INJURY FROM WITHIN: TOWARD AN UNMODIFIED DUTY FOR NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

"It is the faith of empirical legal science that ideals of justice not related to human needs are not true ideals; that justice itself is not an ineffable effervescence of a logical void, but an outflow of specific human relations, of particular human emotions, and of life, and so to be known."

□ **Hessel E. Yntema, *Rational Basis of Legal Science*, 31 COLUM. L. REV. 925 (1931).**

"We may try to see things as objectively as we please. None the less, we can never see them with any eyes except our own."

□ **Benjamin N. Cardozo, The Nature of the Judicial Process, 12–13 (1921).**

INTRODUCTION

This note is inspired by Robin West's mapping of a critique of patriarchal jurisprudence in her essay *Jurisprudence and Gender*.[1] It is an attempt to both catalogue the existing critical projects in the field of emotional distress law and to provide an insight into future ones. The first step in the critique of patriarchal jurisprudence is the narrative and phenomenological critique. Women's lived experiences and their values have been consistently excluded from the Rule of Law, which has resulted in a Rule of Law that works from many sides to perpetuate the oppression of women.[2] To undo this, women must tell the stories of their lives, of their

1. *See generally* Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988).
2. *See id.* at 2-3.

pleasures and pains, and of their desires. This is the only way to begin constructing an image of the human that includes women. In the field of emotional distress law, Martha Chamallas, Linda K. Kerber, and Jennifer Wriggins[3] have worked to "flood the market," as West puts it, with experiences of distinct female pain, like sexual assault and reproductive injury.[4] However, the narrative critique, as West envisions it, cannot end with these two kinds of female pain. In the field of emotional distress, women must keep speaking the truth of their emotional pain into existence.[5] Women must flood the market with stories of pain that go beyond the well-known traumas of sexual assault and reproductive injury. What other kinds of pain does the patriarchal hierarchy produce, at every level and on every scale? What are the stories of pain that we never hear? Those are the stories we need.

The second step in the critique of patriarchal jurisprudence is the interpretative critique. For West, this involves looking at "what lies between the images of legalism," to find there how the law has diminished women by devaluing what they value.[6] In the field of emotional injury, Chamallas has done extensive work to strip away the neutrality of emotional distress law to find behind it deeply embedded misogynistic assumptions about women, weakness, and emotion.[7] The current edifice of emotional injury law is built upon the devaluation of women's pain and a definition of emotion carved in opposition to what men perceive women to be.[8]

The final step in West's critique is what she calls "reconstructive jurisprudence."[9] Its goal is to advance legal reforms, which are based on descriptions of the "human being" that are true to women's lives.[10] We need to build a concept of duty for emotional distress that accounts for the experiences of women, and for the experiences of all of those who experience pain we consider exclusively feminine. The field of emotional injury is not simply one more area of law which could benefit from a feminist reconstruction. Gender-based bias exists in many areas of the law

3. *Id.* at 65.

4. MARTHA CHAMALLAS & JENNIFER WRIGGINS, THE MEASURE OF INJURY: RACE, GENDER, AND TORT LAW (2010).

5. *See* West, *supra* note 1, at 64-66.

6. *Id.* at 67.

7. *See infra* Part I.

8. *See infra* Part II.

9. West, *supra* note 1, at 61, 68.

10. *See infra* Part III.

and takes many different forms.[11] This essay focuses on the law of emotional injury not only because it would benefit from reconstruction, but because the current state of the law is the most explicit example of what West identifies as a masculine jurisprudence. This is precisely why the evolution of this tort will be the most powerful symptom of a change toward a "jurisprudence unmodified."[12]

By making explicit the law's most basic assumptions about the human experience, the field of negligent infliction of emotional distress ("NIED")[13] will lead the way in redefining what the law recognizes as human. Part I of this note argues that the current scholarship on NIED has not fully explored what makes emotional injury such a ripe area of law for creating and perpetuating concepts of humanity. Part II looks at how the limited recognition of NIED by most jurisdictions in the country has reified a fundamental understanding of human beings as primarily separate and distinct from one another. The current condition of the law does not account for our lived experiences with emotion. Part III argues that the recognition of an affirmative duty in NIED is inextricably bound up with the recognition of women's personhood, but its ramifications carry significance for all people.

I. THE LAW OF FRIGHT: WHAT LIES AT THE LIMITS OF MARTHA CHAMALLAS'S CRITICAL PROJECT

Martha Chamallas and Jennifer Wriggins have done extensive critical work in discovering and explaining the gendered origins of emotional injury in tort law.[14] Before the turn of the 20th century, mental disturbance by itself "did not qualify as a legally cognizable harm."[15] The law placed a higher value on physical harm over emotional harm, a hierarchy that

11. On the misogyny inherent in rape laws, see, *e.g.*, Susan Estrich, *Rape*, 95 YALE L.J. 1087 (1986); on the issues of consent analogous to rape in Fourth Amendment jurisprudence, see Josephine Rose, *Blaming the Victim: 'Consent' Within the Fourth Amendment and Rape Law*, 26 HARV. J. RACIAL & ETHNIC JUST. 1 (2010).

12. *Id.* at 70-72.

13. The focus of this paper will be on negligence, instead of intentional infliction of emotional distress ("IIED"), because unlike IIED, NIED does not require intent and is better suited to bring forth the law's assumptions about who is worthy of protection. "Independent" NIED refers to the fact that unlike bystander emotional distress, independent NIED does not require some kind of physical injury.

14. *See generally* Martha Chamallas, *Feminist Legal Theory and Tort Law* (Ohio St. U. Moritz C. L. Pub. L. & Legal Theory, Working Paper Series No. 448, 2018); CHAMALLAS & WRIGGINS, *supra* note 4; Martha Chamallas, Civil Rights in Ordinary Tort Cases: Race, Gender, and the Calculation of Economic Loss, 38 LOY. L.A. L. REV. 1435 (2005).

15. CHAMALLAS & WRIGGINS, *supra* note 4, at 37.

persists to this day.[16] Despite this devaluation, tort law offered recovery for mental harms in cases where the plaintiff could prove the elements of another independent tort or some kind of physical contact.[17] At the turn of the twentieth century, all the claims for "nervous-shock" had one thing in common: the majority of the plaintiffs bringing them were women.[18]

The connection between femininity and emotional injury was forged in the law of personal injury from the beginning.[19] Many of the claimants were pregnant at the time of the incident and suffered miscarriages they believed to be caused by the fright they experienced.[20] Other women suffered some form of hysterical disorder, a condition distinctly identified with the female sex.[21] Scientific knowledge at the time held that nervous shock could cause miscarriages and hysterical episodes and that railroad travel exacerbated these risks for female passengers.[22] As courts began receiving these claims, they often had to decide whether to classify the injury as physical or emotional, since the cause was often fright but the consequence manifested itself physically, like in the case of a miscarriage.[23]

It is this dilemma that gave birth to the so-called impact rule, which was first articulated in *Mitchell*.[24] Annie Mitchell suffered nervous shock as she was waiting to board a railway car because the car came so close to hitting her that she "stood between the horses' heads" when the car finally came to a stop.[25] The court in *Mitchell* found it common sense not to provide recovery for simple fright because fright was not a legally recognized injury.[26] While the obvious response to the court's problem would have been to simply frame Annie Mitchell's injury as a physical one *occasioned* by fright, other courts found the reasoning seductive and quickly followed suit in establishing the parameters of the impact rule.[27]

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16. *Id.* at 38.

17. *Id.* "For example, a plaintiff could recover for the humiliation of being spat upon . . . once plaintiff" could prove all the elements of battery. *Id.* Additionally, "as negligence law developed in the mid-19th century, it became settled" that "emotional injury, such as pain and suffering were recoverable as 'parasitic damages' if they accompanied a physical injury." *Id.*

18. *Id.* at 39.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.* at 40.

23. *Id.*

24. Mitchell v. Rochester Ry. Co., 45 N.E. 354 (N.Y. 1986), *overruled by* Battalla v. State, 176 N.E.2d 34 (N.Y. 1961); CHAMALLAS & WRIGGINS, *supra* note 4, at 39.

25. CHAMALLAS & WRIGGINS, *supra* note 4, at 39-40.

26. *Id.* at 40.

27. *See id.* at 41.

The opinion in *Spade v. Lynn & Boston Railroad*[28] was the first to articulate the impact rule as such and offer a rationale for its implementation.[29] The plaintiff in *Spade* claimed that fright had caused her hysterical paralysis.[30] The court held that "there can be no recovery for such physical injuries as may be caused solely by such mental disturbance, where there is no *injury to the person from without*."[31] In the court's opinion, there is no issue with an externally caused physical injury, but only a "timid or sensitive person" would suffer a physical injury as a result of an *internal* process such as fright.[32] The court opinions that emerge from the early nervous shock cases paint a portrait of women as sensitive, fragile, weak, and overly excitable.[33] Despite the fact that female plaintiffs in nervous shock cases behaved precisely according to culturally demanded script of the fragile, dependent middle-to-upper middle class woman, courts refused to recognize their injuries as legitimate.[34]

Courts gendered emotional distress through drawing fundamental distinctions between the harms suffered by men and women.[35] The reasoning in cases where wives complained for the adultery of their husbands shows how this gendering occurred.[36] A man's loss from his wife's adultery was analogized to a loss of property–in other words, an objective, measurable loss.[37] A wife's injury from a husband's infidelity, on the other hand, was instead relegated to the domain of hurt feelings and viewed as "dependent on the wife's subjective response."[38] Courts located the woman's injury inside her own head placing the responsibility for its

28. *Spade v. Lynn & Boston R.R. Co.*, 47 N.E. 88 (Mass. 1897) *abrogated by Dziokonski v. Babineau*, 380 N.E.2d 1295, 1296 (Mass. 1978).

29. *See* Therese Lee Carabillo, *Tort Law-Payton Revisited: The Beginning of the End of the Physical Harm Requirement*, 27 SUFFOLK U. L. REV. 997, 1000 (1993).

30. *Id.* at 41.

31. *Spade*, 47 N.E. at 89 (emphasis added); CHAMALLAS & WRIGGINS, *supra* note 4, at 41. (emphasis added).

32. *Spade*, 47 N.E. at 88; CHAMALLAS & WRIGGINS, *supra* note 4, at 41.

33. *Id.* at 42. *But see* Purcell v. St. Paul C. Ry. Co., 50 N.W. 1034 (Minn. 1892) (characterizing the plaintiff's emotional injury as a physical one and granted recovery); Simone v. Rhode Island Co., 66 A. 202 (R.I. 1907) (recognizing recovery in a case of fright induced physical injury).

34. CHAMALLAS & WRIGGINS, *supra* note 4, at 42.

35. *See infra* notes 36-39.

36. Martha Chamallas & Linda K. Kerber, *Women, Mothers, and the Law of Fright: A History*, 88 MICH. L. REV. 814, 818 (1990). For a fuller discussion of the effect of structural misogyny on the state of bystander NIED law see Elizabeth Handsley, *Mental Injury Occasioned by Harm to Another: A Feminist Critique*, 14 LAW & INEQ. 391 (1996).

37. Chamallas & Kerber, *supra* note 36, at 818.

38. *Id.* at 818.

redress on her, instead of on her husband or the law.[39] In this way, the law denied women the objective reality of their pain, a tangible harm for which they might be compensated.[40]

For Wriggins and Chamallas, the locus of trouble in emotional injury law is the physical/emotional dichotomy, which is simply another articulation of the male/female dichotomy.[41] As they point out, tracing the influence of gender on the law of fright does not simply require a stacking of female plaintiffs against male plaintiffs.[42] The issue is not merely that the law refuses to recognize the injury because a woman is complaining of it, but rather boils down to the fact that the law does not recognize any injury that it perceives as inherently feminine.[43] The courts' inability to recognize emotional injuries extended even to male plaintiffs who complained of emotional injuries.[44] It is the emotional injury itself that carries the taint of femininity, of deceptive frailty, a designation that brings with it the inherent suspicion that one cannot be trusted to correctly report one's own pain.[45]

This concern that psychic injury defies measurement and is easy to fake can be traced all the way back to the opinion in *Mitchell*.[46] The *Mitchell* opinion expressed three main justifications for curtailing recovery in cases of psychic injury: allowing recovery for psychic injury will (1) open the floodgates of litigation, (2) lead to frivolous claims, and (3) produce liability disproportionate to fault.[47] These justifications are routinely mentioned, in some form or another, in every court opinion that chooses to curtail recovery for emotional injury.[48] These arguments boil down to one overarching observation: There is something particular about emotional injury that distinguishes it from physical injury and from all other torts.[49] Emotional injury is the unwieldy animal that cannot be tamed by the regular confines of tort recovery.[50]

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39. *Id.* 818-19.

40. *Id.* at 819.

41. CHAMALLAS & WRIGGINS, *supra* note 4, at 47.

42. *Id.* at 46.

43. *See id.* at 47.

44. *Id.* at 45-46. *See, e.g.*, Spohn v. Mo. Pac. Ry. Co., 22 S.W. 690 (Mo. 1893); Gulf, Colo. & Santa Fe Ry. Co. v. Trott, 25 S.W. 419 (Tex. 1894).

45. *See* Chamallas & Kerber, *supra* note 36, at 825, 848.

46. Mitchell v. Rochester Ry. Co., 45 N.E. 354, 354-55 (N.Y. 1896), *overruled by* Battalla v. State, 176 N.E.2d 34 (N.Y. 1961).

47. *Id.*

48. *See, e.g.*, *id.*

49. *See infra* notes 52-54.

50. *See infra* notes 52-56.

Except that it is not. As early as 1984, Peter Bell addressed and dismissed virtually every possible argument against full recovery for emotional injury.[51] In response to the unexamined claim that psychic injuries are more susceptible to being faked, Bell argued that the field of psychiatry has created means of assessing and measuring psychic injury.[52] In addition, juries are more than equipped to sort out false from true claims of physical injury, even though, presumably, physical injuries are harder to fake.[53] Juries are also routinely tasked with measuring claims for pain and suffering damages, a purely emotional kind of injury.[54] Studies have consistently shown that juries are capable of making such decisions and that they are unbiased.[55]

To counter the claim that liability is difficult to measure and can be disproportionate to a defendant's conduct, Bell argues that this uncertainty is no more prevalent in psychic injuries than in any other tort.[56] In a system that has chosen to put dollar signs on injury and which attempts to "make plaintiffs whole," some uncertainty as to whether the plaintiff is receiving the precise equivalent of his or her injury will always exist.[57] The hypocrisy of this concern with uncertainty is exacerbated when we consider how tort law allows for speculative damages in areas like lost earnings, which require juries to not simply asses the present injury, but to predict the future.[58] Further, unlike one's future earnings, psychic injury is often "within the personal experience of many jurors,"[59] making it perfectly apt for their consideration.

Bell's article is an exhaustive collection of arguments disproving traditional concerns with psychic injury recovery like causation, deterrence, and the costs of psychic injury on the tort system at large.[60] Other scholars have argued for the recognition of emotional injury from a scientific perspective.[61] Empirical studies have proven that emotional injury can have

51. *See infra* note 52.

52. Peter A. Bell, *The Bell Tolls: Toward Full Tort Recovery for Psychic Injury*, 36 U. FLA. L. REV. 333, 351 (1984). For a more in-depth discussion of the medical aspects of emotional injury see Comment, Negligently Inflicted Mental Distress: The Case for an Independent Tort, 59 GEO. L.J. 1237, 1248–62 (1971).

53. Bell, *supra* note 52, at 352.

54. *Id.* at 352 n.80.

55. *Id.* at 352-53 n.82.

56. *Id.* at 354.

57. *See id.* at 354.

58. *Id.* at 354-55.

59. *Id.* at 355.

60. *See generally id.* at 347-91.

61. *See infra* notes 63-64.

an important effect on one's overall well-being.[62] Scholars have shown that the line between mind and body is significantly more blurred than previously believed.[63] The consensus of both the scientific data and the philosophical thought seems to be that the distinction between physical and emotional injury is incoherent and causes more harm than good.[64]

The current state of NIED law rests on unsound foundations made up by obsolete assumptions about both women and the nature of women's emotions.[65] Yet, despite advances in thought and science, duty for NIED continues to be limited under the implicit, and sometimes explicit, rationale that there is something that distinguishes emotional injury from physical injury.[66] The existing scholarship has focused on unearthing the implicit gendered assumptions at the historical beginnings of emotional injury law, but has not investigated what assumptions lie underneath the current state of the law.[67] Chamallas and Kerber point out that the early reasoning for denying recovery in fright cases rested on a belief that emotional injury was something only those already predisposed to it suffered.[68] In 1944, Dr. Hubert Winston Smith recognized the law's implicit assumption "that normal persons do not suffer injury from fright."[69] He drew an analogy between women complaining of emotional injury and men suffering from psychic injury after they fought in World War II.[70] According to Dr. Smith, both were already weak before they encountered their respective traumas.[71] Similar to the judge in *Spade*, Dr. Smith located the source of emotional injury within the plaintiff and beyond the scope of legal recompense.

When an injury stems from within, the within of the one suffering must be examined. Any person has the capacity to hurt another physically, either by the force of their body or by the use of an object. Emotional injury, on the other hand, will often be determined by the particular interiorities of those involved. By labeling those who suffer emotional injury as weak, the law tells us that emotional pain is the exception, not the norm. As with all

62. David DePianto, *The Hedonic Impact of "Stand-Alone" Emotional Harms – An Analysis of Survey Data*, 36 L. & PSYCHOL. REV. 115, 130 (2012).

63. *See* Govind Persad, *Law, Science, and the Injured Mind*, 67 ALA. L. REV. 1179, 1183 (2016).

64. *See supra* notes 56-57.

65. *See* DePianto, *supra* note 62, at 121-23; Chamallas & Kerber, *supra* note 36, at 814, 823.

66. *See* Bell, *supra* note 52.

67. *See* Chamallas & Kerber, *supra* note 36, at 815; CHAMALLAS & WRIGGINS, *supra* note 4, at 37-38.

68. Chamallas & Kerber, *supra* note 36, at 847.

69. *Id.* at 846-47.

70. *Id.* at 850.

71. *Id.* at 850-51.

marginalization, the exception is not simply rare, it is frowned upon. Those who suffer emotional pain are not just in the minority, they are weak.

What does it mean to be weak? It presupposes a threshold for feeling, pain or otherwise, that is lower than it ought to be. This threshold, however, is not defined by doctors, scientists, or juries, but by a judge, who was, and often is, a man.[72] This presumption of weakness, which carries with it the presumption of the "normal" person as impenetrable, is inextricable from the law of emotional injury.[73] Scholars like Chamallas have found the origin of these presumptions in the devaluation of women's experiences, which have historically stood for weakness.[74] This work has been crucial in stripping away the seeming neutrality of the law of emotional injury.

Building on the work already done, this essay provides a framework for understanding the current requirements for recovery in NIED law as perpetuating fundamentally masculine concepts of the human under the guise of "neutral" concepts like contract and special relationship. The law of fright is not only a distillation of how we as a society devalue women, it is also a reflection of the fact that what we believe makes us human excludes women's lived experiences.

The solution to making NIED law more inclusive of women is not to simply offer up certain female experiences as good contenders for recovery, as Chamallas and Wriggins propose with sexual harassment and reproductive injury in *The Measure of Injury*.[75] Instead, what we need is a systemic analysis of how the current requirements assume things about being human that are not true of especially women, but generally of all people. It is only by localizing and demolishing these assumptions that we can begin to build more inclusive concepts. Anything short of this is tantamount to erecting a building on rotten foundations.

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72. Overall national statistics show that in the US both in the State and Federal judiciary women make up around thirty percent of the overall number of judges sitting on the bench. *Women in the Federal Judiciary: Still a Long Way to Go*, NAT'L WOMEN'S L. CTR. 1 (Oct. 2016), https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2016/07/JudgesCourts WomeninFedJud10.13.2016.pdf; *2016 Representation of US State Court Women Judges, NAT'L ASS'N OF WOMEN JUDGES*, https://www.nawj.org/statistics/2016-us-state-court-women-judges (last visited Feb. 21, 2019).

73. *See* Chamallas & Kerber, *supra* note 36, at 850-51.

74. *See* CHAMALLAS & WRIGGINS, *supra* note 4, at 39, 41, 43.

75. CHAMALLAS & WRIGGINS, *supra* note 4, at 30.

II. NIED TODAY: CONTRACT AND SPECIAL RELATIONSHIP AS THRESHOLDS FOR RECOVERY

Negligent infliction of emotional distress ("NIED") describes two main categories of claims: bystander NIED and "independent" or "direct victim" NIED.[76] Bystander NIED is a claim brought by a person who suffers emotional distress when they observe a loved one experience a physical injury.[77] The requirements to state a claim for bystander NIED vary slightly from state to state but they usually require that the plaintiff witness, visually or aurally, someone's injury, some close relationship between the victim and the plaintiff, and "serious" emotional distress.[78] The requirements to state a claim for independent NIED are less clear.[79] The law has been in a state of incoherence for quite some time, with a pattern emerging only recently.[80]

The California Supreme Court has been at the forefront of developing the contours of "independent" NIED law.[81] In 1980, the court decided *Molien v. Kaiser Foundation Hospitals*.[82] Stephen Molien sued his wife's doctor for misdiagnosing her with syphilis.[83] The erroneous diagnosis, which required Mr. Molien to get tested, placed such a strain on the marriage that the couple began dissolution proceedings.[84] The court determined that Mr. Molien had plead sufficient facts to state a claim for emotional distress as a "direct victim."[85] The court distinguished Mr. Molien's predicament from cases of bystander NIED and held that physical injury was no longer required to recover for emotional distress.[86] The opinion, delivered by Justice Mosk, maintains that the doctor's actions in misdiagnosing Mrs. Molien "foreseeably elicited serious emotional responses in the plaintiff and hence serve as a measure of the validity of plaintiff's claim."[87]

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76. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM §§ 47, 48 (AM. L. INST. 2012).

77. *Id.* at § 48.

78. *Id.* at § 47 cmt. e.

79. *See id.* at § 47.

80. *See* Chamallas & Kerber, *supra* note 36, at 819-21.

81. *See id.* at 820-21 & n.19.

82. 616 P.2d 813 (Cal. 1980).

83. *Id.* at 814-15.

84. *Id.*

85. *Id.* at 816.

86. *Id.* at 816, 820.

87. *Id.* at. 821.

On first blush, *Molien* seems to have been decided on a principle of foreseeability.[88] If we read *Molien* this way, the court discarded any barrier to a general duty of due care for emotional injuries.[89] Under this reading, a "direct victim" merely means a foreseeable one.[90] Yet, the California Supreme Court itself explicitly rejected this interpretation twelve years later in *Burgess v. Superior Court*.[91] Justice Mosk, writing in concurrence, admonished the majority for misinterpreting *Molien* to stand for principles of pure foreseeability.[92] Mosk himself seemed to retreat from his broad language of foreseeability in *Molien* by noting that the guiding principle of "direct victim" NIED is a preexisting relationship between the parties, not foreseeability.[93]

Yet, in the very next sentence of his concurrence, Mosk writes, "[a]nd as the majority correctly hold, it is plainly foreseeable that a negligent delivery resulting in severe permanent injuries to the child will cause its mother serious emotional distress, and hence result in liability on this theory."[94] It is unclear whether "this theory" refers to the foreseeability analysis in the very same sentence, or the principle of preexisting relationships in the sentence preceding it. Since Mosk rejects the view that "direct victim" NIED is guided by pure foreseeability,[95] it is only the preexisting relationship that generates the foreseeability. According to the California Supreme Court, only those participating in a preexisting relationship recognized in law can complain of emotional distress.[96] Courts around the country have followed in California's footsteps by adopting a preexisting relationship as a threshold requirement for NIED claims.[97]

The California Supreme Court first used a preexisting relationship to recognize a duty in NIED in *Christensen v. Superior Court*.[98] Plaintiff sued a funeral home after it lost the remains of plaintiff's child.[99] The court recognized that defendant funeral home had undertaken a duty by contract to take care of decedent's remains on behalf of the family and as such owed

88. *See id.*
89. *See id.*
90. *See id.*
91. 831 P.2d 1197, 1201 (Cal. 1992).
92. *Id.* at 1209 (Mosk, J., concurring).
93. *Id.* at 1210.
94. *Id.*
95. *Id.*.
96. *Id.* at 1200-01 (majority opinion).
97. Hedgepeth v. Whitman Walker Clinic, 22 A.3d 789, 802-04 (D.C. 2011).
98. 820 P.2d 181, 190 (Cal. 1991).
99. *Id.* at 186, 196.

them a duty to treat the remains with care and respect.[100] The relationship between a funeral home and a decedent's family enjoys a special status in emotional distress law.[101] Since 1991, courts have extended the contractual relationship exception to other contracts.[102]

Some courts limit recovery to contracts that deal with intensely emotional subjects.[103] The examples given by the Alaska Supreme Court in

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100. *Id.* at 195-96.

101. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 47 com. h (AM. LAW INST. 2012); Blackwell v. Dykes Funeral Homes, Inc., 771 N.E.2d 692, 693-94 (Ind. Ct. App. 2002) (discussing funeral home losing cremated remains of plaintiffs' child); Gammon v. Osteopathic Hosp. of Me., 534 A.2d 1282, 1283 (Me. 1987) (discussing situation where defendant sent what were supposed to be personal effects of plaintiff's decedent but which contained a "bloodied leg, severed below the knee, and bluish in color"); Menorah Chapels at Millburn v. Needle, 899 A.2d 316 (N.J. Super. Ct. App. Div. 2006) (holding that a contract to provide funeral services can be basis for recovery of emotional-harm damages); Johnson v. State, 334 N.E.2d 590, 593 (N.Y. 1975); Carney v. Knollwood Cemetery Ass'n, 514 N.E.2d 430, 436 (Ohio Ct. App. 1986); Pat H. Foley & Co. v. Wyatt, 442 S.W.2d 904, 904, 907 (Tex. Civ. App. 1969) (holding a mother was entitled to recovery for mental anguish resulting from consequences of offensive odor that emanated from son's casket when opened due to funeral home's negligence in embalming and preserving the body for burial).

102. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 47 (AM. LAW INST. 2012).

103. *See* Hancock v. Northcutt, 808 P.2d 251, 258-59 (Alaska 1991) (giving the following examples of contracts "laden with emotion": "contracts to marry, to conduct a funeral, to sell a sealed casket, to conduct a caesarean birth, to surgically rebuild a nose, to provide promised maternity medical coverage, to provide medical services, and to keep a daughter informed of her mother's health") (footnotes omitted); *see also* Rich v. Foye, 976 A.2d 819, 829-30 (Conn. Super. Ct. 2007) (holding that negligently failing to diagnose fetal malformations allowed for recovery); Hedgepeth v. Whitman Walker Clinic, 22 A.3d 789, 800 (D.C. 2011) (adopting § 46 of the Restatement (Third) of Torts draft, which would become § 47 in the final version, and concluding that relationship in which medical clinic incorrectly diagnosed plaintiff as HIV positive was one that satisfied the requirements of subsection (b)); Fla. Dept. of Corrections v. Abril, 969 So. 2d 201, 206 (Fla. 2007) (holding that failing to protect confidentiality of results of HIV testing of plaintiff permits recovery); Doe Parents No. 1 v. State, 58 P.3d 545, 598 (Haw. 2002) (holding that reinstating teacher accused of child molestation who then sexually abuses student constitutes circumstance with sufficient guarantee of genuineness and seriousness permits recovery for negligently inflicted emotional harm); Spangler v. Bechtel, 958 N.E.2d 458 (Ind. 2011) (permitting parents to pursue non-bystander claim for emotional harm resulting from stillbirth of child); Garcia v. Lawrence Hosp., 773 N.Y.S.2d 59, 60 (App. Div. 2004) (permitting claim for emotional harm suffered by mother, even though mother was not in zone of danger, in case in which mother had been sedated by defendant hospital, which then brought newborn infant to mother's bed, and mother fell asleep on baby, suffocating it, because "[i]n a case such as this, 'there exists "an especial likelihood of genuine and serious mental distress, arising from special circumstances"'"); Freeman v. Harris Cty., 183 S.W.3d 885, 890 (Tex. App. 2006) ("[M]ental anguish damages may be compensable when they are a foreseeable result of a breach of a duty arising out of certain 'special relationships,' including 'a very limited number of contracts dealing with intensely emotional noncommercial subjects such as preparing a corpse for burial'"); Castle v. Lester, 636 S.E.2d 342, 347 (Va. 2006) (upholding claim for emotional harm by mother of child born with severe birth anomalies due to negligence of defendant obstetrician through characterization of injury to a prenatal fetus as physical injury to the mother). For courts

Hancock range from the obvious, marriage and funerals, to the less so, rebuilding a nose.[104] The court offers no common theme that unites these situations except for the court's own choice to group them together. Most importantly, it is not the contractual aspect that endows these contexts with emotion, but rather the emotional bonds between those involved and the emotional ramifications of defendant's negligence. It makes no legal or logical sense to use a contract as a measuring stick for recognizing a duty for emotional distress when the contract is merely a legal fiction, which expresses the responsibility owed to one person by another.[105]

The same fundamental discord plagues the other "exception" for recognizing a duty in NIED, the special relationship between plaintiff and defendant. The most prominent "special relationship" is the one between doctor and patient[106] or therapist and patient.[107] Yet, it is simply human nature to have an emotional reaction to the state of one's health and well-being and while doctors play an important role, they are not responsible for a patient's ability to have an emotional reaction. A doctor will always owe a duty in negligence to a patient and that duty will always encompass some emotional dimension because what is at stake in the relationship is the patient's life. While the relationship itself undeniably carries an emotional charge, the same can be said of virtually any relationship where one individual takes some responsibility for the care of another.

Courts have failed to explain why a relationship and a contract make two individuals more susceptible to causing and suffering emotional harm. It is difficult to see this limitation on NIED duty as anything other than a tool to limit liability. In a case decided after *Molien*, but before *Burgess*, the California Supreme Court allowed recovery for emotional distress in a case brought by a man who had been falsely accused by a supermarket of trying to pay with a counterfeit note.[108] There is little in the opinion to

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recognizing contaminated food as a category of undertaking in which recovery for pure emotional harm should be permitted, see Fisher v. McDonald's Corp., 810 A.2d 341 (Conn. Super. Ct. 2002) (human blood on hamburger bun); Hagan v. Coca-Cola Bottling Co., 804 So. 2d 1234 (Fla. 2001) (used prophylactic); Way v. Tampa Coca Cola Bottling Co., 260 So. 2d 288 (Fla. Dist. Ct. App. 1972) (rodent); Culbert v. Sampson's Supermarkets, Inc., 444 A.2d 433 (Me. 1982) (unidentified foreign object in a jar of baby food); Wallace v. Coca-Cola Bottling Plants, Inc., 269 A.2d 117 (Me. 1970) (unwrapped prophylactic).

104. 808 P.2d at 258-59.

105. *See generally* Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57 (1984).

106. *See* Burgess v. Super. Court, 831 P.2d 1197, 1201 (Cal. 1992); Broadnax v. Gonzalez, 809 N.E.2d 645, 648-49 (N.Y. 2004); Oswald v. LeGrand, 453 N.W.2d 634, 639 (Iowa 1990).

107. Marlene F. v. Affiliated Psychiatric Med. Clinic, Inc., 770 P.2d 278, 282 (Cal. 1989); Gracey v. Eaker, 837 So. 2d 348, 353 (Fla. 2002); Corgan v. Muehling, 574 N.E. 2d 602, 607 (Ill. 1991); Rowe v. Bennett, 514 A.2d 802, 806 (Me. 1986).

108. Pool v. City of Oakland, 728 P.2d 1163, 1164-65 (Cal. 1986).

justify the court's holding except the common sense claim that it was foreseeable that when the market called the police on the plaintiff, they may choose to arrest and question him, thus causing him distress.[109] The court recognized that one entity can cause another emotional distress in the absence of a contract or "special relationship," once again begging the question of what in the nature of emotional distress justifies a limitation based on these two legal concepts.

The answer lies in the fundamental conception jurisprudence has about what it means to be a human being. For both liberal legal theory and critical legal theory, to be human means to be distinct and apart from other people.[110] The belief that humans are primarily distinct from one another first and then form relationships[111] is what West calls the "separation thesis."[112] Both camps embrace the separation thesis, but diverge significantly in how they envision its role.[113] Liberals offer what West calls the "official story," that the fundamental separation among people is precisely why autonomy is our organizing principle and annihilation by the other our primary fear.[114] The "unofficial story" offered by critical legal theorists is that despite the separation, what we truly want is to connect with one another and what we dread is the alienation that our "natural" state entails.[115] The dominant culture, the official story, insists on the value of autonomy and the inherent danger of the other. [116] However, unofficially, we live with the tension between our secret desire to become connected to the other and our fear "of alienation from him."[117]

West first points out that the separation thesis excludes women's experiences because women are not inherently, necessarily, and always separate from the world or the other.[118] Women bear children, experience menstruation and breastfeeding, and are penetrated during sexual intercourse.[119] If to be human means to recognize the separation thesis as

109. *See id.* at 1176.

110. West, *supra* note 1, at 12.

111. *See* ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 33 (1974); MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 133 (1982).

112. West, *supra* note 1, at 1. Accord ROBERTO MANGABEIRA UNGER, KNOWLEDGE & POLITICS 200 (1975).

113. *See infra* text accompanying notes 118-22.

114. West, *supra* note 1, at 12;

115. *Id.*; *see* Unger, *supra* note 112, at 205-06.

116. West, *supra* note 1, at 12-13.

117. *Id.* at 12; Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1774 (1976).

118. West, *supra* note 1, at 2-3.

119. *Id.*

true, then "women are not human."[120] This discord rings sharper when we look at how feminist theory describes the female experience.[121] For both cultural and radical feminists, women's existential state is founded on women's potential for physical and emotional connection to human life.[122]

The divisions between cultural and radical feminists stem from how they evaluate this potential for connection. Similarly, the divergence among legal theorists flows from their evaluation of man's inherent separation from the other.[123] According to cultural feminists, women inherently value intimacy, develop an ethic of care for the other to whom they are connected, and fear separation from the other.[124] Radical feminists maintain that women's physical connection to the other is inherently invasive and unwanted.[125] While women may "officially" value intimacy and connection, women "unofficially" dread the invasion it entails and long for independence and individuation.[126] Radical feminists staunchly maintain that connection and intimacy are tools the patriarchy employs to keep us subservient and oppressed, at the service of the men around us.[127] Women are not born inherently wanting to care for the other because women are born women, but are instead taught to believe that these things make a person a "woman," thereby preserving the status quo of the patriarchal hierarchy.

The truth of experience, as West points out, can be found somewhere in the middle.[128] Women value both autonomy and connection and fear both annihilation by the other and alienation from him.[129] These contradictions are not just expressions of theoretical distinctions, but reflect the materiality of lived experience.[130] Both men and women live with this contradiction.[131] The difference between men and women's experiences with this inherent contradiction is that women have picked up on the value of connection much earlier than men.[132] While men see connection as an

120. *Id.* at 3.

121. *See infra* notes 126-30.

122. West, *supra* note 1, at 14, 20-21.

123. *Id.* at 14; CAROL GILLIGAN, IN A DIFFERENT VOICE 6-8 (1982).

124. West, *supra* note 1, at 15; *see also* Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543, 584-85 (1986).

125. Andrea Dworkin, INTERCOURSE 122 (1987).

126. *See id.*

127. *See id.* at 137-38.

128. *See infra* notes 130-32.

129. West, *supra* note 1, at 51.

130. *Id.* at 56; *See* NANCY CHODOROW, THE REPRODUCTION OF MOTHERING 166-67 (1978).

131. West, *supra* note 1, at 57.

132. GILLIGAN, *supra* note 123, at 17.

overcoming of the inherent state of separation, women see intimacy as an expression of the inherent state of being connected to the world around us.[133] By virtue of the oppressive patriarchal system under which they live, women are acutely aware of just how connected they are to one another and the vulnerability this entails.[134]

The law of emotional distress has perpetuated a concept of human vulnerability as the exception, not the rule. It has done so by recognizing duty only in cases where the parties have legally consented to a relationship, reflecting the idea that what separates us is primary to what connects us. Therefore, duty cannot arise until we choose to be legally connected to one another through contract. Anyone alive and capable of feeling can attest to the fact that emotional injury does not operate this way. People will feel emotional injury whether or not they "consent" to a relationship or to an interaction. The idea of consent is bound up with the idea of separation. Men would like to think that consent can set the boundaries of what can be done to their bodies, but women know this to be patently false as demonstrated by their experiences with menstruation, sexual assault, and unwanted pregnancy. NIED law thus has aided in the solidification of the myth of separation, and therefore in the oppression and devaluation of women's experiences.

III. TOWARD AN EMOTIONAL DISTRESS "UNMODIFIED"

The work of Robin West gives us another feminist angle from which to look at the tort of negligent infliction of emotional distress ("NIED").[135] While Chamallas investigated and exposed the historically gendered assumptions of the tort, the application of West's ideas to the current state of NIED law also shows that the requirements for recovery still reflect a fundamentally male perspective.[136] It is clear that this tort is an explicit expression of the law's misogynistic assumptions. Thus, in order to counter the oppressive work the tort has done to solidify sexist assumptions regarding emotion, scholars must train their efforts to fashion a concept of emotional interaction that better accounts for the experiences of women.

This is in large part what Chamallas and Wriggins attempt to do in *The Measure of Injury*.[137] Implicit in their work to bring female-specific pain to the domain of NIED, is an effort by women to define emotional distress in

133. West, *supra* note 1, at 40.

134. *Id.* at 57.

135. *See* West, *supra* note 1.

136. *Id.*

137. CHAMALLAS & WRIGGINS, *supra* note 4, at 97-112.

their terms after a period in which it was both identified with women and entirely lacking any understanding of women's lived experiences.[138] What Chamallas elucidates so clearly through a historical lens is the alignment in the law of emotion with the feminine.[139] In *The Measure of Injury*, Chamallas proposes the creation of specific torts for distinctly feminine injuries such as sexual harassment[140] and reproductive injury.[141] For Chamallas, the field of emotional distress will be transformed only when tort law begins to understand more fully the distinct inner lives of women and the distinct nature of their pain.[142]

West puts a similar focus on the specificity of women's experiences and particularly on the inherent difference between the pain of women and the pain of men.[143] The path toward what West calls a feminist jurisprudence must necessarily begin with the articulation of women's pain by women themselves.[144] It is vital that women express the nature of their pain without reference to analogous male experiences. The difference between these experiences, despite any extent to which patriarchal culture has shaped them, is subjectively felt by women.[145] An attempt to hunt down the origin of a woman's desire or pain to find its "true" cause is not only futile, but takes away from the intellectual labor we need to perform to catalogue how women find value (or not) in that desire or pain. This does not mean that some interpretative work is not valuable. It is important to place subjective experience in its appropriate cultural and historical context. Once this work is done, however, it is not useful to tell women that their experiences are products of patriarchal manipulation and as a result, false. It makes no sense to describe an intensely personal experience, such as pain or desire, as a lie. This, in fact, is dangerously close to the historically embedded assumption that women cannot be trusted to relay their own experiences. Affirming women's accounts of their pain along with its fundamental difference from men's is paramount in beginning to draw the contours of a new duty for emotional distress.

The danger in limiting recovery to instances of distinctly feminine injuries, such as sexual harassment and reproductive health is the reification of women as only mothers and victims in NIED law. The historical roots of

138. *Id.* at 129.

139. *Id.*

140. *Id.* at 97-102.

141. *See id.* at 102-11.

142. *See supra* notes 138-39.

143. Robin L. West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 15 WIS. WOMEN'S L.J. 149, 149-50 (2000).

144. *Id.* at 214.

145. *Id.*

the law show that emotional distress female plaintiffs were dismissed because they were perceived as inherently weak. Emotional vulnerability is a weakness, which characterizes women and women-like men.[146] Similarly, the recognition of bystander NIED was closely tied to the idea that there is something inherently worth protecting in a mother's concern for her child.[147] The holding in *Dillon v. Legg*,[148] would not have been possible without the deeply gendered rhetoric employed by Justice Tobriner.[149] Plaintiff's lawyer in *Dillon* invited the court to consider that what happened to Mrs. Dillon was highly foreseeable because where there are children, there will be mothers nearby.[150] Chamallas and Kerber trace this rhetoric in *Dillon* to the historical moment during which the case was decided. The cold war's reification of domesticity, where women were primarily perceived as caretakers for children, provided the backdrop for the court's recognition of what it called the "natural justice" of a mother's claim.[151] The law rewarded good mothers, meaning women who placed the well-being of their child above their own.[152]

While the recognition of a broader duty in NIED must begin with the construction of legal concepts which address women's experiences first, ultimately it has to involve the active construction of a duty that more fully describes the human experience of inflicting and suffering emotional injury. This does not entail an effacement of difference in favor of a bland kind of equality, but rather the recognition that the specificity of experience is precisely what unites us. The goal is not to compare women's pain to a "male" pain so men can more easily understand the extent of women's suffering. Rather, the goal is to force the law to develop its capacity for empathy. True empathy involves a capacity to acknowledge and understand the pain of another despite the lack of any similar experience in one's own life. This is what it means to truly affirm the humanity of another different from oneself.

What this concretely entails is best illustrated with two examples of scholarship, one old and well-known, and the other more recent. The first is Catherine MacKinnon's groundbreaking work in chronicling the pervasiveness of women's experience with sexual harassment in the

146. *See* Chamallas & Kerber, *supra* note 36, at 850-51.
147. *Id.* at 855.
148. 441 P.2d 912 (Cal. 1968).
149. *Id.* at 857.
150. *Id.* at 857 n.195.
151. *Id.* at 859.
152. *Id.* at 861.

workplace.[153] MacKinnon argued that this harassment, so common among working women that it was considered natural and inevitable, ought to be considered discrimination on the basis of sex.[154] By articulating how sexual harassment is an important symptom of the inequality between the sexes, MacKinnon located the phenomenon within the legal framework of discrimination, thereby advocating for its recognition.[155] What MacKinnon accomplished in Sexual Harassment of Working Women is two-fold.[156] She called readers' attention first to the specificity of women's lived experiences with sexual harassment.[157] Then, she worked to locate these specific experiences within an existing body of law, without sacrificing the distinctive female perspective on the issue.[158]

The second example is more recent, but no less innovative in its approach. Building on West's work in *Jurisprudence and Gender*, Shari Motro argues that unless sexual partners agree otherwise, pregnancy should create a specific kind of legal relationship.[159] Motro seeks to fashion a legal concept for an experience that is relevant to many women's lives, but as she puts it, "virtually absent from our laws."[160] What happens when a woman becomes pregnant with a partner who is not her husband? Motro argues, taking a cue from West, that the law is currently ill-equipped to address this scenario because it conceives of human beings as essentially separate, with autonomy hailed as the highest value.[161] It is this framework which leaves women "to deal with an unwanted pregnancy alone" while simultaneously feeling free to "disregard a man's interest in the fate of his offspring."[162] This arrangement leaves both men and women vulnerable, in different ways and for different reasons.[163] Motro's solution is to create a legally cognizable relationship which would impose a minimal duty of communication and material support between sexual partners who conceive, regardless of the ultimate result of the pregnancy.[164]

153. CATHERINE MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION (1979).

154. *See id.* at 22-23, 26-27.

155. *See id.* at 25-26.

156. *Id.* at 40.

157. *Id.* at 43.

158. *Id.* at 50.

159. Shari Motro, *The Price of Pleasure*, 104 NW. U.L. REV. 917, 919 (2010).

160. *Id.*

161. *Id.* at 921.

162. *Id.*

163. *See id.* at 947.

164. *Id.* at 956–66.

What unites these two examples of scholarship is their attempt to make conceptual room in the law for experiences that are otherwise overlooked or actively marginalized. They illustrate the law's capacity to not merely be a reflective pool for society's power dynamics, but to act as a tool to break them down. MacKinnon ultimately envisioned a system of rights in which equality for women would not necessarily be measured by the standards of men.[165] West writes that the prerequisite for the liberation of women's desires and feelings, their lives, is the breakdown of the patriarchy.[166] We can only accomplish this work one concept at a time, one law at a time, one specific story at a time. To arrive at a jurisprudence unmodified, we have to begin with an emotional jurisprudence and with a feminist jurisprudence.

CONCLUSION

The continued segregation of emotional distress in tort denies all those who suffer injuries historically gendered feminine their worth before the law. Which is to say, all of us. *Molien* serves as a perfect example of the capacity of a body not legally aligned with emotion to experience emotional distress.[167] The facts of the case, however, are not exceptional or rare. As West points out, the separation thesis erases the experiences of both women and men. Both women and men experience emotional injury outside the bounds of a contract or a special relationship. Yet, since the field of emotional injury is built on sexist foundations, its progress will begin by first demolishing these foundations. The liberation of women's emotional selves will necessarily bring about the liberation of men's emotional lives.

Xhesi Hysi[*]

165. MACKINNON, *supra* note 153, at 40.

166. *See* West, *supra* note 1, at 72.

167. *See supra* notes 83-94 and accompanying text.

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