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Intimate Liability: Emotional Harm, Family Law, and Stereotyped Narratives in Interspousal Torts

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INTIMATE LIABILITY: EMOTIONAL HARM, FAMILY LAW, AND STEREOTYPED NARRATIVES IN INTERSPOUSAL TORTS

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ABSTRACT

Tort liability expanded in the twentieth century, a shift scholars generally attribute to the reorganization of tort law around the fault principle. In privileging compensation and deterrence, this reconfiguration ended various restrictions on liability, long viewed as arbitrary, including limits to the recovery for emotional harm and interspousal immunities. Tort and family law scholars alike portray the end of such immunities as a milestone for gender equality. Their elimination enables spouses and partners to secure compensation for emotional and physical abuse arising in intimate relationships. Yet, tort law is not operating in this way. On the contrary, by endorsing a family/market distinction in private law, scholars have pushed intimate liability claims between spouses away from tort law and into family law. As a result, compensation for emotional harm is mostly actionable in tort when it occurs in the realm of the market rather than in the realm of the family.

Today, intimate liability is left to the agendas of political reformers. Feminists on the left and social conservatives on the right are shaping the litigation on interspousal torts, but they have opposing political agendas. While feminists seek to create more gender equality and protect women both within and outside the marital bond, social conservatives seek to strengthen traditional family values by favoring married plaintiffs only. Both sets of reformers, however, care more about promoting their respective agendas than redressing the harm suffered by those who do not fit their stereotyped narratives.

The current intimate liability regime has a class bias. Plaintiffs in upper-middle-class marriages can benefit from interspousal tort

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litigation, particularly during divorce proceedings, because they can pay for private liability insurance. Low- and middle-income married couples, who cannot afford such liability insurance, cannot bring these claims and instead are at the mercy of tort lawyers operating on contingency fees. Furthermore, unless litigation on emotional harm happens during the breakup of a marriage, it is almost impossible for non-married plaintiffs to recover damages. These include non-married partners, cohabitants, and same-sex couples. To overhaul such unequal outcomes, this paper suggests departing from a market/family dichotomy in tort law. It advocates reconceptualizing intimate liability as a stand-alone tort remedy in order to deter abusive emotional behavior enabled by relationships in which economic and emotional dependency are deeply intertwined.

INTRODUCTION

Efforts to recover for stand-alone emotional harm perpetrated by spouses and intimate partners confront obstacles in the current tort law regime.[1] This confrontation occurs despite the existence of liability for stand-alone emotional harm in recent decades, despite the abolition of interspousal immunities, and despite the broader shift of *mentalité* from community to individual values in the family and family law.[2] In the twentieth century, the end of interspousal immunities signified an important victory for gender equality.[3] Gender equality advocates championed these developments, viewing the emergence of modern interspousal tort litigation as both a broader intimate liability regime and as protection for the individual rights of wives abused physically or emotionally by their husbands.[4]

Today, this is no longer the case. "Unloved" by tort scholars,[5] considered a threat to the affective privacy of married couples by

1. *See* Pamela Laufer-Ukeles, *Reconstructing Fault: The Case for Spousal Torts*, 79 U. CIN. L. REV. 207, 243 (2010).

2. After World War II, the legal consciousness shifted from broad social intervention in family relations through state regulation to the rebirth of subjective rights and individualistic forms of protection through enforcement by private law or transnational courts. *See* Janet Halley, *What is Family Law?: A Genealogy, Part II*, 23 YALE J.L. & HUMAN. 189, 263–64 (2011). Judith Areen has described this post-1960s shift in family law as "the tension between the doctrine of family privacy and protection of the rights of individual family members." *Id.* at 269 (quoting JUDITH AREEN, CASES AND MATERIALS ON FAMILY LAW xix–xx (1978)). Areen further explained that "[c]ritics of the family privacy doctrine argue that it is unfair to the needs of abused wives or children. But at the same time, growing fears about the intrusiveness or clumsiness of modern government have provided new support for the policy of leaving families alone." *Id.* at 269–70.

3. *See id.* at 273. *But see* Clare Dalton, *Domestic Violence, Domestic Torts and Divorce: Constraints and Possibilities*, 31 NEW ENG. L. REV. 319, 328–29 (1997) (explaining that despite the progressive reforms of the twentieth century supported by an energetic women's movement, two crucial arguments, often used in tandem, about domestic harmony and privacy have allowed interspousal immunities to survive, at least in practice).

4. *See id.* at 272–73.

5. *See* John C.P. Goldberg, Essay, *Unloved: Tort in the Modern Legal Academy*, 55 VAND. L. REV. 1501, 1519 (2002) ("[W]e must recapture the idea that tort cases are concerned with the focused task of identifying and remedying instances in which an actor has wronged another, as opposed to providing localized compensation or insurance schemes, regulating antisocial conduct for the good of society, or the like."). Goldberg argues that torts should not be used to remedy "perceived social ills." *Id.*

common law judges,[6] and with a very limited impact on tort litigation,[7] tort liability for stand-alone emotional harm in intimate relationships has fallen out of favor.[8] This article argues that three interrelated, ideological, and doctrinal factors have sharply limited its scope and excluded a majority of plaintiffs from recovering from intimate liability torts.

First, by relying on what Janet Halley and Kerry Rittich call "family law exceptionalism" (FLE),[9] tort and family law scholars have reproduced a market/family distinction in private law reasoning.[10] They have treated intimate liability as a matter for family law, which is concerned with vulnerabilities and emotions, rather than tort law, which is concerned with spreading costs among litigants in the market.[11] In reducing tort law to the goal of compensating damages and deterring unsocial behavior,[12] tort scholars are reluctant to regulate family matters that, in their eyes, should be left to love and emotions rather than money and commercial interests.[13] Therefore, family law appears better equipped to address emotional harm between spouses and intimate partners. This approach has reinforced family law exceptionalism in tort law,[14] namely the idea that private law is characterized by a market/family distinction in which the first is associated with universal and individualistic values and the second with localized and organic ones.[15]

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6. *See, e.g.*, Drake v. Drake, 177 N.W. 624, 625 (Minn. 1920) (emphasizing the tradition of respecting the "tranquillity of family relations" by denying interspousal tort claims), *overruled by* Beaudette v. Frana, 173 N.W.2d 416 (1969); Battalla v. State, 176 N.E.2d 729, 730 (N.Y. 1961) (noting the public policy concern that certain types of tort claims might flood courts with frivolous litigation).

7. *See infra* Part II.C (discussing the limited number of tort lawsuits between spouses and intimate partners).

8. *See* Ira Mark Ellman & Stephen D. Sugarman, *Spousal Emotional Abuse as a Tort?*, 55 MD. L. REV. 1268, 1317–26 (1996).

9. Janet Halley & Kerry Rittich, *Critical Directions in Comparative Family Law: Genealogies and Contemporary Studies of Family Law Exceptionalism—Introduction to the Special Issue on Comparative Family Law*, 58 AM. J. COMP. L. 753, 753 (2010).

10. *See, e.g.*, Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1497 (1983).

11. Halley & Rittich, *supra* note 9, at 754.

12. *See* John C.P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO. L.J. 513, 525 (2003) (explaining the compensation-deterrence theory of tort law as deterring "antisocial conduct" and compensating injured parties).

13. For instance, tort scholars have argued that compensatory damages are, at best, inappropriate when family law is already available to address spousal disagreements and division of property through divorce. *See, e.g.*, Ellman & Sugarman, *supra* note 8, at 1342–43.

14. *See* Janet Halley, *After Gender: Tools for Progressives in a Shift from Sexual Domination to the Economic Family*, 31 PACE L. REV. 887, 897–98 (2011) (discussing the history of FLE).

15. *See* Duncan Kennedy, *Savigny's Family/Patrimony Distinction and its Place in the Global Genealogy of Classical Legal Thought*, 58 AM. J. COMP. L. 811, 813–14 (2010).

Second, feminists on the left and social conservatives on the right are driving the legal changes behind intimate liability. These reformers hold distinct ideals of family life which reflect broader political and cultural struggles over how to reconcile principles of equality and community. These two groups, who find themselves on the same side of this legal reform battle, are motivated by opposing goals. Feminists seek to revamp intimate liability to compensate women for harm inflicted by emotionally abusive men.[16] They reject those doctrines that have immunized the family from interspousal torts in the name of affective privacy.[17] To achieve gender equality and compensate women for emotional harm, they aim to protect the dignity and sexual autonomy of women via the torts of intentional infliction of emotional distress (IIED).[18] Feminists seek to protect women's individual rights in order to promote gender equality while mitigating financial losses triggered by no-fault divorce settlements.[19]

Social conservatives seek to reintroduce fault and moral blame to penalize the cheating spouse who has undermined the marriage and more broadly, the honor of the family.[20] Rather than advocating sexual autonomy, they are driven by a romantic, paternalist ideology which welcomes the intervention of tort law in the family in order to protect spouses and punish their paramours.[21] By revamping the old amatory torts,[22] social conservatives seek to assign moral blame, protect the integrity of marriage, and preserve family honor.[23]

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16. *See* Dalton, *supra* note 3, at 390; Deana Pollard Sacks, *Intentional Sex Torts*, 77 FORDHAM L. REV. 1051, 1051 (2008).

17. *See* Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2173–74 (1996).

18. *See* Sacks, *supra* note 16, at 1051.

19. *See* Deborah L. Rhode & Martha Minow, *Reforming the Questions, Questioning the Reforms: Feminist Perspectives on Divorce Law*, *in* DIVORCE REFORM AT THE CROSSROADS 191, 198 (Stephen D. Sugarman & Herma Hill Kay eds., 1990).

20. Fernanda Nicola, *What's Love Got to Do With It?: Stereotypical Women in Dispositionist Torts*, *in* IDEOLOGY, PSYCHOLOGY, AND LAW 650, 658 (Jon Hanson ed., 2012); Jill Jones, Comment, *Fanning an Old Flame: Alienation of Affections and Criminal Conversation Revisited*, 26 PEPP. L. REV. 61 (1998).

21. *Id.*

22. Amatory torts or "heart balms" are old tort actions between spouses or lovers that included breach of marriage, seduction, alienation of affection, and criminal conversation. *See* David M. Cotter, *Heart Balm Torts: Why Your Client May Not be Safe from Liability*, FAM. ADVOC., Spring 2005, at 14.

23. *See* Linda L. Berger, *Lies Between Mommy and Daddy: The Case for Recognizing Spousal Emotional Distress Claims Based on Domestic Deceit That Interferes with Parent-Child Relationships*, 33 LOY. L.A. L. REV. 449, 516 (2000) ("[T]orts arising out of the marital relationship, and other kinds of domestic misconduct should remain an eligible ground for an IIED claim. Otherwise, some spouses will be allowed to seriously harm their partners through conduct that would be tortious if it were directed at anyone else.").

Third, the background rules modeling tort litigation have made recovering damages for intimate liability practically impossible for a majority of plaintiffs. These rules include contingency fee agreements for lawyers, shielding insurances from family torts,[24] and lack of liability insurance in intimate relations.[25] In particular, non-wealthy individuals and those who are not married are practically excluded from the current regime of intimate liability.[26] Due to the absence of liability insurance, tort lawyers who rely on contingency fee agreements are reluctant to bring stand-alone emotional distress claims between middle- and lower-income spouses or non-married partners.[27]

This article adopts an intellectual and social history framework to show how legal change occurs and how this has ultimately shaped the current intimate liability regime without a clear evolutionary trajectory but rather through constant ideological conflict.[28] Part I analyzes the decline of interspousal immunities in the twentieth century as part of the feminist battle for gender equality and women's civil rights. The feminist agenda in favor of intimate liability emerged and took root only in the late 1980s, in part because feminists felt that the classic dignitary torts incorporated and reflected pernicious gender biases.[29] At the same time, however, feminists and liberals were battling on a different but interrelated ground, namely the elimination of amatory torts, which reflected the outdated principle of coverture.[30] According to this principle, the wife was conceived as property of the husband so that, as an indivisible unit, neither party could

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24. *See* Jennifer Wriggins, *Domestic Violence Torts*, 75 S. CAL. L. REV. 121, 137 (2001) (explaining that while the family member exclusion has been struck down in automobile insurance policies, this has not happened for other mandatory insurance policies such as for homeowners or renters in which there is both a family member and intentional torts exclusion).

25. *See* Jennifer Wriggins, *Interspousal Tort Immunity and Insurance "Family Member Exclusions": Shared Assumptions, Relational and Liberal Feminist Challenges*, 17 WIS. WOMEN'S L.J. 251, 252 (2002).

26. *See* Tom Baker, Essay, *Liability Insurance as Tort Regulation: Six Ways that Liability Insurance Shapes Tort Law in Action*, 12 CONN. INS. L.J. 1, 6–7 (2005) [hereinafter Baker, *Liability Insurance*] (explaining that because of the current tort litigation regime, liability insurance policy exclusions become de facto limits on tort liability); Tom Baker, *Blood Money, New Money, and the Moral Economy of Tort Law in Action*, 35 LAW & SOC'Y REV. 275, 314 (2001) ("The liability insurance norm means that, except for institutional defendants or an outrageous wrong, liability insurance has become a prerequisite for tort liability.").

27. Baker, *Liability Insurance*, *supra* note 26, at 4–5.

28. *See* Robert Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 58 (1984).

29. *See* Martha Chamallas, *Discrimination and Outrage: Exploring the Gap Between Civil Rights and Tort Recoveries*, *in* FAULT LINES: TORT LAW AS CULTURAL PRACTICE 119, 130 (David M. Engel & Michael McCann eds., 2009).

30. *See* Nathan P. Feinsinger, *Legislative Attack on "Heart Balm,"* 33 MICH. L. REV. 979, 979 (1935).

bring litigation against the other.[31] Social conservatives, in contrast, favored the survival and reform of amatory torts.[32] However, their goal was not to reclaim property interests in their wives, as in traditional patriarchal marriages of the mid-eighteenth century.[33] Rather, consistent with the idea of marriage for love, social conservatives favored a male breadwinner/full-time housewife marriage.[34] In embracing a romantic paternalist ideology, social conservatives aimed to modernize amatory torts as a tool to protect family honor and reestablish the traditional function of marriage in society.[35]

In light of the historical evolution of interspousal immunities and amatory torts, Part II examines how tort scholars have shaped intimate liability in the last fifty years. In particular, they have marginalized intentional torts and viewed with great skepticism emotional harm arising in intimate relationships.[36] Such development has been explained from two different, but equally important, tort approaches. From a civil recourse standpoint, John C.P. Goldberg shows that the predominance of the fault principle has led to the ascendancy of compensation and deterrence theories in tort law with the concurrent marginalization of intentional torts.[37] From a feminist standpoint, Martha Chamallas and Jennifer Wriggins propose that the gender biases embedded in the tort system have led to the marginalization of compensation for emotional rather than physical harm.[38] This article, however, offers a third account that relies on

31. *See* 2 WILLIAM BLACKSTONE, COMMENTARIES *441–42 ("By marriage, the husband and wife are one person in law: . . .that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband; under whose wing, protection, and *cover*, she performs everything; and is therefore called in our law—french a *feme-covert*, *femina viro co-operta*; it is said to be *covert-baron*, or under the protection and influence of her husband, her *baron*, or lord; and her condition during her marriage is called her *coverture*.").

32. Nicola, *supra* note 20, at 658.

33. *Id.*

34. *See* STEPHANIE COONTZ, MARRIAGE, A HISTORY: FROM OBEDIENCE TO INTIMACY OR HOW LOVE CONQUERED MARRIAGE 5 (2005) (explaining that marriage had two different traditional functions: first in the mid-eighteenth century and then in the mid-twentieth century, and that the shift from one to the other was due to the new and revolutionary idea that "love should be the central reason for marriage, and companionship its basic goal").

35. Nicola, *supra* note 20, at 658.

36. *See, e.g.*, Ellman & Sugarman, *supra* note 8.

37. *See* Goldberg, *supra* note 12, at 526–27. Because tort law was conceived as advancing public ends, negligence became the paradigmatic tort involving corporate plaintiffs and insurance companies. In contrast, intentional torts received comparatively little scholarly attention, either because scholars understood them as not being matters of public concern, or because they became doctrinally uninteresting. *See id.*

38. *See* MARTHA CHAMALLAS & JENNIFER B. WRIGGINS, THE MEASURE OF INJURY: RACE, GENDER, AND TORT LAW 37–38 (2010) (explaining that while emotional harm was associated with women in domestic settings, physical harm was associated with the action of males in the workplace).

the persistent ideological distinction between the family and the market in tort law. Scholars have successfully deployed IIED claims to redress the mental and relational harm suffered by plaintiffs in employment, debtor-creditor, and landlord-tenant relations.[39] In contrast, they have found family law more suitable to address emotional harm between spouses or intimate partners.[40] In doing so, tort scholars have pushed intimate liability into family law, rather than tort law.[41]

Part III articulates how feminists and social conservatives have stepped into the breach.[42] In past decades, by way of defending their proposed law reforms and litigation outcomes, both groups have used stereotyped gender roles that reflect the reformer's goals.[43] Feminists portray the woman as a victim in the home or as a consumer in the market, whereas social conservatives portray her as a cheater in the family or as a voracious sexual secretary in the market.[44] Insofar as stereotypes based on heterosexual relationships or "traditional" families inform tort doctrine, they prevent many plaintiffs who have suffered emotional harm in intimate relationships from obtaining relief.

Part IV shows how feminists and social conservatives' political motivations for tort reform become clear if we consider what, or who, is left outside of the current litigation strategies.[45] A taxonomy of the plaintiffs covered by intimate liability litigation—married, divorcing, and cohabitant couples—shows that the current intimate liability regime allows only some plaintiffs to recover.[46] In practice, cohabitants and same-sex couples, who do not fit the intimate relationships portrayed by political reformers, are prevented from recovering damages.[47] For same-sex partners or cohabitants, it remains almost impossible to recover damages through intimate liability.

Today, an increasing number of plaintiffs are prevented from accessing the tort system for ideological reasons created by the pervasive market/family distinction and for cultural reasons promoted by the stereotyped narratives of feminists and social conservatives in intimate liability. Therefore, many plaintiffs are unlikely to find redress through tort law and even less likely to do so through family law. Plaintiffs in heterosexual relationships, such as cohabitants who do not conform to traditional visions of the married couple, fall into this category. In addition, due to the limited number of

39. Ellman & Sugarman, *supra* note 8, at 1281.
40. *Id.* at 1342–43.
41. *Id.*
42. *See infra* Part III.
43. Nicola, *supra* note 20, at 651.
44. *See infra* Table 1.
45. *See infra* Part IV.
46. Nicola, *supra* note 20, at 651.
47. *Id.*

states that recognize same-sex marriages, homosexual couples are also left out of interspousal tort litigation promoted by feminists and social conservatives.

In supplementing family law with tort law, or in bringing stand-alone tort claims for emotional distress, plaintiffs who are left out of the tort system or who do not fit stereotyped narratives could reclaim compensation for emotional harm in intimate relations. Intimate liability could offer relief to plaintiffs in situations that go beyond marriage and heteronormative relations and in which economic and emotional dependencies are necessarily intertwined. Compensation in these cases could provide relief for victims, alleviation of economic burden, and effective deterrence for their offenders.

I. THE MIXED LEGACY OF INTERSPOUSAL TORTS: BETWEEN WOMEN'S EMANCIPATION AND THE PROTECTION OF FAMILY HONOR

With the demise of interspousal immunities after World War II, the expansion of liability in intra-family torts became a symbol of the victory for women's rights. The old system of interspousal immunities prevented a spouse from suing the other in tort actions.[48] In particular, it barred a wife from suing her husband while incorporating the wife into her husband's legal personhood.[49] Because interspousal immunity was the norm in the nineteenth century, intra-family, or domestic, torts were a relatively new development.[50] The rise of intra-family torts became part of the women's narrative of emancipation, granting them access to political and civil rights, and marking their increasing legal capacity to own property, sign contracts, and sue in tort.[51]

Women could now enjoy protection and compensation from the tort system against the emotional abuses of men.[52] This development happened at the expense of what was considered oppressive family solidarity in which women were subordinate to men.[53] By the 1980s, feminist scholars, who had grown skeptical about the economic benefits of the new divorce legislation for women, approached intra-family torts as a remedy for the economic disparities that women were subject to in the aftermath of a no-fault divorce.[54]

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48. *See* Salvatore Patti, *Intra-Family Torts*, *in* 4 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW: PERSONS AND FAMILY 9-1, 9-6 (Aleck Chloros et al. eds., 1998).

49. *See* BLACKSTONE, *supra* note 31, at *441–42.

50. Carl Tobias, *Interspousal Tort Immunity in America*, 23 GA. L. REV. 359, 422 (1989).

51. *See* Kerry Abrams, A Legal Home: Derivative Domicile and Women's Citizenship (unpublished manuscript) (on file with author).

52. *See* Wayne F. Foster, Annotation, *Modern Status of Interspousal Tort Immunity in Personal Injury and Wrongful Death Actions*, 92 A.L.R.3d 901, § 15 (1979 & Supp. 1995).

53. *See* Tobias, *supra* note 50, at 471.

54. Laufer-Ukeles, *supra* note 1, at 209.

At the same time, however, interspousal torts litigation became a remedy selected by social conservatives to curb the plague of divorce on demand.[55] They sought to undermine sexual patterns such as adultery, cohabitation, and premarital sex through interspousal torts.[56] Despite the risk of undermining the affective privacy of marital relationships, conservative reformers envisioned the revival and reform of the old amatory torts as a way to protect family honor and preserve the traditional function of marriage in society as the center for intimate and reproductive life.[57]

A. Women's Emancipation as the Ability to Sue their Husbands

This Part traces the doctrinal changes driven by feminist advocates to abolish interspousal immunities in order to allow wives to sue their abusive husbands in tort law. In particular, it addresses the initial suspicion, and then the increasing interest, of feminist scholars in using intentional torts to protect women from physical and emotional harm perpetrated by their male partners.[58] Despite the reluctance of courts to enter the bedroom, feminists were successful in deploying the tort of IIED to compensate women for emotional harm suffered in their relationships.

In addition, the widespread critiques by liberal feminists of the uneven economic outcomes in divorce for women, whereby ex-wives would be made poorer than their ex-husbands,[59] also created great expectations for IIED claims. These critics created an expectation that IIED could become an effective remedy for those women who, having suffered from their abusive husband's behavior, were, at the same time, unfairly impacted economically by a divorce proceeding.[60] Interspousal torts became a compensatory device used in a divorce settlement to redress the wrongs perpetrated by husbands against wives.

1. The End of Interspousal Immunities with Exceptions

With the widespread abrogation of the doctrine of interspousal tort immunity after World War II, many divorcing or divorced spouses have been asserting tort claims against each other for misconduct that occurred during the marriage.[61] This situation sits in stark contrast

55. Nicola, *supra* note 20, at 651.
56. *Id.*
57. *Id.* at 658.
58. *Id.* at 654.
59. Laufer-Ukeles, *supra* note 1, at 210–11.
60. Nicola, *supra* note 20, at 655.
61. *See* Foster, *supra* note 52, at 947, 951.

to the situation at the beginning of the nineteenth century. To understand the notion of interspousal immunities that characterized the tort regime between husbands and wives, it is necessary to go back to William Blackstone, the English jurist who published his *Commentaries on the Law of England* in 1765.[62] According to Blackstone, the family was a private sphere separated from the public in which wife and children obeyed the patriarch.[63] This regime, called coverture, submerged women's legal identity into that of their husbands.[64] The husband exercised absolute authority over his wife's property, debts, and necessities.[65]

In nineteenth-century American law, the doctrine of interspousal immunity derived from Blackstone's conception that husband and wife formed a single unit.[66] For several reasons, this immunity disappeared over time. One reason was the drive for gender equality and the adoption of the Married Women's Property Acts and the Emancipation Acts.[67] These Acts reversed coverture, and women were allowed to control their property and keep their legal identity.[68] Another impetus was the constitutional notion of equal protection under the law.[69] As a result, women acquired the ability to sue in tort law, including the right to sue their husbands.[70]

Even though women acquired the right to sue their husbands in the twentieth century as part of their political and civil emancipation, courts were not always willing to let such cases stand, citing a desire to preserve the harmony and affective privacy of family life.[71] As a consequence, judges and lawyers interpreted the Married Women's Property Acts and Emancipation Acts as maintaining interspousal immunities for tort claims.[72] Because intra-family tort lawsuits were seen as potentially disruptive to the core societal value

62. *See* BLACKSTONE, *supra* note 31, at *443.

63. *Id.*; *see* Olsen, *supra* note 10, at 1530–31.

64. *See* Olsen, *supra* note 10, at 1530–31.

65. Scholars and judges co-opted Blackstone's ideas into the American legal sphere, adopting classical legal thought as a model of legal analysis. These scholars rationalized the market/family distinction through classical legal thought. This allowed scholars to maintain moral tenets within the family, while simultaneously espousing neutral ideas for contract, property, and tort law. *See* Kennedy, *supra* note 15, at 811, 813; *see also* Olsen, *supra* note 10, at 1498, 1530–31 (stating that the nineteenth century viewpoint saw women's home and family sphere as separate and distinct from that of the market structure with which the husband engaged).

66. *See* Tobias, *supra* note 50, at 364–65, 370.

67. *Id.* at 409.

68. *Id.* at 409–10.

69. *See* Price v. Price, 732 S.W.2d 316, 319–20 (Tex. 1987).

70. *See* Tobias, *supra* note 50, at 409–10.

71. *Id.* at 383.

72. *Id.* at 386–88.

of family solidarity, especially when children were involved, state courts varied in when and how they abolished the doctrine of interspousal immunity.[73]

Today, there are salient differences among state common law regimes. For example, even though half of the states have completely abolished interspousal immunity to tortious lawsuits among family members, other states have imposed limitations on these lawsuits for different reasons including: limiting the threat to family harmony, protecting the children, preserving the possibility of fixing a broken marriage, avoiding frivolous lawsuits, preventing fraud and collusion, and limiting litigation to negligent torts rather than intentional ones.[74] A small number of states still recognize interspousal tort immunities in their legislation or through the common law.[75]

Finally, states also differ in terms of when interspousal torts can be brought. While some states allow interspousal tort suits for torts that occurred before the marriage, other states allow these lawsuits during divorce proceedings.[76] Still others allow lawsuits for harm that occurred during the marriage to be brought after the divorce or separation agreement has been finalized.[77]

Because of these procedural differences, and the persistence in the practice of interspousal immunities strengthened by the widespread argument that tort law could destroy the affective privacy of the marriage, it is difficult to find a clear geographical pattern among states with respect to domestic and interspousal torts.[78] Despite a

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73. This variation occurred in the form of legislation, case law, or other means. *See* Elizabeth Katz, Note, *How Automobile Accidents Stalled the Development of Interspousal Liability*, 94 VA. L. REV. 1213, 1217 (2008). Katz explains:

> [T]he trend allowing interspousal torts was complicated by the emergence and prevalence of . . . negligent automobile accidents. Unlike the willful torts considered in the earlier periods, it was obvious in the negligence cases that both the plaintiff-wife and defendant-husband wished for the wife to recover. The invisible defendant, truly responsible for paying any awarded damages, was an insurance company. The resultant concern about insurance fraud and collusion halted judicial willingness to allow interspousal torts. And, because they saw no legal reason to distinguish between negligent and willful torts, the courts construed the [M]arried [W]omen's [A]cts so as to not allow *any* interspousal torts.

Id.

74. *See* Benjamin Shmueli, *Tort Litigation Between Spouses: Let's Meet Somewhere in the Middle*, 15 HARV. NEGOT. L. REV. 195, 215–16 (2010); Tobias, *supra* note 50, at 441.

75. Louisiana is the only state that maintains full immunity through legislation. LA. REV. STAT. ANN. § 9:291 (2012).

76. *See* Foster, *supra* note 52, at § 26, § 30.

77. *See* Shmueli, *supra* note 74, at 217.

78. *See* Carl Tobias, *The Imminent Demise of Interspousal Tort Immunity*, 60 MONT. L. REV. 101, 102 (1999) (explaining the difficulty of showing a geographical pattern while analyzing the differences and similarities between Virginia and Montana).

great variability and disparity in results across jurisdictions, this article shows that the majority of cases redressing emotional harm arise in the context of marital breakdown. In contrast, only a handful of cases, most likely unsuccessful for the plaintiffs, occur between non-married couples, cohabitants, or same-sex couples.[79]

2. Using IIED Torts to Recover for Women's Emotional Harm

After World War II, advocates believed that social injustices could be rectified through emotional torts. Two drafters of the Second Restatement of Torts, William Prosser and Judge Calvert Magruder, included IIED specifically to redress "extreme and outrageous" conduct that caused psychological damage without physical contact.[80]

In the United States, the increasing use of intentional torts and, in particular, the IIED doctrine, has recently given rise to some important cases sanctioning physical and emotional abuse between spouses. The increasing number of cases recognizing interspousal torts demonstrates the creative argumentation used by advocates aiming to shape intimate liability.[81] Despite the conflicting ideological goals among advocates, it is possible to see a common aim, namely reinstating fault in interspousal disputes.

a. Feminist Strategies with IIED

For many feminist scholars, the history of IIED as a new dignitary tort had problematic gender implications. In fact, the early IIED cases were primarily concerned with the protection of "'respectable women' against conduct that threatened their reputation for sexual propriety."[82] Martha Chamallas articulates that, "this 'dignitary tort' was used in the past to 'reinscribe traditional gender ideologies and to reinforce race segregation and white racial privilege.' . . . [T]he precursors of IIED were dignitary claims generally used in gender-saturated contexts so that the tort reflected dominant cultural conceptions of 'male honor' and 'female chastity.'"[83]

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79. *See infra* Part III (explaining the doctrinal complexity and the outcomes of interspousal tort litigation).

80. RESTATEMENT (SECOND) OF TORTS § 46(1), § 71 (1965) ("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.").

81. Such expansion happened by means of a limited number of tort doctrines including: IIED, negligent infliction of emotional distress (NIED), consent, and battery.

82. Chamallas, *supra* note 29, at 122.

83. Nicola, *supra* note 20, at 653 (quoting Chamallas, *supra* note 29, at 122).

Chamallas describes the transformation of IIED tort law. In doing so, Chamallas shows that the evolving cultural status of men, women, and the family has coincided with the changing way in which IIED torts are used.[84] For example, "[i]n the late 1970s, when new gender ideologies—radical and cultural feminism—made their way into the American consciousness, feminist legal scholars tried to parlay the cultural revolution into a legal one."[85] Attaining women's equality, to feminist advocates, meant promoting "rights-based approaches" that safeguarded a women's freedom of choice in both public and private settings.[86]

Catharine A. MacKinnon was at the forefront of this movement. However, MacKinnon was doubtful that tort law could be reformed because she believed that the legal community worked to "protect liberal patriarchy" and, thus, would resist any attempt to augment liability in interspousal or sexual torts.[87] MacKinnon argued that patriarchy "pervades society through modes of male domination in the family and the workplace that go beyond coercion and violence and contributes to the creation of human knowledge with a consciousness of male domination."[88] This "consciousness," imbued in judges and lawyers, influences the outcomes and determinations of IIED claims brought against emotionally abusive husbands by their wives.[89]

By the 1990s, however, scholars began to challenge the notion that tort law could not serve a feminist agenda.[90] They explained that avoiding tort law only served to ostracize sexual discrimination claims from core law school curriculum (that is, through common contract, tort, and property claims).[91] These feminist advocates also pushed for tort solutions to domestic violence.[92] This movement helped

84. Chamallas, *supra* note 29, at 122.

85. Nicola, *supra* note 20, at 654.

86. *Id.*

87. *Id.* (citing Catharine A. MacKinnon, *Difference and Dominance: On Sex Discrimination*, *in* FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 32, 36–38 (1987)).

88. *Id.* The central theme of MacKinnon's theory is that liberal patriarchy not only describes men's domination over women, but also promotes the idea that men's "objective" knowledge is epistemologically perfect in contrast to women's "subjective" knowledge. Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 SIGNS 515, 537–38 (1982). In her estimation, feminism thus requires not only a subversion of those institutional structures that maintain male domination over women, but also, more radically, a new production of knowledge no longer affected by exclusive male control over objectivity. *Id.*

89. *See* Chamallas, *supra* note 29, at 130–31.

90. *See, e.g.*, Leslie Bender, *An Overview of Feminist Torts Scholarship*, 78 CORNELL L. REV. 575, 575 (1993).

91. *See id.* at 589–90 (giving examples of how scholars sought to integrate sexual discrimination into tort classes).

92. *See* Leslie Bender, *Teaching Torts as if Gender Matters: Intentional Torts*, 2 VA. J. SOC. POL'Y & L. 115, 145 (1994).

create IIED tort remedies for sex-based domestic violence and workplace discrimination.[93]

Throughout the 1990s, feminists continued to use tort liability to report and deter violent male spouses. For example, Elizabeth Schneider promoted the theory of battered women as survivors, not simply victims, to encourage judges to appreciate the varied experiences and circumstances of women exposed to domestic violence.[94] Clare Dalton demonstrated that affective privacy and "family harmony" rationales were still pervasive in courtrooms, a vestige of historical interspousal tort immunity.[95] This reality created barriers for women bringing IIED claims, even though interspousal tort immunity had been all but eliminated at this time.[96] As the following sections will show, judges use a variety of arguments and justifications to limit the ability of abused women to bring IIED claims.

b. "Affective Privacy" Arguments Against the Expansion of Interspousal Torts

As previously discussed, the elimination of interspousal immunities did not necessarily correspond to an increase in successful IIED tort claims.[97] For example, in *Hakkila v. Hakkila*, the New Mexico Appeals Court limited such claims by adopting stricter definitions of "outrageous behavior."[98] The court deemed that a husband's behavior was not "outrageous" enough to rule in favor of an IIED claim,

93. *See id.* at 144–47.

94. *See* ELIZABETH M. SCHNEIDER, BATTERED WOMEN & FEMINIST LAWMAKING 17 (2001); *see also* Heather Lauren Hughes, *Contradictions, Open Secrets and Feminist Faith in Enlightenment*, 13 HASTINGS WOMEN'S L.J. 187, 188–89 (2002). Battered Woman Syndrome (BWS) is a medical condition recognized in both tort and criminal law which allowed feminists to extend the statutes of limitations for claims arising from abusive relationships. Dalton, *supra* note 3, at 344–45. Because it can take a long time before women denounce the abusive relationship during or after a marriage, those time limitations made it difficult for women to state their claims or to recover for the entire measure of their injuries. In response, feminist lawyers presented the abusive behavior by the husband as a "continuing tort, and a cumulative injury, so that statutes of limitation begin to run only when the abuse stops, which will be when the partners separate, unless the abuser continues to terrorize his partner, either to punish her, or in the hopes of bringing her back into the relationship." *Id.* at 358. Several states' supreme courts have adopted this approach, and women have been successfully awarded high damages in cases in which the husbands maintained outrageous and abusive behaviors towards their wives, who suffered emotional and psychological harm. *See, e.g.*, Curtis v. Firth, 850 P.2d 749, 756 (Idaho 1993).

95. Dalton, *supra* note 3, at 329.

96. *See id.* at 321.

97. *See* MARC A. FRANKLIN ET AL., TORT LAW AND ALTERNATIVES: CASES AND MATERIALS 218 (8th ed. 2006) (explaining that courts often barred tort actions between spouses, thus restricting the claim of IIED between married partners).

98. 812 P.2d 1320, 1325–26 (N.M. Ct. App. 1991).

despite the fact that he insulted his wife in the presence of friends, yelled at her, "lock[ed] her out of house in the winter when she was wearing nothing but a robe, telling her she was insane, refus[ed] to let her pursue schooling and hobbies, and blame[d] the wife's sexuality for his inadequacies in the bedroom."[99] The court cited the Second Restatement of Torts in support of its decision, opining that:

> The intimacy of the family relationship may . . . involve some relaxation in the application of the concept of reasonable care, particularly in the confines of the home. Thus, if one spouse in undressing leaves shoes out where the other stumbles over them in the dark, or if one spouse spills coffee on the other while they are both still sleepy, this may well be treated as not negligence.[100]

The *Hakkila* court thus relaxed the bar for outrageous conduct when it came to domestic matters by reasoning that judges should not inquire too harshly into torts that occur within the private zone of the home.[101]

The court did not downplay the importance of the new tort of IIED, but it also wished to limit causes of action that would open the doors of the court to an overwhelming number of cases dealing with family matters that ought not be litigated in the first place.[102] To illustrate this, the *Hakkila* court cited Judge Calvert Magruder: "[I]t would be unfortunate if the law closed all the safety valves through which irascible tempers might legally blow off steam."[103] This fear of a flood of IIED claims that would severely limit human actions that are typically chalked up to "irascible tempers" was a concern of both Prosser and Magruder who removed any behavior that was not "extreme and outrageous" from the realm of IIED torts.[104] The *Hakkila* court noted that "[c]ourts must recognize that we are not yet as civilized as we might wish" and refused to sustain the IIED claim against the husband.[105]

The *Hakkila* court and others in the legal world worry that "because of pervasive incivility in our society, judicial resources would be taxed if a cause of action were permitted for every intentional infliction of emotional distress."[106] By limiting the IIED claim and

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99. Nicola, *supra* note 20, at 655 (summarizing the facts of *Hakkila*, 812 P.2d at 1322).

100. *Hakkila*, 812 P.2d at 1323 (quoting RESTATEMENT (SECOND) OF TORTS § 895F cmt. h (1965)).

101. *Id.* at 1326.

102. *Id.* at 1325.

103. *Id.* at 1324 (quoting Calvin Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033, 1053 (1936)).

104. *Id.*

105. *Id.*

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

holding that Arthur Hakkila's behavior was not "extreme and outrageous" but merely the product of a bad temper, the *Hakkila* court sought to discourage litigation propagated by angry wives who wanted revenge on their divorcing husbands.[107]

We can look to other cases for examples of behavior that are indeed considered "outrageous." Generally, "within the context of intimate relationships, it seems, behavior is outrageous only if it involves physical and objective violence like rape, assault, and destruction of property, rather than emotional and subjective accusations of [harm]."[108] In order to recover from a husband who psychologically and verbally abuses her, a wife must satisfy an even higher standard. In these cases, "judges and juries tend to conclude that the 'outrageous' standard had been met only when they are confronted with forms of sexual behavior that they consider immoral, indecent, or extreme."[109] Unless sadomasochistic sex or what societal morality would label as perverse sexual patterns is at issue, the problem for feminist lawyers is that emotionally or psychologically abusive behavior is unlikely to become the object of judicial scrutiny under the outrageousness standard.

3. A Remedy to Compensate Women for the Unfair Consequences of Divorce

Feminist scholars have shown the uneven economic effects of the marital breakdown on men and women and criticized the unfair economic consequences of divorce for women. The hope that interspousal torts could rebalance economic disparities created by divorce settlements became a reason for reintroducing emotional harm claims during divorce proceedings.[110] Tortious causes of action still allow for sizeable damage awards in some states, such as North Carolina, while in others, such as Connecticut, lawyers have strategically used

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107. *Id.* at 1327.

108. Nicola, *supra* note 20, at 656; *see, e.g.*, Henriksen v. Cameron, 622 A.2d 1135, 1137, 1137 n.1 (Me. 1993) (finding that threats of harm, including the threat to "burn down the inn [where she was staying]," sufficed to meet the "outrageous conduct" standard for IIED torts).

109. Nicola, *supra* note 20, at 656 (citation omitted); *see* Massey v. Massey, 867 S.W.2d 766, 767 (Tex. 1993). The use of a subjective, rather than objective, standard taints the decisions of juries because it allows for the expression of class and racial biases, so much so that scholars have argued that IIED suits should be limited to cases in which the "outrageous" conduct is also criminally sanctioned for battery or assault. For an analysis of the Massey case, see Ellman & Sugarman, *supra* note 8, at 1317–24.

110. *See, e.g.*, Havell v. Islam, 751 N.Y.S.2d 449, 454 (App. Div. 2002) (affirming the trial court's decision to grant wife a larger portion of the marital property due to an interpersonal tort).

interspousal torts as a second chance to reassign the distribution of property, irrespective of the divorce settlement.[111]

By the mid-nineteenth century, most states had repealed legislative divorce and implemented judicial divorce in its place, with some states, such as Massachusetts, providing for judicial divorce as early as the 1780s.[112] However, there still existed no such thing as consensual divorce because divorce was conceived as "a privilege granted to an innocent spouse," namely the person who possessed sufficient grounds for dissolving the marital union.[113] Regardless, divorces continued to occur, and the increasing availability of divorce reflected the balance struck between two irreconcilable social demands: protecting the sanctity and stability of marriage on one hand and accommodating the social reality of the need for mechanisms to terminate marriages on the other.[114] Max Rheinstein called the result of these conflicting demands a "democratic compromise" that "resulted in the satisfaction of almost everyone concerned."[115]

Despite the growing demand for divorce, the common acceptable grounds for divorce remained adultery, desertion, fraud, impotence, cruelty, conviction of a felony, and habitual drunkenness.[116] Although the demand for an easily obtainable divorce continued to grow,[117] the process was never simplified because of the influence of those opposing the accessibility of divorce.[118] The increasing demand for divorce was attributed to changes in the institution of marriage, which was no longer a legally sanctioned "indentured servitude," but came to symbolize an ideal companionship entailing heightened expectations of affection and partnership.[119] As Lawrence M. Friedman eloquently explained, by the 1870s, a gap existed between the divorce law on the books and divorce allowed in practice.[120] According to Friedman, per

111. *See* Gyerko v. Gyerko, No. CV095025827S, 2009 WL 2357968 (Conn. Super. Ct. July 7, 2009); *see also* Interview with Robert A. Solomon, Clinical Professor Emeritus of Law, Yale Law Sch. (Mar. 17, 2009) [hereinafter Solomon Interview].

112. Lawrence M. Friedman, *Rights of Passage: Divorce Law in Historical Perspective*, 63 OR. L. REV. 649, 652 (1984).

113. *Id.* at 653.

114. *Id.*

115. MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW: AMERICAN FAILURES, EUROPEAN CHALLENGES 66 (1987) [hereinafter GLENDON, ABORTION AND DIVORCE] (internal quotation marks omitted) (citing MAX RHEINSTEIN, MARRIAGE STABILITY, DIVORCE, AND THE LAW 258 (1972)).

116. Friedman, *supra* note 112, at 653–54.

117. *Id.* at 657.

118. *Id.* at 656.

119. *See* June Carbone & Margaret F. Brinig, *Rethinking Marriage: Feminist Ideology, Economic Change, and Divorce Reform*, 65 TUL. L. REV. 953, 961–62 (1991); Friedman, *supra* note 112, at 657–58.

120. *See* Friedman, *supra* note 112, at 659.

se no-fault divorce did not exist.[121] There existed only consensual "fault" divorces in which couples colluded to fabricate proof of adultery to satisfy strict divorce laws.[122] In jurisdictions where grounds were less strict and allowed for divorce on the grounds of "abandonment" or "cruelty," for example, divorce cases usually went uncontested so that "proof" was not required.[123] Even though in practice people were obtaining consensual divorce through collusion and perjury, the strict requirements for divorce persisted.[124] They reflected a compromise between the two irreconcilable demands of allowing people to pursue individual happiness and preserving marital unity as conjugal peace at any cost.[125]

The transition to no-fault divorce in the United States was led by California, which passed a no-fault divorce law in 1970.[126] Within a decade, all but two states, Illinois and South Dakota, had also enacted no-fault divorce laws.[127] Given that consensual divorce had been available in practice for over a century, the advent of no-fault divorce finally closed the gap between reality and social ideals.[128] Further, the waiting period for a unilateral divorce without fault in a United States mixed-grounds jurisdiction, where both fault and no-fault regimes for terminating divorce were in place, was a year or less.[129]

Often, the result of eliminating fault-based divorce was that wives could recover smaller amounts in no-fault actions, because a husband's "fault" was no longer relevant to the calculation of property division or alimony.[130] Under the Uniform Marriage and Divorce Act, courts had broad discretion to redistribute all of the spouses' property in a way that seemed fair to the judge.[131] Upon divorce, dependent spouses were often given transitional awards intended to encourage their financial independence, but the women were often left in a worse financial state than they had been before they married.[132] After the advent of no-fault divorce, women had less assurance that their marriages would last or that they would receive financial protection if

121. *Id.*
122. *Id.*
123. *Id.* at 660.
124. *Id.* at 662.
125. *Id.* at 663.
126. Friedman, *supra* note 112, at 667.
127. *Id.* at 664.
128. *Id.*
129. MARY ANN GLENDON, THE TRANSFORMATION OF FAMILY LAW: STATE, LAW, AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE 189 (1989) [hereinafter GLENDON, STATE, LAW, AND FAMILY].
130. *Id.* at 190–91.
131. *See id.* at 227.
132. Carbone & Brinig, *supra* note 119, at 979.

these ultimately failed. As a result, women began to view their economic contribution to marriages as more essential,[133] fostering the ideology of "liberal feminism."[134]

Likewise, cultural feminists[135] have argued for the reintroduction of fault-based divorce because they believe that, even assuming total economic equality, gender-based differences in mortality, and the nature of sexual attraction will ensure that men have greater incentives than women to breach marital obligations.[136] Additionally, cultural feminists suggest that "women would have less of an incentive to enter into marriage if they could not enforce marital commitments."[137] Further, cultural feminists oppose laws that penalize women's choices to forego economic opportunities for domestic duties such as child-rearing,[138] and they argue that demanding women's self-support is unrealistic in cases where minor children are present and where one spouse has devoted years to raising children.[139] These advocates wish to restore traditional fault-based schemes that often afforded at least some economic protection to a dependent wife and children upon divorce.[140] Finally, cultural feminists also find the abolition of fault-based divorce problematic because it eliminates the clear principles that could serve as a background for negotiating a fairer division of property.[141]

In contrast, liberal feminists have argued that while fault served to discourage men from leaving marriages, it also left women with little bargaining power within their relationships.[142] The liberal feminist view is reflected in a decline of the patriarchal belief "that the husband is responsible for the financial well-being of his family" and in the simultaneous increase in the belief that economic obligations

133. *Id.* at 980.

134. "Liberal feminism" for the purposes of this article refers to "a view that women and men are, for all legitimate purposes, the same; equality is [liberal feminism's] central social and legal goal. . . . [L]iberal feminism has veered from equal treatment to special treatment; from formal equality to substantive equality; from empty theories of gender to particularized ones." JANET HALLEY, SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM 79 (2006).

135. "Cultural feminism" for the purposes of this article refers to the view that "women have a distinct consciousness and/or culture. . . . [that] derives from their biological situation . . . [or] emerges from their historical oppression by men. Some versions . . . . take both 'essentialist' forms (women are naturally maternal) and 'social constructionist' ones (men made women do all the mothering)." *Id.* at 58–59.

136. Carbone & Brinig, *supra* note 119, at 991–92.

137. *See id.*

138. *See id.* at 996.

139. GLENDON, STATE, LAW, AND FAMILY, *supra* note 129, at 235.

140. GLENDON, ABORTION AND DIVORCE, *supra* note 115, at 81–82.

141. *Id.* at 86.

142. Carbone & Brinig, *supra* note 119, at 997–98.

within marriage and divorce are shared responsibilities and that the basic equality of men and women should restrain women's claims following the advent of no-fault divorce.[143]

Scholars such as Martha Albertson Fineman have articulated the shortcomings of the liberal feminist notion that "rule-equality" (sameness of treatment under the law for women and men) is the best way to ensure equitable results for men and women upon divorce.[144] Fineman points out that, in the two decades following the emergence of economic reforms in divorce law that promote "rule-equality," there has been no evidence that, in the majority of cases, the economic condition of divorced women has improved.[145] Indeed, there is evidence suggesting that the situation is worsening for middle-class and professional women who add full-time work to their childcare duties.[146] For example, studies indicate that "noncustodial parents [(usually men)] typically enjoy higher standard of living than that of the custodial parent [(usually women)] and dependent children."[147]

In 1990, Deborah L. Rhode and Martha Minow highlighted that the frequency and duration of spousal support had declined over the prior two decades, so that only about one-sixth of divorced women received maintenance, and about two-thirds of those spouses received support only for a limited duration.[148] Even for that limited group, to whom maintenance was technically granted, amounts were usually modest, and only about half actually received full payment.[149] Rhode and Minow argued that the legal issues surrounding divorce had been conceived too narrowly and were treated as "private" matters that ignored the link between the private realms of family life and the public realms of the state and market.[150]

The effect of relegating divorce to a purely private sphere meant the shielding of private relations from public oversight and a consequent inability to punish or address marital rape, spousal or child abuse, or to enforce child support obligations.[151] Rhode and Minow insisted that laissez-faire family law policies were not gender neutral,[152] and the assumption of a private/public distinction not only led to the

143. MARTHA ALBERTSON FINEMAN, THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM 38 (1991).
144. *See id.* at 36.
145. *See id.* at 37.
146. *See id.*
147. GLENDON, ABORTION AND DIVORCE, *supra* note 115, at 86.
148. Rhode & Minow, *supra* note 19, at 201–02.
149. *See id.* at 202.
150. *See id.* at 191.
151. *See id.* at 192.
152. *See id.*

undervaluation of women's nonmonetary contributions in the home, but also to the dismissal of gender implications for market practices.[153] Women's disproportionate assumption of domestic responsibilities—including domestic work, as well as marketplace disruptions stemming from childbirth, child-rearing, and accommodation of the family's primary wage earner–limited their ability to pursue opportunities in the public realm, and divorcing wives needed compensation for the resulting losses.[154] Rhode and Minow explained that early no-fault reforms failed to consider the concerns of particularly vulnerable groups, such as those with limited savings or employment options.[155] According to them, early divorce reforms tended to exacerbate rather than eliminate gender inequalities, as illustrated by the sharp decline in single women's standard of living and a rise in that of men following divorce.[156]

The objectives of no-fault divorce, according to these feminist scholars, were merely to reduce expense, acrimony, and fraud in resolving matters considered primarily private concerns, not to ameliorate the post-divorce condition of women.[157] Thus, no-fault divorce simply coincided with the women's rights movement, and its proponents were generally not seeking to further women's position; rather, the greater concern was shielding ex-husbands from the "crippling" and "excessive" burdens created by alimony and child support payments to ex-spouses and children.[158] The result of the no-fault movement was divorce law that called for "equitable" division of assets—equality in form, but not in fact.[159]

Feminist scholars, who depicted women as being at a significant disadvantage both emotionally and economically after a divorce, supported the need to find new legal actions to redress this injustice.[160] However, some courts have rejected IIED claims because under res judicata they could allege that the facts in later tort claims were the same as the ones in the divorce case.[161] Other courts have compensated wives for their husband's abusive behavior through a distribution of assets in the divorce proceeds that favors the wife at the

153. *See id.* at 193.

154. *See* Rhode & Minow, *supra* note 19, at 193.

155. *See id.* at 196.

156. *See id.* at 197 (explaining that no-fault initiatives also omitted criteria for assessing the outcomes of divorce on children, subsequent marriages, stepfamilies, and public welfare responsibilities).

157. *See id.* at 195.

158. *See id.*

159. *See id.*

160. Rhode & Minow, *supra* note 19, at 194.

161. *See* Andrew Schepard, *Divorce, Interspousal Torts, and Res Judicata*, 24 FAM. L. Q. 127, 142 (1990).

expense of the husband.[162] These strategies, to secure economic compensation from husbands or ex-husbands, are controlled by a wide variation in procedure in each state depending on the different statutes of limitations and the possibility of bringing interspousal tort claims during, after, or before divorce proceedings.[163]

B. The Changing Meaning of Amatory Torts: From Coverture to Romantic Paternalism

Since the nineteenth century, amatory torts functioned to protect not only the honor and property of husbands whose wives, because of their gentler nature, had been fraudulently seduced, but also the reputation of women who, after an affair, were stigmatized by society.[164] Despite the demise of amatory torts by the mid-twentieth century, social conservatives have used these torts, either in their heart balm form or through the use of IIED.[165] In advocating for the expansion of interspousal torts, social conservatives have relied on a romantic, paternalist ideology geared to reinforcing traditional gender roles within marriage and protecting the honor of the family from adultery scandals. Yet the meaning of family honor, which is distinct from that of family harmony, has changed somewhat. Contemporary torts protect the honor of men or women who have behaved according to moral and religious precepts, and shame adulterers and their lovers, who have not.

1. Heart Balm Torts

Over the last 100 years, players in the United States legal system have altered the way we currently define tort liability and the means by which damages are calculated in an action between spouses.[166] Nevertheless, some social conservatives still hold a position that is more aligned with nineteenth-century romantic, paternalist ideology, which classified women as the gentler, more altruistic, and more family-oriented sex.[167] By relying on romantic paternalism, women

162. *See* Havell v. Islam, 751 N.Y.S.2d 449, 454 (App. Div. 2002). In this case, the court affirmed a judgment of a lower court which awarded 95.5 percent of marital assets to a wife as "equitable distribution" in a divorce case where the wife was badly abused by the husband. This award is especially interesting in light of what seems to be New York's particularly high threshold for a finding of IIED.

163. *See* Solomon Interview, *supra* note 111.

164. Nicola, *supra* note 20, at 658–59.

165. *Id.*

166. *See, e.g.*, Deana A. Pollard, *Sex Torts*, 91 MINN. L. REV. 769, 788 (2007).

167. *See* Berger, *supra* note 23, at 452–53.

received certain unique protections from the law but were also entitled to fewer benefits.[168]

Since then, there have been different amatory torts that proscribed sexual misconduct, thus reinstating the honor and chivalry of the husband and his exclusive property rights in his wife. "Heart balms," or amatory torts, protected virtuous women's intrinsic value and the property rights of their fathers or husbands by preventing other men from having any sexual interaction with these women.[169] "Criminal conversation" and "alienation of affection" torts still exist today in a few states and are the best-known amatory torts.[170] Criminal conversation, which is an action against a third party who has had an adulterous relationship with the plaintiff's spouse, is a strict liability tort and in general does not have a defense.[171] The tort of alienation of affection "occurs when a third party's interference [in a relationship] destroys the affection that existed between spouses prior to interference."[172]

Amatory torts were often paired with criminal actions. For instance, the seduction statute was a criminal one with civil repercussions.[173] As Lawrence Friedman puts it, this mix of criminal and tort doctrines protected and incentivized women to be "chaste or virtuous," as virgins who could be seduced only by their husbands.[174] In the late nineteenth century, despite strict control over sexual behavior, criminal norms became more relaxed, and tort actions such as criminal conversation changed their social meaning.[175] Rather than protecting the property of the husbands, they were geared toward protecting

168. *See* SUPREME COURT DECISIONS AND WOMEN'S RIGHTS: MILESTONES TO EQUALITY 1 (Clare Cushman ed., 2d ed. 2001).

169. "Heart balm" refers to a number of tort actions that protected women from broken hearts through legal actions such as seduction, or breach of marriage promise, allowing women to sue in their own name for the social injury that women suffered by being compromised before marriage by premarital sex or unwed motherhood. *See* Pollard, *supra* note 166, at 788–89; *see also* Jane E. Larson, *"Women Understand So Little, They Call My Good Nature 'Deceit'": A Feminist Rethinking of Seduction*, 93 COLUM. L. REV. 374 (1993) (explaining the tort of seduction and its former role as a method of condemning male sexual aggression). Two additional types of heart balms—criminal conversation and alienation of affection—were designed to punish a third party by allowing the cheated husbands to sue the wife's paramour. *See* Jones, *supra* note 20, at 68.

170. Pollard, *supra* note 166, at 792.

171. *See* Jones, *supra* note 20, at 67.

172. Nicola, *supra* note 20, at 663 (citing Pollard, *supra* note 166, at 788–89, n.110).

173. *E.g.*, Sacks, *supra* note 16, at 1058.

174. *See* LAWRENCE M. FRIEDMAN, GUARDING LIFE'S DARK SECRETS: LEGAL AND SOCIAL CONTROLS OVER REPUTATION, PROPRIETY, AND PRIVACY 102 (2007).

175. *See id.* at 104 (The "Victorian compromise" recognized "that not all chaste women were immune from seduction, that some middle-class women, like some middle-class men, were capable of sin. The seduction laws were one way to protect these women and give them a second chance.").

"middle-class honor and respectability" by showing that women, just like men, could be seduced and make regrettable mistakes.[176]

The mid-twentieth century witnessed the rise of liberal ideas regarding sexual freedom, leading to widespread criticism of amatory torts.[177] By the time of the New Deal, the predominant idea among liberals was that the decision to engage in sex was a matter of personal choice equally acceptable for men and women. According to scholar Jane E. Larson, "a new generation of female reformers came to equate the seduction action with antiquated sexual values threatening to the interests of emancipated women and men."[178] From their perspective, judges should stay out of the bedroom and avoid pontificating on morality in their opinions. Furthermore, amatory torts had come to be seen as corrupt. Heart balms were often used for nefarious purposes when women were paid to seduce married men in order to cause a divorce or to extort a settlement.[179] Basically, "a sexually active woman could exploit conventional morality for her own profit."[180] Critics of heart balm torts argued that, even when the claims were made in good faith, they harmed more than helped their victims. Amatory actions caused family disgrace, and damages would not restore the woman's virginity.[181]

As a result of these critiques, most states abolished amatory torts by the 1980s. Yet, some states still maintain actions for criminal conversation involving an adulterous relation outside the marriage and have extended the action to wives.[182] Most states have also abolished the tort of alienation of affection, in which lovers were sued for driving a wedge between family members, as well as the action for seduction or breach of a promise to marry.[183]

With the decline of amatory torts, courts began to recognize different intentional tort actions within the family involving the intentional interference with marital bonds.[184] By the 1990s, even though

176. *See id.* at 120 ("They did protect middle-class honor and respectability. They did serve as a shield for women who slipped—by promoting an image of women as chaste but weak, as easily seduced, or as cheated out of their innocence.").

177. *Id.* at 197.

178. *See* Larson, *supra* note 169, at 393.

179. *See* Friedman, *supra* note 112, at 652.

180. *See* Larson, *supra* note 169, at 395.

181. *See* 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); Nehal A. Patel, Note, *The State's Perpetual Protection of Adultery: Examining* Koestler v. Pollard *and Wisconsin's Faded Adultery Torts*, 2003 WIS. L. REV. 1013, 1024 (2003).

182. *See* FRANKLIN ET AL., *supra* note 97, at 920.

183. *See id.* at 921.

184. *Id.* at 920.

procedurally distinct from heart balms, tort actions based on IIED claims were, in substance, very similar to the barred amatory torts.

2. The Revival of Amatory Torts by Social Conservatives

In the last thirty years, to compensate for the loss of the traditional amatory torts, social conservatives have turned their attention to IIED, and, like feminists, they have advocated for an expansion of intimate liability.[185] They have done so, however, for a different purpose: to defend the honor of the family and reinstate traditional sexual behaviors in marriage.[186] Unable to stop the abolition of amatory torts across jurisdictions, these advocates suggest that wronged plaintiffs should have the right to bring adultery-based IIED claims against their unfaithful spouse or third parties.[187] According to them, the use of IIED-based claims against an unfaithful spouse or the unfaithful spouse's lover would not only preserve the marital relationship, but also protect children by ensuring the survival of their parents' marriage and by promoting moral behavior in family life.[188]

By reviving the potential for tort liability between spouses, social conservatives aim to reinforce the institution of marriage, which, in their view, has been undermined by the adoption of no-fault divorce by the majority of U.S. states.[189] "Tort reform" thus takes on a new meaning as some social conservatives attempt to *expand* tort liability to reverse what they now see as legally sanctioned adultery,[190] and they try to cement the heteronormative matrix of marriage as centrally a procreative endeavor between men and women only.[191]

Unless they are in a jurisdiction that has not completely abolished amatory torts,[192] social conservatives are trying to put amatory torts for sexual misconduct between husband and wife through adultery-based IIED claims back in the courtroom.[193] Their main objective is the preservation of traditional marriage, which they believe has been threatened by the introduction of no-fault divorce in the

185. *See, e.g.*, Sacks, *supra* note 16, at 1071.

186. *See* Patel, *supra* note 181, at 1014.

187. Some state courts presented with such cases have already refused to hear them precisely because such claims are intended as substitutes for the abolished amatory torts. *See id.* at 1028.

188. *See* Berger, *supra* note 23, at 525–26.

189. *E.g.*, Friedman, *supra* note 112, at 659–60.

190. *See* Brenda Cossman, *A Matter of Difference: Domestic Contracts and Gender Equality*, 28 OSGOODE HALL L.J. 303, 376 (1990).

191. *See, e.g.*, Kerry Abrams & Peter Brooks, *Marriage as a Message: Same-Sex Couples and the Rhetoric of Accidental Procreation*, 21 YALE J.L. & HUMAN. 1, 1 (2009).

192. *See* Table 2, *infra* Part IV.A.

193. *See, e.g.*, Patel, *supra* note 181, at 1028.

1960s, and, more recently, same-sex marriage.[194] No-fault divorce in particular was intended to curtail hostility between divorcing spouses who would be forced to make accusations of misbehavior against each other in order to legally obtain a divorce under a different regime.[195]

Social conservatives contend that instead of addressing emotional hostility, no-fault divorces actually trivialized marriage and, when anyone could obtain a divorce, resulted in a dramatic increase in the divorce rate.[196] Amatory torts converted into IIED claims should prevent the dissolution of marriage and reinstate the family honor in contemporary American society, "which, with almost half of all marriages ending in divorce . . . , is suffering all the ill effects that accompany the decline and fall of the traditional nuclear family."[197] By punishing the adulterer or his or her paramour, according to these advocates, an adultery-based IIED acts as a deterrent that could strengthen marriage and family life.

Of course, not everyone agrees with social conservatives that the appropriate remedy to climbing divorce rates is to revitalize amatory torts. Critics on both the right and left have noted that the elements of an IIED claim are already litigated as part of a divorce proceeding, and that to add IIED claims back into the mix would strain judicial resources.[198] Social conservatives counter by arguing that the person who suffered emotional trauma because a spouse committed adultery should recover damages irrespective of divorce so that, for example, a wife could elect to sue for IIED to reinstate the honor of her family and blame the paramour but not necessarily sue for a divorce.[199]

Other critics point out that adultery-based IIED claims are essentially the abolished heart balms reintroduced with another name.[200] Many courts have avoided awarding merit to IIED-based claims made against adulterous spouses because they are basically the same as the outdated claims of alienation of affection or criminal conversation.[201]

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194. *See, e.g.*, Abrams & Brooks, *supra* note 191, at 3.

195. *See, e.g.*, Patel, *supra* note 181, at 1047.

196. *See, e.g.*, Brenda Cossman, *Contesting Conservatisms, Family Feuds and the Privatization of Dependency*, 13 AM. U. J. GENDER SOC. POL'Y & L. 415, 426–29 (2005).

197. *See* William R. Corbett, *A Somewhat Modest Proposal to Prevent Adultery and Save Families: Two Old Torts Looking for a New Career*, 33 ARIZ. ST. L.J. 985, 993 (2001).

198. *See* Tobias, *supra* note 50, at 464 (explaining that this argument is very common among courts that have articulated that "women intentionally hurt by their spouses during marriage can be awarded compensation in the dissolution decree.").

199. *See infra* Part III.D (describing the Sexy Secretary stereotype).

200. *See* Marjorie A. Shields, Annotation, *Action for Intentional Infliction of Emotional Distress Against Paramours*, 99 A.L.R.5th 445, § 3 (2002).

201. *See* Quinn v. Walsh, 732 N.E.2d 330, 337–38 (Mass. App. Ct. 2000) (declining to permit an IIED claim by a husband and son against the wife's paramour because by the mid-1950s, adultery torts were limited to alienation of affection and criminal conversation only, which were also later abolished by statute).

When the legal system does not consider an adulterous affair to be sufficiently outrageous to support emotional claims, it is indicating that IIED claims should not be recognized in light of the repeal of amatory torts. In this way, it is signaling judicial restraint, namely limiting the court's role in the tort system.[202]

3. Protecting Family Honor and Traditional Marriage

The social conservative agenda seeking to expand amatory torts to preserve family honor derives from a romantic, paternalist ideology that differs radically from other conservative or liberal positions aiming to protect the family from the intrusion of the state. Family privacy has become a necessary corollary of family harmony in which the law should not interfere, or, as Justice Scalia put it, "our traditions have protected the marital family."[203] The notion that family privacy, and consequently its harmony, is threatened by interspousal torts has been widely used by courts since the beginning of the twentieth century as a way to push back against the elimination of interspousal immunities.[204] The courts also translated family harmony into affective privacy, which would be disrupted if litigation were to expose a couple's bedroom stories in a public trial.

Because tort law was seen as ill-suited to deal with private and emotional issues that were raised by interspousal torts, scholars argued that such matters should be left to criminal law[205] or to mediation and counseling as a "symptom of a broader family problem."[206] Even where family harmony is already disputed, scholars and judges have praised more effective, efficient, and holistic approaches over the tort system to deal with marital breakdowns that involve separation, alimony, child custody, and other shared assets.[207]

Yet, feminists and social conservatives seeking to expand intimate liability challenge the idea that interspousal torts would destroy a happy marital relationship. Instead, they argue that interspousal torts would have "little detrimental impact on marital tranquility in

202. *See* Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518, 522 (1986).

203. *See* Michael H. v. Gerald D., 491 U.S. 110, 124 (1989).

204. *See* Tobias, *supra* note 50, at 448.

205. *See* Feinsinger, *supra* note 30, at 992 ("Granted that the social interest in family solidarity and purity of offspring requires some legal protection, it may suffice to enforce the existing criminal laws which punish adultery, or, on behalf of the aggrieved spouse, to invoke the existing divorce laws which nearly everywhere recognize adultery as ground for dissolution. The inadequacies of these remedies may be conceded, but it is at best doubtful whether the remedy of damages is any more efficient.").

206. *See* Shmueli, *supra* note 74, at 219.

207. *See* DOUGLAS E. ABRAMS ET AL., CONTEMPORARY FAMILY LAW 370 (2006).

numerous circumstances and may protect or even foster peace in some but will seriously jeopardize harmony in only a few."[208] Feminists have argued that women remain oppressed because of their reliance on marriage to structure social relations,[209] so interspousal torts are not undermining a non-existing and fictional marital harmony. In contrast, social conservatives have viewed interspousal torts as a way to compensate for the loss of reputation and social status of men or women involved in adultery or sex scandals.[210]

Traditionally, interspousal torts were used to protect the husband, who could be compensated in a criminal conversation or alienation of affection case against the paramour who dishonored the husband's family.[211]

In the early twentieth century, criminal and civil actions against seduction were used to protect not only the honor of men, but also that of women who had to face stigmatizing consequences.[212] Social conservatives committed to amatory torts are seeking to strengthen the traditional role of marriage in society and shame those who have undermined family solidarity, while protecting the reputation of those family members who have respected moral and religious commitments arising from the marital bond.[213]

Rather than treating the wife as a husband's property, contemporary interspousal tort claims are supposed to protect the honor of the husband who has been cheated on by an aggressive and adventurous wife, rather than a weak and gentle one. The cheating wife ought to be punished and the cuckolded husband compensated.[214] This change in the social meaning of honor to be protected by interspousal torts has allowed social conservatives to depart from old and troubling gender conceptions embedded in amatory torts. Instead,

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208. *See* Tobias, *supra* note 50, at 447.

209. *See* MICHÈLE BARRETT, WOMEN'S OPPRESSION TODAY: PROBLEMS IN MARXIST FEMINIST ANALYSIS 195–96 (1980); NANCY F. COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION 7 (2000); *see also* Nancy F. Cott, *Giving Character to Our Whole Civil Polity: Marriage and the Public Order in the Late Nineteenth Century*, *in* U.S. HISTORY AS WOMEN'S HISTORY: NEW FEMINIST ESSAYS 107, 107 (Linda K. Kerber et al. eds., 1995) (describing how marriage traditionally differentiated the positions of husband and wife and subsequently compromised the woman's ability to act for herself in public).

210. *See, e.g.*, Lea VanderVelde, *The Legal Ways of Seduction*, 48 STAN. L. REV. 817, 886, 892 (1996).

211. *See* FRIEDMAN, *supra* note 174, at 108.

212. *See* VanderVelde, *supra* note 210, at 872. The "sexual connection," as these incidents were called, had derailed the course of their lives. When the sexual connection became known, these women were disgraced and dishonored, their reputations destroyed, and their prospects for marriage, which in the nineteenth century were their best hope for a secure material future, diminished. Single women who were suspected of having had sex, whether true or not, also found it difficult to find or keep respectable jobs. *Id.* at 872.

213. *Id.* at 892.

214. *See infra* Part III.C (discussing the Cheating Wife stereotype).

contemporary interspousal torts have successfully introduced romantic love and gender parity by protecting and compensating the faithful spouse, usually the husband, for the loss of family honor.

II. REDRESSING EMOTIONAL HARM IN THE FAMILY AND THE MARKET

Two important scholarly accounts present compelling explanations for why the evolution of tort law in the twentieth century was centered on the negligence principle, with the corresponding marginalization of other tort doctrines, such as intentional torts.

From a corrective justice perspective, tort law should address, and eventually redress, a moral wrong suffered by individuals, rather than compensate or deter unsocial behavior at large.[215] According to John C.P. Goldberg, the encompassing negligence approach that was dominant in the twentieth century has enabled judges, almost like legislators, to deter unwanted social behavior and compensate victims through tort law.[216] Because of this overwhelming reliance on the fault principle, tort lawyers have marginalized intentional torts to the periphery of the discipline.[217] In departing from a traditional account aimed at redressing moral wrongs, contemporary tort scholarship has mainly focused on negligence as an alternative to strict liability.[218] Whereas tort scholars have addressed important social changes, such as the rise of industrial and automobile accidents through the expansion of negligence and the fault principle,[219] intentional torts have become increasingly marginalized in tort literature.[220] By reducing tort law to compensation and deterrence goals, scholars have made tort law "synonymous with negligence" whereas intentional torts are becoming "historical artifacts."[221]

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215. *See* Goldberg, *supra* note 12, at 525.

216. *See id.* at 526 (arguing that the "removal of arbitrary limits (such as the impact and zone of danger rules) on claims of negligence causing emotional distress" was part of the inevitable expansion of the fault principle).

217. *Id.* at 527 ("Awkwardly, however, the movement started to stall in the 1970s, and courts thereafter even seemed to lurch backward toward tort's moralistic past. . . . And, after flirting with the idea of placing emotional distress under the ambit of the fault principle, even the California Supreme Court backtracked to a set of highly formalized rules limiting the class of plaintiffs who might recover.").

218. *See id.* at 516–17 (explaining that the late eighteenth and early nineteenth century jurists conceptualized the traditional law of torts as a form of redress for those private wrongs committed by citizens).

219. *Id.* at 524 ("As the economy and society modernized, objective negligence came to dominate tort, and tort increasingly took the form of rulings based on judges' conceptions of the social desirability or undesirability of particular forms of conduct.").

220. *See* CHAMALLAS & WRIGGINS, *supra* note 38, at 64 (showing that the marginalization of intentional harm has reduced intentional torts to "render certain types of recurring harms largely invisible within the frame of tort law").

221. *See* Goldberg, *supra* note 12, at 526.

Tort scholars were busy explaining how the modern law of negligence has created coherence in tort liability by purging "arbitrary limitations," such as the elimination of interspousal immunities.[222] The function of tort law was mainly to compensate welfare losses and deter socially detrimental behavior resulting in economic and physical harm.[223] In contrast, compensation of emotional distress was difficult to quantify, and unsocial behavior in the intimate sphere was difficult to deter.[224] Emotional harm and relational injuries, therefore, were ranked as lower class injuries.[225] These did not squarely fit a tort agenda that empowered judges to compensate for the losses created by large-scale accidents and to deter objectively recognized unsocial behavior.[226]

From a feminist perspective, tort lawsuits favor men at the expense of women because they compensate and deter accidents while ignoring deep gender and racial biases that persist in the deeply entrenched physical versus emotional distress distinction.[227] Traditionally, compensation for mental and emotional distress was only an element of the damage resulting from an accident created by a physical injury to the victim.[228] In the 1960s, however, IIED claims appeared, signaling a paradigm shift in tort law, despite the criticism of plaintiffs recovering for a stand-alone mental or emotional harm.[229] According to Martha Chamallas and Jennifer Wriggins, when claims based on emotional distress reached the courts, they encountered doctrinal barriers and gender biases that prevented juries from finding severe emotional distress inflicted by outrageous behavior.[230]

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222. *Id.* at 527 ("In the view of compensation-deterrence theorists, then, the story of twentieth-century tort law is the emergence of negligence as the modern tort, as well as the evolution of that tort toward the pure 'fault principle,' a rule of prima facie negligence liability unadorned by arbitrary limitations.").

223. *Id.* at 527.

224. *Id.* at 528.

225. *Id.* at 527.

226. *See* FRANKLIN ET AL., *supra* note 97, at ix (representing the typical approach, beginning the tort law course with negligence and marginalizing intentional torts of emotional harms as ancillary to compensation).

227. *See* Peter A. Bell, *The Bell Tolls: Toward Full Tort Recovery for Psychic Injury*, 36 U. FLA. L. REV. 333, 363 (1984) (explaining the marginalization of emotional distress claims and the long struggles in tort law to recover for mental distress highlighting the gender biases in such disparate recovery whereby, traditionally, men holding property could recover for physical harm more than women, who were tasked with the emotional work in the family); *see also* Martha Chamallas with Linda K. Kerber, *Women, Mothers, and the Law of Fright: A History*, 88 MICH. L. REV. 814, 864 (1990) (explaining tort law's devaluing of injury associated with women).

228. Bell, *supra* note 227, at 336.

229. *See* RESTATEMENT (SECOND) OF TORTS § 46 (1965); Magruder, *supra* note 103, at 1035–36; William L. Prosser, *Insult and Outrage*,44 CAL. L. REV. 40 (1956).

230. *See* CHAMALLAS & WRIGGINS, *supra* note 38, at 67 ("Rather than being a principal site for litigation alleging domestic violence and workplace harassment, however,

In ranking emotional and relational injuries as less important, tort lawyers have done so at the expense of women.[231] Chamallas and Wriggins explain that, even though tort rules allow some relief for emotional and relational harm, because this relief mostly concerns women, sex, reproduction, and childbearing, judges often hide the gender dimension behind doctrinal intricacies.[232] In doing so, they marginalize IIED claims and dismiss important feminist legal tools to unmask gender biases entrenched in the tort system.[233] For instance, the theory of consent that considers power in all social situations, or the cultural feminist recognition and valuation of intimate relationships, has found little success among judges or juries.[234] Finally, feminist scholars have explained that through the tendency of "steering potential claims of domestic violence into family law," tort law has reduced wrongs that could be addressed by the tort system to family matters.[235]

This article puts forward a different explanation of why, unloved by tort lawyers, intentional torts have not become an effective remedy for addressing emotional harm in intimate relationships. The ideological divide in legal reasoning between market and family ideals has contributed to the current skepticism of tort scholars toward intimate liability.[236] As the family is the place where local and particularized claims are not likely to trigger damages, tort law remains an exclusive tool to regulate the market. In contrast to wrongs taking place in the commercial sphere entailing objective, wrongful behavior and at-large compensatory and deterrence schemes, mental distress happens within the privacy of the home. This requires an ad hoc analysis to compensate emotional wrongs that judges see as entrenched in morality patterns that vary from place to place and ultimately should be left out of the court system.[237]

Tort and family law scholars have approached the possibility of emotional distress claims to compensate spouses for emotional harm and to deter undesired social behavior in intimate relations with greater skepticism. The widespread argument is that the fault principle, which no-fault divorce has sought to eliminate, should be incorporated

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tort law has played only a marginal role in protecting against these intentionally caused injuries.").

231. *See id.* at 92.

232. *Id.*

233. *Id.*

234. *Id.* at 93.

235. *See id.* at 69.

236. *See* Halley & Rittich, *supra* note 9, at 754–55; Kennedy, *supra* note 15, at 813; Fernanda G. Nicola, *Family Law Exceptionalism in Comparative Law*, 58 AM. J. COMP. L. 777, 777 (2010).

237. *See* Halley & Rittich, *supra* note 9, at 758.

in tort and negligence analyses arising in commercial relations but left out of family ones.[238]

Tort scholars have supported IIED claims that arise in market contexts, rather than family contexts, because of the clear economic dependency that characterizes relationships in the commercial realm.[239] Due to the difficulty in compensating plaintiffs for emotional harm, especially those emerging in intimate relationships, these scholars claim that the tort system is ill-suited to address these wrongs.[240] Rather, they have proposed that family law, better suited to deal with emotions, is more apt to address interspousal litigation. The family/market divide currently emerging in intimate liability shows how tort law is another realm in which family law exceptionalism is at work.

A. IIED in the Market

Since the 1950s, courts have increasingly recognized damages for IIED in a variety of circumstances, allowing debtors to recover from unfair collection practices and tenants to recover from harassing landlords.[241] Lawyers have used IIED claims in employment disputes.[242] Employees can seek redress for workplace harassment based on IIED, even though courts have set a high bar for the employer's acts to constitute outrageous behavior. This can range from criticizing job performance, to using rude, demeaning, and vulgar language, or even to imposing stressful working conditions and transferring an employee within a company.[243]

For instance, in *Wilson v. Monarch Paper Co.*,[244] the court characterized the facts as unusual, and far beyond an ordinary employment dispute.[245] Mr. Wilson, the former vice-president with thirty years' experience, was demoted to an entry-level position in a warehouse.[246] In his job reassignment he was "given the most menial and demeaning

238. *See* Harry D. Krause, *On the Danger of Allowing Marital Fault to Re-Emerge in the Guise of Torts*, 73 NOTRE DAME L. REV. 1355, 1363 (1997).

239. Frank J. Cavico, *The Tort of Intentional Infliction of Emotional Distress in the Private Employment Sector*, 21 HOFSTRA LAB. & EMP. L.J. 109, 157 (2003).

240. Krause, *supra* note 238, at 1363.

241. *See* Newby v. Alto Riviera Apartments, 131 Cal. Rptr. 547, 547 (Ct. App. 1976), *superseded by statute*, CAL. CIV. CODE § 1942.5 (West 2012), *as recognized in* Lund v. Merrick, No. G045654, 2012 WL 3635327, at *6 (Cal. Ct. App 2012); Duty v. Gen. Fin. Co., 273 S.W.2d 64, 66 (Tex. 1954).

242. Wilson v. Monarch Paper Co., 939 F.2d. 1138, 1145 (5th Cir. 1991).

243. Cavico, *supra* note 239, at 116–28.

244. *Wilson*, 939 F.2d at 1145.

245. Cavico, *supra* note 239, at 126.

246. *Id.*

duties, including janitorial and cleaning duties."[247] The jury found in favor of the plaintiff, determining that the employer, who was "unwilling to fire [plaintiff] outright*, intentionally and systematically* set out to humiliate him in the hopes he would quit."[248]

On appeal, the Fifth Circuit Court of Appeals affirmed the decision, stating the employer's conduct was "degrading and humiliating, intentional and mean spirited, and a steep downhill push to total humiliation."[249] The court concluded that the "conduct was, indeed, so outrageous that civilized society should not tolerate it."[250]

In *Wilson*, even though the employee received tort damages for emotional distress, in most cases the evidentiary bar is set too high for an employee to prove outrageous behavior.[251] There are ways whereby plaintiffs may obtain compensation for emotional distress by demonstrating a pattern of continuing abusive behavior, especially if related to sexual harassment, or if there is a punitive motive behind the employer's behavior.

In awarding damages to employees, courts have found that emotional distress is more likely to be inflicted by a manager or supervisor who exploits his or her position of power in the workplace in an abusive manner.[252] Lawyers have justified this reasoning from a social justice perspective,[253] aiming to "provide a viable legal instrument to counterbalance the inherent inequality of economic bargaining power in the typical employment relationship."[254]

However, the main difficulty for employees in obtaining damages for IIED is that this tort has been denied in "ordinary" employment disputes and even in wrongful terminations of employment.[255] Likewise, racial and sexual discrimination is not per se a sufficient element to meet the "outrageous" standard in the IIED claim.[256] In order to protect employees from workplace abuse, some courts have relaxed

247. *Id.*

248. *Id.* (internal quotation marks omitted) (quoting *Wilson*, 939 F.2d at 1145).

249. *Id.* at 126–27 (internal quotation marks omitted) (quoting *Wilson*, 939 F.2d at 1145).

250. *Id.* at 127 (internal quotation marks omitted) (quoting *Wilson*, 939 F.2d at 1145).

251. *See, e.g.*, Heather Adams, *Workplace Emotional Distress Claims*, N.C.B. ASS'N (Dec. 17, 2010), http://laborandemploymentlaw.ncbar.org/newsletters/december10lel/emotionaldistress (explaining that in *Daniel v. Carolina Sunrock Corp*., 430 S.E.2d 306 (1993), "the evidence was insufficient for extreme and outrageous conduct where other employees took notes on the plaintiff's activities, counted and screened plaintiff's personal phone calls, inspected the contents of plaintiff's desk while she attended her father's funeral, moved plaintiff to a smaller office with no phone and no heat, and made harassing phone calls to plaintiff, her sister-in-law, and mother.").

252. Cavico, *supra* note 239, at 181.

253. *See* Goldberg, *supra* note 12, at 560–62 (explaining the social justice theory of using tort law to rebalance power).

254. Cavico, *supra* note 239, at 182.

255. *Id.* at 115.

256. *Id.* at 123.

the outrageous standard in situations of obvious economic dependence between the victim and abuser.[257] For instance, scholar Frank J. Cavico has explained that "if the allegedly outrageous and extreme conduct inflicted on an employee occurs at the workplace and in the vicinity of one's fellow employees, the fact that the workplace is involved adds weight to the employee's outrage claim."[258]

An important application of economic dependence-based reasoning is the standard adopted by the Texas Supreme Court, which has commented that "[i]n the employment context, some courts have held that a plaintiff's status as an employee should entitle him to a greater degree of protection from insult and outrage by a supervisor with authority over him than if he were a stranger."[259] However, courts have gone both ways on this issue. Some courts did not find that employment-at-will creates an environment prone to mental abuse; rather, discipline and managerial skills were praised as an essential part of our capitalist economy.[260]

Therefore, tort lawyers address emotional harm when it arises in relationships that are long-term where the employee relies on selling his/her time in exchange for money. Based on this argument, some courts have found that employees who are economically dependent on their jobs are particularly at risk of mental and emotional distress. Yet, such reasoning was never translated to marital or intimate relationships characterized by love and affective dependence rather than labor and economic dependence.

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257. *Id.* at 126–27.

258. *Id.* at 115.

259. *Id.* (quoting GTE Sw., Inc. v. Bruce, 998 S.W.2d 605, 612 (Tex. 1999)) Other jurisdictions have also held that an employee is entitled to more protection from IIED. *See, e.g.*, Alcorn v. Anbro Eng'g, Inc., 468 P.2d 216, 218 n.2 (Cal. 1970); White v. Monsanto Co., 585 So.2d 1205, 1209–10 (La. 1991); *see also* Bridges v. Winn-Dixie Atlanta, Inc., 335 S.E.2d 445, 448 (Ga. Ct. App. 1985) (holding that "the existence of a special relationship in which one person has control over another, as in the employer-employee relationship, may produce a character of outrageousness that otherwise might not exist.").

260. *See, e.g.*, Miller v. Galveston/Houston Diocese, 911 S.W.2d 897, 900–01 (Tex. Ct. App. 1995); Amador v. Tan, 855 S.W.2d 131, 135 (Tex. Ct. App. 1993); Horton v. Montgomery Ward & Co., Inc., 827 S.W.2d 361, 369–70 (Tex. Ct. App. 1992) (adopting a strict approach to IIED claims arising in the workplace, stating that "[i]ncidents in which a Texas court has determined the conduct to be extreme and outrageous in the employer/employee setting are few."); *see also* Sterling v. Upjohn Healthcare Servs., Inc., 772 S.W.2d 329, 330 (Ark. 1989) ("We have taken a strict view of claims for outrage in employment situations."). These courts reason that, "to properly manage its business, an employer must be able to supervise, review, criticize, demote, transfer and discipline employees." Johnson v. Merrell Dow Pharms., Inc., 965 F.2d 31, 34 (5th Cir. 1992); *see Sterling*, 772 S.W.2d at 330 (showing that, although many of these acts are necessarily unpleasant for the employee, an employer must have latitude to exercise these rights in a permissible way, even though emotional distress results); *see also Miller*, 911 S.W.2d at 901; Diamond Shamrock Ref. & Mktg. Co. v. Mendez, 809 S.W.2d 514, 522 (Tex. Ct. App. 1991), *aff'd in part and rev'd in part on other grounds*, 844 S.W.2d 198 (Tex. 1992).

B. Scholars' Skepticism Toward IIED in the Family

The factors that courts have used to interpret the vague outrageous standard of an IIED claim in the employee-employer context include: the continuous duration of the abuse, the power differential between the abuser, and the victim and the economic dependency characterizing the relationship. Yet, in marital or intimate relationships, especially when courts are asked to evaluate IIED claims among spouses, these factors do not always characterize the courts' analysis of the outrageous behavior.[261]

Some courts have analyzed the outrageous behavior between spouses in light of their long term commitment through marriage.[262] However, the idea that the family entails economic and financial dependency, in addition to affective dependency, has rarely played a relevant role in courts' analysis of emotional distress suffered by a plaintiff.[263] In treating interspousal relations as highly emotional, governed by love rather than money, judges have shown greater uneasiness towards these lawsuits.[264] In contrast to IIED claims brought by lawyers in landlord-tenant, employment, or consumer disputes, judges are more inclined to set aside IIED between spouses by relying on arguments such as preserving the affective privacy of the marriage and the risk of frivolous or feigned lawsuits.[265]

In this vein, the most acclaimed argument, embraced both by tort and family scholars, has been that the kinds of wrongs litigated through interspousal torts can be better addressed by divorce proceedings rather than intentional torts.[266] As tort scholar Don B. Dobbs explains: "Adultery of a spouse is usually painful to the faithful spouse, but if it is painful enough to justify legal intervention, divorce might be a better solution than a tort action combined with a continued marriage."[267]

This reasoning reinforces two assumptions. First, family law, rather than tort law, offers better remedies for the emotional and relational distress inflicted by one spouse upon the other. Second, the tort system does not operate, through the threat of an IIED claim, as

261. *See* DAN B. DOBBS, THE LAW OF TORTS 758 (2000) (explaining the reluctance of judges to allow emotional harm factors between spouses because of the emotional nature of marriage in general).

262. *See id.*

263. *See* Whittington v. Whittington, 766 S.W.2d 73, 74 (Ky. Ct. App. 1989) (holding that adulterous and financially unfair behavior of one spouse towards another is insufficient to meet the standard of outrageousness).

264. DOBBS, *supra* note 261, at 758.

265. *See* Dalton, *supra* note 3, at 329.

266. DOBBS, *supra* note 261, at 758.

267. *Id.*

another bargaining tool that divorce lawyers have as an additional resource to obtain benefits for their clients.[268]

Ira Mark Ellman and Stephen D. Sugarman's well-known article *Spousal Emotional Abuse as a Tort?* is the most developed doctrinal and ideological explanation of the skepticism of tort scholars towards interspousal torts.[269] Ellman and Sugarman suggest that courts should not recognize spousal emotional abuse as a tort, except in cases where there is also criminal conduct.[270] Their article, a collaboration between a family scholar and a tort scholar, has become part of the canon in the field of interspousal torts. Not surprisingly, it appears regularly in both tort and family law casebooks.[271]

Ellman and Sugarman start from the premise that a trend towards no-fault divorce has been established and ask the reader if, in light of this evolution, the emerging torts addressing spousal emotional abuse are an "aberration" or if "they suggest a new and improved approach to considering fault in divorce?"[272] The argument is that emotional harm between spouses should be a family law matter, a matter that has no direct market implications. In portraying emotional distress as a family law problem (unless it entails a crime), the authors have internalized what Melissa Murray describes as the decriminalization of adultery in family law whereby marriage is the "lawful site of sexual activity."[273]

In transforming a tortious behavior into a family matter, the authors rely on another premise about "marital fault."[274] Originally, this concept was central to the law of divorce, and today is, according to the authors, equated to "marital misconduct in traditional tort language [so that] recovery of money damages may be possible without actually revising no-fault divorce statutes."[275] In doing so, the authors consciously equate the fault rationale in family law and tort law by declaring their "prior commitments in both fields to substituting no-fault principles for fault-based ones."[276]

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268. *See* Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 950 (1979).

269. *See* Ellman & Sugarman, *supra* note 8, at 1269–76.

270. *See id.* at 1337.

271. *See, e.g.*, JUDITH AREEN & MILTON C. REGAN, JR., FAMILY LAW: CASES AND MATERIALS x (5th ed. 2006); PETER NASH SWISHER ET AL., FAMILY LAW: CASES, MATERIALS, AND PROBLEMS 461 (3d ed. 2012) (showing that the skeptical approach toward spousal emotional abuse presented by Ellman and Sugarman dominates casebooks with almost no counterview in both tort law and family law).

272. *See* Ellman & Sugarman, *supra* note 8, at 1269.

273. *See* Melissa Murray, *Strange Bedfellows: Criminal Law, Family Law, and the Legal Construction of Intimate Life*, 94 IOWA L. REV. 1253, 1259 n.18 (2009) (citing AREEN & REGAN, JR., *supra* note 271, at 98–109).

274. Ellman & Sugarman, *supra* note 8, at 1270.

275. *See id.* at 1271.

276. *Id.* at 1272.

The problem, however, is that the authors collapse two different concepts: marital fault in divorce and the fault created by intentional and negligent torts for emotional distress between intimate parties. Each notion of fault or responsibility is based on different doctrines, evidentiary requirements, trial procedures, and ultimately legal rationales arising in family or tort law. Although some grounds for fault might overlap, such as "abusive behavior," that could be sanctioned in both fields, family lawyers focus on evaluating the behavior that has undermined the marital relationship, as opposed to the emotional harm inflicted upon a person by another individual.[277]

Even though the authors are aware of the differences between the dignitary rationale of IIED torts and the promise to respect marital duties in divorce litigation, they suggest that "[m]ost interspousal emotional injuries might be understood to arise from the violation of promises implicit in the marital role."[278] By making marriage the central focus of their analysis, Ellman and Sugarman reduce IIEDs arising in intimate relations to litigations that can be subsumed in divorce proceedings. As a result, any family relation that is not recognized by the state and performs a similar affective and economic function is implicitly absent from their approach.[279] In reluctantly opting against the regime of spousal emotional abuse, the authors' position also impacts those couples, same-sex or cohabitants, who are left out of the marriage regime.

Ellman and Sugarman's justification of the existence of a market/family distinction in private law works as follows: In asking what should be the goal of tort law for creating liability in intimate relationships, the authors answer by relying on the dominant compensation and deterrence theory of tort law. They argue:

> 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. 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.[280]

277. *Id.* at 1271–72.

278. *Id.* at 1273.

279. *See, e.g.*, ANDREW J. CHERLIN, THE MARRIAGE-GO-ROUND: THE STATE OF MARRIAGE AND THE FAMILY IN AMERICA TODAY (2009); NANCY D. POLIKOFF, BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW 7–8 (2008); JUDITH STACEY, UNHITCHED: LOVE, MARRIAGE, AND FAMILY VALUES FROM WEST HOLLYWOOD TO WESTERN CHINA 4–5 (2011).

280. *See* Ellman & Sugarman, *supra* note 8, at 1288.

Having embraced compensation deterrence theory, Ellman and Sugarman go on making family law exceptionalism claims that strengthen the idea that tort law is better suited to address emotional harm arising in market, rather than family relations:

> 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 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.[281]

The authors' reasoning leads us to assume that emotional harm arising in domestic settings is better addressed by family law instead of tort law. In relying on the predominant compensation and deterrence theory of tort law, they argue that emotionally abusive behavior should be compensated when a plaintiff is suing a corporation or an employer, not another spouse:

> 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.[282]

In their view, family law is better equipped than tort law to address emotional harm between spouses, unless the behavior of one of the parties is punishable under criminal law. This is the only circumstance where tort lawyers should intervene. By pushing litigation away from tort law and into family law, Ellman and Sugarman revamp the family/market dichotomy in private law reasoning. In doing so, they reduce emotional and intimate harm to a family matter while limiting tort law to harms only occurring in the market.

C. Family Law Exceptionalism in Tort Law

Family law exceptionalism (FLE) literature uses several tools to show that family law should not be viewed through the lens of a

281. *Id.* at 1288–89.
282. *Id.* at 1290.

market/family dichotomy and, thus, exceptionalized as the sphere of personal, exclusive, and affective relationships.[283] This approach reduces the family to a sphere of regulation concerned only with traditional values, emotions, and vulnerabilities. Conversely, the market is enlarged to a sphere concerned with universal rights and economic considerations. An example of the negative impact of FLE is the way the law defines the family and its near exclusive concentration on marriage, divorce, and parent-child relations. Because the current boundaries of family law are so narrowly defined, the notion of FLE has been substantially strengthened in private law reasoning.[284]

In an attempt to overcome the exceptional role of the family in private law reasoning, strengthened by the pervasiveness of the market/family dichotomy, Janet Halley and Kerry Rittich have devised a unique terminology to reconceptualize family law. Halley and Rittich group legal regimes, all of which are integral to family law, into different categories entitled Family Law 1, 2, and 3, based on their relation to the family.[285] Each category includes legal regimes that contribute to our understanding of how the family life is lived and the household is structured, but in increasingly less obvious ways.[286]

The Family Law 1 (FL1) category includes legal regimes that most obviously relate to family law matters, such as marriage, divorce, and parental rights.[287] FL1 regimes are those most often associated with family law and most commonly taught in law school classes or family law casebooks. The Family Law 2 (FL2) category includes

283. Halley & Rittich, *supra* note 9, at 753.

284. *See id.* at 761–70.

285. *Id.*

286. *See* Halley, *supra* note 14, at 899–900. Janet Halley explains the three regimes:

> One is to undo the construction of family law by extending our topic beyond the bounds they have been given in the emergence of FLE. We call the law that happened to fall within family law Family Law 1. There is a lot of law that directly regulates the family contained within legal topics commonly understood to be both economically significant and nonfamilial: employment law; the law governing social security programs, both public (welfare) and private (pensions and the like); immigration law; criminal law; tax law; and the list could go on. . . . We call that law Family Law 2. And we consider law that helps to set the bargaining terms of family members with each other, with employers, and so on, but that is silent about family relationships, to be equally relevant, though hidden by FLE in the background. For instance, . . . [t]he school funding and attendance laws do not mention families or family law. But they have such a significant impact on the class strategies of actual parents that it seems almost insane not to consider them Family Law. We call law with this "disparate impact" on family behavior Family Law 3. Figuring out how these three domains of family law interact is one way of undoing the tendency of FLE to hide the economic functions of the family.

Id.

287. Halley & Rittich, *supra* note 9, at 761.

regimes that affect, but are not directly part of FL1, such as tax law, immigration law, labor law, and bankruptcy.[288] With only a cursory glance, FL2 regimes would "seem to have no primary commitment to maintaining the distinctiveness of the family," but in actuality have provisions "peppered throughout" that explicitly target the family.[289] The Family Law 3 (FL3) category is at the periphery and includes legal or non-legal bargaining tools that affect the operation of family relations, such as school funding, landlord/tenant law, and employment law.[290] School funding, for instance, deeply affects the residency choices of families with kids. A particularly interesting analysis would show how all three regimes play an important role in how we structure our family relations.

In deploying the FL1, FL2, and FL3 terminology in intimate liability, Ellman and Sugarman are attempting to move interspousal torts from FL2 to FL1 in an effort to purge tort law from emotional, moral, and affective considerations that they consider ill-suited for the tort system. However, there are other forces at work in the same direction. For instance, the current insurance regime (found in FL3), supported by tort-reform advocates, has limited the possibility of plaintiffs to recover from insurance companies by successfully excluding intentional torts from household and personal policies.[291] As a consequence, tort lawyers working on contingency fees have no incentive to bring IIED claims unless there is a deep pocket defender involved in the litigation. In most cases, the exclusion of these torts from insurance policies is the main reason why only a few well-off plaintiffs are likely to sue their spouses.[292]

By steering emotional and relational harm claims towards family law (FL1), tort scholars have hidden the economic relevance of tort claims that aim to compensate emotional wrongs based on fault or intent between intimate parties. According to them, emotional harm between spouses should be assessed and compensated in a divorce proceeding. In doing so, however, tort scholars have not fully explored the bargaining power and the economic impact that interspousal torts create on family relations.[293] For instance, even in divorce litigation, family lawyers can strategically deploy interspousal torts as a way to bargain on behalf of their clients. Likewise, for social conservatives, these torts represent the possibility to create a higher evidentiary bar for divorce.

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288. *Id.*
289. *Id.*
290. *Id.* at 762.
291. Ellman & Sugarman, *supra* note 8, at 1288.
292. *Id.*
293. *See* Halley & Rittich, *supra* note 9, at 760.

Finally, Ellman and Sugarman have limited IIED and negligent infliction of emotional distress (NIED) claims to only those arising in families recognized by the law, excluding possible tort claims arising between cohabitants or same-sex partners. In expanding our conception of family beyond the legal paradigm created by FLE, Janet Halley explains that this would involve:

> [U]ndo[ing] the construction of the social family to take into account dependency relations that intertwine those of spouses, legal cohabitants, and parent and child but that did not make it into the legal family. The term "family" entrenches marriage and parentage and occludes many additional and/or alternative economic relations that are continually routing through the domestic space.[294]

The steering of interspousal torts into FL1 has limited the possibility to expand intimate liability beyond marriage and attempt to compensate emotional harm in relationships based on cohabitation or same-sex partnerships. In a similar way, the feminist, reformist agenda has supported interspousal torts beyond the marriage framework, but based on heteronormative relations in which a male perpetrator emotionally abuses a woman victim. FLE departs from these stereotyped gender roles to understand intertwined affective and economic relations that characterize intimate relationships.[295]

III. STEREOTYPED NARRATIVES IN THE FAMILY AND THE MARKET

This Part offers taxonomy of the different interspousal torts claims that courts have increasingly grappled with since the mid-1980s. Despite the fact that a majority of claims are based on IIED, some claims, in some limited jurisdictions, rely on old amatory torts. These cases idealize the definition of a relationship, suggesting that their acceptance varies depending on whether the relationship is perceived as part of life in the family, or in the market.[296] As Table 1 below illustrates, these stereotypical roles include the victim, the cheating wife, the free consenter, and the seductive secretary. The use of these "ideal types" denies many women justice because they do not fit into, or are unwilling to portray themselves in terms of, these stereotypes. Thus, despite feminists' and social conservatives' willingness to expand liability between couples to protect a woman's dignity or family honor, intentional torts are neither compensating

294. Halley, *supra* note 14, at 900.
295. *See* STACEY, *supra* note 279, at 5.
296. *See* Olsen, *supra* note 10, at 1500–02; *see also* Nicola, *supra* note 20, at 650.

women nor fully deterring emotionally abusive behavior to the extent that proponents might like.

TABLE 1: THE TAXONOMY OF U.S. INTERSPOUSAL TORTS

	FEMINISTS	SOCIAL CONSERVATIVES
FAMILY	The Victim *Twyman v. Twyman*	The Cheating Wife *Koestler v. Pollard*
MARKET	The Reasonable Consumer *Neal v. Neal*	The Secretary *Hutelmyer v. Cox*

The first two cases, *Twyman v. Twyman*[297] and *Neal v. Neal*,[298] illustrate current feminist strategies, portraying plaintiffs in assigned stereotypical roles, the victim and the free chooser, respectively, to bring interspousal claims or IIED against their lovers. In the second set of cases, *Koestler v. Pollard*[299] and *Hutelmyer v. Cox*,[300] social conservatives have portrayed the defendants as the cheating wife or the secretary, in order to allow husbands and wives to sue the adulterous spouse and recover through IIED claims or amatory torts in jurisdictions that still maintain such causes of actions.

A. The Powerless Victim

It is beyond dispute that women are most often the victims of domestic violence and harmful conduct by spouses and significant others. At the same time, however, because family law plays an "exceptional role" in our legal regime,[301] tort lawyers have not widely supported intentional torts that compensate for emotional harm in the domestic sphere. Whereas the home was seen as a realm of the exclusive competence of family law, tort lawyers have not shied away from compensating plaintiffs for emotional harm suffered in the workplace or other market relations. Not surprisingly, when social conservatives and feminists hijacked intimate liability to implement their

297. 855 S.W.2d 619 (Tex. 1993).
298. 873 P.2d 871 (Idaho 1994).
299. 471 N.W.2d 7, 7–8 (Wis. 1991).
300. 514 S.E.2d 554, 557 (N.C. Ct. App. 1999).
301. *See, e.g.*, Brenda Cossman, *The Story of* Twyman v. Twyman*: Politics, Tort Reform, and Emotional Distress in a Texas Divorce*, *in* FAMILY LAW STORIES 243, 264 (Carol Sanger ed., 2008); Halley & Rittich, *supra* note 9, at 754.

political agenda, they portrayed women in the home as victims and treated them differently from tort claims governed by market ideals.

For instance, the case of *Twyman v. Twyman* illustrates both the progress and the limitations of interspousal torts when women are portrayed as victims.[302] On one hand, this is a landmark case because the plaintiff prevailed on her emotional distress claim. For the first time, the Texas Supreme Court recognized the existence of an IIED-based claim that allowed a wife to collect damages from her husband.[303] Sheila Twyman also elicited a strong dissenting opinion in support of her claim for NIED.[304] But, there was considerable backlash against the dissenting opinion,[305] and Sheila did not succeed on her NIED claim.[306] Sheila claimed that her husband forced her to perform sadomasochistic sex acts, even though he knew she, a victim of rape, was terrified of such acts.[307] The court held that Sheila's IIED claim was valid against her husband, whose behavior was found to be objectively outrageous. However, the Texas Supreme Court dismissed Sheila's NIED claim.[308]

Judge Rose Spector, the only female and feminist on the Texas Supreme Court at the time, wrote a strong dissenting opinion regarding the NIED claim.[309] She argued that Sheila should recover for both IIED and NIED because of the offensive conduct of Sheila's husband. According to Judge Spector, in order to remedy the injustices women confront in our society, Sheila deserved to recover under both claims.[310] A negligence claim could have resulted in higher damages because it would have allowed her to seek damages from her household insurance policy.[311] If women could recover under a negligence standard as well, Judge Spector suggested that NIED claims would have a broader compensatory function.[312] Whereas an IIED claim addresses only the abuse in the context of marriage, an NIED cause of action speaks to the general duty of care society recognizes to plaintiffs. In Judge Spector's view, and others', women are victims of both certain marriages and society as a whole.[313]

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302. 855 S.W.2d 619 (Tex. 1993).
303. *Id.* at 620.
304. *Id.* at 640–45 (Spector, J., dissenting).
305. *Id.* at 638–39; Bender, *supra* note 92, at 150.
306. Cossman, *supra* note 301, at 248.
307. *Id.* at 243.
308. *Twyman*, 855 S.W.2d at 640–45 (Hecht, J., concurring and dissenting).
309. *Id.*
310. *Id.* at 640, 643.
311. *See, e.g.*, Boyles v. Kerr, 855 S.W.2d 593, 604 (Tex. 1993) (Gonzalez, J., concurring opinion on motion for rehearing).
312. *See, e.g.*, *id.*
313. *See, e.g.*, Bender, *supra* note 92, at 149; Natalie Kay Fox, Case Note, *Family/Tort Law—Through the Eyes and Ears of Children: A Significant Advance for Third Parties*

Scholars have cited Judge Spector's opinion as an important expression of feminists' views in tort law. However, the reiteration of those views triggered backlash, especially among male judges, who disputed the victim narrative in Sheila's story and did not allow Sheila to prevail on the NIED claim.[314]

As feminist Leslie Bender explains, "[c]ases like *Twyman* clearly show how much gender matters in tort law and how tort law has been and often continues to be unavailable or unresponsive to women's needs in the locations, like the home, where women are most often injured by others."[315] Even after *Twyman*, NIED claims in the interspousal setting continue to fail for a variety of reasons. Although feminists support NIED claims for domestic torts, conservatives have argued against expanding domestic liability to corporate entities.[316] "On this specific issue, domestic torts reforms have led to divergence between feminists and social conservatives rather than cohesion."[317] NIED claims are usually brought against insurers because they can afford the damages. Courts have been suspicious of the authenticity of such cases.[318] For the most part, insurance companies have been successful in rolling back tort liability as part of the larger tort reform movement over the last few decades, and in that sense, Sheila's claim was poorly timed.[319]

As Brenda Cossman points out, Sheila's case came "to represent a tort that she was never able to realize, and a debate on the place of fault in divorce law that did not buy her the conservative allies that might have been expected."[320] In explaining that Sheila ultimately did not get any compensation from the case, Cossman shows that *Twyman* is not a paramount case for showcasing gender dynamics but, rather, for the exceptional role that family plays in our legal regime. . . . [T]he best reading of this story . . . is that Sheila was the helpless victim and the perpetrator, her husband, was easily identifiable within the domestic walls.[321]

Exposed to Domestic Violence. Bevan v. Fix, *42 P.3d 1013 (Wyo. 2002)*, 3 WYO. L. REV. 735, 750 (2003); Mae C. Quinn, Note, *The Garden Path of* Boyles v. Kerr *and* Twyman v. Twyman*: An Outrageous Response to Victims of Sexual Misconduct*, 4 TEX. J. WOMEN & L. 247, 254–55 (1995). *But see* Bevan v. Fix, 42 P.3d 1013, 1020–21 (Wyo. 2002) (declining to hold that domestic violence was per se outrageous).

314. *See* Susan Frelich Appleton, *Toward a "Culturally Cliterate" Family Law?*, 23 BERKELEY J. GENDER L. & JUST. 267, 332 (2008); *see also* Bender, *supra* note 92, at 150.

315. *See* Bender, *supra* note 92, at 150.

316. Cossman, *supra* note 301, at 252.

317. Nicola, *supra* note 20, at 666.

318. *See* Dalton, *supra* note 3, at 386; Nicola, *supra* note 20, at 666.

319. *See* Cossman, *supra* note 196, at 426.

320. *See* Cossman, *supra* note 301, at 266.

321. Nicola, *supra* note 20, at 667; *see* Appleton, *supra* note 314, at 321.

When we analyze the behavior of William and Sheila Twyman,[322] Janet Halley suggests reading the facts of the case in terms of "the power of each individual in the particular context in which they acted, rather than relying on preexisting gender stereotypes 'without a victim and a victimizer, without dominance and submission, but *with* power.'"[323] From the bigger picture, Halley would have us remove ourselves from "[f]eminist convergentism and paranoid structuralism," which deny women power, especially in legal circles.[324] According to Halley, "feminism has concentrated our attention only on the differences between the two genders and the subordination of women by men, or 'M>F.'"[325] By taking a break from feminism one could also take a break from the victimizing narrative of Sheila and the dominating role of William, who is the one in this story who retains the power to determine the couple's sexual practices. There is little talk of Sheila's preference or the type of sex or relation she would have wished for in her husband.

The complexity Halley adds to the *Twyman* narrative would have been a poor fit with the IIED claim, making it harder to assign blame only to William instead of sharing responsibility between William and Sheila.[326] Departing from the victimizing narrative and focusing on a more complex story about the relationship between Sheila and her husband, such as their societal roles, jobs, education, families, and character, might have introduced the consideration of other "situational" factors that led to the abuse.

B. The Reasonable Consumer

In some battery and IIED cases, feminist advocates have focused on the doctrine of vitiated consent and how consent is affected by "women's reasonable choices." These feminists "have used notions

322. *See* Brenda Cossman et al., *Gender, Sexuality, and Power: Is Feminist Theory Enough?*, 12 COLUM. J. GENDER & L. 601, 602 (2003).

323. Nicola, *supra* note 20, at 666 (citing Cossman et al., *supra* note 322, at 616).

324. *See* Cossman et al., *supra* note 322, at 608.

325. Nicola, *supra* note 20, at 667 (citing Cossman et al., *supra* note 322, at 605). Cossman explains that queer critique of the expansion of liability seeks to take a break from feminists' definitional stakes. This break would allow jurists to rethink the feminist foundations and its boundaries in order to translate them into a left libertarian policy approach that would want to keep the state outside our intimate desires. Cossman et al., *supra* note 322, at 608, 616 (showing that, although she does not abandon feminism, Halley proposes putting it on stand-by in order to better assess what the costs and benefits of the feminist subordination model are for both men and women in cases like *Twyman*).

326. *See* Jon Hanson & Kathleen Hanson, *The Blame Frame: Justifying (Racial) Injustice in America*, 41 HARV. C.R.-C.L. L. REV. 413, 423–24 (2006); Jon Hanson & David Yosifon, *The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture*, 152 U. PA. L. REV. 129, 136–37 (2003).

of individual rights and autonomy to depict women's ability to choose how to dispose of their bodies, their sexuality, and their reproductive abilities."[327] The stereotyped woman in domestic tort cases has become "the free chooser."[328] The free chooser controls what she buys, her rights, and her job, but she must be reasonable in the home. The doctrine of consent, although normally a defense,[329] is being transformed by feminist advocates into a strategic weapon in a woman's arsenal to protect herself in sexual relationships.[330]

Doctrinally, the reasonable consumer cases tend to turn on the issue of informed, meaningful consent. Plaintiffs have brought successful IIED and battery claims against former sexual partners by arguing that they lacked adequate information.[331] By withholding information, these sexual partners violated their duty of care, and thus, the plaintiffs could not give informed consent. In cases in which a sexual partner with a sexually transmitted disease did not inform the plaintiff of this fact, courts have held that consent was vitiated.[332] For example, in *Barbara A. v. John G.*, the defendant (the plaintiff's divorce lawyer) told the plaintiff, "I can't possibly get anyone pregnant."[333] After suffering injuries from the resulting pregnancy, Barbara sued and won, claiming her consent was vitiated because her sexual partner had lied and was in fact fertile.[334]

In *Neal v. Neal*, the Idaho Supreme Court extended this doctrine into the realm of domestic torts. After discovering her husband's extramarital affair, Mary Neal sued for battery.[335] The cause of action alleged that, "although she consented to sexual intercourse with her husband during the time of his affair, had she known of his sexual involvement with another woman, she would not have consented, as sexual relations under those circumstances would have been offensive to her."[336] Her consent was vitiated because her husband had withheld the information necessary for her to give informed consent.[337] The court disagreed, holding that divorce was the plaintiff's exclusive remedy because criminal conversation had been eliminated as

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327. Nicola, *supra* note 20, at 669.

328. *Id.*

329. LINDA R. HIRSHMAN & JANE E. LARSON, HARD BARGAINS: THE POLITICS OF SEX 126, 137–39 (1998).

330. *Id.* at 137, 141.

331. Madden v. Abate, 800 F. Supp. 2d 604, 609–11 (D. Vt. 2011); Weaver v. Pardue, No. M2010-00124-COA-R3-CV, 2010 WL 4272687, at *6 (Tenn. Ct. App. Oct. 28, 2010).

332. *See, e.g.*, Tischler v. Dimenna, 609 N.Y.S.2d 1002, 1004, 1009 (Sup. Ct. 1994).

333. 193 Cal. Rptr. 422, 422 (Ct. App. 1983).

334. *Id.* at 426.

335. *See* Neal v. Neal, 873 P.2d 871, 875 (Idaho 1994).

336. *Id.* at 876.

337. *See id.*

a tort in Idaho.[338] Furthermore, Mary could not recover for emotional distress, as the facts were inadequate to establish the requisite reasonable fear.[339]

The vitiated consent doctrine reinforces the reasonable consumer stereotype. If a woman has enough information regarding the situation, she is free to choose and give meaningful consent. However, from a feminist standpoint, the emergence of the vitiated consent doctrine "contradicts a long feminist tradition of criticizing the way judges and juries have relied on consent to dismiss instances of coercion, misinformation, and behavior."[340] *O'Brien v. Cunard S.S. Co., Ltd.,*[341] in which an Irish immigrant woman received a small pox vaccination, illustrates this point. Mary's actions, raising her arm so the vaccine could be given, were enough to persuade the court that Mary had given consent.[342]

Ann C. Shalleck argues that the court mistakenly assumed that Mary had unfettered agency.[343] Furthermore, in looking at the lawyers' briefs, Shalleck explains that the doctor's and the shipowner's testimonies carried more weight with the court than did Mary's. By weighing the testimony unequally, and assuming Mary had the ability to consent freely, the court concluded that Mary had given consent.[344]

The problem with the reasonable consumer narrative is that it recognizes only the most salient and egregious sources of coercion or disparities in power.[345] A woman who has sex with her lawyer or therapist may have given consent; however, in both cases, these are male professionals who had the women's trust because of their professional positions.[346]

C. The Cheating Wife

Today, social conservatives and pro-marriage advocates seek to expand liability for interspousal torts to protect the honor of the family and punish the immoral behavior of adulterers.[347] Rather than resume old amatory torts against paramours and lovers that rely on outdated notions of women's honor and chivalry, social conservatives

338. *Id.* at 875.
339. *See id.* at 875.
340. Nicola, *supra* note 20, at 670.
341. 28 N.E. 266, 266 (Mass. 1891).
342. *Id.*
343. *See* Ann C. Shalleck, *Feminist Legal Theory and the Reading of* O'Brien v. Cunard, 57 MO. L. REV. 371, 371 (1992).
344. *See id.* at 379–82.
345. *See* Hanson & Yosifon, *supra* note 326, at 289.
346. *See* Bender, *supra* note 92, at 158–60.
347. Berger, *supra* note 23, at 451, 531.

use IIED claims. In some cases, women have been successfully sued for lying about a child's paternity to their husbands.[348]

These social conservatives maintain that this behavior is an outrageous affront to the husband's dignity, a wrong that satisfies IIED because "[f]raudulently creating a parental relationship that imposes legal obligations and allows parent and child to form emotional bonds with the knowledge that the relationship could be disrupted at any moment is extreme conduct, highly likely to inflict emotional harm."[349] As in the old amatory torts, the husband can choose to bring an IIED claim against the "cheating wife" or the wife's paramour. Yet while the old torts protected the woman, these new IIED claims serve very different functions: to restore the family's honor, in particular the cuckolded husband's and the children's reputation, while faulting the immoral wife and her seducer.[350]

In a famous case, *Koestler v. Pollard*, Richard was raising a child with his wife, Vicky. Richard believed that the child was his; however, the biological father was Donald Pollard, who had an extramarital relationship with his wife.[351] Koestler sued Pollard for IIED because Pollard had not told Richard he was the father and this allowed him to emotionally bond with the child.[352] The court held that Koestler could not recover for IIED because the complaint was essentially an amatory tort, and the legislature had abolished amatory torts.[353]

The dissent argued that the IIED claim was allowable because IIED enabled recovery "for injury to the plaintiff's well-being."[354] Furthermore, the dissent stressed IIED had not been abolished by the state legislature.[355] Some scholars agreed with the dissent because IIED claims allowed for a suit against the lover and the adulterous spouse and "[g]iven the complex factual circumstances of most adultery-based claims, it can sometimes seem like the adulterer should be held responsible and in other cases the paramour. . . . IIED allows the plaintiff and jury to decide who is responsible and to what degree."[356]

In a similar New Jersey case, the husband succeeded in winning an IIED claim against his wife's lover.[357] The husband filed a

348. *See id.* at 531; *see, e.g.*, Steve H. v. Wendy S., 67 Cal. Rptr. 2d 90, 90 97 (Ct. App. 1997); G.A.W. III v. D.M.W., 596 N.W.2d 284 (Minn. Ct. App. 1999); Koepke v. Koepke, 556 N.E.2d 1198 (Ohio Ct. App. 1989).

349. *See* Berger, *supra* note 23, at 529.

350. *See* Koestler v. Pollard, 471 N.W.2d 7, 7–8 (Wis. 1991).

351. *Id.*

352. *Id.*

353. *Id.* at 11–12.

354. *Id.* at 13 (Abrahamson, J., dissenting).

355. *Id.* at 12.

356. Patel, *supra* note 181, at 1049–50.

357. *See* C.M. v. J.M., 726 A.2d 998, 998 (N.J. Super. Ct. Ch. Div. 1999), *abrogated by*

third-party complaint for IIED against his wife's paramour in a divorce proceeding when he found out he was not the true father of several children born during his marriage.[358] The court denied the paramour's motion to dismiss on the ground that the state's abolition of actions for alienation barred IIED claims.[359] The court found instead that the core of the action was the failure to inform plaintiff of the true paternity of the children and that the extreme and outrageous conduct was not the affair but the devastating effect upon himself and the children.[360]

Despite the similarity with heart balms, these IIED cases perform a different function from the old amatory torts. Like heart balms, the IIED claims protect family honor, but IIED claims also now protect the institution of family and the honor of the cheated husband who behaved according to moral norms.[361] Rather than offer the wife a second chance,[362] these interspousal cases blame and punish the cheating wife, who has hidden from her husband both the affair and the real paternity of the children involved.

D. The Sexy Secretary

The sexy secretary is the final stereotypical role for women that social conservatives advocate in interspousal torts. The sexy secretary is the archetypical seductress. The immoral sexual desires of the secretary corrupt the husband. This narrative is embodied in *Hutelmyer v. Cox*.[363] Dorothy and Joseph Hutelmyer were married for seventeen years and were a model, churchgoing couple with three children.[364] However, this all changed when Joseph's secretary, Margaret (Margie) Cox, began wearing "short skirts, low-cut blouses, and tight clothing."[365] Eventually, Dorothy and Joseph's marriage began to falter as Joseph began having an affair with his secretary.[366]

Dorothy sued Margie Cox for alienation of affection and criminal conversation after she learned of the affair.[367] She filed the suit in

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R.A.C. v. P.J.S., 880 A.2d 1179, 1192 (N.J. Super Ct. App. Div. 2005), *rev'd sub nom. on other grounds* R.A.C. v. P.J.S., Jr., 927 A.2d 97 (N.J. 2007).

358. *Id.* at 999–1000.

359. *Id.* at 1004.

360. *See id.*

361. Nicola, *supra* note 20, at 672.

362. *See* Paul M. Schwartz, *From Victorian Secrets to Cyberspace Shaming*, 76 U. CHI. L. REV. 1407, 1411–13 (2009) (reviewing FRIEDMAN, *supra* note 174).

363. *See* ROBERT F. COCHRAN JR. & ROBERT M. ACKERMAN, LAW AND COMMUNITY: THE CASE OF TORTS 78–83 (2004) (discussing the case and alienation of affection causes of action).

364. Hutelmyer v. Cox, 514 S.E.2d 554, 557 (N.C. Ct. App. 1999).

365. *Id.*

366. *Id.* at 557–58.

367. *Id.* at 556.

North Carolina, which not only had yet to abolish these amatory torts, but also still allowed for large punitive damages. Dorothy argued that the love that "once existed between her and her husband was alienated and destroyed by defendant's conduct. In 1992, following the breakup of her marriage, defendant openly flirted with plaintiff's husband and spent increasingly more time alone with him."[368] Also, there was support for her request for punitive damages because the "defendant publicly displayed the intimate nature of her relationship with Joseph by holding hands at work or by straightening his ties or brushing lint from his suits."[369]

The court allowed the claim, and the jury returned a verdict against the secretary that totaled $1 million after Dorothy successfully proved damages from emotional distress and humiliation, combined with the loss of her husband's salary.[370] The reactions to the *Hutelmyer v. Cox* case reflect the conflicting ideologies animating these torts. With respect to assigning fault, the reactions to the decision ranged from those of liberals, who feared that such cases would transform the no-fault divorce regime by making adultery relevant to the marital breakdown and the consequent distribution of property,[371] to those of social conservatives, who applauded this case as a way of strengthening the moral obligations arising from a marriage, preserving the honor of the family, and punishing the paramour.[372]

Social conservatives heralded the decision, applauding the court for strengthening traditional marriage, punishing the secretary, and deterring divorce.[373] For conservatives, both the husband and wife are victims of the sexy secretary.[374]

The court's ruling elicited a harsh backlash. One commentator railed against the court for its assumption that the husband apparently had "no self will."[375] This simplistic stance, blaming the secretary and assuming that the husband had been awestruck by a mermaid, ought to be challenged. The lawsuit also had implications for the paramours—in this case, a secretary—at least in North Carolina. This ruling reinforced that idea that the career woman is a threat to the family. In contrast, the loving, stay-at-home mom is rewarded for her traditional values.

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368. *Id.* at 559.

369. Nicola, *supra* note 20, at 672 (quoting *Hutelmyer*, 514 S.E.2d at 560) (internal quotation marks omitted).

370. *See Hutelmyer*, 514 S.E.2d at 561, 562.

371. *See* COCHRAN JR. & ACKERMAN, *supra* note 363, at 80–81.

372. *Id.*

373. *See id.*

374. *See id.* at 81.

375. *Id.*

But on the other hand, no one really knows about Margie's situation. Was she really a sexy seductress trying to destroy a marriage? Or did she think Joseph had already left his wife as he had previously told her? Maybe Joseph would have ended the marriage anyway, and he pursued his secretary to facilitate his exit?[376] The court in *Hutelmyer* ignores these questions.

IV. RECONCEPTUALIZING INTIMATE LIABILITY

Some scholars have sought to reform intimate liability in order to deter abusive emotional behavior through a more effective tort remedy. The work of Constance Ward Cole represents one of the most comprehensive contributions. By taking into account psychological evidence, Cole considers IIED to be an important yet under-analyzed tort doctrine to redress emotional and mental distress inflicted by family members.[377] She suggests reconceptualizing IIED through an internal balancing standard that takes into consideration the interests and rights, as well as the defenses and the privileges, of each party.[378] Her new analytical framework for balancing the gravity of the injury and the outrageousness of the alleged abusive behavior included important contextual and psychological factors. In attempting to influence the practice of tort law, however, Cole underestimated how much tort and family law scholars alike have tainted intimate liability by relegating it to a family matter within the narrow boundaries of FL1.

This Part reconceptualizes intimate liability informed by its doctrinal and historical development summarized in Part I, the theoretical approaches analyzed in Part II, and the litigation strategies promoted by feminist and social conservative reformers in Part III. In showing the current impact of intimate liability litigation, this Part focuses on jurisdictional, cultural, and practical obstacles affecting tort litigation. In particular, the fragmentation of amatory torts across jurisdictional lines and the advantage of married couples in bringing IIED claims show that cohabitants and same-sex partners are most unlikely to recover damages against an emotionally abusive partner. Rather than confining intimate liability to a remedy under FL1, this Part sketches the contours of a stand-alone tort remedy seeking to

376. Nicola, *supra* note 20, at 672.

377. *See* Constance Ward Cole, *Intentional Infliction of Emotional Distress Among Family Members*, 61 DENV. L.J. 553, 553 (1984) (relying on family psychology to explain that the interdependence between family members is the most likely cause of unhappiness and mental distress).

378. *Id.* at 572–73.

deter abusive, emotional behavior enabled by relationships where economic and emotional vulnerabilities are deeply intertwined.

A. The Fragmentation of Amatory Torts

By the late 1990s, all the states, with the exception of Louisiana, abolished interspousal immunities. However, recovering damages for intimate liability remains difficult for a number of reasons.[379] Courts have often rejected IIED claims between spouses and third parties because of the claims' troubling overlap with old amatory torts.[380] In addition, courts have rejected torts arising in intimate or family relations for a variety of different policy reasons, such as the possibility of a flood of litigation, fraud, and collusion among spouses.[381] The abolition of family immunities, however, did not open the floodgates of interspousal tort litigation. Nor did it clog the court system as many had predicted with serious, frivolous, or phony, claims.[382] Though some courts have been rather strict in allowing plaintiffs to pursue these torts, few others have gone as far as allowing non-married couples to bring these claims.[383] Overall, the geographical fragmentation and the attitudes of different jurisdictions have played an important role in expanding or limiting intimate liability.

In spite of growing interest and the occasional news story involving a personality like Tiger Woods, which creates inflammatory opinions,[384] the impact of intimate liability remains relatively limited when considering the litigation triggered by either interspousal or amatory torts. Not only have tort scholars and family law scholars

379. *Id.* at 561–62.

380. *See* Bland v. Hill, 735 So. 2d 414, 421 (Miss. 1999) (maintaining action for alienation of affection although it abolished tort for criminal conversation); Veeder v. Kennedy, 589 N.W.2d 610, 616 (S.D. 1999) (maintaining action for alienation of affection despite acknowledging trend to abolish it because abolition should come from the legislature, and because abolishing it would be a "stamp of approval" of immoral behavior).

381. *See* Gaspard v. Beadle, 36 S.W.3d 229, 238 (Tex. App. 2001) (finding a claim for IIED legally insufficient when a lawyer who was involved with a client broke up with her and then sent her a bill, finding that the "timing of his bill and the manner in which [he] performed the legal work was not prudent; however, sending someone a bill and ending a relationship with them at the same time is simply not extreme and outrageous behavior"); Doe v. Zwelling, 620 S.E.2d 750, 752–53 (Va. 2005) (reversing trial court's dismissal of plaintiff's complaint alleging professional malpractice against a therapist who used confidential information to malign plaintiff with his spouse and enter into a relationship with her and finding that plaintiff could proceed on claims of professional malpractice for harms caused to interests independent of the marriage relationship).

382. *See* Wriggins, *supra* note 25, at 253.

383. *See* Table 3, *infra* Part IV.B.

384. *See* John Day, *Does Ms. Tiger Woods Have a Tort Claim Against the Other Woman?*, DAY ON TORTS (Dec. 2, 2009, 8:41 PM), http://www.dayontorts.com/miscellaneous-does-ms-tiger-woods-have-a-tort-claim-against-the-other-woman.html.

looked with great skepticism at intimate liability,[385] but because of the exclusion of insurance coverage,[386] interspousal tort litigations have appeared more available to upper-middle-class families with enough assets to sustain litigation. For lower- and middle-income married couples who are excluded from liability insurance and constrained by the existence of a deep-pocket defendant, intimate liability is a bad gamble. For these couples, the exclusion of insurance coverage for family members and for intentional torts from homeowners' policies precludes their ability to access litigation. In this respect, Jennifer Wriggins writes that: "Interspousal immunity has reappeared in a new guise—the guise of private insurance. The archaic mechanism for protecting actors who cause harm within families has been replaced by a new, more subtle mechanism. That mechanism is private liability insurance contracts which exclude coverage for intentional torts between family members."[387]

If the insurance exclusion is one important factor affecting middle class couples, another feature that limits the potential impact of these lawsuits is the reluctance that plaintiffs have with bringing these actions and seeing the cases tried. These torts involve deeply emotional circumstances and are ill-suited to the adversarial and "dispositionist" nature of the legal system which dismisses some situational constraints.[388] For these reasons, some scholars have proposed that the alternative dispute resolution (ADR) regime may be more appropriate because it could best protect the private sphere of affective relations by maintaining confidentiality while still achieving economic settlements.[389] Yet private remedies such as mediation and ADR have been criticized for portraying both the family and the market as highly privatized spheres, meaning that the law should minimally intervene or stay away from it.[390]

Finally, because of the doctrinal complexity derived from the geographical fragmentation of state common law rules, plaintiffs have used radically different tort doctrines to recover for emotional

385. *See* Ellman & Sugarman, *supra* note 8, at 1271–72; Krause, *supra* note 238, at 1366 ("[R]elying on existing tort law to deal with marital misconduct is the worst-case alternative.").

386. *See* CHAMALLAS & WRIGGINS, *supra* note 38, at 71 (explaining that the lack of insurance coverage for domestic violence has inhibited tort litigation brought by lawyers on contingency fees).

387. *See* Wriggins, *supra* note 25, at 254.

388. *See* Jon Hanson & Michael McCann, *Situationist Torts*, 41 LOY. L.A. L. REV. 1345, 1366–71 (2008); Nicola, *supra* note 20, at 650–51.

389. *See* Shmueli, *supra* note 74, at 248–49; *see also* Amy J. Cohen, *The Family, the Market, and ADR*, 2011 J. DISP. RESOL. 91, 93 (2011) (noting the economic and social benefits of ADR).

390. *See* Olsen, *supra* note 10, at 1506–07.

harm in intimate relationships. In some states, plaintiffs rely on the old amatory torts favored by social conservatives. In others, they use tort actions based on the IIED claim, a dignitary tort favored by feminists.[391] In addressing interspousal torts, some courts have rejected IIED claims against a husband or a wife on the ground that such claims were too similar to a prohibited heart balm or amatory tort.[392] In those states where amatory torts survive, though, social conservatives are more likely to choose these causes of action as the basis of their lawsuits rather than IIED.[393] Therefore, the status of these actions in different jurisdictions is an important factor for their outcome.

Currently, alienation of affection has been abolished by statute in thirty-four states and the District of Columbia, and four states have abolished it by common law.[394] The abolition of this amatory tort can also bar actions of interference with parental relationship, although many courts do not adopt this approach.[395] At times, IIED claims arising from cases of adultery succeed despite the overtones of prohibited amatory torts primarily because the harm alleged is independent of the affair itself.[396] This overlap between amatory torts and IIED taints the litigation with different meanings and cultural norms that allow political reformers to promote their stereotyped narratives of gender roles in family relations. The tension raised by the overlap of IIED and amatory tort doctrines is heightened by the jurisdictional fragmentation that exists between states that still retain some of the amatory tort actions and those that do not.

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391. *See* Nicola, *supra* note 20, at 658.

392. *See* Bouchard v. Sundberg, 834 A.2d 744, 744–45 (Conn. App. Ct. 2003) (holding that an ex-husband's claims for IIED and NIED were nothing more than claims for alienation of affections and consequently determined to be barred by a state anti–heart balm act); Marjorie A. Shields, *Action For Infliction of Emotional Distress Against Paramours*, 99 A.L.R. 5th 445, 454 (2002) (showing that IIED actions brought by aggrieved spouses in cases of adultery in some of these jurisdictions have been subject to challenge on the grounds that the claims are essentially actions for alienation of affections or criminal conversation "in disguise" and are, therefore, precluded by a state statutory or public policy prohibition against such amatory claims).

393. Nicola, *supra* note 20, at 663.

394. *See* 54 AM. JUR. 3D *Proof of Facts* 135, § 5 (1999).

395. *See* Davis v. Hilton, 780 So. 2d 974, 975–76 (Fla. Dist. Ct. App. 2001) (allowing such a claim only in instances where there is "physical interference by third parties with the custodial relationship").

396. Bailey v. Searles-Bailey, 746 N.E.2d 1159, 1164 (Ohio Ct. App. 2000) (showing that courts first determine whether the claim is one for an abolished amatory tort in disguise and second, whether the harm to the plaintiff is "serious." In this case, a former husband's IIED claim against his wife and her paramour relating to his discovery that he was not the biological father of the child born during his marriage was not barred by Ohio's statutory abolition of amatory claims.).

TABLE 2. THE VARIATION OF AMATORY TORTS ACCORDING TO JURISDICTION

	Alienation of Affection	**Criminal Conversation**	**Seduction**
Jurisdictions where some heart balm torts still stand	Hawaii Kentucky Illinois Mississippi Missouri New Hampshire New Mexico North Carolina South Dakota Utah	Hawaii Kansas Maine Mississippi Missouri North Carolina Tennessee	Arkansas Arizona Connecticut DC Hawaii Kansas Maine Missouri Nebraska New Hampshire New Mexico North Carolina Pennsylvania Rhode Island South Carolina Texas Vermont Wisconsin
Limited (but not abolished) by statute		South Carolina Washington	Indiana—must be a minor Maryland—must be a minor Utah—unmarried and under 18

B. IIED Litigation Beyond Marriage

Feminists and social conservatives alike are complicit in heightening the ideological struggle behind intimate liability by fostering stereotyped narratives of men and women involved in tort litigations.[397] Both sets of reformers have relied on heterosexual relations or on traditional family roles centered on marriage to compensate the victims of emotional harm inflicted by intimate partners.[398] This cultural

397. Nicola, *supra* note 20, at 674.
398. *Id.*

phenomenon has shaped intimate liability to favor plaintiffs in heterosexual relationships and married partners as opposed to same-sex partners and cohabitants.

For instance, IIED cases have been successful in compensating plaintiffs where the underlying claim involved a dispute concerning the paternity of a child,[399] interference with parental rights,[400] assault and battery,[401] threatening or harassing behavior,[402] unprotected sexual relations putting the other spouse at risk,[403] and even concealment of the value of marital assets by one of the spouses.[404]

As premarital sex and cohabitation have become an important social reality, courts have begun to address emotional harm between non-married couples as well as married couples, but reception of IIED claims for non-married couples is mixed.[405] Table 3 below shows that

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399. J.M. v. W.P., 726 A.2d 998, 1004 (N.J. Super. Ct. Ch. Div. 1999) (holding that failure to disclose the paternity of children resulting from an affair "without regard to the high degree of probable harm to defendant, would indeed lead the average member of the community to exclaim 'Outrageous!' ").

400. Kunz v. Deitch, 660 F. Supp. 679, 683–84 (N.D. Ill. 1987) (holding that grandparents' interferences with a father's right to see his child and their solicitations for adoption of the child constituted intentional infliction of emotional distress).

401. Henriksen v. Cameron, 622 A.2d 1135, 1138 (Me. 1993) (holding that physical violence occurring during a marriage was not subject to interspousal immunity).

402. Toles v. Toles, 45 S.W.3d 252, 262 (Tex. Ct. App. 2001) ("When repeated or ongoing severe harassment is shown, the conduct should be evaluated as a whole in determining whether it is extreme and outrageous.").

403. Hogan v. Tavzel, 660 So. 2d 350, 350–52 (Fla. Dist. Ct. App. 1995) (allowing wife to bring IIED against husband for infecting her with genital warts).

404. Shelar v. Shelar, 910 F. Supp. 1307, 1310 (N.D. Ohio 1995) (recognizing wife's IIED claim against husband for tampering with marital assets and lying to plaintiff).

405. When the field of analysis is narrowed down to only intimate relationships such as married couples, cohabitants, and same-sex partnerships, married couples seem to do much better in court than non-married couples. In New York, for instance, a state court held in the 1983 case *Baron v. Jeffer* that an intimate but unmarried couple should be treated as the same in the eyes of the law for the purposes of IIED torts. 469 N.Y.S.2d 815, 816–17 (App. Div. 1983). The court reasoned that

> [I]t would be contrary to public policy to recognize the existence of this type of tort in the context of disputes, as here, arising out of the differences which occur between persons who, although not married, have been living together as husband and wife for an extended period of time (here, over two years).

Id. at 817. It referenced a 1968 opinion, *Weicker v. Weicker*, that barred IIED torts in the context of matrimonial differences, claiming that to do otherwise "would result in a revival of evils not unlike those which prompted the Legislature in 1935 to outlaw actions for alienation of affections and criminal conversation." *Id.* (citing Weicker v. Weicker, 237 N.E.2d 876, 877 (N.Y. 1968)). In the 2011 case *Allam v. Meyers*, however, a federal district court used *Weicker* to overturn the logic expressed in *Baron*. No. 09 CIV. 10580(KMW), 2011 WL 721648, at *9 n.6 (S.D.N.Y. Feb. 24, 2011) ("The Court finds . . . *Baron* is inconsistent with the policy concerns underlying the inter-spousal immunity doctrine."). It held that interspousal immunity bars only IIED claims premised on conduct occurring specifically *during* the marriage. *Id.* at *9 (explaining those IIED claims which are premised on conduct that occurred *during* the parties' marriage must be dismissed pursuant to the interspousal immunity doctrine, but those IIED claims that are premised

the majority of cases concerning interspousal torts involve married couples. However, in a limited number of cases, non-married couples have used IIED claims against their partners in more or less successful ways.

TABLE 3. IIED CLAIMS FOR SPOUSES, NON-MARRIED PARTNERS AND THIRD PARTIES

Married Partner v. Married Partner	**[Cheated] Married Partner v. Third Party**	**[Cheating] Married Partner v. Third Party**	**Non-Married Party v. Non-Married Party**
• Misrepresentation of paternity • Emotional abuse • Physical abuse (assault & battery) • Sexual abuse & sexual deviance • Interference with parental rights • Unprotected sexual relations putting spouse at risk • Fraud • Concealment of value of marital assets • Interference with employment	• Misrepresentation of paternity • Interference with parental rights • Harm resulting from extramarital affair on spouse and children	• Harm resulting from extramarital affair (similar to abolished action for seduction)	• Unprotected sexual relations putting partner at health risk • Breach of promise to marry (similar to abolished amatory tort and therefore largely unsuccessful) • Emotional with physical abuse

on conduct that occurred *prior* to the parties' marriage are not affected by the interspousal immunity doctrine).

Early IIED successes for non-married plaintiffs were confined mainly to actions that involved the potential spread of a sexually transmitted disease. In these cases, the risk of physical harm allows plaintiffs to recover for IIED, which remains in substance a "collateral tort."[406] One of the first such cases was *B.N. v. K.K.*,[407] in which a physician who knew he suffered from genital herpes entered into a sexual relationship with a nurse without informing her of his condition, and the nurse contracted the disease.[408] The nurse sued the physician for fraud, negligence, and IIED.[409] The court held that one who knowingly engages in conduct that is highly likely to infect another with an incurable disease has committed sufficiently extreme and outrageous conduct to give rise to a cause of action for IIED.[410] This case demonstrates that an IIED claim involving conduct between mere sexual partners may stand. At times, however, courts create an exceedingly high threshold for a finding of IIED, thus limiting its use in addressing tortious conduct between partners.[411]

Courts have also permitted the maintenance of an action for IIED amongst engaged couples in some small instances, such as a bad faith promise to marry wherein a man who was already married promised to marry the female plaintiff.[412] The man participated with the woman in planning the wedding and obtaining a marriage license, but he then told her that he would not marry her on the morning of the wedding.[413] The court held that these actions might be sufficiently "outrageous and intolerable in that they offend . . . generally accepted standards of decency and morality."[414]

At the same time, however, the striking similarity between this IIED claim and the old amatory tort of breach of promise to marry has been used to deny this tort as a residue of the past.[415] Even though the rationale for an IIED between intimate partners and the old amatory torts is completely different,[416] these claims are unsuccessful in

406. *See* CHAMALLAS & WRIGGINS, *supra* note 38, at 68.
407. 538 A.2d 1175 (Md. 1988).
408. *Id.* at 1175.
409. *Id.* at 1177.
410. 88 AM. JUR. *Trials* 153 (2003).
411. *See* Robinson v. Louie (*In re* Louie), 213 B.R. 754, 759 (Bankr. N.D. Cal. 1997) (finding that a partner who discovered that his partner knowingly concealed his HIV-positive status from him and yet engaged in high-risk sexual behavior with him did not have a legally cognizable IIED claim because he was still HIV negative six months after the contact that potentially could have infected him and he was therefore no longer able to sustain a cause of action for IIED).
412. Jackson v. Brown, 904 P.2d 685, 686 (Utah 1995).
413. *Id.*
414. *Id.* at 687–88.
415. *See* Miller v. Ratner, 688 A.2d 976, 982 (Md. Ct. Spec. App. 1997).
416. *See* FRIEDMAN, *supra* note 174, at 111–12.

court because they are tainted by old amatory torts. Even though IIED is recognized as an independent tort in most United States jurisdictions, in practice, it has not entirely evolved away from its Victorian origins, nor is it taken seriously enough by courts as an independent cause of action—without an additional battery or transmission of sexual disease—to recover for emotional distress.[417]

Legally, there should be no specialized party definitions for established torts such as IIED, and therefore, any non-married person subject to tortious conduct "should legally be able to sue and be sued without impediment regardless of any intimate relationship short of marriage."[418] Those IIED claims stemming from conduct between non-married people, which have been found to be legally valid, often pertain to conduct that had the potential to cause physical risk to the plaintiff. Although actual physical harm is no longer a requirement of an IIED claim,[419] in practice, plaintiffs otherwise have very little chance to recover, especially if they are not married. As a result, the number of cases involving non-married couples is more limited, not by law, but rather by practice. The fact that married couples are more likely to recover also discourages attorneys operating on contingency fees to represent a non-married plaintiff who has been emotionally harmed by his or her partner. In addition, juries tend to be biased and unsympathetic toward plaintiffs asking for damages in cases where the litigants had premarital sex that was not sanctioned by marriage.[420]

C. Affective and Economic Dependency in Cohabitation and Same-Sex Relationships

Courts have addressed emotional harm between spouses and non-married couples as well. Intimate liability amongst non-married couples, including same-sex partners, has seen a minor surge. Courts have been increasingly willing to accept these claims in the contexts of a breach of promise to marry, emotional and physical abuse, harassment, and unprotected sexual relations that put partners at risk.

Conduct with potential to cause physical risk to the plaintiff is a category of IIED claims between non-married couples that the courts have most often found legally valid. This includes the spread of a sexually transmitted disease. It is in this context, when a plaintiff has

417. *See* Cole, *supra* note 377, at 553–54.

418. Kathleen L. Daerr-Bannon, *Causes of Action in Tort for Spousal Abuse*, *in* 41 CAUSES OF ACTION 407, § 18 (2d ed. 2009).

419. RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 46 cmt. b (2012).

420. *See* Ford v. Douglas, 799 A.2d 448, 449 (Md. Ct. Spec. App. 2002).

suffered IIED as a consequence of a direct physical injury, that the courts produce more predictable results.[421] The acceptance of IIED claims amongst non-married couples involving emotional risk, however, has not fared as well as those involving physical abuse.

However, confusion still exists regarding the reach of interspousal immunity and whether such considerations should also encompass alternative family structures beyond nuclear or legal families. Because the success in court of an IIED claim is heavily tainted by the underlying plaintiff-defendant relationship, amongst intimate relationships, married partners have more success in recovering for emotional distress.[422]

In the context of economic rather than affective dependency, Daniel Givelber explains that: "When the parties have a pre-existing . . . relationship based or apparently based on contract, courts are frequently willing to uphold determinations of outrageousness. . . . When the parties are not bound by contract, the cases are fewer, the results more unpredictable, and doctrine virtually nonexistent."[423]

Therefore, in a marriage, parties are bound by a contractual relationship that they have voluntarily entered. In contrast, in other intimate relationships that may look like marriage, those not bound by a formal contract are likely to have more unpredictable results. This partly explains the skepticism of courts to assess emotional harm in relationships not sanctioned by marriage as a contract. Because of consideration and reliance in a contract, the married plaintiff appears more entitled to show that the emotional abuse arose in the context of a formalized and long-term intimate relationship entailing both affective and economic dependency.[424]

For example, in *Stone v. Wall*, a Florida court found that a parental custody relationship should be entitled to no less legally

421. Aetna Cas. & Sur. Co. v. Sheft, 989 F.2d 1105, 1105 (9th Cir. 1993) (affirming a verdict for IIED against an insurance company and in favor of insured's victim, from whom insured intentionally concealed that he had AIDS, in order to induce the victim to engage in high risk sex); Behr v. Redmond, 123 Cal. Rptr. 3d 97, 102, 105 (Ct. App. 2011) (citing a California state court that upheld an IIED verdict in favor of a former girlfriend who contracted genital herpes from her former boyfriend, stating that "[a] person who knows or should know he or she has herpes and fails to disclose that fact, or misrepresents that he or she is disease-free, may be liable for transmitting the disease to a sexual partner"); Deuschle v. Jobe, 30 S.W.3d 215, 215 (Mo. Ct. App. 2000) (reversing a lower court decision to hold that IIED was valid where the boyfriend of plaintiff "tortiously infect[ed] her with herpes and genital warts").

422. *See supra* Part III (addressing the stereotyped narratives promoted in these cases). It is also worth noting that the number of IIED claims brought by married couples dramatically dwarfs those brought by unmarried couples.

423. 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, 63 (1982).

424. *See* Khalifa v. Shannon, 945 A.2d 1244, 1268 (Md. 2008).

recognized protection from unreasonable interference than business or economic relationships.[425] Therefore, the court recognized an action for intentional interference with the parent-child relationship by allowing the father to sue members of the family of his deceased wife for not returning and hiding the child from him.[426]

In marriages as contracts and in parental custody cases, courts have successfully demonstrated that affective relationships are characterized by economic dependency, which in turn might lead to emotional abuse. Yet, courts have not found cohabitants and same-sex partners vulnerable to emotional harm in situations that entail both affective and economic dependency, despite the fact that cohabitation has become a social and economic reality in the United States as one of the "fastest growing 'family' configuration[s] over the last two decades."[427] Further, an increasing number of states over the past five years have recognized the validity of same-sex marriages.[428]

For instance, in cases involving emotional abuse between cohabitants, the courts are often completely oblivious about the economic dependency characterizing the relationship between two people

425. *See* Stone v. Wall, 734 So. 2d 1038, 1038 (Fla. 1999); *see also* Gouin v. Gouin, 249 F. Supp. 2d 62, 73 (D. Mass. 2003) (holding that under Massachusetts law allegations were sufficient to allege IIED where: 1) the estranged husband knew or should have known his conduct aimed at coercing the wife into relinquishing custody would cause her emotional distress, 2) the actions were extreme and outrageous, and 3) the distress suffered was severe); Bhama v. Bhama, 425 N.W.2d 733, 734–35 (Mich. Ct. App. 1988) (holding that a custodial parent's creation of a negative relationship between a child and the non-custodial parent could constitute conduct so outrageous that it could not be tolerated in a civilized society and could thus support the non-custodial parent's suit for IIED); FRANKLIN ET AL., *supra* note 97, at 922. *But see* Day v. Heller, 653 N.W.2d 475, 482 (Neb. 2002) (holding that it was contrary to public policy to allow a former husband to recover for his IIED claim of emotional harm he suffered by his former wife's misrepresentation of the true paternity of their purported child, which he claimed threatened to destroy his parent-child relationship. The court worried about the children's well-being and also thought that where such plaintiffs established meaningful relationships with these children, it was not appropriate to award damages for the misrepresentation of the child's paternity.); Segal v. Lynch, 993 A.2d 1229, 1233 (N.J. Super. Ct. App. Div. 2010) (finding that although the state Heart Balm Act did not bar plaintiff's claim regarding the loss of a child's affection because the statute's prohibitions were intended to apply only to causes of action alleging alienation of affection arising out of and dependent upon a marital relationship, the claim was problematic from a public policy standpoint. The court reasoned that allowing a parent to utilize a child's loss of affection for him or her as grounds for civil liability against the other parent could be abused by parents with no consideration of how such litigation would affect the child.).

426. *Stone*, 734 So. 2d at 1047.

427. Christopher Kaczor, *Marital Acts Without Marital Vows: Social Justice and Premarital Sex*, LIFEISSUES.NET, http://www.lifeissues.net/writers/kac/kac_12maritalacts.html (last visited Mar. 23, 2013).

428. *See Marriage Equality & Other Relationship Recognition Laws,* HUMAN RIGHTS CAMPAIGN, http://www.hrc.org/files/assets/resources/Relationship_Recognition_Laws_Map(1).pdf (last updated July 6, 2011).

living under the same roof. In *Miller v. Ratner*, plaintiff Lonnie Miller moved in with her boyfriend, Warren Ratner, on the understanding that they were "making a permanent commitment that *would* be followed by marriage."[429] After three years of living together, Lonnie became seriously ill with breast cancer.[430] Warren was at first supportive but later decided to terminate the relationship and ordered Lonnie to leave his house.[431] Upon her refusal, Lonnie claims Warren and his brother conspired to inflict emotional distress on her in an effort to cause her to leave the house and his life.[432] While plaintiff was undergoing radiation treatment, Warren repeatedly woke her up in the middle of the night, threatened her with bodily harm if she did not leave his house, and admonished that she was a financial burden and would soon die.[433] Warren's equally upstanding brother repeatedly telephoned the house to call Lonnie a "bitch," "whore," and "one-breasted woman"—saying Warren "deserves a whole woman, not a one breasted woman."[434] The court held that, although the brothers' actions were morally reprehensible, they were not legally reprehensible. Lonnie's IIED claims were "fatally tainted" by the statutorily prohibited breach of promise aspect.[435] According to the court, the IIED claim was primarily based on Warren's attempt to terminate his promise to marry and take care of Lonnie.[436]

Just like cohabitants, parties that are intimately bound but who are not part of a traditionally defined, heterosexual marriage, have obtained unpredictable results through intimate liability. First, the limited number of claims brought by homosexual partners overwhelmingly concerns the spread of a sexually transmitted disease. This is still true today despite the growing acceptance of legal rights for same-sex marriage, civil unions, and domestic partnerships by the states.[437] IIED claims for same-sex relationships have not correspondingly grown, nor have the types of IIED claims brought by same-sex couples substantially broadened in scope by showing that affective and economic vulnerabilities are inevitably intertwined.

For instance, in *Plaza v. Estate of Wisser*, a New York court addressed such issues in a third-party suit against the estate and

429. Miller v. Ratner, 688 A.2d. 976, 979 (Md. Ct. Spec. App. 1997).
430. *Id.* at 978.
431. *Id.*
432. *Id.* at 979.
433. *Id.* at 978.
434. *Id.*
435. *Miller*, 685 A.2d at 994.
436. *Id.* at 995 ("However vile and repugnant the Ratner's actions were, if true, Warren Ratner nevertheless had the legal right to ask [Lonnie] to leave and to cause her to leave.").
437. *Marriage Equality & Other Relationship Recognition Laws, supra* note 428.

parents of plaintiff Jose Manuel Plaza's deceased companion, Scott Allen Wisser, who died from AIDS-related complications.[438] Jose's IIED claims were brought against Scott's parents for the manner in which they treated him at Scott's funeral and their violation of Scott's commitment to allow Jose to continue living in Scott's condominium after his death.[439] The court found that the allegations

> [R]eflect conduct which may have caused distress and anxiety to plaintiff, [but] they can hardly be said to allege conduct which is "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."[440]

In this case, the court applied the outrageousness standard narrowly by limiting its scrutiny of a relationship, which clearly entails both emotional and economic dependency.

Both *Miller* and *Plaza* are exemplary cases explaining why the number of intimate liability claims brought by married couples still dwarfs those brought by partners in new family structures, such as cohabitation and same-sex partnerships. In addition to the skepticism of scholars and the reluctance of courts and juries to scrutinize the economic dependencies arising from these relationships, the stereotyped narratives promoted by political reformers have not favored these cases. Whereas feminists have narrowed their focus on applying IIED to heteronormative relationships where they can play out the gender conflict of women against men, social conservative reformers have discouraged claims between cohabitants that would lead to acknowledging intimate relations outside of wedlock.[441]

CONCLUSION

Influenced by a family/market distinction in private law, tort and family law scholars are ready to compensate emotional harm when it arises in the commercial, rather than the domestic and intimate, sphere. In pushing emotional harm away from tort and into the narrow contours of family law—called FL1 by family law exceptionalism scholars—they imply that tort law should compensate emotional harm that arises in the situation of economic, rather than affective, dependency.

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438. Plaza v. Estate of Wisser, 626 N.Y.S.2d 446, 449 (App. Div. 1995).
439. *Id.* at 450.
440. *Id.* at 452 (quoting Howell v. N.Y. Post Co., 612 N.E.2d 699, 702 (N.Y. 1993)).
441. *See* Nicola, *supra* note 20, at 676.

Both feminists and social conservatives who defend their proposed law reforms and litigation outcomes deploy stereotyped gender narratives based on traditional families and heterosexual relationships.[442] These stereotyped narratives prevent many plaintiffs who have suffered emotional harm in intimate relationships but who do not fit the stereotypes from obtaining relief.

Finally, in relying on contingency fee agreements, tort lawyers are unlikely to represent clients who have been emotionally harmed by their partners and are excluded by liability insurance. Tort lawyers litigating these cases are aware that if they are not likely to win, they will have to absorb a loss. Although these claims are limited, they hold the potential to shape intimate liability and to include new plaintiffs representing a changing social reality in family life.

Neglected by tort scholars and hijacked by political reformers in the past decades, intimate liability has lost, rather than revamped, the possibility to redress emotional harm between spouses, cohabitants, and same-sex partners. This article suggests that a stand-alone tort remedy could redress emotional harm between intimate partners whose relationships do not fit a one-size-fits-all version of "happy families" and instead include cohabitation and same-sex partnership.[443] By breaking apart the bonds that link intimate liability to marriage and heteronormative relationships, tort law offers a unique possibility to redress emotional harm and compensate plaintiffs in intimate relations. In supplementing family law, tort law offers an important remedy to address stand-alone emotional harm suffered by plaintiffs in the context of economic, as well as affective, dependency. In each case, courts and juries will need to evaluate how emotional harm arose from the specific economic and affective circumstances of each relationship.

442. *Id.* at 676–77.
443. *See* STACEY, *supra* note 279, at 4.