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Escaping the Lion's Den and Going Back for Your Hat - Why Domestic Violence Should be Considered in the Distribution of Marital Property upon Dissolution of Marriage

Cheryl J. Lee

Case Note

ESCAPING THE LION'S DEN AND GOING BACK FOR YOUR HAT – Why Domestic Violence Should be Considered in the Distribution of Marital Property upon Dissolution of Marriage[1]

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1. Upon leaving an abusive second husband, a woman I know was discouraged from seeking a financial remedy. She was advised that when Daniel escaped from the lion's den, he didn't go back for his hat.

2. Cheryl J. Lee is a J.D. candidate at Pace University School of Law, class of 2003. She graduated *magna cum laude* from New York University with a B.A. in English Literature. This article is dedicated to the memory of her grandmother, Beatrice Mae Bond, who was killed by Charles Melton on Friday, March 16, 1962, and her mother, Beatrice M. DeFlavis, a survivor of domestic violence. The author particularly wishes to thank her husband, Ken Ogren, and sons, Nathaniel and Caleb, for their patience and support throughout the writing of this article. Finally, the author extends her appreciation to Margaret Moreland, reference librarian at Pace University School of Law, for her assistance in locating invaluable materials and statistics on victims of domestic violence.

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Your desire shall be for your husband,
And he shall rule over you.[3]

Othello: Think on thy sins.
Desdemona: They are loves I bear to you.
Othello: Ay, and for that thou diest.
Desdemona: That death's unnatural, that kills for loving.[4]

I. INTRODUCTION

It might surprise many citizens of New York to know that victims of domestic violence have virtually no financial remedies against their abusers. At a time when the state has a tough mandatory arrest law for perpetrators of domestic violence,[5] it seems incongruous that abused women do not have appropriate legal remedies to enable them, financially, to leave the men who hurt them for good. For example, tort remedies for victims of domestic violence are virtually non-existent due to New York's one-year statute of limitations on intentional torts;[6] this is just one example of this inequity. Additionally, New York has a rigorous no-fault equitable distribution law under which some courts have refused to consider abusive, violent behavior against a spouse as a factor when distributing marital property upon dissolution of the marriage.[7] Thus, women have been faced with a conundrum—if they leave their spouse, they may be unable to support themselves and their children. In the case of the abused spouse with assets, she may also be faced with having to share equally with her abuser the fruits of her labor.[8] If the abused woman stays with her spouse, on the

3. *Genesis* 4:16.

4. WILLIAM SHAKESPEARE, OTHELLO, THE MOOR OF VENICE act. 4, sc. 2.

5. Arrest is mandated in New York pursuant to N.Y. CRIM. PROC. LAW § 140.10(4) (McKinney 1999).

6. N.Y. CPLR § 215(3) (McKinney 1999).

7. *See* Section III(b) *infra*.

8. *See, e.g.*, Kellerman v. Kellerman, 590 N.Y.S.2d 570 (App. Div. 1992); *but see* Pollack v. Pollack, N.Y.L.J., Oct. 25, 1999, at 40 (N.Y. Sup. Ct. Oct. 25, 1999)

other hand, out of necessity or otherwise, she may be viewed to be at fault for putting up with the abuse.[9]

Additionally, there is no longer any doubt that women experience the heaviest financial losses in the divorce equation.[10] Battered women suffer doubly from this inequity, because economic control is often a facet of the coercive relationship between them and their abusers.[11] The abuser will likely interfere with the battered woman's employment, dominate family finances, and keep the woman under-funded, as well as physically abuse her.[12] Thus, battered women will, in all likelihood, require additional financial assistance to leave their abusers.

This article proposes that repeated acts of domestic violence, which constitute a course of abusive conduct, should affect the share of marital property awarded to an abusive spouse upon dissolution of the marriage. In the recent case of *Havell v. Islam*,[13] the New York Supreme Court denied an incarcerated defendant's motion to preclude his wife from testifying to in-

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(defendant husband who stabbed his wife 8-10 times while she was sleeping was not entitled to a portion of the plaintiff's law practice, law license and other assets as a matter of public policy); Brancoveneau v. Brancoveneau, 535 N.Y.S.2d 86 (App. Div. 1988) (defendant husband who hired assassin to murder his wife not entitled to equitable share of her dental practice which she built through her diligent labor).

9. *See* Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1 (1991) (Discussing the way in which the question "why didn't she leave" shapes both the legal and the social inquiry into battering. This inquiry inappropriately focuses on a supposed female "pathology" and not on male violence.).

10. The Institute for Research on Poverty reports that of all family groups, poverty is highest among those headed by single women with children under 18 years. INSTITUTE FOR RESEARCH ON POVERTY, FREQUENTLY ASKED QUESTIONS, WHO IS POOR?, *at* http://www.ssc.wisc.edu/irp/faws/faq3.htm (last visited Mar. 5, 2003). *See also* Richard R. Peterson, *A Re-evaluation of the Economic Consequences of Divorce*, 61 AM. SOC. REV. 528, 532 (1996) (reporting that men on average experience at least a 10% increase in their standard of living after divorce, while women suffer a decrease of 27% or more).

11. *See* Patricia Horn, *Beating Back the Revolution: Domestic Violence's Economic Toll on Women*, DOLLARS & SENSE, Dec. 1992, at 12 (emphasis added) ("Battering is not only a punch or a slap. It is any range of actions—physical, emotional, sexual, *and financial—designed to assert a man's power and control over a wife* . . . he may not allow her to do paid work. He may put her on an allowance and then withhold the money.").

12. *See generally id.*

13. 718 N.Y.S.2d 807 (Sup. Ct. 2000).

stances of domestic violence during the parties' twenty-one year marriage. The Court stated:

> the wife alleges the husband engaged in conduct resulting in lasting emotional and physical harm to herself and the parties' children. In this court's view, such conduct, if proven, is so egregious and shocking that the court must invoke its equitable power so that justice may be done between the parties.[14]

Although this seems to be a just and proper result, other courts have held to the contrary. This article will discuss, primarily, New York's equitable distribution law and its underlying public policies. It will then consider the narrow egregious conduct exception to the equitable distribution law's no-fault standard of marital property distribution. The article will next discuss how New York courts have dealt with incidents of domestic violence under this egregious conduct standard, and why domestic violence is properly considered under this standard in the distribution of marital property. The article goes on to explore the possible effect that consideration of acts of domestic violence in distributing marital property could have in deterring abusers from further violence as well as in providing a financial remedy that will enable abused women to more easily escape their abusers. The problem that tort law poses to the domestic violence victim in a long-term relationship will be addressed, as well as why a tort remedy is inadequate by itself. Finally, the *Havell v. Islam* case will be examined.

II. NEW YORK'S EQUITABLE DISTRIBUTION LAW

Prior to the enactment of the equitable distribution law,[15] New York courts distributed marital property at divorce according to a title theory: the spouse that held title to property was the sole owner and the non-title holding spouse was generally deprived of any property interest therein.[16] Absent a showing of fraud, the non-title holding spouse, usually the wife, could not obtain an interest in the property notwithstanding her marital contributions.[17] In an attempt to rectify the unjust results that

14. *Id.* at 811.

15. N.Y. DOM. REL. LAW § 236 (McKinney 1999).

16. *See* N.Y. DOM. REL. LAW § 236 cmt. C236B:24 (McKinney 1999) (McKinney Practice Commentaries).

17. *See id.*

often occurred under the title scheme, the legislature enacted the equitable distribution law that is currently in effect in New York.[18]

New York's equitable distribution law was expressly enacted to give women a more equal property allocation upon divorce than had previously been afforded to them.[19] In other words, with a view toward compensating the homemaker spouse whose contributions were largely unpaid and undervalued,[20] New York enacted a law that provided for the equitable distribution, as opposed to equal distribution, of marital property upon marital dissolution. Equitable distribution stands for the proposition that "marriage is a shared endeavor or joint undertaking in the nature of a partnership to which both spouses contribute—directly or indirectly, financially or *non-financially*—the fruits of which are distributable at divorce."[21] The legislature specifically rejected a proposal for the equal distribution of property; however, the consensus of even those who voted in favor of equitable distribution was that, more often than not, equal division should be accomplished.[22] Thus, the courts are directed to use their equitable powers to see that a just and fair, and not necessarily equal, distribution of property is accomplished when marriage ends in divorce.

The concept of equity would appear to give the courts the power to consider the fault of the parties when determining a

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18. *See id.*

19. *See id.*

20. *See* Price v. Price, 503 N.E.2d 684, 687 (N.Y. 1986) (emphasis added) ("The Equitable Distribution Law reflects an awareness that the economic success of the partnership depends not only upon the *respective financial contributions* of the partners, but also on a wide range of nonremunerated services to the joint enterprise, such as *homemaking, raising children and providing the emotional and moral support* necessary to sustain the other spouse in coping with the vicissitudes of life outside the home.") (quoting Brennan v. Brennan, 479 N.Y.S.2d 877, 880 (App. Div. 1984); *see also* MEMORANDUM OF ASSEMBLYMAN GORDON W. BURROWS, NEW YORK STATE LEGISLATIVE ANNUAL 129, 130 (1980) ("The basic premise for the marital property . . . reforms . . . is that modern marriage should be viewed as a form of partnership.").

21. JOHN DEWITT GREGORY, THE LAW OF EQUITABLE DISTRIBUTION ¶ 1.03 (1989) (emphasis added).

22. *See* N.Y. DOM. REL. LAW § 236 cmt. C236B:24 (McKinney 1999) (McKinney Practice Commentaries).

just distribution of marital property.[23] Nonetheless, marital fault is not a specifically enumerated factor in the equitable distribution law. Thirteen such factors were included in the equitable distribution law to provide guidance to courts when they are distributing marital property.[24] Rather than explicitly including marital fault under the statutory scheme, the legislature provided courts with a catchall provision.[25] "The principal reason for the existence of this factor is the Legislature's decision to refrain from expressly including or excluding marital fault from the determination of equitable distribution."[26] Thus, the discretionary power of the courts became doubly important—not only were the courts enjoined to work equity between the parties, but they were also empowered to decide the circumstances under which the parties' *misconduct* would require the exercise of judicial equity.

New York courts quickly decided not to consider, as a general rule, marital fault as a factor when distributing property. The seminal case in this regard is *Blickstein v. Blickstein.*[27] In *Blickstein*, the appellate court was asked to determine whether marital fault, *i.e.* the grounds for dissolution of the marriage, was a just and proper consideration when determining distribution of marital property under the catch-all provision of the equitable distribution law. The Second Department held that the consideration of fault would be contrary to the underlying assumption of the equitable distribution law that marriage was to

23. *See* BLACK'S LAW DICTIONARY 540 (6th ed. 1990) (emphasis added) ("Equity—Justice administered according to *fairness* as contrasted with the strictly formulated rules of common law . . . [t]he term equity denotes the spirit and habit of *fairness, justness and right dealing* which would regulate the intercourse of men with men . . . .").

24. "Subdivision 5(b) of Part B of the DRL § 236 sets forth [13] . . . factors which the court 'shall' consider in determining an equitable distribution. From the use of the word 'shall,' it is apparent that the Legislature intended the courts to consider all of the [13] factors but left the relative weight to be accorded to each factor . . . to the determination of the court . . . ." N.Y. DOM. REL. LAW § 236 cmt. C236B:25 (McKinney 1999) (McKinney Practice Commentaries).

25. *See* N.Y. DOM. REL. LAW §236(B)(5)(d)(13) (McKinney 1999) ("In determining an equitable disposition of property under paragraph c, the court shall consider . . . (13) any other factor which the court shall expressly find to be just and proper.").

26. N.Y. DOM. REL. LAW § 236 cmt. C236B:27 (McKinney 1999) (McKinney Practice Commentaries).

27. 472 N.Y.S.2d 110 (App. Div. 1984).

be viewed as an economic partnership.[28] The court reasoned that because each party had made contributions throughout the duration of the marriage, upon its termination they were each entitled to their fair share of the marital estate.[29] The court further endorsed the proposition that "fault is very difficult to evaluate in the context of a marriage" and may in fact be traceable to both parties' behavior.[30] The New York Court of Appeals adopted this reasoning in *O'Brien v. O'Brien*.[31] In *O'Brien,* the Court of Appeals held that the consideration of marital fault when distributing marital assets was

> inconsistent with the underlying assumption that a marriage is in part an economic partnership and upon its dissolution the parties are entitled to a fair share of the marital estate, because fault will usually be difficult to assign and because introduction of the issue may involve the courts in time-consuming procedural maneuvers relating to collateral issues.[32]

Thus, rather than make moral decisions as to the relative right and wrong of the parties to a divorce, the *O'Brien* court and subsequent lower courts have decided that these determinations are too difficult to make accurately. Instead, the courts have chosen to concentrate on the relatively facile adjudication of the economic concerns of the marriage.[33]

There are several policy implications to consider when contemplating the role that fault should play in the judicial division of the marital estate. The argument against consideration of fault relies primarily on judicial economy and a desire "to lessen the bitterness and in-court recriminations" that are an unfortunate aspect of many divorce actions.[34] The proponents for the consideration of fault in property distribution point out the socially acceptable role that financial accountability for misconduct can play in holding parties responsible for their culpa-

28. *See id.* at 113.

29. *See id.*

30. *See id.*

31. 489 N.E.2d 712 (N.Y. 1985).

32. *Id.* at 719.

33. *See generally* Russell I. Marnell, *Marital Fault in New York: Its Appropriate Role in Financial Issues,* N.Y.L.J., June 16, 1994, at 1, 2.

34. Sally Weintraub, *Dividing the Marital Property in the Face of Egregious Fault*, 10 FAM. L.Q. 20, 22 (1987).

ble behavior.[35] New York courts have chosen to take a Solomon-like approach to the application of fault in property distribution: although as a general rule misconduct is not a judicial consideration, in extreme cases the courts may use their equitable power to prevent an at-fault spouse from reaping a financial windfall in light of their misconduct.

New York courts consider fault in this context according to a narrow exception to the no-fault rule of property distribution carved out by the *Blickstein* court:

> [T]here will be cases in which marital fault, by virtue of its extraordinary nature, becomes relevant and should be considered. But such occasions, we would stress, will be very rare and will require proof of marital fault *substantially greater than that required to establish a bare prima facie case for matrimonial relief.* They will involve situations in which the marital misconduct is so egregious or uncivilized as to bespeak of a blatant disregard of the marital relationship—misconduct that "shocks the conscience" of the court thereby compelling it to invoke its equitable power to do justice between the parties.[36]

The egregious conduct exception to the exclusion of marital fault in property distribution upon marital dissolution is the current standard in New York.[37] However, the standard begs the question: what behavior constitutes egregious conduct?[38] Triggering fault in the property dissolution context clearly re-

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35. *See, e.g.,* Donald C. Schiller, *Fault Still Has a Role in No-Fault Divorce*, CHI. DAILY L. BULL., Dec. 26, 1996, at 6; Marnell, *supra* note 33; Harvey L. Golden & J. Michael Taylor, *Fault Enforces Encountability*, 10 FAM. ADVOC. 11 (1987).

36. Blickstein v. Blickstein, 472 N.Y.S.2d 110, 113-14 (App. Div. 1994) (emphasis added).

37. New York's highest court explicitly adopted the *Blickstein* egregious conduct rationale in *O'Brien v. O'Brien*, 489 N.E.2d 712, 719 (N.Y. 1985) ("Except in egregious cases which shock the conscience of the court, however, [marital fault] is not a 'just and proper' factor for consideration in the equitable distribution of marital property . . . [w]e have no occasion to consider the wife's fault in this action because there is no suggestion that she was guilty of fault sufficient to shock the conscience.").

38. *See* Robert D. Lang, *Marital Fault and Equitable Distribution: Two Unrelated Concepts*, N.Y. ST. B. J., January 1994, at 36. Despite its title, this article concludes that the concept of egregious fault, although hard to define and apply, can be an important factor in negotiating or trying a case of equitable distribution. The article also concludes that as there are no clear standards as to what does constitute egregious fault, and since the introduction of evidence of egregious misconduct may impact the court's decision regarding property, it is worth the effort to focus on the fault of the parties when seeking property awards.

quires more than the level of fault needed to warrant a grant of divorce pursuant to New York law.[39] The ultimate determination of what constitutes egregious fault is left entirely to the conscience of the court.

Where does the plight of the domestic violence victim fit into the equitable distribution equation? Is spousal abuse egregious fault? An examination of the pertinent New York cases discussed in Section III reveals that the answer to this question is equivocal, depending as it does on the conscience of the particular judge before whom the aggrieved spouse is appearing. The predicament of the domestic violence victim throws the discretionary nature of the fault exception to the equitable distribution law into stark relief and raises the concern that personal prejudices of individual judges as well as societal biases against battered women are working to deny these victims financial remedies against their abusers.

An examination of relevant secondary materials justifies the concern that the determination of domestic violence as egregious conduct may be improperly influenced by a judge's individual bias. As preliminarily noted in the introduction to this article, there is a significant societal bias against the battered woman that focuses on the conduct of the abused party and her perceived failure to leave her abuser. The judiciary is not exempt from this prejudice.[40] The fact is that the act of leaving an

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39. Leonard G. Florescue, *Reluctance to Deal with Marital Fault*, N.Y.L.J., Apr. 4, 1991, at 3.

40. *See* Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 YALE J. L. & FEMINISM 3 (1999):

> Most judges come to the bench with little understanding of the social and psychological dynamics of domestic violence and, instead, bring with them a lifetime of exposure to the myths that have long shaped the public's attitude toward the problem. The most persistent of these myths is the belief that battered women could leave their relationships if they simply chose to do so.

Id.; see also Deborah M. Weissman, *Gender-Based Violence as Judicial Anomaly: Between "The Truly National and The Truly Local,"* 42 B.C. L. REV. 1081, 1118-20 (Sept. 2001). The author states:

> Judges are dependent on cognitive strategies shaped by their past experiences that result in stereotypical assumptions . . . .
>
> In [domestic violence] cases, prevailing assumptions about independent and autonomous individuals who freely choose to be, or not to be, in an abusive relationship are based on cultural norms which are contrary to the realities of those women who are without such choices. Ideological axioms that

abuser can be properly classified as hazardous, even suicidal, and that many factors contribute to the battered woman's inability to escape her abuser.[41] The more appropriate inquiry may be how an abused woman finds the courage to escape at all.[42] Nonetheless, the examples of judicial prejudice against the battered woman are legion.[43] In New York, the Task Force on Women in the Courts reported that many judges "appear not to understand the nature of domestic violence and the characteristics of offenders and victims."[44] One judge made the following comment regarding his and his colleagues' attitude toward abused women:

> I don't feel sorry for them. Why don't they just get up and leave? They have been taking these beatings all these years and now they want me to intercede. All they have to do is get out of the house. It is as simple as that. What do they want from me?[45]

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define 'leaving' as the logical and rational response to domestic violence create a construct whereby women who do not conform to this convention are viewed with suspicion and skepticism.

Id.

41. When a woman finally leaves her abuser and he begins to sense his loss of control over her, his violence escalates and often results in homicide or severe physical harm. "The lethality of domestic violence often increases when the perpetrator believes the abused party has left or is about to leave the relationship." Anne. L. Ganley, Ph.D., *Domestic Violence: The What, Why and Who, as Relevant to Civil Court Cases*, *in* DOMESTIC VIOLENCE IN CIVIL COURT CASES: A NATIONAL MODEL FOR JUDICIAL EDUCATION 19 (Jacqueline Agtuca, et al., eds., 1992). Anecdotally, this was exactly the scenario in the *Havell* case. When Theresa Havell informed her husband of twenty-odd years that she wanted a divorce, he crept into her room one night and bashed her head in with a barbell. *Havell v. Islam*, N.Y.L.J., July 30, 2001, at 21 (Sup. Ct. July 30, 2001). Some other considerations for the domestic violence victim when leaving her abuser are "lack of economic resources[,] concern for children[,] emotional attachment to the [abuser,] perceptions of the availability of social support[,] and religious and culturally-based values and norms." Epstein, *supra* note 40, at 39. The significance of the quotations at the beginning of this article is evidenced here. These excerpts reflect the values and norms that affect judges just as they do other members of our society.

42. *See* Horn, *supra* note 11, at 12.

43. *See* Karen Czapanskiy, *Domestic Violence, the Family, and the Lawyering Process: Lessons From Studies on Gender Bias in the Courts*, 27 FAM. L.Q. 247, 252 (1993) ("Every study collected substantial evidence that the credibility accorded women litigants is less than that accorded men litigants . . . . The list of bad outcomes and bad judging seems endless. Women are put at risk or left at risk for no good reason.").

44. *Report of the NewYork Task Force on Women in the Courts*, 15 FORDHAM URB. L.J. 11, 31 (1986) [hereinafter *Task Force Report*].

45. *Id.* at 32.

The answer to the latter question is arguably a greater share of marital property based upon the physically abusive conduct of their soon-to-be-former spouses. The Task Force on Women in the Courts found that, although adequate statutory protections were in place for battered women, the law's remedial purposes were not being accomplished because judges were too often uninformed about the nature of domestic violence and the characteristics of victims and offenders. The Task Force determined that victims' claims were trivialized, and sometimes ignored, by law enforcement and court personnel discouraging the reporting and filing of claims. Finally, the Task Force found that victims are often presumed to have provoked the attack and are not considered credible unless they have visible injuries.[46]

When considered in light of these findings of judicial and societal bias, it seems unlikely that the victim of domestic violence will be given appropriate financial relief under the equitable distribution law. The judge has not only the discretion to decide what constitutes egregious conduct, she then may also consider the other twelve statutory factors and how much weight should be accorded to each. If a judge is operating under a blame-the-victim mentality, it seems unlikely that the battered woman will get a fair share of the marital property.

Judges are directed to consider all twelve factors of Article 13 of New York's Domestic Relations Law Section 236(B)(5)(d) when distributing property.[47] It stands to reason then that, if domestic violence as a form of marital fault were a specifically enumerated factor for judicial consideration, any evidence of domestic violence would by necessity have to be considered by the court when distributing property. A specific consideration of such would go a long way in preventing judicial bias from encroaching on a battered woman's award, as the intent of the legislature would be clear that domestic violence should be contemplated when distributing property. Furthermore, if domestic violence was an explicit factor to be considered under Domestic Relations Law section 236(B)(5)(d), and a judge disregarded evidence of such, the appellate courts would have more discretion to reverse or modify property awards that are not

46. *See id.* at 47.

47. *See supra* note 24 and accompanying text.

based on an appropriate consideration of all factors under the statute.[48]

It is also clear that, when excluding fault as a factor in the equitable distribution law, the legislature was talking about the general fault-finding that is necessary to justify a divorce judgment.[49] There is absolutely no evidence that the legislature intended to exclude spousal abuse from consideration in distributing marital property under the statutory scheme. In fact, the *Blickstein* court's explicit reservation of a category of fault that constitutes egregious misconduct that shocks the conscience of the court could logically be construed to refer to acts of domestic violence.[50] Nonetheless, some courts have excluded evidence of physical abuse that constitutes a course of abusive conduct when distributing property. It appears that these courts are applying the equitable distribution law in a manner that was never intended by the legislature.

III. EGREGIOUS MISCONDUCT

This section discusses the divergent outcomes in equitable distribution cases involving allegations of domestic violence. The first case examined provides an in-depth analysis of the egregious misconduct concept. In the next category of cases, incidents of domestic violence were not found by the court to constitute egregious misconduct affecting the distribution of marital property. Finally, those cases in which acts of domestic violence are the basis for a reduction of a marital property award are considered.

a. *Egregious Misconduct in General*

This section addresses a case in which the court provides the general definition of egregious misconduct. *McCann v. McCann*[51] provides a thoughtful discussion of the egregious misconduct standard. In *McCann*, the wife sought a greater share

48. *See* Havell v. Islam, 751 N.Y.S.2d 449, 454 (App. Div. 2002) (trial courts have broad discretion in determining equitable distribution and the consideration to be given to the statutory factors).

49. New York continues to retain a fault based divorce scheme. *See* N.Y. DOM. REL. LAW § 170 (McKinney 1999).

50. *See* Blickstein v. Blickstein, 472 N.Y.S.2d 110, 113-14 (App. Div. 1984).

51. 593 N.Y.S.2d 917 (Sup. Ct. 1993).

of the marital assets because her husband had refused to have children with her, despite his promise to do so. The issue in that case was whether this fraudulent misrepresentation of the husband's intention constituted egregious misconduct. The *McCann* court noted with regret that the *Blickstein* court's standard is purely subjective and does not provide guidance as to what would constitute conscience-shocking actions.[52] The court went on to opine that a judge's decision as to what sort of behavior should be considered egregious must be based upon "extrinsic evidence of normative societal perceptions of that act."[53] Thus, when a judge is to determine whether a spouse's behavior constitutes egregious conduct, she must consider "whether the social interest compromised by the offending spouse's conduct is *so fundamental* that the court is compelled to punish the offending spouse by affecting the equitable distribution of the marital assets."[54] The court considered several cases in which a spouse's conduct was deemed to be so egregious as to affect the share of marital assets he was to receive, among them a case involving long history of domestic violence.[55] For the purposes of this article, it is significant that the court found physical abuse to be conduct that "callously imperils the value our society places on . . . the integrity of the human body."[56]

This article has already discussed the evidence of the existence of societal and judicial biases against battered women. The executive and legislative branches of the New York government have demonstrated a clear and explicit intention to eradicate domestic violence.[57] The question remains as to what

52. *See id.* at 920.

53. *See id.* at 920-21.

54. *Id.* at 921 (emphasis added).

55. *See id.* at 921-22.

56. *Id.* at 922. As this article was going to press, the First Department affirmed the *Havell* decision. In so doing, the appellate court cited this section of the *McCann* case as the authority for the proposition that physical spousal abuse that amounts to attempted murder is egregious misconduct. Havell v. Islam, 751 N.Y.S.2d 449, 454 (App. Div. 2002).

57. "The Family Court Act and Criminal Procedure Law, by and large, provide an adequate framework for providing relief to victims of domestic violence." *Task Force Report, supra* note 44, at 47. *See also* Weissman, *supra* note 40, at 1110-11("Although progress has been made through state and legislative enactments, there is a *critical disjuncture* between formal law on the one hand, and the implementation of the statutes by the courts in matters involving domestic violence, on the other."). New York legislators have introduced a bill that seeks to amend the

normative value the *McCann* court might expect the judiciary to examine. Some courts seem to consider the societal belief that domestic violence victims should leave and, if they do not, they are "asking for it." In fact, the evidence shows that it is to this societal bias that some judges refer when adjudicating domestic violence cases and not to the "value our society places on the integrity of the human body."[58] The judiciary should be given stronger guidance by the equitable distribution law, which could assist in eliminating the ambiguity that leads to conflicting results in the following cases.

b. *Domestic Violence Not Sufficiently "Egregious" to Warrant Consideration*

The Appellate Division, Third Department has decided a trilogy of cases in which it held that incidents of domestic violence of varying severity were not sufficiently egregious to warrant consideration in the distribution of marital property.[59] The department's failure to consider domestic violence during property distribution in two of these cases evidences a misunderstanding of the egregious conduct standard.

The first case dealt with, interestingly, acts of domestic violence by a woman against her husband.[60] In *Stevens v. Stevens*,[61] the plaintiff wife struck and scratched the defendant a number of times, pulled his hair and bit him, as well as

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state's Civil Rights Law to provide victims of domestic violence with a civil remedy against their abusers. Assemb. B. 6223, 224th Sess. (N.Y. 2001) ("[T]his legislation will send a message that domestic violence is a significant crime that will not be tolerated in our society.").

58. *See McCann*, 593 N.Y.S.2d at 922.

59. *See* Kellerman v. Kellerman, 590 N.Y.S.2d 570 (App. Div. 1992); Orofino v. Orofino, 627 N.Y.S.2d 460 (App. Div. 1995); Stevens v. Stevens, 484 N.Y.S.2d 708 (App. Div. 1985).

60. Domestic violence is overwhelmingly male violence committed against females. *See* PATRICIA TJADEN & NANCY THOENNES, CENTER FOR DISEASE CONTROL, FULL REPORT OF THE PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY iv (Nov. 2000) [hereinafter VIOLENCE AGAINST WOMEN REPORT], which reports that "[w]omen experience more intimate partner violence than do men: 22.1% of surveyed women, compared with 7.4% of surveyed men, reported they were physically assaulted" by an intimate during their lifetime. *Id.* Because women are three times more likely to be victims than men are, I refer to victims as "she" in this article and abusers as "he."

61. 484 N.Y.S.2d 708 (App. Div. 1985).

wounded him with a kitchen knife while attempting to break into his locked briefcase.[62] The court specifically noted that the plaintiff's misconduct took place in the "waning" months of the marriage.[63] The implication is that the wife's behavior was the culmination of years of frustration confined to a limited period of time and the product of a bitter breakup. The abusive behavior did not, therefore, "work a divestiture of the property interest . . . earned over 15 years of marriage."[64] A fair reading of this case shows that the misconduct was concentrated toward the end of the marriage, and was therefore not the result of years of systematic control and abuse that is characteristic of the typical battering relationship.[65] Thus, it appears that the court properly refused to consider this conduct when distributing the marital property.

The second case decided by the Third Department is more disturbing. In *Kellerman v. Kellerman*,[66] the trial court refused, on fault grounds, to award to the defendant husband the appreciation in value of the plaintiff wife's residence that had been purchased prior to the marriage.[67] The appellate court reviewed the allegations of the plaintiff's complaint, which consisted of twenty-seven specific incidents of physical assault, verbal abuse and threats during the parties' brief marriage.[68] The Third Department overturned the trial court's finding that this conduct was sufficiently egregious as to warrant consideration in apportioning the marital property. Thus the case was remanded to the trial court for a determination as to the

62. *Id.* at 710.

63. *Id.*

64. *Id.*

65. Throughout this article I refer to the "abusive" or "battering" relationship. A useful definition of an abusive relationship, which I use interchangeably with the term "domestic violence," can be found in the *Task Force Report*, *supra* note 44, at 27. "Domestic Violence is the physical or psychological abuse of one family member by another. This violence occurs in all social groups. Any family member can be a victim, but experience has shown that women, children, and elderly relatives are the most frequent victims." *Id.* "The behavioral definition of domestic violence focuses on the *pattern of abuse* and violence in relationships between adults . . . ." Ganley, *supra* note 41, at 22 (emphasis added). Thus, a battering relationship normally consists of a variety of abusive behaviors, not all of which are physical assaults, that occur with regularity.

66. 590 N.Y.S.2d 570 (App. Div. 1992).

67. *Id.* at 571.

68. *Id.*

amount the plaintiff wife's separate property had appreciated during the marriage.[69] What is particularly disturbing about the *Kellerman* case is that the conduct complained of is exactly the sort of ongoing abusive coercive conduct exhibited by chronic abusers.[70]

Although the court in *Kellerman* specifically cited to, and relied on, the *Stevens* decision, the cases are inapposite. In *Stevens*, the court explicitly stated that the violent episodes occurred during a bitter period near the end of a failed marriage. In *Kellerman,* the violent episodes were the cause of the marital breakdown. The *Stevens* couple was married fifteen years, whereas the Kellermans were married only two years when they separated for the first time. Lastly, the property to be distributed in *Kellerman* was the appreciation in the wife's separate property, not the "property interest . . . earned over 15 years of marriage."[71]

It is hard to discern how the Third Department could conclude that twenty-seven specific episodes of harassment, physical abuse, and threats were not "so outrageous or extreme as to shock the conscience of the court [so as to] justify [a] divestiture of certain of the parties' marital property."[72] It is even more difficult to understand how the Third Department could rely on a case in which a wife's furious outbursts in the relatively short period at the end of a long relationship could compare to an abusive course of conduct in a marriage of short duration. If a bias exists against women who do not timely escape their batterers, this case sends an ominous message to those who seek to leave after a relatively short relationship. It demonstrates that a genuine risk exists that abusive men will seek a share of their wife's property when she leaves, and may be entitled to it, under the equitable distribution law.

The final case in this trilogy is *Orofino v. Orofino.*[73] The court found the defendant husband to have "consumed extraordinary amounts of alcohol," to have verbally abused the plaintiff wife on a biweekly basis, to have physically abused the

69. *Id.* at 572.
70. *See supra* note 65 and accompanying text.
71. Stevens v. Stevens, 484 N.Y.S.2d 708, 710 (App. Div. 1985).
72. *Kellerman*, 484 N.Y.S.2d at 571.
73. 627 N.Y.S.2d 460 (App. Div. 1995).

plaintiff (including an episode in which he threw an ashtray at her, lacerating her scalp), to have threatened to commit arson and finally, to have placed the muzzle of a rifle against the plaintiff's head and threaten to kill her.[74] Nevertheless, the trial court held that this behavior should not lessen the defendant's share in the nearly two million dollars invested in a joint account/stock portfolio.[75] Instead, the defendant husband was awarded sixty percent of the portfolio based on the fact that he solely managed the assets and plaintiff's contribution consisted of "homemaker" activities.[76] The decision in *Orofino* seems to fly directly in the face of the intention of the New York Legislature in enacting the equitable distribution law. The express intent of the legislature was to treat the marriage as a partnership, with a view toward valuing the homemaker's contributions, and, although an equal division was not mandated, it was presumed that under most circumstances equal division should be accomplished.[77]

Additionally, the *Orofino* court relied on the two previous cases decided by the Third Department discussed above. Both cases are distinguishable: the Orofinos were married for fifteen years (unlike *Kellerman*, where the parties were married for a relatively short time); also the abuse in *Orofino* was part of an ongoing course of conduct (unlike the *Stevens* case). It is hard to fathom what part of holding a gun to his spouse's head the court found not to be conscience-shocking behavior on the part of defendant. Were that the sole act of misconduct, it might be sufficient to meet the egregious misconduct standard; taken together with the threats and physical abuse, the "shock the conscience" standard was clearly met.

c. *Domestic Violence is Held to be Egregious Conduct*

This section discusses those decisions that have distributed a greater share of property to an abused spouse. Several courts have utilized the equitable distribution law's catch-all factor to afford the domestic violence victim a larger share of the marital property. A review of the case law reveals, however, that the

74. *Id.* at 461.
75. *Id.*
76. *Id.* at 462.
77. *See supra* notes 20 and 22 and accompanying text.

judiciary seems uncomfortable with this analysis; the judge will often point to the diminished earning capacity of the domestic violence victim.[78] Although very often there is some negative economic effect on the domestic violence victim, such an effect should not necessarily be a prerequisite to recovery. The focus should be not only on the effect that the abusive behavior has on the wife, but also on redressing the husband's misconduct.[79] Furthermore, it has been shown that women often continue working in the face of abuse for a number of reasons.[80] It would be incongruous to minimize the harm caused by the husband merely because the abuse did not have the result of destroying the woman's earning capacity.

It is also notable that in almost every case in which domestic violence is considered during distribution, the ongoing course of abusive conduct has culminated in a murderous episode that by itself justifies use of the egregious conduct standard. One of the only courts to have explicitly considered an ongoing course of abusive conduct as sufficiently egregious as to shock the conscience of the court was the New York Supreme

78. *See, e.g.,* Pollack v. Pollack, N.Y.L.J., Oct. 25, 1999, at 40 (N.Y. Sup. Ct. Oct. 25, 1999) (injuries inflicted on plaintiff wife during knife attack by defendant husband resulted in reduced income from her law practice); Murtha v. Murtha, N.Y.L.J., May 15, 1998, at 29 (N.Y. Sup. Ct. May 15, 1998) (long history of violence led to wife's being psychologically, economically and financially impaired and thus consideration of the domestic violence must be given in the distributive equation); Wenzel v. Wenzel, 472 N.Y.S.2d 830, 833 (Sup. Ct. 1984) (two-step inquiry required to determine if fault is to be considered as a factor in equitable distribution, the first being the finding of fault, and the second step a finding that the fault had such an adverse physical and/or psychological effect upon the innocent spouse as to interfere with her ability to be or to become self-supporting); *but see,* Havell v. Islam, 751 N.Y.S.2d 449, 453 (App. Div. 2002) (specifically rejecting defendant Islam's argument that a second, adverse economic effect component has been added to the *Blickstein* egregious conduct standard).

79. *See* discussion *infra* section IV.

80. Women who suffer abuse are found to be employed in approximately the same numbers as those who have not. Susan Lloyd, *Domestic Violence and Women's Employment, at* http://www.northwestern.edu/IPR/publications/nupr/nuprv03n1/lloyd.html (last visited Feb. 21, 2002). Current employment status appears to be unaffected by women's varying experiences of male aggression in intimate relationships. On the other hand, women's responses indicate that experience of male violence and coercion may influence their labor market experience over time. *Id.* This would indicate that although a woman seeking property distribution may be employed at the time she appears in court, she may experience the negative economic effects of the abuse at a time when the property is distributed and no modification can be sought.

Court in *Havell v. Islam*.[81] As will be discussed Part IV, however, in its final distributive determination the *Havell* court relied on a murderous assault and failed to rely on the issue of ongoing domestic violence in reducing the husband's award.

Despite the reliance on murderous episodes and economic impairment rather than "mere" domestic violence incidences, there can be no doubt that courts that have considered domestic violence as a factor in distributing marital property are using their equitable powers in a professionally courageous manner. As domestic violence is not an enumerated factor in the equitable distribution law, the courts use creative reasoning to work equity for grievously abused women who are leaving a violent marriage. Thus, we have a number of tortuous opinions with which the judiciary has had to work to fit the meaning of the equitable distribution law to the facts of these cases to protect their decisions from reversal on appeal.[82] We will examine the two cases that consisted solely of physical violence, as opposed to attempted murder, in turn.

Debeny v. Debeny[83] concerns particularly outrageous behavior by a defendant husband. The court found that the husband engaged in the following behavior: "Since 1951, the defendant . . . slapped the plaintiff's face between fifty and seventy times a year . . . in 1965 he broke the plaintiff's foot by stamping it"; in 1970 he pushed her down, causing her to break her ankle; in 1971, he broke her finger causing it to be permanently deformed; in 1974 he "pulled her shoulder out of its socket"; in 1979 he pushed her down, breaking her foot; in 1982, he pushed her down breaking her arm, and causing a 40% loss of the use of the arm; in 1986, defendant slapped plaintiff's face so hard that he cracked two of her teeth, requiring caps and a root canal; the defendant continuously smacked the plaintiff in the face at the location of a jaw injury caused by a car accident; and finally, the defendant threw the plaintiff against the counter in the home

81. 718 N.Y.S.2d 807, 811 (Sup. Ct. 2000) ("[A] pattern of domestic violence, properly proven by competent testimony and evidence, is a 'just and proper' factor to be considered by the Court in connection with the equitable distribution of marital property . . . .").

82. *See, e.g.*, Kellerman v. Kellerman, 590 N.Y.S.2d 570 (App. Div. 1992) (Appellate Division reversed the nisi prius court's decision denying an abusive spouse a share in the appreciation of plaintiff wife's separate property).

83. N.Y.L.J., Jan. 24, 1991, at 21 (N.Y. Sup. Ct. Jan. 24, 1991).

causing the plaintiff to sustain back injuries.[84] The court went on to award the plaintiff 60% of the marital property and defendant 40%, specifically predicating the award on the defendant's abuse of plaintiff:

> It is now well settled that marital fault is generally not a relevant consideration unless it is so egregious as to shock the conscience of the court, and even then, such fault is but only one factor to be considered by the court. *In this case, the defendant's misconduct toward the plaintiff was not one of sudden anger causing a moment of corporal punishment.* It was so severe and so brutal as to clearly demonstrate gross and complete disregard of the marital relationship. The wife, who is 5'6" and weighs 115 lbs., was used as nothing more than a slapping, punching and shoving bag by a defendant, who is 5'9" and weighs 210 lbs. The plaintiff was not treated as a wife by any stretch of the imagination, nor even as an employee. At best she was dealt with as an indentured servant who could be beaten at will!
>
> The court finds the defendant's assaults and conduct toward the plaintiff to be, at the very least, egregious and that it must be considered in determining equitable distribution of the parties' marital property.[85]

The *Debeny* court makes a pertinent point that is also apparent in the *Stevens* case. Domestic violence is rarely the result of the provocation of the abuser by the abused, nor is it a response to anger or stress.[86] Thus, physical violence, by either men or women, which results from situational stress, i.e. the bitterness and recriminations that are the result of an unpleasant breakup, is arguably not properly considered in the equitable distribution process, because it does not meet the behavioral definition of domestic violence.[87] This distinction between the

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84. *Id.*

85. *Id.* (citations omitted) (emphasis added).

86. Ganley, *supra* note 41, at 33-34 ("Domestic violence is not caused by 'anger'. . . . Displays of anger by the perpetrator are often merely tactics employed by the perpetrator to intimidate the abused party . . . . Domestic violence is not caused by stress . . . . When we remember that domestic violence is a pattern of behavior consisting of a variety of tactics repeated over time, then citing specific stressors becomes less meaningful in explaining the entire pattern.").

87. *See supra* note 65 and accompanying text. Another useful definition of domestic violence is "a course of coercive conduct that includes physical force and/or a pattern of mental abuse and control including intense criticism, verbal harassment, sexual coercion and assaults, isolation due to restraint of normal activities and freedom, and denial of access to resources." DIANA ZUCKERMAN & STACEY

two types of behavior should go a long way toward easing the concern of those jurists who express the fear that the abused woman is merely seeking a tactical advantage in the litigation. Although important problems of proof exist regarding domestic violence, it should not be impossible to discern when a plaintiff is alleging that a course of abusive conduct exists, as opposed to one or more isolated incidents that occur toward the end of a relationship. Furthermore, every victim will have to prove her allegations by competent evidence before meeting the *Blickstein* standard.

A course of abusive conduct was at issue in the case of *Murtha v. Murtha*[88] as well. In *Murtha,* the plaintiff husband candidly admitted to physically abusing the defendant throughout their marriage and for a period prior thereto. The court found that while generally emotional considerations should not effect the equitable distribution of property, the outcome of which should be premised on financial matters, in this instance, the abuse contributed to the economic and financial impairment of the plaintiff, and consideration had to be given to such actions.[89] Thus, the property was distributed sixty percent in favor of the battered spouse.

In this case, we again see the court struggling with the issue of domestic violence. The court notes a reluctance to deal with emotional considerations when distributing property, the assumption being that physical abuse of a wife is a by-product of emotion. As previously stated, domestic violence is calculated behavior, not triggered by stress or anger.[90] A victim of such abuse is understandably upset and emotionally damaged, but to call consideration of abuse an emotional issue ignores the fact that male violence against women is a significant social problem regardless of the individual contexts before the courts.

FRIEDMAN, INSTITUTE FOR WOMEN'S POLICY RESEARCH, MEASURING THE COST OF DOMESTIC VIOLENCE AGAINST WOMEN: A SUMMARY OF THE FINDINGS OF THE COSTS OF DOMESTIC VIOLENCE PROJECT, *at* http://alt.municipia.at/fauen/forum/daten/msg00041.htm (February 1998) (on file with Pace Law Review).

88. N.Y.L.J., May 15, 1998, at 29 (N.Y. Sup. Ct. May 15, 1998).

89. *See id.*

90. *See* Ganley, *supra* note 41, at 23 ("Domestic violence is purposeful and instrumental behavior. The pattern of abuse is directed at achieving compliance from or control over the abused party.").

IV. DOMESTIC VIOLENCE AS EGREGIOUS MISCONDUCT

It is disconcerting that courts could determine domestic violence of the *Kellerman* and *Orofino* variety is not sufficiently egregious to merit a reduction in the offending spouse's share of the marital property. Perhaps the judges in those cases did not believe that they were empowered by the equitable distribution law to reduce a spouse's share of marital property where the abuse did not consist of severe physical injury. Some members of the judiciary believe that evidence of physical injury is necessary before domestic violence can justifiably be determined to have occurred.[91] Judges may fear that women will fabricate battering incidents to gain financial and tactical advantage in the divorce proceeding. The empirical evidence disproves this assumption, however.[92]

This section examines the statistics and studies with regard to domestic violence that prove that domestic violence is indeed egregious misconduct which compromises a fundamental societal interest so "that the court is compelled to punish the offending spouse by affecting the equitable distribution of the marital assets."[93] The article will next discuss how the consid-

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91. *See Task Force Report*, *supra* note 44, at 33:

> More pernicious still is some judges' requirement of visible physical injury . . . . Although evidence of physical injury is relevant . . . it is not the *sine qua non* of domestic violence. Psychological abuse, threats of violence and menacing with a weapon do not leave physical scars. Injuries are often to parts of the body covered by clothing: breasts, abdomen, groin. The judicial requests for visible proof of injury are perceived to betray an attitude that women's testimony is not credible unless corroborated by a bruise, a laceration, or a black eye.
>
> The heightened scrutiny of battered women's credibility is "in direct contrast to the facts of the domestic-violence literature: Battered women don't exaggerate; they tend to minimize, to deny the severity and extent of the abuse[,] to protect the abuser and to hide their shame."

Id. (citations omitted) (quoting New York Task Force On Women Public Hearing 48 (Mar. 5 1985) (Rochester) (testimony of Mary Lee Sulkowski)).

92. "Some judges, attorneys and court personnel erroneously presume that petitions for orders of protection filed by women during the course of a matrimonial action are 'tactical' in nature. This assumption fails to appreciate the many legal disincentives to filing a petition as a litigation tactic and that, in a violent relationship, violence is particularly likely to occur after a divorce action has been commenced." *Id.* at 47.

93. McCann v. McCann, 593 N.Y.S.2d 917, 921 (Sup. Ct. 1993).

eration of domestic violence in distribution of marital property will likely have several beneficial results. These benefits include deterring the abuser by holding him financially accountable for his misdeeds, and providing the abused woman with the financial means to escape her abuser, which might help to mitigate the adverse economic effects of divorce on women and their dependent children. Finally, an alternative viewpoint will be discussed, which holds that domestic violence victims should seek a tort remedy for their damages, a viewpoint that this article concludes is unrealistic under the current tort scheme in New York.

America is a violent society.[94] The nature of the violence that American's experience is also dependent on gender.[95] Violence against women is primarily intimate partner violence; 64% of women who report being abused since age eighteen were victimized by an intimate partner, as opposed to 16.2% of men.[96] Studies indicate that societal norms contribute to the prevalence of domestic violence.[97] The consequences of violence are more severe for women than for men; a woman is significantly more likely to be injured than a man during an assault,

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94. "Physical assault is widespread among adults in the United States: . . . an estimated 1.9 million women and 3.2 million men are physically assaulted annually in the United States." VIOLENCE AGAINST WOMEN REPORT, *supra* note 60, at iii.

95. *See*, Ganley, *supra* note 41, at 41.

96. VIOLENCE AGAINST WOMEN REPORT, *supra* note 60, at iv.

97. *See*, Ganley, *supra* note 41, at 30:

> Domestic Violence is learned not only in the family but also in society. It is learned and reinforced by interactions with all of society's major institutions: the familial, social, legal, religious, educational, mental health, medical, entertainment/media etc. In all of these social institutions there are various customs that perpetuate the use of violence as legitimate means of controlling family members at certain times (e.g. religious institutions that state a woman should submit to the will of her husband; laws that do not consider violence against intimates a crime). These practices inadvertently reinforced the use of violence to control intimates by failing to hold the perpetrator accountable and by failing to protect [the] abused party.

Id. See also Demi Kurz, *Women, Welfare and Domestic Violence*, 25 SOC. JUST. 105 (1998) (The state in practice condones male violence because government welfare policies provide little support for women to live independently of men, and this policy effectuates a government refusal to facilitate female escape from male violence.).

and the risk of an injury to a female increases when the assailant is an intimate partner.[98]

Domestic violence, and violence against women in general, has a negative effect on society as a whole. Examples of the direct costs that domestic violence has on society are the expense of emergency room care for victims, the effect of domestic violence on the well-being of children who witness the abuse, foster care expenditures, the cost of sheltering homeless women seeking to escape their abusers and the cost of prison stays and detention for abusers.[99] Indirect costs to the community include the effect on the battered woman as a productive employee[100] as well as the psychological effects on battered women.[101]

The reluctance of certain jurists to consider domestic violence as "sufficiently egregious to shock the conscience of the court" seems ludicrous in light of the research pertaining to domestic violence. If the analysis applied by the *McCann*[102] court is correct, and the judiciary should consider that misconduct that compromises significant societal interests when effectuating equitable distribution, then domestic violence should be considered as such because the empirical evidence indicates that domestic violence exacts a heavy toll from our society. It is not a huge leap in logic to assert that domestic violence, as prevalent and damaging as it is, should be at least accorded the same

98. *See*, VIOLENCE AGAINST WOMEN REPORT, *supra* note 60, at iv (39% of female physical assault victims, compared to 24.8% of male assault victims reported being injured during their most recent physical assault; additionally, women assaulted by an intimate partner reported being injured more often than women who were assaulted by other types of perpetrators).

99. *See generally* ZUCKERMAN & FRIEDMAN, *supra* note 87.

100. *See id. See also* Ganley, *supra* note 41, at 53-54; U.S. GENERAL ACCOUNTING OFFICE, REPORT TO CONGRESSIONAL COMMITTEES, DOMESTIC VIOLENCE: PREVALENCE AND IMPLICATIONS FOR EMPLOYMENT AMONG WELFARE RECIPIENTS 7-8 (1998) [hereinafter REPORT TO CONGRESSIONAL COMMITTEES] (research indicates that abusive partners disrupt women's work-related activities by calling them frequently during the day, coming to their place of employment unannounced, harassing the women at work, making them purposefully late for work and failing to provide promised child care).

101. REPORT TO CONGRESSIONAL COMMITTEES, *supra* note 100, at 8-9 (Women who are abused often experience "chronic health problems, low self-esteem, and depression.").

102. 593 N.Y.S.2d 917, 920 (Sup. Ct. 1993).

weight in distributing property as, for instance, the tax consequences to the parties.[103]

Nor is it fair to say that domestic violence is an emotional, as opposed to a financial, issue.[104] Domestic violence has a significant impact on the productivity of the female worker and of her ability to obtain and keep a job.[105] Spousal abuse has direct adverse economic effects on society as a whole. It is also wrongful behavior inflicted by the human being who the battered woman should justifiably be expected to trust and rely upon more than any other.

Furthermore, there are several beneficial aspects to holding the abuser financially accountable for his misdeeds. Our society countenances holding its members responsible for the wrongs they commit.[106] Failing to hold an abusive spouse financially accountable for his abusive behavior lowers the stakes in the divorce scenario. The abuser stands to lose nothing more than his spouse if he engages in abusive conduct. Significantly, those states that do not consider fault in distributing assets on divorce have had a greater frequency of spousal abuse than those that do consider fault.[107] Holding the batterer financially accountable will send a message that abuse will not be tolerated and may deter the batterer.[108]

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103. *See* N.Y. DOM. REL. LAW § 236(B)(5)(d)(10) (McKinney 1999).

104. *See, e.g.*, *supra* notes 86 and 90 and accompanying text.

105. *See generally*, Connie Stanley, Domestic Violence: An Occupational Impact Study (July 27, 1992) (unpublished study, on file with Pace Law Review); U.S. DEPARTMENT OF LABOR, WOMEN'S BUREAU, DOMESTIC VIOLENCE: A WORKPLACE ISSUE (October 1996); Lloyd, *supra* note 80.

106. "Considering fault among the other equitable factors in dividing property . . . does nothing but allow a court to consider things that most people instinctively think of as fair in making an equitable financial settlement between parties to a failed marriage." *See* Donald C. Schiller, *Fault Still Has a Role in No Fault Divorce*, CHI. DAILY L. BULL., Dec. 26, 1996, at 6.

107. *See* Margaret F. Brinig & Steven M. Crafton, *Marriage and Opportunism*, 23 J. LEGAL STUD. 869, 891-92 (1994) ("Abuse indeed seems to be related to the absence of penalties embodied in the divorce statutes.").

108. *See* CHRISTOPHER D. MAXWELL, JOEL H. GARNER & JEFFREY A. FAGAN, U.S. DEP'T OF JUSTICE, THE EFFECTS OF ARREST ON INTIMATE PARTNER VIOLENCE: NEW EVIDENCE FROM THE SPOUSAL ASSAULT REPLICATION PROGRAM (2001). This report found that arrest was associated with less repeat offending and that the effectiveness of arrest does not vary by jurisdiction. Barbara Bennett Woodhouse draws an analogy to a financial remedy in the form of a marital tort claim and mandatory arrests or fines for domestic violence. *See* Barbara Bennett Woodhouse, *Sex, Lies and Dissipation: The Discourse of Fault in a No-Fault Era*, 82

Providing an abused woman with the economic means to leave her abuser permanently is a very important potential beneficial effect of the consideration of domestic violence in the equitable distribution of property. Divorce has adverse financial effects on women in general.[109] Several factors contribute to the so-called phenomenon of the "feminization of poverty." Primarily, women often forgo career opportunities to stay home and raise the children born to the marriage.[110] This has an adverse effect on their ability to become wage earners.[111] Women in general earn less money then men do. In New York, the earnings ratio between men and women employed full-time, all year in 1997 was 79.3%.[112] Women thus earn about eighty cents for every dollar that men earn. Women generally receive the non-liquid assets in a divorce, such as the marital home and household furnishings.[113] Women are therefore often placed at a financial disadvantage when the marriage comes to an end.

Victims of domestic violence suffer acutely from this inequality. Very often an abuser will use financial means to con-

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GEO. L.J. 2525, 2557 (1994). It stands to reason that the threat of losing a share of the marital property would have a similar deterrent effect.

109. *See, e.g., supra* note 10 and accompanying text.

110. *See* ALLAN M. PARKMAN, NO-FAULT DIVORCE: WHAT WENT WRONG? 87-88 (1992).

111. *See id.* at 87:

> The decision by married couples for the wife to take primary responsibility for the child rearing traditionally has made women less attractive employees than men, with the result that businesses have tended to pay them less and promote them more slowly. The problem is circular. Women earn less than men, so it is rational for families to decide that the mothers will be the parents with the primary responsibility for rearing the children, but at the same time, one of the reasons why women tend to have lower wages is because they assume the role. Career-oriented women find it difficult to convince employers that they are not the typical woman and as a result, they often are adversely affected.

Id. See also Greg J. Duncan & Saul D. Hoffman, *A Reconsideration of the Economic Consequences of Divorce,* 22 DEMOGRAPHY 485, 495-96 (1985) ("The economic consequences of divorce are especially adverse for women. In most cases, children remain with the mother, who usually has considerably lower potential labor market earnings than her former husband, partly because her responsibilities for the children are likely to reduce her labor supply and may have limited her past human capital investments.").

112. *See* THE GENDER WAGE GAP, INSTITUTE FOR WOMEN'S POLICY RESEARCH FACT SHEET (Jan. 2001), *available at* http://www.iwpr.org/.

113. Marsha Garrison, *The Economic Consequences of Divorce*, 32 FAM. & CONCILIATION L. REV. 11, 11 (Jan. 1994).

trol his victim.[114] As a result, she may have virtually no money at her disposal. The battered woman who is employed may be subject to harassment at work that jeopardizes her job.[115] She may suffer significant physical and psychological harm that affects her ability to work.[116] Faced with these obstacles to financial independence, many abused women choose to stay with the abusive spouse rather than subject their children to a life of poverty. If women were assured a greater share of the marital assets, such as at least half of a million dollar stock portfolio (as was at issue in *Orofino*[117]), doubtless they would leave their abusers sooner and stay gone more frequently.

V. DOMESTIC VIOLENCE AS AN INTENTIONAL TORT

Ira Mark Ellman, Chief Reporter of the *American Law Institutes Principles of the Law of Family Dissolution: Analysis and Recommendations* argues quite forcefully against considering spousal abuse in the distribution of property upon divorce. He asserts that compensation for non-financial losses that are a result of the other spouse's battery is better left to tort law.[118] Professor Ellman premises this conclusion on the fact that "[w]ith the general demise of interspousal immunity, tort remedies for spousal violence are readily available."[119] In New York, however, there are virtually no cases in which a spouse has successfully brought an action against her abuser and obtained relief.[120] This is due in large part to the substantial procedural hurdle to bringing an intentional tort claim against a long-term partner in New York: a one-year statute of limitations.[121]

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114. *See* Horn, *supra* note 11 and accompanying text.

115. *See* ZUCKERMAN & FRIEDMAN, *supra* note 87.

116. *See* REPORT TO CONGRESSIONAL COMMITTEES, *supra* note 100, at 8-9.

117. 627 N.Y.S.2d 460 (App. Div. 1995).

118. *See* Ira Mark Ellman, *The Place of Fault in a Modern Divorce Law*, 28 ARIZ. ST. L.J. 773, 808 (1996).

119. *Id.*

120. In my research I was able to discover only one such case. *See* Pollack v. Pollack, N.Y.L.J., Oct. 25, 1999, at 40 (Sup. Ct. Oct. 25, 1999).

121. N.Y. C.P.L.R. § 215(3) (McKinney 1999). The portion of this article which deals with the statute of limitations for intentional torts and the applicable tolling provisions is adapted from a previous article by the author entitled What Congress Knew: Victims of Domestic Violence Deserve a Civil Damages Remedy (Spring 2001) (unpublished manuscript, on file with the author).

The policy behind a statute of limitation is to provide the wrongfully injured party with a reasonable opportunity to secure compensation while protecting potential defendants from the risk of perpetual liability for past actions. Additionally, the limitations periods are set to maximize judicial fairness and reliability of outcome by disfavoring stale suits where evidence has been lost, memories have faded and witnesses are unable to be located.[122] To mitigate the sometimes harsh and unjust results, many jurisdictions provide for tolling of statutes of limitation in certain circumstances.

There are two tolling devices that could be successfully employed in domestic violence situations. The first such device is the continuous tort doctrine. A continuous tort is one that is inflicted over time, and it involves wrongful conduct that is repeated until desisted. A continuing tort sufficient to toll a statute of limitations is occasioned by continual unlawful acts, not by the continuing ill effects from the original violation.[123] When applied to the domestic violence situation, the continuous tort doctrine would treat the entire course of abusive conduct by a spouse as a single, ongoing tort, rather than treating each individual assault as a distinct cause of action. The advantages of the continuous tort doctrine in a domestic violence situation are clear. The wrongful conduct of the domestic violence tortfeasor usually occurs over the course of a relationship, resulting in a cumulative harm from intermittent, regular incidents that can be characterized as "continuing." Thus, under this doctrine, a victim of domestic violence can recover for injuries that result from all of the defendant's conduct, and she is not limited to only those tortious acts falling within the applicable statutory period.

The continuous tort doctrine as applied to intentional tort cases in New York is contradictory.[124] In New York, a tort is treated as continuing in two circumstances. The first circum-

122. Lisa Napoli, *Tolling the Statute of Limitations for Survivors of Domestic Violence Who Wish to Recover Civil Damages Against Their Abusers*, 5 CIRCLES BUFF. WOMEN'S J. OF L. AND SOC. POL'Y 53, 55 (1997).

123. *See* David E. Poplar, *Tolling the Statute of Limitations for Battered Women after* Giovine v. Giovine*: Creating Equitable Exceptions for Victims of Domestic Abuse*, 101 DICK. L. REV. 161, 186 (Fall 1996).

124. As there are so few cases in New York which employ a tolling provision to provide a domestic violence victim with a civil tort remedy (in fact, only one, Nuss-

stance occurs when the complained of behavior necessary to satisfy the elements of the tort takes place over the course of more than one year. For instance, the tort is considered to be continuing in the case of a claim for intentional infliction of emotional distress, when conduct that, taken together, because of the length of time the behavior goes on and its continuous nature, is considered to satisfy the outrageousness standard, i.e. ongoing sexual harassment.[125] The conduct, which spans a period of time longer than the limitations period, can constitute an actionable tort only when considered in aggregate. This ongoing tort theory is to be distinguished from a string of similar incidents, such as a series of spousal assaults, each of which constitutes a discreet tort.

The principal appellate division case for this proposition is *Foley v. Mobil Chemical Co.*[126] In *Foley*, the plaintiff asserted that if *any* of the alleged intentional acts occurred within the period of limitation, then those acts occurring *prior* to the limitation period were also not time-barred.[127] The appellate court rejected this argument. The cause of action for intentional infliction of emotional distress was limited to conduct occurring within the one-year period immediately preceding the action's commencement.[128] Therefore, if a course of conduct, as, for example, in the case of domestic violence, consists of several separate incidents, each of which constitutes a discreet tort, then the statute of limitations is not tolled. The cause of action accrues when the elements of the tort are met and that is when the statute begins to run. Thus, under this theory of the continuing tort doctrine in New York, each battering incident would in all likelihood constitute a separate tort, and only those bat-

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baum v. Steinberg, 703 N.Y.S.2d 32 (App. Div. 2000)), I examine tolling for intentional tort actions as analogous to the domestic violence action.

125. *See* Stram v. Farrell, 646 N.Y.S.2d 193, 195 (App. Div. 1996). The dissent opined that there was no reason to utilize the continuing course of conduct approach where, as in this case, the earlier acts standing alone warrant the imposition of liability and caused damages at the time they were perpetrated. *Id.* at 197-99 (Yesawich, J. dissenting); *see also* Weisman v. Weisman, 485 N.Y.S.2d 570 (App. Div. 1985) (alleged incidents of intentional infliction of emotional distress occurring more than one year before the filing of plaintiffs' claim barred by the statute of limitations).

126. 626 N.Y.S.2d 906 (App. Div. 1995).

127. *See id.* at 907.

128. *See id.*

tering incidents within the year preceding filing a suit would be actionable.

New York claimants have been successful under the continuous course of conduct theory when alleging a course of *concerted* conduct by a tortfeasor which was therefore considered a continuing tort.[129] This manifestation of the continuous tort doctrine is more favorable to the victim of domestic violence who may suffer abuse for several years before ending the relationship. Unfortunately, the New York Court of Appeals has not yet dealt with the issue of a continuous course of conduct doctrine of tort liability directly, and, therefore, it remains to be seen which theory New York will eventually follow. Thus, a good deal of uncertainty exists as to whether this doctrine could, or would, be utilized to toll a statute of limitations in a spousal tort action predicated upon allegations of domestic violence.

The second theory under which the statute of limitations might be tolled is the statutory toll for infancy or insanity.[130] This theory is thought to be the "most appropriate in the context of domestic violence."[131] The basic standard for insanity within the scope of New York Civil Practice Law and Rules section 208 is the individual claimant's "inability to protect [his or her] legal rights because of an over-all inability to function in society."[132] The insanity standard has been strictly construed.[133]

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129. *See, e.g.,* Drury v. Tucker, 621 N.Y.S.2d 822 (App. Div. 1994) (plaintiff sufficiently set forth concrete factual allegations of a continuing course of conduct that terminated within one year of plaintiff's commencing the action); *see also* Misek-Falkoff v. Int'l Bus. Mach. Corp., 556 N.Y.S.2d 331 (App. Div. 1990) (court implied that if concrete factual allegations of a continuing or concerted course of action against plaintiff were established, the court might consider the issue of whether the acts that occurred outside the limitations period could be considered as a part of a "continuing" tort).

130. N.Y. C.P.L.R. § 208 (McKinney 1999). The statute provides in pertinent part that "[I]f a person entitled to commence an action is under a disability because of infancy or insanity at the time the cause of action accrues . . . [and] the time otherwise limited is less than three years, the time shall be extended by the period of disability. The time within which the action must be commenced shall not be extended by this provision beyond ten years after the cause of action accrues . . . ."

131. Napoli, *supra* note 122, at 54.

132. McCarthy v. Volkswagon of Am., Inc., 450 N.Y.S.2d 457, 460 (1980) (plaintiff not permitted to toll statute of limitations based on a post traumatic neurosis that prevented him from confronting the memory of his accident).

Hearings to determine the mental condition of the plaintiff seeking a toll have become common,[134] as the question of insanity is largely one of fact.

The Appellate Division, First Department employed the insanity toll recently in the context of a battered woman in the infamous *Nussbaum v. Steinberg* case.[135] In that case, the plaintiff, Hedda Nussbaum, instituted an intentional tort action to recover money damages from the defendant for the extensive physical and psychological injuries he inflicted upon her from 1978 until November 2, 1987.[136] The plaintiff conceded that almost all of the events alleged in the complaint occurred more than one year before the action was commenced. The plaintiff's injuries arose from incidents of psychological and physical abuse that transpired during the course of their relationship, which began in 1978 and ended with Mr. Steinberg's arrest in November, 1987. The lawsuit was thus filed within one year of the last incident of abuse. As is the case with many victims of domestic violence, however, Ms. Nussbaum suffered abuse for several years before seeking, or being compelled to accept, assistance. Under traditional application of the statute of limitations, Ms. Nussbaum would only be permitted to recover for abuse that occurred during the one-year limitation period; that is, between 1986 and 1987. The argument for tolling the statute of limitations for victims of domestic violence is especially poignant in cases such as this, where the victim is completely under the dominion of the abuser for years.

Ms. Nussbaum argued:

> [T]he defendant's physical and psychological abuse rendered her incapable of independent thought or conduct, and that she thereby suffered from insanity within the statutory meaning of

133. See *Eisenbach v. Metro. Transp. Auth.*, 479 N.Y.S.2d 338, 339-40 (1984), in which the plaintiff brought an action fifty days after the statute had run. Plaintiff claimed that for the 68 days immediately following the accident the statute should have been tolled, as he was hospitalized for that period and unable to understand or protect his rights due to the continuous administration of narcotic painkillers. The court held that the concept of insanity, usually "equated with unsoundness of mind, should not be read to include the temporary effects of medications administered in the treatment of physical injuries." *Id.* (citation omitted).

134. *See* N.Y. C.P.L.R. § 208 cmt. C208:3 (McKinney 1999) (McKinney Practice Commentaries).

135. N.Y.L.J., Mar. 12, 1997 at 26 (N.Y. Sup. Ct. Mar. 11, 1997).

136. *Id.* at 26.

> CPLR § 208. . . . [T]he abuse [the plaintiff] experienced at the hands of the defendant was so severe and violent, that the result rendered her incapable of effectively functioning in society and precluded her from protecting her legal rights.[137]

The court held in pertinent part:

> the law cannot presently exclude or blindly ignore domestic violence causes from the tolling provision under CPLR § 208, *where the allegations of such domestic violence can be proven to constitute in an individual an overall inability to function in society as a result.*
>
> . . . In instances where a batterer's primary goal is often absolute control over every aspect of the victim's life, the combination of such extensive control and violence may disable one's independent judgment and functioning so as to place that person within the insanity definition of CPLR § 208.[138]

The court did recognize the special problem of the domestic violence victim when it stated: "Significantly, because [of] the usual close proximity and/or relationship of the domestic violence abuser and the victim, the abused and battered person is often less able than intentional tort victims to obtain legal protection or recourse after being abused or assaulted . . . ."[139] It is pertinent to note, however, that the court qualified its holding by requiring the domestic violence victim to prove that the victim was unable to function overall in society as a result of the physical and psychological abuse. The court went on to say that "[a]t a minimum, a significant deficit in one's mental capabilities must be demonstrated . . . . Where the evidence shows that an individual is generally able to care for oneself and is aware of any possible claims that might exist, courts will disallow the tolling of the applicable Statute of Limitations."[140] Ms. Nussbaum satisfied the statutory standard by offering expert testimony to the effect that as a result of consistent, long term abuse, she was incapable of functioning independently of the defendant and therefore unable to make her own judgments about her life or the protection of her interests. Ms. Nussbaum's severe, documented injuries, as testified to by expert witnesses,

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137. *Id.*
138. *Id.* (emphasis added).
139. *Id.*
140. *Nussbaum*, N.Y.L.J., Mar. 12, 1997, at 26.

supported her claim of disability based on psychological abuse to the extent that the Statute of Limitations was tolled even under the rigorous standard imposed by the New York Court of Appeals.

There are several problems with employing the statutory tolling provision by reason of insanity in cases of domestic violence. Primarily, by labeling the victim as "insane," and requiring her to prove the extent of her mental disability before tolling the statute, the focus is taken off the abuser's wrongful conduct and placed on the victim's mental state.[141] Additionally, because the standard is rigorous, it may be that only those women who have suffered the most severe abuse over many years will be able to benefit from its employment. The exception is underinclusive in that many women who are abused continue to function out of necessity in everyday life, persisting in their careers and carrying on the duties of their households. Furthermore, "[w]hile women may prevail using this argument, insanity may not be the best option since it feeds into the stereotype that women are helpless and cannot fend for themselves."[142] It is abhorrent to perpetuate this misconception about the female as a victim; additionally, many women do not fit the paradigm of the cowering, weeping wife. It cannot be said that all victims of domestic violence who suffer from battered woman syndrome or other psychological constraints are so far impaired as to "be unable to function in society." Many women in fact "keep up appearances" for years while being battered.[143] These women are not any less entitled to remuneration for their damages than the woman who is more profoundly affected in other areas of her life.

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141. *See supra* note 9 and accompanying text.

142. Napoli, *supra* note 122, at 60.

143. *See supra* text accompanying note 79; *see also* Weissman, *supra* note 40, at 1123:

> Credibility issues are critical in domestic violence cases, where a battered woman's testimony may be the only available evidence. . . . Paradoxically, if she does speak with confidence and authority, she may appear without vulnerability and fear, without—in other words—those traits most commonly associated with victimhood. She will not conform to the stereotype of a battered woman, likewise impugning the credibility of her story in the eyes of a judge.

Id. (Citations omitted).

Based on the inability of most abused women to bring a tort action for the majority of the abuse they have suffered, it seems logical to provide them with a greater share of the marital property to compensate them for the damages they have suffered as a result of domestic violence. It may also work to deter abusive spouses from abusing in that it provides a financial disincentive to abuse. Furthermore, holding the abusive spouse accountable for his misconduct is a socially desirable result in that it discourages violent behavior, which has reached epidemic proportions in the United States. Consideration of domestic violence under the equitable distribution law also provides the abused spouse with the economic ability to leave their spouses for good.

VI. *HAVELL V. ISLAM*

Havell v. Islam[144] provides a useful illustration of the state of the law with regard to domestic violence victims and the distribution of marital property. It is also an interesting case because it involves people from the upper echelon of our society. It is often assumed that domestic violence is a phenomenon that effects only the poor.[145] A contemporary news report described the parties as follows: "Mr. Islam, a former securities executive, is serving an 8 1/3 year sentence in an upstate prison after pleading guilty to first-degree assault on his wife, who heads a money management firm."[146] The fact that this couple was wealthy caught the attention of the media and the case was reported on the front page of *The New York Law Journal*.

Plaintiff Theresa Havell and defendant Aftab Islam were married on May 17, 1978 in New York City.[147] They had six children together. "The wife began her career in the financial industry at Citibank, where she worked from 1970 to 1978. The husband began his career in the financial industry in 1967, as a

144. N.Y.L.J., July 30, 2001, at 21 (Sup. Ct. July 30, 2001).

145. *See* Elaine Chiu, *Confronting the Agency in Battered Mothers*, 74 S. Cal. L. Rev. 1223, 1249 (July 2001) (referring to the societal belief that only poor women at the margins of society suffered from abuse in the home, and documenting how the feminist movement has revealed that domestic violence occurs at all rungs of the socioeconomic ladder).

146. Cerisse Anderson, *Lower Standard Set for Evidence of Abuse; Pattern of Violence Ended in Attack with Barbell,* N.Y.L.J., Dec. 19, 2000, at 1, col. 5.

147. *Havell*, N.Y.L.J., July 30, 2001, at 21.

trainee for Citibank in Pakistan."[148] From 1990 until the date of the assault, Ms. Havell provided the economic support for the family. The family owned three residences, including a Brownstone in New York City where the assault at issue occurred.[149] In the court proceeding to determine the issue admissibility of evidence of domestic violence in the marriage, Ms. Havell testified to numerous incidents of psychological and physical abuse. Her two older children corroborated her testimony.[150]

The *Havell* court recounted the chronology of events during Islam's final abusive rampage as follows. On April 5, 1999, Ms. Havell informed her husband that she wanted a divorce. "In the early morning hours of April 22, 1999, the wife awoke and saw [her] husband enter her room and sit in a chair across the room. He was wearing yellow rubber gloves and carrying a barbell in his hands."[151] She sat up and "the husband came over to the bed, pinned the wife down with his knee, and attacked her with the barbell," hitting her again and again on her face and head.[152] The parties' three daughters and their nanny rushed into the room upon hearing the wife's screams. Islam told them in a matter-of-fact tone that he had killed their mother. One daughter, who turned fifteen that day, called 911.[153] The husband left the room and returned with an industrial sized roll of saran wrap, at which time the parties' twelve-year-old daughter attempted to restrain her father from beating her mother with the roll. He left the room and returned with a towel, which he attempted to put over the wife's face. The police arrived soon after and arrested the husband.[154] Ms. Havell was taken to the hospital. She suffered multiple contusions, a broken nose and jaw, required numerous stitches on her face, the surgical installation of titanium plate over her eye, more than twenty hours of dental procedures, and multiple other oral and facial surgical

148. *Id.*
149. *Id.*
150. *Id.*
151. *Id.*
152. *Havell,* N.Y.L.J., July 30, 2001, at 21.
153. *Id.*
154. *Id.*

procedures over the following months.[155] As a result of the attack, she also suffers from post-traumatic stress disorder.[156]

The parties stipulated to a grant of divorce in favor of Ms. Havell.[157] Islam pled guilty to a charge of first-degree assault in relation to the incident on August 11, 2000.[158] During the equitable distribution phase of the dissolution of their marriage, Islam sought by means of an Order to Show Cause to exclude evidence of prior incidents of domestic violence at trial, arguing that such conduct was not a "just and proper" consideration under the equitable distribution law.[159] The court phrased the issue as follows: "In considering the equitable distribution of marital property, may the court properly admit evidence at trial of a pattern of domestic violence in a marriage of long duration pursuant to Domestic Relations Law section 236(B)(5)(d)(13) . . . and the standard set forth in . . . [*Blickstein v. Blickstein*]?"[160] The court answered the question in the affirmative. The court noted that its holding constituted an expansion of "the egregious conduct standard to include a pattern of physical and emotional abuse during a lengthy marriage."[161] In coming to this decision, however, the court considered its decision justified in light of the jurisprudence of fifteen other states which consider such fault in distribution of marital property, literature regarding domestic violence and its effect on the abused spouse and her children.[162]

The final distribution in the *Havell* case differs from many other cases in that the judge awarded 100% of the remaining marital assets to the injured wife.[163] Significantly, however, the judge did not reach the issue of whether the ongoing course of abusive conduct should reduce the abuser's share of assets; in-

155. *Id.*

156. *Id.*

157. *Havell,* N.Y.L.J., July 30, 2001, at 21.

158. *Id.*

159. *See* Havell v. Islam, 718 N.Y.S.2d 807, 808 (Sup. Ct. 2000).

160. *See id.* at 808; Blickstein v. Blickstein, 472 N.Y.S.2d 110 (App. Div. 1984).

161. *Havell,* 718 N.Y.S.2d at 810.

162. *See Havell,* 718 N.Y.S.2d at 810-11.

163. *See* Havell v. Islam, N.Y.L.J., July 30, 2001, at 25 (Sup. Ct. July 30, 2001). The court permitted the husband to retain funds advanced to him prior to the final determination of equitable distribution. Thus, the court in fact awarded Islam 4.5% of the marital estate.

stead, she predicated the distributive award in part on the assault of April 22, 1999. Relying on an extreme, murderous episode of the sort suffered by Ms. Havell falls squarely within settled New York jurisprudence which awards to the victim a greater share of marital property predicated on attempted murder, and not a course of conduct that constitutes "merely" domestic violence. This sort of judicial caution may be the product of the elusive egregious conduct standard. Although a jurist may wish to provide the battered woman with a greater share of marital assets, the judge's concern has to always be whether her opinion that the abusive conduct was sufficiently egregious as to warrant consideration in property distribution will hold up on appeal. If not, the appellate division will modify the award or reverse the judgment. In order to protect the awards they make to the abused spouse, then, trial courts are forced to fit their decisions into narrow categories of economic impairment or murderous incidents.[164]

The First Department made a pronouncement in a recent affirmance concerning the nature of the equitable distribution award that does not appear to bode well for other cases in which domestic violence is a factor in property distribution. "While fault may be considered for purposes of equitable distribution when conduct is so egregious as to shock the conscience (surely the situation here), even then, such conduct is *only one factor to be considered and does not necessarily preclude an award of equitable distribution.*"[165] A fair reading of the court's statement in this regard is that the appellate division may be concerned that other courts will go too far in dispossessing abusive spouses of their right to an equitable share of the marital estate. As the legislature stated when enacting the equitable distribution law, a consideration of all thirteen enumerated factors is required in the property distribution equation.[166] It would have been a grave injustice, however, had the supreme court's property distribution award been modified in this matter. Justice Silbermann explicitly considered each of the statutory fac-

164. The First Department also based its affirmance on the murderous nature of the final assault on Ms. Havell. *See* Havell v. Islam, 751 N.Y.S.2d 449, 455 (App. Div. 2002).

165. Havell v. Islam, 734 N.Y.S.2d 841, 842 (App. Div. 2001).

166. *See supra* note 24 and accompanying text.

tors in her decision to award the entire marital estate to the wife. Apart from the consideration of Islam's egregious conduct in physically abusing his wife, the court found that Ms. Havell supported the family unit from 1990 forward, as well as had primary responsibility for raising the children.[167] The fact that Ms. Havell was the primary breadwinner reflects a disjunction between perceptions of the battered woman and the reality of the abusive relationship. Women are not always the economically disadvantaged victim; Ms. Havell was a wealthy woman in her own right who provided for her family. As women in our society gain more economic power, they also gain access to the legal resources that can afford them a more equitable resolution of their legal disputes. However, as discussed above, the woman who is confident and economically self-sufficient will often be viewed with scorn for not leaving her abuser sooner.[168] Furthermore, the bias against battered women for not leaving their abusers is often more pronounced when a moneyed spouse endures abuse over many years of a long-term relationship. The *Havell* court examined all of the pertinent factual circumstances and in consideration of Ms. Havell's overwhelming contributions to her large family, both financial and emotional, while suffering demeaning and painful abuse by her husband, properly determined that the entire marital estate was justifiably Ms. Havell's due share.[169]

The issue of whether a violent course of conduct is properly considered under New York Domestic Relations Law Section 236(B)(5)(d)(13) is still very much open.[170] In order to resolve the conflicts that are the result of judicial uncertainty and to provide consistent results that protect victims, the New York Legislature needs to create a clear standard for use in the domestic violence situation.

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167. *See* Havell v. Islam, N.Y.L.J., July 30, 2001, at 25 (N.Y. Sup. Ct. July 31, 2001).

168. *See* text accompanying note 80.

169. *Havell*, N.Y.L.J., July 30, 2001, at 25. The First Department affirmed the award as within the trial court's discretion. *Havell*, 751 N.Y.S.2d 449, 455 (App. Div. 2002).

170. *See, e.g.*, Bodolato v. Bodolato, N.Y.L.J., Oct. 25, 2002, at 24 (N.Y. Sup. Ct. Oct. 25, 2002) (alleged domestic violence alone does not meet the egregious conduct standard asserted in *Havell*).

VII. CONCLUSION

A review of the literature and case law pertaining to the effects of domestic violence reveals that economics are a key issue for abused women. Nonetheless, New York does not have in place a satisfactory scheme to compensate the victim of domestic violence and to assist her in her rehabilitation from years of abuse.[171] The current egregious conduct standard for the consideration of marital fault, including domestic violence, in effect in New York does not provide the domestic violence victim with consistent redress in the form of a larger share of marital property upon equitable distribution. Nor can the victim of domestic violence seek a tort remedy; very often her claim is barred by a rigorous application of New York's one-year statute of limitations for intentional tort actions. Thus, in order to send a clear message to abusers that their conduct will not be tolerated by our society, as well as to insure that a victim of domestic violence receives a greater share of marital property where warranted, the equitable distribution law in New York should be amended to include a specifically-enumerated domestic violence factor for judicial consideration when distributing marital property.

171. A proposed amendment to New York's Civil Right's Law that would provide a civil remedy to victims of domestic violence and gender animus has languished before the New York State Assembly's Governmental Operations Committee since March, 2001. *See* Assemb. B. 6223, 224th Sess. (N.Y. 2001).