

1997

Reassessing Fault Factors In No-Fault Divorce

Peter N. Swisher

University of Richmond, pswisher@richmond.edu

Follow this and additional works at: <http://scholarship.richmond.edu/law-faculty-publications>

 Part of the [Family Law Commons](#)

Recommended Citation

Peter Nash Swisher, *Reassessing Fault Factors In No-Fault Divorce*, 31 Fam. L. Q. 269 (1997)

This Article is brought to you for free and open access by the School of Law at UR Scholarship Repository. It has been accepted for inclusion in Law Faculty Publications by an authorized administrator of UR Scholarship Repository. For more information, please contact scholarshiprepository@richmond.edu.

Reassessing Fault Factors in No-Fault Divorce

PETER NASH SWISHER*

[N]o area of state law is more important than the rules surrounding marriage and divorce, and no area of law in the United States has changed more rapidly. What has been called the no-fault revolution in divorce law and practice was launched in California in the late 1960s after several decades of pressure for change. Nationally, the shift from fault grounds to no-fault as a basis for divorce happened quickly. Within five years after the California law went into effect, most states adopted at least one no-fault ground, and no other regime had [an] articulate defense in [the] legislative halls or in the academy. . . .

From the standard of legislative acceptance, the no-fault reforms were a brilliant success. Whether these changes have also operated to the benefit of the individuals and families at risk of divorce is a separate question. Twenty years after the advent of no-fault, a chronically high rate of divorce is connected to precarious economic status for many women and children. The phrase “feminization of poverty” entered the American language in the 1980’s, and there is widespread suspicion that the changes in divorce law either have placed the interests of women and children in jeopardy or have failed to provide safeguards that domestic relations law can and should establish.

—Franklin E. Zimring¹

* Professor of Law, University of Richmond Law School. The author gratefully acknowledges a research grant funded by the law firm of Hunton & Williams, Richmond, Virginia. Any deficiencies in this article, however, are those of the author alone.

1. Franklin E. Zimring, *Forward*, in *DIVORCE REFORM AT THE CROSSROADS*, *infra* note 3, at vii.

I. Introduction

Divorce reform in America, and in many other countries,² is currently at a crossroads.³ Prior to California's landmark 1969 no-fault divorce legislation, a number of lawyers, jurists, sociologists, and legislators had been dissatisfied with perceived defects in America's fault-based system of divorce. They argued that divorce should not be based solely on traditional fault grounds such as adultery, cruelty, or desertion.⁴ Instead, divorce should be viewed as a regrettable, but necessary, legal definition of a marital failure, where very often the factors leading to the marriage breakdown were not all one-sided and based solely on the fault of one guilty party, but they were also caused by the incompatibility and irreconcilable differences of both spouses.⁵ Moreover, under a fault-based divorce regime, a number of couples in unhappy marriages often would have to fabricate various fault grounds for divorce and resort to perjury, often with the assistance of their legal counsel.⁶ Wealthier Americans increasingly utilized questionable⁷ migratory divorces⁸ from sister state

2. See generally MARY ANN GLENDON, *THE TRANSFORMATION OF FAMILY LAW: STATE, LAW, AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE* (1989). See also Lynn Wardle, Coordinator, *Special Symposium on International Marriage and Divorce Regulation and Recognition in Argentina, Austria, Canada, England, Italy, Jamaica, Japan, Korea, Malaysia, Malta, the Netherlands, Russia, Sierra Leone, Sweden, Switzerland, and Tunisia*, 29 *FAM. L.Q.* 497 (1995) [hereinafter *Symposium on International Marriage and Divorce Regulation*]; *Annual Survey of Family Law in: Albania, Argentina, Australia, Botswana, Canada, Denmark, England, Germany, Hong Kong, Ireland, Italy, Japan, Korea, Mexico, Poland, Scotland, Slovenia, South Africa, Spain, Sweden, Tanzania, United States, Uruguay, and Venezuela*, 33 *U. LOUISVILLE J. FAM. L.* 259 (1995) [hereinafter *Annual Survey of International Family Law*].

3. See, e.g., *DIVORCE REFORM AT THE CROSSROADS* (Stephen D. Sugarman & Herma Hill Kay, eds., 1990) [hereinafter *DIVORCE REFORM AT THE CROSSROADS*].

4. In addition to adultery, cruelty, and desertion fault grounds for divorce, a number of states further expanded the statutory list of marital faults to include insanity, conviction of a crime, and habitual drunkenness or drug addiction. See, e.g., JOSEPH MADDEN, *HANDBOOK OF THE LAW OF PERSONS AND DOMESTIC RELATIONS* 264-92 (2d ed. 1931); CHARLES VERNIER, *AMERICAN FAMILY LAWS* 70-71 (1932).

5. See, e.g., Max Rheinstein, *The Law of Divorce and the Problem of Marriage Stability*, 9 *VAND. L. REV.* 633 (1956). See also MAX RHEINSTEIN, *MARRIAGE STABILITY, DIVORCE, AND THE LAW* (1972).

6. See generally RHEINSTEIN, *supra* note 5. See also Walter Wadlington, *Divorce Without Fault Without Perjury*, 52 *VA. L. REV.* 32 (1966).

7. See, e.g., *Williams v. North Carolina*, 325 U.S. 226 (1945) (refusing to recognize an *ex parte* Nevada divorce and Nevada remarriage of North Carolina residents based upon their sham domicile in Nevada). See also Thomas Reed Powell, *And Repent at Leisure: An Inquiry into the Unhappy Lot of Those Whom Nevada Hath Joined Together and North Carolina Hath Put Asunder*, 58 *HARV. L. REV.* 930 (1945).

8. See, e.g., W. Barton Leach, *Divorce by Plane Ticket in the Affluent Society—With a Side Order of Jurisprudence*, 14 *U. KAN. L. REV.* 549 (1966); David P. Currie, *Suitcase Divorce in the Conflict of Laws*, 34 *U. CHI. L. REV.* 26 (1966).

“divorce mills”⁹ or from various foreign countries that offered “quickie” twenty-four hour divorces to American domiciliaries.¹⁰ No-fault divorce legislation in the United States,¹¹ therefore, was intended to be a good faith remedy to many of these perceived evils and shortcomings inherent in a fault-based divorce regime.¹²

Yet this so-called no-fault divorce revolution over the past thirty years has developed some very serious shortcomings of its own. In addition to a soaring divorce rate in the 1970s, when no-fault divorce was first introduced in most states,¹³ a disturbing number of courts have failed to provide adequate financial protection to many women and children of divorce.¹⁴ Consequently, many children of divorce have

9. See generally NELSON M. BLAKE, *THE ROAD TO RENO: A HISTORY OF DIVORCE IN THE UNITED STATES* (1962). See also Lawrence M. Friedman, *Rights of Passage: Divorce Law in Historical Perspective*, 63 OR. L. REV. 649, 661-62 (1984).

10. See, e.g., Comment, *Mexican Divorces—A Survey*, 33 FORDHAM L. REV. 449 (1965); Note, *Isle of Hispaniola: American Divorce Haven?*, 5 CASE W. RES. J. INT’L L. 198 (1973), and see Peter Nash Swisher, *Foreign Migratory Divorces: A Reappraisal*, 21 J. FAM. L. 9, 25 (1982-83) (stating that, with few exceptions, the overwhelming majority of American states will refuse to recognize a foreign divorce, regardless of its purported validity in the nation awarding it, unless at least one of the spouses was a good faith domiciliary in the foreign nation at the time the divorce was rendered).

11. Section 302(2) of the Uniform Marriage and Divorce Act provides that a court shall enter a dissolution of marriage when the court finds that the marriage is “irretrievably broken” if the finding is supported by evidence that: (1) the parties have lived separate and apart for a period of more than 180 days preceding the commencement of the proceeding; or (2) there is serious marital discord adversely affecting the attitude of one or both of the parties toward the marriage. UNIF. MARRIAGE AND DIVORCE ACT § 302, 9A U.L.A. 181 (1987).

Currently all fifty states have some sort of no-fault divorce alternative, either based upon the parties’ separation for a specified period of time, or based upon the parties’ irreconcilable differences or incompatibility. See generally Linda D. Elrod & Robert G. Spector, *A Review of the Year in Family Law: Of Welfare Reform, Child Support, and Relocation*, 30 FAM. L.Q. 765, 807 (1997).

12. See, e.g., Norman B. Lichtenstein, *Marital Misconduct and the Allocation of Financial Resources at Divorce: A Farewell to Fault*, 54 UMKC L. REV. 1 (1985); Herma Hill Kay, *Equality and Difference: A Perspective on No-Fault Divorce and its Aftermath*, 56 U. CIN. L. REV. 1 (1987).

13. According to the U.S. Bureau of the Census, divorces and annulments in America from 1970 through 1980 rose from less than half a million divorces each year to over one million divorces each year, a figure that has remained fairly constant throughout the 1980s and 1990s. John Leland, *Tightening the Knot*, NEWSWEEK, Feb. 19, 1996, at 72; Laura Gatland, *Putting the Blame on No-Fault*, 82 A.B.A.J. 50, 51 (April 1997) (citing similar statistics). See also HOMER H. CLARK, *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 410 (2d ed. 1988) (“The social change of greatest importance has been the sharp growth in the [American] divorce rate, which reached its highest point in 1979, and which has fluctuated somewhat since then”).

14. See, e.g., Lenore J. Weitzman & Ruth B. Dixon, *The Alimony Myth: Does No-Fault Divorce Make a Difference?*, 14 FAM. L.Q. 141 (Fall 1980); James B. McLindon, *Separate But Unequal: The Economic Disaster of Divorce for Women and Children*, 21 FAM. L.Q. 351, 405 (1987) (“An end to the systemized impoverishment of

suffered long-lasting psychological, as well as economic damage, resulting from divorce.¹⁵ Indeed, a number of commentators have concluded that the no-fault divorce revolution in America “has failed.”¹⁶

women and children by the divorce regime must be one of the foremost items on the nation’s new agenda”).

See generally LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA* (1985). Although the accuracy of Professor Weitzman’s statistical studies have been recently questioned, other studies, like Professor McLindon’s, *supra*, have corroborated this “feminization of poverty” resulting from divorce. According to 1996 data from the Social Science Research Council in New York City, a woman’s standard of living declines by 30% on average the first year after a divorce, while a man’s rises by 10%. Elizabeth Gleick, *Hell Hath No Fury*, *TIME*, Oct. 7, 1996, at 84.

15. *See, e.g.*, JUDITH S. WALLERSTEIN & SANDRA BLAKESLEE, *SECOND CHANCES: MEN, WOMEN, AND CHILDREN A DECADE AFTER DIVORCE* 306 (1989) (suggesting that the goal of the judicial process should be to “minimize the impact of divorce on children and to preserve for children as much as possible the social, economic, and emotional security that existed while their parents’ marriage was intact.”). *See also* Robert F. Cochran, Jr. & Paul C. Vitz, *Child Protective Divorce Laws: A Response to the Effect of Parental Separation on Children*, 17 *FAM. L.Q.* 327 (1983) (“Recent studies in the field of psychology have shown that parental separation and divorce have substantial negative effects on children.”); Elizabeth S. Scott, *Rational Decision-making About Marriage and Divorce*, 76 *VA. L. REV.* 9, 29 (1990) (“There is substantial evidence that the process of going through their parents’ divorce and resulting changes in their lives are psychologically costly for most children.”)

Two-thirds of all divorces involve minor children, and according to Columbia law professor Martha Fineman, author of *The Illusion of Equality*, the average annual child support payment is only around \$3,000. “Equality is being applied with a vengeance against women,” she says. “Assumptions are made about women’s ability to earn wages that are unrealistic, given the discrimination and different rates of pay.” The trend toward joint custody can also impoverish an ex-wife, since the father puts his money toward maintaining a separate household for the kids, not toward supporting hers. The kids too get financially battered. Ultimately, the average household income for children of divorce drops thirty percent while the poverty rate for children living with single mothers is five times as high as for those in intact families.

Gleick, *supra* note 14, at 84.

16. *See, e.g.*, COUNCIL ON FAMILIES IN AMERICA, *MARRIAGE IN AMERICA: A REPORT TO THE NATION* (1995) [hereinafter *MARRIAGE IN AMERICA*]:

The divorce revolution—the steady displacement of a marriage culture by a culture of divorce and unwed parenthood—has failed. It has created terrible hardships for children, incurred unsupportable social costs, and failed to deliver on its promise of greater adult happiness. The time has come to shift the focus of national attention from divorce to marriage and to rebuild a family culture based on enduring marital relationships.

Making marriage in America stronger will require a fundamental shift in cultural values and public policy. No one sector of society is responsible for the decline of marriage. We are all part of the problem, and therefore we all must be part of the solution. We must reclaim the ideal of marital permanence and recognize that out-of-wedlock childbearing does harm. Our goal for the next generation

These very serious and troubling problems inherent in a no-fault divorce regime have generated a number of recent articles and treatises arguing that fault factors may still serve a legitimate function in no-fault divorces,¹⁷ and a number of state legislatures currently

should be to increase the proportion of children who grow up with their two married parents and decrease the proportion who do not. . . .

Id. at 1.

The Research Board of the Council on Families in America included Professors David Popenoe, Rutgers University; Norval D. Glenn, University of Texas at Austin; Samuel Preston, University of Pennsylvania; Ann Swidler, University of California, Berkeley; and Arland Thornton, University of Michigan. *Id.* at 9.

17. See, e.g., J. Herbie DiFonzo, *No Fault Marital Dissolution: The Bitter Truth of Naked Divorce*, 31 SAN DIEGO L. REV. 519, 553-554 (1994):

New challenges, at times, prompt old responses, and some have thought the unthinkable, calling for a return of fault. . . . What is a legal reality in California, as throughout America, is that naked divorce has gone too far. To some, the astonishing suggestion that the concept of culpability might stage a comeback in the divorce ring illustrates the fascinating contingency of history. Twentieth-century legal culture has reached an impasse on divorce. A new legal and cultural matrix must now emerge.

Id. See also J. HERBIE DIFONZO, *BENEATH THE FAULT LINE: THE POPULAR AND LEGAL CULTURE OF DIVORCE IN TWENTIETH CENTURY AMERICA* (1997); Barbara Bennett Woodhouse, *Sex, Lies, and Dissipation: The Discourse of Fault in a No-Fault Era*, 82 GEO. L.J. 2525 (1994); Adriaen M. Morse, Jr., *Fault: A Viable Means of Re-Injecting Responsibility in Marital Relations*, 30 U. RICH. L. REV. 605 (1996); R. Michael Redman, *Coming Down Hard on No-Fault*, 10 FAM. ADVOC. 6 (1987); Harvey J. Golden & J. Michael Taylor, *Fault Enforces Accountability*, 10 FAM. ADVOC. 11 (1987).

Professor Stephen D. Sugarman, a strong advocate of no-fault divorce, allows that even if the decision to grant a divorce is not based on fault:

[T]he rules pertaining to financial rights (and the custody of children) could depend upon marital conduct, as remains the case in some states and in other countries today. Plainly, the rhetorical force of an attack on the California-style no-fault system can be enhanced if set in the context of an innocent and a guilty spouse.

Stephen D. Sugarman, *Dividing Financial Interests on Divorce*, in *DIVORCE REFORM AT THE CROSSROADS*, *supra* note 3, at 136-37. Although Professor Sugarman does not advocate a return to fault grounds in California, he nevertheless describes various potential ways that fault or culpability might be reintroduced into divorce law. *Id.* In many other states, however, fault need not be reintroduced, since fault factors on divorce have never been totally abolished in these jurisdictions, and still continue to serve a legitimate function and purpose. See, e.g., Annot., *Fault as a Consideration in Alimony, Spousal Support, or Property Division Awards Pursuant to a No-Fault Divorce*, 86 A.L.R. 3d 1116 (1978).

See also Scott, *supra* note 15; and Lynn D. Wardle, *No-Fault Divorce and the Divorce Conundrum*, 1991 BYU L. REV. 79, 80:

In recent years, family law scholars and practitioners have raised serious questions about the degree to which no-fault divorce laws have achieved their purpose and whether no-fault divorce laws have caused specific unintended or underestimated injuries to divorcing individuals, their families, and society. While this scholarship has focused on specific flaws and facets of no-fault divorce, those specific problems suggest the need to reexamine seriously the basic premises of contemporary no-

are reassessing the role of fault in divorce.¹⁸ On the other hand, the American Law Institute recently adopted a number of the proposed *Principles of the Law of Family Dissolution*, which argue for the

fault divorce laws and the conundrum of modern divorce law—i.e., the conflicts between policies to promote marriage stability and policies to alleviate distress when marriages have failed, and the tensions between the goal of non-regulation of private choices and regulation of the public consequences of those choices. However, these fundamental issues have not received serious scholarly consideration for nearly a quarter of a century.

See also Gatland, *supra* note 13, at 51-52.

William Galston, a former adviser to President Clinton who now directs the Institute for Philosophy and Public Policy at the University of Maryland in College Park posits that “we lurched as a nation from one fairly extreme system to one that is pretty extreme, by national standards, on the other side. Some people are arguing that there’s a midpoint we missed.”

18. See, e.g., John Leland, *Tightening the Knot: Convinced that Single-parent Families are Bad for Everyone, Some Lawmakers Want to End No-fault Divorce*, NEWSWEEK, Feb. 19, 1996, at 72:

This week, possibly on Valentine’s Day, Michigan state Rep. Jessie Dalman expects to introduce a set of bills ending no-fault [divorce] for contested cases involving children and pushing couples to undergo counseling before getting married. Similar legislation is up for debate in Georgia, Idaho, Illinois, Iowa, Pennsylvania and Virginia. Though none of the bills are yet near passage, the issue has caught fire among feminists, religious groups, men’s advocates, lawyers and the Americans whose first marriage—up to half—are projected to end in divorce.

Id. See also Dana Milback, *The Blame Game: No-Fault Divorce is Assailed in Michigan, and Debate Heats Up*, WALL ST. J., Jan. 5, 1996, at A1; *The Divorce Dilemma: Most People Want Getting a Divorce to be Tougher, Except When the Failing Marriage is Their Own*, U.S. NEWS & WORLD REP., Sept. 30, 1996, at 58. Fault factors on divorce were also discussed on ABC’s World News Tonight with Peter Jennings on February 14, 1996; and on a segment of CNN News on February 19, 1996. See also Gleick, *supra* note 15, at 84:

The effects of marriage breakdowns on women and children have sparked the current bipartisan movement to shore up the institution of marriage and put the fault back in divorce. Two weeks ago, at a conference in Aspen, Colorado, Republican virtuecrat Bill Bennett spoke at a seminar of investors and media executives about the social scourge of divorce. “Don’t just look at young black men or at women on welfare”, he said. “We’ve got to look at ourselves. The middle class needs to set an example of standing by your family and your children and your commitments.” The Masters of the Universe, many sitting with second or third wives, were visibly uncomfortable.

Bennett and others have been targeting no-fault divorce, in which one member of the couple can choose to end the marriage without citing a specific factor, such as adultery or desertion. Lawmakers in Michigan, which is at the forefront of this movement, recently introduced bills to abolish no-fault divorce and put up new barriers to both divorce and marriage. “Marriage is a commitment,” says Brian Willats, a spokesman for the Michigan Family Forum, which supports premarital counseling. “It’s not just notarized dating.”

See also Gatland, *supra* note 13, at 52.

Legislative efforts to repeal no-fault divorce laws began a few years ago in the nation’s heartland. A package of bills sponsored by Rep. Jessie Dalman, R-Mich.,

total abolition of all fault-based factors of marital dissolution or divorce.¹⁹

The purpose of this article is not to “turn back the clock” through the rehabilitation of fault grounds as the sole means for securing a divorce in America.²⁰ Rather, this article will explore the ways in which

in that state’s Legislature called for a two-tier divorce structure that would prohibit no-fault divorces in cases in which one spouse contests the divorce or that involve minor children. Iowa followed with a bill to eliminate no-fault divorces.

Although both measures were swiftly defeated, they set off rumblings across the country. During the past two years, legislators in Georgia, Illinois, Virginia, Washington, and a handful of other states introduced bills to repeal or modify no-fault divorce statutes.

If this media and legislative attention is any indication, fault-based divorce is once again becoming a “hot” topic in American family law.

19. THE AMERICAN LAW INSTITUTE, *PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS* (Proposed Final Draft, Feb. 14, 1997) [hereinafter *PRINCIPLES OF FAMILY DISSOLUTION LAW*]. See also Ira Mark Ellman, *The Place of Fault in a Modern Divorce Law*, 28 ARIZ. ST. L.J. 773 (1996) [hereinafter *Fault in Modern Divorce Law*].

The chief reporter for the *PRINCIPLES OF FAMILY DISSOLUTION LAW* is Professor Ira Mark Ellman, who supports a purely financial and no-fault approach to spousal support or alimony on divorce. See, e.g., Ira Mark Ellman, *The Theory of Alimony*, 77 CAL. L. REV. 1 (1989). However, Professor Ellman’s *Theory of Alimony* article has been criticized by other commentators for not recognizing important nonfinancial losses on divorce as well. Professor June Carbone, for example, faults Professor Ellman for ignoring larger non-economic interests of society, including child rearing, married women’s participation in the work force, a return of appropriate benefits that the other spouse retains on divorce, and sexual equality issues. See June Carbone, *Economics, Feminism, and the Reinvention of Alimony: A Reply to Ira Ellman*, 43 VAND. L. REV. 1463 (1990). Professor Ellman’s *Theory of Alimony* article also has been criticized by Professor Carl Schneider who, while praising Professor Ellman for attempting to provide a coherent rationale for alimony, criticizes Ellman for his refusal to acknowledge any moral discourse on the subject of awarding alimony. See Carl E. Schneider, *Rethinking Alimony: Marital Decisions and Moral Discourse*, 1991 BYU. L. REV. 197. For a reply to such criticism, see Ira Mark Ellman, *Should the Theory of Alimony Include Nonfinancial Losses and Motivations?*, 1991 BYU. L. REV. 259. A thoughtful discussion and analysis of Professor Ellman’s theory of alimony, and the response from Professors Carbone and Schneider, is found in Morse, *supra* note 17. Morse argues that fault also is a relevant nonfinancial factor that should be considered in determining an alimony award.

20. See, e.g., Wardle, *supra* note 17, at 137:

[T]he time has come to consider reforming the first generation of no-fault divorce laws. It would be unrealistic and irresponsible to ignore the fundamental fallacies and specific failures of the current generation of no-fault divorce laws. This does not mean we should “turn the clock back” and reenact 1950’s-era divorce laws. But we should be unafraid to ask hard questions about the 1970’s-era no-fault divorce laws we have inherited. It is time to adopt a new generation of divorce law reforms.

Some state legislatures have begun to reformulate their post no-fault divorce era statutes to include various fault-based factors in determining spousal support awards on divorce, the division of marital property, or both. See, e.g., Woodhouse, *infra* note 41.

fault-based factors, when applied to serious or egregious marital misconduct that significantly contributes to the marital breakdown, may still be utilized in order to bring about enhanced social, economic, and legal protection to spouses on divorce, while concurrently establishing a greater sense of responsibility and accountability in marital relationships.

II. Protecting Marital Rights and Obligations Under American Family Law

One cannot adequately address divorce theory and practice in America without first addressing the underlying social, economic, and legal ramifications of marriage as one of the most important cornerstones of our society. According to the U.S. Supreme Court, marriage constitutes “the most important relation in life, as having more to do with the morals and civilization of a people than any other institution.” Therefore, marriage and its dissolution has always been subject to the control of the state legislatures.²¹

A. *The Traditional American Family*

By the turn of the twentieth century, American and European legal systems had come to share a common set of assumptions regarding marriage and the traditional family unit as a basic social institution: (1) marriage was a primary support institution and a decisive determinant of the social, economic, and legal status of the spouses and children; (2) marriage in principle was to last until the death of a spouse, and

21. *Maynard v. Hill*, 125 U.S. 190, 205 (1888). *See also* *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965):

Marriage is coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

Marriage therefore is subject to constitutional protection from arbitrary state laws. *See, e.g., Loving v. Virginia*, 388 U.S. 1, (1967) (“Marriage is one of the ‘basic civil rights of man’, fundamental to our very existence and survival”). *See also* *Gatland, supra* note 13, at 51: “‘It is a legitimate state interest to define and protect the institution of marriage,’ says David Blankenhorn, president of the Institute for American Values, a nonpartisan think tank in New York City.”

On an international level, the United Nations recognizes that the family “is the natural and fundamental group unit of society and is entitled to protection by society and the State.” Universal Declaration of Human Rights, G.A. Res. 217, U.N. Doc. A/810, Art. 6(3) (1984). *See also Symposium on International Marriage and Divorce Regulation, supra* note 2; *Annual Survey of International Family Law, supra* note 2.

would be terminated during the lives of the spouses only for serious cause; (3) the community aspect of marriage and the family was to be emphasized over the individualistic personalities of each member; (4) within the family, the standard pattern of authority and role allocation was that the husband/father was predominant in decision making and was to provide for the material needs of the family, while the wife/mother cared for the household and the children; and (5) procreation and child rearing were assumed to be major purposes of marriage.²²

This traditional family ideal, however, is no longer the norm in America,²³ and Professor Mary Ann Glendon has observed that the notion is beginning to appear that now “the family exists for the benefit of the individual rather than the individual existing for the benefit of the family.”²⁴

B. The Modern American Family

Many of these traditional assumptions regarding marriage and the nuclear family²⁵ are no longer the norm in America. The “two paycheck” family is now the norm rather than the exception, and the modern American family is now being redefined by gender-neutral laws, new lifestyles, new realities, and new expectations.²⁶ Nevertheless, although extraordinary changes have occurred within the American family structure during the past three decades, and although American family law is currently in a state of flux and transition,²⁷ the

22. See generally MARY ANN GLENDON, *THE NEW FAMILY AND THE NEW PROPERTY* 1-35 (1981) [hereinafter *THE NEW FAMILY*]. See also JOHN DEWITT GREGORY ET AL., *UNDERSTANDING FAMILY LAW* 1-17 (2d ed. 1995) [hereinafter *UNDERSTANDING FAMILY LAW*].

23. See, e.g., Victoria Mikesell Mather, *Evolution and Revolution in Family Law*, 25 ST. MARY'S L.J. 405 (1993); Scott, *supra* note 15; Carl Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803 (1985).

24. *THE NEW FAMILY*, *supra* note 22, at 33. See also *infra* notes 68-79.

25. See *supra* note 22 and accompanying text.

26. See, e.g., *Orr v. Orr*, 440 U.S. 268, 279-80 (1979) (holding that old notions that “generally it is the man’s primary responsibility to provide a home and its essentials” can no longer justify family laws that discriminate on the basis of gender, and no longer “is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas”). See generally *THE NEW FAMILY*, *supra* note 22. However, true gender equality in American family law and social policy is not yet a reality. See, e.g., Martha L. Fineman, *Implementing Equality*, 1983 WIS. L. REV. 789; Martha L. Minow, *Toward a History of Family Law*, 1985 WIS. L. REV. 819; June R. Carbone & Margaret F. Brinig, *Rethinking Marriage: Feminist Ideology, Economic Chance, and Divorce Reform*, 65 TUL. L. REV. 953 (1991).

27. See generally *UNDERSTANDING FAMILY LAW*, *supra* note 22, at 1-17 (analyzing the current impact of traditional and nontraditional families on American society). See also *THE NEW FAMILY*, *supra* note 22, *passim*.

importance of marriage and the nuclear family relationship as an invaluable social and institutional structure remains undiminished. According to Professor Walter Weyrauch:

A family based on formal marriage is still treated by the courts as the most desirable and productive unit of society, although no longer necessarily the most stable. . . . Procreation may still be a purpose of marriage, but other forms of productiveness, for instance, the educational and financial advancement of both spouses, not just of the husband, by joint effort are increasingly recognized. The economics of marriage are thus given closer attention by the parties than in the past, and marriage is beginning to acquire many of the characteristics of a pooling of resources and becomes co-ownership in present and future property similar to a business venture.

This egalitarian model of marriage, in accordance with the aspirations of the women's movement, seems to be more acceptable today than older conceptions in which one party, the husband, was seen as the dominant force or master. In its apparent materialism it refutes the romantic ideal of love, as if it were suspect as a cover for secret exploitation. One factor aiding this evolution is the availability of existing supportive case law; for example, past cases dealing with family-operated small businesses. . . . The trend is toward giving a similarly favorable treatment to the wife as a homemaker and mother, whether the courts refer to an implied contract, partnership, or special equities.²⁸

Other commentators have recognized that a traditional view of marriage often tends to devalue homemaker services. These commentators have further advocated the theory of a marital "economic partnership" based upon a modified version of a business partnership model, borrowing some fundamental tenets from community property law, in order to further assure the equality of both spouses' economic rights during marriage.²⁹ The *feme sole* estate and Married Women's Property Acts also have been rediscovered and are increasingly utilized to pro-

28. Walter Otto Weyrauch, *Metamorphoses of Marriage*, 13 FAM. L.Q. 415, 421-22 (1980). Professor Weyrauch's article also discusses the growth of informal marriages in the United States as well as the changing role of formal marriages. *Id.* at 424-33. See also Barbara Ann Kulzer, *Law and the Housewife: Property, Divorce and Death*, 28 U. FLA. L. REV. 1, 45-53 (1975).

29. See, e.g., Joan M. Krauskopf & Rhonda C. Thomas, *Partnership Marriage: The Solution to an Inefficient and Inequitable Law of Support*, 35 OHIO ST. L.J. 558 (1974). Under this concept of marriage as an "economic partnership," the spouses would be free to tailor their property or support rights by contract prior to marriage, but otherwise the concept of a marital "economic partnership" acknowledges the equal rights and obligations of both husbands and wives with respect to services, management, property ownership, and creditors' rights during marriage. *Id.* at 587-88. Family roles would be determined by the parties in accordance with their individual skills and interests, placing minimum restrictions on individual freedom. *Id.* at 590-94. This "economic partnership" marital model would thus allow married women to pursue a career or other activities outside the home, while protecting those who opt for a traditional role in the home or spend a portion of their lives rearing children. *Id.* at

vide married women with further economic protection in the form of a separate equitable estate.³⁰

In addition to its continuing social and economic value, marriage and the nuclear family still have crucial implications on procreation and child-rearing functions. Moreover, the recent academic support and encouragement of nontraditional family arrangements³¹ has generated a high-level of reevaluation of the major premises underlying marriage, resulting in a number of strong endorsements for a rededicated commitment to strengthening marriage and the nuclear family. For example, a 1991 report issued by the bipartisan National Commission on Children concluded that: "Families formed by marriage, where two caring adults are committed to one another and to their children, provide the best environment for bringing children into the world and supporting their growth and development."³²

594. Other commentators have supported variations of this "economic partnership" marital ideal. *See, e.g.*, Grace Ganz Blumberg, *Marital Property Analysis*, 33 UCLA L. REV. 1250 (1986); Marcia O'Kelly, *Entitlements to Spousal Support After Divorce*, 61 N.D. L. REV. 225 (1985); Susan Westenberg Prager, *Sharing Principles and the Future of Marital Property Law*, 25 UCLA L. REV. 1 (1977).

Other commentators, however, have criticized the "economic partnership" theory of marriage since equating the family relationship to a business may stimulate marital competition rather than marital sharing, and encourage people to view marriage only in financial terms; or because a marital partnership theory allows too much judicial discretion, and places insufficient value on the nonmonetary marital contributions without promoting self-sufficiency after divorce. *See, e.g.*, Jane Rutherford, *Duty in Divorce: Shared Income as a Path to Equality*, 58 FORDHAM L. REV. 539 (1990); Martha M. Fineman, *supra* note 26; Bea Ann Smith, *The Partnership Theory of Marriage: A Borrowed Solution Fails*, 68 TEX. L. REV. 689 (1990).

30. *See generally* Jack J. Rappeport, *The Separate Equitable Estate and Restraints on Anticipation*, 11 MIAMI L.Q. 85 (1956). Some commentators have argued that these gender-based laws protecting a woman's economic rights on marriage are constitutionally permissible since these remedial laws attempt to make amends for society's prior unfavorable treatment of married women. *See, e.g.*, Ruth Bader Ginsberg, *Some Thoughts on Benign Classification in the Context of Sex*, 10 CONN. L. REV. 813, 825 (1978), where the author foresees a continued, but limited, use of benign sexual classifications in American family law that would be justified as compensatory only if adopted by the legislature for remedial reasons and remedial ends. *But see also* Leo Kanowitz, *Benign Sex Discrimination: Its Troubles and Their Cure*, 31 HASTINGS L.J. 1379 (1980), where the author argues that such gender-based remedial laws foster sexual stereotyping and should be abrogated.

31. *See infra* notes 37-67 and accompanying text.

32. NATIONAL COMMISSION ON CHILDREN, *BEYOND RHETORIC* (1991). This study stresses, what most Americans do not realize, that various public regulatory policies actually discourage marriage. The most vivid examples of policies at odds with the preservation of marriage and the family unit are: (1) the "marriage penalty" in income tax law that, in effect, rewards people for living together instead of marrying; and (2) the welfare system which, with few exceptions, applies only to unwed mothers, and not to two-parent families. "In effect," the report states, "low income couples who choose to marry are also forced to choose a much less secure life for their children."

Another report issued by the centrist Progressive Policy Institute argues that any new state or federal governmental programs for children will be largely ineffective without strengthening the two-parent family. This report criticizes both liberals and conservatives alike for failing to adequately address the current strains on American family life:

Traditional conservative support of families is largely rhetorical. Their disregard for the new economic realities engenders a policy of unresponsive neglect—expressed, for example, in President Bush's misguided veto of the Family Leave Act.³³

Conversely, traditional liberals' unwillingness to acknowledge that intact two-parent families are the most effective units for raising children has led them into a series of policy cul-de-sacs. . . . Given all the money in the world, government programs will not be able to instill self-esteem, good study habits, advanced language skills, or sound moral values in children as effectively as can strong families.³⁴

These studies, among other recent studies,³⁵ emphasize that marriage and the nuclear family structure still continue to play an important role in present-day American society and should continue to function, and be legally protected, as a valuable social and institutional ideal.³⁶

The study calls on leaders in the public and private sectors to "make conscious efforts to promote family values and to support the formation and functioning of healthy families." *Id.*

33. This Act was later signed into law by President Clinton. *See, e.g.*, Family Leave Act, 29 U.S.C.A. § 2601 (1993).

34. PROGRESSIVE POLICY INSTITUTE REPORT, PUTTING CHILDREN FIRST: A PROGRESSIVE FAMILY POLICY FOR THE 1990S (1990). *See also* UNDERSTANDING FAMILY LAW, *supra* note 22, at 6–10.

35. *See, e.g.*, MARRIAGE IN AMERICA, *supra* note 16; DAVID BLANKENHORN, FATHERLESS AMERICA: CONFRONTING OUR MOST URGENT SOCIAL PROBLEM (1995); JUDITH WALLERSTEIN & SANDRA BLAKESLEE, THE GOOD MARRIAGE: HOW AND WHY LOVE LASTS (1995); CONTEMPORARY MARRIAGE (Kingsley Davis, ed. 1985).

36. *See generally* MARRIAGE IN AMERICA, *supra* note 16, at 10–11:

More broadly, marriage has evolved in Western societies as a complex institution containing at least five dimensions: natural, religious, economic, social, and legal.

First, marriage has long been viewed as a natural institution, meeting and guiding the primary human inclinations toward sexual expression, reproduction, and emotional intimacy. . . .

Second, marriage is a sacramental institution, typically built on sacred promises and overseen by religious communities. In most cultures, powerful religious symbols and rites have sought to idealize and sanction the marital relationship.

Third, marriage is an economic institution, constituting a primary unit of economic consumption, exchange, and production.

Fourth, marriage is a social institution, nurturing and socializing children and regulating the behavior of both husbands and wives. It typically links together two extended families, thus widening the network of support, resources, and obligations available to help children and other vulnerable family members. From this perspective, marriage as an institution can be seen as a seedbed of civic virtue, perhaps society's most important contrivance for protecting child well-being, turning children into good citizens, and fostering good behavior among adults.

C. Criticism of Marriage and the Nuclear Family Ideal and a Reasoned Response

Not all commentators agree with the assessment that marriage and the nuclear family unit should continue to serve as a valuable social and institutional ideal. Professor Majorie Schultz writes:

Marriage has undergone tremendous change in recent decades. . . . Only a small percentage of American families still have all the characteristics associated with the nuclear family ideal. In place of a single, socially approved ideal we have compelling demands for autonomy and privacy, and multiple levels of intimacy: single parents, working wives, house husbands, homosexual couples, living together arrangements without marriage, serial marriage, and stepchildren. The changes are legion, and their message is clear: the destruction of traditional marriage as the sole model for adult intimacy is irreversible.³⁷

Although the overwhelming majority of states continue to recognize that marriage and the nuclear family still constitutes a fundamental legal status based upon contract,³⁸ a number of other commentators have continued to question the legitimacy and utility of the state's regulation of marriage in contemporary society. They have argued that the

Primarily for this reason, marriage is widely viewed in human societies as a "social good" worthy of strong support.

Finally, due to the importance of each of these dimensions, marriage is also a legal institution, protected and regulated by a body of law that governs entry into the institution, exit from it, and expectations of behavior within it, including an enumeration of the rights and duties that flow from the status of being married.

[T]he institution of marriage was designed less for the accommodation of adults in love than for the proper functioning of society, especially regarding the care of children. Indeed, marriage as an institution is historically based on a fundamental realization—that all affective ties between men and women, no matter how biologically based they may be, are notoriously fragile and breakable. Because of this fact, an important aspect of marriage, in both its legal and religious contexts, are the vows of fidelity and permanence that are almost always a part of the wedding ceremony. In large measure, these promises are designed to bind males to long-term commitments in order to foster the social institution of fatherhood.

37. Marjorie Schultz, *Contractual Ordering of Marriage: A New Model for State Policy*, 70 CAL. L. REV. 204, 207 (1982). See also Minow, *supra* note 26; Martha L. Minow, *Redefining Families: Who's In and Who's Out*, 62 U. COLO. L. REV. 269 (1991); Mary Patricia Treuthart, *Adopting a More Realistic Definition of "Family,"* 26 GONZ. L. REV. 91 (1990-91); Martha L. Fineman, *Intimacy Outside the Natural Family: The Limits of Privacy*, 23 CONN. L. REV. 955 (1991).

38. See, e.g., *Boddie v. Connecticut*, 401 U.S. 371, 376 (1971) ("Without a prior judicial imprimatur, individuals may fully enter into and rescind commercial contracts, for example, but we are unaware of any jurisdiction where private citizens may covenant for or dissolve marriage without state approval"). See also Sugarman, in *DIVORCE REFORM AT THE CROSSROADS*, *supra* note 3, at 138 ("Marriage, at least in this century, is typically said to be best understood as a status, rather than as a contractual relationship.")

legal status of marriage has now become “obsolete” and “anachronistic” in modern society, and the incidents of marriage, therefore, ought to move from status to contract implications with a concurrent reduction of emphasis in the state’s regulation of marriage. For example, Professor Lenore Weitzman argues that:

Prospective spouses are neither informed of the terms of a [marriage] contract, nor are they allowed any options about the terms. . . . However, our society has undergone profound transformations in the past century, and the long-standing legal structure of marriage may now be anachronistic. The state’s interest in preserving the traditional family may not be important enough to offset new social and individual needs which require more flexibility and choice in family forms.³⁹

Other feminist writers have argued for the “uncoupling” of marriage and child rearing. For example, Professors June Carbone and Margaret Brinig state that:

Both the liberal feminist and the cultural feminist agendas ultimately call for uncoupling marriage and child rearing. For traditionalists, children were what marriage was about, and the marital exchange of lifelong support for lifelong services served to encourage women to undertake child rearing and to lock both parents into traditional gender roles once the choice was made. The liberal feminists now wish to release women from the primary child rearing role altogether, and the cultural feminists seek to separate protection for child rearing from the continuation of the marriage. The success of either agenda may accelerate the existing trend away from the traditional family, with more couples choosing not to have children, more children being raised by single parents, and both men and women experiencing a greater variety of parenting roles.⁴⁰

On the other hand, Professor Barbara Bennett Woodhouse believes that:

Women’s situation can and will be improved by a legal framework that supports marriage (same sex as well as heterosexual), asks both partners

39. Lenore J. Weitzman, *Legal Regulation of Marriage: Tradition and Change, A Proposal for Individual Contracts and Contracts in Lieu of Marriage*, 62 CAL. L. REV. 1169, 1170 (1974). See also LENORE J. WEITZMAN, *THE MARRIAGE CONTRACT: SPOUSES, LOVERS, AND THE LAW* (1981). See also Moira Wright, *Marriage: From Status to Contract?*, 13 ANGLO-AMERICAN L. REV. 17 (1984); Schultz, *supra* note 37; Keith G. McWalter, Comment, *Marriage as a Contract: Toward a Functional Redefinition of the Marital Status*, 9 COLUM. J.L. & SOC. PROBS. 607 (1973).

40. Carbone & Brinig, *supra* note 26, at 956. See also Martha Fineman, *The Neutered Mother*, 46 MIAMI L. REV. 653, 664–65 (1992) (arguing that heterosexual relationships should no longer be the basis for family law, and suggesting an increase in public support for mothers and the disassociation of mothering from marriage). *But see also* notes 32–36 *supra*, citing recent empirical studies that suggest otherwise. Moreover, a small, but increasing number of fathers also are the primary caretakers of their children. See Amy Saltzman, *When Dads Stay Home*, U.S. NEWS & WORLD REP. (Mar. 3, 1997), at 71–72.

(not just women) to do their share of the nurture work, and expects both to treat each other with respect and concern. As long as the law seeks to bring both private and public responsibilities into play, it will have to grapple with defining what conduct and what responsibilities trigger individual obligations and claims.⁴¹

Apart from the fact that no American state⁴² or foreign country⁴³ to date has chosen to legislate itself out of the marriage regulation business, Professor Weitzman's proposal to replace the legal status of marriage with contractual alternatives is unrealistic for a number of other reasons. First, most parties now possess various contractual rights to modify or alter their statutory marital property and support rights in the form of premarital⁴⁴ or post-marital⁴⁵ agreements; and unmarried cohabiting couples in many states may also contract for enumerated economic support and property rights by utilizing nonmarital agreements and other equitable remedies.⁴⁶ Second, if the parties were able to privately contract free from all state regulation of marriage, what protection would be afforded to prevent the possible exploitation of one of the contracting

41. Barbara Bennett Woodhouse & Katharine Bartlett, *Sex, Lies, and Dissipation: The Discourse of Fault in a No-Fault Era*, 82 GEO. L. J. 2525, 2564 (1994). See also Barbara Bennett Woodhouse, *Toward a Revitalization of Family Law*, 69 TEX. L. REV. 245 (1990).

42. See note 21, *supra*, and accompanying text.

43. See note 2, *supra*, and accompanying text.

44. See, e.g., Charles W. Gamble, *The Antenuptial Contract*, 26 U. MIAMI L. REV. 692 (1972); Homer Clark, Jr., *Antenuptial Contracts*, 50 U. COLO. L. REV. 141 (1979); Peter Nash Swisher, *Divorce Planning in Antenuptial Agreements: Toward a New Objectivity*, 13 U. RICH. L. REV. 175 (1979). See also THE UNIFORM PREMARI-TAL AGREEMENT ACT, 9B U.L.A. 369 (1983).

45. See, e.g., SAMUEL GREEN & JOHN LONG, MARRIAGE AND FAMILY LAW AGREEMENTS (1984); STEPHEN W. SCHLISSEL, SEPARATION AGREEMENTS AND MARI-TAL CONTRACTS (1986); ALEXANDER LINDEY & LOUIS I. PARLEY, LINDEY ON SEPARA-TION AGREEMENTS AND ANTENUPTIAL CONTRACTS (1992 rev. ed.).

46. See, e.g., *Cook v. Cook*, 691 P.2d 664 (Ariz. 1984); *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976); *Carnes v. Sheldon*, 311 N.W.2d 747 (Mich. Ct. App. 1981); *Kozlowski v. Kozlowski*, 403 A.2d 902 (N.J. 1979); *Merrill v. Davis*, 673 P.2d 1285 (N.M. 1983); *Morone v. Morone*, 413 N.E.2d 1154 (N.Y. 1980); *Watts v. Watts*, 405 N.W.2d 303 (Wis. 1987). See *contra* *Hewitt v. Hewitt*, 394 N.E.2d 1204 (Ill. 1979); *Rehak v. Mathis*, 238 S.E.2d 81 (Ga. 1977). See also MARITAL AND NONMARI-TAL CONTRACTS: PREVENTATIVE LAW FOR THE FAMILY (Joan Krauskopf, ed., 1979).

See also Harry G. Prince, *Public Policy Limitations on Cohabitation Agreements*, 70 MINN. L. REV. 163, 209 (1986):

A more precise, restrictive definition of public policy interests and a more flexible, goal-oriented approach to remedial questions would greatly increase the courts' effectiveness in implementing the overarching public policy in this area: to allow parties the maximum freedom to contract with assurance that courts will enforce promises in accordance with the fairly and freely achieved mutual intent of the parties.

parties by the other contracting party?⁴⁷ Third, in spite of recent societal developments involving alternative lifestyles and nontraditional families, “a majority of Americans still marry in the traditional way and continue to regard marriage as the most important relationship in their lives.”⁴⁸ Finally, recent empirical studies have reaffirmed that marriage and the nuclear family ideal continues to serve a valuable social, economic, political, and legal function in contemporary American society.⁴⁹

Nevertheless, a number of scholars, academicians, and other commentators have unrealistically ignored the continuing strength and viability of marriage and the nuclear family in America as a valuable social, economic, political, and legal institution.⁵⁰ Likewise, a number of conservative and liberal politicians who publicly espouse “family

47. See, e.g., Mary Ann Glendon, *Marriage and the State*, 62 VA. L. REV. 663, 666 (1976) (“If the state is in the process of divesting itself of its marriage regulation business, then, of course, it is not likely to set up shop as an enforcer to heretofore unenforceable contracts”).

48. CLARK, *supra* note 13, at 26.

49. See *supra* notes 28–36 and accompanying text. See also Gatland, *supra* note 13, at 54:

While they have reservations about peeling back no-fault divorce laws, lawyers in domestic relations law, like legislators, have begun to think about how the divorce process can be improved. The ABA Family Law Section, for instance, has created a joint task force with the American Psychological Association to study the issue.

Some lawyers believe the focus should be on how individuals and society treat marriage. After all, only married couples face the problems of divorce.

50. See, e.g., MARRIAGE IN AMERICA, *supra* note 16, at 9:

Much of the scholarly discourse on family issues conducted over the past three decades has contained a strong anti-marriage bias. Many textbooks written for use in schools and colleges openly propagandize against any privileged cultural status for marriage and quite often even against marriage itself.

For a non-academic view of this problem, see John Leo, *On Society: Where Marriage Is a Scary Word*, U.S. NEWS & WORLD REP., Feb. 5, 1996, at 22:

It's impossible to overestimate how deeply our intellectual and cultural elite is implicated in the continuing decline of the American nuclear family. It's not just the constant jeering at the intact family as an Ozzie and Harriet relic of the Eisenhower era. It's the constant broadening of the definition of what a family is (for example, a New Jersey judge said that six college kids on summer vacation constituted a family) and the equally constant attempt to undermine policies that might help the intact family survive.

Maggie Gallagher, in her forthcoming book, *THE ABOLITION OF MARRIAGE*, says that marriage “has been ruthlessly dismantled, piece by piece, under the influence of those who . . . believed that the abolition of marriage was necessary to advance human freedom.” Demoted to one lifestyle among many, marriage is no longer viewed by the elite as a crucial social institution but as a purely private act. . . . Why? Probably because the group is committed to a nonjudgmental culture in which all relationships are equally valuable, endlessly negotiable and disposable. So talk about marriage as a long-term serious commitment that must be shored up or preferred over other “lifestyles” becomes dicey and embarrassing.

values" as a high-profile campaign issue, in reality often treat marriage and family values as a very low priority.⁵¹

Professors Schultz and Weitzman, among many other contemporary commentators, have documented the growth of nontraditional families in America.⁵² Nonmarital cohabitation, as an American social development, has experienced a fivefold increase from 1970 to 1980,⁵³ with strong indications that this trend will continue in the future.⁵⁴ The status of nontraditional families⁵⁵ in America, therefore, remains a legitimate

The next skirmish in this continuing war between the elite and non-elite world views will be divorce reform. The elite will depict it as a punitive, backward, religious attempt to lock people into bad marriages. But that's not it. The point is that wide-open, anything-goes, no-fault divorce has unexpectedly created its own accelerating culture of non-commitment. Under no-fault divorce, marriage increasingly carries no more inherent social weight than a weekend fling to the Bahamas. The goal is not to halt divorce, but to make it rarer by trying to restore gravity to both marriage and separation. But given the attitudes of our elite, the battle will be uphill all the way.

These concerns over the perceived weakening of the institution of marriage in America appear to be shared by the public at large. For example, in a recent national poll conducted by the University of Maryland National Opinion Research Center, 50% of those polled said they wanted "tougher" divorce laws, and only 27% percent wanted "easier" divorce laws. However, most state legislatures have not yet responded to these public concerns. See David Whitman, *The Divorce Dilemma*, U.S. NEWS & WORLD REP., Sept. 30, 1996, at 58.

51. See, e.g., Michael Hirsch, *The Great Debunker: A Nobel-Bound Economist Punctures the CW—and Not a Few Big-Name Washington Egos*, NEWSWEEK, Mar. 4, 1996, at 40-41, 41:

[Stanford economist Paul] Krugman doesn't short-sell America's economic problems. He is alarmed at the country's widening income gap, for one. . . . "I'm terrified of what's happening to our society," says Krugman. But the remedies he would propose "mostly involve improving and strengthening exactly what we're tearing apart—health care for our children, a decent education for poor kids, things like the earned income tax credit." What he's after, he says, is a sense of proportion. "If this administration would put a tenth as much of its attention into trying to prevent a million kids from being thrown into poverty as it did into extracting a few more exports from Japan, we'd all be better off."

52. See notes 37 and 39, *supra*, and accompanying text.

53. See, e.g., *Marital Status and Living Arrangements*, BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS, Series P-20, No. 389 (1983).

54. See, e.g., *Marital Status and Living Arrangements*, BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS, Series P-20, No. 445 (1990).

55. Nontraditional family law concepts may include: non-marital cohabitation, domestic partnerships, same sex marriage, de facto marriage, marriage by estoppel, paternity and legitimacy issues, single parent adoption, gay and lesbian adoption issues, and sexual preference issues related to child custody determination on divorce. See, e.g., UNDERSTANDING FAMILY LAW, *supra* note 22, at 10-11, 19-25. See also Rebecca L. Melton, Note, *Legal Rights of Unmarried Heterosexual and Homosexual Couples and the Evolving Definition of "Family,"* 29 J. FAM. L. 497 (1990-91); Note, *Expansion of the Term "Family" to Include Nontraditional Relationships*, 20 MEMPHIS ST. U. L. REV. 135 (1989).

concern that must also be addressed by the state courts and legislatures. Yet recognizing the needs and obligations of nontraditional families does *not* necessarily require the wholesale destruction of marriage and the nuclear family ideal, since American family law, in its present evolutionary transition, is still able to address, rectify, and subsume the legitimate concerns of Professors Schultz, Weitzman, and others, without the necessity of declaring marriage and the traditional nuclear family to be "obsolete" or "anachronistic."

For example, in addition to the contractual rights of unmarried cohabitants to define their mutual economic needs and obligations in nonmarital contractual agreements,⁵⁶ the status implications of heterosexual or homosexual nonmarital cohabitation and domestic partnership law increasingly have come to the forefront of American family law in the form of: (1) domestic partnership ordinances that have been enacted in a growing number of American cities⁵⁷; (2) employment benefits that a number of corporations have made available, not only to the spouses of their employees, but also to unmarried cohabiting domestic partners as well⁵⁸; and (3) workers' compensation awards and other statutory remedies provided in a number of states to dependent unmarried de facto spouses, as well as to married spouses.⁵⁹ Although these

56. See note 46, *supra*. See also Comment, *Property Rights Upon Termination of Unmarried Cohabitation: Marvin v. Marvin*, 90 HARV. L. REV. 1708 (1977); Kristin Bullock, Comment, *Applying Marvin v. Marvin to Same-Sex Couples: A Proposal for a Sex-Preference Neutral Cohabitation Contract Statute*, 25 U.C. DAVIS L. REV. 1029 (1992).

57. *E.g.*, Berkeley, San Francisco, Santa Cruz, and West Hollywood, California; Tacoma Park, Maryland; New York, New York; Seattle, Washington; Madison, Wisconsin. See generally Vada Berger, *Domestic Partnership Initiatives*, 40 DEPAUL L. REV. 417 (1991); Craig A. Bowman & Blake M. Cornish, Note, *A More Perfect Union: A Legal and Social Analysis of Domestic Partnership Ordinances*, 92 COLUM. L. REV. 1164 (1992). For example, New York City's Executive Order 123 states:

Domestic partners are two people, both of whom are eighteen years of age or older and neither of whom is married, who have a close and committed personal relationship involving shared responsibilities, who have lived together for a period of one year or more on a continuous basis at the time of registration and who have registered as domestic partners.

Berger, *supra*, at 424.

58. See, *e.g.*, Robert L. Eblin, Note, *Domestic Partnership Recognition in the Workplace: Equitable Employee Benefits for Gay Couples (and Others)*, 51 OHIO ST. L.J. 1067 (1990). It is estimated that approximately one-half of Fortune 500 companies now provide such employee benefits.

59. See, *e.g.*, Kempf v. State Accident Ins. Fund, 580 P.2d 1032 (Or. Ct. App. 1978); West v. Marton Marlow Co., 230 N.W.2d 545 (Mich. 1975). See *contra* Caudle-Hyatt, Inc. v. Mixom, 260 S.E.2d 193 (Va. 1979). See generally SAMUEL GREEN & JOHN LONG, MARRIAGE AND FAMILY LAW AGREEMENTS 158-210 (1984).

modest initiatives have not yet enjoyed substantial support in a majority of American states, they nevertheless constitute a first major step in American family law of recognizing nonmarital cohabitation and domestic partnership law as a legally protected status.⁶⁰

Another illustration of recognizing nontraditional domestic partnerships as a legally protected status, without diminishing the importance of marriage and the nuclear family as the preferred form of cohabitation, is found in the domestic relations laws of Sweden, Denmark, and Norway. The Swedish government, for example, has adopted a realistic approach that legally recognizes both marriage and nonmarital heterosexual and homosexual cohabitation through alternative protective statutes. These statutes provide legal recognition and protection to unmarried cohabiting couples in durable, long-term relationships without disturbing the position of marriage as the preferred form of cohabitation in Sweden.⁶¹ A statutory model based upon this Swedish legislation may be beneficial to American state courts and legislatures in resolving disputes between unmarried cohabitants without being limited to often inadequate contractual remedies.⁶² Thus, the preferable approach for American state legislatures and state courts would be to recognize and protect the legal rights and obligations of *both* traditional *and* nontraditional families as they currently coexist in contemporary American society, by providing alternative legal rights and remedies for each

60. See generally Grace Blumberg, *Cohabitation Without Marriage: A Different Perspective*, 28 UCLA L. REV. 1125 (1981); Minow, *supra* note 37; John C. Beattie, Comment, *Prohibiting Marital Status Discrimination: A Proposal for the Protection of Unmarried Couples*, 42 HASTINGS L.J. 1415 (1991).

The recent U.S. Supreme Court case of *Romer v. Evans*, _____ U.S. _____, 116 S. Ct. 1620 (1996), striking down Colorado's constitutional amendment barring legal protections for gays and lesbians also has stirred controversy among legal scholars and practitioners. Although some legal scholars, including Professor Lawrence Tribe at Harvard University Law School, view the Colorado law as so odious that it violates the U.S. Constitution per se. Other legal scholars, including Professor Michael McConnell at the University of Chicago Law School, believe that the Supreme Court did not adopt Professor Tribe's per se theory, but merely found that the Colorado constitutional amendment failed to satisfy a rational basis test. See, e.g., *Gay Rights Watershed? Scholars Debate Whether Past and Future Cases will be Affected by Supreme Court's Romer Decision*, 82 A.B.A.J. 30 (July 1996).

61. See, e.g., Matthew Fawcett, *Taking the Middle Path: Recent Swedish Legislation Grants Minimal Property Rights to Unmarried Cohabitants*, 24 FAM. L.Q. 179 (1990); D. Bradley, *Unmarried Cohabitation in Sweden: A Renewed Social Institution?*, 11 J. LEGAL HIST. 300 (1990). See also Ake Saldeen, *Sweden: Family Counseling, The Tortious Liability of Parents, and Homosexual Partnership*, in *Annual Survey of International Family Law*, *supra* note 2, at 513, 519-21.

62. See, e.g., Fawcett, *supra* note 61. See also Grace Blumberg, *supra* note 60, where Professor Blumberg argues that a publicly created legal status is a much more suitable vehicle for handling support and property claims of unmarried and married cohabitants than is a contract theory.

social structure according to the public policy of each state, as well as the present and future needs of its citizens.⁶³

Finally, those American commentators who may still question the worth of marriage and the traditional nuclear family ideal might also profit from the experience of various Marxist and former Marxist societies regarding their misguided approaches to marriage and the nuclear family over the past seventy years. For example, the hope of the early Soviet Communists was to weaken family ties and marital institutions, which they perceived to be exploitive instruments by which the ruling class maintained its economic and political power. Either spouse was able to escape their marriage by a single *ex parte* application at a registrar's office. In the alternative, it was not necessary to enter into a formal marriage, since Soviet de facto cohabitation was also recognized. However, subsequent Soviet legislation found it necessary to restore state supervision over marriage and to put formidable obstacles in the way of divorce.⁶⁴ A similar progression of events has been taking place in other Marxist, and former Marxist, countries as well.⁶⁵

Thus, those Marxist societies that were once committed to radical social change have been unable to alter the traditional family structure significantly.⁶⁶ These failed social experiments further demonstrate the remarkable resilience of the nuclear family, its invaluable role in the raising and socialization of children, and providing for the economic and social support of its members.⁶⁷

63. See, e.g., UNDERSTANDING FAMILY LAW, *supra* note 22, at 5-17, 11.

64. See JOHN EEKELAAR, FAMILY LAW AND SOCIAL POLICY 20-23 (2d ed. 1984). See also Olga A. Dyuzheva, *International Marriage and Divorce Regulation and Recognition in Russia*, in *Symposium on International Marriage and Divorce Regulation*, *supra* note 2, at 645, 646-48.

65. See, e.g., Marta Soltesz, *Hungary: Toward a Strengthening of Marriage*, 26 J. FAM. L. 113 (1987-88); Michael Palmer, *The People's Republic of China: New Marriage Regulations*, 26 J. FAM. L. 39 (1987-88); Valentina Zace, *Albania: Family Law Under the Dictatorship of the Proletariat*, in *Annual Survey of International Family Law*, *supra* note 2, at 259; Miroslava Gec-Korosec & Vesna Rijavec, *Slovenia: Post-Independence Changes in Family Law Regulation*, in *Annual Survey of International Family Law*, *supra* note 2, at 485.

66. See EEKELAAR, *supra* note 64, at 22: "There are striking similarities between [the Eastern European experience] and the position into which modern Western family law is moving." Query: Are Western European countries and the United States willing to make these same mistakes?

67. See generally EEKELAAR, *supra* note 64. See also LAURENCE D. HOULGATE, FAMILY AND STATE: THE PHILOSOPHY OF FAMILY LAW 49 (1988) (arguing that a family finds its justification not only in its function of raising children and contributing to the well-being of its members, but also in the benevolence and the psychological satisfactions a family brings. Family law therefore finds its ultimate justification in reducing the uncertainties and inequities that are associated with conjugal relationships).

D. Family Rights vs. Individual Rights

Traditionally, the American family has been highly valued as the fundamental cornerstone of our society,⁶⁸ and state legislatures and state courts were thus reluctant to intervene in family affairs on behalf of individual family members. Two basic reasons have been suggested for this traditional opposition to state intervention in family matters. First, many courts perceived that such intervention would be ineffective. Second, the specter of governmental intrusion should not invade the traditional right to family privacy, which had been so deeply ingrained in American social and legal consciousness.⁶⁹

In 1965, the U.S. Supreme Court held that marital privacy was a constitutionally protected right in *Griswold v. Connecticut*,⁷⁰ and this new constitutional right to privacy rapidly became not just a family right, but an individual right as well.⁷¹ Concurrently, the notion was beginning to appear in American family law that now "the family exists for the benefit of the individual, rather than the individual existing for the benefit of the family."⁷² Thus, according to Professor Jane Rutherford, despite the new commitment to the constitutional right to privacy, individualism prevailed when individualism and family privacy conflicted, and the courts were increasingly willing to intrude on marital privacy rights to further the goal of individual independence.⁷³

Professor Carl Schneider agrees that the rise of individual legal rights over family rights means that when the law makes moral decisions, it now transfers them to individuals rather than to families, thus sustaining the image of the family as a collection of discrete individuals rather than as a unified family entity.⁷⁴ Moreover, a major problem involved with the fundamental right to privacy is that although most Americans

without rules, in establishing custody of children, in preventing harm to children, in providing economic rights and obligations for family members, and in establishing rules that will optimize human happiness within a family relationship).

68. See, e.g., *Maynard v. Hill*, 125 U.S. 190, 205 (1888). See also notes 21-36, *supra*, and accompanying text.

69. See Carl Schneider, *supra* note 23, at 1837-38.

70. *Griswold v. Connecticut*, 381 U.S. 479 (1965) (overturning a Connecticut statute prohibiting contraceptives to married couples based upon a constitutional right to marital privacy).

71. See, e.g., *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (recognizing the right to use contraceptives by unmarried individuals); *Roe v. Wade*, 410 U.S. 113 (1973) (recognizing a woman's right to privacy of her body in making abortion decisions).

72. See THE NEW FAMILY, *supra* note 22, at 33.

73. Jane Rutherford, *Beyond Individual Privacy: A New Theory of Family Rights*, 39 U. FLA. L. REV. 627, 636-37 (1987).

74. Schneider, *supra* note 23, at 1858.

believe that this right should exist, they do not all agree on exactly what should be included within this right. For example, Professor Robert Mnookin gives the illustration that liberals generally consider sexuality to be a private sphere, but view economics as a public sphere; whereas conservatives believe in private economic enterprise, yet favor regulation of such sexual matters as abortion and homosexuality.⁷⁵

In an attempt to incorporate and synthesize the traditional view of family privacy rights with the more recent emphasis on individual rights, Professor Rutherford persuasively argues for a new theory of family rights. This theory recognizes: (1) that fundamental family rights belong both to the family as a group and to each individual family member; and (2) that when competing rights need to be accommodated, the rights of the objectively weaker party should take priority over the privacy rights of the family. These competing rights, however, would only arise in an adversarial context against other family members, other people, or the government.⁷⁶ Thus, the modern American family, as a viable legal entity, would continue to coexist with, and nurture, its individual family members under mutually supportive legal and constitutional safeguards.⁷⁷ The alternative to a strong and viable family structure⁷⁸ may be grave. As Professor Laurence Tribe warns, "Once the State, whether acting through its courts or otherwise, has 'liberated' the child—and the adult—from the shackles of such intermediate groups as the family, what is to defend the individual against the combined tyranny of the State and [his or] her own alienation?"⁷⁹

III. Fault Factors in No-Fault Divorce: A Viable Concept in Contemporary American Family Law

A. General Introduction

Like marriage, divorce or dissolution of marriage in America has always been regulated by the state legislatures.⁸⁰ Since marriage and the modern American family still serve a valuable social, legal, eco-

75. See generally Robert Mnookin, *The Public/Private Dichotomy*, 130 U. PA. L. REV. 1430 (1982).

76. Rutherford, *supra* note 73, at 643–44.

77. See UNDERSTANDING FAMILY LAW, *supra* note 22, at 181–83.

78. See *supra* notes 21–36 and accompanying text.

79. LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 988 (1978).

80. See, e.g., *Maynard v. Hill*, 125 U.S. 190, 205 (1888):

Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the legislature. That body prescribes the age at which

nomie, and institutional function,⁸¹ the underlying public policy of most states continues to promote marriage and discourage divorce unless the parties comply with the required statutory guidelines for divorce.⁸²

Since the so-called no-fault divorce revolution,⁸³ a number of commentators have largely discounted the role of fault in American divorce proceedings.⁸⁴ However, these commentators make two serious errors in assuming that fault is “no longer an issue”⁸⁵ in granting divorces in America. First, “no-fault” remedial laws are seldom truly “no-fault” in nature, and often incorporate fault exceptions to the general rule for serious or egregious conduct. Second, a substantial number of American jurisdictions still retain a number of fault grounds for divorce, and a majority of jurisdictions still utilize various fault factors in determining spousal support awards, the equitable distribution of marital property on divorce, or both.

the parties may contract to marry, the procedure or form essential to constitute marriage, the duties and obligations it creates, its effects upon the property rights of both . . . and the acts which may constitute grounds for its dissolution.

See also *Simms v. Simms*, 175 U.S. 162, 167 (1899) (“The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the State, and not the laws of the United States”); *Boddie v. Connecticut*, 401 U.S. 371, 376 (1971), and see generally *supra* note 21 and accompanying text.

81. See generally *supra* notes 28–36, 67 and accompanying text.

82. For example, an overwhelming number of American courts still attempt to validate parties’ marital expectations whenever possible, through a number of presumptions in support of marriage, and through the recognition of certain defective marriages in order to promote marriage in general. See, e.g., *Leonard v. Leonard*, 560 So. 2d 1080 (Ala. Ct. App. 1990); *Panzer v. Panzer*, 528 P.2d 888 (N.M. 1974). See also Clark, *supra* note 48, at 70–75; UNDERSTANDING FAMILY LAW, *supra* note 22, at 26–29, 47; Annots. 34 A.L.R. 464 (1925) and 77 A.L.R. 729 (1932). See also Peter Nash Swisher & Melanie Diana Jones, *The Last-in-Time Marriage Presumption*, 29 FAM. L.Q. 409 (1995).

Divorce, on the other hand, is in derogation of the common law, and divorce statutes therefore must be strictly complied with. See, e.g., *Johnson v. Johnson*, 299 S.E.2d 351 (Va. 1983). See also Clark, *supra* note 48, at 405–12; JOYCE GREEN ET AL., DISSOLUTION OF MARRIAGE 4–53 (1986).

83. See generally *supra* notes 4–16, and accompanying text.

84. See, e.g., CLARK, *supra* note 13, at 496:

Today the non-fault ground of marriage breakdown, incompatibility and living separate and apart, have been enacted in almost all the states. It is thus fair to say that there is now wide agreement that fault no longer should be relevant in determining whether or not a marriage should be dissolved, even though the fault grounds continue to exist in some states.

See also Norman B. Lichtenstein, *Marital Misconduct and the Allocation of Financial Resources at Divorce: A Farewell to Fault*, 54 UMKC L. REV. 1 (1985); Herma Hill Kay, *Equality and Difference: A Perspective on No-Fault Divorce and its Aftermath*, 56 U. CIN. L. REV. 1 (1987).

85. See, e.g., CLARK, *supra* note 13, at 411.

1. REMEDIAL "NO FAULT" LAWS ARE SELDOM TRULY
"NO FAULT" IN NATURE

Remedial "no-fault" legislation, whether it is applied to "no-fault" automobile insurance, "no-fault" worker's compensation statutes, "no-fault" strict products liability law, or "no-fault" divorce law, is seldom truly "no-fault" in nature. Even though these remedial laws attempt to provide certain economic benefits to an injured or wronged party by partially alleviating the traditional burden of proof to demonstrate the other party's fault or conduct, none of these remedial "no-fault" laws totally abolishes or abrogates a defendant's responsibility or accountability for his or her actions involving serious or egregious conduct.

For example, although a majority of states have now adopted some form of "no-fault" automobile insurance coverage for the benefit of their citizens, these statutes are not completely "no-fault" in nature. It is true that up to a specific statutory economic threshold, which is often quite low, an insured automobile driver or passenger cannot sue another driver for personal injury resulting from a motor vehicle accident, and the injured party must look to his or her own insurance company for compensation. However, statutorily prescribed injuries are normally exempt from this "no-fault" cap, including death, dismemberment, disfigurement, or the permanent loss of a bodily function; and property damage very often is not covered under "no-fault" automobile insurance.⁸⁶ Indeed, some commentators now refer to these "no-fault" automobile insurance statutes as "partial-tort-exemption" statutes.⁸⁷ Professor Stephen Sugarman further points out that:

Even relatively pure no-fault accident compensation schemes still typically recognize a residual role for fault in extreme cases. In worker's compensation, intentional self-injury, on one hand, bars worker claims, and especially bad employer conduct, on the other, leads either to an enhanced compensation award or the right to sue in tort on top of the workers' compensation award. Even in New Zealand, where accident law has essentially been obliterated and replaced with a comprehensive accident victim compensation

86. See, e.g., EMERIC FISCHER & PETER SWISHER, *PRINCIPLES OF INSURANCE LAW* 511-16 (2d ed. 1994); ROBERT KEETON & ALAN WIDISS, *INSURANCE LAW* 410-25 (1988). See generally ROGER S. CLARK ET AL., *NO-FAULT AND UNINSURED MOTORIST AUTOMOBILE INSURANCE* (1984).

87. See, e.g., KEETON & WIDISS, *supra* note 86, at 421-25. See also David D. Caldwell, Note, *No-Fault Automobile Insurance: An Evaluative Survey*, 30 *RUTGERS L. REV.* 910, 926 (1977) (pointing out that if the plaintiff's economic losses are greater than the no-fault statutory benefits, then the plaintiff may recover the difference in a tort action).

plan, victims still retain the right to sue, in extraordinary cases, for punitive damages.⁸⁸

Moreover, in products liability litigation, the so-called “no-fault” strict products liability remedies that have been embraced by the vast majority of American jurisdictions⁸⁹ now approximate a negligence foreseeability standard with regard to defective design and defective warning cases, which constitute the vast majority of products liability claims, and the conduct of the consumer in products liability cases is always relevant.⁹⁰

Likewise, the so-called “no-fault” divorce laws in a substantial number of American states are not truly “no fault” in nature.⁹¹ This may

88. Stephen D. Sugarman, *Dividing Financial Interests on Divorce*, in *DIVORCE REFORM AT THE CROSSROADS*, *supra* note 3, at 136, citing Jean C. Love, *Punishment and Deterrence: A Comparative Study of Tort Liability for Punitive Damages Under No-Fault Compensation Legislation*, 16 U. C. DAVIS L. REV. 231 (1983).

89. See, e.g., RESTATEMENT (SECOND) OF TORTS § 402A (1964), and see generally LOUIS R. FRUMER & MELVIN I. FRIEDMAN, *PRODUCTS LIABILITY* (rev. ed. 1992).

90. See, e.g., James A. Henderson & Aaron D. Twerski, *Closing the American Products Liability Frontier: The Rejection of Liability Without Defect*, 66 N.Y.U. L. REV. 1263, 1315 (1991). See also Sheila L. Birnbaum, *Unmasking the Test for Design Defect: From Negligence [to Warranty] to Strict Liability to Negligence*, 33 VAND. L. REV. 593 (1980); James A. Henderson & Aaron D. Twerski, *Doctrinal Collapse in Products Liability: The Empty Shell of Failure to Warn*, 65 N.Y.U. L. REV. 265 (1990); Peter Nash Swisher, *Products Liability Tort Reform*, 27 U. RICH. L. REV. 857 (1993). See also RESTATEMENT (THIRD) OF TORTS § 1–20 (Proposed Draft 1996). Thus, with recent legislative and judicial reform in defective design and defective warning products liability cases, only defective manufacture claims now come under the rubric of “true” strict liability in tort.

Moreover, the conduct of the consumer is still very relevant in “strict” products liability law, embracing the doctrines of comparative fault, assumption of risk, and unforeseeable product misuse by the consumer. See, e.g., HENRY WOODS, *COMPARATIVE FAULT* § 1:11 (2d ed. 1987 & Supp. 1996). See also William M. Landes & Richard A. Posner, *A Positive Economic Analysis of Products Liability*, 14 J. LEGAL STUD. 535, 553–54 (1985) (“[D]esign defects typically involve durable goods, where the likelihood of an accident depends both on the product’s design and on the method and intensity of consumer use. . . . [Thus], if we are right that many product accidents that could be avoided by a different design are joint care situations, then negligence is the more efficient rule than strict liability for design defects”).

91. See Morse, *supra* note 17, at 612:

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

See also Elrod & Spector, *supra* note 11, at 804, 807 (reporting that approximately thirty-two states currently retain various fault-based grounds for divorce, although affording no-fault alternatives; and reporting that marital fault is still a relevant factor in at least twenty-seven states for determining alimony or spousal support on divorce).

be explained by the public policy rationale underlying divorce law in a large number of American states that still takes into account the responsibility and accountability⁹² of the respective spouses on divorce,⁹³ and which, in some ways, may be analogous to tort responsibility. As Professor Twila Perry observes:

It could easily be assumed that any analogy between tort law and divorce would no longer be viable after the widespread enactment of no-fault divorce. After all, a major purpose of no-fault was to remove from divorce proceedings the whole issue of cruel, hurtful, or blameworthy behavior. But the analogy to tort law still has potential to provide remedies to the party suffering losses at the end of the marriage, if the idea of no-fault divorce is brought more into sync with recent developments of tort law. Approaches such as no-fault insurance and strict liability have eliminated consideration of fault in certain areas of torts. They have focused, instead, on rationales and mechanisms to compensate those who have suffered losses.⁹⁴

While this author seriously questions whether “no-fault” insurance statutes and strict products liability tort laws actually have in fact eliminated all consideration of fault,⁹⁵ I do agree with Professor Perry’s

92. The underlying concept of fault goes beyond moral “blame” and generally encompasses a much greater sense of responsibility and accountability. WEBSTER’S UNABRIDGED NEW TWENTIETH CENTURY DICTIONARY 668 (1968) defines fault as “responsibility,” “failure to do what is required,” and “neglect of duty,” and WEBSTER’S NINTH COLLEGIATE DICTIONARY 452 (1991) defines fault as “responsibility for wrongdoing or failure.” Fault therefore encompasses concepts of responsibility and accountability, going well beyond mere “blame.” See also *infra* notes 93, 97–99, 113–20 and accompanying text.

93. See, e.g., Golden & Taylor, *supra* note 17: “Very few states totally ignore fault [in divorce proceedings]. This is because we are brought up to believe that people should be held accountable for their actions, and that courts should establish such accountability and consider it.” See also Morse, *supra* note 17, at 640–41:

The whole notion of fault proves to be a stumbling block for many scholars writing about the current pursuit of equitable ways of dealing with alimony. However, as noted earlier, fault provides an excellent tool to encourage the type of behavior society believes to be appropriate in marriage, and to discourage that behavior which society deems to be inappropriate. It seems that most people would at least agree that engaging in adultery, cruelty, or desertion is not the sort of sharing behavior which marriage should have to endure. In order to provide a disincentive for such behavior, there should be concomitant post-divorce financial consequences for engaging in inappropriate behavior.

See also a recent national opinion poll conducted by the University of Maryland National Opinion Research Center indicating that an increasing number of Americans, 50% of those polled, think it should be “tougher” to divorce in America, while a decreasing number of Americans, only 27% of those polled, think it should be “easier” to divorce. See Whitman, *supra* note 50, at 58.

94. Twila L. Perry, *No-Fault Divorce and Liability Without Fault: Can Family Law Learn from Torts?*, 52 OHIO ST. L.J. 55, 57 (1991).

95. See *supra* notes 86–90 and accompanying text.

assessment that a proper focus of divorce reform must be on promoting a just compensation for marital loss.⁹⁶

Thus, no matter how various “no-fault” remedial laws may be defined, and no matter how such laws may be characterized and formulated—even with the best of intentions, nevertheless, based upon very strong underlying Anglo-American legal precedent, social custom, and state public policy, one is still held to be responsible and accountable for one’s actions.⁹⁷ This underlying principle of an actor’s legal and

96. See Perry, *supra* note 94, at 94: “Unless no-fault divorce is reconceptualized so as to ensure [adequate] compensation to such spouses, what was hailed to be a significant step forward in family law may prove to be, at best, little more than a cosmetic change.”

However, reconceptualizing and analogizing fault and no-fault divorce law compensation theories to tort law compensation theory does not necessarily mandate that only a tort law remedy is appropriate to compensate a spouse for nonfinancial loss on divorce. See generally Section III.C.3. *infra*.

97. See, e.g., OLIVER WENDELL HOLMES, THE COMMON LAW 1-38, 37 (1923) (observing that the various forms of legal liability started from a moral basis, and from the concept that someone was legally responsible and accountable for his or her conduct); BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 112 (1921) (observing that “logic, and history, and custom, and utility, and the accepted standards of right conduct, are the forces which singly or in combination shape the progress of the law”). So query: If a reasonable person of ordinary prudence is properly held legally accountable and responsible for his or her actions in criminal law, tort law, property law, and contract law, why not in family law as well? See *infra* notes 116-20 and accompanying text.

See also Morse, *supra* note 17, at 641-42:

In tort, the law provides a remedy for intentional actions which cause harm, negligent actions which result in harm, and even for some activities where no proof of negligence is necessary, such as product liability. Only in the dissolution of marriage does the law currently seem to ignore even the most egregious of actions by a person toward his or her spouse and provide no compensation for the action. . . . Marriage is the only relationship in which a party may blithely wreak havoc upon another’s life only to have the law shield the behavior through no-fault divorce rather than deter the behavior as it did in the past. Where there is fault, there should be consequence.

Even Professor Ellman initially concedes that:

[T]he thread of modern family law scholarship that looks fondly on the law’s role in vindicating moral values is naturally sympathetic to consideration of fault [citing Schneider, *supra* notes 19 and 23 and MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 197 (1987)]. And indeed, on initial examination at least, it may seem quite implausible to suggest that one spouse’s claim to share in the other’s post-divorce income should be decided without regard to the spouses’ treatment of one another during marriage.

Fault in Modern Divorce Law, *supra* note 19, at 775 & note 5.

Compare also Lynn W. Wardle, *International Marriage and Divorce Regulation and Recognition: A Survey*, in *International Marriage and Divorce Regulation*, *supra* note 2, at 497, 511:

One of the most interesting hybrid approaches [to divorce] is found in Canada and England, where no-fault (breakdown) grounds are the only grounds for di-

social responsibility and accountability to others therefore constitutes a serious inherent flaw within *any* “no-fault” regime, and it is an important reason why so many “no-fault” laws, including “no-fault” divorce laws, often necessitate exclusions or exceptions to the general rule for serious or egregious conduct.

2. FAULT REMAINS A FACTOR IN MANY AMERICAN JURISDICTIONS

A second serious oversight made by a number of legal commentators and scholars in assessing the “no-fault” divorce revolution in America, and divorce reform in general, is their surprising failure to recognize and to adequately address the fact that, almost thirty years after the “no-fault” divorce revolution, a substantial number of American states still retain various fault grounds for divorce, and still utilize certain fault factors in determining spousal support and determining the equitable distribution of marital property on divorce. For example, as family law practitioners Harvey L. Golden and J. Michael Taylor aptly observe:

Critics of the “fault” approach [to divorce] argue that without easy access to divorce, the normal reaction to a miserable situation is not to do the best you can to deal with it, but instead to remain miserable and make those around you, including your children, miserable too. This is undoubtedly true in some circumstances. Therefore, adding no-fault to the traditional grounds for divorce is important as a safety valve because it allows an escape hatch from marriages that were clearly a mistake or have become so.

These same critics, however, mistakenly believe that the adoption of no-fault grounds by every state in the union heralds a beneficial end to the fault system. This is simply not true because most states have *incorporated* no-fault grounds into their traditional framework, not *substituted* one system for another. At least thirty-eight out of fifty-three U.S. jurisdictions consider fault in awarding divorce, property division, or alimony [citing as authority Doris Jonas Freed & Timothy B. Walker, *Family Law in the Fifty States: An Overview*, 20 *FAM. L.Q.* 461-62, 483-84, 494-95 (1987)].

Even among jurisdictions that have adopted “pure” no-fault, some have retained consideration of fault in property division and alimony. (Of seventeen state courts that considered whether fault should be a factor in property division and alimony, eleven held it permissible and only six rejected it outright. *See, Fault as a Consideration in Alimony, Spousal Support, or Property Division Awards Pursuant to No-Fault Divorce*, 86 *A.L.R.*3d 1116.)

Very few states totally ignore fault. That is because we are brought up to believe that people should be held accountable for their actions, and that courts should establish such accountability and consider it.⁹⁸

orce, but the breakdown of the marriage must be proved, and establishing what traditionally were deemed fault grounds for divorce are among the acceptable ways to prove the breakdown of the marriage.

98. Golden & Taylor, *supra* note 17, at 12. *See also* Woodhouse, *supra* note 17, at 2531:

Although we live in a nation aptly characterized by Mary Ann Glendon as an example of “no-fault, no-responsibility” divorce, reports of the death of fault have been exaggerated. While we have been busy dissecting the no-fault revolution, the

Thus, almost thirty years after the so-called no-fault divorce revolution began in America, a majority of American states still recognize certain enumerated fault grounds as alternative grounds for divorce, and even among those jurisdictions that have adopted “pure” or “true” no-fault divorce grounds, a substantial number of states still retain consideration of various fault factors in determining spousal support, the division of marital property on divorce, or both.⁹⁹

B. Fault Factors Applied to Spousal Support and to Marital Property Division Pursuant to a No-Fault Divorce

Although this article does not advocate a return to fault-based divorce grounds as the sole means for securing a divorce in America, based upon a number of underlying public policy arguments and contemporary realities,¹⁰⁰ a major premise of this article is that fault factors on divorce still serve a valuable purpose, and still constitute a viable conceptual tool, in ascertaining spousal support rights and obligations,¹⁰¹ and in ascertaining an equitable division of marital property¹⁰² on divorce.

survival and evolution of fault has aroused relatively little comment. Although half the states employ fault-based doctrines in one context or another, the use of fault as an element in divorce is typically dismissed as contrary to the modern trend. Many of the fault-based laws on alimony and property, however, are recent reforms or amendments of earlier no-fault revolution statutes. Fault is neither as outdated nor as invisible as we have made it seem.

99. See generally Annot., 86 A.L.R.3d 1116 (1978); Elrod & Spector, *supra* note 11, at 804 (listing approximately twenty-eight states where marital fault is still a relevant factor in determining spousal support on divorce). See also *Fault in Modern Divorce Law*, *supra* note 19, at 781–82; and *Principles of Family Law Dissolution*, *supra* note 19, at 50–51, both listing approximately thirty states where fault still plays at least some role as a factor in determining spousal support, division of marital property, or both, on divorce or dissolution of marriage.

What is significant regarding this state public policy recognition of fault-based factors on divorce, is the fact that many fault-based factors affecting spousal support awards and the division of marital property on divorce are recent reforms and amendments to earlier no-fault statutes. See Woodhouse, *supra* note 41, at 278–79.

100. See generally *supra* notes 4–12 and accompanying text.

101. Spousal support or alimony on divorce is currently available in almost all states by statutory authority. There is presently a great deal of controversy regarding the utility and purpose, the incentives and disincentives, and the over-all characterization of alimony in contemporary American divorce law. See, e.g., *supra* note 19 and accompanying text. However, for the purpose of this article, I am assuming the continuing viability of spousal support or alimony as an present-day economic factor in American divorce law.

102. In all states the division of marital or community property on divorce or dissolution of marriage is recognized by statutory enactment. See generally OLDFATHER ET AL., VALUATION AND DISTRIBUTION OF MARITAL PROPERTY (1996 rev. ed.); JOHN DEWITT GREGORY, THE LAW OF EQUITABLE DISTRIBUTION (1989); L. GOLDEN, EQUITABLE DISTRIBUTION OF MARITAL PROPERTY (1983).

1. ARGUMENTS FOR REJECTING FAULT FACTORS IN NO-FAULT DIVORCES

A number of commentators and courts, however, have argued that fault factors should no longer play any valid role in a “no-fault” divorce regime. For example, Professor Norman Lichenstein summarizes the argument in this way:

When a marital unit is split apart, the parties cannot expect to continue their former lifestyle without change. Frequently, the economically less viable spouse—usually the non-working wife with child care responsibilities—will be particularly hard hit. The law should be designed to mitigate the financial disruption of divorce and, to the extent possible, move a needy spouse toward rehabilitation and financial independence. This requires a thorough economic analysis of the financial contributions, resources, and needs of the parties. It also requires bidding farewell to the distraction of trying to find the blameworthy spouse and assigning a value to his or her misconduct.¹⁰³

Professor Ira Ellman likewise argues that fault factors no longer serve any viable function in a marital dissolution action:

[T]he potentially valid functions of a fault principle are better served by the tort and criminal law, and attempting to serve them through a [divorce based] fault rule risks serious distortions in the resolution of the dissolution action. One possible function of the fault rule, punishment for bad conduct, is generally disavowed even by fault states. It is better left to criminal law, which is designed to serve it, and in doing so appropriately reaches a much narrower range of marital misconduct than do the marital misconduct rules of fault states. The second possible function, compensation for the non-financial losses imposed by the other spouse’s battery or emotional abuse, is better left to tort law. . . .

103. Lichtenstein, *supra* note 12, at 18. See also Donald C. Schiller, *Fault Undercuts Equity*, 10 FAM. ADVOC. 10, 14 (Fall 1987):

The reasons fault should not be considered in awarding maintenance are inseparably intertwined with the reasons for no-fault grounds for divorce. The basic shift from a fault system to a no-fault system was discussed by the Commissioners on Uniform State Laws in their Comments to the Uniform Marriage and Divorce Act. They stated, in part:

The traditional grounds for divorce, which assume that one party had been at fault by committing an act giving rise to a cause of action for divorce, are abolished. The legal assignment of blame is here replaced by a search for the reality of the marital situation: Whether the marriage has ended in fact. . . . When a marriage has failed and the family has ceased to be a unit, the purposes of family life are no longer served and the divorce will be permitted.

Uniform Marriage and Divorce Act § 305 (1970).

The true reason a marriage ends usually bears no relationship to the grounds for divorce. No-fault recognizes that marriages that are no longer viable should be dissolved and that trying to fix blame for the failure serves no constructive purpose.

Id. See also Herma Hill Kay, *An Appraisal of California’s No-Fault Divorce Law*, 75 Cal. L. Rev. 291, 299 (1987).

Where valid compensation claims arise, whether for physical violence or emotional abuse, the tort law provides principles to measure and satisfy them, and to determine when they are too stale to entertain. The property allocation and alimony rules of the dissolution law, in contrast, are designed for an entirely different purpose. In the dissolution of a short marriage, the dominant principle is to return the spouses to the premarital situations. As the marriage lengthens [the proposed ALI *Principles of the Law of Family Dissolution*] provide increasingly generous remedies to the financially more vulnerable spouse in recognition of their joint responsibility for the irreversible personal consequences that arise from investing many years in the relationship. . . .¹⁰⁴

Accordingly, approximately eighteen states have now adopted a “pure” or “true” “no-fault” divorce regime, where fault factors no longer play any significant role in determining divorce grounds and defenses, nor do fault factors play any significant role in determining spousal support awards or the equitable distribution of marital property on divorce.¹⁰⁵ For example, under California law, spousal support awards and the division of the parties’ property rights on the dissolution of marriage are still addressed under state statutory authority, utilizing

104. Ira Mark Ellman, *The Place of Fault in a Modern Divorce Law*, 28 ARIZ. ST. L.J. 773, 807-808 (1996).

105. Significantly, however, thirty years after the “no-fault divorce revolution,” this is not a majority of American jurisdictions. According to a recent survey in the *Family Law Quarterly*, no-fault divorce is the sole ground for divorce in only seventeen jurisdictions: Arizona, California, Delaware, the District of Columbia, Hawaii, Iowa, Kentucky, Michigan, Minnesota, Montana, Nebraska, Oregon, Washington, Wisconsin, and Wyoming. “Table 4: Grounds for Divorce and Residency Requirements,” in Elrod & Spector, *supra* note 11, at 807.

Marital fault may not be considered in the award of alimony or spousal support in twenty-four states: Alaska, Arizona, Arkansas, California, Colorado, Delaware, Hawaii, Illinois, Indiana, Iowa, Kansas, Kentucky, Minnesota, Montana, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Texas, Vermont, Washington, and Wisconsin. “Table 1: Alimony/Spousal Support Factors”, in Elrod & Spector, *supra* note 11, at 804.

Professor Ira Ellman’s own research lists twenty states that he categorizes as “complete no-fault states” regarding marital property and alimony: Alaska, Arizona, California, Colorado, Delaware, Florida, Hawaii, Illinois, Indiana, Iowa, Maine, Minnesota, Montana, Nebraska, Nevada, New Mexico, Oklahoma, Oregon, Washington, and Wisconsin. Ellman, *supra* note 104, at 781. See also *infra* note 113.

Professor Elrod and Professor Ellman disagree on how to classify the following states: Alaska, Illinois, Indiana, Kentucky, Nevada, New Mexico, and Wyoming. Thus, classification of states as “pure” or “true” no-fault states is an approximation. Under either classification, however, they are still presently a minority of states.

Many no-fault states have adopted their relevant no-fault statutory language from the Uniform Marriage and Divorce Act. See, e.g., ARIZ. REV. STAT. §§ 25-318, -319 (1996); COLO. REV. STAT. §§ 14-10-113, -114 (1997); DEL. CODE ANN. tit. 13 §§ 1512(c), 1513(a) (1993); ILL. REV. STAT. ch. 40 para. 5-503 and -504 (1993); MINN. STAT. ANN. § 518.58, 552 (1989); MONT. CODE ANN. §§ 40-4-202, -203 (1996); WASH. REV. CODE ANN. §§ 26.09.080, 26.09.090 (1996).

concomitant judicial discretion of the trial court. Nevertheless, any reference to the parties' marital fault has now been eliminated by state statute.¹⁰⁶ Likewise, under Arizona law, fault cannot be an issue in granting the dissolution of a marriage, nor can it be considered in awarding spousal support or disposing of the parties' marital property, unless there were excessive or abnormal expenditures, or the destruction, dissipation, concealment, or fraudulent disposition of marital property.¹⁰⁷ Other cases and statutes in "pure" or "true" no-fault divorce jurisdictions are in accord with these general principles.¹⁰⁸

Thus, in the case of *In re Koch*,¹⁰⁹ the Oregon State Court of Appeals rejected a wife's claim for spousal support based upon injuries sustained by her in a physical confrontation with her husband. The court stated that under Oregon law, fault could not be considered as a factor in dividing the parties' marital property or in awarding spousal support, so the wife's injuries resulting from her husband's physical violence against her were relevant only insofar as they affected her employability or her need for support.¹¹⁰ Two other "true" no-fault states also have held that the murder or the attempted murder of one spouse by the other spouse would have no effect whatsoever on the division of the parties' marital property or any spousal support award, since these awards under "true" no-fault divorce law must be based only on the financial needs of the parties, regardless of fault.¹¹¹

106. See, e.g., *In re Marriage of Rosan*, 101 Cal. Rptr. 295 (Cal. Ct. App. 1972); *In re Marriage of Cosgrove*, 103 Cal. Rptr. 733 (Cal. Ct. App. 1972); *In re Marriage of Boseman*, 107 Cal. Rptr. 232 (Cal. Ct. App. 1973). See also CAL. FAM. CODE §§ 2550, 2335.

107. See, e.g., *Oppenheimer v. Oppenheimer*, 526 P.2d 762 (Ariz. Ct. App. 1974); *Ivancovich v. Ivancovich*, 540 P.2d 718 (Ariz. Ct. App. 1975). Such dissipation, concealment, or destruction of marital assets is sometimes referred to as "economic fault."

108. See, e.g., *Erlandson v. Erlandson*, 318 N.W.2d 36 (Minn. 1982) (holding that the court must set the amount of spousal support and maintenance without regard to marital misconduct by balancing the needs of the spouse receiving such maintenance against the financial condition of the spouse providing it); *In re Marriage of Tjaden*, 199 N.W.2d 475 (Iowa 1972) (reiterating that a "guilty party" concept must be eliminated as a factor for divorce in Iowa, and any evidence placing the fault of the marriage breakdown on either party must also be rejected as a factor in awarding a property settlement or an allowance of alimony). See also *Oberhansley v. Oberhansley*, 798 P.2d 883 (Alaska, 1990); *Heilman v. Heilman*, 610 So. 2d 60 (Fla. Ct. App. 1992); *Markham v. Markham*, 909 P.2d 602 (Haw. Ct. App. 1996); *R.E.G. v. L.M.G.*, 571 N.E.2d 298 (Ind. Ct. App. 1991); *Smith v. Smith*, 847 P.2d 827 (Okla. Ct. App. 1993).

109. 648 P.2d 406 (Or. Ct. App. 1982).

110. 648 P.2d at 408.

111. See, e.g., *Marriage of Cihak*, 416 N.E.2d 701 (Ill. Ct. App. 1981); *Mosbarger v. Mosbarger*, 547 So. 2d 188 (Fla. Ct. App. 1989); *De Castro v. De Castro*, 334 So. 2d 834 (Fla. Ct. App. 1976). See *contra* the case authority cited in *infra* note 113.

2. ARGUMENTS FOR RETAINING FAULT FACTORS IN NO-FAULT DIVORCES

However, a significant number of states, approximately thirty, have rejected the rationale that fault factors should cease to play any role in divorce or dissolution of marriage,¹¹² and a majority of American states to date, therefore continue to recognize that fault factors may still play a viable role in determining spousal support awards on divorce, or in determining the equitable distribution of marital property, even though the parties may have utilized a no-fault ground for divorce.¹¹³ Attorney Adriaen Morse, Jr., notes that:

See also Woodhouse, *supra* note 17, at 2550:

My colleague, Professor Demie Kurz, interviewed 129 women of many races, ages, and classes, investigating their stories about why their marriages ended for her forthcoming book on divorce, *For Richer, For Poorer*. Over half of the women in Kurz's study, and up to eighty percent of those in working class and lower class marriages, told narratives of husbands who abused alcohol and drugs, slept with other women, beat and raped their wives and children, and actually or constructively abandoned the home. . . . In the terminology of fault and no-fault, the typical woman in Kurz's study stated a prima facie case for a fault-based divorce. . . . How many of these women nevertheless see their marriages end with a judgment that forces the sales of the home for "equitable" distribution to their abusers?

112. *See* note 99 *supra*, and accompanying text.

113. Professor Ira Ellman observes that two categories of existing law, fault and no-fault, are inadequate to describe the major variations of state legislative and judicial policy relating to this subject. *Principles of Family Dissolution Law, supra* note 19, at 15-22; *Fault in Modern Divorce Law, supra* note 19, at 776-84. Professor Ellman therefore categorizes the states into five different groups:

Group I: Complete No-Fault Property and Alimony States (20): Alaska, Arizona, California, Colorado, Delaware, Florida, Hawaii, Illinois, Indiana, Iowa, Maine, Minnesota, Montana, Nebraska, Nevada, New Mexico, Oklahoma, Oregon, Washington, Wisconsin

Group II: No-Fault Property, Limited Fault Alimony States (5): Idaho, Kentucky, New Jersey, Ohio, and Utah

Group III: Almost Complete No-Fault Property and Alimony States (3): Arkansas, Kansas, and New York

Group IV: No-Fault Property and Full Fault Alimony States (7): Louisiana, North Carolina, Pennsylvania, South Dakota, Tennessee, Virginia and West Virginia

Group V: Full-Fault Property and Alimony States (15): Alabama, Connecticut, Georgia, Maryland, Massachusetts, Michigan, Mississippi, Missouri, New Hampshire, North Dakota, Rhode Island, South Carolina, Texas, Vermont, and Wyoming

Id.

This is an impressive compilation of state law, and a realistic attempt to classify current, though constantly changing, fault-based divorce law in approximately thirty states. However, a few queries come to mind: First, if Arkansas is considered as an "almost complete" no-fault state (or alternately a "fault" state involving egregious conduct?) based upon the case of *Stover v. Stover*, 696 S.W.2d 750 (Ark. 1986), where the Arkansas court allowed an unequal division of marital property when a wife was convicted of

The whole notion of fault proves to be a stumbling block for many scholars writing about the current pursuit of equitable ways of dealing with alimony [and the division of marital property on divorce]. But . . . fault provides an excellent tool to encourage the type of behavior society believes to be appropriate in marriage, and to discourage that behavior which society deems to be inappropriate. It seems that most people would at least agree that engaging in adultery, cruelty, or desertion is not the sort of sharing behavior which marriage should endure. In order to provide a disincentive for such behavior, there should be concomitant post-divorce financial consequences for engaging in inappropriate behavior.¹¹⁴

Professor Barbara Bennett Woodhouse further analyzes the issue of fault factors on divorce from a feminist perspective:

No-fault divorce is not a natural law, like gravity. It is a legal construct, purposefully designed by lawyers for lawyers. Its primary impetus was to manage exit from the legal status of marriage more efficiently and to spare those in the system from involvement in the costly process and sordid details of assessing blame for a marriage's death. [But] [i]n attempting to operate only on hard data, translated as dollar figures for direct economic loss, modern divorce reform seems to say that what cannot be measured as damage to a tangible property interest does not count. . . .

We should construct instead a scheme that reclaims the power of fault and that attributes consequences to good and bad conduct within marriage.

When the imbalances are striking, we should reward family-centric, caring conduct, rather than turn a blind eye to abuse and exploitation. There are

conspiring to kill her husband, why shouldn't Wisconsin also be categorized in this same group of states based upon *In re Marriage of Brabec*, 510 N.W.2d 752 (Wis. Ct. App. 1993), where the court held that marital fault might still be considered as a factor when a wife was convicted of attempting to kill her husband in a murder-for-hire scheme during the pendency of their divorce proceedings? See also *In re Marriage of Sommers*, 792 P.2d 1005 (Kan. 1990) (marital fault may be considered in "extremely gross and rare situations"); *O'Brien v. O'Brien*, 498 N.Y.S.2d 743 (N.Y. 1985) (marital fault is excluded from consideration in equitable distribution awards except for "egregious cases that shock the conscience"). See also CAL. FAM. CODE §§ 782.5, 4324 (barring any award of spousal support, insurance benefits, or pension benefits to a spouse convicted of attempting to murder the other spouse).

Professor Ellman also characterizes Virginia as a "No-Fault Property, Full Fault Alimony" state, apparently relying on the cases of *Aster v. Gross*, 371 S.E.2d 833 (Va. Ct. App. 1988), and *Gamer v. Gamer*, 429 S.E.2d 618 (Va. Ct. App. 1993), both suggesting that only "economic fault" such as waste or dissipation of assets should affect the division of marital property on divorce. However, in the subsequent case of *O'Loughlin v. O'Loughlin*, 458 S.E.2d 323 (Va. Ct. App. 1995), an unequal division of marital property favoring the wife and based upon the husband's long-term adulterous affairs during the marriage was affirmed on appeal. So one may still quibble as to exactly where a state ought to fit within one of Professor Ellman's five categories. Nevertheless, approximately thirty states, although in varying degrees, do in fact take fault factors into account in determining spousal support on divorce, in determining the equitable distribution of marital property on divorce, or both.

114. Morse, *supra* note 17, at 640-41. See also *supra* notes 80-99, and accompanying text.

many good reasons for harboring a healthy fear of fault. But if we suppress all discourse on badness in marriage, how can we talk persuasively about goodness? Is fault really so dangerous to feminists that we prefer silence?¹¹⁵

Accordingly, a significant number of American state courts and state legislatures still recognize the viable role that fault factors continue to play in divorce or dissolution of marriage, even when the parties may employ no-fault divorce grounds for dissolving their marriage. One rationale for utilizing fault as a relevant factor in determining spousal support or marital property division is that divorce or dissolution of marriage is essentially an equitable proceeding, and therefore the conduct of the parties is always relevant as a source of compensation for harm caused by the conduct of the other spouse.¹¹⁶ For example, in the case of *Robinson v. Robinson*,¹¹⁷ the Connecticut Supreme Court held that a spouse “whose conduct has contributed substantially to the breakdown of the marriage should not expect to receive financial kudos for his or her misconduct.”¹¹⁸ A majority of American states by statutory¹¹⁹ and judicial¹²⁰ authority, therefore continue to recognize that fault factors may still serve a legitimate purpose in determining spousal support awards, the equitable distribution of marital property on divorce, or both.

The most recent, and the most comprehensive, attack on fault-based factors relating to spousal support awards and the division of marital

115. Woodhouse, *supra* note 17, at 2567.

116. *See, e.g.*, *Thames v. Thames*, 477 N.W.2d 496 (Mich. Ct. App. 1991) (holding that a divorce case is equitable in nature, and a court of equity molds its relief according to the character of the case; therefore, in awarding alimony in a divorce action, a court may consider a party’s fault in causing the divorce); *Robinson v. Robinson*, 444 A.2d 234 (Conn. 1982) (similar holding). *See also supra* notes 91–93, 97–99, and accompanying text.

117. 444 A.2d 234 (Conn. 1982).

118. *Robinson*, 444 A.2d at 236. Professor Ellman opines that the *Robinson* case is one example of this fault-based rationale where fault is utilized as a source of compensation for the substantial harm caused by the wrongful conduct of a spouse. *See Principles of Family Dissolution Law, supra* note 19, at 27 n.35.

119. *See, e.g.*, GA. CODE ANN. § 19-6-1 (1994); MD. CODE ANN. §§ 8-205, -206 (1996); MASS. GEN. LAWS ANN. CH. § 208-34 (West 1997); N.H. REV. STAT. ANN. §§ 458:19 (1992); PA. CONS. STAT. ANN. § 3701 (West 1997); R.I. GEN. LAWS §§ 15-5-16, 16.1 (1996); S.D. CODIFIED LAWS § 25-4-45.1 (Michie 1996); TEX. FAM. CODE ANN. § 3.63 (West 1996); VT. STAT. ANN. tit. § 751 (1996); UTAH CODE ANN. § 30-3-5(7)(b) (1995); VA. CODE ANN. §§ 20-107.1, -107.3 (Michie 1995).

120. *See, e.g.*, *Daugherty v. Daugherty*, 606 So. 2d 157 (Ala. Ct. App. 1992); *Bieluch v. Bieluch*, 462 A.2d 1060 (Conn. 1983); *Anderson v. Anderson*, 230 S.E.2d 272 (Ga. 1976); *Platt v. Platt*, 728 S.W.2d 542 (Ky. Ct. App. 1987); *Lagars v. Lagars*, 491 So. 2d 5 (La. 1986); *Thames v. Thames*, 477 N.W.2d 496 (Mich. Ct. App. 1991); *Francis v. Francis*, 823 S.W.2d 36 (Mo. Ct. App. 1991); *Perlberger v. Perlberger*, 626 A.2d 1186 (Pa. Super. Ct. 1993); *Endy v. Endy*, 603 A.2d 641 (Pa. Super. Ct. 1991); *Williams v. Williams*, 415 S.E.2d 252 (Va. 1992); *Durnell v. Durnell*, 460 S.E.2d 710 (W. Va. 1995).

property on divorce comes from the American Law Institute's *Principles of the Law of Family Dissolution: Analysis and Recommendations*.¹²¹ These proposed *Principles*, largely drafted by the Chief Reporter Ira Mark Ellman,¹²² forcefully argue for the establishment of "consistent and predictable" principles relating to compensatory spousal payments and the division of property on divorce, solely based upon no-fault financial principles and objectives, to the exclusion of any nonfinancial fault-based factors, such as marital misconduct. Although these *Principles of the Law of Family Dissolution* appear to constitute an impressive and comprehensive approach to achieve an equitable sharing of loss from divorce or dissolution of marriage, and although this author supports many of these proposals and objectives relating to financial loss, nevertheless Professor Ellman makes some troubling assumptions, and some questionable and largely unsupported assertions in the *Principles of the Law of Family Dissolution* regarding the role of fault in determining spousal support awards and the division of marital property on divorce, that will be more fully addressed below.¹²³

C. Arguments for Retaining Fault Factors in No-Fault Divorce

Part I of the American Law Institute's Proposed Final Draft of its *Principles of the Law of Family Dissolution: Analysis and Recommendations* (February 14, 1997) is a comprehensive, 406-page discussion of recommended family law principles covering the subjects of division of property upon dissolution of marriage and compensatory spousal support payments.¹²⁴ A comprehensive analysis of these *Principles*, including those that seek to allocate financial loss arising from the dissolution of marriage, are beyond the scope of this article. However, this article will respond to some rather troubling assumptions and largely unsupported assertions made by Professor Ellman in Topic Two of the *Principles of Family Dissolution Law* entitled "The Relevance of Marital Misconduct in Property Allocations and Awards of Compensatory Payments."¹²⁵

First, it is important to note that this particular ALI project "is not a Restatement but Principles" that "gives greater weight to emerging legal concepts than does a Restatement,"¹²⁶ and which parenthetically

121. See *supra* note 19 and accompanying text.

122. See also *Fault in Modern Divorce Law*, *supra* note 19, which reemphasizes and expands upon Professor Ellman's argument against utilizing any fault-based factors in determining spousal support and marital property rights on divorce.

123. See generally Section III.C.1-3 *infra*.

124. *Principles of Family Dissolution Law*, *supra* note 19.

125. *Id.* at 14-74.

126. *Id.* at xiii.

recognizes that a substantial number of American states have *not* adopted a “true” no-fault divorce regime that would make it a true restatement of American family law.¹²⁷ Professor Ellman, as the project’s chief reporter, was responsible for drafting this portion of the *Principles of Family Dissolution Law* with contributions from other enumerated advisers and a members’ consultative group.¹²⁸ Professor Ellman reports that in a divided vote the Institute’s Council endorsed the chief reporter’s no-fault treatment of both property allocation and compensatory spousal payments on divorce, and the *Principles of Family Dissolution Law* were then provisionally approved by the membership of the American Law Institute in May 1996, after the defeat of two separate motions to restore a consideration of fault.¹²⁹

Professor Ellman totally rejects the application of any fault-based non-economic factors in determining the allocation of marital property rights and compensatory spousal support awards based upon three major premises: (1) utilizing fault factors “as an agent of morality” in effect “rewards virtue and punishes sin”; (2) judicial discretion is “inherently limitless” if no finding of economic harm to the claimant is required to justify such an award or its amount; and (3) compensation for serious harm caused by the wrongful conduct of a spouse is better left to a separate tort remedy rather than a concomitant fault-based divorce remedy.

1. UTILIZING FAULT FACTORS “AS AN AGENT OF MORALITY” IN EFFECT “REWARDS VIRTUE AND PUNISHES SIN”

Professor Ellman initially posits that:

Punishing the wrongdoer has been a persistent but troubled theme in the law of fault states. Punishment is more usually the function of the criminal law. The use of tort law for this purpose, through punitive damage awards, is often controversial, particularly if the plaintiff has suffered relatively little harm. The punitive use of matrimonial law is yet more problematic. It is thus not surprising that even in fault states, punitive awards are ordinarily condemned—when they are recognized as such. . . .¹³⁰

Some courts appeal to a rationale that seems at first to avoid the punitive nature of a fault award by casting it as compensation for the financial

127. See notes 116–20, *supra*, and accompanying text.

128. *Principles of Family Dissolution Law*, *supra* note 19, at xv. It is unfortunate that none of these enumerated advisers or members of the Consultative Group included any commentators who have been critical of a “true” no-fault financial loss divorce approach. *Id.* at v–vi, ix–xi. See generally *supra* notes 17 and 19, and the articles cited therein. Obviously, not everyone can serve on such an advisory board, but diversity of opinion still serves a worthwhile function.

129. *Fault in Modern Divorce Law*, *supra* note 19, at 776.

130. *Principles of Family Dissolution Law*, *supra* note 19, at 23.

costs of splitting one household in two, costs that necessarily arise in most dissolutions. These courts argue that a fault-based award is justified because it allocates more of those costs to the spouse whose conduct caused them, by causing the dissolution. Framing the rule in this way thus casts it as compensation rather than punishment even though no losses are identified beyond the financial consequences present in nearly every dissolution. . . .¹³¹

In sum, courts that purport to allocate the unavoidable costs of dissolution by assessing the cause of the marital failure are in fact rewarding virtue and punishing sin.¹³²

Professor Ellman's attempt to recharacterize marital fault in tort and criminal law terminology, however, is doubly inappropriate since the underlying concept of fault based upon serious marital misconduct has long been recognized as an important principle in American family law, separate and apart from any tort law or criminal law remedy.¹³³ Moreover, the fact that a number of "true" no-fault divorce jurisdictions have seen fit to abolish all fault factors on divorce or dissolution of marriage by state statutory enactment¹³⁴ does not negate in any way the continuing viability and recognition of marital fault factors in a substantial number of other jurisdictions.¹³⁵ Thus, despite Professor Ellman's attempt to minimize, and in effect trivialize, fault factors on divorce as "rewarding virtue and punishing sin," the recognition of fault factors when applied to serious marital misconduct, continues to serve an important social, legal, moral, and public policy function¹³⁶ when it is properly regulated under applicable state law,¹³⁷ as only one of the many relevant factors a trial court must consider in determining

131. *Id.* at 24-25.

132. *Id.* at 26. See also *Fault in Modern Divorce Law*, *supra* note 19, at 786-97.

133. See, e.g., JAMES SCHOULER, *TREATISE ON THE LAW OF MARRIAGE, DIVORCE & SEPARATION 1790-1877* (6th ed. 1921); MADDEN, *supra* note 4, at 264-87; JOYCE GREEN ET AL., *DISSOLUTION OF MARRIAGE 15-27* (1986); UNDERSTANDING FAMILY LAW, *supra* note 22, at 185-89, 249-50.

Professor Homer Clark discusses "how difficult it is to assign a single social policy to alimony when it is awarded as an incident to absolute divorce," but that, in addition to financial need, "alimony can also serve as compensation to the wife [or the husband] for faithful service during marriage." CLARK, *supra* note 13, at 641-42. See also *supra* notes 116-18 and accompanying text. Thus alimony, or spousal support and maintenance on divorce, legitimately may be based on important non-economic factors as well as financial factors. See, e.g., *supra* note 19 and authority cited therein.

134. See *supra* notes 105-08 and accompanying text.

135. See *supra* notes 112-20, and accompanying text. See also Woodhouse, *supra* note 99.

136. See generally *supra* notes 91-93, 97-99, 112-20 and accompanying text.

137. See, e.g., *supra* notes 99, 113, 119-20, and *infra* note 153.

an appropriate spousal support award or the equitable division of marital property on divorce.¹³⁸ Professor Ellman next states that:

Inquiring into the cause of marital dissolution is different from inquiring into the cause of chicken pox, or of a plumbing failure. The fundamental problem is that the inquiry is one of morality, not science. Some individuals tolerate their spouse's drunkenness or adultery and remain in their marriage. Others may seek divorce if their spouse grows fat, or spends long hours at the office. Is the divorce caused by one spouse's offensive conduct or the other's unreasonable intolerance?¹³⁹

While it is true that some spouses may tolerate and forgive a serious marital fault, such as adultery, based upon the family law principle of

138. See *infra* notes 157–59 and accompanying text.

139. *Principles of Family Dissolution Law*, *supra* note 19, at 25. Initially one may question exactly how the cause of chicken pox or a plumbing failure has any relevance at all to an inquiry into the cause of a marital dissolution, but perhaps this rather strange illustration was meant to reinforce Professor Ellman's statement that "the fundamental problem" of an inquiry into the cause of divorce "is one of morality, not science." But query: Why is this reality so startling to Professor Ellman? It is a well-recognized principle of American law in general, and American family law in a majority of states, that state public policy may indeed consider "accepted standards of right conduct," whether this concept of appropriate conduct is characterized in terms of morality, responsibility, accountability, or fault. See, e.g., *supra* notes 92–93, 97–99, 112–20, and accompanying text.

Is Professor Ellman suggesting that his financially based *Principles of Family Dissolution Law* brings a more "scientific" approach to the law of divorce or dissolution of marriage, and therefore by definition it cannot include any nonfinancial or "nonscientific" loss factors as well? With the exception of some early positivists such as John Austin and Christopher Columbus Langdell, most legal scholars today reject the view that law is a "science." See, e.g., JOHN AUSTIN, *LECTURES ON JURISPRUDENCE: OR THE PHILOSOPHY OF POSITIVE LAW* (1863); Marcia Speziale, *Langdell's Concept of Law as Science: The Beginning of Anti-Formalism in American Law Theory*, 5 VT. L. REV. 1 (1980). Instead, most twentieth-century legal scholars agree that complete consistency and predictability of the law is rarely attainable in the real world, and that the paramount concern of the law should not be logical consistency and uniformity, but socially desirable consequences. See, e.g., Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12 (1910); ROSCOE POUND, *JURISPRUDENCE* (1959); KARL LLEWELLYN, *JURISPRUDENCE: REALISM AND THEORY IN PRACTICE* (1962); WILFRED RUMBLE, *AMERICAN LEGAL REALISM* (1968); ROBERT SUMMERS, *INSTRUMENTALISM AND AMERICAN LEGAL THEORY* (1982); GEORGE AICHELE, *LEGAL REALISM AND TWENTIETH CENTURY AMERICAN JURISPRUDENCE* (1990).

It is true that Professor Ellman's defense of his *Principles of Family Dissolution Law* has the laudable objective that these legal principles relating to spousal support awards and division of marital property on divorce or dissolution of marriage should be "consistent and predictable" in application. See *infra* notes 144–45 and accompanying text. However, consistent and predictable laws that mandate complete uniformity in application ignore important public policy considerations that frequently provide a number of exceptions to any general rule. See, e.g., *supra* notes 80–99, 112–20, and *infra* notes 146, 157–59, and accompanying text.

condonation,¹⁴⁰ other spouses legitimately may not tolerate this serious marital misconduct, such as a long-term adulterous relationship that significantly and substantially contributes to the dissolution of the marriage.¹⁴¹ Moreover, Professor Ellman's attempt to equate adultery in a marital relationship with a spouse's obesity or the spending of long hours at the office is likewise unpersuasive. Serious marital misconduct, as defined by relevant state statutory and decisional authority, generally includes adultery, cruelty, and desertion,¹⁴² and attempting to equate such serious marital misconduct with a spouse "growing fat" or "spending long hours at the office" does little to substantiate Professor Ellman's underlying argument.¹⁴³

In sum, Professor Ellman's defense of his *Principles of Family Dissolution Law* is largely motivated by his underlying objectives that financially based legal principles, when applied to the division of marital property and compensatory spousal support on divorce, should be "consistent and predictable" in application,¹⁴⁴ and that any proposal "to add a compensation-based fault rule to the *Principles of Family Dissolu-*

140. Condonation is generally defined as the conditional forgiveness of a marital fault, with the understanding that the marital fault will not happen again. *See, e.g.*, MADDEN, *supra* note 4, at 300-05; GREEN ET AL., *supra* note 133, at 40-44; UNDERSTANDING FAMILY LAW, *supra* note 22, at 215.

141. *See, e.g.*, O'Loughlin v. O'Loughlin, 458 S.E.2d 323 (Va. Ct. App. 1995) (affirming an unequal division of marital property favoring the wife and supported by the negative nonmonetary contribution of the husband toward the marriage, based upon his long-term adulterous relationships during the marriage which was the substantial cause of the marriage dissolution). However, a short-term adulterous affair occurring immediately prior to or after the parties' separation, when the dissolution of marriage was caused by other relevant factors, should have little if any impact on the parties' spousal support award or division of marital property. *See, e.g.*, Smoot v. Smoot, 357 S.E.2d 728 (Va. 1987) (holding that husband's adultery was only the last unhappy event in a marital relationship long since dissolved in fact, and therefore it was not a relevant factor in awarding spousal support or the equitable division of marital property); Aster v. Gross, 371 S.E.2d 833 (Va. Ct. App. 1988) (holding that multiple acts of adultery did not have any adverse economic effects on the marriage, and that the dissolution of the marriage was based on the cumulative effect of many other factors); Gamer v. Gamer, 429 S.E.2d 618 (Va. Ct. App. 1993) (similar holding).

142. *See, e.g.*, Clark v. Clark, 644 S.W.2d 681 (Tenn. Ct. App. 1982) (adultery); Day v. Day, 501 So. 2d 353 (Miss. 1987) (cruelty); Jamison v. Jamison, 352 S.E.2d 719 (Va. Ct. App. 1987) (desertion). *See generally supra* note 133 and authority cited therein.

143. *See, e.g.*, Morse, *supra* note 17, at 641:

It seems that most people would at least agree that engaging in adultery, cruelty, or desertion is not the sort of sharing behavior which marriage should have to endure. In order to provide a disincentive for such behavior, there should be concomitant post-divorce financial consequences for engaging in inappropriate behavior.

See also supra notes 98 and 115 and accompanying text.

144. *Principles of Family Dissolution Law, supra* note 19, at 83 and 259.

tion Law could therefore be understood as revisiting the fundamental question of whether the law of marital dissolution should provide compensation for nonfinancial losses.¹⁴⁵ However, legal consistency and predictability can be bought at too high a price at the expense of judicial discretion and legislative public policy,¹⁴⁶ especially in the absence of a viable alternative remedy.

So query: What is so inherently wrong or inequitable in generally providing for financial loss on divorce, but with concomitant, nonfinancial compensatory damages for serious or egregious marital misconduct as well? If the institution of marriage still serves a valuable social, legal, and economic function in contemporary American society,¹⁴⁷ and if other no-fault remedial laws such as no-fault automobile insurance, no-fault worker's compensation statutes, and no-fault strict products liability laws all provide fault remedies for serious or egregious conduct,¹⁴⁸ then why not a fault-based exception for serious or egregious marital miscon-

145. *Id.* at 27. *But see supra* notes 19, 91, 97-99, 113-20, 133 and authority cited therein, recognizing that there are important nonfinancial loss factors in divorce or dissolution of marriage as well.

See also Woodhouse, *supra* note 17, at 2561:

Law should reflect and comment on the meaning of human experiences. A fault-blind scheme for balancing equities at divorce asserts that battering and bickering, desertion and disenchantment, repeated infidelity and disappointing marital sex, and the harms that flow from them, are qualitatively indistinguishable. In this telling, only financial relations are justiciable, and only money issues matter. Common sense as well as social science studies of the effects of divorce suggest that this story is neither useful as an ideal nor accurate as a reflection of people's experience.

146. *See, e.g.,* OLIVER W. HOLMES JR., *THE COMMON LAW* (1881):

The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.

See also BENJAMIN CORDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 112-13 (1921):

One of the most fundamental social interests is that the law shall be uniform and impartial. . . . But symmetrical development may be bought at too high a price. Uniformity ceases to be good when it becomes uniformity of oppression. The social interest served by symmetry or certainty must then be balanced against the social interest served by equity and fairness or other elements of social welfare.

See also *Estin v. Estin*, 334 U.S. 541, 545 (1948):

[T]here are few areas of the law in black and white. The greys are dominant, and even among them the shades are innumerable. For the eternal problem of the law is one of making accommodations between conflicting interests. This is why most legal problems end as questions of degree.

See generally supra note 139, and authority cited therein.

147. *See generally supra* Section II.

148. *See generally supra* notes 80-96 and accompanying text.

duct in a no-fault divorce as well? Financially based factors and fault-based factors on divorce or dissolution of marriage are not as mutually exclusive as Professor Ellman suggests, and a significant number of state legislatures and state courts presently take into account a spouse's inappropriate marital behavior and serious marital misconduct as defined and regulated by appropriate statutory and decisional law.¹⁴⁹ A fault-based remedy for serious marital misconduct therefore still serves a realistic, viable, and socially defensible function in contemporary American divorce law, especially since an independent tort-based remedy for serious marital misconduct has proved to be an inadequate alternative.¹⁵⁰

2. "INHERENTLY LIMITLESS" JUDICIAL DISCRETION IF NO FINDING OF ECONOMIC HARM

Next, Professor Ellman severely criticizes the application of fault factors on divorce since he believes the imposition of such behavioral standards "must rely on trial court discretion" and "the moral standards by which blameworthy conduct will be identified and punished will vary from judge to judge, as each judge necessarily relies on his or her own vision of appropriate behavior in intimate relationships." Such judicial discretion "seems inherently limitless if no finding of economic harm to the claimant is required to justify the award or its amount."¹⁵¹

149. See, e.g., *supra* notes 97-99 and 114-21 and *infra* notes 153, 157-59 and accompanying text.

150. See generally *supra* section III.C.3.

151. *Principles of Family Dissolution Law*, *supra* note 19, at 24. See also *Fault in Modern Divorce Law*, *supra* note 19, at 787. See also *Principles of Family Dissolution Law*, at 69-70:

The traditional marital fault rule requires extraordinary reliance on trial court discretion. Neither the standard of misconduct, nor its dollar consequences, are much bounded by any rule. While in principle the trial court's decision can be reviewed for "abuse of discretion," reversals are rare. . . . The traditional fault rule is thus inconsistent with a major theme of the Principles, an effort to improve the consistency and predictability of trial court decisions.

On the other hand, Professor Ellman concedes that:

It is . . . not surprising that research studies find that trial court decisions on alimony vary widely, even within the same jurisdiction. Some decisional variation would be expected in even a perfect system, because trial courts must have discretion in these matters to deal appropriately with factual variations that no statute can comprehensively anticipate. . . .

Id. at 6.

Professor Ellman believes that this variation "arises at least in part because trial courts apply different principles as often as they face different facts." *Id.* However, Ellman does not explain what these "different principles" entail, even though a substantial number of jurisdictions do in fact limit judicial discretion to the application of certain enumerated statutory factors in determining spousal support awards and the distribution of marital property on divorce. See *infra* notes 153-59 and accompanying text.

In answer to Professor Ellman's concern regarding judicial discretion in determining alimony awards and the division of marital property, family court judges, from an equity heritage as triers of both fact and law, do indeed possess broad judicial discretion in adjudicating family law disputes,¹⁵² but for Professor Ellman to characterize this judicial discretion as "inherently limitless" is an unfortunate and an unwarranted characterization when applied to the vast majority of family law disputes.

Judicial discretion involving spousal support awards and the division of marital property on divorce is not as "limitless" as Professor Ellman suggests. Judicial discretion in divorce matters necessarily is constrained by the boundaries of those enumerated statutory factors which affect spousal support awards and the division of marital property in most states.¹⁵³ A court's judicial discretion in awarding spousal support or dividing marital property on divorce is also constrained by appellate review for any erroneous application of the law by the trial court judge¹⁵⁴ or for

152. See, e.g., CLARK, *supra* note 13, at 644-45:

It is axiomatic that the trial courts have wide discretion in determining the propriety and the amount of alimony. The relevant factors are so numerous and their influence so incapable of precise evaluation that the trial court's decision in a particular case will be affirmed unless it amounts to an abuse of discretion or is based upon an erroneous application of legal principles. . . . As a result, claims for alimony are won or lost in the trial courts, which have a correspondingly heavy responsibility to deal fairly with [the] spouses in such cases. [Citations omitted.]

This wide judicial discretion also applies to the classification, valuation, and distribution of marital property on divorce, *Id.* at 589-94, and to child custody determinations as well:

In most states the award of [child] custody is held to be a matter for the discretion of the trial court, to be upset on appeal only where an abuse of that discretion is shown. . . . Certainly any appellate court should be reluctant to substitute its judgment for that of a trial court in cases so entirely dependent upon particular facts and the subtle differences to be drawn from those facts.

Id. at 796-97. Indeed, a parent's conduct and fitness are always relevant factors in any child custody dispute. *Id.* at 797-806.

So query: Is Professor Ellman arguing for the abolition or the serious curtailment of judicial discretion in other family law areas as well as those areas involving fault factors as applied to spousal support and the division of marital property on divorce? What significant parameters and underlying public policy rationales are involved in abolishing or seriously curtailing judicial discretion in family law disputes generally?

153. See generally Elrod & Spector, *supra* note 11, at 804, 808, reporting that thirty-eight states presently have explicit statutory factors to determine alimony or spousal support on divorce, and thirty-six states presently have enumerated statutory factors to determine the equitable distribution of marital or community property on divorce; and Woodhouse, *supra* note 99, observing that a significant number of these state statutory factors were enacted or amended subsequent to no-fault divorce legislation. See also *supra* notes 105 and 119 and authority cited therein.

154. See, e.g., *Anderson v. Anderson*, 230 S.E.2d 272 (Ga. 1976); *Benner v. Benner*, 377 A.2d 582 (Md. Ct. App. 1977); *Sparks v. Sparks*, 485 N.W.2d 893 (Mich. 1992); *Smoot v. Smoot*, 357 S.E.2d 728 (Va. 1987). See also *infra* note 157 and the case authority cited therein.

any abuse of judicial discretion.¹⁵⁵ Judicial discretion is also tempered and constrained by the vast majority of family court judges who often serve long and distinguished judicial careers on the bench, and who possess more depth, breadth, expertise, and day-to-day experience in attempting to reach just and equitable results in family law disputes than, say, many academic lawyers and legal scholars.¹⁵⁶

Professor Ellman's concern about "inherently limitless" judicial discretion, however, is the fact that most fault jurisdictions now recognize fault as only one of many statutory factors that must be taken into consideration by the trial court judge in determining appropriate spousal support and marital property division,¹⁵⁷ and, therefore, the current judicial trend in many states today is that most judges tend to ignore

155. See, e.g., *Clark v. Clark*, 696 P.2d 1386 (Kan. 1985); *Hogan v. Hogan*, 651 S.W.2d 585 (Mo. Ct. App. 1983); *Quick v. Quick*, 290 S.E.2d 653 (N.C. 1982); *Leonard v. Leonard*, 552 A.2d 394 (Vt. 1988); *Blank v. Blank*, 389 S.E.2d 723 (Va. Ct. App. 1990); *Paul v. Paul*, 616 P.2d 707 (Wyo. 1980).

156. Cf. Edward L. Rubin, *The Practice and Discourse of Legal Scholarship*, 86 MICH. L. REV. 1835, 1889 (1988):

Do judges really need to be told [by legal scholars] how to interpret prior cases [or legislative statutes] or how to construct a legal argument? That is the very essence of their job, after all, and most people tend to believe that they can do their job reasonably well on their own.

See also Woodhouse, *supra* note 117, at 2560:

I agree with the ALI's [*Principles of Family Dissolution Law*] description of the complexities and challenges of the judging process, but not with the faint-hearted conclusion that judges are incapable of trying cases that depend on assessing the reasonableness of conduct in a given context or on calculating intangibles. We have learned to calculate "goodwill" in a business enterprise, to place a dollar value on an accident victim's pain, to judge corporate directors' fidelity in complex takeover negotiations, and to calibrate punitive damages to deter misconduct in many spheres. There is no reason why courts cannot undertake similar inquiries in the area of marital fault.

157. See, e.g., *Sparks v. Sparks*, 485 N.W.2d 893 (Mich. 1992) (holding that marital misconduct is only one factor among many in establishing the division of marital property on divorce and should not be dispositive. The trial court judge must consider *all* the statutory factors, and since a marital property award was inequitable because disproportionate weight was given to the wife's fault, the trial court decision was reversed and remanded on appeal). See also *Perlberger v. Perlberger*, 626 A.2d 1186 (Pa. Super. Ct. 1993) (holding that a court may consider marital misconduct with respect to alimony only in the context of *all* relevant statutory factors); *Tarro v. Tarro*, 485 A.2d 558 (R.I. 1984) (holding that the trial court judge must consider *all* of the enumerated statutory factors when awarding spousal support and distributing marital property, not just marital misconduct); *Rexrode v. Rexrode*, 339 S.E.2d 544 (Va. Ct. App. 1986) (holding that a court must consider *all* the statutory factors in making an equitable distribution award of marital property or the award will be invalid); *Woolley v. Woolley*, 349 S.E.2d 422 (Va. Ct. App. 1986) (holding that the failure by the trial court judge to consider *all* the statutory factors in determining spousal support would constitute reversible error).

See also *supra* note 153 and accompanying text.

or severely limit the ultimate effect of any fault-based factors on divorce except in serious or egregious circumstances,¹⁵⁸ as even Professor Ell-

158. A random survey of various fault-based jurisdictions, for example, revealed the following cases: *Anderson v. Anderson*, 230 S.E.2d 272 (Ga. 1976) (holding that where a divorce is granted on a no-fault ground, alimony is authorized, but in such a case the marital misconduct of the parties is not relevant to the amount of alimony to be awarded and is also irrelevant to the division of marital property between the parties); *Platt v. Platt*, 728 S.W.2d 542 (Ky. Ct. App. 1987) (holding that the trial court properly excluded wife's testimony accusing husband of marital infidelity in determining the amount of spousal support, since this would amount to an award greater than what state statutory law legitimately allows); *Thames v. Thames*, 477 N.W.2d 496 (Mich. Ct. App. 1991) (holding that marital fault is only one of twelve statutory factors that a trial court must consider in awarding alimony in a divorce action); *Perlberger v. Perlberger*, 626 A.2d 1186 (Pa. Super. Ct. 1993) (holding that the purpose of enacting no-fault divorce provisions in addition to traditional fault provisions was to provide for the dissolution of marriage in a manner which would keep pace with contemporary social realities. Under Pennsylvania law, therefore, marital misconduct may not be considered by the court in determining the equitable distribution of marital property, but a court may consider marital misconduct in addition to other relevant factors in determining whether alimony is necessary. In this case the trial court judge properly granted a divorce based on no-fault grounds over the wife's objection, and a no-fault alimony award to the wife was based upon the reasonable needs of the payee spouse and the payor's ability to pay); *Tarro v. Tarro*, 485 A.2d 558 (R.I. 1984) (holding that a trial court judge must consider all the statutory factors in awarding spousal support and equitable distribution of marital property, and not just a single statutory factor such as the husband's alleged adultery. So where the trial court judge applied all the statutory factors in this particular case, and reached the conclusion that both parties contributed to the deterioration of the marriage, his decision assigning marital property and awarding alimony without regard to fault was affirmed on appeal.); *Williams v. Williams*, 415 S.E.2d 252 (Va. Ct. App. 1992) (holding that a divorce decree ordering husband to pay spousal support to wife was proper even if the husband had sufficiently proved wife's adultery, since the court had the discretion to grant a divorce based upon a one-year separation of the parties rather than on the wife's adultery, and notwithstanding a finding of adultery, the court may award spousal support); *Barnes v. Barnes*, 428 S.E.2d 294 (Va. Ct. App. 1993) (holding that the wife's post-separation adultery would not bar her from receiving alimony since such adultery had little to do with the deterioration of the marriage which had already been irretrievably lost due to the mutual acts of the parties); *Rexroad v. Rexroad*, 414 S.E.2d 457 (W.Va. 1992) (holding that although fault factors may affect an award of alimony, there was no finding in this particular case that such fault was a contributing factor to the deterioration of the marriage as required by state statute in order for fault to be considered in determining alimony); *Paul v. Paul*, 616 P.2d 707 (Wyo. 1980) (holding that a trial court judge, in his or her discretion, may refuse to hear evidence of adultery or other fault relating to the division of marital property).

The judicial application of relevant state statutory criteria to these particular fact situations therefore does not appear to be as "inflexible" or as "vague" as Professor Ellman suggests. See *Principles of Family Dissolution Law*, *supra* note 19, at 24.

Professor Ellman, however, does cite the case of *Grosskopf v. Grosskopf*, 677 P.2d 814 (Wyo. 1984), as an example of how trial court discretion in assigning liability to nontortious conduct allegedly creates "much mischief" in the application of "unarticulated and effectively unreviewable standards of blameworthiness." *Id.* at 26. Professor Ellman describes the *Grosskopf* decision as one where "a spouse may be held at fault for the breakup of the marriage because she prefers to live in a more urban setting than is available in the forum state preferred by her husband." *Id.* at 26 n.33.

man apparently concedes.¹⁵⁹ In short, fault-based statutory factors for the determination of spousal support or the division of marital property on divorce appear to be rarely applied by most judges unless there is evidence of serious or egregious marital misconduct.

3. IS A SEPARATE TORT ACTION A VIABLE ALTERNATIVE REMEDY?

Professor Ellman finally argues that compensation for nonfinancial loss imposed by the other spouse's serious marital misconduct is better left to a separate tort law remedy:

[T]he potentially valid functions of a fault principle are better served by the tort and criminal law, and attempting to serve them through a [divorce

Professor Ellman's characterization of the relevant facts in *Grosskopf*, however, is too simplistic. The facts were that Mrs. Grosskopf was insistent that the parties move from Cody, Wyoming, to Wisconsin where her family and relatives resided. She wanted her husband to quit his job, she wanted him to sell their new home, and she decided to practice celibacy during the last two years of their marriage. There were numerous occasions when the wife packed her car, determined to leave the husband. On one occasion, the husband returned to an empty house to discover a note stating that she was moving to Montana with the children. Ultimately, the wife took the children out of school and permanently moved to Wisconsin. 677 P.2d at 818. The *Grosskopf* court held with a majority of state courts "that the enactment of a no-fault divorce statute which does no more than provide no-fault grounds on divorce, does not modify the traditional, existing grounds for determining child custody, support, alimony, attorneys fees, and the division of property." 677 P.2d at 819. Arguably, then, Mrs. Grosskopf's marital misconduct could have included elements of desertion, cruelty, or both, which substantially contributed to the breakdown of the marriage, and which were only one of a number of relevant factors that the trial court judge properly considered in determining spousal support or division of marital property on divorce.

Equally important in the *Grosskopf* case was the Wyoming Supreme Court's discussion of another important Wyoming precedent:

In *Paul v. Paul*, 616 P.2d 707 [at 715] (Wyo. 1980), we held that the trial court might refuse to hear testimony concerning fault in the circumstances of that particular case. . . .

Paul v. Paul stands for the principle that in certain circumstances the court may, in its discretion, refuse to hear evidence of fault; and that, in any event, such evidence may not be considered by the court to punish one of the parties, but only to insure that the property division is just and equitable under all the facts and circumstances of the case.

The *Grosskopf* decision therefore does not appear to be as "unarticulated" or as "unreviewable" as Professor Ellman suggests, even though *Grosskopf* may appear to be an exception to the general rule of judicial restraint in applying fault-based factors to spousal support awards or the division of marital property.

159. See, e.g., *Principles of Family Dissolution Law*, *supra* note 19, at 18: "In some [full fault] states, authoritative appellate decisions have on occasion attempted to describe the range of misconduct that trial courts should consider, or suggest restraint in the weight to be accorded [to marital] misconduct." *Id.* However, appellate cases in a number of fault states suggest that such judicial restraint may now constitute the general rule rather than the exception, as Professor Ellman apparently believes. See notes *supra* 153, 157-58 and accompanying text.

based] fault rule risks serious distortions in the resolution of the dissolution action . . . [and] compensation for the non-financial losses imposed by the other spouse's battery or emotional abuse, is better left to tort law. . . . Where valid compensation claims arise, whether for physical violence or emotional abuse, the tort law provides principles to measure and satisfy them, and to determine when they are too stale to entertain. . . .¹⁶⁰

Professor Ellman further posits that there are two possibilities where compensation for harm caused by the wrongful conduct of a spouse could be actionable, and that each has a tort analog:

1. Compensation for emotional losses arising from the other spouse's misconduct. (Intentional or negligent infliction of emotional distress) [and]
2. Compensation for the pain and suffering arising from the other's misconduct. (General damages in battery or assault actions)

In short, a fault rule would serve compensation functions that may already be served by tort law. Such duplication is inadvisable. There is no reason to reinvent compensation principles under the rubric of fault adjudications, nor to incorporate tort principles into divorce adjudications. . . .¹⁶¹

This author agrees with Professor Ellman that there is "no reason to reinvent compensation principles under the rubric of fault adjudica-

Professor Ellman does note, however, that:

Categorization of state law is also complicated by the variation among the fault states in their definition of the relevant misconduct and the financial issues to which it applies. Some allow consideration of only specified forms of misconduct; some leave the matter to trial court discretion but attempt to contain its exercise through rules that in general terms limit the kind of conduct that may be considered. It is particularly difficult to characterize the law of this last group because of the hortatory nature of governing authority. Perhaps the problem is even greater. Experienced practitioners in some states have suggested that trial courts do not always honor the "official" limitations on consideration of fault, while those from other states suggest that their courts are rarely willing to consider evidence of misconduct even though technically relevant under local law. It is difficult to make use of such anecdotal reports of discrepancies between formal law governing fault and a jurisdiction's actual practice.

Principles of Family Dissolution Law, *supra* note 19, at 15–16.

So query: In the absence of objective empirical evidence to the contrary, and with a number of recent cases applying a great deal of judicial restraint in the application of relevant fault factors as only one of a number of statutory factors that a judge must consider in any divorce proceeding, how can Professor Ellman reasonably assume that such judicial discretion is "inherently limitless"? Without supporting empirical evidence, how can he reasonably argue that judicial discretion ought to be seriously curtailed? See *supra* notes 152–58 and accompanying text.

160. *Fault in Modern Divorce Law*, *supra* note 19, at 807–08. A criminal law statute, such as a spousal rape or domestic violence statute, may punish the wrongdoer under state criminal law sanctions, but it does not necessarily compensate the injured spouse. See, e.g., *Commonwealth v. Chretien*, 417 N.E.2d 1203 (1981); *State v. Smith*, 426 A.2d 38 (N.J. 1981); *Weishaupt v. Commonwealth*, 315 S.E.2d 847 (Va. 1984).

161. *Principles of Family Dissolution Law*, *supra* note 19, at 28.

tions," but for an entirely different reason. Fault adjudication on divorce already exists in a majority of American states today, based upon an important underlying state public policy rationale with respect to serious marital misconduct,¹⁶² so fault adjudication on divorce, in a majority of states at least, need not be "reinvented."

I cannot agree, however, with Professor Ellman's attempt to characterize nonfinancial fault-based compensatory remedies only in terms of assault and battery, or in terms of tortious infliction of emotional distress. To be sure, serious marital misconduct under the concept of marital cruelty might indeed include assault and battery and the infliction of emotional distress, as well as spousal abuse, domestic violence, and attempted murder.¹⁶³ But serious marital misconduct is not necessarily limited solely to physical or mental cruelty, since adultery that substantially contributes to the dissolution of a marriage is also recognized as a relevant fault-based factor in a substantial number of states as well.¹⁶⁴ Yet Professor Ellman concedes that emotional distress actions based upon a spouse's adultery generally are not actionable in an independent tort action.¹⁶⁵ Likewise, a number of marital intentional infliction of emotional distress cases brought under independent tort actions have not been successful, since the marital misconduct was not deemed to be "outrageous" enough based upon applicable tort law principles.¹⁶⁶

Another major problem with Professor Ellman's advocacy of an independent tort action for serious marital misconduct is that separate marital tort claims would foster a costly, onerous, and largely unnecessary multiplicity of lawsuits, especially for injured spouses of modest means; and the troubling question of whether or not a tort claim should

162. See *supra* notes 97-99, 112-120, 153-59 and accompanying text.

163. See, e.g., *Stover v. Stover*, 696 S.W.2d 750 (Ark. 1986); *In re Marriage of Sommers*, 792 P.2d 1005 (Kan. 1990); *Brancovenanu v. Brancovenanu*, 535 N.Y.S.2d 86 (N.Y. App. Div. 1988); *In re Marriage of Brabec*, 510 N.W.2d 752 (Wis. Ct. App. 1993). But see *contra supra* notes 109-11 and accompanying text.

164. See, e.g., GA. CODE ANN. § 19-6-1 (1994); MASS. GEN. LAWS ANN. CH. § 208-34 (West 1997); N.C. GEN. STAT. § 50-16.1, -16.3 (1985); PA. CONS. STAT. ANN. § 3701(14) (West 1997); TENN. CODE ANN. § 36-5-101-d(1)(k) (1996); VA. CODE ANN. §§ 20-107.1, -107.3 (Michie 1995); W. VA. CODE § 48-2-15 (1996). See also *supra* notes 112-20, 133 and accompanying text.

165. See *Principles of Family Dissolution Law, supra* note 19, at 32 n.43, citing *Strauss v. Cilek*, 418 N.W.2d 378 (Iowa Ct. App. 1987); *Ruprecht v. Ruprecht*, 599 A.2d 604 (N.J. Super. Ct. 1991); *Poston v. Poston*, 436 S.E.2d 854 (N.C. Ct. App. 1993); *Alexander v. Innman*, 825 S.W.2d 102 (Tenn. Ct. App. 1991).

166. *Principles of Family Dissolution Law, supra* note 19, at 31-34. See, e.g., *Hetfeld v. Bostwick*, 901 P.2d 986 (Or. Ct. App. 1995); and *Dye v. Gainey*, 463 S.E.2d 97 (S.C. Ct. App. 1995).

be joined in a divorce action, and under what applicable procedural rules, continues to trouble many state courts. As Professor Barbara Bennett Woodhouse observes:

Tort claims for marital misconduct have several drawbacks. . . . Because they are treated with suspicion as neither divorce claims nor classic forms of tort, tort remedies for spousal misconduct are often denied or restricted by courts accustomed to no-fault ideology of marriage dissolution. They raise tricky questions of *res judicata* and collateral estoppel, the right to a jury trial, overlapping recoveries, and limitations on damages. These issues . . . currently must be resolved by judges addressing individual cases in a piecemeal fashion and confined to the analytical structure of tort laws.¹⁶⁷

However, Professor Ellman offers no persuasive answers to remedy these very serious substantive and procedural issues involved in bringing a separate tort action for serious marital misconduct. Instead, Professor Ellman concludes:

Reliance on the tort system to provide a satisfactory result where one spouse's wrongful conduct has injured the other requires attention to rules establishing the relationship between inter spousal tort claims and the financial remedies available in an action for marital dissolution. . . . [I]t may be that further attention to this matter is necessary. These questions, however, are largely procedural in nature, and are not within the scope of [these *Principles of Family Dissolution Law*].¹⁶⁸

Thus, Professor Ellman's argument that fault factors no longer should play any role in determining spousal support awards or the division of marital property on divorce are unconvincing and unpersuasive for a number of reasons. First, Ellman's attempt to conceptually recharacterize marital fault in tort and criminal law terminology is doubly inappropriate since the underlying concept of marital fault, based upon serious marital misconduct, has long been recognized as an important principle of American family law separate and apart from any tort law or criminal law remedy; and a majority of American states, therefore, continue to consider fault factors on divorce as serving an important social, economic, moral, and public policy function as only one of the

167. Woodhouse, *supra* note 115, at 2566. See also Elrod & Spector, *supra* note 11, at 800-02 (observing that problems concerning the proper resolution of marital tort issues that arise in the divorce process "continue to trouble the courts").

168. *Principles of Family Dissolution Law*, *supra* note 19, at 50. In effect, then, Professor Ellman advocates an independent tort action for serious marital misconduct that is both costly and duplicative, and that does not provide an adequate remedy for all substantive claims of serious marital misconduct. This raises a number of largely unresolved procedural issues as to exactly how such an independent tort action should be brought. Thus, if these serious substantive and procedural issues are not within the scope of the *Principles of Family Dissolution Law*, they arguably ought to be.

many relevant factors that a trial court judge must properly consider in determining an appropriate award. Professor Ellman's underlying objective in crafting "consistent and predictable" financial loss principles in the *Principles of Family Dissolution Law* seriously underestimates the importance of this essential nonfinancial fault factor.¹⁶⁹ Second, Professor Ellman offers no persuasive evidence in support of his assertion that judicial discretion in applying fault factors on divorce is "inherently limitless" when the opposite may in fact be true that judges today are applying a great deal of judicial restraint in such cases, and are further constrained in their judicial discretion by a number of enumerated legislative factors, and by appellate review.¹⁷⁰ Finally, a separate tort-based remedy for serious marital misconduct fails to provide a realistic alternative remedy to fault-based divorce compensation for a number of important substantive and procedural reasons.¹⁷¹

IV. Conclusion

Marriage continues to serve an important social, economic, and legal function in contemporary American society based upon its invaluable role in the raising and socialization of children and by providing important economic and social support to its family members. Thus, any serious marital misconduct or egregious marital fault that substantially contributes to the breakdown of marriage is still properly considered in a majority of American states as an important factor on divorce, almost thirty years after the so-called no-fault divorce revolution. This is because most states have incorporated no-fault divorce grounds and remedies into their traditional fault-based legal framework, rather than totally substituting one system for the other. Thus, few states today totally ignore fault as one of the many factors that a judge must consider in determining spousal support awards or the division of marital property on divorce.

Various commentators, including Professor Ira Ellman, have argued for the total abolition of all fault-based factors on divorce in favor of more consistent and predictable no-fault financial loss principles. These commentators, however, ignore the crucial fact that important nonfinancial losses occur on divorce as well as financial losses, including the serious or egregious marital misconduct of a spouse that substantially causes the marital breakdown.

169. See *supra* notes 133–38, 140–50 and accompanying text.

170. See *supra* notes 152–59 and accompanying text.

171. See *supra* notes 162–67 and accompanying text.

The concern of some no-fault commentators that fault-based factors, when applied to the allocation of spousal support or the division of marital property on divorce, in effect “rewards virtue and punishes sin,” seriously underestimates and belittles a state’s strong public policy goal of holding a spouse legally accountable and responsible for his or her serious marital misconduct. A concern that judicial discretion is “inherently limitless,” if no finding of economic harm is required, is likewise unpersuasive, and has yet to be clearly demonstrated. On the contrary, judicial discretion in most divorce cases today is constrained by the application of a number of statutory factors relating to spousal support awards and the division of marital property on divorce that a judge must properly consider. Judicial discretion is also tempered and constrained by the trial court judge’s own day-to-day expertise and experience in divorce matters. Judicial discretion is further constrained by appellate review whenever a trial court judge fails to apply the correct statutory or decisional law, or whenever a trial court judge abuses his or her judicial discretion.

Equally important, the fact that most jurisdictions now recognize marital fault as only one of many statutory factors that must be considered by a trial court judge in determining spousal support or the division of marital property on divorce illustrates the current judicial trend in many states today that most judges tend to ignore or severely restrict the ultimate effect of any fault-based factor except in the most serious or egregious of cases. Thus, financially based compensation on divorce is not necessarily incompatible with fault-based compensation for serious marital misconduct since other “no-fault” remedial laws, including no-fault automobile insurance, no-fault worker’s compensation statutes, and no-fault strict products liability laws, also provide fault-based compensation and fault-based remedies for serious or egregious conduct. Finally, separate tort-based compensation as a proposed alternative remedy for serious marital misconduct has proven to be an inadequate remedy for a number of substantive and procedural reasons.

In conclusion, fault-based factors in no-fault divorce continue to serve a useful and viable moral, social, economic, and legal purpose in contemporary American society. Fault-based statutory factors for determining spousal support awards or for determining the distribution of marital property on divorce, therefore, should *not* be abolished or abrogated in those states that continue to recognize and properly utilize these factors, without clear and compelling evidence that fault-based factors do *not* in fact serve an important underlying moral, social, economic, and public policy function. At a time when public policy

studies are focusing on strengthening marital relationships and the nuclear family in America, and at a time when fault-based factors on divorce or dissolution of marriage are being seriously reassessed by a number of commentators, courts, and legislators, it makes no sense at all to totally abolish these fault factors, largely based on questionable arguments and unsubstantiated anecdotal evidence, without a clear and compelling reason to do so, especially in the absence of any viable alternative remedy for serious marital misconduct.