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Access to Meaningful Remedy: Overcoming Doctrinal Obstacles in Tort Litigation Against Domestic Violence Offenders

> Batterers are given systemic immunity in the legal system. It's systemic because there is an unwillingness to accept the litigation of torts in the midst of a divorce proceeding.[1]
>
> —Michigan Judge Bill Callahan

Domestic violence[2] victims may currently file tort actions against their abusers, couched as assault and battery, stalking, intentional infliction of emotional distress, and fraud,[3] among others. Despite the fact that such remedies are desirable under legal and compensation frameworks, battered women have not generally used these options. Domestic violence victims have dramatically underutilized tort law, with at least three doctrinal obstacles thwarting its use: the courts' reluctance to interfere in marriages, the assumption that existing laws adequately regulate divorce, and the primacy of statutes of limitation.

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[1] Diana Diggs, *Lawyers Join Domestic Violence Torts to Divorce Judgments, Judge Leads Quiet Revolution to Educate Family Lawyers*, LAW. WKLY. USA, Feb. 19, 2001, at B3.

[2] "Domestic violence" occurs when one intimate partner uses physical violence, threats, stalking, harassment, or emotional or financial abuse to control, manipulate, coerce, or intimidate the other partner. *See* Roberta Valente, *Domestic Violence and the Law*, *in* THE IMPACT OF DOMESTIC VIOLENCE ON YOUR LEGAL PRACTICE: A LAWYER'S HANDBOOK 1-3 to 1-4 (1996).

[3] *See infra* notes 57-64 and accompanying text for broader discussion of range of potential intentional torts.

Legal doctrine must be reformed to diminish the dangerous and unfair results experienced by too many abuse survivors who turn to the courts for help. After reviewing cultural norms and discussing the doctrinal obstacles, I argue for recognition of a new tort of domestic violence to afford abuse victims increased access to the panoply of remedies to which they are entitled. As an administratively feasible option, the tort of domestic violence reflects the same call for specialization as for medical malpractice, toxic torts, products liability, and mass torts. Recognizing a tort of domestic violence also provides a normative basis for reforming the doctrinal obstacles that needlessly interfere with the right of battered women to seek redress for their harms.[4]

In Part I, I address cultural norms of tort litigation in the context of domestic violence, attempting to explain the dearth of cases. But a more nuanced evaluation is required, as some victims are deterred by the combination of aversion to prolonged divorce litigation and gendered socialization about naming, compensation, and redress. Doctrinal obstacles further deter potential plaintiffs. Geography, race, religion, and, understandably, socioeconomic status impact usage of tort against batterers as well.

Recognition of the full spectrum of abuse is essential to understanding some victims' reticence, but also to pierce the minimization veil that still shrouds intimate partner violence. I argue that acculturated non-empathy for abuse victims is a factor in deterring domestic violence tort actions, with selective concern and the illusion of neutrality prevalent in court decisions. Religious doctrine, particularly that of the conservative Christian move-

[4] Although there are also battered men, they are a miniscule minority of the cases, and I will thus use the terms "battered women" and "abuse victims" interchangeably. *See* CALLIE MARIE RENNISON, U.S. DEP'T OF JUSTICE, INTIMATE PARTNER VIOLENCE AND AGE OF VICTIM, 1993-99, at 3 (Bureau of Just. Stat. Special Rep. NCJ 187635, Oct. 2001) ("Women were victimized in 85% of the 791,210 intimate partner violent crimes in 1999."), *available at* http://www.ojp.usdoj.gov/bjs/abstract/ipva99.htm; *see also* PATRICIA TJADEN & NANCY THOENNES, EXTENT, NATURE, AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE 17 (2000) (noting data that women are significantly more likely than men to report being the victims of intimate partner violence); Russel Dobash et al., *The Myth of Sexual Symmetry in Marital Violence*, 39 SOC. PROBS. 71, 74-75 (1992) (documenting that empirical data prove that females constitute the vast majority of domestic violence victims); Phyllis Goldfarb, *Describing Without Circumscribing: Questioning the Construction of Gender in the Discourse on Intimate Violence*, 64 GEO. WASH. L. REV. 582 (1996) (noting that domestic violence discourse has largely focused on male batterers and female victims).

ment, has also shaped law and policy relating to violence within the family.

Part II covers the doctrinal obstacle presented by courts' consistent reluctance to interfere in marriages, even those involving family violence. A brief discussion of privacy doctrine leads, with pro and con stances on the optimal combination of state versus individual determinant of court intervention; this in turn frames the pivotal issue of designing a judicially manageable threshold that allows harmed victims access to domestic violence tort remedies, while not flooding the courts with minor marital grievances. Here, I speak to the failure of no-fault divorce when domestic violence has occurred, fueled by the premise that any determination of fault, and certainly tort actions, are suspect in dissolution matters. Also troublesome is that divorce law, to the extent that it recognizes physical abuse as problematic, has generally been loathe to compensate for economic and psychological abuse—although empirical studies indicate they can be just as devastating to the victims as physical abuse.

In Part III, I discuss a second doctrinal obstacle, the presumption that existing family law is sufficient, with an examination of the failure of no-fault doctrine in the rubric of domestic violence. I then turn to permissive versus mandatory joinder of tort claims, arguing that every state should allow permissive joinder to enable victims to determine when their cases should be filed, based on considerations of safety, autonomy, access to competent legal counsel, and ability to withstand protracted litigation. In the next subsection, disproportional distribution of the marital estate is discussed as an inadequate means of even minimal compensation. I reference the dearth of prenuptial agreements protecting abuse victims, and critique some courts' convoluted reasoning that allowing tort actions contributes to animus within intimate relationships.

Part IV directly tackles statutes of limitations doctrinal issues, primarily focusing on the need for continuing tort doctrine to be applied uniformly in domestic violence cases where a pattern of harm has occurred over time. In Part V, I make the case for domestic violence to be designated as its own tort, arguing that the power of taxonomy be utilized to confer title to the array of classic torts committed under the rubric of intimate partner abuse. A brief discussion of legislative remedies follows. I then cover remedial proposals for collecting tort judgments, ranging

from inclusion with the alimony order to amending the bankruptcy code to prevent dischargeability of tort damages awards. My suggestions are intended to address the dearth of attention paid to critical issues regarding the scope of lawyer and judicial intervention, timing of sanctions, awarding of damages, and removal of doctrinal obstacles.

Intentional torts require a legal regime that affords predictable remedies for the victims, a framework that will facilitate torts' deterrence function while avoiding a minefield of perverse incentives that currently sabotage many criminal justice efforts to curb domestic violence. Although liability should clearly be predicated on proof of the batterer's intentional, harmful conduct, scant attention has been paid to firmly entrenched doctrinal obstacles that must be removed if abuse victims are to benefit from the progress toward equitable resolutions in tort.

Battered women are crime victims who suffer physical, psychological, sexual, and financial harms. The current legal system does not begin to provide compensation, restitution, or funds for survivors to return to normalcy, as it focuses on terminating the marriage;[5] division of property; and child custody, visitation, and support. This Article provides the means by which small changes in torts practice, easily accomplished through court and legislative advocacy, could remedy many of its present failings. Such reforms are much needed and are consistent with the principles of tort. It is furthermore completely theoretically and jurisprudentially accurate to use tort law in redress for domestic violence harms.

I

CULTURAL NORMS OF DOMESTIC VIOLENCE TORT LITIGATION

A. Use of Tort as a Domestic Violence[6] Remedy

Tort laws' purposes are at least fivefold: corrective justice,[7]

[5] This Article will focus primarily on utilization of tort within the realm of divorce; however, most of the theory, arguments, and recommendations apply equally in cases of unmarried abuse victims seeking compensation for their harm.

[6] Although the criminal law definition of domestic violence is typically limited to physical or sexual assault or threats in civil law, and torts in particular, psychological abuse is also considered within the rubric of domestic violence. *See infra* Part I.A.2. discussing the full spectrum of abuse. I will interchangeably use the terms domestic violence, domestic abuse, partner abuse, intimate partner abuse, and spousal assault to refer to the inclusive definition as described herein.

[7] KENNETH S. ABRAHAM, THE FORMS AND FUNCTIONS OF TORT LAW 14 (1997).

optimal deterrence,[8] loss distribution,[9] compensation,[10] and redress for social grievances.[11] Although these doctrines seem to fit the facts in the vast majority of partner abuse cases, rarely are they argued on behalf of even severely harmed spouses. The polemics of tort litigation raise the normative question: in which genres of law should intimate partner violence be addressed?

Some battered women attempting to have the perpetrators prosecuted for clear violations of criminal statutes find the state unwilling to treat their cases as serious, violent crime.[12] Instead, victims may be referred to family court, perpetuating the archaic notion that domestic violence is a private family matter to be resolved as a relationship dispute.[13] But family law is largely premised on the belief that only minimal state intervention is warranted absent the most egregious, near-fatal conduct, with the greatest emphasis on no-fault divorce as the means to expeditious resolution of the cases.[14] Dropped at the doorstep of tort law, battered spouses face the prospect of too-brief statutes of limitations, confusing joinder mandates, and difficulty in collecting judgments.[15] It makes sense that criminal, family, and tort law be employed, as case facts warrant, in reforming policy and practice in domestic violence cases.

1. Why the Dearth of Cases?

One would assume that any potentially lucrative area of personal injury law would be taught, studied, practiced, reported, and an integral part of the scholarly discourse on torts. Yet relative to other areas of tort, sparse case law and literature exist on the topic of domestic violence,[16] in spite of its damages potential

[8] *Id*. at 15.

[9] *Id*. at 16.

[10] *Id*. at 18.

[11] *Id*. at 19.

[12] *See, e.g.*, 2003 ILL. LAWS 416 ("WHEREAS, Recent national studies demonstrate that women in the United States continue to be greatly harmed by gender-related violence such as domestic violence, which is disproportionately visited upon women by men, and sexual abuse, which harms many women and children without being reported or prosecuted. . .") (for full preamble, *see infra* note 448 and accompanying text).

[13] *See infra* Part II.

[14] *See id*.

[15] *See infra* Parts III, IV, and V.

[16] Some notable exceptions include: Clare Dalton, *Domestic Violence, Domestic Torts and Divorce: Constraints and Possibilities*, 31 NEW ENG. L. REV. 319 (1997); Jennifer Wriggins, *Domestic Violence Torts*, 75 S. CAL. L. REV. 121 (2001).

and the deleterious impact on direct victims,[17] children witnessing the abuse,[18] and the greater community.[19] It is understandable that few abuse victims initiate discussion with their divorce lawyers about tort actions,[20] simply because most have no knowledge of this option. They also may be unaware of their status as abuse victims,[21] or fear retaliation from the batterer for disclosing the harm.[22] But given that the majority of women suing for divorce claim domestic violence as a precipitating factor,[23] it is puzzling that family law practitioners do not file tort actions more frequently. In some cases, the client is more interested in gaining custody of her children and remaining safe; thus she is unwilling to risk antagonizing the batterer with additional legal claims.[24] Most lawyers and judges are not familiar with the basic dynamics of domestic violence relationships, and thus have no concept of the heightened psychological, verbal, financial, and physical abuse typically suffered by abuse victims.[25] That being said, courts are gradually acknowledging the need to compensate

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[17] *See, e.g.*, Caroline M. Clements et al., *Dysphoria and Hopelessness Following Battering: The Role of Perceived Control, Coping and Self-Esteem*, 19 J. OF FAM. VIOLENCE 25 (2004) (citing empirical data documenting that increased physical mortality and morbidity, depression, and low self-esteem are but a few of the many consequences of domestic abuse).

[18] *See, e.g.*, Joanne G. Cummings et al., *Behavior Problems in Children Exposed to Wife Abuse: Gender Differences*, 14 J. FAM. VIOLENCE 133-56 (1999) (describing the adverse influence of simply witnessing abuse, but also the trauma of being harmed while trying to protect an abused mother).

[19] Intimate partner violence costs businesses an estimated $3-5 billion per year in absenteeism, higher insurance costs, employee turnovers, and lost productivity. *See* Centers for Disease Control Intimate Partner Violence Report, *available at* www.cdc.gov/ncipc/pub-res/ipv-cost/IPVBook-Final-Feb18.pdf.

[20] *See* Dalton, *supra* note 17, at 395 n.20. ("Among approximately 2600 reported state cases of battery, assault, or both, from 1981 through 1990, only fifty-three involved adult parties in domestic relationships."). **R**

[21] *See* Barbara Glesner Fines, *Joinder of Tort Claims in Divorce Actions*, 12 J. AM. ACAD. MATRIMONIAL L. 285, 301-02 (1994).

[22] *See* Dalton, *supra* note 17, at 364-71. **R**

[23] *See* Brennan v. Orban, 678 A.2d 667, 675 (N.J. 1996) (citing Linda L. Ammons, *Discretionary Justice: A Legal and Policy Analysis of a Governor's Use of the Clemency Power in the Cases of Incarcerated Battered Women*, 3 J.L. & POL'Y 1, 5 (1994)).

[24] *See* Dalton, *supra* note 17, at 364-71. **R**

[25] Since 1977, I have been a battered women's advocate in Colorado, Massachusetts, New Hampshire, New York, Texas, and Washington (as a shelter advocate, paralegal, and then prosecutor). For the past fifteen years, I have also provided much training and technical assistance to courts and community domestic violence programs in every state, served on the boards of national, state, and local family violence entities, and continue to regularly research, write, and speak on these issues. My cumulative experiences are reflected throughout the Article.

spouses for intentional harms inflicted during the marriage.[26] Additionally, there are exemplary judges and lawyers who have educated themselves thoroughly on family violence matters and implemented model programs that transformed victim and offender interventions.[27]

Many attorneys falsely believe that the collectible damages will be insufficient to make tort suits worthwhile, based on their assumption that most batterers are middle or low-income.[28] Some empirical studies have documented the prevalence of domestic violence across all income strata, with similar levels of frequency and severity,[29] although others indicate a higher incidence among low-income couples.[30] High-income victims tend not to avail themselves of public services such as police, courts, or shelters, instead suffering in silence.[31] Wealthy battered women also face abusers with the means to relentlessly stalk and trace them. Because the batterer often controls all finances of the couple, the victim may have no access to the funds needed to flee unless she can access public assistance.[32] However, the couple may possess substantial assets, some of which have likely been hidden from

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[26] *See, e.g.*, *In re* Marriage of Moore, 890 S.W.2d 821, 828 (Tex. App. 1994) (stating that in the context of divorce, a spouse may recover for intentional torts committed during the marriage).

[27] For further information on model programs and promising practices, *see* National Council of Juvenile and Family Court Judges, www.ncjfcj.org, 1-800-52-PEACE; Battered Women's Justice Project, 1-800-903-0111.

[28] *See, e.g.*, Heather Lauren Hughes, *Contradictions, Open Secrets and Feminist Faith in Enlightenment*, 13 HASTINGS WOMEN'S L.J. 187, 190 n.10 (2002) (stating that one explanation for the low number of tort suits against batterers could be the belief that these cases provide inadequate incentive due to minimal potential damages).

[29] *See* LENORE E. WALKER, THE BATTERED WOMAN 18-19 (1979) (finding that upper income women were beaten just as often and severely as low-income victims).

[30] The Bureau of Justice Statistics reports that women with an annual income under $7,500 have substantially higher rates of violence by an intimate partner (e.g., 22.5 per 1,000 as compared to 12.5 per 1,000 in the $7,500 to $14,999 bracket); *see also* Angela M. Moore, *Intimate Violence: Does Socioeconomic Status Matter?*, *in* VIOLENCE BETWEEN INTIMATE PARTNERS 90 (Albert P. Cardarelli ed., 1997) (discussing the disproportionate incidence of domestic violence among low-income groups).

[31] *See, e.g.*, Hillary Johnson & Francine G. Hermeün, *The Truth About White-Collar Domestic Violence*, WORKING WOMAN, Mar. 1, 1995, at 54 (reporting that "for a vast number of middle- or upper-class women, many of them professionals, domestic violence is a secret, usually silent affair").

[32] *See* Noël Bridget Busch & Terry A. Wolfer, *Battered Women Speak Out, Welfare Reform and Their Decisions to Disclose*, 8 VIOLENCE AGAINST WOMEN 566, 567 (2002) (stating that many battered women use welfare as a means to get out of a violent relationship).

the victim, which the lawyer may access for her fees and for damages in a tort action.[33] Overall, however, the impoverished state of many low-income victims makes their ability to escape from the abuse and retain counsel all the more difficult.[34]

Lawyers handle a wide range of cases for which there may not be a multi-million dollar award, and with domestic violence tort actions there is still much room to both garner an equitable settlement for an abuse victim and collect a profitable fee. For example, a Maine attorney reports that in one domestic violence case the victim was able to obtain a settlement of $25,000, over and above her share of the marital estate.[35] A Virginia lawyer obtained a $50,000 judgment on behalf of a battered woman whose husband had pistol-whipped her.[36] Increasingly, albeit at a frustratingly sluggish pace, some victims are successfully suing their abusers as well as negligent third parties. In 2003, a Massachusetts superior court awarded $9 million to a battered woman left paralyzed by her former boyfriend.[37] Tanya Underhill filed the tort suit after Paul Rathbun broke her neck as he wrenched her from a car at the Eastover Resort in 2000. Rathbun is now serving a fifteen-to-twenty year sentence for the assault, thus minimizing the likelihood that Ms. Underhill will ever receive her award. Although it refused to disclose the details of the settlement, the Eastover Resort earlier settled the case Underhill brought against it for $500,000.[38] It is not the purpose of this Article to address tort litigation against culpable third parties,

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[33] *See, e.g.*, Belz v. Belz, 667 S.W.2d 240 (Tex. App. 1984). The trial court submitted the issue of fraud against the community as a separate action in tort for fraud, for which the jury found the husband guilty and awarded the wife actual damages, exemplary damages, and attorneys fees.

[34] *See, e.g.*, Stacey L. Williams & Kristin D. Mickelson, *The Nexus of Domestic Violence and Poverty*, 10 VIOLENCE AGAINST WOMEN 283, 289 (2004) (reporting that low-income women have heightened anxiety and low self-esteem in the aftermath of abuse, in part due to lack of support and the inability to obtain the resources that could buffer them).

[35] E-mail from Judith A. Plano, attorney in Bangor, Maine (Feb. 2, 2004) (on file with author).

[36] E-mail from Charles Hofheimer, attorney (Feb. 17, 2004) (on file with author). The case was heard in Chesapeake Virginia circuit court, with Thomas Shuttleworth and Charles Hofheimer as co-counsel for the Plaintiff. Attorney Hofheimer states that because there was no insurance, the client settled the judgment for significantly less without consulting counsel.

[37] *Domestic Violence Victim Awarded $9 Million Dollars*, Dec. 14, 2003, *at* http://www.wmnbfm.com/news.php3?story_id=5197 (last visited Feb. 24, 2005).

[38] *Id*.

but counsel is ethically bound to investigate this option and advise clients of possible causes of action.

Those few attorneys who have handled domestic violence tort actions often express a general distaste for these cases, based in large part on their aversion to the grievous nature of the batterer's conduct. Several women lawyers with whom I spoke confided personal fear of the batterers. One had her office destroyed the night after a case (involving a wealthy doctor who had brutally assaulted his eight-months-pregnant wife) settled for $3 million.[39] Blame for the dearth of tort cases as redress for domestic abuse cannot be laid only at the doorstep of uninformed or fearful lawyers, for legislators and judges are stakeholders in the symbiotic process of maintaining the status quo. The underutilization of tort as a remedy for abuse victims reflects cultural norms based on a combination of aversion to prolonged divorce litigation and gendered socialization about naming, compensation, and redress.

Naming relates to many of the privacy concerns discussed herein; that is, not wanting to publicly air personal relationship problems. This trepidation is particularly acute for women of color, who often feel the added pressure of not wanting to contribute to the litany of existing negative stereotypes about their people.[40] Lesbian and gay victims report the same reluctance to not further demonize homosexual relationships, but also that they may pay too high a price for being "outed": rejection by family, loss of job, and condemnation by their church commu-

[39] Although colleagues have encouraged this lawyer to file charges against the batterer, he is a prominent Houston physician and she is sufficiently concerned for her continued safety to have decided not to handle any more domestic violence matters. At this point, she is speaking on the condition of anonymity.

[40] *See* Linda L. Ammons, *Mules, Madonnas, Babies, Bath Water, Racial Imagery and Stereotypes: The African-American Woman and the Battered Woman Syndrome*, 1995 WIS. L. REV. 1003, 1024-25:

> The loyalty trap affects the ability of black women to seek protection and effective counseling. For example, African-American women do not feel comfortable discussing their problems in integrated settings. The fear is that disclosure in some way may hurt the community. Therefore the [cultural] prohibition against airing dirty laundry becomes more important than healing. Emma Jordan Coleman describes the dilemma abused black women face as a "Hobbesian choice between claiming individual protection as a member of her gender and race or contributing to the collective stigma upon her race if she decides to report the misdeeds of a black man to white authority figures.

nity.[41] Self-esteem is highly correlated with whether one feels worthy of compensation and redress. Since survivors often experience low self-worth and blame themselves for their abuse, it may be hard for them to conceptualize themselves as deserving any legal remedies, let alone monetary damages.

Geography, race, culture, religion, and socioeconomic status further impact usage of the legal system,[42] and specifically, filing tort claims against batterers. Some battered women are forced to stay with abusive partners for economic reasons, as coping with such trauma exacerbates their financial woes by making it more difficult to find and maintain employment.[43] Although researchers report finding a higher incidence of domestic violence against African-American women, Professor Amy Farmer argues that this is almost wholly tied to their level of education being less than that of white women, and thus the greater likelihood of being low-income.[44] She notes that after controlling the data for the variables of income, level of education, living in the South, and having children under twelve, white women were more often battered than Hispanic or African-American women.[45] Importantly, Professor Farmer emphasizes that it is a victim's ability to earn a living, as opposed to simply family income, that creates greater opportunity for her to leave.[46] Since many batterers prevent their partners from getting higher education or technical

41 *See* Nancy J. Knauer, *Same-Sex Domestic Violence: Claiming a Domestic Sphere While Risking Negative Stereotypes*, 8 TEMP. POL. & CIV. RTS. L. REV. 325, 331 (1999); Nancy E. Murphy, *Queer Justice: Equal Protection for Victims of Same-Sex Domestic Violence*, 30 VAL. U. L. REV. 335 (1995); *see also* VIOLENCE IN GAY AND LESBIAN DOMESTIC PARTNERSHIPS (Claire M. Renzetti & Charles Harvey Miley eds., 1996); Patrick Letellier, *Gay and Bisexual Male Domestic Violence Victimization: Challenges to Feminist Theory and Responses to Violence*, 9 VIOLENCE & VICTIMS 95 (1994); Ruthann Robson, *Lavender Bruises: Intra-Lesbian Violence, Law and Lesbian Legal Theory*, 20 GOLDEN GATE U. L. REV. 567 (1990).

42 *See, e.g.*, Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991).

43 *See, e.g.*, Williams & Mickelson, *supra* note 34 at 289; *see also* Martha F. Davis, *The Economics of Abuse: How Violence Perpetuates Women's Poverty*, *in* BATTERED WOMEN, CHILDREN, AND WELFARE REFORM 17 (Ruth A. Brandweir ed., 1999).

44 *UA Researcher Cites Legal Aid, Age For Less Abuse of Women*, THE COMMERCIAL APPEAL (Memphis, TN), Nov. 30, 2002, at B5 (reporting that while Farmer's research initially found that African American women were 35% more likely to be abused, it is necessary to control for income, education, children under twelve, and living in the South to gain a more accurate picture of racial implications), *available at* 2002 WL 102832863.

45 *Id*.

46 *Id*.

training, such interference should be included in damages calculations. Fortunately, most abuse victims eventually escape the abuse,[47] but whether they are able to rebuild safe and meaningful lives may depend on finding a competent lawyer who can help protect them from the perpetrator,[48] including securing the financial remuneration to which they are entitled.

Women from families and cultures that revere traditional, patriarchal[49] social norms are also less apt to identify maltreatment as abuse, and are highly unlikely to report the harm to a lawyer, doctor, the court, or police. This is particularly so for immigrants, those for whom English is not their first language or who do not speak it at all,[50] and for isolated women of color.[51] Gender analysis loses a critical dimension without addressing how race and racism influence the incidence of domestic violence and the legal system's response. The dearth of tort cases either within or subsequent to divorces may also reflect the reality that most family law matters are not reported or appealed.

2. Recognition of the Full Spectrum of Abuse

Doctrinal obstacles mute the *scope and severity* of physical,

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[47] *See* Desmond Ellis & Walter S. DeKeseredy, *Rethinking Estrangement, Interventions and Intimate Femicide*, 3 VIOLENCE AGAINST WOMEN 590 (1997).

[48] *See supra* note 44 (reporting findings that access to legal services is the greatest predictor of women achieving safety).

[49] Professor Catharine MacKinnon's widely accepted definition of patriarchy is that of justifying male domination over women. Catherine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS: J. WOM. CULTURE & SOC'Y 635 (1983).

[50] *See, e.g.*, Farah Ahmad et al., *Patriarchal Beliefs and Perceptions of Abuse Among South Asian Immigrant Women*, 10 VIOLENCE AGAINST WOMEN 262 (2004) (reporting their study finding that women who agreed with patriarchal social norms were less likely to identify physical battery as spouse abuse, and almost half of the women in the study did not know they could discuss abuse concerns with medical providers); *see generally* MARGARET ABRAHAM, SPEAKING THE UNSPEAKABLE (2000); A.D. Kulwicki and J. Miller, *Domestic Abuse in the Arab American Population: Transforming Environmental Conditions Through Community Education*, 20 ISSUES IN MENTAL HEALTH NURSING 199-215 (1999); Anita Sharma, *Healing the Wounds of Domestic Abuse: Improving the Effectiveness of Feminist Therapeutic Interventions With Immigrant and Racially Visible Women Who Have Been Abused*, 7 VIOLENCE AGAINST WOMEN 1405 (2001).

[51] *See* Shelby A.D. Moore, *Understanding the Connection Between Domestic Violence, Crime, and Poverty: How Welfare Reform May Keep Battered Women from Leaving Abusive Relationships*, 12 TEXAS J. WOM. & L. 451 (2003); *see also* BETH E. RICHIE, COMPELLED TO CRIME 2 (1996) (stating that "[t]he extent to which some women experience this predicament [domestic violence] is directly related to the degree of stigma, isolation, and marginalization imposed by their social position").

sexual, psychological, and economic abuse often perpetrated against women in intimate relationships.[52] Although those subjected to one type of victimization are likely also to be exposed to other forms,[53] most legal and medical providers do not routinely screen for multiple permutations of abuse.[54] Intimate partner violence is characterized by intentional harms to persons and their property for which the victims should be compensated.[55] Such harms encompass the traditional torts of assault,[56] battery,[57] harassment, stalking,[58] false imprisonment,[59] intentional infliction of emotional distress,[60] trespass to land, fraud,[61] and conver-

[52] *See, e.g.*, Shannon-Lee Meyer et al., *Men's Sexual Aggression in Marriage*, 4 VIOLENCE AGAINST WOMEN 415 (1998) (finding that while all forms of abuse are underreported, sexual violence is typically not acknowledged unless specifically included in screening); *see also* PATRICIA EVANS, THE VERBALLY ABUSIVE RELATIONSHIP 42-50 (1992) (discussing the adverse consequences of verbal abuse).

[53] *See, e.g.*, Victoria M. Follette et al., *Cumulative Trauma: The Impact of Child Sexual Abuse, Adult Sexual Assault, and Spouse Abuse*, 9 J. OF TRAUMATIC STRESS 25 (1996) (stating that data indicate a high co-incidence of various forms of abuse); *see also* Heidi S. Resnick et al., *Prevalence of Civilian Trauma and Posttraumatic Stress Disorder in a Representative National Sample of Women*, 61 J. CONSULTING & CLINICAL PSYCHOL. 984 (1993).

[54] *See* Jeannine Monnier et al., *Patterns of Assault in a Sample of Recent Rape Victims*, 8 VIOLENCE AGAINST WOMEN 585, 593 (2002) (finding in their study that 60% of rape victims had previously suffered sexual assault, 49% experienced prior physical assaults, and 17% reported physical abuse after the last rape).

[55] *See, e.g.*, *In re* Matter of Marriage of Moore, 890 S.W.2d 821, 828 (Tex. App. 1994) (stating that in the context of divorce, a spouse may recover for intentional torts committed during the marriage).

[56] *See, e.g.*, Hogenson v. Williams, 542 S.W.2d 456, 458 (Tex. App. 1976) (defining a tortious civil assault as one in which a person intentionally, knowingly, or recklessly causes bodily injury to another).

[57] Assault and battery herein refers not only to the stereotypical punches, kicks, and other forms of physical abuse, but also to the sexual assault frequently co-occurring in long-term, violent relationships. *See* Angela Browne, *Violence Against Women By Male Partners*, 48 AM. PSYCHOLOGIST 1077 (1993) (reporting that women battered by intimate partners also experienced a high incidence of sexual assault).

[58] *See, e.g.*, Megan Rhyne, *Spying Spouse May Be Guilty of Stalking*, NAT'L L. J., Feb. 17, 2003, at B1 (citing H.E.S. v. J.C.S., 175 N.J. 309 (2003)) (describing the ruling that a husband's secret videotaping of his wife's bedroom likely constitutes stalking and harassment).

[59] *See, e.g.*, Deleon v. Hernandez, 814 S.W.2d 531 (Tex. App. 1991) (wife sought civil damages for false imprisonment).

[60] *See infra* notes 208-18 and accompanying text for examples of IIED cases.

[61] Marital fraud includes misrepresentations that are acted upon and cause harm, also constituting breach of the fiduciary duties that spouses owe each other. *See, e.g.*, *In re* Marriage of Murray, 124 Cal. Rptr. 2d 342, 356 (Ct. App. 2002) (citing CAL. CIVIL CODE § 3294 as permitting punitive damages when fraud is committed); *see also* Vickery v. Vickery, 999 S.W.2d 342, 357 (Tex. 1999) (affirming that spouses are bound by the fiduciary duties in handling the community estate).

sion,[62] but often as multiple violations, with the added component of incessant fear.[63]

The term "separation violence" was coined to describe the all too common abuse that the batterer inflicts after the victim has fled.[64] Feeling that he is losing control of her, the batterer may escalate the violence,[65] and even murder his partner.[66] It is thus irresponsible and unethical to give a battered client the simplistic advice to leave, without preparing a safety plan.[67] Absent a short- and long-term safety plan, the victim is placed in the untenable position of having to placate a volatile batterer, while simultaneously trying to secure legal remedies, achieve financial independence, and secure safety for herself and her children.

In preparing an individualized safety plan, counsel should carefully inquire about the degree to which the client has been subjected to sexual abuse in addition to physical battery. Recent studies have documented that sexually sadistic men are more

[62] *See, e.g.*, Eskine v. Eskine, 428 So.2d 1194 (La. App. 1983) (permitting wife to sue husband for tortious conversion).

[63] *See* Ruth E. Fleury et al., *When Ending the Relationship Does Not End the Violence: Women's Experiences of Violence by Former Partners*, 6 VIOLENCE AGAINST WOMEN 1363 (2000) (reporting that in their research, more than one third of the women who participated in their longitudinal study were assaulted by a male ex-partner during a two-year time period).

[64] *See* RENNISON, *supra* note 5, at 5 (finding that separated females are victimized more often than married, divorced, widowed, or never-married women). **R**

[65] Dana Raigrodski, *Consent Engendered: A Feminist Critique of Consensual Fourth Amendment Searches*, 16 HASTINGS WOMEN'S L.J. 37, 53 (2004) (describing separation abuse as exposing "women to increased violence when they try to leave); *see also* Deborah Tuerkheimer, *Recognizing and Remedying the Harm of Battering: A Call to Criminalize Domestic Violence*, 94 J. CRIM. L. & CRIMINOLOGY 959, 1005 n.229 (2004) (discussing separation assault).

[66] *See* CONSTANCE A. BEAN, WOMEN MURDERED BY THE MEN THEY LOVED (1992); *see also* ANGELA BROWNE, WHEN BATTERED WOMEN KILL (1986); Carolyn Rebecca Block & Antigone Christakos, *Intimate Partner Homicide in Chicago over 29 Years*, 41 CRIME & DELINQ. 496, 526 (1995); Aysan Sev'er, *Recent or Imminent Separation and Intimate Violence Against Women: A Conceptual Overview and Some Canadian Examples*, 3 VIOLENCE AGAINST WOMEN 566 (1997); Margo I. Wilson & Martin Daly, *Who Kills Whom in Spousal Killings? On the Exceptional Sex Ratio of Spousal Homicides in the United States*, 30 CRIMINOLOGY 189, 215 (1992).

[67] Even if the battered client has already left her abuser, counsel should ensure she has a safety plan in place. A safety plan is a well organized action plan to assist the victim in staying alive that addresses the varied circumstances of the victim. A safety plan brochure is available for download from the website of the American Bar Association. Safety Tips for You and Your Family, Am. Bar Ass'n, *at* http://abanet.org/tips/publicservice/safetipseng.html (last visited Mar. 14, 2005). The safety plans are intentionally not copyrighted to encourage their replication and distribution. *See* Sarah M. Buel, *Safety Planning Begins with You*, TEX. PROSECUTOR, Sept. 1996, at 21.

likely to inflict severe physical abuse, sometimes even murdering their partners.[68] Additionally, studies indicate that batterers who are sexually sadistic toward adult partners are also far more likely to perpetrate incest against their own children.[69] Similar to the "morally indiscriminate" child molester, the sexually sadistic offender often exploits any vulnerable, available victim.[70] These findings indicate that when counsel determines that a sexual sadist has victimized her client, she should explore the possibility that child sexual abuse is also present, and if applicable, explore tort remedies on the child's behalf.

A common tactic of batterers going through divorce proceedings is to claim that the victims are either mutually combative or the sole aggressors. Although there exist a small minority of women who initiate abuse, experts warn that most often it is the male who perpetrates the violence.[71] Professor Jeffrey Edelson, researcher and expert in family violence, further asserts that the myth of women as equally violent is politically motivated backlash intended to intimidate true victims.[72] An isolated incident often does not accurately reflect who is the true victim and who is the abuser. Domestic violence is a planned *pattern* of abuse that reflects the perpetrator's belief that he is entitled to use violence if his partner is not sufficiently solicitous, obedient, loyal, or compliant.[73]

Even this simplified insight into the dynamics of battering can help lawyers and judges understand that mutual battering is extraordinarily rare: a domestic violence relationship is typified by

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[68] *See* Janet I. Warren & Robert R. Hazelwood, *Relational Patterns Associated with Sexual Sadism: A Study of 20 Wives and Girlfriends*, 17 J. FAM. VIOLENCE 75, 80 (2002) (stating that sadistic men are likely to inflict many forms of severe physical abuse, including murdering people other than their partners, sometimes with the help of their partners), *available at* http://www.kluweronline.com/issn/0885-7482/contents; *see also* Park Elliot Dietz et al., *The Sexually Sadistic Criminal and His Offenses*, 18 BULL. AM. ACAD. PSYCHIATRY & L. 163 (1990).

[69] Warren & Hazelwood, *supra* note 69, at 267. **R**

[70] *Id*. at 267-68.

[71] See Jeffrey L. Edleson, *Fact & Fantasy: Violent Women: Social Service Agencies Have a Responsibility to Know the Difference*, DOMESTIC ABUSE PROJECT TRAINING & RESEARCH UPDATE, June 1998, *available at* http://www.mincava.umn.edu/papers/jeffdap.htm (last visited Mar. 14, 2005).

[72] *Id*. Professor Edleson suggests utilizing NANCIE HAMLETT & CAROL J. FRICK, WOMEN WHO ABUSE IN INTIMATE RELATIONSHIPS (1998), to better assess women and their stories of abuse.

[73] David Adams, *Treatment Programs for Batterers*, 5 CLINICS FAM. PRAC. 159 (2003).

a persistent batterer and a designated victim.[74] A survivor's use of force in response to certain situations does not make her a batterer. It is the perpetrator who employs terroristic conduct—physical, psychological, sexual, financial, and individualized abuse—to solidify control of his partner.[75] Both during and after the divorce, the offender often tenaciously continues his pattern of abuse in whatever manner the court and police allow. If the court takes victim safety seriously and enforces protective orders, the batterer may resort to more covert tactics, such that he is still able to terrify the victim, but her pleas for help are viewed as exaggerated, neurotic, paranoid, or unwarranted.[76]

Perhaps "separation abuse" would be more accurate, as batterers may stop the physical assaults, but continue harassment, psychological and economic coercion, and any other behavior designed to retain control of their victims. Judges and juries may minimize psychological abuse if counsel does not adequately educate them about compelling empirical data documenting the grievous harm it confers, whether or not there are evident physical manifestations.[77] Batterers frequently sabotage victims' efforts to seek and maintain employment,[78] causing tardiness, absenteeism, and harassment that may result in the women being fired.[79] When they are able to work outside the home, victims are often denied access to their own earnings as well as those of

[74] *See id*.; Linda C. Neilson, *Assessing Mutual Partner-Abuse Claims in Child Custody and Access Cases*, 42 FAM. CT. REV. 411, 420 (2004) (noting that batterer's claims of mutual abuse are typical in family abuse cases).

[75] Neilson, *supra* note 75, at 417-18. **R**

[76] Note that no-fault does allow for consideration of misconduct in determining child custody. *See, e.g.*, Chapman v. Chapman, 498 S.W.2d 134, 137 (Ky. 1973) (quoting KY. REV. STAT. ANN § 403.110: "This chapter shall be liberally construed and applied to promote its underlying purposes, which are to: . . . (3) Mitigate the potential harm to the spouses and their children caused by the process of legal dissolution of marriage.")

[77] *See, e.g.*, Bruce D. Perry & John Marcellus, *The Impact of Abuse and Neglect on the Developing Brain*, *available at* http://teacher.scholastic.com/professional/bruceperry/abuse_neglect.htm (last visited Jan. 22, 2005). When children are exposed to domestic violence or physically abused themselves, their neurodevelopment is stunted by having to remain in a state of fear-related activation during the traumatic experience.

[78] Shelly Kinzel, Comment, *The Effects of Domestic Violence on Welfare Reform: An Assessment of the Personal Responsibility and Work Opportunity Reconciliation Act as Applied to Battered Women*, 50 U. KAN. L. REV. 591, 593 (2002).

[79] *See* Jody Raphael, *Keeping Women Poor: How Domestic Violence Prevents Women from Leaving Welfare and Entering the World of Work*, *in* BATTERED WOMEN, CHILDREN, AND WELFARE REFORM 31 (Ruth A. Brandwein ed., 1999).

their partners.[80] Thus, not only do separation and divorce not solve the problem of abuse,[81] but they may, in fact, operate to sufficiently deter the victim from filing tort claims or taking other legal action to obtain remedies. The full spectrum of abuse reminds the victim of her batterer's potential for violence, effectively intimidating many victims desiring just compensation. It is incumbent upon counsel to include all of the economic and psychological abuse suffered by the survivor in calculating both compensatory and punitive damages.

Given the frequency of intimidation and harm committed by batterers *after* separation and during dissolution proceedings, counsel should advise her client that every state prohibits witness tampering once a criminal case has been reported.[82] Whether or not a battered client is concomitantly pursuing a criminal case against the perpetrator, counsel should use the terminology, definitions, and intent evidenced in witness tampering statutes when presenting the tort claim. For example, in most states these obstruction laws are considered felony level offenses in recognition of the likelihood of the perpetrator's success: many victims and witnesses are deterred from continuing participation in the criminal matter precisely because they fear the offender's retaliation.[83] Counsel will also want to advise his client that offering any financial inducement also constitutes obstruction of justice[84] as the sophisticated batterer may proffer jewelry, cash, or other tempting goods rather than threaten further violence. Even statutes that do not specifically provide for such bribes have general language that covers seemingly innocuous offers that serve the

[80] Kinzel, *supra* note 79, at 593. **R**

[81] Eve Buzawa et al., U.S. DEP'T OF JUST., *Response to Domestic Violence in a Pro-Active Court Setting: Executive Summary* (1999).

[82] *See, e.g.*, ALASKA STAT. § 11.56.540 (Michie 2004) (tampering with a witness in the first degree); FLA. STAT. ANN. § 914.22 (West 2004) (tampering with a witness, victim, or informant); MASS. GEN. LAWS ANN. Ch. 268, § 13B (West 2004) (intimidation of witnesses, jurors and persons furnishing information in connection with criminal proceedings); N.Y. PENAL LAW § 215.10 (McKinney 2004) (tampering with a witness in the fourth degree); TEX. PENAL CODE ANN. § 36.06 (Vernon 2004) (obstruction or retaliation).

[83] *See, e.g.*, ALASKA STAT. § 11.56.540 (tampering with a witness in the first degree is a class C felony); FLA. STAT. ANN. § 914.22 (tampering with a witness, victim, or informant constitutes a third degree felony); TEX. PENAL CODE ANN. § 36.06 (obstruction or retaliation is a third degree felony).

[84] *See, e.g.*, MASS. GEN. LAWS ANN. CH. 268 § 13B, which states that, "Whoever, directly or indirectly, willfully endeavors by means of a gift, offer or promise of anything of value. . . to influence, impede, obstruct, delay or otherwise interfere with any witness. . . shall be punished."

same function as threats or violence.[85]

Importantly, some jurisdictions do not limit their witness protections to those involved solely in criminal cases. Florida's statute provides that a person cannot use physical force, threats, or offer of financial gain with the intent to cause the witness to decline participation in an official investigation or official proceeding.[86] New York offers similar protection by referencing "an action or proceeding,"[87] and Alaska cites "an official proceeding; or . . . judicial proceeding to which the witness has been summoned."[88] By not limiting their purview to criminal cases, Alaska, Florida, and New York have given family law attorneys and their clients another vehicle through which they can hold batterers responsible for the true scope of their abuse. Witness tampering is arguably the single most frequent offense committed against domestic violence victims, yet the least prosecuted in spite of its deleterious impact on the victim's ability to seek legal remedies.

B. Acculturated Non-Empathy for Abuse Victims

Continued antipathy toward domestic violence survivors helps explain the persistence of doctrinal obstacles to their accessing well-established tort remedies. Some feminist analysis would attribute the impediments to the legal system's patriarchal power structure that perpetuates social norms of male domination. Postmodern feminists, however, would argue for a more nuanced approach, as there are varying levels of antagonism exhibited toward battered women depending on their race, culture, socio-economic status, sexual orientation, ability to speak English, and connections within the court system.

1. Selective Empathy and the Illusion of Neutrality

Selective empathy is inexorably predicated on the values of the judges, lawyers, and other stakeholders[89] involved in domestic vi-

[85] *See, e.g.*, ALASKA STAT. ANN. § 11.56.540(a) ("A person commits the crime of tampering with a witness in the first degree if the person knowingly induces or attempts to induce a witness to (1) testify falsely, offer misleading testimony in an official proceeding. . . .")

[86] FLA. STAT. ANN. § 914.22 (1)(a).

[87] N.Y. PENAL LAW § 215.10.

[88] ALASKA STAT. § 11.56.540(1), (2).

[89] Susan A. Bandes, *Introduction to* THE PASSIONS OF LAW 6 (Susan A. Bandes ed., 1999).

olence cases. Attempting to rationally dissect such cases leads many jurists to incorrectly analyze the framework of abuse, and thus dissociate from the victims.[90] In one essay, Judge Richard Posner states that the law must remain neutral regarding emotions unless they serve a legal purpose, such as in evaluating heat of passion crimes.[91] He cites curbing dangerous activity as the goal of criminal law, noting that in most crimes of passion the victim has provoked the perpetrator.[92] This simplistic generalization reflects an extraordinary ignorance of the dynamics of domestic violence relationships. For at least three decades, batterer's treatment experts have asserted that abuse is a *choice*; it is a planned pattern of coercive control that is predicated not on the victim's behavior, but on the perpetrator's willingness to use violence to achieve his ends.[93] By attributing all or much of the blame to the victim, legal professionals can more easily justify relegating domestic violence matters to a low priority.

Particularly relevant is that domestic violence is also highly gendered, with females far more frequently victimized by male perpetrators than the reverse.[94] When asked by a reporter if he thought there were just as many battered men as battered women, former Dallas Police Detective Steve Storrie responded, "If that was true, those domestic violence shelters would have valet parking in the front and golf courses in the back. We wouldn't stand for how badly battered women get treated by the system."[95] But not all law enforcement officers have the compassion and courage of Detective Storrie. Former Seattle Police Chief Norm Stamper writes, "One detective, unburdened by sensitivity, told me, 'You spend your days handing Kleenexes to some sobbing broad whose old man gave her what she de-

[90] See, e.g., Mary Becker, *The Passions of Battered Women: Cognitive Links Between Passion, Empathy, and Power*, 8 WM. & MARY J. OF WOMEN & L. 1 (2001).

[91] Richard A. Posner, *Emotion Versus Emotionalism in Law*, *in* THE PASSIONS OF LAW, *supra* note 89, at 309, 312.

[92] *Id*.

[93] *See, e.g.*, Adams, *supra* note 73, at 163; Hamish Sinclair, *A Community Activist Response to Intimate Partner Violence*, *in* PROGRAMS FOR MEN WHO BATTER (Etiony Aldarondo & Fernando Mederos eds., 2002) 5/1; Peter G. Jaffe & Robert Geffner, *Child Custody Disputes and Domestic Violence: Critical Issues for Mental Health, Social Service, and Legal Professionals*, *in* CHILDREN EXPOSED TO MARITAL VIOLENCE 371 (George W. Holden et al. eds., 1998).

[94] RENNISON, *supra* note 5. R

[95] Statement made in the author's presence on February 16, 2000 in Dallas, Texas. Det. Storrie is a twenty-five-year veteran of the Dallas Police Department and the Dallas County Criminal District Attorney's Office.

served.'"[96] Understandably, when battered women have encountered such antipathy, they are not likely to have much confidence that the legal system will be of assistance.

Especially troubling is the pervasiveness of overt and subtle victim blaming that permeates our culture, even these many decades after heightened awareness of domestic violence and sexual assault. Former Colorado State Senator Joyce Lawrence, co-chair of a panel to examine the recent University of Colorado football team's sexual assault and harassment scandals, commented, "The question I have for the ladies in this is, Why are they going to parties like this and drinking or taking drugs and putting themselves in a very threatening position like this?"[97] Her response begs the question: "So, in spite of state laws to the contrary, women who attend college parties or consume alcohol or drugs have essentially given pre-consent to be raped?" Rape shield laws were intended to direct attention away from whether the victim was a "good girl," and correctly toward whether an unlawful sexual assault had occurred. Indeed, although three victims at the University of Colorado were at college parties when sexually assaulted by either football players or recruits, CU placekicker Katie Hnida reported being raped by a teammate when watching television on a summer evening.[98] Oklahoma athletic director Joe Castiglione advises, "[W]e need to step back and look at the culture that exists on our campuses."[99] But attitudes of entitlement are not limited to football players, nor is protection for perpetrators restricted to universities.

Professor Walter DeKeseredy, a noted researcher in the field of violence against women, found that most studies on marital rape focus only on what occurred during cohabitation, although there is substantial evidence that batterers are likely to increase sexual assaults of their partners *after* separation.[100] In a recent study, Martin D. Schwartz and Professor DeKeseredy asked participants if they had experienced any of the following four types

[96] NORM STAMPER, BREAKING RANKS: A TOP COP'S STREET-SMART PLAN TO MAKE AMERICA A SAFE PLACE – FOR EVERYONE 8 (2004).

[97] Kelli Anderson & George Dohrmann, *University of Colorado Recruiting Scandal; Out of Control?*, SPORTS ILLUSTRATED, Feb. 23, 2004, at 69.

[98] Rick Reilly, *Another Victim at Colorado*, SPORTS ILLUSTRATED, Feb. 23, 2004, at 80.

[99] Anderson and Dohrmann, *supra* note 98. **R**

[100] *See* Walter S. DeKeseredy et al., *Separation/Divorce Sexual Assault: The Current State of Social Scientific Knowledge*, 9 AGGRESSION & VIOLENT BEHAVIOR 675 (2004).

of conduct: (1) sexual contact,[101] (2) sexual coercion,[102] (3) attempted rape,[103] and (4) rape.[104] Incredibly, of the separated or divorced respondents, *eighty percent* had been victims of rape, *twenty percent* victims of attempted rape, *seventy-five percent* victims of sexual coercion, and *sixty-five percent* victims of sexual contact—with *eighty percent* having been subjected to more than one type of sexual abuse.[105] When asked about nonsexual types of abuse perpetrated against them by former spouses, eighty-five percent reported physical violence, ninety percent psychological abuse, seventy percent economic abuse, ten percent abuse of pets, forty percent stalking, and thirty percent destruction of prized possessions.[106] With empirical data documenting this level of severe abuse, it is little wonder that many survivors and advocates believe the continued victim blaming is intentional and systemic preservation of the status quo, doggedly resisting interference with men's conduct in intimate relationships.[107]

Acculturated non-empathy for victims also involves the reality that battered women may be allowed to speak to a police officer, judge, or lawyer, but they are not *heard*. For example, when one female judge was asked what bothers her most about domestic violence cases, she responded that she is furious with the women who recant and ask for their protective orders to be rescinded when it is clear they have been harmed.[108] When it was ex-

101 Schwartz and DeKeseredy define sexual contact as "fondling, kissing, or petting . . . arising from menacing verbal pressure, misuse of authority, threats of harm, or actual physical force." MARTIN D. SCHWARTZ & WALTER S. DEKESEREDY, SEXUAL ASSAULT ON THE COLLEGE CAMPUS 8 (1997).

102 Sexual coercion "includes unwanted sexual intercourse arising from the use of menacing verbal pressure or the misuse of authority." *Id*. at 9.

103 Attempted rape "includes attempted unwanted sexual intercourse arising from the use of or threats of force, or the use of drugs or alcohol." *Id*.

104 Rape is "unwanted sexual intercourse arising from the use of or threats of force and other unwanted sexual intercourse arising from the use of or threats of force and other unwanted sex acts (anal or oral intercourse or penetration by objects other than the penis) arising from the use of or threat of force, or the use of drugs or alcohol." *Id*.

105 WALTER S. DEKESEREDY ET AL., SEPARATION/DIVORCE SEXUAL ASSAULT IN RURAL OHIO: THE CONTRIBUTION OF PATRIARCHAL MALE PEER SUPPORT 6 tbl.1 (2004), *available at* http://www.andvsa.org/Walterrevised2004ascpaper.pdf.

106 *Id*. at 7 tbl.2.

107 *See infra* Part II for elaboration on this doctrinal obstacle.

108 Each semester, we bring our law students in the Domestic Violence Clinic to the local court for a tour and to meet some of the judges. Since we continue to practice before this judge, I will not use her name, but I feel compelled to note the lack of empathy with the plight of the victim acting under duress. Discussion was held at the Travis County (TX.) Courthouse on September 10, 2002.

plained that most victims requesting termination of the protective order are doing so under duress,[109] the judge responded that the women are disrespecting the court when they lie; that if the abuse happened, they should retain the order.[110] This position reflects a profound lack of compassion for the position in which many victims find themselves, that of trying to assess how to stay alive in the face of the batterer's threats and the court's condemnation. This judge assumes that by asking the victim why she wishes to dismiss the protective order, she is engaging in a sufficient colloquy to determine the true nature of the charges. However, in most such situations the victim cannot tell the judge the truth, that her husband said he would kill her if she retains the protective order, proceeds with the divorce, or testifies in the criminal case, as she will likely be harmed by the batterer for revealing his witness tampering.[111]

This judge, and others of similar mindset, does not seem troubled by the habitual lying by batterers proclaiming innocence in the face of overwhelming evidence to the contrary. The persistence of victim blaming ignores the fact that but for the batterer's abusive conduct and threats, the victim would neither initially request the protective order nor be forced to rescind it under duress. Although some judges and lawyers who have an intellectual understanding of a victim's necessary recantation are not able to translate that to an empathetic response, others do not even attempt comprehension—making it easier to react with disdain. Kentucky Judge Megan Lake Thornton ordered two battered women to pay fines of one hundred to two hundred dollars for making contact with their batterers against whom they had obtained restraining orders.[112] In spite of the fact that the restraining orders only mandate that the respondent batterer not have contact with the victim, Judge Thornton proclaimed, "These are orders of the court. People are ordered to follow them, and I don't care which side you're on."[113] The judge also ignored the reality that in the aftermath of separation, it may be necessary to

[109] The Model Penal Code (MPC) provides duress as a defense for one who engages in criminal acts as a result of the use or threatened use of force to which a reasonable person would have succumbed. MODEL PENAL CODE § 2.09(1) (2001).

[110] *Id*.

[111] I use the legal term intentionally, for it is a felony offense in most states to threaten a witness in a pending litigation.

[112] Francis X. Clines, *Judge's Domestic Violence Ruling Creates an Outcry in Kentucky*, N.Y. TIMES, Jan. 8, 2002, at A14.

[113] *Id*.

discuss issues regarding children, joint finances, and other household matters. But even if contact were initiated by victims without the need to discuss family questions, the judge's response ignores that most battered women blame themselves for the relationship conflicts—in part because batterers keep asserting this is so and society affirms it.[114] This judge's response is also troubling since the court has jurisdiction over the respondent, but not the petitioner.

A Massachusetts battered woman, Cara Caraccio, describes the judge presiding over her 2003 case as pressuring her to agree to "irretrievable breakdown" as the basis for her divorce, in spite of a lengthy history of severe abuse.[115] Ms. Caraccio has been trying to divorce her violent husband, Vinnie Caraccio, for several years, but he has been successful at repeatedly blocking completion of the divorce by persuading judges to grant additional continuances while he gets yet another lawyer.[116] Two days before the divorce trial, Vinnie Caraccio's attorney was granted permission to withdraw from the case as his client had neither provided financial statements nor kept numerous appointments, thus postponing trial until late spring of 2004. Cara Caraccio had filed for divorce on the basis of her husband's "cruel and abusive treatment" because, she said, "He was mean and abusive and violent and drank and used drugs and lied and got into trouble and spent all our money and cheated on me."[117] Ms. Caraccio was still required to return to court on the trial date to receive temporary divorce orders and be told to come back for the trial in late spring—the same information she had received three days previously. However, she states that it is worth waiting to have the divorce granted on the basis of his "cruel and abusive" treatment of her, although she is understandably quite frustrated that Vinnie seems to still be controlling the court's handling of their divorce, and the judge evidencing greater concern for moving the case along than for her safety.[118]

Pressuring abuse victims to accept no-fault divorces also tells

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114 *See* Aurelio Jose Figueredo, *Blame, Retribution and Deterrence Among Both Survivors and Perpetrators of Male Violence Against Women*, 8 VA. J. SOC. POL'Y & L. 219 (2000) (stating that the empirical data he has reviewed find that "self-blame is the driving force behind distress among survivors of male violence").

115 E-mail from Cara Caraccio (Feb. 14, 2004) (on file with author).

116 *Id*.

117 *Id*.

118 *Id*.

them that the state believes it is more important to maintain the illusion of minimal discord than to honestly recognize the true nature of the horrific abuse they have suffered. It is thus particularly important to have tort remedies available to address domestic violence, since the courts often do not want to officially acknowledge the harm, let alone compensate the victim for it. Pushing no-fault because it appears administratively more expeditious is based on the faulty logic that the case should simply be dealt with as quickly as possible. However, if the batterer feels that he has been successful in getting the court to view the marriage through his lens of denial and minimization, there is a greater likelihood that he will continue abusing his ex-spouse, often by being overly litigious in requesting change of custody, expanded visitation, decreased child support, and alleging that she is harassing him.[119] The overly litigious batterer makes the court complicit in his abuse, but also creates much additional administrative work, whether or not these matters reach trial.

In her request for a restraining order, Massachusetts battered woman Pamela Nigro Dunn stated in the affidavit: "I'm a prisoner in my apartment. He locks me in and takes the phone cord out. He choked me and threatened to kill me if I try to leave. He made me work only where he works . . . . My life is in danger so long as he is around."[120]

As a result, Somerville District Court Judge Paul Heffernan ordered that her husband, Paul Dunn, was to have no contact with her.[121] At the final hearing twelve days later, Judge Heffernan reprimanded Ms. Dunn for requesting a police officer escort to retrieve her belongings from their apartment, admonishing her to "act as an adult."[122] When a victim advocate from the District Attorney's Office tried to explain further egregious facts of the case, Judge Heffernan told her: "You don't understand my point of view worth one cent. You heard me tell this lady that she didn't need the police."[123] This, although Paul Dunn had also repeatedly beaten Ms. Dunn with an electrical cord, locked her in a closet for hours on end, and assaulted her on numerous occa-

[119] Adams, *supra* note 74, at 162 (describing various forms of abuse, including economic control and harassment). **R**

[120] Joan Meier, *Battered Justice*, WASH. MONTHLY, May 1987, at 38.

[121] Eileen McNamara, *Judge Criticized After Woman's Death*, BOSTON GLOBE, Sept. 21, 1986, at A1.

[122] *Id*.

[123] *Id*.

sions. To the police officer that corroborated the need for an escort, the Judge responded: "You've been duped in this case. I don't mind saying so for the record."[124] With Paul Dunn present, Judge Heffernan added: "This is pretty trivial . . . . This court has a lot more serious matters to contend with. We're doing a terrible disservice to the taxpayers here. You want to gnaw on her and she on you, fine, but let's not do it at the taxpayer's expense."[125]

Within five months of this hearing, Paul Dunn abducted Ms. Dunn from a bus stop, then stabbed, strangled, and shot her, leaving her face down in a pool of water at the Arlington Dump.[126] Ms. Dunn, just twenty-two years old, was five months pregnant at the time of her killing, for which Paul Dunn was convicted of first-degree murder and given a life sentence without parole.[127] As I sat with Pamela Dunn's parents at the sentencing hearing, Paul Dunn's mother walked by and said to them: "Your daughter got what she deserved; she was a bitch!" And so the cultural antipathy for abuse victims comes full circle.

Judges fuel the cynicism of abuse victims and their families when they minimize or excuse domestic violence, for they are refusing to uphold the law. Professor James Ptacek argues that a restraining or protective order represents a negotiation between the battered woman and the state regarding how she will be protected from the perpetrator.[128] By urging abuse victims to obtain protective orders, the state is, in effect, offering a measure of service on which the battered woman ought to be able to rely. That so many abuse victims face harsh treatment once they do seek assistance bespeaks the gender bias still prevalent within our legal system.

Most states define tortious civil assault as bodily injury committed with intent or recklessness,[129] yet judges sometimes add

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[124] *Id*.

[125] Meier, *supra* note 120.

[126] Eileen McNamara, *Judge Is Viewed as Erring on Abuse Law,* BOSTON GLOBE, Sept. 24, 1986, at Metro 1; Eileen McNamara, *Dunn to Face Murder Charges on Return to Mass Today*, BOSTON GLOBE, Nov. 18, 1986 at A1; Eileen McNamara, *Two Judges Criticized in Review By Zoll*, BOSTON GLOBE, Mar. 11, 1987, at A1.

[127] Paul Langner, *Dunn Given Life Term in Wife's Slaying*, BOSTON GLOBE, May 20, 1987, at A1.

[128] JAMES PTACEK, BATTERED WOMEN IN THE COURTROOM 8 (1999) (stating that obtaining a restraining order is an interactive process between battered women and judges over protection from abusive men).

[129] *See, e.g.*, Hogenson v. Williams, 542 S.W.2d 456, 458 (Tex. App. 1976) (stating

their own standards with no legal basis. In a Houston case, the husband did not deny that he had punched his wife in the face and body with his fist, but asserted a claim for summary judgment on the basis that his wife had neither sought medical care nor reported the assault to the police.[130] Although the wife also asserted a claim for false imprisonment, Harris County Judge Bill Elliott granted summary judgment.[131] Although the appellate court reversed, finding that the wife's lack of outreach to community services did not legally defeat her causes of action,[132] too many such trial court rulings stand because victims lack the resources or sound advice to appeal. It can be argued that judges simply reflect the lack of empathy for abuse victims within the community, but judges' authority and vast power invest in them a greater responsibility not only to uphold the law and not supplant their own biases, but also to shine as a beacon of reasonableness and fair play.

2. Religious Doctrine's Effect on Domestic Violence Legal Practices

Religious doctrine greatly impacts the behavior of legal stakeholders' handling of domestic violence matters, reflective of centuries of Judeo-Christian principles promoting patriarchy and male superiority.[133] At present, most churches do not officially approve of domestic violence, but the problematic teachings of women's inferiority and duty to submit to their husbands persist, and offer mixed messages to adherents.[134] Just as in the courts, some church counselors and clergy may feel that preserving the family is more important than the individual concerns of a battered woman.[135]

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a tortious civil assault is committed if a person intentionally, knowingly, or recklessly causes bodily injury to another).

130 DeLeon v. Hernandez, 814 S.W.2d 531 (Tex. App. 1991).

131 *Id*.

132 *Id*. (ruling that summary judgment was improper, as the wife's failure to obtain medical treatment and report the crimes to the police did not negate her causes of action for assault and false imprisonment as a matter of law).

133 *See* Kathleen A. McDonald, *Battered Wives, Religion, & Law: An Interdisciplinary Approach*, 2 YALE J.L. & FEMINISM 251, 252 (1990) (noting that, although quite different in some teachings, both Judaism and Christianity are male-centered and share similar beliefs about the inferiority of women, including that God created the patriarchal family).

134 *Id*.

135 *See* Brenda V. Smith, *Battering, Forgiveness, and Redemption*, 11 AM. U. J. GENDER SOC. POL'Y & L. 921 (2003) (citing Katherine Hancock Ragsdale, *The Role*

On February 6, 2004, the Spanish Roman Catholic Bishops Conference released a treatise on the family in which they declared that domestic violence, sexual abuse, and homeless children are the "bitter fruit[s]" of sexual liberation.[136] Although the leading Spanish newspaper called the bishops' position "ludicrous,"[137] the treatise is noteworthy for its stark denial of the church's failure to intervene appropriately in most cases of violence against women. Lest it be assumed that this perspective is held only by bishops in Spain, similar views are found among clerics of many faiths in America. Research documents that domestic violence victims often turn first to their churches for help, but that, overwhelmingly, they find support lacking from that source, with victim-blaming common.[138] Too often clergy advise battered women to alter their behavior to be more compliant, rather than addressing the importance of the batterer's ceasing his conduct.[139] To their credit, the Bishops of the United States stated in their pastoral response to domestic violence that "[a]s bishops, we condemn the use of the Bible to condone abusive behavior. A correct reading of the Scriptures leads people to a relationship based on mutuality and love."[140] One problem is that such documents, however progressive, do not appear to be translating to more respectful treatment of abuse victims at the parish level. Battered women who divorce their husbands often report great guilt and self-blame based on their understanding of

of Religious Institutions in Responding to the Domestic Violence Crisis, 58 ALB. L. REV. 1149, 1156 (1995) (showing the conflict between "theological values, social values, [and] commonly understood standards of pastoral practice" in churches' response to domestic violence)).

136 *Spaniards Angered by Bishops*, *at* http://www.etaiwannews.com/world/ 2004/02/06/1076034307.htm (Feb. 6, 2004) (reporting that domestic violence is on the rise in Spain, with at least one hundred women killed every year by their husbands).

137 *Id*.

138 *See* Kathryn Casa, *Violence at Home*, NAT'L CATH. REP. (June 29, 2001), *available at* http://www.natcath.com/NCR_Online/archives/062901/062901a.htm (last visited Mar. 14, 2005); *see also* Linda L. Ammons, *What's God Got To Do With It? Church and State Collaboration in the Subordination of Women and Domestic Violence*, 51 RUTGERS L. REV. 1207 (1999) (explaining how the dogma of male superiority has been interpreted from Biblical Scripture and is now codified in church teachings on gender roles); Nada L. Stotland, *Tug-of-War: Domestic Abuse and the Misuse of Religion*, 157 AM. J. PSYCHIATRY 696 (2000).

139 Ammons, *supra* note 138, at 1209.

140 U.S. Bishops' Comms. on Women in Church & Society, and on Marriage and Family Life, *When I Call for Help*, ORIGINS, Nov. 5, 1992; *see also* Susan Hogan, *Bishops Denounce Domestic Violence*, DALLAS MORNING NEWS, Nov. 13, 2002, at 1A (describing an updated statement calling on the church to help victims become safe).

scripture and church tradition.[141]

Conservative Christians also wield great legal and political influence, not simply through their cultural mores, but also by using the coercive power of the state.[142] In 1996, Christian Coalition Executive Director Ralph Reed boasted that sixty percent of the Republican convention's delegates supported his organization.[143] The groups that comprise the religious right, including the Christian Coalition,[144] the Family Research Council,[145] and the Eagle Forum,[146] advocate the promotion of what they deem "family values," consisting of marriage limited to heterosexual couples, upholding marriage as a solution for poverty, and encouraging the traditional family model.[147] Importantly, the theological obstacles faced by conservative Christian battered women are forced on all American women through the powerful influence of the religious right. The pro-family, anti-divorce position of the religious right contributes to acculturated victim blaming, for the abused wife is deemed the one destroying the family.[148]

In an agenda counter to the interests of battered women, the conservative Christians have actively advocated for marriage as the means to bring women out of poverty, adding incentives for those on welfare.[149] Rather than lobbying for job training and financial literacy programs, this effort encourages their notion of "traditional" families in which the wife stays at home with the

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141 Marie M. Fortune, *A Commentary on Religious Issues in Family Violence*, *in* VIOLENCE IN THE FAMILY 137, 138 (1991).

142 Christian Coalition website, *at* http://www.cc.org/about.cfm.

143 Alan Elsner, *Evangelicals Assert Control of Republican Party*, Reuters, Aug 7, 1996.

144 Christian Coalition, *supra* note 143. **R**

145 Family Research Council website, *at* http://www.frc.org.

146 Eagle Forum website, *at* http://www.eagleforum.org.

147 *Id*.; Christian Coalition, *supra* note 143; Family Research Council, *supra* note 146. **R** **R**

148 *See, e.g.*, Henry Weinstein, *Great Society's Legal Aid For Poor Targeted by Budget Ax*, L.A. TIMES, Dec. 29, 1995 (describing the religious right's opposition to funding for Legal Aid on the premise that these lawyers help women obtain divorces; although most all of the divorces Legal Aid obtains are for abuse victims).

149 *See* Kathleen Chapman, *Florida Groups Brainstorm on Marriage Push*, PALM BEACH POST, Feb. 14, 2004, at 24A (reporting that Congress is debating a bill that would provide $240 million to the states to promote marriage, but that some critics are worried that women will be encouraged to commit to battering partners); *see also* Suzanne Fields, *The Victorians and the New Safety Net*, WASH. TIMES, Mar. 30, 1995, at A25.

children—dependent on the husband for all means of support.[150] Absent a vehicle to learn skills and resources to leave the abusive relationship, these programs will do little to help battered women, but instead will further entrap them.[151] A more balanced proposal is a bill filed in the West Virginia legislature offering a lower fee for a marriage license if the couple will attend premarital counseling.[152] The bill's sponsors say they believe counseling could help reduce "domestic violence, financial problems, the divorce rate and all the problems children face because of these issues."[153]

Judaism, too, has an historical tradition of promoting the patriarchal family structure with codified expectations of women's compliance.[154] A Jewish marriage contract, the *ketubah*, provides for dissolution of the marriage upon death or divorce, as delineated by *halakha* or Jewish law.[155] Although *halakha* forbids the intentional harming of another human being,[156] until recently many within the Jewish community denied that domestic violence occurred among them—but in the rare acknowledgements, it was assumed the victim had incited the abuse.[157] Under *ketubah,* the wife is obligated to complete the household duties

150 *See, e.g.*, Liz Schott, *The Congressional Divide over TANF Reauthorization*, 1 SEATTLE J. FOR SOC. JUST. 427 (2002) (noting the lack of training and services and citing Robert Rector, *Implementing Welfare Reform and Restoring Marriage*, *in* PRIORITIES FOR THE PRESIDENT (Stuart M. Butler & Kim Rhodes eds., 2001), *available at* http://www.heritage.org/research/features/mandate/priorities.cfm (last visited Feb. 26, 2005)); *see also* Anita Bernstein, *For and Against Marriage: A Revision*, 102 MICH. L. REV. 129 (2003) (describing the federal financing of state and faith-based organizations encouraging marriage for poor women).

151 Sharon G. Horne and Heidi M. Levitt, *Shelter from the Raging Wind: Religious Needs of Victims of Intimate Partner Violence and Faith Leaders' Responses*, J. OF RELIGION & ABUSE, 2003, at 83, 86 (reporting that abuse victims who were counseled by their churches to endure the abuse to show they were good Christians were placed in increased danger).

152 Kris Wise, *Bill Offers Marriage Incentive Plan Encourages Counseling to Lower State Divorce Rate*, CHARLESTON DAILY MAIL, Feb. 13, 2004, at 1C (reporting that couples can get $7 off the cost of a $35 marriage license for attending four hours of counseling, and reporting that West Virginia recorded 10,000 divorces and 15,000 marriages in 2003).

153 *Id*.

154 *See* Elliot N. Dorff & Arthur Rosett, A LIVING TREE: THE ROOTS AND GROWTH OF JEWISH LAW 17-18 (1988) (stating, for example, that during the time of Abraham the extended family, or clan, was the usual family unit, with a male ruling elder).

155 NAOMI GRAETZ, SILENCE IS DEADLY 63 (1998).

156 *Id*. at 70.

157 *See* Beverly Horsburgh, *Lifting the Veil of Secrecy: Domestic Violence in the Jewish Community*, 18 HARV. WOMEN'S L.J. 171, 209 (1995).

and have consensual sexual relations with her husband, and if she does not perform her duties, the husband may divorce her.[158] With marriage, the husband also legally acquires the right to: (1) any income his wife earns; (2) whatever the wife finds; (3) the fruits of the wife's possessions and property; and (4) his wife's property.[159]

The delineation of these rights has led religiously adherent Jewish women to believe they are prohibited from becoming financially independent. Just as Christian scripture has been misinterpreted to justify battering, so too have a number of abused Jewish women believed they could not seek help as it would involve *lashon hara*, or speaking badly about another—a violation of *halakha*.[160] Notably absent from the discourse was recognition that it was the batterer breaching *lashon hara* by verbally and psychologically abusing his spouse. Some Jewish battered women report being taught that it is their obligation to maintain *shalom bayit*, peace in the home,[161] and that this overarching principle mandates that the marriage be preserved in all circumstances.[162]

The ability to leave one's abuser is important for a victim to find safety. Although *halakha* gives the husband all of the woman's property, because marriage is a contract in Judaism, a wife can sue her husband for breach of contract in addition to her suit for battery.[163] A wife is allowed to flee for safety, and she is not required to return home if she can show that she is in physical danger.[164] Meanwhile, the husband is required to pay the debt she incurs for living expenses although she is gone.[165] *Halakha* specifies that a man may divorce his wife, but she is not permitted to divorce him prior to obtaining permission through a *get*.[166]

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158 GRAETZ, *supra* note 155, at 76-77.

159 *Id*. at 75.

160 Sandra Butler, *A Covenant of Salt: Violence Against Women in Jewish Life*, J. OF RELIGION & ABUSE, 2000, at 49, 53.

161 *Id*. at 56.

162 GRAETZ, *supra* note 156, at 78. **R**

163 David E. S. Stein, *Initiatives to Address Physical Violence by Jewish Husbands, 218 B.C.E.-1400 C.E*, J. OF RELIGION & ABUSE, 2001, at 25, 36.

164 *Id*.

165 *Id*.

166 *See* ABRAHAM J. TWERSKI, THE SHAME BORNE IN SILENCE 30 (1996); Ran Hirschl, *Constitutional Courts vs. Religious Fundamentalism: Three Middle Eastern Tales*, 82 TEX. L. REV. 1819, 1840 n.140 (2004) (explaining that "[u]nder Halakhic law, the get (divorce decree) is a private act between the spouses . . . the ultimate power to decide whether or not to dissolve the marriage remains with the husband).

This seeming digression highlighting Judeo-Christian doctrine is necessary to frame the perspective of judges, lawyers, politicians, jurors, and other legal system stakeholders with the power to sabotage victim safety. Advocates and court personnel from Lynchburg, Virginia express concern that one of their judges, after granting a protective order to unmarried victims cohabiting with their batterers, calls the victims aside and gives them a stern lecture about the moral dangers of "living in sin," then admonishes them to strongly consider marriage.[167] When the Massachusetts legislature was considering whether to pass a constitutional amendment banning gay marriage, Representative Marie Parenti reprimanded her colleagues for leaving God in church on Sunday and not voting their faith.[168] Constitutional mandates for the separation of church and state aside, the influence of religious doctrine on court practices in domestic violence cases is unmistakable and does not bode well for abuse victims.

II

ONE DOCTRINAL OBSTACLE IS THE COURTS' GENERAL RELUCTANCE TO INTERFERE IN MARRIAGES, EVEN WITH THE PRESENCE OF DOMESTIC VIOLENCE

Classic liberalism espouses the belief that individuals should be able to act freely within the family and not fear governmental intrusion.[169] Since men were long considered to have jurisdiction over their wives and children, legal indifference was justified.[170] Courts' deference to marriage takes the liberal notion a step further, using the underpinnings of public policy to claim that allowing state interference incites spousal disagreement and litigation.[171] Although perhaps understandable centuries and

[167] As reported to the author on February 23, 2004 in Roanoke, Virginia.

[168] *Massachusetts Seeks Gay Marriage Compromise* (NPR broadcast, Feb. 12, 2004). Rep. Parenti also reminded fellow legislators that the Catholic Church forbids homosexual relationships and would not recognize gay marriages.

[169] *See, e.g.*, MARY ANN GLENDON, STATE, LAW AND FAMILY 122 (1977) (arguing that benefits of family privacy include maintaining pluralism).

[170] *See* Judith Resnik, *Reconstructing Equality: Of Justice, Justicia, and the Gender of Jurisdiction*, 14 YALE J.L. FEMINISM 393, 397 (2002) (noting that women's bodies were considered within the realm of households, headed by white males with control over the women and children residing there).

[171] *See* Graham v. Graham, 33 F. Supp. 936, 939 (E.D. Mich. 1940) (holding that the state should refrain from inviting controversy and litigation within the marriage); *see also* Kathryn L. Powers, *Sex Segregation and the Ambivalent Directions of Sex Discrimination Law*, 1979 WIS. L. REV. 55, 70-79 (discussing the manner in which the law refrains from regulating marriage).

even decades ago, the persistence of family primacy is particularly troubling given the greater knowledge of domestic violence and its deleterious influence on all family members *and* the community at large. Yet, throughout the court system, the family is revered as a hallowed entity, romanticized in a Norman Rockwell image that denies the need for intervention, in many cases even with dangerous behavior threatening the very institution. Asserting family privacy in the context of domestic violence is disingenuous and contrary to the legislative intent of every state's abuse prevention laws: to protect victims of domestic violence from the perpetrators.

Finding minimal acceptance of equality models within the civil, family court sphere, women's rights advocates turned to the criminal justice system in the 1980s, hoping it would be more receptive to viewing domestic violence as a systemic manifestation of women's forced subordination.[172] Additionally, advocates mobilized numerous state gender bias task forces that overwhelmingly documented the mistreatment of women within the legal system.[173] However, most states devoted neither financial nor staff support to implement the reports' recommended changes.[174]

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[172] *See, e.g., Reducing Case Attrition: Working With Battered Women*, RESPONSE TO VIOLENCE IN THE FAM. Jan./Feb. 1981, at 5, 5-9 (citing the Seattle City Attorney's Battered Women's Project that collaborated with the Seattle Police such that a victim's call to police triggered a letter from a project advocate, inviting the victim's input regarding the most appropriate counseling and sentence for the batterer). The author also worked as a court advocate with the Seattle City Attorney's Family Violence Project (renamed from Battered Women's Project in 1984) from 1984-1985 and witnessed one community's transition from dealing with domestic violence as a mostly private, civil matter to one taken seriously by the criminal justice system.

[173] *See, e.g.*, Jane Marum Roush, *Gender Bias Task Force: Comments on Substantive Law Issues,* 58 WASH. & LEE L. REV. 1095 (2001) (finding that while attorneys highly rated the court's handling of sexual assault cases, the service provider advocates were quite negative in their assessment); *see also* Deborah Hensler & Judith Resnik, *Contested Identities: Task Forces on Gender, Race, and Ethnic Bias and the Obligations of the Legal Profession*, *in* ETHICS IN PRACTICE (Deborah L. Hode ed., 2000); Lynn Hecht Schafran, *Gender Bias in the Courts: An Emerging Focus for Judicial Reform*, 21 ARIZ. ST. L.J. 237 (1989).

[174] Massachusetts has followed up with a re-named Committee, several publications, and funded a staff person to assist in implementing changes. *See* COMMITTEE FOR GENDER EQUALITY, MASSACHUSETTS SUPREME JUDICIAL COURT, OPENING DOORS: MODEL PROJECTS PROVIDING ADVOCACY TO VICTIMS OF DOMESTIC VIOLENCE SEEKING RELIEF IN EASTERN MASSACHUSETTS COURTS (1991).

A. Privacy, Marriage, and Family Violence

Problematic to the family privacy paradigm is the continued treatment of intimate partner violence as a troublesome relationship issue rather than reflective of cultural norms regulating how women and men may behave.[175] It is ethically questionable for the state to be the sole arbiter of what should remain private and thus within the discretion of the spouses, and what may be considered by the court as within its purview. At least interspousal tort immunity has been gradually discarded in most jurisdictions, beginning with Alabama in 1932.[176] Some of the seminal cases abrogating this bar addressed the absurd paradigm previously enforced by the state in which batterers were protected. A West Virginia court noted in 1978 that spousal immunity "permitted the wife beater to practice his twisted frustrations secure in the knowledge that he was immune from civil action except for a divorce, and that any criminal penalty would ordinarily be a modest fine."[177] By 1989, Georgia's appellate court even upheld the provision of punitive damages for a battered wife who had successfully brought a tort action against her ex-husband for assault and battery and false imprisonment.[178]

Although many judges resist interfering in marital problems absent dangerous circumstances, others even refuse to implement clear statutory mandates in the face of domestic violence—instead taking it upon themselves to decide if the abuse is so minimal that state intrusion is unwarranted. One egregious example is the Dunn case.[179]

Within days of Ms. Dunn's murder, her father (Mr. Nigro) called to ask for my help in reforming the courts to prevent this tragedy from befalling others; he wanted to know how judges—as tax-paid, public servants—had the power to not only humiliate

[175] Resnik, *supra* note 171, at 397 (citing a UNICEF research monograph arguing that violence against women is frequently "sanctioned under the garb of cultural practices and norms"). **R**

[176] Bennett v. Bennett, 140 So. 378 (Ala. 1932); *see also* Jones v. Pledger, 363 F.2d 986, 988-89 (D.C. Cir. 1996) (permitting wife to bring wrongful death action against husband); Shook v. Crabb, 281 N.W.2d 616, 620 (Iowa 1979) (stating public policy basis of allowing access to remedies for injury).

[177] Coffindaffer v. Coffindaffer, 244 S.E.2d 338, 343-44 (W. Va. 1978); *see also* Heacock v. Heacock, 520 N.E.2d 151, 153 (Mass. 1988) (finding that divorce did not bar civil tort claim for injuries suffered during marriage).

[178] Catlett v. Catlett, 388 S.E.2d 14, 15 (Ga. Ct. App. 1989).

[179] Meier, *supra* note 120, at 38 and accompanying text; McNamara, *supra* note 122 and accompanying text. **R**

abuse victims, but to so endanger them. Mr. Nigro related his frustration in trying to explain to the judge about Paul Dunn's violent conduct, but he was admonished to help his daughter keep her marriage together. Mr. Nigro was particularly upset that Judge Heffernan had characterized the abuse as mutual, although there was no testimony to that effect.[180]

Batterer's treatment experts caution that abusers often portray their violence as mutual and are adept at minimizing, blaming, and claiming to be the valiant party that simply wants to save the marriage.[181] However, even more disturbing is the institutional collusion, typified in the Dunn case, and aptly described by Professor James Ptacek as social entrapment for the victims.[182] He notes that poverty and racism only exacerbate such victimization, while identifying the courts as the institution with the greatest power to remedy abuse injustices.[183]

The court's reluctance to interfere is understandable when a victim resents and resists its interventions, usually in the criminal sphere. However, the state must examine why these victims decry assistance, in order to determine whether, in some areas of private life the victim should decide if state intrusion is warranted, or whether a compelling state interest exists to justify action absent victim consent.[184] Feminist scholars have discussed women's agency in the context of domestic violence, with most arguing that woman abuse must be viewed as a public matter in order to galvanize state intercession.[185] With domestic violence torts, the abuse victim is asking the state to get involved, requesting its assistance with an untenable situation. As will be seen in the following discussion on establishing a judicially manageable

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[180] Mr. Nigro initially called me on August 15, 1986, and we spoke frequently over the next few years in our mostly successful efforts to reform the Massachusetts Judicial Conduct Commission and increase accountability for those judges endangering abuse victims and sabotaging state laws.

[181] Adams, *supra* note 74, at 165 (noting that batterers frequently deny or minimize their abusive conduct). **R**

[182] PTACEK, *supra* note 129, at 9-10 (describing the forms of collusion documented by historians and scholars). **R**

[183] *Id*. (noting that using social entrapment as the paradigm highlights the benefits and detriments of utilizing courts as the primary means of remedy).

[184] *See, e.g*., Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849 (1996) (arguing that prosecutors must take the choice of prosecution away from the victim to send a message that domestic violence is unacceptable).

[185] *E.g.*, Elizabeth M. Schneider, *The Violence of Privacy,* 23 CONN. L. REV. 973, 974 (1991).

threshold, courts should not interfere in families generally, but a victim's prima facie showing of abuse ought to compel intervention.

A backlash, spawned by conservative women's organizations and popular books, characterized the analogy of domestic violence victims to other crime victims worthy of the court's attention as "victim feminism."[186] They asserted that "power feminism" was a more positive option, as it presumes women can take responsibility for their own lives.[187] Courts seem to reflect this expectation that battered women should simply stop their whining about abuse and put their lives back together rather than seek legal assistance during the dissolution. This simplistic formulation reflects acute ignorance of the overwhelming obstacles—legal, social, psychological, and physical—inherent in leaving a violent partner.[188] Equally problematic, the power feminism proponents fail to recognize the systemic origins of these obstacles, choosing instead a harsh, judgmental model that presumes privilege and access to necessary resources. Professor Elizabeth Schneider notes, "Their work underscores the fundamental inadequacy of *either* victimization or agency (reconceived as 'victim feminism' or 'power feminism') to capture the complexity of struggle in women's lives, and highlights how this false dichotomy leads to problematic extremes."[189]

Importantly, agency and victimization are not mutually exclusive,[190] and courts, as powerful institutions with much influence in how battered women survive abuse, must not justify their inaction by blaming victims who are unable to extricate themselves from the abusive relationship. Even within the same day, let alone the duration of breaking free, a survivor may be forced to

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186 *See* ELIZABETH SCHNEIDER, BATTERED WOMEN AND FEMINIST LAWMAKING 75 (2000).

187 *See id*. (citing KATIE ROIPHE, THE MORNING AFTER 29-50 (1993)); NAOMI WOLF, FIRE WITH FIRE 135-42, 305-21 (1993).

188 *See* Sarah M. Buel, *Fifty Obstacles to Leaving, A.K.A., Why Abuse Victims Stay*, 28 COLO. LAW. 19 (1999) (describing lack of money and job skills, fear of retaliation, bad prior experience with the legal system, family and religious pressure, and low self-esteem as just a few of the many challenges facing victims wishing to flee).

189 SCHNEIDER, *supra* note 187, at 75. **R**

190 *Id*. at 76; *see also* Martha R. Mahoney, *Victimization or Oppression? Women's Lives, Violence, and Agency*, *in* THE PUBLIC NATURE OF PRIVATE VIOLENCE 59, 64 (Martha Albertson Fineman & Roxanne Mykitiuk eds., 1994) (noting that agency means not living with oppression, but that the "all-agent or all-victim conceptual dichotomy will not be easy to escape or transform").

traverse being a victim, then agent, and back again—dependent, in part, on the conduct of her batterer, the courts, and community.

As scholars debate the theoretical virtues and pitfalls of privacy versus equality paradigms, activist lawyers and advocates worry that a practical application has been left in the dust of early wins. The legal doctrine of privacy has afforded women a number of crucial protections, including access to abortion[191] and birth control.[192] Some feminist scholars, however, believe that these reproductive rights cases should have been decided on the basis of equality doctrine and not privacy.[193] This public/private distinction has not always served to promote women's rights, largely because clamoring for family privacy seems to be selectively invoked to avoid protecting battered women in the home. In abrogating interspousal immunity, the Utah Supreme Court stated: "The marriage relation is created by the consent of both of the parties; inherently within such relationship is the consent of both parties to physical contacts with the other, personal dealings and ways of living which would be unpermitted and in some cases unlawful as between other persons."[194]

Other state supreme courts have echoed similar concerns about proscribing otherwise unacceptable conduct within marriages.[195] In *Twyman v. Twyman,* Texas Chief Justice Phillips agreed to recognize the tort of intentional infliction of emotional distress, but not its application to married persons, although Justices Enoch and Hecht declined to approve of the tort in any context.[196] Chief Justice Phillips stated:

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191 *See* Roe v. Wade, 410 U.S. 113 (1973) (holding that the right to choose abortion is premised on right to privacy).

192 *See* Griswold v. Connecticut, 381 U.S. 479 (1965) (holding that privacy rights grant a right to use contraceptives).

193 *See* Catharine MacKinnon, *Roe v. Wade: A Study in Male Ideology*, *in* ABORTION 45, 52-53 (J. Garfield & P. Hennessey eds., 1984) (arguing that *Roe*'s basis in privacy instead of equality brought about *Harris v. McRae*, which held that Constitution does not require public funding of abortions).

194 Stoker v. Stoker, 616 P.2d 590, 592 (Utah 1980).

195 *See, e.g.*, Brown v. Brown, 409 N.E.2d 717, 718, 719 (Mass. 1980); Imag v. March, 279 N.W.2d 382, 386 (Neb. 1979); Beaudette v. Frana, 173 N.W.2d 416, 420 (Minn. 1969).

196 855 S.W.2d 619, 627 (Tex. 1993) (Phillips, J., concurring and dissenting). The plurality notes that their disapproval of any tort action between spouses "would seem to be better directed at the court's earlier decisions to abrogate the doctrine of interspousal tort immunity in *Bounds v. Caudle*, 560 S.W.2d 925 (Tex. 1977), and *Price v. Price*, 732 S.W.2d 316 (Tex. 1987)." *Id*. at 622 n.13.

> [I]t does not necessarily follow that all conduct actionable between strangers is automatically actionable between spouses . . . . I believe that a tort which is grounded solely on a duty not to inflict emotional distress should not be cognizable in the context of marriage. Married couples share an intensely personal and intimate relationship. When discord arises, it is inevitable that the parties will suffer emotional distress, often severe . . . . In such circumstances, the fact finder is left to draw a virtually impossible distinction between recoverable and disallowed injuries.[197]

In the instant case, the defendant, William Twyman, inflicted grievous emotional abuse against his wife, Sheila Twyman, yet the Chief Justice denied her relief because the perpetrator was her husband which, according to Chief Justice Phillips, made it "virtually impossible" to discern which harms to recognize.[198] However, distinguishing between dubious and viable claims is precisely what courts are designed and empowered to do. Dissenting in *Twyman*, Justice Spector argued that the Chief Justice had adopted a "medieval view of marital relations," in which spouses are "shielded from liability for even the most outrageous acts against one another."[199]

B. Judicially Manageable Thresholds

1. Balancing Concerns

Tension exists between courts' efforts to decrease burgeoning caseloads by encouraging no-fault divorce and abuse victims' desire to address marital harm and fault issues. And again, the public/private dichotomy emerges as an issue needing clarification. It is simple enough to state that once a victim can make a prima facie showing of serious abuse, the shroud of privacy ought to be lifted from the intimate relationship. However, determining thresholds requires asking the question of who decides what abuse is egregious enough to warrant consideration outside the presumptive framework. Should aggrieved spouses who may want to litigate marital hurts decide? Should judges choose, though they may be ignorant of substantive domestic violence issues and, thus, may unknowingly prejudice the abuse victim by disallowing worthy claims? And even well-informed judges may be constrained by biased laws. Feminist scholars have long ar-

197 *Twyman*, 855 S.W.2d at 627 (Phillips, J., concurring and dissenting).
198 *Id*. at 620.
199 *Id*. at 644 (Spector, J., dissenting).

gued that "the woman question" must regularly be asked to identify those standards and laws that, though they appear neutral, fail to consider *and value* the experiences of women.[200] As the cases cited herein confirm, enormously problematic practices continue in the handling of domestic violence cases in many, if not most, jurisdictions in this country. Thus, the woman question is relevant in law, particularly in domestic violence law, given that such a disproportionate number of those abused are women.[201]

Professor Katharine Bartlett explains that the woman question forces examination of how institutional composition and social structure perpetuate women's subordinate status, even when laws appear facially neutral.[202] She elaborates:

> Once adopted as a method, asking the woman question is a method of critique as integral to legal analysis as determining the precedential value of a case, stating the facts, or applying law to facts. "Doing law" as a feminist means looking beneath the surface of law to identify the gender implications of rules and the assumptions underlying them and insisting upon applications of rules that do not perpetuate women's subordination. It means recognizing that the woman question always has potential relevance and that "tight" legal analysis never assumes gender neutrality.[203]

The woman question is critical to analyzing a suitable threshold, as application of any model necessarily requires a melding of both objective and subjective evaluation of the battered spouse's experience of abuse. Courts seek a predictable, uniform, and neutral standard that tends to decrease litigation and manipulative behavior by the divorcing parties. However, rigid guidelines eliminate much of the needed ability to customize case dispositions reflective of the individual circumstances in each family.[204]

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[200] *See, e.g.*, Carol C. Gould, *The Woman Question: Philosophy of Liberation and the Liberation of Philosophy*, *in* WOMEN AND PHILOSOPHY: TOWARD A THEORY OF LIBERATION 5 (Carol C. Gould & Marx W. Wartofsky eds., 1976) (discussing the woman question in philosophy); Mary E. Hawkesworth, *Feminist Rhetoric: Discourses on the Male Monopoly of Thought*, 16 POL. THEORY 444, 452-56 (1988) (examining the treatment of the woman question in political theory) (as cited in Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 837 n.23 (1990)) (noting also that the first use of the term "woman question" of which she is aware is in Simone De Beauvoir's *The Second Sex*.

[201] *See* sources cited *supra* note 5 (documenting the disproportionate degree of victimization by gender). **R**

[202] Bartlett, *supra* note 201, at 843. **R**

[203] *Id*.

[204] *See, e.g.*, Marsha Garrison, *How Do Judges Decide Divorce Cases? An Empir-*

In response, rebuttably presumptive standards have been deemed necessary to handle the high number of divorces,[205] but every state's case law indicates that outrageous conduct within the marriage is deemed compensable.[206]

2. Conduct Surpassing the Threshold

Offenses for which battered women may seek remedies range from intentional torts (such as assault, battery, stalking, and economic fraud), to negligent infliction of emotional distress (NIED)[207] and intentional infliction of emotional distress (IIED).[208] Typically, aggrieved spouses claim IIED as caused by the specific allegations of abuse, usually assault and battery.[209] Although it is beyond the purview of this Article to fully discuss IIED, a brief discussion will be included as it relates to the creation of a realistic threshold and represents the issue of greatest

ical Analysis of Discretionary Decision Making, 74 N.C. L. REV. 401, 505-27 (1996) (discussing the trade-offs between determinate and discretionary decision-making custody standards).

[205] Approximately five million domestic relations actions were filed in state courts in 1999. NATIONAL CENTER FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS, 1999-2000 30 (Brian J. Ostrom et al. eds., 2001). However, there were about 7.1 million other civil cases of all kinds filed in 1999 in state courts of general jurisdiction. *Id*. at 18.

[206] Based on an author-created database of every state's divorce laws, including requirements for no-fault divorce and whether they mandate joinder of tort and divorce actions. On file with author; *see also* Erik V. Wicks, *Fault-Based Divorce "Reforms," Archaic Survivals, and Ancient Lessons*, 46 WAYNE L. REV. 1565, 1587 (2000) (noting that spouse abuse was illegal in every state by 1920).

[207] Some states have refused to recognize the tort of negligent infliction of emotional distress, *see, e.g.*, Boyles v. Kerr, 855 S.W.2d 593, 594 (Tex. 1993) ("We hold that there is no general duty in Texas not to negligently inflict emotional distress."), while a minority of states have upheld the duty, *see, e.g.*, Taylor v. Baptist Medical Ctr., Inc., 400 So.2d 369 (Ala. 1981); Montinieri v. Southern New England Tel. Co., 398 A.2d 1180 (Conn. 1978); Rodrigues v. State, 472 P.2d 509 (Haw. 1970); Gammon v. Osteopathic Hosp. Of Maine, Inc., 534 A.2d 1282 (Me. 1987); Johnson v. Supersave Markets, Inc., 686 P.2d 209 (Mont. 1984); Bass v. Nooney Co., 646 S.W.2d 765 (Mo. 1983); Johnson v. Ruark Obstetrics & Gynecology Assoc., 395 S.E.2d 85 (N.C. 1990); Schultz v. Barberton Glass Co., 447 N.E.2d 109 (Ohio 1983) (cited in *Boyles*, 855 S.W.2d at 599 n.4).

[208] *See, e.g.*, Simmons v. Simmons, 773 P.2d 602 (Colo. App. 1988) (plaintiff sued her former husband for assault and battery and IIED, based on six years of marriage during which he engaged in intentional, assaultive conduct, including throwing coffee on her, kicking, slapping, and hitting her, and tearing at her ear; after a jury verdict, the court awarded the wife $15,000 in compensatory damages and $100,000 in punitive damages).

[209] *See, e.g.*, Giovine v. Giovine, 663 A.2d 109 (N.J. Super. 1995) (wife brought tort claims based on assault and battery, as well as intentional infliction of emotional distress).

contention in domestic violence tort cases. It is also yet another area of tort that evidences the nexus between tort and intimate partner violence. Further, IIED is important because, as a firmly rooted legal doctrine, it confers credibility to a battered woman's telling of the dire harm she has suffered. If only assault and battery or other direct harms are recognized, the court may lose an understanding of the depth of physical and emotional pain inflicted when it is the intimate partner who has repeatedly betrayed the plaintiff with his abusive conduct.[210]

An increasing number of courts have found that detailed allegations of domestic violence do meet the standard for severe emotional distress.[211] Some jurisdictions, though allowing IIED to address tortious conduct during the marriage, take great care to warn that a very high bar will be set for IIED in the family law realm.[212] Further permutations emerge as courts allow IIED claims for "bystander view" and the resulting trauma experienced by the battered mother and her son.[213]

The majority of courts recognize that public policy concerns should not impede spouses or former spouses filing for IIED based on harmful behavior during the marriage.[214] Gradually, some courts find that, within the IIED framework, they can formulate a discernable line between the inherent distress of divorce and severe psychological abuse.[215] Judges do want the discretion to determine a cognizable threshold of harm under which no claim is permitted. However, there is growing disinclination to grant judicial discretion in the family law arena,[216]

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[210] *See infra* note 246 and accompanying text for discussion of *betrayal harm.* **R**

[211] *See, e.g.*, Feltmeier v. Feltmeier, 777 N.E.2d 1032 (Ill. App. 2002) (ruling that after being severely battered over eleven years of marriage, wife was not barred from bringing IIED claim against her husband); *see also* Henriksen v. Cameron, 622 A.2d 1135 (Me. 1995) (finding that woman could bring IIED suit against her ex-husband for severe domestic violence inflicted during the marriage).

[212] *See, e.g.*, Christians v. Christians, 637 N.W.2d 377 (S.D. 2001) (noting also a preference that such actions be brought with the dissolution proceedings).

[213] *See, e.g.*, Courtney v. Courtney, 437 S.E.2d 436 (W. Va. 1993) (permitting separate tort action subsequent to the final divorce).

[214] *See, e.g.*, Feltmeier v. Feltmeier, 798 N.E.2d 75 (Ill. 2003) (citing the court's review of case law from around the country addressing this issue).

[215] *See, e.g.*, McColloh v. Drake, 24 P.3d 1162 (Wyo. 2001) (noting that "legal relief in addition to divorce is justified for an [intentional infliction of emotional distress] claim."); *see also* Henricksen v. Cameron, 622 A.2d 1135, 1140 (Me. 1993) (stating that although divorce may allow a victim to escape the abuse, it does not permit compensatory relief).

[216] Judith D. Moran, *Judicial Independence in Family Courts: Beyond the Election-Appointment Dichotomy*, 37 FAM. L.Q. 361, 377 (2003) (stating that the crux of the

where most of these domestic violence tort actions would likely be heard. Professor John J. Sampson notes that it is preferable to have our elected representatives create family law policy rather than lawyers, particularly gubernatorially-appointed judges.[217] He elaborates that even when elected, judges are rarely chosen based on policy matters, with consideration of family law issues virtually non-existent.[218] Thus, this is not a call to make all marital matters open for court intervention, but rather for court intervention with a prima facie showing of serious harm.

What conduct, then, is outrageous *enough*? In *Hakkila v. Hakkila*,[219] the New Mexico Court of Appeals held that marital conduct warranted a higher level of protection than what might be accorded interactions between strangers.[220] The trial court found that the husband's ten years of physical, verbal, and emotional abuse against the wife was so extreme and outrageous that she could recover for IIED. In his appeal, the husband argued that public policy should prevent recognition of IIED within the confines of marriage. Although not fully supporting the husband's position, the appellate court nonetheless held that IIED should only be afforded quite narrow application between spouses[221] and cited agreement with the commentary to Section 895G of the Second Restatement of Torts:

> The intimacies of family life also involve intended physical contacts that would be actionable between strangers but may be commonplace and expected within the family. Family romping, even roughhouse play and momentary flares of temper not producing serious hurt, may be normal in many households, to the point that the privilege arising from consent becomes analogous.[222]

Citing the frequency with which spouses suffered emotional distress because of the other's reckless or intentional behavior,[223] the court stated that open communication between the couple

judicial independence dilemma may be society's growing hesitation to grant judges' decision making in family law).

[217] John J. Sampson, *Bringing the Courts to Heel: Substituting Legislative Policy for Judicial Discretion*, 33 FAM. L.Q. 565 (1999) (commenting on the movement of legislatures taking control of family law guidelines).

[218] *Id*.

[219] 812 P.2d 1320 (N.M. Ct. App. 1991).

[220] *Id*. at 1326.

[221] *Id*. at 1324.

[222] *Id*. at 1323 (citing RESTATEMENT (SECOND) OF TORTS § 895G cmt H (1979)).

[223] *Id*. at 1324; *see infra* notes 240-41 and accompanying text.

would suffer if liability for improper conduct were permitted.[224] The court's attempt to analogize serious domestic violence with the fun "horseplay" of family life is minimization at its most blatant. Its description of short-lived bursts of anger not causing serious harm as normal, and therefore consensual in some households, is not an accurate portrayal of the planned pattern of coercive abuse used by batterers to maintain control of their partners.[225] Further, it is highly discretionary what the court deems to constitute "serious hurt," applying an objective standard of reasonableness with a subjective view of how *this* plaintiff was harmed. To then cite a 1984 law review article as the basis for legal policy curtailing the rights of women to obtain redress for abuse,[226] ostensibly to prevent deteriorating communication, reflects faulty reasoning. It is ludicrous to presume that "open communication" is occurring when one spouse is battering the other, for fear of retaliation alone silences the victim.

The *Hakkila* court states it has not barred spousal IIED cases, but this opinion creates an absurdly high threshold that must be met by a battered woman seeking redress in tort.[227] Acknowledging that New Mexico no longer recognizes the doctrine of interspousal immunity, the court nonetheless imposes an elevated standard of outrageousness cloaked in the disingenuous language of protecting the marital relationship that the batterer is already destroying.[228] The *Hakkila* facts would seem to meet even a rigorous IIED standard, for the trial court found that the husband's abuse which caused her harm was as follows:

> [Husband] on occasions throughout the marriage and continuing until the separation[:]
> a. assaulted and battered [wife],
> b. insulted [wife] in the presence of guests, friends, relatives, and foreign dignitaries,
> c. screamed at [wife] at home and in the presence of others,
> d. on one occasion locked [wife] out of the residence over

[224] *Id*. at 1325.

[225] Adams, *supra* note 74, at 163 (noting that most state standards for batterer's intervention programs define battering as "a pattern of coercive control" often involving economic, physical, emotional, and sexual abuse). **R**

[226] *See Hakkila*, 812 P.2d at 1325 (citing Constance Ward Cole, *Intentional Infliction of Emotional Distress Among Family Members*, 61 DENV. U. L. REV 553, 574 (1984)) ("Because the family's functioning depends upon open and free communication, even negative give and take is necessary.").

[227] *See Hakkila*, 812 P.2d at 1325-26.

[228] *Id*. at 1326.

> night in the dead of winter while she had nothing on but a robe,
> e. made repeated demeaning remarks regarding [wife's] sexuality,
> f. continuously stated to [wife] that she was crazy, insane, and incompetent,
> g. refused to allow [wife] to pursue schooling and hobbies,
> h. refused to participate in normal marital relationship with [wife] which ultimately resulted in only having sexual relations with [wife] on four occasions in the last three years of the marriage,
> i. blamed his sexual inadequacies upon [wife].[229]

Based on these facts, the trial court decided that the husband intentionally inflicted severe emotional distress upon his wife and that his acts were "so outrageous in character and so extreme in degree as to be beyond all possible bounds of decency and were atrocious and utterly intolerable."[230] In overruling that decision, the appellate court found persuasive and cited a 1936 law review article in which a Professor Magruder states, "It would be unfortunate if the law closed all the safety valves through which irascible tempers might legally blow off steam."[231] At no time does Arnold Hakkila, the defendant, claim he was just "blowing off steam"; rather, he engaged in a pattern of unlawful, vicious physical assaults on his wife, as well as a range of psychological abuse that the trial court accurately determined met the standard elements of IIED.

Noting the wife's "suffering from acute depression since approximately 1981,"[232] the trial court cited this as indicative of the

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[229] *Id*. at 1321.

> In late 1984 when wife was pushing her finger in husband's chest, he grabbed her wrist and twisted it severely. In 1981 during an argument in their home husband grabbed wife and threw her face down across the room, into a pot full of dirt. In 1978, when wife was putting groceries in the camper, husband slammed part of the camper shell down on her head and the trunk lid on her hands.

Id. at 1322.

The wife also testified that at a Christmas party at the home of friends: "At about 11:00 p.m. wife approached husband, who was 'weaving back and forth with his hands in his pockets,' and suggested that they go home. Husband began screaming, 'You f_____ bitch, leave me alone.' Wife excused herself and walked home alone." *Id*. Finally, evidence at trial stated that "Throughout the marriage husband made remarks such as, 'You're just plain sick, you're just stupid, you're just insane.'" *Id*.

[230] *Id*. at 1321.

[231] *Id*. at 1324 (citing Calvert Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033, 1053 (1936)).

[232] *Hakkila*, 812 P.2d at 1321.

harm from the husband's tortious acts, although the appellate court chose to frame the trial court's act as possibly impinging on the husband's rights, stating: "Many, if not all, of us need some freedom to vent emotions in order to maintain our mental health. The law should not require a degree of civility beyond our capacity."[233] Such flimsy reasoning would neither excuse nor mitigate criminal charges of assault and battery that could easily lie in this case, and certainly it conflicts with accepted standards of intolerable behavior. Indeed, the often-cited Restatement (Second) of Torts § 46, comment d, specifies that to qualify for IIED, the defendant's conduct must be so extreme "as to go beyond all possible bounds of decency and be regarded as atrocious, and utterly intolerable in a civilized society."[234] Yet, the *Hakkila* court deems that refraining from violent and abusive behavior within marriage requires "a degree of civility beyond our capacity."[235] This rationale is not only insulting to men, but poses a terrifying prospect for women who marry.

Additionally, a well settled doctrine in tort law is that of the eggshell or thin-skull plaintiff,[236] affirming that the tortfeasor takes his victim as he finds her.[237] Thus, even if one ascribes to the barbaric notion that Mr. Hakkila may physically and emotionally abuse his wife in the cause of maintaining his own mental health, that conduct ought to be circumscribed by the knowledge that she was in a fragile state of mind. The thin skull doctrine would not hold Mr. Hakkila responsible for the depression Mrs. Hakkila suffered prior to their marriage, only for aggravating it with his abusive behavior.[238]

The *Hakkila* decision is useful to examine in detail because it elucidates the very doctrinal obstacles discussed herein, but also because it offers the opportunity to discuss the specifics of a domestic violence tort threshold. In evaluating a case, a court can

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233 *Id*. at 1324.

234 RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965).

235 *Hakkila*, 812 P.2d at 1324.

236 *See* DAN B. DOBBS, THE LAW OF TORTS 851-52 (2000) (stating that if a defendant knows he is dealing with a particularly sensitive plaintiff, he is obligated to act with greater care).

237 *See id*. at 465 (explaining that even if the special sensitivity is not foreseeable to the defendant, the plaintiff is entitled to recover for all the harm, thus making the defendant liable for preexisting conditions).

238 *Id*. Professor Dobbs states further that the thin skull rule arises when the defendant's conduct would place a normal person at risk, and having done that, the defendant is then liable for the actual harm caused.

examine a minimum of five factors to determine whether the defendant's conduct meets the IIED standard of being so extreme "as to go beyond all possible bounds of decency and be regarded as atrocious, and utterly intolerable in a civilized society."[239] The proposed five factors are duration, severity, harm, pattern, and context. Each of these considerations is interrelated, such that often they coexist and exacerbate the harm caused, although also highlighting the specifics of a particular plaintiff's case.

Duration means determining what period of time the plaintiff endured abuse *and* the accompanying fear of impending harm. In my experience, battered women who are beaten sporadically report the same levels of dread and fear as those abused more frequently. As the subsequent discussion of continuing tort doctrine describes, many jurisdictions have now recognized that the statute of limitations for tort claims should be tolled if the abuse constitutes "a continuous and unbroken wrong,"[240] over a prolonged period of time. Duration underscores the importance of factoring in the entire length of time that a plaintiff suffered the harm, as well as its severity.

Severity connotes not only the harm from individual acts of abuse, but also the *cumulative* physical and emotional effects of that abuse. Batterers frequently inflict many forms of trauma, each intensifying the harm of the others.[241] The Restatement (Second) of Torts § 46, comment j, adds, "[t]he intensity and duration of the distress are factors to be considered in determining its severity."[242] Additionally, the extreme and offensive character of the defendant's conduct will be evaluated to determine if the abuse constitutes severe emotional distress.[243] Here, the thin-skull plaintiff doctrine applies if the defendant's conduct caused the plaintiff's preexisting conditions of physical or mental illness to worsen.[244]

Harm indicates the adverse consequences a plaintiff suffered as a result of the defendant's intentional or negligent acts, including both physical and mental manifestations. Also germane as an

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239 RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965).

240 Giovine v. Giovine, 663 A.2d 109, 118 (N.J. Super. 1995).

241 *See supra* Part I.A.2 for more complete discussion of the totality of harms.

242 RESTATEMENT (SECOND) OF TORTS § 46 cmt. j (1965) (as cited in McGrath v. Fahey, 533 N.E.2d 806 (Ill. 1988)).

243 *See* Kolegas v. Heftel Broad. Corp., 607 N.E.2d 201 (Ill. 1992).

244 *See supra* notes 236-37 and accompanying text for further discussion of this issue.

aggravating factor is what I have termed *betrayal harm*, to reflect the particular trauma inflicted when the victim is injured by an intimate partner in whom she has placed great trust.[245] This disproportionate reliance confers the responsibility to avoid intentionally harming the other, just as the concept of fiduciary duty between spouses imposes an obligation of utmost good faith and fair dealing.[246] Betrayal harm also seeks to capture the intensely personal nature of intimate partner torts, unlike those occurring between strangers or in the realm of business. The intimate nature of the relationship means that the defendant knows his partner's areas of greatest vulnerability, and often exploits those entrusted secrets with particular viciousness.[247] Some courts do not hold batterers to the same standard of care toward their intimate partners as is required toward strangers.[248]

Thus, it could be argued that, rather than lowering the threshold for IIED within the context of marriage, it ought to be raised in acknowledgement of the added trauma when the perpetrator is a current or former intimate partner. Since the vast majority of batterers *choose* to be abusive,[249] this higher standard could serve a deterrent function in helping them select another option when displeased with their partners. Again, the thin-skull plaintiff concept is relevant as many batterers claim the victim had preexisting depression or physical impairments for which he should not be held responsible.[250]

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[245] I think it is helpful to name this abuse to call attention to its unique aspects that may give rise to increased recovery if the severity is shown to be sufficient.

[246] *See*, *e.g.*, RESTATEMENT (SECOND) OF TORTS § 551 (stating that in most states, a marriage creates a relationship of trust and confidence between the spouses, requiring the utmost good faith in their dealings with each other); *see also* Sprick v. Sprick, 25 S.W.3d 7, 15 (Tex. App. 1999) (McClure, J., concurring) (stating that because of the confidential relationship between a husband and wife, the marital partnership is fiduciary in nature and, therefore, precludes the commission of economic torts against the community estate).

[247] *See*, *e.g.*, Twyman v. Twyman, 855 S.W.2d 619, 620 n.1. Mrs. Sheila Twyman testified at trial that her husband insisted that the only way to save their marriage was for her to engage in sadomasochistic bondage activities, although he knew these were very traumatizing since she had been raped at knifepoint prior to their marriage.

[248] *See* Rhonda L. Kohler, Comment, *The Battered Women and Tort Law: A New Approach to Fighting Domestic Violence*, 25 LOY. L.A. L. REV. 1025, 1029-30 (1992) (arguing that courts also seem to overlook this in barring subsequent tort actions based on res judicata if the victim did not raise the abuse in the divorce).

[249] Adams, *supra* note 74. **R**

[250] *See supra* notes 236-37 and accompanying text for further discussion of this issue.

In establishing a judicially manageable threshold, the concept of betrayal harm can assist the trier of fact in determining the degree of malice exhibited by the defendant. In *Caron v. Caron*, Maine's Supreme Judicial Court upheld a jury award of $119,000 in compensatory damages and $75,000 in punitive damages to the battered ex-wife, and $20,000 in compensatory damages and $35,000 in punitive damages to the abused stepson for claims of assault, battery, and intentional infliction of emotional distress.[251] During the marriage, Arthur, the defendant, repeatedly assaulted and threatened Elaine, the plaintiff,[252] as well as her son, Wade. Arthur force-fed Wade, and if he vomited or gagged, Arthur made Wade swallow the vomit. Arthur also threw Wade at the wooden arm of a couch, causing a deep cut over Wade's eye. In a separate incident, Arthur gave Wade two black eyes by slapping him repeatedly in the face. Arthur also insisted that Wade stay in his room until Arthur left for work, causing Wade to urinate in his pajamas because he was denied access to the bathroom.[253]

After the couple separated, Elaine testified that "almost every other day" Arthur made death threats to her.[254] In admitting to making "numerous" death threats to her, Arthur said that he considered these to be factual statements rather than just threats. Although the divorce was final, Arthur's abuse of Elaine continued, including a prolonged assault in which he took hold of Elaine by her ponytail, knocked her feet out from under her, pulled her around the house, and repeatedly kicked her in her side. He then threw Elaine off his forty-inch high porch, causing her a permanent, disabling knee injury as she hit the cement sidewalk. Surgery has not been able to correct the injury, and Elaine has had to leave her employment. She now suffers from post-traumatic stress disorder (PTSD), manifested in her fear of leaving the house by herself, and has flashbacks of the assault, nightmares, a severe bladder control problem, and a high anxiety level.[255] In pleading guilty to criminal assault, Arthur admitted

251 Caron v. Caron, 577 A.2d 1178, 1180 (Me. 1990).

252 Elaine testified that the abuse included Arthur stranding her on a tree limb, then throwing rocks at her knuckles to make her fall, locking her out of the house when she had on only her nightgown, and twice attempting to kill her dogs. *Id*. at 1180.

253 *Id*.

254 *Id*. at 1179.

255 *Id*.

that he grabbed Elaine by her ponytail in a manner that caused her to lose her footing, but justified his conduct by stating he was "using a reasonable amount of force . . . necessary to remove her."[256]

In affirming this minimal damages award, the Maine Supreme Judicial Court noted that the principal goal of punitive damages is to "express[ ] society's disapproval of intolerable conduct and [to] deter[ ] such conduct where no other remedy could suffice," and that it is quite permissible to apply this remedy in child and spousal abuse cases.[257] The court justified the amount as reasonable in light of the defendant's income ($234,000 for the previous three years) and assets (he claimed $285,000 in total assets, not including $50,000 in accounts payable), particularly given the evidence of intentional malice in the violent and intimidating abuse committed, and Elaine's continuing incapacitating fear of Arthur.[258]

Detail of the *Caron* case is offered under the harm category of determining a reasonable threshold as it highlights the importance of addressing some of the debilitating after-effects of intimate partner abuse. Whether for measuring degree of harm or assessing damages, the residual harm should be neither underestimated nor excluded from the calculation of harm suffered by the plaintiff.

Pattern refers to the course and accumulation of harmful acts that typify the battering relationship over time. Batterer treatment experts emphasize that domestic violence is a planned *pattern* of harm that reflects the perpetrator's sense of entitlement: his abuse is a tool to gain compliance from his partner.[259] Whether the harm is inflicted in a random or routinized fashion, batterers typically display their own individualized pattern of abuse that reflects their proclivities for imposing their will on their partners. As can be seen from the case examples, batterers are adept at justifying their abuse[260] as part of their patterns of carefully targeted humiliation and degradation.[261]

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[256] *Id*. In this incident, Arthur had invited Elaine to his home to pick up their daughter, Nicole, after visitation.

[257] *Id*. at 1180 (citing Tuttle v. Raymond, 494 A.2d 1353, 1355 (Me. 1985)).

[258] *Caron*, 577 A.2d at 1180.

[259] Adams, *supra* note 74. **R**

[260] *See*, *e.g.*, *Caron*, 577 A.2d at 1179, in which the defendant rationalizes a brutal assault as necessary to get his wife to leave.

[261] *See* DONALD G. DUTTON, THE BATTERER 35 (describing the high level of cre-

Finally, context provides the background dynamics of a specific abusive relationship, allowing the court to fully examine the *totality* of the circumstances and thus permitting a more equitable examination of the case. In the *McGrath* opinion, the Illinois Supreme Court recognized several factors to consider when evaluating whether a defendant's conduct is extreme and outrageous, finding the power and control analysis particularly helpful in reviewing marital tort cases:

> It is clear . . . that the degree of power or authority which a defendant has over a plaintiff can impact upon whether that defendant's conduct is outrageous. The more control which a defendant has over the plaintiff, the more likely that defendant's conduct will be deemed outrageous, particularly when the alleged conduct involves either a veiled or explicit threat to exercise such authority or power to plaintiff's detriment. Threats, for example, are much more likely to be a part of outrageous conduct when made by someone with the ability to carry them out than when made by someone in a comparatively weak position.[262]

Context provides another lens through which the court can evaluate the "macro" view of the relationship, rather than simply focusing on the "micro" of words or punches that may garner initial attention. The *Hakkila* court notes at the outset of its opinion that Arnold Hakkila had a Ph.D. in chemistry and was employed at Los Alamos National Laboratory for the duration of the marriage. Peggy Hakkila had only a high school diploma, had earned some credits toward a baccalaureate degree in chemistry, had a vocational degree as a chemical technician, and was a secretary at the laboratory prior to becoming a chemical technician.[263] The relevance of each spouse's level of educational attainment and work history is questionable, particularly when not discussing division of marital property, alimony, or other subjects in which their respective income or earning potential is being reviewed. However, the disparity between Arnold and Peggy's professional status and income, coupled with the detailed accounts of one-sided harmful conduct, should have cued the *Hakkila* court to the evident power imbalance that typifies abusive relationships.

The confluence of these five factors—duration, severity, harm,

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ativity used by batterers in delivering themed abuse designed to undercut that which is most important to their partners).

[262] McGrath v. Fahey, 533 N.E.2d 806, 809 (Ill. 1988).

[263] Hakkila v. Hakkila, 812 P.2d 1320 (N.M. Ct. App. 1991).

pattern, and context—is evident in the similar facts of the *Hakkila* and *Feltmeier* cases, with the New Mexico and Illinois Supreme Courts arriving at opposite conclusions. In *Feltmeier*, the Illinois Supreme Court explains with admirable precision and intellectual acuity why it found the presenting facts to be actionable:

> It combines more than a decade of verbal insults and humiliations with episodes where freedom of movement was deprived and where physical injury was often inflicted. The alleged pattern of abuse, combined with its duration, worked a humiliation and loss of self-esteem. Regardless of the form in which it arrived, violence was certain to erupt, and when seasons of spousal abuse turn to years that span the course of a decade, we are unwilling to dismiss it on grounds that it is unworthy of outrage.[264]

An added tension is that courts seek finality of divorces to eliminate the couple's returning to court with post-dissolution conflicts, yet there must be room for flexibility to address changing circumstances or ongoing harm, particularly given Dr. DeKeseredy's data on the frequency of post-divorce sexual, physical, and psychological abuse.[265]

3. Judicial Quagmire

When attempting to offer a judicially manageable threshold for tort matters accompanying divorce, the woman question reveals disproportionate bias against abuse victims by assuming that *any* dividing line can be drawn by the court absent a full review of the duration, severity, harm, pattern, and context of the abuse. As the above comparison between the *Hakkila* and *Feltmeier* cases illustrates, judges *do* set policy through the rhetoric of their legal opinions, performing a powerful interpretive function in their social construction of battered women's experiences. In order to eliminate the doctrinal obstacles for battered women seeking tort remedies, it is necessary to acknowledge the role of judges in maintaining the status quo, whether ascribing this to the pre-realist notion of reiterating extant law[266] or the legal realist view of moving past a mechanical judging func-

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[264] Feltmeier v. Feltmeier, 777 N.E.2d 1032, 1039-40 (Ill. App. Ct. 2002).

[265] *See supra* notes 100-06 and accompanying text.

[266] *See* Dan Simon, *A Psychological Model of Judicial Decision Making*, 30 RUTGERS L.J. 1, 7 (1998).

tion.[267] Judges are key stakeholders in the evolution of institutionalized cultural norms accepting domestic violence, but some have emerged as champions in accepting the challenge to examine gendered expectations.[268]

Judges face the conundrum of balancing the expectation that they make complex decisions quickly,[269] while not losing sight of the human dimension—the purpose of law. It is remarkable that more judges do not report at least a degree of angst in deciding cases impacting the very safety and well being of the litigants, as in domestic violence matters. Interesting, too, is that the opinions claiming the necessity of ensuring the veritable floodgates are not opened to every disgruntled, divorcing spouse appear to be particularly disconnected from the issues of gendered distortion in their appraisal of the facts.[270] What these opinions are really saying is that they fear the crumbling of the walls of male privilege, as is evident in numerous cases in which battered women have killed their batterers in classic self-defense, yet are denied that mitigation.[271] Duncan Kennedy warns that "many particular claims of legal necessity in judicial opinions are unconvincing on their face, and therefore raise the question of what is 'really' determining the outcome."[272]

Another challenge is that of motivating backward judges toward introspection in the hope that this will spark insight into their biases and revision of their unjust thinking.[273] Changing

267 *See, e.g.*, Joseph W. Singer, *Legal Realism Now*, 76 CAL. L. REV. 467, 504 (1988).

268 For example, Judge Mike Denton, presiding judge of the Travis County (Tex.) Domestic Violence Court since its inception in January of 1999, met with myriad community stakeholders and court staff weekly for a year before the court started to ensure their inclusion in the planning and implementation of the court's mandate. Judge Denton regularly attends training sessions on domestic violence law, dynamics, and model practices, and periodically seeks guidance from victims, offenders, and all practitioners regarding how he can improve the court.

269 Judge Posner states that judges must be able to make quick decisions and leave the cases, that those who are "most introspective, sensitive, and scrupulous people—do not become judges, do not stay judges, or are unhappy judges." RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 192 (1990) (as cited in Simon, *supra* note 267, at 132). R

270 *See Hakkila* case discussion, *supra* notes 219-35 and accompanying text.

271 *See generally* Sarah M. Buel, *Effective Assistance of Counsel for Battered Women Defendants: A Normative Construct*, 26 HARV. WOMEN'S L.J. 217 (2003); *see also* RICHIE, *supra* note 52. R

272 *See* DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION 29 (1997).

273 *See* JEROME FRANK, LAW AND THE MODERN MIND 108 (1930). Frank further suggests that judges have training in psychology and undergo psychoanalysis, *id*. at

cultural norms, coupled with social sanctions, can engender extrinsic motivation, as is evidenced by transforming attitudes about sexual harassment.[274] Organized court watches can also be effective in changing judicial practices, if the problematic behavior is carefully documented and relayed to the court with specific recommendations for change.[275]

C. The Failure of No-Fault Divorce in the Context of Domestic Violence

No-fault divorce statutes have now been enacted in every state,[276] meaning that the parties need not allege grounds or fault, but merely must assert irreconcilable differences.[277] Such laws were passed in an effort to remedy the problem that parting spouses were often forced to contrive claims of adultery or cruel and abusive behavior in order to secure a divorce. This sea change occurred at a time when policymakers were largely unaware of domestic violence, and thus did not consider the ramifications of eliminating potential remedies for outrageous, dangerous conduct. It is incomprehensible that legislators intended to foreclose abuse victims from filing tort actions as part of the no-fault effort. Rather, the goal was to further the public policy of making divorce less contentious by ending practices requiring humiliating accusations. By allowing couples to claim irreconcilable differences, neither party was forced to lie or air the couple's private problems. Additionally, no-fault divorces promoted administrative efficiency by greatly decreasing the time necessary to process a divorce, as another goal was to effect a

148, 156, but that seems a highly unrealistic suggestion, but one from which lawyers, too, could benefit.

274 Simon, *supra* note 267, at 141 (citing Roy F. Baumeister & Kristin L. Sommer, *Consciousness, Free Choice, and Automaticity,* 10 ADVANCES SOC. COGNITION 75, 77-79 (1997)). **R**

275 *See* Sarah M. Buel, *The Pedagogy of Domestic Violence Law: Situating Domestic Violence Work in Law Schools, Adding the Lenses of Race and Class*, 11 AM. U. J. GENDER SOC. POL'Y & L. 309, 348-50 (2003) (describing the purpose and implementation of a court watch program).

276 *See* IRA ELLMAN ET AL., FAMILY LAW 177-86 (2d ed. 1991); *see also* HAW. REV. STAT. ANN. § 580-42 (Michie 2004) (showing statutory adoption of the "irretrievable breakdown" standard for adjudicating a divorce claim); NEB. REV. STAT. ANN. § 42-361 (Michie 2004); N.H. REV. STAT. ANN. 458:7-a (2004).

277 *See*, *e.g.*, *In re* Marriage of Bates, 490 N.E.2d 1014 (Ill. App. Ct. 1986); Joy v. Joy, 734 P.2d 811 (N.M. Ct. App. 1987); Cary v. Cary, 937 S.W.2d 777 (Tenn. 1996); Haumont v. Haumont, 793 P.2d 421 (Utah Ct. App. 1990); Grosskopf v. Grosskopf, 677 P.2d 814 (Wyo. 1984).

"clean break" between parties and encourage a one-time division of the marital estate.[278] Thus, no-fault divorces were intended to rectify a worsening family law problem, not foreclose options for badly harmed abuse victims.

No-fault divorce doctrine is premised on the assumption that it is better for the community to not attribute blame. The term "no-fault" was not meant to be interpreted literally, for each party may be full of recrimination.[279] Instead, there was an assumption that the family and community benefited from the accusations remaining private. No-fault laws hope to promote the social policy of less acrimonious divorces and, in turn, allow the adult and child family members to get on with their lives.[280] One problem in most domestic violence cases, however, is that the batterer will allow neither an amicable divorce nor a peaceful existence for his ex-spouse, thereby sabotaging important goals of no-fault.[281] However, lawyers and judges often find it difficult to hear the panoply of past and present harm, including a degrading regimen of assaults, humiliation, threats, stalking, and verbal abuse, coupled with the demand of total obedience. Some find the vicious conduct incomprehensible, although others have become inured to yet another story of a mistreated battered woman. The result is that the abuse victim is prevented from providing an accurate picture of the totality of harm suffered, the cumulative impact of enduring virtual torture at the hands of an intimate partner.

Yet courts insist on generalizing about the potential negative consequences of allowing evidence of fault. In *Chapman*, the court said that "[t]o permit evidence on the question of fault would necessarily bring into focus past conduct of the parties, with endless invectives hurled at each other—all to the lasting detriment of the parties and their children."[282] Silencing domestic violence victims in court benefits no one: giving a batterer the

278 *See* Drake v. Drake, 725 A.2d 717 (Pa. 1999).

279 *See* Lynn D. Wardle, *Divorce Violence and the No-Fault Divorce Culture*, 1994 UTAH L. REV. 741 (stating that a primary goal of no-fault changes was to decrease the traditional hostility inherent in fault-based divorce).

280 *See*, *e.g.*, Chapman v. Chapman, 498 S.W.2d 134 (Ky. App. 1973) (stating that the purposes of the no-fault divorce laws are to mitigate the possible harm to the spouses and their children caused by the legal dissolution process, and to preserve and strengthen the integrity of marriage and family relationships).

281 *See id*. (noting that no-fault divorce laws are intended to promote amicable dispute resolution between parties to a marriage).

282 *Chapman*, 498 S.W.2d at 137.

green light to continue his abuse decreases the likelihood that he will spend time in prison for his increasingly more serious crimes. Certainly, the victim and children are disadvantaged by a system that neither protects them nor affords an opportunity to gain at least some small measure of healing from telling their stories and witnessing the offenders being held accountable.

In an effort to avoid undermining the principle of no-fault dissolutions, many judges rule that domestic violence evidence is inadmissible as it requires faultfinding and thus runs counter to the intent of the doctrine.[283] Such logic begs the question: for whom is it better to act as though the abuse did not occur? Often the victim's healing process necessitates that the offender is held responsible,[284] but this is also essential for the batterer to get the message of societal condemnation to increase the likelihood that he will stop the abuse. Some batterers contrive archaic and nonsensical arguments in seeking to prevent the divorce from being granted. In *In re Marriage of Haugh*, the battering husband claimed that because his wife had tolerated his outrageous behavior for a long time, she had effectively consented to remain in the marriage forever.[285] The Missouri Court of Appeals affirmed the trial court's analysis that evidence of the husband's ruthless, obsessive, and outrageous conduct toward his wife and six children was sufficient to find the marriage irretrievably broken, and that the wife's previous tolerance of the abuse did not convey consent to withstand it for all eternity.[286]

Some courts, however, have found that although their state statutes omit specific reference to abuse as an enumerated factor to consider, case law provides this option.[287] Public policy arguments attempting to justify nonadmission of fault evidence focus on assumed benefits of including abuse within the "irretrievable breakdown" rubric. However, the rub in this framework is that a

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283 *See supra* notes 119 and 199 and accompanying text for further discussion of statutory construction and case resolutions of this issue; *see also* Naomi R. Cahn, *Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions*, 44 VAND. L. REV. 1041, 1083-84 (1991) (discussing problematic implications in custody suits).

284 *See* JUDITH LEWIS HERMAN, TRAUMA AND RECOVERY (1992).

285 978 S.W.2d 80 (Mo. Ct. App. 1998).

286 *Id*.

287 *See*, *e.g.*, Love v. Love, 72 S.W.3d 167 (Mo. Ct. App. 2002) (finding marriage irretrievably broken after wife testified that husband had been violent with her, had repeatedly violated the restraining order and that she and the children were in fear of him).

large minority of states require that the couple wait two or three years before a unilateral no-fault divorce can be obtained.[288] The divorcing spouses must live apart during this waiting period, unless they are proceeding by mutual agreement, or if the plaintiff alleges the defendant is at fault.[289] The emergence of no-fault is further evidence of the court's reluctance to interfere in marriage.

Examining the public policy encouraged by no-fault divorce laws[290] leads to the unavoidable conclusion that its framework must be modified to address the dangerous phenomenon of domestic violence. An informed analysis of no-fault, as implemented today, reveals a good-faith attempt to address the complex issues inherent in divorces. Universal values include those relishing family peace, which intimate violence obviously destroys. Thus, a one-size-fits-all approach to ending intimate relationships blurs critical differences between couples who seek legal release from unhappy, nonviolent marriages and those in which abuse renders one party a victim who deserves to choose the most appropriate legal remedy. The distinction between abusive versus nonabusive marriages is more than merely academic; it defines the very nature of not only the relationship as it was, but importantly for the court and the victim, how the abusive spouse is likely to behave in the future.[291] As such, there exists a vast disconnect between the doctrine of no-fault and its intended benefit for beleaguered spouses.

III

Doctrinal Obstacle of Belief that Existing Laws are Sufficient

A second doctrinal obstacle is that existing divorce laws provide a framework for addressing domestic violence in both con-

[288] Mississippi, New York, Ohio, and Tennessee require consensual separation in order to obtain a no-fault divorce. Ellman et al., *supra* note 277, at 185-86. **R**

[289] *See*, *e.g.*, Mo. Ann. Stat. § 452.320 (West 2003) (stating grounds for divorce, including consideration of five factors: one year of separation with mutual agreement; two years separation without agreement; adultery; abandonment; or respondent's behavior is intolerable).

[290] *See*, *e.g.*, Laxton v. Laxton, 498 A.2d 909 (Pa. Super. 1985) (finding that when a statute (here no-fault divorce) grants broad discretion to the trial court to strive for justice and equality in its rulings, specific no-fault divorce procedures cannot be avoided or ignored).

[291] *See* Adams, *supra* note 74, at 166 (reporting that batterer's past conduct is the most accurate predictor of his future conduct). **R**

tested and uncontested cases involving dissolution, custody, visitation, and division of property. Thus, courts are likely to resist any proposal that adds complexity to their already large burden.

A. Premise that Torts Are Suspect in Divorce

Courts usually start from the premise that circumspection is warranted when considering tort actions accompanying divorce.[292] Another concern often voiced is that of lying plaintiffs—women claiming to be battered in order to obtain undeserved damages. Empirical studies document, however, that it is the perpetrators who are rarely truthful with those who have the to power to hold them accountable.[293] Additionally, when batterers do admit to their crimes, they tend to minimize the severity, frequency, and range of abuse.[294] Importantly, context is often excluded from both researchers' and the courts' evaluation of violent episodes, resulting in too many women being charged as perpetrators who are, in fact, acting in self-defense and are the true victims.[295] Perhaps uncomfortable for some to acknowledge, the rigorous studies and most esteemed experts agree that the vast majority of domestic violence is perpetrated by men against women,[296] and that it is actually rare for women reporting such abuse to be lying.[297] In fact, empirical data document that

[292] *See*, *e.g.*, Feltmeier v. Feltmeier, 777 N.E.2d 1032, 1039 (Ill. App. Ct. 2002) (stating that intentional infliction of emotional distress claims deserve cautious review in the marital setting).

[293] *See*, *e.g.*, Sarah L. Cook, *Self-Reports of Sexual, Physical, and Nonphysical Abuse Perpetration*, 8 VIOLENCE AGAINST WOMEN 541, 562 (2002) (finding that while a large number of incarcerated men were willing to disclose physical, sexual, and nonphysical abuse to researchers, most had not done so with the criminal justice system); Walter S. DeKeseredy & Martin D. Schwartz, *Measuring the Extent of Woman Abuse in Intimate Heterosexual Relationships: A Critique of the Conflict Tactics Scales*, NAT'L RES. CTR. ON DOMESTIC VIOLENCE, Feb. 1998 (finding that the most common screening questions are limited in scope, allowing offenders to skew reporting), *available at* http://www.vawnet.org/DomesticViolence/ Research/VAWnetDocs/AR_ctscrit.php (last visited Mar. 14, 2005).

[294] *See*, *e.g.*, DeKeseredy & Schwartz, *supra* note 294. **R**

[295] *Id*. at 2 (reporting that while men generally use violence to control their partners, women more often use it to defend themselves).

[296] *See*, *e.g.*, Russell P. Dobash et al., *The Myth of Sexual Symmetry in Marital Violence*, 39 SOCIAL PROBLEMS 71 (1992) (finding that reports of equivalent abuse by gender are false and reflect quite problematic research methodologies).

[297] *See, e.g.*, People v. Colabine, No. C043187, 2004 WL 1616574 (Cal. Ct. App. July 20, 2004) (citing the testimony of expert witness Linda Barnard explaining it is untrue that battered women often lie about their abuse); *see also* People v. Johnson, No. C040781, 2003 WL 21235280 (Cal. Ct. App. May 28, 2003) (citing expert's state-

most battered women dramatically *under*-report the abuse, and when finally coming forward, often minimize the severity of the harm.[298]

The argument typically advanced is that between statutory and case law, sufficient tort remedies exist, the problem being that lawyers do not properly utilize them. But deficient attorney practice cannot be examined in a vacuum, for the legislative process and evolution of legal doctrine are so enmeshed as to preclude scrutiny of one without inclusion of the others. The courts' and bar's general distaste for handling family violence matters is reflected in statutory and case language, and, importantly, formal and informal requirements of victims prior to accessing remedies. For example, the Harris County District Attorney's Office in Houston will not assist an abuse victim in obtaining a protective order unless she has both left the batterer and sustained visible injuries. Rationalized as a screening device, it is contrary to the Texas Family Code, which mandates a finding that family violence has occurred and is likely to occur in the future prior to the issuance of a protective order.[299]

B. Problem of Timing and Rights: Permissive vs. Mandatory Joinder of Claims

1. Res Judicata and Collateral Estoppel[300]

At first glance it would appear that most states are permissive regarding joinder of tort and divorce actions. However, closer scrutiny reveals that many divorce statutes include specific language that, although joinder is not strictly mandatory, if the subject of the subsequent tort action was at all part of the

ment that the number of false reports of domestic violence is no more than for other crimes); *see also* Andrea M. Kovach, *Prosecutorial Use of Other Act of Domestic Violence for Propensity Purposes: A Brief Look at Its Past, Present, and Future*, 2003 U. ILL. L. REV. 1115, 1126 n.91 (discussing how the myth of domestic violence victims lying hurts victims' credibility in court).

298 *See* Alana Dunnigan, Comment, *Restoring Power to the Powerless: The Need to Reform California's Mandatory Mediation for Victims of Domestic Violence*, 37 U.S.F. L. REV. 1031 (2003) (stating that many women minimize their experiences of domestic violence); *see also* Karla Fischer et al., *The Culture of Battering and the Role of Mediation in Domestic Violence Cases*, 46 SMU L. REV. 2117, 2141 (1993) (discussing victim's minimization of abuse).

299 TEX. FAM. CODE ANN. § 85.001 (Vernon 2004) (required findings and orders).

300 Res judicata includes both claim and issue preclusion, with some considering the latter to be a modern term for collateral estoppel. *See* Heacock v. Heacock, 520 N.E.2d 151, 152-53 (Mass. 1988).

dissolution, the tort action will be disallowed on grounds of res judicata.[301] Missouri distinguishes between actions alleging fraud or conversion—allowing them to be filed separately[302]—but not most other claims, such as battery, intentional infliction of emotional distress, and negligent infliction of emotional distress.[303] Maine offers another permutation in specifying that joinder is not required if the divorce proceeds on a no-fault basis, but otherwise res judicata or collateral estoppel would likely bar a later tort suit.[304] Connecticut has decided that public policy favors mandatory joinder of tort law with dissolutions.[305] New Jersey now requires joinder,[306] as do New York[307] and Ohio.[308]

States mandating joinder purport that fairness requires divorce and tort actions to be resolved simultaneously, although others, such as Tennessee[309] and Texas,[310] allow either joined or successive resolution of the claims. Quite problematic, however, is that even in states with permissive joinder, most divorce decrees include a stipulation that all matters between the parties have been resolved, thus barring subsequent tort action. In *Stuart v. Stuart*, a Wisconsin battered woman filed a tort action against her ex-husband, alleging intentional infliction of emotional distress, assault, and battery, just three months after her no-fault divorce

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301 *See, e.g.*, *Ex parte* Howle, 776 So. 2d 133 (Ala. 2001) (allowing summary judgment for husband on tort action, as wife's tort claim for husband's violence was issue raised in divorce and wife was compensated for it); *see also* Kemp v. Kemp, 723 S.W.2d 138 (Tenn. Ct. App. 1986) (affirming dismissal of wife's assault and battery tort suit, brought after the divorce, as the issue of his breaking her nose was raised in the divorce and wife was compensated).

302 *See, e.g.*, Wood v. Wood, 716 S.W.2d 491 (Mo. Ct. App. 1986).

303 It is beyond the scope of this Article to address in depth the tort of negligent infliction of emotional distress, but note that some states have recognized it. For example, New Hampshire does so, but imposes formidable restrictions on its use, such as requiring physical manifestations as an essential element. *See* Corso v. Merrill, 406 A.2d 300 (N.H. 1979); *see also* Horwitz v. Horwitz, 16 S.W.3d 599 (Mo. Ct. App. 2000).

304 *See*, *e.g.*, Henriksen v. Cameron, 622 A.2d 1135 (Me. 1993).

305 *See*, *e.g.*, Hutchings v. Hutchings, 1993 Conn. Super. LEXIS 498 (Conn. Super. Ct. Feb. 22, 1993) (ruling that wife must join actions for divorce and tort).

306 *See*, *e.g.*, Mustilli v. Mustilli, 671 A.2d 653, 657 (N.J. Super. Ct. Ch. Div. 1995) (stating that recent jurisprudence suggests that mandatory joinder is now the rule in New Jersey).

307 *See*, *e.g.*, Partlow v. Kolupa, 504 N.Y.S.2d 870, (App. Div. 1986), *aff'd* 509 N.E.2d 327 (N.Y. 1987).

308 *See*, *e.g.*, Shelar v. Shelar, 910 F. Supp. 1307 (N.D. Ohio 1995).

309 *See*, *e.g.*, Kemp v. Kemp, 723 S.W.2d 138 (Tenn. Ct. App. 1986).

310 *See*, *e.g.*, Twyman v. Twyman, 855 S.W.2d 619 (Tex. 1993).

was granted.[311] The ex-husband countered that since the divorce judgment included language that "all assets, debts, and other ramifications of the marriage" had been fully resolved, the ex-wife should be barred from pursuing the tort claim since she failed to notify him of her intent to file the tort claim.[312] The trial court ruled in favor of the ex-husband, finding it "absolutely unconscionable" that Ms. Stuart failed to notify the court of her impending plans to file a civil action when negotiating her divorce.[313] Characterizing the case as frivolous, "an abuse of the judicial system," and "brought in bad faith and solely for the purposes of harassment and malicious injury," the court awarded Mr. Stuart $10,000 in attorney fees.[314]

The appellate court, however, found that res judicata was not applicable since the divorce case considered only the dissolution and division of property, without addressing the bad behavior or fault of either party, and concomitant compensatory or punitive damages.[315] Importantly, the court specifically noted that "divorce and tort actions do not easily fit within the framework of a single trial"; thus, the goals of res judicata would not be served by insisting on joinder of both matters.[316] Citing the fundamental unfairness of applying res judicata, the court noted that the divorce action did not allow for full consideration of Ms. Stuart's tort claim.[317] Similarly, the appellate court was unmoved by Mr. Stuart's claim of equitable estoppel, finding that "[f]ailing to disclose a potential tort claim cannot be interpreted as a representation that no such claim exists."[318] Finally, the court ruled that the division of marital property was based on state law, negating Mr. Stuart's assertion that he was harmed by Ms. Stuart's failure to reveal her planned tort suit.[319] The Wisconsin Supreme Court

311 *See* Stuart v. Stuart, 410 N.W.2d 632, 634 (Wis. Ct. App. 1987).

312 *Id*. The ex-husband cited res judicata, equitable estoppel, and waiver as the bases of his argument.

313 *Id*.

314 *Id*.

315 *Id*. at 635 (stating that "in making the financial allocation between the parties, the court could not consider one spouse's tortious conduct or, based upon that conduct, award the injured spouse punitive damages or compensatory damages for past pain, suffering, and emotional distress").

316 *Id*. (explaining that the objectives of res judicata are "judicial economy and the conservation of those resources parties would expend in repeated and needless litigation").

317 *Id*. at 636.

318 *Id*.

319 *Id*.

affirmed the appellate court's reasoning,[320] taking a more realistic approach to the joinder quandary.

Some courts do not hold res judicata as a bar to a post-divorce tort action,[321] in some cases even if the harm on which the tort is based was discussed in the dissolution proceedings.[322] Their reasoning is premised on the belief that divorce and tort actions are quite dissimilar.[323] Although divorce is intended to legally dissolve a marriage and apportion support, alimony, and marital property, tort is designed to compensate aggrieved parties in damages.[324] This distinction is critical to a court's interpretation of when to assert res judicata or collateral estoppel.[325] The purpose of alimony is to assist a spouse with financial support, and the division of the marital estate is to reflect each spouse's contributions to the marriage.[326] Thus, res judicata should not prevent further tort claims, as the harmed spouse cannot obtain tort damages as part of the divorce decree even if the abusive behavior is raised in that forum. As distinct from a tort action, the dissolu-

320 Stuart v. Stuart, 421 N.W.2d 505, 508 (Wis. 1988).

321 *See, e.g.*, Vance v. Chandler, 597 N.E.2d 233 (Ill. App. Ct. 1992); Heacock v. Heacock, 520 N.E.2d 151, 153 (Mass. 1988); Aubert v. Aubert, 529 A.2d 909 (N.H. 1987); Noble v. Noble, 761 P.2d 1369, 1371 (Utah 1988).

322 *See Noble*, 761 P.2d at 1374 (ruling that even where divorce case addressed wife's lowered earning potential and increased living expenses due to injuries from her husband intentionally shooting her, res judicata would not bar later tort claim); *see also Heacock*, 520 N.E.2d at 153 (holding that since the record was silent as to considering assaultive conduct in division of marital estate and alimony, res judicata was not applicable).

323 *See* Cater v. Cater, 846 S.W.2d 173, 176 (Ark. 1993) (although wife was awarded property and alimony in her divorce, tort claim for assault and battery was not litigated and, therefore, is not barred by res judicata in later action); Vance v. Chandler, 597 N.E.2d at 237 (although parties were the same, claims were not—thus allowing woman to sue her ex-husband for intentional infliction of emotional distress and civil conspiracy); Heacock, 520 N.E.2d at 153 (underlying claims of tort and divorce are different, thus res judicata does not preclude wife's subsequent tort action); Slansky v. Slansky, 553 A.2d 152 (Vt. 1988) (wife cannot relitigate property division settled in divorce, but decree does not preclude subsequent tort action on different issues).

324 *See Aubert*, 529 A.2d at 912; *see also Heacock*, 520 N.E.2d at 153.

325 Collateral estoppel prevents relitigation of issues already resolved in a prior action involving the same parties, either based on judgment or issue preclusion. *See* Arthur J. Spector, *Bankruptcy*, 2000 L. REV. M.S.U.-D.C.L. 563, 577-78 (explaining collateral estoppel in the context of divorce proceedings); *see also* Leonard Karp & Laura C. Belleau, *Litigating Domestic Emotional Distress Claims*, FAIRSHARE, Mar. 1998, at 2, 5 (stating that "collateral estoppel, or issue preclusion, bars relitigation of an issue determined in the divorce case where the same issues arise in the later tort action.")

326 *See Heacock*, 520 N.E.2d at 153.

tion proceeding is designed neither to provide damages for the harm nor to penalize the abusive spouse.[327] In no-fault jurisdictions, considerations of res judicata are intensified as the tortfeasor's conduct often cannot be raised in the divorce.[328] At least in fault states, there exists some basis for arguing that the harm could have been raised in the divorce action,[329] although the victim's fear of retaliation may prevent her from doing so at that time.[330]

Some states, however, preclude plaintiffs from filing post-divorce tort actions on the basis of res judicata, asserting that the issues either were resolved in the dissolution proceeding or *could* have been disposed of in that venue.[331] Although the distinction between divorce and tort appears to be clear, courts have incorrectly asserted res judicata to bar a quite different cause of action than has already occurred. In *Kemp v. Kemp,* the Tennessee Court of Appeals invoked res judicata to preclude a battered wife's tort action because the husband had been ordered to pay past and future medical bills as part of the divorce decree.[332] Although acknowledging that the two cases were different, the court nonetheless found that payment of medical bills meant the wife had "in effect . . . prevailed on a tort claim."[333] Adopting a broad interpretation of res judicata, the *Kemp* court stated, "[P]rinciples of res judicata apply not only to issues actually raised and finally adjudicated in prior litigation, but to all claims and issues which were relevant and which *could* reasonably have been litigated in a prior action."[334] If the *Kemp* court wishes to establish a rule that all claims must be brought at one time, that is wholly different than stating that the battered wife who only received coverage of medical bills prevailed in her tort action when no damages were assessed.[335]

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[327] *Id*.

[328] *See* Karp & Belleau, supra note 326, at 5. **R**

[329] See Andrew Schepard, *Divorce, Interspousal Torts, and Res Judicata*, 24 FAM. L.Q. 127, 143 (1990).

[330] *See* Dalton, *supra* note 16, at 364-69.

[331] *See*, *e.g.*, Smith v. Smith, 530 So.2d 1389 (Ala. 1988) (plaintiff barred from asserting post-divorce tort action on the grounds that she discussed the tortious injuries in her divorce).

[332] Kemp v. Kemp, 723 S.W.2d 138, 139-40 (Tenn. Ct. App. 1986), (cited in Dalton, *supra* note 17, at 378). **R**

[333] *Kemp*, 723 S.W.2d at 139-40.

[334] *Id*. (emphasis added).

[335] Similarly, in *Smith v. Smith*, 530 So.2d 1389, 1391 (Ala. 1988), the battered wife was barred from bringing a post-divorce tort action because coverage of her

Such an approach has the potential to place abuse victims in a precarious position. As the Wisconsin Court of Appeals noted in the *Stuart* case, a res judicata bar would force an abused spouse to make an unconscionable choice: the spouse can "commence a tort action during the marriage and possibly endure additional abuse"; "join a tort claim in a divorce action and waive the right to a jury trial on the tort claim"; or "commence an action to terminate the marriage, forego the tort claim, and surrender the right to recover damages arising from spousal abuse."[336] What the *Stuart* court understood—that the *Kemp* court missed—is that a battered woman may have myriad valid reasons for being unable to assert the harm in the divorce action, ranging from fear of retaliation to prioritizing acquisition of a job and new home to low self-esteem and depression.[337] But for the batterer's egregious abuse, the victim would not be in a disadvantaged position in having to decide which claims to assert. Certainly a manifest injustice[338] would occur if the batterer benefits from his tortious conduct by being able to assert res judicata, although the victim is left without equitable recovery.

These factors specific to domestic violence torts are virtually ignored by the transactional approach imposed by the Restatement (Second) of Judgments' requirement that, absent extenuating circumstances, all theories of claim and remedy arising from a single transaction be asserted in a single action.[339] Under this theory, joinder is mandatory, as it assumes that the divorce and tort actions emanate from one factual core—the marital relationship.[340] Others have challenged this assertion, arguing instead that the demise of the marriage brings about the divorce, although the harmful actions provide the basis for tort claims.[341] New Jersey ascribes to the mandatory joinder rule, insisting that

medical bills and insurance had been part of the divorce discussions, and the court had known that the husband's violence had caused the ruptured disc for which she needed surgery. *Id*. at 1390.

336 *See* Stuart v. Stuart, 410 N.W.2d 632, 638 (Wis. Ct. App. 1987).

337 *See* Buel, *supra* note 192.

338 Several states' common law provides that res judicata cannot operate if manifest injustice will occur. *See* Yarnell v. City Roofing, Inc., 812 P.2d 1199, 1206 (Haw. Ct. App. 1991), *aff'd*, 813 P.2d 1386 (Haw. 1991) (cited in Stacey A. Kawasaki, *Interspousal Torts: A Procedural Framework for Hawai'i*, 19 U. HAW. L. REV. 377 (1997)).

339 RESTATEMENT (SECOND) OF JUDGMENTS § 24 cmt. C (1982).

340 *See* Schepard, *supra* note 329, at 131.

341 *See* Janet W. Steverson, *Interspousal Tort Claims in a Divorce Action in Oregon*, 31 WILLAMETTE L. REV. 757, 771-72 (1995).

tort and divorce matters must be brought together if they derive from or relate to "the same transactional circumstances."[342] This doctrine was first espoused in dicta in *Tevis v. Tevis*, when the court stated:

> Since the circumstances of the marital tort and its potential for money damages were relevant in the matrimonial proceedings, the claim should not have been held in abeyance; it should, under the "single controversy" doctrine, have been presented in conjunction with [the divorce] action as part of the overall dispute between the parties in order to lay at rest all their legal differences in one proceeding and avoid the prolongation and fractionalization of litigation.[343]

Although the single controversy doctrine may seem appealing at first glance because of its apparent administrative efficiency, even New Jersey courts have acknowledged that its application may produce unjust results, warranting a departure.[344] If counsel is bringing a domestic violence tort action subsequent to divorce in a single controversy doctrine state, she will want to be prepared to argue those facts specific to her case that made limiting the causes of action to one proceeding difficult or impossible.

2. Release Provisions Estopping Relief

In *Stuart*, the trial court ruled in favor of the ex-husband's assertion that subsequent tort action was precluded by the full release clause of his divorce decree, stating that "all assets, debts, and other ramifications of the marriage" had been fully disclosed.[345] In overruling the res judicata bar, the Wisconsin Court of Appeals did not specifically address this release clause,[346] but since the wife prevailed it can be assumed the court did not find that it constituted a sufficient basis to deny her tort relief. Florida courts have ruled that silence will not be construed as a waiver, enforcing release clauses only so long as the language is clear that future rights are being relinquished.[347] It is thus unde-

342 *See* Brown v. Brown, 506 A.2d 29, 32 (N.J. Super. Ct. App. Div. 1986).

343 Tevis v. Tevis, 400 A.2d 1189, 1196 (N.J. 1979).

344 *Brown*, 506 A.2d at 30.

345 Stuart v. Stuart, 410 N.W.2d 632, 634 (Wis. Ct. App. 1987).

346 *Id*. at 632.

347 *See*, *e.g.*, Newsome v. Newsome, 456 So.2d 520, 522 (Fla. Dist. Ct. App. 1984) (stating that the agreement "must be specifically expressed by clear language evidencing an intent to waive all such rights in the future"); *see also* Ryland v. Ryland, 605 So.2d 138 (Fla. Dist. Ct. App. 1992) (finding the couple's settlement did not refer to alimony or attorney's fees, allowing the court to later consider them).

termined whether Florida courts will permit post-divorce tort claims if the issues have not been addressed in the divorce judgment.[348]

Professor Clare Dalton cautions those representing abuse victims to refuse all-inclusive release provisions in divorce actions to preserve their client's right to pursue tort relief in the future.[349] Dalton notes, however, that a victim's aversion to the broad release may alert the batterer as to her later plans. Even if a battered woman is aware of the pitfalls of a full disclosure provision, she may feel compelled to acquiesce under duress. The victim's realistic apprehension of retaliation should be sufficient for a later court to find the release invalid due to its involuntariness.[350]

C. Problematic Mediation Mandates

The proliferation of mediation[351] is problematic for battered women on many fronts, but it is the mandatory provisions that can prove most difficult for those wishing to seek remedies in tort. Administrative efficiency is one reason cited by courts for their increasing use of alternative dispute resolution (ADR) in family law matters,[352] but this represents a shortsighted option in many domestic violence matters as batterers often have no intention of abiding by the agreements, thus increasing the likelihood that the cases will continually reappear. However, mediation, as the preferred ADR method, has become an integral part of family law practice across the country, with some jurisdictions mandating mediation even in domestic violence cases.[353] Largely due to the efforts of battered women's advocates, most states have statutory or informal provisions allowing abuse victims to use shuttle mediation or to opt out altogether, subsequent to a hearing on the merits. Although these provisions at least take into consideration the likely danger of placing the victim and offender in the same room, they usually offer only the illusion of an effective intervention.

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348 *See* Karp & Belleau, *supra* note 325, at 5 (discussing res judicata generally).

349 Dalton, *supra* note 17, at 382. **R**

350 *Id*. at 383.

351 Mediation is defined as a form of negotiation in which a trained third party helps the litigating parties reach a voluntary settlement. 17 AM. JUR. 2D *Alternative Dispute Resolution* § 16 (1995).

352 *See*, *e.g.*, Sarah Krieger, *The Dangers of Mediation in Domestic Violence Cases*, 8 CARDOZO WOMEN'S L. J. 235 (2002).

353 *See*, *e.g*., Dunnigan, *supra* note 298.

One concern is that mediators are often not lawyers, and even those who are may be unfamiliar with the premises of tort, the nuances of causation, harm, continuing tort, intentional infliction of emotional distress, and the dynamics of domestic violence relationships—thus denying the abuse victim's right to be heard on key claims. Particularly in jurisdictions mandating joinder of tort and dissolution claims, yet also in those requiring mediation for contested matters, the victim loses the opportunity to present her case to a learned judge and, hopefully, a jury of her peers.

A second problem is that of abusers not negotiating in good faith, and since this is an essential underpinning of mediation, the victim's chances of achieving an equitable resolution and compliance with the agreement are further minimized. Thus, although mediation is intended to reduce litigation costs and foster greater harmony for the divorcing couple, the batterer ensures that neither goal is achieved because his sense of entitlement means he will not relinquish such power to the court. Third, there is every reason to believe the very power imbalance that characterizes abusive relationships also carries over into mediation. Some jurisdictions do not allow lawyers to be present in the mediation session or do not allow them to speak; often the batterer subtly or overtly silences the victim with words, gestures, and looks that may appear harmless to an outsider, but which have terrifying meaning for the victim.

Fourth, some rules of mediation may be logical in a non-abuse context, but their implementation in domestic violence cases can sabotage the entire effort. For example, "no interrupting" is a typical rule that would appear to foster respectful listening on both sides. However, batterers are adept at taking control of listing the issues to be discussed, framing the conflicts, and formulating solutions. In one mediation session in which I was allowed to sit but not speak, the batterer was permitted, for almost an hour, to list all his grievances with the victim. He alleged that, although his wife worked full-time outside the home, was the primary caretaker for their two small daughters, and attended secretarial classes at night, she was a prostitute, lousy housekeeper, and "bad Christian" because she did not always get the two- and four-year old daughters to church on Sundays. When I objected to this tirade as unfounded verbal abuse, irrelevant to the custody case, the mediator informed me that each side was to have uninterrupted time to speak. My battered client cried

throughout the batterer's invective, as he got increasingly more abusive, calling her a "slut, whore, and tramp," which the mediator allowed, as long as he did not curse. When the batterer rose from his chair and came toward my client, I ushered her from the session and back to the courtroom, where the judge admonished us for being "uncooperative" with the mediation.

A fifth problem with mediation in divorce and tort matters is the victim's fear of retaliation for any negative information she discloses about the batterer. Although it might be assumed that this would also be true with a tort claim, a vastly different framework controls the case. In a formal court hearing, the imprimatur of a robed judge, empanelled jury, court officer, rules of evidence, and statutory and common law are all in place to provide both victim and offender the message that the case is being treated seriously. Sixth, mediation re-privatizes the abuse, allowing the batterer to use its more therapeutic and communication-focused aspects to further manipulate the victim toward inequitable resolutions.[354] With much pressure on the mediator and divorcing parties to reach an agreement, a coercive atmosphere is likely for the victim who desires not only safe transition,[355] but also compensation for the harms inflicted by the batterer.

Seventh, studies indicate that, to forge an effective resolution, mediation must be voluntary and both parties must be committed to implementing the agreement.[356] The purpose of this is to ensure that litigants are entering into the process in good faith and with the intention of implementing the agreement. In the court's quest for administrative efficiency, it may lose sight of these essential components lacking in most domestic violence cases. For the foregoing reasons, mediation is often problematic for battered women seeking termination of dangerous marriages. Further, this trend toward ADR in family law forces the re-privatization of domestic violence matters, thus hindering hard-

354 *See generally* Andre R. Imbrogno, Note, *Using ADR To Address Issues of Public Concern: Can ADR Become an Instrument for Social Oppression?*, 14 OHIO ST. J. ON DISP. RESOL. 855, 858 (1999).

355 Barbara J. Hart, *State Codes on Domestic Violence: Analysis, Commentary and Recommendations*, 43 JUV. & FAM. CT. J. 38 (1992).

356 Barbara J. Hart, *Custody and Divorce Mediation*, *in* FAMILY VIOLENCE DEP'T OF THE NAT'L COUNCIL OF JUVENILE & FAMILY COURT JUDGES, MANAGING YOUR DIVORCE: A GUIDE FOR BATTERED WOMEN 9, 10-11 (1998).

won gains to garner access to the courts.[357]

D. Disproportionate Distribution of the Marital Estate: Inadequacy of Current Doctrine

Obstructed tort remedies might not incite such concern if disproportionate division of property was used to provide some measure of compensation for the harmed spouse, but such is not often the case. Largely based on judicial discretion, court rulings differ widely. Fault and no-fault categories are insufficient to describe the latitude in state policies when evaluating whether evidence of misconduct will be factored into allocation of property and alimony. Some assert that fault cannot be part of the court's evaluation absent express statutory language to permit considering it, as that was the precise intent of no-fault legislation.[358] Well over half the states adhere to no-fault doctrine in dividing marital property, and about half do so in determining alimony.[359] This is based on policy espousing that tort and criminal law are the more appropriate vehicles for addressing fault, as the divorce process would become distorted if forced to take on this issue.[360] This social policy represents the admirable desire to simplify, expedite, and defuse divorce, but it also proves unrealistic and unduly burdensome for abuse victims. Some states mandate that all issues between the parties must be resolved in the divorce action, thus precluding separate tort claims for those without the resources for prolonged, separate litigation. Additionally, the marital assets may not be large enough to warrant a separate tort case, but if fault were considered in the process of dividing the property, the harmed spouse could receive at least some compensation.

Although New York's no-fault divorce law includes a provision assuming equitable distribution, some of its courts will not consider abusive conduct by one spouse against another as a factor when dividing marital property.[361] In *Orofino v. Orofino*,[362] the

357 *See* Krieger, *supra* note 352 (arguing that mediation is a setback to the legislative and political progress of the battered women's movement, in part by forcing family law matters to be dealt with privately).

358 *See*, *e.g.*, *In re* Marriage of Williams, 199 N.W.2d 339 (Iowa 1972).

359 The American Law Institute, *Principles of the Law of Family Dissolution: Analysis and Recommendations*, 8 DUKE J. GENDER L. & POL'Y 1, 59 (2001).

360 *Id*.

361 *See*, *e.g.*, Kellerman v. Kellerman, 590 N.Y.S.2d 570 (App. Div. 1992) (ruling that twenty-seven separate incidents of abuse during a two-year marriage was not sufficiently "egregious" to warrant unequal distribution of marital assets).

defendant was found to have severely abused the plaintiff, including threatening to commit arson and kill her, holding a gun to her head, and, in one incident, lacerating her scalp after throwing a glass ashtray at her.[363] Nevertheless, the trial court ruled that the defendant husband should not receive a reduced share in a nearly two-million-dollar joint account/stock portfolio.[364] Instead, the court gave the defendant sixty percent of the portfolio, rationalizing that he was the sole manager of the assets and plaintiff's only role was that of a "homemaker."[365] The *Orofino* decision is contrary to the New York legislature's express intent when enacting its equitable distribution law:[366] that marriage be viewed as a partnership, giving value to the homemaker's contributions, and presuming a just division upon divorce.[367]

The focus on equity logically empowers courts to take into account reprehensible behavior of the parties when allocating marital property.[368] And, although New York's statute does not include fault among its thirteen itemized factors, number thirteen specifies that the court "shall consider . . . any other factor which the court shall expressly find to be just and proper."[369] Even with this provision, New York courts generally do not take into consideration obvious fault by one party,[370] explaining that "fault

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362 627 N.Y.S.2d 460 (App. Div. 1995).

363 *Id*. at 461.

364 *Id*.

365 *Id*. at 462.

366 *See* N.Y. DOM. REL. LAW § 236 (McKinney 2003).

367 *See* Price v. Price, 503 N.E.2d 684, 687 (N.Y. 1986):

> The Equitable Distribution Law reflects an awareness that the economic success of the partnership depends not only upon the respective financial contributions of the partners, but also on a wide range of nonremunerated services to the joint enterprise, such as homemaking, raising children and providing the emotional and moral support necessary to sustain the other spouse in coping with the vicissitudes of life outside the home.

(citing Brennan v. Brennan, 479 N.Y.S.2d 877, 880 (App. Div. 1984)); *see also Memorandum of Assemblyman Gordon W. Burrows*, *in* NEW YORK STATE LEGISLATIVE ANNUAL 129, 130 (1980) ("The basic premise for the marital property . . . reforms . . . is that modern marriage should be viewed as a form of partnership.").

368 *See* BLACK'S LAW DICTIONARY 540 (6th ed. 1990) ("Equity—Justice administered according to fairness as contrasted with the strictly formulated rules of common law . . . [t]he term equity denotes the spirit and habit of fairness, justness and right dealing which would regulate the intercourse of men with men.").

369 *See* N.Y. DOM. REL. LAW § 236(B)(5)(d) (McKinney 2003)

370 *See* Blickstein v. Blickstein, 472 N.Y.S.2d 110 (App. Div. 1984) (ruling that considering fault when dividing marital property would be contrary to legislative intent); *see also* O'Brien v. O'Brien, 489 N.E.2d 712 (N.Y. 1985) (finding that determining fault would be too time-consuming for courts in the process of divorce).

is very difficult to evaluate in the context of a marriage," in part because both parties' conduct may be the problem.[371] This reasoning is based on several erroneous assumptions, beginning with the projection that the litigants may be equally culpable. The court has a duty to determine if one party is disproportionately at fault, as is the case in most domestic violence situations.

Deeply troubling is the notion that if an issue is difficult, the court can excuse itself from addressing it. This is a puzzling position for the court, given that determining fault and severity of harm is *precisely* its role, whether deciding business, family, or estate conflicts. Furthermore, triers of fact are presumed able to determine level of fault, and, indeed, if it appears both parties are equally culpable, the property can be divided to reflect that. In first recognizing intentional infliction of emotional distress, courts responded to the concern that frivolous claims would proliferate by noting that triers of fact are deemed capable of discerning "slight hurts" as opposed to "outrageous conduct."[372] Particularly if courts are averse to the filing of tort litigation in the marital context, they cannot ethically bar all avenues of redress simply because the cases are difficult.

Perhaps most worrisome is the courts' reliance on the postulation that marriage represents an economic partnership, and that, somehow, this precludes consideration of fault when dividing property.[373] These are not mutually exclusive concepts: the court can evaluate *both* the economic partnership *and* fault aspects of the relationship, particularly because they are likely correlated. Empirical studies have documented that many batterers employ economic abuse and coercion as part of their obsessive control in addition to the infliction of physical harm.[374]

Florida's divorce law is premised on equity as well, with the

371 *Blickstein*, 472 N.Y.S.2d at 113.

372 *See* Knierim v. Izzo, 174 N.E.2d 157 (Ill. 1961) (finding that the defendant had intentionally caused the plaintiff severe emotional distress by his "outrageous conduct" and that the court could ably differentiate that from a "slight hurt").

373 *O'Brien*, 489 N.E.2d at 719.

374 *See* JODY RAPHAEL, SAVING BERNICE: BATTERED WOMEN, WELFARE, AND POVERTY 22, 29-30, 46-50 (2000) (describing how economic abuse often increases dependence on welfare, sabotages birth control efforts, and causes or exacerbates substance abuse—all barriers to work and self-sufficiency); *see also* LUNDY BANCROFT, WHY DOES HE DO THAT? INSIDE THE MINDS OF ANGRY AND CONTROLLING MEN 8 (2002) (noting that batterers often use economic exploitation in addition to many other forms of abuse); Buel, *supra* note 189 (reporting "[f]inancial abuse is a common tactic of abusers . . . . The batterer may control estate planning, access to all financial records, as well as make all money decisions."). R

factors for court consideration delineated by property distribution[375] and alimony.[376] Since neither statute includes fault or damages for harmful conduct among its listed factors, case law expressly prohibits consideration of fault unless the behavior depleted marital assets.[377] Other jurisdictions have ruled that legislative silence can be interpreted as recognizing the necessity of examining fault for the purposes of alimony and property division.[378] Interestingly, even though some statutes mandate that courts continue to weigh fault solely for deciding issues of alimony and property distribution, appellate courts have found that reprehensible conduct was not properly considered by the trial court.[379]

No state allows a spouse to recover both tort damages and a larger share of the marital property, but courts can still award a disproportionate share of the assets to one spouse for factors other than tortious abuse.[380] If the tort and divorce actions are filed together, the factfinder can prevent double recovery simply by considering the tort damages when deciding how to divide the marital estate.[381] However, in community property states, damages for personal injuries for IIED, including pain and suffering, constitute the separate property of the harmed spouse, and are not part of the marital assets to be divided by the court.[382] Trial courts possess immense discretion in distributing the marital assets,[383] with equality not being essential.[384] The doctrinal obstacles discussed herein attest to the overwhelming challenges facing spouses wanting to use tort law in seeking remedies for their harm. It is thus an illusion that existing law is sufficient to

375 *See* FLA. STAT. ANN. § 61.075(1)(a)-(1)(j) (West 2004).

376 *See id*. § 61.08(2)(a)-(2)(g).

377 *See*, *e.g.*, Eckenrode v. Eckenrode, 570 So. 2d 1347, 1349 (Fla. Dist. Ct. App. 1990) (ruling "[a] party's misconduct is not a valid reason to award a disproportionate amount of the marital assets to the innocent spouse, unless the infidelity depleted the marital assets").

378 *See*, *e.g.*, *In re* Marriage of Galloway, 547 S.W.2d 193 (Mo. Ct. App. 1977); *In re* Marriage of Schulte, 546 S.W.2d 41 (Mo. Ct. App. 1977).

379 *Galloway*, 547 S.W.2d at 193; *Schulte*, 546 S.W.2d at 41.

380 *See* Twyman v. Twyman, 855 S.W.2d 619, 625 (Tex. 1993).

381 *Id*.

382 *See*, *e.g.*, Toles v. Toles, 45 S.W.3d 252, 264 (Tex. App. 2001) (citing *Twyman*, 855 S.W.2d at 625 n.20, that "[s]uch a recovery does not add to the marital estate").

383 *See*, *e.g.*, TEX. FAM. CODE ANN. § 7.001 (Vernon 1998); *see also* Jacobs v. Jacobs, 687 S.W.2d 731, 733 (Tex. 1985).

384 *See*, *e.g.*, Murff v. Murff, 615 S.W.2d 696, 698 (Tex. 1981) (describing the factors for courts to consider, including differences in income and earning ability, ages, and benefit to harmed spouse had the marriage continued).

address serious marital misconduct, for too often tort and family law case precedent preclude recovery while the most blameworthy batterer, who has caused the most harm, escapes responsibility.

E. Underutilization of Prenuptial Agreements as Protection Against Spousal Violence

Even with prenuptial agreements utilized more frequently by prospective spouses, it is rare that counsel include provisions to address potential physical violence or economic harms.[385] *Posner* indicated the courts' recognition of spouses' right to contract as deserving of increased influence over the traditional, designated status model that advocated preservation of marriage, almost without exception.[386] Although growing acceptance of prenuptial agreements seemed likely to better protect battered women, surprisingly few of the contracts even mention potential violence, let alone emotional abuse. Prior to Yankee coach Jack Satter's marrying manicurist Nancy Bernard, he wrote a prenuptial agreement she claimed to have signed without reading.[387] Nancy asserted that the agreement should be ruled invalid because Jack had greatly undervalued his business interests.[388] In 1991, the trial court ruled the agreement valid,[389] after which Jack argued that it should be deemed unenforceable because

385 *See*, *e.g.*, Nora Lockwood Tooher, *Prenups Gaining In Popularity*, LAW. WKLY. USA, Jan. 19, 2004, at 3 (noting that most prenuptial agreements address division of property, whether alimony will be provided, and protection of large inheritances).

386 *See* Posner v. Posner, 233 So.2d 381, 384 (Fla. 1970) (stating that the court knew "of no community or society in which . . . public policy . . . condemned a husband and a wife to a lifetime of misery as an alternative to the opprobrium of divorce").

387 *See Dateline NBC: Dateline/Court TV Exclusive; Breaking Up Is Hard to Do, Satter vs. Bernard Divorce* (NBC television broadcast, Nov. 16, 2001) [hereinafter *Dateline NBC*], (cited in Michael T. Flannery, *Affairs of the Heart*, 10 VILL. SPORTS & ENT. L.J. 211, 229 (2003), *available at* 2001 WL 24017844).

388 *See* Satter v. Satter, 659 So. 2d 1185, 1185 (Fla. Dist. Ct. App. 1995); *see also Ex-Wife Settles Abuse Case*, SUN-SENTINEL, Jan. 16, 1997, at 1B; Stephen Van Drake, *Extra-Inning Fight*, BROWARD DAILY BUS. REV., Nov. 7, 2000, at A1; *Dateline NBC*, *supra* note 388 (the prenuptial agreement granted Nancy $1 million upon divorce, in addition to a Mercedes-Benz, a house in Cape Cod, and $1.5 million when Jack died) (as cited in Flannery, *supra* note 388). R R

389 *See Satter*, 659 So. 2d at 1185 (noting that the court awarded wife prejudgment interest and required husband to transfer title of Cape Cod residence free of any liens). The court ruled that Jack was truthful about his worth and that Nancy had a lawyer and an opportunity to read the prenuptial agreement. *See Dateline NBC*, *supra* note 387.

Nancy had breached by refusing to live with him.[390] Nancy claimed that Jack frequently beat and psychologically abused her, as well as carried on affairs, thus driving her away.[391]

In a subsequent 1992 trial, the court ruled that Nancy's testimony regarding physical abuse was believable and that Jack had violated the prenuptial agreement with his "systematic series of mental abuses."[392] After intermittent further litigation,[393] Nancy filed a $10 million tort action against Jack for the physical and emotional abuse he inflicted while they were married.[394] A Florida judge found that the two-year statute of limitations precluded consideration of all but one abuse claim.[395] In less than an hour, an all-male jury found that Nancy should not receive any compensation,[396] perhaps swayed by Jim Rice, Red Auerbach, Maury Povich, and John Havlicek speaking on Jack's behalf, and asserting that he was "super."[397]

IV

Doctrinal Obstacle of Primacy of Statutes of Limitations in Personal Injury Tort Actions

A. Statutes of Limitations

Statutes of limitations are often raised as an affirmative defense, their purpose being to curb stale claims and endless worry of being sued.[398] They are rigidly enforced, with length and form of activation varying by jurisdiction and type of claim, as well as

390 *See Satter*, 659 So. 2d at 1185. The prenuptial agreement provided that "Nancy shall not be entitled to receive anything if [she] cease[d] to cohabitate with Jack." *Dateline NBC*, *supra* note 387.

391 *See Dateline NBC*, *supra* note 387; *see also* Gayle Fee & Laura Raposa, *Ex Puts $10M Bite on Hot Dog King*, Boston Herald, Oct. 18, 1993, at 8 (summarizing Nancy's testimony in Palm Beach Circuit Court).

392 *See* Van Drake, *supra* note 388.

393 Jack said he was not subject to the prenuptial agreement as Nancy had not legally divorced her second husband. However, the court ruled in Nancy's favor. *See Dateline NBC*, *supra* note 388. R

394 *See Dateline NBC*, *supra* note 388; *see also* Gayle Fee & Laura Raposa, *Satters Keep Slicing the Bologna*, Boston Herald, June 16, 1996, at 10 (reporting that Nancy claimed Jack "tyrannized" and "threatened" her during their marriage). R

395 *See* Van Drake, *supra* note 389. R

396 *Id*.

397 *See Dateline NBC*, *supra* note 388; *see also* Fee & Raposa, *supra* note 395, at 10 (Jack's "high-powered pals" at the trial saying that Jack was "super"). R

398 *See*, *e.g.*, Pavlik v. Kornhaber, 761 N.E.2d 175, 186-88 (Ill. App. Ct. 2001).

whether a discovery rule covers commencement of the action.[399] Some of the disagreement focuses on whether the limitations period begins to run when the injury occurs or when the plaintiff knows or should know a tort has been inflicted.[400] Although many of these cases involve some form of negligence, they are equally applicable to intentional domestic violence torts, particularly when a victim has a credible basis for being unaware that the abuse constitutes a cognizable legal claim or that the injury would be severe. Just as in medical malpractice or other tort claims, the full extent of the harm may not manifest or be apparent within the statute of limitations. Thus, in some jurisdictions continuing tort doctrine has been applied as an exception to statutes of limitations to stay the commencement of deadlines until either the ongoing conduct has stopped, the last act has taken place, or the plaintiff becomes aware of the entire scope of harm.[401]

B. Continuing Tort as Rational Remedy in Domestic Violence Cases

A continuing tort is one in which injurious conduct has recurred over a specific period of time, with each day constituting a separate cause of action.[402] Although continuing tort theory has traditionally been applied in a business context,[403] there is no reason to forgo its extension to domestic violence cases. In fact, a 1938 Texas court ruled that a husband could avoid the limitations period in a divorce proceeding because of the continuous

399 *See* DAVID W. ROBERTSON ET AL., CASES AND MATERIALS ON TORTS 470 (2d ed. 1998) (explaining that whether or not a discovery rule is employed, there is disagreement as to whether the time period begins to run when the injury occurs).

400 *Id*. (citing Lo v. Burke, 455 S.E.2d 9 (Va. 1995) (limitations period started running when plaintiff's cyst became cancerous, not when doctor failed to properly interpret CAT scan)).

401 *See*, *e.g.*, Hyon Waste Mgmt. Servs., Inc. v. City of Chicago, 574 N.E.2d 129, 132-33 (Ill. App. Ct. 1991).

402 *See*, *e.g.*, Twyman v. Twyman, 790 S.W.2d 819 (Tex. App. 1990), *rev'd on other grounds*, 855 S.W.2d 619 (Tex. 1993).

403 *See*, *e.g.*, City of Rock Falls v. Chicago Title & Trust Co., 300 N.E.2d 331, 334 (Ill. App. Ct. 1973) (applying continuing tort theory in a case of tortious interference with an owner's use of property); *see also* Pavlik v. Kornhaber, 761 N.E.2d 175, 187-88 (Ill. App. Ct. 2001) (describing the application of continuing torts to a workplace sexual harassment case in which a course of outrageous conduct justifies a remedy that a one-time occurrence might not); Creswell Ranch & Cattle Co. v. Scoggins, 39 S.W. 612 (Tex. Civ. App. 1978) (recognizing the tolling concept of continuing tort in a trespass to land and nuisance case).

nature of his wife's cruel treatment.[404] Continuing tort doctrine prevents the defendant from asserting a statute of limitations defense, and the court bases its liability determination on the cumulative effect of *all* the harmful conduct, not simply a single incident or small cluster.[405] Although in the usual personal injury case, the harmful conduct is finished on a specific day and the statute of limitations begins, in a continuing tort case the cause of action continues and does not accrue until the tortious conduct stops.[406]

The tolling of statutes of limitations is often necessary to facilitate battered women's filing of tort actions because of the relatively short time frames afforded by most states. For example, New York has a one-year statute of limitations on intentional torts,[407] making it extremely difficult for abuse victims to effect timely filing due to their difficulty in marshalling all the resources necessary to leave the abuser. Policy considerations should allow for tolling the statutes of limitations when a victim can show that she was unable to file her tort claim while under the domination of the abuser. This position is consistent with the existing judicial doctrine of estoppel to assert limitations. Remedies expert and law professor Douglas Laycock says that it is analogous to longstanding statutory exceptions for plaintiffs in the military, out of the country, mentally disabled, in prison, or who are otherwise unable to assert timely claims.[408] The doctrine is also supported by the accrual rule on professional malpractice, where the statute generally does not begin to run until the professional relationship ceases. The premise is that one cannot reasonably be expected to take legal action against a fiduciary on whom one still relies.[409] An increasing number of courts are recognizing continuing torts in the context of domestic violence cases as a means of compensating the victim for the full extent of harm. In *Feltmeier*, the Illinois Appellate Court held that a husband's violent acts and intentional infliction of emotional abuse constituted a continuing

[404] *See* C.J.S. *Limitations of Actions* § 177, at 231 (2004) [hereinafter C.J.S.]; *see also* Franzetti v. Franzetti, 120 S.W.2d 123 (Tex. Civ. App. 1938). Interesting that the doctrine is not applied in any of the cases in which wives were being battered by their husbands.

[405] *Twyman*, 790 S.W.2d at 819.

[406] *See* C.J.S., *supra* note 405, at 231. **R**

[407] N.Y. C.P.L.R. 215(3) (McKinney 1999).

[408] E-mail from Douglas Laycock, University of Texas School of Law Professor, (March 12, 2004) (on file with author).

[409] *Id*.

tort, thereby allowing the battered wife additional time in which to file her claim.[410] Citing section 46 of the Restatement (Second) of Torts,[411] the *Feltmeier* court noted that the extent and brutality of the harm provided the battered wife with relief.[412]

In *Giovine v. Giovine*, a battered wife successfully sued her husband in tort, alleging emotional and physical harm caused by his continuous acts of abuse for the duration of their marriage.[413] The *Giovine* court ruled that if an abused partner is determined to have battered woman's syndrome (BWS),[414] she should be allowed to sue her spouse for the emotional and physical torts he committed against her throughout the marriage, "*provided* there is medical, psychiatric, or psychological expert testimony establishing that the wife was caused to have an 'inability to take any action to improve or alter the situation unilaterally.'"[415] Thus, to toll the statute of limitations, *Giovine* affirmed a four-part test to meet the standard for claiming BWS. A victim must have (1) participated in an intimate relationship that is either "marital or marital-like"; (2) suffered psychological abuse committed by the domineering partner over a prolonged period of time; (3) resultingly experienced recurrent psychological or physical harm for the duration of the relationship; and (4) been unable to engage in behavior to improve or change the situation unilaterally.[416]

The *Giovine* court's insistence that BWS dictate the parameters of recovery imposes too rigorous a standard and one based on highly controversial data. BWS is not a defense, but rather a pattern of symptoms describing the effects of abuse on the victim.[417]

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410 Feltmeier v. Feltmeier, 777 N.E.2d 1032, 1040-44 (Ill. App. Ct. 2002).

411 RESTATEMENT (SECOND) OF TORTS § 46 cmt. j at 77-78 (1965) ("Outrageous Conduct Causing Severe Emotional Distress") (noting that "[t]he intensity and the duration of the distress are factors to be considered in determining its severity).

412 *Feltmeier*, 777 N.E.2d at 1043.

413 663 A.2d 109 (N.J. Super. Ct. App. Div. 1993).

414 The term "battered woman's syndrome" was coined by clinical psychologist Lenore Walker to describe the response of abuse victims to the violence perpetrated against them. *See generally* WALKER, *supra* note 30. Walker expanded this theory several years later. *See* LENORE E.A. WALKER, THE BATTERED WOMAN SYNDROME (1984). She theorized that domestic violence occurs in cycles typified by three phases: tension building, explosive incident, and honeymoon. *See id*. at 126. R

415 *Giovine*, 663 A.2d at 114 (quoting Cusseaux v. Pickett, 652 A.2d 789, 794 (N.J. Super. Ct. 1994).

416 *Giovine*, 663 A.2d at 114.

417 *See* Mary Ann Dutton, *Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 HOFSTRA L. REV. 1191 (1993).

Initially hailed as a compelling tool to help battered women explain the reasonableness of their behavior and state of mind, BWS evidence may be misapplied and greatly harm victims who may not fit its narrow descriptions.[418] However, the *Giovine* court does cite *State v. Kelly* as recognizing BWS to explain that an abuse victim may become hopeless when she cannot control the violence, causing a form of psychological paralysis that makes it extremely difficult to extricate herself from the relationship.[419] Importantly, many victims do seek help, but are hampered by shame and fear of the batterer's retaliation.[420]

In *Feltmeier,* the battered wife's psychologist testified that the victim suffered from BWS as a result of the "systematic, repetitive infliction of psychological trauma" intended to "instill terror and helplessness."[421] He also diagnosed her as having PTSD caused by the entire pattern of abusive conduct, not just one incident.[422] Public policy and equity considerations ought to dictate that a batterer not be rewarded for inflicting such severe trauma that the victim is unable to file a tort claim within the statute of limitations. The *Cusseaux* court stated:

> The mate who is responsible for creating the condition suffered by the battered victim must be made to account for his actions—*all* of his actions. Failure to allow affirmative recovery under these circumstances would be tantamount to the courts condoning the continued abusive treatment of women in the domestic sphere.[423]

V

Recognition of Domestic Violence as Its Own Tort

A. Credibility, Empowerment, Necessity, and Fairness

The taxonomy of torts confers title to areas of practice with sufficient specialization to warrant their own name. In some in-

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[418] *See* Shelby A.D. Moore, *Battered Woman Syndrome: Selling the Shadow to Support the Substance*, 38 How. L.J. 297, 301 (1995) (describing the troubling nature of "battered woman jurisprudence, given its debasing female stereotyping which describes abused women as 'suffering' from the battered woman syndrome").

[419] State v. Kelly, 478 A.2d 364 (N.J. 1984).

[420] *Id*.

[421] Feltmeier v. Feltmeier, 777 N.E.2d 1032, 1043 (Ill. App. Ct. 2002) (citing the testimony of Mrs. Feltmeier's psychologist, Dr. Michael E. Althoff).

[422] *Id*. at 1043-44.

[423] Cusseaux v. Pickett, 652 A.2d 789, 794 (N.J. Super. Ct. 1994).

stances a creative legal framework is necessary to reform the legal system's ineffectiveness, as with the evolution of strict products liability in response to uncompensated harmed consumers.[424] Victims of medical malpractice and environmental contaminants have successfully argued for tolling statutes of limitations in those cases in which the harms become apparent only long after the initial tortious conduct.[425] Public policy arguments buttress such doctrine in focusing on the premise that injured plaintiffs should have a means of recourse, particularly when the defendant is in a better position to control the potentially harmful conduct than is the victim.[426] Whether under the rubric of intentional and economic torts or negligence and third party liability, there exists a rich array of domestic violence legal issues making clear the need for its own designation.

In addition to the credibility conferred by special designation, domestic violence torts offer victims an empowering paradigm in which to locate their harms. Some victims know only that they suffer depression, low self-esteem, and pain resulting from the perpetrator's abuse, but assume that previous poor responses from the legal system will be repeated. Upon learning that a delineated category of tort is devoted specifically to the panoply of their harms, victims may feel empowered to use the legal system to hold their batterers accountable.

Necessity and fairness arguments also bolster support for a domestic violence tort as present practices reflect rampant bias against battered women asserting claims within the civil justice system.[427] Intimate partner violence reflects classic intentional

[424] Dalton, *supra* note 17, at 331. **R**

[425] *See*, *e.g.*, Alex J. Grant, *When Does the Clock Start Ticking? Applying the Statute of Limitations in Asbestos Property Damage Actions*, 80 CORNELL L. REV. 695, 697 (1995) (noting that victims with latent diseases highlighted the inadequacy of statutes of limitations that extinguished their claims before they could reasonably have known they had been harmed); *see also* Susan D. Glimcher, *Statutes of Limitations and the Discovery Rule in Latent Injury Claims: An Exception or the Law*, 43 U. PITT. L. REV. 501, 522 (1982) (stating "adoption of a discovery rule by judicial decision or legislative enactment thus becomes merely a nominal concession to the ever-increasing numbers of toxic substances victims"); *Common Law Personal Injury Recovery*, 99 HARV. L. REV. 1602, 1609 (1986) (warning that if courts reform statutes of limitations to allow previously barred victims to recover, legislatures may enact laws to protect the industrial tortfeasors).

[426] *See*, *e.g.*, Judge Traynor's persuasive concurrence in *Escola v. Coca-Cola Bottling Co.*, 150 P.2d 436, 442 (Cal. 1944) ("[P]ublic policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market").

[427] *See*, *e.g.*, DOMESTIC VIOLENCE INVOLVING ADULTS, EXECUTIVE SUMMARY, A

torts, yet with a plethora of its own unique and complex facets.[428] Innovations regarding statutes of limitations, continuing tort, and strict liability exemplify the substantive importance of a specific domestic violence tort.

Countering delineation of a domestic violence tort is the proposition that current law in some states already permits disproportionate distribution of the marital estate as a means of compensating a harmed spouse. However, this option proves too often to be meaningless as it places sole power of equitable remedy within the purview of judges, some of whom will not consider abusive conduct by one spouse against another as a factor when dividing marital property.[429] By joining the ranks of mass torts, medical malpractice, toxic torts, and products liability, domestic violence torts would properly be placed with their brethren, and similarly increase the likelihood of holding batterers responsible for their tortious acts. Under the rubric of domestic violence tort, abuse victims would more likely obtain economic redress, whether or not the batterer is held criminally liable.

Another argument for recognition of domestic violence tort is that law schools and continuing legal education programs would be left with little option but to teach the subject. The legal and social challenges faced by battered women should inform the scholarship and pedagogy of law. Currently, many lawyers and judges view domestic violence law as prosaic, although it is an issue of profound social significance and, as it presents across a spectrum of legal matters, will likely impact their professional and personal lives.[430] It is not surprising, then, that many attor-

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REPORT TO THE SUPREME COURT OF GEORGIA BY THE COMM'N ON GENDER BIAS IN THE JUDICIAL SYSTEM [hereinafter GEORGIA COMM'N ON GENDER BIAS IN THE JUDICIAL SYSTEM REPORT] at 3 (August 1991) (stating that some of the most compelling evidence reflected large numbers of women denied civil and criminal remedies by the courts, with gender biased attitudes "pervasive in the judicial system's handling of domestic violence cases"), *available at* http://www2.state.ga.us/courts/supreme/ceadults.htm (last visited Jan. 24, 2005).

[428] *See supra* notes 17-25 and accompanying text for description of the full spectrum of harms.

[429] *See supra* notes 361-84 and accompanying text for fuller discussion of cases and issues on this topic.

[430] *See* ABA COMM'N ON DOMESTIC VIOLENCE, THE IMPACT OF DOMESTIC VIOLENCE ON YOUR LEGAL PRACTICE (Deborah Goelman et al. eds., 1996) (including chapters covering the relevance for most fields of law, including Children's; Civil Rights; Contracts; Corporate; Criminal; Elder; Employment; Evidence; General Practice; Health Care; Government and Public Sector; Housing and Homelessness; Insurance; Judiciary; Law Firm Management; Legal Services; Mediation; Military; Poverty; Probate, Estate and Trust; Professional Responsibility and Ethics; Real

neys, ignorant of domestic violence issues, mishandle the full spectrum of its legal applications, including potential tort matters. The American Bar Association's Commission on Domestic Violence reports that, overwhelmingly, the technical assistance calls they receive indicate that abuse victims are not receiving adequate representation.[431]

States' gender bias reports, including *The Gender Bias Task Force of Texas, Final Report*, verify that improper handling, at all levels of the legal system, can be traced to attorneys' lack of knowledge about domestic violence.[432] Gender bias reports also demonstrated a dire need for continuing legal education programs for judges, as some of their statements indicated beliefs that domestic violence is a private, family matter that should not be brought before the court, that many victims provoke the abuse, that the victim would leave if the harm were severe enough, and that a man may punish his wife for undesirable behavior.[433] Such biased notions and deficient education on the issue can have catastrophic consequences for the parties involved.[434]

The argument that recognition of a new tort will encourage specious claims has been raised in response to proposals for other torts, such as IIED. Typical of appellate courts' answers to this assertion is that of the Seventh Circuit in *Eckenrode v. Life of America Insurance Co.*: "As to the reason that recognizing the 'new tort' would lead to frivolous claims, the court observed that triers of fact from their own experiences would be able to

Property; Safety Planning; Screening; Sexual Harassment; Solo Practitioners; Sports and Entertainment; State and Local Government; Tax; Trial Practice and Torts).

431 See ABA COMM'N ON DOMESTIC VIOLENCE, WHEN WILL THEY EVER LEARN? EDUCATING TO END DOMESTIC VIOLENCE: A LAW SCHOOL REPORT I-5 (Deborah Goelman & Roberta Valente eds., 1997) *available at* http://www.ojp.usdoj.gov/ovc/publications/infores/etedv/etedvpdf.pdf (last visited Mar. 14, 2005).

432 SUPREME CT. OF TEX., GENDER BIAS TASK FORCE OF TEXAS, FINAL REPORT (1995).

433 *See*, *e.g.*, GEORGIA COMM'N ON GENDER BIAS IN THE JUDICIAL SYSTEM REPORT, *supra* note 428, at 4. **R**

434 For example, a Maryland battered woman was murdered by her partner after a judge denied her a protective order. Civil Protective Order Transcript, Petitioner Helen Jenkins, District Court of Maryland, Prince George's County, Maryland, 1993 (as cited in DOMESTIC VIOLENCE EDUCATION IN LAW SCHOOLS, A REPORT BY THE ABA's COMM'N ON DOMESTIC VIOLENCE 1 (2002)). In another case, a judge gave custody to a father who had not only battered the child's mother, but also had a conviction for his previous wife's murder. Ward v. Ward, 742 So. 2d 250, 252 (Fla. App. 1996).

draw a line between 'slight hurts' and 'outrageous conduct.'"[435] Although *Eckenrode* is an insurance company bad faith case, the same elements of IIED must be proved in domestic violence torts asserting IIED claims.[436]

B. Legislative Remedies

An indication that cultural norms are gradually shifting toward a more accepting view of tort litigation against batterers can be seen in recently enacted statutes specifically recognizing a victim's right to pursue civil remedies. The legislative findings accompanying California's law state that the pervasiveness of domestic violence warrants availability of such tort actions "in order to underscore society's condemnation of these acts, to ensure complete recovery to victims, and to impose significant financial consequences upon perpetrators."[437] The substantive portion of the law provides for tort liability if the abuse is perpetrated by a domestic partner,[438] and for the award of general, special, and/or punitive damages,[439] in addition to "equitable relief, an injunction, costs, and any other relief that the court deems proper, including reasonable attorney's fees."[440]

The Illinois Gender Violence Act provides a civil cause of action for injunctive relief, actual and punitive damages, attorney's fees, costs, or other remedies deemed appropriate against a perpetrator.[441] The statute defines gender-related violence as a form of sex discrimination and includes one or more acts of physical aggression (at least in part committed because of the victim's

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435 470 F.2d 1, 3 (7th Cir. 1972).

436 Most courts have recognized four elements of IIED. *See, e.g.*, Fletcher v. Western Nat'l Life Ins. Co., 89 Cal. Rptr. 78, 88 (Ct. App. 1970) (citing (1) outrageous conduct by the defendant; (2) defendant's intent to cause or reckless disregard of the probability of causing emotional distress; (3) severe suffering or extreme emotional distress by the plaintiff; and (4) the defendant's conduct as the proximate or actual cause of the emotional distress).

437 CAL. CIV. CODE § 1708.6, 2002 Cal. Stat. ch. 193 § 1 (West 2004) (The findings also include "(b) These acts merit special consideration as torts, because the elements of trust, physical proximity, and emotional intimacy necessary to domestic relationships in a healthy society makes participants in those relationships particularly vulnerable to physical attack by their partners").

438 CAL. CIV. CODE § 1708.6(a) (West 2004).

439 CAL. CIV. CODE § 1708.6(b) (West 2004).

440 CAL. CIV. CODE § 1708.6(c) (West 2004).

441 740 ILL. COMP. STAT. ANN. 82/10, 82/15 (West 2003) (perpetrating includes either "personally committing the gender-related violence or personally encouraging or assisting the act or acts of gender-related violence").

gender), sexual assault, and threats, but irrespective of whether criminal charges, prosecution, or conviction have resulted.[442] Actions claiming physical violence or sexual assault must be brought within seven years, although claims based on threats of such offenses must be filed within two years of the cause of action accruing.[443] The statute's preamble provides counsel and judges alike with clear indication of its legislative intent to serve not only as a remedy for past wrongs on an individual basis, but also to recognize the systemic failure to adequately protect abuse victims:

> WHEREAS, Recent national studies demonstrate that women in the United States continue to be greatly harmed by gender-related violence such as domestic violence, which is disproportionately visited upon women by men, and sexual abuse, which harms many women and children without being reported or prosecuted; and
> WHEREAS, It is documented that existing State and federal laws have not provided adequate remedies to women survivors of domestic violence and sexual abuse; and
> WHEREAS, Women survivors of domestic violence oftentimes have found laws against domestic violence used against them by their batterers; and
> WHEREAS, The United States Supreme Court has ruled that the states alone have the authority to grant civil relief to the survivors of such sexually discriminatory violence; and
> WHEREAS, Such acts of gender-related violence are a form of sex discrimination . . . .[444]

Rhode Island has promulgated more limited legislation regarding such torts, denoting the availability of damages recovery in civil actions brought by stalking victims.[445] Virginia, too, specifies only stalking as a cause of action giving rise to compensatory

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442 740 ILL. COMP. STAT. ANN. 82/5.

443 ILL. COMP. STAT. ANN. 82/20 (specifying that if the victim is a minor at the time of the offenses, the action must be brought either within seven years or two years after the person turns eighteen).

444 2003 ILL. LAWS 416.

445 R.I. GEN. LAWS § 9-1-2.1(a) (2004). Rhode Island uses the following definitions:

> (1) "Course of conduct" means a pattern of conduct composed of a series of acts over a period of time, evidencing a continuity of purpose. Constitutionally protected activity is not included within the meaning of "course of conduct." (2) "Harasses" means following a knowing and willful course of conduct directed at a specific person which seriously alarms, annoys, or bothers the person, and which serves no legitimate purpose. The course of conduct must be of a kind that would cause a reasonable person to suffer substantial emotional distress, or be in fear of bodily injury.

Id. § 9-1-2.1(b).

and punitive damages, as well as costs, adding that the perpetrator need not have been charged or convicted of the offense.[446] However, given the frequency with which batterers stalk their victims in tandem with other crimes, counsel should have ample room to either utilize these statutes or argue that their intended purpose is to prevent harm, easily covering physical violence, sexual assault, and threats.

1. Include Judgment as Part of Alimony Order

Since collecting tort judgments can be problematic, one idea is for judges to include the award within the alimony order. This suggestion does not require a reconceptualization of alimony's purpose, but rather a clarification that it is intended to effect the equitable financial settlement of a divorcing couple.[447] Since alimony is not dischargeable in bankruptcy,[448] inclusion of the tort award adds some measure of protection against the unscrupulous batterer who might otherwise use bankruptcy law to avoid payment. International bankruptcy law expert Jay Westbrook cautions, however, that federal bankruptcy courts look at alimony or property awards through the lens of federal purposes for nondischargeability and are free to re-characterize it as appropriate. Thus, a state order might label the tort payment part of a property settlement and hold that is it really alimony for priority and discharge purposes.[449] Rather than leave such an important task wholly within the purview of individual courts, Professor West-

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446 VA. CODE ANN. § 8.01-42.3 (Michie 2004) (defining a victim as one placed in reasonable fear of death, sexual assault, or bodily injury to herself or a minor child, and also specifying that the cause of action must be brought no more than two years after the most recent offense.).

447 *See* The American Law Institute, *supra* note 359, at 24-25 (stating that "[g]rounding compensatory awards on a principle of loss yields a conceptual reformulation that helps explain generally prevailing practices" in alimony distribution).

448 11 U.S.C.A. § 523(a)(5) (West 2004) specifies that a debtor is not discharged from any debt

> to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement.

449 E-mail from Jay Westbrook, University of Texas School of Law Professor (March 10, 2004) (on file with author). Professor Westbrook notes that particularly in a state such as Texas, which has been hostile to alimony awards, the tort payment may be deemed part of a property settlement. *Id*.

brook further suggests amending the Bankruptcy Code to better protect abuse victims who have secured tort judgments.

2. Amend Bankruptcy Code to Prevent Dischargeability

The Bankruptcy Code prohibits dischargeablility of some nineteen categories of debt, including those incurred because the debtor was driving while intoxicated,[450] for fraud committed while acting as a fiduciary,[451] and for payment of restitution ordered under title 18 of the United States Code.[452] Arguably, a tort judgment rendered as part of a divorce could already be covered by § 523(a)(15), which includes within its purview of nondischargeable debts those "incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record."[453] Further, a compensatory debt owed a crime victim is not dischargeable in a Chapter 7 bankruptcy filing if it is categorized as arising from "willful and malicious injury."[454] A Chapter 13 filing similarly excludes from discharge any orders for restitution and criminal fines.[455]

Although these provisions are a good start, I propose amending the Bankruptcy Code to codify that tort damages awards are not dischargeable for many of the same policy reasons as the nineteen categories currently listed: those who would intentionally subvert the payment of debts should not be able to shield themselves from accountability by fraudulently declaring bankruptcy. Westbrook states, "[i]f liabilities arising from drunk driving can make that list, domestic violence tort certainly has an argument with Congress. Given the evolution of social attitudes

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450 11 U.S.C.A. § 523(a)(9) (West 2004) states that a debt cannot be discharged if for "death or personal injuy caused by the debtor's operation of a motor vehicle if such operation was unlawful because the debtor was intoxicated from using alcohol, a drug, or another substance."

451 11 U.S.C.A. § 523(a)(4) (West 2004) (specifying nondischargeability if debt is "for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny").

452 11 U.S.C.A. § 523(a)(13) (West 2004) (specifying nondischargeability "for any payment of an order of restitution issued under title 18, United States Code").

453 11 U.S.C.A. § 523(a)(15) (West 2004).

454 11 U.S.C.A. § 523(a)(6) (West 2004) (providing that a debt survives bankruptcy proceedings if it is based upon "willful and malicious injury by the debtor to another entity or to the property of another entity").

455 *See* 11 U.S.C.A. § 1328(a)(3) (West 2004) (specifying that Chapter 13 superdischarge will not apply to restitution or criminal fines).

on this point, I would think there would be a real shot."[456]

C. Retaliation Concerns

This proposed amendment is consistent with other federal legislation designed to ensure that restitution to crime victims is non-dischargeable. The 1994 Violence Against Women Act mandates that domestic violence offenders pay restitution subsequent to a guilty plea or conviction.[457] In the 1996 Mandatory Victims Restitution Act (MVRA), Congress specified that federal and state restitution liens are neither dischargeable under the Bankruptcy Code nor voidable in bankruptcy proceedings.[458] Additionally, a MVRA lien for the United States must be given the same status as a perfected Internal Revenue Service tax lien,[459] allowing it to be enforced against property that otherwise would be ineligible under state law to become part of the bankruptcy estate.[460] Given that court orders for restitution, criminal fines, and divorce-based tort awards survive bankruptcy discharge, it is reasonable to add crime victims' tort judgments to this list.

In order to be truly effective, the new amendment must also mandate that a victim's restitution and tort awards receive priority status within the Bankruptcy Code. Currently, restitution, fines, and tort awards are all classified as unsecured claims,[461] and as such, the likelihood of recovery is greatly reduced.[462] Since it is unlikely abuse victims can obtain the status of secured creditors,[463] they at least ought to be accorded priority standing

[456] E-mail from Jay Westbrook, *supra* note 450. Professor Westbrook teaches bankruptcy law at the University of Texas School of Law. **R**

[457] *See* Craig A. Gargotta, *The Enforceability of Restitution Liens Under Mandatory Victims Restitution Act*, AM. BANKR. INST. J., Mar. 2002, at 8.

[458] *See* 18 U.S.C.A. § 3613(e) (West 2004) (describing that MVRA restitution liens are not dischargeable in bankruptcy proceedings).

[459] *See* 18 U.S.C.A. § 3613(c) (West 2004). Federal tax liens are deemed priority claims under § 507(a)(9) of the Bankruptcy Code.

[460] *See* 11 U.S.C.A. § 541(a)(1) (West 2004). By giving an MVRA lien the same status as a tax lien, the bankruptcy estate is permitted to succeed the debtor's legal and equitable interests although a state law may have exempted or not defined the substantive rights of these interests.

[461] *See* BRIAN A. BLUM, BANKRUPTCY AND DEBTOR/CREDITOR: EXAMPLES AND EXPLANATIONS 525 (1999) (explaining that the secured creditors are permitted to recover to the amount of the collateral); *see also* 11 U.S.C.A. § 506 (West 2004).

[462] *See* BLUM, *supra* note 462, at 381 (describing the typicality of general unsecured liens receiving minimal or no payment given their low ranking of priority). **R**

[463] A secured creditor is one who had obtained the debtor's personal guarantee to pay through a property lien, and thus, is given priority status over those without such security. BLUM, supra note 462, at 525. **R**

among unsecured creditors. The Bankruptcy Code needs a statutory addition, not only because the current piecemeal approach is confusing, but also because some courts are not properly implementing even existing provisions.

In *In re Bennett*, the bankruptcy court found that restitution liens in favor of the federal government will not be given precedence because § 1613 of the Bankruptcy Code does not specify that an MVRA lien be afforded the same status as an unsecured tax claim.[464] The United States argued that because the benefactors are crime victims, the restitution lien should be granted priority; the court responded only with convoluted reasoning that prioritizing restitution liens would "victimize" other unsecured creditors since the reduced distribution would, in effect, force them to contribute to the debtors's criminal sanctions.[465] The *Bennett* court's interpretation is contrary to the plain meaning of the MVRA statute and explicit legislative intent to provide an effective enforcement mechanism for liens arising from MVRA victim restitution liens. Codification of domestic violence and other crime victims' heightened status within the hierarchy of unsecured creditors is essential to fulfill the legislative intent and the goal of equitable resolution in tort litigation against batterers.

Victims' fear of retaliation is persistent precisely because so many batterers make good on their threats.[466] Counsel and survivors alike must be on guard, for it has proven quite difficult to predict any given batterer's response to the ending of the relationship and the filing of divorce, tort, protective order, or any other legal action.[467] Case law and scholarship abound with documentation of both the constant fear of retaliation voiced by victims, and the typicality of batterers making good on their threats.[468] Abusers need not retaliate solely with violence to be

[464] 237 B.R. 918, 923 (Bankr. N.D. Tex. 1999) (noting that section 1613 defines the procedures for enforcement of liens that have arisen under MVRA).

[465] *Id*. at 923-24 (stating that innocent creditors should not be required to pay for a debtor's criminal sanctions).

[466] *See* Fleury et al., *supra* note 63; *see also* Adams, *supra* note 73; Nora Lockwood Tooher, *Judge Orders Ankle Monitor Company To Compensate Shooting Victim's Family*, LAW. WKLY. USA, Nov. 10, 2003, at 23 (describing how Joseph Whitlow promised he would kill his ex-girlfriend for leaving him, and did so at the first opportunity).

[467] *See* Adams, *supra* note 73; *see also* Dalton, *supra* note 17, at 364-69. **R**

[468] *See*, *e.g.*, State v. Rabago, 81 P.3d 1151 (Haw. 2003) (noting that Penal Code § 288.5 addresses course of conduct crimes, focusing on "a series of acts occurring over a substantial period of time, generally on the same victim and generally resulting in cumulative injury," and that as with intimate partner violence and child abuse,

effective in deterring their victims, for some are quite adept at "financial warfare," such as transferring all funds in joint bank accounts to their private accounts, or engaging in protracted litigation to deplete all the victim's resources.[469] Former Seattle Police Chief Norm Stamper, a thirty-four-year veteran officer, provides insight into the dangers of retaliation:

> Many breathe a sigh of relief when the victim of domestic violence leaves her partner. Cops, and often the victims, know better. Whether it's Anna Quindlen's fictional character in her very realistic *Black and Blue* or the many women I've seen in tragically nonfiction situations, the most dangerous moment in the relationship is usually when the batterer realizes it's over.[470]

With regard to joinder, some commentators indicate that requiring abuse victims to file tort claims with the divorce may trigger dangerous retaliatory conduct by the batterer.[471] Others have suggested that since tort actions do not address the victim's physical safety, they may simply antagonize the offender enough to increase the abuse.[472] However, this stance presumes that counsel and advocates will not be involved in ongoing, short- and long-term safety planning with the survivor, and underscores the need to prepare her for possible retaliation.[473] Additionally, Professor Merle Weiner responds that this argument is weak: "[A] successful suit for damages teaches the abuser that violent behav-

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the victims "'are likely to be unwilling to report their abuse to the authorities due to fear of physical and/or emotional retaliation' by the abuser"); *see also* Rhonda L. Kohler, Comment, *The Battered Woman and Tort Law: A New Approach to Fighting Domestic Violence*, 25 LOY. L.A. L. REV. 1025, 1026 (1992) ("Many women do not report instances of abuse because they are afraid to call the police or seek assistance out of cultural, family or religious pressure, fear of retaliation or lack of protection by the police.").

469 *See, e.g.*, Naomi Stern, *Battered by the System: How Advocates Against Domestic Vilence Have Improved Victims' Access to Child Support and TANF*, 14 HASTINGS WOMEN'S L.J. 47, 55 (2003) ("Retaliation in the context of domestic violence also may include forms of 'financial warfare' against a mother who pursues a divorce or child support action.).

470 E-mail from Norm Stamper, former Seattle Police Chief (Mar. 10, 2004) (on file with author).

471 *See* Schepard, *supra* note 330, at 133 ("Requiring a brutalized spouse to assert a claim for tort for harm inflicted during the marriage in a divorce action, some fear, may simply enrage the abuser more and cause the wife more harm."). **R**

472 *See* Natalie Loder Clark, *Crime Begins At Home: Let's Stop Punishing Victims and Perpetuating Violence*, 28 WM. & MARY L. REV. 263, 271 (1987) (stating that a damage award is not an optimal option as initiating these cases is likely to make the abusers angry and trigger more abuse).

473 *See supra* note 67 and accompanying text.

ior comes only at the money cost of the damage done,"[474] and that "[o]ne of the most effective ways to stop domestic violence is to make clear to abusers and potential abusers that society will not tolerate it."[475]

As should be the case in the practice of law, the client should make the ultimate decision as to whether she wishes to proceed with any potential claims, given the pros and cons are fully explained by counsel. The hope is that although there may be an initial spike in abuse immediately following the filing of legal actions, the batterer will quickly view the prospect of impending sanctions as disincentive to continue.[476] Whether the abuser ceases his retaliatory abuse often hinges on the response of the legal and law enforcement community.

Since 1999, I have worked with a battered mother of four children, Nina Olivo, whose ex-husband, Jimmy Saldivar, has adeptly employed a vast array of terrorizing strategies, most of which either just skirt the law or make it difficult to prove he is the perpetrator.[477] Jimmy Saldivar has (1) killed two of his children's dogs—slashing one of their throats and shooting the other, then leaving them for the children to find just outside the back door; (2) poured ketchup on and stabbed stuffed animals, and left them on Ms. Olivo's lawn; (3) repeatedly smashed the windshield and slashed the tires on her car; (4) stalked her by following her car too closely, bumping it on the highway—narrowly avoiding accidents with the children in her vehicle; (5) often driven very slowly past her house at all hours of the day and night; (6) repeatedly called the police to report that Ms. Olivo is harassing him or his girlfriend, when Ms. Olivo is elsewhere;[478] (7) enlisted the aid of his family and friends to call Ms. Olivo

[474] Merle H. Weiner, *Domestic Violence and the Per Se Standard of Outrage*, 54 MD. L. REV. 183, 191 n.20 (1995) (citing Clark, *supra* note 473, at 281). R

[475] Weiner, *supra* note 474, at 191 n.20 (citing Clark, *supra* note 472, at 279).

[476] *See*, *e.g.*, Weiner, *supra* note 474, at 191 n.20 (stating that "while the filing of a case may escalate the abuse initially, at some point the existence of the cause of action should serve as a general deterrent").

[477] Marie Nina Olivo has asked that she and her ex-husband, Jimmy Saldivar, be identified to enable anyone wishing to view her case files to do so, as her case represents much of what is wrong with the court's response to family violence victims and their children.

[478] For example, on September 10, 2003, Jimmy Saldivar and his girlfriend called the Caldwell County Sheriff's Department to report that Ms. Olivo was harassing them. However, at the time of the alleged harassment, Ms. Olivo was speaking to my Domestic Violence and the Law class, some twenty-five miles away. Rather than investigate the history, a sheriff's deputy called Ms. Olivo and demanded that she

with thinly veiled threats to "get her" if she ever calls the police; (8) put the children in danger by leaving them in a busy freight trucking yard rather than the office where Ms. Olivo worked; (9) refused to pay child support, though admitting that he lives at home with his parents, drives a new truck, works full-time, and has spent more than $8,000 on his lawyer's fees;[479] (10) caused Ms. Olivo to be fired from at least four jobs because of his harassment and frightening behavior;[480] (11) beaten his then sixteen-year-old daughter so badly that she was hospitalized for two days;[481] (12) repeatedly driven past his son's bus stop and schoolyard, though ordered by the court to stay away from him; and (13) continually threatened Ms. Olivo, her elderly mother, and their children that if he ever goes to jail, they "will pay." And this is by no means a complete list.[482]

Perhaps some of this conduct does not strike the non-victim as fearsome behavior, but all of it is designed to make clear he is watching her every move and unwilling to relinquish control of his ex-wife and children, thereby causing them to live in constant fear.[483] It is this pervasive, all-encompassing form of abuse that tort actions may effectively address, particularly when the family and criminal courts either refuse or are unable to do so, as has

cease her harassment. Many of my outraged students and I wrote to the sheriff to document her alibi, but none have received a response.

[479] I was present in child support court on December 6, 2002, when Jimmy Saldivar admitted these financial facts to Judge Dulce Madrigal. Jimmy Saldivar owes Ms. Olivo close to $20,000 in unpaid child support, but seems to have the sympathy of the court, as he is not forced to comply with federal and state child support enforcement laws.

[480] Most of the employers have been willing to write a letter stating that Ms. Olivo was an exemplary employee, but that her ex-husband's conduct forced them to let her go. *See, e.g.*, Letter from Standard Trucking to Ms. Olivo (Sept. 4, 1995) (on file with the author).

[481] There are medical records and photographs depicting large, purple bruises all over Rebecca's body on file with the author.

[482] At my request, Ms. Olivo has kept a notebook documenting many more of Jimmy Saldivar's unlawful and threatening acts; this has proven helpful in obtaining minimal assistance from the court.

[483] For example, after one of his teachers stated that the fifteen-year-old son, Jimmy Alan, was falling asleep in class, I asked him what the problem was. He stated to me that he heard on television that most crime happens from 2 a.m. to 5 a.m., and he wanted to be awake then to protect his mother and younger siblings if his father came to their home. Statement to the author on Sept. 14, 2003 in Austin, Texas; *see also* Nancy Worcester, *Women's Use of Force*, 8 VIOLENCE AGAINST WOMEN 1390, 1397 (2002) (quoting a survivor saying, "I probably only got hurt once a year for twenty years, but I woke up every one of those other 364 days of the year wondering if that would be the day.").

happened in Ms. Olivo's case. Contempt actions may appear as a more expeditious option than the filing of tort claims, but the two are not mutually exclusive. Additionally, when the criminal, family, and child support courts are unwilling to enforce their own court orders, the option of a comprehensive tort action may spur their recognition of the enormity of the batterer's entire history of abusive conduct rather than their usual determination which considers only the most recent incident. In Ms. Olivo's case, her ex-husband has, for the past several months, abated his abusive behavior after we suggested possible tort action to his lawyer, and initiated correspondence with the recalcitrant law enforcement agencies and court. As in every case, we employ an array of coercive strategies and hope that at least one serves as a deterrent.

D. A Recommendation for the Courts

Many judges' misguided handling of domestic violence divorces greatly increases the courts' workload, primarily because these judges are allowing the batterers to dictate policy. Several progressive judges have initiated "rocket dockets"[484] to expedite case handling of domestic violence matters, meaning that either side must have a very good reason to obtain a postponement. Former San Antonio Judge Bill White instituted this procedure in his domestic violence court with stunning results—more victims followed through with prosecution and fewer batterers appeared on the trial date without their lawyers.[485] If judges are truly interested in decreasing their workloads, they must be willing to take a tough stance with batterers who repeatedly request continuances, whether because they appear in court without counsel, have failed to assist their attorneys to such an extent that they must withdraw, or state they are simply dissatisfied with counsel. It is puzzling that judges express frustration with such antics, yet appear unwilling to disallow them.

CONCLUSION

Scant attention has been paid to the deeply embedded doctrinal obstacles that must be remedied if abuse victims are to have the same full access as other aggrieved tort victims. It is hoped

[484] *See generally* Nora Lockwood Tooher, *Rocket Dockets Speed Civil Trials*, LAW. WKLY. USA, 2003.

[485] Telephone interview with Judge Bill White (Jan. 16, 2003).

this contextual analysis of three significant obstacles—the court's reluctance to interfere in marriages, the assumption that existing law is sufficient, and the primacy of statutes of limitations—affords a normative construct for reform. To varying degrees, the functions of tort law—corrective justice, deterrence, compensation, and redress for social grievances—are consistent with the goals of domestic violence legal interventions. Legislative intent specifies abuse prevention as the priority of the many statutory provisions in every state, thus mandating victim safety as a prerequisite to gaining any measure of intended remedy. These proposals do not call for radical, wholesale reform of tort doctrine, but rather a refinement of existing frameworks for all the compelling reasons discussed above. If these adjustments can be made, a powerful message will be relayed from the courts regarding societal condemnation of intimate partner abuse—one that adds legitimacy to torts doctrine and its use.