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A Comment on *Wrongs Committed During a Marriage: The Child that No Area of the Law Wants to Adopt*, by Michelle L. Evans

Robert E. Shepherd*

I want to thank Professor Wilson for the opportunity to participate in this and also thank Dean Danforth and Dean Smolla for the opportunity to teach at W&L, my alma mater, this fall. Mr. McGee said that in the dark ages when he was here they didn't have this. In the dark ages when I was here, we were in Tucker Hall, and it was an entirely different school, although the core is still very much the same. And it is a pleasure being here and seeing the quality of students that W&L is attracting and turning out.

I want to particularly compliment Ms. Evans on her excellent student note.¹ When I got it from Professor Wilson and read through it, I said, "well this must have been co-written by Robin [Wilson] and by Ms. Evans," but I am assured that is not the case. It is exceptionally high level of scholarship and in a good many innovative proposals that she makes [] she is not at all bashful in being critical of those who profess to be experts. Fortunately, I do not have much reason for being critical of what she has said. I do have some disagreements with the practicability of some of the

* Robert E. Shepherd, Jr., Professor Emeritus, University of Richmond School of Law. Sadly, Professor Shepherd passed away on December 11, 2008, after a battle with cancer, at the age of 71. Professor Shepherd dedicated his life to protecting the legal interests of children. Among numerous other accomplishments, he was a founding member of Richmond Law School's National Center for Family Law, he headed the American Bar Association's Juvenile Justice Committee, and he led the Virginia Bar Association's Committee on the Needs of Children. In 1999, he was the first person inducted into the Virginia Juvenile Court Hall of Fame. In 2005, he received the ABA's Livingston Hall Juvenile Justice Award for his contributions. The National Center for Family Law recently created a scholarship in his honor. The Washington and Lee Law Review is proud to publish this written transcript of his comments on Michelle L. Evans's Note, made at the 2008 Washington and Lee Student Notes Colloquium on October 2, 2008, and considers it a small tribute to his lifetime of service to the legal community.

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).

proposals that she is making but far less than I do with the American Law Institute and its principles.²

There are no defenders for the American Law Institute up here today, and one of my primary concerns is one that Professor Wilson alluded to, and that is I see a distinction between being critical of the continued reliance on fault for the grounds of divorce as opposed to the continued consideration of fault when it comes to the incidence of [marital assets] as they are divided and distributed. Virginia, as you may be aware, has a fairly limited no-fault divorce ground based on one-year separation or six-month separation if there are no children and there is a property settlement agreement.³ But, nonetheless, fault comes into play in determining the distribution of property,⁴ [] in considering spousal support,⁵ and indeed, in some instances, even child support.⁶ And I think there is still a role for fault in that part of the unraveling of a marriage. I happen to be one who believes in accountability for the acts that one commits and performs, and I think although it is very hard to sort out who is responsible for the breakdown of the marriage, it is not hard to assess fault and perhaps make some economic distributions based on that fault when it comes to behavior within the marriage.

I think for far too long we disregarded domestic violence in the family law situation. My family law students still go "uhh!" when I show them the eighteenth century British cartoon of Judge Thumb with his rack of sticks over his shoulder saying that you can punish your wife with a stick no bigger around than a thumb if she has misbehaved during the marriage.⁷ And, even into the late nineteenth century there were American cases

2. AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS 52–53 (LexisNexis 2002).

3. VA. CODE ANN. § 20-91(A)(9)(a) (2008).

4. *See id.* § 20-107.3(E)(5) (providing that in dividing the marital property, the Court is permitted to consider "[t]he circumstances and factors which contributed to the dissolution of the marriage").

5. *See id.* § 20-107.1(B) (allowing for an award of permanent spousal support "if the court determines from clear and convincing evidence, that a denial of support and maintenance would constitute a manifest injustice, based upon the respective degrees of fault during the marriage and the relative economic circumstances of the parties").

6. *See id.* § 20-108.1(B)(14) (providing that when a court is determining the amount of a child support award it may consider "such other factors as are necessary to consider the equities for the parents and children").

7. James Gillray, *Judge Thumb; or—Patent Sticks for Family Correction: Warranted Lawful!!* (Nov. 12, 1782), available at <http://memory.loc.gov/master/pnp/cph/3c10000/3c14000/3c14300/3c14396u.tif>.

asserting the Law of Thumb.⁸ And even into the twentieth century there was an attitude in the courts that well, yes we need to take cognizance of what occurs during a marriage in the way of violence but we need to apply a somewhat lesser standard. People kind of assume the risk of certain things that go on in a marriage and the courts should not penetrate behind that veil. And I think there is an element of that here, although I would not attribute those motives to the American Law Institute.

I think to transfer the determination of fault and the allocation of responsibility for fault to tort law is an abysmal idea. I have often heard that the law is a blunt instrument. It is more like an ax than a scalpel. And if anything, tort law is a much blunter instrument than is family law. And not only are there the problems that Michelle has identified with the statute of limitations, and the problems of joinder and *res judicata*,⁹ but it looks to me like [] they are even more problematic. If you are familiar with the litigation that has arisen out of recovered memory of child sexual abuse and attempts to redress what occurred to a child during early childhood through tort litigation, you know how difficult it is to climb over that statute of limitations hurdle, even though the childhood of the plaintiff may toll the statute of limitations for a rather considerable amount of time.

The elements of the tort actions that would be brought, I think, also create problems along with the tolerance that judges may have for a certain amount of physical activity during either sex or other parts of marriage. And I think the paucity of appellate cases dealing with tort actions arising from domestic violence is clearly evidence of the fact that it is not catching on and it is not likely to have any major impact. I am not even sure in New Jersey, which is probably the most progressive state, that there have been many lawsuits brought or many recoveries had.

Remember in most tort action there is insurance that will help to pay for litigation costs, that will help to pay for what occurs as a result of a judgment. And yet, that is not very likely in family litigation. Most insurance policies have family purpose clauses that exclude liability, even with regard to negligent torts, where parties are members of the same family,¹⁰ even though

8. See, e.g., *State v. Rhodes*, 61 N.C. 453, 454, 460 (1868) (affirming the decision of the trial judge acquitting a husband of assault and battery for striking "his wife with a switch no larger than his thumb"), *abrogated by State v. Oliver*, 70 N.C. 60, 61 (1874).

9. See *Evans*, *supra* note 1, at 481–89 (discussing the effects of these procedural problems on the feasibility of bringing an interspousal tort suit).

10. See Jennifer Wriggins, *Interspousal Tort Immunity and Insurance "Family Member Exclusion": Shared Assumptions, Relational and Liberal Feminist Challenges*, 17 *WIS. WOMEN'S L.J.* 251, 252–55 (2002) (arguing that the presence of "family member exclusions" in insurance contracts operates as a "de facto interspousal tort immunity").

the barriers to intra-family torts have fallen considerably, as Michelle's paper points out.¹¹ I might also note that it seems sort of ironic that the American Law Institute's proposal comes on the heels of a contrary trend in the law of most states, and that is the anti-heartbalm statutes have come along and have barred suits for breach of promise or alienation of affections on the grounds that these lawsuits are rife with collusion or blackmail¹² and yet we have a proposal here to reinsert tort law in perhaps an even more troublesome area.¹³

As I was driving up here this morning I thought of a case that the United States Supreme Court decided a couple of decades ago dealing with the redress of grievances for violations of constitutional rights: *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*.¹⁴ There the Court concluded that Bivens could sue some federal agents for having violated his Fourth Amendment rights by searching his property without a warrant and [] that he had no other adequate remedy because there was no pending criminal prosecution in which he could assert his Fourth Amendment rights under the exclusionary rule.¹⁵ And yet, as I read opinions of federal courts of appeals and district courts, it is exceptionally difficult to succeed in a federal tort claims proceeding or any other civil case against law enforcement for violating one's constitutional rights.¹⁶ The tort laws have not proved to be an effective deterrent in that area of the law.

One consideration that has not been addressed, except at the edges, is what impact does all of this have on the children of the marriage? My focus in the law over the years has primarily been on how the law affects children, and that is [] the first question that I ask in any kind of family law or other setting like this. You know, we just assume that there is a Peter Cook and a Christie Brinkley or someone else, a couple, and the children may be grown or there are no children. And yet, here we have got a

11. See Evans, *supra* note 1, at 476–79 (discussing the demise of interspousal tort immunity and the subsequent rise in interspousal litigation).

12. See Jill Jones, Comment, *Fanning an Old Flame: Alienation of Affections and Criminal Conversation Revisited*, 26 PEPP. L. REV. 61, 69–71 (1999) (discussing the demise of the heartbalm torts).

13. AMERICAN LAW INSTITUTE, *supra* note 2, at 52–53.

14. See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971) (allowing civil claim against federal agents for violating the Fourth Amendment).

15. *Id.* at 395–97.

16. See David Zaring, *Personal Liability as Administrative Law*, 66 WASH. & LEE L. REV. 313, 323–31 (2009) (collecting cases and discussing the obstacles to successfully bringing a *Bivens* suit).

proposal that any sort of divorce proceeding should perhaps be held in abeyance while you engage in some tort action or alternate dispute resolution procedure.¹⁷ And what about the child custody and visitation issues that are pending in the divorce action and that ought to be treated as matters of the highest priority and receive expedited treatment by the court?

I know a classic publication in this area, *Beyond the Best Interests of the Child*,¹⁸ Professors Goldstein, Solnit, and Anna Freud argued that child custody proceedings should be handled comparable to prior restraint case[s] under the First Amendment.¹⁹ In other words, they ought to get preference on court dockets and be treated as the real emergency that they are. And yet we are going to put everything involved in the divorce proceeding which may include—I realize you may have *pendente lite* orders for custody, visitation, and support but those are usually only of a limited duration—are you going to have a *pendente lite* order on support and property and the like, and then go through an arbitration proceeding to determine the allocation of fault for any domestic violence that has occurred during the marriage?

The negatives, to me, completely outweigh the positives. Cost, obviously, is an element. Many experts in the area of family law are already concerned about how much divorce litigation costs, and that is one reason that there has been a movement toward alternative dispute resolution, particularly mediation more than arbitration and collaborative law, to try to expedite the proceeding and to depress the costs that are associated that frequently result in the diminution in the assets of marriage before they can even be divided. What about the emotional expense of separate litigation that the American Law Institute proposes or even arbitration because an arbitration proceeding is adversarial? It is certainly faster; it is less expensive than court litigation. But, it is adversarial, and it frequently involves counsel as opposed to mediation or some other technique. You have still got the statute of limitations problem, and the idea of dockets and how long. We are fairly fortunate in Virginia that court dockets are not unreasonably long, but in many jurisdictions a tort action would take several years to come to maturity in court.

17. See Evans, *supra* note 1, at 498–500 (proposing the use of arbitration to resolve the tort claim while the divorce proceeding is pending).

18. JOSEPH GOLDSTEIN, ANNA FREUD & ALBERT J. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* (1973).

19. See *id.* at 43–45 (indicating that freedom of speech cases is one area in which the courts have developed procedures to decide matters without the delay that normally accompanies any judicial proceeding).

I would like to see a further exploration of the possibility of some alternative dispute resolution in this area but [] fault should continue to be an element in the dissolution of the marriage and the allocation of assets. Perhaps mediation would be a possibility. It is less adversarial and probably less expensive. But mediation tries to dampen—the emotion tries to dampen—the animosity between the parties and the jockeying that may go on over who hits who first in the course of the marriage, [which] may poison the water in that well fairly quickly. I am not sure there is an easy solution. And Michelle, I think, acknowledges that in her paper in exploring the various possibilities.²⁰ But I would rather see fault continue as an element when it comes to the distribution of property [and] when it comes to the awarding of support because I think somebody who engages in abusive behavior during the course of a marriage should be held legally responsible for that, even if it is not in the grounds for the divorce. And I think that [] one way to get away from the no-fault dilemma that the ALI sees is to take cruelty out as a ground for divorce but allow it to be considered along perhaps with adultery and economic misbehavior, such as the dissipation of resources, in the economic division between the parties. But at bottom, I congratulate Ms. Evans for having tackled a very difficult topic. She saw the Gordian knot. She tried to untie it. I think she even used the sword. But I think we need to work at a possible solution that is not only rational but will be marketable to legislators.

20. Evans, *supra* note 1, at 497–500.