MARRIAGE AND SOME TROUBLING ISSUES WITH NO-FAULT DIVORCE

*Peter Nash Swisher**

> 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 the parties may contract to marry, the procedure or form essential to constitute marriage, the duties and obligations it creates, its effects on the property rights of both [parties], present and prospective, and the acts which may constitute grounds for its dissolution.
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> - *Maynard v. Hill,* 125 U.S. 190, 205 (1888)

I. INTRODUCTION

Marriage, according to the United States Supreme Court, creates "the most important relation in life, as having more to do with the morals and civilization of a people than any other institution."[1] Thus, despite recent academic and judicial support for various nontraditional family alternatives,[2] a substantial majority of Americans "still marry in

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* Professor of Law, University of Richmond Law School. B.A. Amherst College (1966); M.A. Stanford University (1967); J.D. University of California, Hastings College of Law (1973). Parts of this article have appeared in previous publications by the author, including, *The ALI Principles: A Farewell to Fault—But What Remedy for the Egregious Marital Misconduct of an Abusive Spouse?*, 8 DUKE J. GENDER L. & POL'Y 213 (2001).

[1] Maynard v. Hill, 125 U.S. 190, 205 (1888).

> Marriage is a 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 of 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.

Griswold v. Connecticut, 381 U.S. 479, 486 (1965); *see also* Loving v. Virginia, 388 U.S. 1, 12 (1967) (stating that marriage is "one of the basic civil rights of man" and "fundamental to our very existence and survival").

[2] *See, e.g.*, June Carbone & Margaret F. Brinig, *Rethinking Marriage: Feminist Ideology, Economic Change, and Divorce Reform*, 65 TUL. L. REV. 953 (1991); Martha Albertson Fineman, *Why Marriage?*, 9 VA. J. SOC. POL'Y & L. 239 (2001); Martha Minow, *Redefining Families: Who's In and Who's Out?*, 62 U. COLO. L. REV. 269 (1991); Nancy D. Polikoff, *Ending Marriage As We Know It*, 32 HOFSTRA L. REV. 201 (2003); Marjorie Maguire Schultz, *Contractual Ordering of Marriage: A New Model for State Policy*, 70 CAL. L. REV. 204 (1982); Lenore J. Weitzman, *Legal Regulation of Marriage: Tradition and Change*, 62 CAL. L. REV. 1169 (1974); *see also* Symposium, *A More Perfect Union: Marriage and Marriage-Like Relationships in Family Law*, 30 N.M. L. REV. 1 (2000).

The author is not opposed to some nontraditional alternatives to marriage, when appropriate, but *not* to the exclusion of traditional marriage. *See* JOHN DEWITT GREGORY, PETER N. SWISHER & SHERYL L. WOLF, UNDERSTANDING FAMILY LAW 29 (2d ed. 2001).

the traditional way, and continue to regard marriage as the most important relationship in their lives."[3] Moreover, increasing criticism of marriage in contemporary American society has generated a serious reevaluation of the major moral, legal, social, and economic premises underlying traditional marriage. This reassessment of marriage has led to a number of strong endorsements for a rededicated commitment to strengthening marriage and the nuclear family in America.[4]

Like marriage, divorce or dissolution of marriage is regulated by the state legislatures.[5] Since marriage still continues to serve valuable social, legal, economic, and institutional functions,[6] the underlying public policy in most states continues to promote marriage and discourage divorce unless the parties strictly comply with the statutory requirements for divorce.[7] Since the so-called "no-fault divorce

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> A better reasoned approach would be for more state legislatures and courts to recognize and protect the legal rights and obligations of *both* traditional *and* nontraditional families, as they currently coexist in American society today, by providing alternative legal rights and remedies for each social structure, according to the public policy of each state, and based upon the present and future needs of all its citizens.

Id.

[3] HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 26 (2d ed. 1988).

[4] *See, e.g.*, COUNCIL ON FAMILIES IN AMERICA, MARRIAGE IN AMERICA: A REPORT TO THE NATION 1 (Mar. 1995) (non-partisan council stating "[t]he 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"); NAT'L COMM'N ON CHILDREN: BEYOND RHETORIC: A NEW AMERICAN AGENDA FOR CHILDREN AND FAMILIES 251 (1991) (bipartisan commission concluding that "[f]amilies 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."); *see also* LINDA J. WAITE & MAGGIE GALLAGHER, THE CASE FOR MARRIAGE: WHY MARRIED PEOPLE ARE HAPPIER, HEALTHIER, AND BETTER-OFF FINANCIALLY (2000); David Orgon Coolidge & William C. Duncan, *Reaffirming Marriage: A Presidential Priority*, 24 HARV. J.L. & PUB. POL'Y 623 (2001); George W. Dent, Jr., *The Defense of Traditional Marriage*, 15 J.L. & POL'Y 581 (1999); Lynne D. Wardle, *The Bonds of Matrimony and the Bonds of Constitutional Democracy*, 32 HOFSTRA L. REV. 349 (2003) (arguing that marriage is based upon a number of fundamental core institutions within our constitutional democracy, rather than being based on mere contractual arrangements).

[5] *See, e.g.*, Simms v. Simms, 175 U.S. 162, 167 (1899) (stating "the whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of [each] State, and not to the laws of the United States"); *see also* Boddie v. Connecticut, 401 U.S. 371, 376 (1971); *Maynard,* 125 U.S. at 205.

[6] *See supra* note 4 and accompanying text.

[7] For example, an overwhelming number of American courts still attempt to validate the parties' marital expectations whenever possible. *See, e.g.*, Leonard v. Leonard, 560 So. 2d 1080 (Ala. Civ. App. 1990); Panzer v. Panzer, 528 P.2d 888 (N.M. 1974); CLARK, *supra* note 3, at 70-75. 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 3, at 405-12; JOYCE HENS GREEN ET AL., DISSOLUTION OF MARRIAGE 4-53 (1986).

revolution" of the 1970s, however, a growing number of commentators have largely discounted the role of fault in American divorce law,[8] as well as a spouse's non-economic contributions to the well-being of the family in determining spousal support on divorce, the equitable distribution of marital property on divorce, or both.[9]

The purpose of this Article is to challenge these erroneous assumptions, that fault is "no longer an issue" in modern American divorce law, and that a spouse on divorce should not be compensated for his or her non-economic contributions to the marriage and to the well-being of the family.

II. NO-FAULT DIVORCE AND FAULT-BASED DIVORCE ALTERNATIVES

A. The No-Fault Divorce "Revolution" and Its Unexpected Consequences

Divorce reform in America is currently at a crossroads.[10] Prior to California's landmark 1969 no-fault divorce legislation, a growing number of lawyers, judges, sociologists, and legislators had been dissatisfied with various perceived defects in America's fault-based divorce system. They argued that divorce should not be based solely on traditional fault grounds such as adultery, cruelty, and desertion, but instead divorce should be viewed as a regrettable, but necessary, legal definition of marital failure where often the factors leading to the marriage breakdown were caused by the parties' incompatibility and irreconcilable differences.[11] Moreover, under a fault-based divorce system, couples in unhappy marriages might have to fabricate the necessary fault grounds for divorce and resort to perjury,[12] or attempt to use questionable migratory divorces from sister state "divorce mills."[13]

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[8] *See, e.g.*, Ira Mark Ellman & Sharon Lohr, *Marriage as Contract, Opportunistic Violence, and Other Bad Arguments for Fault Divorce*, 1997 U. ILL. L. REV. 719; Ira Mark Ellman, *The Place of Fault in a Modern Divorce Law*, 28 ARIZ. ST. L.J. 773 (1996); Herma Hill Kay, *Equality and Difference: A Perspective on No-Fault Divorce and Its Aftermath*, 56 U. CIN. L. REV. 1 (1987); Norman B. Lichenstein, *Marital Misconduct and the Allocation of Financial Resources at Divorce: A Farewell to Fault*, 54 UMKC L. REV. 1 (1985).

[9] *See, e.g.*, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS (2000) [hereinafter PRINCIPLES] (proposing a purely financially-based "true" no-fault divorce regime); Ira Mark Ellman, *The Theory of Alimony*, 77 CAL. L. REV. 1 (1989) (same).

[10] *See, e.g.*, DIVORCE REFORM AT THE CROSSROADS (Stephen D. Sugarman & Herma Hill Kay eds., 1990); MARY ANN GLENDON, THE TRANSFORMATION OF FAMILY LAW: STATE, LAW, AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE (1989).

[11] *See, e.g.*, MAX RHEINSTEIN, MARRIAGE STABILITY, DIVORCE, AND THE LAW (1972).

[12] *See, e.g.*, Walter Wadlington, *Divorce Without Fault Without Perjury*, 52 VA. L. REV. 32 (1966).

[13] *See generally* NELSON BLAKE, THE ROAD TO RENO: A HISTORY OF DIVORCE IN THE UNITED STATES (1962).

No-fault divorce legislation in the United States,[14] therefore, was originally intended to be a good faith remedy to many of these perceived evils and shortcomings inherent in a fault-based divorce regime.[15]

Yet America's no-fault divorce "revolution" over the past thirty-five 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,[16] a disturbing number of courts have failed to provide adequate financial protection to many women and children of divorce.[17] Additionally, many children of divorce have suffered long-lasting psychological and economic damage resulting from divorce.[18] Indeed, some commentators have concluded that the no-fault

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[14] Section 302(a)(2) of the Uniform Marriage and Divorce Act provides that a court shall enter a divorce or dissolution of marriage whenever

> the court finds that a marriage is irretrievably broken, if the finding is supported by evidence that (i) the parties have lived separate and apart for a period of more than 180 days next preceding the commencement of the [divorce] proceeding, or (ii) 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. 200 (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 upon their irreconcilable differences or incompatibility. *See generally* Linda D. Elrod & Robert G. Spector, *A Review of the Year in Family Law: Children's Issues Remain the Focus*, 37 FAM. L.Q. 527, 580 (2004).

[15] *See generally* Peter Nash Swisher, *Reassessing Fault Factors in No-Fault Divorce*, 31 FAM. L.Q. 269, 270-76 (1997).

[16] *See, e.g.*, CLARK, *supra* note 3, at 410. "The social change of greatest importance has been the sharp growth in the divorce rate, which reached its highest point in 1979, and which has fluctuated somewhat since then." *Id.*

[17] *See, e.g.*, 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 women and children by the divorce regime must be one of the foremost items on the nation's new agenda."); *see also* LENORE J. WEITZMAN, THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA (1985); Lenore J. Weitzman & Ruth B. Dixon, *The Alimony Myth: Does No-Fault Divorce Make a Difference?*, 14 FAM. L.Q. 141 (1980). Although the accuracy of Professor Weitzman's statistical studies has been questioned, other studies have corroborated this "feminization of poverty" resulting from divorce. For example, 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 standard of living rises by 10%. Elizabeth Gleick, *Hell Hath No Fury*, TIME, Oct. 7, 1996, at 84.

[18] *See, e.g.*, Elizabeth S. Scott, *Rational Decisionmaking 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"); *see generally* JUDITH S. WALLERSTEIN & SANDRA BLAKESLEE, SECOND CHANCES: MEN, WOMEN, AND CHILDREN A DECADE AFTER DIVORCE (1989) (discussing the negative long-term effects of divorce on children); JUDITH WALLERSTEIN ET AL., THE UNEXPECTED LEGACY OF DIVORCE: A 25 YEAR LANDMARK STUDY (2000) (same).

divorce revolution in America "has failed."[19] Consequently, a growing number of courts and commentators have been reassessing whether fault-based factors may still serve a legitimate function and purpose in contemporary American divorce law.[20] Likewise, a growing number of state legislatures have been reassessing the role of fault in contemporary divorce law as they provide for the concurrent goals of protecting, promoting, and "reinstitutionalizing" traditional marriage.[21]

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[19] *See, e.g.*, COUNCIL ON FAMILIES IN AMERICA, *supra* note 4, at 1.

> 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.

Id.

[20] *See, e.g.*, Allen M. Parkman, *Reforming Divorce Reform*, 41 SANTA CLARA L. REV. 379 (2001); Jana B. Singer, *Husbands, Wives, and Human Capital: Why the Shoe Won't Fit*, 31 FAM. L.Q. 119 (1997); Peter Nash Swisher, *The ALI Principles: A Farewell to Fault—But What Remedy for the Egregious Marital Misconduct of an Abusive Spouse?*, 8 DUKE J. GENDER L. & POL'Y 213 (2001); Swisher, *supra* note 15; Lynne D. Wardle, *No-Fault Divorce and the Divorce Conundrum*, 1991 BYU L. REV. 79; 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., Comment, *Fault: A Viable Means of Re-injecting Responsibility in Marital Relations*, 30 U. RICH. L. REV. 605 (1996); *see also* Harvey J. Golden & J. Michael Taylor, *Fault Enforces Accountability*, FAM. ADVOC. Fall 1987, at 11; R. Michael Redman, *Coming Down Hard on No-Fault Divorce*, FAM. ADVOC. Fall 1987, at 6.

[21] *See, e.g.*, SCOTT M. STANLEY & HOWARD J. MARKMAN, UNIV. OF DENVER CTR. FOR MARITAL & FAMILY STUDIES, CAN GOVERNMENT RESCUE MARRIAGE? 1-2 (June 1997), *available at* http://www.aamft.org/Press_Room/Press_releases/viewpoints.asp (last visited Feb. 19, 2005).

> There is a trend sweeping the country to make changes in legal codes to strengthen and stabilize marriages. There are two key thrusts emerging in state legislatures: the first involves changes in laws that would make it harder for couples to divorce; the second involves efforts to encourage or mandate couples to participate in premarital counseling.
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> While strange bedfellows, there is a growing consensus among both liberal and conservative political and religious leaders that something must be done.

Id. Examples of such legislation include "covenant marriage" statutes in Arizona and Louisiana where the parties consensually agree not to obtain a no-fault divorce, and to only dissolve their marriage based upon traditional fault grounds or separation for a period of time. The couple also agrees to obtain premarital counseling prior to marriage. *See* ARIZ. REV. STAT. § 25-901 (2000); LA. REV. STAT. ANN. § 9-224 (West 2000). The Florida legislature also passed the sweeping bipartisan Marriage Preparation and Preservation Act, providing that: (1) all Florida high school students are required to take a course in "marriage and relationship skill-based education"; (2) engaged couples are encouraged, but not required, to take a "premarital education course"; (3) couples applying for a marriage license will receive a handbook prepared by the Florida State Bar Association informing them of "the rights and responsibilities under Florida law of marital partners to each other and to their children, both during marriage and upon dissolution"; and (4) couples filing for divorce that have children must take a "Parent Education and Family Stabilization

B. Fault-Based Alternatives in Contemporary American Divorce Law

When no-fault divorce legislation was enacted in all fifty states during the 1970s and 1980s, a number of commentators were perhaps too quick to bid their final, not-so-fond farewell to fault-based divorce factors.[22] Professor Homer Clark, for example, stated in 1988 that

> [t]oday, the non-fault grounds of marriage breakdown, incompatibility and living separate and apart, have been enacted in almost all 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. Since most of the traditional defenses to divorce are logically related to fault in some way, it is also true that they have been largely abolished or ignored today in those states in which the non-fault grounds for divorce prevail.[23]

Other commentators, including Professor Ira Mark Ellman, continue to erroneously state that fault factors on divorce are only considered in a "small minority" of states today.[24] But to paraphrase Mark Twain, rumors of the demise of fault-based divorce law in America have been greatly exaggerated. In fact, a *majority* of states today still *retain* fault-based divorce alternatives *in addition* to enacting no-fault divorce legislation.[25] Today, a *majority* of states—approximately twenty-eight—*still* consider marital fault factors in determining spousal support and the distribution of marital property.[26] And a *majority* of states—approximately thirty-two—*still* retain alternative fault grounds for dissolving the marital relationship.[27] Indeed, the number of states that have adopted fault-based statutory factors for divorce has *increased*

Course" that covers the legal and emotional impact of divorce on both adults and children, financial responsibility, laws regarding child abuse and neglect, and conflict resolution skills. Mike McManus, *Florida Passes Nation's Most Sweeping Reform of Marriage Law*, ETHICS & RELIGION, May 16, 1998, *available at* http://www.smartmarriages.com/mcmanusflorida.html (last visited Feb. 19, 2005) (predicting that the statute would inspire many other states to pass similar legislation).

[22] *See, e.g.*, *supra* note 8, and accompanying text.

[23] CLARK, *supra* note 3, at 496.

[24] Ira Mark Ellman, *Should the Theory of Alimony Include Nonfinancial Losses and Motivations?*, 1991 BYU L. REV. 259, 262.

[25] *See, e.g.*, Golden & Taylor, *supra* note 20, at 12.

> [Various] critics . . . mistakenly believe that the adoption of no-fault [divorce] 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 the other.

Id.

[26] *See, e.g.*, Elrod & Spector, *supra* note 14, at 576, 581.

[27] *Id*. at 580.

rather than decreased over the past ten years.[28] Thus, as Adriaen Morse Jr. observes:

> Dismissing fault from consideration [in American divorce law] because it is a factor in only a "small minority" of states seems almost ludicrous in view of the facts [since] many legislatures have not been so overcome by the charms of no-fault [divorce] as to wish to repeal the fault remedies entirely. Thus, in this area, Professor Ellman has failed to honestly consider whether moral relations should be factored into alimony [and factored into other important aspects of American divorce law]. A shrug is not an argument.[29]

This same criticism can be leveled at the American Law Institute's (ALI) *Principles of the Law of Family Dissolution* (*Principles*) and its rather curt and unpersuasive dismissal of the role of marital fault in the dissolution of marriage. For example, Comment e to Section 4:09 of the *Principles* excludes marital misconduct factors in the distribution of marital property and spousal support, purportedly justifying the rule as being "consistent with the prevailing trend in the law since the 1970 approval of the Uniform Marriage and Divorce Act."[30] However, only a small *minority* of states have adopted the Uniform Marriage and Divorce Act to date, and only a *minority* of states—about fifteen—are "true" no-fault divorce jurisdictions.[31] Thus, if there is an arguable majority "trend" today, it is to *retain* fault factors in divorce as one of many statutory factors that state courts will still consider in determining spousal support rights, the division of marital property, or both.

Why this strong and continuing legislative and judicial recognition of fault-based divorce factors, despite the general abandonment and premature dismissal of nonfinancial fault factors by many academic scholars and the ALI *Principles of the Law of Family Dissolution*? This may be explained by the strong public policy rationale underlying marriage and divorce in a majority of states today—that moral issues still *do* matter in a family law context,[32] and state legislatures and courts still *do* take into account the responsibility and accountability of the

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[28] For example, Elrod and Walker reported in 1994 that twenty-four states still considered marital fault in awarding alimony, and thirty states retained alternative fault grounds for dissolving a marriage. *See* Linda D. Elrod & Timothy B. Walker, *Family Law in the Fifty States*, 27 FAM. L.Q. 515, 534, 661 (1994). Currently, these figures are twenty-eight states and thirty-two states respectively. *See supra* notes 26-27 and accompanying text.

[29] Morse, *supra* note 20, at 638.

[30] PRINCIPLES, *supra* note 9, at § 4.09 cmt. e.

[31] *See* Elrod & Spector, *supra* note 14, at 580.

[32] *See*, *e.g.,* Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803 (1985).

respective spouses, especially when one spouse is guilty of serious and egregious marital misconduct.[33] Again, as Adriaen Morse Jr. aptly notes:

> 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 with the division of marital property on divorce]. 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.[34]

Accordingly, as will be discussed in more detail below, fault factors in contemporary American divorce law still serve a legitimate purpose for the following three reasons: (1) other no-fault laws, including no-fault workers compensation, automobile insurance, and strict liability tort laws, all have incorporated a number of fault-based remedies within their no-fault statutory framework for serious and egregious conduct, and American divorce law likewise should retain fault-based remedies for serious and egregious marital misconduct; (2) a substantial number of states continue to recognize and use a number of fault-based statutory factors on divorce for determining spousal support and the division of marital property, and state court judges generally have applied these fault-based statutory remedies in a realistic and responsible manner; and (3) alternative tort or criminal law remedies for serious and egregious marital misconduct have proven to be inadequate in theory and practice.

C. Arguments for Retaining Fault Factors in American Divorce Law

Various commentators,[35] and the American Law Institute's *Principles of the Law of Family Dissolution*[36] have argued for "consistent and predictable" no-fault family law principles relating to compensatory spousal support and the division of marital property on divorce.[37] They have argued that these should be based *solely* on no-fault financial principles and objectives, to the exclusion of any nonfinancial spousal

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[33] *See, e.g.*, Golden & Taylor, *supra* note 20, at 12 ("Very few states totally ignore fault [in divorce proceedings]. 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."); *see also infra* notes 49-52 and accompanying text.

[34] *See* Morse, *supra* note 20, at 640-41.

[35] *See supra* note 8 and accompanying text.

[36] *See supra* note 9 and accompanying text.

[37] *See* PRINCIPLES*, supra* note 9, at 23-25.

contributions to the marriage and the well-being of the family, and to the exclusion of any fault-based factors such as marital misconduct.[38]

For example, in his article, *The Theory of Alimony*,[39] the *Principles*' Chief Reporter, Professor Ira Mark Ellman, argued for a purely financial and compensatory no-fault approach to spousal support or alimony. Basically, Ellman's theory of alimony conceptualized spousal support as compensation earned by the economically disadvantaged spouse (normally the wife) through marital investments and as a means to eliminate distorting financial incentives in marriage, rather than as a way to relieve financial need as current alimony law generally allows.[40] However, Ellman's theory of alimony has been criticized by other commentators for not recognizing important nonfinancial losses of divorce as well. Professor June Carbone faults Ellman for ignoring larger noneconomic societal interests such as child-rearing, married women's participation in the work force, a return of appropriate benefits that the other spouse retains on divorce, and sex-equality issues.[41] Professor Carl Schneider criticizes Ellman for his refusal to acknowledge any moral discourse on the subject of awarding alimony on divorce.[42] Schneider also disagrees with Ellman's reasoning that the modern divorce reform movement in America has allegedly "rejected" all fault-based divorce standards by noting that fault is still taken into account in many jurisdictions in awarding alimony,[43] and that a broader view of alimony still requires a great deal of traditional judicial discretion by the courts.[44]

Similar criticism has been leveled at the ALI *Principles'* no-fault approach to alimony, its no-fault approach to the division of marital property, and its failure to take into account many other important non-economic societal interests on divorce.[45] In spite of explicit arguments and proposals made in the *Principles* to the contrary, forty-two states today continue to recognize a spouse's non-economic contributions to the marriage and to the well-being of the family in determining spousal support and the division of marital property.[46] Indeed, if contemporary

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[38] *See id*.

[39] Ellman, *supra* note 9, at 3.

[40] *Id*. at 50-52.

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

[42] Carl E. Schneider, *Rethinking Alimony: Marital Decision and Moral Discourse*, 1991 BYU L. REV. 197.

[43] *Id*. at 249-50.

[44] *Id*. at 252-53.

[45] *See, e.g.*, Katherine Silbaugh, *Gender and Nonfinancial Matters in the ALI Principles of the Law of Family Dissolution*, 8 DUKE J. GENDER L. & POL'Y 203 (2001); Swisher, *supra* note 20; *see also* Francis J. Canania, Jr., *Learning From the Process of Decision: The Parenting Plan*, 2001 BYU L. REV. 857.

[46] *See, e.g.*, Elrod & Spector, *supra* note 14, at 580.

marriage is viewed today as a shared partnership with important economic *and* non-economic expectations,[47] then a "true" no-fault divorce regime, as proposed in the *Principles*, reduces marriage on dissolution to nothing more than impersonal and unrealistic economic calculations, and refuses to consider the many important nonmonetary marital contributions of a spouse to the well-being of the family.[48]

In sum, a majority of state legislatures and state courts still *do* continue to recognize that under Anglo-American law, morality, social custom, and Benjamin Cardozo's "accepted standards of right conduct," one is still held to the standard of being legally responsible and accountable for one's actions,[49] whether such actions arise under criminal law,[50] tort law,[51] or family law[52] principles.

1. Other no-fault laws offer fault-based remedies

It is true that, beginning in the 1920s with no-fault workers compensation laws, and followed in the 1970s and 1980s by no-fault automobile insurance, products liability, and divorce laws, remedial no-fault legislation in a substantial number of states provided 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 unreasonable conduct. However, *none* of these remedial no-fault laws

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[47] *See, e.g.*, Joan Krauskopf & Rhonda Thomas, *Partnership Marriage: The Solution to an Ineffective and Inequitable Law of Support*, 35 OHIO ST. L.J. 558 (1974); Marcia O'Kelly, *Entitlements to Spousal Support After Divorce*, 61 N.D. L. REV. 225 (1985).

[48] *See, e.g.*, Carbone, *supra* note 41; Woodhouse, *supra* note 20, at 2567; *see also* KAREN WINNER, DIVORCED FROM JUSTICE 30-31 (1996).

[49] *See, e.g.*, BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 112 (1921) ("[L]ogic, 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."); OLIVER WENDELL HOLMES, THE COMMON LAW 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).

[50] *See, e.g.*, WAYNE R. LAFAVE, CRIMINAL LAW §§ 1.2(d)–1.3(c) (4th ed. 2003).

[51] *See, e.g.*, W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 1, at 5-7 (5th ed. 1984).

[52] *See, e.g.*, GREEN ET AL., *supra* note 7, at 15-27.

> In tort, the law provides a remedy for intentional actions which cause harm, for 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.

Morse, *supra* note 20, at 641-42.

totally abolished or abrogated a defendant's legal responsibility and accountability for *serious and egregious misconduct*.

For example, although a majority of states have adopted some form of no-fault automobile insurance legislation, these statutes are *not* completely no-fault in nature. Up to a statutory threshold, which is often quite low, an insured automobile driver or passenger cannot sue another driver for personal injuries resulting from a motor vehicle accident. Rather, an injured party must look to his or her own insurance company for compensation. However, certain statutorily-prescribed injuries, including death, disfigurement, permanent loss of a bodily function, and property damage normally are exempt from this no-fault cap.[53] Indeed, some commentators now refer to no-fault automobile insurance statutes as "partial tort exemption statutes."[54]

Moreover, under no-fault workers compensation statutes, intentional self-injuries will *still* bar a worker's claim, while egregious employer conduct can lead to an enhanced compensation award, or the right to sue the employer for an intentional tort in addition to obtaining a workers' compensation award.[55] Also, in products liability litigation, the strict tort liability actions that were formerly embraced by many American jurisdictions in the 1970s now approximate a negligence foreseeability standard with regard to defective design and defective warning cases,[56] with the conduct of the consumer always being relevant.[57]

2. States still use fault when determining spousal support and property division

Likewise, the no-fault divorce laws in a substantial number of American states are *not* truly no-fault in nature, since approximately thirty-two states currently retain various fault-based grounds for divorce while also affording no-fault alternatives. Additionally, marital fault is

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[53] *See, e.g.*, EMERIC FISCHER & PETER SWISHER, PRINCIPLES OF INSURANCE LAW § 5.03, at 511-16 (2d ed. 1994); ROBERT KEETON & ALAN WIDISS, INSURANCE LAW § 4.10 (1988).

[54] KEETON & WIDISS, *supra* note 53, at 421-25.

[55] *See generally* 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).

[56] *See, e.g.*, Sheila L. Birnbaum, *Unmasking the Test for Design Defect: From Negligence (to Warranty) to Strict Liability to Negligence*, 33 VAND. L. REV. 593 (1980); Peter Nash Swisher, *Products Liability Tort Reform: Why Virginia Should Adopt the Henderson-Twerski Proposed Revision of Section 402A, Restatement (Second) of Torts*, 27 U. RICH. L. REV. 857 (1993); *see also* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 (1998).

[57] *See, e.g.*, HENRY WOODS, COMPARATIVE FAULT § 1:11 (2d ed. 1987).

still a relevant statutory factor in at least twenty-eight states for determining alimony and the division of marital property on divorce.[58]

3. Neither tort nor criminal law provides an adequate remedy for egregious marital misconduct

Finally, the absence of any fault-based statutory relief for egregious marital misconduct may place an almost insurmountable burden on an abused spouse to obtain compensatory relief from an abusive spouse. This serious problem is illustrated in a number of cases in a minority of states that have adopted a "pure" or "true" no-fault regime,[59] where non-financial marital fault no longer plays any significant role in determining divorce grounds and defenses, spousal support awards, or the equitable distribution of marital property.[60] For example, in the case of *In re Koch*,[61] the Oregon Court of Appeals rejected a wife's claim for support based upon injuries that she sustained in a severe physical altercation 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.[62] Two other "pure" or "true" no-fault states also have held that the murder or 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 such awards can only be based on the financial needs of the parties, regardless of fault.[63]

A better-reasoned approach would recognize fault-based exceptions in both "pure" or "true" no-fault divorce regimes *and* in "modified" or "alternative" no-fault divorce regimes for serious and egregious marital misconduct, in order to protect and compensate an abused spouse for the egregious acts of an abusive spouse. For example, in *Stover v. Stover*,[64] the Arkansas Supreme Court allowed an unequal division of marital property where the wife was found guilty of conspiring to kill her husband. Similarly, in *Brabac v. Brabac*,[65] the Wisconsin Court of

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[58] *See supra* notes 25-31 and accompanying text.

[59] Approximately fifteen states have taken this approach. However, thirty-five years after the so-called no-fault divorce "revolution," this is *not* a significant majority of states, in spite of many erroneous claims to the contrary.

[60] *See, e.g.*, Boseman v. Boseman, 107 Cal. Rptr. 232 (Ct. App. 1973); Erlandson v. Erlandson, 318 N.W.2d 36 (Minn. 1982). These courts are only able to take into account "economic fault" such as dissipation, concealment, or waste of marital assets. *See, e.g.*, Ivancovich v. Ivancovich, 540 P.2d 718 (Ariz. Ct. App. 1975).

[61] *In re* Koch, 648 P.2d 406 (Or. Ct. App. 1982).

[62] *Id*. at 408.

[63] *See* Mosbarger v. Mosbarger, 547 So. 2d 188 (Fla. Dist. Ct. App. 1989); *In re* Marriage of Cihak, 416 N.E.2d 701 (Ill. App. Ct. 1981).

[64] Stover v. Stover, 696 S.W.2d 750 (Ark. 1985).

[65] Brabac v. Brabac, 510 N.W.2d 762 (Wis. Ct. App. 1993).

Appeals held that marital fault might still be considered in a murder-for-hire scheme during the pendency of a divorce. Of course, fault-based divorce factors are not limited only to murder-for-hire schemes, and would apply to any serious and egregious marital misconduct.[66] Thus, in cases involving flagrant adultery or cruelty, the wife (or husband) may still receive a greater share of the marital property. This way, egregious marital fault would give a less empowered wife greater leverage to negotiate a more equitable divorce settlement and would also give additional means of adequately providing for herself and her children.[67]

A second criticism of contemporary fault-based divorce factors is that the imposition of fault-based behavioral standards on divorce "must rely upon 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 version of appropriate behavior in intimate relationships."[68] Therefore, such judicial discretion "seems inherently limitless if no finding of economic harm to the claimant is required to justify the award or its amount."[69] This erroneous and largely unsubstantiated argument can be questioned on three major grounds. First, family court judges, from their equity heritage as triers of both fact and law, have *always* possessed broad—and necessary—judicial discretion in adjudicating family law disputes.[70] Second, judicial discretion is *not* "inherently limitless" because judges are constrained by various enumerated statutory factors on divorce,[71] as

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[66] *See, e.g.*, Woodhouse, *supra* note 20, at 2550.

> My colleague, Professor Demie Kurz, interviewed 129 women of many races, ages, and classes, investigating their stories about why their marriages ended in divorce 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 [divorce], 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 sale of the [marital] home for "equitable" distribution to their abusers?

Id.

[67] *See* WEITZMAN, *supra* note 17, at 14; WINNER, *supra* note 48, at 31-34.

[68] PRINCIPLES*, supra* note 9, at 25, 50.

[69] *Id.*

[70] *See, e.g.*, CLARK, *supra* note 3, at 644 ("It is axiomatic that the trial courts have wide discretion in determining the propriety and the amount of alimony."). This judicial discretion also applies to the classification, valuation, and distribution of marital property on divorce, *id*. at 589-94, and to child custody determinations, where parental conduct and fitness are always relevant factors in any child custody dispute. *Id*. at 796-806.

[71] One of the strongest arguments against the *Principles*' concern regarding "inherently limitless" judicial discretion is the fact that most fault-sensitive jurisdictions

well as by appellate review for any abuse of judicial discretion.[72] Third, the current trend in many state courts is to ignore or severely limit the effect of any fault-based divorce factors, except in serious and egregious circumstances.[73]

Thus, it is fair to say that a substantial number of states *still* continue to recognize and use a number of fault-based statutory factors for serious and egregious marital misconduct, and that state court judges generally have applied these fault-based remedies in a realistic and responsible manner. As Professor Barbara Bennett Woodhouse aptly observes:

> I agree with the ALI's Draft 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.[74]

Finally, Professor Ellman[75] and the ALI *Principles*[76] both argue that any compensation for nonfinancial loss arising from the other spouse's egregious marital misconduct is "better left" to a separate criminal law or tort remedy, and that there "is no reason to reinvent compensation principles under the rubric of fault adjudication, nor to incorporate tort principles into divorce adjudications."[77]

Professor Ellman and the *Principles* are correct in asserting that there is no reason to "reinvent compensation principles" under the rubric of fault adjudication, but for an entirely different reason. Fault adjudication in divorce *already* exists in a majority of American

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now recognize marital 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 on divorce. *See, e.g.*, Sparks v. Sparks, 485 N.W.2d 893 (Mich. 1992) (holding that marital misconduct is only *one* of *many* statutory factors that a court must properly consider in awarding spousal support or a division of marital property); *accord* Tarro v. Tarro, 485 A.2d 558 (R.I. 1984); Rexrode v. Rexrode, 339 S.E.2d 544 (Va. Ct. App. 1986).

[72] *See, e.g.*, Clark v. Clark, 696 P.2d 1386 (Kan. 1985); Blank v. Blank, 389 S.E.2d 723 (Va. Ct. App. 1990); Paul v. Paul, 616 P.2d 707 (Wyo. 1980).

[73] *See, e.g.*, Anderson v. Anderson, 230 S.E.2d 272 (Ga. 1976); Platt v. Platt, 728 S.W.2d 542 (Ky. Ct. App. 1987); Thames v. Thames, 477 N.W.2d 496 (Mich. Ct. App. 1991); Perlberger v. Perlberger, 626 A.2d 1186 (Pa. Super. Ct. 1993); Williams v. Williams, 415 S.E.2d 252 (Va. Ct. App. 1992).

[74] Woodhouse, *supra* note 20, at 2560.

[75] *See* Ellman, *supra* note 8, at 807-08.

[76] PRINCIPLES, *supra* note 9, at 57-66.

[77] *Id*. at 53.

jurisdictions today, based upon a number of strong underlying public policy reasons, so fault adjudication in divorce, in a majority of states, need *not* be "reinvented." The *Principles*, however, incorrectly attempts to characterize nonfinancial fault-based compensatory remedies only in terms of assault and battery, or tortuous infliction of emotional distress.[78] While serious and egregious marital misconduct may well include these acts as well as spousal abuse, domestic violence, and attempted murder,[79] it is not limited solely to physical or mental cruelty; adultery that substantially contributes to the dissolution of a marriage is also recognized as a relevant fault-based factor in a substantial majority of jurisdictions.[80] Yet, as the *Principles* concedes, emotional distress actions based upon the other spouse's adultery are generally *not* actionable as an independent tort action,[81] nor have many independent tort cases been deemed "outrageous" enough to qualify as intentional infliction of emotional distress.[82]

Although appellate opinions "may suggest that there are a vast number of tort cases associated with divorce, in practice there are relatively few cases that are actually brought, and even fewer when there has been an actual recovery."[83] Thus, as Barbara Bennett Woodhouse observes:

> Tort claims for marital misconduct have severe 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 [also] 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

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[78] *Id*. at 54-64.

[79] *See, e.g.*, Marriage of Sommers, 792 P.2d 1005 (Kan. 1990); Brancovenau v. Brancovenau, 535 N.Y.S.2d 86 (App. Div. 1988); Brabec v. Brabec, 510 N.W.2d 762 (Wis. Ct. App. 1993).

[80] *See, e.g.*, GA. CODE ANN. § 19-6-1 (2004); MASS. GEN. LAWS ANN. ch. 208, § 34 (West 1998); 23 PA. CONS. STAT. ANN. § 3701(b)(14) (West 2001).

[81] PRINCIPLES*, supra* note 9, at 56; *see, e.g.*, Strauss v. Cilek, 418 N.W.2d 378 (Iowa Ct. App. 1987); Poston v. Poston, 436 S.E.2d 854 (N.C. Ct. App. 1993); Alexander v. Inman, 825 S.W.2d 102 (Tenn. Ct. App. 1991).

[82] S*ee, e.g.*, Hetfeld v. Bostwick, 901 P.2d 986 (Or. Ct. App. 1995); Dye v. Gainey, 463 S.E.2d 97 (S.C. Ct. App. 1995).

[83] Robert G. Spector, *Marital Torts: The Current Legal Landscape*, 33 FAM. L.Q. 745, 762 (1999). Among the reasons for not bringing such marital tort cases are that "practically all clients show a distaste for the prolonging of a process that a civil case would entail" and "homeowner insurance policies no longer cover intentional torts. Therefore only where the tort defendant has sufficient assets to satisfy the judgment is a case viable." Finally, "the family law bar is rather inexperienced in the personal injury area." *Id.* at 762-63.

> resolved by judges addressing individual cases in a piecemeal fashion and confined to the analytical structure of tort laws.[84]

The *Principles* therefore advocate an independent tort action for serious and egregious marital misconduct that is both costly and duplicative, rarely used by the spouses in a successful manner, and does not provide an adequate or realistic remedy for serious and egregious marital misconduct. It also raises a number of largely unresolved procedural issues as to exactly *how* such an independent tort action should be brought. The better-reasoned approach, used in the majority of states today, is to retain and utilize economic *and* noneconomic fault factors on divorce in order to determine fair and adequate spousal support awards, and the equitable distribution of marital property on divorce, whenever a spouse has been guilty of serious and egregious marital misconduct.

III. CONCLUSION

Since the so-called no-fault divorce "revolution" of the 1970s, a number of commentators have largely discounted the role of fault in contemporary American divorce law. Likewise, the American Law Institute's proposed *Principles of the Law of Family Dissolution* (2000) dismisses the role of marital fault in the dissolution of marriage, as well as any other noneconomic contribution of a spouse to the marriage and the well-being of the family.

What these commentators largely ignore, however, is that thirty-five years after the so-called no-fault divorce "revolution," only a small minority of states—about fifteen—are "true" no-fault jurisdictions, while a majority of states *still* retain alternative fault grounds for divorce, and *still* consider marital fault factors in determining spousal support and the distribution of marital property on divorce.[85] Indeed, forty-two states *still* continue to evaluate a spouse's noneconomic contributions to the marriage and the well-being of the family, in spite of the *Principles*' arguments to the contrary.[86] This continuing legislative and judicial recognition of fault-based divorce factors may be explained by the strong public policy rationale underlying marriage and divorce in a majority of states—that moral issues still *do* matter in family law, and that states still *do* take into account the actions of the respective spouses on divorce, especially when one spouse is guilty of serious and egregious marital misconduct.

Accordingly, fault factors in contemporary American divorce law still *do* serve a legitimate purpose and function for three reasons. First, other no-fault laws such as workers compensation, automobile

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[84] Woodhouse, *supra* note 20, at 2566.

[85] *See* Elrod & Spector, *supra* note 14, at 580.

[86] *Id*.

insurance, and strict liability torts have incorporated fault-based remedies within their no-fault statutory framework for serious and egregious conduct, and American divorce law should continue to do the same. Second, a substantial number of states continue to recognize and use a number of fault-based statutory factors on divorce for determining spousal support and the division of marital property, and state courts have generally applied these fault-based statutory remedies in a responsible manner. Finally, alternative tort or criminal law remedies for serious and egregious marital misconduct have proven to be inadequate in theory and practice.