

Problems with Division of Marital Property and Alimony in the USA

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Keywords

alimony, anachronism, constitutional, division, fault, marital property, mathematical, no-fault

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Introduction

Since my first legal research project in divorce law in the early 1990s, I have been troubled by several widely accepted features of divorce law in the USA that make no sense to me. This essay considers three related issues:

- (1) How should marital assets be equitably divided?
- (2) Should fault be relevant to determination of alimony?
- (3) Is permanent alimony an anachronism that should be abolished?

While modern¹ divorce law in the USA has tended to avoid considering fault, I think there *may* be good reasons to consider fault in awarding permanent alimony. Instead of current divorce statutes that specify a long list of factors for a judge to consider (which factors lead to *unpredictable* results), I urge that statutes have a mathematical formula for division of marital assets and for determining alimony, so that there is a predictable result.

The scope of this essay specifically excludes judicial orders to pay child support. However, I cite some child support cases in connection with the use of mathematical formulas to determine the amount of support.

I did the legal research for this essay from July 2008 until October 2008. Since then, I have revised the text in a few places, but I not done additional legal research.

disclaimer

This essay presents general information about an interesting topic in law, but is *not* legal advice for your specific problem. See my disclaimer at <http://www.rbs2.com/disclaim.htm> . The reader is cautioned that family law is established by each state in the USA, and a correct statement of law for one state is generally *not* relevant in another state. Further, divorce law continues to evolve, so a correct statement of law at the time this essay was written is *not* necessarily correct at a future time when this essay is read. Readers who are not an attorney are urged to consult a local specialist in family law before relying on any information in this essay. Readers who are not an attorney are explicitly cautioned that this essay is about the history of divorce law and criticizes current (i.e., September 2008) divorce law, but my suggestions in this essay are *not* law.

I list the cases in chronological order in this essay, so the reader can easily follow the historical development of a national phenomenon. If I were writing a legal brief, then I would use the conventional citation order given in the *Bluebook*. Because part of the audience for this essay is nonlawyers in the USA, and also lawyers in other nations, I have included longer quotations from court cases than typical writing for attorneys in the USA.

¹ *Modern* means after divorce statutes in the USA were revised during the years 1969-1985 to include a no-fault ground for divorce.

definitions

I use the word *alimony* to include what some modern state statutes call *maintenance* or *spousal support*.²

In this essay, I use the phrase *permanent alimony* to indicate payments by an ex-spouse after divorce for living expenses of the other ex-spouse. Permanent alimony continues until the first of the following conditions: (1) death of the payor, (2) death of the recipient, or (3) new marriage of the recipient. Sometimes a payor was required to purchase life insurance on himself with the recipient as sole beneficiary, to protect the recipient in event of the death of the payor.

In this essay, I use the word *misconduct* to indicate serious misconduct (e.g., cruel and barbarous treatment, indignities, desertion or abandonment, adultery) that would have been grounds for divorce under the old law in the USA that required fault of one spouse.

In this essay, *modern* means after divorce statutes in the USA were revised during the years 1969-1985 to include a no-fault ground for divorce.

I use the word *divorce* to indicate absolute divorce, which terminates the marriage and leaves the ex-spouses free to marry.

² “Today, for some unknown reason, [alimony] is sometimes referred to as ‘maintenance’.” Homer H. Clark, *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES*, Vol. 2, at page 222 (2d ed. 1987). See also Ira Mark Ellman, “The Theory of Alimony,” 77 *CALIFORNIA LAW REVIEW* 1, 10, n. 20 (Jan 1989) (also choosing to use the word *alimony*); Robert Kirkman Collins, “The Theory of Marital Residuals: Applying and Income Adjustment Calculus to the Enigma of Alimony,” 24 *HARVARD WOMEN’S LAW JOURNAL* 23, 24, n. 1 (2001) (also choosing to use the word *alimony*).

Overview of Law

old law

From the mid-12th Century until 1857, ecclesiastical courts in England granted a “divorce” from bed and board (in Latin: *a mensa et thoro*). I put “divorce” in quotation marks, because a divorce from bed and board was really only a legal separation, and the marriage — along with the husband's legal duty to pay his wife's living expenses — continued after a divorce from bed and board. That is the original reason why courts ordered a husband pay alimony to his wife after a divorce from bed and board.

Old English law had another kind of divorce, known as a divorce from the chains of matrimony (in Latin: *a vinculo matrimonii*) that terminated the marriage, but such a divorce was only available by Act of Parliament and was granted only 317 times during the years 1700 to 1857.³ Divorce *a vinculo matrimonii* is also called *absolute divorce*, because it terminated the marriage and the ex-spouses are again free to marry.

Before the year 1970, divorce in the USA could only be granted if at least one spouse committed some kind of misconduct (e.g., cruel and barbarous treatment, indignities, desertion or abandonment, adultery, etc.). If the husband alone committed misconduct that was grounds for divorce, then the innocent wife could receive permanent alimony. But if the wife alone committed adultery, the wife was legally prohibited from receiving alimony.⁴ Traditionally, alimony appears as a kind of punishment for misconduct (e.g., adultery) that ended the marriage. If the husband committed adultery and the wife was innocent, she was entitled to alimony, which punished the husband for his misconduct. If the wife committed adultery, the law prohibited an award of alimony to an adulterous wife, which punished the wife for her misconduct.

The legal rules for alimony in the USA were the same for both divorce from bed and board (i.e., legal separation) and absolute divorce.⁵

³ Robert Kirkman Collins, “The Theory of Marital Residuals: Applying and Income Adjustment Calculus to the Enigma of Alimony,” 24 *HARVARD WOMEN'S LAW JOURNAL* 23, 28-29 (2001). Collins cites *HALSBURY'S LAWS OF ENGLAND*, Vol. 13, at p. 245 (1975).

⁴ See court cases cited at page 36 below.

⁵ Chester G. Vernier and John B. Hurlbut, “The Historical Background of Alimony Law and its Present Statutory Structure,” 6 *LAW AND CONTEMPORARY PROBLEMS* 197, 210-211 (Spring 1939).

Historically, alimony was only available to women, because the husband had a legal duty to support his wife, but the wife had no corresponding duty to support her husband.⁶ This gender asymmetry in alimony was declared unconstitutional in 1979 by the U.S. Supreme Court, because the gender asymmetry was a violation of the equal protection of law clause in the 14th Amendment to the U.S. Constitution.⁷ Men are now able to receive alimony, but — in practice — it is rare for men in the USA to receive alimony.

The old law was that a husband had a legal duty to provide financial support to his wife, while the wife had a legal duty to provide services to her husband, but courts rarely enforced those duties in an existing marriage.⁸

modern law

Modern law in the USA entitles a spouse to a divorce on grounds of unspecified “irreconcilable difference” or when that spouse has lived “separate and apart” from the other spouse for at least the time specified in statute. The modern law avoids the need to whine about cruel and barbarous treatment, indignities, desertion, adultery, or other serious misconduct or fault. The modern law recognizes the reality that when at least one spouse wants to end the marriage, then the law entitles them to a divorce, regardless of the reason(s) for the divorce.

Judges and lawyers often say that marriage is a *partnership*. This is wrong, because the definition of a partnership specifies that the purpose of a partnership is to make a profit,⁹ while the purpose of a marriage surely involves love,¹⁰ sharing of two lives, and possibly producing children. However, each spouse in a marriage is liable for the debts of the other spouse, in the same way that all partners are liable for the debts of any one partner. Lawyers seem to *assume* that marriage is an *equal* partnership, in which each spouse owns exactly half of the marital property.

⁶ Joel Prentiss Bishop, COMMENTARIES ON THE LAW OF MARRIAGE AND DIVORCE, Vol. 1, § 887, (6th edition, 1881); Chester G. Vernier and John B. Hurlbut, “The Historical Background of Alimony Law and its Present Statutory Structure,” 6 LAW AND CONTEMPORARY PROBLEMS 197, 199-200, 206 (Spring 1939).

⁷ *Orr v. Orr*, 440 U.S. 268 (1979). See history at page 97, below.

⁸ Twila L. Perry, “The ‘Essentials of Marriage’: Reconsidering the Duty of Support and Services,” 15 YALE JOURNAL OF LAW & FEMINISM 1, 3, 10-12, 15, 37, 41, 43 (2003).

⁹ Ira Mark Ellman, “The Theory of Alimony,” 77 CALIFORNIA LAW REVIEW 1, 33-40 (Jan 1989); John C. Sheldon and Nancy Diesel Mills, “In Search of a Theory of Alimony,” 45 MAINE LAW REVIEW 283, 303, n. 60 (1993).

¹⁰ Margaret F. Brinig and June Carbone, “The Reliance Interest in Marriage and Divorce,” 62 TULANE LAW REVIEW 855, 867 (May 1988) (“The basis of modern marriage is love.”).

Such an equality is the law only in so-called community-property states (i.e., Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin), but *not* in most of the USA.

Judges and lawyers often say that marriage is a *contract* between the two spouses. While contract is a good analogy for some aspects of marriage, the longstanding common law is that certain essential aspects of marriage (e.g., the duty of one spouse to support the other spouse, the duty of the wife to live in the husband's house, the obligation not to commit adultery, the duty of parents to support their minor children, etc.) are established in law.¹¹ A premarital or postmarital contract that attempted to change these essential aspects would be held void, as an illegal bargain,¹² or unenforceable, because it is against public policy.¹³ However, the modern trend in some states is to recognize the validity of premarital or postmarital contracts, even when a party waives his/her right to alimony,¹⁴ so marriage as a contract is becoming a reality in some states.

modern alimony

Modern court decisions about alimony seem to recognize two clear areas. First, young (e.g., less than 40 y of age), healthy people who are capable of earning an income are generally *not* entitled to permanent alimony. Second, people who are either elderly (e.g., more than 50 y of age) or incapable of earning an income (e.g., because of chronic disease or disability) are entitled to permanent alimony, to enable them to continue their standard of living during the marriage.

When an ex-spouse is unable to support herself/himself at the standard during the marriage, modern court decisions favor "rehabilitative alimony" for a few years, to allow a person to attend college or a vocational school, to improve their employability.¹⁵ After completion of their education, they can presumably earn an income and adequately support themselves. Rehabilitative

¹¹ Twila L. Perry, "The 'Essentials of Marriage': Reconsidering the Duty of Support and Services," 15 YALE JOURNAL OF LAW & FEMINISM 1, 3-4, 8-12 (2003).

¹² Restatement First of Contracts, § 587 (1932).

¹³ Restatement Second of Contracts, § 190 (1981).

¹⁴ *Baker v. Baker*, 622 So.2d 541, 543 (Fla.App. 1993) (Antenuptial agreement in which wife waived alimony was enforceable, even though wife would become "a pauper and a potential ward of the State of Florida."); *Ledeia-Genaro v. Genaro*, 963 So.2d 749, 753 (Fla.App. 2007) (Spouses can *not* waive duty of support during marriage or during divorce proceedings, but can waive alimony after divorce); *Laub v. Laub*, 505 A.2d 290 (Pa.Super. 1986); *Hamilton v. Hamilton*, 591 A.2d 720 (Pa.Super. 1991) (Antenuptial agreement waiving alimony pendente lite, attorneys fees, and alimony is enforceable).

¹⁵ See cases cited at page 71, below.

alimony began in the early 1970s as one kind of alimony, but more recently a few states declared that rehabilitation is the primary purpose of alimony.¹⁶

Some state statutes (e.g., Florida, Massachusetts, and Pennsylvania) explicitly make misconduct during the marriage one of many relevant factors in determining alimony after a divorce.¹⁷ In September 2008, when this essay was written, statutes in four states (Georgia, South Carolina, North Carolina, and West Virginia) have an absolute prohibition on payments of alimony to a person who committed adultery during the marriage.¹⁸

Additionally, modern state statutes for division of marital property at divorce¹⁹ included factors about *need* of a spouse for assets, so division of marital property took on some of the former purposes of alimony. Modern state statutes are generally in agreement that misconduct during the marriage is *not* relevant to the division of marital assets at divorce.

purpose of alimony

Alimony was reasonable following divorce from bed and board, because such a “divorce” was really only a legal separation, and the husband continued to have a legal duty to support his wife. In a divorce from bed and board, the parties were *not* able to marry someone else, because the marriage continued.

The common divorce in the USA was — and continues to be — an absolute divorce, which ended the marriage, and which permitted the parties to marry someone else. Beginning in the 1980s, a small group of law professors and others have written articles in legal journals asking *why* alimony was granted in absolute divorces, and suggesting new reasons for continuing to award alimony. Despite the fact that judges continue to award alimony, there is no clear purpose or reason for alimony on which legal scholars and judges are agreed. Millions of men have paid — or continue to pay — a substantial fraction of their income in alimony. No doubt, these men would be astounded to know that legal scholars can not agree on the purpose or justification for alimony.

The most common justification for alimony is that alimony continues the duty of spousal support during the marriage. However, this justification does not withstand scrutiny, because absolute divorce terminates the marriage and should terminate *all* obligations between spouses,

¹⁶ See below, beginning at page 71.

¹⁷ See statutes quoted below, beginning at page 23.

¹⁸ See page 61, below.

¹⁹ See page 23, below.

including terminating any duty of *spousal* support. Furthermore, it appears unreasonable for a payor to continue paying living expenses to an ex-spouse who, after divorce, provides *neither* benefits *nor* services to the payor.

Prior to 1970 in the USA, and continuing in some states when this essay was written in 2008, misconduct of a dependent spouse during marriage prohibited an award of alimony.²⁰ Therefore, support is *not* the whole reason for alimony, because a wife — despite her need for alimony — forfeited alimony by her misconduct that caused the divorce. Because alimony was *only* awarded to an innocent wife, part of the justification for alimony must be to punish a spouse for marital misconduct. If the guilty party was the husband and the wife was innocent, then he was punished by a judicial order to pay alimony to the ex-wife. If the guilty party was the wife, then she was punished by a denial of alimony. Regardless of what judges and law professors *wrote* about the justification for alimony, this interpretation of alimony as punishment agrees with the results of cases.

Without permanent alimony, a disabled spouse may be solely dependent on public welfare after divorce. Superficially, this may seem to be a good justification for permanent alimony, and many judges have cited it.²¹ However, the problem of support for people with disability or chronic disease is *not* limited to ex-spouses — it is a larger problem that also affects children, adults who never married, and divorced people who did not ask for alimony²² at divorce.

²⁰ See cases and statutes cited below, beginning at page 36.

²¹ See, e.g., *Miles v. Miles*, 76 Pa. 357, 1874 WL 13217 (Pa. 1874) (“On the subject of alimony the law makes this plain difference between a husband and a wife plaintiff; on the ground probably that the duty of maintenance once assumed by him is not to be released, and thrown upon the public, without a good reason. He may dissolve the tie which binds him to her alone, ... but ... he is not to be relieved from a duty which humanity and the rights of society demand him to fulfil.”). *Miles* was cited in *Mani v. Mani*, 869 A.2d 904, 910 (N.J. 2005) (“... many distinct explanations have been advanced for alimony. avoidance of a drain on the public fisc.”). See also *Aldrich v. Aldrich*, 163 So.2d 276, 278 (Fla. 1964) (Permanent alimony “was obviously included as a necessary concomitant thereto as a social necessity to prevent the wife from becoming a public charge or an object of charity.”); *Nelson v. Walker*, 189 So.2d 54, 60 (La.App. 1966) (Without alimony, “the wife very easily could become a charge of the public fisc for her support and maintenance as a destitute person.”), *aff’d in part*, 197 So.2d 619 (La. 1967); *English v. English*, 565 P.2d 409, 411 (Utah 1977) (“In *Nace v. Nace*, [489 P.2d 48, 50 (Ariz. 1971)] the court stated that the most important function of alimony is to provide support for the wife as nearly as possible at the standard of living she enjoyed during the marriage, and to prevent the wife from becoming a public charge.”); *Gramme v. Gramme*, 587 P.2d 144, 147 (Utah 1978) (The function of alimony “is to provide support for the wife as nearly as possible at the standard of living she enjoyed during marriage and to prevent her from becoming a public charge.”); *Heins v. Ledis*, 664 N.E.2d 10, 13-14 (Mass. 1996) (“Following the onset of married women’s property acts and the recognition of true divorce, alimony was seen as an alternative to leaving many women destitute.”).

²² Perhaps they did not ask for alimony because their disability occurred *after* the final judgment of the divorce court.

In modern law, statutes impose a mutual duty of support on spouses during the marriage.²³ Somehow, for *unexplained* reasons, this mutual duty can be replaced after divorce with by a unilateral duty for the ex-spouse with the greater income to pay permanent alimony to the other ex-spouse.

It remains *unexplained* why a spouse should pay the living expenses of the other spouse *after* absolute divorce, when the recipient of alimony provides *neither* services *nor* benefits to the payor of alimony. Such a continuing obligation is unlike family law in other relationships, for example, parents generally have no legal obligation to pay their child's living expenses after the child is emancipated, and children generally have no legal obligation to support their parents.²⁴

Imagine the hypothetical case of a man who is ordered to pay 1/3 of his income to his ex-wife, W_1 . The man remarries and his new wife, W_2 , enjoy living on the remaining 2/3 of the husband's income. Assuming that the spouses split his remaining income equally, W_2 receives 1/3 of his income. Notice that W_1 and W_2 each receive 1/3 of his income, but W_1 does *nothing* for the man, while W_2 provides homemaking services for him. This might make sense if alimony is punishment for the man's misconduct during his first marriage, or punishment for dumping his first wife for a frivolous reason. But it makes no sense if W_1 either committed misconduct during the marriage or dumped her husband for a frivolous reason.

I argue in this essay that the modern law in the USA, which not only awards alimony after an absolute divorce, but also ignores misconduct of each spouse, makes no sense. In an absolute divorce, the marriage ends and the parties are free to marry, so there should be no continuing duty of *spousal* support after an absolute divorce. However, we *could* justify alimony after an absolute divorce, *if* we require both misconduct by the payor of the alimony and innocence of the recipient of alimony, so that alimony is punishment for misconduct. My opinions on alimony are given in more detail below, beginning at page 120.

²³ See, e.g., California Family Code § 720 ("Husband and wife contract toward each other obligations of mutual respect, fidelity, and support.") (enacted 1992, current Sep 2008); New York Family Court Act § 412 ("A married person is chargeable with the support of his or her spouse") (enacted 1962, amended 1980, current Sep 2008); Ohio Revised Code § 3103.01 ("Husband and wife contract towards each other obligations of mutual respect, fidelity, and support.") (enacted 1953, current Sep 2008); 23 Pennsylvania Consolidated Statute § 4321(1) ("Married persons are liable for the support of each other according to their respective abilities to provide support as provided by law.") (enacted 1985, current Sep 2008).

²⁴ Robert Kirkman Collins, "The Theory of Marital Residuals: Applying and Income Adjustment Calculus to the Enigma of Alimony," 24 HARVARD WOMEN'S LAW JOURNAL 23, 48 (2001).

quotation of authorities

Some states, such as Connecticut, have long ignored misconduct in deciding whether to award alimony and how much alimony to award.

The primary basis for an award of alimony has been not to punish a guilty spouse but to continue the duty to support the other who, in legal contemplation, was abandoned.

[citing three cases]

Tobey v. Tobey, 345 A.2d 21, 25 (Conn. 1974). Quoted with approval in *Fattibene v. Fattibene*, 441 A.2d 3, 7 (Conn. 1981). In states like Connecticut where misconduct during the marriage is not a factor in awarding alimony, it is true that alimony is not a punishment. Instead, in Connecticut, alimony was viewed as damages for breach of the marital contract:

Alimony is based upon the continuing duty of a divorced husband to support a wife whom, in legal contemplation, he has abandoned. [citations to two cases omitted] Ordinarily, the amount of this support should be sufficient to provide her with the kind of living which she might have enjoyed but for the breach of the marriage contract by the defendant.

Shrager v. Shrager, 134 A.2d 69, 71 (Conn. 1957).

In 1974, an intermediate appellate court in Illinois wrote about changing social conditions and greater employment opportunities for women:

We, also, take notice of the recent emancipation of women socially and economically.

We note that this fact has recently led courts to criticize the general rule that a husband is responsible for maintaining his wife at a standard of living to which she became accustomed during marriage. In *Valid v. Valid*, [286 N.E.2d 42, 46-47 (Ill.App. 1972)], the court commented:

When the rules regarding the husband's duty of support were first enunciated, the roles of a husband and wife were more rigid and defined. The husband worked and brought income into the family while the wife maintained and managed the household. The woman generally did not seek outside employment partly, because 'her place was in the home', and partly because few opportunities for meaningful employment were available. Married women nowadays are increasingly developing career skills and successfully entering the employment market. Where a woman is trained, healthy, and employable, and where a woman's efforts have not contributed to her husband's wealth or earning potential, the necessity for an alimony award upon breakup of the marriage is not great.

Borowitz v. Borowitz, 311 N.E.2d 292, 297-298 (Ill.App. 1974).

A leading treatise on family law says the following about the purpose of alimony:

When the English institution of alimony, which served the plain and intelligible purpose of providing support for wives living apart from their husbands, was utilized in America in suits for absolute divorce, however, its purpose became less clear. As a result of absolute divorce, the marriage is entirely dissolved. It is harder to justify imposing on the ex-husband a continuing duty to support his former wife than after divorce a mensa, which does not dissolve the marriage. This difficulty is not obviated by labelling alimony a "substitute" for the wife's right to support. Why should there be a substitute? Would it not be more logical to say that when the marriage is dissolved all rights and duties based upon it end? Doubts about the wisdom of alimony or about how long it should continue after the divorce have also arisen

as a result of the married woman's full legal capacity to own and control her own property and during the last two decades [mid-1960s to mid-1980s] as a result of her increased participation in work outside the home. For example, this has led some courts to award "rehabilitation alimony", to continue for a relatively short period, with the purpose of enabling the married woman to obtain education or training which will qualify her to obtain a job after divorce. [two footnotes omitted]

....

Although nearly all states have statutes authorizing alimony in appropriate cases, there is a lack of agreement on just what purpose alimony serves. In the opinion of some judges alimony continues the support which the wife was entitled to receive while the marriage existed. Others look on alimony as furnishing damages for the husband's wrongful breach of the marriage contract. Still others speak as if it were a penalty imposed on the guilty husband. [three footnotes omitted]

Homer H. Clark, *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES*, Vol. 2, at pages 221-222 (2d ed. 1987), see also *Ibid.* at page 253.

A major law review article on alimony in 1989 said

In short, no one can explain convincingly who should be eligible to receive alimony, even though it remains in almost every jurisdiction.

Ira Mark Ellman, "The Theory of Alimony," 77 *CALIFORNIA LAW REVIEW* 1, 4-5 (Jan 1989).

Yet there is still no general understanding of why we have alimony at all.

Ibid. at 9.

Judge John Sheldon in Maine wrote an amusing, but also serious, article on divorce law:

It's amazing what you can learn about modern divorce law from Nicholas Copernicus and Johannes Kepler. Copernicus was the 16th century churchman who dared to suggest that the sun, not the earth, lies at the center of the solar system. Kepler was the early-17th century mathematician whose three laws of planetary motion provided the foundation for modern cosmology. Neither of these pioneers had a clue what he was doing.

....

I turn next to alimony, a pillar of divorce law that is saturated with anachronism. Our Law Court's most recent description of the purpose of alimony [*Skelton v. Skelton*, 490 A.2d 1204 (Me. 1985)] adopts a view of the law from the virtually pre-historic period when women lacked fundamental liberties and slavery was constitutional. The methodology the court employed to reach this conclusion was identical to that which Johannes Kepler used when, ignoring his own recent discovery of the laws of planetary motion, he persisted in trying to impose a frivolous geometric aesthetic on the universe. Not to be outdone, our legislature got into the act by passing an alimony statute that is as useless a guide to alimony as geometry is to the solar system.

John C. Sheldon, "The Sleepwalker's Tour of Divorce Law," 48 *MAINE LAW REVIEW* 7, 8-9 (1996). For a detailed explanation, see pages 21-26 of Judge Sheldon's article.

An insightful law review article by Professor Perry said

As a result of its awkward history, the theoretical basis for alimony in this country has always been somewhat unclear, leading some to describe alimony as “a practice without a theory.” [citation to five law review articles and Clark’s treatise] In recent years, the institution of alimony has come under attack as legally unsupportable.²⁵ As a result, a number of scholars have been seeking to construct a new theory of alimony based on theories of contract law, tort law, law and economics, and partnership law.[footnote omitted] However, as of now, there is no commonly accepted legal theory that adequately explains why one spouse should continue to have a legal obligation to support the other spouse after their marriage has been legally terminated.

....

When alimony is paid after a divorce, a strange asymmetry results. The paying spouse continues to have a duty of support, but the recipient spouse is relieved of the duty of services. Thus, as a practical matter, while a husband may have an obligation to make financial payments to his former wife, she has no duty to cook his meals, clean his house, or have sexual relations with him.[footnote omitted] It is interesting that this asymmetry between the duty of support and the duty of services in the context of alimony seems to be of no concern, as long as the ex-wife who is receiving alimony is publicly living as a woman alone.

Twila L. Perry, “The ‘Essentials of Marriage’: Reconsidering the Duty of Support and Services,” 15 YALE JOURNAL OF LAW & FEMINISM 1, 23-25 (2003).

Abolition of Heart-Balm Torts

Beginning in the 1930s, there has been a trend amongst states in the USA to abolish four common-law heart-balm torts. There are suggestions that the abolition of these torts is related to the introduction of no-fault divorce, and — in some states — the abolition of fault as a relevant factor in division of marital property and also in determination of alimony.

There are four torts:

1. D has committed the tort of **alienation of affections** when D “purposely alienates one spouse’s affections from the other spouse.”²⁶ “The legally protected marital interests of one spouse include the affections, society, and companionship of the other spouse, sexual relations and the exclusive enjoyment of them, services in the home and support.”²⁷ In other words, the action is for loss of consortium.

²⁵ Prof. Perry cites the dissenting opinion in *Olsen*, 557 P.2d 604 (Idaho 1976), which is quoted below, beginning at page 104.

²⁶ RESTATEMENT SECOND OF TORTS, § 683 (1977).

²⁷ *Ibid.*, comment *c*.

2. **seduction**: causing one spouse to separate from the other spouse,²⁸
3. **criminal conversation**, in which an innocent spouse sues D for having sexual intercourse with the other spouse.²⁹
4. **breach of promise to marry**,³⁰ which contract action has tort remedies.³¹ There is no requirement that the promise be in writing.³² Unscrupulous women threatened litigation for breach of promise to marry, and these women were often rewarded with large payments of money from men who were eager to avoid litigation.

The torts of seduction or criminal conversation often occurred together with the tort of alienation of affections.

All four of these torts are known collectively as “heart-balm torts”, because they provide a payment of money to compensate a person for lost love, end of a marriage caused by a third party, adultery, or failure to honor a promise to marry. The statutes that abolished these torts are properly known as “anti-heart-balm statutes”, however some writers simply call them “heart-balm statutes”.

²⁸ RESTATEMENT SECOND OF TORTS, § 684 (1977).

²⁹ RESTATEMENT SECOND OF TORTS, § 685 (1977).

³⁰ Homer H. Clark, Jr., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES, Vol. 1, pp. 1-21, § 1.1-1.4 (2d ed. 1987).

³¹ *Curtin v. Western Union Tel. Co.*, 42 N.Y.S. 1109, 1110 (N.Y.A.D. 1 Dept. 1897) (dictum: “Though, in form, an action for breach of promise of marriage is upon contract, it essentially sounds in tort.”); *Albinger v. Harris*, 48 P.3d 711, 717 (Mont. 2002) (“When a contract to marry was abrogated, the jilted lover could seek redress in a breach of promise action that sounded in contract law, but availed the plaintiff of tort damages.”). See also Nathan P. Feinsinger, “Legislative Attack on ‘Heart Balm’,” 33 MICHIGAN LAW REVIEW 979, 983, n. 26 (May 1935).

³² RESTATEMENT SECOND OF CONTRACTS, § 124 (1981).

Below I list a sampling of major states that have abolished alienation of affections and the related torts.

California	Calif. Civil Code § 43.5 (enacted 1939)
Florida	Florida Statutes § 771.01 (enacted 1945);
Massachusetts	Mass. General Law Chapter 207, § 47B (enacted 1985);
New York	N.Y. Civil Rights Laws § 80-a (enacted 1935)
Pennsylvania	<i>Fadgen v. Lenkner</i> , 365 A.2d 147 (Pa. 1976) (abolishing tort of criminal conversation); 23 Pa. Consolidated Statutes § 1901 (abolishing alienation of affections) (enacted 1990).

The preamble of the Florida anti-heart-balm statute expresses the justification for the statute:

WHEREAS, The remedies provided for by law for the enforcement of action based upon alleged alienation of affections, criminal conversation, seduction and breach of contract to marry have been subjected to grave abuses, causing extreme annoyance, embarrassment, humiliation and pecuniary damage to many persons wholly innocent and free of any wrongdoing, who were merely the victims of circumstances, and such remedies having been exercised by unscrupulous persons for their unjust enrichment and such remedies having furnished vehicles for the commission or attempted commission of crime and in many cases have resulted in the perpetration of frauds, exploitation and blackmail, it is hereby declared as the public policy of the State of Florida that the best interest of the people of the State will be served by the abolition of such remedies. Consequently, in the public interest the necessity for the enactment of this article is hereby declared as a matter of legislative determination; ...

Fla. St. § 771.01, preamble (enacted 1945);

upheld as constitutional in *Rotwein v. Gersten*, 36 So.2d 419, 420 (Fla. 1948).

The leading torts textbook during the 1980s spoke of problems with heart-balm statutes:

Those actions for interference with domestic relations which carry an accusation of sexual misbehavior — that is to say, criminal conversation, seduction, and to some extent alienation of affections — have been peculiarly susceptible to abuse. Together with the action for breach of promise to marry, it is notorious that they have afforded a fertile field for blackmail and extortion by means of manufactured suits in which the threat of publicity is used to force a settlement. There is good reason to believe that even genuine actions of this type are brought more frequently than not with purely mercenary or vindictive motives; that it is impossible to compensate for such damage with what has derisively been called “heart balm;” that people of any decent instincts do not bring an action which merely adds to the family disgrace; and that no preventative purpose is served, since such torts seldom are committed with deliberate plan.

PROSSER & KEETON ON TORTS § 124 (5th Ed. 1984) Hornbook at p. 929.

quoted with approval in *Fadgen v. Lenkner*, 365 A.2d 147, 151 (Pa. 1976); *Parker v. Bruner*, 683 S.W.2d 265, 268 (Mo. 1985); *Strock v. Pressnell*, 527 N.E.2d 1235, 1240 (Ohio 1988); *Dupuis v. Hand*, 814 S.W.2d 340, 344 (Tenn. 1991).

Several state courts have rejected the heart-balm torts specifically because these torts treat the alienated spouse, seduced spouse, or adulterous spouse as property. The highest court in New York state wrote in 1937:

At common law, the rights which a husband had in the affection and society of his wife were frequently denominated a property right. *Foot v. Card*, 58 Conn. 1, 18 A. 1027, 6 L.R.A. 829, 18 Am.St.Rep. 258. The same statement has often been reiterated in comparatively late judicial opinions. In view of the broad and almost unlimited extension of the rights of married women brought about by statutory enactments and social advancement, we think that no court in this state would decide that the rights which a husband has by virtue of the marriage relation constitute property rights. A wife is no longer the property of her husband in the eyes of the law and by the general acceptance of society. *Hanfgarn v. Mark*, 8 N.E.2d 47, 48 (N.Y. 1937).

The Florida Supreme Court wrote in 1948:

Some of the ancient codes bear evidence of being the genesis of much of our law of domestic relations, and from some of them it may be gleaned, that the right of the husband in the wife was property such as is now protected by the constitution. Appellant so contends, but we do not share this view. In fact there is no such legal concept as a property right of husband in the wife or the wife in the husband. There is a mutual right of consortium and affection and this is the source from which a suit for alienation of affections originates, a social or personal relation that is not protected by the constitution. *Rotwein v. Gersten*, 36 So.2d 419, 421 (Fla. 1948)

The Iowa Supreme Court concluded in a 1981 opinion:

In the last analysis we think the action should be abolished because spousal love is not property which is subject to theft. We do not abolish the action because defendants in such suits, need or deserve our protection. We certainly do not do so because of any changing views on promiscuous sexual conduct. It is merely and simply because the plaintiffs in such suits do not deserve to recover for the loss of or injury to "property" which they do not, and cannot, own. *Fundermann v. Mickelson*, 304 N.W.2d 790, 794 (Iowa 1981).

This paragraph from *Fundermann* was apparently plagiarized by the Tennessee Supreme Court: *Dupuis v. Hand*, 814 S.W.2d 340, 345 (Tenn. 1991).

The Indiana Supreme Court wrote in 2000 about an Indiana case in 1937 that rejected considering a spouse as property:

We agree with the dissent that *Pennington* [*Pennington v. Stewart*, 10 N.E.2d 619 (Ind. 1937) (abolishing the common law tort of alienation of affections)] is unusual because the common law tort of alienation of affections depended on the obsolete concept of a wife as her spouse's property. Nevertheless, that case stands for the proposition that the common law was not frozen in 1851 with the adoption of our constitution, and that the legislature may constitutionally abolish causes of action that existed at common law. It does not invoke the federal Equal Protection Clause to override the state law notion of a spouse as property. Rather, it simply holds that the spouse is not "property," despite the common law view to the contrary. As such, it stands for the proposition that the legislature may abolish a claim for "injury" to "property" at common law.

McIntosh v. Melroe Co., a Div. of Clark Equipment Co., Inc., 729 N.E.2d 972, 977 , n.4 (Ind. 2000).

I suggest that the abolition of these torts also expressed a value that disappointments in love or marriage are *not* compensable in court.³³ Such a value is relevant in determining if permanent alimony should be awarded, as discussed later in this essay. In a case involving breach of promise to marry, the Wisconsin Supreme Court wrote in 1920:

Plaintiff was entitled to compensation for the disappointment in her reasonable expectations of pecuniary advantage from marriage with defendant. *Klitzke v. Davis*, 179 N.W. 586, 588 (Wis. 1920); quoted in *Brown v. Thomas*, 379 N.W.2d 868, 870 (Wis.App. 1985), *review denied*, 383 N.W.2d 64 (Wis. 1986). Wisconsin abolished actions for breach of promise to marry in 1959, so *Klitzke* is no longer good law. However this holding in *Klitzke* continues to be used in the context of awarding permanent alimony to compensate an innocent spouse in her/his reasonable expectations that the marriage would continue.

In the few states that continue to permit tort litigation for alienation of affection and criminal conversation, recent damage awards are sometimes of the order of one million dollars.³⁴ However, one is skeptical whether such large awards deter adulterers.

Since 1970, there have been several law review articles that argue that torts of alienation of affection or seduction should *not* have been abolished.³⁵

³³ See, e.g., *Quinn v. Walsh*, 732 N.E.2d 330, 337 (Mass.App.Ct. 2000) (“By abolishing these common law torts, the Legislature has registered its intent to preclude recovery for emotional distress resulting from adultery. [omitted citations to three cases]”).

³⁴ *Hutelmyer v. Cox*, 514 S.E.2d 554 (N.C.App. 1999) (Actual plus punitive damages of one million dollars); *Oddo v. Presser*, 581 S.E.2d 123, 126 (N.C.App. 2003) (Jury awarded actual plus punitive damages totaling \$1,410,00. Appellate court remanded for new trial on actual damages.), *rev'd*, 592 S.E.2d 195 (N.C. 2004) (no new trial); *Shealy v. Lunsford*, 355 F.Supp.2d 820, 823 (M.D.N.C. 2005) (Legal malpractice case mentions Shealy was ordered to pay default judgment of two million dollars for alienation of affections and criminal conversation in Nov 2001.); *Fitch v. Valentine*, 959 So.2d 1012 (Miss. 2007) (actual plus punitive damages total \$754,500).

³⁵ See e.g., William M. Kelley, Note, “The Case for Retention of Causes of Action for Intentional Interference With the Marital Relationship,” 48 NOTRE DAME LAWYER 426 (Dec 1972) (but retaining neither criminal conversation nor breach of promise to marry); Jill Jones, Comment, “Fanning an Old Flame: Alienation of Affections and Criminal Conversation Revisited,” 26 PEPPERDINE LAW REVIEW 61 (1998); William R. Corbett, “A Somewhat Modest Proposal to Prevent Adultery and Save Families: Two Old Torts Looking For a New Career,” 33 ARIZONA STATE LAW JOURNAL 985 (Winter 2001).

Intent of No-Fault Divorce

Prior to no-fault divorce, spouses in a loveless marriage, but without serious misconduct, could obtain a divorce only by falsely testifying about misconduct in a marriage, thereby committing perjury. The major purpose of no-fault divorce was to make it easy for people trapped in loveless marriages to obtain a divorce without perjury. In addition, the elimination of a recitation of misconduct during the marriage allegedly created less bitterness during the divorce process. Moreover, judges were spared hearing the sordid details of misconduct.

In 1960, the Supreme Court in Washington state upheld a divorce on grounds of cruelty under the old law:

The trial consumed four weeks and one day, and the statement of facts contains slightly in excess of twenty-five hundred pages, one hundred sixty-seven pages of which is argument addressed to the trial court. The charges and countercharges are sordid, indeed. No professional enlightenment would be gained from the details, and public policy decries a permanent memorial to the revolting stories. Certain it is that the marriage is dead, and no useful purpose would be served by a recitation of the details in the concluding act of the judicial autopsy.

Stringfellow v. Stringfellow, 350 P.2d 1003, 1004 (Wash. 1960).

In 1970, the authors of the Uniform Marriage and Divorce Act tersely wrote:

The traditional conception of divorce based on fault has been singled out particularly, both as an ineffective barrier to marriage dissolution which is regularly overcome by perjury, thus promoting disrespect for the law and its processes, and as an unfortunate device which adds to the bitterness and hostility of divorce proceedings.

Prefatory Note, "Uniform Marriage and Divorce Act," 9A UNIFORM LAWS ANNOTATED 159, 160 (1998).

In 1970, the chief judge of the highest court in New York State wrote:

The concept of divorce on the ground — specified in subdivision (5) — that husband and wife have lived apart for two years or more pursuant to a decree of separation is self-evident. Equally clear is the public policy which underlies that concept. If a reconciliation has not been effected within two years following a judicial separation, the Legislature has concluded, and reasonably so, that the parties are irreconcilable and the marriage dead. Since, as is apparent, the legislative design was to render this a basis for divorce, it follows that it makes no difference whether it is the 'innocent' or 'guilty' party who seeks to convert the judicial separation into a final divorce. Moreover, the deliberate failure of the legislators to provide defenses to the new grounds further evinces and confirms their intention of abandoning the traditional fault approach to divorce and permitting the termination of marriages even where both parties are at fault — except in cases of adultery (Domestic Relations Law, § 171). In a word, if there is no longer a viable marriage, the question of fault, of 'guilt' or 'innocence', is irrelevant. [footnote omitted]

Gleason v. Gleason, 256 N.E.2d 513, 516 (N.Y. 1970).

In 1972, an intermediate appellate court in California wrote about the purpose of no-fault divorce:

... the court should bear in mind that one of the principal purposes for the change from dissolution on a fault basis to a marital breakdown basis was the desire to eliminate acrimony and deviousness [sic] and to provide “a conciliatory and uncharged atmosphere which will facilitate resolution of the other issues and perhaps effect a reconciliation.” (Report of 1969 Divorce Reform Legislation of the Assembly Committee on Judiciary (4 Assem.J. (1969) 8054 at p. 8058); see *In Re Marriage of McKim*, Supra, 6 Cal.3d at p. 679, 100 Cal.Rptr. 140, 493 P.2d 868.)

In re Marriage of Walton, 104 Cal.Rptr. 472, 478, n.2 (Cal.App. 1972)

In 1975, an intermediate appellate court in Texas explained the reasons behind no-fault divorce:

As a result of extensive reform movements in the 1960's, the Uniform Marriage and Divorce Act was drafted and various versions of this uniform act dealing with marriage breakdown as a ground for divorce have been adopted by thirty-two states.[FN2] In 1971, Texas, while not adopting the Uniform Code entirely, enacted a portion thereof dealing with ‘no fault’ divorce. Since the language used in the various statutes is new to divorce law there has not yet been time for much judicial interpretation of this language. It is, however, clear that the statutes have as their goal the abolition of fault as a requirement for granting of divorces. It is also 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. For example, in California, evidence of misconduct or fault will not be permitted in the proceedings except when relevant to child custody determination. Cal.Civ.Code § 4509 (West Supp. 1969). Thus, it has been said that in seeking to create a legal system which meets the realities of marital failure, legislators believed that removing considerations of fault and eliminating the incentive to present fault evidence would materially reduce the bitterness and acrimony which had attended divorce proceedings.[FN3]

FN2. A comprehensive survey of this new concept in the law of divorce is found in FAMILY LAW QUARTERLY, American Bar Ass'n, Vol. 8, No. 4, Winter Edition 1974, pp. 401-423.

FN3. For a comprehensive review of this question, and many other questions involving the new Family Code, see Comment, The End of Innocence: Elimination of Fault in California Divorce Law, 17 U.C.L.A.L.REV. 1306 (1970).

Baxla v. Baxla, 522 S.W.2d 736, 738 (Tex.Civ.App. 1975), *disapproved on other grounds in Eggemeyer v. Eggemeyer*, 554 S.W.2d 137, 142 (Tex. 1977). This paragraph from *Baxla* was quoted with approval in *Bell v. Bell*, 540 S.W.2d 432, 435 (Tex.Civ.App. 1976); *Phillips v. Phillips*, 75 S.W.3d 564, 571-572 (Tex.App.-Beaumont 2002).

In 1977, a judge in an intermediate appellate court in Florida wrote:

The so called “no fault” divorce law was enacted, in part, to get rid of emotional and financial blackmail made possible by the continued threat of mental torture by way of embarrassing harassment through public washing of dirty linen.

Unfortunately, the appellate courts have chipped away at it and much of the fault concept has returned. Yet, in our opinion the appellate courts are not to blame for this retrogression because the Florida Statute § 61.08(2) (1973) as enacted, provides in part:

In determining a proper award of alimony, the court may consider any factor necessary to do equity and justice between the parties.

.... In that regard we would repeat what we said recently in *McAllister v. McAllister*, 345 So.2d 352 (Fla. 4DCA 1977), at 354-355,

At all events, we would urge that evidence of misconduct be limited to gross situations such as existed in *Oliver*, with no mitigating circumstances, otherwise, as was conceded in that case, we will return to the very type of “. . . often sordid and provocative testimony of fault . . . that lead to the enactment of the so-called no-fault dissolution of marriage chapter.” [*McAllister* cites *Oliver*, 285 So.2d 638, 640 (Fla. 4DCA 1973).]

Linda v. Linda, 352 So.2d 1208, 1209 (Fla.App. 1977).

In 1993, an intermediate appellate court in Pennsylvania quoted the legislature’s intent in creating no-fault divorce:

... however, “the vindication of private rights or the punishment of matrimonial wrongs” is expressly proscribed in the Divorce Code’s legislative findings and intent. See 23 Pa.C.S. § 3102(a)(3).

Perlberger v. Perlberger, 626 A.2d 1186, 1195 (Pa.Super. 1993), *appeal denied*, 637 A.2d 289 (Pa. 1993). Quoted with approval in *Rich v. Acrivos*, 815 A.2d 1106, 1109, ¶11 (Pa.Super. 2003).

In 1993, the Mississippi Supreme Court stated the intent of granting divorces on ground of "irreconcilable differences":

The statute's intent is to provide a less painful alternative to the traditional grounds for divorce which required the parties to publicly put on proof of sensitive private matters.

Grier v. Grier, 616 So.2d 337, 339 (Miss. 1993).

See also *Patterson v. Patterson*, 917 So.2d 111, 114, ¶8 (Miss.App. 2005) (“The intent of our no-fault divorce statute is to allow parties to agree to avoid the necessity of publicly putting on proofs of private matters.”).

If avoiding “the bitterness and hostility of divorce proceedings”³⁶ was truly the motivation for allowing divorce without proof of fault or misconduct, this motivation was inconsistently applied by state legislatures, many of whom continued to make misconduct during the marriage a relevant factor in determining whether to award alimony. There is no doubt that proving marital misconduct — regardless of whether as a ground for divorce or a factor for alimony — exposes “sordid and ugly details”³⁷ of the marriage.

³⁶ Uniform Marriage and Divorce Act, *supra*.

³⁷ *Baxla*, *supra*.

In 1975, the New Hampshire Supreme Court wrote:

... the intent of the [no-fault divorce] statute to minimize the acrimony attending divorce proceedings.

Desrochers v. Desrochers, 347 A.2d 150, 153 (N.H. 1975).

Quoted in *Murphy v. Murphy*, 366 A.2d 479, 481 (N.H. 1976); *In re Nassar*, 943 A.2d 740, 744 (N.H. 2008). Because of this intent, spouses who seek a divorce in New Hampshire on grounds of “irreconcilable differences” are not allowed to introduce evidence of misconduct, although the alimony statute mentions misconduct as a factor. In New Hampshire, only misconduct that causes the breakdown of a marriage is relevant to alimony, and when spouses file for divorce on grounds of “irreconcilable differences” they allege that misconduct did *not* cause the breakdown of the marriage.

In 1995, a law professor wrote, in the context of torts for emotional harm

To ask a court and jury to pinpoint with any degree of accuracy, the cause of a marital breakup is to invite judicial involvement in intimate and complex human relationships to a disturbing degree.

The law’s tendency, of late, has been in the opposite direction, and for good reason. The *Griswold* privacy decision [381 U.S. 479 (1965) (recognizing right of married adults to purchase and use contraceptives)], the enactment of no-fault divorce laws, and the elimination of “heart balm” actions for breach of promise to marry, seduction, alienation of affections, and criminal conversation have all been designed to get the courts out of our bedrooms, and to reserve judicial scrutiny for matters that the courts are more capable of determining and which are more appropriate to a public forum.

Robert M. Ackerman, “Tort Law and Communitarianism: Where Rights Meet Responsibilities,” 30 WAKE FOREST LAW REVIEW 649, 669-670 (Winter 1995).

State Statutes in July 2008

In most states — including Colorado, Illinois, and Minnesota, which are quoted below — misconduct during the marriage is *not* relevant to either division of marital assets or alimony. However, a few states (e.g., Florida and Pennsylvania) explicitly make misconduct during the marriage a relevant factor in determining alimony. In Massachusetts, misconduct is relevant to both the division of marital property and alimony. When considered superficially, having fault be relevant to alimony but irrelevant to division of marital property seems inconsistent. However, on closer examination, considering fault in determining alimony gives courts a way to compensate an innocent spouse, as discussed below, beginning at page 120.

UNIFORM LAW in 1973

In 1970, a committee of ten attorneys and judges, and five professors of law, finished writing a Uniform Marriage and Divorce Act. While this Act is *not* law, this Act influenced state legislatures, some of which copied much of the Act into state statutes. To show the historical origin of modern divorce law, I quote below the relevant sections of the Act, as amended in 1973.

equitable distribution

§ 307(a), Alternative A

In a proceeding for dissolution of a marriage, legal separation, or disposition of property following a decree of dissolution of marriage or legal separation by a court which lacked personal jurisdiction over the absent spouse or lacked jurisdiction to dispose of the property, the court, **without regard to marital misconduct**,³⁸ shall, and in a proceeding for legal separation may, finally equitably apportion between the parties the property and assets belonging to either or both however and whenever acquired, and whether the title thereto is in the name of the husband or wife or both. In making apportionment the court shall consider

- the duration of the marriage, and prior marriage of either party,
- antenuptial agreement of the parties,
- the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities, and needs of each of the parties,
- custodial provisions, whether the apportionment is in lieu of or in addition to maintenance, and
- the opportunity of each for future acquisition of capital assets and income.

The court shall also consider the contribution or dissipation of each party in the acquisition, preservation, depreciation, or appreciation in value of the respective estates, and the contribution of a spouse as a homemaker or to the family unit.

“Uniform Marriage and Divorce Act,” 9A UNIFORM LAWS ANNOTATED 159, 288 (1998)

[formatting added by Standler].

alimony

§ 308 (a) In a proceeding for dissolution of marriage, legal separation, or maintenance following a decree of dissolution of the marriage by a court which lacked personal jurisdiction over the absent spouse, the court may grant a maintenance order for either spouse only if it finds that the spouse seeking maintenance:

- (1) lacks sufficient property to provide for his reasonable needs; and
- (2) is unable to support himself through appropriate employment or is the custodian of a child whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside the home.

(b) The maintenance order shall be in amounts and for periods of time the court deems just, without regard to marital misconduct, and after considering all relevant factors including:

- (1) the financial resources of the party seeking maintenance, including marital property apportioned to him, his ability to meet his needs independently, and the extent to which a provision for support of a child living with the party includes a sum for that party as custodian;
- (2) the time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment;
- (3) the standard of living established during the marriage;
- (4) the duration of the marriage;
- (5) the age and the physical and emotional condition of the spouse seeking maintenance; and

³⁸ Emphasis added by Standler.

(6) the ability of the spouse from whom maintenance is sought to meet his needs while meeting those of the spouse seeking maintenance.

“Uniform Marriage and Divorce Act,” 9A UNIFORM LAWS ANNOTATED 159, 446 (1998).

comment

According to the authors of the Uniform Marriage and Divorce Act, the distribution of marital property is intended

as the primary means of providing for the future financial needs of the spouses. Where the marital property is insufficient for this purpose, the Act provides that an award of maintenance can be made to either spouse under appropriate circumstances to supplement the available property. But, because of its property division provisions, the Act does not continue the traditional reliance upon maintenance as the primary means of support for divorced spouses. Prefatory Note, “Uniform Marriage and Divorce Act,” 9A UNIFORM LAWS ANNOTATED 159, 161 (1998).

A leading treatise on family law recognized the inadequacy of relying on division of marital property for future support of an ex-spouse:

It is notable that the Uniform Marriage and Divorce Act is framed with the purpose of providing for the spouses by means of a division of property rather than by an award of alimony. Of course it is clear that only a small proportion of divorces involve enough property to be of any benefit to spouses.

Homer H. Clark, *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES*, Vol. 2, at page 223 (2d ed. 1987). Clark cited Lenore Weitzman, *THE DIVORCE REVOLUTION*, at pages 61-69 (1985).

Later in his treatise, Clark said:

The substitution of property awards for alimony is of course not helpful to the large majority of wives whose husbands have little or no property at the time of divorce.

Homer H. Clark, *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES*, Vol. 2, at pages 256-257 (2d ed. 1987). Clark cites Weitzman, “The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards,” 28 *UNIV. OF CALIFORNIA LOS ANGELES LAW REVIEW* 1181, 1188-1196 (1981).

COLORADO
marital property division

In July 2008, the Colorado statute for disposition of marital property says:

- (1) In a proceeding for dissolution of marriage or in a proceeding for legal separation or in a proceeding for disposition of property following the previous dissolution of marriage by a court which at the time of the prior dissolution of the marriage lacked personal jurisdiction over the absent spouse or lacked jurisdiction to dispose of the property, the court, subject to the provisions of subsection (7) of this section, shall set apart to each spouse his or her property and shall divide the marital property, **without regard to marital misconduct**,³⁹ in such proportions as the court deems just after considering all relevant factors including:
- (a) The contribution of each spouse to the acquisition of the marital property, including the contribution of a spouse as homemaker;
 - (b) The value of the property set apart to each spouse;
 - (c) The economic circumstances of each spouse at the time the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for reasonable periods to the spouse with whom any children reside the majority of the time; and
 - (d) Any increases or decreases in the value of the separate property of the spouse during the marriage or the depletion of the separate property for marital purposes.

Colorado Revised Statute § 14-10-113.

alimony

In July 2008, the Colorado statute for permanent alimony (called "maintenance" in Colorado law) says:

- (4) A temporary maintenance order in those circumstances in which the parties' combined annual gross income is more than seventy-five thousand dollars or a maintenance order entered at the time of permanent orders shall be in such amounts and for such periods of time as the court deems just, **without regard to marital misconduct**,⁴⁰ and after considering all relevant factors including:
- (a) The financial resources of the party seeking maintenance, including marital property apportioned to such party, and the party's ability to meet his or her needs independently, including the extent to which a provision for support of a child living with the party includes a sum for that party;
 - (b) The time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment and that party's future earning capacity;
 - (c) The standard of living established during the marriage;
 - (d) The duration of the marriage;
 - (e) The age and the physical and emotional condition of the spouse seeking maintenance; and

³⁹ Boldface added by Standler.

⁴⁰ Boldface added by Standler.

- (f) The ability of the spouse from whom maintenance is sought to meet his or her needs while meeting those of the spouse seeking maintenance.

Colorado Revised Statute § 14-10-114(4).

FLORIDA
equitable distribution

Florida equitable distribution statute in July 2008 says:

- (1) In a proceeding for dissolution of marriage, in addition to all other remedies available to a court to do equity between the parties, or in a proceeding for disposition of assets following a dissolution of marriage by a court which lacked jurisdiction over the absent spouse or lacked jurisdiction to dispose of the assets, the court shall set apart to each spouse that spouse's nonmarital assets and liabilities, and in distributing the marital assets and liabilities between the parties, the court must begin with the premise that the distribution should be equal, unless there is a justification for an unequal distribution based on all relevant factors, including:
- (a) The contribution to the marriage by each spouse, including contributions to the care and education of the children and services as homemaker.
 - (b) The economic circumstances of the parties.
 - (c) The duration of the marriage.
 - (d) Any interruption of personal careers or educational opportunities of either party.
 - (e) The contribution of one spouse to the personal career or educational opportunity of the other spouse.
 - (f) The desirability of retaining any asset, including an interest in a business, corporation, or professional practice, intact and free from any claim or interference by the other party.
 - (g) The contribution of each spouse to the acquisition, enhancement, and production of income or the improvement of, or the incurring of liabilities to, both the marital assets and the nonmarital assets of the parties.
 - (h) The desirability of retaining the marital home as a residence for any dependent child of the marriage, or any other party, when it would be equitable to do so, it is in the best interest of the child or that party, and it is financially feasible for the parties to maintain the residence until the child is emancipated or until exclusive possession is otherwise terminated by a court of competent jurisdiction. In making this determination, the court shall first determine if it would be in the best interest of the dependent child to remain in the marital home; and, if not, whether other equities would be served by giving any other party exclusive use and possession of the marital home.
 - (i) The intentional dissipation, waste, depletion, or destruction of marital assets after the filing of the petition or within 2 years prior to the filing of the petition.
 - (j) Any other factors necessary to do equity and justice between the parties.

Florida Statute § 61.075(1) (enacted July 2002, current July 2008).

This equitable distribution statute mentions neither "fault", "misconduct", nor "adultery".

Note that "the court must begin with the premise that the distribution should be equal" may make the division of marital property *not* equitable, because the presumption of equal distribution pushes the judge toward finding an approximately equal division of marital property.

alimony

In July 2008, the Florida alimony statute says:

- (1) In a proceeding for dissolution of marriage, the court may grant alimony to either party, which alimony may be rehabilitative or permanent in nature. In any award of alimony, the court may order periodic payments or payments in lump sum or both. **The court may consider the adultery of either spouse and the circumstances thereof in determining the amount of alimony, if any, to be awarded.**⁴¹ In all dissolution actions, the court shall include findings of fact relative to the factors enumerated in subsection (2) supporting an award or denial of alimony.
- (2) In determining a proper award of alimony or maintenance, the court shall consider all relevant economic factors, including but not limited to:
 - (a) The standard of living established during the marriage.
 - (b) The duration of the marriage.
 - (c) The age and the physical and emotional condition of each party.
 - (d) The financial resources of each party, the nonmarital and the marital assets and liabilities distributed to each.
 - (e) When applicable, the time necessary for either party to acquire sufficient education or training to enable such party to find appropriate employment.
 - (f) The contribution of each party to the marriage, including, but not limited to, services rendered in homemaking, child care, education, and career building of the other party.
 - (g) All sources of income available to either party.

The court may consider any other factor necessary to do equity and justice between the parties.

- (3) To the extent necessary to protect an award of alimony, the court may order any party who is ordered to pay alimony to purchase or maintain a life insurance policy or a bond, or to otherwise secure such alimony award with any other assets which may be suitable for that purpose.

Florida Statute § 61.08 (current July 2008).

A dissenting judge in a Florida case wrote:

Section 61.08(1), Florida Statutes, specifically allows the court to consider adultery in determining alimony (support) but there is no comparable statute authorizing adultery or other fault to affect the equitable division of marital assets on dissolution. Apparently, if the wife becomes unfaithful and dissolution results she is entitled to an equitable distribution of marital assets without her share being reduced because of her fault, but the husband's marital fault justifies shortchanging him in making an equitable distribution of marital assets.

Such a holding conflicts with *Noah v. Noah*, 467 So.2d 426 (Fla. 1985), where the fourth district held that a property distribution which awarded the wife nearly all of the joint assets in part because of the husband's unfaithfulness was inequitable and constituted improper punishment. Similarly, if the husband uses marital funds to make a good investment upon dissolution the wife is entitled to equitably share the increased marital assets resulting from the husband's good investment of marital funds but if he makes a bad investment of marital funds upon dissolution the trial judge should consider that fact and dock his share for the resulting

⁴¹ Boldface added by Standler.

loss of marital assets. This makes the marriage a very good economic partnership for the wife but not for the husband.

Tuller v. Tuller 469 So.2d 212, 213-214 (Fla.App. 5 Dist. 1985) (Coward, J., dissenting).

ILLINOIS
marital property division

In July 2008, the Illinois statute for disposition of marital property says:

(d) In a proceeding for dissolution of marriage or declaration of invalidity of marriage, or in a proceeding for disposition of property following dissolution of marriage by a court which lacked personal jurisdiction over the absent spouse or lacked jurisdiction to dispose of the property, the court shall assign each spouse's non-marital property to that spouse. It also shall divide the marital property **without regard to marital misconduct**⁴² in just proportions considering all relevant factors, including:

- (1) the contribution of each party to the acquisition, preservation, or increase or decrease in value of the marital or non-marital property, including the contribution of a spouse as a homemaker or to the family unit;
- (2) the dissipation by each party of the marital or non-marital property;
- (3) the value of the property assigned to each spouse;
- (4) the duration of the marriage;
- (5) the relevant economic circumstances of each spouse when the division of property is to become effective, including the desirability of awarding the family home, or the right to live therein for reasonable periods, to the spouse having custody of the children;
- (6) any obligations and rights arising from a prior marriage of either party;
- (7) any antenuptial agreement of the parties;
- (8) the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities, and needs of each of the parties;
- (9) the custodial provisions for any children;
- (10) whether the apportionment is in lieu of or in addition to maintenance;
- (11) the reasonable opportunity of each spouse for future acquisition of capital assets and income; and
- (12) the tax consequences of the property division upon the respective economic circumstances of the parties.

750 Illinois Compiled Statutes 5/503(d) (current July 2008).

alimony

In July 2008, the Illinois Statute for permanent alimony (called “maintenance” in Illinois law) says:

(a) In a proceeding for dissolution of marriage or legal separation or declaration of invalidity of marriage, or a proceeding for maintenance following dissolution of the marriage by a court which lacked personal jurisdiction over the absent spouse, the court may grant a temporary or permanent maintenance award for either spouse in amounts and for periods of time as the

⁴² Boldface added by Standler.

court deems just, **without regard to marital misconduct**,⁴³ in gross or for fixed or indefinite periods of time, and the maintenance may be paid from the income or property of the other spouse after consideration of all relevant factors, including:

- (1) the income and property of each party, including marital property apportioned and non-marital property assigned to the party seeking maintenance;
- (2) the needs of each party;
- (3) the present and future earning capacity of each party;
- (4) any impairment of the present and future earning capacity of the party seeking maintenance due to that party devoting time to domestic duties or having forgone or delayed education, training, employment, or career opportunities due to the marriage;
- (5) the time necessary to enable the party seeking maintenance to acquire appropriate education, training, and employment, and whether that party is able to support himself or herself through appropriate employment or is the custodian of a child making it appropriate that the custodian not seek employment;
- (6) the standard of living established during the marriage;
- (7) the duration of the marriage;
- (8) the age and the physical and emotional condition of both parties;
- (9) the tax consequences of the property division upon the respective economic circumstances of the parties;
- (10) contributions and services by the party seeking maintenance to the education, training, career or career potential, or license of the other spouse;
- (11) any valid agreement of the parties; and
- (12) any other factor that the court expressly finds to be just and equitable.

750 Illinois Compiled Statutes 5/504(a) (current July 2008).

MASSACHUSETTS
marital property division

.... In addition to or in lieu of a judgment to pay alimony, the court may assign to either husband or wife all or any part of the estate of the other, including but not limited to, all vested and nonvested benefits, rights and funds accrued during the marriage and which shall include, but not be limited to, retirement benefits, military retirement benefits if qualified under and to the extent provided by federal law, pension, profit-sharing, annuity, deferred compensation and insurance.

Massachusetts General Laws Chapter 208, § 34 (as amended 1990, still current 2008).

⁴³ Boldface added by Standler.

In Massachusetts, the factors for a judge to consider during the division of marital property are the same⁴⁴ as the factors in the statute for alimony, which is quoted below.

alimony

.... In determining the amount of alimony, if any, to be paid, or in fixing the nature and value of the property, if any, to be so assigned, the court, after hearing the witnesses, if any, of each party, shall consider the

- length of the marriage,
- **the conduct of the parties during the marriage**,⁴⁵
- the age, health, station, occupation, amount and sources of income,
- vocational skills, employability,
- estate, liabilities and needs of each of the parties and
- the opportunity of each for future acquisition of capital assets and income.

In fixing the nature and value of the property to be so assigned, the court shall also consider the present and future needs of the dependent children of the marriage. The court may also consider the contribution of each of the parties in the acquisition, preservation or appreciation in value of their respective estates and the contribution of each of the parties as a homemaker to the family unit.

Massachusetts General Laws Chapter 208, § 34 (as amended 1990, still current 2008) (formatting added by Standler).

⁴⁴ *Hartford v. Hartford*, 803 N.E.2d 334, 336-337 (Mass.App.Ct. 2004) (The trial judge decided the equitable distribution of marital property pursuant to G.L. ch. 208, § 34 after he made “findings (numbering 132 in all) are set out under headings roughly correlating to the mandatory factors to be considered in making a property distribution or alimony award under § 34, except that there was no separate category for ‘conduct.’ ”); *Bagley v. Bagley*, 63 Mass.App.Ct. 1105, listed without opinion at 823 N.E.2d 435, 2005 WL 549477 at *2 (Mass.App.Ct. 2005) (“Our review of the record appendix leads us to conclude that the judge was well aware that she had a nondelegable duty to make a fair and equitable distribution of the marital property. The judge found that the arbitrator had made detailed findings, had considered all the requisite factors set out in G.L. c. 208, § 34, and that his decision was consistent with and flowed rationally from those findings.”).

⁴⁵ Emphasis added by Standler.

MINNESOTA
marital property division

In July 2008, the Minnesota statute for division of marital assets said:

Upon a dissolution of a marriage, an annulment, or in a proceeding for disposition of property following a dissolution of marriage by a court which lacked personal jurisdiction over the absent spouse or lacked jurisdiction to dispose of the property and which has since acquired jurisdiction, the court shall make a just and equitable division of the marital property of the parties **without regard to marital misconduct**,⁴⁶ after making findings regarding the division of the property. The court shall base its findings on all relevant factors including⁴⁷

- the length of the marriage,
- any prior marriage of a party,
- the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities, needs, opportunity for future acquisition of capital assets, and income of each party.
- The court shall also consider the contribution of each in the acquisition, preservation, depreciation or appreciation in the amount or value of the marital property, as well as the contribution of a spouse as a homemaker.

It shall be conclusively presumed that each spouse made a substantial contribution to the acquisition of income and property while they were living together as husband and wife. The court may also award to either spouse the household goods and furniture of the parties, whether or not acquired during the marriage. The court shall value marital assets for purposes of division between the parties as of the day of the initially scheduled prehearing settlement conference, unless a different date is agreed upon by the parties, or unless the court makes specific findings that another date of valuation is fair and equitable. If there is a substantial change in value of an asset between the date of valuation and the final distribution, the court may adjust the valuation of that asset as necessary to effect an equitable distribution.

Minnesota Statute § 518.58, subdivision 1, (current July 2008).

alimony

In July 2008, the Minnesota Statute for permanent alimony (called "maintenance" in Minnesota law) says:

Subdivision 1. Grounds. In a proceeding for dissolution of marriage or legal separation, or in a proceeding for maintenance following dissolution of the marriage by a court which lacked personal jurisdiction over the absent spouse and which has since acquired jurisdiction, the court may grant a maintenance order for either spouse if it finds that the spouse seeking maintenance:

- (a) lacks sufficient property, including marital property apportioned to the spouse, to provide for reasonable needs of the spouse considering the standard of living established during the marriage, especially, but not limited to, a period of training or education, or

⁴⁶ Boldface added by Standler.

⁴⁷ Indented list created by Standler to make these run-on sentences easier to read.

- (b) is unable to provide adequate self-support, after considering the standard of living established during the marriage and all relevant circumstances, through appropriate employment, or is the custodian of a child whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside the home.

Subdivision. 2. Amount; duration. The maintenance order shall be in amounts and for periods of time, either temporary or permanent, as the court deems just, **without regard to marital misconduct**,⁴⁸ and after considering all relevant factors including:

- (a) the financial resources of the party seeking maintenance, including marital property apportioned to the party, and the party's ability to meet needs independently, including the extent to which a provision for support of a child living with the party includes a sum for that party as custodian;
- (b) the time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment, and the probability, given the party's age and skills, of completing education or training and becoming fully or partially self-supporting;
- (c) the standard of living established during the marriage;
- (d) the duration of the marriage and, in the case of a homemaker, the length of absence from employment and the extent to which any education, skills, or experience have become outmoded and earning capacity has become permanently diminished;
- (e) the loss of earnings, seniority, retirement benefits, and other employment opportunities forgone by the spouse seeking spousal maintenance;
- (f) the age, and the physical and emotional condition of the spouse seeking maintenance;
- (g) the ability of the spouse from whom maintenance is sought to meet needs while meeting those of the spouse seeking maintenance; and
- (h) the contribution of each party in the acquisition, preservation, depreciation, or appreciation in the amount or value of the marital property, as well as the contribution of a spouse as a homemaker or in furtherance of the other party's employment or business.

Minnesota Statute § 518.552, subdivisions 1-2 (current July 2008).

PENNSYLVANIA
equitable division of marital property

In 1980 Pennsylvania began no-fault divorce with equitable distribution of marital assets.

In July 2008, the Pennsylvania statute for equitable division of marital property at divorce says:

- (a) General rule. — Upon the request of either party in an action for divorce or annulment, the court shall equitably divide, distribute or assign, in kind or otherwise, the marital property between the parties **without regard to marital misconduct**⁴⁹ in such percentages and in such manner as the court deems just after considering all relevant factors. The court may consider each marital asset or group of assets independently and apply a different percentage to each marital asset or group of assets. Factors which are relevant to the equitable division of marital property include the following:
- (1) The length of the marriage.
 - (2) Any prior marriage of either party.

⁴⁸ Boldface added by Standler.

⁴⁹ Boldface added by Standler.

- (3) The age, health, station, amount and sources of income, vocational skills, employability, estate, liabilities and needs of each of the parties.
 - (4) The contribution by one party to the education, training or increased earning power of the other party.
 - (5) The opportunity of each party for future acquisitions of capital assets and income.
 - (6) The sources of income of both parties, including, but not limited to, medical, retirement, insurance or other benefits.
 - (7) The contribution or dissipation of each party in the acquisition, preservation, depreciation or appreciation of the marital property, including the contribution of a party as homemaker.
 - (8) The value of the property set apart to each party.
 - (9) The standard of living of the parties established during the marriage.
 - (10) The economic circumstances of each party at the time the division of property is to become effective.
 - (10.1) The Federal, State and local tax ramifications associated with each asset to be divided, distributed or assigned, which ramifications need not be immediate and certain.
 - (10.2) The expense of sale, transfer or liquidation associated with a particular asset, which expense need not be immediate and certain.
 - (11) Whether the party will be serving as the custodian of any dependent minor children.
- 23 Pennsylvania Consolidated Statutes § 3502(a) (current July 2008).

Note that many of these factors (e.g., 1-3, 5, 6, 9, 10) *should* be irrelevant to an equitable distribution of marital assets, but such factors would be appropriately considering in awarding alimony. I suggest, beginning at page 115 below, that equitable distribution of marital property should consider only facts during the marriage, and be principally concerned with who earned each asset and the value of that asset at the time of equitable distribution of assets.

alimony

The Pennsylvania alimony statute in July 2008 says:

- (a) General rule. — Where a divorce decree has been entered, the court may allow alimony, as it deems reasonable, to either party only if it finds that alimony is necessary.
- (b) Factors relevant. — In determining whether alimony is necessary and in determining the nature, amount, duration and manner of payment of alimony, the court shall consider all relevant factors, including:
 - (1) The relative earnings and earning capacities of the parties.
 - (2) The ages and the physical, mental and emotional conditions of the parties.
 - (3) The sources of income of both parties, including, but not limited to, medical, retirement, insurance or other benefits.
 - (4) The expectancies and inheritances of the parties.
 - (5) The duration of the marriage.
 - (6) The contribution by one party to the education, training or increased earning power of the other party.
 - (7) The extent to which the earning power, expenses or financial obligations of a party will be affected by reason of serving as the custodian of a minor child.
 - (8) The standard of living of the parties established during the marriage.

- (9) The relative education of the parties and the time necessary to acquire sufficient education or training to enable the party seeking alimony to find appropriate employment.
- (10) The relative assets and liabilities of the parties.
- (11) The property brought to the marriage by either party.
- (12) The contribution of a spouse as homemaker.
- (13) The relative needs of the parties.
- (14) **The marital misconduct of either of the parties during the marriage.**⁵⁰
The marital misconduct of either of the parties from the date of final separation shall not be considered by the court in its determinations relative to alimony except that the court shall consider the abuse of one party by the other party. As used in this paragraph, "abuse" shall have the meaning given to it under section 6102 (relating to definitions).
- (15) The Federal, State and local tax ramifications of the alimony award.
- (16) Whether the party seeking alimony lacks sufficient property, including, but not limited to, property distributed under Chapter 35 (relating to property rights), to provide for the party's reasonable needs.
- (17) Whether the party seeking alimony is incapable of self-support through appropriate employment.

23 Pennsylvania Consolidated Statutes § 3701 (amended 1998, current July 2008).

The word "abuse" in factor 14 is defined as:

"Abuse." The occurrence of one or more of the following acts between family or household members, sexual or intimate partners or persons who share biological parenthood:

- (1) Attempting to cause or intentionally, knowingly or recklessly causing bodily injury, serious bodily injury, rape, involuntary deviate sexual intercourse, sexual assault, statutory sexual assault, aggravated indecent assault, indecent assault or incest with or without a deadly weapon.
- (2) Placing another in reasonable fear of imminent serious bodily injury.
- (3) The infliction of false imprisonment pursuant to 18 Pa.C.S. § 2903 (relating to false imprisonment).
- (4) Physically or sexually abusing minor children, including such terms as defined in Chapter 63 (relating to child protective services).
- (5) Knowingly engaging in a course of conduct or repeatedly committing acts toward another person, including following the person, without proper authority, under circumstances which place the person in reasonable fear of bodily injury. The definition of this paragraph applies only to proceedings commenced under this title and is inapplicable to any criminal prosecutions commenced under Title 18 (relating to crimes and offenses).

23 Pennsylvania Consolidated Statutes § 6102 (current July 2008).

⁵⁰ Boldface added by Standler.

Fault Barred Alimony

The rule of law that a wife's fault prohibited an award of alimony to her can be traced back to the venerable treatise by Blackstone, written in 1765.

But in case of elopement, and living with an adulterer, the law allows her no alimony. Sir William Blackstone, COMMENTARIES ON THE LAW OF ENGLAND, Book 1, Ch. 15, at page 429 (1st edition 1765).

Because English courts prior to 1858 could not grant an absolute divorce, American divorce law was *not* copied from English law. For unspecified reasons, state statutes in the USA allowed alimony after absolute divorce,⁵¹ perhaps to recognize wife's economic contribution to some marriages, to prevent her from becoming a prostitute after divorce, or to prevent her from becoming a burden on charity.⁵²

In the late Nineteenth Century, the major legal treatise on divorce law in the USA gave the following rule for a husband's duty to support his wife:

If a wife abandons her husband without justifiable cause, or commits adultery for which he turns her away, or voluntarily lives apart from him in adultery, or otherwise dwells separate from him without his consent or fault, the law casts on him no duty to supply her even with necessaries.

Joel Prentiss Bishop, COMMENTARIES ON THE LAW OF MARRIAGE AND DIVORCE, Vol. 1, § 573, p. 449 (6th edition, 1881). Even though the parties are still married, either adultery or desertion by the wife automatically ends the husband's duty of support for his wife, provided that both (1) she is living separately from him and (2) the husband has not committed misconduct that caused the separation. Following divorce on grounds of misconduct by a wife, the ex-wife is prohibited from receiving alimony:

We saw, in the first volume, that a blameless husband is not required to provide his wife with necessaries in a separation brought about by her fault. [see preceding quotation] ... the same rule governs permanent alimony; namely, that she is not entitled to it on a divorce decreed in favor of the husband, "even," says Ayliffe, "though he had a considerable dowry with her." So long as he has committed no breach of marital duty, he is under no obligation to provide her a separate maintenance; for she cannot claim it on the ground of her own misconduct. Such is the result of the principles of the unwritten law. And such is justice.

Joel Prentiss Bishop, COMMENTARIES ON THE LAW OF MARRIAGE AND DIVORCE, Vol. 2, § 377, p. 322 (6th edition, 1881). This broadens the rule in Blackstone's time from prohibiting alimony to an adulterous wife, to prohibiting alimony to a wife who is guilty of *any* misconduct (e.g., adultery, desertion, cruelty, etc.) that caused the marriage to end. Bishop goes on to say that this

⁵¹ Joel Prentiss Bishop, COMMENTARIES ON THE LAW OF MARRIAGE AND DIVORCE, Vol. 2, § 376, p. 321 (6th edition, 1881). Bishop tersely notes that absolute divorce severs all marital obligations, so that the ex-husband should no longer be legally obligated to support his ex-wife.

⁵² *Ibid.* at §§ 377-379, pp. 322-324.

broad rule absolutely prohibiting alimony to a guilty wife has been abolished by statute or courts in some states (e.g., Illinois, Indiana, Iowa, Massachusetts, New Hampshire, Ohio, Pennsylvania).⁵³

But Bishop says that such exceptions should be rare:

[The power to award alimony to a guilty ex-wife] is generally exercised with great care, and it ought to be. The giving of a woman divorced for her own faulty a perpetual support from the man on whom she has inflicted the greatest of all injuries should be, not the rule, but the exception, and only seldom allowed.⁵⁴

Joel Prentiss Bishop, COMMENTARIES ON THE LAW OF MARRIAGE AND DIVORCE, Vol. 2, § 379, p. 324 (6th edition, 1881).

Below, I quote a few of the major cases in the USA during the Twentieth Century that hold that misconduct during the marriage by a spouse prohibits that spouse from receiving alimony. Some of these cases are no longer good law, but are cited here to show the historical view that fault bars a person from receiving alimony. I have taken the time to collect a long series of cases in some states (e.g., Florida, Illinois, Georgia, North Carolina, South Carolina, and West Virginia) and the statutes and cases in each of these states are collected together. Limits on my unpaid time have prevented me from making a similar effort for other states.

Florida
statute prohibits alimony to adulterous wife

Before 1971, the Florida alimony statute consistently said “but no alimony shall be granted to an adulterous wife.” This statute has been known as:

- § 1932 of General Statutes of 1906
- § 3195 of Revised General Statutes of 1920
- § 4987 of Compiled General Laws of 1927
- originally codified at § 65.08 (sometime in the mid-1910s)
- renumbered to become § 61.08 in the year 1967.

Finally, this statute was abolished in 1971 by the no-fault divorce statute in Florida. The statute prohibiting alimony to an adulterous wife has a long history, which I have traced through tedious searches of Westlaw. Because this list of cases is only of interest to legal scholars who are trying to understand the history of Florida statutes, I have set this list in a smaller font size.

- *Meeker v. Meeker*, 76 So. 197, 197 (Fla. 1917) (quoting "Sections 1931, 1932, General Statutes 1906, Florida Compiled Laws 1914", which West's headnotes cite as Florida Statutes Annotated § 65.08);

⁵³ Joel Prentiss Bishop, COMMENTARIES ON THE LAW OF MARRIAGE AND DIVORCE, Vol. 2, §§ 378-379, pp. 323-324 (6th edition, 1881).

⁵⁴ Bishop cites *Harris v. Harris*, 31 Grat. 13 [(Va. 1878)].

- *Phinney v. Phinney*, 82 So. 357, 358 (Fla. 1919) (Quoting Florida statute: “ ‘... but no alimony shall be granted to an adulterous wife.’ Section 1932, General Statutes of Florida 1906, Compiled Laws 1914”, which West’s headnote cites as Florida Statutes Annotated § 65.08), quoted in *Cowan v. Cowan*, 2 So.2d 869, 869-870 (Fla. 1941) (Brown, C.J., concurring) (“... the construction of Section 4987, Compiled General Laws of 1927, which is identical with section 3195 of Revised General Statutes of 1920 and section 1932 of General Statutes of 1906.”);
- *Baker v. Baker*, 114 So. 661, 664 (Fla. 1927) (quotes "Rev. Gen. St. 1920, § 3195", which West's headnotes calls Florida Statute Annotated § 65.08);
- *Carson v. Oldfield*, 127 So. 851, 853 (Fla. 1930) (quotes "section 3195 Rev. Gen. Stats.", which West's headnotes calls Florida Statute Annotated § 65.08);
- *Heath v. Heath*, 138 So. 796, 797 (Fla. 1932) (cites "section 4987, Comp. Gen. Laws, section 3195, Rev. Gen. St.", which West's headnotes calls Florida Statute Annotated § 65.08);
- *Johnson v. Johnson*, 175 So. 234, 234 (Fla. 1937) (cites "section 3195, Revised General Statutes of 1920, section 4987, Compiled General Laws of 1927", which West's headnote refers to as Florida Statute Annotated § 65.08);
- *Mooty v. Mooty*, 179 So. 155, 159 (Fla. 1938) (quoting section 3195, Revised General Statutes of Florida);
- *Randolph v. Randolph*, 1 So.2d 480, 480 (Fla. 1941) (quoting section 4987, Compiled General Laws of 1927, which the West headnote refers to as Florida Statute Annotated § 65.08);
- *Engebretsen v. Engebretsen*, 11 So.2d 322, 333 (Fla. 1942) (Welch , J., dissenting) (“Under the statute law of this State an adulterous wife is not entitled to alimony. Section 3195, Rev.Gen. Statutes, 1920, Section 4987, Comp.Gen.Laws of 1927.”);
- *Burns v. Burns*, 174 So.2d 432, 435, n.8 (Fla.App., 1965) (“... section 4987, Comp.Gen.Laws ..., to the effect that no alimony shall be granted to an adulterous wife, [is] now Section 65.08, Florida Statutes.”).
- *Borden v. Borden*, 23 So.2d 529, 529 (Fla. 1945) (quoting § 65.08 in 1945);
- *Aldrich v. Aldrich*, 163 So.2d 276, 282, n.1 (Fla. 1964) (quoting § 65.08 as it existed in 1945);
- *Yandell v. Yandell*, 39 So.2d 554, 555-556 (Fla. 1949) (quoting § 65.08 in 1947);
- *Eakin v. Eakin*, 99 So.2d 854, 855 (Fla. 1958) (citing § 65.08 in 1955);
- *Hall v. Hall*, 200 So.2d 544, 545, n.1 (Fla.App. 1967) (quoting § 65.08);
- *Pacheco v. Pacheco*, 246 So.2d 778, 779 (Fla. 1970) (quoting § 61.08 in 1967);
- *Leonard v. Leonard*, 259 So.2d 529, 529, n.1 (Fla.App. 1972);
- *First Nat. Bank in St. Petersburg v. Ford*, 283 So.2d 342, 345 (Fla. 1973) (“... Florida Statutes, Section 65.08 (1963), which subsequently was only slightly modified by Ch. 67-254, Laws of Florida, (Florida Statutes, Section 61.08, 1967),”);
- *Oliver v. Oliver*, 285 So.2d 638, 640, n.1 (Fla.App. 1973) (quoting § 61.08 in 1969).
- *Baxter v. Baxter*, 720 So.2d 624, 625 (Fla.App. 5 Dist. 1998) (Harris, J., concurring) (“Before no-fault divorce, only the wife could receive alimony under Florida's divorce law. See Chapter 65, Florida Statutes (1967). But even the wife's right to alimony was limited. Section 65.08 provided: ‘but no alimony shall be granted to an adulterous wife.’ ”);

Courts in Florida created a doctrine of “special equity” to avoid denying compensation to adulterous wives in cases where a denial would allegedly be harsh.⁵⁵ “Special equity” is *not* alimony and is thus beyond the scope of this essay.

Florida also has an alimony statute that does *not* require divorce. That statute also includes “... but no alimony shall be granted to an adulterous wife.”⁵⁶ Such a statute is beyond the scope of this essay.

Phinney, (Fla. 1919)

Husband filed for divorce on grounds of wife's "extreme cruelty" to him. Divorce was granted, but the trial court ordered the husband to pay permanent alimony to his ex-wife. Both wife appealed the granting of the divorce, and husband cross-appealed the alimony award. The Florida Supreme Court upheld the divorce, reversed the alimony award, and made new common law in Florida. The Court quoted the statute and explained its holding about alimony:

The statute of Florida governing the granting of permanent alimony upon decrees of divorce is as follows:

‘In every decree of divorce in a suit by the wife, the court shall make such orders touching the maintenance, alimony and suit money of the wife, or any allowance to be made to her, and if any, the security to be given for the same, as from the circumstances of the parties and nature of the case may be fit, equitable and just; but no alimony shall be granted to an adulterous wife.’

Section 1932, General Statutes of Florida 1906, Compiled Laws 1914.

This restricts the granting of alimony upon a decree of divorce to cases in which the suit is brought by the wife. The legislative intention thus set out is in accord with sound principles of justice.

‘Alimony had its origin in the legal obligations of the husband, incident to the marriage state, to maintain his wife in a manner suited to his means and social position, and although it is her right, she may by her misconduct forfeit it; and when she is the offender, she cannot have alimony on a divorce decreed in favor of the husband. So long as he has committed no breach of marital duty, he is under no

⁵⁵ See, e.g., *Heath v. Heath*, 138 So. 796 (Fla. 1932); *Eakin v. Eakin*, 99 So.2d 854, 855 (Fla. 1958); *Duncan v. Duncan*, 379 So.2d 949, 952 (Fla. 1980); *Tommaney v. Tommaney*, 405 So.2d 454, 455 (Fla.App. 1981); *Jones v. Jones*, 419 So.2d 760, 761 (Fla.App. 1 Dist. 1982); *Brown v. Brown*, 429 So.2d 846, 848 (Fla.App. 4 Dist. 1983); *French v. French*, 466 So.2d 1243, 1243, n.1 (Fla.App. 5Dist. 1985) (Coward, J., dissenting).

⁵⁶ See, e.g., *Miller v. Miller*, 15 So. 222, 224 (Fla. 1894) (quoting “§§ 1485 and 1486, Rev. St.”); *Warren v. Warren*, 75 So. 35, 37 (Fla. 1917) (quoting “§ 1933, General Statutes of Florida 1906”); *Preston v. Preston*, 157 So. 197, 198 (Fla. 1934) (Davis, C.J., concurring) (quotes statute); *Bredin v. Bredin*, 89 So.2d 353, 355 (Fla. 1956) (citing Florida Statute § 65.09); *Dawson v. Dawson*, 164 So.2d 536, 538, n.1 (Fla.App., 1964) (quoting § 65.09); *Feldhusen v. Feldhusen*, 214 So.2d 772, 773-774 (Fla.App. 1968) (quoting § 65.09 in 1965, renumbered to § 61.09 in 1967); *Coltea v. Coltea*, 856 So.2d 1047, 1049, n. 2 (Fla.App. 4 Dist. 2003) (citing Florida Statute § 61.09 in 1955).

obligation to provide her a separate maintenance, for she cannot claim it on the ground of her own misconduct.’

Harris v. Harris, 31 Grat. 13 [(Va. 1878)].

The authorities are not in full accord on this question, although in most of the states where permanent alimony is granted the former wife in a suit brought by the husband, and decree of divorce rendered against her, there are statutes expressly permitting it, or from which the right to so award alimony may be reasonably implied. The Supreme Court of Colorado holds that —

‘Without the aid of statute a court of equity will generally decree that the wife as well as the children shall be provided with the necessities of life out of the husband and father's estate, as far as possible, unless her misconduct has been very gross; and the fact that the divorce was granted for her fault certainly will not deprive her of all relief, where she is still deemed worthy to be intrusted with the custody of the children.’

Luthe v. Luthe, 12 Colo. 421, 21 Pac. 467 [, 468-469 (Colo. 1889)].

California holds to the opposite view that —

‘When the court grants a divorce to the husband on account of the offense of the wife, it cannot require the husband to pay to the wife, after the divorce, out of his separate property, a sum or sums of money for her support.’

Everett v. Everett, 52 Cal. 383 [(Cal. 1877)].

The statute upon which the California decisions rest is of similar import to the Florida statute, the distinction being only in phraseology. The California statute (Civ. Code, § 139) provides that, ‘Where a divorce is granted for an offense of the husband, the court may compel him * * * to make such suitable allowance to the wife for her support during her life, or for a shorter period, as the court may deem just;’ while the Florida statute says, ‘In every decree of divorce, in a suit by the wife, the court shall make such orders touching the maintenance, alimony and suit money,’ etc.

No useful purpose would be served by a discussion of the cases from those states that have statutes which in effect provide that —

‘Upon decreeing the dissolution of a marriage, and also upon decreeing a divorce, whether from the bond of matrimony or from bed and board, the court may make such further order as it shall deem expedient concerning the estate and maintenance of the parties, or either of them.’

The quoted passage supra is from the Virginia statute (Code 1873, c. 105, § 12), and under it the Supreme Court of that state, in a very learned discussion of the history and principles controlling the award of alimony, holds that permanent alimony upon divorce cannot be granted where the divorce is obtained by the husband. *Harris v. Harris*, supra.

But in Indiana, under a statute of similar import, it is held that alimony may be awarded to the former wife in a suit where the husband was the complainant. *Cox v. Cox*, 25 Ind. 303; *Conner v. Conner*, 29 Ind. 48.

Most of the decisions holding that alimony can be awarded the former wife in a decree granting a divorce to the husband are predicated upon a finding that the entire blame did not rest upon the wife. The fallacy in this reasoning seems palpable, for why should a decree of divorce be granted to the husband if the wife be not wholly to blame?

Others are predicated upon the finding that the wife helped accumulate the estate out of which the alimony was to be paid. *Conner v. Conner*, supra.

For a very full collection of the cases where this question is discussed, see note to *Davis v. Davis* (Ga.) 20 Ann. Cas. 20.

We consider that the section of the General Statutes of Florida cited supra controls the determination of this question, and that permanent alimony cannot be awarded to the former wife in a suit brought by the husband, where the divorce is granted for the fault of the wife. *Phinney v. Phinney*, 82 So. 357, 358-359 (Fla. 1919).

There is no mention in *Phinney* that the wife committed adultery. Instead, her fault was unspecified “extreme cruelty to [husband] and habitual indulgence in violent and ungovernable temper.”

The holding in *Phinney* involves an interesting slight-of-hand by the Florida Supreme Court. The Florida statute clearly bars alimony only to an adulterous wife. According to the plain meaning of the Florida statute, alimony *may* be awarded in cases involving other kinds of fault or misconduct by the wife. But the Florida Supreme Court broadened the law to interpret "adultery" to mean any kind of fault of misconduct by the wife that caused the divorce. It is no surprise that this holding in *Phinney* was overruled by later cases, *Randolph v. Randolph*, 1 So.2d 480, 481 (Fla. 1941) (“We do not so interpret the statute and [*Phinney*] when read in the light of the statute does not warrant that interpretation. The only class barred absolutely from alimony is the adulterous wife. In all other cases, the Chancellor may award such amounts for alimony....”) and *Cowan v. Cowan*, 2 So.2d 869 (Fla. 1941) (“Appellant contends that the Chancellor was without power to grant alimony when the divorce was occasioned by the fault of the wife. This is true in cases of adultery but in all other cases, the matter is one in the discretion of the Chancellor. The final decree is accordingly affirmed on authority of *Randolph v. Randolph*, Fla., 1 So.2d 480,”), see *Stern v. Stern*, 75 So.2d 810, 812 (Fla. 1954) (recognizing overruling of *Phinney* by *Cowan*).

Furthermore, the reasoning offered in *Phinney* by the Florida Supreme Court was mostly quotations from courts and statutes in other states, many of which the Florida Supreme Court admits disagreed with the Florida Supreme Court’s holding in *Phinney*. Competent legal research — admitted difficult in that era before online databases like Westlaw or Lexis — could have put this holding in *Phinney* on firmer ground, because this holding was accepted in many other states of that era.

Gill, (Fla. 1933)

Husband filed for divorce on grounds that wife engaged in "extreme cruelty and frequent indulgence in a violent and ungovernable temper." The trial court granted the divorce. Wife sought alimony, which was denied by the trial court, so she appealed to the Florida Supreme Court, which reversed the trial court. The Florida Supreme Court distinguished *Phinney* as applying only when the wife's misconduct was the sole cause of the divorce. However, in the case at bar, the husband had physically injured one of her fingers and her wrist, causing her to seek treatment by a bone specialist in Atlanta at the time of the divorce proceedings, so the husband had also committed misconduct during the marriage.

It would be manifestly inequitable to hold the husband not liable for the payment of alimony under the facts in this case. No question of property rights is involved, but he has materially impaired his wife's capacity to make a living, and should therefore be required to contribute to her support. It follows that that part of the final decree refusing the award of alimony is reversed, with directions to the chancellor to inquire as to the facilities of the parties and make such award of alimony as the circumstances of the parties will warrant; the circumstances of the parties having reference to the needs of the wife, the ability of the husband to provide for her, and their station in life.

Gill v. Gill, 145 So. 758, 759 (Fla. 1933) (en banc).

This 75 year old case is remarkable for a surprisingly modern concurring opinion by Justice Davis, which interprets — on the facts of this case — that permanent alimony can be a substitute for tort damages for battery by the husband on the wife. Justice Davis then makes some general remarks about abuses of alimony.

In this case it clearly appeared that the wife had given her husband just cause for divorce on the ground of habitual indulgence in violent and ungovernable temper. The parties were without children, and I do not think it should be said without qualification that, where a woman decides to make herself a female 'dreadnaught' in the marital domicile and elsewhere, and thereby forfeits her right to remain in the status of a wife, that the victimized 'mere man' in the matrimonial compact can either equitably or legally be compelled to continue to support a wife separated from him not for any fault of his, but because of her own inherent meanness and vicious propensity for marital aggressions that have brought about her predicament.

To hold otherwise would necessarily impose upon any man who dared to enter the matrimonial compact an obligation of uxoriousness for which I can find no legal warrant suggested by either reason or authority.

The evidence in this case shows, however, that, notwithstanding all the cause for divorce of which the wife in this case had become guilty, the husband had during the period of the wife's coverture unjustifiably inflicted on his wife certain substantial, permanent personal injuries for which she could have sued him and recovered damages, but for the rule of law that prohibits a wife from recovering from her husband for a tort of that kind committed by him on her person during coverture. So long as the marital status remains intact, the wife is not without remedy for such a wrong, because she continues to be entitled to her husband's support. And the fact that the husband has, by an act of violence, so injured her as to cripple her for life merely adds to the husband's expense on her account, because the husband has to bear the additional burden created by reason of his own wrong, so long as the marital status continues.

But the unconditional dissolution of the marriage on complaint of the husband operates, under the *Phinney Case*, supra, to relieve the husband of any further duty to contribute to his wife's support. It would therefore deprive the permanently injured wife of the only compensation she could have under the law for the wrong done her by her husband's violence to her person *intra matrimoniiis vinculis*.

This circumstance of permanent personal injuries unjustifiably caused by the husband in my judgment brings into consideration an independent equity in the wife's favor, which the court, in the adjudication of the husband's claim for a divorce from her, may require the husband to satisfy as a condition precedent to his being granted the equitable relief of divorce to which he may be entitled so far as his right to be relieved of the matrimonial association is concerned.

In other words, the exception here made to the rule of *Phinney v. Phinney*, supra, may be stated to be that, where during coverture the husband has unjustifiably inflicted on his wife permanent and substantial personal injuries, which would be redressible as a tort but for coverture, a court of equity, vested with jurisdiction to grant the relief of divorce to the husband for causes occasioned by the wife's conduct toward him, may, and in proper cases of real necessity should, require the husband to do equity toward the permanently injured wife by paying to her the equivalent of an allowance of alimony for her support, as a condition precedent to the husband's being granted the divorce he prays for, and is otherwise entitled to receive.

But the foregoing is as far as I think any exception to the rule of *Phinney v. Phinney*, supra, can be acknowledged or extended. I find myself wholly unable to agree that a court of equity can award a guilty wife an allowance as permanent alimony on any other consideration except that just stated, where the suit is by the husband and the divorce is granted for the wife's fault.

To hold more than this would subject an innocent husband to be offered up in the name of equitable principles, as a living sacrifice to the folly of having been inveigled into a connubial misalliance with an unconscionable virago, fair of form, perhaps, but who, like the foolish woman referred to by Solomon in his Proverbs, 'buildeth not her house, but plucketh it down with her hands.'

The every-day phrases 'gold diggers' and 'alimony chiselers,' as applied to shrewish wives, who provoke their husbands by their intemperate or violent conduct to seek relief in a court of divorce, while such wives remain personally free from provable adultery, should not be given any new significance in this jurisdiction by overruling *Phinney v. Phinney*, directly or indirectly. Yet it cannot be denied that the plainest principles of justice demand that a permanently injured wife, so injured without adequate excuse, should not be cast adrift by a court of equity without salvage for her wrongs, merely because her unbridled tongue, or an habitual quirk of temper, has made it impossible for her husband to continue to live with her.

Therefore, with the foregoing modification and reservation herein stated, I concur in the opinion and conclusions stated by Mr. Justice TERRELL, which, because of the sweeping, general language used by him, may be interpreted as practically overruling *Phinney v.*

Phinney, supra, which impression, I am sure, is by no means intended to be conveyed. *Gill v. Gill*, 145 So. 758, 759-760 (Fla. 1933) (Davis, J., concurring specially and joined by two other Justices).

Nolen, (Fla. 1935)

In 1935, the Florida Supreme Court considered a case where the wife had abused her husband:

In short, there is substantial evidence in the record to show that for more than eight years continuously the defendant's treatment of the complainant was cruel and inhuman, not that she inflicted any physical injury upon him by the administration of blows, or personal assault, but by continuously, both day and night, nagging at him in every conceivable way, quarreling with him, threatening his life, accusing him of infidelity, threatening to kill him and to kill herself, as well as to kill their daughter. The record shows that she would wake him up at all hours of the night when he needed rest, because he was a hard-working man, and at such times would proceed to abuse him, threaten him and accuse him of immoral conduct, of which he was not guilty, and for which there was no foundation in fact.

The record shows that she was just such a woman as King Solomon referred to when he said:

‘It is better to dwell in a corner of the housetop than with a brawling woman in a wide house.’

Proverbs 21-9; Proverbs 25-24.

....

There is probably no greater cruelty which may be inflicted upon a self-respecting, peace-loving man than that which is inflicted by a contentious, unreasonable, and nagging woman, making his life unhappy, and well-nigh unbearable, by a continuous indulgence in faultfinding, nagging, threatening, and falsely accusing her husband of improper and disgraceful conduct, arousing him from his sleep at all hours of the night only to engage in brawling, quarreling, and abusive language. Such conduct on the part of a wife is bound to cause her husband a constant worry, anguish, and grief, and renders cohabitation intolerable and unsafe.

Nolen v. Nolen, 163 So. 401, 401-402 (Fla. 1935) (en banc).

The husband filed for divorce, which was granted on grounds of fault by the wife ("extreme cruelty"). The trial court ordered the husband to pay permanent alimony to his wife, and he appealed. The Florida Supreme Court reversed the award of alimony:

The decree having been obtained because of the fault and misconduct of the wife, the decree for permanent alimony was error. *Phinney v. Phinney*, 77 Fla. 850, 82 So. 357.

Nolen, 163 So. at 402 (Fla. 1935).

There is no mention of adultery — the only statutory bar to alimony — in *Nolen*, so this case stands for the proposition that *any* fault or misconduct by wife that causes the divorce is grounds for denying alimony.

Montgomery, (Fla. 1951)

In 1951, the Florida Supreme Court considered a case where the husband “committed numerous acts of abusive treatment”, including breaking his wife's nose. The husband apparently had committed adultery, although the appellate opinion does not use that word. The chancellor (i.e., trial judge) denied alimony to wife because she “is still young and attractive and well able to care for herself”. The Florida Supreme Court reversed the chancellor:

We cannot agree that alimony should be denied simply because the chancellor is of the opinion that in this case it is inequitable since defendant [wife] is young, attractive and able to support herself. Equitable discretion must be exercised in keeping with established principles of law. This husband was found guilty of violating his marital vows. He destroyed his family structure by his own wilful and wrongful act; the law exacts that he now be required to make contribution to rehabilitate, insofar as money will permit, the one he has wronged. An innocent woman's rights are not to be ignored because of her good looks. The general rule is that where the husband has caused the separation he should remain liable for support. We find this case no exception. We, therefore, find the decree in error insofar as alimony is concerned.

Montgomery v. Montgomery, 52 So.2d 276, 277 (Fla. 1951).

This case stands for the proposition that fault by the prospective payor of alimony will justify alimony. Other cases quoted here stand for the proposition that fault by the prospective recipient of alimony will bar alimony.

Hobbs and Smith v. Bollinger, (Fla.App. 1962)

In 1962 a Florida intermediate appellate court wrote:

... we are confronted with an unchallenged divorce in which the appellant wife, although adjudged at fault, nevertheless was awarded permanent alimony of \$200.00 per month.

A wife from whom the husband obtains a divorce because of her misconduct ordinarily is denied alimony eo nomine, but allowances have been granted in exceptional cases. *Mathews v. Mathews*, 1934, 117 Fla. 60, 157 So. 195; 17 Am.Jur., Divorce and Separation, § 676.

Moreover, an offending wife may be decreed an interest in the husband's estate by showing her entitlement to special equity therein. See infra 4th par. et seq.

Hobbs v. Hobbs, 136 So.2d 363, 365 (Fla.App. 1962).

This paragraph is quoted with approval in *Smith v. Bollinger*, 137 So.2d 881, 885 (Fla.App. 1962), which continues:

If it had been alleged and proven in the suit for divorce that Joan was guilty of adultery, she would have been denied alimony under Florida Statutes, §§ 65.08 and 65.09, F.S.A.

Though she admitted adultery in her deposition, the divorce was obtained only on the ground of extreme cruelty and the complaint did not even allege adultery.

Smith v. Bollinger, 137 So.2d 881, 885 (Fla.App. 1962).

Pacheco, (Fla. 1970)

In 1970, the Florida Supreme Court wrote in a case involving an adulterous wife who wanted alimony, despite the fact that the Florida alimony statute prohibited alimony to an adulterous wife.

In addition to other factors, the English courts took fault into consideration when setting the amount of support to be paid. Where the wife was at fault she was entitled to nothing. 1 Blackstone, Commentaries, Bk. I, ch. 15, p. 189 (Gavit ed. 1941). Ecclesiastical courts would never award alimony upon divorce A mensa et thoro to an adulterous wife, for there was no duty for a husband to support an adulterous wife. See, Johnson, FAMILY LAW, ch. 8 p. 188 (2nd ed. 1965), *Woodward v. Dowse* (1861) 10 C.B.(N.S.) 722; *Hartley v. Hartley* (1955) 1 W.L.R. 384.

In enacting Fla.Stat. § 61.08, F.S.A. The Florida Legislature repealed those common law disabilities of the wife who was at fault, with the one exception of adultery. In all other cases the matter rests in the discretion of the chancellor. This was our holding in *Kahn v. Kahn*, 78 So.2d 367 (Fla. 1955), which denied alimony to a wife capable of supporting herself.

We are not here confronted by a statutory deprivation of a common law right. The so-called 'right' to alimony does not exist as an incident to divorce A vinculo unless it is granted by statute. The Florida Legislature has simply decided that the benefit of alimony shall not be available to an adulterous wife, just as it has declined to allow alimony to husbands except in cases of insanity.

.... [The law-making authority] may legislate with reference to degrees of evil and to situations in which the evil is demonstrably more harmful, without denying equal protection of the law. [citation omitted] There is no merit to appellant's contention that equal protection is violated when one evil is attacked more severely than others. This is the very essence of the Legislature's policymaking function. An exercise of the police power thus need not apply equally and uniformly to all evils in the state. It is sufficient to satisfy the constitutional requirement of equal protection if the statute applies equally and uniformly to all persons similarly conditioned. [two citations omitted]

.... It is also worthy to note that of the ten grounds for divorce in Florida adultery is one which is also declared to be a violation of the criminal laws. Moreover, it is the one basis for divorce which is recognized as such by all fifty states, assuming that California so regards it under its recently liberalized divorce laws. No other breach of the marital contract has received such universal condemnation. These are merely added aspects of the offense which support special legislative treatment and contribute additional justification for the decree sustaining the subject statute.

We therefore find that § 61.08, is a valid exercise of the State's police power and does not contravene constitutional assurances of due process and equal protection.

Pacheco v. Pacheco, 246 So.2d 778, 781-782 (Fla. 1970).

no-fault divorce statute

Effective 1 July 1971, the Florida no-fault alimony statute: (1) abolished the absolute prohibition against awarding alimony to an adulterous wife, (2) removed references to gender in alimony, so that husbands — in theory — could receive alimony, and (3) created rehabilitative alimony in Florida. Adultery became one of several factors that a judge could consider in awarding alimony, without any statutory guidance about *how* or *when* to consider adultery, leaving a hole to baffle judges. This hole was filled by the Florida Supreme Court in 1986, as explained below, at page 50.

As the legislature revised the statute, the exact words changed. The initial version in 1971 said:

The court may consider the adultery of a spouse and the circumstances thereof in determining whether alimony shall be awarded to such spouse and the amount of alimony, if any, to be awarded to such spouse.

Williamson v. Williamson, 367 So.2d 1016, 1018 (Fla. 1979) (quoting Florida Statutes § 61.08(1) in 1973).⁵⁷

⁵⁷ Also see *Lefler v. Lefler*, 264 So.2d 112, 113 (Fla.App. 1972) (quoting Florida Statute § 61.08(1) in 1971); *Melin v. Melin*, 265 So.2d 414, 416 (Fla.App. 1972) (quoting Florida Statute § 61.08(1) in 1971); *First Nat. Bank in St. Petersburg v. Ford*, 283 So.2d 342, 346 (Fla. 1973) (quoting Florida Statute § 61.08(1)); *Pfohl v. Pfohl*, 345 So.2d 371, 375 (Fla.App. 1977) (quoting Florida Statute § 61.08(1) in 1975); *Krieger v. Krieger*, 344 So.2d 1346, 1349, n.1 (Fla.App. 1977) (Ervin, J., dissenting) (quoting Florida Statute § 61.08(1) in 1975); *Linda v. Linda*, 352 So.2d 1208, 1209 (Fla.App. 1977) (Dauksch, J., dissenting) (quoting Florida Statute § 61.08 in 1975).

By the late 1980s, this sentence in § 61.08 had been revised to say:

The court may consider the adultery of either spouse and the circumstances thereof in determining the amount of alimony, if any, to be awarded.

Enfinger v. Enfinger, 566 So.2d 261, 263 (Fla.App. 1 Dist. 1990) (quoting Florida Statute § 61.08(1) in 1988); Florida Statute § 61.08(1) (last amended 1991, still current October 2008).

An intermediate appellate court in Florida in 1979 wrote a history of Florida's no-fault alimony statute:

Prior to the 1971 Marital Dissolution Act, the law on alimony remained free from uncertainty as to what factors should be taken into consideration when determining whether or not to permit an award. The equation⁵⁸ was unchanged: alimony = need = the ability to provide for that need.

As originally passed, the 1971 Act adopted section 308 of the Uniform Marriage and Divorce Act which permitted the trial court to enter a maintenance order, unrelated to the fault of either party, once a finding was made that the spouse seeking maintenance lacked sufficient property to provide for his needs, or was unable to support himself or herself through appropriate employment, or was the custodian of a child whose circumstances made it appropriate that the custodian not be required to seek employment outside the home. See H.B. 736, Section 8 (Reg. Session 1971). The governor, however, vetoed this measure. [footnote omitted] The final compromise provision of the Act, Section 61.08(1), modified the 1969 statute (1) by permitting any spouse to apply for alimony, whereas only the wife could do so before, (2) by allowing an award of rehabilitative alimony, and (3) by permitting the court to consider the adultery of the spouse when deciding whether alimony should be awarded, as well as the amount of alimony to be awarded. Subsection (2) was added authorizing the court to “consider any factor necessary to do equity and justice between the parties.”

The net result of the Act was, unfortunately, an anomaly. While the fault of neither spouse was to be considered when determining whether the bonds of marriage should be dissolved, fault, specifically adultery by statute, was retained when deciding whether alimony should be awarded.[FN3] And it was judicially extended to other areas of fault not designated by statute. See, e. g., *Oliver v. Oliver*, 285 So.2d 638 (Fla. 4th DCA 1973); *Baker v. Baker*, 299 So.2d 138 (Fla. 3d DCA 1974), cert. den. 307 So.2d 186 (Fla.). The admission of evidence relating to fault was, however, narrowly circumscribed by the Supreme Court's recent opinion in *Williamson v. Williamson*, 367 So.2d 1016 (Fla. 1979), where the court held that a trial judge could permit evidence of misconduct by the spouse who caused economic hardship to the other, as an equitable circumstance under Section 61.08(2), only after it is demonstrated that both parties will suffer economic hardship following division of their resources.

FN3. For an excellent examination of our ambiguously named “No-Fault Divorce Act”, see note, Alimony in Florida. No-Fault Stops at the Courthouse Door. 28 U. OF FLA.L.REV. 521 (1976).

⁵⁸ This so-called “equation” is total nonsense to anyone familiar with mathematics.

Even following the adoption of the Act, the courts until 1974 continued to follow the traditional equation by which alimony awards were measured. This equation was disregarded in 1974 when *Brown v. Brown*, [300 So.2d 719 (Fla.App. 1974)] was decided. *Cornelius v. Cornelius*, 382 So.2d 710, 713-714 (Fla.App. 1979), *quashed on other grounds*, 387 So.2d 366 (Fla. 1980).

Courts in Florida continued to use old case law with the modern, no-fault statute. For example,:

We feel that because of the mentioned similarity between the two statutes, the case law that construed the earlier alimony statute concerning the misconduct of the parties is equally applicable to the 1971 statute. Thus, the marital conduct and misconduct of the parties is a factor to be considered in determining alimony.

Oliver v. Oliver, 285 So.2d 638, 640 (Fla.App. 1973).

Of course, the removal of the statutory prohibition on alimony to an adulterous wife is a significant change, which effectively rejects all cases before 1971 that denied alimony to an adulterous wife on grounds of her adultery.

Krieger, (Fla.App. 1977)

A Florida trial court refused to award alimony to wife, who remained in Germany after her husband returned to Florida, and an appellate court affirmed without opinion. A dissenting judge in the intermediate appellate court in Florida sketched the history of the law in Florida on the issue of whether misconduct by the wife during the marriage bars alimony.

In *Phinney v. Phinney*, 77 Fla. 850, 82 So. 357 (1919), the court held, in construing the effect of Section 1932, General Statutes, 1906, Compiled Laws 1914,[FN3] that permanent alimony could not be awarded to the former wife in a suit brought by the husband where the divorce was granted for the fault of the wife. This opinion was modified by the court's later decision in *Gill v. Gill*, 107 Fla. 588, 145 So. 758 (1933). In *Gill*, the husband was awarded a divorce from his wife on the grounds of the wife's extreme cruelty and violent and ungovernable temper. The court limited its prior holding in *Phinney v. Phinney*, *supra*, barring alimony to the wife to situations where the wife was wholly at fault. The rule, however, the court continued, does not apply when the husband has not been entirely free from blame, or when the wife has contributed personally to the husband's estate, either from her industry or from her property. Since the husband was not free from fault, the court reversed that portion of the final decree refusing alimony to the wife.

FN3. Providing: "In every decree of divorce in a suit by the wife, the court shall make such orders touching the maintenance, alimony and suit money of the wife, or any allowance to be made to her, and if any, the security to be given for the same, as from the circumstances of the parties and nature of the case may be fit, equitable and just; but no alimony shall be granted to an adulterous wife."

A year later in *Mathews v. Mathews*, 117 Fla. 60, 157 So. 195 (1934), while the chancellor granted a divorce to the husband on the ground of the wife's desertion, nevertheless he awarded permanent alimony to the wife. In *Mathews*, there were no facts showing any degree of fault on behalf of the husband and the court held in a split decision that the award of alimony was justified 'by an equitable consideration of the whole record . . .' 157 So. at 196.

The dissenting opinion of Davis, Chief Justice, quoted the following words from the chancellor's decree: ". . . a faithful wife of 40 years is entitled consideration even though at the end she should desert the husband and the burden of contribution might be a heavy one for the husband, . . ." *Id.* 157 So. at 196. While not expressly stating, I assume the majority opinion tacitly approved the reasoning supporting the chancellor's conclusion.

In *Randolph v. Randolph*, 146 Fla. 491, 1 So.2d 480 (1941), the husband filed a bill for divorce against his wife on the grounds of extreme cruelty and violent and ungovernable temper. The wife counterclaimed charging her husband with the same offenses. At the final hearing the court found that both parties proved their case and entered a decree divorcing each from the other. Replying to the husband's contention that the alimony statute and *Phinney v. Phinney*, supra, barred the offending spouse from alimony if she was the actuating cause of the divorce, the court responded:

"We do not so interpret the statute and the last cited case when read in the light of the statute does not warrant that interpretation. The only class barred absolutely from alimony is the adulterous wife. In all other cases, the Chancellor may award such amounts for alimony as in the 'circumstances of the parties and nature of the case may be fit, equitable and just.' Aside from adultery, the circumstances and conduct of an offending spouse might be such as to bar her from alimony but this is a matter solely in the discretion of the Chancellor governed by equity and justice and the condition of both parties. All these factors the Chancellor should consider the adjudicate the claim for alimony accordingly." 1 So.2d at 481. (Emphasis supplied.)

There evolved from *Randolph* an ad hoc determination, based upon the particular circumstances of each case, whether a nonadulterous wife, guilty of some misconduct, should be awarded alimony.

The court's opinion in *Randolph* was expressly followed shortly afterward in *Cowan v. Cowan*, 147 Fla. 473, 2 So.2d 869 (1941), where it was held that the trial court had discretion in all cases but that of adultery of the wife to grant alimony to the wife. In a concurring opinion by Chief Justice Brown, it was stated that the effect of the court's opinion was to overrule its prior holding in *Phinney v. Phinney*, supra.

In *Borden v. Borden*, 156 Fla. 770, 23 So.2d 529 (1945), a decree of divorce was granted to the wife on the ground of habitual intemperance of the husband. Despite her needs and the husband's ability to pay, she was denied alimony by the trial court for the apparent reason that she had attempted to perpetrate a fraud on her husband by inserting her name along with his as grantee in a bill of sale to a boat. On appeal, the court stated that the only penalty for the wife's wrongdoing recognized by the statute, Section 65.08, Florida Statutes (1941), was adultery and reversed and court's failure to award alimony to the wife.

Brunner v. Brunner, 159 Fla. 762, 32 So.2d 736 (1947) is the first case reversing a denial of alimony to the wife when the husband obtained a divorce based solely upon the fault of the wife. The court's reversal of the denial of alimony was founded purely upon equitable circumstances. Answering the husband's argument that the husband had placed with his wife for safekeeping several thousand dollars which was not returned to him, and that she had dissipated her husband's money at race tracks, and was therefore not entitled to alimony, the court said:

"We do not understand that these contentions, or either of them, are exceptions to the provisions of Section 65.08, supra, which makes it the duty of a husband to pay his wife alimony or otherwise provide for her support and maintenance. It was error on the part of the court below in the final decree not to make provision for the support and maintenance of the wife. The husband is shown to be financially able to pay and the wife's necessity is clearly apparent." 32 So.2d at 737. (Emphasis added.)

Cases affirming judgments of dissolution which disallowed an award of alimony to the wife turn on such circumstances as the wife being youthful, in good health, capable of employment, and the marriage terminating after a short period of time. E.g., *McCarter v. McCarter*, 131 Fla. 561, 179 So. 760 (1938); *Golembeski v. Golembeski*, 57 So.2d 654 (Fla. 1952); *Howell v. Howell*, 109 So.2d 882 (Fla. 1959). Since *Phinney*, the common thread running throughout all the Florida Supreme Court cases on the subject is the overriding concern by the court of the relative positions of the parties: the needs of the wife and the financial ability of the husband to pay.

Krieger v. Krieger, 344 So.2d 1346, 1350-1351 (Fla.App. 1977) (Ervin, J., dissenting).

Beville, (Fla.App. 1982)

In 1982, an intermediate appellate court in Florida held that wife's misconduct during the marriage (e.g., a "lifelong nag and intolerable companion") could defeat her claim for alimony, even if the wife needed alimony.

It appears from the record that this much respected trial judge may have made this pathetically small award of periodic alimony ["a mere \$200/month"] because the wife was shown to be a lifelong nag and intolerable companion, during thirty-five years of marriage. If our supposition is correct, we can voice no objection, but we must ask the trial judge, upon remand, to make such a finding. Otherwise, reversible error was committed. Marital misconduct by a wife who seeks alimony may well limit or forestall any award, but such misconduct should be articulated, so that a reviewing court can discern what is afoot.

Williamson v. Williamson, 367 So.2d 1016 (Fla. 1979).

Beville v. Beville, 415 So.2d 151, 152 (Fla.App. 4 Dist. 1982).

Noah, (Fla. 1986)

Perhaps to remove any discretion from trial judges who might consider refusing to grant alimony to an adulterous spouse, the Florida Supreme Court in 1986 held that only economic consequences of adultery could be considered by judges. This interpretation is a significant narrowing of the statute.

The answer to the certified question now before us is controlled by our decision in *Williamson*:

[I]t must be remembered that the primary standards to be used in determining a proper alimony award are the demonstrated need of the spouse seeking alimony and the demonstrated ability of the other spouse to pay.... [A]limony is not a weapon to be used solely to punish an errant spouse.

[*Williamson*,] 367 So.2d at 1018. See also *Claughton*, 344 So.2d at 946; *Escobar*, 300 So.2d at 703.

We candidly acknowledge that although Florida has a so-called no-fault divorce system, section 61.08(1) does appear to retain a vestige of fault by allowing the trial court to consider the adultery of an alimony-seeking spouse. Why this one factor, as opposed to physical abuse, alcoholism, or a multitude of other factors, is included in the statute is not an issue before us. We reaffirm, however, our holding in *Williamson* that the primary standards to be

used in fashioning an equitable alimony award are the needs of one spouse and the ability of the other to pay. [footnote omitted]

During oral argument before this Court, counsel for petitioner intimated that the pleadings in marital dissolution cases are lengthening and appear to be regressing to the point where the fault of the parties is once again playing a prominent role. In response to this alleged trend, we repeat our admonition in *Williamson*.

For a trial court to perform routinely a balancing act with testimony of alleged marital misconduct of the parties would be a step backward to the days of threats and insinuations which plagued our courts before our no-fault system was enacted and would be directly contrary to express legislative policy.

[*Williamson*,] 367 So.2d at 1019. Some of the uses one spouse's adulterous conduct may play in determining entitlement to alimony have previously been discussed. Another permissible use, and one more apparently relevant than was presented in either *Escobar* or *Cloughton*, has more recently been set forth in *Langer v. Langer*, 463 So.2d 265 (Fla. 3d DCA 1984). In *Langer*, the trial court refused to allow the wife to present corroborative evidence of the husband's extensive drug use and his longstanding adulterous affairs. In reversing the trial court on this point, the district court stated:

In this case, both the adultery and drug use, if as longstanding and extensive as proffered, may have contributed to the depletion of the financial resources of the family and should be admitted on remand.

[*Langer*, 463 So.2d] at 267.

Sub judice, evidence of the adulterous activity of the respondent husband appears to have been presented solely to obtain an increase in the award of alimony. Friends of petitioner testified that news of respondent's adultery "devastated" petitioner. There is, however, neither evidence that this devastation translated into petitioner's greater financial need, nor that the adultery depleted family resources, as in *Langer*.

Noah v. Noah, 491 So.2d 1124, 1127 (Fla. 1986).

In 1987 an intermediate appellate court in Florida summarized the law, including the holding in *Noah*:

The first context in which the husband's sexual activity may become relevant in these dissolution proceedings is the court's statutory authority to take a party's adultery into account on the issue of alimony. See § 61.08(1), Fla. Stat. (1985). The statute has been rather strictly construed and does not constitute a license to bring the issue of adultery into every case where alimony is involved.⁵⁹ For example, the trial court may refuse to permit one spouse to introduce evidence of the other spouse's adultery if its sole purpose is to obtain alimony or increase the amount of alimony for the spouse offering the evidence. *Escobar v. Escobar*, 300 So.2d 702 (Fla. 3d DCA 1974). If, on the other hand, evidence of adultery is admitted against a spouse seeking alimony, then the trial court must also consider, in mitigation, evidence of the other spouse's adultery. *Cloughton v. Cloughton*, 344 So.2d 944 (Fla. 3d DCA 1977). Marital misconduct may be considered by the court where, regardless of what division is made of available resources, the parties will suffer economic hardship AND the marital misconduct in question caused or contributed to the difficult economic situation. *Williamson v. Williamson*, 367 So.2d 1016 (Fla. 1979). See also *Noah v. Noah*, 491 So.2d

⁵⁹ The remark that the statute "does not constitute a license to bring the issue of adultery into every case where alimony is involved" was quoted with approval six years later in *Swift v. Swift*, 617 So.2d 834, 835 (Fla.App. 4 Dist. 1993).

1124 (Fla.1986). Thus, the role of marital misconduct in the trial court's consideration of the issue of alimony has not yet been fully defined and must be considered on a case-by-case basis.

Smith v. Bloom, 506 So.2d 1173, 1176 (Fla.App. 4 Dist. 1987).

A trial court in Florida denied wife's petition for alimony on the sole ground of “marital misconduct” — that she had “left the marital domicile to move in with a woman with whom she had fallen in love.” An intermediate appellate court in Florida reversed and summarized the rule in *Noah*:

In *Noah v. Noah*, 491 So.2d 1124 (Fla. 1986), the supreme court reaffirmed its position that the primary standard to be used by a trial court in considering an alimony award is the need of one spouse and the ability of the other spouse to pay. In *Noah*, the court rejected evidence of adultery as a relevant factor in making such awards unless the adultery caused a depletion of family resources. *Id.* at 1127. (quoting *Williamson v. Williamson*, 367 So.2d 1016 (Fla. 1979) (“Alimony is not a weapon to be used solely to punish an errant spouse”). See also *Eckroade v. Eckroade*, 570 So.2d 1347, 1349 (Fla. 3d DCA 1990) (fact that one party was involved in serious relationship with third party is insufficient reason to deny alimony or to divide the marital assets inequitably); *Pardue v. Pardue*, 518 So.2d 954, 956 (Fla. 1st DCA 1988) (improper to refuse alimony merely because of evidence of requesting spouse's adultery). Mr. Heilman's argument that the family's emotional devastation at the news of the extra-marital affair was sufficiently financially related to constitute a depletion of marital assets is not persuasive. No evidence was presented that the wife's extra-marital relationship “translated” into a depletion of family resources. *Noah*, 491 So.2d at 1127.

Heilman v. Heilman, 610 So.2d 60, 61 (Fla.App. 3 Dist. 1992).

In 1994, another intermediate appellate court in Florida summarized the rule in *Noah* and approved *Heilman*:

In its findings in support of the award of permanent periodic alimony, the court specifically found that Husband's marital misconduct, consisting of many affairs on Husband's part, which caused appellee, Edda L. Santoro (Wife), years of emotional distress, was one of several factual bases relied upon by the trial judge for the award. However, the rule in such cases is that unless such marital misconduct causes a depletion of marital assets, thus affecting one spouse's ability to pay alimony or the other spouse's need for alimony, it may not be used as a basis for an award of alimony. *Noah v. Noah*, 491 So.2d 1124 (Fla. 1986); *Heilman v. Heilman*, 610 So.2d 60 (Fla. 3d DCA 1992).

Since the court's finding here is not based upon a further finding of any untoward financial effects of Husband's adultery, but is based on the emotional consequences to Wife, we conclude that the court erred in considering evidence of Husband's marital misconduct in fashioning an award of permanent periodic alimony. See *Green v. Green*, 501 So.2d 1306 (Fla. 4th DCA 1986), *rev. denied*, 513 So.2d 1061 (Fla. 1987).

Santoro v. Santoro, 642 So.2d 86, 87 (Fla.App. 2 Dist. 1994).

Illinois (1883-1998)

Spitler, (Ill. 1883)

In 1883, the Illinois Supreme Court reviewed the common law about misconduct of the wife barring alimony to her:

As the right to permanent alimony, so far as it depends on general law, is founded upon the duty of the husband to support the wife, it therefore legally, as well as logically, follows, that when this duty ceases the right also ceases. Hence it is generally held, in the absence of statutory provisions controlling the question, when the husband obtains a divorce on account of the misconduct of the wife, the latter will not be entitled to alimony. (2 BISHOP ON MARRIAGE AND DIVORCE, (4th ed.) secs. 376, 377.) Looking at the question on principle, the rule is certainly in harmony with other general rules governing the marital relation, as, for instance, the common law duty of the husband to support the wife is not absolute. He is bound to support her at their common home, and not under another's roof, unless his own improper conduct has forced her to seek shelter elsewhere. Hence if she abandons her home without cause, the right to support from her husband at once ceases. If, then, while the marital relation still exists, the husband is under no obligations to support the wife when she is without cause living apart from him, and particularly when living in criminal relations with another, a fortiori he will not be liable for her support after he has obtained a divorce from her on account of her desertion and adultery.

But a number of States of the Union, including our own, have passed statutes somewhat modifying the common law doctrine on the subject of alimony. The construction given to the statute in these cases establishes the proposition that the fact of granting the husband a divorce on account of the misconduct of the wife, will not of itself necessarily deprive the wife of alimony in all cases, as it would but for the operation of the statute. On the other hand, because alimony may, under special circumstances, be decreed to the wife where the divorce has been granted to the husband for her misconduct, it does not follow that such an order would be warranted where the conduct of the wife, as in the present case, has been grossly improper, and the allowance of alimony is not required for the support of their common offspring, as it was in those cases.

It was manifestly not the object of the legislature in adopting the provisions of the statute above cited, to abrogate the general principles or policy of the law relating to the subject of alimony, but rather to clothe the courts with power to mitigate occasional hardships that would otherwise occur on account of the inflexible rule that the wife is not entitled to alimony where the divorce is granted to the husband on account of her own misconduct.

Spitler v. Spitler, 108 Ill. 120, 1883 WL 10362 at *2-*3 (Ill. 1883).

usual rule in Illinois until 1977

Although an Illinois statute permitted a judge to award alimony to a wife who had committed misconduct during the marriage, judges in Illinois *usually* continued to follow the common-law rule that misconduct by wife barred alimony to her. For example:

- *Hickling v. Hickling*, 40 Ill.App. 73, 1891 WL 1899 (Ill.App. 1891) ("... no reason is perceived for departing from the usual rule of refusing alimony in such cases. The doctrine laid down in the case of *Spitler v. Spitler*, 108 Ill. 120, in its general scope is considered applicable to this case.");

- *M. Martin Polokow Corp. v. Industrial Commission*, 168 N.E. 271, 272 (Ill. 1929) (Worker's compensation case involving payments to the widow of a deceased employee. "The wife's right to be supported by her husband, however, may be lost or forfeited by the commission of some act inconsistent with her marital duty. Adultery by the wife relieves the husband from the obligation to support her. [citations to three cases omitted]");
- *Boylan v. Boylan*, 182 N.E. 614, 615 (Ill. 1932) ("The general rule is that, where a decree of divorce is granted to a husband because of the misconduct of the wife, she will not be entitled to alimony.");
- *Schneider v. Schneider*, 4 N.E.2d 123, 124 (Ill.App. 1936) ("The general rule is stated in *Spitler v. Spitler*, 108 Ill. 120, 121, that the right to alimony is founded upon the duty of the husband to support the wife, and when this duty ceases the right to alimony also ceases. It is generally held, in the absence of statutory provisions, that when the husband obtains a divorce on account of the misconduct of the wife, the latter will not be entitled to alimony. Where there are minor children or special circumstances, alimony may be allowed, although her fault has caused the divorce.");
- *Adler v. Adler*, 26 N.E.2d 504, 508 (Ill. 1940) ("Generally, when a divorce is awarded a husband on the fault of the wife, the latter will not be awarded permanent alimony.");
- *Fox v. Fox*, 138 N.E.2d 547, 552 (Ill. 1956) ("Generally, when a divorce is awarded a husband on the fault of the wife, the latter will not be awarded permanent alimony.");
- *Ganzer v. Ganzer*, 249 N.E.2d 660, 662 (Ill.App. 1969) ("At common law a wife, whose husband was granted a divorce due to her misconduct, was not entitled to alimony. This rule was relaxed by statute, so that the court, in its discretion and under proper circumstances, may grant alimony to an errant wife. [citations omitted] However, it has long been held that where the misconduct of the wife has been so gross, as when she had been guilty of moral delinquency such as adultery, it would be an abuse of discretion to award her permanent alimony. [citations omitted]");
- *Pohren v. Pohren*, 300 N.E.2d 288, 292 (Ill.App. 1973) ("As a general rule when a divorce is granted to husband because of the fault or misconduct of the wife, she is not entitled to, nor will she be awarded permanent alimony unless the circumstances and the equities of the case justify it.");
- *Gross v. Gross*, 318 N.E.2d 659, 663 (Ill.App. 1974) ("It is an almost universal rule that permanent alimony will be denied to a wife who is guilty of adultery. 24 Am.Jur.2d, Divorce and Separation, Sec. 622; Anno: 9 A.L.R.2d 1027, Sec. 2; 34 A.L.R.2d 349, Sec. 13; 16A I.L.P. Divorce, Sec. 154; 27A C.J.S. Divorce s 229(3)b.");
- *Carterfield v. Carterfield*, 350 N.E.2d 491, 493 (Ill.App. 1976) ("An award of alimony does not depend on the question of fault. *Pohren v. Pohren*, 13 Ill.App.3d 380, 300 N.E.2d 288, 292 (3d Dist., 1973), although it has been said as a general rule, that 'when a divorce is granted to a husband because of the fault or misconduct of the wife, she is not entitled to, nor will she be awarded, permanent alimony unless the circumstances and the equities of the case justify it.' *Ibid.*").

- *Lamp v. Lamp*, 410 N.E.2d 31, 35 (Ill. 1980) ("... permanent alimony, whether periodic or in gross, is not normally awarded to the spouse whose fault was the basis for the divorce.").⁶⁰

The above cited set of cases show that courts in Illinois prior to 1977 generally denied alimony to a wife who commits misconduct. There is a second set of cases in Illinois that hold that the innocent wife of a husband who commits misconduct is generally entitled to alimony.⁶¹ These two sets of cases, taken together, show that alimony often punished a husband for his misconduct, or that the denial of alimony often punished a wife for her misconduct — in other words, alimony was often a form of punishment. Bizarrely, there is a third set of cases in Illinois that explicitly denies that alimony is punishment for marital misconduct.⁶² This third set of cases would be correct after the no-fault divorce statute took effect in 1977 and misconduct became irrelevant to alimony. But prior to 1977, this third set of cases is inconsistent with other cases decided by the same Illinois courts.

modern law in Illinois

In 1977, Illinois enacted a statute for alimony (maintenance) that explicitly says alimony will be awarded “without regard to marital misconduct”. In effect, this statute overruled the above cited first set of cases, which had maintained the common-law rule that marital misconduct by a party bars alimony to that party. So far as I could find in a search of Westlaw on 5 Oct 2008, courts in Illinois have *not* recognized the legislative overruling of parts of the Illinois Supreme

⁶⁰ *Lamp* involved modification of the award of the marital home and child custody, according to the new 1977 no-fault divorce statute. *Lang* does *not* mention that the 1977 statute explicitly prohibits consideration of marital misconduct in the determination of alimony.

⁶¹ *Darnell v. Darnell*, 212 Ill.App. 601, 1918 WL 2083 (Ill.App. 1918) (Alimony "is an allowance based upon the common-law obligation of the husband to support his wife, which is not removed by a divorce obtained for his misconduct. 14 Cyc. 742, 743; *Adams v. Storey*, 135 Ill. 448; *Stillman v. Stillman*, 99 Ill. 196."); *Gercke v. Gercke*, 163 N.E. 323, 325 (Ill. 1928) ("The divorce having been granted for the fault of defendant [husband], no valid reason is perceived for denying alimony [to wife]."); *Savich v. Savich*, 147 N.E.2d 85, 88 (Ill. 1958) ("In considering next the propriety of the trial court's division of the property, we are cognizant that a wife granted a divorce for the misconduct of the husband is entitled to alimony, in the absence of special circumstances, and that this right, arising out of the marital relation, is founded upon the legal duty of the husband to support his wife, which is not removed by a divorce obtained for his misconduct. [citation to four cases omitted]"); *Rodely v. Rodely*, 192 N.E.2d 347, 350 (Ill. 1963) (citing *Savich* for proposition: "It may be agreed that a wife granted a divorce for the misconduct of the husband is entitled to alimony, in the absence of special circumstances"); *Doody v. Doody*, 190 N.E.2d 734, 736 (Ill. 1963) (quoting *Savich* with approval).

⁶² *Ratray v. Ratray*, 357 N.E.2d 701, 703 (Ill.App. 1976) ("[Alimony's] purpose is not to visit punishment on one spouse, but to furnish the recipient spouse with support or to contribute to that spouse's partial support. (*Buehler v. Buehler* (1940), 373 Ill. 626, 632, 27 N.E.2d 466 [, 469]; *Byerly v. Byerly* (1936), 363 Ill. 517, 526, 2 N.E.2d 898 [, 902]; *Borowitz v. Borowitz* (1974), 19 Ill.App.3d 176, 183, 311 N.E.2d 292 [, 298].)").

Court holdings in *Spitler, Boylan, Adler, Fox, and Lamp*.⁶³ The following cases are relevant to misconduct and alimony in Illinois, after the no-fault divorce statute was enacted:

- *Schuppe v. Schuppe*, 387 N.E.2d 346, 349 (Ill.App. 1979) (quoting statute);
- *In re Marriage of Hart*, 551 N.E.2d 737, 744 (Ill.App. 1990) (in determining maintenance: "Marital misconduct and morality are not considered."). Quoted with approval by *In re Marriage of Severino*, 698 N.E.2d 193, 195 (Ill.App. 1998).

Williams, (Va. 1948)

In 1948 the Virginia Supreme Court wrote:

As the divorce laws of this State embody equitable principles, a wife should not be allowed to claim the right to support if she has been guilty of such misconduct as to constitute cause for divorce. Nor in equity and good conscience is she entitled to separate maintenance and support if she has permanently left her husband for cause legally insufficient to be made the basis for a judicial proceeding for divorce. *Hendry v. Hendry*, 172 Va. 368, 1 S.E.(2d) 340 [(Va. 1939)].

She cannot elect to depart from her husband's home and live separately from him and so destroy the matrimonial relation, and yet invoke the aid of equity to secure maintenance and support, unless such action on her part is based on conduct which would be grounds for release from the matrimonial status. To hold otherwise would relieve a wife of her matrimonial obligations and encourage the destruction of the marital relation where there were actually no grounds for divorce.

Williams v. Williams, 50 S.E.2d 277, 280 (Va. 1948).

⁶³ During 1973-77, just before the Illinois legislature enacted the no-fault statute, courts in Illinois began to relax the rule that a wife who was guilty of marital misconduct was undeserving of alimony. See *Pohren*, 300 N.E.2d 288 (Ill.App. 1973); *Gross v. Gross*, 318 N.E.2d 659 (Ill.App. 1974); *McClure v. McClure*, 331 N.E.2d 829 (Ill.App. 1975) (Alimony awarded to wife who was "permanently unemployable" because of multiple sclerosis, "even though fault has been attributed to his wife."); *Harambasic v. Harambasic*, 370 N.E.2d 1251, 1255 (Ill.App. 1977) (" 'Alimony is not a prize to be awarded the winner of the divorce contest.' *Fox v. Fox* (1970), 129 Ill.App.2d 209, 215, 262 N.E.2d 607, 610. Rather the court, in its discretion, will determine what is fit, reasonable, just and equitable. (*Fox* at 215, 262 N.E.2d 607.) Since the statute does not refer to nor make an award dependent upon the question of fault, the court is empowered to award alimony to a wife against whom a divorce is granted. (*Pohren v. Pohren* (1973), 13 Ill.App.3d 380, 384, 300 N.E.2d 288.) While formerly an erring wife was considered ineligible for alimony, Illinois courts now will weigh all facts and circumstances in any given case to determine the propriety of awarding alimony. (See *Gold v. Gold* (1974), 17 Ill.App.3d 11, 308 N.E.2d 75; *Bottigliero v. Bottigliero* (1972), 7 Ill.App.3d 907, 289 N.E.2d 85.)").

Brown, (Tenn. 1955)

Husband was granted a divorce because of “cruel and inhuman treatment” by his wife. The trial court awarded alimony to the wife. The Tennessee Supreme Court reversed the award of alimony:

The wife in such cases thus has no right to alimony and the husband is under no corresponding duty to provide it. Therefore, under the statutes of this state the courts, on granting a husband a divorce, have no power to award the wife alimony.

.... Divorce is conceived as a remedy for the innocent against the guilty. *Brewies v. Brewies*, 27 Tenn.App. 68, 178 S.W.2d 84 [(Tenn.App. 1944)]. The unfortunate person against whom a divorce is granted may suffer not only the severance of his or her marital relations, but also the deprivation of those rights, such as alimony, which arise out of the marital relation. These provisions thus are intended to further the policy of rewarding the innocent and punishing the guilty. *Allen v. McCullough*, 49 Tenn. 174, 188 [(Tenn. 1870)]. The statutes may in some circumstances seem unwise, and indeed even harsh, but it is not for the courts to decide the policy of the state in this regard.

Brown v. Brown, 281 S.W.2d 492, 498-499 (Tenn. 1955).

This decision is remarkable, because it is rare for judges to explicitly say that alimony is a punishment for misconduct during the marriage.

Courson, (Md. 1957)

In 1957 the Maryland Supreme Court wrote:

.... In 82 A.L.R. p. 540, it is stated: ‘It is an almost universal rule that permanent alimony will be denied to a wife who has been found guilty of adultery’, citing many cases.

There is a long line of decisions and authorities that hold that where there is no absolute divorce, adultery by the wife is a defense to her suit for separate maintenance and support, or it will justify a modification or revocation of a decree for alimony. *Cariens v. Cariens*, 50 W.Va. 113, 40 S.E. 335, 55 L.R.A. 930; *Jennison v. Jennison*, 136 Ga. 202, 71 S.E. 244; 6 A.L.R. at pages 34, 35, where many cases are cited. See also BISHOP ON MAR., DIV. AND SEP. (1 Ed.), Vol. 1 par. 1230, wherein is stated: ‘Ordinarily if, while husband and wife are living apart under circumstances rendering him liable for her support, she commits adultery, his liability ceases, * * *.’ And to like effect is Nelson, DIVORCE AND ANNULMENT, (2 Ed.) Vol. 3 par. 32.21, where it is said: ‘Where both parties are at fault, or guilty of marital misconduct, separate maintenance will be denied the wife, since the fault or misconduct of one may not be set off against that of the other so as to leave the wife's right to maintenance unimpaired.’

And there is very respectable authority that holds that a wife's adultery is a defense to her claim for maintenance, notwithstanding the husband was likewise guilty of the same offense. *Piper v. Piper*, 176 A. 345, 13 N.J.Misc. 68; *Hawkins v. Hawkins*, 193 N.Y. 409, 86 N.E. 468, 19 L.R.A.,N.S., 468; *Leib v. Leib*, (Can.) 6 Terr.L.Rep. 308; *Mays v. Mays*, Sup., 22 N.Y.S.2d 702; Cf. *Com. ex rel. Crabb v. Crabb*, 119 Pa.Super. 209, 180 A. 902. And at least five States have, or had, statutes prohibiting alimony to an adulterous wife: Florida; Michigan; Minnesota; Nebraska; and Wisconsin.

In this State, a limited divorce is one from bed and board. It grants unto the injured spouse the right to live separate and apart from the one at fault. However, the parties remain

man and wife, and there is no severance of the marital bonds. Alimony stems from the common law duty of a man to support his wife, and, in Maryland, has always been considered as outlined above. We hold the proper rule, supported by reason and authority, is that when a wife, who is living separate and apart from her husband due to his fault and who has obtained no more than a limited divorce from him, commits adultery, she forfeits her right to her husband's support and the future payments of alimony. We agree with the New Jersey Court of Chancery in the case of *G v. G*, 67 N.J.Eq. 30, 56 A. 736, 740, when it said: 'Under a divorce a mensa et thoro the marriage relation still exists, and with it the duty of chastity. Such a divorce is not a license to the wife to indulge in sexual connection with another man, * * *.' Holding as we do, it afforded the wife no justification for complaint when the Chancellor suspended her alimony payments.

It will be noted, we have not been required in this suit to pass upon the right of a wife, who has been granted an absolute divorce and alimony and who thereafter commits adultery, to continue to receive support from the former husband, and express no opinion thereon at this time.

Courson v. Courson, 129 A.2d 917, 919-920 (Md. 1957).

Bruner, (La. 1978)

In 1978, the Louisiana Supreme Court wrote:

The jurisprudence of Louisiana has consistently held that a wife cannot obtain permanent alimony if she has been at fault in causing separation or divorce. In *Adler v. Adler*, 239 So.2d 494 (La.App. 4th Cir. 1970), it was stated:

To constitute fault within the meaning of Article 160, the wife's misconduct must not only be of a serious nature but must also be an independent contributory or proximate cause of the separation rather than a justifiable or natural response to initial fault on the part of the husband. [citations to ten cases omitted] And the wife bears the burden of proving with reasonable certainty both the fact that she was free from fault and the fact that she has not sufficient means for her support. [citations to nine cases omitted]

Bruner v. Bruner, 364 So.2d 1015, 1017 (La. 1978).

The Louisiana Supreme Court concluded:

It is thus our conclusion that for the wife to be entitled to post-divorce alimony our law requires that she be free from fault both prior to the separation judgment and prior to the divorce.

....

We therefore conclude that it is not unconstitutional to require a wife seeking alimony under Article 160 to be free from fault before both the separation and the divorce.

Bruner v. Bruner, 364 So.2d 1015, 1019 (La. 1978).

Roach, (Pa.Super. 1985)

In 1985, an intermediate appellate court in Pennsylvania stated a long-standing rule.

It is well settled that the obligation of support continues until it is shown that the conduct of the dependent spouse provides a ground for divorce. *Morley v. Morley*, 283 Pa.Super. 397, 424 A.2d 524 (1981); *Hellman v. Hellman*, 246 Pa.Super. 536, 371 A.2d 964 (1977).

Moreover, the conduct claimed to nullify the obligation must be proven with clear and convincing evidence. [citations omitted]

Roach v. Roach, 487 A.2d 27, 28 (Pa.Super. 1985), *appeal denied* (Pa. 1985).

Cited with approval in *Crawford v. Crawford*, 633 A.2d 155, 159 (Pa.Super. 1993); *Asin v. Asin*, 690 A.2d 1229, 1232 (Pa.Super. 1997); *Capuano v. Capuano*, 823 A.2d 995, 1002, ¶15 (Pa.Super. 2003) (“Furthermore, it is well established that a dependent spouse who engages in conduct that would constitute grounds for divorce is not entitled to spousal support.”).

Mani, (NJ 2005)

In 2005, the New Jersey Supreme Court traced the history of alimony and how fault might bar alimony:

The history of alimony is instructive. In early England, two forms of marital dissolution existed. The most common was an ecclesiastical divorce from bed and board (a mensa et thoro). Robert Kirkman Collins, *The Theory of Marital Residuals: Applying An Income Adjustment Calculus to the Enigma of Alimony*, 24 HARV. WOMEN'S L.J. 23, 28 (2001). In reality that “divorce” was a legal separation that, in accordance with religious teaching on the indissolubility of marriage, did not terminate the marital relationship. John Witte Jr., *The History and Evolution of Marriage From Sacrament to Contract: Marriage, RELIGION AND LAW IN WESTERN TRADITION* 156, 160-61 (1997). The other form—a civil divorce (a vinculo matrimonii)—which literally means severing the chains of matrimony, although technically available, was extremely rare because it required an act of Parliament. 13 HALSBURY'S LAWS OF ENGLAND, 245 (1975).

Alimony was granted only in the former class of cases on the theory that husband was obliged to continue to support his wife as long as they remained married. Collins, *supra*, 24 HARV. WOMEN'S L.J. at 28-29. Somehow, with the passage of time, the distinction between true divorce and mere separation was obliterated and alimony began to be awarded in all cases. No rationale was advanced to explain why parties, who were no longer married, remained economically bound to one another. As one legal scholar put it:

By the time that matrimonial law reform in Great Britain created universally accessible civil divorce in the mid-nineteenth century, the concept of alimony was so well-accepted that it was carried over and applied to those new cases where the marriage itself was actually ending, without apparent reflection or explanation as to why it should continue once the marital relationship had been extinguished. Section 32 of the Matrimonial Causes Act [of] 1857 gave the judge discretion to order a husband to provide for his wife even after the marriage had ended in an amount reflecting her own wealth, his own means, and their respective conduct during the marriage. Posterity was not, however, provided with a rationale.

[*Ibid.*]

Divorce based on the English practice was available in the American colonies from the earliest times. *Maynard v. Hill*, 125 U.S. 190, 206, 8 S.Ct. 723, 727, 31 L.Ed. 654, 657 (1888). The concept of alimony also carried over. Again, as had been the case in England, the reason for alimony, outside the legal separation scenario, remained an enigma. 2 Homer Harrison Clark, *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES*, 257-58 (2d ed. 1988). That lack of clarity regarding the theoretical underpinning of post-divorce alimony explains why, although alimony is now awarded in every jurisdiction, Collins, *supra*, 24 HARV. WOMEN'S L.J. at 31, there is no consensus regarding its purpose.

Indeed, many distinct explanations have been advanced for alimony. *Id.* at 23. They include its characterization as damages for breach of the marriage contract, Margaret F. Brinig & June R. Carbon, *The Reliance Interest in Marriage and Divorce*, 62 TUL. L.REV. 855, 882 (1988); as a share of the benefits of the marriage partnership, *Rothman v. Rothman*, 65 N.J. 219, 229, 320 A.2d 496 (1974); as damages for economic dislocation (based on past contributions), Elisabeth M. Lands, *Economics of Alimony*, 7 J. LEGAL. STUD. 35 (1978); as damages for personal dislocation (foregoing the chance to marry another), Lloyd Cohen, *Marriage, Divorce, Quasi Rents; Or, "I Gave Him the Best Years of My Life,"* 16 J. LEGAL STUD. 267, 276 (1987); as compensation for certain specific losses at the time of the dissolution, A.L.I., *Principles of Law of Family Dissolution: Analysis and Recommendations*, 8 DUKE J. GENDER L. & POL'Y 1, 28 (2001); as deterrence or punishment for marital indiscretion, Brinig & Carbone, *supra*, 62 TUL. L.REV. at 860-61; and as avoidance of a drain on the public fisc, *Miles v. Miles*, 76 Pa. 357, 358 (1874).

Obviously, some of those purposes favor consideration of fault and some disfavor it. Thus, for example, in jurisdictions that continue to consider alimony as a punishment for marital indiscretion, deterrence against bad behavior, or damages for breach of the marital contract, fault logically figures into the calculus. Contrariwise, in those jurisdictions that view alimony solely in economic terms and prohibit its characterization as punitive, fault would not likely be considered as a weight at all. In other words, the purpose that is identified by a jurisdiction as the rationale for awarding alimony is closely connected to the question whether fault should be a factor in its calculation.

New Jersey cases have long expressed the view that alimony is neither a punishment for the payor nor a reward for the payee. *Aronson v. Aronson*, 245 N.J.Super. 354, 364, 585 A.2d 956 (App.Div. 1991); *Turi v. Turi*, 34 N.J.Super. 313, 322, 112 A.2d 278 (App.Div. 1955); *O'Neil v. O'Neil*, 18 N.J. Misc. 82, 89, 11 A.2d 128(Ch.), *aff'd*, 127 N.J. Eq. 278, 12 A.2d 839 (E. & A. 1940). Rather, it is an economic right that arises out of the marital relationship and provides the dependent spouse with "a level of support and standard of living generally commensurate with the quality of economic life that existed during the marriage." *Stiffler v. Stiffler*, 304 N.J.Super. 96, 99, 698 A.2d 549 (Ch. 1997) (quoting *Koelble v. Koelble*, 261 N.J.Super. 190, 192-93, 618 A.2d 377 (App.Div. 1992)). If that were our sole benchmark, resolving the issue whether fault should be an alimony consideration would be relatively simple. The answer would be "no." There is, however, more to consider. *Mani v. Mani*, 869 A.2d 904, 908-910 (N.J. 2005).

The rules established in *Mani* are that

We agree and hold that in cases in which marital fault has negatively affected the economic status of the parties it may be considered in the calculation of alimony. By way of example, if a spouse gambles away all savings and retirement funds, and the assets are inadequate to allow the other spouse to recoup her share, an appropriate savings and retirement component may be included in the alimony award.

....

Thus we hold that to the extent that marital misconduct affects the economic status quo of the parties, it may be taken into consideration in the calculation of alimony. Where marital fault has no residual economic consequences, it may not be considered in an alimony award.

The only exception to that rule is the narrow band of cases involving the kind of egregious fault alluded to in *Gugliotta* [395 A.2d 901 (N.J.Super.A.D. 1978)] and *Lynn* [398 A.2d 141 (N.J.Super.A.D. 1979)]. Although *Gugliotta* and *Lynn* did not define egregious fault, they left open its characterization as something more than ordinary fault. It seems to us that, in this context, egregious fault is a term of art that requires not simply more, or even more public acts of marital indiscretion, but acts that by their very nature, are different in kind. By way of example but not limitation, California has legislatively barred alimony payments to a dependent spouse who has attempted to murder the supporting spouse. Cal. Fam.Code § 4324. Deliberately infecting a spouse with a loathsome disease also comes to mind. Underlying those examples is the concept that some conduct, by its very nature is so outrageous that it can be said to violate the social contract, such that society would not abide continuing the economic bonds between the parties. In the extremely narrow class of cases in which such conduct occurs, it may be considered by the court, not in calculating an alimony award, but in the initial determination of whether alimony should be allowed at all. *Mani v. Mani*, 869 A.2d 904, 916-917 (N.J. 2005).

The use of alimony to compensate a spouse where the other spouse has dissipated marital assets is a kind of “reimbursement alimony” or restitution. Even an enlightened state like New Jersey still allows “egregious fault” to bar alimony to the person who committed the fault.

statutes of 4 states bar alimony to adulterer

In September 2008, when this essay was written, the following four states — Georgia, North Carolina, South Carolina, and Georgia — had statutes that absolutely prohibited an award of alimony to an adulterous spouse. The rule in these four states is no longer the rule in the majority of the USA.

Georgia (1902-2008)

The common law in Georgia before the 1977 statute is indicated by the following cases:

- *Williams v. Williams*, 40 S.E. 782, 783 (Ga. 1902) (“... such evidence shows that the sole cause of the separation was the infidelity of the wife, uncondoned by the husband, the wife, under such circumstances, is not legally entitled to an allowance as temporary alimony. She alone being responsible for the separation, the court should not compel the husband to support her pending the divorce suit, and thus enable her to become the beneficiary of her own gross misconduct.”);
- *Goodin v. Goodin*, 142 S.E. 148, 159 (Ga. 1928) (In divorce case where wife had deserted husband for more than three years, the trial court instructed the jury: “Plaintiff [i.e., husband] contends that she has forfeited all right to any alimony for herself, by the lack of chastity during this period of three years; that a child was born to her during this period of three years’ desertion, when there had been no access by the husband whatever; and that constitutes

adultery on her part, and therefore she is not entitled to any alimony.” Wife appealed, but the Georgia Supreme Court affirmed the trial court.);

- *Hyndman v. Hyndman*, 69 S.E.2d 859, 861 (Ga. 1952) (“Wilful desertion by the wife deprives her of any rights to alimony. *Hudson v. Hudson*, 189 Ga. 410, 5 S.E.2d 912; *Rogers v. Rogers*, 202 Ga. 329, 43 S.E.2d 152 [(Ga. 1947)]”);
- *Brown v. Brown*, 124 S.E.2d 399, 401 (Ga. 1962) (“Where a wife abandons a husband without just cause, she is not entitled to alimony. *Fuller v. Fuller*, 108 Ga. 256(4), 33 S.E. 865; *Davis v. Davis*, 145 Ga. 56, 88 S.E. 566; *Brisendine v. Brisendine*, 152 Ga. 745, 111 S.E. 22; *Pace v. Pace*, 154 Ga. 712, 115 S.E. 65; *Durham v. Durham*, 156 Ga. 454, 457, 119 S.E. 702, supra; *Hunsicker v. Hunsicker*, 170 Ga. 294, 152 S.E. 581; *Fulenwider v. Fulenwider*, 188 Ga. 856, 866, 5 S.E.2d 20; *Hudson v. Hudson*, 189 Ga. 410, 413, 5 S.E.2d 912; *Mullikin v. Mullikin*, 200 Ga. 638(3), 38 S.E.2d 281; *Acree v. Acree*, 201 Ga. 359, 362, 40 S.E.2d 54; *Crute v. Crute*, 208 Ga. 724, 725, 69 S.E.2d 255; *Livingston v. Livingston*, 211 Ga. 420, 424, 86 S.E.2d 288; *Frankel v. Frankel*, 212 Ga. 643, 94 S.E.2d 728.”);
- *Mack v. Mack*, 217 S.E.2d 278, 280 (Ga. 1975) (“Adultery by the wife has been a long-standing defense to a suit for alimony. *Williams v. Williams*, 114 Ga. 772, 40 S.E. 782; 22 MERCER L.REV. 156 (1971).⁶⁴ The underlying assumption is that alimony arises out of the obligation of the husband to support and maintain his wife. If she causes the marital relationship to cease then she is not entitled to alimony payments by him.”);
- *Anderson v. Anderson*, 230 S.E.2d 272, 274 (Ga. 1976) (“If, however, the jury finds the wife has caused the divorce by her adultery, or by wilfully deserting her husband, and grants him the divorce, any alimony award to her is barred. *Mack v. Mack*, 234 Ga. 692, 217 S.E.2d 278 (1975); *Byers v. Byers*, 225 Ga. 263, 167 S.E.2d 640 (1969); *Brown v. Brown*, 217 Ga. 671, 124 S.E.2d 399 (1962); *Hyndman v. Hyndman*, 208 Ga. 797, 69 S.E.2d 859 (1952).”).

The original 1977 version of this statute said “The wife shall not be entitled to alimony if it is established by a preponderance of the evidence that the separation between the parties was caused by the wife's adultery or desertion.” *Bryan v. Bryan*, 251 S.E.2d 566, 567 (Ga. 1979). Following the U.S. Supreme Court decision in *Orr*, 440 U.S. 268 (1979), and the Georgia Supreme Court decision in *Stitt v. Stitt*, 253 S.E.2d 764 (Ga. 1979), the Georgia legislature in 1979 amended the statute to be gender neutral.

In Georgia, a current statute absolutely prohibits an award of alimony to a spouse whose adultery or desertion caused the breakup of the marriage:

A party shall not be entitled to alimony if it is established by a preponderance of the evidence that the separation between the parties was caused by that party's adultery or desertion. In all cases in which alimony is sought, the court shall receive evidence of the factual cause of the separation even though one or both of the parties may also seek a divorce, regardless of the grounds upon which a divorce is sought or granted by the court.

Georgia Code § 19-6-1(b) (enacted 1977, amended 1979, still current Sep 2008).

⁶⁴ The full citation is Kice H. Stone, “Annual Survey of Georgia Law: Domestic Relations,” 22 MERCER LAW REVIEW 1565, 156 (Winter 1971) (“It is a well established principle that adultery by the wife or abandonment of the husband by the wife is a defense to a suit for alimony.”).

Note that if a divorce is sought in Georgia on no-fault grounds, evidence of adultery or desertion by a party will still bar an award of alimony to that party.

North Carolina (1923-2008)

A North Carolina Statute enacted in 1923 said:

Provided, that in all applications for alimony under this section it shall be competent for the husband to plead the adultery of the wife in bar of her right to such alimony, and if the wife shall deny such plea, and the issue be found against her by the judge, he shall make no order allowing her any sum whatever as alimony, or for her support, but only her reasonable counsel fees.

Quoted in *Price v. Price*, 125 S.E. 264, (N.C. 1924); *Byerly v. Byerly*, 140 S.E. 158, 158 (N.C. 1927).

Then North Carolina General Statute § 50-16.6(a) provided that

Alimony or alimony pendente lite shall not be payable when adultery is pleaded in bar of demand for alimony or alimony pendente lite, made in an action or cross action, and the issue of adultery is found against the spouse seeking alimony, but this shall not be a bar to reasonable counsel fees.

Quoted in *Wright v. Wright*, 188 S.E.2d 317, 320 (N.C. 1972).

Statute § 50-16.6(a) was in force as early as 1971 and was repealed in 1995. *Austin v. Austin*, 183 S.E.2d 420, 427 (N.C.App. 1971); *Coombs v. Coombs*, 468 S.E.2d 807, 809 (N.C.App. 1996).

North Carolina has a current statute that provides an absolute bar to alimony when the recipient has committed adultery:

In an action brought pursuant to Chapter 50 of the General Statutes, either party may move for alimony. The court shall award alimony to the dependent spouse upon a finding that one spouse is a dependent spouse, that the other spouse is a supporting spouse, and that an award of alimony is equitable after considering all relevant factors, including those set out in subsection (b) of this section. If the court finds that the dependent spouse participated in an act of illicit sexual behavior, as defined in G.S. 50-16.1A(3)a., during the marriage and prior to or on the date of separation, the court shall not award alimony. If the court finds that the supporting spouse participated in an act of illicit sexual behavior, as defined in G.S. 50-16.1A(3)a., during the marriage and prior to or on the date of separation, then the court shall order that alimony be paid to a dependent spouse. If the court finds that the dependent and the supporting spouse each participated in an act of illicit sexual behavior during the marriage and prior to or on the date of separation, then alimony shall be denied or awarded in the discretion of the court after consideration of all of the circumstances. Any act of illicit sexual behavior by either party that has been condoned by the other party shall not be considered by the court.

North Carolina General Statute § 50-16.3A(a) (enacted 1995, amended 1998, current Sep 2008). Part quoted in *Brannock v. Brannock*, 523 S.E.2d 110, 112, 115 (N.C.App. 1999).

Notice that this current statute contains a “completely new” requirement that an adulterous supporting spouse pay alimony to the innocent dependent spouse. *Brannock*, 523 S.E.2d at 115.

Such a requirement, regardless of the need of the dependent spouse, seems intended to punish the adulterous supporting spouse.

South Carolina (1973-2008)

In South Carolina, a current statute absolutely prohibits an award of alimony to a spouse who committed adultery:

No alimony may be awarded a spouse who commits adultery before the earliest of these two events: (1) the formal signing of a written property or marital settlement agreement or (2) entry of a permanent order of separate maintenance and support or of a permanent order approving a property or marital settlement agreement between the parties.

S.C.Code Ann. § 20-3-130(A) (amended 1990, current Sep 2008).

Quoted in *Rutherford v. Rutherford*, 414 S.E.2d 157, 162 (S.C. 1992); *Nemeth v. Nemeth*, 481 S.E.2d 181, 184-185 (S.C.App. 1997); *Griffith v. Griffith*, 506 S.E.2d 526, 531 (S.C.App. 1998); *Brown v. Brown*, 665 S.E.2d 174, ___ (S.C.App. 2008).

In South Carolina, this statutory bar goes back many years. In the early 1970s, § 20-113 of the South Carolina statutes said: “But no alimony shall be granted to the adulterous wife.” *Herbert v. Herbert*, 194 S.E.2d 238, 239 (S.C. 1973) (“The only class barred absolutely from alimony is the adulterous wife.”).

West Virginia (1872-2008)

Before 1969, the common law in West Virginia was the same as the common law in Virginia:

Alimony had its origin in the legal obligation of the husband, incident to the marriage state, to maintain his wife in a manner suited to his means and social position, and although it is her right, she may by her misconduct forfeit it; and where she is the offender, she cannot have alimony on a divorce decreed in favor of the husband. So long as he has committed no breach of marital duty, he is under no obligation to provide her a separate maintenance, for she cannot claim it on the ground of her own misconduct. 2 BISHOP ON MARRIAGE & DIVORCE, § 377; *Carr v. Carr*, 22 Gratt. 168, 173 [(Va. 1872)].

Harris v. Harris, 31 Gratt. 13, 1878 WL 5903 at *3 (Va. 1878).

Cited with approval in *State ex rel. Cecil v. Knapp*, 105 S.E.2d 569, 574 (W.Va. 1958).

Quoted with approval in *Beard v. Worrell*, 212 S.E.2d 598, 606 (W.Va. 1974).

In 1969, the West Virginia legislature passed a statute that provides an absolute bar to alimony when the recipient has either committed adultery or deserted the other spouse.

W.Va.Code, 48-2-15(i) (1991), bars a person from alimony in only three instances: (1) where the party has committed adultery; (2) where, subsequent to the marriage, the party has been convicted of a felony, which conviction is final; and (3) where the party has actually abandoned or deserted the other spouse for six months. In those other situations where fault is considered in awarding alimony under W.Va.Code, 48-2-15(i), the court or family law master shall consider and compare the fault or misconduct of either or both of the parties and the effect of such fault or misconduct as a contributing factor to the deterioration of the marital relationship.

Rexroad v. Rexroad, 414 S.E.2d 457, 461 (W.Va. 1992).

Quoted with approval in *Hastings v. Hastings*, 497 S.E.2d 203, 207 (W.Va. 1997); *Drennen v. Drennen*, 575 S.E.2d 299, 304 (W.Va. 2002).

In 1997, the West Virginia Supreme Court recognized that state was one of four states in the USA that made adultery an absolute bar to receiving alimony. Therefore, the rule in West Virginia is no longer the rule in the majority of the USA.

It appears that only three other jurisdictions join West Virginia in making adultery a complete bar to alimony.[FN13]

FN13. “[A]dultery is a complete bar to alimony ... in Georgia, North Carolina, [and] South Carolina[.]” Ira Mark Ellman, *The Place of Fault in A Modern Divorce Law*, 28 ARIZ. ST. L.J. 773, 787 n. 30 (1996).

Michael D.C. v. Wanda L.C., 497 S.E.2d 531, 536, n.13 (W.Va. 1997).

Most Egregious Fault: Murder

Small v. Rockfeld, (N.J. 1974)

In 1974, the New Jersey Supreme Court wrote:

This Court of course adheres to the highly equitable principle which imposes a constructive trust on property unjustly obtained by a husband through the murder of his wife. See *Neiman v. Hurff*, 11 N.J. 55, 93 A.2d 345 (1952); *In re Estate of Kalfus*, 81 N.J.Super. 435, 195 A.2d 903 (Ch.Div. 1963); *Whitney v. Lott*, 134 N.J.Eq. 586, 36 A.2d 888 (Ch. 1944); Cf. *Jackson v. Prudential Ins. Co. of America*, 106 N.J.Super. 61, 254 A.2d 141 (App.Div. 1969); *Turner v. Prudential Insur. Co. of America*, 60 N.J.Super. 175, 158 A.2d 441 (Ch.Div. 1960). Although in each of the cited cases the murder was committed in New Jersey and was an ensuing New Jersey criminal conviction, we do not suggest at all that satisfactory proof other than criminal conviction would not suffice. Cf. *Costanza v. Costanza*, 66 N.J. 63, 328 A.2d 230 (1974); *In the Estate of G., Decd., M. v. L. and Others*, (1946) P. 183 (C.A.); 62 L.Q.Rev. 218 (1946). In any event the Wrongful Death Act specifically contemplates that action thereunder may be maintained in the absence of criminal proceedings; it provides that when the death is caused by a wrongful act, neglect or default, action for damages may be maintained even though ‘the death was caused under circumstances amounting in law to a crime.’ N.J.S.A. 2A:31-1.

Small v. Rockfeld, 330 A.2d 335, 343 (N.J. 1974).

This opinion held that spousal immunity for torts was forfeited “where one parent deliberately and willfully shoots and kills the other parent”. *Ibid.* at 343-344.

Stevens, (N.Y.A.D. 1985)

A trial court in New York state awarded defendant-husband a divorce "on the grounds of the plaintiff's cruel and inhuman treatment and adultery", but awarded plaintiff-wife \$100/week in alimony for next seven years. On appeal by husband, the amount of alimony was cut in half and shortened to six years, saving husband \$20,800. The appellate court said:

In fixing the amount of maintenance, we believe that plaintiff's marital fault is relevant (see *McMahan v. McMahan*, 100 A.D.2d 826, 827, 829, 474 N.Y.S.2d 974 [Kassal, J., dissenting]; *Blickstein v. Blickstein*, 99 A.D.2d 287, 293, 472 N.Y.S.2d 110). Here, beyond openly engaging in an adulterous relationship and threatening future involvement in similar affairs, plaintiff repeatedly berated defendant in the presence of his co-workers at his place of employment, his friends and his family; on a number of occasions she physically abused defendant, striking and scratching him, pulling his hair and even biting him twice; and in the course of breaking into his locked briefcase, she wounded him with a kitchen knife. Without recounting additional instances of marital fault established at trial, we find the circumstances already outlined sufficiently egregious that it would be unjust to ignore plaintiff's behavior. Taking into account factors 8, 9 and 10, we conclude that the maintenance award should be reduced to \$50 per week; this will provide plaintiff funds sufficient to keep her from becoming a public charge. Furthermore, the maximum duration of the maintenance award is to be six years, rather than seven as fixed by the trial court. The record indicates that within six years plaintiff, who has just embarked upon a career selling real estate, is expected to become self supporting (see *Patti v. Patti*, 99 A.D.2d 772, 773, 472 N.Y.S.2d 20).

While plaintiff's fault is to be heeded in arriving at the maintenance award, her misconduct in the waning months of the marriage was not, in our view, so outrageous and extreme as to work a divestiture of the property interest she earned over 15 years of marriage to defendant (see *Hopper v. Hopper*, 103 A.D.2d 911, 912, 478 N.Y.S.2d 147; *Blickstein v. Blickstein*, supra, 99 A.D.2d p. 292, 472 N.Y.S.2d 110). Accordingly, we affirm the trial court's equitable distribution determination.

Stevens v. Stevens, 484 N.Y.S.2d 708, 710 (N.Y.A.D. 3 Dept. 1985).

Noble, (Utah 1988)

After three years of marriage, husband shot wife in head with a .22 rifle as she lay in bed. Wife filed for divorce. The trial judge "specifically found that Elaine had suffered permanent injuries which left her unemployable, unable to operate a motor vehicle, and 'totally and permanently disabled.'" The trial judge "expressly took into account Elaine's increased living expenses and decreased earning ability resulting from the disabilities caused by the shooting." Wife was awarded 1/3 of husband's premarital assets plus alimony at \$750/month. The Utah Supreme Court unanimously affirmed. *Noble v. Noble*, 761 P.2d 1369 (Utah 1988).

Mosbarger, (Fla.App. 1989)

Carol Ann and Richard Dennis Mosbarger were married in 1959. In January 1987, husband filed for divorce, apparently because of wife's unspecified psychological problems. In June 1987, she fired two shots from a pistol at her husband, missing him, but wounding an oak tree. She spent 20 days in jail and five months in a psychiatric hospital while awaiting a criminal trial. In September 1987, she pled guilty to attempted murder in a plea bargain that avoided time in prison. The final judgment of the divorce court in December 1987 awarded most of the marital property to husband (including all of his military pension and all of his pension from a subsequent employer) and ordered him to pay \$500/month in alimony to his ex-wife. Wife appealed and the appellate court held that, among other ways shortchanging the wife, the alimony was only half of what wife needed.⁶⁵ The appellate court explained:

The trial court was clearly bothered by the wife's attempt to kill her husband. We do not condone her actions, and she should not benefit in this proceeding because of her criminal conduct. Nevertheless, Florida's divorce system generally attempts to apply no-fault principles. Since adultery, as a statutorily recognized act of marital misconduct, is only considered when it translates into a greater financial need for the spouse or a depletion of the family resources, we are not inclined to believe that Mrs. Mosbarger's criminal conduct, which is not a statutorily recognized act of marital misconduct, should be treated more severely in this domestic proceeding. § 61.08(1), Fla.Stat. (1987); *Noah v. Noah*, 491 So.2d 1124 (Fla. 1986). See also *West v. West*, 414 So.2d 189 (Fla. 1982) (intentional tort claim barred by interspousal immunity, but divorce court may consider economic damages caused by the intentional tort in award of alimony to injured spouse). Beyond the consequential economic damage to the family unit caused by the criminal conduct, any additional penalty which Mrs. Mosbarger receives should occur within the jurisdiction of the criminal court under the facts of this case.

This case requires a careful delineation between Mrs. Mosbarger's isolated criminal activity and her more pervasive psychiatric illness. Before the trial court imputes income to Mrs. Mosbarger during her period of probation, that court should first expressly determine that she would have been employable, even in light of her mental illness, except for the criminal sentence. Cf. § 61.30(2)(b), Fla.Stat. (1987) (income imputable for child support only if parent is underemployed "absent physical or mental incapacity").

If Mrs. Mosbarger had been suffering from a severe, but curable, physical disease, one suspects that the trial court would have responded more generously to her predicament. When the mental disorder is clearly manifested and professionally diagnosed, we are not inclined to believe it should be treated with less compassion. See *Simzer v. Simzer*, 514 So.2d 372 (Fla. 2d DCA 1987); *Lange v. Lange*, 357 So.2d 1035 (Fla. 4th DCA 1978), *cert. denied*, 380 So.2d 1027 (Fla. 1980). Among the factors which the trial court must consider in

⁶⁵ *Mosbarger v. Mosbarger*, 547 So.2d 188, 191 (Fla.App. 2 Dist. 1989)("Mrs. Mosbarger received an equitable distribution which appears insufficient to pay her existing obligations for medical and legal services, and an award of alimony which is no more than 50% of the amount necessary to modestly support this fifty-year-old woman who is suffering from a psychiatric disorder that will undoubtedly limit her employment opportunities. we find that the trial court abused its discretion by awarding an overall scheme which shortchanged the wife.").

awarding alimony are both the physical and emotional condition of each party. § 61.08(2)(c), Fla.Stat. (1987).

Mosbarger v. Mosbarger, 547 So.2d 188, 191 (Fla.App. 2 Dist. 1989).

Because the holding in *Mosbarger* is an exception to the general rule that egregious contact by a spouse prohibits an award of alimony to that spouse, *Mosgarger* needs to be distinguished from other cases. The weak punishment for wife's crime, and the holding of the appellate court that wife's attempted murder of husband did not bar wife from receiving alimony, both suggest to me that both the criminal court and appellate divorce court considered wife to be mentally ill, and thus her attempted murder was *not* a willful act. One wonders why her criminal defense lawyer did not make a "not guilty by reason of insanity" plea.

Holub, (Pa.Super. 1990)

In July 1980, wife filed for divorce in Pennsylvania. In February 1981, husband was arrested for soliciting the murder of his wife. In January 1989, while husband remained in prison, wife was awarded the entire marital property. The appellate court affirmed the equitable distribution award of 100% to wife. *Mellon Bank, N.A. v. Holub*, 583 A.2d 1157 (Pa.Super. 1990), *appeal denied*, 596 A.2d 158 (Pa. 1991).

Brabec, (Wis.App. 1993)

Wife filed for divorce, which was granted in July 1991. Soon after the divorce, the ex-wife solicited the murder of her ex-husband. The December 1991 final order in the divorce case awarded the ex-wife \$230/month in temporary alimony. In March 1992, the ex-wife pled guilty and was sentenced to 14 months in prison. After the ex-wife was released from prison, she filed for increased alimony from her ex-husband. The trial court denied the increased alimony and an appellate court affirmed.⁶⁶

Notice that in these facts, a divorce occurred *before* the ex-wife solicited the murder of her ex-husband, so that this crime was *not* misconduct during the marriage. Despite this clear fact, the intermediate Wisconsin appellate court wrote eight paragraphs analyzing the legislative history of the alimony statute, and the Wisconsin Supreme Court's interpretation of that alimony statute, to determine whether *marital* misconduct can be considered in awarding alimony. The result — irrelevant to this case, because the misconduct was *after* the divorce — was that marital misconduct can not be considered in awarding alimony.

The Wisconsin appellate court wrote:

The [Wisconsin Supreme Court] then went on to state: "As a result it is unclear under the prior law in what manner the circuit court could have legitimately used marital misconduct in

⁶⁶ All of these facts are from *Brabec v. Brabec*, 510 N.W.2d 762, 763 (Wis.App. 1993).

determining alimony without punishing the guilty party.” [Dixon], 319 N.W.2d [846] at 852 [(Wis. 1982)]. The circumstances here present an illustration of such legitimate use. Diane is not being punished for her acts; rather, fairness to Todd is being considered. Requiring Todd to pay maintenance to the person who tried to have him killed is fundamentally unfair. Additionally, the trial court did not punish Diane by refusing her maintenance, it merely refused to reward her for her failure; if Diane had been successful in having Todd killed, she would receive no maintenance. We conclude that this final line of reasoning for the supreme court's determination that marital misconduct cannot be considered when ordering alimony also fails to apply to our fact situation.

We conclude that construing sec. 767.26, Stats., as prohibiting the trial court from considering Diane's attempt to have her former husband killed would achieve an unreasonable result: Diane would receive maintenance of approximately \$1,000 a month, whereas if she had been successful in her attempt, she would receive nothing. Because we conclude that the reasoning behind the broad conclusion in Dixon, that the legislature did not intend for marital misconduct to be considered when determining maintenance, does not apply to the circumstances at hand, we conclude that the trial court did not misapply the law by considering Diane's solicitation to kill her former husband and, consequently, did not erroneously exercise its discretion.

Brabec v. Brabec, 510 N.W.2d 762, 766 (Wis.App. 1993), *review denied*, 515 N.W.2d 715 (Wis. 1994).

While I agree with the result, the court's reasoning is conclusory when it labels the alimony as “fundamentally unfair”. I am more impressed with “the denial of maintenance was merely a refusal to reward the unsuccessful attempt to kill the husband because if she had been successful, the wife would have received no maintenance.”⁶⁷ I argue that the solicitation of murder is a kind of estrangement or repudiation that should sever all future obligations of the intended victim to the perpetrator, including ending payment of alimony to the perpetrator.

Gardner, (Wis.App. 1998)

The appellate court stated the facts of the case:

The Gardners were married on June 30, 1979, and have two children. Cindee filed for divorce on September 27, 1995, and simultaneously sought a temporary restraining order or domestic abuse injunction against David. On October 2, 1995, the same day the domestic abuse injunction was entered, [footnote omitted] David engaged in conduct which subsequently resulted in his conviction of burglary while armed to his own home and false imprisonment and second-degree sexual assault of Cindee. At the time of the divorce trial, October 15-17, 1996, David was serving a thirty-year prison sentence.

Gardner v. Gardner, unpublished, 1998 WL 391735 (Wis.App. 1998).

⁶⁷ *Gardner v. Gardner*, unpublished, 1998 WL 391735 at *2 (Wis.App. 1998) (per curiam).

David requested half of the marital property. The trial court awarded all of the marital property to Cindee and denied alimony to David. The trial court wrote:

It is this Court's opinion that Mr. Gardner's conduct was so outrageous that it is beyond anything contemplated in Wisconsin Statute 767.255 where it states that marital misconduct cannot be the basis upon which a court can determine property division. If this was mere "marital misconduct," perhaps the Court would be obligated to base its decision without regard to Mr. Gardner's actions. But his action was not "marital misconduct," it was "outrageous, felonious, assaultive conduct" which led to his incarceration and which effectively should cede any claim that he has to marital property.... To award Mr. Gardner any part of the marital estate would in this Court's opinion constitute a reward for the most vile and outrageous crime imaginable. Neither Wisconsin Statute Section 767.255(3) nor *Dixon v. Dixon*, 107 Wis.2d [492, 319 N.W.2d 846 (1982),] require such result. trial court opinion quoted in *Gardner v. Gardner*, unpublished, 1998 WL 391735 (Wis.App. 1998).

The appellate court reversed, because the trial court had not considered the statutory factors. The appellate court did *not* disagree with the result, but only stated that the trial court must explicitly consider the statutory factors and "state its rationale". *Gardner v. Gardner*, unpublished, 1998 WL 391735 (Wis.App. 1998) (per curiam).

Crowe, (Tenn.Ct.App. 2000)

A few days after wife filed for divorce, husband shot her in the abdomen with a .357 Magnum pistol. Husband was incarcerated for attempted murder of his wife. The divorce trial court ordered husband to pay a lump-sum alimony of \$55,000, plus all medical expenses of his wife related to his shooting her. "Wife was awarded virtually all of the marital property"

Husband appealed and the appellate court agreed with husband. The appellate court explained:

Fault is a statutory factor to be considered and there can be little doubt of fault in this case on the part of Husband. The final decree entered in this matter states that there are insufficient assets to make Wife whole and that, as a result of Husband's conduct in shooting her, Wife has suffered substantial damages which are permanent in nature. However, the attribution of fault has been interpreted by this court as not to authorize an award of alimony to punish a guilty spouse. See *Lindsey v. Lindsey*, 976 S.W.2d 175, 179 (Tenn.Ct.App. 1997); *Brown v. Brown*, 913 S.W.2d 163, 169 (Tenn.Ct.App. 1994); and *Lancaster v. Lancaster*, 671 S.W.2d 501, 503 (Tenn.Ct.App. 1984). Therein the court rejected the proposed allowance of "punitive alimony" as such.

Having reviewed this record, we do not find evidence that Husband has the ability to pay the lump sum award of \$55,000 alimony in solido. As reprehensible as we find his conduct to have been, as did the trial court, we do not feel this award is justified by the record before us. We find that the evidence preponderates against the trial court's finding as to this award. *Crowe v. Crowe*, Not Reported in S.W.3d, 2000 WL 575245 at *2-*3 (Tenn.Ct.App. 2000).

Rehabilitative Alimony

The phrase “rehabilitative alimony” appears in large number of cases in Florida courts, beginning in a September 1972 case, *Stamm v. Stamm*, 266 So.2d 413 (Fla.App. 1972). Thereafter, other states began using the same concept. The following cases are among those that discuss the purpose of rehabilitative alimony:

In 1960, the Minnesota Supreme Court — in an opinion at least ten years ahead of its time — commented:

It is also clear that the court may award alimony in a gross amount, payable over a limited period of time, or it may award alimony, payable indefinitely or until changed by the order of the court. In determining how alimony should be awarded, much must be left to the discretion of the trial court. Frequently it serves the purpose of the parties better to award alimony in a gross amount, or in a gross amount payable over a limited period of time, in order to permit a wife to rehabilitate herself rather than to make the alimony payments in small amounts, payable indefinitely.

Druck v. Druck, 103 N.W.2d 123, 124-125 (Minn. 1960).

In 1973, a Florida intermediate appellate court wrote one of the first judicial opinions to use “rehabilitative” in connection with alimony.

The public policy under the new law which the legislature passed and which therefore we must apply seems to be that if the spouse has the capacity to make her own way through the remainder of her life unassisted by the former husband, then the courts cannot require him to pay alimony other than for rehabilitative purposes.

Roberts v. Roberts, 283 So.2d 396, 397 (Fla.App. 1973).

In 1978, the Nevada Supreme Court wrote:

It is clear that the two year award was in the nature of “rehabilitative alimony”, awarded wives for the purpose of facilitating their entry into the labor market. Some states have explicitly or implicitly provided for such awards. See *Reback v. Reback*, 296 So.2d 541, 543 (Fla.App. 1974); *In re Marriage of Lopez*, 38 Cal.App.3d 93, 113 Cal.Rptr. 58, 72 (1974).

Johnson v. Steel, Inc., 581 P.2d 860, 862 (Nev. 1978).

In 1980, the Florida Supreme Court wrote:

The principal purpose of rehabilitative alimony is to establish the capacity for self-support of the receiving spouse, either through the redevelopment of previous skills or provision of the training necessary to develop potential supportive skills. *Reback v. Reback*, 296 So.2d 541 (Fla. 3d DCA 1974).

Canakaris v. Canakaris, 382 So.2d 1197, 1202 (Fla. 1980).

Quoted with approval in *Kuvin v. Kuvin*, 442 So.2d 203, 205 (Fla. 1983).

In 1980, the New Jersey Supreme Court wrote:

We do not share the view that only unusual cases will warrant the “rehabilitative alimony” approach. We note that other states permit such awards. We note that other states permit such awards. See, e. g., Fla.Stat. Ann. § 61.08 (West Supp. 1979); Haw.Rev.Stat. Ann. § 580-47 (Supp. 1979). See also Cal.Civ.Code § 4806 (Supp. 1980) (court may withhold support allowance to a party who is “earning his or her own livelihood”); Ind.Code Ann. § 31-1-11.5-9 (Burns 1979) (prohibiting maintenance of party unless he or she is physically or mentally incapable of supporting himself or herself).

Lepis v. Lepis, 416 A.2d 45, 53, n.9 (N.J. 1980).

In 1980, the Minnesota Supreme Court quoted a law review article:

In recent years, courts have retreated from traditional attitudes toward spousal support because society no longer perceives the married woman as an economically unproductive creature who is “something better than her husband's dog, a little dearer than his horse.” Traditionally, spousal support was a permanent award because it was assumed that a wife had neither the ability nor the resources to become self-sustaining. However, with the mounting dissolution rate, the advent of no-fault dissolution, and the growth of the women's liberation movement, the focal point of spousal support determinations has shifted from the sex of the recipient to the individual's ability to become financially independent. This change in focus has given rise to the concept of rehabilitative alimony, also called maintenance, spousal support, limited alimony, or step-down spousal support.

[“Rehabilitative Spousal Support: In Need of a More Comprehensive Approach to Mitigating Dissolution Trauma,” 12 UNIV. SOUTH FLA. LAW REVIEW 493, 494-95 (1978).]

Otis v. Otis, 299 N.W.2d 114, 116 (Minn. 1980).

In 1982, the Minnesota alimony statute was changed to emphasize that either permanent or temporary alimony could be awarded at divorce. *Gales v. Gales*, 553 N.W.2d 416, 418-419 (Minn. 1996).

In 1983, an intermediate appellate court in Illinois wrote:

The objective of the Act in authorizing rehabilitative maintenance is to enable a formerly dependent spouse to become financially independent in the future. (*In re Marriage of Bramson* (1981), 100 Ill.App.3d 657, 56 Ill.Dec. 205, 427 N.E.2d 285.) A limitation on the award is generally intended as “an incentive for the spouse receiving support to use diligence in procuring training or skills necessary to attain self-sufficiency.” (*In re Marriage of Hellwig* (1981), 100 Ill.App.3d 452, 464, 55 Ill.Dec. 762, 771, 426 N.E.2d 1087, 1096.)

In re Marriage of Wilder, 461 N.E.2d 447, 456 (Ill.App. 1 Dist. 1983).

In 1989, the Arizona Supreme Court wrote:

Up to the 1960s, alimony was often perceived as an automatic award to a woman because the opportunities for economic equality were not present.[FN7] Even if the award was not automatic, in Arizona the function of maintenance was sometimes described simply as providing support for a wife as nearly as possible to the standard of living enjoyed during marriage, to keep her from becoming dependent upon public support. *Nace v. Nace*, 107 Ariz. 411, 489 P.2d 48 (1971); *Kamrath v. Kamrath*, 17 Ariz.App. 394, 498 P.2d 468 (1972).

FN7. Schiller, "Alimony-Should Marital Misbehavior Be a Factor?," Alimony — New Strategies for Pursuit and Defense, 1988 A.B.A. Sec. on Fam. Law 10, 13.

That view of maintenance was revamped with a changing job market in a changing society, at least where those changes were presumed to occur. Maintenance, once seen as automatic, was greatly restricted by such statutes as Arizona's 1973 version of A.R.S. § 25-319(A). See, e.g., *Deatherage v. Deatherage*, 140 Ariz. 317, 681 P.2d 469 (App. 1984) (restricting maintenance only to situations where necessary).

Over the last two decades, both inside Arizona and elsewhere, two trends have competed with each other. One defines the purpose of alimony as rehabilitative, restricting it to a limited amount of time for a spouse to become self-sufficient. The other returns to indefinite alimony, believing that following the dissolution of a long-standing marriage, one spouse will never be self-supporting, at least as compared to the lifestyle during marriage. *Schroeder v. Schroeder*, 778 P.2d 1212, 1217 (Ariz. 1989).

In 1994, the Maryland Supreme Court cited a 1980 report by the Governor's Commission on Domestic Relations Laws:

... the primary purpose of alimony is rehabilitative, nonetheless provided a statutory mechanism whereby a court, in its discretion, could grant indefinite alimony. *Blaine v. Blaine*, 646 A.2d 413, 422 (Md. 1994).

In 1996, an intermediate New Jersey appellate court wrote:

An award of rehabilitative alimony may be appropriate "where a short-term or lump-sum award from one party in a divorce will enable [the] former spouse to complete the preparation necessary for economic self-sufficiency." *Hill v. Hill*, 91 N.J. 506, 509, 453 A.2d 537 (1982). "The basic premise of an award of rehabilitative rather than permanent alimony is an expectation that the supported spouse will be able to obtain employment, or more lucrative employment, at some future date." *Shifman v. Shifman*, 211 N.J.Super. 189, 194-95, 511 A.2d 687 (App.Div. 1986). Thus, rehabilitative alimony is "payable for a terminable period of time when it is reasonably anticipated that a spouse will no longer need support." *McGee v. McGee*, 277 N.J.Super. 1, 14, 648 A.2d 1128 (App.Div. 1994) (quoting *Dotsko v. Dotsko*, 244 N.J.Super. 668, 677, 583 A.2d 395 (App.Div. 1990)). *Milner v. Milner*, 672 A.2d 206, 208 (N.J.Super.A.D. 1996).

In 1996, an intermediate appellate court in Florida wrote:

This court has held that the purpose of rehabilitative alimony is to allow a spouse to obtain a skill, education or rehabilitation in order to adjust to a new life. Rehabilitative alimony is for a time certain or until a specific goal has been met. *Berki v. Berki*, 636 So.2d 532, 534 (Fla. 5th DCA), *rev. denied*, 645 So.2d 450 (Fla. 1994); *Kirchman v. Kirchman*, 389 So.2d 327, 329-330 (Fla. 5th DCA 1980). Further, courts have held that a viable rehabilitative plan must be presented at the time the request for rehabilitative alimony is made. *Berki* at 534; *Hanrahan v. Hanrahan*, 618 So.2d 779 (Fla. 1st DCA 1993). Since rehabilitative alimony is a projection based upon assumptions and probabilities, *O'Neal v. O'Neal*, 410 So.2d 1369 (Fla. 5th DCA 1982), the plan must be in writing in the event the plan or goal is not achieved. This gives the trial court a basis to evaluate the efforts of the petitioner if the goal has not been met despite the petitioner's diligent efforts. If, through no fault of the petitioner, the goal is not met, the rehabilitative alimony may be extended. *Id.* However, a petitioner seeking an extension of rehabilitative alimony must show that

rehabilitation did not occur despite reasonable and diligent efforts. *Wilson v. Wilson*, 585 So.2d 1179, 1180 (Fla. 5th DCA 1991).

Brock v. Brock, 682 So.2d 682, 683 (Fla.App. 5 Dist. 1996).

In 1998, the Connecticut Supreme Court wrote:

... rehabilitative alimony, or time limited alimony, is alimony that is awarded primarily for the purpose of allowing the spouse who receives it to obtain further education, training, or other skills necessary to attain self-sufficiency. [citation omitted] Rehabilitative alimony is not limited to that purpose, however, and there may be other valid reasons for awarding it. *Roach v. Roach*, 20 Conn.App. 500, 506, 568 A.2d 1037 (1990).

Bornemann v. Bornemann, 752 A.2d 978, 996 (Conn. 1998).

In 1999, an intermediate appellate court in Maryland explained that the statute favors rehabilitative alimony over permanent alimony:

Prior to 1980, the principal function of alimony was to maintain the recipient spouse's standard of living that existed during the marriage. Thus, courts frequently awarded alimony for the joint lives of the parties or until the recipient spouse remarried, subject to modification upon a material change in circumstances. See *Blaine v. Blaine*, 336 Md. 49, 69, 646 A.2d 413 (1994). In 1980, the alimony statute was changed by the Legislature to make the principal purpose of alimony rehabilitative, i.e., to support the recipient spouse until he or she became self-supporting. See *Holston v. Holston*, 58 Md.App. 308, 321, 473 A.2d 459 (1984). In cases where it is either impractical for the dependent spouse to become self-supporting, or in cases where the dependent spouse will become self-supporting but still a gross inequity will exist, a court may award alimony for an indefinite period. See *Blaine*, 336 Md. at 70, 646 A.2d 413.

....

The law, however, favors rehabilitative alimony over indefinite alimony. *Tracey v. Tracey*, 328 Md. 380, 391, 614 A.2d 590 (1992). An alimony award should reflect the desirability of each spouse becoming self-supporting and the undesirability of alimony as a lifetime pension. Thus, indefinite alimony should be awarded only in exceptional circumstances. *Turrisi v. Sanzaro*, 308 Md. 515, 527, 520 A.2d 1080 (1987).

Roginsky v. Blake-Roginsky, 740 A.2d 125, 129-130 (Md.App. 1999).

The Maryland statute permits permanent alimony only when:

the court finds that (1) due to age, illness, infirmity, or disability, the party seeking alimony cannot reasonably be expected to make substantial progress toward becoming self-supporting; or (2) even after the party seeking alimony will have made as much progress toward becoming self-supporting as can reasonably be expected, the respective standards of living of the parties will be unconscionably disparate.

Maryland Family Law § 11-106(c) (enacted in 1984 and amended in 1992).

In 2001, the Tennessee Supreme Court wrote:

A court must keep in mind that “the purpose of spousal support is to aid the disadvantaged spouse to become and remain self-sufficient and, when economic rehabilitation is not feasible, to mitigate the harsh economic realities of divorce.” *Anderton*, 988 S.W.2d at 682 (citing *Shackleford v. Shackelford*, 611 S.W.2d 598, 601 (Tenn.Ct.App. 1980)). The amount of alimony should be determined so “that the party obtaining the divorce [is not] left in a worse financial situation than he or she had before the opposite party's misconduct brought about the divorce.” *Aaron*, 909 S.W.2d at 411 (citing *Shackelford*, 611 S.W.2d at 601).

In *Crabtree v. Crabtree* [16 S.W.3d 356 (Tenn. 2000)] we recently held that “[i]f an award of rehabilitative alimony is justified by the parties' circumstances, a trial court initially should award rehabilitative alimony only.” *Crabtree*, 16 S.W.3d at 360. The legislative purpose of rehabilitation is to encourage divorced spouses to become self-sufficient. *Id.* “If rehabilitation is not feasible, the trial court may then make an award of alimony *in futuro*.” *Id.*

Burlew v. Burlew, 40 S.W.3d 465, 470-471 (Tenn. 2001).

In 2008, the New Hampshire Supreme Court wrote:

It has long been recognized that the primary “purpose of alimony is rehabilitative.” E.g., *Tishkevich v. Tishkevich*, 131 N.H. 404, 407, 553 A.2d 1324 (1989); see also RSA 458:19, I(c) (requiring that a trial court find, prior to awarding alimony, that the recipient is “unable to be self-supporting through appropriate employment”). This principle is based upon the realization that “modern spouses are equally able to function in the job market and to provide for their own financial needs.” *Fowler*, 145 N.H. at 520, 764 A.2d 916. Alimony should, therefore, generally be “designed to encourage the recipient to establish an independent source of income.” *In the Matter of Harvey & Harvey*, 153 N.H. 425, 431, 899 A.2d 258 (2006), overruled on other grounds by *In the Matter of Chamberlin & Chamberlin*, 155 N.H. 13, 15-16, 918 A.2d 1 (2007).

However, the express language of the alimony statute dictates that alimony awards need not be rehabilitative in all cases. See RSA 458:19, I (providing for alimony awards that are “either temporary or permanent, for a definite or indefinite period of time”); RSA 458:19, IV (mandating consideration of multiple factors when calculating the amount of an alimony award). Because of this, we have held that the rehabilitative principle is not controlling where, for instance:

- (1) the supported spouse suffers from ill health and is not capable of establishing her own source of income, see *Henry v. Henry*, 129 N.H. 159, 162, 525 A.2d 267 (1987);
- (2) the supported spouse, in a fault-based divorce, has minimal job experience, no formal education, a learning disability and suffers from anxiety and panic attacks caused by the other spouse's emotional abuse, see *In the Matter of Letendre & Letendre*, 149 N.H. 31, 39-40, 815 A.2d 938 (2002); and
- (3) the court determines that it is necessary for the supported spouse to maintain a part-time work schedule in order to care for the parties' child, see *In the Matter of Hampers & Hampers*, 154 N.H. 275, 284-85, 911 A.2d 14 (2006).

In such cases, the court is permitted to provide for more than rehabilitative alimony because the supported party lacks the wherewithal to enter “the job market and ... provide for their own financial needs,” *Fowler*, 145 N.H. at 520, 764 A.2d 916, as those needs have been shaped by the parties' lifestyle during the marriage. See RSA 458:19, I(a), (c); *Harvey*, 153 N.H. at 431, 899 A.2d 258.

In re Nassar, 943 A.2d 740, 747 (N.H. 2008).

Modern Statutes Give *Unpredictable* Results

The modern state divorce statutes quoted above, beginning at page 23, have a long list of factors for a judge to consider in the division of marital property, and another long list of factors for a judge to consider in deciding alimony. Such long list of factors is inherently unjust, because there is no unique, correct result for division of marital property and for deciding alimony.

why mathematical formula preferable

Each spouse in a divorce case can look at the list of factors in the statute and believe that a judge will award him/her significantly more than the settlement offer from the other spouse. In this way, the unpredictability pushes spouses away from accepting a reasonable settlement offer and encourages litigation. Litigation wastes assets.⁶⁸

If the statute contained a mathematical formula for division of marital assets (and a separate formula for the amount of alimony), then there would be a predictable result from litigation. This predictable result would allow one spouse to make a reasonable settlement offer, which is similar to what a judge would decide. Similarly, with a mathematical formula in the statute, the other spouse could compare to the predictable amount from statute to what is in a settlement offer and determine the reasonableness of the offer.

Use of a formula also guarantees that there will be no gender discrimination, no racial discrimination, no bias from inappropriate considerations, all appropriate factors will be considered, and makes it easy to verify that the proper result was obtained.

Given the thousands of law review articles on divorce law,⁶⁹ it is surprising to me that only a few articles mention the unpredictability of modern divorce statutes. I suggest that ignoring *unpredictability* comes naturally to attorneys and judges — nearly all of whom went through high school and college taking the minimum amount of mathematics classes, a subject where problems have a unique correct answer, unlike history and the other liberal arts. Amongst attorneys who never used algebra in their life — and who have a horror of calculus, differential equations, and mathematical laws in physics and chemistry — it is natural to avoid a mathematical formula in making decisions.

⁶⁸ Standler, *Litigated Divorce in the USA As a Waste of Assets*, <http://www.rbs2.com/waste.pdf> (July 2008).

⁶⁹ My search in August 2008 of law review articles in Westlaw found almost two thousand articles that satisfy the query (no-fault /s divorce) and almost six thousand articles that mention the word alimony.

law review articles

Professor Mary Ann Glendon, then at Boston College Law School, was one of the earliest critics of unpredictable divorce statutes:

These schemes, which were presented to state legislatures under the name “equitable distribution,” are more properly called discretionary distribution, since what consistently distinguishes them from their predecessors is not that they are more equitable, but that they are more unpredictable.

In the first place, the system of discretionary distribution, because of inconsistency in results among apparently similar cases, is widely perceived as unfair by litigants. Second, this unpredictability of outcome means the law in this area is not serving one of its most important purposes: to furnish a basis for negotiation and future planning by the parties. In sum, the existing law in most states throws divorcing spouses — and their children — into a lottery whose outcome greatly depends on the luck of the judicial draw and the competence of counsel, and in which the only sure winners are the lawyers.

Mary Ann Glendon, “Family Law Reform in the 1980’s,” 44 *LOUISIANA LAW REVIEW* 1553, 1556 (July 1984). Two years later, Prof. Glendon at Harvard Law School wrote:

The systems of discretionary distribution of marital property upon divorce now in force in the great majority of states cause the divorce process to be unacceptably unpredictable and encourage much wasteful litigation.

Mary Ann Glendon, “Fixed Rules and Discretion in Contemporary Family Law and Succession Law,” 60 *TULANE LAW REVIEW* 1165, 1184 (1986).

Prof. Glendon concluded:

When a trial judge is told, as in Massachusetts, that sixteen unweighted factors in fixing support and dividing spouses’ property may or should be considered, this is tantamount to unlimited discretion. Under this type of statute, litigants have no way to predict which factors will carry the day or what overall goals the judge will be striving to achieve. A list of factors with no indication of relative weight and no over-arching guideline other than the vague admonition to be fair is virtually the same as providing no factors.

Mary Ann Glendon, “Fixed Rules and Discretion in Contemporary Family Law and Succession Law,” 60 *TULANE LAW REVIEW* 1165, 1195-96 (1986).

Professor Jane C. Murphy at the University of Baltimore School of Law wrote in 1991:

Broad discretion [for judges] in family law decisionmaking is detrimental to the judicial system and to the parties seeking to resolve disputes. Vesting judges with such discretion does not enhance their ability to make just decisions; instead, it jeopardizes fundamental rights of parents and children. Vague, indeterminate standards also tend to support the perception of both men and women that judicial decisions in this area are arbitrary or discriminate against them on the basis of their sex. Further, lack of predictability that flows from broad, undefined standards discourages divorcing parents from settling their disputes on equitable terms. As a result, the resources of both the judiciary and the litigants are wasted as a time when both are critically scarce.

Jane C. Murphy, “Eroding the Myth of Discretionary Justice in Family Law: The Child Support Experiment,” 70 *NORTH CAROLINA LAW REVIEW* 209, 210 (Nov 1991).

Later in her article, Prof. Murphy says:

Both men and women , however increasingly perceive that some of the most important decisions of their lives will be made for them in an inequitable way. As Judge Neely has noted, “[i]t is almost universally thought that in awarding child custody, setting child support, alimony and dividing property, domestic courts behave in a high handed, arbitrary and unjust way.” [Murphy cites Richard Neely, *THE DIVORCE DECISION: THE LEGAL AND HUMAN CONSEQUENCES OF ENDING A MARRIAGE*, at p. 4 (1984).]

Murphy, 70 *NORTH CAROLINA LAW REVIEW* at 221-222.

Prof. Murphy urges that legislatures adopt fixed rules, instead of a long list of factors to consider.

... fixed rules result in more predictable and consistent decisions. Byproducts of predictable decisions should include an increase in early settlements. Lawyers representing parties in divorce litigation can better evaluate the facts of the case and advise the client of a likely decision under a presumption or a fixed rule rather than predicting an outcome under a vague “best interest” or “just and reasonable” standard. If a lawyers can advise litigants of potential outcomes with reasonable certainty, litigants are more likely to enter into settlements to resolve disputes.

More definite standards also should facilitate faster and less expensive judicial decisions.

....

Ibid. at 223.

Professor Marsha Garrison, at Brooklyn Law School, criticized unpredictable divorce statutes in 2007:

New York’s property division and spousal maintenance rules are so imprecise that even litigated cases may be altogether unpredictable.

....

If the outcome of litigation is highly uncertain, not even experts can offer clear advice about what constitutes a good or bad negotiated settlement. Nor does a litigant have any capacity to judge whether his or her attorney has negotiated a good deal or a bad one. Indeed, the attorney herself may not know whether she has negotiated a good or bad deal; her capacity to judge success will of necessity be confined to what she learns from reported cases, her own practice experiences, and her observations.

Marsha Garrison, “Reforming Divorce: What’s Needed and What’s Not,” 27 *PACE LAW REVIEW* 921, 931-933 (Summer 2007). Prof. Garrison cited her statistical study⁷⁰ of litigated divorces in New York State as showing that the results for both alimony and property division were highly unpredictable.

⁷⁰ Marsha Garrison, “Good Intentions Gone Awry: The Impact of New York’s Equitable Distribution Law on Divorce Outcomes,” 57 *BROOKLYN LAW REVIEW* 621 (1991).

Neither Prof. Glendon nor Prof. Garrison mentioned the use of a mathematical formula to give predictability to equitable distribution and alimony. Prof. Murphy briefly mentions formulas are used for child support, but does not suggest a formula for alimony. In 1995, a law student did suggest a mathematical formula for alimony.⁷¹

In an article published in 2001, an experienced divorce mediator identified “ten fundamental problems” with “the current system for setting alimony”:

1. First and foremost, the lack of any theoretical consensus as to alimony’s current purpose renders determination of the proper method for setting its correct amount and appropriate duration extremely difficult.
2. The current approach to awarding alimony — the promulgation of statutory lists of criteria without any rules for their application — renders settlement problematic. No objective legislative benchmarks exist by which attorneys and their clients can accurately estimate the court’s likely support award, and such unpredictability has “a pathological effect on the settlement process by which most divorces are handled.” [citing 1997 draft of American Law Institute’s PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION]
3. This same lack of direction regarding how to apply statutory criteria results in inconsistent rulings by judges, even within the same jurisdiction.

....

9. In approximately one-quarter of American jurisdictions, the question of fault remains relevant to the question of alimony, even while it may no longer be pertinent to the grounds for the divorce. This remnant of the fault issue continues to mire many courts in the lengthy and bitter arbitrations of marital history that the reform toward no-fault divorce was intended to obviate.

Robert Kirkman Collins, “The Theory of Marital Residuals: Applying and Income Adjustment Calculus to the Enigma of Alimony,” 24 HARVARD WOMEN’S LAW JOURNAL 23, 24-26 (2001). Collins recommends the use of mathematical formulas to determine alimony.

In August 2003, I wrote an essay on prenuptial and postnuptial contract law in the USA that explains the history of courts’ unwillingness to consider such contracts. In one section of that essay, I mention my frustration with judges in divorce courts.

During the divorce proceedings, each party presents a list of marital assets to be divided by the judge. Sometimes the parties can agree on one list, other times the judge must make one list from the evidence presented at trial. Such a list of marital assets is incredibly detailed, and often has three or four significant digits (e.g., a list that totals \$ 250,000 will include individual items as small as \$ 100, and the amount in financial accounts is rounded to the nearest dollar.). After this precise accounting, one might *expect* the judge also to be precise in deciding what fraction is distributed to each party. I was astounded to find in reading divorce cases that the trial judge could say, for example,

⁷¹ Marti E. Thurman, Note, “Maintenance: A Recognition of the Need for Guidelines,” 33 UNIV. OF LOUISVILLE JOURNAL OF FAMILY LAW 971 (1995).

I have considered all of the statutory factors and I find that the husband is entitled to 45%, and the wife to 55%, of the marital property. without any explanation of the source of the 45% or 55% numbers.

When I did legal research during 1994 for a divorce case in Pennsylvania, I could find *no* reported case in Pennsylvania in which the trial judge had made an accounting of the dollar amount of each statutory factor to be considered in making the equitable division of marital assets. The trial judge simply uttered the talismanic chant “I have considered all of the statutory factors” and then presented the final numerical result (e.g., the 45% to husband), without any calculation mentioned by the trial judge to support his/her numerical result. Worse, appellate courts routinely accepted this kind of judicial declaration.

When I mentioned my horror to attorneys, they reminded me that divorce court judges have a background in liberal arts, not science, not engineering, not accounting, not economics. People in liberal arts do not make a quantitative accounting, they think in words, not numbers. My personal opinion is that such arbitrary partitioning of marital property is *not* proper. But my opinion is clearly against the vast weight of the law and the routine operation of courts.

.... Any scientist or engineer who just pulled numbers “out of a hat”, without any factual support, would be considered *incompetent*, and also perhaps insane. But judges in divorce courts are neither scientists nor engineers. I believe that it is futile to argue in court for a precise numerical accounting by divorce courts — any change in law needs to come from the legislature.

Ronald B. Standler, Prenuptial and Postnuptial Contract Law in the USA,
<http://www.rbs2.com/dcontract.pdf> (Aug 2003).

judicial refusal to use mathematical formula

The majority of the states in the USA have no mathematical formula for determining the amount of alimony, and a few state courts have explicitly rejected a mathematical formula. For example:

Arkansas, 2006-2007

In 2006 and again in 2007, the Arkansas Supreme Court stated:

The amount of alimony should not be reduced to a mathematical formula because the need for flexibility outweighs the need for relative certainty.

Kuchmas v. Kuchmas, 243 S.W.3d 270, 272 (Ark. 2006).

Quoted with approval in *Taylor v. Taylor*, 250 S.W.3d 232, 235 (Ark. 2007).

The Arkansas Supreme Court in *Kuchmas*, was conclusory when they asserted without explanation “the need for flexibility outweighs the need for relative certainty”. As discussed above, the need for certainty is necessary for spouses to negotiate a divorce settlement and avoid an expensive litigated divorce.

Connecticut, 1999

In 1999, the Connecticut Supreme Court declared:

This court has never required trial courts to calculate alimony or divide marital estates with precise mathematical accuracy.

Smith v. Smith, 752 A.2d 1023, 1036 (Conn. 1999).

As a former scientist,⁷² I find such statements to be appalling and deplorable. Any lack of “precise mathematical accuracy” in calculating an amount of money seems to me to be a confession of arbitrariness and a violation of due process of law. Can you imagine a bank that refused to use arithmetic in adding deposits and subtracting withdrawals? And how does the Connecticut Supreme Court envision that judges can “calculate” without “mathematical accuracy”? Either the judges calculate with mathematical accuracy or they calculate erroneously. I think the Court wanted the prestige (and fairness) of a mathematical calculation without doing any mathematical operations.

Georgia 1949-2008

In 1976, the Georgia Supreme Court declared

“The question of alimony cannot be determined by a mathematical formula, as the facts and circumstances in each case are different. The jury is allowed a wide latitude in determining the amount to be awarded.” *Holmes v. Holmes*, 222 Ga. 115, 149 S.E.2d 84 [, 85] (1966); *Jeffrey v. Jeffrey*, 206 Ga. 41, 55 S.E.2d 556 [, 567] (1949).

Smith v. Smith, 228 S.E.2d 883, 884 (Ga. 1976).

In 1978, the Georgia Supreme Court said:

“ ‘The question of alimony cannot be determined by a mathematical formula, as the facts and circumstances in each case are different. The jury is allowed a wide latitude in determining the amount to be awarded.’ (Cits.)” *Smith v. Smith*, 237 Ga. 499, 500, 228 S.E.2d 883, 884 (1976).

Worrell v. Worrell, 247 S.E.2d 847, 849 (Ga. 1978).

In the absence of any mathematical formula, juries are given a wide latitude in fixing the amount of alimony and child support, and to this end they are to use their experience as enlightened persons in judging the amount necessary for support “under the evidence as disclosed by the record and *all the facts and circumstances of the case.*” (Emphasis supplied.) *Hilburn v. Hilburn*, 163 Ga. 23 (3), 135 S.E. 427, 428 (1926); *McNally v. McNally*, 223 Ga. 246, 248 (2), 154 S.E.2d 209 (1967).

Worrell v. Worrell, 247 S.E.2d 847, 850 (Ga. 1978).

Quoted with approval in *Farrish v. Farrish*, 615 S.E.2d 510, 511 (Ga. 2005); *Wood v. Wood*, 655 S.E.2d 611, 613 (Ga. 2008).

⁷² I earned a Ph.D. in physics in 1977 and then was a professor of electrical engineering for ten years, before annihilation of financial support for research in all of my areas of physics and electrical engineering forced me to find another way to earn a living.

Louisiana 1968-1990

In 1968, a judge on an intermediate appellate court in Louisiana declared in a concurring opinion:

Secondly, since it is impossible, for obvious reasons, to lay down a formula or set of rules to govern the answer to this question in all cases, article 160 wisely places the allowance of alimony in the discretion of the court. The principle of law that except for clear abuse of discretion the appellate court should not disturb the judgment of the trial judge or jury, is so well established in our jurisprudence that the citation of authority is not necessary.

Montz v. Montz, 209 So.2d 799, 801 (La.App. 1968) (Barnette, J., concurring), *rev'd on other grounds*, 221 So.2d 40 (La. 1969).

In 1975, a majority opinion in an intermediate appellate court in Louisiana held:

Regardless of the language used in the *Manuel* case [*Manuel v. Broderson*, 298 So.2d 333 (La.App. 3Cir. 1974)], it should be borne in mind that calculation of child support by a mathematical formula is impossible and that all of the varying facts and circumstances of each individual case must be taken into consideration in fixing the amounts awarded.

Fall v. Fontenot, 307 So.2d 779, 781 (La.App. 3Cir. 1975).

Calculation of child support with a mathematical formula is “impossible” was quoted with approval in *Macip v. Wallace*, 381 So.2d 869, 870-871 (La.App. 3Cir. 1980); *Pittman v. Pittman*, 418 So.2d 23, 24 (La.App. 1Cir. 1982); *Clynes v. Clynes*, 450 So.2d 372, 375 (La.App. 4Cir. 1983); *Sims v. Sims*, 457 So.2d 163, 164 (La.App. 2Cir. 1984); *Voelker v. Voelker*, 488 So.2d 1204, 1206 (La.App. 4Cir. 1986); *Schelldorf v. Schelldorf*, 568 So.2d 168, 174 (La.App. 2Cir. 1990), amongst other cases. These judges in Louisiana would be grieved to know that not only is it *possible* to calculate child support with a mathematical formula, but also such a formula is *required* by a federal statute in 1984, as explained at page 87, below. People who declare something impossible are often embarrassed by the future, when someone smarter or more creative achieves the impossible.

Maryland, 1994

In 1994, the highest court in Maryland wrote:

As we have said, the alimony statute, in its entirety, renounces an approach based on rote or formula, *Tracey*, supra, 328 Md. at 389, 614 A.2d 590 [, 595 (Md. 1992)], and we decline to accept an interpretation that would require a rote application of the prospective language of § 11-106(c).

Blaine v. Blaine, 646 A.2d 413, 420 (Md. 1994).

Nebraska 1962-2006

Nebraska has a long series of state supreme court decisions that reject the use of a mathematical formula in divorce cases. In 1962, the Nebraska Supreme Court wrote:

We point out that this rule provides no mathematical formula by which the property shall be divided or by which an alimony award can be exactly determined. Generally speaking, awards of this court in cases of this kind vary from one-third to one-half of the value of the property, depending on the facts and circumstances of the particular case.

Jablonski v. Jablonski, 114 N.W.2d 1, 4 (Neb. 1962).

See similar statements in *Kramer v. Kramer*, 105 N.W.2d 741, 744 (Neb. 1960); *Overton v. Overton*, 133 N.W.2d 7, 10-11 (Neb. 1965); *Junker v. Junker*, 198 N.W.2d 189, 192 (Neb. 1972); *Seybold v. Seybold*, 216 N.W.2d 179, 181 (Neb. 1974); *Grummert v. Grummert*, 237 N.W.2d 126, 129 (Neb. 1975); *Patton v. Patton*, 279 N.W.2d 627, 630 (Neb. 1979).

Nebraska adopted a no-fault divorce statute in 1972, which statute was copied from California,⁷³ with changes to the distribution of marital property, because California — unlike most states in the USA — is a community property state. Therefore, the refusal to use a mathematical formula in divorce cases predates the adoption of no-fault divorce in Nebraska.

In 1986, the Nebraska Supreme Court cited two of its cases from 1980-81:

We have frequently said that there is no mathematical formula by which awards of alimony or division of property in an action for dissolution of marriage can be precisely determined.

They are to be determined by the facts of each case, and the court will consider all pertinent facts and reach an award that is just and equitable. *Cole v. Cole*, 208 Neb. 562, 304 N.W.2d 398 (1981); *Chrisp v. Chrisp*, 207 Neb. 348, 299 N.W.2d 162 (1980). See § 42-365.

Bryan v. Bryan, 382 N.W.2d 603, 607 (Neb. 1986) (per curiam).

Later in 1986, the Nebraska Supreme Court wrote:

In applying § 42-365 we have repeatedly held that the ultimate test for determining an appropriate division of marital property is reasonableness. See *Burger v. Burger*, 215 Neb. 699, 340 N.W.2d 400 (1983). Although generally adhering to a rule authorizing a property division between one-third and one-half, *Rockwood v. Rockwood*, 219 Neb. 21, 360 N.W.2d 497 (1985), *Martin v. Martin*, 215 Neb. 508, 339 N.W.2d 754 (1983), we have been careful to state that a division of marital property is not subject to a precise mathematical formula but, rather, turns upon the circumstances of a particular case and, in particular, upon a careful case-by-case examination of the criteria set forth in § 42-365. See, *Rockwood v. Rockwood*, supra; *Choat v. Choat*, 218 Neb. 875, 359 N.W.2d 810 (1984). In *Koubek v. Koubek*, 212 Neb. 2, 321 N.W.2d 55 (1982), we affirmed a property award of considerably less than one-third of the net marital estate and stated that the general guideline of an award of one-third to one-half is of particular significance when “the marriage is of long duration and the parties are the parents of all the children involved.” *Id.* at 5, 321 N.W.2d at 58. *Knigge v. Knigge*, 204 Neb. 421, 282 N.W.2d 581 (1979).

⁷³ *Magruder v. Magruder*, 209 N.W.2d 585, 589 (Neb. 1973) (White, C.J., dissenting).

Taylor v. Taylor, 386 N.W.2d 851, 859-860 (Neb. 1986).

In 1988, the Nebraska Supreme Court wrote about both the division of marital property and the amount of alimony, and quoted the alimony statute:

Awards of property to the spouse generally vary from one-third to one-half of the value of the property involved, depending upon the facts and circumstances of the particular case. *Martin v. Martin*, 215 Neb. 508, 339 N.W.2d 754 (1983). However, there is no mathematical formula for dividing property when a marriage is dissolved. Such awards are determined by the facts of each case, the ultimate test being one of reasonableness. *Reuter v. Reuter*, 218 Neb. 732, 359 N.W.2d 78 (1984).

....

As in the division of property, there is no mathematical formula for the awarding of alimony. The ultimate test for the division of property and award of alimony is reasonableness as determined by the facts of each case. *Sonntag v. Sonntag*, 219 Neb. 583, 365 N.W.2d 411 (1985); Neb.Rev.Stat. § 42-365 (Reissue 1984). Under § 42-365, this court, in deciding what is reasonable, should consider

the circumstances of the parties, duration of the marriage, a history of the contributions to the marriage by each party, including contributions to the care and education of the children, and interruption of personal careers or educational opportunities, and the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of such party.

Keim v. Keim, 424 N.W.2d 112, 116-117 (Neb. 1988).

In 1991, the Nebraska Supreme Court wrote:

In *Murrell v. Murrell*, 232 Neb. 247, 252, 440 N.W.2d 237, 241 (1989), we said that “[a] division of property and the awarding of alimony are not subject to a precise mathematical formula. Rather, an appropriate division of marital property and amount of alimony must turn on reasonableness and the circumstances of each particular case in light of the factors set forth in § 42-365.”

Stuczynski v. Stuczynski, 471 N.W.2d 122, 127-128 (Neb. 1991).

In 2006, the Nebraska Supreme Court wrote:

Although the division of property is not subject to a precise mathematical formula, the general rule is to award a spouse one-third to one-half of the marital estate, the polestar being fairness and reasonableness as determined by the facts of each case. *Claborn v. Claborn*, 267 Neb. 201, 673 N.W.2d 533 [, 539] (2004); *Gibilisco v. Gibilisco*, 263 Neb. 27, 637 N.W.2d 898 [, 905] (2002).

Gress v. Gress, 710 N.W.2d 318, 328 (Neb. 2006).

Quoted with approval in *Millatmal v. Millatmal*, 723 N.W.2d 79, 86, 88 (Neb. 2006) and *Liming v. Liming*, 723 N.W.2d 89, 99 (Neb. 2006).

New Hampshire, 1970-1992

In 1970, the New Hampshire Supreme Court wrote:

The difficulties presented to the trial judge by these cases [i.e., child support and alimony] have been recognized (*Ballou v. Ballou*, 95 N.H. 105, 58 A.2d 311 (1948)) and argue for the desirability of a formula for decision. We are not persuaded however, that any such simplistic solution is possible. In the vast majority of cases the trial judge has the problem of dividing the meager loaves and fishes without the aid of a miracle. In such cases the only relevant factor is how much can the husband pay toward the support of the wife and children.

Comer v. Comer, 272 A.2d 586, 587 (N.H. 1970).

In 1976, the New Hampshire Supreme Court wrote:

It has consistently been the policy of this court to reject invitations to restrict trial judges by mandating the use of fixed formulas and mechanical decisional techniques in cases involving questions of divorce, alimony and child support, and property division. ‘The rule remains that the trial court may consider all factors relevant to the decision . . .’ *Comer v. Comer*, 110 N.H. 505, 507, 272 A.2d 586, 587 (1970). Yet we have also recognized that ‘(i) n the vast majority of cases the trial judge has the problem of dividing the meager loaves and fishes without the aid of a miracle. In such cases the only relevant factor is how much can the husband pay toward the support of the wife and children.’ *Id.*

Economides v. Economides, 357 A.2d 871, 873 (N.H. 1976).

The phrase “fixed formulas and mechanical decisional techniques” was quoted with approval in *Murphy v. Murphy*, 366 A.2d 479, 481 (N.H. 1976); *Joann P. v. Gary W.*, 441 A.2d 1161, 1162 (N.H. 1982).

In 1992, the New Hampshire Supreme Court again cited *Economides* with approval:

... we are cognizant of the wide discretion afforded trial judges in matters of divorce, alimony and child support, and where possible have declined to require “use of fixed formulas and mechanical decisional techniques” in such cases. *Economides v. Economides*, 116 N.H. 191, 194, 357 A.2d 871, 873 (1976).

Giles v. Giles, 618 A.2d 286, 289 (N.H. 1992).

By affixing pejorative adjectives “fixed” (i.e., rigid) and “mechanical”, to “fixed formulas and mechanical decisional techniques”, the court in *Economides* avoided explaining *why* a formula was less desirable than unfettered discretion of a trial judge. The truth is that overworked trial judges who quickly decide divorce cases on an assembly-line basis are engaging in “mechanical decisional techniques”, while a mathematical formula would be predictable, encourage settlements, and ensure that similarly situated people are treated similarly.

conclusion

Note that all of these cases tersely asserted that a mathematical formula was *undesirable*, without any analysis and without any explanation. As discussed above, the need for predictability is necessary for spouses to negotiate a divorce settlement and avoid an expensive litigated divorce. Furthermore, it *not* reasonable that a judge can consider more than a dozen statutory factors in words, then declare amounts of money without any calculation, with a fair and just result.

judicial criticism

Judges rarely criticize a statute in their opinions, unless they are declaring the statute unconstitutional. Few appellate courts have criticized divorce statutes for causing unpredictable outcomes when applied by judges. An exception is the dicta written by the Ohio Supreme Court in 1976:

The prophetic statements in *Tolerton* [(Ohio 1876)], *Weidman* [48 N.E. 506 (Ohio 1897)] and *Cook* [64 N.E. 567 (Ohio 1902)] reflect the proper function of a court in the allocation of rights and responsibilities which must be parceled out at the dissolution of a marriage. The court must approach the proceeding much like a suit in partition or an action to dissolve, windup and distribute the assets and liabilities of a partnership. **Current solutions [FN27] for resolving the unfairness and unpredictability of contemporary divorce practice**⁷⁴ urge courts to manage the dissolution of marital contracts in ways essentially identical to the foregoing statements of this court circa 1876-1902.

FN27. See, e. g., Note, The Implied Partnership: Equitable Alternative to Contemporary Methods of Postmarital Property Division, 26 U. OF FLORIDA L.REV. 221; Comment, The Economics of Divorce: Alimony and Property Awards, 43 U. OF CINCINNATI L.REV. 133, 152 ('* * * The division of marital property should be viewed in the same light as a 'shared enterprise or joint undertaking.' '); Comment, Division of Marital Property on Divorce: A Proposal to Revise Section 3.63, 7 ST. MARY'S LAW JOURNAL 209, 226 ('* * * (T)he marriage relationship assumes an even greater resemblance to a partnership. Therefore like a partnership the assets or fruits of that partnership should be equally divided upon dissolution. '); Foster & Freed, Marital Property Reform in New York: Partnership of Co-Equals?, 8 FAMILY LAW QUARTERLY 169, 176 ('* * * Marriage should be regarded as a partnership of coequals with a division of labor that entitles each to a one-half interest in the family assets accumulated out of partnership activity while the marriage is functioning. We believe that such a system reflects the contemporary understanding of marriage and the reasonable expectations of the parties. We would exclude from 'family assets' such separate property as was owned before marriage, or individually received by gift, bequest, devise or descent, and hence not derived from the partnership enterprise. We also would exclude from family assets property which was accumulated after separation or breakdown of the marriage and items of a purely personal character, viz., clothing and jewelry, sport and hobby equipment, etc. That which was produced when the family was a going concern ordinarily should be equally divided upon divorce, no matter how title was held, and regardless of blame for the breakdown of the marriage'); Inker, Walsh & Perocchi, Alimony and Assignment of Property: The New Statutory Scheme in Massachusetts, 10 SUFFOLK U.L.REV. 1, 3. ('The

⁷⁴ Emphasis added by Standler.

courts have observed that the strong drive for economic independence by women will have significant effects for the setting of alimony awards. Coupled with the changing economic status of women is the social reality that marriage is a joint enterprise and shared undertaking, based on a division of labor, which should entitle each spouse to a share of the family assets upon divorce.’) (Footnotes omitted.)

Wolfe v. Wolfe, 350 N.E.2d 413, 422-423 (Ohio 1976).

Quoted with approval in *Bieber v. Bieber*, Not Reported in N.E.2d, 1977 WL 200878 (Ohio App. 5 Dist. 1977); *Hill v. Hill*, Not Reported in N.E.2d, 1980 WL 352243 (Ohio App. 11 Dist. 1980) (identifying the quotation as *dictum*).

use of formulas

The use of mathematical formulas in family law appears to have begun in the context of child support. The following cases are amongst the first to use formulas:

- *Commonwealth. ex rel. Buonocore v. Buonocore*, 69 D. & C. 2d 384 (Common Pleas Del. County 1975), *aff'd*, 340 A.2d 579 (Pa.Super. 1975);
- *Lucy K. H. v. Carl W. H.*, 415 A.2d 510, 516 (Del.Fam.Ct. 1979) ("The Court has determined, after considering the factors specified in 13 Del.C. § 511 and by application of the Melson Formula, that respondent will be ordered to pay \$45 per week to petitioner for the support of the child.");
- *Smith v. Smith*, 626 P.2d 342 (Or. 1981) ("Although each case must be considered on its own facts, it is proper to develop general principles to the end that similar cases will be treated similarly." Adopting mathematical formula at page 347.);
- *Atwood v. Atwood*, 643 S.W.2d 263, 266 (Ky.App. 1982) (An intermediate Kentucky appellate court tersely suggested that trial courts use a formula for alimony, to avoid "unfairness".).

Interestingly, a federal government statute, enacted in 1984, requires each state to "establish guidelines for child support award amounts within the State."⁷⁵ In 1988, the federal statute was amended to make it a rebuttable presumption that the guideline amount is the correct amount of child support.⁷⁶ So, for twenty years, judges have used an equation to calculate child support, but — in the same divorce proceeding — the judges simply guessed at the amount of alimony to award, and the judges also simply guessed at what fraction of marital property should be awarded to each spouse. For sake of consistency — and also to avoid vagueness, unpredictability, and treating similarly situated people differently — one might expect legislatures to enact a formula for alimony and for division of marital assets at divorce.

⁷⁵ 42 U.S.C. § 667(a) (amended 1988, current 2008). Child Support Enforcement Amendments of 1984, 98 STATUTES AT-LARGE 1305, 1321, § 18 (1984).

⁷⁶ 42 U.S.C. § 667(b)(2). Family Support Act of 1988, 102 STATUTES AT-LARGE 2343, 2346, § 103(a) (1988).

In an opinion creating child support “guidelines” (actually a mathematical formula), the Pennsylvania Supreme Court said in 1984:

In cases such as this, there are simply too many relevant factors for a court to weigh without the introduction of some system to guide the court in applying the law to the facts of each case. We have concluded that in order to clarify the application of the case law in this area, it is necessary to set forth a guideline — a kind of checklist — to assist hearing courts in child support cases. The purpose of such a guideline is not to divest a hearing court of its authority or discretion to consider all the relevant facts and circumstances in each case, since the resolution of each case must still be based upon those facts and circumstances; rather, its purpose is simply to provide the hearing court with a method for organizing and considering those facts and circumstances in an orderly fashion. We therefore direct that in the future, child support awards should be calculated based upon the following guidelines.

Melzer v. Witsberger, 480 A.2d 991, 995 (Pa. 1984).

The trial court will determine “the reasonable needs of the children and the amount of each parent's income which remains after the deduction of the parent's reasonable living expenses”, and then use the formula. *Ibid.* at 996.

Pennsylvania has a statute that specifies a mathematical formula for the amount of alimony, alimony pendente lite, and child support that a divorced parent must pay. 42 Pennsylvania Consolidated Statutes, Rules Civil Procedure, Rule 1910.16-4 (created 1989, amended 2005).

Ten years after *Melzer*, the Pennsylvania Supreme Court wrote:

The presumption is strong that the appropriate amount of support in each case is the amount as determined from the support guidelines. However, where the facts demonstrate the inappropriateness of such an award, the trier of fact may deviate therefrom. This flexibility is not, however, intended to provide the trier of fact with unfettered discretion to, in each case, deviate from the recommended amount of support. Deviation will be permitted only where special needs and/or circumstances are present such as to render an award in the amount of the guideline figure unjust or inappropriate.

Ball v. Minnick, 648 A.2d 1192, 1196 (Pa. 1994).

Constitutionality of Divorce Statutes unconstitutional ?

I can think of two arguments why modern divorce statutes that use a long list of factors, instead of a mathematical equation, are unconstitutional. A third argument for unconstitutionality — that alimony is involuntary servitude — has been repeatedly litigated without success.

1. equal protection of laws

In my opinion, such unpredictable results in division of marital property — and also in deciding alimony — is a violation of the constitutional guarantee of “equal protection of laws”, because the result depends on how a judge values each factor in the statute, and different judges will reach significantly different results. The guarantee of “equal protection of laws” in the 14th Amendment to the U.S. Constitution “is essentially a direction that all persons similarly situated should be treated alike.” *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439 (1985); see also *Plyler v. Doe*, 457 U.S. 202, 216 (1982) and *F.S. Royster Guano Co. v. Commonwealth of Virginia*, 253 U.S. 412, 415 (1920) (“all persons similarly circumstanced shall be treated alike.”).⁷⁷

Using a mathematical formula would ensure that all similarly situated people are treated alike.

2. void for vagueness — due process

An alternative attack on the constitutionality of divorce statutes could be made by arguing that the long list of factors gives an *unpredictable* (i.e., vague) result. Note that the words and phrases in each factor in the statute are clear enough, but the effect of more than a dozen factors is to make the result unpredictable. In the context of a criminal statute, more than eighty years ago the U.S. Supreme Court wrote:

... a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.

Connally v. General Const. Co., 269 U.S. 385, 391 (1926).

Quoted with approval in *Cline v. Frink Dairy Co.*, 274 U.S. 445, 459 (1927); ...

Cramp v. Board of Public Instruction of Orange County, Fla., 368 U.S. 278, 287 (1961);

Bouie v. City of Columbia, 378 U.S. 347, 351 (1964);

Cole v. Richardson, 405 U.S. 676, 680-681 (1972);

Smith v. Goguen, 415 U.S. 566, 572, n.8 (1974);

U.S. v. Lanier, 520 U.S. 259, 266 (1997).

⁷⁷ This quotation from *Cleburne* was recently quoted with approval in *Tuan Anh Nguyen v. I.N.S.*, 533 U.S. 53, 63 (2001), which shows the continuing validity of this quotation.

In the context of a criminal case in 1972, the U.S. Supreme Court wrote:

It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. [two footnotes omitted]

Grayned v. City of Rockford, 408 U.S. 104, 108-109 (U.S. 1972).

Cited with approval in *U.S. v. Williams*, 128 S.Ct. 1830, 1845 (2008) (“A conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.”).

Because the due process clause in the Fifth Amendment to the U.S. Constitution implicates both criminal (i.e., deprivation of life or liberty) and civil (i.e., deprivation of property) statutes, the standards for vagueness of a statute should be the same for criminal and civil law.⁷⁸ In the context of divorce law, the long list of factors to consider in dividing marital property and in determining alimony offends both of these two values in *Grayned*. First, the statute prevents spouses from anticipating the results of a litigated divorce. Second, the statute provides "arbitrary and discriminatory" rulings by judges in family courts, because no one — neither litigants, their attorneys, nor judges — can predict the outcome of considering such a long list of factors.

⁷⁸ *Troxel v. Granville*, 530 U.S. 57 (2000) (Held state statute on child visitation violated substantive due process.); *Lawrence v. Texas*, 539 U.S. 558, 573-574 (2003) (“In *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992), the Court reaffirmed the substantive force of the liberty protected by the Due Process Clause. The *Casey* decision again confirmed that our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. *Id.*, at 851, 112 S.Ct. 2791.”).

3. involuntary servitude

The Thirteenth Amendment prohibits involuntary servitude and slavery in the USA. Many litigants have argued that alimony constitutes involuntary servitude. As cited below, judges have consistently rejected the argument that alimony constitutes involuntary servitude, however the judges' reasoning is often terse and conclusory, which indicates that the judges did not seriously consider the argument.⁷⁹ Initially, I included this section for completeness, *not* because I personally agreed with the argument that alimony is involuntary servitude. But, after reading cases and thinking about the issue for a few days, I realized that the argument *might* have merit in a case with the proper facts.

3(a) reported cases

- *Wohlfort v. Wohlfort*, 225 P. 746, 750 (Kan. 1924) (Trial court ordered a man without assets to pay alimony, and then sent him to jail when he failed to pay the alimony. Kansas Supreme Court held: “Such a procedure would amount to involuntary servitude, without conviction for crime, and would be in effect an imprisonment for debt, in violation of the spirit, at least, of both our federal and our state Constitutions.”); Quoted with approval in *Johnson v. Johnson*, 319 P.2d 1107, 1109-1110 (Okl. 1957).
- *Clark v. Clark*, 278 S.W. 65, 67-68 (Tenn. 1925) (“... the [circuit] court erred in holding that said contempt proceeding was an attempt to imprison the defendant for a debt and impose upon him involuntary servitude in violation of article 13, § 1 of the federal Constitution. While there is authority to the contrary, the general and better rule is that alimony is not a ‘debt’ within the meaning of statutes of Constitutions which prohibit imprisonment for debt. This was expressly held by this court in *Going v. Going*, 148 Tenn. 559, 256 S. W. 890, [1923] There is no merit in the contention made by the defendant that to compel him to pay the monthly sums of alimony fixed in the decree of divorcement, provided he has ability to do so, would have the effect to impose upon him involuntary servitude in violation of article 13, § 1, of the federal Constitution, which is to the effect that neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party has been duly convicted, shall exist within the United States, and no argument or authority is cited by defendant in support of this ground of his demurrer.”);

⁷⁹ David Wiese, “Court-Ordered Support and the Thirteenth Amendment’s Prohibition Against Imposition of Involuntary Servitude,” 11 JOURNAL OF CONTEMPORARY LEGAL ISSUES 419, 422 (2000) (“The cases treat the matter as though it were axiomatic, and provide little of the reasoning behind their rulings.”); Alfred J. Sciarrino and Susan K. Duke, “Alimony: Peonage or Involuntary Servitude?,” 27 AMERICAN JOURNAL OF TRIAL ADVOCACY 67, 97 (Summer 2003) (“... courts most surely will continue to make a mockery of a serious, perplexing constitutional issue.”); Erwin Chemerinsky, “Constitutional Issues Posed in the Bankruptcy ... Act of 2005,” 79 AMERICAN BANKRUPTCY LAW JOURNAL 571, 588 (Summer 2005) (“But the argument [that alimony is involuntary servitude] is not a frivolous one.”); Samuel L. Bufford and Erwin Chemerinsky, “Constitutional Problems in the 2005 Bankruptcy Amendments,” 82 AMERICAN BANKRUPTCY LAW JOURNAL 1, 35-36 (Winter 2008) (“But the argument is not a frivolous one. Ultimately, the [U.S.] Supreme Court may have to decide the issue as to the meaning of peonage that it has avoided in the alimony context.”).

- *Reese v. Reese*, 278 N.E.2d 122, 123-124 (Ill.App. 1971) (“... since it has been frequently held there is a presumption in favor of the constitutionality of a legislative enactment [citations omitted] to uphold the constitutionality of the Separate Maintenance Statute, it is sufficient to say it is not unreasonable in the light of legislative objectives and is within the province of legislative power. [citation omitted] We find the plaintiff’s constitutional rights have not been violated. Whether or not divorce or separate maintenance statutes are inadequate or inequitable, they can be corrected only by the legislature and not by judicial pronouncement.”);
- *McCarthy v. McCarthy*, 276 N.E.2d 891, 895 (Ind.App. 1971) (Court in Connecticut ordered husband to pay alimony. Husband moved to Indiana and ex-wife sued him there for arrears on alimony. Husband then — improperly — raised an involuntary servitude argument in defense. “Appellant suggests that to force him to pay alimony is to subject him to involuntary servitude. Appellant argues with great zeal that the so-called Women’s Liberation movement has led to many changes in law, bringing into focus the proposition of complete civil equality for women. Appellant urges that a natural adjunct of such progression is the abolition of alimony. Although Indiana law does not provide for installment alimony, it is nevertheless proper under full faith and credit for this court to enforce an installment alimony decree obtained in another state. To further entertain the manifold questions raised by appellant with regard to the constitutional validity of installment alimony would do no more than to clutter this opinion with subject matter for midnight kitchen discussion.”);
- *In re Marriage of Franks*, 542 P.2d 845, 851 (Colo. 1975) (“Appellant’s contentions that the dissolution of marriage statute works involuntary servitude upon him and that, as applied by the courts of this state, it constitutes an impermissible discrimination against the male sex are similarly without merit. The involuntary servitude argument is based upon the assertion that one may be forced to work for the benefit of the other spouse’s attorney, despite the fact that the burdened party is without ‘fault.’ We do not believe, however, that this burden, even if onerous, can be equated with slavery or involuntary servitude within the meaning of Article II, Section 26 of the Colorado Constitution. That provision was intended primarily to echo the language of the Thirteenth Amendment to the federal constitution and to ensure that the practice of African slavery as it existed in portions of this country until the middle of the last century would never find root in Colorado.”);
- *Freeman v. Freeman*, 397 A.2d 554, 557, n. 2 (D.C.App. 1979) (“Appellant also argues that the trial court’s order directing him to seek ‘gainful employment commensurate with his abilities and educational background’ violates his constitutional rights, including his ‘Thirteenth Amendment right against involuntary servitude.’ This contention has no merit.”);
- *In re Marriage of Smith*, 396 N.E.2d 859, 863-864 (Ill.App. 2 Dist. 1979) (tersely stating: “the husband contends that requiring a man to support his ex-wife is ‘peonage’ and is therefore violative of the 13th amendment of the United States Constitution which prohibits slavery and involuntary servitude. This argument is completely without merit. Purely monetary obligations, whether based on ordinary commercial contracts or upon a relationship such as marriage or parenthood cannot be equated with peonage or slavery.”);
- *Hicks v. Hicks*, 387 So.2d 207, 208 (Ala.Civ.App. 1980) (“According to the defendant, this award of alimony of \$750 per month places him in the shoes of an indentured servant in involuntary servitude in violation of the thirteenth amendment. We disagree. While the marital relationship is dissolved by a divorce, certain duties or obligations may continue such

as an award of periodic alimony pursuant to a valid alimony statute. A court order in a divorce judgment directing one party to pay alimony to the other party does not impose involuntary servitude upon the payor. *Clark v. Clark*, 152 Tenn. 431, 278 S.W. 65 (1925).”), *writ denied*, 387 So.2d 209 (Ala. 1980);

- *Morgan v. Morgan*, 27 Pa. D. & C.3d 554 (Pa.Com.Pl. 1982). Husband was employed as an electrician and he earned approximately \$64,000/year prior to the separation from his wife. Husband “consciously and deliberately took what he could of the marital assets, hid others and then left the marital home in October 1981. Since that time, he has quit his job and has done everything possible to avoid his obligations to his family.”⁸⁰ The trial judge wrote:
The court abhors defendant's conduct in deliberately avoiding his family obligations, particularly as to the children. And while we do not believe we can or should go so far as to impose an involuntary servitude upon defendant, we do believe that if defendant is able to work and is willing to work in Ohio or West Virginia or any other state except Pennsylvania, then he should accept available employment in Pennsylvania as well.
.... Moreover, an appropriate order would mitigate the harm to plaintiff and the children caused by the dissolution of the marriage and would effectuate economic justice and insure a fair and just determination of property rights. We are required to consider these legislative objectives in construing the provisions of the Divorce Code. Therefore, an appropriate order⁸¹ will be entered.
Morgan v. Morgan, 27 Pa. D. & C.3d 554, 565 (Pa.Com.Pl. 1982).⁸²
- *Burrell v. Burrell*, 696 P.2d 157, 163, 168 (Alaska, 1984) (Majority rejected constitutional challenge brought ten years after trial court ordered alimony, but two concurring judges “would ... hold [appellant's constitutional challenges] to be without merit.”);
- *Miller v. Miller*, Not Reported in N.E.2d, 1984 WL 7607 (Ohio App. 1984) (tersely asserting “Nor has he demonstrated his requirement to continue to pay such alimony involves either involuntary servitude or deprivation of his property without due process of law.”);
- *Lawler v. Lawler*, 547 A.2d 89, 94 (Conn.App. 1988) (“... with respect to the plaintiff's claim that the court erroneously abused its discretion by establishing a retirement age of sixty-two, and thereby forcing him to work until that age, we find that this claim is completely without merit.”);

⁸⁰ *Morgan*, 27 Pa. D. & C.3d at 555.

⁸¹ *Morgan*, 27 Pa. D. & C.3d at 566, ¶8: “Defendant is directed to notify Local 712 of the International Brotherhood of Electrical Workers that he is available for assignment to employers for work within its jurisdiction and, if physically able, to accept employment that is available to him.”

⁸² I quote this trial court opinion at length, because a legal journal article cited *Morgan* for the proposition “Pennsylvania court desiring to order alimony but not wanting to put the defendant into involuntary servitude.” Sciarrino and Duke, “Alimony: Peonage or Involuntary Servitude?,” 27 AMERICAN JOURNAL OF TRIAL ADVOCACY 67, 94, n. 131 (Summer 2003). But the court actually said at 27 Pa. D&C3d at 561: “... we conclude that she is not a proper candidate for alimony, so long as she has transportation to and from work.” And the court *did* expressly order the husband to seek employment.

- *Warwick v. Warwick*, 438 N.W.2d 673, 679 (Minn.App. 1989) (Cites three cases from other states and concludes: "We find the rationale of these foreign cases consistent with the present state of Minnesota law and therefore applicable here.");
- *Russell v. Russell*, 878 S.W.2d 24, 26 (Ky.App. 1994) (rejected involuntary servitude without giving any reasons and without citing any cases);
- *Cisar v. Cisar*, 168 Vt. 651, 724 A.2d 1033 (Vt. 1998) (affirmed without published opinion), 25 VERMONT BAR JOURNAL & DIGEST 31-32 (March 1999) (Defendant in *Cisar* claimed that "permanent maintenance is a form of involuntary servitude". The Vermont Supreme Court cited *Hicks*, *Lawler*, and *Warwick*, and said: "We reject the claims. Defendant cites no authority to the contrary.")
- *Bagnola v. Bagnola*, Not Reported in N.E.2d, 2003 WL 22501764, ¶11, ¶40 (Ohio App. 5 Dist. 2003) ("The First Assignment of Error objects to the spousal support awarded and asserts the novel constitutional argument that Appellant is thereby placed in involuntary servitude in order to meet the support payments. We disagree. While we cannot accept the concept of servitude presented by Appellant, we recognize that some expenditures customarily enjoyed will be curtailed.");
- *Edens v. Edens*, 109 P.3d 295, 303 (N.M.App. 2005) ("... enforcement of the voluntary MSA [marital settlement agreement] does not amount to involuntary servitude that violates the Thirteenth Amendment to the United States Constitution. Husband freely entered into the terms of the MSA, and he has not been made a 'slave' to Wife.");
- *Stewart v. Stewart*, Not Reported in N.E.2d, 2005 WL 237330, ¶27 (Ohio App. 11 Dist. 2005) ("The issue of the constitutionality of spousal support statutes has long since been addressed by Ohio courts. Spousal support has been deemed a duty owed from one spouse to another at the termination of the marriage. [two footnotes omitted]");
- *Greenberg v. Zingale*, 138 Fed.Appx. 197, 200 (11thCir. 2005) ("... Greenberg has failed to state a cause of action under the Thirteenth Amendment. Alimony is not the type of subject matter the Thirteenth Amendment was designed to address.");
- *Cormier v. Green*, 141 Fed.Appx. 808 (11thCir. 2005) (claims barred by *Younger* abstention);
- *Gogola v. Zingale*, 141 Fed.Appx. 839 (11thCir. 2005) (claims barred by *Rooker-Feldman* doctrine).

In my searches during August 2008 of all state and federal court opinions in Westlaw, I found no courts since *Wohlfort*, 225 P. 746 (Kan. 1924) and *Johnson*, 319 P.2d 1107 (Okl. 1957) have held that alimony can be involuntary servitude. All of the other cases in the above list of cases either rejected the contention that alimony is involuntary servitude or refused to decide the issue. *Wohlfort* and *Johnson* have had little effect on the common law outside of Kansas and Oklahoma.

Next I discuss two other situations involving alleged involuntary servitude, and then I make some conclusions, beginning at page 96, below.

3(b) involuntary servitude in child support

There are additional cases alleging involuntary servitude in the context of child support orders. See, e.g., *Child Support Enforcement Agency v. Doe*, 125 P.3d 461, 472-474 (Hawaii 2005) (citing five cases and holding appeal to be “entirely frivolous”). In 1998, the California Supreme Court wrote a major opinion on involuntary servitude in the context of child support orders:

May a parent whose inability to pay court-ordered child support results from a willful failure to seek and obtain employment be adjudged in contempt of court and punished for violation of the order? Concluding that it was bound by this court's decision a century ago in *Ex parte Todd* (1897) 119 Cal. 57, 50 P. 1071 (*Todd*), which was recognized as binding precedent in *In re Jennings* (1982) 133 Cal.App.3d 373, 184 Cal.Rptr. 53 (*Jennings*), the Court of Appeal reluctantly held that to impose a contempt sanction in those circumstances is beyond the power of the court. It therefore annulled the judgment of contempt in issue in this proceeding. Although not expressly articulated in *Todd*, which, like *Jennings*, involved spousal support, the apparent basis for the *Todd* result was either an assumption that employment sought under even an indirect threat of imprisonment for violation of the support order constituted involuntary servitude or a belief that imposition of a contempt or criminal sanction for failure to pay support constituted imprisonment for debt.

We conclude that there is no constitutional impediment to imposition of contempt sanctions on a parent for violation of a judicial child support order when the parent's financial inability to comply with the order is the result of the parent's willful failure to seek and accept available employment that is commensurate with his or her skills and ability.

Moss v. Superior Court (Ortiz), 950 P.2d 59, 61 (Cal. 1998).

The California Supreme Court wrote:

In those decisions in which a Thirteenth Amendment violation has been found on the basis of involuntary servitude, the court has equated the employment condition to peonage, under which a person is bound to the service of a particular employer or master until an obligation to that person is satisfied. [footnote omitted]

A court order that a parent support a child, compliance with which may require that the parent seek and accept employment, does not bind the parent to any particular employer or form of employment or otherwise affect the freedom of the parent. The parent is free to elect the type of employment and the employer, subject only to an expectation that to the extent necessary to meet the familial support obligation, the employment will be commensurate with the education, training, and abilities of the parent.

Moss, 950 P.2d at 66-67.

Moss is the leading case about involuntary servitude in the context of family law. However, notice that child support in *Moss* is easily distinguishable from alimony. Parents have a legal obligation to support their children until each child is emancipated — the *voluntary* decision to have a child entails future work by the parents to support that child. Statutes prohibit full-time employment of children, while other statutes require children to attend school, which makes it impossible for children to be self-supporting. However, the legal duty to support an ex-spouse is

less clear, and there are no laws prohibiting the employment of adult women. One can argue (see page 127, below) that alimony is an anachronism that persists from past centuries when there were few employment opportunities for women.

3(c) involuntary servitude in reimbursement of education

There are a few cases that consider the value of a professional degree and the other spouse's financial contribution to earning that degree. The supporting spouse often argues that she/he should be awarded a fraction of the value of that degree. Courts have rejected such an argument, and instead awarded reimbursement for the supporting spouse's contribution to the degree.

- *Severs v. Severs*, 426 So.2d 992, 994 (Fla.App. 5 Dist. 1983) ("The wife's claim to a vested interest in the husband's education and professional productivity, past and future, is unsupported by any statutory or case law. Indeed, such an award by the trial court would transmute the bonds of marriage into the bonds of involuntary servitude contrary to Amendment XIII of the United States Constitution."); *Severs* is cited in *Broyles v. Broyles*, 573 So.2d 357, 359 (Fla.App. 5 Dist. 1990).
- *Washburn v. Washburn*, 677 P.2d 152, 158, n.3 (Wash. 1984) ("We wish to emphasize that by permitting the supporting spouse to be compensated with an award of maintenance, we are not subjecting the student spouse to some form of involuntary servitude by requiring him or her to work at the chosen profession against his or her will.");
- *Simmons v. Simmons*, 708 A.2d 949, 962 (Conn. 1998) ("To conclude that the plaintiff's medical degree is property and to distribute it to the defendant as such would, in effect, sentence the plaintiff to a life of involuntary servitude in order to achieve the financial value that has been attributed to his degree.");

These quotations from *Severs*, *Washburn*, and *Simmons* may be dicta, because they are a reason that the court did *not* chose division of a professional degree as marital property, instead of a justification for the actual remedy: ordering alimony. Incidentally, a better reason than "involuntary servitude" is that an academic degree is *personal* property, owned by the person who earned the degree, and thus not marital property subject to division.

4. my conclusion about unconstitutionality

Despite my personal belief that divorce statutes are unconstitutional, I recognize that it would be a long shot for judges in an appellate court to declare such statutes unconstitutional, because most judges are *not* bothered by unpredictable results in division of marital property or *not* bothered by unpredictable amounts of alimony. Furthermore, declaring such statutes unconstitutional would not only create a public uproar, but also create a crisis in already overburdened family courts, as family courts come to a standstill for at least a year until the legislature can revise the statute.

From reading the reported cases in which a litigant alleged involuntary servitude (see page 91, above), a lesson emerges. Every time a litigant alleges divorce law is unconstitutional, but the litigant fails to support the allegations with citations to cases, citations to law review articles, and serious legal arguments in briefs, that litigant contributes to a long list of cases that affirms the constitutionality of divorce statutes. The growing long list makes it more difficult for a future litigant to successfully challenge the constitutionality of the statutes. Judges love to say the constitutionality is well established, then cite several cases, even when none of the cited cases seriously considered the unconstitutionality.

Furthermore, in many of the reported cases in which a litigant argued that divorce statutes were unconstitutional, the litigant (either pro se or through an attorney) made glaring mistakes in civil procedure, such as raising an issue for the first time in an appellate court,⁸³ or filing in a U.S. District Court⁸⁴ instead of appealing to the state supreme court and then to the U.S. Supreme Court.

constitutional prior to *Orr*

A law review article in 1939 said:

Unsuccessful attempts have been made to persuade the courts to award alimony to husbands, based upon the theory that the married women's property acts, and other "equal rights" laws, have so equalized the property rights of the spouses as also to equalize their respective duties, including the duty of support. The answer of the courts has usually been that, in spite of such statutes the duty of support is still upon the husband alone, unless expressly imposed also upon the wife by statute, in which case, in a few instances, the husband has succeeded. [footnote omitted]

Chester G. Vernier and John B. Hurlbut, "The Historical Background of Alimony Law and its Present Statutory Structure," 6 LAW AND CONTEMPORARY PROBLEMS 197, 206 (Spring 1939).

Writing in 1970, a well-known expert on family law wrote:

... how long will it be before someone asserts that equal protection is denied husbands in states where wives without unemancipated children can receive alimony but husbands cannot? Homer H. Clark, Jr., "Divorce Policy and Divorce Reform," 42 UNIVERSITY OF COLORADO LAW REVIEW 403, 409, n. 35 (Nov 1970).

It is not easy to get a state court to declare a state statute unconstitutional. Many husbands challenged the old statutes that allowed payment of alimony only to a wife, as allegedly unconstitutional because of violation of "equal protection of laws" in the Fourteenth Amendment

⁸³ A litigant must raise an issue in trial court to preserve the issue for appeal.

⁸⁴ Standler, Federal Court Jurisdiction in the USA in Family Law Cases, <http://www.rbs2.com/dfederal.pdf> 31 pp., 3 May 2004.

to the U.S. Constitution, but the following nine state supreme court cases erroneously upheld the statutes:⁸⁵

- *Bugden v. Bugden*, 169 S.E.2d 337 (Ga. 1969), *cert. denied*, 396 U.S. 1005 (1969);
- *Stern v. Stern*, 332 A.2d 78 (Conn. 1973);
- *Husband M. v. Wife M.*, 321 A.2d 115, 118 (Del. 1974) (marital property division: “In the vast majority of marital situations in Delaware, including those which come before our Courts, it is the husband who is the ‘bread winner’, upon whom the principal financial burdens fall; it is his income and his opportunity and ability to accumulate wealth upon which the economic stability of the household and the prosperity of the family chiefly depend. In contrast, as a general rule, the wife is the ‘homemaker’, responsible for managing the home and family and performing the domestic functions which enable the husband to act as the main provider of income and wealth.”);
- *Murphy v. Murphy*, 206 S.E.2d 458 (Ga. 1974), *cert. denied*, 421 U.S. 929 (1975). Cited with approval in *Mack v. Mack*, 217 S.E.2d 278, 280 (Ga. 1975);
- *State v. Barton*, 315 So.2d 289, 291 (La. 1975) (“... we are unable to say that La. R.S. 14:74, which discriminates against men by proscribing the intentional nonsupport of wives by husbands but not of husbands by wives, is arbitrary, capricious, or unreasonable. Despite the increasing activities of women in the marketplace of commerce, it presently remains a fact of life that, between two spouses, the husband is invariably the means of support for the couple.”);
- *Eagerton v. Eagerton*, 217 S.E.2d 146, 149 (S.C. 1975) (“While we do not deem the constitutional issue to be properly before us, the only in point authorities coming to our attention are contra to appellant's contention.”);
- *Hendricks v. Hendricks*, 535 S.W.2d 668 (Tex.Civ.App. 1976);⁸⁶
- *Williams v. Williams*, 331 So.2d 438 (La. 1976);
- *Loyacano v. Loyacano*, 358 So.2d 304, 315-316 (La. 1978), *vacated and remanded sub nom. Loyacano v. LeBlanc*, 440 U.S. 952 (1979).

The later decisions cited earlier decisions with the same result to justify their result, although all of these decisions are now recognized as erroneous. This example shows that, because a statute is old and because many judges have held it constitutional, a statute may still be declared constitutional.

⁸⁵ In addition, one old case upheld a related statute. *Barrington v. Barrington*, 89 So. 512 (Ala. 1921) (Held constitutional a statute authorizing wives, but not husbands, to sue for divorce on grounds of nonsupport or cruelty.).

⁸⁶ While *Hendricks* is a decision of an intermediate Texas appellate court, this decision was cited by two state supreme courts: *Buchholz v. Buchholz*, 248 N.W.2d 21, 23-24 (Neb. 1976); *Loyacano*, 358 So.2d 304, 316 (La. 1978).

In March 1979, the U.S. Supreme Court finally declared the Alabama alimony statute unconstitutional. *Orr v. Orr*, 351 So.2d 904 (Ala.Civ.App. 1977), *quashed writ of cert.*, 351 So.2d 906 (Ala. 1977), *rev'd*, 440 U.S. 268 (1979). An idealist could argue that statutes that allow alimony only to wife were always *unconstitutional*, and cases cited above (prior to the U.S. Supreme Court decision in *Orr*) were erroneous. A realist could argue that the statutes were constitutional until a court declared them unconstitutional. The idealist sees one correct result that is true for all time, while the realist sees a changing interpretation of the Constitution as society changes.

Two state courts declared their alimony statute unconstitutional before the U.S. Supreme Court ruled in *Orr*.⁸⁷ The statute in Massachusetts was amended in 1974 to eliminate gender bias.⁸⁸

leading cases

There are surprisingly few reported appellate cases involving discussion of the constitutionality of modern divorce statutes in the USA on grounds of equal protection of laws or due process. The paucity of cases may occur because specialists in family law tend to concentrate on other issues than constitutional law,⁸⁹ or because few people can afford both a litigated divorce *and* a simultaneous, serious attack on the constitutionality of the statute. On 25 Aug 2008, I searched all reported cases in both state and federal courts in Westlaw for

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[("due process" unconstitutional constitutional "equal protection")  
/s (divorce alimony (marital /s property))] /p  
(unpredict! mathematic! formula equation predict!)
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but I did not find any cases in which plaintiffs had argued that divorce statutes were unconstitutional because of the lack of a mathematical formula. I also did additional searches on constitutionality of divorce statutes and found the following leading cases.

⁸⁷ *Henderson v. Henderson*, 327 A.2d 60 (Penn. 1974); *Beal v. Beal*, 388 A.2d 72 (Me. 1978).

⁸⁸ *Saraceno v. Saraceno*, 341 NE2d 261, 262 (Mass. 1976).

⁸⁹ This is in contrast to criminal defense attorneys who routinely raise constitutional issues, because the U.S. Constitution specifically protects criminal defendants in the Fourth through Eighth Amendments.

Walton, (Calif.App. 1972)

In 1972, an intermediate appellate court in California considered the constitutionality of no-fault divorce and disposed of the issue in one terse paragraph:

Unfair and Unjust Impact of the Family Law Act

Under this head, it is asserted that elimination of the fault concept in dissolution proceedings is unjust and unfair because it permits a spouse guilty of morally reprehensible conduct to take advantage of that conduct in terminating marriage against the wishes of an entirely unoffending spouse. While this may be true and while such a result may be offensive to those steeped in the tradition of personal responsibility based upon fault, this contention presents no issue cognizable in the courts. After thorough study, the Legislature, for reasons of social policy deemed compelling, has seen fit to change the grounds for termination of marriage from a fault basis to a marriage breakdown basis. (See Report of 1969 Divorce Reform Legislation of the Assembly Committee on Judiciary (4 Assem.J. (1969), *Supra*, at p. 8057; see also *In Re Marriage of McKim*, *Supra*, 6 Cal.3d at pp. 678-679, 100 Cal.Rptr. 140, 493 P.2d 868.) 'It is not the province of the courts to inquire into the wisdom of legislative enactments.' (*Harsco Corp. v. Department of Public Works*, 21 Cal.App.3d 272, 279, 98 Cal.Rptr. 337, 342.)

In re Marriage of Walton, 104 Cal.Rptr. 472, 481 (Cal.App. 1972).

Quoted with approval in *Dunn v. Dunn*, 511 P.2d 427, 428 (Or.App. 1973).

The court's assertion in *Walton* that it is acceptable to ignore "morally reprehensible conduct" in connection with no-fault divorce would be strange indeed in the context of criminal trials, torts alleging fraud, and other cases that courts routinely decide.

Rothman, (N.J. 1974)

In 1974, the New Jersey Supreme Court considered the constitutionality of a divorce statute, in which plaintiff alleged a deprivation of property without due process of law:

The statute we are considering authorizes the courts, upon divorce, to divide marital assets equitably between the spouses. The public policy sought to be served is at least twofold. Hitherto future financial support for a divorced wife has been available only by grant of alimony. Such support has always been inherently precarious. It ceases upon the death of the former husband and will cease or falter upon his experiencing financial misfortune disabling him from continuing his regular payments. This may result in serious misfortune to the wife and in some cases will compel her to become a public charge. An allocation of property to the wife at the time of the divorce is at least some protection against such an eventuality.⁹⁰ In the second place the enactment seeks to right what many have felt to be a grave wrong. It gives recognition to the essential supportive role played by the wife in the home, acknowledging that as homemaker, wife and mother she should clearly be entitled to a share of family assets accumulated during the marriage. Thus the division of property upon

⁹⁰ The later research of Weitzman and others showed that most marriages have too little assets to provide for the future living expenses of the wife. Thus this assertion by the New Jersey Supreme Court is false.

divorce is responsive to the concept that marriage is a shared enterprise, a joint undertaking, that in many ways it is akin to a partnership. Only if it is clearly understood that far more than economic factors are involved, will the resulting distribution be equitable within the true intent and meaning of the statute. See generally, Freed and Foster, *Economic Effects of Divorce*, 7 FAMILY LAW QUART. 275 (1973). The widely pervasive effect this remedial legislation will almost certainly have throughout our society betokens its great significance.[FN5]

FN5. It hardly needs repeating that the wisdom of the legislation is not a judicial concern. Where, as is clearly true here, the means chosen have a real and substantial relation to the achievement of the legislative purpose, it matters not whether the judiciary would have selected the same or other means to attain the desired end.

Against this exercise of the police power in the public interest we must measure and compare the individual loss that may be sustained by a spouse whose property is allocated to the other spouse incident to a dissolution of the marriage. In the first place the statute does not by its terms directly affect property rights in any way. No interest in property is taken from one person and transferred to another by the language of the enactment. Only if a person becomes party to a proceeding for divorce, and so more directly subject to the police power of the state, does the statute even have potential relevance. Finally, as we were careful to point out in *Painter v. Painter*, 65 N.J. 196, 320 A.2d 484 (1974), no change in property rights will occur except upon the entry of a judgment of allocation, which must by its terms be 'equitable.' This loss or impairment is indeed slight when balanced against the probable benefit to the public welfare inherent in the legislation.

Rothman v. Rothman, 320 A.2d 496, 501-502 (N.J. 1974).

Fern, (Fed.Cir. 1990)

A military retirement pension from the U.S. Government is divided by a state court as part of the division of marital assets following divorce. A federal statute authorized state courts to divide military pensions, including retroactive application to pensions earned prior to the enactment of the statute. A group of former military personnel sued in federal court of claims for reimbursement of the amount "taken" by the state courts in community property states (e.g., California, New Mexico, Texas), in alleged violation of the Fifth Amendment to the U.S. Constitution. The federal courts held that dividing a military pension at divorce was *not* a taking under the Fifth Amendment. The courts explained that a "taking" was the confiscation of private property for a public purpose, while the pension had belonged to the spouses during the marriage and the state court simply divided the pension between the two spouses after divorce. The courts were also *not* bothered by the retroactivity of the reduction in value of a military retirement pay at divorce. *Fern v. U.S.*, 15 Cl.Ct. 580 (Cl.Ct. 1988), *aff'd*, 908 F.2d 955 (Fed.Cir. 1990).

Witcher, (Pa.Super. 1994)

In 1994, an intermediate appellate court in Pennsylvania rejected a wife's assertion that the statute was unconstitutional when it forbid considering marital misconduct when deciding the distribution of marital assets. *Witcher v. Witcher*, 639 A.2d 1187, 1190 (Pa.Super. 1994).

Judicial Criticism of Permanent Alimony

Kahn, (Fla. 1955)

In 1955 the Florida Supreme Court considered a case involving a 25 y old wife who filed for divorce and sought alimony. The trial court denied her alimony because she was earning \$30/week and she had no children to support. The husband was receiving approximately \$80/week in military veterans disability payments and salary. The wife argued that the breakdown of the marriage was the fault of the husband, so she was entitled to alimony. The Florida Supreme Court upheld the denial of alimony, and wrote a few sentences about the history of alimony in Florida and the rule that alimony was *not* an automatic entitlement.

Since its original enactment in 1828, our statute has authorized the Chancellor to make such allowance for alimony to the wife ‘as from the circumstances of the parties and nature of the case may be fit, equitable and just; * * *.’ Section 65.08, Fla.Stat., F.S.A. The wife's need and the husband's ability to pay was at an early date established as the criterion by which to determine what alimony, if any, was to be awarded the wife. See *Jacobs v. Jacobs*, Fla. 1951, 50 So.2d 169, and cases there cited. Thus, there was no need for alimony on the part of the wife if she had a separate estate ‘adequate to her comfortable support.’ *Chaires v. Chaires*, 1864, 10 Fla. 308, 315, citing BRIGHT, ON HUSBAND AND WIFE, p. 359. Ordinarily, however, in those days the husband was the ‘only hope of support’ of an ‘unfortunate wife, who may have been abandoned by a dissolute husband and doomed to drag out a weary existence in married widowhood. * * *’ *Chaires v. Chaires*, supra. And, indeed, until recent years, a divorced wife had little prospect of being able to work and earn a livelihood, and it was essential to a well-ordered society that she be appropriately maintained by her estranged husband so that she would not become a charge on the community. Times have now changed. The broad, practically unlimited opportunities for women in the business world of today are a matter of common knowledge. Thus, in an era where the opportunities for self-support by the wife are so abundant, the fact that the marriage has been brought to an end because of the fault of the husband does not necessarily entitle the wife to be forever supported by a former husband who has little, if any, more economic advantages than she has. We do not construe the marriage status, once achieved, as conferring on the former wife of a ship-wrecked marriage the right to live a life of veritable ease with no effort and little incentive on her part to apply such talent as she may possess to making her own way. The matter still rests — as it has since 1828 — in the discretion of the Chancellor to make such an award for alimony as ‘from the circumstances of the parties and nature of the case may be fit, equitable and just.’

Kahn v. Kahn, 78 So.2d 367, 368 (Fla. 1955).

The sentence in *Kahn* that says “... in an era where the opportunities for self-support by the wife are so abundant, ... does not necessarily entitle the wife to be forever supported by a former husband who has little, if any, more economic advantages than she has.” was quoted with approval by the highest court in New York state. *Kover v. Kover*, 278 N.E.2d 886, 890 (N.Y. 1972). The court in *Kover* concluded “... the courts below did not, in light of the record presented, abuse their discretion in refusing to grant alimony. The couple was childless, the wife was still in

her thirties and capable of supporting herself, the marriage was of moderately short duration and the income of the spouses almost equal.” *Kover*, 278 N.E.2d at 890.

My search of state and federal cases in Westlaw on 28 Sep 2008 showed no courts outside of Florida have quoted the sentence from *Kahn* that denies automatic alimony to wife as a result of her former “ship-wrecked marriage”, and recognizes her obligation to use her talent to earn her own salary instead of living “a life of veritable ease” from the efforts of her former husband. However, this sentence continues to be good law in Florida. *Belcher v. Belcher*, 271 So.2d 7, 16 (Fla. 1972) (Roberts, C.J., concurring); *Hillier v. Iglesias*, 901 So.2d 947, 950 (Fla.App. 4 Dist. 2005) (Farmer, C.J., concurring and dissenting).

Wolfe, (Ohio 1976)

In June 1976, the Ohio Supreme Court appeared to cast doubt on the validity of alimony, even though alimony was authorized by statute. The Court cited a string of Ohio cases that held that *all* marital obligations, including the duty of support, ceased on divorce. The Court then concluded:

At this point we end our quest for an ascertainable and legitimate basis for post-marital alimony, properly so-called, because we are confident that modern legal principles cannot harbor such an anachronistic notion. Rather, it is our considered opinion that most awards of property incident to a final divorce are readjustments of the party's property rights, and “... (w)hether in the judgment such adjustment is called ‘alimony’ or ‘division of property’ ... (has not been considered) important” (*DeMilo v. Watson* (1957), 166 Ohio St. 433, 436, 143 N.E.2d 707, 709, Zimmerman, J.), by parties, bench or bar.

Wolfe v. Wolfe, 350 N.E.2d 413, 421 (Ohio 1976).

Two paragraphs later, *Wolfe* says:

Certainly there is no legislative contemplation or authorization that an ex-husband be ordered to pay periodically, a sum determined by what he can afford, for an indefinite period of time. Such interpretation would be manifestly unfair not only to the husband, who, through the caprice of longevity might eventually pay an astronomically excessive sum, but also to the wife, who might only receive a fraction of what is due her through the death of the ex-husband, or her own remarriage or death.

Wolfe v. Wolfe, 350 N.E.2d 413, 421 (Ohio 1976).

Two pages later, *Wolfe* says:

The courts of this state have always derived the power to award ‘alimony’ from the statutory law.[footnote omitted] The current provisions of R.C. 3105.18 set forth an 11-factor guide for determining, first, ‘whether alimony is necessary,’ and, secondarily ‘the nature, amount, and manner of’ payments of the sum allowed as ‘alimony.’ Many of those factors have little relevance to a possible need for sustenance, e. g., the duration of the marriage, the standard of living of the parties established during the marriage, the property brought to the marriage by either party, the contribution of a spouse as homemaker, and the relative situation of the parties. On the other hand, those factors are quite pertinent to considerations of the distributions of marital assets and liabilities — the property settlement.

Wolfe v. Wolfe, 350 N.E.2d 413, 423 (Ohio 1976).

dissent in *Olsen*, (Idaho 1976)

A physician who had paid alimony for thirty years retired and then petitioned a trial court to modify the amount of alimony he paid, because of his “material change in his circumstances”, the reduction of his annual income from \$45,000/year to \$22,451/year. The trial court denied his petition and the Idaho Supreme Court affirmed. The Idaho Supreme Court was concerned that the ex-wife’s income had declined from “\$14,000 to \$10,300 including the alimony. With the continuance of the \$200 per month alimony, she will be unable to meet her expenses without ... reducing her standard of living.”⁹¹ It seems strange that the Idaho Supreme Court ignored the fact that the ex-husband’s income was now 50% of his pre-retirement income, but was concerned that the ex-wife’s income was now 74% of her pre-retirement income. Certainly, the ex-husband had a larger change of circumstances than his ex-wife’s change.

Justice Allan G. Shepard on the Idaho Supreme Court wrote a blistering dissent that examined the legal history of permanent alimony. In his third paragraph, he wrote:

... I believe that the facts of the instant case emphasize the need for re-examination of the entire concept of alimony and the continuing viability of that concept in contemporary society. Put in different words, the question facing the Court is whether a judicially imposed system of involuntary servitude is to be continued wherein one human being is placed in bondage to another for what is effectively the remainder of his natural life.

Olsen v. Olsen, 557 P.2d 604, 606 (Idaho 1976) (Shepard, J., dissenting, joined by J. Scoggin).

I turn now to the second basis for my dissent and disagreement with the majority's disposition of the instant matter. In my opinion the time has arrived to squarely face the questions and problems of the doctrine of alimony. If society in the past garnered any benefit from this antiquated system of private (versus public) welfare, such is either non-existent in this day and age or at the least is far outweighed by the antagonisms, social dislocations, economic burdens and judicial inefficiency which are involved and result from the perpetuation of the doctrine. See, Peele, ‘Social and Psychological Effects of the Availability and the Granting of Alimony on the Spouses,’ 6 LAW & CONTEMP.PROB., 283 (1939). The rationales which were once said to justify alimony awards have long since lost their force. Of more importance perhaps is that in consideration of the rapidly evolving status of women there is serious doubt of the constitutional validity of our sexually biased alimony provisions. See, Griggs, ‘The Economics of Divorce, Alimony & Property Awards,’ 43 CINN.L.REV. 133 (1974); *Reed v. Reed*, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971). Because of these changes, as more fully discussed below, I am of the opinion that alimony violates the

⁹¹ *Olsen v. Olsen*, 557 P.2d 604, 605 (Idaho 1976) (majority opinion).

dictates of equal protection found in the state and federal constitutions⁹² and should no longer be permitted.

Olsen v. Olsen, 557 P.2d 604, 608 (Idaho 1976) (Shepard, J., dissenting, joined by J. Scoggin).

Justice Shepard noted the historical role of alimony as punishment and that the Idaho Supreme Court in *Good*, 311 P.2d 756 (Idaho 1957) ended the rule that misconduct by the wife barred an award of alimony to her.

Since the concept of alimony arose only from the right of a wife to support during the marriage, once an absolute divorce was granted the conceptual basis of alimony evaporated. Divorce a vinculo declared the marriage never legally existed, that the former wife was a feme sole. Accordingly, under Ecclesiastical law the dissolution of the marriage relationship prohibited alimony thereafter. Vernier and Hurlbut, ["The Historical Background of Alimony Law and Its Present Statutory Structure," 6 LAW & CONTEMP.PROB., 197-201].

In spite of its root origins in the Ecclesiastical law of England, the doctrine of alimony in this country has received very different treatment in the award of support following absolute divorce. American courts have since colonial times extended the husband's duty of support beyond the complete termination of the marriage. I find no explanation for this change in doctrine and it is therefore impossible to ascertain the purpose or policy of the decisions which have evolved. Some courts continue to assert the rationale of punishment, some cite the English experience but then continue support beyond the formal and complete termination of the marriage, and some explain it only in terms of disparities between the man and the woman's social and economic opportunities. In all, this wavering of views on the purpose of alimony in American jurisdictions looks suspiciously like mere groping on the part of the courts and is perhaps the initial indication of the questionable rationale said to legitimate the doctrine.

....

The law of Idaho is no exception to this obfuscation of purpose. Historically, since 1875 punishment has been the primary rationale for the award of alimony in this state. Our present law, I.C. § 32-706, still predicates awards on an offense of the husband. In the earliest alimony opinions of this Court fault was the dominant concern, although other considerations were noted. *Enders v. Enders*, 36 Idaho 481, 211 P. 549 (1922); *Humbird v. Humbird*, 42 Idaho 29, 243 P. 827 (1926); *Smiley v. Smiley*, 46 Idaho 588, 269 P. 589 (1928); *Hampshire v. Hampshire*, 70 Idaho 522, 223 P.2d 950 (1950).[footnote omitted] As recently as 1954 in *Jolliffee v. Jolliffee*, 76 Idaho 95, 101, 278 P.2d 200, 203, it was stated 'evidence as to fault or wrongdoing is the sine qua non of a just and equitable * * * award of alimony.'

....

That radical departure from the traditional rule that the wife's fault barred an award of alimony, see *Enders v. Enders*, [211 P. 549 (Idaho 1922)]; *Fisher v. Fisher*, 84 Idaho 303, 308, 371 P.2d 847 (1962); 34 A.L.R.2d 313, 321 (1954),

⁹² Justice Shepard was correct. Sixteen months after *Olsen*, the U.S. Supreme Court invalidated an Alabama statute that permitted only the wife to receive alimony. *Orr v. Orr*, 440 U.S. 268 (1979). Several years after *Orr*, the Idaho Supreme Court found that allowing alimony only to wife violated the equal protection clauses of the state and federal Constitutions. *Murphey v. Murphey*, 653 P.2d. 441, 447 (Idaho 1982).

....

That perspective was explained in *Good* as necessary to protect the interest of society in not having a former wife left destitute by the divorce. Yet, how far we have moved from this narrow concern for the interest of society. Somehow the legitimate interest of society in preventing destitute divorcees (unable as contrasted to unwilling to work) from being cast upon the relief rolls has been perverted into an instrument to level economic disparities, both real and imagined, between two people in which there exists no legal relationship. The focus of judicial inquiry is no longer whether the former wife is about to become the object of public charity. Without guidance from this Court and at the sole whim of a trial judge, bound by no ascertainable standard, eternal peonage can be imposed upon a man solely because he was once called a husband.

Since *Good* [311 P.2d 756 (Idaho 1957)], 'social necessity' has blossomed into a judicial calculus of many and diverse factors and variables. Among the factors and variables which have been discussed are:

- 1) the fault of the husband;
- 2) the extent of the wife's needs and her ability to meet those needs;
- 3) the amount of the community property award;
- 4) the existence of minor children;
- 5) the wife's health, age and vocational skills;
- 6) eligibility for social security;
- 7) duration of the marriage; and
- 8) remarriage of either spouse.

See, *Simplot v. Simplot*, 96 Idaho 239, 246-47, 526 P.2d 844 (1974); *Speer v. Quinlan*, 96 Idaho 119, 132, 525 P.2d 314 (1974); *Evans v. Evans*, 92 Idaho 911, 920, 453 P.2d 560 (1969); *Saviere v. Saviere*, supra; *Loveland v. Loveland*, 91 Idaho 400, 403, 422 P.2d 67 (1967); *Losee v. Losee*, 91 Idaho 77, 79, 415 P.2d 720 (1966); *Despain v. Despain*, 78 Idaho 185, 190, 300 P.2d 500 (1956); *Nichols v. Nichols*, 84 Idaho 379, 383, 372 P.2d 758 (1962); *McHan v. McHan*, 59 Idaho 496, 506, 84 P.2d 984 (1938). See also, *MacDonald v. MacDonald*, 120 Utah 573, 236 P.2d 1066, 1070 (1951); Clark, supra, at 442.

To substantiate this proliferation of criteria a host of arguments have been foisted upon courts to justify alimony. Professor Homer H. Clark, Jr., in his treatise, *THE LAW OF DOMESTIC RELATIONS*, discusses five rationales which courts have relied upon in justification for alimony awards.

'(A)limony acts indirectly to protect the children of divorce, it prevents the wife from becoming a financial burden to the community, it eases the hardship of transition from marriage to single statute, it compensates the wife for services rendered, and to some extent it gives tangible form to moral judgments about the relative fault of the spouses.' at 442.

In addition, it has been suggested that alimony serves the vital function of compensating women for past and present economic and social discrimination. Griggs, supra, at 149. While at one time or another in the past I might have joined in defending alimony for one or more of these reasons, I now believe that by contemporary standards they no longer provide a reasonable basis or justification for such awards.

I deem it clear that while punishment is of diminishing importance in deciding alimony questions in Idaho, nevertheless, the doctrine of alimony continues to some extent to be infected with the fault-punishment concept. By the institution of no-fault divorce we have at least begun to understand that facile moral judgments serve no legitimate purpose in an area as complex as the marital relationship between man and woman and the dissolution thereof.

To pontificate that the scales of justice are capable of objectively identifying and weighing the origins of marital discord and relative degrees of fault between the parties and then awarding a penalty for such is nothing short of ludicrous. At the least it can do no more than aggravate and prolong the trauma of the occasion of divorce and the residual and resulting bitterness of the parties thereafter. In purporting to punish the fault of the husband but not that of the wife it further raises serious questions of equal protection. See, *Murphy v. Murphy*, (Ga.) 42 U. S. Law Week, 2393; *Wiegand v. Wiegand*, 226 Pa.Super. 278, 310 A.2d 426 (1973). *Olsen v. Olsen*, 557 P.2d 604, 610-612 (Idaho 1976) (Shepard, J., dissenting, joined by J. Scoggin).

Justice Shepard notes that emotional and financial trauma to the ex-husband is ignored in justifications for alimony, and that it is difficult to find objective evidence about the misconduct of spouses during their marriage.

Another rationale for alimony has been that it assuages to some extent the potential trauma of change in the social and financial status of the wife on the occasion of divorce. See, Peele, *supra*, at 291. That reasoning assumes that such disruptions only accrue to the wife and that is clearly not the case. In most divorces, particularly those involving minor children, the wife is awarded the family home and furnishings together with child support. In many cases the husband literally faces bankruptcy and is deprived not only of his marital status but also the greater part of his previous relationship with his children. A good marriage is greater than the sum of its parts and both parties thereto suffer from a division. Alimony only exacerbates the problems by forestalling the recovery of separate identities and rekindling the anguish of the divorce with each periodic payment of alimony. Following a divorce a woman may remarry and usually better her situation through the injection of income from her new husband. On the other hand a divorced man paying alimony and child support is almost automatically barred from remarriage unless willing to risk continued marital discord over which woman he owes more financial loyalty, the one to whom he is married and the law enjoins him to support, I.C. § 32-901, or the one to whom he is no longer married but which a judge has required him to support. At the very least he faces financial stress in trying to support two households.

A further rationale is that the wife is entitled to alimony as just compensation for her faithful contribution to the marriage. As in the question of marital fault there is a complete lack of objectivity in forming such facile moral judgment.

The wife may have made the marriage and the household a living hell for her husband and children. Such may as in *MacDonald v. MacDonald*, [236 P.2d 1066 (Utah 1951)], be a chronic alcoholic who precipitated the break up of the marriage and the family. On the other hand she may have been faithful, loving, tolerant, courteous, kind, obedient, thrifty, industrious and God fearing. We can hardly depend on the parties for an objective evaluation of the wife's contribution to a marriage and any attempted outside evaluation can be nothing but farcical. As John Steinbeck observed in 'Cannery Row', people may be very different depending upon the peephole through which they are viewed. There is too little, if any, objective evidence for courts to blandly announce that alimony should be awarded to women because everyone knows that they contribute faithfully to the well being and stability of the should be granted on an individual rather than a class basis and in any event only by than a class basis and in any even only by an ecclesiastical court.

Olsen v. Olsen, 557 P.2d 604, 613-614 (Idaho 1976) (Shepard, J., dissenting, joined by J. Scoggin).

Justice Shepard says there is no credible justification for alimony and permanent alimony should be abolished.

We now have in this state a doctrine created by statute to serve one purpose and molded through legislative erosion and judicial fiat to serve a multitude of purposes. It has no justification in legal history nor any reasoned explanation for its existence. It is assumed to fulfill a necessary function of social economy, but that 'necessity' appears suspect at best. As far as I can glean from the law of this jurisdiction, and giving due deference to arguments from other jurisdictions, alimony exists because it has always existed and this alone appears to be its sole justification. Such bears no reasonable relationship to the objective the statute is said to serve and consequently results in an impermissible classification in violation of the equal protection of law guarantees of the Idaho and United States Constitutions.

It is said that there is nothing so dangerous to the status quo as an idea whose time has come. More dangerous yet is the continuance of an idea whose time has past. In voiding Idaho Code § 32-706 we would not be alone in holding that permanent alimony no longer has any place as a legal concept or doctrine in contemporary society. We would be joining the states of Texas, Delaware, Pennsylvania and North Carolina. See Vernon's, Annotated Civil Statutes (Tex.) § 4683 (1960); *Beres v. Beres*, 2 Storey 133, 52 Del. 133, 154 A.2d 384 (1959); *Hooks v. Hooks*, 123 Pa.Super. 507, 187 A. 245 (1936); *Rayfield v. Rayfield*, 242 N.C. 691, 89 S.E.2d 399 (1955). In each of those states alternative provisions have been made to insure a fair and financial accounting upon divorce and to protect the interests of society in preventing the creation of charity cases. Nevertheless, the overriding concern in each appears to be the achievement of a complete dissolution of all duties and responsibilities upon divorce. With that objective I am in complete agreement.

Olsen v. Olsen, 557 P.2d 604, 615 (Idaho 1976) (Shepard, J., dissenting, joined by J. Scoggin).

Justice Shepard concludes his dissenting opinion:

In my judgment the time has long since passed when the state and its judiciary should cease its unwarranted, unnecessary, irrational intrusion into the lives of its citizens simply because at one time they occupied a marital status.

In the absence of other factors, we would not countenance the demand of an ex-employee for lifetime support from his ex-employer merely because of the termination of the previously existent employment relationship. How ludicrous would we consider a demand for lifetime support for one who once engaged in a dissolved partnership, the assets of which have been distributed. We would undoubtedly laugh out of court an able bodied person past the age of majority who demanded a judicially mandated lifetime support from another person on the sole basis that a parent-minor child relationship had once existed. I deem it obvious that in all those instances regardless of a plaintive plea that 'I gave him (or her) the best years of my life,' we would nevertheless rule that when the legal relationship terminated and the accounts were settled each person was required to go his own way freed of liability to the other. In each of these cases we would certainly refuse to institute a system of lifetime peonage and bondage and I doubt not that in the event we complied with such requests we would be speedily overruled by higher authority on constitutional grounds.

Why then do we tolerate, continue and judicially mandate a system of lifetime serfdom upon the dissolution of a marriage relationship? I deem there to be no answer to that question except 'that's the way we've always done it.' The law of domestic relations requires more than placebos and patent medicines. It is long past time for judicial surgery to excise the doctrine of alimony from the body of the law of domestic relations.

Olsen v. Olsen, 557 P.2d 604, 616 (Idaho 1976) (Shepard, J., dissenting, joined by J. Scoggin).

Justice Shepard wrote another dissenting opinion on alimony in *Murphey v. Murphey*, 653 P.2d. 441, 447 (Idaho 1982).

While I agree with Justice Shepard, I think he goes too far when he suggests that the division of marital property will always be adequate to provide for future needs of an unemployed spouse. Many married families will rent an apartment, thus not owning a house that can be sold at divorce to generate money. Many families will have negligible savings or investments. The real issue is whether, after divorce, a former homemaker is to become self-reliant and earn an income, or whether the former homemaker is to continue being financially dependent on a working ex-spouse. Beginning at page 120 below, I suggest that alimony should protect an innocent, financially dependent spouse when a financially superior spouse either (1) commits misconduct during the marriage or (2) ends the marriage for no reason or a frivolous reason, thus involuntarily dumping the other spouse. But if we do not want to allow courts to hear evidence of marital misconduct or reasons for divorce, then I suggest abolishing permanent alimony.

Stansberry, (Okla.App. 1977)

Justice Shepard's dissent in *Olsen* has generally been ignored. One exception was an intermediate appellate court in Oklahoma, which quoted Justice Shepard extensively and agreed with him. I want to emphasize that this intermediate appellate court decision was later vacated by the Oklahoma Supreme Court, so the intermediate appellate court decision quoted below is *not* good law.

The facts of the case are simple. The husband was a physician whose gross income was \$77,650/year. After a 19 year marriage, the parties were divorced in December 1973. The trial court ordered the ex-husband to pay alimony of \$1000/month for the next 20 years. The husband would be 65 y old when the alimony order expired. The intermediate appellate court reduced the alimony to \$500/month for 16.67 years, which would total 42% of the amount ordered by the trial court. The Oklahoma Supreme Court vacated the judgment of the intermediate appellate court and affirmed the trial court.

Because the intermediate appellate court decision was neither published nor available in Westlaw, I quote the relevant parts in full:

In Oklahoma, as in most states, the law relating to alimony is unclear, requiring judges and lawyers to speculate as to what the ultimate award of alimony, if any, will be.[FN3] We think this case is a classic example where one representing a client in a \$350,000 divorce cannot predict within \$100,000 what the alimony award, if any, might be.

[FN3] We note numerous Oklahoma cases wherein the trial court's award of alimony was substantially modified without any reason being given. Examples include the two timeworn cases of *Moseley v. Moseley*, 171 Okl. 150, 42 P.2d 237 (1935), and *Collins v. Collins*, 182 Okl. 246, 77 P.2d 74 (1938). In *Moseley*, an \$18,000 award of alimony to the wife was

vacated on ground of excessiveness and the sum of \$6,000 was substituted. In *Collins*, the \$16,000 alimony award was reduced to \$8,000; the parties had been married only four months. The more recent cases follow this precedential perplexity, and are represented by *Laster v. Laster*, Okl., 370 P.2d 823 (1962), in which the court reduced a \$9,000 award to \$6,000; *Warr v. Warr*, Okl., 386 P.2d 639 (1963), wherein the court cut in half a \$210,000 award; and *Kirkland v. Kirkland*, Okl., 488 P.2d 1222 (1971), in which the wife's alimony payments were doubled from \$15,000 to \$30,000.

The cases relating to alimony in Oklahoma are numerous. Support can be found in the cases for absolutely any argument or position one wants to pursue. No citations are necessary when discussing the various and sundry things courts consider in assessing alimony, such as duration of marriage, parties' earning capacities, parties' health, and so forth, and the considerations go on and on. However, again, when all these "elements" are considered, one is still left in the dark as to what the ultimate alimony award, if any, will be in any given case. The early cases involving alimony in Oklahoma clearly indicate it was granted because of need. *Privett v. Privett*, 93 Okl. 171, 220 P. 348 (1923)9, *Gundry v. Gundry*, 11 Okl. 423, 68 P. 509 (1902). As the cases were handed down, new and different elements were injected under new and different factual situations. Soon the term "alimony" became confused and synonymously used for money in lieu of property. *Dobry b. Dobry*, 203 Okl. 327, 220 P.2d 698 (1950); *Diment v. Diment*, Okl. App., 531 P.2d 1071 (1974). This adulteration of terms found its way into the statute. 12 O.S. 1975 Supp. § 1278.

Need for support oftentimes was not mentioned but "alimony" was granted anyway, without any reason being given. *Seelig v. Seelig*, Okl., 460 P.2d 433 (1969); *Bessinger v. Bessinger*, Okl., 372 P.2d 870 (1962); *Smith v. Smith*, Okl., 311 P.2d 229 (1957). Eventually a widespread assumption developed that divorce automatically involved alimony and that the wife was entitled to it regardless of the circumstances. One case went so far as to award alimony to a wayward woman simply because the parties were once married, and although the court did note that the alimony was not a reward for the wife's infidelity, it did not, however, shed any light as to why it was granted. *Pauly v. Pauly*, 14 Okl. 1, 76 P. 148 (1904).

To award alimony simply because it has always been done in divorce cases is not only inequitable, but is also an affront to our statutory law. Times have changed, women have become self-supporting and independent, but the law of alimony lags a century behind.

At one end of the spectrum is a case where an unemployable, sickly and unmarriageable woman is given little or no alimony. At the other end of the spectrum is the case of *Olsen v. Olsen*, Idaho, 557 P.2d 604 (1976), wherein the husband was married to a woman for 10 years and has been paying her alimony for over 30 years notwithstanding the fact she earned in excess of \$14,000 per year and had substantial savings and property. In *Olsen*, the parties were divorced in 1946, and the husband as of 1977 is still paying alimony. In his dissent, Justice Shepard wrote a most penetrating and scholarly analysis of the alimony problem. In part, he said:

[quotation omitted here]

Stansberry v. Stansberry, Not Published in Pacific Reporter, 1977 Okla. Civ. App. LEXIS 154, at *6-*10 (Okla.App. 1977).

After quoting Justice Shepard's dissenting opinion, the intermediate appellate court wrote:

The court is likewise aware of the number of marriages among students of the professions that end in divorce shortly after the student graduates into his or her chosen profession. Oftentimes, if not always, the spouse that lingers behind becomes bitter, resentful, and has an attitude of "I am responsible for you and for the position you have

attained." More times than not the graduated professional would have gone on, with or without the spouse's contribution to his or her education.

This court is also aware of what seems to be a nurtured attitude that once the divorce takes place, the wife should continue to live the same lifestyle as she enjoyed prior to the divorce, even if the husband must live in poverty or the equivalent thereof. Such ideas and reasoning are groundless. A person with any worldly experience knows that two households cannot be maintained as cheaply as one. Both parties under these conditions must lower their lifestyles to some degree. Most common is a factual situation wherein early in the marriage both parties work until both, or at least the husband, is educated. Typically, the wife continues to work until the husband becomes established in his business. The wife then voluntarily quits work, tends to children, and other not so lifeshortening tasks as the husband and family provider endures daily the rest of his life. Typically the parties want the best they can afford and usually live in a lifestyle barely within their income. The wife wants a better house, bigger cars, miscellaneous luxuries, and the husband naturally wants his family to have the best. Therefore the husband works harder and the family's tastes and quality of lifestyle increase accordingly. Suddenly the marriage goes sour and divorce results. Paradoxically, the wife then comes into court saying she is unskilled, having lived the "housewife routine" for many years and seeks to put the husband in economic bondage by making him pay her "private welfare" or a "judicially imposed" social security as Justice Shepard called it. The parties go to court and the wife envisions a happy future for her husband because of his education and contrasts a drab, bleak, and not as easy life for herself in the future. Contributing to those bleak thoughts are the facts she might have to lower her lifestyle, return to gainful employment and give up her accustomed "housewife routine." Understandably she becomes concerned. So concerned in fact she feels she should continue to live in the same way and have her ex-spouse pay for it because he was once her husband. Should she continue to live in a large expensive home (as in this case, with swimming pool), drive luxury automobiles, and should the ex-husband be forced to pay for all this simply because he was once married to her? Possibly so. But for how long? One month? Six months? One year? Until she can get a job or readjusts? Five years? Ten years? In the present case it is for 20 years. Contrast this hypothetical situation with the original purpose of alimony which was to prevent the wife from being destitute and becoming a charge on the public.

Returning to the present case, in addition to the \$500 per month child support and additional schooling expenses paid by defendant husband, in the first 67 months defendant would be paying \$2,000 per month, and subsequently \$1,000 per month until he paid for 20 years. Imposing such a financial enslavement on defendant shakes the conscience of this court. It is true plaintiff has an eye disease, but should defendant be chained in economic servitude because plaintiff suffers from an affliction through no fault of defendant? We do not think so. To burden defendant with the amount of alimony payments as the trial court did is clearly an abuse of discretion. By plaintiff's own medical expert witness the extent of plaintiff's eye disease is unknown and admittedly speculative at the best. It is true plaintiff worked some outside the home during the early years of her marriage to defendant. But it is also apparent from the record that defendant has worked long and hard and the bulk, if not all, of the estate is a result of defendant's efforts. As previously indicated herein, alimony is for support, and the purpose of alimony is to keep the spouse off public welfare, or from becoming destitute. In the present case plaintiff, because she was married to defendant, has monthly expenses of \$1,750, and wants to continue to live in the family home with expenses of \$1,111 on the home alone. Included in this figure is a \$114 per month lawn care bill and a \$75 per month swimming pool maintenance bill. The alimony award granted by the trial court would allow her to live in such a manner for the next 20 years. Defendant in his brief aptly stated the possible consequence of such payments when he said: "The Plaintiff in her

zeal to collect an unconscionable alimony judgment for support could force the liquidation of these operations [farming and horse racing] and in effect kill the goose that lays the golden egg."

We therefore think \$240,000 payable at \$1,000 per month for 20 years is clearly excessive. With \$140,779 worth of property and money in lieu of property it can hardly be said that plaintiff will be destitute or a ward of the public, even if no alimony for support were given her. With the real property, personal property, rental property, and the cash plaintiff received and will receive for 67 months, we think that \$500 per month is more than ample to prevent plaintiff from becoming destitute.[FN4] We therefore reduce the \$240,000 alimony award payable at the rate of \$1,000 per month to a \$100,000 alimony award payable at the rate of \$500 per month until paid or terminated by death or remarriage. We find this allocation is more fair to both parties involved considering all the elements heretofore mentioned that courts consider in determining alimony awards. That is to say, plaintiff's lifestyle will be lessened to a degree, but certainly not to the point where it could be said she is destitute. Also, defendant will not be in what Justice Shepard in *Olsen v. Olsen*, supra, categorized as "lifetime serfdom" or a "judicially created bondage." It is hoped that the highest courts of our land and the legislatures will, after nearly a century of outdated law, inquire into, outlaw, and change the law, or at least set some sort of standards to follow in divorce cases so the lawyers, public, and trial judges can make some educated guess as to what the alimony, if any, should be in any particular case.

[FN4] Defendant states in his brief "it would appear logical that the alimony for support should not exceed \$100,000 in the case at bar."

Stansberry v. Stansberry, Not Published in Pacific Reporter, 1977 Okla. Civ. App. LEXIS 154, at *16-*22 (Okla.App. 1977).

This intermediate appellate opinion in *Stansberry* was vacated by the Oklahoma Supreme Court and the decision of the trial court was affirmed. The Oklahoma Supreme Court tersely remarked on the quotation of *Olsen* by the court below:

The Court of Appeals decision quotes at length and adopts language of a dissenting opinion in *Olsen v. Olsen*, 98 Idaho 10, 557 P.2d 604 (1976). [footnote omitted] We are not persuaded by that dissent and do not accept the dissent's understanding of alimony as controlling here, or as legal precedent in this jurisdiction.

Stansberry v. Stansberry, 580 P.2d 147, 149 (Okla. 1978).

Thus, Justice Shepard's dissent in *Olsen* was rejected in Oklahoma, which is apparently the only state outside of Idaho to cite that dissenting opinion.

Rogers, (Okla.App. 1978)

Six months after their decision in *Stansberry*, supra, the same three-judge panel on an intermediate appellate court in Oklahoma considered another alimony case.

The facts are simple. Both spouses had earned a M.D. degree and both had practiced medicine. "After several years" the wife abandoned her practice of medicine and became a full-time homemaker. In January 1976, after 19 years of marriage, the husband separated because

the “wife was spending too much money”.⁹³ The parties were divorced in May 1977. The trial court ordered husband to pay \$1000/month in alimony for 24 months and then pay \$500/month in alimony for the next 24 months. The wife appealed both the division of marital assets and appealed for more alimony, but the intermediate appellate court affirmed the trial court’s decision. The husband did not appeal, but if he had, the appellate court hinted that the ex-wife’s earning capacity as a physician should deny alimony to her.⁹⁴

Because the intermediate appellate court decision was neither published nor available in Westlaw, I quote the relevant parts in full:

Originally, alimony was ordered paid upon a showing of need to keep the person from becoming a charge upon the public. *Privett v. Privett*, 93 Okl. 171, 220 P. 348 (1923); *Gundry v. Gundry*, 11 Okl. 423, 68 P. 509 (1902). As the cases were handed down over the years numerous criteria were added until in Oklahoma in excess of 22 factors can be considered.[FN2] Support can be found in the cases for absolutely any argument or position one wants to pursue. That is attorneys search the cases for only those criteria most favorable to their side of the case and ignore the rest. The trial bench, the bar, and the litigants, more often than not, after considering these criteria, are still left in the dark as to what the ultimate award of alimony will be, if indeed any is given at all. In one case the trial court's guess was off over \$100,000. *Warr v. Warr*, Okl., 386 P.2d 629 (1963).

[FN2] The following cases reflect the different criteria the court considers in awarding alimony: (1) the wife's loss of the right of inheritance from the husband, *Harden v. Harden*, 182 Okl. 364, 77 P.2d 721 (1938); (2) the expectation of a future inheritance of the husband, *Mathews v. Mathews*, 186 Okl. 245, 96 P.2d 1054 (1939); (3) the husband's future earning capacity, *Jupe v. Jupe*, 198 Okl. 111, 175 P.2d 976 (1947); (4) the husband's present ability to pay, *Jupe v. Jupe*, supra ; (5) the wife's contribution to the husband's accumulation, *DeRoin v. DeRoin*, 198 Okl. 430, 179 P.2d 685 (1947); (6) whether the marriage was one of affection or convenience, *Dobry v. Dobry*, 203 Okl. 327, 220 P.2d 698 (1950); (7) the earning capacity of the husband, *Funk v. Funk*, Okl., 319 P.2d 599 (1957); (8) the wife's condition and means, *Eisenrich v. Eisenrich*, Okl., 323 P.2d 723 (1958); (9) duration of the married life and the ages of the parties, *Hughes v. Hughes*, Okl., 363 P.2d 155 (1961); (10) the wife's health, *Henley*, Okl., 428 P.2d 258 (1967); (11) any future increase in the value of land, *Johnston v. Johnston*, Okl., 440 P.2d 694 (1968); (12) the wife's expectancy of a future inheritance, *Johnston v. Johnston*, supra; (13) the wife's opportunity for employment, *Fitzer v. Fitzer*, Okl., 460 P.2d 888 (1969); (14) the wife's ability to obtain gainful employment, *Kennedy v. Kennedy*, Okl., 461 P.2d 614 (1969); (15) the mode of living to which the wife had become accustomed during the marriage, *Dowdell v. Dowdell*, Okl., 463 P.2d 948 (1969); (16) the probability of the husband's ability to progress financially, *Conrad v. Conrad*, Okl., 471 P.2d 892 (1969); (17) the earning capacity of the wife, *Conrad v. Conrad*, supra ; (18) the wife's ability to make a living before the marriage, *Conrad v. Conrad*, supra ; (19) the conduct of the parties, *Kirkland v. Kirkland*, Okl., 488 P.2d 1222 (1971); (20) the wife's education, *Kirkland v. Kirkland*, supra ; (21) the age of the children, and the need to maintain a home for them, *Price v. Price*, Okl., 484 P.2d 532 (1971); (22) the parties' station in life before the divorce, *Herndon v. Herndon*, Okl., 503 P.2d 545 (1972).

⁹³ *Rogers v. Rogers*, 1978 Okla. Civ. App. LEXIS 117, at *2-*3 (Okla.App. 1978).

⁹⁴ *Rogers v. Rogers*, 1978 Okla. Civ. App. LEXIS 117, at *18-*19 (Okla.App. 1978).

We note numerous Oklahoma cases wherein the trial court's award of alimony was substantially modified without any reason being given. Examples include the two timeworn cases of *Moseley v. Moseley*, 171 Okl. 150, 42 P.2d 237 (1935), and *Collins v. Collins*, 182 Okl. 246, 77 P.2d 74 (1938). In *Moseley*, an \$18,000 award of alimony to the wife was vacated on ground of excessiveness and the sum of \$6,000 was substituted. In *Collins*, the \$16,000 alimony award was reduced to \$8,000; the parties had been married only four months. The more recent cases follow this precedential perplexity, and are represented by *Laster v. Laster*, Okl., 370 P.2d 823 (1962), in which the court reduced a \$9,000 award to \$6,000; *Warr v. Warr*, supra, wherein the court cut in half a \$210,000 award; and *Kirkland v. Kirkland*, supra, in which the wife's alimony payments were doubled from \$15,000 to \$30,000.

Finally, it reached the point where alimony was granted without reason being given at all. *Seelig v. Seelig*, Okl., 460 P.2d 433 (1969); *Bessinger v. Bessinger*, Okl., 372 P.2d 870 (1962); *Smith v. Smith*, Okla., 311 P.2d 229 (1957). Eventually a widespread assumption developed that divorce automatically involved alimony and that the wife was entitled to it regardless of the circumstances until it is being referred to as "a judicially imposed system of involuntary servitude," no longer based upon need, or "lifetime peonage," or "private welfare (versus public welfare)," or "a judicially mandated system of lifetime serfdom." See dissent, *Olsen v. Olsen*, Idaho, 557 P.2d 604 (1976). In *Olsen*, after a 10-year marriage, a husband was ordered in 1977 to continue paying alimony that he had been paying for 30 years since 1946 to an ex-wife who was earning in excess of \$14,000 per year!

Oftentimes alimony arises in a situation where the woman is unwilling to work as opposed to unable to work. In the present case appellant wife is a licensed medical doctor and, as she said, is very healthy. She stated she has not practiced in several years and it would take some time if she went back to the medical field to catch up on recent procedures. Appellee husband testified jobs were available for persons with appellant wife's present credentials which pay in the neighborhood of \$40,000 per year. It is difficult to see, with appellant wife's earning capacity, why the trial court awarded any alimony. As previously noted herein, appellee husband did not appeal this award of alimony and suffice it to say we find no merit to appellant wife's proposition that the trial court erred in failing to provide sufficient alimony to appellant wife to support her.

Rogers v. Rogers, Not Published in Pacific Reporter, 1978 Okla. Civ. App. LEXIS 117, at *16-*19 (Okla.App. 1978).

Two months after this decision in *Rogers*, the Oklahoma Supreme Court rejected Justice Shepard's dissent in *Olsen*. *Stansberry v. Stansberry*, 580 P.2d 147, 149 (Okla. 1978). The remarks in *Rogers* on alimony are therefore *not* law in Oklahoma.

Karmand, (Md.App. 2002)

In July 2002, an intermediate appellate court in Maryland wrote:

It bears repeating that unlike in the early and middle years of the twentieth century, alimony is no longer a vehicle for long-term support for once economically dependent spouses (and as we have pointed out, until 1972, only for wives). Then, because of the generally inferior economic status of women in society, alimony often was the only means of support for divorced and separated wives who both during and after their marriages had little opportunity for gainful employment.

Today, a quarter of a century after the women's liberation movement of the late 1960's effected a cultural sea change, opening doors for women to enter careers formerly unavailable to them, and two decades after enactment of the Maryland Alimony Act, the notion that in most marriages spouses occupy preordained roles of breadwinner and dependent is an anachronism. In some marriages, the husband and wife agree to occupy those roles, for a myriad of reasons personal to them. That is a choice, however, not a limitation imposed by law. In many marriages, the spouses both are breadwinners, or may alternate in the roles of breadwinner and dependent. Unlike in times past, however, there are opportunities in the workplace and the professions for both genders, and in this country spouses are not culturally pre-destined to occupy given economic roles in a marriage.

Karmand v. Karmand, 802 A.2d 1106, 1117 (Md.App. 2002).

My Suggested Equitable Distribution

There are two significant problems with current equitable distribution statutes: (1) the results are *unpredictable*, and (2) the statutes include factors that make no sense, such as the *need* of a party for assets. I suggest that equitable distribution of marital property should consider only facts during the marriage, and be principally concerned with who earned or contributed each asset and the value of that asset at the time of divorce. I propose the following three-step process.

First, some property should be excluded from a proportional distribution of marital property.

- Any separate property (e.g., inheritance or gift that was deposited in an account bearing the name of only the devisee/donee spouse, property excluded by valid prenuptial or postnuptial agreement of the spouses, premarital property that is not commingled with marital property) is excluded from equitable distribution of marital property.
- Property with utility to only spouse (e.g., books, tools, etc. used in his/her profession; clothing) will be distributed to that spouse and excluded from equitable distribution. In effect, this proposal creates a new type of separate property.
- If the spouses have been living in separate buildings continuously for at least one year, their household property (e.g., furniture, cooking utensils, television, sound recordings, etc.) is presumed already equitably distributed by agreement of the parties.

Second, add all of the financial contributions of each party to the marital assets. Such contributions would include wages, salary, tips, fees for services, etc. Such contributions would also include any initially separate property that is commingled with marital assets (e.g., by depositing a gift or inheritance into a joint account, by depositing premarital assets into a joint account). If a homemaker wants credit for her/his nonmonetary contributions to the marital assets, that homemaker can either use (1) standard amounts determined by local courts for child's day care, cooking, laundry, cleaning, etc. or (2) present evidence of the fair-market value⁹⁵ of that

⁹⁵ There are two obvious possibilities for valuation: (1) the salary that a spouse could have earned as an employee of a maid service, cleaners, day-care center, etc., or (2) the retail cost of purchasing such services from commercial establishments. I suggest using the hourly wages times the number of hours that the spouse exclusively engaged in one activity, so that wages of one spouse are compared to

individual homemaker's services. Similarly, a nonhomemaker is entitled to credit for his/her nonmonetary contributions to the marital assets, such as repairs and maintenance of the house, investment decisions, etc.⁹⁶ In cases where both spouses are employed and both contributed to marital assets in nonmonetary ways, they may elect not to value their nonmonetary contributions to the marital assets.

From these totals for each party, one may subtract the value of significant assets that were dissipated or wasted. To prevent arguing over small items, it may be wise to have a statutory bar for considering dissipation or waste that is less than the greater of either (1) 5% of the party's gross monetary contribution to marital assets or (2) \$2000/year.

The total value of financial contributions by husband is H, the total value for wife is W. The marital assets at divorce will be divided so that husband receives $H/(H+W)$ of the total and wife receives $W/(H+W)$ of the total.

In the third step, the marital property will be appraised and divided. The remaining tangible marital property (e.g., house, automobiles, real estate, jewelry, etc.) will be appraised near the time of equitable distribution. The intangible marital property (e.g., bank accounts, mutual funds, stocks, bonds, etc.) will be valued near the time of equitable distribution. Husband will receive $H/(H+W)$ of the total tangible and intangible marital property, and wife will receive $W/(H+W)$ of the total.

potential wages of a homemaker.

⁹⁶ Note that the statutes quoted above, beginning at page 23, all give credit for non-income producing activities of a homemaker, but fail to give similar credit for non-income producing activities of a nonhomemaker. This feature of statutes is both illogical and unfair.

contributions to career or business

I have written a separate essay that surveys nationwide cases involving a supporting spouse's financial support to the professional education of a supported spouse, and reimbursement of such support at divorce.⁹⁷

Consider when the supporting spouse makes a contribution to a business owned by the supported spouse or to the professional education or career of the supported spouse. Such a contribution could take many forms:

1. the supporting spouse contributed her/his separate money (e.g., pre-marital assets belonging to the supporting spouse, inheritance to supporting spouse, or gifts from supporting spouse's parents⁹⁸) to either the education or business of the supported spouse
2. income earned by the supporting spouse that was used to pay for the supported spouse's education
3. supporting spouse's unpaid personal services to the supported spouse's business
4. the amount of marital assets contributed by the supporting spouse that were used either to invest in the supported spouse's business or in acquiring books, tools, or equipment for exclusive use of the supported spouse. When A is the total amount earned by the supporting spouse, and P is the total amount earned by the supported spouse, then the fraction is $A/(A+P)$.
5. the living expenses of the supported spouse during his/her education, especially if the spouses lived in separate cities, so that the supporting spouse could earn a living and the supported spouse could pursue his/her education.

To prevent unjust enrichment of the supported spouse at divorce, I suggest that equitable distribution at divorce include an order that the supported spouse reimburse the supporting spouse for *all* of these contributions, with interest⁹⁹ from the time that the supporting spouse donated the money or services to the supported spouse. Such reimbursement restores the supporting spouse

⁹⁷ Standler, Reimbursement of Educational Expenses at Divorce in the USA, http://www.rbs2.com/ed_reimb.pdf 47 pp., 5 Sep 2003.

⁹⁸ Let A be the supporting spouse. I suggest including gifts from A's parents, because the parents choose to give the gift to their son-in-law or daughter-in-law, only because of his/her marriage to A. Without the marriage, A would have presumably received the money as either a gift to A or as inheritance to A. Gifts from parents might also be argued as conditional gifts, the parent's condition being that the marriage will continue and their son or daughter would benefit from the enhanced earnings of the supported spouse.

⁹⁹ I favor using a modest rate of interest, such as the rate on a certificate of deposit in a bank, a money-market mutual fund, or a short-term U.S. Treasury bond. The exact rate of interest needs to be chosen by a judge according to where the supporting spouse would have invested the money if she/he were not married. This modest interest compensates for inflation and compensates for the lost opportunity to make a safe investment.

to the position that she/he would have had if there had been no marriage. The reimbursement would preferably be either a lump-sum payment by the supported spouse at the time of divorce, but if the supported spouse can not afford such a lump-sum payment, then the supporting spouse will need to receive monthly payments from the supported spouse after the divorce. Such monthly payments should not be taxable income to the supporting spouse, since she/he already paid applicable income taxes on the amounts. And such monthly payments should not be dischargeable on the death of either spouse, bankruptcy of the supported spouse, or on the remarriage of the supporting spouse.

I have concern with a supporting spouse being awarded permanent alimony because the supporting spouse paid for some of the supported spouse's education. Permanent alimony in such a situation treats the supported spouse's career as an investment, like purchasing stock in a corporation.¹⁰⁰ The truth is that a supported spouse is successful because of his/her intelligence, knowledge, diligent work, ambition — all attributes that are *personal* to that spouse. Financial support from the supporting spouse was only a substitute for loans from a bank, which is why I believe such support should be reimbursed with modest interest, but *not* seen as an entitlement to permanent alimony.

division of retirement pensions

The current divorce law for the division of pensions, annuities, and other retirement accounts is too complicated to discuss here. I suggest that the part of each retirement account that represents contributions, deposits, interest, or dividends during the marriage should be divided in the same way as other intangible marital property. Such distribution of retirement accounts — *not* alimony — should be the principal way of financing the retirement of a dependent ex-spouse.

advantages of my proposal

I suggest that there are several advantages to my proposal, as compared to the current statutory scheme for equitable division of marital assets:

1. This proposed method gives a precise, reproducible result that can be easily verified, unlike the current method which uses a long list of factors to consider. Such predictability should encourage spouses to reach a negotiated settlement, instead of litigating their divorce.
2. This proposed method honors the common-sense principle that people are entitled only to what they earn. The mythical presumption of an equal split of marital assets in some states is discarded.

¹⁰⁰ *Karmand v. Karmand*, 802 A.2d 1106, 1118 (Md.App. 2002) (“The contributions the appellant made to enable the appellee to obtain her dental degree and create a successful dental practice, while important to the welfare of the family during the marriage, simply do not translate after divorce into an income-generating investment in the appellee.”).

3. This proposed method considers only facts during the marriage, and avoids any speculation about future income, future inheritances, etc.
4. By valuing assets near the time of equitable distribution, any increase or decrease in value during the marriage is automatically considered.
5. By ignoring the *need* of a spouse in determining division of marital property, alimony becomes the sole method for providing for the future living expenses of an unemployed spouse after divorce. As Weitzman and others have observed, even if a dependent spouse receives half of marital property at divorce, that share is often inadequate to provide for the dependent spouse's future living expenses.

In the situation where one spouse was employed at a high salary (e.g., \$150,000/year) during the marriage, while the other spouse was a homemaker (nonmonetary contribution of perhaps \$20,000/year), the employed spouse will receive the lion's share of marital property — 88% in this example. In the situation where one spouse was a full-time student during the marriage and the other spouse was employed, the employed spouse will receive the lion's share of marital property, perhaps more than 90%. These lopsided results do *not* mean that the financially weaker party during the marriage will always be disadvantaged — a homemaker could qualify for alimony, and a former student will almost certainly earn a high salary in the future.

Under current law, if one spouse is employed at a very high salary and the other spouse is a homemaker, the homemaker receives a windfall at divorce. Consider the following real case. Husband, Mr. Wendt, was President and Chief Executive Officer of GE Capital Services. Mrs. Wendt had earned a bachelor's degree in music and was qualified to teach in public school, but instead she served as an unemployed "mother, homemaker and corporate wife" during 27 years of a 30-year marriage. After a lengthy trial, the court ordered husband to pay permanent alimony of \$252,000/year, half of husband's pension from GE, and half of the marital property that amounted to *many* millions of dollars.¹⁰¹ Why was Mrs. Wendt entitled to much more alimony and much more marital property than the wife of a music teacher, when both wives work equally diligently as homemakers?¹⁰² Apparently, the trial judge believed that Mr. and Mrs. Wendt were equal partners in their marriage, despite the obvious fact that the economic value of Mr. Wendt's services as corporate manager *far exceeded* the fair-market value of Mrs. Wendt's earning capacity as a music teacher in public school, making the fair-market value of their respective services to the marriage far from equal.

¹⁰¹ *Wendt v. Wendt*, Not Reported in A.2d, 1998 WL 161165 (Conn.Super. 1998).

¹⁰² Prof. Ellman seems to be one of a few commentators to notice this unegalitarian result. Ira Mark Ellman, "The Theory of Alimony," 77 CALIFORNIA LAW REVIEW 1, 77 (Jan 1989).

My Suggestions on Alimony

Issues of fault and responsibility are crucial in both criminal and tort law, and also in understanding human relationships.¹⁰³ To the extent that modern law ignores fault in determining permanent alimony, I think the law is both unfair and unreasonable.

The modern, no-fault divorce law has introduced two distortions into well-developed divorce law. First, by refusing to consider whether a party has committed fault (e.g., adultery, abandonment, extreme cruelty, etc.), the modern law has stripped away a moral basis for both (1) awarding alimony to an innocent party and (2) barring alimony to a party whose fault caused the marriage to end. Second, in marriages that end without fault by either party, the modern law refuses to consider who filed for divorce, thus unjustly awarding alimony to the spouse who repudiated the other spouse. I write this discussion in a gender neutral way, because gender is irrelevant under the Equal Protection Clause of the Constitution.¹⁰⁴

A. problems and solutions in modern law of alimony

When a marriage ends because of fault by one party, it does not matter who filed for the divorce. Either (1) the party at fault can file for divorce, or (2) the innocent party can file for divorce to escape an intolerable marriage, somewhat analogous to constructive discharge in employment law.¹⁰⁵ It makes no sense for the party at fault to benefit from that fault by receiving alimony — the old law was correct in holding that fault bars a person from receiving alimony.

¹⁰³ See, e.g., Barbara Bennett Woodhouse, “Sex, Lies, and Dissipation: The Discourse of Fault in a No-Fault Era,” 82 *Georgetown Legal Journal* 2525, 2531 (1994).

¹⁰⁴ See page 97, above.

¹⁰⁵ *Young v. Southwestern Sav. and Loan Ass'n*, 509 F.2d 140, 144 (5th Cir. 1975) (“The general rule is that if the employer deliberately makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation, then the employer has encompassed a constructive discharge and is as liable for any illegal conduct involved therein as if it had formally discharged the aggrieved employee.”).

Alicea Rosado v. Garcia Santiago, 562 F.2d 114, 119 (1st Cir. 1977) (“Before a ‘constructive discharge’ may be found, entitling the employee to quit working altogether rather than accepting a transfer which he thinks is violative of his constitutional rights, the trier of fact must be satisfied that the new working conditions would have been so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign.”); quoted with approval in *Bourque v. Powell Elec. Mfg. Co.*, 617 F.2d 61, 65 (5th Cir. 1980).

Satterwhite v. Smith, 744 F.2d 1380, 1381 (9th Cir. 1984) (“To determine whether [employee] was constructively discharged on the basis of his race, we must find that a reasonable person in his position would have felt that he was forced to quit because of intolerable and discriminatory working conditions. *Nolan v. Cleland*, 686 F.2d 806, 813-14 (9th Cir. 1982); *Heagney v. University of Washington*, 642 F.2d 1157, 1166 (9th Cir. 1981).”).

When a marriage ends because of fault of neither party, there can be situations in which one party (the dumpee) desires a continuation of the marriage and the other party (the dumpor) wishes the marriage to end.¹⁰⁶ It is an injustice for the dumpor to be awarded alimony, because the dumpor would have a new life free of all marital obligations, while the dumpee continues to pay for the dumpor's living expenses, which is a continuation of the duty of marital support, despite the fact that the dumpor has not only rejected or repudiated the dumpee but also provides no benefits to the dumpee. There is an easy way to determine who is the dumpor: the dumpor is the party who filed for divorce, when there is no fault.¹⁰⁷ However, in modern divorce law who filed for divorce is *not* relevant, which sometimes creates situations where alimony can be unjustly awarded to a dumpor. A simple patch for this defect would be: (1) who files for divorce is relevant when there is fault by neither party and (2) the dumpor is considered to have committed fault (i.e., imposing premature end of a marriage, rejecting an innocent spouse) for purposes of determining alimony and is thereby barred from receiving alimony.

In the modern era of divorce law, judges sometimes *say* that alimony is not punishment. I think such rhetoric is not logical. Why should one party pay the living expenses of someone who provides them no services and has no legal obligations to the payor of alimony? The most logical way to justify alimony is that (1) from the perspective of the payor, it is punishment for fault that caused the end of the marriage; and (2) from the perspective of the recipient of alimony, it is continued support that is a justifiable reliance on the promise that the marriage would continue "until death do us part."

Modern law seems to have recognized the reality that most adults divorce at least once during their lifetime, so that marriage is no longer "until death do us part". Recognizing that reality means that there is no longer a justifiable reliance on promises that a marriage will continue "until death do us part." If marriage is only temporary, lasting as long as neither party files for divorce, it would be imprudent for one party to abandon her/his education or career to become a full-time homemaker. In this view of temporary marriage, alimony is an anachronism that should be abolished — the duty of spousal support should always end when the marriage ends. However, I think such a view is overly simplistic, and would *unjustly* allow a dumpor to cheaply dispose of a long-term spouse.

¹⁰⁶ There are oodles of reasons why the dumpor may wish a marriage to end: boredom, desire to marry a more compatible person sometime in the future, desire to have children (when their current spouse is either sterile or unwilling to procreate), various frivolous reasons,

¹⁰⁷ There should be a legal presumption that spouse B wishes to dump the other spouse when B files for divorce without specifying a reason (i.e., no-fault divorce) and the other spouse wishes the marriage to continue.

But, because it is customary for many marriages to involve a full-time homemaker, the law may wish to recognize a possible entitlement to alimony for a spouse who satisfies *all* of the following four conditions:

- (1) abandoned her/his education or career to become a full-time homemaker,
 - (2) either
 - (a) is currently the principal caregiver to minor children or
 - (b) was the principal caregiver to children for at least 15 years
 - (3) did not commit marital fault
- and*
- (4) is not the dumpor.

In the case of an alimony recipient less than 40 y of age and in good health, the alimony might be rehabilitative, to pay for their education to permit them to become appropriately employed. In the case of older or disabled recipients, the alimony should be permanent. Parts of this proposal are commonly accepted by modern judges, but I suggest that the entire set of conditions be enshrined in statute and I especially suggest that (3) and (4) be included.

In addition to the general situations discussed in the preceding paragraphs, consider this hypothetical. A professor had planned that he/she would retire at age 62 y, and then devote his/her retirement to writing a scholarly history. No financial support for such a project was available — neither grants nor contracts — so the professor would use his/her personal collection of books and photocopies of scholarly articles, and the professor would donate his/her time. The professor's spouse files for divorce and seeks permanent alimony. If the judge awards alimony, the professor's retirement annuity (after splitting approximately half to the spouse) is no longer adequate to pay the professor's living expenses and also pay alimony, thus forcing the professor to remain employed as a teacher, and forego his plan of writing a scholarly history.¹⁰⁸ In my view, the spouse should *not* receive alimony, because the spouse dumped the professor and the professor is an innocent party.

Many commentators have suggested that a dependent spouse's support of the other spouse's career or business should entitle the dependent spouse to permanent alimony. I disagree. Above, at page 117, I suggested that such monetary and nonmonetary contributions by a dependent spouse should be *reimbursed* with interest from the time of the contribution, as part of the equitable distribution of marital assets.

If both spouses want to be divorced from each other, then there should be no alimony to either of them. In a mutually agreed divorce, the marriage and *all* of its obligations should end with the equitable distribution of marital assets, unless the spouses agree to alimony in their marital settlement agreement.

¹⁰⁸ In such a case, it is arguable that alimony would force the professor into involuntary servitude.

B. my proposal for permanent alimony

I suggest a three-step process, (1) determining entitlement to permanent alimony, (2) determining the amount of alimony, and (3) multiplying the amount by a number between zero and one depending on the length of the marriage.

1. entitlement

In the first step, I suggest that permanent alimony should be awarded only to a person who is either:

- only able to find meager employment because of long-term absence from employment;
- unable to find appropriate employment because of chronic disease, disability, physical handicap, old age, or other condition beyond the control of the person; or
- over fifty years of age, but no significant pension or annuity that can be distributed at divorce for retirement

and provided that the person is either:

- an innocent spouse (i.e., her/his misconduct did not cause the divorce) *or*
- dumped by the other spouse for *unspecified* reason, when the dumpee did *not* desire the marriage to end.

On the other hand, a party who committed misconduct or fault during the marriage should be barred from receiving alimony, even if that party needs alimony. Similarly, a party who decides to dump an innocent spouse should be barred from receiving alimony, even if that party needs alimony.¹⁰⁹ Further, any tort or crime committed by a recipient of alimony against the payor of alimony, after the end of the marriage, should end the obligation to pay alimony.

It is inequitable for a person whose misconduct caused a divorce — or who dumped their spouse — to demand alimony, because such alimony would reward misconduct or reward dumping. It is also inequitable for a person to abuse an innocent spouse — or dump a spouse — and then escape from alimony, while the innocent spouse has a decreased standard of living after divorce, because such freedom from alimony would reward misconduct or reward dumping. I agree with legal scholars who have said that alimony is punishment for those whose serious

¹⁰⁹ I wrote this section *before* I began reading law review articles on this topic, to preserve the independence of my opinion. Here, I recognize that several law professors have reached the same conclusion. See, e.g., Margaret F. Brinig and June Carbone, “The Reliance Interest in Marriage and Divorce,” 62 *TULANE LAW REVIEW* 855, 895 (May 1988) (“When the wife elects to leave or is otherwise responsible for the divorce, she forfeits her right to continue enjoying the benefits of her husband’s greater income.”); Robert Kirkman Collins, “The Theory of Marital Residuals: Applying and Income Adjustment Calculus to the Enigma of Alimony,” 24 *HARVARD WOMEN’S LAW JOURNAL* 23, 44 (2001) (Person “who terminates the marriage ... arguably may have decided to voluntarily abandon the fruits of his or her efforts.”).

misconduct caused a divorce. Similarly, I argue that alimony is the price that a person should pay for prematurely ending a marriage for no good reason — analogous to one partner purchasing the other partner's share of a jointly owned business.¹¹⁰

2. amount

In the second step, the amount of alimony should be adequate to allow the recipient of alimony to continue her/his recent standard of living during marriage. To make the amount of alimony predictable, a mathematical formula should be used to determine the amount.

Let P be the monthly income (e.g., wages, dividends, interest, pensions, annuities, etc.) of the payor of alimony, minus any court-ordered payments for child support or previous wives. Let R be the monthly income of the recipient of alimony, or the imputed potential income if the recipient is able to earn money. Let N be the monthly amount needed by the recipient to maintain the standard of living during the marriage.

Provided that $N > R$, the amount of alimony is the lesser of $(N - R)$ or $(P/3)$.
If $N < R$, then the amount of alimony is zero, because there is no need for alimony.

This simple formula provides an incentive for a recipient of alimony to earn a living if the recipient's potential earnings are used in R . I suggest an upper-bound on alimony payments of $(P/3)$, following the long-standing law¹¹¹ that limits alimony to a maximum of one-third of the payor's income.

¹¹⁰ Analogizing alimony to buy-out of a partner in a partnership appears to have been first suggested by Cynthia Starnes, "Divorce and the Displaced Homemaker: A Discourse on Playing with Dolls, Partnership Buyouts and Dissociation Under No-Fault," 60 UNIVERSITY OF CHICAGO LAW REVIEW 67 (Winter, 1993). See also Margaret F. Brinig and June Carbone, "The Reliance Interest in Marriage and Divorce," 62 TULANE LAW REVIEW 855, 897 (May 1988) ("... the party choosing to end the marriage is required to pay for the consequences of that decision.").

¹¹¹ *Appeal of McClurg*, 66 Pa. 366, 1871 WL 10958 (Pa. 1870) ("The Act of 1817 allows but one-third of the husband's annual profits or income from his estate or his labor, as the *maximum* of alimony."); *Dietrick v. Dietrick*, 103 A. 242, 243 (N.J. Err. & App. 1918) ("the amount of permanent alimony ... is usually about one-third of the husband's income"); *Commonwealth v. Kramer*, 80 Pa. Super. 210, 1922 WL 3010 (Pa. Super. 1922); *Lamberton v. Lamberton*, 38 N.W.2d 72, 73 (Minn. 1949) (citing statute). See also Chester G. Vernier and John B. Hurlbut, "The Historical Background of Alimony Law and its Present Statutory Structure," 6 LAW AND CONTEMPORARY PROBLEMS 197, 199 (Spring 1939) ("... the wife might be allotted as much as one-half of the combined income of the spouses, and often as much as one-third."). Vernier and Hurlbut cite statutes in Louisiana and Minnesota in the 1920s with a one-third maximum. *Ibid.* at 203, n. 60. See also Robert Kirkman Collins, "The Theory of Marital Residuals: Applying and Income Adjustment Calculus to the Enigma of Alimony," 24 HARVARD WOMEN'S LAW JOURNAL 23, 61-62, nn. 159-164 (2001).

3. length of marriage

Because the essence of no-fault divorce is that marriages in the USA are no longer “until death do us part”, it seems reasonable to make the length of a marriage a factor in determining the amount of alimony. For short-duration marriages (e.g., less than five years), no permanent alimony should be ordered. For long-term marriage (e.g., more than twenty years), the full amount of alimony from the above formula should be ordered. For marriages of intermediate length, the amount of alimony would be proportional to the length of the marriage, analogous to employers who gradually vest an employee in the company’s pension plan, according to the number of years of employment.

I propose that the amount of alimony in the previous step be multiplied by a factor, F , that depends only on the duration, T , of the marriage in months, according to the following piecewise linear relationship:

if $T \leq 60$ months, then $F = 0.0$

if $60 < T < 240$ months, then $F = (T - 60)/180$

if $T \geq 240$ months, then $F = 1.0$

Using a piecewise linear formula eliminates the harsh inequity of denying alimony to a spouse in a marriage with a duration of less than N years, while allowing alimony to a spouse in a marriage with a duration of more than N years, where N is some number.

In the special situation where one spouse *willfully caused* a disability of the other spouse (e.g., battery, attempted murder, etc.) — either reducing the earning capacity of the disabled spouse, or increasing the disabled spouse’s living expenses — then the disabled spouse should be entitled to permanent alimony (i.e., $F = 1.0$), regardless of the duration of the marriage.

If there be other factors that the legislature considers essential to the determination of alimony, each of the other factors may be expressed in an additional mathematical factor.

4. rehabilitative alimony

Finally, if an unemployed spouse is less than fifty years of age and physically able to work, but lacks education or vocational training to receive an income comparable to the other spouse, then the other spouse should pay rehabilitative alimony for a few years to the unemployed spouse.

C. proof of misconduct

Despite the clear unfairness of allowing an innocent spouse to be jettisoned without permanent alimony, I have strong misgivings about proposing a change in law that would make misconduct during the marriage relevant to alimony determinations.

Misconduct is easy to allege. I am concerned that a person who wants a divorce for a frivolous reason might embellish or exaggerate alleged abuse by the other spouse, so the person who wants a divorce appears more justified in wanting to end the marriage. I am concerned that a party who is eccentric or unconventional could be disadvantaged in divorce litigation before a conventional judge. I am concerned that the judge must make a decision about misconduct based on only a few hours of testimony, which seems inadequate to understand a marriage of many years. In his treatise, Homer Clark tersely wrote:

Since facile judgments about who is responsible for the breakup of a marriage are notoriously unreliable, basing alimony awards upon marital fault risks being guided by nothing more substantial than prejudice or sentimentality.

Homer H. Clark, *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES*, Vol. 2, at page 256 (2d ed. 1987). At least two state supreme courts have reached similar conclusions:

We also recognized the difficulty and obfuscation involved in attempting to determine fault under that statute, for factors evidencing fault are often merely symptomatic, rather than causal, of marital breakdown.

Peterson v. Peterson, 242 N.W.2d 103, 108 (Minn. 1976).

Reluctantly, and possibly because of the difficulty of determining fault in the context of a complex interpersonal relationship, we have shifted the focus of the divorce inquiry from fault evidence to more dignified and reliable economic evidence.

Dyer v. Tsapis, 249 S.E.2d 509, 511-512 (W.Va. 1978).

Before the judge considers the misconduct in awarding alimony, corroboration (e.g., testimony of third parties, physical evidence such as letters or e-mail) of any alleged misconduct could be required. And one could require a higher threshold, such as “clear and convincing evidence” instead of “preponderance of evidence” to avoid judicial mistakes. I suggest that dependent children be prohibited from testifying about misconduct committed by one of their parents, in order to keep the children from being manipulated by parents and their lawyers into taking sides in the divorce litigation.

Finally, when one spouse is grieved by some act or omission by the other spouse, the natural human result is to retaliate. After years of marriage, there may be a large collection of alleged incidents of humiliation, embarrassment, indignities, etc. It would be a very distasteful task for a judge to sort through these allegations and counter-allegations, in the search for one innocent

spouse. In the end, each spouse is likely guilty of some regrettable conduct during the marriage, so there may only rarely be one innocent spouse.¹¹²

As with any other issue before a court, there are two errors that need to be avoided. First, a judge must avoid unjustly punishing the financially superior spouse by awarding permanent alimony to a *noninnocent* dependent spouse. Second, a judge must avoid failing to award permanent alimony to an innocent spouse who needs the support. Trying to avoid one error pushes a judge closer to the other error. Feminist authors of law review articles have focused on the problem of the second error, although justice requires that *both* errors be avoided.

D. abolish permanent alimony ?

Looking at the history of law, permanent alimony was created during past centuries, when there were limited employment opportunities for women and when absolute divorce (which ended a husband's legal duty to support his wife) was rare. Since 1980, several law professors have written long articles that attempt to create a modern justification for alimony.¹¹³ These articles show that there is no consensus about *why* statutes continue to authorize alimony, which suggests to me that alimony is an anachronism that has been thoughtlessly continued from past centuries. My reading of these articles suggests to me that the authors first decided that alimony should continue, then the authors searched for reason(s) to justify this conclusion. Furthermore, calling an ex-spouse's payment of living expenses after divorce by new nomenclature (e.g., "spousal support" or "maintenance") instead of using the historical term "alimony" seems to be an attempt to divorce the history of alimony from a continuation of alimony under other names.

It seems strange that legislators have little respect for marriage, in that they made it easy to obtain a divorce for frivolous reasons, by enacting no-fault divorce statutes. But, at the same time, these legislators made it possible for an ex-spouse to receive permanent alimony, as if a former marriage was important enough to justify an entitlement to lifetime financial support, despite the fact that the recipient of the alimony provides no services and no benefits to the payor of alimony. The explanation for this apparent paradox is that alimony comes from a English law prior to 1857, in which the common divorce was from bed and board, which did *not* end the marriage, thus continuing the husband's duty to support his wife. Now that we have absolute divorce, which

¹¹² See, e.g., "While any experienced trial attorney knows that the completely innocent spouse is frequently a myth, it is recognized that the more innocent of the two is entitled to favorable consideration in the division of their property and funds." *Kibbee v. Kibbee*, 108 A.2d 46, 48 (N.H. 1954).

¹¹³ Margaret F. Brinig and June Carbone, "The Reliance Interest in Marriage and Divorce," 62 *TULANE LAW REVIEW* 855 (May 1988); Mary E. O'Connell, "Alimony After No-Fault: A Practice in Search of a Theory," 23 *NEW ENGLAND LAW REVIEW* 437 (Autumn 1988); Ira Mark Ellman, "The Theory of Alimony," 77 *CALIFORNIA LAW REVIEW* 1 (Jan 1989); Robert Kirkman Collins, "The Theory of Marital Residuals: Applying and Income Adjustment Calculus to the Enigma of Alimony," 24 *HARVARD WOMEN'S LAW JOURNAL* 23 (2001).

ends the obligations between the parties, we ought to recognize alimony as an anachronism and abolish permanent alimony.

1. abolition of fault should also abolish alimony

Above, at page 120, I argued that no alimony should be awarded to a spouse who committed misconduct during a marriage, which is a continuation of longstanding law in many states, see page 36, above. There are two ways that misconduct is relevant to a decision to award permanent alimony.

First, if misconduct is irrelevant, an innocent spouse could be ordered to pay alimony to an ex-spouse who either committed misconduct that caused the marriage to end or who dumped the innocent spouse, a result that shocks the conscience and is certainly *unfair* to the innocent spouse. Such a result rewards misconduct. The unfairness is compounded by the fact that the recipient of alimony provides *neither* services *nor* benefits to the payor of alimony.

Second, if misconduct is irrelevant, then a spouse whose misconduct caused the end of the marriage might escape without paying alimony to the innocent spouse, which rewards misconduct.

As explained above, beginning at page 20, one of the purposes of no-fault divorce statutes was to avoid the recitation of sordid detail of marital misconduct in divorce court and simply recognize that a marriage should end in divorce whenever at least one spouse desires to end the marriage. Now, if we include marital misconduct as a relevant factor in determining eligibility for alimony, the courts revert to the old law in which judges must listen to sordid detail of marital misconduct.¹¹⁴ But if we abolish marital misconduct as a relevant factor in determining alimony, then unfair results will occur. In this analysis, the only way to avoid the recitation in divorce court of sordid detail of misconduct is to abolish fault grounds for divorce and also abolish permanent alimony.

Perhaps it is better to say that the spouses condone each other's misconduct as long as the marriage continues. When one spouse decides that the marriage is intolerable, that spouse can file for divorce on grounds of irreconcilable differences. And to minimize whining during litigated divorce, misconduct during the marriage (and also during the separation before formal divorce) should be irrelevant to *all* of the proceedings in divorce, including division of marital property. Therefore, with the prohibition on evidence of misconduct during the marriage, the most practical solution — perhaps *not* an ideal solution — is to abolish permanent alimony.

¹¹⁴ It does *not* matter if marital misconduct is relevant as a ground for divorce or is relevant for a determination of alimony: either way the judge must listen to allegations of marital misconduct, with their sordid detail.

2. unfairness in abolishing permanent alimony

Deciding never to award permanent alimony harms nearly every innocent spouse who is financially dependent, and rewards financially superior spouses whose misconduct caused the divorce. While those results seem unjust, it is also arguably unjust to order a spouse to pay the living expenses of a former spouse who no longer contributes any benefit to the payor of alimony.

The concept of marriage “until death do us part” (or until one spouse committed serious misconduct during the marriage) was rejected when legislatures adopted no-fault divorce. With no-fault divorce, each spouse has the legal right to end the marriage at any time and for any reason, so it is no longer legally justifiable to consider marriage as a permanent entitlement to spousal support. Only a few law review articles on alimony have recognized this conclusion.¹¹⁵ On the other hand, technically, the grounds for divorce and the cost of ending the marriage (including alimony) are two separate issues. It may be that society, through legislatures, wishes to impose a high cost on ending marriages, by requiring a financially superior ex-spouse to pay alimony to the other spouse.

3. not all harms compensable

Earlier in this essay, at page 15, I mentioned the abolition of torts such as alienation of affections as relevant to abolishing fault as a factor in alimony. These torts were abolished because legislators and judges feared that the tort was being misused (e.g., fraud, blackmail). I suggest that the abolition of these torts also expressed a value that disappointments in love or marriage are *not* compensable in court. To be consistent, the legislature should also abolish permanent alimony. If a person is not legally justified in relying on either promises to marry, promises to be monogamous, or promises to live together, then a person is also probably not legally justified in relying on promises of financial support “until death do us part”.

If permanent alimony is abolished, the harm of unfairly jettisoning an innocent spouse after many years of marriage will join other harms (e.g., heart-balm torts) for which the law provides no compensation. Such lack of compensation is obviously unfair to the innocent spouse, but society also avoids misuse of alimony (e.g., threats or blackmail during divorce settlement proceedings, *unfairly* branding one spouse as having committed misconduct, whining about

¹¹⁵ Margaret F. Brinig and June Carbone, “The Reliance Interest in Marriage and Divorce,” 62 *TULANE LAW REVIEW* 855, 879, n. 100 (May 1988) (“If each spouse has a right to leave, then it is difficult to characterize the decision to see the divorce as breach of the marital agreement.”).

marital misconduct in court, the illogic¹¹⁶ of ordering the payor of alimony to pay living expenses of an ex-spouse who contributes *neither* benefits *nor* services to the payor, etc.).

The strongest moral case for alimony is when one spouse deliberately attacked the other spouse, afflicting the other spouse with a permanent disability that prevents the other spouse from earning a living, while also increasing¹¹⁷ the other spouse's living expenses. But, in such cases, the attacker is likely serving a long prison sentence, and thus the attacker has no earned income that can be used to pay alimony.

4. destitution irrelevant at divorce

Similarly, one of the oldest justifications for permanent alimony involves a spouse who is *unable* to earn a living, perhaps as a result of disability or chronic disease, and was dumped by the other spouse.¹¹⁸ However, the problem of people with disability or chronic disease is not limited to ex-spouses — it is a larger problem that also affects children, adults who never married, and divorced people who did not ask for alimony at divorce. I agree with Sciarrino and Duke when they say that “society, in the form of Social Security and other benefits, should” pay living expenses and medical expenses of disabled people.¹¹⁹

¹¹⁶ Alimony is logical if the payor of alimony *caused* both the divorce and the dependent spouse's need, for example when one spouse deliberately shoots the other, leaving the injured spouse not only permanently disabled and unable to work, but also with increased living expenses. As pointed out by Woodhouse (1994) and others, such damages can be recovered in tort, without the need for permanent alimony.

¹¹⁷ Increased living expenses include the cost of medical care, nursing home, etc.

¹¹⁸ See cases cited at page 11, above.

¹¹⁹ Alfred J. Sciarrino and Susan K. Duke, “Alimony: Peonage or Involuntary Servitude?,” 27 AMERICAN JOURNAL OF TRIAL ADVOCACY 67, 96 (Summer 2003). See also the intriguing footnote in Mary E. O'Connell, “Alimony After No-Fault: A Practice in Search of a Theory,” 23 NEW ENGLAND LAW REVIEW 437, 440, n. 17 (Autumn 1988) (Prof. Robert Levy, who worked on the Uniform Marriage and Divorce Act, believed that the problem of the financially dependent ex-spouse should be solved “by careful expansion of a nation-wide social insurance system.”).

Conclusions

I believe the divorce statutes in some states are fundamentally unfair. For example:

1. current statutes for equitable division of marital property specify a long list of factors for a judge to consider, which factors lead to *unpredictable* results. I urge that statutes have a mathematical formula for division of marital assets, so that there is a predictable result.
2. current statutes for equitable division of marital property contain many factors that indicate *need* of a spouse, but I believe such factors should be irrelevant in equitable division of marital property. Instead, I propose equitable distribution of marital property should consider only facts during the marriage, and be principally concerned with who earned each asset and the value of that asset at the time of divorce. I think it would be fairer to allocate marital assets in strict proportion to the contribution of the parties in earning those assets. I agree with the current trend to exclude marital misconduct (except economic misconduct, also known as dissipation of assets) from the distribution of marital assets.
3. current statutes for alimony contain a long list of factors for a judge to consider and give an *unpredictable* result. I urge that statutes have a mathematical formula for the amount of alimony, so that there is a predictable result.
4. the modern tendency to avoid permanent alimony — or to ignore marital misconduct in determining alimony — unjustly rewards a spouse who either (a) commits serious misconduct during the marriage or (b) dumps a long-term spouse for an *unspecified* reason or for a frivolous reason. The dependent spouse trusted¹²⁰ the other spouse, and may have spent a significant fraction of her/his life nurturing (e.g., homemaking or child-rearing services) the other spouse, all in the expectation of lifetime spousal support, only to have that lifetime support unfairly ended by divorce without alimony, and without receiving adequate marital assets to purchase an annuity for lifetime income. See page 120 above.
5. permanent alimony *may* be unconstitutional, as a form of involuntary servitude. See page 91, above.
6. permanent alimony is an anachronism, which should be abolished. See page 127 above.
7. During a marriage, the law in the USA is that each spouse has a mutual duty of support to the other spouse. However, the concept of alimony converts that mutual duty into a unilateral duty of the wealthier spouse to continue to support the dependent spouse, despite the fact that the dependent spouse provides *neither* benefits *nor* services to the payor of alimony.

¹²⁰ In fact, marriage is a fiduciary relationship, which legally justifies the highest level of trust by spouses in each other.

My suggestions, beginning on page 115, are *not* the law anywhere in the USA, but are only my opinion for what the law *should* be. While I recognize that my opinions are *not* going to become new law, I believe that if I criticize something, then I should also offer a constructive proposal.

However, after wrestling with the issue of fault in alimony, I am unable to decide whether (a) judges should consider misconduct during the marriage in determining permanent alimony or (b) permanent alimony should be abolished. There are good reasons for each decision, and it is easy to construct fact patterns of people who would be treated *unfairly* or *unjustly* with each decision. Beginning at page 120 above, I sketch why I think permanent alimony should be awarded and why fault is relevant to a determination to award alimony. Beginning at page 127 above, I sketch why I think permanent alimony should be abolished, along with abolishing all discussion of marital misconduct. Although I am not able to come to a firm conclusion on alimony, I hope that my arguments and citations will be useful to lawyers and legislators.

Changes in divorce law need to come from the legislature, because I believe judges are unlikely to declare the current divorce statutes unconstitutional.

Instead of having legislators impose values on people, and instead of having judges make *unpredictable* decisions about division of marital property and alimony, I urge that spouses have a written prenuptial agreement (or written postnuptial agreement) that specifies both the division of marital property and alimony.

Bibliography

In addition to the cases and statutes cited in this essay, the following articles and books are useful sources.

Robert M. Ackerman, "Tort Law and Communitarianism: Where Rights Meet Responsibilities," 30 WAKE FOREST LAW REVIEW 649 (Winter 1995).

anonymous, Note, "Heartbalm Statutes and Deceit Actions," 83 MICHIGAN LAW REVIEW 1770 (June 1985).

Daniel T. Barker, "Interspousal Immunity and Domestic Torts: A New Twist on the 'War of the Roses'," 15 AMERICAN JOURNAL OF TRIAL ADVOCACY 625 (Spring 1992).

Margaret F. Brinig and June Carbone, "The Reliance Interest in Marriage and Divorce," 62 TULANE LAW REVIEW 855 (May 1988).

Charles Brackney, "Battling Inconsistency and Inadequacy: Child Support Guidelines in the States," 11 HARVARD WOMEN'S LAW JOURNAL 197 (1988).

Homer H. Clark, Jr., "Divorce Policy and Divorce Reform," 42 UNIVERSITY OF COLORADO LAW REVIEW 403 (Nov 1970).

Homer H. Clark, Jr., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES, two volumes, (2d ed. 1987).

Robert Kirkman Collins, "The Theory of Marital Residuals: Applying and Income Adjustment Calculus to the Enigma of Alimony," 24 HARVARD WOMEN'S LAW JOURNAL 23 (2001).

William R. Corbett, "A Somewhat Modest Proposal to Prevent Adultery and Save Families: Two Old Torts Looking For a New Career," 33 ARIZONA STATE LAW JOURNAL 985 (Winter 2001).

Ira Mark Ellman, "The Theory of Alimony," 77 CALIFORNIA LAW REVIEW 1 (Jan 1989).

Ira Mark Ellman, "The Place of Fault in a Modern Divorce Law," 28 ARIZONA STATE LAW JOURNAL 773 (Fall 1996).

Nathan P. Feinsinger, "Legislative Attack on 'Heart Balm'," 33 MICHIGAN LAW REVIEW 979 (May 1935).

Marsha Garrison, "Good Intentions Gone Awry: The Impact of New York's Equitable Distribution Law on Divorce Outcomes," 57 BROOKLYN LAW REVIEW 621 (1991).

Marsha Garrison, "Reforming Divorce: What's Needed and What's Not," 27 PACE LAW REVIEW 921 (Summer 2007).

Mary Ann Glendon, "Family Law Reform in the 1980's," 44 LOUISIANA LAW REVIEW 1553 (July 1984).

Mary Ann Glendon, "Fixed Rules and Discretion in Contemporary Family Law and Succession Law," 60 TULANE LAW REVIEW 1165 (1986).

Jill Jones, Comment, "Fanning an Old Flame: Alienation of Affections and Criminal Conversation Revisited," 26 PEPPERDINE LAW REVIEW 61 (1998).

William M. Kelley, Note, "The Case for Retention of Causes of Action for Intentional Interference With the Marital Relationship," 48 NOTRE DAME LAWYER 426 (Dec 1972).

Joan M. Krauskopf, "Theories of Property Division/Spousal Support: Searching for Solutions to the Mystery," 23 FAMILY LAW QUARTERLY 253 (Summer 1989).

Kathryn Walker Lyles, "Suit Your Spouse: Tort and Third Party Liability Arising From Divorce Actions," 30 AMERICAN JOURNAL OF TRIAL ADVOCACY 609 (Spring 2007).

Rachel F. Moran, "Law and Emotion, Love and Hate," 11 JOURNAL CONTEMPORARY LEGAL ISSUES 747 (2001).

Adrian M Morse, Jr., "Fault: A Viable Means of Re-Injecting Responsibility in Marital Relations," 30 UNIVERSITY OF RICHMOND LAW REVIEW 605 (March 1996).

Jane C. Murphy, "Eroding the Myth of Discretionary Justice in Family Law: The Child Support Experiment," 70 NORTH CAROLINA LAW REVIEW 209 (Nov 1991).

Mary E. O'Connell, "Alimony After No-Fault: A Practice in Search of a Theory," 23 NEW ENGLAND LAW REVIEW 437 (Autumn 1988).

Twila L. Perry, "The 'Essentials of Marriage': Reconsidering the Duty of Support and Services," 15 YALE JOURNAL OF LAW & FEMINISM 1 (2003).

Dena A. Pollard, "Sex Torts," 91 MINNESOTA LAW REVIEW 769 (Feb 2007).

Alfred J. Sciarrino and Susan K. Duke, "Alimony: Peonage or Involuntary Servitude?," 27 AMERICAN JOURNAL OF TRIAL ADVOCACY 67 (Summer 2003).

John C. Sheldon and Nancy Diesel Mills, "In Search of a Theory of Alimony," 45 MAINE LAW REVIEW 283 (1993).

John C. Sheldon, "The Sleepwalker's Tour of Divorce Law," 48 MAINE LAW REVIEW 7 (1996).

Larry R. Spain, "The Elimination of Marital Fault in Awarding Spousal Support: The Minnesota Experience," 28 WILLIAM MITCHELL LAW REVIEW 861 (2001).

Marti E. Thurman, Note, "Maintenance: A Recognition of the Need for Guidelines," 33 UNIV. OF LOUISVILLE JOURNAL OF FAMILY LAW 971 (1995).

Lenore J. Weitzman, "The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards," 28 UNIV. OF CALIFORNIA LOS ANGELES LAW REVIEW 1181 (Aug 1981).

Chester G. Vernier and John B. Hurlbut, "The Historical Background of Alimony Law and its Present Statutory Structure," 6 LAW AND CONTEMPORARY PROBLEMS 197 (Spring 1939).

David Wiese, "Court-Ordered Support and the Thirteenth Amendment's Prohibition Against Imposition of Involuntary Servitude," 11 JOURNAL OF CONTEMPORARY LEGAL ISSUES 419 (2000).

Barbara Bennett Woodhouse, "Sex, Lies, and Dissipation: The Discourse of Fault in a No-Fault Era," 82 GEORGETOWN LEGAL JOURNAL 2525 (Sep 1994).

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