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## Spousal Support Disorder: An Overview of Problems in Current Alimony Law

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SPOUSAL SUPPORT DISORDER:  
AN OVERVIEW OF PROBLEMS IN CURRENT ALIMONY LAW

*Jennifer L. McCoy*

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# SPOUSAL SUPPORT DISORDER: AN OVERVIEW OF PROBLEMS IN CURRENT ALIMONY LAW

JENNIFER L. MCCOY\*

I. INTRODUCTION.....	501
II. THE HISTORY OF DIVORCE AND SPOUSAL SUPPORT LAW .....	503
A. <i>English Divorce Law and the Origins of Spousal Support</i> .....	504
B. <i>Spousal Support Law in the United States</i> .....	505
III. SYSTEMS OF SPOUSAL SUPPORT .....	506
A. <i>Permanent Alimony: The Earliest System</i> .....	506
B. <i>Reimbursive and Compensatory Support: The Middle Systems</i> .....	508
1. <i>Principles of the American Law Institute</i> .....	509
2. <i>The Likely Impact on Spousal Support if ALI's Principles Are Adopted</i> .....	509
C. <i>Rehabilitative Support: The Current Trend</i> .....	511
D. <i>Reorientation and Bridge-the-Gap Support</i> .....	512
E. <i>Property Division in Lieu of Spousal Support?</i> .....	513
IV. CURRENT PROBLEMS WITH SPOUSAL SUPPORT LAW .....	513
A. <i>Spousal Support Law Lacks Consistency</i> .....	514
B. <i>Devastating Effects of Spousal Support Law on Women</i> .....	516
C. <i>Spousal Support Law Is Often Unjust</i> .....	519
D. <i>Spousal Support Orders May Be a Form of Involuntary Servitude</i> .....	521
V. PROPOSED SOLUTION TO THE CURRENT SPOUSAL SUPPORT PROBLEM .....	521
VI. COMMENT ON PREMARITAL AGREEMENTS THAT WAIVE RIGHTS TO SPOUSAL SUPPORT .....	523
VII. CONCLUSION .....	525

## I. INTRODUCTION

Marriage has never been a relationship based solely on love and companionship—it has always primarily been an economic institution.<sup>1</sup> In this institution, husbands and wives contribute to the marital union by earning wages, sharing resources, and making joint decisions regarding careers, purchases, and investments.<sup>2</sup> Thus, some consider marriage an “economic partnership.”<sup>3</sup> Although the term “partnership” suggests gender equality between husbands and wives,<sup>4</sup> the term is misleading because partners to a marriage are typically not economically equal.<sup>5</sup> A happy marriage may mask this inequality, but it becomes openly evident upon divorce.

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1. Margorie Engel, *Pockets of Poverty: The Second Wives Club—Examining the Financial [In]Security of Women in Remarriages*, 5 WM. & MARY J. WOMEN & L. 309, 345 (1999); Vivian Hamilton, *Mistaking Marriage for Social Policy*, 11 VA. J. SOC. POL'Y & L. 307, 362 (2004).

2. See Hamilton, *supra* note 1, at 362-63.

3. Engel, *supra* note 1, at 345.

4. *Id.* at 345-46.

5. *Id.* at 364.

Statistics show that nearly half of all married couples will eventually divorce.<sup>6</sup> Ideally, upon divorce a court divides the couple's property—such as the marital home, personal property, and financial assets—in the most equitable manner possible. Such division should permit the spouses to make a clean, final break from each other and from the marital union. However, because most divorcing couples do not possess valuable property, financial assets that can be divided,<sup>7</sup> or only possess intangible marital assets that cannot be equitably divided,<sup>8</sup> a court will frequently order one spouse to make monthly support payments to the other to supplement the property division. Often, this award of spousal support becomes more important to the recipient than the property settlement.<sup>9</sup>

Spousal support, also known as alimony or maintenance,<sup>10</sup> is designed to balance the effects of divorce<sup>11</sup> by examining the earning capacity and future needs of each spouse<sup>12</sup> and by providing financial support to the spouse who is more economically dependent.<sup>13</sup> Much controversy surrounds this area of the law—spousal support “has been a source of much inconsistency among trial courts, unhappiness among litigants, and conflict among critics.”<sup>14</sup> Most family law attorneys agree that spousal support presents the largest impediment to settling divorces, and support cases are among the most appealed.<sup>15</sup>

The purpose of this Comment is to inform readers about the problems inherent in modern spousal support law and to suggest a

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6. ROSE M. KREIDER & JASON M. FIELDS, NUMBER, TIMING, AND DURATION OF MARRIAGES AND DIVORCES: 1996, U.S. CENSUS BUREAU CURRENT POPULATION REPORTS 18 (2002), available at <http://www.census.gov/prod/2002pubs/p70-80.pdf> (“About 50 percent of first marriages for men under age 45 may end in divorce, and between 44 and 52 percent of women's first marriages may end in divorce for these age groups.”); see also PETER N. SWISHER ET AL., FAMILY LAW: CASES, MATERIALS AND PROBLEMS 771 (1st ed. 1993).

7. See Marsha Garrison, *The Economic Consequences of Divorce: Would Adoption of the ALI Principles Improve Current Outcomes?*, 8 DUKE J. GENDER L. & POL'Y 119, 126, 128 (2001).

8. Michelle Murray, *Alimony as an Equalizing Force in Divorce*, 11 J. CONTEMP. LEGAL ISSUES 313, 318 (2000).

9. Garrison, *supra* note 7, at 128.

10. Mary Frances Lyle & Jeffrey L. Levy, *From Riches to Rags: Does Rehabilitative Alimony Need to Be Rehabilitated?*, 38 FAM. L.Q. 3 (2004).

11. 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, 36 (2001).

12. Carolyn J. Frantz & Hanoach Dagan, *Properties of Marriage*, 104 COLUM. L. REV. 75, 99 (2004).

13. Victoria M. Ho & Jennifer L. Johnson, *Overview of Florida Alimony*, FLA. B.J., Oct. 2004, at 71, 71.

14. Megan A. Drefchinski, Comment, *Out with the Old and In with the New: An Analysis of Illinois Maintenance Law Under the Uniform Marriage and Divorce Act and a Proposal for Its Replacement*, 23 N. ILL. U. L. REV. 581, 613 (2003).

15. Twila B. Larkin, *Guidelines for Alimony: The New Mexico Experiment*, 38 FAM. L.Q. 29, 29 (2004).

possible solution to these problems. Part II describes the history of spousal support, commencing with its origins in England and ending with modern trends in American support law. Part III provides brief overviews of many different types of spousal support currently available to divorced couples—including permanent support, reimbursement and compensatory support, rehabilitative support, reorientation support, bridge-the-gap support, and models of spousal support created by the American Law Institute and Uniform Marriage and Divorce Act. Part IV discusses many of the problems inherent in the modern system of spousal support, such as its devastating effects on women, its lack of clarity and consistency, and its frequent abuse by recipients. Part V presents a possible solution to these problems in the form of a model spousal support system designed to meet the needs of the supported spouse while minimizing the burden of paying on the supporting spouse. Part VI provides a brief comment on premarital agreements that waive the rights to spousal support. Part VII concludes the Comment by refuting general criticisms of spousal support, reiterating its purpose, and predicting the future direction of this area of law.

## II. THE HISTORY OF DIVORCE AND SPOUSAL SUPPORT LAW

The modern American system of spousal support is based on the early English model of alimony.<sup>16</sup> In England, alimony stemmed from the laws of coverture.<sup>17</sup> Under the doctrine of coverture, marriage merged a wife's legal identity with that of her husband, creating a united legal identity.<sup>18</sup> When a couple married, the husband gained control of his wife's assets, including all property she owned prior to the marriage.<sup>19</sup> The wife also "transferred to her husband her ability to hold real property, sign contracts, and keep any earnings."<sup>20</sup> In return, the husband incurred a legal duty and a moral obligation to protect and financially support his wife.<sup>21</sup>

This legal duty, known as the duty of support, arose from the marital relationship itself and was imposed regardless of the wife's

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16. Collins, *supra* note 11, at 30.

17. *Id.* at 29.

18. *Id.* at 40; Lara Lenzotti Kapalla, Comment, *Some Assembly Required: Why States Should Not Adopt the ALI's System of Presumptive Alimony Awards in Its Current Form*, 2004 MICH. ST. L. REV. 207, 211.

19. Kapalla, *supra* note 18, at 211.

20. *Id.* Because the doctrine of unity prevented married women from holding property, signing contracts, partaking in professions, or keeping their own earnings, a spousal support system was necessary for the survival of women who were separated from their husbands. Collins, *supra* note 11, at 29.

21. Collins, *supra* note 11, at 29; Kapalla, *supra* note 18, at 211; Twila L. Perry, *The "Essentials of Marriage": Reconsidering the Duty of Support and Services*, 15 YALE J.L. & FEMINISM 1, 10 (2003).

premarital wealth.<sup>22</sup> It required the husband to provide his wife with material support and the “necessaries” of life, such as food, clothing, and shelter.<sup>23</sup> In return, it required the wife to provide her husband with a duty of service, such as housework, childcare, and companionship.<sup>24</sup> The legal duty of support helps explain the origins of alimony, discussed in the next subsection.

#### A. *English Divorce Law and the Origins of Spousal Support*

Prior to 1857, England applied two types of marital dissolution.<sup>25</sup> The first type of divorce was known as “absolute” divorce.<sup>26</sup> An absolute divorce “actually severed the marital bond.”<sup>27</sup> Ecclesiastical courts could not grant this type of divorce. Only Parliament could grant an absolute divorce, and it was typically granted only to wealthy couples.<sup>28</sup>

The second, more common type of divorce was known as a divorce from bed and board.<sup>29</sup> This type of divorce was similar to today’s notion of legal separation—the court granted the spouses the right to live apart, but the marital relationship was left intact.<sup>30</sup> Since the couple technically remained married, their physical separation did not end the husband’s control of his wife’s assets, and the wife was not permitted to regain control of her own assets.<sup>31</sup> Without any form of financial support, the wife had difficulty surviving.<sup>32</sup> To solve this problem, courts conditioned divorces from bed and board on the husband’s promise to continue paying for his wife’s expenses pursuant to the duty of support.<sup>33</sup> Thus, this created an early system of “alimony.”<sup>34</sup>

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22. Kapalla, *supra* note 18, 211-12.

23. Perry, *supra* note 21, at 11.

24. *Id.* at 3.

25. Collins, *supra* note 11, at 28.

26. *Id.*

27. *Id.*

28. Mavis Maclean, *From Advocacy to Management in Divorce: A Women’s Issue?*, 2 CARDOZO WOMEN’S L.J. 53, 54 (1995).

29. Collins, *supra* note 11, at 28. Divorce from bed and board could only be granted by English “ecclesiastical courts from the mid-twelfth until the mid-nineteenth centuries.” *Id.*

30. *Id.*

31. Kapalla, *supra* note 18, at 211-12.

32. *Id.* at 212.

33. Collins, *supra* note 11, at 29; see Brett R. Turner, *Spousal Support in Chaos*, FAM. ADVOC., Spring 2003, at 14, 15 (“Marriages were expected to last forever and could be ended only on grounds of fault. Since women usually did not and often could not find employment, the wife had a much higher standard of living while married than she could ever have on her own. When the marriage had to end because of the husband’s misconduct, the wife was entitled to the benefit of her bargain—the standard of living she enjoyed during the marriage.”).

34. The term “alimony” has been replaced by more modern terms, such as “maintenance” and “spousal support.” Larry R. Spain, *The Elimination of Marital Fault in*

By the mid-nineteenth century, England had enacted universally accessible civil divorce statutes,<sup>35</sup> so divorce from bed and board became obsolete. However, the concept of alimony was so firmly entrenched in the law that courts continued awarding it even in cases where marriages were officially terminated.<sup>36</sup>

### B. Spousal Support Law in the United States

The American system of alimony was closely modeled on the English system.<sup>37</sup> Courts first began awarding alimony during colonial times.<sup>38</sup> Pennsylvania, for example, required husbands to agree to continue supporting their wives as a condition of receiving a divorce because wives had no other methods to support themselves.<sup>39</sup> In 1852, states began enacting the Married Women's Property Acts, which permitted divorced women to regain control of property they owned prior to marriage.<sup>40</sup> After the enactment of such laws, the idea of alimony and the notion that a husband's duty of support should continue after divorce no longer seemed necessary.<sup>41</sup> Nevertheless, the concept of alimony was as deeply rooted in American law as it was in English law, so courts continued to require husbands to support their wives after divorce.<sup>42</sup> Now, with the large number of women participating in the workforce and the increased employment opportunities available to women, alimony seems even less necessary.

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*Awarding Spousal Support: The Minnesota Experience*, 28 WM. MITCHELL L. REV. 861, 866 (2001).

35. Collins, *supra* note 11, at 30.

36. *Id.*

37. Perry, *supra* note 21, at 23.

38. Collins, *supra* note 11, at 30. Although the colonies granted divorces, they remained rare. In fact, Massachusetts and Connecticut were the only colonies to grant more than a handful of divorces throughout the eighteenth century. *Id.* at 30-31.

39. *Id.* at 31. Underlying this rationale was the belief that if husbands did not continue supporting their ex-wives, the burden of their support would fall upon society.

40. Kapalla, *supra* note 18, at 212. For example, the New Jersey Married Women's Property Act stated:

Be it enacted by the Senate and General Assembly of the State of New Jersey, That the real and personal property of any female who may hereafter marry, and which she shall own at the time of marriage, and the rents, issues, and profits thereof, shall not be subject to the disposal of her husband, nor be liable for his debts, and shall continue her sole and separate property, as if she were a single female.

Chapter CLXXI: An Act for the Better Securing the Property of Married Women, in ACTS OF THE SEVENTY-SIXTH LEGISLATURE OF THE STATE OF NEW JERSEY 407 (1852), [http://www.scc.rutgers.edu/njwomenshistory/Period\\_3/womenspropact.htm](http://www.scc.rutgers.edu/njwomenshistory/Period_3/womenspropact.htm).

41. Kapalla, *supra* note 18, at 212.

42. *Id.* As a fundamental matter of constitutional law, spousal support is no longer reserved for just wives—courts can now order support for husbands as well. *See Orr v. Orr*, 440 U.S. 268 (1979).

Perhaps the concept of spousal support has always been controversial because no reason has ever been provided to adequately explain why one spouse should be forced to continue supporting the other after the termination of the marital relationship.<sup>43</sup> Several theories have been advanced, but none are convincing. For example, one theory posits that courts awarded alimony in the past based on the belief that women could not support themselves outside the home.<sup>44</sup> Another theory suggests that courts did not want “innocent” wives to suffer financial difficulty if their husbands breached the marital contract.<sup>45</sup> Now, spousal support is based on the notion that a couple should not be able to completely sever their economic ties if doing so would leave one spouse financially devastated.<sup>46</sup> However, none of these theories have articulated a clear reason why the economic burden of supporting a needy spouse should “fall on a former spouse, rather than on family members or on society as a whole.”<sup>47</sup>

Now that the history of spousal support has been addressed, it is necessary to discuss the different types of support currently awarded in America.

### III. SYSTEMS OF SPOUSAL SUPPORT

Currently, American courts award different types of spousal support. These include permanent alimony, reimbursive support, compensatory support, rehabilitative support, reorientation support, and bridge-the gap support. The type of support awarded depends on the laws of the state where the recipient lives, and many states offer multiple support options. As the following subsections will demonstrate, support awards have progressed from permanent payments to compensation-based payments and finally to the currently favored temporary rehabilitative payments.

#### A. *Permanent Alimony: The Earliest System*

The earliest type of spousal support was known as permanent alimony.<sup>48</sup> Courts typically awarded this type of support to full-time homemakers after the dissolution of long-term marriages.<sup>49</sup> The amount of the award was based on “the needs of the receiving spouse

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43. Collins, *supra* note 11, at 31.

44. Kapalla, *supra* note 18, at 212.

45. *Id.*

46. *Id.* at 212-13.

47. *Id.* at 213.

48. See Larkin, *supra* note 15, at 34-35.

49. Tonya L. Brito, *Spousal Support Takes on the Mommy Track: Why the ALI Proposal Is Good for Working Mothers*, 8 DUKE J. GENDER L. & POL'Y 151, 153 (2001).



and the ability of the paying spouse to pay.”<sup>50</sup> Courts generally awarded permanent alimony on a periodic or lump-sum basis<sup>51</sup> until the supported spouse either remarried or died.<sup>52</sup> Permanent alimony was a lifeline for many women who found themselves divorced with children to care for, no job, and no marketable skills. On the other hand, permanent alimony posed problems for divorced men who were forced to continue supporting their former spouses indefinitely, especially those men who chose to remarry and assume financial support for their new spouse. However, after the advent of no-fault divorce, permanent alimony fell out of favor because it interfered with the “free exit” from marriage allowed by the new no-fault divorce laws.<sup>53</sup>

The trend in spousal support law now is to award support payments for a limited period in order to force ex-spouses to become financially self-sufficient.<sup>54</sup> Limited-duration awards arose in response to changing assumptions regarding the economic, cultural, and familial roles of men and women.<sup>55</sup> Dividing marital property equally and awarding temporary support fosters a “clean break” between the spouses.<sup>56</sup> Such a break could never be achieved if one spouse remained legally obligated to support the other indefinitely.

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50. Kelly L. DeGance, Note, “*Savings Alimony*”: *The Struggle for Fairness in Permanent Alimony Awards*, 2 FLA. COASTAL L.J. 317, 318 (2001); see also Canakaris v. Canakaris, 382 So. 2d 1197, 1201 (Fla. 1980). The Florida Supreme Court held:

Permanent periodic alimony is used to provide the needs and the necessities of life to a former spouse as they have been established by the marriage of the parties. The two primary elements to be considered when determining permanent periodic alimony are the needs of one spouse for the funds and the ability of the other spouse to provide the necessary funds.

*Id.*

51. Ho & Johnson, *supra* note 13, at 71-72.

52. Larkin, *supra* note 15, at 34-35.

53. Frantz & Dagan, *supra* note 12, at 119-20. Before no-fault divorce laws, parties to a marriage could only divorce upon a showing of fault. However, no-fault divorce allows either party to file for divorce for any or no reason. Legal economists have analogized marriage under new no-fault laws as a type of “employment-at-will” contract. Parties to such contracts may “exit without penalty, thereby vitiating any claim to damages for breach.” Martha M. Ertman, *Commercializing Marriage: A Proposal for Valuing Women’s Work Through Premarital Security Agreements*, 77 TEX. L. REV. 17, 67-68 (1998).

54. Brito, *supra* note 49, at 154-55.

55. Larkin, *supra* note 15, at 35. Beginning in the 1970s, society’s assumptions regarding a woman’s inability to work and support herself began to change. As a result, society began to perceive women as able to obtain employment, able to earn enough money to be self-sufficient, and able to balance working with childcare responsibilities. *Id.*

56. Kapalla, *supra* note 18, at 214.

*B. Reimbursive and Compensatory Support: The Middle Systems*

Reimbursive support was one of the first types of support to emerge after permanent alimony fell out of favor.<sup>57</sup> This type of support was based on the theory that one spouse often chooses to invest his or her time and energy into the marriage believing it will help the other spouse's career and eventually improve the quality of the marriage.<sup>58</sup> However, if divorce occurs, this spouse is denied the future benefits his or her acts have ensured.<sup>59</sup> In the past, courts awarded this type of alimony to reimburse these spouses for their "faithful service during marriage"<sup>60</sup> while modern courts awarded this type of alimony to atone for the fact that they would never have the opportunity to enjoy the future benefits of their services.<sup>61</sup>

Compensatory support emerged more recently as part of the growing body of critical literature urging support awards based on compensation rather than the needs of the economically disadvantaged spouse.<sup>62</sup> This model of support provides compensatory payments for certain losses experienced at the time a marriage is dissolved.<sup>63</sup> It is based on the theory that traditional marriage operates on a "gendered division of labor," in which one spouse works outside the home and one spouse works inside the home.<sup>64</sup> Compensatory support recognizes that the market prospects of the spouse who works outside the home significantly improve while the market prospects of the spouse who works inside the home become substantially impaired.<sup>65</sup> Instead of looking at the individual contributions of each spouse to the marriage, courts instead examine the couple's married standard of living and use it as a baseline for determining the amount of the support payments, suggesting a right of each spouse to continue living as if the marriage had not ended.<sup>66</sup>

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57. See LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA* 146-49 (1985).

58. Murray, *supra* note 8, at 316.

59. *Id.*

60. *Id.* (quoting HOMER H. CLARK, *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 642 (2d ed. 1988)).

61. *Id.*

62. See Christopher D. Nelson, Note, *Toward a Compensatory Model of Alimony in Alaska*, 12 ALASKA L. REV. 101, 120-21 (1995).

63. Collins, *supra* note 11, at 45.

64. Nelson, *supra* note 62, at 120-21.

65. *Id.*

66. Frantz & Dagan, *supra* note 12, at 120.

### 1. *Principles of the American Law Institute*

The American Law Institute (ALI) endorses the compensatory alimony model.<sup>67</sup> In its 1997 draft, the ALI's objective in awarding alimony was to allocate financial losses upon divorce in the most predictable and equitable manner possible.<sup>68</sup> Support should only be ordered in one of five narrow situations: (1) where one spouse in a long-term marriage experiences a decreased standard of living; (2) where one spouse experiences decreased earning capacity due to childcare responsibilities; (3) where one spouse experiences decreased earning capacity arising from the care of third parties; (4) where one spouse would experience an unfair lack of return for his or her investment in the other spouse's earning capacity; and (5) where, after a brief marriage, one spouse needs to adjust to his or her inability to recover the premarital standard of living.<sup>69</sup> If the court finds that a spouse satisfies any of these criteria and deserves compensation, the principles require the court to consider two factors in determining the amount of compensation that spouse should receive: the duration of the marriage and the economic disparity between the spouses at the time of divorce.<sup>70</sup> The ALI principles are touted as very flexible, and they should not be used if a "substantial injustice" would result.<sup>71</sup>

### 2. *The Likely Impact on Spousal Support if ALI's Principles Are Adopted*

If adopted, these principles could completely replace current spousal support laws,<sup>72</sup> so it is important to understand their strengths and weaknesses. Proponents of the principles offer three advantages to their adoption. First, the principles would establish clear, percentage-based presumptions regarding the proper amount and duration of support awards.<sup>73</sup> Second, they would produce results that are more equitable and would lead to greater uniformity among

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67. See PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS ch. 5 (Proposed Final Draft Part I, 1997) [hereinafter ALI PRINCIPLES]; see also Virginia R. Dugan & Jon A. Feder, *Alimony Guidelines: Do They Work?*, FAM. ADVOC., Spring 2003, at 20, 23.

68. Drefchinski, *supra* note 14, at 602; see also Brito, *supra* note 49, at 152 ("The drafters of the *Principles of the Law of Family Dissolution* have sought to bring certainty and fairness to this area of the law by transforming alimony from a need-based into an entitlement-based regime and dramatically reducing judicial discretion through imposition of guidelines for determining spousal support payments.")

69. ALI PRINCIPLES, *supra* note 67, §§ 5.05, .06, .12, .15, .16.

70. Kapalla, *supra* note 18, at 209. Consideration of such factors may trigger a presumption that a support award is warranted. *Id.*

71. *Id.* at 209.

72. *Id.* at 208.

73. Garrison, *supra* note 7, at 129.

divorce cases and settlements.<sup>74</sup> Finally, proponents argue that the principles would greatly improve the postdivorce situation of working parents by providing a mechanism for them to receive support if they have acted as the primary caretakers of their children during the marriage.<sup>75</sup> This last advantage is based on the theory that although working parents do not completely forsake their careers to raise children, they inevitably suffer some loss in earning capacity or career advancement because of caretaking responsibilities, and such loss deserves compensation.<sup>76</sup>

Conversely, opponents of the ALI principles offer two disadvantages. First, the guidelines are too broad to permit consistent application.<sup>77</sup> Ultimately, the presumptions created by the guidelines could have a stronger influence in some jurisdictions than in others.<sup>78</sup> Second, the guidelines use the spouses' standard of living experienced during marriage as a baseline for determining a reasonable support award.<sup>79</sup> This baseline "presuppos[es] a right to live financially as though one continued to be married"<sup>80</sup> which is problematic because it does not reflect the principle that spouses should have the right to make their life as a married couple come to an end.<sup>81</sup> Other ALI proposals suggest differently and assume that the marriage had never occurred and effectively "erases" all decisions the couple made while married.<sup>82</sup> This other ALI approach is problematic because spouses should share equally in the liabilities as well as the benefits of living together.<sup>83</sup>

Currently, the ALI principles remain mere principles—they have not yet been adopted by any of the states. Though the ideas

74. *Id.*

75. Brito, *supra* note 49, at 151-52 ("According to the reporters, [the ALI] proposal is premised on two principles: first, that caretaking is the responsibility of both parents and, second, that the spouse who assumes a greater portion of caretaking during marriage should not bear the full cost of any resultant career damage.")

76. *Id.* at 151-53. Section 5.06 of the ALI principles permits compensation for working parents whose postdivorce earning potentials are lower than they would have been if they had not assumed primary care of children during the marriage. However, this compensation is conditioned on two factors: (1) the children must have lived in the working parent's household for a specific period of time, and (2) the working parent's postdivorce earning capacity must be substantially lower than the earning capacity of the other spouse. *Id.* at 152-53.

77. Kapalla, *supra* note 18, at 210. *See generally* David Westfall, *Unprincipled Family Dissolution: The American Law Institute's Recommendations for Spousal Support and Division of Property*, 27 HARV. J.L. & PUB. POL'Y 917 (2004) (arguing that the ALI recommendations fail to promote interstate uniformity).

78. Kapalla, *supra* note 18, at 210.

79. Frantz & Dagan, *supra* note 12, at 120.

80. *Id.*

81. *Id.*

82. *Id.* at 121.

83. *Id.*

contained in these principles are quite innovative in theory, it remains to be seen how well they would actually work in practice.

*C. Rehabilitative Support: The Current Trend*

As previously stated, the modern trend in spousal support law has shifted toward awarding rehabilitative support.<sup>84</sup> The rationale behind rehabilitative support is very different from the rationale underlying reimbursive and compensatory support. It is not awarded to “reimburse” or to “compensate” a spouse for anything, and courts do not even consider the spouses’ premarital standards of living or contributions to the marriage when setting the amount of the award.<sup>85</sup> Instead, rehabilitative support is awarded to help the financially impacted spouse obtain the skills, training, or education needed to become self-sufficient.<sup>86</sup> It is based on the long-held judicial belief that support awards should reduce the economic disadvantages of divorce on the supported spouse.<sup>87</sup> The presumption behind rehabilitation is that such training will eventually help the supported spouse obtain steady employment and learn to survive.<sup>88</sup>

Courts typically award rehabilitative support to spouses who have been denied the opportunity to pursue an education or a career due to family, childcare, and household responsibilities.<sup>89</sup> In order to receive this type of award, the requesting spouse must demonstrate to the court that he or she has created definite rehabilitative goals, determined how to achieve such goals, and calculated the amount of rehabilitation necessary to become self-sufficient.<sup>90</sup> Rehabilitative support is not awarded if the requesting spouse cannot convince the court of its necessity.<sup>91</sup> Such proof is necessary to ensure that people will not misuse their support payments. Like other types of support, courts should exercise discretion in determining the amount of rehabilitation awarded.<sup>92</sup> To determine the amount and duration of

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84. *Id.* at 119.

85. *Id.* at 122-23.

86. *Id.* at 122; Murray, *supra* note 8, at 317.

87. Murray, *supra* note 8, at 317.

88. Schanck v. Schanck, 717 P.2d 1, 5 (Alaska 1986) (stating that “rehabilitative alimony is properly limited to job training or other means directly related to the end of securing for one party a source of earned income”).

89. Lyle & Levy, *supra* note 10, at 12.

90. Ho & Johnson, *supra* note 13, at 72-73. For example, the Alaska Supreme Court strongly encouraged a divorcee seeking rehabilitative support to submit “a cost estimate of the rehabilitative plan, as well as an approximation of the economic benefit that is expected. It is necessary that the person receiving rehabilitative alimony will improve employability as a result of the plan.” Ulsher v. Ulsher, 867 P.2d 819, 822 n.5 (Alaska 1994).

91. See Nelson, *supra* note 62, at 107-08. Rehabilitative support should also be denied to spouses who intend to use the money for purposes other than education or training. *Id.*

92. Frantz & Dagan, *supra* note 12, at 123.

rehabilitative support, courts should balance the needs of the disadvantaged spouse against the desire to minimize the burden on the spouse forced to pay for those needs.<sup>93</sup> Luckily for the supporting spouse, rehabilitative support is usually temporary—it ends when the supported spouse has had time to become self-sufficient and self-supporting.<sup>94</sup> Upon reaching these goals, there is no further legal duty for the supporting spouse to continue paying.<sup>95</sup>

#### D. Reorientation and Bridge-the-Gap Support

Another type of support, known as reorientation, may be awarded in combination with rehabilitation support.<sup>96</sup> This type of support is designed to “allow the requesting spouse an opportunity to adjust to the changed financial circumstances accompanying a divorce.”<sup>97</sup> It is typically awarded only in cases where the division of the couple’s property does not adequately satisfy the immediate needs of one spouse.<sup>98</sup> Reorientation is inherently transitional, typically lasting for a maximum of one year,<sup>99</sup> or until recipients have had an opportunity to “reorient” themselves to single life. This type of support helps the recipient pay the bills while undergoing rehabilitation training or education.

A few states, including Florida, recognize a newly emerging form of support known as bridge-the-gap.<sup>100</sup> Bridge-the-gap support consists of periodic payments intended to assist a needy spouse with short-term basic living needs.<sup>101</sup> Such support is most helpful when

93. *Id.*

94. Murray, *supra* note 8, at 317.

95. Rehabilitative support awards typically are paid for the duration of the recipient’s estimated rehabilitation plan or for a reasonable amount of time determined by the court. Otherwise, recipients could take advantage of the system by creating rehabilitation plans that endure indefinitely. *See* Nelson, *supra* note 62, at 107-08.

96. *Id.* at 110-11.

97. *Id.* at 110 (quoting *Richmond v. Richmond*, 779 P.2d 1211, 1215 n.6 (Alaska 1989)).

98. *Id.*

99. *Id.*

100. *See* Borchard v. Borchard, 730 So. 2d 748 (Fla. 2d DCA 1999); Green v. Green, 672 So. 2d 49 (Fla. 4th DCA 1996); *see also* Jesse J. Bennett, Jr., *Bridge-the-Gap Alimony: An Emerging Vehicle for Satisfying Short-Term Need*, FLA. B.J., Nov. 1999, at 65, 65.

101. Ho & Johnson, *supra* note 13, at 72. For example, in one case, the Florida Fourth District Court of Appeal ordered a wealthy older husband to pay his younger, less wealthy wife \$1,000 per month in rehabilitative support for six months. *Murray v. Murray*, 374 So. 2d 622 (Fla. 4th DCA 1979). The court held that this “short period of rehabilitative alimony [was] sufficient to allow the wife to ‘bridge’ the gap between the high standard of living enjoyed during the brief marriage and the more modest standard that the wife can provide for herself.” *Id.* at 624. In another case, the Florida Third District Court of Appeal held that a wife was not entitled to more than \$1,000 per month for eighteen months from her husband after the demise of their ten-year marriage because she was employed, possessed adequate job skills, and did not need rehabilitation “other than to ease her transition from a married to a single status.” *Iribar v. Iribar*, 510 So. 2d 1023, 1024 (Fla. 3d DCA 1987).

the divorcing couple does not possess sufficient assets that can be sold for support money or when one spouse requires help transitioning from a married to a single status.<sup>102</sup> It is not designed to help rehabilitate the spouse—just to take care of his or her immediate needs. Bridge-the-gap awards must be reasonable and are based on the supporting spouse's ability to pay,<sup>103</sup> so these awards may appear more fair than other types of awards because they are neither rehabilitative nor compensatory in nature.

#### *E. Property Division in Lieu of Spousal Support?*

The Uniform Marriage and Divorce Act, created in 1970 and amended in 1971 and 1973, actively opposes spousal support.<sup>104</sup> According to the drafters, the goal of the Act is to:

[E]ncourage the court to provide for the financial needs of the spouses by property disposition rather than by an award of maintenance. Only if the available property is insufficient for the purpose and if the spouse who seeks maintenance is unable to secure employment appropriate to his skills and interests or is occupied with childcare may an award of maintenance be ordered.<sup>105</sup>

The Act provides several factors to help courts determine reasonable support awards, such as the requesting party's financial resources and apportionment of the marital property.<sup>106</sup> Clearly, the rationale behind the Uniform Marriage and Divorce Act's model of support is that it should not be awarded in most cases. So far, this model has only been adopted by eight states.<sup>107</sup> Thus, it remains a minority perspective.

#### IV. CURRENT PROBLEMS WITH SPOUSAL SUPPORT LAW

Although all fifty states have some type of spousal support system in operation,<sup>108</sup> support remains a very controversial and problematic area of the law. Most likely, the controversy over support stems

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102. Ho & Johnson, *supra* note 13, at 72.

103. *Id.*

104. UNIF. MARRIAGE & DIVORCE ACT § 308 (amended 1971, 1973), 9A U.L.A. 446 (1998).

105. *Id.* § 308, 9A U.L.A. cmt. at 447.

106. *Id.* § 308(b), 9A U.L.A. at 446. Other factors include the requesting party's ability to meet his or her needs independently, childcare responsibilities of the requesting party, amount of time needed for the requesting party to receive education and training needed to obtain employment, standard of living enjoyed during the marriage, duration of the marriage, age and physical and emotional condition of the requesting party, and the ability of the supporting spouse to pay support and still satisfy his or her own needs. *Id.*

107. Drefchinski, *supra* note 14, at 585. The eight states that have adopted the Uniform Marriage and Divorce Act are Arizona, Colorado, Illinois, Kentucky, Minnesota, Missouri, Montana, and Washington. *Id.*

108. Collins, *supra* note 11, at 31.

largely from the fact that there is no accepted legal theory to explain why one spouse should have to continue financially supporting “the other after their marriage has been legally terminated.”<sup>109</sup> Although courts, scholars, and many divorced couples are well aware and in agreement as to the problems inherent in this area of the law, a universal and comprehensive solution has yet to be adopted. The following subsections outline some of the most widely recognized problems inherent in spousal support law.

#### A. Spousal Support Law Lacks Consistency

The first, and arguably most serious, problem with spousal support law is that the law varies considerably among jurisdictions and even within any single jurisdiction. Such inconsistency may encourage forum shopping and increase litigation. Support law has been described as “vague, complex and highly discretionary”<sup>110</sup> and “neither predictable, accurate, satisfactory, nor fair.”<sup>111</sup>

For example, ten states currently have no statutory guidance to aid courts in determining support awards.<sup>112</sup> Obviously, judges in these states exercise considerable discretion over support sums. Such discretion has “led to few awards, and, in the cases where awards are granted, unpredictable and inconsistent results.”<sup>113</sup> When presented with the same set of facts, a judge in one court could arrive at a completely different support award than a judge in another court within the same jurisdiction.

In the remaining forty states, the situation is not much better. In these states, courts are required to consider specific statutory factors or guidelines in determining the amount and duration of support awards.<sup>114</sup> Spousal support guidelines evolved from child support

109. Perry, *supra* note 21, at 24.

110. Garrison, *supra* note 7, at 119 (quoting Marsha Garrison, *The Economic Consequences of Divorce*, 32 FAM. & CONCILIATION CTS. REV. 10, 22 (1994)).

111. Collins, *supra* note 11, at 23.

112. *Id.* at 32. The ten states are Alabama, Arkansas, Kansas, Michigan, Mississippi, Nevada, North Dakota, Oklahoma, South Dakota, and Wyoming. In these states, courts abide by a general rule to award an amount that is “just or necessary under the circumstances.” *Id.* at 78 tbl.I(A).

113. Kapalla, *supra* note 18, at 208.

114. For example, Florida’s alimony statute lists seven factors to be considered in determining alimony awards. These factors include the following: (a) standard of living during the marriage, (b) duration of the marriage, (c) age, physical, and emotional conditions of the parties, (d) financial resources of the parties, including the nonmarital assets, marital assets, and liabilities distributed to each, (e) when applicable, the time necessary for the parties to obtain education or training needed to find appropriate employment, (f) contribution of each party to the marriage, such as homemaking, childcare services, educational assistance, and career building of the other party, and (g) all sources of income available to the parties. FLA. STAT. § 61.08(2) (2004). Furthermore, the guidelines in nearly all states require consideration of factors such as duration of the



guidelines after states witnessed how successful the guidelines and formulas were in arriving at reasonable child support awards.<sup>115</sup> Supposedly, these guidelines would make support awards more predictable, decrease hostility and negative feelings between parties, and reduce litigation costs.<sup>116</sup>

But have these statutory guidelines actually achieved their intended goals? Most critics would agree that they have not. Currently, at least three major complaints are circulating about these guidelines. First, the guidelines appear simple to apply, but upon closer inspection, are too “broad, idiosyncratic, or unclear in purpose or direction.”<sup>117</sup> Promulgating lists of factors to consider is not very helpful without clear rules for their application.<sup>118</sup> Second, the guidelines do not help quantify the actual monetary value of an award. The amount of the award is left to judicial discretion,<sup>119</sup> and that can result in unreasonable or inconsistent awards.<sup>120</sup> Third, there is no evidence demonstrating that statutory guidelines are even the best method to help courts determine spousal support awards—the process can never be completely objective because judicial discretion is still required to take into account special circumstances in determining awards.<sup>121</sup> Awarding a fair and reasonable amount of support requires judges to make “critical financial decisions . . . which are impossible to ascertain with any degree of certainty,”<sup>122</sup> such as approximations of past expenses, estimations of future expenses, and speculations as to future incomes.<sup>123</sup>

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marriage, needs of the former spouses, and childcare responsibilities. *See* Garrison, *supra* note 7, at 129.

115. Dugan & Feder, *supra* note 67, at 20. States that have adopted their own guidelines include Arizona, California, Florida, Kansas, Maine, Michigan, Nevada, New Mexico, Ohio, Pennsylvania, Texas, and Virginia. *Id.* at 20-22. Additionally, many other states are considering the use of alimony guidelines. *See* Victoria M. Ho & Jennifer J. Cohen, *An Update on Florida Alimony Case Law: Are Alimony Guidelines a Part of Our Future? Part II*, FLA. B.J., Nov. 2003, at 85, 85.

116. Dugan & Feder, *supra* note 67, at 23.

117. Collins, *supra* note 11, at 32.

118. *Id.* at 25.

119. *See* Victoria M. Ho & Jennifer J. Cohen, *An Update on Florida Alimony Case Law: Are Alimony Guidelines a Part of Our Future? Part I*, FLA. B.J., Oct. 2003, at 79 (discussing problems with Florida’s statutory guidelines).

120. *See* Collins, *supra* note 11, at 32-33.

121. *See* Garrison, *supra* note 7, at 123 (“[T]he achievement of equitable outcomes when families break up cannot be achieved either through broad grants of discretion, or even through the substitution of rules for discretionary standards.”).

122. Collins, *supra* note 11, at 25. (“Even if future expenses and incomes could be determined within a tolerable margin of error, the figures presented for purposes of support negotiations or litigation often are the result of strategic posturing rather than accurate projections, and provide an inherently unreliable basis for decisionmaking.”).

123. *Id.*

*B. Devastating Effects of Spousal Support Law on Women*

Another serious problem of spousal support law is its negative effect on divorced women. Despite the tremendous advances women have achieved in the workforce in the last half century, the unfortunate reality remains that women are less economically advantaged than men.<sup>124</sup> Nowhere does such disadvantage readily appear than after a man and woman divorce. But before describing the effects of modern spousal support law on women, it is important to provide some background information comparing the effects of divorce on men and women.<sup>125</sup>

Much research demonstrates the negative impact of divorce on modern women.<sup>126</sup> Despite the idealistic notion that men and women are on “equal footing” while they remain married, “a vast amount of literature shows that women are financially disadvantaged, relative to men, in marriage,”<sup>127</sup> and they definitely do not exit marriage on equal footing.<sup>128</sup> Women remain economically disadvantaged during divorce and encounter significant hardships after divorce.<sup>129</sup> Why do women fare so poorly after divorcing? The answer depends on several related factors.

124. See generally ROBERT L. NELSON & WILLIAM P. BRIDGES, *LEGALIZING GENDER INEQUALITY: COURTS, MARKETS, AND UNEQUAL PAY FOR WOMEN IN AMERICA* (1999) (discussing gender-based wage discrimination); B. Tobias Isbell, *Gender Inequality and Wage Differentials Between the Sexes: Is It Inevitable or Is There an Answer?*, 50 WASH. U. J. URB. & CONTEMP. L. 369 (1996) (discussing lower wages for women in similar fields as men); Robert Nelson, *Law, Markets, and Gender Inequality in Pay*, 10 BERKELEY WOMEN'S L.J. 61 (1995) (discussing wage discrimination within government).

125. It is important to note that some women are economically self-sufficient at the time of divorce, and some women successfully overcome the obstacles they face postdivorce. Unfortunately, these women are the minority. See Penelope Eileen Bryan, *Women's Freedom to Contract at Divorce: A Mask for Contextual Coercion*, 47 BUFF. L. REV. 1153, 1168-69 (1999).

126. For instance, a 1976 Michigan study by Saul Hoffman and John Holmes demonstrated that a man's standard of living increased by 17% after divorce while a woman's standard of living fell by 29%. See SAUL HOFFMAN & JOHN HOLMES, *HUSBANDS, WIVES AND DIVORCE* (1976). Lenore Weitzman's groundbreaking 1978 California study demonstrated the devastating economic effects of no-fault divorce on women. The study showed that after divorce, a man's standard of living generally increased by 42% while a woman's standard of living generally decreased by 73%. WEITZMAN, *supra* note 57, at 323. Heather Wishik's 1982-1983 Vermont study demonstrated that a man's per capita income increased 120% after divorce while a woman's per capita income decreased 33% after divorce. Heather Ruth Wishik, *Economics of Divorce: An Exploratory Study*, 20 FAM. L.Q. 79, 97 (1986). A 1987 Alaskan study by Barbara Baker demonstrated that divorced women and their children experienced a 33% decline in per capita income while divorced men experienced a 17% increase in per capita income. BARBARA BAKER, *FAMILY EQUITY AT ISSUE: A STUDY OF THE ECONOMIC CONSEQUENCES OF DIVORCE ON WOMEN AND CHILDREN*, at i (1987).

127. Engel, *supra* note 1, at 310.

128. Penelope E. Bryan, Symposium, *Reasking the Woman Question at Divorce*, 75 CHI.-KENT L. REV. 713, 713 (2000).

129. *Id.*

First, men and women contribute to their marriages very differently. For instance, men generally invest in their marriages by advancing their careers and increasing their earning potential.<sup>130</sup> These investments pay off much later in the marriage in the form of a higher standard of living for both partners.<sup>131</sup> Conversely, women typically invest in their marriages early on by assuming primary child and home care responsibilities, which pay off immediately in the form of a higher standard of home life for both partners.<sup>132</sup> Unfortunately, such responsibilities often require women to forgo working outside the home and increasing their earning potential.<sup>133</sup> The difference in the way men and women contribute to their marriages permits men to benefit early on from their wives' contributions to their earning potential and home life, whereas it takes women far longer to benefit from their husbands' wage-earning contributions.<sup>134</sup>

Second, because women typically assume the primary responsibility for home and childcare, they often put their careers on hold or place more emphasis on their husbands' careers than on their own.<sup>135</sup> As the marriage endures, the woman's market value decreases as the man's market value increases.<sup>136</sup> Unfortunately, this disparity in market value causes women to become economically dependent upon their husbands.<sup>137</sup> When the marriage fails, these women find themselves newly single, frequently with custody of their children, and with few marketable skills to help support themselves and their families.<sup>138</sup>

Third, as a consequence of possessing few marketable skills, many divorced women experience "difficulty finding work, remain trapped in low-paying jobs, and/or work two jobs to survive."<sup>139</sup> Poverty makes it difficult for divorced women to afford the training and education they need to improve their job skills and increase their earning capacity.<sup>140</sup> After a while, financial difficulties begin to impact the

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130. Ertman, *supra* note 53, at 69.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.* at 69-70 (discussing how wives provide a source of income while husbands attend school).

135. See Hamilton, *supra* note 1, at 365.

136. Ertman, *supra* note 53, at 69-70.

137. See Hamilton, *supra* note 1, at 365.

138. *Id.*

139. Bryan, *supra* note 128, at 714; see also Bryan, *supra* note 125, at 1165-66. Additionally, divorced women also face traditional gender discrimination in the workforce. Gender discrimination is compounded by age discrimination if the divorced woman is older and has not worked for an extended period due to homemaking and childcare. Ertman, *supra* note 53, at 30-31.

140. Bryan, *supra* note 125, at 1165-66.

physical and mental health of divorced women and consequently, their parenting skills.<sup>141</sup> Remarriage often represents the best method for divorced women to achieve economic stability, although age and number of children may diminish their prospects for remarrying.<sup>142</sup>

Clearly, women lose more in divorce than just their husbands—they also lose their economic security. Ever since the advent of “no-fault” divorce law, women have been significantly adversely affected by divorce.<sup>143</sup> Under the traditional fault-based system of divorce law,<sup>144</sup> courts determined which spouse was at fault for the demise of the marriage and ordered that spouse to pay the innocent spouse, usually the wife, an award of financial support.<sup>145</sup> Fault-based divorce law had advantages and disadvantages. On the positive side, it decreased the devastating financial impact of divorce on women. If a husband was found at fault for the demise of the marriage, the wife received a larger property settlement and support award.<sup>146</sup> On the negative side, fault-based divorce law caused significant hostility between couples, because they were forced to testify before the court about private marital affairs. No-fault divorce law was enacted to alleviate the hostilities traditionally associated with divorce by making it easier for couples to separate and by promoting equality through equal distribution of the marital assets.<sup>147</sup> The most significant difference between the two systems is that spousal support was considered a right under fault-based divorce but is considered only a “conditional means of support” under no-fault divorce.<sup>148</sup> Despite its good intentions, no-fault divorce law and its accompanying rationale of conditional spousal support have caused the postdivorce economic situations of women to considerably

141. *Id.* at 1167.

142. Ertman, *supra* note 53, at 30.

143. See Jane Biondi, Note, *Who Pays for Guilt?: Recent Fault-Based Divorce Reform Proposals, Cultural Stereotypes and Economic Consequences*, 40 B.C. L. REV. 611, 615 (1999).

144. Until 1968, most states did not permit couples to obtain a divorce unless they could establish that one partner to the marriage was at “fault” for its demise. Traditional fault grounds included adultery, desertion, abandonment, and physical or mental cruelty. *Id.* at 613.

145. Ertman, *supra* note 53, at 33 (stating that alimony was awarded “as a kind of damages for the other spouse’s misconduct”). This financial award was designed to serve as punishment for the partner at fault and as a deterrent against future marital wrongdoing. Drefchinski, *supra* note 14, at 583.

146. Biondi, *supra* note 143, at 621.

147. Phyllis D. Coontz, *Alimony Awards and the Search for Equity in the No-Fault Divorce Era*, 18 JUST. SYS. J. 103, 103 (1995). “The gender-neutral language of no-fault divorce laws, equitable property division schemes and equality-based support awards did not translate into equal results for men and women.” Biondi, *supra* note 143, at 615.

148. Coontz, *supra* note 147, at 104.

decline.<sup>149</sup> No longer are women guaranteed support payments, regardless of their postdivorce financial condition.

### C. Spousal Support Law Is Often Unjust

Another problem with the spousal support system is that recipients can take advantage of the law in several ways. Unfortunately, society's general perception of the entire system of spousal support is often negatively colored by a small number of recipients who misuse it.

The first way that support recipients may misuse the system is by choosing not to remarry in order to continue receiving support payments. In most states, spousal support ends automatically upon the recipient's remarriage,<sup>150</sup> but in many states, it does not automatically end upon the recipient's cohabitation.<sup>151</sup> If presented with evidence that a recipient is cohabiting, most jurisdictions will only modify the recipient's support payments if he or she has experienced "changed economic circumstances."<sup>152</sup> Such circumstances include, for instance, if the recipient is financially supporting the cohabitant or the cohabitant is financially supporting the recipient.<sup>153</sup> Thus, some support recipients may choose to reside with new significant others rather than get remarried in order to continue collecting support payments.<sup>154</sup> Although a major difference between spouses and cohabitants is that cohabitants do not assume *legal* duties of support and service toward each other, when two romantically involved partners choose to live together, they *constructively* assume mutual duties of support and service toward each other. Due to these constructive duties of support, it makes little sense for courts to continue requiring people to support former spouses who are now being supported by others.

More outrageously, it is possible for a person to commit adultery, physical abuse, or mental abuse and still be awarded spousal support.<sup>155</sup> Although marital misconduct serves as a complete bar to spousal support in a few jurisdictions,<sup>156</sup> other jurisdictions only

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149. *See id.*

150. Collins, *supra* note 11, at 26.

151. *See* Sara Z. Moghadam, *Dismissing the Purpose and Public Policy Surrounding Spousal Support*, 56 MD. L. REV. 927, 931-32 (1997).

152. *Id.* at 931.

153. *Id.* at 931-32.

154. *See* Gordon v. Gordon, 675 A.2d 540 (Md. 1996); Meyer v. Meyer, 394 A.2d 1220 (Md. Ct. Spec. App. 1978).

155. *See* Joanna Grossman, *Can an Adulterer Receive Alimony?*, FINDLAW, May 19, 2005, <http://www.cnn.com/2005/LAW/05/05/grossman.adultery.alimony>.

156. Spain, *supra* note 34, at 866; *see, e.g.*, GA. CODE ANN. § 19-6-1(b) (West, Westlaw through 2005 Special Sess.) ("A party shall not be entitled to alimony if it is established by a preponderance of the evidence that the separation between the parties was caused by

include misconduct among numerous factors to be considered in support determinations.<sup>157</sup> A few jurisdictions now recognize that marital misconduct (especially abuse) may increase the economic needs and expenses of one spouse,<sup>158</sup> usually in the form of medical or counseling bills. Courts in these jurisdictions will consider the physical and mental condition of the abused spouse regarding his or her health, financial condition, and market prospects in determining the amount of a support award.<sup>159</sup> However, those twenty states classified as no-fault consider only a spouse's financial misconduct when determining the amount of a support award.<sup>160</sup> In these states, marital misconduct is not considered because it "is often difficult to assess and [may] introduce[] issues collateral to financial need and ability" of the supporting spouse to pay.<sup>161</sup> Thus, spouses who are victims of serious physical abuse are left to seek tort remedies instead, such as lawsuits for battery.<sup>162</sup> Unfortunately for spouses who are victims of adultery, mental abuse, and less serious or frequent physical abuse, tort remedies are less likely to succeed.<sup>163</sup> Clearly, most people would agree that being forced to pay support money to a spouse who has been abusive or has committed adultery constitutes a great injustice.

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that party's adultery or desertion."); N.C. GEN. STAT. § 50-16.3A(a) (West, Westlaw through 2005 Regular Sess.) ("If the court finds that the dependant spouse participated in an act of illicit sexual behavior . . . during the marriage and prior to or on the date of separation, the court shall not award alimony."); S.C. CODE ANN. § 20-3-130(a) (West, Westlaw through 2005 Regular Sess.) ("No alimony may be awarded a spouse who commits adultery before the earliest of these two events: (1) the formal signing of a written property or marital settlement agreement or (2) entry of a permanent order of separate maintenance and support or of a permanent order approving a property or marital settlement agreement between the parties."); VA. CODE ANN. § 20-107.1(B) (West, Westlaw through 2005 Regular Sess.) (Courts may deny permanent support to spouses who have committed adultery unless "the court determines from clear and convincing evidence, that a denial of support and maintenance would constitute a manifest injustice, based upon the respective degrees of fault during the marriage and the relative economic circumstances of the parties.").

157. Spain, *supra* note 34, at 866-67; *see, e.g.*, FLA. STAT. § 61.08(1) (2004) ("The court may consider the adultery of either spouse and the circumstances thereof in determining the amount of alimony, if any, to be awarded."); 23 PA. CONS. STAT. § 3701(b)(14) (West, Westlaw through Act 2005-96) ("In determining whether alimony is necessary and in determining the nature, amount, duration and manner of payment of alimony, the court shall consider all relevant factors, including . . . [t]he marital misconduct of either of the parties during the marriage.").

158. Catherine Mazzeo, Note, Rodriguez v. Rodriguez: *Fault as a Determinative Factor in Alimony Awards in Nevada and Other Community Property Jurisdictions*, 2 NEV. L.J. 177, 182-83 (2002).

159. *Id.*

160. Westfall, *supra* note 77, at 931-32.

161. Spain, *supra* note 34, at 865.

162. Westfall, *supra* note 77, at 934-35.

163. *Id.* Westfall states that "tort remedies may be adequate in most states for serious physical injury, but are less likely to be provided for adultery or other sources of emotional distress." *Id.*

*D. Spousal Support Orders May Be a Form of Involuntary Servitude*

Some scholars have suggested that forcing one spouse to support the other after divorce is “peonage” or “involuntary servitude.”<sup>164</sup> It is understandable that few divorced people want to keep paying their hard earned money for the support of a person they no longer wish to be united with. Now that the purpose of support has shifted from paying for the immediate physical needs of an ex-spouse to paying for the educational and vocational rehabilitation of that spouse, divorcees are even more likely to resent paying it.<sup>165</sup> Yet, courts continue ordering people to support their ex-spouses. It has been argued that spousal support should be declared involuntary servitude that is unlawful under the Thirteenth Amendment of the United States Constitution.<sup>166</sup> However, the United States Supreme Court has not yet addressed this issue, and if it did, it would most likely declare spousal support an exception to the Thirteenth Amendment’s prohibition on involuntary servitude because of its public importance and the weight of authority already existing in this area of the law.<sup>167</sup>

Even if spousal support is not a form of involuntary servitude, it at least burdens a person’s ability to obtain a divorce. The purpose of no-fault divorce was to remove the barriers preventing couples from exiting their marital unions.<sup>168</sup> But requiring one partner to support the other for the rest of his or her life (or at least until remarriage) may make exiting the marriage too costly for some people, contradicting the entire rationale behind no-fault divorce.

V. PROPOSED SOLUTION TO THE CURRENT SPOUSAL SUPPORT PROBLEM

As demonstrated in the previous section of this Comment, significant problems exist with spousal support law as it exists today. There is no legal basis for requiring someone to continue supporting his or her former spouse, especially one with no childcare responsibilities or health problems that prohibit employment. Everybody resents making support payments, the system is often taken advantage of, and the mere existence of spousal support contributes to society’s negative image of women as helpless and dependent on men. So why do legislatures and courts continue to

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164. Alfred J. Sciarrino & Susan K. Duke, *Alimony: Peonage or Involuntary Servitude?*, 27 AM. J. TRIAL ADVOC. 67, 69 (2003).

165. *See id.*

166. *Id.* at 97.

167. *Id.*

168. *See Frantz & Dagan, supra* note 12, at 86.

maintain the system? Perhaps more importantly, should legislatures and courts continue to maintain the system?

Despite all its problems, few scholars suggest that the entire system of spousal support should be abolished<sup>169</sup>—eliminating support would cause a huge number of divorcees to become destitute and forced to rely on family members, friends, and the government for financial support. Even critics who strongly oppose the system believe it should be preserved but reformed.<sup>170</sup> Perhaps that is the best solution—retain the general system of spousal support but rework its details. Divorce law needs a new support system whereby courts can order the more economically advantaged spouse to temporarily assist the less advantaged spouse's basic needs without imposing too large of a burden and without sacrificing the supporting spouse's own standard of living.

This new system of spousal support should not be based on either compensation or rehabilitation because both models are problematic. For instance, analogizing support payments to compensation for the needier spouse's contributions to the marriage ignores the contributions of the economically advantaged spouse. Although both partners invested in their marriage differently, they both invested equally, so it is unfair to compensate only one spouse. The marital contributions of the wealthier spouse should not be ignored because he or she exits the marriage with better financial prospects. Thus, courts should abandon the use of support based on compensation. Furthermore, the new system of spousal support should not be based on the rehabilitation theory either because that theory carries the burden of the supporting spouse too far. A person should not be forced to pay for the education or vocational training of a person to whom he or she no longer wishes to be married. Awarding rehabilitation money for education and training assumes there exists some type of "right" to these amenities, when in fact there is no such right. If the needier spouse wishes to request rehabilitative support, he or she should be required to prove that, but for the marriage, he or she would have already obtained the education now sought. To accomplish this burden, the requesting spouse could demonstrate to the court that he or she was accepted or enrolled into a college, graduate school, or vocational school, but that due to the marriage, the education was postponed. Without such proof, an award of rehabilitative support places too much of a burden on the supporting spouse.

Instead of basing this new system of spousal support on the compensation or rehabilitation theories, the court should base

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169. Drefchinski, *supra* note 14, at 584.

170. *Id.*



support on a temporary basic needs model. The temporary basic needs model would focus on supporting the immediate, physical needs of the recipient spouse, such as shelter, food, clothing, and medical care. Under this rationale, the less economically advantaged spouse will not become destitute following divorce, and the wealthier spouse will not be required to assume total responsibility for someone else's future. In determining the monetary value of support awards, courts should still use traditional statutory guidelines and judicial discretion, but the primary determinant of the award's value should be the supporting spouses' own needs, salary, and ability to make payments without sacrificing their own standards of living and without compromising their future abilities to assume responsibility for new spouses and children. Most importantly, support payments under this new system would only be temporary. Awards should last no longer than one or two years. This period constitutes a sufficiently reasonable period of time for the recipient spouse to adjust to his or her newly single status, but not long enough for him or her to become accustomed to such payments. Payments should end immediately if the recipient remarries, cohabitates, or attains steady employment prior to the cut-off date.

Although no system of spousal support will ever be perfect, a good system will balance the needs of the supported spouse against the burden on the supporting spouse and will ensure that the negative effects of divorce are imposed equally on both partners to the marriage.<sup>171</sup> Spousal support should be a temporary measure. It should not be a way of life the recipient can rely on forever and not a responsibility for which the paying spouse remains indefinitely obligated.

#### VI. COMMENT ON PREMARITAL AGREEMENTS THAT WAIVE RIGHTS TO SPOUSAL SUPPORT

Before concluding this Comment, it is important to recognize the increasing popularity of premarital agreements and the possible impact they may have on spousal support law. The use of premarital agreements has become widespread in the last few decades.<sup>172</sup> In the

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171. Garrison, *supra* note 7, at 119 (quoting Marsha Garrison, *The Economic Consequences of Divorce*, 32 FAM. & CONCILIATION CTS. REV. 10, 22 (1994)).

172. Carolyn Counce, Comment, *Family Law—Cary v. Cary: Antenuptial Agreements Waiving or Limiting Alimony in Tennessee*, 27 U. MEM. L. REV. 1041, 1042 (1997). Couples create premarital contracts for many reasons. For instance:

[T]he possibility of remarriage after a divorce creates a greater concern over property distribution to children from previous marriages; parties who were financially damaged in a previous divorce may want to protect themselves from such a reoccurrence; and many parties marry later in life after they have acquired significant personal property and assets. By entering into a contract,

past, courts traditionally did not enforce premarital agreements because they were considered to violate public policy and were believed to promote divorce.<sup>173</sup> However, most states will now honor premarital contracts that were properly entered into.<sup>174</sup>

Currently, a handful of states are also permitting couples to include provisions in their premarital agreements that opt out of spousal support obligations in the event that their marriages end in divorce.<sup>175</sup> But should states enforce such provisions? On one hand, supporters of such provisions argue that courts should recognize the rights of couples to contract regarding any aspect of their marriages, including the ability to circumvent spousal support obligations.<sup>176</sup> On the other hand, opponents argue that such provisions should not be enforced because women are frequently coerced into signing premarital agreements and because women often do not understand the ramifications of releasing their spouses from future support

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both parties gain assurance that their property will be allocated according to their wishes upon divorce, creating stability in the marriage itself.

*Id.*

173. Kristine Alton, *The Enforceability in California's Courts of Premarital Agreements Containing Provisions Regarding Spousal Support*, 11 J. CONTEMP. LEGAL ISSUES 139, 142 (2000). In early America, premarital agreements were permitted, but such agreements could not be used to circumvent support obligations for two reasons. First, such agreements could result in situations where husbands could unburden themselves of their obligations to support their wives, even though the husbands' conduct may have led to the divorce. Second, states have a significant interest in ensuring their citizens are adequately supported. If husbands were permitted to contract out of their support obligations, the burden of supporting many divorced women would fall on the state. *See* Counce, *supra* note 172, at 1043-45.

174. Counce, *supra* note 172, at 1049. Premarital agreements are properly entered into if the parties sign them freely and voluntarily, if the parties receive a "full and frank" disclosure of each other's assets prior to signing, and if there is no fraud, deceit, misrepresentation, duress, coercion, or overreaching. *Id.* at 1049-50.

175. *See* McAlpine v. McAlpine, 679 So. 2d 85 (La. 1996) (holding that individuals may enter into premarital agreements waiving their right to alimony, but such agreements are subject to the same grounds for rescission as other contracts). For an analysis of this case, see Marie E. Galtier, Note, *McAlpine v. McAlpine: The Louisiana Supreme Court Gives Its Blessing to the Antenuptial Waiver of Permanent Alimony*, 42 LOY. L. REV. 791 (1997).

California law is less decisive on this issue. Although California has adopted the Uniform Premarital Agreement Act, an examination of the state's case law shows that California courts are reluctant to enforce premarital agreements. *See* Alton, *supra* note 173, at 139-41.

Even the Uniform Marital Property Act permits parties to waive or modify their rights to spousal support. However, this right is limited if the agreement "causes one spouse to be eligible for support under a program of public assistance at the time of dissolution, the court may require the other spouse to provide support to the extent necessary to avoid that eligibility, notwithstanding the terms of the agreement." UNIF. MARITAL PROPERTY ACT § 10(i) (2005). For more information on premarital agreements that waive the spouses' rights to support, see Richard G. Vogl, *Spousal Support Forever?*, 44 ORANGE COUNTY LAW., June 2002, at 40.

176. Bryan, *supra* note 125, at 1153-54. Bryan claims that "[d]ivorcing husbands and wives can 'enhance their personhood' through respectful negotiations, rather than demean one another in the dehumanizing process of adjudication." *Id.* at 1155.

obligations.<sup>177</sup> Thus, women will end up signing agreements that place them at extreme economic disadvantage while sheltering their spouses' income in the event of divorce.<sup>178</sup>

Ultimately, such provisions in premarital contracts should be enforced as long as both parties are fully informed of the advantages and disadvantages of contracting out of support obligations and as long as the contracts are fair and conscionable and signed under the required circumstances. Courts should enforce contracts made by consenting adults, even those agreements that exempt one party from future legal obligations.

## VII. CONCLUSION

As this Comment has suggested, spousal support is one of the most contentious and problematic areas of the law, and nobody can agree on the best way to reform it. Some critics of support argue that people whose economic conditions are destroyed by divorce should "get over it" and learn to move on, including finding employment immediately and becoming self-sufficient. Unfortunately, this solution is not a reality for most divorcees, especially women. Childcare responsibilities, lack of marketable skills, and no economic safety net make postdivorce adjustment difficult. Other critics argue that some married persons make conscious decisions to remain at home and raise children rather than participate in the workforce, so in the event of divorce, these people must face the economic consequences of their choice. However, if married people faced the possibility that divorce could render them penniless, many would be forced to forgo their desired homemaker lifestyles and would instead seek employment to ensure a steady source of income. Although such a choice may benefit these people in the event of divorce, it limits the time they can spend on childcare and household responsibilities. Yet, other critics argue that divorcees should not be treated any differently from other needy persons, and thus, the burden of their financial support should fall on society, not on their former spouses. However, it makes more sense to place the burden of such support on a former spouse rather than on society as a whole because the marriage contract creates a special relationship and obligations between its parties that cannot be wholly severed upon the contract's termination. Clearly, many problems exist in this area of the law, as well as a vast number of different perspectives.

Ultimately, the purpose of spousal support is to equally distribute the negative financial consequences of divorce on both spouses, so as

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177. *Id.* at 1169-70; see Leah Guggenheimer, *A Modest Proposal: The Feminomics of Drafting Premarital Agreements*, 17 WOMEN'S RTS. L. REP. 147, 147 (1996).

178. Guggenheimer, *supra* note 177, at 147-48.

not to devastate one of them. When a marriage breaks up, both spouses are forced to readjust to single life, including finding new living accommodations, obtaining employment, and caring for children. If one spouse exits the marriage with little money and no employment prospects, he or she will have an extremely difficult time with this readjustment. For this reason, the law proscribes the system of spousal support. Although the system is imperfect and often leads to unpredictable and inconsistent results, it remains the only method by which many economically disadvantaged divorcees can survive. Ultimately, spousal support laws should be retained but reformed to eliminate the problems that cause these laws to be so controversial.