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FAULT: A VIABLE MEANS OF RE-INJECTING RESPONSIBILITY IN MARITAL RELATIONS*

It would be difficult for the most fecund mind to conceive a more sordid story of revolting details than that which is portrayed in the testimony in this case. To recite it would be to give permanent form to a chapter which, for all time, would inflict anguish and shame upon innocent persons. There could be no justification for the recital here of things which would shock every sense of delicacy and refinement.¹

I. INTRODUCTION

The era of marital fault being the only grounds for divorce in the United States has passed, and its passing brings few tears to the eyes of most. As evidenced by the passage above, the airing of marital fault in open court, even in the days when such practices were the norm, at times shocked the sensibilities and conscience of those who had to listen to the evidence and then issue decisions based upon it.

This article is not an indiscriminate appeal for the return of fault in the dissolution of marriage. Nor does this article urge a return to a system where years of accumulated misery and acrimony must be dredged up in order to obtain every divorce, regardless of the fact that both parties may wish to simply end their union and no fault in fact exists.

Marriage has become somewhat of a revolving door in this country today. It is expected that up to fifty percent of currently existing marriages in the United States will end in divorce.²

* This article was the second place winner of the 1995 McNeill Writing Competition.

1. *Holt v. Holt*, 5 S.E.2d 504, 505 (Va. 1939) (describing the allegations in a divorce case brought under fault grounds).

2. Marsha Garrison, *Good Intentions Gone Awry: The Impact of New York's Equitable Distribution Law on Divorce Outcomes*, 57 BROOK. L. REV. 621, 625 (1991) (citing Samuel H. Preston, *Estimating the Proportion of American Marriages that End in Divorce*, 3 SOC. METHODS & RES. 435, 457 (1975)); Jana B. Singer, *Divorce Reform*

No-fault divorce cannot be entirely blamed for this fact, since as early as 1967 the United States had the "highest rate of divorce of any nation of parallel culture and development in the world."³ However, it has been argued that the availability of pure no-fault divorce has resulted in more frequent initiation of divorce by husbands, less frequent alimony awards, reduced child support amounts, reduced awards of family assets to the wife, and increased responsibility of wives for household debts upon divorce.⁴ It has also been observed that the advent of no-fault divorce signalled an end to the notion of marriage as a status having at its core the concept of a contract with God and spouse, the breaking of which necessitated circumstances which were intolerable and unavoidable—fault.⁵ Thus there are competing notions concerning the enactment of no-fault divorce. On the one hand, some feel that legislation providing for no-fault divorce has simply made a legal reality of what was already occurring in society. Conversely, others feel that no-fault divorce has exacerbated a grave social problem and resulted in granting persons an easy way out of marriage and thereby cheapening the institution—easy come, easy go.

This article sets out a principled basis for re-injecting some elements of fault into the process of marital dissolution. In Part II, the traditional fault grounds of divorce are discussed. Part III analyzes the abandonment of fault in the era of no-fault divorce and looks at the economic consequences to divorcing spouses. This section also examines two empirical studies which demonstrate that no-fault divorce has done nothing to change the negative and disproportionate economic impact upon women's fortunes at divorce, and asserts that marital property is, in most cases, inadequate to serve as a means of rectifying the financial inequities among divorcing spouses. Part IV builds upon this theme by advancing and analyzing a theory of alimo-

and *Gender Justice*, 67 N.C. L. REV. 1103, 1103 (1989) (citing Charles E. Welch & Sharon Price-Bonham, *A Decade of No-Fault Revisited: California, Georgia, and Washington*, 45 J. MARRIAGE & FAM. 411, 411 (1983)).

3. Charles W. Tenney, Jr., *Divorce Without Fault: The Next Step*, 46 NEB. L. REV. 24, 34 (1967).

4. Harvey L. Golden & J. Michael Taylor, *Fault Enforces Accountability*, FAM. ADVOC., Fall 1987, at 11, 13. "Alimony" is used interchangeably with "spousal support" throughout this article, as both terms are used in the various sources cited.

5. *Id.* at 11.

ny which might accomplish the goal of rectifying some of the financial inequities of divorce and removing incentives for marriage-destroying behavior. Finally, in Part V, a case is made for a system of alimony which considers marital fault upon divorce and which can be used to encourage the sort of responsible marital behavior which society considers desirable.

II. OVERVIEW OF FAULT GROUNDS

Our legal system, based upon English common law, looked to the English ecclesiastical courts for precedents in the area of domestic relations.⁶ Initially, because there were no ecclesiastical courts in the new nation, no real mechanism for obtaining a divorce existed.⁷ Therefore, many of the divorces prior to the middle of the nineteenth century were granted through special legislative acts in state legislatures.⁸ When this began to be seen as an unsatisfactory method of obtaining divorce, the various state legislatures conferred general divorce jurisdiction on the state courts.⁹ The new state statutes usually required proof of a statutorily enumerated fault or offense against the marriage before a divorce would be granted, and then a divorce was granted only upon the application of the spouse who was not at fault.¹⁰

The most common fault ground was adultery, most likely directly borrowed from the ecclesiastical courts which had al-

6. *E.g.*, *Du Pont v. Du Pont*, 83 A.2d 105, 108 (Del. Super. Ct. 1951), *aff'd*, 90 A.2d 467 (Del. 1952) (quoting *S. v. S.*, 29 A.2d 325, 326 (Del. Super. Ct. 1942)) ("Though the Ecclesiastical Law of England is no part of our Common Law, yet when that part of the jurisdiction of the Ecclesiastical Courts relating to the annulment of marriage and divorce was given by law to our Courts, it is reasonable to believe that we should follow the principles and precedents of the Ecclesiastical Courts in the administration of our law. . . ."); *Gold v. Gold*, 62 A.2d 540, 542 (Md. 1948) ("In divorce proceedings the court sits, not in the exercise of its ordinary equity jurisdiction, but as a divorce court and is governed by the rules and principles established in the ecclesiastical courts in England so far as they are consistent with the provisions of the Maryland Code.").

7. Walter Wadlington, *Divorce Without Fault Without Perjury*, 52 VA. L. REV. 32, 35-36 (1966).

8. *Id.* at 36.

9. *Id.*

10. *Id.*; Norman B. Lichtenstein, *Marital Misconduct and the Allocation of Financial Resources at Divorce: A Farewell to Fault*, 54 U. MO. KAN. CITY L. REV. 1, 2-3 (1985).

lowed a divorce from bed and board on this ground.¹¹ In fact, the sole ground for divorce in New York until 1967 was adultery.¹² Originally, the fault grounds for divorce in most states were narrow and few, and in addition to adultery included cruelty and desertion.¹³ Soon other grounds were legislated in

11. Wadlington, *supra* note 7, at 36.

12. *Christian v. Christian*, 365 N.E.2d 849, 852 (N.Y. 1977) ("With the enactment of the Divorce Reform Law of 1966 (L.1966, ch. 254), New York abandoned its position as the only State in the union which regarded adultery as the sole ground for absolute divorce."); *Tenney*, *supra* note 3, at 32. The current section 170 of the New York statute lists the grounds upon which New York courts will grant divorces:

An action for divorce may be maintained by a husband or wife to procure a judgment divorcing the parties and dissolving the marriage on any of the following grounds:

(1) The cruel and inhuman treatment of the plaintiff by the defendant such that the conduct of the defendant so endangers the physical or mental well being of the plaintiff as renders it unsafe or improper for the plaintiff to cohabit with the defendant.

(2) The abandonment of the plaintiff by the defendant for a period of one or more years.

(3) The confinement of the defendant in prison for a period of three or more consecutive years after the marriage of plaintiff and defendant.

(4) The commission of an act of adultery, provided that adultery for the purposes of articles ten, eleven, and eleven-A of this chapter, is hereby defined as the commission of an act of sexual or deviate sexual intercourse, voluntarily performed by the defendant, with a person other than the plaintiff after the marriage of plaintiff and defendant. . . .

(5) The husband and wife have lived apart pursuant to a decree or judgment of separation for a period of one or more years after the granting of such decree or judgment, and satisfactory proof has been submitted by the plaintiff that he or she has substantially performed all the terms and conditions of such decree or judgment.

(6) The husband and wife have lived separate and apart pursuant to a written agreement of separation, subscribed by the parties thereto and acknowledged or proved in the form required to entitle a deed to be recorded, for a period of one or more years after the execution of such agreement and satisfactory proof has been submitted by the plaintiff that he or she has substantially performed all the terms and conditions of such agreement. . . . In lieu of filing such agreement, either party to such agreement may file a memorandum of such agreement, which memorandum shall be similarly subscribed and acknowledged or proved as was the agreement of separation and shall contain the following information: (a) the names and addresses of each of the parties, (b) the date of marriage of the parties, (c) the date of the agreement of separation and (d) the date of this subscription and acknowledgement or proof of such agreement of separation.

N.Y. DOM. REL. LAW § 170 (Consol. 1995).

13. JOHN D.W. GREGORY ET AL., UNDERSTANDING FAMILY LAW § 7.01(B) (1993); Wadlington, *supra* note 7, at 36-37.

the various states, including conviction of certain crimes, insanity, drug addiction, and numerous others with little consistency across the nation.¹⁴ Divorce was originally discouraged, and there was a strong public policy in favor of marriage and against its dissolution. In 1888, according to the Supreme Court:

[W]hilst marriage is often termed by text writers and in decisions of courts a civil contract—generally to indicate that it must be founded upon the agreement of the parties, and does not require any religious ceremony for its solemnization—it is something more than a mere contract. The consent of the parties is of course essential to its existence, but when the contract to marry is executed by the marriage, a relation between the parties is created which they cannot change. Other contracts may be modified, restricted, or enlarged, or entirely released upon the consent of the parties. Not so with marriage. The relation once formed, the law steps in and holds the parties to various obligations and liabilities. It is an institution the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress.¹⁵

The plaintiff spouse had to prove that the other spouse had in fact committed one of the enumerated fault grounds in order to receive a divorce decree, and a divorce case could be dismissed for insufficient evidence.¹⁶

Adultery, defined as sexual intercourse by either spouse with someone not his or her spouse, is currently a fault ground for divorce in approximately twenty-eight states.¹⁷ Adultery may

14. GREGORY ET AL., *supra* note 13, § 7.01(B).

15. *Maynard v. Hill*, 125 U.S. 190, 210-11 (1888).

16. GREGORY ET AL., *supra* note 13, § 7.01(B).

17. *Id.* § 7.03(B)(2); *see, e.g.*, *Milne v. Milne*, 587 S.W.2d 229, 231 (Ark. Ct. App. 1979) (holding, in a case where the appellant was accused of adultery which occurred after he and his wife had separated, that adultery includes sexual intercourse by a married person with a person not his or her spouse, regardless of whether the person accused is living with his spouse at the time); *Flood v. Flood*, 330 A.2d 715, 717 n.1 (Md. Ct. Spec. App. 1975) (holding that adultery is voluntary intercourse between a married person and a partner other than the lawful spouse); *W. v. W.*, 226 A.2d 860, 862 (N.J. Super. Ct. Ch. Div. 1967) (holding that for there to be adultery there must be intercourse, and even actual proof of sexual conduct with a third person other than intercourse would not constitute adultery).

often be proved by circumstantial evidence, but the burden of proof varies from a preponderance of the evidence in some states to beyond a reasonable doubt in others.¹⁸

Cruelty is most often defined as bodily harm or reasonable apprehension of bodily harm that endangers life, limb, or health, and renders continued marital cohabitation unsafe or improper; it is currently a ground for divorce in about twenty-six states.¹⁹ Most courts recognize mental cruelty as falling within this definition, and acts as diverse as a spouse's insistence on excessive or unnatural sexual intercourse, mistreatment and abuse of children, verbal and physical abuse, drunkenness, non-support, and homosexuality have been sufficient to establish cruelty.²⁰

18. *E.g.*, *Frazier v. Frazier*, 134 So. 2d 205, 207 (Ala. 1961) ("The charge of adultery may be proved by circumstantial evidence, but the circumstances must be such as would lead the guarded discretion of a reasonable and just man to conclude that the act of adultery has been committed."); *Drees v. Drees*, 490 P.2d 851, 852 (Ariz. Ct. App. 1971) (stating that cruelty, adultery, desertion, and noncohabitation are to be proved by a preponderance of the evidence); *McAdory v. McAdory*, 608 So. 2d 695, 699 (Miss. 1992) ("In order to grant a divorce on the grounds of adultery, adultery must be proven by clear and convincing evidence."); *Cofone v. Cofone*, 276 A.2d 184, 186 (N.J. Super. Ct. App. Div. 1971) ("[T]he charge of adultery, if true, is known as a crime, and its prosecution partakes strongly of the nature of a criminal proceeding, so much so that the complaining spouse must prove the charge 'beyond a reasonable doubt.'").

19. GREGORY ET AL., *supra* note 13, § 7.03(B)(3); *see, e.g.*, *Steen v. Steen*, 641 So. 2d 1167, 1170 (Miss. 1994) ("[H]abitual cruel and inhuman treatment [is] established only by a continuing course of conduct on the part of the offending spouse which [is] so unkind, unfeeling or brutal as to endanger, or put one in reasonable apprehension of danger to life, limb or health, and further, such course of conduct must be habitual, that is, done so often, or continued so long that it may reasonably be said a permanent condition."); *Kelly v. Kelly*, 191 A. 287, 287 (N.J. Ch. 1936) (stating that cruelty is established when it has been shown that if the husband "is allowed to retain his power over the petitioner, and she is compelled to remain subject to him, her life or her health will be endangered, or that he will render her life one of such extreme discomfort and wretchedness as to incapacitate her to discharge the duties of a wife").

20. GREGORY ET AL., *supra* note 13, § 7.03(B)(3); *see, e.g.*, *Brown v. Brown*, 81 N.E.2d 820, 820-21 (Mass. 1948) (holding that where a wife engages in lewd and lascivious conduct with her father in her husband's presence, such acts constitute cruel and abusive treatment sufficient to sustain a divorce decree); *Adams v. Adams*, 198 N.W.2d 118, 121 (N.D. 1972) (holding that extreme cruelty as defined by the statute comprehends either grievous bodily injury or grievous mental suffering inflicted by one spouse upon the other); *Defonis v. Clinchfield Coal Corp.*, 43 S.E.2d 852, 854 (Va. 1947) (holding that cruelty toward a spouse may constitute desertion and stating "[w]hen either spouse voluntarily so behaves that the other can no longer remain with safety in the marriage state, and is forced to go elsewhere for protection,

Desertion, defined as the breaking off of marital cohabitation "with the intent to remain apart permanently, without the consent and against the will of the other spouse,"²¹ is a traditional fault ground still recognized in about twenty-eight states.²² A separation by mutual consent does not constitute desertion by either party.²³ Actions short of leaving the residence, such as withdrawing sexual privileges from the other spouse without just cause, may constitute constructive desertion which the court will enforce.²⁴

Additional fault grounds for divorce are numerous and varied across the states. It would not be useful or helpful to discuss all of them in this article. The above grounds are intended to give a brief framework of those grounds for divorce which are still viable in most jurisdictions.

Just as there are numerous fault grounds for divorce, a plethora of defenses may be invoked to defeat them. The various defenses are based on the idea that only an innocent spouse could bring an action for dissolution of marriage under the fault-based framework.²⁵ Most of the defenses to fault-based divorce have diminished in relevance, and none have any relevance to no-fault divorce actions, but some continue to have application in states where fault grounds form an alternate basis for divorce.²⁶

Recrimination is a defense where each party must establish that the other has committed an act which would constitute a fault under the statute, in which case neither would be permitted to get a divorce; in other words, neither party can receive equity under the "clean hands" rule.²⁷ Other defenses

the culpable spouse is guilty of desertion. And it matters not whether the injured party is left in the home or is forced to leave by the behavior."

21. *E.g.*, *Barnes v. Barnes*, 428 S.E.2d 294, 297 (Va. Ct. App. 1993) (citing *Arrington v. Arrington*, 82 S.E.2d 548, 551 (Va. 1954) and *Butler v. Butler*, 133 S.E. 756, 758 (Va. 1926)).

22. GREGORY ET AL., *supra* note 13, § 7.03(B)(4).

23. *E.g.*, *Paraskewich v. Paraskewich*, 223 A.2d 530, 530 (Del. 1966). Some jurisdictions require desertion to be proved and corroborated by independent evidence. *E.g.*, *Hurt v. Hurt*, 433 S.E.2d 493, 498 (Va. Ct. App. 1993).

24. *Reppert v. Reppert*, 13 A.2d 705 (Del. Super. Ct. 1940); 27A C.J.S. *Divorce* § 44 (1986 & Cum. Supp. 1994).

25. *Lichtenstein*, *supra* note 10, at 3; *Wadlington*, *supra* note 7, at 38.

26. GREGORY ET AL., *supra* note 13, § 7.03(C).

27. GREGORY ET AL., *supra* note 13, § 7.03(C)(4); *Wadlington*, *supra* note 7, at 38-

include: connivance, where one spouse procures or consents to the other's commission of marital fault; collusion, where the spouses commit fraud on the court by alleging false evidence of a marital offense; and condonation, where the offended spouse conditionally forgives the marital fault, so that the condonation is nullified if the fault is repeated.²⁸

Fault grounds for divorce and defenses remain important for a variety of reasons. No-fault grounds have not replaced fault grounds in most states; instead they were merely added as additional grounds for divorce.²⁹ Fault is still a factor in awarding spousal support or dividing marital assets in many states.³⁰ In addition, this article and some other commentators argue that fault still serves a worthwhile role in some aspects of marital dissolution.³¹

III. THE ABANDONMENT OF FAULT

A. *The Move to No-Fault*

In the 1960s it became apparent that attitudes toward divorce had changed dramatically, and that the courts were not equipped to adequately handle the widespread social acceptance of divorce as necessary and desirable.³² One obvious and apparent symptom of the unpreparedness of the courts was seen in the behavior of many couples who sought divorces in New York.³³ These divorce-seeking couples would engage in sometimes outrageous conduct while cooperating in order to create

39.

28. GREGORY ET AL., *supra* note 13, § 7.03(C); Wadlington, *supra* note 7, at 39.

29. Thirty states currently retain fault grounds while also affording no-fault alternatives. Linda D. Elrod & Timothy B. Walker, *Family Law in the Fifty States*, 27 FAM. L.Q. 515, 661 (1994).

30. For example, in Virginia adultery will preclude the guilty spouse from receiving spousal support. VA. CODE ANN. § 20-107.1 (Michie Repl. Vol. 1995).

31. See GREGORY ET AL., *supra* note 13, § 7.03 (A).

32. Wadlington, *supra* note 7, at 32. Some factors which may have contributed to the increased demand for divorce were the loosening of moral attitudes in the 1960s and 1970s, women's changing roles and expectations, and a greater emphasis on self-gratification. Lichtenstein, *supra* note 10, at 4.

33. New York, as discussed earlier, only allowed divorce upon a showing of adultery. See *Christian v. Christian*, 365 N.E.2d 849, 852 (N.Y. 1977); Tenney, *supra* note 3, at 32.

the appearance of adultery either through perjured testimony or mock or actual adultery to satisfy the statutory requirements.³⁴ One of the major goals behind no-fault reform of divorce laws was to terminate this sort of activity.³⁵

In addition to preventing such activity from contaminating the judicial process, other rationales for doing away with fault were to eliminate the bitterness of the proceedings when intimate marital details had to be aired, and also to avoid the adversarial character of most divorces obtained on fault grounds.³⁶ Since society wished for easier divorce, laws were passed to enact some form of no-fault divorce "to reflect the growing notion of marriage as a relationship terminable at will."³⁷

In furthering these goals, no-fault divorce has succeeded. The no-fault reform in effect has brought about unilateral divorce.³⁸

34. Ira M. Ellman, *The Theory of Alimony*, 77 CAL. L. REV. 1, 6-7 & n.11 (1989). Professor Ellman's article has been criticized for several of its ultimate conclusions about alimony. His article, the criticism of it, and his response to the criticism will be dealt with at length in Part IV, *infra*. See also Lichtenstein, *supra* note 10, at 4; Wadlington, *supra* note 7, at 32, 33 & n.2.

35. *Christian v. Christian*, 365 N.E.2d 849, 853 (N.Y. 1977) (stating that the authenticity of a separation must be supported by a separation decree or agreement and pointing out that "[t]his requirement as to a separation decree or agreement is peculiar to New York and reflects legislative concern over the fraud and collusion which historically infected divorce actions involving adultery"); Ellman, *supra* note 34, at 7; see also Wadlington, *supra* note 7, at 35.

36. Mary F. Blackstone, *The Fault Factor in No-Fault Divorce and Equitable Distribution: Some Suggestions for Change in Wyoming*, 20 LAND & WATER L. REV. 133, 135 (1985); see, e.g., *Baxla v. Baxla*, 522 S.W.2d 736, 738 (Tex. Ct. App. 1975), *rev'd on other grounds sub nom. Eggmeyer v. Eggmeyer*, 554 S.E.2d 137 (Tex. 1977). ("It is . . . manifestly clear from the legislative history of many, if not all, of the statutes, that the purpose and intent of the legislatures of the various states, including Texas, is to abolish the necessity of presenting sordid and ugly details of conduct on the part of either spouse to the marriage in order to obtain a decree of divorce.").

37. Bea A. Smith, *The Partnership Theory of Marriage: A Borrowed Solution Fails*, 68 TEX. L. REV. 689, 695 (1990).

38. Ellman, *supra* note 34, at 7. A person who wants to end his or her marriage may simply file for divorce, alleging that there are irreconcilable differences or that the spouses have lived separate and apart for the requisite amount of time. See *id.*; see also VA. CODE ANN. § 20-91 (Michie Repl. Vol. 1995) (statutory grounds for divorce); *Quinn v. Quinn*, 288 A.2d 51, 52 (N.J. Super. Ct. Ch. Div. 1972) ("The rationale of the recent amendments to the Divorce Act (L.1971, c.212) is to terminate dead marriages regardless of fault or lack of fault. . . . The object is to put an end to a situation of the parties which is barren of good, capable of evil, and probably irremediable by any other means."); *In re Marriage of Clark*, 538 P.2d 145, 147

Since 1985, some form of no-fault divorce has been available in all fifty states. The states differ in their methods for providing no-fault divorce: some designate it as the sole grounds necessary for divorce (often calling it an "irretrievable breakdown" of the marriage or "irreconcilable differences" among the spouses) while other states have simply added no-fault in addition to the existing fault grounds without repealing them.³⁹ Approximately eighteen states are in the first category and thirty states belong to the second.⁴⁰ The remaining states have opted for a provision which permits divorce after living separate and apart for a certain period of time in addition to the fault grounds already in place.⁴¹

B. *Effects of the Abandonment of Fault*

1. Economic Theory of Marriage

The no-fault reform was so widespread and overwhelming that it has been termed the "divorce revolution."⁴² The new laws shifted the focus of divorce proceedings from an inquiry into moral fault and responsibility to an examination of economic issues concerning whether one spouse is financially in need and whether the other spouse is capable of paying.⁴³ Although originally viewed as responding to a need to eliminate moral fault from the divorce proceeding, no-fault reform quickly

(Wash. Ct. App. 1975) ("The 'underlying purpose of the new Dissolution of Marriage Act is to replace the concept of 'fault' and substitute marriage failure or 'irretrievable breakdown' as the basis for a decree dissolving a marriage." (citations omitted)).

39. Elrod & Walker, *supra* note 29, at 661.

40. *Id.*

41. *Id.*

42. GREGORY ET AL., *supra* note 13, § 7.01(B).

43. Lenore J. Weitzman, *The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards*, 28 UCLA L. REV. 1181, 1184 (1981); see, e.g., *Oppenheimer v. Oppenheimer*, 526 P.2d 762, 768 (Ariz. Ct. App. 1974). In *Oppenheimer*, the Arizona Court of Appeals asserted that

fault is not an issue in granting dissolution. Fault has only limited relevance in awarding spousal maintenance, disposition of property, and child support. It should only be considered to the extent that there are "[e]xcessive or abnormal expenditures, destruction, concealment or fraudulent disposition of community, joint tenancy and other property held in common."

Id.

assumed economic overtones, and now it is seen as a means of empowering women and correcting economic inequalities between the sexes.⁴⁴ In fact, one of the central objectives of the Uniform Marriage and Divorce Act⁴⁵ is to render women financially independent.⁴⁶ This secondary aspect of the no-fault reform movement has been seen as an attempt to substitute property distribution upon dissolution of marriage for the lost promise of unending financial support which had been previously guaranteed by marriage.⁴⁷ One widely held conception is that of marriage as an economic partnership, a productive unit to which each spouse makes different but equal contributions in an effort to maximize joint marital income.⁴⁸ Thus, the legal analysis of divorce law has shifted in the past twenty years from a debate concerning whether marriage as an institution is so valuable that there should be major impediments to its dissolution, to an effort to determine the most fair and equitable methods to make the parties whole again once the marriage has been terminated. Inevitably, the argument has become one of competing economic analyses.

Alimony, now called spousal support, descends from the English ecclesiastical courts and was the traditional remedy for wives who were not at fault in the termination of a marriage and who, it was believed, retained a continuing entitlement to marital support.⁴⁹ Since the advent of no-fault divorce, however, this rationale for granting alimony awards in divorce pro-

44. Herma H. Kay, *An Appraisal of California's No-Fault Divorce Law*, 75 CAL. L. REV. 291, 300-01 (1987) (discussing the California experience and the presumption that community and quasi-community property be divided equally); see also Jane Rutherford & Barbara Tishler, *Equalizing the Cost of Divorce Under the Uniform Marriage and Divorce Act: Maintenance Awards in Illinois*, 23 LOY. U. CHI. L.J. 459, 465 (1992).

45. UNIF. MARRIAGE AND DIVORCE ACT, 9A U.L.A. 147 (1987).

46. Rutherford & Tishler, *supra* note 44, at 466-67 (citing *In re Marriage of Wilder*, 461 N.E.2d 447, 456 (Ill. App. Ct. 1983) ("The objective of the Act in authorizing rehabilitative maintenance is to enable a formerly dependent spouse to become financially independent in the future.")).

47. Smith, *supra* note 37, at 695-96.

48. *Id.* at 696; Robert F. Kelly & Greer L. Fox, *Determinants of Alimony Awards: An Empirical Test of Current Theories and a Reflection on Public Policy*, 44 SYRACUSE L. REV. 641, 652 (1993).

49. Garrison, *supra* note 2, at 626-27; see, e.g., *Wallace v. Wallace*, 429 A.2d 232, 236, 237 n.2 (Md. 1981); see also Ellman, *supra* note 34, at 5.

ceedings has been undermined and property distribution has become a focal point of divorce reform.⁵⁰

Although most states traditionally had distributed assets upon divorce solely to the spouse with title, those states now allow courts to reach more of the assets acquired during marriage through equitable distribution laws.⁵¹ The assumptions underlying the division of a greater scope of property upon dissolution were that the primary assets of the marriage were typically the accumulated property of the spouses and that these assets, once divided, would be sufficient to ensure that both spouses would leave the marriage with the result of their efforts during the marriage at least equally divided between them.⁵²

2. Consequences for Divorcing Spouses

The results of the divorce revolution have not been all that was hoped for when the movement first began. One primary goal of the reform movement, as alluded to earlier, was the correction of inequities between husband and wife which became apparent when the marriage was dissolved. The husband was typically the wage earner, and the wife was traditionally the homemaker. Upon dissolution, the husband had an established career and job with which to support himself, while the wife typically had nothing tangible to show for her years of marriage.⁵³ The equitable distribution statutes were designed

50. Ellman, *supra* note 34, at 6; Garrison, *supra* note 2, at 629.

51. See Garrison, *supra* note 2, at 627-28; MINN. STAT. ANN. § 518.58 (West 1990 & Cum. Supp. 1995) (division of marital property upon dissolution of marriage); VA. CODE ANN. § 20-107.3 (Michie Repl. Vol. 1995) (marital property division upon dissolution of marriage); see also Blackstone, *supra* note 36, at 137-38 (historical overview of property distribution at divorce).

52. See, e.g., G. Oliver Koppell, *Commentary*, 57 BROOK. L. REV. 777, 778 (1991). Writing in response to an empirical study on the effects of equitable distribution laws in New York, Mr. Koppell, Chair, New York State Assembly Committee on the Judiciary, stated

[i]f Professor Garrison's research had been available in 1979, those disappointed with the equitable distribution law would have known to begin with that it wouldn't have solved the problems, because the money just wasn't there. Unfortunately, we in the legislature didn't take the time to determine how few people equitable distribution would affect.

Id.

53. See generally Ellman, *supra* note 34, at 42-43.

to ameliorate this disparity.⁵⁴ In this, no-fault reform has been a singular failure.

Reformers of the 1960s and 1970s called not only for a replacement of the fault grounds for divorce with no-fault, but also for a change in the treatment of spousal support as the wife's primary economic entitlement.⁵⁵ Reformers urged that property should assume this role and they expected that property division would replace alimony as support for an ex-spouse.⁵⁶ They also felt that since marriage is a partnership of equals, the financial aspects of divorce should be remodeled accordingly, the logical outcome being a community property system without alimony.⁵⁷ None of the states went this far, however, and spousal support is still available in all states.⁵⁸ Nonetheless, many states have enacted legislation reflecting the view that such support is to be rehabilitative in nature so as to allow the needy spouse to acquire whatever education and training is needed to become self-sufficient.⁵⁹

a. The California Experience

California adopted no-fault divorce in 1970, removing any considerations of fault from the grounds for divorce, from spousal support, and from the division of property.⁶⁰ California was the first state to make such a move, and as such has led the states in most of the no-fault reform movement's efforts.⁶¹

54. See Kay, *supra* note 44, at 300-01.

55. Garrison, *supra* note 2, at 629.

56. *Id.*

57. *Id.* at 630.

58. See Elrod & Walker, *supra* note 29, at 534-36. Twenty-four states consider marital fault as a relevant factor in determining alimony, twenty-four do not (the District of Columbia is included in the survey). *Id.*

59. *Id.* at 549-63.

60. *In re Marriage of Fink*, 126 Cal. Rptr. 626, 630 (Cal. Ct. App. 1976). In California:

A primary purpose of the Family Law Act was to remove from domestic relations litigation the issue of marital fault as a determining factor. The framers of the Act hoped that the new law would provide "practicable procedures" for dissolving marriages where irreconcilable differences existed between the parties, procedures which reflected a realistic approach to the problems involved.

Id. (citations omitted); see Kay, *supra* note 44, at 292.

61. Kay, *supra* note 44, at 292.

In California, a community property state, the courts treat marriage as an equal partnership, and the distribution statute instructs the courts to divide equally the community assets and liabilities.⁶²

One of the earliest studies to comprehensively examine the effects of the equitable distribution statutes upon property and support awards and the post-divorce standards of living of divorced parties and children following the enactment of no-fault divorce was conducted by Dr. Lenore J. Weitzman in California in 1981.⁶³ Dr. Weitzman's study collected data from random samples of court records in San Francisco and Los Angeles from 1968, 1972, and 1977. Her samples included over 500 cases per year in each city.⁶⁴

The data showed that because most divorcing couples were young, they had relatively few assets, the worth of those assets was typically low, and they had little or no property to divide.⁶⁵ In addition, "the spouses' earning capacity [was] typically worth much more than the tangible assets of the marriage."⁶⁶ The study indicated that most divorcing couples were in lower income groups and that neither a home nor any other tangible asset of major value was available to cushion the financial impact of divorce.⁶⁷ For these couples, the primary financial issues were spousal and child support.⁶⁸ Dr. Weitzman noted that there was a dramatic difference between results obtained under the new presumption of equal property division than obtained under former fault provisions, where property was usually divided unequally with the wife (usually the ag-

62. *In re Marriage of Juick*, 98 Cal. Rptr. 324, 329 (Cal. Ct. App. 1971); Weitzman, *supra* note 43, at 1199.

63. Weitzman, *supra* note 43.

64. Weitzman, *supra* note 43, at 1186.

65. *Id.* at 1188. The average value of community property available for division was \$10,900 in 1978 dollars. *Id.* at 1190. This would leave the average spouse with \$5,450 worth of property awarded under equal division principles embodied in California law. See CAL. FAMILY CODE § 2550 (West 1994) (division of community property to be equal except by agreement or stipulation of the parties).

66. Weitzman, *supra* note 43, at 1192.

67. *Id.* at 1197.

68. *Id.* Dr. Weitzman noted that even the ownership of a home and its equity does not necessarily provide a sufficient financial cushion for couples who have homes. Even in these cases, the wage and salary income was of much greater value than the couple's community property. *Id.* at 1197 n.46.

grieved party) receiving the majority of the property division.⁶⁹ Whereas the marital home was usually awarded to the mother of minor children under the old fault-based law, under the new law the home was more likely to be sold with the proceeds divided equally between the spouses.⁷⁰

Dr. Weitzman's data on alimony indicated that it was not awarded in most divorce cases, and that this did not improve under no-fault.⁷¹ The study indicated that in California the mothers of young children had experienced a sharp drop in spousal support awards under the new law.⁷² Another consequence of the new law was that most of the spousal support awards that were granted were temporary in nature, rather than permanent as had been the case under the old law.⁷³ While minimal support was granted to divorcing spouses of a marriage of long duration in about one-half of the cases, and in two-thirds of cases involving long-married housewives, younger women usually did not receive any support, and those that did only received it for a short period.⁷⁴

The study concluded that most men have much more disposable income after divorce than their former wives and children, and hence, their economic status improves while that of divorced women declines.⁷⁵ Divorced men gained a 42% improvement in their post-divorce standard of living (despite losing 19%

69. *Id.* at 1200-01.

70. *Id.* at 1264.

71. *Id.* at 1221. In 1977, only 17% of women who were divorced in California received spousal support, whereas U.S. Bureau of Census data collected between 1887 and 1922 shows that alimony awards were only given in between 9% to 15% of cases. Therefore, no-fault divorce laws are not responsible for a drastic reduction in alimony awards. *Id.* The median amount awarded for spousal support in the 1977 sample was \$210 per month limited to two years. *Id.* at 1225.

72. *Id.* at 1222. Although most of these women had been awarded child support, the study showed that these awards were rarely enough to cover one-half of the costs of the children. *Id.*

73. *Id.* at 1226.

74. *Id.* at 1265. A different study of the financial consequences of divorce in California found that a number of variables, including the income of the two spouses and the duration of the marriage were significant predictors of the probability and/or size of awards. ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, *DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY* 124 (1992). Greater income of husbands increased the probability and size of an award to wives, while greater duration of the marriage increased the amount of the award if one was given. *Id.*

75. Weitzman, *supra* note 43, at 1249.

in real income), while divorced women's standard of living declined 73% (while losing 29% in real income).⁷⁶

Dr. Weitzman made several policy recommendations aimed at correcting some of the inequities of no-fault reform highlighted by her study. These suggestions included: expansion of the definition of community property to include career assets such as professional degrees, adoption of spousal support rules which would enable younger women to develop a greater earning capacity, and a return to more permanent forms of support for older divorced women.⁷⁷ This paper suggests one possible framework for advancing some of the goals and curing some of the inequities identified in Dr. Weitzman's study.⁷⁸

b. The New York Experience

California is one of only nine community property states and is one of only two states which mandate equal distribution of property on divorce.⁷⁹ Therefore, although its alimony statutes are fairly mainstream, its property rules are atypical.⁸⁰ It is more useful to look at the results of no-fault divorce in a jurisdiction which is more in line with the majority of states to see whether Dr. Weitzman's findings are equally relevant elsewhere in the country.

76. *Id.* at 1249-51.

77. *Id.* at 1266-68. Dr. Weitzman's critique of no-fault divorce and her suggestions for reform have been severely criticized by some feminists. *See, e.g.,* Kay, *supra* note 44. Professor Kay is a "liberal feminist" who opposes the re-introduction of fault in any form because she feels that it would encourage women to pursue traditional homemaking roles and because she believes that the way to reduce women's dependence on their husbands is to reduce, not enlarge, financial support upon divorce. June R. Carbone & Margaret F. Brinig, *Rethinking Marriage: Feminist Ideology, Economic Change, and Divorce Reform*, 65 TUL. L. REV. 953, 992-94 (1991). In contrast, Dr. Weitzman's views have been embraced by "cultural feminists" who question whether women should be forced to make the same career decisions as men and oppose laws that have the effect of penalizing women's different choices. *Id.* at 996. Compare Herma H. Kay, *Equality and Difference: A Perspective on No-Fault Divorce and its Aftermath*, 56 U. CIN. L. REV. 1 (1987) with Mary E. O'Connell, *Alimony After No-Fault: A Practice in Search of a Theory*, 23 NEW ENG. L. REV. 437 (1988).

78. *See infra* Part IV.

79. *E.g.,* Elrod & Walker, *supra* note 29, at 695.

80. Garrison, *supra* note 2, at 636.

New York still allows a showing of fault before granting divorce, although there are now no-fault alternatives as well.⁸¹ In 1980, New York enacted an equitable property distribution statute but did not alter the grounds for divorce.⁸² The equitable distribution statute is fairly typical, and it applies to property acquired during the marriage and excludes gifts, inheritances, and personal injury awards. Fault only plays a role in distribution where it is egregious.⁸³ The legislation was expected to increase the assets that most spouses received upon divorce, especially since the statute expanded the property which could be divided by ignoring legal title to assets and explicitly instructed the courts to consider the contributions of a homemaker and parent in asset distribution.⁸⁴ This emphasis on need and nonmonetary contributions was specifically expected to benefit women in divorces.⁸⁵

Professor Marsha Garrison conducted a study of New York divorce cases in three diverse counties, one urban, one rural, and one suburban.⁸⁶ She compared data from divorces adjudicated in 1978, before the enactment of the New York equitable distribution law, with ones decided in 1984, four years after the law took effect.⁸⁷

The data revealed that husbands on average owned a significantly larger proportion of most couples' assets (as anticipated by the legislature), but that husbands also tended to have larger debts, resulting in wives having a slightly higher median

81. N.Y. DOM. REL. LAW § 170 (Consol. 1995); In *Christian v. Christian*, the New York Court of Appeals pointed out that

two new grounds for absolute divorce were specified[:] living apart pursuant to a separation decree or judgment and living separate and apart pursuant to a written separation agreement. . . . These last two bases have become known as the "no fault" grounds, since they were designed to make separation a ground for divorce, regardless of fault, as long as the authenticity of the separation is supported by a separation decree or agreement.

365 N.E.2d 849, 852-53 (N.Y. 1977) (citations omitted).

82. Garrison, *supra* note 2, at 637.

83. *Id.* at 638-39; see *O'Brien v. O'Brien*, 489 N.E.2d 712, 719 (N.Y. 1985); *McCann v. McCann*, 593 N.Y.S.2d 917 (N.Y. Sup. Ct. 1993) (stating that in order for fault to impact on equitable distribution, it must "shock the conscience").

84. Garrison, *supra* note 2, at 651-52.

85. *Id.*

86. See *id.* at 643-44.

87. *Id.* at 641-43.

individual net worth than husbands in 1984.⁸⁸ In fact, more than one-half of husbands had a net worth of less than \$50.⁸⁹ The value of marital property strongly correlated with family income, such that families with an income of \$25,000 per year or less had a net asset value of less than \$2000, while those with a yearly income of greater than \$75,000 had net assets greater than \$200,000.⁹⁰ These figures strongly resemble Weitzman's figures for California and demonstrate the lack of valuable marital property for distribution upon divorce in most households.⁹¹

The research further demonstrated that the single most important asset, and the one which exceeded the value of all other assets, was the marital home.⁹² Both before and after the equitable distribution statute was passed, more than one-half of the wives received more than 50% of the net worth of the marital estate upon divorce.⁹³ This average share is remarkably similar to the results of Dr. Weitzman's California study.⁹⁴

One intended effect of the New York equitable distribution law was its impact upon distribution in cases where the wife was found to have committed a marital fault. In 1978, a judgment against the wife alone impacted adversely upon the size of the net property award she received, while in 1984, the same sort of judgment appeared to have no impact upon her share at all.⁹⁵

The new law had dramatic effects on the frequency and duration of alimony awards, which declined by 43% in all categories of divorce cases, and on the percentage of permanent alimony awards, which was cut in half.⁹⁶ The legislative goal of the new statute was to increase the alimony recipient's opportunity to achieve independence and to reduce permanent awards in

88. *Id.* at 653-58.

89. *Id.* at 657-58.

90. *Id.* at 663. The median net worth of marital property was \$23,591. *Id.*

91. *Id.* at 664. See *supra* notes 65-68 and accompanying text.

92. *Id.* at 665.

93. *Id.* at 674.

94. See Weitzman, *supra* note 43, at 1201.

95. Garrison, *supra* note 2, at 694-95.

96. *Id.* at 697-98. From 21% of all divorcing couples in 1978 to 12% in 1984. *Id.*

favor of temporary “rehabilitative” support awards.⁹⁷ Therefore, the decline in alimony was not unexpected, although predicting which spouses would receive alimony awards was not made any easier.⁹⁸ Professor Garrison concluded that alimony decisions seemed to be based on some rational, quantifiable factors such as length of marriage and earning potential, but that other factors, which she could not explain from the information available in court records, also appeared to determine which spouses received alimony.⁹⁹ Thus it appears that there are either gaps in the rationale for alimony, or that the courts need more guidance for determining when and on what basis to award alimony.¹⁰⁰

Professor Garrison also listed her findings comparing post-divorce per capita income for husbands and wives along with findings reported by other researchers:

Research Site	Husband (Average % Change)	Wife (Average % Change)
Anchorage, Alaska	+ 17%	— 33%
New Haven, Connecticut	+ 90%	— 31%
Los Angeles & San Francisco, California	—	— 21%
Five Counties, Vermont	+ 120%	— 33%
New York/Onondaga/ Westchester, New York	+ 82%	— 32%

97. *Id.* at 698-99.

98. *See id.* at 698-700.

99. *Id.* at 711.

100. *Id.* at 734-36; *see infra* parts IV-V.

This chart¹⁰¹ shows that the results obtained in Professor Garrison's research are not isolated to one geographic area and are in fact quite representative of the economic fortunes of divorced persons across the nation.

Professor Garrison suggests that her research demonstrates that the lack of alimony awards across the nation should not be blamed on the loss of wives' ability to block divorce, since that ability remains intact in New York.¹⁰² She posits that the rules concerning the entitlements of spouses upon divorce appear to be more important to the financial well-being of spouses than are the grounds of divorce, and she argues that what is necessary is revision of those rules based upon a good understanding of the outcomes under current guidelines.¹⁰³ She also notes that property distribution, in light of her findings, should not be the primary method for achieving an equitable distribution of the hardships of divorce between the parties.¹⁰⁴ Rather, more definite standards specifying a method for computing the alimony award are needed to govern the allocation of spousal support.¹⁰⁵

Marital property alone, in the majority of cases, is clearly insufficient to provide either spouse with the financial resources necessary to maintain the standard of living enjoyed during the marriage. This reality should once and for all negate the idea that spouses can somehow be "made whole" after divorce by simply distributing the assets gained during marriage. We now know that there is not enough property in most marriages to accomplish this. By the same token, alimony is granted in only a small minority of cases.¹⁰⁶

To be sure, it appears that even with a shift in the policy governing spousal support in favor of an increase in the number of such awards, neither spouse will truly be in the same financial position separately as they were as a complete eco-

101. Garrison, *supra* note 2, at 721. The data for Los Angeles and San Francisco was obtained by researchers who recomputed data from Dr. Weitzman's study. *Id.*

102. *Id.* at 724. New York's no-fault divorce options are based on mutual consent. *Id.*; see N.Y. DOM. REL. LAW § 170(5), (6) (Consol. 1995).

103. Garrison, *supra* note 2, at 724-25.

104. *Id.* at 729-30.

105. *Id.* at 737-39.

106. See *supra* notes 60-105 and accompanying text.

conomic unit. However, the disparities can be rendered less significant than they are under current law by adopting a policy which provides firm guidelines and directs courts to award spousal support in all cases which fall within those guidelines.

IV. A FRAMEWORK FOR DETERMINING ALIMONY AND PROPERTY DIVISION WHICH RETAINS AND USES FAULT

The inquiry thus turns to fashioning a system which takes into account the realities of the economic positions of spouses in most divorces as revealed by the empirical studies conducted by Dr. Weitzman and Professor Garrison. Now, twenty-five years after the advent of no-fault divorce, it should be possible to acknowledge the impact of no-fault upon marriage and divorce, and to fashion a remedy which more fully redresses the disparities between men and women after marital dissolution. With the dawning realization that property distribution is not the panacea it was originally hoped to be, commentators increasingly are turning their attention to alimony.¹⁰⁷

Professor Ira Ellman developed a doctrinal analysis of alimony in which he discarded the old rationales for its existence and developed a new economic theory centered on the concept of opportunity costs.¹⁰⁸ He argues persuasively that modern reforms have robbed alimony of any consistent theory to justify its continued validity.¹⁰⁹ While many jurisdictions appear to rely on the concept of "need" in their awards of spousal support, the definition of such need is hopelessly confused and varies from case to case.¹¹⁰ Professor Ellman notes that no one can explain why alimony should be awarded although every jurisdiction retains it.¹¹¹

Professor Ellman's theory has been severely criticized. This section first sets out his theory as initially explained by him in 1989. Next, two cogent critiques of his analysis are discussed.

107. See, e.g., David L. Chambers, *Commentary: Meeting the Financial Needs of Children*, 57 BROOK. L. REV. 769, 771 (1991); O'Connell, *supra* note 77.

108. See Ellman, *supra* note 34, at 12.

109. See *id.* at 3-13.

110. *Id.* at 4.

111. *Id.* at 4-5.

The section concludes with Professor Ellman's response to the criticism.

A. *Ellman's Theory*

Professor Ellman contends that the contract analogy, which is often used by courts to describe marriage, fails to satisfactorily define the relationship between the parties because marriage has been treated as a status, with the parties' rights and responsibilities fixed by statute rather than by agreement between them.¹¹² The essential problem with a contract analysis is defining the agreement between the parties.¹¹³ Accepting this contract analogy would allow awards to be fixed according to the contractual obligation of the parties, one of whom has breached the agreement.¹¹⁴ Unfortunately, the analysis fails at this point precisely because very few couples enter into marriage with the same understanding of the "contract." As Professor Ellman notes:

[O]ne might well argue that couples divorce precisely because they discover, as specific issues arise after some years of marriage, that in fact there never was a clear contract, that they do not have the same understanding of their mutual commitment. . . . A court would typically have no basis for deciding which understanding was correct. The spouses' "agreement" was simply too vague to provide a court with sufficient guidance to determine whether it has been breached.¹¹⁵

Because contract principles cannot provide an acceptable outcome in most cases, the courts tend to use contract language while in fact fashioning a remedy which reflects their own views of the equities involved and their own concepts of an appropriate marital "contract."¹¹⁶

The analogy of marriage as a partnership is likewise rejected by Professor Ellman because it is not helpful in the marriage

112. *Id.* at 13; see also *Maynard v. Hill*, 125 U.S. 190, 210-11 (1888).

113. Ellman, *supra* note 34, at 15.

114. See *id.*, at 14-20.

115. *Id.* at 20.

116. *Id.* at 23.

context. Professor Ellman argues that partnership law principles work in the business context because courts can assume that the primary goal of all partners is to maximize profits and that expectations can be evaluated in light of this motivation. However, in the marriage context, courts have no guidance to render judgment beyond their own preferences and expectations.¹¹⁷

Professor Ellman contends that alimony can be justified on social policy grounds. He states that legal doctrines concerning marriage and divorce should be based on the encouragement of a sharing behavior in marriages and an elimination of "distorting incentives."¹¹⁸ By reconceptualizing alimony, he proposes a system for accomplishing this goal.¹¹⁹ He focuses on the traditional wife as a homemaker because currently this model still comprises a significant percentage of marital arrangements, and the homemaker spouse is the most disadvantaged in divorce.¹²⁰ At the same time, he declares that the theoretical model he advances also applies to marriages where both spouses have careers.¹²¹ The core of the analysis rests on the fact that the traditional marriage involves considerable up-front investment by the wife, because she forsakes her career opportunities and other marital opportunities—"investments that a self-interested bargainer would make only in return for a long-term commitment."¹²² The husband, on the other hand, realizes a gain from the marriage in the early years through increased earning capacity and the care of his children at home.¹²³ His contributions to the marriage will not come into full fruition until the later years, when his wife will be able to

117. *Id.* at 40.

118. *Id.* at 40-81. "Distorting incentives" are incentives created by modern divorce law which offer one spouse an economic advantage over the other that can be achieved by ending the marriage. *Id.* at 50 n.143. These incentives are avoided by allocating the economic consequences of a failed marriage appropriately between the parties. *Id.*

119. *Id.*

120. *Id.* at 40-48.

121. *Id.* at 40-41.

122. *Id.* at 42; see also GARY S. BECKER, A TREATISE ON THE FAMILY (1981) (providing an economic analysis of specialization by spouses in marriage to allocate labor and analyzing marriage and divorce from an economic perspective).

123. Ellman, *supra* note 34, at 42.

share in the benefits of his enhanced earning capacity.¹²⁴ This model will alter somewhat with a dual-income couple, but in that case the spouse with the lower earning potential will usually make sacrifices in his or her career (although this still tends to be the wife)¹²⁵ to benefit the economic fortunes of the marriage as a whole.¹²⁶

The function of alimony in Professor Ellman's view, therefore, is to reallocate the financial consequences of divorce to prevent the economic incentive of the higher-earning spouses (generally husbands) to "fire" their spouses when they have obtained the benefits of the marriage and before they have begun to deliver to their wives the benefits for which the initial sacrifices were made (long-term companionship and higher standard of living in later life). This is considered a remedy of one spouse against the other.¹²⁷ This theory of alimony conceptualizes spousal support as an entitlement earned by the economically disadvantaged spouse through marital investments and as a tool to eliminate distorting financial incentives in marriage, not as a way of relieving need as the current law prescribes.¹²⁸

Professor Ellman sets out several principles and rules which courts could follow in fashioning a remedy under his theory. For the purposes of our discussion, these principles are set out below and this article will later address how fault may be made a part of this framework in providing guidance to the courts.

Principle One: A spouse is entitled to alimony only when he or she has made a marital investment resulting in a postmarriage reduction in earning capacity. . . .

Rule 1.1: There is no compensation on divorce for the lost opportunity to have chosen a different spouse, or for the nonfinancial losses arising from the failed marriage. . . .

124. *Id.* at 42-43.

125. This assumption will probably hold true for a few more years, but see Sam Roberts, *Black Women Making Financial Strides*, RICHMOND TIMES-DISPATCH, Nov. 1, 1994, at A2, for a discussion of how recent black women college graduates have begun to earn more than both white women and black men college graduates. In a few years there will hopefully be less disparity between the sexes in earning potential, but this does not change the application of Professor Ellman's analysis.

126. Ellman, *supra* note 34, at 46-47.

127. *Id.* at 50.

128. *Id.* at 52.

Principle Two: Except as provided in Principle Three, only financially rational sharing behavior qualifies as marital investment giving rise to a compensable loss in earning capacity. . . .

Rule 2.1: A loss of earning capacity incurred to accommodate a spouse's lifestyle preferences, yielding a reduction in aggregate marital income, is not compensable [for the spouse whose preference was accommodated]. . . .

Rule 2.2: The claimant spouse is ordinarily entitled to recover the full value of her lost earning capacity. Where, however, no increase in marital income in fact resulted from her marital investment, she has no claim under Principles One and Two. . . .

Principle Three: Notwithstanding Principle Two and Rule 2.2, the homemaker spouse may claim half the value of her lost earning capacity, even though it exceeds the market value of her domestic services, when these services include primary responsibility for the care of children.¹²⁹

Thus, the theory advanced by Professor Ellman measures alimony claims by losses in earning capacity rather than other standards currently used by the courts, which we have seen yield disappointing results. The types of spouses who will have claims under this measure are primarily spouses who have given up careers in order to take care of children and spouses who have subrogated their career and earning prospects to that of his or her spouse to accommodate that spouse's more lucrative prospects.¹³⁰ Therefore, some spouses who would have no claim under this theory might have a claim under current law because they would be considered in need.¹³¹

One situation which Professor Ellman sets forth as a problem case is where a woman who wants to be a traditional homemaker spouse never seeks to develop her market talents.¹³² No effort to describe a loss of earning capacity will ring true in this case, and her real loss is the marriage itself, which is significant because she may never again be able to find a suitable mate.¹³³ Professor Ellman states that the only fault of at

129. *Id.* at 53-73.

130. *Id.* at 73.

131. *Id.*

132. *Id.* at 80.

133. *Id.*

least some of these women will be having made the wrong choice of husbands.¹³⁴ In these cases, the lost earning capacity may be too speculative to be calculated. This problem is not insurmountable, and indeed the proposed form of alimony set forth in Part V provides at the very worst a minimum threshold amount of alimony.

A greater problem for Professor Ellman's theory lies in the criticism levelled at it from various circles. The following sections contain two well-crafted and persuasive views concerning the theory's shortcomings.

B. *Criticism of Ellman*

1. Feminist Dissent

Criticizing Professor Ellman for ignoring the ongoing debate concerning gender neutral divorce laws which make no allowance for women's continuing domestic roles, Professor June Carbone mounts a frontal attack on his theory by assaulting the theme that women should specialize in domestic matters.¹³⁵ Professor Carbone states that Professor Ellman's theory ("the Theory"), by increasing women's dependence on their husbands and providing an economic incentive for women to specialize in domestic roles, would serve only to reinforce existing gender inequalities.¹³⁶

Professor Carbone's article reveals that Ellman's Theory draws on efficiency principles to argue that alimony should be formulated to encourage specialization.¹³⁷ She states that the Theory's rationale is to

deter inefficient divorce and encourage reliance over the life of the marriage, [which] is the classic justification for expectation damages. . . . Ellman . . . rejects the possibility of defining marital obligations [which would be necessary to enforce expectation damages], and his proposals, although

134. *Id.*

135. June Carbone, *Economics, Feminism, and the Reinvention of Alimony: A Reply to Ira Ellman*, 43 VAND. L. REV. 1463, 1463-65 (1990).

136. *Id.* at 1465.

137. *Id.* at 1464.

dressed in the language of reliance, reinvent alimony as a form of restitution.¹³⁸

Restitution provides a way to compensate for benefits conferred at the other spouse's expense.¹³⁹ Therefore, the Theory in fact rests upon contract principles, notwithstanding Professor Ellman's protestations to the contrary.¹⁴⁰ The Theory avoids acknowledging its contractual basis because Professor Ellman wished to address what the rules governing divorce should be without the pretense that those rules necessarily embody the parties' intentions.¹⁴¹

As Professor Carbone correctly points out, to justify that one party continue to enjoy the standard of living established during marriage at the other's expense after divorce, there "must be a reason to believe that the marriage should have endured, such as an enforceable promise to remain married until 'death do us part,' and some reason to impose responsibility for the marriage's failure on the paying party."¹⁴² It seems that consideration of fault in awarding alimony would provide such justification.¹⁴³ Changing the terminology from contractual to noncontractual does not eliminate the need to make a determination of which party "breached" or was at fault.¹⁴⁴ Professor Carbone states:

If Ellman were serious about deterring older men from running off with younger women and leaving their wives with few prospects for remarriage, he would propose an expectation system of damages that would enable the wife to enjoy the financial position she would have had had the marriage continued, whether or not she had suffered a loss of earning potential. This system would, in Ellman's terms, reallocate the loss imposed by the divorce, requiring the husband to consider the wife's losses as well as his own gains in deciding whether to seek a divorce. . . . [H]owever, Ellman can do this only if he recognizes marriage as a

138. *Id.* at 1466.

139. *Id.*

140. *Id.* at 1467.

141. *Id.* at 1469.

142. *Id.* at 1475.

143. *See id.* at 1476.

144. *Id.*

lifelong commitment and ties such an award to a determination that the husband breached the obligation to remain married.¹⁴⁵

Professor Carbone posits restitution as the basis of Professor Ellman's theory, but finds that this renders the Theory's rationale—the need to discourage divorce and encourage specialization—inconsistent with its restitutionary nature.¹⁴⁶ She uses contract principles to conclude that removing "distorting incentives" is not an appropriate basis for choosing restitution over expectation and reliance damages.¹⁴⁷

The real problem that Professor Carbone sees in the Theory is that it ignores and, in her eyes, completely fails to encourage the larger interests of society, including child rearing, married women's participation in the work force, and sexual equality.¹⁴⁸ She agrees that a modern theory of alimony should be noncontractual, but it must take into account wider externalities in order to provide a comprehensive rationale for its implementation.¹⁴⁹

Professor Carbone evaluates the Theory by considering the societal results of no-fault divorce and the elimination of any scrutiny of marital conduct. She finds that the need-based standard adopted by California and other states for spousal support awards falls short of protecting the standard of living enjoyed during marriage and also fails to guarantee the return of an appropriate share of the benefits the other spouse retains after divorce.¹⁵⁰ The current system effectively encourages divorce,

145. *Id.* at 1481 n.78.

146. *Id.* at 1485.

147. *Id.* at 1487-88. Professor Carbone demonstrates that the Theory seeks to accomplish an "efficient breach" by imposing the nonbreaching party's losses on the breaching party, but economists find that only expectation damages are appropriate in such cases to remove the distorting incentives that encourage divorce. *Id.* at 1485-86. "Economists also argue, however, that only restitution, not expectation or reliance, can supply efficient incentives for reliance over the course of the contract," encouraging the nonbreaching party to weigh the investment's advantages against the possibility that the other party will breach the agreement. *Id.* at 1486-87. No single efficient solution exists, but the choice of remedies depends on whether one wishes to deter inefficient breach or overreliance. *Id.* at 1487.

148. *Id.* at 1491.

149. *Id.*

150. *Id.* at 1492-93.

and discourages reliance on the marriage, whether efficient or not.¹⁵¹ In the end, Professor Carbone finds herself endorsing a contract-based restitution system, such as that advocated by Professor Ellman (but not acknowledged by him as such). This restitution system would simultaneously reward the contributions married women make to child rearing and the sacrifices inherent in two-career families, as well as provide two advantages: (1) women would be encouraged to do as much as possible to enhance their earning potential; and (2) the "breaching party" would have to weigh the costs to him or her of paying restitution damages if he or she breaks off the life-long contract.¹⁵²

In endorsing the Theory, Professor Carbone also reiterates her doubt concerning Professor Ellman's belief that changing social views have made it impossible to determine whether marital obligations have been breached. She points out that

nineteenth century judges displayed little hesitation in judging marital conduct amidst the changing social mores of those times, and modern judges in states that permit consideration of marital misconduct to continue to influence financial awards similarly demonstrate their ability to reach principled conclusions. The issue is not so much whether such determinations are possible as whether they are worth the effort. . . . Fault fell into disrepute not because it became indeterminate, but because it became irrelevant to the permissibility of divorce. Its role in the financial dispositions made upon divorce has never really been examined independently of its role as a prerequisite for divorce.¹⁵³

As will be demonstrated in the following section, marital obligations can be determined, and it is necessary to account for them in order to provide a morally justifiable rationale for causing one spouse to pay alimony to a former spouse.

151. *Id.* at 1493.

152. *Id.* at 1493-94.

153. *Id.* at 1494 & n.143 (citations omitted).

2. Moral Dissent

Professor Carl Schneider wrote an insightful article which praised the Theory for its attempt to provide a coherent rationale for alimony, but also criticized it for its refusal to acknowledge any moral discourse on the subject of awarding alimony.¹⁵⁴ Professor Schneider stated that American family law in general has experienced "a diminution of the law's discourse in moral terms about the relations between family members, and the transfer of many moral decisions from the law to the people the law once regulated."¹⁵⁵ He also expressed his doubt that any law of alimony may be based on morally neutral terms or successfully prevent courts from considering spouses' moral relations in awarding alimony.¹⁵⁶

Professor Schneider's first problem with the Theory concerns its stated purpose of creating incentives which will affect the behavior of married couples.¹⁵⁷ He believes that the Theory is so narrowly structured and complex that its incentives and disincentives cannot be easily communicated to those whose behavior it is intended to affect; thus, a wife might make a sacrifice for her husband believing that she will be reimbursed should divorce occur only to find out that she will not be because her sacrifice was economically irrational.¹⁵⁸ The Theory relies on economic reasoning, but most people do not see marriage in those terms.

Professor Schneider next questions whether the kind of marital sharing sought to be promoted by the Theory should be promoted at the expense of other marital goals.¹⁵⁹ He points out that one possible effect of the Theory might be to "induce the wife to abandon her career, since it allows her to do so without financial risk" to herself, which might be exactly what

154. Carl E. Schneider, *Rethinking Alimony: Marital Decisions and Moral Discourse*, 1991 B.Y.U. L. REV. 197.

155. *Id.* at 198 (quoting Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803, 1807-08 (1985)).

156. *Id.*

157. *Id.* at 208.

158. *Id.* at 208-09.

159. *Id.* at 218.

she wishes.¹⁶⁰ If so, it may not be a sacrifice to *her personally*, and therefore, one may question whether it should be compensated upon divorce. Professor Schneider also takes issue with the proposition that optimization of family income is necessarily the purpose of marriage—many people would feel such a system sends an improper message about the nature of marriage.¹⁶¹ The Theory's shortcomings as an economic model are summed up as follows:

First, all transactions except financial transactions are excluded from the model. Second, all financial transactions except those between one or both of the spouses on one hand and outsiders on the other are excluded. Even financial transactions with outsiders seem to be limited to wage-earning and entrepreneurial activities. Within this small world, the theory applies a test of maximizing joint financial wealth. Yet economists regularly deal, for example, with trade-offs between wealth and leisure, with psychic income in numerous forms, and so on.¹⁶²

Professor Schneider concludes that the Theory is "unmanageable in practice," although he is interested in it for its theoretical treatment of alimony and its refusal to consider moral choices.¹⁶³

Professor Schneider believes that many of the shortcomings of the Theory are related to its attempt to justify alimony in morally neutral terms, and he feels that neither legislatures nor the courts can exclude moral relations between spouses in their decisions concerning alimony.¹⁶⁴ The Theory speaks in exclusively economic terms, but the law in fact conceives of families in a combination of economic, social, psychological, and moral terms.¹⁶⁵ Professor Schneider argues that the law of alimony ought not penalize spouses for their generosity to each other by refusing to account for it in setting alimony.¹⁶⁶

160. *Id.* at 219.

161. *Id.* at 218-19.

162. *Id.* at 233.

163. *Id.*

164. *Id.* at 234-35.

165. *Id.* at 242.

166. *Id.* "Whatever alimony rules we write (even if we write none) will affect the incentive structure of marital decisions and thus will (potentially) affect the moral

The true failing of the Theory, in Professor Schneider's view, lies in its blindness to morality.¹⁶⁷ He argues that it sets bright-line rules in a category of cases where the individualized circumstances and moral ramifications matter the most to the participants.¹⁶⁸ Moreover, he asserts that people *legitimately* expect that their most meaningful relationships will not be dissolved and their assets distributed without taking into account the relative merits of the parties.¹⁶⁹ Professor Schneider notes that much of the appeal of the Theory lies in its accord with widely held moral views.¹⁷⁰ It deals appropriately with the almost cliché case in which a wife makes a genuine sacrifice for the sake of her husband and family, providing him with services which she dislikes, and doing so in obedience to social pressures.¹⁷¹ The husband encourages this and his career is directly benefitted by her sacrifice, which she has made in the belief that the marriage will be permanent, or at least that both spouses will do their utmost to make it so.¹⁷² The husband divorces her unjustly, and thereafter she must shoulder the burden of raising the children, but with less earning power and fewer assets.¹⁷³ Meanwhile, the husband is free to continue his career unencumbered by the burden of child rearing, and he may even improve his standard of living.¹⁷⁴ It is in this framework, notes Professor Schneider, that the Theory is most persuasive, precisely because it "does not require us to ignore the moral relations of the parties."¹⁷⁵ The Theory is correspondingly less compelling where a wife's sacrifice is deemed financially irrational.¹⁷⁶

relations of the parties. Therefore any position the law of alimony takes must have moral consequences, even if none are explicitly intended." *Id.* at 236. "The Theory does not profess to escape choices of this kind entirely. . . . But it is half-hearted and ambivalent about doing so, and thus never asks what 'kind of marital behavior we want' with enough persistence to yield persuasive and useful answers." *Id.* at 241.

167. *See id.* at 243.

168. *Id.* at 244.

169. *Id.*

170. *Id.* at 246.

171. *Id.*

172. *Id.*

173. *Id.* at 246-47.

174. *Id.* at 247.

175. *Id.* at 246-47.

176. *Id.* at 248. For instance, taking the same fact pattern, but adding that the wife's sacrifice is financially irrational under the Theory because it is made to accom-

Professor Schneider agrees with the Theory that need alone is not a sufficient basis for awarding alimony. He states that,

[o]ne spouse may come to owe the other support after marriage because of the moral relationship between spouses that are generally part of marriage. In short, the riddle of alimony has a traditional answer. It is not that need gives rise to obligation. It is that entering into the special relationship that is marriage and behaving in some kinds of ways in that relationship can give rise to an obligation to a former spouse who is in need.¹⁷⁷

As Professor Schneider points out, contrary to the assertion in the Theory that the modern divorce reform movement has rejected all fault reasoning, fault still must be taken into account in many jurisdictions in awarding alimony.¹⁷⁸ He concurs with Professor Carbone's opinion that there is more agreement about modern marital expectations than the Theory suggests, and that judges and courts have traditionally been able to perform this analysis.¹⁷⁹

As Professor Schneider suggests, a broader view of alimony will require a great degree of discretion by the court,¹⁸⁰ but this would not be a radical proposition. Courts have always been granted wide latitude in awarding alimony, and even though that discretion has been limited by the Uniform Marriage and Divorce Act, the Act continues to accord much latitude to judges in determining property distribution.¹⁸¹ Whether or not more discretion is granted for alimony decisions, it seems clear that some element of moral discourse must attend any proposed standard for awarding alimony.¹⁸²

modate the husband's preference for a lower-paying job in a rural locale, it seems unjust, in moral terms, to deny the wife any support simply because her acquiescence to her husband's wishes did not result in a net financial gain for the couple.

177. *Id.* at 248-49.

178. *Id.* at 249-50. Twenty-four jurisdictions consider marital fault relevant in awarding alimony. Elrod & Walker, *supra* note 29, at 534.

179. Schneider, *supra* note 154, at 251.

180. *Id.* at 252.

181. *Id.* at 253.

182. *See id.*

C. *Ellman's Response*

Professor Ellman responded to the criticism levelled at the Theory by attempting to clarify his reasoning.¹⁸³ He is partially successful in that he explains how his Theory will encourage the participation of women in the work force, but he fails to persuasively establish that moral relations must be disregarded in determining alimony.

Professor Ellman begins his response by once again dismissing marital fault because considerations of fault in determining alimony are allowed in only a minority of jurisdictions.¹⁸⁴ However, this justification rings hollow; this is a minority view, but barely so. *Twenty-four* jurisdictions still consider marital fault in awarding alimony, while twenty-seven states do not consider it.¹⁸⁵ *Thirty* states retain fault grounds for dissolving the marital relationship.¹⁸⁶ Dismissing fault from consideration because it is a factor in only a "small minority" of states seems almost ludicrous in view of the facts. Apparently many legislatures have not been so overcome by the charms of no-fault as to wish to repeal the fault remedies entirely. Thus, in this area, Professor Ellman has failed to honestly consider whether moral relations should be factored into alimony. A shrug is not an argument.

Professor Ellman explains that the measure of alimony under the Theory is "a reliance measure of the [sacrificing] spouse's loss."¹⁸⁷ However, his explanation actually describes a hybrid award somewhere between reliance and expectation damages.¹⁸⁸ The Theory compensates for the difference between the spouse's economic status at divorce and the status she would have attained had she not engaged in marital sharing behav-

183. Ira M. Ellman, *Should The Theory of Alimony Include Nonfinancial Losses and Motivations?*, 1991 B.Y.U. L. REV. 259.

184. *Id.* at 262.

185. Elrod & Walker, *supra* note 29, at 534. The District of Columbia is included in these figures. *Id.*

186. *Id.* at 661.

187. Ellman, *supra* note 183, at 273.

188. *But see id.* at 273-74 (explaining why "[r]eliance is a better measure than expectation").

ior.¹⁸⁹ Reliance damages put the non-breaching party in the position she would have been in had there never been a contract, but *without* recompensing for lost opportunity.¹⁹⁰ Expectation damages, on the other hand, put her in the position she would have been in had the contract been carried to fruition.¹⁹¹ Restitution restores to the non-breaching party any benefit she has conferred on the breaching party.¹⁹² The Theory looks not only at the spouse's position before making her sacrifice, but also at where her career opportunities would have taken her had she not made the sacrifice.¹⁹³ This seems to be why Professor Carbone concluded that the theory is in fact restitution.¹⁹⁴ It appears that Professor Ellman attempts to provide, as a measure of the benefit conferred on the husband, the lost career opportunities of the wife. Professor Ellman states that this must be done because otherwise the wife "does not lay out [any] funds as part of her reliance."¹⁹⁵ Professor Carbone's contention is that the wife in fact *has* "laid out funds." Those things which the spouse contributes in the form of housekeeping and child rearing are in fact valuable and present investments, but are ignored by the Theory.¹⁹⁶ Professor Carbone appears to initially propose that expectation would be the correct measure of damages to determine alimony under the Theory.¹⁹⁷ However, because expectation would require a showing of breach (or fault), she adopted the path of least resistance in current academic circles by agreeing that determination of marital fault is not desirable.¹⁹⁸ Accordingly, she states that "the purposes such a determination would serve are questionable in themselves and most likely are not worth the costs that an inquiry into marital conduct would impose on the judicial system."¹⁹⁹

189. *Id.* at 273.

190. *Id.* at 273 & n.34.

191. *See id.*

192. RESTATEMENT (SECOND) OF CONTRACTS § 344(c) (1981).

193. Ellman, *supra* note 183, at 273.

194. *See generally* Carbone, *supra* note 135, at 1471-85; *see also supra* notes 146-47 and accompanying text.

195. Ellman, *supra* note 183, at 273 n.34.

196. Carbone, *supra* note 135, at 1481-83.

197. *Id.* at 1466.

198. *Id.* at 1496.

199. *Id.* at 1496-97.

Professor Ellman does, to a certain extent, answer the critique of what behavior his Theory recompenses. He states that it deals only with that behavior which *can* be quantified.²⁰⁰ The other forms of behavior highlighted by Professors Carbone and Schneider are too abstract, in his view, to be reduced to numbers. He further explains that the Theory encourages women's participation in the job market because it makes the wife's loss the measure of the husband's alimony obligation, recompensing the more talented wife who makes greater career sacrifices.²⁰¹

In sum, it is clear that the Theory is far from perfect. However, it is a worthwhile attempt to fashion a better alimony award than currently obtained in the judicial system. As observed in Part III, need-based spousal support has not produced the desired effects, and it has served to make women suffer disproportionately the economic effects of divorce. In the next Part, we will examine whether the Theory may be combined with existing fault principles to fashion a more equitable remedy.

V. ALIMONY AND FAULT

The ultimate question postulated in this paper is whether there still exists a proper role for fault in modern spousal support rights upon divorce, and if so, what that role might be. Professor Ellman spoke of attempting to eliminate "distorting incentives" which he felt contribute to the current high divorce rate and the disproportionate consequences of divorce upon women.²⁰² It seems strange, however, to speak of incentives and disincentives in the arena of divorce while entirely disregarding the possibility that traditional fault concepts might prove valuable.

The whole notion of fault proves to be a stumbling block for many scholars writing about the current pursuit of equitable ways of dealing with alimony.²⁰³ However, as noted earlier,

200. Ellman, *supra* note 183, at 285. "Under *The Theory* only lost earning capacity arising from 'marital sharing behavior' is compensable." *Id.*

201. *Id.* at 287-88.

202. See *supra* note 118 and accompanying text.

203. Some refuse to consider it. See, e.g., Ellman, *supra* note 34, at 6 (stating that

fault provides an excellent tool to encourage the type of behavior society believes to be appropriate in marriage, and to discourage that behavior which society deems to be inappropriate.²⁰⁴ It seems that most people would at least agree that engaging in adultery, cruelty, or desertion is not the sort of shaming behavior which marriage should have to endure. In order to provide a disincentive for such behavior, there should be concomitant post-divorce financial consequences for engaging in inappropriate behavior.

A. *A Proposed Structure for Spousal Support in Virginia*

Professor Ellman was unwilling to use fault principles in providing a rationale for alimony, and, although she ultimately rejected this approach, Professor Carbone acknowledged that in order to justify expectation damages there would have to exist an enforceable promise to remain married until death—or at least to not engage in behavior which will destroy the marriage.²⁰⁵ This paper is not similarly inhibited regarding fault principles.

It should be reiterated that this paper does not argue for re-injecting fault into the process of obtaining a divorce. Rather, it suggests one way to re-inject more equity into the post-divorce financial consequences of spouses. In tort, the law provides a remedy for intentional actions which cause harm, negligent actions which result in harm, and even for some activities where no proof of negligence is necessary, such as product liability.²⁰⁶ Only in the dissolution of marriage does the law currently seem to ignore even the most egregious of actions by a person toward his or her spouse and provide no compensation for the action.²⁰⁷ The relationship between spouses could be

any justification for alimony provided by a fault system "has been undermined completely by the modern divorce reform movement of the last twenty years, which makes fault irrelevant and rejects gender roles"); Ellman, *supra* note 183, at 262. Some scholars find fault simply not worth pursuing. *See, e.g.,* Carbone, *supra* note 135, at 1496-97; Kay, *supra* note 44, at 299; Lichtenstein, *supra* note 10, at 15.

204. *See supra* Part IV.B.

205. *See supra* text accompanying note 142.

206. *See, e.g.,* Turcotte v. Ford Motor Co., 494 F.2d 173, 180-83 (1st Cir. 1974).

207. *See, e.g.,* Taylor v. Taylor, 378 So. 2d 1352 (Fla. Dist. Ct. App. 1980) (disallowing alimony granted to a wife whose husband had physically abused her during

viewed as that of co-fiduciaries, and as such, the breach of the marital partner's trust is all the more egregious and deserving of compensation. Marriage is the only relationship in which a party may blithely wreak havoc upon another's life only to have the law shield the behavior through no-fault divorce rather than deter the behavior as it did in the past. Where there is fault, there should be consequence.

Most people understand the notion of marital fault. They understand that society should set bare minimum standards of marital conduct to which all spouses will be held. This understanding meets Professor Schneider's insightful contention, discussed in Part IV, that if a law is going to serve a hortatory function, then it must be understood by those whose behavior it is intended to affect.²⁰⁸ Thus, fault serves to enforce accountability, and its use in determining alimony has moral implications which will be understood by those whose behavior it is intended to affect.

In view of the lack of property available to most couples for division upon divorce,²⁰⁹ alimony should become the courts' primary tool in fixing equitable results upon divorce. Consequently, alimony must become more available to the courts so that it may be employed in more cases.

In Virginia, fault continues to be an alternative ground for divorce, in addition to living separate and apart for a period of one year, or six months if there are no minor children and the parties have entered into a separation agreement.²¹⁰ Fault is often an issue in Virginia divorce cases because adultery, sodomy and buggery are absolute bars to entitlement to spousal support, and because fault is a statutory factor to be considered

the marriage because in the appellate court's view the alimony was used as a "substitute for a money judgment in a personal injury case").

208. See *supra* text accompanying notes 157-58.

209. See *supra* Part III.B.2.

210. VA. CODE ANN. § 20-91 (Michie Repl. Vol. 1995). The fault grounds are: (1) adultery, sodomy or buggery committed outside the marriage; (2) where either party is convicted of a felony subsequent to the marriage, is sentenced to confinement for more than one year and is so confined for this felony, and "cohabitation has not been resumed after knowledge of such confinement;" and (3) "where either party has been guilty of cruelty, caused reasonable apprehension of bodily hurt, or willfully deserted or abandoned the other" (a divorce decree may be issued after one year from the date of the act). *Id.*

in the decision whether to grant support and in determining the equitable distribution of marital property.²¹¹ In light of the small value of marital property available for division upon divorce in most cases and the fact that fault may act as a complete bar to spousal support, it might be appropriate for fault to assume a somewhat different role in Virginia.

Current Virginia law states that, in determining whether to award spousal support, the court must "consider the circumstances and factors which contributed to the dissolution of the marriage, specifically including adultery and any other ground for divorce under the provisions of subdivisions (3) or (6) of 20-91 or 20-95."²¹² If the court decides that spousal support is warranted, then it must consider the following statutory factors:

1. The earning capacity, obligations, needs and financial resources of the parties, including but not limited to income from all pension, profit sharing or retirement plans, of whatever nature;
2. The education and training of the parties and the ability and opportunity of the parties to secure such education and training;
3. The standard of living established during the marriage;
4. The duration of the marriage;
5. The age and physical and mental condition of the parties;
6. The contributions, monetary and nonmonetary, of each party to the well-being of the family;
7. The property interests of the parties, both real and personal, tangible and intangible;
8. The provisions made with regard to the marital property under § 20-107.3; and
9. Such other factors, including the tax consequences to each party, as are necessary to consider the equities between the parties.²¹³

211. *Id.* §§ 20-107.1 to -107.3(E).

212. *Id.* § 20-107.1. Adultery is codified at § 20-91(1); conviction of a felony is at § 20-91(3); and cruelty is at § 20-91(6). Section 20-95 lists grounds for divorce from bed and board, which are cruelty, reasonable apprehension of bodily hurt, and willful desertion or abandonment.

213. *Id.* § 20-107.1.

Additionally, no spousal support will be awarded from a spouse who has the ground of adultery, sodomy, or buggery in his or her favor except where denial of such support would constitute manifest injustice.²¹⁴ To find manifest injustice in denying spousal support, the court must base its finding on the comparative economic circumstances of the parties and the respective degrees of fault.²¹⁵ The fault during the marriage which the court must consider in determining manifest injustice includes all behavior that affected the marital relationship.²¹⁶ However, the actual amount of the award must be determined by using only the enumerated statutory factors, and not other factors such as fault.²¹⁷

It seems strange that Virginia could bar considerations of all but economic fault in property distribution,²¹⁸ yet allow adultery to act as a complete bar to spousal support. We have already seen that property division does not make the parties whole—only spousal support has the potential to do this.²¹⁹ Although there should be consequences for marital fault, it should not be a complete bar to spousal support since equitable property division will not be likely to leave the guilty spouse with enough upon which to live. With these factors in mind,

214. *Id.*; see also *Hall v. Hall*, 388 S.E.2d 669, 669 n.1 (Va. Ct. App. 1990). In *Hall v. Hall*, the Virginia Court of Appeals points out that

[i]n 1988 the General Assembly amended Code § 20-107.1 to remove desertion and several other fault grounds for divorce as bars to the award of permanent maintenance and support. Presently, the only fault grounds which may bar permanent maintenance and support are provided for in Code § 20-91(1), which are adultery, sodomy or buggery committed outside the marriage.

Id.

215. *Barnes v. Barnes*, 428 S.E.2d 294, 298 (Va. Ct. App. 1993).

216. *Id.*

217. *Id.*; *Steinberg v. Steinberg*, 398 S.E.2d 507, 510 (Va. Ct. App. 1990).

218. *Gamer v. Gamer*, 429 S.E.2d 618, 622-23 (Va. Ct. App. 1993); *Marion v. Marion*, 401 S.E.2d 432, 436 (Va. Ct. App. 1991). In *Aster v. Gross*, the Virginia court of Appeals said:

Circumstances that lead to the dissolution of the marriage but have no effect upon marital property, its value, or otherwise are not relevant to determining a monetary award, need not be considered. . . . When there is no suggestion that the additional acts of misconduct added to the economic consequences caused by the dissolution of the marriage, the evidence is irrelevant to the determination of a monetary award.

Aster v. Gross, 371 S.E.2d 833, 836-37 (Va. Ct. App. 1988)

219. See *supra* Part III.B.

some modification to Virginia's spousal support statute is in order.

When a spouse is blameless for the marital breach, Virginia courts hold that the breaching party must maintain the "blameless" (or "innocent") spouse according to the standard to which he or she was accustomed during marriage.²²⁰ The court must also review all the statutory factors enumerated above,²²¹ and the amount awarded must be fair and just.²²²

An alimony scheme which takes fault into account could be fashioned from Virginia's existing statutes with minimal refinements. Equitable awards could be fashioned by increasing the wide latitude of judicial discretion already present in the existing framework. Rather than being a complete bar to support, fault should instead become one of the enumerated factors for judicial consideration, thus acting to increase or reduce the award to the lower-earning spouse. That part of section 20-107.1 which bars support would be deleted from the statute, and the court would consider, when determining whether to award alimony and the amount of such an award, the existing enumerated factors plus the additional factor described below ("the Proposal"). This would have the effect of providing lower-earning spouses with more than solely property division when fault exists.

The Proposal would require an expectation result if the higher wage-earner has engaged in marital conduct involving fault.

220. *Gamble v. Gamble*, 421 S.E.2d 635, 644 (Va. Ct. App. 1992). In *Via v. Via*, the Virginia Court of Appeals said:

In a divorce case, where a claim for alimony is made by a wife who has been held blameless for the marital breach, the law imposes upon the husband the duty, within the limits of his financial ability, to maintain his former wife according to the station in life to which she was accustomed during the marriage.

In fixing the amount of alimony, the court must look to the financial needs of the wife, her age, physical condition and her ability to earn, and balance against these circumstances the financial ability of the husband to pay, considering his income and ability to earn. The amount awarded must, in any event, be fair and just under all the circumstances of the case.

Via v. Via, 419 S.E.2d 431, 433 (Va. Ct. App. 1992) (quoting *Klotz v. Klotz*, 127 S.E.2d 104, 106 (Va. 1962)).

221. See *supra* note 213 and accompanying text.

222. *Gamble*, 421 S.E.2d at 644.

As has been suggested by other authors, such a provision would require the breaching party to share one-half of his or her income with the non-breaching party (provided that the breaching party is the higher wage-earner).²²³ On the other hand, if fault is committed by the lower wage-earner, then the court would decrease an "Ellman" award (described in the next paragraph) by a certain factor which would be determined at the judge's discretion, while taking into account all the statutory factors.

If there is no fault, the statutory measure of spousal support would be along the terms advocated by Professor Ellman, along with the other statutory factors. This would have the effect of attempting to include some of the "non-quantifiable" contributions described by Professor Carbone in considering Virginia's sixth statutory factor, which calls for a consideration of non-monetary contributions to the family's well-being.²²⁴

There would be a catch-all provision which would provide a floor below which spousal support could not fall, unless the payor spouse could not feasibly pay any support.²²⁵

223. See, e.g., Singer, *supra* note 2, at 1117-18; see *supra* text accompanying note 145.

224. Virginia courts have shown they are quite capable of factoring "non-quantifiable" factors into post-divorce financial determinations. See, e.g., Srinivasan v. Srinivasan, 396 S.E.2d 675, 678 (Va. Ct. App. 1990). In holding that the trial court did not err in its equitable property division, the *Srinivasan* court stated:

Because of the unique circumstances of this case, we find no abuse of discretion in shaping this division of the marital property. The husband worked under a hardship throughout the marriage, most of the time holding two jobs, and sacrificing his own lifestyle and career opportunity so that the wife could pursue her career and education. The husband was deprived not only of the physical comforts of life but also of the company of his family. The wife, who was able during much of the marriage to contribute to the financial support of the family, continued to receive education more for self-fulfillment than for the future financial support of the family.

Id.

225. The numbers used in the proposed statute are completely arbitrary and merely chosen for illustrative purposes. An empirical study of wages and standards of living in particular areas would be required to set levels of support. The idea is to mandate a basic need level below which we do not want the support to fall even if there is fault involved. This sort of number-crunching is best determined by the legislature. There would obviously be a need to determine different levels for different localities—a state-wide amount would be useless due to varying demographics.

Finally, the spousal support should not be permanent, except in cases where the divorce occurs after a long-term marriage and it would be inequitable to require the lower-earning spouse to attempt to secure work. The reason for not making support permanent is that we do not wish to provide incentives for continued dependence in cases where the marriage is of short duration with a concomitant lesser investment. The proposed limit of five years would allow enough time for re-education and acquisition of employment. The court could modify this time limit, but would have to certify in its order that there were certain equitable reasons for the modification, e.g., the spouse already had a lucrative career, or has a Ph.D. and needs less time to find a job. Moreover, if the spouse does not pursue education or training opportunities and refuses to find a job, the award could be curtailed.²²⁶ Looking at the equities of a particular situation, the court might decide to lengthen the duration of spousal support under the right circumstances. For example, if the marriage had lasted fifteen years, the children were in sixth or seventh grade, the wife had been away from the work force for about ten years, a court might decree that it would be equitable to maintain the award long enough for the children to graduate from high school.²²⁷

226. *But see* Dixon v. Pugh, 423 S.E.2d 169, 170 (Va. 1992) (“[A] court may not modify an award of spousal support in a divorce decree in the absence of a statute or a clear and explicit reservation of jurisdiction to modify the spousal support provision.”).

227. Virginia courts already have the discretion to “impute” income to a spouse who is seeking spousal support and has not found a job though qualified for employment. *See, e.g., Srinivasan*, 396 S.E.2d at 679.

In refusing to make a spousal support award in favor the wife, the court imputed to her an income of \$33,000 based upon what the court found she could be earning if she would work as a research grant analyst or teach, as she was qualified to do [since she had a Ph.D. and had taught at George Mason University]. The court noted that she is an expert in oriental studies, concentrating in Indian art and religion, with a knowledge of the Sanskrit language. A court may under appropriate circumstances impute income to a party seeking spousal support. This conclusion logically flows from the principle that one who seeks spousal support is obligated to earn as much as he or she reasonably can to reduce the amount of the support need.

Id.

Below is the Proposal's language, which could be inserted at the end of section 20-107.1 of the Virginia Code in order to accomplish the above goals:

10. a) If any grounds of divorce under the provisions of § 20-91(1), (3), (6), or § 20-95 exist in favor of the lower wage-earner, then the higher wage-earner shall make payments in the amount of one-half of his earnings during the duration of the award.

b) If any grounds of divorce under the provisions of § 20-91(1), (3), (6), or § 20-95 exist in favor of the higher wage-earner, then the lower wage-earner shall receive a reduced award, in the court's discretion and in light of the other factors listed in this section, from the amount he or she would have obtained under subsection 10.c).

c) If no grounds of divorce under the provisions of § 20-91(1), (3), (6), or § 20-95 exist in favor of either spouse, then the court shall fashion a spousal support award in favor of the lower-earning spouse in the amount of any marital investment resulting in a post-marriage reduction in that spouse's earning capacity, taking into account all the other factors listed in this section.

d) The spousal support award may not fall below the following levels, unless the higher-earning spouse is unable to meet such payments: 1) where the payor spouse's annual income equals or exceeds \$60,000 the award shall not fall below \$20,000 per annum; 2) where the payor spouse's annual income is less than \$60,000 the award shall be no less than one-third of the payor spouse's income.

e) The duration of the award shall be five years unless the court determines that the interests of justice would be better served by a different period of time. The trial court preserves the right to modify the spousal support provisions at any time during the duration of the support period and up to one year following its termination, notwithstanding the provisions of Rule 1:1 of the Rules of the Supreme Court of Virginia.

This proposed scheme is not perfect by any means, but it provides a framework for discussion about using fault constructively in alimony determinations. It should be capable of refinement so as to meet most criticisms which will no doubt be levelled at it. Following are two situations posited by Professor Ellman where the modified Virginia proposal works better than his theory.

B. *Putting the Proposal into Practice*

Situation 1:

The wife . . . supports her husband through medical school, abandoning her own professional training while working in a job she does not particularly like. Perhaps she bears a child as well, the birth well timed to coincide with her husband's completion of his training. But at that point he announces his intention to leave her for another woman he has taken a fancy to.²²⁸

Situation 2:

[T]he same marriage ends, at the same time, but now because the wife announces her long-standing passion for a poet she met when her husband was studying late in the library at the beginning of his training. Perhaps the child of the marriage is really the poet's. The poet cannot support her or her child very well, but the wife believes she can solve that problem by the share she expects to receive in her husband's future income as a physician.²²⁹

Professor Ellman recognizes that there is no way to distinguish these two situations unless the system of alimony incorporates findings of fault in fashioning an award.²³⁰ In light of Professor Ellman's own goals of fashioning disincentives to help discourage marriage-destroying behavior, the Virginia Proposal outlined above would provide equitable results in both situations. The Proposal would also have the advantage of conforming to existing societal moral values in marriage as memorialized in the statutory fault grounds. Additionally, the Proposal would provide some consequences for marriage-destroying behavior in all cases.

In Situation 1, the Proposal would award the wife not only her lost earning capacity, but an equal share in her husband's earnings for a period of five years. This is the classic expecta-

228. Ellman, *supra* note 183, at 303-04.

229. *Id.* at 304.

230. *Id.*

tion measure of damages mentioned by Professor Carbone.²³¹ This would allow the wife who was blameless in the breach of the marital contract embodied by her husband's desertion to recoup from her husband some of the expectations she had upon giving up her career in order to enable him to begin his. Five years should be long enough for her to regain to some extent her forsaken career opportunities.

In Situation 2, the court would decrease the wife's award due to her adultery. The amount of the reduction would be left to the court, as would be the computation of her lost earning capacity. Assuming she was a college graduate with an aerospace engineering degree, the court could fashion an award by looking at average salaries for such professionals in the area and decrease the award based on the fault and other factors from that salary. The result would be less than she would have obtained in a divorce not involving fault, but should not fall below a certain level. In this situation the Proposal also provides consequences for marriage-destroying behavior.

Thus it appears that the Proposal is generally workable. It provides disincentives for marital behavior deemed morally flawed by society while providing a floor level to ensure that spouses are not left without means of re-entering the work force. There is no reason for a spouse to have to resort to welfare simply because she went through a divorce and there was insufficient marital property to provide her with the means of retraining herself for work and a career.

There may be certain situations for which the Proposal would not yield results which are quite as clear-cut and morally satisfactory, but the courts are adept at fashioning appropriate remedies when given the discretion to do so.²³² The Proposal embodies great discretion for the court, and that is by design.

231. See Carbone, *supra* note 135, at 1472.

232. See Schneider, *supra* note 154, at 243-54.

V. CONCLUSION

This article has argued for a change in the way financial considerations are handled at divorce. Alimony is currently, and perhaps it always has been, underused as a tool to implement the socially desirable goal of marriage as a sharing enterprise. This article has discussed the need for greater use of alimony upon divorce, analyzed the strengths and weaknesses of Professor Ellman's proposed theory of alimony, and suggested how the injection of fault provides the courts with a more amenable tool to effect the goal of stable marital relationships.

What is needed currently is more responsible relations between adults. No-fault divorce did not begin the process of marital breakdown, but it has certainly failed to provide any incentive whatsoever to avoid it. Perhaps a new look at fault and a new role for it in the current system of available no-fault divorce along the lines of the Proposal delineated in Part V might aid society in at least re-injecting accountability for actions between spouses. This article invites criticism and response, and it is hoped that it sparks some renewed interest in the use of fault in fashioning spousal support awards.

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