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Mark P. Gergen
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A Grudging Defense of the Role of the Collateral Torts in Wrongful Termination Litigation

Mark P. Gergen*

The prevailing image of the role of defamation, intentional infliction of emotional distress, and other collateral torts1 in wrongful termination litigation is not good. The image is that plaintiffs' lawyers plead the "laundry list" of collateral torts in every case hoping to hit pay dirt in the form of a generous award of mental anguish and punitive damages, that judges and juries do a poor job of screening out weak claims from strong ones, and that employers consequently walk on eggshells when handling terminations. Which claims prevail is thought to be mostly a matter of luck and lawyerly skills. Wrongful termination litigation is seen as a big-stakes lottery with outcomes that correlate poorly with the degree of the harm suffered by the plaintiff or the nature of the defendant's conduct.2

* Joseph C. Hutcheson Professor of Law, University of Texas School of Law. B.A. 1979, Yale University; J.D. 1982, University of Chicago Law School. Thank you to David Anderson, William Powers, and the participants in the Symposium for comments on earlier drafts.

1. Other tort theories used in wrongful termination litigation include intentional interference with business relations, see, e.g., Mittelman v. Witous, 552 N.E.2d 973 (Ill. 1989) (upholding an interference claim by an associate in a law firm against a partner who allegedly caused the associate's termination by wrongfully using the associate as a scapegoat to deflect criticism from the partner); prima facie tort, see, e.g., Beavers v. Johnson Controls World Servs., Inc., 881 P.2d 1376 (N.M. 1994) (finding the requirements for a prima facie tort were satisfied by an employer forcing an employee to write a memo describing her violations of office procedures and to distribute the memo to all employees); invasion of privacy, see, e.g., McLain v. Boise Cascade Corp., 533 P.2d 343 (Or. 1975) (rejecting a claim based on the secret surveillance of an employee who claimed disability, but stating that the claim would lie if the surveillance were conducted in an unreasonable and obtrusive manner); fraud, see, e.g., Hunter v. Up-Right, Inc., 864 P.2d 88 (Cal. 1993) (holding that an action for fraud will not lie based on a misrepresentation allegedly made in the course of a termination unless it caused the employee to change his position with regard to a matter that was collateral to the employment contract); and negligent misrepresentation, see, e.g., Weisman v. Connors, 540 A.2d 783 (Md. 1988) (upholding a claim based on misrepresentations made to lure an employee to a new job). Regarding negligent infliction of emotional distress, see, for example, Sacco v. High Country Indep. Press, Inc., 896 P.2d 411 (Mont. 1995) (holding that a discharged employee could bring a claim for negligent infliction of emotional distress in which she alleged that her former employer falsely accused her of theft to the police). Cf. Calleon v. Miyagi, 876 P.2d 1278 (Haw. 1994) (rejecting a claim for negligent infliction of emotional distress in a wrongful termination case because of the absence of physical injury).

2. See, e.g., COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, U.S. DEP'T OF LABOR & U.S. DEP'T OF COMMERCE, FACT FINDING REPORT 110 (1994) ("The overall pattern of jury awards does, however, display a rather lottery-like response to the harms inflicted on individual employees."); Dennis P. Duffy, Intentional Infliction of Emotional Distress and Employment at Will:
Little could be said in defense of such a capricious system for regulating terminations. It would be unfair to defendants because they would be punished without regard to the degree of their wrongdoing and without fair warning. Such a system might also be inefficient. Administration is its most obvious cost. Many claims might be filed despite the low probability of success because of the high potential payoff in mental anguish and punitive damages, while legal uncertainty and the often personally charged nature of the factual issues in dispute in these cases might well hamper settlement. The one good thing that might be said for such a system is that it would induce firms to take greater care in evaluating and terminating employees to limit their exposure to tort claims, but even assuming that a policy of affording such protection to employees is socially desirable, surely that end is better met through a rule of universal "just cause" implemented through arbitration, for such a regime is likely to be fairer and it may lower administrative costs.3

This Paper offers a defense of the collateral torts by challenging the claim that they necessarily operate in a capricious manner, focusing on the two most commonplace collateral tort claims, intentional infliction of emotional distress and defamation. I will show that, in most states, the law empowers a trial judge to dismiss such claims if a terminated employee alleges or can prove nothing more than conduct that might normally or naturally occur in a termination. I also state what I think is the best legal and normative argument for these rules. I do not make a normative argument for the torts because I think it is self-evident why we might want to compensate employees and punish firms or their agents through a tort remedy in extreme cases of cruelty or slander, if the torts could be limited to those extreme cases.

Part II goes further and argues that in one state, Texas, the torts seem not to have been applied in too capricious a manner. A study of reported Texas cases over a five-year period shows that while collateral tort claims often are brought by employees, they usually are dismissed at the trial level.
on a motion for summary judgment. If a claim makes it to the jury, the employee has a very good chance of getting a favorable jury verdict, but the great majority of these verdicts for employees are reversed on appeal. Obviously, these findings are far from conclusive, even for Texas, because the results in reported cases do not tell us how employees fare in settled or unappealed cases (though several attorneys who practice in the area tell me that these findings are consistent with their experience).

If I am right, and plaintiff victories are rare because judges have the doctrinal tools to screen collateral tort claims in wrongful termination litigation, one argument against the collateral torts that remains is that employers perceive a greater risk from such claims than actually exists because of the salience of a few large verdicts for plaintiffs. This myth can be as harmful as real exposure to tort liability in its effects on employer behavior. I find this objection to the collateral torts to be uncompelling, for it would deny to employees what in truth is fairly limited protection from extreme misconduct merely because of the unreasonable fears of employers.

I. Why the Collateral Torts Need Not Be Capricious in Principle

Employers' fears of lawsuits alleging defamation or intentional infliction of emotional distress might seem well grounded, on first impression. If an employee who was discharged for disciplinary reasons can credibly allege that a coworker or superior who accused him of misconduct did so out of spite or with little regard for the truth, and if evidence can be presented upon which a reasonable person might conclude that the accusation was false, then under one view the employee is entitled to a jury trial on a defamation claim. Employers might fear that such allegations could often be made with sufficient credibility to get to the jury if they cannot document the grounds for a discharge and do not guard against expressions of personal animosity by supervisors and other persons playing a part in the decision to terminate the employee. In the case of the tort of intentional infliction of emotional distress, employers fear the unknown. It is difficult to know what conduct in a termination will be deemed outrageous or what level of emotional anguish felt by an employee will be deemed unbearable. Even more worrisome to employers is the prospect that a trial judge will submit an intentional infliction of emotional distress claim to the jury based on the belief that any reasonable person might find that the employer's conduct was outrageous and the fired employee's pain was unbearable.

This Part of my Paper demonstrates that in many states employers face no real risk of liability on a defamation claim or an intentional infliction of emotional distress claim in run-of-the-mill terminations. The most significant safeguard against defamation claims is a rule requiring that an employee prove with clear and convincing evidence that an accusation of misconduct was made in bad faith or out of spite. Employers are protected from intentional infliction of emotional distress claims by the principle that conduct that normally or naturally occurs in a termination cannot, as a matter of law, be deemed morally outrageous.

I also have a larger agenda in this Part. A study of how courts filter intentional infliction of emotional distress claims and defamation claims in wrongful termination cases provides insights into the larger problem of drawing boundaries between contract and tort law. The collateral torts protect nonphysical interests. This point is significant because it is generally accepted that an action may simultaneously lie in tort and contract for a physical loss, and more to the point, that a background rule of immunity in contract will not bar a tort claim based on a physical loss.\(^5\) To take a trivial example, the employment-at-will rule does not protect an employer from an employee's battery claim if a guard manhandles the employee while removing the employee from the workplace.

Torts that protect nonphysical interests are different, for they often give way to contract law. The collateral torts can be crudely divided into two groups subject to different principles of displacement. The tort of intentional infliction of emotional distress is an example of the more formless torts. Similar torts include invasion of privacy,\(^6\) the tort of

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\(^5\) In other contexts, specifically negligence and products liability, the existence of a contract between a plaintiff and a defendant will not by itself bar a tort claim. See Southwestern Bell Tel. Co. v. DeLanney, 809 S.W.2d 493, 494 (Tex. 1991) ("If the defendant's conduct—such as negligently burning down a house—would give rise to liability independent of the fact that a contract exists between the parties, the plaintiff's claim may also sound in tort." (citing W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 92, at 655 (5th ed. 1984))). Specific disclaimers found in a contract may bar tort claims, but only if they are explicit, and not always then. See, e.g., Vandermark v. Ford Motor Co., 391 P.2d 168, 172 (Cal. 1964) (declaring that strict liability in tort is not limited by contractual restrictions); Mid Continent Aircraft Corp. v. Curry County Spraying Serv., Inc., 572 S.W.2d 308, 310 (Tex. 1978) ("Generally, disclaimers are enforced less readily in strict liability cases than in those of contract warranty."). Few employment cases involve disclaimers that might cover liability for defamation or outrageous behavior inflicting emotional distress. The paucity of such cases is not surprising for such disclaimers would seem offensive. An analogous question that arises more often is whether a mandatory arbitration term in an employment contract covers tort claims. See Michael D. Moberly, Truth and Consequences: The Impact of Arbitration in Employment Defamation Cases, 9 LAB. LAW. 577, 594 (1993) (arguing that a grievance or arbitration proceeding's determination of the accuracy of the grounds for disciplinary discharge ought to preclude a defamation claim).

\(^6\) See Nipper v. Variety Wholesalers, Inc., 638 So. 2d 758 (Ala. 1994) (holding that a store's reasonable investigation of complaints against an employee did not rise to the level of invasion of privacy).
intentional interference with business relations,\textsuperscript{7} and the theory of prima facie tort (in the few states that accept this most formless of theories).\textsuperscript{8} These torts began to crystallize in the last century, and their scope remains ill defined.\textsuperscript{9} One could still say today of each of these torts that "[t]he law is still in a stage of development, and the ultimate limits of [the] tort are not yet determined."\textsuperscript{10} I suggest that these torts disappear in the shadow of other, more specific doctrines in contract or tort law. This essential idea underlies a variety of arguments made to justify limitations on the torts. One argument is that the right under contract law to terminate an at-will employee translates into a privilege under the tort law of infliction of emotional distress, thus protecting conduct at the core of the employment-at-will rule. The same essential idea underlies the argument that an at-will employee implicitly submits to being terminated without notice or cause and so cannot claim that such conduct against him is outrageous.\textsuperscript{11}

Defamation represents an example of torts like fraud\textsuperscript{12} and false

\textsuperscript{7} See Mittelman v. Witous, 552 N.E.2d 973 (Ill. 1989) (holding that a claim of tortious interference with contract was established when an associate at a law firm alleged that a partner slandered him regarding his performance in losing two lawsuits, that the slander was intentional, and that the slander resulted in the associate being fired). Some cases reject interference claims brought by fired workers against managers or coworkers who allegedly induced the employee's termination out of malice by requiring direct or strong evidence of malice, as in defamation cases. See, e.g., Forrester v. Stockstill, 869 S.W.2d 328 (Tenn. 1994) (holding that malice could not be inferred from the fact that the defendants' statements led to the plaintiff's termination).

\textsuperscript{8} See Schmitz v. Smentowski, 785 P.2d 726, 730, 733-36 (N.M. 1990) (describing the prima facie tort as a lawful act, done with the intention to harm the plaintiff, that causes harm and was not otherwise justifiable). Schmitz states that the prima facie tort has been adopted in only two other jurisdictions, New York and Missouri. \textit{Id.} at 733-34.

\textsuperscript{9} On the history of the tort of interference with business relations, see Mark P. Gergen, Tortious Interference: "The Flight From Doctrine" to What? (unpublished manuscript, on file with the Texas Law Review). On the history of prima facie tort, see Kenneth J. Vandevelde, \textit{A History of Prima Facie Tort: The Origins of a General Theory of Intentional Tort}, 19 HOFSTRA L. REV. 447 (1990). On the history of invasion of privacy, see KEETON ET AL., supra note 5, \S 117, at 849-51. Invasion of privacy presents a special problem because it is unclear whether it is one or several torts (appropriation of name or likeness, unreasonable intrusion, public disclosure of private facts, and false light). The more general formulation of the tort is more formless. There is a provocative argument in favor of the more general form of the tort in FOWLER V. HARPER ET AL., \textit{THE LAW OF TORTS} \S 9.6 n.3 (2d ed. 1986).

\textsuperscript{10} \textit{Restatement (Second) of Torts} \S 46 cmt. c (1964) (describing the tort of outrageous conduct causing severe emotional distress).

\textsuperscript{11} In California, the question of whether the state workers' compensation act pre-empts an intentional infliction of emotional distress or a defamation claim turns on whether the actions complained of "are a normal part of the employment relationship," Livitsanos v. Superior Court \textit{ex rel. Continental Culture Specialists, Inc.}, 828 P.2d 1195, 1199 (Cal. 1992) (quoting Cole v. Fair Oaks Fire Protection Dist., 729 P.2d 743, 750 (Cal. 1987)), and "outside the scope and normal risks of employment," \textit{id.} at 1204.

\textsuperscript{12} Hunter v. Up-Right, Inc., 864 P.2d 88 (Cal. 1993), holds that a fraud claim may not be brought by an employee for misrepresentations allegedly made to induce him to resign on the theory that the result of the misrepresentation is indistinguishable from a constructive termination for which an action lies only in contract. \textit{Id.} at 93. The case also holds that an action might lie for a misrepresent-
imprisonment. These torts regulate well-defined conduct that is not normally the subject of bargaining or of contract law. A background rule of privilege or immunity in contract law generally will not bar a claim under these torts, though a specific contract disclaimer might. For example, we would not say that an employee implicitly submits to being defamed by agreeing to work at will. Opening the door to defamation claims might seem to pose a special threat to the employment-at-will rule because there will be some factual basis for a defamation claim in many terminations, and juries are thought to be biased in favor of employees. Defamation law provides a solution to this problem in the form of a rule requiring clear and convincing proof to overcome the privilege that shields statements made by employers and their agents about employees.

sentation on a collateral matter, such as a misrepresentation that induced a fired employee not to bring a claim for discrimination. See, e.g., White v. National Steel Corp., 742 F. Supp. 312, 339 (N.D. W. Va. 1989) (requiring clear and convincing evidence that laid-off employees were fraudu- lendy assured by their employer at the time of their promotion that they would be granted an opportunity to return to their prior positions before being terminated from their new posts), aff'd in part, rev'd in part on other grounds, 938 F.2d 474 (4th Cir.), cert. denied, 502 U.S. 974 (1991). But see Spoljaric v. Percival Tours, Inc., 708 S.W.2d 432, 435 (Tex. 1986) (noting that "'[s]light circumstantial evidence' of fraud, when considered with the breach of promise to perform, is sufficient to support a finding of fraudulent intent" (quoting Maulding v. Mienmeyer, 241 S.W.2d 733, 738 (Tex. Civ. App.—El Paso 1951, orig. proceeding [leave denied])).

13. See Fermino v. Fedco, Inc., 872 P.2d 559, 572 (Cal. 1994) (holding that "false imprisonment committed by an employer against an employee is always outside the scope of the compensation bargain").

14. This issue often arises when a fraud or negligent misrepresentation claim is brought on a representation that is inconsistent with the terms of a written contract. The parol evidence rule in contract law may bar some such tort claims. See, e.g., Bank of Am. Nat'l Trust & Sav. Ass'n v. Pendergrass, 48 P.2d 659, 661 (Cal. 1935) (holding that a fraud claim may not be predicated upon a representation that is "directly at variance with the promise of the writing"); Rio Grande Jewelers Supply, Inc. v. Data Gen. Corp., 689 P.2d 1269 (N.M. 1984) (holding that a contract disclaimer and integration clause bars a negligent misrepresentation claim); LaFazia v. Howe, 575 A.2d 182, 185 (R.I. 1990) (holding that a specific disclaimer defeats a fraud claim as a matter of law by negating plaintiff's reliance).

A rule barring claims based on representations that are inconsistent with the terms of a contract leaves open the door to tort claims that seek additional damages in tort for misrepresentations regarding terms that appear in a contract. See Weisman v. Connors, 540 A.2d 783, 793-94 (Md. 1988) (holding that contract law does not bar a negligent misrepresentation claim when the alleged misrepresentations are consistent with the terms of the contract). This rule also has the paradoxical consequence of placing the plaintiff on stronger ground if the negotiations in which the misrepresentations were made never resulted in the parties entering into a contract. Cf. Federal Land Bank Ass'n v. Sloane, 825 S.W.2d 439, 442 (Tex. 1991) (holding that the statute of frauds does not bar a negligent misrepresentation claim when the parties never reached a contract).

15. See, e.g., Behee v. Missouri Pac. Ry., 71 Tex. 424, 429, 9 S.W. 449, 450 (1888) ("A master does not have the right to libel his servant, simply because the relation of master and servant existed or had existed." [This quote was taken from South Western Reporter and contains textual discrepancies from the version in Texas Reports.]).

16. See infra notes 117-40 and accompanying text.
The public policy tort and the action for breach of the covenant of
good faith and fair dealing are outside the scope of this Paper because they
raise quite different issues than the collateral torts. Unlike the collateral
torts, these actions directly address misconduct in employment or in other
contractual relationships. The public policy tort does not pose the same
boundary-drawing problems as do the collateral torts. Whether a termi-
nation violates public policy is understood to be a question of law for a
judge and not a jury to decide, and in most states, judges may exercise
discretion in formulating prohibited grounds for termination by requiring
that such prohibitions be derived from a statute or the state constitution.
The action for breach of the covenant of good faith and fair dealing
should not be in tort. In most states, the action lies in contract, and a
termination will be held to be in bad faith only if the employer fires an
employee for a reason that the employer specifically led the employee to
believe would not be grounds for termination. California is an

17. Stewart Schwab suggests another distinction: in a true public policy case, an employee is
protected to vindicate the interests of third parties or of society; in a true collateral tort case, the
employee's own interests are at stake. Stewart J. Schwab, Wrongful Discharge Law and the Search
for Third-Party Effects, 74 Tex. L. Rev. 1943, 1960-61, 1974 (1996). This distinction is not entirely
accurate as a descriptive matter. Some "public policy" cases protect the interests of the employee by
reasoning that such protection is good public policy. See, e.g., Frampton v. Central Ind. Gas Co., 297
N.E.2d 425 (Ind. 1973) (allowing a claim for retaliatory discharge as the best means of upholding the
public policy served by workers' compensation legislation when the plaintiff was fired after filing a
workers' compensation claim); Monge v. Beebe Rubber Co., 316 A.2d 549, 551 (N.H. 1974) (holding
that the bad faith evidenced by the discharge of an employee after she resisted the sexual advances of
her superior was contrary to the public interest and entitled her to damages). Further, the collateral
torts also protect societal interests. A concern with policing behavior that society will not tolerate is
at the core of the tort of intentional infliction of emotional distress, for it is directed at conduct that is
"regarded as atrocious, and utterly intolerable in a civilized community." Restatement (Second)
of Torts § 46 cmt. d (1964). Moreover, there is a significant overlap between the standard of liability
under these torts and the standard for punitive damages under the collateral torts, which ostensibly are
awarded to protect or vindicate societal interests rather than to compensate the plaintiff, suggesting that
a violation of these torts almost always implicates the public interest. See Transportation Ins. Co. v.
Moriel, 879 S.W.2d 10, 17 (Tex. 1994) (stating that "punitive damages are levied for the public pur-
pose of punishment and deterrence"). In employment defamation cases in some states, the plaintiff
must show malice to overcome the defense of privilege, which is also the standard for punitive
damages. See infra notes 97-112 and accompanying text. And it is difficult to imagine a case where
the defendant's conduct might be held "atrocious, and utterly intolerable in a civilized community" and
not also be held to involve "circumstances of aggravation or outrage, such as spite or 'malice,' or a
fraudulent or evil motive on the part of the defendant, or such conscious and deliberate disregard of
the interests of others," Keeton et al., supra note 5, § 2, at 9-10, as to justify an award of punitive
damages.

18. E.g., Gantt v. Sentry Ins., 824 P.2d 680, 687 (Cal. 1992) ("[C]ourts in wrongful discharge
actions may not declare public policy without a basis in either constitutional or statutory provisions.")
(emphasis in original)). For example, an employee who alleges that she was discharged for engaging in
certain conduct typically must point to a statute that either protects or mandates that conduct.

1235, 1249-54 (1994).

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important exception because there employees with more than a few years of tenure have rights akin to those under a weak rule of universal "just cause" and, until 1988, the action for breach of the covenant lay in tort. The poor perception of the collateral torts may partly be due to their association with the tort action for breach of the covenant of good faith and fair dealing.

A. Intentional Infliction of Emotional Distress

The tort of intentional infliction of emotional distress protects against "outrageous conduct" that "causes severe emotional distress." The Restatement (Second), which many states follow, defines conduct as outrageous if it goes "beyond all possible bounds of decency" and is "regarded as atrocious, and utterly intolerable in a civilized community." The element of moral outrage is thought to make the tort unpredictable, for the definition of outrageous conduct would seem to depend

strong reliance interest in their job) and those by senior employees (who are in the "cycle" of their career when they should be reaping a premium wage as a quid pro quo for the lower wage they accepted when they were young) tend to succeed, while claims brought by mid-career employees tend to fail. Stewart J. Schwab, Life-Cycle Justice: Accommodating Just Cause and Employment at Will, 92 Mich. L. Rev. 8 (1993). I think Schwab is overly optimistic. In most states, employees without explicit job protection in their employment contract who claim wrongful termination have little hope of prevailing on a contract claim unless they can show that the termination violated a definite expectation that was created by the employer; for example, that the employer denied them procedural safeguards promised in a manual, McDonald v. Mobil Coal Producing, Inc., 820 P.2d 986 (Wyo. 1991), broke an oral promise of job security for a definite period, see McIntosh v. Murphy, 469 F.2d 177, 181-82 (Haw. 1970), or fired them for a reason that they were specifically led to believe would not be grounds for termination, see Fortune v. National Cash Register Co., 364 N.E.2d 1251, 1256-57 (Mass. 1977) (stating that an employer cannot fire a salesman to avoid paying commissions as required by the employment contract).

21. On tenure, see Foley v. Interactive Data Corp., 765 P.2d 373, 387-88 (Cal. 1988) (stating that tenure is relevant in finding an implied-in-fact contract and that six years and nine months of service suffices). On the nature of the protection, see Wilkerson v. Wells Fargo Bank, 261 Cal. Rptr. 185 (Cal. Ct. App. 1989) (holding that an employer's good-faith but erroneous belief is a defense to a claim for breach of the covenant of good faith and fair dealing, but that it is not a defense to a claim for breach of an implied contract term allowing termination only for cause). An employer may retain the at-will rule by making it an explicit term of the employment contract. Gianaculas v. Trans World Airlines, Inc., 761 F.2d 1391, 1394 (9th Cir. 1985); Shapiro v. Wells Fargo Realty Advisors, 199 Cal. Rptr. 613, 622 (Cal. Ct. App. 1984).


24. See Daniel Givelber, The Right to Minimum Social Decency and the Limits of Evenhandedness: Intentional Infliction of Emotional Distress by Outrageous Conduct, 82 Colum. L. Rev. 42, 43 n.9 (1982) (collecting states that have followed § 46 or adopted a variant); Melanie L. Carpenter, Comment, Peterson v. Sioux Valley Hospital: Reckless Infliction of Emotional Distress, 38 S.D. L. Rev. 359, 364 n.70 (1993) (noting that only Hawaii, Mississippi, and Nevada have failed to clearly adopt § 46 and listing demonstrative cases from each of the other states).

upon the judge's private values or passions, or the judge's perception of the community's values or passions.\textsuperscript{26}

Employers do face a significant risk if the legal question is framed as whether any reasonable person might consider the employer's conduct morally outrageous,\textsuperscript{27} as it is in a few decisions.\textsuperscript{28} Under such a rule, infliction claims might make it to the jury in a significant number of wrongful termination cases. For example, firing a long-time employee without warning because of false and unverified allegations of misconduct will seem outrageous to some. Scholarly treatment of the outrageousness element reflects this malleability; seizing on the apparent openness of the tort to moral arguments for expanding legal protection, some scholars have embraced it as a vehicle for advancing values they hold dear, in particular employee rights\textsuperscript{29} and the suppression of hate speech in the workplace and elsewhere.\textsuperscript{30}

\textsuperscript{26} See Givelber, supra note 24, at 52, 51-54 (noting that although outrageousness depends upon the court's determination, "courts may have no particular wisdom with respect to what is socially intolerable").

\textsuperscript{27} A recent Montana case, Sacco v. High Country Indep. Press, Inc., 896 P.2d 411 (Mont. 1995), could prove to be an employer's worst nightmare in this respect because it eliminates the element of outrageousness entirely. Plaintiff alleged that her employer falsely swore a complaint with the police, accusing her of stealing photographic negatives and contact sheets. \textit{Id.} at 414. While the plaintiff's allegations might support a claim under a variety of theories if the allegations could be credibly established, the decision loosens the standards for an intentional infliction of emotional distress claim considerably by abolishing the element of outrageousness. \textit{Id.} at 427-28. The justification for this move was that this element could not stand once the tort of negligent infliction of emotional distress was recognized. \textit{Id.} at 428. Under the reformulated tort, "an independent cause of action for intentional infliction of emotional distress will arise under circumstances where serious or severe emotional distress to the plaintiff was the reasonably foreseeable consequence of the defendant's intentional act or omission." \textit{Id.}

\textsuperscript{28} \textit{E.g.}, Montgomery Ward & Co. v. Andrews, 736 P.2d 40, 46-47 (Colo. Ct. App. 1987) (holding that an agent's claim of intentional infliction of emotional distress was properly submitted to the jury because reasonable persons might differ on whether the conduct was outrageous); Murray v. Bridgeport Hosp., 480 A.2d 610, 614 (Conn. Super. Ct. 1984) (holding that an employee's intentional infliction of emotional distress claim was properly submitted to the jury because whether conduct was outrageous is a question of fact).

\textsuperscript{29} \textit{E.g.}, Regina Austin, \textit{Employer Abuse, Worker Resistance, and the Tort of Intentional Infliction of Emotional Distress}, 41 STAN. L. REV. 1, 5 (1988) ("The tort of outrage would serve a useful pedagogical function if instead of compelling accommodation and surrender it . . . extolled the dignity of workers, and legitimated their claims to respectful treatment by supervisors.").

Despite the apparent openness of the tort, infliction claims by employees rarely succeed. My impression is that the majority of successful infliction claims by employees involve persistent sexual demands or lewd behavior by coworkers or superiors. Employees also have had some success with claims alleging "hate speech" of various types. They have had little success in challenging harsh disciplinary measures.

31. The general lack of success employees have had with infliction claims is reflected in the secondary literature. Those who would use the tort to protect employees from all forms of mistreatment express disappointment that employees tend to win only in cases of persistent sexual harassment or overt racial or ethnic slurs. See Austin, supra note 29, at 12 ("The courts will act positively when there is blatant conduct, but do not extend protection against forms of discriminatory abuse that are less explicit or demonstrative."). Perhaps echoing a similar disappointment over the few successes that victims of hate speech have had under the common law, Richard Delgado, an early proponent of the infliction tort as a means to protect against hate speech, now focuses on the tort as a possible framework and inspiration for hate speech codes. See Richard Delgado & David H. Yun, Pressure Valves and Bloodied Chickens: An Analysis of Paternalistic Objections to Hate Speech Regulations, 82 Cal. L. Rev. 871, 886-87 (1994); cf. Stephen Fleischer, Campus Speech Codes: The Threat to Liberal Education, 27 J. MARSHALL L. REV. 709, 726-27 (1994) (stating that "the courts are most willing to grant relief when the plaintiff is either a customer or an employee" and that the "vast majority of successful cases have involved allegations of 'speech plus conduct' rather than pure speech").

32. See, e.g., Ford v. Revlon, Inc., 734 P.2d 580 (Ariz. 1987) (finding Revlon liable for intentional infliction of emotional distress when the company took a year to redress an employee's complaint of aggressive sexual harassment by a Revlon manager); Pavilon v. Kaferty, 561 N.E.2d 1245 (Ill. App. Ct. 1990) (holding that the plaintiff stated a valid claim when her supervisor pressured her to date him, offered to pay her money for sex, and tried to harass her new employer when she left); Bustamento v. Tucker, 607 So. 2d 532 (La. 1992) (holding that the plaintiff stated a claim when coworkers sexually harassed her over a period of years). For examples of claims that failed because the harassment was insufficiently severe, see McIsaac v. WZEW-FM Corp., 495 So. 2d 649, 650, 651 (Ala. 1986) (rejecting an employee's claim alleging that the president of a radio station made "advances" to the plaintiff for several months and that the station manager told the employee that she would be fired for refusing those advances); Hendrix v. Phillips, 428 S.E.2d 91, 93 (Ga. Ct. App. 1993) (rejecting an employee's claim based on "isolated" incidents of "tasteless and rude social conduct" by a coworker); and Miller v. Equitable Life Assurance Soc'y, 537 N.E.2d 887, 889 (Ill. App. Ct. 1989) (rejecting a claim based on "inconsiderate, rude, vulgar, uncooperative, unprofessional, and unfair" behavior by coworkers and supervisors).

33. See, e.g., Bailey v. Binyon, 583 F. Supp. 923, 934 (N.D. Ill. 1984) (denying motion to dismiss in part because of the court's refusal to characterize defendant's "alleged explicit distinction between 'human beings' and 'niggers'" as "mere insults" or "ordinary discrimination"); Agarwal v. Johnson, 603 P.2d 58, 67 (Cal. 1979) (noting that a supervisor's use of a racial epithet was sufficiently outrageous to create liability); Alcorn v. Anbro Eng'g, Inc., 468 P.2d 216, 217 (Cal. 1970) (reversing the dismissal of a claim based on intentional infliction of emotional distress resulting from the employer's "violent and insolent" racial insults); Gomez v. Hug, 645 P.2d 916 (Kan. Ct. App. 1982) (allowing a claim to go to the jury in which a county employee was subjected to a tirade of racial insults and profanity by the county commissioner). Insulting language without racial inventive has also been held tortious. See, e.g., American Medical Int'l, Inc. v. Giurintano, 821 S.W.2d 331 (Tex. App.—Houston [14th Dist.] 1991, no writ) (stating that a claim of intentional infliction of emotional distress could be brought by a prospective hospital administrator on the basis of rumors regarding his future intentions). But cf. Sterling v. Upjohn Healthcare Servs., Inc., 772 S.W.2d 329 (Ark. 1989) (holding that an employee did not state a claim despite repeated instances when he was defamed and cursed).

34. See, e.g., Haldeman v. Total Petroleum, Inc., 376 N.W.2d 98 (Iowa 1985) (denying a claim where a gas station fired a cashier under a company policy of firing all workers on a shift if the register
famous case where the employee prevailed, *Agis v. Howard Johnson Co.*,\(^{35}\) gives a taste of what might be thought of as "utterly intolerable" disciplinary behavior.\(^{36}\) In order to flush out a thief, a restaurant manager fired the waitresses present in the restaurant in alphabetical order until the identity of a suspected thief was disclosed. Agis was first to go. After the trial court dismissed her complaint, the Massachusetts Supreme Court reversed, holding the facts to be legally sufficient to allow Agis the opportunity for a trial on the merits since "reasonable men" might differ about the outrageousness of the manager’s behavior.\(^{37}\)

What I want to do is to defend a proposition often stated by courts in rejecting infliction claims—that conduct which normally or naturally occurs in a termination cannot be considered morally outrageous as a matter of law.\(^{38}\) I use two intersecting lines of argument. My first argument is that

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was short); Kentucky Fried Chicken Nat’l Management Co. v. Weathersby, 607 A.2d 8 (Md. 1992) (denying plaintiff’s claim that she was suspended and demoted because of a false accusation of theft by her employer, even though her supervisor and other employees who had access to the safe were selectively exempted from taking a company polygraph test); Beery v. Maryland Medical Lab., Inc., 597 A.2d 516 (Md. Ct. Spec. App. 1991) (upholding an award of legal fees to the defendant because the fact that plaintiff was summarily fired in front of other employees without prior notice and based upon unsubstantiated accusations of theft was not even remotely sufficient to support plaintiff’s claim of intentional infliction of emotional distress), *cert. denied*, 600 A.2d 850 (Md. 1992).


36. For cases in which an employee successfully challenged an employer’s harsh disciplinary measures, see King v. Brooks, 788 P.2d 707 (Alaska 1990) (allowing a claim to go to the jury in which a fired plaintiff alleged that his termination was the culmination of a two-year private vendetta held by his supervisor); Taiwo v. Vu, 822 P.2d 1024 (Kan. 1991) (reinstating the verdict for the plaintiff which found that her former employer locked her in the company’s building, filed a false police report, and induced a coworker to lie to the police about her); Shoen v. Amerco, Inc., 596 P.2d 469 (Neved 1995) (holding that a retired executive with 41 years of service stated an infliction claim when he alleged (1) that his employer decided to terminate his retirement compensation package in order to cause him distress in retaliation for the plaintiff’s testifying against the employer’s son at an IRS hearing, (2) that the employer’s son verbally threatened the plaintiff for testifying, and (3) that the defendant knew the plaintiff was under psychiatric treatment); and Wilder v. Cody Country Chamber of Commerce, Inc., 868 P.2d 211 (Wyo. 1994) (allowing a claim to go to the jury alleging that the Chamber’s executive director was fired and publicly made the scapegoat for the organization’s financial difficulties prior to completion of the annual audit).

Employees have had unusual success with infliction claims in South Dakota. For example, the South Dakota Supreme Court has held that it was improper to grant the defendant’s motion for summary judgment on an infliction claim where an employee claimed that it was outrageous to fire him based on staff complaints of incompetency when the employer was aware that at the time the employee was hired he did not have the required academic credentials. French v. Dell Rapids Community Hosp., Inc., 432 N.W.2d 285 (S.D. 1988). The South Dakota cases are collected in Richardson v. East River Elec. Power Coop., 531 N.W.2d 23, 27-28 (S.D. 1995), which uncharacteristically rejected an infliction claim based on an employee’s allegation that she was treated in a hurtful manner when she was fired because the court found that the termination was done in a "civilized" manner without raised voices or profanity. *Id.* at 29.


38. See, e.g., Viestenz v. Fleming Cos., 681 F.2d 699, 703 (10th Cir.) ("The conduct must be sufficiently 'outrageous,' and the harm suffered... must have resulted from the manner in which [the employee] was interviewed or discharged, rather than from the fact of discharge itself."), *cert. denied*,
an employer's conduct in terminating an at-will employee is privileged since the employer has the contract right to terminate the employee. I do not rest on the argument of legal privilege, though often this is where courts leave the issue,39 because a case can be made that such a formal doctrinal argument has no place under the infliction tort, which is committed to a more flexible moral analysis. My second argument is that even a judge who is committed to moral analysis should want this analysis to fit the law and so should reject claims that would render tortious conduct that lies at the core of the employment-at-will rule.

To set up the two arguments I need to tell you a little about the history of the tort. Prior to the 1930s, the debate about the extent to which tort law protected emotional interests when the defendant did not make physical contact with the plaintiff focused on two types of cases—those in which the plaintiff suffered fright from a near miss and those in which the plaintiff suffered shock from seeing an accident involving a loved one.40 These cases involved negligent conduct of a sort that was unquestionably regulated by tort law. The issues were the sufficiency of the evidence of the harm suffered by the plaintiff and the remoteness of that harm.41

459 U.S. 972 (1982); Novosel v. Sears, Roebuck & Co., 495 F. Supp. 344 (E.D. Mich. 1980) (noting that an employer has a legal right to terminate an employee if the right is exercised in a permissible fashion); Mertyris v. P.A.M. Transp., Inc., 832 S.W.2d 823, 826 (Ark. 1992) (“Liability in tort-of-outrage cases does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities.”); Harris v. Arkansas Book Co., 700 S.W.2d 41, 43 (Ark. 1985) (“Because of an employer's right to discharge an at-will employee, a claim of outrage by an at-will employee cannot be predicated upon the fact of discharge alone.”); Hrehorovich v. Harbor Hosp. Ctr., Inc., 614 A.2d 1021, 1035 (Md. Ct. Spec. App. 1992) (rejecting an infliction claim on termination because “such action is an everyday occurrence in our world and rarely ‘beyond all possible bounds of decency’”), cert. denied, 624 A.2d 490 (Md. 1993); Wornick Co. v. Casas, 856 S.W.2d 732, 735 (Tex. 1993) (holding that because an employer “acted within its legal rights in discharging [the plaintiff]... the fact of discharge itself as a matter of law cannot constitute outrageous behavior”); Dzingliski v. Weirton Steel Corp., 445 S.E.2d 219, 226 (W. Va. 1994) (noting that when a claim relies solely upon the distress caused by a discharge, but not upon any underlying improper conduct, the claim has no legal remedy); Leithead v. American Colloid Co., 721 P.2d 1059, 1066 (Wyo. 1986) (holding that a claim will not lie if emotional distress exists solely by reason of the termination). But cf. M.B.M. Co. v. Counce, 596 S.W.2d 681, 688 (Ark. 1980) (asserting that an employer’s abuse of power over a plaintiff-employee, such as withholding pay without “satisfactory explanation,” can itself be extreme and outrageous conduct).

39. See, e.g., Dzingliski, 445 S.E.2d at 227-28 (finding that an employer's investigation into the plaintiff's alleged improper conduct was protected by a qualified privilege and, as a matter of law, could not be found to be outrageous conduct).

40. See Francis H. Bohlen, Right to Recover for Injury Resulting from Negligence Without Impact, 41 AM. L. REG. (n.s.) 141 (1902) (surveying the cases in which injuries were the result of feared, but not actual, physical contact); Archibald H. Throckmorton, Damages for Fright, 34 HARV. L. REV. 260, 281 (1921) (advocating a rule of liability that holds defendants liable for fright caused by a wrongful act that results in nervous shock and physical injury).

41. Bohlen, supra note 40, at 164-65 (examining cases that held the harm suffered was both proximately caused by the negligent act and of sufficient magnitude to create a legal cause of action).
The cases that formed the basis for the tort of intentional infliction of emotional distress—primarily cases involving cruel jokes, threats, and insults—were brought to the fore in a pair of articles published in the 1930s by Calvert Magruder and William Prosser. Magruder and Prosser observed that these cases were both easier and harder to explain than the cases involving fright from near misses and shock to bystanders. They were easier because, once it was conceded that the law should protect against negligent infliction of emotional harm, it was self-evident that it should protect against intentional infliction of emotional harm. But they were also harder because the defendant's conduct was not of the sort normally regulated by tort law. Courts had instead allowed recovery through strained applications of the existing torts, such as assault, trespass, or libel. Magruder and Prosser proposed a separate tort of intentional infliction of emotional distress with a standard of outrageousness to cover these cases. They justified the standard of outrageousness on the grounds that it best explained the precedent and that it answered the only serious argument against the tort, which was that it would open the floodgates to exaggerated claims of hurt and litigation over minor insults.

42. E.g., Nickerson v. Hodges, 84 So. 37, 37 (La. 1920) (involving a defendant who fooled the plaintiff into believing that the plaintiff had uncovered a pot of gold that had supposedly been buried by the plaintiff's relatives); Wilkinson v. Downtown, 2 Q.B. 57, 57 (1897) (involving a defendant who told the plaintiff that her husband had been badly injured in an accident as a joke).
43. E.g., Engle v. Simmons, 41 So. 1023, 1023 (Ala. 1906) (holding the defendant liable to a pregnant woman for abusive debt collection practices which induced premature labor).
44. E.g., Emmke v. De Silva, 293 F. 17, 20-22 (8th Cir. 1923) (holding a hotel liable for the damages stemming from the acts of a hotel manager who burst into the plaintiff's hotel room and accused her of being a prostitute even though she was with her husband).
47. Both Magruder and Prosser made the argument that once it is conceded that tort law protects emotional interests, it necessarily follows that tort law ought to protect against malicious conduct that was done expressly to inflict emotional harm. Magruder, supra note 45, at 1058 (“We have seen how extensively mental and emotional distress have been recognized as recoverable elements of damage parasitic upon another, often purely nominal, cause of action . . . . Usually the law's first step in the independent recognition of an interest is to secure it against conduct purposefully invading it.”); Prosser, supra note 46, at 879 (“It is the character of such conduct itself which provides the necessary assurance that genuine harm has been done . . . .”). This move is similar to one that Oliver Wendell Holmes, Jr., made in justifying cases that held malicious interference with business relations to be tortious. Holmes's general theory of tort doctrine was that it regulated harmful behavior by balancing the defendant's interest in acting as he did and the harm to the plaintiff. Under this theory, malicious behavior is tortious because its purpose is to inflict harm, and thus the defendant can point to no legitimate interest that might justify his action. Oliver W. Holmes, Jr., Privilege, Malice, and Intent, 8 HARV. L. REV. 1, 5 (1894).
49. Id. at 1058; Prosser, supra note 46, at 879.
50. Magruder, supra note 45, at 1058-59; Prosser, supra note 46, at 877-79.
When the American Law Institute accepted the tort in 1948, it did not make outrageousness an element but rather provided that intentional infliction of emotional distress was tortious unless the defendant could establish that his action was privileged. Prosser, the Reporter for the Restatement (Second), did not think this formulation satisfactory. He argued that the tort was expanding too quickly, and to put a brake on its expansion he substituted a standard of outrageousness in the Restatement (Second), while relegating the defense of privilege to the comments.

This story seems untroubling—Magruder and Prosser merely tidied up existing law by proposing the tort, and Prosser substituted the element of outrageousness for the defense of privilege in the Restatement (Second) to brake the expansion of the tort—until one asks the question, at each stage in the life of the tort, whether liability might exist for conduct that is privileged or immunized under another body of law. This issue did not arise during the prehistory of the tort. The cruel joke, threat, and insult cases presented what were novel issues of liability in their day. While there was scant precedent for holding such conduct to be tortious, neither was there a well-established body of law holding such conduct privileged. When judges had to strain existing doctrines to find liability, there were built-in safeguards against upsetting other bodies of law, for a judge would be unlikely to strain one doctrine to upset another. Once the tort was crystallized it took on a life of its own, but the defense of privilege made it possible to incorporate rights, privileges, or immunities enjoyed under other bodies of law into the tort. The tort came to be seen as a means for morally troublesome conduct that was privileged under other bodies of law only because in adopting the standard of moral outrageousness and relegating the defense of privilege to the comments (and so to oblivion in the eyes of some), the Restatement (Second) was thought to open the door to the argument that the sole determinant of liability is the personal moralities of the judge and jury.

The Restatement (Second) is not itself authority for this position, for it retained the principle that conduct inflicting severe mental anguish may be privileged because of rights the actor enjoys under other bodies of law.

51. RESTATEMENT OF TORTS § 46 supplement (1948).
52. RESTATEMENT (SECOND) OF TORTS § 46 reporter's note (Tentative Draft No. 1, 1957). Givelber questions how well-founded Prosser's concern was in 1957. See Givelber, supra note 24, at 62 (suggesting that the new outrageousness standard "might reflect nothing more than a change in the identity of the Reporter").
53. Comment g to § 46 states:

[C]onduct, although it would otherwise be extreme and outrageous, may be privileged under the circumstances. The actor is never liable, for example, where he has done no more than to insist upon his legal rights in a permissible way, even though he is well aware that such insistence is certain to cause emotional distress.

RESTATEMENT (SECOND) OF TORTS § 46 cmt. g (1964).
The illustration describes the immunity of a landlord for the severe mental anguish he inflicts when he threatens to evict a poor, sick mother and her children.\(^5\) The element of outrage was laid over the defense of privilege to further restrict the scope of liability. According to the Restatement (Second), conduct inflicting severe mental anguish that was "tortious or even criminal" or that was characterized by malice or by "a degree of aggravation that would entitle the plaintiff to punitive damages for another tort" might not be outrageous\(^5\) though such conduct could hardly be deemed privileged.\(^6\)

If the existence of the defense of privilege is conceded, the argument that the termination of an at-will employee cannot be tortious when the claimed injury arises from the discharge itself (and not from "improper conduct on the part of the employer in effecting the discharge")\(^5\) seems self-evidently correct, because the employer's contract right to discharge an at-will employee must, at a minimum, protect the employer when it did nothing to harm the employee other than to fire him.\(^5\) Logically, the

\(^5\) Id. § 46 cmt. g, illus. 14.
\(^6\) Id. § 46 cmt. d. There is no mention of the concept of privilege in Prosser's first draft of the revisions to § 46. Restatement (Second) of Torts § 46 (Preliminary Draft No. 1, 1955). The copy of that draft in the ALI microfiche records has the handwritten note "Assume=tortious unprivileged" with a line to the term "outrageous" in the text of § 46. Present comment g, with the reference to privilege and the illustration of the cold-hearted landlord, first appears in Restatement (Second) of Torts § 46, at 89-90 (Council Draft No. 1, 1956).

The concept of "privilege" does not really fit what the authors of § 46 were trying to describe. Elsewhere in the Restatement [First] of Torts, privilege is defined instrumentally: an act is privileged only if it "is necessary for the protection of some interest of the actor or the public which is of such importance as to justify the harm caused or threatened by its exercise." Restatement of Torts § 10(2)(b)(i) (1934). Such an instrumental conception of privilege would not necessarily protect the exercise of a legal right for the focus would be the interests and not the rights of the actor. In particular, the malicious exercise of a legal right for the purpose of causing harm could not easily be held privileged since no legitimate interest justifies the action. Only a few privileges, mostly involving conduct implicating significant public interests, protect malicious conduct.

I believe that the inaptness of the concept of privilege to describe when liability will not lie for infliction of mental anguish is due to the fact that the concept is meant to apply when "the Law of Torts . . . under ordinary circumstances, would make the actor liable for invasions of another's legally protected interests," i.e., when the background rule is one of duty to avoid inflicting injury. Francis H. Bolten, Incomplete Privilege to Inflict Intentional Invasions of Interests of Property and Personality, 39 Harv. L. Rev. 307, 307 (1926). The background rule with regards to purely emotional interests is one of no-duty and so it is odd to describe instances of no-liability as matters of privilege.


Daniel Givelber has suggested that the defense of privilege focuses "on the policy question of whether the defendant's ends justified his or her means." Givelber, supra note 24, at 62. This is partly correct. Under the doctrine of intentional interference with business relations, the issue of privilege (sometimes described as propriety or justification) is often framed in terms of the relative costs and benefits of deterring the defendant's conduct. See Restatement (Second) of Torts § 767 (1977) (including as factors to be weighed in determining the propriety of the defendant's conduct the "interests of the other with which the actor's conduct interferes," the "interests sought to be advanced by the actor," and the "social interests in protecting the freedom of action of the actor and the contractual interests of the other"). But whether conduct is privileged may also turn on its morality.
privilege should also cover conduct that would normally or naturally occur in a termination, for the privilege would be of little value if it did not cloak such conduct.

I do not rest on the argument of privilege because there is an appealing account of the tort of intentional infliction of emotional distress that gives short shrift to that defense. Daniel Givelber has applauded the standard of moral outrage because it provides "the basis for achieving situational justice" without providing for "principled adjudication." In his eyes, the tort is a vehicle for dealing with the occasional hard case where the enforcement of normal legal rules or principles produces a result that seems terribly wrong. While Givelber does not address the defense of privilege, he could conceivably argue with some force that while such a defense exists, the scope of the privilege often depends on a moral judgment. Few privileges are absolute in tort law. For example, though a woman has a right to erect a fence on her property, she may be liable in tort if she erects a fence out of spite. More to the point, while an employer has the right to fire an at-will employee, it is now well established that he may not threaten to exercise that right to obtain sexual services.


59. Givelber, supra note 24, at 75.

60. The Restatement (Second) seems to contemplate nonabsolute privileges. It states that "[t]he actor is never liable, for example, where he has done no more than to insist upon his legal rights in a permissible way." RESTATEMENT (SECOND) OF TORTS § 46 cmt. g (1964). The implication is that sometimes a right may be exercised in an impermissible manner.


62. See, e.g., Monge v. Beebe Rubber Co., 316 A.2d 549, 551 (N.H. 1974) (granting damages to an at-will employee wrongfully discharged for refusing her supervisor's advances on the ground that such a discharge violates public policy); Bookman v. Shakespeare Co., 442 S.E.2d 183, 184 (S.C. Ct. App. 1994) (noting that an employer may rightfully discharge an at-will employee for any reason other than for filing a sexual harassment complaint). But see Hogan v. Forsyth Country Club Co., 340 S.E.2d 116, 126 (N.C. Ct. App.) (noting that an at-will employee may be discharged for any reason, including refusal of sexual advances, unless such a discharge is expressly prohibited by statute), review denied, 346 S.E.2d 140 (N.C.), and review denied, 346 S.E.2d 141 (N.C. 1986).
More broadly, any argument that diminishes the moral quality of analysis under the tort is difficult to square with the history of the tort and with significant transformations in the law in this century that presumably were driven by changing social mores. One of the most striking of these doctrinal changes is in the area of sexual harassment. It is worth taking a moment to sketch the history of legal remedies for sexual harassment claims, for it shows how the outrage standard allows new moral values to be woven into the fabric of the common law. Today it is difficult not to cringe while reading a proposition endorsed by Magruder and Prosser two generations ago that "no action will lie for the insult involved in inviting a woman to illicit intercourse, 'the view being, apparently, that there is no harm in asking.'" A generation later, that proposition would have to have been tempered somewhat because women, typically married, had begun to prevail on infliction claims in sexual harassment cases (some of these cases also involved invasion of privacy claims). In the late 1970s and early 1980s, sexual harassment claims in the law of infliction got swept up in the current of Title VII litigation. Plaintiffs successfully pressed infliction claims (along with invasion of privacy and interference with business relations claims) during this period when recovery under Title VII for

63. WILLIAM L. PROSSER, PROSSER ON TORTS § 11, at 64-65 (1st ed. 1941) (quoting Magruder, supra note 45, at 1055). Catherine MacKinnon observes that the cases cited by Magruder do not squarely support the proposition. CATHERINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION 284 n.78 (1979). Some of the cases allowed a claim to proceed on a theory of assault or battery when the man's behavior was very threatening. See, e.g., Prince v. Ridge, 66 N.Y.S. 454, 455 (N.Y. Sup. Ct. 1900); Newell v. Whitcher, 53 Vt. 589, 591 (1880). Others rejected the claim on the arguably independent ground that the tort required a physical invasion. See, e.g., Davis v. Richardson, 89 S.W. 318, 319 (Ark. 1905); Bennett v. McIntire, 23 N.E. 78, 80 (Ind. 1889). Finally, some cases did squarely reject the argument that solicitation was outrageous behavior. E.g., Reed v. Maley, 74 S.W. 1079, 1080-81 (Ky. 1903).

64. Many of the early infliction cases involving sexual harassment appear to have occurred outside the employment relationship. E.g., Mitran v. Williamson, 197 N.Y.S.2d 689 (N.Y. Sup. Ct. 1960) (considering repeated sexual solicitation and sending of obscene photos, with no statement of how the parties knew each other); Samms v. Eccles, 358 P.2d 344 (Utah 1961) (involving repeated sexual solicitation, with no statement of how the parties knew each other). For an early workplace infliction claim, see Skousen v. Nidy, 367 P.2d 248 (Ariz. 1961) (affirming a judgment for damages where an employer repeatedly touched an employee in attempting to seduce her).

sexual harassment in the workplace was uncertain in a case that did not involve the loss of economic benefits. In the late 1980s, if the number of reported cases is a guide, there was a flood of infliction claims involving workplace sexual harassment. Such claims were necessary to supplement the then-meager remedies that were available under Title VII. By 1987, the authors of Prosser's treatise could confidently state in a supplement that "sexual harassment on the job is undoubtedly an intentional infliction of emotional distress." Lately the debate has shifted to a new plane, for current thinking is that certain forms of sexual harassment ought to be held outrageous per se. One cannot help but think that the moral quality of the analysis of the infliction tort facilitated this remarkable two-generation shift in legal standards of conduct.

But conceding that analysis under the infliction tort has a significant moral element does not mean that the status of the defendant's conduct under other bodies of law is entirely irrelevant to the determination of the outrageousness of the conduct. In particular, while hard cases concerning the scope of an employer's privilege to fire an at-will employee may require a moral judgment, easy cases at the "core" of the privilege should not, for several compelling moral reasons. First, the contract rule is evidence of the moral values of the community. Second, preserving a perceived boundary between contract and tort—or what Ronald Dworkin calls the sense of "local priority"—may itself be a value for a reason that Dworkin states: "Law... is interpretive, and compartmentalization is


67. Prior to the Civil Rights Act of 1991, remedies were limited to reinstatement and back pay. Conte, supra note 65, § 2.2.1. One treatise observes of this period that "this [Act] is a monumental change in the federal discrimination laws. Up to now, sexual harassment plaintiffs who sought monetary relief for their injuries had to resort to state court or pendent state law claims and their concomitant standards." Id.


69. See Ruple v. Brooks, 352 N.W.2d 652, 655 (S.D. 1984) (holding that telephone harassment is outrageous as a matter of law on the basis of a state statute outlawing such conduct); see also Montgomery, supra note 66, at 894-95 (arguing that sexual harassment in the workplace should be considered outrageous per se); Merle H. Weiner, Domestic Violence and the Per Se Standard of Outrage, 54 Md. L. Rev. 183 (1995) (arguing that domestic violence ought to be outrageous as a matter of law if the defendant's conduct violates an injunction issued to protect the plaintiff); Krista J. Schoenfelder, Comment, A Theory of Tort Liability for Sexual Harassment in the Workplace, 134 U. Pa. L. Rev. 1461, 1482-83 (1986) (arguing for a per se standard on the ground that the standard of outrageousness because of its subjectivity is the greatest obstacle to recovery for sexual harassment).
a feature of legal practice no competent interpretation can ignore."\textsuperscript{70} Third, and more pragmatically, violating or creating confusion along accepted boundary lines is likely to produce unstable areas of the law where outcomes are capricious (or at least seem that way), sacrificing values such as predictability and evenhandedness\textsuperscript{71} and imposing high litigation costs. Indeed, the outcome is much like the bleak picture of modern wrongful termination litigation.

The legal and moral arguments converge because a qualified defense of privilege can be thought of as a doctrinal expression of a weak requirement of "fit."\textsuperscript{72} Under a weak requirement of fit, the defendant's conduct could not be held morally outrageous if some legal rule gives him a right, privilege, or immunity to act as he did and his conduct seems to be at the core of the conduct protected by that legal rule. One needs only a weak requirement of fit to explain why conduct that normally or naturally occurs in a termination cannot be deemed morally outrageous.

Much of the early law of infliction is consistent with an even stronger requirement of fit, under which the moral principle that the defendant allegedly violated must itself be derived from the law. In the early life of the tort, liability for cruel jokes, threats, and insults was explicitly grounded on a moral principle derived from tort law that forbade "a man to do harm to his neighbor for the sole pleasure of doing harm."\textsuperscript{73} The modern cases involving hate speech might be grounded on the same principle. Alternatively, the hate speech and sexual harassment cases might rest on what Andrew Koppelman calls the antidiscrimination principle,\textsuperscript{74} which is derived from sources outside of the common law.\textsuperscript{75}

\textsuperscript{70} RONALD DWORKIN, LAW'S EMPIRE 251-52 (1986).

\textsuperscript{71} Many of these arguments can be found in Daniel Givelber's excellent article. See Givelber, supra note 24, at 52, 51-55 (arguing that applying a similar outrageousness test in the criminal context would create uncertainty regarding what conduct is criminal and would permit enforcement of the law "in an arbitrary and discriminatory fashion"). I had thought that a requirement that the moral determination that conduct is outrageous be grounded in the law might be justified by the basic concept of law in the liberal state, which requires that the use of state coercion be "licensed or required by individual rights and responsibilities flowing from past political decisions about when collective force is justified." DWORKIN, supra note 70, at 93. A colleague, Bill Powers, suggests that this argument is not entirely persuasive because there may be local areas in the law where decisions are made without regard to precedent or other legal authority. My position might be resurrected with the argument that embedding the infliction tort in other law, including the employment-at-will rule, is essential to "localize" the tort.

\textsuperscript{72} See DWORKIN, supra note 70, at 239 ( positing that "[a] judge's decision . . . must be drawn from an interpretation that both fits and justifies" prior judicial opinions).

\textsuperscript{73} Holmes, supra note 47, at 6. Analogously, cases imposing liability for coercive collection tactics might have been fit under a principle derived from the law on duress and blackmail.

\textsuperscript{74} Koppelman describes the antidiscrimination principle as holding that "[r]acism, sexism, and similar ideologies are so evil and destructive of the proper workings of a free society that the state should do whatever it can to eradicate them." ANDREW KOPPELMAN, ANTIDISCRIMINATION LAW AND SOCIAL EQUALITY (forthcoming 1996) (manuscript at 1, on file with the Texas Law Review).

\textsuperscript{75} The strength of a principle is a function of: how far afield from the law that primarily governs the relationship at issue one had to go in deriving a principle, the principle's level of abstraction, and
Legal analysis can facilitate judgment about the morality of the defendant's conduct even in difficult cases like *Agis v. Howard Johnson Co.*, in which a restaurant manager fired his waitresses in alphabetical order to coerce them into revealing a suspected thief. A plausible legal argument can be made on behalf of either side in *Agis*. The defendant perhaps has the slightly stronger legal argument, for the firm had a contract right to fire the plaintiff, and the manager exercised that right for a bona fide reason—to catch a thief. The manager did not act maliciously in the true sense of the term—while his actions showed little regard for Agis, there is no reason to suspect that they were done out of dislike. Moreover, the firing of a group of employees to guard against thievery by an unknown member of the group has been condoned in other contexts.

A legal basis for a moral argument on behalf of Agis might be constructed upon the old infliction cases that condemn oppressive debt collection tactics. These cases show that some acts, even if done for a bona fide business reason, may be morally outrageous. A plausible moral principle that may be teased out of these cases is proportionality—you cannot inflict or threaten to inflict a great harm on another person to capture a small benefit for yourself. This principle arguably runs through other parts of the common law. In *Agis*, the manager's conduct was objectionable the number of cases within the field that contradict the principle. For example, it may seem easier to ground the hate speech cases under the infliction tort on the principle which condemns purely malicious acts because that principle is derived from tort law. Indeed, that principle is derived from doctrines in tort law that protect nonphysical interests, such as interference with business relations and defamation. But the strength of that principle is weakened by the fact that there are counterexamples within the field holding that malice does not render an otherwise lawful act tortious. See, e.g., Texas Beef Cattle Co. v. Green, 39 Tex. Sup. Ct. J. 194, 1996 WL 200354 (Apr. 25, 1996). Thus, the principle of antidiscrimination greatly strengthens the placing of hate speech cases in tort law, particularly since that principle is instantiated in Title VII and state civil rights laws, which directly regulate the employment relation.

76. See supra notes 35-37 and accompanying text.

77. See, e.g., Union News Co. v. Hildreth, 295 F.2d 658, 660 (6th Cir. 1961) (allowing an employer to discharge almost half of its lunch-counter employees when the employer was unable to determine which employees were guilty of "mishandling . . . merchandise and money" which had led to abnormally low profits).

78. See, e.g., Engle v. Simmons, 41 So. 1023, 1023-24 (Ala. 1906) (endorsing a cause of action to recover damages for physical pain suffered as a result of "a state of nervous excitement" which was caused by a creditor's unlawful entry into the plaintiff's home and his subsequent interrogation of the plaintiff); Barnett v. Collection Serv. Co., 242 N.W. 25, 28 (Iowa 1932) (allowing recovery for mental anguish suffered as a result of malicious letters sent by a collection agency); La Salle Extension Univ. v. Fogarty, 253 N.W. 424, 426 (Neb. 1934) (permitting recovery for mental anguish resulting from "harassing and threatening" letters sent by a creditor).

79. See Mark P. Gergen, A Defense of Judicial Reconstruction of Contracts, 71 IND. L.J. 45, 46-47 (1995) (arguing that several doctrines in contract law are consistent with a principle of "unselfish performance," which prevents a party from acting or threatening to act in a way that would profit him at a large loss to the other party). After I wrote that article I discovered an article by John Dawson invoking a principle of disproportionality stated in a slightly different way to explain duress doctrine. See John P. Dawson, Economic Duress—An Essay in Perspective, 45 MICH. L. REV. 253, 288 (1947).
because it was unlikely to reveal the thief (who had nothing to lose by remaining silent and who probably acted secretly), but it inflicted a substantial loss on the fired waitresses (causing both an economic loss and mental anguish as a result of being so sorely treated). The cases that condone punishing a group for the sins of an unknown individual might be distinguished in some instances on the ground that those policies were pre-announced, or on the ground that a union assented to the policy on behalf of the employee. Such harsh policies are likely to be of greater utility if they are pre-announced because employees will be on notice to monitor each other. That employees or their union assent to such a policy in advance, or even after the fact, also makes it seem less unfair.

Finally, recognizing a defense of privilege or imposing a requirement of fit makes it possible to justify the practice of taking the issue of whether conduct is morally outrageous from the jury even though there might be a difference of opinion on that issue within a community. Placing the moral inquiry within a legal framework secures the authority of the judge to resolve close questions; while it is clear that close legal questions remain questions of law, it is not clear whether close moral questions are for the judge or the jury in tort law.

(“Doctrines of duress are intended to raise precisely the question whether it is 'rightful' to use particular types of pressure for the purpose of extracting an excessive or disproportionate return.”).


81. See Hildreth, 295 F.2d at 664 (allowing a union to agree to the discharge of lunch-counter employees because temporary replacement workers produced a more normal profit margin).

82. But see Simmons v. Union News Co., 382 U.S. 884, 887 (1965) (Black, J., dissenting from a denial of certiorari) (“I cannot believe that those who passed the [National Labor Relations] Act intended to give the union the right to negotiate away alleged breaches of a contract claimed by individual employees.”).

83. Comment h to § 46 of the Restatement (Second) of Torts is ambiguous on this point: Court and jury. It is for the court to determine, in the first instance, whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery, or whether it is necessarily so. Where reasonable men may differ, it is
B. Defamation

An employer exposes itself to a potential defamation claim whenever it discharges an employee for disciplinary reasons. Statements that an employee is incompetent, dishonest, chronically absent, or insubordinate; has a problem with drugs or alcohol; or has behaved in other ways that constitute grounds for disciplinary discharge may well be considered defamatory. Indeed, in some states such statements may be considered defamatory per se, so the employee might not even have to prove actual damages to recover.84

Employers have sought to protect themselves from defamation claims by adopting a policy of refusing to communicate negative information about ex-employees to outsiders.85 By implementing such a policy, they hope

for the jury, subject to the control of the court, to determine whether, in the particular case, the conduct has been sufficiently extreme and outrageous to result in liability. RESTATENEMT (SECOND) OF TORTS § 46 cmt. h (1964). I would think a natural reading of this passage would convey that the issue of outrageousness is like any other factual issue—it is for the jury to decide “[w]here reasonable men may differ.”

A colleague, David Anderson, suggests another interpretation. He notes that the parallel structure of the rule—the judge first decides if conduct is outrageous and then the jury decides—is borrowed from other rules in tort in which it is understood that the judge may initially resolve issues that seem close to her. An example of such a rule can be found in the law governing when a communication will be held to have a defamatory meaning. A judge determines “whether a communication is capable of bearing a particular meaning” and “whether that meaning is defamatory,” while a jury determines whether the communication “was so understood by its recipient.” RESTATEMENT (SECOND) OF TORTS § 614 (1976). The example is different, however, because the judge and jury are passing on different issues—the objective and subjective meaning of a communication—rather than a single issue.

There is another way to rationalize a practice of taking moral questions away from the jury when there is a difference of opinion within the community about what is outrageous. Comment d of § 46 of the Restatement (Second) states that conduct is outrageous if “the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, ‘Outrageous!’” RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1964) (emphasis added). If the criterion is the views of the average member of the community, then a judge might take the issue away from the jury because she believes that is the sentiment of a minority, even though there is significant sentiment within the community that the defendant’s conduct is outrageous. I find this rationale unpersuasive for it assumes judges know the majority’s views.

84. See Weldy v. Piedmont Airlines, Inc., 985 F.2d 57, 62 (2d Cir. 1993) (holding that a statement that an employee was being terminated for aggravated assault was slander per se under New York law); Torosyan v. Boehringer Ingelheim Pharmaceuticals, Inc., 662 A.2d 89, 106 (Conn. 1995) (holding that a statement accusing an employee of falsifying travel expense reports designed to result in the employee’s discharge was defamation per se).

85. See Kirk Johnson, Why References Aren’t ‘Available on Request’, N.Y. TIMES, June 9, 1985, at F8 (noting that American companies increasingly perceive giving references for former employees as “potentially dangerous in an increasingly litigious society”). But see Claudia H. Deutsch, Pastl References Are Sneaking Back, for Real, N.Y. TIMES, Dec. 2, 1990, at F25 (noting that the trend towards giving honest, informal references in spite of corporate-imposed gag orders is motivated by executives’ desire to give good, as well as bad, recommendations). A recent survey indicated that 41% of human resources professionals currently work for companies that have formal written policies stating that outside references will not be provided. Ramona L. Paetzold & Steven L. Willborn, Employer (Irrationality and the Demise of Employer References, 30 AM. BUS. L.J. 123, 123 n.1 (1992) (citing a 1989 survey conducted by the National Association of Corporate and Professional Recruiters, Inc.).
to avoid publication of defamatory matter. But there is little security in such policies. The firm and its employees remain exposed to defamation claims for communications made within the firm because, in most states, internal communications satisfy the publication requirement. In addition, some states have adopted the doctrine of self-publication, which holds a firm liable for a plaintiff’s communication of the grounds for his discharge to others, if the firm would reasonably expect the plaintiff to pass on that information. Under the doctrine of self-publication, a firm may avoid liability only by refusing to tell an employee of the grounds for discharge. However, this policy exposes the firm to a greater risk of liability on other grounds. For example, silence about the grounds for discharge may make later charges of an employee’s misbehavior seem pretextual, which would weaken the firm’s defense on a discrimination claim or on a retaliation claim.

Truth is also a defense at common law, but employers may take little solace from it. If the employee can allege facts from which a reasonable person might conclude that a statement was false, then in most states the plaintiff will be able to get to the jury on the issue of truth. With truth as the defense, a defamation claim becomes a vehicle for litigating the validity of the grounds for discharge.

86. See, e.g., Staples v. Bangor Hydro-Elec. Co., 629 A.2d 601, 604 (Me. 1993) (holding that intracorporate communication is a publication, in part because “damage to one’s reputation within the corporate community may be as devastating as that outside”); Bander v. Metropolitan Life Ins. Co., 47 N.E.2d 595, 599-600 (Mass. 1943) (holding that a manager’s false statement of fact and misleading personal characterization of a discharged employee during a staff meeting were not privileged communications). A famous case to the contrary is Prins v. Holland-North Am. Mortgage Co., 181 P. 680, 681 (Wash. 1919) (holding that when a corporation, acting through one of its agents, sends a libelous communication to another agent, “[i]t is but communicating with itself and therefore the communication ‘cannot be a publication of . . . libel on the part of the corporation’”). In some states, certain internal communications will not constitute publication while others will. E.g., Schrader v. Eli Lilly & Co., 639 N.E.2d 238, 261 (Ind. 1994) (holding that while general intracompany communications among managers do not constitute publication, intracompany communications to coworkers regarding grounds for termination do constitute publication).

87. E.g., Churchey v. Adolph Coors Co., 759 P.2d 1336, 1343-44 (Colo. 1988); Belcher v. Little, 315 N.W.2d 734, 737-38 (Iowa 1982); Lewis v. Equitable Life Assurance Soc’y of the United States, 389 N.W.2d 876, 888 (Minn. 1986) (all finding that there had been a publication where the defendant knew or should have foreseen that the plaintiff would be compelled to repeat the defamatory statement to a third person). Cases that decline to follow Lewis include Layne v. Builders Plumbing Supply Co., 569 N.E.2d 1104, 1110-11 (Ill. App. Ct. 1991); De la Rosa v. Southwest Community Health Servs., Inc., 10 IER Cas. (BNA) 1564 (N.M. 1994); and Yetter v. Ward Trucking Corp., 585 A.2d 1022, 1024-25 (Pa. Super. Ct.), appeal denied, 600 A.2d 539 (Pa. 1991).

88. ROBERT D. SACK & SANDRA S. BARON, LIBEL, SLANDER, AND RELATED PROBLEMS § 3.1 (2d ed. 1994). If the speech is constitutionally protected, the plaintiff must prove falsity. Id. For an odd case to the contrary, see Johnson v. Johnson, 654 A.2d 1212 (R.I. 1995) (holding that maliciously referring to a woman as a whore is actionable as defamation regardless of truth).

The insecurity of the other defenses suggests that the most important safeguard for employers lies in the qualified or conditional privilege that protects (1) complaints made within the firm about an employee by co-workers or managers,90 (2) publication by the firm of the grounds for a discharge to coworkers, customers, or (sometimes) the public,91 and (3) references about a discharged worker given to prospective employers.92

In most cases, an allegedly defamatory statement about an employee will come under a privilege and the issue will be whether the speaker abused the privilege. The concept of abuse of privilege is quite particularized in the Restatement (Second), which distinguishes between lying or speaking with reckless disregard for the truth,93 speaking with an improper purpose (e.g., making an accusation out of spite),94 broadcasting defamatory matter too broadly,95 and including unprivileged, defamatory

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90. See, e.g., Esmark Apparel, Inc. v. James, 10 F.3d 1156, 1162 (5th Cir. 1994) (reasoning that an employer's use of "a proper means of communicating privileged information" permits discussion of sensitive workplace matters within the company while protecting the employer from liability for excessive publication).

91. See, e.g., Schrader v. Eli Lilly & Co., 639 N.E.2d 258, 262 (Ind. 1994) (holding that an intracorporate slide presentation listing the names of employees and the reasons for their discharge was protected by the qualified privilege).

92. See, e.g., Cribbs v. Montgomery Ward & Co., 272 P.2d 978, 981 (Or. 1954). This privilege is codified in some states. E.g., CAL. CIV. CODE § 47(c)(3) (West Supp. 1996) (protecting references that are "based upon credible evidence, made without malice, by a current or former employer of the applicant to, and upon request of, the prospective employer"). MODEL COMMUNICATIVE TORTS ACT, reprinted in 47 WASH. & LEE L. REV. 1 (1990), would considerably restrict the employer's privilege to give references, to provide information to the government, and to use information in labor arbitration or collective bargaining. See id. § 3-102(a). It would also restrict the general privilege to speak to prevent potential harm to others or to preserve the public safety. See id. § 8-107. For example, an employee's complaint to her employer regarding sexual harassment would not be privileged because the communication is made to protect the speaker and not "to prevent potential harm to third persons or to preserve the public safety." Id. § 8-107(c). And an employer's publication to the workforce of the reason for a discharge of a worker would not be privileged for the same reason. Compare the Restatement (Second) which provides a qualified privilege for a statement "that affects a sufficiently important interest of the publisher [if] the recipient's knowledge . . . will be of service in the lawful protection of the interest." RESTATEMENT (SECOND) OF TORTS § 594 (1976). The Act would broaden liability in other respects because its standard of care is negligence requiring a reasonable belief in the truth of the statement, MODEL COMMUNICATIVE TORTS ACT, supra, § 3-102(a), and the burden of proof is the preponderance of the evidence. Id. § 8-109. However, the Act would also eliminate punitive and presumed damages in defamation actions. See id. § 3-101 cmt.

93. RESTATEMENT (SECOND) OF TORTS § 600 (1976).

94. Id. § 603. This class of abuse is further particularized by a separate rule that condemns publishing defamatory matter when one "does not reasonably believe the matter to be necessary to accomplish the purpose for which the privilege is given." Id. § 605.

95. Id. § 604. The issue of overpublication poses a special problem in deciding what is a question for the judge and what is a question for the jury. The issue of whether a privilege exists for a particular communication is for a judge to decide, while the issue of abuse of the privilege is for the jury to decide. Id. § 619. Thus, when the claim is overpublication, a judge may treat the issue as purely legal by concluding that a privilege exists with regard to the entire audience. See Calleon v. Miyagi, 876 P.2d 1278, 1287 (Haw. 1994) (holding that "the court must first decide, as a matter of law, the threshold question whether the qualified privilege exists under the facts of the case"); cf. Schrader v.
matter in a privileged communication.  

Courts often express the standard for abuse of the privilege more loosely, as malice or bad faith, although a few states have a negligence standard. The use of malice as a standard is confusing because the concept of malice appears in several places in the law of defamation, with different meanings in each context. For instance, the concept of abuse of the privilege in the Restatement (Second) includes “actual malice” (sometimes called “constitutional malice” by courts), which means that the defendant spoke “knowing the matter to be false, or act[ing] in reckless disregard as to its veracity.” The usual formulation of the standard (but not the name or the concept, both of which have common-law roots) is from New York Times Co. v. Sullivan. Actual malice is the minimum standard of fault for constitutionally protected speech.

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Eli Lilly & Co., 639 N.E.2d 258 (Ind. 1994) (holding that publication of the grounds for discharge for six employees and distribution to a workforce of 1500 was reasonable because of the company’s legitimate interest in suppressing rumors and speculation about the action). On the other hand, once the judge concludes that the privilege does not exist with regard to some members of the audience, then the issue of abuse is for the jury unless reasonable minds could not differ. Restatement (Second) of Torts § 619 cmt. b (1976).

96. Restatement (Second) of Torts § 605A (1976).

97. E.g., Staples v. Bangor Hydro-Elec. Co., 629 A.2d 601 (Me. 1993); Jacron Sales Co. v. Sindorf, 350 A.2d 688 (Md. 1976); Constant v. Spartanburg Steel Prods., Inc., 447 S.E.2d 194 (S.C.), cert. denied, 115 S. Ct. 580 (1994); Crump v. P & C Food Mkts., Inc., 576 A.2d 441 (Vt. 1990). Some cases suggest “good faith” is a more apt standard because it can account for the possibility that a privilege may exist for reporting harmful information that one has knowledge of, but does not believe, or the possibility that a privilege may not exist for information that one does believe, but reports with an intent to harm another or profit one’s self. E.g., Doane v. Grew, 107 N.E. 620, 622 (Mass. 1915) (explaining that the declarant need not personally believe the information he provides to a third party for it to be privileged, but rather must only exercise good faith in relaying the information). For a good discussion of the standard for abuse of a privilege in a case, see Olson v. 3M Co., 523 N.W.2d 578, 585-86 (Wis. Ct. App.), review denied, 527 N.W.2d 335 (Wis. 1994).


103. 376 U.S. 254, 280 (1964) (defining actual malice as making a statement “with knowledge that it was false or with reckless disregard of whether it was false or not”).

104. Speech by media defendants about public figures on matters of public concern plainly is protected. See Rodney A. Smolla, Law of Defamation § 3.05 (1986). While the question of whether these protections extend to nonmedia defendants has not been settled by the Supreme Court, id. § 3.02[3], most states have extended similar protections to speech by nonmedia defendants about public figures on matters of public concern under the common law or free speech clauses of their state constitutions. See Casso v. Brand, 776 S.W.2d 551, 554 n.2 (Tex. 1989) (collecting state cases). The Supreme Court’s “teasing refusal to lay to rest the media/nonmedia question in defamation law,” Smolla, supra, § 3.02[4], has had an interesting consequence in Texas, because several cases have
The concept of abuse of the privilege in the Restatement (Second) also includes "express malice" (or sometimes "common law malice")\textsuperscript{105}, which means that the defendant spoke out of spite, "from ill will and improper motives, or causelessly and wantonly for the purpose of injuring the plaintiff."\textsuperscript{106} This is also the standard for punitive damages at common law.\textsuperscript{107} Finally, the concept of abuse of the privilege in the Restatement (Second) includes conduct that falls short of lying, reckless disregard for the truth, or spite,\textsuperscript{108} although identifying such cases requires hair-splitting distinctions. For example, if the defendant disclosed a plausible rumor about the plaintiff to a supervisor in order to advance his own career, that might constitute abuse of the privilege under the Restatement (Second) because he spoke with an improper purpose, even though he did not speak out of spite or with reckless disregard for the truth. Cases that invoke a malice standard are all over the map on what it means. Some cases say that express malice must be shown to defeat a privilege,\textsuperscript{109} others say that actual malice must be shown,\textsuperscript{110} some say that a showing of either express malice or actual malice will do,\textsuperscript{111} while others say that both express malice and actual malice must be shown (i.e., the defendant both lied or spoke recklessly and did so out of spite).\textsuperscript{112}

\textsuperscript{105} RESTATEMENT (SECOND) OF TORTS § 603 cmt. a (1976) ("A publication ... if made solely from spite or ill will, is an abuse and not a use of the privilege.").

\textsuperscript{106} Lewis v. Equitable Life Assurance Soc'y of the United States, 389 N.W.2d 876, 891 (Minn. 1986) (quoting Stuempges v. Parke, Davis & Co., 297 N.W.2d 252, 257 (Minn. 1980)).

\textsuperscript{107} SACK & BARON, supra note 88, § 8.3.5.1, at 500-01.

\textsuperscript{108} See supra note 94.

\textsuperscript{109} E.g., Lewis, 389 N.W.2d at 891.

\textsuperscript{110} E.g., ContiCommodity Servs., Inc. v. Ragan, 63 F.3d 438, 442 (5th Cir. 1995), cert. denied, 116 S. Ct. 1318 (1996); Jacron Sales Co. v. Sindorf, 350 A.2d 688, 699 (Md. 1976); Constant v. Spartanburg Steel Prods., Inc., 447 S.E.2d 194, 196 (S.C.), cert. denied, 115 S. Ct. 580 (1994). In addition, Duffy v. Leading Edge Prods., Inc., 44 F.3d 308, 313 (5th Cir. 1995), states (incorrectly, I believe) that Texas requires that actual malice be proven by clear and convincing evidence. Duffy misstated Texas law on this point because although it follows Schauer v. Memorial Care Sys., 856 S.W.2d 437, 450 (Tex. App.—Houston [1st Dist.] 1993, no writ), which requires clear and convincing evidence of an employee's claim, Schauer errs by following Casso v. Brand, 776 S.W.2d 551, 557-59 (Tex. 1989), a case involving a public figure.

\textsuperscript{111} E.g., Staples v. Bangor Hydro-Elec. Co., 629 A.2d 601, 604 (Me. 1993); Crump v. P & C Food Mkts., Inc., 576 A.2d 441, 447 (Vt. 1990); cf. Stephens v. Columbia Pictures Corp., 240 F.2d 764, 767 (2d Cir.) (holding that under New York law, malice not only encompasses cases of personal ill will, but "may also consist of a wanton and reckless disregard of the rights of another"), cert. denied, 353 U.S. 949 (1957). Under this standard, an employee who maliciously tells a supervisor a credible story about a coworker that the employee believes to be true could not claim the privilege, for there is express, but not actual, malice. And a coworker who stupidly believes an incredible rumor which he passes on for well-intentioned reasons could not claim the privilege, for there is actual malice (more precisely, reckless disregard for the truth), but not express malice.

\textsuperscript{112} See, e.g., Bacon v. Michigan Cent. R.R., 33 N.W. 181, 185-86 (Mich. 1887) (remanding even though the plaintiff had shown that the investigators were motivated by ill will when accusing him
In actuality, the precise formulation of the standard for abuse of the privilege is of little importance in most cases. In theory, the standards of actual and express malice refer to different states of mind. Actual malice refers to the defendant's attitude toward the truth of his statement, while express malice refers to his attitude toward the plaintiff. And, in theory, these two states of mind are proven differently. Actual malice is proven by showing the absence of a credible basis for the accusation. Express malice is proven by evidence of "bad blood" between the parties, such as prior conflicts involving the parties, intemperate words, or acts by the plaintiff that would draw the defendant's ire. These differences are not that significant in reality because a plaintiff can use either type of evidence in most cases. If there is not a rule requiring strong or direct evidence of a particular state of mind, then evidence that establishes the other state of mind should also suffice to allow a jury to find the prohibited state of mind, so long as there is not decisive evidence of innocence on the prohibited state of mind. For example, if evidence exists of bad blood between the plaintiff and the defendant, then the jury might infer that the defendant lied or spoke recklessly, so long as it is not clear that there was a solid basis for the accusation. Conversely, if the evidence shows there was no credible basis for the accusation, then the jury might properly infer that the defendant spoke out of spite, so long as it is not clear from other evidence that he harbored no ill feelings towards the plaintiff.

Little attention has been paid to an issue of more practical significance: what constitutes sufficient evidence of abuse of the privilege in a private defamation case. Some states follow New York Times Co. v. Sullivan and require proof of actual malice by clear and convincing evidence. It has been said that under this rule it is not sufficient to
show the jury "that the evidence [is] consistent with the existence of actual malice, or even that it raise[s] a suspicion."¹²⁰ Rather, the evidence of malice must outweigh the evidence against malice.¹²¹ An alternative formulation of the rule requires the plaintiff to show that there was no basis for the defendant's accusation.¹²²

Some courts have rejected a clear and convincing evidence standard on the ground that this standard derives from the First Amendment, which has no application in the employment setting if the plaintiff is not a public figure and the speech is not on a matter of public interest.¹²³ It is a mistake, however, to conclude from this that there is no basis in the law for imposing evidentiary safeguards in a private defamation case. There is much old authority for the proposition that mere proof of the falsity of a defamatory statement was not sufficient proof of malice to overcome a claim of privilege,¹²⁴ a rule that many courts still invoke today.¹²⁵ This

¹²²  See Esmark Apparel, Inc. v. James, 10 F.3d 1156, 1163 (5th Cir. 1994) (holding that the plaintiff "failed to raise a genuine issue of material fact as to [the defendant’s] abuse of its qualified privilege through actual malice").

¹²³  See, e.g., Rattray v. City of National City, 51 F.3d 793, 801 (9th Cir. 1994) ("[a]ccording to established practice, all elements of a defamation claim, with the exception of actual malice in the case of a public official, must be proved by a preponderance of the evidence."), cert. denied, 116 S. Ct. 80 (1995); Weldy v. Piedmont Airlines, Inc., 985 F.2d 57, 64 (2d Cir. 1993) ("A clear-and-convincing standard for proving malice has been applied in some defamation cases, but only in the context of constitutional issues arising under the first amendment . . . .").

¹²⁴  See, e.g., Sabatowski v. Fisher Price Toys, 763 F. Supp. 705, 715 (W.D.N.Y. 1991) (granting summary judgment because there was no "direct evidence" of malice); Bals v. Verduzzo, 600 N.E.2d 1353, 1357 (Ind. 1992) (entry of judgment upheld where plaintiff failed to show any disregard for the truth by defendant); Molt v. Lindsay Mfg. Co., 532 N.W.2d 11, 17 ( Neb. 1995) (granting summary judgment on basis of privilege though there was evidence of falsity); see also, Seidenstein v. National Medical Enters., Inc., 769 F.2d 1100, 1104 (5th Cir. 1985) ("Proof of falsity in fact is not enough [to establish actual malice], nor is proof of a combination of falsehood and general hostility.").
rule is sometimes said to follow logically from the existence of a qualified privilege, since absent such a privilege, legal malice could be presumed from the falsity of the statement as an element of the prima facie defamation case.\(^{126}\) The common-law standard of sufficiency often was expressed as requiring proof of malice either directly with evidence of "declarations, acts, and conduct of the defendant, showing personal ill will toward the plaintiff," or indirectly with evidence "bearing upon the general course of conduct of the defendant toward the plaintiff, the internal evidence furnished by the character of the libel, and any other specific facts and circumstances not in direct proof of the malice."\(^{127}\) The above-quoted case, *Davis v. Hearst*,\(^{128}\) went on to declare certain categories of circumstantial evidence of malice to be legally insufficient, including evidence that "the words are strong . . . , if on defendant's view of the facts strong words were justified"\(^{129}\) and evidence "that the

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126. *E.g., Bradstreet*, 72 Tex. at 121, 9 S.W. at 757; *Prosser, supra* note 63, § 93, at 815, § 94, at 849-51.

127. *Davis v. Hearst*, 116 P. 530, 540 (Cal. 1911); *see also* Brotherhood of R.R. Trainmen v. Jennings, 168 So. 173, 176 (Ala. 1936) ("[A]ctual or express malice may be shown, not only by proof of ill will and hostility, but rivalry also . . . [and] In addition, intemperance in the language used may be looked to by the jury in determining the question of such actual or express malice."); *Mundy v. Hoard*, 185 N.W. 872, 877 (Mich. 1921) ("[T]he question whether there was actual malice is for the jury to determine, either from direct proof, or as an inference from other proof, or from the libel itself." (citations omitted)); *Friedell v. Blakely Printing Co.*, 203 N.W. 974, 976 (Minn. 1925) ("Malice may be proved by extrinsic evidence of personal ill feeling, or by intrinsic evidence such as the exaggerated language of the libel, the character of the language used, the mode and extent of publication, and other matters in excess of the privilege."); *Doyle*, 180 N.Y.S. at 675 ("[T]he plaintiff is not restricted to evidence extrinsic to the alleged libelous communication, if the verbiage thereof is 'extravagant' and 'vituperative.' Plain words, however, carry no penalty." (citation omitted)); *International & G.N.R. Co. v. Edmundson*, 222 S.W. 181, 184 (Tex. Comm'n App. 1920, judgm't adopted) ("Actual or express malice . . . may be inferred from the relation of the parties, the circumstances attending the publication, the terms of the publication itself . . ."); *Kroger Grocery & Baking Co. v. Rosenbaum*, 198 S.E. 461, 462 (Va. 1938) ("When . . . a defamatory communication was privileged, 'the question [of] actual malice is for the jury to determine either from direct proof[,] inference from other proof or from the libel itself. In other words . . . whether [the defendant] has acted maliciously or not . . . is a question for the jury to decide.'" (quoting *Montgomery Ward & Co. v. Nance*, 182 S.E. 264, 271 (Va. 1935)).

Townshend states the rule as one of direct proof. JOHN TOWNSHEND, A TREATISE ON THE WRONGS CALLED SLANDER AND LIBEL, AND ON THE REMEDY BY CIVIL ACTION FOR THOSE WRONGS § 246 (New York, Baker, Voorhis & Co. 1868) (asserting that a "bona fide" character given of a servant that she was saucy, &c., if there be no malice (which must be directly proved), will not ground an action for slander"). He amplifies the rule later, stating that evidence of falsity of statement is not sufficient to show malice, but that proof that the defendant had before him facts that would show the statement was false or that the defendant acted in a way that was inconsistent with his accusation was sufficient. Id. § 389. At another point he collects cases, id. § 246, which do not always seem consistent. Cf. MARTIN L. NEWELL, THE LAW OF DEFAmATION, SLANDER AND LIBEL 770-71 (Chicago, Callaghan & Co. 1890) (stating that falsity of statement is not sufficient to show malice and stating what evidence may be sufficient).

128. 116 P. 530 (Cal. 1911).

129. *id. at 540* (citing *Spill v. Maule*, 4 L.R.-Ex. 232 (Ex. 1869)).
statement was volunteered, if it was defendant’s duty to volunteer it.”\textsuperscript{130} It also has been said that evidence of failure to investigate an accusation is not legally sufficient.\textsuperscript{131} There are also nonconstitutional cases applying something like the “clear and convincing evidence” standard. One such standard resolves doubts in favor of the speaker,\textsuperscript{132} while another protects the speaker if there was a reasonable basis for making the accusation.\textsuperscript{133}

It is easy to find authority to contradict such categorical rules.\textsuperscript{134}

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\item \textsuperscript{130} Id. (citing Gardner v. Slade et ux., 116 Eng. Rep. 1467 (Q.B. 1499)).
\item \textsuperscript{131} Duffy v. Leading Edge Prods., Inc., 44 F.3d 308, 315 (5th Cir. 1995); Washington v. Thomas, 778 S.W.2d 792, 799 (Mo. Ct. App. 1989); Leibson v. Ohio Dep’t of Mental Retardation & Developmental Disabilities, 584 N.E.2d 1363, 1369 (Ohio Ct. Cl. 1989).
\item \textsuperscript{132} ContiCommodity Servs., Inc. v. Ragan, 63 F.3d 438, 443 (5th Cir. 1995), cert. denied, 134 L. Ed. 2d 471 (1996) (finding that evidence that accusations were made prior to investigation was insufficient since “[i]n neither of these arguments is more probable than the other” and that the plaintiff “has not made a showing that is sufficient to constitute the ‘clear evidence’ of malice required to defeat a properly supported motion for summary judgment”); Deale v. General Tel. Co., 115 Cal. Rptr. 582, 585 (Cal. Ct. App. 1974). Townshend cites an English case holding that when [i]f the evidence does not raise any probability of malice, and is quite as consistent with its absence as with its presence; and considering the mere possibility of malice which is found in this case, and in all cases in which it is not disproved, would not be sufficient to justify a finding for the plaintiff.
\item \textsuperscript{133} Townshend, supra note 127, § 246 (citing Somerville v. Hawkins, 3 Eng. Rep. 503 (1850)).
\item \textsuperscript{134} El Deeb v. University of Minn., 60 F.3d 423, 427 (8th Cir. 1995) (“When the only evidence presented of actual malice is that it was an alternative reason for the defendant’s action . . . and there is ‘direct evidence’ that probable cause existed for the action taken . . . no jury question exists with respect to actual malice.”); Broughton v. McGrew, 39 F. 672, 678 (C.C. Ind. 1889) (stating that a jury should presume good faith if the defendant had a reasonable basis for making the accusation); Beauvoir v. Rush-Presbyterian-St. Luke’s Medical Ctr., 484 N.E.2d 841, 844 (Ill. App. Ct. 1985) (holding that a bare assertion of malice will not support a jury finding of malice sufficient to overcome conditionally privileged remarks); Miller-Douglas v. Keller, 579 So. 2d 491, 493-94 (La. Ct. App.) (granting summary judgment where the evidence showed that the defendant had a reasonable basis for making an accusation, notwithstanding evidence that the defendant had spoken sharply about the plaintiff in other instances), writ denied, 581 So. 2d 709 (La. 1991); Frankson v. Design Space Int’l, 394 N.W.2d 140, 144-45 (Minn. 1986) (en bane) (holding that actual malice sufficient to defeat a qualified privilege was not shown when there was direct evidence of the truth of the defendant’s statement); McBride v. Sears, Roebuck & Co., 235 N.W.2d 371, 375 (Minn. 1975) (finding that malice was not shown because the “plaintiff’s evidence was insufficient to negative defendant’s evidence of probable cause, which is inconsistent with the claim that defendant acted causelessly and wantonly to injure plaintiff, and plaintiff did not attempt to establish actual ill will.”); State ex rel. Zorn v. Cox, 298 S.W. 837, 842 (Mo. 1927) (holding that express malice was negated as a matter of law where a reporter had a reasonable basis for making an accusation and it was on a matter of public interest); Lillig v. Becton-Dickinson, 717 P.2d 1371, 1374 (Wash. 1986) (upholding summary judgment because “[p]laintiff offered no evidence to show defendant Krachenfels was without reasonable grounds in his belief of the lying incident”); cf. Frosole v. Lund’s State Bank, 155 N.W. 619, 620 (Minn. 1915) (sustaining malice finding if “[t]here was some evidence from which it might be inferred that defendant knew of the falsity of some of the statements [and] . . . also some evidence of ill feeling between defendant’s [employee] and plaintiff”).
\item \textsuperscript{134} For cases finding malice on the basis of a failure to investigate, see Babb v. Minder, 806 F.2d 749, 756 (7th Cir. 1986) (holding that recklessness, and thus malice, might be inferred from the fact that the supervisor “made no investigation at all despite the seriousness of the allegations and their great potential for harm”) and Abell v. Cornwall Indus. Corp., 150 N.E. 132 (N.Y. 1925) (observing that malice by reporter may be inferred from his reliance on an unsubstantiated rumor). For a case
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This is not surprising; it is difficult to maintain that such broadly defined categories of evidence can never be strongly probative of malice because the weight of such evidence varies depending on its particular character and context. For example, a heated accusation made officiously without investigation is fairly indicative of malice.

I have not yet said anything to justify a clear and convincing evidence standard other than to show that such a standard has some roots in the common law of defamation. Some states commit the issue of abuse of the privilege to the jury on "scant" evidence, including evidence of falsity or failure to investigate. What argument might be made to persuade judges in these states to adopt a more protective standard? Many cases that apply a clear and convincing evidence standard follow constitutional precedent, but the Constitution does not require such a rule in most workplace defamation cases because it protects only speech about public figures or about private figures when the speech is of public concern.

Another set of arguments for a requirement of clear and convincing evidence is grounded on prudential or fairness concerns. Common-law
rules of sufficiency were often justified along such lines. But I do not think that the prudential and fairness arguments can justify such evidentiary safeguards unless we assume a commitment to preserving the employment-at-will doctrine and employer autonomy in the evaluation and termination of employees. That is, the argument for the heightened evidentiary standard derives from the employment-at-will doctrine.

Consider just a few of the difficulties that arise if we ask what is the most efficient rule in the abstract. The proper standard of liability privilege in defamation cases. Robert M. Ackerman, Bringing Coherence to Defamation Law Through Uniform Legislation: The Search for an Elegant Solution, 72 N.C. L. Rev. 291, 304 (1994).

137. For example, in his 1868 treatise on slander and libel, Townshend observed that a master would be reluctant to "give a character to a servant" because of the legal risk to himself though it was in society's interest to encourage such communications so long as they were made in good faith. TOWNSHEND, supra note 127, § 245. To balance these concerns he advised that strong evidence of malice be required so long as the communication was in response to an inquiry about a servant. Id. Frederick Pollock explained that the heightened evidentiary standards were a consequence of the complexity of the concept of malice:

To constitute malice there must be something more than the absence of reasonable ground for belief in the matter communicated. That may be evidence of reckless disregard of truth, but is not always even such evidence. A man may be honest and yet unreasonably credulous; or it may be proper for him to communicate reports or suspicions which he himself does not believe. . . . It has been found difficult to impress this distinction upon juries . . . . The result is that the power of the Court to withhold a case from the jury on the ground of a total want of evidence has on this point been carried very far.

FREDERICK POLLOCK, THE LAW OF TORTS 182-83 (1st ed. 1887) (footnote omitted).

138. Another line of argument can be used to justify a requirement of direct or substantial evidence, though I find it to be less intellectually satisfying. The argument has been made in the analogous context of the tort of bad faith that a plaintiff attempting to establish bad faith must show that there was no plausible basis for denying the claim. See, e.g., Anderson v. Continental Ins. Co., 271 N.W.2d 368, 376 (Wis. 1978) ("To show a claim for bad faith, a plaintiff must show the absence of a reasonable basis for denying benefits of the policy . . . ."); Gulf Atl. Life Ins. Co. v. Barnes, 405 So. 2d 916, 924 (Ala. 1981) ("[T]he tort of bad faith refusal to honor a direct claim arises when there exists 'no lawful basis for the refusal coupled with actual knowledge of that fact.'") (quoting Chavers v. National Sec. Fire & Casualty Co., 405 So. 2d 1 7 (Ala. 1981)). The reasoning behind such a requirement is that a jury could not infer bad faith unless there was no basis for denying a claim. Some cases seem to adopt this position in the defamation context. See, e.g., Carroll v. Robinson, 874 P.2d 1010, 1014 (Ariz. Ct. App. 1994) ("For the plaintiff merely to show that the defendants could have come to a different conclusion than the one they reached is not enough to overcome the defense of qualified immunity."); Bals v. Verduzco, 600 N.E.2d 1353, 1357 (Ind. 1992) (holding that evidence of falsity is insufficient to establish malice because it is not "substantial evidence" that defendant knew his accusation was not true or that he had no reasonable grounds for believing it). However, the argument is unsatisfying as a matter of factual inference, for it concludes from evidence that is merely consistent with the defendant's claim of good faith (i.e., the facts were such that a person acting in good faith could have made the accusation) that the defendant necessarily acted in good faith.

139. We could avoid these and other problems by assuming the correctness of the substantive rules on liability and damages. This assumption considerably simplifies the problem, for the goal becomes choosing the rule of sufficiency that minimizes the error rate in determining whether the defendant acted maliciously or in bad faith. One could justify a rule requiring strong proof of malice on the ground that juries are likely to be biased in favor of employees in suits against employers. This may seem a promising line of argument, for the common wisdom is that such a bias exists. See Joseph P. Monteleone, Coverage Issues Under Commercial General Liability and Directors' and Officers' Liability Policies, 18 W. New Eng. L. Rev. 47, 54 n.31 (1996) ("Some insurers . . . have voluntarily elected
when an employer defames an employee—be it strict liability, negligence, or something worse than negligence—is itself debatable. Assuming that the goal is to induce employers to take the optimal level of precaution from a private and a social perspective in determining the accuracy of potentially damaging statements about employees and in publishing such information, a plausible argument has been made for a heightened rule of strict liability for actual damages for false statements if the defendant’s statements do not benefit a third party. It is not clear to what direction this analysis points in setting the standard of care or the standard of sufficiency of evidence. Under existing law, a damages award may well exceed actual damages because presumed damages may be awarded in the absence of evidence of actual damages and punitive damages may be awarded if common-law malice is shown. Perhaps the lower standard of care (e.g., malice or bad faith) required of those protected by a privilege can be justified as a counterbalance to the excessively high measure of damages. But this argument is problematic because the imperfect correspondence between the two metrics—one going to the degree of the defendant’s fault, the other going to the quantum of damages—creates odd incentives. And the effect of this corrective measure has to be analyzed together with the effect of the already overly low standard of care. These observations just scratch the surface of the problem. They go only to the issue of optimizing the

not to write [employment practices liability insurance] in certain states where they perceive there to be unfavorable law and/or hostile jury biases regarding suits against employers.”). But there are several problems with this line of argument. First, the common wisdom on jury bias may be wrong (it is difficult to verify since we can measure the error rate only if we know the truth in a case). Second, our analysis has been shorn from its normative underpinnings. For example, the assumption of the correctness of the substantive rules on liability and damages may blind us to serious costs that we ought to consider. Third, the argument stands on the claim that the jury is not to be trusted, a claim that is of questionable legal merit (whatever its factual merit) in the context of tort law because of tort law’s commitment to trusting the jury. This last point is made in the dissenting opinion in E.I. du Pont de Nemours & Co. v. Robinson, 38 Tex. Sup. Ct. J. 852, 861, 1995 WL 359024, at *12 (June 15, 1995) (Cornyn, J., dissenting) (contending that requiring trial judges to determine the reliability of scientific testimony threatens to invade the jury’s province). The majority adopted a rule requiring a trial judge to screen scientific expert testimony to determine its reliability and whether its probative value outweighed the likely prejudicial effect, which it justified partly on the ground of the fallibility of jurors in evaluating expert testimony. Id. at 855, 1995 WL 359024, at *4. The dissent responded that the rule “is unwise because it threatens to invade the jury’s province as ‘the sole judge of the credibility of the witnesses and the weight to be given their testimony.’” Id. at 861, 1995 WL 359024 at *13 (Cornyn, J., dissenting).

140. See Alain Sheer & Asghar Zardkoohi, An Analysis of the Economic Efficiency of the Law of Defamation, 80 NW. U. L. REV. 364, 375-79 (1985) (arguing that if an individual who decides to publish a remark about another is the only one to benefit from publication, then a strict liability rule will completely internalize all costs and benefits associated with the decision and, thereby, make it economically efficient). The authors conclude that the rule should be other than strict liability for actual damages if the defendant’s speech benefits a third party. Id. at 379. This conclusion is problematic because the rules on privilege do not distinguish between speaking to further one’s own interests and speaking to further the interests of others.
employer's behavior in choosing to speak and investigating potential defamatory matters. To determine the most efficient rule, we would also need to analyze the effect of different rules on the cost of resolving disputes. It is not worth pursuing these issues in depth because it is unrealistic to think that judges will undertake or be persuaded by a careful analysis of the costs and benefits of alternative rules given the complexity and contingency of such an analysis.

Once the employment-at-will rule is taken as a given, the arguments for a strong rule of sufficiency to show abuse of the privilege are much stronger. Taking the employment-at-will rule as evidence that society puts pre-eminent value on the preservation of autonomy in decisions to make or terminate contractual relationships, then a heightened rule of sufficiency can be justified as the critical bulwark to an employer's autonomy. As I have shown, truth or nonpublication are weak defenses, and the defense of privilege is unreliable (however abuse of the privilege is defined) unless it is coupled with a rule requiring strong evidence of abuse. Even if the normative merit of the employment-at-will doctrine is questioned, a heightened rule of sufficiency can be justified because it is the surest mechanism to limit the capriciousness of the tort, if one assumes that judges will be more vigilant than juries in screening out weak claims.

An attractive feature of a heightened rule of sufficiency is that the rule draws the boundary between contract law and the law of defamation in a way that fits our conflicting intuitions about defamation claims in wrongful termination cases. We are skeptical about such claims because we think that they may be used to get around the employment-at-will rule, but we also believe that an employee does not submit to being defamed by agreeing to work at will. In effect, an employee has to establish malice by clear and convincing evidence because only this can overcome the initial skepticism about his claim and move him from the contract paradigm to the tort paradigm.

II. The Collateral Torts in Practice in Texas

We know little about the impact of the collateral torts in practice. Most studies of wrongful termination litigation either ignore collateral tort claims or aggregate them with claims for retaliatory discharge or claims for breach of the covenant of good faith and fair dealing.\footnote{141} I know of two

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141. The most prominent study is JAMES N. DERTOZOS ET AL., RAND CORP., THE LEGAL AND ECONOMIC CONSEQUENCES OF WRONGFUL TERMINATION (1988), which aggregated all employment termination claims. It found that plaintiffs won 67.5% of 120 jury trials in California from 1980 to 1986 with an average award in cases where the plaintiff was successful of $646,855 and a median award of $177,000. Id. at 25-26. David Cathcart reports on a more recent study of California cases post-dating Foley v. Interactive Data Corp., 765 P.2d 373 (Cal. 1988)—which abolished the action in tort for breach of the covenant of good faith and fair dealing—which found 62 cases in which plaintiffs
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studies that focus specifically on the collateral torts. One is the study by Jung and Harkness of wrongful discharge cases decided in California from 1979 to 1987.\footnote{142} They distinguished cases involving claims for intentional infliction of emotional distress and found (somewhat surprisingly) that median and average awards were much lower in such cases ($49,000 and $59,623 respectively) than in cases involving claims of retaliatory discharge ($265,000 and $512,922) or claims of bad faith ($142,700 and $540,899).\footnote{143} Jung and Harkness do not report what percentage of the total pool of wrongful discharge cases (223) involved infliction claims, nor do they separately report success rates on infliction claims.\footnote{144}

The other study is by Paetzold and Wilborn.\footnote{145} They looked at the number and the success rate of employees who brought defamation claims in cases that appear in the official reports in two five-year periods (1965 through 1969 and 1985 through 1989).\footnote{146} Paetzold and Wilborn found a significant increase in the number of cases (25 to 118) between the two periods, but a decrease in the success rate of employees at trial (twenty-eight percent in the first period, nineteen percent in the second) and on appeal (sixteen percent in the first period, eleven percent in the second), as well as a decrease in the average damage award ($59,760 in the first period, $57,543 in the second).\footnote{147}

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\footnote{142} David J. Jung & Richard Harkness, The Facts of Wrongful Discharge, 4 LAB. LAW. 257 (1988). They collected cases from a weekly jury verdict reporter and from the official reports. \textit{Id.} at 259.

\footnote{143} \textit{Id.} at 263 (Table: Awards in Wrongful Discharge Cases by Cause of Action).

\footnote{144} The overall success rate was 70\%, but that is in cases that made it to the jury or appeared in the official reports—\textit{i.e.}, this percentage excludes cases in which the defendant won on a motion for summary judgment or that did not end up in an official report. \textit{Id.} at 257-60. Jung and Harkness estimated the actual success rate was closer to 45\%. \textit{Id.} at 260-61.

\footnote{145} Paetzold & Willborn, \textit{supra} note 85.

\footnote{146} \textit{Id.} at 124.

\footnote{147} \textit{Id.} at 136.
To get a sense of how collateral tort claims fare in wrongful termination litigation I looked at cases from January 1, 1990, to August 1, 1995, that appear in Westlaw’s Texas state court database. The success rate on collateral claims is quite low in the reported appellate cases. Out of seventy-one wrongful termination cases in which a claim of defamation or intentional infliction of emotional distress was pleaded, in only five cases (seven percent) did an employee win a verdict on a defamation or infliction claim that was upheld on appeal and in only eight other cases (eleven percent) did an employee succeed in reversing on appeal summary judgment for the employer on such a claim. The employer prevailed in fifty-eight cases, nine times by overturning a verdict for the plaintiff on appeal, forty-five times on a motion for summary judgment that was upheld on appeal, two times on a jury verdict, and one time on a judgment notwithstanding a verdict for the employee. Employees fared even worse with interference with business relations claims, bringing the claim twenty-six times while winning a verdict that was upheld on appeal in only one case. In no case was an employee successful with a claim.

148. The searches were conducted in early August 1995 and include decisions issued through July 26, 1995. The primary search was “employ! and (discharge or termination) and tort and date(after 1-1-1990).” I also conducted the same search substituting each individual tort for the term “tort” (including “slander or libel or defamation,” “infliction of emotional distress,” “intentional interference,” and “fraud or misrepresentation or deceit”). And I searched for “retaliatory discharge” and for “wrongful termination.” I did not include cases filed in federal court because I feared the easier standard for summary judgment would skew the results.

149. I omit seven cases which address only a preliminary issue.


152. Exxon Corp. v. Allsup, 808 S.W.2d 648 (Tex. App.—Corpus Christi 1991, writ denied). An interference claim was remanded in one other case, SmithKline Beecham Corp. v. Doe, 903 S.W.2d 347 (Tex. 1995). That outcome was not a victory for the employee because the interference claim was peripheral and undeveloped. The critical claim was for negligence in failing to warn a prospective employee who took a drug test that a false positive might result from the ingestion of poppy seeds. That claim was rejected on the ground that there was no duty to warn.
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for invasion of privacy, breach of the duty of good faith and fair dealing, breach of fiduciary duty, or negligence.153

Employees had greater luck with fraud claims, bringing such a claim fourteen times while winning a verdict that was upheld on appeal twice (fourteen percent)154 and overturning on appeal a decision granting summary judgment for the employer four times (twenty-eight percent). They also had some success with claims of retaliatory discharge.155 Out of forty-one cases with such a claim, four times (ten percent) the employee won a verdict that was upheld on appeal and seven times (seventeen percent) the employee overturned on appeal a trial court ruling for the employer. The most remarkable success rate in reported appellate cases was on whistleblower claims. Out of eight cases with such a claim, three times a jury verdict for the employee was affirmed, four times a jury verdict for the employee was reversed on appeal, and one time a decision granting summary judgment for the employer was reversed on appeal.

A tally of pro and con appellate decisions may well be a poor indicator of the actual success rate in litigation. In particular, a study of wrongful termination litigation in California suggests the weakest claims are appealed.156 There is, however, a serious flaw in that study which

153. Invasion of privacy claims were brought in eight cases. Good faith claims were brought in thirteen cases. Breach of fiduciary duty claims were brought in two cases. Negligence claims were brought in ten cases.


155. The greatest number of cases in this category involve claims under TEX. LAB. CODE ANN. § 451.001(1) (Vernon Supp. 1996) that a termination was in retaliation for an employee filing a workers' compensation claim. The category also includes claims that a termination was in violation of public policy; claims by public employees that a termination was in retaliation for the exercise of conduct protected under the United States Constitution; claims brought under the Juror Reemployment Act, Civ. PRAC. & REM. CODE ANN. § 122.001(a) (Vernon 1986); and claims of retaliation brought under the Texas Commission on Human Rights Act, TEX. LAB. CODE ANN. §§ 21.001-306 (Vernon Supp. 1996). I counted claims brought under the Whistleblower Act, TEX. GOV'T CODE ANN. § 554.004 (Vernon Supp. 1996), separately.

156. Out of a total pool of 120 cases in the Rand study, plaintiffs won in 81 cases at the trial level, or 67.5%. DERTOUZOS ET AL., supra note 141, at 26 (Table: Summary of Jury Verdicts in Wrongful Termination Trials). Sufficient information to trace post-trial activity was available on only 104 of these 120 cases. Unfortunately, the report does not state the plaintiffs' success rate at the trial level in this subgroup. Presumably plaintiffs won at the trial level in around 70 of the 104 cases with known post-trial activity. Defendants appealed in 25% of these cases, or in around 18 cases, and won in 28% of these appeals, or in around 5 cases. Plaintiffs appealed in all of the around 34 cases they lost at trial but only obtained reversal in 7% of those cases, or in around 2 cases. The statement that in 18% of the cases the plaintiff settled for a lower amount than the verdict at trial refers to all 104 cases with known post-trial activity, or around 19 cases. Thus, if one simply looked at appellate decisions it would seem that defendants won in around 37 cases while plaintiffs won in around 15 cases. But, in truth, plaintiffs won or obtained a favorable settlement in around 51 cases while defendants won outright in around 37 cases. These numbers do not add to 104 because 15% of the cases (or around 16 cases) remained on appeal at the time of the study.
might result in undercounting employer victories. The study drew cases from jury verdicts reports and so omits cases in which the employer won on summary judgment, which occurred frequently in Texas. Further, the California experience may be unrepresentative because that state was unusual in allowing a tort claim for bad faith termination. In this respect, Texas is a better state than California in which to isolate the impact of the collateral torts in wrongful termination litigation because the tort of discharge in violation of public policy is quite limited (it protects an employee only if she is dismissed for refusing to engage in an illegal act157) and the tort of bad faith breach of contract does not apply in the employment setting. In addition, Texas procedural rules make it quite difficult to keep weak tort claims away from a jury because it is very difficult to win on a motion for summary judgment158 or to overrule a jury verdict on grounds of factual inadequacy.159

Conversations with a few trial lawyers in Texas who have experience handling defamation and intentional infliction of emotional distress claims in wrongful termination litigation,160 as well as a closer examination of the reported cases (more on this in a moment), tend to confirm that infliction claims are of little value, but such inquiries do suggest that defamation claims may have positive value in a termination where something truly harmful was said about the fired employee.

Every lawyer to whom I spoke was dismissive of infliction claims. They disagreed about the value of defamation claims. A number said that defamation claims were of little value in settlement unless something truly


158. See Casso v. Brand, 776 S.W.2d 551, 555-56 (Tex. 1989) (contrasting the Texas summary judgment rule, in which the party moving for summary judgment has the burden of proving her claim or defense, with the federal rule, which places the burden of proof on the nonmovant if the nonmovant will carry that burden at trial).

159. See Mancorp, Inc. v. Culpepper, 802 S.W.2d 226, 227 (Tex. 1990) (holding that to issue a judgment n.o.v., the record must show that no evidence supported the jury’s finding); Navarette v. Temple Indep. Sch. Dist., 706 S.W.2d 308, 309 (Tex. 1986) (holding that anything more than a scintilla of evidence must preclude a judgment n.o.v.).

160. I spoke to Thomas Bilek of Wilshire, Scott & Dyer in Houston, Texas, who was plaintiff’s counsel in Higgintonbotham v. Allwaste, Inc.; R. John Cullar of Mills, Millar, Matkin & Cullar in Waco, Texas, who was plaintiff’s counsel in Wichita County v. Hart; Phil Durst of Wiseman, Durst, Tuddenham & Owen in Austin, Texas; Julius Glickman of Glickman & Herlong in Houston, Texas; Britton Monts in Dallas, Texas, who was plaintiff’s counsel in Hooper v. Plimley Bowes; Michael Quinn, formerly of Zelle & Larson in Dallas, Texas, who is now a visiting professor at the University of Texas School of Law; Barry Racusin of Racusin & Wagner in Houston, Texas, who was plaintiff’s counsel in Smith Barney Shearson, Inc. v. Finstad; J. Chris Rodriguez of Chavez, Gonzalez & Rodriguez in Corpus Christi, Texas, who was plaintiff’s counsel in Shaheen v. Motion Indus., Inc.; and Gina Williams of Davis & Wilkerson in Austin, Texas.
harmful was said about the plaintiff (and not just an accusation of incompetency or even dishonesty) and there was also strong evidence of malice. One observed that he would expect an offer of only "chump change" on a defamation claim even with good facts. Another said that he would expect a settlement offer for only the "nuisance value" of a suit. Two lawyers were of the view that firms were unlikely to settle even fairly strong defamation claims because a firm's instinct was to stand behind managers who usually were accused of dreadful behavior by the plaintiff in a defamation suit. A third lawyer, who had a fair amount experience in handling wrongful termination cases for defendants, added an interesting gloss to this observation, for he agreed that while small and mid-size firms were unlikely to settle it was his experience that large firms might well settle to avoid adverse publicity.

Other lawyers to whom I spoke had higher opinions of the value of defamation claims. This included one of the better plaintiff's lawyers in Texas, Julius Glickman, who recently won a $124 million verdict at trial on a case that settled prior to appeal. In words that should strike terror in the heart of employers, he warned that "[i]n many wrongful termination cases there lurks a defamation case" and that defamation was often the strongest claim an employee had because it is a "dangerous case for defendants since juries dislike people who slander other people." Still, Glickman agreed with the other lawyers to whom I spoke that defamation cases were unlikely to settle. He thought that this was because insurance adjusters had to be educated about their value. Two other lawyers with significant experience handling employment litigation also said that employers faced a fair amount of risk on defamation claims.

161. Telephone Interview with Thomas Bilek, of Wilshire, Scott & Dyer (Oct. 1995) [hereinafter Bilek Interview]; Telephone Interview with Britton Monts (Apr. 1996) [hereinafter Monts Interview]; Telephone Interview with Barry Racusin, of Racusin & Wagner (Apr. 1996) [hereinafter Racusin Interview]; Telephone Interview with J. Chris Rodriguez, of Chaves, Gonzalez & Rodriguez (Oct. 1995). Phil Durst, one of the leading employment lawyers in Austin, was of the view that defamation was a "hard case" to win but that there was a fair chance of getting to the jury and winning if something truly harmful was said and there was good evidence of malice. Telephone Interview with Phil Durst, of Wiseman, Durst, Tuddenham & Owen (Apr. 1996) [hereinafter Durst Interview]. R. John Cullar was also of this view, but he largely represents public employees who cannot bring defamation claims because of sovereign immunity. Telephone Interview with R. John Cullar of Mills, Millar, Matkin & Cullar (Apr. 1996).

162. Bilek Interview, supra note 161.

163. Racusin Interview, supra note 161.

164. Phil Durst commented, "People go crazy in these cases, they get litigated more often.... They think there is principle here." Durst Interview, supra note 161.

165. Racusin Interview, supra note 161.

166. The case is Janack v. Triton.


168. Interview with Michael Quinn, Visiting Professor, The University of Texas School of Law (Apr. 1996); Telephone Interview with Gina Williams, Of Counsel, Davis & Wilkerson (Apr. 1996).
A lawyer who often represents employers said that she would be concerned if there were an accusation such as theft and the employer had not conducted a careful investigation and could not readily establish the truth of the charge.169

A closer examination of the Texas cases on intentional infliction of emotional distress also suggests that such claims rarely succeed. The law of infliction swung against employees during the period from 1990 to 1995 (this is a small aspect of a sweeping move to the right by the Texas Supreme Court after 1991).170 Employees won two notable victories in 1989 (one of these decisions was reversed in 1991)171 and reached the high water mark the next year in a court of appeals decision that let a nurse go to the jury with the claim that repeated instances of ridicule by a physician with whom she worked constituted outrageous behavior.172 I expect that the last case would come out differently today, for in a 1993 decision the Texas Supreme Court held that firing an employee without

[hereinafter Williams Interview]. Whether insurance coverage exists for workplace defamation claims is an interesting issue in its own right. Most comprehensive general liability policies do cover slander or libel, but they contain an exclusion for injuries arising in the course of employment. E.g., Butler v. Michigan Mut. Ins. Co., 402 So. 2d 949, 951 (Ala. 1981) (setting out the pertinent insurance policy provisions).

169. Williams Interview, supra note 168.

170. In 1990, it looked as if there was a significant chance that the Texas Supreme Court would hold that a wrongfully terminated employee might sue in tort for breach of the covenant of good faith and fair dealing. In the late 1980s, the court had adopted and liberally extended the tort of bad faith breach in insurance cases and it defined the scope of the tort (it applied to "close and confidential relationships") in a way that would naturally encompass the employment relationship. See Mark P. Gergen, A Cautionary Tale About Contractual Good Faith in Texas, 72 Tex. L. Rev. 1235, 1249 (1994) ("The vague and highly subjective terms characterizing the contract to which the tort applies—special relationships involving trust or confidence or relationships involving an imbalance of bargaining power—fit employment, franchise, and other long-term contractual relationships as well as they fit the insurance relationship. . . ."). The question whether a bad faith termination was tortious made it to the court in a 1989 case involving a claim that an employee was fired to prevent his pension from vesting, but the court upheld the claim by extending the public policy tort. McClendon v. Ingersoll-Rand Co., 779 S.W.2d 69, 71 (Tex. 1989) rev'd on other grounds, 498 U.S. 133 (1990). The court took the case on appeal from a decision that held that the implied covenant of good faith and fair dealing did not extend to the employment relationship. McClendon v. Ingersoll-Rand Co., 757 S.W.2d 816, 819-20 (Tex. App.—Houston [14th Dist.] 1988). The case was briefed and argued as a bad faith case. The majority reserved the question of whether the tort of bad faith breach extended to the employment relationship. McClendon, 779 S.W.2d at 70 n.1. Two years later, the case was sent back by the United States Supreme Court which held that the pension theory was pre-empted by ERISA. Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 137-45 (1990). At that point the composition of the Texas Supreme Court had changed, Gergen, supra, at 1248, and the good faith theory was dismissed summarily. McClendon v. Ingersoll-Rand Co., 807 S.W.2d 577 (Tex. 1991).

171. See Dean v. Ford Motor Credit Co., 885 F.2d 300, 307 (5th Cir. 1989) (upholding a judgment for intentional infliction of emotional distress based on evidence that a supervisor had planted company checks on the plaintiff, putting her in fear of criminal charges); Bushell v. Dean, 781 S.W.2d 652, 657-58 (Tex. App.—Austin 1989) (upholding an infliction judgment based on repeated acts of sexual harassment), rev'd, 803 S.W.2d 711 (Tex. 1991).

notice and immediately having her escorted off the job premises by a security guard was not outrageous\textsuperscript{173} and laid down the principle that conduct that normally occurs in a termination is not outrageous as a matter of law.\textsuperscript{174} Employees have won on infliction claims three times since 1993, but two of these cases involve truly lurid facts (a rumor campaign by supervisors that an employee was engaged in satanic behavior\textsuperscript{175} and quid pro quo sexual harassment\textsuperscript{176}) and in the third case, the infliction claim was derivative of a wrongful termination claim, and what the court found to be outrageous was terminating an employee for refusing to engage in an unlawful act.\textsuperscript{177}

The Texas defamation cases are inconsistent. Out of the four cases in which an employee made it to the jury with a claim of abuse of the privilege, in only one was there strong evidence that the defamatory statement was made dishonestly.\textsuperscript{178} The plaintiff was able to show through the testimony of a coworker and strong circumstantial evidence that a manager who had accused him of theft, and later fired him, was covering up his own theft.\textsuperscript{179} In the other three cases—one affirming a jury verdict for the employee\textsuperscript{180} and two reversing decisions granting summary judgment

\textsuperscript{173.} Womick Co. v. Casas, 856 S.W.2d 732, 735-736 (Tex. 1993).
\textsuperscript{174.} Id. The court restated this rule in Randall's Food Mkts., Inc. v. Johnson, 891 S.W.2d 640, 644 (Tex. 1995) (holding that vigorous questioning of a manager about an alleged theft did not constitute extreme and outrageous conduct to support an infliction claim).
\textsuperscript{175.} Hooper v. Pitney Bowes, Inc., 895 S.W.2d 773, 776 (Tex. App.—Texarkana 1995, writ denied). The decision upholds individual judgments against the responsible supervisors. On remand, the employer was held not to be liable for their conduct. \textit{Monts Interview, supra note 161}.
\textsuperscript{176.} Ewald v. Womick Family Foods Corp., 878 S.W.2d 653 (Tex. App.—Corpus Christi 1994, writ denied).
\textsuperscript{177.} Higginbotham v. Allwaste, Inc., 889 S.W.2d 411, 416-17 (Tex. App.—Houston [14th Dist.] 1994, writ denied). More interesting is the court's willingness to allow a claim for wrongful termination in violation of public policy even though the employee was not explicitly ordered to do something for which he would be criminally liable.
\textsuperscript{178.} Borden, Inc. v. Rios, 850 S.W.2d 821 (Tex. App.—Corpus Christi), \textit{judgment set aside}, 859 S.W.2d 70 (Tex. 1993).
\textsuperscript{179.} Id. at 825-26, 830. Apparently the supervisor was overstating wholesale inventory sold on account to route salespersons. A coworker testified that the supervisor had manipulated the inventory so that both he and the plaintiff were drawing from the same stock, thinking it was their own, and that the supervisor told each that the other was stealing his inventory. The amount of the inventory the supervisor claimed the salespersons were responsible for in the aggregate was also preposterous given the limited storage space. \textit{Id.} at 825, 829.
\textsuperscript{180.} In Shearson Lehman Hutton, Inc. v. Tucker, 806 S.W.2d 914 (Tex. App.—Corpus Christi 1991, writ dism'd w.o.j.), a stock brokerage firm was held liable for $1,317,191.66 in damages (including $1 million in exemplary damages) when a manager told two customers that a fired broker was in trouble with the SEC. The court reasoned that the jury could infer that the manager lied or spoke with reckless disregard for the truth from the fact that he passed on information he had heard as a rumor without attempting to verify it. \textit{Id.} at 924. This holding is somewhat difficult to square with the court's statement that "[n]egligence, failure to investigate the truth or falsity of the statements prior to publication, or failure to act as a reasonable prudent person is insufficient to support a finding of malice." \textit{Id.}
to the employer and remanding the claim for trial—the evidence reported in the decision merely went to show that the employer may not have adequately investigated the charge it made against the employee. In other cases, employees did not get to the jury even though they presented some evidence of dishonesty or malice.

**Hagler v. Proctor & Gamble Manufacturing Co.** stands out among these stricter cases because it made it to the Texas Supreme Court. Hagler was accused of theft and fired when he was stopped leaving a plant with a business phone hidden in a sack. He had argued that the phone was his and that his accusers knew or should have known that fact. In setting aside a jury verdict for Hagler, the court of appeals conceded that there was "some slight evidence" to support a finding of actual malice.

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181. In Free v. American Home Assurance Co., 902 S.W.2d 51, 56 (Tex. App.—Houston [1st Dist.] 1995, no writ), the court of appeals reversed a decision granting summary judgment on a defamation claim because the defendant had not introduced an affidavit from the manager attesting to his innocent state of mind when he told a headhunter that the plaintiff was a "lightweight" and when he accused the plaintiff of lying to a coworker about his performance. The plaintiff's letter of resignation indicated that the allegations resulted from a genuine misunderstanding. *Id.* at 55. In Harris v. Top Brass Janitorial, Carpet & Office Cleaning Corp., 1993 WL 307405 (Tex. App.—Dallas, July 30, 1993, no writ), an officer of the defendant, a bank, received a call from someone claiming to be the plaintiff's wife. The caller said that she had caught the plaintiff, a janitor employed by a contractor to clean the bank, leaving the bank the night before with a woman clad in a blanket and carrying a towel. *Id.* at *2, *3. The officer told the contractor that the bank wanted the plaintiff taken off the job and also told an officer at a sister-bank of the incident. *Id.* at *3.

182. Two other cases in which the defendant lost on appeal can be explained on the ground that the defendants won a motion for summary judgment on the wrong issue or with an inadequately developed record to support a claim of privilege. *See* Hardwick v. Houston Lighting & Power Co., 881 S.W.2d 195 (Tex. App.—Corpus Christi 1994, writ dism'd w.o.j.) (reversing a decision granting summary judgment for the defendant where neither plaintiff nor defendant had shown who in defendant's firm had told people in another office that the plaintiff was fired because he was responsible for an accident); Jenke v. UTL Corp., 1994 WL 159842 (Tex. App.—Dallas, Apr. 29, 1994, no writ) (reversing a decision granting summary judgment for the defendants who argued that the accusations were truthful, because there was some evidence to establish falsity). In another case, defendants who had submitted affidavits attesting to their good faith won on appeal while those who had not done so were sent back for a trial on the issue of malice. *See* Long v. Houston Northwest Medical Ctr., Inc., 1991 WL 19837 (Tex. App.—Houston [1st Dist.], Feb. 14, 1991, writ denied).

183. For a particularly extreme example, see LaChance v. Einhorn, No. 01-94-00180-CV, 1995 WL 134861 (Tex. App.—Houston [1st Dist.], Mar. 30, 1995, writ dism'd w.o.j.) (holding that evidence of falsity, general feelings of malice by the defendant towards the plaintiff, and failure to investigate do not sufficiently demonstrate malice), *cert. denied*, 116 S. Ct. 1420 (1996).

184. 884 S.W.2d 771 (Tex. 1994).


186. *Id.* at 124-25.

187. *Id.* at 124. In addition to evidence that the allegation was false, (1) Hagler testified that a manager told him "that Procter & Gamble was not doing its fact finding like it usually did and to expect the worst," *id.* at 127, (2) a coworker who testified that he had corroborated Hagler's story about purchasing the phone also testified that an internal record of his statement was false, *id.*, and (3) the manager who reported the case to a management committee allegedly omitted facts favorable to Hagler. *Id.*
and that on the evidence "the jury could have determined that Proctor & Gamble made a premature decision about Hagler's guilt and then determined to justify that decision." Nevertheless, it reversed the jury verdict on the dubious rationale that "actual malice generally requires a higher level of culpability than mere ill will or animosity. Here, the evidence does not rise to the level of ill will, much less to a higher level of culpability." This rationale rests on the behavioral premise that a person will lie or speak recklessly about another (which is actual malice) only out of ill will or animosity, which of course is not true. For example, a person may falsely blame another to cover up his own mistakes. The Texas Supreme Court refused to take the case on a writ of error, but in a per curiam opinion it disapproved of the court of appeals's rationale. Unfortunately, the court suggested no alternative rationale.

The apparent inconsistencies in the cases may be due to unresolved legal questions in the Texas law of defamation—including whether an employer may be liable for a defamed employee's self-publication of defamatory matter, whether the standard for abuse of the privilege is express malice or actual malice, and the legal standard of sufficiency.

188. Id. at 128.
189. Id. at 128-29.
191. The doctrine of self-publication has been accepted in at least two cases, Chasewood Constr. Co. v. Rico, 696 S.W.2d 439, 445 (Tex. App.—San Antonio 1985, writ ref'd n.r.e.); First State Bank v. Ake, 606 S.W.2d 696, 701 (Tex. Civ. App.—Corpus Christi 1980, writ ref'd n.r.e.); and it has been rejected in one case, Doe v. SmithKline Beecham Corp., 855 S.W.2d 248, 259 (Tex. App.—Austin 1993) (specifically rejecting the Rico and Ake decisions), aff'd as modified, 903 S.W.2d 347 (Tex. 1995).
192. Prior to New York Times v. Sullivan, Texas cases defined malice as ill will. E.g., Buck v. Savage, 323 S.W.2d 363, 372-73 (Tex. Civ. App.—Houston 1959, writ ref'd n.r.e.). More recent cases usually apply a standard of actual malice to claims of abuse of privilege in the employment setting, following a 1989 Texas Supreme Court case, Casso v. Brand, 776 S.W.2d 551 (Tex. 1989), which held that a public figure had to show actual malice to prevail on a defamation claim against a nonmedia defendant. Id. at 554, 558. Typically these cases do not address the relevant standard because neither party objects to use of an actual malice standard. E.g., Schauer v. Memorial Care Sys., 856 S.W.2d 437, 450 (Tex. App.—Houston [1st Dist.] 1993, no writ); Roegeleian Provision Co. v. Mayen, 566 S.W.2d 1, 9-11 (Tex. Civ. App.—San Antonio 1978, writ ref'd n.r.e.). The leading Texas case applying a standard of actual malice involves negligent credit reporting. Dun & Bradstreet, Inc. v. O'Neil, 456 S.W.2d 896 (Tex. 1970).
193. Prior to Casso, the most extensive discussion of which I am aware concerning the standard of proof of malice in a case not involving a public defendant is in Frank B. Hall & Co. v. Buck, 678 S.W.2d 612, 620-21 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.) (upholding a verdict of malice based on evidence that the defendants personally disliked the plaintiff, made accusations against him based on insufficient knowledge, and benefitted financially by firing him), cert. denied, 472 U.S. 1009 (1985). For some reason that is unclear to me, a 1980 case, Dixon v. Southwestern Bell Tel. Co., 607 S.W.2d 240 (Tex. 1980), is not thought to foreclose a clear and convincing evidence standard, even though the court stated that "[w]hile actual or express malice must be proved, it need not be proved by direct or extrinsic evidence. Proof of facts and circumstances from which it may be reasonably inferred is sufficient." Id. at 242 (quoting Buck v. Savage, 323 S.W.2d 363, 373 (Tex. Civ. App.—Houston 1959, writ ref’d n.r.e.)). Perhaps the case is not thought controlling because it
Though my suspicion is that the inconsistencies in the cases are due more to two competing instincts of trial and appellate judges. In my experience, some have a deep-seated reluctance to take factual issues away from the jury. Competing against this reluctance is a view that a terminated employee ought not be able to evade the employment-at-will rule by the artifice of pleading defamation.

The Texas cases do bear out two common perceptions of wrongful termination suits. First, juries are perceived as biased against defendants. The cases seem to bear this out. Of the thirty-nine cases that were submitted to a jury on a tort theory, verdicts were rendered for the plaintiff in thirty-three cases and for the defendant in six. In seventeen of the thirty-three cases, the plaintiff’s verdict was set aside. Second, damage awards are perceived as unpredictable and sometimes large. The reported cases also seem to bear this out. Awards ranged from a low of $22,100 to a high of $13,619,831 (in a whistleblower case). One other award was $10,986,000 (retaliatory discharge); one award in a judgment that was reversed on appeal was $4,307,000 (breach of fiduciary duty); one award was $3,996,000 (defamation); and four were in the $1,000,000 range (two of these judgments were reversed on appeal). The average


Some recent appellate cases follow Casso on the issue of sufficiency by requiring that malice be proven by clear and convincing evidence. Schauer v. Memorial Care Sys., 856 S.W.2d 437, 450 (Tex. App.—Houston [1st Dist.] 1993, reh’g denied). Other cases do not apply a clear and convincing evidence standard but hold certain categories of evidence insufficient, including evidence that an accusation was false and evidence of a failure to investigate. Procter & Gamble Mfg. Co. v. Hagler, 880 S.W.2d 123, 126-27 (Tex. App.—Texarkana, writ denied per curiam 884 S.W.2d 771 (Tex. 1994); Martin v. Southwestern Power Elec. Co., 860 S.W.2d 197, 200 (Tex. App.—Texarkana 1993, writ denied). Randall’s Food Mkts., Inc. v. Johnson, 891 S.W.2d 640 (Tex. 1995) can be read as rejecting a heightened evidentiary standard. The court said that “[t]o invoke the privilege on summary judgment, an employer must conclusively establish that the allegedly defamatory statement was made with an absence of malice.” Id. at 646.

195. Texas Dep’t of Human Servs. v. Green, 855 S.W.2d 136, 140 (Tex. App.—Austin 1993, writ denied).
196. Borden, Inc. v. De la Rosa, 825 S.W.2d 710, 714 (Tex. App.—Corpus Christi), judgment set aside, 831 S.W.2d 304 (Tex. 1991) (disposing of the case pursuant to a settlement).
198. Borden, Inc. v. Rios, 850 S.W.2d 821, 824 (Tex. App.—Corpus Christi), judgment set aside, 859 S.W.2d 70 (Tex. 1993) (disposing of the case pursuant to a settlement).
jury award in twenty-three cases was $1,736,708; the median award was $480,000. As other studies have found, the average is skewed upwards by a few very large awards.

III. Conclusion: The Case for Universal Just Cause or Expanded Contract Protection and the Role of the Collateral Torts

My grudging defense of the collateral torts opens the door to another objection to those torts made by advocates of universal "just cause"—that the collateral torts underprotect employees. The torts compensate far fewer employees than would a rule of universal "just cause" for disciplinary terminations, which would require an employer to convince a third party (an arbitrator under most proposals) that alleged acts of employee misbehavior occurred and were sufficiently grave to justify termination. While proponents of universal "just cause" often cite tort cases or borderline tort cases involving fairly egregious employer misbehavior to illustrate the conduct the rule would check, most discharge cases under collective bargaining agreements involve fairly prosaic issues. In the typical case, an employer attempts to fire or suspend an employee for absenteeism, tardiness, dishonesty, use of drugs or alcohol, horseplay, or insubordination. The case turns on whether the employer can adequately document the charge, whether the employee was adequately warned about her behavior, and whether the level of punishment is commensurate with the employee's level of misbehavior.

Inc. v. Gardiner, 859 S.W.2d 391, 393 (Tex. App.—Houston [1st Dist.] 1993, writ dism'd w.o.j.); Shearson Lehman Hutton, Inc. v. Tucker, 806 S.W.2d 914, 918 (Tex. App.—Corpus Christi 1991, writ dism'd w.o.j.).

200. See St. Antoine, supra note 2, at 375 (arguing that a "monetary award to punish a grievous misdeed may give momentary satisfaction, but in the long run, an employee is likely to benefit more from a restored opportunity to exercise acquired skills"); Weiler & Mundlak, supra note 2, at 1915 (arguing that the protection afforded by tort law is not always realized because individual lawsuits brought by nonunion employees in low-paying jobs "do not have the potential value likely to attract top litigators").

201. Some proposals would also require that layoffs be done on the basis of seniority.

202. E.g., Kenneth A. Sprang, Beware the Toothless Tiger: A Critique of the Model Employment Termination Act, 43 AM. U. L. REV. 849 (1994). Sprang cites two cases that "are illustrative of the range of circumstances surrounding discharge without just cause." Id. at 851. In the first case, Wagenseller v. Scottsdale Memorial Hosp., 710 P.2d 1025 (Ariz. 1985), the plaintiff was fired after she objected to personally offensive behavior by her supervisor and refused to participate in a skit that involved "mooning" the audience during a rafting trip. In the second case, Murphy v. American Home Prods. Corp., 448 N.E.2d 86, 87 (N.Y. 1983), the plaintiff was fired after he reported improprieties in corporate accounting.

zero prospect of success with a tort claim in such cases. For example, many cases hold that it is not intentional infliction of emotional distress to fire an employee on what turns out to be a false suspicion of misbehavior, even though the employer made no effort to investigate the suspicion. Such a discharge would be wrongful under a "just cause" rule.

The criticism of the collateral torts by the advocates of universal "just cause" is somewhat puzzling. One might well concede the case for "just cause" protection—the case grounds on interwoven claims about employee expectations, social practices, and the economic and psychological harms suffered by discharged workers—and still maintain that additional sanctions and remedies are needed in egregious cases of employer misconduct. There is no reason to think that a just cause rule will deter egregious behavior. Workers protected by collective bargaining (who presumably have "just cause" protection) often claim they are mistreated in ways that rise to the level of a tort.

The reasons for the criticism of the collateral torts by the advocates of "just cause" may be partly strategic. The advocates of "just cause" may hope to gain employer support by promising immunity from tort claims. In addition, by misdescribing the role of the collateral torts they frame the policy question in a way that is favorable to their cause. They put the choice as between a system that provides windfall damages to a small number of mistreated employees whose claims are no better than those of their peers at an enormous administrative cost per case, and a system that provides modest protection to the entire class at a low cost per case. If I am right, courts do or could do a good job of screening out weaker claims, and so the collateral torts are or could be more justly administered than the critics contend.

204. See, e.g., St. Antoine, supra note 2, at 381 (suggesting that the adoption of unjust dismissal legislation could avert "the havoc of multimillion-dollar jury verdicts" that can result in tort cases); Weiler & Mundlak, supra note 2, at 1915.


206. See Teamsters Local 959 v. Wells, 749 P.2d 349, 356-58 (Ala. 1988) (affirming the judgment for the plaintiff on an outrageousness claim in which he alleged that a union threatened to kill him if he would not compel his wife to quit working during a strike or turn over to the union confidential information concerning the employer); Blong v. Snyder, 361 N.W.2d 312 (Iowa Ct. App. 1984) (reinstating a verdict for a plaintiff who claimed prolonged harassment by a supervisor that was in retaliation for the employee's arbitration of a grievance).

207. See, e.g., William B. Gould, Reflections on Wrongful Discharge Litigation and Legislation, in ARBITRATION 1984, supra note 203, at 32, 34 (describing how the "flood tide of litigation" changed the political dynamics of wrongful discharge litigation by giving employers an incentive to support reform). There is also pique at plaintiffs' attorneys who advocates of just cause say have been unsupportive of just cause. St. Antoine, supra note 2, at 381 ("Curiously, plaintiffs' attorneys are the most outspoken opponents of [the Model Employment Termination Act]. . . . Ons must sadly conclude that [they] are influenced by the prospective loss of the large contingent fees they now receive from their upper-middle-class clients.").
The one nonstrategic objection to the collateral torts is on distributive grounds. The argument is that the torts mostly protect upper-middle-class workers and primarily enrich plaintiffs' attorneys.\textsuperscript{208} I am not sure the first point is true. Low-wage workers have as much incentive as high wage workers to bring suit when the major elements of damages are mental anguish and punitive damages. The second point probably is true, but it seems inevitable (and maybe even desirable) that attorneys reap much of the reward for bringing what by their nature are very risky claims, for attorneys bear much of the cost of an unsuccessful suit.

Of course, the real attack on the collateral torts comes from the other side of the political spectrum. It is to this attack that I have tried to respond by showing that courts possess the doctrinal tools to dismiss defamation and intentional infliction of emotional distress claims at the summary judgment stage in run-of-the-mill terminations. And in Texas at least, courts seem willing to use these tools. It might be interesting to look at the experience in other states which weaken the employer's defenses in defamation in various ways or which loosen or abandon the standard of outrage under the tort of intentional infliction of emotional distress. But even were such a study to show that the torts operate capriciously in these states it would not change my conclusion, for the problem might be solved by retightening the law.

\textsuperscript{208} Gould, \textit{supra} note 207, at 35-36; St. Antoine, \textit{supra} note 2, at 381.