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**LIES BETWEEN MOMMY AND DADDY:
THE CASE FOR RECOGNIZING
SPOUSAL EMOTIONAL DISTRESS CLAIMS
BASED ON DOMESTIC DECEIT
THAT INTERFERES WITH
PARENT-CHILD RELATIONSHIPS**

*Linda L. Berger**

Steve and Wendy married in 1990 and a daughter, Stephanie, was born eleven months later.¹ Even though Wendy knew that Stephanie was not Steve's daughter, she did not tell him until she challenged his paternity in divorce proceedings nearly three years later, after Steve sought sole custody of Stephanie. Wendy lied about the father, telling Steve that she had conceived Stephanie during a rape. She persuaded Steve to have a blood test to establish paternity, knowing that the test would prove Steve was not the biological father. Wendy finally admitted the truth during a deposition, telling Steve that Stephanie was the product of a love affair that had started before and continued throughout their marriage. After the family court ruled that Steve was still Stephanie's legal father, Steve

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1. These facts are based on *Steve H. v. Wendy S.*, 57 Cal. App. 4th 379, 380, 67 Cal. Rptr. 2d 90, 91 (Ct. App. 1997), *cert. granted*, 946 P.2d 817, 68 Cal. Rptr. 2d 859 (1997), *cert. dismissed*, 960 P.2d 510, 77 Cal. Rptr. 2d 706 (1998). About a year after the California Supreme Court granted review of the appellate court decision, the parties agreed to dismiss the petition for review, apparently as part of a settlement. Under the California Rules of Court, once review is granted the appellate opinion becomes "unpublished" and it has no precedential value in the California courts. *See* CAL. R. CT. 976 ("no opinion superseded by a grant of review . . . shall be published"); CAL. R. CT. 977 (an unpublished opinion "shall not be cited or relied on by a court or a party in any other action or proceeding").

sued Wendy for the emotional distress she caused in her effort to destroy his parental relationship with Stephanie.²

Steve filed his lawsuit in California, a state that allows spouses to sue one another and recognizes intentional infliction of emotional distress (IIED).³ The parties agreed that this story, if proved, showed that Wendy intentionally inflicted emotional distress upon Steve.⁴ Even though Steve stated a cause of action, both the trial and appellate courts found that public policy exempted such spousal emotional distress claims from the general rules.⁵ Steve could not sue for Wendy's adultery nor for her effort to destroy his parental relationship with Stephanie because of the statutory abolition of "heart balm" claims such as criminal conversation and alienation of affections.⁶ Steve could not sue for Wendy's lie after his custody request, nor could he sue after Wendy admitted the truth in the deposition because "[t]he law should not allow an emotional distress claim every time one party to a dissolution proceeding offers evidence or makes an assertion that upsets the other party."⁷ In addition, Steve could not sue for Wendy's fraud in creating a parent-child relationship because courts are reluctant to recognize that having a child can cause legally compensable damages.⁸ Finally, Steve could not sue for Wendy's fraud in attempting to destroy his parent-child relationship because it is considered to be in the "best interest" of the child to protect her from being caught in the middle of such litigation.⁹

2. In particular, Steve based his claim on Wendy's lying about being raped, inducing him to take a blood test, and concealing from him that he was not Stephanie's father. *See Steve H.*, 67 Cal. Rptr. 2d at 91-92.

3. *See id.* at 92.

4. *See id.* at 92, 98 n.1 (Vogel, J., dissenting).

5. *See id.* at 93-94.

6. Steve did not sue for Wendy's adultery, but the court used the policies underlying California's abolition of "heart balm" actions such as adultery as one of its reasons for rejecting Steve's claim. *See id.* at 95-96 (analogizing Steve's claim to an action for alienation of a child's affection).

7. *Id.* at 94-95. The court did not address the statutory privilege protecting communications made in the course of litigation, apparently because it was not raised. Had Steve chosen to claim that the statements Wendy made during the dissolution proceedings caused his emotional distress, the privilege would have barred his action. *See infra* Part III.B.

8. *See id.* at 92-93.

9. *See id.* at 93-94.

This Article discusses whether courts should recognize spousal IIED causes of action based on intentional lies that interfere with the establishment or the continuation of parent-child relationships. The Article begins with an overview of the currents in family law and tort law that converge in domestic tort actions. Next, it reviews the current status of a particular domestic tort: spousal emotional distress. It then examines the evolution of emotional distress claims based on interference with parent-child relationships, moving from California's early and continuing rejection of these claims to the very recent recognition of these claims by other states. Finally, it evaluates the arguments for and against allowing claims such as Steve's and concludes that one spouse's intentional and unjustified interference with a parent-child relationship should lead to the other spouse's liability for any resulting emotional distress.

I. CROSS-CURRENTS OF FAMILY LAW AND TORT LAW

Domestic torts lie at the intersection of family law and tort law, where the 1900s image of the family as an intensely private world still collides with the 1960s vision of marriage as the voluntary joinder of independent and equal personalities.¹⁰ At the turn of the century, the legal system's perceived role was to protect the family unit from intrusion, particularly from external threats of destruction caused by immorality. In the mid-century vision, the legal system's role was to protect the rights of each spouse to personal expression, sexual freedom, fault-free dissolution, and an equal share in property. Change came first in the laws regulating external disruption of family relationships. Subsequent changes occurred in the laws regulating tort liability and internal disruption of family relationships. The resulting convergence of cultural and legal changes made domestic torts possible while simultaneously making them suspect.

10. Viewing the family as a collective entity is consistent with a high degree of power in the parents, historically the father, as well as "a high degree of family privacy and autonomy and a minimum of state intervention in the allocation and exercise of power by family members." DAVID WESTFALL, *FAMILY LAW* 93 (1994). Viewing the family as a group of individuals accords greater recognition to the rights of the family members as individuals and results in "more frequent intervention by the state to protect those interests." *Id.*

At the turn of the century, the laws governing family relationships resembled modern tort law because they were based on fault.¹¹ Although interspousal immunity barred tort claims between spouses, the innocent partner could be compensated for a spouse's wrongdoing through a higher financial award upon divorce.¹² The wronged spouse could recover damages from third parties through common law causes of action (adultery and alienation of affections), and a wronged would-be spouse could also recover through a claim for breach of promise.¹³ These traditional causes of action, collectively known as "heart balm" claims, were based on a legal fiction that family members had protectable interests in one another's services.¹⁴

11. At the beginning of this century, "[t]he divorce decree . . . came to resemble a tort judgment, both being granted for the fault of the defendant causing harm to the plaintiff, and both being denied where the plaintiff either consented or was himself at fault." 1 HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 698 (2d ed. 1987).

12. *See id.*

13. The fourth "heart balm" action was seduction, a common law tort actionable by a parent against an individual for having sexual intercourse with a minor female. A loss of services or ability to render them was required to recover damages. *See* RESTATEMENT (SECOND) OF TORTS § 701 & cmt. c (1977). Adultery, once a crime whose tort version was known as criminal conversation, sought to recover damages from a third party who had sexual intercourse with a spouse. *See id.* § 685. Alienation of affections was a broader claim than adultery, seeking damages for the loss of marital affections, society and companionship of the other spouse, assistance, and services as well as the loss of a sexual relationship; an actual loss of affections was necessary to maintain the claim. *See id.* § 683 & cmts. c, f. These three actions could be brought only against a third party and so were not barred by interspousal immunity. Breach of promise was brought against the person who failed to become the spouse in breach of his or her promise and so this action could not be barred by interspousal immunity. *See id.* § 698 (stating no right of action against third person who interferes in betrothal).

There was no common law right of action by a parent for alienation of a child's affections. *See id.* § 699 & cmt. a (stating no action for mere alienation of affections of child). Only a few cases recognized such an action based on the emotional loss, but the common law did recognize a cause of action for interference with the parents' right to the services and earnings of a minor child. *See* Jeffery F. Ghent, Annotation, *Right of Child or Parent to Recover for Alienation of Other's Affections*, 60 A.L.R. 3d 931, 935 & § 5b (1999).

14. The laws protecting interests in family relationships grew out of early cases in which a master's economic interest in the status of his servants led to a right to recover damages for the loss of their services; this loss of service was the "gist of the legal wrong" in the common law family torts. FOWLER V.

The torts sought "heart balm," compensation for the damage done by lies and betrayals that destroyed family relationships, especially marriages. Beginning in the 1930s, critics claimed that these torts led to blackmail and extortion. Influenced by such criticism and by cultural changes that included more divorces, more obvious infidelity, and more recognition of personal autonomy, many states decided that family members should no longer get damages for these kinds of destruction of marital relationships.¹⁵ More than half the states now have statutes abolishing the heart balm claims. In other states, courts have abolished them by court decision.¹⁶

Related criticisms and the same cultural trends led to the most fundamental change in the laws governing family relationships: "no-fault" divorce.¹⁷ According to the critics, fault-based grounds for divorce led to fraud and collusion by agreeing spouses but did not preserve marriages or improve marital behavior.¹⁸ Instead of a long, bitter, and expensive process, no-fault divorce promised an easy factual finding—is the marriage broken?—followed by a seamless and equitable distribution of property.¹⁹ The adoption of no-fault

HARPER ET AL., *THE LAW OF TORTS* § 8.1, at 499-501 (2d ed. 1986).

15. The abolition of the "heart balm" claims was supported by increasing societal emphasis on personal choice, decriminalization of sexual activities, and skepticism about whether the law can remedy hurt feelings and enforce morality. *See id.*

16. *See* Ira Mark Ellman & Stephen D. Sugarman, *Spousal Emotional Abuse as a Tort?*, 55 MD. L. REV. 1268, 1296 (1996).

17. In 1969, California adopted the first state divorce code to eliminate fault-based grounds for divorce; by 1985, when South Dakota added no-fault to its list of fault-based grounds for divorce, every state had accepted "the concept that marriage failure is itself an adequate reason for marital dissolution." Herma H. Kay, *Beyond No-Fault: New Directions in Divorce Reform*, in *DIVORCE REFORM AT THE CROSSROADS* 6 (Stephen D. Sugarman & Herma H. Kay eds., 1990).

18. Fault-based divorce "bore no relation to the causes, consequences and purposes of divorce. It resulted in widespread hypocrisy, perjury or near perjury, and public contempt for the courts." CLARK, *supra* note 11, at 698; *see also* IRA MARK ELLMAN ET AL., *FAMILY LAW* 165-68 (2d ed. 1991).

19. The Uniform Marriage and Divorce Act (UMDA) was approved by the National Conference of Commissioners on Uniform State Laws in 1970 and amended in 1971 and 1973. *See* UNIF. MARRIAGE & DIVORCE ACT 9A U.L.A. 104 (West 1998). The sole ground for divorce in UMDA is "that the marriage is irretrievably broken." *Id.* The Conference decided that "[t]his standard will redirect the law's attention from an unproductive assignment of blame to a search for the realities of the marital situation." *Id.* The elimination of fault

divorce laws in the 1970s and 1980s did not abolish all consideration of marital fault. Rather, in many states, no-fault grounds for marriage dissolution were simply added to an existing list of fault grounds, and no-fault dissolution did not necessarily mean no-fault financial or child custody decisions. Today, most spouses can obtain a decree dissolving a marriage without first proving that their spouse was guilty of marital misconduct.²⁰ In states with laws similar to the Uniform Marriage and Divorce Act, property distribution and spousal support amounts also are determined "without regard to marital misconduct."²¹ Still, a number of states allow their divorce courts to consider fault when resolving financial issues.²² Moreover, marital misconduct can affect financial decisions in even pure no-fault jurisdictions because all states allow divorce courts to consider misconduct that has directly affected how much property is

extended to spousal support, property division, and child support. *See id.*

Twenty-five years after adoption of UMDA, the American Law Institute reconsidered whether divorce law should consider marital misconduct in setting the financial remedies at divorce. The Chief Reporter to the American Law Institute concluded "the difficulties with interspousal claims for emotional losses may caution against their recognition in any forum. Certainly, there is no reason for the dissolution law to invite the kind of claims with which the tort law has had such difficulty." Ira Mark Ellman, *The Place of Fault in a Modern Divorce Law*, 28 ARIZ. ST. L.J. 773, 802 (1996).

In 1983, the National Conference adopted the Uniform Marital Property Act. According to the authors, property distribution upon dissolution of a marriage would be "the handmaiden of no-fault divorce" if it were similar to property distribution upon dissolution of a partnership. *See* UNIF. MARITAL PROPERTY ACT 9A U.L.A. at 105 (West 1998). The act was designed to "recognize the respective contributions made by men and women during a marriage . . . by raising those contributions to the level of defined, shared and enforceable property rights at the time the contributions are made." *Id.* at 104.

20. All states allow a no-fault divorce to agreeing couples, and only a handful preclude a unilateral no-fault divorce. *See* Ellman & Sugarman, *supra* note 16, at 1276-77.

21. UNIF. MARRIAGE & DIVORCE ACT §§ 307, 308(b) (amended 1973), 9A U.L.A. (West 1998).

22. According to the categories established in a 1996 article, 20 states exclude fault entirely; 15 states are full-fault; five states are pure no-fault for property, almost pure no-fault for alimony; three states are almost pure no-fault; and seven are no-fault for property, full-fault for alimony. *See* Ellman, *supra* note 19, at 778-80. "Fault" also may be considered in child custody proceedings; bad conduct during the marriage may affect the custody decision, which will affect the relative child support amounts. *See, e.g.,* Ellman & Sugarman, *supra* note 16, at 1279 n.38.

available and misconduct that has increased one spouse's need for support.²³

As the laws governing marriage pulled away from compensating injuries caused by interference with the marital relationship, other areas of tort law moved towards recognizing more intangible injuries and more tenuous relationships.²⁴ Domestic torts were able to emerge only because the states began to reject the common law doctrine of interspousal immunity.²⁵ Until the early part of this century, interspousal immunity barred personal tort suits between spouses.²⁶ Immunity was first justified by the English common law fiction that the two persons in the marriage are one; therefore, you could not sue

23. See Ellman, *supra* note 19, at 776-77.

24. "Marriage has become the only contract out of which a breaching party may walk with impunity . . . at the very time when so many other areas of law moved from caveat emptor to an extraordinary, unprecedented concern for the economic underdog." Harry D. Krause, *On the Danger of Allowing Marital Fault to Re-Emerge in the Guise of Torts*, 73 NOTRE DAME L. REV. 1355, 1360 (1998); see also Nancy Levit, *Ethereal Torts*, 61 GEO. WASH. L. REV. 136, 146 (1992) (noting that tort law increasingly has recognized harms to relationship interests "in a variety of contexts, including familial, business, trust, and employment associations"); Paula C. Murray & Brenda J. Winslett, *The Constitutional Right to Privacy and Emerging Tort Liability for Deceit in Interpersonal Relationships*, 1986 U. ILL. L. REV. 779 (1986) (examining the growing number of lawsuits based on deceit between sexual partners).

25. An early law review article recommended that all personal injury actions between spouses should be subject only to substantive limits resulting from the relationship between the parties. See William E. McCurdy, *Torts Between Persons in Domestic Relation*, 43 HARV. L. REV. 1030, 1055 (1930). The next major article addressing domestic torts was Victor E. Schwartz, *The Serious Marital Offender: Tort Law as a Solution*, 6 FAM. L.Q. 219 (1972). As part of a no-fault divorce package, Professor Schwartz proposed that legislatures adopt a tort cause of action for "abuse of the marital relationship" by a "serious marital offender." *Id.* at 222. Professor Schwartz proposed the tort to encourage states to adopt no-fault divorce laws, believing that the main obstacle to enactment was no-fault's inability to deal with such offenders. See *id.* at 222, 232. The proposed cause of action would have encompassed battery and IIED.

26. See Carl Tobias, *Interspousal Tort Immunity in America*, 23 GA. L. REV. 359 (1989) for a history and analysis of interspousal tort immunity. See also Wayne F. Foster, Annotation, *Modern Status of Interspousal Tort Immunity in Personal Injury and Wrongful Death Actions*, 92 A.L.R. 3d 901 (1979) (examining whether the common law rule of interspousal tort immunity is still in effect in particular jurisdictions).

the other half of yourself.²⁷ Beginning in 1844, the states enacted the Married Women's Acts, which gave a married woman a separate legal identity and separate ownership of her own property.²⁸ Under these acts, a wife could sue her husband for any tort against her property interests and for torts involving only pecuniary loss.²⁹ Because the statutes appeared to be intended to give spouses equal standing, courts held that a husband could also sue his wife.³⁰ Despite these statutes, most American courts continued to uphold interspousal immunity for torts based on personal injury on the grounds that their legislatures had not intended the Married Women's Acts to affect personal torts not involving property.³¹ Thus, neither spouse could recover from the other for torts such as assault and battery, false imprisonment, defamation, malicious prosecution, or negligence causing only personal injury.³² In addition to legislative intent, courts found new arguments to support interspousal immunity: the preservation of marital harmony against the threat posed by personal tort actions between husband and wife, the possibility of trivial actions for petty annoyances, the danger of fictitious or fraudulent claims, and the availability of other remedies through divorce and

27. Under the common law doctrine of the legal identity of husband and wife, "[t]he legal existence of the wife was regarded as suspended for the duration of the marriage and merged into that of the husband, so that she lost the capacity to contract for herself or to sue or be sued without joinder of the husband as plaintiff or defendant." RESTATEMENT (SECOND) OF TORTS § 895F cmt. b (1979). Because the husband was entitled to all of the wife's choses in action and became liable for the torts of his wife, committed either before or during the marriage, it was impossible to maintain a tort action between husband and wife:

If the man committed the tort, the woman's right would be a chose in action that the husband could reduce to possession, and he must be joined as plaintiff against himself and the proceeds recovered must be paid to him. If the wife committed the tort, the husband would be liable to himself for it, and must be joined as a defendant in his own action and pay his own judgment. As a result, it was held that neither spouse could maintain an action against the other for any tort, whether it was committed before or during the marriage.

Id.

28. *See id.* cmt. c.

29. *See id.*

30. *See id.*

31. *See id.*

32. *See id.*

criminal proceedings.³³ In adopting a sweeping abolition of interspousal immunity, the authors of the Restatement said these policy reasons were “poor justifications for denying all remedy for a serious and genuine wrong.”³⁴ Beginning in 1914, the states began to abolish interspousal immunity by statute or by court action.³⁵ By 1997, forty-five states and the District of Columbia had completely abandoned interspousal immunity, and five states had abrogated the immunity in limited circumstances.³⁶

The states first to abolish interspousal immunity did so at a time when tort law did not compensate intentional emotional injury. The 1934 Restatement of the Law of Torts did not allow recovery for such injury.³⁷ By 1948, the Restatement authors had reversed their position and included the independent tort of IIED.³⁸ Shortly

33. *See id.* cmt. d.

34. *Id.* The Restatement reflects the status of interspousal immunity in most states today:

(1) A husband or wife is not immune from tort liability to the other solely by reason of that relationship.

(2) Repudiation of general tort immunity does not establish liability for an act or omission that, because of the marital relationship, is otherwise privileged or is not tortious.

Id. The Restatement authors believed that marriage should broaden “[t]he concept of consent to an intentional physical contact” and that “[t]he intimacy of the family relationship may also involve some relaxation in the application of the concept of reasonable care.” *Id.* cmt. h; *see also id.* § 895G cmt. k (discussing how family life may relax some standards applicable to third parties).

35. *See* Tobias, *supra* note 26, at 359 (noting that seven jurisdictions abolished interspousal immunity between 1914 and 1920, there was a gradual erosion from 1920 to 1950, and immunity was transformed from a majority to a minority rule between 1970 and 1989).

36. *See* Stacey A. Kawasaki, *Interspousal Torts: A Procedural Framework for Hawai‘i*, 19 U. HAW. L. REV. 377, 381-82 (1997); *see also* LEONARD KARP & CHERYL L. KARP, DOMESTIC TORTS: FAMILY VIOLENCE, CONFLICT AND SEXUAL ABUSE app. B, at 691-94 (Supp. 1999).

37. *See* RESTATEMENT OF TORTS § 46 (1934) (stating that with exceptions for assault and insult by common carriers, “conduct which is intended or which though not so intended is likely to cause only a mental or emotional disturbance to another does not subject the actor to liability (a) for emotional distress resulting therefrom, or (b) for bodily harm unexpectedly resulting from such disturbance”).

38. *See* RESTATEMENT OF THE LAW, SUPPLEMENT, TORTS § 46 (1948) (“One who, without a privilege to do so, intentionally causes severe emotional distress to another is liable (a) for such emotional distress, and (b) for bodily

thereafter, state courts began recognizing the tort despite “the fear of fictitious or trivial claims, distrust of the proof offered, and the difficulty of setting up any satisfactory boundaries to liability.”³⁹ The 1948 version, which based liability on intentionally causing severe emotional distress without a privilege to do so, was revised in the 1965 version of the Restatement to base liability on extreme and outrageous conduct.⁴⁰ Through this change, the purposes of the tort became protecting the interest in freedom from emotional distress and condemning and punishing bad behavior.⁴¹ By 1993, forty-seven states had adopted the tort.⁴²

The abolition of interspousal immunity and the recognition of IIED made the emergence of domestic torts possible. Combined with the recognition of domestic violence as a crime,⁴³ these family and tort law movements allowed courts to imagine that a spouse could recover for injury inflicted by a marital partner. Yet, despite the nearly unanimous abolition of interspousal immunity and adoption of IIED, many courts have severely limited the circumstances in which spouses may sue spouses.⁴⁴ This hesitancy is linked to the historical “view that such incidents are family affairs and not the true business of the legal system”⁴⁵ and to the more modern view that

harm resulting from it.”).

39. RESTATEMENT (SECOND) OF TORTS § 46 cmt. b (1965).

40. *See id.* § 46 (1965). The current Restatement formula is discussed in more detail in section II.C.1.

41. *See* Daniel Givelber, *The Right to Minimum Social Decency and the Limits of Evenhandedness: Intentional Infliction of Emotional Distress by Outrageous Conduct*, 82 COLUM. L. REV. 42, 54 (1982) (commenting that the emphasis on the outrageousness element means that the tort’s focus is on punishment rather than on compensation).

42. *See* *Twyman v. Twyman*, 855 S.W.2d 619, 621-22 (Tex. 1993).

43. Violent acts committed between spouses have only been considered crimes during the last twenty years, while the same violent acts committed against strangers have long been criminal. *See* Leonore M.J. Simon, *A Therapeutic Jurisprudence Approach to the Legal Processing of Domestic Violence Cases*, 1 PSYCHOL. PUB. POL’Y & L. 43, 44 (1995).

44. Some commentators have suggested what amounts to a return to interspousal tort immunity for all claims except those resulting from criminal conduct. *See* Ellman & Sugarman, *supra* note 16, at 1335. These authors conclude that actionable spousal torts should include only those where the tortious behavior is also a criminal act such as battery, certain assaults, and false imprisonment. *See id.* at 1343.

45. Simon, *supra* note 43, at 46. The traditional public/private distinction

spouses are free actors whose sexual and moral conduct should not be regulated by the state.⁴⁶

II. CURRENT STATUS OF SPOUSAL IIED CLAIMS BASED ON CONDUCT THAT HARMS THE MARITAL RELATIONSHIP⁴⁷

Outside marriage, an IIED claim can arise without physical manifestations and without physical contact. In other words, a cause of action can be based on severe emotional distress and extreme and outrageous words or nontouching conduct.⁴⁸ Once interspousal immunity was abolished, it seemed logical to assume that spouses could sue each other for any tort that would be actionable between strangers.⁴⁹ Once a state had recognized the independent tort of IIED, it

has assumed a separation between the family and the state, marking a zone in which "customary regulations governing contract, torts, and criminal behavior have not applied" and shielding private relations from public oversight. See Deborah L. Rhode & Martha Minow, *Reforming the Questions, Questioning the Reforms: Feminist Perspectives on Divorce Law*, in *DIVORCE REFORM AT THE CROSSROADS*, *supra* note 17, at 192. Recent reforms that have minimized state interference in the termination of marriage grow out of the same tradition. See *id.* at 191, 192.

46. See Stephen D. Sugarman, *Introduction*, in *DIVORCE REFORM AT THE CROSSROADS*, *supra* note 17, at 1, 2.

47. Although in most cases involving emotional distress the spouse brings the claim in connection with a dissolution proceeding, either in the same proceeding or in a separate tort action, no legal barrier appears to prevent a spousal emotional distress claim by a still-married spouse; of course, few happily married spouses would bring such an action or could establish severe emotional distress. Usually, a spouse will not contemplate a tort action until filing for divorce. See Clare Dalton, *Domestic Violence, Domestic Torts and Divorce: Constraints and Possibilities*, 31 *NEW ENG. L. REV.* 321, 363 (1997).

48. See *RESTATEMENT (SECOND) OF TORTS* § 46 cmt. k (1965). Even outside the spousal context, compensable injuries for intentional or negligent infliction of emotional distress historically were tied to physical impact, physical manifestations of injury, or other proxies for emotional distress. See Levit, *supra* note 24, at 170-72.

49. As a result, articles about domestic torts began to appear in publications reaching family lawyers, and in 1989, a lawyer and a psychologist published a practitioners' guide to domestic torts. See KARP & KARP, *supra* note 36. These authors described "an explosion of new domestic tort actions" as a result of "[t]he weakening of family immunities . . . accompanied by increasing numbers of marital dissolutions and a realization that existing legal remedies for certain types of marital misconduct are inadequate." *Id.* at ix.

The articles included Doris J. Freed & Timothy B. Walker, *Family Law in the Fifty States: An Overview*, 20 *FAM. L.Q.* 439, 586 (1987) (identifying

seemed logical to assume that spouses could sue each other for such distress.⁵⁰ This logic came easily to state courts in only two categories of cases: (1) where the spousal victim suffered physical injury or the spousal tortfeasor committed physical violence,⁵¹ and (2) where state statutes provided explicit civil remedies for violations such as eavesdropping and false allegations of child abuse.⁵² The courts less easily reached the seemingly logical conclusion that spouses could now sue each other for IIED absent physical harm, physical violence, or a statutory remedy.⁵³

domestic torts as an emerging trend in family law); Robert G. Spector, *Marital Torts*, 15 FAM. L. REP. 3023 (1989) (describing various recent cases dealing with marital torts); Robert G. Spector, *Marital Torts: Actions for Tortious Conduct Occurring During the Marriage*, 5 AM. J. FAM. L. 71 (1991) (describing an "explosion of cases involving torts and the marital relationship").

50. Articles focusing specifically on spousal IIED causes of action include: Constance W. Cole, *Intentional Infliction of Emotional Distress Among Family Members*, 61 DENV. L.J. 553 (1984) (favoring the recognition of tort claims for outrageous marital conduct that leads to serious emotional injury); Leonard Karp, *Spousal Infliction of Emotional Distress . . . Beyond the Normal Ebb and Flow of Married Life*, 12 J. AM. ACAD. MATRIM. L. 309 (1994) (describing a growing national trend of tort claims for emotional distress arising as part of divorce actions); Bradley A. Case, Note, *Turning Marital Misery into Financial Fortune: Assertion of Intentional Infliction of Emotional Distress Claims by Divorcing Spouses*, 33 U. LOUISVILLE J. FAM. L. 101 (1995) (advocating recognition of spousal IIED claims and hearing them in divorce proceedings); Ellman & Sugarman, *supra* note 16.

51. As domestic violence was recognized as grounds for criminal sanctions, it naturally became the basis for civil actions not only for assault and battery but also for emotional distress. *See, e.g., Dalton, supra* note 47; Leonard Karp & Cheryl L. Karp, *Beyond the Normal Ebb and Flow . . . Infliction of Emotional Distress in Domestic Violence Cases*, 28 FAM. L.Q. 389 (1994); Merle H. Weiner, *Domestic Violence and the Per Se Standard of Outrage*, 54 MD. L. REV. 183 (1995).

52. *See, e.g., M.G. v. J.C.*, 603 A.2d 990, 995 (N.J. Super. Ct. Ch. Div. 1991) (eavesdropping), *overruled on other grounds by Smith v. Whitaker*, 713 A.2d 20, 34 (N.J. Super. App. Div. 1998) (wrongful death); *Begier v. Strom*, 46 Cal. App. 4th 877, 54 Cal. Rptr. 2d 158 (Ct. App. 1996) (child abuse). Although few IIED cases have been based on civil remedies explicitly provided by statute, it seems impossible to reject a cause of action on public policy grounds when the state legislature has decided to allow the cause of action.

53. The authors of a practitioners' guide agree that most successful spousal emotional distress claims involve actual or threatened physical abuse but note that some courts have allowed claims absent severe physical maltreatment in three general categories: transmission of sexual diseases, interference with custodial rights, and conduct intended to cause severe psychological harm. *See*

Because of the abolition of interspousal immunity and the adoption of IIED, courts could bar spousal IIED claims outright only upon finding compelling public policy reasons for doing so. Some courts claimed to have found them, refusing to recognize spousal IIED claims at all. Other courts found that public policy raised the standard for outrageous conduct in marriage: conduct that would be outrageous between strangers might not be outrageous between spouses.⁵⁴ Courts that recognized the possibility that a spouse could state an IIED cause of action refused to allow IIED claims based on what judges believed was all too common in marriage: lies and betrayals, such as adultery, and harsh words and actions, such as insults and outbursts.⁵⁵

Rejecting arguments that marriage implies consent to physical contact or privilege to abuse, most states now agree that a physically

KARP & KARP, *supra* note 36, § 1.24, at 53-55 (Supp. 1999).

54. Compare *Hakkila v. Hakkila*, 812 P.2d 1320, 1326 (N.M. Ct. App. 1991) (setting threshold of outrage in marriage high enough to prevent invasive litigation of meritless claims; insults and outbursts fail to cross the threshold), with *Weiner*, *supra* note 51, at 183-85 (discussing a successful civil suit for IIED based on two obscene phone calls made to a woman by the husband of a co-worker).

55. If a finding of outrage must involve conduct "that goes well beyond the common complaints divorcing spouses have about one another, then neither adultery alone nor deceitful adultery can qualify." Ellman & Sugarman, *supra* note 16, at 1317. Secret affairs and bullying behavior "may be wrongful, unseemly, and nasty—they certainly explain why the complainant would want a divorce. But in the end, they amount to sufficiently customary marital misconduct that, even if deplorable, simply does not rise to the level of 'outrageousness'—whatever that might be." *Id.* (referring to *Ruprecht v. Ruprecht*, 599 A.2d 604 (N.J. Super. Ct. Ch. Div. 1991), and *Hakkila v. Hakkila*, 812 P.2d 1320, 1325 (N.M. Ct. App. 1991)); see also *Strauss v. Cilek*, 418 N.W. 2d 378 (Iowa Ct. App. 1987) (holding wife's affair with husband's friend not outrageous enough in action filed by husband against friend); *Whittington v. Whittington*, 766 S.W.2d 73, 75 (Ky. Ct. App. 1989) (finding "ordinary fraud and adultery can never reach the status of outrageous conduct" because they are routine causes of divorce litigation and relief is available under Kentucky's domestic relations laws); *Poston v. Poston*, 436 S.E.2d 854, 856 (N.C. Ct. App. 1993) (finding evidence of repeated adultery not sufficient to show extreme and outrageous conduct); *Ruprecht v. Ruprecht*, 599 A.2d 604, 607-08 (N.J. Super. Ct. Ch. Div. 1991) (holding eleven-year adulterous affair not sufficiently extreme and outrageous to satisfy the conduct element of an emotional distress cause of action); *Alexander v. Inman*, 825 S.W.2d 102, 105 (Tenn. Ct. App. 1991) (extramarital affairs inappropriate and unacceptable but not beyond the bounds of decency).

abusive spouse should be liable both civilly and criminally under the same standard of care as an unmarried individual. Thus, battery claims are generally available to spouses who suffer physical injury at the hands of their spouse.⁵⁶ When a claim for emotional distress accompanies a claim for battery or replaces a time-barred claim for battery, it is usually allowed to proceed.⁵⁷ However, spousal claims for emotional distress based on IIED alone or other torts such as defamation, invasion of privacy, and fraud, are less successful.

These so-called pure emotional distress claims are less often successful because of policy arguments similar to those once used to support interspousal immunity and to reject IIED. The arguments start from the premise that it is unseemly for courts to intrude into the family sphere and that it is inappropriate or impossible for courts to try to remedy the harms that occur there.⁵⁸ Thus, courts seek to avoid inquiry into "private" matters of sex, marriage, and family life, and to preserve marital harmony by requiring spouses to settle these

56. *See, e.g.,* *Cater v. Cater*, 846 S.W.2d 173 (Ark. 1993) (upholding \$350,000 award for spousal battery); *Self v. Self*, 58 Cal. 2d 683, 376 P.2d 65, 26 Cal. Rptr. 97 (1962) (abolishing interspousal immunity and permitting spousal battery claim); *Burns v. Burns*, 518 So. 2d 1205 (Miss. 1980) (same); *Waite v. Waite*, 618 So. 2d 1360 (Fla. 1993) (abandoning interspousal immunity in case involving battery with machete); *Nobel v. Nobel*, 761 P.2d 1369 (Utah 1988) (allowing personal injury claim for wife shot in the head); *Townsend v. Townsend*, 708 S.W.2d 646 (Mo. 1986) (abolishing interspousal immunity and permitting wife to recover for being shot in the back).

Although spousal battery claims are usually permitted, they are infrequently asserted. *See* Ellman & Sugarman, *supra* note 16, at 1291-93 (speculating on the reasons for this result).

57. *See* *Giovine v. Giovine*, 663 A.2d 109, 119 (N.J. Super. Ct. App. Div. 1995) (stating that barred battery claims may provide relevant evidence of emotional distress).

58. A primary rationale for interspousal tort immunity was that acts within the family are "private" and not within the realm of the judiciary. This now seems an equally strong reason for some courts' reluctance to recognize IIED based on conduct occurring in the home. *See* *Weiner*, *supra* note 51, at 208; *see also* *Murray & Winslett*, *supra* note 24. As for the rationale that some familial harms cannot be remedied, *see* *Richard P. v. Superior Court*, 202 Cal. App. 3d 1089, 1094, 249 Cal. Rptr. 246, 249 (Ct. App. 1988) (barring a tort action against natural father of children born during plaintiff's marriage is barred because it is beyond any effective legal remedy); Ira Mark Ellman, *The Place of Fault in a Modern Divorce Law*, 28 ARIZ. ST. L.J. 773, 801-02 (stating that the law cannot compensate unhappy spouses for the emotional losses resulting from a failed marriage).

matters between themselves. When children are involved, the policies of safeguarding the best interests of the children and the legislatively approved rules for child support join the privacy and harmony concerns.⁵⁹ In addition, courts express concern about spouses colluding for insurance purposes or about a single vengeful spouse plotting to file fraudulent claims.⁶⁰ Believing that marital emotional distress is widespread and that emotional distress damages are easy to plead, courts worry that too many claims will be based on trivial or frivolous domestic disputes.⁶¹ Because emotional distress is an unavoidable part of many divorces, courts point to the difficulty of proving causation, that is, that the emotional distress was caused by particular spousal conduct rather than by the whole process of divorce.⁶² In states with statutes precluding heart balm actions and allowing no-fault divorce, some courts believe that allowing spouses to sue each other in tort is incompatible with the statutory abolition of the heart balm torts or the statutory adoption of fault-free provisions for dissolution, spousal support, and property distribution.⁶³ In states where courts allow fault to be considered in some dissolution decisions, the courts believe that the divorce process provides sufficient remedies and that allowing IIED claims raises the possibility of double recovery.⁶⁴ Finally, when spousal emotional distress claims are

59. See *Richard P.*, 202 Cal. App. 3d at 1095-96, 249 Cal. Rptr. at 250.

60. See, e.g., *Larson v. Dunn*, 460 N.W.2d 39, 47 (Minn. 1990) (expressing fear that the new tort of interference with custodial rights might be used as "a weapon for revenge and continued hostility").

61. See, e.g., *Hakkila v. Hakkila*, 812 P.2d 1320, 1324-25 (N.M. Ct. App. 1991) (expressing fear that claims will be based on "typical marital disputes, taxing judicial resources").

62. See, e.g., *id.* at 1325; *Raftery v. Scott*, 756 F.2d 335, 341 (4th Cir. 1985) (Michael, J., concurring) (stating that because "it is hard to envision any situation between two parties more likely to create emotional distress than the deterioration of the domestic relationship between a husband and wife," it is a given that actions by a spouse "in derogation of the marital relationship will produce an emotional distress in the other spouse").

63. See *Doe v. Doe*, 519 N.Y.S.2d 595, 597-98 (N.Y. Sup. Ct. 1987) (stating that plaintiff cannot circumvent no-fault by attempting to obtain a division of marital property based on fault); *Koestler v. Pollard*, 471 N.W.2d 7, 12 (Wis. 1991) (barring an IIED action by a husband against the biological father of a child born during the marriage on the grounds that allowing it to proceed would undermine the policy behind statutory abolition of the action for criminal conversation).

64. See *Twyman v. Twyman*, 855 S.W.2d 619, 625 (Tex. 1993).

based on statements made during dissolution proceedings, allowing them to proceed may conflict with the policy of protecting communications in judicial proceedings to safeguard access to the courts.⁶⁵

A. Recognition Compelled by Logic

Compelled by the logic inherent in abrogating interspousal immunity and recognizing IIED, the Maine, Oregon, and Texas Supreme Courts have recognized emotional distress claims based on conduct occurring in a marital relationship.⁶⁶ Although the Texas opinion recognized that such a claim could be made, the claim in that lawsuit failed to satisfy the outrageous conduct element of the tort.⁶⁷ The element was satisfied in the Oregon and Maine lawsuits by alleging conduct that included battery.⁶⁸ Following the same logical path, a number of lower state courts have recognized that spousal emotional distress claims can be stated, either in a dissolution proceeding or in a separate action, or that they have been stated in a particular case, usually those involving physical contact or physical injury.⁶⁹

The Maine Supreme Court decision typifies the outcome in cases involving battery. In *Henriksen v. Cameron*,⁷⁰ a former wife sued her former husband for IIED based on physical violence

65. See *infra* Part IV.

66. See *Henriksen v. Cameron*, 622 A.2d 1135 (Me. 1993); *Davis v. Bostick*, 580 P.2d 544 (Or. 1978); *Twyman*, 855 S.W.2d 619.

67. See *Twyman*, 855 S.W.2d at 620-21.

68. The Oregon Supreme Court recognized an IIED cause of action in a lawsuit involving repeated physical violence that occurred after the parties separated but before their divorce. See *Davis*, 580 P.2d 544. The complaint sufficiently alleged outrageous conduct based on allegations that the husband broke his wife's nose, choked her, made threatening and abusive phone calls to her home and office, threatened to kill her and her male friends, and destroyed property. See *id.* at 545-46; see also *Henriksen*, 622 A.2d 1135 (allowing IIED claim against former husband who was physically abusive during the marriage).

69. See *Koepke v. Koepke*, 556 N.E.2d 1198 (Ohio Ct. App. 1989) (stating IIED can and should be pursued in a separate action). But see *Whelan v. Whelan*, 588 A.2d 251 (Conn. Super. Ct. 1991) (stating that IIED is a viable claim between spouses); *Ruprecht v. Ruprecht*, 599 A.2d 604 (N.J. Super. Ct. Ch. Div. 1991) (holding that a spouse may sue the other in a divorce action for IIED even in the absence of physical injury).

70. 622 A.2d 1135 (Me. 1993).

accompanying verbal abuse during the marriage.⁷¹ The wife did not plead causes of action for assault and battery, apparently because the six assaults and three rapes she alleged were barred by the statute of limitations for assault and battery.⁷² At least one of the incidents occurred within the statute of limitations for IIED.⁷³ Although Maine had abolished interspousal immunity in an earlier decision, the court said that the "special nature of the marital relationship" might provide a privilege for some conduct between husband and wife.⁷⁴ The court stated this is due to "the mutual concessions that may be implicit in the marital relationship . . . even though such conduct as between persons not married to each other may not be so regarded."⁷⁵ Despite the possibility of such privilege, the court held that physical violence, accompanied by verbal abuse, intended to inflict emotional distress is not immune merely because the parties were married to each other when that violence occurred.⁷⁶ The court rejected various public policy arguments. First, in a case brought after a divorce, "there is clearly no marital harmony remaining to be preserved."⁷⁷ Second, the threat of excessive and frivolous litigation intruding into the marital lives of the parties is safeguarded by the required showing of extreme and outrageous conduct.⁷⁸ Third, the possibility of double recovery does not exist because no other provisions of Maine law provided compensatory relief for such injury.⁷⁹

In *Twyman v. Twyman*,⁸⁰ a divided Texas Supreme Court recognized the tort of IIED and that it could occur in the marital context.⁸¹

71. *See id.* at 1137.

72. *See id.* at 1142.

73. The appellate court approved the trial court's allowing evidence of an earlier battery on the theory that it was introduced for the purposes of establishing the defendant's intent and the plaintiff's reasonableness in believing any threats made by the defendant. *See id.* at 1143.

74. *Id.* at 1138.

75. *Id.* (quoting *MacDonald v. MacDonald*, 412 A.2d 71, 75 n.5 (Me. 1980)).

76. *See id.*

77. *Id.* at 1139.

78. *See id.* at 1139-40.

79. *See id.* at 1140.

80. 855 S.W.2d 619 (Tex. 1993).

81. *See id.* at 624. The Texas Supreme Court disapproved of the holding in *Chiles v. Chiles*, 779 S.W.2d 127 (Tex. App. 1989), which had refused to recognize IIED as a separate cause of action in a divorce suit on the grounds that

After expressly adopting IIED and noting that Texas had abolished interspousal immunity as to any cause of action in 1987, the plurality opinion concluded without further explanation that no legal impediment existed to bringing the tort claim in a divorce action.⁸² Mrs. Twyman included her claim for emotional harm in her divorce petition, but did not specify whether it was based on negligent or IIED. She claimed that her husband "intentionally and cruelly" attempted to engage her in sadomasochistic sexual acts even though he knew that she had been raped at knifepoint before their marriage.⁸³ The trial court awarded her \$15,000 for emotional distress, apparently on the basis of negligent infliction of emotional distress.⁸⁴ The court of appeals affirmed, holding that the wife could recover for the husband's negligent infliction of emotional distress.⁸⁵ Because it had recently refused to adopt negligent infliction of emotional distress as an independent tort, the Texas Supreme Court remanded for a new trial on the IIED cause of action.⁸⁶ Turning to what it viewed as the more difficult question of when the tort claim must be brought, the court encouraged joinder of tort claims with the divorce action to

doing so would revive the shortcomings associated with fault grounds for divorce. See *Twyman*, 855 S.W.2d at 624 n.15. For a detailed analysis of *Twyman*, see 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). For a detailed analysis of *Chiles*, see David Pfeuffer, Note, *Chiles v. Chiles: Divorce, Torts, and Scandal - Texas Style*, 42 BAYLOR L. REV. 309 (1990).

82. See *Twyman* 855 S.W.2d at 624. Five members of the court agreed on reversing the judgment of the court of appeals, which had been based on recently overruled precedent recognizing a negligent infliction of emotional distress cause of action. Three justices formed a plurality recognizing IIED in the marital context and remanding for a new trial. A fourth justice would have recognized IIED but not in the marital context. Two justices would not have recognized IIED at all. Two more judges would have recognized IIED in the marital context but would have affirmed the court of appeals judgment. See *id.* at 622 n.4. Distinguishing *Davis v. Bostick* and *Henriksen v. Cameron* as involving physical abuse and threats, the justice who would have recognized IIED but not in the marital context said that emotional distress resulting from physical attack or threat of attack is already compensable under other tort theories. See *id.* at 628 (Phillips, C.J., concurring and dissenting).

83. See *id.* at 620-21 & n.1.

84. See *id.*

85. See *id.*

86. See *id.* at 625-26.

avoid two trials.⁸⁷ The court also cautioned trial courts to guard against double recovery, a possibility since Texas allows the fault of the parties to be considered in dividing the marital estate; thus, theoretically a spouse could recover tort damages and a disproportionate share of the community estate based on the same conduct.⁸⁸

B. Rejection Based on Public Policy

The highest state courts of New York and South Dakota have expressly rejected a spousal IIED cause of action on public policy grounds, as have several intermediate appellate courts.⁸⁹ In *Weicker v. Weicker*,⁹⁰ a New York Court of Appeals case, the court held that public policy precluded causes of action growing out of matrimonial disputes. A woman sued her husband and his purported new wife for intentional infliction of mental distress and for injunctive relief to prevent the defendants from holding themselves out to be husband and wife.⁹¹ The plaintiff claimed that she suffered emotional distress

87. *See id.* at 624-25.

88. *See id.* Several years later, the Texas Supreme Court held that a spouse could not bring a separate and independent tort action for actual fraud and punitive damages based on deprivation of community assets; instead, such fraud should be considered in the division of community property. *See Schlueter v. Schlueter*, 975 S.W.2d 584 (Tex. 1998). Unlike IIED, the court said that a wronged spouse has an adequate remedy for such fraud through the "just and right" property division upon divorce. *See id.* at 587-88. The majority distinguished the result in *Twyman* on the basis that redress was not available through the divorce action for intentional torts involving personal injuries; the dissent disagreed, saying redress for personal injuries is available through uneven division of the community estate. *See id.* at 590-91 (Hecht, J., dissenting).

89. *See, e.g.,* *Browning v. Browning*, 584 S.W.2d 406 (Ky. Ct. App. 1979). In *Browning*, a husband sued his wife for IIED and her lover for alienation of affections. The court held that one spouse may not sue the other for emotional distress damages caused by "openly consorting" with another party. The court declined to recognize IIED without physical contact in any context. However, the case is sometimes cited in support of a public policy exception for IIED in the marital context because of its statements that "public policy would not be served by authorizing the recovery of damages under the circumstances alleged" and that "the morals of mankind are more perfectly judged by a court having a final and eternal jurisdiction." *Id.* at 408; *see also* *Koestler v. Pollard*, 471 N.W.2d 7, 12 (Wis. 1991) (barring an IIED action because allowing it would undermine the policy behind statutory abolition of heart balm claims).

90. 237 N.E.2d 876 (N.Y. 1968).

91. *See id.* at 876-77.

because her husband procured a Mexican divorce decree and "married" another woman, and that the couple then held themselves out to be husband and wife. Without elaboration, the New York Court of Appeals held that public policy barred an IIED claim that related to a "dispute arising out of matrimonial differences."⁹² The wife's claim, the court said, "would result in a revival of evils not unlike those which prompted the Legislature in 1935 to outlaw actions for alienation of affections and criminal conversation."⁹³

In *Pickering v. Pickering*,⁹⁴ the South Dakota Supreme Court rejected spousal emotional distress and fraud claims based on "conduct which leads to the dissolution of a marriage," such as a wife's revelation to her husband that he was not the father of her child.⁹⁵ In *Pickering*, Mrs. Pickering had an affair with a co-worker and became pregnant; she then seduced her husband so that he would believe he was the father.⁹⁶ About four months after the birth of her daughter, Mrs. Pickering told her husband the truth.⁹⁷ Mr. Pickering filed for divorce and sued Mrs. Pickering for fraud and IIED; he sued his wife's lover for IIED and alienation of affections.⁹⁸ In addition to maternity and child care expenses, Mr. Pickering sought damages for the "untold humiliation, embarrassment, and emotional scarring" that he suffered because he had been kept in the dark and had told people that he was the child's father.⁹⁹

The majority affirmed the dismissal of all the causes of action except the one for alienation of affections against the lover.¹⁰⁰

92. *Id.* at 876-77.

93. *Id.* at 877. The court said the request for injunctive relief was barred by the same public policy and because such decrees in domestic affairs cannot be enforced. *See id.* New York courts have construed *Weicker* to proscribe spousal claims for IIED only when the basis for the claim is "a mere matrimonial dispute." *See* *Murphy v. Murphy*, 486 N.Y.S.2d 457, 459 (N.Y. App. Div. 1985) (affirming finding of outrageous conduct on evidence of threats, use of force, assaults, and general abusive conduct between unmarried cohabitants, but holding that the circumstances did not constitute a mere matrimonial dispute).

94. 434 N.W.2d 758 (S.D. 1989).

95. *Id.* at 761.

96. *See id.* at 759-60.

97. *See id.* at 760.

98. *See id.*

99. *See id.* at 761 & n.1.

100. *See id.* at 763.

Noting that South Dakota provides a remedy for such a claim against a third party, the court held that an IIED claim against a spouse "should be unavailable as a matter of public policy when it is predicated on conduct which leads to the dissolution of a marriage."¹⁰¹

The court also barred the husband's actions for fraud and deceit since they were beyond any effective legal remedy and thus an inappropriate subject matter for court intervention; in addition, allowing it to proceed might cause significant harm to the child.¹⁰² In his partial dissent, Justice Henderson wrote that he would allow the husband to bring an IIED action against the lover but that

where man and wife are involved in a marriage relationship, there could always exist a tort for intentional infliction of emotional distress where they had an argument. It could be over the family dog, who takes out the garbage, who forgot to pay the bill, or who is spending too much money.¹⁰³

Finally, in *Steve H. v. Wendy S.*,¹⁰⁴ the most comprehensive opinion rejecting a spousal emotional distress cause of action on the basis of public policy, the California Court of Appeal for the Second District decided to bar an IIED claim based on the wife's attempt to terminate the husband's parental rights during a dissolution proceeding.¹⁰⁵ The four public policy grounds for this decision—the inappropriateness of compensation for the creation of a close relationship with a child,¹⁰⁶ the possibility of harm to the best interests of the

101. *Id.* at 761. Again in 1999, the South Dakota Supreme Court refused to abolish the statutorily derived cause of action for alienation of affections. See *Veeder v. Kennedy*, 589 N.W.2d 610 (S.D. 1999).

102. See *Pickering*, 434 N.W.2d at 761-62 (relying on *Richard P. v. Superior Court*, 202 Cal. App. 3d 1089, 249 Cal. Rptr. 246 (Ct. App. 1988)). "Allowing Paul to maintain this cause of action may cause Jody's and Tom's daughter to suffer significant harm. This innocent party, who is now three years old, should not be subjected to this type of 'interfamilial warfare.'" *Id.* at 762.

103. *Id.* at 764 (Henderson, J., concurring in part, dissenting in part). Another justice criticized the majority for denying recovery based on "an unexpressed public policy." *Id.* at 765 (Sabers, J., concurring in part and dissenting in part). This justice noted that the trial court had allowed the husband to recover maternity and child care expenses, a decision that none of the parties appealed. See *id.*

104. 67 Cal. Rptr. 2d 90 (Ct. App. 1997).

105. See *id.*

106. See *id.* at 93.

child if the claim were allowed to proceed,¹⁰⁷ the frequency of conduct causing emotional distress during dissolution proceedings,¹⁰⁸ and the policies underlying abolition of the heart balm claims¹⁰⁹—will be examined further in sections III and IV.

C. Balancing Logic and Limits

Believing that domestic emotional distress is pervasive and often trivial, courts and commentators have proposed various means for distinguishing the everyday from the extreme.¹¹⁰ The difficulty of doing so is illustrated by the very different conclusions reached in a Texas case¹¹¹ decided a few months after *Twyman*, and in a New Mexico case¹¹² decided the same year. In the New Mexico decision, *Hakkila v. Hakkila*,¹¹³ the court suggested that judges adopt a very high threshold for what constitutes extreme and outrageous behavior in the marital context and suggested granting summary judgment

107. *See id.* at 93-94.

108. *See id.* at 94-95.

109. *See id.* at 95-96.

110. Tort law attempts to balance the policy of compensation against the fear that defendants will be held accountable for "injuries disproportionate to their causal participation and that tort liability on an institutional scale will spin out of control. An unceasing tension exists between compensating plaintiffs and limiting the liability of defendants." Levit, *supra* note 24, at 164.

This tension has been a special concern for courts deciding spousal IED claims:

[C]onduct intentionally or recklessly causing emotional distress to one's spouse is prevalent in our society. This is unfortunate but perhaps not surprising, given the length and intensity of the marital relationship. . . . Thus, if the tort of outrage is construed loosely or broadly, claims of outrage may be tacked on in typical marital disputes, taxing judicial resources.

Hakkila v. Hakkila, 812 P.2d 1320, 1324-25 (N.M. Ct. App. 1991).

Both the *Hakkila* court and the *Henriksen* court advocated liberal granting of summary judgment to dispose of frivolous claims. *See id.* at 1327; *Henriksen*, 622 A.2d 1135, 1139-49 (Me. 1993). The *Hakkila* opinion is examined in detail in Heather S. Call, *Intentional Infliction of Emotional Distress in the Marital Context: Hakkila v. Hakkila*, 23 N.M. L. REV. 387 (1993).

111. *See Massey v. Massey*, 807 S.W.2d 391 (Tex. App. 1991), *writ denied*, 867 S.W.2d 766 (Tex. 1993). *See Ellman, supra* note 19, at 797-801, for a detailed criticism of the *Massey* decision.

112. *See Hakkila v. Hakkila*, 812 P.2d 1320 (N.M. Ct. App. 1991).

113. *See id.*

when spousal claims fail to cross the threshold.¹¹⁴ Mrs. Hakkila did not achieve this threshold despite evidence of several incidents of assault and battery, including the times her husband threw her across the room, slammed a camper shell on her head, and closed a trunk lid on her hand.¹¹⁵ Instead, the court concluded that the merits of Mrs. Hakkila's claim should have been disposed of summarily, saving her husband from having to go through a six-day trial surveying the "rights and wrongs" of their marriage.¹¹⁶

In contrast, there were no allegations of physical abuse in *Massey v. Massey*,¹¹⁷ but Mr. Massey was described as angry, threatening, and explosive.¹¹⁸ He had temper tantrums and physical outbursts in which he destroyed property, kept tight control over finances, and threatened to tell people about his wife's affair and to take custody of their children.¹¹⁹ The Texas Court of Appeals upheld a jury award of \$362,000 for the wife's emotional distress.¹²⁰ When the case reached the Texas Supreme Court, the majority agreed with the appellate court, finding that an IIED claim existed.¹²¹ In dissent, Justice Hecht wrote that "[i]t is certainly possible to view [the husband's] conduct as outrageous . . . [i]t is also possible to view his conduct as reprehensible, demeaning and intimidating to [his wife], and destructive of their marriage—but not 'outrageous.' Which view

114. *See id.* at 1326-27.

115. Mrs. Hakkila did not plead any assault and battery causes of action. *See id.* at 1321-22. In addition to those incidents, the trial court found that her husband insulted and screamed at her at home and in the presence of others, locked her out of their residence overnight, made repeated demeaning and abusive remarks, refused to allow her to pursue schooling and hobbies, and refused to participate in normal marital relations. *See id.* at 1321. There was some indication that had she claimed damages for assault and battery, the result would have been different. *See id.* at 1330 (Donnelly, J., specially concurring).

116. *Id.* at 1327.

117. 807 S.W.2d 391 (Tex. Ct. App. 1991), *writ denied*, 867 S.W.2d 766 (Tex. 1993).

118. *See id.* at 399.

119. *See id.* at 399-400.

120. *See id.* at 400.

121. *See Massey v. Massey*, 867 S.W.2d 766, 766 (Tex. 1993) [hereinafter *Massey II*].

is correct? The answer depends entirely upon the personal opinions of the person asked to decide."¹²²

1. The problem with the Restatement formula

Today, the Restatement (Second) of Torts describes the tort of IIED as follows: "One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm."¹²³ Under the Restatement, the element of extreme and outrageous conduct functions as the community's gatekeeper, and therefore its definition remains critical and elusive. The definition a court uses is critical because the court must decide, on a case-by-case basis, what conduct is so socially intolerable that its victims should be compensated. A definition has traditionally been elusive because the proscribed behavior cannot be specifically described, nor can custom supply external standards. As a result, the tort is said to be so indeterminate that even if people wanted to alter their behavior to comply, they probably could not do so.¹²⁴

Although the tort ostensibly has four elements, extreme and outrageous conduct both "limits the reach of the tort and dominates the proof."¹²⁵ Even if the defendant intends to and does inflict emotional distress, the defendant incurs no liability unless the plaintiff proves the conduct was extreme and outrageous. Once the plaintiff proves extreme and outrageous conduct, the nature of the conduct itself may be used to provide evidence of the defendant's intent, the plaintiff's severe emotional distress, and the conduct causing the

122. *Id.* at 767 (Hecht, J., dissenting). Contrast this with the result in *Miller v. Ratner*, 688 A.2d 976, 996 (Md. Ct. Spec. App. 1997). There, the plaintiff and defendant lived together for three years. Seriously ill with breast cancer and undergoing radiation treatments, the plaintiff alleged that the defendant would repeatedly wake her up in the middle of the night, urge her to leave, tell her that she was a financial burden and would soon die, and threaten her with bodily harm if she did not leave. *See id.* The court held that these verbal actions were not of "such egregiousness so as to satisfy the elements of the tort." *Id.* at 996.

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

124. *See Givelber, supra* note 41, at 56, 75.

125. *Id.*

distress.¹²⁶ This collapsing of the tort's elements into a sole determination of outrageous conduct is made possible by the Restatement's commentary.¹²⁷

The first element of the Restatement's formula for IIED is intentional or reckless conduct. The Restatement standard for intention applies where the actor desires to inflict severe emotional distress, and also where he knows that such distress is certain, or substantially certain, to result from his conduct. It applies also where he acts recklessly . . . in deliberate disregard of a high degree of probability that the emotional distress will follow.¹²⁸

Under this standard as interpreted by the courts, when the defendant behaves outrageously, the plaintiff will not be required to show other facts as evidence of either the intention to cause distress or a deliberate disregard of a high degree of probability that it will result.¹²⁹ The intent element has been interpreted as referring to whether the defendant intended to act in a manner that can be considered extreme and outrageous, and intended or knew that the conduct would affect the plaintiff; if so, the defendant will be liable if he or she knew or should have known that emotional distress was the likely result.¹³⁰ As a result, the plaintiff can establish both the conduct and the intent elements by showing that the defendant consciously engaged in outrageous conduct aimed at the plaintiff, without proving that the defendant knew or intended the consequences of his conduct.¹³¹

The second element of IIED requires the plaintiff to suffer severe emotional distress. Because "[c]omplete emotional tranquillity is seldom attainable in this world," the law should not intervene

126. *See id.* at 46-49.

127. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 46 cmt. j (1965) ("[I]n many cases the extreme and outrageous character of the defendant's conduct is in itself important evidence that the distress has existed."). "[I]f the enormity of the outrage carries conviction that there has in fact been severe emotional distress, bodily harm is not required." *Id.* cmt. k.

128. *Id.* § 46 cmt. i. An actor is reckless when he "knows or has reason to know . . . of facts which create a high degree of risk of physical harm to another, and deliberately proceeds to act, or to fail to act, in conscious disregard of, or indifference to, that risk." *Id.* § 500 cmt. a.

129. *See Givelber, supra* note 41, at 46-47.

130. *See id.*

131. *See id.*

unless the distress is "so severe that no reasonable [person] could be expected to endure it."¹³² Nonetheless, "in many cases the extreme and outrageous character of the defendant's conduct is in itself important evidence that the distress has existed."¹³³ Moreover, "if the enormity of the outrage carries conviction that there has in fact been severe emotional distress, bodily harm is not required."¹³⁴ Thus, courts have found the severe emotional distress element to be satisfied by the outrageousness of the conduct, rather than requiring proof of the extent of the suffering as an element of the tort.¹³⁵

The third element of the tort looks to whether the conduct caused the distress. The Restatement authors offer no special explanation of the causation requirement in the IIED context. Again, Professor Givelber points out that if evidence of outrageous conduct can support a conclusion that the plaintiff's suffering was severe, "this evidence necessarily permits a finding that the conduct caused suffering."¹³⁶ In contrast to lawsuits involving physical injuries, where both the cause and extent of the injuries often must be proven by expert testimony, the question of causation in IIED cases sometimes relies on the plaintiff's statement that the defendant's conduct caused his distress.¹³⁷

That leaves extreme and outrageous conduct, the concept into which the elements of intent, injury, and causation have been merged. Despite its centrality, extreme and outrageous conduct does not describe a specific act that can be objectively measured but is instead "an evaluation of behavior."¹³⁸ Thus, the Restatement states:

132. RESTATEMENT (SECOND) OF TORTS § 46 cmt. j (1965).

133. *Id.*

134. *Id.* cmt. k. For example, "A organizes a mob, and brings it to B's door at night. A tells B that unless he leaves town within ten days the mob will return and lynch him. B suffers severe emotional distress, but no physical consequences. A is subject to liability to B." *Id.* cmt. k, illus. 20.

135. See Givelber, *supra* note 41, at 47-48.

136. *Id.* at 49.

137. See *id.*

138. *Id.* at 51. Unlike other evaluations of behavior that juries are called upon to make, the determination of what constitutes extreme and outrageous conduct is not the subject of testimony by expert witnesses about established standards. As one judge put it: "[W]hat standard is [the jury] to use? None can be given them. No evidence can be offered or instruction given about what is 'utterly intolerable in a civilized community.'" *Massey II*, 867 S.W.2d at

Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!"¹³⁹

Recognizing that this description amounts to saying that pornography is "Obscene!", the Restatement authors explain:

[L]iability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. The rough edges of our society are still in need of a good deal of filing down, and in the meantime plaintiffs must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind. There is no occasion for the law to intervene in every case where some one's [sic] feelings are hurt. There must still be freedom to express an unflattering opinion, and some safety valve must be left through which irascible tempers may blow off relatively harmless steam.¹⁴⁰

The Restatement illustrations provide little clarification: lies and practical jokes are sometimes actionable while most insults are not.¹⁴¹ But "where there is a special relation between the parties . . .

767 (Hecht, J., dissenting).

139. RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965).

140. *Id.*

141. For example, "As a practical joke, A falsely tells B that her husband has been badly injured in an accident, and is in the hospital with both legs broken. B suffers severe emotional distress. A is subject to liability to B for her emotional distress." *Id.* cmt. d, illus. 1. As for insults:

A makes a telephone call but is unable to get his number. In the course of an altercation with the telephone operator, A calls her a God damned woman, a God damned liar, and says that if he were there he would break her God damned neck. B suffers severe emotional distress, broods over the incident, is unable to sleep, and is made ill. A's conduct, although insulting, is not so outrageous or extreme as to make A liable to B.

Id. cmt. d, illus. 4.

there may be recovery for insults not amounting to extreme outrage."¹⁴² Moreover, conduct not otherwise outrageous may be viewed as extreme and outrageous because the actor abuses a position or a relationship that gives him actual or apparent authority or the power to affect the plaintiff's interests.¹⁴³

As the Restatement comments illustrate, the context in which the conduct occurs has been crucial in determining whether the conduct is extreme and outrageous. The tort often has been used in commercial or employment settings, to alleviate the unequal bargaining position of one of the parties in a voluntary agreement or to require the defendant who was in a position of power to treat the plaintiff with a "minimum level of decency."¹⁴⁴ When the claim

As more than one critic has pointed out, the problem with these illustrations is that while many people would agree that one or more of them involves outrageous conduct, they most likely would disagree about which ones. *See, e.g.,* *Twyman v. Twyman*, 855 S.W.2d 619, 631 (Tex. 1993) (Hecht, J., concurring & dissenting).

142. RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965).

143. *See id.* cmt. e. Such a special relationship is usually found in cases involving police officers, school authorities, landlords, and collecting creditors. In such situations, bullying conduct apparently is actionable. *See id.* For example:

A, the principal of a high school, summons B, a schoolgirl, to his office, and abruptly accuses her of immoral conduct with various men. A bullies B for an hour, and threatens her with prison and with public disgrace for herself and her parents unless she confesses. B suffers severe emotional distress, and resulting illness. A is subject to liability to B for both.

Id. cmt. e, illus. 6.

Similarly:

A, a creditor, seeking to collect a debt from B, sends B a series of letters in lurid envelopes bearing a picture of lightning about to strike, in which A repeatedly threatens suit without bringing it, reviles B as a deadbeat, a dishonest man, and a criminal, and threatens to garnish his wages, to bother his employer so much that B will be discharged, and to "tie B up tight as a drum" if he does not pay. B suffers severe emotional distress. A is subject to liability to B.

Id. cmt. e, illus. 7.

144. Givelber, *supra* note 41, at 68-72. Professor Givelber concluded that although the tort would probably never provide "the basis for principled adjudication, it has provided and probably will continue to provide the basis for achieving situational justice" because it "adds to the bundle of rights of those who occupy the typically weaker bargaining position" in a relationship in which the parties are bound by a voluntary agreement. *Id.* at 75, 68-69.

involves parties not previously bound by contract, which is the case in marriage despite the presence of an agreement, "the results [are] more unpredictable, and doctrine virtually nonexistent."¹⁴⁵

In addition to abuse of a position or a relationship of power, two other Restatement comments seem particularly relevant to spousal emotional distress claims. The first appears to make it easier for spouses to prove extreme and outrageous conduct because it provides that conduct not otherwise outrageous may become so when the actor knows that "the other is peculiarly susceptible to emotional distress, by reason of some physical or mental condition or peculiarity."¹⁴⁶ The second appears to recognize a defense of sorts for defendant spouses because it provides that conduct, although extreme and outrageous, may be excused.¹⁴⁷ "The actor is never liable, for example, where he has done no more than to insist upon his legal rights [T]here may perhaps be situations in which the actor is privileged" because of circumstances which minimize or remove the outrage.¹⁴⁸

2. Proposals to limit liability

Hoping to limit liability to "culpable acts which are above and beyond the usual acts of cruelty arising in situations of marital discord,"¹⁴⁹ courts and commentators have developed three main approaches. First, the privilege approach requires case-by-case

145. *Id.* at 63.

146. RESTATEMENT (SECOND) OF TORTS § 46 cmt. f (1965). "[C]onduct may become heartless, flagrant, and outrageous when the actor proceeds in the face of such knowledge, where it would not be so if he did not know." *Id.* Thus:

A, who knows that B is pregnant, intentionally shoots before the eyes of B a pet dog, to which A knows that B is greatly attached. B suffers severe emotional distress, which results in a miscarriage. A is subject to liability to B for the distress and for the miscarriage.

Id. cmt. f, illus. 11.

But:

A is an otherwise normal girl who is a little overweight, and is quite sensitive about it. Knowing this, B tells A that she looks like a hippopotamus. This causes A to become embarrassed and angry. She broods over the incident, and is made ill. B is not liable to A.

Id. cmt. f, illus. 13.

147. *See id.* cmt. g.

148. *Id.*

149. Schwartz, *supra* note 25, at 223.

balancing of the plaintiff's injury against the defendant's interests. Second, the gatekeeper approach keeps out meritless claims and allows judges to avoid determining what is extreme and outrageous on a case-by-case basis. Finally, the *per se* approach applies clear and certain rules, which also allows judges to avoid case-by-case inquiries.

a. privilege

The authors of the 1948 Restatement adopted a privilege approach to IIED.¹⁵⁰ Some have suggested a modification of that approach.¹⁵¹ The privilege applies when the defendant engages in actionable conduct that furthers an interest of such social importance that it is protected even in the face of harm to the plaintiff.¹⁵² Under the 1948 Restatement formulation, the plaintiff would presumably prove the elements of the tort—which were only the intentional causing of severe emotional distress—and the defendant would then prove the privilege. Such an approach makes it easier for the plaintiff to establish a *prima facie* case, but it also encourages “the development of greater precision with respect to when it is socially appropriate to inflict serious emotional distress on others” by forcing courts to be specific about when a defendant's interests justify the

150. See RESTATEMENT OF THE LAW § 46 (Supp. 1948).

151. California courts have consistently held that the defendant's conduct must be shown to be unprivileged, whether that proof is treated as an element of the tort or as a defense. See, e.g., *Fletcher v. Western Nat'l Life Ins. Co.*, 10 Cal. App. 3d 376, 394, 89 Cal. Rptr. 78, 88-90 (Ct. App. 1970) (examining defendant's contention that conduct was privileged because it constituted settlement negotiations).

In addition to setting a “high threshold” for what constitutes extreme and outrageous conduct, the *Hakkila* court suggested that some emotionally distressing conduct is “privileged” and should be protected because it serves the need for spouses to vent emotions, the sometimes useful purposes of intentionally making another person unhappy or upset, or the liberty interest in expressing a personal opinion or engaging in a personal relationship. See *Hakkila v. Hakkila*, 812 P.2d 1320, 1324-25 (N.M. Ct. App. 1991).

152. This concept is different from the “privilege” that is sometimes suggested as a way of taking into account the mutual concessions implied in a marriage. The latter kind of privilege is closer to consent, an implied agreement that some acts that would be torts between strangers should not be torts between spouses and that liability should be limited to situations where “a clear abuse of marital privilege exists.” See Spector, *supra* note 49, at 72.

conduct and when a defendant has gone too far in pursuit of his interests.¹⁵³

Recognizing the addition of extreme and outrageous conduct to the Restatement definition, an addition adopted by most states, the author of one of the first articles on domestic torts recommended a modified privilege approach that would balance the plaintiff's and the defendant's interests to determine whether the defendant's conduct was outrageous.¹⁵⁴ An explicit balancing of interests is more precise than determining whether conduct "looks" outrageous because it evaluates the interests at stake in a situation that is difficult to assess because of the relationship of the parties.¹⁵⁵ By comparing the interests the defendant promotes with the interests being harmed, courts might also avoid the problem of judicial reluctance to inquire into the "intimate nature of familial interaction and the attendant notions of one's implied consent to such relationships."¹⁵⁶ Instead, the outrageousness requirement can be met when the "defendant violates an established right of plaintiff or abrogates an established duty owed to plaintiff," a duty established by the courts or the legislature.¹⁵⁷

Coupled with this balancing approach and concerned about the amorphous nature of "outrageous conduct," Professor Cole also suggested that courts focus first on the intent, causation, and severity elements, that is, on "whether or not defendant intended to and has, in fact, caused plaintiff serious mental distress."¹⁵⁸ Such a focus could eliminate some complaints, and therefore the need for a

153. See Givelber, *supra* note 41, at 61.

154. See Charles B. Hochman, "Outrageousness" and Privilege in the Law of Emotional Distress—a Suggestion, 47 CORNELL L.Q. 61 (1961).

155. See Cole, *supra* note 50, at 572.

156. *Id.* As an example, Professor Cole cited a case in which the defendant's constitutionally protected right to seek an abortion outweighed the plaintiff's interest in being free from emotional disturbance. See *Przybyla v. Przybyla*, 275 N.W.2d 112, 115 (Wis. Ct. App. 1978) (holding a woman's exercise of constitutional right to abortion cannot be considered extreme and outrageous conduct).

157. Cole, *supra* note 50, at 573. Other commentators have criticized Cole's approach to balancing the parties' interests, saying that it does not seem satisfactory "except for the easy cases." Ellman & Sugarman, *supra* note 16, at 1341 n.300. Ellman and Sugarman disagree specifically with Cole's use of duties implied from civil statutes. See *id.*

158. Cole, *supra* note 50, at 571.

case-by-case inquiry into outrage: distress, for example, will often be temporary.¹⁵⁹ Professor Cole's suggestion that early application of the intent element might limit the need to inquire into outrageousness appears to be supported by cases such as *Vance v. Vance*.¹⁶⁰ In *Vance*, the Maryland Court of Appeals held that a husband's negligent misrepresentation that he was divorced at the time of his marriage did not satisfy the intent required for IIED.¹⁶¹ Mrs. Vance sought damages for emotional distress suffered because of the concealment and then the revelation of her invalid marital status. Dr. Vance discovered the misrepresentation within a month of making it, but he did not tell his wife until he sought to annul their marriage twenty years later.¹⁶² The court concluded:

[T]here was no evidence from which the jury could have concluded that in 1956, when Dr. Vance told Muriel that he was free to marry her, that he could or should have anticipated that under the circumstances existing some twenty years later, he would reveal what he previously concealed and cause Muriel to suffer severe emotional distress. Thus, Dr. Vance did not have any knowledge of what his concealment would likely occasion, and therefore the record fails to disclose any evidence in support of the first or second elements of the tort.¹⁶³

159. *See id.* & n.153.

160. 408 A.2d 728 (Md. 1979).

161. *See id.* at 737.

162. *See id.*

163. *Id.* at 737. In a case reaching the same conclusion, Mr. Fletcher sued Ms. Ruth for IIED when she ended his visitation and disproved his paternity of her five-year-old child. *See Ruth v. Fletcher*, 377 S.E.2d 412 (Va. 1989). The court said Ms. Ruth's conduct was not intentional or reckless because "[t]here is no proof that she set out to convince [Mr. Fletcher] that the child was his, and to cause him to develop a loving relationship with the child so that in the end, she could hurt [Mr. Fletcher] by taking the child away from him forever. Such proof was required to satisfy the 'intentional or reckless' prong." *Id.* at 416. The mother had doubts about the child's paternity, but no real knowledge, and she did not continue her affair with the biological father. *See id.* at 413-15.

Finally, in *Ruprecht v. Ruprecht*, 599 A.2d 604, 608 (N.J. Super. Ct. Ch. Div. 1991), the court found that the wife's adulterous affair during the last eleven years of their marriage was not outrageous, but also noted that the wife committed no intentional act designed to cause her husband to suffer severe

b. gatekeeper

The 1965 Restatement authors replaced "privilege" with "extreme and outrageous conduct" because of the "need for a more limited statement which will set some boundaries to the liability."¹⁶⁴ By its extraordinary nature, outrageousness would act as a gatekeeper and help judges avoid adjudicating everyday disputes. Reflecting this concern, courts facing spousal IIED claims devised various tests for evaluating outrageousness. For example, the *Massey* trial court suggested that juries follow a "this marriage" test to determine what constitutes extreme and outrageous conduct, instructing the jury that "[t]he bounds of decency vary from legal relationship to legal relationship."¹⁶⁵ Because "[c]onduct considered extreme and outrageous in some relationships may be considered forgivable in other relationships . . . , you shall consider [the claims made] only in the context of the marital relationship of the parties to this case."¹⁶⁶ This jury instruction runs counter to the Restatement's emphasis on social consensus and does not accomplish its apparent purpose of protecting the private understandings of the parties. Instead, it would require a "deep intrusion into the spouses' intimate affairs" to determine what standards the parties set for themselves.¹⁶⁷

emotional distress. "Nothing was done by her to make the incidents known to him. In fact, she kept it a secret from him for the 11 years." *Id.*

164. Givelber, *supra* note 41, at 62 (citing RESTATEMENT (SECOND) OF TORTS § 46, reporter's note (Tentative Draft No. 1, 1957)). The outrageousness limit has been justified on the basis that it guards against the danger of too many claims based on common behavior, helps prove that the plaintiff's suffering is genuine, protects the defendant's liberty interests, and allows for the instances in which upsetting conduct is justified in pursuit of the defendant's legal rights or some social or personal interest. *See id.* at 57.

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

166. *Id.* Neither the intermediate appellate court nor the Texas Supreme Court disturbed the instruction, although a dissenting justice objected that the instruction left "the standard by which outrageousness is to be measured [as] the personal opinion of the person asked to decide." *Massey*, 867 S.W.2d at 766 (Hecht, J., dissenting).

167. Ellman & Sugarman, *supra* note 16, at 1321. In addition, individualized marital standards may create liability if, for example, spouses can promise each other that they will not commit some act that the community condones. *See id.* In contrast, the determination of what constitutes outrageous conduct in commercial interactions can draw on established conventions of public behavior as well as on an understanding that both parties have a financial pur-

Another effort to avoid mundane claims and undue intrusion into the marriage came in the *Hakkila v. Hakkila*¹⁶⁸ opinion. There, the New Mexico Court of Appeals held:

[I]n determining when the tort of outrage should be recognized in the marital setting, the threshold of outrageousness should be set high enough—or the circumstances in which the tort is recognized should be described precisely enough, e.g., child snatching . . . that the social good from recognizing the tort will not be outweighed by unseemly and invasive litigation of meritless claims.¹⁶⁹

Apparently ignoring the trial court's finding that the wife had presented evidence of assault and battery, the court concluded that "[t]he merits of wife's claim can be disposed of summarily. Husband's insults and outbursts fail to meet the legal standard of outrageousness He was privileged to refrain from intercourse. There was no evidence that the other conduct caused severe emotional distress, as opposed to transient pain or discomfort."¹⁷⁰

Rejecting "at least for the time being" the argument that public policy should bar all spousal IIED claims, the court said that policy considerations nevertheless support "a very limited scope for the tort in the marital context."¹⁷¹ These policy considerations include concern that IIED claims might be tacked on to "typical" marital disputes, allowing burdensome litigation of the commonplace, that tort litigation based on intramarital activity might invade the privacy of accused spouses, and that causation would be problematic because of the difficulty of connecting particular outrageous conduct to severe emotional distress.¹⁷² Finally, the court pointed to what it saw as a conflict between the spousal IIED action and New Mexico's adoption of no-fault divorce and dissatisfaction with the alienation of

pose. In the marital context, "neither a financial purpose nor conventions of public conduct provides a compass to guide the tort's application." Ellman, *supra* note 19, at 796.

168. 812 P.2d 1320 (N.M. Ct. App. 1991).

169. *Id.* at 1326.

170. *Id.* at 1327.

171. *Id.* at 1323-24; see also *Henriksen v. Cameron*, 622 A.2d 1135, 1138 (Me. 1993) (suggesting that courts should examine whether particular conduct may be privileged by "virtue of the mutual concessions that may be implicit in the marital relationship").

172. *Id.* at 1325.

affections cause of action.¹⁷³ The *Hakkila* lawsuit itself illustrated the risks of allowing IIED claims because the “husband was subjected to a six-day trial . . . surveying the rights and wrongs of a ten-year marriage.”¹⁷⁴ The court concluded by suggesting that trial courts use summary judgment to dispose of meritless claims, and warning that it might be necessary to reconsider the public policy objections to allowing spousal IIED “if the potential harms from this kind of litigation are too frequently realized.”¹⁷⁵

Although the gatekeeper approach seems attractive, its application in the *Hakkila* decision reveals its shortcomings. The recitation of the facts found by the trial court, and even the alternate version of the facts apparently accepted by the appellate court,¹⁷⁶ includes conduct that if not outrageous, is surely sufficient to support the trial court’s finding that it was.

c. per se rules

Some bright lines have emerged from the case law—battery is outrageous, except apparently in New Mexico, and adultery is not. Several commentators have suggested broader rules as a way to promote determinacy and avoid the need for case-by-case inquiries into outrageousness. Professors Ellman and Sugarman proposed a per se rule based on criminal conduct. The spousal IIED claims would apply only to conduct

that is highly unlikely to have been part of any couple’s mutual understanding, or in any event is sufficiently malevolent to justify overriding these privacy norms [M]arital conduct crosses the line into outrageousness at just the point when it becomes so extreme that it is not

173. *Id.* at 1326.

174. *Id.* at 1327.

175. *Id.*

176. See Heather S. Call, Note, *Tort Law – Intentional Infliction of Emotional Distress in the Marital Context: Hakkila v. Hakkila*, 23 N.M. L. REV. 387, 393 (1993) (suggesting that the explanation for the court’s refusal to find extreme and outrageous conduct may lie in its unusual use of both the trial court’s findings of fact and the husband’s summaries of the evidence supporting the findings).

credible to think it was part of any reasonable couple's marital understanding.¹⁷⁷

The line of outrageousness, they suggest, is clear only when the spouse's conduct is criminal.¹⁷⁸

Professors Ellman and Sugarman warn that more routine uses of IIED claims undermine the no-fault divorce rationale of avoiding re-cremations and assigning blame when marriages end.¹⁷⁹ Second, they claim that allowing spouses to bring IIED claims serves primarily to provide damages for pain and suffering and punitive damages, rather than to provide compensation for economic losses.¹⁸⁰ Third, although the authors acknowledge that recognition of spousal IIED may further the goals of punishment and vengeance, they argue that it does not deter outrageous conduct both because outrageous conduct is so imprecisely defined and because "the strong forces that turn what once was love into a willingness to deliberately harm another will usually be undeterred by the chance of paying court-ordered damages to the abused."¹⁸¹ Fourth, the authors claim that allowing spousal IIED raises judicial complications because of the need to prevent double recovery and distinguish between the causes of compensable emotional harm.¹⁸² Finally, the authors believe there is something unseemly or inappropriate about allowing people to sue for money when they are emotionally wronged in a marriage.¹⁸³ Thus, they conclude that, except when the abusive conduct is criminal, "the best remedy the law can provide the spouse who feels emotionally endangered or harmed by the marital relationship is its expeditious dissolution, along with his or her share of the accumulated property and, in the appropriate cases, enforceable support awards."¹⁸⁴

177. Ellman & Sugarman, *supra* note 16, at 1322-23. The authors suggest another benefit from specifying conduct like battery: it is "so completely out of bounds as to permit its condemnation without any need to probe the nuances of the couple's marital relationship." *Id.* at 1330.

178. *See id.* at 1335.

179. *See id.* at 1285-86.

180. *See id.* at 1286-89.

181. *Id.* at 1287.

182. *See id.* at 1289.

183. *See id.* at 1290.

184. *Id.* at 1343. In the specific context of domestic violence, another author suggested that the willful violation of a civil protection order should constitute

III. INTERFERENCE WITH THE PARENT-CHILD RELATIONSHIP AS A BASIS FOR SPOUSAL IIED: CALIFORNIA'S EARLY AND CONTINUING REJECTION OF THE TORT

Although California adopted IIED in 1952 and abolished interspousal immunity ten years later, only one California appellate decision has allowed a spousal IIED claim based on marital conduct; that decision merely upheld the claim against an attack based on statutory privilege.¹⁸⁵ The development of California law on this issue illustrates the continuing tension between the policy of compensating victims of wrongful acts, predominant in tort law when physical injury or property damage is alleged, and the policy of limiting liability within manageable boundaries, predominant in tort law when emotional distress damage is claimed.

A. Background

The first policy—that where there is a wrongful act, there should be liability—prevailed in *State Rubbish Collectors Ass'n v. Siliznoff*,¹⁸⁶ where the California Supreme Court first recognized an IIED action independent of physical injury.¹⁸⁷ In *Siliznoff*, a rubbish

outrage per se, simplifying the determination of outrage and reducing the plaintiff's burden in proving intent, but leaving intact the elements of severe emotional distress and causation. See Weiner, *supra* note 51, at 223. Such a per se rule expands the remedies for domestic violence victims because it reaches some conduct, including stalking and psychological abuse, that might not be criminal under state law. See *id.* at 189-90 & n.16. It also provides a remedy for domestic violence victims who cannot establish a battery, but who suffer threats of future bodily harm or who missed the statute of limitations for assault and battery. See *id.* at 192-93. Professors Ellman and Sugarman say that Weiner's rule is "not unattractive" because of its specificity and because it is based on criminal conduct. However, they claim it is too restrictive and suggest that a more suitable solution might be contempt proceedings against the violator of the civil protection order. See Ellman & Sugarman, *supra* note 16, at 1343 n.300.

185. See *Begier v. Strom*, 46 Cal. App. 4th 877, 54 Cal. Rptr. 158 (Ct. App. 1996).

186. 38 Cal. 2d 330, 240 P.2d 282 (1952).

187. See *id.* The case is the basis for one of the Restatement's classic illustrations:

A, the president of an association of rubbish collectors, summons B to a meeting of the association, and in the presence of an intimidating group of associates tells B that B has been collecting rubbish in territory which the association regards as exclusively allocated to one of

collector alleged that a rubbish collectors' organization protected its territory by threatening to beat him up and destroy his equipment.¹⁸⁸ In explaining the decision, Justice Traynor recognized a "right to be free from serious, intentional, and unprivileged invasions of mental and emotional tranquility."¹⁸⁹ First, he wrote, "it is anomalous to deny recovery because defendant's intentional misconduct fell short of producing some physical injury" when mental suffering frequently constitutes the major element of damages for some torts.¹⁹⁰ Next, in response to arguments that physical injury is necessary to avoid frivolous claims, Justice Traynor replied, "[t]he jury is ordinarily in a better position . . . to determine whether outrageous conduct results in mental distress than whether that distress in turn results in physical injury."¹⁹¹ From their own experience, jurors can judge "the extent and character of the disagreeable emotions that may result from the defendant's conduct Greater proof that mental suffering occurred is found in the defendant's conduct designed to bring it about than in physical injury that may or may not have resulted therefrom."¹⁹²

The same policy was expressed by Justice Schauer in *Spellens v. Spellens*,¹⁹³ an opinion that led to the abolition several years later of interspousal immunity.¹⁹⁴ In discussing a wife's action for abuse of

its members. A demands that B pay over the proceeds of his rubbish collection, and tells B that if he does not do so the association will beat him up, destroy his truck, and put him out of business. B is badly frightened, and suffers severe emotional distress. A is subject to liability to B for his emotional distress, and if it results in illness, A is also subject to liability to B for his illness.

RESTATEMENT (SECOND) OF TORTS § 46 cmt. d, illus. 2 (1965).

188. See *Siliznoff*, 38 Cal. 2d at 335, 240 P.2d at 284.

189. *Id.* at 337-38, 240 P.2d at 287. Justice Traynor followed the 1948 version of the Restatement, which adopted a privilege approach to the tort. See *supra* Part I.

190. *Siliznoff*, 38 Cal. 2d at 338, 240 P.2d at 286.

191. *Id.*

192. *Id.* at 338, 240 P.2d at 286.

193. 49 Cal. 2d 210, 317 P.2d 613 (1957).

194. See *id.* The abuse of process action in *Spellens* arose from a separate action by a husband to recover possession of personal property. The plaintiff claimed "that defendant maliciously commenced the action . . . and caused a claim and delivery writ to issue and be served." *Id.* at 230, 317 P.2d at 625. The court said that the defendant's action was done for the "ulterior purpose of making things difficult for plaintiff so she would drop her main action." *Id.*

process, Justice Schauer said that it appeared to be an action for mental suffering and pointed out that California then allowed one spouse to sue the other for injury to property but not for injury to person.¹⁹⁵ He suggested that the court “could well consider overruling” the doctrine that barred such lawsuits because “[n]one of the reasons which have been suggested in support of the common law view apply to this action”; in particular, any conjugal harmony had long since been disrupted and there could be no thought of collusion between such warring parties.¹⁹⁶ Moreover, “[t]he court should not decline to entertain a meritorious action against a spouse . . . because of the dubious apprehension that in some future case trifling domestic difficulties may become the subject of litigation.”¹⁹⁷

Subsequently, the California Supreme Court abolished interspousal immunity for intentional torts in *Self v. Self*,¹⁹⁸ where the wife in a pending divorce action had sued for assault and battery.¹⁹⁹ Interspousal immunity was out of line with the general policy of California tort law, in which “the general rule is and should be that, in the absence of statute or some compelling reason of public policy, where there is negligence proximately causing an injury, there should be liability. Immunity exists only by statute or by reason of compelling dictates of public policy. Neither exists here.”²⁰⁰

195. *See id.* at 240, 317 P.2d at 631-32 (Schauer, J. dissenting in part and concurring in part).

196. *Id.* at 241, 317 P.2d at 632.

197. *Id.*

198. 58 Cal. 2d 683, 376 P.2d 65, 26 Cal. Rptr. 97 (1962).

199. *See id.* Beginning in 1955, the California Supreme Court began eliminating familial immunities. In that year, the court held a child may sue a parent for an intentional tort. *See Emery v. Emery*, 45 Cal. 2d 421, 430, 289 P.2d 218, 224 (1955) (“Exceptions to the general principle of liability . . . are not to be lightly created, and we decline to create such an exception on the basis of the speculative assumption that to do so would preserve family harmony.”). The following year, the court held that interspousal immunity did not apply to property torts like fraud. *See Langley v. Schumacker*, 46 Cal. 2d 601, 297 P.2d 977 (1956).

In 1962, the court held in companion cases that there was no interspousal immunity for intentional torts, *Self v. Self*, or for negligence, *Klein v. Klein*, 58 Cal. 2d 692, 376 P.2d 70, 26 Cal. Rptr. 102 (1962). Finally, in 1971, the court abolished parental immunity for negligence suits by children. *See Gibson v. Gibson*, 3 Cal. 3d 914, 479 P.2d 648, 92 Cal. Rptr. 288 (1971).

200. *Self*, 58 Cal. at 689, 376 P.2d at 69, 26 Cal. Rptr. at 101.

The court rejected various policy reasons advanced for immunity, finding that tort actions endanger and harm conjugal harmony no more than already-permitted property actions, and that the possibility of perjury, fraud, and collusion is not relevant in an intentional tort case.²⁰¹ This decision not only established the general rule that spouses ordinarily should be allowed to sue spouses, it also set the stage for arguments that in a particular case, "compelling dictates of public policy" might still preclude such actions.²⁰²

Thus, by the 1960s, California's predominant tort law policy imposed liability for wrongful acts between spouses. In the family law realm, however, the trend moved toward fewer remedies for conduct that disrupted marital relationships. Determining "that certain sexual conduct and interpersonal decisions are, on public policy grounds, outside the realm of tort liability,"²⁰³ California enacted statutes abolishing the traditional heart balm causes of action from the 1930s.²⁰⁴ Critics of the heart balm actions focused on their potential for blackmail or extortion, while some courts interpreted the

201. *See id.* at 689-91, 376 P.2d at 69-70, 26 Cal. Rptr. at 101-02. Also, the court pointed to a legislative change providing that all damages awarded to a married person in a civil action for personal injuries are the separate property of the married person. *See id.* at 691, 376 P.2d at 70, 26 Cal. Rptr. at 101. Before this change, the court noted that if a wife sued her husband for a personal tort, the recovery would be community property "controlled and managed by the husband." *Id.* at 691, 376 P.2d at 70, 26 Cal. Rptr. at 102.

202. *Id.* at 689, 376 P.2d at 69, 26 Cal. Rptr. at 101.

203. *Perry v. Atkinson*, 195 Cal. App. 3d 14, 19, 240 Cal. Rptr. 402, 405 (Ct. App. 1987) (barring a cause of action based on fraudulent misrepresentation that defendant would impregnate the plaintiff later if she had an abortion now).

204. *See Survey, The Work of the 1939 Legislature*, 13 S. CAL. L. REV. 1, 37 (1939) (providing more explanation of the reasons given to abolish the causes of action: they were used for blackmail, they protected duties and obligations unsuited to litigation, and they permitted disproportionate damages). The California statutes are now codified at CAL. CIV. CODE §§ 43.4, 43.5 (West 1999). Section 43.5 abolished the actions for alienation of affections, criminal conversation, seduction of a person over the age of legal consent, and breach of a promise to marry. Section 43.4, enacted to end a loophole, abolished the action for a fraudulent promise to marry or to cohabit after marriage. The legislature did not abolish some causes of action set forth in section 49 of the California Civil Code; that section still forbids "abduction or enticement of a child" and seduction of a person under the age of consent. CAL. CIV. CODE § 49 (West 1999).

statutory abolition more broadly. The anti-heart balm statutes “embody a basic reluctance on the part of both the Legislature and the judiciary to allow recovery for promises of love. This reluctance stems, no doubt, from the sheer unseemliness of litigating tender matters of romantic or sexual emotion in courts of law.”²⁰⁵

The trend against litigating “tender matters” continued with California’s 1969 enactment of the nation’s first no-fault divorce statute.²⁰⁶ Reacting to criticism that “fault” grounds for divorce were symptoms rather than causes of a marriage’s problems and that the prevalence of uncontested divorces made the fault grounds a pretense,²⁰⁷ California’s new no-fault statute authorized divorce on only two grounds, incurable insanity and “irreconcilable differences, which have caused the irremediable breakdown of the marriage.”²⁰⁸ Today, California is one of twenty states classified as being pure no-fault states, excluding consideration of marital misconduct in property allocations and spousal maintenance adjudications.²⁰⁹

B. Early IIED Claims Based on Interference with Parent-Child Relationships

Many of California’s domestic IIED cases are based on allegations of lies that have interfered with the establishment or continuation of a parent-child relationship rather than on any interference with the marital relationship. California courts uniformly reject such causes of action, a result that is echoed in their rejection of sexual

205. *Askew v. Askew*, 22 Cal. App. 4th 942, 957-58, 28 Cal. Rptr. 2d 284, 293 (Ct. App. 1994). “The idea that a judge, or jury of 12 solid citizens, can arbitrate whether an individual’s romantic declarations at a certain time are true or false, or made with intent to deceive, seems almost ridiculously wooden, particularly where the statements were made prior to marriage and the marriage lasted more than 13 years.” *Id.* at 959, 28 Cal. Rptr. 2d at 294. In *Askew*, the plaintiff husband sued for fraud, claiming his bride-to-be falsely told him before the marriage that she felt sexual attraction for him and he relied on that statement to marry her and to put certain parcels of real property into their names as joint tenants. *See id.* at 946, 28 Cal. Rptr. 2d at 285. The court decided this claim was simply an abolished action for breach of promise. *See id.* at 947, 28 Cal. Rptr. 2d at 286.

206. CAL. FAM. CODE § 2310 (West 1999).

207. *See CLARK, supra* note 11, at 700 & n.46.

208. CAL. FAM. CODE § 2310 (West 1999).

209. *See Ellman, supra* note 19, at 778, 781.

partner IIED claims based on unwanted pregnancy but acceptance of such claims when they are based on physical injury. Thus, an IIED cause of action growing out of domestic conduct apparently can proceed only when it claims physical injury or the existence of a statutory remedy.²¹⁰

Based on familiar themes, California courts have rejected lawsuits based on closely related harms variously characterized as wrongful creation of a relationship with a child, unwanted pregnancy, and misrepresentation of paternity. The results depend almost entirely on the harms claimed. The best interests of the child and the impossibility of righting the wrong with a legal remedy were the reasons given for refusing to recognize a cause of action based on wrongful creation of a relationship with a child in *Richard P. v. Superior Court*.²¹¹ There, the court of appeal held that even though a husband's complaint against a third party stated causes of action for fraud and IIED, "the subject matter of the action . . . is not one in which it is appropriate for the courts to intervene."²¹² Apparently because of a stipulated judgment in which a husband waived his rights to sue his former wife, *Richard P.* was not a cause of action between spouses.²¹³ Instead, the husband filed a lawsuit alleging fraud and IIED against the man who had an affair with his wife and had fathered two children the husband thought were his. The husband learned of the true paternity of the children two and one-half years after the birth of the oldest.²¹⁴

Like "betrayal, brutal words, and heartless disregard of the feelings of others," the court said that some wrongs are "beyond any effective legal remedy and any practical administration of law" and that attempting to remedy them may cause more social damage because "the innocent children . . . may suffer significant harm."²¹⁵ In fact, wrote the court, "[f]or a man married to the mother of children

210. The existence of a statutory remedy supported IIED claims in *Begier v. Strom*, 46 Cal. App. 4th 877, 54 Cal. Rptr. 2d 158 (Ct. App. 1996) (regarding false allegations of child abuse), and *Surina v. Lucey*, 168 Cal. App. 3d 539, 214 Cal. Rptr. 509 (Ct. App. 1985) (involving child abduction).

211. 202 Cal. App. 3d 1089, 1094, 249 Cal. Rptr. 246, 249 (Ct. App. 1988).

212. *Id.* at 1093, 249 Cal. Rptr. at 249.

213. *See id.* at 1091, 249 Cal. Rptr. at 247.

214. *See id.*

215. *Id.* at 1094, 249 Cal. Rptr. at 249.

at the time of their conception to be allowed to bring a tort action such as this against the true father of the children could . . . ‘seldom, if ever, result in benefit to a child’” and would even frustrate the public policy of encouraging natural fathers to acknowledge and support their own children because they would have a strong disincentive to reveal the truth.²¹⁶ The court did not, however, foreclose the possibility that the former husband might be able to recover the actual costs incurred in supporting another man’s children on a theory such as unjust enrichment.²¹⁷ The court ordered the lower court to grant the former husband leave to amend to plead such a claim.²¹⁸

The rationale that legal compensation is sometimes impossible or inappropriate barred the spousal IIED claim in *Nagy v. Nagy*,²¹⁹ where a California court of appeal held that “developing a close relationship with a child misrepresented to be [your own] and performing parental acts is not a ‘damage’ which should be compensable under the law.”²²⁰ During the deposition of another witness in their dissolution proceeding, Mrs. Nagy told her husband for the first time that he was not the father of her son born three and one-half years earlier.²²¹ The subsequent dissolution judgment awarded sole custody to the mother and permanently restrained Mr. Nagy from contacting or communicating with the child.²²² After the dissolution, Mr. Nagy sued his former wife for IIED and fraud.²²³ The fraud cause of action failed because the former husband had not and could not plead any legally recognizable damages other than emotional distress, and such damages alone were not sufficient.²²⁴ Moreover, allowing the fraud claim would be contrary to public policy because

216. *Id.* at 1095, 249 Cal. Rptr. at 250.

217. *See id.* at 1096 n.3, 249 Cal. Rptr. 250 n.3.

218. *See id.* at 1096, 249 Cal. Rptr. at 251.

219. 210 Cal. App. 3d 1262, 258 Cal. Rptr. 787 (Ct. App. 1989).

220. *Id.* at 1269-70, 258 Cal. Rptr. at 791.

221. *See id.* at 1266, 258 Cal. Rptr. at 789.

222. *See id.* at 1267, 258 Cal. Rptr. at 789.

223. *See id.* at 1265, 258 Cal. Rptr. at 788.

224. *See id.* at 1268-69, 258 Cal. Rptr. at 790. The husband had waived his right to sue for reimbursement of any money paid on behalf of the child. *See id.* at 1267, 258 Cal. Rptr. at 789. In addition, the majority claimed that emotional distress damages are recoverable in a fraud cause of action only as an aggravation of other damages, which Mr. Nagy had not pleaded. *See id.* at 1269, 258 Cal. Rptr. at 790.

Mrs. Nagy's actions were similar to "a 'betrayal' for which the law wisely should not provide a remedy."²²⁵

Having used public policy to preclude the fraud claim, the court used California's statutory privilege for communications made in judicial proceedings to bar the IIED claim.²²⁶ The court held that the privilege applied to the former wife's statement that the child was not Mr. Nagy's son because it was made during a deposition.²²⁷ In the majority's opinion, the cause of action did not accrue until the former husband suffered appreciable and actual harm and that harm occurred in a privileged litigation setting.²²⁸ If Mr. Nagy thought that he could avoid the statutory privilege by redrafting his complaint to separate his emotional distress from the disclosure of the misrepresentation in a privileged setting, the court wrote that "we would still be compelled to hold that public policy precludes such future recovery."²²⁹ One justice concurred only in the judgment, saying that "public policy concerns about lawsuits over extramarital relations, paternity and other intrafamily conduct outweigh by a slight margin" Mr. Nagy's right to compensation.²³⁰

A new public policy rationale emerged in lawsuits between sexual partners claiming injuries resulting from sexual deceit. Balancing the constitutional right of privacy against public policy concerns for the well-being and support of children, California courts reject causes of action for unwanted pregnancy because children's interests are at stake, but allow similar causes of action that cause physical harm to a sexual partner because no children are involved.²³¹

225. *Id.* at 1270, 258 Cal. Rptr. at 791.

226. *See id.* at 1270-71, 258 Cal. Rptr. at 791.

227. *See id.*

228. *See id.* at 1271, 258 Cal. Rptr. at 792.

229. *Id.*

230. *Id.* (Johnson, J., concurring). As for the IIED claim, Justice Johnson said the majority had failed to distinguish between conduct occurring during a judicial proceeding and conduct occurring outside a judicial proceeding which is revealed during a judicial proceeding. Again, however, Justice Johnson concluded that "public policy considerations outweigh by a slight margin the values that would be promoted by allowing a cause of action for intentional infliction of emotional injury in the instant case." *Id.* at 1276, 258 Cal. Rptr. at 795.

231. *See generally* Murray & Winslett, *supra* note 58, at 780 & nn.5 & 6; *see also* Anne M. Payne, Annotation, *Sexual Partner's Tort Liability to Other*

The constitutional right to privacy is believed to preclude judicial intervention when intentional lies lead to an unwanted pregnancy. Thus, in *Stephen K. v. Roni L.*,²³² the court said that the complaint "is nothing more than asking the court to supervise the promises made between two consenting adults as to the circumstances of their private sexual conduct. To do so would encourage unwarranted governmental intrusion into matters affecting the individual's right to privacy."²³³ In this paternity action, the father admitted paternity but cross-complained for fraud because the mother had falsely represented that she was taking birth control pills.²³⁴ The appellate court held that the facts pleaded were not actionable because "the circumstances and the highly intimate nature of the relationship wherein the false representations may have occurred, are such that a court should not define any standard of conduct therefor."²³⁵

The outcome is different when intentional lies lead to physical harm to one of the sexual partners, rather than to an unwanted child. The courts in the following cases distinguished *Stephen K.* on the basis that they involved neither children nor public policy concerns with respect to parental obligations. Thus, an appellate court held in *Barbara A. v. John G.*²³⁶ that the complaint stated causes of action for battery and deceit because it sought damages for severe bodily injury.²³⁷ In *Barbara A.*, a woman who became sterile after an ectopic pregnancy sued the man who had impregnated her, alleging that he had falsely represented that he was sterile.²³⁸ The appellate court distinguished *Stephen K.* because the father there was seeking damages for wrongful birth, resulting in support obligations and emotional distress, while the plaintiff in *Barbara A.* was seeking

Partner for Fraudulent Misrepresentation Regarding Sterility or Use of Birth Control Resulting in Pregnancy, 2 A.L.R. 5TH 301 (1992) (noting that public policy usually prevents liability for misrepresentations leading to the birth of a normal child but allows recovery for misrepresentations resulting in actual physical injuries).

232. 105 Cal. App. 3d 640, 164 Cal. Rptr. 618 (Ct. App. 1980).

233. *Id.* at 644-45, 164 Cal. Rptr. at 620.

234. *See id.* at 641-42, 164 Cal. Rptr. at 619.

235. *Id.* at 63, 164 Cal. Rptr. at 620.

236. 145 Cal. App. 3d 369, 193 Cal. Rptr. 422 (1983).

237. *See id.* at 375-76, 378-79, 193 Cal. Rptr. at 426-27, 429.

238. *See id.* at 373, 193 Cal. Rptr. at 425.

damages for injury to her body.²³⁹ The *Barbara A.* court held that “[a]lthough the constitutional right to privacy normally shields sexual relations from judicial scrutiny, it does not do so where the right to privacy is used as a shield from liability at the expense of the other party.”²⁴⁰ Similarly, physical injury to the plaintiff overcame the constitutional right to privacy of the defendant in *Kathleen K. v. Robert B.*,²⁴¹ where a woman sought damages for negligence, battery, IIED, and fraud because the defendant had misrepresented that he was free from venereal disease and she contracted genital herpes from sexual intercourse with him.²⁴² Although the constitutional right of privacy in matters relating to marriage, family, and sex precludes unwarranted governmental intrusion, the court held that it was outweighed in *Kathleen K.* by the state’s interest in protecting the health, welfare, and safety of its citizens.²⁴³

These differing conclusions are reconcilable on the basis that even if you commit a wrongful act, you are not liable when there is no resulting harm. If an unwanted pregnancy is not recognized as harm, then the result in *Stephen K.* is correct. In both *Barbara A.* and *Kathleen K.*, the wrongful act caused the kind of harm that courts almost always recognize—physical injury.

Finally, in *Steve H. v. Wendy S.*,²⁴⁴ a California Court of Appeal again faced an IIED claim grounded on a misrepresentation of paternity.²⁴⁵ The result was the same as in *Nagy* despite two major differences between the cases: rather than fraud, the cause of action was

239. *See id.* at 378-79, 193 Cal. Rptr. at 429. The dissenting judge rejected any distinction and wrote that the claim in *Barbara A.*, like the claim in *Stephen K.*, should be rejected because both were based on seduction, one of the abolished heart balm causes of action. *See id.* at 385, 193 Cal. Rptr. at 434 (Scott, J., dissenting).

240. *Id.* at 385, 193 Cal. Rptr. at 433.

241. 150 Cal. App. 3d 992, 198 Cal. Rptr. 273 (1984).

242. *See id.* at 993-95, 198 Cal. Rptr. at 274-75.

243. *See id.* at 996-97, 198 Cal. Rptr. at 276.

244. 57 Cal. App. 4th 379, 67 Cal. Rptr. 2d 90 (Ct. App. 1997), *review granted*, 946 P.2d 817 (Cal. 1997), *review dismissed*, 960 P.2d 510 (Cal. 1998).

245. *See id.* at 379, 67 Cal. Rptr. 2d at 90. This case has no precedential value in the California courts even though the California Supreme Court’s grant of review was later dismissed because it became unpublished as soon as review was granted.

IIED; and rather than fraudulent creation of a parent-child relationship, the harm claimed was the attempted destruction of a parent-child relationship. The majority cited the common themes of the inadequacy of legal remedies and the possibility of harm to the child. The majority added two public policy grounds for precluding the claim: first, the claims resemble alienation of affection actions; and second, the claims threaten judicial economy if spouses are allowed to sue for what goes on in dissolution proceedings.²⁴⁶ As a result, the court held that public policy precluded Steve's IIED claim for emotional distress caused by Wendy's effort to terminate his relationship with the nearly three-year-old daughter he thought was his own.²⁴⁷ In dissent, Justice Vogel wrote that the majority had ignored California's abolition of spousal immunity, its recognition of IIED, and the parties' concession that the elements of IIED had been well pleaded.²⁴⁸ Instead, Justice Vogel said "the majority relies on cases from other states to reach a legally anachronistic result that does little more than reveal their troglodytic wish for a society that no longer exists."²⁴⁹

First, the majority adopted the rationale of the *Richard P. and Nagy* courts that some wrongs are beyond any effective legal remedy, in particular those that result in the creation of a close and loving relationship with a child.²⁵⁰ If the husband's damage resulted from the creation of such a relationship, his damage should not be compensable.²⁵¹ The dissent responded that the *Richard P. and Nagy* rationale was inapplicable because the plaintiffs there sought damages for the wrongful creation of a parent-child relationship while Steve's claim was based on the attempted wrongful destruction of such a relationship.²⁵²

246. *See id.* at 95.

247. *See id.* at 97.

248. *See id.* at 98 (Vogel, J., dissenting).

249. *Id.*

250. *See id.* at 92-93.

251. *See id.* at 93.

252. *See id.* at 100. Justice Vogel distinguished *Richard P. and Nagy* on the basis of the damages being sought, the same basis on which the court in *Barbara A.*, the case in which sexual deceit caused bodily injury, distinguished *Stephen K.*, the case in which sexual deceit caused an unwanted pregnancy. *See id.* at 100-101 n.4.

Second, the court adopted the *Richard P. and Nagy* argument that the best interests of the child precluded the lawsuit because a trial would entangle Stephanie in the middle of bitter litigation.²⁵³ The dissent responded that the majority's policy concern for Stephanie's well-being was legally irrelevant to this claim between Steve and Wendy, the same as it would be to a battery or attempted murder claim between them.²⁵⁴

Third, the court limited its holding to Wendy's attempt in a dissolution proceeding to terminate Steve's parental rights, noting that Steve had also attempted to terminate Wendy's parental rights in his petition for sole custody of Stephanie.²⁵⁵ Because divorce and custody disputes customarily involve emotionally charged issues and countercharges, the court decided to bar emotional distress claims based on statements made and evidence introduced during dissolution proceedings.²⁵⁶

Finally, the court decided that the policies underlying California's abolition of heart balm claims, in particular the action for alienation of affections, supported a bar against Steve's claim.²⁵⁷ Those policies, the court said, include preventing possible harm to the child, avoiding the potential for abuse, and acknowledging the inadequacy of the law in regulating human relationships.²⁵⁸ In addition, other states had rejected causes of action based on alienation of affections of a child because of the potential for abuse when the child is the object of a family dispute and may be used as a pawn in fights over money matters.²⁵⁹ Because Steve's claim was based on an

253. *See id.* at 93-94.

254. *See id.* at 101.

255. *See id.* at 94-95.

256. *See id.* The court did not have to create a public policy bar to claims based on statements made during dissolution proceedings; it already exists in the form of California's absolute statutory privilege for communications made in the course of a judicial proceeding. Although the court neither referred to nor applied this privilege, apparently because it was not raised, the privilege addresses the court's concerns by immunizing parties, attorneys, and witnesses against liability for statements made in connection with any judicial proceeding, including a dissolution action. *See infra* Part V.B.1.

257. *See id.* at 95-96.

258. *See id.* at 95.

259. *See id.* (relying on *Bock v. Lindquist*, 278 N.W.2d 326, 327-28 (Minn. 1979)).

attempt to destroy a parent-child relationship, it resembled a claim for alienation of affections of a child, and the policy reasons given for not recognizing such causes of action should apply.²⁶⁰ The dissenting judge responded that, since Steve was not suing for alienation of affections, both California's abolition of the cause of action for alienation of affections of a spouse and other states' rejection of a cause of action for alienation of affections of a child were irrelevant.²⁶¹

Despite its rejection of spousal IIED based on conduct occurring during dissolution, the majority left an opening when it said that public policy might not bar all civil liability for attempts to terminate a child's relationship with the other parent, referring specifically to acts such as child-stealing.²⁶² In fact, California courts have periodically recognized causes of action seeking emotional distress damages for spousal misconduct when there can be no public policy objection because a statute provides a civil remedy for the conduct.²⁶³ Thus, a cause of action seeking emotional distress damages apparently can be based on the California statute protecting a parent's right to the custody and control of a minor child.²⁶⁴ In *Begier v. Strom*,²⁶⁵

260. *See id.* at 96.

261. *See id.* at 101 (Vogel, J., dissenting).

262. *See id.* at 97-98 n.5 (citing *Surina v. Lucey*, 168 Cal. App. 3d 539, 543, 214 Cal. Rptr. 509 (Ct. App. 1985), and *Rosefield v. Rosefield*, 221 Cal. App. 2d 431, 34 Cal. Rptr. 479 (Ct. App. 1963)).

263. A similar result occurred in a New Jersey case in which the husband recorded his wife's telephone conversations with her female lover in violation of a New Jersey statute. The husband argued an interspousal exemption to the statute, but the court found that the husband's behavior violated the state's electronic eavesdropping law and recognized the wife's cause of action based on the statute. The wife was awarded compensatory damages for the emotional distress she suffered as a result of the husband's egregious conduct as well as punitive damages. *See M.G. v. J.C.*, 603 A.2d 990, 995 (N.J. Super. Ct. Ch. Div. 1991), *overruled on other grounds by Smith v. Whitaker*, 713 A.2d 20, 33-34 (N.J. Super. App. Div. 1998).

264. *See Surina*, 168 Cal. App. 3d at 542-43, 214 Cal. Rptr. at 511-12 (relying on CAL. CIV. CODE § 49 (West 1999)). The *Surina* court found that section 49 establishes tort liability for a parent who abducts or entices a child away, thus deterring child-stealing by feuding parents. *See id.* at 543, 214 Cal. Rptr. at 512. Characterizing their emotional distress claims as a claim for violation of section 49, the court allowed the parents' causes of action against a third party for removing their minor daughter from her home. *See id.* at 544-45, 214 Cal. Rptr. at 513. The court said that the damages recoverable should

without any mention of possible public policy objections, the court allowed a spousal IIED claim based on false allegations of child abuse because a statute specifically provided for liability.²⁶⁶

include the emotional distress resulting from the loss of the child and the expenses incurred in restoring the child as well as punitive damages if appropriate. *See id.* at 544, 214 Cal. Rptr. at 513.

The *Surina* court said that a tort action based on section 49 could be brought even against a parent who has a right to custody of the child, contrasting the tort with the crime of child-stealing which can be brought only against a parent who has been deprived of any right to custody by court order. *See id.* at 543, 214 Cal. Rptr. at 512. The tort action was first recognized in California in *Rosefield v. Rosefield*, 221 Cal. App. 2d 431, 433-34, 34 Cal. Rptr. 479, 481-82 (Ct. App. 1963), but both *Surina* and *Rosefield* were actions against third parties, not between parents. *See Surina*, 168 Cal. App. 3d at 542, 214 Cal. Rptr. at 511; *Rosefield*, 221 Cal. App. 3d at 432, 34 Cal. Rptr. at 479.

265. 46 Cal. App. 4th 877, 54 Cal. Rptr. 2d 158 (1996).

266. *See id.* at 881-85, 54 Cal. Rptr. 2d at 160-63. In *Begier*, the wife filed a petition for dissolution and, about six weeks later, filed a police report falsely accusing her husband of molesting the couple's daughter. *See id.* at 881, 54 Cal. Rptr. 2d at 160. The husband sued his wife for malicious prosecution and IIED based on the false police report and the repetition of the allegation in the couple's dissolution action. *See id.* The trial court granted the wife's demurrer, apparently on the basis that the accusations made within the dissolution proceeding were immune under California's litigation privilege. *See id.* at 880-82, 54 Cal. Rptr. 2d at 160-61 (relying on CAL. CIV. CODE § 47 (b) (West Supp. 1999), which confers an absolute privilege upon publications made in judicial proceedings). Although the false accusations within the dissolution proceeding were covered by this provision, the appellate court said that the false police report was covered instead by a similar privilege for statements made "in any other official proceeding authorized by law." *Id.* at 883, 54 Cal. Rptr. at 161-62 (quoting *Passman v. Torkan*, 34 Cal. App. 4th 607, 40 Cal. Rptr. 2d 291 (1995)). Nonetheless, the privilege was outweighed by a more specific California statute providing that a person "is liable" for any damages caused by a report of child abuse that the maker knows is false. *Id.* at 884, 54 Cal. Rptr. 2d at 162 (relying on CAL. PEN. CODE § 11172 (West 1999)). The legislature had struck a balance between encouraging reports of child abuse and protecting the reputation of those who might be falsely accused by withholding immunity from persons who knowingly make false reports. *See id.* at 885, 54 Cal. Rptr. 2d at 163. Applying the official proceedings privilege "would essentially nullify the Legislature's determination that liability should attach." *Id.* The *Begier* court allowed the IIED cause of action even though a Family Code provision provides sanctions against a party who falsely accuses another of child abuse in a domestic relations proceeding. *See id.* at 887-88, 54 Cal. Rptr. 2d at 165. That statute specifically provides that the sanctions shall be "in addition" to other remedies. *Id.* at 880 & n.2, 54 Cal. Rptr. 2d at 160 & n.2 (quoting CAL. FAM. CODE § 3027(c) (West Supp. 1999)). As for the husband's malicious prosecution cause of action, the court held that the tort did

IV. INTERFERENCE WITH THE PARENT-CHILD RELATIONSHIP AS A BASIS FOR SPOUSAL IIED: THE MOVEMENT TOWARDS RECOGNITION

Relatively new torts based on loss of consortium, interference with custodial rights, and interference with contractual relations recognize legally protectable interests in established relationships and in the expectation that they will continue.²⁶⁷ Because they recognize the right to recover damages for intentional interference with such relationships, these torts provide a basis for recognizing spousal IIED claims based on intentional and unjustified interference with the establishment and continuation of parent-child relationships. This section examines the most recent cases from states other than California, most of which reach a conclusion opposite from California's uniform denial of tort law recovery for spousal deceit that interferes with a parent-child relationship.

A. Interference with Custodial Rights

Many courts recognize a cause of action for deprivation of custody, interference with custodial rights, or IIED based on such deprivation or interference.²⁶⁸ These causes of action may be sustained

not extend to family law proceedings. *See id.* at 886, 54 Cal. Rptr. 2d at 163 (relying on *Bidna v. Rosen*, 19 Cal. App. 4th 27, 23 Cal. Rptr. 2d 251 (Ct. App. 1993)).

267. *See Levit, supra* note 24, at 146-50.

268. The Restatement recognizes a cause of action by a parent who has the right to the custody, control, and services of a minor child against anyone who unlawfully takes or withholds such child. *See* RESTATEMENT (SECOND) OF TORTS § 700 (1977). Recovery includes damages for the emotional distress resulting from the loss of the child and for the expenses incurred in vindicating the parent's rights. *See id.* cmt. g.

Even when they reject a separate cause of action for interference with custody, some courts apparently would allow IIED claims based on deprivation of custody or interference with custody. *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); *Zaharias v. Gammill*, 844 P.2d 137, 141 (Okla. 1992) (refusing to recognize the tort of interference with custodial relations but stating that the same facts might entitle the plaintiff to relief under IIED). For cases involving deprivation of custody, see *Kunz v. Deitch*, 660 F. Supp. 679, 685 (N.D. Ill. 1987), holding that seven months deprivation of custody sufficient to state *prima facie* case for IIED, and *Sheltra v. Smith*, 392 A.2d 431, 433 (Vt. 1978) (stating deprivation of custody for one month states *prima facie* case for IIED). For cases based on interfer-

against anyone who unlawfully takes or withholds such child, and may be based not only on the loss of services but also on the parent's right to the care, custody, and companionship of the child.²⁶⁹ The cause of action has been extended from its most usual application—the physical taking or withholding of a child—to an IIED cause of action based on the “deliberate frustration of a close and affectionate relationship between parent and child.”²⁷⁰

Opponents of this tort, like opponents of spousal IIED, argue that recognizing it is contrary to the “best interests” of the children involved. For example, the Minnesota Supreme Court refused to recognize the tort in *Larson v. Dunn*²⁷¹ on the ground that allowing parents to battle endlessly over family matters would not serve the best interests of the children.²⁷² Unlike the lawsuits in most

ence with custodial rights, see *Kajtazi v. Kajtazi*, 488 F. Supp. 15 (E.D.N.Y. 1978), stating that action of defendant in abducting infant from mother with legal custody and falsely imprisoning him in Yugoslavia stated IIED claim, and *Pankratz v. Willis*, 744 P.2d 1182 (Ariz. Ct. App. 1987), holding that unilateral separation of child from parents can be extreme and outrageous conduct, or *Bartanus v. Lis*, 480 A.2d 1178, 1182-83 (Pa. Super. Ct. 1984), holding that the allegation that family enticed plaintiff's son to stay away from father states a claim for IIED. 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).

269. See RESTATEMENT (SECOND) OF TORTS § 700 cmt. g (1977).

270. *Raftery v. Scott*, 756 F.2d 335, 340 (4th Cir. 1985). There, a father testified that he had been unable to find his former wife and his child for more than four years and that his later efforts to reestablish a relationship with the child were thwarted by the mother. See *id.* at 337. The *Raftery* court rejected arguments that the abolition of alienation of affection claims eliminated the cause of action. See *id.* at 338-40.

See also *Bhama v. Bhama*, 425 N.W.2d 733, 735-36 (Mich. Ct. App. 1988), where the trial court rejected as not outrageous a parent's attempt to create a hostile relationship between the other parent and their child because such conduct was “a problem in almost every marital case.” However, the appellate court held that the plaintiff wife's allegations that her estranged husband had brainwashed their children into rejecting her were sufficient to allow the jury to consider recovery on remand. See *id.* at 737. The appellate court said it was “unpersuaded that the deliberate destruction of a parent-child relationship can never be recognized as outrageous conduct.” *Id.* at 736.

271. 460 N.W.2d 39 (Minn. 1990).

272. See *id.* at 46. Other courts that applied the best interests of the child standard also have rejected the tort. See *Politte v. Politte*, 727 S.W.2d 198, 200 (Mo. Ct. App. 1987); *Zaharias v. Gammill*, 844 P.2d 137, 140 (Okla. 1992).

of the thirteen prior state supreme court decisions that decided that the tort furthered public policy objectives, the Minnesota lawsuit was filed after the kidnapped child had returned home.²⁷³

Rather than a more traditional tort analysis, the majority of the Minnesota Supreme Court turned to the family law standard for making custody determinations and found that it would not be in the child's best interests to allow her father to pursue a cause of action against her mother. Adopting the new tort would place the child in the middle of a bitter family dispute, might allow relitigation of original custody determinations, and "could be used as a weapon for revenge and continued hostility."²⁷⁴ The dissenting justices argued, however, that a child's best interests are served "by encouraging the return of absent children by imposing a civil damages remedy."²⁷⁵

B. Misrepresentation of Paternity

Even though they are "just the sort of lies that commonly lead to marital break-ups,"²⁷⁶ misrepresentations of paternity can be viewed as analogous to interference with custody because they distort or disrupt the establishment and the continuation of the parent-child relationship. Unlike the analysis in *Steve H.*,²⁷⁷ three very recent opinions recognized misrepresentations of paternity as outrageous conduct sufficient to state an IIED claim. In particular, these courts focus on the harm claimed which is the threatened destruction of a parent-child relationship, rather than the breakup of a marriage or the creation of a parent-child relationship. Thus, the claims are allowed because they seek damages not for the support obligations incurred because of a spouse's fraudulent creation of a parent-child

273. Most of the other cases resulted from efforts to recover still-missing children or to recover damages from third parties who helped carry out the kidnapping. See Daniel Oberdorfer, Comment, *Larson v. Dunn: Toward a Reasoned Response to Parental Kidnapping*, 75 MINN. L. REV. 1701, 1701-02 (1991).

274. *Larson*, 460 N.W.2d at 45-47.

275. *Id.* at 52 (Popovich, C.J., joined by Yetka & Kelley, JJ., dissenting).

276. Ellman & Sugarman, *supra* note 16, at 1328 (citing *Koepke v. Koepke*, 556 N.E.2d 1198 (Ohio Ct. App. 1989), in which a husband sued his wife for emotional distress caused by her disclosure that her child was not his, and *Whelan v. Whelan*, 588 A.2d 251 (Conn. Super. Ct. 1991), in which a wife sued her husband for falsely telling her that he had tested positive for AIDS).

277. 57 Cal. App. 4th 379, 67 Cal. Rptr. 2d 90 (1997).

relationship nor for the emotional distress associated with the dissolution of a marriage, but instead for the emotional losses suffered because of a spouse's attempted dissolution of a parent's ongoing relationship with a child.

Thus, in *Doe v. Doe*,²⁷⁸ the Maryland Court of Special Appeals rejected a series of public policy objections to a husband's claims of fraud and IIED based on his wife's misrepresentation that he was the father of two of the parties' three children.²⁷⁹ Shortly after discovering that his wife had engaged in an affair for seven years and that the children might not be his, the husband filed for divorce on grounds of adultery.²⁸⁰ After a paternity test confirmed that he was not the biological father of the three-year-old twins, but was the father of the older child, the husband added IIED and fraud causes of action to his complaint for divorce.²⁸¹ He sought damages for his emotional distress upon learning that he was not the biological father of the twins and for the financial investment incurred as a result of the fraud.²⁸² The trial court dismissed all the tort claims on the grounds that they would harm the best interests of the children, impede the efficient administration of justice, and provide little benefit to the husband because the divorce action would provide a complete remedy.²⁸³

The appellate court rejected the trial court's reasoning: given the abrogation of interspousal immunity and recognition of emotional distress claims, it logically followed that a spouse could sue a spouse for IIED, and the court found no public policy that prevented recovery.²⁸⁴ First, "[i]n this case, as with most other domestic tort cases, discord, suspicion, and distrust have already entered the Doe home. The historic public policy rationale precluding interspousal suits seems inane when there is no home to disrupt and no domestic tranquility left to preserve."²⁸⁵ Second, as for the trial court's

278. 712 A.2d 132 (Md. Ct. Spec. App. 1998), *cert. granted*, 717 A.2d 384 (Md. 1998).

279. *See id.* at 138-39.

280. *See id.* at 136-37.

281. *See id.* at 137.

282. *See id.* at 138.

283. *See id.* at 138-39.

284. *See id.* at 145-46.

285. *Id.* at 146.

reliance on the best interests of the children, the appellate court said that standard, though integral to child custody determinations, was irrelevant in this interspousal suit.²⁸⁶ Because paternity had already been determined, “the children are neither parties nor witnesses in the counts of the complaint at issue here; therefore, the standard does not apply.”²⁸⁷ In addition, the children would not be subject to any more intrafamilial warfare in a tort action than in the companion divorce action, and the wife should not be able to use her children as a shield to avoid potential liability for her tortious conduct.²⁸⁸ Finally, the appellate court found no possibility of double recovery because tort actions and divorce proceedings are “intended to effect different purposes, with different remedies.”²⁸⁹

Having rejected public policy as a ground for refusing to recognize the claim at all, the appellate court reversed the trial court’s finding that the husband had not stated the intent and conduct elements of a claim for IIED.²⁹⁰ The intent element was satisfied because the wife knew the truth and misled her husband and because her continuing affair indicated that she knew “there was a high degree of probability that Mr. Doe would discover the truth” about the affair and the paternity.²⁹¹

The outrageous conduct element also was satisfied. Even though misrepresentation of paternity may not be uncommon, it passes the threshold and “a fact-finder therefore should be given the opportunity to decide whether Ms. Doe’s actions in concealing her affair, concealing the children’s paternity, and affirmatively misrepresenting Mr. Doe as the father of the twins in this particular case was sufficiently outrageous to result in liability.”²⁹² As for the fraud

286. *See id.* at 147.

287. *Id.*

288. *See id.* at 147-48.

289. *Id.* at 148.

290. *See id.* at 160.

291. *Id.* at 153 (relying on RESTATEMENT (SECOND) OF TORTS § 46 cmt. i (1965)).

292. *Id.* at 154. In particular, the court cited the following: “Ms. Doe told a falsehood going to the heart of the marital and parental relationship”; “the falsehood was repeated every day”; “Ms. Doe caused Mr. Doe to develop a parental relationship with the twins, then caused him to learn that the children were not biologically his own”; “Ms. Doe used Mr. Doe to fulfill the emotional, physical, and financial obligations of a father for three years, knowing

count, the appellate court again disagreed that the best interests of the children constituted a public policy bar to an interspousal tort suit. Instead, the husband had adequately stated a cause of action and was seeking damages for the "losses he claims to have suffered because of Ms. Doe's alleged fraud, not damages for developing a loving relationship with the children."²⁹³

In a lawsuit against a third-party lover, a 1999 New Jersey opinion also concluded that misrepresentation of paternity can meet the extreme and outrageous conduct element of IIED and that legally recognizable damages can be based on attempted destruction of a parent-child relationship.²⁹⁴ Like *Doe v. Doe, C.M. v. J.M.* examined the viability of an IIED claim by a husband who had been led to believe that the children born during his marriage were his own when they were instead the products of an ongoing affair.²⁹⁵ The husband sought damages from his wife's lover for "emotional distress resulting from the severance of a financial and emotional bond with the children he was led to believe were his own."²⁹⁶ In a decision on a motion to dismiss the complaint based on statutory abolition of heart balm claims, the court determined that the husband should be allowed to proceed because he was seeking to recover for emotional distress resulting from the dissolution of his relationship with the children, rather than from the dissolution of his relationship with his wife.²⁹⁷

First, the court found that none of the allegations fell within the causes of action barred by the "Heart Balm" Act.²⁹⁸ Next, the court relied on cases from other states to find that outrageous conduct is sufficiently pleaded "when an affair leads to the birth of a child held out to be another's."²⁹⁹ Third, the court found that the intent element

those obligations were not really his"; "Ms. Doe failed to reveal the truth, even when confronted"; and "Ms. Doe caused Mr. Doe to suffer from the knowledge that he had been hoodwinked and used." *Id.* at 160.

293. *Id.* at 162.

294. *See C.M. v. J.M.*, 726 A.2d 998, 1001-04 (N.J. Super. Ct. Ch. Div. 1999).

295. *See id.* at 999.

296. *Id.* at 1000.

297. *See id.* at 1000-01.

298. *See id.*

299. *Id.* at 1002 (citing *Koelle v. Zwiren*, 672 N.E.2d 868 (Ill. App. Ct. 1996); *Doe v. Doe*, 712 A.2d 132 (Md. Ct. Spec. App. 1998); *Miller v. Miller*,

was met because the affair started before the marriage and continued during the marriage and after the birth of both children.³⁰⁰ The wife and her lover “behaved recklessly, in deliberate disregard of the high degree of probability that their affair would be uncovered after each birth, by maintaining their sexual relationship, and by concealing, from J.M., the true paternity of the children.”³⁰¹ As for the lover, the court said he was obviously a cause of the children’s births and that he “abandoned any obligation to the children, while [the husband] helped his wife feed, raise, fund, educate and nurture children that were not his own.”³⁰²

In the most recent misrepresentation of paternity decision, the Minnesota Court of Appeals agreed that no public policy prevented a spouse from suing his current or former spouse for fraud, intentional misrepresentation, or IIED.³⁰³ Whether a claim of misrepresentation of paternity can support those causes of action “goes to whether the elements of each tort are met, not whether the conduct occurred during a marriage.”³⁰⁴ In *G.A.W., III v. D.M.W.*, the husband learned during dissolution that he was not the father of two children born during the marriage.³⁰⁵ After a dissolution settlement agreement, the ex-husband sued his former wife for her misrepresentation of paternity.³⁰⁶ The court first held that the claims were not barred by collateral estoppel or res judicata because they were not required to be raised in the dissolution proceeding.³⁰⁷ In rejecting public policy arguments against bringing the tort claims in another forum, the court

956 P.2d 887 (Okla. 1998)). In particular, the court said that the following actions were sufficient to support a claim of extreme and outrageous conduct:

Keeping the duration of the affair a secret from J.M., as well as suppressing the true paternity of [the first child] for almost three years, including four months after the paternity of [the second child] had been disclosed, without regard to the high degree of probable harm to defendant, would indeed lead the average member of the community to exclaim ‘Outrageous!’

Id. at 1004.

300. *See id.* at 1004.

301. *Id.*

302. *Id.*

303. *See G.A.W., III v. D.M.W.*, 596 N.W.2d 284 (Minn. Ct. App. 1999).

304. *Id.* at 290.

305. *See id.* at 286.

306. *See id.*

307. *See id.* at 287-89.

noted that the Minnesota Supreme Court had abolished interspousal immunity and the legislature had abolished heart balm actions.³⁰⁸ "If the legislature had intended to abolish other torts arising out of the marital relationship, we conclude that it would have so provided."³⁰⁹

These recent results were foreshadowed by the Ohio decision in *Koepke v. Koepke*,³¹⁰ recognizing a similar claim ten years earlier. In *Koepke*, a husband sued his wife for IIED after she announced in her divorce petition that he was not the father of her one-year-old son.³¹¹ The judge assigned to the divorce action dismissed the complaint on public policy grounds, stating the injury could and "should be considered in the divorce litigation."³¹² Although the court of appeals agreed with the trial court that most divorce actions involve some form of emotional distress, it recognized that "a domestic relations forum is not the proper forum in which to litigate a tort claim" and therefore held that a spouse could bring a tort claim for emotional distress arising from a marital relationship separately from the divorce action.³¹³

Identical results have been reached in cases involving misrepresentations of paternity before a marriage or outside a marriage. In *Koelle v. Zwiren*,³¹⁴ an Illinois appellate court held that Koelle, a young man who had a brief sexual affair with Zwiren, had stated a claim for IIED based on a misrepresentation of paternity and that his damages were cognizable because he did not seek to be paid for love and affection.³¹⁵ Instead, he sought compensation for the losses he suffered due to the fraud of the child's mother and for the pain and anxiety he experienced due to the IIED.³¹⁶ In *Miller v. Miller*,³¹⁷ the

308. *See id.* at 289.

309. *Id.*

310. 556 N.E.2d 1198 (Ohio Ct. App. 1989).

311. *See id.* at 1198-99.

312. *Id.* at 1199.

313. *Id.* at 1200.

314. 672 N.E.2d 868 (Ill. App. Ct. 1996).

315. *See id.* at 875.

316. *See id.* Knowing that Koelle was not the father of her child, Zwiren deliberately misrepresented to Koelle for eight years that he was the child's father, asked him to keep the baby's paternity a secret, and told him she would not ask for any financial support. *See id.* at 870-71. After a paternity test showed that he was not the child's father, Koelle sued for fraud, IIED, and also sought visitation rights with the child. *See id.* at 871. The trial court dismissed

Oklahoma Supreme Court allowed an IIED cause of action based on premarital and marital lies that caused the plaintiff to develop a parental relationship with a child and then caused him to learn the child was not his own.³¹⁸

plaintiff's amended complaint for failure to state a claim upon which relief could be granted because "'love and affection' are 'noncompensable.'" *Id.* at 871-72. The appellate court disagreed, rejecting the mother's best interest of the child argument because any harm the child may have suffered would have been caused by the mother: "If anything, plaintiff's lawsuit seeks to limit the harm caused [and to allow] plaintiff and [the child] to continue their loving father-daughter relationship." *Id.* at 875. The court concluded that public policy does not protect people who engage in behavior such as Zwiren's and "we will not allow defendant to use her daughter to avoid responsibility for the consequences of her alleged deception." *Id.*

317. 956 P.2d 887 (Okla. 1998).

318. *See id.* In *Miller*, the husband sued his former wife and her parents, alleging that they knowingly misrepresented that she was pregnant with his child to induce him to marry her. *See id.* at 891. After their divorce, the court ordered the former husband to pay child support and when the daughter was 15, she moved into his house. *See id.* at 892. A year later, the daughter told Mr. Miller that her mother and grandparents had told her that he was not her biological father. *See id.* A paternity test verified that he was not. *See id.* Mr. Miller filed suit for fraud and IIED; the trial court dismissed the suit, and the intermediate appellate court affirmed on the basis that the conduct alleged failed to reach the standard of outrageousness. *See id.* at 892-93. The Oklahoma Supreme Court disagreed, finding that the following allegations were sufficiently extreme and outrageous to meet the Restatement standard:

[T]elling a premarital falsehood going to the heart of the marital and parental relationship, a falsehood that was implicitly repeated every day . . . causing the plaintiff to develop a parental relationship with a child . . . and then causing plaintiff to learn that the child was not biologically his own . . . using the plaintiff to fulfill the . . . obligations of a husband for almost five years and of a father for fifteen years . . . undermining the plaintiff's relationship to his child . . . failing to reveal the truth to the plaintiff in the divorce action . . . causing the plaintiff to suffer from the knowledge that he had been hoodwinked and used. . . .

Id. at 902.

The supreme court decided, however, that the husband did not state a claim for unjust enrichment in his request for restitution of payments he had made under the child support order for ten years. *See id.* at 905.

V. THE CASE FOR ALLOWING SPOUSAL IIED CLAIMS BASED ON
INTENTIONAL AND UNJUSTIFIED INTERFERENCE WITH A PARENT-
CHILD RELATIONSHIP

Spousal emotional distress claims raise a traditional question: Should some wrongs be left uncompensated by the legal system and resolved, if at all, within the family? Most states have answered this question by eliminating legal compensation for misrepresentations that interfere with or threaten to destroy the marital relationship, either through adoption of no-fault divorce, abolition of heart balm claims, or both.³¹⁹ For deceitful spousal conduct aimed at the marital relationship, state legislatures may well have made a policy decision that most such conduct should not be remedied by money damages.

The conduct examined in this Article aims in a different direction, interfering with or threatening to destroy a parent-child relationship rather than a marriage. The Article concludes that state legislatures have made no decision to preclude money damages for lies and betrayals that interfere with or threaten to destroy the parent-child relationship, and the courts should not do so either.

A. *Legislative Intent*

1. Did the legislature intend to preclude all spousal IIED claims based on marital misconduct when it enacted no-fault divorce?

Some commentators would reject spousal tort actions in no-fault states because tort actions necessarily introduce fault.³²⁰ However, a spousal battery action can be pursued despite the adoption of

319. Cf. Note, *Heartbalm Statutes and Deceit Actions*, 83 MICH. L. REV. 1770, 1771 n.5 (1985) (citing statutes abolishing actions for promise to marry and which often abolished the related common law actions for alienation of affections, criminal conversation, and seduction).

320. One critic wrote that "an extreme return to marital fault through an unexpected side door threatens to create havoc with no-fault divorce. Tort law has become the vehicle, alongside or after a divorce action, to compensate one spouse financially for torts inflicted during the marriage by the other spouse." Krause, *supra* note 24, at 1363. Professor Krause predicted that allowing such claims "will reintroduce to the end of marriage more and worse acrimony than no-fault divorce ever eliminated." *Id.* at 1364. He proposed instead a re-thinking of the wholesale rejection of fault from the financial consequences of divorce to maintain family law jurisdiction over marital misconduct. *See id.* at 1366-67.

no-fault.³²¹ The state's decision that battery is a crime effectively counters the argument that the legislature intended to eliminate battery as a spousal cause of action when it eliminated fault considerations from dissolution proceedings.

The question for other spousal tort actions is the same: by adopting no-fault, has the state legislature expressly or impliedly decided to eliminate tort claims based on a particular kind of marital misconduct. The state legislature probably intended for the state's divorce code to provide the exclusive remedy for some wrongs or to exclude any remedy for other wrongs. For example, if the wrong is the basis for a request for dissolution, spousal support, property distribution, child support, or child custody, the state legislature may well have intended its divorce and family code to provide exclusive coverage for such a wrong.³²² Even though the spouse in a no-fault state will recover nothing in a dissolution proceeding for emotional losses or pain and suffering associated with the reasons for the dissolution request, that may be precisely what the legislature intended.

Because the adoption of no-fault merely rules out fault as a grounds for divorce rather than ruling out all considerations of wrongdoing between spouses, it is certain that at least some tort claims may still be brought. No-fault divorce is irrelevant to tort claims based on conduct unrelated to the dissolution of a marriage. Because divorce actions and tort actions serve different functions and have different purposes, even conduct related to the dissolution of a

321. *See, e.g.*, *Stuart v. Stuart*, 421 N.W.2d 505, 507 (Wis. 1988) (holding that the wife's proceeding with a divorce action did not constitute a relinquishment of a right to bring a tort action against the husband because the evidentiary requirements of a divorce action are distinct from a battery claim).

322. Such a division between family court proceedings and domestic tort claims is analogous to the bright line established by the U.S. Supreme Court to distinguish between "domestic relations" claims and claims that can be brought in federal court despite the domestic relations exception to federal diversity jurisdiction. *See Ankenbrandt v. Richards*, 504 U.S. 689, 706 (1992). Federal courts simply do not have jurisdiction to grant divorces, award alimony, or to determine the custody of a child even though the requirements of diversity jurisdiction are otherwise satisfied. *See id.* at 703-04; *see also* CLARK, *supra* note 11, at 705-07; Michael Ashley Stein, *The Domestic Relations Exception to Federal Jurisdiction: Rethinking an Unsettled Federal Courts Doctrine*, 36 B.C. L. REV. 669, 682-88 (1995) (examining the development of the domestic relations exception).

marriage should be assessed as a possible basis for a tort action. The function of a divorce action is to terminate a relationship and allocate resources, usually without regard to fault, while a tort action compensates one spouse for the wrong of the other. Even though criminal law may punish the wrongdoer and “[d]ivorce or separation [may] provide escape from tortious abuse [they] can hardly be equated with a civil right to redress and compensation for personal injuries”³²³ and such double coverage has been widely accepted in cases involving domestic violence.³²⁴

As for the spousal IIED claims discussed in this Article, no-fault is in one sense irrelevant because the statutes providing for no-fault dissolution of marriage do not encompass the establishment and continuation of parent-child relationships. Still, one may argue that dissolution of a parent-child relationship lies solely within the province of a state’s family code. Although the parent-child relationship is based first on biology, rather than on law, a legal relationship comes about once natural or presumed parenthood is established.³²⁵ Unlike the marital relationship, however, the parent-child relationship is only rarely subject to modification or termination.³²⁶ And unlike the purpose of a state divorce code, which is to govern the dissolution of the spousal relationship and the division of family assets, the purpose of the child custody and support provisions is to preserve parent-child relationships and to enforce parental rights and obligations.³²⁷

323. *Merenoff v. Merenoff*, 388 A.2d 951, 962 (N.J. 1978).

324. *See, e.g., id.* (reaching conviction that personal injuries tortiously inflicted by one spouse on another entitles wronged spouse to compensation).

325. *See* CAL. FAM. CODE § 3010 (West 1994) (presuming father is entitled to custody); *id.* § 7611 (establishing presumption of paternity).

326. *See* WESTFALL, *supra* note 10, at 311.

327. *See, e.g.,* CAL. FAM. CODE § 3020(b) (West 1994 & Supp. 1999) (“[I]t is the public policy of this state to assure that children have frequent and continuing contact with both parents . . . and to encourage parents to share the rights and responsibilities of child rearing”); §§ 3900, 3901 (father and mother have an equal responsibility to support children up to age 18); *id.* § 4053(a) (parent’s first and principal obligation is to support children). The contempt of court process can perhaps address “those cases in which a party intentionally violates family-law-based legal obligations either during the divorce process or after,” including such things as concealing assets, violating a support order, and concealing children. Ellman & Sugarman, *supra* note 16, at 1278 n.37. No such family law remedy is available for claims of interference

Even without a no-fault equivalent to dissolution of a parent-child relationship, the dissolution of marriage often brings about the disruption of parent-child relationships. State family codes provide a strong argument against recognizing spousal IIED based on such disruption. Although some judges have argued that the policy of safeguarding the best interests of the children is irrelevant unless child custody matters are involved, the policy is obviously implicated in a spousal IIED claim based on interference with a parent-child relationship. In fact, some critics contend that the recent changes in family law have had the unfortunate result of placing children at the center of parental battles: instead of fighting over the grounds for divorce or the amount of support, many parents turned their disputes into custody battles.³²⁸ For spousal IIED claims based on interference with parent-child relationships, a real conflict exists between parents' legally protectable interests in their relationships with their children and the possibility that allowing a tort claim may provide another vehicle for exacerbating the psychological and financial damages of divorce.

Finally, though, it is difficult to discern how allowing one parent to escape liability for interfering with the child's existing relationship with the other parent can support the best interests of the children. The best interests policy does, however, mean that judges should protect against the possibility that a child's future support may be diminished by allowing a spouse to recover excessive damages from the other spouse.³²⁹

2. Did the legislature intend to preclude all spousal IIED claims based on domestic deceit when it abolished heart balm claims?

Spousal claims of deceitful interference with parent-child relationships have some things in common with the abolished heart balm causes of action. Like breach of promise and alienation of

with parent-child relationships that are not yet the subject of court orders.

328. See generally KARP & KARP, *supra* note 36, at 389 (discussing the increase in custody litigation since the 1970s).

329. In addition, tort litigation between parents can harm children because it causes financial hardship to one or both parents. See *Wood v. Wood*, 338 N.W.2d 123, 129 (Iowa 1983) (Wolle, J., dissenting) (asserting that the "parents' continuing internecine struggle" will exhaust money needed for raising children).

affections, parent-child interference claims are based on lies and misrepresentations that create and destroy family relationships. In this view, lies about paternity are just one of the kinds of lies that spouses tell each other, and actions based upon such lies should be barred for the same reason that heart balm claims have been abolished: there is "a public policy against litigation of the affairs of the heart."³³⁰

The abolition of heart balm claims has had one direct effect on spousal IIED: adultery cannot be the basis for a claim of outrageous conduct. Beyond that, most courts hold that spousal IIED causes of action survived the abolition of heart balm claims, although there exists some dispute concerning whether the policies behind the statutory abolition should bar some spousal IIED claims.³³¹ Some courts have extended abolition of heart balm claims to spousal IIED on the grounds that when the law provides no remedy for adultery or alienation of affections, it should also provide no remedy for adultery or alienation of affections by another name or for the byproduct of

330. *Askew v. Askew*, 22 Cal. App. 4th 942, 947, 28 Cal. Rptr. 2d 284, 286 (Ct. App. 1994) (barring a husband's fraud claim based on his wife's premarital statements of sexual attraction and his transfer of property to her in reliance on those statements). A similar claim has been made that the adoption of no-fault divorce was a legislative signal that courts should avoid public inquiry into what went wrong in a marriage: "Not only should intramarital activity ordinarily not be the basis for tort liability, it should also be protected against disclosure in tort litigation." *Hakkila v. Hakkila*, 812 P.2d 1320, 1325 (N.M. Ct. App. 1991).

331. *See, e.g., Raftery v. Scott*, 756 F.2d 335, 339 n.4 (4th Cir. 1985) (finding that IIED is not the same as a claim for alienation of affections of a child). Rejecting the mother's argument that the father's IIED claim was simply an action for alienation of affections, which had been abrogated by statute, the court in *Raftery* said the two causes of action are separate and distinct kinds of wrongdoing with different elements and burdens of proof. *See id.* Even if the son's affections had not been alienated, the "unwarranted breach in the physical relationship and its resulting adverse impact on the father would have entitled [the father] to some damages" under IIED. *Id.* at 339; *see also Van Meter v. Van Meter*, 328 N.W.2d 497, 498 (Iowa 1983) (holding IIED is not affected by statutory abolition because it differs from alienation of affections in its elements and policy considerations); *Bartanus v. Lis*, 480 A.2d 1178, 1182-85 (Pa. Super. Ct. 1984) (holding IIED claim allowed even though court refused to recognize cause of action for alienation of affections).

Other courts find that the statutory abolition of alienation of affections claims essentially abolished IIED claims between spouses. *See Weicker v. Weicker*, 237 N.E.2d 876 (N.Y. 1968) (per curiam); *Koestler v. Pollard*, 471 N.W.2d 7 (Wis. 1991).

adultery or alienation of affections.³³² Thus, several courts have held that a plaintiff cannot evade the elimination of heart balm claims by simply calling the cause of action IED instead of adultery.³³³

The broader argument—that the statutory abolition of heart balm claims reaches farther than obvious attempts to plead the same causes of action under different names—fails for several reasons. First, none of the abolished causes of action could be brought between spouses. It is difficult to determine whether the legislature intended to make any assertions or imply policies regarding suits between spouses when it abolished suits that were not between spouses. Second, the heart balm claims had different focuses and alleged different harms than IED claims, seeking compensation for disruption of the marital relationship rather than for injury to the person. The tort action for alienation of affections claimed that the

332. As the court reasoned in one case, if the law did not provide a remedy for a “fraudulent promise to fulfill the rights, duties and obligations of a marriage relationship,” logically it did not provide any remedy for a “fraudulent promise by a married man to impregnate a woman not his wife.” *Perry v. Atkinson*, 195 Cal. App. 3d 14, 19, 240 Cal. Rptr. 402, 405 (Ct. App. 1987). In *Perry*, a woman sued for fraud and deceit for pain caused by an abortion she agreed to undergo in reliance on the defendant’s promise that he would impregnate her later. *See id.* at 16, 240 Cal. Rptr. at 403; *see also* *Boyd v. Boyd*, 228 Cal. App. 2d 374, 381, 39 Cal. Rptr. 400, 404 (Ct. App. 1964) (barring a woman’s lawsuit for breach of fraudulent promise to live with and support her as being covered by abolished cause of action for breach of promise to cohabit after marriage).

333. *See, e.g., Koestler*, 471 N.W. 2d at 9. In *Koestler*, a husband sued his wife’s lover for IED for intentionally concealing that he was the biological father of a child born during the marriage and only revealing his paternity four years later, after the plaintiff had developed a bond with the child. *See id.* at 8. Given the state legislature’s abolition of criminal conversation causes of action, the court held that a “complaint which alleges the facts necessary to state a claim for criminal conversation does not state a claim for relief even if it alleges additional facts which need not be alleged to state a claim for criminal conversation.” *Id.* The court said the facts alleged in the plaintiff’s complaint were identical to the facts required for criminal conversation or flowed directly from those facts. *See id.* at 9-10. In addition, the court barred the claim for the public policy reason that it would embroil courts in a dispute in which their intervention is inappropriate. *See id.* at 10-12; *see also* *Askew*, 22 Cal. App. 4th at 946, 28 Cal. Rptr. 2d at 285 (barring a husband’s fraud claim based on his wife’s premarital statements of sexual attraction and his transfer of property to her in reliance on those statements as nothing more than a breach of promise cause of action).

defendant had interfered with the marital emotional relationship; damages resulted from the effect of the defendant's conduct on the plaintiff's spouse. The tort action for criminal conversation claimed that the defendant had interfered with the marital sexual relationship; damages resulted from the defendant's sexual relationship with the plaintiff's spouse. In contrast, spousal IIED actions claim that the defendant has interfered with the plaintiff's emotional well-being. Damages to the plaintiff result from the effect of the defendant's conduct directed towards the plaintiff.³³⁴

The better arguments based on abolition of heart balm claims are (1) that the problems underlying heart balm claims are identical to those underlying spousal IIED claims, and (2) that the policies advanced by statutory abolition of such claims would be furthered by rejecting spousal IIED claims as well. Spousal IIED claims like the ones endorsed in this Article do not, however, pose the same problems as heart balm claims. Because they often were based on sexual misconduct, heart balm claims could be abused for the purpose of blackmail and extortion since their proof required intrusion into very intimate aspects of a marriage. IIED claims do not carry the same potential for abuse because—in contrast to criminal conversation and alienation of affections in particular—it is far more difficult to prove all the elements of IIED.³³⁵ Courts also objected to heart balm claims because they were asked to regulate sexual conduct that could not be regulated and to enforce romantic promises that could not be enforced. To do so, courts had to inquire into private matters. Parental interference claims require no regulation of sexual conduct or enforcement of promises of love. As for inquiring into private matters, no testimony will be required to determine paternity and little private information will be revealed in determining whether a misrepresentation was made.

Finally, critics of spousal IIED contend that state legislatures that have adopted no-fault divorce and abolished heart balm claims

334. See *Bartanus v. Lis*, 480 A.2d 1178, 1185 (Pa. Super. Ct. 1984) (contrasting a parent's IIED action with a parent's action for alienation of a child's affection on the basis that the alleged harm is different; in IIED the focus is on the effect the conduct has on the plaintiff, while in alienation of affections the focus is on the effect the conduct has on the child); *Koestler*, 471 N.W.2d at 12-13 (Abrahamson, J., dissenting).

335. See *Koestler*, 471 N.W.2d at 14-15 (Abrahamson, J., dissenting).

have expressed a general public policy against tort claims based on sexual misconduct and broken promises of love.³³⁶ Even if there is such a public policy, it should have no impact on spousal actions based on tortious conduct other than that described by the heart balm causes of action and the prior fault grounds for divorce.³³⁷ In

336. See *Askew*, 22 Cal. App. 4th at 959-60, 28 Cal. Rptr. 2d at 294-95. Such lawsuits are "fundamentally incompatible with a statutory scheme of no-fault divorce" because "[t]he limited recovery available in dissolution actions is easily circumvented if spouses are allowed to sue each other because of love-related promises [and because] a couple undergoing the unpleasantness of a dissolution could wind up in civil court litigating *the very emotional underpinnings of the marriage itself* in a 'fraud' action. This is just another name for 'fault' divorce." *Id.* at 959-60, 28 Cal. Rptr. 2d at 294-95. Under the former breach of promise lawsuit, the plaintiff could recover for emotional suffering, damage to reputation, humiliation, embarrassment, and the expectation of sharing in the defendant's wealth and social position. See *id.* at 960, 28 Cal. Rptr. 2d at 294. In dissolution proceedings, the plaintiff could recover only half the community property, appropriate support order, and attorney fees with "no hefty premiums for emotional angst." *Id.*, 28 Cal. Rptr. 2d at 295.

337. For example, one court found that even though the public policy of California family law is to eliminate fault as a ground for dissolution of marriage and as a consideration in the division of property, the policy did not prohibit husband and wife from pursuing appropriate civil remedies against one another. See *In re Marriage of McNeill*, 160 Cal. App. 3d 548, 556, 206 Cal. Rptr. 641, 645 (Ct. App. 1984), *overruled on other grounds by In re Marriage of Fabian*, 41 Cal. 3d 440, 451 n.13, 715 P.2d 253, 260 n.13, 224 Cal. Rptr. 333, 340 n.13 (1986). In *McNeill*, the husband claimed that he had been induced to transfer property in reliance on his wife's misrepresentations about her health and profession. See *McNeill*, 160 Cal. App. 3d at 555, 206 Cal. Rptr. at 643-44. After the wife filed a dissolution petition, the husband filed a civil action for, among other causes of action, fraud and rescission. See *id.* The appellate court upheld the trial court's consolidation of the civil and dissolution actions under California Rules of Court 1212 and Civil Procedure Code section 1048, noting that the husband had to file a separate civil action to be compensated for the fraud. See *id.* at 556-58, 206 Cal. Rptr. at 644-46. The *Askew* court distinguished *McNeill* on the basis that both the nature and the time of the misrepresentations were different; the statements in *McNeill* were all made after the marriage and had nothing to do with love, sex, or passion. See *Askew*, 22 Cal. App. 4th at 960-61, 28 Cal. Rptr. 2d at 295.

In *Dale*, the California Court of Appeal held that in the absence of a pending dissolution proceeding, a wife can bring a subsequent tort action based on her spouse's alleged tortious concealment of community assets from her during a dissolution proceeding. See *Dale v. Dale*, 66 Cal. App. 4th 1172, 78 Cal. Rptr. 2d 513 (Ct. App. 1998). The Court of Appeal refused to consider the defendants' argument that the plaintiff's claims were barred by the litigation privilege because the trial court had not yet ruled on the defendants' mo-

no-fault states, spouses can recover nothing through dissolution proceedings for emotional losses or for pain and suffering.³³⁸ Confining spouses to their dissolution remedies is reasonable only if the legislature has excluded other compensation for all kinds of domestic misconduct. When the only legislative determination concerns heart balm claims and fault grounds for divorce, then the legislature did not intend to abolish other torts arising out of the marital relationship, and other kinds of domestic misconduct should remain an eligible ground for an IIED claim. Otherwise, some spouses will be allowed to seriously harm their partners through conduct that would be tortious if it were directed at anyone else.³³⁹

B. Public Policy

1. Does the claim necessarily fail because it is based on statements made during a dissolution proceeding?

The litigation privilege bars spousal IIED claims based on things said during or in connection with dissolution proceedings. Although individual results may seem unfair, immunity for false and malicious statements or evidence is especially necessary in divorce proceedings because of the parties' "emotional involvement" and the many statements made in the heat of the moment. The litigation privilege immunizes spouses for communications made during the dissolution proceeding, but does not protect "noncommunicative conduct," nor does it protect communications made before, after, or completely unconnected with the litigation.³⁴⁰

The privilege is designed to ensure free access to the courts, promote complete and truthful testimony, encourage zealous advocacy, give finality to judgments, and avoid unending litigation. It accomplishes these goals by protecting all statements—true, false, or

tion based on the litigation privilege. *See id.* at 1184 & n.10, 78 Cal. Rptr. 2d at 520 & n.10.

338. *See* *Nagy v. Nagy*, 210 Cal. App. 3d 1262, 1270-71, 258 Cal. Rptr. 787, 791-92 (1989).

339. This lack of consequence was the basis for Professor Schwartz's proposal that legislatures create a cause of action for "abuse of the marital relationship" by a serious marital offender. *See* Schwartz, *supra* note 25, at 232.

340. *See* Sheila M. Smith, Comment, *Absolute Privilege and California Civil Code Section 47(2): A Need for Consistency*, 14 PAC. L.J. 105 (1982).

hurtful—made during the course of litigation. Thus, the litigation privilege protects spouses who tell the truth (“I don’t love you anymore”); make threats (“I’ll make you pay”); and tell lies (“the house is worth only \$120,000”) as long as what they say has a reasonable relationship to the proceeding.

California’s privilege applies broadly and blocks any cause of action based on communications that are related to a dissolution proceeding.³⁴¹ Although the litigation privilege originally protected

341. Most states recognize an absolute privilege that provides immunity for defamatory communications preliminary to, or in the course of a judicial proceeding if the communication has “some relation” to the proceeding. *See* RESTATEMENT (SECOND) OF TORTS § 587 (1977) (parties); *id.* § 588 (witnesses); *id.* § 589 (attorneys); HARPER, *supra* note 14, § 5.22, at 181-92.

In California, the litigation privilege is found in Civil Code section 47, subdivision (b). The section provides:

A privileged publication or broadcast is one made—

....

2. In any . . . judicial proceeding . . . except . . . [a]n allegation or averment contained in any pleading or affidavit filed in an action for marital dissolution or legal separation made of or concerning a person by or against whom no affirmative relief is prayed in the action shall not be a privileged publication or broadcast as to the person making the allegation or averment within the meaning of this section unless the pleading is verified or affidavit sworn to, and is made without malice, by one having reasonable and probable cause for believing the truth of the allegation or averment and unless the allegation or averment is material and relevant to the issues in the action.

CAL. CIV. CODE § 47(2) (West 1999).

The “divorce proviso” was added to the statute in 1927 and applies to allegations involving co-respondents; its inclusion implies that all other communications are privileged without regard to malice. *See id.*

On its face, the privilege applies to *any* publication or broadcast made in a “judicial proceeding.” The California Supreme Court recently reiterated that the privilege applies to all torts except malicious prosecution and to any communication “required or permitted by law in the course of a judicial proceeding to achieve the object of the litigation, even though [it] is made outside the courtroom and no function of the court or its officers is involved.” *Silberg v. Anderson*, 50 Cal. 3d 205, 212, 786 P.2d 365, 369, 266 Cal. Rptr. 638, 641-42 (Cal. 1990). A history of the development of California’s litigation privilege can be found in Smith, *supra* note 340. In addition to the cases discussed in this section, see generally *Green v. Uccelli*, 207 Cal. App. 3d 1112, 1124, 255 Cal. Rptr. 315, 321 (Ct. App. 1989) (using statutory privilege to bar husband’s IIED claim against wife’s divorce attorney); *Carden v. Getzoff*, 190 Cal. App. 3d 907, 913-14, 235 Cal. Rptr. 698, 701 (Ct. App. 1987) (confirming that accountant’s valuation report and testimony in divorce proceeding were privi-

litigants, attorneys, and witnesses against liability only for defamation, it has been interpreted to apply to all torts, except malicious prosecution, and to any communication, whether or not it amounts to a publication. Thus, for example, in *Silberg v. Anderson*,³⁴² the California Supreme Court held that an attorney's alleged misrepresentations about an expert witness in a dissolution proceeding were covered by the privilege because an occasional unfair result, fraudulent communication, or perjured testimony was the price to be paid for free access to the courts without fear of harassing derivative tort actions.³⁴³ By immunizing participants from liability for torts arising from communications made during judicial proceedings, "the law places upon litigants the burden of exposing during trial the bias of witnesses and the falsity of evidence, thereby enhancing the finality of judgments and avoiding an unending roundelay of litigation, an evil far worse than an occasional unfair result."³⁴⁴

The privilege does not apply to torts based on grounds other than communications made during a judicial proceeding. As a result, the California Supreme Court has distinguished between the privileged "injury allegedly arising from communicative acts" and the

leged against husband's claim of abuse of process and IIED); *Chauncey v. Niems*, 182 Cal. App. 3d 967, 980-81, 227 Cal. Rptr. 718, 727-28 (Ct. App. 1986) (determining that statutory privilege applied to IIED claims brought by ex-husband against former wife and her attorney).

342. 50 Cal. 50 Cal. 2d 205, 786 P.2d 365, 266 Cal. Rptr. 638 (1990).

343. *See id.* at 214-15, 786 P.2d at 370, 266 Cal. Rptr. at 643-44. The *Silberg* lawsuit followed a divorce proceeding in which the defendant, Margaret Anderson, was the attorney for the wife of the plaintiff, Barry Silberg. *See id.* at 210, 786 P.2d at 367, 266 Cal. Rptr. at 640. The husband, plaintiff, claimed damages incurred when Anderson's misrepresentations about an expert witness caused him the loss of reasonable visitation arrangements with his children, damage to his reputation in the community and emotional distress. *See id.* The defendant claimed that her statements about the impartiality of the expert were made during the litigation and were, therefore, privileged. *See id.* at 211, 786 P.2d at 368, 266 Cal. Rptr. at 641. The trial court agreed; the intermediate court of appeal held that the plaintiff husband should be allowed to amend his "intentional tort" cause of action to allege an "improper objective" by the defendant Anderson, which would preclude application of the litigation privilege and allow Silberg to proceed on that cause of action. *See id.* The Supreme Court reversed, holding that the privilege was absolute. *See id.* at 212-13, 786 P.2d at 368-69, 266 Cal. Rptr. at 641-42.

344. *Id.* at 214, 786 P.2d at 370, 266 Cal. Rptr. at 643.

actionable "injury resulting from noncommunicative conduct."³⁴⁵ In *Kimmel v. Goland*,³⁴⁶ for example, the court decided that the privilege did not shield a defendant from liability for the unlawful recording of confidential telephone conversations made in anticipation of litigation because the defendants alleged that they were injured "from the taping of confidential telephone conversations, not from any 'publication' . . . of the information contained in these conversations."³⁴⁷ Earlier, in *Ribas v. Clark*,³⁴⁸ the court had determined that the litigation privilege barred a similar action based on IED and the common law right to privacy "because [the] alleged injury stems solely from defendant's testimony at the arbitration proceeding."³⁴⁹ Drawing a distinction between "eavesdropping, in violation of the privacy act, and testifying during an arbitration hearing," the court allowed the civil award specified by statute for the act of eavesdropping "[b]ecause the right to such an award accrues at the moment of the violation [and thus] is not barred by the judicial privilege."³⁵⁰

345. *Kimmel v. Goland*, 51 Cal. 3d 202, 211, 793 P.2d 524, 529, 271 Cal. Rptr. 191, 196 (1990). The California Supreme Court claimed in *Kimmel* that this threshold determination had been established in a case in which a hospital claimed immunity under the litigation privilege from liability for termination of a physician's staff privileges. The doctor's claim:

[Was] not that her injury ha[d] been occasioned simply by [the hospital's] malicious *statements* at the proceedings, but rather that she ha[d] been injured by the malicious *actions* of the hospital . . . in revoking her staff privileges. . . . Although . . . [section 47(2)] has on occasion been applied in contexts other than a defamation action [citation omitted], its absolute privilege has always attached only to *statements* or *publications* made in connection with the applicable proceeding.

Id. (quoting *Westlake Community Hosp. v. Superior Court*, 17 Cal. 3d 465, 482, 551 P.2d 410, 131 Cal. Rptr. 90, 100 (1976)(emphasis in original)).

346. 51 Cal. 3d 202, 793 P.2d 524, 271 Cal. Rptr. 191 (1990).

347. *Id.* at 209, 793 P.2d at 528, 271 Cal. Rptr. at 195. The holding was "limited to the injury resulting from plaintiffs' and [their attorney's] conduct. To the extent the complaint rests on [the attorney's] alleged communicative acts of 'counseling' and 'advising' his clients, the privilege is clearly operative." *Id.* at 208 n.6, 793 P.2d at 527 n.6, 271 Cal. Rptr. at 207 n.6. The tape recording violated CAL. PENAL CODE § 632 (West 1999), a violation for which civil damages are specifically provided by CAL. PENAL CODE § 637.2 (West 1999).

348. 38 Cal. 3d 355, 696 P.2d 637, 212 Cal. Rptr. 143 (1985).

349. *Id.* at 364, 696 P.2d at 643, 212 Cal. Rptr. at 149.

350. *Id.* at 365, 696 P.2d at 643-44, 212 Cal. Rptr. at 149. In *Ribas*, the plaintiff's wife asked her attorney to listen on an extension telephone while she

Finally, in *Rubin v. Green*,³⁵¹ the court held that even allegedly wrongful attorney solicitation fell within the litigation privilege because the acts "were communicative in their essential nature" and had "some relation" to an anticipated lawsuit.³⁵² Referring to *Ribas* and *Kimmel*, the court reiterated that the distinction was between injury based on noncommunicative conduct (taping and eavesdropping) and communicative conduct (using the information in proceedings).³⁵³

To overcome the privilege, plaintiffs seeking redress for interference with a parent-child relationship must show that their injury resulted not from any statement made in the course of the dissolution proceeding, but instead from conduct or statements made before or outside that proceeding.³⁵⁴ The concurring judge in *Nagy* endorsed such an argument, criticizing the majority opinion for failing to distinguish between conduct that occurred during a proceeding and conduct that occurred outside the proceeding, but was revealed

spoke to her husband. *See id.* at 358, 696 P.2d at 639, 212 Cal. Rptr. at 145. On the basis of information obtained during the telephone conversation, the wife filed an action to set aside the dissolution decree, alleging that her husband had procured the settlement agreement by fraud. *See id.* The attorney testified about the contents of the call during an arbitration hearing. *See id.* Following the hearing, the husband sued the attorney for violation of Penal Code sections 631, subdivision (a) and 637.2, as well as common law invasion of privacy, IIED and outrage. *See id.* The trial court determined that the attorney was immune from liability on all causes of action because of the litigation privilege. *See id.*

351. 4 Cal. 4th 1187, 847 P.2d 1044, 17 Cal. Rptr. 2d 828 (1993).

352. *See id.* at 1194-96, 847 P.2d at 1048-49, 17 Cal. Rptr. at 832-33. The plaintiff's claims were founded on alleged misrepresentations made by the law firm in the course of discussions about "the possibility of being retained to prosecute" a lawsuit "and the subsequent filing of pleadings in the lawsuit itself." *Id.* at 1196, 847 P.2d at 1049, 17 Cal. Rptr. at 833.

353. *See id.* at 1195, 847 P.2d 1048, 17 Cal. Rptr. at 832.

354. California courts have foreclosed the use of related torts to avoid the litigation privilege in dissolution matters. That is, even though a malicious prosecution action can survive the sections 47(2) privilege, such actions are not allowed in family matters. *See Bidna v. Rosen*, 19 Cal. App. 4th 27, 31, 23 Cal. Rptr. 2d 251, 253 (Ct. App. 1993) (remedy for egregious conduct is sanctions by the family court); *Begier v. Strom*, 46 Cal. App. 4th 877, 877-88, 54 Cal. Rptr. 2d 158, 165 (Ct. App. 1996) (malicious prosecution should not be extended into family law). Abuse of process claims cannot survive the section 47(2) privilege. *See Abraham v. Lancaster Community Hosp.*, 217 Cal. App. 3d 796, 824, 266 Cal. Rptr. 360, 377-78 (Ct. App. 1990).

during the proceeding.³⁵⁵ Simply revealing the underlying conduct during the proceeding did not make it privileged, the concurrence said; it was not the wife's statement during the deposition that was the basis for the husband's IIED claim, but her knowingly false representations for three and one-half years during the marriage.³⁵⁶ As demonstrated by the results in *Kimmel*, *Ribas*, and *Begier*, plaintiffs also can overcome the privilege by showing that another statute provides a civil remedy for the conduct.

2. Can the claim survive traditional policy arguments?

Because of its emotional power, the *Nagy* argument that creation of a close and loving relationship with a child is simply not "damage" exerts powerful influence.³⁵⁷ The argument grows out of a personal reaction that claiming such damages is another way of saying, "I wish you had never been born," and the historical reluctance to recognize the "'incalculable' values of social relationships" because of the difficulty of calculating damages.³⁵⁸ As for the argument that people simply should not be claiming damages for such events, a plaintiff can differentiate his claim from *Nagy*'s on the basis that it seeks damages not for the creation of but for the threatened destruction of a parent-child relationship. As for the argument that money

355. See *Nagy v. Nagy*, 210 Cal. App. 3d 1262, 1271-72, 258 Cal. Rptr. 787, 792 (Ct. App. 1989) (Johnson, J., concurring).

356. This justice would still have barred the claim on public policy grounds. See *id.* at 1276, 258 Cal. Rptr. at 795.

357. The concurring judge in *Nagy* disagreed that the basis for the husband's damage claim was the creation of a close relationship with the child. Instead, the husband sought damages for the emotional distress he suffered because of the attempt to end that relationship, making the claim no different from any other fraud claim where the plaintiff seeks reimbursement for investments that he was fraudulently induced to make. See *Nagy*, 210 Cal. App. 3d at 1272, 258 Cal. Rptr. at 792 (Johnson, J., concurring). Justice Johnson also said that emotional distress is a damage caused by the fraud and compensable, disagreeing specifically with the majority that emotional distress damages are allowed only as aggravation of other damages in fraud cases. See *id.* at 1273 n.1, 258 Cal. Rptr. at 793 n.1 (Johnson, J., concurring). But he still would have barred the fraud claim on public policy grounds because it occurred during the marriage. See *id.* at 1276, 258 Cal. Rptr. at 795 (Johnson, J., concurring).

358. Levit, *supra* note 24, at 149 & n.75; see also Michael B. Kelly, *The Rightful Position in "Wrongful Life" Actions*, 42 HASTINGS L.J. 505 (1991) (discussing courts' resistance to the wrongful life claim because of the nature of the damages).

damages cannot possibly compensate for such a loss, money damages also cannot compensate for the loss of an arm or a leg but no one questions their appropriateness in such personal injury cases. Monetary "compensation is a necessary—although not sufficient—remedy on a variety of levels."³⁵⁹ Monetary compensation provides medical and psychological care, legitimizes the interests and emotions that were injured, and reaffirms societal expectations that wrongdoers will not profit from their wrongs.³⁶⁰

A related argument is that emotional distress damages cannot be calculated because they are uncertain and speculative. In fact, emotional injuries are "far from uncertain in a scientific sense. Although often the product of multiple causes, [such] injuries display patterns of repetitive, predictable order."³⁶¹ Difficult problems of establishing the amount of damages and deciding the cause of injuries are encountered elsewhere in the tort system and are not seen as impediments when physical injury is involved. Although some courts and commentators are concerned about the filing of false claims for emotional distress, there is little evidence that plaintiffs regularly malinger to file tort actions, and courts and juries have been able to discern false claims for physical injury and to put dollar amounts on physical pain and suffering.³⁶² Requiring the plaintiff to file a separate tort claim in a different forum will divorce the claim from an overall examination of the marital relationship. Separating the actions may allow the court to impose a more stringent requirement of proof that the plaintiff's emotional distress was caused, for example, by misrepresentations of paternity rather than by the process of going through a divorce.

Constitutional privacy objections can be raised to some IIED claims based on intimate conduct, but claims based on misrepresentation of paternity pose little danger of intrusion into matters protected by a constitutional right of privacy. First, there will be no claim unless the lying spouse has raised the issue of paternity.³⁶³

359. Levit, *supra* note 24, at 188.

360. *See id.*

361. *Id.* at 191.

362. *See id.* at 187-88.

363. Any remaining concerns about preserving marital harmony do not apply: the spouse who makes the cause of action possible by revealing the misrepresentation of paternity could have maintained marital harmony but chose

Second, the issue of paternity can be resolved by a blood test, without an inquiry into anyone's sex life. Even if such a claim required an inquiry into private matters, a plaintiff could overcome the constitutional objection based on the state's interest in preservation of the parent-child relationship.³⁶⁴ Although usually raised as an argument that particular outrageous conduct is privileged and rarely raised to block spousal IIED altogether, some spousal statements may be protected by the First Amendment.³⁶⁵ Thus, the spouse's truthful revelation that the husband is not the biological father probably cannot be the basis for a successful claim. However, there is no First Amendment right to lie about paternity. Therefore, the exercise of free speech cannot protect the underlying misrepresentations that created a tenuous relationship.

The remaining policy arguments fall generally into the category of protecting judicial efficiency. In contrast to physical injuries, courts are always more concerned about fraudulent and frivolous emotional distress claims because of an underlying belief that perhaps no claim for emotional or mental distress is quite genuine.³⁶⁶ For spousal IIED claims, courts reflect particular concern that garden variety, run of the mill family law matters may "metastasize into

not to.

364. Perhaps because of concern about transmission of the disease, courts have found liability in some cases of sexual deceit resulting in physical injury despite the intimate nature of the inquiry required and potential problems of proof. See Murray & Winslett, *supra* note 24, at 823-24.

In the first appellate case to recognize a right to sue for the transmission of herpes, the court said the tortious nature of the conduct plus the state's interest in prevention and control of diseases brought the injury "within the type of physical injury [that justifies judicial inquiry into sexual relations]. The constitutional right of privacy does not protect respondent here." Kathleen K. v. Robert B., 150 Cal. App. 3d 992, 997, 198 Cal. Rptr. 273, 276 (Ct. App. 1984).

365. See Richard D. Bernstein, Note, *First Amendment Limits on Tort Liability for Words Intended to Inflict Severe Emotional Distress*, 85 COLUM. L. REV. 1749, 1755 (1985); RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965) ("[t]here must still be freedom to express an unflattering opinion"); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 12, at 59 (5th ed. 1984). Spouses may even have a protected liberty or privacy interest when they intentionally cause emotional distress by engaging in an extramarital relationship. See Hakkila v. Hakkila, 812 P.2d 1320, 1324 (N.M. Ct. App. 1991); Givelber, *supra* note 41, at 57.

366. This concern "often creates almost a presumption that claims of mental disturbance are frivolous." Levit, *supra* note 24, at 172.

something else³⁶⁷ and that such claims will be used to undermine or distort the established family law process.³⁶⁸ “Claims for emotional loss are far easier to plead than claims for physical injury,” and a great many more spouses may “see their estranged mates as perpetrators of outrageous, emotionally abusive conduct than [those who] see them as perpetrators of physical battery.”³⁶⁹ Because of their emotional state and because they are engaged in battles over property, children, and finances, there will be a temptation and

an incentive to carry over the (all too often) characteristic bitterness of family litigation into [other litigation], where one spouse can try to smack the other with the really big club of tort damages rather than curing a failure to live up to Family Code obligations of disclosure within the more predictable confines of a dissolution proceeding.³⁷⁰

If courts allow spousal IIED claims based on interference with the parent-child relationship, parents and their lawyers may be tempted to try to gain an advantage in custody or support arrangements by threatening or filing an IIED cause of action.³⁷¹

367. *d’Elia v. d’Elia*, 58 Cal. App. 4th 415, 417, 68 Cal. Rptr. 2d 324, 325 (Ct. App. 1997). In *d’Elia*, the wife failed to conduct an independent appraisal of a family business and consequently claimed that the value had been misrepresented and that she had therefore been induced to settle for too little in the marital settlement agreement. *See id.* at 417-18, 68 Cal. Rptr. 2d at 326. Rather than seeking to set aside the agreement, the wife filed a lawsuit seeking damages under state securities fraud laws. The court refused to allow her action to proceed. *See id.* at 326, 4 Cal. Rptr. 2d at 418-19.

368. *See* Ellman & Sugarman, *supra* note 16, at 1294.

369. Ellman, *supra* note 19, at 802; Ellman & Sugarman, *supra* note 16, at 1294. Professor Givelber claims that an IIED suit is much cheaper than a negligence claim because there is no need for experts on causation or extent of injury and much easier because it does not depend on the willingness of experts “to verify the existence and extent of suffering by the plaintiff and to assert that it is more probable than not that the defendant’s conduct caused plaintiff’s injury.” Givelber, *supra* note 41, at 51.

370. *d’Elia*, 58 Cal. App. 4th at 418, 68 Cal. Rptr. 2d at 326.

371. Both the danger that claims might be filed to harass and the solution to that danger are illustrated in an Oregon case where a father sued his former wife and her new husband for IIED based on conduct he claimed was designed to estrange him from his children. *See* *Hetfeld v. Bostwick*, 901 P.2d 986 (Or. Ct. App. 1995). The conduct included intentionally disparaging the father’s character and reputation by encouraging the children to call him by his first name; encouraging the children to cut short their visits with their father; plan-

The best safeguards against such fears are the traditional ones: sanctions should be imposed on clients and attorneys who file such claims; courts should examine complaints and grant motions to dismiss and summary judgment motions when a plaintiff cannot state the elements of the tort; and the requirements of intent, causation, and serious emotional distress should be taken as seriously as the element of extreme and outrageous conduct. A requirement that the tort action must be filed separately from the divorce proceeding may discourage frivolous claims designed only to harass or force unfavorable settlements.³⁷²

ning activities for the children in conflict with the father's scheduled visits; causing the children to be known by the new husband's surname; and encouraging the children to identify with their mother's new husband as their father. The court found that the conduct was "all too common in the context of a hostile dissolution involving children" and that it is not "'outrageous in the extreme' to behave as people commonly behave in certain circumstances." *Id.* at 988-89. The dissent pointed out that the "alleged frequency of harassment and taunts based on gender, race or sexual orientation" has not been used to defeat claims that those actions were "outrageous in the extreme." *Id.* at 989 (Leeson, J., dissenting).

372. Allowing a tort action between divorcing parties raises procedural issues that are beyond the scope of this article. But none of these problems have precluded spousal claims based on battery and they should not preclude the kinds of actions endorsed here.

After the abolition of interspousal immunity, a growing number of cases and commentators addressed the issue of whether a tort action between spouses can be, must be, or should not be joined with an action for dissolution of the marriage. See generally Steven J. Gaynor, Annotation, *Joinder of Tort Actions Between Spouses with Proceeding for Dissolution of Marriage*, 4 A.L.R. 5TH 972 (1992). For commentary on this issue, see, for example, Barbara H. Young, *Interspousal Torts and Divorce: Problems, Policies, Procedures*, 27 J. FAM. L. 489 (1989) (advising domestic relations attorneys on the procedural problems posed by filing tort claims in connection with dissolution proceedings); Andrew Shepard, *Divorce, Interspousal Torts, and Res Judicata*, 24 FAM. L.Q. 127 (1990) (examining whether claim preclusion should bar an interspousal tort action filed after a final divorce judgment); Valencia Bilyeu, *Joining Interspousal Personal Injury Tort Claims with Divorce Actions*, 30 IDAHO L. REV. 859 (1994) (favoring permissive joinder of interspousal tort claims and divorce actions); Patricia A. Harris, Note, *Intentional Infliction of Emotional Distress and Divorce: An Argument Against Joinder*, 34 U. LOUISVILLE J. FAM. L. 897 (1996) (recommending independent litigation of IED following dissolution).

Some jurisdictions prohibit joinder, others allow it, but usually do not require it. See, e.g., *Nelson v. Jones*, 787 P.2d 1031 (Alaska 1990) (holding joinder permissible but not required); *Simmons v. Simmons*, 773 P.2d 602

C. Tort Law

1. Would recognizing the claim further the goals of state tort law?

There is no question that emotional distress can be caused by the disruption and threatened loss of relationships, perhaps especially the parent-child relationship. The distress may arise from a variety of emotions—grief, anxiety, depression, shock, fear, embarrassment—and these emotional states may “psychologically, financially, and physically cripple people.”³⁷³ Since this real loss is not fully compensated elsewhere, recognizing spousal IIED claims based on interference with the parent-child relationship furthers most of the commonly recognized goals of tort law. The claim provides more complete compensation for married people who are wrongfully

(Colo. App. 1988) (prohibiting joinder); *Henriksen v. Cameron*, 622 A.2d 1135 (Me. 1993) (stating joinder not required); *Koepke v. Koepke*, 556 N.E.2d 1198 (Ohio App. 1989) (prohibiting joinder); *Walther v. Walther*, 709 P.2d 387 (Utah 1985) (prohibiting joinder); *Stuart v. Stuart*, 410 N.W. 2d 632, 638 (Wis. Ct. App. 1987), *aff'd*, 421 N.W.2d 505 (Wis. 1988) (stating joinder not required); *Twyman v. Twyman*, 855 S.W.2d 619, 624-25 (Tex. 1993) (joinder preferred but not required).

In no-fault states, joinder may be undesirable: “[A]nyone who favors no-fault divorce, believing that the legal process should not focus on recriminations and assigning blame, should oppose joining a spousal suit for outrageous marital conduct with the divorce action.” Ellman & Sugarman, *supra* note 16, at 1285-86. If allowed, the dissolution action should be tried separately and first. *See, e.g., Hakkila v. Hakkila*, 812 P.2d 1320, 1330-31 (N.M. Ct. App. 1991) (Donnelly, J., specially concurring) (suggesting the separate trial alternative to avoid injection of “issues of fault into no-fault divorce proceedings and [to allow] the trial court to mediate custody and property disputes or to achieve an equitable resolution of the issues between the parties”).

No-fault and community property states often have statutory provisions that explicitly or implicitly prohibit joinder of tort claims. In California, for example, a tort action claiming damages cannot be joined with or pleaded in a dissolution proceeding. *See CAL. R. CT.* 1212. In addition, joinder is disallowed because the family court’s jurisdiction over the parties’ separate property is limited. *See In re Marriage of Braud*, 45 Cal. App. 4th 797, 53 Cal. Rptr. 2d 179 (Ct. App. 1996). But a tort claim can be consolidated with a pending dissolution action under suitable circumstances. *See In re Marriage of McNeill*, 160 Cal. App. 3d 548, 206 Cal. Rptr. 641, 644-45 (Ct. App. 1984), *overruled on other grounds by In re Marriage of Fabian*, 41 Cal. 3d 440, 715 P.2d 253, 260, 224 Cal. Rptr. 333 (Cal. 1986); CAL. CIV. PROC. CODE § 1048(a) (West 1980).

373. Levit, *supra* note 24, at 184-85.

harmed by their spouses,³⁷⁴ punishes injurious and socially unacceptable behavior,³⁷⁵ holds the individuals responsible for their harmful conduct, reaffirms societal values,³⁷⁶ and protects the dignity interests of the victims.³⁷⁷

Recognizing these claims might not, however, achieve the tort law goal of deterring future injurious or socially unacceptable behavior³⁷⁸ because a spouse determined to inflict emotional distress will not be deterred from doing so by the threat of a damage award. It may be especially unlikely that a spouse intent on preserving a marriage will be deterred from lying about the paternity of a child born during the marriage, or that a spouse intent on ending a marriage and winning custody will be deterred from finally telling the truth about the paternity of the child.³⁷⁹

374. Commentators agree that spousal tort suits will increase compensation by allowing pain and suffering and possible punitive damages. *See* Tobias, *supra* note 26, at 470; Ellman, *supra* note 19, at 789-90; Ellman & Sugarman, *supra* note 16, at 1286-87. However, Professors Ellman and Sugarman suggest that allowing spousal emotional distress claims will not really further the goal of compensation because medical expenses and lost wages would be considered in divorce proceedings. *See id.* at 1287-90.

375. Under current divorce laws, punishment is thought to be an inappropriate goal in family matters and punitive damages are not available in dissolution actions. Professor Givelber concluded that awarding compensatory damages for IIED furthers goals usually associated with punitive damages: (1) punishment of the defendant as a deterrent to future wrongs and as ethical retribution; (2) deterrence of others; (3) law enforcement by encouraging plaintiff to sue to right societal wrongs; (4) provision of complete compensation through additional funds to pay the attorney; and (5) reaffirmation of societal values. *See* Givelbar, *supra* note 56, at 54 n.63. "If punitive damages are also awarded, punishment and control are intensified." *Id.*

376. *See* Levit, *supra* note 24, at 190 (stating that whether the legal system recognizes particular wrongs says a good deal about what the legal system values). In addition, recognition of such torts promotes "responsible social interaction [by making] a commitment to the value of the permanency of relationships and to appropriate treatment within those relationships." *Id.* at 150.

377. Recognizing spousal IIED causes of action is sometimes viewed as vindicating the individual rights of women. *See* Tobias, *supra* note 26, at 471-72 (noting that a few courts cited the vindication of women's individual rights as an affirmative policy reason for eliminating interspousal immunity).

378. *See* Ellman & Sugarman, *supra* note 16, at 1287-90 (noting that the standard is so imprecise that it cannot deter others).

379. Other kinds of domestic deceit may be more likely candidates for deterrence; for example, permitting tort litigation when financial fraud is present may eventually limit fraudulent conduct. Therefore, "[a]llowing a spouse who

2. Does the claim satisfy the requirements of state tort law?

Given the abrogation of spousal immunity, the recognition of IIED, and the absence of compelling reasons of public policy to reject liability, the only remaining question is whether the claim can meet the elements of the tort. Recognizing spousal IIED causes of action for intentional and unjustified interference with the parent-child relationship poses no danger of unlimited liability if the courts require proof of all the elements of the tort.

For example, Steve H. would first have to show that Wendy acted intentionally or recklessly in causing his emotional distress. Once the dissolution proceedings started, it might be assumed that Wendy desired to cause Steve to suffer emotional distress. But for the reasons discussed in Part V.B.1, her statements made in the course of the proceedings cannot be used to prove intent (or any other element of the tort). Thus, Steve would have to show that Wendy acted intentionally or recklessly to fraudulently create a tenuous parent-child relationship between Steve and Stephanie. If Wendy's statements and conduct led him to believe that he was Stephanie's father, Steve probably could establish that Wendy acted with reckless disregard of a high probability that he would suffer emotional distress. Reckless disregard is shown because at the time of the misrepresentations, Wendy not only knew that another man was Stephanie's biological father, but she also continued her affair with him, making it more probable that Steve would eventually learn the truth.

Second, Steve must show that Wendy's actions created a tenuous relationship between him and Stephanie and that it was the cause of his emotional distress, not the revelation of Wendy's adultery and Stephanie's paternity. Although sorting out causation is unquestionably difficult in such circumstances, plaintiffs in other emotional distress cases have been in similar situations when the wrongful act occurred.³⁸⁰ Further, other torts have causation problems as well,³⁸¹

intentionally concealed the existence of community assets during the course of a dissolution proceeding to avoid liability for punitive damages likely would encourage such tortious behavior. . . . [T]raditional tort remedies, including the risk of an award of punitive damages, should have a greater deterrent effect than the remedies available in family court." *Dale v. Dale*, 66 Cal. App. 4th 1172, 1187, 78 Cal. Rptr. 2d 513, 522 (Ct. App. 1998).

380. See Givelber, *supra* note 41, at 49.

and the impossibility of proving the defendant's role in the creation of the injury has been found to be an appropriate reason to shift the burden of proof to the defendant.³⁸²

Third, Steve would have to show that the emotional distress caused by Wendy's conduct was severe. Again, the proof of this element should be no different from the showing required for any other emotional distress cause of action.

Finally, Steve would have to show that Wendy's conduct was extreme and outrageous. Despite criticism, the combination of "extreme" and "outrageous" in the Restatement formula allows courts to formulate a workable balancing test along the lines suggested by Professor Cole: "extreme and outrageous conduct" is at the high end of a scale of conduct, it is conduct that is socially unacceptable, and it is conduct that is done for no good reason.³⁸³ That is, the defendant cannot justify the conduct by any privilege such as the exercise of a constitutional right, or any defense such as consent or self-defense. In a marriage, battery obviously meets the test. If the scale of objectionable marital conduct begins with verbal criticism, battery is at the high end. Its recognition as both a crime and a tort shows a social consensus that battery is unacceptable. Finally, it is no longer imaginable to justify regular physical abuse, but a battery that occurs in self-defense may not be extreme and outrageous because it is justified. Other domestic conduct is more difficult to assess. Again, if the scale begins with verbal criticism, vicious insults and threats are higher up the scale, but there is no easy answer to whether such conduct is socially unacceptable and some justifications may be offered.

In Steve H.'s case, Wendy's conduct is more similar to the battery example. Fraudulently creating a parental relationship that imposes legal obligations and allows parent and child to form emotional bonds with the knowledge that the relationship could be disrupted at any moment is extreme conduct, highly likely to inflict emotional harm. Since most states have statutes establishing parental

381. See Levit, *supra* note 24, at 167-69 (pointing out that courts admit other kinds of "highly probabilistic" evidence with respect to causation and damages).

382. See Levit, *supra* note 24, at 190; cf. Givelber, *supra* note 41, at 49 (stating that cases involving physical injury typically require an expert to prove both causation and extent of damages).

383. See Cole, *supra* note 50, at 577.

relationships and recognizing rights and obligations flowing from such relationships, conduct that interferes with rights and obligations imposed by state law may be viewed as socially unacceptable.³⁸⁴

Finally, a court should examine whether there is any justification for such an interference. If, for example, a spouse has abused a child, there is obviously justification for attempting to sever an established parental relationship. Even in the case of Steve H., Wendy might argue that her actions were justified because of the need to preserve her marriage or to protect her child. However, a court should balance these factors to determine whether her conduct was extreme and outrageous, rather than reject the claim on public policy grounds.

In addition to meeting the requirements of IIED, spousal claims based on intentional interference with the parent-child relationship are analogous to the claims recognized by most courts because they resolve problems related to recovery for emotional distress. As the conflicting results in prior cases indicate, the difference between the claims that are allowed to proceed and those that are rejected is the kind of harm resulting from the wrongful conduct. In the battery and sexual deceit cases, the physical harm is recognizable because it results in bodily injury and bodily injury is always compensable. In the interference with custody cases, the harm is recognizable because it consists of interference with an established right of the plaintiff, usually one that has been established by a prior court order. In the more recent cases involving emotional distress resulting from interference with parent-child relationships, plaintiffs have overcome the *Nagy* objection that no recognizable harm results from the creation of a close and loving relationship with a child. They claim that the recognizable harm is personal injury in the form of emotional losses suffered as a result of the threatened destruction of the parent-child relationship. Like the interference with custody cases, the harm also is recognizable because it consists of interference with the plaintiff's established right to custody, acquired in many states because of the

384. See, e.g., *Plante v. Engel*, 469 A.2d 1299, 1301-02 (N.H. 1983) (adopting the tort of custodial interference because of the significance that state law affords the parent-child relationship and determining that parents should be fully compensated for any intentional interference with their custodial relationships).

presumption of paternity for a child born during a marriage. Furthermore, most people would agree that misrepresenting paternity to a spouse who would otherwise form neither financial nor emotional bonds with a child is so out of bounds as to be outrageous in any marriage without requiring an inquiry into its private norms.

Finally, a spousal IIED claim based on parental interference is necessary because there are no viable substitutes. Powerful, traditional arguments render fraud an inadequate alternative even though the cause of action is based on misrepresentation. Precedents include the abolition of heart balm actions, indicating to some courts that no lies that lead to creation or destruction of family relationships should be recognized as legally compensable. They also include the *Nagy* argument that creation of a close and loving relationship with a child is simply not "damage." A fraud claim seeks recovery of damages incurred in reliance on the misrepresentation. Therefore, it encounters the argument that allowing the claim contradicts provisions of state family codes that require parents to support their children even if they later learn that they are not biological parents.

VI. CONCLUSION

This Article endorses recognition of spousal emotional distress causes of action based on intentional interference with relationships between parents and children. Like marriage, parenthood creates a relationship with emotional consequences and legal dimensions. Unlike marriage, parenthood cannot be dissolved by saying "I don't love you anymore," and the legal consequences are guaranteed to last for at least eighteen years. To recognize protectable interests in the establishment and continuation of the parent-child relationship is to recognize that these relationships are different from marriage, at least in its current legal image as a voluntary joinder that can be dissolved like any other partnership. Allowing liability for intentional and unjustified disruption of the parent-child relationship may assure parents and children that their expectations of continuity will be protected in this relationship.

