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Domestic Violence and the Per Se Standard of Outrage

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DOMESTIC VIOLENCE AND THE PER SE STANDARD OF OUTRAGE

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INTRODUCTION

On February 1, 1982, Ann Ruple's husband answered their home telephone each of the five or six times it rang, but the caller did not speak. The next day, Ms. Ruple's twelve-year-old babysitter received two telephone calls. During one call, the speaker asked the babysitter if she "sucked cocks" like Ann Ruple did. On the following day Ms. Ruple answered the phone and the caller said, "Hey, baby, how about a blow job?" Because a tap had been placed on Ms. Ruple's phone, the call was traced to Earl Brooks, the husband of Ann Ruple's coworker.

Ms. Ruple brought a civil suit against Mr. Brooks alleging intentional infliction of emotional distress.[1] At trial, Mr. Brooks admitted that he had made the two obscene phone calls, and the court admitted into evidence a criminal complaint to which he had pleaded guilty.[2] Ms. Ruple spent most of her case-in-chief proving that Mr. Brooks's phone calls had caused her to suffer headaches, to vomit, to lose concentration on her work and household chores, to lose sleep, and to fear answering the phone.[3] Her medical bills totalled $133.99.[4]

After the presentation of Ms. Ruple's case, her attorney moved for a directed verdict on the issue of liability, which the court granted. The jury then awarded Ms. Ruple $5,000 in actual damages and $15,000 in punitive damages. On appeal, the Supreme Court of South Dakota upheld the directed verdict, dismissing the defendant's contention that the jury, rather than the court, should have deter-

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1. Ruple v. Brooks, 352 N.W.2d 652 (S.D. 1984).

2. Earl Brooks had pleaded guilty to two counts of using "a telephone to call another person with intent to terrorize, intimidate, threaten, harass, or annoy such person by using any obscene or lewd language or by suggesting any lewd or lascivious act . . . ." *Id.* at 653-54.

3. *Id.* at 655.

4. *Id.*

mined whether the plaintiff had proven all the elements of the tort.[5] It found Mr. Brooks's actions to be those which society has deemed unacceptable, given the criminal statute regulating his behavior. This fact, coupled with Mr. Brooks's knowledge that Ms. Ruple recently had endured traumatic episodes at work and that she recently had been fired, supported the directed verdict in the plaintiff's favor.[6]

Ruple v. Brooks, although not a domestic violence case, provides an interesting backdrop against which to evaluate the tort of intentional infliction of emotional distress within the domestic violence context. Domestic violence victims[7] face a variety of abuse, both physical and emotional,[8] most of it much more severe than that which Ms. Ruple encountered.[9] In recent years, domestic violence victims have

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5. *Id.*

6. *Id.* at 655. Although South Dakota appears to accept "unreasonable" behavior, in lieu of "outrageous" behavior, as an element of the tort of intentional infliction of emotional distress, the supreme court in *Ruple v. Brooks* quotes liberally from the *Restatement (Second) of Torts* § 46 (1965), making it appear that its decision would not differ if South Dakota required "outrageous" conduct for the imposition of liability.

7. This Article uses the term "domestic violence victim," as opposed to "battered woman" in support of Elizabeth Schneider's observation that the term "battered woman" focuses on the woman, rather than on the harm or the perpetrator, as the problem. Elizabeth M. Schneider, *Particularity and Generality: Challenges of Feminist Theory and Practice in Work on Woman-Abuse,* 67 N.Y.U. L. REV. 520, 530 (1992). Also, the term "battered woman" is one that domestic violence victims resist. *Id.* While some labels may be better than "domestic violence victim," e.g., "a woman who has (or had) a relationship with a battering man," *id.* at 531, concern about the length of this Article dictates in favor of the term "domestic violence victim." Schneider must have faced a similar concern about economy as she herself used the phrase "battered women." *See, e.g., id.* at 532; *see also* Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation,* 90 MICH. L. REV. 1, 24-26 (1991) ("Because the term 'battered woman' focuses on the woman in a violent relationship rather than the man or the battering process, it creates a tendency to see the woman as the problem.").

8. This Article defines domestic violence as "the use of physical or psychological force by one adult against another adult with whom there currently exists, or has existed, an intimate relationship." Naomi Cahn, *Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions,* 44 VAND. L. REV. 1041, 1042 n.5 (1991); *see also* Schneider, *supra* note 7, at 537 ("[P]ractical experience is blurring the distinction between physical abuse and other aspects of the battering relationship.").

9. "Battering may involve extremely severe violence, including punching, kicking, and attacks with knives, guns, and broken bottles. Injuries include lacerations, fractures, dislocations, unconsciousness, internal bleeding and death." Brief of Ayuda et al. Amici Curiae in Support of Petitioner at 8, United States v. Dixon, 113 S. Ct. 2849 (1993) (No. 91-1231); *see also* DEL MARTIN, BATTERED WIVES 1 (1983) (describing "beating" in these words of a domestic violence victim: "[P]arts of my body have been hit violently and repeatedly, and . . . painful bruises, swelling, bleeding wounds, unconsciousness, and combinations of these things have resulted."). Battering causes one-fifth of women's hospital emergency room visits. Susan A. MacManus & Nikki R. Van Hightower, *Limits of State Constitutional Guarantees: Lessons from Efforts to Implement Domestic Violence Policies,* 49 PUB. ADMIN. REV. 269 (May/June 1989). Nearly one-third of all female murder victims are killed by their husbands or boyfriends, FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS: CRIME

increasingly relied on the tort of intentional infliction of emotional distress as a basis for suing their abusers,[10] and courts have increasingly recognized the tort in the marital context. Within the last year or so, two state supreme courts have expressly held that the tort of intentional infliction of emotional distress may be applied to marital

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IN THE UNITED STATES 13 (1990), often as the culmination of a history of domestic violence. POLICE FOUNDATION, DOMESTIC VIOLENCE AND THE POLICE iv (1977). Most battering relationships also involve emotional abuse. *See* Douglas D. Scherer, *Tort Remedies for Domestic Violence*, 45 S.C. L. REV. 543, 552-54 (1992). Even in the case of domestic violence without physical violence, the consequences can be devastating. As the Pennsylvania Court of Common Pleas acknowledged in permitting divorce for cruelty based on emotional abuse,

> A husband may, by the course of humiliating insults and annoyances, practiced in the various forms which ingenious malice could readily devise, eventually destroy the life or health of his wife, although such conduct may be unaccompanied by violence, positive or threatened . . . . To hold absolutely that, if a husband avoids positive or threatened personal violence, the wife has no legal protection against any means short of these which he may resort to, and which may destroy her life or health, is to invite such a system of infliction by the indemnity given to the wrong-doer.

Butler v. Butler, 1 Pars. (Pa.) Sel. Cas. 344 (quoted in Kelly v. Kelly, 1 P. 194, 196 (Nev. 1883)); *see also* Farnham v. Farnham, 73 Ill. 496, 500 (1874).

10. "Domestic torts" have emerged recently as a "trend in family law at the federal and state levels." Doris J. Freed & Timothy B. Walker, *Family Law in the Fifty States: An Overview*, 20 FAM. L.Q. 439, 586 (1987). The trend is exemplified, in part, by the cases involving claims for intentional infliction of emotional distress within the domestic violence context. *See, e.g.*, Moran v. Beyer, 734 F.2d 1245 (7th Cir. 1984); Czajkowski v. City of Chicago, Ill., 810 F. Supp. 1428, 1431 (N.D. Ill. 1992); Lewis v. Lennox, 567 So. 2d 264 (Ala. 1990); Simmons v. Simmons, 773 P.2d 602 (Colo. Ct. App. 1988), *cert. denied*, 773 P.2d 602 (Colo. 1989); De la Croix de Lafayette v. De la Croix de Lafayette, 15 Fam. L. Rep. (BNA) 1501 (D.C. Super. Ct. Fam. Div. Aug. 14, 1989); Kukla v. Kukla, 540 N.E.2d 510 (Ill. App. Ct. 1989); Henriksen v. Cameron, 622 A.2d 1135 (Me. 1993); Caron v. Caron, 577 A.2d 1178 (Me. 1990); McCoy v. Cooke, 419 N.W.2d 44 (Mich. Ct. App. 1988); Hassing v. Wortman, 333 N.W.2d 765 (Neb. 1983); Hakkila v. Hakkila, 812 P.2d 1320 (N.M. Ct. App.), *cert. denied*, 811 P.2d 575 (N.M. 1991); Murphy v. Murphy, 486 N.Y.S.2d 457 (N.Y. App. Div. 1985); Weisman v. Weisman, 485 N.Y.S.2d 570 (N.Y. App. Div. 1985); Baron v. Jeffer, 469 N.Y.S.2d 815 (N.Y. App. Div. 1983); Murray v. Murray, 623 N.E.2d 1236 (Ohio Ct. App. 1993); Davis v. Bostick, 580 P.2d 544 (Or. 1978); Twyman v. Twyman, 855 S.W.2d 619 (Tex. 1993); Massey v. Massey, 807 S.W.2d 391 (Tex. Ct. App. 1991), *aff'd*, 867 S.W.2d 766 (Tex. 1993); Chiles v. Chiles, 779 S.W.2d 127 (Tex. Ct. App. 1989); Noble v. Noble, 761 P.2d 1369 (Utah 1988); Ward v. Ward, 583 A.2d 577, 578 (Vt. 1990); Criss v. Criss, 356 S.E.2d 620 (W. Va. 1987); Slawek v. Stroh, 215 N.W.2d 9 (Wis. 1974); Stuart v. Stuart, 410 N.W.2d 632 (Wis. Ct. App. 1987), *aff'd*, 421 N.W.2d 505 (Wis. 1988); *cf.* Whittington v. Whittington, 766 S.W.2d 73 (Ky. Ct. App. 1989) (stating that husband's adultery and fraud were not "outrageous"); Lusby v. Lusby, 283 Md. 334, 390 A.2d 77, 89 (1978) (stating that husband's conduct where he forced wife's vehicle off the road, struck her, raped her and aided two others who attempted to rape her was an outrageous intentional tort); Floyd v. Dodson, 692 P.2d 77 (Okla. Ct. App. 1984) (holding that blackmail of ex-girlfriend with nude photos and cassette recording of lovemaking was probably "outrageous," but jury was improperly instructed that "unreasonable" behavior could give rise to liability for tort of intentional infliction of emotional distress). Often the focus of a court's opinion is on another issue, such as interspousal immunity, and the tort of intentional infliction of emotional distress receives only incidental mention.

conduct.[11] Similarly, law review articles have begun to analyze the tort in the context of domestic violence.[12] No commentator, however, has

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11. Henriksen v. Cameron, 622 A.2d 1135, 1140 (Me. 1993) (holding that multiple assaults, rapes, and verbal abuse are sufficiently outrageous); Twyman v. Twyman, 855 S.W.2d 619 (Tex. 1993) (holding that marital relation does not impede cause of action for intentional infliction of emotional distress); *see also* Davis v. Bostick, 580 P.2d 544 (Or. 1978) (allowing cause of action where husband broke wife's nose, choked her, and threatened her with loaded pistol). Various intermediate appellate courts also have applied the tort to spousal disputes. Simmons v. Simmons, 773 P.2d 602 (Colo. Ct. App. 1988) (allowing wife to sue husband for intentional infliction of emotional distress independently from divorce proceeding); McCoy v. Cooke, 419 N.W.2d 44 (Mich. Ct. App. 1988) (same); Koepke v. Koepke, 556 N.E.2d 1198 (Ohio Ct. App. 1989) (same); Ruprecht v. Ruprecht, 599 A.2d 604 (N.J. Super. Ct. 1991) (recognizing cause of action but finding that defendant's conduct was not "outrageous"); Hakkila v. Hakkila, 812 P.2d 1320 (N.M. Ct. App. 1991) (same). Only two state supreme courts have expressly rejected the cause of action between spouses. Weicker v. Weicker, 237 N.E.2d 876 (N.Y. 1968) (holding that public policy dictates that the marital relationship bars recovery for intentional infliction of emotional distress); Pickering v. Pickering, 434 N.W.2d 758 (S.D. 1988) (same); *see also* Browning v. Browning, 584 S.W.2d 406 (Ky. Ct. App. 1979) (rejecting the cause of action for spouse's public consortium with another party). The recent state supreme court cases have increased the number of domestic violence situations where the tort may be applied. Three-quarters of assault victims already are divorced or separated when the abuse occurs. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, REPORT TO THE NATION ON CRIME AND JUSTICE: THE DATA 21 (1983). Also, much domestic violence occurs outside of the marital relationship altogether. *See* Hon. Mac D. Hunter, *Homosexuals as a New Class of Domestic Violence Subjects Under the New Jersey Prevention of Domestic Violence Act of 1991*, 31 U. LOUISVILLE J. FAM. L. 557, 571 (1992/1993) (citing Caroline W. Harlow, U.S. Dep't of Justice, *Female Victims of Violent Crime* 2 (Jan. 1991)) ("Domestic violence offenders against women were spouses (9%), ex-spouses (35%) and boyfriends or ex-boyfriends (32%) . . . ."); Jane C. Murphy, *Lawyering for Social Change: The Power of the Narrative in Domestic Law Reform*, 21 HOFSTRA L. REV. 1243, 1270 n.142 (1993) ("Unmarried intimate partners are often victims of domestic violence.").

12. The theoretical articles that examine the tort often fail to analyze its application to the domestic violence situation. Daniel Givelber's article, *The Right to Minimum Social Decency and the Limits of Evenhandedness: Intentional Infliction of Emotional Distress by Outrageous Conduct*, 82 COLUM. L. REV. 42, 55 (1982), and Constance W. Cole's article, *Intentional Infliction of Emotional Distress Among Family Members*, 61 DENV. L.J. 553 (1984), are two older yet very thoughtful articles on the topic of intentional infliction of emotional distress. They demonstrate the need for an article that critically analyzes the tort in the domestic violence context.

Givelber divides his analysis of the tort into two categories: outrageousness in the context of voluntary agreements, Givelber, *supra*, at 63-69, and outrageousness in the context of interactions between legal strangers, *id.* at 69-75. While Givelber's first category arguably covers domestic violence, as the parties often have a pre-existing legal relationship such as marriage or child support obligations, Givelber focuses primarily on cases involving "an economic legal relationship." *Id.* at 69. The author explains that many courts do not uphold claims of outrageousness "when the relationship is primarily noneconomic—e.g., marriage." *Id.* He cites two cases for support: Browning v. Browning, 584 S.W.2d 406 (Ky. Ct. App. 1979) and Weicker v. Weicker, 237 N.E.2d 876 (N.Y. 1968). Givelber's conclusion about "noneconomic" relationships begs the question of why courts do not uphold claims of outrage when the relationship is primarily noneconomic—a question Givelber does not answer. In addition, even if one accepts Givelber's dichotomy between "economic" and "noneconomic" relationships, his conclusion about the tort in the

family context seems short-sighted given that cases existed allowing assertion of the tort in "noneconomic" situations. *See, e.g.*, Davis v. Bostick, 580 P.2d 544 (Or. 1978); Sheltra v. Smith, 392 A.2d 431 (Vt. 1978); Slawek v. Stroh, 215 N.W. 9, 20-21 (Wis. 1974). The emergence of additional case law allowing the tort in "noneconomic" circumstances requires a reexamination of the situation.

Moreover, by creating the separate categories of outrage in the context of voluntary agreements and outrage in the context of "legal strangers," Givelber exposes the shortcoming of his analysis in the domestic violence context. Givelber writes, "To draw an analogy from criminal law, the events [in these two categories] were as disparate as random street violence on the one hand and white collar crime on the other." Givelber, *supra*, at 59. Just as domestic violence is neither random street violence nor white collar crime, but rather occurs in its own unique context, similarly it deserves its own special attention within the law of intentional infliction of emotional distress.

Similarly, Cole's article, *supra*, while focusing on the tort between family members, ignores any discussion of domestic violence. Instead, Cole primarily concentrates on cases involving the deprivation of parental rights. While she also discusses other factual scenarios including breaches of separation and alimony agreements and abandonment suits by children against parents, none involves domestic violence.

Nevertheless, Cole does formulate a proposal for applying the tort of intentional infliction of emotional distress in the family context. She urges courts to examine causation and the severe mental anguish components of the tort before analyzing outrageousness. This initial scrutiny will weed out "petty complaints." Cole, *supra*, at 571. As for determining outrageousness, Cole recommends balancing the parties' interests. *Id.* at 572. If the defendant's behavior is privileged under the law, then it cannot be outrageous. If the plaintiff's interest has any type of legal protection, then the defendant's conduct is outrageous. Where neither party has a protected interest—or, presumably, where both parties have protected interests—a balancing of those interests must determine whether the defendant's behavior is outrageous.

Given Cole's silence on the topic of domestic violence, her proposal invites close scrutiny. Problematic for domestic violence victims is her belief that "[w]here litigation only happens coincidentally to involve a family, the case should be dealt with as any other emotional distress action." *Id.* at 570. It is questionable whether one can ever say that the presence of a family tie is "coincidental," and by Cole's analysis irrelevant, to the application of the tort. In addition, because she does not define "family," boyfriend-girlfriend relationships as well as gay and lesbian relationships might be treated as stranger cases. Also troubling is Cole's recommendation that a court first look for the existence of severe mental anguish and whether the defendant intended to cause it. Traditionally, the more outrageous the defendant's conduct, the less mental anguish the plaintiff must establish: "Severe distress must be proved; but in many cases the extreme and outrageous character of the defendant's conduct is in itself important evidence that the distress has existed." RESTATEMENT (SECOND) OF TORTS § 46, cmt. j (1965) [hereinafter RESTATEMENT]. The traditional approach seems appropriate in the domestic violence context. A domestic violence victim who has suffered repeated instances of abuse yet stayed in the abusive relationship may therefore be subjected to accusations that her distress was not severe. The victim should be able to use evidence of the defendant's conduct to help establish that the distress existed. Moreover, it is too easy for a defendant to claim that he did not intend to inflict emotional distress on his victim, but rather, for example, merely wanted to talk to her. Cole even admits that the plaintiff would often face problems of proof. Cole, *supra*, at 571. While Cole's framework may eliminate frivolous complaints, it undoubtedly will also bar recovery for deserving domestic violence victims in many instances.

Cole's balancing approach to determine "outrageousness" also is problematic. While the tort currently requires outrageous behavior, her balancing approach makes conduct tortious so long as the defendant's behavior has less social utility than the plaintiff's behav-

examined the theoretical advantages or limitations of the tort for domestic violence victims, or proposed any changes to it.[13]

This Article, which *Ruple v. Brooks*[14] inspired, inquires whether the tort of intentional infliction of emotional distress can provide a viable remedy for domestic violence victims. The Article begins by analyzing the current state of the law. The success of suits for intentional infliction of emotional distress generally turns on the plaintiff's ability to demonstrate that the defendant's conduct was "outrageous." In theory, such a showing should not be difficult for a domestic violence victim. Under traditional doctrine, there are four factors that arguably support a finding of outrageousness in cases involving domestic violence: a special relationship exists between the parties; domestic violence typically involves a pattern of harassment; an abuser usually exploits a known hypersensitivity of his victim; and a historic and gendered distinction between public and private spheres persists, which should make violence in the private sphere seem particularly outrageous.

Notwithstanding these considerations, the use of the tort by domestic violence victims is problematic under current law. Courts have applied the tort inconsistently in domestic violence cases. The meaning of the term "outrageous" is highly subjective, and allows courts to hold that domestic violence does not qualify. If fact, the ubiquity of domestic violence in our society presents a major barrier to labelling

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ior. *Id.* at 572, 576-77. In addition, her analysis fails to address from whose perspective the balancing occurs. In the family context, Cole states that "the ability to speak one's mind in the family context has greater value than the peace of mind of the person listening." *Id.* at 574. Cole's judgment about the value of speaking one's mind in the family is her own; it certainly does not represent the perspective of the individual who suffers the emotional distress. Moreover, Cole's choice of words hides the true interests to be balanced. In the family context, one is not balancing "the ability to speak one's mind" against the "peace of mind" of the listener. For the tort to exist at all, the distress of the listener must be far worse than mere loss of peace of mind.

Despite these criticisms, Cole, in but a single paragraph, comes close to this Article's proposal. She advocates a finding of outrage where the "defendant violates an established right of plaintiff or abrogates an established duty owed to plaintiff . . . established by the courts or the legislature . . . ." It is this suggestion of Cole's, albeit fleeting, that merits more exploration in the domestic violence context.

13. *See, e.g.*, Daniel T. Barker, *Interspousal Immunity and Domestic Torts: A New Twist on the "War of the Roses,"* 15 AM. J. TR. ADVOC. 625 (1992); Scherer, *supra* note 9; Heather S. Call, *Intentional Infliction of Emotional Distress in the Marital Context:* Hakkila v. Hakkila, 23 N.M. L. REV. 387 (1993). In fact, one author advocates a new tort of spousal abuse with one of its elements being "extreme and outrageous conduct," without analyzing the limitations of this element for domestic violence victims. Rhonda L. Kohler, *The Battered Woman and Tort Law: A New Approach to Fighting Domestic Violence,* 25 LOY. L.A. L. REV. 1025, 1068 (1992).

14. *See supra* notes 1-6 and accompanying text.

such violence "outrageous" under existing doctrine. Further, current law creates a dilemma for feminists who are reluctant to invoke various arguments that underscore the outrageousness of domestic violence—for example, traditional stereotypes of women's role in the home.

This Article argues for a per se standard of outrage whereby the defendant's conduct would be outrageous as a matter of law if he violated an injunction issued for a woman's protection.[15] Such a rule would avoid the need for a subjective, ad hoc inquiry into the outrageousness of domestic violence. Upon proving that the defendant had in fact willfully violated a civil protection order, the plaintiff would establish conclusively the most important element of the tort.

By proposing a solution to the tort's current limitations for domestic violence victims, this Article hopes to provide a useful remedy to women who find the existing remedies (including the tort) inadequate. In general, the proposal may help victims shut out of the criminal justice system, either because the abuser's conduct is not criminal,[16] or because the criminal process is ineffective for domestic

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15. This Article assumes the gender of the victims/plaintiffs is female. Approximately 95% of domestic violence victims are women. REPORT TO THE NATION ON CRIME AND JUSTICE, *supra* note 11, at 21; *see also* Joan Meier, *Battered Justice,* WASH. MONTHLY 37 (May 1987) ("85-95 percent of assault victims and two-thirds of domestic murder victims are women."); State *ex rel.* Williams v. Marsh, 626 S.W.2d 223, 229 (Mo. 1982) (en banc) ("Studies have shown that the victim of adult abuse is usually a woman."). Consequently, women obtain the vast majority of civil protection orders under domestic violence remedial schemes. Of course, domestic violence need not be male on female, but also occurs in lesbian and gay relationships. *See* Schneider, *supra* note 7, at 542-45. Female on male abuse also exists, although it is much less common. *See* BUREAU OF JUSTICE STATISTICS, *supra* note 11, at 21 (reporting that in only 5% of assaults on spouses or ex-spouses was the offender the wife or ex-wife of the victim). As both men and women can be subject to domestic violence and as both are eligible to obtain civil protection orders under domestic violence remedial schemes, this Article's proposal is not limited to use only by women, even though it refers to the victims/plaintiffs as women.

16. Some abusers' actions, for example stalking and psychological abuse, may not be criminal under state law. *See* Karen Brooks, *The New Stalking Laws: Are They Adequate to End Violence?,* 14 HAMLINE J. PUB. L. & POL'Y 259 (1993) (47 states have passed anti-stalking laws); Susan E. Bernstein, *Living Under Siege: Do Stalking Laws Protect Domestic Violence Victims?,* 15 CARDOZO L. REV. 525, 553-54 (1993) (some stalking laws do not address the types of threatening behavior experienced by domestic violence victims). Yet, noncriminal behavior may be sufficient to obtain a civil protection order under a domestic violence remedial scheme. *See* Peter Finn, *Statutory Authority in the Use and Enforcement of Civil Protection Orders Against Domestic Abuse,* 23 FAM. L.Q. 43, 44 (1989). Even if a domestic violence victim needs to prove that a criminal offense occurred in order to obtain a civil protection order, *see, e.g.*, D.C. CODE ANN. §§ 16-1001 to -1006 (1989), her burden of proof is usually only of a civil nature. *Id.* Moreover, much less than a criminal offense usually suffices for a violation of the order. The District of Columbia, for example, allows the Family Division of its Superior Court to issue protection orders:

violence victims.[17] As a plaintiff can recover punitive damages for the tort of intentional infliction of emotional distress,[18] the tort's punitive component can function like the criminal law, thereby discouraging violence.[19] As one author wrote, "[P]unishment is a central feature of outrageousness. Defendants may be punished—stigmatized by the la-

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(1) directing the respondent to refrain from the conduct committed or threatened and to keep the peace toward the family member;

(2) requiring the respondent, along or in conjunction with any other member of the family before the court, to participate in psychiatric or medical treatment or appropriate counseling programs;

(3) directing, where appropriate, that the respondent avoid the presence of the family member endangered;

(4) directing a respondent to refrain from entering or to vacate the dwelling unit of the complainant when the dwelling is (A) marital property of the parties; or (B) jointly owned, leased, or rented and occupied by both parties: Provided, that joint occupancy shall not be required if a party is forced by the respondent to relinquish occupancy; of (C) owned, leased, or rented by the complainant individually; or (D) jointly owned, leased, or rented by the complainant and a person other than the respondent;

(5) directing the respondent to relinquish possession or use of certain personal property owned jointly by the parties or by the complainant individually;

. . .

(7) providing for visitation rights with appropriate restrictions to protect the safety of the complainant;

. . .

(10) directing the respondent to perform or refrain from other actions as may be appropriate to the effective resolution of the matter.

Id. § 16-1005(c). In the District of Columbia, almost all civil protection orders include, at a minimum, the language that the perpetrator must "not molest, assault, or in any manner threaten or physically abuse" his victim. *See, e.g.*, United States v. Dixon, 598 A.2d 724, 725-26 (D.C. 1991), *aff'd in part and rev'd in part*, U.S. v. Dixon, 113 S. Ct. 2849 (1993).

17. *See* Brief of Ayuda et al. as Amici Curiae in support of Petitioner at 9-10, United States v. Dixon, 113 S. Ct. 2849 (1993) (No. 19-1231) ("The criminal justice system by itself has proven sadly ineffective in responding to the problem of domestic violence. Police have treated intrafamily violence less seriously than other crimes, and criminal prosecutions are very rare. Moreover, even when the criminal justice system responds, its delays have a profound impact on victims, who typically experience additional violence while waiting for the system to work."); DALE H. ROBINSON, LIBRARY OF CONGRESS, FAMILY VIOLENCE: BACKGROUND, ISSUES, AND THE STATE AND FEDERAL RESPONSE 22 (1992) ("Law enforcement personnel have been reluctant to prosecute domestic violence cases, which many consider to be private matters between spouses and thus inappropriate for government intervention.").

18. Givelber, *supra* note 12, at 54 & n.61.

19. *See* Coffindaffer v. Coffindaffer, 244 S.E.2d 338, 343-44 (W. Va. 1978) ("Of significance is the right to recover for the intentional tort. Our law before today practiced a cruel paradox. Under the guise of promoting family harmony, it permitted the wife beater to practice his twisted frustrations secure in the knowledge that he was immune from civil action except for a divorce, and that any criminal penalty would ordinarily be a modest fine. If nothing else, the knowledge of a monetary judgement with punitive damages may stay such violence."); Green v. Green, 446 N.E.2d 837, 839 (Ohio Ct. App. 1982) (same); Carl Tobias, *Interspousal Tort Immunity in America*, 23 GA. L. REV. 359, 474 (1989) ("Wife battering is so ubiquitous in the United States as to compel recognition of an intentional

bel 'outrageous' and made to pay damages—because of the obnoxious quality of their behavior alone. In this respect, the tort functions like the criminal law."[20] Yet the tort of intentional infliction of emotional distress also provides benefits beyond the punitive function of the criminal law, as it allows victims to receive compensatory damages.[21] The tort can even be useful for a woman who has obtained a

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tort cause of action, if only to afford one possible means for deterring the heinous conduct.").

20. Givelber, *supra* note 12, at 55. *But see* Natalie L. Clark, *Crime Begins at Home: Let's Stop Punishing Victims and Perpetuating Violence*, 28 WM. & MARY L. REV. 263, 269 & n.19 (1987). Clark suggests that a damage award is not an effective remedy because it fails to provide any physical protection for the victim, it provides little help if the abuser has little or no money to pay damages, courts are notoriously slow in processing personal injury actions, and the filing of such cases is likely to anger abusers and escalate the abuse. *Id.* at 271. Clark's first contention is doubtful because, as she later admits, "a successful suit for damages teaches the abuser that violent behavior comes only at the money cost of the damage done." *Id.* at 281. Moreover, because "one of the most effective ways to stop domestic violence is to make clear to abusers and potential abusers that society will not tolerate it," *id.* at 279, an effective civil remedy would complement her suggestion of mandatory criminal prosecution in accomplishing this goal. Clark's other objections do not argue against making a cause of action available; rather, it should be up to the individual whether she wants to institute a civil action, given the facts of the particular case. Moreover, while the filing of a case may escalate the abuse initially, at some point the existence of the cause of action should serve as a general deterrent. *See also* Mahoney, *supra* note 7, at 66-68 ("[W]omen describe coercive violence escalating after separation—violence clearly aimed at denying their autonomy . . . ."); Andrew Schepard, *Divorce, Interspousal Torts, and Res Judicata*, 24 FAM. L.Q. 127, 133 (1990) ("Requiring a brutalized spouse to assert a claim for tort for harm inflicted during the marriage in a divorce action, some fear, may simply enrage the abuser more and cause the wife more harm.").

21. Johnson v. Johnson, 77 So. 335, 338 (Ala. 1917) ("The wife's remedies, by a criminal prosecution or an action for divorce and alimony, which in some jurisdictions are allowed to stand as her adequate remedies for [assault and battery], so far from being adequate remedies, appear to us to be illusory and inadequate . . . ."); Crowell v. Crowell, 105 S.E. 206, 209 (N.C. 1920) ("As to the suggestion that the defendant could be indicted, that was a matter for the state which has not thus proceeded, and a conviction would be no reparation to the plaintiff."); Courtney v. Courtney, 87 P.2d 660, 666 (Okla. 1938) ("[C]riminal proceedings and separate maintenance and divorce actions for the wrongs committed by her husband . . . may be adequate to prevent future wrongs but they certainly do not compensate for past injuries.").

The size of the compensatory and/or punitive damage awards can vary greatly. *See* Lucinda M. Finley, *A Break in the Silence: Including Women's Issues in a Torts Course*, 1 YALE J. L. & FEMINISM 41, 47 n.18 (1989) (commenting on the low amount of damages in Gay v. Gay, 302 S.E.2d 495 (N.C. Ct. App. 1983), and Lusby v. Lusby, 283 Md. 344, 390 A.2d 77 (1978)); *see also* Reagan v. Rider, 70 Md. App. 503, 505, 521 A.2d 1246, 1247 (1987) (awarding $18,845 compensatory damages and $10,000 punitive damages for several hundred sexual encounters with her stepfather when she was between the ages of 11 and 17 resulting in psychological problems); Garrett v. Garrett, 49 S.E.2d 643 (N.C. 1948) (awarding $20,000 actual damages and $5,000 punitive damages to wife for public beating by husband that caused her lacerations, abrasions, bruises, contusions, and humiliation); Murray v. Murray, 598 So. 2d 921 (Ala. Civ. App. 1992), *cert. denied sub nom. Ex parte* Murray, 1992 Ala. LEXIS 789 (Ala. May 29, 1992) (awarding only $5,000 compensatory damages and $50,000 punitive damages for three separate assaults on wife, although husband's personal assets

civil protection order and whose abuser has committed criminal contempt or another criminal offense by violating the order.[22] The police often do not obtain an arrest warrant if the batterer has fled, and prosecutors and judges treat private complaints for contempt "less seriously."[23] Even if the woman prosecutes the action for criminal contempt herself, she is faced with a more difficult burden of proof than in an ordinary civil action. She must prove every element of the offense beyond a reasonable doubt,[24] and the successful criminal contempt prosecution will not provide her with compensation for her injuries or punitive damages.[25] Nor will she receive the additional benefit of society labelling her abuser's conduct "outrageous," although a criminal contempt proceeding undoubtedly provides some form of censure.

The proposal similarly may assist women who otherwise would lack a civil remedy. This Article is less concerned with the domestic violence victim who can establish a battery (aided, perhaps by compelling physical evidence), than with the woman who cannot, for whatever reason, establish that she has been harmed in that manner. This Article focuses on the woman who has obtained a civil protection order, i.e., injunctive relief through a domestic violence remedial scheme, and yet continues to be abused, although perhaps not in a way that is readily actionable under current tort law. For example, the proposal would be useful to the woman who is not "assaulted" because she suffers only verbal threats of future bodily harm,[26] or a woman

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were approximately $2 million); Simmons v. Simmons, 773 P.2d 602 (Colo. Ct. App. 1988) (awarding $15,000 in compensatory damages and $100,000 in punitive damages for assault and battery, intentional infliction of emotional distress, and outrageous conduct including defendant's throwing coffee on plaintiff, kicking her, slapping her, hitting her, and tearing her ear); Henriksen v. Cameron, 622 A.2d 1135, 1138 (Me. 1993) (awarding $75,000 in compensatory damages and $40,000 in punitive damages for intentional infliction of emotional distress consisting of physical violence and verbal abuse).

22. Violation of a civil protection order constitutes civil contempt in 31 states, criminal contempt in 20 states and the District of Columbia, and civil and criminal contempt in 11 states. Twenty-nine states make the violation of a protection order a misdemeanor offense. Finn, *supra* note 16, at 55.

23. *Id.* at 45.

24. 3A CHARLES A. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 771 (2d ed. 1982).

25. Criminal contempt sanctions are imposed to vindicate the court's authority. *Project. Twenty-Third Annual Review of Criminal Procedure: United States Supreme Court and Court of Appeals 1992-1993*, 82 GEO. L.J. xvi, 1083 (1994) [hereinafter *Review of Criminal Procedure*]; WRIGHT, *supra* note 24, § 704. Any fine imposed on the defendant is payable to the court. *See, e.g.*, Roe v. Operation Rescue, 919 F.2d 857, 869 (3d Cir. 1990); Falstaff Brewing Corp. v. Miller Brewing Co., 702 F.2d 770, 779 (9th Cir. 1983).

26. *Cf.* RESTATEMENT, supra note 12, § 31 cmt. a, illus. 1 (stating that words alone, unaccompanied by an act intended to carry the threat into execution, do not constitute an assault: "A, known to be a resolute and desperate character, threatens to waylay B on his

who misses the statute of limitations for assault or battery.[27] The proposal even benefits the woman who could successfully prosecute a civil contempt action for the violation of her civil protection order.[28] The tort of intentional infliction of emotional distress affords her the opportunity to obtain punitive damages unavailable in a civil contempt action.[29] It also guarantees her compensatory damages for her emotional distress, often not recoverable in a civil contempt action.[30] In addition, it allows her to prove her case by a preponderance of the evidence, an easier evidentiary burden than the "clear and convincing evidence" standard which exists in a civil contempt proceeding.[31]

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way home on a lonely road on a dark night. A is not liable to B for an assault under the rule stated in § 21. A may, however, be liable to B for the infliction of severe emotional distress by extreme and outrageous conduct, under the rule stated in § 46.").

27. States often impose a one-year statute of limitations on actions for "libel, slander, assault, battery, or false imprisonment." *See, e.g.*, Dickens v. Puryear, 276 S.E.2d 325, 330 n.8 (N.C. 1981). The newer tort of intentional infliction of emotional distress sometimes falls under the more general statute of limitations that applies to "any other injury to the person or rights of another, not arising on contract and not hereafter enumerated." *Id. See also* Henriksen v. Cameron, 622 A.2d at 1143 (holding that time-barred evidence of physical abuse could be admitted as substantive evidence of emotional distress claim). *But see* De la Croix de Lafayette v. De la Croix de Lafayette, 15 Fam. L. Rep. (BNA) 1501, 1502-03 (D.C. Super. Ct. Fam. Div. Aug. 14, 1989) (holding that choice of statute of limitations depends upon acts underlying the infliction of emotional distress and that one-year statute of limitations applied to allegations stemming from assault and battery); Pournaras v. Pournaras, Nos. 49936, 49937, (Ohio Ct. App. Dec. 19, 1985) (admonishing plaintiff for bringing suit under the tort of intentional infliction of emotional distress merely to avoid another tort's statute of limitations); R.A.P. v. B.J.P., 428 N.W.2d 103, 109 (Minn. Ct. App. 1988) (applying two-year statute of limitations to all intentional torts including intentional infliction of emotional distress); Davis v. Bostick, 580 P.2d 544, 548 (Or. 1978) (holding time-barred evidence of physical abuse inadmissible as substantive evidence of emotional distress claim); Lord v. Shaw, 665 P.2d 1288 (Utah 1983) (holding cause of action for intentional course of conduct is subject to same statute of limitations as assault and battery).

28. Thirty-one states allow civil contempt proceedings. *See supra* note 22.

29. While a plaintiff can receive compensatory damages in a civil contempt action, *see* Roe v. Operation Rescue, 919 F.2d 857, 868 (3d Cir. 1990), the amount "may not be so excessive as to be punitive in nature." Citronelle-Mobile Gathering, Inc. v. Watkins, 943 F.2d 1297, 1304 (11th Cir. 1991).

30. *See* McBride v. Coleman, 955 F.2d 571, 577 (8th Cir. 1992) ("The problems of proof, assessment, and appropriate compensation attendant to awarding damages for emotional distress are troublesome enough in the ordinary tort case, and should not be imported into civil contempt proceedings."); *In re* Walters, 868 F.2d 665, 670 (4th Cir. 1989) (compensatory damages were proper for expenses necessary to enforce rights but "no authority is offered to support the proposition that emotional distress is an appropriate item of damages for civil contempt, and we know of none"). If a court permits recovery for emotional distress in a civil contempt action, the amount awarded should be offset from any subsequent recovery for intentional infliction of emotional distress under this proposal in order to preclude double recovery.

31. *Review of Criminal Procedure, supra* note 25, at 1083.

The proposal provides the indirect victims of domestic violence with a civil remedy as well. The impact of domestic violence on children is often ignored. Yet, as one court has acknowledged, "In a large percentage of families, children have been present when the abuse occurred . . . . Even if the child is not physically injured, he [or she] likely will suffer emotional trauma from witnessing violence between his [or her] parents."[32] The child who witnesses an outrageous act could recover under the tort (and be benefitted by the proposal herein) because the child, a third party, is a close relative of the intended victim of the outrageous act.[33] Similarly, other friends and relatives of the victim also may have a cause of action.[34]

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32. State *ex rel* Williams v. Marsh, 626 S.W.2d 223, 229 (Mo. 1982) (en banc).

33. The *Restatement* recognizes liability for a family member's severe emotional distress intentionally or recklessly caused by a tortfeasor's extreme and outrageous conduct directed at another family member:

> Where such conduct is directed at a third person, the actor is subject to liability if he [or she] intentionally or recklessly causes severe emotional distress
>
> (a) to a member of such person's immediate family who is present at the time, whether or not such distress results in bodily harm, or
>
> (b) to any person who is present at the time, if such distress results in bodily harm.

RESTATEMENT, *supra* note 12, § 46(2). *See generally* Mahnke v. Moore, 197 Md. 61, 77 A.2d 923 (1951) (holding that five-year-old could state cause of action against father's estate after she witnessed him kill her mother, was kept in the room with the body for seven days, and was forced to watch her father commit suicide); Jeppsen v. Jensen, 155 P. 429 (Utah 1916) (allowing wife cause of action where defendant entered her home and threatened to kill her husband by holding a gun to husband's head), *overruled in part by* Johnson v. Rogers, 763 P.2d 771 (1988).

Through a caveat, the *Restatement* expressed no opinion as to whether the plaintiff must be present when the extreme and outrageous act occurs. RESTATEMENT, *supra* note 12, § 46. Few cases address this issue. *See, e.g.*, De la Croix de Lafayette v. De la Croix de Lafayette, 15 Fam. L. Rep. (BNA) 1501 (D.C. Super. Ct. Fam. Div. Aug. 14, 1989) (parent could not state a claim for intentional infliction of emotional distress when sexual assault of her child occurred out of her presence); Nancy P. v. D'Amato, 517 N.E.2d 824, 828 (Mass. 1988) (presence is not needed, but that mother and brother of sexually abused girl lacked "substantially contemporaneous knowledge of the outrageous conduct" and therefore could not recover damages). Under current doctrine, the threshold for what constitutes outrage may be higher if the plaintiff is a child witness to the violence rather than the object of the abuse. *See* Surety Midland Ins. Co. v. State, 625 P.2d 90, 92 (Nev. 1981) ("[The requirement of outrage] is more difficult to meet when the act has been directed against a third party in cases in which the plaintiff has been a mere witness to the occurrence."); Star v. Rabello, 625 P.2d 90, 92 (Nev. 1981) ("[T]hus far recovery is clearly limited to the most extreme cases of violent attack."). While negligent infliction of emotional distress may often be the most appropriate cause of action for a third-party observer because of the actor's lack of intent, "[t]he great majority of jurisdictions do not allow [this] cause of action." LEONARD KARP & CHERYL L. KARP, DOMESTIC TORTS § 1.28 (1989).

34. *See, e.g.*, RESTATEMENT, *supra* note 12, § 46(2); *see also* Slusher v. Oeder, 476 N.E.2d 714, 718 (Ohio Ct. App. 1984) (husband had claim for intentional infliction of emotional distress when wife was harassed repeatedly on the telephone by a man who intended to

Finally, the proposal hopes to move society towards a recognition that all domestic violence is outrageous.[35] A Comment to the *Second Restatement*, written over a quarter of a century ago, is still true: the law "is still in a state of development, and the ultimate limits of this tort are not yet determined."[36] By adopting the rule that violating a restraining order is per se outrageous conduct, the legal system would validate domestic violence victims' experiences of harm, and move closer to a recognition that domestic violence is itself "outrageous" conduct.

> Law is a language of power, a particularly authoritative discourse. Law can pronounce definitively what something is or is not and how a situation or event is to be understood . . . . Legal language does more than express thoughts. It reinforces certain world views and understandings of events.[37]

Tort law generally, and the tort of intentional infliction of emotional distress in particular, frames what interests we value as a society and prescribes how human beings should treat each other. Within the known and comfortable contours of the law, the per se standard of outrage for violation of a civil protection order will help mold society's thinking about domestic violence. The proposed standard takes the first step towards making all domestic violence per se outrageous.

Part I of this Article examines the current law and notes that the theoretical groundwork is already in place for application of the tort of intentional infliction of emotional distress in cases involving domestic violence. Part II discusses the inadequacies of the present framework. Part III sets forth the proposal for a per se standard of outrage, and considers the advantages and possible criticisms of this approach.

I. ESTABLISHING DOMESTIC VIOLENCE AS OUTRAGEOUS UNDER CURRENT DOCTRINE

Society's sensitivity to the plight of the domestic violence victim is increasing. Laws have proliferated that permit victims of domestic violence to seek civil protection orders proscribing certain conduct by

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entice her into having sexual relations, even though caller avoided direct contact with husband).

35. The tort affords "one way of righting [the] grievous wrong [of domestic violence]." Twyman v. Twyman, 855 S.W.2d 619, 643 (Tex. 1993) (Spector, J., dissenting).

36. RESTATEMENT, *supra* note 12, § 46 cmt. c. *See also* KARP & KARP, *supra* note 33, § 1.24 ("Its limits . . . are still only vaguely defined.").

37. Lucinda M. Finley, *Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning*, 64 NOTRE DAME L. REV. 886, 888 (1989). *Cf.* Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955 (1984) (applying similar analysis to constitutional doctrine).

their abusers.[38] Furthermore, while interspousal tort immunity historically has barred women from suing their husbands for assault and battery, or for any tort,[39] courts and legislatures are steadily abrogating this immunity.[40] Most women now can sue their husbands for as-

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38. *See* Murphy, *supra* note 11, at 1265 n.117 ("All 50 states and the District of Columbia now have some form of protection order statute."). In addition, "[i]n most jurisdictions a protection order can also be issued as a condition of bail or pretrial release in a criminal case." Finn, *supra* note 16, at 45. Statutes in 48 states and the District of Columbia provide for ex parte orders, typically obtainable in emergencies and valid for up to 10 or 14 days, until the hearing on the permanent order. *Id.* at 51-52. The permanent order normally stays in effect for six months to one year, although seven states provide no time limit on the order's validity. Kit Kinports & Karla Fischer, *Orders of Protection in Domestic Violence Cases: An Empirical Assessment of the Impact of the Reform Statutes*, 2 TEX. J. WOMEN & L. 163, 165 (1993) (*citing* Peter Finn & Sarah Colson, *U.S. Dep't of Justice, Civil Protection Orders: Legislation, Current Court Practice, and Enforcement* iii (1990)).

While all states and the District of Columbia make spouses eligible for protection orders, persons living together as spouses qualify in 39 states, and only 24 states extend relief to household members who are unrelated. Finn, *supra* note 16, at 46. Statutes in two states explicitly provide that no order may be issued if a separation or dissolution action is pending between the parties. *Id.* at 47 & n.10. In addition, "[w]hile victims of physical abuse are eligible for protection orders in 49 jurisdictions, victims may petition on the basis of attempted physical abuse in 39 states and the District of Columbia. Statutes in 42 states and the District of Columbia expressly permit an order on the basis of assault without battery." *Id.* at 48.

A protection order obtainable under the various domestic violence remedial schemes prohibits, at a minimum, an abuser from committing further acts of violence. Kinports & Fischer, *supra*, at 165. The protection order may also enjoin other conduct, such as contacting the woman, coming near her residence or workplace, or calling her at home. Among other things, the order may also award custody of a child, grant child support or maintenance, require the abuser to vacate the residence, or mandate that the abuser attend counseling. *Id. See also supra* note 16.

39. *See generally* William E. McCurdy, *Torts Between Persons in Domestic Relation*, 43 HARV. L. REV. 1030, 1033 (1929); William E. McCurdy, *Personal Injury Torts Between Spouses*, 4 VILL. L. REV. 303 (1959).

40. "During the last two decades, interspousal immunity has severely eroded. Many courts have either completely or partially abolished the doctrine, and legislatures in several jurisdictions have provided for intentional tort actions between spouses." Tobias, *supra* note 19, at 435 (footnote omitted). For an excellent discussion of the development and abrogation of interspousal immunity, *see id.* at 359. As of 1988, 31 states had fully abrogated the doctrine, 8 states had abrogated the rule for vehicular torts, 4 states had abrogated the rule for intentional torts, 1 state had abrogated it for all personal injury actions, and 1 state had abrogated it where the death of either spouse intervenes between the tortious act and commencement of suit. Burns v. Burns, 518 So. 2d 1205, 1208-09 (Miss. 1988); *see also* Clark, *supra* note 20, at 271 n.26 (summarizing state law on interspousal immunity). Even in states where interspousal immunity exists, it will not bar many domestic violence victims' claims. "[A]bout three-quarters of domestic assault victims are already divorced or separated at the time of the incident." Finn, *supra* note 16, at 45 (footnote omitted). In addition, some courts have indicated that interspousal immunity will not apply if the parties are divorced at the point when their rights are judicially determined, even if they were married at the time the complaint was filed. Hudson v. Hudson, 532 A.2d 620 (Del. Super. Ct.), *appeal denied*, 527 A.2d 281 (Del. 1987) (allowing intentional tort suit where wife received divorce during pendency of proceeding); *see also* Goode v. Martinis,

sault and battery.[41] Also, state courts have begun to acknowledge domestic violence in their custody decisions.[42] Even the criminal justice system is becoming more responsive to demands that it reform its practices concerning domestic violence.[43]

While the law is becoming more responsive to the problem of domestic violence, it is also becoming more responsive to claims for emotional injury. The history of the tort of intentional infliction of emotional distress is well documented.[44] Before the 1930s, the law awarded damages for mental anguish only if it was "parasitic" to a traditional tort and an accompanying physical injury.[45] In the late 1930s, several scholars criticized the state of the law and called for a new tort allowing recovery for mental distress.[46] The tort first appeared in the *Restatement (Second) of Torts* in the 1948 Supplement. Since then, a trend toward allowing recovery has developed.[47] Forty-eight states now recognize the intentional infliction of emotional distress as an independent tort.[48] Of the states that have recognized the tort, all but three have adopted the *Restatement*'s formulation.[49]

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361 P.2d 941 (Wash. 1961) (en banc) (holding that interspousal immunity did not block ex-wife's action for assault and battery committed while parties were legally separated but before divorce was finalized).

41. *See, e.g.*, Moran v. Beyer, 734 F.2d 1245 (7th Cir. 1984); Lusby v. Lusby, 283 Md. 334, 390 A.2d 77, 88-89 (Md. 1978); Gay v. Gay, 302 S.E.2d 495 (N.C. Ct. App. 1983).

42. Cahn, *supra* note 8, at 1043-44.

43. Many police departments have reformed their practices because of litigation or the threat of litigation. *See, e.g.*, Hynson v. City of Chester Legal Dep't, 864 F.2d 1026 (3rd Cir. 1988); Watson v. City of Kansas City, Kansas, 857 F.2d 690 (10th Cir. 1988); Balistreri v. Pacifica Police Dep't, 901 F.2d 696 (9th Cir. 1988); Dudosh v. City of Allentown, 629 F. Supp. 849 (E.D. Pa. 1985), *cert. denied*, 488 U.S. 942 (1988); Thurman v. City of Torrington, 595 F. Supp. 1521 (D. Conn. 1984); Sorichetti v. City of New York, 482 N.E.2d 70 (N.Y. 1985); Bruno v. Codd, 393 N.E.2d 976, 980 (N.Y.), *appeal denied*, 48 N.Y.2d (1979); Nearing v. Weaver, 670 P.2d 137 (Or. 1983). However, the criminal justice system has far to go before it is genuinely responsive to the needs of domestic violence victims. *See supra* note 17.

44. *See* 2 FOWLER V. HARPER ET AL., THE LAW OF TORTS 603-10 (2d ed. 1986); *see also* Annotation, *Modern Status of Intentional Infliction of Mental Distress as Independent Tort: "Outrage"*, 38 A.L.R.4TH 998 (1985) [hereinafter *Modern Status of Intentional Infliction*]; Givelber, *supra* note 12, at 43-45.

45. The one exception, however, has always been for an assault action. HARPER ET AL., *supra* note 44, at 606.

46. *See, e.g.*, Calvert Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033 (1936); William L. Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874 (1939).

47. HARPER ET AL., *supra* note 44, at 609.

48. *Modern Status of Intentional Infliction*, *supra* note 44, at 1003-16, and Supplement at 70-91 (Supp. 1993).

49. The three states not adopting the *Restatement*'s view still require the equivalent of "outrageous conduct." Chedester v. Stecker, 643 P.2d 532, 535 (Haw. 1982) (requiring the conduct to be "without just cause or excuse and beyond all bounds of decency"); Sears

Section 46(1) of the *Restatement (Second) of Torts* sets forth the tort's elements: "One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm."[50] In other words, a plaintiff must establish four elements to state a claim: extreme and outrageous conduct, severe emotional distress, causation, and an intent or recklessness to cause severe emotional distress.[51] The plaintiff must convince a judge, in the first instance, that the conduct is "outrageous," and the emotional distress is "severe."[52] If the judge finds that

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Roebuck & Co. v. Devers, 405 So. 2d 898, 902 (Miss. 1981) (requiring conduct that "evokes outrage or revulsion"); Hall v. The May Dep't Stores Co., 637 P.2d 126, 129 (Or. 1981) (requiring "some extraordinary transgression of the bounds of socially tolerable conduct"). *See also supra* note 6.

50. RESTATEMENT, *supra* note 12, § 46(1).

51. *E.g.*, Richard L. v. Armon, 536 N.Y.S.2d 1014, 1015 (N.Y. App. Div. 1989) (citing *Modern Status of Intentional Infliction*, *supra* note 44 (these four elements are found in the substantive law of most jurisdictions)).

52. RESTATEMENT, *supra* note 12, § 46 cmt. h. Mental distress "includes all highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry and nausea. It is only where it is extreme that the liability arises." *Id.* cmt. j. The comment continues, "The intensity and the duration of the distress are factors to be considered in determining its severity." *Id.*

Any physical manifestation of the emotional distress will aid in recovery. "Normally, severe emotional distress is accompanied or followed by shock, illness, or other bodily harm, which in itself affords evidence that the distress is genuine and severe." *Id.* cmt. k. *See, e.g.*, Farman v. Farman, 611 P.2d 1314, 1316 (Wash. Ct. App. 1980) (ex-wife stated cause of action against husband's second wife for making over 1000 harassing telephone calls, which allegedly caused severe emotional distress evidenced by nervousness, considerable weight loss, withdrawal, fear of going home at night, inability to perform certain duties at her job, and taking of tranquilizers). Evidence of medical treatment also helps recovery. *See, e.g.*, Reagan v. Rider, 70 Md. App. 503, 511, 521 A.2d 1246, 1250 (1987) (holding that total inability to function is not required when medical evidence exists to demonstrate severity of distress). However, physical injury usually is not essential to recovery. *See, e.g.*, Dickens v. Puryear, 276 S.E.2d 325, 332 (N.C. 1981); RESTATEMENT, *supra* note 12, § 46 cmt. k.

The issue of emotional distress is first a question of law: "It is for the court to determine whether, on the evidence, severe emotional distress can be found; it is for the jury to determine whether, on the evidence, it has in fact existed." RESTATEMENT, *supra* note 12, § 46 cmt. j. There is at least one way that a court's conception of "outrage" can affect its analysis of whether severe emotional distress exists: the burden of proving severe emotional distress diminishes with the outrageousness of the conduct. "[I]n many cases the extreme and outrageous character of the defendant's conduct is in itself important evidence that the distress has existed." *Id. See also id.* illus. 1; National Sec. Fire & Casualty Co. v. Bowen, 447 So. 2d 133, 141 (Ala. 1983) (outrageous conduct included death threats to plaintiff and plaintiff's children, holding plaintiff at gunpoint for more than an hour, and gathering false evidence that led to plaintiff's conviction for arson); Croft v. Wicker, 737 P.2d 789, 792-93 (Alaska 1987) (outrageous conduct included sexual molestation of 14-year-old in close proximity to her parents); *Reagan*, 70 Md. App. at 513, 521 A.2d at 1251 (outrageous conduct included defendant's sexual abuse of stepdaughter hundreds of

reasonable individuals would differ on whether the conduct is "outrageous," the jury must determine whether the conduct has been sufficiently extreme and outrageous to result in liability.[53] Then the plaintiff must convince the fact finder that the defendant did these acts, with the requisite intent,[54] and that the defendant's acts caused the plaintiff severe emotional distress.[55]

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times when she was between the ages of 11 and 17). Simply, "[t]he very nature of the conduct involved can provide a guarantee that the claim for emotional distress is genuine and serious . . . . When the acts of the defendant are so horrible, so atrocious and so barbaric that no civilized person could be expected to endure them without suffering mental distress, the jury may find as a matter of fact that 'severe' emotional distress resulted." *Id.*; *see also* B.N. v. K.K., 312 Md. 135, 148, 538 A.2d 1175, 1182 (Md. 1988) (knowing transmission of genital herpes); RESTATEMENT, *supra* note 12, § 46 cmt. k. Therefore, although this Article does not advocate a per se finding of severe emotional distress upon a civil protection order's violation, recognizing such an act as outrageous may facilitate a finding by the judge that severe emotional distress exists.

Currently, "severe emotional distress" is evaluated by an objective standard: "The law intervenes only where the distress inflicted is so severe that no reasonable man could be expected to endure it." *Id.* § 46 cmt. j. "[T]here is no recovery for exaggerated and unreasonable emotional distress, unless it results from a particular susceptibility to such distress of which the actor has knowledge." *Id.* As most abusers play upon their domestic violence victims' particular susceptibilities, the abusers should be liable for even an "exaggerated and unreasonable" emotional response. *See infra* notes 65-72 and accompanying text.

53. RESTATEMENT, *supra* note 12, § 46 cmt. h.

54. For the tort to exist, the defendant must intend to inflict severe emotional distress or be reckless as to that result. *See id.* cmt. i; *id.* § 500 cmt. a. Tommy's Elbow Room v. Kavorkian, 727 P.2d 1038, 1044 (Alaska 1986); Hearon v. City of Chicago, 510 N.E.2d 1192, 1195 (Ill. App. Ct. 1987); Vance v. Vance, 286 Md. 490, 505-06, 408 A.2d 728, 736, *aff'g in part and rev'g in part* 41 Md. App. 130, 396 A.2d 296 (1979); *Reagan*, 70 Md. App. at 504, 521 A.2d at 1246; *Richard L.*, 536 N.Y.S.2d at 1016. Rarely will a defendant admit that he intended his conduct to cause distress, or that he consciously disregarded the risk that distress would result. *Richard L.*, 536 N.Y.S.2d at 1017; Twyman v. Twyman, 855 S.W.2d 619, 623 (Tex. 1993). "Juries, however, are free to discredit the defendant's protestations that no harm was intended and to draw the necessary inferences to establish intent." *Id.* A per se rule of outrage should help a plaintiff establish intent because an abuser who has been served with a civil protection order is on notice that a violation of it may cause severe emotional distress. A reasonable person in this position would realize the risk involved. Additionally, because the abuser has been told of the risk, when he disregards that risk and commits the act violating the civil protection order, he is subjectively reckless. The plaintiff's decision to prove intent to cause severe emotional distress, subjective recklessness as to that result, or mere objective recklessness may affect an insurer's obligation to indemnify an insured abuser, *see* Richard R. Orsinger, *Asserting Claims for Intentionally or Recklessly Causing Severe Emotional Distress in Connection with Divorce*, 25 ST. MARY'S L.J., 1253, 1307-11 & n.271 (1994) (discussing Texas Standard Homeowners Policy), as well as whether punitive damages are available. *Compare* Floyd v. Dodson, 692 P.2d 77, 81 (Okla. Ct. App. 1984) *with* RESTATEMENT (SECOND) OF TORTS § 908 (1979). *But see* Sielski v. Sielski, 604 A.2d 206, 209-10 (N.J. Super. Ct. Ch. Div. 1992) ("[i]t is difficult to imagine an instance of domestic violence that does not include the requisite element of evil-mindedness or bad motive" to justify punitive damages).

55. Reviewing the case law, Givelber found "causation . . . does not usually present a barrier to recovery . . . . [T]he question of causation has been submitted to the jury solely

"Outrage" has been called the tort's most important element. "[D]espite its apparent abundance of elements, in practice [the tort] tends to reduce to a single element—the outrageousness of the defendant's conduct."[56] Yet the definition of "outrage" has always been as elusive, as it is circular. The *Restatement (Second) of Torts* offers this unhelpful formulation: "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!'"[57] Given this tautology, it is not surprising that courts use various criteria to evaluate whether conduct is outrageous. It is these criteria that determine whether domestic violence qualifies for the tort.

Three factors strongly influence whether conduct is "outrageous": the existence of an actual or apparent authority relationship between the parties, a pattern of harassment, and the defendant's exploitation of a known hypersensitivity of the plaintiff. All three of these factors are normally present in domestic violence cases. A fourth factor, that domestic violence takes place in the "private" sphere, may also influence the tort's application. Therefore, under the current formulation of the tort, domestic violence victims have the tools to hold their abusers liable, although, as noted later, the current formula for recovery presents problems of its own.

A. Existing Relationship Between the Parties

The nature of the parties' relationship is an important factor to consider when evaluating the outrageousness of the defendant's conduct. The more power the defendant has over the plaintiff in a relationship, the more likely the act in question will qualify as "outrageous."

> The extreme and outrageous character of the conduct may arise from an abuse by the actor of a position, or a relation with the other, which gives him actual or apparent authority over the other, or power to affect [her] interests . . . . In particular police officers, school authorities, landlords, and

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on the plaintiff's own assertion that the defendant's conduct caused the suffering." Givelber, *supra* note 12, at 49 (footnotes omitted).

56. *Id.* at 42-43; *see also* Richard D. Bernstein, Note, *First Amendment Limits on Tort Liability for Words Intended to Inflict Severe Emotional Distress*, 85 COLUM. L. REV. 1749, 1750-51 (1985) ("[T]he element of extreme and outrageous conduct is the central if not the sole element of the tort.").

57. RESTATEMENT, *supra* note 12, § 46 cmt. d.

> collecting creditors have been held liable for extreme abuse of their position.[58]

The relationship between an abuser and his victim should be a factor that facilitates a victim's recovery under the tort, as the relationship involves both apparent and actual authority. An abuser often has actual authority over his victim because of her economic dependency on him.[59] In addition, an abuser appears, from his victim's perspective, to have authority over her because he has subjected her to violence in the past, and can do so again in the future. He also has the apparent (and often real) power to affect her interests by causing her trouble so that she loses her job, housing, or friends.

Just as the concept of authority has significance for the tort, so too does the concept of trust.

> The conduct of any . . . defendant who is in a peculiar position to harass plaintiff or otherwise cause emotional distress, such as a creditor, landlord, employer, or physician, or *someone else in a position of trust or special responsibility,* the basis of which is likely to be particularly shattering or oppressive, is likely to be scrutinized more carefully by the courts.[60]

Trust is the *sine qua non* of a family or intimate relationship. Any abuse that violates this trust should receive particularly close scrutiny.

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58. RESTATEMENT, *supra* note 12, § 46 cmt. e. The comment continues, "Even in such cases, however, the actor has not been held liable for mere insults, indignities, or annoyances that are not extreme or outrageous." *Id.*

59. "Other than fear, economic dependence may be the single most important reason why women stay in battering situations." Mugan v. Mugan, 555 A.2d 2, 3 n.1 (N.J. Super Ct. App. Div. 1989) (citation omitted). "Economic dependence is frequently the reason the victim returns to the offender." 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, 992 (1993) (citing National Council on Juvenile and Family Court Judges, Model Code on Domestic Family Violence (1994)). *See also* State *ex rel.* Williams v. Marsh, 626 S.W.2d 223, 229 (Mo. 1982) (en banc) (citing Richard J. Gelles, *Abused Wives: Why Do They Stay,* 38 J. MARRIAGE & FAM. 659 (1976) ("The most compelling reason for an abused woman to remain in the home subject to more abuse is her financial dependency; this is particularly true for women with children.")).

60. HARPER ET AL., *supra* note 44, at 608-09 (emphasis added). *See* Hall v. May Dep't Stores Co., 637 P.2d 126, 130 (Or. 1981) (stating that employer-employee relationship "imposes on the defendant a greater obligation to refrain from subjecting the victim to abuse, fright, or shock than would be true in arm's-length encounters among strangers"); Rockhill v. Pollard, 485 P.2d 28, 28 (Or. 1971) (en banc) (holding that doctor's refusal to administer medical care was "outrageous," as a professional relationship between the parties existed so that they were not dealing at arm's length). Some courts have recognized that family relationships involve positions of trust or special responsibility. *See, e.g.,* Bhama v. Bhama, 425 N.W.2d 733, 736 (Mich. Ct. App. 1988) (holding that destruction of parent-child relationship by custodial parent could be "outrageous").

The importance of the parties' relationship to the tort's application arises from the common-sense notion that parties who have a relationship, legal or otherwise, expect more from each other than they would from a stranger. While a woman may be cautious on the street to avoid an assault, she drops her guard at home under the assumption that her partner will not beat her. When her partner violates that trust, the betrayal is more egregious than random street violence.

B. Pattern of Harassment

A number of scholars have detailed how a pattern of harassment has been found to contribute to a finding of "outrageousness."[61] Because domestic violence victims are typically subjected to repeated abuse, both during a battering incident and also over time, this factor should aid a domestic violence victim's recovery. Many women are "beaten as frequently as once a month, once a week, or even daily."[62] One woman, for example, explained how her husband assaulted her, fracturing her left leg and ankle, then approximately one hour later assaulted her again by choking and threatening to kill her. From the date of those assaults until she brought a civil suit, the husband continued to threaten her verbally with physical harm, "causing [her] to live in constant fear for her physical safety."[63] It is, in fact, rare to find a domestic violence victim who has suffered only an isolated incident of violence, especially when one includes emotional abuse. What makes the pattern of harassment particularly horrific is the fact that domestic violence tends to increase in frequency and intensity over time.[64] Therefore, domestic violence victims should be able to emphasize the repetitive nature of their abusers' conduct and successfully establish its outrageousness.

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61. *See, e.g.*, William Prosser, *Insult and Outrage*, 44 CAL. L. REV. 40, 48-49 (1956) (discussing high-pressure collection methods of creditors); Jean Love, *Discriminatory Speech and the Tort of Intentional Infliction of Emotional Distress*, 47 WASH. & LEE L. REV. 123, 135 (1990) (discussing verbal sexual harassment).

62. Jean Zorza, *The Criminal Law of Misdemeanor Domestic Violence, 1970-1990*, 83 J. CRIM. L. & CRIMINOLOGY 46 (1992) (citing ILLINOIS COALITION AGAINST DOMESTIC VIOLENCE, *Women Abuse: Frequent & Severe* (Springfield, IL 1983)).

63. Gay v. Gay, 302 S.E.2d 495 (N.C. Ct. App. 1983). *See also* Martin v. Massachusetts Mut. Life Ins. Co., 463 S.W.2d 681, 682 (Tenn. 1971) (husband "frequently, over a period of years, 'stomped,' beat, kicked and abused the complainant, appl[ied] the most profane, vulgar, filthy, and insulting epithets, impos[ed] on complainant great fear and humiliation, on account of which she did seek third person and police protection on numerous occasions").

64. MILDRED D. PAGELOW, WOMAN-BATTERING, VICTIMS AND THEIR EXPERIENCES 45 (1981) ("[O]ne of the few things about which almost all researchers agree is that batterings escalate in frequency and intensity over time.").

C. *Known Hypersensitivity*

A defendant's conduct is more likely to qualify as outrageous if the defendant deliberately inflicts mental suffering by exploiting a known hypersensitivity of the plaintiff.

> The extreme and outrageous character of the conduct may arise from the actor's knowledge that the other is peculiarly susceptible to emotional distress, by reason of some physical or mental condition or peculiarity. The conduct may become heartless, flagrant, and outrageous when the actor proceeds in the face of such knowledge, where it would not be so if he did not know.[65]

There are numerous reasons why the domestic violence context may encourage a finding that the defendant has exploited a known hypersensitivity of his victim. An intimate or family relationship usually puts parties in such close proximity that each party is acutely aware of the other's hypersensitivities. As one scholar has observed, "[F]amily members are so interdependent, they are especially able to cause one another unhappiness and mental distress."[66] An abuser almost always knows exactly how and when he can most annoy his victim, and he usually behaves accordingly. In *Ruple v. Brooks*,[67] the obscene phone caller knew that the plaintiff recently had endured traumatic episodes at work and also had lost her job. The court, quoting the *Restatement*, said, "[S]uch knowledge by defendant makes this

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65. *See* RESTATEMENT, *supra* note 12, § 46 cmt. f. The *Restatement* continues, "It must be emphasized again, however, that major outrage is essential to the tort; and the mere fact that the actor knows that the other will regard the conduct as insulting, or will have his feelings hurt, is not enough." *Id.* The Reporter's illustrations, however, demonstrate that most domestic violence will qualify as exploiting a known hypersensitivity. For example, "A knows that B, a Pennsylvania Dutch farmer, is extremely superstitious, and believes in witchcraft. In order to force B to sell A his farm, A goes through the ritual of putting a 'hex' on the farm, causing B to believe that it is bewitched so that crops will not grow on it. B suffers severe emotional distress and resulting illness. A is subject to liability to B for both." RESTATEMENT, *supra* note 12, § 46 cmt. j., illus. 10. The domestic violence context is somewhat analogous: the abuser often "puts a hex" on the victim by exploiting her known fear of violence and threatening to harm her unless she complies with his demands. *Cf.* State v. Kelly, 478 A.2d 364, 369 (N.J. 1984) (abuser, *inter alia*, told his wife he would kill her and cut off her body parts if she tried to leave him).

66. Cole, *supra* note 12, at 553 (footnote omitted). *Cf.* People v. Clark, 789 P.2d 127, 164 (Cal. 1990) (en banc) (holding that former wife was "particularly vulnerable victim" for purposes of sentencing defendant for his rape of her, where defendant used his prior relationship with her and his knowledge of her mother's poor health to gain access to her apartment where she was "alone, inaccessible, unprotected, and unable to protect herself from the assault"), *modified*, 50 Cal. 3d 1157, *cert. denied*, 498 U.S. 973 (1990).

67. 352 N.W.2d 652 (S.D. 1984). *See supra* notes 1-6 and accompanying text.

type of conduct even more unreasonable."[68] Moreover, the defendant's knowledge that his victim is economically or psychologically dependent on him, and thus more vulnerable to his abuse, may justify a determination that the defendant's conduct is outrageous.[69] Other factors that traditionally contribute to a victim's hypersensitivity often exist in the domestic violence situation: for example, the victim's pregnancy or the defendant's destruction of his victim's favorite property. The Reporter to the *Restatement* writes,

> A, who knows that B is pregnant, intentionally shoots before the eyes of B a pet dog, to which A knows that B is greatly attached. B suffers severe emotional distress, which results in a miscarriage. A is subject to liability to B for the distress and for the miscarriage.[70]

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68. *Ruple*, 352 N.W.2d at 655 (quoting RESTATEMENT, *supra* note 12, § 46 cmt. f).

69. *See* Clark, *supra* note 20, at 273 n.33 (citing Judith Gingold, *One of These Days—Pow! Right in the Kisser: The Truth About Battered Wives*, Ms., Aug. 1976, at 51-52 ("Psychological pressures restrain many women from leaving the [sic] husbands because they are raised to believe that they must make their husbands happy. Some women therefore feel responsible for their beatings and may wait years for their husbands to change before they seek divorce.")); *see also supra* note 59.

The role as wife or mother may cause a dependency that is economically and psychologically dysfunctional. Jessie Bernard, *Introduction* to WOMEN INTO WIVES: THE LEGAL AND ECONOMIC IMPACT OF MARRIAGE 12-13 (Jane R. Chapman & Margaret Gates eds., 1977); *see also* SUSAN M. OKIN, JUSTICE, GENDER & THE FAMILY 135-36 (1989) ("[M]arriage and the family, as currently practiced in our society, are unjust institutions. They constitute the pivot of a societal system of gender that renders women vulnerable to dependency, exploitation, and abuse."). This argument becomes even more radical if one accepts that

> most women are indeed forced into motherhood and heterosexuality. One reason for this is utopian blinders: women's lack of awareness of existential choice in the face of what are felt to be biological imperatives. But that is surely not the main reason. The primary reason for the stunted nature of women's lives is male power.

Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 71 (1988); *see also* HUNTER COLLEGE WOMEN'S STUDIES COLLECTIVE, WOMEN'S REALITIES, WOMEN'S CHOICES 191 (1983) ("Whatever the society, girls are taught that the prescribed social roles for women include becoming wives and mothers, roles which involve caring for husbands, homes, and children."); ANDREA DWORKIN, RIGHT-WING WOMEN 14 (1982) (stating that most women choose marriage and heterosexuality in order to gain some protection from male violence).

70. RESTATEMENT, *supra* note 12, § 46 illus. 11. Pregnancy historically has been a factor influencing recovery for the intentional infliction of emotional distress. *See generally* Bartow v. Smith, 78 N.E.2d 735, 738 (Ohio 1948), *overruled in part by* Yeager v. Local Union 20, Teamsters, Chauffers, Warehousemen & Helpers of Am., 453 N.E.2d 666 (Ohio 1983).

Many instances of domestic violence involve either a pregnant victim[71] or the destruction of the victim's favorite property.[72] In addition, while the belief is not unique to the domestic violence context, "[w]omen are stereotypically regarded as having a more sensitive nature, and their sensitivities have often been jealously protected."[73]

Because domestic violence usually involves several acts within an "incident," or a continuing pattern of violence,[74] the domestic violence victim has a good argument that the initial violence made her "hypersensitive," and that its continuation was outrageous. Several courts have recognized that the onset of domestic violence can make a person "hypersensitive." In *Baugh v. CBS, Inc.*,[75] for example, a domestic violence victim sued CBS for airing her encounter with a victim-witness program on its weekly news and public affairs magazine, *Street Stories*.[76] The encounter occurred in her home, after a domestic violence incident.

> Baugh [the victim] has alleged that Defendants' [CBS] personnel entered her home, and misrepresented their identity in order to gain her consent to videotaping, all at a time of extreme emotional vulnerability. Moreover, Defendants selected Baugh specifically because an incident of domestic violence had just occurred; they therefore must have known that Baugh was vulnerable, and took advantage of her position. These allegations adequately state a claim for intentional infliction of emotional distress.[77]

Similarly, in *McDaniel v. Gile*,[78] the court found the victim "was peculiarly susceptible to emotional distress because of her pending marital

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71. Cahn, *supra* note 8, at 1047 ("Battering often begins or becomes more acute when a woman becomes pregnant."); Mahoney, *supra* note 7, at 20 & n.81 ("The accounts of pregnancy triggering men's violence against women are virtually universal.").

72. *See, e.g.*, Murphy v. Murphy, 486 N.Y.S.2d 457 (N.Y. App. Div. 1985) (defendant killed plaintiff's pet Canadian goose, assaulted and abused plaintiff, destroyed plaintiff's property, and violated plaintiff's civil protection order).

73. Finley, *supra* note 37, at 65. *See* JACQUES LECLERCQ, MARRIAGE AND THE FAMILY: A STUDY IN SOCIAL PHILOSOPHY 294-97 (Thomas R. Hanley trans., 1949) ("Feeling plays a greater role in the woman than in the man . . . . [S]he gives herself up to love more than the man does. Love takes up the whole of the woman's life; it transcends the simple problem of carnal satisfactions; it completely overruns the psychical sphere . . . . Love means more for her than it does for him. She needs the man more than he needs her. If he pushes his advantages ever so little, he becomes the master.").

74. *See supra* notes 61-64 and accompanying text.

75. 828 F. Supp. 745 (N.D. Cal. 1993).

76. *Id.* at 750.

77. *Id.* at 758.

78. 281 Cal. Rptr. 242 (Cal. Ct. App. 1991).

dissolution."[79] The facts of the case revealed that around the time of the tortious incident, the victim had sought a restraining order against her husband.[80] Just as Ms. Baugh and Ms. McDaniel were vulnerable after the incidents of domestic violence, every domestic violence victim is potentially vulnerable after the onset of violence.[81]

Research on why women stay in abusive relationships further supports the argument that some women are hypersensitive after the onset of violence. Lenore Walker's model of learned helplessness suggests that the cycles of battering make some victims believe that they have no control over the abuse and cannot stop it or escape from it.[82] This theory has influenced the criminal law's view of domestic violence.[83] While criticisms of this view have emerged,[84] the theory may accurately describe the plight of some women and may help establish the outrageousness of their abusers' acts. Regardless of whether a woman suffers from learned helplessness, however, many abusers isolate their victims so that it is harder for the women to escape from the abusive relationships. As one author stated,

> A wife assault victim may be quite isolated. Her husband may actively work at keeping her that way. She probably has few friends or sources of support. If she does have friends, she may never have told them of her home situation. . . . The more isolated a woman is in her own home, the more

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79. *Id.* at 247.

80. *Id.* at 245.

81. *Cf.* Dickens v. Puryear, 276 S.E.2d 325, 336 (N.C. 1981) (holding that assault and battery barred by statute of limitations were relevant to determine "outrageousness" of the defendant's death threat).

82. LENORE E. WALKER, THE BATTERED WOMAN SYNDROME 49-50 (1984). Sufferers of Battered Woman's Syndrome must have "become so demoralized and degraded by the fact that they cannot predict or control the violence that they sink into a state of psychological paralysis," a state of learned helplessness. State v. Kelly, 478 A.2d 364, 372 (N.J. 1984) (citing LENORE E. WALKER, THE BATTERED WOMAN 75 (1979)). In order for a woman to have developed Battered Woman's Syndrome, she must have been "repeatedly subjected to any forceful physical or psychological behavior by a man in order to coerce her to do something he wants her to do without concern for her rights . . . . Furthermore, in order to be classified as a battered woman, the couple must go through the battering cycle at least twice." WALKER, THE BATTERED WOMAN, *supra*, at xv. Such women are psychologically trapped in their abusive relationships.

83. *See, e.g., Kelly*, 478 A.2d at 377 (addressing evidence of Battered Woman's Syndrome at murder trial of woman who killed husband); Ibn-Tamas v. United States, 407 A.2d 626 (D.C. 1979) (same).

84. *See, e.g.*, Sharon A. Allard, *Rethinking Battered Woman Syndrome: A Black Feminist Perspective*, 1 UCLA WOMAN'S L.J. 191, 196-200 (1991); Cahn, *supra* note 8, at 1050; David L. Faigman, *To Have and Have Not: Assessing the Value of Social Science to the Law as Science and Policy*, 38 EMORY L.J. 1005, 1056-57 (1989); Christine A. Littleton, *Women's Experience and the Problem of Transition: Perspective on Male Battering of Women*, 1989 U. CHI. LEGAL F. 23, 36 (1989); Mahoney, *supra* note 7, at 40-42.

> dependent she is upon her mate for any input about her value as a person.[85]

In short, there are many circumstances that support the conclusion that a batterer exploits his victim's known hypersensitivity.

D. Public/Private Sphere Distinction

One final factor makes domestic abuse a prime candidate for the tort: the legacy of a public/private sphere distinction.[86] The private sphere has traditionally been a woman's sphere. The stereotypes of the home environment and the woman's role there, as well as the history of protectionism by the courts,[87] suggest that it should not be difficult to prove outrage in the domestic violence context.[88] One would expect the courts to grant a remedy that vindicates their stere-

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85. JENNIFER B. FLEMING, STOPPING WIFE ABUSE 87-88 (1979).

86. This dichotomy developed with reference to white, heterosexual, middle-class women. *See* BARBARA J. HARRIS, BEYOND HER SPHERE: WOMEN AND THE PROFESSIONS IN AMERICAN HISTORY 62 (1978); Patricia A. Cain, *Feminism and the Limits of Equality*, 24 GA. L. REV. 803, 814 (1990). In fact, "[m]ost systemic observations of hypothetical differences between females and males involve white, middle-class people, both as observers and as subjects." HUNTER COLLEGE WOMEN'S STUDIES COLLECTIVE, *supra* note 69, at 135.

87. The law has a history of protectionism for women. For example, and ironically, the common law doctrine of interspousal tort immunity had as its basis "her protection and benefit: so great a favorite is the female sex in the laws of England." Townsend v. Townsend, 708 S.W.2d 646, 650 (Mo. 1986) (en banc) (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES 445). Another example of the law's protectionism appears in the historic heightened level of care that carriers owed female passengers. As the court said in Berger v. Southern Pac. Co., 300 P.2d 170, 174 (Cal. Dist. Ct. App. 1956), "To a female passenger a carrier owes a special duty to protect her from insulting remarks, indecent assaults, or improper liberties on the part of its employees." Such protection, when imposed over an individual's desires, becomes paternalism. *See* Leslie Bender, *Changing the Values in Tort Law*, 25 TULSA L.J. 759, 762-63 (1990); Duncan Kennedy, *Distributive and Paternalistic Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 633 (1982). *See generally* Frances Olson, *From False Paternalism to False Equality: Judicial Assaults on Feminist Community, Illinois 1869-1895*, 84 MICH. L. REV. 1518 (1986).

88. Other authors have documented how stereotypes of women affect recovery for emotional injury. For example, Regina Austin explains that although many courts have condoned interrogation techniques at work and summary dismissal for theft and dishonesty—despite employees' view that the techniques are arbitrary, insulting, humiliating, embarrassing, and painful—some courts have also given employees a few victories:

> The successful claimants have been almost uniformly innocent, and most have been young female service workers. It may be that courts are somewhat more sympathetic to workers in this context, but a more likely explanation is that they consider the female plaintiffs especially deserving of compassion because of the emotional vulnerability that is associated with their sex and age.

Regina Austin, *Employer Abuse, Worker Resistance, and the Tort of Intentional Infliction of Emotional Distress*, 41 STAN. L. REV. 1, 11-12 (1988); *see also* Martha Chamallas & Linda K. Kerber, *Women, Mothers, and the Law of Fright: A History*, 88 MICH. L. REV. 814 (1991) (presenting a gendered history of the law's treatment of fright-based injuries); Finley, *supra*

otypical notions of domestic relations when a husband, who is supposed to protect his wife, instead abuses her in the very place that society conceives is the woman's sanctuary.

One scholar has described the public/private sphere distinction as a "central feature of the current view of the family's place in history and society."[89] It is a construct that is "accepted by historians and lawyers alike and, moreover, by those who otherwise differ greatly in their assessments of family and societal development."[90] Historically, gender dictated occupational life, with women's primary place in the private domestic sphere, and men's in the public commercial sphere.[91] This distinction has been called the law of "nature and the Creator,"[92] and has profoundly affected the development of the law and the legal remedies available for the wrongs men and women encounter. The courts often have used the label "private" to justify a lack of intervention in and rectification of tortious conduct occurring in the home, including the intentional infliction of emotional distress.[93]

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note 37, at 41 (explaining the significance of gender roles and gender stereotypes to the development and understanding of tort law).

89. Lee E. Teitelbaum, *Family History and Family Law*, 1985 WIS. L. REV. 1135, 1138. *See generally* Cahn, *supra* note 8, at 1083 ("The tradition of family privacy, of a separate and private sphere for family life, is deeply embedded in the law."); Tobias, *supra* note 19, at 390 & n.177.

90. Teitelbaum, *supra* note 89, at 1138. While Teitelbaum suggests that the public/private line-drawing employs categories whose "meanings are far from obvious," *id.* at 1165, and that the distinction "seems to reflect a series of interpretations of modern conditions," *id.* at 1169, he nowhere dismisses the dichotomy as totally unsupported. Until 1971, the United States Supreme Court's interpretation of the Constitution supported the separate spheres ideology. *See* Reed v. Reed, 404 U.S. 71 (1971).

91. Deborah L. Rhode, *Perspectives on Professional Women*, 40 STAN. L. REV. 1163, 1165 (1988) [hereinafter Rhode, *Perspectives on Professional Women*]; Deborah L. Rhode, *The "No Problem" Problem: Feminist Challenges and Cultural Change*, 100 YALE L.J. 1731, 1737 (1991) [hereinafter Rhode, *The "No Problem" Problem*]; Frances E. Olson, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1501 (1983). *See also* LECLERCQ, *supra* note 73, at 309 ("The woman's place is in the home: this may be called the universal rule. Household affairs belong to the woman, public life to the man.").

92. Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141 (1872) (Bradley, J., concurring) ("The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood . . . .").

93. Note, *Litigation Between Husband and Wife*, 79 HARV. L. REV. 1650 (1966) ("The courts most frequently explain their attitude toward family disputes by referring to the danger that availability of judicial relief could pose to domestic harmony."). Roller v. Roller, 79 P. 788 (Wash. 1905), *overruled in part by* Borst v. Borst, 251 P.2d 149 (1952), an extreme case of family violence, illustrates some courts' reluctance to disrupt "domestic harmony." In *Roller*, a father raped his daughter and was criminally convicted. A civil

Whether one believes that the public/private distinction persists today,[94] or rather that the separate spheres have merged as women have entered public life,[95] certainly the images and stereotypes associated with the distinction linger. Therefore, the distinction remains worthy of discussion. As one author stated, "Despite substantial recent changes in gender roles, gender stereotypes have remained remarkably resilient."[96]

1. The Tranquil Home.—One of the images associated with the private/public dichotomy is that the home is a place of peace and tranquility. For example, one commentator has described the nineteenth century home as "a bastion of peace, of repose, of orderliness, of unwavering devotion to people and principles beyond the self."[97]

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judgment in the daughter's favor was reversed, however. The court emphasized the need for domestic tranquility and indicated that a departure from intra-family immunity would leave "no practical line of demarkation which can be drawn." *Id.* at 789. The court described domestic tranquility as "an interest which has been manifested since the earliest organization of civilized government, an interest inspired by the universally recognized fact that the maintenance of harmonious and proper family relations is conducive to good citizenship, and therefore works to the welfare of the state." *Id.* at 788; *see also* Baron v. Jeffer, 469 N.Y.S.2d 815, 816-17 (N.Y. App. Div. 1983); Weicker v. Weicker, 290 N.Y.S.2d 732 (N.Y. 1968). This rationale also sustained the interspousal tort immunity doctrine. *See, e.g.*, Ebert v. Ebert, 656 P.2d 766 (Kan. 1983) (quoting Stevens v. Stevens, 647 P.2d 1346 (Kan. 1982)).

94. Ruth Gavison, *Feminism and the Public/Private Sphere Distinction*, 45 STAN. L. REV. 1, 22 (1992) ("[T]he post-industrialization distinctions are still in effect today.").

95. Census figures in 1991 showed that 69% of working-age American women participated in the paid labor force, compared to 89% of working-age men. Walter Mead, *Domestic Saints in the Next Revolution*, WORTH, Apr. 1994, at 41 (citing 1991 census figures). However, the average pay of women workers is still, on average, significantly less than that of their male counterparts. Moreover, whether women participate fully in the public sphere is questionable, as women hold only 6% of the United States House and Senate seats, and only 18% of statewide elective office and state legislative positions. Ruth B. Mandel, *The Political Woman*, *in* AMERICAN WOMEN IN THE NINETIES 34, 39 (Sherri Matteo ed., 1993). In addition, women still shoulder approximately 70% of household duties. SUSAN FALUDI, BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN xiv (1991).

96. Rhode, *The "No Problem" Problem*, *supra* note 91, at 1753.

97. John Demos, *Images of the American Family, Then and Now*, *in* CHANGING IMAGES OF THE FAMILY 51 (V. Tufte & B. Myerhoff eds., 1979) (cited in Teitelbaum, *supra* note 89, at 1141); *see also* Continental Casualty Co. v. Garrett, 161 So. 753, 755 (Miss. 1935) (holding that insurance agent's denial of claim, calling insured a "liar," and implying that insured was stealing stated cause of action). In *Garrett*, the Mississippi Supreme Court wrote,

> All our modern notions of law, common and statutory, and particularly in this state, comprise the requirement that the home is a place where the occupant and his family shall be entitled, not as a matter of sentiment, or of morals, or of good manners, but of positive law, to the right of quiet and peaceable enjoyment, free from hostile intrusions, whatever the character of the offensive intrusions may be, which includes, as its mere statement will prove, the right to be free from insults inflicted by those who intrude themselves within the precincts of the home; and that a violation of that right shall be deemed an actionable tort.

More recently, authors have recognized that "[t]he family is traditionally considered one of society's most sacred institutions. It is the source of comfort and nurturance for its members. High standards have been set for its functioning."[98] The home's peace and tranquility have been characterized as divinely ordained: "We recognize fully the importance of the family unit in our society and that peace and tranquility in the home are endowed and inspired by higher authority than statutory enactments and court decisions."[99] Courts, historically reluctant to grant recovery for abusive words alone unless physical injury results,[100] had made an exception when the outrageous words occurred in the home.[101]

These tranquil images of the home contrast sharply with stereotypes of the workplace. Traditionally conceived of as a male enclave, the workplace has been characterized as a "jungle: competitive, impersonal, unrelenting."[102] As Professor Regina Austin has stated, "The conventional wisdom is that, in the workplace, abuse can be a legitimate instrument of worker control and an appropriate form of discipline. By 'abuse' I mean treatment that is intentionally emotionally painful, offensive, or insulting."[103] Given that the public sphere in general and the workplace in particular are stereotypically male,[104] with the attendant characteristics, women have faced a high threshold for establishing workplace behavior as outrageous.

> With occasional notable exceptions . . . sexual harassment victims have rarely found relief through tort law. The men

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Id.

98. Sandra Wexler, *Battered Women and Public Policy, in* WOMEN, POWER, & POLICY 184-85 (Ellen Boneparth ed., 1982). *Cf.* Gavison, *supra* note 94, at 23 (declaring that the family "is the realm of affection, love, harmony, and cooperation").

99. Bounds v. Caudle, 560 S.W.2d 925, 927 (Tex. 1977) (prospectively abolishing interspousal tort immunity for willful and intentional torts).

100. *See* W.J. Dunn, Annotation, *Civil Liability for Insulting or Abusive Language Not Amounting to Defamation*, 15 A.L.R.2D 108 (1951).

101. HARPER ET AL., *supra* note 44, at 613-14.

102. Teitelbaum, *supra* note 89, at 1140-41.

103. Austin, *supra* note 88, at 1. Austin also acknowledges, albeit unintentionally, the private/public sphere division. She indicates that courts, at times, do not allow employers to extend their control beyond the workplace into the homes of their employees. "Employers have attempted to extend their control beyond the workplace into the homes and private lives of their employees. The courts in outrage cases have sometimes allowed workers a sphere of privacy in which the employers' concerns are not given priority." *Id.* at 8 n.26.

104. *See* Rhode, *Perspectives on Professional Women*, *supra* note 91, at 1202 ("Despite substantial progress over the last quarter century, workplace cultures continue to devalue the traits and priorities historically associated with women."); Katz v. Dole, 709 F.2d 251 (4th Cir. 1983) (observing that Title VII "does not require employers to extirpate all signs of centuries-old prejudice").

> who rendered decisions in the judicial system, and who, it is safe to assume, had never themselves experienced sexual harassment, failed to see the complained-of conduct as sufficiently outrageous to warrant imposition of liability for the intentional infliction of emotional distress. It was assumed that persons of ordinary sensibilities (that is, persons very much like the male decision-makers) would not be offended by conduct common in the workplace.[105]

The private/public sphere distinction historically posed a double disadvantage for women by isolating them from the law in the private sphere and preventing them from recovering in the public sphere. However, the distinction could conceivably assist them in arguing that domestic violence should be actionable as intentional infliction of emotional distress. It would be consistent with the courts' near reverence for domestic tranquility and the accepted view that the workplace is emotionally painful to label violence in the private sphere outrageous.[106]

2. A Husband Is To Protect His Wife.—Another stereotype might also afford a basis for finding domestic violence to be outrageous: historically, a husband was supposed to protect his wife. William Blackstone explained the traditional ideal: "[T]he very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated with that of the husband: under whose wing, protection, and cover she performs everything . . . ."[107] In *Bradwell v. Illinois*,[108] for example, Justice Bradley, in trying to justify the prohibition against women's practice of law in Illinois, wrote, "[T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, women's protector and defender."[109] The image persists into the twentieth century: It has been said,

> [T]here grew up in Christian society a whole body of customs which oblige the man to serve the woman, to respect

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105. Finley, *supra* note 37, at 55; *see also* Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1203 (1989) (reviewing judicial opinions in Title VII sexual harassment cases and noting that "a characteristically 'male' view, which depicts sexual taunts, inquiries or magazines as a comparatively harmless amusement, or as the treatment women should expect when they push their way into the workplace, pervades many recent opinions").

106. Scherer, *supra* note 9, at 545 (noting that "domestic abuse typically occurs in a home setting").

107. 1 WILLIAM BLACKSTONE, COMMENTARIES *430.

108. 83 U.S. (16 Wall.) 130 (1872).

109. *Id.* at 141 (Bradley, J., concurring).

> her in the full sense of the word. There is the duty of protection: the man must toil for the woman; he has to defend her if she is attacked; he must attend to her welfare before looking out for his own. . . .[110]

Even today, a husband has a legal duty to protect his wife, and breach of the duty can result in criminal liability in some states.[111] Consequently, it is arguable that a batterer's abuse of the very one whom he has a duty to protect should facilitate a finding of outrageous conduct.

3. Woman as a Moral Icon.—Women's role as homemaker has been glorified throughout this nation's history. As one author stated, "The glorification of marriage has had to be built into our society. One way has been to profess great respect, even reverence, for the role of wife, to accord it high moral, if not legal, status."[112] During the 1800s, the cult of domesticity developed. Society exalted, albeit for some women only, the importance of the home and the role of homemaker.[113] The positions of wives in the nineteenth century "were defined by a purity and altruism directly opposed to everything found in the larger world, and their functions were to 'provide moral uplift for everyone else with whom they came in contact—chiefly their husbands and children.'"[114] During the Cold War, society again emphasized that marriage and motherhood were the only appropriate roles for women and that the mother was "a symbol of stability and security."[115] This view of women as moral icons did not extend simply to wives and mothers. Segments of society have perceived women as venerated madonnas whose "guise is self-sacrificing, pure, and content."[116] Even today, seeing these stereotypical characteristics as

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110. LECLERCQ, *supra* note 73, at 316.

111. *See* WAYNE R. LAFAVE & AUSTIN W. SCOTT, CRIMINAL LAW § 26, at 184 (1972) ("The common law imposes affirmative duties upon . . . husbands to aid their wives . . . . Thus [a husband] may be guilty of criminal homicide . . . for failure to aid his imperiled wife . . . . Action may be required to thwart the threatened perils of nature (e.g., to combat sickness, to ward off starvation or the elements); or it may be required to protect against threatened acts by third persons."); *see also* CHARLES E. TORCIA, WHARTON'S CRIMINAL LAW § 173, at 287 (1979) ("If a husband fails to supply his wife with clothing or shelter, thereby causing her death by freezing or exposure, he is guilty of manslaughter.").

112. Bernard, *supra* note 69, at 11. The author continues, "Still, despite the high status professed for it, the wife has, since the 18th century, suffered a relative loss of status." *Id.*

113. ROSALIND ROSENBERG, BEYOND SEPARATE SPHERES: INTELLECTUAL ROOTS OF MODERN FEMINISM 1-27 (1982) (discussing Edward Clarke's theory on the importance of separate spheres and the dangers of educating women).

114. Teitelbaum, *supra* note 89, at 1142 (quoting John Demos, *The American Family in Past Time*, 43 AM. SCHOLAR 422, 433-34 (1974)).

115. Chamallas & Kerber, *supra* note 88, at 859 (noting that many elements of American society sought to preserve the cult of domesticity in the 1960s).

116. HUNTER COLLEGE WOMEN'S STUDIES COLLECTIVE, *supra* note 69, at 31.

strengths rather than weaknesses, cultural feminists claim that "women are more nurturant, caring, loving and responsible to others than are men."[117] The image of a man abusing a moral icon should evoke a certain sense of outrage and aid recovery under a theory of intentional infliction of emotional distress.

In sum, the traditional conception of gender roles might support a finding that domestic violence is "outrageous." One would expect the courts to grant a remedy when a woman suffers abuse in her "sanctuary," the home, at the hands of her putative protector. In fact, however, courts have inconsistently applied the tort of intentional infliction of emotional distress in the context of domestic violence. Undoubtedly, these inconsistent outcomes discourage victims from seeking redress through the tort.

II. THE INADEQUACIES OF THE PRESENT APPROACH

A. Inconsistencies Exist

Courts that have addressed the tort of intentional infliction of emotional distress in the context of domestic violence have taken inconsistent approaches that have resulted in inconsistent outcomes. A brief examination of six cases illustrates the various approaches, and illustrates that there is no consensus on at least one key issue: how to analyze the element of "outrageousness" in a domestic violence situation.[118]

In *Davis v. Bostick*,[119] the Supreme Court of Oregon allowed the cause of action in a domestic violence case involving physical violence. Lesa Rae Davis and John Bostick had been married for nine years when they separated in May 1973. Shortly after the separation, as the parties were returning from a trip with their children, Bostick struck his wife and broke her nose. Later in the year, Bostick began calling Davis's home and workplace, threatening and abusing her. The calls continued for approximately two years. In late 1973, he choked her and threatened to kill both her and her male friends. During the following year, he accused her in public of obtaining an abortion, threatened to kill her, and destroyed some of her personal property.

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117. West, *supra* note 69, at 17-18 (discussing Gilligan's thesis on gender differences in moral development).

118. Hassing v. Wortman, 333 N.W.2d 765 (Neb. 1983); Hakkila v. Hakkila, 812 P.2d 1320 (N.M. Ct. App.), *cert. denied*, 811 P.2d 575 (N.M. 1991); Murphy v. Murphy, 486 N.Y.S.2d 457 (N.Y. App. Div. 1985); Davis v. Bostick, 580 P.2d 544 (Or. 1978); Twyman v. Twyman, 855 S.W.2d 619 (Tex. 1993); Massey v. Massey, 807 S.W.2d 391 (Tex. Ct. App. 1991), *aff'd*, 867 S.W.2d 766 (Tex. 1993).

119. 580 P.2d 544 (Or. 1978).

After the parties' divorce in 1975, Bostick destroyed more of Davis's property, threatened her with a loaded pistol, damaged her boyfriend's pickup truck, told Davis and others that she had a fatal mental illness, called Davis's future mother-in-law obscene names, harassed Davis's mother, and again threatened to kill Davis. The jury returned a verdict awarding $7,500 in general damages and $10,000 in punitive damages for this "intentional course of conduct designed to inflict emotional stress and mental anguish."[120] The appellate court characterized Bostick's conduct as "to put it mildly, outrageous in the extreme."[121]

The defendant in *Davis* had argued, *inter alia,* that none of the incidents occurring during the marriage should have gone to the jury; he asserted that where no physical injury exists, interspousal immunity should apply. The court flatly rejected that suggestion. Oregon had already abolished interspousal immunity for intentional torts, and the court refused to carve out an exception for the intentional tort of emotional distress. The court rejected the argument that a flood of litigation would occur, pointing to its experience with the abolition of interspousal immunity for other intentional torts, and noting that the burden of proof would protect against unwarranted litigation. The court concluded its discussion by quoting Professor Prosser: "It is the business of the law to remedy wrongs that deserve it, even at the expense of a 'flood of litigation,' and it is a pitiful confession of incompetence on the part of any court of justice to deny relief on such grounds."[122] In the course of its discussion, the court commented that a jury "fairly could" reach the conclusion that this conduct was outrageous and caused severe emotional distress.[123]

In *Massey v. Massey,*[124] a case involving no physical violence against the plaintiff, the jury awarded the plaintiff $362,000 for her emotional distress. The appellate court upheld the award. The facts indicated that the husband, over the course of a twenty-two year marriage, was "abusive, explosive, and rageful. He constantly engaged in verbal abuse such as criticism and blaming, and he belittled [his wife] in front of her children. He had temper tantrums and physical outbursts which sometimes involved the destruction of property."[125]

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120. *Id.* at 545-46.

121. *Id.* at 546.

122. *Id.* at 546-47 (quoting WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 12 at 51 (4th ed. 1971)).

123. *Id.* at 546.

124. 807 S.W.2d 391 (Tex. Ct. App. 1991).

125. *Id.* at 399.

While these outbursts caused the plaintiff "intense anxiety and fear," he never physically assaulted her.[126] Other torment by the defendant included his "tight control over money and his threats that [his wife] would be penniless if she divorced him," as well as threats "to tell her children and her friends of her extramarital affair and to take custody of her youngest daughter from her."[127] He was also "rude to her friends" and "embarrassed her in front of others."[128] The jury specifically found that the defendant had not acted with malice. Consequently, it failed to award exemplary damages.[129]

While the Supreme Court of Oregon and the Texas Court of Appeals recognized the tort of intentional infliction of emotional distress in the domestic violence context, and found the defendants' behavior to be outrageous, not all courts permit the tort[130] or find that domestic violence satisfies the "extreme and outrageous conduct" requirement.

The New Mexico Court of Appeals, for example, adopted a different approach in *Hakkila v. Hakkila*.[131] While recognizing the tort in the marital context, the court set a high threshold for what constituted outrageous conduct. Consequently, it held as a matter of law that the plaintiff's claim lacked merit, although she had prevailed below. The trial court had found,

> [Husband] on occasions throughout the marriage and continuing until the separation:
>
> a. assaulted and battered [wife],[132]
>
> b. insulted [wife] in the presence of guests, friends, relatives, and foreign dignitaries,
>
> c. screamed at [wife] at home and in the presence of others,
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> d. on one occasion locked [wife] out of the residence overnight in the dead of winter while she had nothing on but a robe,

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126. *Id.* The defendant acknowledged having "physically pushed his daughter on one occasion." *Id.*

127. *Id.*

128. *Id.*

129. *Id.* at 400.

130. *See, e.g.*, Weicker v. Weicker, 237 N.E.2d 876, 877 (N.Y. 1968) (refusing to permit a cause of action for intentional infliction of emotional distress between spouses, although New York recognized the tort generally).

131. 812 P.2d 1320 (N.M. Ct. App. 1991).

132. The assault and battery included grabbing the wife during an argument and throwing her face-down across the room into a pot of dirt, as well as slamming part of a camper shell down on her head and the trunk lid down on her hands. *Id.* at 1322.

> e. made repeated demeaning remarks regarding [wife's] sexuality,
>
> f. continuously stated to [wife] that she was crazy, insane, and incompetent,
>
> g. refused to allow [wife] to pursue schooling and hobbies,
>
> h. refused to participate in normal marital relationship with [wife] which ultimately resulted in only having sexual relations with [wife] on four occasions in the last three years of the marriage,
>
> i. blamed his sexual inadequacies upon [wife].[133]

This course of conduct, while egregious, was not held to be "outrageous" as a matter of law.[134]

A striking example of judicial inconsistency on whether domestic violence constitutes outrageous behavior appears in *Hassing v. Wortman*.[135] In *Hassing*, a woman brought a claim for intentional infliction of emotional distress against her ex-husband, who had harassed her for over a year by sending her annoying letters, driving by her house ten to fifteen times a month, crawling in the bushes around her house, entering her home through an unlocked door, trying to force her car over to the side of the road, investigating the background of her new boyfriend, and sending a Christmas letter to relatives accusing her of being pregnant by another man when she married the defendant. He also contacted her employer for the purpose of disadvantaging her in a job. The plaintiff was afraid of the defendant, and even hired a security guard for her second wedding.[136] As to the issue of outrage, the court stated,

> It is doubtful whether the defendant's actions in this case amounted to extreme and outrageous conduct. He did not threaten the plaintiff's safety in any way. . . . While the defendant acted in a childish, irresponsible, and inconsiderate fashion, it is doubtful whether his conduct constituted a sufficient basis upon which liability could be imposed, on the plaintiff's theory of the case.[137]

The dissent, in direct contrast, stated,

> Among the most treasured of the rights a citizen possesses is the right to privacy, the right to be left alone. The accidental

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133. *Id.* at 1321.
134. *Id.* at 1327.
135. 333 N.W.2d 765 (Neb. 1983).
136. *Id.* at 766.
137. *Id.* at 767.

> intrusions on one's right to be left alone necessitated by the complications of an urbanized society are burden enough to bear by any reasonably sensitive person. The deliberate harassing intrusions, repeated frequently and for a continued period, are savage, uncivilized, and outrageous. I reject outright the conclusion that the conduct here is not sufficiently horrid to be classified as outrageous.[138]

There was a similar division in *Murphy v. Murphy*.[139] The majority upheld the jury verdict of intentional infliction of emotional distress and called the defendant's acts "'outrageous' beyond peradventure."[140] The dissent argued that the plaintiff had "voluntarily endured" the defendant's misconduct for nine years, choosing to return to him after he declared the relationship at an end.[141] The dissent ignored evidence indicating that the plaintiff had previously sought relief from the defendant's abuse by obtaining court orders and a warrant for defendant's arrest, and by summoning the police to protect her and her property.[142]

No decision better reflects the divergence of opinion on what constitutes "outrageousness" in a domestic violence situation than *Twyman v. Twyman*.[143] Ms. Twyman's divorce petition included a general claim for emotional harm. The petition alleged that her husband "intentionally and cruelly" attempted to engage her in "deviate sexual acts."[144] At trial she testified that her husband "pursued sadomasochistic bondage activities with her, even though he knew that she feared such activities because she had been raped at knife-point before their marriage."[145] As a result of her husband's activity and demands, the plaintiff testified that she suffered "utter despair" and "devastation," as well as weight loss and an incident of prolonged vaginal bleeding.[146] The psychological pain and humiliation caused her to seek help from three professional counselors.[147] The trial court found that Mr.

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138. *Id.* at 771 (White, J., dissenting).

139. 486 N.Y.S.2d 457 (N.Y. Sup. Ct. 1985).

140. *Id.* at 459.

141. *Id.* at 460 (Mahoney, J., dissenting) ("In August 1981, plaintiff began a written serialization of defendant's acts of assault, threats, neglect and property destruction . . . . It covered a period approximately 10 years in length, and not once during that period did plaintiff either remove herself from the island or seek redress by resort to any traditional tort action. Rather, she meticulously recorded each alleged event until, apparently, the totality of defendant's conduct justified this action for money damages.").

142. *Id.* at 458-59.

143. 855 S.W.2d 619 (Tex. 1993).

144. *Id.* at 620.

145. *Id.* at 620 n.1.

146. *Id.* at 641 (Spector, J., dissenting).

147. *Id.* at 640 (Spector, J., dissenting).

Twyman "attempted to emotionally coerce [the plaintiff] into 'bondage' on an ongoing basis" and "engaged in a continuing course of conduct of attempting to coerce her to join in his practices of 'bondage' by continually asserting that their marriage could be saved only by [the plaintiff] participating with him in his practices of 'bondage.'"[148] The trial court dissolved the marriage, divided the marital estate, awarded child custody and support, and awarded the plaintiff $15,000 plus interest for emotional distress. The intermediate appellate court affirmed, explicitly upholding the recovery for emotional distress on a theory of negligent infliction of emotional distress.[149] Mr. Twyman appealed.

While the case was pending before the Texas Supreme Court, the high court in another decision refused to adopt the tort of negligent infliction of emotional distress in any context.[150] Consequently, the court had to decide whether the judgment could be affirmed on alternate grounds. As Ms. Twyman's pleadings were broad enough to encompass a claim for intentional infliction of emotional distress, it was on that theory that the supreme court analyzed whether it could sustain the trial court's judgment. Five members of the eight-member tribunal recognized the tort of intentional infliction of emotional distress in the marital context. One justice agreed to recognize the tort of intentional infliction of emotional distress, but not in the marital context, while two justices refused to adopt the cause of action at all.[151] More interestingly, however, a controlling plurality of three justices remanded the case to the trial court on the intentional infliction claim, while two justices felt that the court could have affirmed the intermediate appellate court's ruling and upheld the wife's recovery for her husband's infliction of emotional distress under the intentional infliction theory. While the plurality emphasized the trial court's lack of findings on outrageous behavior and severe emotional distress, the two other justices felt that the defendant's behavior was outrageous as a matter of law.[152] One judge, who rejected the adoption of the tort in any context, summed up the contrasting opinions with this comment: "[E]ven the Court itself is unable to say whether the conduct complained of in this case either is, might be, or is not

148. *Id.*
149. *Id.* at 620.
150. Boyles v. Kerr, 855 S.W.2d 593 (Tex. 1993).
151. *Id.* at 622 n.4.
152. *Id.* at 625.

tortious. The fault lies in the principal element of the tort, the requirement that a defendant's conduct be outrageous."[153]

B. Domestic Violence is the Norm

As is evident from the above cases, some judges do not characterize domestic violence as outrageous conduct.[154] Struggling with whether a defendant's conduct is "truly outrageous," judges have applied the tort to the domestic context in a manner that has been described as "somewhat controversial."[155] The prevalence of domestic violence in our society explains, in part, the inconsistent case outcomes and presents a major obstacle for domestic violence victims who seek redress through use of the tort. Domestic violence is incredibly common, as is society's tolerance of it. Murray Straus has written, "[F]or many people a marriage license is a hitting license [and] physical violence between family members is probably as common as love and affection between family members . . . ."[156] A survey conducted for the U.S. National Commission on the Causes and Prevention of Violence found that about twenty-five percent of the people interviewed approved of a spouse hitting the other spouse under certain circumstances.[157] This figure is probably conservative due to underreporting.[158] When one includes emotional abuse, domestic violence,

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153. *Id.* at 639 (Hecht, J., concurring and dissenting).

154. *See* Kohler, *supra* note 13, at 1048 ("Battered women pursue claims for intentional infliction of emotional distress . . . with little success.").

155. Robert G. Spector, *Marital Torts: Actions for Tortious Conduct Occurring During the Marriage*, 5 AM. J. FAM. L. 71, 73 (1991).

156. Murray A. Straus, *Sexual Inequality, Cultural Norms, and Wife-Beating*, *in* WOMEN INTO WIVES: THE LEGAL AND ECONOMIC IMPACT OF MARRIAGE 59 (Jane R. Chapman & Margaret Gates eds., 1977). Straus summarized the tension as follows:

> The norms and values relating to intrafamily violence pose something of a paradox. On the one hand there is what we have called the 'myth of family nonviolence,'. . . which reflects cultural norms and aspirations for the family as a group characterized by love, gentleness, and harmony. On the other hand, there also seem to be social norms which imply the right of family members to strike each other and which therefore legitimize intrafamily assaults, at least under certain conditions.

Id. at 61. Similarly, as the New Jersey Supreme Court recognized, "It is clear that the American home, once assumed to be the cornerstone of our society, is often a violent place." State v. Kelly, 478 A.2d 364, 370 (N.J. 1984).

157. Straus, *supra* note 156, at 67 (citing R. Stark & J. McEvoy III, *Middle Class Violence*, PSYCHOLOGY TODAY, Nov. 4, 1970, at 52-65).

158. Straus, *supra* note 156, at 67 ("That figure [i.e., that 25% of those surveyed approved of one spouse hitting the other under certain circumstances] is probably a considerable underestimate because of the existence of opposite and more socially acceptable antiviolence norms and because of the implicit or covert nature of the proviolence norms.").

as well as society's acceptance of it, is virtually epidemic.[159] At least one court has acknowledged explicitly that the prevalence of domestic violence makes the tort's application problematic. The court in *Hakkila* stated, "Conduct intentionally or recklessly causing emotional distress to one's spouse is prevalent in our society. Thus, if the tort of outrage is construed loosely or broadly, claims of outrage may be tacked on in the typical marital disputes, taxing judicial resources."[160]

It appears that male judges exemplify and perpetuate, to some extent, society's tolerance of domestic violence,[161] and this tolerance poses an obstable for plaintiffs seeking to establish the outrageousness of the abuse. The New Jersey Supreme Court Task Force on Women in the Courts, while examining judicial attitudes in the context of the implementation of the Prevention of Domestic Violence Act,[162] found that judges exhibited "gender-based biases, stereotypical attitudes and . . . well intentioned ignorance."[163] In particular, judges were insensitive to the "dependency factors present in the abusive relationship."[164] They also often "trivialized the plight of the female as victim" because it was a "domestic problem," and considered "what [the woman] did to earn her beating."[165] Furthermore, they failed to punish violations of domestic violence orders in situations that "clearly would not be tolerated except in the domestic context."[166] The offending judges' conduct supports one critic's opinion that "[t]here is a general belief [among judges] that if the woman was seriously abused, then she

159. Hakkila v. Hakkila, 812 P.2d 1320, 1324-25 (N.M. Ct. App. 1991); *see also* Schneider, *supra* note 7, at 539 (noting that defining battering as an issue of power and control evidenced by emotional abuse and not physical violence "makes battering normal and usual.").

160. *Hakkila*, 812 P.2d at 1324-25. *Cf.* Bhama v. Bhama, 425 N.W.2d 733, 755 (Mich. Ct. App. 1988) (failing to find a non-custodial parent's attempts to create a hostile relationship between child and custodial parent outrageous because "it is a problem in almost every marital case").

161. Indeed, because domestic violence transcends class boundaries, many judges themselves may be abusers. *See* Angelo N. Ancheta, *Community Lawyering*, 81 CAL. L. REV. 1363, 1382 (1993) (book review).

162. N.J. STAT. ANN. §§ 2C:25-17 to 25-33 (West 1982, 1994 Supp.) The Act provides, *inter alia*, civil restraining orders for domestic violence victims.

163. Lynn H. Schafron, *Educating the Judiciary About Gender Bias: The National Judicial Education Program to Promote Equality for Women and Men in the Courts and the New Jersey Supreme Court Task Force on Women in the Courts*, 9 WOMEN'S RTS. L. REP. 109, 150 (1986).

164. *Id.*

165. *Id.*

166. *Id. See also* Frances Olson, *Feminist Theory in Grand Style*, 89 COLUM. L. REV. 1147, 1177 n.121 (1989) (reviewing CATHARINE A. MACKINNON, FEMINISM UNMODIFIED (1987)) ("'Domestic violence' is generally thought of and treated as less serious and less aberrant than other forms of violence. The question is more often asked why women victims fail to protect themselves than why the perpetrators commit the violence.").

would leave; if she stays, then the abuse did not occur."[167] Anecdotal evidence indicates that judicial insensitivity is rampant.[168] To make matters even worse, "[i]n the judicial system dominated by men, emotional distress claims have historically been marginalized: 'The law of torts values physical security and property more highly than emotional security and physical relationships.'"[169] Even if a case survives pretrial adjudication, the judge may give the issue of outrage to the jury,[170] subjecting the domestic violence victim to lay misconceptions about domestic violence.[171] The judge may also give a jury instruction on outrage that is potentially detrimental to domestic violence victims.[172] In sum, the male-dominated judiciary is predisposed to disfavor civil claims by victims of domestic violence: "The legal system is dominated by members of the same group engaged in the aggression. The prac-

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167. Cahn, *supra* note 8, at 1985; *see also* Blair v. Blair, 575 A.2d 191, 192-93 (Vt. 1990) (remarking on trial court's finding that plaintiff was likely exaggerating abuse, "as evidenced by the fact that she stayed throughout the four years of marriage").

168. For example, Judge Paul P. Heffernan of Somerville, Massachusetts, told the husband of Pamela Dunn, "You want to gnaw on her and she on you, fine, but let's not do it at the taxpayers' expense.' Ellen Goodman, *Awards the Very Best of the Worst to Mark of Anniversary of Passage of Suffrage*, THE BOSTON GLOBE, Aug. 28, 1987, at A17. Pamela Dunn had gone to court seeking a protective order and was ultimately killed by her husband. *Id. See also* Chief Justice A.M. "Sandy" Keith, *Domestic Violence and the Court System*, 15 HAMLINE L. REV. 105, 110 (1991) ("Some attorneys, mostly male, responded to the Task Force survey with the belief that women 'are crafty schemers who use the OFP [Orders for Protection] proceeding to punish men or gain advantage in a dissolution proceeding.'") (footnote omitted).

169. *Twyman*, 855 S.W.2d at 642 (Spector, J., dissenting) (citing Chamallas & Kerber, *supra* note 88, at 814). *See generally* Chamallas & Kerber, *supra* note 88.

170. *See, e.g.*, Richard L. v. Armon, 536 N.Y.S.2d 1014 (N.Y. App. Div. 1989) (refusing to award plaintiff summary judgment on issue of liability and leaving the factual question of "outrageousness" to jury where defendant had pled guilty to sexual abuse in the second degree of a minor of less than 14 years and the court condemned that conduct as "truly beyond the bounds of a decent society").

171. *See* State v. Kelly, 478 A.2d 364, 379 (N.J. 1984) (acknowledging that "a battering relationship embodies psychological and societal features that are not well understood by lay observers. Indeed, these features are subject to a large groups of myths and stereotypes. It is clear that this subject is beyond the ken of the average juror.").

172. For example, in Massey v. Massey, 807 S.W.2d 391, 400 (Tex. Ct. App. 1991), the trial court gave the following instruction in an emotional distress case:

> The bounds of decency vary from legal relationship to legal relationship. The marital relationship is highly subjective and constituted by mutual understandings and interchanges which are constantly in flux, and any number of which could be viewed by some segments of society as outrageous. Conduct considered extreme and outrageous in some relationships may be considered forgivable in other relationships. In your deliberation on the questions, definitions and instructions that follow, you shall consider them only in the context of the marital relationship of the parties to this case.

While the plaintiff managed to recover $362,000 under this instruction, another jury might have found that repeated abuse was typical in the relationship and therefore, not extreme and outrageous.

tice is formally illegal but seldom found to be against the law. The atrocity is *de jure* illegal but *de facto* permitted."[173]

C. *The Current Doctrinal Approach is Problematic for Feminism*

Feminists face a dilemma when invoking the tort of intentional infliction of emotional distress as a remedy for domestic violence.[174] We may find it strategically advantageous to portray the plight of victims in terms of traditional gender roles in order to emphasize the outrageousness of abusers' misconduct and enhance the chances for recovery. On the other hand, such stereotypes help to perpetuate legal and social disadvantages. By stressing women's moral purity, for example, society can justify keeping women out of some rough-and-tumble areas of the workforce. More insidiously, "lingering stereotypes reinforce gender hierarchy by obscuring its dynamics. The result is that sex-based subordination appears natural and necessary, rather than a consequence of societal construction and a subject for societal challenge."[175] Stereotypes also perpetuate a world view that does not comport with the reality of most women's lives. For instance, many women are single heads of households, and a vast majority of women participate in both the private and public spheres.[176] The traditional public/private sphere dichotomy ignores this reality, and allows courts to rationalize staying out of domestic violence issues altogether.[177] It is similarly problematic to rely on doctrine that defines domestic violence victims as hypersensitive, evoking the stigma of abnormality that the prefix "hyper" implies. Additionally, the current doctrine creates perverse incentives for a victim who wants to increase her chances for recovery: A domestic violence victim is more likely to recover under current doctrine if she experiences repeated harass-

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173. Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1303 (1991) (referring to rape); *see also* CATHARINE A. MACKINNON, TOWARDS A FEMINIST THEORY OF THE STATE 161-62 (1989) (opining that the state, although appearing neutral and objective, is "male in the feminist sense: the law sees and treats women the way men see and treat women. The liberal state coercively and authoritatively constitutes the social order in the interest of men as a gender—through its legitimating norms, forms, relation to society, and substantive policies.").

174. *See* Finley, *supra* note 37, at 891 ("At times, [feminist] lawyers have found themselves constrained by the power of legal discourse . . . .").

175. *Id.* at 1755.

176. *See supra* note 95.

177. *See* Catharine A. MacKinnon, *Privacy v. Equality: Beyond* Roe v. Wade, *in* FEMINISM UNMODIFIED 93, 101 (1987) (stating that "the legal concept of privacy can and has shielded the place of battery, marital rape and women's exploited labor"). *But see* Gavison, *supra* note 94, at 44 ("[T]he all-out fight against the vocabulary of public and private is unjustified, because the terminology is uniquely suited, precisely because of its richness and ambiguities, to make and clarify many of feminism's most fundamental claims.").

ment or learned helplessness, rather than leaving an abusive relationship.[178]

III. A NEW STANDARD FOR THE DOMESTIC VIOLENCE CONTEXT: PER SE OUTRAGE

A. A Description of the Standard

As noted above, almost all states have statutes authorizing civil protection orders for domestic abuse, and protective orders are also available in criminal cases.[179] This Article's modest proposal is that a willful violation of a civil protection order should constitute outrage per se.[180] Whenever a woman, or the state on her behalf, has obtained a judgment for criminal contempt or a conviction for the violation of a civil protection order, that conviction or finding of contempt should suffice to establish the outrage element of the tort of intentional infliction of emotional distress. Alternatively, a woman should be able to prove to a civil court, without first having obtained an order of criminal contempt or a conviction, that the defendant willfully violated her civil protection order.[181] This proposal would simplify the determination of outrage and reduce the plaintiff's burden in proving intent to inflict severe emotional distress, but would leave intact the elements of severe emotional distress and causation. Adoption of the per se standard would ensure that "the circumstances in which the tort is recognized [are] described precisely enough . . . that the social good from recognizing the tort will not be outweighed by the unseemly and invasive litigation of meritless claims."[182]

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178. *See supra* notes 61-64, 82-85 and accompanying text; *see also infra* notes 210-211 and accompanying text.

179. *See supra* note 38.

180. Certainly a more radical proposal is possible, such as one for strict liability for violation of the civil protection order, or one where civil contempt, which does not require willfulness, could be used to establish the element of outrageous conduct. WRIGHT, *supra* note 24, § 771. Nor does the present proposal advocate that the first act of domestic violence be per se outrageous. Instead, it requires at least two acts of violence: the act that led the woman to seek the order and the act that violates the order. The present proposal is also not a blueprint for abolishing patriarchy, the most radical and perhaps the only legitimate solution. *See* West, *supra* note 69, at 4 (arguing that abolition of patriarchy is "the political precondition of a truly ungendered jurisprudence").

181. The Article adopts willful disobedience, as opposed to the civil contempt standard which imposes liability unless the defendant shows his inability to comply, DAN B. DOBBS, LAW OF REMEDIES § 2.8(7) (1993), because it is more consistent with the idea of an intentional tort. To establish a willful violation, it must be shown that a court order exists, the abuser had actual knowledge of the order, the abuser possessed the ability to comply, and the abuser disobeyed the order. *See, e.g.*, People v. Greenfield, 184 Cal. Rptr. 604, 605 (Cal. App. Dep't Super. Ct. 1982); DOBBS, *supra*, § 2.8(7).

182. Hakkila v. Hakkila, 812 P.2d 1320, 1326 (N.M. Ct. App. 1991).

This approach has an analogy in the tort law of negligence.[183] The doctrine of per se negligence exists in most American jurisdictions and allows a court to use the violation of a safety statute to assist it in deciding one element of the tort.[184] Negligence per se applies

> where a statute or municipal ordinance imposes upon any person a specific duty for the protection or benefit of others, if he [or she] neglects to perform that duty he [or she] is liable to those for whose protection or benefit it was imposed for any injuries of the character which the statute or ordinance was designed to prevent, and which were proximately caused by such neglect.[185]

Under a negligence per se rule, a defendant can be liable for certain acts or omissions that might not qualify as negligence under the ordinary reasonable person test,[186] and the issue of reasonable conduct need not go to the jury. Negligence per se is a bright-line rule. It supplants the jury's subjective determination of reasonableness with an objective standard.[187] While negligence per se establishes the existence of the defendant's breach of a legally cognizable duty owed to the plaintiff, it does not establish liability.[188] The plaintiff must still show that such negligence was a proximate cause of the injury or damage sustained.[189]

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183. *See generally* L.S. Tellier, Annotation, *Violation of Statute or Ordinance Regarding Safety of Building or Premises as Creating or Affecting Liability for Injuries or Death*, 132 A.L.R. 863 (1941); RESTATEMENT, *supra* note 12, §§ 286-90.

184. Stephen G. Gilles, *Rule-Based Negligence and the Regulation of Activity Levels*, 21 J. LEGAL STUD. 319, 342 (1992).

185. Osborn v. McMasters, 41 N.W. 543 (Minn. 1889); 57A AM. JUR. 2D *Negligence* § 727 (1981).

186. Clarence Morris, *The Role of Criminal Statutes in Negligence Actions*, 49 COLUM. L. REV. 21, 27 (1949).

187. *See* Twyman v. Twyman, 855 S.W.2d 619, 633 (Tex. 1993) (Hecht, J., concurring and dissenting) (stating that in a negligence action a jury must find that the defendant was careless); Morris, *supra* note 186, at 23.

188. 57A AM. JUR. 2D *Negligence* § 727 (1981).

189. *Id.* Although this Article focuses on an intentional tort and not on negligence, and although it looks at the nature of the conduct and not intent, and while it addresses the violation of a civil protection order and not a statute, the analogy is useful. The analogy is less helpful, however, on the issue of excuse. Under negligence per se, the tortfeasor can rebut the presumption of negligence by showing justification or excuse, that is, that he or she "did what might reasonably be expected of a person under ordinary prudence, acting under similar circumstances, who desired to comply with the law." STUART M. SPEISER, 1 THE NEGLIGENCE CASE: RES IPSA LOQUITUR § 1.8 (1972). Yet, under the Article's proposal, a defendant's violation of the order would be excused only when it was not willful, or when it fell within one of the other excuses generally associated with the law of contempt, *e.g.*, inability to comply without fault on his part, 17 AM. JUR. 2D, *Contempt* § 161 (1990), or vagueness of the order. *Id.* § 157.

Just as a policy analysis must justify the adoption of negligence per se, so too it must justify the per se rule of outrage: "If a civil court's use of a criminal prosecution will result in a novel liability, this liability is the creature of the court, and can be justified in the last analysis only on policy."[190] Consequently, the advantages and disadvantages of the outrage per se standard require examination.

B. The Advantages of the New Standard

A per se standard of outrage offers many advantages. Adopting a per se standard undoubtedly makes for more consistent outcomes in this area of the law. As discussed above, the concept of "outrage" is vague.[191]

> Outrageousness, like obscenity, is a very subjective, value-laden concept; what is outrageous to one may be entirely acceptable to another. To award damages on an I-know-it-when-I-see-it basis is neither principled nor practical. The diverse perspectives present in a free society make decisions about what is outrageous controversial and uncertain in all but the clearest cases . . . .[192]

The same jurist further remarked, "Because outrageousness is a subjective, almost personal notion, its application is as much a matter of who decides as of what happened."[193] The per se standard eliminates this subjectivity.

The per se standard will also facilitate recovery for victims. As discussed above, the determination of whether conduct is outrageous is for the judge at first instance.[194] Many judges may harbor personal views and prejudices about domestic violence and its victims that make recovery difficult at present.[195] The jury does not necessarily regard a victim with any greater empathy.[196] A per se outrage standard will help to remove the effect of these biases and misunderstandings.

The per se standard of outrage also eliminates the need to tackle the thorny issue of who is the "average member of the community," the benchmark against which the trier of fact evaluates conduct to

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190. Morris, *supra* note 186, at 46-47.

191. *See supra* text accompanying note 57.

192. Twyman v. Twyman, 855 S.W.2d 619, 629 (Tex. 1993) (Hecht, J., concurring in part and dissenting in part).

193. *Id.* at 631 (Hecht, J., concurring in part and dissenting in part).

194. *See supra* note 52 and accompanying text.

195. *See supra* notes 161-168 and accompanying text.

196. *See supra* note 171.

determine whether it is outrageous.[197] An "average" male or female member of the community is certain to bring to the analysis his or her own gendered sensibilities. While little scholarly attention has focused on the community member's perspective in the context of intentional infliction of emotional distress, the citizen's perspective is at least as problematic in this context as in more familiar ones.[198] To the extent that jurors do not employ the viewpoint of a reasonable woman in determining outrage under current doctrine, women may have trouble recovering under the tort.[199] On the other hand, relying on

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197. RESTATEMENT, *supra* note 12, § 46 cmt. d.

198. *See* Naomi R. Cahn, *The Looseness of Legal Language: The Reasonable Woman Standard in Theory and in Practice*, 77 CORNELL L. REV. 1398 (1992) (discussing the standard of the reasonable woman in sexual harassment law, domestic violence law, and rape law); Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1091 (1986) (noting that "[i]n rape, the male standard defines a crime committed against women, and male standards are used not only to judge men, but also to judge the conduct of women victims"); Finley, *supra* note 37, at 59 (arguing that the perspective by which one judges the circumstances and reasonableness of actions can be important to outcome); Caroline Forell, *Reasonable Woman Standard of Care*, 11 U. TASMANIA L. REV. 1 (1992) (proposing the imposition of a reasonable woman standard of care in civil actions brought for sexual harassment, rape, offensive battery, intentional infliction of emotional distress, and false imprisonment); *see also* State v. Kelly, 478 A.2d 364, 377 (N.J. 1984) (requiring the jury to evaluate a murder defendant's "honest and reasonable belief" in the need for self-defense from the domestic violence victim's perspective); State v. Wanrow, 559 P.2d 548 (Wash. 1977) (same). *Compare* Rabidue v. Osceola Refining Co., 805 F.2d 611, 620 (6th Cir. 1986) (holding that in Title VII offensive work environment claim "the trier of fact . . . must adopt the perspective of a reasonable person's reaction to a similar environment"), *cert. denied*, 481 U.S. 1041 (1987), *overruled in part by* Harris v. Forklift Sys., Inc., 114 S. Ct. 367 (1993) *with* Ellison v. Brady, 924 F.2d 872, 878 (9th Cir. 1991) (holding that trier of fact must adopt perspective of the "reasonable victim").

199. Women, more than men, tend to believe that an abuser's conduct is outrageous.

> When what is involved is emotional or dignitary injury . . . the socialisation processes and power relations that women and men experience make many of them perceive what is harmful quite differently. This is especially the case when the harm is sexual or involves disparities in physical strength. Much male conduct which women find offensive is viewed by men and therefore the law, as harmless and innocent.

Forell, *supra* note 198, at 5-6. As is true in the Title VII hostile workplace context, "a range of social facts" makes the experience "distinctly different" for women and men. Abrams, *supra* note 105, at 1202.

Unlike the reasonable person debate in other areas, advocates of the reasonable woman standard in the emotional distress context may have authority for stating that the perspective of a reasonable woman should determine outrage. When discussing the gross insult rule applicable to common carriers, *see* RESTATEMENT, *supra* note 12, § 48, one eminent commentator stated that the insult had to be a gross one, "of a kind highly offensive to the ordinary reasonable man." Prosser, *supra* note 61, at 62-63. He then continued, "The personality of the plaintiff is to be taken into account, and a man hardened to rough language may be expected and required to endure more than a lady or a child." *Id.* at 63; *see also* Magruder, *supra* note 46, at 1046 (suggesting that the plaintiff's gender should play a role in the determination of defendant's liability); Fort Worth & R.G. Ry. Co. v. Bryant, 210 S.W. 556 (Tex. Ct. App. 1919) (holding that daughter, but not father, could recover

the "reasonable woman standard" marginalizes those women whose experiences differ from the "average" profile.[200] The per se rule of outrage for violation of a restraining order sidesteps these pitfalls by eliminating altogether the need to determine what is "outrageous."

The per se standard will also ease the plaintiff's burden in establishing the defendant's intent to cause emotional distress. To prove that intent, the plaintiff will be able to employ, as circumstantial evidence, the fact that the defendant willfully violated the civil protection order. Traditionally under the tort, a defendant could argue that he neither intended to inflict emotional distress, nor knew of facts indicating a high probability that such distress would occur.[201] Under the per se outrage standard, however, a domestic violence victim's securing of a civil protection order puts the abuser on notice that any violation of it will likely inflict emotional distress. Therefore, by establishing that the abuser intended to violate the order, the domestic violence victim has a powerful argument that the abuser acted with substantial certainty that severe emotional distress would result from his conduct.

Moreover, the per se standard addresses the concern of some that it is impossible to draw lines circumscribing permissible conduct in a domestic relationship. Discord can result from a variety of behavior, and when discord arises, it is inevitable that parties will suffer emotional distress.[202] Some of this distress is not actionable.[203] A per se rule clarifies which conduct is actionable and sets reasonable limits on

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for exposure to coarse language in a train depot); RESTATEMENT, *supra* note 12, § 48 cmt. c ("[L]anguage addressed to a pregnant or sick woman may be actionable where the same words would not be if they were addressed to a United States Marine."). In addition, the gender of the plaintiff has been deemed relevant to assessing damages in domestic violence assault and battery cases. *See* Duplechin v. Toce, 497 So. 2d 763, 767 (La. Ct. App. 1986), *cert. denied*, 499 So. 2d 86 (1987) (listing victim's gender as one factor to consider in assessing damages).

200. *See generally* Cahn, *supra* note 198. Of course, there is no "reasonable woman standard" applicable to all women, regardless of class, race, ethnicity, and so forth. *See* Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 846 (1991) (noting that for some courts "the objective standard of pervasiveness is defined by an idealized woman who simply may not exist"). For example, discrimination against women of color in the job and housing markets makes domestic violence against women of color more outrageous, as discrimination reduces a woman of color's means to extricate herself from the violence. Schneider, *supra* note 7, at 533.

201. *See* RESTATEMENT, *supra* note 12, § 46 cmt. i ("The rule [of § 46] applies where the actor desires to inflict severe emotional distress, and also where he knows that such distress is certain, or substantially certain, to result from his conduct.").

202. Twyman v. Twyman, 855 S.W.2d at 627 (Phillips, C.J., concurring and dissenting) (stating that "the fact finder is left to draw a virtually impossible distinction between recoverable and disallowed injuries").

203. *Id.*

behavior. Under this proposal, an abuser's menacing conduct would not be per se outrageous unless it had occurred at least twice: once before the woman obtained her civil protection order, and once more after she obtained the order.[204]

By labeling the violation of a restraining order outrageous, the per se rule not only describes the behavior as socially unacceptable, but provides a normative standard.[205] "[T]he term 'outrageous' is neither value-free nor exacting. It does not objectively describe an act or series of acts; rather, it represents an evaluation of behavior."[206] This normative standard will reinforce the legislative responses to the problem, and will place violation of a civil restraining order in the category of behavior that is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community."[207] Then violation of a restraining order meant to protect a domestic violence victim (and perhaps, by extension, domestic violence generally) will take its rightful place among the examples of extreme and outrageous conduct listed in the *Restatement:*

> for one person to tell another, as a practical joke, that the other's spouse has been badly injured in an accident and is in the hospital with both legs broken . . . for a man, knowing of another person's pathological fear of men in women's clothing, to dress as a woman to surprise and startle the

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204. The need for at least two acts of violence comports with some courts' policy of allowing divorce only where the cruelty was severe enough. *See* Brown v. Brown, 56 S.E.2d 330, 333-34 (S.C. 1949) (holding, on physical cruelty count, where husband slapped wife twice and pinched her, "It is not every slight violence, however, committed by the husband or wife against the other, even in anger, which will authorize the divorce. It is generally held that a single act of physical cruelty does not ordinarily constitute ground for divorce, unless it is so severe and atrocious as to endanger life, or unless the act indicates an intention to do serious bodily harm or causes reasonable apprehension of serious danger in the future."); H.D. Warren, Annotation, *Single Act as Basis of Divorce or Separation on Ground of Cruelty*, 7 A.L.R.3D 761, 765 (1966) (stating that most courts follow the rule in *Brown*, and that some states have statutes requiring repeated acts of cruelty before a court will authorize a divorce on that ground). *But see* Tibbetts v. Tibbetts, 248 A.2d 75, 76 (N.H. 1968) (stating that when husband choked his wife twice, "There is no doubt that actual violence committed on a spouse by the other attended with danger to life or limb can constitute extreme cruelty . . . . Undoubtedly, in most instances extreme cruelty consists in a course of conduct rather than in a single act. However acts of violence need not be persistent, or become a fixed habit, or be many in number, before they can be said to constitute extreme cruelty authorizing a divorce on that ground . . . .").

205. *Compare* Austin, *supra* note 88, at 5 (suggesting that tort of outrage would serve a useful "pedagogical function" by helping to legitimize workers' claims to respectful treatment by supervisors).

206. Givelber, *supra* note 12, at 51.

207. RESTATEMENT, *supra* note 12, § 46 cmt. d.

> other person . . . for the president of a rubbish collectors association to summon a member to a meeting, accuse him of working in another member's exclusive territory, and threaten that if he does not pay over what he has earned he will be physically beaten and his business destroyed . . . for a man to give a woman a bathing suit which dissolves in water, leaving her naked in front of strangers . . . for a person to "hex" the farm of a superstitious landowner to force him to sell it . . . .[208]

By adopting the per se standard of outrage, the courts will validate domestic violence victims' descriptions of their experiences and promote the ethics of responsibility and care within intimate relationships. By protecting domestic violence victims and promoting those values, the law will help strengthen the community.[209]

The per se standard is also an empowering standard, helping to remove the general power imbalance that exists between a domestic violence victim and her abuser. Under current law, the abuser may continue his harassment of the victim in court by denying that his acts in violation of a restraining order were wrong or that he intended to cause his victim distress. A per se rule would minimize any opportunity for such mendacity. In addition, the proposed standard encourages a victim to extricate herself from the relationship, unlike current doctrine which creates an incentive for a woman to stay in order to benefit in her tort action from the pattern of harassment or from hypersensitivity attributable to the Battered Woman's Syndrome.[210] The incentive under the per se standard of outrage is to obtain a civil protection order, which usually enjoins any contact between the parties and can evict the abuser from the home.[211] Also, because the per se standard does not depend upon stereotypes of women to convince a court that the conduct is outrageous, the per se standard reinforces the notion of gender equality between the parties.

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208. Twyman v. Twyman, 855 S.W.2d 619, 631 (Tex. 1993) (Hecht, J., concurring and dissenting) (listing examples of extreme and outrageous conduct from RESTATEMENT, *supra* note 12, § 46 cmt. d, illus. 1-3, & cmt. f, illus. 10, and suggesting that judges' views about the outrageousness of such acts would differ).

209. West, *supra* note 69, at 66.

210. Some authors want to import the Battered Woman's Syndrome into the tort of intentional infliction of emotional distress. *See, e.g.*, Kohler, *supra* note 13, at 1030 (arguing that "the Battered Woman Syndrome should be used . . . as evidence of emotional distress"). That suggestion provides a counterproductive incentive, encouraging women to stay in abusive relationships in order to increase their chances for recovery.

211. Finn, *supra* note 16, at 44.

C. *Arguments Against the Approach*

This proposal undoubtedly will encounter resistance. Arguments against it will include the following: (1) victims explicitly or implicitly consent to the violence; (2) many violations of civil protection orders are not violent or outrageous; (3) the per se standard will flood the courts with litigation; (4) the rule will disrupt domestic harmony; (5) the rule will create confusion in other areas of family law; (6) the tort will be used primarily against women; (7) the tort will be unavailable to women without civil protection orders; (8) the per se rule usurps the courts' authority to enforce their orders; and (9) the proposal is not radical enough. This section attempts to show that all of these arguments lack merit.

The first criticism, that victims somehow consent to abuse, rests in part on age-old notions about domestic relations.

> Although a husband has no right, and consequently no privilege by virtue of the marital relation, to beat or chastise his wife or to deprive her of her liberty, it does not follow that there is no privilege arising from the marital relation. It is a matter of common knowledge that the conduct of husband and wife toward each other generally is different from that of strangers. Every motion would not be an assault, nor every touching a battery, although they might be such in particular cases if the parties were strangers. There would be a considerable amount of express or implied consent due to the fact of the marital relation, and even where there was lack of actual consent the relation would license much conduct.[212]

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212. McCurdy, *supra* note 39, at 1055. A similar idea emerged in the marital rape context. *See* Note, *Litigation Between Husband and Wife*, 79 HARV. L. REV. 1650, 1661 (1966) (explaining that a husband's immunity from prosecution for raping his wife arose from traditional notions of marital consent and contract). Cavalier acceptance of apparent consent to physical violence is still common. For example, the following appeared in an Ann Landers column in the 1970s:

> Dear Ann Landers: Come out of the clouds, for Lord's sake, and get down here with us humans. I am sick to death of your holier-than-thou attitude toward women whose husbands given them a well-deserved belt in the mouth.
>
> Don't you know that a man can be pushed to the brink and something's got to give? A crack in the teeth can be a wonderful tension-breaker. It's also a lot healthier than keeping all that anger bottled up.
>
> My husband hauls off and slugs me every few months and I don't mind. He feels better and so do I because he never hits me unless I deserve it. So why don't you come off of it? - REAL HAPPY
>
> Dear R.H.: If you don't mind a crack in the teeth every few months, it's all right with me. I hope you have a good dentist.

Straus, *supra* note 156, at 63 (quoting Ann Landers (Oct. 29, 1973)).

It also rests on the erroneous belief that victims actually enjoy the abuse they suffer: "Some popular misconceptions about battered women include the beliefs that they are masochistic and actually enjoy their beatings, that they purposely provoke their husbands into violent behavior, and . . . that women who remain in battering relationships are free to leave their abusers at any time."[213] While such stereotypes are unworthy of response, the consent argument deserves an answer because of its effectiveness in the context of marital rape. Even assuming that the victim had consented to abuse at one time, her consent dissipates "when notice is given that all such conduct will no longer be tolerated."[214] A woman gives such notice when she obtains a civil protection order, if not long before. Moreover, "even if consent were to be implied to certain emotional 'rough-housing,' if defendant exceeds that consent and does a substantially different act . . . the consent is void."[215] In addition, "[a]cts made criminal for the protection of a certain class of persons simply cannot be consented to."[216] As the consenting party is not *in pari delicto* with the abuser, the traditional basis for the consent rule is undermined.[217] Finally, as a normative matter, public policy should not permit a consent defense to bar recovery.[218]

Another possible argument against the per se rule is that not all violations of civil protection orders are outrageous. Violations of a civil protection order can take many forms. The orders usually proscribe a range of behavior, including being near the plaintiff and calling her.[219] Should a defendant who violates an order requiring no telephone contact be held to have acted outrageously for making a

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213. State v. Kelly, 478 A.2d at 370 (citing LENORE E. WALKER, THE BATTERED WOMAN 19-31 (1979)). Writers have pursued these stereotypes for ages.

> In the female sex there is consequently an instinctive appreciation of manly strength and courage; this is found in most women, and they may enjoy the display of manly force even when it turns against themselves. It is said that among the Slaves of the lower class the wives feel hurt if they are not beaten by their husbands; that the peasant women in some parts of Hungary do not think they are loved by their husbands until they have received the first box on the ear; that among the Italian Camorrists a wife who is not beaten by her husband regards him as a fool.

EDWARD WESTERMARCK, THE FUTURE OF MARRIAGE IN WESTERN CIVILISATION 94 (1936); *see also* LECLERCQ, *supra* note 73, at 311 n.34 (indicating that certain women must be beaten by their husbands to feel loved).

214. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 114 (5th ed. 1984).

215. Cole, *supra* note 12, at 569 (citing WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 12, at 104 (4th ed. 1971)).

216. KARP & KARP, *supra* note 33, at 61.

217. KEETON ET AL., *supra* note 214, § 18, at 122, 124.

218. *Id.* at 124.

219. *See supra* note 16.

single telephone call? Would not the "[i]ndiscriminate allowance of actions for mental anguish encourage neurotic overreactions to trivial hurts"?[220] Such concerns are exaggerated. This proposal still requires that a victim of domestic violence prove her severe mental anguish, as well as causation and intent. These elements of the tort will "minimize the problems of distinguishing the true from the false claim and the trifling annoyance from the serious wrong."[221] Lest it be forgotten, the per se rule can be invoked only after the violation of a civil protection order that itself was predicated on prior domestic violence. Therefore, a pattern of harassing activity between parties who are in a special relationship automatically exists when the civil protection order is violated. Regardless of the way in which an abuser violates his victim's civil protection order, the fact that he willfully violates it and thereby furthers a pattern of abuse is outrageous.[222] The earlier violence cannot and should not be forgotten, nor is it irrelevant to her claim for emotional distress.[223] The initial civil protection order is always predicated on physical abuse, threatened or attempted physical abuse, or sexual abuse.[224] In order to obtain a civil protection order in Washington, D.C., for example, one must establish the existence of an intrafamily offense, which the statute defines as a criminal offense between family members.[225] While a violation of a civil protection order may consist of a noncriminal offense, such as disobeying the stay-away provision, often the violation consists of yet another criminal offense. In fact, it is recognized that "domestic

220. Knierim v. Izzo, 174 N.E.2d 157, 164 (Ill. 1961). Yet as that same court continued, "[A] line can be drawn between the slight hurts which are the price of a complex society and the severe mental disturbances inflicted by intentional actions wholly lacking in social utility." *Id.* at 164.

221. Reagan v. Rider, 70 Md. App. 503, 521 A.2d 1246 (1987).

222. In his famous 1956 article *Insult and Outrage*, William Prosser summarized the liability imposed upon collection agencies and other creditors for high-pressure collection methods, remarking that although only one small occurrence might have triggered the lawsuit, "[i]t is seldom that any one such item of conduct is found alone in a case, and the liability usually has rested on a prolonged course of hounding by a number of extreme methods." Prosser, *supra* note 61, at 48-49 (footnote omitted). The same holds for landlords evicting tenants and insurance adjusters seeking to force a settlement. *Id.* at 49. Similarly, although one small event may ultimately violate the civil protection order, that occurrence is intrinsically part of the history of violence that induced the domestic violence victim to seek a civil protection order in the first place.

223. Even under the traditional formula for the intentional infliction of emotional distress, some courts recognize that violence long since past, perhaps even barred by the statute of limitations, is still relevant to the emotional distress claim. *See, e.g.*, Henriksen v. Cameron, 622 A.2d 1135, 1142 (1993).

224. Finn, *supra* note 16, at 60-63.

225. D.C. CODE ANN. §§ 16-1001 to -1005 (1989).

violence escalates."[226] Even assuming, arguendo, that some violations of civil protection orders are trivial, the abuser always has the defense that the violation of the order should be excused. For example, the defendant could explain that the violation was not willful, e.g., he encountered the plaintiff by chance and had no reason to know of her presence.[227]

Another possible criticism is that the use of the per se standard will flood the courts with cases. Yet no flood of litigation resulted from the abrogation of interspousal immunity, although tortious physical violence is common in many deteriorating marriages.[228] In any event, this fear is not a sufficient justification to reject the standard. The plight of domestic violence victims needs remedying, and administrative convenience is not a compelling reason to reject the per se standard.[229] The plaintiff's burden of proof for the remaining elements of the tort should protect "against unwarranted, meretricious or merely vindictive litigation."[230] Moreover, dire predictions of frivolous litigation assume that domestic violence victims have a motive to bring baseless claims, and that courts will be unable to recognize meritless lawsuits.

A further concern is that the availability of the tort for victims of domestic violence will disrupt domestic tranquility. Courts have recognized the fallacy of such an objection:

> The danger that the domestic tranquility may be disturbed if husband and wife have rights of action against each other for torts, and that the courts will be filled with actions brought by them against each other for assault, slander, and libel . . . we think is not serious. So long as there remains to the parties domestic tranquility, while a remnant is left of that affection and respect without which there cannot have been a true marriage, such actions will be impossible.[231]

Moreover, as another court observed, "When a spouse inflicts intentional harm upon the person of the other spouse, peace and harmony

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226. Clark, *supra* note 20, at 290-91.

227. *See supra* notes 180, 188.

228. Ruprecht v. Ruprecht, 599 A.2d 604, 606 (N.J. Super. Ct. 1991).

229. Davis v. Bostick, 580 P.2d 544, 546-47 (quoting WILLIAM L. PROSSER, HANDBOOK ON THE LAW OF TORTS § 12, at 51 (4th ed. 1971)). *Cf.* Bhama v. Bhama, 425 N.W.2d 733, 736 (Mich Ct. App. 1988) (tort may exist in the context of a non-custodial parent's attempt to foment discord between the custodial parent and child because "the implicit threat of an avalanche of cases, arising whenever one parent makes an uncomplimentary remark about the other, simply is not perceived by us as seriously undermining society or its laws").

230. *Ruprecht*, 599 A.2d at 606.

231. Brown v. Brown, 89 A. 889, 891-92 (Conn. 1914).

in that home has been so damaged that there is little danger that it will be further impaired by maintenance of an action for damages."[232] Other jurists have expressed doubt that personal injury suits between spouses damage marital harmony any more than the property and contract actions courts have traditionally permitted.[233]

Some courts have disfavored the tort, and will likely challenge the per se standard, on the ground that it may resurrect fault as an issue in divorce proceedings,[234] or that it will "obfuscate the issues of custody, support, and division of community property."[235] The related debates about the value of the no-fault divorce system and the means by which a court can best remedy tortious conduct during a marriage when a divorce action between the parties is pending (or has concluded) go beyond this Article's scope and have already attracted scholarly attention.[236] Courts permitting the tort action have taken different approaches to the problem and have arrived at different solutions.[237] The concern, therefore, serves less as an impediment to

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232. Ebert v. Ebert, 656 P.2d 766, 766-67 (Kan. 1983) (quoting Stevens v. Stevens, 647 P.2d 1346, 1348 (Kan. 1982)); *see also* Henriksen v. Cameron, 622 A.2d 1135, 1139 (Me. 1993) ("[B]ehavior that is 'utterly intolerable in a civilized society' and is intended to cause severe emotional distress is not behavior that should be protected in order to promote marital harmony and peace.") (footnote omitted); Townsend v. Townsend, 708 S.W.2d 646, 650 (Mo. 1986) (en banc) ("[T]here can be little sanctity remaining when the relationship becomes the source of wanton violence.").

233. *See* Townsend v. Townsend, 708 S.W.2d 646, 650 (1986); Mertz v. Mertz, 3 N.E.2d 597, 601 (N.Y. 1936) (Crouch, J., dissenting).

234. Doe v. Doe, 519 N.Y.S.2d 595 (N.Y. Sup. Ct. 1987).

235. Chiles v. Chiles, 779 S.W.2d 127, 132 (Tex. Ct. App. 1989) (denying intentional infliction of emotional distress as a separate cause of action in a divorce action).

236. *See, e.g.*, Lynn D. Wardle, *No-Fault Divorce and the Divorce Conundrum*, 1991 B.Y.U. L. REV. 79; Jana B. Singer, *Divorce Reform and Gender Justice*, 67 N.C. L. REV. 1103 (1989); Herma H. Kay, *Equality and Difference: A Perspective on No-Fault Divorce and its Aftermath*, 56 U. CIN. L. REV. 1 (1987). *See also* Barbara H. Young, *Classification of Personal Injury Awards in Divorce Actions*, 27 J. FAM. L. 489 (1988-89) ("The landmark cases in this area give little guidance on how to coordinate such tort suits and divorces."); Schepard, *supra* note 20, at 130-31; Orsinger, *supra* note 54, at 1295.

237. *Compare* Henriksen v. Cameron, 622 A.2d 1135 (Me. 1993) (tort action and divorce action permissible but should not be joined in a no-fault state) *with* Twyman v. Twyman, 855 S.W. 2d 619, 625 (Tex. 1993) (encouraging the actions be brought together). *See also* Stuart v. Stuart, 410 N.W.2d 632, 638 (Wis. Ct. App. 1987), aff'd, 421 N.W.2d 505 (Wis. 1988) (persuasively arguing "if an abused spouse cannot commence a tort action subsequent to a divorce, the spouse will be forced to elect between three equally unacceptable alternatives: (1) commence a tort action during marriage and possibly endure additional abuse; (2) join a tort claim in a divorce action and waive the right to a jury trial on the tort claim; or (3) commence an action to terminate the marriage, forego the tort claim, and surrender the right to recover damages arising from spousal abuse. To enforce such an election would require an abused spouse to surrender both the constitutional right to a jury trial and valuable property rights to preserve his or her well-being. This the law will not do."). In states that allow fault grounds for divorce, or that recognize fault in property distribution, a court might want to guard against double recovery in a subsequent tort

the adoption of a per se rule than as a warning to victims who chose to use it of the various procedural obstacles that might arise in their attempt to do so.[238]

A more troubling criticism of the per se rule is that if the tort becomes more visible in the domestic violence context, it may be used predominantly against women. Women's principal method of fight-

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action by allowing the defendant to raise by way of affirmative defense that the tort and the fault grounds are the same, and thereby attempt to obtain a set-off against a plaintiff's judgment. *See, e.g.*, Goldman v. Wexler, 333 N.W.2d 121, 123 (Mich Ct. App. 1983). This seems like the best alternative because tort remedies may not automatically afford sufficient compensation for marital wrongs recognized in fault divorce statutes. Young, *supra* note 236, at 515, 510 (discussing Murphy v. Murphy, 547 P.2d 1102, 1104 (1976)).

238. Any domestic violence victim who is divorcing her batterer and wants to sue him must carefully inquire into whether the cause of action is permissible and what is the best procedure for bringing it. She must consider whether interspousal immunity bars the action. *See generally supra* note 40. She must also examine whether a state allows, permits, or requires the tort action to be brought during the divorce action, *e.g.*, whether the state excludes all fault from all aspects of the divorce proceedings. Some states consider fault relevant in a property division or maintenance determination even if the grounds for divorce are no-fault. *Compare* Sparks v. Sparks, 485 N.W.2d 893, 901 (Mich. 1992) (holding fault as one factor relevant to the disposition of assets) *with In re* Marriage of Williams, 199 N.W.2d 339 (Iowa 1972) (holding fault is not relevant to the disposition of assets) *and* Stuart v. Stuart, 410 N.W.2d 632, 637 (Wis. Ct. App. 1987) (noting spousal abuse is relevant to maintenance payments under no-fault divorce code but not to disposition of assets). Additional issues are whether a tort claim is an asset that needs to be reduced to judgment in order to value the marital estate or to determine child support or maintenance, and whether the statute of limitations will run if the action is brought after the divorce. A woman who wants to bring suit prior to or during her divorce must also consider whether her recovery will come from the community's estate or from the separate property of her spouse, and whether it will become her separate property or community property. *See, e.g.*, CAL. CIV. CODE § 5126(c) (West Supp. 1983) (excluding interspousal tort awards from community property); Orsinger, *supra* note 54, at 1306-07. Similarly, the domestic violence victim who already has divorced but wants to bring an action for marital violence must carefully consider whether a general release in a divorce settlement agreement or res judicata bar the action. *See, e.g.*, N.J. R. CIV. P. 4:38-2(a); ALA. R. CIV. P. 42(b). Currently a split exists among state courts as to whether an individual can litigate a tort claim after his or her divorce. A majority of courts hold that the suits involve different causes of action, and res judicata does not apply. *See generally* Schepard, *supra* note 20, at 130-31; Orsinger, *supra* note 54, at 1295. *See, e.g.*, Henriksen v. Cameron, 622 A.2d 1135 (Me. 1993) (holding intentional infliction of emotional distress action based on domestic violence not barred by interspousal immunity or res judicata). However, a significant minority of courts apply a same-transaction test and bar the tort claim as res judicata. *See generally* Schepard, *supra* note 20, at 130-31; Orsinger, *supra* note 54, at 1295. It seems, however, that a no-fault divorce action and a tort action would be sufficiently different in terms of proceedings, remedies, and operative facts to avoid the problem of res judicata. Young, *supra* note 236, at 500; Nash v. Overholser, 757 P.2d 1180 (Idaho 1988), *overruled in part on other grounds by* State v. Guzman, 842 P.2d 660 (Idaho 1992) (making a narrow exception to res judicata for tort actions following a divorce); *Stuart*, 410 N.W.2d at 636 ("[T]he divorce and tort actions lack an identity of causes of action or claims. Applying the res judicata doctrine to bar the tort action fails to achieve the doctrine's objectives and would be fundamentally unfair.").

ing back against their abusers is verbal: "It must be acknowledged . . . that the wife too possesses means of making her husband suffer and of exasperating him; nor are they any less efficacious because less muscular."[239] Abusive language can be actionable under the tort,[240] and men do make claims under the tort.[241] It is therefore possible that abusers may invoke the per se standard to harass their victims. Such a risk seems rather insubstantial, however, given the costs of litigation and the plaintiff's burden of proof. Such cases undoubtedly are distinguishable from cases involving true domestic violence. In addition, if judges carefully limit the issuance of civil protection orders to deserving plaintiffs, e.g., by refusing to award mutual restraining orders and screening out frivolous applications, the use of the per se rule by men should not be a problem.[242] Finally, the risk that men will use the civil system to harass women appears to be no greater under this Article's proposal than under the status quo.

One further disadvantage of the proposal is conceivable: If the violation of a civil protection order is per se outrageous, conduct outside of the per se category may be deemed not to be outrageous as a matter of law. Courts must avoid this result by recognizing that much misconduct is outrageous even if the victim obtained no civil protection order in advance, or even if the civil protection order did not prohibit the particular conduct. Again, negligence per se provides a useful analogy. While compliance with a safety statute is evidence of due care, it "does not necessarily preclude a finding that the

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239. LECLERCQ, *supra* note 73, at 311.

240. *See generally* Michael A. DiSabatino, Annotation, *Civil Liability for Insulting or Abusive Language—Modern Status*, 20 A.L.R.4TH 773, 780-81 (1983 & Supp. 1993) (noting that 24 states allow recovery for mental distress, regardless of physical consequences, by a person to whom abusive language is addressed).

241. *See, e.g.*, Browning v. Browning, 584 S.W.2d 406 (Ky. Ct. App. 1979) (husband sued wife for adulterous behavior); Jones v. Jones, 62 N.H. 463, 467 (1883) (husband sued wife for her sudden departure during second week of marriage, taking his clothing, accusing him of bigamy, and threatening to pursue him "to the prison walls"); Ruprecht v. Ruprecht, 599 A.2d 604 (N.J. Super. 1991) (husband sued wife for adulterous behavior); Waliser v. Tada, 1990 WL 20080 (Ohio Ct. App. Mar. 6, 1990) (husband sued battered women's shelter alleging that shelter intentionally inflicted emotional distress by refusing to disclose whether his wife was there); Koepke v. Koepke, 556 N.E.2d 1198 (Ohio Ct. App. 1989) (husband sued wife for wife's announcement, in divorce petition, that he was not the father of her child); Pournaras v. Pournaras, Nos. 49936, 49937 (Ohio Ct. App. Dec. 19, 1985) (husband sued wife for his arrest and jailing on domestic violence charges, which his ex-wife later dropped); Przybyla v. Przybyla, 275 N.W.2d 112 (Wis. Ct. App. 1978) (husband sued wife for obtaining an abortion without his consent and deceiving him as to her intention regarding her pregnancy).

242. *See generally* Elizabeth Topliffe, *Why Civil Protection Orders Are Effective Remedies for Domestic Violence but Mutual Restraining Orders Are Not*, 67 IND. L.J. 1039 (1992).

actor was negligent in failing to take additional precautions."[243] The per se standard should encourage women to obtain civil protection orders, but should not preclude the cause of action for those who do not have such an order or for those women whose abusers' actions do not fall under one.

In addition, courts may resist the per se rule because they believe it usurps their authority to enforce their orders. Courts traditionally address violations of court orders through contempt proceedings, which if criminal in nature are meant to vindicate the authority of the court.[244] Any benefit to the plaintiff from such proceedings is usually incidental. Therefore, a court may perceive a plaintiff's advocacy of her own interests by suing in tort for her abuser's disobedience of a court order as a usurpation of its authority. Such was the situation in *Kukla v. Kukla*,[245] in which a wife brought an action for intentional infliction of emotional distress arising out of her husband's alleged violation of a mutual restraining order entered in a divorce action. The order provided that the parties were "mutually restrained from annoying and harassing each other in any way and more specifically, from telephoning the other."[246] The plaintiff alleged that her husband harassed her by "repeatedly calling her on a car telephone furnished by his employer and by 'coming to her house and acting in a threatening and intimidating manner.'"[247] The trial court dismissed the complaint with prejudice, stating that the plaintiff could not bring her action in circuit court, but rather had to bring it in the domestic

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243. KEETON ET AL., *supra* note 214, at 233 (5th ed. 1984). Morris, *supra* note 186, at 42-46. *Cf.* Stephen G. Gilles, *Rule-Based Negligence and the Regulation of Activity Levels*, 21 J. LEG. STUD. 319, 344 (1992) ("[T]he mere fact that the legislature has not declared an activity unlawful does not warrant an inference that it is not negligent to engage in that activity under ordinary circumstances, let alone an inference that it is never negligent to do so.").

244. *See* Edward Gregory Mascolo, *Procedures and Incarceration for Civil Contempt: A Clash of Wills Between Judge and Contemnor*, 16 NEW ENG. J. CRIM. & CIV. CONFINEMENT 171, 177 (1990) ("[S]anctions for criminal contempt are punitive in character and are imposed to vindicate the authority and dignity of the law and a court."); Falstaff Brewing Corp. v. Miller Brewing Co., 702 F.2d 770, 778 (9th Cir. 1983) ("The primary purpose of criminal contempt is to punish past defiance of a court's judicial authority, thereby vindicating the court."); Scott & Fetzer Co. v. Dile, 643 F.2d 670, 675 n.7 (9th Cir. 1981) ("purpose of criminal contempt is to vindicate the authority of the court"). However, some recognize that civil contempt also can vindicate the court's authority. G-K Prop. v. Redevelopment Agency, 577 F.2d 645 (9th Cir. 1989) (Kennedy, J.). The entire distinction between criminal and civil contempt is rather blurred. State v. Bullis, 315 N.W.2d 485, 487 (S.D. 1982); Joan Meier, *The "Right" to a Disinterested Prosecutor of Criminal Contempt: Unpacking Public and Private Interests*, 70 WASH. U. L.Q. 85, 121 (1992) (confusion on this distinction between criminal and civil contempt has been widespread).

245. 540 N.E.2d 510 (Ill. App. Ct. 1989).

246. *Id.* at 510.

247. *Id.*

relations division.[248] The appellate court clarified that the trial court was only disallowing forum shopping, holding that when "the conduct underlying the tort action has been regulated by a previous order of the domestic relations court, that court retains jurisdiction to fashion relief for a violation of its order."[249] Yet, the appellate court continued, "Defendants also correctly maintain that the contumacious violation of an injunction does not give rise to damages to the party offended by the violation . . . . 'The established rule in Illinois is that the court may imprison or fine for contempt of its orders but is without authority to recompense [plaintiff] for his damages.'"[250]

To the extent that a jurisdiction only permits criminal contempt proceedings and not civil contempt proceedings for a violation of a civil protection order,[251] and to the extent that a jurisdiction follows the reasoning in *Kukla,* the proposal in this Article may not be adopted. Yet even for those ten jurisdictions which allow only an action for criminal contempt and not civil contempt, the holding in *Kukla* is misguided. Illinois explicitly permits both criminal *and* civil contempt for the enforcement of civil protection orders.[252] Moreover, the holding denies a remedy to anyone who has previously obtained an injunction. The rationale for such a result is unclear. While requiring a plaintiff to institute both the contempt proceeding and her tort proceeding in one court may conserve judicial resources,[253] there are two distinct interests to be vindicated.[254]

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248. The trial court stated,

> I would have to sustain the motion to dismiss this for the simple reason that those statutes that you pose have absolutely nothing to do with, as far as I am concerned, with allegations of a complaint that really seeks a remedy that belongs in the court of domestic relations. All these allegations are strictly those of harassment, of non-compliance with court orders in the court of domestic relations and alleged physical and mental anguish and—physical injury and mental anguish as a result thereof. If we were to rule otherwise, we'd open up the floodgates to the law division to everyone who has a domestic relations matter to come into this court for compensatory damages based upon non-compliance with court orders in the court of domestic relations. And obviously, that can't be done at all.

Id. at 511.

249. *Id.* at 512.

250. *Id.*

251. Only ten states allow criminal contempt proceedings, without also allowing civil contempt proceedings, for violation of a civil protection order. Finn, *supra* note 16, at 65.

252. Finn, *supra* note 16, at 64; ILL. ANN. STAT. ch. 750, para. 60/223(b) (Smith-Hurd 1993).

253. This was particularly true in *Kukla,* where the plaintiff filed her complaint during the middle of the divorce trial.

254. Even requiring both causes of action to be brought at once potentially puts the plaintiff at a disadvantage, for defendants in criminal contempt actions have certain crimi-

Finally, some critics may desire a more radical proposal,[255] and ask the question: why must victims of domestic violence seeking recovery under the tort surmount an "outrage" test at all? Not every emotional distress tort requires such a showing. The *Restatement (Second) of Torts*, section 48, entitled "Special Liability of Public Utility for Insults by Servants," allows recovery for gross insults inflicted by a public utility's servant acting within the scope of his or her employment, irrespective of whether the employee's conduct is "outrageous," if the insults "reasonably" offend the plaintiff.[256] Insults for which recovery has been allowed include profane language, and even for the epithet "[a] big fat woman like you."[257] Professor Prosser described the basis for this special rule as "obviously" being the following:

> the responsibility undertaken by the carrier toward the public, which carries with it an obligation of courtesy that does not rest upon ordinary defendants; the unusual power and opportunity afforded the carrier to wound the feelings of those entrusted to its care; and the interest of the public in freedom from insult at the hands of those with whom it must come in contact, and on whom it must rely for essential help.[258]

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nal procedural protections, whereas defendants in purely civil actions might not have such procedural protections. Hicks v. Feiock, 485 U.S. 624, 632 (1988).

255. *See supra* note 180. The reform suggested arguably does not reflect a feminist point of view. It speaks the language of current legal doctrine, and implicitly tolerates, for the time being, a level of violence that many feminists may find unacceptable. Yet the proposal reflects a pragmatic approach that may receive political or judicial support, and it reduces the power imbalance between the sexes. "Since law inevitably will be one of the important discourses affecting the status of women, we must engage in it. We must pursue trying to bring more of women's experiences, perspectives, and voices into law in order to empower women and help legitimate these experiences." Finley, *supra* note 37, at 907. To the extent feminism implies a commitment to equality between the sexes at the substantive level, and to gender as a focus of concern at the methodological level (including women's concrete experiences), *see* Rhode, *The "No Problem" Problem*, *supra* note 91, at 1735-36, the suggested reform is profoundly feminist.

256. "A common carrier or other public utility is subject to liability to patrons utilizing its facilities for gross insults which reasonably offend them, inflicted by the utility's servants while otherwise acting within the scope of their employment." RESTATEMENT, *supra* note 12, § 48.

257. *See* Haile v. New Orleans Ry. & Light Co., 65 So. 225 (1914) (cited in Prosser, *supra* note 61, at 62 n.133). *See generally* W.J. Dunn, Annotation, *Civil Liability for Insulting or Abusive Language Not Amounting to Defamation*, 15 A.L.R.2D 108, 132 (1951).

258. Prosser, *supra* note 61, at 60. Prosser so concludes after discussing Chamberlain v. Chandler, 5 F. Cas. 413, 414 (C.C. Mass. 1893). In that case, the master of a ship insulted and mistreated his passengers. He was liable because he had contracted for transportation and also for "decency of demeanor." Prosser, *supra* note 61, at 59. Subsequent cases relied upon the same rationale. *Id.* Today recovery is allowed where there is no contract. *Id.* at 59-60 nn.114-117.

This reasoning could apply with similar force to the intimate relationship. One entering such a relationship has an obligation of courtesy to his or her partner. The partners have an unusual power and opportunity to injure each other's feelings.[259] The public also has an interest in ensuring that physical and emotional safety exist once parties enter such a relationship.[260]

Yet adopting the equivalent of section 48 of the *Restatement* as a remedy for victims of domestic violence is not the best avenue for changing the law. Simply, it goes too far to award damages for all gross insults in the domestic context. The risks of flooding the judiciary and infringing on liberty counsel against such a proposal.[261] Moreover, the application of the gross insult rule would not lessen the need to rely on stereotypes of women to enhance a victim's chances for recovery. Rather, the proposed per se rule occupies a middle ground between the current interpretation of outrage, and the perilously broad standard of section 48.

In sum, while the objections to the per se standard vary in merit, none presents a compelling reason not to adopt it. Rather, the arguments against the standard warn feminists and the courts to apply the standard vigilantly and in a manner consistent with the legislative purpose of the civil protection order remedial schemes. The advantages of the new standard—including more consistent outcomes, rational line-drawing in intimate relationships, easing of the plaintiff's burden in proving outrage and intent to inflict severe emotional distress, establishment of a normative standard, and empowerment of women—all justify its adoption.

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259. *See supra* text accompanying note 66.

260. *See* Demos, *supra* note 97, at 43-60 ("[W]e have isolated family life as the primary setting—if not, in fact, the only one—for *caring* relationships between people.").

261. *See* Bernstein, *supra* note 56, at 1765. The author explains that the Supreme Court balances censorship of ideas with a recipient's need for spatial privacy by removing the government's power to "regulate the intrusion of offensive ideas into the spatial privacy of the recipient unless the speaker has received actual, specific notice from the individual recipient not to communicate such an idea to him." A civil protection order provides just such notice, making constitutional concerns minimal under the per se rule. Besides, the per se rule prevents those words

> which by their very utterance inflict injury or tend to incite an immediate breach of the peace. . . . [S]uch utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (citing Z. CHAFEE, FREE SPEECH IN THE UNITED STATES 149-50 (1941)).

CONCLUSION

At first blush, the current formulation of the tort of intentional infliction of emotional distress may seem to be a useful cause of action for domestic violence victims because several potential arguments for the outrageousness of domestic violence presently exist. However, domestic violence is depressingly common in our society, hindering the tort's successful application, and the best chance for establishing its outrageousness under current law may require victims to invoke traditional stereotypes of dependency and helplessness that ultimately disadvantage women. That courts have inconsistently applied the tort for domestic violence victims' benefit indicates the need for reform.

The per se standard of outrage for the willful violation of a protection order is a modest proposal for improving domestic violence victims' chances for recovery. It removes an unwarranted obstacle to recovery and helps empower domestic violence victims. It also protects courts and potential defendants from unjustified suits by preserving the requirement that the plaintiff prove the remaining elements of tort. Finally, the proposal establishes a normative standard clearly expressing society's intolerance of the continued abuse of women who have obtained and relied upon court orders for their protection. There is simply no good reason to inquire further into the issue of outrage when an abuser has violated such an order.