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Robin Fretwell Wilson
Washington and Lee University School of Law, wilsonrf@wlu.edu

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I. Introduction

Wrongs Committed During a Marriage: The Child that No Area of the Law Wants to Adopt,[1] by Michelle Evans, does a fabulous job of unpacking the problems with trying to account for wrongs in a marriage outside of the divorce proceeding. These range from the "who goes first" problem of whether and how a divorce settlement or judgment should affect a later criminal trial or tort suit, to the possibility that parallel proceedings might reach conflicting results. The difficulties raised by dual proceedings argue for some ability to consider fault in the marriage's dissolution through, for instance, an arbitration mechanism.[2]

But the difficulties Michelle catalogues also challenge why policymakers have stripped fault out of divorce proceedings entirely in roughly a dozen jurisdictions[3]—and why the American Law Institute's *Principles of the Law of Family Dissolution (Principles)*, published in 2002, would have legislatures remove fault (other than financial waste) from divorce proceedings everywhere.[4] This Comment adds three observations to Michelle's astute analysis: first, that the transaction costs of showing fault may be worth it financially or emotionally to the party who has been wronged; second, that deeply unfair results can arise in the absence of an inquiry into fault in the

* Professor of Law and Law Alumni Faculty Fellow, Washington & Lee University School of Law.

1. Michelle L. Evans, Note, *Wrongs Committed During a Marriage: The Child that No Area of the Law Wants to Adopt*, 66 WASH. & LEE L. REV. 465 (2009).

2. *See id.* at 498–500 (proposing the use of an arbitration proceeding to resolve the issue of marital misconduct).

3. JOHN DE WITT GREGORY ET AL., UNDERSTANDING FAMILY LAW 238 (3d ed. 2005).

4. AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS 66–67 (LexisNexis 2002) [hereinafter ALI PRINCIPLES].

divorce; and third, if we trust judges and juries to determine what is and is not acceptable behavior in the criminal and civil contexts, then why not trust them to make similar determinations about fault in the context of family law?

II. Choosing Fault in a World of No-Fault Divorce

In thirty jurisdictions in the United States today, a wronged spouse has the choice about how to proceed with his or her divorce.[5] He or she can sue either for a no-fault divorce or one that takes fault into consideration in some way. In some jurisdictions, fault may serve as a ground for divorce[6]—allowing for a faster exit from the marriage in some cases.[7] More common, and more relevant here, fault may be a factor in certain jurisdictions in awarding alimony or distributing the couple's marital property.[8]

To understand the deep distrust that some law reformers have of fault, it is important to understand the impetus for no-fault divorce. Michelle explains that the availability of no-fault divorce grew in part out of the inability of courts to sort out after the fact what happened, the desire not to rehash every little problem in a marriage, and respect for the liberty and autonomy of adults to leave marriages that are not satisfying to them.[9] The movement to recognize no-fault divorce reflected other concerns as well, concerns about the burdens on the courts from divorce litigation, as well as the very high transaction costs of showing fault.[10]

Many of the same intuitions that supported no-fault divorce have led law reform bodies, like the ALI, to aver that the time for fault in divorce proceedings is past. The *Principles*, arguably the most sweeping attempt at family law reform in the last quarter century, would reject any role for fault in

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5. Lynn D. Wardle, *Beyond Fault and No-Fault in the Reform of Marital Dissolution Law*, *in* RECONCEIVING THE FAMILY 9, 15 (Robin Fretwell Wilson ed., 2006).

6. *Id.*; *see also* S.C. CODE ANN. § 20-3-10 (1985) (listing five grounds for securing a divorce, four of which involve some degree of fault); VA. CODE ANN. § 20-91(A) (2008) (providing four grounds for securing a divorce, three of which involve fault).

7. *See* S.C. CODE ANN. § 20-3-80 (providing a quicker proceeding for divorces based on desertion or separation).

8. *See* Wardle, *supra* note 5, at 15 ("[T]hirty states allow consideration of marital misconduct in both alimony and property disputes (fifteen states), or in alimony but not property contests (twenty-two always consider fault in alimony awards and eight rarely do).").

9. *See* Evans, *supra* note 1, at 473–76 (discussing the emergence of no-fault divorce).

10. *See* Laura Bradford, Note, *The Counterrevolution: A Critique of Recent Proposals to Reform No-Fault Divorce Laws*, 49 STAN. L. REV. 607, 611 (1997) (noting that divorce proceedings were becoming more "'perfunctory' as judges sought to avoid ugly," drawn-out battles between spouses).

dissolution proceedings, even if a couple wants to make fault relevant to their private relationship.[11]

The Reporters for the *Principles* reject a role for fault for a number of reasons. They reject fault as a device to "punish" the spouse who "caused" the dissolution, arguing that "[i]n the context of marital failure, . . . the word 'cause' has no such meaning, and its use simply masks a moral inquiry with a word pretending a more objective assessment."[12] The Reporters believe that:

> [I]t will be the unusual case in which the fairness of the result will be improved by a judicial inquiry into the relative virtue of the parties' intimate conduct. In some cases the result will become less fair. And the rules that invite such misconduct claims will surely increase the cost and degrade the process in many other cases, even those in which the claim is ultimately cast aside.[13]

Further, the Reporters contend that considerations of fault can open the door to "[m]uch mischief" in divorce proceedings.[14] As they explain:

> Fault makes the outcome of litigation less predictable, and gives parties an incentive to raise claims of misconduct as leverage in the negotiation process. A limited fault rule under which dissolution remedies are forfeited by serious violence would be less unpredictable in operation, but has its own difficulties. Because it would provide an incomplete compensation structure, tort remedies would still be necessary to obtain adequate compensation for many victims. At the same time it would yield a perverse pattern in those cases to which it applied, as it apportions penalties whose harshness increases with the tortfeasor's relative poverty, rather than with his blameworthiness or the damage he inflicted.[15]

Fault in divorce is simply unnecessary, the Reporters urge. When "[o]ffensive conduct in marriage that violates the norms of tort or criminal law [does occur, it] will normally be actionable whether or not it is the 'cause' of the actor's marital dissolution."[16] Because a tort remedy is possible, "inviting additional claims in the dissolution action is a problem, not a solution."[17]

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11. ALI PRINCIPLES, *supra* note 4, at 54; *see also id.* § 7.01(4) (making compliance with the *Principles* a requirement for enforcement of a prenuptial agreement); *id.* § 7.08 (providing that "[a] term in an agreement is not enforceable if . . . (2) it would require or forbid a court to evaluate marital conduct in allocating marital property or awarding compensatory payments, except as the term incorporates principles of state law that so provide").

12. *Id.* at 50–51.

13. *Id.* at 66–67.

14. *Id.* at 51.

15. *Id.* at 67.

16. *Id.* at 51.

17. *Id.* at 54.

Instead, the Reporters would give primacy in financial division and alimony awards to the marriage's length "in recognition of [the couple's] joint responsibility for the irreversible personal consequences that arise from investing many years in the relationship."[18] In short, the Reporters would punt considerations of wrongdoing in the marriage to "the tort law and the criminal-justice system[, which] are designed to serve this purpose [of recourse against the bad actor], while the law of marital dissolution is not."[19]

Michelle ably challenges many of the assumptions underlying these claims. She questions whether tort suits and criminal prosecutions really can provide an adequate remedy for the wrongs in a marriage,[20] and here she is surely right. As any lawyer knows, there is a huge chasm between whether a wrong is "actionable" and whether any attorney would ever take the victim's suit on a contingency basis short of the victim dying or suffering severe bodily injury. Even if some attorney somewhere will bring the suit, Michelle also persuasively demonstrates how expensive, and messy, it would be for the law to relegate consideration of the wrongs in a marriage to a tort proceeding.[21]

Of equal concern, however, should be the human cost of telling spouses that wrongs committed in marriage—the most intimate relationship they may ever have, in which they may be the most vulnerable—simply do not matter to the dissolution of that relationship. Real people continue, when offered the opportunity, to plead and prove fault even when a cheaper no-fault exit option is available. Consider, for example, Christie Brinkley's recent divorce from Peter Cook.

We learned in their high-profile fault-based divorce proceeding (which later settled) that Peter Cook had an affair with eighteen-year old Diana Bianchi, a toy store clerk whom he hired as his personal assistant and soon after began sleeping with.[22] This began a series of ten to twelve sexual encounters, some of which occurred "at [Cook's] office, some at Brinkley's homes in the Hamptons."[23] Bianchi's stepfather, a Long Island policeman, informed

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18. *Id.* at 66.

19. *Id.*

20. *See* Evans, *supra* note 1, at 491–96 (evaluating whether tort suits are really an adequate substitute for the consideration of fault in divorce).

21. *See id.* at 485–86 (discussing the expenses associated with civil litigation).

22. Louise Roug, *Brinkley's Divorce Turns an Idyll into a Spectacle*, L.A. TIMES, July 8, 2008, at A7.

23. Mike Celizic, *Christie Brinkley's Messy Divorce Trial Goes Nuclear*, TODAYSHOW.COM, July 3, 2008, http://www.msnbc.msn.com/id/25509623 (on file with the Washington and Lee Law Review).

Brinkley of the affair after a high school commencement speech she delivered in Southampton, New York.[24]

Brinkley posited other transgressions by Cook that extend beyond adultery. At some point, Cook paid Bianchi $300,000 in "hush money."[25] Cook, Brinkley's attorney said, is a "'sex addict' who spent $3,000 a month on online pornography."[26] He also "masturbated on a Web site [with] a camera on [him] . . . for others to see," something Cook described to Barbara Walters on 20/20 as "quite simply, one-on-one interactive pornography. This was not me broadcasting a show on a Web site, showing myself to the world. Never my face, never my name. If it happened, excuse the pun, a handful of times, that's it."[27] But for Brinkley, the final straw may have come when she learned that Cook also visited websites designed "to 'connect with people' in their neighborhood. . . . 'It was not a voyeur site. It was a meeting site.'"[28] She said, "'It was more than I could bear.'"[29]

Now, many of us naturally wonder: "Why would Christie Brinkley want to air all of this in public?" Certainly, the jurisdiction in which Brinkley and Cook live, New York, may have played a role. New York is one of the last two states (along with Mississippi) to prohibit unilateral no-fault divorce.[30] In order to exit, Brinkley would have to reach an agreement with Cook about the financial terms for the exit, or she would have to show fault.[31] Certainly, the fact that sixty to eighty million dollars in property was at stake (putting aside any prenuptial agreement) may have mattered.[32] That Brinkley and Cook have

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24. Roug, *supra* note 22.

25. Christina Boyle, *Peter Principle After Divorce: I Am What I Am*, N.Y. DAILY NEWS, July 13, 2008, at 6.

26. Roug, *supra* note 22.

27. Kristen Fyfe, *Womanizer: 20/20 Sleazes Things Up in the Name of 'News'*, CULTURE & MEDIA INSTITUTE, Oct. 13, 2008, http://www.cultureandmediainstitute.org/articles/2008/20081013162733.aspx (on file with the Washington and Lee Law Review).

28. Roug, *supra* note 22.

29. *Id.* Claims of "virtual infidelity" are popping up elsewhere as well. William Lee Adams, *UK Couple to Divorce over Affair on* Second Life, TIME ONLINE, Nov. 14, 2008, http://www.time.com/time/world/article/0,8599,1859231,00.html?imw=Y (on file with the Washington and Lee Law Review). In November of 2008, *Time Online* reported that an English woman sought a divorce after her husband's on-line avatar in the game *Second Life* engaged in sex with a cyber-prostitute and "cuddl[ed] a woman on a sofa." *Id.* As the woman, Amy Taylor, explained, "It may have started online, but it existed entirely in the real world and it hurts just as much." *Id.*

30. Robin Fretwell Wilson, *The Harmonisation of Family Law in the United States, in* EUROPEAN CHALLENGES IN CONTEMPORARY FAMILY LAW 27, 29 (Katharina Boele-Woelki & Tone Sverdrup eds., 2008).

31. *See generally* N.Y. DOM. REL. LAW § 170 (McKinney 1999 & Supp. 2009).

32. Braden Keil & Chuck Bennett, *Turf War Set for Christie—Brawl for $80M in*

two minor children, Jack (Cook's stepson) and Sailor Lee (their biological child), may have played a role; Brinkley sought (and later received) primary custody.[33] Of course, Brinkley and Cook could have privately settled their financial affairs and (subject to the court's oversight) even the question of custody, but they chose to litigate.[34] Now, it is possible that Cook and Brinkley could not come to reasonable terms in light of these facts. But it could also be—as some of the media coverage suggests—that Brinkley was "absolutely furious" about what happened and she wanted the world to know how Peter Cook had wronged her.[35]

What could Brinkley have possibly gained? Others have argued that fault can have salutary effects.[36] When fault is no longer an issue in divorce proceedings, it may turn "open and direct conflict" into the "disguised or indirect" type.[37] Because some divorces remain acrimonious, squeezing out fault merely transfers hostility from "marital fault to child custody," resulting in "emotional damage [being] inflicted on [the] innocent and impressionable."[38] This transfer may shift the strategic or dishonest behavior that historically centered on the grounds for divorce to child custody or visitation issues (which some believe may explain the increase in child sexual abuse allegations).[39] Hence, in the absence of fault, "[i]t is much more problematic for courts and lawyers to deal indirectly with phantom factors than to deal directly and openly with factors that drive the parties and their litigation."[40]

Brinkley's choice to pursue fault at the risk of public humiliation and considerable expense may illuminate the findings in a recent empirical study of the *Principles* that I co-authored. The study examined how the *Principles* have been received by legislatures and courts from the project's inception in the early 1990s through May 2008, eight years after their adoption.[41] The

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Property, N.Y. POST, July 7, 2008, at 7.

33. Christina Boyle et al., *How Sweet It Is for Christie*, N.Y. DAILY NEWS, July 11, 2008, at 7.

34. Selim Algar, *The Other Other Woman*, N.Y. POST, July 1, 2008, at 3.

35. Celizic, *supra* note 23. Others may give Brinkley's choice to sue for fault a different valence. As Cook's attorney put it, she wanted him "flogged in public." *Id.*

36. *See* Lynn D. Wardle, *No-Fault Divorce and the Divorce Conundrum*, 1991 BYU L. REV. 79, 119–20 (arguing that "[m]odern no-fault divorce laws fail to balance marriage stability goals with divorce facilitation policy, portray a defective model of marriage, and inadequately provide for the public consequences of private choices").

37. *Id.* at 101.

38. *Id.* at 100–01.

39. *Id.* at 105.

40. Wardle, *supra* note 5, at 17.

41. *See generally* Michael R. Clisham & Robin Fretwell Wilson, *American Law*

staggering finding over those eighteen years was that not a single legislature has indicated that it has followed the *Principles'* recommendation that fault should be removed entirely from divorce.[42] This is ironic since the *Principles* themselves are directed at "rulemakers" who have had eight years to latch onto the idea.[43]

Neither has a single court cited Chapter 1 of the *Principles* where the plea appears to remove fault (other than financial waste) entirely from divorce.[44] This is a remarkable omission because the *Principles* have been cited by courts in over one hundred discrete cases across twenty-seven jurisdictions since 1990.[45] So while the *Principles'* recommendations on alimony, child support, and property division are having some influence with courts, the Reporters' argument that fault has no role to play has not.

III. Grave Injustices

One place where I part ways with Michelle's thesis is the implicit assumption she makes that bad actors in a marriage should not be completely wiped out as a result of their bad act.[46] For example, in the famous case where

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Institute's Principles of the Law of Family Dissolution, *Eight Years After Adoption: Guiding Principles or Obligatory Footnote?*, 42 FAM. L.Q. 573 (2008).

42. *See id.* at 576 ("Although one state, West Virginia, borrowed from the *Principles* in enacting child custody legislation, no other state code or legislation enacted since 1990 referencing the *Principles* was found . . . . [I]f legislatures are borrowing from the *Principles*, they are certainly not tipping their hands.").

43. *See* Ira Mark Ellman, *Chief Reporter's Foreword* to ALI PRINCIPLES, *supra* note 4 ("Other sections, however, are addressed to rulemakers rather than decisionmakers."). By contrast, non-governmental groups have followed the *Principles'* recommendations on fault. On March 9, 2007, the American Academy of Matrimonial Lawyers (AAML) published its report on *Considerations when Determining Alimony, Spousal Support or Maintenance*, which "critically review[ed] the [Principles] to analyze the Principles and to make recommendations consistent with the mission of the Academy." American Academy of Matrimonial Lawyers, *Considerations when Determining Alimony, Spousal Support or Maintenance* (Mar. 9, 2007), http://www.aaml.org/i4a/pages/index.cfm?pageid=3739 (on file with the Washington and Lee Law Review). The AAML ultimately adopted a "formula" for determining alimony that uses the "two factors that are considerations in virtually all jurisdictions—income of the parties and the length of the marriage." *Id.* The AAML recognizes "that the amount arrived at may not always reflect the unique circumstances of the parties" and so provided "deviation factors . . . to address the more common situations where an adjustment would need to be made." *Id.* Fault is not an explicit ground for deviation, although "[o]ther circumstances that make application of these considerations inequitable" is a ground for deviation. *Id.*

44. Clisham & Wilson, *supra* note 41, at 604.

45. *See id.* at 609 (noting that the combined results from searches using Westlaw and Lexis yielded a total universe of one hundred cases).

46. *See* Evans, *supra* note 1, at 491 ("An equitable distribution of property that considers

Aftab Islam beat his wife Theresa brutally with a barbell, requiring her to have hundreds of thousands of dollars of reconstructive surgery,[47] Michelle worries that a tort suit could leave the husband destitute.[48]

For her, an arbitration award, imported back into the divorce proceeding, would be preferable because it would reduce "the danger of leaving the tortfeasor completely insolvent."[49] Yet she acknowledges that if the same man beat a fellow drinker in a bar until he was unrecognizable, he could be wiped out financially.[50] Indeed, the standard for punitive damages is the amount that it will take to deter that conduct in the future. As Michelle recognizes, and as these examples make clear, we often receive less protection in our homes and in our most intimate of relationships than we would receive mingling with strangers at a bar.[51]

Michelle tackles something that is almost always missed in the discussion about fault: The problem of the lesser-earning tortfeasor.[52] Many people seem to assume that it is the higher-earning partner who beats his wife or steps out on her. Yet, the Brinkley case shows that often times it is the wealthier spouse who is wronged but still has a lot to lose upon dissolution. Consider Brinkley's settlement with Cook. Brinkley agreed to give Cook $2.1 million, a substantial sum, although most of it likely "will end up in his lawyers' pockets."[53] Cook had to surrender Sweet Freedom, "the little fishing boat Brinkley gave him on his 40th birthday," but will receive some proceeds of the vessel's sale.[54] Brinkley kept eighteen properties she purchased during the marriage, which "real estate brokers say are worth between $60 and $80 million."[55]

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fault can more adequately balance the compensatory purpose with the desire to leave both parties above subsistence levels when feasible.").

47. Tara Bahrampour, *Unusual Divorce Case Ruling*, N.Y. TIMES, July 27, 2001, at B5.

48. Evans, *supra* note 1, at 490–91 ("[A] damages award in tort, if recoverable, may leave the guilty party in poverty.").

49. *Id.* at 499.

50. *See id.* at 490–91 (recognizing that an independent tort suit has the potential to financially destroy a defendant).

51. *See id.* at 491 (identifying that spouses face barriers in bringing tort actions that are not present in suits between others).

52. *Id.* at 489–91.

53. Boyle et al., *supra* note 33.

54. *Id.*

55. Keil & Bennett, *supra* note 32. Brinkley also received sole custody and decisionmaking power for the children, Jack and Sailor Lee, while Cook retained his visitation rights, which consisted of "every other weekend and one school night a week with extra time in the summer." Boyle et al., *supra* note 33.

One question some may ask is why Peter Cook gets anything. How is it that he can walk away with $2.1 million? For that matter, how is it that one can beat one's wife to the point where she requires extensive reconstructive surgery and walk away with anything?

As Michelle notes, divorce proceedings are inherently concerned with equity, necessarily relying on judges to get these questions right.[56] In a case that followed the famous barbell case, a woman, Mrs. DeSilva, was married to a man who drank heavily and abused her, the abuse increasing in frequency and intensity over time.[57] She made $100,000 per year and he made $45,000 annually, making him a prime candidate in some jurisdictions for alimony.[58] Upon divorce, the court awarded her 100% of all the assets, possession of the marital home where she would live with their minor children, and split their substantial debt, with 92% going to the husband and 8% to the abused wife.[59] In other words, he was wiped out. This man breached the trust of the marriage by beating his wife, and many would say Cook breached the trust of the marriage by cheating on Brinkley. Yet both weaker-earning spouses wanted to get paid. The *DeSilva* court, at least, refused to reward the husband.

It can be hard to grasp what we are doing when we apportion property and award alimony at the end of a marriage. Sometimes it is to compensate for lost opportunity[60]—in the classic case, the wife who puts her career on hold to care for children. Sometimes it is to respond to need,[61] and sometimes it is to give each spouse a share of the wealth they together earned during the marriage.[62] But had Cook not cheated and had DeSilva not abused his wife, neither would need to have the wealth divided or to receive alimony because the marriage presumably would have continued. So both in the end have breached their spouse's trust and want to get paid.

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56. *See* HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 2.1, at 24 (2d ed. 1988) (explaining that American family law started out in the law of equity); J. Thomas Oldham, *Changes in the Economic Consequences of Divorces, 1958–2008*, 42 FAM. L.Q. 419, 427 (2008) ("In the last few decades, it became accepted in all states that a divorce court has the power to divide some or all of the spouses' property, and this routinely occurs in divorces today if the parties have property to divide.").

57. *See* DeSilva v. DeSilva, No. 350818/05, 2006 N.Y. Misc. LEXIS 2489, at *1–4 (N.Y. Sup. Ct. Aug. 15, 2006).

58. *Id.* at *6.

59. *Id.* at *6–7.

60. *See* CLARK, *supra* note 56, § 16.4, at 655 ("In addition to the factors already mentioned, courts also take into account in awarding alimony such considerations as . . . what the wife gave up when she married the husband.").

61. *Id.* § 16.4, at 647–49.

62. *Id.* § 16.4, at 655.

Of course, because domestic violence is beyond the bounds of decency in any civil society, few are likely to be distressed if Mr. DeSilva is wiped out financially. This is likely not so with adultery, which poses a much thornier set of questions. If the law sanctioned adultery as harshly as it did Mr. DeSilva's domestic violence—wiping out adulterers financially—this could create incentives for the offending spouse to continue in the marriage to avoid the potential penalty of fault divorce. At some point, the penalty could become so high that people feel compelled to remain in a failing marriage lest they become insolvent. Fault in this instance could still be considered, not as a mechanism for financially wiping out the adulterer, but as grounds for departure from the presumptive division of marital property that would have occurred in the absence of adultery—for example, in the classic long-term marriage, grounds for departing from a 50/50 split. This disincentive to adultery would not trample on anyone's sexual liberty. The spouse who wants to be a "player" can always obtain a divorce on a no-fault basis *before* taking on new sexual partners, thereby avoiding the financial penalty entirely.

IV. ALI Principles: A Satisfactory Solution?

The primary impetus behind the Reporters' argument that we should eradicate fault from divorce is to avoid "a judicial inquiry into the relative virtue of the parties' intimate conduct."[63] Moral judgments are ultimately unnecessary in divorce because "[o]ffensive conduct in marriage that violates the norms of tort or criminal law will normally be actionable whether or not it is the 'cause' of the actor's marital dissolution."[64] Punishment and compensation rationales both fail in the Reporters' view.[65] Under the compensation rationale, the idea is that a "fault-based award is justified because it allocates more of those costs to the spouse whose conduct caused them, by causing the dissolution."[66]

The Reporters see this as a dishonest exercise, a "sleight of hand,"[67] that masks moral judgments. As they explain:

> The problem is . . . being able to establish which spouse "caused" the dissolution. Inquiring into the cause of marital dissolution is different from inquiring into the cause of chicken pox, or of a plumbing failure. In those

63. ALI PRINCIPLES, *supra* note 4, at 66–67.

64. *Id.* at 51.

65. *Id.* at 49–52.

66. *Id.* at 54.

67. *Id.*

> contexts the word "cause" has an objective meaning; it is a prior event (such as infection, or rust) without which the later event would not have occurred. In the context of marital failure, however, the word "cause" has no such meaning, and its use simply masks a moral inquiry with a word pretending a more objective assessment. Some individuals tolerate their spouse's drunkenness or adultery and remain in their marriage. Others may seek divorce if their spouse grows fat, or spends long hours at the office. Is the divorce "caused" by one spouse's offensive conduct, or by the other's unreasonable intolerance? In deciding that question the court is assessing the parties' relative moral failings, not the relationship between independent and dependent variables. And the complexity of marital relations of course confounds the inquiry. The fading of affective ties makes spouses less tolerant of one another. So determining the "cause" of a marital failure requires establishing the reason for the loss of affection.[68]

This is problematic for the Reporters because:

> [B]y dressing up [a court's] conclusion in the neutral language of causation, the court can assign such blame without identifying the standards under which it does so. Much mischief can result from allowing courts to assign liability to nontortious conduct by application of unarticulated—and effectively unreviewable—standards of blameworthiness.[69]

In other words, the Reporters are saying we cannot know what precipitated the end of the marriage and making moral judgments about these acts—drunkenness, adultery, the loss of affection—is a dangerous undertaking.

The problem with this stance is that it takes as an article of faith that egregious conduct in the marriage will be actionable in tort or criminal law. Michelle persuasively argues that tort remedies cannot always compensate the wronged party, especially when the wrongdoer has few, if any, assets or income.[70] Neither can criminal law always respond to marital wrongs. Prosecutors frequently choose not to prosecute domestic violence cases for a variety of reasons.[71] Moreover, it would be remarkable indeed to see criminal adultery prohibitions enforced.[72] In the absence of these other remedies,

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68. *Id.*

69. *Id.* at 55.

70. *See* Evans, *supra* note 1, at 490 (discussing the danger 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").

71. *See, e.g.*, Donna Willis, *Domestic Violence: The Case for Aggressive Prosecution*, 7 UCLA WOMEN'S L.J. 173, 176 (1997) (arguing that the victim's unwillingness to press charges is one reason "prosecutors traditionally are reluctant to charge batterers").

72. *See* RICHARD A. POSNER & KATHERINE B. SILBAUGH, A GUIDE TO AMERICA'S SEX LAWS 103 (1996) ("As with fornication, it is commonly thought that adultery charges are never prosecuted. This is true to a great extent, but exceptions persist.").

divorce proceedings without fault would treat all conduct that contributed to the end of a marriage alike—whether it is loss of affection or beating another person with a barbell. Acts beyond the bounds of decency simply become irrelevant.

For the Reporters, this is not a bad result. They believe we simply cannot trust judges to make these calls.[73] By contrast, I think, as the *DeSilva* case shows, we can trust the courts to figure out which acts should be beyond the bounds of decency in an intimate relationship. Indeed, judges and juries frequently make those calls in the criminal and tort contexts, and I think we can trust family court judges to make them too.

Not only can we trust judges to separate egregious wrongs from piddly transgressions, I believe we can rely on the victims of egregious conduct to decide for themselves whether they want to air their dirty laundry *and* bear the transaction costs of showing that the other party violated "minimum standards of decency [in a] marriage"[74]—or whether they want simply to agree to a no-fault divorce. At least today they have the choice.

73. *See* ALI PRINCIPLES, *supra* note 4, at 50 ("[T]he moral standards by which blameworthy conduct will be identified and punished will vary from judge to judge, as each judge necessarily relies on his or her own vision of appropriate behavior in intimate relationships.").

74. Evans, *supra* note 1, at 497.