

# Debtor Malice\*

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*This Article is about what malice should mean under bankruptcy law. Malice is used in other areas of law as a sorting function—to identify wrongful acts that are especially grievous. For example, criminal law uses malice to separate murder from manslaughter. The Bankruptcy Code uses malice to perform a similar sorting function. Bankruptcy law discharges or forgives certain kinds of debts. It separates debts that society is willing to forgive from debts that are not forgivable. One way it accomplishes this sorting function is through Section 523(a)(6) of the Bankruptcy Code, which excepts from discharge debts for “willful and malicious injury by the debtor.”*

*The Supreme Court has interpreted the word malicious to require “a wrongful act, done intentionally, without just cause or excuse.” But neither the Supreme Court nor the circuit courts have provided meaningful guidance on the degree of wrongfulness that is required. Because intentionally injuring another is inherently a wrongful act, there should be a difference between a mere willful injury and the required “willful and malicious” injury. In addition, a circuit court split has developed on whether malicious requires intent, and if so, what level of intent. This Article seeks to clarify the meaning of malicious. It explains why courts should stop construing malicious to require intent. It also recommends the definition of malicious be changed to require an “extraordinarily” wrongful act so that malice can accomplish its sorting function.*

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## I. INTRODUCTION

This Article explores what malice should mean under bankruptcy law. Malice is utilized in other areas of law as a sorting function—to identify wrongful acts that are especially grievous. For example, criminal law uses malice to separate murder from manslaughter.<sup>1</sup> Tort law employs malice to

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<sup>1</sup> Compare 18 U.S.C. § 1111(a) (2012) (“Murder is the unlawful killing of a human being with malice aforethought.”), with *id.* § 1112(a) (“Manslaughter is the unlawful killing of a human being without malice.”). See generally 2 CHARLES E. TORCIA, WHARTON’S CRIMINAL LAW §§ 139, 153 (15th ed. 1994) (stating that at common law and by statute in

describe conduct that justifies imposing punitive damages.<sup>2</sup> The Bankruptcy Code uses malice to perform a similar sorting function. Bankruptcy law discharges certain kinds of debts.<sup>3</sup> It separates debts that society is willing to forgive from those that are not forgivable. One way bankruptcy law accomplishes this sorting function is through exceptions to the bankruptcy discharge.

Victims of a debtor's bad conduct occasionally request bankruptcy courts to not discharge the debts owed to them. Section 523(a)(6) of the Bankruptcy Code excepts from discharge debts "for willful and malicious injury by the debtor."<sup>4</sup> The Supreme Court has interpreted the word malicious to require "a wrongful act, done intentionally, without just cause or excuse."<sup>5</sup>

The Bankruptcy Reporter is crowded with examples of debtors who intentionally engaged in wrongful acts without a just cause or excuse. For instance, one debtor took his former girlfriend's Ferrari and hid it despite demands to return the car.<sup>6</sup> Another debtor put his car in reverse and intentionally collided it into a vehicle that was directly behind him.<sup>7</sup> One debtor sexually harassed an employee.<sup>8</sup> Another violated a non-compete agreement by

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many states, "murder is an unlawful homicide with malice aforethought" and "manslaughter is an unlawful homicide without malice aforethought"); WAYNE R. LAFAVE, CRIMINAL LAW 765–66 (5th ed. 2010) (providing a history of murder and observing that "it will not solve modern homicide cases to say simply that murder is the unlawful killing of another with malice aforethought, that manslaughter is the unlawful killing of another without malice aforethought, and that no crime is committed if the killing is lawful"); MODEL PENAL CODE AND COMMENTARIES, Part II § 210.2 cmt. 1 (AM. LAW INST. 1980) (explaining that the phrase malice aforethought is "used by judges to signify any of a number of mental states deemed sufficient to support liability for murder"); Lee R. Russ, Annotation, *Modern Status of the Rules Requiring Malice "Aforethought," "Deliberation," or "Premeditation," as Elements of Murder in the First Degree*, 18 A.L.R.4th 961, 962–64 (1982) (discussing the current status of murder laws).

<sup>2</sup> W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 9–10 (5th ed. 1984) ("Something more than the mere commission of a tort is always required for punitive damages. There must be circumstances of aggravation or outrage, such as spite or 'malice,' or a fraudulent or evil motive on the part of the defendant, or such a conscious and deliberate disregard of the interests of others that the conduct may be called wilful or wanton.") (citations omitted).

<sup>3</sup> 11 U.S.C. § 727(b) (2012) ("Except as provided in section 523 of this title, a discharge under subsection (a) of this section discharges the debtor from all debts that arose before the date of the order for relief under this chapter.").

<sup>4</sup> *Id.* § 523(a)(6).

<sup>5</sup> *Tinker v. Colwell*, 193 U.S. 473, 485–86 (1904) (quoting *Bromage v. Prosser* (1825), 107 Eng. Rep. 1051, 1054, 4 Barn. & Cress. 247, 255).

<sup>6</sup> *State Farm Mut. Auto. Ins. Co. v. Rodriguez (In re Rodriguez)*, 568 B.R. 328, 346 (Bankr. S.D. Cal. 2017) (holding it was malicious).

<sup>7</sup> *Grange Mut. Cas. Co. v. Chapman (In re Chapman)*, 228 B.R. 899, 902, 910 (Bankr. N.D. Ohio 1998) (holding it was malicious).

<sup>8</sup> *Ganci v. Townsend (In re Townsend)*, 550 B.R. 220, 228 (Bankr. E.D.N.Y. 2016) ("[T]he factual findings in the District Court Action are sufficient to show that Defendant's

poaching clients from his former employer.<sup>9</sup> One debtor recklessly shot a paintball gun in a residential neighborhood and injured someone.<sup>10</sup> Prior to surrendering his truck to his lender, one debtor used his key to scratch the paint, removed the “F-150” emblems, and smashed the dashboard interface screen.<sup>11</sup> Another debtor posted nude photographs of a woman, along with her home address, on a revenge porn site.<sup>12</sup> One debtor drove his vehicle twelve miles per hour over the speed limit and ran a red light (which was determined to not be malicious),<sup>13</sup> while a different debtor was found to have been malicious when he crept his car forward at a speed of one to two miles per hour toward a construction flagman, expecting him to get out of the way.<sup>14</sup>

These examples illustrate the variety of bad acts that some debtors commit. The Bankruptcy Code was designed to use malice as a way to separate bad acts that are forgivable from those that are not.<sup>15</sup> The challenge with using malice to sort bad acts comes from the way the Supreme Court has defined it.<sup>16</sup> Simply requiring a “wrongful act” is overinclusive because intentionally injuring another is inherently a wrongful act.<sup>17</sup> Neither the Supreme Court nor the circuit

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conduct was malicious: he subjected Plaintiff to severe or pervasive sexual harassment and his wrongful behavior was ‘without just cause or excuse.’”).

<sup>9</sup> *Patriot Fire Prot., Inc. v. Fuller (In re Fuller)*, 560 B.R. 881, 889 (Bankr. N.D. Ga. 2016) (finding it was malicious and stating “[t]he Debtor had worked in the fire-protection industry for nearly ten years before the events at issue here, and therefore would have understood how precious each client is to a business engaged in that industry, and how poaching clients necessarily caused harm to [his former employer] in that the client would no longer need [his former employer’s] services.”).

<sup>10</sup> *Manna v. Havranek (In re Havranek)*, No. 97-B-30745, 2000 WL 277171, at \*2–3 (Bankr. N.D. Ill. Mar. 13, 2000) (holding it was not malicious).

<sup>11</sup> *Veridian Credit Union v. Lampe (In re Lampe)*, Bankr. No. 16-00590, Adv. No. 16-09034, 2017 WL 6568050, at \*2, \*4 (Bankr. N.D. Iowa Dec. 22, 2017) (finding the debtor acted maliciously in damaging the truck).

<sup>12</sup> *Hoewischer v. White (In re White)*, 551 B.R. 814, 818, 823 (Bankr. S.D. Ohio 2016) (holding it was malicious).

<sup>13</sup> *Tso v. Nevarez (In re Nevarez)*, 415 B.R. 540, 544–45 (Bankr. D.N.M. 2009) (“[R]eckless driving does not rise to the level of willful and malicious intent necessary to a non-dischargeability action . . .”).

<sup>14</sup> *Hough v. Margulies (In re Margulies)*, 541 B.R. 156, 159–60 (Bankr. S.D.N.Y. 2015) (“[The debtor] tried to veer to the left and drive around [the flagman] but traffic in that lane prevented him from doing so. [The debtor] continued to move forward expecting [the flagman] to get out of his way but [the flagman] held his ground, in [the debtor’s] view, ‘simply to annoy’ him. [The debtor] continued to roll forward toward [the flagman], and did not apply his brakes until *after* he hit [the flagman].”).

<sup>15</sup> See 11 U.S.C. § 523 (2012).

<sup>16</sup> *Tinker v. Colwell*, 193 U.S. 473, 485–86 (1904) (defining malice to require “a wrongful act, done intentionally, without just cause or excuse” (quoting *Bromage v. Prosser* (1825), 107 Eng. Rep. 1051, 1054, 4 Barn. & Cress. 247, 255)).

<sup>17</sup> See *id.* at 486 (quoting *Bromage*, 107 Eng. Rep. at 1054, 4 Barn. & Cress. at 255); see also *Viener v. Jacobs (In re Jacobs)*, 381 B.R. 128, 139 (Bankr. E.D. Pa. 2008) (“In some sense, then, a judicial liability determination is always based on ‘wrongful’ conduct.”).

courts have provided meaningful guidance on the degree of wrongfulness that is required.<sup>18</sup>

Defining malice to require a wrongful act does separate acts that are wrong from those that are not. The problem is not all debts associated with a wrongful act should be excepted from discharge. In other words, debts related to some wrongful acts should be discharged in bankruptcy. For example, it may be a wrongful act for a debtor to intentionally refuse to pay a valid medical bill despite having sufficient funds to do so. But that type of wrongful act does not justify excepting the medical bill from the bankruptcy discharge.<sup>19</sup> Consequently, the current definition of malicious does not separate among wrongful acts—it merely sorts acts that are wrong from those that are not. In order to properly sort, the definition of malicious should enable courts to segregate wrongful acts.

When applying the definition of malicious, many circuit courts have turned from the “wrongful act” element to the “done intentionally” requirement in an effort to accomplish the sorting function. They have split in the way they treat this intent-based requirement of malicious.<sup>20</sup> Complicating things further, in 1998 the Supreme Court held that the term “willful” in § 523(a)(6) requires “a deliberate or intentional injury.”<sup>21</sup> This created overlap among the intent-based elements of the statutory terms “willful” and “malicious.” The overlap among the Supreme Court’s definitions of willful and malicious has not been reconciled.<sup>22</sup>

This Article begins by looking at the origin and development of the term malicious in bankruptcy legislation and Supreme Court opinions. It also summarizes the limited scholarship on the meaning of malicious. It explains why courts should stop construing malicious to require intent. It then explores the way criminal and tort law determine wrongfulness and highlights the utility of the comparison method that is used for the tort of negligence. In harmony with this comparative technique, this Article recommends the definition of malicious in § 523(a)(6) be changed to require an “extraordinarily” wrongful act so that it accomplishes its sorting function.

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<sup>18</sup> *Viener*, 381 B.R. at 139 (“There is surprisingly little judicial and scholarly commentary discussing the degree or nature of ‘wrongfulness’ that constitutes ‘malice’ under 11 U.S.C. § 523(a)(6).”); *Forrest v. Bressler (In re Bressler)*, 387 B.R. 446, 455 (Bankr. S.D.N.Y. 2008).

<sup>19</sup> *Cf. Perry v. Norfolk (In re Norfolk)*, 29 B.R. 377, 379 (Bankr. W.D.N.Y. 1983) (“Failure to pay is not willful or malicious injury, otherwise all debtors would be subject to exception to discharge.”).

<sup>20</sup> *See infra* Part III.A.2.b.

<sup>21</sup> *Kawaauhau v. Geiger*, 523 U.S. 57, 61 (1998).

<sup>22</sup> *See infra* Part III.A.2.b.

## II. BACKGROUND OF MALICE IN BANKRUPTCY LEGISLATION, SUPREME COURT DECISIONS, AND SCHOLARSHIP

This Part explores the historical development of the term “malicious” throughout statutory bankruptcy law and Supreme Court decisions. It also highlights the limited scholarly attention on the meaning of malicious.

### *A. Chronological Development of the Term “Malicious” in Bankruptcy Legislation*

Neither the Bankruptcy Act of 1800,<sup>23</sup> the Bankruptcy Act of 1841,<sup>24</sup> nor the Bankruptcy Act of 1867<sup>25</sup> contained the word “malicious.” The term first appeared as an exception to discharge in the Bankruptcy Act of 1898.<sup>26</sup> Legislative history provides minimal insight on the meaning of “malicious.”

The provisions of the Bankruptcy Act of 1898 were substantially derived from the Torrey Bankrupt Bill, which was amended, adopted and recommended to Congress for enactment at the second session of the National Convention of the Representatives of Commercial Bodies of the United States in 1889.<sup>27</sup> As

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<sup>23</sup> Bankruptcy Act of 1800, ch. 19, 2 Stat. 19 (repealed 1803). This act was primarily a creditor remedy against merchant debtors. See Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 14 (1995).

<sup>24</sup> Bankruptcy Act of 1841, ch. 9, 5 Stat. 440 (repealed 1843). The Bankruptcy Act of 1841 was modeled after the Massachusetts Insolvency Law of 1838. CHARLES WARREN, *BANKRUPTCY IN UNITED STATES HISTORY* 70 (1935); Tabb, *supra* note 23, at 17.

<sup>25</sup> Bankruptcy Act of 1867, ch. 176, 14 Stat. 517 (repealed 1878).

<sup>26</sup> Bankruptcy Act of 1898, ch. 541, § 17(a)(2), 30 Stat. 544, 550 (repealed 1978) (“A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as . . . are judgments in actions for frauds, or obtaining property by false pretenses or false representations, or for willful and *malicious* injuries to the person or property of another.” (emphasis added)).

<sup>27</sup> See Proceedings of the Second Session of the National Convention of the Representatives of the Commercial Bodies (Sept. 3–4, 1889), (transcript available at <https://babel.hathitrust.org/cgi/pt?id=mdp.35112102350354;view=1up;seq=7;size=125>) [<https://perma.cc/9FKT-MRPA>] (including the text of the Torrey Bankruptcy Bill to establish a Uniform System of Bankruptcy throughout the United States, as amended, adopted, and recommended to Congress for enactment); see also Bradley Hansen, *Commercial Associations and the Creation of a National Economy: The Demand for Federal Bankruptcy Law*, 72 BUS. HIST. REV. 86 (1998) (exploring how merchants and manufacturers used commercial associations to organize and lobby for a federal bankruptcy law).

[A] young lawyer living in St. Louis who had distinguished himself for his ability and great learning touching the bankruptcy laws in this country took an interest in this question, and at once his marked ability was recognized and he was made chairman of three national conventions to consider the question. I refer to Judge Jay L. Torrey, then a resident of St. Louis. . . .

. . . .

originally recommended by that convention, the Torrey Bankrupt Bill contained only three exceptions to discharge.<sup>28</sup> A willful and malicious injury was not one of them.<sup>29</sup>

The Torrey Bankrupt Bill and several other bankruptcy-related bills were introduced in and rejected by Congress during the ten-year period before the Bankruptcy Act of 1898 was enacted.<sup>30</sup> The bills involved several disputed topics such as concerns over the cost of bankruptcy administration, whether bankruptcy should be voluntary or involuntary, and what the scope of the discharge should be.<sup>31</sup> An 1893 report from the House of Representatives demonstrates the concern over both a voluntary bankruptcy system and the scope of the discharge:

The part of a bankruptcy law most difficult to draft is its voluntary provisions; they must not only provide relief for the honest bankrupt, but they must refuse relief or encouragement to the dishonest bankrupt. It would be quite easy to write a bill saying that the court should grant applications for discharges; the passage of such a law would result in good honest poor men getting discharges, and in so far it would be a good law, but it would also enable a lot of rascals to escape the payment of just debts, and in that respect it would be a bad law. The fact that all debtors might get a discharge, without the possibility of the interference of their creditors, would curtail credits and do untold harm to all of the members of that great class who conduct their various transactions on credit, and in that respect also would be a bad law. All of the scandals under the old law grew out of proceedings under its provisions for voluntary bankruptcy.

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. . . At the Minneapolis convention, on motion of one of the delegates, the bill was named the “Torrey bill” in honor of this young man. He is now the speaker of the Wyoming legislature, a man of ability, modesty, and character.

28 CONG. REC. 5, 4535 (1896).

<sup>28</sup> A discharge in bankruptcy shall release a bankrupt, not a joint stock company or a corporation, from all of his provable debts, except such as (1) are due as a tax levied by the United States, the State, or municipality in which he resides; (2) have not been duly scheduled in time for allowance, with the name of the creditor, if known to the bankrupt, unless such creditor had notice or actual knowledge of the bankruptcy, or (3) were created by his fraud, embezzlement, or defalcation while acting as an officer or in any fiduciary capacity.

Torrey Bankrupt Bill, H.R. 3316, 51st Cong. § 53 (1889).

<sup>29</sup> *See id.*

<sup>30</sup> The Torrey Bankrupt Bill was originally introduced in the House of Representatives on December 20, 1889 by the Honorable Ezra B. Taylor, of Ohio, Chairman of the Judiciary Committee, as H.R. Bill 3316. It was introduced on several other occasions and was rejected several times. *See* 28 CONG. REC. 4678 (1896); 28 CONG. REC. 601 (1896); 25 CONG. REC. 124 (1893); 21 CONG. REC. 10208 (1890); *see also* Hansen, *supra* note 27, at 103–04 (summarizing several introductions and rejections of the Torrey bill).

<sup>31</sup> H.R. REP. No. 55–65, at 35–36 (1897) (voluntary or involuntary bankruptcy); *id.* at 44–47 (administrative expenses); *see also* H.R. REP. No. 53–67, at 5 (1893).

The only ways yet discovered to keep the frauds under a voluntary law down to the minimum, are to make it possible for parties in interest to interfere, by commencing involuntary proceedings, before the fraudulent plans have been consummated and the property secreted or wasted, to provide adequate punishment for fraudulent acts, *and to refuse a discharge to dishonest bankrupts.*

The measure in question is an imperfect voluntary bill. It is not provided with effective safeguards for the protection of the rights of honest debtors or honest creditors, but is calculated to encourage every wrong which is known to rascals.<sup>32</sup>

The congressional floor debates on the various bankruptcy bills from 1893 to 1894 do not mention an exception to discharge for a willful and malicious injury.<sup>33</sup> None of the bankruptcy bills that were introduced in December 1895 and January 1896 contained an exception to discharge for a willful and malicious injury.<sup>34</sup>

Section 16(a)(2) of a bankruptcy bill introduced in April of 1896 contained an exception to discharge for “judgments in actions for frauds or willful and malicious injuries to the person or property of another.”<sup>35</sup> In 1897, the House passed a bill primarily derived from the Torrey Bankrupt Bill, and the Senate passed a different bankruptcy-related bill.<sup>36</sup> A conference committee was established to produce a compromise bill.<sup>37</sup> The House Report explains:

[S]ince the Torrey bill was first introduced in Congress it has undergone very many changes friendly in character. Each Committee on the Judiciary in three successive Congresses has made changes in this bill, growing out of full discussion and much thought devoted to the question. Judge Torrey himself

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<sup>32</sup> H.R. REP. No. 53-206, at 22 (1893) (emphasis added).

<sup>33</sup> See 26 CONG. REC. 7547-64 (1894); 25 CONG. REC. 3003-34 (1893); *id.* at 2966-70; *id.* at 2866-80; *id.* at 2825-36; *id.* at 2798-2816; *id.* at 2777-90.

<sup>34</sup> See H.R. 3956, 54th Cong. (1st Sess. 1896); H.R. 3550, 54th Cong. (1st Sess. 1896); H.R. 2913, 54th Cong. (1st Sess. 1895); H.R. 259, 54th Cong. (1st Sess. 1895). “We have made many changes in almost every section from the original Torrey bill. I do not say we alone, but refer to the other committees that have treated it, and to ripe suggestions made by Judge Torrey himself.” 28 CONG. REC. 4539 (1896).

<sup>35</sup> H.R. REP. No. 54-1228, Exhibit C, at 29 (1896) (attaching H.R. 8110 introduced by Mr. Henderson Apr. 10, 1896).

<sup>36</sup> *Id.* at 1 (“Several bills have been introduced at this session and referred to the committee, namely: H.R. 13, H.R. 259, H.R. 1203, H.R. 2913, H.R. 3550, H.R. 3956, and H.R. 7446. In lieu of all of these the committee recommends the passage of H.R. 8110, which appears as Exhibit C to this report. All of these bills, excepting those which provide only for voluntary bankruptcy, are based upon and are substantially what is known in the country as the Torrey bill.”). Knute Nelson sponsored the simple bankruptcy bill in the Senate; David Henderson sponsored the version of the Torrey bill in the House. 31 CONG. REC. 6296 (1898); *see also* S. DOC. No. 54-101, at 1-2 (1897); H.R. REP. No. 55-65, at 28 (1897).

<sup>37</sup> S. REP. No. 55-294, at 1 (1898) (Conf. Rep.).



has suggested many changes since the first bill was framed, and has ever been ready to cooperate with those having the subject in charge to perfect the bill.

The bill which this committee recommends (H.R. 8110) has for its basis the Torrey bill, with the friendly amendments that have been made as above indicated, and the Committee on the Judiciary of the present Congress has spent many weeks in subcommittee and full committee in considering the bill by sections, and still perfecting it according to its best judgment to meet the needs of the country, and in doing this the committee has not failed to note and take advantage of all just criticisms that have come to its notice.<sup>38</sup>

On July 1, 1898, the Bankruptcy Act of 1898 was enacted.<sup>39</sup> It labeled the exceptions to discharge as “Debts Not Affected by a Discharge” and stated in § 17(a)(2) that: “A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as . . . are judgments in actions . . . for willful and malicious injuries to the person or property of another.”<sup>40</sup> Five years later, the term “judgments” was replaced with the word “liabilities.”<sup>41</sup> The purpose of this amendment was to broaden the scope of debts excepted from discharge beyond those debts that had been reduced to a judgment.<sup>42</sup>

In 1970, § 17(a)(2) of the Bankruptcy Act of 1898 was amended to add an exception to discharge “for willful and malicious conversion of the property of another.”<sup>43</sup> The amendment also added a new § 17(a)(8) clause on “liabilities for willful and malicious injuries to the person or property of another other than conversion as excepted under clause (2) of this subdivision.”<sup>44</sup>

The Bankruptcy Law Reform Act of 1978 updated the exception to discharge to include the newly defined term “entity” and moved it to § 523(a)(6) as follows: “any debt . . . for willful and malicious injury by the debtor to another entity or to the property of another entity.”<sup>45</sup> In 1979, the Supreme Court

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<sup>38</sup> H.R. REP. No. 54-1228, at 1 (1896).

<sup>39</sup> Bankruptcy Act of 1898, ch. 541, 30 Stat. 544 (repealed 1978).

<sup>40</sup> *Id.* § 17(a)(2), 30 Stat. at 550.

<sup>41</sup> See Act of Feb. 5, 1903, ch. 487, § 5, 32 Stat. 797, 797–98 (amending the Bankruptcy Act of 1898). The amended language read: “A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as . . . (2) are liabilities . . . for willful and malicious injuries to the person or property of another.” *Id.*

<sup>42</sup> See *Brown v. Felsen*, 442 U.S. 127, 138 (1979) (discussing the 1903 amendment to the Bankruptcy Act of 1898); *Schall v. Camors*, 251 U.S. 239, 251–52 (1920). The 1903 amendment also added language excepting liabilities “for seduction of an unmarried female, or for criminal conversation.” Act of Feb. 5, 1903, ch. 487, 32 Stat. 798.

<sup>43</sup> Act of Oct. 19, 1970, Pub. L. No. 91-467, § 5, 84 Stat. 990, 992 (amending § 17(a)(2) of the Bankruptcy Act of 1898).

<sup>44</sup> *Id.* § 6 (adding a new § 17(a)(8) of the Bankruptcy Act of 1898).

<sup>45</sup> Bankruptcy Law Reform Act of 1978, Pub. L. No. 95-598, § 523, 92 Stat. 2549, 2590–91 (codified at 11 U.S.C. § 523(a)(6) (2012)). A House Report relating to the Bankruptcy Law Reform Act of 1978 stated “‘willful’ means deliberate or intentional. To the extent that *Tinker v. Colwell* held that a looser standard is intended, and to the extent that other cases have relied on *Tinker* to apply a ‘reckless disregard’ standard, they are

noted that “[d]ischarge provisions substantially similar to § 17 of the [1898 Act] appear in § 523 of the new law.”<sup>46</sup> The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 retained the identical language of the 1978 Act in § 523(a)(6).<sup>47</sup> As the foregoing summary shows, legislative history provides limited help in determining the meaning of malicious.

### B. *The Three Supreme Court Decisions Interpreting the Term “Malicious”*

Over the course of three decisions, the Supreme Court has interpreted the statutory term “malicious” to require a wrongful act that is done intentionally without just cause or excuse.<sup>48</sup> The determination of whether an act is wrongful is made from an objective perspective<sup>49</sup> and the circumstances surrounding a debtor’s act must be considered in determining whether it was wrongful.<sup>50</sup> The cases are addressed in chronological order.

#### 1. *Tinker v. Colwell (1904)*

The first one, *Tinker v. Colwell*, was decided six years after the Bankruptcy Act of 1898 was enacted.<sup>51</sup> In *Tinker*, a creditor obtained a money judgment against a debtor for the debtor’s criminal conversation with the creditor’s wife.<sup>52</sup> Criminal conversation was a husband’s civil cause of action in tort against a man who engaged in sexual intercourse with the husband’s wife.<sup>53</sup> At that time, even if the wife consented to the act the husband had “personal and exclusive rights with regard to the person of his wife” and “such an act on the part of another man constitut[ed] an assault.”<sup>54</sup> The *Tinker* Court considered the

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overruled.” H.R. REP. NO. 95-595, at 365 (1977) (citation omitted). A Senate Report was similar. S. REP. NO. 95-989, at 79 (1978). For an analysis of the impact of these reports, see Charles Jordan Tabb, *The Scope of the Fresh Start in Bankruptcy: Collateral Conversions and the Dischargeability Debate*, 59 GEO. WASH. L. REV. 56, 76–78 (1990).

<sup>46</sup> *Brown v. Felsen*, 442 U.S. 127, 129 n.1 (1979) (addressing res judicata principles).

<sup>47</sup> See Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 215, 119 Stat. 54, 54 (codified at 11 U.S.C. § 523(a)(6)).

<sup>48</sup> *Davis v. Aetna Acceptance Co.*, 293 U.S. 328, 332–33 (1934); *McIntyre v. Kavanaugh*, 242 U.S. 138, 141–42 (1916); *Tinker v. Colwell*, 193 U.S. 473, 485–86 (1904) (quoting *Bromage v. Prosser* (1825), 107 Eng. Rep. 1051, 1054, 4 Barn. & Cress. 247, 255).

<sup>49</sup> *Tinker*, 193 U.S. at 487 (quoting *In re Freche*, 109 F. 620 (D. N.J. 1901)).

<sup>50</sup> *McIntyre*, 242 U.S. at 142; *Davis*, 293 U.S. at 332–33.

<sup>51</sup> *Tinker*, 193 U.S. 473.

<sup>52</sup> *Id.* at 480.

<sup>53</sup> *Bigaouette v. Paulet*, 134 Mass. 123, 125 (1883); *Oppenheim v. Kridel*, 140 N.E. 227, 228–29 (N.Y. 1923); Jacob Lippman, *The Breakdown of Consortium*, 30 COLUM. L. REV. 651, 654–58 (1930).

<sup>54</sup> *Tinker*, 193 U.S. at 481.

debtor's act "an injury to the person and also to the property rights of the husband" because it violated the exclusive marital rights of the husband.<sup>55</sup>

To give meaning to the word "malicious," the *Tinker* Court quoted the following 1825 English case of *Bromage v. Prosser*, which involved the tort of slander, as providing a "good definition of the legal meaning of the word malice":

Malice, in common acceptation, means ill will against a person, but in its legal sense it means a wrongful act, done intentionally, without just cause or excuse. If I give a perfect stranger a blow likely to produce death, I do it of malice, because I do it intentionally and without just cause or excuse. If I maim cattle, without knowing whose they are, if I poison a fishery, without knowing the owner, I do it of malice, because it is a wrongful act, and done intentionally. If I am arraigned of felony, and willfully stand mute, I am said to do it of malice, because it is intentional and without just cause or excuse. And if I traduce a man, whether I know him or not and whether I intend to do him an injury or not, I apprehend the law considers it as done of malice, because it is wrongful and intentional. It equally works an injury, whether I meant to produce an injury or not.<sup>56</sup>

The *Tinker* Court's adoption of the *Bromage* definition established the requirement of a wrongful act. In determining if an act was wrongful, the *Tinker* Court focused on the nature of the act and provided examples such as a person giving a blow likely to produce death to a perfect stranger, maiming cattle, and poisoning a fishery.<sup>57</sup> The nature of the act under consideration in *Tinker* was criminal conversation. The *Tinker* Court observed that "[t]he law will, as we think, imply that degree of malice in an act of the nature under consideration, which is sufficient to bring it within the [exception to discharge]."<sup>58</sup> In determining wrongfulness, the *Tinker* Court looked to the federal district court decision of *In re Freche*, which involved a judgment in favor of a father whose daughter had been seduced by a debtor.

The *Tinker* Court quoted *In re Freche*, which explained that the act in that case was malicious "because the injurious consequences which followed the wrongful act were those which might naturally be expected to result from it, and which [the debtor] must be presumed to have had in mind when he committed the offence [sic]."<sup>59</sup> The *Tinker* definition also established that the wrongfulness

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<sup>55</sup> *Id.* at 485.

<sup>56</sup> *Id.* at 485–86 (quoting *Bromage v. Prosser* (1825), 107 Eng. Rep. 1051, 1054, 4 Barn. & Cress. 247, 255).

<sup>57</sup> *Id.* at 486 (quoting *Bromage*, 107 Eng. Rep. at 1054, 4 Barn. & Cress. at 255).

<sup>58</sup> *Id.* at 486.

<sup>59</sup> *Id.* (quoting *In re Freche*, 109 F. 620, 621 (D.N.J. 1901)).

of an act is not a subjective inquiry viewed from the debtor's perspective.<sup>60</sup> The *Tinker* Court continued quoting *In re Freche*, including language about "what any man of reasonable intelligence must have known to be contrary to his duty."<sup>61</sup> The phrases "presumed to have had in mind" and "must have known" establish that the determination of whether an act is wrongful is from an objective perspective, not a subjective one.<sup>62</sup> Determining wrongfulness from an objective perspective is supported further by the *Tinker* Court's summary of *United States v. Reed*, where it explained that "a malignant spirit or a specific intention to hurt a particular person is not an essential element."<sup>63</sup> For the injury of criminal conversation, the *Tinker* Court concluded that "personal and particular malice towards the husband as an individual need not be shown, for the law implies that there must be malice in the very act itself . . ."<sup>64</sup> Thus, based on the nature of certain acts, wrongfulness is implied.

## 2. *McIntyre v. Kavanaugh* (1916)

In 1916, the Court addressed the meaning of malice in the context of a conversion claim.<sup>65</sup> *McIntyre v. Kavanaugh* involved a debtor who was a partner at a financial brokerage.<sup>66</sup> The brokerage received some stock certificates to hold as security for a loan.<sup>67</sup> The brokerage sold the stocks without authority and used the sale proceeds for its own purposes.<sup>68</sup> The debtor did not participate in the brokerage's sale of the stock, but as a partner, he was "individually responsible for torts by [the brokerage]."<sup>69</sup> The *McIntyre* Court observed that "[i]f under the circumstances here presented the [brokerage] inflicted a willful and malicious injury to property, of course, [the debtor] incurred liability for that character of wrong."<sup>70</sup>

In determining whether the nature of the act was wrongful, the *McIntyre* Court noted that "[t]o deprive another of his property forever by deliberately disposing of it without semblance of authority is certainly an injury."<sup>71</sup> The *McIntyre* Court rejected the argument that the phrase willful and malicious injury did not include conversion and found "no sufficient reason for such a

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<sup>60</sup> *Tinker*, 193 U.S. at 486–87 (quoting *Bromage*, 107 Eng. Rep. at 1054, 4 Barn. & Cress. at 255).

<sup>61</sup> *Id.* at 487 (quoting *Freche*, 109 F. at 621).

<sup>62</sup> *Id.* at 486–87 (quoting *Freche*, 109 F. at 621).

<sup>63</sup> *Id.* at 487 (citing *United States v. Reed*, 86 F. 308, 312 (S.D.N.Y. 1897)). This language from *Tinker* is about the statutory term malicious, not the term willful. *Id.* at 489–90.

<sup>64</sup> *Id.* at 490.

<sup>65</sup> *McIntyre v. Kavanaugh*, 242 U.S. 138 (1916).

<sup>66</sup> *Id.* at 138–39.

<sup>67</sup> *Id.* at 138.

<sup>68</sup> *Id.* at 138–39.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 139.

<sup>71</sup> *McIntyre*, 242 U.S. at 141.

narrow construction.”<sup>72</sup> The *McIntyre* Court then quoted *Tinker* and reaffirmed that “an act which is against good morals and wrongful in and of itself, and which necessarily causes injury . . . may be said to be done willfully and maliciously.”<sup>73</sup> Accordingly, even though the *McIntyre* Court never mentioned why the brokerage disposed of the stock, it concluded that “[t]he circumstances disclosed suffice to show a wilful and malicious injury to property for which [the debtor] became and remains liable to respond in damages.”<sup>74</sup>

### 3. *Davis v. Aetna Acceptance Co. (1934)*

In 1934, the Court addressed the meaning of malice in another conversion case.<sup>75</sup> *Davis v. Aetna Acceptance Co.* involved a debtor who was a car dealer.<sup>76</sup> The debtor borrowed money to buy a car to resell, giving the lender a chattel mortgage and agreeing to hold the car as the property of the lender “for the purpose of storage, and not to sell, pledge, or otherwise dispose of it except upon consent in writing.”<sup>77</sup> The debtor then sold the car without the lender’s written consent.<sup>78</sup> The debtor testified that “notice of the transaction was given the same day to one of the [lender’s] officers.”<sup>79</sup> There was also testimony “support[ing] the inference that on many other occasions cars held upon like terms had been sold [by the debtor] without express consent.”<sup>80</sup>

After citing *McIntyre*, the *Davis* Court explained that not every act of conversion amounted to a willful and malicious injury.<sup>81</sup> The circumstances must be considered.<sup>82</sup> In determining if the debtor’s act was sufficiently wrongful, the *Davis* Court clarified that “[t]here may be an honest, but mistaken belief, engendered by a course of dealing, that powers have been enlarged or incapacities removed. In these and like cases, what is done is a tort, but not a wilful and malicious one.”<sup>83</sup> Thus, the circumstances surrounding a debtor’s act influence the determination of wrongfulness.<sup>84</sup> The *Davis* Court concluded that

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<sup>72</sup> *Id.* (“Why, for example, should a bankrupt who had stolen a watch escape payment of damages but remain obligated for one maliciously broken?”).

<sup>73</sup> *Id.* (quoting *Tinker v. Colwell*, 193 U.S. 473, 487 (1904)).

<sup>74</sup> *Id.* at 142.

<sup>75</sup> *Davis v. Aetna Acceptance Co.*, 293 U.S. 328 (1934).

<sup>76</sup> *Id.* at 330.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Davis*, 293 U.S. at 332.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* The *Davis* Court then concluded that the trial court’s special findings “unmistakably excluded” willfulness and malice because the trial court made a finding that the debtor was “not actuated by willful, malicious or criminal intent in disposing of the car.” *Id.*

<sup>84</sup> *Id.* at 332–33.

“a showing of conversion without aggravated features” was not sufficiently wrongful.<sup>85</sup>

The *Tinker*, *McIntyre*, and *Davis* opinions established that an act is wrongful based on its nature having injurious consequences. It must also have aggravated features.<sup>86</sup> Wrongfulness is determined from an objective perspective based on the surrounding circumstances.<sup>87</sup>

### C. Scholarly Attention on the Meaning of Malicious Has Been Limited

Few scholars have grappled with the meaning of malice and none have focused on the degree of wrongfulness that should be required to constitute malice. Professor Charles J. Tabb wrote an influential article on collateral conversions in 1990.<sup>88</sup> He interpreted the then-existing circuit split on collateral conversions as having four different approaches: the special malice test, the implied malice test, the targeted-at-the-creditor test, and the totality-of-the-circumstances test.<sup>89</sup> In the context of collateral conversions, he proposed a “knowing violation” test which focused on whether a debtor knew that the conversion of the secured creditor’s collateral violated the creditor’s rights.<sup>90</sup>

Some scholars have focused on breach of contract claims.<sup>91</sup> Others argue that the best approach is the one taken by the Ninth Circuit, which requires the debtor’s conduct to constitute an intentional tort as defined by state law.<sup>92</sup> One

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<sup>85</sup> *Id.* at 333.

<sup>86</sup> *Tinker v. Colwell*, 193 U.S. 473, 490 (1904).

<sup>87</sup> *Davis*, 293 U.S. at 332.

<sup>88</sup> Tabb, *supra* note 45, at 56.

<sup>89</sup> *Id.* at 78–89 (describing the special malice test as requiring “an actual subjective intent on the part of the debtor to injure or harm the creditor,” the implied malice test as focusing on whether the debtor knows that an unauthorized conversion is violative of the secured creditor’s rights, the targeted-at-the-creditor test as looking at whether the debtor’s willful conduct is targeted at the creditor “at least in the sense that the conduct is certain or almost certain to cause financial harm,” and the totality-of-the-circumstances test as “mak[ing] the determination of malice by looking at the totality of the circumstances” (citations omitted)).

<sup>90</sup> *Id.* at 104.

<sup>91</sup> See, e.g., Scott F. Norberg, *Contract Claims and the “Willful and Malicious Injury” Exception to the Discharge in Bankruptcy*, 88 AM. BANKR. L.J. 175, 199–202 (2014) (arguing the statutory term “willful” should be interpreted to require voluntary and affirmative conduct so that “a mere failure to perform a contract is not conduct that is sufficiently culpable to warrant nondischargeability”); Theresa J. Pulley Radwan, *With Malice Toward One?—Defining Nondischargeability of Debts for Willful and Malicious Injury Under Section 523(a)(6) of the Bankruptcy Code*, 7 WM. & MARY BUS. L. REV. 151, 183–84 (2016) (concluding that § 523(a)(6) should permit nondischargeability of intentional breaches of contract that lack business justification “where the standard of intent is met and no justification exists for the breach (e.g., the breach is not efficient by commercial law standards)”).

<sup>92</sup> Matthew Harte, *A Critical Analysis of the Bankruptcy Code’s Exception to Discharge for Debts Arising from Wrongful Conduct*, 4 BROOK. J. CORP. FIN. & COM. L. 113, 136 (2009)

author recommends narrowing the intentional tort requirement to only include intentional torts that are eligible for punitive damages under state law.<sup>93</sup> This approach has at least two weaknesses. First, state tort law varies significantly, both in the type of intentional torts and the standards for punitive damages. For example, at least five states prohibit punitive damages or allow them only under limited statutory grounds against particular defendants.<sup>94</sup> Two other states treat punitive damages as being only compensatory in nature.<sup>95</sup> Defining malicious to require torts eligible for punitive damages would prevent a uniform national standard for the exception to discharge. Secondly, the determination of the scope of the bankruptcy discharge, which is often delineated by the exceptions to discharge, is a matter of federal law and should not be given to the states.<sup>96</sup>

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(“The Ninth Circuit rule requiring tortious conduct for a debt to be nondischargeable should be universally adopted . . .”). *But cf.* Andrea R. Blake, *Debts Nondischargeable for “Willful and Malicious Injury”: Applicability of Bankruptcy Code § 523(a)(6) in a Commercial Setting*, 104 COM. L.J. 64, 96 (1999) (“[T]o impose a per se rule that § 523(a)(6) applies only to [traditional intentional torts] would not accord with the Court’s longstanding policy of limiting the bankruptcy fresh start to the honest but unfortunate debtor.”); Michael D. Martinez, *Where There’s a “Will,” There Should Be a Way: Why In re Salvino Unjustifiably Restricts the Application of § 523(a)(6) to Exclude Willful and Malicious Breaches of Contract*, 29 N. ILL. U. L. REV. 441, 467 (2009) (stating a bankruptcy court “was wrong when it concluded that tortious conduct is an essential element of a willful and malicious injury under § 523(a)(6)” (footnote omitted)).

<sup>93</sup> Bryan Hoynak, *Filling in the Blank: Defining Breaches of Contract Excepted from Discharge as Willful and Malicious Injuries to Property Under 11 U.S.C. § 523(a)(6)*, 67 WASH. & LEE L. REV. 693, 728–30 (2010) (arguing not only that the debtor’s conduct must be an intentional tort as defined by state law, but that it also must be one that is eligible for punitive damages under state law).

<sup>94</sup> *McCoy v. Ark. Nat. Gas Co.*, 143 So. 383, 385–86 (La. 1932) (“There is no authority in the law of Louisiana for allowing punitive damages in any case, unless it be for some particular wrong for which a statute expressly authorizes the imposition of some such penalty.”); *City of Lowell v. Mass. Bonding & Ins. Co.*, 47 N.E.2d 265, 272 (Mass. 1943) (“In this Commonwealth exemplary damages are not allowed unless authorized by statute.”); *Abel v. Conover*, 104 N.W.2d 684, 688 (Neb. 1960) (“It has been a fundamental rule of law in this state that punitive, vindictive, or exemplary damages will not be allowed, and that the measure of recovery in all civil cases is compensation for the injury sustained.”); *Stewart v. Bader*, 907 A.2d 931, 943 (N.H. 2006) (“Punitive damages are not allowed in New Hampshire . . . unless authorized by statute.” (citations omitted)); *Broughton Lumber Co. v. BNSF Ry. Co.*, 278 P.3d 173, 183 n.14 (Wash. 2012) (“Washington prohibits the recovery of punitive damages as a violation of public policy unless expressly authorized by statute.”).

<sup>95</sup> *Anastasia v. Gen. Cas. Co. of Wis.*, 59 A.3d 207, 210 n.2 (Conn. 2013) (“[P]unitive damages ‘serve primarily to compensate the plaintiff for his injuries and, thus, are . . . limited to the plaintiff’s litigation expenses less taxable costs . . . .’” (quoting *Matthiessen v. Vanech*, 836 A.2d 394, 395 n.5 (Conn. 2003))); *Hayes-Albion v. Kuberski*, 364 N.W.2d 609, 617 (Mich. 1984) (“[T]he purpose of exemplary damages in Michigan has not been to punish the defendant, but to render the plaintiff whole.”).

<sup>96</sup> *In re Marchiando*, 13 F.3d 1111, 1116 (7th Cir. 1994) (applying the § 523(a)(4) exception to discharge for defalcation while acting in a fiduciary capacity and explaining that “[i]f . . . a fiduciary is anyone whom a state calls a fiduciary . . . states will have it in their power to deny a fresh start to their debtors by declaring all contractual relations

Other commentators argue for uniform adoption of the *Tinker* definition of malicious but have not addressed what a wrongful act is.<sup>97</sup> This recommendation is not helpful because it provides no guidance on how wrongful an act must be in order to make it malicious. This Article seeks to provide that guidance.

### III. ANALYSIS OF WHAT MALICE SHOULD REQUIRE UNDER BANKRUPTCY LAW

Section 523(a)(6) requires a “willful and malicious injury.”<sup>98</sup> The term “injury” has been construed to include physical harm,<sup>99</sup> emotional harm,<sup>100</sup> property damage,<sup>101</sup> and the “invasion of the legal rights of another.”<sup>102</sup> The term “willful” has been construed to require “a deliberate or intentional injury, not merely a deliberate or intentional act that leads to *injury*.”<sup>103</sup> The *Tinker* definition of malicious requires “a wrongful act, done intentionally, without just cause or excuse.”<sup>104</sup>

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fiduciary”); *see also* Jonathon S. Byington, *Fiduciary Capacity and the Bankruptcy Discharge*, 24 AM. BANKR. INST. L. REV. 1, 15–17 (2016) (explaining that although state law is often essential to the analysis, the meaning of words in the Bankruptcy Code is a question of federal law and that “[o]ne reason for this different treatment is that bankruptcy policies differ from those under state law”).

<sup>97</sup> Shawn M. Blatt, *Section 523(a)(6): Willful and Malicious Exception from Discharge: The “Implied Malice” Standard*, 16 U. DAYTON L. REV. 155, 182 (1990) (“The majority approach, applying an implied malice standard, offers the best interpretation of the meaning of willful and malicious.”); Karen N. Fischer, *The Exception to Discharge for Willful and Malicious Injury: The Proper Standard for Malice*, 7 BANKR. DEV. J. 245, 259 (1990) (“The implied malice formulation seems to be the more equitable standard.”).

<sup>98</sup> 11 U.S.C. § 523(a)(6) (2012).

<sup>99</sup> *Lovato v. Irvin (In re Irvin)*, 31 B.R. 251, 253 (Bankr. D. Colo. 1983) (finding an injury where debtor stabbed another in the back and across the chest with a steak knife).

<sup>100</sup> *Magana v. Moore Dev. Corp. (In re Moore)*, 1 B.R. 52, 54 (Bankr. C.D. Cal. 1979) (finding it was not necessary that there be physical abuse and that “the humiliation felt by a minority person refused service because of their race, or who is forced from rental housing by harassment, may well be more painful to the recipient and longer lasting than the effect of a physical beating”); *Berman v. Berman (In re Berman)*, 26 B.R. 301, 304 (Bankr. S.D. Fla. 1982).

<sup>101</sup> *Snoke v. Riso (In re Riso)*, 978 F.2d 1151, 1154 (9th Cir. 1992) (“[I]njury to property includes the conversion of property subject to a creditor’s security interest.”); *Hardwick v. Petsch (In re Petsch)*, 82 B.R. 605, 607 (Bankr. M.D. Fla. 1988) (finding a security interest is property for purposes of § 523(a)(6)).

<sup>102</sup> *Geiger v. Kawaauhau (In re Geiger)*, 113 F.3d 848, 852 (8th Cir. 1997), *aff’d*, 523 U.S. 57 (1998); *Horizon Fin. Bank v. Borstad (In re Borstad)*, 550 B.R. 803, 839 (Bankr. D. N.D. 2016) (citing *Geiger*, 113 F.3d at 852).

<sup>103</sup> *Kawaauhau*, 523 U.S. at 63 (“*Tinker* . . . placed criminal conversation solidly within the traditional intentional tort category, and we so confine its holding.”).

<sup>104</sup> *Tinker v. Colwell*, 193 U.S. 473, 485–86 (1904) (quoting *Bromage v. Prosser* (1825), 107 Eng. Rep. 1051, 1054, 4 Barn. & Cress. 247, 255).



Circuit courts have struggled to consistently apply the *Tinker* definition of malicious. As one recently observed, “in the course of our research we have discovered to our surprise that courts are all over the lot . . . .”<sup>105</sup> Most circuit courts do not require personal hatred, spite, or ill-will.<sup>106</sup> Many allow malice to be constructive or implied based on the conduct of the debtor in the context of the surrounding circumstances.<sup>107</sup> But the circuit courts differ in how they treat the intent and wrongfulness components of the *Tinker* definition of malicious. This Part explores each aspect of the *Tinker* definition: intent, a wrongful act, and attribution.

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<sup>105</sup> *Jendusa-Nicolai v. Larsen*, 677 F.3d 320, 322 (7th Cir. 2012).

<sup>106</sup> *Kane v. Stewart Tilghman Fox & Bianchi, P.A. (In re Kane)*, 755 F.3d 1285, 1294 (11th Cir. 2014) (“‘Malicious’ means wrongful and without just cause or excessive even in the absence of personal hatred, spite or ill-will.” (quoting *Maxfield v. Jennings (In re Jennings)*, 670 F.3d 1329, 1334 (11th Cir. 2012)); *Old Republic Nat’l Title Ins. Co. v. Levasseur (In re Levasseur)*, 737 F.3d 814, 818 (1st Cir. 2013) (“An injury is malicious ‘if it was wrongful and without just cause or excuse, even in the absence of personal hatred, spite or ill-will.’” (quoting *Printy v. Dean Witter Reynolds, Inc.*, 110 F.3d 853, 859 (1st Cir. 1997))); *Ball v. A.O. Smith Corp.*, 451 F.3d 66, 69 (2d Cir. 2006) (“The injury caused by the debtor must also be malicious, meaning ‘wrongful and without just cause or excuse, even in the absence of personal hatred, spite, or ill-will.’” (quoting *Navistar Fin. Corp. v. Stelluti (In re Stelluti)*, 94 F.3d 84, 87 (2d Cir. 1996)); *Petralia v. Jercich (In re Jercich)*, 238 F.3d 1202, 1209 (9th Cir. 2001) (“A ‘malicious’ injury involves ‘(1) a wrongful act, (2) done intentionally, (3) which necessarily causes injury, and (4) is done without just cause or excuse.’” (quoting *Murray v. Bammer (In re Bammer)*, 131 F.3d 788, 791 (9th Cir. 1997))); *Conte v. Gautam (In re Conte)*, 33 F.3d 303, 308 (3d Cir. 1994) (abrogated on other grounds) (stating a malicious injury is one that “was wrongful and without just cause or excuse, even in the absence of personal hatred, spite or ill-will” (quoting *Laganella v. Braen (In re Braen)*, 900 F.2d 621, 626 n.4 (3d Cir. 1990))). *Contra Raspanti v. Keaty (In re Keaty)*, 397 F.3d 264, 270 (5th Cir. 2005) (aggregating “willful and malicious” into a unitary concept); *Miller v. J.D. Abrams Inc. (In re Miller)*, 156 F.3d 598, 603–06 (5th Cir. 1998) (rejecting malicious as meaning without just cause or excuse and instead defining malicious to mean an act done with the actual intent to cause injury).

<sup>107</sup> *In re Kane*, 1285 F.3d at 1295 (finding conduct wrongful based on the circumstances, including testimony that “even in the moment, the secrecy of the settlement did not ‘feel right’” and that the wrongful acts were “excessive”); *Ormsby v. First Am. Title Co. of Nev. (In re Ormsby)*, 591 F.3d 1199, 1207 (9th Cir. 2010) (citing *Transamerica Commercial Fin. Corp. v. Littleton (In re Littleton)*, 942 F.2d 551, 554 (9th Cir. 1991)); *In re Stelluti*, 94 F.3d at 88 (“Malice may be constructive or implied.” (citing *In re Walker*, 48 F.3d 1161, 1164 (11th Cir. 1995))); *First Nat’l Bank of Md. v. Stanley (In re Stanley)*, 66 F.3d 664, 668 (4th Cir. 1995) (“Implied malice . . . may be shown by the acts and conduct of the debtor in the context of [the] surrounding circumstances.” (quoting *Hagan v. McNallen (In re McNallen)*, 62 F.3d 619, 625 (4th Cir. 1995))); *Lee v. Ikner (In re Ikner)*, 883 F.2d 986, 991 (11th Cir. 1989) (“Constructive or implied malice can be found if the nature of the act itself implies a sufficient degree of malice.” (citing *United Bank of Southgate v. Nelson*, 35 B.R. 766, 769 (Bankr. N.D. Ill. 1983))).

### A. *Intent Should Not Be an Element of “Malicious” Under § 523(a)(6)*

This section reviews non-bankruptcy law to illustrate that intent is commonly associated with malice. It then turns to bankruptcy law and evaluates the overlap of the “done intentionally”<sup>108</sup> element of malicious with the statutory term “willful” in § 523(a)(6).<sup>109</sup> The meaning of “willful” is explored as well as the circuit court struggle to construe the “done intentionally” element of malice given the intent-based meaning of the term “willful.” Although non-bankruptcy law typically utilizes malice as a label for some type of intent, this section recommends § 523(a)(6)’s statutory term “malicious” be construed to not require any intent because the statutory term “willful” already encompasses intent.

#### 1. *Malice Usually Requires Intent Under Non-Bankruptcy Law*

This section traverses common-law murder, punitive damages, and defamation to show that under non-bankruptcy law, malice typically requires some type of intent.

##### a. *Malice and Common-Law Murder*

Criminal law utilizes malice as a label for various mental states that are related to the crime of murder. Under common law, murder is the unlawful killing of another with malice aforethought.<sup>110</sup> The phrase “malice aforethought” has been called a “term of art,”<sup>111</sup> “juridical shorthand,”<sup>112</sup> an “arbitrary symbol,”<sup>113</sup> and a “myster[y].”<sup>114</sup> It encompasses several states of

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<sup>108</sup> *Tinker*, 193 U.S. at 485–86 (quoting *Bromage*, 107 Eng. Rep. at 1054, 4 Barn. & Cress. at 255).

<sup>109</sup> 11 U.S.C. § 523(a)(6) (2012).

<sup>110</sup> MODEL PENAL CODE AND COMMENTARIES, Part II § 210.2 cmt. 1 (AM. LAW INST. 1980); LAFAVE, *supra* note 1, at 765; TORCIA, *supra* note 1, at § 139.

<sup>111</sup> Herbert Wechsler & Jerome Michael, *A Rationale of the Law of Homicide*, 37 COLUM. L. REV. 701, 707 (1937) (“The most striking phase of the development of the English law was the reduction of ‘malice aforethought’ to a term of art signifying neither ‘malice’ nor ‘forethought’ in the popular sense.”).

<sup>112</sup> Rollin M. Perkins, *A Re-Examination of Malice Aforethought*, 43 YALE L.J. 537, 570 (1934) (“[‘Malice aforethought’] is rather a bit of juridical shorthand than an explanatory expression. It is not a key which unlocks mysteries, but a label to be attached after the secret is solved. It has no magical powers. It is not a rule of thumb which can dispense with a rigid scrutiny of the facts of each particular case. It is, however, a convenient symbol.”).

<sup>113</sup> MODEL PENAL CODE AND COMMENTARIES, Part II § 210.2 cmt. 1 (“Whatever the original meaning of [the phrase malice aforethought], it became over time an ‘arbitrary symbol’ used by judges to signify any of a number of mental states deemed sufficient to support liability for murder.”).

<sup>114</sup> Bruce A. Antkowiak, *The Art of Malice*, 60 RUTGERS L. REV. 435, 435 (2008) (“One of the serious wrongs in our system is found in the way we instruct juries in a criminal homicide case about the crucial, but mysterious, concept of malice.”).

mind any one of which is sufficient for murder.<sup>115</sup> The states of mind include: “(1) intent to kill; (2) intent to cause great bodily harm; (3) intent to do an act knowing that it will probably cause death or great bodily harm; [and (4)] intent to commit a felony.”<sup>116</sup> Notably, the drafters of the Model Penal Code decided not to use the phrase “malice aforethought” in the Model Penal Code’s definition of murder.<sup>117</sup> Instead, the Model Penal Code employs categories of mental states or culpability such as purposely, knowingly, and recklessly.<sup>118</sup> Some commentators suggest the phrase malice aforethought preceded the year 1340.<sup>119</sup> Despite its aged origin, numerous states still utilize malice in their definition of murder.<sup>120</sup>

### b. *Malice and Punitive Damages*

Malice is often associated with punitive damages under tort law. In this context, malice commonly refers to some type of intent or state of mind, such as deliberate conduct that is outrageous or a disregard for the rights of another.<sup>121</sup> Under the Restatement (Second) of Torts, “mere inadvertence, mistake, errors of judgment and the like, which constitute ordinary negligence”

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<sup>115</sup> MODEL PENAL CODE AND COMMENTARIES, Part II § 210.2 cmt. 1 (explaining that the phrase malice aforethought is “used by judges to signify any of a number of mental states deemed sufficient to support liability for murder”); Perkins, *supra* note 112, at 568–69 (claiming malice aforethought should be defined as “an unjustifiable, inexcusable and unmitigated man-endangering-state-of-mind”).

<sup>116</sup> TORCIA, *supra* note 1, at § 139; *accord* MODEL PENAL CODE AND COMMENTARIES, Part II § 210.2 cmt. 1.

<sup>117</sup> MODEL PENAL CODE AND COMMENTARIES, Part II § 210.

<sup>118</sup> MODEL PENAL CODE AND COMMENTARIES, Part I § 2.02 (AM. LAW INST. 1985); *see* MODEL PENAL CODE AND COMMENTARIES, Part II § 210 Intro. Note (“Murder is defined in Section 210.2 to include cases where a criminal homicide is committed purposely, knowingly, or recklessly under circumstances manifesting extreme indifference to the value of human life. . . . [T]hese concepts provide a more satisfactory means of stating the culpability required for murder than did the older language of ‘malice aforethought’ and its derivatives.”).

<sup>119</sup> Comment, *Malice Aforethought*, 33 YALE L.J. 528, 530–31 (1923–1924) (observing that murder came to mean homicide with malice aforethought after 1340, but that in seeking to find the origin of our modern definition of murder, the time period before 1340 must be considered); Perkins, *supra* note 112, at 544.

<sup>120</sup> Russ, *supra* note 1, at 962.

<sup>121</sup> Dorsey D. Ellis Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 21 (1982) (“[M]alice [is] a state of mind; the desire to harm another that accompanies and provides a reason for an intentional act.”); *see* RESTATEMENT (SECOND) OF TORTS § 908(2) (AM. LAW INST. 1965) (describing the type of conduct justifying punitive damages as “conduct that is outrageous, because of the defendant’s evil motive or his reckless indifference to the rights of others”). *See generally* 1 JOHN J. KIRCHER & CHRISTINE M. WISEMAN, PUNITIVE DAMAGES: LAW AND PRACTICE § 21:23 (2d ed. 2016) (surveying similar state definitions).

and mere “breach of contract” are not enough for punitive damages.<sup>122</sup> As one treatise observes, “[t]here must be circumstances of aggravation or outrage, such as spite or ‘malice,’ or a fraudulent or evil motive on the part of the defendant, or such a conscious and deliberate disregard of the interests of others that the conduct may be called wilful or wanton.”<sup>123</sup>

Approximately forty states include malice as a basis to award punitive damages.<sup>124</sup> Even though they define malice differently, they largely focus on

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<sup>122</sup> RESTATEMENT (SECOND) OF TORTS § 908 cmt. b; *see also* KEETON ET AL., *supra* note 2, at 9 (“Something more than the mere commission of a tort is always required for punitive damages.”).

<sup>123</sup> KEETON ET AL., *supra* note 2, at 9–10.

<sup>124</sup> ALA. CODE § 6-11-20(a) (LexisNexis 2014); ALASKA STAT. § 09.17.020(b) (2016); ARIZ. REV. STAT. ANN. § 12-653.01(2) (2016); ARK. CODE ANN. § 16-55-206(1) (2005); CAL. CIV. CODE § 3294(a) (West 2016); COLO. REV. STAT. § 13-21-102(1)(a) (2017); DEL. CODE ANN. tit. 18, § 6855 (2015); GA. CODE ANN. § 51-12-5.1(b) (2000); IDAHO CODE § 6-1604(1) (2010); KAN. STAT. ANN. § 60-3701(c) (West 2008); KY. REV. STAT. ANN. § 411.184(2) (LexisNexis 2005) (providing for punitive damages for malice, whose definition in KY. REV. STAT. ANN. § 411.184(1)(c) was held in violation of the jural rights doctrine and unconstitutional by *Williams v. Wilson*, 972 S.W.2d 260, 269 (Ky. 1998)); MISS. CODE ANN. § 11-1-65(1)(a) (West 2008); MO. ANN. STAT. § 538.205(10) (West 2008); MONT. CODE ANN. § 27-1-221(1) (West 2017); NEV. REV. STAT. ANN. § 42.005(1) (LexisNexis 2012); N.J. STAT. ANN. § 2A:15-5.12(a) (West 2015); N.M. STAT. ANN. § 13-1827 (LexisNexis 2018); N.C. GEN. STAT. § 1D-15(a) (2015); N.D. CENT. CODE § 32-03.2-11(1) (2010); OHIO REV. CODE ANN. § 2315.21(c)(1) (LexisNexis 2017); OKLA. STAT. ANN. tit. 23, § 9.1(D) (West 2008); OR. REV. STAT. § 31.730(1) (2017); 12 R.I. GEN. LAWS § 12-28-10(b)(1) (2002); S.C. CODE ANN. § 15-51-40 (2018); S.D. CODIFIED LAWS § 21-3-2 (2004); TENN. CODE ANN. § 29-39-104(a)(1) (2012); TEX. CIV. PRAC. & REM. CODE ANN. § 41.003(a) (West 2003); UTAH CODE ANN. § 78B-8-201(1)(a) (LexisNexis 2012); WIS. STAT. ANN. § 895.043(3) (West 2016); *Destefano v. Children’s Nat’l Med. Ctr.*, 121 A.3d 59, 66 (D.C. 2015) (affording punitive damages to a plaintiff who proves “that the [defendant] ‘acted with evil motive, actual malice, deliberate violence or oppression, or with intent to injure, or in willful disregard for the rights of the plaintiff’” (quoting *District of Columbia v. Bamidele*, 103 A.3d 516, 522 (D.C. 2014))); *Amfac, Inc. v. Waikiki Beachcomber Inv. Co.*, 839 P.2d 10, 37 (Haw. 1992) (stating plaintiff must prove “that the defendant has acted wantonly or oppressively or with such malice as implies a spirit of mischief or criminal indifference to civil obligations” (quoting *Masaki v. Gen. Motors Corp.*, 780 P.2d 566, 575 (Haw. 1989))); *Kelsay v. Motorola, Inc.*, 384 N.E.2d 353, 359 (Ill. 1978) (“[P]unitive . . . damages may be awarded [for acts] committed with fraud, actual malice, deliberate violence or oppression, or when the defendant acts willfully, or with such gross negligence as to indicate a wanton disregard of the rights of others.” (citing *Consol. Coal of St. Louis v. Haenni*, 35 N.E. 162, 165 (Ill. 1893))); *Hibschman Pontiac, Inc. v. Batchelor*, 362 N.E.2d 845, 847 (Ind. 1977) (“Punitive damages may be awarded . . . ‘whenever the elements of fraud, malice, gross negligence or oppression *mingle* in the controversy.’” (quoting *Vernon Fire & Cas. Ins. Co. v. Sharp*, 349 N.E.2d 173, 180 (Ind. 1976))); *Oliver v. Martin*, 460 A.2d 594, 595 (Me. 1983) (stating punitive damages may be awarded where “conduct was accompanied by aggravating circumstances; i.e., whether it was intentional, wanton, malicious, reckless, or grossly negligent” (first citing *McKinnon v. Tibbetts*, 440 A.2d 1028, 1031 & n.3 (Me. 1982); and then citing *Vicnire v. Ford Motor Credit Co.*, 401 A.2d 148, 155 (Me. 1979))); *Owens-Ill., Inc. v. Zenobia*, 601 A.2d 633, 652 (Md. 1992) (permitting punitive damages to a plaintiff who shows “that the defendant’s conduct was

intent. For example, the Ohio Supreme Court has determined that malice is “(1) that state of mind under which a person’s conduct is characterized by hatred, ill will or a spirit of revenge, or (2) a conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm.”<sup>125</sup> In California, malice is statutorily defined as “conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.”<sup>126</sup> The Maine Supreme Court has found that “malice exists where the defendant’s tortious conduct is motivated by ill will toward the plaintiff . . . [or] where deliberate conduct by the defendant, although motivated by something other than ill will toward any particular party, is so outrageous that malice toward a person injured as a result of that conduct can be implied.”<sup>127</sup>

### c. *Malice and Defamation*

In the context of the tort of defamation, malice means a knowing or reckless falsehood. Defamation is the publication of a statement that “tends . . . to harm the reputation of another as to lower him in the estimation of the community or

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characterized by evil motive, intent to injure, ill will, or fraud, *i.e.*, ‘actual malice’”); *Smith v. Jones*, 169 N.W.2d 308, 319 (Mich. 1969) (stating punitive damages are awarded “where there is malice, or willful or wanton misconduct” (emphasis omitted) (quoting *Scripps v. Reilly*, 38 Mich. 10, 23 (Mich. 1878))); *Westinghouse Elec. Supply Co. v. Pyramid Champlain Co.*, 193 A.D.2d 928, 932 (N.Y. App. Div. 3d 1993) (requiring plaintiff to allege facts indicating that the defendant acted in a “wanton, willful or malicious manner” (quoting *RKB Enters., Inc. v. Ernst & Young*, 182 A.D.2d 971, 973 (N.Y. App. Div. 3d 1992))); *Post & Beam Equities Grp., LLC v. Sunne Village Dev. Prop. Owners Ass’n*, 124 A.3d 454, 469 (Vt. 2015) (“Punitive damages are permitted . . . when defendant’s acts are . . . ‘intentional and deliberate’ and conducted with ‘actual malice’—that is, ‘bad spirit and wrong intention’ . . .” (quoting *Brueckner v. Norwich Univ.*, 730 A.2d 1086, 1095 (Vt. 1999))); *Condo. Servs., Inc. v. First Owners’ Ass’n of Forty Six Hundred Condo., Inc.*, 709 S.E.2d 163, 174 (Va. 2011) (“Punitive . . . damages are allowable only where there is misconduct or actual malice, or such recklessness or negligence as to evince a conscious disregard of the rights of others.” (first quoting *Giant of Va., Inc. v. Pigg*, 152 S.E.2d 271, 277 (Va. 1967); and then citing *Banks v. Mario Indus. of Va., Inc.*, 650 S.E.2d 687, 699 (Va. 2007))); *Belcher v. Terry*, 420 S.E.2d 909, 914–15 (W. Va. 1992) (“[W]here there is an intentional wrong, or where there are circumstances which warrant an inference of malice, willfulness, or wanton disregard of the rights of others, punitive damages may be awarded.” (quoting *Addair v. Huffman*, 195 S.E.2d 739, 743 (W. Va. 1973))); *Petsch v. Florom*, 538 P.2d 1011, 1013 (Wyo. 1975) (stating punitive damages require “the act of the defendant [be] committed maliciously, willfully or wantonly” (citing *Wilson v. Hall*, 244 P. 1002, 1003 (Wyo. 1926))).

<sup>125</sup> *Preston v. Murty*, 512 N.E.2d 1174, 1176 (Ohio 1987).

<sup>126</sup> CAL. CIV. CODE § 3294(c)(1) (West 2016).

<sup>127</sup> *Tuttle v. Raymond*, 494 A.2d 1353, 1361 (Me. 1985) (citations omitted) (“We emphasize that for the purpose of assessing punitive damages, such ‘implied’ or ‘legal’ malice will *not* be established by the defendant’s mere reckless disregard of the circumstances.”).

to deter third persons from associating or dealing with him.”<sup>128</sup> A plaintiff must prove (1) an unprivileged communication to a third party (2) of a false and defamatory statement, (3) fault, and (4) damages.<sup>129</sup> In *New York Times Co. v. Sullivan*, the Supreme Court held that defamation cases involving a public official also require the statement be made “with ‘actual malice’—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.”<sup>130</sup> A tort treatise explains:

Actual malice has become a term of art to provide a convenient shorthand for the New York Times standard of liability. It is quite different from the common law standard of “malice” generally required under state tort law to support an award of punitive damages. While the common law standard focuses on the defendant’s attitude toward the plaintiff, actual malice concentrates on the defendant’s attitude toward the truth or falsity of the material published.<sup>131</sup>

As the foregoing summary demonstrates, malice is used under non-bankruptcy law as an intent-based concept, with the required type of intent varying depending on the area of law.

## 2. *Intent Is the Entire Characteristic of “Willful” Under § 523(a)(6)*

Even though non-bankruptcy law typically defines malice to require some type of intent, the term “malicious” in § 523(a)(6) should not do so because intent is already a necessary element of the statutory term “willful.” Section 523(a)(6) excepts from discharge debts for “willful and malicious injury by the debtor.”<sup>132</sup> The *Tinker* Court held that for bankruptcy purposes, malice requires a wrongful act that is “done intentionally.”<sup>133</sup> This “done intentionally”

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<sup>128</sup> RESTATEMENT (SECOND) OF TORTS § 559 (AM. LAW INST. 1965); *see also* KEETON ET AL., *supra* note 2, at 773 (“Defamation is . . . that which tends to injure ‘reputation’ in the popular sense; to diminish the esteem, respect, goodwill or confidence in which the plaintiff is held, or to excite adverse, derogatory or unpleasant feelings or opinions against him.” (internal citation omitted)); DAN B. DOBBS ET AL., HORNBOOK ON TORTS 936 (2d ed. 2016) (“Defamation law, executed through the rules of libel and slander, aims at protecting reputation and good name against false and derogatory communications.”).

<sup>129</sup> 4 J.D. LEE & BARRY A. LINDAHL, MODERN TORT LAW: LIABILITY AND LITIGATION, § 36:1 (2d ed. 2003).

<sup>130</sup> *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964); *see also* Curtis Publ’g Co. v. Butts, 388 U.S. 130, 164 (1967) (Warren, J., concurring) (extending the requirement to “public figures”); DOBBS ET AL., *supra* note 128, at 989 (comparing “actual malice” with knowing or reckless falsehood).

<sup>131</sup> LEE & LINDAHL, *supra* note 129, at § 36:40. Another treatise suggests “it may facilitate analysis to avoid the actual malice terminology and specify knowing or reckless falsehood instead.” DOBBS ET AL., *supra* note 128, at 989.

<sup>132</sup> 11 U.S.C. § 523(a)(6) (2012).

<sup>133</sup> *Tinker v. Colwell*, 193 U.S. 473, 486 (1904) (quoting *Bromage v. Prosser* (1825), 107 Eng. Rep. 1051, 1054, 4 Barn. & Cress. 247, 255).

requirement is confusing because it overlaps the term “willful” in § 523(a)(6).<sup>134</sup> This Part examines the meaning of willful in § 523(a)(6), looks at how the circuit courts have split on the way they treat intent as an element of malice, and then turns to the interplay between the statutory terms “willful” and “malicious.”

a. *The Statutory Term “Willful” Is Intent-Based and Requires a Deliberate or Intentional Injury*

The term “willful” in § 523(a)(6) is intent-based. The Supreme Court has interpreted this term on two occasions.<sup>135</sup> In 1904, the *Tinker* Court briefly noted that “willful” requires an act that is “intentional and voluntary.”<sup>136</sup> The remainder of the *Tinker* decision focused on the term malicious.<sup>137</sup> In 1998, the Supreme Court in *Kawaauhau v. Geiger* changed the willful standard to require “a deliberate or intentional *injury*, not merely a deliberate or intentional *act* that leads to injury.”<sup>138</sup>

*Kawaauhau* involved a medical malpractice case where the debtor was a doctor.<sup>139</sup> The debtor provided treatment to a patient for a foot injury and admitted her to the hospital to attend to the risk of infection.<sup>140</sup> The debtor decided not to transfer the patient to an infectious disease specialist and discontinued all antibiotics because he believed the infection had subsided.<sup>141</sup> The patient’s condition deteriorated and eventually her right leg was amputated below the knee.<sup>142</sup> The patient was awarded a money judgment against the debtor for malpractice and the debtor filed bankruptcy.<sup>143</sup> The patient argued the malpractice award was debt for a willful and malicious injury because the debtor “intentionally rendered inadequate medical care . . . that necessarily led to [the patient’s] injury.”<sup>144</sup>

The *Kawaauhau* Court explained that “[t]he word ‘willful’ in (a)(6) modifies the word ‘injury,’ indicating that nondischargeability takes a deliberate or intentional *injury*, not merely a deliberate or intentional *act* that leads to injury.”<sup>145</sup> The *Kawaauhau* Court continued: “the (a)(6) formulation triggers in

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<sup>134</sup> 11 U.S.C. § 523(a)(6) (2012).

<sup>135</sup> *Kawaauhau v. Geiger*, 523 U.S. 57 (1998); *Tinker*, 193 U.S. 473.

<sup>136</sup> *Tinker*, 193 U.S. at 485 (interpreting § 17(a)(2) of the Bankruptcy Act of 1898 stating “[t]he act is willful, of course, in the sense that it is intentional and voluntary, and we think that it is also malicious within the meaning of the statute”).

<sup>137</sup> See *supra* Part II.B.1.

<sup>138</sup> *Kawaauhau*, 523 U.S. at 61; see also *id.* at 63 (“*Tinker* . . . placed criminal conversation solidly within the traditional intentional tort category, and we so confine its holding.”).

<sup>139</sup> *Id.* at 59.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 59–60.

<sup>144</sup> *Kawaauhau*, 523 U.S. at 61.

<sup>145</sup> *Id.*

the lawyer's mind the category 'intentional torts,' as distinguished from negligent or reckless torts. Intentional torts generally require that the actor intend 'the consequences of an act,' not simply 'the act itself.'"<sup>146</sup> The Court clarified that willful does not include "situations in which an act is intentional, but injury is unintended, *i.e.*, neither desired nor in fact anticipated by the debtor."<sup>147</sup> Consequently, it held that "debts arising from recklessly or negligently inflicted injuries do not fall within the compass of § 523(a)(6)."<sup>148</sup>

*b. The Circuit Courts Have Split on the Way They Treat the "Done Intentionally" Element of Malicious*

The circuit courts have split on the way they treat the "done intentionally" element of the *Tinker* definition of malicious.<sup>149</sup> Some circuits do not define malicious to require any type of intent. The First, Second, and Eleventh Circuits have dropped the "done intentionally" element from the *Tinker* definition of malicious.<sup>150</sup>

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<sup>146</sup> *Id.* at 61–62 (quoting RESTATEMENT (SECOND) OF TORTS § 908(2) § 8A, cmt. a (AM. LAW INST. 1965)).

<sup>147</sup> *Id.* at 62.

<sup>148</sup> *Id.* at 64; *see also* S. REP. No. 95-989, at 79 (1978) ("Paragraph (5) provides that debts for willful and malicious . . . injury by the debtor to another entity or the property of another entity are nondischargeable. Under this paragraph 'willful' means deliberate or intentional. To the extent that *Tinker v. Colwell* held that a less strict standard is intended, and to the extent that other cases have relied on *Tinker* to apply a 'reckless disregard' standard, they are overruled." (citation omitted)). This report was speaking only of the willful element of § 523(a)(6), not the malicious element. *See* Tabb, *supra* note 45, at 77 ("On its face, the statement obviously refers only to the 'willful' component of the discharge exception. Nothing is said about 'malice,' and it is thus difficult to see how *Tinker v. Colwell*'s implied malice formulation could be interpreted as being overruled." (internal citations omitted)).

<sup>149</sup> *See generally* *Tinker v. Colwell*, 193 U.S. 473, 486 (1904) (quoting *Bromage v. Prosser* (1825), 107 Eng. Rep. 1051, 1054, 4 Barn. & Cress. 247, 255) ("[Malice] in its legal sense . . . means a wrongful act, done intentionally, without just cause or excuse."). It appears that some of the circuit courts have gone the way that they have gone because they were bound by their own pre-*Kawaauhau* circuit decisions. *See, e.g.*, *Kane v. Stewart Tilghman Fox & Bianchi, P.A. (In re Kane)*, 755 F.3d 1285, 1296 (11th Cir. 2014) (citing *Maxfield v. Jennings (In re Jennings)*, 670 F.3d 1329, 1334 (11th Cir. 2012)); *Old Republic Nat'l Title Ins. Co. v. Levasseur (In re Levasseur)*, 737 F.3d 814, 819 (1st Cir. 2013) (citing *Printy v. Dean Witter Reynolds, Inc.*, 110 F.3d 853, 859–60 (1st Cir. 1997)); *Ball v. A.O. Smith Corp.*, 451 F.3d 66, 69–70 (2d Cir. 2006) (citing *Navistar Fin. Corp. v. Stelluti (In re Stelluti)*, 94 F.3d 84, 87 (2d Cir. 1996)).

<sup>150</sup> *Kane*, 755 F.3d at 1294 ("'Malicious' means wrongful and without just cause or excessive even in the absence of personal hatred, spite or ill-will. To establish malice, a showing of specific intent to harm another is not necessary." (internal quotation marks and citation omitted in original) (quoting *Jennings*, 670 F.3d at 1334)); *Levasseur*, 737 F.3d at 818 ("An injury is malicious 'if it was wrongful and without just cause or excuse, even in the absence of personal hatred, spite or ill-will.'" (quoting *Printy*, 110 F.3d at 859)); *Ball*, 451 F.3d at 69 (stating a malicious injury must be "wrongful and without just cause or



The Seventh Circuit requires a level of intent that is similar to the Model Penal Code's culpability of acting "recklessly."<sup>151</sup> It defines malicious to require the debtor to have acted "in conscious disregard of [his or her] duties or without just cause or excuse; it does not require ill-will or specific intent to do harm."<sup>152</sup>

The Eighth Circuit requires a level of intent that is akin to the Model Penal Code's culpability of acting "knowingly."<sup>153</sup> It held that malice "requires more than recklessness or reckless disregard"<sup>154</sup> and necessitates conduct "targeted at the creditor . . . at least in the sense that the conduct is certain or almost certain to cause . . . harm."<sup>155</sup> The Fourth Circuit has not issued a published opinion on the topic after *Kawaauhau* but appears to define malice to require "[a]n act that is done deliberately and intentionally in knowing disregard of the rights of another . . . ."<sup>156</sup>

Other circuits define malicious to require a level of intent that is similar to the Restatement (Third) of Torts's definition of "intent."<sup>157</sup> The Tenth Circuit

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excuse, even in the absence of personal hatred, spite, or ill-will" (quoting *Stelluti*, 94 F.3d 84, 87–88 (2d Cir. 1996)).

<sup>151</sup> MODEL PENAL CODE AND COMMENTARIES, Part I § 2.02(2)(c) (AM. LAW INST. 1985) ("A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.").

<sup>152</sup> *First Weber Grp., Inc. v. Horsfall*, 738 F.3d 767, 774 (7th Cir. 2013) (quoting *In re Thirtyacre*, 36 F.3d 697, 700 (7th Cir. 1994)).

<sup>153</sup> MODEL PENAL CODE AND COMMENTARIES, Part I § 2.02(2)(b)(ii) ("A person acts knowingly with respect to a material element of an offense when . . . if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.").

<sup>154</sup> *Roussel v. Clear Sky Props., LLC*, 829 F.3d 1043, 1047 (8th Cir. 2016).

<sup>155</sup> *Sells v. Porter (In re Porter)*, 539 F.3d 889, 894 (8th Cir. 2008) (quoting *Siemer v. Nangle (In re Nangle)*, 274 F.3d 481, 484 (8th Cir. 2001)); see also *Roussel*, 829 F.3d at 1047 (permitting an inference of malice for a similar standard of culpability); *Barclays Am./Bus. Credit, Inc. v. Long (In re Long)*, 774 F.2d 875, 881 (8th Cir. 1985) ("When transfers in breach of security agreements are in issue, we believe nondischargeability turns on whether the conduct is (1) headstrong and knowing ('willful') and, (2) targeted at the creditor ('malicious'), at least in the sense that the conduct is certain or almost certain to cause financial harm.").

<sup>156</sup> *Hagan v. McNallen (In re McNallen)*, 62 F.3d 619, 626 (4th Cir. 1995) (quoting *Rountrey v. Lee (In re Lee)*, 90 B.R. 202, 207 (Bankr. E.D. Va. 1988)); accord *Harrell v. Merch.'s Express Money Order Co. (In re Harrell)*, No. 98-1728, 1999 WL 150278, at \*2 (4th Cir. Mar. 19, 1999) (holding willful means "deliberate or intentional" and malice requires "a debtor's injurious act be done deliberately and intentionally in knowing disregard of the rights of another"); see also *First Nat'l Bank of Md. v. Stanley (In re Stanley)*, 66 F.3d 664, 667 (4th Cir. 1995); *St. Paul Fire & Marine Ins. Co. v. Vaughn (In re Vaughn)*, 779 F.2d 1003, 1010 (4th Cir. 1985).

<sup>157</sup> RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 1 (AM. LAW INST. 2010) ("A person acts with the intent to produce a consequence if: (a)

defines malicious to require “the debtor either intend the resulting injury or intentionally take action that is substantially certain to cause the injury.”<sup>158</sup> After *Kawaauhau*, the Sixth Circuit articulated a new standard that does not separate the statutory terms willful and malicious. It held that “unless ‘the actor desires to cause consequences of his act, or . . . believes that the consequences are substantially certain to result from it,’ he has not committed a ‘willful and malicious injury’ . . . .”<sup>159</sup>

Over the course of several decisions, the Fifth Circuit abandoned the *Tinker* definition of malicious.<sup>160</sup> It eventually aggregated the statutory terms willful and malicious into a unitary concept requiring “‘either an objective substantial certainty of harm or a subjective motive to cause harm’ on the part of the debtor.”<sup>161</sup> The Third Circuit has not given separate meaning to the terms “willful” and “malicious” but has held that an injury is willful and malicious “only if the actor purposefully inflicted the injury or acted with substantial certainty that injury would result.”<sup>162</sup> The Ninth Circuit treats the statutory terms willful and malicious as separate.<sup>163</sup> It has defined malicious to require a

the person acts with the purpose of producing that consequence; or (b) the person acts knowing that the consequence is substantially certain to result.”); *see also* RESTATEMENT (SECOND) OF TORTS § 908(2) § 8A (AM. LAW INST. 1965) (defining intent “to denote that the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it”).

<sup>158</sup> *Panalis v. Moore (In re Moore)*, 357 F.3d 1125, 1129 (10th Cir. 2004) (quoting *Hope v. Walker (In re Walker)*, 48 F.3d 1161, 1164 (11th Cir. 1995)).

<sup>159</sup> *Markowitz v. Campbell (In re Markowitz)*, 190 F.3d 455, 464 (6th Cir. 1999) (quoting RESTATEMENT (SECOND) OF TORTS § 8A); *accord Kennedy v. Mustaine (In re Kennedy)*, 249 F.3d 576, 580 (6th Cir. 2001).

<sup>160</sup> *Miller v. J.D. Abrams Inc. (In re Miller)*, 156 F.3d 598, 605 (5th Cir. 1998) (mischaracterizing the holding of *Vickers v. Home Indem. Co. (In re Vickers)*, 546 F.2d 1149, 1150–51 (5th Cir. 1977), defining malicious to mean without just cause or excuse, and also incorrectly stating that the Supreme Court’s decision in *Kawaauhau* displaced the just cause or excuse standard of malice); *Corley v. Delaney (In re Delaney)*, 97 F.3d 800, 802 (5th Cir. 1996) (“[F]or willfulness and malice to prevent discharge under § 523(a)(6), the debtor must have intended the actual injury that resulted.”); *Seven Elves, Inc. v. Eskenazi*, 704 F.2d 241, 245 (5th Cir. 1983) (mischaracterizing the holding of *Petty v. Dardar (In re Dardar)*, 620 F.2d 39, 40–41 (5th Cir. 1980) and defining malicious to mean the absence of just cause or excuse).

<sup>161</sup> *Williams v. Int’l Bhd. of Elec. Workers Local 520 (In re Williams)*, 337 F.3d 504, 509 (5th Cir. 2003) (quoting *Miller*, 156 F.3d at 606); *see also Raspanti v. Keaty (In re Keaty)*, 397 F.3d 264, 270 (5th Cir. 2005) (aggregating “willful and malicious” into a unitary concept).

<sup>162</sup> *Conte v. Gautam (In re Conte)*, 33 F.3d 303, 305 (3d Cir. 1994); *see also Link v. Mauz (In re Mauz)*, 672 F. App’x 176, 178 (3d Cir. 2017); *McQueen v. Macri (In re Macri)*, 642 F. App’x 128, 129 (3d Cir. 2016); *In re Granoff*, 250 F. App’x 494, 495 (3d Cir. 2007).

<sup>163</sup> *Barboza v. New Form, Inc. (In re Barboza)*, 545 F.3d 702, 711 (9th Cir. 2008) (“Although there may be some overlap between the test for ‘willfulness’ and the test for ‘malice,’ the overlap does not mean that the Bankruptcy Court can ignore entirely the malice inquiry. We require a separate analysis for each of the ‘willful’ and ‘malicious’ prongs.” (citations omitted)).

wrongful act that is “done intentionally”<sup>164</sup> and then analyzed whether the debtor knew an injury was substantially certain to occur.<sup>165</sup>

*c. Intent Should Not Be an Element of “Malicious” Under § 523(a)(6) Because It Is Already Encompassed by the Statutory Term “Willful”*

The circuit court split on whether intent should be a required part of malicious shows the need for guidance. The overlap between the term “willful” in § 523(a)(6) and the “done intentionally” element of malicious from *Tinker* has caused confusion in the circuit courts. The *Kawaauhau* Court interpreted willful to require a “deliberate or intentional injury.”<sup>166</sup> The *Tinker* definition of malicious requires a wrongful act that is “done intentionally.”<sup>167</sup> As the *Kawaauhau* Court pointed out, there is a meaningful difference between an intentional act that leads to injury and a “deliberate or intentional injury.”<sup>168</sup> The deliberate or intentional injury requirement of “willful” invariably subsumes the intentional act requirement of “malicious.” In other words, the intent required by the *Kawaauhau* Court’s 1998 interpretation of willful will always encompass the intent needed by the *Tinker* Court’s 1904 definition of malicious.

Accordingly, the “done intentionally” element of malicious should be abandoned because it no longer serves any function due to it being subsumed by the intentional injury element of willful. This approach reconciles the overlap on intent created by the *Tinker* Court’s definition of malicious with the later-decided definition of willful in *Kawaauhau*. It also provides an instructive construct for evaluating what malicious should mean. The *Kawaauhau* Court’s interpretation clarified that § 523(a)(6) is relying upon the term “willful” to fully embody intent, not malicious.

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<sup>164</sup> *Petralia v. Jercich (In re Jercich)*, 238 F.3d 1202, 1209 (9th Cir. 2001) (holding a malicious injury requires “(1) a wrongful act, (2) done intentionally, (3) which necessarily causes injury, and (4) is done without just cause or excuse”).

<sup>165</sup> *Id.* (holding state court findings were sufficient to show that the injury inflicted was malicious where “Jercich knew he owed Petralia the wages and that injury to Petralia was substantially certain to occur if the wages were not paid”); *see also Ormsby v. First Am. Title Co. of Nev. (In re Ormsby)*, 591 F.3d 1199, 1207 (9th Cir. 2010) (holding conduct met the malicious prong because “Ormsby knew that FATCO’s injury was substantially certain to occur as a result of his conduct”).

<sup>166</sup> *Kawaauhau v. Geiger*, 523 U.S. 57, 61 (1998).

<sup>167</sup> *Tinker v. Colwell*, 193 U.S. 473, 486 (1904) (quoting *Bromage v. Prosser* (1825), 107 Eng. Rep. 1051, 1054, 4 Barn. & Cress. 247, 255).

<sup>168</sup> *Kawaauhau*, 523 U.S. at 61.

## B. Determining a Wrongful Act That Is Malicious

Section 523(a)(6) requires a “willful *and* malicious injury.”<sup>169</sup> The *Tinker* Court’s definition of malicious requires “a wrongful act.”<sup>170</sup> Other than situations involving attribution (such as self-defense), intentionally injuring another is inherently a wrongful act. This suggests that the wrongful act element of malicious is modifying the statutory term “injury” in a way that makes it distinct from acts that are wrongful simply because the debtor intentionally caused an injury. In other words, there is a difference between a mere willful injury and the required willful and malicious injury. This section reviews some of the ways criminal and tort law identify wrongful acts and concludes that those methods will not work under § 523(a)(6)’s standard. It then evaluates how to determine wrongfulness that constitutes a malicious injury under bankruptcy law.

### 1. Methods Used by Criminal and Tort Law to Identify Wrongful Acts

One challenging aspect of the “willful and malicious injury” standard under § 523(a)(6) is that it is cause of action neutral, meaning it is not limited to identified criminal offenses or specific tort claims. Considering how criminal law and tort law identify offenses and claims is instructive.

Criminal law separates wrong from not wrong by “declar[ing] what conduct is criminal and prescrib[ing] the punishment to be imposed for such conduct.”<sup>171</sup> Crimes are defined by identified acts or omissions along with specified mental states.<sup>172</sup> For example, a person is guilty of false imprisonment if they “knowingly restrain[] another unlawfully so as to interfere substantially with [the other’s] liberty.”<sup>173</sup> The mental state of “knowingly” performs a function that is similar to the “willful” requirement of § 523(a)(6). The phrase “restrains another unlawfully so as to interfere substantially with his liberty” describes what specific conduct and result are required for the crime. The *Tinker* Court’s definition of malicious, which requires a “wrongful act,” is much broader than a single instance of specifically identified conduct. As presently defined by the *Tinker* Court, this breadth limits the ability of the term to perform its sorting function.

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<sup>169</sup> 11 U.S.C. § 523(a)(6) (2012) (emphasis added).

<sup>170</sup> *Tinker*, 193 U.S. at 486 (1904) (quoting *Bromage*, 107 Eng. Rep. at 1054, 4 Barn. & Cress. at 255).

<sup>171</sup> LAFAVE, *supra* note 1, at 8.

<sup>172</sup> *Id.*; see also MODEL PENAL CODE AND COMMENTARIES, Part I § 1.13(9) (AM. LAW INST. 1985) (defining the term “element of an offense” to mean specified conduct, attendant circumstances or a result of conduct). Of course, strict liability crimes do not have a required mental state. MODEL PENAL CODE AND COMMENTARIES, Part I § 2.05(1)(b).

<sup>173</sup> MODEL PENAL CODE AND COMMENTARIES, Part II § 212.3 (AM. LAW INST. 1985) (defining false imprisonment).

Tort law provides limited assistance in modeling how to identify wrongful acts that are malicious. “[T]ortious conduct is twisted conduct, conduct that departs from the existing norm” and “torts are traditionally associated with wrongdoing in some moral sense.”<sup>174</sup> For many torts, the primary basis of liability is the fault or blameworthiness of the tortfeasor.<sup>175</sup> As one treatise observes: “The issue of fault . . . dominates most of tort law. Although fault may be defined quite differently according to the factual setting and relationships of the parties, courts are deeply involved with defining fault in a large proportion of all tort cases.”<sup>176</sup> Tort law uses three different principles to determine fault: intent, recklessness, and negligence.<sup>177</sup> Section 523(a)(6)’s willful requirement is intent-based and performs a function that is similar to torts based on intent<sup>178</sup>

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<sup>174</sup> DOBBS ET AL., *supra* note 128, at 4 (“The term ‘tort’ is derived from Latin roots meaning ‘twisted.’”); *see id.* at 3 (“A tort is conduct that constitutes a legal wrong and causes harm for which courts will impose civil liability.”); KEETON ET AL., *supra* note 2, at 2 (“Broadly speaking, a tort is a civil wrong, other than breach of contract, for which the court will provide a remedy in the form of an action for damages . . . .”); *Tort*, BLACK’S LAW DICTIONARY (10th ed. 2014) (defining a tort as “[a] civil wrong, other than breach of contract, for which a remedy may be obtained, usu[ally] in the form of damages; a breach of a duty that the law imposes on persons who stand in a particular relation to one another”).

<sup>175</sup> DOBBS ET AL., *supra* note 128, at 4–5 (“[F]ault remains the basis of tort liability and a marker of its limits in the overwhelming number of cases.”). *But see id.* at 5 (“In a few instances tort law imposes strict liability. Strict liability is liability without proof of fault . . . [where] liability may be imposed as a matter of legal policy irrespective of the defendant’s fault.”).

<sup>176</sup> *Id.* at 12. The fault principle has been explained in KEETON ET AL., *supra* note 2, at 608 as follows:

Unless other interests served outweigh intended harms and are treated as justification, conduct causing intended harms is blameworthy. When blameworthy conduct causes harms to others, the blameworthy actor ought, in general, to compensate for those harms. Similarly, unintended harms are ordinarily compensable if caused by conduct that involves undue risks—risks that, along with other costs, outweigh the usefulness of the conduct causing the harms. Conduct of this kind is socially undesirable and deserves to be classified as blameworthy.

(footnotes omitted).

<sup>177</sup> RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM §§ 1–3 (AM. LAW INST. 2010). The terminology employed to administer these principles “possesses great elasticity.” Ellis, *supra* note 121, at 34 (“One source of tort law’s enduring vitality and resilience is the use of terminology possessing great elasticity. Ineffably vague terms such as negligence, duty, and the reasonable person, serve to minimize or at least to mask the inevitable tension between the often conflicting objectives the law seeks to further.”).

<sup>178</sup> “A person acts with the intent to produce a consequence if (a) the person acts with the purpose of producing that consequence; or (b) the person acts knowing that the consequence is substantially certain to result.” RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 1; *see also id.* § 1 cmt. c (“[K]nowledge that harm is substantially certain to result is sufficient to show that the harm is intentional even in the absence of a purpose to bring about that harm. Of course, a mere showing that harm is

and recklessness.<sup>179</sup> Negligence is not directly analogous to § 523(a)(6) because it is impossible to have a negligent injury that is also willful.<sup>180</sup> But it is instructive to consider the allocation of fault based on negligence principles as a comparative methodology for determining a wrongful act that is malicious.

A person is negligent if they do not use reasonable care under the circumstances.<sup>181</sup> In a negligence case, the tortfeasor does not desire to cause injury, and harm is a possibility but not a certainty.<sup>182</sup> Negligence involves an objective perspective on risk “as it would be perceived by a reasonable person.”<sup>183</sup> Negligence principles determine fault by comparing the conduct in question to the conduct of a reasonable person.<sup>184</sup> This comparison method is helpful because, like § 523(a)(6), it is not tethered to specifically enumerated conduct.<sup>185</sup> The measure of deviation in negligence is embodied in the concept of breach—whether the defendant violated the appropriate standard of conduct.<sup>186</sup> Therefore, comparison is a useful method to identify wrongful conduct.

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substantially certain to result from the actor’s conduct is not sufficient to prove intent; it must also be shown that the actor is aware of this.”).

<sup>179</sup> Recklessness requires conduct where: “(a) the person knows of the risk of harm created by the conduct or knows facts that make the risk obvious to another in the person’s situation, and (b) the precaution that would eliminate or reduce the risk involves burdens that are so slight relative to the magnitude of the risk as to render the person’s failure to adopt the precaution a demonstration of the person’s indifference to the risk.” *Id.* § 2 and cmt. a (“This Section, along with other materials in the three current Restatement Third projects, supersedes coverage of recklessness in Chapter 19 of the Restatement Second of Torts.”); *see also* RESTATEMENT (SECOND) OF TORTS § 500 (AM. LAW INST. 1965); RESTATEMENT (FIRST) OF TORTS § 500 (AM. LAW INST. 1934).

<sup>180</sup> *See* DOBBS ET AL., *supra* note 128, at 200 (“Because the emphasis in negligence cases is on unreasonably risky conduct, a bad state of mind is neither necessary nor sufficient to show negligence. . . . The legal concept of negligence as unduly risky conduct distinct from state of mind reflects the law’s strong commitment to an objective standard of behavior.”).

<sup>181</sup> RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 3 (stating the primary factors to consider in ascertaining whether the person’s conduct lacks reasonable care are “the foreseeable likelihood that the person’s conduct will result in harm, the foreseeable severity of any harm that may ensue, and the burden of precautions to eliminate or reduce the risk of harm”); *see* DOBBS ET AL., *supra* note 128, at 187.

<sup>182</sup> RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 1 cmt. d.

<sup>183</sup> DOBBS ET AL., *supra* note 128, at 58.

<sup>184</sup> KEETON ET AL., *supra* note 2, § 32, at 173.

<sup>185</sup> *Id.* at 173–74 (“The whole theory of negligence presupposes some uniform standard of behavior. Yet the infinite variety of situations which may arise makes it impossible to fix definite rules in advance for all conceivable human conduct. The utmost that can be done is to devise something in the nature of a formula, the application of which in each particular case must be left to the jury, or to the court. . . . The courts have dealt with this very difficult problem by creating a fictitious person, who never has existed on land or sea: the ‘reasonable man of ordinary prudence.’”).

<sup>186</sup> DOBBS ET AL., *supra* note 128, at 206.

*2. A Malicious Injury Under Bankruptcy Law Should Require an Extraordinarily Wrongful Act in Order to Perform Its Sorting Function*

Defining malicious to require a mere “wrongful act” prevents the term from performing its sorting function. Under a generic definition, an act is wrongful if it is “a violation of a valid norm prohibiting or requiring specific conduct.”<sup>187</sup> An act can also be described as wrongful if it harms the legitimate interests of another.<sup>188</sup>

Two problems arise from defining malicious to include acts that involve any degree of wrongfulness. First, allowing any degree of wrongfulness to satisfy the “malicious” term in § 523(a)(6) makes the term itself meaningless because wrongful acts are already encompassed by “willful” injuries. This is because it is inherently wrong to deliberately or intentionally injure another. In order for the “malicious” modifier of injury to have separate significance, it must mean something that is not already encompassed by the term “willful.”

The second reason malicious should not be defined as acts involving any degree of wrongfulness goes to the nature of an exception to discharge under bankruptcy law. From a policy perspective, an exception to discharge should not be interpreted in a way that results in the exception applying to all debts.<sup>189</sup> The exceptions to discharge in § 523 demonstrate a congressional decision that the interests of certain creditors in recovering debt payment outweigh the interests of debtors in obtaining a fresh start.<sup>190</sup>

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<sup>187</sup> GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 472 (1978); see H.L.A. HART, *THE CONCEPT OF LAW* 86 (Paul Craig ed., 3d ed. 2012) (“Rules are conceived and spoken of as imposing obligations when the general demand for conformity is insistent and the social pressure brought to bear upon those who deviate or threaten to deviate is great. Such rules may be wholly customary in origin: there may be no centrally organized system of punishments for breach of the rules; the social pressure may take only the form of a general diffused hostile or critical reaction which may stop short of physical sanctions. It may be limited to verbal manifestations of disapproval or of appeals to the individuals’ respect for the rule violated; it may depend heavily on the operation of feelings of shame, remorse, and guilt.”).

<sup>188</sup> JULES L. COLEMAN, *RISKS AND WRONGS* 331–32 (1992) (stating losses are wrongful if they result from conduct harmful of legitimate interests and that wrongdoing consists of unjustifiable departures from the relevant standards of permissible behavior). From a moral basis, Professor H.L.A. Hart suggested rules that are essential to the survival of any society are “those forbidding, or at least restricting, the free use of violence, rules requiring certain forms of honesty and truthfulness in dealings with others, and rules forbidding the destruction of tangible things or their seizure from others.” HART, *supra* note 187, at 171–72 (acknowledging that moral rules “may vary from society to society or within a single society at different times”).

<sup>189</sup> *Chapman v. Forsyth*, 43 U.S. 202, 208 (1844) (interpreting a different exception to discharge and noting that one of the litigant’s proposed interpretations “would have left but few debts on which the law [meaning a discharge of debt] could operate”).

<sup>190</sup> *Cohen v. de la Cruz*, 523 U.S. 213, 222 (1998) (“The various exceptions to discharge in § 523(a) reflect a conclusion on the part of Congress ‘that the creditors’ interest in recovering full payment of debts in these categories outweigh[s] the debtors’ interest in a

The exceptions to discharge in § 523 can be divided into two categories: those based on the debt's importance to society and those based on a debtor's bad conduct. Examples of debts that are important to society include debts relating to taxes,<sup>191</sup> domestic-support obligations,<sup>192</sup> government fines,<sup>193</sup> educational loans,<sup>194</sup> and orders of restitution in criminal cases.<sup>195</sup> The very nature of these debts is significant enough to outweigh both the public and private interests in providing debtors a fresh start. Examples of exceptions that arise from certain types of bad conduct by a debtor include debts obtained by false pretenses or actual fraud,<sup>196</sup> embezzlement,<sup>197</sup> or larceny.<sup>198</sup> The exception to discharge for "willful and malicious injury" in § 523(a)(6) is based on the bad conduct of the debtor. As such, the bad conduct should be bad enough to justify the debt being excepted from discharge, not just conduct that involves any degree of wrongfulness.

Debtor conduct that involves a degree of wrongfulness that is minor, tolerable, or expected should not be considered malicious. In other words, slightly wrongful conduct should still be discharged in bankruptcy. A criminal law scholar distinguished wrongful conduct from wrongdoing by explaining that "[m]urder and larceny are equally wrongful in the same way that both violate legal norms. But murder is a greater wrong—a graver case of wrongdoing—than larceny. Determining the degree of wrongdoing is obviously a subtle problem of moral judgment."<sup>199</sup>

Courts should stop defining malicious to require a mere "wrongful act" because doing so prevents the term from performing its sorting function. Instead, malicious in § 523(a)(6) should require an "extraordinarily wrongful

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complete fresh start." (quoting *Grogan v. Garner*, 498 U.S. 279, 287 (1991)); *Bruning v. United States*, 376 U.S. 358, 361 (1964) (noting the predecessor to section 523(a) "[was] not a compassionate section for debtors" because "it demonstrate[d] congressional judgment that certain problems . . . override the value of giving the debtor a wholly fresh start"); *see also* Jonathon S. Byington, *The Fresh Start Canon*, 69 FLA. L. REV. 115, 117 (2017) (describing a rival policy to the fresh start, that "discharge of debt is a selectively conferred privilege" and that the Bankruptcy Code "manifests the 'discharge restrictions' policy through provisions that deny a debtor a discharge altogether under § 727(a) or except specific, individual debts from discharge under § 523(a)").

<sup>191</sup> *See* 11 U.S.C. § 523(a)(1) (2012) (certain tax debts cannot be discharged).

<sup>192</sup> *Id.* § 523(a)(5) (certain domestic support obligations cannot be discharged).

<sup>193</sup> *Id.* § 523(a)(7) (certain governmental fines cannot be discharged).

<sup>194</sup> *Id.* § 523(a)(8) (certain educational loans cannot be discharged).

<sup>195</sup> *Id.* § 523(a)(13) (certain orders of restitution cannot be discharged).

<sup>196</sup> *Id.* § 523(a)(2)(A) ("A discharge . . . does not discharge an individual debtor from any debt . . . for money, property, [or] services . . . to the extent obtained by false pretenses, a false representation, or actual fraud . . .").

<sup>197</sup> 11 U.S.C. § 523(a)(4) ("A discharge . . . does not discharge an individual debtor from any debt . . . for . . . embezzlement . . .").

<sup>198</sup> *Id.* ("A discharge . . . does not discharge an individual debtor from any debt . . . for . . . larceny.").

<sup>199</sup> FLETCHER, *supra* note 187, at 458.



act.”<sup>200</sup> This standard would allow the definition of malicious to exclude acts that have a small degree of wrongfulness. Debts arising from such minimally wrongful acts, even where the injury was intended by the debtor, should still be discharged. To hold otherwise would except from discharge a mere willful injury instead of the required willful and malicious injury. Whether an act is extraordinarily wrongful should be assessed from an objective standard.<sup>201</sup> Requiring an extraordinarily wrongful act changes the focus of the sorting function. It centers the analysis on whether an act has a substantial degree of wrongfulness instead of the unhelpful standard of whether an act was merely wrong or not. Interpreting the term in this manner gives separate meaning to both of the adjectives in § 523(a)(6): willful and malicious. It also allows the exception to discharge to properly perform its sorting function.

*C. The Definition of Malicious Should Retain the Attributive Function of the Requirement That the Act Be “Without Just Cause or Excuse”*

The final element of the *Tinker* definition of malicious requires the wrongful act be done “without just cause or excuse.”<sup>202</sup> This element relates to attribution. Attribution is about whether a person is responsible for their wrongful conduct. In criminal law, a person may have engaged in wrongful conduct but because they are insane or an infant they may not be accountable for an offense.<sup>203</sup> A privilege like self-defense is another example of attribution.<sup>204</sup> In limited situations, wrongful acts may be justified to avoid some other injury. The portion of the *Tinker* Court’s definition of malicious that relates to whether there was just cause or excuse goes to attribution and should be retained.

#### IV. CONCLUSION

The definition of malicious in § 523(a)(6) needs to change. In order to harmonize the *Tinker* Court’s definition of malicious with the *Kawaauhau* Court’s definition of willful, courts should stop construing malicious to require intent. This means the “done intentionally” element of the *Tinker* Court’s definition of malicious should be eliminated. In addition, the “wrongful act”

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<sup>200</sup> There is a precedential basis for a judicial adoption of this elevated standard. In determining whether a debtor’s acts were sufficiently wrongful, the *Davis* Court suggested the wrongful act needs to have “aggravated features.” *Davis v. Aetna Acceptance Co.*, 293 U.S. 328, 333 (1934).

<sup>201</sup> See *supra* Part II.B.1 (stating that determination of whether an act is wrongful is made from an objective perspective, not a subjective one). For a discussion on whether the “willful” requirement in § 523(a)(6) is assessed with an objective or subjective standard, see Norberg, *supra* note 91, at 182–84.

<sup>202</sup> *Tinker v. Colwell*, 193 U.S. 473, 485–86 (1904) (quoting *Bromage v. Prosser* (1825), 107 Eng. Rep. 1051, 1054, 4 Barn. & Cress. 247, 255).

<sup>203</sup> FLETCHER, *supra* note 187, at 455.

<sup>204</sup> See MODEL PENAL CODE AND COMMENTARIES, Part I § 3.04 (AM. LAW INST. 1985).

element of the *Tinker* Court's definition of malicious should be changed to require an "extraordinarily wrongful act." This adjustment allows the term to perform its sorting function. Accordingly, the term "malicious" in § 523(a)(6) should require an extraordinarily wrongful act that is done without just cause or excuse.