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Domestic Violence Torts

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DOMESTIC VIOLENCE TORTS

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"Domestic violence is the most common cause of nonfatal injury to women in the United States. Victims are pushed, punched, kicked, strangled, and assaulted with various weapons with the intent of causing pain, injury, and emotional distress."[1]

I. INTRODUCTION

Domestic violence[2] has created a massive epidemic of uncompensated intentional torts.[3] Domestic violence causes serious and widespread harms,

1. Demetrios N. Kyriacou, Deirdre Anglin, Ellen Taliaferro, Susan Stone, Toni Tubb, Judith A. Linden, Robert Muelleman, Erik Barton, & Jess F. Kraus, *Risk Factors for Injury to Women from Domestic Violence*, 341 NEW ENG. J. MED. 1892, 1892 (1999).

2. According to one authority:

particularly to women.[4] The national scope of the problem was made plain when Congress passed the Violence Against Women Act of 1994 ("VAWA"),[5] which included criminal provisions, funding for services and law enforcement, and a civil remedy provision.[6] People who commit

> Domestic violence is the establishment of control and fear in a relationship through the use of physical violence, intimidation, and other forms of abuse. Legal definitions of domestic abuse vary from state to state, but generally these definitions encompass the physical, sexual, and/or psychological abuse of a person by someone with whom they have an intimate relationship. Domestic abuse can come in all different forms: striking, beating, pulling hair, shoving, pulling, punching, slapping, kicking, hitting, tripping, squeezing, choking, pushing, biting, pulling clothes, pointing weapons, using weapons, throwing things, threatening, harassing, stalking, intimidating, raping, abusing children, emotional abuse.

FREDRICA L. LEHRMAN, DOMESTIC VIOLENCE PRACTICE AND PROCEDURE, § 1.3, at 1–7 (1997). Debate exists about what terms are appropriate. *See* ELIZABETH M. SCHNEIDER, BATTERED WOMEN AND FEMINIST LAWMAKING 45 (2000) (noting that different terms such as "domestic violence," "family violence," "spouse abuse," or "woman abuse" reflect contrasting concepts of battering); CLARE DALTON & ELIZABETH M. SCHNEIDER, BATTERED WOMEN AND THE LAW 3 (2001) (noting objections to the term "domestic violence"). Recognizing that no single term may be ideal, this Article will use the term "domestic violence" to refer both to "domestic violence" and to "domestic abuse" as defined by Lehrman.

3. *See infra* Part II.

4. *See, e.g.*, NATIONAL RESEARCH COUNCIL, UNDERSTANDING VIOLENCE AGAINST WOMEN 7 (Nancy A. Crowell & Ann W. Burgess eds., 1996) (noting that "[w]omen are far more likely than men to be victimized by an intimate partner" and that attacks by partners are more likely to result in injury to women than attacks by strangers); DALTON & SCHNEIDER, *supra* note 2, at 4–6 (summarizing data). There is debate about how much domestic violence is committed by men, and how much by women. Clare Dalton's analysis of the debate is instructive and will be followed here. Dalton notes that "more than 90% of heterosexual partner violence reported to law-enforcement authorities is perpetrated by men." Clare Dalton, *Domestic Violence, Domestic Torts and Divorce: Constraints and Possibilities*, 31 NEW ENG. L. REV. 319, 321–22 n. 2 (1997). Statistics gleaned from reporting to law enforcement authorities, however, do not necessarily reflect empirical reality. *See id.* at 322 n.2. Violence in a battering relationship differs from other types of violence in that it is often part of a wider "coercive strategy to subdue or control a partner." *Id.* She further notes that this type of violence "appears to be largely a male phenomenon" although not exclusively so. *See id.* She uses gender-specific terminology; the male pronoun refers to person who commits domestic violence, and the female pronoun refers to the victim, in abusive marital relationships, "in which it is indeed much more likely that the abusive partner will be male." *Id.* This practice will generally be followed in this Article; in recognition of the fact that the abusive partner is not necessarily male, however, gender-neutral language will at times be used.

5. Pub. L. No. 103-322, 108 Stat. 1902 (1994). *See infra* text accompanying notes 144–49. VAWA tried to address not just domestic violence, but violence against women generally.

6. Violence Against Women Act of 1994, Pub. L. No. 103-322 (codified as amended in various sections of 8, 16, 20, 28, and 42 U.S.C.). VAWA included a civil rights remedy provision which allowed victims of crimes motivated by gender to sue the perpetrators. 42 U.S.C. § 13981 (1994). This provision was struck down by the Supreme Court in *United States v. Morrison*, 529 U.S. 598 (2000). The dissent in *Morrison* enumerated some of the costs of domestic violence and rape. *See id.* at 628–35. For discussion of *Morrison*, see Julie Goldscheid, U.S. v. Morrison *and the Civil Rights Remedy of the Violence Against Women Act: A Civil Rights Law Struck Down in the Name of Federalism*, 86 CORNELL L. REV. 109 (2000); Catharine A. MacKinnon, Comment*: Disputing Male Sovereignty: On* United States v. Morrison, 114 HARV. L. REV. 135 (2000). The majority opinion indicated in a footnote that the criminal remedy for interstate domestic violence contained in VAWA, codified at 18 U.S.C. § 2261(a)(1), was constitutional. *Morrison*, 529 U.S. at 613 n.5. VAWA also

domestic violence generally are, in theory, liable under intentional tort theories, in addition to whatever liability they may face under criminal law.[7] But despite the frequency with which people are injured by "domestic violence torts,"[8] very few tort suits are brought to seek recovery for the harms domestic violence causes.[9] This underenforcement is caused by several factors. First, standard liability insurance policies generally do not cover domestic violence torts.[10] Second, many defendants have limited or no assets. Third, statutes of limitations are typically shorter for intentional torts than for negligence.[11]

A consequence of the dearth of lawsuits is that one of the key aims of the tort system—deterrence—is failing.[12] These harms are not

contained criminal provisions pertaining to stalking, 18 U.S.C. § 2261(a) (2001), and interstate violation of protection orders, 18 U.S.C. § 2262 (2001), as well as a mandatory restitution provision, 18 U.S.C. § 2248 (2001).

7. *See infra* Part II.A. Applicable torts include assault, battery, and intentional infliction of emotional distress. Archaic defenses to these tort claims, such as interspousal immunity and the marital rape exemption, now are largely gone. *See generally* Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CAL. L. REV. 1373 (2000); Carl Tobias, *The Imminent Demise of Interspousal Tort Immunity*, 60 MONT. L. REV. 101 (1999). Between 1994 and 2000, when VAWA's civil rights remedy provision was struck down, a perpetrator might also have liability under that provision, 42 U.S.C. § 13981. Not all domestic violence torts are crimes; for example, the tort of intentional infliction of emotional distress creates liability for behavior that is often not criminal. *See, e.g.*, Merle H. Weiner, *Domestic Violence and the Per Se Standard of Outrage*, 54 MD. L. REV. 183, 189 n.16 (1995). The American Law Institute's DRAFT PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS contains a brief discussion of tort claims for "marital misconduct" which expresses skepticism about intentional infliction of emotional distress claims. *See* ALI, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS, 35–51 (Tentative Draft No. 2, March 14, 1996). *See also infra* Part II.A.

8. "Domestic violence torts" refers to torts committed as part of domestic violence. For a definition of domestic violence, see *supra* note 2. Commonly applicable tort theories are battery, assault, and intentional infliction of emotional distress. *See infra* Part II.A.

9. *See, e.g.*, Douglas D. Scherer, *Tort Remedies for Victims of Domestic Abuse*, 43 S.C. L. REV. 543, 565 (1992); *infra* Part II.B.

10. *See* Tom Baker, *Reconsidering Insurance for Punitive Damages*, 1998 WIS. L. REV. 101, 120; Ellen S. Pryor, *The Stories We Tell: Intentional Harm and the Quest for Insurance Funding*, 75 TEX. L. REV.1721, 1722–23 (1997).

11. *See infra* notes 86–87 and accompanying text.

12. *See infra* Part II.D.1. In many tort contexts such as negligence, the deterrence goal, as expressed in the economic analysis of tort law, is that tort rules should lead to an optimal level of safety, as opposed to a level of safety at which no one is injured. It is axiomatic that to prevent all accidents would be prohibitively expensive. *See, e.g.*, DAVID D. FRIEDMAN, LAW'S ORDER: WHAT ECONOMICS HAS TO DO WITH LAW AND WHY IT MATTERS 197 (2000); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 163–67 (4th ed. 1992). In the context of intentional torts such as domestic violence torts, however, the deterrence goal, although rarely articulated and unattainable, is that no such torts take place. *See generally* WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW 168–71 (1987) (explaining that defendant's cost of avoiding harm in battery and assault cases is negative while victim's cost is higher and that battery and assault liability rules make economic sense); POSNER, *supra*, at 210 (arguing that liability should rest on person who spits in someone else's

compensated through the tort system;[13] the losses simply remain where they fall.[14] Second, other commonly recognized policy aims of the tort system (such as loss spreading)[15] fail in the case of domestic violence torts. Third, because the injuries fall outside the tort system, they are less visible

face even if the well-being of the person who spits is increased more than the well-being of the person who is spat on is diminished).

13. "Compensation" refers to tort damages that include lost wages and earning capacity, medical expenses, compensation for property damage, as well as damages for pain and suffering and mental distress. Compensation also refers to punitive damages, in cases of particularly egregious behavior. A victim may have first-party insurance for medical expenses and (much less likely) may have disability insurance. *See infra* notes 138–43 and accompanying text. These types of first-party insurance partially compensate for the harm. But if there is no tort suit, compensation is not received through the tort system; therefore, the victim will not receive pain and suffering damages, mental distress damages, or punitive damages. From the perspective of the current tort system, such a victim does not receive full compensation. There is considerable controversy concerning pain and suffering damages. Some commentators believe that pain and suffering damages are appropriate and even necessary. *See* Martha Chamallas, *The Architecture of Bias: Deep Structures in Tort Law*, 146 U. PA. L. REV. 463, 508–10 (1998) (arguing that the individualized, nonobjective nature of pain and suffering damages is a positive aspect of tort law); Steven P. Croley & Jon D. Hanson, *The Nonpecuniary Costs of Accidents: Pain-and-Suffering Damages in Tort Law*, 108 HARV. L. REV. 1785 (1995); Mark Geistfield, *Placing a Price on Pain and Suffering: A Method for Helping Juries Determine Tort Damages for Nonmonetary Injuries*, 83 CAL. L. REV. 773 (1995). Others believe that pain and suffering damages should be abandoned and the tort system replaced with other compensation mechanisms that would cover medical expenses and lost wages. *See, e.g.*, STEPHEN D. SUGARMAN, DOING AWAY WITH PERSONAL INJURY LAW: NEW COMPENSATION MECHANISMS FOR VICTIMS, CONSUMERS, AND BUSINESSES (1989); George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L.J. 1521, 1586–87 (1987). Punitive damages are also controversial. *See generally* Symposium, *The Future of Punitive Damages*, 1998 WIS. L. REV. 1 (1998) (examining the side in the debate over insurance for punitive damages).

14. This phrase is from Oliver Wendell Holmes: "[t]he general principle of our law is that loss from accident must lie where it falls." OLIVER WENDELL HOLMES, THE COMMON LAW 76 (Harvard U. Press 1963) (1881). Holmes is referring to "accidents" but he seems to apply the principle more broadly, since he says immediately after that the "cumbrous and expensive machinery [of the state] ought not to be set in motion unless some clear benefit is to be derived from disturbing the *status quo*." *Id.* at 77.

15. There is not much literature about loss or risk spreading as a policy in the intentional tort area. There appears to be no inherent reason why loss spreading is not an objective of intentional tort liability. Gail Hollister claims that loss-spreading is not an objective of intentional tort liability: "[o]ne goal of negligence liability—loss spreading—is not an objective of intentional tort liability because generally it cannot be achieved by imposing liability on intentional tortfeasors." Gail D. Hollister, *Using Comparative Fault to Replace the All-or-Nothing Lottery Imposed in Intentional Tort Suits in Which Both Plaintiff and Defendant Are at Fault*, 46 VAND. L. REV. 121, 130 (1993). This is so, she claims, because generally there is no insurance for intentional torts. *See id.* at 131. Sometimes, however, insurance does cover intentional torts. *See, e.g.*, Baker, *supra* note 10, at 120 n.66 (noting that some kinds of insurance cover punitive damages); Jeffrey P. Klenk, *Emerging Coverage Issues in Employment Practices Liability Insurance: The Industry Perspective on Recent Developments*, 21 W. NEW ENG. L. REV. 323, 333 (1999) (reviewing insurance coverage for sexual harassment and intentional torts of employees). *See also* discussion *infra* Parts II.C.1, III.A.5. In such instances, loss-spreading objectives presumably are being met. Loss-spreading as a goal is not inherently incompatible with intentional tort liability.

or even invisible to the public and the behavior of the perpetrator is not condemned through the tort system.[16]

This Article offers a more effective approach[17] to civil liability for domestic violence torts through insurance reform. Part III.A discusses the proposed "Domestic Violence Torts Insurance Plan." The plan challenges the conventional wisdom that intentional torts cannot or should not be insurable, asserting instead that domestic violence torts can and should be insured. Under the plan, liability insurance would be available to cover claims for domestic violence torts in order to increase deterrence and compensation and as a matter of fairness to domestic violence tort victims.[18] To work best, this liability insurance probably would need to be a mandatory part of automobile liability insurance.[19] If there is liability coverage, more lawsuits will be filed, settled, and tried, since it is generally easier to recover from a defendant's liability insurance policy than from a defendant's assets.[20] Persons harmed by domestic violence torts would be more likely to receive compensation than they are now. Liability policies would require that insureds reimburse insurers for payments they make for domestic violence torts.[21] Insurers would pursue such reimbursement, and

16. To the extent that the tort system presents moral guidelines for action, these guidelines are not enforced where, as here, there is widespread harm yet lawsuits are not brought seeking compensation for the harm. As David Owen writes, "[t]ort law . . . involves questions of how people should treat one another and the rules of proper behavior that society imposes on each citizen for avoiding improper harm to others, and for determining when compensation for harm is due." David G. Owen, *Foreward: Why Philosophy Matters to Tort Law*, *in* PHILOSOPHICAL FOUNDATIONS OF TORT LAW 7 (David G. Owen ed., 1995). *See infra* Part II.D.3.

17. The term "approach," rather than "system," is used deliberately. The United States currently does not have a compensation "system" for injury. *See* Kenneth S. Abraham & Lance Liebman, *Private Insurance, Social Insurance, and Tort Reform: Toward a New Vision of Compensation for Illness and Injury*, 93 COLUM. L. REV. 75, 75 (1993). This Article does not propose a comprehensive system, but rather proposes a range of integrated changes in the arrangements of insurance and tort law.

18. *See infra* Part III.A.

19. *See* KENNETH S. ABRAHAM, DISTRIBUTING RISK: INSURANCE, LEGAL THEORY, AND PUBLIC POLICY 215–16 (1986) (noting that private automobile insurance is required and homeowners liability coverage is nearly mandatory). As discussed more fully in Part III.A.4., I believe liability insurance should be mandatory to prevent market failure and to promote the aims of public policy.

20. *See* Tom Baker, *Blood Money, New Money, and the Moral Economy of Personal Injury*, 35 LAW & SOC'Y REV. (forthcoming 2002). The factual settings of these torts make them different from many other torts. Often, as with other torts, the facts will be murky. A battery claim or other claim may be answered with a counterclaim. But factual complexity is nothing new for torts. Litigation is designed to resolve factual conflicts, and there is nothing about domestic violence torts that make them uniquely intractable.

21. This reimbursement requirement is a variation on the idea of subrogation. "Subrogation" is "the substitution of one person in the place of another with reference to a lawful claim, demand or right, so that he who is substituted succeeds to the rights of the other in relation to the debt or claim, and its rights, remedies, or securities." BLACK'S LAW DICTIONARY 1427 (6th ed. 1990). In some instances, when an insurer pays an insured for a loss, and the insured is entitled to recover for that loss from

thus the assets of domestic violence tortfeasors would be at risk. The deterrence of domestic violence torts should be greater than it is currently because threats of liability and threats to assets will be real.[22] Another feature of this proposed plan is an insurance policy to cover tort claims where a domestic violence tort defendant is uninsured. If a defendant is uninsured, a person injured by domestic violence could make a claim under the "uninsured domestic violence tortfeasor" part of her policy, which would be similar in some ways to an uninsured motorist policy.[23] The "uninsured assailant provision" would also contain a reimbursement requirement, so that the insurance company could pursue the assets of the domestic violence tortfeasor. Thus, the deterrent effects of liability would be present.[24] Such a policy would probably need to be a mandatory part of automobile insurance.[25]

In addition to the insurance features outlined above, a more effective civil liability arrangement would be different from what we have now in several other ways. Statutes of limitations would be long enough for a woman to disentangle herself from an abusive relationship and still have time to file suit for injuries.[26] Procedural obstacles such as requiring tort claims be brought with a divorce would be absent.[27] These features also would increase the likelihood that tort claims would be brought, and thus increase deterrence and compensation. This proposed approach has practical limitations, but should better deter tortfeasors and compensate victims than the current system.

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someone else, the insurer may be subrogated to the rights of the insured. This means that the insurer "stands in the shoes" of the insured, and the insurer's rights are equal to the insured's rights. In other words, the insured can go after the third party for whatever it paid on the insured's behalf. *See* ROBERT E. KEETON & ALAN I. WIDISS, INSURANCE LAW: A GUIDE TO FUNDAMENTAL PRINCIPLES, LEGAL DOCTRINES, AND COMMERCIAL PRACTICES § 3.10(a)(1) (Student ed. 1988). Usually an insurer's rights to subrogation are limited to those rights the insured may have had against third parties, and the insurer cannot obtain subrogation against an insured. *See id.* at 221. Where insurance is covering claims for intentional torts, however, the insurance company should be able to seek subrogation against its insured to the amount it pays on his behalf for intentional tort claims. *See* Ambassador Ins. Co. v. Montes, 388 A.2d 603 (N.J. 1978) (holding that an insurance company that compensates victim of arsonist's action may seek reimbursement from the arsonist).

22. *See infra* Parts II.D.1, III.A.2. The subject of criminal deterrence is beyond the scope of this Article.

23. See *infra* Part III.A.2.a.

24. *See infra* Parts II.D.1, III.A.2.

25. The reasons the uninsured assailant provision would probably need to be mandatory are similar to the reasons why the liability policy would need to be mandatory. *See* Part III.A.4.

26. *See infra* Part II.C.3. (discussing barriers posed by short statutes of limitations) and III.B.1. (discussing proposed changes).

27. *See infra* Part III.B.2.

More broadly, it is time to address, rather than take for granted, the relative lack of deterrence and compensation that the tort and insurance systems provide for domestic violence torts. Particularly because intentional harm is more serious than other types of harm for which the tort system provides compensation,[28] greater attention should be paid to the barriers that prevent compensation for these intentional harms. Moreover, ever since the United States Supreme Court struck down the VAWA civil remedy provision in its 2000 term,[29] the only civil remedy a victim may pursue is likely to be through the tort system. While the complex dynamics often involved in domestic violence[30] may make development of these ideas particularly challenging, it is important to remember that serious consideration of these issues has only just begun.

Following the discussion of ideas to counter underenforcement, Part IV discusses the focus of twentieth-century torts scholarship on accidental harm, and highlights how this focus leaves domestic violence torts at the periphery. Torts scholarship should place domestic violence torts at the center of inquiry in view of the extensive harm that they cause.[31] Moreover, existing approaches to domestic violence should be supplemented by treating harm from domestic violence as tortious harm, in addition to whatever else it might be.[32] The fact that much domestic

28. RESTATEMENT (THIRD) OF TORTS: GENERAL PRINCIPLES states that "intentional torts are deemed considerably more serious than torts of mere negligence." RESTATEMENT (THIRD) OF TORTS: GENERAL PRINCIPLES § 1 at 2–3 (Discussion Draft, April 5, 1999) [hereinafter, RESTATEMENT (THIRD)]. *See also* JULES L. COLEMAN, RISKS AND WRONGS, 333–34 (1992) (distinguishing actions that are morally culpable from actions that are wrongful because they depart from objective norms of conduct); Richard A. Epstein, *Intentional Harms*, 4 J. LEGAL STUD. 391, 391–92 (1975).

> We do not need utilitarian analysis to decide that it is generally a bad thing for one person deliberately to maim or kill another. . . . What offends the moral sense is that one person deliberately uses his own power to deprive another of the very rights which he claims and defends for himself.

Id.; Pryor, *supra* note 10, at 1727 (noting that "[a]cting with a purpose to inflict personal injury is morally more objectionable than acting in a way that deviates from an objectified standard of reasonable care with respect to the creation of risk").

29. *See* United States v. Morrison, 529 U.S. 598 (2000). There is now an effort to pass state versions of the Violence Against Women Act. To date, none have passed. *See, e.g.*, ARIZ. SB 1535 (introduced Arizona 44th Legislature 2000). The analysis used by the Supreme Court is beyond the scope of this Article, although one of the assumptions of this Article is that contrary to the majority opinion, violence against women including domestic violence is not "purely local" in nature. *See Morrison*, 529 U.S. at 617–18. *See generally* Sally F. Goldfarb, *Violence Against Women and the Persistence of Privacy*, 61 OHIO ST. L.J. 1 (2000) (discussing historical and current ideological link between women and private sphere, and arguing that opposition to VAWA civil rights remedy endorses link between women and private sphere); Goldscheid, *supra* note 6; MacKinnon, *supra* note 6.

30. *See infra* notes 89–92, 100–20 and accompanying text.

31. *See infra* Part IV.

32. *See generally* Sally Goldfarb, NOW Legal Defense and Education Fund, FDCH Congressional Testimony, November 16, 1993, at 3 (noting that violence against women, including

violence is also prohibited by criminal statutes does not mean that such violence is not tortious as well. It is legitimate, and indeed necessary, to bring the tools of insurance and torts to bear on this widespread harm.[33]

II. DOMESTIC VIOLENCE TORTS, AND THE SHORT-LIVED CIVIL RIGHTS REMEDY OF THE VIOLENCE AGAINST WOMEN ACT

A. APPLICABLE THEORIES AND RELEVANT HISTORY

Common law intentional torts include domestic violence[34] and rape.[35] Harm from domestic violence between members of a married couple only recently became actionable as tortious since such suits used to be barred by interspousal tort immunity.[36] Rape (by someone other than one's husband) has been civilly actionable in some jurisdictions since the early 1900s.[37]

Harm from domestic violence often meets the elements of battery. According to Dan Dobbs, "[t]he defendant is subject to liability for a simple battery when he intentionally causes bodily contact to the plaintiff in a way not justified by the plaintiff's apparent wishes or by a privilege,

domestic violence, is a form of discrimination against women); Rhonda Copelon, *Recognizing the Egregious in the Everyday: Domestic Violence as Torture*, 25 COLUM. HUM. RTS. L. REV. 291 (1994) (arguing that domestic violence, stripped of ideologies that support it, is torture under international human rights principles).

33. *See infra* Part III.A–B.

34. For scholarship discussing the intersection of domestic violence and tort law, see LEONARD KARP & CHERYL L. KARP, DOMESTIC TORTS: FAMILY VIOLENCE, CONFLICT AND SEXUAL ABUSE (1989); Dalton, *supra* note 4; Ira Mark Ellman & Stephen D. Sugarman, *Spousal Emotional Abuse as a Tort?*, 55 MD. L. REV. 1268 (1996); Leonard Karp & Cheryl L. Karp, *Beyond the Normal Ebb and Flow . . . Infliction of Emotional Distress in Domestic Violence Cases*, 28 FAM. L.Q. 389 (1989); Scherer, *supra* note 9; Robert G. Spector, *Marital Torts: The Current Legal Landscape*, 33 FAM. L. Q. 745 (1999); Weiner, *supra* note 7; Rhonda L. Kohler, Comment*: The Battered Woman and Tort Law: A New Approach to Fighting Domestic Violence*, 25 LOY. L.A. L. REV. 1025 (1992); David E. Poplar, Comment: *Tolling the Statute of Limitations for Battered Women after Giovine v. Giovine: Creating Equitable Exceptions for Victims of Domestic Abuse*, 101 DICK. L. REV. 161 (1996).

35. *See* Ellen M. Bublick, *Citizen No-Duty Rules: Rape Victims and Comparative Fault*, 99 COLUM. L. REV. 1413, 1419 (1999). *See also* Corinne Casarino, Note, *Civil Remedies in Acquaintance Rape Cases*, 6 B.U. PUB. INT. L.J. 185 (1996); Holly J. Manley, Comment, *Civil Compensation of the Victim of Rape*, 7 COOLEY L. REV. 193 (1990).

36. *See* Spector, *supra* note 34, at 745; Carl Tobias, *Interspousal Tort Immunity in America*, 23 GA. L. REV. 359 (1989). *See generally* Reva B. Siegel, *"The Rule of Love:" Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117 (1996) (tracing historical development of rationales for interspousal immunity).

37. Bublick, *supra* note 35, at 1419–20. *See generally* Hasday, *supra* note 7. Rape within marriage used to be legal. *See, e.g.*, Frazier v. State, 86 S.W. 754, 755 (Tex. Crim. App. 1905) (noting that a husband cannot be guilty of raping his wife). The marital exception for rape has been modified or eliminated in every state. *See* GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY 849 (Katherine Bartlett & Angela Harris eds., 2d ed. 1998).

and the contact is in fact harmful or against the plaintiff's will."[38] The plaintiff in a battery suit need not even show that the defendant intended to cause harm.[39] The defendant's damages liability for battery is broad.[40] Indeed, punitive damages may be available.[41] Battery claims sometimes have been used by ex-wives to try to recover for injuries during marriage,[42] although significant procedural and other obstacles can make such claims difficult.[43]

Another possible avenue for recovery is a tort claim for assault which is "an act that is intended to and does place the plaintiff in apprehension of an immediate unconsented-to touching that would amount to a battery."[44] Damages are recoverable even when no physical injury is inflicted.[45] Some

38. W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON, & DAVID G. OWEN, THE LAW OF TORTS § 28, at 52–53 (2000). Prosser and Keeton define battery as: "harmful or offensive contact with a person, resulting from an act intended to cause the plaintiff or a third person to suffer such a contact." PROSSER AND KEETON ON TORTS § 9, at 39 (W. Page Keeton ed., 5th ed. 1984).

39. "It is enough that the defendant intends bodily contact that is "offensive," which is to say a bodily contact that does not appear acceptable to the plaintiff and that is not permitted by a rule of law." DOBBS, *supra* note 38, § 28. The tort of battery is similar to the crime of assault. Under Maine law, for example, "[a] person is guilty of assault if he intentionally, knowingly, or recklessly causes bodily injury or offensive physical contact to another." 17-A ME. REV. STAT. ANN. tit. 17-A, § 207 (2000). While tort battery claims seek recovery for conduct that is probably criminal, this is not necessarily true of assault claims or intentional infliction of emotional distress claims. *See* Weiner, *supra* note 7, at 189 n.6 (explaining that intentional infliction of emotional distress claims target conduct that is not necessarily criminal).

40. "Once a battery is established, the defendant becomes liable for the harms resulting, including unintended ones. He may intend only an offensive touching, but he is liable for any actual harm that results . . . he is also liable for impermissible touchings that are not physically harmful." DOBBS, *supra* note 38, § 28. While liability was originally thought of "in terms of force and violence," it now "vindicates the plaintiff's rights of autonomy and self-determination, her right to decide for herself how her body will be treated by others, and to exclude their invasions as a matter of personal preference, whether physical harm is done or not." *Id.* Dobbs notes that "the plaintiff's right to avoid unwanted intentional contact does not depend upon the defendant's hostile intent or even upon the reasonableness of the plaintiff's wishes." *Id.* § 29, at 54.

41. Circumstances in which punitive damages may be available include where the defendant acts with a particularly reprehensible state of mind, such as with "malice or oppression." DOBBS, *supra* note 38, § 42. Some states limit the amount of punitive damages that can be recovered. *See id.*

42. *See, e.g.*, Smith v. Smith, 530 So. 2d 1389 (Ala. 1988) (ruling wife estopped from bringing assault and battery claims after divorce based on negotiations concerning injuries in settlement of divorce action); Noble v. Noble, 761 P.2d 602 (Colo. Ct. App. 1989) (holding prior divorce judgment does not bar wife's action for damages from shooting by husband); Heacock v. Heacock, 520 N.E.2d 151 (Mass. 1988) (ruling claim for "assaultive" actions not precluded by earlier divorce action); Cain v. McKinnon, 552 So. 2d 91 (Miss. 1989) (holding interspousal immunity does not bar tort action for "savage beating").

43. *See infra* Part II.C.4. *See also* Dalton, *supra* note 4, at 374–94 (describing several obstacles to such recovery under common law and the laws of several states).

44. DOBBS, *supra* note 38, § 33. "The plaintiff's subjective recognition or apprehension that she is about to be touched in an impermissible way is at the core of the assault claim." *Id.*

45. *Id.* at 64.

successful claims have been brought for assaults during marriages, but procedural obstacles are similar to those that challenge battery claims.[46]

A third possible tort claim is intentional infliction of emotional distress.[47] The Restatement (Second) of Torts states that "[o]ne who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress."[48] This tort has been used in many states to seek compensation for harms from domestic violence.[49] Other tort theories such as false imprisonment are also possible.[50] Some commentators have suggested that a new tort be created that specifically addresses domestic violence.[51]

From 1995 to 2000, the civil rights remedy of VAWA provided an additional potential remedy for some domestic violence injuries: under VAWA individuals "have the right to be free from crimes of violence motivated by gender."[52] To prove that a plaintiff was a victim of a crime

46. *See* Dalton, *supra* note 4, at 374–94.

47. For a thorough discussion of the tort of intentional infliction of emotional distress in the context of domestic violence, see Weiner, *supra* note 7.

48. RESTATEMENT (SECOND) OF TORTS § 46 (1965) [HEREINAFTER RESTATEMENT (SECOND)]. The Third Restatement of Torts, currently under development, does not address emotional distress. *See* RESTATEMENT (THIRD), *supra* note 28.

49. *See* Weiner, *supra* note 7, at 184–86, nn.10–11. *See, e.g.*, Henricksen v. Cameron, 622 A.2d 1135 (Me. 1993). Intent can be shown by either "evidence that the defendant acted with a desire or purpose to accomplish the harm, or by evidence that such harm was substantially certain to occur. . . . [A] reckless or willful attitude will also suffice to meet the requirement." DOBBS, *supra* note 38, § 303. *See generally* KARP & KARP, *supra* note 34. Issues have arisen in the domestic violence context as to whether conduct was sufficiently "outrageous" to be actionable; courts have applied the standard in inconsistent ways. *See* Weiner, *supra* note 7, at 200–23. The Restatement's formulation for outrageousness is: "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!'." RESTATEMENT (SECOND), *supra*, note 48, § 46, cmt. d. Not surprisingly, the circularity of this definition has contributed to the inconsistency with which it has been applied. *See* Weiner, *supra* note 7, at 200–23. One of the barriers to recovery in some cases appears to have been the notion that domestic violence is not "outrageous." *See id.* at 219–21; Dalton, *supra* note 4, at 341–43.

50. *See* Daniel G. Atkins, Jan R. Jurden, Susan L. Miller & Elizabeth A. Patten, *Striving for Justice with the Violence Against Women Act and Civil Tort Actions*, 14 WIS. WOMEN'S L.J. 69, 84 n.74 (1999) (suggesting additional possible tort causes of action for domestic abuse cases: "stalking, rape, trespassing, negligent transmission of sexually transmitted diseases, negligent infliction of emotional distress, defamation, outrage, wrongful imprisonment, property or economic torts, and wrongful death). *See generally* KARP & KARP, *supra* note 34. False imprisonment is "established by proof that the defendant intentionally confined or instigated the confinement of the plaintiff. Confinement "implies that the plaintiff is constrained against her will." DOBBS, *supra* note 38, § 36. In addition, the plaintiff "must have been aware of the confinement at the time." *Id.*

51. *See, e.g.*, Kohler, *supra* note 34, at 1067–68. Giovine v. Giovine, 663 A.2d 109 (N.J. App. Div. 1995) (recognizing continuing tort of battered women syndrome). *See generally* Anita Bernstein, *How to Make a New Tort: Three Paradoxes*, 75 TEX. L. REV. 1539 (1997) (discussing development of new torts generally).

52. 42 U.S.C. § 13981(b) (1999).

motivated by gender, she had to show that the crime was "due, at least in part, to an animus based on the victim's gender."[53] The crime had to be a felony,[54] although the defendant did not have to be convicted to be civilly liable.[55] Victims of gender-motivated crimes could sue their attackers in state or federal court for compensatory and punitive damages, as well as injunctive relief.[56] While the civil rights remedy provision was in effect, the majority of plaintiffs seeking recovery under VAWA joined their claims with intentional tort claims inlcuding those in the domestic violence context.[57] This combination of VAWA claims and intentional tort claims is not surprising, since the prerequisites for such tort liability are generally less stringent than the requirements for VAWA civil liability.[58] It also

53. *Id.* § 13981(d)(1).

54. *Id.* § 13981(d)(2)(a).

55. *Id.* § 13981(e)(2).

56. *Id.* § 13981(c).

57. Seventy-three reported decisions in state and federal court discussed the civil remedy provision of VAWA. A search of 42 U.S.C. § 13981 in the ALLCASES database of Westlaw retrieves 164 cases. However, the majority of these cases do not pertain to the civil remedy provision, and pertain instead to attorney fees or criminal matters. A manual search through these cases produced the following numbers. Intentional tort claims were brought in at least fifty-one of the seventy-three lawsuits. It is not possible to tell in each of the seventy-three reported decisions whether the plaintiff brought tort claims in addition to VAWA claims, since many of the decisions are on motions to dismiss only some counts of a plaintiff's complaint; thus the decisions do not discuss all counts of a plaintiff's complaint. With respect to the remaining twenty-two reported decisions, twelve of the lawsuits probably included tort claims and ten probably did not include tort claims. Memo dated February 6, 2001 (on file with the author). Of the seventy-three reported decisions, eleven arose in domestic abuse situations. Of these, eight had tort claims, two probably had tort claims, and one did not. *See, e.g.*, Bergeron v. Bergeron, 48 F. Supp. 2d 628 (E.D. La. 1999) (bringing claims against ex-husband for battery, assault and other torts with VAWA claims); Kuhn v. Kuhn, 1998 WL 673629 (N.D. Ill. 1998) (bringing state tort claims with VAWA claim for personal injuries from husband's assaults and batteries); Seaton v. Seaton, 971 F. Supp. 1188 (E.D. Tenn. 1997), *dismissed* 2000 U.S. App. Lexis 12146 (6th Cir. 2000) (bringing state tort claims for assault, battery, intentional infliction of emotional distress, false imprisonment and other torts with VAWA claims against ex-husband); Avila-Franco v. Worrell, 1998 U.S. Dist Lexis 12129 (1998) (bringing claims of assault, battery, intentional infliction of emotional distress with sexual harassment in employment case). Unreported cases may also have combined VAWA claims with intentional tort claims. *See, e.g.*, Atkins et al., *supra* note 50 (describing domestic abuse lawsuit that ultimately settled, which combined VAWA and tort claims). *See generally* Steven M. Pincus & David N. Rosen, *Fighting Back: Filing Suit Under the Violence Against Women Act*, TRIAL, Dec. 1997, at 20 (noting high percentage of violent attacks committed on women by intimate partners and recommending bringing VAWA lawsuits for domestic violence in appropriate cases).

58. VAWA civil liability often was harder to establish than intentional tort liability because of the requirements that a victim show that the defendant had committed a felony-level crime. *See* 42 U.S.C. § 13981(d)(2)(A). *See, e.g.*, Wright v. Blythe-Nelson, 2000 WL 349747 (N.D. Tex. 2000) (dismissing VAWA claim because no allegation of felony-level crime by defendant had been made but not dismissing battery claim); Palazzolo v. Ruggiano, 993 F. Supp. 45 (D. R.I. 1998) (dismissing VAWA claim against psychiatrist because no allegation of felony-level crime). VAWA also required that the victim show that the crime was "a crime of violence committed because of gender or on the

speaks to the viability of tort theories in the wider class of domestic violence cases.

B. THE RELATIVE DEARTH OF LAWSUITS FOR DOMESTIC VIOLENCE TORTS

Civil actions for intentional torts such as battery, assault, and intentional infliction of emotional distress are rare, particularly in relation to the high rate of domestic violence in our society.[59] Intentional tort lawsuits comprise a small minority of tort lawsuits:[60]

> [Of] 2600 reported state cases of battery, assault, or both, from 1981 through 1990, only fifty-three involved adult parties in domestic relationships. Similarly, during the same time frame, only four reported federal cases involved a claim or counterclaim between adult parties in a domestic relationship. From 1958 through 1990 slightly more than 6000 intentional infliction of emotional distress cases were reported from all state and federal courts. Evaluation of these cases revealed a total of

basis of gender, and due, at least in part, to an animus based on the victim's gender." 42 U.S.C. § 13981(d)(1). In several instances, defendants failed in getting cases dismissed on the basis that the plaintiff did not sufficiently allege gender animus. *See, e.g.*, Jugmohan v. Zola, 2000 WL 222186(S.D.N.Y. 2000) (finding allegations that defendant used sexual language to a stranger, commented on her figure and breasts, physically attacked her, and had a history of doing similar things in the workplace were sufficient to state claim); Mattison v. Click Corp. of America, 1998 WL 32597(E.D. Pa. 1998) (ruling that allegations of sexual assault, harassment and battering by defendant, if proven would satisfy gender animus requirement). It is difficult to tell how these matters would fare in front of a jury; *Morrison* of course made these cases moot. Neither the requirement of showing a felony crime nor of showing that the crime was committed based on gender and due in part to gender-based animus is necessary for proving tort liability. *See supra* text accompanying notes 35–59. In addition, criminal assault (which frequently includes the common law tort of battery) is often a misdemeanor rather than a felony. *See, e.g.*, ME. REV. STAT. ANN. tit. 17-A, § 207 (2000) (Punishment of Class D crimes); 17-A ME. REV. STAT. § 1252(D) (assault is class D crime, punishable by a period of less than one year). Intentional infliction of emotional distress often provides liability for conduct that is not criminal. *See* Weiner, *supra* note 7, at 189 n.16. Thus, intentional tort liability is significantly broader than civil VAWA liability would have been.

59. *See* sources cited *supra* note 2.

60. According to a Bureau of Justice Statistics report, 2.9% of the tort cases, or 10,879 cases, disposed of in the nation's seventy-five largest counties in 1992, were intentional tort cases. Steven K. Smith, Carol J. DeFrance & Patrick A. Langan, *Tort Cases in Large Counties, Civil Justice Survey of State Courts 1992*, BUREAU OF JUSTICIE STATISTICS SPECIAL REPORT, April 1995, NCJ-153177, at 2. The report did not specify the content of the intentional tort cases, so it is not possible to determine exactly how many were for domestic violence injuries. The report did break down the cases by whether the plaintiff, the defendant, or both, were individuals. 94.9% of the intentional tort cases, or 10,324, were brought by individuals. *Id.* at 4 & tbl.5. In 44.4% of these cases, or 4,830, the defendant was an individual. *Id.* Thus, a very small proportion of the civil cases disposed of, 4,830, roughly 1.27%, had even the possibility of seeking compensation for domestic violence injuries.

> eighteen in which courts have applied the tort action to a domestic abuse fact pattern.[61]

There are accounts of the increased use of intentional torts in divorce litigation, including as a means for recovering for domestic violence injuries.[62] There appear, however, to be neither statistics on published tort cases seeking recovery for domestic violence injuries since Scherer's 1992 article, nor studies of unpublished cases.

Government administrators predicted that the civil rights remedy provision of VAWA would generate thousands of lawsuits in view of the extent of violent victimization of women.[63] These predictions proved unfounded. In fact, only seventy-three reported cases dealt with VAWA's civil remedy provision.[64]

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61. Scherer, *supra* note 9, at 565. Weiner, writing about intentional infliction of emotional distress in 1995, lists twenty-eight reported cases where intentional infliction of emotional distress was used in a domestic violence setting. *See* Weiner, *supra* note 7, at 184–86 nn.10–11. It is not clear why the numbers they list differ; however, that does not detract from the broader point that reported lawsuits for intentional infliction of emotional distress cases are uncommon.

62. *See, e.g.*, William J. Glucksman & Kristina C. Royce, *Remedies: Whether to Pursue Potential Interspousal Tort Actions*, 6 INTELL. PROP. STRATEGIST 3, at 4 (Nov. 1999) (noting growing trend towards asserting tort claims in matrimonial contexts); Diana Digges, *Lawyers Join Domestic Violence Torts to Divorce Judgments: Judge Leads Quiet Revolution to Educate Family Lawyers*, LAW WKLY. USA, Feb. 19 2001, at B-3; Fredrica L. Lehrman, *Uncovering the Hidden Tort: Domestic Violence May Provide Grounds for Civil Action Against Abusers*, A.B.A. J., Sept. 1996, at 82 (reporting that tort law is becoming increasingly important in domestic violence context); William C. Smith, *See You in Divorce Tort: Splitting Spouses Raise RICO, Fraud and Other Claims*, A.B.A. J., Jan. 1999, at 30 (noting trend that divorcing spouses are adding more tort claims).

63. When an early version of VAWA, the Violence Against Women Act of 1991, was proposed, the Judicial Impact Statement prepared by the Office of Judicial Impact Assessment of the Administrative Office of the U.S. Courts, predicted that the civil rights remedy provision "may generate as many as 53,800 civil tort cases annually." JUDICIAL IMPACT STATEMENT, VIOLENCE AGAINST WOMEN ACT OF 1991, S. 15, OFFICE OF JUDICIAL IMPACT ASSESSMENT, THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS (1991), at 15–16 [hereinafter JUDICIAL IMPACT STATEMENT]. This estimate was based on both rape and aggravated assault statistics. The Judicial Impact Statement stated:

> there are approximately 2.6 million violent victimizations of women annually, which includes 155,000 attempted and completed rapes (102,000 attempted and 53,000 completed) . . . . Not all of the women involved in the 2.6 million violent victimizations will file a civil tort action. The analysis used the number of: 1. Reported rapes which were completed and the attacker was known. This reduces the number of potential rape cases from 155,000 a year to 15,100 per year. 2. Reported other violent crimes against women that were aggravated assaults and reported to the authorities, the attacker was known, and there was a desire by the victim to 'punish' the offender. This reduces the number of potential other cases from 2.45 million a year to 38,700 . . . . The actual caseloads may be substantially lower or higher than this estimate. It could be lower because many of the offenders will have limited assets, thus discouraging tort cases.

Id. at 18.

64. Memorandum by Dennis Carrillo (Mar. 2, 2001) (on file with author). The majority of these include intentional tort claims. While seventy-three reported cases may be a substantial number given the short duration the statute was in effect, it is a minuscule number in comparison to the extent of violent victimization of women. This was predicted by the proponents of the VAWA civil rights

C. REASONS FOR THE DEARTH

Why are there so few lawsuits, given that injuries are widespread and that interspousal immunity, which in the past would have barred many such cases, no longer pertains? Many forces combine to create the dearth.[65]

1. Lack of Insurance

Insurance (or the lack of it) is extremely important in all aspects of tort litigation. Torts and insurance cannot be understood in isolation from one another.[66] Litigation for harms from domestic violence is no exception. There is very little third-party liability insurance coverage[67] for defendants accused of domestic violence torts. Lack of insurance is a major contributor to the scarcity of tort claims for domestic violence injuries.[68]

The most common types of liability insurance policies issued to individuals, such as homeowners, renters, and automobile policies,

remedy provision. *See* Testimony of Sally F. Goldfarb, FDCH Congressional Testimony, Nov. 16, 1993, at 8 (predicting that the civil remedy provision would "provide a significant new remedy without generating a large number of cases").

65. The discussion in the text pertains largely to intentional torts, but most of it applies as well to the now-ineffectual VAWA civil rights remedy provision. Where there are issues specific to VAWA, they are flagged in the footnotes. Of course, interspousal immunity would not have barred claims between cohabiting unmarried couples.

66. *See, e.g.*, Baker, *supra* note 10, at 130 (noting relationship between torts and insurance); Kent D. Syverud, *The Duty to Settle*, 76 VA. L. REV. 1113, 1114–15 (1990) (discussing relationship between torts and insurance and noting that some insurance coverage preceded assertion of tort claims covered by such insurance). As Marshall Shapo states:

> Tort litigation in modern life takes place almost entirely against a background of liability insurance carried by persons who engage in risky activities to protect themselves against the financial consequences of judgments entered against them under tort law. . . . [K]eep in mind that when a lawyer for an injury claimant decides to take a case, and as litigation progresses, the insurance coverage of the defendant is typically assumed by both sides to provide a pool of money that will pay for all, or a significant part, of any judgment. Indeed, if the potential defendant has no liability insurance, and no independent wealth, it is not likely that there will be a suit at all.

MARSHALL S. SHAPO, TORT AND INJURY LAW 166 (2d ed. 2000).

67. Liability insurance is often referred to as "third-party insurance," since it protects insureds against claims by third parties, as contrasted with "first-party insurance," such as health insurance, fire insurance, or uninsured motorist coverage, which covers the insured's own direct losses. 7 Lee R. Russ & Thomas F. Segalla, Couch on Insurance 3d (West) § 101:58 (1997). "Liability insurance" is a "[c]ontract by which one party promises on consideration to compensate or reimburse other if he shall suffer loss from specified cause or to guaranty or indemnify or secure him against loss from that cause. That type of insurance protection which indemnifies one from liability to third persons as contrasted with insurance coverage for losses sustained by the insured." BLACK'S LAW DICTIONARY 915 (6th ed. 1990).

68. *See* Pincus & Rosen, supra note 57, at 20 (noting one reason so few torts suits are filed for domestic violence is insurance exclusions). See *infra* Part II.B for discussion of the dearth of claims.

typically exclude coverage for "intentional acts" of the insured.[69] As a result of this "intentional acts exclusion," if a plaintiff brings a claim for intentional torts and the insured is a homeowner or renter with liability insurance,[70] the insurance company is likely to claim (successfully) that the suit is not covered by the policy.[71]

69. *See* KEETON & WIDISS, *supra* note 21, §§ 5.3(f), 5.4(d). *See generally* Baker, *supra* note 10, at 120; James A. Fischer, *The Exclusion from Insurance Coverage of Losses Caused by the Intentional Acts of the Insured: A Policy in Search of a Justification*, 30 SANTA CLARA L. REV. 95, 110–27 (1990); George L. Priest, *Insurability and Punitive Damages*, 40 ALA. L. REV. 1009, 1015–16 (1989); Pryor, *supra* note 10. Specialized forms of insurance do cover punitive damages; these policies are likely to provide coverage for intentional acts. *See* Baker, *supra* note 10, at 120 n.66. Moreover, many employers' liability policies cover employers for intentional acts of employees. *See* Klenk, *supra* note 15, at 333; *infra* Part III.A.5.a. The scope of the "intentional acts" exclusion varies from state to state. *See* KEETON & WIDISS, *supra* note 21. In some states, for the exclusion to apply, the insured must have intended not only the act in question, but the consequences of the act as well. *See id.* at 520–21. This interpretation results in a fairly narrow exclusion, since tort defendants can claim that they intended the act, but not the full consequences of it, and thereby retain coverage. *See id.* Other states subscribe to a broader exclusion whereby all that is necessary for the exclusion to apply is for the insured to have intended the act. *See id.* In either case, the intentional act exclusion creates incentives for plaintiffs to characterize harm as caused by negligence rather than by intentional acts to secure insurance coverage for their claims. *See* Pryor, *supra* note 10, at 1722–27. Ellen Pryor terms this phenomenon, which is not limited to domestic violence cases, "underlitigating." *See id.*; Dalton, *supra* note 4, at 341 (describing dilemma for women injured by domestic violence to characterize harm as negligently inflicted in order to secure insurance coverage and thus compensation).

70. Lenders, as a condition of obtaining mortgages, require homeowners to maintain liability insurance. *See* Tom Baker & Karen McElrath, *Whose Safety Net? Home Insurance and Inequality*, 21 LAW & SOC. INQUIRY 229, 242–43 (1996) (noting that financing a home requires purchase of insurance but that there is no mechanism compelling purchase of insurance for renters); Leah Wortham, *The Economics of Insurance Classification: The Sound of One Invisible Hand Clapping*, 47 OHIO ST. L.J. 835, 871 (1986) (obtaining insurance is a requirement for procuring financing on a car or home). Once a mortgage is paid off, lenders cannot require homeowners to maintain liability insurance. Roughly forty percent of owner-occupied homes in the United States are owned free and clear, and thus do not require liability insurance. *See* U.S. CENSUS BUREAU: AMERICAN HOUSING SURVEY FOR THE UNITED STATES Table 3-15 (1997), *available at* http://www.census.gov/hhes/www/housing/ahs/ahs97/tab315.html.

71. *See* KEETON & WIDISS, *supra* note 21, § 5.3(f). If the potential tort defendant is uninsured, there is no other source of recovery for that defendant's liability to which a potential plaintiff can turn. This differs from the automobile situation where a person can seek recovery from her uninsured motorist coverage if the defendant who has injured her is not insured. Part III includes a proposal for first-party insurance that could be used if a domestic violence tortfeasor is uninsured. Similarly, insurance companies in all likelihood denied coverage for civil VAWA claims against individual perpetrators, since for an act to meet the requirements of VAWA civil liability, the act would almost certainly fall within the "intentional acts" exclusion of the tortfeasor's liability policy. Moreover, efforts to insure against consequences of criminal activity generally have been rejected by courts, largely on the grounds that they violate public policy. *See* 1 Russ & Segalla, *supra* note 67, § 1.34 (2001). This "public policy" argument would seem to be a particular barrier for VAWA claims because of the statutory requirements that a plaintiff prove that the defendant had committed a felony-level crime. Some activity that is tortious, such as much conduct causing intentional infliction of emotional distresses, is not criminal. *See* Weiner, *supra* note 7, at 189 n.16. *See infra* Part III.A.5.b.

A second common barrier to liability insurance coverage is the "family member exclusion." Often with jointly owned property, homeowners liability policies name all owners or residents as insureds, and exclude all claims by insureds against one another.[72] Thus, a tort claim of any sort between insureds would not be covered by such a policy. If a husband inadvertently left a shoe on the stairs and his wife slipped on it and was injured, the policy would not cover him for her negligence claim against him. If the husband did the same act but a guest slipped and was injured, however, the policy would cover the guest's negligence claim. Family member exclusions were once standard in automobile policies but have been struck down in many jurisdictions in recent years.[73]

These insurance barriers limit or in many instances, vitiate, insurance coverage. Even if litigation would likely be successful on the merits, these insurance issues present hurdles that discourage filing lawsuits even in cases of clear liability and serious injury.[74]

2. Asset Limitations

Resource limitations are another reason why there are so few reported lawsuits seeking recovery for harms from domestic violence torts.

72. *See, e.g.*, Principal Cas. Ins. Co. v. Blair, 500 N.W.2d 67, 68–69 (Iowa 1993) (upholding family member exclusion in homeowners policy and noting that such exclusions are contained in every homeowners policy in Iowa); State Farm Fire & Cas. Co. v. White, 993 S.W.2d 40, 43 (Tenn. Ct. App. 1998) (holding that a family member exclusion in homeowners policy is binding). For example, State Farm's standard homeowners policy defines the "insured" as "you, and if residents of your household, (a) your relatives and (b) any other person under 21 who is in the care of any person described above." State Farm Standard Homeowners Policy, Definitions, on file with the author. The policy also excludes coverage for "bodily injury to you or any insured within the meaning of part (a) or (b) of the definition of the insured." *Id.* at II, 2.f, p. 14. Thus, the policyholder, and relatives who live with the policyholder, cannot make claims against the policy. *See id.* These types of provisions are also found in automobile policies.

73. In many states with mandatory automobile insurance laws, the exclusions have been struck down as contrary to the public policies supporting mandatory coverage and compensation of those injured in automobile accidents. *See, e.g.*, Cartner v. Nationwide Mutual Fire Ins. Co., 472 S.E.2d 389, 391 (N.C. Ct. App. 1996); Nat. County Mut. Ins. Co. v. Johnson, 879 S.W.2d 1, 3 (Tex. 1993) (striking down auto family exclusion as contrary to public policy and inconsistent with purposes of mandatory insurance law, up to mandatory insurance limit); Tissell v. Liberty Mut. Ins. Co., 795 P.2d 126, 128 (Wash. 1990); State Farm Mut. Auto. Ins. Co. v. Nationwide Mut. Ins. Co., 516 A.2d 586 (Md. 1986); Bishop v. Allstate Ins., 623 S.W.2d 865 (Ky. 1981); DeWitt v. Young, 625 P.2d 478 (Kan. 1981); Arceneaux v. State Farm Mut. Auto. Ins. Co. 550 P.2d 87, 89 (Ariz. 1976); GEICO v. Morris, 1997 WL 527982 (Del. Super. Ct. 1997). *But see* Setters v. Permanent Gen. Assurance Co., 937 S.W.2d 950, 953 (Tenn. App. 1996); Thompson v. Miss. Farm Bureau Mut. Ins. Co., 602 So.2d 855, 858 (Miss. 1992); Transamerica Ins. Co. v. Henry, 563 N.E.2d 1265, 1269 (Ind. 1990); Cook v. Wausau Underwriters Ins. Co., 772 S.W.2d 614, 616 (Ark. 1989); Allstate Insurance Co. v. Boles, 481 N.E.2d 1096 (Ind. 1985) (upholding household exclusion from automobile policy as consistent with public policy).

74. Part III.A. describes ideas for insurance reform.

Financial recovery against a defendant who lacks assets or insurance is not possible.[75] Many persons in the United States are judgment-proof.[76]

A house is often a person's or family's largest asset. In the United States in 1999, 66.8% of the adult population owned a home,[77] but there are considerable regional variations in home ownership[78] as well as racial disparities.[79] In a domestic violence situation, this asset may be jointly owned by the victim and the perpetrator, complicating the obtaining of the asset. The house may be mortgaged,[80] protected by a homestead exemption,[81] located in another state, or encumbered by preexisting involuntary liens. Moreover, lawyers are likely to be more reluctant to pursue a claim on a contingency basis when the only asset is a house owned by the defendant than if there is insurance.[82] Even when there are significant assets, attorneys prefer to seek funds provided by insurance.[83]

75. *See* Leonard Karp & Laura C. Belleau, *Litigating Domestic Emotional Distress Claims*, 18 FAIR$HARE 2 (1998) ("Almost every divorce case carries with it some form of domestic tort. . . . Only when there is a serious physical or psychological injury and a source of recovery, should a practitioner consider pursuing a separate tort action.").

76. It is difficult to get exact estimates, but a 1991 Judicial Impact Statement for an earlier version of the Violence Against Women Act noted that "75 to 80 percent of current criminal cases require appointment of public defenders," which suggests that those defendants are judgment-proof. JUDICIAL IMPACT STATEMENT, *supra* note 63, at 16. Moreover, many Americans are heavily in debt even if they would not qualify for the services of a public defender. *See* Kathy Bergen, *Americans Handling Debt for Now, But Danger Lurks*, CHI. TRIB., Feb. 24, 2000. *See generally* ARTHUR B. KENNICKELL, MARTHA STARR-MCCLUER & BRIAN J. SURRETTE, RECENT CHANGES IN U.S. FAMILY FINANCES: RESULTS FROM THE 1998 SURVEY OF CONSUMER FINANCES, 86 FED. RES. BULL. 1 (2000).

77. *See* U.S. CENSUS BUREAU: HOUSING VACANCIES & HOMEOWNERSHIP ANNUAL STATISTICS: 1999, tbl.13, *available at* http://www.census.gov/hhes/www/housing/hvs/annual99/ann99t13.html (last visited Aug. 30, 2001). Of course, domestic violence perpetrators come from all walks of life. *See* Sally Goldfarb, FDCH Congressional Testimony in support of VAWA, Nov. 16, 1993, at 5 (noting that violence against women is found at all socioeconomic levels and that even an uncollectible judgment will be seen by some victims as a vindication of their rights).

78. For example, in 1999 Maine had the highest homeownership rate in the country, 77.4%, while the District of Columbia had the lowest, 40%. See U.S. CENSUS BUREAU, *supra* note 77.

79. For example, the 1999 white homeownership rate was 70.5% whereas the black homeownership rate was 46.3%. *Id.* at tbl.20.

80. As of 1997, about 61% of owner-occupied homes were mortgaged. U.S. CENSUS BUREAU, *supra* note 70.

81. Several states, including Florida, Texas, Iowa, South Dakota and Kansas, have unlimited homestead exemptions. *See* Floyd Norris, *The New Bankruptcy Reform: Make The Rich Plan Ahead*, N.Y. TIMES, June 2, 2000, at C1.

82. *See, e.g.*, Karp & Belleau, *supra* note 75, at 2; Pincus & Rosen, *supra* note 57, at 20 (noting that reasons why so few suits are filed for domestic violence includes lack of defendant assets); Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—And Why Not?* 140 U. PA. L. REV. 1147, 1190 (1992) ("lawyers usually do not accept a case unless they see an acceptable probability of economic success for themselves in doing so").

83. *See* Baker, *supra* note 20, at 6–25. Another potential asset is a pension or 401K plan, but these assets are difficult to obtain. 29 U.S.C. §1056 (2000) (requiring pension plans must specify that

Getting a private attorney to take a case on a contingency basis where there are neither assets nor insurance is difficult, if not impossible.[84] If a plaintiff has funds to pay an attorney, she is more likely to find one, but most potential plaintiffs are not in a position to pay a private attorney to pursue a claim.

3. Statutes of Limitations

Another reason so few tort lawsuits are filed for harm from domestic violence torts is the relatively short statutes of limitations for most intentional torts.[85] Statutes of limitations for assault, battery, and false imprisonment are typically between one and two years.[86] Although statutes of limitations for intentional infliction of emotional distress range from one to ten years, the most common statutes of limitations lengths are two and three years.[87] By contrast, statutes of limitations for negligence and strict liability generally are longer, ranging from two to six years.[88]

benefits under the plan may not be alienated); Richard I. Loebl & Orin D. Brustad, *Effect of Participant's Insolvency Unclear*, NATL'L L.J., Jan. 20, 1992, at 21 (noting that while pension benefits cannot be garnished in state court, confusion remains about whether creditors can reach such benefits when an individual files for bankruptcy).

84. *See* Saks, *supra* note 82, at 1190.

85. The historical origins of this disparity are reviewed in Part III.B.1.a. The statute of limitations for the VAWA civil rights remedy provision presented a different situation, since VAWA did not include a statute of limitations. Commentators asserted that the four year "catch all" federal statute of limitations applied to VAWA claims. *See, e.g.* Goldscheid, *supra* note 6, at 114 n.31 and sources cited therein. Courts were divided as to whether VAWA claims would be governed by the four-year statute of limitations established by 28 U.S.C. § 1658 or by an analogous state statute of limitations. *See, e.g.*, Grace v. Thomason Nissan, 76 F. Supp. 2d. 1083 (D. Or. 1999) (applying four-year statute of limitations of 28 U.S.C. § 1658 to VAWA claim); Wesley v. Don Stein Buick, 42 F. Supp. 2d 1192 (D. Kan. 1999) (ruling that VAWA claims are governed by Kansas two-year statute of limitations); Santiago v. Alonso, 66 F. Supp. 2d. 269 (D. P.R. 1999) (applying Puerto Rico's one-year statute of limitations to VAWA claim).

86. In thirty-eight states, the statute of limitations for assault and battery claims is one or two years. *See* Carrillo, *supra* note 64. *See, e.g.*, ALASKA STAT. ANN. § 9.10.070 (providing two years for assault, battery, and false imprisonment); ARK. CODE ANN. § 16-56-104 (providing one year for assault, battery, and false imprisonment); KAN. STAT. ANN. § 60-514(4) (Supp.) (providing one year for assault, battery, and false imprisonment); MD. CTS. & JUD. CODE ANN. § 5-105 (providing one year for assault and battery); S.C. CODE § 15-3-550 (providing two years for assault, battery, and false imprisonment). *See also* Owens v. Okure, 488 U.S. 235, 245–47 (1989) (listing many states' statutes of limitations for intentional torts).

87. Eighteen states have a statute of limitations of two years for intentional infliction of emotional distress; nine states have a statute of limitations of three years. *See* Carrillo, *supra* note 64. Statutes of limitations often do not specifically list intentional infliction of emotional distress, but it is included in the general or "residual" statute of limitations. *See, e.g.*, ARK. STAT. ANN. § 16-56-104(2) (2000) (providing one year for assault and battery, five years for residual claims); COLO. REV. STAT. § 13-18-102(a) (1987) (providing two years for torts involving outrageous conduct); KAN. STAT. ANN. § 60-513(a)(4) (Supp.) (providing one year for assault and battery, two years for injuries to rights of another, not arising from contract and not otherwise specified); MD. CTS. & JUD. PROC. CODE ANN.

The complex dynamics of domestic violence, which often include extensive psychological control, as well as physical violence,[89] can make consideration of filing a tort claim near the time that the injuries are inflicted inconceivable. Abuse and control may last for years, and a victim may only be able to escape from the relationship, at great risk, after a long period of time.[90] By the time a person is able to leave an abusive relationship (whether married or unmarried) and decides to sue, the statute of limitations on some or all of her intentional tort claims may well have run.[91]

4. Procedural Barriers

Existing law makes the conjunction of divorce and tort claims complicated and fraught with potential difficulty for domestic violence tort victims.[92] Various procedural obstacles can make it difficult or impossible

§ 5-101 (providing three years for all civil actions, not including assault and battery); S.C. CODE § 15-3-530(5) (providing six years for any injury to "the person or rights of another" not arising from a contract, and not specified elsewhere).

88. *See* Dalton, *supra* note 4, at 357.

89. *See* DALTON & SCHNEIDER, *supra* note 2, at 50–115 (excerpting articles on the dynamics of domestic violence); Dalton, *supra* note 4, at 330–38 (describing psychological as well as physical dynamics of domestic violence).

90. *See* Dalton, *supra* note 4, at 337–38 (describing dynamics of abuse, including increased danger to women who leave abusive relationships). *See generally* Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1 (1991) (describing risks to women who leave abusive relationships).

91. *Seaton v. Seaton*, a Tennessee case in which the plaintiff combined tort and VAWA claims against her batterer, illustrates the phenomenon. Seaton v. Seaton, 971 F. Supp. 1188 (E.D. Tenn. 1997), *dismissed* 2000 U.S. App. Lexis 12146 (6th Cir. 2000). According to the plaintiff, she was abused from 1992–95. The abuse perpetrated by her husband during the marriage included assault, battery, and intentional infliction of emotional distress. *See id.* at 1189. In 1995, the parties had an altercation, the day after which she filed for divorce. She filed tort and VAWA claims in federal court 364 days after the altercation. Tennessee's statute of limitations for intentional and other torts was one year, so that all of the intentional tort claims that arose from events prior to the final altercation were time-barred in federal court. *See id*. at 1195. By contrast, if Ms. Seaton had been suing for injury to property, she would have had three years to file in court. *See* TENN. CODE ANN. § 28-3-105 (1999). The court also held that the continuing tort doctrine did not allow the late assertion of her claims. *See Seaton*, 971 F. Supp. at 1195. The plaintiff also had made tort claims in her state court divorce action; this may have influenced the federal court decision. *See id.* at 1195–96. The timeliness of Ms. Seaton's VAWA claim was not challenged. Another example is *Henriksen v. Cameron*, in which an ex-wife sued her ex-husband for intentional infliction of emotional distress that he had allegedly inflicted during the marriage. Henriksen v. Cameron, 622 A.2d 1135 (Me. 1993). He also had physically abused her, but the assault and battery claims were time-barred by Maine's two-year statute of limitations. *See id.* at 1142. The intentional infliction of emotional distress claim nonetheless was allowed because it was filed within the six-year statute of limitations for that tort. *See id.*

92. This Subsection pertains to procedural barriers of marriage and divorce. Other significant barriers, distinct from procedural barriers, face persons attempting to end relationships with abusers. *See* discussion *supra* Part II.C.3., *infra* Part II.C.5.

for an abused person to bring a tort claim for abuse that occurs during a marriage. To bring a claim for compensation while a marriage continues has obvious problems. A person is unlikely to be able to even consider such a claim until she has decided to seek a divorce.[93] A married person's most immediate legal need at that time may be to end the legal relationship with her spouse. Her most immediate practical needs may be physical and economic survival, and maintaining contact with her children.[94] Asserting tort claims at the time of divorce may jeopardize all those interests.[95] Despite these and other reasons why tort claims should not have to be asserted at the time of divorce, some courts have held that a tort claim for abuse occurring during a marriage must be asserted at the time of the divorce, or it is barred by res judicata.[96] Other courts have held that principles of waiver and equitable estoppel may bar tort actions filed after divorces.[97]

5. Other Issues

Additional factors contribute to the relative dearth of lawsuits for domestic violence torts. In general, for a variety of reasons, relatively few injured people seek compensation for their injuries, whatever the source of those injuries.[98] Many of those reasons apply with particular force to domestic violence claims.[99] Moreover, various factors specific to domestic violence and domestic violence injuries ensure that the rate that victims seek compensation for their injuries is almost certainly lower than the rate that victims of other harms seek compensation.[100]

Overall, few injury victims seek recovery through the legal system relative to the incidence of injury.[101] Many potential plaintiffs who have

93. Dalton, *supra* note 4, at 363; Barbara Glesner Fines, *Joinder of Tort Claims in Divorce Actions*, 12 J. AM. ACAD. MATRIMONIAL LAW 285, 298–300 (1994); Kristyn J. Krohse, Note, *No Longer Following the Rule of Thumb—What to Do with Domestic Torts and Divorce Claims*, 1997 U. ILL. L. REV. 923, 923 (1997).

94. *See supra* Part II.C.3, *infra* Part II.C.5.

95. *See* Dalton, *supra* note 4, at 385–87.

96. *See id.* at 378.

97. *See id.* at 379–85.

98. *See* Saks, *supra* note 82, at 1185.

99. *See infra* text accompanying notes 101–08.

100. *See infra* text accompanying notes 101–20.

101. *See* Saks, *supra* note 82, at 1183. For example, a 1990 study concluded that in New York, "eight times as many patients suffer an injury from medical negligence as there are malpractice claims. Because only about half the claimants receive compensation, there are about sixteen times as many patients who suffer an injury from negligence as there are persons who receive compensation through the tort system." *Id.* at 1183–84 (quoting HARVARD MEDICAL PRACTICE STUDY, PATIENTS, DOCTORS, AND LAWYERS: MEDICAL INJURY, MALPRACTICE LITIGATION, AND PATIENT COMPENSATION IN NEW

valid claims never assert their claims.[102] The statistics contrasting the number of suits filed with the incidence of domestic violence suggest that this pattern holds true in the domestic violence context.[103]

One reason people do not bring claims is that they do not know that they have a claim.[104] This likely is a reason so few suits are brought for domestic violence injuries even after a person escapes from an abuser.[105] Moreover, unlike injuries from car accidents, for which people have grown to expect compensation through a highly regulated insurance system,[106] there is no such expectation of compensation for domestic violence injuries.

People sometimes blame themselves for injuries caused by unsafe products.[107] Similarly, persons who are victimized by domestic violence often blame themselves (and are blamed for it by their abusers).[108] Thus, it may not occur to a domestic violence victim to sue for a harm for which she feels responsible.

One might be surprised that there are not more tort suits in connection with divorce, given that divorce is an occasion where a victim would come in contact with the legal system, and might have an attorney. Many people, however, do not have attorneys in divorce; this is particularly true for women.[109] Women are much more likely to be victims of domestic violence than are men.[110] Even when a person injured by domestic violence does have an attorney for her divorce, it is possible that the lawyer dealing with the divorce does not even consider a tort case.[111]

Bringing a claim has costs, which "may include stigma associated with the act of asserting a complaint, keeping the memory of the injury or loss alive, or continued confrontation with the injurer, a distressing

YORK, THE REPORT OF THE HARVARD MEDICAL PRACTICE STUDY TO THE STATE OF NEW YORK 7-1 (1990)).

102. *See* Saks, *supra* note 82, at 1185.

103. *See supra* Part II.B.

104. *See* Saks, *supra* note 82, at 1188–89.

105. *See* Dalton, *supra* note 4, at 347–53.

106. *See infra* text accompanying notes 161–64.

107. *See* Saks, *supra* note 82, at 1188.

108. *See* Dalton, *supra* note 4, at 350–51.

109. *See, e.g.*, Jeannette F. Swent, *Gender Bias at the Heart of Justice: An Empirical Study of State Task Forces*, 6 S. CAL. REV. L. & WOMEN'S STUD. 1, 59 (1996) (citing gender bias studies of state judicial systems finding that women, because of lack of funds, encounter special difficulties hiring divorce attorneys).

110. *See* Dalton, *supra* note 4, at 321–22 n.2.

111. *See* Digges, *supra* note 62; Ellman & Sugarman, *supra* note 34, at 1292; Scherer, *supra* note 9, at 543.

prospect for most victims."[112] The costs of domestic violence tort claims to victims are much higher than for other kinds of tort claims. First, the injury is caused by someone known by the victim. Continued confrontation with the injurer is likely to be more distressing than when the injurer is a manufacturer or a heretofore unknown driver.[113] Second, for many domestic abuse victims, there is a real and reasonable fear of violent retaliation for the suit.[114] The end of a relationship is the most dangerous time for victims; filing a lawsuit is a way of demonstrating that the relationship is indeed over and may result in serious and, in some instances, fatal consequences.[115] Third, if the parties are married and are not yet divorced, a victim may rationally fear that the potential defendant will assert retaliatory legal strategies in the divorce.[116] Failure to raise the tort claims in a divorce action may result in those claims being barred later.[117] Thus, victims face a catch-22 and pressure to forego asserting tort claims. Fourth, many people who have been in intimate relationships where they have been victims of domestic violence torts simply wish to end the abusive relationship and move on.[118] Fifth, in civil rape cases in state court, rape shield laws do not apply, which may discourage some injured plaintiffs.[119] The plaintiff might appear unsympathetic to a jury, so a lawyer may advise against pursuing an otherwise meritorious claim.[120] It is

112. Saks, *supra* note 82, at 1189.

113. *See* Weiner, *supra* note 7, at 200–02 (noting that trust is a foundation of family relationships and that violation of trust by partner's violence is a more egregious betrayal than random street violence). *See also* Beverly Balos & Mary Louise Fellows, *Guilty of the Crime of Trust: Nonstranger Rape*, 75 MINN. L. REV. 599, 604 (1991) (arguing that individuals who know each other should owe each other a heightened duty of care).

114. *See* Atkins et al., *supra* note 50, at 85 (noting that when a survivor of domestic violence filed suit for domestic abuse, the police department was notified and the plaintiff's name was entered into the computer system so that any call from her line would be acted on immediately); Ellman & Sugarman, *supra* note 34, at 1293.

115. *See* Dalton, *supra* note 4, at 337–38; Mahoney, *supra* note 90, at 64–65. Moreover, a tort lawsuit, which inevitably takes time to resolve, would not assist with many victims' most immediate needs for emergency expenses, such as changing locks, first and last month's rent, crime scene cleanup, and new bedding and furniture. Interview with Judith E. Beals, former Director, Massachusetts Victims Compensation Board (Jan. 5, 2001).

116. *See* Ellman & Sugarman, *supra* note 34, at 1293.

117. *See supra* Part II.C.4.

118. *See* Ellman & Sugarman, *supra* note 34, at 1292.

119. *See* Casarino, *supra* note 35, at 198. Rape shield laws allow persons alleging rape to shield their sexual history from cross-examination. *See, e.g.*, ALA. CODE § 12-21-203 (1975); FED. R. EV. 412; MASS. ANN. LAWS. CH. 233, § 21B. Civil defendants also lack some of the protections that criminal defendants have. For example, civil defendants cannot refuse to take the stand and can only refuse to answer questions that involve "*criminally* inculpatory" answers. *See* Casarino, *supra* note 35, at 197–98.

120. *See* Ellman & Sugarman, *supra* note 34, at 1293.

also possible that a victim may have injured the abuser, making a tort claim on behalf of one likely to be answered with a valid counterclaim.

D. CONSEQUENCES OF THE DEARTH

1. Deterrence Consequences

Deterrence is one of the important justifications for tort liability.[121] But since so few lawsuits are brought by domestic violence victims compared to the harms committed, tort law is not an effective deterrent.

For tort liability to work as a deterrent, tort victims must have an incentive to sue.[122] Simply stated, if there is no (or virtually no) threat of actual tort liability for certain conduct, then the tort system is providing no deterrence of that conduct.

Debate persists about the extent to which the tort system actually deters tortious behavior, but it is indisputably a goal of the system.[123]

121. *See* DOBBS, *supra* note 38, § 11 ("[A]nother aim of tort law is to deter certain kinds of conduct by imposing liability when that conduct causes harm. The idea of deterrence is not so much that an individual, having been held liable for a tort, would thereafter conduct himself better. It is rather the idea that all persons, recognizing potential tort liability, would tend to avoid conduct that could lead to tort liability."); ABRAHAM, *supra* note 19, at 17 ("[T]he influence of potential liability on behavior is a central feature of certain economic rationales for tort liability. Properly imposed, tort liability is supposed by these rationales to promote optimal deterrence."); RESTATEMENT (SECOND) *supra* note 48, § 901 (noting that one of the "purposes for which actions of tort are maintainable" is "to punish wrongdoers and deter wrongful conduct"); Heidi Li Feldman, *Harm and Money: Against the Insurance Theory of Tort Compensation*, 75 TEX. L. REV. 1567, 1570 (1997) (discouraging excessively dangerous conduct by requiring injurers to pay for the costs of their behavior is one of the traditional goals of tort law). *See also* Jennifer H. Arlen, *Compensation Systems and Efficient Deterrence*, 52 MD. L. REV. 1093, 1114 (1993) (noting that *ex post* regulation of car accidents through criminal liability is not as effective as *ex post* regulation through civil liability because civil actions are more likely to be brought).

122. One of the reasons compensatory damages should be paid to victims directly (rather than to the state) is "to give the victim an incentive to sue, which is essential to the maintenance of the tort system as an effective, credible deterrent to negligence." POSNER, *supra* note 12, at 191. The same argument applies to victims of intentional torts.

123. *See, e.g.*, Saks, *supra* note 82, *passim* (noting that goals of tort system include deterrence and compensation but that available empirical evidence about the tort system's actual behavior is insufficient to evaluate its effectiveness at meeting goals); Gary T. Schwartz, *Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?*, 42 UCLA L. REV. 377, 381–90 (1994) (summarizing different scholars' viewpoints). Many tort theorists assert that tort liability deters unsafe conduct. *See, e.g.*, POSNER, *supra* note 12, at 191; Arlen, *supra* note 121, at 1111 (criticizing no-fault car accident proposal because it would lead to increased expected accident costs since motorists would be more careless if they did not have to pay for other motorists' accident costs). Others question this assumption. *See, e.g.*, SUGARMAN, *supra* note 13, at 21–23 (claiming that empirical evidence supporting deterrence effects of tort law is not convincing). Economic theory is based on a model of "man as a rational maximizer of his self-interest [which] implies that people respond to incentives." POSNER, *supra* note 12, at 4. This model assumes that tort liability affects behavior. *See id.* at 191. The

Much of the literature is focused on accidents, rather than intentional torts, and is grounded in economic theory.[124] This literature rests on an assumption that liability and the threat of liability affect behavior.[125] This Article likewise will assume that the threat of domestic violence tort liability and domestic violence tort liability itself will affect behavior. There is no theoretical reason why tort liability and the threat of liability would lead to deterrence in the contexts of negligence and strict liability, but not in the intentional tort context.

The economic literature also rests on the idea that tort rules should be designed to lead to an optimal level of safety.[126] The goal of an "optimal level of safety" does not make much sense in the context of domestic violence torts. Rather, the goal is that these torts do not take place at all, even if that goal is unattainable.[127] In economic terms, persons who commit domestic violence torts externalize the costs of those acts; they do not bear the costs of such acts.[128] Far more domestic violence torts are

authors of a popular law and economics casebook acknowledge that deterrence relies on assumptions that tort liability will deter: "Deterrence in tort law rests on the notion that placing liability on a particular type of actor for past acts will deter similarly situated actors in the future." DAVID W. BARNES & LYNN A. STOUT, THE ECONOMIC ANALYSIS OF TORT LAW 46 (1992). Recent scholarship has noted limitations of the "rational self-interest maximizer" model and begun to replace it with a more nuanced model grounded in behavioral psychology. *See, e.g.*, Hanson & Logue, *The Costs of Cigarettes: The Economic Case for Ex Post Incentive-Based Regulation*, 107 YALE L.J. 1163, 1181–1262; Christine Jolls, Cass R. Sunstein, & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1998).

124. *See, e.g.*, BARNES & STOUT, *supra* note 123; GUIDO CALABRESI, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS (1970); ROBERT COOTER & THOMAS ULEN, LAW & ECONOMICS (3d ed. 2000); LANDES & POSNER, *supra* note 12; POSNER, *supra* note 12. *See generally* Thomas C. Grey, *Accidental Torts*, 54 VAND. L. REV. 1225 (2001) (highlighting accident-centered focus of twentieth-century tort law).

125. *See* text and sources cited *supra* note 123.

126. According to economic analyses of accident law, the goal of tort law is to produce an optimal level of precautions, not to prevent all accidents, which would be inefficient. *See, e.g.*, FRIEDMAN, *supra* note 12, at 197–201; LANDES & POSNER, *supra* note 12, at 1 (arguing that "the common law of torts is best explained as if . . . judges . . . were trying to promote efficient resource allocation"); POSNER, *supra* note 12, at 163–67. According to David Barnes and Lynn Stout, "Tort law may be viewed as a system of rules designed to maximize wealth by allocating risks so as to minimize the costs associated with engaging in daily activities." BARNES & STOUT, *supra* note 123, at 27.

127. *See* LANDES & POSNER, *supra* note 12, at 168–70 (noting that defendant's cost of avoiding harm in battery and assault cases is negative while victim's cost is higher; battery and assault liability rules make economic sense); POSNER, *supra* note 12, at 210 (spitting in someone's face is not wealth-maximizing or lawful, even if the utility to the spitter is greater than the harm caused to the person spat upon). Since much of the literature focuses exclusively on accidents, and implicitly defines torts as dealing only with accidents, this tort goal is rarely discussed. *See* Grey, *supra* note 124, at 1226 (noting that tort law is centered on accidents). *See also infra* note 370.

128. Externalities are "social benefits or costs that are not translated into market signals." ABRAHAM, *supra* note 19, at 16. *See generally* COOTER & ULEN, *supra* note 124, at 290 ("Economists describe harms that are outside private agreements as *externalities*. The economic purpose of tort

committed than would be if the costs were internalized, or borne, by the tortfeasors.[129] Tort law is failing mightily in its deterrence goal.

2. Compensation Consequences

Compensation[130] is another central purpose of tort law.[131] One clear consequence of the dearth of lawsuits is that compensation is not received through the tort system. Compensation paid to victims of domestic violence from sources outside the tort system is piecemeal or wholly inadequate. Victims may have first-party insurance such as health insurance to cover some medical expenses from their injuries. As of Fall 2000, however, over 38 million Americans did not have health insurance.[132] Moreover, medical insurers have declined to issue health, life, and disability insurance policies to domestic violence victims.[133] Disability insurance may provide some lost wages if a victim of domestic

liability is to induce injurers to *internalize* these costs. Tort law internalizes these costs by making the injurer compensate the victim.").

129. Thus, domestic violence torts are inefficient. According to Kenneth Abraham's nontechnical definition, which will be used here, "an allocation [of resources] is efficient when resources are used in a manner that maximizes their value." ABRAHAM, *supra* note 19, at 10. This concept might seem to fit uneasily with domestic violence torts, except when one remembers that there is no efficiency justification for domestic violence torts like assault and battery. *See* LANDES & POSNER, *supra* note 12, at 168–71; POSNER, *supra* note 12, at 210. By definition, in economic terms, assaulting someone or committing other domestic violence torts uses resources in a manner that does not maximize their value.

130. For a definition of compensation, see *supra* note 13. *See also* Croley & Hanson, *supra* note 13, at 1835 (suggesting that there is consumer demand for pain and suffering damages); Feldman, *supra* note 121, at 1570 (arguing that individualized pain and suffering damages are an important part of the tort system's way of "making victims whole").

131. As Dan Dobbs notes in his hornbook*:*

> [C]ompensation of injured persons is one of the generally accepted aims of tort law. Payment of compensation to injured persons is desirable . . . compensation is also socially desirable, for otherwise the uncompensated injured persons will represent further costs and problems for society. . . Injury costs are socially as well as individually significant. . . . Compensation for injury may actually help reduce personal injury costs. Appropriate medical attention, for example, may allow an injured person to return to work sooner. Injury also has ripple effects, especially when it promotes economic hardship. Children and others within a family stressed by serious injury and consequent economic difficulty may reflect that stress by inflicting still further economic costs upon society, for example, by abusing alcohol or drugs.

DOBBS, *supra* note 38, § 10. *See also*, RESTATEMENT (SECOND), *supra* note 48, § 901 (stating that one of the "purposes for which actions of tort are maintainable" is "to give compensation, indemnity or restitution for harms"); Feldman, *supra* note 121, at 1570 (noting that making victims whole is one traditional tort law goal).

132. Robert Pear, *Number of Uninsured Drops for 2nd Year*, N.Y. TIMES, Sept. 28, 2001, at A19. Medical insurance often requires copayments that the insured must pay, may have reimbursement caps, and does not necessarily cover all expenses.

133. *See* Deborah S. Hellman, *Is Actuarially Fair Insurance Pricing Actually Fair?: A Case Study in Insuring Battered Women*, 32 HARV. C.R.-C.L. L. REV. 355, 355–56 (1997); Sherri A. Mullikin, Note, *A Cost Analysis Approach to Determining the Reasonableness of Using Domestic Violence as an Insurance Classification*, 25 J. LEGIS. 195 (1999).

violence loses work as a result of her injuries. Long-term disability insurance, however, is not widespread.[134] While victims compensation funds, in theory, could provide significant compensation, in practice, only a small fraction of expended victims compensation funds go to domestic violence victims.[135]

The costs of these domestic violence torts, financial and nonfinancial, are borne largely by the victims, but also by their children and their employers.[136] In addition to direct out-of-pocket expenses, lost wages and pain and suffering, domestic violence also imposes broad costs on society. Some of these costs were detailed in the dissent in *U.S. v. Morrison:*[137]

"Partial estimates show that violent crime against women costs this country at least 3 billion—not million, but billion—dollars a year."[138]

"[E]stimates suggest that we spend $5 to $10 billion a year on health care, criminal justice, and other social costs of domestic violence."[139]

"[A]s many as 50 percent of homeless women and children are fleeing domestic violence."[140]

"Since 1974, the assault rate against women has outstripped the rate for men by at least twice for some age groups and far more for others."[141]

"Between 2,000 and 4,000 women die every year from [domestic] abuse."[142]

The harm goes largely uncompensated.[143]

134. Approximately 22% of the working population has long-term disability insurance. *See* Abraham & Liebman, *supra* note 17, at 81–82. Moreover, disability insurance does not fully cover lost wages. *See* Croley & Hanson, *supra* note 13, at 1901 (noting that disability policies require greater copayments in general than health insurance policies).

135. *See* Desmond S. Greer, *A Transatlantic Perspective on the Compensation of Crime Victims in the United States*, 85 J. CRIM. L. & CRIMINOLOGY 333, 348 (1994).

136. *See id.* at 387 (noting that costs of domestic violence are borne largely by victims and their employers). Some of the costs are already shared more widely through first-party medical insurance. *See generally* Hellman, *supra* note 133 (addressing medical insurance companies' treatment of domestic violence victims). For those without private insurance Medicaid covers some of the medical costs, and Temporary Aid to Needy Families covers some of the living expenses of people who cannot support their children. These are publicly funded and thus some cost sharing occurs through taxation.

137. United States v. Morrison, 529 U.S. 598, 631 (2000) (Souter, J., dissenting).

138. *Id.* at 632 (citing S.REP. NO. 101-545, at 33).

139. *Id.* at 632–33 (citing S.REP. NO. 103-138, at 41).

140. *Id.* at 631 (citing S. REP. NO. 101-545, at 37).

141. *Id.* at 631–32 (citing S. REP. NO. 101-545, at 30).

142. *Id.* at 632 (citing S. REP. NO. 101-545, at 36).

143. For discussion of the term "compensation," see *supra* note 13. One article on the civil rights remedy provision of VAWA claims that there is no compensation problem. Judge William Bassler claims that there is no "evidence that significant numbers of women are not being compensated . . . for

3. Other Consequences

Tort law "plays a narrative and declarative role for individual litigants and for the culture at large."[144] Like other areas of law, tort law has important expressive and rhetorical functions:

> Law . . . tells stories about the culture that helped to shape it, and which it in turn helps to shape . . . . Indeed, it may be that law affects our lives at least as much by these stories as it does by the specific rules, standards, institutions, and procedures of which it is composed.[145]

It is important to explore the stories that the tort system is telling.

The extensive harm caused by domestic violence, coupled with the lack of tort deterrence or compensation of that harm, tells a story that the activity is acceptable in at least one particular sense—it reflects what Holmes termed "[T]he general principle of our law . . . that loss . . . must lie where it falls."[146] Only if there is a "clear benefit . . . from disturbing the *status quo*" should losses be shifted.[147] The harm plus the lack of compensation, in effect says, to use Holmes' words, that there is no "clear benefit . . . to be derived from . . . [*changing*] the *status quo*."[148] These implicit assumptions can be challenged. The status quo is unacceptable, as feminist analysis has shown.[149] Legal arrangements, including torts and insurance bars to enforcement, play an active role in constituting the status quo.[150] Shifting the losses caused by domestic violence from the individual harmed by it to the perpetrator and the society at large is imperative.

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assaults motivated by anti-female prejudice." William G. Bassler, *The Federalization of Domestic Violence: An Exercise in Cooperative Federalism or a Misallocation of Federal Judicial Resources?*, 48 RUTGERS L. REV. 1139, 1169 (1996). This claim is puzzling, since it is so clear that women are not compensated in significant numbers for domestic violence injuries, as few tort suits are brought. *See* Scherer, *supra* note 9, at 565; *supra* Part II.B. Furthermore, only a small proportion of victims compensation funds go to domestic violence victims. *See* Greer, *supra* note 135, at 348. Perhaps Bassler is saying that it is not clear that domestic violence injuries are motivated by anti-female prejudice, so that the lack of compensation for those injuries is not significant. But whether or not the assaults are motivated by anti-female prejudice, it is clear that women are not being compensated for these assaults.

144. Pryor, *supra* note 10, at 1748.

145. MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW: AMERICAN FAILURES, EUROPEAN CHALLENGES 8 (1987). *See generally* JAMES BOYD WHITE, HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW (1985).

146. HOLMES, *supra* note 14, at 76.

147. *Id.* at 77.

148. *See id.*

149. *See, e.g.*, SCHNEIDER, *supra* note 2; DALTON & SCHNEIDER, *supra* note 2; text accompanying notes 136–43.

150. *See supra* Part II.C. *See generally* DUNCAN KENNEDY, *The Stakes of Law, or Hale and Foucault!*, *in* SEXY DRESSING ETC. 92, 124 (1993) (arguing that background legal rules have distributive and normative consequences); Frances E. Olsen, *The Family and the Market: A Study of*

Law is telling various inconsistent stories about domestic violence. Domestic violence is no longer invisible to law in the way that it once was.[151] In every state, victims can obtain civil protection orders that are enforceable by criminal penalties.[152] There is now an extensive network of shelters for women injured and threatened by domestic violence.[153] State and federal criminal charges can be, and sometimes are, brought for domestic assaults and stalking.[154] Divorce, if the parties are married, can sever the legal relationship between them. In bankruptcy law, discharge is not available for certain intentional tort judgments,[155] sending a message that these torts are serious. But the many roadblocks that prevent delivery of this message in the domestic violence tort context send their own message: tort deterrence and compensation are unimportant.[156]

Ideology and Legal Reform, 96 HARV. L. REV. 1497 (1983) (noting that family is not separate from the market and legal rules constitute family, rather than family constituting separate realm).

151. *See generally* Siegel, *supra* note 36 (analyzing history of law concerning wife-beating and showing how changes in formal legal rules may lead to reinforcing of status relationships in a different form).

152. *See* Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 810–11 (1993).

153. *See* SCHNEIDER, *supra* note 2, at 21, 182 (describing development of shelter network).

154. In addition to state criminal laws, VAWA contained several criminal provisions. *See supra* note 6. Elizabeth Schneider notes that many woman who are battered, for a variety of reasons, refuse to press charges. *See* SCHNEIDER, *supra* note 2, at 184–85. For materials discussing issues in domestic violence prosecutions, see DALTON & SCHNEIDER, *supra* note 2, at 528–55.

155. 11 U.S.C. § 523(6) (1999) (providing that debts "for willful and malicious injury by the debtor to another entity or to the property of another entity cannot" be discharged in bankruptcy).

156. Relatively little of the rich body of feminist legal scholarship on domestic violence focuses on the tort aspects of domestic violence. *See* Elizabeth M. Schneider, *Epilogue: Making Reconceptualization of Violence Against Women Real*, 58 ALB. L. REV. 1245, 1246–48 nn.4–6 (1995) (listing legal scholarship). For work that deals with tort aspects of domestic violence, see, for example, Dalton, *supra* note 4; Scherer, *supra* note 9; Weiner, *supra* note 7, at 189 (arguing that for the tort of intentional infliction of emotional distress, a *per se* standard should be applied to satisfy the "outrageousness" requirement when a defendant violates an injunction issued to protect the plaintiff). The civil rights remedy of VAWA, 42 U.S.C. § 13981, provided a mechanism for potential compensation for some domestic violence injuries, but the scholarship endorsing the remedy provision did not focus directly on compensation. *See, e.g.*, Julie Goldscheid, *Gender-Motivated Violence: Developing a Meaningful Paradigm for Civil Rights Enforcement*, 22 HARV. WOMEN'S L.J. 123 (1999) (discussing analogies to civil rights law as a guide to interpretation of VAWA civil rights remedy provision). The criminal provisions of VAWA are paired with a mandatory restitution provision. *See* 18 U.S.C. § 2248 (2000). This requires courts to order, in addition to other penalties, a range of types of compensation. This includes medical expenses, transportation, temporary housing and child care, attorneys fees, and other costs. *See id.* This obviously evidences a focus on compensation, albeit in the context of criminal prosecution. The laws providing for civil protection orders in most states provide for the possibility of some economic relief in a protection order. *See* Klein & Orloff, *supra* note 152, at 993. In civil protection proceedings, however, judges routinely turn down requests for monetary relief. *See id.* at 992.

This is particularly striking when one examines insurance and compensation schemes for other widespread losses and attention paid by scholars and legislators to deterrence and compensation in other contexts.[157] Society certainly does not provide compensation plans for all losses or injuries.[158] But some types of loss are deemed worthy enough that scholars and legislators create markets and forge systematic compensation plans.[159] Workers compensation, for example, was instituted in response to the "initially staggering" problem of uninsured workplace injuries and is now a massive system that provides compensation for employees who suffer work-related injuries.[160] Injuries sustained in automobile accidents are addressed in almost all states by insurance that drivers must purchase and insurers must provide.[161] Moreover, uninsured motorist coverage is required in many states so that people injured by uninsured motorists can receive compensation.[162] Government-subsidized

157. Regarding cigarettes, *see. e.g.*, Hanson & Logue, *supra* note 123, at 1187–88 (1998). For example, a 1993 symposium on "Future Prospects for Compensation Systems" focused on compensation for accidents from cars, toxic materials, industry and medical treatment. Symposium, *Future Prospects For Compensation Systems*, 52 MD. L. REV. 893 (1993). Similarly, a 1985 symposium on "Alternative Compensation Schemes and Tort Theory" did not deal with harm from intentional torts. Symposium, *Alternative Compensation Schemes and Tort Theory*, 73 CAL. L. REV. 548 (1985). Extensive legislation exists in every state concerning workers compensation and automobile insurance. *See* 9 Russ & Segalla, *supra* note 67, §§ 133:1, 133:5.

158. *See generally* Abraham & Liebman, *supra* note 17, at 80.

159. As Keeton & Widiss note, "[t]he undesirable social consequences of uninsured losses have given rise to proposals in many contexts for governmental participation in various types of insurance arrangements." KEETON & WIDISS, *supra* note 21, § 8.6(e). An example of this is statutorily mandated high-risk auto insurance plans. *See id.* § 8.6(f) (noting that the problem of unwanted insureds is dealt with through mandatory, assigned risk plans in which private insurers participate). For example, the Maine assigned risk statute reads in part: "Every insurer undertaking to transact in this State the business of automobile and motor vehicle bodily injury, property damage liability, physical damage and medical payments insurance . . . shall cooperate in the preparation and submission of a plan for the equitable apportionment among insurers of applicants for insurance who are in good faith entitled to, but who are unable to procure through ordinary methods, such insurance." 24-A ME. REV. STAT. ANN. § 2325 (2000).

160. *See* KEETON & WIDISS, *supra* note 21, § 8.6(e). *See generally* 9 Russ & Segalla, *supra* note 67, § 133:2; Martha T. McCluskey, *The Illusion of Efficiency in Workers' Compensation "Reform,"* 50 RUTGERS L. REV. 657 (1998). Some observers claim that this insurance does not undermine deterrence incentives. *See* ABRAHAM, *supra* note 19, at 17 (noting that some observers claim that workers compensation does not impede optimal deterrence).

161. *See* ABRAHAM, *supra* note 19, at 219. Abraham notes:

> the current emphasis on various kinds of residual markets in the automobile insurance field reveals a great deal about the centrality of the automobile in our culture. The use of an automobile at a tolerable cost has become almost a fundamental right; the maintenance of residual markets that assure all drivers minimum insurance follows from and reflects this development.

Id.

property insurance programs for inner-city properties have been developed in most states.[163] Similarly, in each state there is a high-risk automobile insurance pool which must insure people who are otherwise uninsurable.[164] The basic idea behind these plans is that the social harm of not having the plan outweighs the burden of having the plan. Yet, for domestic violence victims and victims of other intentional torts there is no meaningful, let alone comparable, compensation system. This disparity sends the message that some injuries are more worthy of compensation than others.[165] There is no reason why, in a society with a "civilized system of justice,"[166] the injuries of a person who is hurt in a car accident should be treated as more worthy of compensation than the injuries of a person who is hurt by a spouse or intimate partner.

162. *See* ALAN I. WIDISS, UNINSURED AND UNDERINSURED MOTORIST COVERAGE §2.5 at 29–30 (2d ed. 1999) (noting that eighteen states mandate purchase of uninsured motorist coverage; remainder of states require that uninsured motorist coverage be offered to motorists).

163. Government insurance programs have been instituted that require insurance companies to provide coverage in certain areas, namely inner city neighborhoods, that they otherwise would not be willing to insure. *See* KEETON & WIDISS, *supra* note 21, § 8.6(c)(5). These plans, known as Fair Access to Insurance Requirements ("FAIR") Plans, exist in twenty-nine states. *See* Willy E. Rice, *Race, Gender, "Redlining," and the Discriminatory Access to Loans, Credit, and Insurance: An Historical and Empirical Analysis of Consumers Who Sued Lenders and Insurers in Federal and State Courts, 1950–1995*, 33 SAN DIEGO L. REV. 583, 613 n.124 (1996). *See generally* Regina Austin, *The Insurance Classification Controversy*, 131 U. PA. L. REV. 517 (1983); John Hugh Gilmore, Note*: Insurance Redlining & the Fair Housing Act: The Lost Opportunity of Mackey v. Nationwide Insurance Companies*, 34 CATH. U. L. REV. 563 (1985).

164. *See* KEETON & WIDISS, *supra* note 21, § 8.6(f). For example, the Maine assigned risk statute reads in part:

> Every insurer undertaking to transact in this State the business of automobile and motor vehicle bodily injury, property damage liability, physical damage and medical payments insurance . . . shall cooperate in the preparation and submission of a plan for the equitable apportionment among insurers of applicants for insurance who are in good faith entitled to, but who are unable to procure through ordinary methods, such insurance.

24-A ME. REV. STAT. ANN. § 2325 (2000).

165. *See generally* Martha Chamallas & Linda K. Kerber, *Women, Mothers, and the Law of Fright: A History*, 88 MICH. L. REV. 814, 864 (1990) (arguing through historical examples that "courts and commentators [from the late nineteenth century to the 1960s] used injuries associated with men as the dominant standard for determining legal value . . . [which] had the effect of devaluing injuries associated with women, albeit expressed differently in different historical periods").

166. United States v. Morrison, 529 U.S. 598, 627 (2000). The phrase is from Chief Justice Rehnquist's opinion, where he notes that if Brzonkala's claims are true, "no civilized system of justice could fail to provide her a remedy for the conduct of respondent Morrison." *Id.* She alleged that he raped her shortly after meeting her. *See id.* at 602.

III. CONSTRUCTING A MORE EFFECTIVE APPROACH TO DOMESTIC VIOLENCE TORT LIABILITY

A. INSURANCE REFORM: LIABILITY INSURANCE FOR DOMESTIC VIOLENCE TORTS AND "UNINSURED DOMESTIC VIOLENCE TORTFEASOR" INSURANCE

1. Introduction

This Section will begin by reviewing the essential features of the proposed "Domestic Violence Torts Insurance Plan," paying special attention to the uninsured domestic violence tortfeasor feature of the plan.[167] It will then discuss why pricing the insurance is viable,[168] why it should be a mandatory part of automobile insurance,[169] and possible objections to the plan.[170]

2. The "Domestic Violence Torts Insurance Plan"

a. In General

The proposed plan of liability insurance for domestic violence torts would look like this: mandatory automobile liability insurance would include a required minimum amount of coverage for domestic violence torts, so that if a policyholder is sued for such a tort, the automobile policy would cover the claim to the minimum.[171] In the case of a jointly owned automobile, the policy would cover a policyholder for a liability claim by another policyholder.[172] The policy would contain reimbursement provisions for domestic violence torts, so that the insurance company could seek reimbursement from a policyholder for amounts it pays out for domestic violence tort claims.[173] In addition, mandatory automobile

167. *See infra* Part III.A.2.

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

169. *See infra* Part III.A.4.

170. *See infra* Part III.A.5.

171. The policy would have a deductible so that some less serious claims would be weeded out. Individuals could purchase higher liability limits if they chose.

172. The policy would not contain a family member exclusion, unlike many automobile and homeowners policies. *See infra* Part III.A.5.a.

173. If property is jointly held between the insured defendant and the plaintiff seeking compensation or if the property is marital property, this can create problematic scenarios. One example is a situation where a plaintiff sues a defendant and recovers judgment from the insurance company. The plaintiff and defendant are not married but own a house together in which they live. The insurance company seeks reimbursement from the defendant, which results in liens placed on the house and its eventual sale, so that the insurance company is reimbursed. The plaintiff ends up with funds from the

insurance would include a required minimum amount of coverage, somewhat analogous to uninsured motorist coverage.[174] Under this coverage, where an insured is a victim of a domestic violence tort, and the defendant is uninsured, the victim can make a claim under the "uninsured domestic violence tortfeasor" section of the policy. The insured's insurance company could then seek reimbursement from the uninsured defendant, imposing costs on the defendant.

b. More on "Uninsured Domestic Violence Tortfeasor" Insurance

This Subsection will explain the idea of "Uninsured Domestic Violence Tortfeasor" Insurance and why it is particularly appropriate that this coverage apply to domestic violence torts. To present the proposal for "uninsured assailant" coverage, it is necessary to first provide basic information concerning uninsured motorist coverage. "Uninsured motorist coverage" is the part of auto coverage that allows compensation from the policyholder's insurance company if the policyholder is injured by a driver who is uninsured, or by a hit-and-run driver.[175] Recovery under existing uninsured motorist policies is not limited to harm caused by negligent acts of an uninsured tortfeasor, but also covers *intentional* torts of an uninsured tortfeasor.[176] The language of standard uninsured motorist policies applies only to injuries caused by accidents.[177] In practice, however, injuries caused by the *intentional* acts of an uninsured motorist generally *are* covered because the injury-causing event is viewed *from the perspective of the victim, not the perpetrator*.[178] Thus, injury caused by a tortfeasor's intentional, and even deliberate acts, is covered.

judgment but no house. The defendant ends up with no house. Another scenario is a fraudulent claim where a husband and wife concoct a tort and damages and share the proceeds. Another scenario is where a controlling batterer commits the tort and then takes the proceeds. Obviously, fraud and collusion would be forbidden under the policy, and insurers would attempt to root it out. Another scenario is where a claim is brought and resolved during a marriage and the plaintiff and defendant later get divorced; the award the plaintiff received could be marital property. State legislation defining marital property as not including settlements or judgments from domestic violence torts could resolve this. These scenarios are troubling, and others can be imagined, but there is no perfect solution. For cases dealing with the dilemma of an estranged spouse burning down the house that was owned by the couple, see Utah Farm Bureau Ins. Co. v. Crook, 980 P.2d 685 (Utah 1999) (declaring as valid and consistent with public policy an exclusion barring innocent spouse's recovery for property damage); Watson v. United Serv. Auto. Ass'n, 566 N.W.2d 683 (Minn. 1997) (ruling that exclusion barring innocent spouse's recovery for property damage is illegal under state statute).

174. *See infra* Part III.A.5.b.

175. *See generally* WIDISS, *supra* note 162.

176. *See* KEETON & WIDISS, *supra* note 21, § 5.4(c)(3).

177. Standard uninsured motorist policies state that the insurer shall pay all sums "that an insured is 'legally entitled to recover as damages . . . because of bodily injury sustained by the insured *caused by accident.*'" *Id.* (emphasis in original).

178. *See id.*

There are several reasons why it is appropriate to adopt the viewpoint of the injured party:

> from the perspective of the injured person (and especially so when an assault, using a motor vehicle, was not provoked by that person), the cause of the injuries is no less fortuitous than in the situation in which a person is injured as a result of the negligent operation of an uninsured vehicle.[179]

Furthermore, payments under uninsured motorist coverage do not undermine the goals of tort liability or insurance.[180] Courts generally have allowed compensation even though actions that caused the injury were intended by the uninsured motorist.[181] So, too, in the domestic violence context: the harm caused may be intentional from the perspective of the perpetrator, but not intentional from the perspective of the injured person.[182] The policy can be written, as uninsured motorist policies are, to provide that the insurance company can seek reimbursement from the tortfeasor.[183]

179. *Id.*

180. *Id.* § 5.4(c)(3), at 516.

181. *See id.* Keeton & Widiss list several other reasons why it is appropriate to view the event from the perspective of the insured: the tortfeasor does not benefit from the coverage and the insurance company can seek reimbursement for the payments it makes from the tortfeasor; payments made under uninsured motorist policies "do not reduce the possibility that either the tort system or the criminal law system will operate either to punish or to influence the conduct either of the tortfeasor who caused the loss which is indemnified by the insurance or of other potential tortfeasors"; the passage of uninsured motorist coverage in many states demonstrates the importance of providing indemnification to motorists injured by financially irresponsible motorists; and "providing indemnification to insureds under the uninsured motorist coverage is also warranted because a tort action is likely to yield little, if any, compensation, even though such a tortfeasor, if financially responsible, would be liable for an intentional tort." *Id.* at 515.

182. Part of the contribution of feminist theory to law is the effort to shift perspectives in law so that the perspective of those with less power is included and that women's perspectives and subjectivities are taken seriously in law. *See generally* CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 237–39 (1989). By looking at intentional harm from the perspective of the victim, this aspect of insurance law is an interesting example of a feminist approach to the problem of intentional harm. One concern is that the analogy to uninsured motorist coverage for intentional acts seems to call for an analysis of whether the violence was "provoked." *See* KEETON & WIDISS, *supra* note 21, § 5.4(c)(3) (stating that it as appropriate to cover intentional harm under an uninsured motorist policy if the attack was not "provoked"). This analysis would be undertaken initially by insurance companies in determining whether there was coverage, and then by courts if there were coverage disputes. Feminist scholarship has articulated a comprehensive critique of patriarchal domestic violence ideologies including the ideology that "she asked for it" or provoked it. *See* Hellman, *supra* note 133, at 362–77 (arguing that health insurance should not be denied to battered women who "stay" in a violent relationship); Mahoney, *supra* note 90, at 78–93 (discussing concept of separation assault); SCHNEIDER, *supra* note 2, at 79–86 (noting that in situations where battered women killed their assailants, myths that battered women were "provocative" made these women seem especially unreasonable, and calling for a recognition of the complexities of agency).

183. *See* KEETON & WIDISS, *supra* note 21, § 5.4(c)(3).

3. Pricing the Insurance

Pricing the insurance is a threshold requirement for the plan to be viable. Insurance is "a method of managing risk by distributing it among large numbers of individuals or enterprises."[184] "Risk" is "the possibility of injury or loss."[185] Insureds agree, through contracts, to pay the insurer a fee, or premium, based on their expected losses.[186] "Expected loss" is the "probability of a loss [over a given time period] multiplied by the amount of the loss if it occurs."[187] Insureds are divided into groups according to their risk of loss, so that each member of the group faces roughly the same risk of loss.[188] The insurer agrees to provide funds to compensate the insureds who actually experience a loss.[189] Insurance must be priced close to the insured's expected loss for insurance companies to function and to further efficiency.[190]

Given the considerable knowledge about domestic violence, it should be possible to calculate insureds' expected losses and thus price insurance for it. Research on domestic violence, including its incidence, has

184. ABRAHAM, *supra* note 19, at 1–2. Another formulation states that it is an "arrangement for transferring and distributing risks." KEETON & WIDISS, *supra* note 21. There is no one, concise, universally applicable definition of insurance. *See id.*

185. ABRAHAM, *supra* note 19, at 2.

186. *See* Croley & Hanson, *supra* note 13, at 1793.

187. ABRAHAM, *supra* note 19, at 11. Insurance premiums, in a perfectly competitive market, would consist of the expected loss plus administrative costs, and a profit. *See id.* at 13. Expected loss, however, can be difficult to calculate and other factors may interfere with the goal of pricing in accordance with expected loss. *See id.* at 67–69.

188. *See* Croley & Hanson, *supra* note 13, at 1793.

189. *See id.*

190. ABRAHAM, *supra* note 19, at 12. If insureds' actual losses exceed the expected losses, the insurance company will lose money. Writing about efficient the pricing of insurance, Abraham notes that "if [insurance] is underpriced . . . I may purchase more insurance than I would otherwise: I will underallocate to prevention and overallocate to insurance." *Id.* Similarly, if insurance pricing is not sensitive to claims history, it may undermine deterrence incentives. *See id.* at 46. This would apply to insurance for intentional torts as well as accidents. Pricing insurance in accordance with expected loss is important to economic efficiency, but promoting efficiency is not the sole purpose of insurance law. *See id.* at 18. Normative issues inevitably arise regarding what constitutes a fair distribution of risk. To illustrate some of these issues, Abraham uses the example of an imaginary ethnic group, the Claudians, that are more prone to falling in bathtubs than other groups.

> Concern for efficiency alone would dictate that Claudians be charged more than other people for bathtub-fall insurance, if there were such a thing. Some might argue, however, that this extra risk should not be borne by Claudians because not all Claudians are prone to falling, those who do fall have no control over their falls, or singling out a specific ethnic group for such treatment unfairly discriminates against it. These are arguments for redistributing risk so that Claudians as a group do not bear all the risk that they actually pose.

Id. at 19. *See infra* text accompanying notes 197–201.

exploded in recent decades. Systematic research has begun to analyze risk factors for domestic violence.[191]

Some observers may argue that insurance for any intentionally caused harm, including harm that caused by domestic violence torts, cannot be accurately priced because the losses are not probabilistic in nature.[192] Liability insurance, however, is not limited to coverage for harms that are produced unintentionally. Insurance is provided in some circumstances for punitive damages, for example, which often are awarded for intentional conduct.[193] Insurance has developed over the last decade for employers covering their liability for their employees' intentional acts such as sexual harassment.[194] As new forms of liability emerge, insurance often follows.[195] Despite early challenges in pricing employers' liability insurance, this insurance has become widely available.[196] It should also be possible to determine prices for the insurance proposed here.

Pricing insurance involves classifying insureds into groups, each member of which faces a similar risk of loss.[197] Decisions as to the composition of the groups often raise complex and controversial issues of fairness, as has been seen in debates over gender, race, and insurance.[198]

191. *See, e.g.*, Kyriacou et al., *supra* note 1.

192. Priest raises one such argument:

> Insurance operates where losses have some . . . probabilistic character. . . . For a loss or a set of losses to be probabilistic means that the occurrence of the loss or set can be described by a probability distribution. . . . The [intentional acts exclusion] represents an obvious effort to constrain insurance to probabilistic risks. If the insured knows or expects that a particular occurrence will happen, the loss caused by the occurrence cannot be said to be probabilistic, and, thus, cannot be effectively insured.

Priest, *supra* note 69, at 1020–25. Likewise, Ellen Pryor states "[h]arms that insureds produce intentionally, unlike accidental harms, generally do not follow the law of large numbers that makes it possible for insurers to aggregate and predict the expected losses posed by a pool of insureds." Pryor, *supra* note 10, at 1740.

193. *See* Baker, *supra* note 10, at 120 n.66; Priest, *supra* note 69, at 1009.

194. *See* Klenk, *supra* note 15.

195. *See id.* at 330. As noted above, sometimes the process happens in reverse; insurance coverage predates liability. *See* Syverud, *supra* note 66, at 1115.

196. *See* Klenk, *supra* note 15, at 325. *See generally* Symposium, *Employment Practices Liability Insurance and the Changing American Workplace*, 21 W. NEW ENG. L. REV. 245 (1999). Insurance company literature uses as a selling point the fact that the insurance covers intentional acts. *See, e.g.*, Amity Insurance Agency Employment Practices Liability Insurance (emphaisizing employment practices liability insurance has no exclusion for intentional acts and covers punitive damages), *available at* http://www.amityinsurance.com/eplinsur.htm (last visited Jul. 10, 2001); Florida Police Chiefs Association, FPCA Buyer's Guide: Municipal Insurance (noting that insurance provides coverage for intentional acts and also "responds to the punitive damages issue"), *available at* http://www.fpca.com/pfcsifcoverage.htm (last visited Jul. 10, 2001).

197. *See* Croley & Hanson, *supra* note 13, at 1793.

198. *See* ABRAHAM, *supra* note 19, at 18–31, 64–100; Austin, *supra* note 163; Hellman, *supra* note 133, at 378–79.

One approach to challenging the way that risk is allocated by the private market is to argue for more risk spreading in general.[199] There may be a danger that insurance companies will form classifications that are discriminatory in some unacceptable way, which may lead to regulation.[200] Debates about fairness in risk distribution are inevitable and endemic to private insurance schemes.[201] They do not undermine the basic point that pricing insurance for domestic violence torts should be practical.

4. Reasons for a Mandatory Plan

There are three reasons the coverage should be mandatory. First, persons considering whether to voluntarily purchase this insurance are likely to underestimate their risk of inflicting or suffering domestic violence torts.[202] This means that relatively few people would purchase the insurance, which would make it prohibitively expensive. Second, if purchase of the insurance were voluntary, it is likely that the problem of adverse selection[203] would arise. Only those who needed it most would purchase it, which would result in an unacceptably high number of claims. Therefore, if the insurance were purely voluntary, the market for it would likely fail. Third, domestic violence torts are so pervasive and damaging that drastic steps need to be taken to address them as a matter of fairness.[204] Coverage should be part of automobile insurance because a problem of this magnitude demands a broad solution. Because automobile insurance is more pervasive than homeowners insurance, mandating domestic violence insurance in car insurance would spread the risk more broadly than if the insurance was marketed with homeowners insurance.[205]

199. *See* ABRAHAM, *supra* note 19, at 19. Another approach is to argue for redistributing risk between individuals and groups. *See id.*

200. *See generally* ABRAHAM, *supra* note 19, at 64–100; Austin, *supra* note 163; Hellman, *supra* note 133; Mulliken, *supra* note 133; Rice, *supra* note 163. It is not the purpose of this Article to propose a detailed scheme of risk distribution; this Article argues for a broader spreading of risk in general.

201. *See supra* note 175.

202. *See supra* text accompanying notes 206–13.

203. Adverse selection refers to the problem of people who are disproportionately likely to experience an insured-against event having the tendency to buy insurance for that event. *See* Baker, *supra* note 10, at 121. This leads to a heightened number of claims and increased costs. *Id. See infra* Part III.A.4.b.

204. As explained above, current law leaves the costs of domestic violence largely on its victims; tort law is not deterring or compensating in this area. *See supra* Part II.D.

205. Another option would be to include domestic violence insurance as a mandatory part of homeowners' policies. But given that a large fraction of the population does not own a home and that homeowners insurance is not required once a mortgage has been paid off, see *supra* notes 70, 78–80, this idea would spread risk much more narrowly than if the insurance was attached to automobile insurance.

a. Imperfect Information

People generally are poor risk-estimators. A growing body of research shows that people commonly underestimate or overestimate the likelihood of uncertain events and the costs of such events.[206] Research has not been published specifically on individuals' estimates of the probability that they will be a victim or perpetrator of domestic violence. It is reasonable to conclude, however, that people estimate their risks of being a victim or perpetrator of domestic violence torts as much lower than it is. There is a documented "third person" effect with smokers; smokers may overestimate the risks of smoking in general but underestimate the risks of smoking to them personally.[207] Similarly, members of a couple may be aware of or even overestimate the incidence of domestic violence, but may underestimate the risks to them of being a victim or perpetrator. This seems particularly likely in the domestic violence context since it often involves affectional attachments and changes in people over a long period of time.[208] An even more closely related example is research showing that one hundred percent of couples about to marry dismiss the possibility of divorce.[209] If insurance is voluntary, it seems likely that few people will purchase it. Moreover, in cases where the domestic violence perpetrator controls the finances and purchases of the household, it is very unlikely that any domestic violence tort insurance would be purchased. Thus, insurance markets would not be able to function, leading to market failure.

206. *See* Croley & Hanson, *supra* note 13, at 1845–48 (noting that individuals do not possess enough information to enter into a reasonably well-specified insurance contract for pain-and-suffering damages); Hanson & Logue, *supra* note 123, at 1186–87 (pointing out that consumers may overestimate the dangers of smoking in general but underestimate the health risks of smoking for them personally); Jolls et al., *supra* note 123, at 1518–19 (reviewing research showing that people routinely underestimate or overestimate the risk of environmental and other harms depending on "the observed frequency of the hazard and its salience"); Ellen Smith Pryor, *The Tort Law Debate, Efficiency, and the Kingdom of the Ill: A Critique of the Insurance Theory of Compensation*, 79 VA. L. REV. 91, 143 n.152 (1993) (citing research showing that people make "systematic errors in judgments about the future" and noting that because of the invisibility of disabled people, non-disabled individuals may "underestimate the likelihood of disability"); Michael H. Schill, *An Economic Analysis of Mortgagor Protection Laws*, 77 VA. L. REV. 489, 524–30 (1991) (suggesting that people underestimate the costs of low probability, high loss events and so may not buy optimal amounts of insurance); Wortham, *supra* note 70, at 861–74 (noting that people are generally unskilled at estimating risk).

207. *See* Hanson & Logue, *supra* note 123, at 1186–88 (describing the "third-party effect" in the smoking context).

208. *See* Dalton, *supra* note 4, at 336 (noting that women do not fall in love with men who are initially abusive—the abuse develops over time).

209. *See* Lynn A. Baker & Robert E. Emery, *When Every Relationship is Above Average: Perceptions and Expectations of Divorce at the Time of Marriage*, 17 LAW & HUM. BEHAV. 439, 443 (1993) (reporting that 100% of people about to marry believe they will not get divorced).

While there is little insurance for domestic violence tort liability, this does not mean that there is no demand for it or that there never will be demand. Taking the broader example of demand for intentional acts insurance, it may be that there is no such insurance because there is no demand for it.[210] As Jon Hanson and Steven Croley have shown, however, insurance markets do not necessarily reflect consumer preferences.[211] People may not demand insurance for domestic violence injuries or claims because they are not injuries or claims against which one can generally insure.[212] The demand for third-party insurance is somewhat circular. Because claims are not brought, there is no perception of a need for such insurance that such claims might create. The same is true for uninsured domestic violence tortfeasor insurance. There is no expectation of compensation, and thus no demand for insurance.[213] Further education about the probability of committing or suffering domestic violence might help create demand. But definitive conclusions about future demand cannot be reached based on the current situation.

b. Adverse Selection

The phenomenon of adverse selection suggests that people who are most likely to need a particular kind of insurance are the most likely to buy it, which leads to insurers paying an economically unacceptable number of claims.[214] If coverage were voluntary, it is possible that people most likely

210. *See* Pryor, *supra* note 10, at 1741 (noting that "consumer choice might go far in explaining the basic exclusion for intentionally produced bodily harm or property damage"). *See also* Priest, *supra* note 13, at 1547 (arguing insurance markets reflect consumer demand).

211. *See* Croley & Hanson, *supra* note 13, at 1835–95. *See also* Wortham, *supra* note 70, at 861–74 (noting that the insurance market does not reflect predictions of economic theory, including predictions that people do not make rational insurance purchase decisions and are unskilled at probabilistic thinking).

212. *See* Croley & Hanson, *supra* note 13, at 1836 n.157 (arguing that lack of availability of first-party insurance for pain-and-suffering damages is an important factor in the lack of demand for such insurance); Pryor, *supra* note 206, at 144 ("[A] person's lack of desire for a good or opportunity may result from her perception that it will be denied to her.").

213. The idea that the insurance market reflects the demands of the sovereign consumer is undermined by the development of uninsured motorist coverage. According to the leading treatise on uninsured motorist coverage:

> one of the most important things to remember [about uninsured motorist coverage] is that the coverage terms have been almost entirely developed privately by the insurance industry . . . in response to significant pressures for changes in the accident compensation system (so that accident victims would be assured a source of indemnification) and as a means of averting possibly more extensive modifications in the then existing automobile compensation system. . . . [T]he public did not directly influence the terms of the coverage.

WIDISS, *supra* note 162, § 1.14, at 18.

214. For a definition of adverse selection, *see supra* note 203 and accompanying text. As Croley & Hanson note in the context of insurance for nonpecuniary loss:

> Adverse selection occurs because individuals who know in advance either that they are more likely than others to suffer some nonpecuniary loss, or that their nonpecuniary losses would

to cause or suffer domestic violence torts would be most likely to purchase the insurance, therefore driving the price up, perhaps to economically unacceptable levels.[215] If purchase of the coverage was part of the already mandatory car insurance, however, adverse selection would not be a significant problem.[216]

c. Fairness

The costs of domestic violence torts currently are unfairly distributed: They fall almost exclusively on the victims, their employers, and their families. Neither the torts system nor insurance markets are cushioning the blows to individuals by spreading the risk, as they could and should. This is a major social problem and the status quo is unacceptable. Law should promote sharing of the risks and costs of domestic violence torts in view of the enormous, society-wide nature of this problem.[217]

The question may arise as to why this plan should be limited to domestic violence torts and why all intentional torts should not also be included. The response is normative. The problem of domestic violence torts is epidemic.[218] Feminist legal scholarship has shown the importance of domestic violence.[219] In view of the magnitude and extent of domestic violence, public policy supports limiting the insurance plan proposed above to domestic violence torts. Similarly, public policy supports making coverage as broad as possible and thus attaching the coverage to automobile policies.[220]

> be much greater than average for a given accident, or both, are more likely to buy insurance. Their behavior will tend to drive up the price of insurance . . . .

Croley & Hanson, *supra* note 13, at 1851.

215. It is also possible that adverse selection would not be a problem. *See supra* Part III.A.4.a.

216. *See* Wortham, *supra* note 70, at 888 (noting that since automobile insurance is mandatory, adverse selection concerns are lessened).

217. Fairness in risk distribution is a purpose of insurance law. *See* ABRAHAM, *supra* note 19, at 18. This Article argues for broader risk distribution, not for a particular redistribution of risk between specific groups.

218. *See, e.g.*, NATIONAL RESEARCH COUNCIL, *supra* note 4, at 23–29.

219. *See, e.g.*, SCHNEIDER, supra note 2; DALTON & SCHNEIDER, *supra* note 2; sources cited in *supra* note 33; text accompanying notes 137–42.

220. Attaching the coverage to automobile policies ensures broader risk spreading than limiting it to homeowners policies. This would not run afoul of the "insurable interest" doctrine of insurance. The insurable interest doctrine "requires that there be some significant relationship between the insured and the person, the object, or the activity that is the subject of an insurance transaction." KEETON & WIDISS, *supra* note 21, § 3.1(b). This doctrine is related to moral hazard, discussed *infra* at Part III.A.5.a. The basic idea is that people should not receive a net gain from insurance, but should only be indemnified for losses. *See* KEETON & WIDISS, *supra* note 21, § 3.1(b). It is most relevant in contexts of property and life insurance. *See id.* §§ 3.3–3.5, at 149–91. The rationale, which is a public policy against incentives to destroy property or do other bad acts, arguably does not apply to liability insurance. David M. Smith, *Sudden Exposure: Accessing Historic Insurance Policies for the*

The history of the invention of uninsured motorist coverage is instructive when thinking about the failures of insurance and tort mechanisms to deal with domestic violence torts and efforts to improve these mechanisms. The problem of uninsured motorists who could not pay damage claims became particularly serious in the late 1930s.[221] The costs of accidents caused by uninsured motorists rose to unacceptable levels by the early 1950s.[222] Social, economic and political pressures developed for legislation aimed at compensating those injured.[223] In response, the insurance industry developed a plan for uninsured motorist coverage[224] and changes in risk distribution were thus made. This process has taken place in other contexts;[225] it should now happen in connection with domestic violence torts.

5. Objections and Responses

a. Moral Hazard

Critics may argue that insuring domestic violence torts would create an unacceptable "moral hazard." Moral hazard, which applies to all types of insurance, is the broad idea that if people are insured against a particular harm, they will be less likely to avoid that harm, may even suffer it purposely, and may exaggerate their losses once they suffer it.[226]

Environmental Liabilities Associated With Newly Acquired Properties or Operations, 25 ECOLOGY L.Q. 439, 452 (1998). Automobile liability policies currently are limited to liabilities related in some way to the operation of a vehicle. By contrast, homeowners policies have no such limit. Standard homeowners policies indemnify homeowners for any liabilities not covered by an exclusion, even if the liability is not connected with homeownership and even if it greatly exceeds the value of the owner's equity in the home. *See* KEETON & WIDISS, *supra* note 21, at 1133, 1142, App. 1. There is no theoretical reason why automobile liability policies could not extend to domestic violence torts.

221. *See* ALAN I. WIDISS, A GUIDE TO UNINSURED MOTORIST COVERAGE, § 1.4, at 4 (1969).

222. *See id.* § 1.6, at 10. The costs in New York state alone were over seven million dollars a year. *Id.*

223. *See id.* Proposals were developed aimed at compensating people regardless of fault. *See id.*

224. *See id.* § 1.8, at 12.

225. *See supra* text accompanying notes 157–63, 221–25.

226. *See* Croley & Hanson, *supra* note 13, at 1848–50. Tom Baker defines moral hazard has having two components, "situational" moral hazard and "individual" moral hazard. *See* Baker, *supra* note 10, at 120–21. Situational moral hazard is "the effect on incentives whenever one person bears the costs of harm caused by another. In such a situation, the person causing the harm has less incentive to avoid that harm than if (all other things being equal) she bore the full costs of that harm herself." *Id.* at 120 n.65. Individual moral hazard is more difficult to define but it is understood by underwriters to be "part of the character of the individuals . . . that participate in insurance arrangements." *Id.* at 116. An individual's moral hazard, to insurance underwriters, has to do (among other things) with the individual's propensity to take care to avoid harm to herself, her possessions, and other people and their possessions, and an individual's "degree of attachment to other conventional social norms." *Id.* at 117. *See also* ABRAHAM, *supra* note 19, at 14–18 (defining moral hazard more narrowly, as a transaction cost having to do with incomplete information possessed by the insurer about the insured and as being

Tort liability is thought to impose efficient deterrence incentives on potential defendants, since they will have to pay liability judgments out of their own pockets.[227] Liability insurance is thought to skew these incentives, resulting in more harm than would have occurred in the absence of insurance, since insured defendants will not have to pay judgments out of their own pockets.[228] Insurance companies use various devices to control moral hazard, such as deductibles, coinsurance provisions, experience ratings, and risk classification, and take it into account when they set premiums.[229] Other devices to control moral hazard that are particularly relevant to domestic violence torts are "intentional act exclusions"[230] and "family member exclusions" from homeowners policies.

The reason for the "intentional act exclusion" is the concern that, "If the insured is able to shift the cost of his willful misconduct from himself to his insurer, the insured might be less inclined to avoid engaging in such undesirable conduct.[231] Indeed, "The goal of deterring the insured, and those similarly situated, from engaging in willful misconduct is accomplished by taking away the one source of payment to which the victim can confidently look for payment of her claim."[232]

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the "tendency of an insured to underallocate to loss prevention after purchasing insurance"). *See generally* Tom Baker, *On the Genealogy of Moral Hazard*, 75 TEX. L. REV. 237 (1996) (reviewing historical development of moral hazard). Moral hazard is a concern for all insurance. One is likely to be less careful to avoid theft of a car sound system, for example, if it is insured than if it is uninsured. *See* COOTER & ULEN, *supra* note 124, at 50.

227. *See supra* Part.II.D.1. As Abraham writes in the context of accidents, "[t]he old world in which those who caused accidents paid their victims out of their own pockets was a comparatively simple one. In that world, the deterrent effect of tort liability seemed straightforward. In theory at least, a potential defendant could calculate the cost of liability, discounted by the probability of its imposition, and thereby determine whether the benefit to be derived from a hazardous activity was worth seeking. Private law thus could realistically strive to promote optimal levels of safety and risk." ABRAHAM, *supra* note 19, at 45. A similar analysis would apply to intentional torts. *See supra* notes 123–28 and accompanying text.

228. For example, regarding insurance for punitive damages, George Priest claims that "the number of intentional harm-causing actions and the extent of harm intentionally caused would be higher if insurance coverage were available than if insurance coverage were excluded." Priest, *supra* note 69, at 1026.

229. *See* ABRAHAM, *supra* note 19, at 15. *See also* Schwartz, *supra* note 123 (arguing that while deterrence shifts incentives, the extent of the shift depends on the particular type of insurance and factors such as experience rating and deductibles).

230. *See* ABRAHAM, *supra* note 19, at 15. *See also* Baker, *supra* note 10, at 120. As noted above, intentional acts exclusions are one important reason why there is so little litigation of domestic violence torts. *See supra* Part II.C.1. Family member exclusions are discussed further at *infra* text accompanying notes 238–39.

231. Fischer, *supra* note 69, at 111.

232. *Id.* at 96–97.

The exclusion assumes that intentional tortfeasors, including domestic violence tortfeasors, will pay for their torts directly if there is no insurance, and thus, their torts will be best deterred in the absence of insurance.

This moral hazard objection to insuring the intentional acts that constitute domestic violence torts, however, is not convincing. The assumption that the current tort arrangements provide ideal deterrence incentives, is unwarranted.[233] Underenforcement is so great that tort deterrence is minimal to nonexistent.[234] For a range of reasons, individual defendants who commit domestic violence torts generally do not have to pay for that harm directly.[235] The assumption that leaving such harms uninsured provides deterrence of such harms is unfounded.

Instituting a system whereby harm would be insured, but insurance companies would seek reimbursement from insureds, would be likely to create more deterrence, since more tortfeasors would have to pay for their torts.[236] Moreover, unlike today, claims would be brought for domestic violence torts and the costs of domestic violence torts would be more likely to be borne by the perpetrator. Indeed, properly structured insurance is unlikely to decrease deterrence and is in fact likely to increase deterrence through reimbursement and pricing.

The widespread availability of employer liability insurance for employees' intentional torts and sexual harassment underscores the weakness of the moral hazard rationale for refusing to insure individuals' domestic violence torts.[237] Critics might argue that the moral hazard concerns are different and reduced for employers as compared to individuals: because employers are not directly committing intentional torts and sexual harassment, but are merely being insured for liability, the moral hazard created by the insurance is much less than when individuals are insured for their own intentional torts. This argument is weak, however, since the moral hazard issues for the insured employer in the employment setting would be significant. Employers can exercise a great deal of control over the employment setting. If a firm is insured for employees'

233. *See supra* Part II.D.1.

234. *See id.* Not only are individual defendants unlikely to pay for intentional harm directly if there is no insurance, but in the case of harm from domestic violence, specific barriers obstruct enforcement and compensation. For a discussion of short statutes of limitations for intentional torts, see *supra* Parts II.C.3, IV.B.1; for procedural barriers, see *supra* Part II.C.4; and for other factors, see *supra* Part II.C.5.

235. *See supra* Parts II.C.2–4.

236. *See supra* Part II.D.1.

237. *See* Klenk, *supra* note 15, at 330 (noting the availability of third-party insurance covering an employee's sexual harassment).

intentional torts and sexual harassment, it might rationally choose to forego adequate screening, training or supervision of employees which would prevent some of the torts and harassment. Because of the insurance, more intentional torts and sexual harassment would occur. This coverage nonetheless exists, presumably because the social, economic and political justifications for its existence outweigh the moral hazard issues. Similarly, social, economic and political reasons for domestic violence tort coverage outweigh the moral hazard issues.

The "family member exclusion" is included in policies because of moral hazard concerns that family members are particularly likely to engage in fraud and collusion.[238] The widely held assumption that family members are more likely to defraud insurers than others is not universally shared.[239] With no family member exclusion, as the plan proposes, inevitably there will be some fraud and collusion. The possibility of some fraud and collusion, however, must be considered against the backdrop of the current system which excludes all claims, even valid ones, from coverage.

To the extent that moral hazard is a concern, there are ways to combat it short of refusing to insure liability for domestic violence torts altogether. Policies can contain deductibles or coinsurance provisions, which are

238. KEETON & WIDISS, *supra* note 21, § 4.9(c)(1) (noting that family member automobile exclusions were "designed with a view to protecting insurers from collusive suits."). *See, e.g.*, Allstate Ins. Co. v. Feshali, 814 P.2d 863 (Colo. 1991) (acknowledging legislative change which overturned Meyer v. State Farm Mut. Auto. Ins. Co., 689 P.2d 585 (Colo. 1984)); Farmers Ins. Exch. v. Call, 712 P.2d 231 (Utah 1985) (ruling that despite possibility of household collusion, policy of protecting victims of automobile accidents outweighs importance of protecting insurers from possible collusion); Meyer v. State Farm Mut. Auto Ins. Co., 689 P.2d 585 (Colo. 1984) (recognizing possibility of fraud and collusion between family members but holding that public policy in favor of insurance and compensation for those injured in automobile accidents rendered family member exclusion invalid). *See also* Shannon v. Shannon, 442 N.W.2d 25 (Wis. 1989) (upholding family member exclusion in homeowners policy in view of likely bias of family members). *See generally* Joseph W. McKnight, *Family Law: Husband and Wife*, 48 SMU L. REV. 1225 (1995) (noting that while intrafamily immunity was the law of torts, family member exclusions were consistent with the law of torts, but that when immunity was abolished, policy exclusion contradicted tort policy). *See also* Martin J. McMahon, Annotation, *Validity, Under Insurance Statutes, of Coverage Exclusion for Injury or Death of Insured's Family or Household Members*, 52 A.L.R. 4th 18 (1987) (noting that "[p]rovisions excluding from coverage members of an insured's family or household have been held valid and effective to protect the insurer against collusive claims").

239. *See, e.g.*, Whitworth v. Bynum, 699 S.W.2d 194, 197 (Tex. 1985) (announcing that "we refuse to indulge in the assumption that close relatives will prevaricate so as to promote a spurious lawsuit"); Shearer v. Shearer, 480 N.E.2d 388, 393 (Ohio 1985) (arguing that spouses are no more likely to defraud auto insurance companies than are unrelated parties in car accident situations who want to provide compensation to an injured passenger). *See generally* Tobias, *supra* note 36.

common ways of reducing moral hazard.[240] Reimbursement provisions can play an important role.[241] Reimbursement by the insured should undermine moral hazard, since the tortfeasor's assets will be available to reimburse the insurance company.[242] The litigation process contains mechanisms designed to root out problems of fraud and collusion.[243] More claims will be brought than if there were no insurance, and more tortfeasors will pay through reimbursement than they currently pay in the insuranceless world of domestic violence torts. Thus, there should be more deterrence.

b. Public Policy

Critics may argue that insuring domestic violence torts is contrary to public policy. A common justification for the refusal to insure intentional torts, more broadly, is public policy.[244] It is well-established that "an insurer may not contract to indemnify an insured against the civil consequences of . . . willful criminal conduct."[245] Deterrence is often cited as one of the specific public policy reasons for the intentional act exclusion.[246] According to an influential case of the New Jersey Supreme Court, "[w]ere a person able to insure himself against the economic consequences of his intentional wrongdoing, the deterrence attributable to financial responsibility would be missing."[247] As discussed above, however, liability and financial responsibility that exist only in theory do not create tort deterrence.[248] Thus, deterrence is an invalid justification for the intentional acts exclusion.

Another set of public policy arguments stem from the idea that wrongdoers should not benefit from intentional misconduct, and that, therefore, insurance against such conduct should be prohibited.[249] Despite the broad public policy against insuring intentional acts, however, many

240. *See* COOTER & ULEN, *supra* note 124, at 51.

241. *See, e.g.*, Ambassador Ins. Co. v. Montes, A.2d 603, 606 (N.J. 1978) (noting that insurance company may seek subrogation from insured for payment it makes for intentional tort claims).

242. This would also be the case for the uninsured domestic violence tortfeasor policy.

243. *See* Croley & Hanson, *supra* note 13, at 1901–06.

244. *See* KEETON & WIDISS, *supra* note 21, § 5.4(d)(1). The public policy exception can be implied by courts in the absence of an express policy provision. *See id.*

245. *Id.* (quoting *Ambassador Ins. Co. v. Montes*, 388 A.2d 603, 606 (N.J. 1978)). The public policy exclusion that courts might imply could even be broader than the intentional acts exclusion. *See id.*

246. *See supra* text accompanying notes 237–43. The public policy justification overlaps with the moral hazard justification. *See supra* Part III.A.5.a.

247. *Ambassador*, 388 A.2d at 606.

248. *See supra* Part II.D.1.

249. *See* Fischer, *supra* note 69, at 111 (noting California Insurance Statute's justification of "prohibiting indemnification for intentional misconduct").

courts have upheld provisions that do.[250] Moreover, if insurance is provided for financial consequences of intentional wrongdoing, it can include a right of reimbursement so that the insurance company can seek to recover whatever it pays from the insured, and thus the insured will not benefit from his misconduct.[251] The New Jersey Supreme Court articulated the "general principle that an insurer may not contract to indemnify an insured against the civil consequences of his own wilful criminal act," where an insured arsonist's actions had killed four people.[252] The court further stated:

> [W]hen the insurance company has contracted to pay an innocent person monetary damages due to any liability of the insured, such payment when ascribable to a criminal event should be made so long as the benefit thereof does not enure to the [insured]. In furtherance of that justifiable end, under most circumstances it is equitable and just that the insurer be indemnified by the insured for the payment to the injured party. In subrogating the insurer to the injured person's rights so that the insurer may be reimbursed for its payment of the insured's debt to the injured person, the public policy principle to which we adhere, that the assured may not be relieved of financial responsibility arising out of his criminal act, is honored.[253]

According to this reasoning, public policy is not violated when the victim of the intentional wrongdoing may benefit, but not the wrongdoer, since the insurance company may seek reimbursement from the wrongdoer.

250. *See, e.g.*, Andover Newton Theological Sch. Inc. v. Cont. Cas. Co., 930 F.2d 89, 95–96 (1st Cir. 1991); Sch. Dist. of Royal Oak v. Cont. Cas. Co., 912 F.2d 844 (6th Cir. 1990); New Madrid County Reorganized Sch. Dist. No. 1, Enlarge v. Cont. Cas. Co. 904 F.2d 1236, 1242–43 (8th Cir. 1990) (public policy of Missouri allows insurance coverage for insured's intentional acts when the policy provides for such coverage); Solo Cup Co. v. Fed. Ins. Co., 619 F.2d 1178, 1197–98 (7th Cir. 1980); Union Camp Corp. v. Cont. Cas. Co., 452 F. Supp. 565 (S.D. Ga. 1978); Titan Indem. Co. v. Riley, 679 So. 2d 701 (Ala. 1996) (holding Alabama public policy does not forbid enforcement of policy requiring insurer to pay damages for officers' acts of malicious prosecution, assault and battery); Everglades Marina, Inc. v. Am. E. Dev. Corp., 374 So. 2d 517 (Fla. 1979) (ruling Florida public policy allowed enforcement of insurance contract requiring insurer to compensate owners for damage to boats in marina, which insured had intentionally burned); Dixon Distrib. Co. v. Hanover Ins. Co., 612 N.E.2d 846, 847 (Ill. App. Ct. 1993), *aff'd on other grounds*, 641 N.E.2d 395 (Ill. 1994); Indep. Sch. Dist. No. 697, Eveleth v. St. Paul Fire & Marine Ins. Co., 515 N.W.2d 576, 579 (Minn. 1994); Am. Home Assurance Co. v. Fish, 451 A.2d 358, 360 (N.H. 1982) (holding New Hampshire public policy does not forbid insuring for liability arising directly against that insured from intentional torts such as slander and false arrest). *See generally* Sean W. Gallagher, Note: *The Public Policy Exclusion and Insurance for Intentional Employment Discrimination*, 92 MICH. L. REV. 1256 (1994) (discussing courts' treatment of employer liability insurance provisions that by their language seem to cover both unintentional and untentional tort liability).

251. *See id.* at 111–14.

252. *Ambassador*, 388 A.2d at 606. The court went on to list various exceptions to the principle. *Id.*

253. *Id.*

An additional public policy justification for an intentional acts exclusion may be a corrective justice notion that wrongdoers should pay directly for their wrongs.[254] Liability insurance arguably undermines this justification because the wrongdoer does not pay directly.[255] Leaving a victim of a wrongdoer uncompensated, however, is not consistent with corrective justice aims either.[256] Thus, the potential corrective justice justification for the public policy exception is weak.[257]

The public policy of deterrence that is supposedly furthered by the intentional acts exclusion must be considered in light of the public policy effects of refusing to insure domestic violence torts. The refusal to insure means that claims are not brought, tortfeasors do not bear the costs of their torts, and the negative consequences rebound throughout society.[258] "Public policy" is not a compelling objection to the plan.

c. Interference with Free Choice and the Market

Arguments may be made that the current situation of uninsured domestic violence torts simply reflects consumer demand and that consumer demand should not be tampered with.[259] As noted above,[260] however, the current insurance market does not necessarily reflect consumer demand. Moreover, such an argument reflects a simplistic conception of individuals which has been challenged by scholarship incorporating behavioral psychology into law and economics.[261]

The lack of enforcement of tort liability rules and the lack of insurance for domestic violence torts can be seen as market failures, which call for new and different regulation. This proposal's intervention in the market is

254. Under the corrective justice view of tort law, tort law deals with situations where one person wrongfully injuries another, and aims to nullify losses and gains that arise from such situations. *See* David A. Fischer & Robert H. Jerry II, *Teaching Torts Without Insurance: A Second-Best Solution*, 45 ST. LOUIS U. L.J. 857, 868–70 (2001). *See also* Catharine Pierce Wells, *Tort Law As Corrective Justice: A Pragmatic Justification for Jury Adjudication*, 88 MICH. L. REV. 2348, 2350, 2355 (1990). As Ellen Pryor describes this idea, "the combination of an injured victim, along with a wrongdoer that is in some way morally responsible for the injury, gives rise on the victim's part to a claim for compensation or restoration by the wrongdoer." Pryor, *supra* note 10, at 1747.

255. *See id.* at 1748 (noting that when an insured receives insurance coverage for intentionally caused harms, the insured usually does not pay for this coverage through premiums, and thus is excused from paying, which may be inconsistent with corrective justice.) *See generally* Schwartz, *The Ethics and the Economics of Tort Liability Insurance*, 75 CORNELL L. REV. 313 (1990).

256. *See* Pryor, *supra* note 10, at 1748.

257. *See generally* Schwartz, *supra* note 255.

258. *See supra* Part II.D.

259. *See, e.g.*, Priest, *supra* note 13, at 1547 (arguing that insurance markets reflect consumer demand and tort law does not).

260. *See* part III.A.5.

261. *See, e.g.*, Jolls et al., *supra* note 123, at 1490.

likely to have unanticipated effects, as market intervention generally does.[262] Intervention in the insurance market, however, has been justified in the past for a variety of compelling reasons.[263] It is no less justified now.

d. Transaction Costs

Another objection to the plan may be that it would involve such large transaction costs that it would reduce welfare and resources overall.[264] The resources involved in moving costs from the victims of domestic violence torts, to insurance companies, and in turn to the perpetrators, will be high. Insurers' work in classifying risks will be costly, and distributing risks in a way other than the status quo will have costs.[265]

It is difficult to predict whether these costs would reduce overall welfare and resources; many different outcomes are possible. The goal of liability for domestic violence torts is not an efficient level of accidents, as in other tort contexts, but an end to domestic violence torts. Moreover part

262. *See* ABRAHAM, *supra* note 19, at 95–100. One unfortunate effect might be less reporting of domestic violence injuries. This might happen if rates for the "uninsured domestic violence tort policy" were based on an insured's past experience of domestic violence. If a potential insured knew this, she might be less likely to seek medical attention for, or to report domestic violence, in order to keep her rates down, since presumably the insurance company could find this information out through the underwriting process by asking her questions on the application and making her sign releases. Similarly, if rates for the liability portion of the policy were based on whether an insured had committed domestic violence, and a potential insured knew this, a person who committed a domestic violence tort would be more likely to pressure a victim to not report or seek medical attention for her injuries. A more fortunate effect would be that a potential liability defendant, knowing his rates would go up if he were found to have committed domestic violence, would refrain from doing so. Other effects might include insurance companies taking steps to reduce the incidence of domestic violence, *see* Tom Baker, *Insurance and the Law*, *in* THE INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL AND BEHAVIORAL SCIENCES (2002) (describing insurance as a form of private and (delegated) public regulation), and victims of domestic violence torts no longer being pressured to underlitigate, or characterize defendants' actions as negligent rather than intentional. *See* Dalton, *supra* note 4, at 341; Pryor, *supra* note 10, at 1722–23 (describing "underlitigating" of domestic violence claims).

263. *See supra* text accompanying notes 157–65.

264. "Transaction costs" are broadly defined as "the costs of exchange." COOTER & ULEN, *supra* note 124, at 87–88. Although often defined in terms of the costs of voluntary exchange, *see id*, the term also is applied to the costs of an exchange that is accomplished through litigation. *See, e.g.*, Deborah R. Hensler & Thomas D. Rowe, Jr., *Beyond "It Just Ain't Worth It": Alternative Strategies for Damage Class Action Reform*, 64 LAW & CONTEMP. PROBS. 137, 137 n.1 (2001) (noting that litigation fee-shifting schemes would involve transaction costs and citing study of asbestos litigation finding that transaction costs constituted 60% of the total amount paid by defendants); Robin Jones, *Searching for Solutions to the Problems Caused by the "Elephantine Mass" of Asbestos Litigation*, 14 TUL. ENVTL. L.J. 549, 553 (2001) (discussing transaction costs of asbestos litigation). To say that the costs of the plan are such that it would reduce welfare and resources is another way of saying that the plan is inefficient. *See supra* note 129.

265. *See* ABRAHAM, *supra* note 19, at 98–99.

of the goal is greater fairness, and this may conflict with "pure" efficiency concerns.[266] This conflict is present in other contexts and should be resolved in favor of fairness for those injured by domestic violence torts.[267]

6. Conclusion

Starting from the insight that tort law cannot be understood in isolation from insurance, this Section has explained insurance-based reasons why underenforcement of domestic violence tort prohibitions is so extreme.[268] On close inspection, supposedly vital reasons why intentional acts such as domestic violence torts cannot be insured are revealed as weak.[269] Considering a range of insurance contexts, such as employer practices liability insurance[270] and uninsured motorist coverage,[271] the insuranceless world of domestic violence torts emerges as less of an economic or social necessity and more of a policy choice. Strong reasons exist for the choice of a different policy, namely the "Domestic Violence Torts Insurance Plan" outlined here.

B. TORT LAW REFORMS

This Section analyzes the statute of limitations and procedural barriers that contribute to underenforcement of domestic violence tort prohibitions.

1. Statutes of Limitations

Statutes of limitations for intentional torts generally are shorter than for other torts.[272] This is one reason why there have been so few tort suits for domestic violence injuries.[273] This Subsection explores the historical

266. *See id.*

267. If high transaction costs or objections are compelling, an alternative is to greatly expand existing victims compensation funds and adapt them more fully to the needs of domestic violence victims. There are victims compensation funds in every state. *See* Greer, *supra* note 135, at 334. In order for a crime victim to receive compensation funds, a perpetrator does not have to be convicted but the victim must cooperate with the authorities. *See id.* at 366–68. Currently, only a small proportion of victims compensation funds go to domestic violence victims. *See id.* at 348. Funds could seek reimbursement from perpetrators, which might retain deterrence incentives, but this has not been very successful in the past. *See id.* at 382. Special compensation funds have been developed for toxic tort exposure compensation, *see* ABRAHAM, *supra* note 19, at 44–63, and more consideration should be given to such a possibility for victims of domestic violence torts.

268. *See supra* Parts III.A.1–4.

269. *See supra* Part III.A.5.

270. *See supra* text accompanying notes 237–43.

271. *See supra* text accompanying notes 220–25.

272. *See supra* Part II.C.3.

273. *See id.*

background of torts statutes of limitations. It reviews possible reasons for the disparity between the relatively short statutes of limitations for assault, battery, and false imprisonment on the one hand, and the often longer statutes of limitations for negligence, strict liability, and intentional infliction of emotional distress, on the other hand.[274]

Historical analysis reveals that the disparity originated in an Act of Parliament passed in 1623 which provided that assault and related torts had a statute of limitations of four years, while trespass on the case (from which negligence is commonly thought to be derived) had a statute of limitations of six years.[275] Little systematic analysis of the disparities has been undertaken since 1623, at least in the United States.[276] The disparities operate in a manner that tends to prevent suits for torts that arise out of domestic violence. There is no good reason for the disparities. The relatively short statutes of limitations for the types of torts that tend to apply to domestic violence injuries should be extended to be at least commensurate with the statutes of limitations for other torts such as negligence and strict liability. Even better, legislatures should pass statutes of limitations tailored to the issues and dynamics of domestic violence.

a. Historical Background: Lines Drawn in 1623

Before 1623, there were no statutes of limitations for tort claims.[277] In 1623, the English Parliament passed a statute of limitations which divided personal actions into three groups with three different time periods: two, four, and six years.[278] A two-year statute of limitations applied to

274. *See infra* text accompanying notes 275–320.

275. *See* WILLIAM D. FERGUSON, THE STATUTES OF LIMITATIONS SAVING STATUTES 8 (1978).

276. Relatively little academic attention has been paid to the policies underlying statutes of limitations, compared to their ubiquity. *See, e.g.*, *id.* at 9; Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 476 (1897) (noting that statutes of limitations "never have been explained or theorized about in any adequate way"); Harry B. Littell, *A Comparison of the Statutes of Limitation*, 21 IND. L.J. 23, 23 (1945) (noting that statutes of limitations have been supported by courts both in the U.S. and England since the Limitation Act of 1623); John R. Mix, *State Statutes of Limitation: Contrasted and Compared*, 3 ROCKY MTN. L. REV. 106, 106 (1931) (pointing out that statutes of limitations have not developed along practical or logical lines); Tyler T. Ochoa & Andrew J. Wistrich, *The Puzzling Purposes of Statutes of Limitation*, 28 PAC. L.J. 453, 454 (1997) (noting the relative dearth of attention to purposes behind statutes of limitations); *Developments in the Law: Statutes of Limitations*, 63 HARV. L. REV. 1177, 1177 (1950).

277. *See* FERGUSON, *supra* note 275, at 9; Mix, *supra* note 276, at 107; *Developments in the Law: Statutes of Limitations*, *supra* note 276, at 1178.

278. *See* FERGUSON, *supra* note 275, at 13; An Act for Limitation of Actions, and for Avoiding of Suits in Law, 21 Jam. 1, c. 16 (1623) (Eng.), *reprinted in* FERGUSON, *supra* note 275, app. D, at 515 [hereinafter An Act for Limitation of Actions].

slander.[279] A four-year period applied to "Actions of . . . Assault, Battery, Wounding, Imprisonment, or any of them . . . ."[280] A six-year period applied to "[t]respass *Quare clausum fregit,*" trespass, actions upon the case (other than for slander), actions for account, debt, detinue, and replevin for goods and chattels.[281] These time periods were tolled for persons "under disability"[282] such as minors, married women, and persons in jail or at sea.[283] After the disability for such persons was removed, they had ten years to pursue their cause of action.[284]

b. Current State Laws

Most states derived their statutes of limitations from the 1623 Act.[285] Current state statutes of limitations generally lump assault, battery and false imprisonment together in a short time period,[286] and also typically fix a time period for "all other actions,"[287] known as a "residual" statute of limitations.[288] These "residual" statutes of limitations typically are longer than the statutes of limitations for assault, battery, and false imprisonment.[289] The longer "residual" statute of limitations generally is applied to negligence,[290] and runs for six years.[291] In the 1623 statute, the time period for bringing "actions upon the case" is six years.[292] The "action upon the case" was the predecessor of negligence liability.[293] Thus, the relatively long statute of limitations for negligence currently in effect in most states derives from the 1623 Act, which set a relatively long statute of limitations for actions on the case and for certain other actions. Similarly, the relatively short statute of limitations for assault and various other intentional torts derives from the 1623 Act. More recent additions to the

279. *See* FERGUSON, *supra* note 275, at 13; An Act for Limitation of Actions, *supra* note 278, ¶ III, at 517.

280. An Act for Limitation of Actions, *supra* note 278, ¶ III, at 517.

281. *See id.* at 516.

282. *See* FERGUSON, *supra* note 275, at 13.

283. *See id.*

284. *See id.*

285. *See id.* at 46; Mix, *supra* note 276, at 108.

286. *See* Carrillo, *supra* note 64. Miscellaneous statutes of limitations pertain to specific subjects such as construction injuries and products liability. *See id.*

287. *See Developments in the Law: Statutes of Limitations*, *supra* note 276, at 1179.

288. *See, e.g.*, Owens v. Okure, 488 U.S. 235, 245–47 (1989).

289. *See supra* note 87. *See Owens*, 488 U.S. at 245–48 (noting that states have various statutes of limitations for intentional torts but that each state has a "general or residual" statute of limitations). These range from one to ten years. *See also Carrillo*, supra note 64.

290. *See id*.

291. *See id.*

292. *See* An Act for Limitation of Actions, *supra* note 278, ¶ III, at 516.

293. *See* PROSSER AND KEETON ON TORTS, *supra* note 38, § 6, at 30–31.

torts roster, such as products liability and intentional infliction of emotional distress, also generally fall within the "residual" statute of limitations that derives from the original trespass on the case statute of limitations.[294] As in the 1623 statute, current state laws usually contain provisions that postpone or extend the relevant time period in specific circumstances.[295]

c. Rationales

The historical record is not clear as to why the 1623 Act was passed.[296] William Ferguson makes an argument based on the structure of the statutes of limitations to conclude that "it logically appears that the primary purpose of the statutes was to protect defendant against loss of witnesses and evidence and to protect his acts in reasonable reliance upon plaintiff's inaction."[297] Tolling provisions that delay accrual of the statute of limitations until the plaintiff is no longer under a disability apply where competing interests outweigh protecting the defendant.[298] This general explanation, however, does not shed light on why the specific decisions were made as to the appropriate length of statute of limitations for different kinds of suits. [299]

Systematic analysis of the operation of statutes of limitations is virtually nonexistent in the United States, presumably because under federalism, each state chooses its own statutes of limitations and the issues are not analyzed at a national level.[300] By contrast, in England and Wales in the twentieth century, numerous official bodies have reviewed statutes of

294. *See supra* note 87.

295. *See Developments in the Law: Statutes of Limitations*, *supra* note 276, at 1179.

296. *See* FERGUSON, *supra* note 275, at 40–41.

297. *Id.* at 43. Another source draws an inference from other laws passed contemporaneously that the Act was intended to "keep out of the King's courts what might be considered inconsequential claims, and, incidentally, to minimize the hardship which suit in the King's courts imposed on poor defendants." *Developments in the Law: Statutes of Limitations*, *supra* note 276, at 1178.

298. Tolling provisions represent "instances where competing interests outweigh the interest of the defendant. The few instances where the plaintiff could not sue because of a disability existing when the cause of action accrued exemplify this principle. Since the plaintiff could not protect himself, it would be unfair to punish him by applying the statute." FERGUSON, *supra* note 275, at 44.

299. If the purpose was to protect the defendant against loss of witnesses and evidence, why set a period of six years, rather than one year, for trespass actions? If such was the purpose, why have different lengths of time for different actions? Why have four years to bring an assault action but six for replevin actions for goods? It seems that witnesses and evidence in both types of cases would be affected by the passage of time. *But see* Ochoa & Wistrich, *supra* note 276, at 471–82 (noting that some evidence becomes clearer over time).

300. *See infra* notes 303–19.

limitations and reported to Parliament.[301] Interestingly, the disparity between the statute of limitations for intentional torts and for negligence suits now cuts the opposite way in England and Wales, which have a three-year statute of limitations for negligence and a six-year statute of limitations for intentional torts.[302]

The United States Supreme Court wrote in 1989, in the context of deciding which state statute of limitations should apply to claims brought under 42 U.S.C. § 1983, that "[p]redictability . . . [is] a primary goal of statutes of limitations."[303] The principle of predictability, however, does not reveal how long a statute of limitations needs to be, only that there needs to be a statute of limitations. Two scholars have shown that the simple-minded invocation of various policies in support of statutes of limitations often does not reflect the complexity of actual situations.[304]

The reasons for the current overall disparity between statutes of limitations for many intentional torts, on the one hand, and negligence, on the other hand, remain unclear. In one of the few articles that compares different states' statutes of limitations, John Mix in 1931 noted that the six-year limit of many statutes of limitations for many causes of action has historical reasons, "[b]ut there seems to be no logical or practical basis for the other differences in time limits."[305] The derivation of contemporary statutes of limitations from the 1623 Act seems to be the most reasonable

301. *See, e.g.*, *In re* Stubbings v. United Kingdom, No. 36-37/1995/542-543/628-629, ¶ ¶ 28–35 (Eur. Ct. H.R. 1996), *at* http://www.echr.coe.int/hudoc (recounting history of statute of limitations commissions).

302. *See id.* ¶ ¶ 35–36. In *Stubbings*, the European Court of Human Rights rejected a challenge to the six-year statute of limitations for intentional torts brought by adult victims of child sexual abuse, who filed suit more than six years after their eighteenth birthday (the statute of limitations having been tolled until their eighteenth birthday by operation of law). Plaintiffs argued *inter alia* that they did not realize that the childhood sexual abuse may have caused their mental problems until more than six years after they turned eighteen, and that the court's refusal to let them sue denied them rights of access to court and to be free from discrimination. The statute of limitations for negligence was extendable in appropriate circumstances but not for other torts. *See id.* ¶ 36. Recognizing that the statue of limitations for child sexual abuse might need to change in view of recent knowledge about sexual abuse, *id.* ¶ 56, the Court nonetheless held that the existing statute of limitations, which barred their claims, was acceptable, *id.* ¶ ¶ 8–29, 43, 57, 72, 75.

303. Owens v. Okure, 488 U.S. 235, 240 (1989).

304. Ochoa & Wistrich, *supra* note 276, at 471–82. For example, while statutes of limitations often are justified as reflecting a policy to minimize deterioration of evidence, in some situations evidence actually becomes clearer, as opposed to less clear, with time. *See id.* They note that shorter statutes of limitations are sometimes passed for political reasons, such as the reduction of wrongful death claims from two years to one year in 1905, which they believe was a response to increased industrialization. *See id.* at 499.

305. Mix, *supra* note 276, at 117. Mix argued that a uniform law of statutes of limitations should be adopted. *See id.*

explanation for the overall disparity between intentional torts and other claims.[306]

One might speculate that a shorter statute of limitations means that a particular cause of action is disfavored, but analysis shows otherwise. As the *Harvard Law Review* editors noted in 1950, "[m]any special statutes provide for relatively short periods of a year or less, apparently indicating disfavor of the action or a policy in favor of particularly quick settlement. Suits for slander . . . are frequently subject to short statutes."[307] The 1623 Act provided a two-year statute of limitations for slander.[308] It does not make sense, however, to say that suits for all intentional torts are simply "disfavored," when it is these kinds of torts, not negligence, for which punitive damages can be awarded,[309] when it is widely recognized that the acts for which recovery is sought are more reprehensible than, for example, negligent acts,[310] and when some of these same torts are nondischargeable in bankruptcy because of their seriousness.[311] Similarly, the idea that the major purpose of statutes of limitations is "undoubtedly one of fairness to the defendant"[312] is unpersuasive. If fairness to the defendant is the primary consideration, so that the defendant after a certain time can "rest easy," there is no reason why statutes of limitations for intentional torts should be shorter than for negligence. Many statutes of limitations, counterintuitively, let the more egregious wrongdoer rest easy well before the negligent wrongdoer can.

Perhaps there are specific policy reasons for having shorter statutes of limitations for assault, battery, and false imprisonment than for negligence and other torts.[313] One possibility is that it is easier to identify the

306. *See supra* text accompanying notes 285–99.

307. *Developments in the Law*: *Statutes of Limitation*, *supra* note 276, at 1180.

308. *See* FERGUSON, *supra* note 275, at 13; An Act for Limitation of Actions, *supra* note 278, ¶ III, at 517.

309. *See* DOBBS, *supra* note 38, § 381 (noting that punitive damages are awarded in a variety of circumstances for egregious acts including battery and that "[s]ome courts insist upon malice, ill-will, and intent to injure, evil motive or the like, while others have found it sufficient that the defendant engages in wanton misconduct with conscious indifference to risk").

310. *See* sources cited *supra* note 28.

311. *See* 11 U.S.C. § 523(a)(4) (2001) (barring debts for fraud committed while debtor was acting in a fiduciary capacity); § 523(a)(6) (prohibiting debts for willful and malicious injury by the debtor to another entity for to the property of another entity); § 523(a)(9) (preventing discharge for death or personal injury caused by the debtor's operation of a motor vehicle if such operation was unlawful because the debtor was intoxicated from using alcohol, a drug or another substance).

312. *Developments in the Law: Statutes of Limitations*, *supra* note 276, at 1185.

313. The deep historical basis of the disparity is not in itself a justification for its continuation. As Oliver Wendell Holmes famously stated, "[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV." Holmes, *supra* note 276, at 469.

defendant in an assault or battery case than in other kinds of cases, so the burden should be on the plaintiff to bring the case sooner.[314] But this is not always the case, for as in the case of an unconsented to action in surgery, it may be difficult to identify the defendant.[315] But even if it is easier for the plaintiff to identify an intentional tort defendant than other defendants, this is not a compelling reason for the statute of limitations to be shorter for such claims. Since intentional torts are more reprehensible[316] than other torts, the policy reasons would cut the other way. Deterrence is especially important for intentional torts, in view of their seriousness; moreover, for deterrence to work, claims must be brought.[317] A short statute of limitations prevents meritorious claims from being brought, undercutting deterrence incentives.

d. Conclusion

The disparity between assault, battery, and false imprisonment on the one hand, and negligence and other torts, on the other hand, goes back almost four centuries. When the 1623 Act was passed, coverture was in full force, thus a wife suing a husband for battery was inconceivable.[318] Parliament could not have been considering the circumstances of persons injured by domestic violence torts when it determined the categories to which each time period would apply. Now that interspousal tort immunity has been abrogated, other barriers to spouses seeking tort relief for injuries inflicted during a marriage have come to light. These include the practical impossibility of suing a spouse for domestic violence torts while the marriage is still in effect.[319] Safety, economics, and psychology also are barriers to filing such lawsuits, either while a relationship is ongoing or in its immediate aftermath.[320] These short statutes of limitations are not designed for domestic violence torts, but for situations where the types of barriers mentioned above are not present.

The disparity between short statutes of limitations for assault, battery and false imprisonment, and other torts, operates particularly to bar claims for domestic violence torts. This, in itself, is a compelling reason to

314. *See* VINCENT R. JOHNSON & ALAN GUNN, STUDIES IN AMERICAN TORT LAW 829 (2d ed. 1999).

315. *See, e.g.*, Ybarra v. Spangard, 154 P.2d 687 (Cal. 1944) (holding that when plaintiff receives injuries while unconscious and in the course of medical treatment but is unable to identify the person causing the injury, everyone who might have caused the injury must explain conduct).

316. *See* sources cited *supra* note 28.

317. *See supra* Part II.D.1.

318. *See* Tobias, *supra* note 7, at 101; Tobias, *supra* note 36, at 359.

319. *See supra* Part II.C.3.

320. *See supra* Parts II.C.3, II.C.5.

eliminate it by extending the statute of limitations for these torts to be at least commensurate with the statute of limitations for negligence. Moreover, states that have short statutes of limitations for all torts should consider lengthening them in view of the considerations outlined here. Indeed, given the dynamics of domestic violence,[321] it makes sense to have a statute of limitations designed for domestic violence torts. California has adopted a useful approach. The California statute provides that a domestic violence tort case must be filed within three years of the later of two events:[322] the date of the last act of domestic violence,[323] or within three years of the date the plaintiff discovered or should have discovered that the plaintiff's injury or illness resulted from defendant's act of domestic violence.[324] This approach combines a relatively short statute of limitations, three years, with sensible points at which the clock should start running. Alternatively, Michigan provides a longer period for domestic violence claims than for other intentional tort claims: five years for assault and battery claims brought by former intimate partners, and two years for assault and battery by others.[325] Although the merits of each may be debated,[326] both are superior to the current situation; California's may be the most appropriate given the realities of domestic violence.

2. Procedural Reforms

Some courts have required that tort claims be filed with divorces.[327] There are many reasons this should be rejected. It forces the victim to assert tort claims at a time when it may be very perilous, even life-threatening in some instances, to do so.[328] Moreover, there are institutional reasons why joinder should not be required. Family courts and judges generally[329] are not equipped to deal with tort claims. Juries do not decide divorce issues but do decide tort claims, so complex joinder issues may

321. *See supra* Parts II.C.3, II.C.5.

322. *See* CAL. CIV. PROC. CODE. § 340.15 (West 2001).

323. *See id.* § 340.15(a)(1).

324. *See id.* § 340.15(a)(2).

325. MICH. STAT. ANN. § 27A.5805 (2000) (Five-year statute of limitations for assault or battery brought by person assaulted or battered by former spouse or intimate partner; two years for assault and battery).

326. *See* Dalton, *supra* note 4, at 362–63 (arguing for a tolling provision specific to domestic violence cases).

327. *See supra* Part II.C.3.

328. *See supra* text accompanying notes 90–91.

329. Some family court judges are qualified. *See* Digges, *supra* note 62 (recounting Michigan judge's efforts to educate family law practitioners on tort claims for domestic violence). *See* Alexander v. Alexander (Wayne County Mich. Circuit Ct. July 11, 2000) *available at* http://www.lawyersweekly usa.com/opinions.

arise if tort claims must be asserted at the time of divorce.[330] Judges who hear family cases may not have authority to hear jury cases.[331] A requirement that all potential tort claims be joined with divorces would likely increase the number of such claims,[332] undermining the "no-fault" policy that currently predominates in our family law system.[333] By contrast, it is likely that if separate tort claims can be brought later, only the more serious claims will be brought. On the other hand, in some cases joinder may be appropriate and should be permitted.[334]

Clare Dalton persuasively concludes, as have the supreme courts of several states,[335] that claimants should not be forced to join their tort claims with divorce lawsuits:[336]

> The most crucial argument in favor of allowing a woman to wait until her divorce is resolved before she brings a tort action against her abuser is that unless the legal system preserves this option, a tort remedy will be foreclosed altogether for any woman who feels that pursuing a claim is simply too dangerous, until such time as her separation from her abuser has been successfully accomplished, and a structure has been put in place that sets limits to his interactions with her and her children. If she is forced to pursue the tort claim together with the divorce, or even to notify the probate court that she is bringing it, or plans to bring it in another court, she may well forfeit the claim to buy her safety. But if the legal system encourages or facilitates this choice, it rewards her abuser by reinforcing his belief that violence, or the threat of violence, is an effective strategy to secure his interests.[337]

Concerns that a person might receive a double recovery, first through the divorce property division or alimony, and second through the tort case, can be satisfied by ensuring that a tort recovery is reduced by amounts

330. *See, e.g.*, Henricksen v. Cameron, 622 A.2d 1135, 1141 (Me. 1993).

331. Almost every state has a separate family or probate court designed to deal with family matters.

332. *See* Delahunty v. Massachusetts Mut. Life Ins. Co., 674 A.2d 1290, 1296 (Conn. 1996).

333. *See Henricksen*, 622 A.2d at 1141. The idea of "no-fault" often fits uneasily with the reality of family breakups. This disconnect has been noted by many. *See, e.g.*, Barbara Bennett Woodhouse, *Sex, Lies, and Dissipation: The Discourse of Fault in a No-Fault Era*, 82 GEO. L. J. 2525, 2526–27 (1994); GLENDON, *supra* note 145, at 104–11.

334. *See* Fines, *supra* note 93, at 299; Krohse, *supra* note 93, at 954–55.

335. *See, e.g.*, *Delahunty*, 674 A.2d 1290; *Henricksen*, 622 A.2d 1135.

336. Dalton, *supra* note 4, at 386–88.

337. *Id.* at 386–87.

recovered through the divorce that were awarded because of the tortious conduct of one of the spouses.[338]

3. Conclusion

Two straightforward reforms should be considered to begin to address tort-related reasons for the underenforcement of domestic violence tort prohibitions. First, statutes of limitations that apply to domestic violence tort claims must either be extended to the length of the applicable statute or by developing a statute designed for domestic violence claims. Second, joinder of tort claims with divorce claims must be permissive rather than mandatory.

IV. THE ACCIDENT-CENTERED FOCUS OF TWENTIETH-CENTURY TORT LAW AND ITS IMPLICATIONS

A. INTRODUCTION

Having analyzed and proposed specific responses to the insurance and tort obstacles to domestic violence tort liability, this Part considers the implications of the "accident-centered" focus of twentieth-century, U.S. torts scholarship.[339] This focus originated in the latter part of the nineteenth and early twentieth century,[340] when domestic violence torts were invisible and inconceivable.[341] Much twentieth-century torts scholarship, with its focus on accidentally-caused harm, implicitly assumes that the intellectual and practical problems of intentionally caused harm have been addressed and, presumably, solved.[342] Despite significant changes that make domestic violence torts cognizable, they have remained largely invisible in mainstream legal scholarship.[343]

B. TWO INFLUENTIAL COMMENTARIES

The focus on accidents and the simultaneous notion that the law and problems of intentionally caused harm are archaic can be traced back at

338. *See id.* at 388–94. In states with a comprehensive no-fault policy, tortious conduct of one of the spouses will not affect divorce allocation of property or alimony anyway. *See, e.g.*, *Henricksen*, 622 A.2d at 1141.

339. *See generally* Grey, *supra* note 124 (examining accident-centered concept of torts and tracing its origins).

340. *See id. See infra* Part IV.B.

341. *See infra* text accompanying notes 352–67.

342. *See infra* notes 352–72.

343. *See infra* notes 366–82.

least to Oliver Wendell Holmes' influential 1897 essay, *The Path of the Law*:[344]

> Our law of torts comes from the old days of isolated, ungeneralized wrongs, assaults, slanders, and the like . . . But the torts with which our courts are kept busy to-day are mainly the incidents of certain well known businesses. They are injuries to person or property by railroads, factories, and the like.[345]

Holmes' empirical observation that claims for industrial injuries were brought frequently in 1897, implies that assault and slander claims were less frequent. More importantly, he is identifying assault and slander with the past, and industrial injuries with the future.[346]

Roscoe Pound made a similar point about the progress beyond intentional torts:

> [I]n civilized society men must be able to assume that others will do them no intended injury—that others will commit no intentional aggressions upon them. The savage must move stealthily, avoid the sky-line and go armed. The civilized man assumes that no one will attack him and so moves among his fellow men openly and unarmed, going about his business in a minute division of labor. Otherwise there could be no division of labor beyond the differentiation of men of fighting age, as we see it in a primitive society . . . Everywhere *dolus*[347] is first dealt with. The system of nominate derelicts or nominate torts, both in Roman law and in our law, proceeds on this postulate.[348]

Introducing the idea of negligence, Pound goes on to assert that "in civilized society men must be able to assume that their fellow men . . . will [act] with due care" so as not to impose an unreasonable degree of risk upon them.[349] The underlying notion is that the law and problems of assaults and "intentional aggressions"[350] were resolved a long time ago, and both law and society have moved on to less obvious and more challenging problems. While Pound's statement is unusually explicit, this

344. *See* Holmes, *supra* note 276. Thomas Grey, in a recent article, traces the focus on accidents and negligence even further, to an 1873 essay by Holmes entitled *The Theory of Torts.* Grey, *supra* note 124, at 1232.

345. Holmes, *supra* note 276, at 467.

346. This is not to assert that he developed his tort theories in response to the increasing predominance of negligence claims. Grey argues that Holmes' motives in placing accidents and negligence at the center of torts stemmed from his desire to create a coherent theory rather than a response to the concrete problem of accidental injury. *See* Grey, *supra* note 124, at 1257.

347. *Dolus* is guile, deceitfulness, malicious fraud. BLACK'S LAW DICTIONARY 483 (6th ed. 1990).

348. ROSCOE POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 169–70 (1922).

349. *Id.* at 170.

350. *Id.* at 169.

idea appears to be an implicit assumption in much twentieth-century torts scholarship.[351]

At the time Holmes and Pound suggested that intentional torts were a concern of the past, actions by husbands that caused harm to wives were rarely recognized by the legal system, and domestic violence, as we recognize it today, was legally nonexistent.[352] Interspousal tort immunity was universal when Holmes wrote in 1897,[353] and was the rule in a large majority of the states when Pound wrote in 1922.[354] While in the late nineteenth century it was no longer legal for husbands to physically "chastise" their wives,[355] courts and lawmakers "routinely condoned violence in marriage."[356] The rhetoric of privacy and domestic harmony was used to justify interspousal tort immunity from the late nineteenth century into the second half of the twentieth century.[357]

Pound's description of the olden days of uncontrolled aggression and the modern days of civilized society explicitly takes men as its model.[358]

351. *See, e.g.*, Grey, *supra* note 124, at 1228 (asserting that "accidental injury is what tort law is really all about").

352. *See* Tobias, *supra* note 36, at 385–422.

353. *See id.* at 383 (noting that during the period from 1863-1913, judges unanimously rejected interspousal suits seeking personal injury damages).

354. *See id.* at 409, 421 (noting that between 1914 and 1920, seven courts rejected interspousal tort immunity and seven courts affirmed the immunity). A divided Supreme Court upheld interspousal immunity in the 1910 case of Thompson v. Thompson, 218 U.S. 611 (1910). Justice Holmes joined the dissent of Justice Harlan. The dissent and majority opinions used "cryptic methods" to reach their results. Tobias, *supra* note 36, at 401. In the 1920s, the rejection of interspousal tort immunity slowed, and maintained a very slow pace until it accelerated in the 1970s. *See id.* at 422.

355. *See* Siegel, *supra* note 36, at 2118, 2129–42, 2162–66.

356. *See id.* at 2130.

357. *See id.* at 2150–70. This is not to say that women never received tort compensation prior to the second half of the twentieth century. *See* Margo Schlanger, *Injured Women Before Common Law Courts 1860–1930*, 21 HARV. WOMEN'S L.J. 79 114–32 (1998) (describing how courts required common carriers to accommodate physical limitations of female passengers or face liability for negligence).

358. It is also plausible to conclude that in Pound's description of "the savage" as opposed to the "civilized man," there is a racial subtext of "savage" coding as "black" and "civilized man" coding as "white." *See* Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?*, 77 CORNELL L. REV. 1258, 1264 (1992) (noting late nineteenth-century media images of male blacks as brutish and bestial); Jennifer Wriggins, *Rape, Racism, and the Law*, 6 HARV. WOMEN'S L.J. 103, 108 (1983) (describing late nineteenth-century and early twentieth-century stereotypes of black males as criminal and bestial). *See generally* Amy H. Kastely, *Out of the Whiteness: On Raced Codes and White Race Consciousness in Some Tort, Criminal, and Contract Law*, 63 U. CIN. L. REV. 269, 280–314 (1994) (describing how white race consciousness pervades many areas of law although it is not explicitly described as such); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

Pound's reference to "men of fighting age,"[359] for example, can only refer to males since traditionally in this country only males have officially been used in combat.[360] Similarly, Pound's reference to the "civilized man . . . going about his business in a minute division of labor,"[361] cannot plausibly be read as referring both to men and women. When Pound wrote, women were not generally considered to be in the category of "civilized [men] . . . going about [their] business."[362] When Pound implied that intentional torts were vestigial, he did not consider the harm to married women by their husbands that interspousal immunity and other factors sheltered from view.[363] The idea, expressed by these thinkers in the late nineteenth and early twentieth century, that intentional torts were remnants of the past, only made sense if one did not consider the realities of interpersonal violence to include domestic violence.

Holmes's references to intentional torts as being by or against "neighbors" are other indications of the invisibility of domestic violence.[364] He also refers to situations "when A assaults or slanders his neighbor, or converts his neighbor's property."[365] These are clearly references to people outside the home.

C. RECENT DEVELOPMENTS

Consistent with these early pronouncements, post World War II torts scholarship has tended to focus on accidental injury, rather than on

359. POUND, *supra* note 348, at 169.

360. *See* Rostker v. Goldberg, 453 U.S. 57 (1981) (upholding male-only selective service registration requirement against sex discrimination challenge).

361. POUND, *supra* note 348, at 169.

362. *See id. See also* Tobias, *supra* note 36, at 433 (noting that between the 1920s and the 1940s "prominent public figures and organs of popular culture persistently reinforced the notion that a woman's proper place was in the home"). Of course, the notion that "a woman's proper place was in the home" did not apply to black women, who were expected to work outside their homes, but only to some white women. *See generally* BLACK WOMEN IN WHITE AMERICA: A DOCUMENTARY HISTORY 227–84 (Gerda Lerner ed., 1972); JULIE A. MATTHEI, AN ECONOMIC HISTORY OF WOMEN IN AMERICA 94–97, 133–36 (1982).

363. This is not to attribute any malevolence to either Holmes or Pound, but rather simply to acknowledge the context in which they wrote. Likewise, judges who developed interspousal immunity doctrines, "[t]hey could well have harbored the good faith conviction that privacy and domestic harmony were important social values that required protection as they superintended the marriage relation through a period of turbulent legal transformation." Siegel, *supra* note 36, at 2180.

364. HOLMES, *supra* note 14, at 68. For example, Holmes wrote in THE COMMON LAW that "[e]very man, it is said, has an absolute right to his person, and so forth, free from detriment at the hands of his neighbors." *Id.*

365. *Id.* at 63.

intentional torts.[366] Reflecting this focus, the introduction to the discussion draft of the 1999 Restatement (Third) of the Law of Torts declares that "[t]he problem of accidental injury is what many see as the core problem facing modern tort law."[367] Intentional torts are peripheral to much torts scholarship.[368] Similarly, despite the persistent problem of domestic violence and the abolition of interspousal immunity, Holmes's assumptions about torts and neighbors continue in recent scholarship. For example, David Owen wrote in 1995 that "[t]he law of torts concerns the obligations of persons living in a crowded society to respect the safety, property, and personality of their *neighbors*."[369] The idea that family members cause harm to each other still is not included in the overarching conception of what constitutes "tort law." The unstated assumptions of torts scholars seem to be that the doctrines of intentional torts are robust and not in need of further exploration or development, that intentional torts occur less frequently than in the past, or that these torts should be dealt with by criminal law rather than torts.[370]

366. *See infra* text accompanying notes 367–82.

367. RESTATEMENT (THIRD), *supra* note 28, at xxi.

368. *See generally* Grey, *supra* note 124 (noting that many torts scholars consider accidental injury to be the primary domain of torts). There is some recent scholarship concerning intentional torts, such as a substantial body of scholarship arguing that racial insults and epithets should be compensable under intentional infliction of emotional distress theories. *See, e.g.*, MARI J. MATSUDA, CHARLES R. LAWRENCE III, RICHARD DELGADO & KIMBERLE WILLIAMS CRENSHAW, WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT (1993); Okianer Christian Dark, *Racial Insults: "Keep Thy Tongue From Evil,"* 24 SUFFOLK. U. L. REV. 559 (1990); Richard Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989). Others have argued for application of the intentional infliction of emotional distress tort to new contexts. *See, e.g.*, Regina Austin, *Employer Abuse, Worker Resistance, and the Tort of Intentional Infliction of Emotional Distress*, 41 STAN. L. REV. 1 (1988); Susan Etta Keller, *Does the Roof Have to Cave In?: The Landlord/Tenant Power Relationship and the Intentional Infliction of Emotional Distress*, 9 CARDOZO L. REV. 1663 (1988). In addition, some more general scholarship has treated intentional torts as centrally important. *See, e.g.*, Timothy D. Lytton, *Rules and Relationships: The Varieties of Wrongdoing in Tort Law*, 28 SETON HALL L. REV. 359 (1997) (developing relational approach to tort liability). This is not intended to be a comprehensive list of twentieth-century torts scholarship dealing with intentional torts.

369. OWEN, *supra* note 16, at 7 (emphasis added).

370. Economic analysis of tort law has focussed primarily on accidents rather than intentional torts; in some instances, tort law is implicitly or explicitly defined as law concerning the problem of accidental injury. *See, e.g.*, BARNES & STOUT, *supra* note 123, at 27 (stating that the economic analysis of tort law deals with determining risk of loss created by activities that result in *accidental* personal injuries or destruction of property); CALABRESI, *supra* note 124; COOTER & ULEN, *supra* note 124, at 429 (stating that tort law concerns *accidental* harm and criminal law concerns intentional harm); Virginia E. Nolan & Edmund Ursin, *The Deacademification of Tort Theory*, 48 U. KAN. L. REV. 59, 61 (1999) (criticizing corrective justice scholars for not dealing with "the problem of accidental injury"). *See generally* Grey, *supra* note 124 (noting widespread perception that tort law is primarily about accidents). Richard Posner's ECONOMIC ANALYSIS OF LAW (4th ed. 1992), for example, devotes about

The general fact that compensation for injuries caused by intentional acts is less likely than compensation for accidentally caused injury is well known.[371] It is perplexing that torts scholarship ignores the disparity or accepts it as "somewhat ironic[]," while acknowledging that intentional torts are "considerably more serious" than negligence.[372] If one defines the central problem of torts as the problem of accidental injury, one excludes vast realms of human experience from close analysis. The most common cause of nonfatal injury to women in the United States[373] is placed at the periphery of torts. The torts that are the most serious and reprehensible[374] are treated as the least important.

Since the late nineteenth and early twentieth century, major changes in family law and in the law related to women's status have taken place. Interspousal tort immunity is virtually dead.[375] Divorce is now widely available.[376] Marriage rates have declined significantly in the past several

six pages to intentional torts and forty-six pages to the rest of torts. Some of the material on non-intentional torts relates to intentional torts also, such as material on causation, but the main focus is on non-intentional torts. *See* POSNER, *supra* note 12. William Landes and Richard Posner's THE ECONOMIC STRUCTURE OF TORT LAW (1987) covers intentional torts in 41 pages out of 316 pages. *See* LANDES & POSNER, *supra* note 12. Interestingly, Cooter & Ulen subsume intentional torts into crimes because of a perceived similarity between the two. *See* COOTER & ULEN, *supra* note 124, at 288–89; while Posner conflates many intentional torts with negligence because of the economic similarity between the two. *See* POSNER, *supra* note 12, at 206–08. Law and economics has not ignored intentional torts, but intentional torts have not been a central focus. Economic theories have had great influence in tort scholarship. *See* OWEN, *supra* note 16, at 3 (noting that by the early 1980s, "the economic theorists' utility and efficiency-based approaches . . . had become entrenched as the dominant theoretical [tort] scholarship of the time"). Corrective justice, which sees tort law as "a means of rectifying wrongful losses, not inefficient exchanges," has not had intentional torts as a central focus. *See id.* at 5. *See, e.g.*, COLEMAN, *supra* note 28; ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW (1995). *But see* John Finnis, *Intention in Tort Law*, *in* OWEN, *supra* note 16, at 233–37, 242–47 (criticizing Posner's analysis of intentional torts as incoherent and as inappropriately applying utilitarian analysis to normative issues); Epstein, *supra* note 28, at 391–92.

371. As the Restatement states:

> [s]omewhat ironically—given that intentional torts are deemed considerably more serious than torts of mere negligence—in certain circumstances the plaintiff is worse off if the tort committed against the plaintiff is classified as intentional rather than negligent. In some jurisdictions, for example, the statute of limitations is shorter for intentional torts than for negligent torts . . . . The plaintiff may expect to collect an eventual judgment from the defendant's insurance policy, and that policy may exclude coverage for intentional torts; accordingly, the plaintiff can be worse off if the tort is intentional rather than negligent.

RESTATEMENT (THIRD), supra 28 § 1 cmt.a.

372. *See id.*

373. *See* text accompanying *supra* note 1.

374. The Restatement introductory draft notes that "intentional torts are deemed considerably more serious than torts of mere negligence." RESTATEMENT (THIRD), *supra* note 28, § 1a. *See supra* note 28 and accompanying text.

375. *See* Tobias, *supra* note 36, at 478.

376. *See generally*, GLENDON, *supra* note 145, at 63–111 (examining U.S. and European divorce law).

decades.[377] Domestic violence has come to light and continues to be much discussed.[378]

One might expect that the abrogation of interspousal tort immunity and the societal recognition of domestic violence, which opens up new realms of harm to analysis, would have prompted some reflection among mainstream tort scholars about tort issues involving domestic violence. But this largely has not happened. A limited legal literature discusses torts of domestic violence, but sustained attention to issues such as deterrence or compensation related to such torts largely is lacking.[379] Twenty-first century torts scholarship must acknowledge the problem of domestic violence torts and should see the problem of domestic violence torts as a core problem of tort law.

V. CONCLUSION

Common law tort remedies are broad enough to encompass liability for domestic violence torts. Yet, insurance and torts contain structural barriers that lead to lack of enforcement. These structural barriers have largely been taken for granted. This Article has examined many of these barriers and developed ideas to begin to surmount them.

The myopic focus of twentieth-century torts on accidental harm has excluded from consideration "the most common cause of nonfatal injury to women in the United States."[380] Taking that statement as a starting premise for tort theory, tort scholarship has much work to do. Current torts and insurance arrangements implicitly consider the problem of domestic violence torts to be either intractable or unimportant. This problem is obviously important. Although we do not know whether the problem is intractable, other seemingly intractable problems like uncompensated harm from uninsured motorists have been ameliorated. We have only begun to address, rather than ignore and endorse, harm from domestic violence torts.

377. *See* Ira Mark Ellman, *Divorce Rates, Marriage Rates, and the Problematic Persistence of Traditional Marital Roles*, 34 FAM. L.Q. 1, 1 (2000).

378. *See, e.g.*, sources cited in *supra* note 2.

379. *See supra* note 34 and accompanying text.

380. Kyriacou et al., *supra* note 1, at 1892.