

**Alimony and the Need to Protect Faith in Marriage:  
Balancing Values and Practicalities in an Era of Social Change**

by

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*I. Introduction: Confusion and Conceptualization*

- A. Alimony For the Purpose of Protecting Faith in Marriage*

In order for marriage to work, couples contemplating and attempting marriage must believe that their marriage will be successful. Marriage is as great an exercise of practical faith as one can find in the world today (matched, perhaps, only by procreation and child-rearing, which are other faith activities usually linked with marriage). The American philosopher William James explained why it is critical for people to have faith in the integrity of marriage in order for marriage to work when he wrote:

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A social organism of any sort whatever, large or small, is what it is because each member proceeds to do his own duty with a trust that the other members will simultaneously do theirs. Wherever a desired result is achieved by the co-operation of many independent persons, its existence as a fact is a pure consequence of the precursive faith in one another of those immediately concerned.<sup>2</sup>

Similarly, in *The End of History and the Last Man*, Francis Fukuyama argues that communities that share a language of good and evil are more likely to bound together by a stronger glue than those based merely on shared self-interests.<sup>3</sup> Such communities, whether nuclear families or liberal democracies, are not self-sufficient, but they depend upon an exterior source of values for the community life that sustains them.<sup>4</sup>

It takes more faith to enter and maintain a marriage today than in earlier times because divorce has become so common-place in and accepted by our society, and because our unilateral no-fault divorce laws convey a powerful message about the legal insecurity of the relationship. As Allan Bloom once put it: “The possibility of separation is already the fact of separation, inasmuch as one must plan to be whole and self-sufficient, and cannot risk interdependence.”<sup>5</sup> Bloom, a translator of the work of Jean-Jacques Rousseau, was merely repeating what Rousseau had described more than two centuries earlier in *Emile*:

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<sup>2</sup> William James, *The Will to Believe* in *The Will to Believe and other essays in popular philosophy* 1, 24 (Dover 1956).

<sup>3</sup> Francis Fukuyama, *The End of History and the Last Man* 326 (1992) (“Lockian liberals who made the American revolution, like Jefferson or Franklin, or a passionate believer in liberty and equality like Abraham Lincoln, did not hesitate to assert that liberty required belief in God.”).

<sup>4</sup> *Id.* at 327.

<sup>5</sup> Allan Bloom, *Theory Becomes Practice: A Revolution in the Relation Between the Sexes in the West*, at 19, paper delivered at the World Conference of the International Society of Family Law at Universite Catholique de Louvain, Belgium (July 8-14, 1985) (unpublished manuscript).

As soon as they envisage from afar their separation, as soon as they foresee the moment which is going to make them strangers to one another, they are already strangers. Each sets up his own little separate system; and both, engrossed by the time they will no longer be together, stay only reluctantly.<sup>6</sup>

As Sir James Wilde, later Lord Penzance, declared in a well-known English case from the mid-eighteenth century: “The possibility of freedom begets the desire to be set free, and the great evil of a marriage dissolved is, that it loosens the bonds of so many others.”<sup>7</sup>

At the same time as so powerful centrifugal social, cultural and legal forces have had such a disintegrating effect of marriages, one important legal doctrine that existed for centuries to protect the faith of parties who invested their vulnerable lives in marriage has become weakened and confused. That legal doctrine is the doctrine of alimony. Historically, alimony functioned and was theoretically justified in no small part by the moral principle of protecting faith in marriage. That “golden thread” that runs through the centuries of alimony doctrine and practice has become obscured, lost, even rejected, by many contemporary legal scholars who have attempted to substitute new theoretical conceptualizations of alimony that have failed to achieve either popular endorsement or practical success. This paper reviews the history of alimony, its current state of confusion, and calls for a rediscovery of the value of protecting faith in marriage as the core theoretical justification for and basis of alimony today.

*B. Overview: The Lost “Golden Thread” of Alimony Theory*

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<sup>6</sup> Jean-Jacques Rousseau, *Emile: or, On Education* 53 (Allan Bloom trans., Basic Books, 1979) (1762). *See also* Allan Bloom, *The Closing of the American Mind* 201 (1987).

<sup>7</sup> *Sidney v. Sidney* (1865), 4 Sw & Tr 178, 34 LJMP & A 122, quoted in Brenda M. Hoggett & David S. Pearl, *The Family, Law and Society, Cases and Materials* 248 (3d ed. 1991).

There is much confusion and conflict regarding alimony in the United States of America. That is primarily due to the erosion of theoretical foundations for requiring the payment of alimony upon divorce. The doctrinal justification for awarding alimony that existed in days of fault grounds for divorce no longer seems to apply in most divorces today. This paper will argue that viewed from the most relevant level of generality the historic justification for alimony still applies to justify alimony awards in many cases of divorce today. That is because the principal theoretical justification for alimony awards in earlier centuries was to protect the institution of marriage by protecting the faith of individuals in marriage. Historically, alimony has provided some economic protection for persons who manifest their faith in marriage by investing their lives in marital relationships that failed due to causes that were substantially beyond their control but were substantially within the control of the other party to the marriage.

Part II of this paper briefly reviews the history of alimony in the Anglo-American legal tradition. The theoretical basis for awarding alimony that existed in days of “fault” grounds for divorce no longer seems to apply in most divorces today. Nineteenth century fault justifications have been undermined since marriage can be dissolved without regard to fault. Likewise, the economic justification for divorce during the mid twentieth century divorce reform in the United States no longer applies to conditions in the 21<sup>st</sup> century, as economic dependence of wives upon husbands is no longer socially expected or economically compelled, and traditional husband-earner, wife-homemaker family labor division no longer characterizes most marriages. The search for a theory to make sense of and justify alimony in the 21<sup>st</sup> century has led to a number of theoretical reformulations and creative manipulations which have failed to find broad support among lawmakers or in the general public because they have substituted abstract ideology for practical experience and common notions of morality.

Part III of this paper proposes that alimony is best understood as an incentive to promote and protect investment by spouses in critical social functions relating to child rearing and family maintenance. It is not designed so much to protect the individual economic interests of the spouses, as they live in a society in which economic individual adult self-sufficiency is not only possible, but it is the standard. Rather, alimony is designed to secure and promote public values rather than private interests. The public values relate to increasing factors that correlate with marital stability, couple happiness, and child well-being. Fostering and maintaining those factors requires an investment that may diminish individual economic productivity. Alimony is designed to protect that investment for the sake of supporting and encouraging strong families.

Part IV outlines some principles upon which alimony may be awarded today that is consistent with the historic purpose of alimony to protect the institution of marriage by protecting the economic interests of those who invest their lives in marriages. A review of the theoretical, economic, and demographic data will show that this understanding of alimony balances these important public policy values with changing practical realities of family life in 21<sup>st</sup> century America.

Part V presents, for discussion purposes, a possible alimony statute based upon the historical foundation of protecting faith in marriage. While there are many ways such a scheme of alimony may be constructed, the sample statute shows that it is possible to link the historical purposes and values underlying alimony with the practical necessities of this era.

Part VI concludes by recapping the discussion. The genius of the historical theory of alimony is that it can be adapted to contemporary circumstances.

## II. *A Brief History of Alimony*

It is necessary to review the history of alimony in Anglo-American law not only to provide context for discussion of the contemporary dilemma but to discern the core purpose of that legal concept. As Randy Barnett has written:

To at least some extent . . . the degree of generality is itself an historical question. In light of the context and usage at the time, how general was a term or phrase at the time it was used? Answering this question is necessary to discover the “objective” or reasonable meaning of a term at the time of either contract or constitutional formation. In sum, determining original meaning entails determining the level of generality with which a particular term was used. As Keith Whittington has argued, “[t]he level of generality at which terms were defined is not an a priori theoretical question but a contextualized historical one. . . .”<sup>8</sup>

The power of courts to award alimony (sometimes called *aliment* or *maintenance*) has long been a part of Anglo-American divorce proceedings. There have been many (and many good) summaries and descriptions of the history of alimony.<sup>9</sup> The key elements are undisputed. Blackstone summarized them succinctly 250 years ago:

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<sup>8</sup> Barnett, *supra* note \_\_\_, at 644, quoting Keith E. Whittington, *Constitutional Interpretation: Textual Meaning, Original Intent and Judicial Review* 187 (1999).

<sup>9</sup> See generally William Blackstone, *Commentaries on the Laws of England* \*442; Frederick Pollock & Frederic W. Maitland, *The History of English Law* 367-68 (1909); Chester A. Vernier & John B. Hurlbut, *The Historical Background of Alimony Law and Its Present Structure*, 6 *L. & Contemp. Probs.* 197 (1939); Rayden’s *Practice and Law of Divorce* 1-8 (9<sup>th</sup> ed. 1964 & Supp. 1966); John Eekelaar & Mavis Maclean, *Maintenance After Divorce* (1986); Brenda M. Hoggett & David S. Pearl, *The Family, Law and Society, Cases and Materials* 248 (3d ed. 1991); Homer H. Clark, Jr., *The Law of Domestic Relations in the United States* 619-22 (2d ed. 1988); see also Vol. 3 *Contemporary Family Law* § 22.02 (Lynn D. Wardle, Christopher Blakesley & Jacqueline Y. Parker, eds. 1988); Julene Persinger, *A Brief History of Alimony*, paper prepared for Anglo-American Legal History, 1993 (in the Howard W. Hunter Law Library at BYU Law School); Richard White, *Alimony: Past and Present*, paper prepared for Anglo-American Legal History,

In case of divorce *a mensa et thoro*, the law allows alimony to the wife: which is that allowance which is made to a woman for the support out of the husband's estate; being settled at the discretion of the ecclesiastical judge, on consideration of all the circumstances of the case. This is sometimes called her *estovers*; for which, if he refuses payment, there is (besides the ordinary process of excommunication) a writ at common law *de estoveriis habendis* (of recovering estovers), in order to recover it. It is generally proportioned to the rank and quality of the parties. But in cases of elopement, and living with an adulterer, the law allows her no alimony.<sup>10</sup>

From the middle of the twelfth century until the middle of the nineteenth century, Ecclesiastical Courts had exclusive jurisdiction over matters of marriage and divorce in England.<sup>11</sup> The Ecclesiastical Courts had power to grant both temporary alimony *pendent lite* and eventually even permanent alimony, as did the successor secular courts after passage of the Matrimonial Causes Act of 1857.<sup>12</sup>

Two types of alimony awards were traditionally available: alimony *pendente lite* and post-divorce (*or permanent*) alimony. (Strictly speaking, the term *alimony* referred originally to the spousal support ordered to be paid by an Ecclesiastical Court during a suit for or upon order of a

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April 20, 1981 (in the Howard W. Hunter Law Library at BYU Law School); *see further infra* note \_\_ and sources cited therein (reviewing alimony theories).

<sup>10</sup> Blackston, *supra* at \*422.

<sup>11</sup> *Rayden's supra* note \_\_, at 1-8 (9<sup>th</sup> ed. 1964 & Supp. 1966); Parliamentary divorces by private Act of Parliament were possible but quite rare, numbering only 184 in the 138 years of 1715-1852 inclusive. *Id.* at 6. Parliamentary divorce was considered "the privilege of the aristocracy." Vernier & Hurlbut, *supra* note \_\_, at 198. Little is known of the Ecclesiastical court decisions before the nineteenth century., *Id.* n.10.

<sup>12</sup> *Rayden's supra* note \_\_, at 7-8, 438, 755, n. (a). "It was not until the sixteenth century that the law began to intervene in a significant manner in the economies of families by the assertion of

divorce *a mensa et thoro*, and the term *maintenance* was the permanent award for support after the marriage ended authorized by Parliament in the Matrimonial Causes Act of 1857, though the use of both terms for post-divorce support spousal support became accepted.)<sup>13</sup> Temporary (or *pendent lite*) alimony awards were based upon the fact that marriage still continued until the divorce decree was entered, and the husband had the duty to support the wife during the marriage.

Originally, *post-divorce* or *permanent* alimony awarded by the Ecclesiastical courts also was based on the fact that the marriage still continued because ecclesiastical courts could only award alimony when granting a *divorce a mensa et thoro*, the equivalent of what today would be called legal separation. That divorce decree did not terminate the marriage, and since the marriage still continued the duty of the husband to support his wife remained intact (unless the husband could show some defense that would eliminate his duty to support his wife).<sup>14</sup> Thus the earliest legal justification for alimony was that the marriage still legally existed, and with it the duty of spousal support.

The liberalization of grounds for divorce in the nineteenth century produced the next theoretical reconceptualization of alimony.<sup>15</sup> Since divorce was available only for marital

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family support duties.” Eekelaar & Maclean, *supra* note \_\_, at 1 (referring to the Tudor poor laws).

<sup>13</sup> Blacks Law Dictionary 97 (Rev. 4<sup>th</sup> ed. 1968). The term comes from the Latin *alimonia* meaning sustenance, or *alere* meaning to nourish and sustain. *Id.* See also Rayden’s, *supra* note \_\_, at 760-65.

<sup>14</sup> Hoggett & Pearl, *supra* note \_\_, at 249, quoting \_\_ (Finer & )) McGregor, History of the Obligation to Maintain (App. 5 to the Finer Report of 1974). Until 1813 alimony awards by Ecclesiastical courts could only be enforced by excommunication or other spiritual discipline. *Id.* “Under the Ecclesiastical law, the wife was not entitled to permanent alimony after divorce *a vinculo [matrimonii]*.” Vernier & Hurlburt, *supra* note \_\_, at 201.

<sup>15</sup> In American courts, alimony was available upon divorce *a vinculo* as well as divorce *a mensa et thoro*. See *id.* at 201; Milton C. Regan, Jr., Family Law and the Pursuit of Intimacy 220 (1993). But it has been noted by Professor Clark that the awarding of alimony in America in

misconduct, the duty to pay alimony became tied to fault as well.<sup>16</sup> That is, if the husband had violated the minimum standards of socially tolerable marital behavior, the innocent wife was entitled to a divorce and to alimony (assuming the husband had funds from which the alimony could be paid) because “but for” the husband’s extreme misbehavior the marriage (and her right to continued support) would have continued, whereas to terminate alimony because the marriage had ended (due to the husband’s misbehavior) would cause the wife to further suffer (and to allow the husband to profit) from his misconduct. On the other hand, if the wife had committed the marital misconduct, by her misbehavior she had forfeited her claim to further support, just as she had forfeited her claim to protection of her status as wife and to the other benefits of marriage.<sup>17</sup>

During this era, alimony functioned as, and had as one of its key purposes the establishment of, a legal, social and economic counter-incentive to careless divorce and a partial remedy to the economic injury it imposes, often on the more vulnerable spouse. As Sir James Wilde, declared in *Sidney v. Sidney* nearly 150 years ago:

If, . . . a man can part with his wife at the door of the Divorce Court without any obligation to support her, and with full liberty to form a new connections, his triumph over the sacred permanence of marriage will have been complete. To him, marriage will have been a mere temporary arrangement, coterminous with his inclinations, and void of all lasting tie or burden.

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general was more influenced by the practice of the Ecclesiastical courts than by the Parliamentary divorce practice. Clark, *supra* note \_\_, at 620.

<sup>16</sup> Eekelaar & Maclean, *supra* note \_\_, at 8-14.

. . . Those for whom shame has no dread, honourable vows no tie, and violence to the weak no sense of degradation, may still be held in check by an appeal to their love of money . . . .”<sup>18</sup>

The award of alimony historically reflected the belief that marriage (and the duty of support associated with marriage) was a lifelong commitment.<sup>19</sup> Thus, while misconduct justified termination of the conjugal and legal interrelationship, alimony could be awarded to reflect the economic disadvantages that resulted for the innocent spouse when she was left without a husband to support her.

The adoption of no-fault divorce, however, undermined this justification for awarding alimony. As Eekelaar and Maclean put it, “when the legislature made a definite . . . move away from fault-based divorce in 1971, the only rationale for [the award of alimony] collapsed. . . . The retention of the fiction of the marital support obligation was no longer tenable.”<sup>20</sup>

The latest evolution of alimony practice has reflected growing ability of spouses to pay alimony. As men’s economic opportunities increased so that a real income stream was generated, the awarding of alimony increased and the standards for awarding it became clearer. Alimony was generally awardable upon showing that the wife had a *need* for continued spousal support, and that the husband had the *ability to pay* such support. Of course, “need” is not a very precise standard, and a rough, general reference point was the standard of living the parties enjoyed

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<sup>17</sup> *Id.* at 248-50. In contrast, however, in Parliamentary divorce it became the accepted practice to require the husband to provide support even for a guilty wife from whom he sought a divorce. Clark, *supra* note \_\_, at 619-20.

<sup>18</sup> Sidney v. Sidney (1865), 4 Sw & Tr 178, 34 LJMP & A 122, quoted in Brenda M. Hoggett & David S. Pearl, *The Family, Law and Society, Cases and Materials* 248 (3d ed. 1991), and in Eekelaar & Maclean, *supra* note \_\_, at 14-15.

<sup>19</sup> Eekelaar & Maclean speculate that the husband’s ownership of his wife’s labor or the unity of man and wife in marriage underlie early poor law obligations. Eekelaar & Maclean, *supra* note \_\_, at 2. No supporting authority is mentioned.

during marriage, though that was only a general reference point because in most cases it would be impossible for both parties to enjoy the same standard of living after divorce that they enjoyed while living together during marriage.<sup>21</sup>

However, as the economy improved and social barriers to women's employment fell, the "need" for alimony from some perspectives fell. Eventually, alimony was seldom awarded. For instance, one study of alimony shortly before the general adoption no-fault divorce revealed that alimony awards were granted in only 15% of divorce cases.<sup>22</sup> That statistic may also reflect the fact that most divorces occur early in marriage, before the parties have acquired much in the way of income or assets. Thus, today, it appears that alimony is awarded in relatively few cases, and the alimony awards usually are small and of short duration.<sup>23</sup>

Today, courts in all American jurisdictions have the power to award "alimony" or "maintenance" to a divorcing spouse at the time of the divorce. According to Professors Elrod and Spector's latest review of Family Law in the Fifty States, forty states have statutes prescribing a "laundry list" of factors to be considered by the courts when evaluating alimony claims, marital fault is considered in awarding alimony in half of the states, and in thirty-nine states the standard of living while married is a baseline reference point consideration in determining "need."<sup>24</sup>

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<sup>20</sup> Eekelaar & Maclean, *supra* note \_\_\_, at 15.

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<sup>22</sup> Lenore Weitzman, \*; *see also* Lenore J. Weitzman & Ruth B. Dixon, *The Alimony Myth: Does No-Fault Divorce Make a Difference?* 14 Fam. L. Q. 141 (1980).

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<sup>24</sup> Linda D. Elrod & Robert G. Spector, *A Review of the Year in Family Law: Erisa, Jurisdiction, and Third-Party Cases Multiply*, 40 Fam. L. Q. 545 (2007); *id.* at 591, Chart 1—Alimony/Spousal Support Factors.

## B. *Studies of Alimony in Practice*

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### III. *Theories of Alimony*

#### A. *Recent Theoretical Reconceptualizations of Alimony*

The no-fault divorce revolution has profoundly affected alimony doctrine and practice. The practice of awarding permanent alimony (X dollars per month for life) seems to have given way to common awards of short-term rehabilitative alimony. It seems that less alimony is being awarded and for shorter periods of time. Perhaps as a result, advocates of greater wealth-redistribution upon divorce have proposed many new theories for awarding more alimony.

Recent legal theorists have promoted many theoretical reconceptualizations that are temporarily popular, or contain some ideologically intriguing explanations of and justifications for alimony.<sup>25</sup> The explosion of new theoretical images of alimony has contributed to the

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<sup>25</sup> See, e.g., Ira M. Ellman, *The Theory of Alimony*, 77 Cal. L. Rev. 1 (1989); June R. Carbone, *Economics, Feminism and the Reinvention of Alimony: A Reply to Ira Ellman*, 43 Vand. L. Rev. 1463 (1990); Carl Schneider, *Rethinking Alimony: Marital Decisions and Moral Discourse*, 1991 B.Y.U. L. Rev. 197 (1991); June Carbone & Margaret F. Brinig, *Rethinking Marriage: Feminist Ideology, Economic Change, and Divorce Reform* 65 Tulane L. Rev. 953 (1991); John C. Sheldon & Nancy Diesel Mills, *In Search of a Theory of Alimony*, 45 Me. L. Rev. 283 (1993); Jana B. Singer, *Alimony and Efficiency: The Gendered Costs and Benefits of the Economic Justifications for Alimony*, 82 Geo. L. J. 2432 (1994); Margaret Brinig, *Comment on Jana Singer's Alimony and Efficiency*, 82 Geo. L. J. 2461 (1994); Margaret Brinig & Steven M. Crafton, *Marriage and Opportunism*, 23 J. Legal Stud. 869 (1994); Joan Williams, *Is Coverture Dead? Beyond A New Theory of Alimony*, 82 Geo. L. J. 2227 (1994); Ann Laquer Estin, *Love and Obligation: Family Law and the Romance of Economics*, 365 Wm. & Mary L. Rev. 989 (1995); David D. Haddock & Daniel D. Polsby, *Family As A Rational Classification*, 74 Wash. U. L. Q. 15 (1996); Robert Kirkman Collins, *The Theory of Marital Residuals: Applying an Income Adjustment Calculus to the Enigma of Alimony*, 24 Harv. Women's L.J. 23 (2001); Allen M. Parkman, *Good Intentions Gone Awry: No Fault Divorce and the American Family* (2000); Lynn D. Wardle, *Beyond Fault and No-Fault in the Law of Marital Dissolution in Reconceiving the Family: Critical Reflections on the American Law Institute's Principles of the Law of Family Dissolution* at 9 (2006); Gaytri Kachroo, *Mapping Alimony: From Status to Contract and Beyond*, 5 Pierce L. Rev. 163 (2007). See also Lynn D. Wardle & Laurence C. Nolan, *Fundamental Principles of Family Law* 703-14 (2d ed. 2006); Joan M. Krauskopf,

confusion over the purpose and role of alimony today. Surprisingly, many contemporary alimony theorists have overlooked or dismissed the important faith-in-marriage purposes of alimony. Not surprisingly, under the influence of such theoretical confusion, both alimony awards in courts and faith in marriage in the current generation have waned, rather than increased. The explosion in alimony theories has been a dud, producing lots of talk but no real reform, and little no real improvement in the lot of spouses economically disadvantaged by an unwanted or unexpected divorce.

There is tremendous confusion in the alimony cases as courts and legislators struggle with the basic question, “why alimony?” The historical justifications for alimony are rarely applicable today. For instance, “fault” as a ground for award of alimony seems inconsistent with, if not eliminated by, the adoption and overwhelming use of no-fault grounds for divorce today. By the same token, unilateral no-fault divorce belies and subverts the assumption that marriage is a lifelong obligation (or even, in some communities, that this is a reasonable expectation). “Need” no longer suffices because social and economic changes in the past thirty years have made it possible (and socially preferred) for women to obtain the same kind of education and jobs that men have. What justification is there now for ever ordering a man (usually) to continue to pay support to a woman to whom he is no longer married, who has (or is capable of obtaining) an education and a job that will provide her with enough salary to be fully self-sufficient?

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*Rehabilitative Alimony: Uses and Abuses of Limited Duration Alimony*, 21 Fam. L. Q. 573 (1988); Allen M. Parkman, *Bringing Consistency to the Financial Arrangements at Divorce*, 87 Ky. L.J. 51 (1998-99); Frances Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 Harv. L. Rev. 1497 (1983); Lenore Weitzman, *The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards*, 28 UCLA L. Rev. 1181 (1981).

For example, Dean Herma Hill Kay has long advocated elimination of alimony (as a goal, at least) in order to force married women to become more self-sufficient (and thus less economically vulnerable in divorce).

In the long run, however, I do not believe that we should encourage future couples entering marriage to make choices that will be economically disabling for women, thereby perpetuating their traditional financial dependence upon men and contributing to their inequality with men at divorce. I do not mean to suggest that these choices are unjustified. For most couples, they are based on the presence of children in the family. . . .

. . . Throughout history, the choice of the mother as the primary nurturing parent has been the most common response to the infant's claim. But other choices are possible . . . .

. . . [S]ince, . . . Anglo-American family law has traditionally reflected the social division of function by sex within marriage, it will be necessary to withdraw existing legal supports for that arrangement as a cultural norm. . . .<sup>26</sup>

A more purely Marxist approach might argue for the redistribution of wealth from men to women via alimony to liberate women from the oppression of marriages to which they might otherwise be bound by virtue of their choices to become mothers. It might be insisted that alimony is a penalty to keep men in marriages to punish them economically for opting to leave marriages or behaving in a way that would cause the wife to want to leave the marriage.<sup>27</sup>

Most of the new alimony theories that have been proposed and attempted rest on notions of contract and inter-party equity. They seek to equalize or fairly apportion the economic advantages and disadvantages of the divorce. Thus, they seek to compensate the spouse (usually

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<sup>26</sup> Herma Hill Kay, *Equality and Difference: A Perspective on No-Fault Divorce and It's Aftermath*, 56 U. Cin. L. Rev. 1, 79, 84-85 (1987). Much of the discussion in this section mirrors Chapter 28 of *Fundamental Principles of Family Law*, *supra*.

the wife) who opted to forego market-skill-development or income-development opportunities in order to raise children and/or manage the home; they seek to reimburse the wife who contributed significantly to her husband's acquisition of income-producing non-property assets (like education, degrees, licenses); they attempt to recognize and compensate for the economic value of the contributions of the stay-at-home spouse; they seek restitution for investments in the economic operation that they will not enjoy as a spouse. And they seek to do it by establishing one-size-fits-all rules that apply in a context of unilateral no-fault divorce.

What principle justifies awarding alimony in any case? How does that principle causally connect to marriage to justify alimony upon divorce? What rule applies fairly where the wife may be the one leaving her hard-working, faithful high-school-math-teacher-husband to live with her unemployed, paramour poet-lover, as well as in the case where the brain-surgeon husband is leaving the woman who put him through twelve years of medical training so that he can marry his infatuated young lover; as well as in cases of the lazy husband who leaves the 14-hour-per-day working wife? Can they fairly apply in cases when the husband pressured the wife give up her job to stay home, as well as in cases when he demanded that she work, despite her desires to raise their children; when, despite his pleas and his provision of adequate family income, she left their young children in day care in order to have a career as well, as when she had not children but refused to find employment. They will apply to spouses who choose low-paying jobs because they love the work, or because they want to spend more time with family, as well as to spouses who forego those interests in order to maximize income for self or family. Can *any* one-size-fits-all alimony rule work justice in all divorce cases?

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<sup>27</sup> See generally Olsen, *infra*, and Haddock, *infra*.

The American Law Institute's *Principles of the Law of Family Dissolution* recommends liberal redistribution of income streams to equalize income after marriage on a general compensation for lost economic opportunity theory.<sup>28</sup> However, as Allen Parkman has noted:

[T]he ALI Principles lacks consistency because it does not provide a logical reason why ex-spouses' incomes should be shared just because they were married.

Without a clearly defined reason, numerous injustices will occur. For example, a woman who made numerous sacrifices before marriage to acquire important income-earning skills, such as a medical education, will be forced to share her income with a man who did not make similar sacrifices either before or during marriage. On the other hand, if a spouse limits a career to provide important services in the home and that loss is recognized at dissolution, the loss will not disappear even if the person remarries, at which time the ALI Principles would normally terminate compensation.<sup>29</sup>

One problem with most recent theoretical reconceptualizations of alimony is that they take a market approach, viewing marriage as a joint economic investment. But market principles do not justify alimony. In what other joint economic investments – partnerships, career choices, employment decisions – does the other party have a legal duty to share income after the partnership or joint economic enterprise terminates? If a woman marries a husband and starts a job with a law firm on the same day, expecting that both relationships will succeed, and if both fail – if she fails to “make partner” in the law firm, and on the same day that she learns that she must leave the firm her husband files for divorce, why should she have a continuing right to income from either one (or a duty to share her later earnings with either one) if both relationships

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<sup>28</sup> The American Law Institute, *Principles of the Law of Family Dissolution*, at 785 (2002) (Chapter 5, Compensatory Spousal Payments).

were predicated on the same market, economic, or investment principles? In fact, marriages are much more than economic investment enterprises, and the alimony obligation flows from the marital relationship, not from economic, market or investment principles.

*B. Levels of Generalization in Legal Theory*

During the past two decades, or longer, there has been a wide-ranging debate over the level of generality with which judicially-created constitutional rights should be stated.<sup>30</sup> Most of this debate has been concerned with constitutional interpretation and whether various

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<sup>29</sup> Allen M. Parkman, *Bringing Consistency to the Financial Arrangements at Divorce*, 87 Ky. L.J. 51, 55 (1998-99).

<sup>30</sup> See generally John Sefranek and Stephen Safranek, *Finding Rights Specifically*, 111 Penn St. L. Rev. 945 (2007); John F. Basiak, Jr., *Inconsistent Levels of Generality in the Characterization of Unenumerated Rights*, 17 U. Fl. J.L. & Pub. Pol'y 401 (2005) (criticizing generalist approaches but proposing a "moderate" level of abstraction); Randy E. Barnett, *An Originalism for Non-Originalists*, 45 Loy. L. Rev. 611, 644-45 (1999) (discussion importance of level of generality for originalist interpretative approaches); Bruce Ackerman, *Liberating Abstraction*, 59 U. Chi. L. Rev. 317 (1992) (criticizing reluctance to adopt generalist interpretative approaches in protecting individual rights); Frank H. Easterbrook, *Abstraction and Authority*, 59 U. Chi. L. J. 349, 358 (1992) (criticism generalist approaches in constitutional interpretation; "Instead of assuming power and then searching for a level of abstraction, the court should search for that degree of generality capable of justifying a judicial role." *Id.* at 372); Steven R. Greenberger, *Justice Scalia's Due Process Traditionalism Applied to Territorial Jurisdiction: the Illusion of Adjudication without Judgment*, 33 B.C. L. Rev. 981, 1030 (1992) (recounting Tribe & Dorf's criticism of the difficulty of establishing a metric for Justice Scalia's theory of specification); Timothy L. Rattschke Shattuck, *Justice Scalia's Due Process Methodology: Examining Specific Traditions*, 65 S. Cal. L. Rev. 2743, 2769-70 (1992) (arguing that Justice Scalia chooses the most specific tradition available); L. Benjamin Young, Jr., *Justice Scalia's History and Tradition: the Chief Nightmare in Professor Tribe's Anxiety Closet*, 78 Va. L. Rev. 581, 600-18 (1992) (asserting that Justice Scalia does not always chose the most specific level of generalization); Gregory C. Cook, *Footnote 6: Justice Scalia's Attempt To Impose a Rule of Substantive Due Process*, 14 Harv. J.L. & Pub. Pol'y 853, 885-87 (1991) (briefly defending Justice Scalia's Theory); Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. Chi. L. Rev. 1057, 1058 (1990) ("The more abstractly one states the already-protected right, the more likely it becomes that the claimed right will fall within its protection."); See also Paul Brest, *Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 Yale L.J. 1063, 1085 (1981) ("The indeterminacy and

fundamental rights that are not expressed in the text or history of the Constitution should be defined in specific or general terms.<sup>31</sup> That context is distinguishable from the context in which questions about alimony arise involving judicial interpretation of rights grounded in legislative enactments and in the common law. For example, one obvious difference is that the people (the popular sovereign) can overturn and amend judicial interpretations of statutes and common law by merely passing legislation, whereas the democratic branches of government cannot overturn or amend judicial constructions of the Constitution as that requires a constitutional amendment (very difficult, requiring extraordinary supermajoritarian consensus of multiple levels and branches of government). So support for preferring the general rather than the specific in interpretation of statutes and common law doctrines is more consistent with democratic theory and republican principle than a similar approach to interpretation of constitutional law.

Another difference between defining constitutional and statutory/common law rights broadly is that constitutions are intended to establish principles at a level of descriptive abstraction, whereas statutes and common law rights are tailored by specific legal context. Thus, one criticism of a generalist interpretative approach in constitutional adjudication is

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manipulability of levels of generality is closely related... to the arbitrariness inherent in accommodating fundamental rights with competing government interests.").

<sup>31</sup> Most of the recent discussion stems from Justice Kennedy's opinion for the Court in *Lawrence v. Texas*, 539 U.S. 558 (2003); *id.* at 587, 597-89 (Scalia, J., with Rehnquist, C.J. and Thomas, J., dissenting); and, earlier, from Justice Scalia's plurality opinion in *Michael H. and Victoria D v. Gerald D.*, 491 U.S. 110 (1989); *id.* at \_\_\_, n.6; *id.* at \_\_\_ (O'Connor & Kennedy, JJ., concurring); *id.* at \_\_\_ (Brennan, J., dissenting). *See also* *Washington v. Glucksberg*, 521 U.S. 702, 722-23 (1997) (constitutional right to die is precise, not general); *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (Powell, J., plurality); *id.* at \_\_\_ (Brennan and Marshall, JJ., concurring); *id.* at \_\_\_ (White, J., concurring). Justice Scalia has been the most outspoken advocate of defining unwritten constitutional rights narrowly and specificity; Justice Brennan was the most articulate advocate of giving such rights broad and general definition; and Justice O'Connor the most reluctant as a matter of principle to commit to a particular, binding method of constitutional interpretation.

that there are no meaningful "general" rights. General rights are useless for adjudication because they are not prescriptive, that is, they cannot justify rights to any specific acts. A "general" right to liberty or marriage exists if general means that most citizens are able to satisfy the conditions necessary to exercise the right. However, this sense of a general right does not justify any specific rights because it is descriptive rather than prescriptive: it merely states the fact that most individuals are in fact able to fulfill the conditions that specify the right.<sup>32</sup>

On the other hand, in a narrower statutory and common law context, it may be more feasible to speak of "general" descriptive rights in the specific context, just as the legislation or common law establishes "general" obligations and duties in the particular context. Still, one problem with some of the theories of alimony that have been proposed during the past two decades is the level of generality of abstraction used to reconcile past practices and justify particular new proposals.

Professors Tribe and Dorf have proposed a method of for abstracting general principles from the specific liberties in constitutional interpretation.<sup>33</sup> They propose to identify "higher unifying principles from the specific rights mentioned in the Constitution, including those

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<sup>32</sup>John Sefranek and Stephen Safranek, *Finding Rights Specifically*, 111 Penn St. L. Rev. 945, 958 (2007). *See also id.* at 956 n. 92 quoting Louis Seidman and Mark Tushnet, *Remnants of Belief* 41 (1995) ("Perhaps it is possible to generate wide agreement on highly abstract principles of justice... [but] the very abstraction that makes agreement possible deprives the principle of much use in practice.").

<sup>33</sup>Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. Chi. L. Rev. 1057, 1067-68 (1990); *Finding Rights*, *supra* note \_\_\_, at 949. *See also* *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting).

logically presupposed or instrumentally required to vindicate the specified constitutional rights.<sup>34</sup> Their method has been criticized.<sup>35</sup>

My proposal for reference to the general unifying principle that runs through the history of alimony law is much more modest. First, it does not propose any constitutional principle or general theory. Second, it is intended to provide a principled basis for lawmakers to make sense of and update alimony law for the twenty-first century. Given the extent to which alimony is controlled and constrained by statute in most states, it would be rare indeed for this method to be used in direct judicial interpretation of an alimony statute. Nonetheless, the level of generality of the policy or purpose underlying a rule clearly is relevant to our understanding and balancing of legal rules generally, including alimony rules.<sup>36</sup>

#### *IV. The Golden Thread: Alimony to Protect Faith in Marriage*

Contrary to some recent reconceptualizations of alimony, historically alimony awards were not primarily intended to protect the individual interest in marriage, but were intended to protect the public interest in the integrity of a public institution -- marriage. A more careful review of the history of alimony in English ecclesiastic and secular courts confirms this insight.<sup>37</sup>

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<sup>34</sup> Tribe & Dorf, *supra* note \_\_, at 1068-69.

<sup>35</sup> See, e.g., *Finding Rights*, *supra* note \_\_, at 951-965.

<sup>36</sup> Mark V. Tushnet, *Anti-Formalism in Recent Constitutional Theory*, 83 Mich. L. Rev. 1502, 1513-14 (1985) (discussing the problems courts have with “balancing interests that even if ultimately commensurable, are defined on different levels of generality,” and noting that “the interest and facts balanced have to be described on the same level of generality.”).

<sup>37</sup> Relatively little is known of the Ecclesiastical court decisions before the nineteenth century because “there are no regular reports of ecclesiastical courts prior to the three volumes of Phillmore beginning in 1809.” Vernier & Hurlbut, *supra* note \_\_, at 198, n.10. However, Blackstone wrote in the middle of the eighteenth century, allowing a peek into practice a half-century before Phillmore’s reports.

In the nineteenth century English courts awarded alimony, “[o]nly if his own wrongful actions precipitated her into poverty could his funds be reached” to order alimony or maintenance to his former wife.<sup>38</sup> If a wife of the same class as her husband was working and self-supporting, the Ecclesiastical Court might not order the husband to pay alimony.<sup>39</sup> The Ecclesiastical Courts did not apparently perceive or seek to enforce an obligation of a husband to support a wife in perpetuity *simpliciter*, but it was conditional on his wrongdoing to her (adultery, cruelty, or unnatural offences), and on his having unjustly enriched himself at her expense (he obtained her property), and her disabled and deprived condition upon divorce.<sup>40</sup> If the wife was at fault, the husband had no alimony liability, as a general rule.<sup>41</sup> “When we look at the instances of the awards of alimony, it is very striking how much attention is given to the fact that (as was usual in these cases) the husband had profited greatly by their acquisition of property from their wives on entering marriage. The courts were doing little more than returning to the wives [in the form of alimony] what had been theirs and which was lost on marriage.”<sup>42</sup> If she had independent means, alimony was not awarded.<sup>43</sup> Alimony awards were very uncommon when the Ecclesiastical courts had jurisdiction, and based more upon equitable property arrangements (to

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<sup>38</sup> Eekelaar & Maclean, *supra* note \_\_, at 4.

<sup>39</sup> Eekelaar & Maclean, *supra* note \_\_, at 3, citing *Warr v. Huntly*, (1703) 1 Salk. 118. However, the case report is very abbreviated and does not exclude a number of other relevant factors (including marital misconduct by the wife) that may have influenced the decision besides the fact that the wife was working.

<sup>40</sup> Eekelaar & Maclean, *supra* note \_\_, at 5-6.

<sup>41</sup> Eekelaar & Maclean, *supra* note \_\_, at 14.

<sup>42</sup> Eekelaar & Maclean, *supra* note \_\_, at 6. *See also id.* at 14. Vernier and Hurlburt agree that consideration of fairness and unjust enrichment resulting from the marital transfer of property from wife to husband was a major consideration in alimony awards, Vernier & Hurlburt, *supra* note \_\_, at 199, but they also assert (with less persuasive authority) that “the primary object of the order for permanent alimony was to provide continuing maintenance for the wife.” *Id.* at 198.

<sup>43</sup> Eekelaar & Maclean, *supra* note \_\_, at 14.

compensate the wife for her property that had come under her husband's control by marriage).<sup>44</sup>

The same is true of Parliamentary private Acts of Divorce in the same era: "the primary legal concern seemed to be directed towards inequities which marriage breakdown would bring about regarding property holdings between the parties, or between their respective families."<sup>45</sup>

As Eekelaar and Maclean emphasize: "Ecclesiastical law, therefore, as it was applied by the beginning of the nineteenth century, does not seem to have made a serious contribution to ensuring that a family's resources were properly distributed amongst its members [upon divorce]."<sup>46</sup> The economic enterprise theory or even the family support principle was not a major consideration historically. Rather, one key principle that Eekelaar and Maclean see throughout the evolution of the doctrine of alimony in English legal history was "an attempt to deter people from divorce . . . ."<sup>47</sup> It was to protect the institution of marriage by protecting individual parties' faith in the integrity of their own marriages.

Section 32 of the Matrimonial Causes Act of 1857 gave courts the power to order a husband to provide maintenance for his former wife in a larger number of cases than the Ecclesiastical law had done, and required some new theoretical justification for so doing. Essentially, the principle resolved upon was "need" – originally to prevent the destitute wife from starving or turning to prostitution, and to protect the public purse from welfare burden.<sup>48</sup> Later, it evolved further by referring to the standard of living during marriage as the measure of "need."<sup>49</sup> Protection of working class wives from the abuse of their husbands also became an explicit consideration in alimony awards in the nineteenth and twentieth centuries in England,

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<sup>44</sup> Eekelaar & Maclean, *supra* note \_\_, at 5-8.

<sup>45</sup> Eekelaar & Maclean, *supra* note \_\_, at 7.

<sup>46</sup> Eekelaar & Maclean, *supra* note \_\_, at 7.

<sup>47</sup> Eekelaar & Maclean, *supra* note \_\_, at 14.

<sup>48</sup> Eekelaar & Maclean, *supra* note \_\_, at 9-10.

and influenced the practice of awarding the wife one-third of the husband's income.<sup>50</sup> Also, "punishing the guilty party" was a clear consideration in the evolution of alimony law in England over the past two centuries.<sup>51</sup>

The public "protect faith in marriage" purpose of alimony is evident from many details of alimony doctrine over the past two centuries. In awarding alimony English courts for centuries had "an unfettered discretion to award what sum it consider[ed] just,"<sup>52</sup> though as recently as the last third of the twentieth century the usual English practice was to award the wife an amount for alimony *pendent lite* "which w[ould] bring the income of the wife up to approximately one-fifth of the joint incomes, but there [wa]s no hard and fast rule as to this and each case st[ood] on its own merits,"<sup>53</sup> and for permanent alimony it was common (but not required) to "follow[] the practice in certain cases of the Ecclesiastical Courts of allowing one-third of the husband's income, or, where the wife has an income of her own, of making up the wife's income to one-third of the joint incomes."<sup>54</sup>

Nevertheless, the public and private interests were linked; the public purpose of stabilizing marital unions and upholding the integrity of the institution of marriage and the private interest of providing a socially adequate sum of money for the divorced woman deprived of her expectation of spousal support were congruent and mutually reinforcing. While the standard practice of awarding one-fifth or one-third of the joint income to the wife today may seem cheap or chary by contemporary standards, the economy and social expectations were quite

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<sup>49</sup> Eekelaar & Maclean, *supra* note \_\_, at 10-11.

<sup>50</sup> Eekelaar & Maclean, *supra* note \_\_, at 12-13.

<sup>51</sup> Eekelaar & Maclean, *supra* note \_\_, at 14.

<sup>52</sup> Rayden's *supra* note \_\_, at 449.

<sup>53</sup> Rayden's *supra* note \_\_, at 448.

different a century ago, and no less a feminist than Virginia Woolf wrote in 1929 about how wonderful she thought it would be for a single woman to have “a room of her own” and a mere £500 per year (a paltry £42 per month).<sup>55</sup>

The faith-in-marriage purpose of historic alimony is reflected also in the historic English matrimonial rule that a wife could not obtain an award of alimony if she was found guilty of adultery -- unless her husband had connived in or caused the adultery or the court exercised its discretion on her behalf.<sup>56</sup> “The general conduct of the wife must be considered,” as well as the behavior of the husband, according to the leading authority.<sup>57</sup>

Historically and in modern English law, an award of alimony has been an “allowance to be paid by the husband for the maintenance and support of the wife. *It is neither the property of the wife, nor, for this purpose, a debt due from the husband.* The wife cannot assign or release her interest in the order.”<sup>58</sup> It was not considered a debt or liability for purposes of English bankruptcy, but failure to pay it could result in imprisonment for failure to obey a court order.<sup>59</sup> Alimony could not “be released, assigned, or taken in execution.”<sup>60</sup>

Similarly, unlike private contractual obligations, alimony was not subject to the usual attorney’s lien, unless the wife voluntarily allowed her solicitor to receive the money, “for the court w[ould] not countenance money, paid for alimony, being so diverted.”<sup>61</sup> Similarly

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<sup>54</sup> Rayden’s *supra* note \_\_, at 758.

<sup>55</sup> Virginia Woolf, *A Room of One’s Own* (1929).

<sup>56</sup> Rayden’s *supra* note \_\_, at 446-47. Adultery did not necessarily bar an award of alimony *pendent lite*, *id.* at 438-39, but as a practical matter if not *de jure* adultery would preclude the award of permanent alimony. *Id.* at 454. *See also id.* at 768 (“there is nothing to prevent a wife, found guilty of adultery, from applying for maintenance”).

<sup>57</sup> Rayden’s *supra* note \_\_, at 758. *See also id.* at 760; *id.* at 764 n. (f); *id.* at 769 (“The registrar must have regard to the conduct of the parties”).

<sup>58</sup> Rayden’s *supra* note \_\_, at 455 (emphasis added).

<sup>59</sup> Rayden’s *supra* note \_\_, at 459, 760.

<sup>60</sup> Rayden’s *supra* note \_\_, at 756.

<sup>61</sup> Rayden’s *supra* note \_\_, at 453.

underscoring the public interest, the court could at any time after making an alimony award “vary, discharge or temporarily suspend . . . or revive” the alimony order.<sup>62</sup> The source of the duty to pay alimony was not contractual and private but derived from and was to vindicate the public interest in the marital relationship.

The faith-in-the-marriage-relationship aspect of alimony was also manifest as alimony was awarded in lieu of the lost financial aspects of the marital relationship. Thus, until modern legislation provided otherwise, there was no right to alimony if the marriage was annulled (if there was no valid marriage). “The power to award maintenance after a decree of nullity was first conferred by the Matrimonial Causes Act, 1907.”<sup>63</sup> Likewise, the absence of “fault” on the part of the husband (as if he were found to be insane) did not preclude recovery of maintenance by the wife, based on the marital relationship.<sup>64</sup>

Alimony has historically functioned to counter-act influences that discourage couples from marrying or drive couples to divorce – social, familial, cultural, but especially *economic* dis-integrating influences. By providing that a spouse could in socially-approved cases receive monetary compensation from her ex-spouse in the case of marital failure alimony laws and doctrines provided an incentive for the potentially more vulnerable party to invest in marriage and an incentive for the potentially liable spouse to avoid divorce-causing behaviors (such as domestic abuse and adultery). The incentives and disincentives of alimony helped to foster faith in marriage.

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<sup>62</sup> Rayden’s *supra* note \_\_, at 804.

<sup>63</sup> Rayden’s *supra* note \_\_, at 761, n. (b).

<sup>64</sup> Rayden’s *supra* note \_\_, at 768.

Today the public approach to alimony emphasizes satisfying the financial needs and circumstances of the dependent or lesser-earning spouse, more than manipulating the payor through his selfish acquisitiveness or greed. But the net effect is the same – it is to remove a disincentive for the more vulnerable spouse to marry and to create a disincentive for the higher-earning spouse to abandon or disregard his spouse’s reliance upon the stability of their marriage. It is to protect and vindicate the spouse’s faith in marriage.

V. *A Sample Alimony Statute*

For discussion purposes, I provide below a sample alimony statute build upon the principle of protecting faith in marriage. The structure and basic principles are simple. There are multiple different circumstances in which it would be fair to require a divorcing spouse to pay alimony to the other spouse. Thus, a “one-size-fits-all” rule will not do justice in all cases; the alimony law need to include different standards to cover a variety of circumstances. The statute provides that alimony may be awarded in five different circumstances. In any given case one or more alimony provisions may apply. The court should compute how much alimony should be awarded under each provision, but they should offset and subtract as necessary to prevent double-dipping and multiple compensation for overlapping losses. There should be a maximum cap on the total possible alimony (and alimony-plus-child-support) awarded. Spousal conduct that falls below the minimum floor of tolerable marital behavior may justify increasing or decreasing the alimony award, in recognition of the fact that such conduct can be expected to have contributed to a just termination of the marriage by the other spouse.

*Preamble*

It is the policy of this state to encourage spouses to invest their time, energy, resources, and emotion in supporting marriage and family relationships in order to make those relationships happy, healthy, and successful. Husbands and wives make very valuable and profound contributions to the happiness and welfare of their families and family members, and make very important contributions to the common good and to the well-being of our communities and our society when they invest their time and resources to (a) care for dependent family members, including minor children, aged relatives, and family members and friends with disabilities, (b) train and nurture children, and support, aid and assist the education of any family members, (c) give emotional support and encouragement to children, spouses, and other family members, (d) keep the home and its members and environs clean, neat, orderly, well-maintained, and beautiful, (e) provide nourishing meals, (f) provide healthy social interaction, and wholesome environment, opportunities, and equipment for recreation and relaxation, and (g) maintain a safe and appropriate living environment.

It takes time to perform these important family and social services, and while many of them are performed by loving and dedicated parents before and after their paid-employment hours, often family circumstances or hopes for optimal family benefits require or call for the investment of a parent's time and energy that precludes significant regular participation in paid employment, or at least necessitates the sacrifice of full-time or significant regular paid employment, for some substantial period(s) of time. Thus, many parents sacrifice significant employment opportunities, career development, and workplace seniority for the sake of giving full-time or substantial part-time critical family services.

When marriages end in dissolution, a spouse who has made such sacrifices for the sake of the family ought to receive legal recognition of both the contribution she has made and the financial-career sacrifice she has made. Such contributions and sacrifices of both spouses, if made, should be recognized and accounted for in the dissolution proceeding, by an appropriate award of alimony.

It is against public policy to give parties a strong financial windfall incentive to divorce or to not remarry.

#### *Operative Provisions*

1. (a) The court shall award *reimbursement alimony* to be paid to a spouse in an amount sufficient to allow the recipient to acquire or complete education, licensing, skills, experience, or career-development opportunity, whenever the court finds that (1) the payor has the ability to pay, and (2) the recipient donor spouse sacrificed her own education, training, licensing, experience, or career-development opportunity to support the beneficiary spouse to allow the beneficiary spouse to acquire earning education, licensing, skills, experience, or career-development opportunity.

(b) Such reimbursement alimony shall be for a period up to but not exceeding the number of years that the donor spouse provided principal financial support for the beneficiary spouse as he pursued an education, professional licensing, skills, or other similar training or career development opportunity.

2. The court shall award *rehabilitative alimony* to be paid by to one's former spouse for a period of up to five years when the court finds (1) the payor has the ability to pay, (2) the recipient spouse's current earnings or earning potential is at least 25% less than the payor spouse, (3) the recipient spouse would better be able to engage in self-supporting employment with

education, training, or licensing or time for career-development, and (4) the court finds that the income differential is mostly due to the parties' marriage.

3. (a) The court shall award *homemaking service alimony* to be paid by a higher-earning spouse to a lower-earning spouse who for a period of time not less than six years or one-half of the length of the marriage, whichever is less, was engaged in substantial homemaking service to her family and was not at the same time employed or engaged in education, training, or career-development activities for more than 20 hours per week.

(b) Such award shall not be made if the court finds that (1) the payor spouse does not have the ability to pay, (2) recipient spouse did not make significant sacrifice of her income or income producing abilities to provide substantial homemaking service for the family, and (3) the homemaker spouse did not substantially provide valuable homemaking services.

(c) The amount of homemaking service alimony shall be up to 80% of the difference between what the homemaker spouse is earning or reasonably can earn and what she reasonably would be earning had she not engaged in substantial homemaking services. The total amount of alimony awarded shall not exceed 40% of the differential between the recipient's actual or reasonably possible income and the payor's higher actual or reasonably possible income, and alimony may be ordered for period up to the length of time the recipient spouse was engaged in substantial homemaking service to her family.

4. (a) The court shall award *marriage-loss alimony* to the party who wishes to continue the marriage, is willing to fulfill reasonable marital responsibilities, who is not guilty of serious marital misconduct, and who will suffer real impairment or loss from divorce.

(b) Marriage-loss alimony shall be in an amount not to exceed one-half of either the alimony awarded to the other spouse or one-half of the value of the property division awarded to the other spouse.

5. (a) The court shall award *contract alimony* to be paid by to one's former spouse whenever the court finds that the parties agreed in writing that alimony would be paid in the event of divorce and that the conditions for the payment have been proven to exist.

(b) An award of contract alimony shall be in lieu of any other kind of alimony, unless the court finds by clear and convincing evidence that exceptional circumstances require an additional award of alimony in the interest of fairness and justice.

6. (a) The total amount of alimony awarded by the court shall not be redundant or provide multiple compensation for overlapping losses. The amount of alimony awarded shall not exceed forty-five percent of the obligor's actual or reasonably possible net income, nor shall it last longer than the time it would takes the youngest child of the marriage to reach the age of majority, or the length of the marriage, whichever is longer. The total amount of alimony and child support awards combined shall not exceed fifty-five percent of the obligor's actual or reasonably possible net income.

(b) The alimony awarded shall not be in an amount or of a duration that is so great or so long as to give the alimony recipient a strong financial windfall incentive to divorce or to not remarry.

(c ) The court may reduce an alimony award by up to 50% for spousal misconduct by the party seeking alimony that was clearly in violation of well-understood community standards of minimum-acceptable marital behavior (such as but not limited to infidelity, domestic violence, child abuse, or drug or alcohol abuse), that was not overwhelmingly provoked or encouraged by the obligor spouse.

(d) Subject to subsections (a) and (b) of this section, the court may increase an alimony award by up to 50% for spousal misconduct the alimony obligor that was clearly in violation of well-understood community standards of minimum-acceptable marital behavior (such as but not limited to infidelity, domestic violence, child abuse, or drug or alcohol abuse), that was not overwhelmingly provoked or encouraged by the spouse seeking alimony.

#### VI. *Conclusion: Alimony and Faith in Marriage*

This paper has argued that protecting faith in marriage is, at the most appropriate level of generalization, the core historic purpose of alimony, the “golden thread” that runs through and connects the various theories, doctrines and conceptualizations of alimony for centuries. Failure to recognize this has caused much of the confusion that has developed in recent years about alimony theory and doctrine, has impeded judges from making alimony awards in some cases when such awards have been merited, and has produced a dramatic overall reduction in the making (and the length or amount) of alimony awards in America.

The genius of this historic “protect faith in marriage” principle underlying alimony is that it is so easily adaptable to contemporary circumstances. While making such application may not require as much intellectual creativity or give as much ideological satisfaction as other theories that have been proposed, it has the great merit of having a substantial track record of experience in which various flaws and defects have become apparent over time and been corrected, and it has the greatest potential for successful practical application today. It also would contribute to restoring in some principled basis for faith in marriage and in the law governing marriage dissolution that has been so lacking in recent years.

-END-