CRIMINAL INFLICTION OF EMOTIONAL DISTRESS

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This Article identifies and critiques a trend to criminalize the infliction of emotional harm independent of any physical injury or threat. The Article defines a new category of criminal infliction of emotional distress *("CIED") statutes, which include laws designed to combat behaviors such as harassing, stalking, and bullying. In contrast to tort liability for emotional harm, which is cabined by statutes and the common law, CIED statutes allow states to regulate and punish the infliction of emotional harm in an increasingly expansive way.*

In assessing harm and devising punishment, the law has always taken nonphysical harm seriously, but traditionally it has only implicitly accounted for emotional harm; it has not made emotional harm an element of criminal liability. CIED statutes represent a break in this narrative. The Article uses these statutes as an entry point to examine the role that victim emotion does and should play in substantive criminal law, and it finds that CIED statutes may endanger free expression and equality and provide insufficient notice to defendants. These statutes thus offer a cautionary tale, illustrating problems that can arise when victim emotion plays an explicit role in criminal culpability. CIED statutes also reveal the comparative benefits of the implicit approach, which acknowledges the significance of nonphysical harm yet does not predicate criminal liability on the existence of emotional harm.

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Introduction

In Florida, two middle school–age girls[1] were recently charged with aggravated stalking, a felony; their Facebook messages allegedly caused a classmate to suffer emotional distress that led to her suicide.[2] In Montana, Roman McCarthy received a five-year sentence after mailing two letters to his ex-wife, neither of which she opened but which nonetheless caused her emotional distress.[3] In Louisiana, Timothy Ryan was convicted of stalking

1. Both teens were named by the authorities, but this Article follows the lead of various news sources in refraining from publishing the names of juveniles charged with crimes. *See* Steve Almasy et al., *Sheriff: Taunting Post Leads to Arrests in Rebecca Sedwick Bullying Death*, CNN (Oct. 16, 2013, 8:53 AM), http://www.cnn.com/2013/10/15/justice/rebecca-sedwick-bullying-death-arrests/.

2. *Id.*

3. State v. McCarthy, 980 P.2d 629 (Mont. 1999).

for driving back and forth in front of the Wrights' house several times over the course of a day while he was looking for someone else, a pattern of behavior that caused Mrs. Wright emotional distress.[4]

Each of these cases involved a criminal statute that imposes liability for causing another person emotional harm. They are part of a growing trend; in recent years, thirty states and the District of Columbia have criminalized the infliction of emotional harm independent of any physical harm or threat of physical injury.[5] These laws, which I term *criminal infliction of emotional distress* ("CIED") statutes, are designed to combat antisocial behaviors such as harassment, stalking, and bullying. Emotional harm is an element of all CIED statutes. Yet the statutes range considerably in both the actions they prohibit and the defendant's required mental state.[6] For example, some require proving that the emotional harm was intentional, but others do not. Some enumerate prohibited acts, while others include a catchall phrase—like "repeated unwanted communication"[7]—without further specification.

In one sense, these laws are unsurprising: emotional harm should beget criminal liability under the three main theories of criminal punishment. Utilitarian theory is premised on maximizing welfare; indeed, one reason why limiting *physical* harm is of high social value is because of its *emotional* consequences. Under a retributive theory, morally blameworthy conduct should be punished, and knowingly or recklessly inflicting emotional harm on another person is morally blameworthy. An expressive theory prioritizes communicating solidarity with victims and rectifying a moral imbalance, which would support taking emotional harm seriously and standing by victims of emotional abuse.

Since none of these theoretical arguments for criminalizing emotional harm necessarily requires the existence of related physical harm, we might expect that substantive criminal law would recognize emotional harm as no less legitimate than physical harm. Yet traditionally there is no criminal culpability for emotional distress absent physical injury or threat of physical harm.[8] CIED statutes depart from this norm.

This Article uses CIED statutes as an entry point to examine what role victim emotion does and should play in substantive criminal law. It asks several questions: Why has it been so rare in the past to explicitly criminalize infliction of emotional harm (other than fear of physical harm)? In other words, why have we not *always* embraced CIED laws? Furthermore, should we view CIED statutes as a positive step in realigning criminal law doctrine

4. State v. Ryan, 969 So. 2d 1268 (La. Ct. App. 2007) (overturning conviction).

5. For a comprehensive list of criminal infliction of emotional distress statutes and their key features, see *infra* Appendix.

6. *See infra* Appendix.

7. *E.g.*, Mo. Rev. Stat. § 565.090.1(5) (Supp. 2013).

8. *See, e.g.*, Youngjae Lee, *What Is Philosophy of Criminal Law?*, 8 Crim. L. & Phil. 671 (2014) (distinguishing "emotional cruelty" as among those harms that are not subject to criminal liability).

with theories of punishment, or are they a troublesome break in the criminal law narrative? Ultimately, this Article argues that criminal laws have always acknowledged the importance of victim emotion, even though such laws traditionally avoid explicitly including emotional harm as a result element. I refer to this paradigm as the *implicit approach*. Indeed, substantive criminal law has always assumed that certain kinds of physical violence are more emotionally traumatic for victims than others. For example, consider why the punishment for rape is more serious than that for other forms of assault that may cause more physical damage.[9] The special seriousness of rape comes, at least in part, from its emotional consequences. Yet convicting a defendant on a rape charge does not require an inquiry into whether a victim of rape actually experienced emotional harm.

Laws have tended not to criminalize emotional harm explicitly, through emotional-harm elements, because doing so contravenes several core substantive criminal law design considerations. First, emotional distress is difficult to define—and predict—in a way that would provide adequate notice to criminal defendants.[10] Second, criminalizing the infliction of emotional distress conflicts with free-expression values and a strongly maintained distinction between speech and conduct.[11] Indeed, central to the First Amendment–protected "marketplace of ideas" is the notion that one need not worry about hurting the feelings of others. Third, lack of social consensus may undermine CIED laws because of sharp cultural disagreement about the types of conduct that emotionally distress a reasonable person. Finally, criminalizing emotional harm exacerbates existing concerns about disparate enforcement and stereotyping by criminal justice actors. The implicit approach traditionally taken by the criminal law therefore represents a careful compromise, if not necessarily a conscious one: it indirectly addresses emotionally harmful conduct while being fair to defendants and preserving the social consensus that supports criminal law.

Against this backdrop, the Article examines and critiques CIED statutes. First, it finds that, in contrast to the implicit approach, CIED statutes fail to provide adequate notice to defendants because of the imprecise definition of prohibited acts as well as the unpredictability of emotional harm. It further raises concerns about institutional competence, challenging the claim that criminal justice actors, such as prosecutors and police, can be relied on to prevent the overreach of CIED laws. Concerns about overreach of these broad CIED statutes may be especially stark in the juvenile context, as these statutes risk prematurely subjecting juveniles to the criminal justice system.[12]

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9. *See infra* Section I.B.

10. *See infra* Section IV.A.

11. *See infra* Section IV.B.

12. To be sure, the movements to protect victims of stalking and bullying address critical interests. For example, bullying is a real problem, largely because of the emotional harm it causes. And yet in the juvenile-peer-bullying context, laws that are supposed to protect juveniles may also end up harming them by subjecting them unnecessarily to the criminal justice system. Furthermore, when the theory behind a bullying charge is that the defendant's behavior caused emotional distress that led to the victim's suicide, proving causation presents

Second, the use of CIED statutes raises serious concerns about stifling expression. In the CIED context, there is no imminent threat of civil disorder or other serious harm, and these statutes therefore run the risk of chilling and even punishing protected speech. And strong empirical support is lacking for the justification that these laws are necessary as a prophylactic measure to prevent future physical harm.

Third, CIED statutes do not grow out of social consensus, and the criminal justice system is ill-equipped to deal with the nuances of CIED cases. Communications between former intimates are highly personalized, and, in this often-fraught context, differentiating among welcome, annoying, and harassing communications may prove exceptionally difficult.[13] For example, even if two unopened letters from a man to his ex-wife constitute a serious harm, is the legal process competent to determine whether that harm is criminal? These cases depend on nuanced interpersonal dynamics, a realm that the criminal law is especially unprepared to regulate.[14]

Fourth, the use of CIED statutes also risks exacerbating stereotypes; for example, the stalking case involving Timothy Ryan, mentioned above, reinforces the perception that women are so fragile that they would reasonably be emotionally distressed by the sight of a car driving down their block a few times over the course of the day. And criminal justice actors—such as police, prosecutors, and judges—are not always immune from such stereotyping. Thus, relying on their discretion to weed out all but the most egregious CIED cases may not counterbalance the breadth of the statutory text. In Ryan's case, the trial judge explained that, "when I consider all the facts[,] I do believe that there was emotional distress on the part of the victims and that's reasonable to understand because, as I've stated before, the suspicious conduct in a neighborhood causes a certain amount of—degree of emotional distress especially with the womenfolk."[15]

CIED statutes thus offer a cautionary tale. They illuminate problems that arise when the criminal law abandons its traditional, implicit approach

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a formidable challenge. For example, it may be impossible to prove that a defendant's offensive Facebook messages caused a young person's suicide if that person had a history of emotional instability and self-abuse that predated the defendant's conduct. Indeed, the investigation into the teenager's suicide in the aforementioned Florida case revealed that she was "a fragile girl who had a troubled home life, had been cutting herself and was ordered to go to a psychiatric facility to get help." Lizette Alvarez, *Charges Dropped in Florida Cyberbullying Death, but Sheriff Isn't Backing Down*, N.Y. Times, Nov. 22, 2013, at A14, *available at* http://www.nytimes.com/2013/11/22/us/charges-dropped-against-florida-girls-accused-in-cyberbullying-death.html?pagewanted=all&_r=0.

13. This scenario also implicates the concerns expressed above about a lack of sufficient notice to defendants.

14. *Cf.* John C.P. Goldberg & Robert H. Sitkoff, *Torts and Estates: Remedying Wrongful Interference with Inheritance*, 65 Stan. L. Rev. 335 (2013) (critiquing the tort of interference with inheritance along similar lines). There is no reason to suspect that the criminal law would handle such interpersonal subtleties any better, and concerns about prosecutorial discretion and disparate enforcement suggest that inviting the criminal law to deal with such cases may be even more precarious in the criminal law context. *See infra* Section IV.A.

15. State v. Ryan, 969 So. 2d 1268, 1271 (La. Ct. App. 2007) (alteration in original).

to victim emotion. Indeed, CIED statutes make criminal law's traditional compromise appear prudent, even if not always perfectly calibrated.[16]

This Article provides the first sustained examination of the role of victim emotion in the criminal law.[17] The dominant strain of criminal law scholarship that addresses emotions focuses on the role of *defendant* emotion,[18] especially as pertaining to the murder/manslaughter distinction,[19] and the role of emotion in a defendant's punishment.[20] Meanwhile, the question of how *victim* emotion impacts substantive criminal law has been largely ignored.[21] This Article fills that gap in the literature by exploring the set of

16. While some may dispute how much weight the implicit approach gives emotional harm, this is a question of degree and could be altered without fundamentally changing the way the criminal law assesses culpability.

17. Previous scholarship on emotions and the criminal law focuses on two main topics. First, the role of defendant emotion as a mitigating factor in criminal punishment. *See, e.g.*, Joshua Dressler, *Provocation: Partial Justification or Partial Excuse?*, 51 MOD. L. REV. 467 (1988); Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 270 (1996); Victoria Nourse, *Passion's Progress: Modern Law Reform and the Provocation Defense*, 106 YALE L.J. 1331 (1997). Second, the role of victim impact statements during sentencing. *See, e.g.*, Susan A. Bandes, *Victims, "Closure," and the Sociology of Emotion*, 72 LAW & CONTEMP. PROBS. 1 (2009) [hereinafter Bandes, *Victims*]; Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361 (1996) [hereinafter Bandes, *Empathy*]; Edna Erez, *Victim Voice, Impact Statements and Sentencing: Integrating Restorative Justice and Therapeutic Jurisprudence Principles in Adversarial Proceedings*, 40 CRIM. L. BULL. 483 (2004). Another strain of scholarship examines victim characteristics as they relate to vulnerable victim statutes and hate crime laws. This scholarship focuses on objective, status-oriented characteristics, such as age, disability, and homelessness, rather than on victim emotion, which is less objective and could not be considered as akin to a status. *See, e.g.*, Joshua Kleinfeld, *A Theory of Criminal Victimization*, 65 STAN. L. REV. 1087 (2013) (suggesting that states adopt the Federal Sentencing Guidelines's "Vulnerable Victim" provision, which increases an offender's sentence where the defendant knowingly preyed on vulnerable populations such as children, the elderly, or the disabled); Frederick M. Lawrence, *The Evolving Federal Role in Bias Crime Law Enforcement and the Hate Crimes Prevention Act of 2007*, 19 STAN. L. & POL'Y REV. 251, 255 (2008); Jay Dyckman, Note, *Brightening the Line: Properly Identifying a Vulnerable Victim for Purposes of Section 3A1.1 of the Federal Sentencing Guidelines*, 98 COLUM. L. REV. 1960 (1998); Katherine B. O'Keefe, Note, *Protecting the Homeless Under Vulnerable Victim Sentencing Guidelines: An Alternative to Inclusion in Hate Crime Laws*, 52 WM. & MARY L. REV. 301 (2010).

18. *See, e.g.*, Kahan & Nussbaum, *supra* note 17.

19. *See, e.g.*, Dressler, *supra* note 17; Joshua Dressler, *Rethinking Heat of Passion: A Defense in Search of a Rationale*, 73 J. CRIM. L. & CRIMINOLOGY 421 (1982); Nourse, *supra* note 17.

20. *See, e.g.*, Terry A. Maroney, *Law and Emotion: A Proposed Taxonomy of an Emerging Field*, 30 LAW & HUM. BEHAV. 119, 129–30 (2006) (outlining the contours of the "legal doctrine" category and the limited scholarship to date in this area and concluding that it should be "an exciting area to watch"); *see also* Betsy J. Grey, *Neuroscience, PTSD, and Sentencing Mitigation*, 34 CARDOZO L. REV. 53 (2012) (describing and assessing sentencing mitigation for PTSD and other mental disorders).

21. By way of example, *The Passions of Law*, an anthology dedicated to moving emotion into the purview of legal analysis, refers to victims in only two contexts. *See* THE PASSIONS OF LAW (Susan A. Bandes ed., 1999). The first context is victim impact statements. *Id.* at 178, 189, 218, 325–27. The second context is the victim's role in punishment—namely, a discussion about the role of the public prosecutor that contrasts English common law, where victims can

legal doctrines that explicitly categorizes emotional injury as criminal harm and by contextualizing CIED statutes within the theoretical foundations of substantive criminal law. The Article also reframes existing scholarship on law and emotions,[22] drawing a distinction between the implicit and explicit ways that the criminal law can consider emotional harm.[23]

Part I introduces the traditional, implicit approach, which carves out a role for victim emotion in the criminal law without explicitly mentioning emotional harm as the required result of the defendant's conduct. Part II identifies two legal developments outside the confines of substantive criminal law that preceded the first CIED statutes. These developments brought victim emotion into the foreground in narrowly circumscribed contexts. This Part first highlights the role of the victims' rights movement in making victim emotion an explicit consideration in criminal sentencing, most notably through the introduction of victim impact statements. It then examines precursor doctrines in civil law—the emotional distress torts—and draws attention to their limiting principles.

Part III identifies CIED statutes as a category of laws that explicitly criminalizes the infliction of emotional harm by including emotional distress as the result element. This Part outlines the elements of CIED statutes, explores the leading justifications for these laws, and highlights their expansive tendencies, which contrast starkly with the limiting principles of the emotional distress torts. Part IV critiques CIED laws by identifying tensions between these statutes and core values such as notice to defendants, free expression, social consensus, and equality.

Part V assesses possible statutory reforms, including prohibiting specific conduct that predictably causes emotional harm and revising CIED laws to bring them more in line with the emotional distress torts. This Part also explores the broader implications of this analysis for the role of victim emotion in criminal law. The Article argues that CIED statutes forgo the implicit approach that criminal law traditionally uses when accounting for victim emotion and that, ultimately, the blunt tool of the criminal law is not well suited for addressing emotional harm that is independent of physical injury

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still prosecute cases, with the American system, where the state has assumed the role of prosecutor. *Id.* at 204–05.

22. This body of scholarship includes work by legal academics in the diverse areas of family law, criminal law, and tort law, among other disciplines. *See, e.g.*, THE PASSIONS OF LAW, *supra* note 21; Kathryn Abrams & Hila Keren, *Who's Afraid of Law and the Emotions?*, 94 MINN. L. REV. 1997 (2010); Jeremy A. Blumenthal, *Law and the Emotions: The Problems of Affective Forecasting*, 80 IND. L.J. 155 (2005); Eric A. Posner, *Law and the Emotions*, 89 GEO. L.J. 1977 (2001); Carol Sanger, Essay, *The Role and Reality of Emotions in Law*, 8 WM. & MARY J. WOMEN & L. 107 (2001). Notably, outside the context of the provocation doctrine, surprisingly little scholarship addresses the literal overlap between law and emotions, that is, when the substantive law explicitly is called upon to assess human emotion.

23. Some scholars critique the law for a "tendency to dichotomize and hierarchize reason and emotion," and they argue that emotions should play a more explicit role. *E.g.*, Abrams & Keren, *supra* note 22, at 2002. By identifying the implicit approach to victim emotion and highlighting its advantages, the Article challenges this view and offers a competing framework for future analysis.

or threat of physical harm. Instead, criminal law should strongly prefer the traditional, implicit approach to victim emotion.

I. The Traditional Implicit Approach to Victim Emotion in Criminal Law

A. *Emotional Harm and Punishment Theory*

Each of the three main theories of punishment—utilitarian, retributive, and expressive[24]—supports treating emotional harm as cognizable in criminal law, independent of physical harm.[25] Furthermore, none of these theories requires that the emotional harm in question is fear of physical injury or that it is in any other way connected to physical harm.

Under a utilitarian theory, which is premised on maximizing welfare and minimizing unhappiness, emotional harm is not only cognizable, but *physical* harm is important precisely because of its *emotional* consequences.[26] A central tenet of utilitarianism is that "the moral worth of an action (or of a practice, institution, law, etc.) is to be judged by its effect in promoting happiness."[27] Therefore, punishment is appropriate when happiness has been compromised, because the state's goal is to maximize the welfare of its citizens.

Under a retributive theory, morally blameworthy conduct should be punished,[28] and knowingly or recklessly inflicting emotional harm on another person constitutes such conduct. According to the retributivist,

24. Some scholars include expressivism as a subcategory of retribution. *E.g.*, Carissa Byrne Hessick, *Motive's Role in Criminal Punishment*, 80 S. Cal. L. Rev. 89, 113 (2006). I separate it out here for analytical purposes and have suggested elsewhere that it is closely related both to retributivism and to utilitarianism. *E.g.*, Avlana Eisenberg, *Expressive Enforcement*, 61 UCLA L. Rev. 858, 878–80 (2014).

25. There is substantial debate about what constitutes an emotion and to what extent emotion is related to cognition, but that discussion is beyond the scope of this Article. Laura E. Little, *Negotiating the Tangle of Law and Emotion*, 86 Cornell L. Rev. 974, 982 (2001) (reviewing The Passions of Law) (describing three primary theoretical approaches to discerning what constitutes an emotion: Freudian, evolutionary, and social constructionist); *see also* Jon Elster, Alchemies of the Mind: Rationality and the Emotions 443 (1999) (listing forty-four separate emotions). The Article's focus on emotional harm, however, is not intended to reach nonemotional mental states such as impaired cognition.

26. Notably, recent psychological research on affective forecasting has cast doubt on whether individuals are able to predict how, and to what extent, future events will affect their emotional well-being. *See, e.g.*, Blumenthal, *supra* note 22, at 158–59. But one can still assume that physical harm would in many instances result in reduced happiness, even if not as drastically or with as far-reaching long-term consequences as one might expect.

27. Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. Legal Stud. 103, 104 (1979) (distinguishing utilitarianism, which focuses on maximizing happiness, from the economic norm of "wealth maximization").

28. Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 Law & Contemp. Probs. 401, 412 (1958).

"Crime inflicts an injury on victims and communities, and, as a consequence, offenders deserve to suffer in proportion to their blameworthiness."[29] Retributivists may disagree about how best to assess emotional harm in determining proportional penalties, but, as a foundational matter, emotional harm is cognizable harm.[30]

Finally, expressive theory prioritizes rectifying a moral imbalance by expressing solidarity with victims.[31] According to expressive theory, punishment is "a conventional device for the expression of attitudes of resentment and indignation, and of judgments of disapproval and reprobation."[32] Expressing indignation at the harm suffered by a victim necessarily includes taking seriously the victim's emotional abuse as well as any physical harm. Punishment may also serve an expressive function by effectuating "the repair of the material and emotional harms that criminal behavior inflicts."[33]

While emotional distress, independent of physical harm, is cognizable under the main theories of criminal punishment, in practice it has not been punished. The next Section explores why, delving into the criminal law's traditional treatment of victim emotion.

B. *Emotional Harm and Crime Definition*

Victim emotion has always been relevant to criminal punishment. A traditional account of the injury associated with a particular crime includes, in addition to physical harm, an implicit assessment of the victim's emotional harm. Substantive criminal law has always assumed that victims experience certain kinds of physical violence as more emotionally traumatic than others, and it has scaled punishments accordingly. For example, this assumption helps to explain the heightened punishment for rape as compared to the punishment for other forms of assault that may cause more physical damage.[34] Consider also the difference between punishments for larceny and

29. Erik Luna, *Punishment Theory, Holism, and the Procedural Conception of Restorative Justice*, 2003 Utah L. Rev. 205, 219.

30. For a related critique of retributivism based on concerns about rank-ordering crimes, see David Dolinko, *Three Mistakes of Retributivism*, 39 UCLA L. Rev. 1623, 1636–42 (1992).

31. For a general discussion of expressive theory and how laws have been said to send messages, see, for example, Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. Chi. L. Rev. 943 (1995); Richard H. McAdams, *An Attitudinal Theory of Expressive Law*, 79 Or. L. Rev. 339 (2000); and Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. Pa. L. Rev. 2021 (1996). For a critique of expressive theory, see, for example, Robert Weisberg, *Norms and Criminal Law, and the Norms of Criminal Law Scholarship*, 93 J. Crim. L. & Criminology 467 (2003).

32. Joel Feinberg, *The Expressive Function of Punishment*, *in* Doing & Deserving: Essays in the Theory of Responsibility 95, 98 (1970); Kahan & Nussbaum, *supra* note 17, at 352.

33. Laura I. Appleman, *Retributive Justice and Hidden Sentencing*, 68 Ohio St. L.J. 1307, 1337 (2007) (footnote omitted) (internal quotation marks omitted).

34. Coker v. Georgia, 433 U.S. 584, 597–98 (1977) (acknowledging the "mental and psychological damage" of rape, in addition to any physical injury); Susan Estrich, Real Rape 103–04 (1987) (recognizing that rape is "a violation of the most personal, most intimate, and most offensive kind"). Historically, rape was also considered more serious than assault in part

for the more serious robbery and burglary. Robbery is larceny plus the use or threat of force, which the law assumes to have a greater emotional impact on the victim (even though it may have no greater physical impact, assuming that the threat is not carried out).[35] Burglary traditionally involved breaking and entering a dwelling at night, which was also believed to result in heightened emotional consequences.[36]

But, historically, victims' emotions have largely been considered in the abstract; if a particular crime has been deemed to cause severe emotional harm, it is punished with extra seriousness but requires no specific inquiry into the harm suffered by a particular victim.[37] A harsher punishment is assumed to be appropriate based on the generalized assumption that some crimes result in greater emotional harm. In the rape context, for example, the act of nonconsensual sex, even if there was no observable physical harm, was understood to be intrinsically harmful to victims' emotional well-being.[38] But neither emotional harm nor even physical harm is an element of the crime of rape.[39]

Other crimes integrate generalized assumptions about emotional harm to particular classes of victims—for example, the laws that specifically punish conduct that is understood to be emotionally harmful to children. The laws that criminalize child molestation and child pornography are particularly severe and designed to address not just possible physical injury that may result from these crimes but also psychic harm that is understood to be especially long lasting and acute.[40] Again, however, these crimes do not require the prosecutor to prove emotional harm; the role of emotion is implicit.

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because it was a violation of men's property rights in their daughters or wives. *See, e.g.*, Susan Brownmiller, Against Our Will: Men, Women and Rape 7–9 (1975).

35. *See, e.g.*, Fla. Stat. § 812.13(1) (2013).

36. *See, e.g.*, U.S. Sentencing Guidelines Manual § 2B2.1 cmt. background (2013) (distinguishing further between residential burglary—which is understood to be more psychologically injurious and thus deserving of higher penalties—and commercial burglary).

37. *See, e.g.*, Cal. Penal Code § 261 (West 2014) (omitting any reference to victim's emotional harm).

38. *See* Catharine A. MacKinnon, Feminism Unmodified: Discourses on Life and Law 111 (1987) (noting that rape shield laws were created to protect women from the "humiliation" of being "raped again on the stand" by having their sexual past disclosed at trial). Here, the suggestion is that the emotional harm of the crime would be exacerbated by the further emotional harm that would result from testimony about the victim's prior sexual history.

39. *See, e.g.*, Cal. Penal Code § 261. Some *aggravated* rape statutes, however, do include the requirement that the victim suffer serious bodily injury. Mass. Gen. Laws ch. 265, § 22(a) (2012).

40. *See, e.g.*, Child Protection and Obscenity Enforcement Act of 1988, 18 U.S.C. §§ 2251–53 (2012); Audrey Rogers, *Child Pornography's Forgotten Victims*, 28 Pace L. Rev. 847, 852–54, 856–58 (2008).

Similarly, hate crime laws are justified based on emotional harm to victims and victims' identity groups,[41] yet emotional harm is not an independent element of these crimes. Rather, the laws are grounded in a belief that, as a general matter, bias-motivated conduct is more harmful than the same conduct without the bias motive and therefore should be punished more severely.[42] Accordingly, advocates of hate crime legislation have relied on generalized claims about the emotional harm caused by bias-motivated conduct, both to victims and to victims' identity groups.[43] For example, consider the crime of defacing a religious monument with hate-symbol graffiti, such as a swastika; the physical damage may be relatively trivial, but the emotional harms are understood to be significant. The punishment for acts of property damage or vandalism where there is a discriminatory motive is meant to be proportionate to the composite harm incurred, including not only the value of the property destroyed but also the resulting emotional harm attributable to hate-motivated conduct.[44] This effect on the victim and the victim's identity group is assumed, based on the gravity of the act.[45]

41. *See* Wisconsin v. Mitchell, 508 U.S. 476, 488 (1993) (noting the arguments by amici that hate crimes can "inflict distinct emotional harms on their victims"). Hate crime laws are also justified as important in sending a message to society at large. *See* Lawrence, *supra* note 17, at 255.

42. *See, e.g.*, Heidi M. Hurd & Michael S. Moore, *Punishing Hatred and Prejudice*, 56 Stan. L. Rev. 1081, 1085 (2004).

43. *Id.* For example, some studies suggest that, irrespective of race, symptoms such as anxiety, depression, and isolation are frequent in bias-crime victims, and this finding would support a generalized understanding of emotional harm that does not require further inquiry into the specific experience of a particular victim. Some criticize this blanket assumption, questioning whether it is fair to assume that a bias-motivated crime is, at all times, more harmful than a non-bias-motivated crime. *See, e.g.*, Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 Harv. L. Rev. 413, 468 (1999).

44. *See* Frederick M. Lawrence, *The Punishment of Hate: Toward a Normative Theory of Bias-Motivated Crimes*, 93 Mich. L. Rev. 320 (1994) (articulating a theory for why hate crimes cause greater harm and therefore should receive more severe punishments than their parallel crimes). Many oppose this rationale, questioning both its conceptual and empirical validity. *See, e.g.*, Anthony M. Dillof, *The Importance of Being Biased*, 98 Mich. L. Rev. 1678, 1684 (2000) (book review). But a nonphysical-harm-based explanation continues to be a widespread justification for hate crime legislation. Ely Aharonson, "*Pro-Minority*" *Criminalization and the Transformation of Visions of Citizenship in Contemporary Liberal Democracies: A Critique*, 13 New Crim. L. Rev. 286, 297 (2010).

45. *But see* N.J. Stat. Ann. § 2C:16-1 (West 2005 & Supp. 2014) (looking to whether the victim "reasonably believed" that "the offense was committed with a purpose to intimidate the victim . . . because of race, color, religion, gender, disability, sexual orientation, gender identity or expression, national origin, or ethnicity"). New Jersey's bias-intimidation law is unique but recently gained national attention when Dharun Ravi was charged in connection with the suicide of Tyler Clementi. Indictment for State of New Jersey, State v. Ravi, No. 10002861, 2011 WL 7656976 (N.J. Super. Apr. 20, 2011) (charging a college student for filming the sexual encounter of his gay roommate, who committed suicide as a result).

C. *The Unique Role of Fear*

The law has always been particularly solicitous of one victim emotion: fear of imminent bodily harm. The law treats fear differently from other emotions; sometimes this is only implicit in the crime's definition, and sometimes it is more explicit.

For example, threats of violence are assumed to result in fear, even if the threat does not include actual attempted violence.[46] Rather, there is a generalized assumption that the threat itself would put a victim in fear, and a threat is punishable even if there is no proof that the defendant intended to go through with an attack or that the defendant committed any act that came close to actually completing the crime. Furthermore, if property is unlawfully obtained through a threat of violence (for example, robbery), it is punished more severely than if the same property were obtained through fraud or embezzlement.[47]

Terrorism is considered to be more serious than other violent acts of comparable magnitude because it is assumed to produce a heightened emotional response.[48] Specifically, the intent to terrorize—or the nature of the act (such as exploding a bomb instead of firing a gun)—is assumed to inspire widespread fear.[49] Here again, criminal law takes fear into account when delineating the severity of crimes and devising a hierarchy of punishment.

While many have assumed that fear is a subset of the broader category of emotional distress,[50] in the context of criminal law, fear can be better understood as connected to a particular and expected result rather than as an intrinsic emotional state. For example, the classic case of assault occurs when the defendant throws a punch but misses the victim, sparing the victim serious injury but still causing reasonable fear; it was only through sheer luck (or the defendant's terribly bad aim) that the victim was spared.[51] In this paradigmatic case, there is the defendant's intent coupled with a criminal act that put the victim in fear of imminent harm. In this context, the "reasonable fear" is directly related to the possibility of a particular serious

46. *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377, 388 (1992). Thus, the law seems to care about fear itself and does not concern itself solely with impending physical violence.

47. For example, under the U.S. Sentencing Guidelines, compare the base offense level for robbery (20) with that for general fraud (7). USSG §§ 2B1.1, 2B3.1.

48. *See* Burton Leiser, *Terrorism, Guerilla Warfare, and International Morality*, 12 STAN. J. INT'L STUD. 39, 39 (1977).

49. Terrorism also carries a substantial sentencing enhancement of twelve levels. THOMAS W. HUTCHISON ET AL., FEDERAL SENTENCING LAW & PRACTICE § 3A1.4 (2014 ed. 2014).

50. *See, e.g.*, Kenneth W. Miller, Note, *Toxic Torts and Emotional Distress: The Case for an Independent Cause of Action for Fear of Future Harm*, 40 ARIZ. L. REV. 681, 684 (1998).

51. There are, however, other instances of assault where the defendant intends to inspire fear in the victim rather than strike the victim—for example, the defendant points a gun at the victim knowing that the gun is unloaded, but the victim believes that the gun is loaded.

injury or death—much like in the "near-miss" context of tort law.[52] In other words, the answer to "Fear of what?" is a specific physical injury.

Accordingly, the question in fear cases is not about how painful or distressing the experience of fear was for the victim. Rather, the question is whether the victim (reasonably) anticipated a substantial risk of physical harm. Thus, the focus is on the victim's predictions of future events or risks[53] rather than on the victim's emotional experience. In fact, one could just as easily replace the term "fear" with "anticipation" or "expectation" of physical harm, without changing the meaning of the statute.[54]

Why has the criminal law historically prioritized fear of physical harm over other emotions? One plausible explanation is that the reasonableness of the expectation of harm is more objectively observable than is the depth of any given emotion. This objective dimension allows the criminal law to be predictable, to give notice to defendants, and to provide proportional penalties. While there will always be some murkiness associated with what constitutes "reasonable fear,"[55] many believe that requiring that the fear of imminent harm be "reasonable" is indispensable[56] to providing proportional penalties and predictability—two cornerstones of criminal punishment.[57]

The implicit approach is desirable precisely because it manages to take victim emotion into account without predicating criminal liability on the existence of a victim's emotional harm. This approach thus strikes a valuable

52. John C.P. Goldberg et al., Tort Law: Responsibilities and Redress 131 (3d ed. 2012).

53. Similarly, the mental state element of result crimes concerns the *defendant's* prediction of future events or risks. Indeed, we often expect criminal juries to assess what individuals expected about the future.

54. By contrast, CIED statutes address actual emotional experiences—rather than predicted events—and are thus more amorphous. *See infra* Section III.A.3.

55. The question of what constitutes reasonable fear has been explored extensively in the context of civil liability for exposure to lethal agents, such as asbestos, and communicable diseases, such as AIDS. *See, e.g.*, Lester Brickman, *The Asbestos Litigation Crisis: Is There a Need for an Administrative Alternative?*, 13 Cardozo L. Rev. 1819, 1849 n.126 (1992); Andrew R. Klein, *Fear of Disease and the Puzzle of Futures Cases in Tort*, 35 U.C. Davis L. Rev. 965, 970 (2002); John Patrick Darby, Note, *Tort Liability for the Transmission of the AIDS Virus: Damages for Fear of AIDS and Prospective AIDS*, 45 Wash. & Lee L. Rev. 185, 192 (1988). For a discussion of the "selectivity" of fear, which may undermine its reliability, see, for example, Cass R. Sunstein, Laws of Fear 224 (2005).

56. *E.g.*, Cynthia Lee, Murder and the Reasonable Man: Passion and Fear in the Criminal Courtroom 269 (2003).

57. Beyond this general principle, however, there is reason to wonder whether the criminal law succeeds in its goal of proportionality. For example, the aimed but unloaded gun likely causes much more fear than the poorly thrown punch, and yet the criminal law classifies both as simple assaults that carry the same penalties. When considered in tandem, these two examples suggest a lack of proportionality, at least as concerns the victim's reactions. By contrast, in the CIED context, the strength of the victim's emotional reaction often determines whether a crime has been committed, a situation that presents a separate set of concerns. *See infra* Section III.A.3. For example, in the aforementioned example where the victim received a letter that constitutes an unwanted communication, if she had merely called a friend, complaining that "this really annoys me," rather than calling the police to report harassment, there surely would have been no criminal liability. *See supra* note 3 and accompanying text.

compromise, acknowledging the importance of emotional harm while refusing to adjudicate the nuances of victim emotion in individual cases.

II. Explicit Consideration of Victim Emotion

While the implicit approach has dominated substantive criminal law, more explicit consideration of victim emotion has emerged in the criminal-procedure and civil-law contexts. Part II identifies these legal developments, which preceded the first CIED statutes, and highlights their limiting principles as a contrast to the increasingly expansive scope of CIED laws.

A. *The Victims' Rights Movement and Victim Impact Statements*

This Section highlights the central role of the victims' rights movement in the sentencing context, which foreshadowed its role in shaping CIED law. Although criminal law traditionally has addressed victims' emotional harm implicitly, the victims' rights movement has worked to make victims' emotions an explicit concern of criminal procedure through such innovations as victim impact statements.[58] Since the early 1970s, the victims' rights movement has been concerned with domestic violence and rape cases and, in particular, with airing the victim's voice in the prosecutorial process.[59] In 1982, the President's Task Force on Victims of Crime recommended introducing victim impact statements during the sentencing process in order to help the sentencing court understand the full extent of harm that the offender's conduct caused the victim, including emotional and psychological harm.[60]

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58. Of course, the victims' rights movement, and victim impact statements specifically, is not concerned exclusively with victim emotion; for example, as part of a victim impact statement, the victim could speak about harms that are not strictly emotional. For a general background of the victims' rights movement, see Douglas E. Beloof et al., Victims in Criminal Procedure (3d ed. 2010), and Shirley S. Abrahamson, *Redefining Roles: The Victims' Rights Movement*, 1985 Utah L. Rev. 517. For a critique and illustration of unintended consequences associated with the successes of the victims' rights movement, see Jeannie Suk, *Criminal Law Comes Home*, 116 Yale L.J. 2 (2006) (critiquing no-drop policies and suggesting that prosecutors' enforcement of protective orders has resulted in a loss of autonomy for victims of domestic violence).

59. *See* Peggy M. Tobolowsky et al., Crime Victim Rights and Remedies 8–9 (2d ed. 2010).

60. President's Task Force on Victims of Crime, Final Report 18, 33, 72–73 (1982), *available at* http://www.ovc.gov/publications/presdntstskforcrprt/87299.pdf; *see also* Kristin Henning, *What's Wrong with Victims' Rights in Juvenile Court?: Retributive Versus Rehabilitative Systems of Justice*, 97 Calif. L. Rev. 1107, 1111, 1127 (2009). In 1991, the Supreme Court upheld the use of victim impact statements in capital cases, reversing its precedent from four years earlier. Payne v. Tennessee, 501 U.S. 808 (1991), *overruling* Booth v. Maryland, 482 U.S. 496 (1987). While still criticized by many academics and practitioners, victim impact statements are now an established part of criminal sentencing practice, and they are often considered the most sweeping achievement of the victims' rights movement in criminal law. *See, e.g.*, Bandes, *Victims*, *supra* note 17, at 11; Aya Gruber, *A Distributive Theory of Criminal Law*, 52 Wm. & Mary L. Rev. 1, 41 (2010).

Victims' rights advocates universally heralded the introduction of victim impact statements as a momentous victory, and their diverse rationales foreshadow some of the arguments used to justify CIED statutes. Some viewed victim impact statements as serving "the retributive goals of the criminal justice system," arguing that such evidence is crucial to help a judge impose sentences that "accurately reflect the harm caused to the victim."[61] Others focused less on punishing the offender, valuing victim impact statements instead primarily for expressing the proper social concern for the victim[62] or for empowering the victim and aiding in the victim's search for emotional healing.[63] Some advocates put forth an equality argument, contending that, for reasons of fairness and justice, especially in light of opportunities for the defendant to offer mitigating evidence, the court should hear both the victim and the defendant.[64] Critics of victim impact statements argued that the statements "pollute" the sentencing process, overshadowing objectivity and reason while injecting excessive emotion.[65]

Along with the rise of the victims' rights movement, in recent decades emotional well-being has become increasingly prominent in popular and academic discourse. This phenomenon is characterized by a belief in "the self-evidence and therefore the objectivity of painful feeling."[66] The trend toward prioritizing emotional well-being is evidenced by the classification of "happiness studies" as a discipline,[67] the surge in self-help volumes, and the extensive academic work on trauma.[68] Additionally, as emotional trauma, associated with post-traumatic stress disorder and other diagnoses, has gained prominence as a medical disorder, the notion of emotional distress as tangible, even in the absence of physical signs, has become more accepted.[69]

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61. Henning, *supra* note 60, at 1129.

62. *See* Bandes, *Empathy*, *supra* note 17, at 362. *See generally* Erin Ann O'Hara & Douglas Yarn, *On Apology and Consilience*, 77 WASH. L. REV. 1121, 1122–26 (2002) (considering the value and potential effects of apologies on victims).

63. Robert P. Mosteller, *Victim Impact Evidence: Hard to Find the Real Rules*, 88 CORNELL L. REV. 543, 548–49 (2003).

64. *Payne*, 501 U.S. at 825 (citing *Booth*, 482 U.S. at 517 (White, J., dissenting)).

65. *See, e.g.*, Erez, *supra* note 17, at 484; Kenji Yoshino, *The City and the Poet*, 114 YALE L.J. 1835, 1869 (2005).

66. Lauren Berlant, *The Subject of True Feeling: Pain, Privacy, and Politics*, *in* LEFT LEGALISM/LEFT CRITIQUE 105, 107 (Wendy Brown & Janet Halley eds., 2002) (emphasis omitted).

67. *See, e.g.*, THE JOURNAL OF HAPPINESS STUDIES, which is a peer-reviewed publication that describes itself as "an interdisciplinary forum on subjective well-being."

68. *See, e.g.*, Jeannie Suk, *The Trajectory of Trauma: Bodies and Minds of Abortion Discourse*, 110 COLUM. L. REV. 1193 (2010). While this Article does not attempt to prove a causal link between CIED statutes and any of the recent developments that have brought emotions more squarely into mainstream discourse, this broader cultural shift is one possible explanation worth exploring. In any event, it affects the ways in which laws are likely to be applied. *See, e.g.*, Stephanie Francis Cahill, *Bring It On: Parents Take Schools to Court over Cheerleading Cuts, Other 'Hurt Feelings'*, 2 ABA J. E-REPORT, no. 13, Apr. 4, 2003 (chronicling a spate of recent cases that suggests "'hurt feelings' lawsuits are on the rise").

69. Francis X. Shen, *Mind, Body, and the Criminal Law*, 97 MINN. L. REV. 2036, 2038 (2013).

Critics refer to this trend as the "feeling culture," and some argue that the increased emphasis on psychic harm leads to individuals' overidentifying with their experience of trauma and eventually allowing it to define them.[70] Critics also describe the unbridled expansion of the "ambit of trauma."[71] Whereas in earlier eras trauma was associated with extreme events such as war or rape,[72] modern-day psychologists claim that "workplace harassment, including overhearing sexual jokes, or even rude comments, can be a diagnosable cause of PTSD."[73] Of course, a huge gulf exists between the trauma of war and rape and that of overhearing sexual jokes, but psychological research suggests that a wide range of losses, such as the death of a loved one or divorce, can be the source of severe, long-lasting emotional distress.[74]

This research raises questions about whether and how the law should account for various sources of emotional distress and when the law should formally name someone a victim for the purpose of tort compensation or criminal liability. These contested questions set the stage for the Article's examination of legal developments that regulate and, increasingly, criminalize the infliction of emotional distress.[75]

B. *The Civil-Law Context*

Substantive law's first foray into explicitly considering victims' independent emotional harm was in the tort context. Early understandings of emotional harm as noncompensable yielded to limited acceptance of emotional harm as compensable in the civil-law context through the doctrines of intentional and negligent infliction of emotional distress.[76] The civil law introduced the regulation of emotional harm, and an examination of the development of emotional distress torts helps both to contextualize the

70. *See, e.g.*, Berlant, *supra* note 66, at 125–26; *see also* Wendy Brown, *Wounded Attachments*, 21 POL. THEORY 390, 400, 401 (1993) (describing the present-day culture as "streaked with the pathos of ressentiment," epitomized by "the triumph of the weak as weak" (citing WILLIAM CONNOLLY, IDENTITY\DIFFERENCE: DEMOCRATIC NEGOTIATIONS OF POLITICAL PARADOX 21–27 (Cornell Univ. Press 1991))).

71. Suk, *supra* note 68, at 1212.

72. *Id.*

73. *Id. See generally* Claudia Avina & William O'Donohue, *Sexual Harassment and PTSD: Is Sexual Harassment Diagnosable Trauma?*, 15 J. TRAUMATIC STRESS 69, 72 (2002). For a general discussion of challenges to diagnosing PTSD, see CHRIS R. BREWIN, POSTTRAUMATIC STRESS DISORDER: MALADY OR MYTH? 12–14 (2003).

74. The mind/body divide has the potential to become increasingly murky; at least one court to date has ruled that, since "[t]he brain is a part of the human body," PTSD, absent any other physical symptoms, can be deemed a "bodily injury" by law. Allen v. Bloomfield Hills Sch. Dist., 760 N.W.2d 811, 815 (Mich. Ct. App. 2008). By contrast, CIED statutes do not classify emotional injuries as physical injuries but rather expand coverage of criminal harm to include emotional injury, without requiring any medical or psychological diagnosis. *See infra* Section III.A.3.

75. For a historical perspective on the increasing expectations of law's duty to redress injury, see LAWRENCE M. FRIEDMAN, TOTAL JUSTICE 63 (1985).

76. Some jurisdictions also allow recovery for emotional injury more widely in other kinds of tort cases if, and only if, the emotional injury is linked to physical harm. *See, e.g.*, FLA.

emergence of CIED statutes and to highlight key differences between the limited reach of tort law in this realm and the more expansive reach of CIED statutes.

1. Emotional Distress Torts

The emotional distress tort evolved from early assault cases.[77] According to the assault doctrine, there could be no liability where a threat of physical harm was not imminent. An independent emotional distress tort began to develop in the late 1800s in a range of cases that did not involve physical injury or threat of injury.[78] Courts also allowed recovery for nonphysical injury to relatives arising from the intentional mistreatment of their family members' dead bodies,[79] as well as against common carriers, telegraph companies, and innkeepers.[80] Early cases ran the gamut, from vicious practical jokes that resulted in the plaintiff's humiliation to harassment by overbearing creditors that left the plaintiff shaken.[81]

Legal scholars in the 1930s were the first to collect these various lines of cases and distill them into a new emotional distress tort.[82] While the First Restatement of Torts explicitly precluded recovery on the basis of emotional

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STAT. § 440.093 (2013) (allowing for recovery for emotional distress in the employment context only if accompanied by a physical injury from the same cause); Binns v. Fredendall, 513 N.E.2d 278, 280 (Ohio 1987) (explaining that a lower showing of emotional injury is compensable if linked to physical harm).

77. *See, e.g.*, I. de S. and Wife v. W. de S., Y.B. 22 Edw. 3, fol. 99, pl. 60 (1348) (Eng.), *reprinted in* ROBERT E. KEETON, TORT AND ACCIDENT LAW 85 (3d ed. 1998) (holding that damages were appropriate where a would-be patron, upset that the bar he hoped to enter was closed, swung an ax at the bar owner's wife, and, even though she was not physically injured, the court found that she had suffered harm such that her husband could recover damages for assault under the writ of trespass).

78. *See, e.g.*, Wilkinson v. Downton, [1897] 2 Q.B. 57 (Eng.) (holding that, where defendant played a practical joke on plaintiff, telling her that her husband was in a serious accident and thereby causing her severe emotional suffering, defendant could be held liable and plaintiff could recover damages).

79. *See, e.g.*, Gostkowski v. Roman Catholic Church of the Sacred Hearts of Jesus & Mary, 186 N.E. 798 (N.Y. 1933).

80. Notably, internet servers, which may be the modern equivalent of telegraph companies, are generally not civilly liable for emotional distress. Samuel J. Morley, *How Broad Is Web Publisher Immunity Under §230 of the Communications Decency Act of 1996?*, FLA. B.J., Feb. 2010, at 8.

81. JOHN C.P. GOLDBERG & BENJAMIN C. ZIPURSKY, THE OXFORD INTRODUCTIONS TO U.S. LAW: TORTS 221–22 (2010).

82. *See* William L. Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874, 874 (1939) ("It is time to recognize that the courts have created a new tort. . . . It consists of the intentional, outrageous infliction of mental suffering in an extreme form."); *see also* Calvert Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033, 1067 (1936) ("No longer is it even approximately true that the law does not pretend to redress mental pain and anguish . . . . If a consistent pattern cannot yet be clearly discerned in the cases, this but indicates that the law on this subject is in a process of growth."). In a similar vein, this Article synthesizes the diverse array of criminal statutes that proscribes emotional harm, thereby highlighting the scope of CIED law.

harm,[83] the Second Restatement of Torts canonized the emotional distress tort, which subjects to liability one who "by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another."[84]

Emotional distress torts have long generated controversy, and courts have struggled to define limiting principles.[85] While these torts are firmly rooted in the civil-law lexicon,[86] courts traditionally have been suspicious of them and continue to limit the circumstances in which tort law will compensate plaintiffs for independent emotional harm.[87]

2. Limiting Principles

a. *Intentional Infliction of Emotional Distress Claims and "Outrageous Conduct"*

To succeed in a claim for intentional infliction of emotional distress ("IIED"), a plaintiff must prove that a defendant's behavior was "extreme and outrageous."[88] It is insufficient that a defendant intended to cause severe distress to a victim or that the defendant actually caused such distress;[89] instead, a successful IIED claim requires that the victim's emotional distress was caused by the defendant's outrageous conduct.[90]

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83. Restatement of Torts § 46 (1934).

84. Restatement (Second) of Torts § 46(1) (1965).

85. *See, e.g.*, Robert L. Rabin, *Emotional Distress in Tort Law: Themes of Constraint*, 44 Wake Forest L. Rev. 1197 (2009). While this Article focuses on U.S. law, there have been analogous debates and discussions elsewhere. *See, e.g.*, Marian Allsopp, Emotional Abuse and Other Psychic Harms 88–95 (2013) (discussing the range of opinions among British academics, including those that would advocate abolishing legal liability for emotional distress or "shock").

86. Tort textbooks and hornbooks devote considerable space to discussing emotional distress torts (and their limiting principles). *See, e.g.*, Richard A. Epstein & Catherine M. Sharkey, Cases and Materials on Torts 68–75, 495–508 (10th ed. 2012); Goldberg et al., *supra* note 52.

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

88. Restatement (Second) of Torts § 46 cmt. d (1965) (specifying that defendant's behavior must be so atrocious that it would make an average community member exclaim, "Outrageous!").

89. Courts have dismissed many IIED claims after determining that the defendant's conduct simply could not, as a matter of law, be deemed extreme and outrageous. Examples of unsuccessful claims include "[t]he seduction of a victim's spouse by the victim's trusted advisor, the hurling by a store clerk of vile racist epithets at a customer, [and] the endless, bad faith stonewalling of an insurance company on an insured's obviously valid claim." Goldberg & Zipursky, *supra* note 81, at 223.

90. Restatement (Second) of Torts § 46(1) (1965). This insistence on causation in the common law is supplemented by such statutory limitations as § 230 of the Communications Decency Act, which immunizes internet servers from liability for third-party content: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." Communications Decency Act, 47 U.S.C. § 230 (2012). Courts have interpreted § 230 to preempt state law claims

A showing of outrageousness may provide evidence of "severe" emotional distress, another requirement of the emotional distress tort.[91] Recovery by the plaintiff requires that the defendant's act created an oppressive circumstance that goes beyond the "common and unavoidable situations in which a person faces extreme stress[,]" and the environment must be stressful enough to be "unbearable even for persons of ordinary fortitude."[92] IIED cases often involve a power imbalance between the tortfeasor and victim—an imbalance that the tortfeasor knowingly exploits[93]—and the Restatement specifically references the abuse of a position of authority as a factor that could constitute outrageous conduct.[94]

b. *Negligent Infliction of Emotional Distress Claims and "Physical Impact"*

A plaintiff may also recover damages for negligently inflicted emotional harm, although limiting principles tightly circumscribe the scope of such cases. Some states allow negligent infliction of emotional distress ("NIED") claims only if there was a physical impact (which may or may not result in physical injury to the plaintiff).[95] Other states require that the plaintiff demonstrate a concrete physical harm flowing from the plaintiff's distress in

for infliction of emotional distress. *See, e.g.*, Doe v. Friedfinder Network, Inc., 540 F. Supp. 2d 288 (D.N.H. 2008).

91. 2 Dan B. Dobbs et al., The Law of Torts § 386, at 551 (2d ed. 2011).

92. Goldberg et al., *supra* note 52, at 223. While an outrageousness finding is primary, according to the Restatement the victim must suffer emotional distress "so severe that no reasonable man could be expected to endure it." Restatement (Second) of Torts § 46 cmt. j (1965).

93. *See, e.g.*, Brewer v. Erwin, 600 P.2d 398 (Or. 1979), *abrogated by* McGanty v. Staudenraus, 901 P.2d 841 (Or. 1995) (example of an IIED case involving a landlord who padlocked tenant's apartment without taking steps toward a legal eviction and threatened tenant and her friends). *See generally* Susan Etta Keller, *Does the Roof Have to Cave In?: The Landlord/Tenant Power Relationship and the Intentional Infliction of Emotional Distress*, 9 Cardozo L. Rev. 1663 (1988).

94. Restatement (Second) of Torts § 46 cmt. e–f (1965); *see also* 2 Dobbs et al., *supra* note 91, § 386, at 551. Courts analyzing IIED claims have suggested that "the more power and control that a defendant has over a plaintiff, the more likely defendant's conduct should be deemed to be outrageous." Graham v. Commonwealth Edison Co., 742 N.E.2d 858, 866 (Ill. App. Ct. 2000). Familiar contexts include creditor–debtor, landlord–tenant, and employer–employee. *See, e.g.*, GTE Sw., Inc. v. Bruce, 998 S.W.2d 605 (Tex. 1999) (involving an employer–employee relationship that was characterized by the employer's abuse of power). In the employer–employee context, for example, courts have reasoned that the power dynamic intrinsic in the employment relationship may exacerbate the outrageousness of the defendant's actions and the severity of the victim's emotional distress. Frank J. Cavico, *The Tort of Intentional Infliction of Emotional Distress in the Private Employment Sector,* 21 Hofstra Lab. & Emp. L.J. 109, 141 (2003).

95. *See, e.g.*, E. Airlines, Inc. v. King, 557 So. 2d 574 (Fla. 1990) (discussing Florida's NIED cause of action and section 500 of the Second Restatement of Torts, which requires that the defendant's conduct create "an unreasonable risk of physical harm to another"); Gilliam v. Stewart, 291 So. 2d 593 (Fla. 1974), *abrogated on other grounds by* Meek v. Zell, 665 So. 2d 1048 (Fla. 1995); Howard v. Bloodworth, 224 S.E.2d 122 (Ga. Ct. App. 1976).

order to recover on an NIED claim.[96] Courts have justified the bodily injury requirement as "designed to provide some guaranty of the genuineness of the claim in the face of the danger that claims of mental harm will be falsified or imagined."[97]

A distinct line of decisions, called "bystander" cases, allows recovery to plaintiffs who, while not themselves in the zone of danger, are traumatized as a result of witnessing the defendant carelessly cause physical harm to a close relative.[98] Notably, whereas in the zone-of-danger context there is still a relational connection between the defendant and the victim (for example, a driver who almost runs over a victim exhibits conduct that was not merely careless in the abstract but specifically careless as to the victim), in bystander cases the defendant is not careless as to the bystander's physical well-being (since, by definition, the bystander is out of the zone of danger).[99] Instead, these claims are grounded in purely emotional harm, premised on the notion that it is emotionally distressing to see a loved one in danger.[100]

The explicit approach to considering victim emotion in the civil-law context is thus tightly circumscribed, much like the explicit approach in the

96. *See, e.g.*, Burns v. Jaquays Mining Corp., 752 P.2d 28 (Ariz. Ct. App. 1988), *petition for review dismissed* 781 P.2d 1373 (Ariz. 1989) (discussing Arizona's NIED cause of action). CIED statutes, by contrast, have never required evidence of bodily injury.

97. Czaplicki v. Gooding Joint Sch. Dist. No. 231, 775 P.2d 640, 646 (Idaho 1989). Other states award damages in "zone-of-danger" or "near-miss" cases because, while the defendant's carelessness does not result in physical harm to the plaintiff, the plaintiff, having perceived that she was almost physically harmed, suffers emotional distress. GOLDBERG & ZIPURSKY, *supra* note 81, at 131. Courts will hold the defendant liable if the plaintiff can show that she was in the zone of danger such that the defendant's carelessness put her at risk of physical harm and that this risk is what caused her emotional distress. *Id.* Scholars have also raised the question of whether, irrespective of any physical impact, defendants should be held liable for emotional harm based on merely negligent conduct. *See, e.g.*, David Crump, *Evaluating Independent Torts Based upon "Intentional" or "Negligent" Infliction of Emotional Distress: How Can We Keep the Baby from Dissolving in the Bath Water?*, 34 ARIZ. L. REV. 439, 506 (1992) ("[R]ecognition of the general tort of negligent infliction of emotional distress would impose liability . . . upon a wide variety of ostensibly innocent activities. It would affect the conduct of a broad spectrum of individuals and businesses, as indeed the tort law is supposed to do; in this instance, however, it would have unintended and dysfunctional results.").

98. *See, e.g.*, Dillon v. Legg, 441 P.2d 912, 919–22 (Cal. 1968) (holding that, where a person creates a risk of physical harm to another and it would be reasonably foreseeable that such conduct would also cause emotional harm, the person creating the risk is liable for the ensuing emotional distress). Notably, this expansion is nonetheless still predicated on the perceived risk of physical harm, whether as perceived by the person in the zone of danger or by the bystander.

99. Scholars explain this extension of the traditional understanding of negligence as a derivative or vicarious liability, that is, the bystander, as a close relative, is given the power to sue "derivatively, as the vicarious beneficiary of the defendant's breach of a duty owed to the relative." GOLDBERG & ZIPURSKY, *supra* note 81, at 133–34 (emphasis omitted) (internal quotation marks omitted).

100. To prevent a flood of litigation, courts have also limited the bystander category to "close relatives of the victim who can demonstrate that they were distressed by virtue of contemporaneously witnessing firsthand the careless injuring of the victim." *Id.* at 133; *see also* Thing v. La Chusa, 771 P.2d 814, 830 (Cal. 1989).

criminal-procedure context, which is limited to sentencing. By contrast, CIED laws represent a novel introduction of the explicit approach in the context of substantive criminal law, and these laws are not subject to the limiting principles that exist in tort.

III. Criminal Infliction of Emotional Distress Statutes

This Part identifies and examines CIED statutes, which include certain laws designed to combat behaviors like harassing, stalking, and bullying. Most significantly, what unites these statutes is the inclusion of emotional distress, standing alone, as a distinct criminal harm. These statutes explicitly specify emotional harm as the required result of the defendant's conduct. In doing so, they depart from the criminal law's traditional, implicit approach to victim emotion,[101] and they thus bring into the scope of criminal activity a range of behaviors that would not otherwise constitute criminal conduct.

CIED statutes go by a variety of names in different jurisdictions,[102] but there is tremendous overlap in their use.[103] Yet despite their shared features and overlapping elements, the scholarly literature has not drawn connections between the different sorts of CIED statutes in order to assess the scope of CIED law. Instead, the shared text of these laws tends to be obscured by the different situations to which they are applied. A peer-bullying case looks very different from a stalking case involving intimates,[104] and scholars tend to focus on discrete areas of substantive law,[105] such as the question of whether a particular emotionally harmful behavior, like bullying, should be unlawful.[106] Yet it is crucial to understand these laws as overlapping, interconnected, and representative of the same phenomenon in order both to comprehend the expansive scope of CIED law and to explore common problems and possible reforms.

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101. *See supra* Section I.B.

102. See *infra* Appendix for a list of CIED statutes and key features.

103. *See infra* notes 150–152 and accompanying text.

104. Furthermore, the colloquial understanding of "bullying" or "stalking" may not reflect the statutory text of CIED laws. For example, whereas many stalking statutes broadly characterize criminal behavior as "harassing," the dominant example of stalking in popular discourse is as a particular course of conduct involving a deranged, obsessive man stalking his desired prey, typically a woman who does not share his affection. Similarly, when advocacy groups lobby for bullying legislation, they tend to have a particular peer-bullying case in mind, no matter that the case ultimately gets charged under a stalking statute. The aforementioned Florida case, in which police arrested two girls for stalking, is illustrative. Although the case was colloquially described as a peer-bullying case, it was charged under Florida's stalking statute. *See supra* notes 1–2 and accompanying text.

105. For academic treatments focused on the peer-bullying context, see, for example, Ari Ezra Waldman, *Hostile Educational Environments*, 71 Md. L. Rev. 705 (2012). For scholarly discussion focused on the stalking context, see, for example, Carol E. Jordan et al., *Stalking: Cultural, Clinical, and Legal Considerations*, 38 Brandeis L.J. 513 (2000).

106. *See, e.g.*, Leah M. Christensen, *Sticks, Stones, and Schoolyard Bullies: Restorative Justice, Mediation and a New Approach to Conflict Resolution in Our Schools*, 9 Nev. L.J. 545 (2009); Lyrissa Lidsky & Andrea Pinzon Garcia, *How Not to Criminalize Cyberbullying*, 77 Mo. L. Rev. 693 (2012).

A. *Elements*

This Section provides a taxonomy of CIED statutes, briefly outlining their key features—act, intent, and result. By way of orientation, one sample CIED statute reads as follows: "A person is guilty . . . when the person knowingly engages in a course of conduct directed at a specific person and that conduct would cause a reasonable person to . . . suffer other significant mental anguish or distress."[107] In this example, the prohibited act is "a course of conduct," the intent requirement is "knowingly," and the degree of emotional distress required to constitute a crime is "significant" and assessed on the basis of what "a reasonable person" would experience.[108] Other variations of the CIED elements are delineated below.

1. Act

Some CIED statutes specify conduct that constitutes criminal activity—for example, following someone[109]—while other statutes either do not describe prohibited conduct or include a nonexhaustive set of examples. Wyoming's statute, for example, includes some types of contact that could constitute stalking, although the statute specifies that the list is nonexhaustive. These include "[c]ommunicating, anonymously or otherwise, or causing a communication with another person by verbal, electronic, mechanical, telegraphic, telephonic or written means," and the catchall behavior of "[o]therwise engaging in a course of conduct" that causes emotional distress.[110] In Delaware, no particular form of communication is specified, but criminal culpability may attach where a defendant "insults, taunts or challenges another person."[111]

2. Intent

The intent requirement for CIED statutes ranges considerably. Some states require the defendant's specific intent to intimidate or terrorize the victim.[112] Other states require proof that the defendant specifically intended "to cause . . . emotional distress"[113] or to "harass, annoy, or alarm"[114] the victim. Some states allow conviction under CIED statutes upon proof of the

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107. Del. Code Ann. tit. 11, § 1312 (2007 & Supp. 2012).

108. Del. Code Ann. tit. 11, § 1312(e)(2) further specifies that "'[a] reasonable person' means a reasonable person in the victim's circumstances."

109. *See, e.g.*, S.D. Codified Laws § 22-19A-1(1) (2006).

110. Wyo. Stat. Ann. § 6-2-506(b) (2013); *see also* Colo. Rev. Stat. § 18-3-602(1)(b) (2013) (defining the actus reus as when defendant "makes any form of communication with that person, a member of that person's immediate family, or someone with whom that person has or has had a continuing relationship").

111. Del. Code Ann. tit. 11, § 1311(a)(1).

112. *See, e.g.*, N.M. Stat. Ann. § 30-3A-3 (2004 & Supp. 2013).

113. *See, e.g.*, D.C. Code § 22-3133 (LexisNexis 2001).

114. Del. Code Ann. tit. 11, § 1311(a).

defendant's "intent to . . . embarrass."[115] Other states do not require proof that the defendant intended to cause any harm, so long as the defendant intended to commit the act that resulted in emotional harm to the victim.[116] Of those CIED statutes that do not require the defendant's specific intent to emotionally harm the victim, some statutes impose a negligence standard, requiring that the defendant knew or should have known that the behavior would cause emotional distress.[117] For example, Utah, which uses such a negligence standard, requires that, to be criminally liable, the defendant "knows or should know" that the person would suffer emotional distress.[118]

Only Maryland's CIED statute affirmatively requires that the defendant be on notice that conduct is unwanted.[119] Some statutes explicitly state that the defendant need not be on notice and that the lack of such notice cannot be used as a defense. For example, in Delaware, where stalking is a Class G felony, "it shall not be a defense that the perpetrator was not given actual notice that the course of conduct was unwanted; or that the perpetrator did not intend to cause the victim fear or other emotional distress."[120]

3. Result

CIED statutes uniformly specify a victim's emotional distress as the result element. But the level of emotional distress that the statutes require differs considerably across states. Some states require severe or substantial emotional harm;[121] others require significant emotional distress;[122] and still others require simple emotional distress.[123] Many states explicitly clarify that a victim's emotional distress need not be so severe as to "require medical or other professional treatment or counseling."[124]

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115. Tex. Penal Code Ann. § 42.07(a) (West 2013). Some states include a catchall intent requirement, "improper purpose," without clarifying its scope. Ala. Code § 13A-6-90.1(a) (LexisNexis Supp. 2013).

116. *See, e.g.*, Del. Code Ann. tit. 11, § 1312(a); N.Y. Penal Law § 120.45 (McKinney 2014).

117. *See, e.g.*, Del. Code Ann. tit. 11, § 1312(a); Wyo. Stat. Ann. § 6-2-506(b) (2013).

118. Utah Code Ann. § 76-5-106.5(2) (LexisNexis 2012).

119. Md. Code Ann., Crim. Law § 3-803 (LexisNexis 2012).

120. Del. Code Ann. tit. 11, § 1312(h) (Supp. 2012).

121. *See, e.g.*, R.I. Gen. Laws § 11-52-4.2 (2002 & Supp. 2013) (requiring conduct that "would cause a reasonable person to suffer substantial emotional distress").

122. *See, e.g.*, W. Va. Code Ann. § 61-2-9a (LexisNexis 2008).

123. *See, e.g.*, 720 Ill. Comp. Stat. 5/12-7.3 (2012). A few states use terms other than "emotional distress" to characterize the nonphysical harm that could give rise to conviction under their CIED statutes. For example, Texas criminalizes behavior that may "embarrass, or offend another," Tex. Penal Code Ann. § 42.07 (West 2013), and Maine criminalizes behavior that may result in "serious inconvenience." Me. Rev. Stat. Ann. tit. 17-A, § 210-A (2013).

124. *See, e.g.*, Del. Code Ann. tit. 11, § 1312(a)(2) (2007 & Supp. 2012). No state requires that the victim's emotional distress be serious enough to demand medical or other professional attention.

States also differ regarding whether harm is assessed as part of an objective inquiry, a subjective inquiry, or both. Some states require both subjective and objective inquiries, asking whether a reasonable person would suffer emotional distress under the circumstances and also whether the particular victim suffered emotional distress.[125] Other states require only a subjective inquiry, asking whether the particular victim suffered emotional distress.[126] In some states, there is no requirement of actual harm; thus, if a given situation would cause a reasonable person emotional harm, the prosecutor need not prove that the victim actually suffered harm.[127] For example, Utah's stalking statute does not require that the victim was actually afraid or suffered emotional distress.[128]

B. *Expansive Tendencies*

This Section traces the history of CIED statutes and delineates four ways in which they have expanded the scope of punishable conduct. It also highlights the role of the National Center for Victims of Crime ("NCVC"), a leading victims' rights organization, in advocating for these reforms. Specifically, in 2007 the NCVC published a "Model Stalking Code," which encouraged states to broaden the reach of their CIED statutes and proposed model legislation. Many states have since complied with the NCVC recommendations, resulting in substantially expanded CIED statutes that may be applied to a range of behaviors that could be classified as harassing, stalking, or bullying. The expansiveness of modern-day CIED statutes is particularly dramatic when examined alongside the traditional requirements of criminal assault or the doctrines cabining tort law.

1. Expanding the Criminal Result: From Reasonable Fear to Emotional Distress

This subsection demonstrates the development of emotional distress as independent criminal harm. It traces the origin of the CIED result element, from early assault statutes to harassment laws, then to stalking laws that required fear, and finally to the relaxation of the requirement of fear in modern stalking statutes and the elevation of emotional distress as independent criminal harm.

Reasonable fear of imminent injury is an element of assault in many jurisdictions and in the Model Penal Code, which defines simple assault as "attempts by physical menace to put another in fear of imminent serious

125. *See infra* Appendix.

126. *See infra* Appendix.

127. *See, e.g.*, DEL. CODE ANN. tit. 11, § 1312.

128. UTAH CODE ANN. § 76-5-106.5 (LexisNexis 2012). Utah's stalking statute also does not require that the defendant intended harm, instead employing a negligence standard such that the defendant could be found criminally liable without intending the victim any harm and without actually causing the victim any harm. *Id.*

bodily injury."[129] Beginning in the 1960s, harassment statutes began expanding the "reasonable-fear" requirement intrinsic to criminal law assault.[130] By the mid-1980s, every state had telephone harassment laws,[131] which were designed to address practical issues attendant to the widespread proliferation of home telephones, such as concerns about obscene and profane calls,[132] repeated calls in the middle of the night,[133] and tied up landlines.[134] Instead of requiring that the defendant's conduct cause a reasonable victim to fear future harm, some of these statutes demanded only that the defendant's behavior cause a reasonable person to be "seriously alarmed, annoyed, or harassed."[135] Harassment statutes, which broadened criminal harm to include "annoying" or "insulting" behavior as distinct from "fear of imminent injury,"[136] presaged modern stalking statutes, which represent the criminal law's first explicit foray into criminalizing discrete emotional harm.

Stalking statutes did not originate as CIED statutes, however. Rather, early stalking statutes required that the defendant put the victim in fear of death or physical injury; emotional distress was not enough to trigger culpability.[137] Concerned that law enforcement was not able to intervene early

129. Model Penal Code § 211.1(1)(c) (1962).

130. *See, e.g.*, N.Y. Penal Law § 240.25 (McKinney 2014); *see also* New York v. Keim, 308 F. Supp. 421 (S.D.N.Y. 1969) (discussing jurisdictional issues over New York harassment crime).

131. Note, *A Remedial Approach to Harassment*, 70 Va. L. Rev. 507, 522 (1984).

132. *E.g.*, Hall v. State, 498 P.2d 415 (Okla. Crim. App. 1972) (upholding a jury's conviction where complainant testified that defendant requested that he be allowed to perform "unnatural sex acts on her person" and, when asked to identify himself, replied that he would do so only if she complied with his request); *cf.* Sanders v. State, 306 So. 2d 636 (Miss. 1975) (finding that the words "'I want you,' standing alone, are neither profane, vulgar, indecent, threatening, obscene nor insulting" for purposes of a criminal harassment charge).

133. *E.g.*, State v. Zeit, 539 P.2d 1130 (Or. Ct. App. 1975).

134. *E.g.*, Von Lusch v. State, 356 A.2d 277, 283 (Md. Ct. Spec. App. 1976), *rev'd on other grounds*, 368 A.2d 468 (Md. 1977). When the harassment charge was based on threats conveyed by telephone, courts found that a single telephone call threatening bodily harm was sufficient to violate the harassment statute. State v. Mack, 499 S.E.2d 355, 356 (Ga. Ct. App. 1998).

135. *See, e.g.*, Ariz. Rev. Stat. Ann. § 13-2921(E) (1992); Ark. Code Ann. § 5-71-208(a) (2005).

136. Arguably, these early harassment statutes largely targeted nonemotional harms—for example, waking people up at night or keeping them from being able to use their phones in the way they would like. In a sense, therefore, the aim of these statutes was to address the problem of "disturbing the peace" through telephones. Modern stalking statutes, however, have recharacterized "annoyance" and "harassment" as emotional harms.

137. *See, e.g.*, Alaska Stat. Ann. § 11.41.270(a) (1993). The move to criminalize stalking was triggered by a cluster of highly publicized murders in the late 1980s, most notably the murder of television actress Rebecca Schaeffer by Robert Bardo, a nineteen-year-old who "carried a publicity photo of the actress with him, called her publicity agency several times, and sent her fan mail." Robert N. Miller, Note, *"Stalk Talk": A First Look at Anti-Stalking Legislation*, 50 Wash. & Lee L. Rev. 1303, 1303 (1993). In the same year, during one six-week period, five women were killed by their former husbands or boyfriends in Orange County, California.

enough to prevent violent attacks,[138] some states modified their statutes to include emotional distress in addition to fear.[139]

Since the first generation of stalking statutes emerged in the early 1990s, the coverage of stalking laws has continued to expand. Many states now include a catchall clause that explicitly criminalizes any course of conduct that causes emotional distress, even without traditional physical stalking behaviors.[140] Some states reached that point by passing a second generation of stalking legislation, while others modified existing laws to isolate or specify emotional distress as criminal harm.[141] The federal government has done the same; in 2006, Congress expanded its law criminalizing interstate stalking to include conduct causing "substantial emotional distress" to the victim.[142]

There remains continued pressure to expand the reach of stalking laws. The NCVC's Model Stalking Code favors eliminating such modifiers as "severe" or "substantial," preferring that a stalking conviction require a showing only of "significant" emotional distress.[143] The Model Stalking Code also clarifies that emotional distress need not "rise to the level of psychological trauma requiring medical intervention or proof of any type of long-term ill effects."[144] Furthermore, the NCVC's model legislation report notes that numerous courts have found that no independent expert testimony is necessary to substantiate a victim's emotional distress.[145]

Recently, many states and advocacy groups have turned their attention toward bullying, urging legislative reform that would criminalize the infliction of emotional distress in the peer-bullying context.[146] In the context of

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Id. By 1993, all states and the District of Columbia had laws that criminalized stalking behaviors. Paul Mullen & Michele Pathé, *Stalking*, 29 CRIME & JUST. 273, 274–75 (2002).

138. *See infra* Section III.C.1 (discussing the prophylactic justification for criminalizing emotional harm).

139. *See, e.g.*, H.R. 1168, 62d Gen. Assemb., 1st Reg. Sess. (Colo. 1999) (enacted) (amending COLO. REV. STAT. § 18-9-111 to include emotional distress); *see also* NAT'L CTR. FOR VICTIMS OF CRIME, THE MODEL STALKING CODE REVISITED: RESPONDING TO THE NEW REALITIES OF STALKING 40 (2007) [hereinafter MODEL STALKING CODE], *available at* http://www.victimsofcrime.org/docs/src/model-stalking-code.pdf (explaining NCVC's reasons for revising the 1993 Model Stalking Code to include emotional distress in addition to fear).

140. *E.g.*, DEL. CODE ANN. tit. 11, § 1311(a)(1) (2007 & Supp. 2012) (defining as criminal when a defendant "engages in any other course of alarming or distressing conduct which serves no legitimate purpose").

141. *See, e.g.*, H.R. 1168, 62d Gen. Assemb., 1st Reg. Sess. (Colo. 1999) (enacted) (amending COLO. REV. STAT. § 18-9-111 to include emotional distress). In 2010, the stalking statute's relevant provisions were relocated. They currently appear at COLO. REV. STAT. §§ 18-3-601 to -602 (2013). *See* H.R. 1233, 67th Gen. Assemb., 2d Reg. Sess. (Colo. 2010) (enacted).

142. Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub L. No. 109-162, § 114, 119 Stat. 2960, 2987 (2006) (codified as amended at 18 U.S.C.A. § 2261A (West Supp. 2013)).

143. *See* MODEL STALKING CODE, *supra* note 139, at 48.

144. *Id.*

145. *See id.*

146. Legislative and advocacy efforts have included proposals for new criminal statutes, for expanded education codes, and for statewide school policies to address bullying. *E.g.*, VICTORIA STUART-CASSEL ET AL., U.S. DEP'T OF EDUC., ANALYSIS OF STATE BULLYING LAWS AND

peer-to-peer youth bullying, advocates have stressed a need to intervene before tragedy ensues in the form of teenage suicide.[147] Although modern bullying laws could cover physical abuse, these laws are primarily designed to combat emotional abuse that is not covered by existing assault laws. For example, the bullying laws are designed to address verbal abuse either in person or on social networks. Here, even beyond a worry that nominal teasing or harassment may escalate into violent behavior, the dominant concern is explicitly the emotional harm that could lead a youth to engage in self-abuse. And, in states that do not explicitly criminalize bullying, prosecutors have turned to existing statutes, relying on a CIED theory: A causes B emotional distress. B commits suicide. A is criminally charged for causing B emotional distress.[148]

Some states have enacted or proposed criminal laws specifically to address bullying,[149] while others have appropriated harassment or stalking statutes to cover bullying behaviors.[150] For example, the provisions of Kentucky's harassment statute were incorporated into the "Golden Rule Act" (receiving an A++ grade from the Bully Police USA[151]) and include a nonexhaustive list of possible bullying behaviors that "cause another student to suffer fear of physical harm, intimidation, humiliation, or embarrassment."[152] The range of possible harm is vast; for purposes of conviction under the harassment statute, "fear of physical harm" is indistinguishable from "embarrassment."

While many states have modified their harassment laws to isolate emotional distress as criminal harm,[153] the range of culpable conduct varies among states with CIED statutes. Some states look to whether a reasonable

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POLICIES 19–20 (2011), *available at* http://www2.ed.gov/rschstat/eval/bullying/state-bullying-laws/state-bullying-laws.pdf. The success of these efforts has been dramatic; in 1999, one state enacted bullying legislation, whereas by 2010 twenty-one states had enacted bullying legislation of one sort or another. *Id.* at xi.

147. *See, e.g.*, *id.* at 1; Justin W. Patchin & Sameer Hinduja, *Cyberbullying and Self-Esteem*, 80 J. SCH. HEALTH 614, 619–20 (2010).

148. *E.g.*, *supra* note 2 and accompanying text.

149. *E.g.*, IDAHO CODE ANN. § 18-917A (Supp. 2014); N.C. GEN. STAT. § 14-458.1 (2013).

150. Various sources suggest applying traditional stalking or harassment statutes to bullying behaviors. *E.g.*, Christopher S. Burrichter, Comment, *Cyberbullying 2.0: A "Schoolhouse Problem" Grows Up*, 60 DEPAUL L. REV. 141, 173–74 (2010); Tracy Tefertiller, Note, *Out of the Principal's Office and into the Courtroom: How Should California Approach Criminal Remedies for School Bullying?*, 16 BERKELEY J. CRIM. L. 168, 216–17 (2011).

151. *Kentucky*, BULLY POLICE USA, http://www.bullypolice.org/ky_law.html (last visited Oct. 14, 2014).

152. KY. REV. STAT. ANN. § 525.070(1)(f)(3) (LexisNexis 2008). For purposes of comparison, according to Kentucky's harassment statute, if a defendant communicates with another with the intent to annoy, and if the communication is such that "a reasonable person under the circumstances should know [it] would cause another student to suffer fear of physical harm, intimidation, humiliation, or embarrassment," the defendant can be convicted of a Class B misdemeanor. KY. REV. STAT. ANN. § 525.080.

153. *See supra* note 146.

person would have experienced emotional distress,[154] while others look to whether a reasonable person in the victim's circumstances would have suffered emotional harm.[155] The latter is a more subjective standard and takes into account the victim's preexisting level of emotional fragility, generally without requiring that the defendant knew or should have known of the victim's particular vulnerability. In the CIED context, this further inquiry is increasingly required by statute, and courts have delved into the depths of parties' relationships in order to determine whether particular behaviors are liable to cause emotional distress.[156]

The Model Stalking Code advocates adding "in the victim's circumstances" to those statutes that still use a chiefly objective standard.[157] Incorporating a victim's subjective circumstances in this way is understood to address the concerns of victims' rights advocates about cases where a defendant's conduct might be viewed as neutral or even positive as a general matter but in a particular context the same conduct could cause emotional distress to a victim.[158] For example, in one case where a defendant left letters of poetry on the victim's windshield and mailed a few nonthreatening cards to her house, the court examining how a reasonable person in the victim's circumstances would respond found that this conduct alone could reasonably cause the victim emotional harm.[159]

2. Expanding the Criminal Act: Beyond Physical Proximity

Although physical proximity was traditionally a prerequisite for any assault-related crime, technological advances made this requirement obsolete. The widespread use of the telephone fundamentally changed the landscape and gave rise to telephone-harassment statutes; the modern internet age has further rendered obsolete the requirement of physical proximity and expanded the scope of criminal activity.

The rise of telephone use was accompanied by a perceived need for telephone-harassment statutes, which criminalized harassing communications

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154. *See, e.g.*, ME. REV. STAT. tit. 17-A, § 210-A (West Supp. 2013).

155. *See, e.g.*, S.C. CODE ANN. § 16-3-1700 (West Supp. 2013).

156. *See, e.g.*, State v. Yuhas, 243 P.3d 409, 410 (Mont. 2010); State v. McCarthy, 980 P.2d 629, 633 (Mont. 1999); Bott v. Osburn, 257 P.3d 1022, 1026–27 (Utah App. 2011). Courts have also relied on gross generalities and gender stereotypes to make assumptions about how a reasonable person in the victim's circumstances would likely react. *See, e.g.*, State v. Ryan, 969 So. 2d 1268, 1271 (La. Ct. App. 2007); *see also infra* Section IV.D.

157. MODEL STALKING CODE, *supra* note 139, at 37.

158. *Id.*

159. State v. Breen, 767 A.2d 50, 53 (R.I. 2001). This Article suggests that such examples cast significant doubt on the wisdom of a subjective inquiry in this context. Some commentators, however, lament courts' inability (in "credible-threat" jurisdictions) to use stalking statutes more widely. *See, e.g.*, Wayne E. Bradburn, Jr., Comment, *Stalking Statutes: An Ineffective Legislative Remedy For Rectifying Perceived Problems with Today's Injunction System*, 19 OHIO N.U. L. REV. 271, 284 (1992) (advocating a subjective inquiry and using, as an illustration of a case that should be prosecutable as stalking, the example of a defendant whose "*modus operandi* was to tape a pack of chewing gum onto envelopes that were addressed to his victim").

by phone. These statutes divorced assault from physical proximity. With the vast spread in telephone use, someone could be miles away yet still engage in assaultive behavior. Although some harassment statutes required a credible threat of imminent harm, others did not, thus expanding the law's definition of assault.

Furthermore, because definitions of harassment are increasingly variable,[160] notions of what behavior could be criminal continue to expand. A prime example is the increased attention to cyberharassment, now that the internet and social networks allow individuals to communicate with an increasingly broad array of readers and viewers. Many CIED statutes have been expanded to cover cyberharassment explicitly,[161] further expanding the possible universe of assaultive behaviors.

Thus, whereas the standard definition of stalking involves physical following (as with a predator stalking prey[162]), in many jurisdictions the legal definition of stalking is significantly broader and includes any repeated communication, whether in person, by telephone, online, or by post. For example, in Alabama one can be convicted of stalking if one "repeatedly follows or harasses another person."[163] By contrast, Alabama's separate "harassment" offense clearly defines prohibited conduct as requiring that the defendant either (1) "[s]trikes, shoves, kicks, or otherwise touches a person or subjects him or her to physical conduct;"[164] or (2) "[d]irects abusive or obscene language or makes an obscene gesture towards another person."[165] Additionally, "harassment shall include a threat, verbal or nonverbal."[166] In this particular context, the difference between harassment and stalking statutes is significant. Stalking requires "repeated" conduct while harassment requires only a single threat. But whereas harassing behavior, if repeated, would constitute stalking, the universe of conduct that could constitute stalking is far more vast and varied than that which would constitute harassment.[167]

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160. The sexual-harassment context provides a useful analogy; the definition of "sexual harassment" has evolved considerably over time, and the law continues its struggle to define the parameters of actionable conduct. *See, e.g.*, Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061, 2088 (2003) (noting the many different definitions of sexual harassment); Vicki Schultz & Eileen Goldsmith, *Sexual Harassment: Legal Perspectives*, *in* 21 INTERNATIONAL ENCYCLOPEDIA OF SOCIAL & BEHAVIORAL SCIENCE 13,982 (Neil J. Smelser & Paul B. Baltes eds., 2001).

161. *See, e.g.*, WYO. STAT. ANN. § 6-2-506(b) (2013).

162. According to *Merriam-Webster*, the definition of the verb "stalk" is "to follow (an animal or person that you are hunting or trying to capture)." *Definition of Stalk*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/stalk (last visited Sept. 15, 2014).

163. ALA. CODE § 13A-6-90(a) (LexisNexis Supp. 2013).

164. ALA. CODE § 13A-11-8(a)(1)(a).

165. ALA. CODE § 13A-11-8(a)(1)(b).

166. ALA. CODE § 13A-11-8(a)(2).

167. Furthermore, although the result element for harassment is that the victim "fear for his or her safety," the result element for stalking is that the victim experience mental or emotional harm. *Compare* ALA. CODE § 13A-11-8, *with* ALA. CODE § 13A-6-90.1.

In some states, the distinction between the acts that could constitute harassment and stalking is even murkier, with both harassment and stalking requiring "repeated conduct," also described as a "course of conduct." For example, in Wisconsin one can be convicted of either harassment or stalking if one "engages in a course of conduct" that causes the victim harm.[168]

The NCVC has published a list entitled "Examples of Stalking Behaviors State Laws Should Cover," but it clarifies that this list "in no way reflects the full scope of possible actions in which a stalker might engage."[169] The list includes "engaging in obsessive or controlling behaviors," "disseminating embarrassing or inaccurate information about a victim," and "sending flowers, cards, or e-mail messages to a victim's home or workplace."[170] Additional conduct that could be covered under CIED statutes includes calling a person and hanging up, repeated emails declaring one's love, or even repeated communication of apology.[171]

Academics have also contributed to an expansion of the popular definition of stalking. For example, in a recent Texas study of stalking, interviewers attempting to gauge the prevalence of stalking behaviors began their interviews by providing the following definition of stalking: "deliberate but unwanted acts by a person to get your attention because he or she wants to have a relationship with you, has a relationship with you, or assumes there is a relationship with you when there is not."[172] Such broad definitions are becoming more common in the academic literature.[173]

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168. Wis. Stat. § 947.013 (2012) (harassment statute); Wis. Stat. § 940.32 (stalking statute). A significant difference between the Wisconsin statutes is that only the stalking statute refers to "emotional distress" in addition to "fear of bodily injury . . . or . . . death." *Id.* § 940.32. Thus, the result element distinguishes the harassment and stalking statutes, but the repeated conduct could be the same.

169. Model Stalking Code, *supra* note 139, at 21.

170. *Id.*

171. Ashley N.B. Beagle, Comment, *Modern Stalking Laws: A Survey of State Anti-Stalking Statutes Considering Modern Mediums and Constitutional Challenges*, 14 Chap. L. Rev. 457, 457–58, 63 (2011) (describing an "archetypal" stalking case where, after a breakup, a man spent years calling, emailing, and leaving messages on social media for his ex-girlfriend begging her to take him back, apologizing, declaring his love, and sometimes making threats).

172. Glen Kercher & Matthew Johnson, Crime Victims' Inst., Stalking in Texas 6 (2007). Under this definition, a bar patron's single attempt to strike up a conversation with hopes of beginning a more intimate relationship with a second—uninterested—bar patron could constitute stalking.

173. *See, e.g.*, Maria T. Lopez & Carol M. Bast, *The Difficulties in Prosecuting Stalking Cases*, 45 Crim. L. Bull. 54, 73–78 (2009) (proposing a variety of amendments to Florida stalking laws that would broaden the definition of stalking and make stalking incidents easier to prosecute successfully); Mullen & Pathé, *supra* note 137, at 277 ("[S]ome complaints may well be made about behavior that others would shrug off as part of life's mundane inconveniences, [but since stalking is victim defined] perpetrators have to take their victims as they find them—eggshell skulls, peculiar sensitivities, and all . . . .").

3. Broadening the Mens Rea Requirement: From Specific to General Intent

While common law criminal assault required intent to cause fear of imminent bodily harm, the intent requirement for early harassment statutes—the precursors of CIED statutes—was significantly more expansive. Most specified the following requisite intent: intent to terrify, intimidate, threaten, harass, annoy, or offend.[174] Of particular significance is the chasm that exists between intent to cause fear and intent to annoy or offend.

While early stalking statutes resembled traditional assault statutes in that they required that the defendant intended to put the victim in fear of bodily injury or death, many CIED statutes have eliminated this requirement. Moreover, while some states require the defendant's specific intent to intimidate or terrorize the victim in order to convict under a CIED statute,[175] others do not require proof that the defendant intended to cause any harm, so long as the defendant intended to commit the act that resulted in emotional harm to the victim.[176]

A general intent formulation is increasingly common and favored by the NCVC's Model Stalking Code.[177] The NCVC "recommends that states incorporate a general intent requirement into their stalking laws instead of a specific intent requirement."[178] The general intent requirement in NCVC states ranges from intentional[179] to purposeful[180] to knowing[181] conduct; what unifies these statutes, however, is that there is no requirement that the defendant intended to cause the victim emotional (or other) harm. Thus, while the conduct must be intentional, the specific aim of causing the victim emotional distress need not be.[182]

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174. *See, e.g.*, N.M. Stat. Ann. § 30-20-12 (2004 & Supp. 2013); Seattle, Wash. Mun. Code § 12A.06.100 (2014), http://clerk.seattle.gov/~scripts/nph-brs.exe?s1=12A.06.100&s2=&S3=&Sect4=AND&l=0&Sect3=PLURON&Sect5=CODE1&d=CODE&p=1&u=%2F~public%2Fcode1.htm&r=1&Sect6=HITOFF&f=G; *see also* City of Seattle v. Huff, 767 P.2d 572 (Wash. 1989) (upholding statute against challenges of overbreadth and vagueness).

175. *See, e.g.*, N.M. Stat. Ann. § 30-3A-3.

176. *See, e.g.*, Del. Code Ann. tit. 11, § 1312 (2007 & Supp. 2012); N.Y. Penal Law § 120.45 (McKinney 2014).

177. Model Stalking Code, *supra* note 139, at 32.

178. *Id.* Some states have amended their stalking statutes to eliminate a requirement of specific intent. *Id.* at 33.

179. *E.g.*, N.Y. Penal Law § 120.45.

180. The Model Code proposes "purposeful" to modify defendant's conduct. Model Stalking Code, *supra* note 139, at 24.

181. *See, e.g.*, R.I. Gen. Laws § 11-59-2 (2002 & Supp. 2013).

182. *See, e.g.*, Del. Code Ann. tit. 11, § 1312 (2007 & Supp. 2012).

C. *Justifications*

The primary justifications for CIED law are twofold: First, CIED statutes have been justified according to a prophylactic rationale, which is forward looking and stresses the importance of allowing police to intervene proactively, before a serious, violent crime is committed. Second, CIED statutes have been justified according to an independent wrong rationale, which holds that emotional distress is intrinsically harmful and thus worthy of attention.[183] While the prophylactic rationale focuses on the need for early intervention and the independent wrong rationale focuses on reshaping social norms to give credence to emotional injury, both of these justifications are keenly concerned with protecting specific classes of individuals, namely women and children.

1. Prophylactic Rationale

According to the prophylactic rationale, CIED statutes are justified to prevent physical violence: they allow law enforcement to intervene before the victim has been physically harmed.[184] Legislative history suggests that policymakers have frequently used the prophylactic rationale to justify CIED laws.[185] For example, according to Carol Hanson, a former representative in the Florida legislature and a proponent of the state's stalking statute, "the intent of the bill is to stop the stalker before a more serious criminal offense, such as murder, occurs."[186] Florida's stalking statute, like many others, was designed as a stopgap measure to protect women from harassment before the defendant's behaviors escalated to involve physical injury or the threat thereof.[187] Courts have also cited the prophylactic rationale as part of their analysis in CIED cases.[188] A Connecticut court justified its state's stalking statute as "compelling in providing law enforcement authorities with a means for intervening in stalking situations early on, before the behavior can escalate into something more serious, including physical assault."[189]

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183. While the prophylactic rationale essentially treats CIED statutes as specific versions of general attempt laws, the independent wrong rationale has more radical implications, that is, policymakers should criminalize behaviors that cause emotional harm without any regard to whether such behaviors are likely to predict future physical harm.

184. *See, e.g.*, Beagle, *supra* note 171, at 466; Kathleen G. McAnaney et al., Note, *From Imprudence to Crime: Anti-Stalking Laws*, 68 Notre Dame L. Rev. 819, 890 (1993); Laurie Salame, Note, *A National Survey of Stalking Laws: A Legislative Trend Comes to the Aid of Domestic Violence Victims and Others*, 27 Suffolk U. L. Rev. 67, 100 & n.193 (1993).

185. *See, e.g.*, Fla. H.R., Comm. on Criminal Justice, Final Bill Analysis & Economic Impact Statement, HB 97, at 6–7 (1992).

186. *Id.*

187. James Thomas Tucker, Note, *Stalking the Problems with Stalking Laws: The Effectiveness of Florida Statutes Section 784.048*, 45 Fla. L. Rev. 609, 628–29 (1993).

188. *See, e.g.*, State v. Culmo, 642 A.2d 90, 101–02 (Conn. Super. Ct. 1993); Curry v. State, 811 So. 2d 736, 741–43 (Fla. Dist. Ct. App. 2002).

189. *Culmo*, 642 A.2d at 101–02. The Culmo court also stressed the importance of "safeguarding the mental well-being of victims," maintaining that "[p]roviding protection from

The prophylactic rationale assumes that emotional distress is often a precursor to physical harm and, therefore, that criminalizing emotional harm in stalking or bullying contexts prevents future physical harm. Such future physical harm might be imposed by the perpetrator (as in stalking contexts) or it could be self-imposed (as in some bullying cases in which the victim begins self-harming).[190]

2. Independent Wrong Rationale

CIED statutes have also been justified based on an understanding of emotional harm as no less damaging than physical harm.[191] According to the independent wrong rationale, CIED statutes are crucial to educating society and to changing social norms such that emotional harm will be understood as an independent wrong.[192] This rationale is grounded in psychological literature that asserts the primacy of emotions and the interconnectedness of mind and body.[193] Various studies have documented a link between physical and emotional well-being and have found that emotional stress can lead to physical disease.[194] CIED laws thus are intended to send a broad message that behaviors such as stalking and bullying are not acceptable in a civil society.

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stalking conduct is at the heart of the state's social contract with its citizens, who should be able to go about their daily business free of the concern that the [*sic*] may be the targets of systematic surveillance by predators who wish them ill." *Id.* at 102. While the court thus signals support for the "independent-harm" rationale, such support is based on an understanding of stalking as entailing "systematic surveillance by predators who wish them ill," which implicates a far narrower category of interactions than many state CIED statutes currently criminalize.

190. In the stalking context, the prophylactic rationale is concerned primarily with stalking escalating to violence, while in the bullying context the concern is both about escalation to violence and also the possibility that, if left unchecked, more serious and prolonged bullying behaviors might lead the victim to suicide. Arguably, the prophylactic rationale, when applied to juveniles, highlights overlap between prophylactic and independent wrong rationales. Whereas in the stalking context we are concerned mostly about the defendant's inappropriate behavior, in the juvenile context we are more concerned about the power of emotional distress and the tragic consequences of emotional harm to an impressionable juvenile.

191. *See, e.g.*, Lisa Nolen Birmingham, Note, *Closing the Loophole: Vermont's Legislative Response to Stalking*, 18 VT. L. REV. 477, 520 (1994); *cf.* ALLSOPP, *supra* note 85, at 93 (noting, in the context of tort law, that "[t]here is no intrinsic hierarchy in these different forms of harm").

192. This analysis echoes that of the sexual-harassment context, where scholars have written extensively about the subordinating effects of gender-based hostile-work-environment harassment and about the law's educative role in shifting norms. *See generally* Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183 (1989); Katherine M. Franke, *What's Wrong with Sexual Harassment?*, 49 STAN. L. REV. 691 (1997).

193. *See supra* notes 66–69 and accompanying text.

194. *See, e.g.*, Bruce S. McEwen & Peter J. Gianaros, *Central Role of the Brain in Stress and Adaptation: Links to Socioeconomic Status, Health, and Disease*, 1186 ANNALS N.Y. ACAD. SCI. 190 (2010).

The examples that dominate the discussion focus on a need to protect women and children from emotional harm. For example, the enactment of stalking statutes has been characterized as "part of a rapidly spreading effort to protect women from the terrifying advances of obsessed men."[195] In the bullying context, legislators have described criminal bullying statutes as critical to "help and protect the children."[196] In the cyber context, there is an increasing concern about anonymous online groups or "cyber-attack" groups that "attack women, people of color, and members of other traditionally disadvantaged classes."[197] Here, the concern is not about allowing early intervention or preventing future escalation but instead about protecting vulnerable populations from intrinsic emotional harm.[198]

IV. Critique of CIED Statutes

Having outlined the elements of CIED statutes and their leading justifications, the Article now assesses these statutes critically. This Part highlights tensions between CIED statutes and core criminal law values such as notice to defendants, free expression, social consensus, and equality. In doing so, it explains why these laws are unsettling: they make criminal responsibility turn directly on a new, unpredictable, and subjective category of harm rather than on clearly defined conduct and defendant mental states.

A. *Notice*

For punishment to be justified—and to satisfy the demands of predictability and fairness, two primary criminal justice values—criminal laws must provide adequate notice to defendants. Many CIED statutes fail to provide this notice because of (1) the breadth of terms describing both the prohibited behavior and the required result of the defendant's conduct; (2) the weak mental state required of defendants; and (3) the unpredictability of emotional harm. After examining these issues, this Section raises concerns about institutional competence, challenging the claim that we can rely on

195. Mitchell Landsberg, *Stalker Laws Among Many That Will Take Effect Tomorrow; California Passed the First in 1990*, Phila. Inquirer, June 30, 1992, at A5.

196. Aubrey Jackson, *New Bill Could Criminalize Cyber Bullying*, WBTW News 13 (Apr. 16, 2013, 11:59 PM), http://www.wbtw.com/story/21997569/new-bill-could-criminalize-cyber-bullying (quoting South Carolina Representative Funderburk).

197. Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. Rev. 61, 62, 66 (2009) (proposing the development of a "cyber civil rights agenda"). *See generally* Danielle Keats Citron, Hate Crimes in Cyberspace (2014); Danielle Keats Citron, Essay, *Law's Expressive Value in Combating Cyber Gender Harassment*, 108 Mich. L. Rev. 373 (2009).

198. Legislators in other countries have also justified proposed CIED legislation based on an independent wrong rationale, grounded in a desire to protect children. *See, e.g.*, *Canada Looking at Criminalizing Cyber-Bullying: PM*, Agence France-Presse, May 11, 2013 (quoting Prime Minister Harper), *available at* http://gadgets.ndtv.com/internet/news/canada-looking-at-criminalizing-cyber-bullying-pm-365523 ("The Internet is in most ways a great development for our society. . . . Unfortunately, it has other purposes and other uses, and young people are extremely vulnerable.").

institutional actors—such as prosecutors, police, and school administrators—to prevent the overreach of broad CIED laws.

Many CIED statutes do not specify prohibited conduct (instead relying on a nonexhaustive list of unwanted communications), and thus they risk criminalizing a wide array of behaviors that would be impossible to define in advance.[199] Furthermore, despite using such adjectives as "substantial" or "significant," CIED laws fail to draw a meaningful line delineating the level to which a victim's emotional distress must rise before triggering criminal culpability.[200] And the scope of CIED laws promises to expand further as states increasingly follow the lead of the NCVC and classify lower levels of emotional distress as criminal harm.[201]

The reach of CIED statutes is often vast since repeated unwanted communication is something that many, if not most, in this hyperconnected world could allege.[202] While school bullying may be the cause du jour,[203] there are unlimited contexts in which criminal-harassment statutes could apply; indeed, many repeated unwanted communications—by a stranger, by a loved one, by a former loved one, at work, at school, online, off-line—could potentially be encompassed by an expansive definition of criminal harassment.

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199. Here, the concern is both with the nonexhaustive quality of the list (that is, what constitutes criminal behavior is not specified) and with the subjective nature of "unwanted" (which adds to the difficulty in defining prohibited conduct).

200. For a related discussion of concerns regarding the threshold requirement for such inchoate crimes as solicitation and conspiracy, see generally Robert M. Chesney, *Beyond Conspiracy? Anticipatory Prosecution and the Challenge of Unaffiliated Terrorism*, 80 S. CAL. L. REV. 425, 435–36, 447–49 (2007) (describing the "inherent tension between the costs and benefits associated with preventive interventions in general, a tension that grows sharper the earlier that the intervention occurs").

201. *See supra* Section III.B.1. While concerns about a lack of clarity undercut both prophylactic and independent wrong rationales for CIED statutes, such concerns are particularly challenging in the context of the prophylactic rationale. If one intends to criminalize emotional harm qua emotional harm, while there still may be disagreement about what level of emotional harm is necessary to trigger criminal liability, at least the harm one intends to punish is the subject of inquiry. By contrast, according to the prophylactic rationale, the primary concern is preventing physical harm. Therefore, sweeping criminal legislation prohibiting unwanted communication—but with no clarity regarding at what stage behavior turns criminal such that law enforcement can or should intervene—should be especially concerning to those whose support for CIED statutes is grounded in the prophylactic rationale.

202. While CIED statutes could retain safeguards to prevent such broad application, this concern becomes increasingly salient as more states adopt the recommendations of the NCVC Model Code.

203. In *Queen Bees & Wannabes*, Rosalind Wiseman's best-selling book about bullying, Wiseman stresses the pervasiveness of gossiping and bullying behaviors: "If she's over twelve, girls have probably called your daughter a slut and/or bitch. And it's just as likely that she has called other girls a slut and/or bitch." ROSALIND WISEMAN, QUEEN BEES & WANNABES 189 (2d ed. 2009). Wiseman also highlights the pervasiveness of "Unintentional Bad Teasing," suggesting that, rather than implementing a zero-tolerance policy, schools could better address such negative interactions by informing the "teaser" that his or her behavior was hurtful, which may precipitate a good-faith apology. *Id.* at 193–94.

In addition to expanding the scope of harm that criminal law punishes, modern CIED statutes have also adopted relatively loose mental state requirements. These statutes thus lack both clear directives and a specific intent requirement. CIED statutes have broadened the type of harm the defendant intended to cause—and, even more troubling, many statutes do not require that the defendant intended to cause any harm at all. While regulatory offenses such as environmental or financial crimes may do away with specific intent requirements, at least they feature clear directives, and criminal liability is premised on a failure to follow these directives.[204] By contrast, the loosely defined harms in many CIED statutes are exacerbated by their weak intent requirements.[205]

Furthermore, emotional harm, let alone *degree* of emotional harm in a particular case, is highly variable and evades prediction. And yet, with rare exception,[206] CIED statutes neither require any warning to the defendant nor any indication that future communication is unwanted. The same unwanted communication may be a mere annoyance to one person but emotionally distressing to another, and it may be impossible to predict ex ante how the recipient of the communication will react.[207]

The unpredictability and variability of emotional responses help to explain why some CIED cases involve behaviors that may not at first blush strike readers as criminal. For example, a defendant was charged under Rhode Island's CIED statute after he sent three nonthreatening greeting cards to the complainant, his ex-girlfriend, over the course of two months. These cards included a birthday card, a Valentine's Day card, and a condolence card after the passing of her grandmother. An appellate court in Rhode Island affirmed the defendant's felony conviction for stalking, and, in attempting to analyze the conduct that might have resulted in the complainant's emotional distress, the court highlighted the "love stamps" affixed to each of these cards.[208]

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204. Of course, while the acts constituting regulatory offenses may be clearly defined, this is not to suggest that all those convicted of regulatory crimes knew that their behavior constituted a crime, and this reality is one among many reasons why regulatory-offense statutes have been criticized. *See, e.g.*, Stuart P. Green, *Why It's a Crime to Tear the Tag Off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses*, 46 EMORY L.J. 1533 (1997).

205. A voluminous literature examines problems associated with weakening mens rea requirements in criminal law, and these same concerns are present in the CIED context, although they are amplified by the lack of clearly defined prohibited conduct. *See, e.g.*, Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 725–29 (2005).

206. *See* MD. CODE ANN., CRIM. LAW § 3-803 (LexisNexis 2012) (requiring a "reasonable warning or request to stop").

207. *See, e.g.*, Janice Nadler & Mary R. Rose, *Victim Impact Testimony and the Psychology of Punishment*, 88 CORNELL L. REV. 419, 442 (2003) (noting that individuals "vary widely on how they respond and express themselves emotionally" to the same act). Notably, recent psychological research on affective forecasting suggests that not even the person on the receiving end of the communication will likely be able to predict his or her emotional reaction over the long term. *See, e.g.*, Blumenthal, *supra* note 22, at 161–65.

208. State v. Breen, 767 A.2d 50 (R.I. 2001).

While some might argue that we can rely on institutional actors—such as prosecutors, police, and school administrators—to prevent the overreach of CIED laws, this assumption fails to take into account the diverse motivations of criminal justice actors, who cannot be relied upon to pursue only the most severe CIED cases. For example, legislators may justify CIED statutes according to a prophylactic rationale, but prosecutors may prioritize the text of the law rather than focusing on the stated motivations of the legislature.[209] Notably, in one case, the defendant was incarcerated and unable physically to harm the complainant at the time of the alleged stalking incident, so the prosecutor's charge was not rooted in prophylactic concerns.[210] While a prophylactic justification—the desire to allow police to intervene in a stalking case before the stalker becomes violent—may have motivated Montana policymakers to enact a CIED statute, that justification carried little weight at the prosecution phase in this case. Without further statutory guidance, there is simply no reason to expect prosecutors to pursue only particularly egregious CIED cases or to prioritize underlying legislative motivations for CIED statutes rather than the statutory text.

Similar concerns are germane to the bullying context. One might think that discretion represents a solution to overreach concerns, such that bullying need never form a basis for criminal prosecution if it is not very serious. Yet some state legislatures are considering proposals to impose fines on teachers and administrators who fail to report bullying,[211] which would make it far riskier for such actors to decline to pursue a case while encouraging them to err on the side of notifying the police. Proposed legislation that would penalize teachers or administrators who fail to report harassing behavior raises the concern that an overly vigilant teacher or administrator could unwittingly subject students to criminal prosecution for behavior that is neither threatening nor physically abusive, such as embarrassing or insulting a fellow student.

The recent history of zero-tolerance policies suggests that schools are unlikely to be voices of moderation[212] or to limit the parameters of CIED enforcement. And, in the CIED context, zero-tolerance policies may prove

209. For an analysis of how enforcement incentives can undermine legislative motivation in the hate-crime context, see Eisenberg, *supra* note 24.

210. State v. McCarthy, 980 P.2d 629 (Mont. 1999).

211. *See, e.g.*, Joe Nelson, *Bill Fines Teachers, Staff Who Fail to Report Bullying*, Associated Press, Mar. 21, 2013, *available at* http://www.weau.com/home/headlines/Bill-requires-teachers-staff-to-report-bullying-199361511.html (discussing the recent bill proposed by Wisconsin Republican Representative Bies).

212. *See, e.g.*, Nan Stein, *Sexual Harassment Meets Zero Tolerance: Life in K–12 Schools*, *in* Zero Tolerance: Resisting the Drive for Punishment in Our Schools 143, 144 (William Ayers et al. eds., 2001); Lindsey Tepe, *Recent Cases of School Discipline Overreach Date Back Further than Sandy Hook*, New Am. Found. (Mar. 21, 2013), http://earlyed.newamerica.net/blogposts/2013/recent_cases_of_student_discipline_overreach_date_back_further_than_sandy_hook-81163.

especially problematic because exposure to the criminal justice system carries severe consequences that could affect a student for the rest of her life.[213] Moreover, there is serious concern that widespread discretion may result in disparate enforcement. Recent reports from the U.S. Department of Justice reveal that "[s]tudents of color are receiving different and harsher disciplinary punishments than whites for the same or similar infractions, and they are disproportionately impacted by zero-tolerance policies—a fact that only serves to exacerbate already deeply entrenched disparities in many communities."[214]

The rationales often invoked by advocates of CIED legislation emphasize maximizing protection of victims, both from present emotional harm and future physical harm.[215] But while these interests are important, protecting victims at all costs ignores the fact that criminalization imposes real harms on the defendants, many of whom are merely children themselves. Specifically, in the bullying context, CIED laws raise concerns that laws passed to protect a certain class of individuals (for example, juveniles) may end up harming other members of the same class by subjecting them prematurely and unnecessarily to the machinery of the criminal justice system. For example, a six-year-old boy in the Massachusetts public-school system recently was reported to criminal authorities after "putting his hand in the elastic of his classmate's pants, touching the skin on [her] back."[216]

Supreme Court precedent distinguishes between adults and juveniles, and some of the legal distinctions are rooted in scientific understanding about adolescent brain development.[217] Yet CIED laws risk subjecting juveniles, who are still undergoing social development—and may not yet

213. School teachers and administrators could instead be made responsible for being in contact with parents and for working with students (in conjunction with mental health experts and other counselors) to improve the culture at school. For a comprehensive examination of education-reform measures designed to combat bullying, see DENA T. SACCO ET AL., AN OVERVIEW OF STATE ANTI-BULLYING LEGISLATION AND OTHER RELATED LAWS (2012), *available at* http://cyber.law.harvard.edu/sites/cyber.law.harvard.edu/files/State_Anti_bullying_Legislation_Overview_0.pdf.

214. Sarah McIntosh, *Federal Government to Analyze 'Disparate Impact' of School Discipline on Minorities*, HEARTLAND (Jan. 18, 2011), http://news.heartland.org/newspaper-article/2011/01/18/federal-government-analyze-disparate-impact-school-discipline-minoritie (describing the U.S. Justice Department and Education Department's investigation of school-discipline policies and use of a "disparate-impact analysis" to assess concerns about disparate enforcement).

215. *See supra* Section III.C.

216. Susan S. Silbey, *Talk of Law: Contested and Conventional Legality*, 56 DEPAUL L. REV. 639, 639 (2007); *see* Maria Papadopoulos & Terence J. Downing, *Touchy Subject*, ENTERPRISE (Brockton, Mass.), Feb. 11, 2006. School officials claimed that "[t]his was done right by the book," Ralph Ranalli & Raja Mishra, *Boy's Suspension in Harassment Case Outrages Mother*, BOS. GLOBE, Feb. 8, 2006, at A1, and that "[y]ou have a policy, you have to follow the policy, and we do." Papadopoulos & Downing, *supra*. Another administrator explained that "civil rights has no age limit on it . . . all such complaints must be taken seriously" and that "[t]eachers are mandated reporters . . . . That's the standard . . . ." *Id.*

217. Specifically, the Supreme Court relied on recent neurological research in its 2005 decision that ended the death penalty for juveniles, citing scientific research that shows that

have the social skills to know when they are behaving inappropriately[218]—to criminal justice proceedings.[219] Many CIED statutes can already be applied to juvenile-bullying behaviors,[220] and some civil-education codes cross-reference criminal harassment statutes, further expanding the scope of CIED law.[221] It is crucial to examine the repercussions of linking juvenile behavior with adult harassing behaviors—for example, when law enforcement is called to intervene in a minor interpersonal squabble that a school administrator could more appropriately handle.[222] In the juvenile-bullying context, characterizing the same squabble as "harassment" may have drastic repercussions.

Ultimately, the expansiveness of CIED statutes, coupled with the unpredictability of emotional harm, undermines fundamental criminal justice concerns of fairness and notice to defendants. And those charged with implementing these laws cannot be relied on to pursue only the most egregious cases.

B. *Free Expression*

Even if the definitional concerns were somehow resolved and the parameters of CIED statutes were defined in a clear way that provided adequate notice to defendants, CIED statutes run afoul of the core value of free

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the adolescent frontal lobe, which governs judgment and impulse control, is not fully developed. Roper v. Simmons, 543 U.S. 551, 569 (2005), *rev'g* Stanford v. Kentucky, 492 U.S. 361 (1989). The Supreme Court again relied on neurological evidence in its recent decision that eliminated life without parole for most minors. Miller v. Alabama, 132 S. Ct. 2455, 2464–65 (2012). These distinctions between adults and juveniles—which have been used to support the proposition that juveniles should not receive punishment as harsh as what adults receive—are also relevant to the CIED context. At the very least, in keeping with the Court's framework, juveniles should be given less serious, more rehabilitative sentences. But this Article argues further that efforts to criminalize independent emotional harm are concerning overall and that they are particularly alarming in the juvenile context.

218. For example, as in the case of the six-year-old boy who was reported to criminal authorities for inappropriately touching his classmate's back. *See supra* note 216 and accompanying text.

219. *See, e.g.*, Silbey, *supra* note 216, at 639–41 (describing the possible application of criminal law to a juvenile).

220. *See supra* note 150.

221. *See, e.g.*, Sacco et al., *supra* note 213, at 9–10.

222. Especially with respect to bullying, and also in many stalking situations involving intimates, there is not always a bright-line distinction between the powerful and the powerless, which raises further concerns about the institutional competence of law enforcement to police this arena and of courts to adjudicate these issues. Many instances of "repeated unwanted communication" are simply too nuanced to be captured by stark terms like "bullied" and "bully," which further complicates enforcement and adjudication of CIED cases. By contrast, in the tort context, the law identifies specific status-based hierarchies—such as employer–employee and landlord–tenant—that, if abused, could support a finding of outrageousness. *See supra* notes 91–94 and accompanying text.

expression because they risk chilling and even punishing protected speech.[223] Where there is no imminent threat of civil disorder or other serious harm, free-expression rights are strongly protected under the Supreme Court's First Amendment jurisprudence.[224] In the CIED context, often there is no imminent threat, and prophylactic justifications for the statutes lack convincing empirical support. In the stalking context, for example, the evidence linking emotional harm to future physical harm is inconclusive.[225] And as the definition of stalking continues to broaden, this link becomes increasingly tenuous. While some stalking cases lead to violence, the vast majority do not. Moreover, recent studies suggest an inverse correlation between a stalker's likelihood of persistence and risk of violence.[226]

In the "bullycide" context, despite a strong correlation between depression and suicide, the evidence linking bullying and suicide is inconclusive. Instead, bullying is almost always one of many factors—if indeed it is a factor at all—to which the tragic suicide of a teenager can be attributed.[227] Studies of gay youth suggest that, "once a child's prior mental health was

223. *See* Eugene Volokh, *What Speech Does 'Hostile Work Environment' Harassment Law Restrict?*, 85 GEO. L.J. 627 (1997) (using the example of "hostile-work-environment" legislation to illustrate how laws designed to change social norms may chill protected speech).

224. *See, e.g.*, R.A.V. v. City of Saint Paul, 505 U.S. 377 (1992). Notably, while the concurrence in this case focused on the overbreadth of Minnesota's statute criminalizing hate-motivated speech, the majority opinion offered an "underbreadth" rationale, reasoning that the statute was an improper content-based regulation and that "St. Paul has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules," a reference to the generally accepted rules of boxing in the nineteenth century. *Id.* at 392. Arguably, states, in enacting CIED statutes, have resolved the "content-based" concerns of the Court by substantially broadening criminal liability to address the underbreadth concerns of the majority while failing to take into consideration serious concerns about overbreadth. CIED statutes, in essence, mandate that everyone follow Marquis of Queensberry rules, and they define these rules according to the emotional well-being of the victim.

A few CIED statutes have been struck down as unconstitutionally vague. *See, e.g.*, Commonwealth v. Kwiatkowski, 637 N.E.2d 854, 857 (Mass. 1994); State v. Norris-Romine, 894 P.2d 1221, 1224–25 (Or. Ct. App. 1995). One court observed that the "First Amendment does not permit the outlawing of conduct merely because the speaker intends to annoy the listener and a reasonable person would in fact be annoyed." Long v. State, 931 S.W.2d 285, 290 n.4 (Tex. Crim. App. 1996) (en banc).

225. While there have been studies linking stalking behaviors to domestic violence, sexual assault, and other violent conduct, the vast majority of stalkers are not physically violent. J. Reid Meloy, *The Psychology of Stalking*, *in* THE PSYCHOLOGY OF STALKING: CLINICAL AND FORENSIC PERSPECTIVES 1, 5 (J. Reid Meloy ed., 1998) (reporting that, of the approximately 25–35% of incidents where there is any reported physical contact, most do not cause serious physical injury, and less than 2% of stalking cases result in the death of the victim). Of course, some may argue that, even if the odds are miniscule that stalking behaviors would escalate into physical violence, early intervention is still justifiable.

226. Troy E. McEwan et al., *A Study of the Predictors of Persistence in Stalking Situations*, 33 LAW & HUM. BEHAV. 149, 157 (2009).

227. Thus, proving causation in "bullycide" cases presents a formidable problem. For a contrasting example, see *Stephenson v. State*, 179 N.E. 633 (Ind. 1932) (concluding that, when a rape victim was still under the control of the defendant and she committed suicide, the defendant could be held responsible for her death).

taken into account," there is no evidence that bullying actually predicts suicide.[228] That is, bullies may target kids who are already emotionally vulnerable. The tragic loss of life provides strong impetus to "do something," however, and many advocate using CIED statutes to punish both student-on-student harm and self-inflicted harm.[229]

The desire to attribute blame in the wake of a tragedy has already led prosecutors to file charges against alleged bullies, despite murky and inconclusive facts. For example, in the well-publicized case involving the suicide of teenager Phoebe Prince of South Hadley, Massachusetts, District Attorney Scheibel chose to prosecute six teenagers for the death of their classmate.[230] This decision was made despite extensive evidence that, "when Phoebe fell apart, it was because of a cascade of troubles" that extended well beyond her experiences at South Hadley High School and her interactions with the six teenagers accused of bullying her.[231] Indeed, Prince had a history of psychological problems, including self-cutting, for years before she took her own life.[232] The empirical evidence does not show that criminalizing emotional harm would be an effective prophylactic to physical harm in cases like Phoebe Prince's or others.

Given the strong impulse to act following a tragedy, especially one involving harm to children, policymakers should be especially vigilant to avoid sweeping yet more behavior into the criminal law domain.[233] The instinct to draft new criminal laws in the face of tragedy should be counterbalanced by a reluctance to expand the reach of criminal law, especially given the poor conditions and lack of rehabilitative services in overcrowded American prisons.[234]

C. *Social Consensus*

CIED statutes raise the question of whether the criminal law can be trusted to assess and punish emotional harm caused by unwanted or offensive communication between any two individuals. And, if it can, is it possible to agree on an acceptable baseline of emotional tranquility, below which the criminal law should be prepared to intervene?

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228. Emily Bazelon, Sticks and Stones: Defeating the Culture of Bullying and Rediscovering the Power of Character and Empathy 184–85 (2013).

229. For example, after the suicide of a twelve-year-old girl in Florida, a state bill was proposed to make bullying a crime. Nicole Flatow, *Florida Bill Would Put "Bullies" in Jail for a Year*, Think Progress (Mar. 7, 2014, 2:45 PM), http://thinkprogress.org/justice/2014/03/07/3372181/florida-bill-would-put-bullies-in-jail-for-a-year/.

230. Bazelon, *supra* note 228, at 110–11.

231. *Id.* at 172–73.

232. *Id.* at 172.

233. *See, e.g.*, Luna, *supra* note 205.

234. *See, e.g.*, Kevin Wehr & Elyshia Aseltine, Beyond the Prison Industrial Complex: Crime and Incarceration in the 21st Century 1 (2013).

Law's legitimacy is at least in part derived from the assent of its citizenry,[235] and where a strong social consensus exists about the criminality of particular behavior,[236] laws criminalizing such behavior will be respected.[237] By contrast, where such social consensus is absent, laws lack some of their force and may result in backlash.[238]

Notably, CIED laws and many CIED cases—like that involving the Florida girls charged with stalking for posting insulting Facebook messages—have been met with vocal opposition.[239] Controversy surrounding CIED cases supports the claim that there is no social consensus as to the point at which unwanted communication turns criminal,[240] nor is there consensus about how resilient a state should expect its citizens to be.[241] While to one person unwanted communication may be threatening based on past experience (either with the person initiating the communication or, quite possibly, with someone entirely unconnected to the present event), to another it may be a minor inconvenience. Indeed, one person might consider an ex-boyfriend's condolence card a thoughtful gesture, while another person might find the same card to be offensive and disturbing.[242] As a society, we do not have clear, objective guidelines to discern which reaction is more likely—let

235. *See, e.g.*, Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349 (1997).

236. Of course, a social consensus that a particular behavior should be criminalized does not in itself mean that the behavior should necessarily be criminalized. For a discussion of the problems associated with allowing the emotions of "shame" and "disgust" to dictate crime definitions, using antisodomy laws as a case study, see MARTHA C. NUSSBAUM, HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW (2004).

237. *See, e.g.*, Hart, *supra* note 28, at 405.

238. For example, Prohibition failed in large part due to a perceived lack of legitimacy (reinforced by a lack of enforcement). NAT'L COMM'N ON LAW OBSERVANCE & ENFORCEMENT, REPORT ON THE ENFORCEMENT OF THE PROHIBITION LAWS OF THE UNITED STATES, H.R. DOC. No. 722, at 55–58 (1931); CHARLES MERZ, THE DRY DECADE 71–73 (1931).

239. *See, e.g.*, Winnie Hu, *Bullying Law Puts New Jersey Schools on Spot*, N.Y. TIMES, Aug. 31, 2011, at A1, *available at* http://www.nytimes.com/2011/08/31/nyregion/bullying-law-puts-new-jersey-schools-on-spot.html?pagewanted=all&_r=0; Greg Toppo, *Should Bullies be Treated As Criminals?*, USA TODAY (June 12, 2012), http://usatoday30.usatoday.com/news/nation/story/2012-06-12/bullying-crime-schools-suicide/55554112/1; *see also* Silbey, *supra* note 216, at 639–40 (describing the flabbergasted response of a community after a six-year-old boy was suspended from school after touching his girl classmate's underwear). *See generally* Maggie Clark, *Criminal Case Puts Focus on Bullying Laws*, STATELINE (Nov. 4, 2013), http://www.pewstates.org/projects/stateline/headlines/criminal-case-puts-focus-on-bullying-laws-85899517052.

240. For a general discussion about the lack of social consensus regarding what speech is sufficiently offensive to be regulated, see Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking About You*, 52 STAN. L. REV. 1049, 1113 (2000). Presumably, the level at which offensive speech should be *criminalized* would be even more hotly contested.

241. For a discussion of the variation in average emotional temperament among cultural subgroups in the United States, see RICHARD E. NISBETT & DOV COHEN, CULTURE OF HONOR: THE PSYCHOLOGY OF VIOLENCE IN THE SOUTH 50 (1996). *But see* Posner, *supra* note 22, at 1985 (arguing that "people can cultivate their emotions").

242. *See supra* note 208 and accompanying text.

alone reasonable—which suggests that it would be very difficult to develop a consensus as to what constitutes emotional injury significant enough to trigger criminal culpability.[243] This lack of consensus about what constitutes emotional injury, combined with the varying (and often unpredictable) reactions of the people receiving the communication, makes CIED scenarios uniquely murky, especially when compared with the archetypal assault case that involves impending physical harm.[244]

Of course, law not only reflects society's views but also helps to shape these views.[245] Thus, by criminalizing emotional harm, CIED statutes arguably may be useful both in legitimating emotional harm as significant harm and in sending the message that certain behaviors are unacceptable, thereby helping to change norms. And yet the lack of clearly defined prohibited acts, which contributes to the concerns about vagueness and overbreadth, severely undercuts the expressive function of these laws.[246] The criminal law thus may not be an appropriate tool for changing behavior in this instance.

D. *Equality*

An argument common to both the prophylactic and independent wrong rationales for CIED statutes is that the statutes are critical to protect vulnerable populations, particularly women and children.[247] Despite the dominance of this rhetoric in the victims' rights movement, however, there are serious downsides to labeling particular groups as "vulnerable," including concerns about perpetuating stereotypes and facilitating disparate enforcement.

CIED laws may further entrench stereotypes about the "emotional" or "hysterical" woman.[248] While statistics show that cases involving physical

243. There are of course other circumstances in which juries are asked to make judgments where no social consensus exists; for example, when considering mitigating circumstances, juries may be asked to use flexible standards in determining whether certain behavior constituted "adequate provocation." But it is significant that, in the CIED context, the primary determination is not the defendant's degree of culpability for behavior that is indisputably criminal but *whether* something constitutes criminal activity. This distinction dramatically raises the stakes of the CIED inquiry. It also exacerbates earlier concerns about providing notice to potential defendants.

244. To be sure, there are line-drawing problems throughout the criminal law. *Cf.* Shen, *supra* note 69, at 2041 (finding that people do not agree about what constitutes bodily injury). And the line between physical harm and mental injury is not absolute. *See id.* at 2041–43. But conduct such as stalking and bullying—as currently defined by CIED statutes—cannot reasonably be defined as bodily injury.

245. *See generally* Lessig, *supra* note 31, at 948; McAdams, *supra* note 31, at 339; Sunstein, *supra* note 31, at 2024–25.

246. Discrepancies between the scope of CIED laws as enacted and their enforcement may also undercut the laws' expressive impact. *See* Eisenberg, *supra* note 24.

247. *See supra* Section III.C.

248. The benefits gained by victims through expanding CIED statutes must be balanced against the costs of further propagating such stereotypes. For a related critique of legal-reform measures that patronize or stereotype women under the guise of providing increased protection, see Aviva Orenstein, *No Bad Men!: A Feminist Analysis of Character Evidence in Rape*

harm are more likely to involve female victims and male perpetrators than male victims and female perpetrators,[249] any assumed discrepancy in the likelihood of emotional harm is grounded in stereotypes about women.[250] Such assumptions threaten both to perpetuate this stereotype and to unfairly influence CIED enforcement. A concern exists that, when new statutes are used (and expanded) largely to protect women and juveniles, this sends an unambiguous message that women are emotionally fragile and should be classified as vulnerable or even juvenilelike. This concern continues to be borne out in practice,[251] providing sobering examples of gendered stereotypes entrenched in the modern judicial system.

Notably, references to "emotional distress" did not become a standard element in criminal law until stalking statutes were enacted. While no stalking statute is explicitly gendered—that is, none includes gendered pronouns or explicit references to men or women—the media and popular culture portray the crime of stalking as almost exclusively gendered: males stalking females.[252]

One could argue that these statutes are a positive development inasmuch as the criminal law is taking the woman's side and valuing her emotions rather than dismissing her as hysterical or debasing emotions as generally unimportant. As with increased efforts to enforce domestic violence as a criminal offense,[253] the move to criminalize stalking may also be a by-product of feminist successes in criminal justice reform.[254]

Trials, 49 HASTINGS L.J. 663, 695 (1998) ("[F]eminists must be on the lookout for differences in the law that may cross the line from acknowledging women's different voice and experience to patronizing women by providing them increased 'protection.'").

249. *See, e.g.*, *Victims and Perpetrators*, NAT'L INST. JUST., http://www.nij.gov/topics/crime/rape-sexual-violence/pages/victims-perpetrators.aspx (last modified Oct. 26, 2010).

250. Moreover, it should be recognized that the view that women are emotionally fragile and in need of protection is itself controversial. And while it reflects a prevalent stereotype, this view certainly does not represent the social consensus or a desired norm that the law should work to reinforce.

251. *See, e.g.*, State v. Ryan, 969 So. 2d 1268, 1271 (La. Ct. App. 2007) (describing the emotional fragility of "womenfolk"). Ultimately, the trial court was overturned on the basis of the specific intent requirement in Louisiana's stalking statute. The appellate court's analysis demonstrates the importance of a specific intent requirement in avoiding convicting defendants where there is no intent or motive but merely a misunderstanding or a case of a hypersensitive complainant. *See supra* Section III.B.3.

252. Congress grounded the enactment of the Violence Against Women Act, which was partially struck down by the Supreme Court, in a conception of stalking, sexual assault, and domestic violence as gender-based violence. *See, e.g.*, Julie Goldscheid, United States v. Morrison *and the Civil Rights Remedy of the Violence Against Women Act: A Civil Rights Law Struck Down in the Name of Federalism*, 86 CORNELL L. REV. 109, 116 (2000).

253. For a discussion of this and other feminist criminal-justice reform goals, see, for example, CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 193 (1989) (discussing how privacy laws have protected men from prosecution for battery, marital rape, and women's exploited domestic labor), and ELIZABETH M. SCHNEIDER, BATTERED WOMEN AND FEMINIST LAWMAKING 13, 44–46 (2000).

254. The term "governance feminism" has been used to describe (and critique) a distinct strain of feminism that "has a will to power" and "wants to rule." *See, e.g.*, JANET HALLEY,

But such successes are not without their costs, both to groups the statutes are designed to protect and to those who may be unable to call upon the statutes due to stereotypes that effectively transform neutral statutes into gendered ones. For example, there is serious concern that law enforcement may not take as seriously claims that men have suffered emotional distress.[255] Police might simply not expect that a man would be seriously distressed by the incessant contact of his ex-girlfriend.[256] By contrast, the criminal law might be more willing to classify as stalking an ex-boyfriend's pursuit of his ex-girlfriend where the ex-girlfriend claimed emotional distress as a consequence of the unwanted contact.[257]

V. Implications

This Part explores the implications of the above analysis for CIED statutes specifically and, more broadly, for the role of victim emotion in criminal law. It examines statutory-reform options within the criminal law as well as approaches beyond the criminal justice system that are geared toward combating behaviors that cause emotional harm. Finally, the Part applies insights gleaned from the analysis of CIED laws to the broader question of how the criminal law should approach victim emotion, and in doing so it highlights the advantages of the traditional, implicit approach. The existing literature has not grappled with the foundational issue of whether and to what extent victim emotion should matter in criminal law, nor has it scrutinized CIED statutes in the context of that question. I show here that the problem is not that the laws have chosen the wrong particular behaviors to target. Indeed, there may be appropriate ways for criminal law to address these behaviors, such as by prohibiting specific conduct that predictably causes emotional distress, an alternative that would be consistent with the more traditional role of victim emotion in substantive criminal law.

Split Decisions: How and Why to Take a Break from Feminism 20–22 (2006) (emphasis omitted).

255. Here, it is important to distinguish between emotional distress caused by domestic disputes and PTSD, which can be traced to combat or other experience of war. *See* Marcia G. Shein, *Post-Traumatic Stress Disorder in the Criminal Justice System: From Vietnam to Iraq and Afghanistan*, Fed. Law., Sept. 2010, at 42, 45, *available at* http://www.fedbar.org/Federal-Lawyer-Magazine/2010/The-Federal-Lawyer-September-2010/Features/Post-Traumatic-Stress-Disorder-in-the-Criminal-Justice-System.aspx.

256. Studies from the domestic violence context may prove instructive, such as recent findings that, when both a man and a woman were allegedly perpetrators of abuse, police routinely arrested only the man. Chandra Gavin & Nora K. Puffett, Ctr. for Court Innovation, Criminal Domestic Violence Case Processing: A Case Study of the Five Boroughs of New York City 34–35 (2005), *available at* http://www.courtinnovation.org/_uploads/ documents/Citywide%20Final1.pdf.

257. Some attribute such tendencies to the influence of Catharine MacKinnon and the impact of "governance feminism." *See, e.g.*, Halley, *supra* note 254. Others, however, contend that, while various feminist reforms have been enacted in the past thirty years, these measures have largely failed to produce meaningful change in criminal justice outcomes. *See, e.g.*, Ilene Seidman & Susan Vickers, *The Second Wave: An Agenda for the Next Thirty Years of Rape Law Reform*, 38 Suffolk U. L. Rev. 467, 467–68 (2005).

A. *Statutory Reform*

This Section examines ways to address antisocial behaviors by specifying prohibited conduct and thereby providing ample notice to defendants. It explores ways in which the criminal law can avoid the pitfalls of CIED legislation by carefully circumscribing new crimes (for example, "revenge porn") and by reimagining existing features of the law (for example, by strengthening penalties for breach of protective orders). This Section then explores an alternative approach—that of tracking the emotional distress tort—and concludes that, while preferable to current CIED statutes, this reform would still require an inquiry into victim emotion, a result that this Article cautions against.[258]

1. Prohibiting Specific Conduct

a. *Revenge Porn*

Instead of punishing defendants based on victims' emotional distress, policymakers should focus—when possible—on defining the criminal act. A relatively new legal context—that of "revenge porn," which is the act of posting sexual photos of someone without his or her permission—is instructive.[259] Revenge porn has been described as "a form of cyber harassment and cyber stalking whose victims are predominantly female,"[260] and as a result of a few highly publicized cases, some states have enacted revenge-porn legislation while others currently have bills pending.[261] California, for example, makes it a misdemeanor to photograph or otherwise take private, nude photos of another person and distribute the photos in a way that is intended to and does cause emotional distress.[262]

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258. This Article focuses on legislative questions and therefore will not address possible constitutional concerns with CIED statutes in depth. Yet in light of the Supreme Court's recent as-applied decision in the context of emotional torts, Snyder v. Phelps, 131 S. Ct. 1207 (2011), it is possible that some CIED statutes could be successfully challenged on First Amendment grounds.

259. For a general discussion of revenge-porn statutes, their justifications, and their critiques, see Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345 (2014).

260. *Id.* at 354.

261. New Jersey and California have criminalized revenge porn; bills that would do the same have also been introduced in Maryland, New York, and Pennsylvania. Angela Couloumbis, *Pa. Bill Would Make Online 'Revenge Porn' a Crime*, PHILA. INQUIRER, Dec. 10, 2013, at B1, *available at* http://articles.philly.com/2013-12-11/news/45038761_1_harassment-law-mary-anne-franks-explicit-image. Some of these bills are stand-alone, while others, such as the Pennsylvania proposal, would amend the state's harassment statute. *See, e.g.*, *id.*; *Del. Jon Cardin to Introduce 'Revenge Porn' Bill*, BALT. NEWS J. (Oct. 30, 2013), http://www.baltimorenewsjournal.com/2013/10/30/del-jon-cardin-to-introduce-revenge-porn-bill/.

262. CAL. PENAL CODE § 647(j)(4)(A) (West Supp. 2014) ("Any person who photographs . . . the intimate body part or parts of another identifiable person, under circumstances where the parties agree or understand that the image shall remain private, and the person subsequently distributes the images taken, with the intent to cause serious emotional distress,

Policymakers have important choices to make regarding how best to structure revenge-porn statutes, and they should endeavor to avoid the pitfalls of CIED legislation. First, they should refrain from following California's example in making "emotional distress" the result element of the crime.[263] Otherwise, these laws focus the trial too much on the victim, which may be a painful experience for victims, as has been documented in the rape context.[264] Additionally, focusing on the victim's emotional distress may make the state's case excessively difficult to prove, thus essentially negating the purpose of the statute. Instead, a preferable statute would resemble Pennsylvania's bill, criminalizing the specific act of nonconsensual distribution without including emotional distress as the result element.[265] This formulation avoids an inquiry into the victim's particular emotions or whether a reasonable person would be emotionally distressed under the circumstances.[266]

The revenge-porn context provides an ideal opportunity for policymakers to detail particular criminal acts without referring to the victim's emotional distress. This approach would avoid the vagaries of criminalizing an amorphous category of behaviors that may result in the victim's emotional distress. It would also sidestep the problems associated with delving into the fraught territory of determining whether, and to what extent, a victim experienced emotional distress.[267] As in the case of rape, if the underlying conduct is inherently objectionable and can be assumed to be emotionally harmful in all cases, a prosecutor should not be required to prove that the victim suffered emotional distress.[268] Such an approach would also address

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and the depicted person suffers serious emotional distress."). In December 2014, the first defendant was convicted under California's revenge porn statute and sentenced to a year in jail. Veronica Rocha, *Online Targets Find Recourse*, L.A. Times, Dec. 6, 2014, at AA1, *available at* http://www.latimes.com/local/crime/la-me-1204-revenge-porn-20141205-story.html.

263. Here, the focus is drawn away from the defendant's conduct and directed instead at the victim's response, which raises many of the same problems discussed above in the context of CIED statutes.

264. *See* Aviva Orenstein, *Special Issues Raised by Rape Trials*, 76 Fordham L. Rev. 1585, 1599 (2007).

265. *See, e.g.*, Pa. S.B. 1167, 2013 Sess. (2013) (amend. Jan. 14, 2014) (proposing, as a definition of revenge porn, the posting of a sexually explicit image of an intimate partner with no legitimate purpose and without the partner's consent).

266. For a discussion of problems associated with "emotional profiling . . . where the outcome of an inquiry depends on whether there is satisfactory proof that a particular emotion existed," see Sanger, *supra* note 22, at 108, 111 (criticizing the "tyranny in requiring a particular emotional response as part of a legal process").

267. Of course, not all "harassing" behaviors are as easy to anticipate (and specifically to prohibit) as revenge porn. Nonetheless, while it may be more convenient for legislators to enact broad CIED statutes—thus deferring to the discretion of prosecutors—the aforementioned problems with such far-reaching statutes (and concerns about the exercise of prosecutorial discretion) should motivate policymakers to think more carefully about exactly what behaviors they intend to criminalize.

268. *See* Emily Bazelon, *Why Do We Tolerate Revenge Porn?*, Slate (Sept. 25, 2013, 6:21 AM), http://www.slate.com/articles/double_x/doublex/2013/09/revenge_porn_legislation_a_new_bill_in_california_doesn_t_go_far_enough.html (arguing that California's revenge-porn

concerns about predictability and notice, and it falls squarely within the traditional, implicit approach to victim emotion in criminal law.

b. *Breach of Protective Order*

Where it is difficult to define a particular offensive act but where policymakers want to address emotional harm to victims caused by repeated unwanted conduct, legislation could focus on expanding the role of protective orders and strengthening penalties for violating them. Civil protection orders ("CPOs") are currently used in the domestic violence context by all fifty states and the District of Columbia.[269] State laws vary, but protective orders are available in all states for victims of physical violence or other criminal acts, and one-third of the states also provide protective orders for victims of psychological, emotional, or economic abuse.[270] Legislators in the remaining states, if concerned with persistent emotional harm between intimates, could extend CPOs to encompass a wider array of harms.[271] These CPOs could also be expanded beyond the traditional confines of domestic violence to apply to intimates or former intimates who do not live together,[272] and even to situations involving acquaintances or strangers where one party causes emotional harm to the other.[273]

In cases where limiting contact between parties would likely reduce emotional distress, this approach would seem more fitting than inviting the heavy machinery of the criminal justice system to intervene with no prior

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law "only goes halfway" because it requires the prosecutor to prove that the defendant intended to inflict emotional distress rather than treating the defendant's act "as an objectively harmful invasion of privacy").

269. Jane K. Stoever, *Enjoining Abuse: The Case for Indefinite Domestic Violence Protection Orders*, 67 VAND. L. REV. 1015, 1093–98 (2014) (reviewing a fifty-state survey of domestic violence protection orders).

270. Margaret E. Johnson, *Redefining Harm, Reimagining Remedies, and Reclaiming Domestic Violence Law*, 42 U.C. DAVIS L. REV. 1107, 1134 (2009). Of states that allow for CPOs in cases that do not involve physical violence or the threat thereof, many of the civil statutes refer to the state's criminal-harassment or stalking statute. *See, e.g.*, FLA. STAT. § 741.28 (2013) (cross-referencing Florida's stalking statute).

271. For arguments in favor of such legislative reform, see Johnson, *supra* note 270. Notably, in many of the cases referenced that involved emotional harm, there were also incidents of battery. While many states may prefer not to grant a CPO for name calling (even if frequent and derogatory), a victim of battery or other physical harm could petition for a CPO according to the laws of any state.

272. Some states have already initiated this reform. For a discussion of the various permutations of CPO laws and their specific relationship requirements, see Judith A. Smith, *Battered Non-Wives and Unequal Protection-Order Coverage: A Call for Reform*, 23 YALE L. & POL'Y REV. 93, 102–08 (2005).

273. Here, a CPO could be obtained for stalking behaviors outside of the domestic context—for example, against work or former work colleagues or the proverbial obsessed fan—that would put the alleged stalker on notice and clarify acceptable parameters of future contact.

warning.[274] The order would provide notice to the defendant so that there would be no question about what level of contact was or was not permitted and, if the order were violated, what penalties would attach. Then, if the protective order were indeed violated, there would be a more serious penalty. This approach would help to ensure that the protective order is taken seriously while avoiding the premature involvement of the criminal justice system in situations where such an order would be sufficient to resolve the issue.[275]

For example, in the stalking context, to provide notice to defendants, protective orders could be required in cases that do not involve a credible threat of imminent harm, and policymakers could impose criminal penalties for violating the order. Since violating a protective order is a clearly defined act that is not dependent on the victim's emotions, this alternative to CIED statutes would fit within the implicit approach.

Furthermore, given the victim-centered impulses of CIED statutes, the victim-centered remedy of a protective order may be more effective than criminal punishment, which may actually exacerbate the situation and raise the possibility of retaliation.[276] Additionally, since a CPO generally provides for immediate relief through a temporary restraining order, obtaining civil relief may be a quicker and more effective means of relief.[277] There is some

274. There is some evidence that, once the criminal justice system gets involved, violence worsens and the victim of domestic abuse becomes even more vulnerable when the aggressor reenters society after being confined. *See, e.g.*, LINDA G. MILLS, INSULT TO INJURY: RETHINKING OUR RESPONSES TO INTIMATE ABUSE 6 (2003). Furthermore, many sentences for domestic violence are quite short. Jane K. Stoever, *Freedom from Violence: Using the Stages of Change Model To Realize the Promise of Civil Protection Orders*, 72 OHIO ST. L.J. 303, 316 (2011). In comparison, a CPO could be significantly longer without seriously limiting the freedom of the defendant, and therefore such an order seems more proportional than a prison sentence.

275. Of course, this proposal invites consideration of how widely we are prepared to grant protective orders and to what extent individuals should be able to insulate themselves from others who may annoy them but who do not threaten them in any way. Although this Article does not offer guidelines for determining this question, it flags the issue for future consideration.

276. Elizabeth Topliffe, Note, *Why Civil Protection Orders Are Effective Remedies for Domestic Violence but Mutual Protective Orders Are Not*, 67 IND. L.J. 1039, 1043 (1992).

277. Lowell T. Woods, *Anti-Stalker Legislation: A Legislative Attempt to Surmount the Inadequacies of Protective Orders*, 27 IND. L. REV. 449, 456 (1993). Of course, the ease with which victims can get CPOs entirely depends on state-specific statutory qualifications and procedural requirements. For example, in some states, restraining-order legislation may apply only to spouses or former spouses, while in other states unmarried persons can petition for a CPO. *Id.* at 453. Procedural obstacles include filing fees, clerks who discourage petitioners from filing for a CPO, and an inability in some jurisdictions to obtain temporary restraining orders after business hours and on weekends. Topliffe, *supra* note 276. Other concerns include whether police respond in a timely fashion and whether courts actually dole out punishments when a CPO is violated. Woods, *supra*, at 459. Although these impediments compromise the efficacy of CPOs, they are by no means endemic and can be changed through statutory or administrative reform.

evidence that domestic violence victims find protective orders helpful both in reducing violence and as a tool to rearrange an abusive relationship.[278]

While notice to defendants would address a major concern regarding CIED statutes, the problem remains that the criminal law would be called to intervene in situations regarding intimates and peers where no violence is threatened and the prohibited conduct is unwanted communication. This reform thus would not alleviate all concerns related to free expression and the criminal law's encroachment into the private lives of citizens. It would, however, represent a serious improvement in shifting the focus of the criminal law toward definable acts and away from attempts to assess victim emotion.

2. Tracking the Emotional Distress Tort

Policymakers disinclined to eliminate CIED statutes but still intent on implementing statutory reforms to narrow the potential scope of CIED legislation might consider including an outrageous-conduct requirement, which echoes the standard for the IIED tort. If criminal statutes required a similar standard, it would restore the focus of a case to the defendant's conduct and would avoid the risk of convicting a defendant for nonthreatening, nonoutrageous behavior that happened to cause a victim emotional distress.[279] Yet even adding this requirement would be too subjective to provide adequate notice to criminal defendants, an issue of particular concern given that the stakes of a criminal prosecution are far higher than those of tort regulation.[280]

While an outrageousness requirement would circumscribe current CIED statutes and bring the criminal system more in line with its closest civil counterpart,[281] including such a requirement raises concerns (also relevant to tort) about what behaviors should be deemed "outrageous" for purposes of CIED liability. The tort landscape is full of murky fact patterns

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278. Julia Henderson Gist et al., *Protection Orders and Assault Charges: Do Justice Interventions Reduce Violence Against Women*, 15 AM. J. FAM. L. 59 (2001); Jane C. Murphy, *Engaging with the State: The Growing Reliance on Lawyers and Judges to Protect Battered Women*, 11 AM. U. J. GENDER SOC. POL'Y & L. 499, 513 (2003). But CPOs have also come under attack for ignoring the extent to which "domestic violence is a community problem." Jane Aiken & Katherine Goldwasser, *The Perils of Empowerment*, 20 CORNELL J.L. & PUB. POL'Y 139, 142 (2010) (criticizing the CPO model for relying on individual empowerment of victims instead of on changing social norms).

279. This would also, in essence, require an objective inquiry into the victim's emotional harm, that is, it would require asking whether a reasonable victim would suffer emotional distress rather than whether this particular victim experienced emotional harm.

280. *Cf.* WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW 282 (2d ed. 1986) (explaining that in tort law defendants may be held accountable for conduct different from that which was "actually risked by his conduct, while this is generally not the [case] in criminal law" (footnote omitted)); Susan R. Klein, *Identifying and (Re)Formulating Prophylactic Rules, Safe Harbors, and Incidental Rights in Constitutional Criminal Procedure*, 99 MICH. L. REV. 1030, 1036 (2001).

281. While one could argue that it would be better to level down—that is, to bring the requirements of emotional distress torts more in line with the criminal law, at the very least—

involving intimates, former intimates, and others with extensive histories where determining what constitutes outrageous behavior is extremely difficult.[282] Such cases should give pause to policymakers tasked with reforming criminal statutes, and these cases presage some of the problems that may arise if CIED statutes were to include an outrageousness requirement.

Some might argue that criminal law should further borrow from tort law by amending CIED laws to require "severe" emotional distress, a change that would avoid subjecting defendants to criminal liability based on a lower level of harm.[283] But this reform would still require an inquiry into victim emotion, which this Article cautions against. The nature of the IIED inquiry into the degree of impact on the victim is unique,[284] and critics suggest that this inquiry into the victim's level of emotional distress puts courts in the difficult position of needing to distinguish between a victim's severe emotional distress and distress that may be intense but is more temporary.[285]

If the criminal law were to track the emotional distress tort framework, the "severe emotional distress" requirement should be (at most) a second-order inquiry, conducted only after outrageous conduct has been established.[286] Although this statutory reform would help to avoid criminalizing behavior that does not predictably cause emotional distress, it would not solve the problems inherent in determining what constitutes "outrageous behavior," especially in complex interpersonal relationships. Ultimately, it is better to avoid altogether a case-by-case inquiry into what victim emotions are reasonable in a particular situation,[287] let alone what emotional harm a particular victim experienced.

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it is intuitively odd that the criminal justice system, with its higher stakes for defendants, should be *less* protective than its analogue in tort.

282. *See, e.g.*, Twyman v. Twyman, 855 S.W.2d 619 (Tex. 1993) (assessing whether sadomasochistic practices could be considered inherently outrageous); *see also* Halley, *supra* note 254, at 356.

283. Notably, the NCVC, among other advocates, continues its attempts to broaden criminal liability by reducing the harm requirement. *See* Model Stalking Code, *supra* note 139, at 24–25.

284. *See* Restatement (Second) of Torts § 46 cmt. j (1965).

285. Goldberg et al., *supra* note 52, at 222.

286. Arguably, such statutory reform would prevent the situation in which the defendant's conduct may have been outrageous, but the victim was not seriously harmed. This Article maintains, however, that requiring an inquiry into the degree of emotional harm to the victim is inadvisable. Additionally, some may argue that deterrence goals dictate that we criminalize antisocial behavior, whether or not there is a victim who suffered harm. Others may suggest instead that, given the complex interpersonal aspects of most CIED cases, requiring that there be some harm to the victim would represent a sound approach to cabining liability.

287. For a discussion of problems associated with the "reasonable person" and "reasonable person . . . under the circumstances" inquiries, see Stephen P. Garvey, *The Moral Emotions of the Criminal Law*, 22 Quinnipiac L. Rev. 145, 155–57 (2003).

B. *Beyond the Criminal Justice System*

Stalking and bullying are important social problems. But not all important social problems are best addressed by the criminal justice system. There are extensive opportunities beyond the scope of the criminal law for policymakers, educational institutions, and advocacy organizations to work toward changing behaviors and discouraging behaviors that cause emotional harm. For example, this Article has already reviewed civil law options suggesting that, in the context of stalking among adults, CPOs may sometimes provide the best solution.[288]

In the juvenile context, there has been a recent explosion of programs and proposals to address bullying. These proposals include antiaggression programs,[289] which have been tested extensively on elementary-, middle-, and high-school students; restorative justice approaches, which focus on education rather than on punishment and offer opportunities for mediated dialogue between the offender and the victim;[290] and social-media advocacy efforts (for example, the "It Gets Better" campaign against antigay bullying).[291] While an examination of the effectiveness of these programs is beyond the scope of this Article, there is a growing literature devoted to describing and evaluating them.[292]

These and other efforts by educational institutions and advocacy groups have been instrumental in moving the problem of juvenile bullying into the foreground. Furthermore, these efforts have experienced significant success without unnecessarily subjecting juveniles to the criminal justice system.

C. *Preferring the Implicit Approach*

A vocal wave of critics suggests that the criminal law (and law in general) does not sufficiently take emotions into account.[293] Many of those who

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288. *See supra* Section V.A.1.

289. *See, e.g.*, James Alan Fox et al., Fight Crime: Invest in Kids, Bullying Prevention *Is* Crime Prevention 12–16 (2003), *available at* http://www.pluk.org/Pubs/Bullying2.pdf (describing programs including the Olweus Bullying Prevention Program, The Incredible Years program, and the Linking the Interests of Families and Teachers program).

290. *See, e.g.*, Susan Hanley Duncan, *Restorative Justice and Bullying: A Missing Solution in the Anti-Bullying Laws*, 37 New Eng. J. on Crim. & Civ. Confinement 267, 281–91 (2011).

291. *See, e.g.*, StopBullying.gov, www.stopbullying.gov/ (last visited Sept. 15, 2014); U.S. Dep't of Educ., *Department of Education: It Gets Better*, YouTube (June 27, 2013), https://www.youtube.com/watch?v=eU9_6v6i4nE.

292. *See, e.g.*, Kathleen Conn, T.K. *and* J.C.*: Guidance for Schools Dealing with Bullying and Cyberbullying*, 5 Northeastern U. L.J. 77 (2013); Susan M. Swearer Napolitano et al., *What Can Be Done About School Bullying? Linking Research to Educational Practice*, 39 Educ. Researcher 38, 41–43 (2010); *see also* Sacco et al., *supra* note 213; J. David Smith et al., *Antibullying Programs: A Survey of Evaluation Activities in Public Schools*, 33 Stud. Educ. Evaluation 120 (2007).

293. *See, e.g.*, Katharine K. Baker, *Gender and Emotion in Criminal Law*, 28 Harv. J.L. & Gender 447, 447 (2005); *see also* Susan Estrich, *Rape*, 95 Yale L.J. 1087, 1088 (1986); Angela P. Harris & Marjorie M. Shultz, *"A(nother) Critique of Pure Reason": Toward Civic Virtue in Legal Education*, 45 Stan. L. Rev. 1773, 1774 (1993).

lament law's marginalization of emotions assume that the only way to integrate emotion into law is to do so explicitly.[294] In the criminal-law context, there have been additional concerns that the law does not sufficiently take victims into account.[295]

This Article suggests that, in assessing harm and devising punishment, (1) the law has always taken emotion into account by using the implicit approach; and (2) we should continue to work within this system of compromise to police conduct that causes severe emotional harm. A more explicit approach may be appropriate in some areas of law, but the implicit approach is best for the purpose of defining substantive crimes: it acknowledges the importance of emotional harm, but it does not predicate criminal liability on the existence of that harm.[296]

First, though, we must acknowledge that the law makes this compromise—that it already takes emotions into account. Claims that the criminal law has no interest in emotions ignore the obvious emotional content that pervades the narratives of crime and punishment. Moreover, to deny the existence of the implicit approach is to fail to comprehend distinctions throughout criminal law that punish more seriously those crimes we assume to cause heightened emotional or psychological harm.[297] This does not mean, however, that the law always does a perfect job calibrating harms and punishments—indeed, it may be the case that the implicit approach does

294. *See, e.g.*, Clare Huntington, *Repairing Family Law*, 57 DUKE L.J. 1245 (2008); McAnaney et al., *supra* note 184, at 890; Posner, *supra* note 22.

295. *See, e.g.*, George P. Fletcher, *The Place of Victims in the Theory of Retribution*, 3 BUFF. CRIM. L. REV. 51, 55 (1999). For an articulation of the contrary view that victims should not play a role in assessing blame or punishment, see Michael Moore, *Victims and Retribution: A Reply to Professor Fletcher*, 3 BUFF. CRIM. L. REV. 65 (1999).

296. What of the argument that CIED statutes are merely a natural extension of victim impact statements and that the implications of this Article extend even beyond crime definition into criminal procedure? A great deal of literature discusses the merits and demerits of victim impact statements, and this Article does not purport to cover that ground. But crucial to this Article is the insight that recent developments in substantive law are fundamentally different from victim impact statements and have not been the source of sustained scholarly attention. CIED statutes are distinct from victim impact statements because, rather than provide additional factors to be taken into account in assessing the severity of conduct already firmly established, such statutes expand the scope of criminal behavior. By contrast, we have always allowed sentencing judges to take into account an unlimited scope of evidence. Individual circumstances have always been central to sentencing, and rules of evidence do not apply to the sentencing context. Victim impact statements are therefore one of many "soft factors" for a judge to consider or ignore, whereas CIED statutes redefine a new set of crimes for which one can be convicted, thus expanding the scope of what constitutes criminal activity. The Supreme Court has consistently recognized this distinction as important. *See, e.g.*, Apprendi v. New Jersey, 530 U.S. 466 (2000) (holding that a hate-crime enhancement, which would increase a defendant's statutory maximum sentence, was an element of the crime rather than a sentencing factor and, as such, was a fact to be determined by the jury using a reasonable doubt standard).

297. For a related claim about the law's treatment of vulnerable victims, see Kleinfeld, *supra* note 17.

not always sufficiently account for emotional harm.[298] As awareness of emotional harm increases, so does impatience with the implicit approach for not doing enough. Yet we should not be too quick to reject this approach even if it seems to address emotional harm insufficiently in a particular situation.

We should also resist assuming that, to account adequately for emotional harm, we must explicitly criminalize the infliction of emotional distress. While that view is perhaps an outgrowth of the broader impulse to bring emotions to the forefront in law, it is too extreme. Instead, we should work within the implicit approach's system of compromise to identify conduct that causes severe emotional harm and to explicitly prohibit such behaviors. Otherwise, we risk upsetting the precarious balance between protecting the safety and well-being of citizens and preserving core values such as free expression and notice to defendants.

Conclusion

The traditional way of addressing victim emotion—through proscribing conduct categories that are particularly likely to cause emotional distress—is preferable to predicating criminal liability on another's emotional harm. CIED statutes provide a useful lens for examining the role of victim emotion in criminal law. While these statutes are designed to address real social problems, the criminal law is an exceedingly blunt tool for shifting social norms in this context. Ultimately, criminal law can best account for victim emotion implicitly, by identifying and prohibiting specific conduct that is assumed to be harmful. Legislators should pay heed to the advantages of this implicit approach and favor reforms that would circumscribe existing CIED statutes while opposing measures to further expand the reach of these statutes.

298. The empirical project of assessing the law's effectiveness in this regard is beyond the scope of this Article.

Appendix:

CIED Statutes

The following chart distills the main features of state CIED statutes.[299] First, it indicates whether the intent required by the statute is specific (that is, the defendant must have intended to harm the victim) or general (that is, the defendant must have intended to commit the offending act but need not have intended to cause harm to the victim). Second, the chart indicates the standard of inquiry required to assess emotional harm: either objective, subjective, or both. An objective inquiry examines whether a reasonable victim would have experienced emotional harm, while a subjective inquiry looks to whether this particular victim experienced emotional distress. Finally, the chart indicates the degree of emotional harm required under the statute.

299. Ala. Code § 13A-6-90.1 (LexisNexis Supp. 2013); Ariz. Rev. Stat. Ann. § 13-2921 (2009); Ark. Code Ann. § 5-71-208 (2005); Colo. Rev. Stat. § 18-3-602 (2013); Conn. Gen. Stat. § 53a-183 (2013); Del. Code Ann. tit. 11, §§ 1311, 1312 (Supp. 2012); D.C. Code § 22-3133 (LexisNexis 2001); Fla. Stat. § 784.048 (2013); Idaho Code Ann. § 18-7906 (West 2004); 720 Ill. Comp. Stat. 5/12-7.3 (2012); Iowa Code § 708.7 (2013); Ky. Rev. Stat. Ann. § 525.070 (LexisNexis 2008); La. Rev. Stat. Ann. § 14:40.2 (Supp. 2014); Me. Rev. Stat. Ann. tit. 17-A, § 210-A (West Supp. 2013); Md. Code Ann., Crim. Law § 3-802 (LexisNexis Supp. 2013); Mass. Gen. Laws ch. 265, § 43 (2010); Mo. Rev. Stat. §§ 565.090, 565.225 (2014); Mont. Code Ann. § 45-5-221 (2013); N.J. Stat. Ann. § 2C:33-4 (West 2005); N.M. Stat. Ann. § 30-3A-2 (2013); N.Y. Penal Law §§ 120.6, 240.25 (McKinney 2014); Ohio Rev. Code Ann. § 2903.211 (West 2014); R.I. Gen. Laws § 11-59-2 (2002); S.C. Code Ann. § 16-3-1700 (2006); S.D. Codified Laws § 22-19A-1 (2006); Tenn. Code Ann. §§ 39-17-308, 39-17-315 (2012); Tex. Penal Code Ann. § 42.07 (West 2011); Utah Code Ann. § 76-5-106.5 (LexisNexis 2012); Vt. Stat. Ann. tit. 13, § 1062 (2009); W. Va. Code § 61-2-9a (LexisNexis 2010); Wyo. Stat. Ann. § 6-2-506 (2013).

State	Intent	Standard	Degree of Harm
Alabama	Specific	Subjective	Material harm to emotional health
Arizona	Specific	Both	Annoyance
Arkansas	Specific	Subjective	Serious annoyance
Colorado	General	Both	Serious emotional distress
Connecticut	Specific	Objective	Annoyance
Delaware	Specific	Objective	Annoyance
	General	Objective	Significant mental anguish or distress
District of Columbia	General	Either	Emotional distress
Florida	General	Subjective	Substantial emotional distress
Idaho	General	Both	Serious annoyance
Illinois	General	Objective	Emotional distress
Iowa	Specific	Objective	Annoyance
Kentucky	Specific	Subjective	Serious annoyance
Louisiana	General	Objective	Emotional distress
Maine	General	Objective	Inconvenience or emotional distress
Maryland	Specific	Subjective	Serious annoyance
Massachusetts	General	Both	Substantial emotional distress
Missouri	General	Either	Emotional distress
Montana	Specific	Subjective	Substantial emotional distress
New Jersey	Specific	Objective	Annoyance
New Mexico	Specific	Objective	Substantial emotional distress
New York	Specific	Subjective	Serious annoyance
	General	Subjective	Material harm to emotional health
Ohio	Specific	Subjective	Mental distress
Rhode Island	Specific	Objective	Substantial emotional distress
South Carolina	General	Both	Emotional distress
South Dakota	General	Subjective	Annoyance
Tennessee	Specific	Subjective	Annoyance
Texas	Specific	Objective	Annoyance, embarrassment
Utah	General	Objective	Emotional distress
Vermont	General	Objective	Substantial emotional distress
West Virginia	Specific	Subjective	Significant emotional distress
Wyoming	General	Both	Substantial emotional distress