LOVE AND THE LAW, CHILDREN AGAINST MOTHERS AND FATHERS: OR, WHAT'S LOVE GOT TO DO WITH IT?

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ABSTRACT

Should there be a legally enforceable duty for a parent to raise his child in an atmosphere of warmth and love? Is it possible to use our current judicial system to judge a civil dispute between a parent and child based on failure to meet the duty of emotional care? And, if it is possible, should the legal process impose a positive duty on the parent to love his child, or should it confine itself to merely a negative duty for the parent not to emotionally neglect his child? These questions are not trivial in a world that, until recently, held the perception that the law should refrain from intervening in the family unit and allow the parent to retain his authority, rather than giving the child the right to file a claim against his parent for damages in general, and on the grounds of emotional neglect and lack of love in particular.

This paper grapples with the question of whether parents should be required by law to act lovingly towards their children. It will present several legal models which seek a balanced approach, perceiving the family as a separate sphere, where legal intervention in its affairs may cause more harm than good, but also perceiving the family as a collection of individuals whose disputes may be resolved within the framework of private law. This paper will show that the existing models are not balanced enough. Some prefer the sanctity, autonomy, and privacy of the family and therefore grant immunity to the parent from tort lawsuits brought by their children; some tend to the other extreme, and in practice almost negate any separate arrangement for the family unit; and some, which are more balanced, allow special arrangements in which the child can sue relying on ordinary legal mechanisms, are insufficient because they lack a clear legal declaration defining the rights of the child in general, and the right not be emotionally neglected in particular. One religious model presents a satisfactorily balanced solution, but it cannot be applied as is to modern secular law.

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The proposed model tries to achieve true balance between the sanctity of the family and the needs of a child by bringing together tools from modern law and religious legal systems to result in a new and creative solution.

This paper wrestles with many difficult topics within the realm of family law, among them: familial relations as reflected in civil law; justiciability of parent-child relations; the role of extra-judicial mediation or treatment within the legal process; children's rights and the respect owed to the child; and the importance of recognizing the role of expressive law and its declarative function in cases when, on the one hand, it is very important to create the norm and grant the right, but on the other hand, it is not so appropriate due to the nature of familial relations to enforce it in daily life.

Emotional neglect serves as a test case for examining tort lawsuits against parents in general. The proposals in this paper are also relevant in non-tort cases of civil claims brought by children against their parents, not just claims for emotional neglect.

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I. PRESENTATION OF THE FUNDAMENTAL DILEMMA: RECOGNITION OF A TORT LAW SUIT BY A CHILD AGAINST A PARENT ON THE GROUNDS OF EMOTIONAL NEGLECT OR LACK OF LOVE

A parent's love for his child is a precious feature of natural law, since society expects and encourages parents to protect, nurture, and safeguard their children.[1] Natural law dictates that a child will grow in his father and mother's home, that they will love him, feed him, and educate him until he reaches his majority. The parents' love sometimes takes formal legal attire, too[2] – particularly, the law should intervene when the parents do not provide these basic necessities to their child.

The song "Jeremy" tells of a boy who is aggressive in school because "[d]addy didn't give attention to the fact that mommy didn't care."[3] The parent emotionally neglects his child, meaning that he displays a lack of involvement in the life of his child, does not participate in his process of growth, and in extreme cases is even alienated from the child and ignores him completely. Maas and Engler have given children who have suffered emotional neglect the harsh yet apt name "orphans of the living."[4]

Is it indeed the function of state law to intervene and follow in the steps of natural law by holding that the parent's duty to raise his child in an atmosphere of warmth and love must be accorded enforceable legal status? Is it even possible to judge a civil dispute between a parent and child based on failure to meet the duty of emotional care using the normal tools of law that are available to us? And, if so, should the law impose a positive duty on the parent to love his

1. G. Steven Neeley, *The Psychological and Emotional Abuse of Children: Suing Parents in Tort for the Infliction of Emotional Distress*, 27 N. KY. L. REV. 689, 711 (2000).

2. CA 3798/94 A v. B [1996] IsrSC 50(3) 133, 141.

3. PEARL JAM, *Jeremy*, *on* TEN (Epic Records 1992).

4. HENRY S. MAAS & RICHARD E. ENGLER, CHILDREN IN NEED OF PARENTS 380 (1959). *See also* Steven D. Guynn, *Compensation for 'Orphans of the Living'*, 18 J. FAMILY LAW 501 (1978-9).

child, or should it confine itself to a negative duty which imposes liability on the parent for emotional neglect?[5]

This paper attempts to answer these questions, particularly the fundamental dilemma which underlies them all—what judicial policy should be adopted regarding the nature and scope of legal intervention in the family in general, and in parent-child relations in particular? Emotional neglect serves as a test case for examining tort lawsuits against parents in general.

There are currently several potential models for legal intervention designed to resolve the fundamental dilemma. This paper will consider the advantages and disadvantages of each and conclude by proposing a new model which draws elements from secular and religious legal systems. This model creates a delicate balance between the family-collective-communitarian approach, which is concerned with the question of what is good for the family as a whole, and the individualistic approach, which focuses on realizing the right of the individual, whether adult or child, to bring a tort case. In other words, I shall attempt to draw a balance between an approach which perceives the family as a separate sphere, where legal intervention in its affairs may cause more harm than good, and an approach which perceives the family as a collection of individuals whose disputes must be resolved within the framework of private law.

While one might suppose that only two legal models are possible, a model of sweeping intervention in parent-child relations or a model of minimal intervention, reality has shown that the legal situation is much more complex. The law has shaped additional models by giving differing weight to considerations for and against claims of emotional neglect. These considerations will be presented in Part II of this paper. In Parts III through VI, I will present the four prevailing models: (1) the *minimal intervention model*, based on Roman law and Old American law, under which the claim will always be barred; (2) the *moderate legal intervention model*, which prevails in most US jurisdictions, enables the family unit to enjoy a certain autonomy by affording the parent special defenses—but not complete immunity—against civil claims brought by his child against him; (3) the *stringent-sweeping intervention legal model*, present in Israeli law, which enables a child to sue his parents, even for emotional neglect; and (4) the *soft-sweeping intervention legal model*, rooted in Jewish law, which is a religious extra-territorial law that imposes a positive duty on the parent to love his child, but enforces this duty only moderately.

None of these existing models is sufficiently compatible with 21st century laws. Accordingly, in Part VII, I will propose a new model: the *integrated model for resolving the fundamental dilemma*. This model seeks to integrate the advantages of each of the existing models while eliminating their disadvantages,

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5. For different proposals regarding the definition of the term, some of which deal with the input (the emotional neglect), some of which deal with the outcome (the emotional damage), and some of which combine the two, *see* Ira S .Lourie & Lorraine Stefano, *On Defining Emotional Neglect*, 2 NAT'L CONFERENCE ON CHILD ABUSE AND NEGLECT 201, 203 (1978); Jeanne M. Giovannoni, *Definitional Issues in Child Maltreatment*, *in* CHILD MALTREATMENT: THEORY AND RESEARCH ON CAUSES AND CONSEQUENCES OF CHILD ABUSE AND NEGLECT (Dante Cicchetti & Vicki Carlson eds.,1989); Rebecca L. Hegar & Jeffrey J. Yungman, *Towards a Causal Typology of Child Neglect*, 11 CHILD & YOUTH SERVICES REV. 203-20 (1989); Ruth Lawrence-Karski, *United States: California's Reporting System*, *in* COMBATTING CHILD ABUSE: INTERNATIONAL PERSPECTIVES AND TRENDS 9-37 (Neil Gilbert ed., 1997).

in attempting to find an intermediate approach which is not overly sweeping but also not minimal. The proposed model will also work to integrate principles of secular and religious law.

Note that if the plaintiff is no longer living with his parents, or if he is no longer a minor, there is no problem with forcing his parents to pay him compensation. If the child remains a ward of his parents, technically the court may order that the damages be kept in a trust fund for deposit in a long-term savings plan which is off-limits to family members and which the minor can open when he turns eighteen. Of course, there would still possibly be serious issues resulting from the fact that the child still lives with his parents, and I address these issues below.

This paper deals with a number of important issues, among them: familial relations as reflected in civil law; justiciability of parent-child relations; the role of extra-judicial means of mediation or treatment within the legal process; the importance of children's rights, including the granting of respect to the child; and the importance of recognizing the role of expressive law and its declarative function in cases when, on the one hand, it is very important to create the norm and grant the right, but, on the other hand, it is not so appropriate, due to the nature of familial relations, to enforce it in daily life.

II. CONSIDERATIONS FOR AND AGAINST RECOGNITION OF A CIVIL CLAIM AGAINST PARENTS

Deciding whether or not to recognize children's civil claims in general, and claims of emotional neglect in particular, against their parents relies upon various considerations, some legal and others social. A claim of this type can certainly be adjudicated from a normative point of view, but the question is whether it would be more appropriate to leave such claims outside the ambit of legal intervention.

There are two main approaches to this issue which often contradict each other, the *individualistic approach* and the *family approach* (which is derived from the collectivistic-communitarian approach). According to the individualistic approach, the individual is autonomous and separate from the group to which he belongs. Accordingly, every person in the family unit is perceived as an individual, with the right to file a claim against a tortfeasor who has wronged him, even if the latter is a parent.[6]

In contrast, the family approach acknowledges the unique nature of families and allows them to conduct themselves as self-contained units, without legal intervention into their affairs, autonomy, or privacy. This approach focuses

6. For a discussion of these approaches in different situations see C. Harry Hui, *Measurement of Individualism-Collectivism*, 22 J. OF RES. PERSONALITY 17 (1988); Martha Minow and Mary Lyndon Shanley, *Relational Rights and Responsibilities: Revisioning the Family in Liberal Political Theory and Law*, 11 HYPATIA 4, 5-6 (1996) (reprinted as Martha Minow & Mary Lyndon Shanley, *Revisioning the Family: Relational Rights and Responsibilities*, *in* RECONSTRUCTING POLITICAL THEORY: FEMINIST PERSPECTIVES 84 (Mary Lyndon Shanley & Uma Narayan eds., 1997)); Benjamin Shmueli, *Who's Afraid of Banning Corporal Punishment? A Comparative View on Current and Desirable Models*, 26 PENN ST. INT'L L. REV. 57, 61-66 (2007) [hereinafter Shmueli, *Corporal Punishment*]; Sandra L. Haley, Comment, *The Parental Tort Immunity Doctrine: Is It A Defensible Defense?*, 30 U. RICH. L. REV. 575, 579 (1996).

on the collective,[7] and for this paper's purposes, on the family unit, taking a fairly paternalistic view of what is in the best interests of the unit. This approach sees the possibility of reinstating harmony in the family unit, as well as respecting its sanctity and privacy, as supreme values that might be impaired by legal intervention. The family unit is therefore a separate sphere that cannot be interfered with and, on occasion, the rights of the individual harmed by a tort must be pushed aside in favor of the interest of the family, which possesses interests as an independent body.[8] Treating the family as a unit with its own special rights has been heavily criticized for causing harm to the vulnerable members of the family, mainly women and children.[9] Treating the family as a unit enables that unit to hide a multitude of wrongs because it grants power to the strong members over the weak members.[10] Thus, children's rights are the first to be harmed by the family approach.

On the other hand, recognizing the rights of individual family members against each other does not seem to fit the family setting, where family members are believed to share some sense of collectivity, a sense "that 'we' exist as something beyond 'you' and 'me.'"[11] Communitarian theorists have argued that using the language of rights, which focuses on the personal interests of the individual family members, is not suitable for family life and might harm the sense of collectivity, as well as the intimacy and loving relationships that should be an integral part of every family.[12] A common response to this critique is that individual rights between family members are necessary in the unhappy event of a breakdown of the relationship, or if the family fails to perform its protective and nurturing role (such as in the cases of abuse or neglect).[13] This critique is accurate only if the family is broken and no harmony can be restored to it.

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7. Hui, *supra* note 6; Ron Shor, *The Significance of Religion in Advancing a Culturally Sensitive Approach towards Child Maltreatment*, 79 FAMILIES IN SOCIETY 400 (1998).

8. The issue of "the private is the public" has been discussed intensively in the feminist discourse concerning the rights of women and children. *See e.g.*, Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983) [hereinafter Olsen, *The Family and the Market*]; Frances Olsen, *Children's Rights: Some Feminist Approaches to the United Nations Convention on the Rights of the Child*, 6 INT'L J. L. POL'Y & FAM. 192, 194-95, 208 (1992); Hilary Lim & Jeremy Roche, *Feminism and Children's Rights*, *in* FEMINIST PERSPECTIVES ON CHILD LAW 227 (Jo Bridgeman & Daniel Monk eds., 2000); Michael Freeman, *Feminism and Child Law*, *in* FEMINIST PERSPECTIVES ON CHILD LAW 19, 20 (Jo Bridgeman & Daniel Monk eds., 2000).

9. *See e.g.*, Barbara Bennett Woodhouse, *The Dark Side of Family Privacy*, 67 GEO. WASH. L. REV. 1247 (1999); David J. Herring, *Exploring the Political Roles of the Family: Justifications for Permanency Planning for Children*, 26 LOY. U. CHI. L.J. 183, 243 (1995).

10. Woodhouse, *supra* note 9, at 1252, 1254.

11. Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L. J. 624, 629 (1980).

12. MARY A. GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 123 (1991) (criticizing the American discourse of rights that shifts the image of familial relationships from a community of interests to an alliance of independent individuals); MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 33-34, 169 (2nd ed. 1998) (arguing that in the moderately ideal family situation, members of the family interact in a spirit of generosity, with genuine affection. Appeal to the rights of the individual members is seldom made in this situation, not because injustice is rampant, but because appeal to such rights is pre-empted by a spirit of generosity in which the family members are rarely inclined to demand their perceived rights or their fair share).

13. *See* e.g., Jeremy Waldron, *When Justice Replaces Affection: The Need for Rights*, *in* LIBERAL RIGHTS: COLLECTED PAPERS 1981-1991, 370 (1993); Elizabeth Kiss, *Alchemy or Fool's Gold? Assessing*

The central considerations for and against recognizing a child's civil claim against his parent derives from these two approaches.[14]

A. The Considerations Favoring Recognition of the Child's Claim:

1. *Recognition of rights for the child and justice and equality before the law*. This is the primary consideration in favor of recognition of the child's claim against his parent. According to the individualistic approach, the child is an independent and autonomous person, with the same vested rights as any human being. These rights are separate from those of his parents, and include the right to make independent decisions with regards to his fate. Accordingly, the child has the right to decide whether to bring a tort claim against any person, including his parents. The fact that such a claim might be contrary to his benefit and the benefit of the family unit – or even might harm other members of the family unit – does not negate that intrinsic right.

The basis for this viewpoint is justice and equality. Why should a child who has been wronged be deprived of his rights merely because the wrongdoer is his parent? On the contrary, perhaps in such cases tort claims should not only be recognized, but even encouraged, because the parent has a greater responsibility to his child than most human beings have towards each other.

This approach seeks to achieve equality between the parent, who is regarded as physically, economically, and socially strong, and the child, who is considered much weaker, even if this imposed equality impairs the rights and authority of the parent.[15] The parent is not always cognizant of the injustice caused to the child by

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Feminist Doubts About Rights, in RECONSTRUCTING POLITICAL THEORY: FEMINIST PERSPECTIVES 1 (Mary Lyndon Shanley & Uma Narayan eds., 1997).

14. For further discussion regarding some of the considerations *see* Neeley, *supra* note 1; Eric T. Lanham, *Suing Parents in Tort for Child Abuse: A New Role for the Court Appointed Guardian Ad Litem?*, 61 UMKC L. REV. 101 (1992); Reid H. Hamilton, *Defining the Parent's Duty after Rejection of Parent-Child Immunity: Parental Liability for Emotional Injury to Abandoned Children*, 33 VAND. LAW REV. 775, 778 (1980); Judith G. McMullen, *Privacy, Family Autonomy, and the Maltreated Child*, 75 MARQ. L. REV. 569, 589-98 (1992); Leonard Karp & Cheryl L. Karp, *Beyond the Normal Ebb and Flow...Infliction of Emotional Distress in Domestic Violence Cases*, 28 FAM. L.Q. 389 (1994).

15. The issue can be examined from the perspective of equality which arises from the philosophical and moral approach taken by John Rawls. *See* JOHN RAWLS, A THEORY OF JUSTICE (Harvard University Press 1999) (1971) (assuming that there are fundamental freedoms to which every individual is entitled in equal measure and to the maximum extent. In Rawls' opinion it is permitted to derogate from these freedoms in two principal areas: to preserve freedom generally, and to preserve the freedom of weaker persons, those who from the start enjoy less freedom. Rawls perceives justice in the sense of fairness, and explains that every individual in society must assume that he himself may, one day, belong to that weaker group (from an economic or social point of view, etc.). Utilitarian justice ignores the rights of minority groups and freedom of the individual in such a regime is secondary in importance compared to the interest of the majority. In contrast, justice which relies on fairness takes care of the weak. It is possible to extrapolate from this theory and assert the need to equate the position of the child (as a weak party) to that of the adult and allow him equal opportunities in different areas of life, even if, in practice, this may lead to a derogation of the freedom of the stronger party – the parent.); *see also* Convention on the Rights of the Child, G.A. Res. 44/25, U.N. GAOR, 44th Sess., U.N. Doc. A/44/49 (1989) [hereinafter UNCRC] (taking into account the rights of the child according to his evolving capacities, although there is a mixture in the Articles between children's rights and the best interests of the child, and UNCRC does not expressly deal with tort claims of children against their parents. Another doctrine to be dealt with *infra*). For the emergence of children's rights *see* LEGAL RIGHTS OF CHILDREN (Robert M. Horowitz & Howard A. Davidson, eds., 1984); John Eekelaar, *The*

his acts, and his lessened sensitivity stems from the disparity in their level of power.[16] Children make up the most vulnerable sector of society, and naturally they have limited access to the legal system.[17] On occasion, a parent will cause permanent damage to the physical and mental development of his child, which amounts to a betrayal and a severe breach of the child's trust. The individualistic approach gives effect to the right of the child to sue and recover damages for the harm done to him, thus attaining a position of power *vis-à-vis* his neglectful parent.[18] According to this approach, even if one were to accept the principle that the family unit possesses a certain autonomy, the strong individuals in the family—the parents—must know that there is a limit to the harm they can do to their children.[19]

Feminist theories, too, are based on the premise of equality and justice, and assert that recognition should be given to a child's civil claim against his parent.[20]

Emergence of Children's Rights, 6 OXFORD J. LEGAL STUD. 161 (1986); Michael D.A. Freeman, *Taking Children's Rights Seriously*, 6 INT'L J. L. POL'Y & FAM. 52 (1992); Eugeen Verhellen, *Changes in the Images of the Child*, *in* THE IDEOLOGIES OF CHILDREN'S RIGHTS 80 (Michael Freeman & Philip Veerman eds., 1992) (presenting different approaches as to children's rights); JOHN CALDWELL HOLT, ESCAPE FROM CHILDHOOD (1974) (holding a radical approach and suggesting that children be given the maximum possible rights); Bruce C. Hafen, *Children's Liberation and the New Egalitarianism: Some Reservations about Abandoning Youth to Their "Rights"*, 3 BYU L. REV. 605 (1976) (raising fear arising from granting full rights for children); Michael D. A. Freeman, *Introduction: Rights, Ideology and Children*, *in* THE IDEOLOGIES OF CHILDREN'S RIGHTS 4, 42 (Michael Freeman & Philip Veerman eds., 1992) (presenting an intermediate approach that he labels "liberal paternalism"); LEON SHASKOLSKY SHELEFF, GENERATIONS APART: ADULT HOSTILITY TO YOUTH (1981) (examining the relationship between parents and children against the background of inequality, looking at it from a different angle, which stems from the assertion that there is a natural parental animosity towards the child and perpetual intergenerational tension which creates what he calls "the intergenerational conflict." It is easier to link Sheleff's approach with principles of equality because it refers to mutual feelings of hostility, and the relations are symmetrical, albeit only on the face of it. In an unequal system such as the tense family unit, the stronger will overpower the weaker and the asymmetry will become manifest, particularly when a parent is confronting his child. In other words, the parent's hostility towards the child will override and dominate the relationship); Benjamin Shmueli, *What Has Feminism got to do with Children's Rights? A Case Study of a Ban on Corporal Punishment*, 22 WIS. WOMEN'S L.J. 177 (2007) [hereinafter Shmueli, *Feminism*] (discussing the development of these points and the link between feminism and the rights of a child).

16. *Cf.* Morton Deutsch, *Justice and Conflict*, *in* THE HANDBOOK OF CONFLICT RESOLUTION: THEORY AND PRACTICE 43, 46-56 (Morton Deutsch & Peter T. Coleman eds., 2d ed. 2006) (explaining that on occasion only an external observer can discern the existence of a victim and wrongdoer, a situation which perpetuates injustice, as one or both of the parties are unaware of the wrongness of their own situation or behavior. Injustice in the case of a wrongdoer and victim can take the form of distributive injustice, procedural injustice, or retributive injustice. Distributive injustice is assisted by the consequential test. Thus, for example, in the situation discussed in this paper, emotional neglect means that the child did not receive his fair or equal "portion").

17. Neeley, *supra* note 1, at 710.

18. *Id*. at 711.

19. *See* DEUTSCH & COLEMAN, *supra* note 16 (this idea is derived from their look at the decision-making process of the wrongdoer. For this paper's purposes, this process made by the parent was unfair, and therefore the child was caused an injustice by the actual decision-making process.).

20. Different feminist theories call for more state intervention in the family for the sake of equality and abolishing discrepancies, and to perpetuate the division of power in the family between parents and children (and not only between men and women), even in cases where the weak victim might be harmed. *See* Olsen, *The Family and the Market*, *supra* note 8, at 1497-1527; Shmueli, *Feminism*, *supra* note 15.

Accordingly, when weighing the child's right of action against the harm to a parent compelled to compensate his child, the former should take precedence.

2. *A matter which is not "justiciable" invites the dominant party in the family to act as he wills.* In most cases, the balance of power in the family unit points to a strong, authoritarian parent and a comparatively weak child. In the view of Francis Olsen, society today expects the courts to confirm the traditional social function of the parents as imposers of discipline. Most people would think the law was intervening too much in the life of the family if it allowed a child to sue his parents for being sent to his room as a punishment, even though a similar act if committed by a stranger would be considered a prohibited deprivation of the child's freedom – false imprisonment.[21] Olsen points out that failure to enact civil statutes governing the family unit beyond those already in place, such as those allowing the child to protect himself against his parent or even to sue him, may create a type of internal contradiction and disharmony. The state refrains from recognizing intrafamilial civil claims, while simultaneously enforcing criminal law within the family by enacting criminal statutes, sometimes for the very same acts.[22] Accordingly, Olsen argues, the concept that everything is justiciable should also, and perhaps in particular, be applied to the family unit.

3. *Recognition of the claim is compatible with the general objectives of tort law*, which include compensation, corrective justice, distributive justice, and deterrence.[23] Were a court to refuse to hear a wronged child's claim, he would be left without compensation for his damages – an unjust legal outcome which is also undesirable because it fails to deter both that child's parent and others from engaging in harmful parental conduct. From an economic perspective, failing to hold a tortfeasor liable for his actions may be contrary to society's aggregate welfare, since in the future society may be forced to pay for the physical and mental treatment of the injured. The wrongdoing parent who neglects his child is the best and cheapest avoider of the damage,[24] and in many cases he is the sole avoider of the loss. Classic corrective justice only takes into account the parties to the dispute; others, such as the rest of the family, are not taken into account.[25]

4. *Monetary compensation has a psychological, symbolic, and educational impact.* In practice, a compensation award proclaims the invalidity of the parental act[26] and helps the child begin to heal from the harm the parental act caused. In addition, public acknowledgement of the victim's right to compensation is important from an educational point of view. A parent who has neglected his

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21. Olsen, *The Family and the Market*, *supra* note 8, at 1505-06.

22. *Id*. at 1523.

23. *See e.g.*, Glanville L. Williams, *The Aims of the Law of Torts*, CURRENT LEGAL PROBLEMS 137-76 (George E. Keeton & Georg Schwarzenberger, eds., vol. 4, 1951); IZHAK ENGLARD, THE PHILOSOPHY OF TORT LAW 7-20 (1993); DAN B. DOBBS, THE LAW OF TORTS 12-25 (2000).

24. See Guido Calabresi & Jon T. Hirschoff, *Toward a Test of Strict Liability in Torts*, 81 YALE L.J. 1055 (1972) (approaching strict liability from an economic perspective).

25. *See, e.g.*, Ernest J. Weinrib, *Corrective Justice*, 77 IOWA L. REV. 403 (1992).

26. Neeley, *supra* note 1, at 711-13.

child violates not only the trust of the child, but also of society. Therefore, society should arrange a system in which the parent may be held liable for his tortious acts against his child.

5. *The degree of harm to the family unit is greater in criminal law*. For the family in general and the victim in particular, the civil claim process for tortious actions of the parent against the child is preferable to turning to criminal courts, since imprisonment or other harsh sanction of the parent will almost certainly damage the family (including the victim himself) more than civil penalties would.

6. Even though the criminal process is initiated by the state, and not a family member, criminal charges and civil claims are brought for the same wrongful actions, so it does not make sense to allow one but not the other. It is in the civil process alone that the child is a direct party to the dispute, a fact which in certain circumstances may deepen the conflict and harm the family unit as a whole, but in others may empower the child by giving him legal equality with his parents.

B. The Considerations Against Recognition of the Claim:

1. *Allowing a child to bring a civil suit against his parents might be contrary to the best interests of the child and the family.* This is the central consideration opposing recognition of the claim. The best interests of the child are a core principle according to § 3 of United Nations Convention on the rights of the Child (UNCRC),[27] the most comprehensive international document dealing with the rights of children. § 12 of UNCRC puts forth that children who are capable of forming their own views and expressing their own wishes and feelings must be allowed to participate in legal processes affecting them and weight must be accorded to their wishes; but there is no express provision which states that the court must make a decision in matters regarding children (like guardianship, visitation, etc.) in accordance with their wishes. It follows that § 12 does not vest the child with full autonomy similar to that of an adult, and it certainly does not *per se* vest the child with the right to sue his parents. In effect, § 12 contains two qualifications: ability and age. The right of the child to express a view and be heard only applies to a child who is capable of forming his own views, and the weight which will be accorded to his views will depend on his age and maturity. Clearly it is adults who determine the degree to which these parameters are satisfied, so that § 12 too is, in effect, paternalistic and does not establish rights for a child which are equivalent to those of an adult.[28] In addition, § 12 must be read together with § 5 of UNCRC, which preserves the rights and duties of parents. Together, these sections insist that the desire of the child must be taken into account, but the child's desire will not always be consistent with his actual best interests. Indeed, according to the family approach, which, acknowledges the unique nature of families and allows them to conduct themselves as self-

27. UNCRC, *supra* note 15.

28. *Cf.* Michael Freeman, *The Right to be Heard*, 22 ADOPTION & FOSTERING 50-59 (1998-99).

contained units, without legal intervention into their affairs, autonomy, or privacy, a child's claim against a parent may be contrary to that child's best interests because it leads to a confrontation between the parent and child.[29]

Such a confrontation may also arise in a criminal case brought for the same acts, but in the criminal process it is the state which brings the charges. Because in civil law it is the victim who decides whether to bring a suit against the tortfeasor, if a child were to choose to do so, it is easy to imagine a situation where he would be seen as the enemy of the parent. The child might not understand that insistence upon giving effect to his right to bring a civil suit against his parents may be incompatible with his own interests.

Moreover, the child's claim may be contrary to the best interests of the entire family unit, as it may strain relations between the child and the rest of the family, who may not see him as a victim but as their enemy. If the parents have to pay him damages, it harms the rest of the family too. The resulting fissure in the family would likely be very difficult to heal, and the child may be the one who suffers most. For this reason, the Jewish law principle "ground of animosity" [30] only recognizes a child's civil claim when he is not dependent on his father or he is otherwise detached from the family (e.g. because he has reached the age of majority or has been legally or actually separated).

From a public and family perspective, one may argue that the public has an interest in preserving family tranquility and harmony that will be ignored if the civil claim of a child is permitted. This consideration holds that recognition of such a claim endangers the harmony of the family unit, which from society's perspective is an important, if not *the* most important, unit of society. Accordingly, proponents of this view argue that in cases where there is a possibility of restoring family harmony, no recognition should be accorded to the child's claim, since in addition to disrupting the harmony of the family, these kinds of claims also harm the privacy of the family.[31] Another argument is that courts should not examine non-monetary parent-child issues from a legal viewpoint;[32] if they did, they would be essentially trying to commercialize the love and affection of the parent toward the child.[33]

Under this approach, priority is given to the well-being of the entire family over the well-being of just one of its members, even if the individual is weak and needs the protection of the law. However, this family approach does not apply in cases where it is clearly not possible to restore the family harmony, especially in cases where the child's parent no longer has legal parental responsibility for the child, such as when the child is transferred to another guardian or reaches the age of majority.

According to this consideration, the individualistic approach that advocates maximizing intervention in the name of equality and justice ignores the fact that intrafamilial relations cannot maintain full equality. The aspiration for equality between parents and their children is neither practical nor appropriate. Moreover,

29. Anderson v. Stream, 295 N.W.2d 595, 600 (Minn. 1980).
30. *See* an extended discussion in the text accompanying footnote 129.
31. *See*, *e.g.*, Wagner v. Smith, 340 N.W.2d 255 (Iowa 1983).
32. *See*, *e.g.*, Kane v. Quigley, 203 N.E.2d 338 (Ohio 1964).
33. *Id*. at 339.

it is problematic to look at parent-child relations through the prism of corrective justice, which is solely concerned with the two parties to the dispute and fails to take into account other members of the family who will be affected by the child's claim. Though the family is technically a collection of individuals, these individuals create a unit—located between the public and private domains—which is so important to society that its sanctity must be protected. Therefore, while in most civil cases damage that may be done to third parties is disregarded, such damage cannot be disregarded when the third parties are external to the claim, but not external to the family. The ramifications of the claim on the family as a whole may be economic (the damages awarded to the child may come at the expense of the welfare of other members of the family) or emotional (perception of the plaintiff as the enemy of the family and responsible for its collapse).

Nonetheless, this argument *per se* prevents recognition of any suit from one member of a family against another, and could even be construed to argue against laying criminal charges against parents for crimes against their children. However, if a child wants to bring a civil claim against his parents it seems likely that there is already an absence of harmony in the family. In such cases, in order for the family to try to recover from its existing problems, it may be necessary for the tortfeasor to take responsibility for and cease to commit his tortious actions and occasionally by bringing a civil claim the child can thus restore, rather than disrupt, the harmony of the family.[34]

2. Recognition of the claim undermines the parent's authority to discipline the child, leads to disobedience towards the parent, and thereby impairs an important tool in the "game of roles" in the family dynamics.[35] However, it can be asserted that parental authority is constrained by certain rules and the parent cannot be allowed to do as he pleases. In addition, this argument is irrelevant when the child no longer lives with his parents.

3. *The claim might be used as a weapon in a dispute between the parents.* One of the parents might influence the child to sue the other parent for wrongs committed against the child, or might join the child as an additional plaintiff in a claim which the parent files against his spouse in order to hurt him.[36] In such a situation the loss is twofold: the child is used as a tool in the dispute and the family itself is damaged, allegedly in order to give effect to the rights of the child.

4. There are alternative courses of action, both legal and extra-judicial, such as criminal charges or approaching Social Services for assistance. However,

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34. *Cf.* Rhona Schuz, *Child Protection in the Israeli Supreme Court: Tortious Parenting, Physical Punishment and Criminal Child Abuse*, *in* THE INTERNATIONAL SURVEY OF FAMILY LAW 2001 EDITION 165, 176 (Andrew Bainham ed., 2001) (noting that civil claims do not harm the family to the same extent as criminal proceedings).

35. Rambo v. Rambo, 114 S.W.2d 468, 469 (Ark. 1938); Felderhoff v. Felderhoff, 473 S.W.2d 928, 933 (Tex. 1971).

36. Many claims are submitted in such cases. *See, e.g.*, *Kane*, 203 N.E.2d 338; Daily v. Parker, 152 F. 2d 174 (7th Cir. 1945); Trevarton v. Trevarton, 378 P. 2d 640 (7th Cir. 1963); Courtney v. Courtney, 413 S.E. 2d 418 (W. Va. 1991).

in many cases the child is too afraid of repercussions to seek help from the authorities, and it is not the child's decision whether to bring criminal charges. In addition, neither of these courses of action seek to compensate the child, and they are not always suitable in situations where the parental conduct has already terminated and the child is now interested in compensation for past suffering for the purpose of self-rehabilitation.

5. *The floodgates argument*.[37] It is possible that as soon as courts agree to recognize the civil suits of children against their parents, the courts will be flooded with such suits.[38]

6. *The slippery slope problem.* Even if the case law states that these claims should only be recognized in rare cases, once the first judgment has been delivered recognizing such a claim, it is subject to interpretation and the dam which the judge intended to construct may be swiftly breached as people seek to circumvent the restrictions.[39] In order to block the slide down the slippery slope, either case law or legislation needs to establish clear criteria to determine when to recognize such claims.

7. *Fear of conspiracy, deceit, and insurance fraud*. Allowing a child to bring a civil claim against his parent opens the door for possible conspiracies in the form of fictitious claims against insured parents aimed at enriching the family coffers by defrauding or otherwise exploiting insurance companies.[40] The potential for such conspiracies exists in other types of law as well, however,[41] and the legal system has developed the means to find out whether a fraud has occurred.[42] In addition, accepting such an argument would deny any intrafamilial claim and prevent the implementation of a statutory right.[43] Anyway, it may be assumed that emotional neglect will fall outside the coverage of the insurance policy. If the tortious behavior is covered by the insurance, it will generally entail an accident caused by a family member or some other unintentional tort.

8. *Recognition of the claim undermines the respect due to the mother and father and shows contempt for the defendant parent.* Respecting one's parents is a religious

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37. *See* McLoughlin v. O'Brian (1982) 2 All Eng. Rep. 298 (H. L.) (opinion of Lord Wilberforce).

38. Morrow v. Yannantuono, N.Y.S. 912 (N.Y. 1934); Johnson v. Luhmen, 71 N.E. 2d 810 (Ill. 1947).

39. *See*, *e.g.*, Levesque v. Levesque, 106 A. 2d 563 (N.H. 1954) (in cases of road accidents); *Daily*, 152 F. 2d 174 (in cases of alienation of affection); *but see* Miller v. Monsen, 37 N.W. 2d 543 (Minn. 1949) (arguing that reality shows that the fear of slippery slope has no basis, and in any case that fear should not block the realization of rights).

40. Gibson v. Gibson, 479 P. 2d 648 (Cal. 1971); Haley, *supra* note 6, at 579, 600; GEORGE C. CHRISTIE ET. AL., CASES AND MATERIALS ON THE LAW OF TORTS 544-45 (4th ed., 2004); Ira Mark Ellman & Stephen D. Sugarman, *Spousal Emotional Abuse as a Tort?*, 55 MD. L. REV. 1268, 1286 (1996).

41. Holodook v. Spencer, 324 N.E.2d 338 (N.Y. 1974).

42. Foldi v. Jeffries, 461 A. 2d 1145 (N.J. 1983).

43. CHRISTIE, *supra* note 40, at 548; Goller v. White, 122 N.W.2d 193 (Wis. 1963).

commandment which also has a certain place in secular legal systems.[44] If a child commences legal proceedings against his parents, he may be violating that commandment. Despite this argument, a child's claim against his parents has been recognized in certain circumstances by certain legal systems (as this paper will show below), and one cannot see the child's respect for his parents as a parameter that is taken into account in the judgments.

9. *Problems which originate in the laws of succession and the fear that a wrongdoer will profit.* On the death of the child it is the parent who inherits the child's estate.[45] Thus, it is possible to conceive of the undesirable legal outcome in which a person can inherit the monies which he himself paid to the person who sued him.[46] Nonetheless, this problem can be circumvented by suitable legislation (most children do not write wills), and such cases will be rare.

This paper will now examine how different legal systems have weighed these considerations when faced with cases of emotional neglect, which are especially problematic, because in such cases, not only is the child suing his parents, but the subject matter of the case is rooted in love and emotions. Thus, we are faced with the question, ought such cases to be above the reach and handling of the law and therefore not justiciable? In many cases, emotional neglect is accompanied by other forms of damaging parental conduct, such as material neglect or abuse, and it is this misconduct on which the law should focus. In addition, emotional neglect can be difficult to identify because it does not leave external, physical scars.[47]

Those who give greater weight to the considerations favoring recognition of the claim favor sweeping legal intervention, treating a claim by one member of the family against another in the same way as claims between individuals, with emphasis on the rights of the child. In contrast, those who give greater weight to the considerations against recognition of the claim tend toward minimal legal intervention, protecting the sanctity of the family as an autonomous legal unit, at least for as long as no red lines are crossed. However, the law has developed two additional models which lie somewhere between these two extreme viewpoints. Parts III through VI will describe the four prevailing models. Part VII will demonstrate how it is possible to bridge the gap between competing approaches by creating a desirable model that relies on both secular and religious legal systems.

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44. *See*, *e.g.*, § 16 Capacity and Guardianship Law, 5722-1962, 16 LSI 106 (1962) (Isr.) [hereinafter LCGL] (compelling a child to obey his parents in each matter that falls within their guardianship of him and to respect them).

45. *See*, *e.g.*, Trevarton v. Trevarton, 378 P. 2d 640 (7th Cir. 1963); Roter v. Roter, 866 P. 2d 929 (Colo. 1994).

46. Roller v. Roller, 79 P. 788, 789 (Wash. 1905); Thomas J. Herthel, *Parental Immunity in Alabama: Let's Not Let Parents Get Away With Murder-An Argument to Reexamine the Issue*, 25 CUMB. L. REV. 409, 431 (1994-95).

47. Neeley, *supra* note 1, at 689-720; Marcia A. Kincanon, *The Child Abuse that Doesn't Count: General and Emotional Neglect*, 22 U.C. DAVIS L. REV. 1039, 1043 (1989).

III. THE MINIMAL LEGAL INTERVENTION MODEL: POSITIVE REGULATION OF PARENT IMMUNITY

A. Roman Law: The Rule of the Father – Patria Potestas

The Roman minimal legal intervention model creates a unique arrangement for the family which operates on the premise that a parent (in particular the father) must enjoy almost complete immunity from legal intervention in his dealings with his child. It is important to consider this issue in the context of Roman law in order to understand the origins of current legal models surrounding father-child relations.

Roman law practiced patriarchal internal family control, under which the father was the head of the family and controlled its affairs on all levels, so that the family was almost independently governed. This supremacy was called "the rule of the father" or *patria potestas*.[48] The father's almost complete control over his children continued even after they reached the age of majority or married.[49] The state only intervened in intrafamilial relations in very rare cases. It certainly did not award compensation to children who suffered neglect or violence from their parents.[50]

Moreover, the "rule of the father" granted the father the power of adjudication over members of the family who were subject to his authority, to the extent that he was described as having the power to "rule over life and death" (*just vitae necisque potestas*).[51] Indeed, in certain cases Roman law permitted the father to punish the child even to the extent of killing him. On rare occasions the government would intervene, but only as the exception.[52] Underlying the "rule of the father" is the concept that the family is a small and basic governmental unit within society, one which must be given almost complete autonomy to conduct its affairs so that the government could concentrate on other matters; therefore, the father acted as a quasi execution officer on behalf of the government. Under the "rule of the father," the child's rights were seriously impaired, and sometimes even completely abrogated, all with the acquiescence of government.[53]

From a modern perspective, the "rule of the father" seems to be a distant concept that has passed from the world. However, the basis for the creation of a separate law for the family unit has survived, albeit in a less acute way, in modern law, as the next section will explore.

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48. *See generally* JANE F. GARDNER, WOMEN IN ROMAN LAW AND SOCIETY 5-29, 67-68, 137-54 (Indiana University Press 1991); BARRY NICHOLAS, AN INTRODUCTION TO ROMAN LAW 80-82 (1962); Mason P. Thomas Jr., *Child Abuse and Neglect Part I: Historical Overview, Legal Matrix, and Social Perspectives*, 50 N.C. L. REV. 293, 295 (1971-72); Lanham, *supra* note 14; R. Howe Brian, *Do Parents have Fundamental Rights?*, 36 J. OF CANADIAN STUD. 61, 66 (2001). The impact of Roman law on the law of European countries is discernible from the year 1100 onwards and particularly in the years 1495-1900.

49. *Id.*

50. *Id.*

51. Meyer v. Nebraska, 262 US 390 (1923).

52. Thomas, *supra* note 48; TONI VAUGHN HEINEMAN, THE ABUSED CHILD: PSYCHODYNAMIC UNDERSTANDING & TREATMENT 15 (Guilford Press, 1998); Neeley, *supra* note 1, at 697.

53. *Id.*

B. Old American Law: The Doctrine of Parent-Child Immunity

The end of the 19th century saw the development in American law of the principle of non-intervention in the family—the "doctrine of parent-child immunity" or the "doctrine of parental tort immunity."[54] This doctrine was created by American case law, which set substantive and formal obstacles in the path of recognition of children's civil claims against parents who had harmed them.[55] The case law explained that the purpose of the doctrine was "to protect parental discipline, domestic felicity and family tranquility."[56] The doctrine was formulated in three cases heard in three different states at the end of the 19th century and beginning of the 20th century, and accordingly these cases were known by their critics as "The Great Trilogy."[57]

In the beginning, there was broad acknowledgement of the doctrine and it spread rapidly to many states.[58] The courts of the various states did not distinguish between negligent or reckless or deliberate parental action, and exempted parents from liability even in serious cases such as rape or abuse.[59]

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54. See generally Gail D. Hollister, *Parent-Child Immunity: A Doctrine in Search of Justification*, 50 FORDHAM L. REV. 489, 495-96 (1982); Sean S. Modjarrad, *Hartman v. Hartman: Is 'Parental Immunity' Recognized?*, 22 AM. J. TRIAL ADVOC. 463, 465-67 (1998); Haley, *supra* note 6, at 575-604; Neeley, *supra* note 1, at 700; Lanham, *supra* note 14, at 106; Joseph J. Basgier, *Children's Right: A Renewed Call for the End of Parental Immunity in Alabama and Arguments for the Further Expansion of a Child's Right to Sue*, 26 LAW AND PSYCHOL. REV. 123, 123-39 (2000).

55. FOWLER V. HARPER ET AL., THE LAW OF TORTS 573-74 (2d ed. 1986); Brenda K. Harmon, *Parent-Child Tort Immunity: The Supreme Court of Illinois Finally Gives this Doctrine the Attention it's Been Demanding,* 19 S. ILL. U. L.J. 633, 658 (1995). In common law countries there was no explicit doctrine of parental immunity. *See*, *e.g.*, Ash v. Lady Ash, (1696) 90 Eng. Rep. 526 (hearing a girl's claim of assault and false imprisonment against her mother); Young v. Rankin, (1934) S. C. 499 (awarding damages to a child for his father's negligent driving); McCallion v. Dodd [1966] N.Z.L.R. 710 (S.C.) (awarding damages to a child for his father's negligent driving); and *see* JOHN G. FLEMING, THE LAW OF TORTS 669 (Sydney, 5th ed., 1977) (arguing that the parent-child tort immunity doctrine has not spread in common law countries).

56. Wright v. Wright, 191 S.E.2d 223, 224 (Va. 1972).

57. Hewlett v. George, 9 So. 885 (Miss. 1891) (holding that recognition of a daughter's tort claim against her mother might impair the harmony of the family unit and be contrary to the best interest and safety of society. Court dismissed daughter's claim that she had been falsely imprisoned after the mother hospitalized her in a mental asylum with the aim of taking over her assets.); Mckelvey v. Mckelvey, 77 S.W 664 (Tenn. 1903) (dismissing a tort claim of a daughter against her stepmother and father for cruel punishment imposed on her by the mother which the father knew of but did not stop. The claim was dismissed on the grounds of preserving family harmony and the parent's authority over the children, and court emphasized that it would not accept state interference by allowing it to replace the parent and impose discipline. The court pointed out that American common law did not offer relief for this type of damage); Roller v. Roller, 79 P. 788, 789 (Wash. 1905) (dismissing a daughter's tort claim against her father for injury he caused by raping her. The court dismissed due to fear that the child would predecease the parent and then the parent would inherit the compensation award paid to the child. The court also noted that the compensation payment might leave the parent without resources and harm all the family members including the child herself).

58. Small v. Morrison, 118 S.E. 12 (N.C. 1923); ROBERT H. MNOOKIN & D. KELLY WEISBERG, CHILD, FAMILY AND STATE: PROBLEMS AND MATERIALS ON CHILDREN AND THE LAW 347 (3rd ed. 1995).

59. Haley, *supra* note 6, at 578-79.

Most states recognized the doctrine until the 1950's.[60] Some states codified the immunity in one form or another in legislation.[61] Over the years the states developed different rationales in support of the doctrine, and often it is difficult to identify a common thread between the judgments in various states.

Since then, the doctrine of parental immunity has been subject to change and alternatives have been found in some states, but it has remained the lodestar that has guided state courts in actions brought by children against their parents. There are a few states which still continue to follow the original doctrine and thereby effectively adhere to the model of minimal intervention.[62] Some states, however, have repudiated the model of minimal intervention and replaced it with a different standard, one which will be considered in section IV.

C. Critique

The consequence of immunity in Roman law and in old American law was similar—a child could not bring an action against his parent—but the rationale for each was different. In Roman law, the government was not interested in interfering with the family and it was convenient that the father would fulfill both the judicial and executive function of the government within the family. Despite its current problematic outcomes, the American doctrine of parental immunity was intended to preserve the harmony and integrity of the family unit. This rationale was based on the assumption that although a parent engaging in harsh behavior towards his children could be punished in a criminal setting, where the state was the accuser, recognizing a civil claim submitted against him by his children would harm the family unit.

This model is gradually, and rightfully, disappearing globally. Granting immunity to parents for their actions against their children is not appropriate in contemporary times. In cases that are completely unconnected to parental authority (e.g., damage caused to the child by a parent in his capacity as a driver or employer) or in serious situations such as abuse and even rape, parental immunity cannot be accepted under modern law. Nonetheless, the best interest of the family and preservation of family harmony, albeit not at any price, can help in creating a model for solving the fundamental dilemma.

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60. Modjarrad, *supra* note 54, at 467-68; Herthel, *supra* note 46, at 412-14; Martin J. Rooney & Colleen M. Rooney, *Parental Tort Immunity: Spare the Liability, Spoil the Parent*, 25 NEW ENG. L. REV. 1161, 1164 (1991); Basgier, *supra* note 54, at 126.

61. *See*, *e.g.*, LA. REV. STAT. ANN. § 9:571 (1960).

62. Edwin D. Akers & William H. Drummond, *Tort Actions Between Members of the Family Husband & Wife - Parent & Child*, 26 MO. L. REV. 152, 194 (1961); Lanham, *supra* note 14; Neeley, *supra* note 1, at 700.

IV. THE MODERATE LEGAL INTERVENTION MODEL: SPECIFIC AND RELATIVE DEFENSES OF A PARENT IN PREVAILING LAW

A. The Prevailing American Law

1. Overview

The present model in a majority of the U.S. jurisdictions is a qualified doctrine of parental immunity, or reliance on a standard similar to that found in the Restatement of Torts.[63]

In the years following the initial recognition of the parental immunity doctrine, a similar spousal immunity was gradually abrogated.[64] Emotional harm caused by a tort committed by one spouse against another attained legal recognition and also found general expression in the provisions of the Restatement dealing with the intentional infliction of emotional distress (IIED),[65] which has become increasingly accepted throughout the United States.[66] In some states, though, IIED is recognized only in cases of severe emotional distress,[67] or as an outcome of physical abuse or corporal punishment.[68] Both spousal and parental immunities stem from the same family domain, so it is likely that the repeal of inter-spousal immunity spurred the changes which followed in the arena of parental immunity.

The doctrine of parental immunity has not been repealed in most of the United States.[69] However, a large number of states have qualified it in many respects.[70] Some of the qualifications stem from the understanding that when damage occurs outside of the parent's role as a parent (for example in the

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63. RESTATEMENT (SECOND) OF TORTS (1965) [hereinafter the Restatement].

64. The immunity against mutual claims by spouses was repealed in most modern systems of law. In English law this immunity was repealed in 1962, and it was provided that in civil claims spouses would be treated in the same way as single persons; in American law the immunity was based on the ground that the spouses in effect comprised a single entity ("unity of person") and accordingly one spouse could not sue the other. This immunity was gradually abrogated in the various American states, particularly in the second third of the 20th century. *See* Haley, *supra* note 6, at 598-602.

65. Ellman & Sugarman, *supra* note 40, at 1269. The Restatement deals with that through §46.1, in general, not especially in terms of familial relations: "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."

66. LEONARD KARP, DOMESTIC TORTS: FAMILY VIOLENCE, CONFLICT, AND SEXUAL ABUSE 116 (Rev. ed. 2005).

67. *Id*.

68. Deana Pollard, *Banning Child Corporal Punishment*, 77 TUL. L. REV. 575, 647-57 (2002-2003) (expanding on the American case law and studies on emotional neglect and emotional harm arising from child abuse and corporal punishment).

69. *See generally*, DAN B. DOBBS & PAUL T. HAYDEN, TORTS AND COMPENSATION 388-89 (4th ed. 2001). In some states the parent-tort immunity doctrine was retained. *See*, *e.g.*, Commerce Bank v. Augsburger, 680 N.E.2d 822, 827 (Ill. 1997) (dismissing a suit against parents who had locked a girl in a bedroom closet and failed to monitor her. The girl died from asphyxia, but the court held that the immunity applied to "parental discretion in the provision of care including maintenance of the family home, medical treatment, and supervision of the child.").

70. *Id*.

context of a work relationship)[71] parental immunity cannot be justified. In most of the United States, immunity does not apply when the defendant is actually a third party, such as the employer of the parent or his insurer, even though the basis for the claim is the parent's behavior.[72] It also does not apply to contractual and property claims,[73] to property damage (as opposed to personal injuries), or to claims of wrongful life.[74] In some states it has even been held in the case law that the doctrine will protect a natural parent only, and not one who comes *in loco parentis*, even an adoptive parent.[75]

In cases where the legal ties between the child and the defendant biological parent have been severed, either because the child has reached the age of majority or because he has been transferred to the custody of a different guardian, immunity has not been recognized, because the primary rationale of protecting the sanctity of the family unit is no longer relevant. Clearly, this is also the reasoning behind the refusal to recognize immunity in cases where one of the parties (the child or parent) is no longer alive, and the claim is brought by or against the estate.[76]

Since the 1960's, the doctrine of parental immunity has been significantly qualified, beginning with a landmark case which started a wave which ultimately led to the overwhelming repudiation of the doctrine as presented in its original form.

2. Parental Authority – "The Wisconsin Approach"

In *Goller v. White*, a 1963 Wisconsin court dealt with the negligence of a father who sat his step-son on a farm tractor and the child was injured.[77] The court found that the parental immunity rule in negligence cases was to be abrogated except where the alleged negligent act involved an exercise of parental authority over the child or where it involved an exercise of ordinary parental discretion with respect to the provision of food, clothing, housing, medical and dental services, and other care. The court ruled that in every other case the immunity had no application, even if the parent's actions were

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71. Dunlap v. Dunlap, 150 A. 905 (N.H. 1930).

72. RESTATEMENT (SECOND) OF TORTS § 895 cmt. d (1977); Schlessinger v. Schlessinger, 796 P.2d 1385 (1990); Allstate Insurance Company v. Kyong Hu Kim, 829 A.2d 611 (2003); William E. McCurdy, *Torts between Parents and Children*, 5 VILL. L. REV. 521, 540 (1960). *But see* Henderson v. Woolley, 644 A.2d 1303, 1305 (Conn. 1994); Rousey v. Rousey, 528 A.2d 416 (D.C. 1987); Wagner v. Smith, 340 N.W.2d 255 (Iowa 1983); Levesque v. Levesque, 106 A.2d 563 (N.H. 1954).

73. *Rousey*, 528 A.2d at 528; Signs v. Signs, 103 N.E.2d 743, 748 (Ohio 1952).

74. Haley, *supra* note 6, at 587-89.

75. A. John Hoomani & Kimberly Sieredzki Woodell, Liner v. Brown*: Where Should We Go From Here - Two Different Approaches for North Carolina*, 19 CAMPBELL L. REV. 447 (1996-97).

76. Stacey L. Ross, *The Parental Tort Immunity Doctrine Applied to Wrongful Death Actions: A Rule without Reason*, 13 S. ILL. U. L.J. 175 (1988-89).

77. Goller v. White, 122 N.W.2d 193 (Wis. 1963); *cf.* Barrett v. London Borough of Enfield (1999) 2 F.L.R. 426 (H.L.) (Lord Slynn of Hadley in obiter dictum) ("[A] parent does not have a blanket immunity for whatever he does to his child; negligence in driving a car by a parent would still be actionable if the child was caused injury ... in respect of some matters, parents do have an actionable duty of care. [But] ... the court should be slow to hold that a child can sue its parents for negligent decisions in its upbringing").

negligent rather than deliberate and intentional.[78] Following this judgment, the resulting qualified immunity doctrine was known as "The Wisconsin rule."[79]

The Wisconsin approach opened the door for a considerable constriction of the doctrine of parental immunity in many states. Some courts explained their qualification of "parental authority" on the grounds that because society requires the parent to maintain order in the family, it is society which must protect the other members of the family should the parent overstep his bounds in the exercise of his society-given authority.[80]

In 1972 in *Wisconsin v. Yoder*,[81] the United States Supreme Court ruled that a parent could not exercise unfettered control over his child, and that if he exceeded the boundaries of acceptable behavior, he could be exposed to a civil claim. This further qualification of parental immunity became known as the "parental authority" qualification.[82]

Over time, particularly in the 1970's and the beginning of the 1980's, the "parental authority" qualification developed further, to the point that most states denied parental immunity in cases of negligence by a parent leading to the child's injury.[83] These cases included both domestic accidents, such as damage caused by electrical appliances, and accidents and injuries caused outside the home, such as failure to care for a child crossing the road.[84] This qualification, in effect, removed cases of negligent lack of care from the scope of the immunity.[85] Taking this qualification a step further, it makes sense to argue that cases of deliberate and persistent emotional neglect, which also do not ensue from the exercise of the parent's authority regarding the needs of the child, should *a fortiori* be excluded from the scope of parental immunity.

These qualifications to the doctrine of parental immunity gradually began to breach the walls of the dam, and the courts in various states began re-examining the broad scope of the doctrine and limiting it to cases of negligence ensuing from the exercise of parental authority.[86] In most states the doctrine was not entirely abrogated, and it continues to apply in one form or another to this day.[87] Even in those states which have chosen to retain the doctrine rather than turned to one of the alternative models, it has been restricted by means of exceptions, particularly in accordance with the Wisconsin approach, and has been rejected, for example, in cases of sexual offenses, road accidents, and the performance of deliberate and outrageous acts by the parent.[88]

As a result of the restrictions on the application of the doctrine of parental immunity, increased numbers of civil suits were filed throughout the United States since the 1960's and 1970's by children alleging various types of abuse by

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78. Goller v. White, 122 N.W.2d 193, 197-99 (Wis. 1963).
79. Haley, *supra* note 6, at 596.
80. Neeley, *supra* note 1, at 703.
81. 406 U.S. 205 (1972).
82. *See also* Prince v. Massachusetts, 321 U.S. 158 (1944).
83. Haley, *supra* note 6, at 590, 595-96.
84. *See, e.g.*, Thoreson v. Milwaukee & Suburban Transport Co., 201 N.W.2d 745 (Wis. 1972).
85. Haley, *supra* note 6, at 589-90, 595.
86. *Id*. at 593-94.
87. *Id*. at 593-94. *See also* note 94 at 593.
88. *Id*. at 581, 585; Neeley, *supra* note 1, at 700.

their parents.[89] At the same time there were those who criticized the doctrine even in its new circumscribed state. They asserted that it was no longer appropriate, and that courts should rely on the common law, which has ways of drawing a proper balance in the circumstances of each case without the aid of the doctrine.[90]

3. Emotional Damage – *Burnette v. Wahl*

One interesting test case for the use of the parental immunity doctrine and the different qualifications for it was *Burnette v. Wahl*.[91] In this 1978 case, the Supreme Court of Oregon considered whether to recognize tort claims brought by three minor children who were in the custody of social services, acting through their guardians, for damages due to emotional neglect. The claims were against their mothers for emotional neglect.[92] In *Burnette*, the plaintiffs argued that the parents' behavior amounted to breaches of criminal and civil statutes in the state of Oregon, which imposed various duties on the parent,[93] including the duty to support their children (particularly indigent children) and a prohibition on neglecting and abandoning them.[94] The plaintiffs, all of whom were indigent, argued that the mothers had failed to provide them with care, custody, parental nurturance, affection, comfort, companionship, and support.[95] They alleged that the mothers did not take part in raising the children, and did not maintain regular contact or visitation.[96] The children also alleged that through their behavior the mothers neglected and in effect abandoned their children and deprived them of the love, care, affection, and comfort to which they were entitled, thereby endangering their health and welfare.[97] Finally, it was alleged that they neglected their children maliciously, intentionally, and with cruel disregard for the consequential emotional and psychological injuries to the children.[98]

Under the qualified doctrine that prevailed in Oregon at the time, the court could have allowed the claim and not applied the doctrine of immunity. Instead, the court dismissed the claim by a majority decision. Even within the majority judgment there were several disparate perspectives on and approaches to dealing with the considerations for and against recognition of civil suits by children against their parents, specifically in cases of emotional neglect.

Judge Holman, who wrote the majority opinion, identified a problem in recognizing emotional neglect, in contrast to recognizing physical damage or even emotional damage caused by a physical act, such as a beating, rape, or

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89. Akers & Drummond, *supra* note 62 ;Lanham, *supra* note 14; Neeley, *supra* note 1, at 700.

90. *See*, *e.g.*, Basgier, *supra* note 54, at 123 ;Buchler v. State, 853 P.2d 798, 808-09 (Or. 1993).

91. Burnette v. Wahl, 588 P.2d 1105 (Or. 1978).

92. *Id*. at 1107.

93. *Id*.

94. OR. REV. STAT. § 109.010 (2007); OR. REV. STAT.§ 163.535 (2007); OR. REV. STAT. § 163.545 (2007); OR. REV. STAT. §163.555 (2007).

95. Burnette v. Wahl, 588 P.2d 1105, 1107 (Or. 1978).

96. *Id*. at 1108-09.

97. *Id*.

98. *Id*.

injury in an automobile accident.[99] In his opinion, the court had to recognize the limits of its power and refrain from intruding excessively in internal family relations in a manner which might undermine the fundamental elements of the legal system, interfere with the objectives of the original Oregon legislation, and consequently cause tension between courts and the legislature.[100] The judge also took a principled stand against the possibility of recognizing such claims, citing the same grounds that underpinned the original doctrine. In his view, recognition of the claim would lead to additional rifts within the family and prevent any possibility of healing it, contrary to the "therapeutic" objectives of the Oregon legislation.[101] The core of the judgment therefore relied upon the traditional primary consideration against recognition of these claims: the best interests of the family as a whole taking precedence over the interests of an individual member of the family. Judge Holman also raises an interesting point:

> In addition to the contention that defendants should be liable for civil damages because of their violation of criminal and regulatory statutes, plaintiffs also contend that defendants are responsible because of the infliction of severe emotional distress by intentional acts. Plaintiffs allege that defendants intentionally deserted and abandoned them; however, they do not contend that defendants deserted them for the purpose of inflicting emotional harm upon them. We recognize that this tort usually also encompasses the infliction of emotional harm under circumstances from which a reasonable person would conclude that harm was almost certain to result. We believe this latter rationale is inapplicable as between parents and children. If it were otherwise, the children of divorced parents would almost always have an action for emotional damage against their parents. Divorce has become a way of life with almost certain emotional trauma of a greater or lesser degree to the children from the legal dissolution of the family and the resultant absence of at least one of the parents and sometimes of both.[102]

Judge Tongue concurred with this outcome, but not with the underlying rationale.[103] He pointed out that the Oregon Supreme Court had previously abandoned the doctrine of intrafamilial tort immunity at least in its original form, and had recognized the need to award damages to a child for intentional torts that resulted in physical injuries. In his opinion, it did not follow that the doctrine should also be abandoned for torts resulting only in "mental and emotional injuries."[104]

Judge Lent emphasized the seriousness of mental and emotional injury, but concurred with the majority opinion because the plaintiffs had not succeeded in proving that the mother's behavior amounted to "outrageous conduct."[105]

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99. *Id*. at 1108.

100. *Id*. at 1108-10.

101. *Id*. at 1110-11.

102. *Id*. at 1112. *Cf*, as to English law, Barrett v. London Borough of Enfield (1999) 2 F.L.R. 426 (H.L.).

103. *Id*.

104. *Id*.

105. *Id*. at 1112-15. See Courtney v. Courtney, 413 S.E. 2d 418 (W. Va. 1991), for a discussion of this principle after *Burnette*.

The dissenting opinion was written by Judge Linde.[106] According to the judge, the claim had to be recognized, particularly because the Oregon statute did not expressly reject such a claim.[107] The judge referred to the primary consideration raised in the majority opinion and argued that it would be difficult to award compensation for neglect with disregard for the malicious, intentional consequences as causing harm to the family, since mothers who acted in such a way had already destroyed the family by their conduct and violated their duties towards their children.[108] In any other type of relationship, the claim would have been recognized. The majority opinion had dismissed the claim, *inter alia*, because the injury was emotional and psychological rather than physical. According to Judge Linde, if one were to accept the premise of the majority opinion, and the law always had to take into account the need to re-establish harmony within the family unit, then civil claims would also have to be dismissed where the damage to the child was physical. However, U.S. courts in general, and Oregon courts in particular, did recognize such claims.[109] The judge also argued that it is incongruous to hold that the legislature provided for felony prosecution of parents who violated these duties, and at the same time meant to exclude tort claims for fear of impairing the family unit.[110]

Burnette neatly illustrates the varying and conflicting approaches that may be taken toward the doctrine of parental immunity. Despite the logic of Judge Linde's dissent, it appears that no United States court has recognized the tort claim of a child against his parent for emotional neglect.

In the literature there are those who support the majority opinion and assert that the appropriate way to solve such disputes does not involve recognition of civil suits against parents.[111] However, scholars have voiced considerable criticism of the majority opinion, placing emphasis on the fact that one cannot ignore the fact that two of the dissenting judges had advocated the abrogation of parental immunity and raised good reasons for that opinion.[112] Some argue that there is no reason not to recognize tort claims against parents in cases of emotional neglect,[113] since similar claims based on physical or sexual cruelty have been recognized, some of which included emotional injury (albeit not as the sole injury). In addition, courts eventually recognized an independent cause of action for emotional injury in suits between spouses, and as that doctrine evolved it would have been appropriate for the doctrine of parental immunity to evolve simultaneously.[114]

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106. *Id*. at 1115-19.

107. *Id*. at 1116-19.

108. *Id*. at 1118-19.

109. *Id*. at 1119.

110. *Id*. at 1118-19.

111. Lanham, *supra* note 14, at 116-18; Mary Kate Kearney, *Breaking the Silence: Tort Liability for Failing to Protect Children from Abuse*, 42 BUFF. L. REV. 405, 406-08, 434-36 (1994).

112. Guynn, *supra* note 4, at 508.

113. Neeley, *supra* note 1, at 701, 705.

114. *See* Benjamin Shmueli, *Tort Litigation between Spouses: Let's Meet Somewhere in the Middle*, 15 HARV. NEGOT. L. REV. (forthcoming 2010).

4. The Reasonable and Prudent Parent Standard – "The California Approach"

It is likely that some of this criticism, together with other criticisms voiced against the doctrine over the years, contributed to the fact that about one fifth of U.S. states repealed or abandoned parental immunity in the latter half of the 20th century, and were also unwilling to accept the qualified doctrine, which they saw as anachronistic.[115] Some of these states instead adopted a standard originating from the tort of negligence, the "reasonable and prudent parent standard." This standard, which was first adopted in California at the beginning of the 1970's, and therefore earned the label "the California approach," tested whether the parent had acted the way an "ordinary and careful" parent would reasonably have acted towards his children in similar circumstances.[116] According to some views, this test was sufficiently flexible and drew an adequate balance between the need to preserve the authority of the parent and the need to impose legal liability upon him in the appropriate cases.[117]

A number of states did not adopt any special standard for the family framework, and used standards which were similar, in effect, to the model described next, the stringent-sweeping legal intervention model. Such states contemplate the use of the ordinary tools of civil torts in these types of cases, while expressly opposing the California approach.[118]

5. The Restatement Standard

Other states adopted yet another standard, similar yet different to the qualified doctrine. This standard draws its principles from the Restatement, § 895G (2):

> (1) A parent or child is not immune from tort liability to the other solely by reason of that relationship.
>
> (2) Repudiation of general tort immunity does not establish liability for an act or omission that, because of the parent-child relationship, is otherwise privileged or is not tortious.[119]

The provision recognizes the possibility of imposing liability upon a parent. However, the argument that parents should be able to use their discretion when exercising their authority over their child may be sufficient

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115. Haley, *supra* note 6, at 603-04.

116. Herthel, *supra* note 46, at 414-15; Basgier, *supra* note 54, at 128-29.

117. Broadbent v. Broadbent, 907 P.2d 43, 49-50 (Ariz. 1995); Gibson v. Gibson, 479 P.2d 648, 653 (Cal. 1971); Anderson v. Stream, 295 N.W.2d 595, 596, 601 (Minn. 1980); Hartman v. Hartman, 821 S.W.2d 852, 857 (Mo. 1991); Kendall v. Sears, Roebuck & Co., 634 S.W.2d 176, 180 (Mo. 1982).

118. This settlement took place in the state of New York a few years after the California standard was announced. *See* Holodook v. Spencer, 324 N.E.2d 338, 346 (N.Y. 1974). For discussion and comparison between the two standards, *see* Haley, *supra* note 6, at 596-97. In my opinion, the roots of this approach can be found a few years earlier, before the California Approach. *See* Gelbman v. Gelbman, 245 N.E.2d 192 (N.Y. 1969). Nonetheless, it should be noted that even in the state of New York itself one cannot find a single clear common thread in the case law. *Compare id., and Holodook*, 324 N.E.2d at 346, *with* Hairston v. Broadwater, 342 N.Y.S.2d 787 (N.Y. Sup. Ct. 1973).

119. RESTATEMENT (SECOND) OF TORTS, § 895G(2) (1977). According to Comment K, when the tort has no direct connection to familial relations, there would be no special defense at all.

grounds for not imposing liability.[120] Thus, in 1984, the Supreme Court of Oregon abrogated the parental immunity doctrine and replaced it with the Restatement standard, holding that this standard was clearer than its alternatives and allowed the creation of a separate duty of care for a parent, one which was distinct from the ordinary duty of care in negligence cases.[121] Nonetheless, in a later case, the Oregon Court of Appeals found it difficult to interpret and implement the new standard and criticized its vagueness.[122] Finally, in order not to deviate from the ruling of the Supreme Court, the Court of Appeals chose to give effect to the standard by drawing an analogy with the principles of "gross negligence" (in contrast to "ordinary negligence"). It thereby created a clearer and improved rule, whereby only gross negligence would be grounds for liability.[123] Nonetheless, the current position in Oregon is not clear-cut, and there is no certainty that a child's action against his parent for damages for severe emotional harm (which is not accompanied by physical injury), even if caused by gross negligence, will be recognized, and that the *Burnette* outcome would indeed be changed.[124]

No state has adopted a positive duty for a parent to love his child.[125]

B. Critique

Considering that American law has, at least until recently, favored immunity against tort claims by children against their parents even in cases of serious abuse, it is no wonder that the state of Oregon barred actions for emotional neglect. Despite considering and weighing the various considerations in the *Burnette* case – and declaring in the dissenting opinion that the doctrine of parental immunity should be rescinded – the court did not free itself from the fetters of the parental immunity doctrine.

The "reasonable and prudent parent" standard has been subject to criticsm because it does not provide objective tools for determining what is permitted and

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120. Haley, *supra* note 6, at 596, n.108.

121. Winn v. Gilroy, 681 P.2d 776, 783-85 (Or. 1984) (The judgment was written by Justice Linde, who was in the minority in the Burnette case, and recognized a claim against a father who drove while drunk and negligently caused the death of his two daughters in the resulting automobile accident. The court emphasized that in each case the conduct of a parent had to be examined on its merits and no sweeping immunity applied.). This case provided a highly suitable platform for abandoning the doctrine and establishing an alternative to it, as it was one of many cases which did not involve the parent in his parental capacity but in his capacity as a driver. This was particularly true following the spread of the Wisconsin rule of 1963, which, as noted, applied the doctrine to matters within the scope of parental authority only.

122. Martin v. Yunker, 853 P.2d 1332 (Or. Ct. App. 1993).

123. *Id.* at 1335. This was done in other cases too. *See*, *e.g.*, Foldi v. Jeffries, 461 A.2d 1145 (N.J. 1983); Chaffin v. Chaffin, 397 P.2d 771 (Or. 1964).

124. *See*, *e.g.*, Hammond v. Cent. Lane Commc'ns Ctr., 816 P.2d 593 (Or. 1991) (In this case, which did not concern parent-child relations, the court emphasized that emotional distress which is not accompanied by physical damage would not be recognized as subject to compensation if its origins were in negligence only.).

125. *See*, *e.g.*, Aboussie v. Aboussie, 270 S.W.2d 636 (Tex. Civ. App. 1954) (stating that a parent cannot be sued for loss of his society, love, companionship, and guidance); Kane v. Quigley, 203 N.E.2d 338 (Ohio 1964) (stating that this kind of obligation may be moral but not legal); *cf.* Comment, *The Rights of Children: A Trust Model*, 46 FORDHAM L. REV. 669, 731-32 (1978).

what is prohibited when raising children.[126] This is a valid criticism and it would be appropriate to establish at least general guidelines delineating the boundaries of acceptable parental behavior in order to ensure legal certainty. The goal of this standard is correct – to establish a separate rule unique to parental conduct within the general system of negligence law; however, it would seem that the execution is flawed, since the elements of prudence and reasonableness are aspects of the general tort of negligence. The "reasonable and prudent parent" standard is merely a standard of ordinary negligence law, which is adapted to apply to the professional or personal status of the defendant; in this case, the parent. Accordingly, it is difficult to see how this standard resolves the difficulties raised by the fundamental dilemma.

The standard which relies on the Restatement provides an intermediate path between use of the doctrine of parental immunity and its sweeping abrogation. It may be assumed that the ultimate outcome of using this standard will not be very different from the outcome of using the parental immunity doctrine in its constricted form. According to the qualified doctrine, parental immunity is the rule while the exceptions will lead to the imposition of liability. The Restatement standard takes the converse approach: the parent's civil liability is the rule, with the exceptions affording him immunity.

This model does not provide a suitable solution to the fundamental dilemma, because of its vagueness. The Restatement standard takes a special approach towards the family which is not as extreme as that which is found in Roman law or old American law, but even its implementation is problematic because it does not set sufficient guidelines. Still, this model has expressly excluded cases of parental authority from immunity, and in so doing has taken a step, if only a hesitant one, in the direction of delineating the boundaries of a recognizable claim.

Likewise, the basic rule underlying this model cannot provide a bridge between the various considerations for and against recognition of the claim, as it does not provide a suitable means for giving effect to the rights of the child.

V. THE STRINGENT-SWEEPING LEGAL INTERVENTION MODEL: APPLICATION OF PREVAILING GENERAL LAW TO THE FAMILY

A. Israeli Law: Recognition of Emotional Neglect as a Ground for a Tort Law Claim Against a Parent

In Israel, also a common law country, the door has always been open for a child to bring a civil claim against a parent because Israel never developed a doctrine of parental immunity.[127] This open stance is consistent with the interpretation of the provisions of the constitutinal statute : Basic Law, Human Dignity and Freedom of 1992, which is applied to minor children.[128] There are

126. *See* Anderson v. Stream, 295 N.W.2d 595, 602-04 (Minn. 1980) (Rogosheske J., dissenting); Haley, *supra* note 6, at 595-96.

127. CA 193/49 Perlstein v. Nomberg, abstract 49 (1949) Piskei Din (IsrSC); Gad Tadeski, *On Tort Law in Birth Cases*, ESSAYS ON LAW 269, 272 (1978) (Isr.).

128. CA 6106/92 Anon. v. The Attorney General (1994) Tak-El 94(2) 1166; Aharon Barak, INTERPRETATION IN LAW – CONSTITUTIONAL INTERPRETATION 435 (Vol. C, 1994) (Isr.).

obstacles to recognition of such a claim, however: general protection of a parent accorded by the Legal Capacity and Guardianship Law[129] (hereinafter LCGL) against civil claims and inherent problems with the recognition of the independent *locus standi* of a child in court.

The legal framework which regulates the relations between parents and their minor children and which defines their rights and obligations is the LCGL. This statute provides for a parent's civil liability for damage caused to the child if the former fails to act in good faith or does not act in the best interests of the child.[130]

The case law has held that protection of the child's best interests is a supreme principle in the application of LCGL, including when the court is interpreting the defenses accorded to the parent.[131] Accordingly, it would be difficult for a parent who has emotionally neglected his child to claim protection by virtue of the statute, as it would be difficult to argue that neglect—in contrast to other parental behaviors, such as corporal punishment—is in the child's best interests.

With regard to a child's claim in court, the Family Court Law was enacted in 1995[132] and provides in Section 3(d) that a child can file an independent claim or application by himself or through an *amicus curiae*, or make an application through a claim instituted by another, in any matter where his rights may have been seriously infringed. By virtue of Section 1(2) of the Law, these matters include civil claims within the family. Therefore, this procedure is only available where the emotional neglect causes the child serious harm.

Tort lawsuits against parents on the grounds of sexual or physical abuse have been acknowledged.[133] Consequently, the question is whether emotional neglect is serious enough to provide a civil cause of action against a parent. Prior

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129. Capacity and Guardianship Law, 5722-1962, 16 LSI 106 (5722-1961/62) (Isr.).

130. The relevant duties of the parents, who are the natural guardians of the child, are found in §§ 14, 15 & 17 of the statute. § 22 provides that the parents shall not be liable for injury caused by them to the minor in the exercise of their duties as guardians except where they acted otherwise than in good faith or without proper intent for the best interests of the minor. It follows that § 22 in effect establishes civil liability of the parent for the injury to the child if the parent does not act in accordance with these standards and criteria. Note that LCGL does not establish sanctions for violation of the duties set out therein. Accordingly, it is not possible to bring an action solely by virtue of the statute, but a plaintiff must use a tort of breach of a statutory duty in order to do so. *See* Civil Wrongs Ordinance (New Version), 5732-1972, 2 LSI 12, § 63 (1972) (Isr.). The standards which have been set in the LCGL and the case law stemming from it have had a direct impact on the tort of negligence, as they provide the standard for the breach of the duty of care, which is one of the cumulative elements of the tort of negligence. *Id.* at §§ 35-36; *see* CA 2034/98 Amin v. Amin (1999) (IsrSC) 53(5) 69, paras. 14, 19, *available at* http://elyon1.court.gov.il/files_eng/98/340/020/q07/98020340.q07.htm (last visited July 18, 2009); CF. (TA) 1016/88 Amin v. Amin (1997) Tak-Mech 97(2) 330.

131. CA 549/75 Anon v. The Attorney General (1995) (IsrSC) 30(1) 459, para. 7; FH. 7015/94 The Attorney General v. Anon (1995) (IsrSC) 50(1) 48, 66, 95-100; CA 458/79 Nir v. Nir (1980) (IsrSC) 35(1) 518, 523-24.

132. Family Law Court 1995, S.H. 1537, 393.

133. *See*, *e.g.*, FamC (Jer) 2160/99 L. v. L. (2005) (not yet published, August 31, 2005); FamC (Krayot) 1330/01 A. v. Roe (2009) (not yet published, June 4, 2009); FamC (TA) 2880/00 M.P. v. Y.S. (2003) (not yet published, June 11, 2003).

to 1999, there was almost no instance of this, apart from *dicta* in the case law regarding custody and adoption of children.[134]

In 1999 the Israeli Supreme Court was the first to recognize such a claim in *Amin v. Amin*.[135] But it all began in 1988, when a civil claim was brought by three adult siblings in the District Court of Tel Aviv.[136] The girl and two boys, all of whom were in their twenties, had lost their mother when she committed suicide shortly after the birth of the youngest son.[137] The claim was brought against the father by his children, for damages for emotional injury caused to them in their youth as a result of the father's violation of the his duties as a parent. They alleged that he failed to satisfy their emotional needs, in addition to failure to meet their material needs, such as food, clothing, and education. The father did not participate in raising the children, neglected them, repudiated them, was alienated from them, actively denied paternity, and in practice abandoned them. The children lived for a short time in their impoverished grandmother's home (which was also the home of their uncle – a mentally retarded man) before being moved by the welfare services to boarding schools. The children were separated and over the years moved from one foster home and institution to another until they reached the age of majority.[138] Four years after the mother committed suicide, the father remarried, and entered into a written agreement with his new wife under which they both undertook not to bring their children from their previous marriages into the new marital home, in order to open a new page in their lives. Two children were born to the new couple.[139]

The father's children from his first marriage sought emotional warmth from the father in vain.[140] When they came to his home he expelled them with shouts, and also disapproved of their visits to their grandmother's home. Even after they became adults the father did not bother to visit them and did not show any interest in their lives.[141] In the meantime, the children all developed serious problems.[142] All efforts by welfare services to involve the father in the

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134. It was held that satisfying emotional duties was also important under the LCGL, and included the positive duty of love. Indeed, statements that a parent is under a duty to show affection, love, and softness towards his children for the purpose of parental custody were made in a number of cases, but all of them in regard to guardianship and adoption. CA 549/75 Anon v. The Attorney General (1995) (IsrSC) 30(1) 459, para. 7; CA 845/76 Anon. v. Attorney General (1977) (IsrSC) 32(1) 128; CA 783/81, Applic. 228/83 Anon. v. Anon. (1983) (IsrSC) 39(2) 1, 8; FamC (Jer) 14622/97 Anon. v. Anon. (1998) Tak-Mish. 98(3) 19; *see also* Avner Hai Shaki, *A Re-examination of the Nature of the Parents' Right to Custody of their Minor Children*, 9 IUNEI MISHPAT 59, 98 (1983) (Isr.); Avner Hai Shaki, *Trends in Custody of Minor Children – with Emphasis on the Implementation of the Principle of the Best Interest of the Child*, 10 IUNEI MISHPAT 5, 15 (1984) (Isr.); Pinhas Shifman, *Parent Against his Will – Misrepresentation in relation to the use of Prophylactics*, 18 MISHPATIM 459, 461-62 (1989) (Isr.); Shulamit Almog, RIGHTS OF CHILDREN 58 (1997) (Isr.).

135. CA 2034/98 Amin v. Amin (1999) (IsrSC) 53(5) 69.

136. CF (TA) 1016/88 Amin v. Amin (1997) Tak-Mech 97(2) 330.

137. CA 2034/98 Amin v. Amin (1999) IsrSC 53(5) 69, para. 1 (opinion of Englard, J.).

138. *Id*.

139. *Id*. at para. 2.

140. *Id*.

141. *Id*.

142. The children ran away from the institutions and foster families in which they were placed, often created disturbances, and were found wandering the streets. "One son started a family but was unable to work and lived off monthly National Insurance payments. The other son wandered from job to job, unable

care and support of the children failed.[143] The father did not even respond to invitations sent by the children to visit on their birthdays,[144] and the children's complaint against him, as described by the court, was that:

The tragedy of the children passes from generation to generation.

> In their bitterness and distress, the sons and daughter point accusatory fingers at their father; he turned his back on them throughout their childhood and youth and continues to do so today. The children sought and pleaded for fatherly attention, for a modicum of warmth and concern and care, and for any measure of interest in them and in their lives from their father, but they hit a brick wall. The severance was intentional and absolute. . . . Their eyes full of yearning, the children watched how the father showered his love on the two sons born to him by his second wife and ensured their education. And they were neglected and left to care for themselves![145]

The claim was based on two torts: negligence, on the ground that the father had not conducted himself as a reasonable parent would, and breach of a statutory duty set out in §§ 15 and 17 of the LCGL, which include directives regarding the appropriate behavior of a parent towards his child. The plaintiffs proved that they had suffered from emotional injury and personality disturbances amounting to mental injury and that there was a causal connection between these injuries and the absence of parental support and the active cruelty of their father towards them.

The father argued that after the suicide of his first wife, he found himself in a dire economic and mental state which almost caused him to lose his ability to function, and that as a result he was unable to take care of his children.[146]

The District Court of Tel Aviv held that a parent has a legal obligation to take care of the needs of his children, including their emotional and mental needs, and that a child can bring a civil claim against his parent if these duties have not been fulfilled.[147] The court held that the intentional acts of the father can be included in the tort of negligence.[148] Accordingly, the claim was upheld, and the District Court awarded damages.[149]

The father appealed to the Supreme Court. He did not dispute the factual conclusions of the District Court, but chose to attack the submission of the suit, the like of which had never been recognized in the world.[150] He argued that his acts or omissions in the emotional domain, even if immoral, did not give rise to any legal liability, and certainly not in the civil arena (in contrast to failure to satisfy material needs).[151] Accordingly, he argued that the claim had to be set aside by virtue of the

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to keep a place of employment for long. The daughter married and divorced: the eldest was given up for adoption, and the others were put in group homes; their mother's drug abuse renders her unable to care for them." *Id.* at para. 1.

143. *Id*. at para. 3.
144. *Id*.
145. *Id.* at paras. 1-2.
146. *Id*. at para. 7.
147. CF (TA) 1016/88 Amin v. Amin (1997) Tak-Mech 97(2) 330, para. 41.
148. *Id*. at para. 117a.
149. *Id*. at para. 122.
150. CA 2034/98 Amin v. Amin (1999) (IsrSC) 53(5) 69, para. 7 (opinion of Englard, J.).
151. *Id*.

court's inability to enforce a duty which should be confined to the moral arena.[152] The father also asserted that upholding the claim would lead to a slippery slope and the courts would be flooded with similar claims, and consequently that it should be denied on grounds of judicial policy.[153]

The Supreme Court affirmed the judgment of the District Court and held that the father had breached his parental duties as laid out in the LCGL, which also applied in the emotional and mental spheres, and which existed in the legal domain and not only in the moral domain.[154] The court held that the father could not enjoy the defenses afforded by the statute.[155]

The Supreme Court produced a world precedent in recognizing this type of claim, as the court itself pointed out.[156] This ruling entails an even greater innovation than would appear at first glance. Not only does the ruling apply to the treatment of children by their biological parents, but because according to the Israeli statute dealing with adoption, the duty to satisfy the needs of a child applies to any person who has custody of a child, these duties can provide the basis for claims by an adopted child against his adoptive parents as well.[157] The *Amin* case also introduced an innovation in the opposite direction. In effect, the court held that the duty found in the LCGL to satisfy the needs of the child applied to a biological parent even when the child was not in his custody or under his care.

The Court emphasized the extreme circumstances of the case, both in order to lessen the fear of the slippery slope argument and in order to allow a certain measure of flexibility regarding the question of what is included in the legal duty of a parent towards his child. Nonetheless, the court's ruling is clear and definite. Still, in order to ease fears of sliding down the slippery slope, the court formed a three-way solution in the shape of what it termed the "safety valves" which would help to categorize the various claims children might bring against their parents:[158] (1) if the defense set out in § 22 of the LCGL (acting in the best interests of the child) is fulfilled, the lawsuit is rejected; (2) if the act was *de minimis*,[159] the lawsuit is rejected; and (3) the need to accept this kind of lawsuit only in limited and very special circumstances, like the *Amin* case, in order to prevent the flooding of the courts.

Does the *Amin* court's decision create a positive duty for a parent to love his child, or only a negative duty not to neglect him? The District Court held that the claim did not deal with the lack of love or its insufficient quantity. The claim was in respect to the father's severe rejection of the children, his complete disregard for them, the severance of any connection with them, and the absence of any parental support.[160] The Supreme Court clarified that it did not intend to

152. *Id*.
153. *Id*.
154. *Id*. at para. 8.
155. *Id*. at paras. 10-15.
156. *Id*. at introduction.
157. Adoption Law, 1981, S. H. 1981 29 §§ 16, 35.
158. CA 2034/98 Amin v. Amin (1999) (IsrSC) 53(5) 69, paras. 17, 19, 21.
159. Civil Wrongs Ordinance (New Version), 5732-1972, 2 LSI 12, § 4 (1972) (Isr.).
160. CF (TA) 1016/88 Amin v. Amin (1997) Tak-Mech 97(2) 330, para. 39.

go so far as to establish a positive legal duty to love the child, as this was outside the limited capacity of the court.[161] The Court could only examine the damage caused to the child as a result of the parent's failure to satisfy his material and emotional needs.

B. Critique

The *Amin* case was a groundbreaking ruling; no comparative precedent existed. Though the decision in this case was undoubtedly justified in view of the Amin family's tragic and difficult circumstances, serious consideration must be given to the future ramifications of this ruling, both in Israel and other countries that might adopt a similar rule.

This ruling embodies an individualistic approach, which implements the model of stringent-sweeping intervention in parent-child relations. However, the desire to regulate the relations between child and parent within a framework similar to that of private law, rather than treating the family unit as a special, discrete entity, is sometimes counterproductive. The general principles of tort law were established to deal with conflicts and enmities between two strangers and some are not appropriate in the family framework. Principles of corrective justice, for example, only take into account the two parties to the dispute, but in an intrafamilial dispute the two parties do not exist in a vacuum, and the remaining members of the family unit are not "strangers" to the situation. Accordingly, it is necessary to set criteria for determining when intervention in parent-child relations is appropriate, rather than relying on future cases being similar to the *Amin* case to make such a determination. It would have been best if the *Amin* court had established criteria for determining when to recognize a child's civil claim, particularly because Israel follows the common law, where such a ruling creates a binding precedent.

Despite the Supreme Court's attempt to "quiet" fears about the slippery slope by stating that the *de minimis* rule would limit recognition of the claims, there are too many cases that lie between harsh and extreme circumstances on the one hand and *de minimis* circumstances on the other. Justice Theodor Orr concurred with the opinion of Justice Englard, who wrote the main judgment, but also addressed this issue in a more comprehensive manner:

Counsel for the appellant expressed his concern that recognizing the right of the respondents to compensation from their father for the emotional harm caused to them would lead the court down a slippery slope. . . .

> Indeed, there is no doubt that the relationship between parents and children is often complex and emotionally-laden. It is not immune from frustrations, disappointments, and disillusionment, whether mutual or one-sided, which are likely to give rise to the feeling that one side has not fulfilled his or her duties with the appropriate amount of dedication. The court, therefore, should be doubly cautious in addressing these issues, and must take care not to intrude unnecessarily upon this delicate fabric of relations. It must not clear the way for a wave of tort claims of children against parents, claims which are based in complex life circumstances which are difficult to judge in retrospect. Parents are not immune from errors in judgment during the course of such a long and

161. CA 2034/98 Amin v. Amin (1999) (IsrSC) 53(5) 69, paras. 8, 10.

> complicated relationship. The court must exercise appropriate caution in drawing the line delineating when it will intervene by recognizing a cause of action in tort by a child against his or her parent. Appropriate judicial policy dictates that only in extreme cases will parents' acts or omissions rise to the level of the negligence sufficient to sustain a tort claim against them.[162]

These comments express an appropriate approach which emphasizes a balanced, moderate, and considered policy of legal intervention, one which is not sweeping in nature. Accordingly, especially in a common law country where rulings like the *Amin* court's create a binding precedent, we might have expected the court to establish criteria in order to draw a distinction and create a boundary between harsh cases in which the circumstances are special and rare, and other cases. Justice Orr explains their failure to establish such boundaries:

> The case at bar does not require us to delineate where the line falls. The circumstances of this case are so extreme in their severity, the question of where to draw the line does not arise at all.
>
> This is not the ordinary case requiring us to evaluate how a parent exercised his or her judgment. The appellant shirked all his parental duties completely and harshly. He simply abandoned his children and ignored their existence. His behavior is particularly harsh in light of the fact that the children had already been orphaned of their mother. Even worse: this case shocks the conscience in particular because of the fact that his children watched him establish a new family, which he nurtured and of which he took care. His children watched him do this from afar, while they yearned for him. The circumstances of this case are unique, and our recognition of the rights of the respondents to damages under the circumstances should not be seen as opening the floodgate to suits by children against their parents for every case of inappropriate behavior by parents toward their children. Indeed, ordinarily, parents are entitled to the defense imparted by Section 22 of the law of Legal Capacity and Guardianship Law.[163]

Indeed, these were harsh and unique circumstances, and the sense of justice "declares" that the claim should have been recognized. Yet how will it be possible to decide henceforth when a tort claim against a parent will be recognized and when it will not? What will happen, for example, when similar conduct is directed at children who have not been orphaned? The judges have relied upon the extreme nature of the case as an excuse for not establishing criteria which can be implemented as a matter of law in the future. How then can one prevent a slide down the slippery slope? Is it really possible to rely on the very general protection given by § 22 of the LCGL? It would seem that the court itself did not rely solely on this section. Had it done so, it would have dismissed the claim. Therefore, what is the "normal case" which will fall within the protection of § 22? Justice Orr stated that:

> [C]ourt[s] will have to delineate rules which will, on the one hand, allow children, in appropriate cases, to claim compensation from their parents for emotional harm, and on the other hand, recognize that a parent's judgment enjoys an autonomy which should not be unnecessarily infringed upon. In any

162. CA 2034/98 Amin v. Amin (1999) (IsrSC) 53(5) 69 (opinion of Orr, J.).

163. *Id.*

> event, the question is beyond the scope of the case before us, and so we will leave a discussion of the issue, with all the problems it raises, until such time as it becomes necessary to adjudicate it.[164]

"[C]ourt[s] will have to delineate rules,"[165] but the *Amin* court refused to do so, and here is the heart of the problem. The moment the comments were written by the court they became subject to interpretation, particularly as the issue was not analyzed in sufficient depth (per Justice Orr himself). The judges were convinced of the need to create a proper balance between the various factors, but they did not draw the guidelines for determining such a balance. Thus, they released an important and innovative ruling of global proportions without setting clear criteria which might help potential litigants know where they stand.

In practice, the *Amin* ruling is vague, since it does not differentiate between the extreme and rare cases where children should be able to bring civil claims, and the more usual cases where they should not. Though it may never be possible to perfectly delineate when a child may bring a civil claim against his parents, a number of principal criteria must be clarified which can be used to guide us in the future.

Two actions brought before the family courts in Israel since the *Amin* case, which sought to rely on that judgment, were dismissed indicating that the floodgates have not been opened.[166] The court is "on guard" and clearly in no

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164. *Id.*

165. *Id.*

166. A first attempt to breach the dam took place about six months after judgment was given by the Supreme Court in the *Amin* case, in a case which also dealt with damage caused by emotional neglect as the sole damage. *See* Applic. 3190/00 FamC (Hi) 1620/00 Anon. v. Anon (2001) Tak-Mish 2001(3) 33. The Family Court in Haifa was presented with a claim filed by children (who lived with their mother) against their father for negligence in raising and nurturing them, and for breach of statutory duties towards them in a manifest attempt to rely on the ruling of the *Amin* case. The court held that no proof was adduced of any damage as a result of the neglect and no causation had been proven between the breach of the parental duties of the defendant father – if there were any – and the damage. The court pointed out that the *Amin* ruling had to be followed gently and very cautiously in view of its special and extreme circumstances. The neglect – if any – was not material but only emotional; the children had a mother, and the case, as a whole, was less serious and centered solely on the question of meetings.

F.Ct. (Jer) 19286/98 Anon. v. Anon (2001) Tak-Mish 2001(3) 659. A claim was filed by a wife and children against the father. The wife sued her husband on the basis of the tort of defamation and breach of privacy as a result of notices about her which the father had disseminated throughout the neighborhood, which shamed her and maligned her because she had turned to the secular courts of the state (the Family Court) for the purpose of obtaining a restraining order against him after he had engaged in violent outbursts instead of turning to the private ultra-orthodox courts which she should have done in view of their lifestyle. The children, for their part, alleged that this act of the father was a breach of his parental duties, and that as a result of his actions, they suffered greatly, *inter alia*, because the neighborhood children refused to visit their homes and they themselves could not go out and play freely in the neighborhood park because of bullying by the neighborhood children, with the result that their mother was forced to take them to far away parks. They added that they suffered because they were ostracized and humiliated, had lost their pleasure in life, their social development had been impaired, and their educational achievements had suffered. Accordingly, they claimed that the elements of the tort of negligence had been met by the acts of the father. They also argued that the father had breached the statutory duties imposed on him by § 29 of the LCGL, because he had failed to act in the way that a devoted parent would have acted in the circumstances of the matter. The children asked for compensation for damage to their social

rush to recognize every child's claim against his parent, even without clear guidelines about when such recognition is appropriate. The facts of these cases were very far removed from those of *Amin*. The circumstances were much easier and there was no proof adduced of damage and causation between the parent's conduct and the alleged damage.

Still, it would appear that the dam has been breached by the very submission of additional claims following the *Amin* case, since there were no similar claims submitted before *Amin*. A more serious effort to breach the dam came with the submission of a civil claim (which is still ongoing at the time of writing this paper) in the District Court of Jerusalem some two years after the judgment in the *Amin* case, a claim which is similar to the *Amin* claim, and perhaps even more serious.[167]

There are many other cases in addition to these three which are potentially suitable subject matter for such claims, because they disclose *prima facie* parental emotional neglect. Other cases that have reached criminal and civil courts in various forms, with the exception of tort claims, prove that cases of emotional neglect are not as rare as one might hope.[168] The problem posed by the failure of

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development, loss of happiness, damage to their education, aggravation, distress, shame, and financial loss because of the cost of traveling to distant parks. The court dismissed the children's claim (and partially accepted the mother's claim) because no proof had been adduced of the damage alleged, and no proof was adduced of causation between the act of publishing the notices and the alleged injury to the children's interests. The court also added that the duties of a parent as a parent should not be stretched too far. The facts of this claim too, of course, do not resemble the facts of the *Amin* case.

167. CF (Dct. Ct. Jerusalem) 3320/01 Mazor (Sa'ada) v. Avidan (file opened July 2, 2001). The case concerns a young man born in 1977 who brought a claim against a number of persons for acts committed against him when he was a minor, while he was staying with a foster family, after having been abandoned by his biological mother. He alleges that he was the victim of neglect, exploitation, humiliation, and physical, mental, and sexual cruelty over many years, and that no one lifted a finger to rescue him from this situation, notwithstanding repeated reports of violence and neglect submitted by psychologists and welfare officers. Among the defendants is the foster mother who beat him, imprisoned him in a dark and empty room for hours, and severely neglected him. Likewise, the Ministry of Labor and Welfare is being sued as is as the Department of Social Services of the municipality of Rehovot. The neglect was reflected, *inter alia*, by sloppy, dirty clothing unsuitable for the season. After a number of years, when the plaintiff was aged 9, he was transferred to a boarding school because the foster mother, who had hardly taken care of his basic physical needs, allegedly had had enough of him. The plaintiff alleges, amongst other things, damage which is developmental, and includes emotional deprivation and mental distress, inadequate education, failure to integrate into decent jobs, and his transformation into a rentboy, who engaged in homosexual prostitution. The plaintiff contends that he has been diagnosed as suffering from chronic post-traumatic syndrome. Certain aspects of this case, as arises from the statement of claim, are more severe than those presented by the *Amin* case: a foster family is designed to provide a refuge for a child, and there he believes he can find the warmth and love which he could not find in his biological family. Neglect and beatings, humiliation, and the indignities heaped upon him, particularly by the foster family, is like a further knife in the back of the child, because these acts convey a message of despair and hopelessness to the child who has now been betrayed for the second time in his life.

168. Indeed, there is data relating to numerous children who fall victim to emotional abuse. *See, e.g.*, Neeley *supra* note 1, at 716. Below is a random sample of cases in which it is possible to point to severe emotional neglect which can provide the platform for a tort claim: FamC (Beer Sheva) 18030/98 Anon. v. Anon. (1998) (unpublished); Civil A. (TA) 1090/02 G.H. v. D.H. (2003) Tak-Meh 2003(2) 28716; CA 549/75 Anon v. The Attorney General (1995) (IsrSC) 30(1) 459; CrF (Jer) 606/03

the *Amin* ruling to establish criteria is demonstrated by these additional cases, whose facts differ significantly from the facts of the *Amin* case. So far, there is no clear-cut rule and no case law recognizing, for example, claims against a divorced, non-custodial father who does not maintain contact with his children, cases where the neglect is only emotional, but the parent supports his child economically, or cases of severe alienation of unorphaned children who have a second parent who meets their emotional and other needs.

The use of the *de minimis* defense which was relied upon in the *Amin* case in order to screen the circumstances of the case, only brings us a short way forwards. Likewise, the defense provided by § 22 of the LCGL – acting in good faith and for the best interest of the child – is not sufficient by itself, as it is overly general and leaves too many cases within the gray zone. Actually establishing definitive and extensive criteria beyond those set out in the LCGL will provide clear answers and lessen the fear of the slippery slope.

Nonetheless, in the wake of the *Amin* case, Israeli courts have not been flooded with similar suits. If the vagueness of the *Amin* ruling actually deters parents from taking steps which are located within the gray zone because of fear of being sued by their children, then ostensibly the stringent-sweeping intervention has achieved its goal by generating greater deterrence, which is one of the prime objectives of tort law. However, the lack of legal certainty affects the child-plaintiff, who cannot assess the chances of his claim being recognized in court.

Yet, establishing the criteria which are lacking, in accordance with the balance between the individualistic approach and the family approach, may help solve the fundamental dilemma.

VI. THE SOFT-SWEEPING LEGAL INTERVENTION MODEL: CREATING A GAP BETWEEN SWEEPING DECLARATION AND MODERATE ENFORCEMENT

A. Jewish Law: Between Fundamental-but-Qualified Recognition of Liability, and Human Non-Enforcement

Jewish law, also known as Halacha, is a religious extra-territorial law which applies to Jews all over the world. In Israel it is applied by virtue of statute to matters of marriage and divorce only. In every other matter, and in every other country, it is not mandated as a matter of state law. The believer acts according to Jewish law, though sometimes it is not enforced upon him by human judges or enforcement mechanisms, particularly those elements pertaining primarily to religion, such as imperatives towards God. Other times the religious law is enforced, particularly those aspects concerning relations between people, such as torts and contracts, which have practical purposes outside of their religious roots.

The question of whether Jewish law permits a child to bring a civil claim of emotional abuse against his parent requires a two step examination. First, one must examine whether a child can actually sue his parent under this system of law. Then, one must examine the cause of action by investigating whether there

State of Israel v. Anon (2004) (unpublished); Cr.F. (Jer) 1233/00 State of Israel v. Gazawwi (2002) (unpublished).

is a known Jewish law mechanism that can be used to justify allowing children to sue their parents for emotional neglect.

Jewish law recognizes a claim brought by a child against his parents and does not allow for parental immunity. The Jewish law of damages imposes liability on a person who has injured another person and awards monetary compensation for the injury, making no distinction between whether the injured person is a child or adult.[169] Indeed, the dynamics of Jewish law show that students have sued their teachers for causing them injury.[170] Most Jewish law sources do not distinguish between the parent and the teacher, because the authority of the teacher derives from a relationship of agency, express or implied, imposed on him by the parent. Yet, one cannot find claims for damages brought by children against their parents. This is because, notwithstanding the agency relationship, and despite the analogy between a parent and teacher, a child's claim against his parent is more complex and must take into account additional considerations.

Certainly, Halachic sources contain debates about child-parent disputes.[171] However, these sources do not refer to tort claims for damages, but instead rely on family law duties of financial support, etc. It would seem that this is not coincidental. Jewish law does not encourage the institution of such tort claims[172]—it seeks to identify alternative courses of action out of an unwillingness to compromise the family unit and a desire to protect the respect due to the parent and the interests of the child himself. The preservation of the dignity of the parent and his authority is a supreme value in Judaism, and respect for one's mother and father is one of the Ten Commandments.[173] The parents of a child are regarded as partners with God in the child's creation.[174]

If the child decides to sue his parents under Jewish law, he will be subject to a system of qualifications and limitations which have developed over the years. First, the Jewish law Sages and adjudicators took care to ensure the dignity of the woman. A child can sue his father,[175] but it is considered inappropriate for him to sue his mother in court because she will suffer more indignity than the father,[176] and to sue one's mother would be a definitive transgression of the commandment to honor one's mother and father. If, nevertheless the child sues his mother (or his mother sues him) and the parties reside in different places, the child must go to her when bringing the suit and

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169. PINHAS KEHATI, THE MISHNAH, Seder Nezikin Vol. 1: BAVA KAMMA/BAVA METZIA, BAVA KAMMA 8:4, 117-18 (Avner Tomaschoff ed., Edward Levin trans. Department For Torah Education and Culture in the Diaspora, Jerusalem, 1994).

170. *See*, *e.g.*, Resp. Shvut Ya'akov, Choshen Mishpat 3:140, and Resp. Kiryat Hannah #22 of R. Gershon Koblentz, in NATANEL WEIL, SEFER TORAT NETANEL: TSHUVOT GEONEI ASHKENAZ (1991, originally published in 1785).

171. *See*, *e.g.*, Rema on Shulchan Arukh, Yore De'a 240:8.

172. *See*, *e.g.*, YEHUDAH HECHASID, SEFER CHASIDIM: THE BOOK OF THE PIOUS §584, 150 (Avraham Ya'akov Finkel ann. & trans., 1997).

173. *Exodus* 20:11; *Deuteronomy* 5:15.

174. TALMUD BAVLI, *Niddah* 31a, Tractate Niddah Vol. 1, 31a[2] (Yisroel Simcha Schorr ed., Mesorah Publications, 2d ed., 2d prtg. 2005); TALMUD BAVLI, *Kiddushin* 30b, Tractate Kiddushin Vol. 1, 30b[4] (Hersh Goldwurm ed., Mesorah Publications, 5th ed. 2005).

175. Resp. Rif 92.

176. Resp. Ktav Sofer, Yore De'a 107.

not trouble her to come to him.[177] In addition, it is permitted to file a claim only in cases of real damage and impoverishment, and not in cases of loss of profit only.[178] Likewise, according to certain opinions, no claim may be brought for damages ensuing from an educational relationship.[179] The law also directs the child to engage in the briefest practicable proceedings in view of the need to maintain the honor of the parent and to limit the humiliation which will arise from the very existence of the suit. Accordingly, within the framework of these proceedings, only what is essential for the hearing must be included.[180] Further, if the parent takes an oath during the course of the hearing, he must not be compelled to take the most serious type of oath.[181]

Finally, there is a qualification called the "animosity ground": a person who beats his minor child is liable, particularly if the child is not dependent on the father.[182] The rationale behind this qualification is that if the son is dependent on the father, imposition of a duty on the father to pay his son would not have any real meaning, because the father in any event enjoys the benefit of the assets of the son. Those who look at this caveat in a different light argue that the fundamental purpose of allowing children to bring claims against their parents is to restore peace and harmony to the family unit. Therefore, although a child should not be beaten excessively, it is unacceptable to recognize a claim against a parent if it will further disrupt the family harmony, even though such a claim is justified.[183] If the parent were to be tried in such a case, this would cause him to feel animosity and hatred towards his child, and as a result the parent might no longer support his child.

This approach reflects a practical perspective, even if it is somewhat paternalistic, that the basic rights of the child may be damaged by this animosity to the extent that he might lose the financial support of his parents or even be expelled from the house. It may be assumed that the restriction relating to dependence on the father applies not only to damage caused by beatings, but also to every other type of damage as well. It should be noted that this qualification only refers to minor children, whereas a person who injures his older children is liable,[184] probably because an older child is no longer dependent on his father. If the financial dependency on the father is indeed the reason underlying the Halachic rule, then one can assume that when this presumption is contradicted in practice, and the older child is still dependent on the father, the animosity principle will continue to apply, perhaps even more

177. Resp. Maharik 58.

178. Rema on Shulchan Arukh, Yore De'a 240:8.

179. Uri Dasberg, *Education is No Law*, 8 TCHUMIN 199 (1987).

180. Resp. Ktav Sofer, Yore De'a 107.

181. MAIMONIDES, *Rebels* 5:15, THE CODE OF MAIMONIDES – BOOK FOURTEEN: THE BOOK OF JUDGES 153 (Abraham M. Hershman trans., Yale University Press 1949). This instruction is meant for the judges.

182. MAIMONIDES, CODE, Laws of Chovel U'Mezik 4:19.

183. RAMBAN, MILHAMOT HASHEM, Baba Kama 86:2.

184. Liable, in principle, for all five kinds of torts (damage – evaluation of the monetary loss caused as a result of the victim's inability to perform certain work; pain – estimation of the pain according to clear guidelines; medical expenses; incapacitation – loss of work days; and shame (mental anguish)). *See* Tosefta Bava Kama (Lieberman) 9:8 & 9:10.

forcibly, because in most scholars' view the father is not under a legal obligation to support his older child.

One possible solution to the problem of a dependant child suing his parent may be to use a legal device that vests the cause of action in another, who will conduct the proceedings in the name of the child,[185] similar to the modern legal concept of assigning rights. This course of action may be suitable in certain cases in order to avoid direct conflict between the child and his parent and in order to solve the animosity problem. But this is not a magical solution, since it is not clear that it will cause the animosity between parties to disappear, nor will it negate the practical risk of the father expelling the child from his home. However, assigning rights may be useful both in preserving the dignity of the father and preventing him from the disgrace of being legally confronted by his child. Naturally, the parent knows that the child stands behind the suit, but conduct of the proceedings by another will blunt the animosity which arises from direct contact. Clearly it is not possible to evade some confrontation, such as would arise from the testimony of the child, and therefore the solution is only partially effective.

Thus, Jewish law in principle allows a civil claim to be brought by a child against his parent, particularly his father, but it limits the circumstances under which such a claim may be brought by stringent substantive and procedural conditions.

Now to the question of the cause of action. Is it possible to sue for emotional neglect? Jewish law imposes a series of obligations on parents to their children. In particular, it strongly emphasizes the obligation of the father to supply the material, educational, and spiritual needs of his child.[186] The duty to educate the child is presented as the most important commandment in this context.[187] Accordingly, Jewish law strongly disapproves of emotional neglect, which is perceived as the opposite of an investment in education and care for the child; indeed, there are those who perceive a failure to display compassion towards the child as an intolerable wrong.[188]

However, Jewish law goes a step further and imposes a positive duty of love on every person towards the other, and includes in this principle a parent's love towards his child, as a product of the imperative: "love your neighbour as yourself."[189] This imperative, which was established by Rabbi Akiva, and which he stated to be "a great principle of the Torah,"[190] is an imperative on the Halachic legal plane and not only on the moral plane. This imperative has numerous elements, and in effect amounts to a blanket principle. Some of the duties making up the rule are negative in nature, such as the rule embodied in the saying of Hillel, "[D]on't do to others what you would not want done to

185. Sefer She'elot U'Teshuvot Ha'Geonim #300 at 82 (1960).

186. TALMUD BAVLI, *Kiddushin* 29a, Tractate Kiddushin Vol. 1, 29a[2] (Hersh Goldwurm ed., Mesorah Publications, 5th ed. 2005).

187. Reference is both to education in observing the commandments and compliance with basic qualities of conduct, such as respect for one's parents or conduct in society. *See* R. AHARON HALEVI, SEFER HA-CHINUKH, Mitzva 419.

188. RABBI YEHUDAH HA-CHASSID, SEFER CHASSIDIM, § 155, at 316-17.

189. *Leviticus* 19:18.

190. Safra, Kdoshim, 2:4.

yourself, this is the entire Torah, and the remaining details go and study,"[191] the message of which is to refrain from doing wrong.[192] The duty not to emotionally neglect one's child can be derived from the general rule of Hillel to refrain from doing wrong, which is apparently perceived as easier to achieve than a positive duty of love.[193] The various specific imperatives making up the rule "love your neighbor as yourself"[194] (hereinafter "the rule") have the manifest purpose of creating and building a man's love for his neighbor, even if only in stages. This comes out of the understanding that without these specific imperatives it would be difficult to instill this love in the heart of man (a parent is subject to additional imperatives beyond love for a stranger).[195]

It seems that the imperative to love in Jewish law is, in effect, an imperative to develop *qualities* of love and not necessarily a *feeling* of love. Qualities belong to the power of the will and the soul, which also contain envy, hatred, avarice, lust, and more. That quality of the soul has an external emotional manifestation, but its basis is in the will, and the assumption is that a person can improve his qualities, and build and better himself by means of the mind, without denying the difficulties posed by emotion. Feelings, on the other hand, are impossible to control.[196] Thus, it is possible to develop love by means of action.

It follows from various principles of Jewish law that the imperative to love is applicable to every human being, young and old, whether in its positive aspect of love the neighbor or in its negative aspect of refraining from harming him.[197] The rule also applies to the parent-child relationship.[198] Accordingly, it would seem that love for a child stems from a positive duty which is derived

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191. TALMUD BAVLI, Shabbos 31a, Tractate Shabbos Vol. 1, 31a2 (Yisroel Simcha Schorr and Chaim Malinowitz eds., Mesorah Publications, 3d ed., 2nd prtg. 2005) ("That which is hateful to you, do not do to your fellow; this, in a few words, is the entire Torah; all the rest is but an elaboration of this one, central point. Now, go and learn it.").

192. For this interpretation, *see* Smag (Sefer Mitzvot Gdolot), Mitzvat Aseh 9; Chiddushei Harim on the Torah, at 183.

193. Different approaches exist regarding the relationship between the rule made by Rabbi Akiva and the rule offered by Hillel, and in my opinion, the two statements are largely two sides of the same coin, where one deals with positive duties of love and the other with negative duties of refraining from wrongdoing. One should not reject the possibility that there is a hierarchy between these two rules, where "love your neighbor" is more difficult to achieve and "do not do" is easier to achieve; however, it seems that both are normative in Jewish law.

194. Such as compassion, charity, giving clothing to the naked, raising orphans, the need to bring happiness to a bride and groom, comforting the bereaved, and dozens of similar imperatives.

195. Bearing in mind the adage "the heart follows the action." HALEVI, *supra* note 187, Mitzva 16.

196. *See* RAMBAM, SHEMONAH PRAKIM (Eight Chapters) (Jerusalem, 1972) chapter 1, at 9 & 12, and chapter 2, at 14.

197. *See*, *e.g.*, TALMUD BAVLI, *Nedarim* 40a, Tractate Nedarim Vol. 1, 40a[1] (Mesorah Publications 2000) (describing the duty to visit sick persons, even little children); Maimonides, *Discernment* 6:8, The Book of Knowledge: from the Mishnah Torah of Maimonides 46 (H.M. Russel and J. Weinberg trans, The Royal College of Physicians of Edinburgh 1981) (the prohibition to shame in public, even little children).

198. The Talmud deals with the question whether a child can and is perhaps required to spill his father's blood for the purpose of healing him, as derived from the rule, at least according to the approaches of Rav Matna and Rashi. TALMUD BAVLI, *Sanhedrin* 84b, Tractate Sanhedrin Vol. 3, 84b[3-4] (Yisroel Simcha Schorr ed., Mesorah Publications, 2d ed. 2002). Possibly one can also learn of the duty to love a parent from the *a fortiori* rule, from the fact that the Sages imposed an express duty on the teacher to love the student. *See* Maimonides, *supra* note 197, at 63.

from the rule, as an imperative relating to the heart and feelings, whereas the prohibition on neglecting him stems from the negative duty. There are those who expressly declared that parents, and the father in particular, are obliged to take care both of the material needs and the emotional or spiritual needs of the child, at least until the child reaches the age of majority and is able to take care of these needs by himself.[199] The rule is also important in relation to the raising of orphans, like the children of the Amin family.[200]

However, this does not bring an end to the discussion. Some of the 613 imperatives in Jewish law are not enforceable by man—if a person does not abide by them, they cannot be enforced nor can he be brought to justice in an earthly court, because there is no human sanction that applies for these laws.[201] Those who violate such imperatives, according to Jewish law, will be taken to account by the heavens—by God. This gap between the norm and its earthly enforcement is particularly true of "imperatives of the heart," which deal with human feelings, including the imperative to love.[202] For example, there are imperatives to love a convert, to refrain from hating, begrudging, or coveting, but it is not possible to compel a person to do so, just as it is not possible to compel a person to love his child, which is also an imperative of the heart. It is also not possible to compel a person to implement certain of the practical aspects of love, such as going to the funeral[203] or showing hospitality.[204] On the other hand, there are imperatives that are applicable to our issue which are practical, operative, and enforcable, such as compelling a person to divorce his wife in certain cases,[205] compelling a person to give to charity,[206] and compelling a person to send his child to a teacher to be educated.[207]

Whatever the case, in Jewish law, the inability to enforce an obligation through human intervention does not lessen the legal nature of the norm, since there are plenty of legal norms without human enforcement. However, if we wish to examine the compatibility of the norms with contemporary modern secular law and see if a child can get compensated by his parents for emotional neglect, we shall have to examine whether the parent's duties towards his child are enforcable. As noted, most of the imperatives of the heart are not enforcable, while most of the practical operative imperatives are subject to enforcement.

Jewish sources discuss the absence of love towards other persons as a *per se* cause of injury. Institution of an action for damages because of the absence of love has not been completely negated, though the rationale for this conclusion is

199. Moshe Chiger, *Duties of Parents towards their Children (from the Law of Tzdakkah)*, KOL HAKATUV LE'CHAIM 146-58 (Haim Rozenberg ed., 1983).

200. TALMUD BAVLI, *Sanhedrin* 19b, Tractate Sanhedrin Vol. 1, 19b[3] (Hersh Goldwurm ed., Mesorah Publications, 2d ed. 2002).

201. TALMUD BAVLI, Bava Kama 55b; Gitin 53a.

202. For the imperatives of the heart, *see* RABBEINU BEHAYEI EVEN PEKUDA, THE LAW OF THE IMPERATIVES OF THE HEART (translated. Feldman, 1996); MAIMONIDES, CODE LAWS OF EXTORTION AND LOSS 1:10, Eabn-Ezra Interpretation, on Exodus, 20:1.

203. Shulchan Arukh Yore De'ah 381:1-5.

204. Shulchan Arukh Orach Chayim 333:1.

205. Maimonides, Code, Laws of Gerushin (Divorce).

206. Shulchan Arukh Yore De'ah 247-59.

207. Shulchan Arukh Yore De'ah 245:4.

a convoluted one. The central precondition is that the act which is the subject of the claim is a negative act by the person violating the duty, and therefore the violation of the imperative does not remain inside his heart.[208] It follows that only an act which expresses the absence of the parent's love, and not merely an examination of what resides inside his heart, may lead to a recognizable claim by the child against the parent.

In conclusion, it is possible that a child may sue his parent if the parent does not fulfill his emotional duties towards the child, but this will only be the case if it is possible to examine the manifestation of this absence of feeling through the parent's observable deeds. However, even here, the actual existence of the duty in Jewish law will not give rise to earthly sanctions. The path towards achieving monetary damages for a child who has suffered emotional neglect by his parent is a complex one, and if there is a duty on a parent to love his child, and not only to avoid harming him emotionally, the enforcement of that duty in human courts has been very limited. Even then, the child is directed to vest the cause of action in another person, who will conduct the trial in the name of the child.

B. The Compatibility of the Model to Modern Western Law

Jewish law does not avoid confrontation with and intervention in matters belonging to the arena of love and other emotions, but its mode of intervention is unique. On one hand, the intervention is unusually sweeping, in that it does not only compel the parent not to harm or emotionally neglect the child, but also requires the parent to love him. Even the model of stringent-sweeping intervention does not place such strong demands upon the parent. On the other hand, the general unwillingness and inability of courts to enforce this duty in practice indicates a manifest discrepancy between this sweeping legal declaration and its almost impossible enforcement in human courts, as well as the ever-present limitations on claims by children against parents. This gap between declaration and enforcement is one which exists only in the eyes of a modern jurist. Enforcement by God is not foreign to Jewish law.

The function of Jewish law as a religious system of law is generally to educate, not just to impose order in society by enforcing human sanctions. In the religious system of law, a man is under a duty first and foremost to his God, and accordingly, while the system is a legal system, the enforcement of some of its norms is carried out in the supra-human domain, the heavens. All of this is apart from the general problem of reconciling legal norms from a religious system to a modern secular one.

Nonetheless, Jewish law can provide enormous help towards resolving the fundamental dilemma. We may learn from the balances drawn by Jewish law

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208. Rabbi Kook in resp. in Hoshen Mishpat 26 concludes that the visible act of a person, stemming from lack of love for another (such as when a person takes an oath not to greet his friend), is a *heizek she'eino nikar*, meaning that the person causes an invisible damage that cannot be observed on the surface. The influence of the damaging action on the damaged object (body or money) cannot be seen by human eyes since the shape of the object remains the same. Emotional neglect may be deemed to be *heizek she'eino nikar*, but then one would have to pursue a very winding course before this kind of damage could be recognized as enforceable in a court of human law. For this issue, *see* Talmudic Encyclopedia, vol. 8, entries *"heizek she'eino nikar"* and *"heizek she'eino nikar be'heizek she'lo huzkar batakanah,"* column 707.

between recognizing damages claims against a parent in principle, and protecting the honor of the parent and the unity of the family. This is particularly true when the child is dependent on the parent and the institution of the claim can lead to his expulsion from the home.

The most appropriate model for gauging when to recognize a child's claim against his parent, therefore, should draw upon principles presented in Jewish law. It acknowledges the great importance attached to the maintenance of proper family life, where on one hand the parent loves his child and fulfills all his needs, including his emotional needs, and on the other hand, it bears in mind the recognition of the limited power of human law to enforce these duties in practice. In addition, a certain gap between the unequivocal declaration and its minimal enforcement can in some cases also be applicable in secular law. Finally, it is possible to learn that in cases where it is possible to sue the parent it would be inappropriate to hastily give effect to this right. Instead, creative alternatives should be sought, including extra-legal alternatives, both in order to preserve the honor of the parent and safeguard the intimacy of the family unit, and in order to ensure the promotion of the best interests of the family members, including the injured child, prior to pursing the right to sue.

VII. INTEGRATED MODEL PROPOSAL: SPECIAL POSITIVE ARRANGEMENTS INTEGRATING INTO PREVAILING LAW

A. The Problems in Each of the Existing Models and the Need for an Integrated Model

The different models presented in this paper reflect varying legal approaches towards the family unit. The model of moderate legal intervention which prevails today and the model of minimal intervention which has almost completely disappeared from the Western legal landscape both express the need to accord the family autonomy, privacy, and a special status as its own unit of society. That is the sole similarity between the models, as they differ substantively in terms of the degree of legal intervention they endorse. The model of minimal legal intervention sees the autonomy of the family unit as a quality which is both sanctified and fortified, resulting in almost total immunity against legal intervention into the behavior of the father or mother in his or her role as a parent. It expresses, in effect, an extreme position which leaves the intrafamilial relations open to excessive internal independent management and the exploitation of the weak by the strong. The model of moderate legal intervention also emphasizes the autonomy of the family, but also seeks to fulfill the needs of the individual – protecting the rights of the child and his best interests and even seeking to accord him equality, insofar as is possible within the traditional family structure.

The two models which clash within modern systems of law are the model of moderate intervention and the model of stringent-sweeping intervention. The latter model starts from an almost completely opposite premise to the two models discussed above, as it argues that separate regulations for a family should not be established within prevailing tort law. According to this model, family disputes should be dealt with using customary legal tools, on the basis of the individualistic approach which underlies private law and which is not

interested in obstructing the right of the child to sue. It does not see the family as a unique unit in society, a consideration which the other models put forth, often for the benefit of the child himself (whether he realizes it or not).

The model of moderate legal intervention draws a better balance between considerations of sanctity of the family and individualism, and between the fundamental desire to grant the child equality and the necessary recognition that it is not possible in practice to maintain equality between two such different members of this delicate and unique unit. However, the model is overly paternalistic and lacks a clear normative statement regarding what constitutes inappropriate behavior by the parent in cases of emotional neglect and boundaries of parental behavior to determine which claims should be recognized in court. Accordingly, this model does not provide a successful bridge between the model of minimal intervention and the model of stringent-sweeping intervention, and its implementation is problematic.

In contrast, the model of soft-sweeping intervention assembles most of the missing pieces of the jigsaw puzzle and presents a more balanced theoretical approach, one which creates a gap between a sweeping positive declaration and moderate enforcement. This gap is expressed on the one hand by a clear and sweeping positive declaration regarding the need for a parent to love his child, and on the other hand by the possibility, in principle, though it is difficult to implement in practice, of recognizing a civil claim by a child against his parent. While this model cannot stand as it is in a modern system of law, because it relies on religious legal traditions and places importance on norms, some of which are not enforceable by human beings, borrowing some of its principles will help to resolve the fundamental dilemma.

Creating a model which takes an intermediate path between the judicial models, and between the individualistic approach and the family approach, requires caution. The ideal model must look at the members of the family unit as individuals who have rights and may sue each other, even their parents, who do not enjoy absolute immunity. At the same time, it needs to preserve, to some extent, the perception that the family should be treated as a special unit, and that parent-child relations are different from relations between strangers.

Bush and Folger present a relational world view that balances the individualistic and family approaches in the context of mediation.[209] In their view, the individualistic approach is inappropriate because it focuses solely on the individual and his discrete identity. This approach is too extreme, as it sees attachment felt by an individual to be a sign of weakness.[210] The collectivist approach, akin to the family approach in the present context, negates the rights of the individual by exaggerating the importance of the collective. Thus, it is also inappropriate when it stands on its own.[211] In Bush and Folger's opinion, a relational world view must be taken, one which does not negate the individualistic approach, but sees it as merely one dimension of a more complex fabric, wherein there is an understanding that humans are concerned not only

209. ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION 245 (1994).

210. *Id.* at 238-39, 245.

211. *Id.* at 241, 245.

with themselves, but with the broader society to which they belong.[212] This approach recognizes that a human being is concurrently both separate and connected.[213] The relational world view attempts, therefore, to maintain the dichotomy between the individual and the collective, with all its ambivalence. It seems that this intermediate approach, raised by Bush and Folger with regards to mediation, is particularly appropriate to civil disputes within the family unit. It provides room for tort litigation against a parent, but also for balance and restrictions.

To find the ideal model, we must identify the points of connection between the family and the individualistic approaches, each of which is lacking and unbalanced on its own. In Kagitcibasi's opinion, it is necessary to present a complex family structure, which expresses a nexus between the individual and the collective, that is to say, between culture, the structure of the family, the values of society, and the mutual relations within the family.[214] A similar path is taken from the feminist perspective by Martha Minow and Mary Lyndon Shanley, who offer an account of family relations that reconciles this tension by seeing the members of the family as individuals while simultaneously recognizing their connections to each other.[215]

In light of the problems the existing models entail, creative thinking is required to formulate a new balanced model, in the spirit of the general proposals of Bush and Folger, Kagitcibasi, and Minow and Shanley, under which there will be place for a civil claim against a family member, but there will also be protection of the family as a unit. The starting point of the proposed model will be the individualistic approach, which recognizes the right of the child to sue for damages. But my intermediate solution will be built by restricting blanket recognition of such claims, and by treating them unlike other tort claims. This model will be inspired by the soft-sweeping model of legal intervention, subject to necessary changes and adjustments, and will adopt principles from both clashing modern models – the moderate legal intervention and the stringent-sweeping legal intervention models – while discarding their shortcomings.

B. The Integrated Model: A Proposal for Resolving the Fundamental Dilemma

This section offers an integrated proposal for resolving the fundamental dilemma, which may be compatible with every modern general system of law. This model attempts to draw a balance between the clashing considerations. It emphasizes the importance of maintaining harmony and restoring peace to the family unit, in cases where this is feasible, alongside implementation of the right to sue in cases where it is no longer possible to rescue the family relationships. The emotional neglect issue is used here as a test case, but the criteria the model introduces are designed to apply to every type of tort lawsuit against a parent, whatever the grounds. These are the basic elements of the proposal: (1) creation

212. *Id.* at 242-43.

213. *Id.* at 241.

214. CIGDEM KAGITCIBASI, FAMILY AND HUMAN DEVELOPMENT ACROSS CULTURES: A VIEW FROM THE OTHER SIDE, 1-19 (1996).

215. Minow & Shanley, *supra* note 6, at 5-6.

of a reasonable gap between sweeping declaration of children's rights to be free from emotional neglect and moderate enforcement that is compatible with modern law, but not religious law; (2) presentation of criteria for recognition of the tort law suit, which was missing in the *Amin* case and may be partially drawn from American law; (3) referral of the parties to a mandatory extra-judicial procedure if the court feels that there is a chance to renew family harmony—an alternative that, when feasible, may neutralize the disadvantages of recognizing a tort law claim; and (4) allowance for special "emotional" remedies, among them apology and expression of remorse.

1. Creation of a Reasonable Gap between Sweeping Declaration and Moderate Enforcement

Unlike in Jewish law, in modern secular law it is difficult to enforce a positive duty of an individual to love another person, even if the individuals involved are parent and child. Nevertheless, we must examine the possibility of legislating a clause in Family Acts or Child Acts which requires a parent to respect his child and satisfy his emotional, mental, and spiritual needs, in addition to his material needs.

The significance of granting rights to individual family members against each other as a means of respect has great importance. Joel Feinberg explains that rights play a significant role in the construction of genuine loving relations, because rights establish respect.[216] According to him, having rights is necessary for human dignity and self-respect.[217] Relying on this idea, he has claimed that rights are "as necessary to love as affection itself."[218] He mentions that one way to define love is "a relation between persons characterized by mutual affection *and* moral respect, among other things."[219] Feinberg thus suggests that since respect is closely tied to the idea of rights, rights are valuable for being the object of moral respect, and they are essentially constituent "of the full bond of love."[220]

I suggest that recognizing that children have the right to the warm care of their parents, or at least the right to have their needs, both physical and emotional, met by their parents, would create a societal and familial respect for the child, even if this right is not enforced on a daily basis.

A possible proposal for establishing such a right in the civil domain would be that:

> Parents, as guardians to a minor child, are under a duty to act in the best interests of the child in the way that devoted parents would act in the same circumstances, showing respect for the child and consideration for his material and emotional needs.

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216. Charles Fried, *Privacy*, 77 YALE L.J. 475, 479-80 (1968) (suggesting that the right to privacy be based on respect).

217. *Id.*

218. Joel Feinberg, *Moral Rights and the Constitution*, *in* THE NORMATIVE CONSTITUTION: ESSAYS FOR THE THIRD CENTURY 99, 118 (1995).

219. Joel Feinberg, *In Defense of Moral Rights: Their Social Importance*, *in* FREEDOM AND FULFILLMENT: PHILOSOPHICAL ESSAYS at 239, n.17.

220. *Id.*

Even if this norm will not always be enforced, the civil legal declaration *per se* is important because it establishes a valuable legal and moral norm. This declaration can be used by the court for the purpose of establishing a standard of parental conduct and duty of care in relation to negligence.

Another possibility is to establish a more moderate section in civil law which views the issue from the perspective of the right of the child, and not from the perspective of the duty of the parent:

> It is the right of a child to grow safely, with care taken for his welfare, and have his parents or other guardian take part in the process of raising him. It is also his right to receive his basic living, material, and emotional needs from said parents or guardians.

The expressive function of law has a great deal of importance. The law is not only a mechanism of dispute-solving; it can also convey various ideas, ideals, and social themes.[221] It may direct and affect human modes of expression, behavior, and inter-relationships.[222] This is particularly true in the realm of family life and intimate relations, where ideology, emotions, and other powerful extra-legal forces affect human behavior.[223] Due to the expressive function of the law, recognizing children's rights vis-à-vis their parents is a valuable step in itself. Such a right conveys an important message regarding the independent personality of children, and the respect they should be given as persons by their parents—a conclusion that is not always obvious, especially in the legal aspect.

There is sometimes a gap between a sweeping declaration and moderate enforcement in modern secular systems of law. This gap, which means that the law declares a norm but does not necessarily enforce it, is especially visible in the following examples: the civil duty of a child to obey his parents in relation to every matter belonging to their guardianship over him, according to § 26 of UNCRC and § 16 of the Israeli LCGL and as derived from the Restatement;[224]

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221. *See*, *e.g.*, Carol Weisbrod, *On the Expressive Functions of Family Law*, 22 U.C. DAVIS L. REV. 991, 995.(1989).

222. *See*, *e.g.*, Lewis A. Kornhauser, *No Best Answer?*, 146 U. PA. L. REV. 1599, 1625 (1998); ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 284-85 (1991).

223. *See*, *e.g.*, MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES 14-34 (1995); *see also* Weisbrod, *supra* note 221, at 995-96.

224. § 16 of the Israeli LCGL requires a child to obey his parents in relation to every matter belonging to their guardianship over him, while showing respect for his mother and father. Israeli law does not enforce this section in practice. § 29(1)(c) of UNCRC provides for a similar arrangement ("States Parties agree that the education of the child shall be directed to… [t]he development of respect for the child's parents."). UNCRC, *supra* note 15. Indeed, it is difficult to describe a situation in which this Article will be enforced in the daily relations within the family, that is to say, where a refusal by a child to obey his parents will expose the child to a civil claim by his parents. It follows that the law itself recognizes the possibility of the existence of statutory provisions which have a declarative objective; their importance lies in their social and value-laden dimensions, and they are not enforced by choice. The standard set out in the RESTATEMENT (SECOND) OF TORTS, § 895G(2) (1977), discussed above, also refers to the absence of immunity of the child himself in actions brought against him by the parent (and not just the converse), and here too we have not found an instance of a claim brought by a parent against his child despite the absence of immunity. In Jewish law too, there is a similar "mirror image": not only is the imperative "and you shall love your neighbor as yourself," from which the duty of the parent to love his child is derived, not enforced in many cases, but many aspects of the commandment to respect one's mother and father also remain unenforced in human law. *See* TALMUD BAVLI, *Shabbat* 127a, Tractate Shabbos Vol. 4, 127a[a] (Yisroel Simcha Schorr ed., Mesorah Publications, 3d ed. 2002);

and Scandinavian civil legislation in relation to corporal punishment of children by their parents.[225]

The proposed gap is not at the level of a sweeping declaration versus *marginal* non-enforcement, but versus *moderate* enforcement.

An approach of moderate enforcement should express a clear list of criteria for recognition of the claim.

2. Presentation of Criteria for Recognition of the Tort Law Suit

A dispute between parent and child which reaches civil court should be treated in more a delicate manner than a case between strangers. As noted, the prevailing models have not established sufficient criteria for determining when courts should recognize the child's claim. Therefore, I shall now propose a list of rules and criteria, the more of which are met in a given situation, the easier it will be for the court to hold that the child is entitled to compensation for emotional neglect. These standards are constructed primarily in an attempt to balance the considerations for and against recognition of the claim, the many considerations in American law resulting in various approaches to parental immunity (taken from the moderate legal intervention model), an analysis of the *Amin* ruling, and the approach taken by Jewish law to claims of this sort. As mentioned, the emotional neglect issue is our test example, but the criteria to be introduced are designed to apply to every tort lawsuit against a parent. Accordingly, recognition of the claim will depend upon the existence of the following criteria:

a) *The parental conduct does not stem from authority and care giving*. According to the limitations on the doctrine of parental immunity in American law, there is a greater likelihood of recognition of a claim which does not stem from the exercise of parental authority, but rather from a business transaction in

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Talmud Bavli, *Chulin* 110b, Tractate Chullin Vol. 4, 110b (Yisroel Simcha Schorr & Chaim Malinowitz eds., Mesorah Publications 2005); *id.* at 142a[1-2].

225. All the Scandinavian countries have adopted in their civil law a type of prohibition on corporal punishment which is formulated as the right of the child not to be exposed to corporal punishment. *See* SUSAN H. BITENSKY, CORPORAL PUNISHMENT OF CHILDREN: A HUMAN RIGHTS VIOLATION 154-70, 180-84 (2006); Shmueli, *Corporal Punishment*, *supra* note 6, at 110-15. This is a first step in a process which is designed to educate the public and change the prevalent view on this issue. Sweden, which was a pioneer in this area, accompanied this statutory provision with a widespread publicity campaign conducted by the Ministry of Justice using advertisements and dissemination of explanatory materials, with the clear goal that parents would abandon the path of corporal punishment. The battle against the phenomenon did not take place through the courts, except in extreme and severe cases. The Scandinavian countries showed patience: surveys which were conducted an average of 15 years after the beginning of this process in each of the Scandinavian countries pointed to a drastic drop in the phenomena. The educational campaign was launched with patience and an expectation that results would take years to show themselves. *See id*. I do not intend to say that conclusions must be drawn directly or in an identical manner from these two cases. Moderate, reasonable, and light corporal punishment which is imposed by a parent on his child, even if it is undesirable, is still made within the family framework and out of the parent's desire to educate his child, whereas negligence, disregard, alienation, and abandonment are an expression of indifference and lack of care and attention; we have here a legal arrangement which creates a gap between a sweeping declaration and moderate enforcement, where the data points to the fact that this gap led, ultimately, to the desired results. *See id*. at 119-23.

which the parent and child are involved (for example, when there is an employment contract between them).[226]

b) *The claim is in fact directed at a third party*. Here, too, following the limitations on the doctrine in American law, when the claim is directed at a third party, such as an employer or insurer, there will be a tendency to recognize the claim even if to reach this result liability must be imposed on the parent.[227] In such a case, direct confrontation between the parent and child, which is something traditional approaches to our issue have sought to avoid, does not take place, and the employer or insurer rather than the parent pays the damage.

c) The parent acts deliberately and intentionally, or at least recklessly, with a lack of good faith and without consideration for the best interests of the child. This criterion is in the spirit of one of the limitations on the doctrine of parental immunity found in American law[228] and in § 22 of the Israeli LCGL.[229] When the parent is able, without investing great effort, to maintain minor emotional contact with his child and he deliberately does not do so, there will be a tendency to recognize the claim. On the other hand, in the case of parents who have a sick child and who invest most of their time and effort in him, and consequently neglect that child's siblings, such a claim will not be recognized. There will be a similar result in the case of a parent who is almost never at home as a result of commitment to work (e.g. a person belonging to the security forces or a parent who works abroad and only comes home infrequently), as this is perceived as one of the maladies of society rather than a fault of the parent's. The child can also be the victim of excessive affluence or poverty, if the parent either spends too much time seeking self-fulfillment and career development, or is unable to give sufficient attention to his child because he is trying to earn a basic living. Thus, in all emotional neglect cases it is essential to consider the facts at hand, and to raise questions such as: was the neglect really performed with the intention of furthering the best interests of the child?

d) *The type of tort committed by the parent*. There is a substantive difference between claims relying on the rule of negligence, which are the torts which cause emotional injury, and claims which rely on torts such as assault, battery, or false imprisonment, which are generally seen as arising from attempts by the parent to educate the child. Whereas in torts of the first type,

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226. *See, supra* Part IV.

227. *See, supra* note 72 and accompanying text.

228. *See* Trevarton v. Trevarton, 378 P.2d 640, 641-42 (criticizing judgments that imposed immunity without differentiating between intentional acts and negligent ones); Foldi v. Jeffries, 461 A.2d 1145, 1152 (N.J. 1983) (holding that the freedom of educating the child cannot justify the use of violence or any intentional act of harm towards a child); Doe v. Holt, 418 S.E.2d 511, 514-15 (N.C. 1992) (stating that outrageous conduct of the parent indeed justifies holding him liable for full damages); Frye v. Frye, 505 A.2d 826 (1986) (explaining that outrageous conduct is cruel and inhuman, or wanton and malicious); Henderson v. Woolley, 644 A.2d 1303, 1307-09 (Conn. 1994) (stating that the immunity should be abolished only as to certain classes of torts such as intentional torts and sexual abuse).

229. *See, supra* Part VI B.

judicial policy determines when to recognize the claim,[230] this is not the case in torts of the second type. In those torts, a claim must be allowed if the elements of the specific tort have been proven, without taking into account various matters of judicial policy or the motive behind the parental conduct. Nonetheless, there is room to consider issues of judicial policy even in claims that arise from the latter type of tort. In such claims, one must examine whether it is right to intervene in the family unit and the extent of intervention that is desirable. It seems that the way to do this is to examine the degree of desirability of the conduct performed. In other words, corporal punishment or imprisonment such as a "time out" or grounding are connected to the education of the child, which is a positive act in principle, and whether society should intervene in such conduct relies upon the degree to which such conduct is performed—i.e. the question of limits. In contrast, emotional neglect, like any neglect, has no educational or other positive rationale, and accordingly it can be equated for this paper's purposes to those acts which are not connected to parental capacity, such as driving or employment relations, or acts which have no underlying positive aspect, such as sexual abuse. Accordingly, it may be that the grounds for recognizing a claim for emotional neglect are stronger than the grounds for recognizing claims based on corporal punishment or imprisonment. This modification from what is customarily accepted ensues from the unique nature of intrafamilial torts, and from the understanding that a routine recognition of tort claims in cases of actions which are fundamentally desirable, even if one might say that the parent has not acted reasonably when performing them, may lead to over-deterrence. On the contrary, if the action is not desirable and stems from parental indifference instead of parental care, no such over-deterrence occurs.

The following two guidelines attempt to give meaning to the vague statements found in the *Amin* ruling:

a) *The parental conduct is cruel or persistent.* In accordance with the Restatement standard, cruelty is sometimes expressed by the fact that emotional neglect is accompanied by material neglect, as in the *Amin* and *Burnette* cases, or by serious violence, which intensifies the gravity of the misconduct and the developmental damage to the child. However, it is also possible to describe cases of severe emotional neglect *per se*, which will meet this guideline even without physical violence.

b) *The damage proven is severe*. This is consistent with the current approach taken by many of the U.S. jurisdictions which recognize IIED only in cases of "severe emotional distress," as well as the general limitation expressed in Section 1(d) of the Family Court Law in Israel,[231] under which the claim of a minor is only allowed in cases of severe injury.[232] For this purpose, it is

230. Using questions such as: in which cases will the negligence be recognized? Is it only when the standard of reasonableness has not been met or is it confined to cases of severe negligence?. *Cf.* Neeley, *supra* note 1, at 715-16.

231. *Supra* note 132.

232. A similar criterion was presented in the past in other cases, even in cases of emotional damage, although not in regard to intrafamilial relations. In the United States, *see* Thing v. La Chusa, 771 P.2d 814,

necessary to examine in every case the nature of the emotional damage and obtain the assistance of experts to determine its severity. The literature takes the damage which emotional neglect may cause very seriously. The literature contains considerable evidence that neglect, including emotional neglect, may cause the child psychological harm on a variety of levels and over different periods of time,[233] and these may be expressed in different physical syndromes.[234] There are those who see emotional neglect which has taken place over a long period of time as a cumulative trauma, in that it undermines the development of the child on different levels[235] and may cause him various types of harm. The literature lists among the characteristic types of damage ensuing from emotional neglect: physical, mental and other developmental syndromes, which are primarily connected to developmental psychopathology. Psychopathology is a field that deals with pathological development and mental illness or psychological impairment.[236] According to it, injuries take place over the short, intermediate, and long term, and include: the development of various diseases; possible damage to the quality of attachment felt by the child towards other children or adults, including lack of confidence and fundamental distrust towards other human beings; tardy development; problems in bonding between the child and his parents (both the wrongdoer and the one who did not do any wrong); the collapse of a marriage, since the matured child cannot build relationships; fears and suspicions, such as fear of abandonment; inferiority complex; depression; tendency to addiction; problems of adaptation to various frameworks and problems in learning and concentration; problems of self-image, low self-esteem, loss of identity; various post-traumatic syndromes; aggressiveness, anger towards others, and violence; and, in extreme cases, loss of desire to live, suicide attempts, and diminished ability to make contact and feel emotion. Emotional neglect may even create a cycle which will affect the next generation, in one of two ways. A parent who was emotionally neglected in

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829 (Cal. 1989); Greenberg v. Stanley, 143 A.2d 588, 597-98 (N.J. Super. Ct. App. Div. 1958), aff'd in part, rev'd in part, 153 A.2d 833 (N.J. 1959); Courtney v. Courtney, 413 S.E.2d 418, 422 (W. Va. 1991); Harless v. First National Bank, 289 S.E.2d 692, 701-02 (W. Va. 1982); RESTATEMENT (SECOND) OF TORTS § 436(3) (1965); DOBBS, *supra* note 23, at 841; W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 365 (5th ed. 1984). In the United Kingdom, *see* White v. Chief Constable, (1999) 2 A.C. 455 (H.L.) (appeal taken from C.A.); Alcock v. Chief Constable, (1992) 1 A.C. 310 (H.L.) (appeal taken from C.A.); McLoughlin v. O'Brian, (1983) 1 A.C. 410 (H.L.) (appeal taken from C.A.); Owens v. Liverpool Corp., (1939) 1 K.B. 349, 400; McLoughlin v. O'Brian (1982) 2 All Eng. Rep. 298 (H. L.) (opinion of Lord Wilberforce); Alcock v. Chief Constable (1991) 3 W.L.R. 1057; White v. Chief Constable (1999) 1 All E.R. 1; Susan Maidment Kershner, *Children v. Parents: A New Tort Duty-Situation for Psychiatric Injury?*, 35 ISR. L. REV. 79, 79 (2001). In Israel, *see* Permission for CA 444/87 ElSucha v. The Estate of Dahan, (1990) (IsrSC) 43(3) 397; CA 754, 759/05 Levi v. Sha'arei Tzedek Medical Center (not yet published, June 5, 2007).

233. Dennis Drotar, *Prevention of Neglect and Nonorganic Failure to Thrive*, *in* PREVENTION OF CHILD MALTREATMENT: DEVELOPMENTAL AND ECOLOGICAL PERSPECTIVES 115, 119 (Diane J. Willis, E. Wayne Holden & Mindy Susan Rosenberg eds., 1992).

234. Maria Berger & Hansi Kennedy, in collaboration with Don Campbell, Sara Lundberg & Randi Markowitz, *Pseudobackwardness in Children: Maternal Attitudes as an Etiological Factor*, 30 PSYCHOANALYTIC STUDY OF THE CHILD 279 (1975).

235. *See* M. Masud R. Khan, *The Concept of Cumulative Trauma*, 18 THE PSYCHOANALYTIC STUDY OF THE CHILD 286 (1963).

236. http://medical-dictionary.thefreedictionary.com/psychopathology, last visited on February 22, 2010.

his childhood and did not feel love from his parents, may, on one hand, aspire to "compensate" himself for his past difficulties by placing excessive pressure on his own children, and, on the other hand, may fail to love his own children, possibly resulting in neglect or abuse.[237]

Goldstein, Freud, and Solnit "tie the ends" between emotional neglect and the intergenerational circle:

> Only a child who has at least one person whom he can love, and who also feels loved, valued, and wanted by that person, will develop a healthy self-esteem. He can then become confident of his own chances of achievement in life and convinced of his own human value. Where this positive environmental attitude toward an infant is missing from the start, the consequences become obvious in later childhood and adult life. They take the form of the individual's diminished care for the well-being of his own body, or for his physical appearance and clothing, or for his image presented to his fellow beings. What is damaged is his love and regard for himself, and consequently his capacity to love and care for others, including his own children. . . . Adults who as children suffered from disruptions of continuity may themselves, in "identifying" with their many "parents," treat their children as they themselves were treated—continuing a cycle costly for both a new generation of children as well as for society itself.[238]

There are those who argue that the long-term damage caused by emotional neglect exceeds the damage caused by various types of abuse, including physical abuse[239] and sexual abuse.[240] It follows that in many cases proving emotional neglect will satisfy the criteria of proving very serious damage. Indeed, a considerable portion of the harm caused by emotional neglect develops at a later stage in the life of the child; however, it is possible to assess the expected harm to the plaintiff child by means of expert evidence and reliance on the professional literature in the area.

a) *Family circumstances*. The court must conduct an examination of the circumstances of the case and the extent to which they have caused emotional harm to the child. The social-science literature points to a significant negative

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237. Vicki Carlson, Dante Cicchetti, Douglas Barnett & Karen Braunwald, *Disorganized/Disoriented Attachment Relationships in Maltreated Infants*, 25 DEVELOPMENTAL PSYCHOLOGY 525 (1989); Joan Kaufman & Dante Cicchetti, *Effects of Maltreatment on School-Age Children's Socioemotional Development: Assessments in a Day Camp Setting*, 25 DEVELOPMENTAL PSYCHOLOGY 516 (1989); JOSEPH GOLDSTEIN, ANNA FREUD, & ALBERT J. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD 20, 33 (1973); J. Lawrence Aber et al, *The Effects of Maltreatment on Development During Early Childhood: Recent Studies and Their Theoretical, Clinical and Policy Implications*, *in* DANTE CICCHETTI & VICKI CARLSON (EDS.), CHILD MALTREATMENT: THEORY AND RESEARCH ON THE CAUSES AND CONSEQUENCES OF CHILD ABUSE AND NEGLECT 579-619 (1989); Dante Cicchetti & Marjorie Beeghly, *Symbiotic Development in Maltreated Youngsters: An Organizational Perspective*, 36 NEW DIRECTIONS FOR CHILD DEVELOPMENT 47 (1987); Robert H. Mnookin, *Foster Care – In Whose Best Interests?*, 43 HARV. EDUCATIONAL REV. 599, 623-25 (1973); Lenore C. Terr, *A Family Study of Child Abuse*, 127 AMER. J. PSYCHIAT. 125 (1970); Neeley, *supra* note 1, at 690, 693, 696-97.

238. GOLDSTEIN, FREUD, & SOLNIT, *supra* note 237, at 20.

239. Sonia Renee Martin, *A Child's Right to be Gay: Addressing the Emotional Maltreatment of Queer Youth*, 48 HASTINGS L.J. 167, 171 (1996); Judith G. McMullen, *The Inherent Limitations of After-the-Fact Statutes Dealing with the Emotional and Sexual Maltreatment of Children*, 41 DRAKE L. REV. 483, 494-95 (1992).

240. Neeley, *supra* note 1, at 691-97.

influence which may result from neglect in families, irrespective of their economic or social strata.[241] Nonetheless, one may assume that courts will take a more lenient approach towards parents in a family suffering from severe financial problems, or parents whose adopted child has not adapted well to his adoptive family. Conversely, courts should extend no such leniency to emotional neglect by parents in families which seem to the outside observer to be normal. On the other hand, one might argue that in families where there are circumstantial difficulties, emotional neglect actually causes greater harm to the child, and this justifies a harsher position towards the parent rather than a more lenient one. Thus, for example, a parent who neglects a child in circumstances where the child has no other parent (because that parent has left, or died—as in the *Amin* case—or the family is a one-parent family from the start) violates his duty as a parent in an even more severe and cruel manner, because he is the only one on whom the child can rely. Likewise, adoptive parents who emotionally neglect their adopted children may cause them more serious harm than biological parents, because the adopted children feel that they have been betrayed twice, once by each set of parents.

b) Preservation of the integrity of the family unit and an examination of the likelihood of healing the rifts and restoring harmony to the family as much as possible. So long as it is possible to do this, in accordance with the basic principles of American law, the law must do its part to rehabilitate the family unit and refer the parties for treatment within an extra-judicial framework prior to recognizing the civil claim. When the family unit has already been destroyed, and there is no possibility of rehabilitating it and restoring its harmony, or if this prospect is irrelevant because the child is no longer part of the family unit because he has reached the age of majority and has left the home or his connection with his parents has been severed, or when the extra-judicial effort has failed, there is room for considering recognition of the claim, in accordance with the other criteria presented above.

The proposed criteria can also be relevant in other cases of civil claims brought by children against their parents, not only in cases of emotional neglect. However, only setting criteria is not sufficient – our model must take further steps to completely address all of the issues at hand. Legislatures should offer the courts the possibility of sending the parties to seek a non-judicial ADR solution, as a mandatory stage prior to hearing the case when the court feels that there is a possibility of restoring harmony to the family.

3. Referral of the Parties to a Mandatory Extra-Judicial Procedure in Cases Presenting a Chance to Renew Family Harmony

It is not appropriate to resolve all family disputes within a judicial setting. An application to the court can be a symptom of a serious family problem which must be dealt with, but provision of legal relief does not always satisfy the true needs of the plaintiff child. Sometimes it is the default option, particularly when it allows the child to confront his parent directly in a setting which is not easy

241. *See, e.g.*, Karp & Karp, *supra* note 14, at 392-94; Kearney, *supra* note 111, at 453-54; Neeley, *supra* note 1, at 713.

for either party. The minimal legal intervention model thought that it was right to bar the claim. The court can provide an appropriate arena for settling disputes even where they relate to the family. However, the parties can be referred by the court to an alternative process which can help the entire family. The utility of an extra-judicial process in the initial stages of the claim will lie in its ability to expose the real reason for the institution of the civil claim, and bring about a more successful solution than the award of damages. This extra-judicial process is inspired by the consideration of familial harmony, which was originally taken from American law, and integrated with inspiration taken from Jewish law, which sought alternative paths.

The true interest of the child plaintiff does not always coincide with his legal right, as not every interest can be met in the legal arena. The interest which motivates the child's claim may not really be the desire to obtain monetary compensation, but rather, for example, the desire to obtain an expression of remorse or apology from the parent, or a desire to obtain a victory over the parent, which can play an important part in healing the child.[242] On occasion, the child seeks, sometimes unbeknownst to him, to reconcile with his parent and return to a normal family routine, or at least to establish some form of communication.[243] The limitations of the law do not allow a court to expend the time and effort to uncover the real desires of the plaintiff in order to determine the real remedy he would like. This means that the plaintiff is forced to request the usual remedies provided in tort law, particularly monetary compensation, even when the adversarial litigation process may ultimately harm the family and deepen the rift between its members.[244] In other cases, potential plaintiffs may indeed waive their right to tort litigation, since this does not really reflect their wishes.

There are situations in which a tort claim is filed and it comes before the court, which chooses to consider it, but the court understands that the real remedy being sought is something other than compensation. Here the mechanism of tort litigation is not really suitable for resolving the dispute. There are two possible solutions. The first is an increased effort by the judges to solve the dispute between the child and the parent by means of a compromise. However, often this is not possible—judges cannot "work miracles"—and this solution is thus limited, although in many instances it is utilized.

Another possible solution may be to resolve the dispute through non-judicial means; that is, to send the parties for mediation, counseling, or therapy. Mediation is a process in which the two parties, with the assistance of a neutral person, systematically isolate issues within their dispute, so as to create options and consider alternatives that could lead to an agreement that serves the needs

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242. *Cf.* THE HANDBOOK OF CONFLICT RESOLUTION: THEORY AND PRACTICE, *supra* note 16, at 59.

243. Schuz, *supra* note 34, at 175 (arguing that compensation might not be so important and meaningful compared to the damage to the family as a whole). *But cf.* Caroline Forell, *Statutory Torts, Statutory Duty Actions, and Negligence Per Se: What's the Difference?*, 77 OR. L. REV. 497, 528, note 146 (1998) ("[w]hat would be accomplished by children suing their indigent parents? It seems likely that the only purpose that would be served would be to further punish the parents for abandoning their children. Since this is [a criminal offense] it's hard to see what additional punitive benefit is served through a lawsuit.").

244. *See* Lyons v. Lyons, 208 N.E.2d 533, 535 (Ohio 1965).

of the parties.[245] This is a subjective, reconciliatory process, as opposed to legal proceedings which are an objective process, based on rivalry and abstract laws.[246] The stages of mediation, which is meant to be a fair, speedy, and just process, are: (a) the parties present their demands, and the mediator assists them in reaching agreement; (b) the parties submit the agreement to their attorneys, and they formulate it in legal terms for submission to the court; and (c) the court gives the mediation agreement the force of a legal judgment.[247]

Indeed, there are those who point to extra-judicial options like mediation as more successful than litigation in many cases,[248] particularly in situations of child abuse.[249] Mediation proceedings help to preserve intrafamilial relationships without intensifying the rivalry between the parties.[250] Unlike the adversarial approach of litigation, which focuses on attributing blame for past events, mediation focuses on the future, and serves as a source of empowerment for both parties, encouraging them to express their individual needs in order to reach mutual agreement.[251] This option may bring to the surface the true desires of the parties, while not limiting them to the remedies provided by legal proceedings. The informal atmosphere prevailing in mediations or treatment sessions and the use of non-legal language and the absence of legal procedures, in contrast to the authoritarian and even threatening atmosphere of the court environment, can help achieve true communication, whereas the legal process may actually intensify the problem.

The central problems facing this solution are high costs and the difficulty of "dragging" the victim to these ADR extra-judicial processes, which by their nature rely on the willingness of both parties to participate, have a desire to resolve the problems, and intend to reach a settlement. On the other hand, these processes are swift and often less expensive than legal proceedings.

The goal of corrective justice can also be achieved by use of extra-judicial devices. Some scholars perceive peace-making between the parties, or appeasement, as an independent goal of civil law.[252] Indeed, the mechanism of mediation in civil cases is not foreign to the law.[253] For our purposes, courts must examine whether there is a chance of restoring family harmony.

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245. *See, e.g.*, Holly Joyce, *Mediation and Domestic Violence: Legislative Responses*, 14 J. AM. ACAD. MATRIMONIAL LAW 447, 447 (1997).

246. *Id*.

247. Sarah Krieger, *The Dangers of Mediation in Domestic Violence Cases,* 8 CARDOZO WOMEN'S L.J. 235, 243 (2002).

248. Roselle L. Wissler, *Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research*, 17 OHIO ST. J. ON DISP. RESOL. 641, 670-77 (2002) (taking less time and being more likely to settle the disputes between the parties).

249. *See, e.g.*, Jolene M. Lowry, *Family Group Conferences as a Form of Court-Approved Alternative Dispute Resolution in Child Abuse and Neglect Cases*, 31 U. MICH. J.L. REFORM 57, 61-63 (1997).

250. Krieger, *supra* note 247, at 241.

251. Kerry Loomis, *Domestic Violence and Mediation: A Tragic Combination for Victims in California Family Court,* 35 CAL. W.L. REV. 355, 367 (1999).

252. Williams, *supra* note 23, at 138-40.

253. In the area of tort law (as in insurance law, building defects, copyright, taxation, and banking), it is customary in North America to turn to Early Neutral Evaluation – ENE – in which the court appoints an expert attorney to give an opinion to the parties regarding the chances of success of the claim and the amount of the financial relief which may be awarded, if any. The opinion does

Mediation may also help the abuser to explain his acts or omissions. Thus, for example, a parent can explain that he abused his child or neglected him because he himself suffered a difficult childhood, has financial troubles, suffers from a serious physical, mental, or medical problem, is a single-parent, or because the plaintiff child is hyperactive and difficult to raise, etc. Of course, the aim here is not to accept an excuse for abusive or neglectful behavior which blames the child, but to reach some understanding in order to try and renew the relationship and rebuild the broken family. There is value to allowing the wrongdoer to express himself freely, to having the mediator and the victim listen, and to have the parent hear the complaints of the child victim. Sometimes, this will be the first time that the abuser comprehends the extent of the harm that he has caused the child. It is also very important for the victim to talk about the harm his parent has caused to him. Many victims are interested in expressing their frustrations before the abuser, and they seek recognition from the abuser and from society of the fact that they have been caused harm and that they themselves are not at fault. From the point of view of the victims, an apology and expression of remorse on the part of the abuser can be preferable sometimes to monetary compensation, though the compensation can play an important part in the process. The mediation can also induce the abusive parent to take responsibility for his actions. It is difficult to achieve all this in the civil legal process.

Successful mediation also causes the parties to reach an agreement regarding the final solution to the dispute, even if this means that they abandon their initial positions to some extent. In contrast, the outcome in a legal proceeding is generally one of victor and vanquished. Parties who resolve a dispute by way of mediation may also be more satisfied than parties whose dispute has been decided by the court, even if they are the party who succeeded in the court action. They may feel that the mediated solution deals with the entire dispute and not only the monetary part of it, and that the solution is one which they have reached themselves and is agreed to willingly.

The mediation process may, therefore, give effect to the autonomy of the child, his independence and desires, sometimes even more than the legal process. The child and parent have a greater ability to shape the decision which is ultimately made. Further confrontation between the child and his parent within the framework of the legal proceedings may add fuel to the fire of the dispute and intensify the damage which already exists. The child may be left with monetary compensation, which is not always what he genuinely desires, with even deeper psychological scars than existed before the legal proceedings, and with further deterioration not only in his relationship with the defendant

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not bind the parties, but in many cases is used as a tool to resolve the dispute and achieve agreement notwithstanding the high degree of technicality in this process. One of the reasons for this is that in this process the parties themselves receive clear information regarding the likelihood of success of the claim from an external and independent source, one which is not dependent on the information received from the parties' own attorneys, who may sometimes actually be looking for a legal confrontation. *See*, *e.g.*, N.D. Cal. ADR L.R. 5; Southern District of California's CJRA plan, effective January 1, 1992, General Order 394-B, and S.D. Cal. CivLR 16.1(c); U.S. Dist. Ct. (Vt.) LR 16.3; *see also* American Bar Association, *Court ADR Template Forms, Brochures, and Resources*, *available at* http://www.abanet.org/dispute/bycourtlevel.pdf.

parent and the remaining family members, but also in his own psychological condition. Notwithstanding its limitations, the law can still use its power and authority to promote the resolution of the dispute in a more temperate manner, by referring the parties to this course of action prior to dealing with the case on the merits.

The treatment or mediation solution is particularly appropriate according to Jewish law, which prefers finding alternative solutions to direct and disrespectful confrontations between a child and his parent in the civil courts. In fact, mediation, even if in a somewhat different form, is strongly encouraged in Jewish law.[254] Mediation and treatment also circumvent the problem of making the parent swear and testify in court.

Accordingly, if the court sees a possibility of restoring family harmony, it will be able to refer the parties to at least two sessions of an extra-judicial ADR process, as a compulsory first step to litigation. Mandating that ADR be used for the entire process is not recommended.[255] If ADR does not succeed, the case will return to the court for a hearing. Indeed, the mediation or treatment process is based on agreement, and such agreement must be present in every stage of the mediation, including in the referral to it. But in many cases, the primary obstacle is the initial mediation hearing, because subsequently, if one or both of the parties do not wish to continue, it will not be possible to compel them to do so. Usually, the initial refusal will stem from lack of familiarity with the process and lack of confidence in its prospects for success. Accordingly, this paper proposes that the parties should be compelled to participate in two sessions of an extra-judicial process and that the judicial proceedings be stayed in the interim. During the first session, the mediation or treatment process will be described, together with its advantages and the stages comprising it. After the second session, a report will be submitted to the court by the therapist or mediator, with recommendations concerning further treatment. If there is no point in continuing with the process, either because the desired result has not been achieved, or because of the vehement objection of one of the parties to continuing the process, the court action will continue as usual.

This proposal balances the individualistic approach and the family approach by seeking to incorporate the aims of both. According to this proposal,

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254. *Cf.* MAIMONIDES, *Sanhedrin* 22:4, THE CODE OF MAIMONIDES – BOOK FOURTEEN: THE BOOK OF JUDGES, 66-67 (Abraham M. Hershman trans., Yale University Press 1949).

255. *See* Note*: Mandatory Mediation and Summary Jury Trial: Guidelines for Ensuring Fair and Effective Processes*, 103 HARV. L. REV. 1086, 1087, 1093 (1990); *Developments in the Law – The Paths of Civil Litigation: VI. ADR, the Judiciary, and Justice: Coming to Terms with the Alternatives*, 113 HARV. L. REV. 1851, 1855-57 (2002) (discussing the question of mandating participation in ADR (Alternative Dispute Resolution) under the auspices of the court and its advantages and disadvantages). In certain American states there is a kind of court-referred mandatory mediation proceeding, both under Federal and under state legislation. *See* Amy M. Pugh & Richard A. Bales, *The Inherent Power of the Federal Courts to Compel Participation in Nonbinding Forms of Alternative Dispute Resolution*, 42 DUQ. L. REV. 1 (2003); Holly A. Street-Schaefer, *A Look at Court Mandated Civil Mediation*, 49 DRAKE L. REV. 367, 369 (2001); Matthew Parrott, *Is Compulsory Court-Annexed Medical Malpractice Arbitration Constitutional? How the Debate Reflects a Trend Towards Compulsion in Alternative Dispute Resolution*, 75 FORDHAM L. REV. 2685 (2007); Donna Stienstra, *Alternative Dispute Resolution Act of 1998*: *Seeds of Change in the Federal District Courts*, http://www.ncsconline.org/WC/Publications/KIS_ADRMed_Trends99-00_98ActPub.pdf.

the civil claim will be heard by the court. However, if the judge believes that it may be possible to restore harmony, he will do everything in his power to resolve the dispute by means other than ordinary legal proceedings, including referring the parties to the initial mediation sessions by compulsory process.

4. The Need to Legislate Special "Emotional" Remedies: Apology and Expression of Remorse

Due to the nature of intrafamilial torts, and the fact that the true remedy sought in many instances may not be a traditional remedy offered by the law, it is possible to legislate suitable remedies for such torts, such as apology and expression of remorse. In addition to the existing remedies, these new alternatives could serve as tools for the court in considering tort litigation in the family framework.[256] Thus, there may be room for remedies such as an apology or expression of regret. Such remedies may be determined at the conclusion of a therapy or mediation process. Or, if the mediation fails and the dispute returns to the court, judges should be allowed to conclude such a dispute with a ruling in which these alternative forms of relief are awarded, either on their own or in conjunction with other remedies.

On the surface, this appears to be an inappropriate suggestion for the legal system. But even for claims between strangers, the law sometimes provides for the award of similar remedies.[257] Therefore there is no reason to forbid the court to impose an apology or expression of regret as a remedy, with the following possible applications: (a) a final remedy of an apology, inspired by arrangements existing in many countries regarding defamation, in which the law provides for the remedy of an apology, correction, or retraction; (b) obligating the parent to provide an apology, orally or in writing, even before the final judgment in the case; or (c) if the court decides to impose compensation on the parent as well, a possible reduction of the compensation award in consideration of his sincere apology.

VIII. CONCLUSION

In this article, emotional neglect has served as a test case for examining tort lawsuits against parents in general.

Modern law is not prepared to impose a positive duty of love on a parent. It leaves such a duty to the arena of morality. At most it is willing to examine the harm caused to the child as a result of the failure to satisfy his emotional needs, and, if it is severe enough, punish the parent in civil court, thus using the negative duty not to harm the child as grounds for a tort claim.

The laws of different nations differ on this issue and in this paper I delineated some models for resolving the fundamental dilemma of when to allow a child to bring a civil claim against his parent for emotional neglect. Some of the models preference the sanctity of the family and grant immunity to the parent, creating a special domain for the family which is separate from the prevailing law, reflecting the collectivist-family approach. Others tend to the

256. Their suitability to other types of relationships requires a separate, extensive examination.

257. Mostly in cases of libel and slander.

opposite extreme, and almost negate any separate arrangement for the family unit, as a reflection of an individualistic approach. Still others are lacking due to the absence of a clear legal declaration establishing the rights of the child in general, and particularly the right not to be neglected emotionally and materially. A Jewish religious model embodies a legal declaration which is very sweeping and which establishes a positive duty on the parent to love his child. However, there is a structural gap between the sweeping declaration and its enforcement by human beings.

The possibility of legal intervention in parent-child relations is certainly a blessing, and man's home should not be his castle whose gates are impermeable to the law. However, the character of the family unit requires a special approach to be taken. These cases are not only about a "play" in the framework of private law in which the actors are solely a tortfeasor and his victim. In this "play" there is a third actor, who is of no less consequence than the other two—the family as a whole. The best interests of the family unit and the attempt to preserve its harmony and restore its peace, even if only a relative peace, must apply when determining the appropriate level of legal intervention in parent-child relations. The law can and must intervene when an individual's rights have been impaired, particularly when the individual is a child. However, care must be taken to ensure that the legal intervention will not turn into a double-edged sword, wielded against the family as a whole, including the child.

This paper proposes a model which tries to walk a golden path between the two poles, the first of which negates intervention and the second of which supports it, though with an understanding that legal interference within the family must be carried out prudently, both in terms of scope and substance. This is an integrated model which attempts to adopt the advantages of the prevailing models while discarding their disadvantages.

The essence of the model is the creation of a structured gap between a sweeping legal declaration, which imposes a duty on the parent to take into account the dignity of the child and his emotional needs and a reasonable enforcement of the declaration, in addition to the ability of the courts to turn to extra-judicial mechanisms such as mediation or treatment. The model hopes to give the child the true remedy he seeks, such as peace-making, or an expression of remorse or admission of wrongdoing by the parents.

The proposal is based on the premise that the family enjoys an important status, one which is almost sanctified, both religiously and secularly, and it is necessary to do everything possible to minimize harm to it and restore its harmony in cases where that harmony has dissipated, while concurrently safeguarding the rights of the child in the face of an abusive or neglectful parent. It may be that in Western society at the beginning of the 21st century, when the status of the traditional family is in sharp decline, this premise is not an obvious one. In any event, the family is still the most important unit in society, even if it is losing its value or even its values.

To achieve these goals, this paper has pointed to the fact that modern law can join forces with religious legal systems for the purpose of bringing to the fore new and creative solutions.

This paper dealt with parental emotional neglect in the eyes of tort law. However, the criteria and proposals can be applied, with the right adjustments,

to civil claims by a child against his parent on other grounds, and the proposed model can be used in relation to other issues concerning legal intervention in parent-child relations which exceed the scope of this paper.