

# Sex, Lies, and Dissipation: The Discourse of Fault in a No-Fault Era

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WITH COMMENTS BY KATHARINE T. BARTLETT\*\*

This article took shape as I was working on a mind-numbing multistate survey of fault in U.S. divorce law, which was the basis for a report I prepared for a conference of comparative law scholars.<sup>1</sup> I had originally planned a different paper for this symposium but, as my research immersed me in case after case about bad acts that destroyed once viable marriages and left behind the human casualties, I began to feel troubled. As translated into domestic relations law, these human stories seemed robbed of their moral size and texture.<sup>2</sup> I was struck by the ways in which the discourse of fault, even in jurisdictions that recognize its relevance, seems to have shrunk in response to the pinch of no-fault principles. At the same time, I was struck by the durability of old-fashioned judgments about fault, their narrative power, and their capacity to help as well as harm.

My observations contradicted much of the common wisdom on divorce. The common wisdom says that fault in the breakdown of a marriage has become legally irrelevant and that only a nation of barbarians would have it any other way. Seamy details and finger-pointing belong in tabloids, not in law reporters. When I told my non-family law colleagues I was working on a study of fault in divorce law, most of them responded with “Isn’t all divorce no-fault now?” or “I thought fault was dead!”

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Professors Woodhouse and Bartlett present their symposium contributions in an interactive framework. They have chosen this format to capture the process of conversation about fault that was sparked by Professor Woodhouse's paper, Professor Bartlett's reflections on it, the open symposium discussions, and the authors' subsequent exchanges. To delineate the author that is speaking, Professor Woodhouse's text appears in roman type, while Professor Bartlett's comments appear in italics.

1. Barbara Bennett Woodhouse, *Property and Alimony in No-Fault Divorce (II)*, 42 AM. J. COMP. L. 175 (Supp. 1994) (reports to XIVth Congress of the International Academy of Comparative Law). My co-reporter, Professor David Gruning of Louisiana, prepared a comprehensive report on fault in the community property states in the same volume. See David Gruning, *Property and Alimony in No-Fault Divorce (I)*, 42 AM. J. COMP. L. 147 (Supp. 1994).

2. Martha Minow explores how the language used by courts talking about family violence affects the way we think about the conduct. See generally Martha Minow, *Words and the Door to the Land of Change: Law, Language, and Family Violence*, 43 VAND. L. REV. 1665 (1990).

Perhaps it should be. After all, fault has a history of abuse. It has been used to reinforce stereotypes about women's sexuality and to keep women in their place. Many of the modern cases I read gave me pause, recalling the spirit of *The Scarlet Letter*. Other cases, however, proved that the sex, lies, and dissipation—the beating, boozing, cheating, exploitation, and abuse that constituted “grounds” for a traditional divorce—continue to present serious risks to the dependent spouse. Both spouses, but especially the primary caregiver or homemaker, still share a fragile status in which another person's unilateral acts can destroy financial expectations and inflict serious emotional and physical injury.<sup>3</sup> Only the legal discourse about marital misconduct and its remedy has shifted.

I decided to suspend my “fear of fault” in divorce long enough to seriously approach the fault-based system, to briefly review why it is out of favor today, to examine it carefully, and to attempt to determine whether it has any continuing value. The traditional fault paradigm, still dominant in some states, reflected an obsession with controlling women and their sexuality.<sup>4</sup> It had the virtue, however, of protecting (at least in theory) those conventionally “virtuous” spouses who worked hard and kept the promises that their partner failed to keep. By contrast, the new no-fault paradigm tends to reduce marriage to a calculus that considers economic harms, but not violations of physical integrity, intimacy, or trust.

Elsewhere, I have argued for a revitalization of family law's storytelling function as a source of norms for intimate relationships of care.<sup>5</sup> I have identified a dual function of family law, both as a mechanism for meeting the needs of family members and as a vehicle for expressing our values and aspirations about family life to ourselves and to our children. In my previous writings, I have advocated bringing to bear on issues of family law what I call a “generist” perspective, defined as one that places a high value on meeting children's needs for nurture and care and that encourages and rewards “family-centric,” interdependent behavior, as opposed to self-centered, individualist conduct.<sup>6</sup> The current legal reality, however, is different. Modern companionate marriage may be characterized, as Profes-

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3. See generally JUDITH S. WALLERSTEIN & SANDRA BLAKESLEE, *SECOND CHANCES* (1990); LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION* (1985).

4. See MARY JO FRUG, *POSTMODERN LEGAL FEMINISM* 141-45 (1992) (discussing how legal rules influence female sexuality).

5. See generally Barbara Bennett Woodhouse, “Out of Children's Needs, Children's Rights”: *The Child's Voice in Defining the Family*, 8 B.Y.U. J. PUB. L. 321 (1994); Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 CARDOZO L. REV. 1747 (1993) [hereinafter *Hatching the Egg*]; Barbara Bennett Woodhouse, *Towards a Revitalization of Family Law*, 69 TEX. L. REV. 245 (1990) [hereinafter *Revitalization*] (reviewing MARY ANN GLENDON, *THE TRANSFORMATION OF FAMILY LAW IN THE UNITED STATES AND WESTERN EUROPE* (1989)).

6. Woodhouse, *Hatching the Egg*, *supra* note 5, at 1754-57; Woodhouse, *Revitalization*, *supra* note 5, at 279-80.

sor Regan argues, by a search for intimacy and trust.<sup>7</sup> But divorce law seems in danger of forgetting both the rhetoric and the remedies for addressing good and bad marital conduct and abuses of trust in intimate relationships.

### I. THE ROLE OF FAULT IN THE DISCOURSE OF DIVORCE

The changing discourse of fault affects all people in interdependent relationships, men and women alike. I believe we should be especially worried by the implications of this paradigmatic shift for women (and the children in their care). Feminist legal theory consciously exposes how legal norms reflect and bolster gendered imbalances of power.<sup>8</sup> A central claim of much of feminist jurisprudence is that relations between the sexes are inherently relations of power. Marriage is, by legal definition, a relationship between a man and a woman. Whether we focus on its status characteristics or approach it as a contract, it is a relationship between individuals who often have disparate physical and economic power and who may invest very different resources in maintaining marriage and family. Marriage creates a special relationship. It thrives in an environment of privacy that also shields from scrutiny acts of physical and emotional aggression that, between strangers, may state a cause of action in tort or even constitute a crime.

In almost every other legal arena except fault in divorce, feminists have pushed the law to acknowledge, and to deter and punish, the exploitation of inequalities between men and women. Laws have been reformed to protect wage-earning women from wrongful gender discrimination and abuse of power by the men who dominate their workplace.<sup>9</sup> American wage-earning women read in their newspapers about *Harris v. Forklift*

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7. See generally MILTON REGAN, *FAMILY LAW AND THE PURSUIT OF INTIMACY* (1993). My reading of the cases on fault was illuminated by Professor Regan's book, which I was reading as I wrote the fault survey referred to *supra* note 1.

8. Feminist legal theory is, of course, as diverse as its practitioners. See Carol Sanger, *Feminism and Disciplinarity: The Curl of the Petals*, 27 LOY. L.A. L. REV. 225, 230-32 (1993) (noting that feminism allows recognition of difference without the compulsion to reconcile difference). For a range of feminist discussions of the power differentials between men and women and the feminist implications of inequalities not only of gender but of race and class, see generally MARTHA ALBERTSON FINEMAN, *THE ILLUSION OF EQUALITY* (1991); ELIZABETH FOX-GENOVESE, *FEMINISM WITHOUT ILLUSIONS* (1991); CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 215-34 (1989); SUSAN MOLLER OKIN, *JUSTICE, GENDER AND THE FAMILY* (1989); PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* (1991); Regina Austin, *Sapphire Bound!*, 1989 WIS. L. REV. 539 (1989); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990); Robin L. West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 WIS. WOMEN'S L. J. 81 (1987); Joan Williams, *Gender Wars: Selfless Women in the Republic of Choice*, 66 N.Y.U. L. REV. 1559 (1991).

9. See, e.g., Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e-2(a)(1) (1988) (making it unlawful for employers to discriminate against any individual on the basis of gender).

*Systems, Inc.*,<sup>10</sup> in which the Supreme Court unanimously held that an employee need not show wrongful discharge or suffer psychological harm to recover for conduct that a reasonable person would experience as creating a hostile and abusive work environment.<sup>11</sup> In this and other ambiguous and highly contextualized interactions between men and women of unequal power, courts now are routinely being called upon to set a standard of conduct, assess fault, and measure damages.<sup>12</sup>

As feminists have demanded new protections for women in the public sphere, we seem to have simultaneously acquiesced in a reductionist vision of moral responsibility in the domestic sphere. Ironically, this is the sphere in which women are most at risk of economic, physical, and emotional injury. In many states, courts adjudicating divorce cases are severely restricted or blocked from considering issues of misconduct when determining not only whether to grant a divorce, but also in awarding compensation to an injured spouse.<sup>13</sup>

Many of the recent discussions of the impact of no-fault principles have been predicated on the supposed disappearance of fault and have centered on how this affects the relative financial bargaining power of spouses.<sup>14</sup> Academics have used a variety of tools to examine either the rationale for post-divorce financial support in the era of no-fault, the impact of no-fault on women's financial security, or whether new rules promising equity in marriage translate into gains for women in court decisions.<sup>15</sup>

I decided to focus instead on the rhetoric of fault—its survival, evolution, and function in modern divorce law. Although fault plays a diminishing role in the right to exit an unhappy marriage, it still figures significantly in the economics of marriage dissolution. For this reason, I will examine a range of situations in which an injured spouse claims compensation for

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10. 114 S. Ct. 367 (1993).

11. *Id.* at 371.

12. See, e.g., *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 64-67 (1986) (holding that damages are available under Title VII for discriminatory intimidation, ridicule, and insult that create a hostile work environment); *In re M.T.S.*, 609 A.2d 1266, 1267 (N.J. 1992) (defining acquaintance rape); Beverly Balos & Mary Louise Fellows, *Guilty of the Crime of Trust: Nonstranger Rape*, 75 MINN. L. REV. 599, 611-17 (1991) (discussing acquaintance rape cases).

13. See *infra* notes 32-39 and accompanying text.

14. See, e.g., WEITZMAN, *supra* note 3.

15. See generally Marsha Garrison, *The Economics of Divorce: Changing Rules, Changing Results*, in *DIVORCE REFORM AT THE CROSSROADS* 75 (Stephen D. Sugarman & Herma Hill Kay eds., 1990); Stephen D. Sugarman, *Dividing Financial Interests on Divorce*, in *DIVORCE REFORM AT THE CROSSROADS*, *supra*, at 130; June Carbone & Margaret F. Brinig, *Rethinking Marriage: Feminist Ideology, Economic Change, and Divorce Reform*, 65 TUL. L. REV. 953 (1991); Ira M. Ellman, *The Theory of Alimony*, 77 CAL. L. REV. 1 (1989); Jane Rutherford, *Duty in Divorce: Shared Income as a Path to Equality*, 58 FORDHAM L. REV. 539 (1990); Carl E. Schneider, *Rethinking Alimony: Marital Decisions and Moral Discourse*, 1991 B.Y.U. L. REV. 197; Jana B. Singer, *Divorce Reform and Gender Justice*, 67 N.C. L. REV. 1103 (1989); Lynn D. Wardle, *No-Fault Divorce and the Divorce Conundrum*, 1991 B.Y.U. L. REV. 79.

misconduct that occurred during the marriage.<sup>16</sup> Although some state laws distinguish between various kinds of fault within marriage and use “marital fault” as a term of art, I approach the notion of fault expansively. I will examine what courts say and do about a broad range of conduct that violates a trust or duty and that inflicts physical, emotional, or financial harm on the other spouse.<sup>17</sup>

My aim is to bring both traditional and feminist methods to an examination of the discourse of fault in a supposedly no-fault era. First, I will provide a taxonomy of fault in divorce and review the current role of fault in determining the financial consequences of divorce. Next, I intend to place fault in its legal and human context by placing the discourse of fault in narrative form, drawn from a typical case (which I have called *In re Marriage of a Postal Employee*) as my vehicle for examining the discourse of fault. I will examine this story from various legal perspectives and as I imagine it was experienced by the injured party herself.

My objective is to show that the new discourse of fault reflects a certain reductionist materialism. Dissipation of assets and conduct inflicting direct economic harm command the divorce court’s attention. Those cases that present compelling stories of intentional marital misconduct on one side and serious non-economic injury on the other are marginalized or recharacterized as tort claims. Moreover, factfinders can avoid value judgments about the misuse of power within marriage by pointing to the victim’s response, rather than to the violator’s conduct. Requiring hard data on causality and dollar amounts of damage presents still another hurdle to fault matters. It often seems that the discourse of no-fault, created to simplify exit from a broken marriage, has affected judgments about conduct during marriage. When judges do make judgments about marital fault, traditional biases about gender roles and sexuality often distort a court’s interpretations of events and their meaning.

Finally, I will confront the “fear of fault” shared by many liberals and feminists. While I closely examine a number of cogent arguments in favor of fault-blindness, I conclude that fault should count in spite of the risks of judicial bias and indeterminacy that fault entails. A fault-blind approach to

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16. Compensation takes many forms, from alimony awards, to property distributions, to tort recoveries.

17. Fault and misconduct, as I use the terms, include harmful acts such as desertion and failure to support, violence and abuse, and intentional infliction of emotional harm. These acts seem less analogous to a breach of contract than to a gross breach of trust or an intentional spousal tort. Although divorce—even in the absence of fault—certainly causes harm, articulating a general theory for allocating the losses caused by a marriage’s ending is beyond the scope of this article. Rather, I am interested in the role of fault as distinguished from other potentially relevant factors such as need, contribution, or theories of equality. See Martha Albertson Fineman, *Societal Factors Affecting Creation of Legal Rules for Distribution of Property at Divorce*, in *AT THE BOUNDARIES OF THE LAW* 265, 269 (Martha Albertson Fineman ed., 1991) (enumerating factors to consider in addition to fault and defending a distribution system focused on needs rather than formal equality).

divorce—like a fault-blind approach to domestic violence—hurts women by suppressing more authentic narratives of their lives. I will propose that, instead of ignoring marital misconduct, we consider reshaping the discourse of fault in marriage so that it provides affirmative protections for women. As in workplace harassment and domestic violence, we must acknowledge fault if we are to provide protection and compensation for victims of abuse of spousal trust.

WHAT'S FAULT GOT TO DO WITH IT?

*There are several things I appreciate about your approach. First, like most academics, I am intrigued by inconsistencies and thus am taken by your juxtaposition of the workplace and marriage. You suggest that, in the workplace, harms to which women are especially vulnerable are increasingly recognized, while in marriage, harms to which women are especially vulnerable are increasingly not recognized. Seen this way, the diminishing attention placed on fault in the divorce context does seem perversely backwards. Since I approve of ending harms to which women are especially vulnerable, I am drawn to your argument that there may be some continuing role for marital fault in divorce proceedings. Consideration of fault in marriage might be analogous to fault in the workplace, which can be addressed in discrimination and discharge proceedings.*

*Second, I come from Cotton Mather-style, New England Puritan stock, so I have fewer problems than many might have with the moralistic aspects of reinvigorating fault in divorce proceedings. It seems right that the consequences of one party's bad acts should fall on that party, more than on innocent others. Thus, even if it makes sense not to make fault a barrier to divorce, I am not opposed, as a matter of principle, to making fault a factor in deciding how to divide up a limited economic pie after a divorce.*

*Finally, as an advocate for feminist methodologies, I appreciate the tools you propose to use in exploring the role of fault: the use of narrative to show how laws that recognize only economic dissipation distort the stories to be told about marital breakdown; the priority you intend to give to women's experience; and your method of self-criticism, by which you seek to anticipate objections—not just so you can shoot them down but so that you can alter and adjust your thesis to try to accommodate these objections.*

*My concern with your project is that, while you argue that fault concepts in the economic aspects of divorce help to structure more “authentic” narratives by many women, you may overlook those other women whose stories will be distorted by the structure of fault. I am thinking here of two different kinds of narratives that may be affected if fault matters at divorce: those narratives that retell the story of what happened in a marriage (after it is over) at divorce, and those narratives that will themselves be potentially changed or affected during the marriage and the events leading up to the divorce.*

## II. THE SURVIVAL AND EVOLUTION OF FAULT

### A. FAULT AS AN ESSENTIAL OF THE DIVORCE LAW NARRATIVE

Your concerns about distortion and authenticity are compelling, and I will try to address them. Equally compelling to me, however, is a conviction that judgments about fault are unavoidable. If narrative, as I believe, is a core component of human experience and human understanding, then concepts of fault and responsibility will always play a part. They are an integral part of the cultural context that gives a narrative its meaning.<sup>18</sup> Fault has been under attack for many years. It is criticized on the pragmatic and indeterminacy grounds that you highlight, as well as on the basis of a commitment to moral neutrality that you find less compelling. Yet it continues to matter in many contexts and in complex ways. People (including legislators, judges, and litigants) continue to use fault in the stories they tell about marriage and divorce. It is worth pausing to examine the current status of fault and to outline a taxonomy for discussing it before we debate whether and how fault principles ought to figure at divorce.

Although we live in a nation aptly characterized by Mary Ann Glendon as an example of “no-fault, no-responsibility” divorce,<sup>19</sup> reports of the death of fault have been exaggerated. While we have been busy dissecting the no-fault revolution,<sup>20</sup> the survival and evolution of fault have aroused relatively little comment.<sup>21</sup> Although half the states employ fault-based doctrines in one context or another, the use of fault as an element in divorce is typically dismissed as contrary to the modern trend.<sup>22</sup> Many of the fault-based laws on alimony and property, however, are recent reforms or amendments of earlier no-fault revolution statutes.<sup>23</sup> Fault is neither as outdated nor as invisible as we have made it seem.

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18. See generally DONALD E. POLKINGHORNE, *NARRATIVE KNOWING AND THE HUMAN SCIENCES* 144-45 (1988). Polkinghorne argues that humans extract meaning out of experience by telling stories—with plots, a protagonist, a predicament, events, and causal relationships among all these elements—all unfolding against a cultural backdrop of shared symbols and understandings. *Id.* Carl Schneider discusses the many arguments against moral neutrality in family law, including the fact that people consider questions of right and wrong important. Schneider, *supra* note 15, at 243-48.

19. MARY ANN GLENDON, *THE TRANSFORMATION OF FAMILY LAW* 188-90 (1989).

20. See generally HERBERT JACOB, *SILENT REVOLUTION* (1988); WEITZMAN, *supra* note 3.

21. The yearly overviews of “Divorce in the Fifty States,” published together in the *Family Law Reporter*, documented the relevance of fault in various aspects of divorce. See, e.g., Doris J. Freed & Henry M. Forster, *Divorce in the Fifty States: An Overview as of August 1, 1980*, 6 Fam. L. Rep. (BNA) 4043 (Sept. 2, 1980) (examining state law). Others have examined fault in the context of defending no-fault reforms or proposing alternative no-fault theories. See, e.g., Carbone & Brinig, *supra* note 15, at 957; Herma Hill Kay, *Equality and Difference: A Perspective on No-Fault Divorce and its Aftermath*, 56 U. CIN. L. REV. 1, 72 n.363 (1987); Rutherford, *supra* note 15, at 541.

22. AMERICAN LAW INSTITUTE, *PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS* 286 (Preliminary Draft No. 4, 1993) [hereinafter ALI PRINCIPLES].

23. See Woodhouse, *Revitalization*, *supra* note 5, at 278-79.

Judgments about individual responsibility within marriage survive in a variety of divorce law contexts, from grounds, to alimony, to property distribution, to the related context of child custody. Virtually all states now permit spouses to dissolve a marriage without showing that one or the other is at fault.<sup>24</sup> In many states, however, even when the divorce is obtained on no-fault grounds, fault may be a factor in awarding post divorce support or in allocating property. Fault divorces are still an option in the many states that added fault grounds to no-fault grounds, creating so-called "hedged no-fault" systems.<sup>25</sup> Whether called "misconduct," "marital fault," "egregious fault," "economic fault," or "dissipation," fault is a significant factor in fully half of the states' divorce laws.<sup>26</sup>

My focus here is on the role of fault in post-divorce finances, rather than in custody determinations. Property distribution and alimony (or spousal maintenance) are the two traditional mechanisms for resolving the equities between spouses and distributing the costs of divorce.<sup>27</sup> These two mechanisms have traditionally been distinguished temporally. Property claims reach assets acquired during marriage (and sometimes before), while alimony is a claim against post-divorce income. Tort claims based on misconduct during marriage are now emerging as a third way to claim a spouse's assets. Obviously, fault figures centrally in such tort claims, but it has also played a role in alimony and, to a lesser extent, in property distribution. Although the law across the fifty states seems like a crazy quilt of disparate rules and doctrines, it is worth stretching to identify some general patterns of tradition, change, and diversification.

#### B. A TAXONOMY: FAULT-DRIVEN, FAULT-BLIND, AND FAULT-REGARDING LAWS

Let me briefly sketch a taxonomy of fault in divorce that distinguishes the old fashioned "fault-driven" systems and the newer "fault-blind" systems from those that I term "fault-regarding."<sup>28</sup> Fault-blind jurisdictions completely embrace the theory that merit and blame within marriage are unknowable or irrelevant to divorce. At every opportunity, fault-blind systems close the door on allegations of bad behavior. Fault-driven systems, by contrast, single out specific types of conduct—usually adultery or

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24. Woodhouse, *supra* note 1, at 175.

25. *Id.* at 179.

26. *Id.* at 178-86.

27. As Joan Williams points out, the little boxes we construct in family law are highly arbitrary and there are many ways in which money changes hands at divorce or during marriage. Joan Williams, *Is Coverture Dead? Beyond a New Theory of Alimony*, 82 GEO. L.J. 2227, 2280-82 (1994). Child support is a transfer of assets, but fault plays no direct role in determining the amount or entitlement to child support. Issues of merit and blame do, however, play a large role in judicial decisions about who shall have custody and thus be entitled to receive support payments on behalf of children.

28. I develop this taxonomy more fully in Woodhouse, *supra* note 1, at 177-78.



abandonment—and make them not only relevant but dispositive of spousal rights and obligations. In such jurisdictions, a spouse who commits one act of adultery may be barred from receiving alimony, no matter how severe the need or disparate the parties' resources.

Occupying a middle ground, fault-regarding states continue to weigh issues of merit and blame, but expand their focus from the traditional grounds such as adultery and abandonment to the wider context of the couple's particular marriage, general situation, and shared social norms. In contrast to fault-driven systems, a fault-regarding system adopts notions of comparative blame. When the balance of fault is truly lopsided, taking into account all the circumstances, a fault-regarding system uses an award of alimony or a larger share of the marital property to compensate the victim and to punish the wrongful conduct.

### C. CURRENT RULES ON PROPERTY AND ALIMONY

#### 1. Fault in Distribution of Property

Under common-law traditions, property was divided according to title. In the community property states, property acquired during marriage was jointly owned during marriage and was divided equally between the spouses at divorce. Divorce reforms in common-law title states, under the name of "equitable distribution," introduced the concept that property acquired during marriage should be divided between the partners at divorce, regardless of which partner held title.<sup>29</sup>

According to common wisdom, the "whole concept of fault is one which is not relevant to the basis for property division, i.e., that it recognizes the contribution which each spouse made to the marriage."<sup>30</sup> The laws on the books are more ambiguous. Some equitable distribution statutes expressly consider issues of marital fault or misconduct when distributing property; other statutes expressly exclude these issues from consideration. A few states will consider only "extreme" or "egregious" marital misconduct in redistributing marital property.<sup>31</sup> A different kind of misconduct—"economic fault" in the form of misuse, waste, or dissipation of assets—

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29. *O'Brien v. O'Brien*, 489 N.E.2d 712, 715 (N.Y. 1985) (noting that marital property "arises full-grown, like Athena, upon the signing of a separation agreement or the commencement of a matrimonial action").

30. *Sparks v. Sparks*, 485 N.W.2d, 893, 904-05 n.12 (Mich. 1992) (Levin, J., dissenting) (citing 2 HOMER HARRISON CLARK, *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* § 16.3 (2d ed. 1988)).

31. These include Kansas, North Dakota, and New York. See *In re Sommers*, 792 P.2d 1005, 1010 (Kan. 1990) (holding that marital fault may affect property disposition in extreme situations only); *Martin v. Martin*, 450 N.W.2d 768, 770 (N.D. 1990) (finding that an unbalanced division is appropriate only in cases of serious marital misconduct); *Rosenberg v. Rosenberg*, 510 N.Y.S.2d 659, 662 (N.Y. App. Div. 1987) (allowing redistribution only in cases of misconduct so egregious as to shock the conscience), *appeal denied*, 512 N.E.2d 549 (N.Y. 1987).

often figures as a factor in the "equitable" redistribution of property. And in many states, the courts will consider old-fashioned marital misconduct such as adultery and cruelty, but only if it results in direct economic harm.<sup>32</sup>

Applying the taxonomy of fault sketched above, to the extent there has been a trend to fault-blindness, the language of the actual divorce laws shows it is far from monolithic or complete. The states' statutory schemes take a patchwork of approaches. In the wake of no-fault reforms of grounds for dissolution, perhaps one quarter of the state legislatures opt for a fault-blind approach to property division and explicitly exclude marital fault or misconduct as a factor.<sup>33</sup> More than half of these states leave the door open to charges of economic fault, or to misconduct that inflicts economic harm. These statutes use words like "depreciation" or "dissipation" of assets in prescribing the formula for balancing the equities.<sup>34</sup> Statutes of approximately one quarter of the states use general fault-based factors—such as the grounds for divorce, the circumstances contributing to the estrangement, the conduct of the parties, or the parties' respective merits—as one of many relevant considerations in property distribution. Courts in several states have construed these terms narrowly to cover marital misconduct only if it has economic effects.<sup>35</sup> Many of the states that list marital misconduct as a factor also include economic fault in the calculus.<sup>36</sup> A few of the remaining statutes are entirely silent as to marital

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32. Woodhouse, *supra* note 1, at 181-83 & nn. 20-21, 24.

33. Among states that abolish fault grounds, those that also expressly exclude marital misconduct from consideration in property disposition include Alaska, Kentucky, Minnesota, Montana, and Wisconsin. *See generally* Woodhouse, *supra* note 1, at 182 & n.19 (cataloging state statutes). Many of the states that preserve fault grounds nevertheless expressly exclude marital misconduct from consideration of property distribution. These states include Delaware, Illinois, Pennsylvania, South Dakota, Tennessee, and West Virginia. *Id.*

34. State statutes that explicitly exclude marital fault, but explicitly recognize economic fault by considering effect of marital misconduct on finances or parties' acquisition, dissipation, or depreciation of assets include Alaska, Minnesota, Illinois, Montana, Pennsylvania, South Dakota, Tennessee, West Virginia, and Wisconsin. Woodhouse, *supra* note 1, at 182 & n.20.

35. States with equitable distribution provisions that explicitly allow consideration of conduct during marriage in property distributions include Connecticut, Florida, Maryland, Massachusetts, Missouri, New Hampshire, Rhode Island, South Carolina, Vermont, Virginia, and Wyoming. *Id.* at 182 & n.21. Courts in Virginia and Florida, however, have drawn upon no-fault principles to limit these provisions to marital conduct that exacts an economic impact. *See* *Marion v. Marion*, 401 S.E.2d 432, 436 (Va. Ct. App. 1991) (finding that husband's adultery cannot be considered when dividing marital property); *Mosbarger v. Mosbarger*, 547 So. 2d 188, 191 (Fla. Dist. Ct. App. 1989) (finding that wife's attempted murder of husband cannot be considered when dividing marital property). Some states, such as New Hampshire, limit consideration of marital fault to cases in which fault is proven by the claimant and is the primary cause of the breakdown of the marriage. *Chabot v. Chabot*, 497 A.2d 851, 852 (N.H. 1985).

36. Statutes that explicitly include both economic and marital fault as elements in property disposition include New Hampshire, Rhode Island, South Carolina, and Vermont. *See, e.g.*, N.H. REV. STAT. ANN. § 458:16-a.II(f) & (l) (1992); R.I. GEN. LAWS § 15-5-16.1(a)(2) &

fault;<sup>37</sup> however, some of these statutes allow the consideration of certain factors relevant to economic fault.<sup>38</sup> Finally, many statutes contain inclusive language or catch-all provisions. Judges in some states have interpreted these provisions as preserving fault considerations, while judges in other states have interpreted them narrowly as excluding marital fault.<sup>39</sup> Clearly, these statutory schemes and their judicial interpretations reflect many variations and divergent perspectives. Applying the rough taxonomy outlined above, the states are almost evenly divided between the fault-blind and limited fault-regarding approaches, treating only economic fault as a valid factor in equitable distribution. A substantial minority, approximately one quarter, regard economic and marital fault as relevant to property distribution.<sup>40</sup>

## 2. Fault in Awards of Alimony

While equitable distribution was a new concept<sup>41</sup> that drew upon the relatively fault-blind traditions of community property, alimony reforms were built upon a strongly fault-based legacy. Alimony under common law originated as the continuing right of an innocent wife—one who had been abandoned or had justifiably left her husband—to support during “divorce *a mensa et thoro*” or “divorce from bed and board.”<sup>42</sup> With the advent of complete divorce and actual dissolution of the marriage, alimony still functioned to punish misconduct and reward virtue by awarding continued

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(11) (Supp. 1992); S.C. CODE ANN. § 20-7-472 (2) (Law. Co-op. Supp. 1992); VT. STAT. ANN. tit. 15, § 751 (1989).

37. These states are Alabama, Iowa, Maine, and Michigan. See, e.g., ALA. CODE § 30-2-51 (1975); IOWA CODE ANN. § 598.21 (West 1981); ME. REV. STAT. ANN. tit. 19, § 722-A(1) (West 1964); MICH. COMP. LAWS § 552.23(1) (1988). Courts in Maine and Iowa have interpreted the silence to preclude consideration of fault. See *Boyd v. Boyd*, 421 A.2d 1356, 1357-58 (Me. 1980) (deeming marital fault irrelevant); *In re Tjaden*, 199 N.W.2d 475, 476 (Iowa 1972) (same). Alabama and Michigan, on the other hand, have interpreted their statutes to allow marital fault. See *Sparks v. Sparks*, 485 N.W.2d 893, 896-97 (Mich. 1992); *Terry v. Terry*, 581 So. 2d 1114, 1115-16 (Ala. Civ. App. 1991).

38. States that are silent as to marital fault, but list economic fault as a factor, include Indiana, Kansas, New York, North Carolina, and Ohio. Woodhouse, *supra* note 1, at 183 & n.24 (cataloging state statutes).

39. Statutes that contain broad general language such as “just and proper in all the circumstances” or a catch-all phrase allowing consideration of unlisted “relevant factors” include Florida, Kansas, Iowa, Maine, New York, Michigan, Ohio, Oklahoma, Oregon, and Wisconsin. *Id.* at 183 & n.25. The scope of these catch-all phrases must be hammered out in court decisions. New York and Kansas have construed them to allow consideration of extreme or egregious fault. See *supra* note 31. Iowa, Maine, and Wisconsin have interpreted their laws as excluding marital fault, but Michigan has held that its law does not exclude marital fault. See *Dixon v. Dixon*, 319 N.W.2d 846, 849-52 (Wis. 1982); see also *supra* note 37. Florida has interpreted its statute as allowing only fault with economic impact to affect distributions of property. See *supra* note 35.

40. Woodhouse, *supra* note 1, at 183.

41. See *supra* note 29 and accompanying text.

42. CLARK, *supra* note 30, § 16.1.

financial support until death or remarriage only to the "innocent" wife divorcing a "guilty" husband.<sup>43</sup> Thus, alimony was predicated not on a division of income-providing assets already accumulated, but instead on punishing misconduct and enforcing promises of support from which the non-breaching spouse had no right to be released.

Modern reformers tended to view alimony as a relic of an era of moralistic judgments, role stereotyping, and female dependency. Many saw it as an unfair burden on the supporting spouse's individual liberty. The modern notion that divorce laws should be redesigned to reduce animosity, avoid gender stereotypes, promote individual independence, and offer a "clean break" influenced reformers to revisit the rules on alimony. They narrowed awards to limited periods, based them exclusively on need and ability to pay, and made them available to both men and women.<sup>44</sup> Often renaming the remedy "maintenance" or "spousal support," these reformers sought to recharacterize alimony as "rehabilitation" for the needy dependent spouse that would facilitate the transition to an independent life.

But, perhaps because of history, fault plays a more complex set of roles in alimony than in property distribution. It may determine eligibility to receive alimony, liability to pay alimony, and the amount of the award. In each of these contexts, fault can either play a dispositive role, figure as one of many factors, or be excluded as irrelevant. Moreover, while some alimony schemes weigh the misconduct of both parties, along with need and ability to pay, when determining whether and how much alimony is necessary,<sup>45</sup> some jurisdictions make a dependent spouse's fault dispositive. In such jurisdictions, a dependent spouse would be barred from receiving alimony if found at fault.<sup>46</sup> Some states also require a showing of the supporting spouse's fault before awarding alimony.<sup>47</sup>

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43. Recent studies indicate that awards of alimony are relatively rare and were relatively rare even before no-fault. *See infra* note text accompanying 87; IRA ELLMAN ET AL., FAMILY LAW 264-65 (2d ed. 1991) (citing figures ranging from 18% to 20%). Examinations of alimony as a concept, however, have played an important role in constructing a modern theory of divorce responsibility.

44. *See* UNIFORM MARRIAGE AND DIVORCE ACT § 308, 9A U.L.A. 147, 347 (1987). Gender-neutral alimony laws were mandated by the U.S. Supreme Court in *Orr v. Orr*, 440 U.S. 268 (1979). The Court held that laws that predicated eligibility for alimony on the sex of the spouse, rather than on need or other gender neutral criteria, violated the Equal Protection Clause. *Id.* at 283. "Alimony" is a controversial term, now discarded by many reformers.

45. Alabama and Pennsylvania, among others, have adopted such alimony schemes. *See* Woodhouse, *supra* note 1, at 184 & n.27.

46. These include North Carolina, Georgia, Virginia, and West Virginia. *Id.* at 184 & n.28.

47. North Carolina, for example, treats the supporting spouse's fault as an eligibility requirement. *See, e.g., Williams v. Williams*, 261 S.E.2d 849 (N.C. 1980); ELLMAN ET AL., *supra* note 43, at 270.

Perhaps the impression of a trend toward fault-blindness in alimony was fueled by the drafters of Section 308 of the Uniform Marriage and Divorce Act (UMDA),<sup>48</sup> which rejects notions of marital fault entirely. Some states have adopted the language of Section 308 and thus have directed their courts to do what is "just, without regard to marital misconduct, and after considering all relevant factors."<sup>49</sup> However, many legislatures adopted the UMDA scheme, but rejected the notion that marital fault was irrelevant to a "just" decision and deleted the fault-excluding language.<sup>50</sup> A significant number of jurisdictions have added statutory language explicitly allowing considerations of marital fault.<sup>51</sup> No-fault principles have also influenced judicial interpretation of these statutes. Some courts have narrowly construed new statutes that allow limited consideration of fault in certain circumstances to exclude consideration of fault. However, many courts construe these statutes according to their plain meaning and consider the full range of good and bad conduct relevant to the equities of dissolving the marriage.<sup>52</sup> To complicate matters further, states that consider fault in alimony vary widely on the relevance and admissibility of evidence of fault when the divorce is granted on no-fault grounds.<sup>53</sup>

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48. 9A U.L.A. 147, 347 (1987).

49. A number of states have patterned their statutes after Section 308 of the Uniform Marriage and Divorce Act (UMDA). See COLO. REV. STAT. § 14-10-114 (1993); DEL. CODE ANN. tit. 13, § 1512 (1993); ILL. ANN. STAT. ch. 750, para. 5/504 (Smith-Hurd 1993); MINN. STAT. ANN. § 518.552 (West 1992); MONT. CODE ANN. § 40-4-203(2) (1992).

50. KY. REV. STAT. ANN. § 403.200 (Baldwin 1990); MO. STAT. ANN. § 452.335 (Vernon 1986).

51. Many statutes list factors such as marital misconduct, the causes of or grounds for the divorce, the respective merits of the parties, the relative fault, and the conduct of the parties as elements to be weighed in considering an award of alimony, its amount, and duration. These statutes include those of Connecticut, Massachusetts, Georgia, Hawaii, Missouri, Pennsylvania, Rhode Island, South Carolina, Tennessee, Virginia, and West Virginia. Woodhouse, *supra* note 1, at 185. Some alimony statutes single out certain forms of fault, or make fault relevant only in specific circumstances. See, e.g., FLA. STAT. ANN. § 61.08 (West 1985) (adultery of either spouse). New Hampshire, for example, provides that fault of either party is to be considered if it caused the breakdown of the marriage or was the ground for divorce and either caused substantial physical or mental suffering or caused substantial economic loss. N.H. REV. STAT. ANN. § 458:19 (1992). Other legislatures remained silent on the role of fault in alimony and gave courts full discretion to do what is just and equitable—to consider a history of contributions to the marriage and other relevant factors. Examples include Iowa, Kansas, Kentucky, Maine, Nebraska, Ohio, Oklahoma, South Dakota, and Wisconsin. Woodhouse, *supra* note 1, at 185 & n.36.

52. One source notes that the courts of most states have interpreted this silence as allowing consideration of fault. Kristine Cordier Karnezis, Annotation, *Fault as Consideration in Alimony, Spousal Support, or Property Division Awards Pursuant to No-Fault Divorce*, 86 A.L.R. 3d 1116 (1978).

53. New Jersey considers fault only when the divorce is obtained on fault grounds. N.J. STAT. ANN. § 2A:34-23 (West 1987). Although Illinois provides fault grounds for divorce, it has completely barred consideration of fault in alimony and property. ILL. ANN. STAT. ch. 750, paras. 5/503-04 (Smith-Hurd 1993). Florida takes yet another approach, offering only no-fault grounds for divorce, but admitting evidence of adultery in determining whether alimony should be granted and, if so, how much. FLA. STAT. ANN. § 61.08 (West 1985). In an

Economic fault, familiar from the equitable distribution reforms, is also a factor in many alimony laws. Jurisdictions that consider economic fault often list depreciation or dissipation of marital property as one of a number of enumerated considerations.<sup>54</sup> Some courts, influenced by no-fault tenets, have limited consideration of marital fault to situations in which it has adverse economic consequences.<sup>55</sup> Yet in spite of the no-fault revolution, approximately half the states assign a significant role to both economic dissipation and general marital fault in awarding alimony.

#### D. THE EMERGENCE OF MARITAL TORTS

Meanwhile, another kind of claim—a claim for injury under tort law—has invaded the territory formerly reserved to family law doctrines like alimony.<sup>56</sup> Twenty years ago, before the advent of no-fault, all but twelve states recognized the doctrine of interspousal tort immunity.<sup>57</sup> Alimony provided the sole remedy for a spouse who claimed to have been injured by conduct of a partner during marriage. By 1992, the vast majority of states had abolished interspousal tort immunity.<sup>58</sup> Theoretically, injured parties can now assert tort claims against a spouse, either joined with their divorce action or in a separate action in a court of general jurisdiction. These claims overlap significantly with the old fault grounds. A claim based on an assault, on harm due to sexually transmitted diseases, or on intentional infliction of emotional distress involves the same conduct as the traditional fault grounds of adultery, mental cruelty, and physical cruelty.

Currently, states adopt a variety of policies towards tort claims predicated on marital misconduct. In many states, such claims offer a back door through which notions of merit and blame, excluded by no-fault reforms, can enter the arena.<sup>59</sup> Some fault-regarding states take the position that

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example of the interplay between courts and legislatures, the Georgia court construed the legislature's enactment of no-fault grounds as foreclosing consideration of fault in alimony unless a divorce was granted on fault grounds. *Anderson v. Anderson*, 230 S.E.2d 272, 275 (Ga. 1976). The legislature then amended the statute to require the court to consider proof of fault whenever alimony is sought, even when the divorce was granted on no-fault grounds. GA. CODE ANN. § 30-201 (Harrison 1980); *Bryan v. Bryan*, 251 S.E.2d 566, 568-69 (Ga. 1979).

54. Examples include Maine, Minnesota, and New York. *Woodhouse*, *supra* note 1, at 186 & n.38.

55. *Sommers v. Sommers*, 792 P.2d 1005, 1010-11 (Kan. 1990) (holding that marital fault is relevant to alimony only when it has economic consequences).

56. "Estranged husbands and wives don't just sue for divorce these days; they sue for damages—and frequently they win." Milo Geyelin, *The Legal Beat: Divorcing Couples Wage War With Domestic Torts*, WALL ST. J., Feb. 2, 1994, at B1.

57. Daniel T. Barker, *Interspousal Immunity and Domestic Torts: A New Twist on the "War of the Roses"*, 15 AM. J. TRIAL ADVOC. 625, 631-39 (1992) (describing the effects of denying immunity in divorce actions).

58. *Id.*

59. See generally Steven J. Gaylor, Annotation, *Joinder of Tort Actions Between Spouses with Proceeding for Dissolution of Marriage*, 4 A.L.R. 5th 972 (1992) (examining compatibility of

tort claims based on ordinary marital misconduct are superfluous, noting that "suitable relief is available under . . . domestic relations laws."<sup>60</sup> Judges in states that severely limit or exclude consideration of marital fault from property division and alimony determination often extend the no-fault principle to also exclude tort actions based on marital misconduct.<sup>61</sup> Other jurisdictions close the door by simply setting a high threshold of outrageousness for emotional distress claims.<sup>62</sup> Many states, however, recognize some form of tort claim grounded in misconduct during marriage.<sup>63</sup>

It seems that tort claims provide a safety valve for societal pressures to acknowledge fault as relevant to financial equities at divorce, if not to the freedom to exit a marriage. Tort claims filed in conjunction with divorce claims increasingly bridge the gap between no-fault and traditional fault-based justice, serving to compensate for physical and emotional suffering, as well as economic loss, and to punish reckless or intentional infliction of harm.<sup>64</sup>

### III. SEX, LIES, AND DISSIPATION, OR THE THREE FACES OF *IN RE MARRIAGE OF A POSTAL EMPLOYEE*

#### A. PUTTING FAULT IN CONTEXT

Fault is inherently contextual. It needs a story and characters to make it comprehensible. Cases are stories, and when I began this project I had been reading cases until facts and holdings had become trees that ob-

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divorce actions with tort actions); Barbara H. Young, *Interspousal Torts and Divorce: Problems, Policies, Procedures*, 27 J. FAM. L. 489 (1989) (examining the compatibility of no-fault divorce with tort liability). Decisions from common-law title states recognizing separate tort claims include *Simmons v. Simmons*, 773 P.2d 602 (Colo. Ct. App. 1988); *McNevin v. McNevin*, 447 N.E.2d 611 (Ind. Ct. App. 1983); *Heacock v. Heacock*, 520 N.E.2d 151 (Mass. 1988); *McCoy v. Cooke*, 419 N.W.2d 44 (Mich. Ct. App. 1988); *Noble v. Noble*, 761 P.2d 1369 (Utah 1988); *Slansky v. Slansky*, 556 A.2d 94 (Vt. 1988).

60. *Whittington v. Whittington*, 766 S.W.2d 73, 75 (Ky. Ct. App. 1989) (holding that alleged adultery and fraud did not reach the level of outrageous conduct necessary to sustain the tort of causing severe emotional distress).

61. For example, the South Dakota Supreme Court rejected a tort claim of infliction of emotional distress that was based on a wife's misrepresenting to her husband that he was the father of a child she conceived in an adulterous affair. *Pickering v. Pickering*, 434 N.W.2d 758 (S.D. 1989). The *Pickering* Court reasoned that public policy would be violated, and the child injured, by prolonging intrafamilial conflict. *Id.* at 762.

62. See *Hassing v. Wortman*, 333 N.W.2d 765, 771 (Neb. 1983) (holding that although conduct caused humiliation, it did not rise to a level of distress so severe that a reasonable person could not endure it); *Wiener v. Wiener*, 444 N.Y.S.2d 130, 131 (N.Y. App. Div. 1981) (holding that without evidence of physical abuse, allegations of abusive language, abandonment, and nonsupport do not state a tort claim).

63. See, e.g., *Coleman v. Coleman*, 566 So. 2d 482 (Ala. 1990); *Simmons v. Simmons*, 773 P.2d 602 (Colo. Ct. App. 1988); *Aubert v. Aubert*, 529 A.2d 909 (N.H. 1987); *Ward v. Ward*, 583 A.2d 577 (Vt. 1990).

64. *Simmons*, 773 P.2d at 603 (addressing complaint that alleged throwing coffee, kicking, slapping, hitting, and infliction of distress through outrageous conduct); see also *Coleman*, 566 So. 2d at 486 (upholding tort claim based on transmission of venereal disease); *Maharam v. Maharam*, 575 N.Y.S.2d 846, 847 (N.Y. App. Div. 1991) (same).

scured the forest. I encountered cases about spouses who hired hit men to end the marriage and about spouses who overdrew their charge accounts. Some courts refused claims for property or alimony from spouses who had suffered beatings and harassment, while others treated post-separation affairs as disqualifying needy spouses from claiming alimony.

The impetus for my project was to put the human, noneconomic costs back into the story and give them size, texture, and perspective. To do this, I needed to select one tale to represent the mindnumbing multitude. I thought about selecting a case of serious physical injury such as *Noble v. Noble*,<sup>65</sup> in which the question was whether a husband who shot his wife in the head should be liable to her for the injuries he inflicted, both economic and noneconomic.<sup>66</sup> This case, however, was too stark and acontextual to provide an adequate exploration of my concerns. In this day and age, most people (and surely all feminists) would respond with outrage at the notion that a spouse could inflict such harm with impunity when a stranger would clearly be liable. Surely such a claim must be recognized; the details of whether it should be styled as a spousal claim or a tort claim, or whether it should be a part of the divorce action or litigated separately, would seem relatively trivial.

Thus, instead of this stark story, I selected a "hard case" that arguably risks making bad law. It is a story about conduct and injuries that can be understood only within the context of an intimate relationship. It forces an examination of the role of law in telling stories not only about individuals hurting each other, but about men and women, joined in marriage, hurting one another. It asks whether law should directly confront or studiously ignore allegations of "marital abuse."

I take my tale from a "typical" jurisdiction among those that consider economic but not marital fault in their property statute. The story does not involve attempted murders or permanent bodily injury, and some would argue it falls short of the egregiousness that many jurisdictions require to justify a property claim or state a claim in tort. Yet the "reasonable person" alluded to in employment cases like *Harris v. Forklift*<sup>67</sup> would surely find that the conduct, in context, rises above mere disaffection or incompatibility.

Although I took my story from an actual case, I have avoided calling it by the parties' names because neither the court's stories nor mine can claim to provide an accurate representation of the lives of this particular couple. The stories are not offered as true stories of individual people, but

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65. 761 P.2d 1369 (Utah 1988).

66. Utah law on alimony and property distribution considers misconduct during marriage if it has economic consequences. *Noble*, 761 P.2d at 1372. The court in *Noble* held that the wife could recover in tort for emotional distress, even though she had been fully compensated in her divorce action for the economic harms caused by her battery. *Id.*

67. 114 S. Ct. 367 (1993).



rather as representative of the kind and texture of facts that are included or excluded from the many cases that consider whether and how fault should figure in divorce.

I will begin by examining the case through the lens of law. In true lawyerly fashion, I will brief the case, focusing only on the “relevant” facts, the question presented, and the relevant legal text to be interpreted. I will describe the court’s analysis and its holding as shaped by the era of no-fault. Then I will retell the same story, this time attempting to fill its contextual blanks and charge its passive vagueness with human action, human emotion, and human experience. Finally, I will explore how a fault-regarding jurisdiction would tell the story. In this way, I hope to highlight the contrast between the discourse of fault as shaped by various legal rules and the story as it might actually be experienced.

B. THE CASE AS A DISSIPATION OF FINANCIAL ASSETS:  
THE NO-FAULT CONTEXT

The husband, a former postal employee, sued the wife for a divorce based on irreconcilable breakdown. The wife claimed all of the equity in their main asset, the family home. She argued that he had misled her—by falsely claiming his innocence in a criminal case—into borrowing money and spending marital assets to defend him.<sup>68</sup>

The divorce court denied the wife’s claim and divided the family home equally between the parties, subject to “[the wife’s] use of the property for the benefit of the children.”<sup>69</sup> The appellate court reversed, concluding that dissipation within the meaning of the statute had occurred, justifying an unequal division of property. The couple lived in a partially fault-regarding state—one that considers economic fault but not other kinds of fault in property distribution.

The legal text supplied by the state legislature to address this situation provides:

A court . . . shall divide the marital property without regard to marital misconduct<sup>70</sup> in just proportions considering all relevant factors, including: (1) the contribution of each party to the acquisition, preservation, or increase or decrease in value of the marital and nonmarital property; (2) the dissipation by each party of the marital or non-marital property.<sup>71</sup>

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68. This story is loosely based on the facts of *In re Marriage of O’Neill*, 563 N.E.2d 494 (Ill. 1990).

69. The court does not discuss the economic implications of this arrangement, but critics have warned of its impact on a caregiver’s mobility and independence and of the potential depletion of the equity share of the spouse who remains in residence to raise the children. See Carol Bruch, *The Definition and Division of Marital Property in California: Towards Parity and Simplicity*, 33 HASTINGS L.J. 769, 848-50 (1982).

70. Marital misconduct is a term of art that denotes conduct giving rise to traditional fault grounds such as adultery.

71. ILL. ANN. STAT. ch. 750, para. 5/503 (Smith-Hurd 1993).

The no-fault ideology behind the statute's text shaped the wife's story. The wife's claim to the home to compensate for harm she had suffered could not be based on the crime, or on the abuse of trust she felt on discovering the husband's guilt. These were noneconomic harms, excluded by the statute's terms. Her story about the joint savings wasted on attorneys' fees, however, was a viable claim against her husband's presumptively equal share of the home. The money could be characterized as "dissipated," rather than simply spent unwisely, because the husband had lied to the wife about a material fact to gain her assent.

No-fault ideology also shaped both the state court's interpretation of the respondent wife's story and its interpretation of the relevant statute. In this as in many cases, no-fault seems to provide a new canon of construction, something like "in all domestic relations law, derogations from no-fault principles shall be strictly construed."<sup>72</sup> On appeal, the state high court held that the term "dissipation," as used in the state's Marriage and Divorce Act, should be confined to situations involving the use of marital property for the sole benefit of one of the spouses for a purpose unrelated to the marriage and at a time when the marriage is undergoing irreconcilable breakdown. Having thus narrowed the relevant time frame, the court concluded that the alleged dissipation occurred before the marriage's breakdown began. The court used this construction to avoid considering any portion of the wife's story of fault outside this narrow frame. As the dissent pointed out, the majority ignored the plain meaning of the statute and based its holding on the dubious practice of statutory interpretation that treats a legislature's failure to amend a law as a tacit adoption of a lower court's interpretation of it.<sup>73</sup>

Ironically, in this telling of the "legal" story, the lie itself created a safe haven for the husband's misconduct. It prevented the wife from knowing that the relationship was in danger, and thus negated her claim that breakdown had begun. The court also noted that the wife had failed to establish a causal connection between the misrepresentations and the dissipation of marital assets at issue. The law demanded a calculated response, which the wife could not summon. When questioned by the judge as to whether she would have authorized the expenditure of fifteen thousand dollars in attorneys' fees if she had known her husband's guilt, the wife's answer was inconclusive. "I have given that a lot of thought," she testified, "and I honestly don't know."<sup>74</sup>

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72. The *Sparks* dissent is a good example. *Sparks v. Sparks*, 485 N.W.2d 893, 905 (Mich. 1992) (Levin, J., dissenting).

73. See *O'Neill*, 138 Ill. 2d at 497, 503-04.

74. See *id.* at 490.

C. THE METAPHORICAL RAPE OF SPOUSAL TRUST: ABUSE IN A  
RELATIONAL CONTEXT

As I recount the case a second time, I try to fill in the emotional spaces that the court left blank. For coloration, I pay attention to nuances of fact that the court has treated as irrelevant. I try out different faces and bodies, different images of men and women, and their children. Although the court never tells us their ages, I imagine a man and woman who are about thirty years old when their troubles begin. At this time, the couple has young children, some equity in a house, and a few thousand dollars in savings. The man (the opinion tells us) works as a postal service employee. I place the woman in the home (perhaps she also worked outside the home part-time), and I give them a modest house (I estimate from the court's facts that their equity was no more than thirty thousand dollars).

The relative peace is broken when an attempted rape charge is brought against the husband. The first lawyer they consult charges a five-thousand-dollar retainer and tells them to hire a second lawyer—a criminal defense expert whose fees are ten thousand dollars. They can't afford it, but they are frightened by the arrest and the complainant's malicious accusation. They decide to pay the additional ten thousand dollars because they agree (the court tells us) that it is important for the husband to have the best possible defense.<sup>75</sup>

My retelling of the story, however, should begin before the arrest. I imagine them living what the husband described as "just an average marriage, I guess." I imagine a life made up of ordinary things like going to the supermarket, drinking coffee together in the kitchen, bickering a little, watching TV, watching the kids play, and (average?) sex. But the marriage stops being average when he is arrested and charged with attempted rape—not of his wife but of another woman.

The other woman is lying, he tells his wife. The husband swears he is innocent. Actually, he is guilty, but the wife does not know it yet. I suspect his explanation of how he came to be alone with the victim and what motivated her accusation was a complicated lie to tell, filled with unpleasant details, and a hard one for a wife to hear.

Where does an average couple in 1983 scrape together fifteen thousand dollars to buy the best possible defense for an innocent man? They close out the joint savings account and use some insurance money from a car accident. The most painful part, I imagine, was the seven thousand dollars that the wife had to borrow from her father. What was the tenor of that father-daughter conversation? Was it purely economic? Did it trade on reserves of affection and trust, or did it involve humiliation, shame, and pleading?

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75. *Id.* at 489.

After the arrest, the couple did what Ann Landers would advise—they went to marriage counseling. I imagine the sessions: the wife earnestly “working” on their relationship, exposing doubts and vulnerabilities, trading accusations and small confidences, struggling with guilt and anger, and with her guilt about being angry at an innocent man—working to build “trust.”

The husband was tried and convicted. His wife (the court tells us) assisted in his defense. (If the lawyers were worth the fifteen thousand dollars, they must have advised how important it was to the jury that she sit beside him and appear calm and disbelieving when that other woman, the alleged “victim,” took the stand.) When he was convicted of the crime, the man lost his postal service job. Eventually, he found work again, but his new job was insecure, and he earned lower wages.

Two years after the crime, during a marriage counseling session, the man confessed his guilt for the first time. His previous explanation of the rape charge had been a lie. Nevertheless, another year-and-a-half passed before the man moved out and sued for divorce under the state’s no-fault divorce provisions. Why did she stay and he leave? The court does not tell us, but we know that she remains in the house with the children after he left. She apparently makes no claim for alimony; she wants only to have the house. Perhaps her lawyer tells her she would lose an alimony claim or never collect it. I imagine her first trying to “save” her marriage to preserve her home and then trying just to hang onto the house.

#### D. THE CASE AND THE TRIPLE MEANINGS OF DISSIPATION: THE EXPRESSIVE CONTEXT

Dissipation is an intriguing word—a word that captures law’s ambivalence about marital fault. It is strangely passive, yet it carries several layers of meaning that charge even its economic connotation with sexual and emotional elements. “Dissipation” is defined in the dictionary on my desk as “wasteful consumption or expenditure” or “dissolute indulgence in pleasure.”<sup>76</sup> Dissolute means “lacking in moral restraint.”<sup>77</sup>

The legal version of the story suppresses these overtones. It identifies the criminal charge as one of attempted rape, but treats it as analytically indistinguishable from a bad business investment. The sort of conduct at issue in this case, however, the violent and exploitative sex of the attempted rape, has figured as a symbol of moral dissipation in traditional texts—from Sir Walter Scott’s *Ivanhoe*, to Alessandro Manzoni’s *I Promessi Sposi*, to Verdi’s *Rigoletto*. Sexual violence, when turned against a spouse, is inherently destructive. When directed at another woman, it would seem

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76. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 382 (1981).

77. *Id.*

to be a uniquely ugly form of adultery, throwing the man's relationships with all women, his wife included, into doubt.

In the story, as you or I experience it, another powerful element is the lie. Between spouses, lies are the dissipation of an intangible asset, the abuse (indeed, the metaphorical rape) of an accumulated trust. The larger the lie and the longer it continues, the greater the violation. The lie he tells about his persecuted innocence is large and complex, often repeated, and labor-intensive to maintain. It goes on for years. Each conversation, each decision they make together, is tainted by the lie. The lie becomes part of the marriage and its dissolution and never quite "dissipates," even in the fresh air of confession.

Even when confined to its strictly economic meaning, a "dissipation of assets" resulted from the attempted rape and the lie, and it damaged the woman. As a result of his crime, the man was fired. As a result of his lie, the savings were exhausted. The attempted rape and the lie cost the wife her rightful share of their past and future earnings, savings, pension rights, and financial security. All these good things would have been both of theirs, but for the rape and the lie. Yet no-fault notions foreclosed even the limited economic dissipation remedy provided by statute. The court deftly avoided making judgments about breaches of trust during marriage by limiting the dissipation remedy to a time when it was least needed, when parties begin to trade at arms length, with eyes open and the marriage on the rocks. In human terms, the distinction makes no sense. The husband knew when he took her father's money—although the wife did not—that the breakdown had begun.

Ultimately, the judicial story makes conventional wifely "virtue" a liability. Even at the moment of divorce, the wife wanted, in the words of Tammy Wynette, to "stand by her man." Would she have supported him (the court wanted to know) if she had known the worst? Although it weakened her case for dissipation, she testified, "I've given that a lot of thought, (fill the pause with whatever images you wish) and I honestly don't know." An economist would say the judicial story was efficient. Law ought to avoid creating incentives to remain in unrewarding relationships. The story we tell about marriage as an irrational commitment, however, speaks in different terms—of better and worse, of sickness and health, of richer and poorer, and of resisting (against reason) the dissipation of trust.

#### E. IN A FAULT-BASED LEGAL CONTEXT

##### 1. Through a Traditional Fault-Driven Lens of Grounds

My test case of *In re Marriage of a Postal Employee* would play out rather differently in a jurisdiction that considers marital misconduct (as traditionally defined) in divorce proceedings. This human story of merit and blame would not be silenced as it would be in no-fault states. Instead, the story would be channeled into narrow, traditional forms.

In New Hampshire, for example, courts may grant a divorce on either fault or no-fault grounds. The New Hampshire statute on property distribution provides a different text for *In re Marriage of Postal Employee*, and allows the court to consider "[t]he fault of either party . . . if said fault caused the breakdown of the marriage and: (1) Caused substantial physical or mental pain and suffering; or (2) Resulted in substantial economic loss to the marital estate or the injured party."<sup>78</sup>

Under this formulation, examination of causality would shift from the dissipation of money to the formal grounds for divorce and their relation to the marriage's end. The power of the attempted rape charge and the lie would be judged under this regime by their effect on the marriage and considered in light of the other actions of the spouses. Dissipation, in the economic sense, would be only one element in a scheme in which violation of the statutory norms of marriage creates a positive claim and justifies a negative sanction if it causes serious harm.

The New Hampshire formula, however, relies on special categories of misconduct—the traditional fault grounds. As Jana Singer remarks, traditional fault grounds "[reflect] both the gender-based expectations of the traditional marriage contract and the double standard applied to men's and women's sexual behavior."<sup>79</sup> Would the facts surrounding this breach of spousal trust fall within the familiar enumerated grounds of divorce? Would the attempted rape constitute adultery, or merely an unconsummated act of extramarital sex? Would the lie qualify as mental cruelty, or merely as a man's protecting his wife from the seamy facts of male sexuality?

## 2. Through a Fault-Regarding Lens of Comparative Conduct

Formulations invoking specific fault grounds arguably fail as stories of modern relationships. They place too much emphasis on particular kinds of endings and undervalue elements of conduct during marriage, such as economic partnership, shared parenting, emotional support, and sacrifices for the common good. More reflective of modern marriages (or our ideals about them) is a formula that makes all conduct, good or bad, relevant to evaluating moral equities. This formula is used, for instance, in Rhode Island, where both alimony and property statutes identify "conduct during marriage" as a relevant factor. The Rhode Island Supreme Court, construing this language in *Tarro v. Tarro*, held that consideration was "not limited to bad conduct or marital fault but also encompasses good conduct during the term of the marriage."<sup>80</sup> In this fault-regarding scheme, one act

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78. N.H. REV. STAT. ANN. § 458:16-a(II)(I) (1992). Section 458:7 provides 12 fault grounds, including extreme cruelty, adultery, habitual drunkenness, refusal to cohabit, failure to support, imprisonment for crime, and so on. N.H. REV. STAT. ANN. § 458:7 (1992).

79. Singer, *supra* note 15, at 1110-11.

80. 485 A.2d 558, 561 (R.I. 1984) (citing *Fisk v. Fisk*, 477 A.2d 956, 958 (R.I. 1984)).

of adultery would not cancel out years of abuse, as it does in fault-driven schemes that treat adultery as a bar to alimony.

The focus on "conduct during marriage" enables each spouse to describe the events as he or she experienced them. The court considers both the authenticity and the importance of these events to the particular marriage relationship. This formulation seems to reflect more closely the diversity of marriage relationships, while both protecting the reality of women's experience and valuing the attachment and interdependence that actually shape many women's gendered lives.<sup>81</sup>

*BUT WON'T FAULT DISTORT THE NARRATIVE?*

*While you fear that women's authentic stories are suppressed by fault-blind regimes, I fear that many women's stories will be distorted by the structure of fault. I mentioned earlier my concern with two types of narratives: first, the ones that retell the story of what happened in a marriage told after it is over (at divorce); and second, the narratives that may themselves be changed or affected, during the marriage and during the events leading up to the divorce, because fault matters at divorce.*

*1. The Retelling of the Marriage Story at Divorce*

*Your focus is on narratives that retell the story of a marriage that is already over. Your particular concern is the way in which no-fault rules submerge narratives of husband-fault and female-innocence as a result of which, you argue, the narratives told about marriage at divorce often do not reflect the "reality" of women's experience during marriage.*

*Any legal rules relating to past events, of course, affect the telling of those events. What you may overlook, however, is that all rules have some distorting effect. The question is which distortions are tolerable, or even desirable, and which are not.*

*That the issue is one of which distortions the law encourages rather than whether any will occur is evident in the reversion to some fault concepts at divorce that you favor. This reversion does not simply enlarge the field of narratives available at divorce. Rather, it reverses the field—highlighting some previously submerged narratives, and submerging or distorting others. As a result, fault-regarding rules make some stories told at divorce more "authentic" but at the same time, they make other stories less authentic.*

*Thus, for example, a fault-regarding scheme pushes parties to squeeze stories of lives that took different, incompatible turns—of lost love—into tales of blame and innocence. Stories of mutual indiscretions and thoughtlessness will*

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81. Professor Martha Fineman uses this term to describe how, in spite of the ideology of equality, women's lives are structured around caregiving and support of children, parents, and mates. See Martha Albertson Fineman, *The Neutered Mother*, 46 U. MIAMI L. REV. 653, 666 (1992).

*be re-spun into yarns of torture and evil. Stories of disappointment and grief will be translated into mutual recriminations of unworthiness, betrayal, and wrong. The result of a greater prominence of fault is not, then, that all narratives become more authentic; rather, some narratives will ring true more often, and others less often.*

## 2. *The Distortion of Marriage and Divorce*

*I am concerned also with the effects of fault narratives on marriage itself. In fact, it is this type of distortion that worries me most. In some marriages, the effects of fault-regarding rules might be favorable. Some may be encouraged to act in more fault-free ways; that is, they may be deterred from engaging in blameworthy behaviors. This result is, indeed, the desired goal. But others are likely to respond in less desirable ways. For persons in these marriages—perhaps especially women—marriage and divorce will be worse rather than better as a result of fault-regarding rules. For example, some (perhaps many) will respond to the state's endorsement of fault concepts in marriage by being offense-oriented. When fault matters, these individuals will become "nitpicky" and focused on mutual recriminations and accusations. Their marriages will become balance sheets of rights and wrongs. Spouses will tend to blame and mistrust one another for what goes wrong, and, to be sure, every wrong is registered.*

## IV. FEAR OF FAULT

### A. DOES FAULT REVERSE THE FIELD OR LEVEL IT?

I share the fears of fault you articulate. I began by suspending mine. Now I will examine them in detail. One serious reservation I share with you is the fear that consideration of marital misconduct might escalate hostility during divorce, to the detriment of both children and adults. The weight of expert opinion and common experience confirms the damage wrought by continuing strife between separated and divorced spouses.<sup>82</sup> If I were persuaded that banishing fault would end the strife, I would be for it.

Recent studies suggest, however, that spousal hostility and blaming have a life of their own, regardless of whether the law looks to substantive standards of fault.<sup>83</sup> For example, Mnookin and Maccoby's study indicates that most spouses settle out of court, with the "guilty" spouse often compensating the "innocent" spouse with a relatively generous settlement, even without coercive legal intervention.<sup>84</sup> Meanwhile, a few extremely

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82. FRANK F. FURSTENBERG, JR. & ANDREW J. CHERLIN, *DIVIDED FAMILIES* 68-71, 108 (1991).

83. *See generally id.*; ELEANOR E. MACCUBY & ROBERT H. MNOOKIN, *DIVIDING THE CHILD* (1992); JUDITH S. WALLERSTEIN & SANDRA BLAKESLEE, *SECOND CHANCES* (1989).

84. MACCUBY & MNOOKIN, *supra* note 83, at 123-24.



conflicted couples apparently shift their anger to the custody dispute and battle implacably until the exhausted court declares a winner, or calls a draw and awards joint custody.<sup>85</sup> A New Jersey divorce attorney recently commented, "My angry clients need closure. They will not quit until they get the judge to tell them who was right and who was wrong."<sup>86</sup> It seems, however, that closure is often purchased at the expense of children.

I also agree that it makes no sense to force people to recast their stories of disappointed love as narratives about fault. Falling in and out of love can hurt terribly, but I do not think it constitutes the kind of injury we are able to deter or compensate. I approve of no-fault grounds and remedies. Such reforms were essential to make room for those stories—perhaps the large majority of marriage dissolutions—that were distorted by being forced to fit into the language of fault. My claim is that fault-blindness squeezes out other stories. My proposal is not to reverse the field, from fault-blind to fault-driven, but to level or balance it by opening up the discourse to consideration of fault and its contextualized meaning.

I selected the story of *In re Marriage of a Postal Employee* as an example of a case that exposed the limitations of the fault-blind, acontextual approach in modern divorce law. The case involves intentional conduct that foreseeably causes economic and emotional harm. It falls short, however, of the very high levels of direct aggression some states seem to require for tort claims and it is arguably outside the traditional fault category of adultery. My point was to offer a case in which the misconduct was not only unmistakable, but uniquely marital. My objective was to suggest that, for all its dangers, only a discourse that includes (not imposes) marital fault seems adequate to convey certain stories.

Some feminists, protective of autonomy, might argue that the freedom from moral censure is worth the cost of suppressing some stories and of sacrificing some remedies. Besides, alimony remedies were never a significant source of support for women, even before no-fault reforms.<sup>87</sup> Traditional alimony rules, which imposed a fault-based story, punished women and men unequally. They penalized women but not men for sexual misconduct by denying alimony to a woman who left her marriage without cause. Men, as the supporting spouses, lost nothing through their own misconduct, but gained freedom from financial responsibility by proving their wives' misconduct. Some feminists would argue that removing fault from the equation places women on an equal footing with men—neither sex

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85. *Id.* at 150-53.

86. Discussion following speech made by the author at the Family Law Symposium, Monmouth County Family Law Section, Philadelphia, PA (Feb. 8, 1994).

87. Studies suggest that, even before no-fault, only about 20% of women received alimony awards. Garrison, *supra* note 15, at 83; Singer, *supra* note 15, at 1106-07; Lenore J. Weitzman, *The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards*, 28 UCLA L. REV. 1181, 1221 (1981).

profits and neither loses. This argument, I believe, deserves closer examination and may be predicated on incomplete information or class-biased assumptions about how and why women leave marriage.

Women are more likely than men to initiate a divorce.<sup>88</sup> But bare statistics without data on fault are potentially misleading. My colleague, Professor Demie Kurz, interviewed 129 women of many races, ages, and classes, investigating their stories about why their marriages ended for her forthcoming book on divorce, *For Richer, For Poorer*.<sup>89</sup> Over half of the women in Kurz's study, and up to eighty percent of those in working class and lower class marriages, told narratives of husbands who abused alcohol and drugs, slept with other women, beat and raped their wives and children, and actually or constructively abandoned the home.<sup>90</sup> Although their partners were not interviewed and might well have disputed these claims, numerous studies of domestic violence reflect comparable levels of spousal abuse of women.<sup>91</sup> In the terminology of fault and no-fault, the typical woman in Kurz's study stated a prima facie case for a fault-based divorce. Modern domestic violence laws have been reformed in many states to prevent an abusive partner from forcing the victim out of her home, regardless of who has formal title.<sup>92</sup> How many of these women nevertheless see their marriages end with a judgment that forces the sale of the home for "equitable" distribution to their abusers?

#### B. NO-FAULT AND THE NURTURE WORKER

Denying protection from abuse of power in marriage is especially damaging to a class of people, mostly women, whom I will call "nurture workers."

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88. FURSTENBERG & CHERLIN, *supra* note 82, at 22.

89. DEMIE KURZ, *FOR RICHER, FOR POORER* (forthcoming 1995).

90. *Id.*; see also FURSTENBERG & CHERLIN, *supra* note 82, at 22 (noting research that suggests men provoke wives into initiating divorce).

91. See generally MURRAY A. STRAUS & RICHARD J. GELLES, *PHYSICAL VIOLENCE IN AMERICAN FAMILIES* (1990). Researchers differ on interpreting statistics that compare women's and men's acts of domestic violence, but I am persuaded by those who believe that the use of violence by woman toward men is primarily a response to male aggression. See, e.g., Demie Kurz, *Corporal Punishment and Adult Use of Violence: A Critique of "Discipline and Deviance"*, 38 SOC. PROB. 155, 159 (1991); J.A. Mercy & L.E. Saltzman, *Fatal Violence Among Spouses in the United States, 1976-85*, 79 AM. J. PUB. HEALTH 595 (1989) (noting that women are 30% more likely than men to be killed by a spouse).

Researchers also differ on statistics about gender differences in rates of infidelity. Andrew Greeley points out that the most reliable random national probability samples indicate rates of adultery for men of 20% and for women of 10%, far lower for both sexes than those found in more widely publicized sources. Andrew Greeley, *Marital Infidelity*, SOC'Y, May 1994, at 9. Recent writers in evolutionary biology make provocative arguments about the evolutionary incentives, even in culturally monogamous societies, for both men and women to engage in multiple sexual relationships. See HELEN FISHER, *ANATOMY OF LOVE* 84-86 (1992); Robert Wright, *Our Cheating Hearts*, TIME, Aug. 15, 1994, at 45, 46-47. Most statistics, however, confirm higher rates of infidelity and promiscuity in American husbands than in American wives.

92. Most states have enacted protection from abuse statutes that provide for eviction of the abusive spouse from the marital domicile. See ELLMAN ET AL., *supra* note 43, at 127.

Many women who work in the wage economy also moonlight as nurture workers—a phenomenon Arlie Hochschild described in *The Second Shift*.<sup>93</sup> Barbara Stark remarks, “American feminists approach nurturing work with considerable ambivalence. Unlike battering, rape, incest, sexual harassment, and other forms of oppression, nurturing work is not necessarily painful or embarrassing. Indeed, it is often a source of great satisfaction.”<sup>94</sup>

Like any other form of work, however, an exploitative or abusive environment can render nurture work painful and intolerable. As the figures on the post-divorce decline in women’s standard of living show,<sup>95</sup> it is inaccurate to say nurture workers are “unpaid” for their work or are “self-employed.” Although it may offend our feminist principles, the current reality is that most women work for men, in the home as well as in the market. Homemakers and primary caregivers in our social system historically received compensation through sharing the lifestyle and earnings of a waged worker spouse. Most suffer financially when their marriages terminate. All invest emotionally and physically in their nurture work, and many consider homemaking and nurture their primary career for part if not all of their lives. Yet nurture workers are singularly at risk. They can be fired without cause or notice, constructively discharged, denied fair compensation, or sexually harassed in their work place. Moreover, they cannot escape because their workplace is also their home.

Sexual harassment in employment may not be entirely analogous to emotional and physical abuse in marriage, but the parallels are striking. The dependent spouse, whether male or female, occupies a highly gendered position of vulnerability.<sup>96</sup> Much of the violent conduct and mental cruelty of traditional fault grounds is directly related to gender and sexuality. In spite of their vulnerability, people who do the work of home and family are increasingly viewed as employees at-will, even while workers in the wage economy are gaining new protection against wrongful termination.<sup>97</sup> A man who is exposed to carcinogens because of his employer’s

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93. See generally ARLIE HOCHSCHILD, *THE SECOND SHIFT* (1989).

94. Barbara Stark, *The Other Half of the International Bill of Rights as a Postmodern Feminist Text*, in *RECONCEIVING REALITY* 19, 28 (Dorinda G. Dallmeyer ed., 1993). These observations apply to women who work in the wage-earning labor force while doing significant work in the home as well as to full-time homemakers.

95. The most notorious data comes from Lenore J. Weitzman’s *Divorce Revolution*. See WEITZMAN, *supra* note 3, at 388 (reporting that a woman’s standard of living declines 73% one year after divorce while a man’s increases by 42%). Even critics of Weitzman’s data agree that a woman’s income a year after divorce typically drops by over 30%. See ELLMAN ET AL., *supra* note 43, at 294-96.

96. See Joan Williams’s discussions of “He who earns it, owns it.” Williams, *supra* note 27, at 2279-82.

97. See generally Peter Linzer, *The Decline of Assent: At-Will Employment as a Case Study of the Breakdown of Private Law Theory*, 20 GA. L. REV. 323 (1986).

fault has a remedy. A woman who is exposed to AIDS by a promiscuous mate may not.<sup>98</sup>

Demie Kurz's study suggests that working class and poor women may be more at risk of being involuntarily deprived of spousal support for their nurture work than middle class women.<sup>99</sup> In her study, women in lower socioeconomic groupings were less likely to cite personal dissatisfaction and more likely to cite a spouse's adultery, abandonment, substance abuse, or violence as the reason for the end of the marital relationship. Feminists might blame marriage, the wage structure, and other economic and cultural factors that encourage female dependency, but, nevertheless, no-fault ideology exacerbates a very real vulnerability. No-fault doctrines fail to distinguish between the situations of a woman who resigns voluntarily to seek a more satisfying job, one who leaves by mutual agreement with her employer, and one who is fired by an abusive boss or harassed into leaving. The committed, virtuous, and skilled nurture worker has no rhetoric for describing wrongful discharge or protesting a hostile work environment, or for demanding remedies that adequately address these harms and deter these forms of misconduct.

In a dilemma familiar to feminists concerned about false equality and the public versus private dichotomy,<sup>100</sup> nurture workers seem to have the worst of both worlds. They have gained the freedom to terminate their employment at-will. But they have lost many protections that accompanied their dependent status as subordinates in hierarchical families. They have gained the right to independence without gaining the independent means or the public support, public insurance against unemployment, and legal remedies that make independence possible.

Like laws on sexual harassment and domestic violence, fault-regarding divorce laws say that it does matter whether the relationship is terminated mutually or unilaterally and without cause. I am not arguing for restrictions on the ability of either spouse to terminate the marriage unilaterally. The "liberal" fear of fault, however, may be harming more women than it helps by extending fault-blindness to all aspects of divorce, and not just to the right to dissolve the relationship and remarry. Realistic consideration of marital fault would recognize both noneconomic and economic harms

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98. Compare *Potter v. Firestone Tire & Rubber Co.*, 863 P.2d 795, 800 (Cal. 1993) (holding that recovery for emotional distress may be available when fear of cancer is serious and genuine and exposure involves oppression, fraud, or malice) with *In re R.E.G.*, 571 N.E.2d 298, 303-04 (Ind. Ct. App. 1991) (discussed in text accompanying *infra* note 118). HIV casts a different light on adultery as a potentially lethal breach of the implicit mutual promise of safe sex in an exclusive relationship.

99. See KURZ, *supra* note 89.

100. See, e.g., FINEMAN, *supra* note 8; Carbone & Brinig, *supra* note 15, at 974-81; Frances Olsen, *The Family and the Market*, 96 HARV. L. REV. 1497 (1983); Joan Williams, *supra* note 8, at 1594-98.

and provide deterrence and compensation for oppression of women by men (and of men by women).

BUT DOES A FAULT-BASED ORIENTATION ADVANCE  
OR HAMPER WOMEN'S PROGRESS?

*Let me address the disparity you observe between the law's growing regard for workplace wrongs on the one hand and diminishing regard for marital wrongs on the other. You argue that wives should receive more, not less, protection in marriage just as employees are receiving more, not less, protection in the workplace. But it is not clear to me that the disparity between workplace and marriage you identify should be resolved in the direction of more fault. In fact, it could be argued that both workplace and marital harms could be addressed better by downplaying fault, rather than enhancing its importance.*

*Again, it depends on what kind of offenses or harms we are referring to in our discussion. The most egregious, intentionally harmful behaviors must be firmly condemned; a strong fault notion is necessary to reinforce this condemnation. But as to some of the more intractable, unintentional, subtle forms of gender-based humiliations and harms, it might be that a fault-based orientation has hampered progress. My thinking is that, when behaviors that spring more from ignorance than from mean-spiritedness are governed by rules that presume wrongdoers or "harassers" are bad people, the tendency of the "wrongdoers" is to react defensively, to deny, to resent calls to change behavior—to deny that one's accustomed victim is anything other than a whiner and a crybaby. It may be that if some harassment situations were seen less in terms of a wrongdoer and a victim, and more in terms of improving workplace communication, relationships, and understandings about gender, it would be easier to change these behaviors.*

*The analogy to marriage is clear, if unproven: rules that encourage parties to process the events of their marriage in terms of fault tend to encourage individuals to find wrongdoing in the other, not themselves; to be defensive to "charges" of fault; and to resist admitting wrong and to changing their behaviors. If these effects occur, they are unlikely to be gender-neutral. For example, women, who are more likely to internalize the problems of a marriage as their own fault, will be more vulnerable to exploitation and manipulation in fault-based regimes that insist on assigning fault.*

*Consider, too, the abused woman seeking to end her marriage. It is possible, it seems to me, that making fault relevant to property and support issues in divorce proceedings will raise the stakes in legal actions, such that wives who now have a problem leaving exploitative or abusive relationships will have an even harder time. An abusive husband who stands to lose more of his property or pay more support as a result of his past deeds may pull out more stops to keep her around. In addition, the insecure, abusive husband who is offended by this uppity wife challenging his authority by accusing him of being wrong may become even more abusive and dangerous. In these instances, fault has*

*the perverse effect of discouraging claims by women who have the strongest cases of fault.*

V. FINE-TUNING FAULT: THE FINE LINES BETWEEN DOING JUSTICE,  
NITPICKING, AND INCITING TO VIOLENCE

I generally agree with what you say about personal dynamics and the distinctions you draw between intentional injury and ignorance or lack of sensitivity.<sup>101</sup> Orgies of blaming help no one. I suspect your quarrel with fault lies more with the blunt instruments that fault-driven systems traditionally adopt, and their abstraction from the context of human interaction, than with the underlying notion that conduct within marriage matters. There are many ways to make legal judgments as well as personal stories about fault more authentic, while avoiding polarization and distortion of narratives about the death of love.

To begin with, we need to think in terms of comparative fault, as opposed to contributory fault. I believe that this is one of the key distinctions between a fault-driven (contributory) and a fault-regarding (comparative) approach. For example, my state of Pennsylvania (unlike your state of North Carolina) takes the comparative or fault-regarding approach to alimony and weighs both parties' marital misconduct as a factor. Other ways of avoiding distortion include insisting that allegations of fault be placed in a wider context and distinguishing between negligent and intentional harm. As evidence that such nuances are not beyond our powers, I suggest we continue to draw upon a host of analogous contexts in which fault plays a meaningful role.

Let me also address your point about danger to battered women and the possibility that fault might further impair their ability to leave their batterers. I share your concerns, but I believe they are best served by giving the woman her choice of when and where to assert her claim, not by denying her a remedy in the hope that it will pacify the abuser. Some courts have recognized that a battered spouse might want to bring a tort claim after the marriage was dissolved. They have commented that a tort claim brought after the divorce is final not only allows consideration of a different kind of harm, but also buys a battered spouse the time and distance that she may need to assert her claim safely.

For example, in *Stuart v. Stuart*,<sup>102</sup> the Wisconsin Supreme Court allowed a wife to bring a post-divorce action for assault, battery, and intentional infliction of emotional distress arising from actions that occurred

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101. I do not believe that we should avoid fixing blame to defuse an abusive spouse's anger. Here, I believe experience with domestic violence teaches us that an extremely firm and aggressive response is necessary and that passivity does not make abusers more docile and reasonable.

102. 421 N.W.2d 505 (Wis. 1988).

during the marriage. The court held it was contrary to public policy to require the wife to join her tort claim with her divorce action.<sup>103</sup> The court noted that Wisconsin divorce law allowed consideration of the parties' mental and physical health, but excluded consideration of marital fault.<sup>104</sup> The wife's tort claim thus was separate and distinct. Compelling joinder with the divorce claim would have deprived the wife of her right to a jury trial as to the tort claim, would have delayed resolution of the divorce issues, and might have exposed her to risk of further abuse.<sup>105</sup>

Similarly, in *McNevin v. McNevin*,<sup>106</sup> an Indiana appeals court concluded that the wife's claim for damages from a violent husband, while predicated on conduct that might well be precluded from the divorce action under the no-fault rules, could be brought in a subsequent tort action.<sup>107</sup> The spouses had signed an agreement purporting to settle all their property and alimony claims.<sup>108</sup> Nevertheless, the court held that the wife's tort claim was not a marital asset capable of division at the time of divorce.<sup>109</sup>

Rather than torture traditional doctrines, as the *McNevin* court seemed compelled to do, to preserve the battered spouse's tort remedies, perhaps we should allow the complainant to select from a number of choices: joining her tort claim to the divorce action, bringing it as an element of the domestic relations claim, or asserting it in a subsequent action. Past reformers managed to merge law and equity, as well as law and admiralty, in ways that preserved common-law remedies while allowing joinder with statutory and equitable remedies.<sup>110</sup> The joinder of tort law and domestic relations claims to bolster efficient procedures and sensible outcomes should not be an impossible task.

This notion of embracing fault in domestic relations proceedings may sound counterintuitive. In fact, you have argued that it is inimical to the ideal you and I both share of reducing hostility in marriage and divorce and of promoting marriage as a relationship of interdependence and care. How can a scheme of blaming at divorce advance an ideology of love and forgiveness during marriage? It bears noting that courts in the era before

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103. *Id.* at 508.

104. *Id.* at 507.

105. *Id.* at 508.

106. 447 N.E.2d 611 (Ind. Ct. App. 1983).

107. *Id.* at 615.

108. *Id.* at 618.

109. *Id.* at 616.

110. For example, with the merger of law, equity, and admiralty, plaintiffs acquired the right to join various claims without sacrificing their remedies or compromising their right to a jury trial for the common-law claim. See 9 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2301 (1971). With the unification of family courts a high priority of family law reform, it should be possible to construct similar reforms consolidating in a single forum all claims arising out of dissolution of a marriage and affecting distribution of assets at divorce. See AMERICAN BAR ASSOCIATION, AMERICA'S CHILDREN AT RISK 53 (1993).

equitable property distribution routinely denied or limited equitable remedies at divorce precisely because they seemed incompatible with the ideology of selflessness in marriage.<sup>111</sup> We now believe that selflessness and interdependence in marriage are reinforced when such conduct is protected at divorce, and weakened when it is not. By creating a system that makes abuse of trust invisible, we condone abuse and discourage trust. Fault-blindness, whether with respect to economic, emotional, or physical abuse during marriage, may compromise the “family-centric,” “generist,” and “relational” environment of interdependence that we identify as the goal of family law.<sup>112</sup>

WON'T FAULT HURT THE WOMEN YOU WANT TO PROTECT?

*I am not persuaded that women, as a group, gain from the particular distortions that come from privileging fault over no-fault narratives. Your claim that lower class women are more likely to cite a spouse's fault as opposed to personal dissatisfaction as a reason to end a marriage does not convince me that women are likely to be able to prove their own innocence, or their husband's fault. It may be true that women who are “nurture workers” are more vulnerable when they are “cast off” by their mates—they certainly are more vulnerable economically, as a group. But it is not clear that those who are most vulnerable will also be the innocent spouses of guilty husbands and thus that fault is the instrument by which to protect this vulnerability.*

*Another possible consequence of fault, during marriage and at divorce, concerns the divorce litigation itself, which you yourself acknowledge. One of the reasons there was such an eagerness to abandon fault in divorce was that it raised the level of intensity, bitterness, and acrimony of divorce proceedings. You suggest that divorce acrimony will play itself out regardless of the fault orientation of the applicable rules. I don't think we know this, and my instincts are to the contrary.*

VI. UNPACKING SOME ASSUMPTIONS

Certainly, my argument rests on a number of intuitive but untested assumptions. Your intuitions are as good as mine. I know of no empirical evidence on whether women are more “innocent” than men, but I am persuaded by researchers who say they are on average less violent and more faithful (for whatever reason) than men.<sup>113</sup> Perhaps someone will design an experiment to test your hypothesis that a background rule of

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111. See, e.g., *Saff v. Saff*, 402 N.Y.S.2d 690, 693-94 (N.Y. App. Div. 1978) (refusing to recognize a wife's contribution to the family business because her labors were freely given as expected in the normal incident of marriage), *appeal dismissed*, 389 N.E.2d 142 (1979).

112. See generally Katharine T. Bartlett, *Re-Expressing Parenthood*, 98 YALE L.J. 293 (1988); Woodhouse, *Hatching the Egg*, *supra* note 5; Woodhouse, *Revitalization*, *supra* note 5.

113. See Kurz, *supra* note 91.



fault makes people more calculating during marriage and at divorce. Economists Margaret Brinig and Steven Crafton have begun to test one hypothesis that I find intuitively appealing—that a background rule of no-fault makes people more brutal and uncaring.<sup>114</sup> Exploring their hypothesis about the likely consequences of the diminished enforceability of the marriage contract, they have found that marriage rates are lower and domestic violence rates are higher in states with no-fault divorce laws.

I may be overly optimistic in believing that enforcing standards of conduct between men and women and confronting physical and emotional abuse is more likely to reduce violence than to escalate it. Confronting need not become confrontation. In the workplace as well as in the home, I would rather see people talk through and mediate their shared responsibilities for misunderstanding and miscommunication, but I want the law to respond very forcefully and unequivocally to intentional misconduct. To my mind, a marital tort claim or a claim for abuse of spousal trust is the divorce court analogy to mandatory arrest and fines for domestic violence.<sup>115</sup>

The danger, of course, is that allowing judges to consider fault, no matter how broadly defined, invites them to continue judging what is “good” and “bad” conduct according to their own fondly held stereotypes about “proper” gender roles. Especially in jurisdictions, such as North Carolina, where alimony rules are fault-driven, rather than merely fault-regarding, judicial discretion in weighing blame heightens the risk that judges will employ a double standard that rewards heterosexual males, unfairly penalizes homosexual or female sexuality, and perpetuates sex-based stereotypes.

A South Carolina court’s decision in *RGM v. DEM*<sup>116</sup> provides a striking example. The court disqualified a seriously ill and financially needy wife from receiving alimony or health insurance and severely limited her property rights because of her adulterous relationship with another woman. Taken as a whole, the story told by the court seems closer to a tale of irreconcilable difference than one of abuse of trust. The couple had experienced troubles from the start of their marriage and had been in marriage counseling long before the wife met the female friend, a friendship that developed after the wife was diagnosed with lupus. The women’s relationship did not become sexual until after the wife had confided her

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114. See generally Margaret F. Brinig & Steven M. Crafton, *Marriage and Opportunism*, 23 J. LEGAL STUD. 869 (1994).

115. Studies suggest that a forceful response reduces recidivism. See ELLMAN ET AL., *supra* note 43, at 124 (citing Minneapolis police study); Sarah Mausolff Buel, Note, *Mandatory Arrest for Domestic Violence*, 11 HARV. WOMEN’S L.J. 213 (1988).

116. 410 S.E.2d 564 (S.C. 1991).

feelings for her friend to the husband. After several attempts to reconcile, husband and wife separated.<sup>117</sup> Most fault-regarding systems do not treat adultery—without blatant promiscuity, abuse, or desertion of a needy spouse—as a basis for denying a reasonable share of property or alimony to a needy spouse. The inference is strong that the court judged the wife more harshly than it would have judged a similarly situated heterosexual male.

I am not persuaded, however, that the best response to judicial bias against outsiders is fault-blindness. A case from Indiana, *In re the Marriage of R.E.G.*,<sup>118</sup> illustrates the opposite extreme—a completely fault-blind approach to issues of sexual fidelity. The Indiana Supreme Court reversed a lower court's decision to award the wife of a gay man sixty percent of the marital property. The lower court had based its unequal division on fault—the husband's exposure of the wife to the risk of contracting AIDS. The evidence at trial did not support the wife's claim since the husband and wife both tested negative for HIV, and the husband denied having engaged in any unsafe sex.

The Indiana Supreme Court could have reversed on that ground. It relied, instead, on no-fault principles and held that only the parties' future needs could be relevant to property distribution. The court refused to consider past conduct. Even if the wife were to contract AIDS from the husband, the court reasoned, her medical and financial circumstances would be no worse than his. Without a showing that the conduct at issue had caused a *disparity* in future *economic* circumstances between the parties, the unequal division was "impermissibly tainted by fault." This fault-blind approach guards against bias, but at significant cost to values of trust and reliance.

Rather than adopting a fault-blind approach to avoid discrimination, I would ask that judges evaluate male, female, heterosexual, and homosexual conduct by a single standard. At issue is an abuse of trust that jeopardizes the partner's physical and emotional integrity. A person who agrees to an exclusive, monogamous relationship clearly has wronged the partner when he or she secretly has sex with others and exposes the faithful partner to sexually transmitted disease. He or she should be responsible to the mate for the harm inflicted.

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117. The court also rejected the doctrines of condonation and recrimination. Although the husband had condoned her adultery by having sex with the wife after he knew of her lesbian relationship, the court found that, by continuing her lesbian activity, she revived the ground of adultery. The husband in this case had himself slept with another woman after the couple separated, but the court concluded that this recrimination did not constitute an exception to the rule that adultery bars alimony. *Id.* at 567.

118. 571 N.E.2d 298 (Ind. Ct. App. 1991).

WILL JUDGES KNOW FAULT WHEN THEY SEE IT OR WILL THEY JUST SEE IT  
THROUGH SEXIST GLASSES?

*Even when fault exists, there is the problem of proving it. You acknowledge the problem of judicial bias in fault determinations. Your answer is that we should attack this bias rather than concede its existence and build our rules around it. As a matter of principle, this is surely the high road. But as a matter of practice, it is much easier said than done. Marriage remains one of the central sites of the sex-based double standards that have long disadvantaged women. How many women—even in the 1990s—will be found to have cruelly and unforgivably sacrificed their husbands and children to their careers? How many women will be found to have driven their husbands to infidelity by refusing to be sexually available on demand, or by failing to keep up their appearance? What happens while we are chipping away at the assumptions upon which these judgments are based?*

VII. FAULT AS AN INTEGRAL PART OF MARITAL JUSTICE: DOUBLE  
STANDARDS OR NO STANDARDS?

The American Law Institute (ALI) apparently shares your view that fault is nonjusticiable and invites abuse. The ALI has taken on the task of writing a comprehensive scheme for the dissolution of marriage. The ALI draft grapples seriously with issues of economic justice. The fourth Preliminary Draft of the ALI's *Principles of the Law of Family Dissolution*, however, rejects the principle that marital fault ought to influence calculations of "just" compensation at divorce. The draft excludes fault entirely from consideration of support or property distribution. Noting that many marriages fail without anyone's clear misconduct, the comments go on to discuss divorces where misconduct is present.

The ALI Draft concluded that, when there is misconduct, the fault principle

would seem to require a causal analysis that is often beyond the court's capacity. As a logical matter, a relationship fails only when one partner finds the other's conduct intolerable, but the same behavior may be intolerable for one individual but not for another. The decision-maker cannot therefore assign *A* causal responsibility for the marital failure simply because *B* finds *A*'s conduct intolerable, but must also determine whether *B*'s reaction to *A*'s conduct is reasonable. The evaluation of *B*'s reaction to *A*'s conduct is in turn affected by *B*'s own conduct, both as a part of *A*'s, and as bearing on the reasonableness of *B*'s expectations of *A*. So what begins as an objective attempt to assign causal responsibility for the marital failure often ends as a subjective judgment of which spouse's conduct was worse. That judgment may turn on factual nuances as well as values, and consensus will be hard to find. The problem grows

when consideration turns from the judgment of relative spousal misconduct to the dollar adjustment in the award that should flow from that judgment.<sup>119</sup>

I agree with the ALI's Draft description of the complexities and challenges of the judging process, but not with the faint-hearted conclusion that judges are incapable of trying cases that depend on assessing the reasonableness of conduct in a given context or on calculating intangibles. We have learned to calculate "goodwill" in a business enterprise, to place a dollar value on an accident victim's pain, to judge corporate directors' fidelity in complex takeover negotiations, and to calibrate punitive damages to deter misconduct in many spheres. There is no reason why courts cannot undertake similar inquiries in the arena of marital fault.

The reluctance to address injustice in the family is not new. Feminists have fought against it in the contexts of domestic violence, rape, and tort immunity. Although often explained in pragmatic terms, it reflects a judgment that the claims of family members (often women) are too "private" or not important enough to merit public resources and attention. The bias against hearing testimony about harm inflicted by one spouse on another finds its way into custody law as well, with serious detriment to the children.<sup>120</sup> When women raise issues of domestic violence or substance abuse in custody cases, judges steeped in no-fault ideology often refuse to hear the evidence because it sounds too much like marital fault and they "don't want to get into that!"<sup>121</sup>

The Reporters' comments to the ALI Draft also imply that a no-fault rule reflects and is justified by our lack of a consensus about the meaning of marriage. How, they ask, can we set baseline norms for good and bad conduct in marriage—let alone for punishing breaches of spousal trust—if we cannot even agree on what a good marriage ought to be? I find this subjectivity-indeterminacy argument suspect. In commercial law, tort law, employment law, and landlord-tenant law, we manage to deal with uncertainties and evolving standards in relationships. We establish general mandatory norms that provide a floor on compensation and a limit on

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119. ALI PRINCIPLES, *supra* note 22, at 287-88.

120. Naomi Cahn, *Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions*, 44 VAND. L. REV. 1041, 1044 (1991); Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 46-49 (1991).

121. See, e.g., Karen Czapanskiy, *Gender Bias in the Courts: Social Change Strategies*, 4 GEO. J. LEGAL ETHICS 1 (1990); Karen Czapanskiy, *Minnesota Supreme Court Task Force for Gender Fairness*, 15 WM. MITCHELL L. REV. 826 (1989); Karen Czapanskiy, *New Jersey Supreme Court Task Force on Women in the Courts*, 9 WOMEN'S RTS. L. REP. 109 (1986); Karen Czapanskiy, *New York State Task Force on Women in the Courts*, 15 FORDHAM URB. L.J. 11 (1986); Karen Czapanskiy, *Report of the Missouri Task Force on Gender and Justice*, 58 MO. L. REV. 485 (1993).

overreaching. We often fill in the contract's blanks with the parties' customary course of conduct and treat gross departures as evidence of a breach. In tort law, we impose a baseline norm, a standard of behavior, on people who have never met, let alone publicly committed to love and cherish each other.

The notion that we cannot agree on boundaries or standards of conduct within marriage is especially suspect because, as noted, marriage is a fundamentally gendered arrangement. Our willingness, exemplified in *Harris v. Forklift Systems, Inc.*,<sup>122</sup> to establish and even redraw the boundaries of behavior between male and female, employer and employee, stands in sharp contrast to the no-fault ideology of deregulation applied to the male and female bound in marriage.

Law should reflect and comment on the meaning of human experiences.<sup>123</sup> A fault-blind scheme for balancing equities at divorce asserts that battering and bickering, desertion and disenchantment, repeated infidelity and disappointing marital sex, and the harms that flow from them, are qualitatively indistinguishable. In this telling, only financial relations are justiciable, and only money issues matter. Common sense as well as social science studies of the effects of divorce suggest that this story is neither useful as an ideal nor accurate as a reflection of people's experience.

WHY NOT ADDRESS VULNERABILITY DIRECTLY  
AND AVOID THE DISTORTIONS OF FAULT?

*If vulnerability is what we want to address, why use fault as a proxy? Especially given the risks of judicial bias, it makes more sense to focus on vulnerability itself, rather than innocence. One of the things I fear is that as fault becomes the trigger for protecting the vulnerable, a woman whose spouse is not at fault will not receive the protection she needs. I see this in North Carolina (a fault-driven state), where adultery is both a mandatory bar to alimony and an eligibility requirement. A woman seeking spousal support must be innocent and prove her husband's fault. This bar has left many women out in the cold. In response, eliminating fault from support determinations is one of the highest current priorities of North Carolina's Association of Women Attorneys.*

VIII. ADDRESSING BOTH VULNERABILITY AND INJUSTICE

I agree with your concern that discussions of marital fault may drown out claims based solely on need. But why not address both need and injustice? Many scholars have offered proposals for handling the financial

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122. 114 S. Ct. 367 (1993).

123. I am not alone in believing that a no-fault rule that imposes no sanctions on misconduct overlooks the storytelling function of law. See, e.g., GLENDON, *supra* note 5; REGAN, *supra* note 7; Schneider, *supra* note 15; Wardle, *supra* note 15.

consequences of dissolution of the marriage partnership. They argue for equitable remedies that address homemakers' and dependent spouses' lost opportunity interests, reliance interests in maintaining a decent standard of living, claims for support during transition to independence or remarriage, and claims to alimony as a form of pension right.<sup>124</sup> I very much agree that fault should not displace all other theories of post-divorce economics, including need or partnership theories. Need-based and economic-sharing theories remain valid independent of fault.

I would urge that family law, rather than making fault irrelevant or dispositive, accept it as only one of many elements in determining how to divide financial assets and post divorce earnings. Fault should not cancel out need; in fact, need could provide a floor much as it now frequently provides a ceiling. Similarly, a fault award should not obviate awards of property or post-divorce income based on theories such as partnership or expectation and reliance, but would be charged against a spouse's assets, much as if it were a tort judgment. In my paradigm case of *In re Marriage of a Postal Employee*, for example, each spouse might claim an equal share of the marital home, based on theories of economic partnership, but the injured spouse could claim compensation from the other's share of the equity, citing comparative fault. Although fault might militate against bestowing a larger share of property or a large award of alimony to a spouse who has breached the trust of her partner, it should not necessarily cancel out her claim for alimony adequate to meet her basic needs.<sup>125</sup> My suggestion is not that fault should be dispositive, but only that it should not be invisible and irrelevant in the calculus.

#### *I FEAR THAT FAULT ENCOURAGES THE PRIVATIZATION OF DIVORCE*

*There is one more reason for disfavoring a revitalization of fault at divorce. We have been struggling at this symposium with the problem of the privatization of divorce, and the extent to which divorce norms reinforce family support as a private matter for which private, not public, solutions must be sought. Fault concepts, in my view, help to maintain the ideology of privacy of family responsibility. In focusing the state's attention on private rights and wrongs as a source of future support entitlements, it reinstates family support as a matter of*

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124. Ellman, *supra* note 15, at 40-73 (basing alimony on policy of encouraging marital sharing behavior); Singer, *supra* note 15, at 1113-21 (advocating equal post-divorce income sharing for a period of time, reflecting the partnership model of marriage).

125. Professor Carl Schneider argues that the obligation of one spouse to provide for the needs of the other after divorce is predicated on the special relationship created by marriage. Schneider, *supra* note 15, at 248-49. I agree. I would not equate a finding of the other spouse's fault with a complete release from any on-going obligations. I see no reason why courts should not be empowered to distinguish between good conduct that merits protection, misconduct that justifies unequal division of assets to compensate the injured party, and conduct that is so egregious and inexcusable as to release the injured party from any further responsibility.

*private concern, thereby moving the state still further from responsibility for the vulnerable.*

*Women fare worse than men under no-fault divorce regimes. This however, does not justify fault-based rules. For women also fare worse than men in fault-based regimes—both past and present. The question, then, is not whether women fare badly under no-fault divorce rules, but whether the inequities of divorce are increased or decreased by fault. The empirical work needed to resolve this question dispositively has not yet been done. In the meantime, for the reasons I have described, I would prefer to see the trend of eliminating fault from divorce proceedings continue. This would leave other concepts, like economic need, to resolve issues of women's economic vulnerability at divorce. It would stem the trend to privatizing divorce and would recognize public responsibility for meeting women's and children's needs in the aftermath of divorce. It would also leave room for separate actions, outside the divorce proceedings, for particularly egregious forms of fault, which I also think are a good idea.*

## IX. TOWARDS A COMPLEX THEORY OF MARRIAGE DISSOLUTION

### A. FAMILY AS A PUBLIC-PRIVATE VENTURE

I, too, view the privatized model of family as a serious threat to women and children.<sup>126</sup> Family policy, it seems to me, demands a complex model of family law that includes public and private elements. Encouraging private responsibility need not deprive women and children of public support. I favor policies that further a public-private partnership in support of families: child support enforcement coupled with child support insurance; schooling and job programs matched by subsidized day care, health care, and housing; and church-based and community-based services for children and parents. Enforcing individual responsibility for relational commitments to spouses and children should be part of a network of public and private support for families.

Many feminists, most notably Professor Martha Fineman, argue that heterosexual relationships should not be the basis for family law.<sup>127</sup> Rather than constructing rules to protect women who choose interdependence in traditional patriarchal families, family law should encourage and support the care-giving unit, most often mother and child. We should not link family law to heterosexual family forms, she argues, but rather to the

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126. See Barbara B. Woodhouse, "Who Owns the Child?": Meyer and Pierce and the Child as Property, 33 WM. & MARY L. REV. 995, 1117-22 (1992) (arguing that, as a nation, we do not treat children as part of the community and consequently lack public commitment to meeting their basic welfare needs).

127. MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER AND OTHER TWENTIETH CENTURY TRAGEDIES (1994); Fineman, *supra* note 81, at 664.

mother and child relationship.<sup>128</sup> One means to these ends, as Fineman suggests, is increasing public support for mothers and dissociating mothering from marriage.<sup>129</sup> A more draconian means to reduce female dependency, and the one I am challenging here, is a system of no-fault, no-responsibility rules that make marriage, as a vehicle of family formation, insanely risky. We are dangerously close to the second and still far from the first.<sup>130</sup> My view is that women's situation can and will be improved by a legal framework that supports marriage (same-sex as well as heterosexual), asks both partners (not just women) to do their share of the nurture work, and expects both to treat each other with respect and concern. As long as law seeks to bring both private and public responsibility into play, it will have to grapple with defining what conduct and what relationships trigger individual obligations and claims.

#### B. FAMILY LAW AS A STUDY IN COMPLEXITY

Scholars have recently been searching for a legal paradigm that adequately explains, in light of no-fault divorce principles for exit from marriage, why money should change hands at or after divorce. Should obligations at divorce be defined by tort, status, or contract? Should domestic relations adopt trust, partnership, or property as the model of rights and duties within the family and between spouses?<sup>131</sup> Although I find these debates illuminating, I will avoid taking sides because it is my intuition that all of these characterizations are true of different aspects of marriage.

Complexity theory, even if it is suspiciously trendy in the physical sciences, strikes me as having something to say about fault's role in the evolution of family law. "Biological evolution proceeds at the boundary between order and chaos. If there is too much order, the system becomes frozen and cannot change. But if there is too much chaos, the system

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128. Fineman, *supra* note 81, at 665.

129. *Id.*

130. See A.B.A., *supra* note 110, at 69 (statistics show 58% of women with children whose fathers were absent had support orders); NATIONAL COMMISSION ON CHILDREN, BEYOND RHETORIC: A NEW AMERICAN AGENDA FOR CHILDREN AND FAMILIES 15-37 (1991); Harry D. Krause, *Child Support Reassessed: Limits of Private Responsibility and the Public Interest*, in *DIVORCE REFORM AT THE CROSSROADS*, *supra* note 15, at 166.

131. See, e.g., Twila Perry, *No-Fault Divorce and Liability Without Fault: Can Family Law Learn from Torts?*, 52 OHIO ST. L.J. 55, 94 (1991) (arguing that no-fault divorce "should have the same focus as liability without fault in torts—promoting compensation for losses"); REGAN, *supra* note 7, at 137-43 (discussing the limitations, theoretical underpinnings, and problems with no-fault divorce proceedings); Cynthia Starnes, *Divorce and the Displaced Homemaker: A Discourse on Playing with Dolls, Partnership Buyouts, and Dissociation Under No-Fault*, 60 U. CHI. L. REV. 67, 106-19 (1993) (reviewing proposed models of contract and status, and advocating partnership model).



retains no memory of what went on before.”<sup>132</sup> Fault, it seems to me, plays a complex role in each of these substantive areas—from contract, to property, to tort—to which we turn for family law models and analogies. In different situations, law adopts principles of negligence or strict liability, of caveat emptor or protective warranty, of commodification or inalienability, of immunity or liability. We assign legal significance to a wide range of conduct in order to promote substantive policies and do justice in individual cases.<sup>133</sup> The question of fault is related to—but not justified or explained by—the way we characterize the marriage relationship.

Why, I wonder, do you say that a tort action “outside the divorce” is a good idea while maintaining that a divorce claim based on fault is a bad idea? In explaining why a subsequent tort claim is or is not barred by or merged in the divorce action, judges tend to emphasize the analytical divisions between tort, property, and alimony.<sup>134</sup> They point out that the purpose of the tort claim (to “redress a legal wrong in damages”) differs fundamentally from both the purpose of alimony (“to provide economic support to a dependent spouse”) and the purpose of property division (“to recognize and equitably recompense the parties’ respective contributions to the marital partnership”).<sup>135</sup>

The divisions between redressing wrong, providing support, and doing economic justice are, however, far from clear, historically and functionally. Issues of merit and blame played a large role in traditional discussions of alimony eligibility and liability, and continue to do so in many jurisdictions. The transition from common law title to equitable distribution was partially fueled by the failure of traditional equity rules. These rules did not adequately integrate the standard of selflessness, trust, forgiveness, and loyalty traditionally expected of a spouse. For example, in the infamous case of *Saff v. Saff*,<sup>136</sup> a wife of thirty years lost her claim to a share of the family business. She had worked side-by-side with her husband, without demanding shares of stock in the enterprise and often without pay. Because the marriage relationship suggested a donative intent, the majority discounted her argument that she had relied on her husband’s promise to share the profits with her. It refused to impose a “constructive trust” on

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132. Michael D. Lemonick, *The New Field of Complexity May Explain Mysteries*, TIME, Feb. 22, 1993, at 62 (quoting Stuart Kaufman of the Santa Fe Institute). I like this description, which makes me think of Carol Rose’s “crystals and mud” discussion. See generally Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577 (1988).

133. Rose, *supra* note 132, at 578 (explaining that “straightforward common law crystalline [property] rules have been muddied” over time).

134. See, e.g., *Heacock v. Heacock*, 520 N.E.2d 151, 153 (Mass. 1988) (“A tort action is not based on the same underlying claim as a divorce.”); *McCoy v. Cooke*, 419 N.W.2d 44, 46 (Mich. Ct. App. 1988) (“[D]ivorce and tort actions are separate causes of action.”).

135. *Heacock*, 520 N.E.2d at 153.

136. 402 N.Y.S.2d 690 (N.Y. App. Div. 1978), *appeal dismissed*, 389 N.E.2d 142 (1979). This case contributed to the pressure for reform of divorce law in New York State.

the enterprise at divorce. The dissent argued, however, that promises between a husband and wife ought to be enforced and, therefore, the court should look at the entire relationship in assessing the equities.<sup>137</sup> The dissent's reformulation of the equities was an attempt to integrate the realities of this marriage into an assessment of the parties' claims at its dissolution and to avoid penalizing the wife for placing others' welfare before her own. This moral dimension of equity between spouses, which fueled demands for reform, seems to have been lost in the translation from common law title rules to equitable distribution rules.

C. EMBRACING FAULT: RECOGNIZING A CLAIM OF MARITAL TORT OR  
BREACH OF SPOUSAL TRUST

Here, we may well agree on a remedy but disagree on the forum. In my view, the evolution toward recognizing tort claims between spouses is a corrective response that stops short of the mark. Tort remedies combine values of victim compensation and cost allocation with societal interests in punishment and deterrence. From a feminist perspective, experience with tort cases suggests that a practice of encouraging separate claims might assume a positive strategic role in restoring gendered imbalances of power.

Tort claims for marital misconduct have several drawbacks, however. Because they are treated with suspicion as neither divorce claims nor classic forms of tort, tort remedies for spousal misconduct are often denied or restricted by courts accustomed to a no-fault ideology of marriage dissolution. They raise tricky questions of *res judicata* and collateral estoppel, the right to a jury trial, overlapping recoveries, and limitations on damages. These issues, as my discussion of tort cases shows, currently must be resolved by judges addressing individual cases in a piecemeal fashion and confined to the analytical structure of tort laws.

I am not entirely persuaded that it makes sense to construct a system around analytical boundaries similar to those that theoretically separate alimony, property, and child support. But assuming that divorce law is clarified by allocating only support functions to alimony and only financial equities to property theory, I would propose recognizing a third type of claim—a claim for marital tort or breach of spousal trust. However characterized, this claim would authorize compensation for physical, emotional, and economic injuries flowing from a spouse's misconduct.<sup>138</sup> Such a claim

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137. "Since appellant-wife seeks here an equitable remedy, it is important to note that in granting Mrs. Saff a divorce from her husband on the grounds of abandonment, the Trial Court found that [Mr.] Saff had left the marital residence in 1972 and has not returned." *Id.* at 697. The court noted that the wife had weathered many personal and family strains such as their child's illness with polio, her husband's drinking, and his fathering of a child in an extramarital relationship. *Id.*

138. Child support payments, of course, are also a part of the entire financial picture. Separation agreements and divorce decrees often blur the functional lines between child

would have the virtue of speaking unequivocally—as the law of sexual harassment does in the employment context—about a person's right to be free from egregious conduct related to sex and gender and to abuse of power in the home. If joined with the divorce proceeding, a judgment could operate either as a set-off against the wrongdoer's share of property, or as a surcharge on the alimony award, or as an in personam judgment against the wrongdoer. Whether such claims should be part of the divorce proceeding or brought separately would depend upon a variety of legal and policy judgments about judicial economy, finality, the dynamics of family violence, and the right to a jury. Any articulation of principles of family dissolution should not banish fault from consideration, but should instead embrace and integrate fault into the broader equitable scheme.

#### CONCLUSION

No-fault divorce is not a natural law, like gravity. It is a legal construct, purposefully designed by lawyers for lawyers. Its primary impetus was to manage exit from the legal status of marriage more efficiently and to spare those in the system from involvement in the costly process and sordid details of assessing blame for a marriage's death. In attempting to operate only on hard data, translated as dollar figures for direct economic loss, modern divorce reform seems to say that what cannot be measured as damage to a tangible property interest does not count.

Divorce law, like civil rights law or tort law, uses the power of narrative not only to tell legal stories, but also to influence social discourse. The rhetoric of fault, just like that of no-fault, has the power to change our expectations about responsibility in relations between the sexes. My retelling of the facts of *In re Marriage of a Postal Employee*, and my dwelling on the many meanings of sex, lies, and dissipation as applied to those facts, have been a conscious attempt to examine and articulate the nature of the noneconomic harm that threatens to become invisible to lawyers, but is compelling and real to people. As feminists, we advocate breaking silence about the harms of sexual abuse, economic exploitation, and violence against women. In the era of no-fault divorce, however, the law has been telling us not to dwell on or personalize the details, not only when love, intimacy, and trust dies a peaceful, natural death, but also when they are recklessly or intentionally destroyed. For every situation, we adopt the passive voice of "breakdown." Law constructs a wonderland populated by mysteriously "displaced" homemakers and suddenly "single" mothers.

We should construct instead a scheme that reclaims the power of fault and that attributes consequences to good and bad conduct within marriage. When the imbalances are striking, we should reward family-centric,

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support and spousal support due to pragmatic decisions about tax liability or because of alimony's dual role as spousal support and as compensation for in-kind caregiving.

caring conduct, rather than turn a blind eye to abuse and exploitation. There are many good reasons for harboring a healthy fear of fault. But if we suppress all discourse on badness in marriage, how can we talk persuasively about goodness? Is fault really so dangerous to feminists that we prefer silence?

#### RETHINKING AND CONFINING FAULT

*I also support a rethinking of what we mean to label "fault," whatever role it plays in divorce. As you mention, notions of marital fault traditionally centered on a kind of property claim by one spouse to the other. Proposals to revitalize fault tend to favor expansion of the kinds of behaviors considered blameworthy, which you also favor, on the theory that the more factors that are considered, the greater the likelihood that a fuller and more authentic story will be told.*

*I prefer, on balance, to move in the opposite direction. If we are to find a larger role for fault, I would like to see it more narrowly focused on the other kind of fault of which you spoke—physical and emotional abuse. In fact, it might be worth dropping the word "fault" altogether, and using instead the word "abuse." Although adultery should not be condoned, I do not think that the state should be involved in keeping spouses from being sexually accessible to others, where the relational context is voluntary. Rather, the state should be trying to keep spouses from threatening their partners because one spouse is an involuntary target.*

*In short, I am sympathetic to the objectives that the reinvigoration of fault concepts is intended to serve and with many of the themes that arguments in favor of using fault principles play. In the end, however, I fear that fault, unless very narrowly confined and perhaps redefined, may stimulate as much vulnerability as it reduces. For me, the question is not whether we fear silence more than fault, but whether fault breaks the silence.*

#### CODA

We seem to agree on many things, among them that silence itself is problematic. Perhaps we can agree that a reformed concept of fault, if handled with care, might break the silence without doing more harm than good. You suggest that fault should be redefined and confined to "abuse." I, too, want to get away from the old obsession with female chastity. As I have argued, marital fault ought to mean something more reflective of modern companionate marriage and partnership theories. My models are the cases that say we need to credit good conduct, as well as debit bad conduct. I, too, want to avoid nitpicking and provide a remedy only when the balance of equities is truly lopsided. I, too, find the term "abuse" expressive of an important distinction between intentional and careless harms.

But, in addition to physical and emotional abuse, I would consider allowing a claim of marital tort or breach of spousal trust as part of a divorce proceeding. The case reports are fairly rich with such stories: lying about an attempted rape to get your spouse's savings is one example and having sex with a teenage stepchild or hiring a hit man are others. Such claims would ask that we examine conduct between spouses in a consciously contextual manner. By proposing a fault-based claim as an integral part of divorce principles, I am drawing fault farther into no-fault territory than the separate tort claims you have in mind. Your intuitions about the power of fault to distort and polarize may be right and mine about its restorative and storytelling powers may be wrong. You certainly provide a persuasive critique, even if I refuse to be persuaded. The places where you and I diverge are generally forks in the road that make me nervous about the direction I am taking. Nevertheless, I will continue on pursuing my thorny trail up Fault Ridge. Who knows what the view will be like from the top.

