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Alimony After No-Fault: A Practice in Search of a Theory

Mary E. O’Connell*

I. INTRODUCTION

This is an article about alimony; it is not, however, an autopsy report. Although alimony has always been rare,1 (and the payment of alimony rarer still),2 and although at least some of the divorce reform legislation of the 1970's is overtly hostile to it,3 alimony persists. This Article advocates that it should not only persist, but be revitalized.

The resurrection of alimony is impelled by the persistence of gender based social roles and the economic fallout which accompanies

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* Professor of Law, Northeastern University School of Law; J.D. Northeastern University, 1975; B.A. Brandeis University, 1970. I was aided in the preparation of this article by more, and more capable, student research assistants than I can name, or than I had the right to expect. In addition, my colleagues, particularly Professor Daniel Schaffer and Professor Karl Klare, kindly shared insights and improved this manuscript with their criticisms. Professors Mary Joe Frug, Martha Minow and Judith Greenberg commented on an earlier draft, and offered support and encouragement when both were badly needed. My extraordinarily patient Dean, Daniel J. Givelber, merits a special thanks, as does Professor Wendy E. Parmet, whose perceptive criticisms helped to shape the final draft. Finally, my debt to my friend and mentor Professor Judith Olans Brown, is here acknowledged, but can probably never be repaid.

1. All of the available empirical evidence indicates that alimony is awarded only in a small minority of cases. In his classic work on divorce, Paul Jacobson reported that alimony was awarded in only 9.3 percent of American divorces in the years between 1887 and 1906; by 1922, the figure rose to 14.7 percent. P. JACOBSON, AMERICAN MARRIAGE AND DIVORCE 126 (1959). In samples drawn from Los Angeles County in 1968, 1972 and 1977, Professor Lenore Weitzman found a range of 12.9 to 18.8 percent. L. WEITZMAN, THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA 169, table 13 (1985). A 14.9 percent figure was reported by the United States Census Bureau in 1981. BUREAU OF THE CENSUS, U.S. DEP’T COMMERCE, CURRENT POPULATION REPORTS SERIES P-23, No. 124, Child Support and Alimony: 1981 2, table A (1983).

2. Weitzman reports data indicating that within six months of divorce, one of every six men owed an average of $1000 in unpaid alimony. WEITZMAN, supra note 1, at 161. Since the median alimony award was only $209 per month, this represents a nearly total default. See id. at 172, table 14.

them. Despite the rapid influx of women into the paid labor force it remains true that in this culture men earn money and women rear children. While these norms may change in the future, they have not yet changed, and their persistence redounds to the detriment of those many women whose labor force participation is compromised by their childrearing responsibilities. Men and women may be created equal, but their eventual economic circumstances are indisputably disparate. Alimony has a small but crucial role to play in remedying this disparity.

Although the major proponents of the divorce reform legislation of the 1970's believed that women's newly enhanced labor force opportunities would rapidly make alimony an anachronism, the empirical work of the past decade entirely refutes this optimistic projection. As this empirical data is assembled, a groundswell of support for the revival of alimony is beginning. To date, however, little attention has been paid to the theoretical underpinnings of the doctrine. I believe that significant theoretical work is essential if alimony is to be "repackaged" as a logically and politically acceptable doctrine. This work is a first step toward articulating the often murky premises upon which alimony is founded and identifying the barriers which confront those who would revive it.

Part II briefly describes the economic circumstances of divorced women in contemporary America. Part III undertakes an historical analysis of the legal rules underlying the practice of awarding alimony. This historical review argues that in American law, religiously based notions of sin were transubstantiated, becoming the secular doctrine of "divorce for fault." At the height of the fault era, alimony functioned largely as a damage award, intended to make an innocent spouse whole.


5. A recent report pegs the wage paid to white female workers at 63% of that earned by white males. Black and Hispanic women fare worse. Figures for these groups are 56% of the white male rate for black women and 53% for Hispanic women. Nat'l Comm. on Pay Equity, Pay Equity: An Issue of Race, Ethnicity and Sex 1 (1987).


7. See, e.g., Desk Guide to the Uniform Marriage and Divorce Act 86 n.8 (BNA 1974). "When a woman can work . . . [she] shouldn't think that once married, she has an annuity for life." Id. (quoting Judge William Hogoboom of L.A. County).

8. See Weitzman, supra note 1, at 143-214.

9. See, e.g., Weitzman, supra note 1, at 143-83; J. Eekelarr & M. Maclean, Maintenance After Divorce 90-99 (1986); B. Bergmann, The Economic Emergence of Women 215-18 (1986).
Next, Part IV traces the erosion of this tort-based view of alimony, a process beginning at the close of World War I, and which ultimately led to the express abandonment of fault-based principles in the divorce law. Part V discusses the impact of no-fault divorce and its replacement of alimony's "make whole" function with the tantalizing view that divorce, now relabelled "dissolution," is most closely analogous to the termination of a business partnership. Finally, Part VI comments upon the deficiencies of both the make whole and partnership models of alimony and argues that a successful revitalization of the doctrine cannot occur without a concomitant revision of our attitude toward a role often central to the lives of women — childrearer. Until we abandon the view that childrearing is a private hobby; until we cease to treat those who engage in it as either self-indulgent or crippled, efforts to revive the institution of alimony run a great risk of failure.

II. ALIMONY IN CONTEMPORARY SOCIETY

In her pioneering study of the economic effects of divorce on women and children, Professor Lenore Weitzman concluded that the custodial mothers and children in her sample experienced a 73% decline in their standard of living when a divorce occurred. Other studies, using different samples and methodologies, have produced less dramatic figures, but there is general agreement among the empiricists that for white families — particularly middle class white families — divorce is frequently an economically devastating event, and a major contributor to the feminization of poverty and the impoverishment of children.

The data establishing the deleterious effects of divorce is quite generally believed and acknowledged; efforts to set a policy agenda to ame-
liorate these effects, however, are only beginning. To know that women and children suffer serious economic harm at divorce is important, but that knowledge does not, of itself, suggest where the additional resources which these women and their children so clearly need shall be found.

There seem to be four potential sources of income for divorced women and their children: (1) the mother's wages; (2) public funds; (3) the wages of a new husband/father on remarriage; and (4) interspousal transfers (alimony, property division and child support). Each of these, in fact, provides some resources to some post-divorce families. But the empirical data reveals severe and seemingly intractable problems in augmenting the first through third.

As to the first, a mother's wages must be earned in the depressed female wage market, where the average full-time white earner garners just 63% of the male wage. Since even the rosiest reports predict only slow progress in closing this gap, a sudden increase in mothers' wages seems an unlikely source of short term improvement in the condition of divorced women and their children.

A rapid rise in the level of public money available to divorced mothers and their children seems similarly remote. Although at least some of the major proponents of no-fault legislation apparently believed that public funds would be used to assist divorced women, the

14. See Nat'l Comm. on Pay Equity, supra note 5, at 1.
15. In fact, economist Nancy Barrett argues that the wage gap may increase in the near future. Barrett notes that the recession of the 1970's had its most pronounced impact on the high-wage male-dominated segments of the economy. Thus, while women's wages kept pace with inflation in the 1970's, men's fell behind, creating the appearance of a narrowing of the gap. Barrett speculates that lower oil prices will boost the goods sector of the economy (the male sector) and widen the pay gap in the near-term future. Barrett, supra note 4, at 133-34. Furthermore, single mothers may earn less than other female workers. While research failed to identify any study focusing expressly on the wages of single mothers, there is extensive data which shows that child care responsibilities compromise the ability of women to earn wages. S. Hewlett, A Lesser Life 70-100 (1986). Since most single mothers bear a very heavy child care burden, their wages may fall below the overall average for female workers. Id. at 61-69.
16. In the introduction to the Congressional Caucus on Women's Issues' recent report, Congresswoman Juanita Kreps concludes that "[a]s a result of . . . pay differentials, women are disproportionately poor and they seem destined to remain so." Kreps, Introduction, in The American Woman, supra note 4, at 27.
17. There is a fascinating bit of "lost history" here. Professor Robert Levy, who prepared the initial working document for the Special Committee on Divorce of the National Conference of Commissioners on Uniform State Laws (the body which promulgated the Uniform Marriage and Divorce Act) concluded in a seldom quoted section of his preliminary report that "sound solutions to the problem of the dependent, divorced spouse will ultimately be achieved, not by reform of divorce-property doctrines, but by careful expansion of a nation-wide social insurance system." R. Levy, Uniform Marriage and Divorce Legislation: A Preliminary Analysis, Study Prepared for the Special Committee on Divorce of the National
current administration has failed to fund even the most modest programs.\textsuperscript{18}

The third source, the wages of a new husband, is an appropriate consideration only if one concludes that the state of "being divorced" is a temporary one.\textsuperscript{19} But the empirical data reveals that this assumption is far too facile. While younger ex-wives do remarry in large numbers, most women who divorce after age forty never remarry and the experience of those who divorce in their thirties is distinctly mixed.\textsuperscript{20}

Thus, as new data confirms the intractable nature of the wage gap and the paucity of public resources available to divorced women, reform minded thinkers have begun to ponder the "ironic"\textsuperscript{21} step of calling for an increase in the level of payments passing between husband and wife at and after divorce.

Interspousal payments incident to divorce are of three kinds: alimony, child support, and property division. As will be explained, these seemingly distinct categories in fact frequently overlap.\textsuperscript{22} However, in the late 1960's and early 1970's — the period of the no-fault revolution — these categories were seen as distinct, and the balance among them was tipped strongly in favor of property division and against alimony.\textsuperscript{23}

Conference of Commissioners on Uniform State Laws 186. Concrete proposals for this necessary expansion were, however, deemed beyond the Commission's mandate. None were proffered.

Since the publication of Levy's report and the adoption of no-fault rules in all of the states, virtually nothing has been done to make public funds available to divorced mothers and their children. Some, of course, qualify for AFDC, and older wives can claim Social Security benefits based on their husbands' records if their marriages lasted ten years or more. \textit{See} 42 U.S.C. §§ 402(b)(1), (2)(1982). However, one would be hard put to classify either of these as a "careful expansion of a nation-wide social insurance system." \textit{See} Levy, \textit{supra}.

18. Consider, for example, the defunding of the Displaced Homemakers Network, an organization which provided career counseling and support to women seeking paid work after many years of unpaid work in their homes. \textit{See} Hewlett, \textit{supra} note 15, at 54 n.4.

19. It is clear from Weitzman's work that this is the attitude of many family law judges. \textit{See} Weitzman, \textit{supra} note 1, at 204.

20. Weitzman gives women in their 30's a 50% chance of remarriage and those over 40 only a 28% possibility. \textit{Id.} at 204. Cherlin regards these figures as overly gloomy, arguing that the skills and economic resources of the divorced woman affect her remarriage potential. Cherlin, \textit{supra} note 10, at 91.

21. The term is Weitzman's. Weitzman, \textit{supra} note 1, at 388.

22. See the Appendix, \textit{infra}.

23. For a discussion of this change, see \textit{infra} notes 328-36. It is harder to say what happened to child support. There has been a virtual explosion in the literature, and the resulting political response was the Child Support Enforcement Amendments of 1984, Pub. L. No. 98-378, 98 Stat. 1305, as codified at 42 U.S.C. § 651 et seq. (1983). However, the data needed to assess the real impact of this new interest in child support is only beginning to be collected. Although the Amendments themselves are more than four years old, the state implementing mechanisms have been in place a much shorter time, often too short to collect meaningful empirical data. \textit{See}, \textit{e.g.}, Mass. Child Support Guidelines,
The effects of this newly institutionalized hostility to alimony are extensively documented in Professor Weitzman's work.\textsuperscript{24} She has shown convincingly that the reformers' dream of substituting property division for alimony is fundamentally flawed. The average divorcing couple has far too little property to make division of it a realistic source of economic security for the future.\textsuperscript{25}

At the conclusion of her work, Professor Weitzman proposes a three pronged approach to augmenting the wife’s share of interspousal transfers at divorce. First, she advocates a broader view of “property” permitting the division of assets such as professional degrees;\textsuperscript{26} second, she argues for larger child support awards and better procedures for collecting the child support which is ordered;\textsuperscript{27} third, she proposes the resuscitation of the always rare, and now virtually extinct, institution of alimony.\textsuperscript{28}

Since the completion of Weitzman’s research, some progress has been made on the first two fronts. Litigation pressing for the inclusion in property divisions of formerly “nonproperty” assets has become voluminous and has met with some success.\textsuperscript{29} The ferment in the child support area has produced the Child Support Enforcement Amendments of 1984,\textsuperscript{30} and has spawned a variety of state efforts to implement them and to improve child support enforcement overall.\textsuperscript{31} On the alimony front, however, little seems to have been accomplished.

I believe that the movement to revive alimony is worthy of serious thought. Most families lack the professional degrees and investments

\textsuperscript{24}See WEITZMAN, supra note 1, at 143-83.

\textsuperscript{25}Weitzman’s ten year study of divorce in California revealed that the median gross value of the marital property being divided by divorcing couples was under $15,000. \textit{Id.} at 56, table 2. Furthermore, even among couples with more significant assets, the potential for awards which provide some financial security for the wife and children is apparently not being realized. \textit{See, e.g.}, Dullea, Women’s and Bar Groups Fault Divorce Law, N.Y. Times, Aug. 5, 1985, at Al, col. 4, at B5, col. 2.

\textsuperscript{26}WEITZMAN, supra note 1, at 110-42.

\textsuperscript{27}Id. at 262-322.

\textsuperscript{28}Id. at 388-91.

\textsuperscript{29}FOOTE, LEVY & SANDER, supra note 6, at 610-671. \textit{E.g.}, Woodworth v. Woodworth, 337 N.W.2d 332 (Mich. Ct. App. 1983) (fairness dictates that wife be compensated for husband’s law degree that resulted from concerted family investment).


\textsuperscript{31}The literature reporting these state efforts is just beginning to be published, and research failed to reveal any empirical studies completed to date. Discussion of the Amendments can be found in Sampson, Withholding from Earnings for Child Support: A Revolution in Enforcement (Pay Me Now or Pay Me Now), 49 TEX. B.J. 544 (1986); Note, Kansas Enacts New Provisions for Child Support Enforcement — Mandatory Wage Withholding, 25 WASHBURN L.J. 91 (1985); Note, H.R. 4323 and H.R. 614 — Federal and State Answers to Economic Child Abuse? 11 U. DAYTON L. REV. 139 (1985).
which are necessary if property division is to have significant impact. Most families live on their incomes — the lion’s share of which is usually paid to the man. Less miserly and more effectively enforced child support awards are desperately needed, but these alone will cure only part of the problem. The woman who scales down her labor force participation in order to care for children never regains the pay, benefits, or seniority she foregoes.  

She may well find herself age fifty and unable to earn a living. Her husband who, by doing less parenting, was able to devote more of his efforts to the labor force, is rewarded for his choice. But unless some of the enhanced income he receives is shared with his wife at divorce, she is punished, often severely, for hers.

Believing that alimony was too readily abandoned by starry-eyed reformers is, however, far easier than finding a way to repackage that much vilified concept. Attempts to revive the institution face formidable obstacles. Some of these are practical. Many men, particularly members of racial minorities, simply earn too little to pay alimony. For those able to pay, however, a psychological barrier and a theoretical model combine to strongly disincline judges to award alimony.

The psychological barrier is derived from the view that what a person is paid for going to work each day is his, and should be taken from him and given to another only when a compelling basis for such a taking is established. The theoretical model is the no-fault reformers’ “partnership” model of divorce. The partnership model strongly discourages

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32. In her seminal work on American family law in the late twentieth century, Professor Mary Ann Glendon argues that:

the nature and degree of their labor force participation and compromises between work and child care mean that mothers end up with relatively lower earnings, less power and more vulnerability in divorce than fathers.

[W]omen continue to make trade-offs in job quality in order to be able to fulfill family roles such as caring for children. . . . The concentration of women in traditionally female occupations and part-time work are major causes of lower earnings and, ultimately, of lower retirement benefits. Pervasive sex-discrimination in the work place has certainly been an influential factor historically, but as it diminishes, the role of personal decisions about allocation of time and energy between work and family roles can be expected to become more visible.


33. All of the empiricists cite specific cases of formerly middle class mothers living in, or near, poverty after divorce. E.g., Hewlett, supra note 15, at 51-54.

34. Glendon makes this argument with reference to child support. See Glendon, supra note 32, at 71.

35. This mode of thought may be incorrect in a community property regime. However, the application of community property norms to property divisions at divorce has changed so dramatically in the past decade that some question the utility of continuing to recognize the community/common law dichotomy at all. Both common law and community property states seem to be rapidly converging upon an equitable distribution model. Glendon, supra note 32, at 62-64. For a discussion of equitable distribution, see infra notes 319-33 and accompanying text.
the awarding of alimony for the largely irrelevant reason that one business partner does not support the other after a partnership dissolves.\textsuperscript{36}

Whether these barriers can be surmounted remains, of course, to be seen. The deep-seated view that the labor force participant "earns," and the spouse caring for children does not, is close to the heart of the alimony controversy. But the matter of an appropriate model is also important, and it is possible that the proper theoretical model could itself help to dismantle the devaluation of parenting and the limited view of "earning" which have served to make alimony so unpalatable.

But alimony has its own long, complex and rarely analyzed history, a history which cannot help but influence and constrain the shape of the doctrine in the future. It is to that history that we now turn.

III. Divorce and Alimony Before World War I

A. Our Protestant Heritage and Divorce as Sin

It is impossible to understand alimony, and the correlative and sometimes overlapping doctrines of child support and property division, without viewing them in the context of divorce, for a society's attitude toward divorce in large measure dictates its view of the financial consequences which divorce should entail.\textsuperscript{37} The current American view of divorce as a "necessary evil" is radically different from the revulsion with which divorce was viewed at the turn of the century.\textsuperscript{38} On closer inspection, however, these attitudes can be seen as merely opposite points on a very old spectrum.

Historians point out that over the centuries there have been a number of societies which have held very liberal views of divorce, allowing couples to sever their legal connection merely by stating their intent to do so.\textsuperscript{39} Beginning in the fourth and fifth centuries, however,

\textsuperscript{36} For a critique of the partnership model, see infra notes 334-43 and accompanying text.

\textsuperscript{37} Professor Clark's observation concerning the relationship between marriage and divorce seems germane: "The view of divorce taken by any society is closely related to that society's ideal of marriage and family." H. Clark, The Law of Domestic Relations § 12.1, 405-06 (1988).

\textsuperscript{38} For a detailed history of the high water mark of American antidivorce sentiment, see generally W. O'Neil, Divorce in the Progressive Era (1967). For a discussion of the uneasy compromise between strict laws and loose practice in the middle of this century, see generally M. Rheinstein, Marriage Stability, Divorce, and the Law (1972).

\textsuperscript{39} Rheinstein points out that consent divorce became available by edict under the rule of King Frederick II of Prussia in 1756. Rheinstein, supra note 38, at 25-26. The Greek state of Athens also recognized divorce by mutual consent, and Jewish law allowed a man to put aside his wife at will. N. Blake, The Road to Reno: A History of Divorce in the United States 9-10 (1962). In England, casual polygamy, easy divorce and concubinage were prevalent until the eleventh century. L. Stone, The Family, Sex and Marriage in England 1500-1800 30 (1977).
A number of forces joined to press for greater formality in and centralized control of marriage. Some of these pressures came from the rapid regularization of private property law. In fact, nuptial rites arose in tandem with the practice of exchanging property at marriage, and a formal rite secured the property claims of the woman's offspring. In her historical and comparative work on family law, Professor Mary Ann Glendon describes this linkage:

In cultures where marriage is simply the decision of the partners to live together and raise common children, and involves no exchange of property, it tends to be dissolved simply by desertion and separation. . . . The emphasis on procedures for formalization and dissolution seems to vary with the importance of rank and property.

An increasingly formal law of property was not, however, the sole impetus behind the new formalities surrounding marriage. A second great force pressing for formal marriage was the early Catholic Church. In the fourth century, St. Ambrose had argued that marriage was a sacrament, and, thus, an event of great religious significance. The doctrine of marriage as a sacrament, and the related rule that the sacramental bond could not be dissolved during the lives of the spouses, were also urged by St. Augustine. These doctrines were far from popular. Although the Roman Empire was nominally Christian as early as 285 A.D., the first measures limiting divorce by consent were not enacted until 542. Moreover, these were so universally disliked that in 566 Emperor Justinus II repealed them. It was not until the reign of Charlemagne in the ninth century that civil institutions began to enforce the Church's rule of indissolubility.

Outside the Roman Empire, in those areas where Roman influence had weakened by the fifth century, the Church embarked on a strenuous campaign to solidify its authority and to carve out its own sphere of influence in the face of the newly forming western European states. One manifestation of the Church's efforts was its claim of exclusive jurisdiction over a number of significant matters, among them succession to property at death, all matters affecting Church land, all matters concerning the clergy (civil and criminal) and marriage. Only with re-

41. Glendon, supra note 40, at 305; Stone, supra note 39, at 87-91.
42. Glendon, supra note 40, at 306; see also Stone, supra note 39, at 30-41 and 85-93.
43. Glendon, supra note 40, at 309.
44. Id.
45. This marks the beginning of the reign of Constantine. Id. at 307.
46. See Rheinstein, supra note 38, at 16.
47. Id.
49. Glendon, supra note 40, at 308.
50. Id. at 311.
gard to marriage was the Church’s claim of sole authority ultimately successful.

Prior to the fifth century, most societies treated marriage either as a private or a religious matter. Its forms were not prescribed by law; instead, the law simply acknowledged social custom.\textsuperscript{51} In asserting its right to regulate and control marriage, then, the early Church was not confronted with the need to supplant civil authority. Instead, it merely absorbed a previously unregulated field.\textsuperscript{52} This is not meant to suggest that the Church’s success in asserting its authority over marriage did not have important consequences: clearly it did. First, it gave the Church a role in the formation of marriages, and, thus, some voice in what was, among the propertied classes, an important economic transaction.\textsuperscript{53} Second, it provided the Church with a source of revenue.\textsuperscript{54} Both results were of considerable value at this critical period in the Church’s growth.

As the Church’s authority to regulate marriage became widely accepted, the doctrines of marriage as sacrament and of indissoluble marriage became prevalent. By the tenth century, the areas which now comprise France and Germany had adopted the Church’s views, and England soon joined the fold.\textsuperscript{55} Slowly, divorce by consent was eliminated in favor of the rule of indissolubility, and with this shift a number of problems which had previously been solved by divorce began to fester.

In Roman times, and in England prior to the eleventh century, a man whose wife proved barren was entitled to divorce her.\textsuperscript{56} Adultery, too, constituted a cause for divorce.\textsuperscript{57} Thus, either with his wife’s consent or against her will, a man who found that the continuation of his lineage was jeopardized (whether because his wife was barren or because she was an adulteress)\textsuperscript{58} might terminate his marriage and enter into a new one which, he hoped, would produce a male heir. Indissolubility, by barring divorce, whether by consent or for cause, put an end to this practice. It did not, however, put an end to the pressures which various property transfer systems, particularly primogeniture, exerted

\textsuperscript{51} Id.  
\textsuperscript{52} In matters like succession to property at death, where a body of civil rules was already forming, the Church’s claim of exclusive jurisdiction failed. Id.  
\textsuperscript{53} Stone states: “Marriage was for centuries one of the most common mechanisms for the transfer and redistribution of property and capital, inevitably second to direct inheritance in the male line, but leaving purchase and sale a very poor third.” Stone, supra note 39, at 22 (footnote omitted).  
\textsuperscript{54} GLENDON, supra note 40, at 311.  
\textsuperscript{55} Id.  
\textsuperscript{56} Id. at 306.  
\textsuperscript{57} RHEINSTEIN, supra note 38, at 16.  
\textsuperscript{58} Adultery of the wife would jeopardize the lineage by casting doubt on the legitimacy of the putative heir.
upon men and women alike to produce legitimate male children.\textsuperscript{59} The Church's response to these pressures was not to relax the doctrine of indissolubility, but rather to establish a set of technical rules governing the validity of marriage.

In a society where marriages begin and end whenever the two spouses see fit, there is little need for an elaborate set of rules to identify the valid marriage. With the acceptance of the doctrine of indissolubility, however, the consequences of entering into a marriage became enormous, and a method for distinguishing the valid marriage from all other arrangements became essential. The Catholic Church, through canon law, devised such a method.

Professor Rheinstein argues that, at least in the beginning, the Church's rules for identifying a valid marriage were a matter of "intrinsic logic."\textsuperscript{60} Whether this was, in fact, the case remains unclear; but that the rules soon became an object of abuse and manipulation is extensively documented.\textsuperscript{61} Spouses who seemed to all observers to have entered into a valid marriage might approach the ecclesiastical courts\textsuperscript{62} and, pointing to some defect recognized by the canon law,\textsuperscript{63} might ask these authorities to declare that their marriage had never been validly concluded. If the authorities agreed, they would declare the marriage void \textit{ab initio},\textsuperscript{64} with the result that the two parties were as free to marry

\begin{itemize}
  \item \textsuperscript{59} Stone, \textit{supra} note 39, at 87-88.
  \item \textsuperscript{60} Rheinstein states:
    
    Probably the development of such rules was due more to the necessity of intrinsic logic than to practical regard for human nature. When it became established that a marriage once concluded was to be indissoluble, it became necessary to work out clear criteria for determining whether or not a marriage had been concluded.
  
  Rheinstein, \textit{supra} note 38, at 20-21.
  \item \textsuperscript{61} See, e.g., Blake, \textit{supra} note 39, at 15-17.
  \item \textsuperscript{62} In the Middle Ages, the Catholic Church maintained a system of courts to administer the Canon Law. Their jurisdiction included questions arising out of the status of matrimony. In England, the Protestant Reformation resulted in a transfer of these courts' allegiance from Pope to King, but otherwise worked remarkably little change. The ecclesiastical courts retained their jurisdiction over marital issues until 1857. G. Radcliffe & G. Cross, \textit{The English Legal System} 227-39 (1978).
  \item \textsuperscript{63} For an informative, brief discussion of the enormous catalog of defects recognized by the ecclesiastical courts, see Blake, \textit{supra} note 39, at 15-17. Included in the invalid category were marriage to third cousins, marriage to a third cousin of one's grandparent, a marriage contracted after one spouse had formed the intention of marrying another, impotence, insanity, force and fraud. \textit{Id}.
  \item \textsuperscript{64} The correct term for the declaration of invalidity seems to be a matter of dispute. Blake and Professors Vernier and Hurlbut use the term "divortium a vinculo." See Vernier & Hurlbut, \textit{The Historical Background of Alimony Law and Its Present Statutory Structure,} 6 \textit{Law \& Contemp. Probs.} 197 (1939). While that phrase technically means divorce from the bonds of matrimony, Blake states that the canonists applied the term to declarations of invalidity. Blake, \textit{supra} note 39, at 14. Rheinstein, on the other hand, uses the term "divortium a vinculo" only to describe actions for absolute divorce of the kind unavailable under the canon law. See
\end{itemize}
as any other unwed man or woman.

The abuses associated with these declarations of invalidity persisted until the reforms ordered by the Council of Trent took effect in 1563.\textsuperscript{65} Professor Blake suggests that for those with the funds, the patience, and the inclination, a declaration of nullity could always be obtained.\textsuperscript{66}

For spouses who either did not want or could not obtain a declaration of nullity, there was an alternate remedy offered by the ecclesiastical courts. This was divortium a mensa et thoro, literally, “divorce from bed and board.” This divorce was actually not a divorce at all since the bonds of marriage remained intact after the decree was issued. The purpose of the divortium a mensa et thoro was not to pave the way for a subsequent valid marriage. Instead, couples seeking a decree a mensa wished to have the ecclesiastical authorities declare their right to live apart. Unlike declarations of invalidity, which were based upon technical defects in the formation of the marriage, divortium a mensa et thoro was considered appropriate when an innocent spouse wished to live apart from a sinful one. Thus, a wife who could demonstrate that her husband was a heretic or an apostate\textsuperscript{67} could have her petition for divortium a mensa et thoro granted, and could live apart from her husband, and avoid the contamination of his sinful conduct, while still being supported by him.\textsuperscript{68} As the body of divorces a mensa grew, a number of recurring grounds came to be recognized. These included apostasy, heresy and adultery, all dangers to the spiritual well-being of the innocent spouse; serious mistreatment, a physical danger; and desertion, which would leave a married woman destitute, and probably expose her to dangers both physical and spiritual.\textsuperscript{69}

\textsuperscript{\textbf{RHEINSTEIN, supra note 38, at 249. To avoid this confusion, the English phrase, “declaration of invalidity,” although awkward, is used here.}}\textsuperscript{65. BLAKE, supra note 39, at 16-21; GLENDON, supra note 40, at 314.}

\textsuperscript{\textbf{66. Blake states that: “it was notorious that wealthy husbands had little difficulty in putting away their wives and marrying other women.” BLAKE, supra note 39, at 17. King Louis VII of France and Queen Elizabeth of Aquitaine, for example, had their marriage annulled because they were related in the seventh degree of consanguinity. \textit{Id.} at 18.}}\textsuperscript{67. Id. at 14-15.}

\textsuperscript{\textbf{68. In fact, the motive for obtaining a decree a mensa was usually economic. At common law, a woman lost title to all of her personality at marriage, and any personal property she acquired during her marriage belonged to her husband. The husband did not take title to his wife’s realty, but he acquired use of it, and all rents and profits flowing from it belonged solely to him. 3 HOLDsworth, HISTORY OF ENGLISH LAW 526 (3d ed. 1923). In return for these rights, the husband became obligated to provide for the support of his wife throughout the marriage. If the parties separated, the husband retained the wife’s property, and she generally had to resort to a divortium a mensa to enforce his support obligations. See generally, Vernier & Hurlbut, supra note 64.}}\textsuperscript{68. Id. at 14-15.}

\textsuperscript{\textbf{69. At common law, a married woman had no money or property. If her husband ceased to support her, she had no resources available for her own support. This would, of course, endanger her physical well-being and might force her to}}
At the dawn of the Protestant Reformation, then, the Catholic tribunals had two quite dissimilar remedies available to dissatisfied spouses. If a technical defect in the parties' marriage could be discovered, the marriage might be declared invalid, leaving the parties as free to marry as any other unwed persons. Once a valid marriage was effected, however, only the limited remedy of *divortium a mensa et thoro* could be granted by a court system which embraced the doctrine of indissolubility.

The Protestant reformers' disagreements with Catholic theology covered a broad spectrum which included fundamental objections to the Church's views on marriage and divorce. The Catholic Church of 1517 viewed marriage as a necessary concession to human frailty. Perpetual virginity (the state required of the clergy) was far holier and, thus, preferable. In the Church's view, sexuality, even when confined within the bounds of an indissoluble, monogamous union had a vaguely sinful character. The reformers redefined marriage, taking two seemingly contradictory steps simultaneously. First, they denied that marriage was a sacrament; on the contrary, they claimed it was a purely secular institution. At the same time, the reformers urged that marriage was a positive and virtuous state, in fact preferable to perpetual virginity. Thus, although in Protestant theology marriage was not a sacrament, it was sanctified. "Holy matrimony" was a constant theme of sixteenth century Protestant preaching.

Strangely enough, this new emphasis on marriage as a holy state coincided with the recognition of absolute divorce. Unlike the Catholic turn to prostitution, thus endangering her soul. For a much later expression of a court's fear that abandoned wives might "turn over to the charity of friends" or "turn out to prostitution and starvation," see *Bauman v. Bauman*, 18 Ark. 320, 328 (1857).

70. It was in 1517 that Martin Luther nailed his 95 Theses to the door of All Saints Church in Wittenberg signalling the commencement of the Protestant Reformation. *Encyclopedia Britannica* 190 (15th ed. 1980).

71. St. Augustine had preached that intercourse between spouses could be unlawful if its purpose was other than procreation. According to Stone: "Intercourse to avoid fornication was defined as a venial sin, and intercourse to satisfy lust or to enhance pleasure a mortal sin." *Stone*, *supra* note 39, at 624.

72. *Glendon*, *supra* note 40, at 316. With remarkable prescience, Luther contended that divorce "should be left to the lawyers and made subject to the secular government." *Blake*, *supra* note 39, at 22-23.


74. In his remarkable book, historian Lawrence Stone suggests an explanation for this simultaneous exaltation of marriage and recognition of divorce. Before the sixteenth century, Stone argues, the marital relationship was not a particularly important one. As Stone describes it:

relations within the nuclear family, between husband and wife and parents and children, were not much closer than those with neighbours, with relatives, or with 'friends'. ... the association in marriage was only one of many social relationships. ... It was also very short-lived, being frequently dis-
lic Church, the reformers conceded that a validly formed marriage could be terminated during the lives of the spouses. Thus, in a single stroke, the reformers secularized, exalted and made terminable the Catholic Church's sacramental and indissoluble marriage.

As the new doctrine of terminable marriage began to be disseminated, a number of fundamental questions had to be resolved. A key issue was the matter of _when_ a marriage might terminate. Was it to be dissolved by the mutual consent of the spouses as had been the case in many cultures before Catholic dogma took hold? The reformers, particularly Luther, were quick to answer this question in the negative. Divorce, Luther argued, was permissible only in accordance with the sacred scripture, that is, when one spouse was guilty of adultery, or had deserted the other. As Professor Glendon states:

> [a]lthough Luther and others had claimed that marriage was a proper subject for the civil courts and not subject to exclusive ecclesiastical control, they little dreamed that marriage would one day be regulated by the State according to other than Christian principles. While the

solved by the death of husband or wife. . . . So far as the individual members were concerned, it was neither very durable, nor emotionally or sexually very demanding. The closest analogy to a sixteenth-century home is a bird's nest.

STONE, _supra_ note 39, at 5-7. Thus, pre-sixteenth century spouses expected little of their marriages, and, if Stone is correct, little is exactly what they got.

In the sixteenth and seventeenth centuries, however, enormous changes took place both in the structure of the family, and in the functions it performed. The nuclear family of husband, wife and children began to separate from the larger kinship group which had overshadowed it. and, simultaneously, the emotional bonding of this new family changed, from a set of loose, distant relationships to a relationship of increasing emotional intensity. _Id._ at 123. To the family historians, these changes are both so pronounced and so critical, that, as Stone concludes, the "new emphasis on the home and on domestic virtues . . . was perhaps . . . the most far-reaching consequence of the [Protestant] Reformation in England." _Id._ at 141. In this new "companionate marriage," spouses came to expect more from each other than the production of children. _Id._ at 325-404. The Holy Matrimony of the Protestant clergy was supposed to be a union of two loving and mutually supportive companions. Obviously, this standard was not always met. Stone concludes, in fact, that these "profound changes in domestic relationships . . . [produced] very severe stresses — perhaps even a major crisis" in the institution of marriage. _Id._ at 404. Although the very high adult mortality rate of the sixteenth through eighteenth centuries meant that many of these stressful marriages did not last very many years, Stone speculates that some "institutional escape hatch" from companionate marriage was essential. _Id._ at 56. In recognizing divorce while eulogizing marriage, the Protestants merely provided that escape hatch.

75. Glendon cautions that the practical significance of this step should not be overestimated. Although the Protestants recognized absolute divorce, they rejected the canon law's welter of rules on the validity of marriages. In substituting divorce for what had, in essence, been a liberal system of annulments, the Protestants changed mechanisms without increasing the number of marriages dissolved. GLENDON, _supra_ note 40, at 317.

76. BLAKE, _supra_ note 39, at 23.
reformers held that marriage was not a sacrament, they thought that secular regulations would conform to Christian teaching. Christian teaching was of course reinterpreted by them to permit divorce as a punishment for grave violation of marital duties. . . . 77

Thus, in accepting absolute divorce, the reformers took a bold new step. In taking that step, however, they dragged along much of the practice and theory associated with the canon law institution of divorcium a mensa et thoro. In the Protestant view, while a valid marriage was dissolvable, 78 it was dissolvable only in the presence of gravely sinful conduct. The divorce of the Protestant Reformation was a divorce founded upon sin.

B. Sin and the Secular Society

The marriage laws and customs brought to the New World by the English settlers varied markedly from colony to colony. Colonies like Virginia, which had a strong Anglican tradition, did not recognize absolute divorce. 79 Other colonies, particularly those in New England, followed the reformist teachings and held that marriage was both secular and terminable. 80 As in Europe, however, even where divorce was allowed, clear proof that one spouse was guilty of seriously sinful conduct was required. 81

77. GLENDON, supra note 40, at 316 (emphasis supplied; footnote omitted).
78. Like divorce a mensa, the absolute divorce of the Reformation freed an innocent spouse from the threat of contamination posed by a sinful one. With the Protestant emphasis on marital felicity, however, it was also necessary to free the innocent spouse from the bonds of her marriage in order that she might find domestic felicity elsewhere. The guilty spouse deserved no such treatment. Many divorce laws extended the right of remarriage to the innocent spouse alone. See Note, Interlocutory Decrees of Divorce, 56 COLUM. L. REV. 228 (1956).
79. While the views of the Protestant reformers gained wide acceptance in much of Western Europe, England, under Henry VIII, opposed the teachings of Calvin and Luther. Even after his own marital difficulties forced Henry to break with the Catholic Church, the new Church of England continued to apply Catholic canon law, including the doctrine of indissolubility, to marriage. BLAKE, supra note 39, at 26.
80. CLARK, supra note 37, § 12.1, at 408.
81. RHEINSTEIN, supra note 38, at 51. Rheinstein described the situation as follows:

[All] those grounds of divorce which were enumerated in the statutes of a significant number of jurisdictions were forms of marital misconduct, as they were stated by Martin Luther and his successors in their interpretations of the New Testament. Divorce was regarded as repudiation of a guilty spouse by the innocent and as punishment for misconduct.
In the many colonies where church and state were overlapping institutions, this link between divorce and sin seemed not only proper but self-evident. As their troubles with the absentee government in England grew, however, the colonies developed common secular goals which leavened their religious differences. Within each colony, the need to resist the mounting intrusions of the British Parliament caused the local government to grow both stronger and more secular. Ultimately, of course, a revolution and a new national government converted the colonies into states, bound together by a federal Constitution. Interestingly enough, this Constitution did not require disestablishment. The move toward secularization was, however, well underway by 1789. Within a half century, it would be complete.

In retrospect, it seems incredible that the secularization of American law should have left the religiously based rules of divorce essentially intact. Yet, for nearly one hundred and fifty years after the demise of the last established church, American law continued to permit divorce only upon a showing of grievous marital wrong, the secular equivalent of sin. Secularization did not change the rules of divorce, it simply provided new rationales for the rules already in effect. As Professor Rheinstein explains it:

[i]n the secularized world it became necessary to support the tradition alist view of divorce by secular arguments. Even if monogamous marriage and the family grounded upon it were not divinely established institutions, their continued maintenance would be required as the basis of society, and their integrity was considered to be endangered by the possibility of easy divorce.

Id. at 51-52.


84. E. Smith, Religious Liberty in the United States 246-51 (1972); See also A. Stokes & L. Pfeffer, Church and State in the United States 83-103 (1964).


86. The first amendment left government involvement in religion to the States. In fact, "the Constitution contained no prohibition against individual state religious establishments; indeed — some states that ratified the Constitution had such religious establishments at the time of ratification, some of which continued to exist even after ratification of the First Amendment until they were ended by the states themselves. . . ." R. Cord, Separation of Church and State 14 (1982).


87. Massachussetts was the last state to disestablish, in 1833. L. Levy, The Establishment Clause: Religion and the First Amendment 38 (1986).

88. Rheinstein, supra note 38, at 41 (emphasis added).
The new tenet of faith requiring permanent marriage was, then, the secular notion that marriage and the nuclear family are the pillars upon which civilization rests. Under this view, human civilization has always drawn its sustenance from the nuclear family, which is the atomic particle of society. If it is split, cataclysm follows. To those who hold this view, any threat to the integrity of the nuclear family poses a profound danger to human civilization as a whole.

Scores of appellate decisions spanning nearly a century testify to the impact of the creed of the "immutable family" on the American judiciary. The early cases cite the need to surround "the marriage relation... with every safeguard," and well into the twentieth century, the courts proclaimed a "public policy favoring the marriage relation and moral wholesomeness of same." Marriage, said the courts, is "beneficial to the public [interest]; each divorce prejudicial." The permanency of marriage and the home were viewed as essential to the stability of government and civilization.

This abiding faith in the rectitude of indissoluble marriage was to waiver in the changed moral atmosphere which followed World War I, but the belief that the nuclear family is the linchpin of civilized society persists to this day.

That a belief in the essentiality of the nuclear family has had an enormous impact upon the shape of American divorce law seems beyond dispute. In a system committed (however uneasily) to separate roles for religion and government, it has permitted the clothing of a set of religious rules in secular trappings, and has thus allowed those rules to coexist in apparent harmony with the dictates of the first amendment. The myth of the immutable family has served as a secular society's validation of the restrictive and punitive divorce laws of the Protestant Reformation. By converting the religious concept of sin to the secular notion of fault, the myth also — though perhaps acciden-

91. Hawley v. Hawley, 101 Or. 649, 653, 199 P. 589, 590 (1921) (quoting J. BISHOP ON MARRIAGE, DIVORCE AND SEPARATION (1891)).
92. See, e.g., Lazarczyk v. Lazarczyk, 122 Misc. 536, 538, 203 N.Y.S. 291, 293 (Sup.Ct.Eq.1924) (court denied annulment to underage bride stating "the home and the family are the very basis upon which our civilization rests"). See also Perry v. Perry, 199 Iowa 685, 690, 202 N.W. 572, 574 (1925) (in reviewing trial court order granting a divorce, the court emphasized society's interest in permanency and stability of marriage); De Vuist v. De Vuist, 228 Mich. 454, 199 N.W. 229 (1924).
94. Rheinstein notes that sin and myth share an important common feature: they escape all requirements of logical justification. Rheinstein states: "[r]eligious faith does not need evidence. A tenet of faith cannot and need not be proved. Its force is beyond and above reason. So, too, is a secular faith held as a basic world view." RHEINSTEIN, supra note 38, at 253-54.
tally — produced another far-reaching result. Under the influence of fault doctrine, American divorce became a civil remedy modeled upon the law of tort.

C. The American Model: Divorce as Tort

When a court fashions an order, it compares the facts presented to it by the litigants with its own theoretical model of a “right” result. The goal of the order is to alter the facts in such a way that the new situation of the parties better conforms to this theoretically “right” result. In granting divorce petitions, ordering alimony and setting levels of child support, family law judges continually apply their own theoretical models of “right” results, however unconscious and poorly articulated these models may be. In America, the judicial model of a “right” result in divorce cases was for centuries heavily influenced by the fault theory of divorce, our legacy from the Protestant Reformation.95

When the English ecclesiastical courts were presented with petitions for divorce a mensa, their task was to determine if one spouse was guilty of seriously sinful conduct.96 If such conduct was found, the divorce would be granted, not only to protect the innocent spouse, but also, perhaps, to punish the guilty one.97 In America, as secular laws supplanted the religious rules, fault replaced sin, and divorce was deemed appropriate if one spouse was guilty of a marital offense, defined now by the secular statutes rather than by the law of God.98

In shifting from sin to fault, American divorce laws attempted to move away from their ecclesiastical origins. As they did so, however, they unconsciously continued a process which had begun in the canon law courts. They defined the consequences of divorce and structured the defenses to it in such a way as to bring the law of divorce parallel to another body of law based upon fault, the law of tort.99 Professor Clark

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95. This statement is not meant to suggest that fault concepts are dead. Despite the universal adoption of no-fault divorce rules, at least twenty states still authorize the commencement of divorce actions based on fault grounds. These are Alabama, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Maine, Massachusetts, Mississippi, Missouri, New Hampshire, North Dakota, Pennsylvania, Rhode Island, South Dakota, Tennessee, Virginia and Wyoming. Freed & Walker, Family Law in the Fifty States: An Overview, 20 Fam. L.Q. 461-62, table 1 (1987). In addition, at least eleven states and the District of Columbia allow their courts to consider the fault of the parties in setting alimony and in dividing marital property, even when the divorce is granted on a no-fault ground (Connecticut, Florida, Kentucky, Michigan, Missouri, New Hampshire, North Dakota, Pennsylvania, Rhode Island, South Dakota and Tennessee). Id. at 494-95. Although the importance of fault notions has receded, the fault concept has not been abandoned. 96. This was originally limited to proof of adultery, spiritual adultery or cruelty.Blake, supra note 39, at 14-15.
97. Rheinstein, supra note 38, at 52.
98. Clark, supra note 37, § 12.1, at 408.
99. Clark argues that the existence of defenses such as condonation and
states that "[t]he divorce decree . . . came to resemble a tort judgment, both being granted for the fault of the defendant causing harm to the plaintiff, and both being denied where the plaintiff either consented or was himself at fault."\textsuperscript{100}

This tort model of divorce is reflected in the language of numerous appellate decisions. In a case decided in 1894, for example, the Indiana Supreme Court held that in order for divorce to be appropriate: "there must be found an injured party and a guilty party."\textsuperscript{101}

The Tennessee Supreme Court took the idea further:

[d]ivorce . . . is not a matter to be worked out for the mutual accommodation of the parties in whatever manner they may desire, or in whatever manner the Court may deem to be fair and just under the circumstances. It is conceived as a remedy for the innocent against the guilty.\textsuperscript{102}

In case after case, divorce is portrayed as an action for redress brought by an innocent victim against a wrongdoer. This model is, of course, a logical successor to both the sin-based divorce \textit{a mensa} of the ecclesiastical courts and the restrictive absolute divorce of the Protestant Reformation. Both of these earlier forms required a showing of wrongdoing by one spouse. However, they were to prove insufficient as models for American secular divorce, for the American courts faced issues which had no parallels in the prior practice.

When an ecclesiastical court granted a petition for divorce \textit{a mensa}, only a single ancillary issue arose. If the successful petitioner were the wife, she would (almost without exception) request that in addition to granting her petition for divorce, the court also order her husband to make periodic payments to her for her support.\textsuperscript{103} As Professor Clark notes, this was an entirely logical request.\textsuperscript{104} The divorce \textit{a mensa} did not terminate the parties' marriage, and, as Professors Vernier and Hurlbut point out, it did not revest in the wife the property interest she had lost as a result of the marriage.\textsuperscript{105} The property remained the husband's, the marriage remained intact, and the husband's support obligation, the quid pro quo for the property transferred to him by the wife,\textsuperscript{106} remained in force.

recrimination reflects "a carry over of attitudes from tort law." CLARK, supra note 37, § 12.1, at 408.

100. Id. at 409.


103. See supra note 56.

104. CLARK, supra note 37, § 16.1, at 620.

105. See Vernier and Hurlbut, supra note 64, at 198.

106. Id. Vernier suggests that the level of the periodic payments which the
In applying their new secular divorce statutes, the American courts also received ancillary requests for support orders. These requests arose, however, in a context quite different from that which had obtained in the canon law courts, for the American courts granted absolute divorces.\(^{107}\) Unlike the decree \emph{a mensa}, a decree of absolute divorce terminated the parties' marriage completely and permanently, leaving the ex-spouses free to remarry.\(^{108}\) This fundamental change in the effect of the divorce decree raises an important and troubling question. If, after a divorce \emph{a mensa}, it was appropriate for a husband to continue to support his wife because their marriage (and, thus, his support obligation) survived the decree, what was the justification for a continued duty of support after an absolute divorce?\(^2\)

Professor Clark argues that it is illogical to award alimony in conjunction with a decree of absolute divorce. He states that:

\(\text{[w]hen the English institution of alimony, which served the plain and intelligible purpose of providing support for wives living apart from their husbands, was utilized in America in suits for absolute divorce . . . its purpose became less clear. As a result of absolute divorce the marriage is entirely dissolved. It is harder to justify imposing on the ex-husband a continuing duty to support his wife than after a divorce \emph{a mensa}, which does not dissolve the marriage. This difficulty is not obviated by labelling alimony a "substitute" for the wife's right to support. Why should there be such a substitute? Would it not be more logical to say that when the marriage is dissolved all rights and duties based upon it end?}\(^{109}\)

In fact, at least one state seems to have taken the position Clark advocates. Courts in North Carolina have held that alimony is appropriate in conjunction with a decree \emph{a mensa}, but cannot be awarded when the decree is one of absolute divorce.\(^{110}\)

\(^{107}\) Not all states provided for absolute divorce during the eighteenth and nineteenth centuries. In fact, as late as 1931, the state of South Carolina still did not authorize its courts to grant absolute divorces. C. Vernier, \textit{II American Family Laws} 4-5 (1931). A number of states provided for both absolute divorce and divorce \emph{a mensa} as late as 1927. \textit{Id.} at 342-43.

\(^{108}\) During the nineteenth and early twentieth centuries, the statutes of some states restricted the privilege of remarriage, granting it only to the innocent spouse. \textit{See supra} note 78. \textit{See also} Child's Case, 109 Mass. 406 (1872); People v. Prouty, 262 Ill. 218, 104 N.E. 387 (1914). These provisions were never particularly effective, however, since the guilty spouse could remarry in a state which did not recognize the bar imposed by the divorcing state. This subsequent remarriage would be valid even in the divorcing state. \textit{See Inhabitants of Medway v. Inhabitants of Needham}, 16 Mass. 157 (1819). By 1920, most of the states had amended their statutes, substituting a waiting period before remarriage for the former absolute bar. \textit{See}, e.g., \textit{In re} Eichler, 84 Misc. 667, 146 N.Y.S. 846 (Sur. Ct. 1914).

\(^{109}\) \textit{Clark, supra} note 37, \S 16.1, at 620.

\(^{110}\) \textit{See} Stanley v. Stanley, 226 N.C. 129, 37 S.E.2d 118 (1946). The states of
The problem of justifying alimony awards made in conjunction with decrees of absolute divorce was further complicated by the adoption of the so-called "Married Women's Property Acts." Beginning with Arkansas in 1835, the states rapidly enacted legislation removing many of the "disabilities" which the common law had imposed upon women at marriage.

By the close of the Civil War, legislation in all of the states provided that a wife no longer lost title to her personality or the right to the rents and profits of her realty as a consequence of marriage. In short, with the adoption of Married Women's legislation, a woman no longer traded her property for a right to lifetime support.

Absolute divorce and the Married Women's Acts fundamentally restructured the legal and economic rules governing marriage and divorce. The changes these statutes effected were monumental. Their practical impact, however, was astonishingly small. The appellate divorce cases of the middle and late nineteenth century rarely mention either set of statutes. If the courts of the period found these enactments significant, they chose to keep their reactions to themselves. As Professor Clark has noted, alimony continued to be awarded with little or no discussion of the fact that a husband's support obligation now extended beyond the duration of his marriage. Similarly, courts rarely mentioned the Married Women's Acts, much less used them...


In his 1931 compendium of family laws and the later 1938 supplement, Vernier lists three states, Delaware, North Carolina and Texas, which did not authorize alimony orders in conjunction with decrees of absolute divorce. In Delaware and Texas, transfers of property were used to provide support. The practice in North Carolina is unclear; Vernier described the statute as "fragmentary and obscure." Vernier & Hurlbut, supra note 105, at 260.

111. CLARK, supra note 37, §§ 7.2 & 16.1 at 289-90, 619-22.
112. The commonly accepted date for the first American married women's statute is 1839. See, e.g., L. Weitzman, The Marriage Contract 3 (1981); L. Friedman, A History of American Law 185 (1973). In his recent extensive re-examination of the early statutes, however, Chused has discovered one enactment (Arkansas's) which predates the 1839 Mississippi law. Chused, Married Women's Property Law 1800-1850, 71 Geo. L.J. 1359, 1361 (1983).
113. CLARK, supra note 37, § 7.1, at 286.
114. The Married Women's Acts were passed in three fairly distinct waves. The first set appeared in the 1840's and was primarily aimed at protecting property from the husband's creditors. The second wave established separate estates for married women. These statutes were enacted between 1840 and 1865. The final set established a married woman's right to her own wages. These were post-Civil War enactments. Chused, supra note 112, at 1998.
115. CLARK, supra note 37, § 16.1, at 620.
116. Professor Freidman has noted the dearth of contemporary response to the...
to justify a denial of alimony.

How could the divorce courts fail to respond to such seemingly drastic changes in the law? With alimony stripped of both its theoretical bases how did the courts justify its continuance? In one sense, the answers to these questions are simple, but the reasons behind them are complex. Simply stated, alimony continued because it had to. By the time the Married Women's Acts were passed, middle class wives had become an economically dependent class, and the children of the middle class were spending their childhood and adolescence at home or in school, not engaged in productive labor. It was this new and total economic dependence of wives and children that made it impossible for the courts to abandon the institution of alimony. Since

Acts either in the legislative reports or in the press: "the laws were hardly debated, or discussed at the time. Newspapers made almost no mention of them . . . great silence followed them." FREIDMAN, supra note 111, at 186 (footnote omitted).

117. In the previous sections, two theoretical bases for the awarding of alimony have been suggested, both deriving from ecclesiastical practice. First, if the parties' divorce was a divorce a mensa et thoro, their marriage survived the court's decree, and the obligations inherent in the married state continued. See supra notes 68-70 and accompanying text. Second, since at common law a divorced husband retained the property his wife had brought to the marriage, she retained her quid pro quo, i.e., her right to support. See supra notes 104-105 and accompanying text.

118. The problem of creating a new theoretical justification for alimony fell almost entirely to the courts. Prior to the adoption of no-fault divorce legislation in the 1970's, the usual alimony statute was entirely vague and general. VERNIER, supra note 105, at 283-85.

119. Divorce and alimony have always been shaped by middle class attitudes and middle class needs. See WEITZMAN, supra note 112, at 190-98. Even under the most restrictive legislation, divorce is available to the wealthy. In England prior to 1857, wealthy men and women obtained divorces by special acts of Parliament. See BLAKE, supra note 39, at 31-33. In America, a temporary residence in a state with more liberal divorce laws served the same purpose. Id. at 116-29. Among the poor, divorce, even in a fairly permissive society, has been a luxury few can afford. WEITZMAN, supra note 112, at 190-98.

120. This was a change from the pattern of the seventeenth and eighteenth centuries, when children might begin to help with tending animals and providing firewood at about age seven. STONE, supra note 39, at 471. See infra notes 132-41 and accompanying text.

121. Significant confusion arises from the fact that the term "alimony" has had at least two distinct meanings at different points in history. Prior to 1942, the term included both payments made for the support of a former spouse and payments made to support minor children. Today, this latter set of payments would be denominated "child support." However, this term does not seem to have come into general use until the enactment in 1942 of a series of amendments to the Internal Revenue Code. See 26 U.S.C. §§ 71(a)-(c) (1942). Because of these changes in the tax law, it became important to differentiate payments intended for the support of children from those intended for the support of an ex-spouse, and the term "child support" began to be widely used. Unfortunately, the previously all-inclusive term "alimony" continued to be used, but with a new and more restrictive meaning. It is now generally intended to refer only to payments made to an ex-spouse for his or her own support.
alimony could not be abandoned, it was continued, with new rationales provided for its existence. The fault model of divorce was to prove the perfect vehicle to this end.

1. Industrialization: The Domestic Wife and the Dependent Child

In the farming communities which dominated seventeenth and eighteenth century American society, the home was the center of production. All members of a farm family, men, women and children, had tasks to perform which were crucial to the family’s welfare. Although women’s tasks might be different from men’s, their contributions were essential, and were recognized as such. In the industrial economy of the succeeding century, however, this pattern was radically altered. As subsistence farming gave way to wage work, the family ceased to be the unit of economic productivity. In an industrial economy, each individual sells his or her own labor for whatever price the market offers. For the poorest members of society, this simply means a shift in the workplace, the factory replacing the home. All family members, including children, continue to work. But among the nineteenth century middle class, industrialization produced a profound change in the family’s function. While middle class men went out of the home to work, women and children stayed behind.

Professor William Chafe has stated that the nineteenth century marked the first time in the nation’s history that white middle class women “were not centrally involved in what the dominant culture defined as mainstream economic activities.” The retreat of white middle class women to their homes spawned a complex series of consequences which were felt throughout society. As industrialization made it possible for a working husband to support his family entirely by his own labor, attitudes about sex roles hardened. Income producing labor by a wife “cast a negative reflection on her husband’s ability as a provider,” while “a wife who enacted the culturally prescribed role of full-time homemaker constituted a visible badge of having achieved

122. Historian William Chafe states that “In the overwhelmingly agrarian society of colonial America, there was little opportunity for a leisure class existence or a polarization of labor between the sexes. Women from all classes were centrally involved in the mainstream economic activities of the community.” W. CHAFE, WOMAN AND EQUALITY: CHANGING PATTERNS IN AMERICAN CULTURE 17 (1977).
123. It is frequently said that the family changed from the unit of production to the unit of consumption. See e.g., Zainaldin, The Emergence of a Modern American Family Law: Child Custody, Adoption, and the Courts, 1796-1851, 73 NW. U.L. REV. 1038, 1051 (1979).
124. GLENDON, supra note 32, at 42-43.
125. STONE, supra note 39, at 472-74.
126. CHAFE, supra note 122, at 23.
127. Id. at 32.
Thus, the pressures on husbands and wives alike to have the wife assume a role of total economic dependence were enormous. The results of these pressures are clearly documented by the data collected in the census of 1900. By 1900, the census classified only 17% of all white females as gainfully employed, and even within this small group, Chafe suggests that most were recent immigrants.

The racial and class composition of the female labor force had a pronounced impact upon the wages and working conditions of female employees. A labor force which is composed almost entirely of non-whites and immigrants is bound to be subjected to conditions which would not be tolerated if the sisters and daughters of the white middle class were affected by them. Thus, the absence of white middle class women from the labor market allowed a set of seriously deleterious working conditions to exist. The conditions themselves became a factor reinforcing the absence of the white middle class, for a market which offered only depressed wages and health-threatening conditions was to be avoided not only by wives, but by middle class widows, divorcees and single women as well. In sum, then, the culturally sanctioned withdrawal of white middle class wives from the labor force both signalled and reinforced the withdrawal of all white middle class women. These women, whatever their marital status, became the dependents of wage earning males who alone had access to decent pay and conditions of employment.

Like women, children had important responsibilities in the agrarian households of the seventeenth and eighteenth centuries. Describing the English society of that period, Lawrence Stone states that "[f]or those slightly above the line of absolute destitution, the smallholders, small tenant farmers, cottagers and artisans, children were positive economic assets, primarily for their productive labour from the age of seven until their marriage...." Children guarded the livestock, collected the family's firewood and performed other essential tasks. Industrial economies, however, provide few such opportunities for productive labor by middle class children. As the home and the

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128. Id. at 22.
129. Id. at 23.
130. Id.
131. The 1900 census indicated that 41% of non-white females were gainfully employed. Id. (citing SMUTS, WOMEN AND WORK IN AMERICA). Thus, this was a labor force made up almost entirely of nonwhites and immigrants. See id.
132. For a description of the change in the female workforce in the decades immediately preceding the Civil War, see A. KESSLER-HARRIS, OUT TO WORK 45-72 (1982).
133. STONE, supra note 39, at 468.
134. Id. at 471.
135. There were, of course, ample opportunities for the exploitation of child labor, but working children were almost always members of the poorest families. Id. at 468-74. The depression of wages and deterioration of working conditions.
workplace separated, middle class children remained with their mothers, cut off from any means of contributing to the family's wealth.

For middle class children, as for their mothers, industrialization meant the full-time development of new roles. Before the mid-seventeenth century, childhood had not been perceived as a separate and special stage of life. Infants were considered a nuisance, and children who survived early childhood worked as miniature adults. In the two centuries preceding the Industrial Revolution, however, a new perception of childhood developed. Children became the focus of intense nurturance. Their dependence was accepted rather than resented, and the length of this dependence steadily increased. In the mid-eighteenth century, children began to be cared for by their parents through infancy and early childhood, becoming productive participants in the agrarian household at age seven. Gradually, their dependence extended to age fourteen, when they became apprentices or entered domestic service, and ultimately, dependence increased again to approximately twenty-one, the age of completion of formal education. With each of these changes, the economic burden carried by the family's sole wage earner increased. By 1900, middle class children, like their mothers, were consumers not producers, and they were entirely dependent upon their working fathers' income.

2. The Age of Dependence: Legal Response

The Industrial Revolution's radical alteration of intrafamilial economic relations could scarcely have passed unnoticed by the judiciary. Yet, the response of the divorce courts to these changes is particularly described above in connection with the predominantly nonwhite, non-native female workforce was replicated in the child labor market. In fact, at least in England, children were paid less and subjected to worse conditions than adult females. See id. at 472-73.

136. This is, of course, the central thesis of the foremost work on the history of the family. See generally P. Aries, Centuries of Childhood: A Social History of Family Life (1962).

137. Stone, supra note 39, at 471.

138. Id. at 472-73.

139. This had not been the pattern previously. Before the sixteenth century, all but the poorest classes had their infants "fostered out." This meant separation of the infant from the parents at birth. If the infant survived (and many did not) it would be returned to the parents at about age eighteen months. This practice continued in the prosperous classes until roughly 1750. Id. at 107.

140. Id. at 684.

141. Id. Apprenticeship, in which the young apprentice became a member of the master's household, was common from the sixteenth to mid-eighteenth centuries. Id. at 107, 363.

142. Id. at 684. There are, of course, no "bright lines" here. Apprenticeship did not suddenly cease, to be replaced by formal education, but Stone describes a gradual lengthening of the child's stay in his parents' home between about 1500 and 1750. Id.
difficult to identify. As Professor Clark has noted, the courts seem merely to have continued the ecclesiastical practice of awarding alimony without recognizing the very different economic world in which they now functioned.143 In fact, however, there may have been good reasons for the courts’ failure to change, for although the family had undergone a profound transformation, the alimony rules of ecclesiastical practice happened to correspond quite well to the needs of the mid-nineteenth century divorced family.

Why should rules developed in a society which barred absolute divorce and deprived married women of their property continue to function in nineteenth century industrial America? Any number of reasons could be suggested, but two seem to have special significance. First, despite their seemingly revolutionary content, the Married Women’s Acts had little practical impact. The economic position of the average wife was little better in mid-nineteenth century America than it had been in seventeenth century England.144 Second, changes in the child custody laws which occurred nearly simultaneously with the enactment of the Married Women’s legislation served to place most children of divorce in the custody of their mothers.145 In a world in which white males monopolized the market for decent jobs and wages, this fatherless family constituted an extraordinarily needy unit, probably quite as compelling as the female petitioner for divorce a mensa. It was to this new family constellation that the divorce courts responded by declining to change.

i. The Married Women’s Property Acts

It was the English common law which created and enforced the legal disabilities of married women.146 As Professor Friedman has noted, the rules delineating married women’s rights were designed by and intended primarily for the class of upper-income landowners.147 Although such a class existed in the United States,148 American law has always been more heavily influenced by the needs and aspirations of

143. CLARK, supra note 37, § 16.1, at 620.
144. Sweeping statements like this are always at least partially wrong. For the poor, the possibility of a wife’s producing an independent income (an opportunity much more generally available in an industrial society) might mean a significant improvement in the family’s lot. The statement in the text describes middle class wives.
145. See infra notes 157-63 and accompanying text.
146. There were no parallel rules in the civil code systems of continental Europe. See FOOTE, LEVY & SANDER, supra note 6, at 612-13.
147. FRIEDMAN, supra note 112, at 186. The common law was primarily geared toward the needs of the landed gentry. Id. at 179-86.
148. Id. at 185. The southern plantation owners comprised a class roughly similar to the English landed aristocracy. Friedman suggests that these southern planters were more readily able to adapt the English married women’s law to their needs than were most American subgroups. Id.
the middle class than has the law of England. For the American middle class family of the mid-nineteenth century, a system of laws which transferred a wife's property to her husband at marriage had little practical significance. Although the English marriage of the twelfth through seventeenth centuries may well have been a fundamentally economic transaction designed to aggregate the estates of two powerful families, the middle class marriage of mid-nineteenth century America rested upon quite different considerations. In an economy in which men work for wages and women stay at home tending the household and children, wives are prized for their domestic virtues, not for their fathers' estates. With the dowry system moribund, and with middle class women excluded from the workforce, it is difficult to see how middle class wives could bring any significant property to their marriages. If, as seems likely, middle class women had little or no property, it is easy to understand how a series of statutes which changed the rules governing this nonexistent property would provoke little public response.

Although the Acts gave a wife the power to hold property, they gave her no property to hold. The rules had changed, but the economic relations of middle class spouses had not. Thus, although hard evidence must await empirical documentation, nothing in the case law suggests that the Married Women's Property Acts had any significant impact on the economic relations within the American family. Both before and after the Acts the vast majority of middle class wives were entirely dependent upon their husbands for support.

149. Id. at 186.
150. See Stone, supra note 39, at 22.
151. Stone argues that this change was occurring in England as early as 1700: Mate selection was determined more by free choice than by parental decision and was based as much on expectations of lasting mutual affection as on calculations of an increase in money, status or power. Except in the highest aristocratic circles, the financial considerations of the dowry and the jointure became less decisive elements in marriage negotiations than the prospect of future personal happiness.

Id. at 56.
152. Id.
153. Chused, supra note 112, at 1403-04. Recent scholars argue persuasively that the first wave of Married Women's Property Acts was, at least in significant part, a reaction to the Panic of 1837. Giving a married woman separate property insulated that property from the husband's creditors. Id. Friedman agrees with this analysis, stating:

[t]he statutes spoke of rights of husband and wife, as if the issue was the intimate relations between the sexes. But the real point of the statutes was to rationalize more cold-blooded matters, such as the rights of a creditor to collect debts out of land owned by husbands, wives or both.

Friedman, supra note 112, at 186. While Chused ultimately concludes that the Acts "must therefore have been part of a larger evolution in the treatment of women by the law," neither he nor Friedman sees the Acts as having broad contemporary impact. See Chused, supra note 112, at 1404.
ii. The Law of Child Custody: Industrialization and the Best Interests of the Child

At common law, children, like wives, had a status strictly subordinate to that of the male head of the household. The father of the family was viewed as his children's natural guardian and protector. He was also the absolute owner of any goods they produced or services they rendered. A number of causes of action, available to fathers but not to mothers, recognized these rights. A father might, for example, bring a claim for damages if his daughter were seduced or his son enticed away. Both claims were founded on the notion that the father's right to the value of his children's services had been interfered with — on the one hand by his daughter's pregnancy and on the other by his son's departure.

Like the legal disabilities of married women, the law of paternal guardianship was brought to America from England. Again paralleling the Married Women's law, the reception given the rules of guardianship was less enthusiastic on this side of the Atlantic. As early as 1796, American courts were claiming that they might, in a proper case, deprive an unfit father of custody. It was not until the 1840's however (the same decade as the first wave of Married Women's Acts) that the rules favoring the father as guardian of his children were finally discarded.

In describing the emergence of modern laws on child custody, Professor Zainaldin notes two significant events which occurred during the 1840's. The first is the introduction of the now-famous "best interests of the child" standard. Though still in its early stages, this rule had begun to recognize the strong attachment of children — particularly young children — to their mothers. Paraphrasing the language of the courts during that decade, Zainaldin reports: "[i]t was said that nature implanted in the woman a domesticity, an affection and love for helpless infancy which no man could likely possess 'in an equal degree'."

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155. Blackstone, whose remarks about the legal unity of husbands and wives are still widely quoted (See 1 BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 442) (4th ed. 1899)) stated that mothers are "entitled to no power, but only to reverence and respect. . . ." Id. at 453.
156. See Foster, Relational Interests in the Family, 1982 Ill. L. Forum, 493, 497-505.
158. Zainaldin, supra note 123, at 1070. Zainaldin writes that: "[t]he decade of the 1840's . . . was far more than a continuation of an earlier trend. It marked the triumph of a cultural point of view, locking the framework of American child custody law to a modern paradigm of family relations." Id.
159. Id. at 1072.
160. Id. at 1073. This must have been a fairly recent implant. Describing the sixteenth century, Stone notes that "before the age of two infants were regarded
With this recognition of children's attachment to their mothers came a second shift — a reversal of the rule that fathers had a primary right to the custody of their children. Natural law was consulted to supply a rationale for this change. In a highly unusual opinion handed down in 1840, the New York Court for the Correction of Errors reached the conclusion that with the emergence of the modern state, fathers had lost their role as sovereigns. Stripped of this role, they had no stronger claim to the custody of their children than did the children's mothers.

Whatever the law of nature may have provided, it is quite clear that the practical effect of the many child custody decisions handed down during the 1840's was a greatly increased likelihood that a divorced wife would be named custodian of her children, particularly her youngest and most helpless children. The practical (as opposed to philosophical) reasons for this change are probably rooted in the same realignment of family roles which produced the economically dependent wife. With middle class children (or, at least, young middle class children) relegated to non-productive roles, fathers had lost all economic incentive for demanding custody. Furthermore, fathers who now spent long hours at a work place separate from the family home would find caring for a young child extremely difficult. Finally, a family structure which removed a father from his children while intensely bonding them to their mother would serve to make maternal custody seem — as in fact the courts felt it was — ordained by nature.

iii. The American Model: Divorce as a Tort

The decade of the 1840's produced two milestones of American family law: the Married Women's Acts and the "best interests of the child" standard. Although the underlying motives and practical impact of these new rules were markedly different, they had an additive effect which strongly influenced the structure and circumstances of the "broken" family of succeeding decades. It was to be a family in which the husband departed, leaving the wife and children in a state of near total economic helplessness. It is to this situation that the opinions of the

with some distaste as smelly and unformed little animals lacking the capacity to reason." STONE, supra note 39, at 106.

161. Zainaldin, supra note 123, at 1073.

162. See id., at 1070-71 (citing Mercen v. People ex rel Barry, 25 Wend. 65, 102-03 (N.Y. 1840)).

163. Mercen, 25 Wend. at 102-03.

164. In England, an identical development was taking place, and was embodied in a piece of legislation. In 1839, Parliament enacted Justice Talfour's Act (2 and 3 Vict. 54). The Act authorized the Court of Chancery to award the custody of children under the age of seven to their mothers. Zainaldin notes that boys of eleven and older were frequently placed in their father's custody. Zainaldin, supra note 123, at 1072-73.
late nineteenth and early twentieth century divorce courts were so often addressed.

iv. Divorce as Tort: A Rule of Damages

The previous sections of this Article have argued that by the latter half of the nineteenth century, the American divorce courts operated within a set of legal constraints which were fundamentally unlike those that had affected the ecclesiastical tribunals. The Married Women’s Acts and the “best interests of the child” rule had abolished or reversed crucial presumptions upon which the ecclesiastical rules of alimony had been founded. Despite these significant changes in the law, however, there was surprisingly little change in the economic circumstances of married women. The propertyless wife of the common law had simply been succeeded by the nineteenth-century housewife. The successor was, in her own way, as entirely cut off from any source of income as her predecessor had been; furthermore, she was more likely to have her children with her.

In the face, then, of changed rules but largely unchanged circumstances, the American divorce courts made a logical, if perhaps not totally conscious, choice. They retained the ecclesiastical practice of awarding alimony to divorced wives, and found in the fault model of divorce a new rationale for their actions.

If divorce is an adjudication of fault, one of its major functions must be to require a wrongdoer to compensate the party he has injured. Clearly, it would be antithetical to this purpose to allow the party at fault to derive a benefit from his wrong. When this goal — insuring that the wrongdoer does not profit from his misconduct — is applied to the divorce process, two rules emerge. First is the rule that when both spouses are guilty of misconduct they cannot be allowed to “benefit” from their acts by having their marriage terminated. This was the rationale behind the defense of recrimination, which was applied in most states until the 1960’s. In a legal system which viewed divorce solely as a remedy for innocent spouses, a marriage of two guilty spouses left neither entitled to a divorce. The second consequence of the courts’ desire to prevent wrongdoers from benefitting from their wrongs provided the needed justification for continuing the practice of awarding

165. See supra notes 95-108 and accompanying text.

166. Chafe concludes that, “[w]omen who were not middle class were expected to serve as a marginal, underpaid, and exploited part of the working class; those who were middle class, in contrast, were for the most part denied the opportunity for employment.” CHAFE, supra note 122, at 31.

167. See supra notes 157-63 and accompanying text.

168. In 1931, thirty-two states recognized the defense of recrimination. VERNIER, supra note 107, at 82-83. Writing in 1968, Clark noted the declining availability of this defense. H. CLARK, THE LAW OF DOMESTIC RELATIONS § 12.12, at 373-77 (1968).
alimony despite absolute divorce and the Married Women’s Acts. Under a fault model, if a husband were guilty of a marital offense, and if his wife sued for divorce, she, the innocent party, could have her petition granted and her marriage terminated completely and permanently. Professor Clark argues that this should, logically, also terminate the husband’s support obligation. However, if a court did terminate the husband’s duty to support his innocent wife merely because she had been granted an absolute divorce, it would, in effect, reward the wrongdoer for his wrong. The husband’s own misconduct would serve to free him from the burden of providing for his wife’s needs. Influenced by analogies to tort, and cognizant of the fact that there was simply no place in the labor force for a middle class woman, court after court seized upon the notion that terminating a guilty husband’s support obligation would amount to rewarding him for wrongdoing.

In some cases, the analogy to tort law is fairly explicit. In others, the courts suggest a contract analysis. In still others, reference is made to state statutes which supply rules which are sometimes analogous to tort and sometimes to contract. Even in those cases theoretically based upon

169. Clark, supra note 37, § 16.1, at 620.

170. See, e.g., Webber (“the husband entered upon an obligation which bound him to support his wife during the period of their joint lives, that by his own wrong he has forced her to sever the relation. . . .”); Webber v. Webber, 33 Cal.2d 153, 157, 199 P.2d 934, 937 (1948) (quoting Arnold v. Arnold, 76 Cal. App. 2d 877, 885, 174 P.2d 674, 682 (1946); Scheibe v. Scheibe, 57 Cal. App. 2d 336, 342, 134 P.2d 835, 839 (1943) (describing state statute which permitted an assessment against the husband as compensation for his severance of the relationship); Heard v. Heard, 116 Conn. 632, 636, 166 A. 67, 69 (1933) (“to hold that a defendant merely by voluntarily assuming a second matrimonial responsibility could, thereby, relieve himself [of] duties imposed upon him by law . . . would suggest an easy way to evade the obligation . . . and would be inconsistent with the settled policy of our law. . . .” (citing Wright v. Wright, 93 Conn. 296, 300, 105 A. 684, 686 (1919)); Rogers v. Rogers, 46 Ind. App. 506, 512; 89 N.E. 901, 903 (1909) (husband not relieved of support obligation of wife after divorce due to his marital offense); Isserman v. Isserman, 11 N.J. 106, 112, 93 A.2d 571, 575 (1952) (husband may not absolve himself of statutory duty of support through misconduct which brings about the dissolution of the marriage); Parmly v. Parmly, 16 N.J. Misc. 447, 451, 1 A.2d 646, 649 (1938) (husband cannot absolve himself of wife’s support obligation despite escape support obligation); See also Fickle v. Granger, 83 Ohio St. 335, 83 Ohio St. 527 (1910); Anderson v. Anderson, 104 Utah 104, 138 P.2d 253 (1943); Norma v. Norman, 88 W. Va. 640, 107 S.E. 407 (1921).

Compare G. v. G., 67 N.J. Eq. 30, 56 A. 736 (1903) (alimony denied because husband’s impotence, the ground for divorce, does not amount to fault).

171. See, e.g., Rice v. Rice, 256 Mich. 287, 239 N.E. 256 (1931) (husband must leave wife in the financial condition which would have obtained but for his misconduct).

172. See, e.g., Kelly v. Kelly, 183 Ky. 172, 180, 209 S.W. 335, 338 (1919) (one possible view of alimony is that it constitutes damages for breach of the marriage covenant).

173. In fact, the same statute is sometimes analogized to tort principles in one case and to contract rules in another. See, e.g., Schiebe v. Schiebe, 57 Cal. App. 2d
contract, however, the effect is exactly that described above. The courts required evidence of a breach of duty. Whether the duty was seen as an incident of the married state (and, consequently, its breach a tort) or as an obligation undertaken voluntarily by the decision to enter into marriage (making misconduct a breach of contract) really makes no difference. In either event, the breach is seen as injurious, and the injured party is entitled to the remedy of divorce.

Despite analogies to two different branches of the law, then, the American divorce courts of the early twentieth century were consistent in viewing divorce as a remedy for breach of duty. Their strenuous insistence upon the state's interest in marriage and the unalterable incidents of that status, as well as the tort-like defenses noted by Professor Clark make the analogy to tort seem the better fit. Under either theory, however, it is clear that courts hearing divorce

336, 134 P.2d 835 (1943); Arnold v. Arnold, 76 Cal. App. 2d 877, 174 P.2d 674 (1946). California permitted an allowance for the wife above and beyond her alimony award to compensate her for the wrong done by her husband. In Scheibe, this is characterized as a makewhole remedy. Scheibe, 57 Cal. App. 2d at 342, 134 P.2d at 840. In Arnold, the reference is to the husband's entering "upon an obligation which bound him to support his wife. . . ." Arnold, 76 Cal. App. 2d at 885, 174 P.2d at 681.

174. As Professor Grant Gilmore so persuasively demonstrated in his classic Death of Contract, contract was historically and is presently essentially a species of tort. G. Gilmore, Death of Contract 87 (1974). Just as tort recognizes and enforces certain fundamental social duties, the law of contract recognizes the subset of duties based upon agreement. Id. Although the theoretical separation of the two disciplines has resulted in the development of different sets of legal rules for each (e.g., different rules of damages; different statutes of limitation) their commonality is more significant than their divergence. The common heritage of tort and contract is particularly apparent in divorce cases, allowing one court to argue that "an award of permanent support . . . to a wife . . . [is] in the nature of compensation for the wrong done her and, in this sense, a penalty imposed upon the husband." (Loeb v. Loeb, 84 Cal. App. 2d 141, 146, 190 P.2d 246, 249 (1948)) and another to conclude that "whether the granting of permanent alimony be considered as damages for breach of the marriage covenant or the exercise of a sound judicial discretion . . . alimony awarded, should be so apportioned, as to secure to the wife, the same social standing, comforts, and luxuries of life, as she would have had, but for the enforced separation. . . ." Kelly v. Kelly, 183 Ky. 172, 180, 209 S.W. 335, 338 (1919). The different theories produce the same result.


177. Clark, supra note 37, § 12.1, at 409.

178. In a sense, the question whether a violation of a marital obligation is a tort or a breach of contract merely replicates the longstanding debate concerning the nature of the institution of marriage. If marriage is a contract, a violation of a marital duty would be a breach of that contract. If, alternatively, marriage is a legal status, then breach of the legally imposed obligations of that status would be
cases in the early decades of this century required evidence of a breach of duty by a wrongdoing spouse, and were much concerned that the wrongdoer not be allowed to use his own misconduct to evade his marital obligations.

The fault model, which was divorce's legacy from the Protestant Reformation, and which was strongly reinforced by the language of the divorce statutes, also influenced the judiciary when it ordered alimony payments. Particularly in the early part of this century, the appellate courts frequently announced formulas for computing alimony which directly restated tort and contract rules of damages. In Pederson

7. See supra note 110.
8. See supra notes 94-98 and accompanying text.
9. See supra notes 94-98 and accompanying text.
10. See supra note 110.
179. See supra notes 94-98 and accompanying text.
180. See supra note 110.

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Because this article focuses on the set of rules governing the awarding of alimony and the division of marital property, and because prior to the United States Supreme Court's decision in Orr v. Orr, 440 U.S. 268 (1979) many states awarded alimony only to wives, most of this discussion concerns divorces granted on account of the fault of the husband. In fact, however, the tort/contract model was formerly applied also to cases in which a guilty wife was divorced by an innocent husband.

At common law, if a wife were the guilty party in a divorce a mensa proceeding she was barred from claiming alimony. Several American courts adopted this common law rule. See, e.g., Jones v. Jones, 46 Ohio App. 97, 69 N.E.2d 69 (1945); Brown v. Brown, 198 Tenn. 600, 281 S.W.2d 492 (1955); Vernier & Hurlbut, supra note 64, at 197, 199. Others limited its applicability to divorces granted for a wife's adultery. See, e.g., Pederson v. Pederson, 88 Neb. 55, 128 N.W. 649 (1910); Dickerson v. Dickerson, 26 Neb. 328, 42 N.W. 9 (1889). Since, prior to the Married Women's Acts, a divorced wife did not retain the property she had brought to the marriage, the effect of a divorce granted for a wife's misconduct was to cut off the husband's support obligation while allowing him to retain the wife's property. Although this failed to compensate the husband for injuries to his feelings resulting from the wife's misconduct, it did allow him to retain the major economic benefits of his marriage.

With the shift to housewife marriage and the adoption of the Married Women's Property Acts, the issue of "damages" for an injured husband became more problematic. While some courts still relieved husbands of all responsibility for their guilty wives' support, e.g., Jones, 46 Ohio App. at 97, 69 N.E.2d at 69, it became impossible to allow an ex-husband to enjoy all of the economic benefits of marriage after the marriage's termination. An ex-wife simply could not be compelled to continue to provide domestic services. At this point, then, the contract/tort analogy breaks down, and one could argue that a guilty wife is allowed to escape her domestic responsibilities via her own misconduct. At the same time, with the development of the "best interests of the child" test and the increasing prevalence of maternal custody, it became equally impossible to deny guilty wives alimony, since that term included a sum intended for the support of the children. See supra note 110. Finally, even after the division of "alimony" into the two contemporary concepts of alimony and child support, many courts granted alimony to guilty wives in order to enable them to remain in the home to care for their children. See CLARK, supra note 37, § 16.4, at 642.
v. Pederson,\(^\text{181}\) for example, the Supreme Court of Nebraska held that a divorced wife "should not be placed in a worse condition financially than she was at the time of her marriage. . . ."\(^\text{182}\)

In Nelson v. Nelson,\(^\text{183}\) after an exceptionally thorough and accurate review of the ecclesiastical roots of alimony, the Missouri Supreme Court announced that permanent alimony:

is the allowance of such a sum of money in gross or in installments as will fairly and reasonably compensate [the wife] . . . for the loss of her support by the annulment of the marriage contract. In this limited sense at least it may be deemed an assessment of damages in her favor for breach of the contract by the husband.\(^\text{184}\)

And in a formulation which comes quite close to the infamous "style to which she is accustomed" standard,\(^\text{185}\) the Supreme Court of Kentucky held that:

the principle applying, whether the granting of permanent alimony be considered as damages for breach of the marriage covenant, or the exercise of a sound judicial discretion, in providing for the wife an allowance out of the husband's estate, is that the alimony awarded, should be so apportioned, as to secure to the wife the same social standing, comforts, and luxuries of life, as she would have had, but for the enforced separation. . . .\(^\text{186}\)

The rules were logical. In a legal system which viewed divorce as a remedy to be granted upon proof of marital misconduct, it seemed entirely appropriate to adopt as a rule of damages a formula which attempted to place the victim of the marital misconduct in the position she would have occupied but for the guilty spouse's wrongdoing. The rules were not particularly practical,\(^\text{187}\) nor were they easy to administer.\(^\text{188}\) Despite their shortcomings, however, the theory that divorce

\(^\text{181}\) 88 Neb. 55, 128 N.W. 649 (1910).
\(^\text{182}\) Id. at 60, 128 N.W. at 651.
\(^\text{183}\) 282 Mo. 412, 221 S.W. 1066 (1920).
\(^\text{184}\) Id. at 416, 221 S.W. at 1069.
\(^\text{187}\) For the practical difficulties tort and contract damage rules posed, see infra § IVB.
\(^\text{188}\) Like all tort and contract actions, the divorce cases presented the courts
entitled an innocent wife to “make whole” damages was the predominant American model prior to the close of World War I. The model was never universal,189 nor ever unquestioned. With each passing decade, the forces supporting it weakened,190 yet, it remained an important factor in the computation of alimony awards until the 1970’s, and, in some jurisdictions, is still a factor a court may consider today.

The old law of alimony, then, like the old law of divorce, while flawed, was nonetheless internally cohesive. Divorce was a remedy for the innocent; alimony was the injured party’s compensation. So long as divorce was infrequent and the nuclear family was viewed as the foundation of civilization, severe moral, legal and economic sanctions could be imposed upon divorcing couples. But morality is defined by the conduct of the populace. Whenever a significant minority persists in an immoral course of conduct, that conduct is on its way to being redefined as moral. In the aura of disillusionment which followed World War I, the American moral climate shifted, and divorce as tort was doomed.


The tort-like model which dominated American divorce law from the colonial period to the mid-twentieth century was, in large part, the product of an historical accident, for the American secular divorce statutes simply carried forward the religious rules of divorce which had been devised during the Protestant Reformation.191 American secular divorce, like the divorce of the Reformation, rested on the premise that when one spouse committed a grave marital offense, the other spouse should be entitled to request a termination of the marriage. Both forms of divorce required that one party to the marriage be found guilty of wrongdoing and that the other be innocent,192 and both made divorce available only at the behest of the innocent spouse.

The fault divorce of the American statutes was both rationalized and sustained by a firm commitment to the essential rectitude of the intact

with the problem of measuring the injured party’s loss. This was no easy task. Deciding how a husband would have provided for his wife had she not divorced him is as speculative an undertaking as one could imagine. See Weitzman, supra note 112, at 40-43. For a further development of this subject, see infra § IVB.

189. Texas courts, for example, did not grant alimony and Louisiana courts analogized alimony to a pension. See Brown v. Harris, 225 La. 320, 72 So.2d 746 (1954); Reich v. Grief, 214 La. 673, 38 So.2d 381 (1949); supra note 98.

190. For example, the notion of the “immutable family,” a powerful theoretical support for the concept of divorce as tort, waned in the middle of this century. See infra § IIIA.

191. See supra notes 94-103 and accompanying text.

192. If both parties were guilty of marital fault, the defense of recrimination would apply barring divorce. Clark, supra note 37, § 15.11, at 527-28.
nuclear family. This view, which idealized the nuclear family and portrayed it as the very cornerstone of civilized society, was highly influential during a period roughly delimited by the close of the Civil War and the American entry into World War I. During this time, the general attitude toward the nuclear family was one of reverence, and divorce was viewed as a grave threat to the social order. The fault statutes mirrored these views. Although they authorized divorce, they carefully limited its incidence to only the most compelling cases. By delineating the classes of fault which might warrant divorce, the states in effect provided a balancing test which weighed society's interest in preventing divorce against the competing goal of providing relief to a blameless victim. Thus, if the offense to the innocent spouse was great, her needs might outweigh society's interest in the preservation of the family. Lesser offenses, however, simply had to be borne: "the law does not permit courts to sever the marriage bonds, and to break up households, merely because parties, from unruly tempers or mutual wranglings, live unhappily together . . ." The balancing test inherent in the fault statutes both presumed and required a societal commitment to family integrity sufficiently strong that it might counterbalance the petitioning spouse's desire for a divorce, at least in some cases. A true fault system does not grant the petition of every suffering spouse. It values the maintenance of an intact family at least as highly as it does the goals of individual happiness and fulfillment.

The fault model of divorce, then, depended upon both a moral code willing to sacrifice individual freedom to promote family integrity, and a court system committed to enforcing such values. Sometime in the first half of this century, however, both these requisites disappeared.

A. Changing Values: Personal Fulfillment and the Cynical Society

As is discussed in Section III B above, despite disestablishment in all of the American states by 1834, the American secular divorce laws of the nineteenth century were little more than restatements of the divorce rules laid down during the Protestant Reformation. That the religiously based rules of divorce failed to change despite as significant

193. See supra notes 142-44 and accompanying text.
194. For the definitive work on American attitudes toward divorce during this period, see generally O'Neill, supra note 38.
195. Id. at 58.
196. De Vuist v. De Vuist, 228 Mich. 454, 458, 199 N.W. 229, 230 (1924) (quoting Cooper v. Cooper, 17 Mich. 204, 209 (1868)). See also McMillian v. McMillian, 115 Wash. 250, 193 P. 673 (1920) (divorce may not be granted merely because court believes that society would be best served by granting the divorce decree); Lazarcyk v. Lazarcyk, 122 Misc. 336, 358, 203 N.Y.S. 291, 293 (1924) (not the policy of court to grant divorce for the many couples who are "illy mated").
197. See supra notes 84-85 and accompanying text.
198. See supra notes 86-93 and accompanying text.
an occurrence as disestablishment suggests both a conclusion and a hypothesis. The conclusion has been outlined above, that is, that the prevailing attitude toward divorce in nineteenth century America closely paralleled the attitude of the sixteenth century Protestant Reformers. That conclusion is probably sound, but it seems less important than the hypothesis. The hypothesis suggested by divorce law's failure to change in response to disestablishment is simply this: divorce law appears to respond to fundamental alterations in social values and to fail to react to legal changes unaccompanied by basic value shifts. In other words, during periods when the prevailing morality remains unaltered, legal change — even change of the magnitude of disestablishment or the Married Women's Property Acts, does not necessitate changes in the law of divorce. Conversely, periods of significant social and moral upheaval have an impact on divorce law and practice even if the law in other areas remains constant.

In a sense, this hypothesis is little more than a reiteration of the truism that changes in the law follow social change. It is, however, useful, for it helps to explain why, despite significant legal change in 1789, 1833, and 1875, the divorce law remained essentially unaltered. As is discussed in Part II, none of these dates marks a significant shift in moral values. The hypothesis also suggests that the changes in American divorce law which occurred during the twentieth

199. See id.

200. The argument made above was that, at least in common law countries, restrictive divorce laws were as economically necessary in 1890 as in 1690, because in both periods the economic structure made it nearly impossible for a divorced woman to support herself. See supra notes 118-27 and accompanying text. The argument advanced here is that this similarity in economic conditions probably fostered similar attitudes toward divorce, for instance, the notion that divorce posed a threat to society, and that strict limitations on its availability were salutary. The strong parallels between the pro-family preachments of the reformation and the secular myth of the immutable family should also have fostered similar views of divorce in the two periods.

201. For a discussion of the impact of the Married Women's Property Acts, see supra notes 145-52 and accompanying text.

202. This was the year of the ratification of the United States Constitution. The First Amendment, prohibiting Congress from establishing a national religion, was ratified in 1791. See U.S.C.A., Constitution Amendment 1-3 Historical Note, 6 (West 1987).

203. This year marks the demise of the last established church in America. See supra note 87.

204. By 1875, all of the states had enacted Married Women's legislation. See supra notes 111-14.

205. For an explanation of this conclusion, see supra notes 111-19 and accompanying text. Disestablishment does not seem to have been the result of any significant shift in moral values. It was not mandated by the Constitution and it proceeded only gradually, and with little fanfare. Similarly, although the Married Women's Property Acts seem revolutionary, in fact they had little practical impact.

century have their roots in a period which did see enormous moral upheaval — the years immediately following World War I.

Assigning a date to an occurrence as amorphous as a shift in societal values is necessarily arbitrary, but the end of the second decade of the twentieth century has often been described as a sort of moral watershed. Historians Henry May and William O'Neill both contend that the prevailing attitudes and outlook of the American people changed profoundly during the years immediately following the war. O'Neill describes this as an era devoid of the "airy hopefulness" of the Progressive years, with an overriding tone of disillusionment and despair. Post-war America had lost its "belief in the relative perfectibility of society," and Americans had become apathetic and cynical. In such an atmosphere, the optimistic social movements which had flourished at the end of the nineteenth century withered.

The anti-divorce crusade, which had been energetically pursued before the war failed to regroup thereafter, and no serious effort to abolish divorce was ever undertaken in America again.

It would, of course, be wrong to characterize the America of the 1920's as pro-divorce. Strident anti-divorce rhetoric still dotted the legal opinions, but post-war America simply cared less about reformist issues in general, and divorce in particular, than had the America of 1890. In a society which was condemned to imperfection and peopled by human beings who were not fundamentally good, what was to be gained by abolishing divorce? The overriding sentiment seemed to be — very little.

Although quite ill-suited to fostering movements for social betterment, the cynical temperament of the post-war era did lend sustenance to an older and very different movement, the ever-escalating trend toward individualism. Since before the Industrial Revolution, the indi-

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207. See generally, O'Neill, supra note 38.
208. Id. at 270.
209. Id.
210. Id. at 269-70.
211. Id.
212. Id. at 194-96 & 254-57.
213. See, e.g., Githens v. Githens, 78 Colo. 102, 239 P. 1023 (1925); Perry v. Perry, 199 Iowa 202, 685 N.W. 572 (1925); LeBlanc v. LeBlanc, 228 Mich. 74, 199 N.W. 601 (1924); Reese v. Reese, 194 A.D. 907, 185 N.Y.S. 110 (1920); Hawley v. Hawley, 101 Or. 649, 199 P. 589 (1921).
214. O'Neill's summary of the change bears quoting:

Both the political reforms and the moral changes of the Progressive years were sustained by a belief in the relative perfectibility of society. The death of that vision in the trenches of France and the conference halls of Versailles did not mean the end of political reform and moral change. But reform and reformers were never quite the same again.

O'Neill, supra note 38, at 270.
industrial had been breaking loose from her moorings in the family. As industrialization contributed mightily to this change by undercutting the family’s role as the basic unit of economic productivity. As a work force of unrelated individuals replaced the former family-centered economy, both law and social policy had to adjust to a new reality. Stripped of its economic centrality, the family, not surprisingly, began to lose some of the moral value previously ascribed to it.

As is noted above, a fault model of divorce can function only in a society which places a very high value on family integrity and which believes that restrictive legislation, making divorce difficult to obtain, is an effective avenue for attaining that goal. In 1890, American society had both these attributes. By 1920, it had neither. Among World War I’s casualties was America’s belief in the efficacy of fault divorce. The fault statutes would not change for some fifty years, but the appellate opinions and the commentators both remark upon fundamental changes in divorce practice in the period between the wars. Although fault divorce remained the law on the books, perjury and collusion came to reign in the courts.

B. Changing Practices: Collusive Divorce and the Non-Adversary System

The appellate divorce opinions of the decades preceding World War I touch upon a broad range of topics, but certain themes recur frequently. The importance of preserving family integrity, for example,

215. Many historians and sociologists credit the Industrial Revolution with creating the concept of the individual. See, e.g., Parsons, Social Structure of the Family in THE FAMILY, ITS FUNCTION AND ITS DESTINY 173-201 (R. Anshen ed. 1959). More recent works suggest, however, that individual autonomy was recognized, at least in some social classes, substantially prior to industrialization. Stone’s work is particularly persuasive. Stone, supra note 39, at 221-69.

216. Zainaldin explains: “The household in a traditional agrarian society functioned as a unit of production. In the industrializing and urbanizing America, however, it increasingly became a unit of consumption.” Zainaldin, supra note 123, at 1038.

217. Some of the best examples of this adjustment occur in periods later than the post World War I years. They are, nonetheless, instructive. Professor Glendon notes that the reform legislation of the New Deal was fundamentally individualistic. See Glendon, supra note 32, at 158-40. Not only is Social Security, for example, earned by and paid to individuals, but, by providing public funds for the support of the elderly and the disabled, the government, through the Social Security Administration, has taken over functions previously performed by the family.

In the area of constitutional law, Professor Lawrence Tribe had documented a parallel development. In the past two decades, constitutional law has increasingly focused on individual rights and autonomy. L. Tribe, AMERICAN CONSTITUTIONAL LAW 987 (1978).


219. Rheinstein, supra note 38, at 249-60.
is regularly mentioned, as is the heavy burden a petitioning spouse bears when she attempts to prove that her case is sufficiently compelling to warrant the drastic remedy of divorce. In tone and in outcome, the decisions reflect the balancing process of the fault statutes. In the decades following World War I, however, although the opinions retained their anti-divorce rhetoric, new concerns emerged. As early as the 1920's, the appellate decisions voiced the fear that the integrity of the judicial process was in jeopardy. Thereafter, in numerous opinions, the reviewing courts exhorted the trial bench to insist upon a true adversary process. The implication is too clear to be missed: the appellate courts suspected the trial bench of condoning collusion and perjury in the trial of divorce actions.

Collusive divorce did not, of course, suddenly spring into being in 1920. In fact, although no hard data is available to support the proposition, it seems likely that divorce by covert agreement of the parties has existed in all cultures and at all times, regardless of the official position of the legal system. What is remarkable, then, about the courts'
sudden preoccupation with collusion in the three decades following World War I is not the fact that collusion may have existed, but that it had apparently become either so flagrant, so frequent, or both, that the appellate courts felt compelled to comment upon the practice.

Was there, in fact, a sudden surge in the incidence of collusive divorce between 1920 and 1950? In the absence of the requisite empirical research, no definitive answer to this question can be offered. It is, however, clear that both the commentators and the courts viewed the mid-twentieth century as an era of rampant collusion, and much that can be documented about this period lends support to their view. During the decades between the two World Wars and in the years immediately following World War II, a number of forces were at work which simultaneously intensified the demand for divorce, and undercut the efficacy of the fault model. Three of these forces seem particularly significant: one ideological, another sociological, and the last economic.

Rome even after the adoption of Christianity and it continued in Britain until the eleventh century. See supra notes 60-65 and accompanying text. Collusion also infected the Catholic Church's annulment process. Blake, supra note 39, at 15-17. Further, it was made a defense to divorce a mensa by the ecclesiastical courts. Clark, supra note 37, § 12.1 at 409.

227. Furthermore, since collusion, by its nature, is concealed more often than it is documented, a final answer may be unobtainable.

228. Sociologists Robert Stoughton Lynd and Helen Merrell Lynd, for example, note in their 1937 study that:

the official responsibility of the community to sift, and in doubtful cases to check, divorces has been largely given up in response to the pressure of the interested parties for easy divorce with no questions asked and the pressure of the lawmen to make more income out of legal cases.

R. Lynd & H. Lynd, Middletown in Transition 162 (1937) (emphasis added). More direct documentation of collusive divorce comes from former New York Supreme Court Justice Henry Clay Greenberg, whose 1947 article in American Magazine stated his belief that at least 75% of New York's divorces were collusive. Blake, supra note 39, at 211-12 (citing Greenberg, New York's Perjury Mills, American Magazine 46 (Oct. 1947)).

Further evidence of New York's difficulties with collusive divorce can be found in a bill offered in the State Assembly in 1958. This bill, which would have made fraud or collusion in matrimonial actions a misdemeanor, was defeated. Blake, supra note 39, at 224. Perhaps the bill's defeat demonstrated the divorce law's heavy reliance on perjured testimony. See Rheinstein, supra note 38, at 251-52. Clearly, however, its very existence documents the fact that collusive divorce was a recognized problem in New York in 1958.

Among legal commentators, Rheinstein's conclusion that "[d]ressed up as divorce for misconduct, consent divorce, abhorred in the official law of all states, [became] an established institution of American law..." is perhaps the best summary. For judicial reactions to collusion, see the cases cited supra at note 224.

229. See supra notes 198-218 and accompanying text, and infra notes 231-35 and accompanying text.

230. See infra notes 236-61 and accompanying text.

231. See infra notes 266-75 and accompanying text.
The fundamental ideological shifts which occurred in America in the years surrounding World War I have been discussed above. The argument made here is that by the end of World War I, the buoyant optimism which had been the hallmark of the Progressive Era had given way to apathy, and the prevailing attitude toward divorce had shifted from opposition to ambivalence. Although the occurrence of this ideological change provides no direct proof of any increase in the incidence of collusive divorce, it seems logical to suspect that post World War I attitudes were far more conducive to collusion than was the atmosphere before the War. In the Progressive Era, with its strong commitment to family integrity, the fault divorce model stood as a bulwark, safeguarding society from the evils of "free love." As the ideological investment in family integrity dwindled, however, fault divorce came to be perceived not as a bulwark protecting morality, but as an impediment to a newly ascendant value — individual happiness. Gradually, individualistic goals supplanted familial ones and collusion began to seem less a violation of law and a threat to morality than an efficient approach to the annoying anachronisms of the fault laws.

The ideological revolution of the second decade of the twentieth century had, then, a marked impact on divorce. It is, however, an impact which cannot be fully assessed unless it is viewed in the light of a sociological phenomenon — the ever-increasing pressure for divorce. This pressure built steadily from 1910 onward and exploded in the years immediately following World War II.

The American divorce rate increased steadily from 1860 to 1946. Punctuating the climb of the curve are temporary but distinct peaks following each major war. A number of hypotheses have been offered to explain the high rate of divorce experienced in post war periods.

232. See supra notes 198-218 and accompanying text.
233. Later sociological studies document the occurrence of this shift. In MIDDLETOWN IN TRANSITION, the second of their trilogy of studies, the Lynds conclude that: "[i]n this whole matter of divorce Middletown shows the kind of ambivalence characteristic of all its cultural change in areas of behavior involving strong moral sanctions." LYND & LYND, supra note 228, at 161.
234. The "free love" debate occupied the lecture platforms and the popular press from about 1850 to 1880. See BLAKE, supra note 39, at 97-115.
236. In 1946, the American divorce rate hit a peak of 18 divorces per 1000 women aged fifteen and over. Id. at 133. This was three times the 1933 rate, and four and one half times the rate experienced at the turn of the century. The 1946 peak was not surpassed until 1974. WEITZMAN, supra note 112, at 142.
237. There are two minor exceptions to this assertion. First, there was a slight dip following the post-World War I peak. Second, there was a more significant drop in the early years of the Great Depression. Cherlin, supra note 235, at 133. Both these effects were temporary, however, with the rate rapidly recovering and again proceeding upward. Id.
238. Id. at 132.
Nelson Blake suggests that hasty wartime marriages, infidelity during the lengthy separations caused by war, and fundamental personality changes experienced by one spouse or the other as a result of wartime experiences all contribute to the increase. Whether Blake's is the most appropriate list of factors seems less important than noting its poor fit with the fault concept of divorce. Only the second factor suggested by Blake, infidelity, would be a ground for divorce under most fault statutes. Making a poor choice of marriage partner, or finding that one's partner had become a stranger were not problems which the fault statutes were designed to redress.

The morality and ideology underlying the fault statutes thus clashed squarely with the post war pressure for divorce. Had the statutes stood firm, many of the spouses who petitioned for divorce in the years following a major war would have had their petitions denied. Although empirical data is sparse, this does not seem to have been the case. Instead, in the face of the enormous pressure for divorce which has marked most of the twentieth century, the legal system produced what has been described as "the democratic compromise." While paying lip-service to the sacrosanct fault statutes, (thus avoiding the need to confront the conservative forces which opposed the liberalization of the divorce laws) the divorce courts, in practice, allowed the flimsiest fabrications to masquerade as evidence of fault, thus both encouraging and condoning collusive divorce. Although the appellate courts occasionally protested these practices, citing their deleterious effect on the judicial system in general, there is no evidence of any sustained effort to prevent or punish collusion and perjury in divorce actions. Instead, as increasing pressure for divorce was brought to bear on a statutory system no longer supported by a strong moral consensus, the law became a mere obstacle to be surmounted by whatever technique might seem efficacious.

239. See Blake, supra note 39, at 211.
240. For a list of the fault grounds covered by most traditional statutes, see Vernier, supra note 107, table XXVII, at 3-4.
242. No available source seems to compare the number of divorce petitions in the post war periods with the number of divorces granted. It is, therefore, possible that many spouses who attempted to divorce had their petitions denied. The contemporaneous commentary, however, never gives the slightest indication that this phenomenon was occurring. Although they comment freely upon collusion and upon the staggering number of divorces granted, the sources do not mention that any significant number of petitions were being denied. See supra note 228.
243. Rheinstein, supra note 38, at 247-60.
244. See generally id.
245. See supra note 224.
246. In fact, efforts as limited as a bill to make collusion in divorce actions a misdemeanor could not muster the votes necessary for enactment. See supra note 228.
The fault model of divorce was thus seriously eroded long before the outbreak of World War II. Its supporting ideology had perished by 1920, and the divorce rate turned sharply upward in 1933. World War II, however, made its own significant contribution to the demise of fault divorce by changing, fundamentally and permanently, the role of women in the American economy.

With the attack on Pearl Harbor came an immediate and critical need to mobilize an army. Mobilization, which took men out of the work force, in turn created an equally critical need — for new workers to run American industry. The response was a second, and, in its own way, equally significant mobilization: the transformation of American housewives into an army of paid employees. Between 1940 and 1945, the size of the female labor force in America increased by over 50%, the principal source of supply being the ranks of the urban housewife. Over 3.7 million of the 6.5 million women who began paid work during World War II listed themselves as former housewives. These women not only swelled the female work force, they also fundamentally altered its character. Before World War II, women who worked for pay were young and single, but “by the end of the war it was just as likely that a wife over forty would be employed as a single woman under twenty-five.”

Our assessment of the impact of these changes on divorce law and practice must take note of one additional crucial factor: the women who joined the labor force during World War II did not leave it at war’s end. Although popular mythology portrays a vast exodus of women abandoning the assembly line for the maternity ward, the statistics tell another story entirely. There was, of course, a monumental reshuffling of jobs as men returned from the war to reclaim the positions they had vacated after Pearl Harbor. The combination of veterans’ preference laws and the “last hired, first fired” rule pushed millions of women out

247. Cherlin, supra note 10, at 123.
249. Although World War I had also produced an influx of women into formerly all-male jobs, the vast majority of the women were in the labor force already, and merely shifted to better paying jobs during the war. ld. at 52. The women who ran the factories during World War II were, by contrast, largely new to the paid work force. ld. at 142.
250. ld. at 145.
251. Id. at 144. In 1940, 15% of all married women engaged in paid employment. By the end of 1945, 24% of married women were in the paid labor force. Id. The significance of this change can only be appreciated if one notes that before World War II it had been both legal and commonplace for employers to adopt express policies prohibiting the hiring or retention of married female workers. Id. at 146. Many companies dropped these policies during the War and did not reinstate them thereafter. Id. at 146, 150.
of the jobs they had held during the war. The effect, however, was distinctly temporary. The vast majority of women squeezed out of the paid labor force by returning veterans promptly found re-employment. Chafe’s statistics are impressive. He states that: “[b]etween September 1945 and November 1946, 2.25 million women left work, and another million were laid off. But in the same period, nearly 2.75 million were hired, causing a net decline in female employment of only 600,000.”

Thus, the effect of demobilization was not to oust women from the work force, but, instead, to relegate them to the least remunerative and desirable of available jobs.

Professor Chafe concludes that World War II was the single most significant watershed in the history of American women at work. It pushed millions of women into the paid labor force for the first time; it brought about a suspension of the rules which had barred the employment of married women; it provided an income, outlet, and a purpose to married women whose children were grown. Such fundamental changes in life patterns could scarcely fail to have an impact on the law of divorce and alimony. Nor did they. Although the divorce and alimony statutes remained unaltered, the courts implementing them faced a new reality. For the first time since industrialization, the American labor market had a place for middle-class women.

It is a truism of divorce practice that it is usually impossible for the two households which result from a divorce to survive on the income of a sole wage earner. Prior to World War II, however, one income was the norm. Only the husband worked for wages, and even a wife des-

252. Id. at 179-80.
253. Id. at 180. Kessler-Harris argues that most of the growth in the female workforce would have occurred even without the war. KESSLER-HARRIS, supra note 132, at 277-78. While she disputes Chafe’s assignments of cause and effect, she seems generally to agree with his figures.
254. Id. at 180-81.
255. See id. at 183. The pre-World War II pattern had pushed white middle-class women out of the labor force as soon as they married (if, in fact, they worked for pay at all) and had thereafter excluded them permanently. The post World War II pattern had women rejoining (or joining) the paid work force once all their children were of school age. Id.
256. It was, of course, a distinctly second-class place. The fact that middle-class women could find work and relatively safe working conditions in no way suggests that they had employment opportunities equal to those of males. This was even less true in 1946 than it is in 1988.

Chafe cites figures showing that at the end of World War II, women in manufacturing earned 66% of the male wage while laundry workers earned 50% of that wage. Id. A circa 1950 study by the Bureau of Labor Statistics pegged the female wage at 53% of the male wage. Id. at 185 (footnotes omitted). Current figures show a welcome, but less than overwhelming, increase to 63% of the male wage. See NAT’L COMM. ON PAY EQUITY, note 5, at 1.
257. See GLENDON, supra note 32, at 52. CLARK, supra note 37, § 16.1, at 621.
258. In 1940, only 15.2% of married women worked for pay. CHAFE, supra note
perate for paid work found very few opportunities.259

It would, of course, be entirely too facile to conclude that economic difficulties actually kept families intact. Statistics do indicate that divorce rates drop during periods of economic depression,260 but these statistics measure only formal divorce, not an informal break-up of the family unit.261 All one can safely say is that once ex-wives could find real employment opportunities, the economic pressures which might otherwise have forced them to accept nearly intolerable marriages were lessened. So too, unhappy husbands could convince themselves that their ex-wives would not suffer as a result of divorce. For at least some middle-class families, the post-War labor market probably provided the way out of a miserable marriage.

This, then, was the status of fault-based divorce in 1950. Its moral force had been severely undercut, pressure for divorce was intense,262 and the labor market offered jobs and wages to married and formerly married women. Although fault divorce was still enshrined in the statutes, it was becoming more and more difficult for those involved to take it seriously.

As fault divorce failed, the rules and practices which depended upon the fault model began to unravel. When divorce had been a remedy for a moral wrong perpetrated upon an innocent spouse, alimony and property transfers were used (in an analogy to tort law) to make the innocent spouse whole.263 By 1950, however, whatever divorce might once have been, it was clearly no longer a moral condemnation of the guilty by the innocent. In fact, it bore a much closer resemblance to a rather tarnished backroom compromise.264 But if divorce was no longer a moral wrong and an injury to the innocent spouse, what was

248, at 144. The remaining 85% of households apparently included only one wage-earner. See id.
259. For a discussion of the exclusion of white, non-immigrant women from the American labor force, see supra notes 125-33 and accompanying text.
260. See Cherlin, supra note 235, at 133.
262. In fact, the divorce rate fell in the 1950's, only to rise again, quite dramatically, in the 1960's. Some commentators have argued that the 1960's and early 1970's were an aberrant period, reflecting some terrible (but, it was hoped, temporary) dislocation in American society. More recent authorities have taken a contrary stand. They see the 1950's as aberrant, with the two ensuing decades more clearly reflective of a century long trend toward increasing rates of divorce. Cherlin, supra note 10, at 72-73. Even the leveling of the rate in the mid-1970's to mid-1980's is not seen by sociologists as a return to a more marriage centered society. See id. at 73-74.
263. This is a central thesis of Part III of this article.
264. In the decades immediately preceding no-fault, some 90% of divorces were entirely uncontested; that is, even the ancillary issues of support, property division and child custody had been agreed upon by the spouses prior to the divorce hearing. See Rheinstein, supra note 38, at 247.
the purpose of alimony? Stripped of its "make whole" function, alimony was set adrift. Its theoretical basis, always less than solid, became even more obscure. Alimony had become a practice in search of a theory.

C. Non-Adversary Divorce and the Rules of Alimony

As Part III of this article explained, the practice of granting alimony to divorced wives lost its only firm theoretical footing several centuries ago when various legal systems, following the teachings of the Protestant Reformation, began to grant absolute divorces. In America, later developments, particularly the adoption of the Married Women's Property Acts, further obscured alimony's function. The practice of granting alimony, however, continued. The American divorce statutes authorized alimony awards, and the divorce courts, faced with often harsh economic realities, granted petitions for alimony without expending any great effort on the construction of theoretical models. Such models as were proposed were closely analogous to the rules of tort and contract, particularly tort. Under these models, the main function of alimony was to compensate innocent wives for the losses they sustained as a result of divorce.

Even those courts which specifically embraced a "make whole" model, however, found the process of adjudicating alimony claims extremely difficult. Although they had taken a giant step merely by deciding what alimony was expected to accomplish, they still faced the awesome task of determining just what a wife lost when she divorced. The courts never came close to consensus on this issue, but certain major themes can be identified.

One approach to making divorced wives whole focused on the fact

265. See supra notes 108 & 109 and accompanying text.
266. When the only form of "divorce" available (divorce a mensa et thoro) did not dissolve the marriage of the parties nor re vest in the wife property she had lost to her husband by virtue of their marriage, an order requiring the husband to continue to support his wife was entirely logical. See CLARK, supra note 37, at 421; Part III supra.
267. See supra notes 110-21 and accompanying text. After the enactment of this legislation, a woman no longer lost title to her property as a result of her marriage, and, if she divorced, she left the marriage taking her own property with her. Thus, after the Married Women's Acts, alimony could no longer be justified as a quid pro quo for the husband's acquisition of his wife's property at marriage.
268. This is not meant to imply that alimony was freely awarded; it was not. Professor Weitzman states that even in the early decades of this century, when access to the labor market was all but foreclosed to middle class women, alimony was awarded in only 9 to 15% of all divorces. WEITZMAN, supra note 1, at 45.
269. See VERNIER, supra note 107, at 265-74, 283-90. The statutes, however, spoke only in the most general terms. They did not purport to define the purposes of alimony.
270. See supra notes 164-90 and accompanying text.
that an ex-wife could not become her estranged husband's widow.\textsuperscript{271} She therefore did not stand to inherit one-third of his estate at his death.\textsuperscript{272} A number of statutes and cases, concentrating on the divorced wife's dower rights, took the position that the way to make an ex-wife whole was either to order her ex-husband to transfer one-third of his property to her at divorce,\textsuperscript{273} or to order him to make periodic payments of one-third of his income to her.\textsuperscript{274}

Other courts and legislatures attempted to take a less mechanistic approach to determining what a wife lost as a result of divorce. This often took the form of reviewing the family's accustomed style of living

\textsuperscript{271} In Phillips v. Phillips, 221 Ala. 455, 129 So. 3 (1930), for example, the Alabama Supreme Court noted that it is generally improper to award an innocent ex-wife less than one-third of her husband's property at divorce. Because the divorce terminates the wife's dower interest, allowing her less than one-third of the husband's property would result in the husband's profiting from his misconduct. \textit{Id. at 4}. See also Wesley v. Wesley, 181 Ky. 135, 204 S.W.165 (1918) (contrasting divorce from bed and board, which does not terminate dower rights, with divorce from the bonds of matrimony which does). See also 2 BISHOP ON MARRIAGE, DIVORCE AND SEPARATION § 1029 (1891).

\textsuperscript{272} Under common law rules, at her husband's death a wife took a life interest in one-third of all the land he held during their marriage. CLARK, supra note 37, § 7.1, at 288.

\textsuperscript{273} See, e.g., Spratler v. Spratler, 203 Mich. 498, 169 N.W. 956 (1918) (citing 3 MICH. COMP. LAWS 1915, § 11415, "[w]hen the marriage shall be dissolved ... the wife shall be entitled to her dower ... "). This statute was later overruled and the awarding of alimony made discretionary. See also Phillips v. Phillips, 221 Ala. at 455, 129 So. at 3; Glick v. Glick, 86 Ind. App. 593, 159 N.E. 33 (1927); Wesley v. Wesley, 181 Ky. 135, 204 S.W. 105 (1918); Griffin v. Griffin, 18 Utah 98, 55 P. 84 (1898).

For a compilation of statutes prohibiting alimony awards in excess of one-third of the husband's estate, see VERNIER, supra note 107, at 283.

Professor Glendon, commenting on the practice of equating alimony with dower rights, remarks that "[s]o long as divorce was relatively uncommon, legal systems responded to it by analogizing from and adapting the techniques that existed for dealing with disruption of marriage by death or separation." GLENDON, supra note 32, at 52.

Writing long before Glendon, Bishop remarked in his treatise on domestic relations that "the dissolution of a marriage by divorce is analogous to its dissolution by death." BISHOP, supra note 271, at § 1029.

\textsuperscript{274} See, e.g., Gould v. Gould, 95 Pa. Super. 387 (1928); Andreas v. Andreas, 88 N.J. Eq. 130, 102 A. 259 (1917).

Whether the economic readjustments necessitated by divorce should be accomplished by transfers of property or by orders for periodic payments of income has long been a matter of dispute. Some states, by statute, formerly restricted their courts' power to make property awards at divorce. See VERNIER, supra note 107, at 217-22. See also H. FOSTER & D. FREED, 2 LAW AND THE FAMILY: NEW YORK 104 (1966). For a general discussion of such restrictions, see WEITZMAN, supra note 1, at 32-36. Some of these states, however, ameliorated these restrictions by allowing courts to order that alimony obligations should be discharged by lump sum payments. E.g., VERNIER, supra note 107, at 285-309, table LV. Still others gave their courts broad authority to redistribute property between the spouses. \textit{Id. at 215-22}. Various hybrid solutions were also devised, and tax and
and estimating the amount which the husband must pay to the wife in order to allow her and the children (if any)275 to maintain that lifestyle.

Both these approaches seem entirely consistent with a “make whole” view of alimony. Each attempts to identify the “whole” which has been lost by divorce, and each orders the husband to make some sort of payment designed to re-establish — or, at least, to mimic — that whole. The theoretical tidiness of these approaches was, however, far too trivial a benefit to sustain them, for they suffered from two critical flaws. “Make whole” alimony is (a) frequently impractical and (b) entirely dependent upon the fault model of divorce.

The courts which attempted to use alimony to maintain the pre-divorce lifestyle of innocent wives and children acted upon a fundamentally false premise. They envisioned a world in which a family’s assets would generally be sufficient to maintain the pre-divorce standards of one household (the wife and children’s) while creating and supporting another (the husband’s). Unfortunately, this world does not exist.277 It is the rare family which can divide one household into two without severely compromising the standard of living of all members of the for-

other considerations frequently persuaded the parties to a divorce to label their method of payment one thing when it was, in fact, another.

For a discussion of the often overlapping meanings of the terms “alimony,” “child support” and “property division,” see the Appendix to this article.

275. See Reavis v. Reavis, 2 Ill. (1 Scam.) 242 (1835); Packard v. Packard, 34 Kan. 53, 7 P. 628 (1885) (wife awarded alimony necessary to maintain her and her children as if still living with husband); Davieson v. Davieson, 192 La. 44, 187 So. 49 (1939) (maternal custody of children taken into consideration in fixing amount of alimony); Knabe v. Knabe, 176 Md. 606, 6 A.2d 366 (1939) (alimony should be commensurate with obligation to support children whose custody has been awarded); See also Brown v. Brown, 222 Mass. 415, 111 N.E. 42 (1916); Heninger v. Heninger, 90 Va. 271, 18 S.E. 193 (1893).

276. See, e.g., Smith v. Smith, 251 Ala. 694, 39 So.2d 230 (1949); Heard v. Heard, 116 Conn. 632, 166 A. 67 (1933). Many courts simply held that alimony is a continuation of the husband’s support obligation. Floyd v. Floyd, 91 Fla. 910, 108 So. 896 (1926). Others focused on the husband’s assets, the number of children and the family’s social position. E.g., McGee v. McGee, 10 Ga. 477 (1851). See also Muir v. Muir, 133 Ky. 125, 92 S.W. 314 (1909); Parmly v. Parmly, 16 N.J. Misc. 447, 1 A.2d 646 (1938); Dickinson v. Dickinson, 271 N.Y. 158, 2 N.E.2d 524 (1936). This was, of course, the justification for alimony under divorce a mensa practice. See supra notes 102-07 and accompanying text. As applied to absolute divorce, this formulation seems to be a sort of shorthand statement of the “maintenance of lifestyle” rule, that is, the husband must continue to support his wife as he did during marriage. See Packard v. Packard, 34 Kan. 53, 7 P. 628 (1885).

277. Weitzman makes this argument with respect to property divisions. Weitzman, supra note 1, at 54-61. Glendon makes the same argument in the context of child support. Glendon, supra note 32, at 71-76.

O’Neill suggests that this world has not existed since the nineteenth century. O’Neill, supra note 38, at 23. Nineteenth century divorce was largely an upper and middle class phenomenon. As the twentieth century began, however, it became increasingly associated with the lower economic classes. Id.
mer family.\textsuperscript{278}

By contrast, the “dower school” had the significant advantage of focusing on what a family \textit{has}, rather than on what it \textit{needs}. As a result, dower rules were fairly easily implemented, whatever the size of the family’s assets.\textsuperscript{279} Dower rules became unworkable, however, when they required working class husbands to make transfers of property. Although some courts apparently adapted to this problem by ordering payments of income,\textsuperscript{280} as late as 1932, many statutes still spoke in terms of payments from the husband’s “estate.”\textsuperscript{281}

The second fatal flaw of “make whole” alimony was common to both the lifestyle and dower approaches: both were inextricably bound to the fault divorce system. The notion that one party to a divorce should be compelled to make the other “whole” seems inseparable from the conclusion that the former is guilty of inflicting harm upon the latter. If the husband is blameless, or if both parties are blameworthy, what is the justification for taking the husband’s income and property from him?\textsuperscript{282} As fault divorce waned, the logical basis for “make whole” alimony was severely undermined.

Tracing the demise of “make whole” alimony presents even greater obstacles than describing the failing fortunes of fault divorce.\textsuperscript{283} Fault divorce was universal, and it was explicitly defined by the statutes which created it. By contrast, “make whole” alimony never approached universal acceptance,\textsuperscript{284} and the alimony statutes were amorphous. They

\textsuperscript{278} But see Weitzman, supra note 1, at 323. She claims that “[m]en actually enjoy a higher standard of living after divorce.” Id. This premise was confirmed by the recent work of Duncan and Hoffman. See generally, Duncan & Hoffman, supra note 12.

\textsuperscript{279} This may help to explain the great popularity of this approach. See supra notes 270-74 and accompanying text. In fact, awards of one-third of the husband’s assets appear in cases which make no mention of dower rights. See, e.g., Peterson v. United New York Sandy Hook Pilots Ass’n, 17 F. Supp. 676 (E.D.N.Y.1936); Habble v. Habble, 99 N.J. Eq. 55, 132 A. 113 (1926). The “one-third” mystique continues today. The empirical data shows a clustering of awards around the one-third figure, Weitzman & Dixon, The Alimony Myth: Does No-Fault Divorce Make a Difference? 14 Fam. L.Q. 141, 178 (1930). Recently issued child support guidelines reflect the same. See, e.g., Massachusetts Child Support Guidelines, supra note 23.

\textsuperscript{280} See supra note 274.

\textsuperscript{281} See II Vernier, supra note 107, at 285-90, table LV. This is, of course, an ambiguous term, and Vernier’s annotations make it clear that at least in some states the estate could be the source of periodic payments. Nonetheless, references to the husband’s estate clearly demonstrate a reliance on property as the source of transfers to the wife. See id.

\textsuperscript{282} This perception of the husband’s income as “his” is, of course, a crucial assumption.

\textsuperscript{283} See supra notes 190-219 and accompanying text.

\textsuperscript{284} In every period one can find opinions which apply rules and standards clearly violative of “make whole” norms. See e.g., Abele v. Abele, 62 N.J. Eq. 644, 50 A. 686 (1901). In Abele, a wife was denied alimony because the court found that
rarely did more than require that the divorce courts be "just," "reasonable," and "equitable," leaving most of the details of alimony practice to the courts' discretion. With such standards in force, it is hardly surprising that changes in the alimony statutes are rarely made. Instead, alimony law changes in a more subtle way, through a series of judicial opinions. Courts may, for example, begin to consider new factors in fashioning alimony awards, or they may come to view or weigh established factors differently. In the first three decades of this century, a series of these subtle changes served to move alimony law away from the "make whole" model and toward an ever more pragmatic orientation.

One important shift in alimony law in the early part of this century concerned the use courts made of their evaluation of the divorcing husband's assets. This evaluation had been an essential feature of the "make whole" approach, for it either determined the base from which to calculate the wife's one-third share (dower approach), or it (presumably) strongly influenced the family's lifestyle. By the second decade of the twentieth century, however, at least some of the opinions suggest that the courts had begun to take a different view of this computation. They began to suggest that the amount of the husband's assets measured the wife's rights.

What the courts meant by this formulation is, of course, less than entirely clear. They seem, however, to be implying that the trial courts should not focus solely on the loss suffered by the wife. However badly she may have been injured, the courts seemed to be saying she can only be compensated in an amount which her husband's assets can absorb.

The rule seems eminently practical. What, indeed, is the use of an alimony order which exceeds the total assets of the husband? Yet, for women, the effect of this new focus was pernicious. Under a pure "make whole" model, a judge would, presumably, order a divorcing husband to pay his wife the amount required to maintain her standard of living. Just as a tort judgment is not (at least in theory) limited by the defendant's lack of assets, so too, an alimony award would measure the wife's injury without regard to the husband's estate. That he was "in great part, supporting herself . . . [and] quite young enough to expect to be married again. . . ." Id. at 649, 50 A. at 688.

285. See VERNIER, supra note 107, at 283-90.
286. Whether the no-fault statutes of the 1970's changed alimony practices is the subject of Part V of this article, and of much of Professor Weitzman's work. See WEITZMAN, supra note 1, at 143-83.
287. Change in this area is, of course, further complicated by the fact that few divorce cases are appealed. The trial court's method of testing its broad discretion is therefore rarely reviewed.
288. See infra notes 290-96 and accompanying text.
289. This is something of an overstatement since the family's style of living would be heavily dependent upon the husband's assets.
might then pay less than the entire amount, and that the wife might accept such a payment, would be entirely separate considerations.  

Under the new model, however, an additional factor entered the courts' computation: the husband's ability to pay. Instead of being used as a post-judgment bargaining tool, this factor became an element which could serve to reduce (and, under a lifestyle approach, only to reduce) the wife's award. A wife now received only what a court, in its discretion, felt her husband was able to pay. Divorced wives thus found themselves increasingly at the mercy of a predominantly male and nearly omnipotent judiciary.

That the make whole approach to alimony should be modified by a "husband's ability to pay" rule at just the point when the fault model of divorce began eroding is, of course, not at all surprising. The real issue facing the courts was this: if there was to be a shortfall in resources, as was frequently the case, who should bear the brunt of it? Under a "make whole" model, the guilty husband would, at least theoretically, bear the entire loss, since the wife's lifestyle was to proceed undiminished. But by modifying the "make whole" model so as to limit the wife's recovery to an amount her husband was able to pay, the courts made it possible to distribute this loss between the spouses.

As husbands grew less guilty and societal commitment to the tort model waned, this redistribution seemed even more appropriate. In fact, as the notion of guilty and innocent parties to a divorce lost its validity, the "guilty" husband lost his horns and tail, and emerged as a

Admittedly, however, the parties' power to enter into an agreement modifying the court's judgment stands on a different footing in divorce than in a tort or contract case. The nearly perpetual modifiability of alimony awards, see Clark, supra note 37, § 16.5, at 655-71, and the fact that they are often orders for periodic payments over an indeterminate period, probably makes it impossible for the parties ever to reach the equivalent of an accord and satisfaction.

1. See, e.g., Evans v. Evans, 159 Iowa 338, 140 N.W. 801 (1913). In modifying an alimony award downward, the Iowa Supreme Court stated "[i]f the alimony could be measured by the necessity of the plaintiff [wife], it might well be approved. But it cannot be so measured. It must be measured by the property or financial resources of the parties." Id. at 341, 140 N.W. at 802. See also Closz v. Closz, 184 Iowa 739, 169 N.W. 183 (1918).

2. This article does not argue that the law suddenly changed to allow judicial consideration of the husband's resources in awarding alimony. Rather, it contends that in the second and third decades of this century, courts began to use this admittedly old factor in new ways.

3. In Evans, the court expressly, if harshly, ordered such a distribution. "The difficulty that evidently confronted the trial court was that any division of the little pittance of property would leave the plaintiff [wife] in worse condition with divorce than . . . without one." Evans, 159 Iowa at 342, 140 N.W. at 802. The trial court had dealt with this problem by awarding all property to the wife. In modifying the award, the Iowa Supreme Court stated that having too little property to divide "is frequently the result in divorce cases, and it ought to receive advance consideration by a plaintiff." Id.
not entirely unsympathetic character. By the 1930’s, appellate courts had begun to caution the trial bench against “consuming the estate and breaking down all incentives to exertion on the part of the defendant [husband],”294 or setting alimony payments at a level which might “dishearten” him.295

Paralleling this transformation of the divorcing husband was a decline in the status of the divorcing wife. Under a “make whole” model, the wife had been an innocent victim deserving of protection and recompense. By the 1930’s, however, a shift in this perception is apparent from the opinions.296 Here again, as in the “husband’s assets” cases, familiar factors are applied, but their use has been subtly altered. Just as courts had long considered the divorcing husband’s assets in computing alimony awards, so too had they evaluated what a divorced wife “needed” in order to make her whole. By the 1930’s, however, although the courts spoke of what a wife needed, it is apparent that they no longer meant needed to maintain her predivorce style of living. By the 1940’s, the courts had come to focus heavily on the wife’s independent resources, and these were used to offset her “needs.”297 And, even as early as the Depression years, at least some courts were ready to hold that a wife who is able to support herself has no “needs” at all.298 Clearly, at this juncture, “need” was a far different concept than under a “make whole” approach. The court which held that a wife who was capable of self-support had no needs probably did not mean that she

296. By 1940, at least one state, Louisiana, had expressly rejected the notion that alimony should allow the divorced wife to support her prior lifestyle. “The test by which the court must be guided . . . in fixing the amount of the alimony . . . is not what it takes to support the divorced wife in the manner in which she has been accustomed to live, but what will provide her with ‘sufficient means for her maintenance’.” Fortier v. Gelpi, 195 La. 449, 456, 197 So. 138, 140 (1940). Other states, although nominally following the “lifestyle” standard, in fact made decisions having a quite different tone. See, e.g., Lamborn v. Lamborn, 80 Cal. App. 494, 251 P. 943 (1926). The Lamborn court stated, “[w]e agree . . . that trial courts should not be niggardly in the matter of awarding alimony and we also coincide with the court’s insistence that where the ex-husband is earning wages by daily labor, a trial court, in awarding alimony, should not do so in a sum inducing idleness on the part of the ex-wife.” Id. at 498, 251 P. at 944.
297. See, e.g., Newbauer v. Newbauer, 95 Cal. App. 2d 36, 212 P.2d 240 (1949) (trial court appropriately considered that plaintiff had been self-supporting at the time of marriage, that she was relatively young and her physician expected her to be sufficiently recovered to assume gainful employment within one year); Youngblood v. Youngblood, 252 N.W.2d 21 (Ky. 1952); See also Zimmerman v. Zimmerman, 199 Md. 176, 85 A.2d 802 (1952); Judd v. Judd, 1 Misc. 2d 965, 59 N.Y.S.2d 680 (1946) (wife’s income shall be taken into consideration in setting amount of alimony).
had lost no assets as a result of her divorce. The court was not speaking of “needs to make whole.” The new focus seemed to be “needs to survive.”

If, during the decline of the fault model of divorce, the husband became a less than monstrous creature who deserved some sympathy and protection from the courts, the wife of this era seems to be a lazy gold digger intent upon avoiding honest work, and desirous of hounding her ex-husband to the grave. The image of the pampered divorcee has been tenacious. In numerous opinions courts chided divorced women to get on their feet; warned trial courts against awarding alimony out of sympathy; and held that younger wives, who had not suffered more than “the ordinary wear and tear of matrimony” should become self-sufficient immediately following their divorces.

299. See e.g., Lamborn v. Lamborn, 80 Cal. App. 494, 251 P. 943 (1926); Converse v. Converse, 225 Iowa 1359, 282 N.W. 368 (1938); Shilkett v. Shilkett, 285 S.W.2d 67, 70 (Mo. Ct. App. 1955). The court held that a “divorced wife [a tuberculosis patient] . . . has no right to insist that her husband maintain her in idleness and luxury, simply because he has been adjudged the guilty party.” The plaintiff had spent most of her married life in a tuberculosis sanitarium. Rogers v. Rogers, 221 S.W. 763, 764 (Mo. Ct. App. 1920) held that “the law does not contemplate that a woman who is not sick nor disabled shall be supported in absolute idleness.” Id. The plaintiff in Rogers was 57 years old.

Probably the most memorable portrayal appears in a New York Supreme Court opinion from 1957. In Doyle v. Doyle, Judge Hofstadter, after noting that the courts should be solicitous of wives who have contributed to their husbands’ careers or who have devoted “the greatest part” of their time to homemaking and childrearing, went on to say: [but] the same considerations do not operate in the case of a young woman who in all but form had remained alien to her husband’s interest. Why should ex-wives and separated women seek a preferred status in which they shall toil not, neither shall they spin? Alimony was originally devised by society to protect those without power of ownership or earning resources. It was never intended to assure a perpetual state of secured indolence. It should not be suffered to convert a host of physically and mentally competent women into an army of alimony drones. Doyle v. Doyle, 5 Misc. 2d 4, 158 N.Y.S. 2d 909, 912 (1957).

The metaphor has apparently been too good to lose. In Law and the Family: New York, Professor Henry Foster and Ms. Doris J. Freed state that “‘alimony drones’ are familiar sights at many resort areas.” Foster & Freed, supra note 274, at xii. No authority is cited supporting this observation, nor do any of those using the phrase note that ‘drones,’ by definition, are male. 1 Oxford English Dictionary 807 (1971).

300. See, e.g., Kahn v. Kahn, 78 So.2d 367 (Fla. 1955). The court stated: We do not construe the marriage status, once achieved, as conferring on the former wife of a ship-wrecked marriage the right to live a life of veritable ease with no effort and little incentive on her part to apply such talent as she may possess to making her own way.

Id. at 368. The court also refers to the “broad practically unlimited opportunities for women in the business world of today . . .” Id.

301. See, e.g., Prosser v. Prosser, 156 Neb. 629, 634, 57 N.W.2d 173, 176 (1953).

302. Pinion v. Pinion, 92 Utah 255, 67 P.2d 265 (1937). The court stated that:
None of this, of course, was either so clear or so straightforward a development as this discussion suggests. As late as 1943, the California courts allowed alimony as compensation for a wrong done to the wife,\textsuperscript{303} while the notion that no order should be entered against a husband without resources can be found in an opinion dating from 1855.\textsuperscript{304} In a system so purely discretionary as the American law of alimony, such inconsistencies are not surprising.

What, then, was the status of the law of alimony at the dawn of no-fault? It suffered from a fundamental confusion. With fault laws still on the books, courts would occasionally enter an almost punitive order against a particularly "guilty" husband;\textsuperscript{305} and in the face of numerous "make-whole" precedents, the order would almost certainly be sustained. At the same time, however, the pragmatic view of alimony had been ascendant for some fifty years. By the 1940's, several courts had begun to express directly what had been implied by numerous opinions during the two preceding decades: that alimony's function was to keep divorced women off the welfare rolls.\textsuperscript{306}

It was upon this welter of half-formulated theories and frequently \textit{ad hoc} results that the no-fault reforms were superimposed. Their empirical effects have been extensively documented elsewhere.\textsuperscript{307} But what was their impact upon the theoretical foundation of alimony law?

\textit{[a]s a general rule a young couple, married a short time, who break up with no children, would call it a misadventure in matrimony, and unless the wife has suffered more than the ordinary wear and tear of matrimony . . . no alimony ordinarily will be given."} \textit{Id.} at 260, 67 P.2d at 267.


\textsuperscript{304} Feigley v. Feigley, 7 Md. 537 (1855).

\textsuperscript{305} California law, for example, had a special provision permitting the assessment of punitive alimony. \textit{See} Scheibe, 57 Cal. App. 2d at 342, 134 P.2d at 839-40 (citing \textit{CAL. CIV. CODE} §§ 94 & 139).

\textsuperscript{306} \textit{See}, e.g., Bowzer v. Bowzer, 236 Mo. App. 514, 524, 155 S.W.2d 530, 535 (1941). The \textit{Bowzer} court stated, "we also have in view the vital interest of the State in having a safe and secure provision for the maintenance of appellant . . . to the end that appellant may not become dependent so long as respondent is able to support her." \textit{See also} Wheeler v. Wheeler, 188 F.2d 31, 33 (D.C. Cir. 1951), "[t]he policy underlying the alimony statutes is not punishment for a wrong-doing husband. Rather, it is to insure that where the wife is entitled to support, she will receive it, and not become a public charge." Herd v. Bilby, 199 Okla. 437, 439, 186 P.2d 833, 835 (1947), "alimony to the wife, because of whose fault the divorce was granted, is not a matter of statutory right, but . . . the court, in its discretion, and with due regard to the husband's ability to pay, may allow her such alimony as would save her from destitution, and prevent her from becoming an immediate charge upon society." \textit{Id.} (citing Haynes v. Haynes, 190 Okla. 596, 126 P.2d 65 (1942) and authorities therein cited).

\textsuperscript{307} Professor Weitzman is regarded as the leading empiricist in this field. Her well known book, \textit{The Divorce Revolution}, is the leading work. \textit{See generally} \textit{Weitzman, supra} note 1.
Again, the answers are less than clear, but the key assumptions can be traced and considered.

V. NO FAULT DIVORCE AND THE "NEW ALIMONY"

In 1969, the State of California adopted the nation's first no-fault divorce statute.308 The State of Iowa followed shortly thereafter.309 In the next sixteen years, all of the states and the District of Columbia either substituted for, or added to, the fault criteria of their statutes new grounds for divorce based on the concept of "breakdown of the marriage."310

With the enactment of no-fault legislation, the "democratic compromise" was at an end.311 No longer was it necessary for couples seeking a divorce to fabricate fault grounds or to present perjured testimony. Instead, they were permitted to testify that their marriage was "irretrievably broken,"312 and the trial judge was empowered to grant the divorce if this breakdown was established to her satisfaction. With the adoption of the no-fault laws, the model of divorce as a remedy for the innocent and a punishment for the guilty — a notion which had not been truly believed for half a century — was finally laid to rest.

As demonstrated earlier, the law of divorce and the laws of alimony and marital property division are inextricably interwoven.313 In the nineteenth and early twentieth centuries, when fault divorce was at its apex, alimony was a "make whole" remedy designed to compensate an injured and innocent wife.314 As fault notions eroded, and the courts began to view divorce as an unfortunate but unavoidable occurrence, alimony orders shifted and came to be governed by pragmatic considerations such as the wife's need for income and the husband's ability to pay.315

No-fault legislation signalled a new era for the law of divorce; an era in which it was expressly permissible to dissolve a marriage simply because the parties to it were dissatisfied. Clearly, individualistic values had triumphed and the societal commitment to maintaining the family

310. See 11 FAMILY LAW R. 3015 (1985). South Dakota was the last state to adopt no-fault divorce on March 14, 1985. Id.
311. See supra note 243.
312. UNIF. MARRIAGE & DIVORCE ACT § 302(2). 9A U.L.A. 181 (West 1987). There are a number of largely insignificant variations in the language of the no-fault statutes.
313. See supra Part III.
314. See supra notes 164-89 and accompanying text.
315. See supra notes 286-302 and accompanying text.
was at a low ebb.\textsuperscript{316} Unfortunately, this watershed in the statutory requirements for divorce was not accompanied by a similar "bright line" change in the ancillary matters of alimony, property division and child support. Nor, in fact, is this particularly surprising. All of the contemporary sources indicate that the reformers concentrated their energies on packaging and selling the no-fault concept. They devoted little or no time to rethinking the ancillary economic issues.\textsuperscript{317}

Although eschewing an intent to alter the economic consequences of divorce, the reformers did change the rules governing those economic consequences in two important ways. First, they institutionalized a prevalent but mysterious system for dealing with property transfers at divorce, the so-called "equitable distribution" rules. Second, they gave this system clear primacy, relegating alimony to a distinctly secondary and clearly disfavored position.\textsuperscript{318}

That the result has been profoundly flawed is well documented.\textsuperscript{319} It is, however, critical to understand the ways in which the current models for property distribution and alimony awards fail before we can consider the substitution of alternatives.

A. Equitable Distribution: An Old Concept in New Clothes

At the heart of the no-fault scheme for adjusting the economic dislocations incident to divorce is the concept of "equitable distribution."\textsuperscript{320} This is the title given to power vested in the divorce courts to "finally equitably apportion between the parties the property and assets belonging to either or both . . . whether the title thereto is in the name of the husband or wife or both."\textsuperscript{321}

To practitioners and commentators in what were, before no-fault, "pure" title states,\textsuperscript{322} the enactment of equitable distribution statutes

\textsuperscript{316} This is the conclusion which Professor Glendon reaches in her important work, \textit{The New Family and the New Property}. Glendon, supra note 32, at 11-97. A possible resurgence of familial commitment and a subordination of individualism is a current topic in the popular press. See Kantrowitz, \textit{How to Stay Married}, Newsweek, Aug. 24, 1987, at 52.

\textsuperscript{317} See, e.g., Levy, Uniform Marriage & Divorce Legislation: A Preliminary Analysis 138-39 (Papers prepared for the Special Committee on Divorce of the National Conference of Commissioners on Uniform State Laws).


\textsuperscript{319} For an empirical analysis, see Weitzman, supra note 1, at 143-215. A theoretical critique is supplied by Glendon, supra note 32, at 57-68.

\textsuperscript{320} By 1984, all of the common law states except Mississippi used equitable distribution rules in allocating property at divorce. Freed & Walker, \textit{Family Law in the Fifty States: An Overview}, 20 Fam. L.Q. 439, 474 (1987). In addition, at least two of the eight community property states direct the division of parties' property equitably. Id., table IV, at 472-73.


\textsuperscript{322} See Appendix, infra for a discussion of this concept.
seemed revolutionary. However, the commentators failed to realize that the majority of states had equitable distribution rules in effect long before the first no-fault statute was adopted.

The earliest equitable distribution statute was that of Kansas, passed in 1889. That statute authorized the divorce courts to make "just and reasonable" division of "such property . . . as shall have been acquired by the parties jointly during their marriage, whether the title thereto be in either or both of said parties. . . ."323 The Kansas courts apparently interpreted this mandate broadly. In the 1928 case of Mecke v. Mecke,324 a wife was awarded half of her husband's interest in a prospective inheritance from his parents.

Oklahoma was the second equitable distribution state, adopting a property division statute in 1893 patterned after the Kansas statute.325 By 1931, Vernier was able to describe the state laws on property division at divorce as follows:

Some merely state the common law rules, either in a general way, or as applied to some particular property right; others provide that the decree operates to modify property rights in a specified manner; still others provide that the court is to have a more or less broad discretion in disposing of the property. The last type is the commonest.326

Thus, by 1931, discretionary provisions were in effect in twenty-two of the fifty-one jurisdictions covered by Vernier's survey.327 In seventeen states, the court was permitted to divide the property of both parties; in fifteen of these states, this power extended to all property, however and whenever acquired.328

Equitable distribution is, then, far from new. It was not created as an analogue to no-fault divorce. Instead, the no-fault laws simply institutionalized the system which was prevalent at the time the statutes were proposed.329 In embracing equitable distribution, however, the


324. 126 Kan. 760, 271 P. 275 (1928).


326. II VERNIER, supra note 107, at 216 (emphasis added). Vernier apparently approved of these discretionary statutes. He continued:

In view of the infinite and unforeseeable variety of circumstances which may arise in divorce actions, it would seem that such statutes are also the most likely to promote the ends of justice and to protect the interests of society by enabling the court to protect an impoverished wife or husband, to provide for the children, or to penalize the guilty party, as the particular case may seem to require.

Id.

327. Id. Vernier's compendium includes the forty-eight contiguous states, Alaska, Hawaii and the District of Columbia. Id. at 217-22.

328. Id.

329. In fact, the drafters of the UMDA understood this. In a major symposium on that statute published by the South Dakota Law Review in 1973, the sections
no-fault reformers faced a dilemma. The theoretical roots of the concept had been lost. Kansas, the first state to adopt the scheme, no longer understood its goals; the Chairman of that state's Special Committee on Family Law described the rules on alimony and property division as "almost hopelessly confused."

Rather than rushing to fill this theoretical void, however, at least some of the framers apparently embraced it. Arguing that families are intimate and unique, founded on emotion not negotiation, they urged great flexibility in the application of the statutes, and the avoidance of all "rules of thumb." Thus, a typical no-fault statute provides a lengthy list of factors for the court's consideration in making a property division, but does not describe for the court the end result, other covering alimony, property division and child support were relegated to a student note which concluded that: "the provisions of the Uniform Marriage and Divorce Act that relate to property, maintenance, and child support and custody do not in fact work any radical change in this area of domestic relations law." Note, Property, Maintenance, and Child Support Decrees Under the Uniform Marriage and Divorce Act, 18 S.D.L. Rev. 559, 570 (1973). 330. Hopson, Property Rights in Divorce and Separate Maintenance Cases, 30 J.B.A. Kan. 302, 314 (1962).

331. Professor Henry Foster, the author of New York's 1980 statute on marital property division and an influential participant in the debate over the UMDA stated:

[I]n view of the surrounding circumstances, varying weight will be accorded each [statutory] factor and a balancing approach is contemplated. Such was intended because of the myriad of fact situations presented in matrimonial litigation and the need for equitable discretion and flexibility, if justice is to be achieved . . . the policy decision by the Legislature was that flexibility is most desirable and that "rules of thumb" should be avoided.


332. See Equitable Distribution, supra note 331, at 32.

333. The UMDA's list of factors for judicial consideration in dividing marital property is typical:

the duration of the marriage, and prior marriage of either party, antenuptial agreement of the parties, the age, health, station, occupation, amount and source of income, vocational skills, employability, estate, liabilities, and needs of each of the parties, custodial provisions, whether the apportionment is in lieu of or in addition to maintenance, and the opportunity of each for future acquisition of capital assets and income. The court shall also consider the contribution or dissipation of each party in the acquisition, preservation, depreciation, or appreciation value of the respective estates, and the contribution of a spouse as a homemaker or to the family unit.

than to label it "equitable."

The impression that emerges from a review of the work of the drafters of the UMDA is that they conflated two quite distinct concepts. They provided standards for the measurement of an award but offered no rule to rationalize the making of it. Courts were told how to measure alimony and property awards, but were not told why they should make them. Unable to operate in this vacuum, the courts and some commentators filled the void with a new conceptual model for alimony and property division, the model of partnership. Partnership, the clean break and equal sharing notions were offered to replace the injury/compensation model of the fault statutes.

The defects in the partnership model of alimony and property division have been the subject of extensive commentary during the past few decades. Professor Glendon, in particular, has noted the very poor fit between the circumstances surrounding the dissolution of a marriage and those which obtain when a business partnership terminates. For example, the two relationships commence in entirely different ways. Business partners frequently initiate their relationship by negotiating and committing to writing a comprehensive agreement setting forth the purpose of their enterprise, the method and proportions in which gains and losses will be allocated, and a set of rules to govern dissolution. In the course of this negotiation process, each prospective partner takes steps to secure his or her own interests. Marriage partners, by contrast, seem to relegate many of their most crucial decisions to tacit assumptions. They assume that they will pool their earnings and make joint financial decisions; they assume that the wife will bear primary responsibility for the household even while working full-time; they assume

334. Id.

335. The analogy to partnership was, in fact, suggested in the UMDA. "The distribution of property upon the termination of a marriage should be treated, as nearly as possible, like the distribution of assets incident to the dissolution of a partnership." UNIF. MARRIAGE & DIVORCE ACT, Prefatory Note, 9A U.L.A. 149 (West 1987). The term does not appear, however, in either the text of, or comments to the property and alimony sections of the statute. See also DECK GUIDE TO THE UNIFORM MARRIAGE AND DIVORCE ACT, Comments, supra note 7, at 86; WEITZMAN, supra note 1, at 143-214.

336. Weitzman has developed the empirical data, Glendon the theoretical critique. See WEITZMAN, supra note 1, at 52-214. Although Weitzman speaks positively of partnership as a theoretical construct she is highly critical of the results produced by the current law. See id.; GLENDON, supra note 32, at 57-68. There are also a number of other works which discuss the defects of the partnership model. See, e.g., Fineman, Implementing Equality: Ideology, Contradiction and Social Change—A Study of Rhetoric and Results in the Regulating of the Consequences of Divorce, 1983 Wis. L. REV. 789; Grant, How Much of a Partnership Is Marriage?: Community Property Rights Under the California Family Law Act of 1969, 23 HASTINGS L. J. 249 (1971).

337. GLENDON, supra note 32, at 62-68.

338. Sociologist Joanne Vanek states flatly: "Housework is still divided along traditional lines and is not reallocated when wives enter the labor force. In other
that she will be the primary childcare provider and he will be the primary breadwinner once the children are born.\textsuperscript{339} While these assumptions are not universal, the reliance on implicit assumption rather than explicit negotiation is critical. This is characteristic of marriage, much less so of business partnerships.

More important, at least for our purposes, than this lack of agreement on the goals and allocations of the ongoing partnership, however, is the fact that very few couples — and very many business partners — plan for the dissolution of their enterprise at the outset. Society frowns on such a practice in connection with marriage. It is anti-romantic and smacks of acquisitiveness. Furthermore, it may be futile. Marriage has, arguably, a broader scope than most business partnerships. While one might be able to plan one’s business, planning the future of one’s marriage is roughly equivalent to planning one’s life.\textsuperscript{340}

Whether a partnership-like document outlining the duties and responsibilities of marriage and the sharing of its benefits is feasible is an interesting query. Relevant here, however, is the fact that such documents virtually never exist — nor does the conscious planning and decision-making which would have gone into the document’s creation. Thus, unlike their counterparts in equity ruling upon a petition for a partnership accounting, family court judges have neither a written partnership agreement nor any explicitly agreed upon goals and methods for the allocation of partnership assets. Faced with so radically different a set of facts can the courts really be expected to draw upon precedents from partnership law?

A second major failing of the partnership model is its strong, if hidden, bias against women. Partnership law rests on the theory that partners are equals dealing at arm’s length. If each walks away from the partnership with fifty percent of the assets (or some other agreed upon proportion) theoretically, each has an equal opportunity for success in the future. The law of business partnerships does not assume that one partner is “damaged” by having participated in the partnership. The data suggests, however, that divorced women’s economic status is inferior to that of never-married women.\textsuperscript{341} In short, women are economically damaged by their participation in a failed marriage.\textsuperscript{342}

words, the allocation of work in the home continues to be shaped by deeply ingrained ideas about the roles of the sexes.” Vanek, Household Work, Wage Work, and Sexual Equality, reprinted in FAMILY IN TRANSITION, supra note 235, at 176-77. See also Barrett, supra note 4, at 106-11.


340. The sample marriage contracts produced by Professor Weitzman in THE MARRIAGE CONTRACT are reflective of this dilemma. See Weitzman, supra note 112, at 291-333.

341. See, e.g., Hewlett, supra note 15, at 82-91.

342. For the economic data, see Weitzman, The Economics of Divorce: Social and
The third failure of the partnership analogy is its assumption that there will be a significant amount of property to divide in most cases. Professors Glendon and Weitzman have shown that most divorcing couples have so little property at divorce that even if all of it were allocated to one spouse it would do very little toward helping her "start over."\textsuperscript{343}

In short, the data of the past decade has proved convincingly that the no-fault reformers' reliance on property division to adjust the fortunes of ex-spouses was seriously misplaced. There is too little property, and the gap between the earnings potential of the average husband and the average wife is too large. It is to this reality that efforts to expand the role of alimony must be addressed. But if the "make whole" view of alimony is dead, and if the partnership model argues that alimony is inappropriate,\textsuperscript{344} what theoretical rationale can be offered in support of this most vilified concept?

VI. THE QUEST FOR A NEW THEORETICAL MODEL

In her 1983 study of divorce reform in Wisconsin, Professor Martha Fineman suggested that the economic redistributions necessitated by divorce are complicated by the existence of two simultaneous but conflicting images of women in society. She labelled these images "woman as victim" and "woman as equal."\textsuperscript{345} Although Professor Fineman was not describing the changing rationales used to justify alimony awards,\textsuperscript{346} her comments are directly applicable to the models depicted in the preceding pages.

Clearly, fault is a victim-oriented approach to the redistribution of


\textsuperscript{343} Glendon's figures date from 1979, and indicate that the only significant asset of most families is their house. The average equity in these houses, however, was only $26,000. Furthermore, over 35% of families did not own a house. \textit{Glendon, supra} note 32, at 94. Weitzman reports that the median value of property owned by the divorcing couples in her sample was $15,000. \textit{Weitzman, supra} note 342, at 1190.

\textsuperscript{344} The anti-alimony bias of many of the no-fault statutes is express and blatant. Alimony is to be awarded only to those "unable to secure employment appropriate to [their] skills and interests [and to those] occupied with childcare. . . ." \textit{Unif. Marriage & Divorce Act} § 308, Comment, 9A U.L.A. 348 (1987). In their study of the impact of no-fault on alimony awards, Professors Weitzman and Dixon conclude that: "The overall frequency of alimony awards did drop significantly after the no-fault divorce law went into effect. . . . Th[e] significant decline . . . suggests that the courts are applying the minimalist standard of alimony." \textit{Weitzman & Dixon, supra} note 279, at 154-55.

\textsuperscript{345} Fineman, \textit{supra} note 336 at 814-20.

\textsuperscript{346} Fineman's paper is a criticism of the Wisconsin rule requiring equal division of property at divorce. \textit{See generally id.}
marital assets at divorce. By defining categories of fault, the old divorce statutes recognized duties inherent in the marriage relation. When a husband breached one of those duties, his wife/victim was entitled to be made whole via alimony and property division. By contrast, the partnership model of divorce focuses on the theoretical equality of husband and wife. As it looks back at the terminating marriage, it insists that the contributions of the parties to that marriage should be considered equal.\textsuperscript{347} Thus, what the parties have accumulated is to be apportioned between them; it does not necessarily belong to the spouse in whose name title may be held or whose income made the purchase of an asset possible. In looking forward, the equal partnership model, at least in its purer forms, insists that neither spouse should be economically dependent upon the other after marriage except in extraordinary circumstances.\textsuperscript{348} Such a rule is seen as consistent with business practice in which ex-partners go their separate ways and do not support each other after dissolution. To force a husband to support his ex-wife is, under the partnership model, not only unfair to him but offensive to the wife by presuming her inability to function economically after divorce.

The struggle between the two images is readily apparent in the contemporary theoretical work on divorce economics. A variety of terms have come into the lexicon in the past fifteen years, all of which can be ascribed to this over-arching victim/partner dichotomy. Thus, the statutes, the cases and the literature discuss "reimbursement alimony," "human capital theory" and "rehabilitative alimony." Though dissimilar, these approaches share a common goal: they are rationales for transferring to a wife some share of her husband's post-divorce income — a result which the typical no-fault statute, on its face, discourages.\textsuperscript{349} The models also share a common flaw: whether their vision of woman is as victim or as equal, all of the models evaluate women in masculine terms. The equality models actively deny that gender-based role differences are significant; the victimization models treat women as damaged because they have deviated from the male model of continuous participation in the paid labor force. Although all of the models help women by making transfers from husband to wife at divorce more likely, none

\textsuperscript{347} The much touted recognition of the contributions of a homemaker in the text of many of the statutes is an attempt to embody this equal contribution ideal. \textit{See, e.g.}, \textit{Unif. Marriage \& Divorce Act} § 307(1), 9A U.L.A. 239 (1987); Wis. Stat. § 767.255(3) (West 1981).

\textsuperscript{348} This view reaches its zenith in the Indiana divorce statute which permits an award of permanent alimony only if the recipient spouse is mentally or physically handicapped or "is the custodian of a child whose physical or mental incapacity requires the custodian to forego employment..." In all other cases, an award is limited to three years or less. \textit{Ind. Code Ann.} § 31-1-11.5-11(e)(2) (Burns 1987).

succeeds in reaching the core issue. That issue is this: the vast majority of American women live what can only be fairly described as a feminine lifestyle. They undertake the major — and sometimes sole — responsibility for rearing children, and interrupt or scale down their participation in the paid labor force in order to do so. At divorce, however, this lifestyle choice is either minimized (equality theory) or treated as deviant (victim theory). A woman is either told that she must accept the consequences of her choice and go on, or her husband is ordered to “repair” part of the “damage” his wife has suffered, so that she can be fully self-supporting (i.e., function like a man) in the future. A brief analysis of the current models for the awarding of alimony makes both the victim/equal imagery and the devaluation of feminine lifestyles clear.

A. Reimbursement

Reimbursement alimony is an early post no-fault concept, and one entirely consistent with the partnership model of divorce. Using reimbursement theory, courts have required husbands whose wives have underwritten some or all of the costs of the husbands’ educations to reimburse their wives for these expenditures. If there is sufficient property available, this reimbursement may be effected via property division. The significance of the reimbursement concept, however, lies in

350. Demographers estimate that about 85% of today’s young adult women will marry, and that approximately 75% of all women (married and unmarried) will become mothers. Cherlin, supra note 10, at 75-76.

Economist Sylvia Hewlett cites statistics indicating that in 1980 only 10% of all women aged forty to forty-four were childless. Hewlett, supra note 15, at 177.

351. Professor Glendon makes this point specifically:

Even though the current labor force participation of mothers may be less intermittent than in the past, and the homemaker role more so, women continue to make trade-offs in job quality in order to be able to fulfill family roles such as caring for children, or elderly or ill family members.

Glendon, supra note 32, at 130 (citations omitted).

352. A particularly pointed expression of this view can be found in Professor Levy’s working papers on the UMDA:

It is true that the mother of young children, supported at the level typical of divorced wives of blue-collar husbands, might find it more difficult than a never-married woman to work or pursue her education. But she can hardly be considered totally “innocent” of responsibility for the marriage and child-bearing decisions.

Levy, supra note 317, at 147.

353. Some commentators trace the concept to the 1982 New Jersey Supreme Court decision in Mahoney v. Mahoney, 91 N.J. 488, 453 A.2d 527 (1982). See, e.g., Wettman, supra note 1, at 128. The idea, however, was clearly being formulated before the New Jersey decision. What New Jersey called “reimbursement alimony” seems identical to what Professor Leonard Schwartz termed “ordinary restitution.” See Schwartz, Divorce and Earning Ability, 1982 Det. C.L. Rev. 69.
the fact that if property is not available, the reimbursement may be assessed against the benefitting spouse's future income through alimony.

Reimbursement is, of course, an extremely limited remedy. At least one state, Indiana, limits the divorce court to the consideration of direct financial contributions to "tuition, books and laboratory fees." However, even under a more expansive view, which might consider rent payments, groceries, and home maintenance, the concept remains problematic. Enmeshed as it is in partnership ideology, reimbursement alimony looks for the type of contribution one business partner might make to another. It proceeds by direct analogy to marketplace transfers. However, the more subtle ways in which spouses assist each other, particularly when the benefit to the husband is not readily quantifiable, seem beyond the scope of the reimbursement model.

B. *Human Capital Theory*

An alternative to reimbursement can be traced to several articles appearing between 1978 and 1982. Drawing on the prior work of a number of economists, the authors of these papers analogized the efforts of a wife supporting a student husband to the process of investing in the stock market. The wife was portrayed as an investor in her husband; when he earned a degree which enhanced his wages, the investor/wife owned some portion of this wage enhancement.

355. For example, the business might pay for computer training for one partner.
356. The beauty of the so-called "professional degree" cases — which have been the source of much of the recent theoretical development in the area of divorce economics — is that there is a benefit to the husband which can be isolated, i.e., the enhanced earnings attributable to the professional degree. Although measuring the dollar value of that benefit is less than controversial, it is far easier than measuring the contributions of the homemaker wife of a blue collar worker.
358. Krauskopf argues that the "human capital" concept can be traced to Plato, but she also admits that as recently as 1948, the theory did not appear in the basic economics texts. The major developmental phase of the theory was during the 1960's. Krauskopf, *supra* note 357, at 381.
359. This model is drawn more specifically by Krauskopf than by Landes. Krauskopf, *supra* note 357, at 381-99. Landes's work focused on alimony as a contributor to the overall economic efficiency of marriage. While Landes articulates the role of alimony quite specifically, she did not purport to construct a model for use by the courts. *See generally*, Landes, *supra* note 357.
360. Krauskopf, *supra* note 357, at 587-88. As with reimbursement alimony (*supra* notes 352-56) the preferred method for the return of the wife's investment is property division. However, if that is impossible, an assessment against the future income of the benefitted spouse may be made.
Viewed solely from the spousal investment perspective, human capital theory is consistent with a partnership model of divorce. Although the analogy is actually to a corporate investor, marketplace concepts still govern and the equality model is not challenged. But there is a second prong to the human capital analysis, one which, while couched in economic and business terms, is in fact premised on the vision of woman as victim. This prong focuses not on the gain to the husband as a result of investments in the "marital firm,"361 but on losses experienced by the wife.

Human capital theorists agree that a spouse who withdraws from the paid labor force experiences a depreciation in her earning capacity because (1) she does not receive the benefits and promotions which continuous involvement in the paid labor force would provide, and (2) she cannot, in the absence of labor force work, continue to invest in and enhance her own human capital.362 This loss, the theorists argue, should be compensated at divorce because, like direct investments in the husband's earning capacity, the wife's losses were incurred in an effort to maximize the returns to the family firm.363 A number of measures are suggested in the literature, but all of them look to capturing the difference between the income that the wife can expect to earn after the divorce and the income she would have earned if she had not left the workforce.364

The human capital model is particularly fascinating because it attempts to compensate a wife for her victimization via the norms of the equality model. While explicitly articulating a view of the wife as damaged,365 the rationale for compensation under the human capital approach is return to the wife of her investment in the marriage.

Although its ability to perceive both the wife's direct financial contributions and her sacrifices makes the human capital model far supe-

361. Krauskopf uses this term to depict the family as a decision-making unit which operates to maximize the unit's utility at the expense of individual utility. Krauskopf, supra note 357, at 386.
362. Id. at 386-87.
363. See Landes, supra note 357, at 44-49. Landes's article applies the economic theory of the Chicago School to the rules of alimony, stressing this model of spousal behavior. Id.
364. See e.g., Parkman, The Recognition of Human Capital as Property in Divorce Settlements, 40 Ark. L. Rev. 439 (1987). Professor Parkman provides a useful summary and critique of prior human capital models and proposes a variant which he alleges will more accurately measure the loss incurred by the wife. Id.
365. All of the human capital articles cite the work of Mincer and Polachek who concluded that women who remain out of the labor market after the birth of their first child experience a depreciation in earning capacity of about 1.5% per year. The actual amount varies with the woman's level of education, the highest rate of depreciation being experienced by the women with the most education. See generally, Mincer and Polachek, Family Investments in Human Capital, in ECONOMICS OF THE FAMILY (Schultz ed. 1974).
rior (from the wife’s perspective) to the cruder reimbursement approach, like reimbursement, human capital theory will probably only serve to aid a small minority of divorcing women.\textsuperscript{366} First, the necessary proof of diminished earning capacity will require expensive expert testimony, a cost which even upper middle class wives find difficult to underwrite.\textsuperscript{367} Second, the quantification problem will again mean that this method will work best for those who underwrote their husbands’ educations or who abandoned established careers for full-time homemaking. The theory seems incapable of capturing the subtler effects of the adoption of a feminine lifestyle. It does not, for example, address the fact that the wife may well have chosen her earlier work with an eye to interrupted or reduced labor force participation during her childrearing years. Flexibility may have outweighed remuneration or potential for advancement as a value to be maximized in choosing a job. No formulation of human capital theory captures the impact of this choice. Yet, by ignoring it, the model is, in effect, applying a masculine template to a feminine lifestyle, the contours of which it does not even begin to discern.

At its most comprehensive, then, human capital theory is limited. It is not bad, wrong or useless, but its aura of mathematical precision is misleading. It might soothe those members of the judiciary who have an affinity for formulas; it may prove a considerable boon to some wives who would otherwise suffer terrible losses at divorce; but as a theory, it does no more than crudely measure one small part of the labor force compromises which are commonly made by women in our society.

C. rehabilitative Alimony

The last and most widely touted of the triumvirate of new rationales for alimony is “rehabilitative” alimony.\textsuperscript{368} This form takes as its goal

\begin{itemize}
\item \textsuperscript{366} This does not in any way render the theory useless. As was stated in the introduction, alimony is only feasible when the husband earns a fairly high wage. However, it has great potential for aiding middle class divorcees. \textit{See supra} notes 10-36 and accompanying text.
\item \textsuperscript{367} A number of sources have commented upon the soaring attorneys’ fees in divorce cases in recent years. \textit{See, e.g.}, Castillo, \textit{Divorce Costs Rise Under New Law}, N.Y. Times, Feb. 2, 1981, at 1, col. 1; Goodman, \textit{With Equitable Distribution, Divorce Lawyers’ Fees Soar}, N.Y Times, Jan. 13, 1983, at 17, cols. 1 & 2. Goodman wrote that: “As burdensome as legal fees in divorce are, they are more difficult for women, even wives of very rich men, because they often do not have immediate access to cash.” \textit{Id.} At least some of the increased cost is attributable to the complex economic proof which the new theories of recovery require.
\item \textsuperscript{368} The concept of alimony as a source of rehabilitation for wives, in fact, predates the no-fault statutes. In their casebook, Weyrauch and Katz reprint a passage from the 1963 case, Dakin, in which the Supreme Court of Washington ordered that a plaintiff wife should “be encouraged to rehabilitate herself...[to] become self-supporting.” W. WEYRAUCH & S. KATZ, \textit{AMERICAN FAMILY LAW IN TRANSITION} 318 (1983) (citing Dakin v. Dakin, 62 Wash. 2d 687, 384 P.2d 639
\end{itemize}
the restoration of the wife to financial independence. In theory, this can be done by ordering the ex-husband to pay time-limited, sometimes declining, sums as alimony. The wife is to use this money to train (or retrain) for paid employment.369

Unlike reimbursement alimony, which is grounded in the partnership model, and human capital theory, which draws on both victim and equality images, rehabilitative alimony is a purely victim-oriented conceptualization of alimony's role. It views a woman who compromises her participation in the paid labor force as damaged, and it asks what sum of money is needed to repair the damage sufficiently to enable the woman to function. The answers to this question have varied significantly.

In her lengthy empirical study of divorce in California, Professor Lenore Weitzman concluded that judges in that state employ a "minimalist" standard for rehabilitative alimony.370 By this she means that the courts award women the minimum amount needed to allow them to train for some position in the labor force, however low a standard of living that position might support. Rehabilitation is achieved if the wife can survive without applying for public benefits. Her further progress is her own responsibility.

Although data comparable to Weitzman's is not available in other states, the view that rehabilitation can be achieved quickly is embedded in the very language of at least some of the no-fault statutes. Indiana, for example, limits rehabilitative payments to a period of three years.371 In other states, appellate courts have reversed awards of permanent alimony on the ground that the wife was capable of self-support, and that only rehabilitative alimony was appropriate.372

There is, however, a clear ray of hope. Despite its victim imagery, the concept of rehabilitative alimony is extremely flexible; and at least one court, North Dakota's, is using this flexibility in ways which begin to move the conception of alimony beyond the limitations of the vic-

(1963). No-fault legislation has, however, served to make this form of alimony the rule rather than the exception. Id. at 319-21.

369. The concept has been particularly well developed in Florida. See, e.g., Comment, Rehabilitative Alimony — A Matter of Discretion or Direction?, 12 FLA. ST. U.L. REV. 285 (1984) (citing Reback v. Reback, 296 So.2d 541 (Fla. 3d Dist. Ct. App. 1974) (rehabilitative alimony appropriate where possible to develop capacity for self-support); See Herbert v. Herbert, 304 So. 2d 465 (Fla. 4th Dist. Ct. App. 1974); See also Russala v. Russala, 360 So. 2d 1288 (Fla. 2d Dist. Ct. App. 1978).

370. Weitzman, supra note 1, at 180.

371. IND. STAT. ANN. § 31-1-11.5-11(e) (Burns 1987).

372. See, e.g., Abuzzahab v. Abuzzahab, 359 N.W.2d 12 (Minn. 1984) (wife, a registered nurse, with earning capacity of $18,000-$22,000 per year capable of self-sufficiency despite not having been employed for 20 years); McClelland v. McClelland, 359 N.W.2d 7 (Minn. 1984) (permanent maintenance warranted only in "exceptional situations"); Auld v. Auld, 72 Or. App. 747, 697 P.2d 220 (1985) (inequitable to require husband to pay for employable wife's career training).
tim/equal dichotomy. Although they call the product of their decisions rehabilitative alimony, the movement afoot in North Dakota is in fact far closer to the "result equality" urged by Fineman and others.373

D. The North Dakota Model

In the 1976 case of Bingert v. Bingert,374 the North Dakota Supreme Court adopted the concept of rehabilitative alimony.375 In a series of opinions handed down over the past five years,376 however, the court has made it plain that its view of rehabilitation is far different from the minimalist perception Weitzman describes in California.377 The North Dakota courts use alimony "as a means of sharing marital assets that cannot be fairly reallocated by a division of property at the time of divorce."378 The major asset described by this characterization is the future earning capacity of a spouse. Without adopting the mathematical models of the human capital school, the North Dakota courts have focused on the fact that most divorcing spouses have extremely disparate earning potentials. These courts then take the further and novel step of ordering the husband to pay permanent alimony379 for the explicit purpose of reducing this disparity.380

As is the norm in alimony decisions, the North Dakota courts have not directly endorsed any particular theoretical model. Rather, in reviewing the broad discretion of the trial courts, they have chosen to affirm decisions which clearly exceed minimalist rehabilitation, and which in fact draw upon all of the theoretical models discussed herein. References to the spouses' predivorce standard of living suggest a de-

373. See Fineman, supra note 345, at 826-42. See also Weitzman, supra note 1, at 357-401.
375. Id. at 469.
376. See, e.g., Weir v. Weir, 374 N.W.2d 858 (N.D. 1985); Bullock v. Bullock, 354 N.W.2d 904 (N.D. 1984); Mees v. Mees, 325 N.W.2d 207 (N.D. 1982).
377. Weitzman, supra note 1, at 180.
378. O'Kelly, Entitlements to Spousal Support After Divorce, 61 N.D.L. REV. 225, 226 (1985). This section of this article relies heavily upon O'Kelly's work.
379. This term is, of course, a misnomer. The alimony referred to is modifiable, and could terminate upon the occurrence of a variety of events, a common one being the remarriage of the wife. Clark, supra note 37, § 16.5, at 660-71. The denomination of this type of alimony as permanent is intended to distinguish it from time-limited alimony, such as is frequently ordered for rehabilitative purposes.
380. In Bullock v. Bullock, for example, the North Dakota Supreme Court, in upholding the lower court's award of permanent alimony, held that:
[the court could very reasonably have concluded that rehabilitation beyond [the wife's] present earning capacity was not likely in the near future. In the meantime, the disparity in the earning abilities of the parties justifies the award of alimony.
sire to "make whole." The partnership construct of marriage is expressly endorsed, and human capital concepts weave their way through the decisions. Although there is a clear recognition of the wife's contributions to the enhancement of the husband's earning potential, the North Dakota courts do not attempt to measure this enhancement. Instead, they take a result-oriented approach designed to "provide an equitable sharing of the overall reduction in the parties' separate standards of living [occasioned by the divorce]." On reading the cases one is left with the strong impression of a court groping toward a rationale for a conclusion it believes intuitively to be correct.

Fortunately, for those who believe that alimony's demise has been premature, North Dakota is not the only state moving toward a revitalization of the concept. Minnesota, by statute, now requires that courts consider "the loss of earnings, seniority, retirement benefits, and other employment opportunities foregone by the spouse seeking spousal maintenance." The new statute also states that "[n]othing in this section shall be construed to favor a temporary award of maintenance over a permanent award. . . ." Other decisions, while not articulating the goal of equality of result as clearly as the North Dakota cases, seem to endorse the same premise. In light of these developments, what strategy holds the greatest promise for reform?

VII. CONCLUSION: GUIDELINES FOR THE FUTURE

All of the foregoing would seem to counsel that those who will work for an augmented role for alimony in the middle-class divorces of the future must strive to transcend the victim/equal dichotomy which has both limited and diverted the utility of alimony in the past. The role choices adopted by so many women in our culture cannot be ignored, but it is equally wrong to treat those choices as requiring a remedy. Women are not damaged men. The victim imagery which treats them

381. See, e.g., id. (had she not been a military wife, plaintiff would have the income of an established teacher).
382. See Fischer v. Fischer, 349 N.W.2d 22 (N.D. 1984). "We have said that marriage in a sense is a partnership." Id. at 24 (citing Jones v. Jones, 310 N.W.2d 753 (N.D. 1981); Rummel v. Rummel, 265 N.W.2d 230 (N.D. 1978)).
383. See, e.g., Weir v. Weir, 374 N.W.2d 858 (N.D. 1985) (plaintiff supported family while defendant attended law school).
384. Id. at 864 (emphasis supplied).
386. MINN. STAT. ANN. § 518.552(3) (West Supp. 1988).
as such may yield short-term gains, but cannot provide long-term solutions. But, as the empiricists have convincingly shown, women are not undamaged men either. The vision of giving the divorced wife half the marital property and telling her to "start over" is one which has proved hollow.

But if both the victim and the equality views are to be discarded, what constructs might a court apply in their stead? There are at least two answers to this question. First, the North Dakota cases suggest that an atheoretical result equality approach can be implemented. Without facing the global issues, the individual economic circumstances of two divorcing spouses can be readjusted to equalize their post divorce lifestyles. For political reformers, this may be the most practical goal — achievable, perhaps, by statutory amendment as in Minnesota,388 or by judicial decision as in New Jersey,389 North Dakota390 and other states.

For the theoretician, however, this approach is less than satisfying, for in eschewing the victim/equal paradigms, we come to the brink of a frightening issue. Is it either necessary or wise to recognize a separate lifestyle for women — not, of course, unavailable to men, but only very rarely chosen by them? Does such a recognition damage the prospects for meaningful reform by relegating women to a separate and lesser status? Clearly, the ramifications of any answer to this query could fill volumes, but the lessons taught by the evolution, and devolution, of alimony point powerfully toward an unpopular conclusion. Children do not raise themselves, and the vision of an America in which the great bulk of childrearing occurs outside the home and is done by persons other than the parents is a difficult one to embrace wholeheartedly. Rather, reforms which make the decision to compromise labor force participation in order to rear children less economically perilous are sorely needed. Perhaps the tremendous economic vulnerability of childrearers contributes to the disincentive to take on the role which men so clearly exhibit. Certainly, making the role safer cannot make it less attractive to men, and making childrearing more attractive to men would seem to have the potential for benefitting men, women and children alike.

How can the childrearing role be made less perilous? Clearly, alimony can play only a small part, but perhaps a crucial one. If our model for the correct post divorce result is equal lifestyles, and if we begin to recognize that it is not only years absent from the labor force but also the presence of children which compromise one's ability to earn a living at paid work, we may begin to move toward a model which

insists that the parent who devotes herself to childrearing must not end up in a worse position than the one who devotes himself to success in the labor force. This will not be easy. In many cases, the family's total assets, including income, will be meager, and the wage-earning husband, who cannot collect public benefits, will have to be given a larger share of earnings. The thorny problems posed by the establishment of sequential families will have to be addressed. But here we are speaking of models. The current models are of victims and equals. We need a new model, a model which does not treat the uncompensated rearing of children as aberrant, a model which sees women as women, but does not rush either to protect or to penalize them on that basis. For a legal system which is simultaneously steeped in a history of woman as chattel, and passionately committed to the ideal that all people are fundamentally the same, the creation of this model can only be a painful process. For divorced women and their children, however, it is likely to prove far less painful than reality of their lives as victims and equals.

APPENDIX

Alimony, Property Division and Child Support: A Field Guide

Adding to the confusion already abroad in the family law area is the fact that its basic economic terms "alimony," (or "maintenance" as it is now called) "property division," and "child support" all have a history of shifting and overlapping meanings. The terms have also meant different things in different jurisdictions. Yet any discussion of the financial effects of divorce must include these terms. It is, therefore, important to try to sort out the various meanings which have been assigned to them.

(a) **Alimony**

As it is presently used, the term "alimony" or "maintenance" means a payment from the income of one divorced spouse to the other for the recipient's use.\(^{391}\) This payment is routinely made weekly or monthly.\(^{392}\) In older practice, these payments continued until the death of the payor spouse, or the remarriage of the recipient. Today, many of the newer alimony orders and agreements provide for payments over a short or limited period. In fact, some of the new legislation expressly forbids permanent alimony.\(^{393}\)

Until the 1940's, the term "alimony" included payments for "child

\(^{391}\) Since 1979, alimony statutes have been required to be gender neutral. See *Orr v. Orr*, 440 U.S. 268, 282-83 (1979).

\(^{392}\) Some states, however, have allowed alimony to be paid in a lump sum. This sort of payment, often called "alimony in gross," serves to blur the distinction between alimony and property divisions.

\(^{393}\) See, e.g., *IND. CODE ANN. § 31-1-11.5-11(e)* (Burns 1987).
support”; this term did not emerge as a separate category until the adoption of a series of amendments to the Internal Revenue Code promulgated in 1941 and 1942. Finally, long after the separation of the terms — with alimony defined as spousal support and child support used to cover payments intended for the children — the tax laws promoted a continuation of the practice of blurring the terminology. It did so in the following way. Although child support is intended for the children, it is generally paid to the custodial parent who may also be the recipient of alimony. The payor spouse rarely makes separate payments; one check is issued covering both liabilities. Prior to 1984, the spouses would, for tax reasons, often denominate the entire payment “alimony.” Amounts paid as alimony are deductible from the gross income of the payor, and taxable to the payee. Child support, by contrast, is neither deductible by the payor nor taxable to the payee. If, as is nearly always the case, the payor spouse has the larger income, both ex-spouses stand to benefit from any deduction reducing the payor’s overall tax liability. Thus, many couples agreed to a single payment, denominated alimony but intended in large part, if not in its entirety, as child support.

Alimony has therefore overlapped both property division and child support. An historical merger of terms prompted the old cases to use the label “alimony” to mean “child support” — an inclusive application of the term which the Code encouraged until 1984. Furthermore, the practice in some courts of awarding “alimony in gross” — a lump sum payment of alimony in place of periodic payments — has caused that term to overlap with the concept of property division.

(b) Property Division

The English ecclesiastical courts initiated the practice of granting alimony as an adjunct to the old divortium a mensa et thoro, an institution equivalent to modern day legal separation. These ecclesiastical awards were made at a time when married women lost essentially all of their

394. In two significant acts passed in 1941 and 1942, Congress greatly enhanced the revenue impact of the individual income tax. Pub. L. No. 77-250, 55 Stat. 412 (1941) and Pub. L. No. 77-753, 56 Stat. 619 (1942). This required the creation of a set of exemptions, deductions and exclusions, one of which provided that alimony, but not child support, should be deductible by the payor and taxable to the payee. See Pub. L. No. 77-753, 56 Stat. 619, § 120 (codified at 26 U.S.C. § 22(k) (1939) (current version at 26 U.S.C. § 71 (1986)).


396. See supra note 394.
property at marriage. This property was not restored by virtue of the divorce \textit{a mensa et thoro}. The marriage remained intact even after the decree, and so did the husband's rights in the wife's property.

In America, however, divorce \textit{a mensa et thoro}, while recognized, was rare, and in some areas absolute divorce was permitted from the beginning of the colonial period. Upon the granting of an absolute divorce, the courts generally did return the property the wife had brought to the marriage, occasionally denying the wife alimony on the ground that a division of the parties' property — and not an award of alimony — was proper in such a case. This reasoning, however, ran afoul of fault notions, since, in the many cases in which wives brought little or no property to the marriage, the rule would allow a guilty husband to use his own wrongful conduct to escape his marital obligations. Thus, many courts continued to award alimony in suits for absolute divorce as well as in those for a divorce \textit{a mensa et thoro}.

With the enactment of the Married Women's Property Acts, property division issues became more complex. Under the Acts, spouses retained their individual rights to the property they brought to the marriage. Further, they could, during the marriage, acquire property either individually or jointly. At divorce, a court would, in addition to making orders regarding alimony and child support, disentangle the interests in the couple's jointly held property while awarding to each spouse the property held in his or her name. That, at least, was the theory.

397. See generally Vernier & Hurlbut, supra note 178, at 199.
398. Id. at 199.
399. Id. at 198. \textit{E.g.}, Dean v. Richmond, 22 Mass. 461 (5 Pick.) (1827).
400. See, \textit{e.g.}, Quarles v. Quarles, 19 Ala. 363 (1851); Moore v. Moore, 64 Pa. Super. 192 (1916). The reason for the rule is unclear. Moore is a very narrow holding, denying alimony on the ground that the Pennsylvania statutes did not state that alimony could be awarded in connection with an absolute divorce. Moore, 64 Pa. Super. at 194-95. Quarles seems to analogize the absolute divorce to an ecclesiastical annulment. Quarles, 19 Ala. at 368. An annulment, being a declaration that no marriage had ever existed, would not, of course, entitle a wife to alimony, and would nullify any rights claimed by the husband in her property.
401. See, \textit{e.g.}, Bauman v. Bauman, 18 Ark. 320 (1857).
402. This is, of course, true only in the 42 states which apply separate property doctrine. In the remaining states (Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas and Washington) married people hold property under a different form of ownership — community property. Community property rules vary significantly from state to state and generalized descriptions are dangerous. The key attribute for community property, however, is the rule that all property acquired during the marriage by the effort of either spouse (this reference to "effort" serves to except gifts and inherited property) belongs to both spouses in equal, undifferentiated shares. R. Cunningham, W. Stoebuck, D. Whitman, \textit{The Law of Property} §§ 5.14-5.15 (1984). For the declining significance of the common law/community property dichotomy, see Glendon, supra note 40, at 57-59.
Even in separate property states, however, the practice was rarely so simple.

A very few states did simplify the rules for property distribution at divorce by the clear, if brutal rule, that property was to be allocated purely on the basis of title, with no consideration of other factors. The rule produced many inequities, perhaps the most striking example being the case of *Wirth v. Wirth.*\(^403\) In *Wirth*, a husband and wife pooled their income for twenty-two years. They agreed that family expenses would be paid from the wife's earnings, with the husband's used for investment. All of these investments were taken in the husband's name alone. When the Wirths divorced, the New York court applied the title rule. Since title to the investments stood in the name of Mr. Wirth, the court held that they were his. Mrs. Wirth received nothing.\(^404\)

*Wirth*, of course, raised a furor, and was perfect grist for the mill of reformers.\(^405\) It is important to note, however, that long before no-fault statutes, at least two alternative approaches to property division were in common usage. The first has been noted in connection with the term “alimony,” that is, “alimony in gross.” Some courts, for example Ohio's, took a broad view of the concept of alimony. Periodic payments could be ordered, but so could lump sums. Furthermore, payments denominated alimony could be used to divide the property accumulated by the spouses during the marriage.\(^406\) While practices varied markedly from state to state, it is clear that courts like Ohio's took a much less restrictive view of their power to allocate spousal property at divorce than did the title states.

Finally, in many states, courts were empowered by statute to order transfers of property between divorcing spouses, without regard to title, long before the Uniform Marriage and Divorce Act.\(^407\)

Thus, just as the line between alimony and child support has been blurred, so too have the distinctions between alimony and property division varied from place to place and time to time. Alimony in gross, while called alimony, appears to the uninitiated like property division. And property divisions can be made to mimic alimony, since courts

\(^{403}\) 38 A.D.2d 611, 326 N.Y.S. 2d 308 (1971).

\(^{404}\) Id. at 612, 326 N.Y.S.2d at 308.

\(^{405}\) Weitzman, for example, describes the case in detail in *The Marriage Contract*, supra note 112, at 70-71.

\(^{406}\) In *Klump*, for example, the court stated:

[A]limony under the Ohio statutes comprehends a division of property accumulated by the joint efforts of the husband and wife during their domestic partnership, as well as an allowance for separate maintenance and support in the nature of a pension.


\(^{407}\) *See supra* notes 319-29.
sometimes order them or allow them to be paid in installments. Yet, for several reasons, the distinctions between alimony and property division can be crucial.

Just as it provides for different treatment of alimony and child support, the Internal Revenue Code also distinguishes between alimony and property division. Alimony is deductible from the income of the payor and taxable to the payee. A property transfer is not deductible by the transferor. Just as was the case with child support, strained interpretations calling property divisions alimony are sometimes attempted in order to secure the tax deduction. In the property division-alimony area, however, there is a countervailing consideration having nothing to do with the Code. Under the laws of many states, alimony awards may be modified at any time. They generally terminate at the death of the payor or at the remarriage of the recipient. They are enforced via contempt proceedings. By contrast, an order that property of the spouses be divided is not modifiable; rather, it is a debt enforceable by the transferee's estate and chargeable to the estate of the transferor. A property division order remains enforceable despite the remarriage of the transferee, and the enforcement of such an order may require a separate judicial proceeding. Thus, both the available methods of enforcement and a desire to obtain or avoid modifiability affect both spouses and courts in designating transfers alimony or property division. The great varia-

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408. See, e.g., Woodworth v. Woodworth, 126 Mich. App. 258, 337 N.W.2d 332 (1983). The Woodworth court reviewed a trial court order which required a husband to pay his wife the sum of $20,000 as her share of his law degree. The money was to be paid at the rate of $2,000 per year for 10 years. Id. at 258, 337 N.W.2d at 333-34.


411. Twenty-eight states have statutory provisions governing the modification of alimony. CLARK, supra note 37, § 16.5, at 655 n.1.

412. This is, however, a matter of some complexity. See id. at 661-63.

413. Id. at 663-64.

414. Id. § 16.6, at 673-76.

415. Id. § 16.5, at 657-58.

416. Id.

417. See Foote, Levy and Sander, supra note 6, at 682-84.

418. This is another area of significant dispute among the states. Both California and Michigan have held that using contempt to enforce a property division amounts to imprisonment for debt and is therefore unconstitutional. See, e.g., Bradley v. Superior Court, 48 Cal.2d 509, 310 P.2d 634 (1957); Thomas v. Thomas, 337 Mich. 510, 60 N.W.2d 331 (1953). Other states have held the opposite. Ex Parte Preston, 162 Tex. 379, 347 S.W.2d 938 (1961); see, e.g., Decker v. Decker, 52 Wash. 2d 456, 326 P.2d 332 (1958); see also CLARK, supra note 37, § 16.5, at 665-68.
tions in state practice, the tax ramifications and the enforcement consequences have all served to blur, and, at the same time, to increase the importance of the distinction between these concepts.

(c) **Child Support**

Unlike alimony and property division, child support is not an obligation flowing between the former spouses. In this respect it is logically distinct from those concepts. It is a payment ordered for the support of the minor children of the divorcing couple. As was explained, however, while child support payments may be for the children, they are generally paid to the custodial parent who, at least before the 1984 amendment to the Code, might receive a single payment, intended to cover both alimony and child support but denominated, for tax purposes, alimony.

The 1984 and 1986 amendments to the Internal Revenue Code provisions covering alimony, child support and property divisions will undoubtedly have a significant impact upon both court orders and private separation agreements. One goal of the changes has been to clarify and separate these three often murky concepts. It is, however, too soon to evaluate their efficacy in achieving that goal.


420. See supra notes 394-97 and accompanying text.