

SCIENCE OR STATUS QUO? DISREGARD FOR A DEFENDANT'S MENTAL ILLNESS IN TORT SUITS

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Abstract: Mental illness is almost never considered when courts determine whether a defendant is liable for a tort. Nearly every United States jurisdiction—Washington state included—declines to offer a modified “reasonable person” standard for negligent tort defendants with mental illnesses or any form of mental illness-based affirmative defense for intentional tort defendants. There is much debate about whether tort law should evolve to accommodate defendants with mental illnesses. This Comment seeks to dive deeper into *why* that debate persists.

Although there are numerous justifications for this current state of tort law, the most common rationalizations given are twofold. First, that the primary principle of tort law is to compensate the injured person. Second, that a mental illness-based affirmative defense or modified negligence standard would be problematic to administer in that the factfinder would not know where to “draw the line.” That is, the judge or juror may have difficulty determining whether a defendant’s mental illness truly contributed to their tortious conduct. Many legal scholars rebut this justification by referencing the existence of a modified negligence standard for children and people with physical disabilities, and the availability of the insanity and/or diminished capacity affirmative defenses in criminal courts.

This Comment seeks to provide more insight into the debate by answering the following three questions: (1) Do mental health professionals think it would be possible to “draw the line” and decide whether a defendant qualifies for an affirmative defense or modified negligence standard due to their mental illness? (2) From the perspective of both civil attorneys and mental health professionals, should such a defense and/or negligence standard be available to tort defendants? (3) And would such a defense and/or negligence standard be “workable” in a court of law? These questions are answered in the form of a survey-based research study, and the results indicate a great divide between the opinions of mental health professionals and civil attorneys.

Mental health professionals endorse an affirmative defense of mental illness to intentional torts, while civil attorneys oppose both the availability and workability of intentional tort affirmative defenses and oppose a modified negligence standard. These results do not solidify a definitive answer as to whether courts should consider the mental health of tort defendants. Rather, they highlight a significant discrepancy between tort law and psychology. Even though modern psychological and psychiatric knowledge about mental health tells us that mental illness can mitigate tort culpability, courts and state legislators are unwilling to change the status quo. This reticence to change is likely in the interest of upholding traditional principles of tort law, conserving judicial resources and party expenses, and heeding legal workability concerns.

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INTRODUCTION

In Washington State, and all other jurisdictions that offer the “insanity defense” to criminal charges, a person with a mental illness could be exculpated of a *criminal* assault charge, but found guilty for the exact same offense in *civil* court.¹ This is because mental illness is not a permitted basis for an affirmative defense to an intentional tort suit.² Similarly, while Washington state applies a modified “reasonable person” standard to evaluate negligent tort defendants with physical disabilities,³ and child defendants,⁴ a modified standard is not utilized for defendants with mental illnesses.⁵ Courts consider a defendant’s physical disability, and a child defendant’s age, when determining how negligently—if at all—a defendant acted under the circumstances.⁶ Physical disability and minor age are mitigating factors that can either decrease the culpability of, or entirely exculpate, some tort defendants.⁷ However, defendants with mental illnesses are not evaluated under a modified standard, but rather held to the standard of a reasonable person *without* the defendant’s mental illness. This is true even if their mental illness may have been what caused them to act negligently in the first place.⁸

1. *Polmatier v. Russ*, 537 A.2d 468, 469, 474 (Conn. 1988); *Teopffer v. Teopffer*, 101 P.2d 904, 907 (Kan. 1940); *Hackenberger v. Travelers Mut. Cas. Co.*, 62 P.2d 545, 547 (Kan. 1936); *Phillips’ Comm. v. Wards Adm’r*, 43 S.W.2d 331 (Ky. 1931); *McGuire v. Almy*, 8 N.E.2d 760 (Mass. 1937); *Bryant v. Carrier*, 198 S.E. 619 (N.C. 1938); *Sweeney v. Carter*, 137 S.W.2d 892 (Tenn. App. 1939); *Shedrick v. Lathrop*, 172 A. 630 (Vt. 1934); *Garratt v. Dailey*, 26 Wash. 2d 197, 205, 279 P.2d 1091, 1095 (1955); *New York Underwriters Ins. Co. v. Doty*, 58 Wash. App. 546, 551, 794 P.2d 521, 525 (1990); *Pub. Employees Mut. Ins. Co. v. Rash*, 48 Wash. App. 701, 705, 740 P.2d 370, 373 (1987) (finding the defendant’s mental illness was irrelevant in a child sexual assault case; that is, once the intent to commit the abuse was proved the intent to harm is inferable).

2. *Burrows v. Hawaiian Trust Co.*, 417 P.2d 816 (Haw. 1966); *Young v. Young*, 132 S.W. 155 (Ky. 1910); *McGuire v. Almy*, 8 N.E.2d 760 (Mass. 1937); *Filip v. Gagne*, 177 A.2d 509 (N.H. 1962); *Bryant v. Carrier*, 198 S.E. 619 (N.C. 1938); *Sweeney v. Carter*, 137 S.W.2d 892 (Tenn. App. 1939); *Leary v. Oates*, 84 S.W.2d 486 (Tex. Civ. App. 1935); *Shedrick v. Lathrop*, 172 A. 630 (Vt. 1934); *In re Meyer’s Guardianship*, 261 N.W. 211 (Wis. 1935); *Delahanty v. Hinkley*, 799 F. Supp. 184 (D.D.C. 1992) (rejecting consideration of a tort defendant’s mental illness in federal court); see also Jean M. Eggen, *Mental Disabilities and Duty in Negligence Law: Will Neuroscience Reform Tort Doctrine?*, 12 IND. HEALTH L. REV. 591, 600–02 (2015). *cf.* *Breunig v. American Family Ins. Co.*, 173 N.W.2d 619, 624 (Wis. 1970) (finding an exception for people operating motor vehicles who become “sudden[ly] mentally incapacitated”).

3. *Fletcher v. City of Aberdeen*, 54 Wash. 2d 174, 338 P.2d 743 (1959).

4. *Bauman by Chapman v. Crawford*, 104 Wash. 2d 241, 704 P.2d 1181 (1985).

5. *Ramey v. Knorr*, 130 Wash. App. 672, 124 P.3d 314 (2005).

6. *Brunner v. John*, 45 Wash. 2d 341, 343, 274 P.2d 581, 582 (1954).

7. *Bauman*, at 241, 704 P.2d at 1181; *Fletcher*, at 174, 338 P.2d at 743.

8. *Kusah v. McCorkle*, 100 Wash. 318, 319–20, 170 P. 1023, 1025 (1918).

Currently, there are two opposing viewpoints regarding the culpability of tort defendants with mental illnesses.⁹ On one side, countless judicial opinions,¹⁰ as well as the Second¹¹ and Third Restatements of Torts¹²—albeit minimal scholarship¹³—cite various justifications for applying the objective standard to negligence defendants with mental illnesses. These opinions also advocate for maintaining the status quo with regard to intentional tort affirmative defenses—disallowing any sort of mental illness-based defense. On the other side, substantial legal scholarship calls for change and rebuts the justifications for continuing to disallow consideration of a tort defendant's mental illness.¹⁴ While there are many justifications for maintaining the status quo, two particular types of justifications seem to be the most prevalent. The first is that adding mental illness to the liability equation will bring about “administrability” and

9. A myriad of scholars advocate for consideration of the mental illnesses of tort defendants. Paul S. Appelbaum, *Responsibility for Torts: Should the Courts Continue to Ignore Mental Illness?* 63 L. & PSYCHIATRY 308 (2012); Johnny C. Criscoe, *A Plea to North Carolina: Bring Fairness to the Assessment of Civil Battery Liability for Defendants with Cognitive Disabilities*, 39 CAMPBELL L. REV. 241 (2017); Johnny Criscoe & Lisa Lukasik, *Re-examining Reasonableness: Negligence Liability in Adult Defendants with Cognitive Disabilities*, 6 ALA. C.R. & C.L. L. REV. (2015); Okianer C. Dark, *Tort Liability and the “Unquiet Mind”: A Proposal to Incorporate Mental Disabilities into the Standard of Care*, 30 T. MARSHALL L. REV. 169 (2004); Eggen, *supra* note 2; James W. Ellis, *Tort Responsibility of Mentally Disabled Persons*, 1981 AM. B. FOUND. RES. J. 1079 (1981); Elizabeth J. Goldstein, *Asking the Impossible: The Negligence Liability of the Mentally Ill*, 12 J. CONTEMP. HEALTH L. & POL'Y 67 (1995); Kristin Harlow, *Applying the Reasonable Person Standard to Psychosis: How Tort Law Unfairly Burdens Adults with Mental Illness*, 68 OHIO ST. L.J. 1733 (2007); Vaughn E. James, *No Help for the Helpless: How the Law has Failed to Serve and Protect Persons Suffering from Alzheimer's Disease*, 7 J. HEALTH & BIOMEDICAL L. 407 (2012); Patrick Kelley, *Infancy, Insanity, and Infirmary in the Law of Torts*, 48 AM. J. JURIS. 179 (2003); Harry J.F. Korrell, *The Liability of Mentally Disabled Tort Defendants*, 19 L. & PSYCHOL. REV. 1 (1995); Jacob E. McKnite, *When Reasonable Care is Unreasonable: Rethinking the Negligence Liability of Adults with Mental Retardation*, 38 WM. MITCHELL L. REV. 1375 (2012); Grant H. Morris, *Requiring Sound Judgment of Unsound Minds: Tort Liability and the Limits of Therapeutic Jurisprudence*, 47 SMU L. REV. 1837 (1994); David E. Seidelson, *Reasonable Expectations and Modified Standards in Negligence Law: The Minor, The Mentally Impaired, and the Mentally Incompetent*, 50 GEO. WASH. L. REV. 17 (1981).

Contrarily, other scholars, and judges through their opinions, also advocate for maintaining the current status quo of not allowing an affirmative defense of mental illness and continuing to hold people with mental illnesses to the objective reasonable person standard. *Ramey v. Knorr*, 130 Wash. App. 672, 674–75, 124 P.3d 314, 316–17 (2005); George J. Alexander & Thomas S. Szasz, *Mental Illness As an Excuse for Civil Wrongs*, 43 NOTRE DAME L. REV. 24 (1968); William J. Curran, *Tort Liability of the Mentally Ill and Mentally Deficient*, 21 OHIO ST. L.J. 52 (1960); Stephanie I. Splane, *Tort Liability of the Mentally Ill in Negligence Actions*, 93 YALE L.J. 153 (1983); Wm. Justis Wilkinson, *Mental Incompetency as a Defense to Tort Liability*, 17 ROCKY MNTN. L. REV. 38 (1944).

10. *Ramey*, at 674–75, 124 P.3d at 316–17.

11. RESTATEMENT (SECOND) OF TORTS § 283B cmt. b (AM. LAW INST. 1965).

12. RESTATEMENT (THIRD) TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 11 cmt. e (AM. LAW INST. 2005).

13. Curran, *supra* note 9; Splane, *supra* note 9; Wilkinson, *supra* note 9.

14. Harlow, *supra* note 9; Goldstein, *supra* note 9; Kelley, *supra* note 9; Korrell, *supra* note 9.

“line-drawing” problems.¹⁵ In other words, some legal professionals fear that judges and juries may not be able to decide whether a person’s mental illness qualifies them for an affirmative defense or modified negligence standard.¹⁶ In the same vein, there are a multitude of mental illnesses, and many do not manifest clear, tangible symptoms. So how would the courts “draw the line?”¹⁷ Would severe Depressive Disorder suffice as an affirmative defense to battery in a particular circumstance? What about Obsessive-Compulsive Disorder? Or Generalized Anxiety Disorder? Another component of this justification is that consideration of a defendant’s mental illness requires additional judicial resources, can prolong litigation, and would be costly to the parties.¹⁸ Overall, however, critics of the administrability and “line-drawing” justification respond that criminal courts do this very “line-drawing” all the time, so civil courts should be able to do so as well.¹⁹

The second, commonly cited justification is that the primary purpose of tort law is to compensate the injured person.²⁰ Courts frequently state that between two innocent parties, the person who caused the injury is liable to the person who incurred the injury.²¹ Many judicial opinions cite this as a foundation of tort law, noting that the person who caused the harm is the person who should have to pay for damage resulting from the harm.²²

15. *Ramey*, at 674–75, 124 P.3d at 316–17; RESTATEMENT (SECOND) OF TORTS § 283B (AM. LAW INST. 1965); *Splane*, *supra* note 9, at 156; *Harlow*, *supra* note 9, at 1751 (“Courts have argued that it is impossible to determine whether a defendant is actually mentally ill or merely using bad judgment.”); *see Delahanty v. Hinkley*, 799 F. Supp. 184, 186 (D.D.C. 1992); *Jolley v. Powell*, 299 So. 2d 647, 649 (Fla. App. 1974); *Williams v. Kearby*, 775 P.2d 670 (Kan. App. 1989); *Goff v. Taylor*, 708 S.W.2d 113 (Ky. 1986); *Williams v. Hays*, 38 N.E. 449, 450–51 (N.Y. 1894); *Sforza v. Green Bus Lines, Inc.*, 268 N.Y.S. 446, 448 (1934); *Schumann v. Crofoot*, 602 P.2d 298, 300–01 (Or. Ct. App. 1979); RESTATEMENT (SECOND) OF TORTS § 283B cmt.s b(2) & b(3) (AM. LAW INST. 1965); *Korrell*, *supra* note 9, at 27; *McKnite*, *supra* note 9, at 1389.

16. *Harlow*, *supra* note 9, at 1751; *Korrell*, *supra* note 9, at 34–40 (labeling this as the “Burden on the Courts” justification).

17. *Kuhn v. Zabotsky*, 224 N.E.2d 137, 140 (Ohio 1967).

18. *Harlow*, *supra* note 9, at 1751

19. *Appelbaum*, *supra* note 9, at 309 (“[D]eterminations about the connection between mental impairment and behavior are made routinely by the criminal courts.”); *Goldstein*, *supra* note 9, at 76–78; *Harlow*, *supra* note 9, at 1751; RITA J. SIMON & DAVID E. ARONSON, *THE INSANITY DEFENSE: A CRITICAL ASSESSMENT OF LAW AND POLICY IN THE POST HINCKLEY ERA* 134–35 (1988); RITA J. SIMON, *THE JURY AND THE DEFENSE OF INSANITY* 176–77 (1967); *see also AAPL Practice Guideline for Forensic Psychiatric Evaluation of Defendants Raising the Insanity Defense*, 42 THE J. OF THE AM. ACAD. OF PSYCHIATRY & THE L. supp. 3 (2014).

20. RESTATEMENT (SECOND) TORTS § 283B cmt. b (AM. LAW INST 1965).

21. *Id.*; *see also Appelbaum*, *supra* note 9, at 309; *Criscoe & Lukasik*, *supra* note 9, at 25; *Harlow*, *supra* note 9, at 1747-48; *Korrell*, *supra* note 9, at 27; *Splane*, *supra* note 9, at 156, 167.

22. *Gould v. Am. Family Mut. Ins. Co.*, 543 N.W.2d 282, 284 (Wis. 1996); *Jankee v. Clark Cty.*,

This Comment seeks to provide more insight into the debate by answering three questions. First, do mental health professionals think it would be possible to “draw the line” and decide whether a defendant qualifies for a specific affirmative defense or modified negligence standard due to their mental illness? Second, do civil attorneys think a mental illness-based defense and/or modified negligence standard be available to a tort defendant? Why or why not? And third, would such a defense and/or negligence standard be “workable” in a court of law? For the purposes of this Comment, “workable” means that a factfinder (judge or jury) could use the expert testimony of a mental health professional, in addition to the facts of a case, to decide whether a defendant qualifies for a mental illness defense or modified negligence standard.

Part I of this Comment discusses the current state of negligence tort law and the “reasonable person” standard, as well as exceptions to this standard. It also discusses intentional tort law and the use of the insanity defense and diminished capacity defense in Washington state criminal courts. Part I also explains that Washington courts consider the mental health of *plaintiffs* in tort suits, but not defendants. Part II then details two of the primary “justifications” proffered in court opinions and secondary sources that seek to explain why defendants’ mental illnesses are not, and should not be, factored into tort law determinations of fault. Part III details the Author’s empirical research on the “administrability” and “drawing the line” justification, and the “faultless-but-guilty” justification. In conducting the research, the Author surveyed mental health professionals and civil attorneys, asking their professional opinions on whether a modified negligence standard and mental illness-based affirmative defenses should be available to Washington state tort defendants.

Finally, Part IV discusses the results and implications of the data obtained from the surveys, in conjunction with the court opinions and legal scholarship from Parts I and II—concluding that there exists a great divide between psychology and the law in this particular area. Mental health professionals reported that “line drawing” is indeed possible, and that a mental illness-based affirmative defense is necessary from a psychological or medical perspective. Civil attorneys, however, reported that a mental illness-based defense and modified negligence standard should not be made available to tort defendants, and that neither would be workable in civil suits. The attorney participants largely explained their opinions by citing administrability and “faultless-but-guilty” justifications.

Although the data cannot answer whether courts should consider mental illness in tort liability, this research evidences an important reason for why the “mental-illness-in-tort-suits” debate persists: The legal community is ignoring psychological and medical expertise on the role that mental illness can play in tortious culpability. When one side of a debate ceases to consider the knowledge of the other side, a standstill ensues—as has happened here. Therefore, mental illness will remain unconsidered in tort suits unless judges and legislators decide to weigh the expertise of mental health professionals more heavily than attorneys’ concerns about workability.

I. NEGLIGENCE STANDARDS AND INTENTIONAL TORT DEFENSES

Despite significant advancements in society’s understanding of mental health, modern tort law provides no accommodations for defendants with mental illnesses.²³ Like tort law in all U.S. jurisdictions, Washington state tort law provides neither a modified “reasonable person with the defendant’s mental illness” standard for negligence tort defendants nor an affirmative defense for intentional tort defendants with mental illnesses.²⁴

A. *Negligence: The Reasonable Person Standard and Exceptions*

To prevail in a negligence suit, a plaintiff must show that the defendant breached their duty to use reasonable care.²⁵ This reasonable care standard is assessed in light of what an objectively reasonable person under similar circumstances would have done.²⁶ Courts have essentially created a

23. *Ramey v. Knorr*, 130 Wash. App. 672, 675, 124 P.3d 314, 317 (2005); *Splane*, *supra* note 9, at 154; *Korrell*, *supra* note 9, at 1; *Kelley*, *supra* note 9, at 180; *Goldstein*, *supra* note 9, at 67; *Appelbaum*, *supra* note 9, at 308.

24. *Ramey*, at 675–77, 124 P.3d at 317 (“Washington, along with the majority of states, holds the mentally ill to the standard of a reasonable person under like circumstances.”); *Criez v. Sunset Motor Co.*, 123 Wash. 604, 608, 213 P. 7 (1923); RESTATEMENT (SECOND) OF TORTS § 283B (AM. LAW INST 1965).

25. *Hvolboll v. Wolff Co.*, 187 Wash. App. 37, 347 P.3d 476 (2015); 6 Wash. Prac., Wash. Pattern Jury Instructions Civ. WPI 10.01 (7th ed.) (“Negligence is the failure to exercise ordinary care. It is the doing of some act that a reasonably careful person would not do under the same or similar circumstances or the failure to do some act that a reasonably careful person would have done under the same or similar circumstances.”).

26. *See Swank v. Valley Christian School*, 188 Wash.2d 663, 398 P.3d 1108 (2017); *Ranger Ins. Co. v. Pierce County*, 164 Wash. 2d 545, 192 P.3d 886 (2008); *Estate of Bruce Templeton ex rel. Templeton v. Daffern*, 98 Wash.App. 677, 682, 990 P.2d 968, 971 (2007) (“At the root of any common law negligence action is the common law duty to exercise reasonable care (or, in alternative terms, the common law duty to exercise at least as much care as a reasonable person would exercise under the same or similar circumstances). This duty is breached when a defendant fails to exercise ordinary

fictional “reasonable person” so allegedly negligent defendants can be evaluated against an objective, yet hypothetical, standard. A “reasonable person” is someone who exercises the average care, skill, and judgment in their actions.²⁷ And a defendant has failed to meet this standard if they did not conform their actions to that of a reasonable person, thereby breaching their duty to act with reasonable care.²⁸ The Restatement (Second) of Torts specifies that negligence is “a departure from a standard of conduct demanded by the community for the protection of others against unreasonable risk.”²⁹

1. *Exception: Children*

The objective, reasonable person standard does make exceptions for people who cannot be expected behave like a “reasonable person” all the time.³⁰ This is because certain subsets of people, mainly children and people with physical disabilities, are unable to conform their conduct to the generally required norms of society.³¹ “[W]hen application of the reasonable person standard would impose liability on one who . . . is unable to conform [their] conduct to the generally required norm, courts must reject the objective reasonable person standard and take into account the actor’s inability to comply.”³² Washington state tort law employs a modified standard for children because children are not expected to conform their actions to those of a reasonable adult person.³³ In fact,

care (or, in alternative terms, when a defendant fails to exercise as much care as a reasonable person would exercise under the same or similar circumstances). Any such failure is “negligence.”); *see also* RESTATEMENT (SECOND) TORTS §§ 283, 292, 298–99 (AM. LAW INST. 1965).

27. *Gall v. McDonald Indus.*, 84 Wash. App. 194, 204, 926 P.2d 934, 939 (1996); *Baughn v. Malone*, 33 Wash. App. 592, 597, 656 P.2d 1118, 1123 (1983); *Mathis v. Ammons*, 84 Wash. App. 411, 416, 928 P.2d 431, 434 (1996).

28. RESTATEMENT (SECOND) TORTS §§ 283, 292, 298–99 (AM. LAW INST. 1965).

29. RESTATEMENT (SECOND) TORTS § 283 cmt. c (AM. LAW INST. 1965). “The standard which the community demands must be an objective and external one, rather than that of the individual judgment, good or bad, of the particular individual. It must be the same for all persons, since the law can have no favorites; and yet allowance must be made for some of the differences between individuals, the risk apparent to the actor, his capacity to meet it, and the circumstances under which he must act.” *Id.*

30. Korrell, *supra* note 9, at 23.

31. *Id.*

32. *Id.* at 22–23.

33. *See Robinson v. Lindsay*, 92 Wash. 2d 410, 598 P.2d 392 (1979) (where the finding that the trial judge erred in holding 13-year-old snowmobile operator to child’s standard; by operating dangerous instrumentality child assumed duty of reasonable person without regard to age); *see also Bauman by Chapman v. Crawford*, 104 Wash. 2d 241, 704 P.2d 1181 (1985) (finding that a child bicyclist is negligent in failing to obey the standard if a child of similar age, intelligence, maturity, and experience would have behaved differently); WASH. PATTERN Jury Instr. Crim. WPIC § 10.04

jurisdictions throughout the United States apply a modified standard of care for determining the negligence of a child by considering how a hypothetical “child of like age, intelligence[, capacity] and experience” would have acted in similar circumstances.³⁴

The rationale for this modified standard for children is that a child does not possess “the judgment, discretion, and experience of an adult.”³⁵ It would be unfair to base the legal fault of a child on the behavior of an objectively reasonable adult, which most children are mentally and/or physically incapable of meeting.³⁶ The child’s “immaturity of judgment and lack of capacity to appreciate dangers” is the crux of what “justifies [the] special . . . standard.”³⁷ Furthermore, the modified reasonable child standard is realistic as it allows for the “normal incapacities and indiscretions of youth.”³⁸ The Restatement (Second) of Torts also notes that this modified standard is justified by public interest in, and sympathy towards, the welfare of children, as well as the great extent of societal knowledge about what we can reasonably expect from children.³⁹

2. *Exception: People with Physical Disabilities*

Another exception to the objective reasonable person standard is the modified standard for people with physical disabilities.⁴⁰ Washington state civil courts have noted that a defendant’s physical disability at the

(2016); David K. DeWolf & Keller W. Allen, *Reasonable Care Defined—Children*, 16 Wash. Prac., Tort Law & Prac. § 2:31 (4th ed. 2018); (“A child’s conduct is measured by the conduct of a reasonably careful child of the same age, intelligence, maturity, training, and experience.”).

34. RESTATEMENT (FIRST) TORTS § 283 cmt. e (AM. LAW INST. 1934). This standard is applicable to both negligence and contributory negligence. *Id.*; see also RESTATEMENT (SECOND) TORTS § 283A (AM. LAW INST. 1965) (“If the actor is a child, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable person of like age, intelligence, and experience under like circumstances.”).

35. *Bauman*, 104 Wash. 2d at 244, 704 P.2d at 1187.

36. *Id.*

37. *Id.*; see also Kelley, *supra* note 9, at 190; Korrell, *supra* note 9, at 23.

38. *Bauman*, 104 Wash. 2d at 244, 704 P.2d at 1184 (“Washington has long recognized the special standard of care applicable to children: a child’s conduct is measured by the conduct of a reasonably careful child of the same age, intelligence, maturity, training and experience.”); see also Kelley, *supra* note 9, at 190; Robinson v. Lindsay, 92 Wash. 2d 410, 412, 598 P.2d 392, 393 (1979); Roth v. Union Depot Co., 13 Wash. 525, 544–45, 43 P. 641, 647 (1896).

39. RESTATEMENT (SECOND) OF TORTS § 283C cmt. b (AM. LAW INST. 1965).

40. Fletcher v. City of Aberdeen, 54 Wash. 2d 174, 179, 338 P.2d 743, 746 (1959) (finding that a blind pedestrian is only held to the standard of care that a reasonable person with the same or similar disability would use); Brunner v. John, 45 Wash. 2d 341, 343, 274 P.2d 581, 582 (1954) (discussing that the trial judge should have taken into account 87-year-old plaintiff’s physical infirmity).

time of the alleged negligence is highly relevant to the determination of whether the defendant can be held liable for their actions.⁴¹ This is because people with physical disabilities may be unable to conform their conduct to that of an objectively reasonable person without their disability.⁴² For instance, people who are blind or hard-of-hearing are “only required to take the contributory precautions reasonable in light of [their] limitation.”⁴³ That is, the reasonable person standard is often lowered to accommodate a person's physical disability.⁴⁴ The standard of care for a person with a physical disability is that of a reasonable person “under like disability.”⁴⁵ The main rationales for applying this modified standard are the public's familiarity with physical disabilities “and the ease and certainty with which physical disabilities may be proven.”⁴⁶ The Restatement (Third) of Torts explains: “The conduct of an actor with a physical disability is negligent only if the conduct does not conform to that of a reasonably careful person with the same disability.”⁴⁷

In *Masterson v. Lennon*,⁴⁸ the Washington State Supreme Court found that a blind person must be held to a modified standard of care.⁴⁹ That is, a blind person must “exercise th[e] degree of care that an ordinarily careful and prudent person would have exercised under the circumstances and in a similar [physical] condition.”⁵⁰ The Washington State Supreme Court has applied this same standard to other physical disabilities as well.⁵¹

41. *Brunner*, at 343, 274 P.2d at 582; *Horney v. Giering*, 132 Wash. 555, 560–62, 231 P. 958, 960 (1925).

42. Korrell, *supra* note 9, at 39–40; Criscoe & Lukasik, *supra* note 9, at 46, 77.

43. Omri Ben-Shahar & Ariel Porat, *Personalizing Negligence Law* (Univ. Chi., Inst. Law & Econ. Working Paper No. 10, = 2015), https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2417&context=law_and_economics [<https://perma.cc/NKL9-HGEK>].

44. *Id.* at 10–11 (“[F]or example, [for a blind or deaf person] such precautions cannot include looking or listening for a train at a railroad crossing.”); *id.* at 11 n.28 (“These obligations to stop and listen [before going over the tracks of a railroad] must receive a reasonable construction and interpretation . . . [a party] cannot be required to listen if he is deaf . . .” (quoting *Railroad v. Dies*, 98 Tenn. 655, 663 (1897))).

45. RESTATEMENT (SECOND) OF TORTS § 283C (AM. LAW INST. 1965).

46. Splane, *supra* note 9, at 160 n.39 (citing RESTATEMENT (SECOND) OF TORTS § 283C cmt. b (1965)).

47. RESTATEMENT (THIRD) TORTS § 11(a) (AM. LAW INST. 2005).

48. *See Masterson v. Lennon*, 115 Wash. 305, 308–09, 197 P. 38, 39 (1921) (holding that the trial court correctly permitted the jury consider the defendant's blindness in assessing negligence).

49. *Id.*

50. *Id.*

51. *See Robinson v. Lindsay*, 92 Wash. 2d 410, 412, 598 P.2d 392, 393–94 (1979) (explaining that exceptions to the reasonable person standard developed when the individual whose conduct was alleged to have been negligent suffered from some physical impairment such as blindness or deafness).

3. No “Reasonable Person” Standard Exception for Mental Illness

There is no modified negligence standard for defendants with mental illnesses. Although Washington state has carved out a modified negligence standard for children⁵² and defendants with physical disabilities,⁵³ no state (or federal jurisdiction for that matter) has done so for tort defendants with mental illnesses.⁵⁴ For example, in Colorado and Connecticut, courts have found that defendants with severe mental illnesses such as Schizophrenia are not evaluated against a modified, reasonable-person-with-the-defendant’s-mental-illness standard.⁵⁵

Rather, these people are held to the objectively reasonable person standard, even if their mental illness may have caused or contributed to their tortious actions.⁵⁶ This is the case despite the fact that psychology and medicine have demonstrated that physical and mental disabilities are not necessarily distinct,⁵⁷ and also despite the fact that some people with mental illnesses can be rendered the cognitive age of a child.⁵⁸

The practice of holding people with mental illnesses to the standard of an objectively reasonable person has historic roots; specifically, the

52. *Bauman by Chapman v. Crawford*, 104 Wash. 2d 241, 244, 704 P.2d 1181, 1184 (1985) (holding that a child bicyclist would be negligent only if a child of similar age, intelligence, maturity, and experience would not have also behaved negligently); *Robinson*, at 412, 598 P.2d at 393 (ruling that a thirteen-year-old child operating a snowmobile is held to the reasonable person, not reasonable child, standard because operating a snowmobile is an adult activity and therefore the child assumed the duty of with reasonable adult care); *Roth v. Union Depot Co.*, 13 Wash. 525, 544–45, 43 P. 641, 647 (1896) (reasoning that a child’s age and maturity level were necessary to consider when determining contributory negligence); *see also* Wash. Pattern Jury Instr. Crim. WPIC § 10.05 (2016); RESTATEMENT (SECOND) TORTS § 283A (AM. LAW INST. 1965).

53. *Fletcher v. City of Aberdeen*, 54 Wash. 2d 174, 179, 338 P.2d 743, 746 (1959) (holding that a blind pedestrian was not liable for negligence because a blind person is only obliged to use care that a reasonable person with the same or similar physical disability would use); *Brunner v. John*, 45 Wash. 2d 341, 343, 274 P.2d 581, 582 (1954) (holding that the jury should take into account an eighty-seven-year-old plaintiff’s physical infirmity).

54. RESTATEMENT (SECOND) OF TORTS § 283B (AM. LAW INST. 1965); *see Criez v. Sunset Motor Co.*, 123 Wash. 604, 608, 213 P. 7, 10–11 (1923); J.A. BRYANT, JR., LIABILITY OF INSANE PERSON FOR HIS OWN NEGLIGENCE, 49 A.L.R. 3d 189 (1973).

55. *Polmatier v. Russ*, 537 A.2d 468, 473–74 (Conn. 1988); *Johnson v. Lambote*, 363 P.2d 165, 166–67 (Colo. 1961).

56. *See Ramey v. Knorr*, 130 Wash. App. 672, 689, 124 P.3d 314, 323 (2005) (trial court properly rejected insanity defense to negligence claim).

57. Korrell, *supra* note 9, at 14.

58. Some sources proffer that people with Intellectual Disability disorder often have lower than average IQ score. *Definition of Intellectual Disability*, AM. ASS’N ON INTELL. & DEVELOPMENTAL DISABILITIES, <https://aaidd.org/intellectual-disability/definition> [https://perma.cc/J6TB-LWAP] (last visited Mar. 7, 2019); *see also* Kelly Herzberg, M.D., *Autism and IQ*, THE AUTISM BLOG, SEATTLE CHILDREN’S HOSP. (Oct. 1, 2014), <https://theautismblog.seattlechildrens.org/autism-and-iq/> [https://perma.cc/V6GT-V8RT] (discussing autism); NAT’L ACAD. SCI., ENG’G, & MED., *Clinical Characteristics of Intellectual Disabilities*, in MENTAL DISORDERS AND DISABILITIES AMONG LOW-INCOME CHILDREN, ch. 9 (Thomas F. Boat & Joel T. Wu eds., 2015).

English case from 1616, *Weaver v. Ward*.⁵⁹ In *Weaver*, court stated that “‘if a lunatick hurt a man, he shall be answerable in trespass.’”⁶⁰ The court seemed to allude to mental incapacitation as being an insufficient defense to the tort of trespass.⁶¹ However, many scholars consider this dicta because the defendant in *Weaver* did not have a mental illness, nor was he asserting such a defense.⁶² Nonetheless, the *Weaver* case set the precedent the court's holding in an American case, *Williams v. Hayes*,⁶³ where the court determined that insanity was no defense to negligence.⁶⁴

The Restatement (Third) of Torts also disclaims any exception to the objective reasonable person standard for adult defendants with mental disabilities, but does so for children.⁶⁵ This is the case even though some mental illnesses can reduce a person's mental age and/or intellectual functioning.⁶⁶ Furthermore, the line between physical disability and mental illness is by no means a bright one.⁶⁷ With modern advances in science and medicine, we now know that most mental illnesses have biological and physical underpinnings.⁶⁸

The Restatement (Second) of Torts also distinguishes between physical and mental illnesses, noting that a “heart attack, or a temporary dizziness due to fever or nausea” are both “circumstances to be taken into account,” but mental illness is no such “circumstance.”⁶⁹ The authors of the Restatement proffer that this distinction exists because the public is more familiar with physical illnesses and because physical illnesses can be proved with greater certainty than mental illnesses.⁷⁰ However, the

59. Eli K. Best, *Atypical Actors and Tort Law's Expressive Function*, 96 MARQUETTE L. REV. 461, 465 (2012) (citing *Weaver v. Ward*, 80 Eng. Rep. 284 (K.B. 1616)).

60. *Id.* (citing *Weaver*, 80 Eng. Rep. 284).

61. *Id.*

62. *Id.*; see also W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 135, 1072 (5th ed. 1984).

63. 38 N.E. 449, 450 (N.Y. 1894) (finding that an “insane” ship captain was liable for negligently refusing help from ships passing by his broken boat).

64. Best, *supra* note 59, at 465 (citing *Williams* 38 N.E. 449).

65. RESTATEMENT (THIRD) TORTS §11(c) (AM. LAW INST. 2005) (“An actor's mental or emotional disability is not considered in determining whether conduct is negligent, unless the actor is a child.”); see also *id.* cmt. e.

66. See *supra* n.52 and accompanying text.

67. “The courts' continued distinction between mental and physical disabilities ignores decades of research and discovery in the fields of neurology and psychiatry . . . [T]he medical community commonly accepts that nearly all psychiatric and developmental problems which might prevent one from conforming his conduct to the standard required of ‘healthy’ people are manifestations of physiological abnormalities.” Korrell, *supra* note 9, at 1–3, 14.

68. *Id.*

69. RESTATEMENT (SECOND) TORTS § 283C (AM. LAW. INST. 1965); see Splane, *supra* note 9, at 159–60.

70. Splane, *supra* note 9, at 159–60.

rationale is somewhat inconsistent with science in that mental and physical illnesses are not necessarily distinct.⁷¹ “The courts’ continued distinction between mental and physical disabilities ignores decades of research and discovery in the fields of neurology and psychiatry.”⁷² Importantly, medical doctors generally accept that physiological underpinnings explain, or at least contribute to, most psychological disorders.⁷³ For example, a brain lesion can cause physical damage such as loss of muscle control, blindness, and neurological damage generally.⁷⁴ These physical injuries manifest in ways that can affect emotion, memory, inhibitions, etc.⁷⁵ Despite the fact that the source of the physical damage and the resulting mental damage is the same—the brain lesion—the current state of tort law permits legal consideration of the physiological but not psychological effects of the same injury.⁷⁶ Additional examples include: Schizophrenia, which is actually “a behavioral manifestation of an excess of dopaminergic transmission within the brain;”⁷⁷ and depression, which is caused by neural abnormalities.⁷⁸

One mental illness-related exception—one which Washington state has not yet recognized—is a “sudden mental incapacity” defense to negligence.⁷⁹ However, this defense has only been applied in very limited contexts.⁸⁰ This defense requires a defendant to establish that: (1) they had

71. Korrell, *supra* note 9, at 14.

72. *Id.*

73. *Id.* (“[T]he medical community commonly accepts that nearly all psychiatric and developmental problems . . . are manifestations of physiological abnormalities.”).

74. Korrell, *supra* note 9, at 16–17 (citing RICHARD M. RESTAK, M.D., *THE BRAIN* 147–49 (1984)).

75. *Id.* at 15–16.

76. *Id.* at 19 (“Under the current classification scheme, the manifestations of these physiological traumas that impair thought processes, emotion, volition, inhibitions or memory are ‘mental’ disabilities. The manifestations that impair the victim’s eyesight, hearing, sense of smell, or control of his limbs are ‘physical’ disabilities.”).

Many mental illnesses have physiological causes, for instance: “Lesions on the temporal lobes can produce dramatic personality changes and violent behavior. Damage to the basal ganglia, the part of the brain that regulates motor functions, also manifests psychiatric symptoms, including . . . Parkinson’s disease Damage to other brain systems can cause memory loss, hallucinations, paranoia, speech problems, schizophrenia, affective disorders, and myriad other symptoms.” *Id.* at 15–16 (citing NANCY C. ANDREASEN, M.D., PH.D. & DONALD W. BLACK, M.D., *INTRODUCTORY TEXTBOOK OF PSYCHIATRY* 103, 101–138 (1991)).

77. RICHARD M. RESTAK, M.D., *THE BRAIN* 291 (1984).

78. Larry Westreich, M.D., Philip A. Bialer, M.D., *Delirium and Acute Psychosis*, 92 *POSTGRADUATE MED.* 319, 320 tbl.1 (2016) (discussing the fact that neurotransmitter abnormalities contribute to depression).

79. *Ramey v. Knorr*, 130 Wash. App. 672, 674–75, 124 P.3d 314, 316–17 (2005) (rejecting application of the sudden mental incapacitation defense in this particular case); see also Michael F. Dubis, *Insanity as a Tort Defense*, 54 *MARQUETTE L. REV.* 245, 246–47 (1971).

80. See e.g., *Word v. Jones ex el. Moore*, 516 S.E.2d 144, 145–47 (N.C. 1999) (allowing the defense

no prior notice or forewarning of their potential for becoming mentally disabled, and (2) the disability rendered them incapable of conforming to the standards of ordinary care.⁸¹ For instance, the Wisconsin Supreme Court recognized this defense for a driver who “suddenly and without warning was seized with a mental aberration or delusion which rendered her unable to operate the automobile with her conscious mind.”⁸²

Again, this is a highly limited defense that has not yet been applied in Washington State.

In sum, defendants in negligence tort actions are generally held to the objectively “reasonable person” standard. There are exceptions for children and people with physical disabilities, in which age and physical impairment, respectively, are factored into whether a defendant acted with reasonable care. However, there is no such exception for people with mental illnesses. A defendant with a mental illness in a negligence suit is held to the standard of an objectively “reasonable person” *without* that defendant's mental illness.

B. Intentional Torts and Affirmative Defenses

The lack of an exception for tort defendants with mental illnesses is paralleled in the world of intentional torts as well. While negligence involves a defendant who has failed to exercise due care and accidentally harms another person, an intentional tort involves a defendant who acts intentionally and purposefully causes harm to another individual.⁸³ All intentional torts require that the defendant “commit a voluntary act and that the harm suffered by the plaintiff be the result of the defendant's intentional conduct.”⁸⁴ Importantly, the “act” component must be volitional,⁸⁵ meaning voluntary.⁸⁶ The “intent” element requires that the defendant “acted with a purpose to achieve the result of [their] act, or that

of sudden mental incapacitation where the defendant had Alzheimer's and was sued for negligent driving); *Gould v. Am. Family Mut. Ins. Co.*, 543 N.W.2d 282, 283, 287 (Wis. 1996) (holding that a defendant's mental disability must be considered in a negligence suit where the defendant has been institutionalized for a mental disability and where the plaintiff is the defendant's caretaker); *Breunig v American Family Insurance Co.* 173 N.W.2d 619, 621–22 (Wis. 1970) (finding that the jury must be allowed to consider the defendant's mental illness where the defendant “suddenly and without warning was seized with a mental aberration or delusion which rendered her unable to operate the automobile with her conscious mind”).

81. *Breunig v. Am. Family Ins. Co.*, 173 N.W.2d 619 (Wis. 1970).

82. *Id.* at 622.

83. *See DeWolf & Allen, supra* note 33, § 14:2.

84. *Id.*; *see also* *Fluke Corp. v. Hartford Acc. & Indem. Co.*, 145 Wash. 2d 137, 146–47, 34 P.3d 809, 813–14 (2001); RESTATEMENT (SECOND) OF TORTS § 2 (AM. LAW. INST 1965) (defining “act”); *id.* § 7 (defining “injury and harm”).

85. RESTATEMENT (SECOND) OF TORTS § 2, cmt. a (AM. LAW INST. 1965).

86. KEETON ET AL., *supra* note 62, § 8, 31.

[they] believed that the consequences were substantially certain to result from it.”⁸⁷ This “intent” requirement applies to all intentional torts, such as assault,⁸⁸ battery,⁸⁹ false imprisonment,⁹⁰ and trespass.⁹¹

There are some affirmative defenses available for intentional torts, which do not negate an element of the tort, but instead provide an explanation for the defendant’s tortious act(s).⁹² Examples of these include self-defense,⁹³ consent,⁹⁴ defense of others,⁹⁵ and prevention of trespass.⁹⁶ However, courts do not recognize an affirmative defense of mental illness—even in cases where a defendant was deemed Not Guilty by Reason of Insanity (NGRI) for the same conduct in a criminal court.⁹⁷

1. *Insanity as an Affirmative Defense in Criminal Court*

Although mental illness is not recognized as an affirmative defense to intentional torts, Washington state recognizes the affirmative defense of insanity in criminal cases.⁹⁸ Criminal courts allow this affirmative defense because legal “insanity” interferes with the defendant’s mental state and ability to form the requisite, criminal, intent.⁹⁹ The exact verbiage of the Washington State insanity defense is as follows:

To establish the defense of insanity, it must be shown that: (1) At the time of the commission of the offense, as a result of mental

87. DeWolf & Allen, *supra* note 33, § 14:2; *see also* Sutton v. Tacoma Sch. Dist., 180 Wash. App. 859, 867–68, 324 P.3d 763, 767 (2014).

88. Brower v. Ackerley, 88 Wash. App. 87, 92–93, 943 P.2d 1141, 1144–45 (1997) (citing RESTATEMENT (SECOND) OF TORTS § 21 (AM. LAW INST. 1965)).

89. Garratt v. Dailey, 46 Wash. 2d 197, 202–05, 279 P.2d 1091, 1094–95 (1955); *see also* RESTATEMENT (SECOND) OF TORTS § 13 (AM. LAW INST. 1965).

90. Kellogg v. State, 94 Wash. 2d 851, 856, 621 P.2d 133, 137 (1980) (false imprisonment).

91. RESTATEMENT (SECOND) OF TORTS § 158 (AM. LAW INST. 1965).

92. *See* WASH. REV. CODE § 9A.16.020(3) (1986); Hellriegel v. Tholl, 69 Wash. 2d 97, 106, 417 P.2d 362, 367–68 (1966).

93. WASH. REV. CODE § 9A.16.020(3) (1986); Parrott-Horjes v. Rice, 168 Wash. App. 438, 276 P.3d 376 (2012), *as amended* (May 23, 2012) (admitting evidence of self-defense).

94. Hart v. Geysel, 159 Wash. 632, 636, 294 P. 570, 572 (1930); RESTATEMENT (SECOND) OF TORTS §§ 49–51, 53, 56 (AM. LAW INST. 1965).

95. WASH. REV. CODE § 9A.16.020(3) (1986). People with mental illnesses have been held liable for “assault and battery, false imprisonment, trespass on land, destruction of property, conversion, wrongfully suing out an injunction, alienation of affections, infringement of a patent,” etc. KEETON ET AL., *supra* note 62, § 135, 1072–73 (internal citations omitted).

96. WASH. REV. CODE § 9A.16.020(3) (1986); *see also* Peasley v. Puget Sound Tug & Barge Co., 13 Wash. 2d 485, 506, 125 P.2d 681, 691 (1942).

97. Polmatier v. Russ, 537 A.2d 468, 472–74 (Conn. 1988).

98. WASH. REV. CODE § 9A.12.010 (2011).

99. Wash. Pattern Jury Instr. Crim. WPIC § 20.01; *see also* State v. Thomas, 8 Wash. App. 495, 499–502, 507 P.2d 153, 156–57 (1973); Erica Beecher-Monas & Edgar Garcia-Rill, *Actus Reus, Mens Rea, and Brain Science: What Do Volition and Intent Really Mean?*, 106 KY. L.J. 265, 298–99 (2018).

disease or defect, the mind of the actor was affected to such an extent that: (a) He or she was unable to perceive the nature and quality of the act with which he or she is charged; or (b) He or she was unable to tell right from wrong with reference to the particular act charged. (2) The defense of insanity must be established by a preponderance of the evidence.¹⁰⁰

The result of acquittal due to a verdict of insanity is usually involuntary commitment to a mental health treatment facility.¹⁰¹

Washington state also offers a diminished capacity defense for criminal defendants.¹⁰² This defense may be raised when three requirements are met: “(1) the crime charged must include a particular mental state as an element; (2) the defendant must present evidence of a mental disorder; and (3) expert testimony must logically and reasonably connect the defendant’s alleged mental condition with the asserted inability to form the mental state required for the crime charged.”¹⁰³ Specifically, the diminished capacity defense is used to negate the “intent” element of most crimes:¹⁰⁴ “If specific intent or knowledge is an element [of the crime charged], evidence of diminished capacity can then be considered in determining whether the defendant had the capacity to form the requisite mental state.”¹⁰⁵

Factfinders in criminal cases use the information provided by expert testimonies to inform their decision-making process about whether a criminal defendant meets all the elements of an NGRI or diminished capacity defense.¹⁰⁶ Past and recent history demonstrates that juries in criminal cases do indeed understand how to apply the NGRI jury instructions to the facts of a case.¹⁰⁷ Even so, the prevalence of defendants

100. WASH. REV. CODE § 9A.12.010 (2011).

101. Beecher-Monas & Garcia-Rill, *supra* note 99, at 298–99.

102. *See* State v. Thomas, 123 Wn. App. 771, 779, 98 P.3d 1258 (2004); Wash. Pattern Jury Instr. Crim. WPIC § 18.20.

103. Wash. Pattern Jury Instr. Crim. WPIC § 18.20; *see also* State v. Eakins, 127 Wn.2d 490, 502, 902 P.2d 1236 (1995).

104. Henry F. Fradella, *From Insanity to Beyond Diminished Capacity: Mental Illness and Criminal Excuse in the Post-Clark Era*, 18 U. FLA. J.L. & PUB. POL’Y 7, 47–49 (2007).

105. *Thomas*, 123 Wn. App. at 779, 98 P.3d at 1262; *see also* Wash. Pattern Jury Instr. Crim. WPIC § 18.20.

106. Harlow, *supra* note 9, at 1751 (“[N]ot only is legal insanity effectively determined in the criminal context, but it is currently being used in the context of contract law, probate, health care, and family law.”).

107. RITA J. SIMON, *THE JURY AND THE DEFENSE OF INSANITY* 176–77 (1967); *see also* Goldstein, *supra* note 9, at 78 (“Indeed, it is not evident that jurors will understand less about mental illness than other substantive areas of knowledge needed to resolve a case (i.e., the correct way to build a bridge or deliver a baby).”).

asserting the insanity defense is actually minimal.¹⁰⁸ For instance, the insanity defense is asserted in approximately just one percent of felony cases, and only one-quarter of defendants who raised the insanity defense in a 1991 study (which included Washington state) were successful.¹⁰⁹ Many scholars argue that the availability of the insanity defense to criminal offenses inherently means that it should also be available for intentional tort suits.¹¹⁰

C. *Tort Law Considers the Mental Health of Plaintiffs*

Although Washington courts do not permit an affirmative defense or a modified standard for tort defendants with mental illnesses, they do consider the mental state of the tort *plaintiffs*.¹¹¹ This is exhibited by Washington courts' adoption of the eggshell plaintiff principle—sometimes referred to as “particular susceptibility”¹¹²—and recognition of the tort of Negligent Infliction of Emotional Distress (NIED).¹¹³

The idea behind the particular susceptibility rule is that “a tortfeasor takes his victim as he finds him, and must bear liability for the manner and degree in which his fault manifests itself on the individual physiology of the victim.”¹¹⁴ The purpose of this rule is to protect a plaintiff's ability to recover damages, even when the plaintiff's losses are much greater than

108. Criscoe & Lukasik, *supra* note 9, at 31 (“According to the Virginia Department of Mental Health, Mental Retardation, and Substance Abuse Services, only one percent of felony defendants nationwide raise the insanity defense[;] [t]he rate of these defendants successfully pleading the insanity defense is even lower—less than 0.002%”).

109. Lisa A. Callahan et al., *The Volume and Characteristics of Insanity Defense Pleas: An Eight-State Study*, 19 BULL. AM. ACAD. PSYCHIATRY L. 331, 337 (1991).

110. See, e.g., Harlow, *supra* note 9, at 1758 (explaining that the Model Penal Code “standard for determining mental disease or defect for purposes of criminal defense . . . may be easily adjusted to fit a negligence action”); Kelley, *supra* note 9, at 188 (“A number of other authors in the late nineteenth century urged that the criminal and tort law rules regarding the liability of children and the insane should be the same, without invoking Holmes's overriding deterrence theory. These authors argued, simply, that it was unfair to hold someone civilly liable for conduct he could not have avoided because of his age or mental condition, just as it is unfair to hold someone criminally liable for that conduct.”); Korrell, *supra* note 9, at 52 (“Like the criminal jury that acquitted him, a civil jury should have no trouble concluding that [the defendant] could not reasonably have been expected to act any other way.”).

111. *Kumar v. Gate Gourmet Inc.*, 180 Wash. 2d 481, 506, 325 P.3d 193, 205 (2014) (Negligent Infliction of Emotional Distress); *Vickers v. Olaes*, No. 53579-0-I, 2005 WL 352094, at *3 (Wash. Ct. App. Feb. 14, 2005) (discussing Washington State's “particular susceptibility” principle—also known as the eggshell plaintiff principle).

112. *Lawrence v. TruGreen Landcare, LLC*, No. 67245-2-I, 2013 WL 68579, at *4 (Wash. Ct. App. Jan. 7, 2013).

113. *Kumar*, 180 Wash. 2d at 506, 325 P.3d at 205.

114. *Buchalski v. Universal Marine Corp.*, 393 F. Supp. 246, 248 (W.D. Wash. 1975).

they would have been if the plaintiff did not have a pre-existing physical or mental condition.¹¹⁵

NIED, albeit available in Washington state, is quite limited in its applicability.¹¹⁶ It is a cause of action specifically for family members to recover “‘foreseeable’, intangible injuries caused by viewing a physically injured loved one shortly after a traumatic accident.”¹¹⁷ In Washington, a cause of action for NIED is recognized only “where a plaintiff witnesses the victim’s injuries at the scene of an accident shortly after it occurs and before there is a material change in the attendant circumstances.”¹¹⁸ Thus, Washington courts are willing to consider an person’s mental illness if they are the plaintiff, but unwilling to do so when they are the defendant.¹¹⁹

II. PRIMARY JUSTIFICATIONS FOR MAINTAINING THE STATUS QUO

Courts and legal scholars have proffered countless justifications for not applying modified negligence standard to defendants with mental illnesses and not offering an affirmative, insanity- or diminished capacity- eqsue defense to intentional torts. Two justifications, however, stand out above the others and seem to be the most commonly proffered by courts and legal scholars.¹²⁰ These justifications—and their respective rebuttals—are outlined in the first section of this Part.¹²¹

A. *The Administrability and “Drawing-the-Line” Justification*

Courts, legal scholars, and lawmakers are concerned with the possibility that a factfinder would not be able to “draw the line” due to the broad range in the severity of mental health issues and the fact that some affect behavior and general functioning significantly more than others.¹²² That is, which mental illnesses under which particular circumstance could exculpate a defendant sued for negligence? And which would qualify a defendant for a mental illness-related affirmative defense in an intentional tort suit? The court in a Washington Supreme Court case, *Ramey v.*

115. Harlow, *supra* note 9, at 17.

116. Cortese v. Wells, No. 76748-8-I, 2017 WL 2539627, at *2–3 (Wash. Ct. App. 2017).

117. Colbert v. Moomba Sports, Inc., 163 Wash. 2d 43, 49, 176 P.3d 497, 500 (2008).

118. *Hegel*, 136 Wash. 2d 122, 132, 960 P.2d 424 429; *see also Cortese*, 2017 WL 2539627, at *2–3.

119. Harlow, *supra* note 9, at 16–17.

120. This assertion is based on the author’s extensive research, finding that two justifications were mentioned in most judicial opinions and journal articles.

121. The myriad other justifications are beyond the scope of this Comment.

122. Criscoe & Lukasik, *supra* note 9, at 29; Korrell, *supra* note 9, at 27; Splane, *supra* note 9, at 156.

Knorr,¹²³ stated that “the existence and degree of one’s mental illness can be difficult to measure and is a major obstacle for applying a mental deficiency defense.”¹²⁴ In fact, “administrability arguments may be the most commonly cited reason for maintaining an objective reasonable person standard for those who are mentally ill.”¹²⁵ Administrability arguments include the concern that it may be difficult to determine whether a defendant’s mental illness truly affected their tort liability (the “line-drawing” justification).¹²⁶ Another concern that seems to fall within the umbrella of an administrability argument is that an affirmative defense or modified negligence standard would require additional expenditure of judicial resources and increase the parties’ litigation costs due to, for instance, prolonged litigation procedures and hiring expert witnesses.¹²⁷

The administrability justification—which includes supposed difficulty in “drawing the line”—persists despite the fact that modern psychology and psychiatry can tell us a great deal about the effects and underpinnings of various mental illnesses.¹²⁸ In fact, modern psychological tests are highly effective at identifying defendants whose mental illness contributed to a particular behavior or action.¹²⁹ Psychiatrists are “[e]ffectively identifying defendants with a mental illness that impairs their capacity for understanding negligent action is an existing and effective part of the justice system.”¹³⁰ And “states have created detailed manuals providing processes for determining the mental status of defendants.”¹³¹

123. *Ramey v. Knorr*, 130 Wash. App. 672, 124 P.3d 314 (2005).

124. *Id.* at 676, 124 P.3d at 317; see also RESTATEMENT (SECOND) OF TORTS § 283B (AM. LAW INST. 1965).

125. Harlow, *supra* note 9, at 1751 (citing Korrell, *supra* note 9 at 34–40).

126. Korrell, *supra* note *supra* note 9, at 35.

127. See Korrell, *supra* note 9, at 30, 31 (discussing the cost and evidentiary problems that come with a subjective standard for people with mental illnesses).

128. See Korrell, *supra* note 9, at 14–17.

129. Jill S. Hayes, David B. Hale, & William Drew Gouvier, *Malingering Detection in a Mentally Retarded Forensic Population*, 5 APPLIED NEUROPSYCHOL. 33 (1998) (showing that four psychological tests were able to accurately distinguish people with mental illnesses from people pretending to have a mental illness in order to escape criminal liability); Richard Rogers, J. Roy Gillis, & R. Michael Bagby, *The SIRS as a Measure of Malingering: A Validation Study with a Correctional Sample*, 8 BEHAV. SCI. & L. 85, 89 (1990) (demonstrating that 88% of the correctional population who were evaluated on a new scale were successfully identified as either “malingering”—pretending to have a mental illness—or clinical—actually having a mental illness); see generally JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 343–352 (3rd ed. 2001) (outlining the myriad of tests that can be used to determine “insanity”).

130. Harlow, *supra* note 9, at 1751–52 (citing H. Patrick Furman, *The Definition and Determination of Insanity in Colorado*, 21 COLO. L. 693 (1992)).

131. Harlow, *supra* note 9, at 1751–52 (citing H. Patrick Furman, *The Definition and Determination of Insanity in Colorado*, 21 COLO. L. 693 (1992)).

The existence of the insanity defense in criminal court is perhaps the most significant counterpoint to this worry about a factfinder's ability to "draw the line" and decide whether or not a tort defendant's mental illness contributed—or fully caused—their negligence or intentionally tortious action. Jurors and judges in criminal court proceedings have been doing this very thing. They determine whether connection exists between a mental illness and a particular behavior relevant to a crime.¹³² Also, mental health and medical professionals are able to detect when someone does or does not suffer from a particular mental illness and when a person is merely malingering, or pretending to have a mental illness.¹³³ Overall, criminal courts allow mental illness as a defense, and judges and juries readily make judgments about which defendants qualify for the defense given the crime charged.¹³⁴ So why the reluctance to allow civil court judges and jurors to do the same?

The ability of judges and juries to apply the law to the facts of a particular case is contingent on the workability of the language of an affirmative defense and modified reasonable person standard.¹³⁵ For either the defense or standard to be "workable," the language of the jury instructions and the law on which they're based must be clear and able to be applied to a factual scenario. This begs the question: is there legal language (i.e. jury instructions) that would be conducive to determining if a defendant lacked the mental capacity to be held fully or partially liable for their tort? Additionally, is it possible to "draw the line" and determine whether a person's mental illness actually caused—either in whole or in part—their tortious conduct? According to legal and psychological professionals, should courts even consider the mental state of a tort defendant? Parts III and IV of this Comment addresses these questions by surveying mental health professionals and civil attorneys.

132. Goldstein, *supra* note 9, at 76–78; SIMON, *supra* note 19, at 176–77; *see also AAPL Guidelines for Forensic Psychiatric Evaluation of Defendants*, *supra* note 19.

133. Some have stated that "[s]cientists are between ninety-two and ninety-five percent likely to identify excessive disability when it is faked." Criscoe & Lukasik, *supra* note 9, at 31.

134. WASH. REV. CODE § 9A.12.010 (2011); *see State v. Crenshaw*, 98 Wash. 2d 789, 792, 659 P.2d 488, 491 (1983) (applying the NGRI jury instruction).

135. A legislative bill proposing a law must be workable. *In re Dependency of J.W.H.* 106 Wash. App. 714, 721, 24 P.3d 1105, 1109 (2001) ("The court acknowledged that the intent of the pension statute was to provide liberally for beneficiaries and to that end, 'the phrase "legal custody" [must] be given a functional and workable meaning consistent with the purpose and intent of the pension legislation.'" (alterations in original) (quoting *Hanson v. City of Seattle*, 80 Wash. 3d 242, 247, 493 P.2d 775, 778 (1972)), *reversed by J.W.H. v. Dep't of Soc. & Health Servs.*, 147 Wash. 2d 687, 57 P.3d 266 (2002).

B. “*The Faultless-but-Guilty*” Justification

Between two innocent parties, the party that caused the injury to the other party should assume the financial burden.¹³⁶ This is often cited as a foundational principle of tort law: the person who caused the harm ought to pay for damage resulting from the harm.¹³⁷ However, this is limited by another bedrock principle of tort law: that a defendant is not liable if they acted reasonably.¹³⁸ In tort law, liability must only be assigned where fault is due, not where the actor is not at fault.¹³⁹ That is, when a defendant acts reasonably for someone with their same disability or illness, “liability for harm should not be placed arbitrarily in the lap of the actor with the illness.”¹⁴⁰

Additionally, the existence of modified standards for children and people with physical disabilities contravenes the supposed rationale that the tort system must hold a person liable merely because they caused harm to another person—even though they are may actually be at fault due to their mental illness.¹⁴¹ Some scholars even describe this absence of consideration for tort defendants with a mental illness as an improper application of strict liability.¹⁴² For instance, say the defendant in a negligence suit had acted reasonably for someone with her mental illness,—and thereby did not breach any duty of care—the defendant can still be held liable for the harm that resulted from their reasonable actions.¹⁴³ Essentially, such a defendant is liable just by virtue of having a mental illness that they cannot control.¹⁴⁴

Importantly, society may actually be more capable of compensating the plaintiff—for instance through taxes or insurance than a defendant with a mental illness. This is because some people with mental illnesses may not be financially equipped to adequately compensate the injured plaintiff. A majority of people with severe mental illnesses are either entirely or partially reliant on public assistance for income.¹⁴⁵ According to a report

136. See Appelbaum, *supra* note 9, at 309; Criscoe & Lukasik, *supra* note 9, at 26; Harlow, *supra* note 9, at 1747–48; Korrell, *supra* note 9, at 27; Splane, *supra* note 9, at 156, 167.

137. *Jankee v. Clark Cty.*, 612 N.W.2d 297, 312 (Wis. 2000); *Gould v. Am. Family Mut. Ins. Co.*, 543 N.W.2d 282, 284 (Wis. 1996); *Polmatier v. Russ*, 537 A.2d 468, 470 (Conn. 1988).

138. Harlow, *supra* note 9, at 1748–49 (citing Keeton, *supra* note 56, § 32, at 174–75).

139. *Id.* at 1748.

140. *Id.*

141. Kelley, *supra* note 9, at 180; Korrell, *supra* note 9, at 23–34.

142. Goldstein, *supra* note 9 at 75.

143. *Id.* (noting that this is essentially “strict liability” for having a mental illness).

144. *Id.*

145. The results of a study of 162 mental patients showed that 70% of the patients relied on public funds for their living and wellbeing expenses within a year of being released from their medical treatment facilities. JUDITH BELLIVEAU KRAUS, R.N. & ANN T. SLAVINSKY, R.N., THE CHRONICALLY ILL PSYCHIATRIC PATIENT AND THE COMMUNITY 83 (1982).

by the World Health Organization, the “[h]ighest estimated prevalence of mental disorders can be found among people with the lowest levels of education or people who are unemployed.”¹⁴⁶ Overall, having a mental disorder increases a person’s likelihood of experiencing poverty.¹⁴⁷ The National Survey of Drug Use and Health reported that approximately 9.8 million adults ages eighteen-years or older in the U.S. had a serious mental illness in 2016, and 2.5 million of those adults were living below the poverty line.¹⁴⁸ Furthermore, the percentage of adults with mental illnesses who were unemployed in Washington state was 86.90% in 2012.¹⁴⁹ Thus, tort defendants with mental illnesses may not be in a financial position to personally compensate an injured plaintiff, or even afford insurance policy could provide such compensation.

III. EMPIRICAL RESEARCH ON A MODIFIED NEGLIGENCE STANDARD AND AFFIRMATIVE DEFENSES FOR TORT DEFENDANTS WITH MENTAL ILLNESSES

Despite ample scholarship advocating for a modified negligence standard and/or an affirmative defense to intentional torts for defendants with mental illnesses,¹⁵⁰ no jurisdiction in the United States has adopted either.¹⁵¹ Why does this incongruity between scholarship and the state of the law exist? As outlined above, two frequently cited reasons are that such a standard or defense: (1) may be difficult to administer; and (2) would go against the principle of tort law that the injured person shall be compensated.

146. WORLD HEALTH ORGANIZATION, *Breaking the Vicious Cycle Between Mental Ill-Health and Poverty 1* (2007), https://www.who.int/mental_health/policy/development/1_Breakingviciouscycle_Infosheet.pdf [<https://perma.cc/C2FV-Q8ER>]. For example, “[p]eople with schizophrenia, in comparison to people without mental disorders, are 4 times more likely to be unemployed or partly employed.” *Id.* Additionally, “depression is 1.5 to 2 times more prevalent among the low-income groups of a population.” *Id.*

147. *Id.* at 1.

148. SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMINISTRATION, *Results from the 2015 National Survey on Drug Use and Health: Detailed Tables*, tbl 8.5A, 8.6A (2016), <https://www.samhsa.gov/data/sites/default/files/NSDUH-DefTabs-2015/NSDUH-DefTabs-2015/NSDUH-DefTabs-2015.pdf> [<https://perma.cc/PEN7-V44H>].

149. Press Release, Nat’l Alliance on Mental Illness, Mental Illness: NAMI Report Deplores 80 Percent Unemployment Rate (Jan. 1, 2014), <https://www.nami.org/Press-Media/Press-Releases/2014/Mental-Illness-NAMI-Report-Deplores-80-Percent-Unemployment-Rate> [<https://perma.cc/BC4M-TQHX>].

150. Appelbaum, *supra* note 9, at 308; Chriscoe, *supra* note 9, at 241; Dark, *supra* note 9, at 169; Eggen, *supra* note 9, at 591; Ellis, *supra* note 9, at 1079; Goldstein, *supra* note 9, at 67; Harlow, *supra* note 9, at 1733; James, *supra* note 9, at 407; Kelley, *supra* note 9, at 179; Korrell, *supra* note 9, at 1; McKnite, *supra* note 9, at 1375; Morris, *supra* note 9, at 1837; Seidelson, *supra* note 9, at 17.

151. Korrell, *supra* note 9, at 1 (“[T]he common law has long refused mentally disabled tort defendants a similar defense. A mentally disabled tort defendant is held to that requisite standard of care without regard to the disability’s effect on his ability to comply.”).

This Comment seeks to further understand these administrability/“line drawing” and “faultless-but-guilty” justifications by proffering and analyzing novel empirical research. The Author’s research synthesizes empirical opinion data from mental health professionals and civil attorneys.

The opinion of mental health professionals on whether a tort defendant’s mental illness should play a role in a finding of culpability is highly valuable because mental health professionals’ expert testimony is required establish an insanity defense¹⁵² or diminished capacity¹⁵³ in criminal court. Such expert testimony is also sometimes used in tort cases where the plaintiff is asserting emotional distress claims¹⁵⁴ or particular susceptibility.¹⁵⁵ Given the integral role of mental health professionals in this process, asking such experts what they think about an affirmative defense or modified standard in tort law is important to ensure that any such legislation proposed is scientifically accurate and usable by such experts.¹⁵⁶ Additionally, civil plaintiffs’ and defense attorneys—the very people who would be advocating for, or opposing, the affirmative defense and modified standard instructions to the jury—can offer important insight into whether an affirmative defense and modified standard would be legally workable.

Opinion data from these two groups of professionals can shed light on the justifications for maintaining the status quo in tort law. Therefore, the Author designed and conducted a research study to investigate the administrability and “faultless-but-guilty” justifications by surveying mental health professionals and civil attorneys. Overall, survey participants were asked whether it makes sense—from a mental health or legal perspective, respectively—to establish an affirmative defense and

152. WASH. REV. CODE § 10.77.060 (2016) (“Whenever a defendant has pleaded not guilty by reason of insanity, or there is reason to doubt his or her competency, the court on its own motion or on the motion of any party shall either appoint or request the secretary to designate a qualified expert or professional person, who shall be approved by the prosecuting attorney, to evaluate and report upon the mental condition of the defendant.”).

153. Brett C. Trowbridge, *The New Diminished Capacity Defense in Washington*, 36 GONZ. L. REV. 497, 502–04 (2000) (“Thus, it seems clear that after [*State v.*] *Stumpf*, expert opinion evidence would also be required for other mental defenses, such as incompetency, insanity, childhood incapacity, etc., and lay opinion evidence without expert testimony would also not be allowed.”); see *State v. Stumpf*, 64 Wash. App. 522, 524, 827 P.2d 294, 296 (1992).

154. See *Kazatsky v. King David Mem’l Park, Inc.* 527 A.2d 988, 995 (Pa. 1987) (Intentional Infliction of Emotional Distress); *Berger v. Sonneland*, 144 Wash. 2d 91, 110–12, 26 P.3d 257, 267–68 (2001) (emotional distress due to a medical procedure).

155. See *Lawrence v. TruGreen Landcare, LLC*, No. 67245-2-I, 2013 WL 68579, at *5 (Wash. Ct. App. Jan. 7, 2013) (psychologist’s expert testimony demonstrated that the plaintiff did not have a preexisting mental health condition).

156. OFFICE OF THE CODE REVISER, *Washington State Legislature’s Bill Drafting Guide* 1 (2019) (noting that they “do not do substantive research and will rely on [the bill proposer’s] expertise”).

modified standard for tort defendants with mental illnesses. Civil attorney participants were also asked whether they think certain mental illness-based affirmative defenses and a “reasonable person with the defendant’s mental illness” negligence standard would be workable in a court of law.

A. *Research Methodology*

The research was conducted in the form of two self-report surveys. The mental health professionals survey (MHPS) was disseminated via the Qualtrics survey platform,¹⁵⁷ and the civil attorney survey (CAS) via the University of Washington’s Catalyst WebQ platform.¹⁵⁸ Sixty-eight mental health professionals participated in the MHPS, however, 12 participants’ data were dropped because those participants did not complete the entire survey, rendering the final MHPS data pool a total of 54 participants. Sixty-two attorneys participated the CAS, however, 6 participants’ data were dropped because the participants were not civil plaintiff or defense attorneys, rendering the final CAS data pool a total of 56 participants.

All mental health professional participants were licensed mental health professionals, with varying career titles. Of the 54 MHPS participants, the breakdown of participants’ self-reported “professional title” is as follows: 26 (48%)¹⁵⁹ Psychiatrists, 17 (31%) Clinical Psychologists, 6 (11%) Psychologists, 2 (4%) Master’s Level Clinicians, and 3 (6%) selected the “Other” option and wrote in their own professional title (two “Forensic Psychiatrists” and one “Doctoral Level Clinician”). Of the 54 final participants, 32 are licensed to practice in Washington state, and 24 are licensed to practice in a U.S. state other than Washington.

All civil attorney participants are licensed attorneys, active members of the Washington State Bar Association, and have been practicing civil law in Washington for at least one year. Of the 56 CAS participants, there are 21 (38%) civil defense attorneys, 31 (55%) civil plaintiff attorneys, and 4 (7%) participants identified as both civil defense *and* plaintiff attorneys.

B. *Mental Health Professional Survey Design*

The MHPS contains twelve questions. The first question asks participants to consent to participating in the study, and questions two through five are demographic questions. Question six includes a short,

157. QUALTRICS EXPERIENCE MANAGEMENT, <https://www.qualtrics.com/> [<https://perma.cc/Z3PA-EGSV>].

158. *WebQ Survey*, U. WASH. INFO. TECHNOLOGY, <https://itconnect.uw.edu/learn/tools/catalyst-web-tools/webq/> [<https://perma.cc/U9H8-YYVS>].

159. All percentages are reported as rounded to the nearest whole number.

paragraph description of tort law meant to orient the participants and give them essential background information. This informative paragraph explains the difference between intentional torts and negligence torts, the fact that there is currently no affirmative defense for intentional tort defendants with mental illnesses, nor a modified standard for negligence tort defendants with mental illnesses. It also provides a brief explanation about the availability of the affirmative defense of insanity in Washington state criminal courts. Furthermore, the introductory paragraph explains one of the current justifications for not allowing a modified standard or affirmative defense of mental illness: the feared inability of the jury to “draw the line” and decide whether a defendant’s mental illness in the particular circumstance affected the defendants’ culpability. The introductory paragraph also explains to participants that this research study seeks to investigate this justification by asking mental health professionals whether they think that a modified standard and affirmative defense should be implemented in Washington state for tort suits. This informative paragraph was available for participants to refer to throughout the remaining survey questions. Participants were required to indicate whether or not they read the informative paragraph before proceeding to the subsequent survey questions.

The seventh question then asks participants whether they think a slightly modified version of the diminished capacity defense should be available as a defense for intentional tort defendants.¹⁶⁰ The eighth question is similar but asks participants whether they think a slightly modified version of the insanity defense should be available.¹⁶¹

The ninth question asks participants if a judge or jury should consider a defendant’s mental illness when that defendant is being sued for negligence. The tenth question asks participants to select which types of mental illnesses (if any) they think could be considered when deciding whether a defendant is guilty of a tort. The types of mental illnesses listed for participants to choose from are based on the chapter sections in the

160. The exact diminished capacity defense language provided to the participants is as follows: “Diminished Capacity may be raised as a defense when either specific intent or knowledge is an element of the crime charged. If specific intent or knowledge is an element, evidence of diminished capacity can then be considered in determining whether the defendant had the capacity to form the requisite mental state.” Wash. Pattern Jury Instr. Crim. WPIC § 18.20.

161. The modified NGRI defense language was taken from the Washington Pattern Jury Instructions for NGRI. The exact language provided to participants is as follows: “For a defendant to be found not guilty by reason of insanity you must find that, as a result of mental disease or defect, the defendant’s mind was affected to such an extent that the defendant was unable to perceive the nature and quality of the acts with which the defendant is charged or was unable to tell right from wrong with reference to the particular acts with which the defendant is charged.” Wash. Pattern Jury Instr. Crim. WPIC § 20.01.

most recent edition of the Diagnostic and Statistical Manual of Mental Disorders.¹⁶²

The eleventh question asked participants about the “sudden mental incapacitation” defense to negligence, but analyses of responses to this question have been omitted for reasons beyond the scope of this Comment.

Finally, the twelfth question thanks participants for completing the survey and permits, but does not require, them to write down any additional comments, questions, or concerns they may have. Importantly, all of the questions proceeding the informative paragraph ask, but do not require, participants to provide qualitative answers along with their selected answer choice, explaining why they chose the answer they did. The entire mental health professionals survey questionnaire is located in Appendix A.

C. Civil Attorney Survey Design

The CAS contains fifteen questions, first asking participants to consent to study participation. Questions two through four are demographic questions—one of which asks participants to indicate whether they are a civil defense attorney, plaintiff's attorney, or “other” (if they select “other” they are asked to write in their title). The survey then proceeds with an informative, introductory paragraph, explaining that mental illness is currently not an available affirmative defense to intentional torts, nor is there a modified standard for negligence defendants with mental illnesses. This introductory paragraph also explains that if a defense or modified standard were to be available to tort defendants, it would need to be “workable.” “Workable” is defined for participants as: “the actual text describing the defense would need to be something that a jury or judge could use, in conjunction with the expert testimony of a psychologist or psychiatrist, to decide whether the defendant's mental illness is exculpatory or diminishes the defendant's liability.” This informative paragraph is available for participants to refer to throughout the course of the survey questions. Question number five requires participants to indicate whether or not they have read the informative paragraph before proceeding to the subsequent survey questions.

The sixth question proposes the same diminished capacity defense language as was proposed in the mental health professionals' survey, but with additional text about specifically when the diminished capacity jury

162. Examples of the types listed are “Depressive Disorders,” “Obsessive-Compulsive and Related Disorders,” “Bipolar and Related Disorders,” “Schizophrenia Spectrum and Other Psychotic Disorders,” and “Anxiety Disorders.” AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (5th ed. 2013).

instruction would be submitted to the jury.¹⁶³ Participants are asked whether they think the diminished capacity defense should be available to intentional tort defendants with mental illnesses.

The seventh question then asks whether the diminished capacity defense would be “workable” in a court of law. Again, “workable,” in this sense, refers to whether the jury (or judge) could use the expert testimony of a mental health professional, in addition to the facts of a case, to decide whether a defendant qualifies for the diminished capacity defense.

The eighth question proposes the same NGRI-based jury instruction as that of the MHPS and asks participants whether they think it should be an available defense for intentional torts. The ninth question then queries whether participants think the NGRI defense language would be workable in a court of law. Question ten participants to indicate if they think the “reasonable person with the defendant’s mental illness” standard should be available for negligent tort defendants with mental illnesses. Question eleven follows and queries whether this modified standard would be workable in a court of law. The twelfth question is identical to the sudden mental incapacitation question (question eleven) in the MHPS. But, again, analyses of the responses to this question have been omitted for reasons beyond the scope of this Comment.

Questions thirteen and fourteen ask participants to indicate how many defendants (if any) they have represented or opposed in their years as practicing attorneys, whom they believe would have qualified for an affirmative defense of mental illness, and how many they think should have been evaluated based on the modified reasonable person standard. The final, fifteenth question is identical to the last question in the MHPS—thanking the participants for their time and allowing them a chance to write down any comments, questions, or concerns they had about the survey. Similar to the MHPS, all of the questions proceeding the informative paragraph ask, but do not mandate, participants to provide qualitative answers along with their selected answer choice. The entire CAS questionnaire is located in Appendix B.

163. The survey excerpt on when to submit Diminished Capacity instruction to the jury is adapted from the section 18.20 of the Washington Pattern Criminal Jury Instructions. Wash. Pattern Jury Instr. Crim. WPIC § 18.20. The modification is minimal, however, as the only changes are substituting the word “tort” for “crime” and “tort alleged” for “crime alleged.” Specifically, the survey states: The Diminished Capacity “pattern instruction may be submitted to the jury only if the defendant satisfies the following three requirements: (1) the tort must include a particular mental state as an element; (2) the defendant must present evidence of a mental disorder; and (3) expert testimony must logically and reasonably connect the defendant’s alleged mental condition with the asserted inability to form the mental state required for the tort alleged.”

D. *Analysis of Mental Health Professional Survey Data*

1. *MHPS Quantitative Data*

The majority of MHPS participants reported that the diminished capacity defense, insanity defense, and modified negligence standard should all be available to tort defendants with mental illnesses. The majority distribution was statistically significant for the diminished capacity and insanity defense, but not for the modified negligence standard.

In response to the question of whether diminished capacity should be an available affirmative defense to intentional torts, 32 (59%) mental health professional participants reported “yes,” 13 (24%) reported “maybe/I don’t know,” and 9 (17%) reported “no.” The distribution of answers to the insanity defense question was similar, with 30 (56%) “yes” responses, 13 (24%) “maybe/I don’t know” responses, and 11 (20%) “no” responses. When asked whether there should be a modified negligence standard for defendants with mental illnesses, the number of “yes” responses dropped slightly to 25 (46%), with 17 (32%) reporting “maybe/I don’t know,” and 11 (20%) reporting “no.”¹⁶⁴

The limited range for the response options (“yes,” “no,” or “maybe”) warranted the use of nonparametric analysis: Chi-square goodness-of-fit tests¹⁶⁵ were applied to test whether participants’ answer choices differed from a chance distribution (i.e. one-third of participants choosing “yes,” one-third choosing “no,” and one-third choosing “maybe”). Chi square goodness-of-fit tests were run on each, substantive question in the MHPS: the diminished capacity, insanity defense, and modified negligence standard questions. Additionally, a Chi-square goodness-of-fit test was used to assess the significance of the DSM question, synthesizing the response options—for analysis purposes—into whether the participants indicated that “none,” “all,” or “some” of the DSM mental illness types could (depending on the situation) contribute to tort liability. This totaled to five Chi-Square goodness-of-fit tests.

The Chi-square tests revealed that participant’s choices were different from the chance distribution (i.e. one-third of participants choosing “yes,” one-third choosing “no,” and one-third choosing “maybe”) for the

164. The reason the percentages do not add up to 100% is because one participant did not answer this question.

165. A Chi-Square goodness-of-fit test is a test for statistical significance used to determine how the observed value of a given occurrence is significantly different from the expected value of the occurrence. *Chi Square Goodness of Fit Test*, STAT. SOLUTIONS (2019), <https://www.statisticssolutions.com/chi-square-goodness-of-fit-test/> [https://perma.cc/5243-UF4T]. For the purposes of the present research, the “observed value” is how many participants chose a particular answer to a question (i.e., “yes,” “maybe/I don’t know,” or “no”). Because there are three answer choices, the “expected value” is that one-third of participants would choose each answer.

diminished capacity, insanity defense, and DSM questions, but not significantly different from chance distribution for the modified negligence standard question (non-significant results are indicated with a *):

Diminished Capacity, $\chi^2(2, N = 54) = 16.95, p = .00021$

Insanity Defense, $\chi^2(2, N = 54) = 12.24, p = .0022$

*Mental Illness Negligence Standard, $\chi^2(2, N = 54) = 5.647, p = .05941$

DSM Mental Illnesses, $\chi^2(2, N = 54) = 19.310, p = .00006$

The distribution of participants' responses for the diminished capacity, insanity defense, and DSM questions was significant at a p value of $<.05$. Therefore, the fact that the majority of participants chose "yes," and the margin by which "yes" was the majority answer is statistically significant.

Alternately, the distribution of participants' responses for the Negligence Standard question was *not* significant at a p value of $>.05$. So, while the majority of participants indicated that "yes" there should be a Negligence Standard for people with mental illnesses, the margin by which "yes" was the majority is not significant.

2. *MHPS Qualitative*¹⁶⁶ *Data*

To analyze the qualitative responses accompanying "yes" or "no" answers to the diminished capacity, insanity defense, negligence standard, and SMI questions, the Author coded the text written by the participants and categorized their qualitative responses into one of two categories: (1) the affirmative defense/modified negligence standard makes logical sense from a psychological or medical perspective ("category 1")¹⁶⁷; (2) or the affirmative defense/modified negligence standard does *not* make sense because mental illness does not cause, is no excuse for, or does not preclude responsibility for, tortious conduct ("category 2").¹⁶⁸ Note that

166. "Qualitative data describes qualities or characteristics. It is collected using questionnaires, interviews, or observation, and frequently appears in narrative form. For example, it could be notes taken during a focus group on the quality of the food at [a café], or responses from an open-ended questionnaire. Qualitative data may be difficult to precisely measure and analyze. The data may be in the form of descriptive words that can be examined for patterns or meaning, sometimes through the use of coding. Coding allows the researcher to categorize qualitative data to identify themes that correspond with the research questions and to perform quantitative analysis." *Quantitative vs. Qualitative Data*, RES. GUIDES (Nov. 8, 2019), <https://libguides.maclester.edu/c.php?g=527786&p=3608639> [<https://perma.cc/8DGU-XW6H>].

167. An example of one participant's response that falls within category 1 is "[s]pecific intent is something that would be particularly impaired with various mental illnesses related to impulse control difficulties, reality testing difficulties, or cognitive trouble. I also think that if it is available as a defense in the criminal court I don't understand why it wouldn't be in civil court."

168. An example of one participant's response that falls within category 2 is "mental illness doesn't preclude anyone from responsibility or being a responsible citizen. Part of their responsibility would be getting help or medication for their mental illness so negligent things wouldn't happen, if their illness is severe enough. Again, this would stigmatize mental health if used as a defense."

the qualitative responses were optional and therefore not every participant provided responses. Also note that not every response fell within one of the two categories.

Twenty-six participants answered “yes” *and* included a qualitative response to the diminished capacity question. All 26 of these “yes” responses included category 1 explanations—that the diminished capacity defense makes sense from a psychological perspective. Alternately, while 7 participants answered “no” *and* provided a qualitative response, only 2 of these responses included category 2 explanations for their “no”—that such a defense is illogical because mental illness does not cause or is no excuse for tortious conduct. For the insanity defense question, 47 participants wrote qualitative responses. Twenty-five participants answered “yes” and included a qualitative response, of which 24 were classified as category 1. Alternately, while 9 participants answered “no” and included a qualitative response, only 2 included category 2 responses. Thus, the large majority of the mental health professionals who answered “yes” to the diminished capacity and insanity defense questions did so because they believe that the affirmative defenses make sense psychologically and/or medically (81% for diminished capacity, and 80% for insanity defense).¹⁶⁹

Even though the distribution was not significant, the Author also coded the qualitative responses to the negligence standard question and, again, found that the majority of participants reported “yes” because they believe the standard and defense cohere with modern psychological knowledge (15 out of the 25 “yes” responses to the negligence standard question were category 1). Furthermore, very few of the participants who responded “no” did so because they do not think mental illness affects, or should affect, negligence liability (3 out of the 11 “no” responses to the negligence standard question were category 2).

Overall, the data show that mental health professional participants significantly support the implementation of a mental illness defense to intentional torts. More specifically, the qualitative responses suggest that most participants support a Diminished Capacity and Insanity Defense because those defenses make sense given modern day psychological and medical knowledge about the human mind. Furthermore, very few participants were against the defenses for the reason that they do not make sense psychologically or medically. Although the majority of participants technically also supported a mental illness negligence standard, no inferences can be drawn from the numbers as they are not significant. Even so, the majority of participants who supported the modified standard

169. For diminished capacity: 32 total participants answered “yes,” and 26 of these included category 1 responses; this equals 81%. For insanity defense: 30 total participants answered “yes,” and 24 of these included category 1 responses; this equals 80%.

did so because it makes sense psychologically and/or medically. And, again, only a small minority of participants who did not support the modified standard chose “no” because they thought mental illness does not, or should not, psychologically affect a defendant’s negligence liability. Finally, participants also significantly reported that some or all types of mental illnesses in the DSM could indeed be the basis for a mental illness defense in civil suits.

E. Analysis of the Civil Attorney Survey Data

1. CAS Quantitative Data

Unlike mental health professionals, the majority of civil attorneys indicated they do *not* think a diminished capacity defense, insanity defense, or modified negligence standard should be available for tort defendants with mental illnesses. An analysis of the CAS participant data for each defense is detailed below.

When asked about diminished capacity as a defense to intentional torts, 31 (55%) participants reported “no”—that they do not think it should be an available defense—, 16 (29%) reported “yes,” and 9 (16%) reported “maybe/I don’t know.” However, when asked whether a diminished capacity defense would be workable in a court of law, 23 (41%) indicated “yes,” 22 (39%) “no,” and 11 “(20%) maybe/I don’t know.” So, even though only 16 (29%) participants believed the diminished capacity defense should be available, 23 (41%) participants said it was conceptually workable.

For the insanity defense questions, 32 (57%) participants indicated that it should *not* be an available defense, 13 (23%) reported “yes,” and 11 (20%) reported “maybe/I don’t know.” The distribution was somewhat parallel when asked whether the insanity defense would be workable: 26 (46%) participants said “no,” 17 (30%) “yes,” and 13 (23%) “maybe/I don’t know.”

When asked whether a modified standard should be used to evaluate defendants with mental illnesses in negligence suits, 47 (84%) participants indicated “no,” 5 (9%) “yes,” and 4 (7%) “maybe/I don’t know.” Again, the distribution for the question of workability was somewhat parallel, albeit more participants thought the standard would be workable than thought it should be applied in a court of law. That is, 38 (68%) participants said a modified mental illness standard would *not* be workable, 11 (20%) said “yes,” and 7 (13%) said “no.”

Lastly, in response to the question about how many of their past clients do participants believe would have qualified for either the insanity or diminished capacity affirmative defense, 32 (57%) said they had not encountered any such clients, 17 (30%) said they had encountered one-to-

ten, 1 (2%) participant said ten-to-twenty, one indicated forty-to-fifty, and 5 (9%) participants did not report a number. In response to this same question, but about the modified negligence standard, 41 (73%) said they had not encountered any clients that would have qualified for a modified negligence standard, 11 (20%) said one-to-ten clients, 1 (2%) participant indicated twenty-to-thirty, and 3 (5%) participants declined to report a numerical quantity.

As with the MHPS, the limited range for the response options (“yes,” “no,” or “maybe”) warranted the use of nonparametric analysis: Chi-square goodness-of-fit tests were used to test whether participants’ answer choices differed from a chance distribution (i.e. one-third of participants choosing “yes,” one-third choosing “no,” and one-third choosing “maybe”). Chi square goodness-of-fit tests were run on each, substantive question in the CAS: the Diminished Capacity, Insanity Defense, Modified Reasonable Person, and Mental Illness Negligence Standard questions, the respective “workability” questions, and the question about the number of participants’ clients who may have qualified for either a mental illness-based affirmative defense or modified negligence standard. This totaled to nine chi-square analyses.

The Chi-square goodness-of-fit tests revealed that participant’s choices were different from the chance distribution for each question except for the question on Diminished Capacity workability (non-significant indicated with a *):

Diminished Capacity, $\chi^2(2, N = 56) = 13.68, p = .001$

*Diminished Capacity workability, $\chi^2(2, N = 56) = 4.80, p = .091$

Insanity Defense, $\chi^2(2, N = 56) = 14.54, p < .001$

Insanity Defense workability, $\chi^2(2, N = 56) = 4.80, p = .091$

Mental Illness Negligence Standard, $\chi^2(2, N = 56) = 65.19,$
 $p < .00001$

Mental Illness Negligence Standard workability, $\chi^2(2, N = 56) =$
 $30.78, p < .00001$

Number Affirmative Defense Clients, $\chi^2(2, N = 56) = 63.818,$
 $p = < .00001$

Number of Modified Negligence Standard Clients, $\chi^2(2, N = 56)$
 $= 73.429, p = < .00001$

The distribution of participants’ responses for each question—except the diminished capacity workability question—was significant at a p value of $< .05$. Therefore, the fact that the majority of participants chose “no,” and the margin by which “no” was the majority answer is statistically significant. According to the Chi square tests, it is also significant that the majority of participants indicated they had not

encountered any clients whom they believe would have qualified for either an affirmative defense of mental illness or a modified negligence standard. Overall, the data show that civil attorney participants significantly renounce mental illness as an available defense to intentional torts, or a modified, reasonable person standard in tort law.

2. *CAS Qualitative Data*

To analyze the qualitative responses accompanying the “yes” or “no” answers to the diminished capacity, insanity defense, and modified negligence standard questions,¹⁷⁰ the Author coded the participants’ written text and categorized the responses into one of four categories. “Yes” responses with an explanation indicating that participants believe the affirmative defense/modified negligence standard makes logical sense from a legal perspective were labeled as “category A”.¹⁷¹ “No” responses accompanied by a qualitative “faultless-but-guilty” justification¹⁷²—per the over-arching principle of tort law, the person who caused the harm must compensate the injured—were labeled as “category B.”¹⁷³ And “no” responses accompanied by a qualitative “administrability” justification¹⁷⁴—concern that a jury or judge will not be able to determine whether a defendant’s mental illness contributed to their actions, and/or concern that the affirmative defense/negligence standard would unnecessarily expend judicial resources, increase litigation costs, etc.—were labeled as “category C.”¹⁷⁵ Finally, “no” responses that were a combination of category B and C were labeled as “category D.”¹⁷⁶

Fourteen participants answered “yes” to the “should diminished capacity be an available defense to an intentional tort” question *and* included a qualitative response, 13 of these “yes” responses were

170. While the survey included qualitative answer options to almost all the questions, for the purposes of this Comment the most relevant responses are to the Dim Cap, Insanity Defense, and Modified Negligence Standard questions.

171. An example of one participant’s category A response is “[i]ntentional Torts-by definition-require an intent. If someone cannot formulate an intent to injure, they shouldn’t be liable for an intentional tort.”

172. *See supra* section II.A.1.

173. An example of one participant’s category B response is “[t]he purpose of criminal law is to punish people . . . the purpose of civil law is to compensate people who have suffered damages at the hands of another purpose. I am not sure why the victim of a tort should have to bear the consequences of another person’s mental illness. Maybe there are good reasons, but I would have to be convinced.”

174. *See supra* section II.A.8.

175. An example of one participant’s category C response is “[t]his will give plaintiff’s another opportunity to scam the system, require more experts, increasing costs, and confuse the burden of proof.”

176. An example of one participant’s category D response is “a sliding scale of responsibility is fraught with ambiguities, which would 1) prevent compensation for innocent victims, 2) creat[e] such confusion as to be unworkable.”

accompanied by a qualitative category A explanation. Thus, the large majority (93%)¹⁷⁷ of participants who answered “yes” and included a qualitative response did so because they believe the diminished capacity defense makes sense from a legal perspective. Alternately, while 28 participants answered “no” to the diminished capacity question *and* included a qualitative response, 13 of the responses were category B, 6 were category C, and 2 were category D. Thus, the majority (75%) of “no” response justifications fell into applied either the “faultless-but-guilty” justification, the “administrability” justification, or both.¹⁷⁸

Eight participants answered “yes” to the “should the Insanity Defense be an available defense to an intentional tort?” question *and* included a qualitative response. All eight of these “yes” responses were accompanied by a qualitative category A explanation. Thus, every participant (100%) who answered “yes” and included a qualitative response did so because they believe the Insanity Defense makes sense from a legal perspective. Alternately, while 28 participants answered “no” to the Insanity Defense question *and* included a qualitative response, 15 of the responses were Category B, 4 were Category C, and 3 were Category D. Thus, the majority of “no” response justifications fell into applied either the “faultless-but-guilty” justification, the “administrability” justification, or both (79%).¹⁷⁹ Again, note that the qualitative responses were optional and therefore not every participant provided responses. Also note that not every response qualified under the above categories.

Only two participants answered “yes” *and* included a qualitative response to the question of “should there be a modified negligence standard for tort defendants with mental illnesses?” Both of these “yes” responses were accompanied by a qualitative category A explanation. Thus, each participant who answered “yes” and included a qualitative response did so because they believe the “modified person with the defendant’s mental illness” negligence standard makes sense from a legal perspective. Alternately, while 41 participants answered “no” to the insanity defense question *and* included a qualitative response, 12 of the responses were category B, 12 were category C, and 4 were category D. Thus, the majority (68%)¹⁸⁰ of “no” responses were forms of either the “faultless-but-guilty” justification, the “administrability” justification, or both.

Overall, the qualitative data from the CAS evinces civil attorney participants’ opposition to a diminished capacity defense, insanity defense, and modified negligence standard. Specifically, the qualitative

177. Thirteen out of fourteen participants equals 93%.

178. Twenty-one out of twenty-eight participants equals 75%.

179. Twenty-two out of twenty-eight participants equals 79%.

180. Twenty-eight out of forty-one participants equals 68%.

responses suggest that this opposition is largely rooted in the “faultless-but-guilty” and “administrability” justifications.

3. *Civil Plaintiff Attorneys Versus Civil Defense Attorneys*

An additional question to consider is whether a participant’s status as a civil *plaintiff* versus civil *defense* attorney may affect whether a participant supports or opposes a defense/standard, or thinks a defense/standard would be workable. To answer this question, the Author applied a one-tailed z-test for two population proportions. This type of z-test is used when a researcher wants to know whether two populations or groups (defense attorneys and plaintiff attorneys) differ significantly on a single, categorical characteristic (whether or not they answered yes, no, or maybe to the diminished capacity, insanity defense, and negligence standard questions).¹⁸¹ The results of the z-tests indicated a significant relationship between a participant’s status as a defense versus plaintiff attorney and their answer choice for only three types of responses (non-significant relationships are indicted with a “*”):

*Diminished Capacity “yes”: z-score = -1.495, $p = .068$

*Diminished Capacity “maybe”: z-score = -1.386, $p = .082$

Diminished Capacity “no”: z-score = 2.354, $p = .009$

*Insanity Defense “yes”: z-score = -0.774, $p = .221$

*Insanity Defense “maybe”: z-score = -1.02, $p = 0.154$

*Insanity Defense “no”: z-score = 1.451, $p = 0.073$

Modified Negligence Standard “yes”: z-score = -1.899, $p = 0.029$

*Modified Negligence Standard “maybe”: z-score = -1.469, $p = 0.071$

Modified Negligence Standard “no”: z-score = 2.169, $p = 0.015$

These data demonstrate the difference is significant between the number of civil defense attorneys versus plaintiff attorneys who answered “no” to the diminished capacity question. This means that significantly more civil plaintiff attorneys were against the diminished capacity defense. This difference is also significant for those who answered “yes” and “no” to the modified negligence standard question. For all other question-response combinations, the plaintiff/defense distinction was not significant.

IV. DISCUSSION OF THE SURVEY RESULTS

The MHPS and CAS data indicate a significant divide between the opinions of mental health professionals the opinions of civil attorneys. Mental health professionals believe that courts should consider a tort defendant’s

181. *Z Score Calculator for 2 Population Proportions*, SOCIAL SCIENCE STATISTICS, <https://www.socscistatistics.com/tests/ztest/default.aspx> [https://perma.cc/UT7P-U2X3].

mental illness in intentional tort suits,¹⁸² while civil attorneys disapprove of such consideration for both intentional torts and negligence.¹⁸³

A. *Mental Health Professionals Support Some Mental Illness Defenses to Intentional Torts*

The results of the MHPS suggest that experts in the mental health field support the implementation of a mental illness-based affirmative defense to intentional torts. The majority of MHPS participants indicated they believe a diminished capacity defense, insanity defense, and modified negligence standard should be available to tort defendants with mental illness (albeit the majority margin was not significant for the modified negligence standard). The qualitative responses shed light on the rationale behind the MHPS participants' opinions in two, important ways. First, the responses indicate that the primary reason the mental health professionals supported the defenses/standard is because they make sense from a psychological/medical perspective—that is, the defenses/standard conform with what modern psychology and medicine has taught us about the human mind. Second, the mental health professionals rarely opposed the defenses/standard because they believe mental illness does not, or should not, contribute to tort liability from a psychological or medical perspective.

Additionally, the MHPS results demonstrate that the majority of mental health professionals surveyed believe that multiple mental illnesses in the DSM could qualify an individual for a modified negligence standard or a diminished capacity/insanity defense in conjunction with the facts of a particular case.

In sum, these data from mental health professionals rebut the notion that the court and jury will have trouble “drawing the line” in intentional tort suits—that is, distinguishing/deciding whether a defendant's mental illness should be exculpatory or limit liability. The very people whose testimony would be relied upon to help “draw the line”—mental health professional expert witnesses—believe that mental illness could affect a defendant's tortious culpability and that a diminished capacity defense or insanity defense should be available for intentional torts. The opinion of these mental health professionals is highly valuable because they are tasked with explaining the relevant information about the defendant to the factfinder in court.¹⁸⁴ This support for the consideration of tort defendants'

182. *See supra* section III.D.

183. *See supra* section III.E.

184. *See, e.g.* Colleen M. Berryessa, *Educator of the Court: The Role of Expert Witnesses in Cases Involving Autism Spectrum Disorder*, 23 PSYCHOL. CRIME L. 575, 575 (2017) (“The role of the expert

mental illnesses, however, is not matched in the civil attorneys' responses to the CAS questions.

B. Civil Attorneys Do Not Support Consideration of a Tort Defendant's Mental Illness

Like mental health professionals, civil attorneys also provide an important perspective on the potential for mental illness-based defenses and a modified negligence standard. As the advocates tasked with propounding or contending a defense or legal standard in court, the civil attorney participants were able to opine on the workability of such defenses and modified standard. The results from the CAS suggest that civil attorneys do not support an insanity defense, diminished capacity defense, or a modified negligence standard in tort suits. Additionally, the majority of CAS participants stated they did not think the insanity defense or modified negligence standard would be workable in a court of law. However, although a slight majority reported that the diminished capacity defense would not be workable, this distribution was insignificant and therefore no factual conclusions can be drawn from the diminished capacity workability question data. This leaves open the possibility that while civil attorneys do not believe the diminished capacity defense *should* be available to civil defendants, they may believe that it *could* be.

Also noteworthy—but not statistically significant—is the fact that fewer participants indicated “no” to the workability questions than to the questions about whether each defense/standard should be available to defendants. For the diminished capacity questions, 31 participants indicated it should not be available, but only 22 indicated it would not be workable. For the insanity defense questions, 32 participants thought it should not be available, but only 26 said it would be unworkable. For the modified negligence standard questions, 47 indicated it should not be an available standard, yet only 38 indicated it would not be workable. This uneven distribution could be interpreted as an indication that there are some civil attorneys who believe that mental illness should not be a defense to intentional torts for policy reasons, but that if it *were*, the factfinder (be it a judge or jury) would be able to apply the proposed language to the facts of a case and successfully evaluate a defendant's liability. Although this supposition is just conjecture, as the CAS did not produce statistically significant data, it sheds light on a future direction for more research. Answering this question of why attorneys think a defense/standard would be workable but still do not support its implementation would require further research on more participants who

witness in legal contexts is to educate fact finders of the court who may have no background in the expert's area.”).

select “no” for the question of availability but select “maybe” or “yes” for the question of workability.

The qualitative responses help to explain the civil attorney participants' opinions because they demonstrate that the “administrative” and “faultless-but-guilty” justifications were the most common reasons for attorneys opposing the intentional tort defenses and modified negligence standard. Additionally, while only a small number of attorney participants supported the defenses and negligence standard, nearly all these attorneys' qualitative responses included language indicating that they believed the defenses/standard made sense from a legal perspective.

C. *Plaintiff Attorneys Are More Likely to Oppose a Diminished Capacity Defense and a Modified Negligence Standard*

Plaintiff versus defense attorneys differed significantly when answering the question of whether the diminished capacity defense and modified negligence standard should be available to tort defendants with a mental illness. It was statistically significant that 22 plaintiff attorneys but only 8 defense attorneys reported “no” to the diminished capacity availability question. Additionally, the difference between plaintiff versus defense attorneys who reported “yes” and “no” to the modified negligence standard question was also statistically significant. That is, significantly more plaintiff attorneys than defense attorneys reported they do *not* support a modified negligence standard for tort defendants with a mental illness (29 plaintiff, 15 defense). On the flip side, significantly more defense attorneys than plaintiff attorneys reported they *do* support a modified negligence standard for tort defendants with a mental illness (4 defense, 1 plaintiff). These data suggest that plaintiff attorneys are significantly more likely than defense attorneys to oppose both the diminished capacity defense and a modified negligence standard, while defense attorneys are significantly more likely to support a modified negligence standard. This information is not surprising given the attorneys positional differences in litigation, but also suggests that the CAS participants' responses could be influenced by their status as a defense or plaintiff attorney.

D. *Comparison Between Mental Health Professionals and Civil Attorneys*

Given this drastic discrepancy between the CAS and MHPS results, what is to be done? Who should we believe: the mental health professionals—the people who would likely serve as expert witnesses in civil suits involving a defendant with a mental illness—or the civil attorneys—the people tasked with arguing for or against a mental illness-

based defense or negligence standard? Who should the courts and legislature listen to? The results of this research seem to address why substantial scholarship calls for the implementation of a mental illness negligence standard and an insanity/diminished capacity defense to intentional torts, yet no state in the U.S. has established such common law or passed such legislation. Civil courts are either knowingly or unknowingly ignoring the science behind mental illness. While this research demonstrates that, from a psychological perspective, some mental illnesses can mitigate tort liability, it is clear that attorneys nonetheless do not think the court should consider a defendant's mental illness in a tort suit. Furthermore, while attorneys do not believe an insanity or diminished capacity defense standard would be "workable" in a court of law and oppose it on "administrability" and "faultless-but-guilty" grounds, mental health professionals believe that the proposed affirmative defenses are necessary given the psychological effects of mental illness. Overall, the data from this research is inherently contradictory. The MHPS data show that mental health professionals believe it is possible to "draw the line" for intentional torts: they support the implementation of a mental illness-based affirmative defense and can even postulate which mental illnesses in the DSM may contribute to a defendant's tortious actions. The CAS data, on the other hand, indicate that civil attorneys do not support mental illness as an affirmative defense to intentional torts or a modified negligence standard and maintain that either defense or standard would be legally unworkable.

The data from this research will hopefully provide future tort lawmakers with important information that frames issue as a choice between two pools of knowledge: Should tort law incorporate modern medical and psychological knowledge about people with mental illnesses, or should it discount such information in the interest of maintaining traditional tort principles and avoiding potential administrability issues? To side with the mental health professionals would be to bypass concerns about legal workability and policy, but to side with the civil attorneys would be to ignore modern psychology. Must tort law evolve alongside developments in medicine and social sciences? Psychologist and psychiatrists think it should, but civil attorneys are not convinced.

CONCLUSION

Despite ample scholarship advocating for an affirmative defense or modified negligence standard for tort defendants with mental illnesses, no jurisdiction in the United States has established either. Rather, court opinions continue to justify the lack of an affirmative defense or modified standard, often by citing either "administrability" or "faultless-but-guilty" grounds. For instance, Justice Cox of the Washington Court of Appeals

explained in *Ramey v. Knorr* that Washington state rejects a modified negligence standard in part because “the existence and degree of one’s mental illness can be difficult to measure” and because of “the difficulty of drawing a line between mental illness and variations of temperaments, intellect, and emotional balance.”¹⁸⁵ While critics of the justifications have offered rebuttals to each one, this Comment includes novel, qualitative and quantitative data that sheds light on the “administrability” justification and the “faultless-but-guilty” justification. The administrability/line-drawing justification is repudiated by the existence of the insanity and diminished defenses in Washington state, and by the existence of a modified standard for children and people with physical disabilities. This Comment adds to these rebuttals by providing novel empirical research. The research demonstrates that mental health professionals endorse the adoption of an affirmative defense for intentional tort defendants with mental illness, but also raises the concern that civil attorneys believe such a defense would be unworkable in a court of law. Mental health professionals who participated in the Author’s research support the adoption of a mental illness-based affirmative defense in Washington state, and were also able to posit which mental illnesses may qualify a defendant to assert an affirmative defense or apply a modified negligence standard. Civil attorney participants, however, opined that a mental illness-based affirmative defense or negligence standard would not be “workable” in a court of law and opposed on both “faultless-but-guilty” and “administrability” grounds. This discrepancy begs the question: Should Washington state tort law reflect the opinions of mental health practitioners or civil attorneys? Psychology and medicine, or legal logistics and tradition? The choice is one of inconvenient change versus convenient stagnation.

185. 130 Wash. App. at 674–75, 124 P.3d at 317 (“Both for historical and other reasons, insanity or other mental deficiencies generally are not recognized as defenses to negligence. Washington . . . holds the mentally ill to the standard of a reasonable person under like circumstances.”).

Appendix A

Mental Health Professional Survey Tort defendants with Mental Illnesses

Q1 Welcome to the research survey!

We are interested in the possibility of mental illness as a defense that either decreases or exculpates a defendant's liability in Washington state tort suits. Tort law is a section of the civil legal system that addresses liability for accidental or intentional legal wrongs that result in harm to a private party, such as negligence, assault, or battery. Prior to answering any survey questions, you will be presented with information about mental health and tort law. You will then be asked your professional opinion about defendants with mental illnesses who are being sued in civil court for committing a tort in Washington state.

By completing this survey, you are consenting to participate in this study and consenting to the potential use of your survey responses in the researcher's *Washington Law Review* article. However, your responses will be kept anonymous, confidential, and in no way connected to your name, email address, or other directly-identifying information.

The study should take you around 10-20 minutes to complete. Your participation in this research is voluntary. You have the right to stop the survey at any point, for any reason, and without any prejudice. If you would like to contact the Principal Investigator in the study to discuss this research, please e-mail Gabrielle Lindquist at lindqg@uw.edu.

By clicking the button below, you acknowledge that your participation in the study is voluntary, that you are at least 18 years of age, and that you are aware that you may choose to terminate your participation in the survey at any time and for any reason (just exit the survey on your computer).

Please note that this survey will be best displayed on a laptop or desktop computer. Some features may be less compatible for use on a mobile device.

- I consent, begin the study
- I do not consent, I do not wish to participate

Q2 Please select the professional title that applies to you:

- Psychiatrist
- Clinical Psychologist
- Psychologist
- Social Worker
- Master's Level Clinician
- Therapist
- Other (please explain): _____

Q3 What is your educational background?

- I have an M.D. in Psychiatry.
- I have a Ph.D. in Clinical Psychology
- I have a Psy.D.
- I have a Master's in Psychology or a related mental health field
(please specify the exact degree title here): _____
- Other (please explain): _____

Q4 I am a licensed psychiatrist, psychologist, mental health counselor, social worker, or therapist in Washington state.

- Yes
- No
- Other (please explain): _____

Q5 I have been a psychiatrist, psychologist, mental health counselor, social worker, or therapist in Washington state for:

- less than 1 year
- 1 to 5 years
- 5 to 10 years
- more than 10 years
- Other (please explain): _____

Q6 PLEASE READ THE FOLLOWING INFORMATION CAREFULLY, as it will be necessary to answer all further survey questions:**What is a tort?**

“Torts” are wrongful acts for which the wrongdoer can be sued in civil court—as opposed to criminally prosecuted by the government. Civil court cases are about the defendant paying money damages for harm they caused to a private party, unlike criminal court where the state/government is party bringing the suit against the defendant. Some examples of torts are: someone driving their car while distracted (negligence), someone trespassing on another person's land (trespass), someone shoving another person from behind (battery), or someone

verbally threatening another person to the point that the other person believes they may be harmed (assault).

Tort law does not take into consideration a defendant's mental illness:

Mental illness is not currently available as a defense for people who are being sued for torts. That is, if someone with a mental illness is being sued for battery or assault in *civil court*, for instance, they cannot cite to their mental illness as a reason why they were unable to control their behavior or unable to know what they were doing. In *criminal court*, however, defendants *can* cite to their mental illness as a defense. That is, criminal defendants can argue that, because of their mental illness, they didn't know what they were doing and therefore cannot be responsible (either fully or partially) for their crime. Additionally, when a person with a mental illness is sued for negligence, the jury is asked to decide if that defendant acted like an "objectively reasonable person" (without a mental illness). If the defendant acted "objectively unreasonable," then they are found to be guilty of negligence. Even if the defendant has a mental illness, the jury or judge is not allowed to consider their mental illness when deciding whether the defendant acted negligently and should be found guilty.

We want your opinion:

The next few pages of this survey will ask your opinion about whether you think a defendant's mental illness should be an available defense, and/or at least considered, when a judge or jury decides whether a defendant is guilty of a tort.

**You can scroll back up to this information at any time while you are answering the remaining questions on this page of the survey.*

Please indicate below if you have read the above information:

- Yes, I have read it.
- No, I did not read it.

Q7 In your opinion, should the following defense be an option for defendants with mental illnesses who are being sued for a tort such as battery, trespass, or assault?

This proposed defense is modeled on the current "Diminished Capacity" affirmative defense that Washington state currently allows in criminal prosecutions:

"Diminished Capacity may be raised as a defense when either specific intent or knowledge is an element of the tort. If specific intent or

knowledge is an element, evidence of diminished capacity can then be considered in determining whether the defendant had the capacity to form the knowledge or intent.”

- Yes, I think this defense should be available (please explain why):

- No, I do not think this defense should be available (please explain why): _____
- Maybe/I don't know (please explain why): _____

Q8 In your opinion, should the following defense be an option for defendants with mental illnesses who are being sued for a tort such as battery, trespass, or assault?

This proposed defense is modeled on the “Insanity Defense” jury instructions that Washington state currently allows in criminal prosecutions:

“For a defendant to be found not guilty by reason of insanity you must find that, as a result of mental disease or defect, the defendant’s mind was affected to such an extent that the defendant was unable to perceive the nature and quality of the acts with which the defendant is charged or was unable to tell right from wrong with reference to the particular acts with which the defendant is charged.”

- Yes, I think this defense should be available (please explain why):

- No, I do not think this defense should be available (please explain why): _____
- Maybe/I don't know (please explain why): _____

Q9 In your opinion, should a judge or jury consider a defendant’s mental illness when that defendant is being sued for negligence?

***Examples of negligence are: running through a stop sign while driving, leaving your gate open and your dog escaping and biting someone, or not repairing a step in the stairs in your home and a visitor falling down your stairs as a result of the broken step.**

• Yes, I think this standard should be applied to people with mental illnesses (please explain why):

• No, I do not think this standard should be applied to people with mental illnesses (please explain why):

• Maybe/I don't know (please explain why):

Q10 Please select which types of mental illnesses (if any) that you think should be considered when deciding whether a defendant is guilty of a tort. Each individual case, of course, would depend on the particular facts of each defendant's situation (the type of mental illness itself would not be the sole basis for a finding of innocence/guilt).

You can choose multiple answers. If you would like to add any information or explanation to your answers, you can write in the text boxes next to each answer option.

***The types of mental illnesses listed are based on the chapter titles of the DSM-5.**

• NO mental illnesses

• ALL of the below mental illnesses

• Neurodevelopmental Disorders

• Schizophrenia Spectrum and Other Psychotic Disorders

• Bipolar and Related Disorders

• Depressive Disorders

• Anxiety Disorders

• Obsessive-Compulsive and Related Disorders

• Trauma- and Stressor-Related Disorders

• Dissociative Disorders

- Somatic Symptom Disorders

- Feeding and Eating Disorders

- Elimination Disorders

- Sleep-Wake Disorders

- Sexual Dysfunctions

- Gender Dysphoria

- Disruptive, Impulse Control and Conduct Disorders

- Substance Use and Addictive Disorders

- Neurocognitive Disorders

- Personality Disorders

- Paraphilic Disorders

- Other Disorders (please explain)

Q11

Washington state currently allows “sudden mental incapacitation” as a defense to negligence torts, but ONLY in the context of a defendant negligently operating a motor vehicle.

The “sudden mental incapacitation” defense requires a defendant to establish: (1) that they had no prior notice or forewarning of their potential for becoming [mentally] “disabled,” and (2) that the “disability” renders them incapable of conforming to the standards of ordinary care.

Do you think that Washington should expand this “sudden mental incapacitation” defense for all negligence torts rather than just motor vehicle accidents?

- Yes, I think it should be an available defense (please explain why):

- No, I do not think it should be an available defense (please explain why): _____

- Maybe/I don't know (please explain why):
-

Q12 Thank you very much for completing this survey! If there is anything else you would like us to know, please fill out the text box below.

Otherwise, if you have questions for the Primary Investigator please feel free to email Gabrielle Lindquist at lindgg@uw.edu. Thank you very much for taking the time to fill out this survey, your participation is much appreciated.

Appendix B
Civil Attorney Survey — Tort defendants with Mental Illnesses

Question 1.

Welcome to the research survey!

We are interested in the possibility of mental illness as a defense that either decreases or exculpates a defendant's liability in Washington state tort suits. Prior to answering any survey questions, you will be presented with information about mental health and tort law. You will then be asked your professional opinion about defendants with mental illnesses who are being sued in civil court for committing a tort in Washington state.

By completing this survey, you are consenting to participate in this study and consenting to the potential use of your survey responses in the researcher's *Washington Law Review* article. However, your responses will be kept anonymous, confidential, and in no way connected to your name, email address, or other directly-identifying information.

The study should take you around 10-20 minutes to complete. Your participation in this research is voluntary. You have the right to stop the survey at any point, for any reason, and without any prejudice. If you would like to contact the Principal Investigator in the study to discuss this research, please e-mail Gabrielle Lindquist at lindqg@uw.edu.

By clicking the button below, you acknowledge that your participation in the study is voluntary, that you are at least 18 years of age, and that you are aware that you may choose to terminate your participation in the survey at any time and for any reason (just exit the survey on your computer).

Please note that this survey will be best displayed on a laptop or desktop computer. Some features may be less compatible for use on a mobile device.

- I consent, begin the survey.
- I do not consent, I do not wish to participate.

Question 2.

Please select the professional title that applies to you:

- Civil Defense Attorney
- Civil Plaintiff's Attorney
- Other (please explain): _____

Question 3.

Are you licensed by the Washington State Bar Association to practice law in Washington state?

- Yes
- No

Question 4.

I have been practicing civil law in Washington state for:

- Less than 1 year
- 1 to 5 years
- 5 to 10 years
- more than 10 years

Question 5.

PLEASE READ THE FOLLOWING INFORMATION CAREFULLY, as it will be necessary to answer all further survey questions:

Intentional torts - mental illness not currently available as an affirmative defense:

As you may know, Washington state allows insanity as an affirmative defense for criminal prosecutions, but not for civil intentional torts suits. That is, a person could be charged for assault in both criminal and civil court separately, then be found not guilty by reason of insanity for the criminal charges, but found guilty in civil court.

Negligence torts - mental illness not currently available as a subjective standard:

As you may also know, Washington state tort law has an exception (subjective standard) for children and people with physical disabilities, but not for people with mental illnesses. Children and people with physical disabilities are evaluated based on “a reasonable child” standard and a “reasonable person with the defendant’s same physical disability” standard. People with mental illnesses (even severe illnesses such as Schizophrenia or Downs Syndrome) are not evaluated on a subjective standard. That is, individuals with mental illnesses are held to the standard of a reasonable person *without* a mental illness, even if their mental illness may have been what caused, or contributed, to the negligence for which they are being sued.

Would an affirmative defense and/or subjective standard for mental illness be “workable?”

If an affirmative mental illness defense to intentional torts were to be implemented, the specific language would need to be “workable.” By “workable” we mean that the actual text describing the defense would need to be something that a jury or judge could use, in conjunction with the expert testimony of a psychologist or psychiatrist, to decide whether the defendant’s mental illness is exculpatory or diminishes the defendant’s liability. A subjective, “reasonable person with the defendant’s mental illness” standard would need to be workable in this way as well.

We want your opinion:

The next few pages of this survey will ask your opinion about the potential use of mental illness as an affirmative defense to intentional torts, as well as your opinion about the use of a subjective, “reasonable person with the defendant’s mental illness” standard for negligence.

**You can scroll back up to this information at any time while you are answering the remaining questions on this page of the survey.*

Please indicate below if you have read the above information:

- Yes, I have read it.
- No, I have not read it.

Question 6.

In your opinion, should the following affirmative defense language below be an option for defendants with mental illnesses who commit intentional torts?

This affirmative defense language is modeled on the current “**Diminished Capacity**” affirmative defense that Washington state currently allows in criminal prosecutions:

Diminished Capacity Jury Instructions: “Diminished Capacity may be raised as a defense when either specific intent or knowledge is an element of the tort. If specific intent or knowledge is an element, evidence of diminished capacity can then be considered in determining whether the defendant had the capacity to form the requisite mental state.”

*These Diminished Capacity instructions would be submitted to the jury only if the defendant satisfies the following three requirements: (1) the tort must include a particular mental state as an element; (2) the defendant must present evidence of a mental disorder; and (3) expert testimony must

logically and reasonably connect the defendant's alleged mental condition with the asserted inability to form the mental state required for the tort.

- Yes, I think this defense should be available (please explain why below):
 - No, I do not think this defense should be available (please explain why below):
 - Maybe/I don't know (please explain why below):
 - *Please explain why you chose your answer:
-

Question 7.

Would the **Diminished Capacity** defense to intentional torts (language above) be workable in a court of law?

By "workable" we mean, do you think a judge or juror would be able to use the Diminished Capacity language to assess whether a defendant qualifies for that affirmative defense based on expert testimony from a psychologist or psychiatrist?

- Yes, it would be workable (please explain why below):
 - No, it would not be workable (please explain why below):
 - Maybe/I don't know (please explain why below):
 - *Please explain why you chose your answer:
-

Question 8.

In your opinion, should the following affirmative defense language below be an option for defendants with mental illnesses who commit intentional torts?

This affirmative defense language is modeled on the **Insanity Defense** jury instructions that Washington state currently allows in criminal prosecutions:

Insanity Defense Jury Instructions: "For a defendant to be found not guilty by reason of insanity you must find that, as a result of mental disease or defect, the defendant's mind was affected to such an extent that the defendant was unable to perceive the nature and quality of the acts with which the defendant is charged or was unable to tell right from wrong with reference to the particular acts with which the defendant is charged."

- Yes, I think this defense should be available (please explain why below):

- No, I do not think this defense should be available (please explain why below):

- Maybe/I don't know (please explain why below):

- *Please explain why you chose your answer:

Question 9.

Would the **Insanity Defense** to intentional torts (language above) be workable in a court of law?

*By "workable" we mean, do you think a judge or juror would be able to use the Insanity Defense language to assess whether a defendant qualifies for that affirmative defense based on expert testimony from a psychologist/psychiatrist?

- Yes, it would be workable (please explain why below):

- No, it would not be workable (please explain why below):

- Maybe/I don't know (please explain why below):

- *Please explain why you chose your answer:

Question 10.

In your opinion, should the below "reasonable person with the defendant's mental illness" standard be an option for defendants with mental illnesses being sued for civil negligence?

As explained earlier, a subjective, "**reasonable person with the defendant's mental illness**" standard for negligence tort defendants with mental illnesses could either decrease or preclude a defendant's liability. The defendant's negligent behavior would be evaluated based on how a "reasonable person with the defendant's mental illness" would have behaved in a particular situation.

- Yes, I think this standard should be applied to people with mental illnesses (please explain why below):

- No, I do not think this standard should be applied to people with mental illnesses (please explain why below):

- Maybe/I don't know (please explain why below):

- *Please explain why you chose your answer:

Question 11.

Would the "**reasonable person with the defendant's mental illness**" subjective standard be a workable standard for defendants sued for

negligence?

By “workable” we mean, would a judge or jury be able to decide whether the defendant was acting “reasonably” given their mental illness under the circumstances with the aid of testimony from a professional psychologist or psychiatrist?

- Yes, it would be workable (please explain why below):
 - No, it would not be workable (please explain why below):
 - Maybe/I don’t know (please explain why below):
 - *Please explain why you chose your answer:
-

Question 12.

Washington state currently allows “**sudden mental incapacitation**” as a defense to negligence torts, but **ONLY** in the context of a defendant negligently operating a motor vehicle.

The “sudden mental incapacitation” defense requires a defendant to establish: (1) that they had no prior notice or forewarning of their potential for becoming [mentally] “disabled,” and (2) that the “disability” renders them incapable of conforming to the standards of ordinary care.

Do you think that Washington should expand this “sudden mental incapacitation” defense for all negligence torts rather than just car accidents?

- Yes, I think it should be an available defense for all negligence torts (please explain why below):
 - No, I do not think it should be an available defense for all negligence torts (please explain why below):
 - Maybe/I don’t know (please explain why below):
 - *Please explain why you chose your answer:
-

Question 13.

In your time as a practicing attorney, have you encountered (either represented or opposed) any tort defendants who you believe would have qualified for an affirmative defense of mental illness? If so, approximately how many defendants? We understand this is a *rough* estimate.

*There is a text box provided at the end of the answer options if you would like to elaborate on your answer.

- None
 - Yes, 1 to 10
 - Yes, 10 to 20
 - Yes, 20 to 30
 - Yes, 30 to 40
 - Yes, 40 to 50
 - Yes, 50 or more
 - If you would like to elaborate on your answer, please do so here:
-

Question 14.

In your time as a practicing attorney, have you encountered (either represented or opposed) any civil defendants who you believe should have been evaluated for their negligence based on a “reasonable person with the defendant’s mental illness” standard? If so, approximately how many defendants? We understand this is a *rough* estimate.

*There is a text box provided at the end of the answer options if you would like to elaborate on your answer.

- None
 - Yes, 1 to 10
 - Yes, 10 to 20
 - Yes, 20 to 30
 - Yes, 30 to 40
 - Yes, 40 to 50
 - Yes, 50 or more
 - If you would like to elaborate on your answer, please do so here:
-

Question 15.

Thank you very much for completing this survey! If there is anything else you would like us to know, please fill out the text box below.

Otherwise, if you have questions for the Primary Investigator please feel free to email Gabrielle Lindquist at lindqg@uw.edu. Thanks again for taking the time to fill out this survey, your participation is much appreciated.
