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The advent of no-fault divorce is nearly fifty years in the making, and despite broad intellectual support for the principle of no-fault, fault is persistently a factor in divorce in many jurisdictions and in the arena of public and scholarly opinion. Feminists too have been struggling with this issue for decades, but the controversy persists. This Article attempts to decode and resolve some of the tension between advocates of the relevance of fault and those who simply cannot believe that no-fault divorce has not ended the fault discussion. This Article focuses on the plight of caregivers and dependents, which should be the focus of any divorce regulation, and argues that fault divorce is not appropriate no matter which side of the sameness/difference debate one focuses upon. Fault in divorce disproportionately punishes dependents and does not work hard enough to protect children from the many potential harms resulting from the dissolution of the marriage. Instead, spousal torts are the appropriate exclusive domain for contending with wrongdoing during marriage and the role of spousal torts should be solidified and clarified so as to provide a clear outlet for marital wrongdoing. Spousal torts appropriately provide redress for wrongs between spouses that are recoverable as between strangers and thereby protect the vulnerable in the domestic sphere. Moreover, confining litigation of marital wrongs within tort law provides a narrower and more judiciable means of contending with serious marital wrongs that appropriately reflects contemporary norms, protects caregivers and children in need of financial support and more fairly compensates the victim. The transfer of fault litigation from divorce to torts, while often criticized as simply transferring the acrimony from one forum to another, has distinct theoretical and practical advantages and can preserve what seems inescapably relevant in fault divorce while benefiting from advantages

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of no-fault divorce.

I. INTRODUCTION

Fault in divorce is a curious issue. On the one hand, no-fault divorce has forcefully revamped the divorce system in all but a very few

jurisdictions.[1] On the other hand, fault or blameworthy conduct is persistently relevant, whether as an option in divorce statutes, as a bargaining mechanism, or to gain advantage in financial and custodial matters.[2] Despite the broad intellectual acceptance of the advantages of no-fault divorce for parents and children, there is persistent belief that wrongdoing that has caused or, at the least was a part of, the breakdown of the marriage should be relevant in the law of divorce. In that regard, the divorce process has witnessed the amazing resilience of blame. Eliminate the bitterness and fighting over the cause of the marital breakdown from one area of divorce law and the blame and acrimony pop up elsewhere—property disputes, alimony, or custody.[3] Despite decades of exploration and contemplation, divorce law and scholars who study divorce law are still mired in the tension between fault and no-fault without a clear resolution.[4]

Feminists too have mixed feelings about fault divorce. Although not originally the product of a deliberately feminist enterprise, no-fault divorce was endorsed by liberal feminists who applauded the potential of no-fault divorce to further the goal of gender neutrality.[5] Having to prove grounds in order to obtain a divorce was traditionally mired with rigid hierarchical notions of male and female gender roles, and divorce

1. *See, e.g.*, JOHN DE WITT GREGORY ET AL., UNDERSTANDING FAMILY LAW 237–38 (2005). Despite the presence of a no-fault option in all fifty states, fault divorce is still dominant in those jurisdictions—currently only three states—that only provide for a consensual no-fault option. *See infra* Part II.A.

2. *See, e.g.*, Lynn Wardle, *No-Fault Divorce and the Divorce Conundrum*, 1991 B.Y.U. L. REV. 79, 100–102 (1991); *see also infra* Part II.A.

3. *See* Wardle, *supra* note 2, at 100–102; *see generally* ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY (1992); Alan H. Frank, John J. Berman, & Stanley F. Mazur-Hart, *No-Fault Divorce and the Divorce Rate: The Nebraska Experience—An Interrupted Time Series Analysis and Commentary*, 58 NEB. L. REV. 1, 50–51 (1978) ("Since fighting over who caused the breakup is futile, 'those who want a fight, now use collateral issues as the battle ground.' Fights over custody and support are far more prevalent and are often just as acrimonious and humiliating as those over grounds, if not more so." (quoting comment of judge in Judges' Questionnaire on Nebraska's Dissolution of Marriage Law (November 1977) (results on file with Alan Frank, College of Law, University of Nebraska)); *see also* Robert Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226, 289–91 (1975); *see, e.g.*, AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.08 cmt. b at 182, § 2.09(2)–(3) (2002) [hereinafter ALI PRINCIPLES] (discussing how adversarial custody disputes can become regarding which parent will be best custodian and thus recommending a more definitive standard).

4. For recent discussions still struggling with the topic, see Michelle L. Evans, *Wrongs Committed During Marriage: The Child that No Area of the Law Wants*, 66 WASH. & LEE L. REV. 465 (2009), Harry Krause, *On the Danger of Allowing Marital Fault Torts to Re-Emerge in the Guise of Torts*, 73 NOTRE DAME L. REV. 1355, 1362–63 (2003), and Clare Huntington, *Repairing Family Law*, 57 DUKE L.J. 1245, 1303 (2008).

5. *See* Herma Hill Kay, *Equality and Difference: A Perspective on No-Fault Divorce and its Aftermath*, 56 U. CIN. L. REV. 1, 2–4 (1987) (describing in detail the advent of no-fault divorce).

has too often been awarded in a discriminatory fashion.[6] Moreover, feminists aspiring to formal equality and fighting women's traditional dependence on men have supported allowing either party to a marriage to exit if they so choose without having to prove or contrive the existence of fault. Such independence and autonomy for women and men conforms with liberal feminists' regard for the power of choice.[7] Other feminists, Lenore Weitzman primary among them,[8] are more sensitive to the effect divorce has had on women's lives, and argue that taking grounds out of divorce and assuming women's equal status at the time of divorce may undermine women's bargaining power and sacrifice their ability to obtain needed financial support.[9] Others look to

6. *See* Jana Singer, *Divorce Reform and Gender Justice*, 67 N.C. L. REV. 1103, 1110–11 (1989).

7. *See, e.g.*, Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443, 1461, 1474 (1992); ROBERT E. BURGER, THE LOVE CONTRACT: HANDBOOK FOR A LIBERATED MARRIAGE (1973); Leah Guggenheimer, *A Modest Proposal: The Feminomics of Drafting Premarital Agreements*, 17 WOMEN'S RTS. L. REP. 147, 155 (1996).

8. Lenore Weitzman has published the best-known work on the economic consequences of the new divorce laws for women and children. Her study of no-fault divorce in California found that "divorced men experience[d] an average 42 percent rise in their standard of living in the first year after the divorce, while divorced women (and their children) experience[d] a 73 percent decline." LENORE J. WEITZMAN, THE DIVORCE REVOLUTION: THE ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA 323 (1985). Several scholars have challenged Weitzman's methodology and her specific findings. *See, e.g.*, Saul D. Hoffman & Greg J. Duncan, *What Are the Economic Consequences of Divorce?*, 25 DEMOGRAPHY 641, 641 (1988); Richard R. Peterson, *A Re-Evaluation of the Economic Consequences of Divorce*, 61 AM. SOC. REV. 528, 529–35 (1996). A number of studies, however, confirm that modern divorce laws have been economically devastating for many women and children. *See, e.g.*, Rosalyn B. Bell, *Alimony and the Financially Dependent Spouse in Montgomery County, Maryland*, 22 FAM. L.Q. 225, 284 chart 6 (1988) (finding that in contested divorce adjudications where the women were awarded alimony the mean per capita income of the women fell 37% after divorce, the income of their children fell 61%, and the income of their former husbands increased 55%); Greg J. Duncan & Saul D. Hoffman, *A Reconsideration of the Economic Consequences of Marital Dissolution*, 22 DEMOGRAPHY 485, 488 (1985) (reporting that in the first year after divorce or separation "the family income of women who do not remarry is 70 percent of its previous figure; five years after a divorce or separation, the ratio for those still unmarried is 71 percent"); Barbara R. Rowe & Jean M. Lown, *The Economics of Divorce and Remarriage for Rural Utah Families*, 16 J. CONTEMP. L. 301, 324–25 (1990) (reporting that "the divorced men in this study experienced a 73 percent increase in their standard of living while divorced women experienced a 32 percent decrease"); Heather Ruth Wishik, *Economics of Divorce: An Exploratory Study*, 20 FAM. L.Q. 79, 98 tbl.15 (1986) (reporting that, even assuming that all support orders were paid, women's mean per capita income after divorce declined by 33%, children's declined by 25%, and men's rose by 120%). Even more modern accounts of the effects of divorce, agree that there is a disparity between custodial women's standard of living after marriage and their spouse's. *See, e.g.*, ELIZABETH WARREN & AMELIA WARREN TYAGI, THE TWO-INCOME TRAP: WHY MIDDLE-CLASS MOTHERS AND FATHERS ARE GOING BROKE 118 (2003). Others argue that it is not no-fault but rules regarding alimony and property distribution that are causing women and children to suffer after divorce. *See, e.g.*, Marsha Garrison, *The Economics of Divorce: Changing Rules, Changing Results*, in DIVORCE REFORM AT THE CROSSROADS 90–100 (Stephan D. Sugarman & Herma Hill Kay eds., 1990).

9. *See, e.g.*, Deborah L. Rhode & Martha Minow, *Reforming the Questions, Questioning the Reforms: Feminist Perspectives on Divorce Law*, *in* DIVORCE REFORM AT THE CROSSROADS 191

increased divorce rates and the failure of modern divorce regulations to fairly compensate women for their time out of the market as the cause of women's ills, but still believe that unilateral no-fault divorce increases divorce rates.[10] Those concerned with the effect of no-fault divorce on women and children question no-fault divorce—which makes scholars concerned with the plight of women post-divorce uneasy bedfellows with social conservatives who long for a return to traditional values that sanctified life-long marriage regardless of dissatisfaction. Feminists are just as caught in the puzzle of fault as society at large: on the one hand they seek equal treatment, and on the other they are trying to protect women who are suffering under modern divorce laws.

This Article offers a pragmatic[11] resolution to the feminist dilemma while seeking to relieve tension in the broader "fault conundrum."[12] It proposes abandoning fault in divorce, but provides a clear framework in tort law for litigating physical abuse and extraordinary and outrageous conduct that causes severe distress between spouses. The transfer of fault litigation from divorce to torts, while often criticized as simply transferring the acrimony from one forum to another,[13] has distinct theoretical and practical advantages, which can preserve what seems inescapably relevant in fault divorce while benefiting from the advantages of no-fault divorce.

Despite bargaining power advantages that accrue to some women, feminists, who are concerned with the effect no-fault divorce has on

(Stephen D. Sugarman & Herma Hill Kay eds., 1980); Jill Elaine Hasday, *The Canon of Family Law*, 57 STAN. L. REV. 825, 866–70 (2004) ("The prohibition on interspousal contracts for domestic labor and the doctrine of necessaries help insure that many married women acquire few separate assets during marriage, while performing labor that diminishes their future earning potential in the market. In light of this legal and economic background, divorce laws that assume that spouses have equal bargaining power in marriage and equal earning power after divorce may frequently be insufficient to keep many divorced women and their children out of poverty."); Martha Fineman, *Implemeting Equality: Ideology, Contradiction and Social Change, A Study in Rhetoric and Response in Regulation of the Consequences of Divorce*, 1983 WIS. L. REV. 789; Barbara Bennett Woodhouse with comments by Katherine T. Bartlett, *Sex, Lies, and Dissipation: The Discourse of Fault in a No-Fault Era*, 82 GEO. L. J. 2525, 2532 (1994); Robin Fretwell Wilson, *Don't Let Divorce off the Hook*, N.Y. TIMES, Oct. 1, 2006, at 14LI.

10. *See, e.g.*, Wardle, *supra* note 2, at 116–19; Thomas Marvell, *Divorce Rates and the Fault Requirement*, 23 LAW & SOC. REV. 543 (1989) (no-fault laws "have a significant impact on divorce rates").

11. Margaret Radin is the innovator of the concept of the pragmatic feminist. *See, e.g.*, Margaret Jane Radin, *The Pragmatist and the Feminist*, 63 S. CAL. L. REV. 1699, 1699, 1701, 1704–08 (1990). This Article adopts a perspective in the tradition of Radin's emphasis on dealing with the realities of women's situations and the effect laws have on women's lives. Radin recommends a context specific approach to feminist analysis that considers the practical effects of feminist reforms as opposed to a theoretical construct that can be applied in any situation.

12. The term "divorce conundrum" was coined by Lynn Wardle. *See* Wardle, *supra* note 2.

13. *See, e.g.*, Krause, *supra* note 4, at 1364; Woodhouse, *supra* note 9, at 2538–39. See also *infra* Part III.C for responses to criticism of spousal torts.

women and children, should still opt to abandon fault in divorce because punishing bad behavior in the divorce process disproportionately punishes child caregivers, who are usually women[14] and whose well-being significantly affects the well-being of children.[15] Caregivers in this context are parents who opt out of market work to some extent—by not working at all,[16] by working part-time,[17] by selecting a job that only

14. According to the 2008 Census Bureau, *Household Data, Annual Averages, Presence at Work – Full and Part Time Status*, mothers of children under six are in the labor force at a rate of 59%, and mothers with children under eighteen at a rate of 68%. The November 2004 U.S. Bureau of Statistics Report, *American Families and Living Arrangements*, indicates that approximately 30% of mothers with children under eighteen stay out of the workforce full-time to care for children, compared with approximately 5% of fathers. *See* U.S. Census Bureau, Families and Living Arrangements, http://www.census.gov/population/www/socdemo/hh-fam.html (last visited Feb. 3, 2010); *see also* Kemba J. Dunham, *Stay-at-Home Dads Fight Stigma*, WALL ST. J., Aug. 26, 2003, at B1 ("According to the U.S. Census Bureau's March 2002 Current Population Survey, among two-parent households, there were 189,000 children with stay-at-home dads [compared with] 11 million children with stay-at-home moms . . . ."); Ira Mark Ellman, *Divorce Rates, Marriage Rates, and the Problematic Persistence of Traditional Marital Roles*, 34 FAM. L.Q. 1, 19–31 (2000); Joan Williams, *Is Coverture Dead? Beyond a New Theory of Alimony*, 82 GEO. L. J. 2227, 2236 (1994) ("The dominant family ecology has three basic elements: the gendered structure of wage labor, a gendered sense of the extent to which child care can be delegated, and gender pressures on men to structure their identities around work."); BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, EMPLOYMENT CHARACTERISTICS OF FAMILIES IN 2003 tbl.4 (2004). Even after work, research shows that mothers do a lot more caregiving than dads. *See* ARLIE HOCHSCHILD & ANNE MACHUNG, THE SECOND SHIFT: WORKING PARENTS AND THE REVOLUTION AT HOME 6 (1989) (documenting the phenomena of the second-shift wherein working mothers retain significant domestic labors: "The women [] interviewed seemed to be far more deeply torn between the demands of work and family than their husbands . . . . They felt the second shift was their issue and most of their husbands agreed.").

15. Because ensuring the financial stability of caregivers is in the best interests of the children for whom caregivers care, by extension the focus on caregivers is directly to the benefit of children. *See* Pamela Laufer-Ukeles, *Selective Recognition of Gender Difference in the Law: Revaluing the Caregiver Role*, 31 HARV. J.L. & GENDER 1, 47–50 (2008).

16. Although clearly becoming less common, this phenomenon still exists. Only 59% of women with children under six are in the labor market; 68% of women with children under eighteen are in the labor market. That still leaves many women who leave the labor market altogether when their children are young. Men are also leaving the job market to care for children, in increasing, but still marginal numbers. *See* Sharon R. Cohany & Emy Sok, *Married Mothers in the Labor Force: Trends in Labor Force Participation in Married Mothers of Infants*, MONTHLY LABOR REV., Feb. 2007, *available at* http://www.bls.gov/opub/mlr/2007/02/art2full.pdf. On average, both the husband and wife work in only 54.1% of married couples. *See* U.S. CENSUS BUREAU, PERCENT OF MARRIED-COUPLE FAMILIES WITH BOTH HUSBAND AND WIFE IN THE LABOR FORCE: 2008 (2008).

17. Persons are included as employed in labor statistics and part of the labor force even if they are employed fewer than thirty-five hours per week. According to the 2008 Census Bureau, *Household Data, Annual Averages, Presence at Work – Full and Part Time Status*, mothers of children under six appear to be in the labor force at a rate of 59%—leaving 41% unemployed entirely—although that number does not account for the subset of women working part-time—less than thirty-five hours—and thereby sacrifice earning potential to be with children. According to The Bureau of Labor Statistics released in February 2007, *Trends in Labor Force Participation of Married Mothers of Infants*, 60.2% of women with children under three are in the labor force, 29.4% of those women work part-time. About 68% of mothers with children under eighteen are in the workforce and 24.3% of those women are working part-time. *Women Leaving and Re-entering the Workforce*, EMPLOYMOMS, June, 2009,

demands forty hours per week or fewer,[18] by working from home, or by otherwise getting caught in the mommy–track long term or temporarily—in order to care for their children. Therefore, caregivers earn a reduced or limited market wage and become wholly or partially financially dependent on their spouses and attached to the children for whom they care.[19] Notwithstanding the reality that many female and male primary caretakers within a marriage have become significant contributors to family income, for the most part, primary caretakers, who are usually women, still contribute and work significantly less than their spouses.[20] The same is logically true for men who take on the role of primary caretakers. Since considering fault can be used to reduce needed financial support and can even affect custody,[21] caregivers and their dependents are disproportionately affected by fault because they are more sensitive to the loss of support and custody. As a result, caregivers, who may have acted badly in a moral sense (i.e., by committing adultery, being incorrigible to their spouses, or being bullies) but are still good mothers or fathers are disproportionately subject to punishment in the divorce process.

Caregiving is an essential and undervalued gender role,[22] and the law

http://www.employmoms.com/node/83. *See also* PEW RES. CTR., FROM 1997–2007: FEWER MOTHERS PREFER FULL-TIME WORK (2007), *available at* http://pewresearch.org/assets/social/pdf/WomenWorking.pdf (describing how over the past decade, full-time work outside of the home has lost its appeal to working moms); DAPHNE SPAIN & SUZANNE M. BIANCHI, BALANCING ACT: MOTHERHOOD, MARRIAGE AND EMPLOYMENT AMONG AMERICAN WOMEN 146–48 (1996) (indicating that only 28 percent of women with young children work full-time outside of the home, while an additional 40 percent work from home and/or part-time); Joan Williams, *"It's Snowing Down South": How to Help Mothers and Avoid Recycling the Sameness/Difference Debate*, 102 COLUM. L. REV. 812, 828 (2002) ("Today, two out of three mothers are employed less than forty hours a week during the key years of career advancement and eighty-five percent of women become mothers."); Robert Pear, *Married and Single Parents Spending More Time with Children, Study Finds*, N.Y. TIMES, Oct. 16, 2006, at A1 (documenting an increase in time spent by both parents with children and a decrease in time spent doing housework, but indicating that women still do twice as much housework and child work than men, as women average twenty-three hours of paid work per week, thirteen hours of child care and nineteen hours of house work, whereas men average thirty-seven hours of paid work per week).

18. *See* JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 1–9 (2002) (93% of mothers work forty-nine hours per week or less). The U.S. Census Bureau provides statistics indicating that full-time work is thirty-five hours per week. Many of the better paying jobs, however, demand many more hours—more than even forty hours per week. *See supra* note 17.

19. *See infra* Part II.C.2; Laufer-Ukeles, *supra* note 15, at 2; Twila L. Perry, *No-Fault Divorce Liability Without Fairness: Can Family Law Learn from Torts?*, 52 OHIO ST. L.J. 55, 58–59 (1991); Donald R. Williams, *Women's Part-Time Employment: A Gross Flows Analysis*, MONTHLY LABOR REV., Apr. 1995, at 36 (most married mothers still work primarily part-time).

20. *See supra* notes 14–19 and accompanying text.

21. *See infra* Part II.A.

22. Although the focus on caregivers in this Article is gender neutral, it is still a gendered feminist perspective because caregivers are usually female and because the disadvantaged role that

must focus on the effects it is having on this vital institution.[23] The plight of caregivers and the children for whom they care should be the focus of modern divorce law.[24] Therefore, the goals of divorce law should not be punishing bad behavior, potentially leaving good caregivers and their children in financial ruin, but rather should focus on shepherding families through the process of divorce with as much financial and emotional stability as possible so that the parties can separate their lives and work together for the betterment of the children of the marriage.[25]

On the other hand, it is a palpable injustice to ignore certain extreme wrongdoing between spouses. When wrongdoing is not only "fault" but physical abuse or extraordinary and outrageous emotional abuse causing severe distress, the legal system must provide an outlet for adjudicating

caregivers find themselves in has evolved in the context of the gendered nature of that caregiver role. CATHERINE MACKINNON, FEMINISM UNMODIFIED: DISCOURCES ON LIFE AND LAW 73 (1987) ("A few husbands are like most wives—financially dependent on their spouse. It is also true that a few fathers, like most mothers are primary parents . . . . My point though is that occupying those particular positions is consistent with the norms for gender female. To be poor, financially dependent, and a primary parent constitutes part of what being a woman means. Most of those who are in those circumstances are women."); MARTHA ALBERTSON FINEMAN, THE AUTONOMY MYTH: A THEORY OF DEPENDENCY 179 (2004). This Article focuses on and argues on behalf of the institution of caregiving. Although the Article points out that woman are usually the caregivers, it does not seek to reinforce outdated stereotypes, nor does it attempt to encourage or force women, as opposed to men, to undertake caregiving roles.

23. *See* Laufer-Ukeles, *supra* note 15, at 4–6, 32–39; *see also* Anne Laquer Estin, *Maintenance, Alimony and the Rehabilitation of Family Care*, 71 N.C. L. REV. 721, 787–802 (1993); Laura T. Kessler, *The Attachment Gap: Employment Discrimination Law, Women's Cultural Caregiving, and the Limits of Economic and Liberal Theory*, 34 U. MICH. J.L. REFORM 371 (2001) (arguing that the importance of caregiving should be considered in shaping and interpreting the law of employment discrimination); Mary Becker, *Care and Feminists*, 17 WIS. WOMEN'S L.J. 57, 61 (2002) ("'We need to elevate care to this level of importance [a core value] for the basic reason that it is essential to human health and balanced development.'" (quoting MONA HARRINGTON, CARE AND EQUALITY: INVENTING A NEW FAMILY POLITICS 48–49 (1999))); Lucinda Findley, *Transcending Equality Theory: A Way out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118, 1176 (1986) ("Employers should bear the costs of [childbearing] responsibilities because childbearing and rearing are crucially important social functions that are connected to and have major impacts on the work world."). *But see* Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law and Desire*, 101 COLUM. L. REV. 181, 186–87, 208 (2001) (arguing that children are not, in fact, a public good, but rather a personal choice and that population can be replenished by immigration). For a poignant critique of Franke's argument, see Becker, *supra*, at 73–75.

24. *See infra* Part II.B.1.

25. Because this article focuses on the effects of divorce on caregivers and dependents, the arguments are aimed at married couples with children, and approximately 70% of married couples have children. *See* U.S. CENSUS BUREAU, HOUSE AND FAMILY STRUCTURE: HOUSEHOLD TYPE 1999–2000 (2000)*; infra* notes 104–105 and accompanying text. For married couples without children, no-fault divorce does not carry the great burden of contending with dependency and children which are the leading indicator of causes of poverty and thus the no-fault dilemma is not pressing. *See, e.g.*, WARREN & TYAGI, *supra* note 8, at 6–7. For unmarried couples with children, divorce law does not apply and is thus beyond the scope of this Article.

such harms.[26] When such abuse occurs, punishment and even financial ruin may be warranted, regardless of the caregiving activity of whoever inflicted the abuse.[27] Despite the end of spousal immunities, such litigation is still rare for physical abuse and is not widely accepted for emotional abuse.[28] Moreover, spousal torts are heavily criticized by scholars for simply transferring the acrimony and creating more intrusive litigation.[29] Yet, ignoring such abuse in the domestic sphere discriminates against women, who as a matter of statistics spend more time in the home and are more vulnerable to abuse in the home. Moreover, entering the domain of torts establishes a deliberately higher bar for punishing wrongdoers, thereby preserving financial loss for extraordinary wrongdoing. Indeed, the notion of "extraordinary and outrageous conduct" in the tort of intentional infliction of emotional distress should be used in the marital context to distinguish between bad behavior that should not cause financial suffering for caregivers and children in the divorce process and tortious conduct that justifies significant pecuniary compensation.

This argument against fault in divorce and for legitimizing a role for spousal torts resolves the tension between feminists concerned with recognizing and supporting the reality of women's lives[30] and liberal feminists looking for gender neutral laws.[31] According to this argument, no-fault divorce should be preferred from the perspective of gender neutrality or difference feminism, particularly for cultural feminists focused on the importance of caregiving. Torts should be available for spouses in a manner equivalent to their availability for strangers, thereby satisfying liberal feminists' quest for equality and relational feminists'

26. The terms "extraordinary and outrageous" behavior and "severe" distress are used in order to signal the reference to the tort of intentional infliction of emotional distress (IIED). *See infra* Part III.A.1 for case cites and discussion of this tort.

27. Primary caregivers should be awarded a presumption of custody. However, when serious physical and emotional abuse has been carried out, even loss of custody to the primary caregiver during the marriage may be warranted or at least may need to be considered and the custodial presumption rebutted in the best interests of the children. *See* Laufer-Ukeles, *supra* note 15, at 47; *see also infra* notes 286–294 and accompanying text.

28. *See infra* Part III.A.

29. *See infra* Part III.C.

30. For a sampling of formal neutrality feminists focused on gender neutral law, see Ruth Bader Ginsburg, *Gender and the Constitution*, 44 U. CIN. L. REV. 1 (1975); Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 344 (1949).

31. For a sampling of the perspective of difference feminists, see Mary Becker, *Patriarchy and Inequality: Towards a Substantive Feminism*, 1999 U. CHI. LEGAL F. 21, 41–42 (1999); Christine Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279, 1295–300; 1304–08 (1987); CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1993); Robin West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 WIS. WOMEN'S L.J. 81, 87 (1987).

desire to protect women's different lives.

In addition, this solution provides a clear, albeit limited outlet for the harshest feelings between spouses that develop because of physical abuse and for extraordinary and outrageous emotional abuse. This should provide satisfaction to those who persist in attributing legal relevance, at least with regards to financial consequences, to bad behavior that causes or surrounds divorce. Thus, although fault in divorce and spousal torts are clearly separate inquiries, this Article links the two in an essential manner because it points to an alternate and better outlet for dealing with the harshest behavior between spouses. At the same time, spousal torts should be separated to the extent possible from the divorce process so as to preserve divorce for dealing with separating families as well as providing financial and emotional stability for parents and children. Torts cannot and should not contend with all, or even most, of the bitterness that is associated with divorce—such mutual recrimination is not judiciable, nor does punishing bad behavior in the courtroom serve the interests of families.[32] However, spousal torts do provide legal recourse where such recourse would be warranted as between non-spouses and that much is fundamental to providing a just and non-discriminatory legal system.

This Article's argument has two parts. Part II assesses contending with wrongdoing between spouses in the context of divorce law, and Part III assesses the alternative of spousal torts. Part II is structured in three subparts. First, in order to facilitate this assessment of fault in divorce, subpart A discusses the current role that fault plays in the divorce process. In particular, it examines unilateral versus consensual divorce, fault-regarding as opposed to fault-driven and fault-blind divorce, and the role of complicity in divorce.

Next, subpart B considers the appropriate goals of modern divorce law in light of contemporary norms in order to assess fault in divorce. The best justification for divorce regulations in light of the more individualistic and equal society in which we currently live is the protection of dependent children and their caregivers as opposed to more traditional rigid regulations focused on preventing divorce. That subpart also considers arguments that divorce law should attribute blame as a reflection of the acrimonious and often blameworthy nature of the marital breakdown. In actuality, attributing blame to a winner and a loser in a divorce process does not reflect the mutual blame, regret, and breakdown of trust that is a regular part of most divorces.

Subpart C then considers the way in which taking fault out of divorce

32. *See infra* Part III.A.3.

affects the plight of children and caregivers. This subpart considers the argument that taking fault out of divorce hurts women because it undermines the bargaining power needed to obtain vital financial support. This Article argues, however, that punishing wrongdoers for their role in causing the breakdown of the marriage disproportionately affects women in divorce because caregivers have more to lose from financial and custodial sanctions than market earners, who take their earning potential with them after divorce. This subpart next considers whether taking fault out of divorce would hurt children because it eases the divorce process and harms the sanctity of marriage; therefore, potentially causing an increase in divorce or a decline in marriage, which can be harmful to children. This Article concludes that the evidence does not reliably support these hypotheses.

Part III, which makes the case for tort law as an alternative outlet for contending with wrongdoing by spouses during marriage, is divided into three subsections. First, it provides an outline of the modern jurisprudence of spousal torts. It describes the contemporary legal recourse available for wrongdoing between spouses in the realm of torts. It then provides rationales as to why spousal torts are so rarely brought and are even more rarely successful. In particular, it focuses on the problems of overlap between fault in divorce and spousal torts as well as the need to define an exclusive outlet for marital wrongs. Finally, it reorients marital wrongs in the context of spousal torts, describing harms for which spouses could recover damages and those for which they could not.

Second, Part III makes the case for spousal torts by espousing three significant benefits of spousal torts as the exclusive arena for litigating marital wrongdoing. It explores the imperative for providing spousal torts in order to ensure recourse for those who suffer domestic harms amounting to extraordinary, abusive, or criminal behavior, just as torts provide such recourse for such harm to all other people. Any alternative is discriminatory against the interests of women, who are more vulnerable to domestic abuse. Moreover, transferring the punishment of wrongdoing between spouses to the torts context modernizes the litigation of marital wrongs in light of contemporary norms. A narrower and more heightened realm of judiciable wrongs conforms to modern perceptions of the appropriate realm of litigation between spouses, protects caregivers and children unless serious extraordinary wrongdoing is involved, and more fairly compensates victims of abuse. Finally, contending with marital wrongs in torts harnesses the gender neutral power of torts in pursuit of harms most often suffered by women.

The third subsection of Part III addresses four critiques of spousal

torts: (1) they are too intimate for objective and identification; (2) they will only increase acrimony between divorcing spouses; (3) they ignore complex co-dependent participation in abusive behavior by marital partners; and (4) they are too costly.

II. ASSESSING THE ROLE OF FAULT IN DIVORCE

This Article assesses the role of fault in divorce in three steps. First, it outlines the role of fault in contemporary divorce law. Next, it considers the appropriate purposes of divorce law in order to create a framework for assessing fault in divorce. Finally, it discusses the role of fault in divorce in light of the proper purposes developed—namely, the protection of caregivers and children.

A. The Role of Fault in Modern Divorce Law

In order to set the stage for assessing the role of fault in divorce, this subpart explores contemporary divorce law, focusing on the relevance of fault. It discusses the advent of unilateral divorce and the distinction between unilateral and consensual no-fault divorce, and points to distinct ways of integrating fault in divorce: fault-blind divorce, fault-regarding divorce and fault-driven divorce. Finally, this subpart analyzes the role of complicity in the movement from fault-driven to fault-regarding and fault-blind divorce.

1. No-Fault Divorce Versus Unilateral Divorce

The right to obtain a divorce no longer must be won based on proving "grounds"—blameworthy behavior of one's spouse.[33] In all fifty states, a marriage can be terminated without proving either spouse's guilt or innocence.[34] The no-fault divorce revolution surfaced in the United States when a 1966 California Governor's Commission issued a recommendation that the sole grounds for divorce in that state should be an "irretrievable breakdown" of the marriage or insanity.[35] In 1970 this

33. For a discussion of traditional fault divorce, see Lawrence M. Friedman, *A Dead Language: Divorce Law and Practice Before No-Fault*, 86 VA. L. REV. 1497 (2000); Herma Hill Kay, *From the Second Sex to the Joint Venture: An Overview of Women's Rights and Family Law in the United States During the Twentieth Century*, 88 CAL. L. REV. 2019 (2000).

34. *See, e.g.*, Peter Nash Swisher, Commentary, *The Ali Principles: A Farewell to Fault—But What Remedy for the Egregious Marital Misconduct of an Abusive Spouse*, 8 DUKE J. GENDER L. & POL'Y 213, 213–16 (2001); *see also* Linda Elrod & Robert Spector, *A Review of the Year in Family Law*, 33 FAM. L.Q. 865, 911 (2000).

35. Herma Hill Kay, *An Appraisal of California's No-Fault Divorce Law*, 75 CAL. L. REV. 291,

recommendation became law in California.[36] The concept of no-fault divorce then spread eastward, strengthened by its endorsement in the Uniform Marriage and Divorce Act (UMDA).[37] Laws that are referred to as "no-fault" divorce laws do not always maintain the original "irretrievable breakdown" language of the California's law. Rather the term "no-fault" refers to any grounds for divorce that do not require one party to find fault with the other in order to obtain a divorce, including divorce on the basis of separation for a designated amount of time.[38] A primary goal of no-fault reform was to eliminate the perjury, complicity, and adversity that were rampant in the fault system for obtaining divorce.[39] Moreover, the belief was that the reform would better serve to preserve those marriages that had not "broken down," while allowing troubled marriages to dissolve.[40] The original no-fault reformers envisioned that fact-finding would be necessary to determine whether the breakdown of the marriage had occurred, and that, absent such a finding, a divorce would not be granted.[41] If one party were to maintain that the marriage was not broken and provide evidence of its continued functionality, this would be evidence towards a finding that the marriage should not be ended by divorce.[42] Indeed, the drafting of original no-fault statutes demonstrates that the lack of spousal agreement to the breakdown of the marriage would be cause for temporarily or permanently delaying the divorce.[43]

Nonetheless, modern divorce law, with only a few exceptions,[44] has

300 (1987); Walter Wadlington, *Divorce Without Fault Without Perjury*, 52 VA. L. REV. 32 (1966); Charles W. Tenney, Jr., *Divorce Without Fault: The Next Step*, 46 NEB. L. REV. 24 (1967).

36. *See* Kay, *supra* note 35, at 291, 291 n.2.

37. UNIF. MARRIAGE & DIVORCE ACT, 9 U.L.A. 91 (1979).

38. No-fault laws variously focus on the irretrievable breakdown of the marriage, see, for example, GA. CODE ANN. § 19-5-3(13) (West 2010), incompatibility/insupportability, see, for example, TEX. FAM. CODE ANN. § 6.001 (West 2010), or the de facto separation of the parties, see, for example, VT. STAT. ANN. tit. 15, § 551 (West 2010) (separation for six months) and R.I. GEN. LAWS § 15-5-3(a) (West 2010) (separation for three years).

39. Kay, *supra* note 5, at 4. *See also* Wardle, *supra* note 2 at 92–94; Evans, *supra* note 4, at 473; Marsha Garrison, *Reviving Marriage: Should We? Could We?*, 10 J.L. & FAM. STUD. 279, 317 (2008); *infra* Part II.A.3.

40. Kay, *supra* note 5, at 5.

41. *See generally* Wadlington, *supra* note 36.

42. Kay, *supra* note 5, at 36.

43. *Id.* at 36–39.

44. New York, Mississippi, and Tennessee require mutual consent with regard to no-fault divorces. *See, e.g.*, N.Y. DOM. REL. LAW § 170 (McKinney 2010) (requiring both parties to sign a separation agreement, resolving all issues between them, including property distribution, custody and support payments); MISS. CODE ANN. § 93-5-2(1) (2009) (a divorce "may be granted on the ground of irreconcilable differences, but only upon the joint complaint of the husband and wife"); TENN. CODE ANN. § 36-4-103(b) (2010) ("[T]he parties [must] have made adequate and sufficient provision by written agreement for the custody and maintenance of any children of that marriage and for the equitable

gone even further in easing access to divorce. Modern divorce law is not only no-fault, it is also unilateral.[45] In addition to not having to prove grounds, either spouse can obtain a divorce without the other's consent. While only one state officially allows for unilateral divorce by statute,[46] the vast majority of other states allow unilateral divorce after predetermined waiting periods or by finding that the marriage is irretrievably broken if one party deems it so.[47] Courts are not apt to probe extensively into the facts of the parties' relationship to determine how broken a marriage is if one party expressly wants to terminate the marriage.[48] This was not an intended consequence of the original no-fault reform.[49] In fact, early critics of no-fault divorce forecasted this slip into unilateral divorce.[50] Yet, unilateral divorce is a fundamental part of the trend toward easier access to divorce and the modern societal distaste for keeping a party trapped in an unwanted marriage. It is part of the modern focus on the benefits of autonomy in family law—as opposed to the traditional emphasis on obligation, status, structure, and regulations.[51]

Many jurisdictions maintain both fault and no-fault grounds for divorce. As of November 2004, fourteen states and the District of Columbia had statutes allowing only for no-fault divorce, while thirty-three states provided a choice.[52] Given that divorce is available unilaterally without grounds, however, the question remains as to why married couples would use fault grounds for divorce (other than in the three states that require mutual consent).[53] There are a few reasons, but

settlement of any property rights between the parties.").

45. *See, e.g.*, Elayne Carol Berg, Note, *Irreconcilable Differences: California Courts Respond to No Fault Dissolutions*, 7 LOY. L.A. L. REV. 453 (1974); Niko Matouschek & Imran Rosul, *The Economics of the Marriage Contract: Theories and Evidence*, 51 J.L. & ECON. 59, 62 (2008); Garrison, *supra* note 39, at 317.

46. WASH. REV. CODE ANN. § 26.09.030 (2010).

47. *See, e.g.*, OHIO REV. CODE ANN. § 3105.01(J) (West 2011) (providing for divorce "[o]n the application of either party, when husband and wife have, without interruption for one year, lived separate and apart without cohabitation"); *see* Frank, Berman, & Mazur-Hart, *supra* note 3, at 66–67.

48. *See* Stephen L. Sass, *The Iowa No Fault Dissolution of Marriage Law in Action*, 18 S.D. L. REV. 629, 650 (1973); *In re* Marriage of Collins, 200 N.W.2d 886, 890 (Iowa 1972); J. Herbie Difonzo & Ruth Stern, *The Winding Road from Form to Function: A Brief History of Contemporary Marriage*, 21 J. AM. ACAD. MATRIM. L. 1, 21–22 (2008) (marriage is generally over if one spouse says it is).

49. Kay, *supra* note 5, at 4; REPORT OF THE CALIFORNIA GOVERNOR'S COMMISSION ON THE FAMILY (1966).

50. Sass, *supra* note 48, at 650; Frank, Berman, & Mazur-Hart, *supra* note 3, at 61–65.

51. *See infra* Part II.B.1.

52. Alaska, Arizona, California, Colorado, Florida, Iowa, Kentucky, Michigan, Minnesota, Montana, Nebraska, Oregon, Washington, Wisconsin provide only for no-fault divorce. Kay, *supra* note 5, at 5–6.

53. *See supra* note 44 and accompanying text.

admittedly none justify the use of grounds in most cases making no-fault divorces the statistical norm.[54] First, grounds can eliminate delays that require parties to live separate for a certain amount of time[55] under no-fault laws.[56] Second, where there is no settlement, a fault divorce may provide one party with an advantage in settling the financial incidents of divorce, although for states that consider fault with regard to property distribution, or alimony, fault grounds for obtaining the divorce are usually not a prerequisite for such consideration.[57] A determination of fault may also make it easier for the innocent spouse to obtain custody.[58] While marital wrongdoing is not usually as directly relevant to custody disputes as it once was, courts still may consider marital wrongdoing in discussions of moral character and fitness.[59] Finally, angry spouses

54. Nancy D. Polikoff, *Valuing All Families: An Intro to the 2008 Santa Clara Law Review Symposium*, 48 SANTA CLARA L. REV. 741, 743 (2008); Marsha Garrison, *The Decline of Formal Marriage: Inevitable or Reversible*, 41 FAM. L.Q. 491, 508 (2008); Elisabeth S. Scott, *Parental Autonomy and Children's Welfare*, 11 WM. & MARY BILL RTS. J. 1071, 1087 (2003).

55. These amounts of time are usually between six months and one year, although in some jurisdictions it can be a requirement of up to three years.

56. Kyle v. Kyle, 475 S.E.2d 344, 355 (W. Va. 1996); Konefal v. Konefal, 446 S.E.2d 153, 154 (Va. Ct. App. 1994); Rivette v. Rivette, 899 So.2d 873, 875 (La. Ct. App. 2005) (grounds for divorce are present when spouses have lived separate and apart continuously for at least 180 days prior to the filing of the divorce, but since there was evidence of reconciliation in the 180 day period divorce could not be granted on these grounds); Prather v. Prather, 459 N.E.2d 234, 235 (Ohio Ct. App. 1983) (grounds for divorce are established if spouses live separate and apart for the statutorily required period of one year without cohabitation, even if they had intercourse one time during that year); Scott v. Scott, 586 A.2d 1140, 1142 (Vt. 1990) (in order to obtain a divorce based on the grounds of living separate and apart the spouses must live separate and apart for the statutorily required six months, but this does not mean that the couple must live under separate roofs); Caccamise v. Caccamise, 747 A.2d 221, 229 (Md. Ct. Spec. App. 2000) (A decree of divorce may be based on voluntary separation if the parties voluntarily lived separate and apart without cohabitation for twelve months prior to filing for divorce, but because the wife left the husband and the separation was not mutually voluntary the divorce could not be granted on the grounds of living separate and apart.).

57. *See* Margaret Brinig & F.H. Buckley, *No-Fault Laws and At Fault People*, 18 INT'L REV. L. & ECON. 325, 326–27 (1998). *But see, e.g.*, Bacon v. Bacon, 351 S.E.2d 37 (Va. Ct. App. 1986) (Decree based on one year's separation reversed because trial court must consider wife's claim for divorce based on husband's desertion, since such grounds may be relevant in determining alimony.).

58. Patel v. Patel, 577 S.E.2d 587, 589 (Ga. 2003) (Upon a finding of fault in granting divorce, the party not at fault will be awarded custody unless evidence demonstrates that it is in the best interests of the child to be in the other parent's custody.); Brekeen v. Brekeen, 880 So.2d 280, 282 (Miss. 2004); Stonham v. Widiastuti, 79 P.3d 1188, 1193 (Wyo. 2003); Pietrzak v. Schroeder, 759 N.W.2d 734, 744 (S.D. 2009).

59. Bower v. Bower, 758 So.2d 405, 412 (Miss. 2000) (holding that adulterous relationship can be considered when determining the moral fitness of a parent to raise a child); Anderson v. Anderson, 386 So.2d 59, 60 (Fla. Dist. Ct. App. 1980) (adultery can affect custody determinations if the adulterous relationship has a negative effect on the child); Chastain v. Chastain, 672 S.E.2d 108 (S.C. Ct. App. 2009) (A parent's morality is considered when it has an effect on the welfare of the child; flagrant promiscuity is immoral conduct that inevitably affects the child, but in this case, the wife's affairs did not rise to the level of flagrant promiscuity.); Brinkley v. Brinkley, 336 S.E.2d 901, 902–03 (Va. Ct. App. 1985).

sometimes want the record to reflect their spouse's wrongdoing merely as a record of the wrongdoing.[60]

In sum, no-fault divorce has made way for an even more permissive system of unilateral divorce in most states. Unilateral divorce reflects modern societal focus on autonomy.[61] While fault is an option in unilateral divorce states, it is redundant in most instances. On the other hand, when divorce must be consensual fault plays a much larger role in the divorce process.

2. The Impact of Fault on the Incidents of Divorce

The goals of the California Governor's Commission were to eliminate grounds, and to "remove fault from other aspects of marital dissolution: from the award of spousal support, from the division of property, and from the child custody determination."[62] However, as the states have adopted no-fault grounds,[63] state legislatures have varied in the extent to which they are willing to modify their existing provisions governing the relationship between grounds, the financial aspects of divorce, and issues of custody of marital children.[64] Recently, fault has become much less prominent as a factor in determining alimony and property division in many states, but marital misconduct remains relevant in others.[65] Twenty-five states include marital fault as a factor in alimony decisions.[66] Thus, even after the no-fault revolution, where fault considerations influence financial matters, accusations of fault are not infrequently used as a means of gaining leverage over the other party in

60. *See, e.g.*, Robin Fretwell Wilson, *Beyond the Bounds of Decency: Why Fault Matters to (Some) Wronged Spouses*, 66 WASH. & LEE L. REV. 503, 506 (2009).

61. *See* Elisabeth Scott, *Social Norms and the Legal Regulation of Marriage*, 86 VA. L. REV. 1901, 1944 (2000); *infra* Part II.B.1.

62. *See* Kay, *supra* note 5, at 5 (citing REPORT OF THE CALIFORNIA GOVERNOR'S COMMISSION ON THE FAMILY 1–2 (1966)).

63. Linda Elrod & Robert Spector, *A Review of the Year in Family Law*, 30 FAM. L.Q. 765, 807 (1997); Ira Ellman, *The Place of Fault in Modern Divorce Law*, 28 ARIZ. ST. L.J. 773, 775 (1996).

64. *See* Kay, *supra* note 5, at 5–12; Ellman, *supra* note 63, at 775.

65. According to a survey by the American Law Institute, twenty states decide the financial consequences of dissolution without regard to marital misconduct; five disregard fault for property division and, as a practical matter, almost always do so for support; three almost never consider fault in financial matters although they could do so under their statutes; seven disregard fault for property division but consider it for spousal support awards; and fifteen states consider misconduct for both property division and alimony. *See* AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS ch. 1, topic 2 (2002); *see also* Linda D. Elrod & Robert G. Spector, *A Review of the Year in Family Law: Redefining Families, Reforming Custody Jurisdiction, and Refining Support Issues*, 34 FAM. L.Q. 607, 653 (listing twenty-three jurisdictions in which fault is not considered in alimony cases and thirty where it is relevant).

66. *See* Linda Rio, *Charts*, 38 FAM. L.Q. 809, 809 (2005).

terms of rights to marital property and spousal support. All states determine custody according to the best interests of the child (or in one state by approximating custody before divorce),[67] and do not use custody determinations to intentionally punish a spouse found to be at fault for ending the marriage.[68] Yet, the details of the fault of one parent can be used in setting a presumption in determining custody or can be used in determining moral fitness, one factor in determining custodial rights in the best interests of the child,[69] particularly if the nature of the fault can be shown to have caused harm to the child.[70]

Accordingly, despite the common perception that fault divorce is largely antiquated, in an important respect, fault is very much relevant. There are really two different aspects of fault in divorce: (1) whether fault should limit access to divorce; and (2) whether fault should affect the incidents to divorce, particularly the financial incidents.[71] In a comprehensive study, Brining and Buckley explain how the use of the term no-fault divorce to define only access to divorce is too simplistic, particularly when discussing how no-fault has affected rates of divorce, as fault affecting the incidents of divorce can also affect rates of divorce.[72] Based on this distinction between access to divorce and the effect fault can have on the incidents of divorce, Barbara Bennett Woodhouse designates three categories of state systems relating to fault: (1) "fault-blind;" (2) "fault-driven;" and (3) "fault-regarding."[73] While

67. One state approximates custody before divorce. *See* W. VA. CODE § 48-1-210 (2010).

68. Albright v. Albright, 437 So.2d 1003, 1005 (Miss. 1983) (holding that marital fault should not be used in custody determinations in order to punish the other spouse); Sumrall v. Sumrall, 970 So.2d 254, 257 (Miss. Ct. App. 2007) (The court found that the primary consideration when determining custody of a child is the best interest of the child, not marital fault.).

69. *See* Brekeen v. Brekeen, 880 So.2d 280, 282 (Miss. 2004) (Moral fitness of parents can be considered as one factor when determining the best interest of the child.); Stonham v. Widiastuti, 79 P.3d 1188, 1193 (Wyo. 2003) (Wyoming Stat. Ann. § 20-2-201 requires the court to consider nine specific factors when determining a child's best interest including the relative competence and fitness of each parent.).

70. *See* Lynn Wardle, *Parental Infidelity and the "No-Harm" Rule in Custody Litigation*, 52 CATH. U. L. REV. 81, 81–82 (2002). This is particularly relevant in the case of domestic abuse where many states will weigh domestic abuse of the mother as a factor, or even as a presumption. *See, e.g.*, NEV. REV. STAT. § 125.480 (2009); FLA. STAT. ANN § 61.13(b) (West 2010); LA. REV. STAT. ANN § 9:364 (2009); Naomi Cahn, *Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions*, 44 VAND. L. REV. 1041, 1055–58 (1991); Bonnie E. Rabin, *Violence Against Mothers Equals Violence Against Children: Understanding the Connections*, 58 ALB. L. REV. 1109 (1995). Needless to say, abuse of the child is directly relevant and is not infrequently a per se factor. *See, e.g.*, Bruner v. Hager, 534 N.W.2d 825, 826 (N.D. 1995); Krank v. Krank, 541 N.W.2d 714, 716 (N.D. 1996); *In re* T.M.B., 491 N.W.2d 58, 61 (Neb. 1992); Knock v. Knock, 621 A.2d 267, 273 (Conn. 1993).

71. *See* Krause, *supra* note 4, at 1362–63.

72. Brinig & Buckley, *supra* note 57.

73. Woodhouse, *supra* note 9, at 2532. *See also* Ellman, *supra* note 63, at 778–84.

there are no longer any fault-driven states, all but the approximately twenty fault blind states are fault regarding when it comes to property distribution, alimony, or both.[74] The vast majority of states that are fault-regarding simply treat fault only as one factor in determining financial incidents of divorce and not as a bar or an eligibility requirement.[75] With regard to property distribution, most states are either fault-blind or have adopted limited fault-regarding approaches, in which only dissipation of income is considered, but a sizable minority, approximately one quarter, are fault-regarding.[76] Considerations of fault are more common with regard to alimony, perhaps because of the historical context of the importance of fault in setting alimony,[77] with about half the states allowing considerations of marital fault, including economic fault.[78]

States also vary as to what they consider marital misconduct.[79] For instance, financial misconduct is more often considered than other misconduct.[80] States that consider misconduct other than financial wrongdoing consider a variety of conduct to constitute fault: adultery—which is perhaps the most common and traditional[81]—cruelty, insanity, and desertion, among others.[82] Considerations of fault have been difficult to remove entirely because people have strong emotional reactions to feeling wronged and want that reflected in the divorce process.[83]

74. *See* Ellman, *supra* note 63, at 778–84 (explaining that there are three possible ways to consider fault in setting the financial incidents of divorce: it can be an eligibility requirement (must prove fault in order to receive alimony), it may be a bar (cannot receive alimony if marital wrongdoing is demonstrated), or it may be a factor affecting in some circumstances the amount of alimony or property received). North Carolina used to treat misconduct as a bar and as an eligibility requirement, but no longer does.

75. *Id.*; Katherine Shaw Spaht, *The Last One Hundred Years: The Incredible Retreat of Law from the Regulation of Marriage*, 63 LA. L. REV. 243, 244–45 (2003); Ellman, *supra* note 63, at 786 n.29.

76. Woodhouse, *supra* note 9, at 2534.

77. For a discussion of the historic relationship between alimony and fault, see *infra* note 299 and accompanying text.

78. *See* Rio, *supra* note 66, at 809 chart 1.

79. *See* further discussion *infra* Part III.A.3; *see also* Ellman, *supra* note 63, at 777.

80. At least forty-one states authorize taking economic misconduct into account in dividing property at divorce. *See* Rio, *supra* note 66, at 813 chart 5; *see also* Ellman, *supra* note 63, at 777.

81. *See infra* notes 241–251 and accompanying text.

82. Impotence and presumption of death are other fault grounds sometimes included in state laws. *See generally* LAWRENCE FRIEDMAN, A HISTORY OF AMERICAN LAW 204–08 (3d ed. 1985); Adriaen M. Morse, Jr., *Fault: A Viable Means of Re-Injecting Responsibility in Marital Relations*, 30 U. RICH. L. REV 605, 612 (1996) (listing fault grounds and giving a historical overview of their uses).

83. *See, e.g.*, Krause, *supra* note 4, at 1363.

3. Complicity and Fraud in Divorce

A substantial motivation for proponents of no-fault divorce was to avoid de-legitimization of the system of divorce as couples were actively circumventing the fault system.[84] If both parties wanted a divorce, too often they contrived to ensure that the relationship warranted the divorce and collusion was not uncommon.[85] Moreover, even without agreement, lawyers reported pressure to doctor evidence so that a divorce could be obtained.[86] The abandonment of fault-driven divorce has undoubtedly opened the door to people stuck in troubled relationships to leave the marriage without having to stoop to disreputable practices.[87] It is safe to assume that fraud has been reduced by the no-fault system and by allowing unilateral divorce.[88] This seems a significant benefit to no-fault divorce. This benefit applies to divorce upon mutual consent and to unilateral divorce where one party was so desperate to leave the marriage that he or she would engage in deception. It is conventional wisdom that a return to a fault system of divorce would encourage perjury once again.[89] The reality is that upon a return to a fault-driven system of divorce, couples would likely still divorce at the same rates, but their fraudulent behavior would be to the detriment of the legal system and to the financial detriment of the spouse who most wants to exit the marriage, and who therefore may need to sacrifice money or custody in order to secure complicity.[90] As discussed below, penalizing this spouse, regardless of his or her identity or circumstances, is not always in the interests of the legal process or society.[91]

84. Morse, Jr., *supra* note 82, at 612; Herbi DiFonzo, *No-Fault Marital Dissolution: The Bitter Triumph of Naked Divorce*, 31 SAN DIEGO L. REV. 519 (1994); Wardle, *supra* note 2, at 137.

85. *See* Wardle, *supra* note 2, at 93.

86. *Id.* at 93.

87. *Id.* at 104; Marsha Garrison, *Nonmarital Cohabitation: Social Revolution and Legal Regulations*, 42 FAM. L. Q. 309, 317 (2008).

88. *See* Wardle, *supra* note 2, at 104; *see also* Note, *Collusive and Consensual Divorce and the New York Anomaly*, 36 COLUM. L. REV. 1121, 1127–28 (1936) (reporting widespread belief that legislators, judges, other court personnel, lawyers, parties, and others colluded to concoct evidence in divorce cases to satisfy the requirements of New York's fault-based law).

89. LINDA R. HIRSHMAN & JANE E. LARSON, HARD BARGAINS: THE POLITICS OF SEX 285 (1998).

90. As discussed below, although many have assumed that the spouse who wants to exit the marriage is usually the man, women more and more frequently are the parties who desire to leave the marriage. Moreover, they are more often abused and thus need to leave the marriage more quickly. Women also have more to lose from the divorce process as they are usually more financially dependent on their spouses. *See infra* Part II.C.2; *see also* Garrison, *supra* note 87, at 317–18.

91. *See infra* Part II.C.2.

B. The Purpose of Contemporary Divorce Regulations

This subpart explores the proper role of regulation in contemporary divorce. First, this subpart considers the changing social norms that have transformed the very nature of marriage and the corresponding social attitudes toward divorce, advocating divorce regulations that focus on dependents and their caregivers as opposed to status and obligation. Next, this subsection examines the challenge made by some scholars, jurists, and legislators that ignoring wrongdoing leaves something fundamental out of the divorce process.

1. Changing Nature of Marriage and Divorce

A significant impetus for the move away from fault driven divorce is changing societal perceptions of the nature and the purpose of marriage as well as the changing role of women in society.[92] By the 1960s and 1970s, marriage had begun to transform from a social and economic necessity for integrating women into society and ensuring their livelihood to a source of personal satisfaction.[93] As women entered the workforce, obtaining expanded potential for economic independence, and as their equal status to men solidified, marriage was no longer critical as a source of social stability and financial sustenance. Marriage has instead become a tool of fulfillment.[94] While no-fault divorce was not a product of the women's movement, certainly many feminists supported it based on the notion of equality and increased status of women it reflects.[95] Contemporary individuals search for a marital partner with whom they can share a "deep emotional and spiritual connection" and with whom they "can communicate about [their] deepest feelings."[96] These high expectations inevitably lead to disappointment and dissatisfaction. When expectations are not met, individuals feel a conviction that they should not be forced to remain in a relationship with someone with whom they do not have a bond of love,

92. *See* Wardle, *supra* note 2, at 95.

93. STEVEN MINTZ & SUSAN KELLOGG, DOMESTIC REVOLUTIONS: A SOCIAL HISTORY OF AMERICAN FAMILY LIFE 203–04 (1988); PAUL R. AMATO & ALAN BOOTH, A GENERATION AT RISK: GROWING UP IN AN ERA OF UPHEAVAL 12 (1997).

94. *See, e.g.*, Kay, *supra* note 33; John Demos, *Images of the American Family, Then and Now*, *in* CHANGING IMAGES OF THE FAMILY 43–60 (1979).

95. Kay, *supra* note 5, at 2–3.

96. BARBARA DAFOE WITEHEAD & DAVID POENOE, THE NAT'L MARRIAGE PROJECT, THE STATE OF OUR UNIONS: WHO WANTS TO MARRY A SOUL MATE?: NEW SURVEY FINDINGS ON YOUNG ADULTS' ATTITUDES ABOUT LOVE AND MARRIAGE 2 (2001).

regardless of fault.[97] Modern marriage's focus on personal fulfillment understandably sets the tone for demanding release when such fulfillment is not met.[98]

The enhanced commitment to personal choice and private ordering in the law in the past few decades further propels the sense that marriage should be freely chosen and not used as a mechanism for entrapment.[99] Society has become more of an observer of intact marriages and is perceived as having less responsibility in ensuring the longevity and preservation of marriage when even one member of a couple no longer wishes to remain in the relationship.[100] In light of the modern focus of marriage and emphasis on individual rights,[101] both the prerequisites to entering marriage and the requisites to divorce have waned dramatically over the past several decades.[102] State interests in keeping unloving couples in a marriage have weakened substantially and fault-driven divorce litigation centered on the possibility of denying divorce altogether has lost its cogency. The question that remains is which rationale for state regulations of marriage and divorce remains compelling.

While marriage's transformation to an instrument of personal fulfillment has signaled a more complex vision of marriage than as the sole "instrumentality charged with civilization's most burdensome, time-consuming but indispensable task, the acculturation of children,"[103] the latter task is still very much at the heart of marriage. Approximately 72% of marriages result in dependent children.[104] Marriage is still

97. *See* Scott, *supra* note 61, at 1944.

98. The effect of law on culture and society, and of culture on law, is a matter of scholarly debate. For its purposes of this Article assumes a complex transformative mutually coexistent relationship. *See* Spaht, *supra* note 75, at 245; Katherine Shaw Spaht, *For the Sake of the Children: Recapturing the Meaning of Marriage*, 73 NOTRE DAME L. REV. 1547, 1559–63 (1998).

99. Michael Grossberg, *Balancing Acts: Crisis, Change, and Continuity in American Family Law*, 28 IND. L. REV. 273, 295 (1995); Carl Schneider, *Moral Discourse and the Transformation of the American Family*, 83 MICH. L. REV. 1803, 1809–10 (1985); Carolyn J. Frantz & Hanoch Dagan, *Properties of Marriage*, 104 COLUM. L. REV. 75, 86 (2004) (arguing that "the availability of free exit through no-fault divorce" is "a bedrock liberal value" that "stands for the right to withdraw or refuse to engage; it is the ability to dissociate, to cut oneself out of a relationship with other persons"); Spaht, *supra* note 75, at 301–02.

100. Schneider, *supra* note 99, at 1809.

101. Scott, *supra* note 61, at 1944.

102. *See generally* Spaht, *supra* note 75, at 288–305.

103. *See id.* at 244–45; *see also* Harry D. Krause, *Marriage for the New Millennium: Heterosexual, Same Sex— or Not at All?*, 34 FAM. L.Q. 271, 299 (2000).

104. Census 2000, analyzed by the Social Science Data Analysis Network, reports that approximately 28% of married couples did not have children. Census Scope, Household and Family Structure 1990–2000, http://www.censusscope.org/us/chart_house.html (last visited Aug. 30, 2010) (reviewing Census 2000). The U.S. Bureau of Statistics issued a Report in November 2004 entitled "American Families and Living Arrangements" indicating that in 2003, 66% of married men from the

widely considered the ideal framework in which to provide financial and emotional stability to children.[105] When children are raised by a married couple, one spouse usually compromises his potential for market earnings to some extent in order to care for those children.[106] Those children and that spouse become dependent to some extent on the market earner for financial support both during that marriage and, often for some period of time, after a marriage ends in divorce.[107] Despite the increasing presence of both spouses in the workplace,[108] mothers are still primarily responsible for child care and, as a result, sacrifice market earning potential and must contend with dependency on their spouses more than fathers.[109] Recognizing the value in raising children and the valuable service that caregivers provide[110] necessitates protecting caregivers and the children for whom they care.[111] And, statistics show,

ages of twenty five to fifty-four had children under the age of eighteen and 63% of married women from the ages of twenty-five to fifty-four had children under the age of eighteen. *See* U.S. Census Bureau, Families and Living Arrangements, http://www.census.gov/population/www/socdemo/hh-fam.html (last visited Aug. 30, 2010). Clearly a larger percentage of overall married persons have children as these percentages do not take into account married couples with children over eighteen. *See* WILLIAMS, *supra* note 18, at 1–9.

105. *See, e.g.*, Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy—Balancing the Individual and Social Interests*, 81 MICH. L. REV. 463, 472 (1983) ("The objectives of a democratic society based on established patterns of marriage and kinship should not be terribly mysterious . . . . For instance, a stable environment is crucial to the developmental needs of children . . . ."); *see also infra* Part II.C.3.

106. *See supra* notes 14–19 and accompanying text.

107. *See* Laufer-Ukeles, *supra* note 15, at 5–7; MARTHA ALBERTSON FINEMAN, NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES 228 (1995); WILLIAMS, *supra* note 18, at 64–81.

108. Mothers are undoubtedly increasingly in the work force. *See* SPAIN & BIANCHI, *supra* note 17, at 152 ("In 1970, 44% of married women with young children worked during the year and only 10% worked full-time, year round. By 1990, 68% of married women with young children worked outside the home and 28% worked full-time, year round. By 1990, most married mothers of young children had some involvement in market work, although they typically were employed part-time."). But the fact is that mothers are not in the work force in the same manner as men: they usually work a modified schedule—part-time, flex-time, in the home, or they choose professions or jobs that, although full-time, allow them to be in the home more than a traditional "male" job. Furthermore, it should be noted that women who work outside the home have fewer children. *See* WILLIAMS, *supra* note 18, at 13–39, 124 ("Prior chapters have contested the accepted wisdom that it used to be 'a man's world' but that 'men and women are equal now.' A more accurate description is that our system has shifted from one where (middle class) men were breadwinners and (middle-class) women were housewives to one where men are ideal workers and their wives (or ex-wives) are workers marginalized by caregiving."); *supra* notes 13–19 and accompanying text.

109. *See supra* notes 13–19 and accompanying text.

110. *See supra* note 23.

111. *See* NANCY COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION 157 (2000) (While historically status and public recognition played the preeminent role in marriage, "[i]n the twentieth century the public framework of marriage would be preeminently economic, preserving the husband's role as primary provider and the wife as his dependent—despite the growing presence of women in the labor force.").

dependents suffer from divorce.[112] Thus, the primary regulatory role for the state in marriage and divorce has shifted—and should continue to shift—from regulating entrance into marriage and preserving the continuity of the marital status toward protecting caregiving, dependency, and the welfare of children.[113] Family law should create a supportive environment for rearing children, and upon the dissolution of a marriage, should protect the children and their caregivers who have the most to lose from the divorce.

2. The Persistent Belief in the Relevance of Fault

Even in a divorce that reflects contemporary norms, however, a persistent belief that marital wrongs deserve to be punished remains. As Harry Krause asked:

> are not the risks of marriage increased and is marriage not diminished as a legal status, and as an economic good, if "good" or "bad" behavior does not matter? Is it not intuitive—at least to the general public—that "fault" and "merit" *are* relevant to achieving "fairness"? Fault and merit are relevant in all other areas of the law, so why are they not relevant to the fair distribution of the financial burdens (and benefits) of divorce?[114]

Individuals may suffer significant harms in the emotionally charged breakdown of marital relations, which makes it difficult to accept the irrelevance of such harms in divorce.[115] Arguably, fault, the part of divorce that allowed the parties to air grievances about the behavior that caused the breakdown of the marriage, provided an appropriate outlet. It has been posited that the narrative and experience of wrongs suffered is so central to those undergoing divorce that ignoring them fails to capture the very nature of the divorce process.[116] Simply put, fault matters to people, so why should it not matter in the law?

The question remains as to whether the judicial process should reflect the reality of the emotional nature of divorce.[117] Reflecting this reality in the law needs to be justified, not assumed. Given the hostility and moral blame as between many divorcing couples, one should inquire

112. *See supra* note 8 and accompanying text.

113. *See* Laufer-Ukeles, *supra* note 15, at 36–65; *see also* Krause, *supra* note 4, at 1361–62.

114. Krause, *supra* note 4, at 1363.

115. *See* Woodhouse, *supra* note 9, at 2525, 2531; *see also* Wardle, *supra* note 2, at 108 ("Apparently, feelings of anger and blame are still a very real dimension of the breakup of modern marriage.").

116. *See, e.g.*, Wilson, *supra* note 60, at 504–06; Wardle, *supra* note 2, at 101.

117. *Cf.* Laura A. Rosenbury, *Rights and Realities*, 94 VA. L. REV. IN BRIEF 39 (2008) (commenting on the debatable proposition of basing family law on the reality of family life where family life is affected by the law and can be amorphous).

into how the law is affecting the divorce process and whether it is creating a process that works. Society supports the rights of people in failed marriages to exit those marriages without being forced to remain married. Yet, marriage is still an emotional, love-based commitment entered into in the hope, if not the expectation that it will last for eternity.[118] In that way, marital commitments are unique.[119] Allowing relatively quick, unilateral, and guiltless separation without any consequences for wrongdoing can actually increase frustration, hostility, and tension during the divorce process and thereafter.[120] Accordingly, it has been argued that perhaps fault divorce would create a more lasting and stable resolution of spousal disputes allowing the parties to move on and feel vindicated.[121]

Despite its logic, this argument should be rejected. Giving an expressive outlet to the anger involved in the breakdown of marriages within the judicial process of divorce is inappropriate for dealing with the typical reciprocal misunderstandings, blame, alienation, anger, and guilt that occur between spouses during most marriages that result in divorce.[122] Except in instances of extreme and abusive behavior,[123] where the tort system should provide monetary recourse,[124] such mutual blame and general breakdown cannot be fairly reflected through fault-driven or fault-regarding divorce where a guilty and innocent party must be identified resulting in one party being punished and the other vindicated.[125] Moreover, the mutual culpability, blame, and resentment that often results in divorce is inappropriate for objective identification as the "cause of divorce," which can be elusive.[126] Such mutual fault and recrimination was not part of the original concept of fault divorce, when divorce was intended to be awarded much less frequently than it

118. *See* Wardle, *supra* note 2, at 122.

119. Lynne Marie Kohn & Karen M. Groen, *Cohabitation and the Future of Marriage*, 17 REGENT U. L. REV. 261, 272 (2005) (citing LINDA J. WAITE & MAGGIE GALLAGHER, THE CASE FOR MARRIAGE 36–46 (2000)).

120. *See* Wardle, *supra* note 2, at 99–103, 199–220, 129–30 ("Modern no-fault divorce laws fail to balance marriage stability goals with divorce facilitation policy, portray a defective model of marriage and inadequately provide for the public consequences of private choices.").

121. *See* Krause, *supra* note 4, at 1362–64; Wilson, *supra* note 60, at 506–07; Woodhouse, *supra* note 9, at 2546–47.

122. Huntington, *supra* note 4, at 1303 (commending the end of fault divorce because fault divorce failed to contend with the complex realities of human emotion which involve love and hate but also guilt and reparation).

123. *See infra* Part III.A.3.

124. *See infra* Part III.B.1.

125. *See* Huntington, *supra* note 4, at 1296 (arguing that the divorce process should be focus on "repair" and in that process should contend with mutual blame, guilt, anger, and love).

126. *See* ALI PRINCIPLES, *supra* note 3, at 50–51, 66–67 (discussing how most minor marital wrongs can not be easily pegged as the "cause" of divorce); Ellman, *supra* note 63, at 788–89.

currently is and mutuality or recrimination was a defense to divorce.[127]

While family law cannot be the same as family counseling, it should lean on processes like mediation and collaborative family law in order to facilitate working relationships among family members beyond divorce.[128] Families are still families after divorce when children are involved. Because children are central to why we still need regulatory, protective family law, as opposed to private contracts and psychological counselors,[129] the divorce process should not focus on assigning blame in a one-time fashion, whether through fault-driven or fault-regarding divorce, but should be part of a process of healing that can recreate a family support system for children in two households.

C. Evaluating the Effect of No-Fault Divorce on Dependent Children and Their Caregivers

Previous parts of this Article have defended the proposition that the focus of divorce law should be protecting and supporting dependents, and that despite the acrimony inherent in marital breakdown, fault in divorce cannot properly reflect such feelings. This Part considers in greater depth how taking fault out of divorce will affect dependents and their caregivers. First, it provides a brief introduction and historical perspective on the purpose and nature of no-fault divorce. Second, it analyzes arguments that eliminating the role of fault from divorce hurts women and children by eliminating needed leverage in bargaining for financial incidents of divorce. In countering that argument, this Part argues that since both men and women are equally likely to want to exit marriage, but that the financial punishments usually linked to fault divorce have a greater impact on women, fault divorce has a disproportionate, harmful effect on caregivers and dependents.

Finally, this Part considers arguments against the abandonment of fault-driven divorce or divorce by consent because no-fault divorce has caused an increase in divorce rates and has punctured the stability of marriage. Those arguments continue by arguing that because divorce hurts children, no-fault unilateral divorce goes against the interests of

127. A common defense to proving fault grounds for divorce was recrimination—if the accusing party was also guilty of some wrongdoing, the divorce would not be allowed. *See, e.g.*, J. Herbie Difonzo, *Alternatives to Marital Fault: Legislative and Judicial Experiments in Cultural Change*, 34 IDAHO L. REV. 1, 53 (1997); *see generally*, Spaht, *supra* note 75.

128. *See* Jana B. Singer, *Dispute Resolution and the Post-Divorce Family: Implications of a Paradigm Shift*, 47 FAM. CT. REV. 363 (2009); Pauline H. Tesler, *Collaborative Family Law*, 4 PEPP. DISP. RESOL. L.J. 317, 322–23 (2004); Nancy Ver Steegh, *Family Court Reform and ADR: Shifting Values and Expectations Transform the Divorce Process*, 42 FAM. L.Q. 659 (2008).

129. *See supra* Part II.B.1.

children. This Part critiques these arguments on two levels. First, while it is clear that children benefit from a stable two-parent home, evidence does not support the proposition that keeping parents in an unwanted marriages will always be in the best interests of the children of the marriage. Second, the correlation between no-fault divorce and the divorce rate is too complex to be reliable, and marriage is still a thriving institution.

1. The Purpose of No-Fault Divorce

If marriage regulations are to focus on dependents and their caregivers as opposed to disputes between spouses or attempts to entrench spouses within marriages, it seems logical that divorce laws should aim to smooth potentially harsh effects on children and ensure that parents are able to work together after divorce. As Herma Hill Kay noted, no-fault divorce was devised as a method of decreasing hostility between divorcing couples and ensuring that resolution of disputes received the proper support in family courts with specialized judges.[130] The need to prove grounds and to counter harsh defenses created financial and emotional turmoil.[131] This acrimony could not have served children's interest in the divorce process.[132] Although the California Commission's ideal of eliminating fault-driven as well as fault-regarding divorce did not become reality, the dissolution of marriage has been veering toward a more collaborative system for divorce.[133] No-fault divorce does eliminate the necessity for a focus on blame in obtaining a divorce: even if the system has been less supportive than originally envisioned, blame is still part of the process in many instances.

A divorce process focused on addressing the needs of the parties and their children, as well as settling financial and custodial issues post-divorce in a manner that focuses on the interests of children and caregivers, would only seem to be frustrated by contending with blame and fault, whether in a fault-driven or fault-regarding system.[134] Accordingly, the "forward-looking"[135] American Law Institute's

130. *See* Kay, *supra* note 5, at 4–5; *see also* Wardle, *supra* note 2, at 92.

131. Wardle, *supra* note 2, at 92.

132. *Id.*

133. *See* Huntington, *supra* note 4, at 1287.

134. *See, e.g.*, Chapman v. Chapman, 498 S.W.2d 134 (Ky. 1973) (stating that the purpose of no-fault divorce is to help families get on with their lives without getting bogged down in blame and the corresponding harm that results to children).

135. Unable to make a model law out of such disparate state systems, the ALI sets out to make proactive recommendations while capturing the best of what has already taken hold in state systems.

Principles of Family Dissolution (ALI Principles) make the case that divorce should focus on post-divorce living standards and ensuring adequate financial resources and should not relate to blame at all.[136] This is particularly so in a divorce process that reflects modern sentiment that it is not worthwhile to keep spouses married, when even one of the spouses desires to leave the marriage. Both fault-driven and fault-regarding divorce does not seem to serve the goals of a divorce process intended to deal with dependents and dependency.[137]

2. The Effect of No-Fault Divorce on Women's Bargaining Power

Feminists have been critical of no-fault divorce for its effects on dependents and their caregivers.[138] In particular, Lenore Weitzman, in her influential sociological study, argued that no-fault divorce had harmed women by tipping the bargaining power to men.[139] While the degree of disparity she represented is contested, it is undisputed that women are worse off after divorce than men.[140] Because of women's greater level of caregiving activities during marriage[141] and because of men's greater market work participation resulting in higher earning power, women suffer financially more than men at the time of divorce and need more financial adjustments through property distribution and alimony.[142] Such caregiving activities may cause financial instability post-divorce whether undertaken by men or women.[143] When caregivers suffer financially, the well-being of the children for whom

See ALI PRINCIPLES, *supra* note 3, § 2.02; *see also* James Herbie Difonzo, *Customized Marriage*, 75 IND. L.J. 875, 923 (2000).

136. *See* ALI PRINCIPLES, *supra* note 3, at 44–53.

137. This does not mean that considerations of abusive behavior—particularly when aimed at children—should not be relevant in determining who should have primary physical custody. This is crucial for the well-being of children and should be included in a best interests analysis. *See supra* notes 58–59, 67–70 and accompanying text. Primary physical custody, however, should be presumed to go to the primary caretaker absent such clear showings of abuse. *See* Laufer-Ukeles, *supra* note 15, at 47. Yet, consideration of abusive behavior during a custody determination is different than awarding custody to the "innocent" party as opposed to the guilty party against whom a divorce is issued in the manner of traditional fault divorce law. *See, e.g.*, Kay, *supra* note 33; Danaya C. Wright, "*Well Behaved Women Don't Make History": Rethinking English Family, Law, and History*, 19 WIS. WOMEN'S L.J. 211, 313 (2004); Jane C. Murphy, *Rules, Responsibility and Commitment to Children: The New Language of Morality in Family Law*, 60 U. PITT. L. REV. 1111 (1999).

138. *See supra* notes 8–9 and accompanying text.

139. *See supra* note 8 and accompanying text.

140. *See supra* note 8 and accompanying text.

141. *See supra* notes 14–18 and accompanying text.

142. *See supra* notes 14–18 and accompanying text.

143. *See supra* note 19 and accompanying text.

they care suffers as well.[144] Based on her study, Weitzman claims that no-fault divorce contributed to the relative poverty of divorced women because not needing to prove grounds for divorce or obtain a consensual divorce gave women less control in determining the financial incidents of divorce.[145] Weitzman argues that grounds for divorce helped women by giving them extra bargaining power at the time of divorce to extract from their spouses much needed financial support.[146]

In other words, the fear is that no-fault divorce allows a man to take advantage of his wife's caretaking services during marriage and then walk away from a virtuous wife over her objections leaving his wife to suffer for her choices during marriage.[147] Although equitable property division rules that consider homemaking services often lead to equal division of property at divorce, this does not contend with the difference in future earning capacity.[148] Alimony is unpredictable and rarely awarded.[149] This is particularly problematic when there is little property to divide, which is usually the case.[150] Moreover, given that the vast majority of divorces are settled by agreement, the bargaining power realities are often much more prescient than judge-made law[151]—although such laws when more determinate have a clear impact on the settlement process.[152]

It should be noted that empirical data confirming such claims is inconclusive.[153] There is some anecdotal evidence from states like New York that fault-driven or consensual divorce can help women bargaining for better financial settlements.[154] Others, including the American Law Institute, have argued that it is not no-fault or unilateral divorce that is

144. *See supra* note 15 and accompanying text.

145. WEITZMAN, *supra* note 8, at 25–27, 323–29.

146. *Id.* at 25–27, 323–29. *See also* Margaret F. Brinig & Steven M. Crafton, *Marriage and Opportunism*, 23 J. LEG. STUD. 869 (1994); ALLEN M. PARKMAN, NO-FAULT DIVORCE: WHAT WENT WRONG 79–80 (1992).

147. *See* MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 105 (1987) (referring to no-fault divorce as "no-responsibility" divorce).

148. *See* Laufer-Ukeles, *supra* note 15, at 60–65 (discussing need for caretaker alimony to deal with this discrepancy).

149. *See* CARL E. SCHNEIDER & MARGARET F. BRINIG, AN INVITATION TO FAMILY LAW 329 (3d ed. 2006); Katherine C. Daniels et al., *Alternative Formulas for Distributing Parental Incomes at Divorce*, 27 J. FAM. & ECON. ISSUES 4, 6 (2006) (collecting studies and noting that spousal support is only awarded in ten to fifteen percent of cases).

150. *See* Brinig & Crafton, *supra* note 146, at 877–78; WEITZMAN, *supra* note 8, at 1186–88.

151. Robert Mnookin & Lewis Kornhauser, *Bargaining the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 951 (1979).

152. *Id.* at 954–57.

153. *See* Rhode & Minow, *supra* note 9, at 195; Katerhine T. Bartlett, *Saving the Family from the Reformers*, 31 U.C. DAVIS L. REV. 809, 835 (1998).

154. Garrison, *supra* note 8, at 90–100.

the source of the problem, but the lack of legislation intended to preserve the financial stability of women after divorce.[155] More direct legislation providing for caregiver support and the primary caregiver presumption would be more directly effective in curing imbalances in determining divorce settlements.[156] If the focus of divorce legislation is on dependents and their caregivers, ensuring sufficient financial support to those caregivers would arguably be the most effective measure to take.

Moreover, the feminist argument that rejects no-fault divorce because it deprives women of bargaining power with regard to the financial incidents of divorce fails to recognize the modern reality that women, and by extension primary caregivers, are increasingly the parties who are at fault or who initiate the divorce.[157] No longer tied to marital status for social legitimacy, unhappy women are leaving marriages nearly as often as men. Weitzman acknowledges that caregivers only receive alimony under fault divorce when they are innocent, but assumes that they usually are.[158] Yet, women are at fault or instigate divorce proceedings in modern times at an increasing rate. Recent studies suggest that women are equally likely to commit adultery as men are.[159] Accordingly, given their increasing lack of innocence and desire to leave marriages, women suffer from the same need to bargain as men.

Hence, the bargaining power argument, while it may help women in individual instances, increasingly weakens women's strategic advantage in bargaining for needed financial support.[160] As discussed above, fault-driven divorce is also fault-regarding; traditionally, grounds determine not only the granting of a divorce but whichever party was able to prove

155. *See* Ira Mark Ellman, *The Misguided Movement to Revive Fault Divorce, and Why Reformers Should Look Instead to the American Law Institute*, 11 INT'L J.L., POL'Y & FAM. 216, 229–30 (1997); *see also* Marsha Garrison, *Good Intentions Gone Awry: The Impact of New York's Equitable Distribution Law on Divorce Outcomes*, 57 BROOK. L. REV. 621, 636 (1991) (suggesting that her research on the effects of divorce in New York demonstrates not a lack of women's bargaining power at divorce, but a lack of rules that provide sufficient spousal support).

156. *See* Laufer-Ukeles, *supra* note 15, at 46–47.

157. *See* Sanford L. Braver, Marnie Whitley, & Christine Ng, *Who Divorced Whom? Methodological and Theoretical Issues*, 20 J. DIVORCE & REMARRIAGE 1 (1993); Margaret F. Brinig & Douglas W. Allen, *"These Boots Are Made for Walking": Why Most Divorce Filers Are Women*, 2 AM. L. & ECON. REV. 126 (2000).

158. *See* WEITZMAN, *supra* note 8, at 13; *see also* Singer, *supra* note 6, at 1110.

159. Benedict Carey & Tara Parker-Pope, *Marriage Stands Up for Itself*, N.Y. TIMES, June 28, 2009, at ST1, *available at* http://www.nytimes.com/2009/06/28/fashion/28marriage.html.

160. *See* Marygold S. Melli, *Constructing a Social Problem: The Post-Divorce Plight of Women and Children*, 1986 AM. B. FOUND. RES. J. 759, 770–71 (1986) (Weitzman's bargaining power argument assumes that most people who want to exit marriages are men, which is not always the case and thus fault divorce does not hurt all women.).

grounds also enjoyed a bundle of financial and custodial rewards.[161] The extent of a spouse's guilt is still a factor in many jurisdictions when fault is relevant in setting the alimony, determining property distribution, or determining custody.[162] Primary caregivers, who are usually women, have much more to lose in such bargains, and thus, the lack of power hurts them more than it does men. Primary caregivers have become attached to those children and are wholly or partially financially dependent on their husbands.[163] Therefore, the primary caregiver stands to lose disproportionately from the condemnation of "improper" behavior through reduced financial support because she is more in need of such support.[164] Moreover, primary caregivers are more attached to the children for whom they care and more vulnerable to the severing of ties with the marital children if fault affects custody determinations.[165] After divorce, primary earners retain their jobs

161. *See* HOMER H. CLARK, JR., LAW OF DOMESTIC RELATIONS 585 (1968) ("The best illustration of this is also the commonest case, where the divorce is granted for the wife's adultery. Some courts have been unduly rigid in refusing to give the wife custody where it appeared quite clearly that the child would be better of in her care."); HERBERT JACOB, SILENT REVOLUTION: THE TRANSFORMATION OF DIVORCE LAW IN THE UNITED STATES 33–35 (1988); Singer, *supra* note 7, at 1461 (1992); Lynn A. Baker, *Promulgating the Marriage Contract*, 23 MICH. J.L. REFORM 217, 25–52 (1990).

162. *See supra* Part II.A.2; *see also* Kay, *supra* note 5, at 6 (citing ROBERT LEVY, UNIFORM MARRIAGE AND DIVORCE LEGISLATION: A PRELIMINARY ANALYSIS V, B-1 to B-18 (1969)); Grosskopf v. Grosskopf, 677 P.2d 814 (Wyo. 1984); Williams v. Williams, 415 S.E.2d 252 (Va. Ct. App. 1992).

163. *See* Spaht, *supra* note 75, at 295–96; *see also supra* notes 14–18 and accompanying text.

164. The traditional and outdated grounds system of divorce essentially reflects a system in which property belongs to men and it is for women to lose. Women are to be protected and coveted when good, but punished when bad. Under early English common law principles, adopted in the U.S., in all but eight states that have adopted community property rules, husband and wife were considered one legal entity, but the husband was the "one" who enjoyed control and ownership rights over the marital assets. Later, under constructive trust principles, and under the Married Women's Property Acts, the economic inequality was partially alleviated. But upon divorce, there was still a rebuttable presumption in most states that the wage earner—traditionally the husband—owned most of the property acquired during the marriage. Not until 1970 did the National Conference of Commissioners on Uniform States Laws draft the Uniform Marriage and Divorce Act which, borrowing from community property precedent, instituted a classification for property division on divorce based upon marital separate property. Thus, the backdrop for fault rules in marriage is clear: the background was that men owned the property and that at most the woman was entitled to some support upon divorce, and that support could be lost as a result of her bad behavior. *See* Sally F. Golfarb, *Marital Partnership and the Case for Permanent Alimony*, *in* ALIMONY: NEW STRATEGIES FOR PURSUIT AND DEFENSE (1988), *reprinted in* 27 J. FAM. L. 351 (1989). Harriet Martineau, an English sociologist who visited the United States in the 1840's describes the position of women and the problem of domesticity as such: "Indulgence is given her as a substitute for justice." 3 HARRIET MARTINEAU, SOCIETY IN AMERICA 106, 296 (1837). Despite their elevation (in marriage), society respected and protected women only insofar as they complied with an exacting ideal of virtuous and submissive womanhood. The glorification of domestic femininity was tightly bound to a correspondingly harsh condemnation of those women who strayed outside the bonds of patronage and dependence. *See id. See also infra* notes 284–292 and accompanying text describing why torts provides a more just financial recourse for abusive behavior.

165. *See, e.g.*, *Grosskopf*, 677 P.2d 814; Robinson v. Robinson, 444 A.2d 234 (Conn. 1982); Lagars v. Lagars, 491 So.2d 5 (La. 1986); Thames v. Thames, 477 N.W.2d 496 (Mich. Ct. App. 1991);

making them less dependent on alimony or property distributed. They are more accustomed to seeing their children for limited periods of time as market work keeps them away from home. This might cause more dependent women to remain in marriages that they would otherwise want to exit, but this is a questionable objective that is out of sync with contemporary social mores.[166] Indeed, fault divorce disproportionately punishes the very caregivers and children whose welfare divorce regulation should be focused on protecting.

3. The Effect of No-Fault Divorce on Children

Scholars have voiced serious concern over the ease of unilateral no-fault divorce in light of the potential harms of divorce on children.[167] Several commentators have argued that allowing "easy divorce" in the no-fault system does not adequately incentivize parents to work out their problems and remain in the marriage.[168] If no-fault divorce leads to more divorce and divorce hurts children, then perhaps no-fault divorce does not further the goals adopted herein of protecting and supporting dependents and their caregivers.[169] Scholars and legislators have therefore proposed a two-tier divorce system, making it harder for couples with children to divorce.[170] William Galston has even proposed eliminating unilateral no-fault divorce for marriages with minor children.[171]

Yet, studies on the effect of divorce on children are mixed making it

Francis v. Francis, 823 S.W.2d 36 (Mo. Ct. App. 1991); Endy v. Endy, 603 A.2d 641 (Pa. Super. Ct. 1992); *see also* Norma Lichtenstein, *Marital Misconduct and the Allocation of Financial Resources at Divorce: A Farewell to Fault*, 54 UMKC L. REV. 1, 8 (1985); Donald Schiller, *Fault Undercuts Equity*, 10 FAM. ADVOCATE 10 (1987); Ellman, *supra* note 63, at 807–08.

166. *See supra* Part II.B.1.

167. *See generally* Difonzo, *supra* note 135; JUDITH S. WALLERSTEIN & SANDRA BLAKESLEE, SECOND CHANCES: MEN, WOMEN AND CHILDREN A DECADE AFTER DIVORCE 10–20, 129–204 (1989); Robert F. Cochran, Jr. & Paul C. Bitz, *Child Protective Divorce Laws: A Response to the Effects of Parental Separation on Children*, 17 FAM. L.Q. 327 (1983); Elizabeth S. Scott, *Rational Decisionmaking About Marriage and Divorce*, 76 VA. L. REV. 9, 29 (1990).

168. *See, e.g.*, GLENDON, *supra* note 147, at 106–08 (1987); GLENN T. STANTON, WHY MARRIAGE MATTERS: REASONS TO BELIEVE IN MARRIAGE IN POST-MODERN SOCIETY (1997); Spaht, *supra* note 98, at 1552–59; Robert M. Gordon, Note, *The Limits of Limits on Divorce*, 107 YALE L.J. 1435, 1438–41 (1998).

169. *See supra* Part II.B.1.

170. Michigan State Representative Jessie F. Dalman introduced such a bill in 1996. *See* Kay, *supra* note 33; *see also* Laura Bradford, Note, *The Counterrevolution: A Critique of Recent Proposals to Reform No-Fault Divorce Laws*, 49 STAN. L. REV. 607, 607 (1997).

171. William Galston, *Braking Divorce for the Sake of Children*, AM. ENTERPRISE, May–June 1996, at 36; William A. Galston, *Divorce American Style*, PUB. INTEREST, Summer 1996, at 12, 22–23. *See also* Difonzo, *supra* note 135, at 928.

difficult to articulate sweeping generalizations.[172] While it is clear that studies demonstrate that children of intact marriages benefit from their stable family structure,[173] and that children suffer financially and emotionally from divorce as compared to that previous intact family structure,[174] it is unclear whether children of divorce or single-parent households would be better off with their parents married or in two-parent homes. Modern, intact families are most usually coupled by parents who desire to be together, not those in broken marriages staying together by sheer dictate. It is unclear what family life would be like for children with parents who would prefer not to be married, but rather divorced.[175] Practically, preventing divorce by making it fault-driven or simply prohibited cannot recreate loving stable families, however beneficial to children such families are.

On the other hand, studies have more directly concluded that two issues have serious effects on children's well-being: (1) the level of conflict to which children are exposed; and (2) the amount of child support actually received and financially stability experienced.[176] In

172. *See* ROBERT EMERY, MARRIAGE, DIVORCE AND CHILDREN'S ADJUSTMENT 1 (1999); Yongmin Sun, *Family Environment and Adolescents' Well-Being Before and After Parents' Marital Disruption: A Longitudinal Analysis*, 63 J. MARRIAGE & FAM. 697 (2001); Donna Ruane Morrison & Mary Jo Coiro, *Parental Conflict and Marital Disruption: Do Children Benefit When High-Conflict Marriages are Dissolved?*, 61 J. MARRIAGE & FAM. 626, 636 (1999) (finding, based on a study of 727 children between the ages of four and nine in 1988 who lived in intact families to determine the relation between parents' marital conflict and childrens' level of behavior problems in 1994, that "frequent marital conflict has a deleterious effect on children, possibly even exceeding the adverse effects of physical separation or divorce").

173. *See, e.g.*, Patrick F. Fagan et al., *The Child Abuse Crises: The Disintegration of Marriage, Family, and the American Community*, BACKGROUNDER (1997); SARA MCLANAHAN & GARY SANDEFUR, GROWING UP WITH A SINGLE-PARENT: WHAT HURTS, WHAT HELPS (1994); GLENN T. STANTON, WHY MARRIAGE MATTERS: REASONS TO BELIEVE IN MARRIAGE IN POSTMODERN SOCIETY 10 (1997); David H. Demo & Alan C. Acock, *The Impact of Divorce on Children: An Assessment of Recent Evidence*, 50 J. MARRIAGE & FAM. 619, 622 (1988).

174. *See supra* note 8 and accompanying text.

175. *But see* AMATO & BOOTH, *supra* note 93, at 238 (concluding that studies show that parents staying in unhappy marriages would benefit children). Yet, since unhappy people generally do not stay together, it is impossible to actually study what such families would be like.

176. *See* Paul. R. Amato & Bruce Keith, *Parental Divorce and the Well-Being of Children: A Meta-Analysis*, 53 J. MARRIAGE & FAM. 43 (1991) ("Meta-analysis supports the notion that the impact of father absence appears to be mediated by family conflict; father absence in itself may not affect children's well-being. The family conflict perspective was strongly confirmed by the data. This perspective holds that children in intact families with high levels of conflict should have the same well-being problems as children of divorce, and the data supported this hypothesis."); DANIEL G. SAUNDERS, NAT'L ONLINE RES. CTR. ON VIOLENCE AGAINST WOMEN, CHILD CUSTODY AND VISITATION DECISIONS IN DOMESTIC VIOLENCE CASES: LEGAL TRENDS, RISK FACTORS, AND SAFETY CONCERNS (Revised 2007) ("Enthusiasm for joint custody in the early 1980s was fueled by studies of couples who were highly motivated to 'make it work.' This enthusiasm has waned in recent years, in part because of social science findings. . . . [For example,] Johnston concluded from her [most recent] review of research that 'highly conflictual parents' (not necessarily violent) had a poor prognosis for becoming

theory, such benefits might be gained either inside or outside of marriage. In particular, studies have shown that in the context of high conflict marriages, children of divorce have been better off than children of parents who have remained in marriage.[177] While the tension and instability occasioned by divorce undoubtedly harm children,[178] so does living inside an unloving, potentially abusive relationship mired by conflict. Clearly, quantifying which is worse in each situation is difficult. Similarly, it is not possible to ascertain with any clarity which marriages are better left intact for the sake of children and which are better dissolved. Marriages are fluid as are their effects on children. It is clear that financial stability, low conflict, and supportive environments are extremely beneficial to children. Thus, in order to maximize children's interests, the goal of divorce law should be providing a low-conflict process for divorce and ensuring sufficient financial support post-marriage through direct legislation.

The argument that no-fault unilateral divorce hurts children assumes that no-fault divorce leads to more divorce and thereby strikes at the stability of the marriage relationship. However, it is not clear that no-fault divorce actually increases divorce rates. It is not contested that divorce rates almost doubled between 1969 and 1985, during which time every state liberalized their divorce laws, making unilateral no-fault the divorce the reality for most.[179] Logically, it should not be surprising that easing access to divorce would increase the number of divorces—no-fault unilateral divorce is less costly and does not have preventative eligibility requirements. Brining and Buckley argue that under an expanded notion of fault, allowing for consideration of fault regarding states, an empirical analysis does demonstrate increased divorce in pure no-fault states relative to fault-regarding states.[180]

On the other hand, many scholars have contested this correlation. In a convincing law and economic analysis, Elizabeth Peters argued that,

cooperative parents," and "[t]here is increasing evidence, however, that children of divorce have more problems because of the conflict between the parents *before* the divorce and not because of the divorce itself . . . ." (internal citations omitted) (emphasis in original)); E. Mavis Hetherington, *Should We Stay Together for the Sake of the Children*, *in* COPING WITH DIVORCE, SINGLE PARENTING AND REMARRIAGE: A RISK AND RESILIENCY PERSPECTIVE 93–116 (1999).

177. *See* Paul R. Amato et al., *Parental Divorce, Marital Conflict, and Offspring Well-Being During Early Adulthood*, 73 SOC. FORCES 895 (1995); Susan Jekielek, *Parental Conflict, Marital Disruption and Children's Emotional Well-Being*, 76 SOC. FORCES 905 (1998).

178. *See supra* notes 173–174 and accompanying text.

179. *See* Brinig & Buckley, *supra* note 57, at 325–26; ANDREW J. CHERLIN, MARRIAGE, DIVORCE, REMARRIAGE 20–25 (1992).

180. *See* Brinig & Buckley, *supra* note 57, at 326–27; *see also* Wardle, *supra* note 2, at 116–19 ("[I]t is apparent that the significant rise in the divorce rate in the United States did not begin until the no-fault divorce reform movement was well-underway.").

because of Coasian bargaining, divorce levels should not be affected by the legal regime.[181] She argues that the economics of divorce should change and provides data supporting her argument.[182] To that end, Marsha Garrison pointed out that divorce rates in mutual consent states, where fault grounds are more commonly used, are not lower than in no-fault states.[183] Other scholars simply point to the continuing increase in divorce rates over the second half of the twentieth century, beginning from before the time of the liberalization of divorce laws, and point out that causation cannot be inferred from correlation.[184] Finally, many have opined that both no-fault laws and the increasing divorce rate were caused by the same sociological factors that developed around mid-century. The most important of these factors is women's increasing presence in the work force.[185] In particular, as discussed above, changing social mores regarding marriage have certainly affected modern views of divorce and have made divorce more acceptable and common.[186] Divorce laws likely do not cause a change in society, but rather the laws and change in society reflect reciprocal influence more generally.[187] This complex relationship between social norms and the law is much more reflective of reality than the alternative of direct causation in either direction.[188]

Furthermore, more recently, the rates of divorce have stabilized and even declined.[189] A recent *New York Times* article reported a conglomeration of studies indicating that ten year divorce rates among college-educated men married in the 1970s, 1980s and 1990s is

181. *See* Elizabeth H. Peters, *Marriage and Divorce: Informational Constraints and Private Contracting*, 76 AM. ECON. REV. 437 (1986).

182. *Id.*

183. *See* Garrison, *supra* note 87, at 316–17.

184. *See, e.g.*, Maire Ni Bhrolchain, *"Divorce Effects" and Causality in the Social Sciences*, 17 EUROPEAN SOC. REV. 33, 44–53 (2001); V.R. MCKIN & S.P. TURNER, CAUSALITY IN CRISIS?: STATISTICAL METHODS AND THE SEARCH FOR CAUSAL KNOWLEDGE IN THE SOCIAL SCIENCES (1997); *see also* Ira Mark Ellman & Sharon L. Lohr, *Dissolving the Relationship Between Divorce Laws and Divorce Rates*, 18 INT'L REV. L. & ECON. 341 (1998).

185. *See* CHERLIN, *supra* note 179, at 51; JACOB, *supra* note 161, at 17–18 (1988).

186. *See supra* Part II.A.1.

187. Carol Weisbrod, *On the Expressive Functions of Family Law*, 22 U.C. DAVIS L. REV. 991 (1989) ("Law is a . . . thing that is shaped by culture, and in turn shapes the culture."). Due to the problem of complicity, fault-driven divorce may not even prevent divorces in light of social mores driving up divorce rates. *See supra* Part II.B.1.

188. *See* Ira Mark Ellman, *Divorce Rates, Marriage Rates, and the Problematic Persistence of Traditional Marital Roles*, 34 FAM. L.Q. 7–13 (2000); DEBORAH L. RHODE, JUSTICE AND GENDER 148–49 (1991) ("It is rarely if ever possible to isolate the effects of legal reform from social forces that produced it.").

189. *See* U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2002, at 59, tbl.66 (2002).

declining:[190]

> Among men who married in the 1970s, for example, about 23 percent had divorced by the 10th year of marriage. Among similar men married in the 1980s, about 20 percent had divorced by the 10th year. Men married in the 1990s are doing even better—with a 10-year divorce rate of 16 percent.[191]

Indeed, marital relations appear stronger and more resilient.[192]

Scholars have also expressed concern that the meaning and importance of marriage may suffer from unilateral no-fault divorce in particular when alternative means of protecting rights, such as "Marvin" cohabitation contracts[193] and domestic partnership options have become more accessible.[194] Because co-habitants can do much to secure marriage-like rights via contracts and married couples can contract away from the normal obligations of marriage, the lines are blurring.[195] Some argue that unilateral no-fault divorce laws coupled with expanded rights for cohabitants weakens the institution of marriage by undercutting the social norm that marriage is a life-long commitment different from simply living together.[196] Yet, given the modern popular belief that marriage and cohabitation are both acceptable and different options, it is not clear that creating an alternative to marriage is a problem.[197] Empirically, cohabitation looks different in practice than marriage as it is usually entered into by younger people with less financial stability and for shorter amounts of time.[198] Finally, marriage remains a popular and well-regarded institution that people continue to fight to enter.[199]

In sum, fault in divorce is still at issue in U.S. law because of the

190. *See* Carey & Parker-Pope, *supra* note 159.

191. *Id.*

192. *Id.*

193. The term "Marvin" cohabitation contracts refers to contracts between unmarried cohabitants legitimized by the California Supreme Court in *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976).

194. Krause, *supra* note 103, at 293–94; Garrison, *supra* note 87, at 325–30.

195. Krause, *supra* note 103, at 293–94.

196. *See, e.g.*, LINDA J. WAITE & MAGGIE GALLAGHER, THE CASE FOR MARRIAGE: WHY MARRIED PEOPLE ARE HAPPIER HEALTHIER AND BETTER OFF FINANCIALLY (2000); Scott, *supra* note 54.

197. Garrison, *supra* note 87, at 325–31 (arguing that cohabitation and marriage have different benefits and are experienced differently and therefore cohabitants should be treated differently than married persons).

198. *Id.* at 323–24. *See also* Pamela Smock & Wendy Manning, *Living Together Unmarried in the United States: Demographic Perspectives and Implications for Family Policy*, 26 LAW & POL'Y 87, 87–92, 96–98 (2004).

199. *See, e.g.*, Garrison, *supra* note 87, at 325; LETTY COTTIN POGREBIN, FAMILY POLITICS: LOVE AND POWER ON AN INTIMATE FRONTIER 21–22, 24–26 (1983); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003).

prevalence of fault-regarding divorce as well as in states still requires consensual divorce. Unilateral no-fault divorce is increasingly the norm and properly reflects contemporary social mores. Divorce regulations should focus on caregivers and children who have the most at stake and suffer the most from unregulated unilateral no-fault divorce. No-fault divorce provides the best forum for supporting post-divorce families, easing tension and creating stability. Indeed, allowing fault into the divorce process disproportionately harms caregivers and the children affected by the well-being of such caregivers and cannot appropriately help children by saving failed marriages.

III. THE CASE FOR SPOUSAL TORTS

Having set out why a determination of fault in divorce does not coincide with the interests of children, the interest of their caregivers, or societal norms, and therefore is not appropriate for divorce law, the question is whether the law should contend with wrongdoing between spouses in any context? Furthermore, what is the nature of the wrongdoing that should be addressed by the law—should it differ from the nature of fault in divorce? This Part argues for considering wrongdoing between spouses exclusively within the context of torts and under a heightened threshold for defining culpability.

The first subpart provides an outline of the law of spousal torts. While spousal torts have been introduced in a number of jurisdictions, such cases are rarely brought in the context of physical or emotional abuse and are even more rarely successful. It then discusses why that is and what can be done about it. Finally, the first subpart provides a legal framework for how spousal torts should work, replete with examples for clarity.

The second subpart argues the normative case for spousal torts. The subpart argues for the benefits of spousal torts on three levels. First, spousal torts are appropriate to ensure recourse against all physical and extreme dignitary harms, and especially for those harms to which caregivers are disproportionately vulnerable—domestic abuse. Second, it argues that the relative rarity and punitive aspect of torts more fairly punishes those wrongdoers who have committed physical and serious dignity abuse than litigations over fault in divorce. Finally, the second subpart concludes that tort law is an appropriate and powerful tool that should be wielded in all instances of harm, in particular harms that are more often faced by women.

The third subpart addresses critiques of spousal torts. Namely, it considers arguments that identifying outrageous and extraordinary

behavior is too difficult in the context of the subjective intimacy of marriage, that allowing spousal torts will only increase acrimony between divorcing spouses, that spousal torts ignore the complexity of marital relations, and that spousal torts are too expensive and impractical.

A. Contemporary Jurisprudence of Spousal Torts

1. The Lack of Recourse to Spousal Torts

Despite the fact that inter-spousal immunities have been almost entirely abolished, abuse between spouses, both physical and emotional, is rarely addressed in the tort context.[200] In the marital home, if the abuse is physical, the law protects the vulnerable through criminal and tortious domestic violence protection, although tort claims are rarely used.[201] But emotional abuse in the home is the true orphan. A few state statutes prohibiting domestic violence and enabling victims to receive protection orders include psychological abuse, but they do not provide for monetary redress.[202] Some states allow spouses to bring torts for intentionally inflicting emotional abuse, but the tort is still controversial and not widely accepted.[203]

200. *See* Jennifer B. Wriggins, *Toward a Feminist Revision of Torts*, 13 AM. U. J. GENDER SOC. POL'Y & L. 139, 153–54 (2005) (arguing that tort law and scholarship ignore the relevance of domestic violence to tort doctrine because (1) torts has been conceptualized as pertaining primarily to accidental injury and (2) because there are few domestic violence torts to even analyze).

201. *See id.* at 155–56; Sarah H. Buel, *Access to Meaningful Remedy: Overcoming Doctrinal Obstacles in Tort Litigation Against Domestic Violence Offenders*, 83 OR. L. REV. 945, 950 (2004) (discussing various reasons the domestic violence torts are underused and arguing for a new tort of domestic violence to cure judicial failure to provide proper recourse).

202. *See* HAW. REV. STAT. § 586-1 (2010) (making a civil protection order available for 'Extreme psychological abuse' which is defined as "an intentional or knowing course of conduct directed at an individual that seriously alarms or disturbs consistently or continually bothers the individual, and that serves no legitimate purpose; provided that such course of conduct would cause a reasonable person to suffer extreme emotional distress"); MICH. COMP. LAWS. ANN. § 400.1501(d) (West 2010) ("[c]ausing or attempting to cause physical or mental harm to a family or household member").

203. *See, e.g.*, Hendriksen v. Carrero, 622 A.2d 1135 (Me. 1993); Davis v. Bostik, 580 P.2d 544 (Or. 1978); Simmons v. Simmons, 773 P.2d 602 (Col. Ct. App. 1988); McCoy v. Cooke, 419 N.W.2d 44 (Mich. Ct. App. 1988); Koepke v. Koepke, 556 N.E.2d 1198 (Ohio Ct. App. 1989). The tort of IIED between spouses has been explicitly rejected in a number of states. *See* Weiker v. Weiker, 237 N.E.2d 876 (N.Y. 1968) (rejecting a IIED between spouses); Pickering v. Pickering, 434 N.W.2d 758 (S.D. 1989); Koestler v. Pollard, 471 N.W.2d 7, 12 (Wis. 1991) (barring an IIED action between spouses because allowing it would undermine opposition to heart balm claims); Linda L. Berger, *Lies Between Mommy and Daddy: The Case for Recognizing Spousal Emotional Distress Claims Based on the Domestic Deceit that Interferes with Parent-Child Relationships*, 33 LOY. L.A. L. REV. 449, 463 (2000); *see also* Gwen Seaquist & Eileen Kelly, *Intentional Infliction of Emotional Distress in Divorce: New York's Reluctance to Enter the Fray*, 10 BUFF. WOMEN'S L.J. 29, 29 (2002). Many other states have yet to address the issue.

For instance, in *Twyman v. Twyman* the Texas Supreme Court recognized the claim of intentional infliction of emotional distress (IIED) between spouses for conduct that occurred during their marriage.[204] To make an IIED claim, one must prove intentional conduct, that is extreme and outrageous, and that causes severe distress.[205] The specific conduct alleged in *Twyman* was coercive deviant sexual interactions, aggravated by a history of violent rape.[206] In *Twyman*, Texas became the forty-seventh state to recognize a tortious claim of IIED.[207] However, in permitting such claims between spouses, especially in the context of a divorce, the Texas Supreme Court was at the forefront of allowing money damages for emotional injuries between spouses. Only a limited number of states, in limited circumstances, allow such claims for purely emotional abuse that occurred during marriage.[208] Yet, given the success courts have had in crafting a sustainable and contained cause of action for such torts in these states,[209] the possibilities for providing this outlet for emotionally abused spouses more broadly are evident. Indeed, despite the widespread acceptance of IIED to provide recourse for dignitary harms among strangers, emotional wrongs in the home are largely not addressed by the law unless state law recognizes such abuses in the context of fault

204. 855 S.W.2d 619 (Tex. 1993). The possibility of allowing negligent infliction of emotional distress between spouses was also discussed in *Twyman* by the dissent. *See id.* 640–45 (Spector, J., dissenting). Since IIED is a more developed and accepted tort as between strangers, and would cover the intentional dignitary harms between spouses that are arguably the most disturbing and culpable, it is the focus of this Article. *See* TERRENCE F. KIELY, MODERN TORT LIABILITY: RECOVERY IN THE 90'S 109–110 (1990); W. PAGE KEATON et. al., PROSSER AND KEATON ON TORTS § 54, at 361 (5th ed. 1984); Bradley Peacock, Recent Decision, 65 MISS. L.J. 763, 773 (1996).

205. *Twyman*, 855 S.W.2d at 621.

206. *Id.* This Article does not intend to opine as to whether the facts in *Twyman* constitute IIED. *See infra* Part III.C.3 (discussing Queer Theory's critique of the facts of *Twyman*). But, to the extent that the facts in *Twyman* would constitute IIED as between strangers, assuming the man was aware of the woman's previous history of sexual assault, then it should be considered IIED as between spouses.

207. *Twyman*, 855 S.W.2d at 621.

208. *See Koepke*, 556 N.E.2d 1198 (cause of action for IIED brought by husband regarding wife's failure to notify husband that child born during marriage was not his should be allowed and considered separately from divorce); Bailey v. Searles-Bailey, 746 N.E.2d 1159 (Ohio Ct. App. 2000); *see also supra* note 203 and accompanying text; George C. Blum, *Intentional Infliction of Emotional Distress in the Marital Context*, 110 A.L.R.5th 371 (2003, with updates).

209. Only a limited number of claims have been brought in total in the U.S. *See, e.g.*, Hakkila v. Hakkila, 812 P.2d 1320 (N,M. Ct. App. 1991) (rejecting argument that all such claims should be rejected because they will cause an onslaught of meritless claims because only a limited number of claims had been brought); Lewis v. Lewis, 351 N.E.2d 526 (Mass. 1976) (When immunity is abolished, the "'uninvited kiss'" does not become a significant problem, since the court is competent to identify frivolous claims.); *see also* Klein v. Klein, 376 P.2d 70, 72 (Cal. 1962); Stoker v. Stoker, 616 P.2d 590, 592 (Utah 1980) (citing Taylor v. Patten, 275 P.2d 696, 699 (Utah 1954), *overruled in part by* Rubalcava v. Gisseman, 384 P.2d 389 (Utah 1963)).

divorce,[210] even though it is widely acknowledged that domestic abuse can be emotional in nature.[211]

2. The Reasons That Spousal Torts Are Limited

The alternative outlet for airing grievances between spouses, fault considerations in divorce, has considerably stunted adjudication of spousal torts.[212] Before the advent of no-fault divorce, the vast majority of states maintained immunities between spouses for torts.[213] Fault divorce was the only avenue of recovery for an injured spouse.[214] Now, there is potential overlap as the same wrongs could be tort grounds or fault divorce grounds depending on a state's willingness to consider spousal torts, the breadth of such consideration, and the availability of grounds for a fault divorce.[215] Such recoveries can be problematically duplicative because they provide financial recourse for the same wrongs.[216] There are a myriad of procedural impediments to bringing both torts and fault divorce covering the same issues.[217] Strict no-fault states are hesitant to allow fault between spouses to be considered in the context of a tort suit for fear a remedy that was intended to have been abolished is finding another outlet.[218] Fault–regarding states are mixed as to the appropriate forum for considering fault and are legitimately concerned about double recovery. Therefore, fault states often join the two cases, harming the separate nature of the divorce process.[219] Courts instinctively flinch when asked to consider torts that feel like fault divorce, deferring to the specialized family law system.[220] The

210. *See, e.g.*, ALI PRINCIPLES, *supra* note 3, at 55–64.

211. *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 891 (1992) (recognizing that domestic violence can be purely psychological and committed in the form of forced social and economic isolation, verbal harassment, threats of future violence, or destruction of personal property); *see also* Joy M. Bingham, *Protecting Victims by Working Around the System and Within the System: Statutory Protection for Emotional Abuse in the Domestic Violence Context*, 81 N.D. L. REV. 837 (2005).

212. *See* Carl Tobias, *The Imminent Demise of Interspousal Tort Immunity*, 60 MONT. L. REV. 101, 101 (1999).

213. *See* Woodhouse, *supra* note 9, at 2538. *See also* CLARE DALTON & ELIZABETH SCHNEIDER, BATTERED WOMEN AND THE LAW 816–45 (2001); Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CAL. L. REV. 1373, 1482–503 (2000).

214. *See* Woodhouse, *supra* note 9, at 2538.

215. *Id. See also* Twyman v. Twyman, 835 S.W.2d 619 (Tex. 1993).

216. *See, e.g.*, Whittington v. Whittington, 766 S.W.2d 73, 75 (Ky. Ct. App. 1989).

217. *See* Evans, *supra* note 4, at 481–89; *see also infra* notes 222–225.

218. *See, e.g.*, Pickering v. Pickering, 434 N.W.2d 758 (S.D. 1989) (considering spousal torts a violation of public policy supporting no-fault divorce).

219. *See Whittington*, 766 S.W.2d at 75.

220. Usually, by failing to find the adequate amount of intentionality, distress or outrageousness necessary for a claim of IIED. *See* Woodhouse, *supra* note 9, at 2538–39; *see also* Hassing v. Wortman,

confusion and conflict surrounding whether marital wrongs belong in divorce or in torts litigation demonstrates the need to determine which is the more suitable forum.[221] A clear and exclusive demarcation of a place within torts for contending with wrongdoing during marriage is needed to avoid potential ambiguity.

The procedural legal doctrines of res judicata and collateral estoppel have complicated and even prevented bringing claims for spousal torts when fault is potentially relevant during a divorce.[222] Certain jurisdictions,[223] as well as a number of legal scholars,[224] have argued that all claims arising out of the same subject matter or nucleus of facts—i.e., the marriage—should be litigated simultaneously as one case, or at least by one court.[225] Failure to bring a tort claim during the divorce process would prevent bringing a later tort suit for actions that occurred during the marriage. If the same behavior is relevant in divorce and in the tort process, joinder of the divorce and the tort makes sense not only to avoid duplicative legal proceedings but also to avoid double recovery for the same wrongdoing.

Yet, bringing a tort suit along with a divorce suit can create confusion and elongation of the divorce process to the detriment of a spouse that has suffered some grave harm and thus likely needs a quick escape from the marriage. Fault considerations in divorce can, and usually do, elongate proceedings by making spouses more defensive and less likely to agree to the divorce, particularly if they have to part with additionally money because of the accusations of fault.[226] Requiring joinder

333 N.W.2d 765, 771 (Neb. 1983); Wiener v. Wiener, 444 N.Y.S.2d 130, 131 (N.Y. App. Div. 1981).

221. *See* Buel, *supra* note 201, at 949, 998; Clare Dalton, *Domestic Violence, Domestic Torts and Divorce: Constraints and Possibilities*, 31 NEW ENG. L. REV. 319, 378 (1997) (general discussion of problems arising out of joinder and analysis of case law dealing with joinder in various states).

222. For instance, in *Twyman v. Twyman*, fault was relevant to the divorce process and thus the court allowed for joinder subject to the principles of res judicata. *See* Twyman v. Twyman, 855 S.W.2d 619 (Tex. 1993). The court noted however, that if the tortious conduct was not relevant to the divorce, joinder would not be appropriate. *See also* Evans, *supra* note 4, at 481–89 (thorough review of potential procedural problems that litigants have faced in court because of judicial confusion over where such claims belong); Barbara Glesner Fines, *Joinder of Tort Claims in Divorce Actions*, 12 J. AM. ACAD. MATRIMONIAL LAW 285, 289 (1994) (same, concluding that voluntary joineder is most appropriate); Dalton, *supra* note 221, at 378.

223. *See, e.g.*, Tevis v. Tevis, 400 A.2d 1189 (N.J. 1979) (arguing that divorce and torts should be joined under a "single controversy" rule). States have also made joinder mandatory on a case by case basis. *See* Coleman v. Coleman, 566 So.2d 482 (Ala. 1990); Kemp v. Kemp, 723 S.W.2d 138 (Tenn. Ct. App. 1986).

224. *See infra* note 344 and accompanying text.

225. *See, e.g.*, Andrew Schepard, *Divorce, Interspousal Torts, and Res Judicata*, 24 FAM. L.Q. 127 (1990) (arguing for the propriety of mandatory joinder).

226. Woodhouse, *supra* note 9, at 2553 ("An abusive husband who stands to lose more of his property or pay mor support as a result of his past deeds may pull out more stops to keep her around.").

prevents victims from bringing domestic abuse torts when they are focused on extracting themselves from the marriage as quickly as possible.[227] Distancing fault considerations in torts from the divorce process will promote the safety of the abused through timely legal separation, while still providing later financial recourse to the victim.[228] Litigating a tort for marital wrongdoing and separate from divorce allows the needed separation and quick escape from an abusive marriage.[229]

Moreover, the need to join a spousal tort case with a divorce confuses what should be two very different processes with different goals.[230] Keeping the process of punishing culpable behavior and providing monetary recourse in tort will best allow judges to focus on what I argue should be the goal of divorce: ensuring adequate support of dependents of the marriage and optimizing post-divorce relations between parents and children.[231] The subject matter of divorce and spousal torts is mostly different,[232] and the goals are entirely different. Simply because the spouses are married does not make all their interactions in need of judicial intervention appropriate for one court. For instance, juries should be available for torts in a manner totally inappropriate in divorce.[233] Criminal and civil proceedings that resolve the same disputes are separated because of different legal standards that apply and distinctive purposes of the criminal and civil system.[234] This same reasoning should apply in family law and civil torts when different

227. *See* Wriggins, *supra* note 200, at 155–56; Jennifer B. Wriggins, *Domestic Violence Torts*, 75 S. CAL. L. REV. 121, 140–41 (2001) (arguing that bringing tort claims together with divorce claims can put the plaintiff's economic or physical survival, or relationship with children at risk); Dalton, *supra* note 221, at 387.

228. Dalton, *supra* note 221, at 390.

229. Stuart v. Stuart, 421 N.W.2d 505 (Wis. 1998).

230. *See, e.g.*, Aubert v. Aubert, 529 A.2d 909, 912 (N.H. 1987) (the purpose of divorce is to dissolve a marriage whereas the purpose of a tort suit is to compensate injuries); Heacock v. Heacock, 520 N.E.2d 151, 153 (Mass. 1988).

231. *See supra* Part II.B.1.

232. Custody decisions would have to look at the conduct of the spouses to the extent the conduct harms the child. *See supra* notes 67–70 and accompanying text.

233. *See, e.g.*, Koepke v. Koepke, 556 N.E.2d 1198 (Ohio Ct. App. 1989), *jurisdictional motion overruled by*, 551 N.E.2d 1304 (Ohio 1990); Behringer v. Behringer, 884 S.W.2d 839 (Tex. App. 1994) (threatening behavior, including threats of a hit man, significant enough to sustain IIED tort); Ward v. Ward, 583 A.2d 577, 581 (Vt. 1990).

234. *See* One Lot Emerald Cut Stones v. United States, 409 U.S. 232, 235 (1972) (finding the difference in the burden of proof in criminal and civil cases precludes application of the doctrine of collateral estoppel since the acquittal of the criminal charges may have only represented "an adjudication that the proof was not sufficient to overcome all reasonable doubt of the guilt of the accused"); State v. Enebak, 272 N.W.2d 27, 30 (Minn. 1978); *see generally*, Andrew Z. Glickman, *Civil Sanctions and the Double Jeopardy Clause: Applying the Multiple Punishment Doctrine to Parallel Proceedings After* U.S. v. Halper, 76 VA. L. REV. 1251 (1990).

purposes and goals are involved, particularly when fault is not even adjudicated in the divorce process.[235] In fact, the lack of fault consideration in most divorce law makes joinder particularly inappropriate as discussion of abusive behavior could cloud the remedial purpose of the divorce process.[236] Claim preclusion should not arise from settlement agreements in the divorce process either.[237] Settlement agreements regularly purport to release all the parties from all "property rights" between them or "claims, rights and duties arising or growing out of said marital relationship"; torts do not arise from the marriage nor do they concern property rights.[238] Preclusion of tort claims has been unjustifiably allowed based on such settlement agreements.[239] A release of a tort claim could be separately negotiated.

3. Reorienting Marital Wrongs in the Context of Torts

Reorienting the litigation of wrongdoing between spouses in the context of torts demands redefining what kind of wrongdoing is judiciable between spouses and when. Therefore, this Article develops the particulars of spousal wrongs that should be considered spousal torts.

First, as a precursor to the discussion of the nature of spousal torts, in the context of divorce, many, if not all, courts take into account the dissipation of assets in determining equitable property distribution.[240] This is the only wrongdoing that should appropriately remain in the divorce context. Such economic fault seems eminently relevant in determining property distribution although other fault should not be considered. Just as monetary contributions, debt, and child caregiving efforts are relevant for equitable distribution purposes, economic dissipation should be relevant too. Such factors are all relevant for how the couples' property at the end of marriage came into being and thus how it should be divided equitably. If such dissipation is relevant in divorce, it should not be also recoverable as a tort to avoid double

235. *See, e.g.*, Richard R. Orsinger, *Asserting Claims for Intentionally or Recklessly Causing Severe Emotional Distress in Connection with Divorce*, 25 ST. MARY'S L.J. 1253 (1994).

236. *See* Simmons v. Simmons, 773 P.2d 602, 603–04 (Colo. Ct. App. 1989); Glesner Fines, *supra* note 222, at 289.

237. *See, e.g.*, Janet W. Steversen, *Interspousal Tort Claims in a Divorce Action in Oregon*, 31 WILLAMETTE L. REV. 757, 776–77 (1995).

238. *See, e.g.*, Coleman v. Coleman, 566 So.2d 482, 483–85 (Ala. 1990); Overberg v. Lusby, 921 F.2d 90, 91–92 (6th Cir. 1990); Slansky v. Slansky, 553 A.2d 152, 153–54 (Vt. 1988); Jackson v. Hall, 460 So.2d 1290, 1292 (Ala. 1984).

239. *Hall*, 460 S.2d at 1292.

240. *See supra* note 76 and accompanying text; Krause, *supra* note 4, at 1364; Beltran v. Beltran, 227 Cal. Rptr. 924 (Cal. Ct. App. 1986); Marriage of Foster, 227 Cal. Rptr. 446 (Cal. Ct. App. 1986).

recovery. In any event, it is not usually extraordinary and outrageous.

Adultery, the most typical of grounds for divorce, by itself should not be grounds for spousal torts.[241] Historically, the purpose of marriage was community building and the complete, life-long "channeling of sexual expression" into a monogamous relationship.[242] Accordingly, children born out of wedlock were treated particularly harshly by the law as "bastards."[243] Yet, now, we do not treat children born out of wedlock as illegitimate and any such treatment has largely been deemed unconstitutional.[244] Moreover, while adultery clearly is still frowned upon,[245] and can have significant effects on people's careers if they are in the public spotlight, it is also relatively common.[246] It is not deemed a huge impingement on societal interests and is not punished with direct legal ramifications as it once was,[247] particularly in the age of no-fault.[248] For instance, in some states an adulterer was legally prohibited from marrying his accomplice, but all such laws have since been repealed.[249] Moreover, where adultery was once a breach of criminal law,[250] it is doubtful that any such law could pass constitutional muster after *Lawrence v. Texas*.[251]

241. Spaht, *supra* note 75, at 258.

242. *Id. See also supra* notes 92–94 and accompanying text.

243. Spaht, *supra* note 75, at 258.

244. *See* Levy v. La., 391 U.S. 68 (1968), *remanded to sub nom.*, Levy v. State *ex rel.* Charity Hosp. of La. at New Orleans Bd. of Adm'rs, 216 So.2d 818 (La. 1968); Trimble v. Gordon, 430 U.S. 762 (1977); Ralph Calhoun Brashier, *Half-Bloods, Inheritance, and Family*, 37 U. MEM. L. REV. 215, 236 (2007).

245. *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, 1046–47 (2001) (citing a number of surveys and sources that indicate that an overwhelming majority of Americans say that adultery is wrong).

246. *See id.* (citing surveys that suggest high adultery rates); *see also* Carey & Parker-Pope, *supra* note 159.

247. Unless the adultery occurs in the context of a religious (even if not state) marriage and the state chooses to pursue a polygamous offender. *See* Katherine B. Silbaugh, *The Practice of Marriage*, 20 WIS. WOMEN'S L.J. 189, 191 (1991) (discussing the prosecution of Thomas Green in *State v. Green*, 2004 UT 76, 99 P.3d 820, on criminal polygamy charges).

248. Spaht, *supra* note 75, at 261 ("Even though the public continues to impose a legal obligation of fidelity upon the spouses in their personal relationship and permits an immediate divorce for the betrayed spouse, it has in every other respect withdrawn any punishment on behalf of society at large for conduct once considered violative of the public interest, punishment intended to protect the marital relationship from destructive outside forces.").

249. *Id.*

250. *See, e.g.*, LA. CIV. CODE ANN. art. 161 (2009) ("In case of divorce, on account of adultery, the guilty party can never hereafter contract matrimony with his or her accomplice in adultery, under the penalty of being considered and prosecuted as guilty of the crime of bigamy . . . .").

251. *See* Lawrence v. Texas, 539 U.S. 558, 599 (2003) (Scalia, J., dissenting) (arguing that the Court's reasoning would call into question the constitutionality of "criminal laws against fornication, bigamy, adultery, adult incest, bestiality, and obscenity"); Ariela R. Dubler, *From* McLaughlin v.

In fact, spouses themselves are often willing to overlook adultery and remain in their marriages.[252] Although societal status no longer necessarily mandates that spouses stay in broken marriages, modern marriage—in accordance with the ideal of joining with one's soul mate[253]—is more complex than just the context for monogamous sexual relations. Marriage, in other words, is built on more than its sexual "essentials."[254] While infidelity is a common reason for divorce, surveys indicate that the majority of people, who know or have reason to know their spouse is cheating, remain married for years afterward.[255]

Conduct that constitutes physical violence should be actionable as a battery or assault and perhaps facilitated through the use of continuous torts.[256] Moreover, emotional distress claims can and should be brought as corollaries to physical torts.[257] This must be the case even though physical abuse is not uncommon—society must deem such abuse to be an outrage.[258]

The harder question regarding spousal torts is defining IIED beyond physical abuse. The focus of IIED is the extreme and outrageous behavior,[259] which is actionable only if it causes severe emotional distress.[260] In all contexts, including between spouses, courts want to avoid being involved in litigating "meanness" that is not "outrageous" or "beyond the bounds of decency" and so look for abusive behavior that goes "beyond the normal ebb and flow of married life."[261] The behavior identified must be so outrageous that it "shocks the conscience."[262] As discussed above, adultery alone, given how unexceptional it has

Florida *to* Lawrence v. Texas: *Sexual Freedom and the Road to Marriage*, 106 COLUM. L. REV. 1165 (2006); Gabrielle Viator, Note, *The Validity of Criminal Adultery Prohibitions After* Lawrence v. Texas, 39 SUFFOLK U. L. REV. 837 (2006).

252. *See* Carey & Parker-Pope, *supra* note 159.

253. *See supra* notes 96–98 and accompanying text.

254. *See infra* note 326 and accompanying text.

255. *See* Carey & Parker-Pope, *supra* note 159.

256. *See, e.g.*, Giovone v. Giovone, 663 A.2d 109 (N.J. Super. Ct. App. Div. 1995). Further discussion of battered women's syndrome is beyond the scope of this Article.

257. *See, e.g.*, Henriksen v. Cameron, 622 A.2d 1135, 1137 (Me. 1993); *see also* Buel, *supra* note 201, at 985–87; Merle H. Weiner, *Domestic Violence and the Per Se Standard of Outrage*, 54 MD. L. REV. 183, 213–20 (1995) (citing a number of cases where IIED is allowed due to physical abuse).

258. *See* Weiner, *supra* note 257 at 220–25 (pointing to the relative frequency of domestic violence and arguing for a per se "outrageous" standard for domestic violence).

259. *See id.* at 200 (indicating that outrage is the most important element of the tort); Ellman, *supra* note 63, at 795.

260. *See supra* Part III.A.1.

261. *See, e.g.*, Leornard Karp & Cheryl L. Karp, *Beyond the Normal Ebb and Flow . . . Infliction of Emotional Distress in Domestic Violence Cases*, 28 FAM. L.Q. 389, 397 (1995).

262. *Id.*

become,[263] and how spouses themselves so often overlook it, would not qualify for the tort of intentional infliction of distress—it simply does not "shock the conscience."[264] In addition, because of the significant change in sexual norms in the contemporary era, traditional heartbalm torts, still available in a few states, would not be appropriate for litigation under this framework.[265] Breaking a promise to marry, even if it led to sexual intercourse, causing single parenthood, or engaging in adultery are actions that by themselves are not outrageous, without other facts that might shock the conscience. On the other hand, a wife's repeated threats to hire a hit man to have her husband murdered[266] and a wife's knowing failure to inform her husband that a child during the marriage was not his, have appropriately risen to the level of IIED.[267]

In order to shed some light on the distinction between culpable behavior that is not tortious and extraordinary dignitary harms that are, this Article provides a few examples of what might be deemed outrageous behavior. Of course, doctrinally, in order to recover, the spouse also must experience severe distress from such outrageous behavior and must prove intent by demonstrating either intentional or reckless behavior.

a. Aggravated Adultery

Under the theory expressed here, it has already been indicated that the run of the mill adulterer—however morally degenerate—could not be liable for IIED on that basis alone. But, what about the adulterer who is

263. *See supra* notes 246–255 and accompanying text.

264. *See, e.g.*, Doe v. Doe, 747 A.2d 617 (Md. 2000); Ruprecht v. Ruprecht, 599 A.2d 604 (N.J. Super. Ct. Ch. Div. 1991) (eleven year adulterous affair not sufficiently outrageous); Poston v. Poston, 436 S.E.2d 854 (N.C. Ct. App. 1993). Unless, however, the adulterous conduct was indeed beyond the ordinary "cheating" behavior and reached extraordinary heights. See discussion of "aggravated adultery," *infra* Part III.A.3.a.

265. Historically, American law provided recourse for deceptive and undesirable sexual activity in the form of heartbalm torts that provided recourse for a broken heart caused by sexual fraud. *See, e.g.*, Deana Pollard Sacks, *Intentional Sex Torts*, 77 FORDHAM L. REV. 1051, 1061 (2008). The four torts referred to as heartbalm torts are: (1) alienation of affections (a third party causes estrangement between spouses); (2) criminal conversation (a third party's adulterous relationship with a plaintiff's wife, usually); (3) seduction (an unmarried woman's father and the woman herself could make a claim for injury resulting from premarital sex or unwed motherhood); and (4) breach of marriage promise (a promise of future marriage induced a woman to engage in sexual behavior that she would not have but for the promise and expectation of marriage). *See, e.g.*, Corbett, *supra* note 245, at 1002–03.

266. Behringer v. Behringer, 884 S.W.2d 839 (Tex. App. 1994). *See also* Bozman v. Bozman, 830 A.2d 450 (Md. 2003); Vance v. Chandler, 597 N.E.2d 233 (Ill. Ct. App. 1992) (Wife permitted to recover against husband in IIED claim alleging that husband attempted to hire someone to murder her.).

267. Koepke v. Koepke, 556 N.E.2d 1198 (Ohio Ct. App. 1989), *jurisdictional motion overruled by*, 551 N.E.2d 1304 (Ohio 1990).

later sued for sexual harassment or sexual assault by one of his attempted or actual mistresses? Should he also be subject to suit for IIED by his wife if she can prove that he acted in order to cause her distress or was reckless in causing her distress? Does the aggravated nature of the adultery being forced, or in some manner abusive, justify a suit by the perpetrator's wife as well? It certainly adds another level of humiliation, but is it extraordinary and outrageous?

On these facts alone, probably not because, if so, any married person subject to a sexual harassment or sexual assault suit would then be subject to a suit in tort by his or her spouse. While having your spouse sued for sexual assault of another woman is not mundane, these facts alone in today's litigious society are not extraordinary—particularly if the spouse is ultimately not convicted. Yet, additional aggravating circumstances could make this situation clearly extraordinary. Imagine the sexual assault claim is brought by the wife's sister and the husband is convicted. Imagine the assaulting spouse, who is eventually convicted, implicates the spouse in his activities by having her testify on his behalf or liquidating her resources. What if the couple's children were in the house when the assault occurred and the husband recklessly or even intentionally allowed them to view the assault? Such facts start to reach a "shock to the conscience" level and become extraordinary, even if the wife would not be able to bring a criminal charge against her husband.[268] Although it is difficult to articulate a precise standard, such outrageous facts are not particularly hard to conceive of and should be actionable as determined by a jury.

b. Aggravated Bullying

A wife who mildly or moderately bullies her husband would also not be liable for IIED. A wife who screams at her husband and throws him out of the house does not shock the conscience and should not be subject to a dignitary tort regardless of how mean she might be. Yet, extraordinary circumstances are possible. A wife might make her husband honestly fear for his life. A wife who hides the couple's children without allowing him access for an extended period of time and without serious provocation is acting outrageously. While tort remedies are often available once custodial rights are assigned during divorce or separation,[269] during the marriage custodial rights are assumed rather

268. *See* Ira Mark Ellman & Stephen D. Sugarman, *Spousal Emotional Abuse as a Tort?*, 55 MD. L. REV. 1268, 1337–42 (1996) (discussing an exception to their argument against emotional spousal abuse as a tort when a criminal case could be brought against the spouse for actions to his/her spouse).

269. *See* Berger, *supra* note 203, at 501–02.

than ordered making the availability of an IIED claim necessary.[270] The bully spouse who does outlandish things in order to cause harm to her spouse, like threaten and interfere with a spouse's close relationships and work situations causing serious struggle and disarray in a person's life, might also be subject to a claim of IIED, depending on the specific circumstances.[271] Similarly, a spouse who deprives his dependent spouse and/or children of the basic necessities of life, like food, acceptable living conditions, or an education, may be subject to a dignitary tort as well.[272]

The relevance of marriage to a finding of IIED is complex but ultimately discernible.[273] The fact that the parties are married is relevant in considering the nature of the relationship and the impact the conduct would have on the plaintiff. For instance, when a spouse rapes his wife's sister, that the parties were married would impact a claim for IIED because of the conduct's impact and level of outrageousness. Yet, in determining outrageousness between spouses, the bullying standards should not be lower than between strangers because of the "trust" that has developed in a married couple because that level of trust is too subjective and outrageousness is objective. Bullying conduct that would be "outrageous" enough between strangers, should be sufficiently outrageous between spouses.

Ultimately, the inquiry is extremely fact specific and jury dependent. IIED has been extremely hard to prove. Thus, those worried that it will encompass too much marital behavior and be too much of an invasion on marital privacy would have to explain why it would be different than other contexts to which the tort has remained contained,[274] and why it is different than physical abuse in which marital privacy has been rightfully dismissed as a reason not to adjudicate. Just as in non-spousal IIED cases, as well as torts generally, there are bound to be

270. *See, e.g.*, Larson v. Dunn, 460 N.W.2d 39, 46 (Minn. 1990) (rejecting the tort of interference with custody as being contrary to the best interests of the children, but willing to consider an IIED action based on the same conduct if the latter is egregious); *see also* Michael K. Steenson, *The Anatomy of Emotional Distress Claims in Minnesota*, 19 WM. MITCHELL L. REV. 1, 67–68 (1993) (contrasting claims for IIED with claims for interference with custodial rights).

271. *See, e.g.*, Christians v. Christians, 637 N.W.2d 377 (S.D. 2001) (finding IIED where husband interfered with employer in an outrageous manner).

272. One thing the seminal case of McGuire v. McGuire case teaches family law students is that a married couple can act horribly to each other within the context of an ongoing marriage McGuire v. McGuire, 59 N.W.2d 336 (Neb. 1953) (refusing to enforce husband's duty to provides necessaries to wife based on the doctrine of privacy where wife alleges husband withholds money and basic provisions).

273. *See infra* Part III.C.1 for a discussion of Ellman and Sugarman's argument that as between spouses extraordinary conduct is too subjective to be identified.

274. *See supra* note 209 and accompanying text.

inconsistencies between cases because judgments are jury dependent.[275] But that does not detract from the need for tortious recourse for serious emotional abuse. What is "extreme and outrageous" is dependent on social norms and realities and is thus best left determined by juries in all contexts. Such behavior should be punished through monetary rewards. IIED is an outlet for dignitary harms that is not context specific, and it should not be context exclusive by excluding the marriage.[276]

B. Advantages of Spousal Torts

The tort process, which is intended to deal with civil disputes assigning fault and blame, is the appropriate exclusive forum for contending with marital wrongs. This subpart posits three reasons for promoting spousal torts. First, torts provide monetary redress for extraordinary and outrageous harms between spouses that would be recoverable as between strangers. Domestic abuse should not be privileged from litigation. Second, a tort remedy is more appropriate given contemporary societal norms that support focus on protecting caregivers and children in the divorce process. Third, the power of torts should be wielded to counter gendered harms.

1. Providing Monetary Redress for Domestic Abuse

Harms judiciable as between strangers should also be judiciable as between spouses. Otherwise, domestic abuse is more protected from litigation than similar wrongs, which is discriminatory against women and contradicts the societal consensus for the need to protect against domestic abuse.

Primary caregivers, who are usually women, are more tied to home life because they spend more time caring for dependent children and spend more time working in the home, even if they also work in the marketplace.[277] As discussed above, women are therefore disproportionately vulnerable to punishment under traditional concepts of marital fault by being denied property, alimony, and custody.[278] Moreover, women are more likely to be the abused party when domestic

275. *Compare* Simmons v. Simmons, 773 P.2d 602 (Colo. Ct. App. 1988) (allowing recovery on spousal IIED claim) *with* Hakkila v. Hakkila, 812 P.2d 1320 (N.M. Ct. App. 1991) (denying recovery).

276. *See* Buel, *supra* note 201, at 987.

277. *See* SPAIN & BIANCHI, *supra* note 17, at 167–76; HOCHSCHILD & MACHUNG, *supra* note 14 (documenting the phenomena of the "second shift" whereby even women who work "full-time" do much more of the household work).

278. *See supra* Part II.C.2.

abuse occurs, and therefore need to be able to get out of the marriage as quickly as possible, without contending with difficult evidentiary issues of fault.[279] Both these gendered arguments favor leaving fault out of divorce. On the other hand, if serious wrongs mounting to the level of marital domestic physical or emotional abuse are not punished at all, it is women, who are usually the victims of serious physical and emotional abuse in the home that are left without recourse. This is logical because women are both more present in and more dependent on the home and are more physically and emotionally vulnerable to such abuse.[280]

It has been noted that, "[a]s feminists have demanded new protections for women in the public sphere, we [feminists] seem to have simultaneously acquiesced to a reductionist vision of moral responsibility in the domestic sphere. Ironically, this is the sphere in which women are most at risk of economic, physical, and emotional injury."[281] In the workplace, in the criminal system, and in the context of domestic physical violence, feminists advocate recognition of women's abuse. If abuse occurs in the workplace, whether it is physical or emotional, the law addresses such abuse in the context of sexual harassment laws, criminal laws, or civil torts. While emotional injury in the workplace, classified as sexual harassment, was originally prosecuted in order to assure workplace equality, justifications for sexual harassment have since been broadened.[282] Instead, scholars argue that sexual harassment should be understood to inflict tortious dignitary harm, allowing sexual harassment in prisons, and other non-workplace public settings.[283] Criminal law and tort law increasingly addresses physical or emotional abuse suffered by women in the public

279. *See* CALLIE MARIE RENNISON & SARAH WELCHANS, U.S. DEP'T OF JUSTICE, INTIMATE PARTNER VIOLENCE 1 (2000) (finding that in 2001, 85% of domestic violence victims were women); Merle H. Weiner, *The Potential and Challenges of Transnational Litigation for Feminists Concerned About Domestic Violence Here and Abroad*, 11 AM. U. J. GENDER SOC. POL'Y & L. 749, 786–87 (2003) (recognizing that governments usually do not interfere with domestic violence issues and therefore fail to protect women victims); Violence Against Women Act, Pub. L. No. 103-322, § 40302, 108 Stat. 1902, 1941 (1994) (codified at 42 U.S.C. § 13981(b) (2006), *declared unconstitutional by* United States v. Morrison, 120 U.S. 598 (2000)) (noting that victims of domestic violence are usually women); Ileana Arias et al., *Violence Against Women: The State of Batterer Prevention Programs*, 30 J.L. MED. & ETHICS 157 (2002).

280. *See* Buel, *supra* note 201, at 958, 962 (men are usually the perpetrators and initiators of domestic abuse).

281. Woodhouse, *supra* note 9, at 2528.

282. Camille Gear Rich, *What Dignity Demands: The Challenges of Creating Sexual Harassment Protections for Non-Workplace Settings* (U. of S. Cal. Legal Studies Working Paper Series, Paper No. 24, 2009), http://law.bepress.com/usclwps/lss/art24.

283. *Id. See also* Anita Bernstein, *Treating Sexual Harassment with Respect*, 111 HARV. L. REV. 445, 487 (1997).

sphere, whether in the workplace or other institutional setting.[284]

Excluding dignitary harms inflicted in the home from tort law neglects a significant area of harm, which is usually suffered by women. In fact, any reason for such exclusion would be discriminatory against women—deeming domestic disputes too private, too emotional, and too subjective for judicial determination.[285] Abuse usually suffered by women can be addressed through the civil arena of torts just as any personal injury claim can.[286] Allowing a case for IIED between spouses is not injecting a tort recovery in lieu of fault divorce; rather, it is merely providing a remedy to an aggrieved party available to every other citizen of the state.[287]

2. Redefining Marital Wrongdoing in a Contemporary Context

Traditional fault grounds developed in a hierarchal society in which different gender roles for men and women were mandated.[288] The nature of conduct necessitating serious legal punishment has transformed. The analysis above, narrowing and reorienting marital wrongs in the contexts of torts, gives adjudication of marital wrongs a much needed update.[289] Prosecuting instances of adultery and judicial resolution of heartbalm torts at one point reflected the core of marriage and intimate relations,[290] but judicial resolution is no longer appropriate in light of the self-fulfilling visions of marriage previously discussed.[291]

Moreover, in accordance with contemporary societal mores, under which divorce should focus on the plight of caregivers and their dependents,[292] tort law is a more suitable outlet for spousal wrongs. First, not all wrongdoing between spouses is judiciable; much of the

284. *Id.*

285. This critique will be taken up in more detail in *infra* Part III.C.1. *See* Wriggins, *supra* note 200, at 154; Reva B. Seigel, *The Rule of Love, Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2119–20 (1996); Twyman v. Twyman, 855 S.W.2d. 619, 640–05 (Spector, J., dissenting) (arguing that both IIED and negligent infliction of emotional distress should be available as recourse against spousal wrongdoing to recognize tortious harm women are more likely to experience).

286. McCulloh v. Drake, 24 P.3d 1162, 1169 (Wyo. 2001); Christians v. Christians, 637 N.W.2d 377, 382 (stating that the court was not "injecting a tort recovery for intentional infliction of emotional distress" into every domestic suit, but rather, that it was "only providing a remedy to an aggrieved party . . . available to every other citizen of the state.").

287. *Christians*, 637 N.W.2d at 377.

288. *See* Singer, *supra* note 6, at 1111–12.

289. *See supra* Part III.A.3.

290. *See supra* notes 265–267 and accompanying text.

291. *See supra* Part II.B.1; Krause, *supra* note 4, at 1365 (discussing the need to update notions of spousal wrongdoing); Spaht, *supra* note 75, at 258 (analyzing outdated notions of fault).

292. *See supra* Part II.B.1.

harms are mutual accounts of resentment and pain that are better handled by a therapist than by a judge.[293] Torts would not be available for all wrongdoing but only for physical abuse and extraordinary and outrageous intentional dignitary harms that cause severe distress.[294] Such torts make consideration of marital wrongdoing significantly less frequent than fault-driven divorce and fault-regarding divorce do.[295] Such a system may have been relevant where the state had a strong interest in keeping all marriages together, but not in light of more contemporary perspectives on marriage.[296] In that way, the focus of divorce remains on caregivers and dependents and only in extreme cases are financial penalties levied on deserving wrongdoers in a separate suit in the context of torts. Primary caregivers and the dependent children for whom they care, who are in need of support and should be protected by divorce laws, will only find themselves in financial ruin because of extreme and outrageous behavior on the part of a caregiver, in which case primary custody should in any event be questioned.[297] All indications are that spousal torts are and will continue to be relatively rare and saved for extreme circumstances.[298]

As compared to fault-regarding divorce, tort law more fairly provides financial recourse to whichever spouse has suffered the physical or emotional abuse. In divorce law, a determination of wrongdoing, particularly adultery, was traditionally used to bar, decrease, or completely discharge an obligation of alimony or, more recently, decrease the equitable share of property distribution.[299] That financial support is usually paid by a primary earner to a primary caregiver. If the primary caregiver is at fault, a reduction in the financial incidents of divorce punishes that caregiver for her wrongdoing by denying her this needed support. If the higher earner is at fault, then he could be forced to pay more than an otherwise equitable share of his property and

293. *See supra* Part II.B.2.

294. *See supra* Part III.A.

295. *See supra* Part II.A.

296. *See supra* Part II.A.1, II.B.1; HIRSHMAN & LARSON, *supra* note 89, at 285–86 (arguing for a civil remedy as opposed to marital grounds remedy for marital wrongs because the injury of infidelity is one to the spouse and under current social mores, not a harm committed against the state; such a penalty should be in the form of property distribution "bonus" or a separate civil remedy); *see also* ALI PRINCIPLES, *supra* note 3, at 49–53.

297. *See supra* Part III.A.3.

298. *See supra* note 209 and accompanying text.

299. *See* Singer, *supra* note 7, at 1461, 1474; Wardle, *supra* note 2, at 115 n.148 (Adoption of no-fault divorce "has created significant problems for the justification of the imposition of any post-dissolution continuing spousal support or sharing obligation."); Ira M. Ellman, *The Theory of Alimony*, 77 CAL. L. REV. 1, 5–6 (1989) (Modern divorce reform has completely undermined traditional justifications for alimony.); Ellman, *supra* note 63, at 787.

potentially higher alimony. As discussed above, any such system has a greater impact on the caregiver who cannot rely on a continuing salary, and thus such punishment should only come in the wake of relatively rare, extraordinary abuse.[300] Moreover, divorce rewards are an equitable system of property division and continuing support,[301] which are potentially subject to later modification based on totally unrelated scenarios.[302] There are many factors involved in determining divorce awards with the overriding goal being to support the separation of families and to provide a sustainable life for the divided family going forward.[303] A change in alimony would still be in the context of issues beyond fault and would generally not "wipe out" one of the two parties.[304] Alternately, tort law traditionally acts to reward the victim and not just reduce a financial obligation.[305] A determination of serious wrongdoing should not only adjust equitable rewards but also have the potential to be a financial boon, with punitive damages potentially available.[306] Behavior worthy of severe reprimand to the perpetrator and a financial windfall for the victim as between strangers should be similarly punished in the tort system as between spouses. Personal injury law is applicable to separate property of the spouses if brought simultaneously and joined, or, in the preferred circumstances tort recovery after divorce, would apply to the spouse's post-divorce property.[307] Tort law can be punitive and can leave someone financially needy because of abusive behavior. Divorce law should not leave anyone destitute—it should separate families and provide equitable relief.[308]

3. Harnessing the Power of Torts

Finally, it is crucial that feminists focus on the use of torts to redress wrongs that women suffer.[309] Tort law is a central focal point for determining social norms, and anytime women are disproportionately

300. *See supra* Part II.C.2 and note 209 and accompanying text.

301. *See, e.g.*, Wilson, *supra* note 60, at 511.

302. *See* Dalton, *supra* note 221, at 390.

303. *See supra* Part II.A.1, 2.

304. *See, e.g.*, Wilson, *supra* note 60, at 511.

305. *See* Krause, *supra* note 4, at 1365–66.

306. *See id.*; Dalton, *supra* note 221, at 390.

307. *See* Twyman v. Twyman, 855 S.W. 2d 619, 625 n.20 (Tex. 1993); *see also* Barbara H. Young, *Interspousal Torts and Divorce: Problems, Policies, Procedures*, 27 J. FAM. L. 489, 511 (1989).

308. *See* Evans, *supra* note 4, at 491.

309. *See, e.g.*, Wriggins, *supra* note 200, at 140.

harmed, that should be integrated into the tort system.[310] The failure to recognize certain torts and defining the parameters of tort have gendered implications.[311] It is problematic for domestic abuse to be separated from other physically and emotional abusive behavior as "relationship trouble" and not be part of the general social fabric of wrongs that need recourse.[312] Unlike in areas of constitutional law, criminal law, or family law, where women's issues are a specialized subset of those legal systems, torts mainstreams the issue into a "decentralized, egalitarian decision-making system—the jury."[313] Such mainstreaming allows women to feel that their particular experiences and complaints are worthy of attention as part of critical tort doctrines—they do not need to be separated out or put in parentheses.[314] Moreover, tort law is not fraught with the hierarchal history of family law.[315] Unlike constitutional law and employment law that deal with discrimination and stereotyping, or family law that deals with special doctrines that affect women, torts can contend with gender in a generalized manner because it redresses all wrongs that are suffered by an individual.

C. Addressing Critiques of Spousal Torts

1. Spousal Torts Are Too Intimate To Be Objectively Adjudicated

In an influential article,[316] Ira Ellman and Stephen Sugarman argue that although physical violence between spouses should be subject to

310. *See id.*

311. *See id.* at 142.

312. *See* Buel, *supra* note 201, at 976.

313. Wriggins, *supra* note 200, at 140.

314. Regina Austin, *Super Size Me and the Conundrum of Race/Ethnicity, Gender, and Class for the Contemporary Law-Genre Documentary Filmmaker*, 40 LOY. L.A. L. REV. 687, 713 (2007); Lucinda M. Finley, *A Break in the Silence: Including Women's Issues in a Torts Course*, 1 YALE J.L. & FEMINISM 41, 43 (1989) ("Acknowledgment of gender issues in torts can help women feel less like outsiders to the enterprise of the law, and may encourage them to engage in open dialogue, to bring up their experiences, to scrutinize the exclusiveness or inclusiveness of various legal rules, and to raise previously unraised questions.").

315. *See, e.g.*, COTT, *supra* note 111, at 7 ("A man's headship of a family, his taking the responsibility for dependent wife and children, qualified him to be a participating member of a state."); Martha Albertson Fineman, *Progress and Progression in Family Law*, 2004 U. CHI. LEGAL F. 1, 2 (2004); MARTHA ALBERTSON FINEMAN, THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM 1–13, 17–35 (1991).

316. Excerpts of the article have been included and the article itself cited in numerous family casebooks, see, for example, JUDITH AREEN & MILTON C. REGAN, JR., FAMILY LAW CASES AND MATERIALS (2006) and HARRY D. KRAUSE ET. AL., FAMILY LAW: CASES, COMMENTS, AND QUESTIONS (2004), and the article has been cited extensively elsewhere (according to a Westlaw search it has been cited in 41 law review articles and treatises).

tort suits, emotional abuse generally should not.[317] They contend that determining "extreme and outrageous" conduct between married couples—one of the elements of the tort of intentional infliction of emotional distress—is not a judicially determinable concept because of the subjective nature of marital relations.[318] They argue that marital relations are too personal and diverse to be subject to an objective scrutiny of conduct that is "outrageous."[319] Instead they argue that only behavior that would be considered criminal toward the spouse should be actionable in a tort of IIED.[320]

But what makes marital relations so different from other subjective and personal relationships? There are many complex and even intimate relationships that are subject to tortious recovery for emotional abuse: workplace relations, institutional relations such as prisoners and prison guards,[321] student-teacher relations and/or relations between congregants and pastors or patients and doctors/psychologists, non-married lovers, or best-friends. Such relations can be just as complicated and difficult to scrutinize objectively. Thus, excluding only married couples from the possibility of emotional torts must be carefully justified.

One difference is the emotional nature of the marital relations, which are intended to be more love-based and emotive than workplace relations (though not necessarily different than non-married couples).[322] Yet, in other legal contexts the emotional nature of the relations has not justified exemptions from legal recourse. For instance, in contracts between spouses, society has not credited the emotional nature of the relations with sufficient weight to reject the enforceability of spousal contracts,[323] although some states insist on some protective measures before enforcing spousal contracts to protect the spouse who is less informed, less powerful, or has more to lose.[324] In the context of torts, where the goal is expressly to give redress to the abused spouse, the emotional nature of the relationship should have even less influence than

317. *See* Ellman & Sugarman, *supra* note 268, at 1317–26, 1340–42.

318. *Id.* at 1318. (citing Massey v. Massey, 801 S.W.2d 391, 400 (Tx. Ct. App. 2001) ("The bounds of decency vary from legal relationship to legal relationship. The marital relationship is highly subjective and constituted by mutual understandings and interchanges which are constantly in flux, and any number of which can be viewed by some segments of society as outrageous.").

319. *Id.*

320. *Id.* at 1337–42.

321. *See* Rich, *supra* note 282.

322. *See, e.g.*, Hakkila v. Hakkila, 812 P.2d 1320, 1324–25 (N.M. Ct. App. 1991).

323. *See* Simeone v. Simeone, 581 A.2d 162 (Pa. 1990) (treating contracts between spouses in the same manner as contracts between strangers).

324. *See, e.g.*, Edwardson v. Edwardson, 798 S.W.2d 941 (Ky. 1990); UNIF. PREMARITAL AGREEMENT ACT § 6 (1984).

in contracts.[325] Moreover, in the context of rape, which is intimately interconnected with the sexual "essentials" of marriage,[326] the subjective and complicated nature of the relations continues to have some effect on the ease of prosecutions, but the effect is waning.[327] While the claim of marital rape used to be completely unavailable, it is gaining in acceptance.[328] In fact, with regard to civil or criminal orders of protection, the emotional nature of the relations has afforded greater, more specialized attention.[329] Accordingly, the emotional nature of marital relations should not exclude adjudication of abuse between spouses; rather, as in other areas of law, sensitivity to the real harms that can be suffered must be acknowledged.

Another difference between spousal torts and other dignitary harms is whether they occur in the public or private sphere—in the home or outside it.[330] Keeping the private sphere out of torts has been squarely rejected when the abuse is physical and should be similarly rejected with regard to emotional abuse.[331] Privacy infamously has been used as a cloak for hiding paternalistic sentiments in which men are deemed rulers of their households making public scrutiny inappropriate.[332] For instance, in *Hakkila v. Hakkila*, the court found that identifying blatantly

325. *See* Fraces E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1516–18 (1983) (describing the move of the law back into the family life in order to redress issues of inequality and abuse).

326. The "essentials" of marriage is a term coined in the context of determining what constitutes fraud in entering a marriage agreement. Traditional case law, which is still applicable in most jurisdictions, only accepts fraud claims based on deceit or trickery regarding an essential or "sexual" element of the marriage, such as infertility, impotence, virginity, pregnancy, possession of venereal diseases, *etc.* *See, e.g.*, Johnston v. Johnston, 18 Cal.App.4th 499 (Cal. Ct. App. 1993) (finding husband's lazy, unshaven, and drunk behavior insufficient to prove fraud); Stepp v. Stepp, No. 03CA0052-M, 2004 WL 626116 (Ohio Ct. App. Mar. 31, 2004) (disallowing annulment based on fraudulent portrayal of assets).

327. *See* Hasday, *supra* note 213, 1482–523.

328. *Id.*

329. *See, e.g.*, Judith Smith, *Battered Wives and Unequal Protective-Order Coverage: A Call for Reform*, 23 YALE L. & POL'Y REV. 93, 105–08 (2005); Leigh Goodmark, *Law is the Answer? Do We Know that For Sure? Questioning the Efficacy of Legal Interventions for Battered Women*, 23 ST. LOUIS U. PUB. L. REV. 7, 9–10 (2004).

330. *See* Weiner, *supra* note 257, at 207–08.

331. *See* Olsen, *supra* note 325, at 1498–501 (describing the legal perspective of the family as the private, altruistic female realm as opposed to the market which is the public, male productive sphere).

332. For an examples of a historic case in which horrendous abuse is rejected in the context of marriage due to concerns for the privacy of the couple, see *Abbott v. Abbott*, 67 Me. 304, 305–09 (Me. 1877) (entering a nonsuit against the former wife where her ex-husband with friends forcibly kidnapped her and had her institutionalized in a mental institution), *overruled by Henriksen v. Cameron*, 622 A.2d 1135 (Me. 1993). *See also* Seaquist & Kelley, *supra* note 203, at 31; Crowell v. Crowell, 105 S.E. 206, 210 (N.C. 1920) ("Whenever a man has laid open his wife's head with a bludgeon, put out her eye, broken her arm, or poisoned her body, he is no longer exempt from liability to her on the ground that he vowed at the altar to 'love, cherish, and protect' her."); Buel, *supra* note 201, at 975.

abusive behavior, including physical abuse, as "beyond our capacity" because of the regular abuse that occurs within many marriages.[333] This kind of reasoning must be rejected; it is deeply prejudicial to victims of marital abuse. Behavior that meets the high standards for IIED—that "shocks the conscience"—does so within the marital context as well. Although it is argued that some spouses are simply used to being mean to one another, conduct that rises to the level of abuse, that is "extraordinary," should not be protected because it occurs within a marriage. Even (or especially) within a marriage, behavior that a jury objectively determines to be objectively emotionally abusive should be subject to societal condemnation through torts. Ultimately, determining what conduct is extreme and outrageous is a very difficult inquiry in any context,[334] but it has proved to be both feasible and defensible.[335] So too in the context of marital relations, the outrageous emotional abuse can and should be identified.[336]

2. Spousal Torts Will Create Even More Acrimony than Fault Divorce

Despite his belief in the continuing relevance of fault in marital relations at the time of divorce, Harry Krause argues forcefully against allowing fault during marriage to pervade the area of tort litigation because "tort law will reintroduce to the end of marriage more and worse acrimony than no-fault divorce ever eliminated."[337] But why should that be? If the divorce is already procured, custody and support issues already determined the dispute becomes a purely financial one, like any other tort. Logically, the acrimony should be lessened as compared to fault divorce, not elevated. The longer process for recovery in torts than there should be for obtaining a divorce should provide distance from the wrongful act, assuming legal doctrines such as res judicata and collateral estoppel are not improperly used to prevent bringing the tort after the divorce.[338] Moreover, the parties will have

333. Hakkila v. Hakkila, 812 P.2d 1320, 1324 (N.M. Ct. App. 1991).

334. *See, e.g.*, Kristyn J. Krohse, Note, *No Longer Following the Rule of Thumb—What To Do with Domestic Torts and Divorce Claims*, 1997 U. ILL. L. REV. 923, 931.

335. All jurisdictions now recognize and adjudicate the tort of IIED. *See* 2 DAN B. DOBBS, THE LAW OF TORTS 1247 (2000).

336. For further discussion of what outrageous behavior would look like in the marital context, see *supra* III.A.3.

337. Krause, *supra* note 4, at 1364.

338. *See supra* notes 222–237 and accompanying text; *see, e.g.*, Dalton, *supra* note 221, at 386 (arguing that if abused spouses can escape procedural hurdles, "later is better"). Alternately, in a rare case, a tort might be filed prior to divorce. Although statute of limitations problems could be addressed through allowing continuous torts of domestic violence or abuse, see, for example, *Giovine v. Giovine*, 663 A.2d 109 (N.J. Super. Ct. App. Div. 1995), a tort might be filed earlier than a divorce for strategic

had recourse to the divorce process to separate from the marriage and move on with their lives without an accusatory component. Indeed, as indicated above, these torts should be much rarer than fault inquiries for fault-driven or fault-regarding divorce. Yet the potential for such torts and the availability of recourse apart from marriage is significant and appropriate when the factual basis for a tort of IIED is present.[339]

3. Spousal Torts Ignore the Complexity of Marital Relations

Queer theorists have argued that sexual aggression and sexual deviance, such as encountered in the facts of *Twyman*, is overly condemned due to undue hostility toward sex and sexual deviance as well as the over-privileging of the social norms of monogamy.[340] It is more accurate, according to Halley, to view the Twymans as willing participants in the sexual deviance—it is Sheila Twyman's role to be the victim and the husband's to be the dominator and both engage in such domination willingly.[341] In other words, the sexual or even non-sexual abuse is both desired by and abhorred by the victim reflecting the very nature of the marital relationship such that punishing these complex interactions is inappropriate, particularly in the marital framework where a long-term structure for these interactions is in place.

Minimizing sexual and abusive harms by alleging enjoyment of the abuse or equal power when engaging in it such that there is no one victim, ignores how men and women indicate they have experienced these harms.[342] Moreover, whatever enjoyment people are experiencing from abusive subordinating relations, society has a right to protect its citizens from abuse by discouraging it.[343] Abusive outrageous conduct is harmful even in the context of a problematically co-dependent relationship, as Halley describes, where both parties are active participants.

reasons.

339. See *supra* Part III.A for a discussion of the necessary factual claims for IIED.

340. *See* Janet Halley, *Sexuality Harassment*, *in* DIRECTIONS IN SEXUAL HARASSMENT LAW 182, 193–98 (2003); Janet Halley et al., *Gender Sexuality, and Power: Is Feminist Theory Enough?*, 12 COLUM. J. GENDER & L. 601, 615–18 (2003).

341. Halley et al., *supra* note 340, at 615–18.

342. *See, e.g.*, Robin West, *Desperately Seeking a Moralist*, 29 HARV. J.L. & GENDER 1 (2006).

343. For instance, Michel Foucalt, upon whom Janet Halley relies in exploring queer theory, also questions the advisability of perusing sexual abuse against children because in part a child may enjoy the abuse. *See* MICHEL FOUCALT, POLITICS, PHILOSOPHY, CULTURE, INTERVIEWS AND OTHER WRITINGS 204–05 (1988). Regulations and torts that frown upon morally problematic abusive behavior are justifiable on these grounds alone. *See* West, *supra* note 342.

4. Spousal Torts are Prohibitively Costly

Others argue that separating torts from divorce is prohibitively costly.[344] On the one hand, all litigation is costly and so bringing a separate suit would logically increase costs.[345] On the other hand, if all issues of blame and fault are removed from the divorce process and the focus is only on devising a sustainable, fair, and appropriate custody and financial settlement intended to optimize what is always a difficult situation, divorce would include significantly less litigation, thereby reducing its cost. Mediation, collaborative lawyering, negotiated settlements, and family counseling would become even more central to the process.[346] It is true that in a fault-driven or fault-regarding divorce system, two suits would be costly and wasteful. But, the hope is that a true no-fault divorce would be quicker and cheaper. Torts, on the other hand, are full litigations with full costs, but they could be open to contingency arrangements for those who could not otherwise afford to bring such a suit.[347]

IV. CONCLUSION

This analysis makes the case for the use of torts as opposed to the divorce process to contend with marital wrongdoing. Indeed, fault should be completely irrelevant in divorce and spousal torts a well-defined remedy in tort law. This analysis takes seriously the needs of dependents and their caregivers who it is argued should be the central concern of divorce law and who have the most to lose from the divorce process. In fact, because spousal support should be based on needed support for caretaking functions engaged in by primary caregivers, fault should not be part of the support or property distribution formula.[348] In addition, caregivers, who spend more time in the domestic sphere, should receive the protection in torts that women do in the workplace and as between strangers—a remedy for physical and severe emotional

344. *See* Peter Nash Swisher, *Reassessing Fault Factors in No-Fault Divorce*, 31 FAM. L.Q. 269, 316 (1997); Evans, *supra* note 4, at 495–97.

345. *See Developments in the Law—Legal Responses to Domestic Violence*, 106 HARV. L. REV. 1498, 1532–33 (1993) (recognizing the practical limitations of tort suits to remedy situations of marital abuse).

346. *See supra* Part II.B.2.

347. *See* Buel, *supra* note 201, at 951–53 (commenting that many attorneys falsely believe that such suits are not worth bringing because defendant's are likely to be lower income—but in fact violence occurs among all financial strata at equal rates). *But see* Wilson, *supra* note 60, at 506 (arguing that lawyers are unlikely to take marital torts on a contingency basis in most cases).

348. *See* Laufer-Ukeles, *supra* note 15, at 56–65.

abuse. Torts present a powerful means of seeking redress while still allowing those who need to escape the marriage because of serious abuse to do so as quickly as possible. Only in rare, extraordinary, and shocking circumstances should spousal wrongdoings affect post-divorce lives of caregivers in need of financial support. In such cases of physical and outrageous emotional abuse, financial ruin may befall the perpetrator of the tort, but in such limited instances financial retribution is just.

Moreover, extracting fault from divorce, yet preserving the relevance of physical and emotional abuse in the context of torts, will preserve the persistent experiential relevance of serious marital wrongdoing while allowing the divorce process to be reparative and focus on the ongoing relationships that are necessitated by children. It is true that such spousal torts will be relatively rare and thus not release all the tension between spouses. Yet, it is hoped that knowing that serious abuse torts are available will have a reassuring effect on spouses in general. Nonetheless, some tension would have to be appropriately healed not through the law, but by time and other social resources not related to litigation.