

# SPOUSAL EMOTIONAL ABUSE AS A TORT?

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## INTRODUCTION

Should “spousal emotional abuse” be a tort? More precisely, should states recognize a cause of action by one spouse against another for intentional infliction of emotional distress as set out in section 46 of the *Restatement (Second) of Torts*?<sup>1</sup> In recent years, courts have been asked to apply this tort of “outrageous” conduct<sup>2</sup> to the marital setting in more than a handful of cases in which the plaintiff was not claiming a physical beating.<sup>3</sup> Some judges have now allowed divorcing spouses to bring such fault-based tort suits,<sup>4</sup> a remarkable development if one considers the historical trend toward no-fault divorce that is relentlessly squeezing out fault as a consideration in resolving family law disputes.<sup>5</sup> Are such cases an aberration, or do they suggest a new and improved approach to considering fault in divorce? In this Article we describe and evaluate this new development.

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1. RESTATEMENT (SECOND) OF TORTS § 46 (1965). Section 46, titled “Outrageous Conduct Causing Severe Emotional Distress,” states:

(1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.

(2) Where such conduct is directed at a third person, the actor is subject to liability if he intentionally or recklessly causes severe emotional distress

(a) to a member of such person’s immediate family who is present at the time, whether or not such distress results in bodily harm, or

(b) to any other person who is present at the time, if such distress results in bodily harm.

*Id.*

2. *Id.*; see also *infra* notes 14, 44 and accompanying text. For an analysis of the concept of outrageous conduct, see 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, 51-54 (1982).

3. See *infra* notes 43-47 and accompanying text for an account of the general recognition of this tort by state courts. See also Leonard Karp & Cheryl Karp, *Beyond the Normal Ebb and Flow . . . Infliction of Emotional Distress in Domestic Violence Cases*, 28 FAM. L.Q. 389, 399-400 (1994).

4. See *infra* notes 68-69 and accompanying text; *cf.* *Hakkila v. Hakkila*, 812 P.2d 1320, 1325 (N.M. Ct. App.) (recommending “[a] cautious approach to the tort of intramarital outrage”), *cert. denied*, 811 P.2d 575 (N.M. 1991).

5. See Herma H. Kay, *Beyond No-Fault: New Directions in Divorce Reform*, in *DIVORCE REFORM AT THE CROSSROADS* 6 (Stephen D. Sugarman & Herma H. Kay ed., 1990) (noting that all states have accepted the failure of a marriage as an adequate reason for dissolution).

Twenty-five years ago the idea of marital fault was central to the law of divorce.<sup>6</sup> Today, however, divorce is possible in all fifty states without any showing of fault, and in the majority of states fault plays little role in the allocation of property and the fixing of spousal support obligations.<sup>7</sup> Still, the pervasive character of no-fault reforms masks a discontent that occasionally surfaces in the cases<sup>8</sup> as well as in the scholarly<sup>9</sup> and professional<sup>10</sup> literature. The law's dramatic shift leaves some observers with second thoughts. The continuing impulse to incorporate into the law a code of conduct for marriage has its source in worthy values that are both instrumental (for example, to encourage "responsible" marital behavior) and moral (to achieve fairness in the law's treatment of parties).

There is no real movement to revive a fault requirement for ending marriage.<sup>11</sup> But when contemplating the financial consequences

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6. *See id.* In 1990 Kay acknowledged that [d]uring the past twenty years the United States has experienced a rapid change in the laws governing divorce. Touched off in 1969 by California's adoption of the nation's first divorce code that dispensed entirely with traditional fault-based divorce grounds and completed in 1985 when South Dakota added a no-fault provision to its list of fault-based grounds, the concept that marriage failure is itself an adequate reason for marital dissolution has been accepted by every state.

*Id.*

7. *See* AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION 17-27, 60-88 (Tent. Draft No. 2 1996); Doris J. Freed & Timothy R. Walker, *Family Law in the Fifty States: An Overview*, 23 *FAM. L.Q.* 495, 532-33 (1990); Barbara Woodhouse, *Property and Alimony in No-Fault Divorce*, 42 *AM. J. COM. L.* 175, 181-83 (1994).

8. *See* IRA ELLMAN ET AL., *FAMILY LAW* 177-186 (2d ed. 1991) (relating Missouri hedged no-fault system).

9. For recent examples, see Barbara Woodhouse, *Sex, Lies, and Dissipation: The Discourse of Fault in a No-Fault Era*, 82 *GEO. L.J.* 2525, 2548-50 (1994). Woodhouse explains that "[r]ecent studies suggest . . . that spousal hostility and blaming have a life of their own, regardless of whether the law looks to substantive standards of fault." *Id.* at 2548; *see also* Stephen D. Sugarman, *Dividing Financial Interests on Divorce*, in *DIVORCE REFORM AT THE CROSSROADS*, *supra* note 5, at 130-65 (comparing and critiquing the effects of fault and no-fault divorce on alimony).

10. For example, the Fall 1987 issue of *Family Advocate* dealt exclusively with the issue of "fault." *Special Issue on: Fault*, *FAM. ADVOC.*, Fall 1987.

11. Some commentators have expressed misgivings about the dominant American rule of unilateral divorce. *See, e.g.*, MARY ANN GLENDON, *THE TRANSFORMATION OF FAMILY LAW* 173 (1989) (expressing comparative admiration for the French system by arguing that it is "a modern approach to divorce that contrasts strikingly with the less carefully thought-out rush to the no-fault bandwagon in many American states. France had made divorce available on unilateral application, but under such conditions that no one would think of describing it as 'divorce on demand.'). Other commentators would limit the dissolution of marriages with minor children to those that were particularly dysfunctional without necessarily identifying the spouse at "fault" for the dysfunction. *See, e.g.*, Judith T. Younger, *Marital Regimes: A Story of Compromise and Demoralization, Together with Criticism and Suggestions for Reform*, 67 *CORNELL L. REV.* 45, 90 (1981) (proposing the creation of a special

of divorce, the process rationale for no-fault<sup>12</sup> is less compelling, and the moral rationale for a fault-based rule is perhaps more inviting.<sup>13</sup> By framing claims of marital misconduct in traditional tort language, recovery of money damages may be possible without actually revising no-fault divorce statutes. In this way, a few trail-blazing plaintiffs have now obtained damages for misconduct that a thoroughly no-fault divorce law no longer addresses.<sup>14</sup>

While divorce law reforms of the past twenty-five years may provide the motivation for an aggrieved spouse to turn to tort law, two parallel developments combined to make such claims doctrinally plausible: (a) the widespread recognition of the tort of "outrageous" conduct outside the marital setting,<sup>15</sup> and (b) the widespread abandonment of the general rule of interspousal tort immunity (even though that rule typically has been abandoned for other reasons and without attention to its possible impact on spousal emotional abuse cases).<sup>16</sup>

Other contemporary developments also may encourage the deployment of this legal strategy. For one thing, lawyers, as well as the public, are paying increased attention to physical spousal abuse,<sup>17</sup> and victims' advocates have succeeded in creating more public and private programs to provide sanctuary and support for abused spouses, the overwhelming proportion of whom are women.<sup>18</sup> At the same time,

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marital status, which would continue through the child's 18th birthday, referred to as "marriage for minor children").

12. The old rule that fault be shown before a marriage could be dissolved created process problems that were easy targets for the divorce reform movement. These problems included the inevitable collusion between cooperating spouses to show the necessary proof of marital misconduct, and the establishment of a sham spousal residence in a state with a more flexible understanding of the required fault. ELLMAN ET AL., *supra* note 8, at 165-68. The importance that some attached to the fault requirement's moral message could not justify these process distortions, particularly given that the fault requirement seemed ineffectual in either preserving marriage or in influencing marital behavior. *Id.*

13. Because unilateral divorce is like "desertion," the fault doctrine may have lent "emotional vindication to the rejected spouse," and therefore "greater justification" may be required for eliminating fault from determinations of support and allocation of property. Kay, *supra* note 5, at 8.

14. *E.g.*, Massey v. Massey, 807 S.W.2d 391 (Tex. Ct. App. 1991), *writ denied*, 807 S.W.2d 766 (Tex. 1993).

15. *See, e.g.*, Victor E. Schwartz, *The Serious Marital Offender: Tort Law as a Solution*, 6 FAM. L.Q. 219, 223 (1972) (noting that "[t]he growing body of precedent grouped under the rubric 'intentional infliction of emotional harm' by the Restatement of Torts 2d illustrates conduct patterns that might be deemed actionable for these purposes").

16. *See* Robert Spector, *Marital Torts: Actions for Tortious Conduct Occurring During the Marriage*, 5 AM. J. FAM. L. 71, 71 (1991).

17. *See* Karp & Karp, *supra* note 3, at 391.

18. *Id.* Karp and Karp explain that there may be as many as "4 million women severely assaulted by male partners in an average 12-month period." *Id.* at 393.

we all are aware today that psychological mistreatment also can be gravely damaging and disabling, and that all spousal abuse is not physical. Furthermore, recent legal trends generally favor wider remedies for emotionally degrading conduct even outside the common-law tort system, especially conduct that is demeaning and humiliating to members of vulnerable groups, such as the liability for "sexual harassment" of employers who create a work environment hostile to women.<sup>19</sup> Therefore, if women emotionally abused by men at work can claim the help of the law, why not women emotionally abused at home?

Into this minefield we now seek carefully to tread. We come to this question, from our overlapping interests in family law and tort law, with prior commitments in both fields to substituting no-fault principles for fault-based ones. Yet we find the question of whether a tort law remedy should be provided for spousal emotional abuse difficult, with much to be said on both sides. We eventually come down, gingerly and somewhat reluctantly, against the general recognition of spousal emotional abuse as a tort, although we are prepared to support tort claims between spouses for emotional harm in certain more narrowly defined settings. In the end, however, we will be reasonably satisfied if we have aired the important considerations in a thoughtful way, even if our conclusions are not persuasive to everyone.<sup>20</sup>

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19. Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813 (1991).

20. This issue, so far as we have been able to determine, was first addressed in Schwartz, *supra* note 15, at 219. Professor Schwartz advocated legislative adoption of a cause of action in tort for what he called the "abuse of the marital relationship" by a "serious marital offender." *Id.* at 222. Such offenders would include not only those who beat their spouses, but also those who imposed emotional distress by acting outrageously within the meaning of section 46 of the *Restatement*. *Id.* at 223. Schwartz devoted only a few words to specifics:

[A] spouse who merely stays out late, drinks excessively or even commits an act of adultery should not be within the compass of such a tort. But where a spouse continually threatens the physical well-being of the other, or commits an act of adultery and brags about it with the intent to cause his spouse resultant serious emotional harm, a jury should be permitted to decide whether damages may be awarded.

*Id.* at 224-25. Schwartz addressed few of the qualms about this cause of action that we raise here. Indeed, his major motivation for proposing this tort was to encourage states to adopt no-fault divorce laws that removed fault from consideration in both the granting of the divorce and the dividing of their financial interests. *Id.* at 222, 232. By including this tort as part of the legislative package, Schwartz believed he was responding to the main obstacle standing in the way of widespread enactment of no-fault divorce, which was then in its early stages of adoption. *Id.*

The next publication devoting serious attention to our issue is Constance W. Cole, *Intentional Infliction of Emotional Distress Among Family Members*, 61 DENV. L.J. 553 (1984). Professor Cole examined claims between parents and children that are beyond the scope of this Article. *Id.* at 558, 566-67. She also addressed claims arising between former spouses, including child kidnapping, refusal to pay support, and denial of visitation. *Id.* at

## I. THE LANDSCAPE

A. *What Sorts of Marital Discord Might Lead to a Claim of Spousal Emotional Abuse?*

Rather than starting with a focus on the facts of the few, possibly eccentric reported cases, we want to describe in the beginning a broad range of circumstances that might give rise to severe spousal distress. We mean to give the reader a feel for the many different settings out of which a tort of spousal emotional abuse would have to be fashioned. We deliberately include behavior for which some embittered spouses might wish redress even though most observers, we will argue, would think tort recovery is clearly inappropriate.

Most interspousal emotional injuries might be understood to arise from the violation of promises implicit in the marital role. The complaining party may feel entitled to say, "When we got married I never dreamed you would behave like this." The distress may be especially acute because marriage commonly involves an initial surrender through love of the walls of protection we might otherwise build around our emotions. In other words, the emotional intimacy of mar-

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562-70. While closer to home, these are also beyond our current subject, which is restricted instead to what Professor Cole calls "real family cases, those alleging emotional harm arising out of the relationship between the litigants." *Id.* at 571. Like Professor Schwartz, Cole favors the recognition of tort claims for outrageous marital conduct that leads to serious emotional injury. *Id.* We will consider some of her arguments as we go along.

Some of the more recent writings related to our issue focus primarily on procedural issues, assuming that interspousal tort claims will be allowed. *See, e.g.*, Andrew Schepard, *Divorce, Interspousal Torts, and Res Judicata*, 24 *FAM. L.Q.* 127, 136 (1990) (examining "whether the 'claim preclusion' branch of res judicata bars an interspousal tort action filed after a final divorce judgment"); Barbara H. Young, *Interspousal Torts and Divorce: Problems, Policies, Procedures*, 27 *J. FAM. L.* 489, 490 (1989) (examining "the procedural and policy issues that domestic relations attorneys should address in serving the tort victim spouse who seeks a divorce"). Other articles largely describe this question and other related, recent developments. *See* Karp & Karp, *supra* note 3, at 389 (examining emotional distress within the context of domestic violence); Robert Spector, *Marital Torts*, 15 *FAM. L. REP.* 3023, 3025 (1989) (describing tort claims growing out of the marriage); Spector, *supra* note 16, at 71 (describing tort claims arising from domestic actions). Still others are "case-notes," largely limiting analysis to single cases. *See* Heather S. Call, *Intentional Infliction of Emotional Distress in the Marital Context: Hakkila v. Hakkila*, 23 *N.M. L. REV.* 387 (1993) (discussing an action for intentional infliction of emotional distress within a divorce proceeding); Bradley Case, *Turning Marital Misery into Financial Fortune; Assertion of Intentional Infliction of Emotional Distress Claims by Divorcing Spouses*, 33 *J. FAM. L.* 101 (1994-95); Richard R. Orsinger, *Asserting Claims for Intentionally or Recklessly Causing Severe Emotional Distress in Connection with Divorce*, 25 *ST. MARY'S L.J.* 1253 (1994) (analyzing emotional distress in the divorce case of *Twyman v. Twyman*); David Pfeuffer, Note, *Chiles v. Chiles: Divorce, Torts, and Scandal—Texas Style*, 42 *BAYLOR L. REV.* 309 (1990) (discussing whether emotional distress claim can be brought with divorce action under Texas law).

riage makes each spouse particularly vulnerable to emotional injury by the other.

We start with a classic example of spousal conduct that may impose great emotional harm, but one that few people would urge the law to recognize a tort claim under these facts alone. Suppose one spouse simply announces a desire to terminate the marriage by saying, "I'm terribly sorry, but I don't love you anymore." It is certainly understandable that the other spouse could be utterly crushed by this withdrawal of affection and that the departing spouse knew well this would be the reaction. Moreover, the forsaken spouse may well believe that the other has breached a promise of a lifetime love. Yet to be able to turn this emotional injury into a successful claim for money damages would be radically inconsistent with the principle now followed in the divorce law of all states, and which we endorse, that a spouse's mere desire to end the marriage should not by itself be punished financially.

Of course, tort principles do not recognize all harmful conduct as actionable. Indeed, as noted already, tort claims for intentional infliction of emotional distress generally require wrongdoing that is grave enough to be termed "outrageous." We later return to the difficulties of this formulation.<sup>21</sup> For now, however, we will just assume that virtually no one would assert that merely deciding you are no longer in love and announcing that you do not want to be married to your spouse should be termed "outrageous" and thus constitute a tort.

But, of course, marital breakups are rarely quite so simple, and as we next canvass a variety of more challenging scenarios, we invite the reader to consider whether this is the sort of conduct for which the law should provide a tort remedy.

Suppose that the spouse who wants out of the marriage also admits that he is currently in love with another person and has violated the marital undertaking of sexual fidelity. Has that spouse engaged in misconduct that should give the other spouse a damage claim for inflicting emotional distress? Is the claim stronger or weaker if the spouse had committed adultery but is not in fact in love with any third person? Should it matter whether the party seeking the divorce is the unfaithful partner or the one who has been betrayed?

Turning to other scenarios, let us next assume that marital partners ordinarily believe their relationship includes a commitment to treat one another with kindness and respect. Does that mean that the law should find actionable abuse when one spouse constantly belittles,

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21. See *infra* notes 43-54 and accompanying text.

criticizes, taunts, curses, or mocks the other? Should it matter if the demeaning spouse knowingly takes advantage of an emotional weakness of the other? Or assume that most people believe marital partners should keep their word to each other. Does that mean the law should find actionable abuse when one spouse makes life miserable for the other by willfully ignoring pledges, say, to perform household tasks? Should it depend upon the nature of the tasks? For example, if the tasks include parenting responsibilities, the injured spouse may feel especially aggrieved.

Dishonesty may exacerbate any of the circumstances we have considered, and the deceived spouse is in any event likely to believe that lying is itself a violation of the marital commitment. The greater the trust the marital partners extend to one another, the greater the sense of betrayal if it is violated. If adultery alone were not considered emotional spousal abuse, should it become actionable when combined with deceit? To go perhaps further, what if a wife leads her husband to believe that he fathered her child and a year later reveals that the father was really her lover with whom she now is going to live?

As discussed below, spousal battery (physical striking) generally is actionable,<sup>22</sup> and so perhaps *threats* of violence should be as well. What then of threats of physical isolation, abandonment, or the revelation of secrets? Fear of such conduct may alone cause great anguish. It also may allow the threatening spouse to extort certain behavior from the victim in return for holding back, which can be an independent source of severe emotional distress. And, of course, emotional agony may result if the threat materializes—say, from physical confinement or from cutting off phone service and other connections with the outside world. All of this may happen without any actual touching. Does any or all of it amount to “emotional abuse”?

Consider next whether it should matter if others are brought into the rift. For example, the shaming may occur in front of friends or relations. Or a lover may be encouraged to join in the taunting of the rejected spouse. Or lies may be told, or unjustified complaints made about the spouse to others. Or highly humiliating things that the other spouse expected to be kept private may be shown or told to others—such as nude photos, descriptions of sexual conduct, unsavory habits, past misbehavior, and the like. The involvement of others may, in some cases, be central to the victim’s woe.

It might be emphasized that sometimes the central motivation of the actor is to cause the other spouse emotional distress. Yet even

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22. See *infra* notes 66-67 and accompanying text.



those who seek to injure may be prompted by quite different underlying emotions—hate, narcissism, misguided love, and more. Other times the harming spouse may be recklessly indifferent to the consequences of his words or behavior. In still other cases the injuring spouse may truly wish not to harm, but does so anyway as a by-product of the pursuit of some other objective. Should the actor's motivation, assuming we could ascertain it, bear on whether the victim ought to have a cause of action?

Sometimes the victim's emotional suffering is traceable, at least in part, to her own earlier behavior. For example, sometimes a harming spouse is retaliating, seeking revenge perhaps, for the victim's prior conduct (for example, "I would not have been nasty to you if you had not had an affair."). Surely an evaluation of the victim's earlier conduct often will influence an observer's view of whether the perpetrator's conduct is "outrageous."

This survey should make clear that there are a great variety of ways, short of physical battering, through which one spouse can cause the other severe emotional distress. Before going on to decide whether any of these examples should be actionable in tort, something must be said about the divorce law context in which the issue arises. This is because, as a practical matter, it makes little sense to think about spouses suing each other in tort for spousal emotional abuse while their marriage remains intact.

### *B. The Connection with No-Fault Divorce*

All American states today permit agreeing couples to obtain a no-fault divorce.<sup>23</sup> Moreover, all but a handful allow either spouse to end the marriage unilaterally without any showing that the other spouse is at fault,<sup>24</sup> although a substantial minority hedge that result by imposing a delay of two or even three years before a unilateral no-fault divorce can be granted.<sup>25</sup> This latter pattern of "hedged" no-fault

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23. ELLMAN ET AL., *supra* note 8, at 177.

24. In four states (New York, Mississippi, Ohio, and Tennessee), the only ground for a no-fault divorce is consensual separation. *Id.* at 185-86. A de facto separation, regardless of duration, provides no ground for divorce, at least when the separation itself was not consensual. *Id.* Thus a resisting spouse who did not consent to the parties living apart can be divorced only if shown at fault. *Id.* Even in these states, however, spouses can divorce by mutual agreement without any showing of fault. *Id.*

25. This result usually is achieved by limiting unilateral no-fault divorces to cases in which the parties have in fact lived separately and apart for some substantial period such as two years, while allowing more rapid divorce if the separation is by mutual consent or if the petitioner shows the respondent is at fault. *See, e.g.,* MO. ANN. STAT. § 452.320 (Vernon 1986) (stating that divorce may be based on one year of separation if by mutual consent, on two years of separation with no requirement of mutual consent, or on the fault grounds

divorce is also common in Western Europe.<sup>26</sup> In these jurisdictions, fault-based divorces are still available for those who do not wish to wait.<sup>27</sup> Fault-based divorce thus is required for unilaterally acting spouses in the very few states that do not allow unilateral no-fault divorce. Despite this variety, the upshot is that most American divorces are now granted on a no-fault basis.<sup>28</sup>

Even more central to our issue are the divorce law rules applicable to fixing the amount of spousal support awards (alimony) and the allocation of marital property. It appears that on these money issues many states exclude consideration of fault.<sup>29</sup> Although there certainly is no consensus among these states on the precise basis for either the award of alimony or the division of the couple's assets,<sup>30</sup> the point is that marital misconduct is not one of the factors that is supposed to be taken into account.<sup>31</sup> The remaining states do allow consideration of

of adultery, abandonment, or that the respondent "has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent"). For a case denying a divorce decree because the Missouri statutory requirements were not met, see *In re Marriage of Mitchell*, 545 S.W.2d 313 (Mo. Ct. App. 1976). For a case interpreting these same statutory provisions more flexibly, see *Gummels v. Gummels*, 561 S.W.2d 442 (Mo. Ct. App. 1978). A fairly recent compendium of state divorce laws is included in Herma H. Kay, *Equality and Difference: A Perspective on No-Fault Divorce and Its Aftermath*, 56 U. CIN. L. REV. 1, 5-7 & nn.19-21 (1987). Kay lists Arkansas and Texas as requiring three years of separation. *Id.* at 6 n.22.

26. For example, France requires six years of separation for a unilateral, no-fault divorce, and imposes support duties on the petitioning spouse not otherwise applicable. See GLENDON, *supra* note 11, at 166-71.

27. Glendon reports that only one percent of French divorces are based on the six years separation requirement. *Id.* at 171. Studies in Ohio and England find that even the two-year requirement deters more than three-fourths of the petitioners, who prefer instead to agree with their spouses on a more immediate fault divorce. See ELLMAN ET AL., *supra* note 8, at 194.

28. See *supra* note 7 and accompanying text.

29. See AMERICAN LAW INSTITUTE, *supra* note 7, at 17-27, 60-88.

30. *Id.*

31. *Id.* The American Law Institute provides a tabular summary of state approaches to alimony. *Id.* It does not include in the tally of states allowing consideration of fault those that limit such consideration to economic misconduct such as the fraudulent concealment from the other spouse of marital assets. See, e.g., ARIZ. REV. STAT. ANN. § 25-318(A) (1991) ("Nothing in this section shall prevent the court from considering excessive or abnormal expenditures, destruction, concealment or fraudulent disposition of community, joint tenancy and other property held in common."); CAL. CIV. CODE § 4800(b)(2) (West 1983) ("As an additional award or offset against existing property, the court may award, from a party's share, any sum it determines to have been deliberately misappropriated by such party to the exclusion of the community property or quasi-community property interest of the other party."). Some states, however, extend this principle to reach more traditional forms of marital misconduct as well. See, e.g., *LaBuda v. LaBuda*, 503 A.2d 971 (Pa. Super. Ct. 1986) (asserting that an extramarital affair, to the extent it resulted in dissipation of assets, may be considered in the resolution of asset allocation), *appeal denied*, 524 A.2d 494 (Pa. 1987). But see *In re Marriage of Sommers*, 792 P.2d 1005 (Kan. 1990) (noting that "[i]t

certain kinds of marital misbehavior, such as adultery or desertion,<sup>32</sup> or misconduct thought to be extreme, such as when one spouse is guilty of attempting to murder the other.<sup>33</sup>

About this mixed picture it may at least be said that the movement to no-fault divorce has significantly reduced the role of fault considerations in the calculation of the financial terms of the divorce decree. In the past, for example, the traditional fault- and gender-based divorce law treated the wife very differently depending upon whether she or her husband was considered the wrongdoer responsible for the marital failure.<sup>34</sup> When the wife's conduct was thought to breach her marital vows and thereby cause the marital breakdown, courts would bar or limit her claim for alimony.<sup>35</sup> Alternatively, the husband wrongdoer would be liable for continued support of his former wife because his own breach of the marital commitment could not be allowed to terminate his obligations under it.<sup>36</sup> The rationale for this pre-no-fault result was not tort law, however, and if one were looking for common-law analogies, breach of contract might come closer.

We will consider later what light may be shed on our core subject from the experience of states whose current divorce laws are not "fault free" as to financial issues.<sup>37</sup> At first, however, we ask whether a tort

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is difficult to conceive of any circumstances where evidence of marital infidelity would be a proper consideration in the resolution of the financial aspects of a marriage"). *See also infra* note 144 and accompanying text.

32. This is often the case as to alimony, for which adultery may be a bar even if fault is otherwise not considered. *See* ELLMAN ET AL., *supra* note 8, at 270-71. *But see infra* note 144 and accompanying text.

33. This seems to be the New York rule, as attempted murder alone has been found to satisfy the official standard that fault can be considered only in "rare" situations in which the conduct "shocks the conscience." For a description of the cases, see ELLMAN ET AL., *supra* note 8, at 243-44.

34. Woodhouse explains that "[t]he traditional fault paradigm, still dominant in some states, reflected an obsession with controlling women and their sexuality." Woodhouse, *supra* note 9, at 2526.

35. *Id.* at 2533-36.

36. *Id.*

37. Distinguishable from the question examined in this Article are those cases in which a party intentionally violates family-law-based legal obligations either during the divorce process or after. For example, one spouse might deliberately conceal the couple's assets in hopes of obtaining an unfair share of them; or, a divorced spouse might deliberately violate a support order when compliance would cause no financial hardship, possibly in order to cause the former spouse anguish; or a divorced spouse might conceal the children, possibly even disappearing with them, in order to prevent the other spouse from exercising custody rights. We can imagine that these sorts of behaviors could be deemed torts, and we can also imagine that the contempt of court process available in the divorce context might deal adequately with them. In either event we agree that legal remedies should be available for such behavior and believe that any debate over the choice of remedy raises

action for spousal emotional abuse should be allowed in states where divorce law is indifferent to fault in determining the divorcing parties' financial obligations to each other.<sup>38</sup> That is, we address the tort issue on the assumption that it arises in the context of a fully no-fault divorce law.

Indeed, in states that still allow consideration of fault there is arguably no role for tort law because the remedy it would provide would overlap with the fault-based enhancements of alimony or property claims, or so we will assume for the moment.<sup>39</sup> At the end of this Article we briefly consider what our analysis of the tort question implies for the divorce action.<sup>40</sup>

## II. THE CASE FOR RECOGNIZING EMOTIONAL DISTRESS CLAIMS

We now present arguments for allowing a spouse to bring a claim for intentional infliction of emotional distress or, as it may be more accurately described, the tort of outrageous conduct. For now we put aside possible tort claims between spouses for negligent infliction of

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less fundamental questions than does the issue we examine here. We also put aside other issues, such as harassing conduct by a former spouse after the parties are divorced, *see, e.g.*, *Pyle v. Pyle*, 463 N.E.2d 98 (Ohio Ct. App. 1983), or before a couple is married, *see, e.g.*, *Halio v. Lurie*, 222 N.Y.S.2d 759 (App. Div. 1961).

38. We understand that bad conduct during marriage might properly affect the decision in a custody contest, which would in turn determine the spouses' relative child support obligations. (For an overview of the legal principles governing custody, see generally HOMER H. CLARK, *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 572-60 (1st ed. 1968)). Clark explains that "[t]he morals of the parties are a relevant subject of inquiry in custody disputes and often have a sharp effect on the outcome." *Id.* at 585. For an explanation of child support orders, see generally *id.* at 488-520.) But those obligations will flow from the terms of the custody decree, not from the reason for those terms. *Id.* at 490. Identical financial positions should yield the same support obligation for abusive fathers and for fathers who reluctantly but voluntarily surrender custody because they think it is in the best interests of their children.

We also understand that family law might provide indirectly for the financial consequences of spousal emotional abuse by considering the earning capacity and medical needs of the husband and wife when allocating property or fixing their alimony obligations. *See id.* at 443-48. But while an enlarged claim is thereby available to the spouse whose earning capacity or medical needs are affected by the emotional abuse suffered during marriage, this compensation is not fault-based because it is equally available to spouses with earning capacity or medical needs similarly affected by other causes. And, of course, a comprehensive no-fault divorce law would not provide recovery for intangible losses (pain and suffering) or allow an award of punitive damages.

39. Oddly enough, some of the states that have recently allowed tort claims for spousal emotional abuse also take fault into account in their divorce law. These states include, for example, Texas and Connecticut. *See infra* note 68 and accompanying text. We find it more than a little perplexing for a legal regime to provide overlapping remedies for the same conduct, unless, perhaps, a spouse were required to elect between the two.

40. *See infra* notes 305-306 and accompanying text.

emotional distress.<sup>41</sup> We later consider why allowing tort claims for such conduct seems implausible, in order to see whether that reaction tells us anything about claims for intentional infliction of emotional distress.<sup>42</sup> But we first focus on claims of intentional conduct.

### A. Doctrinal Arguments

Section 46 of the *Restatement (Second) of Torts* describes a cause of action in which the defendant, through “outrageous” conduct, intentionally or recklessly causes the plaintiff severe emotional distress.<sup>43</sup> State courts generally have recognized the tort of intentional infliction of emotional distress (IIED).<sup>44</sup> No physical contact is required; the tort can be committed through words or other nontouching acts alone.<sup>45</sup> Moreover, under the *Restatement* formulation, the victim need not prove any particular physical consequences arising from the distress—although such consequences are often alleged.<sup>46</sup>

Despite the tort’s four “official” elements—(1) an intentional or reckless act that is (2) extreme and outrageous, and (3) causes (4) severe emotional distress<sup>47</sup>—in practice the action boils down to the one element of “outrage” that we have been equating here with “spousal emotional abuse.”<sup>48</sup> The tort has never been thought to require actual intent to cause the distress, but only to commit the act that produced it.<sup>49</sup> Where intentional outrageous conduct is proven, courts readily assume that such conduct caused severe distress,<sup>50</sup> and

41. See RESTATEMENT (SECOND) OF TORTS §§ 312, 313, 436, 436A (1965).

42. See *infra* notes 108-124 and accompanying text.

43. RESTATEMENT (SECOND) OF TORTS § 46 (1965); see *supra* note 1.

44. Professor Givelber, author of the best recent article on the subject, describes the tort as “widely recognized.” Givelber, *supra* note 2, at 42. Givelber notes that two important earlier articles—Calvert Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033 (1936) and William Prosser, *Insult and Outrage*, 44 CAL. L. REV. 40 (1956)—were critical of the American Law Institute’s recognition of this tort, and, in turn, the broad embrace of the tort in decisions around the nation. Givelber, *supra* note 2, at 42 & nn.1-2.

Indeed, according to a 1993 opinion of the Texas Supreme Court, Texas became the 47th state to follow the *Restatement’s* lead. *Twyman v. Twyman*, 855 S.W.2d 619, 621-22 (Tex. 1993).

45. Givelber explains that “[n]egligence and other intentional torts . . . require more than awareness; plaintiff must show defendant’s unreasonable behavior and plaintiff’s demonstrable physical injury resulting from that behavior.” Givelber, *supra* note 2, at 50.

46. RESTATEMENT (SECOND) OF TORTS § 46 (1965).

47. *Id.*; see *supra* note 1.

48. Givelber discusses “[t]he significance of the [c]ollapse of [e]lements” into that of outrage, concluding that “[t]he issues of conduct and resulting injury, distinct in an action for unintentional injuries, here merge into a single issue.” Givelber, *supra* note 2, at 49, 51.

49. *Id.* at 46.

50. *Id.* at 50.

where outrage is not proven the tort fails, even if the defendant meant to cause the plaintiff severe emotional distress and succeeded.<sup>51</sup> Thus the tort is somewhat misnamed. It seems designed less to protect an interest in emotional tranquility from intentional invasion than to condemn and punish bad behavior.<sup>52</sup> Everything turns on the scope of “outrageous” conduct employed in judging the tort. Of course, plaintiffs often seek to detail their emotional upset in order to maximize the amount of their recovery, and in that important sense, a showing of distress is central in the tort’s application.<sup>53</sup> In most states, the successful plaintiff in an IIED case can obtain both compensatory damages, including general damages for pain and suffering, and punitive damages.<sup>54</sup>

The authorities are remarkably vague on the basic question of defining the culpable conduct. The tort has most often been used to police relations between actors in a commercial context, enforcing a minimal requirement of decency and fair procedure as between, say, landlords and tenants, creditors and debtors, and employers and employees.<sup>55</sup> One writer concludes that distress claims involving parties not previously bound by contract “are fewer, the results more unpredictable, and doctrine virtually nonexistent.”<sup>56</sup> The existence of a previously established commercial relationship with a well-understood purpose gives the court context for establishing the limits of decency by which to judge the defendant’s conduct.<sup>57</sup>

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51. *Id.* at 46.

52. *Id.* at 54, 59.

53. *Id.* at 54.

54. But this is not the case in Connecticut, for example, where the court in *Whelan v. Whelan*, 588 A.2d 251, 253 (Conn. Super. Ct. 1991) concluded that when the “underlying cause of action is based on a claim of outrageous conduct . . . additional recovery for punitive damages would not be appropriate.” The opinion offers no real justification for its decision, apart from citing *Knierim v. Izzo*, 174 N.E.2d 157, 165 (Ill. 1961), an earlier Illinois opinion that adopted the same conclusory result.

55. See Givelber, *supra* note 2, at 53.

56. *Id.* at 63. One well-known exception to this principle allows recovery when cruel practical jokes are played on those with known weaknesses. See RESTATEMENT (SECOND) OF TORTS § 46 cmt. d, illus. 1 (1986), which states:

As a practical joke *A* falsely tells *B* that her husband has been badly injured in an accident, and is in the hospital with both legs broken. *B* suffers severe emotional distress. *A* is subject to liability to *B* for her emotional distress. If it causes nervous shock and resulting illness, *A* is subject to *B* for her illness.

*Id.* This illustration is born of the facts of the famous case of *Wilkinson v. Downtown* [1897] 2 Q.B. 57 (holding that the willful infliction of emotional distress causing physical harm is a viable cause of action and worthy of damages).

57. Of course, context can be provided by a relationship that is not contractual. For example, in *Young v. Stensrude*, 664 S.W.2d 263 (Mo. Ct. App. 1984), the plaintiff was attending a business meeting in the defendant’s office, but had no contractual relationship

In any event, on its face section 46 provides a tort law basis for one spouse recovering damages from the other for emotional harm arising from conduct that a jury finds "outrageous." Traditionally, the doctrine of interspousal immunity would have prevented such suits, but in recent years this immunity has been largely abolished.<sup>58</sup> For example, a recent decision of the Mississippi Supreme Court, overturning the doctrine, found that the interspousal immunity principle remains fully in place in only a handful of states.<sup>59</sup>

To be sure, most of the claims made possible by this abolition involve the negligent imposition of physical injury (perhaps most importantly through careless driving)—and a few states appear to have overruled interspousal immunity only for these sorts of claims.<sup>60</sup> However, intentional harm of one spouse by the other is an altogether different matter, even though the total ending of interspousal immunity simultaneously paves the way for both types of claims. Unlike suits for negligent imposition of physical injury,<sup>61</sup> fear of collusion was hardly the concern that traditionally led courts to block interspousal lawsuits for intentional wrongdoing; if nothing else, these claims almost surely would not be covered by liability insurance. Rather, the

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directly with him. The defendant, saying he wanted to show an educational film, instead exhibited the pornographic movie *Deep Throat*, during which he uttered "sexual obscenities" to the plaintiff, who was the only woman present at the meeting. *Id.* at 65. The trial court had dismissed the action on a general demurrer, but the appeals court held she stated a cause of action because such behavior could amount to "extreme or outrageous conduct." *Id.*

58. See generally 2 FOWLER HARPER ET AL., THE LAW OF TORTS § 8.10 (2d ed. 1986) (providing a historical survey of the various ways in which interspousal immunity has been curtailed or abrogated); RESTATEMENT (SECOND) OF TORTS § 895F (rejecting interspousal immunity).

59. *Burns v. Burns*, 518 So. 2d 1205, 1208-09 (Miss. 1988) (stating that "the forty-four states abrogating the doctrine recognize the reasons for the common law rule no longer exist").

60. See *id.* at 1212-13 (listing eight states that have abrogated spousal immunity for "vehicular torts"). In this type of litigation, typically what is really involved is an attempt by the couple to access their insurance coverage so as to provide compensation for the injured spouse's losses. The conduct at issue would not ordinarily trigger a divorce, and thus negligence claims between spouses normally arise during ongoing marriages. In fact, in those circumstances there is good reason to fear that the defendant spouse may concede (or pretend) that he was negligent in what in fact is a collusive raid on the insurer; and this concern was one of the justifications for maintaining interspousal immunity in the earlier part of this century. However, in the end, judges and legislatures have generally decided that all spouses should not be deemed collusive, even if some might be, and that insurers will simply have to ferret out the facts in each case. Or, in some jurisdictions, liability insurers are permitted to exclude from coverage claims within the family, and some insurers take advantage of this right. See 2 HARPER ET AL., *supra* note 58, § 8.10 n.21 (explaining that states are divided over whether a family exclusion clause in an automobile insurance contract is valid).

61. See *supra* note 60.

historic explanation for the ban in these cases, at least on the surface, was simply formalistic. Upon marriage women lost their legal identity, which merged with that of their husband, and because spouses were legally one they could hardly sue each other.<sup>62</sup>

But even long after women began to gain certain legal autonomy with respect to, say, property rights, interspousal tort immunity remained firm.<sup>63</sup> Sometimes the courts expressed the concern that allowing such suits would contribute to the family's disharmony.<sup>64</sup> The obvious reply to this point is that if one spouse is willing to sue, the marital relationship is already disrupted. Perhaps at that time the courts simply were not prepared to use tort law to protect wives from "discipline" by their husbands, physical or otherwise. Courts may have assumed that if the abused spouse really wanted relief she could seek it in the divorce courts where extreme cruelty was generally a principal ground for divorce, and one that would allow the wife a claim for alimony.<sup>65</sup>

In any event, with the end of interspousal immunity, it seems quite clear today that most states will recognize lawsuits by one spouse against the other for physical battery.<sup>66</sup> Indeed, in some jurisdictions the overruling of interspousal immunity occurred in spousal battering cases, and a few states actually seem to restrict interspousal tort claims to cases of intentional wrongdoing.<sup>67</sup>

Therefore, in most states it may now be argued that it "logically" follows from the end of immunity that, because section 46 torts are generally recognized, they should be available to spouses as well, or at least that the burden of persuasion lies with those who reject this position.

In fact, several courts have followed this logic in allowing interspousal section 46 claims,<sup>68</sup> although sometimes finding as a matter of

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62. See Younger, *supra* note 11, at 50 (noting that "common law rules recognized husband and wife not as individuals, but as 'one person in law'" (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES pt. 2, 441 (G. Tucker ed., 1803))).

63. See 2 HARPER ET AL., *supra* note 58, § 8.10.

64. For a discussion and rejection of the "family harmony" rationale as a justification for intrafamily tort immunity, see Goller v. White, 122 N.W.2d 193, 196 (Wis. 1963).

65. See Woodhouse, *supra* note 9, at 2535-36.

66. See Burns v. Burns, 518 So. 2d 1205, 1211-13 (Miss. 1988); 2 HARPER ET AL., *supra* note 58, § 8.10 nn.16-23.

67. Burns, 518 So. 2d at 1213.

68. These courts include Texas, Ohio, and Connecticut. For our discussion of a Texas decision, see *infra* notes 169-177 and accompanying text. See also Koepke v. Koepke, 556 N.E.2d 1198, 1199-1200 (Ohio Ct. App. 1989) (holding that the IIED torts should be pursued in action separate from divorce proceeding); Whelan v. Whelan, 588 A.2d 251, 252 (Conn. Super. Ct. 1991) (holding, inter alia, that IIED is a viable claim).



law that the conduct alleged in the specific case does not qualify as outrageous.<sup>69</sup> Other jurisdictions have rejected this logic and rejected the cause of action.<sup>70</sup> Before turning to the opposing side of this argument, we want next to emphasize that the supporting position has rather more than mere doctrinal consistency in its favor.

### B. Policy Arguments

First, viewed through the lens of contemporary tort law developments—once it is conceded that spousal physical battering is now, and should be, generally actionable in tort simply as a specific instance of battery—erecting a legal barrier between emotional and physical abuse goes against a strong trend. It may be pointed out by way of analogy that the tort of negligent infliction of emotional distress is, generally speaking, a burgeoning area of the law, in which recovery is allowed for many sorts of harms that do not involve the physical touching of the plaintiff by the defendant. Indeed, section 46 itself represents a strong repudiation by tort law of the idea that emotional harm has to arise out of some other conventional tort, such as battery, before it is actionable.

Second, one function of tort law generally is to moralize—to establish and promulgate standards of conduct for members of the community.<sup>71</sup> From this outlook, extreme wrongdoing in marriage should be condemned. Through the vehicle of tort litigation, certain sorts of emotionally abusive conduct by spouses can be declared clearly out-of-bounds. Here tort law may be seen to provide redress in extreme cases, a function of the law that was abandoned in jurisdictions where complete no-fault divorce has been adopted.

Third, other related functions of tort law are to castigate wrongdoers and to provide victims with a sense of justice and empowerment.<sup>72</sup> From this view, allowing a section 46 claim gives spouses a way to retaliate against emotional abuse. Empowered by the law, they can come to court (or threaten to do so) in order to ward off, fight

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69. These courts include New Mexico, New Jersey, and Kentucky. *See infra* notes 160-168, 178-184 and accompanying text.

70. New York and South Dakota appear to best reflect this position. *See infra* notes 143-144 and accompanying text; *see also* *Pickering v. Pickering*, 434 N.W.2d 758, 761 (S.D. 1989) (stating that “we believe the tort of intentional infliction of emotional distress should be unavailable as a matter of public policy when it is predicated on conduct which leads to the dissolution of a marriage”).

71. *See* GUIDO CALABRESI, *THE COST OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* 291-92 (1970).

72. *Id.*

back against, and ultimately punish the wrongdoer. Recovery, in turn, could provide a needed feeling of satisfaction.

Fourth, despite its general formulation, section 46 in practice primarily has been used in cases of dominant-dependent relationships—albeit typically in a commercial context.<sup>73</sup> This arguably makes the tort of outrageous conduct especially apt for application as well to the marital setting where emotional abuse may be broadly seen to be inflicted upon a dependent spouse by a dominant one—typically the wife being abused by the husband. Indeed, although spousal emotional abuse is not exclusively committed by husbands, IIED actions may be seen to play a special role in combatting oppressive patriarchy.<sup>74</sup>

Advocates favoring the availability of section 46 claims in the marital setting should not be understood to be seeking judicial intervention for every little nasty word or act. They would not call such conduct “abuse” nor, in the terms of section 46, would they seek to label it “outrageous.” Hence, they would clearly not say it is a tort to tell your spouse that you no longer love him even if you knew it would be very hurtful to reveal this truthful feeling. Put differently, it is not sufficient proof of “outrageousness” merely to show that the defendant was knowingly wounding; indeed, in some cases the harmful conduct is not even wrongful. In short, the pro-tort vision assumes that these interspousal cases would be relatively infrequent and reserved for truly awful behavior.

Having presented both formal and policy arguments for recognizing spousal emotional abuse as a tort, we turn now to the considerable qualms we have about this idea.

### III. PRELIMINARY CAUTIONS AGAINST RECOGNIZING EMOTIONAL DISTRESS CLAIMS

#### A. *Worries That No-Fault Divorce Law Will Be Undermined*

Allowing tort claims for marital misconduct will clearly undermine some goals of no-fault divorce. For example, anyone who favors no-fault divorce, believing that the legal process should not focus on

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73. See *infra* notes 85-86 and accompanying text.

74. Although this way of thinking may fit well with the “difference” school of feminist thought, (e.g., Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988); Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543 (1986)), it may at the same time be said to perpetuate the stereotype of the dependent female, thereby running afoul of the “equality” school of feminist critique (e.g., Wendy W. Williams, *The Equity Crisis: Some Reflections on Culture, Courts and Feminism*, 7 WOMEN’S RTS. L. REP. 175 (1982)).

recriminations and assigning blame, should oppose joining a spousal suit for outrageous marital conduct with the divorce action. Even if the tort suit is brought separately from the divorce action,<sup>75</sup> it is likely that lawyers, as well as their clients, will be battling simultaneously over the tort suit and the divorce settlement, connecting them psychologically and strategically if not procedurally.<sup>76</sup> Routine use of IIED tort claims would thus undermine one important rationale often offered for no-fault divorce.

*B. General Qualms About Expanding Tort Law's Reach*

We next want to confess our general uneasiness about the way tort law currently operates. At present, tort law allows juries to grant open-ended awards, and punitive damage awards for pain and suffering are often based upon the ability of lawyers and witnesses to "rile up" the jurors. We are also distressed about the large amounts of money lost to transaction costs, most importantly in legal fees.

Indeed, one of us has called for doing away with personal injury law with respect to unintentional bodily injuries and replacing it with a no-fault compensation scheme focusing primarily upon actual out-of-pocket losses, albeit including lost wages and expenses of therapy brought about through emotional injury.<sup>77</sup> Nonetheless, even this sweeping attack on the personal injury law system did not argue for the elimination of the right to sue for intentional wrongs, even though it did propose reform in the way such determinations are made and to what extent punitive damages should be awarded.<sup>78</sup>

Having made these disclosures, we do not intend to rely on these broader concerns to resolve the specific issue before us here. It is important to emphasize that the main financial consequence of allowing divorcing spouses to bring section 46 suits would be to provide the victim money for pain and suffering and punitive damages. But we do not want to claim that just because tort law allows such recovery, its role should be rejected. Put differently, we acknowledge that disallowing section 46 claims would result primarily in denying spouses pain and suffering and punitive damage awards (as opposed, for ex-

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75. Indeed, some courts that have recognized interspousal IIED claims already insist that they be brought in separate lawsuits, noting also that because of the practice of using contingent fees in tort and not in divorce, joint claims would create undesirable difficulties. See Schepard, *supra* note 20, at 141-55 (discussing the problems of res judicata, tort claims, and divorce).

76. *Id.* at 151-52.

77. STEPHEN D. SUGARMAN, *DOING AWAY WITH PERSONAL INJURY LAW: NEW COMPENSATION MECHANISMS FOR VICTIMS, CONSUMERS, AND BUSINESS* 211-15 (1989).

78. *Id.* at 181-83.

ample, to denying them access to medical care). Nevertheless, we are prepared, for these purposes, to accept the award of those sorts of damages under tort law's existing procedures and standards when the availability of a tort remedy is generally thought appropriate—leaving for later the possible adjustment in those standards and procedures for intentional torts generally.

*C. Specific Policy Qualms About Spousal Emotional Abuse as a Tort*

Conceding that a cause of action for spousal emotional abuse might further some goals of tort law, such as punishment and vengeance, other goals would not be well served. The major social engineering objective assigned to tort law these days is the deterrence of socially undesirable conduct.<sup>79</sup> But despite the behavior-channelling models that economists of the family could create, we doubt that potential tort liability for outrageous conduct would improve spouses' behavior toward each other. In contrast to the role that section 46 might play in curbing outrageous commercial practices, the strong forces that turn what once was love into a willingness to deliberately harm another will usually be undeterred by the chance of paying court-ordered damages to the abused.

For the same reason, one should not be terribly optimistic that the tort of battery will curtail very much spousal physical abuse. After all, even restraining orders aimed at specific abusers do not always have sufficient deterrent power. Furthermore, if the abuser is willing to risk criminal punishment, is he likely to be controlled by the abstract threat of tort liability?

Even so, the contrast between an IIED claim and a battery claim is stark. Battery is well-defined and its social message is correspondingly clear. The message contained in a rule that merely says "do not treat your spouse outrageously" is far more attenuated. Seen in this light, the fact patterns of many IIED cases brought thus far<sup>80</sup> provide even less promising candidates for deterrence. In these cases, the defendant is usually not guilty of some sudden and obvious nastiness, but rather, has engaged in a long pattern of behavior to which the plaintiff finally objects. In such cases the defendant might not ever have considered the possibility that the conduct, which was for so long tolerated if not consented to, could later be found actionably outrageous. In short, a tort rule that threatens only those who consider

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79. Indeed, "law and economics" arose largely from this insight. *Id.* at 3-34.

80. For our discussion of these cases, see *infra* notes 160-193 and accompanying text.

their own conduct toward their spouse emotionally abusive may have no deterrent power at all.<sup>81</sup>

The importance of precise definition for this tort arises with respect to other policy arguments as well. Earlier we noted that one important argument for allowing a tort of outrageous spousal conduct could be its moralizing role.<sup>82</sup> Using tort to set at least minimal boundaries of socially acceptable conduct between married people has some appeal. But the achievement of this goal also depends upon whether the law develops a coherent and consistent rule by which to set those boundaries.

Compensation for economic losses is a second important social goal of modern tort law.<sup>83</sup> However, such compensation is not the point of IIED suits. Medical expenses and wage losses flowing from the other spouse's conduct would affect their post-divorce financial arrangements in any event, through basic divorce law. Thus, as already noted, the main *financial* purpose of an IIED suit for the victim would be to obtain punitive damages and compensation for pain and suffering.

The compensation goal of modern tort law is often explained as serving a useful loss-spreading function, by shifting the plaintiff's economic loss onto the defendant's insurance pool.<sup>84</sup> This purpose also would not be served in interspousal IIED suits that almost surely involve uninsured (and probably uninsurable) conduct. Allowing these suits will not spread losses but will only redistribute the couple's wealth. There is ordinarily no "deep pocket" to tap, unlike interspousal torts for negligent injuries when the couple's insurance policy is the target.<sup>85</sup>

This examination of tort law's deterrence and loss-spreading goals reveals how different the effects of permitting a tort of spousal emotional abuse are from the use of IIED claims against employers, landlords, bill collectors, and the like. Potential tort liability is far

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81. If one believes there will be robust behavioral responses to such tort rules, one would then need to worry about creating socially undesirable over-deterrence—with people ending marriages too early, out of the fear that if they go on and try to patch things up and it does not work they might later be sued.

82. See *supra* note 71 and accompanying text.

83. SUGARMAN, *supra* note 77, at 35-36.

84. See *id.* at 35.

85. Of course, to the extent that husbands are both abusers of and richer than their wives, the redistribution resulting from IIED suits would be progressive. But it hardly makes sense to employ tort law to achieve such a redistribution. An obviously superior method for meeting this goal is revision of the divorce law to provide more generous spousal support or allocations of marital property to the needier spouse.

more likely to deter commercial behavior largely motivated in the first instance by financial incentives than to stop spousal behavior arising from a far more complex set of motivations. Additionally, commercial enterprises can spread their losses even without insurance by raising prices and reducing investor returns.

Allowing IIED claims among spouses raises other complications, such as fashioning the measure of damages. First, in order to prevent double recovery for future income loss and medical expenses, the tort award will have to take into account the claimant's divorce law remedy. This can lead to complications. Suppose, for instance, that a tort claimant seeks compensation, in part, to pay for future therapy but the divorce settlement is already intended to provide for the claimant's health insurance coverage. Second, and potentially even more troublesome, will be the need to distinguish the compensable emotional harm actually "caused" by the "outrageous" conduct from non-compensable emotional distress that would have resulted anyway from, for example, the realization that the defendant no longer cares about the plaintiff. While tort law has to deal with these two types of difficulties all the time, it usually does not do so smoothly.<sup>86</sup> In actuality, our system typically papers over these sorts of difficulties through the mysteries of general jury verdicts.<sup>87</sup> Moreover, in the marital setting, the distinction may be especially difficult to make. Consider, for example, the wife who finally decides she can no longer put up with her husband's actionable verbal abuse and develops the courage to leave. Let us also assume this same wife is upset at confronting the actual demise of her marriage and the years she wasted trying to live with it. If this latter "upset" is considered nonactionable distress resulting from the breakdown of the marriage, can we really expect a jury to sort out these separate harms?

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86. See *Battalla v. State*, 176 N.E.2d 729, 731-32 (N.Y. 1961). In this case, a nine-year-old child sought emotional distress damages after a ski resort employee placed the child in a chair lift but failed to secure and lock the safety belt. *Id.* at 729. The claimant's father died four days after this incident from entirely unrelated causes, leaving the jury to separate the distress caused by the chair-lift operator's negligence from that caused by the claimant's father's death. *Id.* at 731-32.

87. In *Steinhauser v. Hertz Corp.*, 421 F.2d 1169, 1170 (2d Cir. 1970), the plaintiff, then 14 years old, was in an auto accident. Although there was no bodily injury, the plaintiff was soon observed to be "disturbed" and was later diagnosed "schizophrenic reaction—acute—undifferentiated." *Id.* The court's opinion noted that the defendant would be liable for the injury if the accident brought on the schizophrenia; however, if the plaintiff suffered a worsening pre-existing condition, the defendant would be entitled to a reduction in damages. *Id.* at 1173. In a memorable conclusion, Justice Friendly stated that "[i]t is no answer that the exact prediction of Cynthia's future apart from the accident is difficult or even impossible. However taxing such a problem may be for men who have devoted their lives to psychiatry, it is one for which a jury is ideally suited." *Id.* at 1174.

Finally, while it is true that spousal emotional abuse claims may be viewed as a means of punishing wrongdoing or quenching the thirst for vengeance, there is another less appealing way to look at it. Is suing for money really the sort of thing we want people to do when they are emotionally wronged in a marriage? Does society really want to send a message that in effect states that in America the way we deal with an emotionally abusive marriage is to turn it into a lawsuit for cash? Again, such suits against businesses are another matter entirely. In business, the bottom line is cash, and forcing the disgorging of cash when conduct has been outrageous seems to be more appropriate.

In sum, suits for outrageous spousal conduct do not fit comfortably with many of the sometimes conflicting societal goals of tort law. Obviously, people value these goals differently. Those who believe the central purpose of tort law is to provide justice to any wronged person are far more likely to accept tort suits for spousal emotional abuse than those whose visions of it differ. We therefore suspect that many people will not find this level of analysis persuasive one way or the other.

Hence, we turn our attention now to more precise matters. We first ask whether we can learn anything from the law's experience with related tort actions. Next, we focus on a central dilemma—the difficulty in practice of establishing a fair and judicially administrable standard of outrageous conduct in the marital setting.

#### IV. EXPERIENCE WITH RELATED TORTS

##### *A. Spousal Battering Litigation*

We expect most people favor allowing a tort claim to a person injured by a spouse's intentional infliction of physical harm, that is, the conventional battery. Take what is perhaps the easiest case. Suppose, for example, a husband, out of the blue, comes home angry and beats up his wife, permanently injuring her. She finds this behavior totally intolerable, sues him in tort, and seeks a divorce. If his conduct has disabled her to the point of impairing her future earning potential, it would certainly seem quite unfair for him to leave the marriage without suffering any financial consequences for his conduct. Or, suppose the beating leaves her with current and future medical expenses. We assume most people would find it fair that he should be required to pay for these expenses. Even if divorce law would consider the wife's financial needs in light of the battering, awarding her more property or more spousal support than she otherwise would have obtained, many people would allow her a tort claim as well. Most would want the battered spouse to have a greater entitlement from

her husband than a divorcing spouse who has been disabled from, for instance, an unavoidable illness. One plain doctrinal path to this result lies in allowing the battered wife a tort recovery that provides recompense for her pain and suffering from the beating as well as punitive damages intended to punish the husband and stigmatize his conduct, neither of which would be available under a thoroughly no-fault divorce law.

Two facts combine to justify allowing the battered wife more from her husband than a divorcing wife who is disabled from other causes. First, the battered wife has been terribly wronged by her husband, and second, her financial losses as well as her pain and suffering were caused by that wrong. As for the wife disabled by illness, we might believe, perhaps depending upon other facts such as the length of their marriage, that her former husband also should share in the financial losses flowing from her disability. But we are unlikely to believe that he is responsible to shoulder *all* of that loss, and certainly not when that obligation would make him less well off than her. Moreover, if the disabled wife's *financial* loss is relatively small—say, for example, that she loses the use of her legs and is in a wheelchair but is not prevented from engaging in the same occupation as before—then we might think he has little liability to her. That is, the fact that they are now divorcing itself provides no reason why he should compensate her for any of her nonfinancial losses flowing from her paraplegia. However, where the wife's paraplegia arose from her husband's physical abuse, leading her to want a divorce, the case feels altogether different.

Yet, even though spousal battery claims seem well justified and generally are permitted under state law,<sup>88</sup> they are infrequent.<sup>89</sup> To be sure, the batterer is often poor, unemployed, or otherwise an unpromising source of compensation. But plainly there are a sufficient number of more financially comfortable batterers to conclude that judgment-proof defendants are not the entire explanation for the paucity of lawsuits. Nor does it seem likely that victims reject tort claims because they obtain financial recompense through other legal avenues. For example, the criminal battery laws of some states permit the victim a compensatory award,<sup>90</sup> and other states also may allow a

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88. See *supra* note 66 and accompanying text.

89. Although we have found no statistics on this point, discussions with both divorce lawyers and lawyers representing battered women convince us that the number of battered victims who sue in tort represents a tiny proportion of the total.

90. See *Developments in the Law: Legal Response to Domestic Violence*, 106 HARV. L. REV. 1498, 1531 (1993) (presenting an overview of "the legal system's responses to domestic



compensatory award for the victim of spousal abuse who obtains a restraining order against her assailant.<sup>91</sup> Yet practitioners with whom we have talked tell us that these remedies, like tort suits, are rarely pursued by spousal battery victims.

It is not entirely clear to us why spousal battering victims so rarely seek special financial redress. Because we do not know the actual explanation, we can only consider the various possibilities. Keep in mind that the question for us is whether the explanation for the lack of battery claims, whatever it is, tells us anything helpful about the wisdom of permitting spousal suits for outrageous conduct.

One explanation that seems likely is that neither the battery victim nor her lawyer even considers the tort suit possibility. A common pattern, we imagine, involves battery incidents that leave the victim with no permanent physical loss, even though they are painful and humiliating when they occur. Perhaps the victim initially responds to these experiences by trying to avoid events or situations that might provoke the batterer, or by staying out of his way at those times. When these strategies fail, the victim eventually leaves the marital home, and at some point then consults a divorce lawyer. Especially if the victim has no permanent physical injury, it might not occur to a divorce lawyer—who may have never handled a personal injury case, and who does not think of himself as a personal injury lawyer—that a tort claim is a possibility, even though the lawyer would understand, if the matter were raised, that it is doctrinally clear that a battery has been committed. But the victim may never raise the question because the goal foremost in her mind when she consults the lawyer is ending her relationship with the batterer. She is also likely to be concerned about the custody and support of her children, and perhaps about leaving with a fair share of accumulated property. Again, however, these concerns translate much more easily into traditional divorce rather than tort claims.

Even if the tort possibility is raised, we can imagine more than a few reasons why the battery victim and her lawyer would decide not to pursue it, especially in the case in which there is no remaining physical injury. In the basic pattern we imagined, the victim's avoidance efforts may have been successful in reducing the frequency of incidents considerably—and claims resting on some, or even all, of the

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violence"). Statutes providing compensation for victims of violent crimes also typically cover spousal battering. *See, e.g.*, V.I. CODE ANN., tit. 34,162 (1994).

91. *See, e.g.*, MISS. CODE ANN. § 93-21-15(f) (1981); N.J. STAT. ANN. § 2C:25-29(4) (West 1995).

physical strikings may now be barred by the statute of limitations.<sup>92</sup> The price of having acted in ways designed to forestall further battering may, of course, have been great stress for the victim, but that stress does not itself present a battery claim. With only few recent incidents of physical attack, the victim and her lawyer might believe there is little prospect for obtaining an award large enough to warrant the additional lawyer time. Indeed, they may foresee that a battery claim will provoke some retaliatory legal strategy that will further increase the cost and hassle of the divorce process.

Other spousal battering victims may pursue no legal remedy against their abusers because they may fear further and more serious postseparation physical abuse. Others may find the psychological price of such a claim too high. They may feel personal shame in having been abused, leaving them either unwilling to reveal it in a public process, or believing it too painful to relive the abuse by testifying to it in a legal proceeding. Finally, whether warranted or not, many may doubt that their claims will be sympathetically received. They may worry that the court will dismiss their charges as manufactured, especially if they suffered abuse for some time and have no witnesses or physical evidence to offer. Some battering victims may assume that because of their own conduct judges and juries will not be sympathetic. Suppose the victim is a drug addict, or a drinker, or an adulterer, or a whiner and complainer. While we assume that most readers would strongly agree that none of this remotely entitles the other spouse to engage in physical abuse, the victim may nonetheless fear that if she takes the matter to court she will be thought to have earned the beating.

What then are the implications of these explanations for allowing spouses to bring IIED actions? One interpretation is that if battery claims are rarely brought, then IIED claims are unlikely to be brought either, suggesting perhaps that there is little downside to allowing them. Certainly if divorce lawyers do not think of bringing battery claims on behalf of their physically abused clients, one could argue that they would rarely think of bringing IIED claims on behalf of their emotionally abused clients.

On the other hand, some of the factors that may discourage battery victims from seeking redress may not apply to emotional abuse victims. The very act of leaving the abuser and seeking divorce may

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92. This was the problem confronted by the plaintiff in *Davis v. Bostick*, 580 P.2d 544, 547-48 (Or. 1978) (holding that several past strikings and threats were not "continuous," hence triggering the statute of limitations).

evidence a newly found emotional strength that makes the IIED plaintiff feel less vulnerable to retaliatory abuse than would the battery plaintiff, who is unlikely to have newly found physical strength.

Of greater concern is the possibility that as the IIED action's availability became known it would be more likely than battery to draw the attention of questionable plaintiffs. IIED is far easier to plead and arguably far more widespread among solvent defendants than is physical battery. Almost certainly, a far higher percentage of affluent spouses will see their estranged mates as perpetrators of outrageous, emotionally abusive conduct than those who see them as perpetrators of physical battery. While the subjective lens of spousal bitterness easily can transform nasty conduct into outrageous conduct, it is less likely to invent a physical attack that never actually took place. Especially if the liability standard is not clear, lawyers on both sides may find it more difficult to defend against the questionable IIED claim than the questionable battery claim. The plaintiff's lawyer may thus see more strategic advantage in making such an IIED claim, and the lawyer for the innocent IIED defendant may feel less able, compared to a questionable battery case, to assure the client that the risk of significant exposure is low. Permitting the spousal IIED claim thus may present a greater risk of generating a significant number of dubious actions whose settlement distorts the divorce process. Potential defendants of significant means would presumably be especially at risk.

In sum, it appears that both sides of the IIED debate can find something in the battery experience to support their cause. While our speculations suggest that the balance favors those who doubt the wisdom of permitting IIED claims, they remain speculations. Perhaps the main point to note is that the problems with IIED claims, if they in fact would arise in large numbers, are traceable in significant respects to the open-ended nature of the liability standard.

*B. Alienation of Affections, Breach of Promise to Marry, and Related Torts*

Traditionally, several related torts existed to protect those harmed through the destruction of the marital relationship. Some of these torts concerned called-off engagements, such as "breach of promise to marry." In these cases, the would-be groom was nearly always the defendant,<sup>93</sup> and because the couple never married, interspousal immunity was, of course, no bar. Some courts also recognized an action for "interference with the betrothal relationship," in which

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93. See 2 HARPER ET AL., *supra* note 58, § 8.1.

the defendants might be those who were trying to prevent themselves from becoming in-laws.<sup>94</sup>

Related torts focused on marriages gone off the rails. Two very similar claims were for “alienation of affections” and for “criminal conversation”—in both cases the defendants were persons outside the marriage.<sup>95</sup> The former normally was brought against the other spouse’s lover, but in principle also could be maintained against others who caused a decrease in spousal affections or injured the plaintiff’s consortium rights.<sup>96</sup> This action was available against other relatives as well as strangers.<sup>97</sup> The latter, brought exclusively against lovers, was an odd label for having sex with another man’s wife.<sup>98</sup> Yet another claim was sometimes recognized for “seduction,” although this tort mainly was aimed at protecting a man’s interests with respect to the premarital chastity of his daughter and the loyalty of his servants, and, if brought with respect to a spouse, essentially duplicated criminal conversation.<sup>99</sup>

These torts arose in entirely different times, when only men’s rights counted after marriage (and men were, in effect, thought to own their wives as they did their horses), when marriage was often a matter of economic alliance, when premarital and extramarital sexual activities were far more stigmatized, and when women were viewed (or at least stereotyped) as both passive and gullible.<sup>100</sup>

Nevertheless, these various torts formed the basis of lawsuits common in many states well into the twentieth century,<sup>101</sup> even though by then we had entered into an era of changing notions about marriage, divorce and remarriage, women’s autonomy, and so on. In this changed cultural setting, these common-law torts could be understood as upholding conventional morality with respect to marriage, as well as protecting the emotional feelings and community standing of those wronged by others who would flout that conventional morality. In other words, a bride should not be left at the altar. Nor should a man promise to marry a woman, even privately, and then renege, es-

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94. *Id.* § 8.2.

95. William M. Kelly, Note, *The Case for Retention of Causes of Action for Intentional Interference with the Marital Relationship*, 48 NOTRE DAME L. REV. 426, 427-29 (1972) (discussing the common-law development of familial torts).

96. *Id.* at 428-29.

97. Marshall L. Davidson III, Comment, *Stealing Love in Tennessee: The Thief Goes Free*, 56 TENN. L. REV. 629, 644-49 (1989) (noting that actions for alienation of affections in Tennessee could be brought against other parties).

98. Kelly, *supra* note 95, at 427.

99. CLARK, *supra* note 38, at 270-71 (listing the elements of seduction).

100. Kelly, *supra* note 95, at 429-33 (discussing arguments for abolishing those torts).

101. *Id.* at 429 (noting that in 1972 a majority of states still permitted these tort claims).

pecially if she agrees to premarital sexual relations with him in reliance on his promise. Neither should spouses seek out affairs with others, nor should third parties seek liaisons with married people aiming to steal away their affection or sexual favors.

But starting in the mid-1930s, strong reaction arose against allowing tort claims for these various sorts of wrongful behaviors with respect to marriage.<sup>102</sup> As a result, more than half the states have now passed statutes abolishing at least one and usually most or all of these traditional causes of action.<sup>103</sup> In addition, many courts have in more recent years eliminated their continuing viability as common-law actions.<sup>104</sup>

This experience alone, we think, should lend considerable doubt to the wisdom of recognizing a new role for tort law—through the tort of spousal emotional abuse—in setting and enforcing standards of proper marriage-related behavior.

Moreover, the specific reasons often given for eliminating these torts also arguably counsel against permitting claims for spousal emotional abuse. For example, one frequent explanation for the abandonment of these torts is that the truly wounded rarely sued, but instead fraudulent claims often were made or threatened in order to obtain a quiet cash settlement.<sup>105</sup> This case was made most strongly with respect to “breach of promise” actions, in which it was commonly said that the truly injured would-be bride was too embarrassed to publicize her humiliation and perhaps would lose her virtue by filing suit. Meanwhile the unscrupulous woman would threaten a false claim in the hopes of extracting a quick and quiet financial settlement from an innocent man who feared the reputational stain of a public lawsuit.

Some are concerned that this same pattern might emerge with lawsuits for spousal emotional abuse, in which the truly emotionally devastated will cringe at the prospect of tort litigation while the steel-nerved and vindictive cheerfully will lie about the details of the couple’s intimate relationship. This risk is greater than that posed in battery cases, because those wrongfully accused can challenge the ab-

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102. For examples of modern writing on the issue, see Kay Kavanagh, Note, *Alienation of Affections and Criminal Conversation: Unholy Marriage in Need of Annulment*, 23 ARIZ. L. REV. 323 (1981); Kelly, *supra* note 95, at 429-33; Davidson, *supra* note 97, at 656-57. South Carolina, for example, abolished the tort of alienation of affections in 1992 in *Russo v. Sutton*, 422 S.E.2d 750, 753 (S.C. 1992).

103. *Russo*, 422 S.E.2d at 752 n.2 (listing state statutes abolishing alienation of affection and criminal conversation).

104. *Id.* at 753 n.3 (listing state cases abolishing alienation of affection and criminal conversation).

105. Kelly, *supra* note 95, at 430.

sence of bruises and medical reports. Indeed, today the risk of invented IIED claims may be greater than the risk of fraudulent breach of promise claims, given that with changed morals, public accusation of the former is the far greater embarrassment.

A second argument given for eliminating the traditional torts of criminal conversation and breach of promise is more substantive: as people think of marriage more in affective terms and less in terms of duty and propriety,<sup>106</sup> doubt is cast on whether people should have the right to protect marital interests with damage actions. This doubt reflects the contemporary cultural reality that marriage is based upon romantic love, that many couples divorce and remarry, that divorce ordinarily is no longer so stigmatizing, and that infidelity is widespread and no longer thought controllable by law. There surely seems little point in penalizing someone for not going through with a marriage ceremony if that person has the right to obtain a divorce the day after the wedding with little or no financial obligation to his overnight spouse. Engagements are now viewed more as tryout periods than commitments, and broken engagements do not have the same detrimental consequences on marriage prospects as they once often had. This way of thinking does not deny that one could be emotionally wounded by a broken engagement or the estrangement of one's spouse, but it rejects one's right to recover cash for it. That same perspective may be applied to spousal claims of emotional abuse.

In sum, the law's unhappy experience with these related torts suggests two concerns with allowing spousal IIED claims. First, such claims would allow an unacceptably high proportion of claims by the "wrong" plaintiffs, and second, the "policing" of romantic misadventures is an inappropriate use of the legal system. On the other hand we must acknowledge some limitations to this analysis. First, not only do some states still formally recognize some or all of these traditional torts, they have actually been successfully pursued by plaintiffs even into the 1990s.<sup>107</sup> While these jurisdictions may not invoke the ancient justifications for these torts, the laws in these states still stand for the idea that conventional morality has its place with respect to marriage and deserves the law's support. So, for example, if a husband decides he wants to leave his wife for another woman, these tort principles assert that even today he should get divorced first. Of course, in the real world, it often does not happen like that. People often find

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106. *Id.* at 430-31 (noting the hostility to the common-law view of the husband's proprietary interest in his wife).

107. *See, e.g., Kirk v. Koch*, 607 So. 2d 1220, 1224 (Miss. 1992) (upholding a \$50,000 damage award in an action for alienation of affections).

themselves involved with others before they decide that they want a divorce.

Second, from a different approach, one can argue that the very point of the spousal emotional abuse tort is to replace the “old” torts. In the past these “old” torts presumptively treated entire categories of conduct as completely out-of-bounds, and, of course, those presumptions are no longer apt. This argument claims that in individual cases where marriage-related misconduct is sufficiently out-of-bounds to merit condemnation, this new tort will serve that function, thereby preventing us from throwing out deserving claims along with undeserving ones.

As for this last point, we believe its validity depends upon the assumption that the courts could fairly and effectively administer the tort of spousal emotional abuse on a case-by-case basis, an assumption that we examine at length below.

### C. *Negligent Infliction of Emotional Distress*

At common law the traditional view was that there was no broad cause of action for the negligent infliction of emotional distress (NIED).<sup>108</sup> Instead, before any recovery could lie for emotional upheaval caused by another’s carelessness, it was ordinarily first necessary to show that the defendant’s conduct had brought him or something into physical contact or “impact” with the victim.<sup>109</sup>

Many explanations have been given for this rule, including the idea that emotional injury is too easily feigned both in fact and extent; that emotional distress is unsuitable for judicial recognition because emotional upheavals are a necessary part of life; that without “impact” the defendant and the jury might be mystified about whether the true cause had been identified; that people who suffer grave consequences from emotional shocks are probably hypersensitive; and that if courts

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108. See *infra* notes 109-110 and accompanying text.

109. The leading case was *Mitchell v. Rochester Ry. Co.*, 45 N.E. 354 (N.Y. 1896), *overruled by* *Battalla v. State*, 176 N.E.2d 729 (N.Y. 1961). In *Mitchell*, the court held that the plaintiff could not recover for injuries “occasioned by fright, because there was no personal injury.” *Id.* at 354-55. The defendant in *Mitchell* drove carelessly around a corner causing the plaintiff “great fright” by leading her to fear that she or the child with her would be hit, or that the fetus she was carrying would be hurt. *Id.* at 354. The plaintiff was not permitted to recover for her consequent injury even though that injury included a miscarriage, nightmares, the need for ongoing medical treatment, and future psychological inability to leave her house. *Id.* at 354-55.

recognize a cause of action for emotional distress they will be flooded with litigation.<sup>110</sup>

Currently, most if not all of these arguments are regarded with some suspicion. As a result, courts for the most part have abandoned the earlier outlook, and impact is no longer the touchstone for recovery.<sup>111</sup> The difficulty here, as compared to the tort of intentional infliction of emotional distress, is the focus on the victim's reaction rather than on the defendant's conduct. As previously noted, IIED might better be called the tort of outrage, because the essential element is the outrageous conduct of the tortfeasor, with intent to cause the emotional distress being neither a necessary nor a sufficient condition of liability.<sup>112</sup> But this compass of "outrage" necessarily is lost when we move from the intentional to the negligent tort. No satisfactory replacement for it has been found. Tort law on the negligent infliction of emotional distress thus remains highly unstable, varying from state to state, and lacking any satisfactory consensus among courts and commentators about its nature.<sup>113</sup> Still, some things are reasonably clear. We might ask whether the more well-defined aspects of NIED offer a lesson for our inquiry, in areas where the compass of outrage may be unhelpful. Two kinds of NIED claims are widely allowed. First, if you are put in fear of physical injury to yourself by the negligence of another, you may sue for the emotional distress you suffer.<sup>114</sup> Second, a large number of jurisdictions permit suits by those

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110. See Martha Chamallas & Linda Kerber, *Women, Mothers, and the Law of Fright: A History*, 88 MICH. L. REV. 814, 824-34 (1990) (noting that when the harm "arises" from the body of the plaintiff, the legal system is less willing to assign legitimacy to the claim). It is also perhaps not out of place to note that many of the early unsuccessful plaintiffs were women who failed to gain empathy for their harm from the universally male judiciary. Several of the famous early cases involved claims of miscarriage, and we assume judges were probably reluctant to examine evidence on pregnancy and sexuality in their courtrooms.

111. See, e.g., *Dillon v. Legg*, 441 P.2d 912, 924 (Cal. 1968) (en banc) (holding that general principles of negligence, proximate cause, and foreseeability govern fright-induced injury cases).

112. See *supra* notes 48-53 and accompanying text.

113. For two recent efforts to sort out the differences between NIED and IIED claims, see David Crump, *Evaluating Independent Torts Based upon "Intentional" or "Negligent" Infliction of Emotional Distress: How Can We Keep the Baby from Dissolving in the Bath Water?*, 34 ARIZ. L. REV. 439, 507 (1992) (advocating the intentional tort approach to emotional distress); Julie Davies, *Direct Actions for Emotional Harm: Is Compromise Possible?*, 67 WASH. L. REV. 1, 53 (1992) (favoring expanding the availability of claims beyond risk of physical injury and reducing the role of foreseeability in determining duty owed).

114. See, e.g., *Battalla v. State*, 176 N.E.2d 729 (N.Y. 1961), *overruling* *Mitchell v. Rochester Ry.*, 45 N.E. 354 (N.Y. 1896). A rash of recent lawsuits in this category have involved emotional shock incurred during air travel. See cases cited *infra*. Perhaps the plane is partly disabled (for example, a door is blown out, or there is an engine fire) or went into a



who are emotionally shocked by seeing their loved ones killed or injured through the negligence of others.<sup>115</sup>

Often however, people suffer emotional injury for reasons arising neither from witnessing harm to family members nor from fear of physical injury to themselves. These types of cases have given courts a great deal of trouble. Two historic examples, however, allow an exception to the impact rule. One example is when a corpse is negligently mishandled in front of grieving family members;<sup>116</sup> the other example involves the negligent transmission of incorrect news that a loved one had died when in fact the person is still alive.<sup>117</sup>

No clear principles support these exceptions to the impact rule, although two things might be said about them. First, we have little doubt that people would be distressed emotionally by the conduct involved. Second, because neither the corpse nor the still-living relative could sue, the only way tort law can punish the defendant and attempt

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nosedive. In many of these cases there is no actual crash that physically hurts the plaintiff. In others the plane finally crashes and kills the passengers, but the suit (attached to the wrongful death suit) is for the emotional distress presumptively suffered in the moments before death when, it is argued, the passenger realized that he was going to die. Although courts remain divided on these various cases, the trend is toward allowing recovery. See *Haley v. Pan Am. World Airways, Inc.*, 746 F.2d 311, 315 (5th Cir. 1984) (allowing recovery in wrongful death suit governed by Louisiana law); *Solomon v. Warren*, 540 F.2d 777, 792-93 (5th Cir. 1976) (allowing recovery in wrongful death suit governed by Florida law), *cert. dismissed*, 434 U.S. 801 (1977); *DeYoung v. McDonnell Douglas Corp.*, 507 F. Supp. 21, 23 (N.D. Ill. 1980) (refusing to allow recovery); *Quill v. Trans World Airlines, Inc.*, 361 N.W.2d 438, 443-44 (Minn. Ct. App. 1985) (allowing recovery when there was no crash).

115. The classic example is the mother who watches as her young child is struck and killed by a careless driver. Many courts, understandably, have found it odd that the mother who fears that she too will be run over would be able to sue but the one who fears for her child could not. *Mitchell*, 45 N.E. at 354-55; see *supra* note 109. As a result, in many states other-oriented mothers are now also allowed to recover for emotional distress in such settings. The leading case is *Dillon v. Legg*, 441 P.2d 912 (Cal. 1968) (en banc) (permitting mother who witnessed death of her child to recover).

As in *Dillon*, these "indirect harm" claims are often hemmed in by specific judicial requirements: the plaintiff must be a close family member and was actually present and witnessed the accident. *Id.* at 920-21. Such rules exclude, for example, plaintiffs who are shocked from later hearing about the event, those who are shocked from arriving at the scene moments after the accident and viewing one's child lying dead or bleeding in the road, and those who suffer emotional distress from witnessing the negligent killing of their best friend or "domestic partner." No agreement as to the proper way to handle these "indirect" cases has been achieved.

116. See, e.g., *Gammon v. Osteopathic Hosp., Inc.*, 534 A.2d 1282, 1283 (Me. 1987) (allowing the plaintiff to sue a hospital after discovering a bloodied, human leg in a bag the plaintiff believed contained the personal effects of his recently deceased father).

117. See, e.g., *Johnson v. State*, 332 N.E.2d 590, 591 (N.Y. 1975) (permitting suit against hospital that sent telegram to daughter incorrectly informing her that her mother had died).

to discourage this conduct in the future is to grant a cause of action to the shocked relative.

Given the seemingly infinite variety of life, it is hardly surprising that over time courts have been presented with a wide range of additional claims for emotional harm. Although not involving fear of physical injury, many of these claims do seem as compelling as the two historic examples noted above.<sup>118</sup> One much-discussed emotional harm case of this sort involved a doctor who negligently diagnosed a wife as having syphilis, and told her to inform her husband.<sup>119</sup> This understandably led to cross-accusations of infidelity, the end of the marriage, and emotional suffering by both parties.<sup>120</sup> Later the couple learned that she never had syphilis.<sup>121</sup> Arguably, many states would allow the wife a suit against the doctor for NIED. What about the husband? Saying that he too was a "direct" victim of the doctor's negligence, the California Supreme Court recognized his cause of action.<sup>122</sup> Other states would see it the other way, perhaps rejecting entirely the idea that NIED claims routinely ought to be made available to "direct victims" who do not fear for their physical safety.<sup>123</sup>

From this background one can see that some jurisdictions would reject NIED claims between spouses as part of a more general rejection of most NIED claims. By contrast, in more liberal jurisdictions the mechanical application of prevailing doctrine would allow NIED claims between spouses because the plaintiff would be a "direct" vic-

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118. See, e.g., *Johnson v. Jamaica Hosp.*, 467 N.E.2d 502, 503 (N.Y. 1984) (denying recovery when plaintiffs' baby was abducted from defendant's hospital); *Oresky v. Scharf*, 510 N.Y.S.2d 897, 898 (App. Div.) (disallowing recovery where plaintiffs' mother, who had Alzheimer's disease, wandered away from defendants' nursing home), *appeal dismissed*, 507 N.E.2d 316 (N.Y.), *and appeal denied*, 509 N.E.2d 361 (N.Y. 1987); *Nieman v. Upper Queens Medical Group*, 220 N.Y.S.2d 129, 130 (N.Y. City Ct. 1961) (disallowing suit in which defendant negligently reported that plaintiff's sperm count indicated sterility). Although in all these cases the plaintiffs understandably are emotionally upset, many have lost because of judicial reluctance to extend liability beyond traditional bounds.

119. *Molien v. Kaiser Found. Hosp.*, 616 P.2d 813, 814 (Cal. 1980) (en banc).

120. *Id.* at 814-15.

121. *Id.* at 814.

122. *Id.* at 817 (holding that the doctor owed the plaintiff-husband a duty of care when examining the wife, and that the doctor's alleged tortious conduct was directed against both the plaintiff and his wife).

123. Compare *Rodrigues v. State*, 472 P.2d 509, 520 (Haw. 1970) (adopting similar standard to that used in IIED cases) and *Gammon v. Osteopathic Hosp., Inc.*, 534 A.2d 1282, 1283 (Me. 1987) (allowing NIED claim to victim who had not feared for personal safety) with *Bovsun v. Sanperi*, 461 N.E.2d 843, 848 (N.Y. 1984) (adopting the "zone of danger" standard, allowing a plaintiff exposed to unreasonable risk of harm or death to recover damages for serious injury or death of an immediate family member resulting from the same negligent conduct) and *Tobin v. Grossman*, 249 N.E.2d 419, 422 (N.Y. 1969) (refusing to extend the rule to include third persons not physically injured in an accident).

tim. Yet most couples, courts, and scholars likely would find it ludicrous to suggest that a cause of action should lie for the careless "emotional bruising" of one spouse by the other in his or her marital role. Consider some everyday examples. Suppose a spouse carelessly, even repeatedly, forgets about the couple's anniversary or the other spouse's birthday. Or suppose a spouse thoughtlessly, and perhaps often, comes home much later than promised. Or suppose one spouse is unthinkingly rude to the other in the presence of friends. Or maybe, through indifference, one treats the other more like an employee than a spouse. Or perhaps one spouse is too self-absorbed and as a result inattentively ignores the other's emotional needs. Suppose further that because of these oversights the other spouse suffers great unhappiness and sleepless nights, and is sufficiently upset to seek therapy. Few people would believe the emotionally distressed spouse should then be compensated in a lawsuit. Whatever unarticulated principle courts use in limiting NIED suits, it would surely exclude these types of claims. It may be instructive to ask why.

While emotionally wounding incidents surely occur in most marriages, lawsuits should not. Additionally, there may be doubt that the judiciary is well equipped to select from the common array of hurtful incidents those few that plausibly might be thought actionable. The marital context adds special difficulties to the application of the usual negligence principles. On one hand, the marital relation implies for most people an enhanced moral duty to one's spouse, suggesting that a finding of unreasonable conduct might arise from behavior that would not violate one's obligation to others. It is surely worse to ignore a spouse's birthday than a friend's. Yet, at the same time, love implies a mutual indulgence and tolerance for the shortcomings of one's spouse, including even his or her unreliability in these very matters. Hence, an incident of spousal insensitivity may be at the same time negligent and excusable. Heightened moral obligation and special privilege, so to speak, seem to go hand in hand.

Of course an entitlement to spousal indulgence has its limits. But most people, we believe, would conclude that divorce rather than redress is the proper remedy for those who feel irreconcilably aggrieved from their spouse's emotional carelessness. This seems especially apt because, although an individual spouse will know when the breach has gone too far, it is difficult to have confidence that a judge or jury could reliably determine that same question in the course of adjudicating any particular NIED claim in the marital setting. We therefore conclude that even a jurisdiction with a very liberalized NIED stan-

dard would probably adopt a rule barring interspousal claims for NIED.<sup>124</sup>

More important, the conclusion that interspousal cases should be excluded from a general regime otherwise allowing recovery for NIED suggests that it would not necessarily be unprincipled to exclude interspousal IIED claims as well. At a minimum, the NIED analysis convinces us that it counts for little to argue that merely because courts generally recognize IIED claims, they should be available for spousal emotional abuse.

The key difference between NIED and IIED is the added element of outrageousness. The question is whether this element provides the courts with an adequate basis for distinguishing the cases in which a spouse's duty has been breached by unprivileged conduct from cases in which it has not. Here again, the case for recognizing an interspousal IIED claim requires a convincing showing that the "outrage" standard is administrable in the marital setting.

#### *D. Punitive Damages Claims Generally*

Can we learn anything about the likely frequency of IIED claims between spouses from our experience with punitive damages awards generally? The outrage requirement of the section 46 claim is similar to what tort law generally requires for the recovery of punitive damages in any setting.<sup>125</sup> Punitive damages are awarded in a small proportion of tort suits,<sup>126</sup> and this may give some people confidence that

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124. Doctrinally, the best way to do this is through the adoption of a legal "no duty" rule. We have not found any cases that squarely address this issue. In *Twyman v. Twyman*, 855 S.W.2d 619 (Tex. 1993), the Texas Supreme Court concluded that the trial court probably based the plaintiff's award on an NIED theory and remanded it for reconsideration as an IIED case. *Id.* at 626. However, Texas has rejected NIED claims as a broad category, not just in the interspousal context. *Id.* at 621, 626.

Note that our discussion of NIED claims has focused on what we have called "marital" conduct. Consider, by contrast, a case in which one spouse carelessly backs the family car out of the garage and nearly runs the other down, thereby imposing a severe emotional shock on the other and leading to substantial emotional harm. That case, we think, is probably and properly actionable.

125. The *Restatement* provides, "Punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others." RESTATEMENT (SECOND) OF TORTS § 908 (1965).

126. See, e.g., Stephen Daniels & Joanne Martin, *Myth and Reality in Punitive Damages*, 75 MINN. L. REV. 1, 31-39 (1990) (noting a 4.9% incidence of punitive damage awards in a 5-year, 42-county study encompassing 10 states); Marc Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 AM. U. L. REV. 1393, 1411-17 (1993) (collecting and discussing a number of studies on punitive damages).

awards for spousal emotional abuse would be made in only a small proportion of divorces.<sup>127</sup>

Yet those concerned about punitive damages counter that claims are made far more often than they are awarded and that jury unpredictability creates considerable uncertainty about whether they would be awarded in any specific case.<sup>128</sup> If the same result followed spousal IIED claims, then the threat of suit could affect divorce negotiations and undermine no-fault divorce policies, even if IIED claims were not often successful. The gravity of this problem, as with others we have raised, seems to be directly connected to the precision with which tort law could define actionable spousal conduct. Simply put, claims are less likely to be brought for conduct that unambiguously falls outside the rule's reach. But the less precise the rule, the wider the range of conduct that arguably falls within it.

Other lessons from the punitive damages experience may counsel against recognizing open-ended rules of recovery for spousal misconduct. It is sometimes said that the uncertain standard for punitive damages often results in awards that are excessive and not fairly deserved.<sup>129</sup> Examples of these unjust awards are found in personal injury suits by consumers allegedly harmed by defective products.<sup>130</sup> These disproportionate punitive awards allegedly result in several socially undesirable consequences, such as: extra legal fees to defend such claims; unjustly high payments to settle the suits; a reluctance to discharge unsuitable employees; or unwillingness to market suitable products.<sup>131</sup> Some parallel results are possible from allowing actions for outrageous spousal misconduct, results that might be expected if

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127. However, one should note that punitive damage awards are significantly more frequent in successful emotional harm cases. Daniels & Martin, *supra* note 126, at 37-38. Furthermore, such awards are more frequent in intentional torts cases. Galanter & Luban, *supra* note 126, at 1411.

128. Galanter & Luban, *supra* note 126, at 1410-11 (noting reformers' argument that punitive damage awards "are the greatest cause of legal uncertainty for innovators"); James B. Sales & Kenneth B. Cole, Jr., *Punitive Damages: A Relic That Has Outlived Its Origins*, 37 VAND. L. REV. 1117, 1155-56 (noting the increasing number of awards).

129. See, e.g., JAMES N. DERTOUZOS & LYNN A. KAROLY, RAND INST. FOR CIVIL JUSTICE, LABOR-MARKET RESPONSES TO EMPLOYER LIABILITY 8-9 (1992); David G. Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. CHI. L. REV. 1, 59 (1982) (pondering whether punitive damage awards in product liability cases are sometimes unfair or too large); Sales & Cole, *supra* note 128, at 1154-58.

130. Sales & Cole, *supra* note 128, at 1157.

131. DERTOUZOS & KAROLY, *supra* note 129, at 35-45. See generally THE LIABILITY MAZE: THE IMPACT OF LIABILITY LAW ON SAFETY AND INNOVATION (Peter W. Huber & Robert E. Litan eds., 1991).

divorce lawyers find it necessary to file a companion tort suit in order to protect themselves from malpractice claims.<sup>132</sup>

## V. IS SPOUSAL EMOTIONAL ABUSE A JUDICIALLY ADMINISTRABLE CONCEPT?

At several points in our discussion of the desirability of recognizing a tort of spousal emotional abuse, we have mentioned the importance of establishing a clear standard for what constitutes outrageous conduct.<sup>133</sup> We now deal directly with this issue. First, we consider aspects of current and past divorce law in which analogous inquiries arguably are made. Second, we look to the few cases that have already addressed the question of whether section 46 tort claims should be available in the marital setting. Finally, we assess the issue of judicial administerability more generally.

### A. *Divorce Law Experience with Defining "Outrageous" Conduct*

One natural place to look for experience in defining outrageous marital conduct is the divorce law. After all, as noted earlier, several states still allow divorce courts to consider fault when fixing alimony awards or dividing property.<sup>134</sup> The standards developed for that purpose possibly would assist in establishing a clear definition of the outrageous conduct that could be actionable in tort. We conclude, however, that in this respect divorce law is not a promising source of standards.

In the first place, less law exists in this area than one might expect. Some states that allow consideration of fault in principle limit it in ways that make it irrelevant to our problem. For example, some states hold that marital misconduct can be considered only to the extent it has economic (that is, financial) consequences.<sup>135</sup> This rule retains, as the core purpose of alimony and property allocation, adjustment of the spouses' relative financial positions. It is not used to punish or to provide one spouse compensation for the other spouse's morally offensive conduct when the resulting harm is noneconomic.

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132. Such potential exposure may help explain why many divorce lawyers have shown some hostility to permitting IIED suits in the divorce context. For a discussion of lawyers' views about whether tort claims between divorcing spouses will become commonplace, see Beverly Beyette, *Will Divorce Torts Play Here?*, L.A. TIMES, May 1, 1988, § 6, at 1.

133. See *supra* notes 55-57, 81 and text accompanying notes. Professor Cole recognizes this concern as well. See Cole, *supra* note 20, at 569.

134. See *supra* notes 7-10 and accompanying text.

135. See Woodhouse, *supra* note 7, at 182 nn.20-21; see also *supra* note 31 (listing statutes).

States with rules that allow consideration of only financial misconduct present much the same difficulty.<sup>136</sup> Therefore, experience in these states does not assist our formulation of a standard that would help specify the meaning of "outrageous" marital misconduct for purposes of IIED claims.<sup>137</sup>

At the other end of the spectrum are states that permit divorce courts to consider, in a very open-ended way, the merits or faults of the parties in allocating property or awarding alimony.<sup>138</sup> Trial judges in such systems occasionally may be reversed by appellate courts that find their conclusions extreme,<sup>139</sup> but for the most part these states substitute trial judge discretion for rules, and provide us no help in searching for a more certain standard of outrageous marital conduct.<sup>140</sup> Although the opinions in these states sometimes assign fault only to misconduct causing the other spouse harm, or leading to the marriage's demise, such limitations are illusory in operation, effectively adding nothing to the inquiry.<sup>141</sup> Hence, the experience of

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136. See, e.g., *supra* note 31 (citing statutes).

137. The Kansas Supreme Court recognized this point in *In re Marriage of Sommers*, 792 P.2d 1005 (Kan. 1990), noting that "[t]he court, in such circumstances, is not imposing a penalty for fault but is considering the circumstances of the parties as they exist and making its award based on such" circumstances. *Id.* at 1010.

138. A relatively recent example is *Sparks v. Sparks*, 485 N.W.2d 893 (Mich. 1992), in which the court merely stated that marital fault is one of several factors that the trial court is permitted to consider in allocating property. *Id.* at 894. Other examples include *Marble v. Marble*, 457 So. 2d 1342, 1343 (Miss. 1984) (holding that the wife was not entitled to alimony because she admitted that the marital problems were the fault of both parties); *Emmons v. Emmons*, 450 A.2d 1113, 1115 (Vt. 1982) (holding that within some limits fault was relevant under a statute directing a division of property "having regard for the respective merits of the parties"); and *Grosskopf v. Grosskopf*, 677 P.2d 814, 819 (Wyo. 1984) (holding that in both allocating property and awarding alimony, the court can consider "merits" of the parties, defined as their relative "deservedness" or "goodness").

139. E.g., *Sparks*, 485 N.W.2d at 902 (holding that trial court gave wife's adultery "disproportionate" weight in allocating 75% of marital property to husband).

140. See, e.g., *Barth v. Barth*, 800 S.W.2d 127, 130 (Mo. Ct. App. 1990) (finding that an award to the wife of 55% of the substantial marital property at the termination of the parties' 11-year marriage could be justified by the husband's affair and his sale of marital assets without his wife's knowledge). The court provided little analysis to support this result other than observing that each case must be decided on its own facts. *Id.* The court noted that in one of its decisions it reversed a 60/40 allocation, *D'Aquila v. D'Aquila*, 715 S.W.2d 318 (Mo. Ct. App. 1986), while in another case it allowed an 87/13 split, *Schwartz v. Schwartz*, 631 S.W.2d 694 (Mo. Ct. App. 1982). *Barth*, 800 S.W.2d at 130. Indeed, the brief opinion in *Schwartz* affirms the result with only the observation that the trial court made no error, and that "an extended opinion would have no precedential value." *Schwartz*, 631 S.W.2d at 695.

141. For an example of one court's imprecise analysis, see *Burtscher v. Burtscher*, 563 S.W.2d 526 (Mo. Ct. App. 1978), in which the court first stated that "the conduct factor becomes important when the conduct of one party to the marriage is such that it throws upon the other party marital burdens beyond the norms to be expected in the marital relationship," *id.* at 527, but also asserted that "[i]t is unnecessary and probably impossible

these states also sheds no light on what marital conduct would be considered "outrageous."

A few states allow divorce courts to consider only "egregious" misconduct, an apparent cousin of the outrageous conduct required for IIED liability.<sup>142</sup> We had hoped to find some promising experience here. Such states, in practice, seem to apply this standard to exceptionally limited circumstances, usually reaching only conduct that is so extreme, such as attempted murder or violent assault, that it not only gives rise to traditional tort claims, but also violates the most serious criminal prohibitions.<sup>143</sup> For example, one court that applied this ap-

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to lay down any precise guidelines for the weight to be given to the conduct factor." *Id.* In *Burtscher*, the wife complained that the trial court had erred in not counting the affair she claimed the husband had near the end of their 24-year marriage. *Id.* The appeals court found no error, describing as "also detrimental" the fact that the wife played bingo four nights a week over the husband's objection. *Id.* at 528. Compare *In re Marriage of Gustin*, 861 S.W.2d 639, 644 (Mo. Ct. App. 1993) (holding that the wife's chopping through the door of the marital residence after their separation did not place burdens on the marital relationship) with *Divine v. Divine*, 752 S.W.2d 76, 79 (Mo. Ct. App. 1988) (holding that the husband's failure to communicate with his wife, as well as his physical abuse, telephone harassment, and false accusations, placed undue stress on his wife during the marriage). Similar language also can be found in the opinions of other states, although the meaning varies considerably in application. Compare *Woodside v. Woodside*, 350 S.E.2d 407, 412 (S.C. Ct. App. 1986) (holding that husband's adultery does not affect property allocation because it did not burden his wife "beyond the norms expected in marital relationship") with *Robinson v. Robinson*, 444 A.2d 234, 235-36 (Conn. 1982) (holding that in apportioning marital property, a court may consider the "humiliation and anguish" that the wife's adultery caused her husband). *Robinson* also suggests that misconduct is regarded as particularly important when it leads to the demise of the marriage. *Id.* at 236; see also *Chabot v. Chabot*, 497 A.2d 851, 852 (N.H. 1985) (holding that a court may consider fault in property division only when proven to be a primary cause of marital failure). As applied, this language adds nothing—"causation" in this context states a moral rather than an empirical conclusion. One spouse may sincerely believe that the other's conduct was intolerable and therefore caused the marriage's end, but the complaining spouse's conclusion on this matter is not dispositive. If the complaint is that the other spouse does not like to watch television, a court may reach a different conclusion on causation than if the complaint is that the other spouse is physically abusive. The question is whether the court believes one spouse's conduct is sufficiently offensive to justify the other's refusal to tolerate it. If so, then the offensive spouse is said to have caused the marital breakdown; if not, then the complaining spouse's intolerance may be the cause. So the process of assigning cause for the marital breakdown is essentially indistinguishable from deciding the relative wrong of the spouses' conduct.

142. *E.g.*, *In re Marriage of Sommers*, 792 P.2d 1005, 1010 (Kan. 1990) (holding that legislative intent in passing a no-fault divorce statute precluded imposing financial penalties on the basis of fault except in egregious circumstances); *Blickstein v. Blickstein*, 472 N.Y.S.2d 110, 113-14 (App. Div. 1985) (holding that marital fault was relevant in equitable distribution of property only in "very rare" situations involving conduct that "shocks the conscience").

143. *E.g.*, *Brancoveau v. Brancoveau*, 535 N.Y.S.2d 86, 90 (App. Div. 1988) (holding that husband's share of marital property would be reduced in light of his attempt to arrange the murder of his wife), *cert. denied*, 502 U.S. 854 (1991); *Stevens v. Stevens*, 484 N.Y.S.2d



proach stated that "it is difficult to conceive of any circumstances" in which marital infidelity would be considered "egregious" misconduct.<sup>144</sup> An analogous restriction of IIED claims might be thought to defeat the objective of policing outrageous marital conduct. Nonetheless, as we shall see below, some reliance on the criminal law to identify actionable spousal conduct may make sense.

Examination of the older law requiring that fault be shown as grounds for divorce is disappointing. Mental cruelty was perhaps the most common ground upon which divorce was then granted, and one might imagine that extensive judicial experience with such claims would assist in formulating a standard for the tort. Indeed, the traditional definition of mental cruelty suggests the same outlook that would underlie the tort of spousal emotional abuse: "[C]ruelty may exist in systematic abuse, humiliating insults and annoyances, causing mental suffering and consequent ill health."<sup>145</sup> Moreover, as also would be true for IIED claims, mental cruelty law took context into account: A "divorce on the ground of cruelty [would] not be granted if the ill treatment [had] been caused by the misconduct of the plaintiff."<sup>146</sup> How were these generalizations applied in practice?

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708, 710 (App. Div. 1985) (holding that marital fault was relevant when wife committed adultery, physical abuse (scratching, biting, and pulling hair of husband), and verbal abuse (repeatedly berating him in front of coworkers and friends)).

144. *Sommers*, 792 P.2d at 1010. The formulation of the standard in *Sommers* is slightly different than the New York version: fault counts only in "some rare and unusual situation where a party's conduct is so gross and extreme that failure to penalize therefor [sic] would, itself, be inequitable." *Id.* at 1010. Our search has yielded no cases in which a court has found any marital conduct that falls within this language.

Louisiana has a few versions of this rule. Perhaps the oldest formulation requires "unjustifiable conduct . . . which so grievously wounds the mental feelings of the other [spouse], or . . . in any other matter utterly destroys the legitimate ends and objects of matrimony." *Krauss v. Krauss*, 111 So. 683, 685 (La. 1927). This formulation of the rule was controlling in *Batiste v. Batiste*, 548 So. 2d 14, 16 (La. Ct. App. 1989). Another version defines fault as "substantial acts of omission or commission . . . violative of marital duties and responsibilities." *Pearce v. Pearce*, 348 So. 2d 75, 77 (La. 1977). The application as well as the standard seems to vary, perhaps because state law bars alimony awards to a spouse found at fault even if the other spouse is also at fault. *Compare* *Eppling v. Eppling*, 537 So. 2d 814, 816-18 (La. Ct. App.) (affirming judgment of mutual fault, thus denying wife's alimony when the husband had an extramarital affair and the wife repeatedly embarrassed the husband in front of business associates with public accusations of infidelity and profanity), *writ denied*, 538 So. 2d 619 (La. 1989) and *Bruner v. Bruner*, 364 So. 2d 1015, 1018 (La. 1978) (holding that the wife's intemperance bars alimony despite husband's adultery) *with* *Adams v. Adams*, 389 So. 2d 381, 383 (La. 1980) (holding that wife's alimony claim was not fault-barred by her constant accusations of infidelity because they did not render their living together "insupportable").

145. JOSEPH W. MADDEN, *HANDBOOK OF THE LAW OF PERSONS AND DOMESTIC RELATIONS* 271 (1931). For cases granting divorce on grounds of harsh or humiliating language or demeanor, see *id.* at 272 n.8.

146. *Id.* at 274.

Although the requirement that the defendant's conduct caused the plaintiff to suffer ill health might have been expected to exclude many claims, Professor Clark found that the requirement was largely illusory in application because most courts would find it satisfied by the plaintiff's testimony of lost sleep, nervousness, weight loss, and the like.<sup>147</sup> This outcome is, of course, analogous to the experience with section 46 tort claims outside the marital arena, in which the central focus has been on the outrage rather than its consequences.<sup>148</sup>

What about the efforts of divorce courts to specify the meaning of "mental cruelty"? So far as we have been able to determine, no objective standards emerged. The divorce court judges would simply conclude, or not, that the defendant's conduct was sufficiently abusive or insulting to constitute cruelty, taking into account the plaintiff's own lapses. In this way a court might deny mental cruelty claims by wives whose own conduct was found, in that particular judge's opinion, to be "incompatible with the duty of a wife" or that "justly provoke[d] the indignation of the husband."<sup>149</sup>

Many states had additional rules that made it even more difficult for the courts to define the conduct that constituted cruelty. For example, some courts held that subjective tests should be applied so that the more sensitive wife could make out a cruelty claim for her husband's conduct that would not be found cruel if done by the husband of her coarser sister.<sup>150</sup> A few others held it a good defense that the plaintiff had knowledge, prior to the marriage, of the defendant's propensity to engage in the behavior giving rise to the current complaint, although such a rule was uncommon.<sup>151</sup> Both rules are consistent with a desire to avoid imposing external standards on the intimate relations of married partners, so that we do not label cruel or abusive a pattern of relationship that the parties themselves found acceptable or even satisfying.<sup>152</sup> We will see that this same preference has been expressed by some modern courts considering IIED claims in the con-

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147. CLARK, *supra* note 38, at 344.

148. See *supra* notes 48-57 and accompanying text.

149. MADDEN, *supra* note 145, at 274.

150. *Id.*

151. CLARK, *supra* note 38, at 345.

152. One could perhaps make the same observation about the traditional divorce defense of condonation, under which the divorce plaintiff could not rely on conduct of the defendant that had been condoned. *Id.* at 365. Clark, however, attributes the doctrine to other policies. *Id.* at 366-67. The cases were apparently divided as to precisely what constituted condonation, but the combination of knowledge of the offense, an attitude of forgiveness, and a resumption of sexual relations would almost always do. *Id.* at 365-67. In applying the defense to divorce actions based on cruelty, courts had the difficulty of distinguishing the spouse who had truly condoned the conduct from the one who had tried

text of marriage.<sup>153</sup> Yet vindication of that preference requires shifting standards that respond to the fact finder's examination of the relationship of the parties in each case. Consistency and predictability of adjudication necessarily suffer.

It is thus not surprising that just before the advent of no-fault divorce reforms, the standard hornbook on the subject stated,

[I]t may be that attempts at general definitions [of cruelty] are of little assistance in deciding cases . . . . Even specific cases may not be very helpful in later litigation, since the context in which the conduct of the parties is placed is all important, and no two cases are entirely alike.<sup>154</sup>

In short, rather than having real guideposts on which to rely, judges largely turned inward to decide for themselves whether the standard was met, drawing, we suppose, on a combination of their own values and their experience with other divorce cases.

Furthermore, outcomes under the old law were especially problematic because of the circumstances in which the claims arose.<sup>155</sup> These contaminating factors make us especially leery about relying on the notion that because the mental cruelty principle was somehow "successfully" applied for so many years, we ought to have confidence in the ability of courts fairly and efficiently to administer the "outrage" concept. On the contrary, the divorce law experience with mental cruelty adds to our qualms about recognizing IIED claims between spouses.

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sticking things out in the hope that matters would improve. *Id.* at 370. This may have led courts to resist the doctrine's literal application to cruelty cases. *Id.*

153. See *infra* notes 204-217 and accompanying text.

154. CLARK, *supra* note 38, at 345. The text attempts to summarize judicial treatment of the claim by classifying the fact patterns often held to constitute cruelty. The easiest, of course, is physical violence and threats of physical violence, including "the sort of minor physical abuse which is more an expression of dislike than a danger to safety." *Id.* at 346. Excessive or unreasonable sexual demands were often held abusive, but the text found it impossible to generalize about what particular patterns would qualify. *Id.* The most common cruelty complaint relied on the defendant's repeated insults of the plaintiff, or on the repeated expression to strangers of accusations about the plaintiff's misconduct. *Id.* at 346-47.

155. Often, the husband and wife had agreed on the divorce and only pleaded and admitted mental cruelty as a way to accomplish their mutual objective. In such settings many judges were likely to be rather lenient in finding that the standard was met—unless, perhaps, the judge had strong feelings against divorce. Even when the divorce was contested, surely some judges believed that anyone willing to allege mental cruelty ought to be able to obtain a divorce whatever the facts, and this would be another reason to apply the cruelty standard liberally. Yet other judges were probably driven to make findings about mental cruelty in order to facilitate the financial allocation between the parties they thought fairest.

*B. The New Section 46 Cases: The Standard Fact Patterns*

We turn now to the decided IIED cases that have prompted our inquiry into whether there should be a tort action for spousal emotional abuse. While a fairly long list of decisions can be compiled that mention interspousal IIED claims, most, for various reasons, are not really on point.

Several of these cases involve allegations of battery with emotional distress claims added on. As earlier explained, states today overwhelmingly allow interspousal battery actions,<sup>156</sup> as we think they should. Because a successful battery action can support the award of punitive damages as well as compensatory damages for the pain and suffering arising from the tortious act, an accompanying IIED claim is typically superfluous. The jury is likely to make the same award whether or not the victim asserts an IIED case along with her complaint about being physically beaten.

Of course, a spouse's IIED claim could be grounded on an entirely separate course of conduct from the beating, but that does not seem to be the usual pattern. Rather, the allegations are more typically something like this: the husband came home angry, drank too much, cruelly berated and taunted his wife, and struck her all in the same evening. Therefore, when the legal claims are combined, courts have had little reason to consider the distinctive policy issues that arise if the plaintiff spouse were to rely exclusively on an IIED action. The sharply contested legal issues in these combined claim cases often have focused instead on the general question of abolishing interspousal tort immunity, or on the procedural issues involved in relating the tort recovery to the ordinary financial claims between spouses that arise in the parties' divorce.<sup>157</sup> These cases have not focused on the policy issues with which we are concerned and therefore we do not dwell on them here.

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156. See *supra* notes 66-67 and accompanying text. Recent decisions include *Cater v. Cater*, 846 S.W.2d 173, 176 (Ark. 1993) (affirming a \$350,000 award for spousal battery); *Waite v. Waite*, 618 So. 2d 1360, 1360-61 (Fla. 1993) (holding that interspousal battery with machete not barred by interspousal immunity, and abandoning interspousal immunity); *Burns v. Burns*, 518 So. 2d 1205, 1209-11 (Miss. 1988) (abrogating interspousal immunity and permitting battery claim against spouse); *Townsend v. Townsend*, 708 S.W.2d 646, 649 (Mo. 1986) (en banc) (abrogating interspousal immunity and permitting wife to recover when husband shot wife in the back); and *Noble v. Noble*, 761 P.2d 1369, 1374 (Utah 1988) (holding that wife's personal injury claims were not barred by claim preclusion where husband shot wife in head).

157. See cases discussed *supra* note 156. The cases of *Burns*, 518 So. 2d at 1205, *Townsend*, 708 S.W.2d at 646, and *Waite*, 618 So. 2d at 1360, center on overruling interspousal immunity, while *Cater*, 846 S.W.2d at 173, and *Noble*, 761 P.2d at 1369, focus on procedural issues connecting divorce and tort actions.

A second group of cases involves romantic triangles in which the third party is in the lawsuit as well.<sup>158</sup> Indeed, in some of these cases, the IIED action is brought exclusively against the third party, which alters the legal issues in the case substantially. The primary question addressed in these opinions is often whether an IIED action against the third party is barred by the local statute or prior judicial opinion abolishing claims for alienation of affections.<sup>159</sup> This question raises policy issues common to our subject, but these concerns are not typically the focus of these opinions. Nonetheless we will later mention some of these cases because the fact pattern they present helps illuminate our problem.

We can put the remaining cases, all of which more clearly involve IIED claims between spouses, in two groups: those that involve the kind of complaints one might think common between divorcing parties, and those involving behavior that may seem especially deviant, or at least special.

We consider first the more ordinary fact patterns. As we noted at the outset, on the question of whether they are properly made the subject of a lawsuit, the courts are divided. We will focus on four decisions that we have grouped under three headings.

1. *The Bully*.—Here we highlight two cases that we believe treated similar facts quite differently. In *Hakkila v. Hakkila*,<sup>160</sup> the spouses separated in 1985 after ten years of marriage.<sup>161</sup> When the husband filed a petition for dissolution, the wife, who had a history of depression, counterclaimed for IIED.<sup>162</sup> It appears the divorce and tort cases were tried together before a judge, who made factual findings to support his award of tort damages to the wife.<sup>163</sup> Although

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158. *E.g.*, *Speer v. Dealy*, 495 N.W.2d 911, 912 (Neb. 1993) (suing third-party defendant, who was plaintiff's supervisor and had an affair with plaintiff's wife); *Koestler v. Pollard*, 471 N.W.2d 7, 8 (Wis. 1991) (involving defendant who concealed paternity of child born to plaintiff's wife during plaintiff's marriage, only to later reveal paternity after developing a relationship with the child).

159. *See, e.g.*, *Speer*, 495 N.W.2d at 914-15 (holding that IIED claim, which was substantially the same as alienation of affections and criminal conversation, was barred by statutory elimination of the latter two torts); *Koestler*, 471 N.W.2d at 9 (holding that IIED claim, which was the basis for a criminal conversation claim, was barred by statutory abolition of latter tort).

160. 812 P.2d 1320 (N.M. Ct. App.), *cert. denied*, 811 P.2d 575 (N.M. 1991).

161. *Id.* at 1321.

162. *Id.*

163. The trial court allowed the wife an alimony award of \$1050 monthly in the divorce action. *Id.* at 1327. The court then provided that as damages on the tort claim she should receive \$5000 in medical expenses plus the marital residence, worth \$136,000, "free and clear [of her] husband's one-half community property interest and existing mortgage." *Id.*

apparently there was no separate claim for battery, the trial court supported the IIED verdict in part with a general finding that the husband had "assaulted and battered" the wife.<sup>164</sup> The finding was supported in the record, according to the appeals court, by evidence of "several" incidents.<sup>165</sup>

The New Mexico appellate court in *Hakkila* cautiously concluded that while spousal IIED claims might be valid in other settings,<sup>166</sup> the facts of this case were inadequate as a matter of law to demonstrate such a tort.<sup>167</sup> Hence it reversed the judgment for the wife. Indeed, the court expressed concern that the husband was subjected to a six-day trial on these claims, and urged trial courts to make more liberal use of summary judgments if similar IIED cases arise in the future.<sup>168</sup>

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at 1329 (Donnelly, J., specially concurring). The apparent intent was that existing mortgages be retired from her husband's assets, and the effect was thus a judgment for at least \$73,000 (\$5000 plus her husband's \$68,000 half-share of the home), and perhaps more if there were existing mortgages on the home for which the husband assumed sole liability. *Id.*

164. *Id.*

165. *Id.* at 1322. In 1984, when the wife was pushing her finger at her husband's chest, her husband grabbed her wrist and twisted it severely. *Id.* In 1981, during another argument four years before their separation, he grabbed her and "threw her face down across the room, into a pot full of dirt." *Id.* In 1978, while the wife was putting groceries in their camper, he slammed part of the camper shell and trunk lid on her head and hands. *Id.* In 1976, "and sometimes thereafter," the husband used "excessive force" during consensual sex when "attempting to stimulate the wife with his hands." *Id.* The court recounted another argument, in which the wife grabbed his shirt and popped all its buttons off, and then, after she stepped outside their home, the husband closed and locked the door. *Id.* Neighbors let her in, after which he threw his clothes in their camper and drove off for the night. *Id.* He returned the following morning, they made up, and made love. *Id.* The court concluded there was "no evidence that [this] conduct caused severe emotional distress." *Id.* at 1327.

The trial court also found additional instances of "outrageous" acts "so extreme in degree as to be beyond all possible bounds of decency and . . . atrocious and utterly intolerable." *Id.* At a Christmas party the husband screamed an obscenity at the wife in front of others when she suggested, at 11:00 p.m., that they go home. *Id.* There was no other evidence of his screaming at her in front of others, but the wife did testify that when the couple was home alone the husband would scream at her. *Id.* At various times he told her "you're just plain sick, you're just stupid, you're just insane," and on several occasions the husband said to the wife that "you prefer women to men." *Id.* He testified that he meant only that she preferred women's company, and she did not testify that his remarks had any sexual connotations. *Id.* Finally, the trial court found that the husband refused to engage in normal sexual relations with the wife, and the wife testified that he blamed his sexual inadequacies on her. *Id.*

166. *Id.* at 1326. The court, in dicta, indicated that an interspousal IIED claim would lie where "the social good from recognizing the tort will not be outweighed by unseemly and invasive litigation of meritless claims." *Id.*

167. *Id.* at 1327. The court reasoned that the husband's insults did not constitute outrageousness, that "[h]e was privileged to refrain from intercourse," and that there was no evidence of other acts causing "severe emotional distress" as defined by the *Restatement*. *Id.*

168. *Id.*

In *Massey v. Massey*,<sup>169</sup> the wife claimed that her husband, a bank president, denied her any independent access to funds and doled out money to her in small amounts, belittled her in front of others, had outbursts that sometimes included property destruction and that caused her to experience "intense anxiety and fear," and threatened to tell her children and friends of her extramarital affair and take custody of her youngest daughter from her.<sup>170</sup> The wife's psychologist testified that the wife dealt with the husband by "walking on egg shells so as not to trigger [his] rage."<sup>171</sup> The wife made no claim of personal physical violence, and the jury ultimately found that the husband "had not assaulted [the wife] by threat of imminent injury nor acted with malice."<sup>172</sup> Although the husband portrayed most facts differently than his wife, he conceded that he often used threats in both his business and his marriage "to get his way."<sup>173</sup> The husband claimed that the wife was an alcoholic, and that he had been devastated by her extramarital affair.<sup>174</sup> The parties had been married for twenty-two years.<sup>175</sup> The distress claim, tried with the divorce action, resulted in a judgment against the husband for \$362,000 in compensatory damages, with no punitive damages award.<sup>176</sup> A Texas appeals court affirmed the award.<sup>177</sup>

2. *The Cheater*.—In *Ruprecht v. Ruprecht*,<sup>178</sup> the parties' marriage appeared stable from its commencement in 1960 to about 1980, when the wife returned to work after the children had grown.<sup>179</sup> There were several separations over the ensuing decade, and one petition for divorce that was dismissed for want of prosecution.<sup>180</sup> During this time the husband repeatedly asked his wife whether she was having an affair with her boss, and she consistently denied the accusation.<sup>181</sup> In 1990, soon after filing for divorce, the husband learned that the wife had in fact been involved in an adulterous relationship with her em-

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169. 807 S.W.2d 391 (Tex. Ct. App. 1991), *writ denied*, 867 S.W.2d 766 (Tex. 1993).

170. *Id.* at 399.

171. *Id.* at 400.

172. *Id.*

173. *Id.* at 399.

174. *Id.*

175. *Id.*

176. *Id.* There was also a division of property unfavorable to the husband, but other than rejecting the husband's claim that this uneven allocation was based on fault, the opinion provides no details of the court's reasoning. *Id.* at 405-06.

177. *Id.* at 406.

178. 599 A.2d 604 (N.J. Super. Ct. Ch. Div. 1991).

179. *Id.* at 605.

180. *Id.*

181. *Id.*

ployer during her entire period of employment.<sup>182</sup> At this point, the husband then added a claim for IIED to his divorce action.<sup>183</sup> As in *Hakkila*, the New Jersey court decided that such interspousal IIED claims would be allowed in principle, but that the facts alleged in this case did not meet the “outrageousness” requirement.<sup>184</sup>

3. *The Brute*.—Finally, in *Henriksen v. Cameron*,<sup>185</sup> the wife alleged physical as well as emotional abuse.<sup>186</sup> Her action for IIED, allowed under a longer limitation statute,<sup>187</sup> alleged threatening conduct of various sorts, apparently all occurring while the husband was intoxicated.<sup>188</sup> This conduct included the following: shattering kitchen cabinet doors while coming after her and yelling obscenities; calling for her at a friend’s home where she was staying and threatening to burn down the hotel that they owned; tearing down a wall in their dining room before she returned; threatening that the wife would “get what his mother got” (the husband’s father having beaten his mother); and pulling the telephone from the wall so that she could not call for help.<sup>189</sup> He also accused her of sleeping with his brother.<sup>190</sup> The wife also was allowed to testify to an incident of rape and an incident of physical abuse in order to show the reasonableness of her emotional response, but the jury was instructed not to award damages for these two incidents because of the battery time bar.<sup>191</sup> The action was brought after the parties’ divorce had been con-

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182. *Id.*

183. *Id.*

184. *Id.* at 608. Other cases centrally involving extramarital affairs include *Whittington v. Whittington*, 766 S.W.2d 73, 74 (Ky. Ct. App. 1989) (holding that the conduct involved did not rise to the level of “outrageousness”); *Browning v. Browning*, 584 S.W.2d 406, 408 (Ky. Ct. App. 1979) (holding that there was no recovery for public policy reasons); *Weicker v. Weicker*, 237 N.E.2d 816, 817 (N.Y. 1968) (rejecting IIED claims in marital context for policy reasons); *Doe v. Doe*, 519 N.Y.S.2d 595, 597-99 (Sup. Ct. 1987) (holding that wife’s allegation that she suffered “AIDS-phobia” because husband failed to disclose homosexual relationship did not satisfy IIED claim because neither wife nor husband had contracted the disease); *Pickering v. Pickering*, 434 N.W.2d 758, 761 (S.D. 1989) (holding that IIED was not available in divorce action for public policy reasons).

185. 622 A.2d 1135 (Me. 1993).

186. *Id.* at 1142. The wife’s battery claims were time-barred under the state’s two-year statute of limitations. *Id.*

187. Over defendant’s objections, the court ruled that because a claim for IIED can stand independent of the underlying battery claim, the plaintiff’s suit would be governed by the six-year limitation for IIED, rather than the two-year limitation for battery claims. *Id.* at 1142-43.

188. *Id.* at 1137 n.1

189. *Id.*

190. *Id.* at 1137.

191. *Id.* at 1143.



cluded.<sup>192</sup> The Maine Supreme Court affirmed the jury verdict, awarding the wife \$75,000 in compensatory damages and \$40,000 in punitive damages.<sup>193</sup>

We imagine that, on initial examination at least, *Ruprecht* and *Henriksen* will seem to most readers the easiest of the four cases just discussed. Because the IIED action allowed in *Henriksen* can be seen as vindicating the same interests that the barred battery claim would have protected, there can be little substantive objection to allowing the action if one believes—as we do—that battery actions should be allowed. The consequences of physical attacks and the surrounding fear of further attacks are at the heart of the *Henriksen* claim.<sup>194</sup> Perhaps one might object, as the *Henriksen* defendant unsuccessfully did, that the IIED action should not be available to avoid the shorter limitation statute Maine applied to battery claims.<sup>195</sup> But valid or not, that objection does not raise the policy concerns we mean to address in this Article. Put another way, even if it seems odd for a jurisdiction to place a two-year statute of limitations on claims for the physical harms flowing from a battery, while allowing nearly five-year-old claims for emotional harm, we do not believe that the application of such a regime to spousal suits would raise important additional concerns. For our purposes, then, *Henriksen* can be put to one side, along with the earlier noted cases in which the IIED claim was merely a tactical weapon employed to gain advantage in a suit that is, in substance, a battery action.

*Ruprecht* presents essentially this question: should tort damages be allowed against a person who has an ongoing affair with a third party, while denying the affair to his or her spouse?<sup>196</sup> We have no doubt that many are devastated to learn that their spouses have been sexually unfaithful, and that the emotional wound can be even greater

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192. *Id.* at 1137.

193. *Id.* at 1138, 1144; *see also* *McCoy v. Cooke*, 419 N.W.2d 44, 46 (Mich. Ct. App. 1988) (permitting a wife to sue her husband independent of a divorce proceeding); *Davis v. Bostick*, 580 P.2d 544, 548-49 (Or. 1978) (awarding money to both plaintiffs at trial for IIED claims that actually involved battery, with both plaintiffs losing on appeal for technical reasons unrelated to IIED); *Simmons v. Simmons*, 773 P.2d 602, 603, 605 (Colo. Ct. App. 1988) (same). Another related case is *Courtney v. Courtney*, 413 S.E.2d 418, 424, 428 (W. Va. 1991), in which a child who watched his father beat his mother was allowed to sue for IIED. *See also* *Stuart v. Stuart*, 421 N.W.2d 505, 507 (Wis. 1988) (giving substantial attention to IIED claims included in plaintiffs' battery suits); *Caron v. Caron*, 577 A.2d 1178, 1179-81 (Me. 1990) (same).

194. *Henriksen v. Cameron*, 622 A.2d 1135 (Me. 1993); *see supra* notes 185-193 and accompanying text.

195. *See supra* notes 186-187 and accompanying text.

196. *Ruprecht v. Ruprecht*, 599 A.2d 604 (N.J. Super. Ct. Ch. Div. 1991); *see supra* notes 178-184 and accompanying text.

if the adulterous spouse has been dishonest as well. Moreover, many people in our society certainly consider engaging in this sort of infidelity to be one of the worst things spouses can do to each other. Nevertheless, we have grave doubts about the wisdom of permitting the victim of that infidelity to sue in tort for emotional distress, and believe that most people would agree with us. Given the extent to which adultery apparently occurs in contemporary marriages, the reach of a rule that would allow the *Ruprecht* claim would reintroduce a fault standard in fixing the financial affairs of a substantial proportion of divorcing parties.

In rejecting the IIED claim, the *Ruprecht* court contented itself with a reprise of the *Restatement* formula,<sup>197</sup> observing that “[a] recitation of the facts of this case to an average member of the community would not lead him to exclaim, ‘Outrageous!’”<sup>198</sup> Certainly if one believes that a finding of “outrage” in IIED cases must involve behavior that goes well beyond the common complaints divorcing spouses have about one another, then neither adultery alone nor deceitful adultery can qualify.

This way of thinking about what constitutes “outrageous” marital behavior can readily explain both *Ruprecht* and *Hakkila*. In these two cases the complained-of acts (the wife’s secret affair in *Ruprecht* and the husband’s bullying behavior in *Hakkila*) may be wrongful, unseemly, and nasty—they certainly explain why the complainant would want a divorce. But in the end, they amount to sufficiently customary marital misconduct that, even if deplorable, simply does not rise to the level of “outrageousness”—whatever that might be.

The problem, however, is how to reconcile *Massey*.<sup>199</sup> The wife’s complaints there about her bullying husband were hardly unusual.<sup>200</sup> As in *Hakkila*,<sup>201</sup> and in contrast to *Henriksen*,<sup>202</sup> the heart of the *Massey* case was about emotional, not physical, harm, even if a certain amount of what some might characterize as “brutality” was involved.

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197. See RESTATEMENT (SECOND) OF TORTS § 46(1) (1965).

198. *Ruprecht*, 599 A.2d at 607 (holding that an extramarital affair is not significantly outrageous to give rise to an IIED claim) (quoting *Strauss v. Cilek*, 418 N.W.2d 378, 380 (Iowa 1987)); see also *Poston v. Poston*, 436 S.E.2d 854, 856 (N.C. Ct. App. 1993) (holding that a husband’s allegation of adultery does not evidence the outrageous conduct necessary to support a claim for IIED); *Alexander v. Inman*, 825 S.W.2d 102, 105 (Tenn. Ct. App. 1991) (holding that an extramarital affair is not so outrageous as to give rise to a claim for outrageous conduct).

199. *Massey v. Massey*, 807 S.W.2d 391 (Tex. Ct. App. 1991), writ denied, 867 S.W.2d 766 (Tex. 1993).

200. See *supra* text accompanying note 170.

201. See *supra* notes 160-168 and accompanying text.

202. See *supra* notes 185-193 and accompanying text.

*Massey* and *Hakkila* seem very similar on their facts, although they reach opposite results.

*Massey* is troubling to us for two reasons. First, it seems wrongly decided and thereby portends further inappropriate decisions if the tort of spousal emotional abuse is unleashed.<sup>203</sup> Second, the way the appellate court in *Massey* envisioned how “outrageousness” is to be determined in individual cases seems ultimately misguided.

In rejecting the arguments that the husband’s conduct was outrageous as a matter of law, the appeals court in *Massey* approved the following instruction that the trial judge had given the jury:

The bounds of decency vary from legal relationship to legal relationship. The marital relationship is highly subjective and constituted by mutual understandings and interchanges which are constantly in flux, and any number of which could be viewed by some segments of society as outrageous. Conduct considered extreme and outrageous in some relationships may be considered forgivable in other relationships. In your deliberation on the questions, definitions and instructions that follow, you shall consider them only in the context of the marital relationship of the parties to this case.<sup>204</sup>

In short, by accepting the proposition that the “bounds of decency vary” among marital relationships, the court seemed thereby drawn to the conclusion that the same acts could be found “outrageous” in the context of one marriage but not in another. Put differently, the court approved a jury instruction that seeks to avoid imposing fixed societal standards of conduct on intimate personal relationships, asking the jury, in effect, to apply the couple’s own standards. The instruction tells the jurors not to focus on what they would find outrageous in their own marriage, nor to search for some com-

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203. In *Chiles v. Chiles*, 779 S.W.2d 127 (Tex. Ct. App. 1983), the Texas appellate court denied the plaintiff the \$500,000 in tort damages awarded her by a jury that found that her husband had engaged in “extreme and outrageous” conduct, including “physical and verbal abuse, harassment, [and] threats” proximately causing the plaintiff’s “severe emotional distress.” *Id.* at 131, 132. In so doing, the *Chiles* court concluded that the tort of IIED should not be recognized in divorce actions. *Id.* at 131. The legal basis for this result has since been undermined by the Texas Supreme Court in *Twyman v. Twyman*, 855 S.W.2d 619, 620 (Tex. 1993) (holding that the tort of IIED is recognized and can be brought in divorce proceedings). We do not see any clear difference between *Hakkila* and *Chiles*. Interestingly enough, because of the husband’s great wealth in *Chiles*, some viewed a half million dollar tort award against him as a victory for him. See Pfeuffer, *supra* note 20, at 311. For fascinating background to the case, see Beverly Beyette, *Suing Your Spouse for More Than Divorce: Texas Award for Distress Sparks Uproar*, L.A. TIMES, May 1, 1988, § 6, at 1.

204. *Massey v. Massey*, 807 S.W.2d 391, 400 (Tex. Ct. App. 1991), *writ denied*, 867 S.W.2d 766 (Tex. 1993).

munity consensus as to what marital behavior is completely out of bounds. Rather, they are to decide whether the complaining spouse can fairly label as "outrageous" the complained of acts in the setting of her own marriage.

The policy issue here—shall the outrageousness of spousal conduct be judged by external or internal standards—seems fundamental. The apparent justification for the choice expressed by the approved jury instruction is that the imposition of external standards on an intimate relationship may risk inappropriate, and possibly even unconstitutional intrusion on marital privacy. But while we agree that such intrusion should be avoided, we doubt that *Massey's* resort to internal standards offers a promising solution.

Presumably, any effort to judge a spouse's conduct by the couple's own standards must look for those standards in the parties' understanding at the time their marriage began, or as they mutually adjusted it at some later time, rather than in the unilateral expressions of one party after the marriage has fallen apart. Consider, then, some possible interpretations of the *Massey* facts. On the one hand, the opinion portrays the husband as an insensitive, domineering bully in his personal relations, a man whose conduct might be judged to fit precisely the classic fault-divorce standard of mental cruelty.<sup>205</sup> Yet his marriage lasted over twenty years, and perhaps close scrutiny would have shown that during much of the marriage his wife enjoyed compensating benefits in her relationship with him.<sup>206</sup> Possibly his behavior became more extreme during the course of the marriage. Or possibly when they first married both were poorly socialized and incapable of "normal" relationships, but later the wife matured. Still, their earlier understanding, even if "unhealthy," functioned for two decades or more, perhaps meeting each other's needs as well as either of them could.<sup>207</sup> On this last understanding of the couple's marriage, the court's jury instruction would seem to require a verdict for the defendant.

Consider also the husband's claim in *Massey* that his wife was an alcoholic and that he had been devastated by her extramarital affair.<sup>208</sup> Although *Ruprecht* tells us that the wife's affair would not give

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205. See *supra* notes 169-176 and accompanying text; see also MADDEN, *supra* note 145, at 271 ("[C]ruelty may exist in systematic abuse, humiliating insults and annoyances, causing mental suffering and consequent ill health . . ."). For a list of cases granting divorce on grounds of "harsh or humiliating language or demeanor," see *id.* at 272 n.78.

206. *Massey*, 807 S.W.2d at 395.

207. *Id.* at 399-400.

208. *Id.*

the husband an IIED action for *her* violation of her marital vows,<sup>209</sup> under the approved jury instruction ought not the wife's adultery and excessive drinking in *Massey*, if proved, at least provide a context in which *his* behavior, even if still wrongful, should not be deemed outrageous?<sup>210</sup> Indeed, on close examination, this couple's "mutual understanding" might well have condemned adultery more than the husband's behavior of which the wife complained.

What is going on here? In the first place, it appears that the kind of close examination of the couple's entire marriage history called for by the judge's instruction did not actually take place in *Massey*. Indeed, we find it highly questionable whether it is either realistic or desirable to ask the jury to make such an inquiry in order to determine exactly what standards the parties had set for themselves. To do so requires a great deal of nuanced detective work at a time when the parties have every incentive to cast earlier words and actions in an altogether false light. Moreover, to successfully make the inquiry requires a deep intrusion into the spouses' intimate affairs, thereby flying in the face of a central argument in favor of the internal standard in the first place—that it is supposed to respect their privacy by refraining from imposing outside standards on them.

It appears, then, that despite what both courts said, the jury and both levels of the judiciary are doing something different than what is called for by the appellate court's legal reasoning.<sup>211</sup> Rather, it seems the jurors were permitted to deem the husband's conduct unacceptable for whatever reasons of their own they might have had,<sup>212</sup> and,

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209. *Ruprecht v. Ruprecht*, 599 A.2d 604, 608 (N.J. Super. Ct. Ch. Div. 1991).

210. Under the old fault law a "divorce on the ground of cruelty will not be granted if the ill treatment has been caused by the misconduct of the plaintiff," thus barring claims by women whose conduct was "incompatible with the duty of a wife" or who "justly provoke[d] the indignation of the husband." MADDEN, *supra* note 145, at 274. Although today the rule surely would be phrased differently, it seems inevitable that a similar defense necessarily would be allowed to a claim of outrageous conduct because the context of the conduct is necessary to evaluating its outrageousness. *See supra* text accompanying note 204.

211. *See Massey*, 807 S.W.2d at 400.

212. This is apparently what the wife's attorney invited them to do in his closing argument. The dissent in the Texas Supreme Court's denial of certiorari in *Massey v. Massey*, 867 S.W.2d 766 (Tex. 1993) (Hecht, J., dissenting), stated:

In his closing . . . argument to the jury, Gayle's attorney urged them: Show him. Show him that you're sensitive. Show him by your verdict that you mean business. Tell this community by your verdict that we, these 12 people don't sanction this type of conduct in this country. We want to speak up for the people similarly situated as Gayle Massey and say take notice. We're not going to sanction this type of conduct and only you people can do that. You can only do it through your verdict.

*Id.* at 767.

following the trial court, the reviewing court simply shrank from overturning that verdict as a matter of law. At the appellate level this means either that the court, applying its own values, decided that the husband's behavior was outrageous despite the wife's adultery and drinking, or that, by approving the internal standard, the court put itself in a position where appellate reversal of the jury determination becomes all but impossible.

The most disturbing implication for us is that standardless instructions combined with toothless appellate review add up to enormous jury discretion to impose on the couple just about any decision they wish.<sup>213</sup> This not only threatens uneven justice and unpredictable outcomes, but also invites virtually all discontented, divorcing spouses to try their chance at the lottery.

There is an additional consequence of allowing marital IIED claims based upon internal standards: they can create liability as well as avoid it. Suppose, for example, that the couple in *Ruprecht*,<sup>214</sup> at the time of their marriage, were both staunch members of an orthodox religious group in whose sacred texts adultery was clearly viewed as an outrage. The use of internal standards would then seem to require judgment for the plaintiff even though, as a general matter, IIED claims by spouses harmed by their partners' extramarital affairs would fail. Go a step further. Suppose a marrying couple solemnly vows never to tell each other even the smallest of "white lies" on the mutual understanding that to do so would be to rip the very heart out of their relationship. Should the victimized spouse in this marriage be entitled to recover in tort when the other tells a fib concerning a rather unimportant subject? Although a positive answer is implied by the internal standard, using tort law to police such private codes of behavior would seem to take us far away from what section 46 is supposed to be about.<sup>215</sup>

Even if a jury wanted to be faithful to the *Massey* instruction,<sup>216</sup> the implementation difficulties with internal standards seem irremediable. All too often it will be hopeless to derive internal marital standards from a postmarriage investigation of the typically informal and

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The dissenting judge shared our concern that the jury, despite the instruction that it should consider the alleged conduct within the context of the marital relationship before it, would in fact "resort [to] its own views of propriety." *Id.*

213. For example, the dissenting judge in the Texas Supreme Court stated that "[w]ithout standards for guidance, the jury may be incited to act out of simple dislike for the defendant." *Id.*

214. *See supra* notes 178-184 and accompanying text.

215. *See supra* note 1.

216. *See supra* note 204 and accompanying text.

unarticulated understandings that once existed in the now-defunct relationship.<sup>217</sup> Consider our last two examples again. Even commitments to well-defined fundamentalist religious beliefs about adultery, and even written commitments about honesty made at the time of the wedding, may well have been mutually adjusted (or at least reasonably believed to have been so by one party) during the course of the marriage. As a result, at the crucial moment when the plaintiff claims an outrageous breach took place, the couple's unique "deal" may be fairly understood to be different from what it was at the outset. But it hardly seems realistic to expect the jury to determine accurately the terms of that "deal" in the wake of the lawsuit.

Because of this, it seems to us inevitable that *Massey* illustrates that judges and juries instead will apply their own values as they carry out post hoc inquiries into now-dissolved intimate relationships. The internal standard will become a mirage as the subtle interactions of facts and values in these cases will usually render it impossible to tell what standards the decision-maker actually applied. Yet the values that juries and judges wind up applying may not be consistent with the understanding upon which the marriage was built—the central thrust of the *Massey* jury instruction in the first place.

We conclude, therefore, that the approach to these cases envisioned by the *Massey* appeals court is misguided, and that if section 46 of the *Restatement*<sup>218</sup> were made applicable to interspousal claims, one would at least have to start with external standards. Yet we also agree that the *Massey* court was emphasizing an important consideration. Because marital understandings *do* vary, important privacy norms can be violated if tort law were to impose liability after the marriage for conduct that was within the bounds of the marriage as the spouses then understood it. This means that the external standard only should reach conduct that is highly unlikely to have been part of any couple's mutual understanding, or in any event is sufficiently malevolent to justify overriding these privacy norms. Indeed, one might argue that the outrage standard is meant to incorporate this very idea: marital conduct crosses the line into outrageousness at just the point

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217. To rely on such a spousal understanding one would need to establish some kind of implied contract between them about their conduct. The hopelessness of that kind of effort is explicated in Ira M. Ellman, *The Theory of Alimony*, 77 CAL. L. REV. 1 (1989). Clearly any effort to avoid the "wrongfulness" problem by appeal to individual spousal values may exacerbate the process problem, for it would require a more intrusive inquiry into the spousal relationship, both to discern clearly the values on which the marriage is grounded and to determine that one spouse's conduct violated those values. *Id.*

218. See *supra* note 1 and accompanying text.

when it becomes so extreme that it is not credible to think it was part of any reasonable couple's marital understanding.

The preeminent example of such conduct is battery. In holding spouses liable for the physical injuries they intentionally inflict on one another, a court has no occasion to remind the jury that "bounds of decency vary from marital relationship to marital relationship."<sup>219</sup> We normally do not believe that couples meaningfully agree that one may batter the other in return for, say, providing financial support; and the social norm against spousal beating is sufficiently strong that we are prepared to condemn it anyway, notwithstanding any alleged mutual understanding of the couple.

This approach would serve, in addition, to exclude from recovery claims by spouses who had marital relationships that were extrasensitive to matters of sexual fidelity or honesty, as illustrated in the hypotheticals described earlier involving fundamentalist religious objections to adultery and written promises to tell the truth at all cost.

But what alleged spousal emotional abuse, if any, would be included? There's the rub. In contrast to battery, it is much more difficult to establish satisfactory standards to identify when emotional mistreatment is completely out of bounds. First of all, intimate relationships often involve complex emotional bargains that make no sense to third parties with different needs or perceptions.<sup>220</sup> People

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219. *Massey v. Massey*, 807 S.W.2d 391, 400 (Tex. App. 1991), *writ denied*, 867 S.W.2d 766 (Tex. 1993).

220. Consider as well the difference in the law's treatment of fraud committed in the course of a commercial sale, and fraud committed as a tactic in seduction. If in order to induce a sale, a man promises the buyer of his car that he will pay for any repairs that become necessary within a year, even though in fact he has no intention whatever of doing this, he is liable for fraud. If to induce a woman to engage in sexual relations with him a man tells her that he will always love her, even though he knows he does not and will not, no fraud action will lie. See RICHARD A. POSNER, *SEX AND REASON* 392 (1992). The difference between the two cannot be the seriousness of the loss, for the first case may involve a small loss of money, and the second a significant loss in emotional well-being, depending upon the scope or depth of the deception.

Although not a crime at common law, many states once made seduction a crime. MODEL PENAL CODE § 213.3 cmt. 5 n.52, at 54 (1980). The Model Penal Code limits the crime to the case in which a male has sexual intercourse with a female not his wife "who is induced to participate by a promise of marriage which the actor does not mean to perform." *Id.* § 213.3(1)(d). In explaining why it rejects a general rule making fraudulent seduction a crime, the comments explain:

A man who defrauds a girl of a few dollars is covered, and it may be thought even more important that criminal penalties be assigned for defrauding her of her virtue. [However], [t]he traditional law of seduction is grounded in an outmoded conception of sexual relations . . . [in which] the female engages in intercourse only to oblige the male . . . . [Today] [i]ntercourse is characteristically a matter of mutual gratification by male and female . . . [that] casts the role of "deception" in a different light. Normally, a person does not give money away



often remain in marriages that look to others to be unhealthy. Although staying married is sometimes the result of coercion or delusion, often what may seem to outsiders as, say, intolerably extreme verbal harshness, is instead a feature of the particular relationship with which the parties, at least on balance, are content. In short, in many matters some couples arrive at solutions that depart from the social conventions that govern most of their acquaintances. Because those who sufficiently dislike their spouse's behavior can seek a divorce, it becomes more difficult to justify the conclusion that their marital relationship was so unacceptably uncivilized as to require tort damages when they wait many years to do so.

For example, was Mrs. Massey the victim of an extremely cruel husband who fiendishly exploited her personal insecurity in order to keep her trapped in an abusive relationship?<sup>221</sup> Or was she someone who willingly accepted verbal unkindness and a loss of independence in return for relief from many ordinary responsibilities, who later changed her mind and wants compensation? We doubt that jurors can really tell, and simply judging the acts of the parties, there seems to be no basis on which Mr. Massey's conduct is to be deemed qualitatively different from that of Mr. Hakkila or Mrs. Ruprecht.<sup>222</sup> The upshot is that while we are content to tell the batterer that he acts at his peril, we feel much less comfortable with a legal regime that says the same to Mr. Massey.

Turning away from the peculiarities of any specific couple, and looking generally at marital conduct that can be emotionally distressing, it is critical to recognize that by requiring "outrageous" conduct the *Restatement* clearly means to exclude from liability the common

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. . . . Thus, it may be easy to show that a person who parted with money . . . did so because of deception. In the context of sexual relations pleasing to both parties, however, it may be . . . unrealistic to base criminal liability on the ground that the female yielded . . . predominantly on account of deception. [Moreover], [i]n . . . romance . . . deception often involves arousal of emotion. Flattery, professions of undying love, even promise of matrimony may have this quality of expressing or evoking affection rather than falsely proffering a *quid pro quo*. For these reasons, deception in sexual affairs often does not betoken the same depravity and disregard of social norms as does deception in business. . . . Evidentiary considerations support this need for restraint in imposing liability for seduction. Courts . . . will face unusual difficulties in distinguishing with sufficient certainty victimization by fraud from superficially similar cases of regret and disappointment.

*Id.* § 213.3 cmt. 5.

221. See *supra* notes 169-176 and accompanying text.

222. For a description of Mr. Massey's conduct, see *supra* text accompanying note 170. Compare Mr. Massey's conduct with that of Mr. Hakkila, *supra* notes 160-165 and accompanying text, and Mrs. Ruprecht, *supra* notes 178-183 and accompanying text.

incivilities of everyday life.<sup>223</sup> The idea is that such rude, insensitive, or mean-spirited behavior is better regulated, at least in the usual case, by social mechanisms or through self-help resort to divorce rather than through tort law.<sup>224</sup> Although one reason for seeking to restrict recovery to extreme cases is to prevent a flood of litigation,<sup>225</sup> surely another reason for a high threshold is the disparity between our aspirations and our conduct. Few if any of us consistently can avoid violating the norms of appropriate, sensitive social conduct that we endorse. The gap between societal aspiration and individual reality may be especially great in marital relations.

Yet, without clear guidelines as to what meets the threshold, the risk is that at least some juries will measure outrageousness against an ideal standard of marital relations—in effect lowering the threshold. This tendency is facilitated if outrageousness is left a flexible, open-ended concept. In this way, the outrage standard could yield liability for a much wider swath of marital conduct than for conduct by employers toward their employees, creditors toward their debtors, and landlords toward their tenants.

We concede that some commentators explicitly have urged the use of tort law as a tool for reforming intimate relations between the genders—by threatening to hold individuals to aspirational stan-

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223. See RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965), stating:

It has not been enough [for liability for IIED] that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by "malice," or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only when the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community . . . .

The liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities.

*Id.*

224. See Magruder, *supra* note 44, at 1053 ("No pressing social need requires that every abusive outburst be converted into a tort; upon the contrary, it would be unfortunate if the law closed all the safety valves through which irascible tempers might legally blow off steam.")

225. In his dissenting opinion in *Pickering v. Pickering*, 434 N.W.2d 758 (S.D. 1989), Justice Henderson articulated the concern that failing to confine recovery to extreme cases will generate a flood of litigation:

[W]here man and wife are involved in a marriage relationship, there could always exist a tort for intentional infliction of emotional distress where they had an argument. It could be over the family dog, who takes out the garbage, who forgot to pay the bill, or who is spending too much money. In other words, the law should not provide a basis for interfamilial warfare between husband and wives where our courts would be flooded with litigation.

*Id.* at 764 (Henderson, J., concurring in part and dissenting in part).

dards.<sup>226</sup> But this strategy flies in the face of most modern family law reform that has acknowledged the need to conform the law to a social reality that traditional rules did not accept.<sup>227</sup> Hence, applying tort law to claims of spousal emotional abuse risks a reprise of this very problem.

If there are no clear social norms as to what would constitute spousal emotional abuse, then giving juries instructions containing undefined external standards is likely to yield the same troubling results we predicted for jury instructions based on internal standards—inconsistent and unpredictable decisions.<sup>228</sup> This forecast is strengthened by our examination, in the preceding section, of earlier law that gave divorce courts discretion to consider the parties' fault in allocating marital property or in fixing alimony awards.<sup>229</sup> Decades of experience with such rules failed to provide consistent or predictable adjudications because agreement on the general principle that the divorce court could consider marital misconduct was far from agreement on that principle's application to particular cases.<sup>230</sup> Regardless of the formal rule, the standard actually applied varied greatly from case to case. The same result seems likely in applying a tort rule creating liability for "outrageous" marital conduct. Indeed, the problem may be even greater. Divorce suits typically are decided by judges, while tort claims usually are decided, at least in the first instance, by juries.<sup>231</sup>

Some of our concerns are expressed by the court in *Hakkila v. Hakkila*,<sup>232</sup> which observed that the meaning of outrageous conduct

226. Professor Larson seems to take this approach in seeking to revive the law of seduction as a tool for reshaping courting behavior. See Jane E. Larson, "Women Understand So Little, They Call My Good Nature 'Deceit': A Feminist Rethinking of Seduction, 93 COLUM. L. REV. 374 (1993).

227. The most important example is the modern movement to eliminate from divorce laws the requirement that one spouse prove the other "at fault," a requirement that ignored the social reality that marriages often failed in circumstances in which neither party was "at fault" in any meaningful way, and that assumed that the law could somehow deter such marital failures. See ELLMAN ET AL., *supra* note 8, at 165-77.

228. See *supra* notes 211-213 and accompanying text.

229. See *supra* notes 30-39 and accompanying text.

230. Various cases from Missouri on weighing a spouse's adultery illustrate this difficulty. See, e.g., *Cook v. Cook*, 706 S.W.2d 606 (Mo. Ct. App. 1986) (repeated adultery justifies 86/14 split); *D'Aquila v. D'Aquila*, 715 S.W.2d 318 (Mo. Ct. App. 1986) (60/40 split of marital property disproportionate despite adultery); *Schwarz v. Schwarz*, 631 S.W.2d 694 (Mo. Ct. App. 1982) (85/15 split sustained).

231. In *Henriksen v. Cameron*, 622 A.2d 1135 (Me. 1993), the court observed that jurors, many of whom were married, are best able to decide what conduct is "intolerable." *Id.* at 1139.

232. 812 P.2d 1320 (N.M. Ct. App.), *cert. denied*, 811 P.2d 575 (N.M. 1991).

within marriage may be more difficult to define because even “the most distressing conduct is likely to be privileged.”<sup>233</sup> Surely, honestly telling your spouse that you no longer love him falls squarely in this category. The opinion goes on to assert that “the abolition of [spousal] immunity does not mean that the existence of the marriage must be ignored in determining the scope of liability,”<sup>234</sup> and to conclude that there is only “a very limited scope for the tort in the marital context.”<sup>235</sup> The court’s solution was to declare that a high threshold of outrageousness is necessary in interspousal IIED claims:<sup>236</sup> actionable conduct must be “beyond all possible bounds of decency . . . and utterly intolerable.”<sup>237</sup> Concerned that such general language by itself may be inadequate to cabin the action to appropriate cases, the court specifically urged trial courts to be sympathetic in considering defendants’ motions for summary judgment, observing that “[d]espite the . . . lack of merit” in the claim against him, Mr. Hakkila “was subjected to a six-day trial . . . surveying the rights and wrongs of a ten-year marriage.”<sup>238</sup> We certainly agree that easy availability of summary judgment would be critical if one is concerned that outrage claims otherwise will become common at divorce, not only for strategic reasons, but also because the anger common in divorce can lead spouses to quickly view one another’s conduct as outrageous. The emotional pain often arising from the divorce itself easily can be characterized as distress caused by the other spouse’s nonprivileged conduct.<sup>239</sup>

Perhaps *Hakkila* has found a way to protect against the qualms we have about interspousal IIED cases while leaving open the possibility of recovery in the truly exceptional case. Much would turn upon how seriously trial courts took the admonition to consider summary judgment motions with sympathy, which would seem in turn to depend upon the scrutiny given such cases on appeal. Moreover, we recognize that *Hakkila* acknowledged its continuing concern that outrage claims still will arise too often by reserving the right in the future “to

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233. *Id.* at 1325.

234. *Id.* at 1323. The court also noted that “[t]he intimacy of the family relationship may also involve some relaxation in the application of the concept of reasonable care.” *Id.* (quoting the RESTATEMENT (SECOND) OF TORTS § 895F cmt. h (1979)). The court further discussed the abolition of parental immunity by observing that the “intimacies of family life also involve intended physical contacts that would be actionable between strangers but may be commonplace and expected within the family.” *Id.* (quoting the RESTATEMENT (SECOND) OF TORTS § 895G cmt. k (1979)).

235. *Id.* at 1324.

236. *Id.* at 1326.

237. *Id.* at 1327 (quoting *Sanders v. Lutz*, 784 P.2d 12, 15 (1989)).

238. *Id.*

239. *Id.* at 1324-25.

reconsider [the] husband's suggestion that the tort of outrage be denied in the interspousal context."<sup>240</sup> Given the fact that a narrow ground was available to the court to hold for the husband in *Hakkila*,<sup>241</sup> perhaps its temporizing approach with respect to future cases can be applauded as a nice application of the common-law tradition.

Nevertheless, we remain concerned about how the *Hakkila* vision actually will play out. For us to be satisfied, the implementation surely would have to be different from what happened in *Massey*.<sup>242</sup> But looking to decisions in two other states, we are worried. For example, in *Koepke v. Koepke*,<sup>243</sup> a husband sued his wife for IIED when she revealed that her child was not his.<sup>244</sup> The Ohio appeals court, overturning the trial court's dismissal, remanded the case to have the jury decide whether the wife's conduct was outrageous.<sup>245</sup> In *Whelan v. Whelan*,<sup>246</sup> a wife sued her husband claiming that he had falsely told her that he had tested positive for AIDS and that she should go away with their son so that he would not have to watch his father die.<sup>247</sup> The wife complained of suffering additional distress when she later learned that her husband had lied to her and did not have AIDS after all.<sup>248</sup> Although this case arose on the pleadings,<sup>249</sup> the Connecticut court made it clear that so far as it was concerned, if the allegations were proven the husband's behavior would meet the "outrageousness" standard.<sup>250</sup>

Although we do not condone the lies the defendant spouses allegedly told in these two cases, they seem to us to be just the sort of lies that commonly lead to marital break-ups. The conduct does not seem to us to be meaningfully different from that in *Hakkila*<sup>251</sup> or *Rupprecht*,<sup>252</sup> nor does it seem to meet the "high threshold" discussed in *Hakkila*.<sup>253</sup> Yet given the reactions of the appeals courts in these two

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240. *Id.* at 1327.

241. The court held for the husband on the grounds that his "insults and outbursts fail[ed] to meet the legal standard of outrageousness." *Id.*

242. *See supra* notes 169-177 and accompanying text.

243. 556 N.E.2d 1198 (Ohio Ct. App. 1989).

244. *Id.* at 1198-99.

245. *Id.* at 1200.

246. 588 A.2d 251 (Conn. Super. Ct. 1991).

247. *Id.* at 252.

248. *Id.*

249. *Id.* at 251.

250. *Id.* at 253.

251. *See supra* notes 160-168 and accompanying text.

252. *See supra* notes 178-184 and accompanying text.

253. *See supra* notes 232-239 and accompanying text.

cases, we have little doubt that even with *Hakkila's* admonitions, some juries would find for the plaintiffs—and in large amounts.<sup>254</sup>

In the end, deciding whether tort law generally should recognize claims for spousal emotional abuse depends in part on how one feels about juries. We concede that adding the tort remedy to an otherwise no-fault world has an understandable appeal if only one could be confident that juries will single out for liability that relatively small share of the divorces in which most members of society, if they knew all the facts, would concur that the defendant spouse acted outrageously. Alas, we do not share that confidence.

Therefore, we are considerably more comfortable with the more decisive outcomes of two other states when faced with similar IIED claims. In *Pickering v. Pickering*,<sup>255</sup> the wife told the husband that her child was his when in fact it was her lover's.<sup>256</sup> The South Dakota Supreme Court rejected outright the availability of interspousal IIED<sup>257</sup> claims when the husband brought suit against his wife after she revealed the truth and left him for her lover.<sup>258</sup> In New York, the unavailability of interspousal IIED claims also was confirmed in *Doe v. Doe*,<sup>259</sup> a case somewhat like *Whelan*,<sup>260</sup> in which a wife sued for emo-

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254. Indeed, in *Van Meter v. Van Meter*, 328 N.W.2d 497 (Iowa 1983), the Iowa Supreme Court went so far as to conclude that a cause of action for IIED could, as in *Ruprecht*, be stated in the adultery setting. *Id.* at 498. For a critique of the *Van Meter* solution, see Christopher J. Whitesell, *Loss of Consortium and Intentional Infliction of Emotional Distress: Alternative Theories to Alienation of Affections*, 67 IOWA L. REV. 859 (1982). For a recent rejection of the strategy to claim for IIED when the cause of action for alienation of affections has been abolished, see *D.D. v. C.L.D.*, 600 So. 2d 219, 222-23 (Ala. 1992) (holding husband's claim against wife's lover for damages resulting from interference with his marriage was barred by a statute prohibiting civil damage claims based on alienation of affections).

255. 434 N.W.2d 758 (S.D. 1989).

256. *Id.* at 760.

257. *Id.* at 761. The court concluded by stating that "we believe the tort of intentional infliction of emotional distress should be unavailable as matter of public policy when it is predicated on conduct which leads to the dissolution of a marriage." *Id.*

258. *Id.* at 760. What makes *Pickering* a bit bizarre is that the court partly justified its result by stating that under South Dakota law the husband could still sue the lover for alienation of affections (certainly a minority rule). *Id.* at 761. For a factually similar California case, see *Nagy v. Nagy*, 258 Cal. Rptr. 787 (Ct. App. 1989). Although the IIED claim was also rejected, the court in *Nagy* relied on a special California statute concerning privileges in connection with judicial proceedings inasmuch as the plaintiff only learned that the child was not his from a deposition given in the course of the divorce proceedings. *Id.* at 791-92.

259. 519 N.Y.S.2d 595 (Sup. Ct. 1987). For another New York decision rejecting interspousal claims for emotional distress, see *Wiener v. Wiener*, 444 N.Y.S.2d 130 (App. Div. 1981), in which the wife complained, among other things, that her husband cruelly announced that he no longer loved her. *Id.* at 131.

260. See *supra* notes 246-250 and accompanying text.

tional distress after having learned that her husband had engaged in homosexual sex during their marriage, claiming that she feared contracting AIDS.<sup>261</sup>

### C. *Special Cases? Requiring a Criminal Act*

Because of our skepticism over the reliability of the *Hakkila* solution, we think it important to explore other possibilities. One, of course, as already indicated, is to reject altogether suits for spousal emotional abuse. Perhaps, in the end, this indeed is the best solution for what we have termed the “standard fact patterns.”

Nevertheless, we have come upon a few decisions and hypotheticals that present what some might consider special cases. We address them in this section. If some seem deserving of recovery, what is to be done? Can we say only that these situations meet *Hakkila*'s high threshold?<sup>262</sup> Or is there some way to formulate more precise standards that will distinguish these special cases from the standard fact patterns? Or, in the end, should these claims, too, be rejected? In light of the discussion in the preceding sections, the question for us is whether such examples can be captured by clear rules specifying conduct that, like battery, is widely understood to be completely out of bounds—so completely out of bounds as to permit its condemnation without any need to probe the nuances of the couple's marital relationship.

Nonetheless, before coming to that approach, we first considered some other possibilities that seemed promising because they at first appeared to avoid entirely the problem of evaluating details of the parties' relationship. We gave some thought, for example, to the idea of recognizing only spousal emotional distress claims arising from acts that take place outside the realm of marital privacy, and hence, in front of or involving third parties. This rule would deny challenges to conduct occurring, as it were, behind closed doors. But while the sentiment is appealing, in the end this rule does not work. On the one hand, it would not exclude the “infidelity” cases like *Ruprecht v. Ruprecht*,<sup>263</sup> or the “bully” cases like *Hakkila v. Hakkila*<sup>264</sup> and *Massey v.*

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261. *Doe*, 519 N.Y.S.2d at 596.

262. *See supra* notes 232-239 and accompanying text.

263. 599 A.2d 604 (N.J. Super. Ct. Ch. Div. 1991); *see supra* notes 178-184 and accompanying text.

264. 812 P.2d 1320 (N.M. Ct. App.), *cert. denied*, 811 P.2d 575 (N.M. 1991); *see supra* notes 160-168 and accompanying text.

*Massey*,<sup>265</sup> in which at least some of the bullying took place in the company of others. These problematic results illustrate that evaluating the blameworthiness of a public act still can require judgments about the underlying relationship's private aspects. On the other hand, the proposed rule would exclude claims based entirely on private bullying, including even private batteries, which also makes little sense especially if it suggests that private spousal beatings are somehow less offensive than public ones.

We then considered barring those claims in which the emotional hurt was by its nature one that could be imposed only by a spouse or an equivalent intimate. This would exclude only claims that are, in effect, claims for breach of the marital relationship because such claims necessarily would seem to require for their resolution the very kind of inquiry that we have argued the law should avoid. This approach, for example, would exclude claims based upon sexual infidelity but allow an IIED claim against the husband who locked his wife in the basement for two weeks, given that a stranger who did this would be subject to suit. Although we liked those results, we were puzzled about how to categorize some other cases. For example, where do we put the bullying cases (both private and public) and the cases of spouses lying to each other? The impact of telling someone you have AIDS when you do not is likely to have the harshest impact when that someone is your spouse. But might not a nonsexually involved close friend also feel disturbed about learning he had been duped about such a grave matter?

As we thought further about the wife locked in the basement, we also thought of the husband who shoots at his wife in an attempt to kill her, or hires a hit man to do it for him—all cases in which we also think the tort law should be available. We then realized that each of these examples has the elements of a separately recognized intentional tort that is more specific than IIED—respectively, false imprisonment, assault, and what would probably be called conspiracy to commit a battery.<sup>266</sup> This led us to consider whether the solution lay in precisely such a requirement: perhaps these other torts would supply necessary specificity needed to satisfy the “outrage” standard.<sup>267</sup>

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265. 807 S.W.2d 391 (Tex. Ct. App. 1991), *writ denied*, 867 S.W.2d 766 (Tex. 1993); *see supra* notes 169-177 and accompanying text.

266. *See, e.g., Vance v. Chandler*, 597 N.E.2d 2233 (Ill. App. Ct.) (allowing a claim for civil conspiracy to inflict emotional distress in a suit by a wife against her ex-husband and daughter based on their hiring someone to murder her), *appeal denied*, 606 N.E.2d 1236 (Ill. 1992).

267. *See* RESTATEMENT (SECOND) OF TORTS § 46 (1965).



Indeed, maybe one could dispense with interspousal IIED claims altogether and refer plaintiffs to these other classic causes of action, if available.

But on further thought we found this approach unattractive because it would permit claims that we think should not be allowed. The problem is primarily that specificity is only one of our requirements. The other requirement—that the act in question is so out-of-bounds that we can condemn it without making a nuanced inquiry into the marriage—is not necessarily met by every act that would satisfy the elements of some other intentional tort.

Consider, for example, the tort of the invasion of privacy—in particular, the branch that focuses on intrusion.<sup>268</sup> Would the privacy tort make it actionable for one spouse to come through a closed bedroom door without knocking while the other spouse is undressing? We might ordinarily think, of course, that such claims would be defeated by consent. But what if the offended spouse had told the defendant not to enter? One could imagine a defendant arguing that in the context of their overall relationship it was reasonable of him to ignore the request, or interpret it as not seriously intended. But let us go further, and assume that these defenses can easily be rejected. The request for privacy was clear.

To us, the intruding spouse's conduct simply does not seem bad enough to warrant recovery of tort damages. Presumably, the spouses do see each other naked on some occasions. Moreover, we do not see how the law could make this conduct actionable while rejecting, say, the intruder's counterclaim for the emotional distress caused by the other spouse's repeatedly inviting to dinner, over the intruder's objection, an offensive neighbor who makes the intruder very uncomfortable. Here too, after all, the objection is clear, and the nature of the harm is similar. The point is that the privacy intrusion is not bad enough to condemn, without inquiry into the rest of the relationship, which cannot be done. We doubt in any event that many people would think these matters are appropriate for regulation through the tort system.<sup>269</sup> Rather, if the intrusions or the dinner invitations are altogether unacceptable, the offended spouse should just call the marriage off.

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268. See RESTATEMENT (SECOND) OF TORTS § 652B (1977) (“[O]ne who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.”).

269. See *supra* notes 224-225 and accompanying text.

We reach the same conclusion when we examine some other torts. Consider the privacy tort's protection against unwanted disclosure of private facts.<sup>270</sup> Would that make it actionable for a wife to discuss her husband's sexual prowess and technique, or lack thereof, with her women's group or her lover; or for a husband to describe his wife's breasts at his men's poker game or while flirting with a co-worker? Or consider the tort of defamation.<sup>271</sup> Should the law allow a cause of action to a man whose wife falsely complains to her mother that her husband is a philanderer, or to a wife whose husband falsely tells his drinking buddies that the wife squanders their grocery money on massages and gambling? Clear definition of these torts alone is inadequate to justify regulating such conduct through a tort regime that allows punitive damages and recovery for pain and suffering arising from these ill-mannered, but, we imagine, hardly unprecedented revelations. The conduct is simply no worse than the nonjusticiable IIED claims already discussed.<sup>272</sup> Therefore, in these situations we believe neither should it suffice for purposes of an IIED claim that the plaintiff can prove the elements of defamation or privacy invasion, nor should spouses be able to sue each other by grounding their claims in these conventional tort doctrines.

*Neal v. Neal*,<sup>273</sup> a recent Idaho case, provides an unintended illustration of this position in the context of the tort of deceit. It starts out like many other romantic triangle cases: the husband became involved with a lover and lied about it to his wife, leading the wife to sue both the lover and the husband.<sup>274</sup> The Idaho Supreme Court first tossed out the complaint against the lover, concluding that common-law actions for "criminal conversation" would not be recognized in

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270. See RESTATEMENT (SECOND) OF TORTS § 652D (1977), which states:

One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that

- (a) would be highly offensive to a reasonable person, and
- (b) is not of legitimate concern to the public.

*Id.*

271. See *id.* §§ 558–559.

272. See *supra* notes 160–261 and accompanying text.

273. 873 P.2d 871 (Idaho 1994).

274. *Id.* at 873.

Idaho.<sup>275</sup> As was the case in *Ruprecht v. Ruprecht*,<sup>276</sup> the court also rejected the wife's IIED claim against her husband.<sup>277</sup>

However, in what to us is a startling move, the court announced that Idaho will recognize the wife's claim for what is in effect battery by deceit.<sup>278</sup> The wife's argument was that his deceitful words and acts enticed her into sexual relations, and that had she known that he had taken a lover, she no longer would have had such relations with him.<sup>279</sup> In effect, she claimed marital rape by deception. We understand her disgust with his conduct and we can empathize with a spouse who wants to have nothing to do with her husband once she learns of his unfaithfulness.<sup>280</sup> Moreover, we can appreciate the wife's fears of contracting a sexually transmitted disease once she learned that she and her husband had sex subsequent to his affair with another.<sup>281</sup> Nonetheless, we believe that it was a mistake to give a plaintiff an interspousal tort claim grounded in deceit.

The *Neal* rule makes liable in tort every spouse who has an affair, does not tell, and subsequently has sexual relations with his or her spouse—a result that substantially undermines no-fault divorce. Indeed, the theory's logic extends beyond cases in which the deceitful spouse has an extramarital affair. Suppose that a husband lies to his wife about gambling away the couple's money, leading the wife to assert indignantly that she never would have continued to have sex with him had she known about his behavior. Nor, indeed, would it seem necessary under this theory that his deceit was followed by sex; surely many incensed spouses could claim that they never would have allowed themselves to have been kissed (battery if unconsented to) had they known about the hidden behavior of their spouse. Again, we do not mean to be blind to the victim spouses' sense of violation—but we

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275. *Id.* at 873-75 (citing *O'Neil v. Schuckardt*, 733 P.2d 693 (Idaho 1986) (abolishing an alienation of affections cause of action)).

276. 599 A.2d 604 (N.J. Super. Ct. Ch. Div. 1991); *see supra* text accompanying notes 178-184.

277. *Neal*, 873 P.2d at 876. The *Neal* court denied the wife recovery for her IIED claim on the ground that she did not demonstrate a reasonable fear of contracting a sexually transmitted disease from her adulterous husband, reasonable fear being a requisite element in her claim for IIED. *Id.*

278. *Id.* at 876-77.

279. *Id.* at 876.

280. In this particular case, however, the wife may have proof problems on remand, because it appears from the opinion that she voluntarily had sexual relations with him after learning of his affair. *Id.* at 876-77.

281. *Id.* at 876. There seemed to be no allegation that he actually transmitted any such disease to her. *Id.*

do not believe that their remedy against their lying spouse should include a successful tort suit.

In sum, a requirement that an emotional abuse claim also contain the elements of some other intentional tort is insufficient. The threshold need not only be clear, it need be high enough to justify lifting the defendant's conduct out of the context of the marital relationship. As we thought more about the kind of cases we would allow, we came to realize that most of them have this common thread: the tortious behavior is also a criminal act. Thus, our list of actionable spousal torts includes battery, certain assaults (including attempted murder), and false arrest or imprisonment. Our list would not, however, include the most conventional tort of assault—threatened battery. On the other hand, a threat of violence employed to coerce certain conduct (such as sexual relations) is a crime and would therefore also be actionable under this rule. As a general matter, we find ourselves comfortable with this approach. Not only does it seem to reach sensible results, but reliance upon the criminal law for this purpose seems to make some sense. A classic jurisprudential idea, after all, is that a primary function of the criminal law is to identify just those behaviors that society wishes particularly to condemn. It is therefore not surprising, perhaps, that this is also the list of behaviors that we might be prepared to say should be actionable within marriage without regard to the rest of the marital relationship or to the nuances of the "spousal understanding." Indeed, this approach is very similar to that employed by New York in its application of a rule limiting consideration of fault in the allocation of marital property to cases of "egregious conduct."<sup>282</sup>

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282. New York's rule excluding consideration of marital fault except for "egregious cases that shock the conscience," appears to operate in practice to exclude everything but serious felonies. *O'Brien v. O'Brien*, 498 N.Y.S.2d 743, 750 (N.Y. 1985). It is well-established in New York that "verbal harassment, threats and several acts of minor domestic violence" are not egregious misconduct under this rule. *Kellerman v. Kellerman*, 590 N.Y.S.2d 570, 571 (App. Div. 1992). Neither does the husband's refusal to have children in violation of an explicit promise constitute egregious misconduct. *McCann v. McCann*, 593 N.Y.S.2d 917, 923 (Sup. Ct. 1993). Nor does the combination of the wife's open adultery, physical abuse (scratching, biting, and pulling hair of husband), verbal abuse (repeatedly berating him in front of coworkers and friends), and wounding of her husband with a knife while breaking into his locked briefcase constitute such conduct. *Stevens v. Stevens*, 484 N.Y.S.2d 708, 710-11 (App. Div. 1985). Attempted murder is egregious misconduct. *Brancoveanu v. Brancoveanu*, 535 N.Y.S.2d 86, 90-91 (App. Div. 1988). Trial courts have found egregious misconduct in cases involving assault with a knife that produced multiple stab wounds, *Wenzel v. Wenzel*, 472 N.Y.S.2d 830, 833-34 (Sup. Ct. 1984); rape, *Thompson v. Thompson*, N.Y.L.J., Jan. 5, 1990, at 22; and repeated physical abuse in which, over a 40-year period, the husband slapped plaintiff's face weekly; broke her foot by stamping on it; broke her finger, leaving it permanently deformed; pushed her, causing a broken arm with

While the criminal law is therefore a convenient guidepost in identifying harms that one spouse might inflict upon the other that are sufficiently egregious to condemn without further inquiry into the marital relationship, it is not itself designed for that purpose, at least not exclusively. So the correspondence between the statutes defining criminal acts and our policy concern cannot be perfect. Regulatory crimes bear little connection with our problem, for example. An environmentally sensitive husband ought not to have an IIED claim against his wife for the distress he feels as a result of her refusal to properly separate their household refuse into the various categories of recyclables, even if her practice violates a municipal ordinance. One refinement, then, might be to consider only acts that have been made crimes because of the harm they inflict on a particular individual; tort claims would then also be allowed without regard to whether the victim was married to the perpetrator.

There is also the odd problem that criminal statutes sometimes remain on the books only because they are never enforced. Indeed, this area is rich with such examples. In some states, for example, oral or anal intercourse may be criminal, even between married persons,<sup>283</sup> or adultery may still be a crime.<sup>284</sup> Of course, arguments can be made about whether such statutes pass constitutional muster; some clearly do not. But we prefer to rely on a different argument for excluding such crimes from our list. It seems to us that when a society declines to enforce a criminal prohibition it has in effect concluded either that the act in question is not actually bad enough to warrant that kind of condemnation, or that the nature of the conduct is such that it is not appropriately regulated by legal prohibitions. In either

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a permanent 40% loss of use; and punched her so hard that she sustained dental damage requiring caps and root canal work, *Debeny v. Debeny*, N.Y.L.J., Jan. 24, 1991, at 21. New York commentators have concluded that egregious misconduct requires either attempted murder or the actual commission of "serious violence." Russell I. Marnell, *Marital Fault in New York: Its Appropriate Role in Financial Issues*, N.Y.L.J., June 16, 1994, at 1.

New York's reason for adopting this rule echoes some of our concerns. The New York Court of Appeals has said that it would be too difficult to assess the parties' relative fault, apart from the kinds of extreme cases contemplated under its rule, and "may involve the courts in time-consuming procedural maneuvers relating to collateral issues." *O'Brien*, 498 N.Y.S.2d at 750.

283. There are currently 23 states that have laws criminalizing oral and anal intercourse between consenting partners, 7 of which apply only to same-sex partners. Jane Gross, *After a Ruling, Hawaii Weighs Gay Marriages*, N.Y. TIMES, Apr. 25, 1994, at C12 (citing statistics of the American Civil Liberties Union); see MODEL PENAL CODE § 213.0(3) (1980) (defining deviant sexual intercourse as oral and anal sexual intercourse between people who are not married to each other and any sexual intercourse between people and animals).

284. See Martin J. Siegel, *For Better or Worse: Adultery, Crime & the Constitution*, 30 J. FAM. L. 45, 50 n.36 (listing 25 states that have retained their adultery laws).

case the prohibition—whether continuing from inattention, inertia, or its perceived symbolic value—ceases to have the persuasive power necessary to render the formally proscribed conduct presumptively tortious as between spouses. This principle should also apply, it seems to us, where a crime is prosecuted, but never between spouses. Consider, for example, criminal prohibitions under which peeping Toms are prosecuted.<sup>285</sup> We do not know whether the relevant statutes typically contain language that bar such prosecutions when the parties are married to each other, but we cannot imagine that prosecutions would be brought in such cases.

With these caveats, then, we imagine that most readers would agree that criminal conduct in which the victim was one's spouse should also be actionable in tort (assuming the conduct also contains the ordinary elements of a tort). So the remaining question is whether this standard is too high: are there noncriminal acts that should also be actionable? We were concerned particularly with three fact patterns that were raised by the cases.

Consider first the wife who falsely accuses her husband of beating her. If this accusation is made to her mother, under our rule no tort action should lie, even though the accusation might meet the ordinary elements of a defamation claim.<sup>286</sup> That result seems correct to us. If she makes the accusation to the police and her husband is imprisoned, her behavior is both tortious (defamation plus false arrest or malicious prosecution), and, it would seem, criminal (knowingly making a false police report). So our rule would allow the tort claim. This is what happened in *Gordon v. Gordon*,<sup>287</sup> a recent case in which a New York court awarded recovery in tort to the husband, subsequent to his arrest and jailing, in the amount of \$25,000 for the wife's false

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285. See, e.g., CAL. PENAL CODE § 647(h) (West 1988) (prohibiting nighttime prowling on private property and peeking in windows without lawful business with the owner).

286. See *supra* note 271 and accompanying text.

287. *Gordon v. Gordon*, N.Y.L.J., Mar. 10, 1992, at 22.

complaint to the police,<sup>288</sup> notwithstanding New York's antipathy towards interspousal IIED claims.<sup>289</sup>

Now consider the case in which the false accusation of wife beating is made, say, to the husband's law partners, who as a result terminate his partnership to his grave financial loss. Something akin to this seems to have happened in *Gordon*.<sup>290</sup> Such behavior is apparently not a crime, and thus not tortious under our rule. As for the emotional harms the husband might suffer—humiliation, disrupted friendships, among others—we are comfortable with this result. We are less certain, however, about the husband's financial loss, which might well be actionable absent a special rule arising from the spousal relationship (interference with contractual relations, for example). But in this Article we will, for the most part, put that possibility aside, for it is not the sort of loss on which we are focusing. We briefly observe, however, that even thoroughly no-fault divorce regimes often consider the *financial* losses flowing from spousal misconduct, such as gambling or gifts to paramours,<sup>291</sup> and routinely consider the financial consequences of a spouse's job loss in allocating the couple's property and awarding ongoing spousal support, even if the job loss somehow arises from the other spouse's blameworthy behavior. So a rule that distinguished economic from emotional losses seems neither novel nor arbitrary. Nonetheless, we have no doubt that many careers are damaged by inappropriate spousal conduct that leads to divorce, so some further thought is necessary in considering the scope of a rule allowing such interspousal tort claims.

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288. *Id.* at 17-18. The *Gordon* court based the recovery on the tort of "abuse of process," however, saying nothing about whether Mrs. Gordon violated the criminal law. *Id.* Probably not all actions that would constitute the torts of false imprisonment, abuse of process, malicious prosecution, or false arrest would constitute crimes. In *Hill v. Hill*, 415 So. 2d 20 (Fla. 1982) (arising before Florida abrogated its spousal immunity doctrine), a wife accused her husband, among other things, of maliciously committing her to a mental institution against her will. *Id.* at 21. The husband sought to justify this conduct as necessary to protect the welfare of their daughter. *Id.* We are assuming, however, that Mrs. Gordon's behavior did constitute a crime.

289. See *Weicker v. Weicker*, 237 N.E.2d 876 (N.Y. 1968); *Doe v. Doe*, 519 N.Y.S.2d 595 (Sup. Ct. 1987).

290. *Gordon*, N.Y.L.J., Mar. 10, 1992, at 5. The opinion states, "At one point a partner informed Mr. Gordon that a perception was getting around the firm that since Mr. Gordon couldn't control his private life, he couldn't be entrusted to act on and control the business of his clients." *Id.* Later in the opinion it is simply reported that he was asked to leave the partnership. *Id.* at 8.

291. In many jurisdictions, however, such losses can be considered only when the behavior that gave rise to them took place toward the end of the marriage. See AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION § 4.17 (Council Draft No. 3).

The second case we thought more about is *Twyman v. Twyman*,<sup>292</sup> in which the husband pressed his wife to have sadomasochistic sex with him.<sup>293</sup> The husband did not use force of the sort that would make it marital rape;<sup>294</sup> instead he engaged in sexual activity with other women, telling his wife that the reason for his behavior was that she was not sexually satisfying to him.<sup>295</sup> He knew that before their marriage she had been raped, and it probably should not have been surprising that, when she finally did try the sadomasochistic sex with him (at her therapist's suggestion, no less), it was an emotionally terrible experience for her.<sup>296</sup> His behavior was not a crime, however. Should it nonetheless be actionable as in interspousal tort for IIED? The Texas Supreme Court has at least held open that possibility.<sup>297</sup>

We are troubled by this result. Had he coerced her through threats of violence, that would have been one thing. And we recognize that some (perhaps many) will believe that it was disgraceful for him even to ask. Evidently, this couple was sexually incompatible, and as a result they probably should not have stayed married. But, in the end, as we read the opinion, she decided voluntarily, with her therapist's encouragement, to try to satisfy him in hopes of keeping their marriage together.<sup>298</sup> Surely it is common for many couples to engage regularly in sexual acts even though one of them would just as soon not, precisely because the otherwise reluctant spouse does so to

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292. 855 S.W.2d 619 (Tex. 1993).

293. *Id.* at 620. The court termed the sexual conduct as "bondage." *Id.* at 620 n.1.

294. *Id.* at 620.

295. *Id.* at 620-21.

296. *Id.* at 620 n.1.

297. The trial court in *Twyman* joined the tort claim with the divorce action. *Id.* at 620. The claims were decided together in a bench trial in which the wife was awarded \$15,000 on the tort claim. *Id.* The trial judge's findings, however, appeared to treat the claim as one for *negligent* infliction of emotional distress, and therefore never made a finding on crucial IIED issues, such as whether the defendant's conduct was outrageous. *Id.* at 620-21. The Texas Supreme Court, having in the meantime held that NIED would not be recognized in Texas, remanded the case so that the tort claim could be reconsidered as one for IIED. *Id.* at 625-26. The opinion gives no indication that the marital relationship of the parties was ever considered relevant to recognition of the action, except for its discussion of the entirely procedural question of whether the IIED claim should be joined with the divorce action. *Id.* at 624-26. Texas's treatment of this issue is noteworthy. Unlike most jurisdictions that have considered the matter, *Twyman* encourages the trial court to join the tort and divorce claims. *Id.* In evaluating the result it seems relevant that Texas was unique among American states in refusing to recognize any claims for alimony. Its apparent encouragement of IIED claims joined with divorce actions, however, seems very much akin to the once common system in which alimony at divorce was allowed exclusively to the "innocent" wife. We note that Texas recently changed its law to provide a very limited alimony remedy. See TEX. FAM. CODE ANN. §§ 3.9601, .9605 (West 1996).

298. *Twyman*, 855 S.W.2d at 636 (Hecht, J., concurring and dissenting).



please the other one. Moreover, we are prepared to assume that this pattern may often involve sexual acts that would strike some as deviant. But we finally conclude that if consensual "bondage" between married couples is not a crime, it should not be actionable in tort either. It seems to us that the objecting spouse's remedy in these situations should be separation, not grudging consent followed by litigation.

Our third and final "troublesome" example involves the husband who, without telling his wife, made videotapes of her nude or engaged in sexual intercourse with him, and then showed the tapes to friends. This is surely an invasion of privacy, but it might not be a crime if the pictures are not obscene. Nothing in our discussion suggests that the wife should not be able to enjoin the photos' further distribution, but the "criminal act" requirement would bar her from recovering in tort for the distress we would expect she suffered in learning of the distribution that had already taken place. That distress would be actionable if the plaintiff and defendant were not married—the actual facts of *Boyles v. Kerr*.<sup>299</sup>

It seems to us that our example is difficult precisely because the conduct in question easily could be treated as criminal, even if in fact it is not. Obviously, if the pictures fell within the legal definition of obscenity, their distribution alone *would* be criminal. We need not review in this Article the voluminous literature on obscenity in order to observe that videotapes of a couple engaging in sexual intercourse are close enough to the line that they could be found obscene, depending upon other contextual factors. Moreover, we can easily imagine laws that not only treat as a separate crime the distribution of obscene photographs of individuals who have not consented to such distribution, but that even extend the prohibition to the unconsented-to creation and distribution of sexually revealing photographs that do not necessarily meet the constitutional test of obscenity. The crime in this case would lie not in the distribution alone, but in the privacy invasion inherent in their creation and distribution without the subject's consent. The idea of such a prohibition would be in fact to punish, and perhaps deter, the defendant's imposition of the very same

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299. 855 S.W.2d 593 (Tex. 1993). The legal niceties of *Boyles* were more complex. Rather than suing for intentional harm, the plaintiff filed a claim for NIED. *Id.* at 594. Apparently, she claimed this lesser wrong in order to try to collect from the defendant's or his family's liability insurance policy. David Frum, *Find the Deep Pocket*, FORBES, Mar. 29, 1993, at 44. The Texas Supreme Court used the occasion to wipe out NIED claims generally in Texas. *Boyles*, 855 S.W.2d at 599-600. Our point, however, is that had she sued for invasion of privacy, we think that she would have won. Of course, perhaps her wrongdoer would then have been judgment proof.

emotional harm for which the unknowing subject might also seek recompense in tort.

If the analysis of the preceding paragraph is correct, then the “criminal-act” test’s possible exclusion of a tort claim between spouses under these facts is not a serious problem. The question, we think, is this: would those who believe that a tort claim should be allowed under such facts also find it appropriate to criminalize that conduct? If so, then it seems we are right in thinking that the criminal-act standard taps the appropriate threshold for invoking tort claims over spousal conduct. The fact that people may disagree on whether particular acts should be criminalized is hardly a new or surprising insight. The criminal-act test, like any other test we might devise, will thus have some cases near the line, and some imprecision in the line’s location, but the basic geometry still can be correct.<sup>300</sup>

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300. Professor Cole, in searching for guidance as to what should constitute “outrageous” conduct, also suggests relying on violations of criminal statutes. Cole, *supra* note 20, at 573. More generally, however, her solution calls for what she terms “balancing the parties’ interests.” *Id.* at 572. But except for the easy cases, her approach does not seem satisfactory. For example, it may rule out cases in which the husband’s IIED suit is grounded on his wife’s decision to have an abortion against his wishes, given that under Professor Cole’s balancing approach, her constitutional right would win out. *Id.* Yet, these “safe harbors” do not provide useful guidance as to when the facts of a case should constitute a tort. There she turns to a combination of the criminal law violation plus the amorphous and ambiguous statement that “duties also may be implied from civil statutes.” *Id.* at 573. By way of illustration, she would have allowed an IIED claim in *Weicker v. Weicker*, 217 N.E.2d 876 (N.Y. 1976), in which the husband obtained a Mexican divorce and married another woman, because the divorce was illegal as a civil matter. Cole, *supra* note 20, at 574. We certainly would not allow such a claim. Moreover, we are puzzled by how her approach would deal with *Massey v. Massey*, 807 S.W.2d 391 (Tex. Ct. App. 1991) and *Hakkila v. Hakkila*, 812 P.2d 1320 (N.M. Ct. App. 1991). Cole states that she would rule out cases in which one spouse tells the other that he no longer loves her because, on free speech grounds, his interest would win out. Cole, *supra* note 20, at 574. Does this mean that all bullies are to get off on free speech grounds? In a very recent article, Merle Weiner proposes that it should be per se “outrageous” for someone (including a spouse) to willfully violate a civil protection order. Merle H. Weiner, *Domestic Violence and the Per Se Standard of Outrage*, 54 MD. L. REV. 183, 223 (1995). Weiner explains that “the per se rule can only be invoked after the violation of a civil protection order that itself was predicated on prior domestic violence.” *Id.* at 232. Indeed, in Weiner’s view, the prior behaviors that lead to the issuance of the protection order constitute a “criminal offense between family members.” *Id.* Hence, under Weiner’s approach, the per se rule is invoked only against those who are at least second time offenders, although she recognizes that the second offense itself might not constitute a crime. *Id.* Because of its specificity, and because criminal conduct undergirds it, Weiner’s particular rule is not unattractive to us. Still, we would not want to restrict tort recovery this much. Moreover, for the specific problem she examines (those who violate civil protection orders), perhaps a more suitable solution would be contempt proceedings against the violator including financial penalties that are awarded to the victim. See *supra* text accompanying notes 90-91.

Our approach is thus consistent with the fairly recent decision of a New Jersey trial court in *M.G. v. J.C.*,<sup>301</sup> in which the husband recorded his wife's home telephone conversations with her female lover, threatened to use the tapes to harm his wife, and then played the tapes to his wife's sister.<sup>302</sup> The court found that the husband's behavior violated the state's electronic eavesdropping law, that his conduct was egregious, and that the wife suffered extreme emotional distress as a result of his conduct.<sup>303</sup> The court awarded the wife \$10,000 in compensatory and \$50,000 in punitive damages.<sup>304</sup> Although the claim and the damages awarded appear in this case to have been predicated exclusively on the provisions of the eavesdropping law itself, these facts would, under our approach, support a claim for IIED.

### CONCLUSION

We have set out the many reasons why we think courts should be extremely leery of recognizing interspousal torts for emotional distress. We should mention, however, one final point that somewhat calms our anxieties. This point is that even though a few interspousal tort claims for IIED have succeeded, there has not been in recent years a large number of additional claims. Maybe it is just too soon, and they will come in time. But perhaps there is a different explanation.

Interspousal tort claims require time and effort for which lawyers will demand a proportionate financial return. But in most cases the offending spouse does not have enough wealth to satisfy a reasonably large judgment.<sup>305</sup> Perhaps too, the lawyer will believe that, absent truly despicable conduct by the defendant and a demonstration of grave consequences to the plaintiff, juries will resist large awards. In short, the traditional personal injury bar may not be much interested in getting involved as second lawyers on behalf of divorcing plaintiffs, preferring instead to concentrate, as now, on claims against enterprises and defendants with insurance.

In that case the divorce bar would have to carry the load. Yet our discussions with matrimonial attorneys leave us with the impression that divorce lawyers are loathe to bring such claims. Not only are they inexpert in personal injury practice, but they have been socialized for two decades in a no-fault mentality with a forward-looking outlook on

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301. 18 Fam. L. Rep. (BNA) 1247 (N.J. Super. Ct. Ch. Div. Apr. 7, 1992).

302. *Id.* at 1247.

303. *Id.* at 1247-48.

304. *Id.* at 1247.

305. Sugarman, *supra* note 9, at 132.

divorce. They try to steer their clients away from recrimination. It would thus take a revised self-image for many of them to take up what was once the usual stance of the domestic relations lawyer. Of course, were it to be considered actionable legal malpractice not to discuss the possibility of an IIED claim with any divorcing spouse, we have no doubt that many lawyers would promptly make that standard behavior on their part regardless of their personal attitudes about no-fault divorce. And so we still worry, despite the relative paucity of tort claims thus far, that its recognition will eventually yield the IIED claims we would disallow.<sup>306</sup>

In the end, then, we conclude that it is probably a mistake for the courts to make tort law available for claims between divorcing spouses, apart from cases in which the abusive conduct is criminal. This would bar most, if not all, claims for IIED or invasion of privacy, while allowing claims for physical violence and the like. Our examination of the tort problem also persuades us that it would be a mistake for divorce courts to allocate property or decide spousal maintenance on an open-ended fault basis. On the other hand, the “egregious misconduct” standard employed by New York and perhaps other states,<sup>307</sup> while in form closely related to the “outrage” standard that we reject,<sup>308</sup> seems in practice closer to our proposal, at least so far as one can tell from the reported decisions.<sup>309</sup> So a more carefully stated version of the standard, which also limited claims to criminal conduct, might be as defensible as the tort rule that we propose. Surely, however, if the law provides such remedies, it should do so in either the divorce suit or in a separate tort claim, but not in both. Which forum—divorce court or tort action—is the better choice is not a question we address, as it raises issues of procedure and administration of the law that are far afield from our topic. What is clear to us, however, is that the great majority of divorces do not present the kind of criminal behavior that should give rise to such claims in either forum. For these far more usual cases, the best remedy the law can provide the spouse who feels emotionally endangered or harmed by the marital relationship is its expeditious dissolution, along with his or her share of the accumulated property and, in the appropriate cases, enforceable support awards.

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306. A possible harbinger of this may be found in Karp & Karp, *supra* note 3, at 390, who comment, “Often the threat of a possible suit for personal injuries is more advantageous as a negotiating tool than the lawsuit itself.” *Id.*

307. See *supra* note 282 and accompanying text.

308. See *supra* notes 232-254 and accompanying text.

309. See *supra* note 282 and accompanying text.