

2004

## Domestic Violence

Jennifer Wriggins

*University of Maine School of Law*, wriggins@maine.edu

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### Suggested Bluebook Citation

Jennifer Wriggins, *Domestic Violence*, 54 J. Legal Educ. 511 (2004).

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## Domestic Violence in the First-Year Torts Curriculum

Jennifer B. Wriggins

The *New England Journal of Medicine* has this description of domestic violence: "victims are pushed, punched, kicked, strangled and assaulted with various weapons with the intent of causing pain, injury, and emotional distress."<sup>1</sup> Domestic violence is tortious activity, in addition to being often—although not always—criminal activity.<sup>2</sup> It is a very common form of tortious activity, although its incidence is difficult to determine. And yet domestic violence, or what I call domestic violence torts, is hardly covered in many torts casebooks.<sup>3</sup>

Domestic violence torts should be included in torts casebooks and courses for at least four reasons. The first is simply that the harm caused by domestic violence is widespread and has broad ramifications.<sup>4</sup> A second reason is that certain cases can be useful in gaining a deeper understanding of doctrinal

**Jennifer B. Wriggins** is a professor at the University of Maine School of Law. In spring 2005 she is a visiting professor at Harvard Law School and Boston University Law School.

Thanks to the Law and Society Association for the opportunity to present an early draft of this article at its annual meeting in 2003. Thanks to the Association of American Law Schools for the opportunity to present an early draft at its midyear meeting on torts. Thanks to Katy Moore and Dennis Carrillo, University of Maine School of Law, for excellent research assistance, and thanks to the members of the *Maine Law Review* for assistance in cite checking. Christine Hepler, reference librarian at the school's Garbrecht Law Library, was very helpful in locating materials. I am grateful to Dean Colleen Khoury for summer research funding, and for supporting the school's faculty scholarship series, at which a draft of this was presented. Thanks to Tom Baker and Tom Russell for fruitful discussions of these ideas. My colleagues Lois Lupica and, especially, Deborah Tuerkheimer provided invaluable assistance by reviewing drafts and engaging in repeated conversations with me.

1. Demetrios N. Kyriacou et al., Risk Factors for Injury to Women from Domestic Violence, 341 *New Eng. J. Med.* 1892, 1892 (1999).
2. Intentional or reckless infliction of emotional distress is an example of tortious activity that often is based on conduct to which criminal penalties do not attach. Merle H. Weiner, Domestic Violence and the Per Se Standard of Outrage, 54 *Md. L. Rev.* 183, 189 n.16 (1995).
3. Domestic violence torts are torts such as assault, battery, false imprisonment, and intentional infliction of emotional distress, committed in the course of domestic violence. Jennifer Wriggins, Domestic Violence Torts, 75 *S. Cal. L. Rev.* 121, 123 n.8 (2001).
4. The broad impact of domestic violence was outlined in Justice Souter's dissent in *United States v. Morrison*, 529 U.S. 598, 631–37 (2000). The section on torts in the Dalton & Schneider casebook is excellent, but the topic of domestic violence torts is so important that it should be included in the required first-year torts course. Clare Dalton & Elizabeth M. Schneider, Battered Women and the Law 805–68 (New York, 2001). An ABA report makes the point that domestic violence should be part of the torts curriculum. Commission on Domestic Violence, American Bar Association, *When Will They Ever Learn? Educating to End Domestic Violence*, 25, 39–40 (Chicago, 1997).

issues, particularly concerning intentional infliction of emotional distress, and in highlighting the importance of intentional torts, which are often neglected in casebooks. Intentional torts remind us that torts is not just about optimal levels of safety in technology, but is also about basic limits on behavior by and between human beings. The third reason is that inclusion of domestic violence torts can be a vivid way to illuminate relationships between torts and insurance—an important lesson in any torts course. Fourth, inclusion can lead to thought-provoking, broad discussions about tort policy, focusing on issues such as what harms are recognized, what harms could be recognized, and how one measures harm. This article first discusses what I call the underteaching of domestic violence torts and intentional torts generally, and reasons for the underteaching.<sup>5</sup> Next I discuss specific approaches and several cases. On my faculty profile page on the Web, I have included a bibliography of cases and related materials, as well as excerpted cases and assignments.<sup>6</sup>

### Reasons for the Lack of Attention to Domestic Violence Torts

Domestic violence torts are given short shrift for at least two related reasons. First is that the tort system by various mechanisms, in combination with other factors, ensures that there are few published cases to even consider including in a torts casebook or course. Second, the overriding focus of twentieth- and twenty-first-century tort law has been a focus on accidental injury. Consistent with this focus, domestic violence torts are conceptualized (when they are thought about at all) as criminal or family law matters rather than torts.

#### Why So Few Cases?

It is difficult to determine exact numbers of reported domestic violence tort cases and even more difficult to determine exact numbers of cases filed and settled. But it is safe to say that there are few in relation to the amount of domestic violence that occurs. To start with, intentional tort cases are only a small proportion of tort cases dealt with by the legal system.<sup>7</sup> Domestic violence tort cases, in turn, are likely to be a tiny proportion of intentional tort cases filed. Recent searches in the Westlaw ALLCASES database for cases containing the words *domestic violence* and *assault, battery, or intentional infliction of emotional distress*, retrieved a total of 6,138 citations, but only 34 cases that

5. At appropriate points in the text I will reference five casebooks: Dan B. Dobbs & Paul T. Hayden, *Torts and Compensation: Personal Accountability and Social Responsibility for Injury*, 4th ed. (St. Paul, 2001); Richard A. Epstein, *Cases and Material on Torts*, 7th ed. (New York, 2001), Marc A. Franklin & Robert L. Rabin, *Tort Law and Alternatives: Cases and Materials*, 7th ed. (New York, 2001); Vincent R. Johnson & Alan Gunn, *Studies in American Tort Law*, 2d ed. (Durham, N.C., 1999); Dominick Vetri et al., *Tort Law and Practice*, 2d ed. (Newark, N.J., 2002). I reviewed fifteen casebooks generally, including the above.
6. See <<http://mainelaw.maine.edu/wriggins.htm>>.
7. According to a Bureau of Justice Statistics report, in 1992, 10,879 cases, or 2.9 percent of the tort cases, disposed of in the country's 75 largest counties were intentional tort cases. Steven K. Smith et al., *Tort Cases in Large Counties*, Civil Justice Survey of State Courts 1992, at 2 (Bureau of Justice Statistics, U.S. Department of Justice, Special Report NCJ-153177 (Washington, 1995)).

contained tort claims arising from domestic violence in an intimate or formerly intimate relationship.<sup>8</sup> There was no indication that such cases were more frequent in the recent past. I found no domestic violence tort cases in the Civil Justice database of the National Crime Victim Bar Association, which includes over 11,000 cases. Data found by other researchers consistently confirm the conclusion that very few tort cases arise from domestic violence.<sup>9</sup>

How does the tort system, in combination with other mechanisms, ensure that there are few reported cases in this area? One way is through tort statutes of limitation, which typically are much shorter for assault, battery, and other traditional intentional torts than for negligence or strict liability. Since domestic violence torts by definition arise out of an ongoing relationship, a short statute of limitations is likely to have a powerful impact in limiting claims. A second way is through insurance. Domestic violence torts are intentional torts. The ubiquitous "intentional acts" exclusion in liability policies, which denies coverage for harm caused by intentional acts of the insured, means that liability insurance coverage such as homeowners' coverage or automobile coverage is likely to be unavailable to pay claims. Another insurance aspect is the "family member" exclusion commonly found in liability policies, which means that a family member's claim against another family member—even for negligence—will not be covered. Since most tort damages claims are paid out of liability coverage, the insurance exclusions virtually guarantee that few claims are brought. Moreover, most defendants do not have sufficient assets to pay a judgment; if a couple is married, all assets may be jointly owned. Even if a house is not jointly owned, it may be unattainable to satisfy a judgment because it may be mortgaged, protected by a homestead exemption, or encumbered by previous involuntary liens. Significant assets such as pensions are individually owned and protected from attachment by federal retirement law. Often divorce settlements now include releases of tort claims signed by both parties; such releases may also prevent parties from bringing claims.

Other factors leading to few reported cases include procedural requirements in some places that tort claims must be brought with a divorce,<sup>10</sup> and

8. Specifically, the search (July 30, 2003) for cases containing the words *domestic violence* and *assault* retrieved 4,408 citations, going back to 1961. Only 22 contained tort claims arising from domestic violence in an intimate or formerly intimate relationship. The search (July 31, 2003) for cases containing the words *domestic violence* and *battery* retrieved 1,598 citations, 25 of which contained such tort claims. Of those 25, 18 overlapped with cases retrieved with the *domestic violence* and *assault* search, so there was a total of 29 separate cases between the two searches. Similarly, the search (June 12, 2003) for cases mentioning *domestic violence* and *intentional infliction of emotional distress* retrieved 132 cases going back to 1982, only 13 of which dealt with the sort of claims I was seeking. Eight of these overlapped with cases in the other categories; in other words, there were 5 cases that did not fall in another category. Thus, the three searches turned up a total of 34 cases. Some of the 34 cases dealt with tort claims brought as counterclaims in a divorce, and some dealt with tort claims independent of divorces. The overall figure of 6,138 citations includes cases that appear in more than one category. These searches revealed thousands of criminal prosecutions pertaining to domestic violence.
9. See Douglas D. Scherer, *Tort Remedies for Victims of Domestic Abuse*, 43 S.C. L. Rev. 543, 565 (1992); Weiner, *supra* note 2, at 184–86 nn.10–11.
10. Clare Dalton, *Domestic Violence, Domestic Torts: Constraints and Possibilities*, 31 New Eng. L. Rev. 319, 378–85 (1997).

practical barriers connected with ending an abusive relationship: it can be dangerous to leave, and for many domestic violence survivors, there is a reasonable fear of violent retaliation for the suit.<sup>11</sup> A victim who is married may rationally fear that the potential defendant will use retaliatory legal tactics in the divorce. The psychological cost to the victim of asserting claims, which necessarily involves continuing engagement with the abuser, may outweigh the benefits of asserting and winning the claims.

### *The Theoretical Focus on Accidental Injury*

A second reason for the lack of attention to domestic violence torts is that relatively little attention has been paid to intentional torts in recent legal scholarship.<sup>12</sup> In significant part, that is because of the predominance of economic theory in torts scholarship. Much law and economics scholarship, implicitly or explicitly, defines tort law as dealing with accidental injury. The focus in the economic tort literature on designing tort rules to lead to an optimal level of safety is ill suited to intentional torts, where the ultimate goal is not an optimal level of intentional torts, but no intentional torts. An additional reason is influential early commentary, such as by Oliver Wendell Holmes in 1897 and Roscoe Pound in 1922, which treated intentional torts as almost vestigial concerns of the past, in contrast to the more modern problems of industrial injury.<sup>13</sup> When Holmes and Pound wrote, interspousal immunity was the rule, and domestic violence was invisible. The assumption in their writing that tort law should deal largely with harms to strangers—rather than, sometimes, family members—persists in the torts field. This assumption excludes many intentional torts and all domestic violence torts from consideration and analysis. Consistent with the theoretical focus on accidental injury, many torts casebooks devote a small proportion of their text to intentional torts.<sup>14</sup> Concomitantly, many casebooks give only brief treatment to domestic violence and domestic violence torts.<sup>15</sup>

11. See Elizabeth M. Schneider, *Battered Women and Feminist Lawmaking* 77–78 (New Haven, 2000).
12. As Anita Bernstein writes, "American tort law remains barren and primitive in areas where insurance coverage is unavailable, especially intentional torts." *Restatement (3d) of Torts: Prescription of Masculine Order*, 54 *Vand. L. Rev.* 1367, 1375 (2001).
13. See Oliver Wendell Holmes, *The Path of the Law*, 10 *Harv. L. Rev.* 457, 467 (1897) (noting that tort law "comes from the old days of isolated, ungeneralized wrongs, slanders, and the like . . . [but contemporary torts] are mainly the incidents of certain well known businesses"); Roscoe Pound, *An Introduction to the Philosophy of Law* 169–70 (New Haven, 1922) (noting that in "civilized society," intentional torts are not a significant problem, and that for "the savage" intentional attacks are a problem and preclude the division of labor that is necessary for civilization).
14. In most of the 15 torts casebooks I reviewed generally, the intentional torts of assault, battery, false imprisonment, intentional or reckless infliction of emotional distress, conversion and trespass to chattel, and defenses to these torts, accounted for about one-tenth of each. For example, those torts and defenses to them take up about 7 percent of the text of *Dobbs & Hayden*; 6 percent of *Epstein*; 5 percent of *Franklin & Rabin*; 13 percent of *Johnson & Gunn*; and 8 percent of *Vetri et al.* (all *supra* note 5). This analysis does not include defamation, slander, or other intentional torts not listed.
15. Of the five casebooks I reviewed closely (*supra* note 5), *Dobbs & Hayden* and *Vetri et al.* had the most detailed treatment. *Epstein* had the least detailed treatment. *Dobbs & Hayden* includes a problem on domestic violence (p. 37); discusses immunity (386–87); includes a case involving the public duty rule where police failed to protect a woman from attacks by her

Given the focus of mainstream tort theory on accidental injury, it is not surprising that domestic violence is rarely analyzed as a torts issue. It is seen as belonging to family law or criminal law. Actually, domestic violence raises important questions for all these fields. The cases discussed here shed interesting light on family law and torts in particular. The fact that domestic violence torts overlaps these areas simply means that it belongs in all of them.

Part of my agenda is to resist the marginalization of intentional torts. The draft *Restatement (Third) of Torts: General Principles* states that "intentional torts are deemed considerably more serious than torts of mere negligence," and notes that "the plaintiff can be worse off if the tort is intentional rather than negligent" because it is harder to obtain compensation for intentional torts than for negligence.<sup>16</sup> The document is not specific as to the reasons that intentional torts are deemed considerably more serious than negligent ones, but it seems reasonable to assume that they are more serious because the defendant's conduct is more culpable, or the plaintiff's injuries are more serious, or both. The same document says, "The problem of *accidental* injury is what many see as the core problem facing modern tort law."<sup>17</sup> If intentional torts are indeed considerably more serious than acts of "mere negligence," torts scholars and teachers should focus more on how the torts system is working with respect to deterrence of and compensation for intentional torts. The "core problem" of modern torts should include the most serious torts.

### Approaches

This section discusses several approaches to including domestic violence torts in first-year torts courses. The first approach is to assign several cases involving domestic violence. The second is to ask why there are so few domestic violence tort cases and lead a discussion on that and related questions. The two approaches can be effectively combined.

rejected suitor (404-06) (*Riss v. N.Y.*, 293 N.Y.S.2d 897 (N.Y. 1968)); includes a case involving police failure to respond to a woman who had a protective order against her ex-husband (419-22); has a note on tort claims for emotional harm during marriage (505); and discusses alienation of affections and criminal conversation (931). Epstein discusses husband-wife immunity (1332-33). Johnson & Gunn (currently being revised for the third edition) has a note asking whether spouse abuse that does not amount to battery or assault should be actionable under the tort of outrage (81); describes alienation of affections and criminal conversation (94); discusses interspousal immunity (801); and includes *Riss v. N.Y.* (496-500). Franklin & Rabin discusses criminal conversation and alienation of affections (899-905); refers to immunity (214); and includes *Riss v. N.Y.* (226-30). Vetri et al. includes *Twyman v. Twyman*, 855 S.W.2d 619 (Tex. 1993), which deals with intentional and negligent infliction of emotional distress claims between divorcing spouses and related material (816-22); discusses the public duty rule in the context of domestic violence protective orders (323-26); discusses domestic violence in the context of immunity (768) and statutes of limitations (765); and includes a problem on spousal abuse (893-97).

16. Section 1 at 2-3 (Philadelphia, Discussion Draft, 1999). The draft has been retitled Liability for Physical Harm: Basic Principles (American Law Institute 2003) at <<http://www.ali.org>> (last visited Aug. 20, 2003).

17. *Id.* at xxi.

## Cases

Some of the most interesting tort cases pertaining to domestic violence are those brought by an ex-spouse after a divorce alleging intentional infliction of emotional distress. These cases, discussed below, are useful in teaching about the tort of intentional infliction of emotional distress as well as issues related to statutes of limitation, immunity, and releases. Important questions arise in these cases. How should the tort of intentional infliction of emotional distress be applied in a marital or other intimate context? What is "extreme and outrageous conduct" in a marital or other intimate context? How do (and how should) courts deal with statutes of limitation in domestic violence tort cases, a context where because of the circumstances in which they are committed, the victim is unlikely to be able to sue promptly? Last, they present a way to approach the underlying empirical question of who sues and gets sued for intentional infliction of emotional distress or other domestic violence torts.

### Intentional Infliction of Emotional Distress, Extreme and Outrageous Conduct, and Interspousal Immunity

*Henriksen v. Cameron*,<sup>18</sup> a 1993 Maine Supreme Court case often cited by other courts and commentators, upheld a jury verdict for an ex-wife against her ex-husband for his intentional infliction of emotional distress during the marriage. The court had earlier adopted, and applied in another context, the elements of the tort of outrage as defined by the Restatement (2d) of Torts section 46: (1) intent or recklessness; (2) conduct so "extreme and outrageous" as to exceed "all possible bounds of decency" and which must be regarded as "atrocious and utterly intolerable in a civilized community"; (3) causation; and (4) emotional distress so "severe" that no "reasonable man could be expected to endure it."<sup>19</sup> In *Henriksen*, the court accepted without much discussion the jury's conclusion that the defendant had committed intentional infliction of emotional distress.<sup>20</sup> It said that his actions "ranged from [defendant's] accusing Henriksen of 'sleeping with' his brother to his raping and assaulting her." His actions also included

shattering the kitchen cabinets while he "came after" her meanwhile calling her a "lying, whoring bitch" who was "stealing money from him;" calling Henriksen at a friend's house where she was staying because she was afraid to come home and threatening to burn down [her] Inn; tearing down a wall in the dining room before she returned; swaying over her bed and threatening to "get" her . . . pulling the telephone out of the wall and telling Henriksen he did so to prevent her from calling for help.<sup>21</sup>

18. 622 A.2d 1135 (Me. 1993).

19. *Id.* at 1139.

20. The jury awarded Henriksen \$75,000 in compensatory damages and \$40,000 in punitive damages. *Id.* at 1138.

21. *Id.* at 1137 n.1. No criminal charges were brought for the rape or any of defendant's other actions.

Although lawsuits for injuries caused by the defendant's actions would have been barred by interspousal immunity in the past, the court concluded that the policy reasons for interspousal immunity were no longer viable, and so completed its gradual rejection of it. The court reasoned that if the justification for interspousal immunity was to preserve marital harmony, no marital harmony was left to preserve, since the parties were divorced. The court also said that behavior that is "utterly intolerable in a civilized society and is intended to cause severe emotional distress is not behavior that should be protected in order to promote marital harmony and peace." Students may be surprised to find that the court was jettisoning interspousal immunity as late as 1993. The court noted that "special caution" was required for intentional infliction of emotional distress claims in the marital context because of the dangers of frivolous litigation, and that summary judgment should be looked at favorably in this context.<sup>22</sup>

Regarding the potentially troublesome issue of what behavior is extreme and outrageous in the marital context, since it is important that not every disagreement give rise to tort liability, the court noted that "jurors, many of whom are themselves married, are in the best possible position to determine what behavior between spouses is 'atrocious and utterly intolerable in a civilized community' and what behavior is 'within the normal ebb and flow' of a marital relationship."<sup>23</sup> Thus the court seemed to call for the application of community standards, via the opinions of a particular jury, to the marriage. This raises the issue of community standards (which relate to negligence standards). If certain types of domestic violence are very, very common, can they be truly extreme and outrageous? Should they be considered extreme and outrageous?

A second provocative case about intentional infliction of emotional distress is *Feltmeier v. Feltmeier*.<sup>24</sup> The decision has language recognizing the seriousness of domestic violence as well as its former invisibility, together with an instructive policy discussion about intentional infliction of emotional distress which implies that some interspousal violence is not tortious. Plaintiff's complaint, filed after her divorce, alleged that her husband had physically beaten her at least eleven times during the marriage, that he had physically restrained her on more than one occasion, that he had thrown objects at her, verbally attacked her, stalked her, and "systematically isolated her from family and friends."<sup>25</sup>

Defendant claimed that the conduct alleged, even if true, was neither extreme nor outrageous because of the "marital context" in which it arose. He further claimed that "any objectively reasonable woman could have endured

22. *Id.* at 1138-40.

23. *Id.* at 1139.

24. 333 Ill. App. 3d 1167 (2002); *Feltmeier v. Feltmeier*, 2003 WL 22145661 (Ill. 2003) (affirming judgment of lower court). The Illinois Supreme Court's 2003 affirmation of the intermediate court's decision, 2003 WL 221456611, is important, but the intermediate court's 2002 opinion is more stimulating for teaching purposes, so that is the opinion discussed here.

25. 333 Ill. App. 3d at 1170.



the abuse that he is alleged to have administered without suffering severe emotional distress."<sup>26</sup> He argued that since the alleged physical abuse occurred only three or four times a year, defendant's conduct was "marital conduct that any reasonable wife should be able to endure without suffering emotional distress," and thus the conduct was not extreme or outrageous.

The appellate court rejected this contention, describing the pattern of abuse that typifies domestic violence:

Even though the abusive events may occur only a handful of times over the course of a year, the repeated pattern of abuse inflicts daily psychic torment . . . Domestic violence and domestic abuse can take many forms. The kind alleged here is extreme enough to be actionable. It combines more than a decade of verbal insults and humiliations with episodes where freedom of movement was deprived and where physical injury was often inflicted. . . . [W]e are unwilling to dismiss it on grounds that it is unworthy of outrage.<sup>27</sup>

As with *Henriksen*, the facts involved a combination of physical and psychic abuse, and the court found intentional infliction of emotional distress to be an appropriate theory.

This case, like *Henriksen*, can be a useful vehicle for discussing the contours of the intentional infliction of emotional distress tort. The court's policy discussion, rejecting defendant's argument that his actions as alleged were not extreme and outrageous, draws a distinction between this case and the ebb and flow of married life:

We understand that married couples will get into arguments and that, on occasion, those arguments will become heated. Spouses will most assuredly bruise each other's feelings. And, from time to time, a husband will touch his wife with an angry hand. However, the marital conduct alleged in this particular case is different.<sup>28</sup>

It is fascinating and disturbing that the court, while recognizing the tort, seems to be saying that a husband's occasionally "touch[ing] his wife with an angry hand" is not tortious within marriage, when such an act, as every first-year law student learns, in other contexts (assuming there is no consent) is a battery.

Conventional criticism of the intentional infliction of emotional distress tort asserts that the "extreme and outrageous" standard is very subjective and varies according to the whim of juries.<sup>29</sup> Such criticism further claims that the entire tort actually collapses into the vague requirement of defendant's con-

26. *Id.* The case involves an interlocutory appeal from the trial court's denial of defendant's motion to dismiss. As such, it tests the sufficiency of the plaintiff's allegations.

27. 33 Ill. App. 3d at 1176-77.

28. *Id.*

29. 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 (1982). This is still an influential article. See *Principles of the Law of Family Dissolution: Analysis and Recommendations* 55 n.93 (Philadelphia, 2002). The article did not mention use of intentional infliction of emotional distress in marital or other intimate contexts, presumably because there were so few cases at that time.

duct having been extreme and outrageous. Two scholars who accept the conventional criticism of the tort have suggested that intentional infliction of emotional distress should be available in the context of divorce only where physical abuse that is a violation of the criminal law has taken place.<sup>30</sup>

In considering the conventional criticism of the tort, it is important to remember that tort standards and decisions in general often are criticized as subjective and variable.<sup>31</sup> Further, while the elements of the tort are vague, they are not meaningless. The requirement of extreme and outrageous conduct focuses in large part on an objective assessment of the defendant's conduct.<sup>32</sup> A plaintiff can not win simply because she does not like the conduct; it must be objectively extreme and outrageous conduct. In addition to the intent and causation requirements, the tort requires, unlike other intentional tort claims, that the plaintiff's emotional distress must be severe. It is not sufficient that a plaintiff suffers emotional distress, but the distress must be so severe that no reasonable person could endure it. So it is not accurate to say that the entire tort collapses into the extreme and outrageous conduct requirement. The tort arguably is not an abrupt departure from other torts; for example, it is similar to the tort of assault in that it does not require any physical contact between defendant and plaintiff, and it protects mental and emotional interests rather than physical ones.<sup>33</sup>

I generally assign these domestic violence tort cases together with other casebook materials on intentional infliction of emotional distress. I make sure students understand the elements of the tort and its interesting history. Some students are troubled by the vagueness of the "extreme and outrageous conduct" requirement; others feel comfortable having a jury decide and strongly resist the idea that a judge should ever decide that conduct is extreme and outrageous as a matter of law. Some are puzzled by, others outraged by, others in agreement with the *Feltmeier* court's view that a husband's occasionally "touch[ing] his wife with an angry hand" is not tortious. Some (married) students have articulated the view that words alone definitely should not be sufficient to establish the tort, since in the heat of the moment, especially with the stresses of young children, "extreme and outrageous" things may get said.

The potentially broad scope of this relatively new tort sheds light on traditional torts such as assault and battery and invites discussion of whether traditional torts "fit" the realities of domestic violence. Using *Feltmeier*, the class can discuss whether traditional event-centered torts like assault and battery, which focus on a single physical incident, necessarily capture the ongoing and varying nature of domestic violence or the damage it can cause, much of which can be psychic.<sup>34</sup> The wider lens of intentional infliction of

30. Ira M. Ellman & Stephen D. Sugarman, Spousal Emotional Abuse as a Tort? 55 Md. L. Rev. 1268 (1996).

31. See, e.g., Stephen D. Sugarman, *Doing Away with Personal Injury Law: New Compensation Mechanisms for Victims, Consumers, and Businesses* (New York, 1989).

32. Givelber, *supra* note 29, at 47.

33. See Restatement (Second) Torts, §§ 21, 46 (Philadelphia, 1977).

34. See generally Dalton & Schneider, *supra* note 4; Schneider, *supra* note 11, at 65-66; Deborah Tuerkheimer, A Call to Criminalize Domestic Violence, 94 J. Crim. L. & Criminology 101 (2004).

emotional distress may more accurately reflect the realities of domestic violence than do traditional intentional torts.

One of the policy issues that arises with this tort is whether its elements are clear enough for potential defendants to have sufficient notice. Certainly the standard that the defendant's behavior must strike the average community member as "outrageous" is murky. But in many contexts, as students often are surprised to discover, the line between tortious and nontortious behavior is hard to locate. As with other intentional torts, it is in society's best interest to discourage conduct that is even close to the line. There is minimal, if any, danger of overdeterrence. The lack of a clear line therefore is not as significant as with some other torts, such as strict liability torts. Students may articulate slippery slope arguments and ask whether the tort of negligent infliction of emotional distress can be brought in the marital or intimate context. It seems that such claims have rarely been brought and generally have not been recognized.

Other public policy issues worth discussing include the difficulty of proving or disproving allegations when the conduct at issue has taken place in private and between people who formerly were intimate. This does not mean law has to succumb to notions of privacy that may shelter abuse, but it does mean special challenges of proof may arise.

Also there is the question of the extent to which allowing intentional infliction of emotional distress claims in the course of divorce, or between ex-spouses, conflicts with the no-fault policy of divorce law.<sup>35</sup> The historical torts of criminal conversation and alienation of affections should be brought up here. Criminal conversation meant simply that a defendant who engaged in adultery with the plaintiff's spouse would be liable to the plaintiff. Historically the plaintiff had to be the husband. For the defendant to be liable under the alienation of affections tort, the defendant must have known of the marital relationship, intended to affect it adversely, and deprived one spouse of the other's affection, even if no adultery was committed. Both of these torts have been abolished in most states.<sup>36</sup> Although students may envision torts as a field with ever-expanding liability, the abolition of these torts, like the abolition of joint and several liability in some states, modifies that idea. In South Dakota, where the cause of action for alienation of affections persists, so that a man can sue the person with whom his wife has fallen in love, the state supreme court has held that claims of intentional infliction of emotional distress can not be asserted as a matter of policy when they are based on conduct that leads to the end of a marriage.<sup>37</sup> In *Pickering v. Pickering*, the ex-wife had lied to her ex-husband about his paternity of a child born during the marriage, causing him extreme distress and humiliation. It does not appear that physical abuse was involved. When he sued her for intentional infliction of emotional distress, the South Dakota Supreme Court found that the lawsuit would subject

35. See Ellman & Sugarman, *supra* note 30.

36. Dan Dobbs, *The Law of Torts* 1246-47 (St. Paul, 2000).

37. *Pickering v. Pickering*, 434 N.W.2d 758 (S.D. 1989).

the child to "interfamilial warfare" and that "attempts to redress [the] wrong may do more social damage than if the law leaves it alone."<sup>38</sup> But the alienation of affections suit against the ex-wife's lover was allowed to continue. *Pickering*, when contrasted with *Feltmeier* and *Henriksen*, can lead to a thought-provoking discussion. The court's view of intentional infliction of emotional distress to some extent echoes the justifications for interspousal tort immunity. Does lying to a spouse about adultery and parenthood reach the outer bounds of unusual behavior that the extreme and outrageous requirement is meant to describe? Or is it cruel yet relatively common and not "extreme and outrageous"? What are the costs and benefits when tort law gets involved in matters concerning marital breakups?

Discussing the public policy issues provides a framework for discussion of broader tort issues. Will imposition of liability deter? How often are victims likely to receive compensation? Why does it matter? Are there particular reasons why courts should be wary of applying this tort to intimate contexts? Should the tort be limited in the marital or other intimate context to physical abuse?

This issue of tort liability for harms from domestic violence can be used as a starting point to discuss insurance and public policy. Intentional acts are specifically excluded from liability coverage, so domestic violence torts are generally excluded from liability coverage. One of the reasons for the exclusion is that insuring for intentional torts allows a person to profit from her own wrong. She will be more strongly deterred from tortious conduct by the threat of paying a judgment herself, than if the insurance company will pay the judgment, the argument goes. This assumption about deterrence can be explored and challenged. Given that most people have few assets that can be collected to satisfy a tort judgment, how much of a deterrent is the threat of financial liability anyway? And if the threat of financial liability is not much of a deterrent, how much would insuring intentional torts really undermine deterrence? One way of looking at the public policy issues is to say that the public policy of not insuring for intentional torts contributes to the consequence that few intentional tort victims receive compensation.

The discussion may test students' intuitions about deterrence. Would the imposition of civil liability for domestic violence torts (i.e., intentional torts) create more or less deterrence than it does in the negligence area? The discussion may be brought around to other functions of tort law. Even if deterrence is unclear and compensation unlikely, does it matter what story tort law tells about interspousal injury? Does the assertion that law should stay out of the private realm unless there is physical abuse tend to reproduce inequalities that existed in the first place?

38. *Id.* at 762. Another provocative public policy discussion is found in a New Mexico Court of Appeals decision, *Hakkila v. Hakkila*, 812 P.2d 1320 (N.M. 1991). *Hakkila* recognized the tort of intentional infliction of emotional distress but found its elements not satisfied by the facts in that case. *Hakkila*, and interesting questions about it, are included in Dalton & Schneider, *supra* note 4, at 827-34.

## Statutes of Limitation

It is hard to talk about domestic violence torts without talking about statutes of limitations. Because of the circumstances in which the torts are committed, it is difficult for plaintiffs to sue expeditiously.<sup>39</sup> As I mentioned, the statute of limitations for traditional intentional torts is often shorter than for other torts, so statute of limitations issues arise often.

Those issues were important in *Feltmeier v. Feltmeier*, since in that case the appellate courts adopted the continuing tort theory for intentional infliction of emotional distress claims. A two-year statute of limitations applied to such claims, as well as to assault and battery claims. Defendant argued that each new act of abuse triggered a new statute of limitations, so that any act that occurred more than two years before the complaint was filed would be time-barred. The plaintiff argued that the continuing tort theory applied, so that the defendant's behavior should be looked at as a whole, and the statute of limitations would not begin to run until the last act of abuse or the continuing behavior ended. Illinois had applied that doctrine in a variety of circumstances, including nuisance, trespass, a long-term check-cashing scheme, medical malpractice, and intentional infliction of emotional distress. The court agreed with the plaintiff, joining other courts in finding that the continuing tort theory should apply in domestic abuse cases: the two-year statute of limitations for intentional infliction of emotional distress would begin to run on the date of the last injury or when the tortious acts stopped. Plaintiff did not assert assault and battery claims because there was no plausible argument that the continuing tort theory would apply to them.<sup>40</sup> The plaintiff's claims, which involved activities over an eleven-year period that continued after the divorce, were not time-barred. The use of the continuing tort theory in this context can be included in a larger discussion about statutes of limitation in other contexts, such as the discovery rule in medical malpractice cases.

*Henriksen* presents another example of how statute of limitations issues arise in domestic violence tort cases. The statute of limitations for assault and battery was two years, while the statute of limitations for intentional infliction of emotional distress was six years.<sup>41</sup> Henriksen claimed to have been assaulted and raped by her husband, yet all of these actions occurred more than two years before she filed suit. Many of these actions occurred more than two years but less than six years before she filed suit. Therefore, the plaintiff could not bring an assault and battery claim, but had to proceed on intentional inflic-

39. Some casebooks (see *supra* note 5) cover statutes of limitation and some do not. Epstein and Franklin & Rabin do not discuss statutes of limitation. Dobbs & Hayden discusses statutes of limitation. Johnson & Gunn notes that statutes of limitation for intentional torts generally are shorter than for other torts (825–26). Vetri et al. uses an example of domestic violence in highlighting various statute of limitations issues (765–66).

40. Interview with plaintiff's attorney Morris Lane Harvey, Aug. 2003. See also Dalton, *supra* note 10.

41. 622 A.2d at 1142. The intentional infliction of emotional distress claim fell within the residual statute of limitations that applied except where a specific statute of limitations existed. Jack H. Simmons et al., *Maine Tort Law*, § 17.11 (Charlottesville, 2001).

tion of emotional distress alone.<sup>42</sup> She was able to introduce evidence of assaults (including the rape) that had happened more than two years before suit was filed, but within six years before suit was filed, for the purpose of seeking recovery for only the *emotional* harm caused by the assaults, as opposed to recovery for the *physical* harm they caused.<sup>43</sup> Whether the jury accepted this mental/physical distinction is anyone's guess.

This is an excellent area in which to remind students of the importance of legislation in torts. Legislation in some states has tackled the statute of limitations issues that frequently arise in this area. California, for example, provides that domestic violence tort cases must be filed within three years of the later of two events: the date of the last act of domestic violence, or the date that the plaintiff discovered or should have discovered that the plaintiff's illness or injury resulted from defendant's act of domestic violence.<sup>44</sup> This, in effect, adopts by statute the continuing tort theory. Michigan provides a longer period for suits for domestic violence torts than for other types of torts.<sup>45</sup> Some students may argue that the legislature is the appropriate forum for changes in statutes of limitation, and this can be profitably discussed.<sup>46</sup>

#### Underlying Empirical Issues: Who Sues and Gets Sued?

A critically important aspect of *Henriksen* that may seem incidental at first is that the plaintiff owned a "seasonal hotel, the Tides Inn," on the Maine coast, and she operated it with her husband.<sup>47</sup> Why does this matter? The answer ties in with the general points made earlier about the rarity of reported cases of domestic violence torts. The plaintiff owned property and received income from the property. Unlike many postdivorce women, she had the funds to hire a lawyer to bring the case.<sup>48</sup> Defendant, although this does not come out in the opinion, also had assets and the funds to hire a lawyer to defend the case. If

42. She initially asserted a negligent infliction of emotional distress claim, but the trial judge entered a directed verdict for the defendant on this claim, and this action was not disturbed on appeal. 622 A.2d at 1142.

43. *Id.* at 1143.

44. Cal. Civ. Proc. Code § 340.15 (West 2000).

45. 59 Mich. Stat. Ann. § 600.6805 (Michie 2002) (five-year statute of limitations for assault or battery brought by person assaulted or battered by former spouse or intimate partner; two years for other assault and battery).

46. Releases are now commonly obtained in the course of divorces, and their enforceability can raise interesting public policy issues, detailed discussion of which is beyond the scope of this article. In *Henriksen*, the court suggested that if Cameron's lawyer had gotten a general release, it would have barred the claim. 622 A.2d at 1142. But when the parties were divorced in 1984 in Maine, it was not routine practice to use such releases, and Cameron did not sue his divorce lawyer for failing to ensure that he got one. In *Feltmeier*, the divorce settlement included releases, but the court decided that public policy precluded enforcement of boilerplate language and that the continuing tort theory meant that the cause of action did not arise until after the agreement was signed (since defendant's abusive behavior continued after the divorce). 33 Ill. App.3d at 1182-83. This discussion can be made part of a larger discussion about settlement, releases, and the importance of finality (as well as of other competing considerations).

47. 622 A.2d at 1137.

48. As an associate I was involved in the pretrial stages of the case, representing the plaintiff.

not for those factors, there would have been no lawsuit and therefore no reported case. Similarly, in *Feltmeier*, the defendant had an ongoing successful business with assets.<sup>49</sup> These cases are the exceptions; the general rule is that no litigation will result from the types of actions alleged in these cases.

In sum, *Henriksen*, *Feltmeier*, and *Pickering* can be used to discuss intentional infliction of emotional distress, statutes of limitation, and immunity, as well as many public policy issues including those pertaining to insurance and deterrence.

### *Why So Few Domestic Violence Tort Cases?*

A second approach is to tell students how few reported cases there appear to be on domestic violence torts, compared with the incidence of domestic violence, and to ask why there are so few. Some students may bring up interspousal immunity, but as casebooks make clear, formally it is almost if not totally dead.<sup>50</sup> Moving beyond immunity, barriers to litigation include the intentional acts exclusion and the family member exclusion in liability insurance policies; short statutes of limitation; tortfeasors who lack assets or who own assets jointly with plaintiffs; procedural barriers; and other barriers, such as threats of retaliation and the need to move on. It is clear that the actual number of cases filed seeking recovery for domestic violence injuries is many times less than the number of actual injuries from domestic violence.

The why-so-few-cases discussion could lead to discussion of "naming/blaming/claiming" behavior<sup>51</sup> and what Marc Galanter and others call the dispute pyramid.<sup>52</sup> While there are widespread perceptions that Americans sue at the drop of a hat, that the torts system is overburdened to the crushing point by spurious lawsuits, and that runaway juries often make absurd punitive damages awards, many scholars have argued that the reality is quite different.<sup>53</sup> For example, the Harvard study of medical malpractice in New York concluded that "eight times as many patients suffered an injury from negligence as filed a malpractice claim in New York State. About sixteen times as many patients suffered an injury from negligence as received compensation from the tort liability system."<sup>54</sup> While in the automobile injury context claiming rates are

49. Conversation with plaintiff's attorney Morris Lane Harvey, June 2, 2003.

50. See *supra* note 15. See also Carl Tobias, *The Imminent Demise of Interspousal Tort Immunity*, 60 *Mont. L. Rev.* 101 (1999).

51. See William L. F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, and Claiming*, 15 *Law & Soc'y Rev.* 631 (1980) (describing complex process by which injured people come to recognize injuries and make claims for them, and suggesting that many injuries do not become claims). Alternatively, one could start with the naming, blaming, claiming discussion in another context such as medical malpractice and move to the domestic violence context.

52. *Real World Torts: An Antidote to Anecdote*, 55 *Md. L. Rev.* 1093, 1099-1103 (1996).

53. See, e.g., *id.*; Deborah J. Merritt & Kathryn A. Barry, *Is the Torts System in Crisis? New Empirical Evidence*, 60 *Ohio St. L.J.* 315 (1999); Richard L. Abel, *The Real Tort Crisis—Too Few Claims*, 48 *Ohio St. L.J.* 443 (1987).

54. *Patients, Doctors, and Lawyers: Medical Injury, Malpractice Litigation, and Patient Compensation in New York: The Report of the Harvard Medical Study to the State of New York* 6 (New York, 1990).

high, in other contexts they are not.<sup>55</sup> Domestic violence injuries occur in a context where claiming rates must be low, in contrast to automobile injuries, where there is an insurance system designed for compensation (mandatory liability insurance plus mandatory uninsured motorist coverage) and differing cultural expectations.<sup>56</sup>

This could lead to discussion about criminal prosecution of those intentional torts that are crimes, compared with civil compensation for injuries caused by the same acts. Most of these acts are criminal; why isn't criminal prosecution enough, or is it? Deterrence is a goal of both criminal and tort law, yet the empirical evidence that either system deters is far from clear.<sup>57</sup> If tort law in general does deter, the fact that there are so few lawsuits for domestic violence torts injuries means that tort law is not deterring in this area. Moreover, compensation is a central purpose of tort law, whereas compensation is not a central purpose of criminal law. What about victims' compensation programs? Compensation rarely goes to domestic violence victims.<sup>58</sup> Students may be familiar with the now common civil injunctions that victims of domestic violence may obtain against abusers. Many of these statutes provide that economic relief can be awarded in an injunction proceeding. But rarely is compensation awarded under these statutes.

Another important difference between criminal and civil matters in this context is that the decision about whether to prosecute criminally rests with the prosecutor, while the decision to pursue a tort claim rests with the victim (and her lawyer). Third, criminal defendants have constitutional protections—such as the Fifth Amendment right to be free from self-incrimination and the right to an attorney if threatened with jail—that civil defendants lack. The threat of imprisonment in criminal cases is linked with a heightened standard of proof, while the threat of monetary loss in civil cases is linked with a more relaxed standard of proof. In theory, because of the different standard

55. Deborah R. Hensler et al., *Rand Inst. for Civil Justice, Compensation for Accidental Injuries in the United States*, 20–21 (Washington, 1991) (finding that the "claiming rate" for motor vehicle injuries was 44 percent, for work injuries 7 percent, for other injuries 3 percent, based on national survey of claiming behavior).

56. See generally Wriggins, *supra* note 3.

57. Regarding deterrence created by civil liability, see, e.g. Gary T. Schwartz, *Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?* 42 *UCLA L. Rev.* 377, 381–90 (1994). Regarding deterrence created by criminal liability, see, e.g., Daniel S. Nagin, *Criminal Deterrence Research at the Outset of the Twenty-first Century*, 23 *Crime & Just.* 1 (1998). I am not aware of any definitive studies concerning the deterrent effect of criminal or civil liability for domestic violence. It may be interesting to discuss whether the threat of liability deters intentional torts more than torts of negligence, or less. In discussing this question with many people, I have received remarkably divergent answers. Many people think that the threat of tort liability would *not* deter domestic violence because domestic violence is impulsive, unreasoned action, whereas the threat of liability *would* deter in the context of negligence because exercising care is something that is based on reason and consciousness. But many other people think exactly the opposite: that the threat of tort liability *would* deter domestic violence because domestic violence is intentional, whereas the threat of negligence liability does *not* deter negligence because it is not intentional. At work here may be differing concepts of domestic violence—as actions of "passion" (a more traditional view) or as actions of control (a more recent conceptualization).

58. While every state has victim compensation programs, they provide minimal compensation to victims of domestic violence. Wriggins, *supra* note 3, at 147 nn.135–36.



of proof and other factors, civil cases could be brought and won more frequently than criminal prosecutions, and the expected deterrent effect from the threat of civil liability might then be greater than the effect from the threat of criminal liability.

One can also lead a broader discussion of the ways the tort system treats different injuries. One could contrast the likelihood that a faultless driver will receive compensation for her injuries with the likelihood that a victim of domestic violence will receive compensation for her injuries. Policy choices such as requiring car insurance and requiring uninsured motorist coverage, which spread risk broadly, make it reasonable to conclude that the likelihood of an injured driver's receiving compensation is far higher than the likelihood that an injured domestic violence tort victim will receive compensation. Related issues include the different ways that the tort system has treated mental versus physical injury, discussed provocatively in the recent United States Supreme Court decision *Norfolk & Western Railway v. Ayers*.<sup>59</sup> There may or may not be compelling reasons for the differences in treatment; the differences are at least worth discussing.

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The spectrum of issues that the first-year torts course can deal with is wonderfully wide. Deciding what to include and what to exclude is a perpetual challenge. The prevalence of domestic violence and its tortious nature present strong arguments for discussing it in first-year Torts. The intentional infliction of emotional distress cases discussed above offer a compelling context for learning both about domestic violence and about the importance and problematic aspects of this tort. Further, key aspects of each case link both with critical aspects of torts and with salient aspects of domestic violence. For example, the statute of limitations aspects of *Feltmeier* and *Henriksen* illuminate statute of limitations issues generally and domestic violence specifically. As we see from analysis of those cases, applying traditional event-based statutes of limitations to traditional event-based torts like assault and battery often leads to exclusion of domestic violence tort claims. For domestic violence tort victims to seek tort redress, they often must use the newer theory of intentional infliction of emotional distress and have access to the continuing tort theory or to a statute tailored to domestic violence torts. Moreover, these cases, by their very rarity, highlight structures that prevent redress of domestic violence through the tort system except in extremely unusual circumstances. Analysis of these and other domestic violence tort cases grounds the torts curriculum in broad contemporary realities and provides insight into important doctrinal and public policy issues that are central to torts as a field.

59. *Norfolk & Western Railway v. Ayers*, 123 S. Ct. 1210 (2003).