Washington and Lee Law Review

Volume 66 | Issue 1 Article 11

Winter 1-1-2009

Wrongs Committed During a Marriage: The Child that No Area of the Law Wants to Adoptt

Michelle L. Evans

Follow this and additional works at: https://scholarlycommons.law.wlu.edu/wlulr

Part of the Family Law Commons

Recommended Citation

Michelle L. Evans, *Wrongs Committed During a Marriage: The Child that No Area of the Law Wants to Adoptt*, 66 Wash. & Lee L. Rev. 465 (2009).

Available at: https://scholarlycommons.law.wlu.edu/wlulr/vol66/iss1/11

This Note is brought to you for free and open access by the Washington and Lee Law Review at Washington and Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Washington and Lee Law Review by an authorized editor of Washington and Lee University School of Law Scholarly Commons. For more information, please contact christensena@wlu.edu.

Wrongs Committed During a Marriage: The Child that No Area of the Law Wants to Adopt[†]

Michelle L. Evans[*]

Table of Contents

I. Introduction 466
II. Illustrations 468
III. Brief Background of Developments in Divorce Law 471
A. Traditional Fault-Based Divorce 472
B. The Emergence of No-Fault Divorce 473
C. The Evolution of Interspousal Torts 476
IV. Overview of the No-Fault/Tort Dichotomy 479
A. The American Law Institute's Recommendation 479
B. Procedural Problems 481
1. Statute of Limitations 481
2. Joinder 483
3. Res Judicata 487
C. The Problem of the Lesser-Earning Tortfeasor 489
V. Are Tort Suits an Adequate Alternative? 491
A. Assault and Battery 492
B. Intentional Infliction of Emotional Distress 493
C. Adultery 494
D. Realities of Civil Litigation 495
VI. Recommendations 497

† This Note received the 2008 Washington and Lee University Law Council Law Review Award for outstanding student Note.

* Candidate for J.D., Washington and Lee University School of Law, May 2009; B.S., Virginia Polytechnic Institute and State University, 2006. I dedicate this Note to my family for all of their love, encouragement, and support. I would like to thank Professor Robin Fretwell Wilson for identifying this topic and serving as my Note advisor.

A. Recommendations to Reform the Substantive Law 497
B. Recommendation to Reform the Procedural Law 498
VII. Conclusion 500

There is no winning! Only degrees of losing!
Danny DeVito as Gavin D'Amato[1]

I. Introduction

Although divorce rates have declined in recent decades, it is estimated that 40% of marriages in the United States end in divorce.[2] A related social concern affecting American families is the high "prevalence of domestic violence among intimate partners."[3] Studies on domestic violence reveal that between 8% and 12% of women are victims of domestic abuse and that "women who are separated or divorced are far more likely to have experienced domestic violence."[4] As a result, claims of domestic abuse and marital misconduct appear in a number of divorce cases.

In the past, evidence of tortious conduct was an integral part of a divorce proceeding because it formed the basis upon which a divorce was granted and influenced the distribution of assets and determination of support awards.[5] Interestingly enough, it has been suggested that much of early divorce law was an outgrowth of tort law concepts.[6] The widespread shift to no-fault divorce meant that many spouses seeking redress for wrongs that occurred during the marriage had to turn elsewhere[7]—the law of torts. Transferring claims of marital misconduct from divorce proceedings into tort suits has not been without its problems. Courts and legislatures have struggled to decide

---

1. THE WAR OF THE ROSES (Gracie Films 1989).

2. Mary Leonard, *A Familiar Look to US Families Census Bureau Sees Move to the "Traditional"*, BOSTON GLOBE, May 28, 1998, at A1.

3. Susan Wilt & Sarah Olson, *Prevalence of Domestic Violence in the United States*, J. AM. MED. WOMEN'S ASS'N, May–July 1996, at 77, 81.

4. *Id.*

5. *See infra* Part III.A (discussing the traditional fault-based system of divorce).

6. *See* HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 409 (2d ed. 1988) ("The divorce decree thus came to resemble a tort judgment, both being granted for the fault of the defendant causing harm to the plaintiff, and both being denied where the plaintiff either consented or was himself at fault.").

7. *See infra* Part III.B (discussing the evolution of no-fault divorce and its consequences for abused spouses).

"whether . . . a particular grievance should be handled within the context of the family law system, rather than bringing a separate tort claim."[8]

This Note examines whether family law or tort law should be primarily responsible for compensating the victim of marital misconduct. More specifically, who loses under a regime that compensates for harms during the marriage in tort rather than divorce? Part II of this Note elaborates on the consequences of considering tortious conduct in a separate lawsuit rather than in conjunction with the divorce through illustrative cases employing the two alternatives.[9] These cases also demonstrate how tort principles are modified on the basis of the parties' marital status.[10]

Part III of this Note provides a brief background of the relevant developments in divorce and interspousal torts. The major development in twentieth-century divorce law was the shift from the traditional fault-based systems to the no-fault systems that currently predominate in the United States.[11] The eradication of the doctrine of interspousal tort immunity, which prevented spouses from suing each other until the mid-1900s, introduced the opportunity to redress injuries inflicted during marriage through tort law.[12]

The American Law Institute recommends that divorce proceedings remain free of any consideration of fault, leaving the parties to resort to the law of torts.[13] However, the intersection of independent interspousal tort claims and no-fault divorce proceedings generates a multitude of obstacles for the individual parties and the courts, an issue discussed in Part IV of this Note.[14] Many of these problems are procedural—concerning the applicable statute of limitations, joinder, and res judicata.[15] Financial limitations raise additional

---

8. Robert G. Spector, *Marital Torts: The Current Legal Landscape*, 33 FAM. L.Q. 745, 748 (1999).

9. *See infra* Part II (discussing four cases in which torts were committed in romantic relationships).

10. *See infra* Part II (comparing a tort case between spouses with a tort case between cohabitants).

11. *See infra* Part III.A–B (discussing features of both systems and reasons for the transition).

12. *See infra* Part III.C (discussing the justifications for interspousal tort immunity and the reasons it was abolished).

13. *See infra* Part IV.A (discussing the rationales for the American Law Institute's proposal).

14. *See infra* Part IV.B–C (discussing the procedural and financial difficulties of separating tort claims from divorce proceedings).

15. *See infra* Part IV.B.1–3 (discussing the nature of the procedural problems and the approaches adopted to resolve them).

obstacles, particularly when the tortfeasor is not as economically stable as the injured party.[16]

Part V evaluates the American Law Institute's recommendation by exploring the adequacy of current tort law to compensate victims of marital misconduct. This Part examines how successfully tort law provides relief for three of the most common marital wrongs—assault and battery, intentional infliction of emotional distress, and adultery.[17] This Note then considers the realities of civil litigation to assess whether filing multiple suits is a viable option.[18]

A number of alternatives that may compensate victims more adequately than the proposal offered by the American Law Institute are recommended in Part VI. These alternatives include reforming divorce law to provide for limited consideration of fault or reforming tort law to address harms that are unique to the marital relationship.[19] Ultimately, this Note concludes that integration of alternative dispute resolution methods to resolve the tort claims brought in connection with divorce actions is the most attractive option.[20] Finally, Part VII offers some concluding remarks.

II. Illustrations

The problem generated by removing fault from the property distribution equation at divorce and relying on tort law to compensate spouses is best illustrated through a handful of cases. Part II discusses four cases resolving claims of misconduct between couples. The first case depicts a situation in which the trial court takes into account the fault of one party when determining the appropriate distribution of property in a divorce proceeding.[21] The second case addresses the merits of an independent tort suit brought by a spouse after

16. *See infra* Part IV.C (discussing the additional difficulties that separate tort suits pose when the tortfeasor is not the primary wage-earner).

17. *See infra* Part V.A–C (discussing the potential theories of recovery for these three types of misconduct and evaluating the ability of tort law to provide relief).

18. *See infra* Part V.D (discussing effects of double litigation on a spouse's ability to recover damages).

19. *See infra* notes 198–206 and accompanying text (suggesting reforms in substantive law).

20. *See infra* notes 207–18 and accompanying text (suggesting a method for integrating arbitration into contentious divorce proceedings and discussing the advantages of this approach).

21. *Infra* notes 25–31 and accompanying text.

the dissolution of the marriage.[22] The third case illustrates the resolution of a tort suit between an unmarried couple.[23] Finally, a high-profile ongoing divorce case involving claims of misconduct is discussed.[24]

In *Havell v. Islam*,[25] the trial court considered the husband's abusive behavior when it distributed the marital property in the divorce proceeding.[26] After almost twenty-one years of marriage, Theresa Havell told her husband, Aftab Islam, that "she would seek a divorce."[27] A week later, her husband "pinned [her] to the bed with his knee and began beating her viciously on the head, face, neck and hands with a barbell," inflicting serious injuries that required extensive medical treatment including "the surgical installation of a titanium plate over her eye, over twenty hours of painful dental procedure, and many other oral and facial surgical procedures."[28] This event was the culmination of two decades of physical, verbal, and emotional abuse that the husband inflicted upon his wife and children.[29] The trial court concluded: "[A] pattern of domestic violence . . . is a 'just and proper' factor to be considered by the court in connection with the equitable distribution of marital property."[30] Considering the pattern of abuse as well as other factors, the appellate court affirmed the equitable distribution order awarding the wife 95.5% of the marital property.[31] As this case demonstrates, considering fault within a divorce proceeding is a way to redress marital wrongs and compensate the injured party.

In *Hakkila v. Hakkila*,[32] Mrs. Hakkila secured a divorce from her husband and subsequently instituted a civil tort action for intentional infliction of

22. *Infra* notes 32–36 and accompanying text.

23. *Infra* notes 37–41 and accompanying text.

24. *Infra* notes 42–44 and accompanying text.

25. Havell v. Islam, 751 N.Y.S.2d 449, 455 (App. Div. 2002) (affirming the trial court's "equitable distribution," which limited the defendant-husband to 4.5% of the marital property).

26. *See id.* at 452 (explaining that the trial court "consider[ed] the issue of marital fault including the domestic violence" under factor thirteen of equitable distribution, namely "any other factor which the court shall expressly find to be just and proper").

27. *Id.* at 450.

28. *Id.* Following this attack, the husband received a sentence of over eight years in prison for attempted murder and assault. *Id.* at 451.

29. *See* Havell v. Islam, 718 N.Y.S.2d 807, 809–10 (Sup. Ct. 2000) (listing over twenty incidents of abuse that the wife asserted took place during the marriage).

30. *Id.* at 811.

31. Havell v. Islam, 751 N.Y.S.2d 449, 455 (App. Div. 2002).

32. Hakkila v. Hakkila, 812 P.2d 1320, 1327 (N.M. Ct. App. 1991) (dismissing the plaintiff-wife's intentional infliction of emotional distress claim because it "fail[ed] to meet the legal standard of outrageousness").

emotional distress.[33] During the course of their marriage, Mr. Hakkila committed a number of abusive acts against his wife, including, but not limited to, slamming part of a camper on her head and hands, using excessive force during sex, insulting her and screaming obscenities at her in public, and locking her out of their house in the middle of winter.[34] Dismissing her claim, the court concluded that the husband's conduct did not rise to the level of outrageousness necessary for recovery.[35] Because New Mexico adopted no-fault divorce, the court found that the tort of intentional infliction of emotional distress had limited application within the martial context.[36] This case raises the possibility that an aggrieved spouse can recover in a civil suit on the right set of facts, while recognizing that the marital relationship is unique in civil society.

As a helpful comparison, *Curtis v. Firth*[37] was a personal injury case between unmarried cohabitants who enjoyed a ten year romantic relationship with each other.[38] Over the course of the relationship, Curtis verbally abused Firth in public, physically abused her on several occasions, and "forced [Firth] to engage in sexual acts which she found repugnant and . . . sexually assaulted [her]."[39] In Firth's civil suit for battery and intentional infliction of emotional distress, the jury awarded her compensatory damages in the amount of $275,000 in addition to punitive damages totaling $725,000.[40] Although the award in this case is higher than the typical recovery in domestic abuse cases,[41]

33. *Id.* at 1321.

34. *See id.* at 1321–22 (summarizing the incidents of intentional misconduct the husband inflicted upon his wife during their ten year marriage).

35. *See id.* at 1327 ("Husband's insults and outbursts fail to meet the legal standard of outrageousness. . . . There was no evidence that the other conduct caused severe emotional distress, as opposed to transient pain or discomfort.").

36. *See id.* at 1324–26 ("A cautious approach to the tort of intramarital outrage finds support in the public policy of New Mexico to avoid inquiry into what went wrong in a marriage.").

37. Curtis v. Firth, 850 P.2d 749, 757 (Idaho 1993) (upholding the jury's verdict against Curtis on the claims of battery and intentional infliction of emotional distress because of the abuse he inflicted during the relationship).

38. *Id.* at 751.

39. *Id.* at 756–57.

40. *Id.* at 752. The Idaho Supreme Court affirmed the finding that Curtis was liable for the tortious conduct but remanded the case to adequately consider the defendant's claim that the damage award was excessive. *Id.* at 762. On remand, the trial court made the requisite findings and concluded that the damages were not excessive in light of the evidence. Curtis v. Firth, 869 P.2d 229, 230 (Idaho 1994). The Supreme Court affirmed the trial court's order. *Id.*

41. *See* David E. Poplar, Comment, *Tolling the Statute of Limitations for Battered Women After* Giovine v. Giovine*: Creating Equitable Exceptions for Victims of Domestic Abuse*, 101 DICK. L. REV. 161, 168 (1996) ("Curtis remains one of the largest awards in this type of action.").

it demonstrates the potential that civil actions in tort have to provide relief for parties injured during the course of a close relationship.

A very public divorce marked by political scandal, sexual indiscretion, and book deals[42] demonstrates the continuing prevalence of the divorce-tort hybrid case. In 2004, while James McGreevey was still the acting governor of New Jersey, he publicly announced that he was "'a gay American' who had an extramarital affair with a male aide, and that he would resign" from his political office.[43] In the divorce papers, Dina Matos McGreevey alleged acts of "extreme cruelty" and requested financial relief for the torts of "fraud, emotional distress and libel."[44] The issues and problems discussed in this Note will ultimately have to be resolved by the New Jersey court before the McGreeveys will be able to move on with their lives.

These few cases introduce some of the relevant issues that wronged spouses must confront during a time of divorce. One principal issue, evoked by comparing *Hakkila* to *Curtis*, is that civil courts are predisposed to apply a different standard to torts occurring between unmarried couples and married couples. The *Havell* and *Hakkila* decisions demonstrate that, depending on the circumstances, it may be more advantageous for a spouse to seek a greater share of the property distribution than to seek compensation in the form of civil damages.

III. Brief Background of Developments in Divorce Law

Prior to addressing the specific problems posed by the inclusion or exclusion of tort claims in divorce actions, it is helpful to understand how divorce law has evolved over the years. The laws governing dissolution have shifted dramatically from a system concerned with allocating fault to a no-fault system that avoids assigning blame. In addition to surveying the changes in the divorce system as a whole, Part III discusses the particularly relevant doctrine of interspousal tort immunity. It is only because the interspousal tort immunity doctrine has been abolished that commentators are able to debate the merits of replacing fault considerations in the divorce context with independent tort suits.

---

42. James McGreevey published a book entitled *The Confession* while Dina Matos McGreevey's account appears in her own book entitled *Silent Partner: A Memoir of My Marriage*. Jonathan Miller, *McGreevey Saga Goes On: Now His Ex-Wife Weighs In*, N.Y. TIMES, Apr. 1, 2007, § 14 (New Jersey), at 2.

43. The Associated Press, *McGreevey Divorce Case: No End to the 'Madness,'* N.J. RECORD, June 17, 2007, at A4.

44. Chris Newmarker, *Divorce Case Gets Uglier: Matos McGreevey Cites Extreme Cruelty in Filing*, N.J. RECORD, May 8, 2007, at A3.

A. Traditional Fault-Based Divorce

English law did not recognize divorce "until 1857, when divorce jurisdiction was transferred from the ecclesiastical courts to the civil court system and divorces were authorized for adultery."[45] In the United States, the law regulating civil marriage and divorce varied widely among the colonies.[46] Although the laws differed, the colonies recognized divorce or judicial separation on limited grounds, all involving some degree of fault.[47] In addition to the most common grounds of "[a]dultery, extreme cruelty, and desertion," some states included "insanity, conviction of a crime, habitual drunkenness and drug addiction" to the bases upon which to secure a divorce.[48] Until the 1960s, parties in the United States could not dissolve their marriage unless they could demonstrate that one spouse engaged in conduct that fell within one of the few statutory grounds for divorce.[49] In sum, courts only granted a divorce when one party was at fault.

Under this traditional system, the dominant concern was "the strong public interest in preserving marriage."[50] Providing access to divorce only in circumstances involving fault furthered the state's interest in protecting the institution of marriage. Much like the policies underlying tort law, divorce was

45. CLARK, *supra* note 6, at 407.

46. *See* NELSON MANFRED BLAKE, THE ROAD TO RENO: A HISTORY OF DIVORCE IN THE UNITED STATES 34–47 (Greenwood Press 1977) (1962) (surveying the laws of the early colonies and noting the differences in the various approaches adopted).

47. *See id.* (discussing the grounds for dissolving a marriage in the original colonies). The New England colonies—Massachusetts, Connecticut, Rhode Island, and New Hampshire—all authorized divorce, at least on the grounds of adultery and desertion. *Id.* at 35–40. The southern colonies—Virginia, Maryland, North Carolina, South Carolina, and Georgia—"did not permit absolute divorce, but [they] did allow judicial separations from bed and board on two grounds, adultery and cruelty." *Id.* at 40–41. Finally, the middle colonies—New York, New Jersey, Pennsylvania, and Delaware—allowed for divorce or separation in cases of adultery or desertion. *Id.* at 41–47.

48. JOHN DE WITT GREGORY ET AL., UNDERSTANDING FAMILY LAW 237 (3d ed. 2005). Adultery involves sexual intercourse outside of the marital relationship and can be proven by circumstantial evidence "that the [adulterous] spouse had both the disposition and the opportunity to commit the offense." *Id.* at 263–64. Cruelty, "the most commonly utilized ground for divorce in the United States," involves physical or mental harm as well as fear of physical harm. *Id.* at 264–65. Desertion is "the breaking off of marital cohabitation with an intent to end the marriage on the part of the deserting spouse." *Id.* at 266. Desertion can be accomplished physically by leaving the domicile, or constructively by withholding sex or ceasing to perform other marital duties. *Id.* at 267.

49. *See id.* at 236–37 (discussing the fault grounds upon which a divorce could be secured in the United States).

50. Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443, 1471.

"conceived as a remedy for the innocent against the guilty."[51] Accordingly, when both parties were "guilty . . . of marital misconduct" the doctrine of recrimination barred the court from granting a divorce.[52] This restrictive system of divorce eroded in the latter half of the twentieth century as states granted divorces irrespective of fault.

B. The Emergence of No-Fault Divorce

The limited availability of divorce trapped many couples in dissatisfying marriages and led to corruption in the family law system.[53] Frustration with the traditional system of divorce emerged from a "view of marriage as an institution that should last only as long as the emotional needs of the spouses were served by it."[54] Some unhappy couples resorted to collusion—fabricating evidence of martial misconduct for the purpose of establishing one of the grounds upon which a divorce could be granted.[55] For example, in one hundred divorce cases in New York, a Miss Dorothy Jarvis was hired to stage an adulterous rendezvous at a hotel with the husband where they would be caught in the act by a photographer—providing the necessary evidence for the wife to secure a divorce.[56]

The high incidence of collusion and perjury[57] by couples wishing to be divorced but unable to prove fault led to corruption and challenged the

---

51. Brown v. Brown, 281 S.W.2d 492, 498 (Tenn. 1955) (citing Brewies v. Brewies, 178 S.W.2d 84, 85 (Tenn. Ct. App. 1943)).

52. J.G. Beamer, *The Doctrine of Recrimination in Divorce Proceedings*, 10 U. KAN. CITY L. REV. 213, 213 (1941–1942). As Beamer notes: "The paradoxical result is that if both parties have a ground for divorce, neither party has a right to a divorce." *Id.*

53. *See* GREGORY ET AL., *supra* note 48, at 237 (discussing the downfalls of traditional divorce law and the catalysts for divorce reform).

54. Barbara Handschu & Mary Kay Kisthardt, *Finding Fault: Should 'Legal Punishment' Be Part of a Divorce Proceeding?*, N.Y. FAM. L. MONTHLY, Apr. 2003, at 1, 5; *see also* Ira Mark Ellman, *Divorce in the United States*, *in* CROSS CURRENTS: FAMILY LAW AND POLICY IN THE US AND ENGLAND 341, 344 (Sanford N. Katz, John Eekelarr, & Mavis Maclean eds., 2000) (describing the "psychological revolution" in which "[t]he question to consider . . . became whether the parties find the marriage personally fulfilling, not whether their moral commitments to one another or their children requires its continuation").

55. *See* Lawrence M. Friedman, *A Dead Language: Divorce Law and Practice Before No-Fault*, 86 VA. L. REV. 1497, 1512 (2000) (explaining the concept of collusion and its widespread use in the practice of divorce law prior to the introduction of no-fault rules).

56. *See id.* (recounting the story of the infamous blonde who made a career out of "soft-core adultery").

57. *See id.* at 1507 (stating that in the early twentieth-century a Massachusetts divorce court judge "claimed there was 'no tribunal in the country' where 'perjury' was 'more rife than in the Divorce Court'" (quoting HENRY EDWIN FENN, THIRTY-FIVE YEARS IN THE DIVORCE

legitimacy of the family law system.[58] In response, California enacted the first "no-fault" law in 1969.[59] This revolutionary legislation inspired similar changes across the country as the no-fault system grew in popularity.[60] By the mid-1980s, "all [fifty] states had at least some form of no-fault provision" integrated into their divorce law[61] as either the sole basis for dissolution[62] or as an alternative to the traditional fault-based systems.[63]

The typical no-fault divorce cites "irreconcilable differences" or "irretrievable breakdown" as the basis for dissolution.[64] These neutral grounds for dissolution reduced the "moral stigma" and "scandalous reputation" once associated with divorce.[65] In addition to changing the available grounds for

---

COURT 139 (1911))).

58. *See* MARY ANN GLENDON, THE TRANSFORMATION OF FAMILY LAW 191 (1989) ("The major criticisms leveled at the fault system were that it tended to aggravate and perpetuate bitterness between the spouses and that the wide-spread practice of using perjured testimony in collusive divorces promoted disrespect for the legal system."); Ellman, *supra* note 54, at 341 ("The entire package of [fault-based divorce] rules encouraged the very sham that the collusion doctrine ineffectually sought to suppress.").

59. *See* CAL. FAM. CODE § 2310 (West 2004) (permitting divorce upon a showing of "the irremediable breakdown of the marriage" or "incurable insanity"). The 1969 statute read: "A court may decree a dissolution of the marriage or legal separation on either of the following grounds, which shall be pleaded generally: (1) [i]rreconcilable differences, which have caused the irremediable breakdown of marriage[;] (2) [i]ncurable insanity." CAL. CIV. CODE § 4506 (West 1970).

60. See GREGORY ET AL., *supra* note 48, at 237 (discussing California's reform as the forefront of the "divorce revolution").

61. Handschu & Kisthardt, *supra* note 54, at 5; *see also* GLENDON, *supra* note 58, at 189 (noting that in 1985, "South Dakota became the last American jurisdiction to repeal an exclusively fault-based statute").

62. *See* GREGORY ET AL., *supra* note 48, at 238 (noting that approximately fifteen states have adopted a system in which "irreconcilable differences or irretrievable breakdown [is] the sole ground for divorce").

63. *See* GLENDON, *supra* note 58, at 189 (noting that rather than abandon fault all together, many states "had modernized their law simply by adding nonfault to fault grounds and eliminating the old traditional defenses of recrimination and collusion"); Peter Nash Swisher, *Reassessing Fault Factors in No-Fault Divorce*, 31 FAM. L.Q. 269, 297 (1997) ("[A]lmost thirty years after the so-called no-fault divorce revolution began in America, a majority of American states still recognize certain enumerated fault grounds as alternative grounds for divorce . . . ."); Jane Biondi, Note, *Who Pays for Guilt?: Recent Fault-Based Divorce Reform Proposals, Cultural Stereotypes and Economic Consequences*, 40 B.C. L. REV. 611, 615 (1999) ("[A]lthough fault grounds no longer exist as the exclusive means to dissolve a marriage, they continue to exist as an alternative divorce procedure in most states.").

64. GREGORY ET AL., *supra* note 48, at 238; *see also* Timothy B. Walker, *Family Law in the Fifty States: An Overview*, 25 FAM. L.Q. 417, 439–40 (1992) (indicating the bases upon which a no-fault divorce can be granted in each of the jurisdictions).

65. Michael Grossberg, *How to Give the Present a Past? Family Law in the United States, 1950–2000*, *in* CROSS CURRENTS: FAMILY LAW AND POLICY IN THE US AND ENGLAND,

dissolution and allowing divorce by mutual consent, the vast majority of no-fault regimes permit unilateral divorce in which "one spouse [can] terminate a marriage without the consent of the other."[66]

Social scientists studying family relationships suggested that "marriages broke up in a context of conflicts in attitude, personality, or other difficulty on both sides, rather than as a result of fault by one spouse and innocence by the other."[67] Some proponents of the no-fault revolution relied on this social science evidence to conclude that traditional grounds for divorce—such as adultery and desertion—were "symptoms" of a failing relationship rather than the cause of the breakdown.[68] While the research supports extending access to divorce on a no-fault basis, it should not necessarily preclude a court from considering the harmful "symptoms" when structuring the couple's post-divorce property settlement.

The emergence of no-fault systems of divorce coincided with the demise of the perception of the married couple as a single unit and its replacement with society's recognition that the individual parties in a family are autonomous and independent.[69] This modern perception of the married couple was so widely accepted that in 1972, the highest court in the country recognized that "the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup."[70] Consistent with the greater emphasis on the autonomy of

---

supra note 54, at 3, 7.

66. *Id.* Only New York, Mississippi, and Tennessee still prohibit unilateral divorce. The New York no-fault provision requires that "[t]he husband and wife have lived separate and apart pursuant to a written agreement of separation . . . for a period of one or more years after the execution of such agreement . . . ." N.Y. DOM. REL. LAW § 170(6) (McKinney 1999 & Supp. 2009). In Mississippi, a divorce "may be granted on the ground of irreconcilable differences, but only upon the joint complaint of the husband and wife . . . ." MISS. CODE ANN. § 93-5-2(1) (West 2007 & Supp. 2008). The statute further provides that "no divorce shall be granted on the ground of irreconcilable differences where there has been a contest or denial . . . ." *Id.* § 93-5-2(5). In order to obtain a no-fault divorce in Tennessee, "the parties [must] have made adequate and sufficient provision by written agreement for the custody and maintenance of any children of that marriage and for the equitable settlement of any property rights between the parties." TENN. CODE ANN. § 36-4-103(b) (2005 & Supp. 2008). The Tennessee law makes clear that "[i]f there has been a contest or denial of the grounds of irreconcilable differences, no divorce shall be granted on the grounds of irreconcilable differences." *Id.* § 36-4-103(e).

67. Grossberg, *supra* note 65, at 18 (quoting HOMER H. CLARK, JR., CASES AND PROBLEMS ON DOMESTIC RELATIONS (2d ed. 1974)).

68. *Id.* at 17–18.

69. *See* Singer, *supra* note 50, at 1512 ("The doctrinal shift from family privacy to decisional autonomy is thus consistent with the rapid shift from fault-based to consensual divorce and ultimately to divorce at the option of either spouse.").

70. Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (discussing the effect that marriage

the individuals in a relationship, divorce shifted its focus away from assigning fault and toward restoring the parties' independence through separation.

Securing a divorce became easier under a no-fault system because the parties no longer had to prove a wrong was committed and either party could petition for dissolution without the consent of the other spouse. However, the shift was not entirely advantageous for divorcing couples. Under the fault system, the wrong of one spouse was often used to affect the property distribution or the alimony award upon divorce. However, with the de-emphasis of fault in family law and divorce proceedings, wronged spouses were no longer compensated for the harm suffered. At approximately the same time that states began to reform their divorce laws to reflect a scheme of no-fault divorce, spouses gained the right to sue each other in tort. The emerging feasibility of interspousal tort suits made the law of torts much more important as a source of compensation within the context of a failing marriage.

C. *The Evolution of Interspousal Torts*

The doctrine of interspousal tort immunity evolved primarily from the notion that a husband and wife were a single legal entity[71] and, therefore, could not have a cause of action against each other.[72] It would be logically inconsistent to allow a man to sue himself for battery because he would be asserting the claim and defending against it simultaneously. Therefore, a wife could not sue her husband in tort because they were one person in the eyes of the law and the suit would be equivalent to a man suing himself.[73]

---

should have on the right of individuals to obtain contraceptives).

71. *See* WILLIAM BLACKSTONE, 1 COMMENTARIES *442 ("By marriage, the husband and wife are one person in law: [T]hat is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband . . . ."). It has been proffered that the concept of marital unity originated in either the practices of the early Romans or the biblical account of "the creation of woman from [man's] rib." Jack L. Herskowitz, Comment, *Tort Liability Between Husband and Wife: The Interspousal Immunity Doctrine*, 21 U. MIAMI L. REV. 423, 425 (1966). For further discussion regarding the concept of marital unity and its consequences in other areas of the law, see Mark E. Cammack, *Marital Property in California and Indonesia: Community Property and* Harta Bersama, 64 WASH. & LEE L. REV. 1417, 1421–22 (2007).

72. *See* Daniel T. Barker, Note, *Interspousal Immunity and Domestic Torts: A New Twist on the "War of the Roses,"* 15 AM. J. TRIAL ADVOC. 625, 627–28 (1992) (discussing the common law "roots of the interspousal tort immunity doctrine").

73. *See* William E. McCurdy, *Torts Between Persons in Domestic Relation*, 43 HARV. L. REV. 1030, 1033 (1930) ("[T]he duty to make compensation . . . would be united *eo instante* in the same person, and no cause of action could arise; and even if it could be said to arise, there would be the procedural difficulty of the husband's being both plaintiff and defendant.").

The theory that personal tort actions "would disrupt and tend to destroy the peace and harmony of the home" was often cited as an additional justification for spousal immunity.[74] However, that argument has been criticized as meritless because "if torts are occurring between a husband and his wife, the peace and harmony of the family is already gone."[75] In fact, some commentators suggest that the availability of a legal remedy may actually increase marital harmony by "deter[ing] the kind of conduct that produced the present dispute."[76]

The enactment of Married Women's Property Acts during the mid-1800s[77] recognized the legal identity of women as independent from their husbands, eroding the marital unity concept.[78] At common law, a married woman relinquished title to her personal property, as well as control over her real property, to her husband.[79] The Married Women's Property Acts altered this system by extending women the right to own and manage their separate property during marriage.[80]

---

74. Goode v. Martinis, 361 P.2d 941, 944 (Wash. 1961); *see also* Thompson v. Thompson, 218 U.S. 611, 617–18 (1910) (suggesting that allowing a wife to maintain an action against her husband for harms inflicted may be detrimental to "public welfare and domestic harmony"); Ritter v. Ritter, 31 Pa. 396, 398 (1858) ("The flames which litigation would kindle on the domestic hearth would consume in an instant the conjugal bond . . . .").

75. Barker, *supra* note 72, at 628; *see also* Crowell v. Crowell, 105 S.E. 206, 210 (N.C. 1920) ("Whenever a man has laid open his wife's head with a bludgeon, put out her eye, broken her arm, or poisoned her body, he is no longer exempt from liability to her on the ground that he vowed at the altar to 'love, cherish, and protect' her."); CLARK, *supra* note 6, at 371 (discussing the absurdity of the marital harmony argument).

76. Note, *Litigation Between Husband and Wife*, 79 HARV. L. REV. 1650, 1653 (1966).

77. Carl Tobias, *Interspousal Tort Immunity in America*, 23 GA. L. REV. 359, 371–72 (1989).

78. *See* GREGORY ET AL., *supra* note 48, at 72 (describing the Married Women's Property Acts as "statutes [that] were intended to reduce or eliminate the economic disabilities imposed on wives under common law").

79. *See* Cammack, *supra* note 71, at 1424–25 (describing the property rights of married women under a common law system).

80. *See id.* at 1427 (discussing how the Married Women's Property Acts affected the respective property rights of married individuals). The Virginia statute is representative of the language used in the Married Women's Property Acts:

> A married woman shall have the right to acquire, hold, use, control and dispose of property as if she were unmarried and such power of use, control and disposition shall apply to all property of a married woman which has been acquired by her since April [4, 1877], or shall be hereafter acquired. . . . [N]either her husband's right to curtesy nor his marital rights shall entitle him to the possession or use, or to the rent, issues and profits, of such real estate during the coverture; nor shall the property of the wife be subject to the debts or liabilities of the husband.

VA. CODE ANN. § 55-35 (1950).

The statutes also granted a married woman the rights to enter into contracts and sue independently of her husband.[81] Even though a woman could clearly bring an action against her husband for "matters relating to her separate property,"[82] most of the acts did not expressly grant her the right to sue her husband for tortious conduct.[83] The failure of the statutes to explicitly address personal injury suits between spouses made the judiciary reluctant to modify the common law doctrine of tort immunity.[84] However, the increased independence of married women effectuated by these statutes challenged the primary rationale for maintaining interspousal tort immunity because the new laws dismantled the concept of marital unity.[85] In 1962, California expressly abandoned the doctrine of interspousal immunity, allowing the wife to maintain an action against her husband for assault.[86] The abrogation of the immunity

---

81. *See* GREGORY ET AL., *supra* note 48, at 72 (describing the various rights women obtained by virtue of the enactment of the Married Women's Property Acts). Again, the Virginia statute is illustrative:

> A married woman may contract and be contracted with and sue and be sued in the same manner and with the same consequences as if she were unmarried, whether the right or liability asserted by or against her shall have accrued heretofore or hereafter. In an action by a married woman to recover for a personal injury inflicted on her she may recover the entire damage sustained including the personal injury and expenses arising out of the injury, whether chargeable to her or her husband . . . .

VA. CODE ANN. § 55-36 (1950).

82. Herskowitz, *supra* note 71, at 424.

83. *See id.* at 427–30 (discussing the statutes' silence on interspousal tort suits); *see also* Tobias, *supra* note 77, at 373–83 (detailing the three "waves" in which Married Women's Property Acts were enacted and noting that they were "primarily commercial" in nature without much if any mention of their effect on the interspousal relationship). For a discussion of the various approaches taken by states in dealing with a spouse's ability to sue the other spouse in tort, see William E. McCurdy, *Personal Injury Torts Between Spouses*, 4 VILL. L. REV. 303, 311–13 (1959).

84. *See* Tobias, *supra* note 77, at 383–98 (discussing the approaches taken by judges to justify retention of the tort immunity in spite of the new statutes).

85. *See* Self v. Self, 376 P.2d 65, 69 (Cal. 1962) ("[T]he fundamental basis of the interspousal disability doctrine—legal identity of husband and wife—no longer exists."); Barker, *supra* note 72, at 629–30 (recognizing the "major trend toward total abrogation of this antiquated doctrine"). For an expanded discussion on the marital unity doctrine and the economic, political, and social forces leading to its decline, see Norma Basch, *Invisible Women: The Legal Fiction of Marital Unity in Nineteenth-Century America*, *in* 3 HISTORY OF WOMEN IN THE UNITED STATES 132 (Nancy F. Cott ed., 1992).

86. *See Self*, 376 P.2d at 65, 70 ("[T]he rule should be that one spouse may sue the other in tort, at least where that tort is an intentional one."). Approximately twenty states had abolished interspousal immunity prior to California, but *Self* was an influential case in the "eventual demise" of the immunity doctrine. Spector, *supra* note 8, at 745 n.2.

doctrine became the dominant trend, with only nine jurisdictions retaining some version of the doctrine into the twenty-first century.[87]

The "divorce revolution" dramatically transformed the family law system—allowing parties to decide when divorce was warranted, but at the same time removing the compensation and punishment functions that fault served in the traditional system. The elimination of the interspousal tort immunity doctrine provided injured spouses with an alternative through which to recover. However, the dichotomy between no-fault divorce and marital tort actions created an entirely new set of obstacles for aggrieved spouses ranging from matters of judicial procedure to matters of personal finance.

IV. Overview of the No-Fault/Tort Dichotomy

The intersection of the no-fault divorce regime and interspousal torts raises a number of concerns for the court and the parties involved. Part IV discusses the American Law Institute's (ALI) recommendation for dealing with tort claims at the time of divorce, as well as some of the issues that arise when these two proceedings overlap. The court has to face a number of procedural issues when parties file for divorce and also institute a tort suit. Particularly, the court has to wrestle with the applicable statute of limitations, joinder, and res judicata. Another major issue to consider is the financial position of the parties.

A. The American Law Institute's Recommendation

According to the American Law Institute, noneconomic fault—such as adultery, cruelty, or abandonment—is not a legitimate consideration during the divorce proceeding. Rather, the ALI focuses on dissolving the legal obligations between the parties and "emphasizes disparities in post-dissolution living standards as the primary basis for compensatory-payment awards."[88] Therefore,

87. *See* 2 DOMESTIC TORTS: FAMILY VIOLENCE, CONFLICT AND SEXUAL ABUSE app. B, at 683–86 (rev. ed. 2005) (indicating that Florida, Georgia, Idaho, Iowa, Louisiana, Massachusetts, Nevada, Utah, and Vermont have not fully abrogated the interspousal tort immunity rule); *see also* RESTATEMENT (SECOND) OF TORTS § 895F (1979) ("A husband or wife is not immune from tort liability to the other solely by reason of that relationship."); Wayne F. Foster, *Modern Status of Interspousal Tort Immunity in Personal Injury and Wrongful Death Actions*, 92 A.L.R.3d 901 (1979) (surveying changes in the doctrine of interspousal tort immunity and identifying those jurisdictions that made exceptions to the doctrine or eliminated it all together).

88. AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS 44 (LexisNexis 2002).

the divorce proceeding is primarily about distributing the couple's assets and placing the parties in reasonable financial standing.

The possible "rationale[s] for considering marital misconduct"[89] are punishment of "the spouse who 'caused' the dissolution"[90] or compensation of the injured party. The ALI rejects punishment as a viable function of divorce law because of the difficulty in identifying the actual cause of the breakdown in the relationship and assigning blame accordingly.[91] Furthermore, the ALI asserts that the criminal law, and to some extent tort law, adequately fulfills the punishment function, so it is not necessary to unduly complicate the area of domestic relations with fault considerations.[92]

The ALI also criticizes the use of "[f]ault law as a source of compensation" and argues that tort law fulfills this compensatory function.[93] There are potentially three classes of harm that arise in the context of domestic misconduct and may be the basis for compensation: (1) financial harm, (2) emotional harm, and (3) physical harm.[94] Financial harm refers to the losses in available assets at divorce occasioned by purposeful waste or "misconduct that results in an increase in one spouse's economic needs," such as medical expenses to treat a physical injury inflicted by the other spouse.[95] All no-fault regimes uncontroversially recognize financial harm as a relevant consideration in the division of property and the determination of support awards, such as alimony.[96] The Principles go on to argue that the intentional infliction of emotional distress tort compensates for emotional harms, while assault and battery claims compensate for physical harms.[97]

The ALI's ultimate conclusion is that any compensatory purpose served by considering fault within the context of divorce proceedings is already met by the tort law and "duplication is inadvisable."[98] Thus, the ALI perceives divorce

---

89. *Id.* at 49.

90. *Id.* at 50.

91. *Id.*

92. *See id.* at 49–52 (noting that "[p]unishment is more usually the function of the criminal law" and that when coupled with punitive damages in tort, "[o]ffensive conduct in marriage . . . will normally be actionable whether or not it is the 'cause' of the actor's marital dissolution").

93. *Id.* at 52–53 ("[A] fault rule would serve compensation functions that may already be served by the tort law.").

94. *See id.* (identifying the potential losses that would be compensated by a fault-based rule).

95. Handschu & Kisthardt, *supra* note 54, at 5.

96. AMERICAN LAW INSTITUTE, *supra* note 88, at 52.

97. *Id.* at 53.

98. *Id.* The ALI goes on to explain that "[t]here is no reason to reinvent compensation

as a process to relieve parties of the legal obligations of marriage and believes other legal mechanisms should remedy the wrongs that took place during the marital relationship. While such an approach may be advantageous and desirable in theory, it implicates a number of procedural problems when put into practice.[99]

B. Procedural Problems

Widespread reform to eliminate interspousal tort immunity freed spouses to pursue tort claims on the same basis as unmarried individuals. However, accompanying this new-found opportunity was an onslaught of procedural problems regarding how to handle the two claims. The unique procedural problems that arise in the context of a failing marriage surface because the parties often bring the tort claim and the divorce action simultaneously or in close proximity—a factor that is not a consideration for the tort actions of unmarried litigants. From the ashes of the demise of interspousal tort immunity arose a phoenix of procedural problems concerning the statute of limitations, joinder of the claims, and res judicata.

1. Statute of Limitations

Many interspousal tort suits are never litigated "because the statute of limitations has traditionally posed the greatest obstacle to recovery for battered spouses who sue their abusers."[100] Many civil courts hearing tort suits conclude that "[e]ach act of abuse gives rise to a claim that is subject to its own statute of limitations,"[101] which for intentional torts is generally very

---

principles under the rubric of fault adjudications, nor to incorporate tort principles into divorce adjudications." *Id.*

99. The ALI purposefully avoided addressing the procedural problems that accompany a recommendation to separate divorce and tort suits, focusing instead solely on the substantive features of tort law. *See id.* (noting that "consideration of procedural issues [is] beyond the scope of the[] Principles").

100. Poplar, *supra* note 41, at 162.

101. de la Croix de Lafayette v. de la Croix de Lafayette, 15 Fam. L. Rep. (BNA) 1501, 1502 (D.C. Super. Ct. 1989); *see also* Davis v. Bostick, 580 P.2d 544, 547–48 (Or. 1978) (barring some of plaintiff's older tort claims because "the acts of assault and battery and the death threat in 1973 and the defamatory abortion talk and death threat in early 1974 were separately actionable because they caused harm"); *Developments in the Law—Legal Responses to Domestic Violence*, 106 HARV. L. REV. 1498, 1532 (1993) [hereinafter *Developments in the Law*] (noting that "[c]ourts . . . have continued to treat each individual occasion of violence as a separate cause of action subject to its own limitations period").

short.[102] However, victims of marital wrongs are unlikely to institute a civil action prior to a legal separation or divorce decree.[103] The reluctance of an abused spouse to bring a tort suit while still married stems from a multitude of concerns including financial dependency on the abusive spouse, concern for children in the household, and fear of retaliatory violence.[104]

The condition of being married generally does not toll the statute of limitations on a cause of action between spouses.[105] Supporters of the ALI's position argue that the statute of limitations problem is not appropriately resolved by considering the claim as part of the divorce proceeding because tort law is better able to address such issues.[106] In fact, one court suggested that considering the claim in a dissolution action after the applicable statute of limitations has expired would be contrary to the policy behind such statutes—to avoid litigation on old claims.[107] Established rules in tort law may in fact be the best tools for determining the appropriate treatment of the statute of limitations. However, if they are not applied to allow suits between spouses that were not previously brought because of the dangers or difficulties in such a course of action, then, contrary to the ALI's assumption, the victimized spouse cannot adequately seek relief through tort.

In response to the problems in bringing timely civil actions for marital torts, some states have altered the tort law to accommodate this unique context. For instance, California requires that a plaintiff bring an action of assault or battery within a two year period[108] while allowing victims of domestic violence a three year period from the later of "the date of the last act of domestic

---

102. *See* Edward S. Snyder, *Remedies for Domestic Violence: A Continuing Challenge*, 12 J. AM. ACAD. MATRIMONIAL LAW. 335, 360 (1994) ("Most of the claims pursued by battered spouses are intentional torts, . . . which typically carry short limitation periods.").

103. *See id.* at 361 (recognizing that spouses are less likely to sue each other because of the heightened emotional and psychological obstacles inherent in attempting to regain "the strength and courage to escape the [abusive] situation and seek redress").

104. *See* Stuart v. Stuart, 421 N.W.2d 505, 508 (Wis. 1988) (recognizing that filing a civil claim against the abusive spouse prior to divorce makes the victim vulnerable to further abuse); Poplar, *supra* note 41, at 169–70 (discussing the "societal obstacles" that make it difficult for abused spouses to file suit).

105. *See* Barbara H. Young, *Interspousal Torts and Divorce: Problems, Policies, Procedures*, 27 J. FAM. L. 489, 491–93 (1989) (noting that the statute of limitations will continue to run during marriage unless the jurisdiction has specifically suspended it).

106. *See* Ira Mark Ellman, *The Place of Fault in a Modern Divorce Law*, 28 ARIZ. ST. L.J. 773, 793 (1996) (arguing that "[t]ort law has a rich body of precedent on these tolling questions to which it can look in working out a solution").

107. *See* Davis v. Bostick, 580 P.2d 544, 548 (Or. 1978) ("The policy of the statute of limitations is to put at legal rest old claims.").

108. CAL. CIV. PROC. CODE § 335.1 (West 2006).

violence" or "the date the plaintiff discovers or reasonably should have discovered that an injury or illness resulted from an act of domestic violence."[109] New Jersey made a more dramatic reform by allowing abused spouses suffering from "battered-woman's syndrome" to treat all acts of domestic violence occurring during the marriage as a continuing tort, thereby tolling the statute of limitations.[110] The problem posed by the statute of limitations is tempered in states, such as New Jersey, that have reformed their laws to account for the marital context. However, in jurisdictions that have not taken such steps, the ALI's proposal may still leave spouses without a venue in which to redress past wrongs. Assuming the cause of action is not time-barred, the court still has to determine how to proceed with the divorce and tort claims.

2. *Joinder*

The realms of family law and divorce have undergone revolutionary changes over the past three decades. However, Professor Barbara Glesner Fines notes:

> [A] number of divorces still occur the old fashioned way—with an extended, adversarial fight over fault and financial distribution. One question facing the legal system in this climate is the extent to which divorce should be the last battle—bloody, wide-ranging, but final—or simply the first step in an ongoing war. An important issue in resolving this question is the extent to which a spouse may or must join in a divorce action any tort claims he or she may have against the other spouse.[111]

---

109. *Id.* § 340.15(a).

110. *See* Cusseaux v. Pickett, 652 A.2d 789, 794 (N.J. Super. Ct. Law Div. 1994) ("Because the battered-woman's syndrome is the result of a continuing pattern of abuse and violent behavior that causes continuing damage, it must be treated in the same way as a continuing tort."), *overruled on other grounds by* Giovine v. Giovine, 663 A.2d 109 (N.J. Super. Ct. App. Div. 1995). The elements of the battered-woman's syndrome cause of action are:

> (1) involvement in a marital or marital-like intimate relationship; and (2) physical or psychological abuse perpetrated by the dominant partner to the relationship over an extended period of time; and (3) the aforestated abuse has caused recurring physical or psychological injury over the course of the relationship; and (4) a past or present inability to take any action to improve or alter the situation unilaterally.

Id. at 793–94. A wife attempting to sue on the basis of battered woman's syndrome must provide "expert testimony establishing that the wife was caused to have an 'inability to take any action to improve or alter the situation unilaterally.'" Giovine v. Giovine, 663 A.2d 109, 114 (N.J. Super. Ct. App. Div. 1995) (quoting *Cusseaux*, 652 A.2d at 794), *overruled on other grounds by* Brennan v. Orban, 678 A.2d 667 (N.J. 1996).

111. Barbara Glesner Fines, *Joinder of Tort Claims in Divorce Actions*, 12 J. AM. ACAD.

The rules of joinder, referred to by Professor Fines, govern "[t]he uniting of parties or claims in a single lawsuit."[112] One matter that affects the issue of joinder is subject matter jurisdiction. Subject matter jurisdiction refers to a court's ability to hear a particular type of case and to award a particular remedy.[113] Every state has a court of general jurisdiction with the ability to hear a broad range of cases,[114] but there are also a number of courts of limited jurisdiction—such as juvenile courts, which only hear cases involving minors.[115] In some states, divorce actions are heard by courts of general jurisdiction,[116] but there are also a number of states that utilize specialized family law courts to handle divorces.[117] Courts can also be divided into chancery courts, which apply principles of equity, and courts of law.[118] Divorce is considered an equitable proceeding while tort suits are actions in law, potentially creating jurisdictional problems in those states that maintain a distinction between law and equity.[119]

The states that have addressed these procedural incompatibilities have adopted drastically different approaches to the possibility of joinder.[120]

MATRIM. LAW 285, 285 (1994).

112. BLACK'S LAW DICTIONARY 853 (8th ed. 2004).

113. *Id.* at 870.

114. *See, e.g.*, TENN. CODE ANN. § 16-10-101 (1994) ("The circuit court is a court of general jurisdiction, and the judge thereof shall administer right and justice according to law, in all cases where the jurisdiction is not conferred upon another tribunal.").

115. *See, e.g.*, *id.* § 37-1-103 (providing juvenile courts with exclusive original jurisdiction over matters involving juvenile delinquency, child neglect, and guardianship).

116. *See* VA. CODE ANN. § 20-96 (2004 & Supp. 2007) (establishing that divorce actions fall within the general jurisdiction of the circuit court).

117. *See* Aither v. Estate of Aither, 913 A.2d 376, 377–78 (Vt. 2006) (noting that the family court is a court of "limited jurisdiction" with the ability to adjudicate "seventeen types of proceedings, including divorces"). For charts detailing the use of family law courts and the subject matter jurisdiction of those courts in each of the states, see Linda D. Elrod & Robert G. Spector, *A Review of the Year in Family Law: State Courts React to* Troxel, 35 FAM. L.Q. 577, 628–33 (2002).

118. *See* Morton Gitelman, *The Separation of Law and Equity and the Arkansas Chancery Courts: Historical Anomalies and Political Realities*, 17 U. ARK. LITTLE ROCK L.J. 215, 223–25 (1995) (discussing the historical separation of matters in equity from those in law and the jurisdiction exercised by the Chancery Court). For additional discussion of the creation of the Chancery Court in England and the evolution of the distinction between law and equity, see DOUG RENDLEMAN, REMEDIES: CASES AND MATERIALS 9–14 (7th ed. 2006).

119. *See* Young, *supra* note 105, at 493–99 (noting the subject matter differences between the two actions).

120. *See* Fines, *supra* note 111, at 285–87 (discussing various approaches to joining tort and divorce proceedings).

Nine states—Arizona,[121] Colorado,[122] Iowa,[123] Massachusetts,[124] New Hampshire,[125] Ohio,[126] Utah,[127] Vermont,[128] and Wyoming[129]—prohibit joinder of tort and divorce actions. Some courts have focused on the inconsistency between tort actions and no-fault divorce, concluding that allowing joinder of the actions would be contrary to the "legislative intent."[130] Another rationale for prohibiting joinder is the different objectives of the actions. The purpose of a divorce is to separate the parties while the "purpose of the tort suit is to provide damages to the injured spouse."[131] Finally, courts prohibiting joinder cite the nature of the claims as justification for keeping the actions separate[132] because joining equitable claims with legal claims may deprive the parties of their constitutional right to a jury trial.[133] Generally, a plaintiff in a tort action

---

121. *See* Windauer v. O'Connor, 485 P.2d 1157, 1158 (Ariz. 1971) ("[T]he peculiar and special nature of a divorce action speaks against the brining of the two actions in one litigation.").

122. *See* Simmons v. Simmons, 773 P.2d 602, 605 (Colo. Ct. App. 1988) (concluding "that sound policy considerations preclude either permissive or compulsory joinder of interspousal tort claims, or non-related contract claims, with dissolution of marriage proceedings").

123. *See* IOWA CODE § 598.3 (2001) ("An action for dissolution of marriage shall be by equitable proceedings, and no cause of action, save for alimony, shall be joined therewith.").

124. *See* Heacock v. Heacock, 520 N.E.2d 151, 153 (Mass. 1988) ("The plaintiff could not have recovered damages for the tort in the divorce action, as the Probate Court does not have jurisdiction to hear tort actions and award damages.").

125. *See* Aubert v. Aubert, 529 A.2d 909, 912 (N.H. 1987) ("The issue of his right to recover damages for his injuries was not before the divorce court, and could not have been. Indeed, the divorce court would be without jurisdiction to award damages for personal injuries.").

126. *See* Koepke v. Koepke, 556 N.E.2d 1198, 1199 (Ohio App. 1989) (concluding that a "cause of action for intentional infliction of emotional distress should have been considered separately from the divorce proceeding").

127. *See* Walther v. Walther, 709 P.2d 387, 388 (Utah 1985) ("[D]ivorce actions will become unduly complicated in their trial and disposition if torts can be or must be litigated in the same action." (quoting Lord v. Shaw, 665 P.2d 1288, 1291 (Utah 1983))).

128. *See* Ward v. Ward, 583 A.2d 577, 581 (Vt. 1990) (ruling that the spouses' tort claims "were improperly joined into the divorce action").

129. *See* McCulloh v. Drake, 24 P.3d 1162, 1171 (Wyo. 2001) ("[O]ur holding precludes tort issues from being joined with marital dissolution issues . . . .").

130. Fines, *supra* note 111, at 304.

131. Kristyn J. Krohse, Note, *No Longer Following the Rule of Thumb—What to Do With Domestic Torts and Divorce Claims*, 1997 U. ILL. L. REV. 923, 937.

132. *See* Noble v. Noble, 761 P.2d 1369, 1371 (Utah 1988) ("Tort claims, which are legal in nature, should be kept separate from divorce actions, which are equitable in nature.").

133. *See* Young, *supra* note 105, at 498 (explaining "that joinder may interfere with the right to a jury trial for the tort").

seeking damages has a constitutional right to a trial by jury;[134] however, in most states there is no right to a jury trial in a divorce action.[135]

New Jersey takes the opposite approach and requires that all claims arising from the marriage be joined in a single suit.[136] The McGreevey case, which is pending in New Jersey,[137] will be joined consistent with this rule. One rationale for requiring joinder is that a marriage is a single transaction and the doctrine of res judicata would bar a separate action.[138] Another reason to join the actions is a concern for "fairness to the tortfeasor spouse" because a separate tort action "allow[s] an unjust redistribution of marital resources based on only one factor (tortious conduct), rather than the equitable, multi-factored distribution that occurs in dissolution proceedings."[139]

At least eleven states take an intermediate position, encouraging or permitting tort claims to be joined with divorce actions, but not requiring joinder.[140] As noted by Professor Fines, the advantage of this approach is that it is flexible enough to accommodate the needs and desires of the parties:

> This approach responds to the needs of the litigants in the vast majority of tort cases who, as abused spouses, may be emotionally unable or unwilling to bring tort actions during the tumultuous and dangerous time of divorce.

---

134. *See, e.g.*, U.S. CONST. amend. VII ("In [s]uits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . ."); TEX. CONST. art. I, § 15 ("The right of trial by jury shall remain inviolate.").

135. *See, e.g.*, Hutchings v. Hutchings, No. 054449S, 1993 WL 57741, at *9 (Conn. Super. Feb. 22, 1993) ("The reason[] that divorce practice takes place before judges, not juries is because distributing a marital estate often requires complex accounting of the parties' mutual claims against each other."). *But see* N.Y. DOM. REL. LAW § 173 (McKinney 1999) ("In an action for divorce there is a right to trial by jury of the issues of the grounds for granting the divorce.").

136. Brown v. Brown, 506 A.2d 29, 33–35 (N.J. Super. Ct. App. Div. 1986) (reaffirming joinder for marital tort claims arising before the divorce proceeding commences but holding that the issue of joinder should be left to the judge's discretion when the tortious conduct occurs after the divorce action has been instituted).

137. *Supra* notes 42–44 and accompanying text.

138. *See* Tevis v. Tevis, 400 A.2d 1189, 1196 (N.J. 1979) (requiring the joinder of interspousal tort claims and divorce proceedings "under the 'single controversy' doctrine").

139. Fines, *supra* note 111, at 292.

140. For middle-ground states' cases, see generally Jackson v. Hall, 460 So. 2d 1290 (Ala. 1984); Nelson v. Jones, 787 P.2d 1031 (Alaska 1990); Hutchings v. Hutchings, No. 054449S, 1993 WL 57741 (Conn. Super. Feb. 22, 1993); Mize v. Mize, 56 S.E.2d 121 (Ga. Ct. App. 1949); Nash v. Overholser, 757 P.2d 118 (Idaho 1988); McNevin v. McNevin, 447 N.E.2d 611 (Ind. Ct. App. 1983); Pelletier v. Pelletier, 742 P.2d 1027 (Nev. 1987); Maharam v. Maharam, 575 N.Y.S.2d 846 (N.Y. App. Div. 1991); Kemp v. Kemp, 723 S.W.2d 138 (Tenn. 1987); Mogford v. Mogford, 616 S.W.2d 936 (Tex. Civ. App. 1981); and Stuart v. Stuart, 421 N.W.2d 505 (Wis. App. 1988).

> For those litigants who do wish to resolve all issues at once, however, this approach allows for that efficiency.[141]

Some couples value "a quick, efficient, less costly resolution" while others are willing to endure the time and expense of a separate proceeding.[142] Although the procedural problems affecting joinder—such as whether a jury trial will be permitted—persist in these jurisdictions, the aggrieved party is "able to weigh the factors and decide what is most important."[143]

Parties who adopt the ALI's approach and commence separate tort actions at the time of divorce have to determine when and where they can bring the claim. In some states, the claims fall within the jurisdiction of different courts. The states disagree on the most appropriate resolution; some states adopt completely opposing views of joinder and other states hedge their bets with an intermediate approach. Where the two claims are not joined for litigation, the parties must confront the danger that the tort claim will be barred by the doctrine of res judicata.

3. *Res Judicata*

The doctrine of res judicata "prevents a party from suing on a claim which has been previously litigated to a final judgment by that party or such party's privies and precludes the assertion by such parties of any legal theory, cause of action, or defense which could have been asserted in that action."[144] In effect, the doctrine of res judicata serves as a form of protection from the civil equivalent of double jeopardy because it only allows one suit over the same problem.[145] Entry of a final property settlement in a divorce proceeding often "provides a full, final, and complete compromise of all matters" and may preclude the wronged spouse from pursuing a tort claim for conduct occurring in the marriage.[146] This result is even more likely where one party has introduced evidence of wrongdoing in an attempt "to receive a disproportionate

141. Fines, *supra* note 111, at 286–87.

142. Krohse, *supra* note 131, at 957.

143. *Id.*

144. 18 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 131.10(1)(a) (3d ed. 2008).

145. *See* Krohse, *supra* note 131, at 937 ("The judicial system enforces res judicata in order to avoid relitigation, conserve judicial resources, and provide the prevailing party with stability of judgment.").

146. Young, *supra* note 105, at 501–02 (citing Jackson v. Hall, 460 So. 2d 1290 (Ala. 1984)).

share of community property" because the issue has been directly considered by the court.[147]

There are two major tests used to determine if the doctrine of res judicata precludes a subsequent action: the "transactional test" and the "same claim test."[148] According to the transactional test, a final judgment "extinguishe[s] . . . all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose."[149] This approach focuses on the real-world factual settings in which claims arise rather than the legal theories brought before the court.[150] For example, a car accident is a single factual event and under the transactional test, a final judgment for damage to the car would preclude a second suit for personal injuries.[151] Similarly, a marriage can be viewed as a single transaction or as a series of transactions such that all claims arising from the marital relationship would have to be resolved in a single proceeding.

The same claim test is somewhat narrower than the transactional test and only precludes actions "that involve the same primary rights."[152] In contrast to the transactional approach, the same claim test focuses on the substantive theory of recovery that occasioned the suit.[153] For example, a party involved in a car accident could legitimately bring separate actions for the damage to the car and for the personal injuries on the basis that "the right to be free of bodily

147. Brinkman v. Brinkman, 966 S.W.2d 780, 783 (Tex. App. 1998); *see also* Coleman v. Coleman, 566 So. 2d 482, 485–86 (Ala. 1990) (concluding that the final divorce settlement barred the wife's claim for tortious transmission of a sexually transmitted disease where evidence of the disease was introduced during the divorce proceeding). The *Brinkman* court discussed the rationale for precluding a tort suit, noting that:

> To hold otherwise would enable a spouse to use one instance of abuse as grounds for receiving a large amount of temporary spousal support or a greater share of community property, and then another instance of abuse to obtain actual and punitive damages from the former spouse. . . . The prevention of such a situation is one purpose of res judicata.

Brinkman, 966 S.W.2d at 783.

148. Fines, *supra* note 111, at 291–92.

149. RESTATEMENT (SECOND) OF JUDGMENTS § 24(1) (1982).

150. *See id.* at § 24 cmt. a ("The present trend is to see a claim in factual terms and to make it coterminous with the transaction regardless of the number of substantive theories, or variant forms of relief flowing from those theories, that may be available to the plaintiff.").

151. *Id.* at § 24 cmt. c, illus. 1.

152. Fines, *supra* note 111, at 292.

153. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 24 cmt. a (1982) ("[D]efeated in an action based on one theory, the plaintiff might be able to maintain another action based on a different theory, even though both actions were grounded upon the defendant's identical act or connected acts forming a single life-situation.").

injury [is] distinct from the property right."[154] In the context of the same claim test, an injured spouse may argue that the divorce proceeding is meant "to sever the marital relationship between the parties" and is, therefore, distinct and independent from the right to recover damages in tort for physical or mental harm.[155]

Regardless of which of the two tests is used, courts are inclined to "liberally construe the causes of action so as to avoid the problem of res judicata barring a later-filed tort claim" if possible.[156] However, the court may bar the tort claim where relevant evidence of misconduct is introduced in the dissolution action, even if the court does not issue an ultimate ruling on the claim.[157] Parties that enter into a settlement agreement in the divorce proceeding and avoid formally litigating their claims have to be careful that they do not waive the right to bring a subsequent tort action.[158]

C. The Problem of the Lesser-Earning Tortfeasor

When discussing the role of fault in divorce and the financial consequences to the parties, there is a tendency to assume that the economically superior spouse—stereotypically the husband—is the wrongdoer.[159] Flowing from this assumption, some scholars argue that the consideration of fault provides the abused spouse with leverage to achieve "better financial settlements" upon divorce.[160] According to this view, the aggrieved spouse can use the threat of a public trial to negotiate a more favorable economic arrangement, and if the matter does go to trial the injured spouse can use the evidence of fault to "receive a greater economic share of the property and significant spousal support by the court."[161] Advocates of no-fault divorce

---

154. *Id.*

155. Heacock v. Heacock, 520 N.E.2d 151, 153 (Mass. 1988); *see also* Henriksen v. Cameron, 622 A.2d 1135, 1141 (Me. 1993) ("An action for divorce, even based on the [fault] ground . . . is not based on the same underlying claim as an action in tort . . . .").

156. Krohse, *supra* note 131, at 937–38.

157. *See* Young, *supra* note 105, at 501 (discussing the pitfalls that litigants may fall victim to in litigating a divorce action).

158. *See* Gramer v. Gramer, 523 N.W.2d 861, 862–63 (Mich. App. 1994) ("A property agreement that purports to settle all claims arising from the marriage and divorce bars future or existing tort claims brought by one spouse against another.").

159. *See* Jana Singer, *Divorce Reform and Gender Justice*, 67 N.C. L. REV. 1103, 1110 (1989) (challenging the "unsupported assumption that women were generally the 'innocent' spouses").

160. Biondi, *supra* note 63, at 620.

161. *Id.* at 621.

claim that the wronged spouse can attain the same leverage for economic gain through the threat of a separate tort suit.[162]

What neither of these positions adequately considers is the fact that the tortfeasor is not always the primary income earner in the relationship. Lower- and middle-class couples are particularly devastated by divorce because they rarely have the marital assets necessary to allow both parties to live apart comfortably.[163] Under a no-fault system of divorce, with its emphasis on equal or equitable distribution of property, the spouse who does not have a substantial source of independent income is in danger of becoming impoverished by a subsequent tort action.[164]

Exacerbating the problem further is the fact that the lesser-earning tortfeasor may become judgment-proof in tort. It has already been established that the parties are going to take a financial hit after divorce and only in the rare case are both parties going to be able to maintain the same standard of living that was enjoyed during the marriage.[165] An added obstacle is that the tortfeasor may squander his or her portion of the marital property, or creditors may make claims against those funds before a tort suit can be resolved and a damage award issued.[166] As a result, reliance on a separate tort action may force the injured spouse to relinquish property or funds that would otherwise be retained in a dissolution proceeding.

Tort law is concerned with compensation and not relative equity. Therefore, a damages award in tort, if recoverable, may leave the guilty party in

---

162. *See id.* at 630 (arguing that "tort actions seem to serve a leveraging function similar to fault in the fault regime"); Ellman, *supra* note 106, at 792 (arguing against the incorporation of tort claims into the divorce proceeding because "some tort claims might be made for tactical advantage in the divorce settlement negotiations").

163. *See* Cynthia Starnes, *Divorce and the Displaced Homemaker: A Discourse on Playing With Dolls, Partnership Buyouts and Dissociation Under No-Fault*, 60 U. CHI. L. REV. 67, 85–95 (1993) (criticizing no-fault principles of property division for inadequately accounting for the economic realities faced by many divorcing couples).

164. *See id.* at 78–85 (discussing the economic hardship experienced by homemakers after divorce).

165. *See* Sanford L. Braver, Jessica R. Shapiro, & Matthew R. Goodman, *Consequences of Divorce for Parents*, *in* HANDBOOK OF DIVORCE AND RELATIONSHIP DISSOLUTION 313, 318 (Mark A. Fine & John H. Harvey eds., 2005) (recognizing the inevitable reduction in resources available to divorced spouses). A number of studies indicate that females fair much worse after a divorce than their male counterparts. *See, e.g.*, Karen C. Holden & Pamela J. Smock, *The Economic Costs of Marital Dissolution: Why Do Women Bear a Disproportionate Cost?*, 17 ANN. REV. SOC. 51, 53 (1991) ("[G]ender differentials are marked, with men generally better off following separation and divorce, relative both to women and to their pre-disruption standard of living.").

166. *See* Spector, *supra* note 8, at 762 ("[E]ven when the client is willing to bring a separate tort action there may not be a source of funds to pay the damages.").

poverty. An equitable distribution of property that considers fault can more adequately balance the compensatory purpose with the desire to leave both parties above subsistence levels when feasible.

The ALI's proposal to eliminate noneconomic fault from the divorce proceeding and to require injured spouses to bring a separate tort action forces the courts to resolve a number of complex procedural problems. An aggrieved spouse first has to hurdle the statute of limitations and the doctrine of res judicata before the possibility of suing in tort becomes an option. Additionally, when the plaintiff is the wealthier spouse the ability to recover in tort may be effectively barred because of the inability to "get blood from a turnip." Even if the injured spouse overcomes these substantial obstacles, it is meaningless if the substantive law of torts fails to provide an adequate remedy—a matter discussed in Part V.

V. Are Tort Suits an Adequate Alternative?

In support of its position that fault is an inappropriate consideration in a divorce proceeding, the American Law Institute claims that wronged spouses can turn to criminal law or tort law to seek compensation for any perceived wrongs.[167] However, surveying the case law and recognizing the realities of litigation calls the ALI's assumption into question. Tort actions between spouses may generally prove more difficult than those between strangers because a different standard applies within the marriage on the theory that "husbands and wives 'assume the risk' of minor assaults or of negligence in the conduct of the home."[168] Part V discusses various torts that divorcing spouses

167. AMERICAN LAW INSTITUTE, *supra* note 88, at 52–53.

168. Note, *supra* note 76, at 1661; *see also* Comment, *Tort Liability Within the Family Area—A Suggested Approach*, 51 NW. U. L. REV. 610, 618 (1956) (suggesting that because of the "constant contact" between family members "it seems unjust and unwise to decide arbitrarily that members of the family must observe the same standards of conduct toward one another that they are required to observe toward other persons"). An example of the application of a different standard and the notion of assuming the risk or consent appeared in the criminal law's marital exemption for rape. The common law definition of rape was "the unlawful carnal knowledge of a woman, *not a spouse*, forcibly and against her will." 1 DOMESTIC TORTS: FAMILY VIOLENCE, CONFLICT AND SEXUAL ABUSE § 1:28, at 97 (rev. ed. 2005). Therefore, by marriage, a woman gave "irrevocable implied consent" to engage in sexual relations with her husband and the husband was immune from prosecution for rape. *Id.* However, by the mid-1980s the tides had turned and a majority of jurisdictions abolished marriage as a defense to a rape charge. *See id.* at 97–98 (discussing the ways in which states have limited or abolished the exemption and noting that even where a criminal charge is barred, "one should always consider a civil action for assault and battery").

often invoke and explores whether tort suits actually compensate wronged spouses.

A. Assault and Battery

Prior to the 1970s, domestic violence victims could not sue in tort for damages but could only seek an injunction in connection with a divorce or legal separation.[169] After the abolition of interspousal tort immunity, victims of abuse have successfully sued for both compensatory and punitive damages.[170] In fact, claims of assault and battery account for the "vast majority of interspousal torts."[171]

To succeed on a claim for battery, a plaintiff must show (1) "a harmful or offensive contact with [a] person"; (2) resulting from an "act[] intend[ed] to cause a harmful or offensive contact with the person . . . or an imminent apprehension of such a contact."[172] To succeed on a claim for assault, the plaintiff must prove "an imminent apprehension of [a harmful or offensive] contact" and that the defendant "intend[ed] to cause a harmful or offensive contact . . . or an imminent apprehension of such a contact."[173] Divorcing spouses do not face any special barriers to succeeding on assault or battery claims because the applicable standards and elements are very objective. For example, a woman recovered $30,000 in compensatory and punitive damages after her husband "dragged her down a stairway by her feet because he thought it was 'comical.'"[174] Tort suits for assault and battery seem to be adequate to compensate spouses for physical harms incurred during the marriage. However, because not all torts are created equal it is important to investigate the adequacy of other torts before concluding that the ALI's recommendation should be adopted.

---

169. *See Developments in the Law*, *supra* note 101, at 1528 (discussing the difficulty of getting relief for domestic abuse).

170. *See id.* at 1531 (discussing tort actions as one of the state responses to the problem of domestic violence).

171. Fines, *supra* note 111, at 297.

172. RESTATEMENT (SECOND) OF TORTS § 13 (1965). Although the Restatement Third is in the publication process, the drafters expressly stated that "the Restatement Second remains largely authoritative in explaining the details of the specific torts encompassed by this Section" on intentional physical harms. RESTATEMENT (THIRD) OF TORTS § 5, cmt. c. (Proposed Final Draft No. 1, 2005).

173. RESTATEMENT (SECOND) OF TORTS § 21 (1965).

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

B. Intentional Infliction of Emotional Distress

Behind claims of assault and battery, "[i]ntentional infliction of emotional distress is the second most commonly alleged tort in divorce actions."[175] To succeed on a claim for intentional infliction of emotional distress (IIED), a plaintiff must show that the defendant: (1) "intentionally or recklessly" (2) "cause[d] severe emotional disturbance" (3) "by extreme and outrageous conduct."[176] Generally, the element that makes or breaks an intentional infliction of emotional distress claim is the "extreme and outrageous conduct" element.[177] This is particularly the case in the context of a marriage, where the parties are not allowed to recover for the "subtle ebb and flow of married life."[178] Moreover, "most marriages ending in divorce see their share of insults, indignities, threats, annoyances and petty oppressions as well as transient and trivial mental anguish" but do not give rise to civil liability.[179]

Unlike the elements for assault or battery, the outrage element of an IIED case is a very subjective standard. The application of this special rule for spouses leads to inconsistent application of the outrageous element. In *Henriksen v. Cameron*,[180] the court upheld a jury award of "$75,000 in compensatory damages and $40,000 in punitive damages" in an intentional

---

175. Barker, *supra* note 72, at 626.

176. RESTATEMENT (THIRD) OF TORTS § 45 (Tentative Draft No. 5, 2007). For a discussion of the initial resistance to recognizing the infliction of mental injury as a basis for liability and the eventual emergence of the independent tort of intentional infliction of emotional distress, see WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 12, at 49–56 (4th ed. 1971) and Daniel Givelber, *The Right to Minimum Social Decency and the Limits of Evenhandedness: Intentional Infliction of Emotional Distress by Outrageous Conduct*, 82 COLUM. L REV. 42, 43–45 (1982).

177. *See* Bradley A. Case, Note, *Turning Marital Misery into Financial Fortune: Assertion of Intentional Infliction of Emotional Distress Claims by Divorcing Spouses*, 33 U. LOUISVILLE J. FAM. L. 101, 107 (1994) ("In or out of the marital context, most litigation of intentional infliction of emotional distress claims centers around the definition of 'outrageous' conduct."); Ellman, *supra* note 106, at 795 ("[I]n practice the action boils down to the one element of 'outrage.'").

178. 1 DOMESTIC TORTS: FAMILY VIOLENCE, CONFLICT AND SEXUAL ABUSE § 1:34 (rev. ed. 2005). Additionally, "recovering for 'purely' emotional harm (as opposed to emotional harm accompanied by physical injury) seems virtually impossible because almost every dissolving marriage is extremely distressful." Case, *supra* note 177, at 102; *see also* Koepke v. Koepke, 556 N.E.2d 1198, 1200 (Ohio Ct. App. 1989) (finding that because "almost all divorce actions involve some form of emotional distress," the plaintiff must show that serious harm was inflicted).

179. Case, *supra* note 177, at 115.

180. Henriksen v. Cameron, 622 A.2d 1135, 1137 (Me. 1993) (holding that the ex-wife's intentional infliction of emotion distress claim was actionable and affirming the trial court's judgment).

infliction of emotional distress action based on the physical and verbal abuse inflicted by the husband on the wife during their twelve year marriage.[181] On the other hand, in *Hakkila*—discussed in Part II—the court found that public verbal abuse, failure to engage in normal sexual relations, and multiple instances of battery over the course of a ten year marriage were not sufficiently outrageous to recover on a claim for intentional infliction of emotional distress.[182] There is no readily ascertainable difference between the two cases and yet one wife was awarded over $100,000 while the other walked away empty-handed. Such divergent results suggest that tort law may not be effectively redressing the emotional harm between married persons.

C. Adultery

Despite the fact that adultery is a common source of harm arising in a marriage, such conduct has been virtually eradicated as a basis for a claim to recover damages in any area of the law. Surprisingly, in approximately 40% of states, adultery is not even an available ground for securing a divorce.[183] Adultery is a crime in half of the states, punishable by a monetary penalty in some states and up to five years in prison in others.[184] However, these laws have never been substantially enforced.[185] Extramarital sex was also the basis for civil liability under the torts of "alienation of affections" and "criminal conversation."[186] Both torts allowed the faithful spouse to recover damages from the third party who participated in the affair, but not from the adulterous

181. *Id.* at 1137–38, 1144.

182. *See* Hakkila v. Hakkila, 812 P.2d 1320, 1321–22, 1327 (N.M. Ct. App. 1991) (dismissing the wife's claim for "fail[ure] to meet the legal standard of outrageousness").

183. *See* GREGORY ET AL., *supra* note 48, at 263 (noting that adultery "is currently a ground for divorce in approximately [twenty-nine] states").

184. *See* Martin J. Siegel, *For Better or for Worse: Adultery, Crime & the Constitution*, 30 J. FAM. L. 45, 49–52 (1991–1992) (discussing the criminalization of adultery in the twentieth century).

185. *Id.* at 52–53.

186. *See* Jill Jones, Comment, *Fanning an Old Flame: Alienation of Affections and Criminal Conversation Revisited*, 26 PEPP. L. REV. 61, 66–67 (1999) (discussing the origins of tort liability for adultery). To succeed in a suit for "alienation of affections, the plaintiff must first prove that true affection existed in the marriage at one time; second, it must be shown that the affection is now destroyed; and third, that the defendant caused that destruction, or at least impairment, of the marital relationships." *Id.* at 68. An action for "[c]riminal conversation requires proof of adulterous relations between the plaintiff's spouse and the defendant, as well as proof of a valid marriage between the plaintiff and the allegedly errant spouse." *Id.* at 67.

spouse.[187] Today, states have either abolished these causes of action "or have simply not recognized them in recent years."[188]

The most plausible modern theory of recovery for an extramarital affair in tort is through an action for infliction of emotional distress.[189] Although adultery causes a great deal of emotional turmoil in a marriage, "[c]ourts have generally agreed that while adulterous conduct of a spouse is not acceptable, it does not rise to the level of outrageousness required in an intentional infliction of emotional distress case."[190] This seemingly harsh result is predicated on the notion that individuals in a marriage continue to enjoy personal autonomy and sexual liberty.[191] Adultery is clearly an instance of marital misconduct that causes harm, yet tort law fails to provide the faithful spouse with a remedy.

D. Realities of Civil Litigation

The ALI's assertion that spouses can seek redress for marital wrongs through a tort suit assumes that such an avenue is actually feasible for the parties. Bringing a civil suit is an expensive endeavor and, because of crowded court dockets, relief can take years.[192] The expense and sacrifice associated with litigation is particularly pronounced when the parties have recently resolved one suit—the divorce proceeding.[193] Participating in litigation is

---

187. *See id.* at 67–69 (reviewing the elements of the torts and the nature of the damages awarded).

188. *Id.* at 70 n.80.

189. *Supra* Part V.B.

190. Spector, *supra* note 8, at 750; *see also* Whittington v. Whittington, 766 S.W.2d 73, 74–75 (Ky. App. 1989) ("The emotional and financial distress caused by a spouse's fraud and adultery may be very painful and difficult but does not necessarily implicate the tort of outrage."); Quinn v. Walsh, 732 N.E.2d 330, 334 (Mass. App. Ct. 2000) (ruling that "an adulterous affair that was openly conducted and initiated 'in part' to injure a plaintiff" was insufficient to state a claim upon which relief may be granted); Ruprecht v. Ruprecht, 599 A.2d 604, 608 (N.J. Super. Ch. 1991) (concluding that the wife's eleven year affair "fail[ed] to reach the level of outrageousness necessary for liability under this tort").

191. *See* Hakkila v. Hakkila, 812 P.2d 1320, 1324 (N.M. Ct. App. 1991) ("[T]he interest in personal autonomy apparently has led courts to reject a cause of action when a person intentionally causes emotional distress by engaging in an extramarital relationship . . . ."); Givelber, *supra* note 176, at 57 (noting that the "concern for personal liberty . . . includes the freedom to exercise privacy rights even in the face of certain knowledge that it will severely distress another").

192. *See Developments in the Law*, *supra* note 101, at 1532–33 (recognizing the practical limitations of tort suits to remedy situations of marital abuse).

193. *See* Swisher, *supra* note 63, at 316 ("[S]eparate marital tort claims would foster a costly, onerous, and largely unnecessary multiplicity of lawsuits, especially for injured spouses of modest means . . . .").

generally exhausting for the parties, win or lose. The experience is particularly emotionally and psychologically draining when it involves the dissolution of a relationship—the parties usually want a sense of closure and are reluctant to re-open wounds that have begun to heal.[194]

The financial toll that litigation and divorce take on parties is a major barrier to filing a second suit. Separate suits necessitate separate court fees, attorney fees, and various other expenses associated with litigating a tort claim. While these costs are burdensome for any litigant, a majority of recently divorced persons are in a particularly dire situation.[195] As a practical matter, the standard of living for both individuals in a newly divorced couple takes a major hit because they now have to incur more in basic living expenses.[196] A Connecticut court recognized that the culmination of the two events can be particularly burdensome:

> Divorce is generally a zero sum economic transaction: [T]here is not enough money in the marital settlement pot for both spouses to live postdivorce at the same standard of living as before the divorce. Increasing the transaction costs of the divorce settlement by reopening proceedings reduces further the total resources available for the postdivorce family to live on.[197]

Case law demonstrates that with the exception of claims for assault and battery, a civil suit in tort is not a realistic option for divorcing spouses. Married persons have to confront heightened standards to recover for emotional distress and they are left without any course of action against an adulterous spouse. Furthermore, even if the currently available torts were adequate to compensate injured spouses, the personal and financial burdens of commencing a civil suit while securing a divorce can effectively deter the pursuit of valid claims. The inadequacy of tort law to provide aggrieved spouses with appropriate relief necessitates the development of other alternatives.

---

194. *See* Spector, *supra* note 8, at 762 ("[P]ractically all clients show a distaste for the prolonging of the process that a civil case would entail. As a result, a large number of cases that otherwise might prove to be viable are simply not filed.").

195. *See* Braver et al., *supra* note 165, at 318 (discussing the financial burdens of divorce and estimating that the average divorce costs $20,000).

196. *See id.* ("[B]ecause of economies of scale, two households are more expensive to maintain than one."); Thomas J. Espenshade, *The Economic Consequences of Divorce*, 41 J. MARRIAGE & FAM. 615, 620 (1979) ("When many family members live together there are items of nearly fixed costs (*e.g.*, housing) that can be spread around so that the *per capita* cost of maintaining a given standard of living is less than for a smaller family. When couples divorce these benefits are reduced.").

197. Hutchings v. Hutchings, No. 054449S, 1993 WL 57741, at *4 (Conn. Super. Ct. Feb. 22, 1993).

VI. Recommendations

As discussed above, a number of problems arise at the crossroads between interspousal torts and divorce. It is particularly difficult to recommend a working solution to the problem because of the wide variations among the states in the laws of tort, divorce, and procedure. Therefore, the recommendations proposed here are broad and will only be desirable or feasible in some jurisdictions.

A. Recommendations to Reform the Substantive Law

One potential solution, suggested by Professor Craig W. Dallon, is to consider a limited sphere of marital misconduct in divorce proceedings.[198] There are two primary rationales for this approach: (1) tort law and criminal law do not address some of the forms of misconduct most unique to the marital context[199] and (2) the injured spouse should be compensated for the financial loss suffered as a result of the divorce.[200] Claims of assault and battery, and claims of intentional infliction of emotional distress (at least when accompanied by physical injury) would arguably remain within the province of other areas of the law, primarily tort law.[201] This approach would establish minimum standards of decency within the marriage.[202] Furthermore, it gives at least some spouses, who cannot otherwise bring a separate tort action for financial reasons, the opportunity to recover for injury.

Another potential solution is tort reform by devising a new cause of action to deal with the misconduct not currently addressed, or inadequately addressed, in other areas of the law. This approach was adopted to some extent in New

---

198. *See* Craig W. Dallon, *The Likely Impact of the ALI Principles of the Law of Family Dissolution on Property Division*, 2001 BYU L. REV. 891, 919–20 (noting the problems with the ALI's complete disregard of fault and recommending an intermediate approach).

199. *See id.* at 918 (recognizing that other areas of the law may be suitable to address misconduct like battery but that "adultery, desertion, [and] alleged purely emotional abuse in marriage" are not sufficiently addressed).

200. *See id.* at 919 ("The spouse who, through marital misconduct, precipitates the marital breakdown causes financial loss to the other spouse.").

201. *See id.* (recognizing that some misconduct is not "inherently linked to the marital relationship" and concluding that "not all conduct should qualify as marital misconduct or fault").

202. *See* Lynn D. Wardle, *Beyond Fault and No-Fault in the Reform of Marital Dissolution Law*, *in* RECONCEIVING THE FAMILY 9, 26 (Robin Fretwell Wilson ed., 2006) (criticizing the ALI's recommendation and encouraging divorce courts to bolster "community standards of minimum acceptable spousal behavior").

Jersey, where "battered-woman's syndrome" is distinctly recognized in tort.[203] The new tort not only recognizes the unique parameters of the marital context, but it also avoids some of the procedural problems otherwise present, specifically the danger of the statute of limitations running prior to divorce.[204] Professor Barbara Bennett Woodhouse suggested a variation of this approach, recommending the development of a new tort for "breach of spousal trust."[205] This cause of action would "authorize compensation for physical, emotional, and economic injuries flowing from a spouse's misconduct."[206]

B. Recommendation to Reform the Procedural Law

Integrating alternative dispute resolution techniques into the contentious divorce proceeding is another possibility. States should adopt a system in which parties notify the court that they intend to pursue a tort claim in connection with the marital relationship. If the parties are determined to bring such a claim, the court suspends final resolution of the divorce proceeding pending arbitration to resolve the issue of fault.[207] The arbitrator supplies a decision on the issue of liability for the charged wrongs, using the standards normally applicable to unmarried individuals rather than the heightened standards currently applied to married couples. On the issue of damages, the arbitrator would provide a property split based solely on the tort claim (such as a 65/35 distribution in favor of the injured spouse). Provided the arbitrator's decision is supported by the evidence, the judge uses the arbitrator's split as a starting point and makes the remaining distribution according to the normal factors that drive equitable distribution.

An arbitration proceeding has a number of advantages over the ALI's recommendation, which requires a separate tort suit. The main advantage is the reduced financial cost incurred by the parties. Many couples are deterred from bringing a civil suit because of the enormous financial burden subsequent

---

203. Cusseaux v. Pickett, 652 A.2d 789, 793 (N.J. Super. Ct. 1994), *overruled on other grounds by* Giovine v. Giovine, 663 A.2d 109 (N.J. Super. Ct. App. Div. 1995).

204. *See id.* at 794 (establishing that battered-woman's syndrome allows the plaintiff to combine the individual acts of misconduct as a continuing tort, thus avoiding the forfeiture of older incidents).

205. Barbara Bennett Woodhouse, *Sex, Lies, and Dissipation: The Discourse of Fault in a No-Fault Era*, 82 GEO. L.J. 2525, 2566 (1994).

206. *Id.*

207. The court could still resolve issues that are not related to the distribution of property and that require immediate resolution—such as child custody issues.

litigation places on parties that have already taken a financial hit in divorce.[208] Arbitration proceedings are generally cheaper[209] and would allow some parties, otherwise barred from seeking compensation, to be made whole. Another benefit of arbitration is the length of the proceeding. As discussed above, civil litigation can take years to resolve and keep the parties entangled in a contentious battle.[210] In contrast, the arbitration proceeding is generally quicker[211] and, therefore, the divorce proceeding can be suspended for a short period of time to resolve the tort claim.

The problem of the lesser-earning tortfeasor[212] would all but disappear by combining arbitration of torts and judicial resolution of divorce. No property distribution or support award would be made until after the resolution of the misconduct claim. Therefore, creditors cannot attach their claims to the award ahead of time and the tortfeasor cannot circumvent liability by disposing of the funds. Furthermore, if the arbitration award is made in terms of a percentile split, the danger of leaving the tortfeasor completely insolvent is reduced.

An added benefit of the arbitration alternative is that the parties do not have to "air their dirty laundry" in open court. One of the concerns of courts in allowing interspousal litigation is that the intimacy of the relationship will be exposed to public scrutiny.[213] Protecting the accused spouse from humiliation is cited as one of the justifications for limiting the application of tort suits in the context of interspousal suits.[214] Submitting interspousal tort claims to arbitration reduces the danger of unnecessary disclosure and allows the marital activities to remain relatively private.

---

208. *Supra* notes 192–97 and accompanying text.

209. *See* NAT'L ARBITRATION FORUM, THE CASE FOR PRE-DISPUTE ARBITRATION AGREEMENTS: EFFECTIVE AND AFFORDABLE ACCESS TO JUSTICE FOR CONSUMERS 10 (2004) (citing Lisa Brener, *Cost and Value of Arbitration*, 14 WORLD ARBITRATION & MEDIATION REPORT 111 (2003)), *available at* www.arbitration-forum.com/rcontrol/documents/ResearchStudiesAndStatistics/2004EmpiricalStudies.pdf (reporting that 89% of persons who took advantage of arbitration procedures "found that [it] was less expensive than litigation").

210. *Supra* note 192 and accompanying text.

211. *See* U.S. CHAMBER INST. FOR LEGAL REFORM, ARBITRATION: SIMPLER, CHEAPER, AND FASTER THAN LITIGATION 19 (2005), *available at* www.adrforum.com/rcontrol/documents/ResearchStudiesAndStatistics/2005HarrisPoll.pdf (indicating that 74% of users perceived that arbitration proceedings were faster than courtroom litigation).

212. *Supra* Part IV.C.

213. *See* Hakkila v. Hakkila, 812 P.2d 1320, 1325 (N.M. Ct. App. 1991) ("Any litigation of a claim is certain to require exposure of the intimacies of married life.").

214. *See id.* ("In determining the scope of the tort of outrage in the marital context, it is necessary to consider the privacy interests of the accused spouse.").

The use of arbitration procedures to resolve personal injury claims has been criticized as inconsistent with the policies and values of tort law.[215] However, such criticism was based on the use of arbitration arising from a contractual relationship.[216] Consequently, central to the criticism was the ability of the party with superior bargaining power to secure favorable procedures or limitations on the proceeding, thereby challenging the fairness to the other party.[217] The dissolution of a marriage is not usually predicated on a formal contract that establishes procedures for arbitration, and so the concern of bargaining power is not realized. The danger of excessively limiting opportunities for discovery and witness testimony[218] may not be as problematic in the context of a divorce. In the generic case, the facts and circumstances surrounding marital torts will be less complex and require fewer discovery requests than a typical suit between strangers with a contractual relationship.

VII. Conclusion

The American Law Institute's recommendation that aggrieved spouses seek compensation in independent tort actions is likely to leave injured parties without any remedy. A variety of procedural and financial hurdles often prevent spouses from being able to institute a separate suit and have their claim heard. Furthermore, spouses who are able to have their claim decided on the merits encounter a higher standard for recovery than unmarried persons. This Note does not mean to suggest that tort law is completely incapable of fulfilling the objectives that were traditionally met by the use of fault in divorce. However, in the current system the principles and rationales for no-fault divorce are bleeding over into the application of tort law to divorcing spouses.[219] In an attempt to smooth out the inequities of such a system, states

215. *See* Elizabeth G. Thornburg, *Contracting with Tortfeasors: Mandatory Arbitration Clauses and Personal Injury Claims*, 67 LAW & CONTEMP. PROBS. 253, 261–67, 270–73 (2004) (arguing that arbitration can deprive a personal injury plaintiff of the expansive procedural protections of litigation and limit the available recovery in such a way that undermines the purposes of tort law).

216. *See id.* at 254–55 ("Mandatory arbitration clauses have come to be used to compel arbitration of personal injury claims arising between contracting parties.").

217. *See id.* at 262–63 (discussing the ways in which contracting parties can "eliminate or severely limit" the basic rights that accompany litigation).

218. *See id.* (arguing that full discovery and opportunity to hear testimony are important to prevent "a significant information imbalance").

219. *See* Hakkila v. Hakkila, 812 P.2d 1320, 1325–26 (N.M. Ct. App. 1991) ("A cautious approach to the tort of intramarital outrage also finds support in the public policy of New Mexico to avoid inquiry into what went wrong in a marriage.").

should consider integrating arbitration proceedings into divorce actions. Given the circumstances, there is still "no winning," but at least the appropriate party bears the greater degree of losing.