist church group that went around the country disparaging homosexuals and other mainstream cultural norms by protesting at funeral services. Again, the plaintiff's IIED claim was rejected on First Amendment freedom of speech grounds.

A cautionary note. Since most IIED claims have no political or cultural overtones, but rather are simply exceptionally egregious examples of one-on-one antisocial conduct, the reach of these two Supreme Court opinions is almost certainly limited. Nonetheless, they do stand as a barrier to an important category of intangible harm claims that might be based on intentional infliction of emotional distress —those identified with social/political criticism.

B. Accidental Harm Cases

1. Negligent Infliction of Emotional Distress (NIED): Direct Harm Cases

---

[47] A leading English case involving an egregious practical joker is Wilkinson v. Downton, (1897) 2 Q.B. 57; a particularly mean-spirited effort to humiliate an emotionally fragile victim is redressed in Nickerson v. Hodges, 84 So. 37 (La.1920).

[48] RESTATEMENT (SECOND) OF TORTS § 46 (1965).

[49] For judicial expressions of this viewpoint, see e.g., Wallace v. Shoreham Hotel Corp., 49 A.2d 81 (D.C.Mun.App.1946)(insulting behavior by a waiter in a restaurant); Bartow v. Smith, 78 N.E.2d 735 (Ohio 1948)(epithets haranguing a vulnerable individual on a crowded city street). For skepticism about the Restatement's effort to draw a line in § 46 sanctioning excessive incivility, see Daniel Givelber, *The Right to Minimum Social Decency and the Limits of Evenhandedness: Intentional Infliction of Emotional Distress by Outrageous Conduct*, 82 Colum L.Rev. 42 (1982).

[50] 485 U.S. 46 (1988).

[51] 562 U.S. 443 (2011).

Until the 1960s, American courts did not recognize a tort of negligently inflicted emotional distress apart from narrowly circumscribed, especially gruesome circumstances: the mishandling of a corpse and the erroneous sending of a family death notification telegram.[52] Other than those situations, virtually every state required some sort of physical contact as a threshold to emotional distress recovery, providing some assurance against three related concerns: 1) opening the floodgates to excessive litigation; 2) encouraging fraudulent claims; and 3) creating valuation assessments not anchored in pecuniary loss.

But in the 1960s, the courts began to cautiously entertain such claims. A leading case came out of the New York Court of Appeals. In *Battalla v. State*,[53] defendant negligently failed to secure a young plaintiff in her ski chair lift, leaving her dangling precipitously at a great height for an extended period of time. The highest New York court overturned earlier precedents and recognized the plaintiff's claim for fright. Other state courts were similarly receptive in "near miss" cases like *Falzone v. Busch*,[54] in which the plaintiff narrowly missed being seriously injured by the defendant's negligently driven auto, which had veered across the highway, and in fact seriously injured her husband. These cases, in which a negligent infliction of emotional distress tort (NIED) was recognized, came to be identified as "zone of danger," or fear of physical injury scenarios.

Importantly, most American courts treat these circumstances as a baseline requirement for recovery of stand-alone intangible harm. As a consequence, a major category of potential emotional distress claims has been generally disregarded: so-called cancerphobia cases, those involving fear of future development of cancer from present negligently-caused exposure to a toxic substance.

This case law has been substantially affected by the mass asbestos exposures beginning near the middle of the twentieth century. Initially, asbestos manufacturers vigorously contested *any* responsibility. But it became clear that the industry had failed to warn exposure victims—principally in workplaces—about the serious risks posed by asbestos. Thousands of claims have been brought for mesothelioma (a particularly fatal type of cancer closely identified with asbestos exposure), lung cancer, and asbestosis. Not surprisingly, as these physical harm cases have been filed en masse, other asbestos-exposed workers not yet suffering from any disease have been wracked with anxieties over the prospect of developing a future serious disease.

A leading case, denying recovery to exposure-only cancerphobia victims, was handed down by the U.S. Supreme Court, which had jurisdiction under the Federal Employers' Liability Act (FELA), a federal statute that provides relief to negligently injured railroad workers.[55] In *Metro-North Commuter Railroad Co. v. Buckley*,[56] plaintiff sought recovery for years of exposure to asbestos while working as a pipefitter in New York's Grand Central Station. He claimed serious and continuing emotional distress—although without yet experiencing physical disease symptoms—upon finding out that he might develop cancer in the future. The Supreme Court surveyed state court decisions elsewhere and concluded that plaintiff could not recover because he could claim neither harm based on physical contact nor zone of danger-based

[52] *See* DOBBS, *supra* note 14, at 836-37.
[53] 250 N.E.2d 224 (1969).
[54] 214 A.2d 12 (1965).
[55] 45 U.S.C. §§ 51-60 (2012).
[56] 521 U.S. 424 (1997).

exposure. While the Court's non-constitutional decision in this case—based on its interpretation of the FELA—is not binding on the states, it does reflect the majority view among state courts.[57]

One could argue that it is anomalous to allow emotional distress recovery to "near-miss" victims, who might be expected to suffer only short-term distress and anxiety, but to deny such recovery to those facing the prospect of long-latency development of cancer from significant exposure to asbestos or toxic drinking water. The anomaly is almost certainly explained, if not resolved, on pragmatic grounds. In a chemical age, when carcinogens are ubiquitous and exposures at some level are very widespread in the population, the courts have been reluctant to potential opening of the floodgates to an enormous number of claims. By contrast, the near-miss cases, just because they do involve highly transitory, ephemeral claims are almost assuredly not likely to generate jury awards of any substance; and consequently are unlikely to cause more than a ripple in the stream of stand-alone cases, limited most likely to dramatic circumstances, as in *Battalla*, the ski-lift case.[58]

2. *Negligent Infliction of Emotional Distress: Eyewitness Cases*

It wasn't long after the direct claim NIED cases became a recognized, if limited category of recovery for intangible harm, before third-party claims crystallized as a related category. In these cases, an archetypal scenario would be a negligently caused auto accident where a child suffers serious physical injury or death as her parent eyewitnesses the accident scene. The intangible loss claim is brought by the parent for the shock and horror of seeing the injury or fatality occur. *Dillon v. Legg*,[59] the leading case decided by the California Supreme Court, is just such a scenario. In *Dillon*, the court established three guideposts for identifying a duty owed to the third-party eyewitness: 1) close family relationship to the physical injury victim; 2) direct observation of the accident; and 3) location near the scene of the accident. Many courts follow, or approximate, these guideposts—albeit many would undoubtedly read the factors strictly; so that, for example a parent notified over the phone, or coming on the accident scene after the accident in fact occurred, would not be allowed emotional distress recovery.[60]

Like the courts in direct-claim NIED cases, the judiciary has been cautious about opening the doors too widely to aggrieved victims. Indeed, the New York Court of Appeals recognizes a duty to third-party observers only if they are in the zone of danger, as well as satisfying *Dillon*-type criteria.[61] This serves to highlight the circumspect approach in this area, since there is no logical reason to add a zone of danger requirement when the victim's claim is based on distress from eyewitnessing injury to another, not apprehension of personal injury.

---

[57] But see, Potter v. Firestone Tire and Rubber Co. 863 P.2d 795 (Cal.1993), a claim based on exposure to toxic chemicals in the family's drinking water, which reflects a slightly more plaintiff-friendly approach to cases in which no physical symptoms have yet developed. *Potter*, however, affords an exceedingly cautious recognition of a duty, requiring that "the plaintiff's fear stems from a knowledge corroborated by reliable medical or scientific opinion, that it is more likely than not that the plaintiff will develop cancer in the future due to the toxic exposure."

[58] For a more expansive treatment of the range of policy-based limitations on recovery for intangible harm, see Robert L. Rabin, *Emotional Distress in Tort Law: Themes of Constraint*, 44 Wake Forest L. Rev. 1197 (2009).

[59] 441 P.2d 912 (1968) (en banc).

[60] This is how the case law in fact has evolved in California. *See* Thing v. La Chusa, 771 P.2d 814, 815, 830 (1989) (en banc) (holding that a mother, who found her minor son bloody and unconscious after being hit by a car, could not recover for emotional distress because she had not witnessed the accident itself).

[61] *See* Bovsun v. Sanperi, 461 N.E.2d 843, 847 (1984).

The strong point of emphasis here is that neither the New York, nor for that matter the more plaintiff-friendly California approach, can be taken to be foreseeability-based. It is surely foreseeable that witnessing a horrific injury to a very close friend, or a parent coming on the scene belatedly while the child still lies insensate, would suffer great distress. And yet these claims would generally be denied. These duties reflect a constrained version of foreseeability, limited to the most apparent markers of likely distress, in order to keep the NIED category within boundaries that avoid overwhelming the judicial docket.[62]

C. Stand-Alone Emotional Harm: Concluding Thoughts

There is a disjuncture between the thematic underpinnings of the stand-alone emotional harm torts of ancient vintage and those that come into their own in the twentieth century. The longest-standing tortious claims for emotional distress—assault and false imprisonment—addressed violent conduct of a physical nature that never came to full fruition. This is clearest in the case of assault, which can be viewed as an incomplete battery. But it is also true of false imprisonment (and false arrest), which served as a legal response to actions tantamount to physical incarceration. By contrast, crude and aggressive interpersonal conduct was tolerated in earlier eras, with limited exceptions for extreme circumstances. Prior to the twentieth century, this was perhaps particularly the case in America, much of which was a frontier society devoid of refined cultural norms—to some extent, even in its cities. Nonetheless, when the border of physical violence was approached, the courts fashioned legal barriers to antisocial conduct.

As the twentieth century progressed, however, societal attitudes evolved regarding what constituted unacceptable interpersonal conduct. A more textured view of protecting individual autonomy came to be recognized, reflecting not only a higher regard for hurt feelings (the threshold articulated in the IIED tort), but also a recognition that shock, fright, and other severe distress, even if caused by *accidental* misconduct seriously impinging on one's equanimity deserved qualified legal protection (the NIED torts). Although the courts constructed high barriers to a generalized right of protection against exposure to foreseeability-based intangible harms from accidental misconduct—never losing sight of the floodgates concern—they categorically recognized tortious responsibility in particularly sympathetic scenarios.

III. DEFAMATION

A. Introduction and Exposition

Tracing its origins back through the centuries, the classic tort of defamation recognizes liability for false statements of fact injurious to reputation. While the common law elements of the tort, as well as the defenses, closely tracked its English origins, reputational claims were traditionally looked upon with some skepticism in America. Writing in 1947, a leading civil liberties scholar, Zechariah Chafee, well-captured the American sentiments:

> An able American has too much else to do to waste time on an expensive libel suit. Most strangers will not read the article, most of his friends will not believe it, and his enemies, who will believe it of course, were against him before. Anyway, it is just one more blow in the rough-and-tumble of politics or business. . . . A libeled American prefers to vindicate

[62] There is almost certainly a corresponding sense of disproportionality at work here; that is, judicial constraint based on fairness concerns about excessive liability for acts that are, in commonly understood terms, *accidental* in character.

himself by steadily pushing forward his career and not by hiring a lawyer to talk in a courtroom.[63]

The law of defamation, in fact, encompasses two torts, libel and slander: the former associated with written reputational harm and the latter with oral reputational harm. As the twentieth century progressed, and as new forms of communication developed, American courts were faced with category decisions on defamation over radio, television, and most recently the Internet. Under the common law, these classification decisions have real consequences—with particular salience for my topic in this paper—because the tort of slander required a showing of pecuniary harm (with some important exceptions), in contrast to libelous statements where intangible harm to reputation was presumed, and no showing of out-of-pocket loss was required to make out a prima facie case.[64] As these new forms of media communication developed, libel came to be the dominant classification—and concomitantly, intangible harm came to be the touchstone to liability in most cases.

But in 1964, a landmark decision of the U.S. Supreme Court, *New York Times Co. v. Sullivan*,[65] totally transformed the American law of defamation. In *Times*, a public official in Montgomery, Alabama, who was in charge of the police department, alleged that he had been defamed by an advertisement published in the New York Times protesting against actions taken by the police during civil rights demonstrations. The Alabama state courts had upheld a sizable judgment against the Times. On appeal, the Supreme Court, for the first time, established a constitutional defense to defamation actions, based on the First Amendment freedom of speech and press clause. The Court held that the First Amendment required a showing of "actual malice" on the part of the defendant New York Times—defining actual malice as "knowledge that [the statement] was false or with reckless disregard of whether it was false or not"—in order to survive dismissal.[66] The Court then proceeded to reverse the Alabama Supreme Court and dismiss the case.[67]

Soon after the *Times* decision, the Supreme Court extended the privilege to claims of media defamation brought by public figures as well as public officials.[68] And subsequently, in *Gertz v. Robert Welch, Inc.*,[69]the Court held that even private plaintiffs in matters of public

---

[63] ZECHARIAH CHAFEE, GOVERNMENT AND MASS COMMUNICATIONS: A REPORT FROM THE COMMISSION ON FREEDOM OF THE PRESS 106-07 (1947). *See also* David Reisman, *Democracy and Defamation: Fair Game and Fair Comment II*, 42 COLUM L. REV. 1282 (1942).

[64] Plaintiff was required to allege a false statement of fact harmful to reputation. Liability was strict; in other words, plaintiff did not need to allege (or prove) negligence. Defendant's best options were either to prove truth as a defense, or to establish one of a variety of common law privileges, the principal ones being common interest, fair comment, and fair and accurate report. For detailed discussion, see generally, ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS (4th ed. 2010).

[65] 376 U.S. 254 (1964).

[66] *Id.* at 279-80.

[67] The Alabama Supreme Court had affirmed a $500,000 judgment against the Times, rejecting a fair comment defense on the grounds that not all of the facts in the published ad were accurate.

[68] *See* Curtis Pub. Co. v. Butts; Associated Press v. Walker, 388 U.S. 130, 155 (1967) (plurality opinion) ("We consider and would hold that a 'public figure' who is not a public official may also recover damages for a defamatory falsehood whose substance makes substantial danger to reputation apparent, on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers.").

[69] 418 U.S. 323 (1974).

concern were required to establish negligence in order to avoid dismissal —no longer was strict liability available in such cases.[70]

The Court has never definitively decided whether private plaintiffs suing defendants in matters of *purely private concern* would also lose the benefits of a strict liability standard of responsibility.[71] But clearly, the *Times/Gertz* privileges and related decisions, cut a huge swath into defamation law in any claims related to public concerns.

In the twenty-first century, the rapid growth of Internet communications has vastly expanded the potential for wide public distribution of defamatory statements. But a restriction on consequent tort claims—many of which might fall into the private plaintiff/private concern category—second only in importance to the *Times* decision, was enacted by the U.S. Congress in 1996. The Communications Decency Act, section 230(c)(1) states that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[72]

This provision, explicitly designed to create immunity for Internet service providers (ISPs), from mass defamation claims arising from identity theft and malicious mischief transmitted online by users of the Internet—users often messaging under a shield of anonymity—has been broadly interpreted by American courts to radically constrict victims from generating liability claims against ISPs that otherwise might be viable under the *Times* privilege because of the private status of the victim and absence of public content in the defamatory malicious statements.[73]

In sum, under the *Times/Gertz* privilege it does remain possible for public figures and officials to recover for defamation when the media publishes statements in a truly reckless fashion, and for private figures to recover when the media negligently publishes defamatory statements on matters of public concern. But these are very substantial barriers to overcome: The First Amendment has dramatically altered the common law. Correspondingly, Congress has foreclosed defamation actions against ISPs in cases of defamation, however malicious the

---

[70] Plaintiff, an attorney, had been retained to represent a victim killed by a Chicago police officer. Defendant magazine falsely alleged that plaintiff was a communist with a criminal record, who had been hired as part of a frame-up of the police officer. The requirement of showing negligence on the part of defendant in a private plaintiff/ public concern case was coupled with a vague requisite of "actual damages" (rather than only "presumed damages," as at common law) unless the plaintiff could in fact satisfy the *Times* "actual malice" standard.

[71] Nor has the Court clearly stated that the First Amendment *Times* privilege extends to non-media sources as well as media defendants. Both of these questions were elided in Dun & Bradstreet v. Greenmoss Builders, 472 U.S. 749 (1985), involving a defamation claim against a credit reporting agency for an incorrect report of a bankruptcy petition.

In another important development, the Supreme Court also held, as a constitutional requirement, that the plaintiff has the burden of establishing falsity, overturning the common law presumption of defamation once a false statement of fact was alleged. Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 768-69 (1986) ("Here, we hold that, at least where a newspaper publishes speech of public concern, a private-figure plaintiff cannot recover damages without also showing that the statements at issue are false.").

[72] 47 U.S.C. § 230(c)(1) (2012).

[73] *See, e.g.*, Carafano v. Metrosplash.com, Inc., 339 F.3d 1119 (9th Cir. 2003), involving a malicious identity theft falsely targeting plaintiff as a sexual adventurer soliciting encounters. See generally, Dan B. Dobbs, et al., HANDBOOK ON TORTS (2d ed. 2016) at 70-72.

content, published on the Internet—further limiting the prospects for defamation victims to recover in tort.[74]

B. Defamation: Concluding Thoughts

In 1986, Robert Post published an article in the California Law Review, in which he sought to identify the underlying values promoted by the tort of defamation.[75] In his view, defamation law had provided protection, in the centuries of its evolution, to three critical aspects of reputation: *status* concerns, *economic* interests, and *dignitary* rights. From the perspective of American tort law, it seems fair to say that status concerns were never a paramount value.[76] Surveying American defamation law, one can find evidence of an economic base to certain types of claims: the defamed landlord or shopkeeper, perhaps alleged to be engaged in criminal activity, who sues principally seeking compensation for loss of business and commercial goodwill.[77] But the dignitary interest seems the dominant theme in American defamation law—an intangible harm theme—whether the victim is a woman falsely alleged to be open to carefree sex (often through identity theft); a public figure supposedly engaged in illicit personal behavior; or a public official falsely asserted to have engaged in criminal misconduct.

Whatever the case, these false attributions are universally condemned. But in American tort law, providing redress for the harm inflicted is frequently in tension with protecting free speech or freedom of the press from the chilling effect of potential liability if factual statements believed to be true by a prospective defendant turn out to be false. In short, American tort law reflects a dominant concern about "sanitizing" what can be said in the marketplace of public affairs—and that concern more often than not overrides any avenue for recourse open to victims of reputational harm.

IV. RIGHT OF PRIVACY

Rarely can the origins of a tort be traced to the publication of a law review article. The right of privacy is an exception to this otherwise sweeping proposition. In 1890, Samuel Warren and Louis Brandeis published their landmark article, *The Right to Privacy*, in the Harvard Law Review.[78] Protesting against behavior by the press that has a strikingly modern-day resonance, they asserted that:

> The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip, which can only be

[74] Congress has also foreclosed enforcement of foreign judgments in U.S. courts unless they satisfy the standards required under the *Times* doctrine interpretation of the First Amendment. See Securing the Protection of our Enduring and Established Constitutional Heritage (SPEECH) Act, Pub .L. No. 111-223, 124 Stat. 2380 (2010) (codified at 28 U.S.C. §§ 4101-05 (2012)). For a critical view of the Act, see David A. Anderson, *Transnational Libel*, 53 VA. J. INT'L L. 71 (2012).
[75] Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CAL. L. REV. 691 (1986).
[76] *See, e.g.*, CHAFEE, *supra* note 63.
[77] *See e.g.*, Liberman v. Gelstein, 605 N.E.2d 344 (N.Y.1992).
[78] Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

> procured by intrusion upon the domestic circle. . . . When personal gossip attains the dignity of print, and crowds the space available for matters of real interest to the community, what wonder that the ignorant and thoughtless mistake its relative importance. Easy of comprehension, appealing to that weak side of human nature which is never wholly cast down by the misfortunes and frailties of our neighbors, no one can be surprised that it usurps the place of interest in brains capable of other things. Triviality destroys at once robustness of thought and delicacy of feelings. No enthusiasm can flourish, no generous impulse can survive under its blighting influence.[79]

Warren and Brandeis proposed as a remedy a new tort directly addressing the intangible harm resulting from media conduct overstepping "the bounds of propriety and decency"—a right to privacy. From this proposal in a respected scholarly journal, four discrete privacy torts emerged in the twentieth century under the umbrella of the right of privacy.[80] I will address two of these, public disclosure of private facts and intrusion. A third, false light, is of minor significance; basically, a pale version of defamation. And the fourth, appropriation (or right of publicity), is essentially a claim of lost economic advantage rather than intangible harm.

A. Public Disclosure of Private Facts

Two leading American cases nicely illustrate both the types of conduct characteristic of these claims in the twentieth century, and the extraordinary barriers to recovery. *Sidis v. F-R Publishing Corp.*,[81] involved an individual seeking to put his past life behind him. The plaintiff had been a widely-publicized mathematical prodigy at a very early age, a boy genius, who for thirty years afterwards had withdrawn into a totally reclusive, idiosyncratic life pursuing anonymity. The New Yorker Magazine ran an article in its featured "where is he now" column, drawing a detailed portrait of the plaintiff's exceedingly eccentric behavior and life-style—leading to a right of privacy suit. The Second Circuit Court of Appeals dismissed the case, proclaiming a legitimate public interest in how the lives of once-lauded public figures have unfolded.

Haynes v. Alfred A. Knopf, Inc.,[82] involved a historical volume on the mass movement of African-Americans from the southern states to the northern states in the period between 1940 and 1970. Drawing on personal narrative along with aggregate data, the author documented the social and cultural changes experienced by the African-American community in transition. One extended personal narrative was that of a black woman who described in some detail the adulterous and alcoholic nature of her then-husband in the context of readjusting to a new life in the north. Her husband, Haynes, had meanwhile moved on to a new life, remarried and became a deacon in his church. He sued for invasion of privacy in dredging up facts from his earlier life.

Dismissing the suit, The Seventh Circuit Court of Appeals explained that social history through the medium of personal narratives is a legitimate form of protected activity, falling within the recognized principle that newsworthy accounts of private facts about an individual—

---

[79] *Id.* at 196.
[80] *See* William L. Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960).
[81] 113 F.2d 806 (2d Cir. 1940).

[82] 8 F.3d 1222 (7th Cir. 1993).

so long as they are not intimate details such as nude photographs or videos of sexual activity—are insufficient grounds for a public disclosure of private facts suit.[83]

These cases are not necessarily amenable to the same treatment. One could argue that socio-cultural studies relying on personal narrative, like *Haynes*, play an important educational role for the public, but that "where are they now" reportage, as in *Sidis*, is simply catering to idle public curiosity. But American courts have not recognized any such distinction. While most states pay lip-service to the private disclosure of public facts tort, there are almost no examples of successful cases. Moreover, the non-newsworthiness requirement, which is a common law prerequisite to a successful claim, stands in the shadow of the First Amendment; indeed, Judge Posner, in *Haynes*, equated the two in dismissing the lawsuit.

On another score, however, Judge Posner was prescient in his examples of conduct that might successfully overcome the high newsworthiness bar to recovery in a public disclosure of private facts case: On the contemporary scene, nude photos (often taken as a "selfie") and sexual relations recorded at an earlier time when the partner thought that showing the images would remain a private matter. In a recent series of incidents—coming to be known as "revenge porn"—ex-husbands and jilted boyfriends bent on revenge and harboring animosity publish on the Internet, and in some cases distribute to family members and employers, photos and videos seeking to humiliate and distress former companions.[84] Once again, the Internet has created new incentives to engage in malicious conduct with the promise of virtually unlimited distribution.

B. Intrusion

In striking contrast to the public disclosure of private facts tort, plaintiffs in intrusion privacy cases have realized a considerable degree of success. The explanation is not difficult to discern. The focal point of the intrusion tort is the *conduct* of the defendant, not the character of the publication; hence, the newsworthiness defense, which has proven to be a virtually impenetrable barrier in public disclosure cases, has no relevance as a barrier to the claim. The "newsworthiness" of an exposé of a sham faith healer or a video documentary of emergency medical services, in which the news story is gathered through a trespass, an unconsented videotaping, or an illicit wiretap leaves grounds for recovery, because it is the penetration of the victim's right of seclusion, rather than its ultimate use, that is the core transgression.[85]

Interestingly, there are constitutional limits that come into play in the intrusion tort, as well. Where the publisher of the illicitly captured information—for example, by an illegal wiretap—is a *third party* who played no part in the invasive conduct and did not receive it

---

[83] *Id.* at 1233-35 (citing RESTATEMENT (SECOND) OF TORTS § 652D (1977)).

[84] See Erica Goode, *Victims Push Laws to End Online Revenge Posts*, N,Y, Times, Sept. 24, 2013 at A11. Some states have now criminalized such conduct. In addition, however, victims are exploring routes to civil recovery on a number of theories, with the right of privacy as a focal point.

Other civil recourse theories include intentional infliction of emotional distress, defamation, and copyright (where the victim has registered the self-taken images under the copyright law). The copyright law also potentially provides an avenue for injunctive relief (a take-down remedy) when the defendant has posted the images on an Internet site. Internet Service Provider immunity under the Communications Decency Act, discussed *supra* notes 72-73, is exempted from copyright coverage.

[85] See e.g. Dietemann v. Time, Inc., 449 F.2d 245 (9th Cir.1971); Shulman v. Group W Productions, Inc., 955 P.2d 469 (Cal. 1998).

through illegal means, the U.S. Supreme Court has held that the First Amendment protects the publisher from civil (or criminal) liability.[86]

But prying behavior per se is unprotected. The illicit gatherer is subject to civil liability. Cases attempting to shield newsgathering under an extension of the public right to know rationale—so widely invoked in support of newsworthy publication—has failed to elicit judicial support. Here, perhaps in the shadow of another U.S. Constitutional provision—the Fourth Amendment prohibition on unreasonable searches and seizures—protecting individual autonomy has been regarded as paramount.

C. Privacy: Concluding Thoughts

There is a striking divergence between American and European views in balancing the protection of individual privacy against the promotion of freedom of expression. The difference is highlighted by a recent decision of the European Court of Justice, ordering Google to take down links to a Spanish newspaper article published more than a decade earlier concerning the auctioning of the plaintiff's property to pay off his debts.[87] There is general agreement that this "right to be forgotten" now widely supported in European countries, would not be recognized in America, based on newsworthiness, First Amendment protection, and Internet Service Provider immunity, discussed in preceding sections.[88] As this paper has emphasized throughout, American cultural and social values are ubiquitously present in virtually every aspect of recovery in tort for intangible harm.

[86] Bartnicki v. Vopper, 532 U.S. 514 (2001).
[87] For discussion, *see* Jeffrey Toobin, *The Solace of Oblivion*, The New Yorker, Sept. 29, 2014 at 26.
[88] For comparative analysis of Western European and U.S. cultural values informing privacy laws, *see* James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 Yale Law Journ. 1153 (2004).