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Torts Without Names, New Torts, and the Future of Liability for Intangible Harm

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ARTICLES

TORTS WITHOUT NAMES, NEW TORTS, AND THE FUTURE OF LIABILITY FOR INTANGIBLE HARM

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Torts have names for a reason. A tort without a name would very nearly be a contradiction in terms because it would not describe itself. But torts do not always get names immediately upon birth. Typically, it takes some time to recognize what they are because they are in search of an identity or have vaguely defined content. The law of torts of the future may well experience this process, as it works through the rights and liabilities that govern harms characteristic of the information age: invasions and misuses of digitized personal data and sexualized attitudes and misconduct, for example. The dominant form that new liabilities took in the twentieth century was through the establishment of new, particularized torts. An alternative, but much less known form of liability, however, competed with the named-tort approach during this same period and to some extent, still competes with it. This is the application of what we call a "residual category" of liability. In our judgment, however, a residual category approach to the intangible harms of the twenty-first century should and would fail in the same way, and for the same reasons, that this approach largely failed in the twentieth century. The new torts of the twenty-first century will have to be particular, named torts. This Article explains why this will be the case, and then undertakes to demonstrate how these explanations apply to the most salient

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forms of intangible harm on the current scene—harms that inevitably will be candidates for tort liability in the years to come. We identify the aspects of each form of loss that we think may well become actionable through the adoption of new torts or the expansion of existing torts, as well as the aspects of loss that will continue not to be actionable.

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INTRODUCTION

Torts have names for a reason. The names "invasion of privacy," "intentional infliction of emotional distress" ("IIED"), and even "negligence" each are descriptions of the core content of these different causes of action. The same is true of all the other torts. A tort without a name would very nearly be a contradiction in terms because it would not describe itself. But torts do not always get names immediately upon birth. Typically, it takes some time to recognize what they are because they are in search of an identity or have a vaguely defined content. This was at first true for IIED[1] and the privacy torts,[2] the last new intentional torts to be adopted, about a century ago.[3] And new torts sounding in negligence have largely camouflaged this process through the combined force of doctrinal structure and misdirected emphasis.[4]

Because not a single, named new tort has been adopted in nearly a century, it might appear that the process by which new tort liabilities

1. *See, e.g.*, Nickerson v. Hodges, 84 So. 37, 37–39 (La. 1920) (holding the defendants liable for intentionally inflicting emotional distress via a cruel practical joke, without naming the basis or cause of action); Lamson v. Great N. Ry. Co., 130 N.W. 945, 945–46 (Minn. 1911) (affirming a judgment holding a railroad conductor liable for affecting the plaintiff's health by using strong language in her presence).

2. *See, e.g.*, Pavesich v. New England Life Ins. Co., 50 S.E. 68, 68–69, 81 (Ga. 1905) (holding that the petition set forth a cause of action for violating a person's privacy when a publishing company published a likeness of the plaintiff without the plaintiff's consent); Rhodes v. Graham, 37 S.W.2d 46, 46–47 (Ky. 1931) (reversing the trial court's decision granting the defendant's demurrer in an action for wiretapping plaintiff's telephone conversations, with no reference to what would later be termed the tort of "intrusion on seclusion").

3. *See generally* WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 54–67, 1050–62 (1941) (describing the emergence of IIED and privacy tort actions).

4. The default rule that there is no liability in negligence without the existence of a predicate duty means that new negligence torts often are created by recognizing a new duty not to negligently risk causing a particular form of loss. *See* KENNETH S. ABRAHAM, THE FORMS AND FUNCTIONS OF TORT LAW 61 (5th Ed. 2017). When this happens it often incorrectly appears that an artificial restriction on liability for negligence has been removed, not that a new form of liability—and certainly not a new tort—has been created. *See, e.g.*, Kline v. 1500 Mass. Ave. Apartment Corp., 439 F.2d 477, 478–81 (D.C. Cir. 1970) (adopting negligence liability for a landlord's failure to maintain adequate security by relaxing no-duty restriction on liability); Dillon v. Legg, 441 P.2d 912, 916–17, 924–25 (Cal. 1968) (adopting liability for negligent infliction of emotional distress by relaxing no-duty restriction on liability).

are created has become static, or even moribund. In our judgment, this conclusion may soon prove to be dramatically incorrect. If harms involving tangible, physical forces—railroads, cars, durable products, drugs, and chemical wastes—were the stuff of twentieth-century tort law, harms involving intangible forces and intangible harms—invasions and misuses of digitized personal data, and sexualized attitudes and misconduct, for example—may be the stuff of the law of torts in the twenty-first century.[5]

For this reason, the law of torts of the future may be the farthest thing from static or moribund. Rather, it may well become a prime battleground for working through the rights and liabilities that govern harms characteristic of the information age. Indeed, the parallels between the present period and the era of 1960 to 1985, which was the most dynamic period in the history of the law of torts, are striking and suggestive. Because of social pressure for tort law to expand both negligence and strict liability, the earlier period witnessed tremendous ferment, turmoil, and the consequent explosion of liability for physical harm caused by the tangible, physical forces of the industrial era.[6]

The present age may be about to witness the same degree of social pressure, with corresponding turmoil and expansion of liability for intangible forces and the intangible harms they cause. For example, because of inadequate data security, cyber hacking now commonly results in both economic loss and invasions of the privacy of those whose credit accounts or digitized personal information have been

5. Tort law tends to protect against physical harm—bodily injury and property damage (and their consequences)—and to compensate victims who suffer those physical harms more rigorously than other forms of harm, such as "pure" (freestanding) emotional suffering and economic loss. *See* ABRAHAM, *supra* note 4, at 272. We use the term "tangible" to refer to overtly physical forces and overtly physical harms and the term "intangible" to refer to forces (cyber invasions, for example) and harms (emotional and economic loss, for example) that are not overtly physical. Obviously, we recognize that cyber invasions have a physical component, even when that component is not overt and observable. In addition, by describing emotional and economic harm as "intangible," we do not mean that these harms are any less real or important than physical harms. Rather, our reference to "tangible" and "intangible" forces and harms is a shorthand designed to capture the general distinction between two subject matters that the law of torts, as it now stands, usually treats differently.

6. *See generally* George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461, 461 (1985) (reflecting on the dramatic "conceptual revolution" in tort law between 1960 and 1985); Gary T. Schwartz, *The Beginning and the Possible End of the Rise of Modern American Tort Law*, 26 GA. L. REV. 601, 601, 604–05 (1992) (noting the uncertainty and vitality, which resulted from a "huge growth in tort liability").

hacked.[7] In addition, varieties of sexual and sexualized misconduct recently have garnered much more attention and concern than in the past.[8] Each of these forms of wrongful conduct generates mainly intangible loss rather than physical harm.

The form taken by any new tort liabilities arising out of these and similar wrongs will be important to the development and predictability of those liabilities, and to their impact on wrongful conduct. The dominant form that new liabilities took in the twentieth century was through the establishment of new, particularized torts. An alternative but much less known form of liability, however, competed with the named-tort approach during this same period, and to some extent still competes with it. This is the application of what we call a "residual category" of liability.

The idea of a residual category of tort liability first surfaced more than a hundred years ago, when Oliver Wendell Holmes partly described, and partly proposed, that there be tort liability for "intentional infliction of temporal damage."[9] Cases decided in the following decades imposed liability on grounds that appeared to reflect this residual category, which came to be principally illustrated in the concept of what eventually was termed "prima facie tort."[10] This alternative approach turned out to garner very little, actual support in decided cases, but it continues to be asserted sporadically as a potential basis for the imposition of liability in lawsuits around the country.[11] In our view, however, a residual category approach to the intangible harms of the twenty-first century should and would fail in the same way, and for the same reasons that this approach largely failed in the twentieth century. The new torts of the twenty-first century will have to be particular, named torts.

This Article explains why this will be the case, and then undertakes to demonstrate how these explanations apply to the most salient forms of intangible harm on the current scene—harms that inevitably will be candidates for tort liability in the years to come. Part I develops a general theory of the preconditions necessary to the adoption of new torts and the variety of obstacles that potential new torts must surmount if they are to be adopted. In Part II, we explore the history of Holmes's contention

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7. *See infra* Section III.A–B (discussing negligent release of hacked consumer credit information and confidential information).

8. *See infra* Section III.C (discussing intentional or negligent sexualized misconduct in the rise of the MeToo movement).

9. Oliver Wendell Holmes, Jr., *Privilege, Malice, and Intent*, 8 HARV. L. REV. 1, 3 (1894) [hereinafter Holmes, *Privilege, Malice, and Intent*].

10. *See infra* Sections II.B–C.

11. *See infra* Sections II.B–C.

that there was a residual category of tort liability for "intentional infliction of temporal harm" subject to "justification." In addition to Holmes, this contention had eminent supporters—Pollock, Bohlen, and Prosser, among others. Yet, as we show, in the form in which those luminaries described it, this general, residual category of liability was never established as a robust alternative to the adoption of particular, named torts. In Part III, we apply our analysis of how new torts become "named" and their scope becomes defined to several potential new torts of the future, all involving intangible forces or harms likely to be salient during the rest of the century. We identify the aspects of each form of loss that we think may well become actionable through the adoption of new torts or the expansion of existing torts, as well as the aspects of loss that will continue not to be actionable.

We conclude by arguing that, despite the fact that invasions of intangible "rights" or "interests" may be more common in the future and may increasingly be perceived as wrongs that reflect widespread social concern, the invasions should not be, and are unlikely to be, redressed through the application of a residual category of liability for the intentional infliction of intangible harm. Rather, we contend that if new torts associated with intangible forces and harms are adopted, they will be discrete, concrete, and contained. In short, any residual potential tort liability that exists will manifest itself in the expansion of existing torts or the establishment of new torts with discrete elements and defined limitations—torts with names.

I. A GENERAL THEORY OF THE PRECONDITIONS TO THE EMERGENCE OF NEW TORTS

Our focus here is on torts that have come into existence or have been proposed or considered, but failed to come into existence, during roughly the last century, and torts that might come into existence in a future that bears some resemblance to the present.[12] Any theory must explain not only positive but also negative evidence. Ours therefore seeks to explain,

12. Although the account in this Part does not directly address how and why all of the existing torts came into being, what we have to say applies in many ways to the existing torts. There is a core set of torts involving the interests in bodily security and rights of property, for example, that have long been in force and whose existence can easily be explained and justified by the importance of the interests they protect: assault, battery, negligence, liability for defective products, trespass to property, and nuisance. A number of torts that protect other interests are also subject to ready explanation and justification because of the interests they protect: fraud, defamation, and intentional interference with contract, for example. The tort system long ago picked all of this low-hanging fruit. That fruit is not our concern. For an effort to explain how to intentionally create a new tort, however, see generally Anita Bernstein, *How to Make a New Tort: Three Paradoxes*, 75 TEX. L. REV. 1539 (1997).

among other things, why potential torts that some people thought were going to emerge, or might have emerged, did not do so.[13]

The first step in our inquiry is to identify what it takes for a new form of tort liability to come into being. There are four preconditions relevant to the establishment of a new tort. The more clearly one or more preconditions is satisfied in a particular situation, the less important complete satisfaction of the other conditions is likely to be.

A. Social Salience and Normative Weight

The first and predominant precondition to the imposition of tort liability, and therefore to the emergence of a new tort, is the perceived wrongfulness of the defendant's conduct. Perceived wrongfulness often is reflected in concern outside the legal system that transforms what would otherwise be a technical doctrinal issue into a social problem presented to the courts for solution. "Social salience" and "normative weight" are not really separate phenomena. They overlap and reinforce each other. Nonetheless, we address these closely related factors separately in order to tease out their slightly different aspects.

1. Social salience

At various times, widespread perceptions surface that certain kinds of conduct are causing harms to others and that the conduct and resulting harms are socially troublesome enough to amount to "wrongs." One example of this phenomenon was the emergence, about a century ago, of causes of action in tort for pure emotional distress.[14]

Prior to the emergence of causes of action for intentional and negligent infliction of emotional distress, courts denied such recovery

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13. On this score, theories of torts often have little to say. For example, the most prominent civil recourse theorists have written extensively on what characterizes torts and have sought to explain why torts are legal wrongs even when they are not moral wrongs but say much less about why some acts or omissions that might count as legal wrongs do not. *See, e.g.*, John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917, 918–19, 937 (2010) (explaining how courts must consider social policy as well as economic and political circumstances when deciding whether a particular act is justiciable). Similarly, corrective justice theorists explain the structure of tort liability but not why certain injustices are not subject to tort liability. The closest statement addressing this issue we have found in the work of one of the leading corrective justice theorists is that the "plaintiff's injury must be to something, such as personal integrity or a proprietary entitlement, that ranks as the embodiment of a right." ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW 134 (1995). Nor have we found anything expressly addressing the issue in one of the leading instrumental works, WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW (1987).

14. *See* PROSSER, *supra* note 3, at 216–17.

on a number of grounds.[15] Those barriers to recovery were then surmounted because of developments outside the legal system. Society began to take genuine emotional harm more seriously, rather than dismissing it as frivolous, idiosyncratic, or simply as a necessary condition of human interaction. This was partly because the professionalization of specialists in mental health made emotional harm diagnosable and treatable.[16] They could diagnose genuine emotional distress and distinguish it from idiosyncratic or feigned distress.[17] In addition, the costs of diagnosing and treating emotional harm could be quantified.[18] The previously speculative character of emotional harm and of the damages that might be awarded to people who had suffered it was thereby reduced. And as those developments occurred, the difficulties presented to the legal system from feigned or frivolous claims, or from massive litigation, were perceived as surmountable.[19] Cumulatively, this social recognition of genuine emotional loss resulted in tort liability emerging as a basis for the redress of some conduct producing purely emotional harm.[20]

Analogous social salience can be observed in the emergence in the 1960s of strict liability for manufacturing defects—departures from the manufacturer's intended design—in products that caused harm to the users and consumers of those products.[21] The mass manufacturing

15. One was that emotional harm itself was too idiosyncratic and too speculative to be capable of being concretized in the form of an actionable wrong. A second, related reason was that because of the idiosyncratic nature of emotional harm, damages for that harm were impossible to measure. The last reason was that if the tort system allowed recovery for emotional harm, it would be overwhelmed with frivolous or feigned claims, opening up the floodgates of litigation that would clog courts' dockets. *See* DAN B. DOBBS, THE LAW OF TORTS 822–24 (2000).

16. *See* G. EDWARD WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY 103 (expanded ed. 2003).

17. *Id.*

18. *Id.* at 105.

19. *Id.*

20. *Id.* at 102–06.

21. Initially, tort remedies for negligently caused defects in products were available only to those in privity (contractual relations) with the persons responsible for the defects. But after the rise of mass production and distribution, the typical user or consumer of a product was no longer the person in privity with the product's manufacturer; the person in privity was more typically a retailer who did not use the product but sold it to a consumer. Thus, the liability of manufacturers for negligently-caused defects in their products was extended beyond retailers to consumers. The theory of that extension was that the manufacturer was aware that its product was going to be used by consumers rather than retailers, and that if it negligently caused defects in the product, it would be the consumers rather than the retailers who were likely to be injured. *See* MacPherson v. Buick Motor Co., 111 N.E. 1050, 1051, 1053–55 (N.Y.

and distribution of products in the twentieth century had resulted in countless products reaching the hands of consumers that had been manufactured by enterprises with which they had virtually no connection. For manufacturers to profit from selling such products, yet to bear no responsibility for the injuries they caused when the manufacturer's negligence could not be pinpointed, seemed unfair.[22]

The point here is simply that the emergence of liability for pure emotional distress and of strict liability for manufacturing defects was driven not only by technical, doctrinal considerations that were completely internal to the tort system. Those doctrinal changes—in effect the adoption of new torts—reflected attitudes in the world outside the legal system about responsibility for those losses.

2. Normative weight

A second factor is the wrongfulness of the conduct that would be subject to a potential new tort. Social salience and normative weight are closely related because the more wrongful the conduct, the more socially salient it is likely to be. The elements of a new tort then tend to reflect this connection by focusing on what is most wrongful about the conduct in question. The courts ensured that the principal new torts established in the twentieth century satisfied this condition by making only the most blameworthy forms of the conduct they addressed subject to liability.[23] Thus, IIED is actionable only if the defendant's conduct in causing distress was "extreme and outrageous."[24] Analogous requirements apply in the torts involving invasion of privacy. Intrusion on seclusion is actionable only if the intrusion is intentional and would be "highly offensive to a reasonable person."[25] Public disclosure of true private facts is actionable only if the matter

1916) (holding Buick liable for negligence even though the vehicle was sold to the plaintiff indirectly through a retailer).

22. *See* Note, *The Cutter Polio Vaccine Incident: A Case Study of Manufacturers' Liability Without Fault in Tort and Warranty*, 65 YALE L.J. 262, 263–64 (1955) ("Policy considerations indicate that Cutter should be liable to persons who contracted polio from live virus in the vaccine it manufactured, without regard to whether it was at 'fault.'"). For an expression of the legal arguments reflecting these social concerns, see Escola v. Coca Cola Bottling Co., 150 P.2d 436, 440 (Cal. 1944) (en banc) (Traynor, J., concurring).

23. *See generally* RESTATEMENT (SECOND) OF TORTS § 46–48 (AM. LAW INST. 1965).

24. *Id.* § 46.

25. *See* RESTATEMENT (SECOND) OF TORTS § 652B (AM. LAW INST. 1977).

publicized would be both "highly offensive to a reasonable person" and "is not of legitimate concern to the public."[26]

A second aspect of normative weight is the extent to which the wrong in question can be fitted into an already-existing tort. The greater the fit, the smaller the residuum of wrongs that will go unredressed if a new tort is not created. Conversely, the lesser the fit, the larger the category of unredressed wrongs and the more likely the courts are to create a new tort. For example, intrusions on seclusion often did not involve physical trespass because they occurred through sight or hearing rather than physical presence,[27] and public disclosure of true facts did not involve defamation because falsity of the defamatory statement is an element of that tort.[28] Establishment of those new causes of action redressed a major category of wrongful conduct that trespass and defamation could not capture.[29]

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26. *See id.* § 652D. Similarly, placing a person in a false light is actionable only if it would be "highly offensive to a reasonable person," and the defendant had knowledge of or acted in reckless disregard of the falsity in question. *Id.* § 652E. The last privacy tort is appropriation of another's name or likeness. This tort involves the wrongful appropriation of an aspect of the plaintiff's identity, resulting in either commercial loss or personal distress. *Id.* § 652C. The scope of the torts of public disclosure and false light is now limited, however, by First Amendment free speech principles. *See* Florida Star v. B.J.F., 491 U.S. 524, 526 (1989) (public disclosure); Cantrell v. Forest City Publ'g Co., 419 U.S. 245, 246, 249 (1974) (false light).

27. *See, e.g.*, Pritchett v. Bd. of Comm'rs, 85 N.E. 32, 33 (Ind. App. 1908) (observing the plaintiff from outside her property); McDaniel v. Atlanta Coca-Cola Bottling Co., 2 S.E.2d 810, 812 (Ga. Ct. App. 1939) (recording conversations).

28. DOBBS, *supra* note 15, at 1119–20.

29. On the other hand, much that now falls within the privacy torts of false light and appropriation of name or likeness could well have fit within expanded versions of defamation and conversion. Something like that might well have occurred had the highly influential torts scholar William Prosser not contended early on that a single tort of invasion of privacy was emerging. PROSSER, *supra* note 3, at 1050 ("The majority of the courts which have considered the question have recognized the existence of a right of 'privacy,' which will be protected against interferences which are serious, and outrageous, or beyond the limits of common ideas of decent conduct."). He later recanted, for it soon became clear that there was no such residual category, even for invasions of privacy. WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 637 (2d ed. 1955) (indicating that invasion of privacy "appears in reality to be a complex of four distinct wrongs"). Rather, there are now the four separate privacy torts. Similarly, whether IIED could have been assimilated into assault, which already protected a plaintiff's interest in peace of mind, is a closer question. But once again, the eagerness of legal scholars—this time Calvert Magruder and, again, Prosser—to synthesize developments and, perhaps prematurely, denominate them as new torts, redirected that approach. *See, e.g.*, Calvert Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033–35, 1064 (1936); William L. Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874, 874 (1939).

Over the years, commentators have proposed the creation of a number of new torts, some of which we think may not have developed because much of the conduct in question could be characterized as falling within the scope of an existing tort. Thus, a conventional cause of action for battery applies to some forms of the proposed tort of sexual fraud,[30] and with a bit of modification, it could apply to others.[31] Similarly, IIED applies to at least some forms of the proposed tort of racial hate speech.[32] The availability of existing causes of action as a means of remedying at least some of the wrongs that would fall within the scope of potentially new torts takes the pressure off creating a new cause of action, both by diminishing the normative appeal of a new tort and, as a practical matter,[33] by giving plaintiffs and their lawyers avenues of recovery that obviate the need to pursue establishment of a new tort all the way through the otherwise necessary process of trial (or summary judgment) and appeal.

The picture in the world of negligence liability is similar. Despite the tendency of the courts and tort scholars to treat expansions of liability in negligence as mere removal of restrictions on liability, new causes of action in negligence often would be better understood to be new torts recognizing the normative weight of the wrongs in question.[34] Moreover, whether new forms of negligence liability are considered new torts or mere relaxation of limitations on liability, it would not be accurate to say that there is prima facie liability for negligently-

30. *See* RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 15 cmt. e (AM. LAW INST., Tentative Draft No. 4, 2019) (a defendant's failure to disclose to a plaintiff that he has a sexually transmitted disease prior to consensual intercourse constitutes battery).

31. *See id.* cmt. f (suggesting that a false statement to the plaintiff that the defendant intended to marry her does not render consensual sexual intercourse a battery); *see also* Jane E. Larson, *"Women Understand So Little, They Call My Good Nature 'Deceit'": A Feminist Rethinking of Seduction*, 93 COLUM. L. REV. 374, 379–80 (1993) (proposing the tort of sexual fraud).

32. *See, e.g.*, 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, 179 (1982) (proposing a tort based on intent to demean by reference to race).

33. *See* discussion *infra* Section I.D.

34. That was undoubtedly true of negligent infliction of "pure" emotional distress, as courts came to acknowledge the seriousness of the emotional distress suffered by the women who were so frequently plaintiffs in these cases, and the consequent wrongfulness of risking this kind of loss. *See* ABRAHAM, *supra* note 4, at 272. The same is true of the rise of manufacturer liability in negligence for product-related injury. Nominally, this new liability came about through the abolition of a no-duty-in-the-absence-of-privity rule. *See* MacPherson v. Buick Motor Co., 111 N.E. 1050, 1051 (N.Y. 1916). But for all practical purposes, products liability was a new tort, reflecting increased recognition of the wrongfulness of manufacturing unduly dangerous products.

caused harm. On the contrary, there is no general duty not to be negligent,[35] and therefore no sense in which negligence resulting in harm must always be justified in order to avoid liability for causing that harm. In short, new forms of liability in negligence are not manifestations of any residual category of liability for negligently-caused harm.

B. Justiciability

To be viable, a new tort must be justiciable, by which we mean amenable to adjudication. Justiciability in this context has two features: the first involving the elements of the tort and the second involving the damages that are recoverable for committing it.

1. Discreteness requirements

First, the elements of a new tort must be discrete, concrete, and contained. A tort that would be open-ended will be unappealing to the courts because of the difficulties they anticipate it would later pose for them. The threat that there will not be a core set of routine facts to which a new doctrine can be easily applied, but instead a series of lawsuits in which the courts are called upon in each case to define the scope of and fashion limits on liability, will discourage creation of a new tort. On the other hand, if the scope of a potential new tort can be delineated to a reasonable extent in the early stages of its development, the prospect of recognizing it will be far less threatening.

The elements of the two core privacy torts discussed above, intrusion on seclusion and public disclosure of true facts, satisfied this requirement by specifying that the invasions in question must be "highly offensive" to the reasonable person.[36] This was so obviously limited to a discrete and contained (as well as normatively weighty) category of invasions that there was little prospect of its generating a series of suits posing challenges involving doctrinal formation and open-ended boundaries. In addition, whether an invasion was "highly offensive" posed a mixed question of fact and law, which meant that in many instances, it would be unnecessary for the courts to define in great detail the cases that fell into that category. Rather, if reasonable people could disagree about that question, answering it became the province of the jury, subject only to fairly general instructions.

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35. *See* ABRAHAM, *supra* note 4, at 261.

36. *See supra* notes 25–26 and accompanying text. The other two "privacy" torts posed little challenge in this regard. False light was a close relative of defamation, and appropriation in many instances involved the wrongful use of a commercial asset. *See* RESTATEMENT (SECOND) OF TORTS § 652C cmt. b (AM. LAW INST. 1977).

The same was true of IIED, in which the defining and limiting criterion of liability was that the infliction be "extreme and outrageous."[37] There would be few lawsuits with the potential to satisfy this criterion. And the lynchpin of this cause of action also posed a mixed question of fact and law that would be subject to application by juries on a case-by-case basis, rather than requiring detailed, standard development by the courts as a matter of law.[38]

Some of the new torts proposed during recent decades may have foundered because they did not promise this kind of discreteness and limitability. A proposal for a tort of suppression of protected speech, for example, contemplated a balancing of property and contract interests against free speech rights in order to determine what counts as an actionable suppression.[39] That would be a vague standard of liability. On the other hand, the tort of spoliation of evidence, which has now been recognized in several jurisdictions, has objectively definable contours. It involves the failure to preserve property for another's use as evidence in pending or future litigation.[40] The failure of this tort to become widely recognized must be ascribed to other factors, most notably (as we indicate next) the difficulty of proving cognizable damages resulting from breach.

2. Cognizable damages

The second feature of justiciability is that the damages that are awarded for commission of a new tort must be cognizable. Tangible losses tend to be more quantifiable and therefore more cognizable than intangible losses. This is one of the many reasons that liability for bodily injury and property damage has thus far been more robust than liability for intangible harm. Thus, neither the privacy torts nor IIED had easily cognizable damages because the harm suffered by the plaintiff was almost always exclusively emotional.[41] For this reason, the courts had been reluctant, up to the point at which those torts were recognized, to countenance awards for pure emotional loss.[42] A cause

37. RESTATEMENT (SECOND) OF TORTS § 46 (AM. LAW INST. 1965).

38. *See id.* § 46 cmt. h.

39. *See, e.g.*, Rory Lancman, *Protecting Speech from Private Abridgement: Introducing the Tort of Suppression*, 25 SW. L. REV. 223, 226, 245–55 (1996).

40. Terry R. Spencer, *Do Not Fold Spindle or Mutilate: The Trend Towards Recognition of Spoliation as a Separate Tort*, 30 IDAHO L. REV. 37, 38, 39 (1993).

41. The exception was commercial appropriation when the plaintiff sought to recover commercial losses.

42. *See* ABRAHAM, *supra* note 4, at 272.

of action for negligent infliction of emotional distress, for example, had been recognized in only very limited circumstances.[43]

We suspect that it was not merely increased comfort with awards of damages for pure emotional loss that led to the courts' acceptance of causes of action that involved this form of loss in privacy and IIED cases. Rather, the high degree of blame required for invasions of privacy and IIED to be actionable meant that awards for compensatory damages actually functioned something like punitive damages. Under such circumstances, the courts could overlook the difficulties associated with quantifying the amount of emotional loss the plaintiff had suffered because they did not think of the awards as being completely geared to the amount of loss the plaintiff had suffered as they would have been in cases involving less blameworthy behavior by the defendant.

A number of contemporary proposals for new torts contemplate awarding damages on a basis that would seriously fail the cognizability test. For example, the damages available for suppression of protected speech would compensate for "frustration, humiliation, feelings of powerlessness," and "the denial of a fundamental aspect of citizenship."[44] Similarly, a number of courts have refused to recognize spoliation of evidence as a tort because of the uncertainties associated

43. For example, the "impact rule" that was in force for the first several decades of the twentieth century required that the plaintiff have suffered a physical contact of some sort, even if not an injurious contact, in order to recover damages for emotional distress resulting from fear of injury. *See* ABRAHAM, *supra* note 4, at 272–73. Part of the reason for this reluctance was that the courts lacked confidence in the verifiability of such loss. But another reason was the difficulty of valuing the losses even when there was no doubt that they had occurred.

Similarly, until well into the twentieth century, awards for the emotional losses suffered by survivors resulting from the wrongful death of a loved one were either expressly precluded (though the fact that juries awarded such damages anyway was an open secret), or subject to a definite, and low, monetary ceiling. *See id.* at 255. The major form of intangible loss that was recoverable at that point was of course the pain and suffering associated with bodily injury. But awards for pain and suffering were comparatively low until the middle of the twentieth century, and awards were anchored, in practice, to the seriousness of a tangible physical injury. For example, as late as 1961, a decision from the California Supreme Court, affirming a negligence judgment for $187,000, including $53,000 for pecuniary losses, for injuries involving serious, painful, and permanent injury to the plaintiff's foot, elicited a dissent from Justice Roger Traynor, arguing that the award of $134,000 for pain and suffering was excessive. Seffert v. L.A. Transit Lines, 364 P.2d 337, 339, 341, 344 (Cal. 1961) (en banc) (Traynor, J., dissenting).

44. Lancman, *supra* note 39, at 260.

with damages that may have resulted from spoliation.[45] The marginal cognizability of damages in many spoliation cases also seems related to the difficulty of proving a causal connection between spoliation and loss since the harm often involves impairment of the plaintiff's ability to have succeeded in a lawsuit, a quintessentially speculative question.[46] Unsurprisingly, many of the cases in which spoliation claims survive motions for summary judgment adopt an approach to causation whose proof is less problematic.[47]

C. Essentiality: The Unavailability of Other Sources of Regulation or Relief

A third precondition to the emergence of a new tort is that the wrongful acts in question are not effectively addressed already by a source of law outside the common law of torts. When there is a statutory or regulatory regime that addresses the wrongful acts that the courts might otherwise hold are tortious, the probability that the courts will create a new tort to deal with those wrongful acts declines. In such a situation, the pressure to create a new cause of action will be less intense than it would otherwise be. The courts will therefore be less likely to perceive a need for redress in tort. For example, the U.S. Fair Housing Act[48] and Title VII of the Civil Rights Act of 1964[49] both prohibit various forms of discrimination and allow awards of damages, as well as counsel fees, to successful complainants.[50] The existence of these causes of action made it less likely that new torts redressing these kinds of wrongs would be created.

It is worth noting that the causal sequence we are describing works in both directions. Sometimes a regulatory regime comes into existence precisely because tort law has been unable to address the wrongful conduct in question. Environmental protection statutes, such as the Clean Air Act,[51] were adopted, in part, because the law of

45. Edwards v. Louisville Ladder Co., 796 F. Supp. 966, 966–69 (W.D. La. 1992); Federated Mut. Ins. Co. v. Litchfield Precision Components, Inc., 456 N.W.2d 434, 435, 438–39 (Minn. 1990) (en banc).

46. Spencer, *supra* note 40, at 53.

47. *See, e.g.*, Schaefer v. Universal Scaffolding & Equip., LLC, 839 F.3d 599, 611 (7th Cir. 2016), *remanded to* 2017 WL 1382815, at *1 (S.D. Ill. Apr. 18, 2017) (requiring only that the plaintiff prove that there would have been a reasonable probability of success if the missing evidence were available); Danna v. Ritz-Carlton Hotel Co., 213 So. 3d 26, 37 (La. Ct. App. 2016) (adopting a presumption that spoiled evidence would have been unfavorable to the party who failed to preserve it).

48. 42 U.S.C. §§ 3601–3619 (2012).

49. § 2000.

50. §§ 2000e-5(g), 3613(c).

51. §§ 7401–71.

nuisance was not capable of deterring excessive pollution or compensating its victims.[52] On the other hand, sometimes a new tort emerges, in part, because there is no adequate regulatory regime already addressing the problem. The tort of spoliation of evidence seems to us to fit this pattern.

When a federal regulatory regime is in place, it may be held to preempt state tort law or serve as the basis of a "regulatory compliance" defense when a negligence suit is brought against the enterprise being regulated.[53] In both instances, regulatory regimes that are responses to newly emergent social problems, such as the discovery of latent adverse effects from the use of prosthetic medical devices or drugs,[54] may serve to deter suits against the manufacturers of those products, either because the regulatory regime seeks to limit the scope of tort liability or because its regulations are treated as absolving a manufacturer from negligence if complied with. Thus, when pressure emerges to provide redress for a newly perceived social wrong, a central preliminary question is whether there is an existing regulatory response to the problem.

D. Practicality: A Critical Mass of Cases with the Potential for Substantial Damages

Beyond the foregoing considerations, there are practical prerequisites to the establishment of a new tort. There must be a sufficient number of cases involving the tort for the courts to have the opportunity to develop the contours of the tort and for law governing the tort to be articulated. For this to occur, ordinarily the new tort must involve damages of sufficient magnitude to encourage the filing of lawsuits by attorneys, who typically are paid for their success on a contingent fee basis.

1. A sufficient number of cases

The nearly infinite variety of life throws up any number of examples of objectionable conduct that might otherwise qualify as tortious. But the occasional one-off or rare instance of wrongdoing is unlikely to

52. There is wide agreement that the common law is a grossly inadequate method of addressing modern pollution problems. This is recognized even by staunch advocates of the common law. *See, e.g.*, RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 46–47 (2d ed. 1977).

53. For discussion, see Robert L. Rabin, *Reassessing Regulatory Compliance*, 88 GEO. L.J. 2049, 2050 (2000); Catherine M. Sharkey, *Products Liability Preemption: An Institutional Approach*, 76 GEO. WASH. L. REV. 449, 450 (2008).

54. *See* Editorial, *80,000 Deaths. 2 Million Injuries. It's Time for a Reckoning on Medical Devices.*, N.Y. TIMES, May 4, 2019, https://www.nytimes.com/2019/05/04/opinion/Sunday/medical-devices.html [https://perma.cc/F4SX-49LH] (noting that problems with medical devices often take many years to emerge).

generate a lawsuit or, if it does, is unlikely to prompt the courts to seriously contemplate recognizing the conduct as tortious. First, without a critical mass of cases, the courts simply will not have the opportunity to articulate and develop the standards that govern a potential new tort. Faced with allegations that may well seem to be one-of-a-kind, the courts will be presented with a motion to dismiss on the ground that the complaint fails to state a cause of action. When the courts conclude that the allegations not only fail to fall into an existing form of tort liability but also that they are unlikely to be repeated very often, the courts will be disinclined to permit a suit to proceed. They are likely to shy away from recognizing the kind of claim that they predict will end after just one case. Even if a court did recognize a cause-of-action, the absence of subsequent cases involving similar allegations would mean that the initial recognition had led nowhere, making it an isolated, unclassified instance of something indeterminate. This prospect will discourage permitting the imposition of liability in such cases.

In addition, if the courts perceive a case to be unique or extremely unusual, the type of wrongful conduct in the case will not be understood to require activating the "cumbrous and expensive machinery" of the state to which Holmes famously referred.[55] Actions in tort are typically perceived as addressing recurring patterns of misconduct that, precisely because they recur, warrant legal intervention. One-off wrongs simply do not qualify on this score. Although the perceived uniqueness of a form of wrongful conduct is an index of the low social salience that we have already identified as being a precondition to the development of a new tort, it is a highly practical consideration as well: very unusual wrongs are unlikely to be embraced by the tort system precisely because their uniqueness suggests they are unlikely to recur across a range of cases.

2. Adequate damages

The U.S. system of compensating plaintiffs' attorneys reinforces the points we have just made. Most attorneys representing plaintiffs in tort actions take the cases on a contingent-fee basis.[56] If the plaintiff recovers damages, either through judgment or settlement, then the plaintiff's counsel is paid a previously agreed-upon percentage of the recovery. If the plaintiff recovers nothing, however, then the plaintiff's counsel is paid nothing.[57]

As a consequence, plaintiffs' attorneys make risk-reward calculations in deciding which cases to take. A case with a low probability of success

55. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 88 (G. Edward White ed., 2009).
56. *See* ABRAHAM, *supra* note 4, at 4.
57. *See* ABRAHAM, *supra* note **4**, at 4.

must promise a significant payoff in the event that it is successful, or it is not a good "bet" for an attorney considering whether to take the case. Any case that would require establishing a new cause of action will necessarily involve an investment by the plaintiff's attorney that is substantially in excess of the investment required in a case falling within an established tort. Addressing legal issues of first impression at trial and on appeal is costly. If a defendant who is a likely repeat-player in the event that a new tort is established, or a liability insurer that will face repeated claims for coverage in that event is involved, then the defendant will oppose recovery even more strongly. Consequently, the investment of time and money required by the plaintiff's attorney will increase accordingly.

The upshot of these considerations is that cases that do not involve significant potential damages are much less likely to materialize into lawsuits than cases that have the prospect of a significant payoff in damages. This means not only that any individual case must present such a prospect, but also that there be some prospect that there will be other cases in the future if a new tort is established, so that an attorney in the first case can amortize his or her substantial investment in establishing a new tort over a set of future cases, which will cost less per case to litigate than the first case. To put it another way, the greater the probability that the front-end cost of establishing a new tort can, in effect, be recovered in future cases, the greater the likelihood that the effort to establish a new tort will be undertaken.[58]

II. PRIMA FACIE TORT AND THE QUEST FOR A RESIDUAL CATEGORY OF LIABILITY

We have just argued that, unless a wrong satisfies the preconditions to establishment of a new tort, it will not be established and will not be named. An alternative view, however, is that tort liability can be based on a residual category of tort liability that is always potentially available to redress sporadic and isolated wrongs that otherwise would not be

58. In addition, because the plaintiff's counsel is paid a percentage of any recovery, the amount of damages that flow from a potential new tort will be an important ingredient in decisions about whether to pursue a new cause of action. In our view, cases that promise only vindication, or nominal damages that merely signify indignation over the defendant's behavior, are less likely to be brought. On the other hand, cases in which the defendant's behavior was sufficiently egregious to create the potential for an award of punitive damages even when a plaintiff's actual losses are minimal are more likely to be brought. Since these are cases in which the defendant's behavior was intentional and possibly malicious, we should expect that, in cases where actual damages are minimal, there will be more pressure to establish new intentional torts than torts sounding in negligence or strict liability.

actionable.[59] This view has had very respectable adherents, dating all the way back to Holmes.[60]

No one, to our knowledge, has ever contended that there is residual liability in tort for "wrongful infliction of harm." That would be a residual category of tort liability as broad as there could be. The principal example of a putative residual category of liability in tort involves a narrower, but still comparatively broad, form of liability. This cause of action started out as "intentional infliction of temporal damage," which meant something like inflicting "tangible" harm,[61] and then evolved into what was called "prima facie tort." The rise of prima facie tort, and its subsequent failure to mature and develop, is the best example we have of putative residual liability in tort—a broad form of presumptive tort liability, without a meaningful name—in actual operation.

This story demonstrates that there is an important distinction between the potential for new forms of tort liability to be adopted and the existence of a residual *category* of tort liability. The former potential always exists, but that potential is not realized through the invocation of the latter. This is the paradox of residual tort liability. No form of liability supposedly falling within a residual category actually stays there once it is recognized. Residual tort liability is, at most, merely a conceptual placeholder. To demonstrate this, we canvass, in some detail, the history of prima facie tort, explaining how it first existed without bearing that name, was then recognized and named in a few states, yet later proved to have little traction.

A. Holmes, Pollock, and the Early Cases

In the 1870s, Oliver Wendell Holmes, Jr., in the United States,[62] and Frederick Pollock, in England, both began publishing legal scholarship.[63]

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59. *See infra* Sections II.A.1, II.A.2.

60. *See infra* Sections II.A.1, II.A.2.

61. Holmes seems to have been the first, or one of the first, to use the term "temporal," but he did not define what he meant by it. *See* Holmes, *Privilege, Malice, and Intent*, *supra* note 9, at 3. It is possible that he meant "tangible" damage, such as injury to person or property, as opposed to intangible damage such as emotional harm. An alternative definition is "compensation in money as a substitute for and the equivalent of the promised performance," which to the modern ear sounds virtually unlimited, and therefore is probably not accurate. ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 55.1 (Joseph M. Perillo, revised ed. 2005).

62. Holmes and Pollock were contemporaries who first met in England in 1874 and would correspond with one another through 1932. *See* David H. Burton, *The Intellectual Kinship of Oliver Wendell Holmes, Jr., Frederick E. Pollock, and Harold J. Laski*, 119 PROC. AM. PHIL. SOC'Y 133–35 (1975).

63. Burton, *supra* note 62, at 133–35.

Holmes had contributed legal essays and digests of cases to the *American Law Review*, of which he became co-editor in 1870, and in 1881, he published a series of lectures known as *The Common Law*.[64] Pollock's *Principles of Contract at Law and in Equity* appeared in 1876, and in 1887, he published the first edition of his *The Law of Torts*.[65] Both Holmes and Pollock were particularly interested in deriving and articulating general principles of liability around which common law subjects could be organized.

1. Setting the conceptual stage

Holmes argued in *The Common Law* that standards of tort liability should be objective rather than subjective and that there was a sharp distinction between acts that offended morality and acts that were legally culpable.[66] His intuition seems to have been that malicious motives were irrelevant if one kept within the law.[67] Holmes's initial inclination was thus to subsume "malice" in "intent" and to treat the existence of intent as an objective inquiry.[68] A few years later, Frederick Pollock stated his position on the same issue a bit differently:

> There is no express authority that I know of for stating as a general proposition of English law that it is a wrong to do wilful harm to one's neighbour without lawful justification or excuse . . . . Thus in the Anglo-Saxon laws . . . [o]nly that harm which falls within one of the specified categories of wrong-doing entitles the person aggrieved to a legal remedy. Such is not the modern way of regarding legal duties or remedies . . . . The three main heads of duty with which the law of torts is concerned—namely, to abstain from wilful injury, to respect the property of others, and to use due diligence to avoid causing harm to others—are all alike of a comprehensive nature.[69]

In the meantime, Holmes's thinking had evolved toward Pollock's, and he modified the position on "malice" that he had taken in *The Common Law*. In an article in the Harvard Law Review in 1894,[70] Holmes maintained that "the intentional infliction of temporal

64. HOLMES, *supra* note 55, at xxxix, 1–2.

65. For more detail on Pollock's early scholarship, see NEIL DUXBURY, FREDERICK POLLOCK AND THE ENGLISH JURISTIC TRADITION 20–27 (2004).

66. HOLMES, *supra* note 55, at 102–03.

67. *Id.* at 131.

68. *Id.* at 132–33.

69. FREDERICK POLLOCK, THE LAW OF TORTS: A TREATISE ON THE PRINCIPLES OF OBLIGATIONS ARISING FROM CIVIL WRONGS IN THE COMMON LAW 21–22 (1887).

70. Holmes, *Privilege, Malice, and Intent*, *supra* note 9. For a discussion of the evolution of Holmes's thinking and an account of the rise of prima facie tort, see Kenneth J. Vandevelde, *A History of Prima Facie Tort: The Origins of a General Theory of Intentional Tort*, 19 HOFSTRA L. REV. 447, 447, 457–62 (1990).

damage, or the doing of an act manifestly likely to inflict such damage and inflicting it, is actionable if done without just cause."[71]

2. The rise of the putative cause of action

Holmes's formulation suggested that causing "malicious" economic injury (for example, to a competitor) was prima facie tortious.[72] But in Holmes's view, this seemingly residual category of potential liability did not automatically result in liability for intentional economic damage inflicted on another.[73] Such liability depended on whether the conduct in question had a justification.[74] This is evident in the cases in which Holmes applied this principle after his Harvard article appeared. The most important was *Vegelahn v. Guntner*,[75] in which workers went on strike for shorter working hours and higher pay, organizing a picket line outside Vegelahn's factory and seeking to encourage persons to boycott Vegelahn's business or to discourage persons from doing business with or working for Vegelahn.[76] The Supreme Judicial Court of Massachusetts prohibited both the picketing and the boycott.[77]

In his dissent in *Vegelahn*, Holmes treated the case as demonstrating that the "intentional infliction of temporal damage" was "warrant[ed]"

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71. Holmes, *Privilege, Malice, and Intent*, *supra* note 9, at 3. First, he acknowledged that a finding of "malice" might in itself subject a party to tort liability even if his conduct was not otherwise unlawful. *Id.* "Malice" was no longer subsumed in the category of "intent;" it was an independent basis of liability. *Id.* Second, whereas in *The Common Law* Holmes had treated "malice" as part of a continuum of foreseeability that also included "intent" and "negligence," *see* HOLMES, *supra* 55, at 131–33, and as a tool serving to clarify whether a defendant's conduct had violated a standard of liability, his analysis of "malice" in *Privilege, Malice, and Intent* was centered on justification and excuse. Intentional injury resulting in "temporal" damage was now presumed to be actionable unless a defendant could show that his or her actions were not "malicious" because they were justified. *See* Holmes, *Privilege, Malice, and Intent*, *supra* note 9, at 3.

72. *See* Holmes, *Privilege, Malice, and Intent*, *supra* note 9, at 7–8.

73. *Id.*

74. *Id.*

75. 44 N.E. 1077 (Mass. 1896).

76. The case first came to Holmes, sitting as a trial judge in an equity court, in the form of an injunction against the picketing and the boycott. Holmes issued a partial injunction preventing the striking workers from obstructing the door of Vegelahn's factory or threatening violence against persons who sought to enter it, but allowed both the picketing, so long as it was conducted peacefully, and the boycott to continue. *Id.* at 1077. During the years that Holmes served on the Supreme Judicial Court of Massachusetts (1882 to 1902), all of the justices of that court were expected to spend part of their time traveling around the state and serving as trial judges, sometimes in law courts and sometimes in equity courts. For more detail, see G. EDWARD WHITE, JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF 255–56 (1993).

77. *Vegelahn*, 44 N.E. at 1078.

by the "law" when it was "justified."[78] In "numberless instances," Holmes wrote, an actor could intentionally do harm to another if the basis for inflicting that harm was justifiable.[79] Whether the harm was justifiable turned on "considerations of policy and of social advantage."[80] Holmes thought that in the context of labor disputes, efforts on the part of workers to secure better wages and working conditions justified strikes, boycotts, and picketing in pursuit of those aims, so long as they were peaceful.[81] In short, Holmes had announced the proposition that the intentional infliction of temporal damage was tortious unless justifiable in order to focus on justifiability, and in *Vegelahn*, had analyzed justifiability to limit the scope of liability.

Holmes was the lone dissent in *Vegelahn*.[82] But despite focusing on the justification for "intentional infliction of temporal damage," rather than the mere fact that acts had been done intentionally or had caused harm, he still acknowledged the possibility that a number of such inflictions might end up being actionable.[83] Similar opinions, applying similar logic and doctrinal structure, followed,[84] often with Holmes dissenting but sometimes in the majority depending on what counted as sufficient "justification."[85]

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78. *Id.* at 1080 (Holmes, J., dissenting).

79. *Id.*

80. *Id.*

81. *Id.* at 1081–82.

82. Ironically, he believed that since his opinion apparently took the side of labor against capital in an industrial dispute, it would end up being something he "may have to pay for [ ], practically, before I die." *Oliver Wendell Holmes Jr. Correspondence with Lady Clare Castletown* (November 21, 1896), *in* OLIVER WENDELL HOLMES PAPERS (Microfilm ed. 1985), quoted in WHITE, *supra* note 76, at 289.

83. *Vegelahn*, 44 N.E. at 1080–81 (Holmes, J., dissenting).

84. In Plant v. Woods, 57 N.E. 1011, 1015 (Mass. 1900), a majority of Holmes's Massachusetts judicial colleagues ended up agreeing with him that justifiability was the critical inquiry in such cases, and that justifiability was a matter of social policy. But once again, in a labor dispute, the majority found that efforts by members of workers to disparage their opponents were not justifiable and thus actionable if they could be shown to produce damage. *Id.* "The necessity that the plaintiffs should join this association is not so great," the majority declared, "such as to bring the acts of the defendant under the shelter of the principles of trade competition." *Id.* The plaintiffs had "the right . . . to be free from molestation." *Id.*

85. Similarly, in Moran v. Dunphy, 59 N.E. 125, 126 (Mass. 1901), the defendant made comments about the plaintiff to the plaintiff's employer that eventually caused the employer to fire the plaintiff. The plaintiff sued for intentional interference with contractual relations, a recognized tort. *Id.* Holmes, overruling a demurrer to the action granted by a trial court, held that "to induce a third person to end his employment," when done "maliciously and without justifiable cause," was "an actionable tort." *Id.* Technically, the decision only allowed the case to go forward: Holmes and his colleagues did not pass on the justifiability of the defendant's actions or even note what the defendant's purported justification was. Moreover, Holmes

After Holmes was appointed to the U.S. Supreme Court, he was afforded another opportunity to articulate the elements of the form of residual liability in tort he had been identifying. The case, *Aikens v. Wisconsin*,[86] did not come to the Court as a common law decision, but as a challenge to the constitutionality of a Wisconsin statute prohibiting the combination of two or more persons from willfully or maliciously interfering with another in trade or business.[87] Since the defendants had admitted that they had malicious motives in making the agreement, and the Wisconsin court had stopped short of concluding that the statute could fairly be applied to non-malicious "willful" acts as well as malicious acts, the case reduced itself to whether a legislature could constitutionally punish malicious acts that damaged others.[88]

This led Holmes to assert that the acts of the defendants would have been actionable at common law.[89] In his assertion, Holmes provided his clearest statement of the elements of that action. "It has been thought by other courts as well as the Supreme Court of Wisconsin," he maintained, "that such a combination followed by damage would be actionable even at common law. It has been considered that, prima facie, the intentional infliction of temporal damage is a cause of action, which . . . requires a justification if the defendant is to escape."[90] In addition, because "malicious mischief is a familiar and proper subject for legislative repression," he was prepared to conclude that "[i]t would be impossible to hold that the liberty to combine to inflict such mischief . . . was among the rights which the Fourteenth Amendment was intended to preserve."[91]

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treated the case as involving intentional interference with contract rather than a prima facie tort. But his analysis suggested that he was inclined to extend his emphasis on justification to other torts in which persons intentionally interfered with the business relationships of others. The cognizability of the tort of intentional interference with contract, at a time when the concept of an all-purpose tort of intentional, unjustifiable infliction of temporal damage was still largely unrecognized, can be put down to the value afforded "rights" of property and contract and the importance attributed to preserving the stability of contracts in late nineteenth-century America. *See* Stephen A. Siegel, *Understanding the Nineteenth Century Contract Clause: The Role of the Property-Privilege Distinction and "Takings" Clause Jurisprudence*, 60 S. CALIF. L. REV. 1, 8–9 (1986); Henry N. Butler & Larry E. Ribstein, *The Contract Clause and the Corporation*, 55 BROOK. L. REV. 767, 778 (1989).

86. 195 U.S. 194 (1904).

87. *Id.* at 201–02.

88. *Id.* at 202, 206–07.

89. *Id.* at 204.

90. *Id.*

91. *Id.* at 205.

Finally, Holmes suggested that when what he called "disinterested malevolence" could be shown as a basis for the intentional infliction of temporal damage, it could serve to take such actions "out of the justification by the motive with which they were made."[92] Although Holmes did not make explicit whether a tort action could be maintained if "disinterested malevolence" was paired with some other appropriate motive, such as further competition in business or securing leverage in labor negotiations, he said that the statute in *Aikens* should be limited to "combinations of a kind for which no justification could be offered."[93]

In light of the progression of those decisions, at this point, it would have been plausible to conclude that there was an emerging residual category of liability for "intentional infliction of temporal damage,"[94] and that "disinterested malevolence"[95] would be a key to determining when there was liability and when there was a justification that insulated a potential defendant from liability. Certainly, the broad language that Holmes used would have supported that conclusion.

But given the actual facts of the cases in which this kind of broad language had been used, a different conclusion would also have been possible. All of the cases we have discussed, in which Holmes and others articulated a broad principle that could be understood to be applying a residual category of liability, involved labor disputes. In each of those disputes, multiple parties, or an organization composed of multiple parties, were the defendants, and the common characteristic of the alleged wrongful conduct was that the defendants had acted in concert. The crux of the alleged wrong was the exercise of collective power to affect market competition. In the cases we discussed above and in his writing, Holmes took the position that this kind of conduct was not actionable when it was not violent.[96] The point, however, is that whether or not the conduct was actionable in a particular case, use of this particular species of market leverage by labor was often considered wrongful in the laissez-faire world of the late nineteenth century and that was what the cases were all about. Once we understand labor disputes to be the subject matter of these cases, then the proposition that liability in those cases, when it was imposed, was for "intentional infliction of temporal

92. *Id.* at 206.

93. *Id.*

94. Holmes, *Privilege, Malice, and Intent*, *supra* note 9, at 3.

95. Aikens v. Wisconsin, 195 U.S. 194, 206 (1904).

96. *See id.* at 203–04; Vegelahn v. Guntner, 44 N.E. 1077, 1081–82 (Mass. 1896) (Holmes, J., dissenting); Holmes, *Privilege, Malice, and Intent*, *supra* note 9, at 3–4.

damage," ends up being considerably broader than is necessary to explain what was going on in the decided cases.

Nonetheless, after the labor cases faded into the background, those cases and the doctrinal explanation that had been given for them were invoked by some courts in another set of cases in business settings that did not involve contests between labor and management.[97] But not all courts took this route. Rather, other courts began to recognize that many of the cases involved, or could be explained by reference to, a narrower basis of liability, which would come to be called "intentional interference with prospective economic advantage."[98] We therefore turn next to those two lines of cases.

B. Two Different Lines of Doctrinal Development

The stage was set, then, for two different lines of authority to be discerned. What happened was as follows. The tort of interference with prospective economic advantage emerged and thrived. But over time, this tort proved to be even more limited than had once been thought and, for this reason, proved to be quite different from the putative cause of action for intentional infliction of temporal harm. At the same time, the notion that there was also a residual category of liability for intentional interference with temporal advantage was separately maintained in a few jurisdictions, but barely developed.[99] Where this basis for the imposition of liability was recognized, it came to be called "prima facie tort."[100]

1. Interference with prospective economic advantage

The foundations of this tort were laid in *Temperton v. Russell*,[101] an 1893 English decision, in which the court held, by analogy to the existing tort of inducing breach of contract, that inducing someone not to enter into a contract also could be actionable under some circumstances.[102] The facts in the case were similar to those in the U.S. labor dispute cases invoking Holmes's rationale. But the rationale for the imposition of liability for interfering with prospective economic advantage, and the situations to which the tort applied, were obviously narrower.

American courts soon picked up the theme. Sometimes the courts were not entirely clear which cause of action was involved. In the

97. *See infra* Section II.B.2.

98. Della Penna v. Toyota Motor Sales, U.S.A., Inc., 902 P.2d 740, 752 (Cal. 1995) (Mosk, J., concurring).

99. *See infra* Section II.B.1.

100. *See infra* Section II.B.2.

101. [1893] 1 Q.B. 715 (Eng.).

102. *Id.* at 734–35.

celebrated case of *Tuttle v. Buck*,[103] for example, a wealthy banker opened up a barber shop, allegedly for the sole purpose of driving an existing barber out of business.[104] In the barber's suit against the banker, the Minnesota Supreme Court allowed the case to proceed.[105] The court said that the proposition that malicious motives could not render an otherwise lawful action unlawful was flawed.[106] What was "lawful" was based on grounds of policy, and sometimes "[t]he purpose for which a man is using his own property may . . . determine his rights."[107] Where the *sole* purpose of operating a business was to drive a competitor out of business rather than to make a profit, that conduct was unlawful.[108] The court cited Pollock's treatise and suggested that the basis of liability, if it were imposed, would be for intentional infliction of temporal damage, without justification.[109] Other cases followed.[110]

By 1941, the cause of action had acquired the name "interference with prospective economic advantage." In a section of Prosser's treatise titled, "Interference with Prospective Economic Advantage," he described the case law of 1941 as follows:

> [S]ince a large part of what is most valuable in modern life depends on "probable expectancies" . . . the courts must do more to discover, define and protect them from undue interference . . . . For the most part the "expectancies" thus protected have been those of future contractual relations . . . the tort began with "malice," and it has remained a matter, at least, of intent to interfere.[111]

After this, the case law accumulated further, and in 1979, the *Restatement (Second) of Torts* referred to the tort as "Intentional Interference with Prospective Contractual Relations," providing that there was liability when an actor intentionally and improperly engaged in this form of interference.[112] As time went on, however, the courts recognized that, as in *Tuttle v. Buck*, whether the defendant had mixed

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103. 119 N.W. 946 (Minn. 1909).
104. *Id.* at 946.
105. *Id.* at 947.
106. *Id.*
107. *Id.*
108. *Id.* at 948.
109. *Id.* at 947.
110. *See, e.g.*, Hutton v. Watters, 179 S.W. 134, 134–35, 138 (Tenn. 1915) (upholding cause of action against defendant who out of ill will attempted to drive a boarding house out of business); Dunshee v. Standard Oil Co., 132 N.W. 371, 376 (Iowa 1911) (holding that an action would lie when agents of defendant conveyed false information about plaintiff and harassed its employees).
111. PROSSER, *supra* note 3, at 1015–17.
112. RESTATEMENT (SECOND) OF TORTS: APPENDIX VOLUME THROUGH JUNE 1987 § 766B (AM. LAW INST. 1989).

motives often rendered decisions difficult.[113] For decades, as the *Restatement (Third) of Torts* recently put it, the courts "sometimes hedged on the extent to which the defendant's motives" were "relevant," focusing instead on the means the defendant had used to interfere with the plaintiff's prospects.[114] Consequently, the defendant's motive has now fallen completely out of the picture, and there is liability, regardless of motive, only if the defendant "committed an independent legal wrong," though not necessarily a tortious one.[115] Probably the most prominent recent case to make that clear was decided by the Supreme Court of California in 1995.[116]

2. Prima facie tort

In contrast, the subsequent development of liability for intentional infliction of temporal damage, which led to prima facie tort, was considerably more limited. A prominent precursor here was *Beardsley v. Kilmer*,[117] in which the defendant was the manufacturer of a patent medicine known as "Swamp Root" that he and his father sold in Binghamton, New York.[118] The plaintiff, owner of a local newspaper, published a series of articles about the medicine, which suggested that it had few medicinal properties.[119] The defendant, after unsuccessful efforts to get the plaintiff to cease writing about his product, opened a rival newspaper, which eventually had the effect of attracting subscribers, employees, and advertisers from the plaintiff's newspaper, causing it to close.[120] The court held that "lawful" actions undertaken solely out of "malicious" motives could be deemed unjustifiable and actionable.[121]

In *Beardsley*, however, the defendant apparently had some experience in the newspaper industry before starting a competing paper and continued to operate his paper after the plaintiff had closed his.[122] The defendant's prior experience suggested to the New York Court of Appeals that his motives were mixed and, in its view, defeated

113. *Tuttle*, 119 N.W. at 947–48.
114. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR ECONOMIC HARM § 17 (AM. LAW INST., Tentative Draft No. 3, 2018).
115. *Id.* § 17(b).
116. Della Penna v. Toyota Motor Sales, U.S.A, Inc., 902 P.2d 740, 751 (Cal. 1995) (Mosk, J., concurring).
117. 140 N.E. 203 (N.Y. 1923).
118. *Id.* at 203.
119. *Id.*
120. *Id.*
121. *Id.* at 205.
122. *Id.* at 204.

recovery.[123] "[T]he genesis which will make a lawful act unlawful," the court announced, "must be a malicious one unmixed with any other and exclusively directed to injury and damage of another."[124]

In retrospect, the facts in *Beardsley* seem highly similar to those in *Tuttle v. Buck*. Both can be understood to involve interferences with business opportunities. But *Tuttle v. Buck* became a seminal case in the development of interference with prospect economic advantage,[125] whereas *Beardsley* was a precursor of prima facie tort.

Nevertheless, there also were a few cases that were not described, or at least could not easily be described, as intentional interference with prospective advantage. This is because they involved loss that did not arise out of interference with a business opportunity. Those cases might well have been examples of a residual, unnamed category of tort liability, but there were so few of them that describing them as members of a "category" would have been strained.

In essence, they were outliers. For example, in one case, a defendant utility company sought to undermine the influence of the plaintiff, a prominent physician, regarding a forthcoming bond issue.[126] To do this, the defendant attempted to induce the physician to perform an illegal abortion.[127] Although the plaintiff sought damages measured by the injury to his reputation and damage to his business, the defendant's purpose was to influence the election, not to interfere with the plaintiff's prospective economic advantage.[128] The court nonetheless ruled that the case could properly be submitted to a jury.[129]

Cases of this sort also appeared in the New York courts, and occasionally, something like purely disinterested malevolence in a non-business context was found to have existed. In *Al Raschid v. News Syndicate Co.*,[130] the defendant newspaper gave false information to immigration authorities that caused the plaintiff to be arrested and deported, despite his being a native-born American citizen.[131] He sued for malicious prosecution, but that case was dismissed because the

123. *Id.* at 205.
124. *Id.* at 206.
125. For example, Minnesota, where *Tuttle* was decided, now characterizes the case as establishing a cause of action for wrongful interference with non-contractual business relationships. Witte Transp. Co. v. Murphy Motor Freight Lines, Inc., 193 N.W.2d 148, 151 (Minn. 1971).
126. Mangum Elec. Co. v. Border, 222 P. 1002, 1003–04 (Okla. 1923).
127. *Id.* at 1004.
128. *Id.*
129. *Id.* at 1008.
130. 191 N.E. 713 (N.Y. 1934).
131. *Id.* at 713.

information was disclosed in a deportation hearing, which was not a judicial proceeding, and the defendant had not instituted any action against the plaintiff.[132] After dismissal at the trial court level, the plaintiff appealed to the New York Court of Appeals, which held that although the malicious prosecution claim was properly dismissed, the plaintiff might maintain an action for the intentional infliction of temporal damage without justification, citing *Tuttle*, *Beardsley*, and Pollock's treatise.[133] The court noted that the plaintiff had not alleged the proper elements to make out a cause of action, but gave him ten days to replead.[134] Nothing further was ever reported.

This was a rare, tenable example of the as-yet-unnamed, residual category of prima facie tort. It did not involve concerted action in the labor context, nor could it be characterized as intentional interference with prospective economic advantage. But there were not many such cases. Prior to 1946, the New York Court of Appeals had not referred to prima facie tort by name, and most of the cases in which it had suggested that there might be an action for the unjustified, intentional infliction of temporal damage were ones in which other causes of action also were alleged.[135] But in a 1946 case, the New York Court of Appeals used the phrase "prima facie tort."[136]

In *Advance Music Corp. v. American Tobacco Co.*,[137] the plaintiff had published musical compositions in the form of sheet music, which it then sold to jobbers and dealers in the music industry.[138] The defendant compiled a weekly list of the nine or ten "most popular" current songs in the nation, in the ostensible order of their popularity, allegedly based on an extensive and accurate survey it conducted.[139] The plaintiff alleged that the defendant's surveys repeatedly failed to include its compositions in lists of popular songs or listed them in an "improper order of popularity."[140] The ratings of popular songs, Advance Music charged, were simply "the choice or result of caprice or other considerations foreign to a selection" based on accuracy.[141]

132. *Id.*
133. *Id.* at 714.
134. *Id.*
135. *See generally* Vandevelde, *supra* note 70, at 487–91 (discussing the early stages of development of the prima facie tort doctrine).
136. *Id.* at 447.
137. 70 N.E.2d 401, 403 (N.Y. 1946).
138. *Id.* at 401.
139. *Id.* at 402.
140. *Id.*
141. *Id.*

The defendants had acted "wantonly and without good faith" in failing to include Advance Music songs in its lists.[142]

The plaintiff had suffered economic loss, but not through the defendant's having intentionally interfered with any particular prospective contractual advantage of the plaintiff. The court held that New York courts had adopted Holmes's view that "prima facie, the intentional infliction of temporal damages is a cause of action which, . . . requires a justification if the defendant is to escape," and that the plaintiff "alleges such a prima facie tort and, therefore, is sufficient in law on its face."[143]

Subsequent New York decisions, however, imposed three limitations on this action.[144] First, the infliction of harm had to be based *solely* on "malice," described by Holmes in *Aikens* as "disinterested malevolence."[145] Mixed motives for a defendant's conduct, such as those that appeared in *Beardsley* and arguably in *Tuttle*, were insufficient.[146] Second, prima facie tort actions could only be brought where no other tort action was available to a plaintiff.[147] Because many cases in which the intentional infliction of temporal damage in a business context gave rise to an action for intentional interference with contractual relations or with prospective advantage, prima facie tort was limited to cases in which the elements of those torts could not be satisfied. Finally, damages in prima facie tort were limited to "special" damages, which typically meant out-of-pocket losses and did not include emotional harm.[148] That limitation tended to exclude from the category of prima facie tort any actions in which the defendant appeared to have intentionally and gratuitously sought to injure the plaintiff, but the damage the plaintiff suffered only was reputational and therefore not "special."[149]

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142. *Id.*

143. *Id.* at 403.

144. *See* Ruza v. Ruza, 146 N.Y.S.2d 808, 810–11 (N.Y. 1955); Reinforce, Inc. v. Birney, 124 N.E.2d 104, 105–07 (N.Y. 1954) (noting that the infliction of damage had to be based on malice); Brandt v. Winchell, 127 N.Y.S.2d 865, 867 (N.Y. App. Div. 1954).

145. *Reinforce, Inc.*, 124 N.E.2d at 104–06.

146. *Id.* at 106.

147. *Ruza*, 146 N.Y.S.2d at 810–11.

148. *Id.*

149. As the (yet unnamed) prima facie tort seemed to be establishing itself in New York, the first Torts Restatement adopted a section 870, somewhat buried under the category of "Miscellaneous Rules," which provided that:

> [A] person who does any tortious act for the purpose of causing harm to another or to his things or to the pecuniary interests of another is liable to the other for such harm if it results, except where the harm results from an outside force the risk of which is not increased by the defendant's act.

Despite those limitations on the cause of action, however, in 1979, the *Restatement (Second) of Torts* virtually duplicated Holmes's broad description of intentional infliction of temporal damage in *Aikens*.[150] "One who intentionally causes injury to another," the provision read, "is subject to liability to the other for that injury, if his conduct is generally culpable and not justifiable under the circumstances."[151] The provision added that "[t]his liability may be imposed although the actor's conduct does not come within a traditional category of tort liability."[152] Nowhere was there mention of the three limitations New York courts had placed on the prima facie tort. The provision (section 870) did add a requirement that the conduct be "generally culpable,"[153] but folded that requirement into unjustifiability, treating the intentional infliction of damage without a justification as culpable conduct.[154]

Adopted in 1977, a time when most observers thought that tort law's recent expansion would actively continue, section 870 laid out a potential basis for the development of a broad category of residual liability in tort. Like a number of other liability-expanding provisions that have been adopted in Restatements with little case law to support

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RESTATEMENT OF TORTS § 870 (AM. LAW INST. 1934). That formulation was curious. The term "tortious" seemed to suggest that all the section was doing was allowing recovery for purposeful acts that were torts. The limitation appeared to be only directed toward causation. No mention was made of justifiability. Although a comment suggested that it might provide a basis for recovery in cases where specific torts were unavailable because of technical limitations on them, *id.* at cmt. c, on its face, the term "tortious" in the section seemed to presuppose that the elements of particular torts had been satisfied. Read that way, the section only codified intentional torts that resulted in harm to persons, property, or pecuniary interests, all of which were already in existence.

150. RESTATEMENT (SECOND) OF TORTS § 870 (AM. LAW INST. 1979).

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.* at cmt. e. Whether the Reporters for the second Restatement (first Prosser and then John Wade) intended section 870 to function as a residual category, or instead to serve as a placeholder for new, named intentional torts, is not completely clear. Comments to the last draft before adoption stated:

> This Section is intended to supply a generalization for tortious conduct involving harm intentionally inflicted . . . it has traditionally been assumed that . . . intentional torts developed separately and independently, and not in accordance with a unifying principle. This Section purports to supply that unifying principle and to explain the basis for the development of the more recently created intentional torts.

RESTATEMENT (SECOND) OF TORTS § 870 cmt. a (AM. LAW INST., Council Draft No. 39, 1975). The first portion of this passage suggests that the section reflected a residual category, but the second suggests a somewhat different ("unifying") function.

them,[155] it might have been prophetic. At this point, therefore, the idea that a residual category of tort liability existed had been widely noted, if not necessarily widely accepted. Over the next few decades, however, cases would demonstrate that, practically speaking, there was no such residual category.

C. The Modern Period

It turned out that both Holmes and those responsible for section 870 were wrong. Prima facie tort has been adopted in only a few jurisdictions.[156] And the even more broadly stated, arguably residual cause of action adopted by section 870 has garnered little support.[157] Rather, most types of conduct, which might have constituted intentional infliction of temporal damage without justification, fell within the classic categories of other intentional torts, such as assault, battery, intentional damage to property, false imprisonment, trespass, malicious prosecution, or the later-appearing business torts of interference with contract or interference with prospective advantage. Each of those torts includes its own justifications for conduct that would otherwise be actionable in the form of distinctive defenses and privileges.

Holmes and Pollock seem never to have envisioned this alternative route to the development of previously unrecognized forms of tort liability. Because they were so focused on conceptualizing a unified theory of tort liability, what mattered most to them was identifying a residual category of liability that was not exhausted by the existing torts.[158] What Holmes would have said about the subsequent emergence of new named torts, such as intrusion on seclusion, public disclosure of true private facts, and intentional infliction of emotional distress, is unclear. All of those are intentional torts, though none involves "temporal" damage.

1. The near non-existence of prima facie tort in practice

Outside of New York, there are perhaps several dozen reported cases in which the courts have contemplated prima facie tort without directly

155. Examples include RESTATEMENT (SECOND) OF CONTRACTS § 90 (AM. LAW INST. 1979) (adopting promissory estoppel) and RESTATEMENT (SECOND) OF TORTS § 402A (AM. LAW INST. 1965) (adopting strict products liability).

156. *See* James P. Bieg, *Prima Facie Tort Comes to New Mexico: A Summary of Prima Facie Tort Law*, 21 N.M. L. REV. 327, 343–47 (1991) (discussing the states that adopted the doctrine).

157. *Id.* at 347–49.

158. *See e.g.*, Vandevelde, *supra* note 70, at 447, 471–74 (discussing Pollock and Holmes's influence on the development of the general theory of an intentional tort).

rejecting it.[159] There are only three other states, however, in which it can plausibly be said that prima facie tort has been squarely adopted: Missouri,[160] New Mexico,[161] and Ohio.[162] Even in those states, the cause of action sometimes is not favored.[163] One commentator has suggested that there are a few other states in which adoption is arguably implied.[164] But cases in which the prima facie tort allegation actually bears weight are rare. Even in New York, where there have been over a thousand reported cases mentioning prima facie tort, it has had the same fate. The cause of action is applicable in only a tiny percentage of those cases.[165]

In the few jurisdictions where prima facie tort has been adopted, allegations that fall within the tort are narrow. They are made primarily in business contexts where a defendant's conduct inflicted pecuniary damage on a rival and was arguably unjustified, but could not be made the basis of one of the classic actions because of technical limitations on them.[166] In fact, as we have seen, New York, the leading late twentieth-century jurisdiction that nominally had adopted prima facie tort, limited the action to instances in which recovery in a classic intentional tort was unavailable.[167]

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159. Bieg, *supra* note 156, at 343–47.

160. *See* Porter v. Crawford & Co., 611 S.W.2d 265, 268, 272 (Mo. Ct. App. 1980).

161. Schmitz v. Smentowski, 785 P.2d 726, 734 (N.M. 1990).

162. Bajpayee v. Rothermich, 372 N.E.2d 817, 820 (Ohio Ct. App. 1977).

163. "Missouri courts, while recognizing prima facie torts at least nominally, do not look upon them with favor and have consistently limited the application of the prima facie tort." Hertz Corp. v. RAKS Hosp., Inc., 196 S.W.3d 536, 549 (Mo. Ct. App. 2006).

164. *See* Frontier Mgmt. Co. v. Balboa Ins. Co., 658 F. Supp. 987, 994 (D. Mass. 1986) (accepting prima facie tort as a valid cause of action in Nebraska); Newell Co. v. William E. Wright Co., 500 A.2d 974, 980–81 n.4 (Del. Ch. 1985) (acknowledging prima facie tort as a valid cause of action in Delaware); Vandevelde, *supra* note 70, at 485, 487, 495 (discussing the development of the doctrine in different states).

165. *See* Mark P. Gergen, *Tortious Interference: How It Is Engulfing Commercial Law, Why This Is Not Entirely Bad, and a Prudential Response*, 38 ARIZ. L. REV. 1175, 1217 (1996) ("But the theory of prima facie tort disappeared as a legal principle, other than in New York (and perhaps a few other states), which adopted the theory in the crystallized form of the doctrine of prima facie tort. The crystallized doctrine proved inert." (footnotes omitted)).

166. *See, e.g.*, Porter v. Crawford & Co., 611 S.W.2d 265, 266–68 (Mo. Ct. App. 1980) (appealing the lower court's dismissal of a negligence claim for failure to state a cause of action in negligence and, instead, relying on the doctrine of prima facie tort; the plaintiff argued that the defendant's actions were willful and knowing and his sole intention was to harm the plaintiff).

167. *See, e.g.*, Ruza v. Ruza, 146 N.Y.S.2d 808, 810–11 (N.Y. 1955) (rejecting the prima facie tort theory because remedy was available based on one of the traditional torts); Brandt v. Winchell, 127 N.Y.S.2d 865, 868 (N.Y. App. Div. 1954) (stating that when the plaintiff relies on the prima facie tort theory, he should limit his pleading to

Moreover, it has been the rare case in which some form of justification is completely unavailable. In cases that arise out of business dealings, the motives of securing a profit, obtaining a competitive advantage in the marketplace, or furthering one's interest in labor relations are readily discernible and serve as barriers to findings of disinterested malevolence. Even a showing that a defendant whose competition with another business forced that business to close, but the defendant failed to operate a profitable enterprise, as in the *Beardsley* case, would not necessarily result in such a finding: a defendant might simply have erroneously assessed the profitability of his or her undertaking. The combination of there being few factual situations in which intentional injury causing damage is not actionable under any other tort, and in which there was no justification for the defendant's conduct, has meant that very few stand-alone actions of prima facie tort have been brought, and even fewer have been successful.[168] These involve such conduct as improperly stopping payment on a check,[169] wrongfully seeking collection on a note,[170] and humiliating an employee where the facts did not constitute intentional infliction of emotional distress.[171]

Turning specifically to New York, the picture is the same. "Pure" cases in which no other cause of action is available are an endangered species there too. We reviewed the one hundred most-cited New York cases in which there was an allegation of prima facie tort.[172] They were decided between 1934 and 2009. We found only two cases that could reasonably qualify as "pure." These were *Al Raschid*, decided in 1934, and *Advance Music*, decided in 1946, both of which we have already discussed.[173]

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allegations limited to this tort and eliminate statements of injury and wrongdoing that are more applicable to one of the traditional torts).

168. RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 104, Reporters Notes to cmt. a at 117–18 (AM. LAW INST., Tentative Draft No. 1, 2015) (there will be a new draft and it will become section 4).

169. *Porter*, 611 S.W.2d at 272.

170. Schmitz v. Smentowski, 785 P.2d 726, 738 (N.M. 1990).

171. Beavers v. Johnson Controls World Servs., Inc., 901 P.2d 761, 763 (N.M. Ct. App. 1995).

172. On June 4, 2018, we did a Westlaw search of New York federal and state cases using the search term "prima facie tort." The search revealed 1074 such cases. We then used the "Most Cited" filter to identify the 100 most cited such cases.

173. *See supra* notes 130, 137 and accompanying text. Similarly, Kenneth Vandevelde reviewed thirty-five New York cases alleging prima facie tort that were decided during the two-year period ending on May 31, 1990. In every case, the plaintiff also alleged another cause of action, and the prima facie tort claim was unsuccessful. *See* Kenneth J. Vandevelde, *The Modern Prima Facie Tort Doctrine*, 79 KY. L.J. 519, 545–46 (1990–91).

Rather, in the vast majority of those 100 cases, there were allegations asserting multiple causes of action, and the courts dismissed allegations of prima facie tort under the circumstances of each case. In a few of the other cases, the courts declined to dismiss the count alleging prima facie tort, despite the allegations involving other causes of action, because it was possible in theory that the other causes of action would prove to be unavailable.[174] Thus, it is only a small fraction of New York cases in which prima facie tort allegations are not dismissed outright. Given the possibility that the other alleged causes of action will fail, and the fact that the allegations of prima facie tort are not insufficient on their face, the latter sometimes are not dismissed.

All of this is confirmed by the ongoing projects in the *Restatement (Third) of Torts* series. There is no mention of prima facie tort or section 870 in *Restatement (Third) of Torts: Liability for Economic Harm*[175] or in *Restatement (Third) of Torts: Intentional Torts to Persons*.[176]

The upshot of our examination of the cases in New York and elsewhere, then, is this: cases in which the weight-bearing basis of liability, or even of potential liability, is prima facie tort, are extremely rare. We doubt that in the entire history of the tort, there are more than a dozen reported cases, nationwide, in which the actual imposition of liability on the basis of prima facie tort, and prima facie tort alone, has been upheld on appeal.

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174. For example, the allegation in *Halperin v. Salvan*, 499 N.Y.S.2d 55, 56–58 (N.Y. App. Div. 1986), was that an attorney had instituted a baseless class action against the plaintiff. The complaint alleged not only prima facie tort, but also libel and intentional infliction of emotional distress. *Id.* at 57–58. The court merely upheld the trial court's refusal to dismiss the complaint. *Id.* at 57. Similarly, in *Cavanaugh v. Doherty*, 675 N.Y.S.2d 143, 146 (N.Y. App. Div. 1998), the plaintiff alleged that she was dismissed from at-will employment because of her political views. She alleged not only prima facie tort, but also (among other things) intentional interference with contract and intentional infliction of emotional distress. *Id.* Despite declining to dismiss a number of the other alleged causes of action, the court also declined to dismiss the allegations of prima facie tort. *Id.* at 150. Finally, in *Board of Education v. Farmingdale Classroom Teachers Ass'n*, 343 N.E.2d 278, 279 (N.Y. 1975), the Board brought suit against a teachers' association for issuing subpoenas to eighty-seven teachers and refusing to stagger their required court appearances. The complaint alleged both abuse of process and prima facie tort. With regard to the latter, the court held that the allegations could state a cause of action, regardless of what it was called, but noted that "once a traditional tort has been established the allegation with respect to prima facie tort will be rendered academic." *Id.* at 285.

175. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR ECONOMIC HARM (AM. LAW. INST., Tentative Draft No. 3, 2018).

176. *See* RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS (AM. LAW. INST., Tentative Draft No. 1, 2015).

2. Taking stock

There is a close connection between the conditions necessary for the establishment of new torts that we identified in Part I and the failure of prima facie tort ever to develop. Prima facie tort never was able to satisfy these conditions. Most importantly, this putative tort did not have the discreteness necessary for it to be amenable to common law adjudication; it was not justiciable in the sense that we described in Part I. The great historian of the common law, Frederic William Maitland, famously said that, although we have buried the forms of action, "they still rule us from their graves."[177] Maitland's insight was not only that the substance of the forms of action had stayed in force, but also that the common law approach to adjudication still ruled, even after the forms were abolished.[178] The essence of the common law approach is the process of reasoning from precedents about causes of action whose elements are discrete, contained, and limited. Without satisfying these features of justiciability, a new tort cannot emerge and thrive. For this reason, prima facie tort died on the vine.

Although prima facie tort is alleged a fair amount, considering the hundreds of recent appellate decisions referencing the cause of action, it is not a robust residual liability category even when, in theory, it is available. Similarly, with or without express reference to prima facie tort, section 870 is sometimes made the basis for allegations in a complaint, both in states that have adopted prima facie tort and those that have not. Such allegations receive the same negative reception as prima facie tort itself. In some cases, the allegation is dismissed or is regarded as immaterial to the issue a court is deciding.[179] In others, it is treated as equivalent to prima facie tort[180] and rejected on this ground.[181] Some courts, however, have invoked section 870 as the basis

177. FREDERICK WILLIAM MAITLAND, THE FORMS OF ACTION AT COMMON LAW 1 (A.H. Chaytor & W.J. Whittaker, eds. 1909).

178. *Id.* at 1–4.

179. *See, e.g.*, Bardes v. Mass. Mut. Life Ins. Co., No. 1:11-CV-340, 2014 WL 12496540, at *1 (M.D.N.C. Apr. 28, 2014), *aff'd*, 585 Fed. App'x 156 (4th Cir. 2014); Kurowski v. Town of Chester, 172 A.3d 522, 523 (N.H. 2017); King & Mockovak Eye Ctr., Inc. v. Mockovak, No. 74544-1-I, 2017 WL 4898237, at *1–2 (Wash. Ct. App. Oct. 30, 2017).

180. Bus. Payment Sys., LLC v. Nat'l Processing Co., No. 3:10-CV-00669, 2012 WL 6020400, at *21–22 (W.D. Ky. Dec. 3, 2012); Deutsch v. Backus Corp., No. X07CV106022074S, 2012 WL 1871398, at *9–10 (Conn. Super. Ct. May 2, 2012).

181. Coachtrans, Inc. v. Uber Techs., Inc., No. CV 16-88, 2016 WL 4417261, at *3 (E.D. Pa. Aug. 19, 2016); Lips v. Scottsdale Healthcare Corp., 214 P.3d 434, 440 n.8 (Ariz. Ct. App. 2009), *aff'd in part, vacated in part*, 229 P.3d 1008 (Ariz. 2010).

for creating new, named torts, thus treating it as a placeholder rather than a residual category of liability.[182]

The rejection of prima facie tort and of section 870 by the *Restatement (Third) of Torts*, however, is not binding on the courts and does not automatically deter plaintiffs' attorneys from seeking to rely on them. Consequently, the fact that section 870 is arguably broader than prima facie tort—it has been the basis for allegations of liability for bodily injury and emotional distress,[183] for example—suggests that it, too, may be seen as providing support for future suits alleging the existence of a residual category of tort liability involving intangibles. Indeed, whether out of stubbornness, desperation, or ignorance, plaintiffs' lawyers seem not to have gotten the message. They continue to invoke prima facie tort and section 870 as alleged bases for the imposition of liability. In the entire history of the action, a total of 3,813 reported cases have made reference to prima facie tort.[184] In just the period since the beginning of 2016—less than two years prior to the time we conducted the search—244 reported cases made such a reference.[185] This many references, mainly at the appellate level, confirm that, however doubtful the doctrine may be on paper, prima facie tort is alive and well in the hearts and minds of plaintiffs' lawyers.

III. THE FUTURE OF LIABILITY FOR INTANGIBLE HARM

There can be no question that we have entered a post-industrial era, in which information, rather than things themselves, is playing and will continue to play an increasingly important role in our economy and in our social lives. New forms of harm—either caused by intangible forces, involving intangible loss,[186] or both—are emerging and will undoubtedly be more prevalent as the information age proceeds. For these new forms of harm to result in the creation of new torts, or the expansion of existing torts, they will have to satisfy the preconditions

182. *See, e.g.*, Beren v. Ropfogel, 24 F.3d 1226, 1230 (10th Cir. 1994) (tortious interference with inheritance); Willard v. Caterpillar, Inc., 48 Cal. Rptr. 2d, 607, 616 (1995) (spoliation of evidence).

183. *See, e.g.*, Taylor v. D.C. Water & Sewer Auth., 957 A.2d 45, 50 (D.C. 2008) (physical and emotional mistreatment of an employee); Doe v. Roe, 598 N.Y.S.2d 678, 680 (Just. Ct. Rockland Cty. 1993) (intentional transmission of venereal disease).

184. The search was conducted on Westlaw using the search terms "prima facie tort" on August 21, 2018.

185. The search was conducted on Westlaw using the search terms "prima facie tort" on August 21, 2018.

186. As we noted at the outset, see *supra* note 5, we use the term "intangible" to denote loss falling outside the classic contours of damages for bodily injury and property damage. We include pure economic loss in that category when it is caused by an intangible force such as digital hacking.

to creation of new torts that we identified in Part I. In addition, the saga of the residual category of liability approach that we explored in Part II strongly suggests that any new liability will take the form of particular, named torts.

Predicting the exact nature of the intangible harms that have not yet occurred or even been imagined would, of course, be a fruitless venture. Even just a few years ago, almost no one would have predicted that misuse of Facebook data would have influenced the 2016 election for president of the United States, or that a series of prominent men holding powerful media positions would lose their jobs as a result of their sexual misconduct. We will not attempt to envision a future that may be stranger than fiction.

Nonetheless, we are struck by certain parallels between the last period of great turmoil in tort law and what may well be about to occur. Between about 1960 and 1985, the physical harms of the late industrial age generated new tort liabilities to meet them.[187] Early in this period, injuries caused by durable consumer products—cars, power tools, and appliances—became the subject of much greater concern than in the past, and liability for defects in the design of such products emerged.[188] At roughly the same time, the pharmaceutical revolution produced marvelous and powerful new drugs, but the drugs sometimes were sold with inadequate warnings about the side effects that the drugs could cause.[189] Liability in tort for failure to warn of those side effects emerged.[190] In addition, automobile accidents had, by this time, become a significant enough social problem that, in a number of states, no-fault auto insurance was partially substituted for tort liability for auto-related bodily injuries.[191] Then, late in the period came the discovery that the industrial activity of the prior decades was responsible for a deposit of leaking hazardous waste at thousands of sites, posing a danger to health and the environment.[192] A federal

187. *See e.g.*, William L. Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 791–94 (1966) (discussing the impact of industrialization on the development of products liability law).

188. *Id.* at 791.

189. *Id.* at 808.

190. *Id.*

191. *See* ABRAHAM, *supra* note 4, at 287–94.

192. *See* Richard E. Lotz, *Liability Issues Under CERCLA*, 23 A.F. L. REV. 370, 370–71 (1982) ("Senator Randolph stated the study had 'found that 1100 disposal sites, holding about 100 million tons of chemical wastes, had been used by the Nation's 53 largest chemical companies, since 1950 without any regulatory control.'").

regime imposing civil liability for the cost of cleanup of these sites was enacted.[193] Similar state regimes also were adopted.[194]

We may well be at the beginning of an analogous period in our history. In the past few decades, the cyber revolution has spawned forms of activity that simply did not exist in the past. Like the products and pharmaceutical revolutions, the cyber revolution has yielded enormous, unforeseen benefits. And like the prior revolutions, the cyber revolution has initially taken place largely without legal regulation and without much influence by the law of torts. Several decades into the revolution, however, cyber wrongdoing and the harms that it can cause are becoming increasingly evident.[195] The same kind of cultural pressure that led to the modernization of tort liability for physical forces and physical harm more than fifty years ago may now be starting to develop in the context of the intangible forces and intangible harms of the digital world.

A slightly different, but related state of affairs may be emerging in another social sphere. Harms caused by sexual misconduct have long been understood to occur regularly, and both statutory and common law liabilities have long been available to redress harms involving sexual misconduct. But it has become obvious in just the last few years that those harms have been even more widespread than some people had previously recognized. The legal regimes designed not only to compensate for such harms, but also to deter them from occurring, have in many respects failed at that task.[196] In contrast to cyber misconduct and in connection with harms involving sexual misconduct, we need not speculate about whether cultural pressure to better address the harms this misconduct causes will develop. That pressure exists, and those kinds of harms already have high social salience.

We are not prescient enough to predict in detail how either of those radically new developments and the harms that accompany them will

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193. Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601–75 (2012).

194. *See, e.g.*, Kimberly Bick, *Contaminated Groundwater as a Resource in California*, HASTINGS ENVTL. L.J. 97, 105–06 ("In California, the analog to CERCLA is the Hazardous Substance Account Act (HSAA) . . . .").

195. *See, e.g.*, *In re* Heartland Payment Sys., Inc. Customer Data Sec. Breach Litig., 834 F. Supp. 2d 566 (S.D. Tex. 2011) (allowing a class action lawsuit against a payment transaction company after its computer systems were compromised by hackers), *rev'd in part*, Lone Star Nat'l Bank v. Heartland Payment Sys., Inc., 729 F.3d 421 (5th Cir. 2013).

196. *See, e.g.*, STEPHEN J. SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW ix–x (1998); John F. Decker & Peter G. Baroni, *"No" Still Means "Yes": The Failure of the "Non-Consent" Reform Movement in American Rape and Sexual Assault Law*, 101 J. CRIM. L. & CRIMINOLOGY 1081, 1082 (2011).

play out in tort law over the long term. But given our aims here, that is not necessary. What we can do is sketch out the implications of the considerations we have already identified, in connection with the creation of new torts, for the potential development of tort liability for intangible harms with high social salience. In order to do this, we focus on three kinds of intangible harms that have already occurred and that can be expected to occur with considerably more frequency or to be the subject of greater scrutiny in the future. These intangible harms include: consumer credit losses resulting from digital hacking; the unauthorized publication of medical or other private information obtained from confidential websites; and sexualized misconduct that does not involve or pose the threat of imminent bodily contact.

We have singled out those harms for discussion because they currently have high social salience. The hacking of credit accounts has become a nearly ubiquitous phenomenon, and typically, consumers are protected against losses through arrangements with the banks that issue credit cards or otherwise support accounts.[197] But in addition to the hacking of credit accounts, massive data breaches of large enterprises, including hospitals and universities, have resulted in large amounts of private information being compromised.[198] Some social websites also have inadvertently released to third parties the information supplied by their subscribers—information that was intended to be limited to a circumscribed group of other subscribers.[199] Finally, the MeToo movement has generated a large

197. For recent examples of major data breaches, see Vindu Goel & Rachel Abrams, *Hackers Stole Data from Millions of Cards at Saks*, N.Y. TIMES, Apr. 2, 2018, at B2; Tara Siegel Bernard et al., *Equifax Attack Exposes Data of 143 Million*, N.Y. TIMES, September 8, 2017, at A1, A20. One 2017 survey stated that "46% of Americans have been victim to credit card fraud in the past 5 years." Rebecca Lake, *23 Frightening Credit Fraud Card Statistics*, CREDIT DONKEY (Feb. 1, 2017), https://www.creditdonkey.com/credit-card-fraud-statistics.html [https://perma.cc/3U92-S5H8]. Consumers' exposure to liability for unauthorized transactions on their credit cards is generally limited by federal law. *See* John S. Kiernan, *Credit Card & Debit Card Fraud Statistics*, WALLET HUB (Feb. 17, 2017), https://wallethub.com/edu/credit-debit-card-fraud-statistics/25725 [https://perma.cc/BPW5-4RUQ].

198. *See, e.g.*, Henry K. Lee, *Hackers Tap Thousands of Students' Key Records*, S.F. CHRONICLE, May 9, 2009, at B1; Nate Lord, *Top 10 Biggest Healthcare Data Breaches of All Time*, DIGITAL GUARDIAN (June 25, 2018), https://digitalguardian.com/blog/top-10-biggest-healthcare-data-breaches-all-time [https://perma.cc/P43Z-4XPB]; Nicole Perlroth, *Hospital Company Hacked, Affecting 4.5 Million Patients*, N.Y. TIMES, Aug. 19, 2014, at B4.

199. *See, e.g.*, Gerry Shih, *Facebook Admits Year-Long Data Breach Exposed 6 Million Users*, REUTERS (June 21, 2013), https://www.reuters.com/article/net-us-facebook-security [https://perma.cc/WA7B-54ZU]. Facebook also releases vast amounts of private

amount of publicity for inappropriate sexualized behavior, primarily directed at females by males, that does not come within the definitions of assault, battery, or statutory sexual harassment.[200] All of those activities have generated widespread negative reactions: they amount to perceived "social wrongs" with ample normative weight.

Those intangible harms are, no doubt, the proverbial tip of the iceberg. The unexpected sharing of digital data by one source with another—think of Google's sharing of consumer shopping data with other vendors, under terms of use that arguably "authorize" Google to do so[201]—also may eventually lead to tort litigation. The casual quip that a smartphone is a surveillance device that also permits communication directs our attention to the possibility of future suits over unauthorized surveillance of personal devices.[202] Our analyses of the three kinds of harms on which we do focus are primarily intended to serve as illustrations of the manner in which courts in the future may go about addressing new types of tort claims involving intangible losses.

The message of Parts I and II was that residual categories of liability are abstractions, maintained only before the imposition of liability under particular circumstances becomes a live possibility. At that point, if a claim is successful, it is either assimilated into an existing, possibly expanded tort, or a new, but contained and limited tort is created. Nothing stays for long in the residual category. For this reason, we doubt very much that there will ever be a residual category of liability consisting of something like "invasion of data privacy."

Similarly, in our view, there will never be a residual category of tort liability for sexual misconduct. The question will be whether forms of what has been called "sexualized misconduct"[203] that do not currently fall within the confines of one or more of the existing torts will continue not to be actionable in the future, or instead, will result in the expansion of an existing tort or the creation of a new tort or torts

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information by design. Gabriel J.X. Dance et al., *Device Companies Have Vast Access to Facebook Data*, N.Y. TIMES, June 4, 2018, at A1, A13.

200. *See infra* Section III.C (discussing consequences for inappropriate sexual behavior).

201. *See, e.g.*, Charles Arthur, *Google Raises Privacy Fears as Personal Details Are Released to App Developers*, GUARDIAN (Feb. 25, 2013), https://www.theguardian.com/technology/2013/feb/25/google-privacy-fears-app-developers [https://perma.cc/9QCN-7Y35].

202. Scott Rosenburg, *Your Phone is also a Surveillance Device, and It's Turning Your Life into a Map*, BUSINESS INSIDER (Jan. 14, 2019), https://www.insider.com/your-phone-is-also-a-surveillance-device [https://perma.cc/C234-488Z].

203. Vicki Schultz, *Reconceptualizing Sexual Harassment, Again*, 128 YALE L.J. FORUM 22, 27 (2018).

that would permit the imposition of liability for intangible harms not actionable at present.

A. Negligent Release of Hacked Consumer Credit Information

There are almost weekly reports of the hacking of consumer credit and other data maintained by businesses with whom consumers deal. In most instances, the consumers whose information is obtained are protected by contract against direct losses resulting from fraudulent charges made on their accounts.[204] However, by contract, the banks issuing credit cards, which are used by hackers or their successors to make fraudulent charges on credit card accounts, must pay those charges.[205] In addition, consumers whose information is wrongfully obtained may suffer other losses caused by the misuse of the information, the most salient of which is identity theft.[206] We discuss below both the banks' and the consumers' potential causes of action for their losses.

1. The issuing banks' losses

To date, the principal issue in banks' negligence suits against merchants and others whose data reservoirs have been hacked has been whether the "economic loss rule" applies.[207] This is the general rule that there is no liability in negligence for pure economic loss,[208] and the particular application of this rule to instances in which the parties have contracted, or had the potential to contract, regarding liability for such losses.

Legal scholarship about those suits has identified a number of considerations which might bear on their treatment.[209] None of this writing, however, has recognized the consideration that we identified in Part I as being central to the creation of new torts: the wrong to the issuing banks has little social salience or normative weight. The

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204. *See* 15 U.S.C. § 1643 (2012) (limiting liability of card holders); 12 C.F.R. § 12 (2018) (same). These consumers may nonetheless have indirect or consequential losses, resulting from the inconvenience of setting up new accounts and the possible short-term lack of access to credit while new accounts are established.

205. *See* Catherine M. Sharkey, *Can Data Breach Claims Survive the Economic Loss Rule?*, 66 DEPAUL L. REV. 339, 346 (2017) ("Privity thus exists between the issuer bank and the payment card network, as well as between the acquirer bank and the payment card network.").

206. U.S. GAO, REPORT TO CONGRESSIONAL REQUESTERS, DATA BREACHES, RANGE OF CONSUMER RISKS HIGHLIGHTS LIMITATIONS OF IDENTITY THEFT SERVICES (Mar. 2019).

207. *See* Sharkey, *supra* note 205, at 346.

208. *See id.*

209. *See generally The Twenty-Second Annual Clifford Symposium on Tort Law and Social Policy: Privacy, Data Theft and Corporate Responsibility*, 66 DEPAUL L. REV. 311 (2017) (introducing several articles on tort law and social policy).

merchants' failure to protect consumers' data is highly blameworthy, but the principal wrong is to the consumers whose data they failed to protect, not to the issuing banks. There is no cultural pressure to afford the banks a right of recovery in this situation. Most people do not consider whether banks might have such a right, and if they did, they would likely think that the banks have no one to blame but themselves for their losses, since they could have protected themselves by contract. The banks are strategically placed to enter into contractual arrangements with merchants and possibly even with consumers, limiting their exposure to consumer losses suffered when merchant data reservoirs are hacked, but, for whatever reasons, do not seem to have not done so.[210] As a consequence, we do not anticipate the expansion of existing forms of tort liability, or the creation of a new tort, to address the issuing banks' losses in this situation.

2. Consumer losses

The situation of banks issuing credit cards is obviously not the same as that of consumers whose data is hacked. Although consumers are protected against direct losses on their stolen credit card accounts, they are vulnerable to other misuses of their stolen data. In principle, consumers' potential claims against the negligent merchants who stored now-hacked data might be subject to the economic loss rule. Consumers may or may not be in privity of contract with those merchants,[211] but if they are, contracts between the two could address potential economic losses resulting from the merchants' negligence.

On the other hand, contracts between consumers and merchants are boilerplate contracts, whose terms arguably should have less binding force than those between the merchants and issuing banks. From a normative standpoint, the merchants' wrongdoing is often serious. Consumer data has been entrusted to those merchants; they know or should know that there is a substantial risk that their customers will suffer losses beyond their existing credit accounts if the security of

210. The banks are not in direct privity with the merchants but are in indirect privity by virtue of the membership in the Visa or MasterCard networks that contract with the merchants. *See* Sharkey, *supra* note 205, at 361–62. With respect to contracts between banks and consumers, Mark Geistfeld suggests that whether the economic loss rule applies in data breach cases will typically turn on whether a consumer has sufficient information to protect his or her confidential information by contracting with a business over reasonable security for that data. Mark A. Geistfeld, *Protecting Confidential Information Entrusted to Others in Business Transactions: Data Breaches, Identity Theft, and Tort Liability*, 66 DEPAUL L. REV. 385, 394 (2017).

211. Sharkey, *supra* note 205, at 346 (suggesting that privity of contract does not "always exist between consumer credit card holders and merchants").

their data is not maintained, and they know that there is a significant threat that hackers will attempt to obtain the data. A failure to exercise reasonable care to protect the data under these circumstances is highly blameworthy. Interestingly, however, there does not seem to be much cultural pressure to afford a remedy for such negligence. In our experience, most people who are notified that their data has been hacked appear to be satisfied once they have been reimbursed for any authorized use of credit cards, if they are given a free year or two of membership in a credit and identity protection service by the merchant in question.

In addition, there are justiciability issues that may adversely affect efforts to establish a new tort governing liability for this type of harm. First, developing standards to define what constitutes reasonable care in the maintenance and protection of consumer data could be a challenge. Some of the highly publicized data breaches in recent years seem particularly egregious and sloppy,[212] but not all will be. And there will possibly be vexing causation questions since hackers may well be capable of overcoming even reasonable efforts at protecting consumer data, in which instances a merchant's negligence may not necessarily be a cause of the breach.

Second, consumers' damages from identity theft resulting from data breaches may lie at the margin of cognizability. One of the reasons for the economic loss rule is the difficulty of tracing the economic effects of negligent behavior.[213] Consumers' immediate losses from data breach—e.g., the cost of establishing new accounts and of disputing charges made on a new, fraudulently-obtained credit card—may be cognizable (though small), but the ripple effects of other disruptions suffered by the party in question may be harder to trace. This difficulty may be aggravated when the consequences of identity theft are not recognized or manifested until a considerable period after the theft actually occurs.

Consumers may suffer other losses, however, upon learning that their data, and therefore their identities, may have been compromised. They may worry about what may occur in the future, for example, if their identity is not merely stolen in bulk with the identities of others, but actually compromised. The analogy to fear of future bodily injury is suggestive, but not dispositive. Except under unusual circumstances, fear of experiencing bodily injury or disease in the future is not

212. *See, e.g.*, Julie Creswell & Nicole Perlroth, *Ex-Employees Say Home Depot Left Data Vulnerable*, N.Y. TIMES, Sept. 20, 2014, at A1, B2.

213. *See* Sharkey, *supra* note 205, at 334 n.13.

compensable in tort until some tangible injury has occurred.[214] This makes sense on several grounds, not the least of which is concern for avoiding multiple law suits: the first, for fear of injury and the second, for actual injury if it later materializes.[215] Data theft may seem closer to constituting an actual loss—perhaps analogous to the theft of property—than to being exposed to the pure risk of suffering harm in the future, but we think the same difficulties with recovery for emotional harm before any tangible harm occurs are presented when someone becomes anxious about the future release of private information that might compromise his or her identity.

Finally, as a practical matter, both the financial and emotional losses of most victims are likely to be comparatively small, but the sum total of such losses suffered by hundreds of thousands of victims (or more) may be enormous. One of the other justifications for the economic loss rule is that liability for pure economic loss would impose catastrophic liability of this sort on a single party, whereas the absence of liability spreads a series of comparatively small losses among a large number of victims, who can insure against or mitigate their losses more effectively.[216]

In light of all these considerations, we suspect there will be no tort liability for what might be termed the "ordinary" financial and emotional losses associated with credit data breaches and resulting identity thefts. Rather, we think that tort liability for those losses will be limited to those who suffer unusual emotional loss beyond what the reasonable person would be expected to suffer,[217] or demonstrable out-of-pocket financial loss, analogous to special damages that must sometimes be proved in order to recover for loss caused by defamation. A plaintiff will have to have suffered losses different in kind or magnitude from what other victims suffered in order to have a right to recover for them.

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214. *See, e.g.*, Metro-N. Commuter R.R. Co. v. Buckley, 521 U.S. 424, 426–27 (1997) (disallowing a claim alleging fear of cancer resulting from exposure to asbestos).

215. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 47 cmt. k. (AM. LAW INST. 2015).

216. *See* ABRAHAM, *supra* note 4, at 278.

217. There is an analogy here to the requirement some jurisdictions apply in suits involving negligent infliction of emotional distress resulting from witnessing the death of another person: the plaintiff must suffer distress beyond that which would have been experienced by a disinterested party. *See, e.g.*, Thing v. La Chusa, 771 P.2d 814, 815 (Cal. 1989) (holding that only a person closely related to a victim, present at the scene of the accident, and suffering a harm, could recover for negligent infliction of emotional distress).

B. Negligent Release of Confidential Personal Information

Massive amounts of medical and other confidential information are now maintained in digital form. Much of this information is insecure and vulnerable to breaches of confidentiality. To give just two examples, the health insurer Anthem[218] and the marital dating site Ashley Madison both have been hacked,[219] and the identity of some of the individuals registered on the latter were released.[220] Here, the principal, and often exclusive, harm to the individuals in question is the invasion, or potential invasion, of their privacy with its attendant consequences, including possible or actual identity theft.

Such harms fall within the potential gravitational pull of two of the interests protected by the existing privacy torts, intrusion on seclusion and public disclosure of true private facts. We predict that liability will be imposed for some but not all of the harm involved, and that this will be accomplished by a hybrid approach. First, there will be no liability for intrusion itself. Second, liability for release of private or confidential information will be assimilated into the existing cause of action for public disclosure, in the sense that the new liability will be for invasion of the same interest that is already protected by this tort. But this tort currently requires the defendant to intend to invade the plaintiff's privacy.[221] The new tort will be actionable even in the absence of intent if the defendant has been negligent in failing to protect the plaintiff's privacy.

1. Data breach itself

The first type of harm involved in breaches of this sort is the invasion itself. The possible analogy between this kind of invasion of private data, and intrusion on seclusion through such means as eavesdropping or visual spying, is evident. In each instance, a party without the right to do so gains access to something highly private or confidential. Intrusion on seclusion is actionable even in the absence

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218. *See In re* Anthem Inc. Data Breach Litig., 162 F. Supp. 3d 953, 1016 (N.D. Cal. 2016) (allowing Anthem policy holders to sue Anthem for data breach but requiring dismissal of all non-anthem policy holders); Reed Abelson & Matthew Goldstein, *Hackers Breached Data of Millions, Insurer Says*, N.Y. TIMES, Feb. 5, 2015, at B1.

219. *See* Dino Grandoni, *Ashley Madison, a Website for Straying Spouses, Is Hit by an Online Attack*, N.Y. TIMES, July 21, 2015, at B3.

220. *Id.*

221. *See* Koeppel v. Speirs, 808 N.W.2d 177, 178 (Iowa 2011) (quoting Stessman v. Am. Black Hawk Broad. Co., 416 N.W.2d 685, 686 (Iowa 1987)) ("We have held that an intrusion upon seclusion occurs when a person '*intentionally intrudes*, physically or otherwise, upon the solitude or seclusion of another . . . .'").

of a showing that an individual witnessed what was secluded.[222] Recording an intimate conversation, for example, would be actionable even without proof that anyone listened to the recording.[223] Clearly, the core of the wrong in the invasion of private data, however, is not the fact of intrusion itself but the combination of intrusion and the fact that someone listened to or saw what was intruded upon. The core of the wrong lies in something private being witnessed.

Consequently, the mere hacking of private or confidential information lies outside the core of the tort of intrusion on seclusion. Conventional intrusions on seclusion usually involve a single victim or only a few victims.[224] Even without proof that the tortfeasor actually listened to or witnessed what was intruded upon, there is often a substantial possibility, perhaps even a de facto presumption, that this occurred. Moreover, at least part of the outrage victims reasonably feel upon learning of an intrusion is often that a particular, identified individual may have actually witnessed them in a private or intimate setting. That is emphatically not what occurs with mass digital intrusions in which a wrongdoer gains access to medical or other private information about tens or hundreds of thousands of individuals. Victims have no reason to imagine that anyone, let alone a particular individual, actually has gained personal knowledge of the information in question merely by virtue of successful hacking. On the contrary, victims' legitimate concern is not about the fact of hacking alone, but that the hacking will lead to disclosure of the information to third parties.

In this situation, we think that the courts would neither impose liability for intrusion on seclusion nor create a new tort to govern liability for such an intrusion. The emotional harm that victims suffer from merely knowing that their private information is no longer safely

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222. *See id.* at 181 (noting that there are only two elements of invasion of privacy: invading where plaintiff "has a right to expect privacy" and in a manner "highly offensive to a reasonable person").

223. *See id.* at 178 (holding that installation of a non-functional camera to view female employees was actionable).

224. Most of the prominent seclusion cases involve only a single victim or a small number of victims. *See, e.g.*, Galella v. Onassis, 487 F.2d 986, 991 (2d Cir. 1973) (one victim); Dietemann v. Time, Inc., 449 F.2d 245, 245 (9th Cir. 1971) (one victim); Shulman v. Grp. W Prods., Inc., 955 P.2d 469, 475 (Cal. 1998) (two victims); Nader v. Gen. Motors Corp., 255 N.E.2d 765, 767 (N.Y. 1970) (one victim). *See generally* David Bender, *A Guide to Cyberlaw and Data Privacy Law*, 5 COMP. LAW Sect. 41 (2018) (summarizing additional cases).

maintained is real, but, in most cases, likely to be minimal and difficult to quantify; this harm is not easily cognizable.[225]

2. Public disclosure

In contrast to the mismatch between hacking and intrusion on seclusion, the actual release of improperly obtained confidential digital information resembles the harm that is addressed by the tort of public disclosure of true private facts. Much, and arguably all, of an individual's medical information is sufficiently personal, even if its release does not reveal anything embarrassing, to satisfy the element of this tort requiring that the disclosure be "highly offensive" to the reasonable person.[226]

Moreover, the damages that result from such disclosure will be of the same order as those that plaintiffs suffer in more conventional cases of public disclosure—embarrassment, anxiety, and the like. Although damages for such losses may be difficult to quantify, tort law has already determined that they are sufficiently cognizable to warrant being awarded.[227]

However, the courts will have to surmount a different, substantial barrier to adopting liability for the release of this form of information. Currently, there is no liability in negligence for public disclosure of true private facts.[228] The tort requires an intent to disclose. Although there may be occasions on which a defendant deliberately publicizes private information that it maintains in digital form, much more frequently, the disclosure will result from invasion by an unknown hacker, and the defendant ordinarily will be an entity whose alleged negligence made the hacking possible.

Adopting a tort of negligent failure to protect against public disclosure of true private facts would, no doubt, be a major expansion of liability. Some courts will refuse to take such action. But if the disclosure of private information from hacking becomes common and widespread, and there is no statutory or regulatory regime rigorously deterring negligent failure to provide adequate data security by imposing severe penalties for

225. *But see* Daniel J. Solove & Danielle Keats Citron, *Risk and Anxiety: A Theory of Data-Breach Harms*, 96 TEX. L. REV. 737, 737–38 (2018) (arguing that the harm is cognizable and demonstrating how courts could use existing precedent to "assess risk and anxiety in a concrete and coherent way").

226. *See supra* note 217 and accompanying text.

227. *See* Virgil v. Time, Inc., 527 F.2d 1122, 1129 (9th Cir. 1975) (allowing damages for releasing private information "when the publicity ceases to be the giving of information . . . and becomes a morbid and sensational prying into private lives").

228. We have been unable to find an authoritative statement to this effect, but we also have not been able to identify any cases in which liability was imposed for negligent disclosure. We are therefore confident that the assertion we make in the text is the law on this issue.

violations,[229] then eventually, some courts will expressly or impliedly recognize that the tort, under some circumstances, satisfies the criteria we identified in Part I. There has been enough attention paid to data security breaches, and enough public concern about them, that the failure to maintain adequate cyber security is a matter of increasing social salience. Negligent failure to do so is widely regarded as blameworthy and will be regarded as especially blameworthy in cases involving embarrassing or other confidential facts.

The kinds of disclosures that have occurred thus far involve such facts as medical data on tens of thousands of individuals.[230] The liability faced by an allegedly negligent defendant would be catastrophic in magnitude. As we noted earlier, this prospect is one of the considerations that underlies the economic loss rule. Imposing liability focuses an enormous cost on a single party, whereas denying liability spreads a large number of small losses among victims who have the potential to buy health, disability, property, and business interruption insurance against them.[231] In contrast to economic losses incurred by victims of data breaches, however, emotional losses from public disclosure of confidential information will be much more difficult for potential victims to insure against. There is no prospect that such insurance will become available any time soon, and we doubt that such insurance will ever be feasible. There has never even been a separate market for first-party insurance against pain and suffering associated with physical injury, for example, despite the fact that such loss is likely to be more easily quantified than embarrassment associated with disclosure of private information.[232]

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229. There are at least a dozen federal statutes addressing data security, but they obviously have not deterred the many data breaches that have occurred in the past few years. Some are probably obsolete, given technological advances. *See, e.g.*, Financial Services Modernization Act of 1999, 15 U.S.C. §§ 6801–02 (2012) (regulating the confidentiality of financial institutions' consumer information); Computer Fraud and Abuse Act of 1986, 18 U.S.C. § 1030 (regulating computer tampering); Video Privacy Protection Act of 1988, 18 U.S.C. § 2710 (regulating the disclosure of private audio and visual rental and purchase records); Family Educational Rights and Privacy Act of 1974, 20 U.S.C. § 1232g (regulating the privacy of educational records); Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. §§ 1320d–1320d-9 (regulating identifiable health information).

230. *See, e.g.*, Abelson & Goldstein, *supra* note 218.

231. *See* Ward Farnsworth, *The Economic Loss Rule*, 50 VAL. UNIV. L. REV. 545, 555 (2016).

232. For discussion, see ABRAHAM, *supra* note 4, at 246; Steven P. Croley & Jon D. Hanson, *The Nonpecuniary Costs of Accidents: Pain-and-Suffering Damages in Tort Law*, 108 HARV. L. REV. 1785, 1790 (1995) ("[F]rom purely an insurance perspective, consumers would prefer not to receive pain-and-suffering damages *at all*."); Alan Schwartz, *Proposals for Products Liability Reform: A Theoretical Synthesis*, 97 YALE L.J. 353, 364 (1988).

Taking all these considerations into account, we predict that, in contrast to what we suggested would be considerable judicial reluctance to recognize broad liability for economic loss resulting from data breaches, a limited cause of action for public disclosure of confidential digital information will be recognized. We think that, at least initially, successful actions will be restricted to cases in which comparatively small groups of victims have suffered distinctive and severe forms of harm. We make this suggestion based on the criteria set forth in Part I. Violations resulting in distinctive and severe forms of harm are likely to foster high social salience and normative weight. The small size of the victim group serves as a counter to the fear of potentially unlimited liability, making such cases more cognizable. And the cognizability of such cases makes it more likely that lawyers will consider bringing them.

Thus, health insurers and others who maintain individuals' medical data, as well as dating or similar websites as to which the mere fact of participation is confidential, will simply have to recognize the enormous potential liability they face if they do not maintain reasonable security against hacking. They may find it in their interest to purchase substantial amounts of insurance against such liability in the same manner that major corporations now purchase hundreds of millions of dollars of insurance against liability for bodily injury and property damage.[233]

For companies such as Anthem and other leading health insurers, this is a feasible approach. We suspect, however, that the major consequence for smaller companies such as Ashley Madison will be bankruptcy, and, thus, only limited, if any, compensation will be granted for the victims of such disclosures."[234] That is a prospect of which users of confidential social websites should be aware.

C. Intentional and Negligent Sexualized Misconduct

The much-heightened scrutiny of sexual misconduct that has occurred over the last several years will undoubtedly trigger liabilities that fall into a number of already existing common law and statutory categories: the common law torts of assault, battery, and IIED, as well as statutory liability for creation of a hostile work environment, among others. Another form of misconduct, however, falls outside those categories in many instances. In order to distinguish this misconduct from conduct that is actionable under existing forms of liability—but

233. Judy Greenwald, *Cyber Insurance Policies Vary Widely and Require Close Scrutiny*, BUS. INS. (May 10, 2015, 12:00 AM), http://www.businessinsurance.com/article/00010101/NEWS06/305109992 [https://perma.cc/84UH-HFM9].

234. *See* Grandoni, *supra* note 219, at B3.

not to diminish in any way the significance of either form of misconduct—we call the currently-not-actionable forms of behavior "sexualized" (rather than "sexual") misconduct.[235]

This form of misconduct is not easy to define with precision because it takes many forms. To speak in the vernacular, this is creepy (or worse) conduct, usually by males, that has sexual connotations or overtones. Often, the conduct is verbal only, consisting of references to another person's appearance or attractiveness, or another's conduct with others. It may also consist of requests for social interaction that are clearly not welcomed but continue to occur.

The courts would have to create a new tort for this kind of conduct if the harm that it causes were to be actionable. From a normative standpoint, the conduct probably qualifies. Admittedly, it is the kind of conduct at which many people in the past merely rolled their eyes or complained to their friends about and then ignored. But new and higher standards of social interaction have resulted in such conduct being perceived as more objectionable to a much larger percentage of the population than it was in the past.[236] More egregious, already tortious conduct uncovered by the MeToo movement has rendered this currently non-tortious conduct more salient, and more widely understood to be improper, than previously.[237] The cultural pressure necessary to support the imposition for liability for this conduct certainly is present in a way that it was not even a few years ago.

On the other hand, tort law has refrained over a long period from imposing liability for similarly objectionable, but non-sexualized, misconduct. The tort of IIED, for example, requires that conduct intended to cause emotional distress be "extreme and outrageous,"[238] partly on the ground that everyone must learn to live with a certain amount of offensive conduct from others,[239] and that the expensive machinery of tort law should not be invoked until the conduct is more

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235. *See* Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061, 2064 (2003) (arguing against legal standards that attempt to banish sexuality from the workplace).

236. *See* Kristen N. Coletta, *Sexual Harassment on Social Media: Why Traditional Company Sexual Harassment Policies Are Not Enough and How to Fix It*, 48 SETON HALL L. REV. 449, 450 (2018); Jessica Fink, *Gender Sidelining and the Problem of Unactionable Discrimination*, 29 STAN. L. & POL'Y REV. 57, 62 (2018); Kevin Gomez et al., *State Regulation of Sexual Harassment*, 18 GEO. J. GENDER & L. 815, 829–30 n.85 (2017); Ramit Mizrahi, *Sexual Harassment After #Metoo: Looking to California as a Model*, 128 YALE L.J. FORUM 121, 127 (2018).

237. Schultz, *supra* note 203, at 31–32, 32 n.27.

238. RESTATEMENT (SECOND) OF TORTS § 46 (AM. LAW INST. 1965).

239. *See* W. Page Keeton et al., PROSSER AND KEETON ON THE LAW OF TORTS 59 (5th ed. 1984) (noting that "[l]iability of course cannot be extended to every indignity").

than merely offensive. Much of the objectionable sexualized misconduct that we have in mind is offensive, but arguably, it is not always necessarily "extreme and outrageous," as *Restatement (Second) of Torts* section 46 has indicated.[240] Moreover, there is a difference between unintentional or unconscious microaggressions and conduct that the defendant intends to cause serious discomfort or knows will do so. That distinction would have to be drawn in a way that makes it operational.

In our view, however, the damages that could be awarded for engaging in sexualized misconduct would be cognizable, perhaps on the model of what happens in cases where IIED is actionable. And it is possible that the ordinary practical obstacles to bringing suit for sexualized misconduct could be overcome. Most lawyers would not take most cases on a contingency fee basis because the amount of damages likely to be awarded would often be small. We can picture some plaintiffs nonetheless being willing to pay lawyers an hourly fee to sue on their behalf even when the prospect of recovering more than $5,000, for example, would be small. There might not be many such suits, but it might not take very many to send potential violators a strong message.

But there would be two challenges. First, it would be difficult to articulate discrete and limited standards governing liability. "I know it when I see it" would be inadequate, not only because that standard is vague, but because the question would also have to be whether the defendant knew "it" when he did "it." For this reason, sexualized misconduct that received an explicit negative reaction and then was repeated might have to be required. If this were the case, the tort would effectively be for a pattern of sexualized misconduct, except when no reasonable person could think that the first act was acceptable, in which case a single instance would be actionable.

An important (though non-exclusive) source for rendering the new liability standard discrete might be the rules governing what constitutes a "hostile work environment" under Title VII of the federal Civil Rights Act.[241] Sexual harassment in the workplace has taken various forms that would often be equally objectionable in non-workplace settings: leering at a woman and offering her money to engage in sexual intercourse;[242] repeatedly asking a woman to "do

240. RESTATEMENT (SECOND) OF TORTS § 46.
241. 42 U.S.C. § 2000 (2012).
242. Robson v. Eva's Super Mkt., Inc., 538 F. Supp. 857, 859 (N.D. Ohio 1982).

something nice for [me];"[243] making demeaning sexual inquiries;[244] and making sexual references to parts of the plaintiff's body.[245] The making of sexual jokes, negative remarks about people of a particular gender or sexual orientation, displaying sexual material or pictures, sending inappropriate emails or other forms of communication, scapegoating, and name calling, for example, could also easily qualify.[246] Some such conduct might be more objectionable in the workplace than outside of it, depending, among other things, on how free the victim is to avoid the individual who engages or attempts to engage in objectionable conduct. But the Title VII analogy is a good starting point for making the standard of liability concrete.

Second, there would be a risk that the threat of liability for sexualized misconduct might have a chilling effect on tolerable social interaction. It may be even less desirable for the law to risk promoting sexually "sanitized" social interactions than promoting sexual sanitization of the workplace.[247] In addition, because sexualized misconduct would not be tortious in the absence of a defendant's knowledge that it was offensive or his intent that it be offensive, insurance against this form of liability would be either unavailable or against public policy, on the ground that it created excessive moral hazard.[248] The anticipated self-insured costs of defense even in cases that were not successful could be significant for defendants.[249]

The consequence might be that, for all but the most egregious and judgment-proof individuals, refraining from engaging in conduct that plausibly could be alleged, even unsuccessfully, to constitute sexualized misconduct would be the wisest course for most people. We might even move slightly more toward the kinds of more formal interactions between individuals that characterized upper-class relationships in the nineteenth century.[250] For many women, that might be preferable to what they have been forced to tolerate over the

243. Coley v. Consol. Rail Corp., 561 F. Supp. 645, 647 (E.D. Mich. 1982).

244. Henson v. City of Dundee, 682 F.2d. 897, 899 (11th Cir. 1982).

245. E.E.O.C. v. Int'l Profit Ass'n, 647 F. Supp. 2d 951, 956 (N.D. Ill. 2009).

246. For discussion, see *supra* note 236 and accompanying text.

247. *See* Schultz, *supra* note 203, at 24.

248. *See* KENNETH S. ABRAHAM & DANIEL SCHWARCZ, INSURANCE LAW & REGULATION: CASES AND MATERIALS 96–97 (6th ed. 2015) (indicating that most courts hold that insurance against liability for intentional wrongdoing violates public policy).

249. Most liability insurance policies cover both indemnity and the costs of defense, but included the latter only when incurred to defend a suit that would be covered by the policy if the allegations were true. *See id.* at 577.

250. *See generally 18th Century Etiquette & Expectations*, LOVERS & LIARS, https://loversandliarsmedley.wordpress.com/about/a-dramaturgs-perspective/18th-century-ettiquette-expectations [https://perma.cc/G5Q3-88G6].

course of their lives. But in the parlance of tort theory, in an effort to obtain desirable, safety-level effects, the threat of liability might generate arguably sub-optimal, activity-level effects.[251]

Finally, as referenced by the essentiality criterion we developed in Part I, other sources of relief sometimes are available and sometimes are not in this area. Employers have some liability for creating or knowingly tolerating a hostile work environment. Even in instances in which there would be no such liability, adverse publicity recently has produced firings and suspensions of prominent individuals who might be defendants if a new form of tort were created, for example.[252] Anti-harassment statutes are available in some jurisdictions to enjoin the more egregious forms of misconduct (sexualized or not) that involve physical proximity,[253] phone calling, or other vexatious communications.

But much of the misconduct we have in mind does not readily fit into existing categories of common law tort liability or statutory anti-discrimination law. Imagine the sort of encounter, now commonly recounted by participants in the MeToo movement, in which a male occupying some sort of authoritative position in an industry or a corporate enterprise—a movie producer or a senior executive—invites a junior female in that industry or enterprise who is not his employee—an aspiring actress or a colleague from another company—to his residence, purportedly to discuss a role in a forthcoming film or to offer career advice. In the process, the male engages in sexualized behavior toward the female—sitting uncomfortably close to her, making remarks about her appearance, or calling attention to his own physical characteristics that stops short of an assault or intentional infliction of emotional distress, but that in a formal workplace setting involving an employee, might qualify as sexual harassment. Tort law, as presently constituted, provides no remedy for that sort of behavior in that setting, and Title VII does not apply.

In the past, a warning visit to the culprit from the police, or from a member of the victim's family, might have been available to some victims of sexualized misconduct and might have been effective. This kind of self-help still may occur sporadically. Courts know about those other

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251. *See* Steven Shavell, *Strict Liability Versus Negligence*, 9 J. LEGAL STUD. 1, 2 (1980) (discussing the distinction between safety-level and activity-level effects).

252. *See, e.g.*, *'Extra' Host A.J. Calloway Suspended Following Sexual Assault Allegations*, (Feb. 9, 2019), https://www.nytimes.com/2019/02/09/arts/television/aj-calloway-suspended-extra.html [https://perma.cc/5R8R-CLAT].

253. *See, e.g.*, Galella v. Onassis, 487 F.2d 986, 987, 991 (2d Cir. 1973) (applying an anti-harassment statute to a suit by Jaqueline Kennedy Onassis against photographer who stalked her and her children).

possible sources of relief, although they also know that relief of those sorts is likely only to be sporadically available and only to some victims. And of course, the courts know that even when those sources of relief prevent future offensive conduct, they do nothing to compensate victims for the losses they have already experienced.

In view of this analysis, we are uncertain about the future of potential tort liability for harm caused by sexualized misconduct. The courts might decide, reluctantly, to refrain from entering the field and refuse to recognize liability for conduct that falls outside the confines of the existing torts. Or the courts might begin, as they did with negligent infliction of emotional distress,[254] by permitting the imposition of liability in a core set of especially appealing cases, without initially articulating the limits and standards governing other conduct lying further from the core, but eventually doing so as more new cases are brought.

Which path is taken may well depend on how developments in our culture evolve beyond where they are at present. The MeToo movement marks the beginning of a new cultural moment, not the end of one. On this score, the one thing our analysis leads us to be confident about is that if liability is imposed, it will not take long for the courts to recognize that it is not a reflection of a residual category of liability, but the introduction of a new tort.

CONCLUSION

We began this Article asking how torts come into being and identifying a set of factors that serve as preconditions for the emergence of new torts. We then showed that the notion that there is a residual *category* of tort liability had not been borne out in practice. New torts are not illustrations of the existence of an unnamed, residual category of tort liability for the simple reason that satisfaction of the preconditions for new torts results in the torts being named.

The paradox of residual tort liability is that every time a new tort action is named and comes into being, it can no longer be understood as residual, even if it once was conceived in that fashion. The preconditions for the creation of new torts we have set forth, however, do provide a basis for understanding why the concept of a residual category of tort liability might seem theoretically attractive. Scholars up through most of the nineteenth century who denied the existence of such a category insisted that "tort law" was simply the aggregate of existing causes of action for tortious relief. But there is something counterintuitive about that formulation because it is obvious that as tort law has evolved in the United States, something like the

254. *See supra* note 217 and accompanying text.

progressive extension of tort liability to diverse, new situations has accompanied that evolution. To see that extension of tort liability as only taking place within existing tort actions does not seem quite accurate, and to characterize "tort law" as being limited to the aggregate of existing tort causes of actions at any point in time is a cramped, conclusory view. The concept of a sphere of residual tort liability existing in a space outside existing tort causes of action seems theoretically attractive, we believe, because of the preconditions of social salience and normative weight. And as a practical matter, the concept is obviously attractive to plaintiffs' lawyers, who continue to invoke it. As the examples of potential tort liability for intangible harm we discussed in Part III illustrate, tort law is never static because new events and social attitudes toward them generate new perceptions of social wrongs for which some form of relief should be afforded, and tort law becomes a candidate to provide that relief. When tort law ends up providing some of the relief, the basis for that relief amounts to the naming of a new tort. Accordingly, it does not seem theoretically implausible to think of the relief as emanating from a sphere of residual tort liability.

But in fact, it does not. It emanates, instead, from all of the preconditions we have identified. Taken together, those preconditions amount to formidable barriers to the emergence of new torts, and we have suggested in Part III that despite the quite clear, contemporary attitudes that cyber hacking of personal data, publication of that data, and sexualized misconduct are social wrongs that ideally would require some form of legal relief; the preconditions of justiciability and practicality caution against a hasty assumption that relief against those wrongs will successfully emerge in tort law.

Should some relief for harm from intangible forces and harms largely of an intangible nature end up being accorded by tort law, however, the new torts created to redress that harm will not serve to demonstrate the existence of an unnamed, residual category of tort law. Once the new torts are created, they will be named, and their naming will serve to strip them of any residual identity they may have had. In the end, the future of tortious relief for intangible harm, if it is to take any concrete form, will be in new torts with names.