The State’s Perpetual Protection of Adultery: Examining Koestler v. Pollard and Wisconsin’s Faded Adultery Torts

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THE STATE’S PERPETUAL PROTECTION OF ADULTERY: EXAMINING KOESTLER V. POLLARD AND WISCONSIN’S FADED ADULTERY TORTS

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INTRODUCTION

Richard Koestler married his wife, Vicki, in 1973.¹ For over a decade, he seemed to have the comforts and rewards that marriage and family are supposed to offer. In 1983, his joys culminated in the birth of his daughter, Courtney.² For four years, he and his wife watched Courtney grow bigger each day. Like any loving parent, Richard developed an indescribable bond with his daughter, full of intense emotion. However, one fateful day sent Richard Koestler into a state of sheer confusion when another man told him that Koestler was not Courtney’s biological father.³ The news hit Richard like a bullet; Vicki had an affair with another man and had deceived him for years.⁴ The shock of knowing he was not his own daughter’s biological father slowly sank in, and suddenly he realized that his family life was nothing as it seemed. Richard Koestler suffered this fate twelve years ago, and it forever changed his life.⁵

Adultery is almost always debilitating for victimized spouses.⁶ They can suffer tremendous emotional damage,⁷ loss of trust,⁸ troubling mental

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¹ Brief for Appellant at 3, Koestler v. Pollard, 162 Wis.2d 797, 471 N.W.2d 7 (1991) (No. 90-1004).
² Id.
³ Id.
⁴ Koestler, 162 Wis.2d at 801, 471 N.W.2d at 8.
⁵ Id.
⁷ Strock v. Pressnell, 527 N.E.2d 1235 (Ohio 1988). In Ohio, an ex-husband sued a minister for an adulterous affair with the husband’s ex-wife during their marriage. Id. at 1236. The ex-husband claimed that the affair between the minister and his wife caused his eventual divorce and “anguish, shock, nervousness, and depression.” Id.
⁸ JANIS ABRAHMS SPRENG & MICHAEL SPRENG, AFTER THE AFFAIR: HEALING THE PAIN AND REBUILDING TRUST WHEN A PARTNER HAS BEEN UNFAITHFUL 147 (1996); see GLASS & STAHELL, supra note 6, at 69, 347.
insecurities, decreased job performance, and financial insecurity (especially when adultery leads to divorces involving children). What is even more tragic is that currently, most law in the United States does little to remedy the mental damage caused by unfaithful spouses.

Traditionally, every state except Louisiana recognized in their common law the torts of alienation of affections and criminal conversation to remedy a victimized spouse. Between the 1930s and 1980s, however, the number of states recognizing alienation of affections or criminal conversation dwindled to a minority. Wisconsin statutorily abolished both torts in 1971. However, this abolition did not keep adultery-based claims from coming to court. In 1991, the Wisconsin Supreme Court revisited the issue of adultery in Koestler v. Pollard.

10. R.E.R. v. J.G., 552 N.W.2d 27, 29 (Minn. Ct. App. 1996). In this case a husband sued a minister under intentional infliction of emotional distress claiming that the minister’s adulterous affair with the husband’s wife caused him severe emotional damage from “dealing with spousal guilt, depression, unhappiness, and low self-esteem,” resulting in decreased job performance and termination, medical expenses, and a damaging career change. Id.
12. Phillip Sykes, Recent Decision, 63 Miss. L.J. 249, 251 (1993). The alienation of affections and criminal conversation torts protected spouses from third party interference with their marriage. Alienation of affections required a plaintiff to prove that the defendant destroyed affection between the plaintiff and his spouse. Criminal conversation required proof of sexual intercourse between the defendant and the plaintiff’s spouse. For a deeper discussion of alienation of affections and criminal conversation, see infra Part I.
14. Wis. Stat. § 248.01 (1971). This abolition applied to marriage contracts created subsequent to the abolition. Id. This statute was renumbered in 1979. Wis. Stat. § 768.01 (1979–1980).
15. See generally 162 Wis. 2d 797, 471 N.W.2d 7.
Koestler brought his claim under the tort of intentional infliction of emotional distress (“IIED”) against his wife’s paramour. The court interpreted his complaint as a claim for criminal conversation and rejected it before it could reach a jury.

In her dissent, then-Justice Shirley Abrahamson claimed that the majority’s interpretation unfairly barred Koestler’s IIED claim primarily because his emotional distress occurred within a marital relationship. She also noted “the marital relationship deserves legal protection.” Justice Abrahamson’s dissent illustrates that by disallowing claims under IIED that contain evidentiary matters applicable to alienation of affections and criminal conversation claims, the majority in Koestler bars emotional harm within marriage from recognition in Wisconsin courts. The majority reasoning results in the paradoxical outcome that emotional well-being deserves protection, but the institution that is meant to nurture emotional well-being most—marriage—is categorically eliminated from legal protection under IIED. The court’s holding in Koestler affirmatively denies claims for emotional harm where the greatest emotional harm can occur.

The thesis of this Note is that, although Koestler is the current law in Wisconsin, it was wrong and should be overturned, and adultery claims should be allowed under IIED. According to the “godmother of infidelity research,” Shirley Glass, the United States is currently experiencing a “crisis of unfaithfulness.” The most reputable social science surveys reveal that at least twenty to fifty percent of American adults admit to committing adultery, and some studies estimate the adultery rate to be as high as seventy percent. Promarriage activists and feminists are leading a war against decisions such as Koestler. Promarriage activists usually attack rejections of adultery claims by emphasizing the importance of

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16. Id. at 800, 471 N.W.2d at 8.
17. Id. at 801, 471 N.W.2d at 8.
18. Id. at 818, 471 N.W.2d at 16 (Abrahamson, J., dissenting).
19. Id. at 814, 471 N.W.2d at 14 (Abrahamson, J., dissenting).
20. See generally id. at 797, 471 N.W.2d 7.
22. GLASS & STAEHELII, supra note 6, at 2–3; EDWARD O. LAUMANN ET AL., THE SOCIAL ORGANIZATION OF SEXUALITY: SEXUAL PRACTICES IN THE UNITED STATES 214, 216 (1994); Drew, supra note 21, at 3L.
marriage and family. 23 Feminists favoring adultery claims emphasize the
negative consequences of adultery on women. 24

This Note will address two main questions. First, shouldn’t states
allow adultery-based tort claims? Second, how can Wisconsin recognize
emotional harm caused by adultery? Parts I and II provide a national
overview of adultery claims. Part I describes the history of adultery
claims and the torts of alienation of affections and criminal conversation.
Part II describes the tort of IIED and demonstrates that plaintiffs continue
to bring adultery-based claims under IIED, asserting that the policies
underlying dismissal of their claims are unfair.

Part III concentrates on current Wisconsin law and critiques the
unfair policies underlying the Koestler decision. Part IV uses
promarriage and feminist perspectives to explain why courts should not
prevent adultery-based claims from reaching juries. Finally, Part V
utilizes the promarriage and feminist perspectives to argue for allowing
adultery-based intentional infliction of emotional distress claims in
Wisconsin.

I. HISTORY OF ADULTERY AND THE TORTS OF ALIENATION OF
AFFECTIONS AND CRIMINAL CONVERSATION IN THE UNITED STATES

Traditionally, English law considered adultery to be an act with
serious consequences. 25 Of all the actions for divorce, adultery was
principal and "with reason named the first." 26 William Blackstone once
described adultery as a public crime that is also a civil injury of which
"there can be no greater." 27 Blackstone described the damages awarded
for adultery as "very large and exemplary." 28

Legal action for adultery has its origins in property notions of the
wife. In early common law, husband and wife were considered united as
one legal person. 29 Upon marriage, "the very being or legal existence of
the woman [was] suspended." 30 While under the husband’s protection,

16, 1997, at A1. Reverend Don Carter said of a recent case awarding a wife one million
dollars for her husband’s adultery, "I certainly hope [this] sends out a strong signal to
people that family is very important to our society and that adultery is wrong." Id.
Reverend Carter went on to say, "I’m afraid today that through television and the film
industry and books, we have glorified infidelity, almost made it a game." Id.

24. For a discussion of how adultery laws affect women, see LINDA R.

25. See 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 109

26. 1 id. at 339.
27. 3 id. at 109.
28. 3 id. at 140. For a woman guilty of adultery, "the law allow[ed] her no
alimony." 1 id. at 339.
29. 1 id. at 339.
30. 1 id.
the wife’s condition during marriage was called “coverature.”31 The wife’s coverature meant that a husband could not grant anything to or make agreements with his wife because such action “would suppose her separate existence: and to covenant with her, would be only to covenant with himself.”32

Through coverature, property remained in the hands of men, who functioned as married women’s lords.33 Only at death could a husband transfer property to his wife because the disability of coverature would have ceased.34 A married woman also could not sue for her own injuries “without her husband’s concurrence,”35 and husbands were the defendants in cases where wives were sued.36 Husbands also assumed the responsibility to provide necessities for wives as much as they provided for themselves and were obligated to pay any of the wife’s debts acquired before or after the marriage.37

The United States inherited England’s legal concern toward adultery.38 In 1631, Massachusetts instituted the death penalty for adultery.39 Most of the remaining colonies later followed suit.40 After 1660, the laws in most colonies relaxed.41 For instance, most New England courts of this time usually fined men ten or twenty pounds and flogged women.42 Often, adulterers were forced to wear a letter on their garment like Hester Pryne in *The Scarlet Letter*,43 or have the letter

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31. *id.*
32. *id.* at 340.
33. *id.* at 339.
34. *id.* at 340.
35. *id.*
36. *id.*
37. *id.*
38. John D’Emilio & Estelle B. Freedman, *Intimate Matters: A History of Sexuality in America* 27 (2d ed. 1997). In addition to the legal punishments for adultery, communities were strongly against it. *Id.* at 29. American colonial life helped regulate adultery by condoning and encouraging high levels of intrusiveness into the lives of other community members. *Id.* In Puritan communities, there was a dominant belief that God punished entire communities for not subscribing to His Will. *Id.* Thus, it was incumbent on every community member to patrol the morality of other members. Stories abound of community members “heav[ing] the door[s] off . . . hinges,” or peeping through keyholes to witness adulterous liaisons they suspected. *Id.*
39. *Id.* at 28.
40. *Id.*
41. *See id.*
42. *Id.*
burned into their foreheads as punishment. As late as 1962, virtually every state still considered adultery a crime.

Civil actions for adultery evolved from actions for enticing away a servant from a master. Because servants were property of masters, those responsible for depriving the master of the servant’s services could be held liable. The status of wives was comparable to that of servants in early common law. Therefore, husbands could use the action of trespass against another for deprivation of a wife’s services.

Over the centuries, the husband’s interest broadened to include “a bundle of legal rights [comprised of] the services, society, and sexual intercourse of the wife.” Together, these rights were called “consortium.” “Modern law . . . added a fourth” right to those of the husband called “conjugal affection.” Today, loss of services is no longer required for a claim, and any one of the aforementioned four rights may form the basis of a consortium claim. Courts eventually recognized that trespass included a loss of consortium, and the idea emerged that anyone who unjustifiably disrupted the marital union caused “sufficient damage.” Interference with marriage torts emerged from this line of thinking.

At common law, interference with marriage torts provided civil remedies only to a husband for the adulterous acts of his wife.

44. D’Emilio & Freedman, supra note 38, at 28.
47. See Prosser and Keeton, supra note 46, at 916; see also Jacob Lippman, The Breakdown of Consortium, 30 Colum. L. REV. 651, 655–56 (1930).
48. See Prosser and Keeton, supra note 46, at 916; Lippman, supra note 47, at 655–56; see also John H. Wigmore, Interference with Social Relations, 21 AM. L. REV. 764, 769–70 (1887). Therefore, the action for enticement extended to cover a husband’s deprivation of a wife’s services as a servant. See Prosser and Keeton, supra note 46, at 916.
49. Prosser and Keeton, supra note 46, at 917. There once existed a writ of “ravishment” that listed the wife among the husband’s chattel and was available to husbands if the wife was either involuntarily abducted or voluntarily eloped with another man. Id.
50. Id. at 916.
51. Id.
52. Id.
53. Id.
54. Id. at 917.
55. See Restatement (Second) of Torts, § 895F cmt. c (1977).
Beginning in 1844, through the passage of the Married Women’s Acts, married women gained the right to recover for “interference with her spousal relations” on essentially the same grounds as any man. Most notable were the torts of alienation of affections and criminal conversation. They were considered among the torts nicknamed “amatory” or “heart-balm” torts, which also included seduction and breach of promise to marry.

The term “alienation of affection” was first used in a New York Court in 1866. There were three elements to the alienation of affections tort. The plaintiff had to prove: first, that “true affection existed in the marriage at one time; second, . . . the affection [had been] destroyed; and third, that the defendant caused that destruction, or at least impairment, of the marital relationship.” True affection was considered a spouse’s love, society, companionship, or comfort. In some states, a claim could be dismissed on grounds that no true affection existed in the marriage for the defendant to destroy.

Second, the element of destruction of affection was satisfied by demonstrating the absence of a spouse’s love, society, companionship, or


57. In the past—and today in jurisdictions that retain alienation of affection and criminal conversation—juries decided the amount of damages awarded, and punitive damages were allowed. However, the differences between the torts require separate explanation. See generally Jill Jones, Comment, Fanning an Old Flame: Alienation of Affections and Criminal Conversation Revisited, 26 Pepp. L. Rev. 61 (1998) (explaining the history of the amatory torts). See also Richard A. Posner, Sex and Reason 81 (1992) (discussing civil remedies for sexual offenses).

58. Jones, Comment, supra note 57, at 63; see also Hirshman & Larson, supra note 24, at 165–66. American amatory torts were derived from English common law. Campbell, supra note 46, at 220; Jones, Comment, supra note 57, at 66–67. English Courts recognized two torts that addressed third-party interference in the marital union: enticement and seduction. Campbell, supra note 46, at 219–20. At least one commentator believes that the American tort of alienation of affection can be traced to the English tort of enticement. Id. However, another commentator gives a different description of the origins of American amatory torts from English law. See Thompson, Note, supra note 56, at 240–41.

59. Thompson, Note, supra note 56, at 241–42 (citing Heermance v. James, 47 Barb. 120 (N.Y. App. Div. 1866)).

60. Jones, Comment, supra note 57, at 68; see also Restatement (Second) of Torts, supra note 55, § 684.

61. Prosser and Keeton, supra note 46, at 918.

62. Tennessee, however, had a rebuttable presumption that marital relationships entail affection. Marshall L. Davidson, III, Comment, Stealing Love in Tennessee: The Thief Goes Free, 56 Tenn. L. Rev. 629, 636–38 (1989). In some states, a lack or absence of affection between spouses can serve to mitigate damage claims. Id. at 653.
comfort. To prove that affection was destroyed, there was no requirement of deprivation of services or pecuniary loss, and no sexual relationship was required between the spouse and the third party. Alienation of affections was a tort meant to protect a person’s interest in his spouse’s affections and mental state. Therefore, any third party—such as in-laws, employers, or ministers—could alienate the affections of a plaintiff’s spouse. However, evidence of a defendant’s sexual intercourse with the spouse could influence a damage award.

Third, the defendant did not have to be the sole cause of harm to the marriage for the plaintiff to prove causation. Instead, the defendant merely had to “be a substantial factor; or, as some courts put it, a ‘controlling’ or ‘procuring’ cause” of the harm. Generally, it seems that the defendant did not have to act with malice or improper motives in order to be liable. This usually meant that the defendant had “an intent to act without justification or excuse” for the purpose of affecting the marriage. If the defendant did not know of the marriage, there could be no liability.

Numerous defenses to alienation of affections existed. For instance, a defendant was not liable if there were no affections within the marriage to alienate. To succeed with this defense, a defendant had to overcome the presumption of affection between spouses. Some courts concluded there could be no liability if there was a “complete and permanent breach” between the spouses, such as a separation. Other courts allowed recovery despite a separation when there seemed to be

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63. PROSSER AND KEETON, supra note 46, at 918.
64. Id.
66. See Jones, Comment, supra note 57, at 68–69.
67. Id.
68. RESTATEMENT (SECOND) OF TORTS, supra note 55, § 683 cmt. c; see also PROSSER AND KEETON, supra note 46, at 919.
69. PROSSER AND KEETON, supra note 46, at 920.
70. RESTATEMENT (SECOND) OF TORTS, supra note 55, § 683 cmt. j; see also Davidson, Comment, supra note 62, at 653 n.38.
71. PROSSER AND KEETON, supra note 46, at 920 & n.63 (citing several cases as examples).
72. Id. at 920 & n.59.
73. Id. at 920; RESTATEMENT (SECOND) OF TORTS, supra note 55, § 683 cmt. i; see also Davidson, Comment, supra note 62, at 643. Moreover, at least one state recognizes a defense “in the best interest of the child.” McRae v. Robinson, 110 So. 504, 507 (Miss. 1926). One court in Mississippi held that defendant-parents were not liable for trying to convince their daughter (the plaintiff’s wife) to leave the plaintiff because the wife’s parents acted in their child’s best interest. Id. at 508.
74. Davidson, Comment, supra note 62, at 642.
75. PROSSER AND KEETON, supra note 46, at 921.
76. Id.
77. Id.
opportunity for reconciliation and thus only considered the separation to mitigate damages. Also, consent of the nonparticipating spouse before the alleged acts took place amounted to a total defense, but a nonparticipating spouse's forgiveness or “condonation” after the alienation occurred could only be considered to mitigate damages. The defendant’s actions also could withstand liability if unintentional, accidental, or inadvertent, rather than malicious.

Criminal conversation was supported by policies to protect property rights of the husband in the wife’s body and punish paramours for defiling “the marriage bed” and inflicting mental distress. The tort was specifically meant to protect individuals from sexual intercourse between their spouses and paramours. Therefore, a plaintiff had to prove adultery between his spouse and the defendant. The plaintiff also had to prove a valid marriage between himself and his spouse because criminal conversation only protected sexual relationships in the marriage bond.

In practice, criminal conversation resembled a strict liability tort because there were hardly any defenses against a claim. Because marriage joined the husband and wife as one legal entity, courts reasoned

78. Id. Any filing of separation or divorce after the alienation occurred also could only be considered to mitigate damages. Id.
79. Id.
80. Id. at 920.
81. HENDRICK HARTOG, MAN AND WIFE IN AMERICA: A HISTORY 137 (2000); James Leonard, Note, Cannon v. Miller: The Brief Death of Alienation of Affections and Criminal Conversation in North Carolina, 63 N.C. L. REV. 1317, 1321 (1985). Adultery in the nineteenth century was also a legitimate basis for husbands to kill seducers. HARTOG, supra, at 218–19. Legally, this was explained as an extension of a man’s right to self-defense, not only of himself but also of his property as was the case with trespassers or burglars. Id. The right was restricted, however, to killing a seducer “on the spot,” thus justifying the killing as one that took place in the heat of passion rather than as a premeditated act that would be harmful to public peace. Id.
82. PROSSER AND KEETON, supra note 46, at 918; Leonard, Note, supra note 81, at 1320–21. However, many social critics of the time demanded stiffer penalties than merely monetary payments. These critics, especially in New York where adultery was not considered a criminal offense, felt it offensive that adultery was the only of the Ten Commandments whose transgression did not amount to an earthly crime. HARTOG, supra note 81, at 142.
83. PROSSER AND KEETON, supra note 46, at 918. Holdsworth discusses the trespass and loss of consortium theories for actions against paramours. 8 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 430 (7th ed. 1956); see also HARTOG, supra note 81, at 139–40; Lippman, supra note 47, at 651–73.
85. Id.; see also RESTATEMENT (SECOND) OF TORTS, supra note 55, § 685.
86. RESTATEMENT (SECOND) OF TORTS, supra note 55, § 685; Leonard, Note, supra note 81, at 1321.
87. Kavanagh, Note, supra note 84, at 325; Leonard, Note, supra note 81, at 1321.
that one spouse could not give consent that would harm the interest of the other spouse. Therefore, courts awarded damages in criminal conversation suits even if the adulterous spouse consented to sexual intercourse with the defendant. A successful defense had to overcome the presumption and illustrate the nonparticipating spouse’s consent prior to the adultery. Moreover, ignorance of the marriage was not a defense as it was in alienation of affections, because the adultery itself was seen as unlawful and harmful.

One judge declared that adultery, as a common-law crime, “consisted of intercourse by any man, married or single, with a married woman not his wife.” A single private act of adultery was considered sufficient; an ongoing relationship was not required. Direct evidence was not needed to find adultery. Rather, guilt could and can be inferred from circumstantial evidence. A “clear and satisfactory” preponderance of the evidence was and is still the accepted evidentiary standard.

The remedy given for an alienation of affections or criminal conversation claim was monetary damages, and juries were given great flexibility in determining damage awards. Damages were intended to provide for loss of consortium; punitive damages and awards for mental distress and economic loss could also be given. A participating spouse’s promiscuous reputation, a nonparticipating spouse’s forgiveness or condonation following the adultery, or a separation or contemplation of divorce at the time of the adultery could mitigate damages. Generally,

88. Prosser and Keeton, supra note 46, at 917.
89. Id. One judge summarized that “[i]t is but the old cowardly excuse set up by the first man[:] ‘The woman gave me of the tree and I did eat.’ It did not save from the penalty the first defendant, and cannot, under the law, save this one.” Seiber v. Pettitt, 49 A. 763, 765 (Pa. 1901).
90. Prosser and Keeton, supra note 46, at 921.
91. Id. at 920.
92. State v. Roberts, 169 Wis. 570, 572, 173 N.W. 310, 311 (1919) (emphasis added); see also Wis. Stat. § 351.01 (1933) (Adultery was listed as an “[o]ffense[] Against Chastity, Morality and Decency”).
93. “The offense of adultery is not necessarily a continuing act and need not be one of which the public has notice.” State v. Brooks, 215 Wis. 134, 137, 254 N.W. 374, 375 (1934).
94. Baker v. United States, 1 Pin. 641, 642 (Wis. 1846).
95. Id.
96. Poertner v. Poertner, 66 Wis. 644, 647, 29 N.W. 386, 388 (1886).
97. Chapman v. Chapman, 3 Wis. 2d 559, 561–62, 89 N.W.2d 207, 208 (1958); Ermis v. Ermis, 255 Wis. 339, 342, 38 N.W.2d 485, 486 (1949); Poertner, 66 Wis. at 647, 29 N.W. at 388; see also Molloy v. Molloy, 46 Wis. 2d 682, 686, 176 N.W.2d 292, 295 (1970).
98. Prosser and Keeton, supra note 46, at 923.
99. See Davidson, Comment, supra note 62, at 653. Only the sexual intercourse aspect of consortium is at issue. See Bedan v. Turney, 34 P. 442, 443 (Cal. 1893) (allowing recovery for an impotent husband under criminal conversation).
100. Prosser and Keeton, supra note 46, at 923.
101. Id. at 918, 921.
courts saw equitable relief as impractical and injunctions as “a serious infringement of the personal freedom of the other spouse and beyond the appropriate reach of equity.”

102 Only Alabama103 and Texas104 courts have granted injunctions against interference in the marriage. A New Jersey court said injunctions could be granted if the enforcement of them was practical.105

Traditionally, either criminal conversation or alienation of affections was recognized in every state except Louisiana as a tort that provided remedies for adultery through family law.106 However, in the twentieth century, critics of amatory torts claimed that these torts were particularly susceptible to abuse. Stories abounded of women being paid to seduce men into hotel rooms. By one count, 500 men were “caught in the act” in New York City in the 1930s.107 In one scenario, a photographer would knock on the door disguised as a waiter or bellboy, enter the room, and begin taking photographs of the seducer and victim as they were taking off their clothes.108 One woman reported involvement in over 100 of these situations for purposes of causing divorces, threatening publicity, and extorting money through settlement.109

Even plaintiffs with genuine actions under interference with marriage torts were accused of having “mercenary or vindictive motives.”110 Critics also said that a home was doomed to crumble if it was susceptible to adultery.111 They argued that it was impossible to compensate heart-balm damages, that amatory torts had no preventative value, and that no person of “decent instincts” would cause family disgrace by bringing an amatory action.112 There was also increasing pressure to acknowledge the autonomy of spouses113 and disavow the belief that a spouse could be seen as property.114

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102. Id. at 923–24.
108. Id.
109. Id.
110. Prosser and Keeton, supra note 46, at 929.
112. Prosser and Keeton, supra note 46, at 929.
114. Prosser and Keeton, supra note 46, at 930.
In 1935, Indiana became the first state to abolish an amatory tort—alienation of affections. An emphasis on personal choice, keeping courts out of the bedroom, decriminalizing sex acts, and removing the use of law to legislate morality resulted in the abolition of amatory torts in almost every state. Only one state argued for minimizing damage awards instead of abolition. Some states abolished amatory torts judicially rather than legislatively. In states where legislatures abolished the amatory torts by statute, these statutes have almost never been held unconstitutional.

II. CURRENT ADULTERY CLAIMS USING IIED

Until recent times, infliction of emotional distress was considered too unforeseeable to allow recovery. Early cases allowed remedies for emotional distress only if the distress was parasitic to another recognized tort, such as assault, battery, false imprisonment, or seduction. However, courts soon acknowledged that emotional distress was a

117. Id. at 190–91.
118. Id. at 190.
119. See Corbett, supra note 106, at 1017–18. But see id. at 1053–54 (proposing a new promarriage "interference with marriage" tort).
120. Prosser and Keeton, supra note 46, at 930; Corbett, supra note 106, at 1048 (stating that only nine states currently recognize either alienation of affections or criminal conversation).
122. For examples of judicial abolition of criminal conversation, see Bearbower v. Merry, 266 N.W.2d 128, 135 (Iowa 1978); Kline v. Ansell, 287 Md. 585, 593 (1980); Fadgen v. Lenker, 365 A.2d 147, 152 (Pa. 1976); Hunt v. Hunt, 309 N.W.2d 818 (S.D. 1981); Hanover v. Ruch, 809 S.W.2d 893, 898 (Tenn. 1991). For examples of judicial abolition of alienation of affections, see Funderman v. Mickelson, 304 N.W.2d 790, 791 (Iowa 1981); Wyman v. Wallace, 615 P.2d 452 (Wash. 1980); see also Hanover, 809 S.W.2d at 898. In Hanover v. Ruch, the plaintiff's wife was a patient of a male gynecologist. 809 S.W.2d at 893. The gynecologist and plaintiff's wife had an adulterous affair for two years, later causing a divorce between plaintiff and his wife after thirty-one years of marriage. Id. Plaintiff-husband filed a suit against defendant-gynecologist, claiming alienation of affection, criminal conversation, and medical malpractice. Id. The jury ruled against the husband on the alienation of affection and medical malpractice grounds. Id. However, the jury ruled in favor of the husband on the count of criminal conversation, awarding the husband compensatory damages of $25,000 and $100,000 in punitive damages. Id. Defendant-gynecologist appealed, and the Tennessee Supreme Court reversed the trial court decision, claiming that the state was offended by claims based on criminal conversation and could retroactively abolish the tort. Id.
124. See id. at 55.
125. Id.
foresawable harm because medical science recognized that fright, shock, grief, anxiety, rage, and shame were actually physiological injuries.\textsuperscript{126}

Recovery for emotional distress as an independent cause of action has been limited to extreme and outrageous misconduct.\textsuperscript{127} In the first such case, a man was held liable for falsely telling a woman that her husband had been maimed in an accident.\textsuperscript{128} In the 1930s, as cases of outrageous conduct increased, courts began recognizing IIED as an independent action.\textsuperscript{129} As a general rule, conduct was deemed liable if it exceeded all bounds generally tolerated by decent society and was especially calculated to cause—and did cause—serious emotional distress.\textsuperscript{130} Such examples included spreading lies that a plaintiff’s son hanged himself,\textsuperscript{131} hounding a plaintiff for sexual intercourse,\textsuperscript{132} or placing a dismembered rat into a sandwich container.\textsuperscript{133}

Courts generally limited recovery under this rule but also considered a defendant’s abuse of a relationship or “power to damage the plaintiff’s interests,”\textsuperscript{134} For example, a plaintiff recovered emotional distress damages because a mob came to his house at night and told him to leave town or they would lynch him.\textsuperscript{135} The Arkansas Supreme Court concluded there was no doubt that the plaintiff’s emotional distress was real.\textsuperscript{136}

Courts generally required that the existing emotional distress had to be “severe.”\textsuperscript{137} The plaintiff had to suffer distress under circumstances severe enough to affect “a reasonable person of ordinary sensibilities”—mere annoyance would not constitute a claim.\textsuperscript{138} Claims were legitimate for inappropriate sexual advances, fake emergency calls meant to cause great shock, or “violent cursing, abuse, and accusations of dishonesty.”\textsuperscript{139} Special circumstances, such as a defendant’s abuse of a plaintiff he knew to be especially sensitive or the mishandling of a dead body, were permitted recovery.\textsuperscript{140}

\begin{itemize}
  \item \textsuperscript{126}\textsuperscript{126}. \textit{id.} at 56.
  \item \textsuperscript{127}\textsuperscript{127}. \textit{id.} at 60.
  \item \textsuperscript{128}\textsuperscript{128}. \textit{id.} (citing Wilkinson v. Downton, 2 Q.B. 57 (1897)).
  \item \textsuperscript{129}\textsuperscript{129}. \textit{id.}
  \item \textsuperscript{130}\textsuperscript{130}. \textit{id.}
  \item \textsuperscript{131}\textsuperscript{131}. \textit{id.} at 61 (citing Bielitski v. Obadiak, [1921] 61 D.L.R. 494 (Saskatchewan, Canada case of false report that person hanged himself)).
  \item \textsuperscript{132}\textsuperscript{132}. \textit{id.} (citing Samms v. Eccles, 358 P.2d 344 (Utah 1961)).
  \item \textsuperscript{133}\textsuperscript{133}. \textit{id.} (citing Great Atl. & Pac. Tea Co. v. Roch, 153 A. 22 (Md. App. 1931)).
  \item \textsuperscript{134}\textsuperscript{134}. PROSSER AND KEETON, supra note 46, at 61.
  \item \textsuperscript{135}\textsuperscript{135}. Wilson v. Wilkins, 25 S.W.2d 428, 428 (Ark. 1930).
  \item \textsuperscript{136}\textsuperscript{136}. \textit{id.} at 429.
  \item \textsuperscript{137}\textsuperscript{137}. PROSSER AND KEETON, supra note 46, at 63.
  \item \textsuperscript{138}\textsuperscript{138}. \textit{id.} (internal quotations omitted).
  \item \textsuperscript{139}\textsuperscript{139}. \textit{id.} at 59.
  \item \textsuperscript{140}\textsuperscript{140}. \textit{id.} at 61–62 (indicating that the latter cases commonly involved collections agencies and creditors).
  \item \textsuperscript{141}\textsuperscript{141}. \textit{id.} at 62–63.
\end{itemize}
In 1948, the First Restatement of Torts was amended to reject any absolute requirement of physical injury for an emotional distress claim. Where physical harm was lacking, courts were likely to look for extreme and outrageous conduct in order to ensure the existence of genuine emotional distress. There are many examples of cases where no evidence of physical disturbance was required. Even so, some courts still explicitly require a showing of physical illness of a serious character or some other nonmental damage.

A plaintiff must satisfy the following elements in an IIED claim: (1) that the defendant acted intentionally or recklessly; (2) that the conduct was extreme or outrageous; (3) that the defendant’s actions caused the plaintiff’s emotional distress; and (4) that the plaintiff’s distress was severe. The second element often decides cases.

Acts inflicting emotional distress are intentional, reckless, or negligent. Intentional and reckless conduct satisfies the first IIED element. An act is intentional when the actor desires to inflict severe emotional distress and when the actor knows that such distress is certain, or substantially certain, to result from his conduct. However, there can also be recovery under emotional distress in situations where a defendant has no intent to harm or where no substantial certainty exists that harm will result from the act. This conduct is commonly considered reckless. An act is reckless if a person deliberately disregards a high

142. Id. at 64.
143. See id.
144. Id. n.93.
145. Id. n.91.
146. RESTATEMENT (SECOND) OF TORTS § 46(1) (1965) [hereinafter 1965 RESTATEMENT]. The Restatement says, “One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.” Id. Wisconsin is among the majority of states to adopt the 1965 Restatement’s definition. See Alsteen v. Gehl, 21 Wis. 2d 349, 357–58, 124 N.W.2d 312, 316 (1963) (stating that Wisconsin does not adopt the definition articulated in the tentative draft of the 1965 Restatement but qualifies it because Wisconsin does not attach liability to those who recklessly cause severe emotional distress).
148. See 1965 RESTATEMENT, supra note 146, § 46. Negligent infliction of emotional distress (NEID) occurs when a defendant did not intend the harm and the harm could have been foreseen or prevented by the exercise of reasonable precautions. PROSSER AND KEETON, supra note 46, at 162. Unlike recklessness, negligence refers to a lack of skillfulness or failure to take precaution rather than a choice with knowledge of the danger it would produce to a reasonable person. 57A AM. JUR. 2d Negligence § 295 (1989).
149. See PROSSER AND KEETON, supra note 46, at 57.
150. RESTATEMENT (SECOND) OF TORTS, supra note 55, § 46 cmt. i.
151. 57A AM. JUR. 2d Negligence, supra note 148, § 293.
152. PROSSER AND KEETON, supra note 46, at 64.
degree of probability that emotional distress will follow. For example, one reckless infliction of emotional distress case involved a defendant who committed suicide in the plaintiff’s kitchen. The plaintiff suffered emotional distress when entering the kitchen full of blood.

The second element usually requires that conduct be so extreme that it is considered atrocious and beyond the bounds of decency in a civilized community. The element is satisfied if “recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim ‘[o]utrageous!’” This crucial requirement of “outrageousness” tends to be the deciding factor for courts. If a court finds the defendant’s conduct “outrageous,” the plaintiff usually wins; if the court does not find the defendant’s conduct “outrageous,” the defendant must win.

Until the late nineteenth century, the common law doctrine of interspousal immunity barred tort claims between husband and wife, including IIED claims. Courts were willing to recognize interspousal suits for property after states adopted some version of the Married Women’s Property Act, which allowed wives to own property separately. Even so, many courts claimed that marital harmony, avoiding frivolous or fraudulent claims, and availability of family and criminal law remedies were policy reasons for continued interspousal immunity for tort claims. However, between 1914 and 1997, forty-five states abolished interspousal immunity and five states permitted immunity only in limited circumstances. Representing the changing sentiment, the Second Restatement authors claimed that the policy reasons for interspousal immunity were “poor justifications for denying all remedy

153. 1965 Restatement, supra note 146, § 500 cmt. a.
154. Prosser and Keeton, supra note 46, at 64 & n.95 (citing Blakeley v. Estate of Shortal, 20 N.W.2d 28, 29 (Iowa 1945)).
155. Id.
156. 1965 Restatement, supra note 146, § 46 cmt. d.
157. Id. Courts often assume that the plaintiff experienced severe emotional distress if the outrageousness element is satisfied. Berger, supra note 147, at 474.
159. Ellman & Sugarman, supra note 158, at 1280–81.
161. See, e.g., Koestler, 162 Wis. 2d at 811, 471 N.W.2d at 16.
162. Berger, supra note 147, at 456–57.
163. Id. at 457. By the 1970s, only a minority of the states accepted interspousal tort immunity. Tobias, supra note 160, at 359 & n.2, 383; see also Meredith L. Taylor, Comment, North Carolina’s Recognition of Tort Liability for the Intentional Infliction of Emotional Distress During Marriage, 32 Wake Forest L. Rev. 1261, 1267 (1997).
for a serious and genuine wrong. Judges also began to recognize that married individuals should have recourse in cases of marital misconduct. 

Similar to the trend in other marital contexts, a number of adultery-based claims arise under IIED. Courts in states that abolished amatory torts seem torn between whether adultery-based IIED claims should be treated as IIED or amatory claims. Despite having statutes and public policies abolishing amatory torts, Colorado, Connecticut, Iowa, Maryland, New Jersey, Ohio, Oregon, and Texas have not barred adultery-based IIED claims.

In contrast, courts in states that forbid adultery-based IIED claims assert that the claims are too similar to ones brought under the abolished amatory torts. These courts claim that to validate an adultery-based IIED claim would violate the public policy against alienation of affections and criminal conversation implicit in their abolition. Wisconsin is a state that bars adultery-based IIED claims, and like most other states that

164. Berger, supra note 147, at 457 (citation omitted).

165. See Leonard Karp & Cheryl L. Karp, Domestic Torts: Family Violence, Conflict, and Sexual Abuse ix (Family Law Series 1989); Taylor, Comment, supra note 163, at 1261. Marital tort cases often involve adultery, parent-child issues, sexually transmitted diseases, or abuse. Karp & Karp, supra, at x.


167. Shields, supra note 166, at 454, 458.


abolished the amatory torts, Wisconsin has seen a shift in plaintiffs’ adultery-based claims from the use of amatory torts to IIED.171

III. THE SHIFT IN WISCONSIN FROM AMATORY TORTS TO IIED

A. Roach v. Keane: The Last Successful Amatory Claim

The last case brought under the amatory torts was Roach v. Keane,172 in which a jury awarded the plaintiff-husband $30,000 in compensation and punitive damages against his wife’s paramour for alienation of affections and criminal conversion.173 The Wisconsin Supreme Court later reduced the award to $6100.174

In Roach, a husband sued his wife’s paramour under both alienation of affections and criminal conversion.175 The Roach marriage was marred by a history of the husband’s own alleged infidelity and domestic abuse.176 However, the jury overlooked the marital history and saw the marriage as a balanced one between the spouses at the time of the wife’s affair.177 The Wisconsin Supreme Court reasoned that the defendant’s affair with the wife helped cause the subsequent divorce and the plaintiff’s emotional harm, which deserved compensation.178

Roach is significant for two reasons. First, it shows that juries are willing to recognize the emotional harm caused by adultery. Moreover, the fact that the appellate court reduced the damage award gives critics the security of knowing that jury awards can be controlled without being eliminated. Second, the court was willing to recognize that emotional damage caused by adultery deserved compensation right up to the legislative abolition. If juries found it legitimate to award damages for adultery in 1976, what happened in Wisconsin after abolition?

B. Koestler v. Pollard: The Precedential Case for Adultery-based IIED Claims

Fifteen years after Roach, plaintiff Koestler brought an IIED claim seeking emotional distress damages.179 Koestler believed he was the father of his wife’s child, who was born during their marriage.180 After

171. See Koestler, 162 Wis. 2d at 797, 471 N.W.2d at 7; Roach v. Keane, 73 Wis. 2d 524, 243 N.W.2d 508 (1976).
172. Roach, 73 Wis. 2d at 524, 243 N.W.2d at 508.
173. Id. at 526, 243 N.W.2d at 510.
174. Id. at 541–42, 243 N.W.2d at 518.
175. Id. at 526, 243 N.W.2d at 510.
176. Id. at 527–30, 243 N.W.2d at 511–12.
177. Id. at 535, 243 N.W.2d at 514.
178. Id. at 541, 243 N.W.2d at 518.
179. Koestler, 162 Wis. 2d at 800, 471 N.W.2d at 8.
180. Id.
learning that his wife had an affair with the defendant Donald Pollard and that Pollard was the biological father of his child. Koestler sued Pollard for IIED.\textsuperscript{181} The Wisconsin Supreme Court held that the statutory abolition of criminal conversation barred Koestler’s claim.\textsuperscript{182}

Koestler’s complaint alleged four facts: (1) that he and his wife were actually married; (2) that his wife and Pollard engaged in sexual intercourse; (3) that his wife gave birth to a child “during the marriage as a result of the aforementioned sexual intercourse;” and (4) “the initial concealment and eventual disclosure of the fact that Pollard [was] the biological father.”\textsuperscript{183} The court noted that the first two facts were identical to those required for a finding of criminal conversation.\textsuperscript{184} Furthermore, the court saw the third fact as a “natural and probable consequence”\textsuperscript{185} of the second fact, and the fourth fact as “undoubtedly a common occurrence in cases of criminal conversation which result in pregnancy.”\textsuperscript{186} Therefore, the court reasoned that Koestler’s complaint essentially stated a criminal conversation claim because the third and fourth facts “flow[ed] directly from the facts constituting criminal conversation.”\textsuperscript{187} The court also noted that the Wisconsin legislature enacted section 768.08, which states that chapter 768’s abolition of amatory torts “shall be liberally construed to effectuate the object thereof.”\textsuperscript{188} Consequently, the Koestler court concluded that a liberal construction of the statute barred Koestler’s claim because his claim alleged criminal conversation.\textsuperscript{189}

Justice Abrahamson’s dissent, however, presented an interpretation of the Koestler facts that would have permitted Koestler’s claim.\textsuperscript{190} Her dissent challenged the majority’s liberal application of section 768.01 by showing that IIED is a “separate and distinct” tort, not one subject to mere liberal construction of alienation of affections and criminal conversation.\textsuperscript{191} The dissent stated that alienation of affections and

\begin{footnotes}
\begin{enumerate}
\item Id.
\item Id. at 809, 471 N.W.2d at 12.
\item Id. at 802–03, 471 N.W.2d at 9.
\item Id. at 803, 471 N.W.2d at 9.
\item Id.
\item Id.
\item Id.
\item Id.
\item Id. at 804, 471 N.W.2d at 10 (internal quotations omitted); \textit{see also} Wis. STAT. § 768.08 (2001–2002).
\item Koestler, 162 Wis. 2d at 805, 471 N.W.2d at 10.
\item Id. at 810, 471 N.W.2d at 12 (Abrahamson, J., dissenting).
\item Id. at 812–13, 471 N.W.2d at 13–14 (Abrahamson, J., dissenting). South Dakota illustrated this distinction clearly. \textit{See} Pickering v. Pickering, 434 N.W.2d 758 (S.D. 1989). In \textit{Pickering}, a husband sued his wife and her paramour under IIED and alienation of affection. \textit{Id.} at 759. The South Dakota Supreme Court held that although the IIED was invalidated on defendant’s summary judgment motion, the alienation of affection claim was not barred because South Dakota allows for damage recovery against paramours under alienation of affection. \textit{Id.}
\end{enumerate}
\end{footnotes}
criminal conversation “focus[...] on the effect of the defendant’s conduct on the plaintiff’s spouse,” while IIED “focuses on . . . the effect of the defendant’s conduct on the plaintiff.” Moreover, while alienation of affections and criminal conversation actions sought compensation for disruption in the marital relationship, a plaintiff with an IIED claim “seeks compensation for injury to his or her person.” Alienation of affections and criminal conversation never required emotional harm to the plaintiff. Therefore, Justice Abrahamson concluded that “the legislature did not abolish [IIED] when it abolished alienation of affections and criminal conversation” for cases involving the marital relationship, because IIED “requires proof of different elements and redresses a different harm than alienation of affections or a criminal conversation action.”

Given Justice Abrahamson’s distinction between IIED and the amatory torts, the question remains whether the public policies that were used to abolish the amatory torts apply to IIED. The majority reasoned that even if the claim were not barred by section 768.01, the claim would still be barred because of the public policy considerations underlying the legislature’s abolition of criminal conversation. The court said that the policies were meant to decrease the evil consequences of the abolished torts and mentioned four of those “evils” in its opinion. However, the evils seem like little more than a recycled list used by courts across the country to justify dismissing claims involving adultery. Moreover, the court provided little information on the likelihood of these evils occurring in the Koestler case.

1. THE FIRST EVIL: ADULTERY-BASED CLAIMS ENCOURAGE BLACKMAIL AND EXTORTION
The court stated that one of the evils of amatory claims is the propensity "for blackmail and extortion by means of manufactured suits in which the threat of publicity is used to force a settlement." However, it is unclear how this reasoning applies to Koestler’s IIED claim. Koestler did not manufacture his suit to create publicity or a settlement. His claim arose out of the emotional distress he felt when Pollard told him four years after Courtney’s birth that Pollard was Courtney’s biological father. It is not wrong to be concerned about extortion or to see it as an issue. It is wrong to use extortion as a blanket dismissal to deny all claims, including those like Koestler’s, where extortion does not apply.

Moreover, Koestler does not fit the profile of an extortionist. At the time of abolition, critics claimed two types of stereotypical tort abusers existed: the gold digger who married for money and the seducer who extorted money from a lover. Married couples also could blackmail wealthy third parties into affairs: there were newspaper accounts of such types of exploiters in the twentieth century. However, the court never explains why Koestler might qualify as any of these types of abusers. Koestler is certainly not a gold digger or a seducer. Koestler could not have been conspiring with his wife, either, because he did not know of the affair until four years after Courtney’s birth. Therefore, the court failed to provide any logical reason why Koestler’s IIED claim specifically provoked concern over blackmail.

Even if the court found a reason to brand Koestler an extortionist, it would be based on an unlikely policy. First, many of the depictions of gold diggers in the early 1900s were motivated by a “misogynistic backlash” to the sexual revolution and female assertiveness. Second, as adultery no longer carries the stigma it once had, today there is not as much incentive for blackmail through adultery. Third, although critics

201. *Id.* at 807, 471 N.W.2d at 11 (quoting PROSSER & KEETON, supra note 46, at 929).
203. *Id.* at 3.
205. Jones, Comment, supra note 57, at 73.
207. Besides, because gold diggers were not in existing marriages, they filed breach of promise to marry claims, not alienation of affection or criminal conversation claims. Larson, supra note 204, at 394 (proposing a new sexual fraud tort based on contract principles).
208. *Koestler*, 162 Wis. 2d at 801, 471 N.W.2d at 8.
of amatory torts claim a high incidence of married couples blackmailing third parties, no data exist to determine how often and in what proportion blackmail occurs in adultery cases relative to other legitimate adultery claims.\textsuperscript{211} Although critics of amatory torts claim that this is true because most extortion claims end in settlement, the frequency of such settlements is impossible to document.\textsuperscript{212} Furthermore, one commentator noted that data suggest that other torts are equally susceptible to abuse.\textsuperscript{213} Therefore, as one Pennsylvania court concluded, courts should be afforded—just as they are with any other cause of action—discretion to distinguish between just and unjust claims that arise under adultery causes of action.\textsuperscript{214}

2. THE SECOND EVIL: ADULTERY-BASED CLAIMS ARE BROUGHT WITH MERCENARY OR VINDICTIVE MOTIVES

The Koestler court’s second evil is that genuine amatory claims “‘[were] brought more frequently than not with purely mercenary or vindictive motives.’”\textsuperscript{215} Two problems arise from this conclusion. First, the threat of vindictiveness exists in many areas of law other than adultery, yet its threat is rarely used as a bar in other claims. As one commentator noted, “when [a plaintiff’s] motives fall short of vindictiveness, it is difficult to distinguish how a plaintiff’s suit for alienation of affections [or an adultery-based IIED claim] differs from a plaintiff’s suit in any other matter.”\textsuperscript{216} The Koestler court never explained why it targeted adultery-based claims with this rationale.

Second, as is problematic with the first evil, critics of alienation of affections and criminal conversation have never shown empirical evidence for their claim that plaintiffs had vindictive motives.\textsuperscript{217} Instead,
this conclusion is based on mere speculation. Considering the Koe
tler facts, it seems unlikely that Koe
tler’s feelings were purely mercenary. Psychological research shows that betrayed spouses are traumatized by the discovery of their spouse’s adultery and experience many difficult and complex emotions. Their feelings must be acknowledged; the recognition of their trauma by others can be an important step in their healing process. Ko
tler’s emotional distress is natural, not mercenary.

3. THE THIRD EVIL: ADULTERY-BASED CLAIMS DO MORE HARM THAN GOOD

The Wisconsin Supreme Court barred Koe
tler’s claim because “[t]o attempt to correct such wrongs or give relief from their effects ‘may do more social damage than if the law leaves them alone.’” However, the only concrete example the court provided was a concern for the innocent children that would “’suffer significant harm’” if suits of this type were allowed.

Three problems arise from the court’s example. First, it is important to remember that not all emotional harm claims arising from adultery

proclaimed, “the people in our community are saying with this verdict that families are important.” Financial Cost of Adultery, INDIANAPOLIS NEWS, Aug. 15, 1997, at A14.

218. See cases cited supra notes 168, 170.
219. Compare Koe
tler, 162 Wis. 2d 797, 471 N.W.2d 7, with cases cited supra note 168, 170.
220. See SPRING & SPRING, supra note 8, at 9–36; RONA SUBOTNIK & GLORIA G. HARRIS, SURVIVING INFIDELITY: MAKING DECISIONS, RECOVERING FROM THE PAIN 79–112 (2d ed.1999); see also DREW, supra note 21, at 3L. 221. SPRING & SPRING, supra note 8, at 18–19; MARCELLA BAKUR WEINER & ARMAND DI MELE, REPAIRING YOUR MARRIAGE AFTER HIS AFFAIR: A WOMAN’S GUIDE TO HOPE AND HEALING 95–97, 107 (1998).
222. Ko
tler only wanted his emotional distress to be recognized, one way or another. See Brief for Appellant at 3, Koe
tler, 156 Wis. 2d ivii (No. 90-1004). Perhaps if Pollard openly expressed his understanding of the damage he caused to Koe
tler, a court case would have been unnecessary to demand recognition natural to the healing process. See JULIA COLE, AFTER THE AFFAIR: HOW TO BUILD TRUST AND LOVE AGAIN 173–94 (1999).
223. Koe
tler, 162 Wis. 2d at 808, 471 N.W.2d at 11 (quoting Richard P., 249 Cal. Rptr. at 249). California refused to award IIED claims against paramours in Richard P., 249 Cal. Rptr. at 249. A husband brought an IIED claim when he learned that the two children he believed he fathered with his wife were not his biological offspring and the result of his wife’s secret adulterous affair. Id. at 247. The California Superior Court denied the husband’s claim, holding that his IIED claim too closely resembled the already-barred tort of alienation of affection. Id. at 249. The court specifically mentioned the public policy against intrafamily litigation when children are involved, stating that unless it is necessary, it is not in the best interest of children to see their families embroiled in bitter legal debates. Id.
224. Koe
tler, 162 Wis. 2d at 809, 471 N.W.2d at 11–12 (quoting Richard P., 249 Cal. Rptr. at 249).
involve children. By focusing on the child, the court is able to ignore the central issue in an IIED claim: the emotional distress of the plaintiff. Second, forbidding litigation with paramours or adulterers would not protect children from the harm caused by adultery. A betrayed spouse will not be prevented from bad-mouthing the would-be opponents; in fact, limiting options for an aggrieved spouse could increase slanderous remarks hurtful to children if aggrieved spouses have no alternative psychological outlet. Third, it is the parents’ responsibility to protect the child’s well-being; the courts are minimally involved in the child’s trauma because most of the harm happens out of court. If a court is concerned about its minimal role, it can forbid children’s testimony in adulterous situations. Keeping children out of the courtroom would protect them from the trauma of what goes on in that environment.

4. THE FOURTH EVIL: JUDICIAL INTERVENTION IS INAPPROPRIATE IN ADULTEROUS SITUATIONS

Last, the Wisconsin Supreme Court claimed that allowing adultery-based IIED claims would cause courts to get involved in disputes where “judicial intervention is inappropriate.” This claim evokes the question of how one determines which disputes are appropriate. The court is even more silent in regard to this evil than the previous three and does not explain why. If the purpose of law is to address injustice, the Wisconsin Supreme Court should have asked, “why can’t the court address these wrongs?”

The following review of the Koestler opinion exposes the Wisconsin Supreme Court’s failure to find an adequate reason for dismissing claims under IIED before they reach juries. Even under a liberal construction of the abolition statute, there is no convincing reason that Koestler’s emotional distress claim should be barred.

First, there is no reason to believe that Koestler’s claim was brought for blackmail or vindictive purposes. Second, the court only stated one reason why more social

225. Id. at 813, 471 N.W.2d at 13 (Abrahamson, J., dissenting).
226. The effects on children are clear regardless of court involvement. One
patient described her childhood in two phases: before her father’s affair and after her
father’s affair. GLASS & STAHEL, supra note 6, at 98–99.
227. Conversation with Jane Larson, Professor, Univ. of Wis. Law School, in
228. Koestler, 162 Wis. 2d at 804, 471 N.W.2d at 10.
229. Perhaps the court is referring to the fact that family matters are often
considered private matters, but the court still does not give a reason. “Consider, for
example, courts’ recent forays into emotional injuries and employment issues.” Corbett,
supra note 106, at 109.
230. The court did not cite only the legislature; it also cited numerous other policy
reasons to dismiss Koestler’s claim. Koestler, 162 Wis. 2d at 797, 471 N.W.2d at 7. This
unfair decision is not merely the result of the legislature’s desire for broad construal; it
also exposes the court’s misguided view of adultery suits.
damage would occur by allowing Koestler’s claim, and that reason can be easily rectified. Third, the court gave no explanation of why Koestler’s claim was inappropriate.
IV. WHY ADULTERY-BASED CLAIMS SHOULD NOT BE BARRED AND HOW AND WHY WISCONSIN SHOULD NOT BAR THEM

In the twentieth century, critics gave numerous reasons to abolish amatory torts. Today, adultery-based claims such as Richard Koestler’s are dismissed before they reach a jury. Advocates of adultery-based claims present numerous reasons for allowing these claims to reach juries.

Articles that support adultery-based claims can be divided into two groups. One group of articles comes from authors that see adultery as an issue that destroys marriages and families. In this Note, the authors of these articles will be called “promarriage activists.” These authors share the view that marriage is an important institution that is worth protecting from outsiders who could defile it. As a result, they tend to support actions against paramours. By punishing the third parties, these authors believe they can preserve what they see as the traditional family: husband, wife, and children.

The second group of articles comes from writers that use feminist perspectives to conceptualize relationships and build a legal framework on which to base actions for adultery. In this Note, the authors of these articles will be called “feminists.” These authors share the view that current legal theories justifying the dismissals of adultery-based claims do not adequately consider feminist views of sexuality and therefore undermine women’s interests in their bodies and autonomy. Their tort-reform efforts focus on applying contract theories and tend to be directed at the spouse participating in the affair. By raising these issues, feminists hope to advance the interests of women, promote gender equality, and encourage healthy and trusting sexual relationships.

Promarriage activists and feminists both offer important contributions to the literature on adultery-based claims. However, their respective camps hardly ever speak to one another. As a result, their tort-reform proposals are directed to their own group of writers but not to all interested parties. The following Sections will utilize both promarriage and feminist perspectives to explain why adultery-based claims should

231. See, e.g., Berger, supra note 147, 526–27; Corbett, supra note 106, at 1020; Jones, Comment, supra note 57, at 85.
232. See Berger, supra note 147, 526–27; Corbett, supra note 106, at 1020; Jones, Comment, supra note 57, at 85.
233. See Corbett, supra note 106, at 1020; Jones, Comment, supra note 57, at 85.
234. See Corbett, supra note 106, at 1020; Jones, Comment, supra note 57, at 85.
238. See generally Hirshman & Larson, supra note 24; Coombs, supra note 206; Larson, supra note 204.
not be barred from juries and how Wisconsin can allow adultery-based IIED claims to reach juries.

A. Why Adultery Claims Should Not Be Barred

Beyond the easily challenged arguments made by the Wisconsin Supreme Court in Koestler, advocates for adultery-based claims still face two major obstacles. The first obstacle is the pair of background assumptions about privacy and consent implicit in the Koestler opinion. By refusing to engage feminist perspectives in its reasoning, the court silently dodged a major critique that exposes the gross deficiencies in the Koestler opinion. In Koestler, the supreme court assumes that privacy is a concept applied to individuals and not to relationships. This approach distorts the ideal of privacy at the expense of marriage. The court also assumes that moral questioning ends at the point where interacting sexual partners give each other consent. This view of consent ignores the consequences of the actors’ behavior on others and prevents discussion of the need for the consent of others. It is imperative that feminist perspectives be discussed in order to expose the ideologies that the court seemed unwilling to acknowledge.

The second obstacle consists of criticisms of adultery-based claims that have arisen outside Wisconsin courts. Critics have chastised adultery-based claims for their flawed origins in property law, their inability to deter adultery, the tendency of juries to give excessively high damage awards, the availability of remedies outside of tort law, and the threat of a litigation explosion. Although the Wisconsin Supreme Court did not mention them, these concerns deserve attention and must be addressed one-by-one.

1. WHAT THE KOESTLER COURT DID NOT DISCUSS: THE UNSPOKEN ASSUMPTIONS IN THE KOESTLER OPINION

a. One: Privacy Applies Only to the Individual

Some critics of the amatory torts have argued that allowing adultery-based claims will violate the government’s policy to respect the sexual privacy of individuals.239 The right to privacy is “a principle as old as the common law.”240 As early as 1890, Professors Warren and Brandeis (not yet a Supreme Court Justice) observed that the right to privacy was extending from the narrow realm of physical interference and property to the broad interpretation of privacy as meaning the right “to be left

239. Larson, supra note 204, at 404.
alone.”  By borrowing the phrase “being let alone” from Judge Thomas Cooley to describe their view of privacy, Warren and Brandeis set a standard in American law with which subsequent scholars have struggled for over a century.

The view of Warren and Brandeis represents the broader ideological division between public and private that has dominated western societies for two centuries. In western societies, people’s lives became increasingly divided into two spheres: a public work sphere that was dominated by men; and a home and family sphere to which women were relegated. This development was contemporaneous with the social standard that sexual activity should occur only within marriage. Accordingly, sexual activity that occurred within marriage remained outside of state interference. As norms for sexual activity increasingly moved outside of marriage in the twentieth century, the legacy of sex as a private matter remained, and an explosion of discourse on sexual liberties gave new and vibrant meaning to the value of privacy in sexual matters.

Catharine MacKinnon notes that the “law of privacy proposes to guarantee . . . freedom of intimacy.” In order to achieve freedom of intimacy, the liberal ideal of privacy assumes that people need to interact “freely and equally,” and that free and equal interactions require the absence of public interference. These assumptions overlook the fact that social relationships have preexisting power inequalities. By remaining uninvolved, the state actually protects “[t]he existing distribution of power and resources within the private sphere,” rather than providing the control of intimacy that the privately disadvantaged do not possess.

Adultery introduces new power inequalities by allowing one spouse to have the resource of a paramour at the expense of the knowledge of the

241. Id.
245. See D’EMILIO & FREEDMAN, supra note 38, at 27; HARTOG, supra note 81, at 142.
246. See ALLEN, supra note 242, at 7.
247. CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 96–97 (1987) [hereinafter MACKINNON, FEMINISM UNMODIFIED].
248. Id. at 99.
249. Id.
251. Id.
252. Id.
nonparticipating spouse.\textsuperscript{253} Once this new power imbalance is introduced, the liberal notion of privacy that assumes free and equal interactions becomes fundamentally unfair. By simply resting on the presumption that an individual’s sexual privacy is at stake, courts simplify the doctrine of privacy in a way that disguises the power imbalances between the spouse with knowledge of the affair and the spouse without knowledge.

Furthermore, “freedom of intimacy” assumes an interaction between people. However, rather than seeing the “freedom of intimacy” as being relational, dominant liberalism conceptualizes privacy between people to be an individual issue. By not recognizing the inherently relational nature of intimacy, the liberal notion of privacy ends up protecting the privacy between the adulterer and paramour instead of the privacy of the married couples’ intimacy. This underlying legal ideology is silent but painfully apparent in the \textit{Koestler} decision, and the \textit{Koestler} court perpetuated the reluctance to deal with these conceptual inconsistencies by dismissing the case.\textsuperscript{254}

Fortunately, many courts are realizing that some pain and suffering caused in private should not be ignored.\textsuperscript{255} Since the abolition of interspousal immunity, many states have applied IIED to marriage.\textsuperscript{256} The high demand has resulted in “‘an explosion of cases involving torts and the marital relationship,’”\textsuperscript{257} and courts now recognize “that existing legal remedies for certain types of marital misconduct are inadequate.”\textsuperscript{258}

It is crucial for courts to recognize that when “the tension in a particular case arises between the interests of a wrongdoer and those of a victim,

\begin{footnotes}
\item[253] Assume a situation in which the paramour knows of the spouse but the spouse does not know of the paramour. Adultery creates power inequalities between spouses. Under the dominant liberal regime, adulterers have the power to choose whether they want access to a third party as a sexual resource. However, adulterers simultaneously deprive their spouses of the power to decide whether they want to be involved in a nonmonogamous relationship. As a result, the nonparticipating spouse lacks the power to rescind her sexual intimacy because she does not have knowledge of the adulterer’s breach. Because of the power imbalance created by the adulterer’s misrepresentation, the liberal notion of privacy works against betrayed spouses. The paramour also has the power to choose whether to participate in a love triangle, while the nonparticipating spouse is not even equipped to make such decision.

\item[254] MacKinnon also notes that the law of privacy also guarantees “individual bodily integrity.” See MacKINNON, FEMINISM UNMODIFIED, supra note 247, at 97. This concern is one that the \textit{Koestler} court completely overlooked. Legislatures and courts are struggling with whether AIDS and other public health issues are relevant to bodily integrity. JANET SHIBLEY HYDE & JOHN D. DELAMATER, UNDERSTANDING HUMAN SEXUALITY 572–73 (6th ed. 1997). These health issues certainly are relevant to the nonparticipating spouse when a nonparticipating spouse is not aware of the adultery.

\item[255] See Berger, supra note 147, at 458.

\item[256] Id. at 459–60 & n.49 (citing Doris Jones Freed & Timothy B. Walker, Family Law in the Fifty States: An Overview, 20 Fam. L.Q. 439, 586 (1987)).

\item[257] Id. at 459–60 n.49 (quoting Robert G. Spector, Marital Torts: Actions for Tortious Conduct Occurring During the Marriage, 5 Am. J. Fam. L. 71 (1991)).

\item[258] KARP & KARP, supra note 165, at ix.
\end{footnotes}
[individual] privacy rights should not shield otherwise unlawful or tortious conduct.\textsuperscript{259} For Koestler to have won his suit, the court would have had to overlook some amount of individual privacy to remedy the emotional distress, but in the process, the court would have protected the relational privacy of the marriage. This trade-off should be desirable to courts regardless of whether the emotional distress was caused by adultery.

The U.S. Supreme Court has definitively established that the state has an interest in the institution of marriage.\textsuperscript{260} The Supreme Court also has clearly stated that freedom of association is a fundamental right protected by the Constitution.\textsuperscript{261} Critics certainly will agree that the freedom of association applies to “keeping courts out of the bedroom,” but they should also agree that this freedom includes the freedom to create a private marital bond. By recognizing adultery-based claims, the Wisconsin Supreme Court would implicitly acknowledge what is already well established: that a notion of marital privacy is meaningless unless it is given some protection. It is the privacy of the marital relationship, not of the individuals or the affair, which must be considered most important in an adulterous triangle.

\textit{b. Two: Consent Between the Paramour and Adulterer Justifies Adultery}

Critics also argue that allowing adultery-based claims will violate the government’s policy of leaving choices about sexual relationships to the participants. The “‘enthronement of the individual choice’“\textsuperscript{262} in modern legal culture has been central to the liberal thought that characterizes modern American society.\textsuperscript{263} In the nineteenth century, the idea of individual choice was used primarily for economic freedom, but traditional sexual and religious norms continued to dominate private life.\textsuperscript{264} By the end of the nineteenth century, the celebration of freedom extended to choosing one’s own lifestyle and having the right to freely develop one’s personality.\textsuperscript{265}

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\textsuperscript{259} Larson, supra note 204, at 441.
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\textsuperscript{263} Williams, supra note 262, at 1562–63.
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\textsuperscript{264} Id.; see Friedman, \textit{The Republic}, supra note 262, at 27–35.
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\textsuperscript{265} See Friedman, \textit{The Republic}, supra note 262, at 35–38; see also Williams, supra note 262, at 1563.
\end{flushright}
Feminists began utilizing the notion of individual choice and autonomy to help women acquire power over their own sexuality.\textsuperscript{266} Today, consent remains a feminist value that promotes a woman’s opportunity for self-determination.\textsuperscript{267} However, feminists generally are among the staunchest critics of the theoretical basis of classical liberalism.\textsuperscript{268}

The liberal image of society that dominates American culture is designed to create “autonomous individuals who produce the greater good by pursuing their own self-interest.”\textsuperscript{269} Mainstream liberals proclaim that in order to enhance individual choice and the self-determination inherent to choice, the government should not interfere with voluntary social transactions.\textsuperscript{270} Government interference results in an inability to exercise the natural right of personal autonomy.\textsuperscript{271} Therefore, the individual’s decision to give consent is used to divide the acceptable from the unacceptable in sexual relationships.\textsuperscript{272} Individuals, whether married or unmarried, hold the right to consent to sex to which only they need give consent.\textsuperscript{273}

The problem with this notion of consent is that it functions as a “moral trump.”\textsuperscript{274} Consent seems morally attractive when it is conceptualized only at the individual level.\textsuperscript{275} However, the dominant liberal notion of consent, like the notion of privacy, ignores the fact that human interactions are relational. To claim that moral questioning ends at the point where an actor gives consent ignores the effects of the actor’s conduct on others and prevents discussion of the need for the consent of other parties for maximizing the greater good.

Adulterous relationships cannot be justified on dominant liberal grounds of consent because not all affected parties are able to provide consent. Today, adultery is justified far too often by relying on sexual

\textsuperscript{266} See Hirshman & Larson, supra note 24, at 9–10.
\textsuperscript{267} Larson, supra note 204, at 426.
\textsuperscript{268} Id. at 424–25 & n.220.
\textsuperscript{269} Williams, supra note 262, at 1567. Hirshman and Larson also note that the notion of the greater good interwoven with liberalism had its origins in utilitarianism. Hirshman & Larson, supra note 24, at 211.
\textsuperscript{270} David L. Kirp et al., Gender Justice 10 (1986); Richard A. Posner, Colloquy, The Ethical Significance of Free Choice: A Reply to Professor West, 99 Harv. L. Rev. 1431, 1431 (1986).
\textsuperscript{271} Carol Gilligan, In a Different Voice: Psychological Theory and Women’s Development 17–22 (1982).
\textsuperscript{273} Courts today generally recognize that consenting adults will face no prosecution for fornication or adultery. Hirshman & Larson, supra note 24, at 260–61.
\textsuperscript{275} Id.
freedom rhetoric that does not incorporate the consent of the betrayed spouse. By withholding the truth of an affair, an adulterer denies the betrayed spouse an opportunity either to consent to the affair or to withdraw consent to continued sexual intimacy with the adulterer. As a result, the betrayed spouses are denied the freedom to choose whatever sexual arrangements they want to join.

Furthermore, allowing ignorance of an adulterous spouse’s transgressions assumes that knowledge of an affair would not affect an honest spouse’s selection of whom to give access to his body and sexuality.\textsuperscript{276} The principle of autonomy guarantees “personal exercise of moral intelligence.”\textsuperscript{277} Without the knowledge of an affair and the subsequent freedom to exercise moral judgment, nonparticipating spouses are not able to make their own consensual decisions that preserve the autonomy needed for self-determination.

2. CRITICISMS OF ADULTERY-BASED CLAIMS NOT LISTED AMONG THE “EVILS” IN KOESTLER

William Corbett notes that “society recognizes that [marital protection is important] because marriage is not always a blissful relationship” and that “spouses have to deal with many matters that are not always fun, including balancing budgets, making decisions about children, caring for aging parents and in-laws . . . . [while] [a] third person, who offers the fun and excitement of sexual relations unencumbered by these other weighty matters, might be an attractive diversion.”\textsuperscript{278} Corbett’s comment reflects the belief that protecting the interests of a nonadulterous spouse is consistent with social interests in protecting marriage and family. Promarriage activists emphasize society’s interest in promoting marriage to accomplish myriad social needs, such as promoting secure relationships.\textsuperscript{279} However, critics of adultery-based torts hold on to counterarguments based on many unsupported and outdated assumptions. This Note next addresses five counterarguments, illustrating why none of them effectively exclude adultery-based IIED claims.

a. One: Adultery-based Claims Resurrect Property Notions of the Wife

\textsuperscript{276} Recently, this understanding prompted many state legislatures to criminalize the transmission of the HIV virus to partners without giving notice that one is a carrier. HYDE & DELAMATER, supra note 254, at 605–06.

\textsuperscript{277} MACKINNON, FEMINISM UNMODIFIED, supra note 247, at 97.

\textsuperscript{278} Corbett, supra note 106, at 1019–20.

\textsuperscript{279} See id. at 998, 1019.
Critics of adultery-based claims are understandably concerned about resurrecting sexist notions of wives as the property of men. As stated in Prosser and Keeton, “[t]he idea that one spouse can recover for an act the other spouse has willingly consented to is perhaps better suited for an era that regarded one spouse as the property of another.” Using conventional consent rationale, at least one state has limited damage awards for adultery to nominal damages, and many judges completely reject criminal conversation on outdated property grounds.

However, a resurrection of property notions is not necessary to recognize the damage caused by adultery. In the early twentieth century, the underlying property basis for amatory torts lost support. There was a growing notion in society that the history of the actions implied that the property notions had no place in contemporary society. This was due in part to the emancipation of women from their status as the property of husbands. As women’s rights increased, the property basis of many tort laws became less acceptable.

Although the criticism that adultery-based claims resurrect property notions of the wife is still used today, it is ineffective because IIED has never rested on the same property theories as amatory torts. IIED has its origins in the interest in peace of mind and is a later development of the cause of action in assault cases. Generally, mental distress torts are considered an evolutionary offshoot of interests in intentional interference with the person rather than property. Therefore, the undesirability of arcane property notions has no real historical connection to modern IIED adultery-based claims, such as the one in Koestler.

Even if the property basis used to criticize amatory torts legitimately can be applied to IIED, the criticism remains ineffective because amatory torts survived long after property theories lost popularity and the right to use them was extended to women. A contract theory more palatable to

280. Id. at 996 & n.40.
281. PROSSER AND KEETON, supra note 46, at 917.
282. Id. (citing Felsenthal v. McMillan, 493 S.W.2d 729, 730 (Tex. 1973)).
283. See, e.g., Bearbower, 266 N.W.2d at 129; Kline v. Ansell, 414 A.2d 929, 930–31 (Md. App. 1980) (rejecting criminal conversion on state equal rights law, but referring to it as outdated on property notions as well); Fadgen v. Lenkner, 365 A.2d 147, 149 (Pa. 1976).
287. Corbett, supra note 106, at 1014 (citing Charles A. Reich, The New Property, 73 YALE L.J. 733 (1964)).
288. PROSSER AND KEETON, supra note 46, at 54–55.
289. Id.
290. See Chamallas, Architecture, supra note 284, at 528.
the modern mind replaced the property theory by the time of the Married Women’s Property Act in the late nineteenth century.\textsuperscript{291} Therefore, it is unclear why the torts would be seen as necessarily propagating the sexist beliefs that supported property theories.\textsuperscript{292}

\textbf{b. Two: Adultery-based Claims Do Not Deter People from Committing Adultery}

Critics also argue that allowing adultery-based claims will not deter adultery.\textsuperscript{293} For millennia, societies around the world have had strict laws surrounding adulterous activity.\textsuperscript{294} To assume that laws against adultery have no effect goes against thousands of years of legal tradition.\textsuperscript{295} Nonetheless, skeptics claim that laws have no deterrent effect because adultery is simply a result of passion.\textsuperscript{296} Psychological research shows that this is simply not true; marital counselors have successfully developed strategies that can deter unfaithfulness.\textsuperscript{297} Their techniques are the result of decades of experience dealing with couples.\textsuperscript{298} One judge believes that people tend to “drift into a situation” involving adultery before they ever become aware of a legal issue.\textsuperscript{299} However, this belief ignores a person’s ability to refrain from harmful activity; counselors and lawmakers have been relying on people’s better judgment for millennia to successfully guide human behavior.\textsuperscript{300}

\textbf{c. Three: Juries Will Award Unreasonably High Damages}

\begin{itemize}
  \item \textsuperscript{291} Corbett, supra note 106, at 1013.
  \item \textsuperscript{292} See William M. Kelly, Note, The Case for Retention of Causes of Action for Intentional Interference With the Marital Relationship, 48 Notre Dame L. Rev. 426, 431 (1972).
  \item \textsuperscript{293} Thompson, Note, supra note 56, at 252; see also O’Neil v. Schuckardt, 733 P.2d 693, 698 (Idaho 1986) (noting that although alienation of affections purportedly existed to discourage third persons from wrecking marriages, “[n]ever has there been any documentation that the existence of the action actually protects marriages”); Wyman v. Wallace, 549 P.2d 71, 74 (Wash. Ct. App. 1976).
  \item \textsuperscript{294} See Daniel E. Murray, Ancient Laws on Adultery—A Synopsis, 1 J. Fam. L. 89, 89–90, 104 (1961).
  \item \textsuperscript{295} See id. at 89 (explaining that “the reasons behind the prohibition of adultery are as numerous as the races of man”).
  \item \textsuperscript{296} See Feinsinger, Heart-Balm, supra note 56, at 992.
  \item \textsuperscript{297} GLASS & STAEBELI, supra note 6, at 379–82 (describing various techniques to affair-proof marriages).
  \item \textsuperscript{298} See id.
  \item \textsuperscript{299} Newton v. Hardy, 149 L.T.R. 165, 167–68 (K.B. 1933).
  \item \textsuperscript{300} Counselor Polly Drew recounts a story of a woman who left her job to protect a coworker from having an affair with her and ruining his marriage. Drew, supra note 21, at 3L. Moreover, one commentator noted that the paramour in a North Carolina case claimed: “[the husband] would probably have to be divorced before I’d see him” when asked whether she would have dated him again while he was still married. Jones, Comment, supra note 57, at 84 & n.183 (citation omitted).
\end{itemize}
Critics also fear that juries will award adultery-based IIED plaintiffs excessive and unreasonably high damage awards. Two reasons made critics skeptical of excessive jury awards. First, the basis of damages is uncertain. In particular, there were clear problems associated with trying to find a monetary value for injured feelings. However, courts today recognize that finding monetary values for practically any injury is problematic. Given the fact that modern torts recognize emotional distress independently from or parasitic to physical damages, there is little reason for this criticism to linger. Courts often have given the task of finding appropriate awards to juries, who possess both the strengths of skepticism and sympathy.

Second, excessively high punitive damage awards present a potential injustice to the defendant. One commentator claimed that the “unusual legislative receptivity [toward abolition] is a recent reaction against . . . the perversion of . . . juries to express their emotional sympathy and moral indignation.” Even when juries claim that damages are compensatory, critics argue that the measure of damages is too unpredictable to prevent excessively high awards. For instance, in a recent North Carolina case, Dorothy Hutelmyer sued her husband’s secretary under IIED after her husband left her to move in with the secretary. The jury awarded Mrs. Hutelmyer $500,000 in punitive damages. Although critics consider this award “excessive,” how excessive these damages are depends on what one understands the purposes of these torts to be. Part of the compensatory and punitive power of tort remedies is their potential to award high damages to plaintiffs.

### d. Four: Other Options Exist to Remedy Betrayed Spouses

Some critics argue that adultery-based claims should be barred because there are other options available to remedy betrayed spouses’ emotional damage. The notion that adultery torts no longer served their purpose emerged as early as 1935 in an article written by Professor

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302. Feinsinger, Heart-Balm, supra note 56, at 979.
304. Larson, supra note 204, at 461.
306. Feinsinger, Heart-Balm, supra note 56, at 979.
307. See, e.g., Brown, supra note 285, at 505.
308. Hutelmyer, 514 S.E.2d at 558.
309. Id.
311. See id. at 82.
Nathan Feinsinger. In his article, Feinsinger stated that proponents of legislation abolishing amatory torts supported family or criminal law sanctions to preserve family solidarity. However, family and criminal law alternatives are not available in most states today. States either do not have criminal statutes against adultery or, like Wisconsin, have statutes but no longer enforce them. Furthermore, between 1969 and 1985, every state implemented no-fault divorce. The widespread acceptance of no-fault divorce essentially eliminated the traditional option of fault-based divorce. Therefore, ironically, the argument that torts against adulterers are not needed is the argument that has become outdated.

e. Five: Adultery-based Torts Will Clog the Courts

Critics also fear that allowing adultery-based torts will overburden the courts. As already discussed, abolishing torts against adulterers has not kept courts from being overloaded with cases. Creative plaintiffs have shifted their attention to IIED since the amatory tort abolition. The abundance of adultery-based IIED case law diminishes the power of the “clogging the courts” critique and should be a signal to courts that adultery-based claims will not go away. This should also signal courts about a much-needed tort reform because plaintiffs continue to feel that their pain and suffering are too great to be ignored. The excuse that a tort brings too many cases can be used for all areas of law.

B. The Solution: How and Why Wisconsin Should Not Bar Adultery-Based IIED Claims

312. Feinsinger, Heart-Balm, supra note 56, at 979. This argument mistakenly is still used today. See Garrett E. Asher, Recent Development, Hanover v. Ruch, 809 S.W.2d 893 (Tenn. 1991), 59 TENN. L. REV. 159, 165 (1991).
313. Feinsinger, Heart-Balm, supra note 56, at 992. Rather than serving their purpose like family or criminal sanctions, a 1939 New York abolition statute said the torts were instead “subjected to grave abuses, causing extreme annoyance, embarrassment, humiliation and pecuniary damage to many persons wholly innocent and free of any wrongdoing, who were merely the victims of circumstances.” Larson, supra note 204, at 395 n.88 (quoting N.Y. CIV. PRACTICE ACT § 61-a (Thompson 1939)).
315. Berger, supra note 147, at 453 n.17.
316. Id.
317. Then-Chief Justice Joe Greenhill of the Texas Supreme Court even questioned the claim that courts are clogged, referring to his observation that courts “seldom see a suit of this nature.” Felsenthal, 493 S.W.2d at 730 (addressing a criminal conversation claim).
Corbett reminds us that the regulation of adultery has been a major legal issue for time immemorial.\textsuperscript{318} Especially given the effects on families, it makes sense that laws against adultery would be central to any legal system. Therefore, “the issue to be debated is not whether law will regulate sexual conduct, but how law will regulate it.”\textsuperscript{319}

This Note proposes that Wisconsin courts follow states that do not bar adultery-based IIED claims, while at the same time preserving a high bar for recovery.\textsuperscript{320} The bright-line exclusion currently used in Wisconsin undermines legitimate claims. Critics identify a number of concerns that should not be ignored, but given the accepted death of interspousal immunity, it seems strange that in modern times adultery-based claims are singled out for exclusion.

There are sensible, practical reasons for treating adultery-based claims like any other IIED claim. First, opening IIED to adultery-based claims recognizes the relational reality of social life. Dominant notions of privacy and consent protect adulterous relationships, adulterers, and paramours over marital relationships and nonparticipating spouses. As a result, the law of privacy distorts social life, and the doctrine of consent ignores the nonparticipating spouse. Allowing adultery-based IIED claims rectifies the inconsistencies in dominant notions of privacy and consent by acknowledging all of the relationships and individuals involved in adulterous situations.

Second, allowing adultery-based IIED claims implicitly acknowledges promarriage activists’ concerns about how marriage is undermined. Although allowing adultery-based claims will do more to uphold marriage, critics are legitimately concerned about the reemergence of property theories of the wife. To appease critics around the country, it must be emphasized that the rationale under IIED is not based on property theory. Adultery-based IIED claims are based on the same rationale as any other IIED claim: that an individual’s peace of mind has been violated. There is no need to resurrect property notions for causes of action under IIED.


\textsuperscript{319} Corbett, \textit{supra} note 106, at 1018. “[E]motionail suffering is a natural and foreseeable result of intimate betrayal, and a form of pain with which many people have had personal experience.” Larson, \textit{supra} note 204, at 461.

\textsuperscript{320} For a precedent that would have favored Koestler’s claim, see generally \textit{C.M.}, 726 A.2d 998. In \textit{C.M.}, a husband sued his wife's paramour after learning that the paramour was the biological father of his two children. \textit{Id.} at 1004. The New Jersey Superior Court denied the paramour’s motion to dismiss, saying that keeping the affair and true paternity of the children a secret for almost three years “without regard to the high degree of probable harm [to the husband] would indeed lead the average member of the community to exclaim ‘Outrageous!’” \textit{Id.} The court concluded that the husband’s allegations were severe enough to state an emotional distress claim. \textit{Id.}
Third, adultery-based IIED claims are desirable because they will maintain a higher bar to recovery than the amatory torts; the presumption that adultery causes distress is easier to rebut under IIED than under the amatory torts. While criminal conversation only required proof of adultery, IIED requires four elements be satisfied. This not only gives IIED greater built-in protection against rewarding blackmail and mercenary motives but also provides an additional safeguard against an abundance of damage awards and a subsequent tidal wave of cases. Furthermore, preserving defenses traditionally used in amatory claims adds more protection from frivolous claims. Consent of the nonparticipating spouse can remain an absolute defense, and the paramour can have the additional defense of ignorance of the marriage.

Fourth, one of the strengths of IIED is that it can be used on either the adulterer or paramour. Amatory torts could only be used on the paramour since they were based on a spouse’s property right over the unfaithful spouse. Given the complex factual circumstances of most adultery-based claims, it can sometimes seem like the adulterer should be held responsible and in other cases the paramour. Rather than assuming that one party will be more responsible for the emotional distress than another party, IIED allows the plaintiff and jury to decide who is responsible and to what degree. Plaintiffs can choose whether to sue the adulterer, paramour, or both. Juries can then decide whether damages seem appropriate and how much each party should be allotted. The ability to sue either party may also minimize the likelihood of blackmail because any of the participating parties potentially could be held liable.

Critics may feel that allowing adultery-based IIED torts puts a cost on marriage by making it more likely that people will divorce. The fact is that adultery-based IIED claims almost exclusively are filed during or after a divorce so they pose little if any threat to intact marriages. Some critics also may feel that these claims reintroduce fault into divorce, but fault always rested on the adulterer; with IIED, some or all of the responsibility may go to the paramour, which is where it may belong.

Finally, juries are more desirable fact finders than judges in deciding IIED adultery-based claims. In theory, juries exist because jurors have a better sense of what constitutes acceptable behavior in their community than a judge. Critics are concerned about how juries will distinguish between claims that deserve compensation and those that do not. This concern undermines the jury’s function as the very source of that determination.

321. Shields, supra note 166, at 454.
322. Koestler, 162 Wis. 2d at 804, 471 N.W.2d at 13. For a three-part test, see Shields, supra note 166, at 454.
323. See Berger, supra note 147, at 514.
324. See cases cited supra note 168, 170.
For example, the Wisconsin Supreme Court justices who believed that Koestler’s case offended public sentiments were out of touch with community standards. In a national social science survey published the same year Koestler filed suit, approximately 50% of respondents thought that legal action should be taken against adulterers.\textsuperscript{325} Out of this majority, 38% favored assigning adulterers to a rehabilitation or treatment program for help, 33.4% favored probation with the threat of jail if probation is violated, 13.2% favored a lesser punishment such as jail or a fine, and 11.5% favored a prison term of at least a year.\textsuperscript{326}

More importantly, moral attitudes about adultery have not changed. During Koestler’s marriage and in other recent surveys, almost 90% of Americans thought adultery was “always wrong” or “almost always wrong” when given response options of “always wrong,” “almost always wrong,” “wrong only sometimes,” and “not wrong at all.”\textsuperscript{327} Therefore, jurors, as representatives of the public, would know their own community standards better than judges and be better able to determine the appropriate limits of adultery-based suits. It may be that juries tend to only find real emotional distress in specific factual circumstances, such as when a child results from an affair or when a plaintiff contracts a sexually transmitted disease. If that is the case, both critics and proponents should accept the trends as indicative of public sentiment.

Similarly, jurors can provide a better measure of what the community considers outrageous because they are from the community themselves. It is well accepted that community standards vary across the country. Our legal system allows for that variation. Given the wide range of sentiments in different communities, jurors are perhaps the best indicators of what constitutes outrageous behavior that a community can offer. Moreover, a group of peers has the ability to gauge whether a plaintiff suffered real emotional distress or whether the suit is merely mercenary. Jurors bring their life experiences and observations of adulterous situations to the courtroom, making them well equipped to recognize genuine emotional distress.\textsuperscript{328}

Even if juries are allowed to hear claims in Wisconsin, critics understandably would be concerned about high damage awards. Excessive awards generally can be limited easily by using preexisting review mechanisms.\textsuperscript{329} Similarly, in adultery-based IIED claims,
Wisconsin judges can use existing rules of judicial review to adjust excessive damage awards as they do with any other claim.330

V. CONCLUSION

In the last few decades, tort remedies once available to betrayed spouses harmed by adultery virtually have died. This is due primarily to misconceptions about the disproportionate uses of the legal system for spurious claims and myths about the American public’s view of adultery. However, the relentless caseload that continues to come to courts regarding adultery and the recent emergence of law review articles favoring the reemergence of sexual honesty and responsibility in the legal system suggest that laws need to address problems arising from adulterous relationships.

As it stands today, Wisconsin law transmits inconsistent signals about sexual responsibility and perpetually protects adulterers and their paramours at the expense of their spouses. Allowing adultery-based IIED claims while maintaining a high bar to recovery can remedy this inconsistency, appease critics, and successfully address the widespread concerns raised by feminists and profamily activists.

Richard Koestler—and millions like him—are waiting.