HOW AUTOMOBILE ACCIDENTS STALLED THE DEVELOPMENT OF INTERSPOUSAL LIABILITY

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INTRODUCTION

IN 1920 Lacy Crowell sought damages from her husband, W.J. Crowell, for infecting her with a "vile and loathsome" venereal disease.[1] This was not W.J.'s first brush with the law. After divorcing his first wife, he aided his second wife in proving his own adultery to obtain another divorce. As W.J. testified, "Women have always been my trouble."[2] His trouble with women only grew worse. Before Lacy's suit, he was convicted in Virginia under the White Slave Act and was appealing a conviction for abducting a girl under the age of sixteen. Nevertheless, his liability to Lacy was unclear. He employed the defense that had served other husbands well for decades: he claimed Lacy had no cause of action because the par-

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[1] Crowell v. Crowell, 105 S.E. 206, 207 (N.C. 1920).

[2] Id. at 208.

ties were husband and wife at the time of the offense, and under the common law, spouses could not sue each other. The Supreme Court of North Carolina sustained Lacy's cause of action, but that outcome was far from certain.

In all likelihood, a suit like Lacy's would have been rejected by most state supreme courts if brought only a decade earlier or later. This Note will analyze the development of interspousal tort liability for personal harms following the enactment of the married women's property acts,[3] statutes that altered the common law status and legal rights of women in states throughout the country. These developments came in several distinct chronological periods. The first period, from the 1860s through 1913, was defined by narrow judicial construction of married women's acts. Courts reasoned that the acts were meant to confer a procedural rather than a substantive right, doubted their legislatures would grant causes of action to married women that might remain unavailable to married men, and denied that personal torts were property. They supplemented these statutory arguments with public policy concerns, warning that allowing such suits would destroy familial harmony and that adequate remedies were available from the divorce and criminal courts.

[3] Although the married women's acts are not an uncommon topic within legal scholarship, most legal historians end their narratives in the nineteenth century and limit their queries to issues of property law. See, e.g., Kathleen S. Sullivan, Constitutional Context: Women and Rights Discourse in Nineteenth-Century America (2007); Richard H. Chused, Late Nineteenth Century Married Women's Property Law: Reception of the Early Married Women's Property Acts by Courts and Legislatures, 29 Am. J. Legal Hist. 3 (1985) [hereinafter Chused, Reception]; Richard H. Chused, Married Women's Property Law: 1800–1850, 71 Geo. L.J. 1359 (1982) [hereinafter Chused, Married Women's Property Law]; Suzanne D. Lebsock, Radical Reconstruction and the Property Rights of Southern Women, 43 J. S. Hist. 195 (1977); Sara L. Zeigler, Uniformity and Conformity: Regionalism and the Adjudication of the Married Women's Property Acts, 28 Polity 467 (1996); Jacob Katz Cogan, Note, The Look Within: Property, Capacity, and Suffrage in Nineteenth-Century America, 107 Yale L.J. 473, 485–89 (1997); Kay Ellen Thurman, The Married Women's Property Acts (Jan. 6, 1966) (unpublished manuscript, available through Hein's Legal Theses and Dissertations). In contrast, the study of interspousal tort liability extends through the late twentieth century and involves issues only tangentially related to traditional aspects of property. Joseph A. Ranney, Anglicans, Merchants, and Feminists: A Comparative Study of the Evolution of Married Women's Rights in Virginia, New York, and Wisconsin, 6 Wm. & Mary J. Women & L. 493, 493–94 (2000).

By 1914, these statutory and public policy reasons no longer seemed adequate. Most courts evaluating interspousal personal torts for the first time from 1914 through 1920 allowed the claims. These courts disagreed with the earlier statutory constructions and harshly criticized established public policy rationales. Further, they reasoned that harmonious couples would not bring causes of action against each other and that it was nonsensical to allow divorce and criminal proceedings yet disallow tort suits. Legal scholars saw the allowance of these suits as both more sensible and truer to legislative intent. They therefore predicted other courts would follow the new trend.

Their expectations were quashed, however, in the next two decades, when the vast majority of courts decided not to allow interspousal torts. This reversal is often glossed over as part of the natural evolution of the rule.[4] When recognized, however, the only reason scholars have provided to explain the change is that the stagnation and internal split of the women's movement, following the successful passage of the Nineteenth Amendment, reduced pressure on the judiciary to interpret the married women's acts liberally.[5] This hypothesis, though chronologically possible, is problematic for two reasons.[6] First, scholars suggesting this theory have

[4] See, e.g., Daniel M. Oyler, Interspousal Tort Liability for Infliction of a Sexually Transmitted Disease, 29 J. Fam. L. 519, 519 (1990) ("These arguments began to erode in several jurisdictions after the passage of statutes called Married Women's Acts."); Carl Tobias, Interspousal Tort Immunity in America, 23 Ga. L. Rev. 359, 421–22 (1989) ("[A]ny change in such a longstanding and widely recognized doctrine which happened so abruptly [as it did from 1914–1920] was unlikely to continue at a comparable pace. Accordingly, it is not surprising that during the ensuing half century immunity eroded more gradually."); Kathryn Walker Lyles, Note, *Suit* Your Spouse: Tort and Third Party Liability Arising from Divorce Actions, 30 Am. J. Trial Advoc. 609, 609 (2007) ("However, after the harbinger holding in the Connecticut case of *Brown v. Brown,* interspousal immunity began a steady descent into its grave.").

[5] Carl Tobias, The Imminent Demise of Interspousal Tort Liability, 60 Mont. L. Rev. 101, 102 (1999) ("[T]he rise of the women's movement and its culmination in winning the suffrage during the teens may explain the early group of decisions which overruled the doctrine. The relative quiescence of the women's movement over the succeeding four decades seems to explain the slow pace of abolition in that period, while the revitalization of the movement during the mid-1960s appears to explain the doctrine's rapid decline from 1970 until the present."); see also Ranney, supra note 3, at 535.

[6] Language from at least one case suggests the opposite effect of the Amendment's enactment. See Crowell v. Crowell, 105 S.E. 206, 210 (N.C. 1920) ("Wives are no longer chattels. There are half a million women voters in North Carolina. They do not

failed to support the implied assumption that the women's movement influenced judicial decisions at all. Without developing the claim that the women's movement effectively pressured the judiciary to interpret the married women's acts liberally through 1920, it cannot follow that any subsequent reduction in pressure would lead to more conservative statutory constructions. More importantly, the assertion that the split of the women's movement led to stagnation is itself questionable.[7] Although the National Women's Party's (NWP) support of absolute sex equality was irreconcilable with the League of Women Voters' (LWV) desire for protective legislation,[8] this tension did not preclude either group from advocating for and achieving change on both the state and federal levels.[9] Thus, the internal conflict of the women's movement cannot be pinpointed as a primary cause of trends in the development of interspousal liability.

need to beg for protection for their persons, their property, or their characters. They can command it.").

[7] See J. Stanley Lemons, The Woman Citizen: Social Feminism in the 1920s (1973); Ronnie L. Podolefsky, The Illusion of Suffrage: Female Voting Rights and the Women's Poll Tax Repeal Movement After the Nineteenth Amendment, 7 Colum. J. Gender & L. 185 (1998); see also Gretchen Ritter, Gender and Citizenship After the Nineteenth Amendment, 32 Polity 345, 349 (2000) ("The displacement of coverture was a long historical process that began in the middle of the nineteenth century, *accelerated* right after the passage of the Nineteenth Amendment, and continued for decades thereafter.") (emphasis added).

[8] Ariela R. Dubler, In the Shadow of Marriage: Single Women and the Legal Construction of the Family and the State, 112 Yale L.J. 1641, 1690 (2003); see also David E. Bernstein, *Lochner*'s Feminist Legacy, 101 Mich. L. Rev. 1960, 1974 (2003) (describing how NWP leaders refused to exempt protective legislation from the proposed Equal Rights Amendment); Michael J. Goldberg, Law, Labor, and the Mainstream Press: Labor Day Commentaries on Labor and Employment Law, 1882–1935, 15 Lab. Law. 93, 108–09 (1999) (explaining the irreconcilable views of protective legislation advocates and of Equal Rights Amendment proponents); Reva B. Siegel, Text in Contest: Gender and the Constitution from a Social Movement Perspective, 150 U. Pa. L. Rev. 297, 308 n.24 (2001) (acknowledging the historical tension between those in favor of an Equal Rights Amendment and those who prefer protective legislation).

[9] Dubler, supra note 8, at 1691; Richard F. Hamm, Mobilizing Legal Talent for a Cause: The National Woman's Party and the Campaign to Make Jury Service for Women a Federal Right, 9 Am. U. J. Gender Soc. Pol'y & L. 97, 98–100 (2001); Podolefsky, supra note 7, at 185–86; Reva B. Siegel, She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family, 115 Harv. L. Rev. 947, 1008–09 (2002); Joan G. Zimmerman, The Jurisprudence of Equality: The Women's Minimum Wage, the First Equal Rights Amendment, and *Adkins v. Children's Hospital*, 1905–1923, 78 J. Am. Hist. 188, 188–90 (1991).

Instead, this Note suggests that the trend allowing interspousal torts was complicated by the emergence and prevalence of a new fact pattern: negligent automobile accidents. Unlike the willful torts considered in the earlier periods, it was obvious in the negligence cases that both the plaintiff-wife and defendant-husband wished for the wife to recover. The invisible defendant, truly responsible for paying any awarded damages, was an insurance company. The resultant concern about insurance fraud and collusion halted judicial willingness to allow interspousal torts. And, because they saw no legal reason to distinguish between negligent and willful torts, the courts construed the married women's acts so as to not allow *any* interspousal torts.

The study of interspousal tort liability is important in that it embraces the suggestion that gender deserves greater attention in the study of tort law.[10] At the same time, however, this Note removes the apparently gender-based line of cases from the traditional realm of feminist analysis and places it within the narrative of tort law more generally.[11] The most prolific advocate of acknowledging the gendered nature of torts has noted, "The rich and diverse body of existing feminist work lays the foundation for and intersects with scholarship in torts, but much of it cannot fairly be called torts scholarship . . . ."[12] The leading piece on interspousal tort liability

[10] See Leslie Bender, A Lawyer's Primer on Feminist Theory and Tort, 38 J. Legal Educ. 3, 4, 36–37 (1988) [hereinafter Bender, A Lawyer's Primer]; Leslie Bender, An Overview of Feminist Torts Scholarship, 78 Cornell L. Rev. 575, 575, 579–80 (1993) [hereinafter Bender, An Overview]; Leslie Bender, Teaching Torts as if Gender Matters: Intentional Torts, 2 Va. J. Soc. Pol'y & L. 115, 115–16, 144 (1994); Lucinda M. Finley, A Break in the Silence: Including Women's Issues in a Torts Course, 1 Yale J.L. & Feminism 41, 44–45 (1989); Margo Schlanger, Injured Women Before Common Law Courts, 1860–1930, 21 Harv. Women's L.J. 79, 79 (1998); see also John Fabian Witt, Toward a New History of American Accident Law: Classical Tort Law and the Cooperative First-Party Insurance Movement, 114 Harv. L. Rev. 690, 693 (2001) ("[T]he history of accident law in the United States is usually recounted as separate and apart from the main currents of the political and legal history of the nineteenth and twentieth centuries.").

[11] On the value of studying the history of accident law, see generally Kenneth S. Abraham, The Uses of Accident Law's Past, 1 J. Tort L., Iss. 2 (2007), http://www.bepress.com/jtl/vol1/iss2/art2/; John Fabian Witt, Contingency, Immanence, and Inevitability in the Law of Accidents, 1 J. Tort L., Iss. 2 (2007), http://www.bepress.com/jtl/vol1/iss2/art1/.

[12] Bender, An Overview, supra note 10, at 575. But see, e.g., Barbara Y. Welke, Unreasonable Women: Gender and the Law of Accidental Injury, 1870–1920, 19 L. & Soc. Inquiry 369, 371–72 (1994) ("[Gender difference] was both backdrop and fore-

"indicates how the doctrine developed *in the context of women's history*."[13] Unfortunately, and perhaps because of its feminist approach, the leading piece also misconstrues the development of the law, underemphasizing judicial willingness to allow interspousal torts during a key period.[14] The result is the oversimplification of works by other scholars, who mistakenly believe that there was a nearly universal, patriarchy-rooted refusal to allow interspousal torts.[15] In contrast, this Note argues that the feminist interpretation

ground. But it did not determine. Indeed, giving credence to the fundamental role of gender difference in late 19th- and early 20th-century American society actually requires letting go of the concept of a chain of historical causation controlled by particular actors. In its place, one must be willing to embrace a more nebulous sense of historical causation: individual happenings, all informed by and to some extent reflecting a common gender ideology, coming together to produce an end, which bore the unmistakable imprint of gender."); see also Martha Chamallas & Linda K. Kerber, Women, Mothers, and the Law of Fright: A History, 88 Mich. L. Rev. 814, 864 (1990) ("Increasingly, legal scholars have chosen to examine a host of seemingly neutral tort doctrines in search of latent systematic biases against less privileged groups."); Thomas Koenig & Michael Rustad, His and Her Tort Reform: Gender Injustice in Disguise, 70 Wash. L. Rev. 1, 3 (1995) ("Tort law does not descend disembodied from the thin, rarefied air of the legal heavens. Modern tort law is not value-free; it is continually forged and remolded in a social and political context."); Schlanger, supra note 10, at 79 ("My aim is to illuminate the common law of torts and its relation to and with ideas about gender difference.").

[13] Bender, An Overview, supra note 10, at 579 (emphasis added) (discussing the scholarship of Carl R. Tobias).

[14] Tobias, supra note 4 at 383. Professor Tobias provides an exceptionally thorough history of interspousal tort immunity. However, Tobias problematically divides the immunity case law into the following periods: 1863–1913, 1910, 1914–1920, and 1921–1970. Id. at 383. The odd decision to place 1910 in its own category (to accommodate an important Supreme Court case), despite its actual placement in the first category, illustrates the difficulty authors have faced in creating a cohesive narrative about the law's development. Additionally, as will be discussed in more detail in Section II.B, Tobias's claim that "[f]rom 1914 until 1920, jurists in seven states allowed such actions, and a comparable number denied them," is inaccurate and consequently downplays judicial willingness to allow interspousal torts. Id. It is not even entirely clear why Tobias thought it was helpful to split the case law at 1920. Tobias did acknowledge the fear of insurance fraud in the spousal context, but he did so in discussing the reasons immunity was retained by some jurisdictions at the time his article was published. Id. at 449–56.

[15] In particular, Tobias's work has been used by scholars in their historical narratives about privacy. Because Tobias underemphasizes judicial willingness to allow torts from 1914–1920 and ignores the widespread approval of this development by legal observers, subsequent scholars have unfortunately overlooked the counterexamples to their privacy-related theses. See, e.g., Jonathan L. Hafetz, "A Man's Home Is His Castle?": Reflections on the Home, the Family, and Privacy During the Late Nineteenth and Early Twentieth Centuries, 8 Wm. & Mary J. Women & L. 175, 189–93

of interspousal tort history, which views judicial hesitance as demonstrating "the persistence of the patriarchal principle that husbands and fathers have the right to discipline their females,"[16] distorts the development of the case law. Judicial willingness to allow interspousal causes of action was thwarted more directly by the emergence of automobile accidents than by the patriarchy.

Part I of this Note will provide background information regarding the common law concept of coverture, the legal unity of man and wife, and its gradual reduction through the passage of married women's acts. Part II moves into the interspousal tort cases themselves, broken down into time periods. These chronological subcategories are (1) the 1860s through 1913, the period in which no interspousal tort claims were allowed; (2) 1914 through 1920, when a trend allowing the claims developed; and (3) 1921 through 1940, a period in which the seemingly inevitable evolution toward allowing the claims stalled.[17] It was during this third period, this Note argues, that judicial hesitancy emanated not from the persistence of the patriarchy in judicial proceedings but rather from the emergence of automobile accident suits and fear of insurance fraud.

(2002); Linda C. McClain, Inviolability and Privacy: The Castle, the Sanctuary, and the Body, 7 Yale J.L. & Human. 195, 212–15 (1995); Reva B. Siegel, "The Rule of Love": Wife Beating as Prerogative and Privacy, 105 Yale L.J. 2117, 2163 n.163 (1996).

[16] Finley, supra note 10, at 46 ("[D]espite the grant of the right to sue, courts used tortured equality reasoning to rule that the Acts were not intended to give women a right against their husbands."); see also, Bender, A Lawyer's Primer, supra note 10, at 8 ("The primary task of feminist scholars is to awaken women and men to the insidious ways in which patriarchy distorts all of our lives.").

[17] Today most states allow interspousal torts, but the period from 1941 to the present is outside the scope of this Note. See Jennifer Wriggins, Interspousal Tort Immunity and Insurance "Family Member Exclusions": Shared Assumptions, Relational and Liberal Feminist Challenges, 17 Wis. Women's L.J. 251, 252 (2002) (arguing that private insurance exclusions for family members have resulted in the de facto continuance of interspousal immunity); see also Jill Elaine Hasday, Contest and Consent: A Legal History of Marital Rape, 88 Cal. L. Rev. 1373, 1485 n.414 (2000); Siegel, supra note 15, at 2163 n.163; Daniel T. Barker, Note, Interspousal Immunity and Domestic Torts: A New Twist on the "War of the Roses," 15 Am. J. Trial Advoc. 625, 625 n.3 (1992); Wayne F. Foster, Annotation, Modern Status of Interspousal Tort Immunity in Personal Injury and Wrongful Death Actions, 92 A.L.R.3d 901, 923–24 (1979).

I. BACKGROUND

Under the common law doctrine of coverture, a husband and wife were one legal entity.[18] As Blackstone explained, "By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband."[19] Because husband and wife were considered one person under the law, it was nonsensical for a wife to sue her husband as doing so would be equivalent to suing herself.

The historical restrictions on married women's legal rights began to change in the United States in the 1830s with the passage of married women's property acts. Most scholars have divided passage of the acts into three waves.[20] These waves are complicated by state legislatures' repeated amendment and revision of the statutes,[21] but trends can be discerned. The first wave protected women's property from their husbands' creditors, often by allowing women to retain title to the property they brought to the marriage or subsequently acquired.[22] Almost every state in existence at the time adopted such a statute.[23] These statutes were far from radical, with one scholar finding their "most striking feature" to be "the lack of sustained sharp controversy."[24] For the purposes of this Note, what is most crucial to identify about the first-wave statutes is that they were motivated by economic concerns, rather than a desire to change women's status.[25] Economic problems, especially

[18] The history of coverture has been discussed extensively by legal historians, so only a brief summary is provided here. One of the most helpful summaries can be found in Norma Basch, Invisible Women: The Legal Fiction of Marital Unity in Nineteenth-Century America, 5 *Feminist Stud.* 346 (1979).

[19] William Blackstone, 1 Commentaries *430.

[20] Chused, Married Women's Property Laws, supra note 3, at 1398.

[21] Chused, Reception, supra note 3, at 3; Reva B. Siegel, The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings, 1860–1930, 82 Geo. L.J. 2127, 2141 n.45 (1994); Thurman, supra note 3, at 3; see, e.g., F.A. Erwin, Assault and Battery (Wife vs. Husband), 3 U.L. Rev. 67, 70–71 (1897) (describing legislative enactments in New York and noting new acts in 1848, 1849, 1853, 1860, 1862, 1867, 1876, 1880, 1884, 1887, and 1890).

[22] Chused, Married Women's Property Laws, supra note 3, at 1398; Sullivan, supra note 3, at 69.

[23] Chused, Married Women's Property Laws, supra note 3, at 1398.

[24] Thurman, supra note 3, at 7.

[25] Chused, Married Women's Property Laws, supra note 3, at 1400–04.

after the Panic of 1837, caused serious concern about debtors and resulted in the exemption of various types of property from the reach of creditors.[26] The married women's property acts thus were counterparts to legislation in the fields of banking, bankruptcy, and debtor rights, such as homestead exemptions and spendthrift trusts, rather than statutes designed to change the status of women.[27] The statutes also extended some of the protections traditionally available in courts of equity, such as equity trusts and settlements, to those previously unable to afford them.[28] This development is best viewed as part of the larger movement for codification and the ideals of Jacksonian democracy.[29] While changing views of women may have helped ease the passage of these statutes[30], they were not the foundation, nor was the women's movement significantly involved.[31]

The next two waves were rooted in the first.[32] These overlapping phases first granted married women full *feme sole* rights to control their property and later gave them control over their earnings.[33] The second and third waves are less consistently defined in the literature than the first, and their cause and reception are controversial. One continuing debate involves the extent to which these later waves were the result of efforts by the women's movement. It seems relatively accepted that in the mid-nineteenth century "an increasingly vocal woman's rights movement began to lobby state legislatures and mount petition campaigns demanding suffrage and

[26] Id at 1400.

[27] Sullivan, supra note 3, at 69; Chused, Married Women's Property Laws, supra note 3, at 1401; Thurman, supra note 3, at 15–16.

[28] Married women were recognized as separate entities in equity since the seventeenth century. Thurman, supra note 3, at 1–2.

[29] Id. at 11–13. Thurman also identifies two other contemporary movements that "made intellectually more palatable the enactment of the Married Women's Property Acts": the Protestant Evangelical Movement and the "continuing natural rights philosophy developed during the eighteenth century Enlightenment." Id. at 9; see also Sullivan, supra note 3, at 67; Chused, Married Women's Property Law, supra note 3, at 1409; Peggy A. Rabkin, The Origins of Law Reform: The Social Significance of the Nineteenth-Century Codification Movement and Its Contribution to the Passage of the Early Married Women's Property Acts, 24 Buff. L. Rev. 683 (1974); Siegel, supra note 21, at 2136.

[30] Chused, Married Women's Property Laws, supra note 3, at 1400, 1404–09.

[31] Id. at 1410; Thurman, supra note 3, at 13.

[32] Sullivan, supra note 3, at 69.

[33] Ranney, supra note 3, at 517; Zeigler, supra note 3, at 478–79.

the reform of marital status law."[34] Whether or not this held true in every state is more difficult to determine. Many scholars cite Norma Basch's detailed study of feminist activism in New York,[35] but similarly comprehensive studies are lacking for most other states. Furthermore, even in states with active women's movements, it cannot be assumed that women petitioners influenced legislation without an in-depth review of primary sources.

Scholars also disagree about whether it is most appropriate to view the "piecemeal"[36] changes made to women's rights as a joint effort between legislators and judges to maintain the patriarchal status quo[37] or as mainly the result of conservative judiciaries stalling the efforts of liberalizing legislatures. It is true that legislators could have drafted statutes that extended women's rights more explicitly. Legislative short-sightedness and sloppy statutory drafting certainly contributed to the slow evolution of the statutes.[38] For example, New York's first statute guaranteed a married woman sole title to her property without extending her the right to contract. This left both spouses unable to convey the property until the legislature passed an additional statute the following year.[39] However, judicial reliance on the common law command that statutes in derogation of the common law be narrowly construed seems to have been most responsible for the halting advances made in this arena. Despite statutory variation by region and time of enactment, judicial interpretation of the statutes remained uniform.[40]

Furthermore, a reading of the cases shows the extremes to which judges went to justify retaining the common law. A particularly sensational example from the middle of the enactments came in the case of *Ritter v. Ritter*, in which a wife attempted, under a recently enacted married woman's act, to maintain an action of debt against her husband by her "next friend."[41] The court began by ob-

[34] Siegel, supra note 21, at 2137; see also Chused, Married Women's Property Laws, supra note 3, at 1424; Ranney, supra note 3, at 516.

[35] Norma Basch, In the Eyes of the Law: Women, Marriage, and Property in Nineteenth-Century New York (1982).

[36] Chused, Reception, supra note 3, at 3.

[37] See, e.g., Siegel, supra note 21, at 2140.

[38] Thurman, supra note 3, at 37–38.

[39] Id. at 38–39.

[40] Zeigler, supra note 3, at 481–82.

[41] 31 Pa. 396 (1858).

serving that "[t]he marriage relation, as old as the human race, and the basis of the family, which is itself the basis of society and civil states, has always been sedulously guarded and cherished by the common law."[42] The unity of man and woman is "one of the favourite maxims of the common law" and "of course it excludes the possibility of a civil suit between them." This arrangement "is in exact accordance with the revealed will of God, was designed for the protection of the woman, and leads to that identification of sympathies and interests, which secures to families and neighbourhoods the blessings of harmony and good order."[43] The court continued, with increasing intensity and passion:

> The maddest advocate for woman's rights, and for the abolition on earth of all divine institutions, could wish for no more decisive blow from the courts than this. The flames which litigation would kindle on the domestic hearth would consume in an instant the conjugal bond, and bring on a new era indeed—an era of universal discord, of unchastity, of bastardy, of dissoluteness, of violence, cruelty, and murders.[44]

The court was quite clear about when it would allow such a catastrophe to occur: "Never." It continued, "If it is to be done, it must be by the legislature, and then by no indirection, or inferential consequence, but by direct, plain, unmistakable English."[45] The court's attitude toward the legislature's arguably ambiguous intent is exemplary of the attitude judges would espouse for decades to come and which was recognized by the judges themselves.[46] The observation of one judge, made in the late 1870s, holds true throughout the period studied in this Note: "The courts, which have ever been conservative, and which have always been inclined to check, with an unsparing hand, any attempted departure from the principles of the body of our law," regarded the passage of the married women's acts "as a violent innovation upon the common law."[47] Conse-

[42] Id. at 398.
[43] Id.
[44] Id.
[45] Id.
[46] See generally Roscoe Pound, The Ideal Element in American Judicial Decision, 45 Harv. L. Rev. 136, 143 (1931).
[47] Wells v. Caywood, 3 Colo. 487, 491 (1877).

quently, they "construed them in a spirit so narrow and illiberal as to almost entirely defeat the intention of the law-makers."[48] This judicial aversion to the liberalization of marital relations, first shown in the contexts of property and contract, proved even more severe and enduring in tort.

II. THE DEVELOPMENT OF INTERSPOUSAL LIABILITY FOR PERSONAL TORTS[49]

A. 1860s–1913: Uniform Rejection of Interspousal Liability

Women first attempted to bring causes of action for interspousal personal torts under the married women's acts in the 1860s,[50] with the first case reaching a state supreme court in 1875.[51] From 1875 through 1911, nine state supreme courts heard and dismissed actions for assault and battery, wrongful imprisonment, seduction, and infliction of venereal disease.[52] The period of complete denial

[48] Id.; see also Austin v. Austin, 100 So. 591, 601 (Miss. 1924) (Ethridge, J., dissenting) ("It is well known that the judicial department of the whole country is reluctant to travel new-cut roads, and the disposition to cling to the absurd and brutal rules of the common law in so far as it deals with women and women's rights in the marriage relation is nothing less than astonishing.").

[49] This subtitle stands in contrast to the usual description of this legal development: the demise of spousal immunity. Although the difference may seem merely semantic, speaking of the rise of liability is more accurate. At the common law, people did not speak of husbands as "immune" from suit because doing so would have been nonsensical; wives could not sue *anyone*. So, rather than chipping away at men's immunity piece by piece, the legislatures slowly extended married women's rights to bring suit. Referring to the development in this legal field as "the demise of spousal immunity" is thus misleading and indicative of a male-centered analytical perspective.

[50] Freethy v. Freethy, 42 Barb. 641 (N.Y. App. Div. 1865); Longendyke v. Longendyke, 44 Barb. 366 (N.Y. App. Div. 1863). These early New York cases carried great weight and were frequently cited by state supreme courts. They retained their importance as persuasive authority even after the New York Court of Appeals case of *Schultz v. Schultz*, 89 N.Y. 644 (1882), because that case was issued without an opinion.

[51] Peters v. Peters, 42 Iowa 182 (1875).

[52] Peters v. Peters, 103 P. 219, 220 (Cal. 1909) (suit brought by husband against wife); Henneger v. Lomas, 44 N.E. 462 (Ind. 1896); *Peters*, 42 Iowa 182; Libby v. Berry, 74 Me. 286 (1883); Bandfield v. Bandfield, 75 N.W. 287 (Mich. 1898); Strom v. Strom, 107 N.W. 1047 (Minn. 1906); Schultz v. Schultz, 89 N.Y. 644; Nickerson v. Nickerson, 65 Tex. 281 (1886); Schultz v. Christopher, 118 P. 629 (Wash. 1911). *Abbott v. Abbott*, 67 Me. 304 (1877), is not included in this list because it was heard prior to Maine's enactment of any statute that could reasonably be construed as providing a basis for an interspousal cause of action. Consequently, the court's decision merely discusses the common law.

of these claims also included a U.S. Supreme Court case construing a District of Columbia statute in 1910.[53] The cases are remarkably consistent in their reasoning throughout the period, relying on narrow statutory interpretation and public policy rationales.

Courts devoted most of their attention to interpretation of state statutes. Following the common law rules of judicial interpretation, they construed statutes in derogation of the common law narrowly and declined to allow interspousal torts in the absence of explicit legislative intent.[54] Courts declared that the common law cases from the United States and England, which uniformly barred interspousal torts, "clearly indicate what the rule should be . . . unless we find some statutory provisions to the contrary."[55] They believed "[t]he legislature should speak in no uncertain manner when it seeks to abrogate the plain and long-established rules of the common law," and "[c]ourts should not be left to construction to sustain such bold innovations."[56]

Following this reasoning, it is hardly surprising that when faced with a statute allowing "any married woman [to] bring and maintain an action in her own name, for damages, against any person," one early court construed the text so as not to include the woman's husband within the scope of "any person."[57] Other statutes were more amenable to the courts' preferred reading. The courts deter-

[53] Thompson v. Thompson, 218 U.S. 611 (1910).

[54] See, e.g., *Peters*, 103 P. at 220; *Peters*, 42 Iowa at 183 ("Whilst it must be admitted that very radical changes have been made in the relation of husband and wife, still it seems to us that these changes do not yet reach the extent of allowing either husband or wife to sue the other for a personal injury committed during coverture."); *Nickerson*, 65 Tex. at 285.

[55] *Peters*, 103 P. at 220; see also*, Thompson*, 218 U.S. at 616; *Bandfield*, 75 N.W. at 288. The most frequently cited common law cases are *Phillips v. Barnet*, 1 Q.B.D. 436 (1876), and *Abbott*, 67 Me. at 304.

[56] *Bandfield*, 75 N.W. at 288.

[57] Freethy v. Freethy, 42 Barb. 641, 642 (N.Y. Gen. Term 1865) ("It is true that the words 'any person' are very comprehensive, and might in a proper case be held to include a husband; but the question is, whether, in view of all . . . the surrounding circumstances, we can infer that the legislature intended that a wife might bring such an action."); see also Longendyke v. Longendyke, 44 Barb. 366, 368 (N.Y. Gen. Term 1863) ("The right to sue her husband in an action of assault and battery may perhaps be covered under the literal language of this section; but I think such was not the meaning and intent of the legislature, and such should not be the construction given to the act."). For a critique of this narrow interpretation, see Note, Can a Married Woman Maintain an Action of Tort Against Her Husband for a Tort Committed During Coverture?, 22 Yale L.J. 250, 253 (1913) [hereinafter Can a Married Woman].

mined that statutes explicitly allowing women to maintain suits without joining their husbands as co-plaintiffs were not intended to allow a woman to sue her husband,[58] because the passage of a married women's act "enlarges not her right of action, but her *sole* right of action."[59] Under this reasoning, the married women's acts were merely procedural. Allowing a wife to sue "does not enable her to maintain suits which could not have been maintained before, but to bring in her own name those which before must have been brought in the husband's name, either alone or as a party plaintiff with her."[60]

Courts further declared that because "[t]he purpose of the statute was to place the husband and wife on an equality as to actions by either for injuries to person, reputation or property," legislatures could not have intended to extend the right to maintain an interspousal suit to women without extending the same right to men.[61] They explained that "when it is conceded that the husband has not the right under this statute, and did not have at common law, to sue the wife for a tort, it is plain that no such right is conferred upon the wife."[62] Finally, that statutes permitted married property owners to "maintain an action [for property], or for any right growing out of the same, in the same manner and extent as if they were unmarried," also did not translate into causes of action for personal torts.[63] Arguing to the contrary would "involve[] the admission or assumption of the thing undertaken to be proved."[64]

[58] See Strom v. Strom, 107 N.W. 1047, 1048 (Minn. 1906); Schultz v. Christopher, 118 P. 629, 629–30 (Wash. 1911).

[59] Libby v. Berry, 74 Me. 286, 288 (1883) (emphasis added).

[60] Id. at 288–89; see also *Thompson*, 218 U.S. at 617; Henneger v. Lomas, 44 N.E. 462, 464 (Ind. 1896). Law reviews criticized judicial inconsistency in statutory construction, finding it problematic that courts disallowed personal torts yet allowed contract suits and property torts. See, e.g., Case Comment, Action by a Wife Against Her Husband for a Tort to the Person, 23 Yale L.J. 613, 616–17 (1914) [hereinafter Action by a Wife]; Recent Case, Husband and Wife—Rights of Wife Against Husband—Wife's Right to Sue Husband for Personal Torts, 28 Harv. L. Rev. 109, 109 (1914) [hereinafter Rights of Wife Against Husband].

[61] *Strom*, 107 N.W. at 1048; see also *Christopher*, 118 P. at 630.

[62] *Christopher*, 118 P. at 630.

[63] Peters v. Peters, 42 Iowa 182, 184 (1875) (quoting Iowa Code § 2204 (1873) (codified at Iowa Code § 597.3 (1999))).

[64] Id. at 185; see also Bandfield v. Bandfield, 75 N.W. 287, 287 (Mich. 1898).

Without a statutory cause of action, the right to maintain personal torts was deemed not to be a property right.[65]

Despite the strong attention paid to the wording of the statutes, the text was not the exclusive basis for refusing to allow the claims. This is perhaps best illustrated by the strong dissent provided in the Supreme Court case of *Thompson v. Thompson*. Both the majority and minority opinions quoted the relevant statutes, yet reached opposing results.[66] While the majority found its own holding "obvious from a reading of the statute in the light of the purpose sought to be accomplished,"[67] the dissent claimed "there is not here . . . any room whatever for mere construction, so explicit are the words of Congress."[68] The dissent added that the majority's interpretation put Congress "in the anomalous position" of allowing a married woman to maintain a cause of action to recover property but not to recover for damages from "brutal assaults upon her person."[69]

Contemporary observers noted that given the majority's admission that the wife could "sue her husband separately in *tort* for recovery of her property and damages for its detention . . . there are no grounds for going further and discriminating as to the kinds of tort for which she could or could not maintain an action, as the majority do."[70] The Court's narrow construction of the broad statute at issue, critics noted, "seems to be a pure judicial limitation on the intent of the legislature."[71] Indeed, although statutory construction was relied upon through 1940, it became increasingly obvious that other concerns, more than the text itself, influenced judicial construction.

First, courts suggested that spouses had adequate remedies in the divorce and criminal courts.[72] Criminal courts can "inflict punishment commensurate with the offense committed."[73] The courts

[65] *Peters*, 42 Iowa at 185; see also *Strom*, 107 N.W. at 1048.
[66] Thompson v. Thompson, 218 U.S. 611, 615–16 (1910).
[67] Id. at 617.
[68] Id. at 621 (Harlan, J., dissenting).
[69] Id. at 623.
[70] Can a Married Woman, supra note 57, at 251.
[71] Id.; see also Case Comment, Liability of the Husband to the Wife for an Assault upon Her, 16 Va. L. Reg. 856, 857 (1911) [hereinafter Liability of the Husband].
[72] The accuracy of this belief may have varied by class. Siegel, supra note 15, at 2162–63.
[73] *Thompson*, 218 U.S. at 619.

of equity, which granted divorces, "can do justice to her for the wrongs of her husband, so far as courts can do justice" and "may take into account the cruel and outrageous conduct inflicted upon her by him" in determining how much property to award her.[74] When a wife attempted to sue her husband in tort after divorce, "[t]he presumption must obtain that all their rights were determined in the divorce proceeding."[75] Moreover, "[w]ith divorces as common as they are now-a-days, there would be new harvests of litigation" if interspousal tort suits were allowed after divorces were granted.[76]

Courts seemed even more invested in the belief that allowing interspousal torts would "destroy the sacred relation of man and wife . . . [by] open[ing] the door to lawsuits between them for every real and fancied wrong."[77] Although legal scholars challenged the familial harmony rationale before the turn of the century,[78] courts continued to employ it throughout this period. In 1910, the Supreme Court reasoned, "Whether the exercise of such jurisdiction would be promotive of the public welfare and domestic harmony is at least a debatable question."[79]

Observers were quick to note, however, that the courts should not be in the business of "maintain[ing] the common law in the teeth of the words of the statute, because they consider it better public policy."[80] The Supreme Court's decision in *Thompson* received great attention, with most commentators favoring the dis-

[74] Bandfield v. Bandfield, 75 N.W. 287, 288 (Mich. 1898); see also *Thompson*, 218 U.S. at 617.

[75] *Christopher*, 118 P. at 630.

[76] Abbott v. Abbott, 67 Me. 304, 308 (1877).

[77] *Bandfield*, 75 N.W. at 288.

[78] One scholar noted that the New York courts "have adverted, quite unnecessarily it would seem, to the danger to conjugal union and tranquillity [sic], and have allowed their emotions in this regard to influence rules of interpretation and construction." Erwin, supra note 21, at 68.

[79] Thompson v. Thompson, 218 U.S. 611, 618 (1910).

[80] Can a Married Woman, supra note 57, at 255. Feminist scholars ignore the public reaction, focusing instead on the holding to make their point. See, e.g., Finley, supra note 10, at 46–47 (1989) ("This ruling [*Thompson v. Thompson*] was not surprising for the time, since domestic violence was not regarded as a significant problem—the court considered the specter of 'frivolous' litigation to be far more serious—and society retained the attitude that the right to 'discipline' the wife was among men's privileges in marriage.").

sent.[81] Scholars observed that the dissenting opinion was "[t]he first intimation that the tide was starting to turn."[82] This negative sentiment toward the majority view was not limited to the legal world. *The Washington Post* first covered the case under the title, "May a Man Beat His Wife? U.S. Supreme Court to Rule,"[83] and after the decision noted, "Curiously, it is the alleged wife-beater who makes the first successful stand against the latter-day tendency of lawmakers to enter the home and revolutionize the relations between husband and wife."[84] By 1913, the question arose: "Is [allowing interspousal torts] enough against public policy and the modern conception of the marital relation to justify the Court in contravening the plain words of the statute?"[85] The following year, courts began answering that question with a resounding "no."

B. 1914–1920: Trend Allowing Interspousal Liability

The unrelenting judicial refusal to recognize interspousal torts ceased in 1914, when a woman in Connecticut was permitted to maintain a cause of action against her husband for assault and false imprisonment.[86] From 1914 through 1920, seven state supreme courts allowed spouses to maintain actions for assault and battery, wrongful imprisonment, wrongful death, and infliction of venereal disease.[87] During the same period, only three courts hearing the

[81] Case Comment, Husband and Wife—Domestic Relations—Torts—Right of One Spouse to Sue the Other in Tort, 11 Minn. L. Rev. 79, 80 (1926).

[82] Comment, Actions for Personal Tort by Wife Against Husband and Child Against Parent, 32 Yale L.J. 315, 317 (1923).

[83] May a Man Beat his Wife? U.S. Supreme Court to Rule, Wash. Post, Nov. 14, 1910, at 8.

[84] A District Cause Celebre, Wash. Post, Dec. 14, 1910.

[85] Note, Can a Married Women, supra note 57, at 255.

[86] Brown v. Brown, 89 A. 889 (Conn. 1914).

[87] Johnson v. Johnson, 77 So. 335 (Ala. 1917); Fitzpatrick v. Owens, 186 S.W. 832 (Ark. 1916); *Brown*, 89 A. at 889 (Connecticut); Gilman v. Gilman, 95 A. 657 (N.H. 1915); Crowell v. Crowell, 105 S.E. 206, 206 (N.C. 1920); Fiedeer v. Fiedeer, 140 P. 1022 (Okla. 1914); Prosser v. Prosser, 102 S.E. 787 (S.C. 1920). It is interesting to note that the vast majority of courts hearing the cases in this period were located in the South. No reason has been found for this pattern, but it is noteworthy in that it seems to indicate two serious flaws in the literature. First, it suggests that the numerous studies that attempt to do regional comparisons by selecting a "representative" state for each region cannot possibly do so by selecting a single state to represent "the South." Secondly, it severely undermines the hypothesis that the women's movement was responsible for trends in gendered tort law. The women's movement was far less active

matter for the first time denied the suits,[88] with one additional court affirming its earlier forbiddance.[89] State supreme courts, explicitly referring to the *Thompson* dissent and influenced by changing perceptions of women arising from the feminist movement and women's participation in World War I,[90] showed an increasing willingness to allow women to sue their husbands.

To justify departing from earlier holdings, the courts provided their own statutory interpretations and questioned the standard public policy concerns.[91] Before construing their own statutes, however, several courts strongly criticized the "[m]any carefully reasoned, though we cannot say well reasoned, cases" that barred the torts in prior years.[92] One court observed, "[M]odern Legislatures, though vainly, it seems, have by plain, explicit, and unambiguous language attempted to break away from the common-law rule and to put the courts out of hearing of the still lingering echoes of bar-

in the South than in the North, yet most of the courts allowing the suits were located in the South.

[88] Rogers v. Rogers, 177 S.W. 382 (Mo. 1915); Lillienkamp v. Rippetoe, 179 S.W. 628 (Tenn. 1915); Keister's Adm'r v. Keister's Ex'rs, 96 S.E. 315 (Va. 1918). Tobias counts four additional jurisdictions as refusing to recognize the torts and consequently suggests that courts were roughly split on whether to allow the torts in this period. Tobias, supra note 14, at 409 n.245. These extra cases are excluded from the tally in this Note for the following reasons: *Heyman v. Heyman*, 92 S.E. 25 (Ga. Ct. App. 1917), was not decided by the highest court in the state; *Drake v. Drake*, 177 N.W. 624 (Minn. 1920), was not heard as an issue of first impression—it relied explicitly on *Strom v. Strom*, 107 N.W. 1047, 1047 (Minn. 1906)—and the question was "whether under our statutes the husband may maintain a suit *in equity* against the wife to restrain" her from nagging him, rather than a suit at law for damages; *Drake*, 177 N.W. at 624 (emphasis added); *Dishon's Adm'r v. Dishon's Adm'r*, 219 S.W. 794 (Ky. 1920), was construing a wrongful death statute, not a married women's act; and *Butterfield v. Butterfield*, 187 S.W. 295 (Mo. Ct. App. 1916), did not address the matter as an issue of first impression, nor did the case reach the highest court in the state.

[89] *Drake*, 177 N.W. at 624.

[90] Lemons, supra note 7, at ch. 1.

[91] Two of the seven jurisdictions allowing the claims in this period did not construe statutes in derogation of the common law narrowly. See Fiedeer v. Fiedeer, 140 P. 1022, 1024 (Okla. 1914); Prosser v. Prosser, 102 S.E. 787, 788 (S.C. 1920). While this certainly helped the judges write persuasive opinions, it does not seem to have been crucial to the outcomes, given the identical outcomes in the states that continued to construe statutes narrowly. Furthermore, license to construe statutes broadly did not guarantee that the torts would be allowed. See Conley v. Conley, 15 P.2d 922, 925 (Mont. 1932).

[92] *Fiedeer*, 140 P. at 1023.

baric days."[93] Another court harshly noted that under the common law, a wife could not sue her husband because "by marriage the wife became the chattel of the husband . . . as was the case in this state as to wives until the Constitution of 1868, though as to slaves it had ceased on their emancipation in 1865."[94] Continuing the comparison between slaves and wives, the court noted that "[t]he owner lost the right to chastise his slaves in 1865, but the wife was not emancipated from the lash of the husband till 9 years later" by a court case.[95]

More substantively, courts compared and contrasted their statutes to those previously construed, yet did not feel confined to follow disagreeable precedent. A court faced with "statutes more or less similar to the one here in question" nevertheless reached the opposite holding as prior courts.[96] To support this change, courts discarded the proposition that married women's acts merely eliminated procedural impediments to suit. Under a statute requiring that a wife sue alone for injuries to her property, person, or reputation, it was illogical to permit property actions while forbidding those for personal torts.[97] That a statute allowed a woman "to sue and be sued . . . as though she were a feme sole" did not "necessarily exclude[] the right to maintain a suit against her husband for the reason that, if she were a feme sole, she would have no husband to sue."[98]

In direct contrast to the earlier period, some courts saw personal harms as creating property rights: "a wife has a right in her person; and a suit for a wrong to her person is a thing in action; and a thing in action is property, and her property."[99] Also in contrast to earlier court decisions, these jurisdictions determined that statutes stating that women and men have the same rights did not preclude

[93] Id.; see also Fitzpatrick v. Owens, 186 S.W. 832, 834 (Ark. 1916).

[94] Crowell v. Crowell, 105 S.E. 206, 209–10 (N.C. 1920).

[95] Id. at 210. For another judge referencing slavery to demand rights for women, see *Austin v. Austin*, 100 So. 591, 595 (Miss. 1924) (Ethridge, J., dissenting).

[96] Brown v. Brown, 89 A. 889, 891 (Conn. 1914). Later courts were able to rely upon construction of statutes nearly identical to their own to support allowing the torts. See, e.g., *Crowell*, 105 S.E. at 208–09.

[97] Johnson v. Johnson, 77 So. 335, 337–38 (Ala. 1917); see also Gilman v. Gilman, 95 A. 657, 657 (N.H. 1915).

[98] *Fitzpatrick*, 186 S.W. at 833, 835.

[99] Prosser v. Prosser, 102 S.E. 787, 788 (S.C. 1920); see also *Brown*, 89 A. at 891.

women's causes of action.[100] That a statute granted women greater rights than their husbands "may be true, and still the statute is in accord with previous legislation on the subject which gives the wife greater rights than the husband. It was within the power of the Legislature to give the wife new rights without conferring reciprocal rights upon the husband . . . ."[101] Another court suggested that a married women's statute was not even needed to give a woman specific rights because they "belonged to her before marriage." The statute merely precluded the rights from being "lost by the fact of marriage as they were under the common-law status."[102] Under this theory, "the test to determine whether the plaintiff can maintain this action is to inquire whether she could maintain it if she were unmarried, and not to inquire who the defendant is . . . ."[103]

Public policy rationales provided by the earlier courts were seen as illogical. Forbidding spouses to sue each other in tort because such claims would "invade the holy sanctity of the home and shatter the sacred relations between husband and wife" was inconsistent with the courts' trumpeting of the use of divorce and criminal courts.[104] Courts following the new trend found it difficult to understand why a wife should not have a civil remedy for "the brutal assault of a man with whom she has unfortunately been linked for life," given that the husband could already be criminally prosecuted and jailed.[105] Domestically tranquil couples would not sue each other, and once a marriage turned hostile, "there is no reason why the husband or wife should not have the same remedies for injuries inflicted by the other spouse which the courts would give

[100] Fiedeer v. Fiedeer, 140 P. 1022, 1024 (Okla. 1914).

[101] *Fitzpatrick*, 186 S.W. at 836. But see Fitzpatrick v. Owens, 187 S.W. 460, 460 (Ark. 1916) (Hart, J., dissenting). This issue remained unresolved in the next period studied, too. In *Shirley v. Ayers*, 158 S.E. 840, 842 (N.C. 1931), a court that had already determined women may sue their husbands in tort skirted the issue of whether men could do the same because the case involved a pre-nuptial tort. Another court that allowed women to sue their husbands noted that regarding the husband's right to sue his wife, "we are not now required to and do not decide." Fitzmaurice v. Fitzmaurice, 242 N.W. 526, 529 (N.D. 1932).

[102] *Brown*, 89 A. at 891; see also *Gilman*, 95 A. at 657.

[103] *Gilman*, 95 A. at 657.

[104] *Fiedeer*, 140 P. at 1023; see also Johnson v. Johnson, 77 So. 335, 338 (Ala. 1917).

[105] *Fiedeer*, 140 P. at 1023–24; see also *Brown*, 89 A. at 891.

them against other persons."[106] The existing alternatives, "so far from being adequate remedies, appear to us to be illusory and inadequate."[107] Plaintiffs would not receive reparations from a criminal conviction.[108] Furthermore, turning the argument that harms could be compensated during divorce settlements on its head, one court asked, "Now, upon what theory would such additional alimony be allowed? Unquestionably it would be on the ground of the tort she had received at the hands of her husband. We can see no difference in principle in an indirect and direct recovery for tort."[109]

In the face of these objections, the three courts hearing the issue for the first time and disallowing the suit used first-period statutory and public policy reasoning to support their decisions.[110] Now, however, they were forced to acknowledge the existence of contrary holdings. "[T]he strong, if not the almost unbroken, current of authority" suddenly seemed less secure, with the first of these three courts noting that "the wisdom or justice of such statutes" was not a matter of judicial concern.[111]

The earlier rationales also were reused by the one court that heard the issue in both the first and second periods. That court seemed to find the statutory construction less persuasive in the second period, too, noting that "[t]he authorities in other jurisdictions are not in harmony, though the statutory provisions upon the

[106] *Brown*, 89 A. at 892 ("No greater public inconvenience and scandal can thus arise than would arise if they were left to answer one assault with another and one slander with another slander until the public peace is broken and the criminal law invoked against them.").

[107] *Johnson*, 77 So. at 338.

[108] Crowell v. Crowell, 105 S.E. 206, 209 (N.C. 1920).

[109] *Fiedeer*, 140 P. at 1025.

[110] Rogers v. Rogers, 177 S.W. 382, 382 (Mo. 1915); Lillienkamp v. Rippetoe, 179 S.W. 628, 629 (Tenn. 1915); Keister's Adm'r v. Keister's Ex'rs, 96 S.E. 315, 316–17 (Va. 1918).

[111] *Rogers*, 177 S.W. at 384. The court mitigated the resulting hardship to the plaintiff by allowing her to sue the men who assisted her husband in committing her to an insane asylum, id. at 384–85, although this action arguably was in derogation of the common law. In another case in which a husband's friends helped falsely imprison his wife, the opposite result was reached under the common law. See Abbott v. Abbott, 67 Me. 304, 308–09 (1877) ("If the co-defendants had been then sued, the action must have been in the name of the husband and wife, and the husband would have sued to recover damages for an injury actually committed by himself. . . . But if there was no injury to him there was none to her. They are one.").

subject appear substantially the same in all."[112] Because "the statutes of those states [allowing the torts] for all practical purposes are the same as in the states where the right of action is denied," the court turned to public policy rationales.[113] Relying on public policy was more reasonable under the particular facts of the case, however, as a husband sought to enjoin his wife from "what is commonly known and understood as nagging."[114] The court, perfecting the public policy fears introduced years early, explained:

> We prefer the rule of the [earlier case], and think it should be adhered to until such time as the Legislature shall deem it wise and prudent to open up a field for marring or disturbing the tranquility of family relations, heretofore withheld as to actions of this kind, by dragging into court for judicial investigation at the suit of a peevish, faultfinding husband, or at the suit of the nagging, ill-tempered wife, matters of no serious moment, which if permitted to slumber in the home closet would silently be forgiven or forgotten. . . . [T]he welfare of the home, the abiding place of domestic love and affection, the maintenance of which in all its sacredness, undisturbed by a public exposure of trivial family disagreements, is so essential to society, demands and requires that no new grounds for its disturbance or disruption by judicial proceedings be ingrafted on the law by rule of court not sanctioned or made necessary by express legislation.[115]

Still, a desire for change often shone beneath the surface of the opinions. A judge dissenting from one of the trendsetting decisions explained that although existing legal doctrine compelled his dissent, he had "no regret that, by judicial construction, the rules of the common law on this subject" had disappeared.[116]

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[112] Drake v. Drake, 177 N.W. 624, 624 (Minn. 1920); see also Heyman v. Heyman, 92 S.E. 25, 26 (Ga. Ct. App. 1917).

[113] *Drake*, 177 N.W. at 625.

[114] Id. at 624. Summarizing the wife's actions as "nagging" was arguably an understatement, as the husband found her behavior "so oppressive, persistent, and long continued as to become injurious to [his] health and comfort." Id. The wife allegedly made false charges about her husband at his workplace, social club, and church; attempted to force him into bankruptcy; ruined his health; and hired detectives to beat him up, among other things. Id.

[115] Id. at 625.

[116] Fitzpatrick v. Owens, 187 S.W. 460, 460 (Ark. 1916) (Hart, J., dissenting).

The "trend of recent decisions throughout the country" allowing interspousal personal torts[117] began with the relatively timid question of why, if a wife could sue her husband for a "broken promise," she could not also sue for a "broken arm,"[118] and ended with the 1920 proclamation that

> [w]hether a man has laid open his wife's head with a bludgeon, put out her eye, broken her arm, or poisoned her body, he is no longer exempt from liability to her on the ground that he vowed at the alter to "love, cherish, and protect" her. We have progressed that far in civilization and justice.[119]

In denying a motion for rehearing in 1921, the Supreme Court of North Carolina claimed that "Shylock in Shakespeare's Merchant of Venice, as he stood in court insisting upon the terms of his bond, was in a better position than the [accused husband] in this case."[120] Much of the common law had "disappeared under the pressure of a public opinion steadily growing in enlightenment."[121]

Law reviews carefully followed and often praised the emerging trend.[122] The first case was viewed as "correct, both as a matter of

[117] Crowell v. Crowell, 105 S.E. 206, 209 (N.C. 1920).

[118] Brown v. Brown, 89 A. 889, 891 (Conn. 1914).

[119] *Crowell*, 105 S.E. at 210.

[120] Crowell v. Crowell, 106 S.E. 149, 149 (N.C. 1921) (petition for rehearing dismissed).

[121] Johnson v. Johnson, 77 So. 335, 337 (Ala. 1917).

[122] See, e.g., Recent Decision, Husband and Wife—Actions Between Husband and Wife—Tort, 16 Colum. L. Rev. 606 (1916); Recent Case, Husband and Wife—Action by Husband Against Wife—Personal Tort, 4 Minn. L. Rev. 538 (1920); Note, Husband and Wife—Action by Wife Against Husband—Personal Tort—Married Women's Acts, 1 Minn. L. Rev. 82, 84 (1917); Recent Important Decision, Husband and Wife—Can a Wife Recover Against Her Husband for a Personal Tort, 12 Mich. L. Rev. 700 (1914); Recent Decision, Husband and Wife—Injunction—Torts of Spouse, 7 Va. L. Rev. 228 (1921); John H. McCooey, Jr., Note and Comment, Domestic Relations: Effect of Married Women's Enabling Acts upon the Wife's Actions in Tort, 5 Cornell L.Q. 171 (1920); Note of Case, Husband and Wife—Right of Husband to Enjoin "Nagging" by Wife, 6 Va. L. Reg., N.S. 946 (1921); Note of Case, Husband and Wife—Right of Wife to Maintain Action against Husband for Infection with Venereal Disease, 7 Va. L. Reg., N.S. 62 (1922); Recent Case Note, Husband and Wife—Right of Wife to Sue Husband for Assault and Battery, 27 Yale L.J. 1081 (1917); Recent Case, Husband and Wife—Rights of Wife Against Husband and His Property—Wife's Right to Sue her Husband for Torts—Assault, 34 Harv. L. Rev. 676 (1921) [hereinafter Rights of Wife Against Husband and His Property]; Rights of Wife Against Husband, supra note 62.

construction and as a decision in harmony with the spirit of the times."[123] As early as 1914, legal scholars recognized that "[a]t present a change seems to be taking place in the law."[124] The change "seems correct, for it is difficult to perceive why a tort action is more subversive of public morals than divorce suits and criminal proceedings, which are universally allowed."[125] By 1917, observers noted "a growing inclination on the part of the courts to construe the Married Women's Acts liberally."[126] Another law review observed that the alleged public policy considerations of earlier years "is believed to be more imaginary than real."[127] "[T]he decisions reached seem to depend not so much on the phraseology of the statutes as on the judicial attitudes toward them," and "[t]he liberal construction seems the saner"[128] and "sounder."[129] The continuing liberalization of spousal rights seemed certain. As one legal scholar wrote,

> It seems reasonable to believe that it is only a question of time before the courts will come to realize that the old common law rule . . . is not in accord with the modern view as to the rights of a married woman, and that the wife need no longer be subjected to a battery by her husband without redress in a civil action.[130]

He concluded, "A few courts have taken the step and the others may be expected to fall in line."[131]

C. 1921–1940: Abandonment of the Liberalizing Trend

In 1921, Leah Perlman's "automobile pleasure ride" ended with a crash, as her husband's negligent driving unexpectedly caused

[123] Action by a Wife, supra note 62, at 617.
[124] Rights of Wife Against Husband, supra note 62, at 109.
[125] Recent Decision, Husband and Wife—Actions Between Husband and Wife—Tort, supra note 122, at 607; see also Note, Husband and Wife—Action by Wife Against Husband—Personal Tort—Married Women's Acts, supra note 122, at 84.
[126] Note, Husband and Wife—Action by Wife Against Husband—Personal Tort—Married Women's Acts, supra note 122, at 84.
[127] Recent Case Note, Husband and Wife—Right of Wife to Sue Husband for Assault and Battery, supra note 122, at 1081.
[128] Id.
[129] Rights of Wife Against Husband and His Property, supra note 122, at 676.
[130] McCooey, supra note 122, at 174.
[131] Id.

them to collide with an oncoming trolley car.[132] Her case ushered in a similarly unanticipated halt to the trend developed in the earlier period. This Section will argue that automobile accidents stalled the earlier trend permitting suits because judges added the possibilities of insurance fraud and collusion to the existing list of public policy concerns. When faced with negligence torts, judges construed the married women's acts so as to *never* allow interspousal causes of action, rather than distinguishing between willful and negligent torts. Automobile accidents thus foreclosed the possibility of civil suit for those spouses suffering other types of harms. That this development was not rooted in patriarchal restrictions on women's rights becomes especially clear by comparing judicial treatment of automobile accidents in the interspousal context with the development of guest statutes. The introduction of guest statutes, like the denial of interspousal tort suits, shows judicial and legislative suspicion of suits presenting the possibility of insurance fraud and collusion.

1. Interspousal Automobile Suits

Lower courts began hearing interspousal suits for automobile accidents in the late 1910s.[133] The first suit reached a state supreme court in 1922,[134] and dozens more were heard through 1940.[135] Of the approximately fifty state supreme court cases in this period deciding whether a married women's act allowed a wife to sue her husband for a personal tort,[136] all but five involved a negligent automobile accident.[137] The prevalence of automobile negligence suits is not surprising, given the historical timeline of automobile ownership. Automobile manufacturers sold 4,000 cars in 1900, almost 200,000 cars in 1910, 1.6 million cars in 1916, and 4.3 million

[132] Perlman v. Brooklyn City R.R. Co., 191 N.Y.S. 891, 891 (Sup. Ct. 1921), aff'd, 194 N.Y.S. 971 (App. Div. 1922).

[133] See, e.g., Heyman v. Heyman, 92 S.E. 25, 25 (Ga. Ct. App. 1917); *Perlman*, 191 N.Y.S. at 891.

[134] Oken v. Oken, 117 A. 357 (R.I. 1922).

[135] See Appendix. For a discussion of third-party liability when husband-drivers and wife-passengers were involved in accidents, see Schlanger, supra note 10, at 87–106.

[136] This tally includes cases in which the husband was not technically a party to the suit but the issue of interspousal liability was nonetheless determined as a prerequisite to determining third party liability.

[137] See Appendix.

cars in 1926.[138] This meant that while just one percent of households owned an automobile in 1910, sixty percent owned one by 1930.[139] With this explosion in ownership came a dramatic increase in automobile accidents,[140] and "for the first time, the automobile accident began to replace industrial and railroad accidents as the largest source of civil lawsuits and the most visible symbol of the potential for horror and carnage in modern life."[141] Despite attempts by many states to quickly enact driving regulations,[142] by the end of the 1920s, automobile accidents were the leading cause of accidental death.[143] More than 30,000 people died in automobile accidents in 1930 alone.[144] This carnage was especially dramatic as it came after a period "in which the whole category of such deaths did not exist."[145]

Because automobile suits dominated the field of interspousal torts after 1920, all thirteen states that considered the issue for the first time in this period were faced with automobile accident fact patterns. Of the thirteen, only three allowed the tort (one in the first decade).[146] This turnaround from the first-impression cases of

[138] Sally H. Clarke, Unmanageable Risks: *Macpherson v. Buick* and the Emergence of a Mass Consumer Market, 23 Law & Hist. Rev. 1, 11, 34 (2005); Jonathan Simon, Driving Governmentality: Automobile Accidents, Insurance, and the Challenge to Social Order in the Inter-War Years, 1919 to 1941, 4 Conn. Ins. L.J. 521, 531 (1998).

[139] Clarke, supra note 138, at 34; see also Simon, supra note 138, at 522.

[140] The increase in accidents was paralleled by an increase in the number of lawyers. John Fabian Witt, Toward a New History of American Accident Law: Classical Tort Law and the Cooperative First-Party Insurance Movement, 114 Harv. L. Rev. 690, 760 (2001).

[141] Simon, supra note 138, at 525; see also Charles C. Collins, Recent Legislation Directed Against Anti-Social Motorist: Laws Designed to Deal with Reckless Driving, Hit-and-Run Driver, 'Guest Suits,' Evaders of Responsibility, N.Y. Times, Jan. 7, 1934, at A16.

[142] Simon, supra note 138, at 526.

[143] Id. at 540.

[144] Id. at 525; see also Collins, supra note 141.

[145] Simon, supra note 138, at 525.

[146] Courts hearing automobile accidents the first time they are determining the issue and *not allowing* the torts: Broaddus v. Wilkenson, 136 S.W.2d 1052 (Ky. Ct. App. 1940); Furstenberg v. Furstenberg, 136 A. 534 (Md. 1927); Lubowitz v. Taines, 198 N.E. 320 (Mass. 1936); Austin v. Austin, 100 So. 591 (Miss. 1924); Conley v. Conley, 15 P.2d 922 (Mont. 1932); Emerson v. Western Seed & Irrigation Co., 216 N.W. 297 (Neb. 1927); Hudson v. Gas Consumers' Ass'n, 8 A.2d 337 (N.J. Ct. App. 1939); Koontz v. Messer, 181 A. 792 (Pa. 1935); Oken v. Oken, 117 A. 357 (R.I. 1922); Poling v. Poling, 179 S.E. 604 (W.Va. 1935).

the second period is especially pronounced when added to the uniformly unmodified decisions of the earlier periods. All nineteen states that ruled on the issue of interspousal liability during the first two periods declined to alter their initial statutory constructions.[147] This left the 1921 tally at thirteen jurisdictions banning the torts and only seven allowing them. Twenty-nine states entered the 1920s with judicial blank slates and thus were free to continue the liberalizing trend of the second period.

The legal narrative between 1921 and 1940 is less straightforward than the narratives developed in the earlier periods because

Courts hearing automobile accidents the first time they are determining the issue and *allowing* the torts: Rains v. Rains, 46 P.2d 740 (Col. 1935); Fitzmaurice v. Fitzmaurice, 242 N.W. 526, 529 (N.D. 1932); Wait v. Pierce, 209 N.W. 475 (Wis. 1926). It is not surprising that the first (and only for the first decade) state to allow the torts was Wisconsin. According to Ranney, "The *Wait* decision was emblematic of the times: in the 1920s and 1930s, the Wisconsin court was known for its propensity to make policy and to defend its policymaking in unusually blunt terms." Ranney, supra note 3, at 540.

Note that these cases include those in which the husband was not a party but the court determined the husband's liability before evaluating that of his employer. (*Poulin* and *Webster* should not be included because the issue of husband liability was not determined.)

[147] Every jurisdiction that had already determined the issue in the context of willful torts in an earlier period followed that precedent for negligent automobile torts. Kalamian v. Kalamian, 139 A. 635 (Conn. 1927) (reaffirming *Bushnell*); Bushnell v. Bushnell, 131 A. 432 (Conn. 1925) (reaffirming *Brown*); Spector v. Weisman, 40 F.2d 792 (C.A.D.C. 1930) (affirming Thompson v. Thompson, 218 U.S. 611 (1910)); Maine v. James Maine & Sons, 201 N.W. 20 (Iowa 1924); Harvey v. Harvey, 214 N.W. 305 (Mich. 1927) (affirming *Bandfield*); Woltman v. Woltman, 189 N.W. 1022 (Minn. 1922) (reaffirming *Strom*); Schubert v. August Schubert Wagon Co., 164 N.E. 42 (N.Y. 1928); Roberts v. Roberts, 118 S.E. 9 (N.C. 1923) (reaffirming *Crowell*).

Some courts reaffirmed earlier cases, while others (on both sides of the argument) touted subsequent legislative history to support the earlier cases' holdings. Courts casually disregarded statutory modifications that might change the outcome of cases while citing a lack of statutory change as a sign of legislative approval. See, e.g., Aldrich v. Tracey, 269 N.W. 30, 33 (Iowa 1936); *Harvey*, 214 N.W. at 305 (noting that "counsel for plaintiff points to an amendment of the statute after" the prior decision, but never directly addressing that claim). A legislature's decision not to enact a new statute suggested "that the Legislature seems satisfied with the statutory construction announced" in the state's first interspousal tort case. Kelly v. Williams, 21 P.2d 58, 58 (Mont. 1933); see also Sacknoff v. Sacknoff, 161 A. 669, 670 (Me. 1932); Willott v. Willott, 62 S.W.2d 1084, 1085–86 (Mo. 1933). Courts that heard multiple cases in the 1921–1940 period also reaffirmed on this basis. See, e.g., Fontaine v. Fontaine, 238 N.W. 410, 412–13 (Wis. 1931).

cases involving ante-nuptial torts,[148] suits by husbands,[149] comity,[150] causes of action between children and their parents,[151] vicarious liability of employers,[152] and ambiguous statutory amendments ob-

[148] See, e.g., *Spector*, 40 F.2d at 792; Shirley v. Ayers, 158 S.E. 840 (N.C. 1931).

[149] See, e.g., *Shirley*, 158 S.E. 840.

[150] See, e.g., Dawson v. Dawson, 138 So. 414 (Ala. 1931); Poling v. Poling, 179 S.E. 604 (W.Va. 1935); Buckeye v. Buckeye, 234 N.W. 342 (Wis. 1931).

[151] Many judges and legal scholars analogized child-parent suits to those between spouses. See, e.g., Chase v. New Haven Waste Material Corp., 150 A. 107 (Conn. 1930); Hudson v. Gas Consumers' Ass'n, 8 A.2d 337, 338 (N.J. 1939); Koontz v. Messer, 181 A. 792, 795 (Pa. 1935); *Poling*, 179 S.E. at 607; *Wait*, 209 N.W. at 481 (Eschweiler, J., dissenting). These comparisons also were made by law reviews. See, e.g., Comment, Actions for Personal Tort by Wife Against Husband and Child Against Parent, 33 Yale L.J. 315 (1923).

[152] Courts gradually shifted from viewing spousal liability as a prerequisite to third-party suits to deeming the liability of the spouse irrelevant. Consequently, language regarding interspousal torts, though explicit, was pushed into dicta in some cases and may be less appropriate to include in analysis of the interspousal tort trend. See, e.g., Webster v. Snyder, 138 So. 755 (Fla. 1932); Poulin v. Graham, 147 A. 698, 699 (Vt. 1929). But see *Webster*, 138 So. at 756 (Buford, J., dissenting) (determining that "we must say whether or not the wife can maintain an action in tort against the husband" before considering the liability of the employer and consequently finding that neither could be held liable). The first cases in this period explicitly held that employer/car owner liability was dependant upon husband/driver liability. Maine v. James Maine & Sons Co., 201 N.W. 20 (Iowa 1924); Riser v. Riser, 215 N.W. 290, 291 (Mich. 1927); Emerson v. Western Seed & Irrigation Co., 216 N.W. 297 (Neb. 1927). However, Justice Benjamin Cardozo, then sitting on the highest court of New York, initiated a new line of cases in 1928 with *Schubert v. August Schubert Wagon Co.*, 164 N.E. 42 (N.Y. 1928). The future Supreme Court justice determined that the result of the earlier cases was "to pervert the meaning and effect of the disability that has its origin in marital identity." Id. at 43. He reasoned that "[a] trespass, negligent or willful, upon the person of a wife, does not cease to be an unlawful act, though the law exempts the husband from liability for the damage. Others may not hide behind the skirts of his immunity." Id. That the employer might then attempt to recover from the employee "may be admitted without admitting its significance as a determining factor in the solution of the problem." Id. The court was "not at liberty to extend" the exception "engrafted upon this rule where the husband is defendant." Id. By 1940, twelve additional courts considered the issue, with three outcomes. One outcome was courts following *Schubert* and allowing recovery. *Webster*, 138 So. 755; Broaddus v. Wilkenson, 136 S.W.2d 1052 (Ky. Ct. App. 1940); Miller v. J.A. Tyrholm & Co., 265 N.W. 324 (Minn. 1936); *Koontz*, 181 A. 792; *Poulin*, 147 A. 698; Hensel v. Hensel Yellow Cab Co., 245 N.W. 159, 165 (Wis. 1932) (applying Ohio law). A second outcome was courts following *Schubert* but preventing recovery on other grounds. Pittsley v. David, 11 N.E.2d 461, 465 (Mass. 1937) (determining that the suit was blocked by a guest statute because it was caused by ordinary, rather than gross, negligence); McLaurin v. McLaurin Furniture Co., 146 So. 877 (Miss. 1933) (finding that the accident did not occur within the course of employment); Mullally v. Langenberg Bros. Grain Co., 98 S.W.2d 645, 650 (Mo. 1936) (finding that the accident did not occur within the course

scure which decisions are truly precedent-setting and thus most relevant to discerning trends. The most common source of confusion in this regard is rooted in states' repeated enactment of new statutes, which led to court cases in which it is unclear whether the courts believed they were considering an issue of first impression based on the new statutes or were just acknowledging irrelevant amendments and relying on earlier precedent. For example, in *Allen v. Allen*, the New York Court of Appeals felt so strongly that it was reaffirming the earlier case of *Schultz v. Schultz*, in which it refused to recognize interspousal torts, that it found it unnecessary to write its own opinion.[153] In contrast, the dissent argued the court was

> set free to re-examine the question, not primarily by the silence of the majority in the *Schultz* Case [which was issued without an opinion], the lapse of time, and the conflict of authority . . . but by the subsequent change in the language of the statute, which requires a new consideration of the factors that determine the present legislative intent.[154]

Other courts relied upon multiple versions of their statute without clarifying whether the latest version was necessary for their holding.[155]

Courts on both sides of the controversy also blurred any arguable legal distinction between negligent and willful torts by devoting little or no attention to concerns particular to each.[156] The pres-

of employment); Hudson v. Gas Consumers' Ass'n, 8 A.2d 337, 339 (N.J. Ct. App. 1939) (remanding for jury consideration whether the wife was a licensee or invitee). A third outcome was courts declining to follow *Schubert* altogether. Sacknoff v. Sacknoff, 161 A. 669, 670 (Me. 1932); Riegger v. Bruton Brewing Co., 16 A.2d 99, 102 (Md. 1940); David v. David, 157 A. 755 (Md. 1932).

[153] Allen v. Allen, 159 N.E. 656 (N.Y. 1927).

[154] Id. at 659 (Pound, J., dissenting).

[155] See, e.g. Katzenberg v. Katzenberg, 37 S.W.2d 696, 697 (Ark. 1931) ("Under both the act of 1915 and 1919, married women became wholly independent of the doctrine of marital unity.").

[156] Some courts explicitly ignored the negligent nature of the tort in framing the beginning of their inquiry. See, e.g., *Spector*, 40 F.2d. at 792; Furstenberg v. Furstenberg, 136 A. 534, 535 (Md. 1927); Austin v. Austin, 100 So. 591, 591 (Miss. 1924); Conley v. Conley, 15 P.2d 922, 923 (Mont. 1932). Many other courts acknowledged that the tort considered was negligent but devoted little or no discussion to the distinction between willfulness and negligence, relying on the precedent and reasoning established in the willful tort context. See, e.g., *Katzenberg*, 37 S.W.2d at 696; Woltman v. Woltman, 189

ence of the term "negligence" in a court's holding is of questionable significance. For example, a court facing an automobile fact pattern defined its question as "whether a wife may sue her husband for tortious wrong against her person."[157] Its analysis fit the broad question, with no discussion of negligence whatsoever, yet it reached the seemingly narrower conclusion that "in this state a wife may sue her husband for personal injuries caused by the *negligence* of her husband."[158] In one of the few non-negligence cases, a case in which both spouses died of gunshot wounds intentionally inflicted by the husband, the court, apparently wishing to be thorough, nevertheless asked the question, "May the wife maintain an action against her husband for personal injuries *negligently or willfully* inflicted upon her by her husband?"[159] Almost every court, both those allowing and not allowing interspousal torts, mixed precedent from the willful tort and negligent tort contexts to support whatever outcome it wished.[160]

This mixed precedent was not seen as problematic because courts agreed that negligent and willful torts should be treated alike. Those that barred the torts determined that the negligent and willful cases did "not seem to us to require a different rule of liability."[161] Although reevaluating interspousal torts in the negligence context "would lend itself to interesting discussion, for there is some diversity of opinion," these courts claimed "the question is not an open one" because of holdings in willful tort cases.[162] Furthermore, "if a distinction could be made between the two classes of cases there would seem the greater reason for imposing liability

N.W. 1022, 1022 (Minn. 1922); Roberts v. Roberts, 118 S.E. 9, 10 (N.C. 1923); Comstock v. Comstock, 169 A. 903, 903 (Vt. 1934).

[157] *Rains*, 46 P.2d at 741.

[158] Id. at 743 (emphasis added).

[159] In re Dolmage's Estate, 212 N.W. 553, 553 (Iowa 1927) (emphasis added).

[160] See, e.g., Fitzmaurice v. Fitzmaurice, 242 N.W. 526, 527–28 (N.D. 1932). The first state supreme court case in this period is a notable exception. Oken v. Oken, 117 A. 357, 357–58 (R.I. 1922) ("The attorneys for the plaintiff have cited several cases from other states, in which the wife has been permitted to maintain an action against her husband for a violent assault upon her; but no case has been cited where the wife has maintained an action against her husband for personal injuries cause by his negligence.").

[161] Woltman v. Woltman, 189 N.W. 1022, 1023 (Minn. 1922).

[162] Id. at 1022.

in the more aggravated case."[163] Reviewing their own earlier decisions, courts allowing the torts observed that their prior holdings were correct in treating willful and negligent torts alike as a matter of tort law,[164] *stare decisis*, and statutory construction.[165] The language in the earlier cases "was designed to apply broadly."[166] Even when the issue of negligence was ostensibly viewed as left open by prior decisions, the "statute and the analogy of the foregoing decisions" suggested the same result should be reached in the negligence context.[167] The courts had "no desire" and saw no reason "to modify any expression contained in the [earlier] decision."[168] One court, recalling the question posed in the earlier period—"If she may sue him for a broken promise, why may she not sue him for a broken arm?"[169]—melodramatically concluded, "We say that if the wife is to be allowed a civil action against her husband for a broken arm, how can it be defeated merely by the absence of intent or malice on the part of her wrong-doing spouse?"[170]

The refusal to make legal distinctions between negligent and willful torts translated into a recycling of earlier public policy con-

[163] Id. at 1023; see also Perlman v. Brooklyn City R.R. Co., 191 N.Y.S. 891, 892 (Sup. Ct. 1921), aff'd, 194 N.Y.S. 971 (App. Div. 1922) ("Regarding the above-cited cases, which involved willful torts, I may say that, were they cases of first impression, I should be inclined to view them more favorably for the plaintiffs . . . ."); Recent Cases, Husband and Wife—Right of One Spouse to Recover for Negligent Tort of the Other, 10 Minn. L. Rev. 373, 439 (1926) ("Where relief is denied for a wilful [sic] tort, in certain cases, even in the teeth of a liberal statute, it is doubtful if the result would be any different if the case involved only a negligent tort. In fact there is more likelihood that a right of action would be denied.").

[164] Roberts v. Roberts, 118 S.E. 9, 11 (N.C. 1923); see also Courtney v. Courtney, 87 P.2d 660, 661 (Okla. 1938).

[165] Katzenberg v. Katzenberg, 37 S.W.2d 696, 697 (Ark. 1931); see also *Courtney*, 87 P.2d at 661 ("Though the present case involves a negligent tort rather than a willful one between parties whose marital relations have not been disturbed, we find no basis imbedded [sic] in the law for applying herein legal principles different from those which controlled the Fiedler Case."). But see *Katzenberg*, 37 S.W.2d at 697 (Hart, J., dissenting) ("Judge BUTLER and I think that basing the majority opinion on [our earlier willful tort case], is an apt illustration of the adage that reasoning by analogy is oftentimes dangerous.").

[166] Bushnell v. Bushnell, 131 A. 432, 433 (Conn. 1925).

[167] Penton v. Penton, 135 So. 481, 483 (Ala. 1931).

[168] Id.; see also Bennett v. Bennett, 140 So. 378, 379–80 (Ala. 1932).

[169] Brown v. Brown, 89 A. 889, 891 (Conn. 1914).

[170] *Courtney*, 87 P.2d at 662.

cerns by courts on both sides.[171] This was true of those courts already versed in the matter of interspousal liability as well as those new to it. According to the liability-refusing majority view, apparently even in an automobile accident suit "[t]he divorce courts and the criminal courts furnish ample redress to the husband and wife for such wrongs as this," and "[s]ecrecy will cure many troubles of the home, while publicity will only add fuel to the flames."[172] Similarly, although minority courts allegedly relied on legislative history and the construction of statutes to reach their decisions—"[w]ith the wisdom or unwisdom of statutes courts are not concerned"[173]—public policy issues were clearly motivating factors. The only court allowing the torts as a matter of first impression during the first decade of this period noted:

> It may not be improper to observe that, while there are many persons, particularly those of the older generation, who are genuinely alarmed at the statutory modification of the family status as it existed at common law, there are an equal if not a greater number who see in the emancipation of married women a necessary genuine social advance.[174]

Explaining that "[w]e all have more or less conscious ideals and cherished concepts relating to the unity of the family and the sanctity of the family relation," the court determined that the statutes "[a]s a matter of fact" did not disturb family relations because "[i]t is only when the ideal family relation has for some reason been dis-

[171] See, e.g., Newton v. Weber, 196 N.Y.S. 113, 114 (Sup. Ct. 1922) (quoting the public policy concerns about assault and battery suits from *Longendyke v. Longendyke*, 44 Barb. 366, 369 (N.Y. App. Div. 1863)).

[172] Austin v. Austin, 100 So. 591, 592–93 (Miss. 1924); see also Patenaude v. Patenaude, 263 N.W. 546, 547–48 (Minn. 1935); Leonardi v. Leonardi, 153 N.E. 93, 94 (Ohio Ct. App. 1925). Legal observers criticized reliance upon family harmony rationales in the automobile context. See, e.g., Recent Important Decision, Husband and Wife—Right of Wife to Sue Husband for Personal Tort, 21 Mich. L. Rev. 473, 474 (1923).

[173] In re Dolmage's Estate, 212 N.W. 553, 555 (Iowa 1927). However, note that courts during this period were still acutely aware that the statutory text only partially explained the divergence of opinions among the jurisdictions. See, e.g., Rains v. Rains, 46 P.2d 740, 742–43 (Colo. 1935); *In re Dolmage's Estate*, 212 N.W. at 554; Allen v. Allen, 159 N.E. 656, 659 (N.Y. 1927) (Pound, J., dissenting); *Courtney*, 87 P.2d at 665.

[174] Wait v. Pierce, 209 N.W. 475, 478–79 (Wis. 1926).

rupted that rights under the statute are asserted."[175] Clearly this was not necessarily true in automobile accident cases, where perfectly harmonious spouses, with "ideal family relation[s]" might have reason to sue each other for damages. Some earlier arguments were strengthened in the negligence context. For example, "The argument that the wife has sufficient remedy in criminal proceedings and separate maintenance and divorce actions for the wrongs committed by her husband is barely worthy of consideration in any case . . . and especially in a negligence case."[176] Additionally, "the fear that such litigation will destroy marital peace has become more groundless since the purchase of liability insurance has become so common."[177] However, the acknowledgement that negligence cases might be different was rare and generally unnecessary to the outcome of the cases.

2. Insurance Fraud and Collusion

The way in which negligence did change the outcome of cases was through the underlying fear of insurance fraud and collusion. In the context of automobile suits between loving spouses, it became blatantly obvious that "the husband is only a nominal party in the case; the real party being the indemnity company which has insured the husband against damages arising from his negligence."[178] In 1929, over 250 million dollars of liability insurance and 100 million dollars of property insurance on automobiles were purchased, and by 1931, only workers' compensation insurance outpaced automobile liability in the casualty insurance market.[179] Over one-quarter of registered vehicles were covered by an insurance policy in 1929.[180]

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[175] Id. at 478.

[176] Courtney v. Courtney, 87 P.2d 660, 666 (Okla. 1938).

[177] Id. at 668; see also Harvey v. Harvey, 214 N.W. 305, 306 (Mich. 1927).

[178] Leonardi v. Leonardi, 153 N.E. 93, 95 (Ohio Ct. App. 1925); see also C.G. Haglund, Tort Actions Between Husband and Wife, 27 Geo. L.J. 697, 713 (1939); Case Note, Torts—Action by Wife Against Husband for Personal Tort, 37 Yale L.J. 834, 835 (1928); Comment, Personal Tort Actions Between Husband and Wife, 4 Fordham L. Rev. 475, 479 (1935). Sometimes the insurance company was a named party. See, e.g., Fontaine v. Fontaine, 238 N.W. 410 (Wis. 1931) (suing both Walter J. Fontaine *and* Travelers Insurance Company).

[179] Simon, supra note 140, at 527.

[180] Id. at 564.

These developments were covered in prominent newspapers alongside stories about fraudulent insurance claims. For example, one story reported that the defendants in an upcoming trial were "accused of resorting to torture methods to simulate injuries upon minor conspirators in an attempt to collect $2000 insurance money from two companies."[181] An article about a similar situation explained that "a widespread conspiracy to collect automobile insurance on accidents that existed only in police reports" was revealed because one of the conspirators, "fear[ing] further mutilation," came forward to police.[182] His co-conspirators "had inflicted a deep cut on his left arm, sewed it up with eleven stitches and encased his uninjured left leg in a cast" before he overheard them planning further injuries.[183] A father-and-son team was indicted after working with physicians and other accomplices to fake car accidents and recover from insurance companies over a five-year period.[184] A detective hired by an insurance agency said, "The probability is that there is not an insurance company in the country that has not been swindled."[185] These "fake claims" were blamed for expensive insurance premiums and treated very seriously.[186] A defrauder who pled guilty faced "an indeterminate term in Sing Sing," according to *The New York Times.*[187]

The rise of these fraudulent claims was quickly incorporated into judicial reasoning in cases involving interspousal accident claims.[188] As one early lower-court decision boldly proclaimed:

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[181] Auto Insurance Fraud Trial Scheduled Today, L.A. Times, Aug. 21, 1936, at A2; see also Auto Insurance Fraud Trial Opens, N.Y. Times, Mar. 15, 1932, at 9; Collected Thousands By Burning Insured Autos, N.Y. Times, Mar. 25, 1917, at XX6.

[182] Mutilated, He Says, by 'Accident Ring,' N.Y. Times, Jan. 19, 1932, at 14.

[183] Id.

[184] 3 Indicted in Auto Insurance Frauds, N.Y. Times, Mar. 4, 1922, at 9.

[185] Id.

[186] C.L. Mosher, Fake Claims Bring High Rates, N.Y. Times, Nov. 9, 1936, at A8.

[187] Sentenced for Auto Insurance Fraud, N.Y. Times, Feb. 10, 1917, at 10.

[188] Judges were well aware of the developments. Chas. B. Quarles, Notes and Comment, Automobiles: Guest and Invitee; Negligence, Degree of Care, 11 Marq. L. Rev. 57, 58 (1926) ("It is a matter of common knowledge that most automobile accident cases are defended by lawyers employed by insurance companies."). The insured status of defendants was frequently included in newspaper articles. See, e.g., Rules Wife Can Sue Husband in Auto Case: Hartford Judge Holds Damage for Injuries Is Actionable—Man Carried Insurance, N.Y. Times, Oct. 19, 1924, at 28 ("Mr. Bushnell carried liability insurance in a Providence insurance company."); Husband Exempted from Suit by Wife, Wash. Post, Feb. 10, 1927, at 2 ("[Mrs. Furstenberg] sued [her hus-

> If it were not for the repeated admonition of our appellate courts that the subject of casualty insurance should not be referred to in this class of litigation, I should indulge in the presumption that the husband is not only insured against liability for negligently causing injury, but that, if he were not, we should hardly be confronted with this suit against him. A husband and wife, living in a state of connubial felicity and enjoying each other's society in an automobile pleasure ride, suggests little in consonance with the wife's desire to transfer money from the pocket of her husband to her own pocket, because his inadvertence has caused her a personal hurt.[189]

Another court observed, "The maintenance of an action of this character, unless the sole purpose be a raid upon an insurance company, would not add to conjugal happiness and unison, which it is the policy of the law to further and promote."[190] In extending a husband's protection from tort liability to the company owned by the husband's family members, one court noted, "The occasion for a controversy of this character, between parties so related and associated, may be found in the fact, shown in evidence, that the appellant company carried a policy protecting it against liability for damages caused by the automobile in question."[191]

Majority courts credited insurance companies' views that "the suits were not bona fida [sic] in the sense that the injured spouses would not have brought suit excepting for the purpose of procuring the proceeds of the policy which in fact had been written for the protection of the automobile owner rather than for the benefit of the person who might be injured."[192] Insurers would face extreme difficulties in presenting a defense because "the natural interest of the assured is with the person suing and it has been felt that the in-

band] and the insurance company in which he held a policy."). Additionally, judges acknowledged the commonness of insurance when evaluating whether juries were unfairly prejudiced by insurance-related testimony. See Rains v. Rains, 46 P.2d 740, 745 (Colo. 1935); Pardue v. Pardue, 166 S.E. 101, 104 (S.C. 1932) (Bonham, J., concurring).

[189] Perlman v. Brooklyn City R.R. Co., 191 N.Y.S. 891, 891 (Sup. Ct. 1921), aff'd, 194 N.Y.S. 971 (App. Div. 1922).

[190] Newton v. Weber, 196 N.Y.S. 113, 114 (Sup. Ct. 1922); see also Katzenberg v. Katzenberg, 37 S.W.2d 696, 697 (Ark. 1931) (Hart, J., dissenting).

[191] Maine v. James Maine & Sons, 201 N.W. 20, 21 (Iowa 1924).

[192] Quarles, supra note 188, at 58.

surance companies could not get the cooperation from the policy holders to which they are entitled."[193] This fear was also reflected in legislative enactments. For example, when the New York legislature passed a bill expressly allowing interspousal torts in 1937, it simultaneously enacted a statute creating a presumption that insurance policies did not insure against injuries to spouses.[194]

In contrast, one minority court, while acknowledging that majority courts feared a "raid" on insurance companies, said it "fail[ed] to see the justification for the use of the word 'raid.'"[195] It explained, "A man pays for insurance to indemnify any person whom he injures by his careless driving, and if it is intended to except his wife from such indemnification, such intent can very easily be expressed in the contract."[196] This point was reiterated in a case where a husband, who the court previously had determined was liable to his wife for damages, sought to recover from an insurance company.[197] The insurance company argued "that it is against public policy and sound morals to permit the plaintiff to recover in this case," but the court reasoned that the company "can change its contract in the future, if it desires to do so, so as not to cover a negligent injury to the wife."[198] The same suggestion frequently appeared in law review articles.[199] Furthermore, courts recognized

[193] Id. at 58–59.

[194] Val Sanford, Personal Torts within the Family, 9 Vand. L. Rev. 823, 831 n.43 (1956) (citing N.Y. Dom. Rel. Law § 57 (1937) and N.Y. Ins. Law § 167(3) (1939)). New York is the only state that overturned its court's refusal to hear interspousal tort claims. Id.

[195] Courtney v. Courtney, 87 P.2d 660, 668 (Okla. 1938).

[196] Id.

[197] Roberts v. U.S. Fid. & Guar. Co., 125 S.E. 611 (S.C. 1924). The damages were upheld in *Roberts v. Roberts*, 118 S.E. 9 (N.C. 1923). But cf. Austin v. Md. Cas. Co., 105. So. 640, 640 (Miss. 1925) (holding that the opinion in *Austin v. Austin*, 100 So. 591 (Miss. 1924), denying the wife the right to hold her husband liable for negligent injuries, precluded suit for recovery against the insurance company).

[198] *U.S. Fid. & Guar. Co.*, 125 S.E. at 612.

[199] See, e.g., C.E. Fugina & Glen H. Bell, Notes—Recent Cases, Husband and Wife—Right of a Wife to Maintain an Action Against Her Husband for Injuries to Her Person Caused by His Negligence, 4 Wis. L. Rev. 37, 40 (1926) ("[I]t is probable that insurance companies will insert a provision in their policies to care for this situation."); Comment, Personal Tort Actions Between Husband and Wife, 4 Fordham L. Rev. 475, 480 (1935) ("If the right of action were granted, the insurance contract could be so drawn as to provide coverage for liability to outsiders only, or to include protection for the family of the insured. In the long run the policyholder would pay premiums in accordance with the protection he seeks.").

that such cases should not carry a presumption of fraud *ab initio*.[200] Although a suit in which spouses were both plaintiff and defendant might affect their credibility as witnesses, "[t]he fact that the plaintiff is the wife of the defendant does not render this action constructively fraudulent or otherwise illegitimate."[201] Despite these arguments, however, a majority of courts remained unwilling to allow the suits through 1940.

3. Guest Statutes

During roughly the same period discussed in this section, courts and legislatures were simultaneously dealing with the issue of suit by injured passengers more broadly.[202] In 1917, the Supreme Judicial Court of Massachusetts determined that unpaid drivers, analogized to gratuitous bailees, should not be held liable to their guests for automobile accidents in the absence of gross negligence.[203] Prior to this decision, ordinary negligence was grounds for liability in all jurisdictions. However, the court reasoned, "Justice requires that the one who undertakes to perform a duty gratuitously should not be under the same measure of obligation as one who enters upon the same undertaking for pay."[204] Following the decision, several other courts also limited drivers' liability to their guests,[205] expressing the belief that to allow recovery in the absence of "culpable negligence" in this context "shocks one's sense of justice."[206]

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[200] *Courtney*, 87 P.2d at 668.

[201] Kalamian v. Kalamian, 139 A. 635, 637 (Conn. 1927).

[202] Quarles, supra note 188, at 57 ("The liability of the owner or operator of an automobile to an invited guest in the various situations that may arise has been, and still is, somewhat in doubt.").

[203] Massaletti v. Fitzroy, 118 N.E. 168 (Mass. 1917).

[204] Id. at 177.

[205] Epps v. Parrish, 106 S.E. 297 (Ga. Ct. App. 1921); Lutvin v. Dopkus, 108 A. 862 (N.J. 1920); Boggs v. Plybon, 160 S.E. 77 (Va. 1931); Saxe v. Terry, 250 P. 27 (Wash. 1926); Cleary v. Eckart, 210 N.W. 267 (Wis. 1926)); Andrew Kull, Comments, The Common Law Basis of Automobile Guest Statutes, 43 U. Chi. L. Rev. 798, 812–13 n.52 (1976) (citing Cody v. Venzie, 107 A. 383 (Penn. 1919)); see also Stanley W. Widger, Jr., Note, The Present Status of Automobile Guest Statutes, 59 Cornell L. Rev. 659, 659 n.1, 662 (1974) (acknowledging relevant judicial decisions only in Massachusetts, Georgia, and Wisconsin, and identifying *O'Shea v. Lavoy*, 185 N.W. 525 (Wis. 1921), as the first Wisconsin case on the topic).

[206] *Boggs*, 160 S.E. at 81.

Although most courts retained the duty of ordinary care under the common law,[207] from 1927 through 1939 almost thirty states adopted the heightened negligence requirement by statute.[208] The guest cases and statutes complemented and often replaced reliance upon statutory construction of married women's acts as justification to block suits. "That a wife riding in her husband's car at his invitation is a 'guest' within the meaning of these statutes is not questioned,"[209] so many spousal cases were settled on guest exclusion grounds.[210] More subtly, guest-statute terminology seeped into the interspousal context, perhaps unconsciously influencing judicial decisions, or at the very least indicating how interconnected the two categories were in judges' minds.[211]

The existence of guest statutes may also have influenced judicial decisions about whether to allow interspousal liability at all. In all three of the first-impression cases that allowed wives to sue their husbands in this period, common law or statutory precedent in the state already suggested that there were limits on drivers' liability.[212] In two cases, state legislatures had previously enacted guest statutes.[213] In the third,[214] an earlier decision provided explicit guest-related dictum that strongly suggested the court would limit driver liability.[215] Then, just months after the court's decision to allow in-

[207] Kull, supra note 205, at 813.

[208] Comment, The Constitutionality of Automobile Guest Statutes: A Roadmap to the Recent Equal Protection Challenges, 1975 BYU L. Rev. 99, 99 (1975) (counting twenty-seven states); Widger, supra note 205, at 659 (counting twenty-eight states); see also Kull, supra note 210 at 814.

[209] Roberson v. Roberson, 101 S.W.2d 961, 962 (Ark. 1937).

[210] The most prominent example is the Supreme Court case of *Silver v. Silver*, 280 U.S. 117 (1929). The case upheld the constitutionality of Connecticut's guest statute, which was being used to prevent a wife from suing her husband in a state that otherwise allowed interspousal torts. Id.; see also Silver v. Silver, 143 A. 240 (Conn. 1928).

[211] See, e.g., Comstock v. Comstock, 169 A. 903, 903 (Vt. 1934) ("The single question for review is whether a married woman can maintain an action against her husband, under the laws of this state, for injuries caused by his gross negligence in operating an automobile in which she was riding *as his guest*.") (emphasis added).

[212] None of these interspousal cases, or the cases subsequently affirming them, actually acknowledges the existence of common law or statutory guest restrictions.

[213] Katzenberg v. Katzenberg, 37 S.W.2d 696 (Ark. 1931); Fitzmaurice v. Fitzmaurice, 242 N.W. 526, 526 (N.D. 1932); Comment, The Constitutionality of Automobile Guest Statutes: A Roadmap to the Recent Equal Protection Challenges, 1975 BYU L. Rev. 99, 99 (1975).

[214] Wait v. Pierce, 209 N.W. 475 (Wis. 1926).

[215] O'Shea v. Lavoy, 185 N.W. 525, 527–28 (Wis. 1921).

terspousal torts, the expectations aroused by the dictum were fulfilled with a decision to limit driver liability.[216] As one legal scholar observed, the decision in that latter case would "be of very great importance, particularly because of the fact that the [state] Supreme Court has recently held that a wife may sue a husband for negligence in the operation of an automobile in which the wife is a guest."[217] Cases involving guest statutes were clearly linked to those resting upon married women's acts; the restrictions were seen as working in concert to block undesirable suits. Guest statutes may have also eased the judicial consciences of minority courts when reaffirming their earlier decisions in the automobile context. These courts could continue allowing interspousal liability because guest statutes blocked undesirable suits.

The guest and interspousal based limitations are also linked in their underlying rationale. Although protecting the driver from ungrateful guests was a common explanation provided for the guest statutes,[218] concerns related to liability insurance seem to have been the true motivation.[219] A 1934 newspaper article about legislation passed in reaction to "anti-social motorists" described guest suits as "[p]robably the greatest 'legal racket'" in connection with liability.[220] Such suits included those "where the wife sues her husband,

[216] Cleary v. Eckart, 210 N.W. 267 (Wis. 1926).

[217] Quarles, supra note 192, at 58.

[218] Widger, supra note 210, at 664 (noting that hitchhikers were a particular concern during the Great Depression, but explaining that "[a]lthough the fear of 'hitchhiker suits' had almost no statistical basis, it nevertheless became a popular and frequently-cited justification for the statutes"); see also Driver Free of Liability from Hitch-Hike Suits, L.A. Times, Dec. 15, 1929, at VI.3; Press Comment: "Hitch-Hikers," Wash. Post, Sep. 19, 1928, at 6 ("The hitch-hiker is not only an annoyance, he is a potential danger to the driver, who is legally liable for any harm that may happen to his passengers because of an accident. . . ."); Alfred Sandboy, Letter to the Editor, "Guest Suits" Constitute a New Racket that Should be Curbed by Legislation, Wash. Post, Aug. 4, 1930, at 4 ("I think that it would be a fine thing for all States to adopt the statute which Connecticut has pertaining to this matter of 'guest suits.'"); 7 States Prohibit Auto Guest Suits, Wash. Post, Mar. 9, 1930, at A6 ("Seven States have given the motorist legislative protection against the guest who sues for damages on the slightest pretext."); E.L.Y., Laws Now Curb Hitch-Hikers, N.Y. Times, Sep. 8, 1935, at XX 1 ("Abuses under this law have led some States to abolish 'guest suits' in an effort to stop what had in some cases become a profitable racket.").

[219] Torts: New Approach Suggested in Holding Guest Statutes Inapplicable, 1964 Duke L.J. 177, 178 (1964) ("Guests statutes were designed to protect the public from the abuses of vexacious and collusive suits.").

[220] Collins, supra note 141.

or a man sues his father, and so on. Frequently of course, an insurance company is the real defendant."[221] The increase in suits threatened a corresponding increase in the possibility of insurance fraud,[222] and insurance companies were extremely effective lobbyists for their interests.[223] Logically then, if the insurance fraud rationale was unpersuasive in one context, it was unpersuasive in both. For example, the supreme court of Oklahoma, which never enacted a common law or statutory restriction on guest recovery, viewed guest suits and interspousal suits as equally nonthreatening. In affirming its willingness to allow interspousal suits, it wrote that the "danger of fraud upon the insurer" was no worse in interspousal cases than "where a guest passenger sues his insured host to recover due to the host's negligence."[224]

The common law basis of guest statutes and their prevalence in more than half the states in the country shows that the fear of collusion and insurance fraud was not unique to interspousal negligence torts. The dreaded "suing racket" included, but extended beyond, spouses: "Wives sue their husbands, daughters bring actions against their mothers, and bridge-club members sue their neighbors—all with the hope that the insurance company will be made to pay."[225] Indeed, it seems that just as the early married women's acts were counterparts to homestead exemptions and other debtor relief measures, judicial reluctance to allow interspousal automobile suits was a counterpart to skepticism of guest suits more broadly. Thus, while both the married women's acts and interspousal automobile torts are undeniably tied to gender, the larger picture suggests that gender was not the primary driving factor behind either.

[221] Id.

[222] Widger, supra note 205, at 665.

[223] Id. at 664–65 n.37 ("Unfortunately, because of the generally 'quiet' nature of lobbying practices, very little is known about the lobbyists' role in influencing guest legislation other than the fact that it was highly successful. It is perhaps more than mere coincidence that one of the first guest statutes was enacted in the nation's 'insurance capital,' Connecticut.").

[224] Courtney, 87 P.2d at 668. This case was decided toward the end of the heyday of guest statutes. None were enacted after 1939.

[225] Collins, supra note 141.

CONCLUSION

The evolution of interspousal tort liability, while clearly related to and affecting women's status, was influenced by broader trends in tort law. Early judicial conservatism, based on familial harmony concerns, led to narrow construction of married women's acts. However, changes in society's view of women coupled with a persuasive Supreme Court dissent heralded the end of the first period's approach. From 1914 through 1920, seven state supreme courts discarded earlier statutory constructions and public policy concerns, replacing them with views that seemed fairer and truer to legislative intent. Widely expected to continue, this trend was cut short in the 1920s and 1930s by automobile accident suits. Because automobile suits brought with them the risk of insurance fraud and collusion, judges reverted to disallowing interspousal suits in all contexts. In contrast to paradigmatic feminist explanations, which suggest that patriarchal restrictions motivated the seemingly unassailable immunity that developed around husbands, the study of interspousal suits within a broader torts framework indicates that gender-neutral factors were more influential. Thus, the study of both gender and tort law should reflect the reality that automobile accident suits greatly influenced the development of interspousal liability law.

APPENDIX

Chart #1 Interspousal Tort Cases Through 1940

Cases printed in bold are cases of first impression on the issue of interspousal torts under the married women's property acts. In all others analysis of the act was in dicta or the issue had been conclusively determined in an earlier case.

Cases with grey backgrounds were not decided by the highest court in the state.

Cases in italics applied another state's law.

† Was the interspousal suit allowed under a married women's act? (If in parenthesis, the husband was not technically a party.)

Date	Case Name	State	Citation	Suit? †	Cause of Suit (* means husband suing wife)
1863	**Longendyke v. Longendyke**	**New York**	**44 Barb. 366**	**No**	**Assault**
1865	**Freethy v. Freethy**	**New York**	**42 Barb. 641**	**No**	**Slander**
1875	Chestnut v. Chestnut	Illinois	77 Ill. 346	No	Divorce case
1875	**Peters v. Peters**	**Iowa**	**42 Iowa 182**	**No**	**Battery**
1877	Abbott v. Abbott	Maine	67 Me. 304	No	Assault/imprisonment
1882	**Schultz v. Schultz**	**New York**	**89 N.Y. 644**	**No**	**Battery**
1883	**Libby v. Berry**	**Maine**	**74 Me. 286**	**(No)**	**Battery**
1886	**Nickerson v. Nickerson**	**Texas**	**65 Tex. 281**	**No**	**Imprisonment**
1896	**Henneger v. Lomas**	**Indiana**	**44 N.E. 462**	**No**	**Seduction**
1898	**Bandfield v. Bandfield**	**Michigan**	**75 N.W. 287**	**No**	**Venereal disease**
1906	**Strom v. Strom**	**Minnesota**	**107 N.W. 1047**	**No**	**Assault**
1909	**Peters v. Peters**	**California**	**103 P. 219**	**No**	**Assault***
1910	**Thompson v. Thompson**	**DC**	**218 U.S. 611**	**No**	**Assault**
1911	**Schultz v. Christopher**	**Washington**	**118 P. 629**	**No**	**Venereal disease**
1914	**Brown v. Brown**	**Connecticut**	**89 A. 889**	**Yes**	**Assault/imprisonment**
1914	**Fiedeer v. Fiedeer**	**Oklahoma**	**140 P. 1022**	**Yes**	**Assault**
1915	**Rogers v. Rogers**	**Missouri**	**177 S.W. 382**	**No**	**Imprisonment**

1915	**Gilman v. Gilman**	**New Hampshire**	**95 A. 657**	**Yes**	**Assault**
1915	**Lillienkamp v. Rippetoe**	**Tennessee**	**179 S.W. 628**	**No**	**Assault**
1916	**Fitzpatrick v. Owens**	**Arkansas**	**186 S.W. 832**	**Yes**	**Assault causing death**
1916	**Butterfield v. Butterfield**	**Missouri**	**187 S.W. 295**	**No**	**Assault**
1917	**Heyman v. Heyman**	**Georgia**	**92 S.E. 25**	**No**	**Automobile accident**
1917	**Johnson v. Johnson**	**Alabama**	**77 So. 335**	**Yes**	**Assault**
1918	**Keister's Adm'r v. Keister's Ex'rs**	**Virginia**	**96 S.E. 315**	**No**	**Assault causing death**
1920	Dishon's Adm'r v. Dishon's Adm'r	Kentucky	219 S.W. 794	No	Wrongful death
1920	**Prosser v. Prosser**	**South Carolina**	**102 S.E. 787**	**Yes**	**Assault**
1920	Drake v. Drake	Minnesota	177 N.W. 624	No	Nagging*
1920	Robinson's Adm'r v. Robinson	Kentucky	220 S.W. 1074	No	Wrongful death
1920	**Crowell v. Crowell**	**North Carolina**	**105 S.E. 206**	**Yes**	**Venereal disease**
1921	**Perlman v. Brooklyn City R. Co.**	**New York**	**191 N.Y.S. 891**	**No**	**Automobile accident**
1922	**Oken v. Oken**	**Rhode Island**	**117 A. 357**	**No**	**Automobile accident**
1922	**Newton v. Weber**	**New York**	**196 N.Y.S. 113**	**No**	**Automobile accident**
1922	Woltman v. Woltman	Minnesota	189 N.W. 1022	No	Automobile accident
1923	Roberts v. Roberts	North Carolina	118 S.E. 9	Yes	Automobile accident
1924	**Austin v. Austin**	**Mississippi**	**100 So. 591**	**No**	**Automobile accident**
1925	**Leonardi v. Leonardi**	**Ohio**	**153 N.E. 93**	**No**	**Automobile accident**
1925	Bushnell v. Bushnell	Connecticut	131 A. 432	Yes	Automobile accident
1926	**Wait v. Pierce**	**Wisconsin**	**209 N.W. 475**	**Yes**	**Automobile accident**
1926	Moore v. Moore	Wisconsin	209 N.W. 483	Yes	Automobile accident

1926	**Von Laszewski v. Von Laszewski**	**New Jersey**	**133 A. 179**	**No**	**Automobile accident**
1926	Wilson v. Barton	Tennessee	283 S.W. 71	No	Assault causing death
1927	**Furstenburg v. Furtstenburg**	**Maryland**	**136 A. 534**	**No**	**Automobile accident**
1927	**In re Dolmage's Estate**	**Iowa**	**212 N.W. 553**	**No**	**Wrongful death**
1927	**Harvey v. Harvey**	**Michigan**	**214 N.W. 305**	**No**	**Automobile accident**
1927	Allen v. Allen	New York	159 N.E. 656	No	Malicious prosecution
1927	Kalamian v. Kalamian	Connecticut	139 A. 635	Yes	Automobile accident
1928	**Pepper v. Morrill**	**Massachusetts**	**24 F.2d 320**	**(No)**	**Automobile accident**
1929	**Blickenstaff v. Blickenstaff**	**Indiana**	**167 N.E. 146**	**No**	**Automobile accident**
1930	Spector v. Weisman	DC	40 F.2d 792	No	Automobile accident
1931	*Buckeye v. Buckeye*	*Wisconsin*	*234 N.W. 342*	*No*	*Automobile accident*
1931	Tobin v. Gelrich	Tennessee	34 S.W.2d 1058	No	Automobile accident
1931	*Howard v. Howard*	*North Carolina*	*158 S.E. 101*	*No*	*Automobile accident*
1931	Katzenberg v. Katzenberg	Arkansas	37 S.W.2d 696	Yes	Automobile accident
1931	Shirley v. Ayers	North Carolina	158 S.E. 840	Yes	Automobile accident*
1931	**Penton v. Penton**	**Alabama**	**135 So. 481**	**Yes**	**Automobile accident**
1931	Fontaine v. Fontaine	Wisconsin	238 N.W. 410	Yes	Automobile accident
1931	*Dawson v. Dawson*	*Alabama*	*138 So. 414*	*No*	*Automobile accident*
1932	*Bennett v. Bennett*	*Alabama*	*140 So. 378*	*Yes*	*Automobile accident*
1932	**Fitzmaurice v. Fitzmaurice**	**North Dakota**	**242 N.W. 526**	**Yes**	**Automobile accident**
1932	Pardue v. Pardue	South Carolina	166 S.E. 101	Yes	Automobile accident
1932	**Conley v. Conley**	**Montana**	**15 P.2d 922**	**No**	**Automobile accident**
1932	Raines v. Mercer	Tennessee	55 S.W.2d 263	No	Automobile accident

1933	Kelly v. Williams	Montana	21 P.2d 58	No	Automobile accident
1933	Willott v. Willott	Missouri	62 S.W.2d 1084	No	Automobile accident
1934	Scales v. Scales	Mississippi	151 So. 551	No	Automobile accident
1934	**Comstock v. Comstock**	**Vermont**	**169 A. 903**	**No**	**Automobile accident**
1934	*Gray v. Gray*	*New Hampshire*	*174 A. 508*	*No*	*Automobile accident*
1935	**Poling v. Poling**	**West Virginia**	**179 S.E. 604**	**No**	**Automobile accident***
1935	**Rains v. Rains**	**Colorado**	**46 P.2d 740**	**Yes**	**Automobile accident**
1935	Patenaude v. Patenaude	Minnesota	263 N.W. 546	No	Automobile accident
1936	**Lubowitz v. Taines**	**Massachusetts**	**198 N.E. 320**	**No**	**Automobile accident**
1936	Mertz v. Mertz	New York	3 N.E.2d 597	No	Automobile accident
1936	**Aldrich v. Tracy**	**Iowa**	**269 N.W. 30**	**No**	**Wrongful death**
1937	Roberson v. Roberson	Arkansas	101 S.W.2d 961	Yes	Automobile accident
1938	Forbes v. Forbes	Wisconsin	277 N.W. 112	Yes	Automobile accident
1938	*Miltimore v. Milford Motor Co.*	*New Hampshire*	*197 A. 330*	*No*	*Automobile Accident*
1938	Courtney v. Courtney	Oklahoma	87 P.2d 660	Yes	Automobile accident
1939	Bourestom v. Bourestom	Wisconsin	285 N.W. 426	Yes	Automobile accident
1939	Ewald v. Lane	DC	104 F.2d 222	(No)	Conspiracy to defame
1939	Kircher v. Kircher	Michigan	286 N.W. 120	No	Automobile accident
1940	Alberts v. Alberts	North Carolina	8 S.E.2d 523	Yes	Automobile accident

Chart #2: Suits Between Wives and Husbands' Employers
(Husband not a Party)

Date	Case Name	State	Citation	Suit?	Cause
1924	Maine v. James Maine & Sons Co.	Iowa	201 N.W. 20	No	Automobile accident

1927	Riser v. Riser	Michigan	215 N.W. 290	No	Automobile accident
1927	Emerson v. Western Seed & Irrigation Co.	Nebraska**	216 N.W. 297	No	Automobile accident
1928	Schubert v. August Schubert Wagon Co.	New York	164 N.E. 42	Yes	Automobile accident
1929	Poulin v. Graham*	Vermont**	147 A. 698	Yes	Automobile accident
1932	Webster v. Snyder*	Florida**	138 So. 755	Yes	Automobile accident
1932	David v. David	Maryland	157 A. 755	No	W fell in H's building
1932	Sacknoff v. Sacknoff	Maine	161 A. 669	No	Automobile accident
1932	Hensel v. Hensel Yellow Cab Co., Inc.	Wisconsin	245 N.W. 159	Yes	Automobile accident
1933	McLaurin v. McLaurin Furniture Co.	Mississippi	146 So. 877	Yes	Automobile accident
1935	Koontz v. Messer	Pennsylvania**	181 A. 792	Yes	Automobile accident
1936	Miller v. J.A. Tyrholm & Co.	Minnesota	265 N.W. 324	Yes	Automobile accident
1936	Mullally v. Langenberg Bros. Grain Co.	Missouri	98 S.W.2d 645	Yes	Automobile accident
1937	Pittsley v. David	Massachusetts	11 N.E.2d 461	Yes	Automobile accident
1939	Hudson v. Gas Consumers' Ass'n	New Jersey**	8 A.2d 337	Yes	Automobile accident
1940	Broaddus v. Wilkenson	Kentucky**	136 S.W.2d 1052	Yes	Automobile accident
1940	Riegger v. Bruton Brewing Co.	Maryland	16 A.2d 99	No	Unclear (Negligence)

* In these cases the court declined to first decide whether interspousal torts were allowed in their state.

** These states had not previously decided the issue of whether interspousal torts were allowed prior to the wife-employer suit.