

**PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION:
ANALYSIS AND RECOMMENDATIONS***

**CHAPTER 1
INTRODUCTORY MATERIALS**

**Topic 1
Summary Overview of the Remaining Chapters**

Chapter Two**

I. The Current Legal Context

The primary challenge in shaping the law that governs allocation of responsibility for children is to determine how to facilitate thoughtful planning by cooperative parents while minimizing the harm to children who are caught in a cycle of conflict. Several unavoidable tensions in the law's objectives and its design complicate this task.

a. Predictability v. individualized decision-making. There is a significant tension in custody law between the goals of *predictability* and *individualization*. The predictability of outcomes helps to reduce litigation, as well as strategic and manipulative behavior by parents. Predictable outcomes are insufficient, however, unless they are also sound. And it is difficult to imagine sound outcomes in custody cases unless the diverse range of circumstances in which family breakdown occurs are taken into account. Predictability is important, and so is the customization of a result to the individual, sometimes unique, facts of a case.

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** The ALI has organized the *Principles* in a unique fashion. The Introductory Materials (Chapter One) is divided into subtopics and further divided into chapters within those subtopics. Thus, the focus of this issue is on Chapter Two, which is a subchapter of Topic One within the Introductory Materials (Chapter One). Katharine T. Bartlett, Dean of the Duke University School of Law, served as the Reporter for Chapter Two.

The goals of predictability and individualization point the policymaker in different directions. Predictable results require clear, determinate, easily applied rules. Individualized results require open-ended standards allowing judges to respond to the infinite variety of individual circumstances that these cases present. Determinate rules facilitate efficient, predictable decisionmaking, but curtail the judicial discretion needed to take into account highly individualized circumstances. Judicial discretion facilitates individualized decisionmaking, but undermines uniformity and predictability of results.¹

Throughout the first two-thirds of the twentieth century in the United States, the best-interests-of-the-child test was implemented through maternal preference rules that produced results that were both uniform, and generally regarded as sound.² The relatively recent elimination of explicit sex-based preferences and the erosion of the ideology on which it was based left the best-interests test without concrete mooring. Today, the test is uniformly disparaged. Critics charge that the unpredictability of results encourages parents to engage in strategic behavior, take their chances in litigation, and hire expensive experts to highlight each other's shortcomings rather than work together to make the best of the inevitable. The test is also condemned because of the room it allows for those who apply it to express biases based on gender, race, religion, unconventional behaviors and life choices, and economic circumstances.³

Another criticism of the best-interests test is that it sets an unrealistic goal for the law. The standard tells courts to do what is best for a child, as if what is best can be determined and is within their power to achieve. In fact, what is best for children depends upon values and norms upon which reasonable people sometimes differ. Even when consensus exists, there are substantial limits on the ability of courts to predict outcomes for children and to compel individuals to act in ways most beneficial to children.

Over the last decade, most jurisdictions have attempted to make the best-interests test more concrete by specifying the criteria courts should consider in applying it.⁴ Such criteria can be helpful in clarifying what is relevant in a cus-

1. The trade-offs entailed in discretionary and determinate decision-making custody standards are reviewed in Marsha Garrison, *How do Judges Decide Divorce Cases? An Empirical Analysis of Discretionary Decision Making*, 74 N.C. L. REV. 401, 505-27 (1996).

2. On the history of child custody law, see MARY ANN MASON, *FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES* (1994); MICHAEL GROSSBERG, *GOVERNING THE HEARTH: LAW AND FAMILY IN NINETEENTH-CENTURY AMERICA* (1985); Jacob Goldstein & C. Abraham Fenster, *Anglo-American Criteria for Resolving Child Custody Disputes from the Eighteenth Century to the Present*, 19 J. FAM. HIST. 35 (1994).

3. The classic critiques of the best-interests-of-the-child test include Gary Crippen, *Stumbling Beyond the Best Interests of the Child: Reexamining Child Custody Standard-Setting in the Wake of Minnesota's Four Year Experiment with the Primary Caretaker Preference*, 75 MINN. L. REV. 427, 499-500 (1990); Jon Elster, *Solomonic Judgments: Against the Best Interests of the Child*, 54 U. CHI. L. REV. 1 (1987); Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decision-making*, 101 HARV. L. REV. 727 (1988); Mary Anne Glendon, *Fixed Rules and Discretion in Contemporary Family Law and Succession Law*, 60 TULANE L. REV. 1365, 1181 (1986); Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226 (Summer 1975); Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

4. E.g., Alaska Stat. § 25.24.150(c) (1995). Other examples are listed in the Reporter's Note to § 2.08, Comment (a).

tody case, but an all-inclusive itemization of factors adds little determinacy unless the rule specifies priorities among them.

An alternative for achieving greater determinacy is an approach that builds in a preference in favor of, or against, a particular form of custody. For example, some states express a presumption that joint custody is in a child's best interests,⁵ other states have a presumption in favor of the primary custodian.⁶ Such presumptions add determinacy to the decisionmaking process, but they are based necessarily on factual and normative assumptions about families and children that (1) are not accurate across the board, and (2) run counter to the commitment this society avows toward family diversity.

There is consensus that the law should seek to promote the child's best interests. The problem is in determining what those interests are. The best solution would be to find predictability in the concrete, individual patterns of specific families.

b. Finality v. flexibility. Another tension in custodial rule-making is created by the desire for both finality of results and flexibility in the face of changing circumstances. Finality forces parents to accept and live with the results of judicial decisionmaking, leading potentially to greater stability for the child. Yet flexibility is necessary to be responsive to children's needs and parental circumstances as they change over time. In the two-parent, intact family, finality and flexibility typically are achieved through an ongoing process of consensus, negotiation and compromise. When parents no longer live together in a single family unit, more structured mechanisms are often necessary.

Officially, current law favors finality, treating a custody decision as a fixed event at which the court, often based on agreement by the parents, determines each parent's "rights" to the child. When parents do not agree, a great deal of time, attention and resources are often put into this decision because so much is at stake. Once a decision is reached, it is expected to be final; relitigation is considered a failure of adjudication and often is limited by a strict modification standard.⁷

In contrast to the time and resources spent on the initial custody determination, little attention is given to anticipating future changes and how to respond to them. Even though changes may be expected to occur, at the time of the custody determination they are treated not as part of the inevitably unpredictable evolution of events for which advance provision should be made, but as contingent risks to be allocated at the time of divorce. When the time comes, however, courts are often reluctant to enforce a dysfunctional custody order, notwithstanding the legal barriers to its modification. The result is that there is neither planning for change nor any real finality.

The law also requires little in the way of steps to minimize the impact on children of family dissolution. Because the focus of the law at divorce is on solving the immediate issue of custody, opportunities are missed to undertake

5. *E.g.*, D.C. CODE ANN. § 16-911(a)(5) (Supp. 1996). Other examples are listed in the Reporter's Note to § 2.08, Comment (a).

6. *E.g.*, OR. REV. STAT. § 107.169(3) (1990). Other examples are listed in the Reporter's Note to § 2.08, Comment (a).

7. See Reporter's Note to § 2.16, Comment (a).

measures that will meet the child's ongoing need for stability. For example, in contested cases experts tend to be deployed to strengthen one parent's case against the other, rather than to soften conflict and help the family work together for the benefit of the child. Few jurisdictions offer services that will inform the parents about the risks of divorce to children and what steps they might take to reduce those risks.

The best legal approaches to conflict over children at divorce would assume the likelihood of future changes and disagreements, and provide for them. Rules should require planning for the child's future needs, anticipate disruptions, and provide a process for defusing and resolving conflict.

c. Judicial supervision v. private ordering. Generally speaking, responsibility for children is allocated on a de-centralized basis, to a child's parents. That responsibility is broad and near-absolute.⁸ The degree of confidence placed in parents is not based on the certainty that all parents will do best for their children; some children would undoubtedly be better off if they had been assigned to someone other than their parents, or if their parents were more heavily supervised. It is assumed, however, that children on the whole will be better off, because: (1) parents are the adults most likely to love their children; (2) love inspires parents to act responsibly toward their children, and (3) parental autonomy not only makes parents able to care for their children but more committed to doing so. Society, in turn, benefits from the diverse social fabric that is created by the de-centralized manner in which their care is provided.⁹

At divorce, societal deference to parents is considered more problematic. Although a high percentage of custody arrangements are settled by agreement of the parents,¹⁰ under most states' laws a court must review an agreement to determine whether it is in the child's best interests. The practice of court review reflects various concerns about parents who are going through divorce, including a fear they may compromise their child's interests in favor of their own.¹¹ Despite the appearance of review, however, independent judicial inquiry is difficult because of the inaccessibility of facts that might dictate a different result.¹² The result is the worst of both worlds: parents enter the divorce process with their autonomy to make arrangements for their children officially abridged, and yet arrangements that might truly be detrimental to children are unlikely to be identified.

8. See Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: the Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879, 883-85 (1984).

9. On the full range of reasons for giving broad and exclusive autonomy to parents, see generally Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401 (1995); see also Carl E. Schneider, *On the Duties and Rights of Parents*, 81 VA. L. REV. 2477, 2485-86 (1995).

10. A study of 933 families with minor children from two California counties, only four percent required a custody hearing. See ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, *DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY* 138 (1992).

11. See *Ford v. Ford*, 371 U.S. 187, 193 (1962) ("the estrangement of husband and wife beclouds parental judgement with emotion and prejudice").

12. See Marygold S. Melli, Howard S. Erlanger & Elizabeth Chambliss, *The Process of Negotiation: An Exploratory Investigation in the Context of No-Fault Divorce*, 40 RUTGERS L. REV. 1133, 1145 (1988) (reporting study showing that only one case of 349 offered settlement was rejected by a court).

d. Biological v. de facto parenthood. As noted above, a child's legal parents are given comprehensive authority to make decisions for their children, in part to reinforce their maximum commitment to the parenting enterprise. In practice, however, children are often cared for by adults other than parents. These adults include some stepparents, grandparents, and parental partners who function as co-parents. Giving rights to de facto parents may serve to weaken the commitment society has to legal parents, on which the ideology of responsible parenting is based; yet disregarding their connection to a child at the time of family dissolution ignores child-parent relationships that may be fundamental to the child's sense of stability.

Traditionally, parenthood is an exclusive, all-or-nothing status. A child can have only one mother and only one father; others have no rights, regardless of their functional roles. Only when a parent has been shown to be unfit or to have abandoned the child may a parent's rights be taken away. Yet states have carved out an exception for one group of non-parents—grandparents—who may be given rights sometimes without regard to their prior contact with the child. The distance between these two sets of principles is difficult to reconcile from a child-centered perspective.

The law's challenge is to identify an approach applicable to all cases that allows continued contacts by de facto parents whose participation in the child's life is critically important to the child's welfare and recognizes the importance that some families place on extended family, and yet is consistent with the autonomy of parents that is essential to their meaningful exercise of responsibility.

e. Protection v. privacy. The final tension concerns the conflict between the state's interest in protecting individuals from harm and the freedom of families to have their privacy undisturbed. There is increasing awareness of the prevalence and danger of domestic abuse both to the physical security of individuals and to domestic tranquility.¹³ At the same time, there is a traditional resistance to interference in the family, rooted in ideologies of family privacy which are supported in constitutional jurisprudence.¹⁴ The law's difficult task to provide protection for individuals who need it, within an institution valued primarily for the privacy from law that it provides.

II. An Overview of the Principles of Chapter 2

Chapter 2 addresses the issues identified above through a set of principles designed to: (1) focus greater attention during family breakdown on planning for the child's needs; (2) locate responsibility for the child in parents, and in

13. See Reporter's Notes to § 2.11.

14. *E.g.*, *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (right of the individual "to marry, establish a home and bring up children" is "essential to the orderly pursuit of happiness by free men"); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (summarizing prior U.S. Supreme Court decisions establishing "the private realm of family life which the state cannot enter"); *Griswold v. Connecticut*, 381 U.S. 479, 495 (1965) (Goldberg, J., concurring) ("The entire fabric of the Constitution and the purposes that clearly underlie its specific guarantees demonstrate that the rights to marital privacy and to marry and raise a family are of similar order and magnitude as the fundamental rights specifically protected [in the Constitution].").

courts only as the last resort; (3) provide more determinate criteria for resolving disputes over children that will promote continuity and minimize reliance on stereotypes; (4) preserve the diversity in parenting arrangements within families; (5) encourage parents to anticipate future problems and disputes and to establish means for resolving them short of relitigation in court; (6) allow continued participation in the child's life, in certain limited circumstances, by individuals who are not parents under state law but who have functioned as parents; and (7) provide appropriate protection for victims of domestic abuse after a family separation.

a. The parenting plan. The cornerstone of Chapter 2 is the parenting plan, which is an individualized and customized set of custodial and decisionmaking arrangements for a child whose parents do not live together. Parents seeking court-ordered responsibility for or access to a child must file a parenting plan, and they are encouraged to file a joint plan. Joint plans must be approved by the court, with limited exceptions. See *b*, below. When the parents do not agree on a joint plan, the court must formulate one, applying the criteria set forth in the Chapter.

As part of the parenting plan process, Chapter 2 obligates courts to have a screening process for identifying cases in which there is credible information that child abuse or domestic abuse has occurred. This requirement helps to ensure that parents who are victims of domestic abuse understand the process, including their rights, and know about resources that may exist to address the abuse. The requirement also identifies cases in which there is special concern about coercion and manipulation of the victim and about the safety of the child, so that the court may satisfy its obligation to ensure that parental agreements are knowing and voluntary and that they are not harmful to the child, and to order protective measures when necessary to protect the child or a parent. See *b*, below.

A parenting plan is not simply a recital of who "wins" custody and who has to settle for visitation. The assumption of a parenting plan is that each parent ordinarily will play an important ongoing role in the child's life. A parenting plan must set forth the child's custodial arrangements in some detail, specifying the time each parent is to have responsibility for the child and a schedule, or a method for determining a schedule. A parenting plan must also designate who is to make significant decisions with respect to the child's education, health care, and other important matters. This does not mean that parents are bound at divorce to permanent, detailed arrangements for the child's care and control. The parenting plan must also contain provisions that respond to anticipated changes and can resolve future disputes as to matters that may not have been anticipated. See Comment (e), below.

As parenting plans move parents toward richer and fuller plans for the child, the limitations of traditional "custody" and "visitation" terminology become apparent. These traditional terms represent, and help to perpetuate, an adversarial, win-lose paradigm of divorce. One alternative is to assume that parents will share "joint custody," but this substitutes one assumed ideal form of custody for another. Once planning for the child at divorce is viewed as a more dynamic and complex process, terms that imply one form of custody over another are inadequate. Chapter 2 uses "custodial responsibility" to encompass

all forms of custody and visitation. The more inclusive terminology expresses the ordinary expectation that both parents have meaningful responsibilities for their child at divorce; it leaves open the question of what those responsibilities will be. Likewise, the term “decisionmaking responsibility” reframes the traditional concept of “legal custody” to better connote a wide range of possible ways decisionmaking authority for a child can be divided, rather than a fixed template imposed by the state. The changes in terminology cannot be expected, by themselves, to revolutionize how custody allocations are viewed, but they may contribute to a broader reconceptualization of the question from who will possess and control children to what adjustments in family roles will be most appropriate for the child. It affirms that the options are not limited to one or two prescribed models but, rather, are spread out along a continuum. And it helps to move beyond the terms of public policy debates that posit a “best” way of dividing up responsibility for children based on the experience of divorced families in the aggregate, to a legal framework focusing on the diverse circumstances and possibilities of each individual family.

b. Preference for voluntary agreements. Chapter 2 assumes that parental agreement is, generally speaking, good for children, and that it is difficult for courts to accomplish meaningful review that is likely to improve measurably those agreements. Thus, if parents have agreed on each parent’s future responsibility for their child, Chapter 2 requires the court to accept the agreement, unless the court makes specific findings that the agreement is not knowing or voluntary, or provides for an arrangement that would be harmful to the child. The court ordinarily may accept an agreement without an evidentiary hearing on these matters, but if there is credible information that child abuse or domestic abuse has occurred, review is mandatory. A screening process is mandated to aid the court in identifying cases to which the review requirement applies. *See* § 2.05(3); *see also* § 2.07(2) (mandatory screening for domestic abuse before mediation).

To facilitate agreement and to help the parents focus their negotiations on the child’s interests, Chapter 2 provides that the court may order parents to attend parenting classes, as well as information sessions about mediation or other forms of dispute resolution. § 2.07(1). Chapter 2 does not allow courts to require parents to engage in face-to-face mediation or other procedures or classes involving face-to-face conduct. § 2.07(3). The benefits of face-to-face mediation have been demonstrated primarily in the context of voluntary procedures; the Chapter assumes that mediation that is not voluntary creates too great an opportunity for the dominant parent to coerce the other into an agreement.

c. Structured decisionmaking. Chapter 2 achieves greater predictability through structured, yet individualized, decisionmaking principles. The principal rule for allocating custodial responsibility when parents do not otherwise agree is that custodial time between parents approximate the share of caretaking each parent performed for the child before the parents separated.¹⁵ § 2.08(1) By

15. Elizabeth S. Scott first suggested this concept, which she called the “approximation standard.” *See* Elizabeth C. Scott, *Pluralism, Parental Preferences, and Child Custody*, 80 CAL. L. REV. 615 (1992).

focusing on how the child was cared for previously, the past caretaking rule anchors the determination of the child's best interests not in generalizations about what post-divorce arrangements work best for children, but in the individual history of each family. How caretaking was divided in the past provides a relatively concrete point of reference which is likely to reflect various qualitative factors that are otherwise very hard to measure, including the strength of the emotional ties between the child and each parent, relative parental competencies, and the willingness of each parent to put the child's interests first. At the same time, it reduces the need for predictions about the future, and thus the expenses and uncertainty produced by expert witnesses and psychological studies. It is also consistent with Chapter 2's emphasis on parental agreements, in that when parents do not agree, past divisions of responsibility may be the most reliable proxy for the shares of responsibility they would agree upon if they were focused on their child.

Operationally, the approximation rule means that allocations of custodial responsibility, when not otherwise agreed to by the parents, should reflect the roles each parent assumed prior to their separation. This does not mean that caretaking arrangements are expected to remain the same after the divorce. What it means is that a parent who has been the primary caretaker of the child should remain so, and that parents who had co-equal roles before their separation should also retain those roles afterwards, if possible. The options are not limited to any particular standard arrangement, but cover the entire spectrum of possibilities. The *Principles* of Chapter 2 resist the tendency to identify some particular arrangement that works best in the greatest number of cases. They assume, instead, that if the parents do not agree about post-separation arrangements for their child, the arrangements they previously followed are the best guide for the future.

A number of *Principles* qualify the past caretaking rule. First, unless circumstances exist warranting access limitations under § 2.11, each parent should be allocated an amount of custodial responsibility that will enable the parent to maintain a relationship with the child, even if this level of responsibility is not supported by the parent's past level of involvement in the child's care. In the case of a parent who has contributed in other ways to the child's welfare, such as by providing financial support, the amount of responsibility to be allocated should not go below a certain presumptive amount of time, as established in a uniform rule of statewide application. § 2.08(1)(a).

Second, the court should accommodate the preferences of an older child who has firm and reasonable preferences. The *Principles* do not specify the age at which a child's preferences should be accommodated, but recommend that each jurisdiction adopt a uniform rule of statewide application. This exception for the child's preferences assumes that an older child is more mature than a younger child and may have a perspective that provides better information about the child's interests than the history of past caretaking roles provides. It also assumes that forcing older children to adjust to arrangements to which they are keenly opposed is often unrealistic and counter-productive. § 2.08(1)(b).

Third, the court should attempt to keep siblings together if it determines that doing so is necessary to their welfare. § 2.08(1)(c).

Fourth, the court should depart from an arrangement that approximates past shares of caretaking responsibility to take account of a gross disparity in the quality of the emotional attachments between the child and each parent, or in the ability or availability of each parent. This qualification applies only when, notwithstanding past caretaking roles, a disparity in the quality of the parents' emotional bonds with the child or in the ability or availability of the parents is so severe that it would harm the child and thus clearly demands a different result than the past caretaking standard alone would produce. § 2.08(1)(d).

Fifth, prior agreements between the parents should be taken into account if the court determines that doing so would be appropriate in the circumstances, including the expectations of the parties and the extent to which the circumstances match what the parties anticipated. This qualification applies when the parents had an understanding about how caretaking responsibility would be divided that would be frustrated if the past caretaking standard is applied. It would not be appropriate to apply this limitation when to do so would be contrary to the child's welfare. § 2.08(1)(e).

Sixth, courts should take account of logistical and relevant factors that make an otherwise appropriate equal allocation of custodial time impractical or harmful to the child's stability. Among the factors to be considered are the distance between the parents' residences, the cost and difficulty of transporting the child, the parents' and child's daily schedules, and the ability of the parents to cooperate in the arrangements. § 2.08(1)(f). While such factors are generally applicable only to determining the manner in which custodial time is allocated and not how much is allocated to each parent, see § 2.08(4), when significant practical obstacles make it necessary, they may also affect each parent's share of custodial time.

Finally, a catch-all exception requires departure from the past caretaking rule to avoid substantial and almost certain harm to the child. § 2.08(1)(h).

These *Principles* do not eliminate the focus on the best interests of the child, but rather refine it. In some cases, however, the *Principles* will not provide the intended determinacy. For example, when the past caretaking patterns are too complex or unstable to provide a guide to decision-making, courts must fall back on the less satisfactory, unguided best-interests-of-the-child test as a necessary, second-best alternative. § 2.08(3).

The Chapter also provides greater structure for resolving questions about decisionmaking responsibility for children at divorce. For example, the *Principles* establish a presumption in favor of joint decisionmaking responsibility if both parents have been exercising a reasonable share of parenting functions. § 2.09(2).

d. Limitations in cases involving domestic abuse. Chapter 2 takes into account, in a number of different ways, the risks to the child or parent who has been the victim of abuse. As noted above, the court is required to have a process to screening for child and domestic abuse, and court review of parental agreements submitted in such cases is mandatory. §§ 2.05(3); 2.06(2). The Chapter also prohibits courts from requiring parents to participate in face-to-face meetings or to engage in mandatory mediation. § 2.07(3).

The existence of domestic abuse requires special measures in a parenting plan to protect the child or adult victim. If necessary, the court must limit access to a child by an individual who has committed acts of domestic abuse. Limitations are also required when other risk factors exist, such as a parent's drug or alcohol abuse, or interference with the other parent's lawful access to the child. § 2.11. Substantial allegations of domestic abuse also require, in most instances, a court-ordered investigation or the appointment of a guardian ad litem or attorney for the child. § 2.13(4).

e. Resolution of future disputes. Chapter 2 requires that parenting plans provide for the resolution of future disputes. § 2.10. In so doing, the Chapter treats future change and disagreement as something to be anticipated and planned for, rather than as extraordinary and unexpected. Chapter 2 assumes that alternatives to judicial re-litigation can provide a faster, less expensive, and less adversarial means for responding to issues that later arise, even though not all outcomes from alternative dispute resolution mechanisms are necessarily final.

With regard to modifications of the parenting plan itself, Chapter 2 differentiates changes intended to reinforce parental agreement or continuity in caretaking arrangements, to which a liberal modification standard applies, from changes more likely to be threatening to a child's continuity, which are subject to stricter modification rules. In the first category are modifications determined to be in the child's best interests that (1) are agreed to by the parents themselves, (2) reflect the actual parenting arrangements that have evolved since adoption of the plan, (3) are minor adjustments, or (4) accommodate an older child's reasonable and firm preferences. § 2.16. The stricter standards required for all other modification requests are intended to discourage interruption of the child's existing caretaking arrangements. § 2.15.

An especially difficult issue in modification is the proposed relocation of a parent. The parent seeking to move may have the stronger relationship to the child and a significant personal stake in the move, such as an important career opportunity or remarriage to a spouse or domestic partner who lives (or moves) elsewhere. The other parent, however, may have a relationship with the child that will be significantly compromised by the move. There is often not a good solution to this conflict. This Chapter approaches the dilemma within its general framework that emphasizes the responsibility each parent has been exercising for the child up to that point. It allows a parent who has been exercising a significant majority of custodial responsibility to relocate with the child, for a legitimate purpose, in good faith, and to a location reasonable in light of that purpose, with appropriate adjustments to the parenting plan to maintain the child's relationship with the other parent. A relocation that does not meet these criteria justifies reconsideration of the basic custodial framework under the fall-back, best-interests-of-the-child test. § 2.17.

f. Prohibitions against discrimination based on race, ethnicity, sex, religion, sexual orientation, sexual conduct, and economic circumstances of a parent. Chapter 2 prohibits consideration of race, ethnicity, sex, and sexual orientation. It also limits consideration of religion and sexual conduct to circumstances in which the child would otherwise be harmed, and it allows consideration of the parents'

financial resources only to the extent necessary to consider whether the otherwise appropriate custodial arrangements would be feasible. § 2.12(a), (b), (c), & (f).

These non-discrimination provisions conform to the emerging law, which recognizes that the prohibited factors usually reflect prejudice rather than a rational assessment of the child's welfare. Because much bias is unintentional and subtle, however, it cannot be expected that non-discrimination provisions will be entirely effective in ending over-reliance on stereotypes. To an important extent, it is the more determinate standards of the Chapter rather than the non-discrimination provisions themselves that will curtail stereotyped custody decisions.

The most controversial of the Chapter's prohibited factors is sexual orientation. Some courts assume that the open homosexuality of a parent is detrimental to the child's interests. This treatment reflects a moral judgment, not a scientific one, and even as a moral matter, is subject to considerable societal debate. Attempting to avoid over-generalizations on both sides of the debate, Chapter 2 requires that sexual orientation should not be a consideration and that homosexual conduct, like heterosexual, extra-marital conduct, should be disregarded unless shown to be harmful to an individual child. § 2.12(1)(d) & (e).

g. Extension of principles to parents by estoppel and de facto parents. Chapter 2 covers not only disputes between legal parents who do not live together but also, in some circumstances, individuals who have functioned as parents. The Chapter extends the same treatment that it affords to legal parents to four categories of individuals whom it labels "parents by estoppel." § 2.03(1)(b). One category includes an individual upon whom a child support obligation is imposed, even if he or she is not the child's legal parent. Another category includes a man who lived with the child for at least two years and had a reasonable good faith belief that he was the child's biological father. Still another category of parent by estoppel extends to an individual who lived with the child since the child's birth under a co-parenting agreement with the legal parent or parents. Finally, an individual who lived with the child for at least two years pursuant to an appropriate agreement with the legal parent or parents may be a parent by estoppel.

Other individuals, such as a stepparent or the non-marital partner of the legal parent, may function as a parent and thereby receive recognition as a de facto parent, under a strict set of criteria designed to test the individual's level of commitment and involvement in the child's life. § 2.03(1)(c). De facto parent status is extended only to an adult who lived with the child and who regularly performed at least half of the caretaking functions with respect to the child, with the consent of at least one of the child's parents and without expectation of financial compensation.

Recognition as a parent does not necessarily entail an allocation of custodial or decisionmaking responsibility, only that consideration will be given under the allocation rules set forth in the Chapter. In applying these rules, a legal parent and a parent by estoppel are favored somewhat over a de facto parent. For example, a de facto parent ordinarily cannot receive primary custody responsibility if a fit legal parent is able and willing to take such responsibility. § 2.18(1)(a). A de facto parent, in turn, is favored over other non-parents. Except

for grandparents and other close relatives, a person who is neither a legal parent, a parent by estoppel or a de facto parent cannot be allocated custodial or decisionmaking responsibility, unless the alternative would be harmful to the child. § 2.18(2). Even a grandparent or close relative cannot be allocated responsibility unless the individual has developed a significant relationship with the child, one of the child's parents consents, and the objecting parent has not been performing a reasonable share of parenting functions. § 2.18(2)(a). Exception is also made for a biological parent of the child who is not the child's legal parent but who had an agreement with a legal parent under which the individual retained some parental rights or responsibilities. § 2.18(2)(b).

III. Recognizing the Limits of Law

Chapter 2 recognizes the limited role the law can effectively play in resolving disputes over the care and control of children. It assumes that the law cannot prevent embittered or adversarial adults from waging battle over children, predict with any certainty the future behaviors of adults or future responses by children, or guarantee that children will obtain the love and nurture that they most need.

Too often reform efforts focus on the narrow minority of high conflict cases whose results are likely to be poor, no matter what the law is.¹⁶ Judged by the outcomes in these cases, no law will seem sound. Acknowledging the limits of law, this Chapter seeks to manage the small percentage of cases in which serious conflict exists, while strengthening the incentives of most parents to serve their children well without undue interference by the law.

Chapter Three

I. Introduction

The Anglo-American history of child support encompasses both public and private law. Child support obligations were first imposed by the Elizabethan poor law. They ran not to children but to the local parish, for they were designed to save the parish the expense of supporting indigent children. At common law, parents had no privately enforceable obligation to support their children. Commentators frequently observed that parents had a moral but not a legal responsibility to their children, and hence there was no private remedy for nonsupport, at least not at law. In the United States, remnants of this principle persisted well into the twentieth century.¹⁷

During the twentieth century, all states enacted statutes requiring parents to provide child support, generally in a "just and reasonable" amount. Receiving little guidance from those vague statutes, trial courts frequently applied a rubric that referred to the child's needs and the nonresidential parent's eco-

16. The Maccoby & Mnookin study determined that about 15 percent of cases involved intense conflict between the parents. See MACCOBY & MNOOKIN, *supra* note 10, at 140.

17. See *Greenspan v. Slate*, 97 A.2d 390 (N.J. 1953) (liability of parent for medical services provided to minor child) and cases cited therein. See *generally* ROBERT MNOOKIN & D. KELLY WEISBERG, *CHILD, FAMILY, AND STATE* 261-270 (4th ed. 2000).

conomic ability to help satisfy those needs. This approach to child support awards has often been characterized as “need-based,” or “discretionary.” In practice, the residential parent generally submitted a household budget in excess of household income, and the nonresidential parent did likewise. The child support order effectively required that the nonresidential parent pay some portion of the unmet budget expenses of the child. Child support awards were unpredictable and highly variable in factually indistinguishable cases. Additionally, child support awards were widely believed to be grossly inadequate.

In the third quarter of the twentieth century Congress persistently expressed concern about the adequacy of child support awards and the burdens that inadequate awards cast on federal and state government, particularly on the categorical public assistance program formerly called Aid to Families with Dependent Children (AFDC) and later restyled as Temporary Assistance to Needy Families (TANF).¹⁸ In 1984, as a condition for state receipt of federal AFDC funds, Congress required states to adopt non-binding guidelines for establishing child support obligations. In 1988, Congress additionally required that the guidelines¹⁹ be given presumptive effect, and that any different result be justified in writing or on the record.²⁰ All states now calculate the basic child support obligation as a percentage of parent earnings. Congress has not mandated any particular percentages, and there is wide variation. States also differ in their treatment of child expenditure not included within the formula, such as day care expenditure required by the residential parent’s employment. American child support guidelines generally base child support obligations on estimates of marginal child expenditure in two-parent families. Chapter 3 characterizes these guidelines as first-generation Marginal Expenditure guidelines.

The anticipated benefits of formulaic awards, as compared to earlier discretionary awards, were predictability, uniformity of awards in like circumstances, and greater adequacy and “correctness” of child support transfers. Most observers consider the guidelines a step forward in providing predictable and uniform awards. However, typical guidelines have only modestly increased the dollar amount of child support awards.²¹ Moreover, the mere notion of a presumptively applicable child support guideline does not prescribe the content of the guideline, that is, does not provide the substance of the child support obligation. Although in retrospect this may seem self-evident, formulaic

18. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105, 42 U.S.C. §§ 601 et seq.

19. Although “formula” is often descriptively more apt, the term “child support guideline” is frequently employed in federal law and the legal literature. “Child support guideline” is sometimes also used to distinguish the practice, in some states, of expressing child support obligations in tabular form, rather than directly applying the underlying child support formula to each individual case. Chapter 3 uses “formula” and “guideline” interchangeably. “Guidelines,” in the plural, is also used to signify the entire body of child support rules, including the formula.

20. 42 U.S.C. § 667.

21. Examining child support awards made before and after the introduction of child support guidelines in three representative states, one study reported “. . . a modest post-guideline increase of 15 percent” and concluded that these “findings appear to be consistent with those reached in the few other empirical studies of child support guidelines conducted to date.” Jessica Pearson, Nancy Thoenes, & Patricia Tjaden, *Legislating Adequacy: The Impact of Child Support Guidelines*, 23 LAW & SOC’Y REV. 569, 585 (1989).

guidelines were initially welcomed as scientific answers to old questions never adequately addressed by child support doctrine. It was commonly believed that a formula would produce a “correct answer” to the question: What is the right, or just, amount of child support? On the contrary, instead of answering this question, child support guidelines simply pose it anew in the generalized context of a uniform guideline rather than in the individualized context of a discretionary award. Additionally, the factors that underlay inadequate or unjust discretionary child support awards could not be expected to vanish in the face of formulaic guidelines; those factors might instead be expected to influence rule-makers who construct the guidelines.

Chapter 3 sets out a method for establishing the substantive content of child support rules. Chapter 3 is primarily addressed to the rulemaker who constructs or reviews²² the state child support formula and the associated child support rules. In order to illustrate the content and consequences of alternative rules, Chapter 3 uses available data, including estimates of marginal child expenditure and household equivalence scales. However, the significance of Chapter 3 lies not in the numbers chosen for illustrative purposes, but rather in the method followed for establishing child support obligations. As the data improve and change, the numbers may vary. But the methodology should remain constant.²³

Chapter 3 is followed by a Glossary and an Appendix. The Glossary is organized substantively, rather than alphabetically, and is designed to serve as an introduction to the theory and landscape of contemporary American child support law. It explains the concept of marginal child expenditure; surveys a range of competing child support formulas, including those currently used by American jurisdictions; and sets out two tables for determining basic adequacy and comparing the standards of living of the child’s residential household and the support obligor, adjusting both tables to take into account direct child expenditure by the obligor, as well by the residential parent. Readers unfamiliar with the technical literature of child support may profitably begin with the Glossary, which is reprinted at the end of Chapter 3. The Glossary is followed by an Appendix containing portions of a prior draft of Chapter 3, which proposed a first-generation Marginal Expenditure formula enhanced by meliorative provisions. The commentary of this earlier draft contains, *inter alia*, extensive discussion of the concept of marginal child expenditure and its appropriate use in the development of child support obligations. The prior draft can be read as an explanation and a critique of the first-generation Marginal Expenditure formula. It shows the limitations of the first-generation Marginal Expenditure formula and demonstrates how difficult they are to overcome without fundamentally altering the formula. It may also be read as a rulemaker’s guide to the second-best,

22. Federal law requires each state to review its guidelines “at least once every 4 years to ensure that their application results in the determination of appropriate child support award amounts.” 42 U.S.C. § 667(a).

23. Chapter 3 necessarily uses concrete numerical explanations and illustrations. Numbers are an unavoidable aspect of understanding child support and constructing just child support rules. However, the reader needs no more than rudimentary arithmetic and patience to work with this material.

that is, how to revise an existing first-generation Marginal Expenditure formula to make the most of a seriously flawed instrument, should that be required.

II. The Methodology of Chapter 3

Chapter 3 begins with a balancing process generally familiar to legal audiences. Balancing is typically used to resolve legal disputes when diverse claimants seek to assert legitimate but conflicting interests. However, balancing has not previously been systematically applied in the development of child support rules and formulas. Chapter 3 posits that the establishment of a just child support obligation requires the compromise and harmonization of competing values and interests.²⁴ Chapter 3 initially identifies the interests of all the parties, including the child, the residential parent, the nonresidential parent, and the state. It also identifies the social and cultural values implicated in the formulation and execution of child support rules. After exploring a range of interests that each party might assert, Chapter 3 establishes the *cognizable* interests of each of the parties (those interests that are taken into account in establishing the operative objectives of Chapter 3) and also specifies the social and cultural values that should be reflected or expressed in the child support rules.

In Chapter 3, the role of compromise and harmonization is three-fold. First, the interests of all parties are taken into account in defining the *cognizable* interests of each party, that is, those interests that the Chapter recognizes, subject to compromise and harmonization. Next, in defining the § 3.04 objectives of child support, the cognizable interests of each party are compromised and harmonized with the competing cognizable interests of all other parties. Finally, in responding to the specific economic circumstances of the parties, the child support formula and rules again balance and harmonize the interests of the parties in a manner designed to realize § 3.04 objectives in the particular case before the court.

Besides yielding a set of operative goals and principled child support guidelines, the process of balancing interests has another important virtue. In the highly charged and often polarized arena of child support, balancing tends to be consensus-building, for it identifies and takes into account the interests of all parties. No single interest is fully vindicated, but no interest is ignored or slighted either. Identifying and accounting for all interests is a useful antidote to the polarization that results when the interests of one party, whether the child, the state, the residential parent, or the support obligor, are treated as preeminent or specially privileged.

24. Child support law has been characterized, on the one hand, by precepts that exalt the child's interests and, on the other, by often inadequate awards that may leave children in poverty while their nonresidential parent enjoys a comfortable standard of living. This is not to say that there are not other operative objectives; the results bespeak them. But they generally operate sub silentio, and the gap between the principles and operative reality has resulted in normless decisionmaking and rulemaking. Child support doctrine and legal scholarship have failed to recognize explicitly that the interests of the parties are conflicting and competing, and that a just law of child support must identify and balance those competing interests.

The formula and the auxiliary rules proposed in Chapter 3 are designed to realize § 3.04 objectives.²⁵ Commonly, state child support guidelines are preceded by a list of objectives. Not uncommonly, the objectives are inconsistent and thus incapable of realization. Even when the objectives are coherent and thus theoretically capable of realization, the guidelines that follow are usually incapable of realizing those objectives. The extent to which they do so is measured throughout the Chapter in the Comment and in representative illustrations.²⁶

Chapter 3 illustrations show both male and female residential parents. However, when it is not possible to avoid using a personal pronoun or adjective in speaking about parents generally, “she” and “her” have been used for residential parents, and “he” and “his” have been used for nonresidential parents. This has been done simply for conciseness and clarity; it expresses no gender preference in the allocation of residential responsibility. The results of each Illustration are quantitatively evaluated in terms of comparative economic outcomes and economic adequacy for all parties. The Bureau of Labor Statistics household equivalence scale is applied generally to compare economic outcomes. A measure of basic adequacy derived from federal poverty threshold figures is additionally applied to low-income households. (For full discussion of these measures, see Glossary.) Each illustration also compares the results under the formula and rules proposed by Chapter 3 with the results under a typical first-generation Marginal Expenditure formula and associated rules. Qualitative achievement of the goals of the Chapter is measured by the extent to which the child support rules express identified social and cultural values and provide desired behavioral incentives. The operation of the formula and auxiliary rules is additionally demonstrated in a series of step-by-step work sheets of the sort typically used by states to calculate child support obligations. The work sheets, which are appended to the sections they illustrate, may also be used to construct a computer program.

25. Section 3.04 objectives are not simply aspirational or hortatory. They are intended to be operative goals. They are concrete and determinate, and their achievement is measurable.

26. The Chapter 3 formula sets obligations for one, two, and three or more children. However, the illustrations are limited to one and two children, for they constitute the large majority of children subject to child support orders.

In their representative California sample, Maccoby and Mnookin found that “[n]early half of the separating couples had only one child, and most of the rest had only two.” ELEANOR E. MACCOBY AND ROBERT H. MNOOKIN, *DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY* 59 (1992). Specifically, their data showed:

Number of children from this marriage	Percentage of families
One	47.1
Two	40.9
Three	10.0
Four	1.6
Five or more	<u>0.4</u>
	100.0%

(N = 1,124)

Id. at 61. With respect to number of children, Maccoby and Mnookin observed that their California sample was quite similar to a national sample of divorced mothers. *Id.* at 62.

III. Section 3.04: the Establishment of Legal Principles upon Which to Base Child Support Obligations

With two noteworthy exceptions, child support guidelines now extant in the United States are based on the principle that a nonresidential parent should contribute to the support of a child as the parent would if he were sharing a home with the child and the child's residential parent. These guidelines determine a parent's support obligation for a child who resides in another household according to estimates of marginal child expenditure, expressed as a percentage of total family expenditure, in two-parent families. These guidelines may be understood to address the question: What is the just amount of child support payable by a nonresidential parent? Unlike the earlier need-based discretionary rubric, these guidelines are neither intended nor designed to register and reflect the need of the child in the residential household. They do not, in any meaningful manner, consider the resources independently available to the residential household.²⁷ Rather, they generally establish uniform percentages payable at given levels of obligor income. Chapter 3 characterizes these guidelines as first-generation Marginal Expenditure guidelines, or formulas.

First-generation Marginal Expenditure guidelines are capable of producing just results when the child's parents have substantially equal incomes before the payment of child support; indeed, in various ways these guidelines implicitly assume substantial equality of income. However, they generally do not produce satisfactory results when the child's parents have substantially unequal incomes. This shortcoming is apparent when the residential parent has substantially lower or higher income: in the first case, child support payments are inadequate; in the second, they are excessive and unjustifiably burden the support obligor.

An earlier draft of this Chapter succumbed to the weight of current law and propounded a first-generation Marginal Expenditure formula, which it augmented with several meliorative provisions designed to remedy some of the most obvious shortcomings of first-generation Marginal Expenditure guidelines. This mildly reformist approach appears as an Appendix to this chapter. It is included for the assistance of jurisdictions reconsidering their guidelines; it serves both to critique first-generation Marginal Expenditure guidelines and to guide jurisdictions choosing to retain and reform a first-generation Marginal Expenditure guideline.

The Institute ultimately concluded that a first-generation Marginal Expenditure formula, even when augmented by meliorative provisions, was too often incapable of accomplishing the goals expressed in § 3.04. Moreover, the meliorative provisions added undue complexity to the routine administration of child support law. To more fully and efficiently accomplish § 3.04 goals, Chapter 3

27. A majority of the first-generation guidelines, the so-called "Income Shares" guidelines, nominally consider the combined income of both parents for the purpose of establishing the percentage of income payable by the nonresidential parent. However, the purpose and effect of such consideration is not to assess the resources independently available to the child in the residential household, but simply to execute the principle that the percentage of income actually (by the non-residential parent) and constructively (by the residential parent) payable as child support should be determined by and applied against the total income of both parents. For further explanation of this point, see Glossary, note 8.

required a child support formula that would take into account the absolute and relative incomes of the child's parents.

Chapter 3 ultimately drew inspiration from the Massachusetts child support formula,²⁸ which has also been adopted, in a modified form, by the District of Columbia.²⁹ The child support formula propounded by Chapter 3 effectively adopts the first-generation concept of marginal child expenditure, or a close proxy, as a baseline measure. It accepts it, all other things being equal, as a just measure of a nonresidential parent's child support obligation. But when all other things are not equal, as they usually are not, the second-generation formula proposed by Chapter 3 makes appropriate adjustments.

The Chapter 3 formula combines the conceptual virtues of the old need-based discretionary rubric with the conceptual and practical virtues of the first-generation Marginal Expenditure formulas. Like a first-generation Marginal Expenditure formula, the Chapter 3 formula can be efficiently administered in a mass system of child support. Yet the Chapter 3 formula, like the need-based discretionary rubric, is also sensitive to the relative and absolute needs of the parents and their children. The Chapter 3 formula requires no more information than that employed by the first-generation Marginal Expenditure guideline used in a majority of states, the so-called Income Shares formula. Yet, unlike first-generation Marginal Expenditure guidelines, the Chapter 3 formula processes that information in a manner that takes into account the economic circumstances of the residential household as well as those of the nonresidential parent. It registers absolute need for both parents and factors the relative economic circumstances of the parents, adjusting the child support obligation accordingly, both upward and downward.

IV. The Various Sections of Chapter 3

a. *The formula.* The essence of the Chapter 3 formula, also called the ALI formula, is presented in two provisions: Sections 3.05 and 3.15. Section 3.05 prescribes the content of the ALI child support formula and the appropriate treatment of child expenditure not included within the formula. Section 3.15 is an income imputation provision designed to capture income actually or constructively available to the residential household. These two provisions are a package. They are not meant to be combined with the provisions of a first-generation Marginal Expenditure formula.

b. *The remaining provisions of the Chapter.* Unless specifically indicated otherwise, all the remaining provisions of the Chapter apply to both the ALI formula and a first-generation Marginal Expenditure formula. Although the remaining provisions apply equally to both formulas, their application may produce different results depending on whether the provisions are applied with

28. Massachusetts Rules of Court, Child Support Guidelines. Although the Massachusetts formula has not been explained or rationalized as the ALI formula has in Chapter 3, nevertheless the basic elements used and refined in the ALI formula are contained in the Massachusetts child support formula. For further discussion of the Massachusetts formula, see § 3.05, Reporter's Note to Comment b, and § 3.06, Reporter's Note to Comment c.

29. D.C. CODE ANN. § 16-916.1.

a Marginal Expenditure or ALI formula. In such cases, the superiority of the ALI formula is again evident. See particularly § 3.08, Determining the Child Support Obligations of Dual Residential Parents, where the difficult problems posed by the application of a first-generation Marginal Expenditure formula in dual residence (joint physical custody) cases largely disappear with application of the ALI formula.

c. The Appendix. The Appendix includes a first-generation Marginal Expenditure formula supplemented with equitable provisions. Section 3.05A prescribes the content of the Marginal Expenditure child support formula and the appropriate treatment of types of child expenditure not included within the formula. Sections 3.052A, 3.053A, and 3.07A (2)(e) are meliorative provisions designed to remedy some of the most serious shortcomings of first-generation Marginal Expenditure formulas. Section 3.052A provides a supplementary child support award when a child's need for care limits the earnings of the residential parent. Section 3.053A provides a supplementary child support award when the residential household, despite the best efforts of the residential parent, is unable to achieve a minimum decent standard of living. Section 3.07A (2)(e) affords hardship relief to nonresidential parents whose income is less than that of the residential parent. The four provisions are a package. They are not meant to be combined with ALI formula provisions.³⁰ The Appendix also contains small portions of other provisions of the Chapter that should or may be varied to accommodate a first-generation Marginal Expenditure formula.

Chapters Four and Five

I. The Background of Existing Law

a. Division of property. At one time there was a sharp division between most American states, which followed traditional common-law principles in the allocation of property at divorce, and the eight states that followed community property principles. The common law treated property owned by the spouses during their marriage as the individual property of one of them unless, as to a particular piece of property, they had acted to create joint ownership. The title in which property was held was critical. The effect was to vest ownership in the spouse who earned the money with which the property was purchased, although that owner could make a gift to the other spouse by shifting property to joint title, or sole title in the other spouse's name. At divorce each spouse was allocated his or her property. The result in most cases was to allocate the bulk of the property to the husband. Alimony was therefore often the only financial remedy available to meet claims the divorced wife might have on her own be-

30. This is because the ALI formula proposed by Section 3.05 does the work of all four Marginal Expenditure provisions (§§ 3.05A, 3.052A, 3.053A, and 3.07A (2)(e)). The ALI formula itself accounts for earnings constraints the residential parent may experience and for difficulty the residential household may have in attaining a minimum decent standard of living. The ALI formula also adjusts, in both directions, for relative income inequality between the parents.

half, as contrasted with claims of child support she might make on behalf of her children.

Community property law begins with the contrary presumption: all earnings from spousal labor during the marriage are the property of the marital "community" in which each spouse has an undivided one-half interest. Property acquired with spousal earnings is therefore also owned equally by the spouses, regardless of whether purchased with funds earned by the husband, the wife, or both, unless the parties change the character of the property by agreement or gift. In California and two other community property states, all community property is divided at divorce into spousal shares equal in value, although not necessarily identical in kind. Alimony (renamed as "spousal support" or "maintenance" in most jurisdictions) may also be allowed, as determined on a case-by-case basis.

This sharp dichotomy between common law and community property traditions no longer prevails in the United States. All the common-law states now allow the divorce court to distribute the spouse's property between them on a basis other than common-law principles of ownership, under a doctrine known generally as "equitable distribution." Five of the eight community property states also instruct their divorce courts to divide the community property between the spouses "equitably" (rather than "equally"). Equitable distribution is therefore the dominant rule today, followed everywhere but in the three "equal division" community property states.³¹

The consensus, however, is not so great as first appears. In community property states, the concept of joint ownership is pervasive, applicable not only at dissolution but also at death and during the intact marriage.³² The common-law states, in contrast, generally retain their traditional separate ownership principles in all matters other than the system of equitable distribution they apply at divorce. These different starting points in the basic underlying concepts of ownership may yield differences in the application of equitable distribution rules that are similar in form. The two most critical features of any law of equitable distribution are its rules for identifying which spousal-owned property is within the pool available to the divorce court to allocate on equitable grounds, and its default or presumptive allocation rule. The trend in equitable division states has favored a presumption, whether formal or in practice, that an equitable division of property is an equal division, but not all states follow this pattern, and its strength varies among those that do. Such differences in the default allocation rule are sometimes related to differences in the definition of property available for allocation. Strong presumptions of equal division are more common among states that exclude from the allocable pool inherited property, or property owned by the spouses individually before their marriage, as compared to states that allow the divorce court to allocate all property owned by the spouses, however or whenever acquired. More generally, inclusive or open-ended rules defining the property available for allocation are associated with

31. These three are California, Louisiana, and New Mexico.

32. For example, the will of a spouse in a community property state applies only to that spouse's half-share of the community property. The surviving spouse's ownership of the other half is not dependent upon the will and cannot be defeated by it.

more discretionary and open-ended rules of allocation. California is a leading example at the other end of the spectrum; it requires equal division in all cases, but has detailed and comprehensive rules distinguishing the equally-divided community property from each spouse's "separate property," which the court cannot reallocate.

Looking behind these differences nonetheless reveals some common substantive themes. For example, even in those states that do not require or strongly presume equal division, property acquired with spousal labor is often divided equally at dissolution. At the same time, even in those states which in principle allow the court to allocate all property owned by the spouses, property inherited by one spouse during the marriage is treated differently from property acquired through spousal labor. Important distinctions among the states thus emerge primarily at the next level of detail: when is a case not "ordinary," so that an equal division presumption should not apply? When, if ever, should the court be allowed to divide property that one of the spouses inherited or owned before the marriage?

Generalization becomes more difficult at this finer level of detail for two reasons. First, the rules of many states leave so much to trial court discretion that statutes and reported decisions provide limited guidance to how the law actually operates in practice. Second, for reasons developed further below, there was an effort in the past two decades to persuade courts to include, within the rubric of property division, claims on post-marital earnings that could traditionally have been made only under the rubric of alimony. Some of these claims have been rejected by most courts, but others have been embraced in varying degrees. For example, nearly all courts have rejected attempts to treat degrees or professional licenses as property, while the treatment of professional goodwill has been considerably more varied.³³ The significance of these resulting variations in marital property law cannot be understood without examining the treatment of related alimony claims, which traditionally were the only basis for claims on post-marital earnings.

b. Alimony. Alimony was originally a remedy of the English ecclesiastical courts developed at a time when complete divorce was available only by special legislative action, and gender roles in marriage were rigid and unquestioned. The husband had a legal and customary duty to support his wife. This duty continued after divorce because there was no divorce in the modern sense, but only legal separation. When judicial divorce became available in the 18th and 19th century, alimony remained a remedy even though its initial justification—the duty of the husband to support his wife—no longer applied. One explanation was that the duty to support one's wife could not be extinguished by the husband's own misconduct. Following that rationale, some jurisdictions allowed alimony claims only by "innocent" wives divorcing "guilty" husbands. Other jurisdictions, focusing on women's financial dependency, in theory al-

33. Property claims on both degrees and goodwill are effectively claims on post-dissolution earnings if the "asset" in question is measured by estimating them. New York is the only state that accepts this treatment of degrees and licenses.

lowed claims by guilty wives as well.³⁴ This view was eventually adopted by the English ecclesiastical courts from their concern that the wife might otherwise “be turned out destitute on the streets or led into temptation,” the assumption being that women were limited to domestic skills and could not support themselves by employment.³⁵ The traditional explanation for alimony was weakened considerably once absolute divorce was allowed, and was undermined completely by modern reforms removing fault from divorce and rejecting gender roles. Yet the financial dependency of wives continued in most marriages. On a practical level a doctrine such as alimony was believed necessary even though the law had no theory to explain it.

Unease over the continuing validity of the traditional rationale for alimony affected decisions early in the modern regime of no-fault divorce. These decisions granted only limited-duration alimony to women who had been homemakers in long-term marriages, and expressed the view that alimony’s principal purpose was to provide short-term transitional assistance to such women. The inability to articulate any basis for an indefinite continuation of the husband’s support obligation, and the conviction that where possible divorce should effect a “clean break” between the marital partners, combined to push the courts in this direction. The result was buttressed by the expectation that the homemaker would develop marketable skills sufficient to afford her an acceptable living standard, at least when combined with her share in the equitable distribution of their accumulated property, an entitlement which was then relatively new in many common-law states.

But these expectations were often frustrated, and this vision of alimony does not describe the law that one finds today in most appellate opinions. At least in long-term marriages one instead finds a widespread view that marital dissolution should not dissolve all financial ties between the former spouses if the result would be a significant disparity in the spouses’ post-dissolution financial standing. A similar intuition encourages awards in marriages of shorter duration as well, where there are children of the marriage who are still young and will be primarily in the care of one spouse.

But this apparent consensus exists only in very general terms, and has produced no dominant theory to explain the alimony award. The prevailing statutory formulation allows the court to grant alimony (now usually called “spousal support” or “maintenance”) to the spouse who is in need. Neither the statutes nor the cases, however, explain why a needy person’s former spouse should be liable for his or her support rather than the needy person’s parents, children, or society as a whole. The result is that the meaning of “need”—the most fundamental issue created by such statutes—is hopelessly confused. Some opinions find an alimony claimant in “need” only if unable to provide for her basic necessities; others find need if the claimant is unable to support himself at a moderate middle-class level; and still others find need when the claimant is unable to

34. A well-known commentator of the era argued that “a guilty wife may starve as quickly as an innocent one,” from which he concluded that the husband has a lifetime obligation to keep his wife from need until the obligation was assumed by another. Vernier & Hurlbut, *The Historical Background of Alimony Law and Its Present Statutory Structure*, 6 LAW & CONTEMP. PROBS. 197, 199 (1939).

35. J. EEKALAAR & M. MACLEAN, MAINTENANCE AFTER DIVORCE 9, 14 (1986).

sustain the living standard enjoyed during the marriage even if it was lavish. There can be no principled basis for choosing among these definitions of need without an explanation for imposing the obligation to meet it. In fact, “need” is often used in the law as a conclusory term whose only meaning is that a court has found the spouse entitled to an award of alimony.

It is therefore not surprising that research studies find that trial court decisions on alimony vary widely, even within the same jurisdiction. Some decisional variation would be expected in even a perfect system, because trial courts must have discretion in these matters to deal appropriately with factual variations that no statute can comprehensively anticipate. But it seems clear that the variation arises at least in part because trial courts apply different principles as often as they face different facts. As a consequence, decisions are very difficult to predict. This unpredictability affects the negotiations that settle the great majority of cases.³⁶

c. The relationship between alimony awards and property allocations. Income flows and capital assets can be substituted for one another, and can be valued on a common scale. For this reason, an enhanced share of marital property may in principle always substitute for a fixed-term alimony award. This was the premise sometimes relied upon early in the no-fault reform era by those who hoped that equitable distribution reforms, by recognizing the wife’s property claims, would end reliance upon alimony. Those hopes were frustrated in practice. Few divorcing couples have capital assets sufficiently large to provide an adequate substitute for any but the most modest of alimony awards. Yet alimony also remained an unsatisfactory remedy. The dramatic reforms in marital property law, and in the grounds for divorce, left the law of alimony largely unaffected. Alimony awards were still unpredictable, unreliable, and often unenforceable. It was thus natural for advocates to look for alternatives in the newly reformed property law. Alimony claims based on the former spouse’s greater earnings could be replaced by claims that such earnings were the product of a thing called “earning capacity” that was marital property in which both spouses had an ownership interest. That characterization would give the claimant a marital property entitlement to share in the portion of the other spouse’s post-dissolution earnings attributable to this jointly owned earning capacity. Such a property entitlement promised a far more reliable strategy than the appeal to judicial discretion at the heart of the alimony claim which it replaced.

36. As a general matter settlement is more likely when the parties have similar expectations of the likely outcome of litigation, than when their expectations differ significantly. There is evidence that clear rules encourage settlement, suggesting that the highly discretionary rules traditionally employed in divorce make parties less likely to settle, perhaps because the difficulty of predicting the result of litigation makes it more likely the parties’ lawyers will have different predictions. Griffiths, *What Do Dutch Lawyers Actually Do in Divorce Cases?*, 20 LAW AND SOC’Y REV. 135, 161 n.24 (1986). An alternative hypothesis observes that highly discretionary rules of adjudication also make the parties less confident of their predictions. Their uncertainty increases the bargaining advantage in the negotiations of the party who is more able, financially or emotionally, to bear the risk of an unfavorable outcome. This consequence of discretionary rules is thought unfortunate by writers who have considered them. See Mnookin & Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

Judicial receptivity to property claims on “earning capacity” depended largely on the extent to which those claims could be framed in familiar terms. Courts generally rejected claims that professional degrees or licenses are “property” with a value measured by the earnings increment that the holders of such credentials typically realize. On the other hand, most courts allow property claims on professional goodwill, and many have accepted measures of that goodwill that effectively include the obligor’s earning capacity.

While in some cases the treatment of earning capacity as property would lead to an equitable result, in other cases it would not. One source of this variation is the usual rule that marital property does not include property acquired before marriage. Marital property rules would not therefore reach earning capacity brought into the marriage. One spouse’s post-dissolution income may thus be treated as marital property while the other’s is not, depending upon when the capacity to earn that income had been acquired. This timing question may or may not be related to the equitable considerations that appropriately bear on the law’s treatment of such post-dissolution income. See § 4.07, Comment *a*. Alimony awards, in contrast, may be based on the parties’ current income without regard to this timing question.

There are additional reasons as well why alimony is a better vehicle than property allocations for adjusting the former spouse’s relative post-dissolution living standards. An alimony award, ordinarily paid periodically, is subject to modification with changes in the circumstances of the obligee or obligor. A property award, in contrast, is a fixed judgment debt. A “property” award determined by capitalizing some portion of the obligor’s expected future income thus becomes a fixed obligation which cannot be changed if the earnings forecast proves inaccurate. It may therefore be a poor vehicle for achieving equitable objectives. But property claims on future earnings will be brought if the only alternative is an alimony remedy which is unreliable or uncertain.

II. Lessons from This History

a. The importance of establishing a coherent justification for alimony. The absence of any systematic theory of alimony in modern divorce law presents difficulties that extend to the law of marital property. The law of alimony needs a justification that can support a law operating more consistently, more reliably, and more predictably. Part I(b) of this essay observed that *need*, the most common criterion for an alimony award under existing law, is employed largely as a conclusory term. Not only do courts use varying definitions of need, but they sometimes grant alimony awards in cases where no need exists under any commonly employed standard. Sometimes alimony is denied despite the presence of obvious need. The solution does not lie in refining our understanding of *need*, but in recognizing that alimony has been used as a residual category to provide remedies in a wide variety of cases that do not share any consistent pattern that can be captured in a sensible definition of *need*. A unifying concept must be sought in other terms. The approach of the *Principles* is to refocus the alimony inquiry from *need* to *loss*, a shift that some of the cases have now begun to adopt.

A spouse found in need is usually a spouse on whom the marital dissolution imposes a loss that seems unfairly disproportionate. That is, the sense that one spouse has an obligation to meet the other's post-dissolution needs arises from the recognition that the need results at least in part from an unfair distribution of the financial losses arising from the marital failure. The payment's true justification is as a remedy for an unfair loss allocation, not as relief of need, and need is not therefore an eligibility requirement for the award. The spouse who incurs a disproportionate financial loss from the dissolution will often seem in need, but even in those cases the degree of need will vary. That is why no single standard of need appropriately decides all alimony cases. Chapter 5 therefore characterizes the remedy as *compensation for loss* rather than relief of need, and employs the term *compensatory payment* (instead of alimony or spousal support) to emphasize this conceptual change.

Grounding compensatory awards on a principle of loss yields a conceptual reformulation that helps explain generally prevailing practices. The categories of compensable loss recognized in the draft bear a close relationship to the kinds of fact patterns that most often support alimony claims in existing law. At the same time, the shift to *loss* as the primary explanatory concept allows development of rules of adjudication that are more predictable in application than are rules grounded upon a single but ill-defined goal of relieving need. Perhaps equally important, reconceptualizing the award's purpose as the equitable allocation of a joint loss changes it from a plea for help to a claim of entitlement, thereby making the award's availability more certain. One result is to reduce the pressure to expand the relief available through the division of property to reach claims for which that remedy is ill-suited.

b. Recognizing the relationship between property allocation and compensatory payments (alimony). An equitable distribution rule must say something about

the facts that bear on assessments of equity. Even a rule that presumptively divides marital property equally must offer guidance as to the circumstances under which the presumption is rebutted. Existing statutes typically provide a list of factors for the trial court to consider. That list typically overlaps with other lists of factors that bear on whether alimony should be ordered. The overlap arises because "need" is the most common rationale both for awarding alimony and also for allowing one spouse an enhanced share of the marital property. As explained above, the *Principles* redefine the question from need into whether one of the spouses has incurred a compensable loss. But whether "need" or "loss" is the central concept, there is no reason the term should mean different things in these two contexts. The assessment of whether a spouse has incurred a compensable loss can thus be made just once. If a compensable loss has occurred, the choice of remedy (property or compensatory payments) is a separate question, appropriately decided by rules that rely more on practical considerations and less on basic principle.

A loss that is well-defined and close-ended, such as the cost of an educational program, may be remedied with a fixed sum provided from an enhanced share of the property allocation. A loss that is open-ended and variable, such as the loss of the marital living standard, will instead usually require modifiable periodic payments, which is the form of award traditionally associated with alimony, and recognized in these *Principles* as compensatory payments. While

these general observations are helpful, the circumstances of some parties will suggest departures from these conventional patterns. For some couples it may be better to settle, for a lump sum and with finality, a claim that would in other cases be better handled by periodic payments of modifiable amount or uncertain duration. The potential size of the compensable loss relative to the value of the parties' marital property may affect this assessment. The *Principles* therefore give courts considerable discretion to determine the most appropriate form for any award in light of practical considerations. Most often the parties themselves will readily reach agreement on these matters of implementation, especially if they negotiate under the influence of rules such as those contained in the *Principles*, that establish with some clarity whether, and in what amount, a compensable loss will be recognized. Property division and alimony are always considered together by attorneys negotiating a settlement and by trial judges adjudicating contested cases. Each element has an economic value and they can be traded off against one another.

A court's determination of whether a compensable loss has been incurred by either spouse is made under rules set forth in Chapter 5 (Compensatory Spousal Payments). Having found a spouse entitled to compensatory payments, the court may then determine whether that entitlement is best satisfied through an award of periodic payments, an enhanced share of the marital property, or a blend of the two. The contrary pattern of the existing law, in which property claims and for alimony claims are formally considered separately, is probably an historical fortuity: the two remedies developed separately because they developed at different times.³⁷

c. The value of statewide rules establishing presumptive results. With divorce rates at their current levels, divorce proceedings affect a large proportion of the population. It appears that an individual American is more likely to be a party to a state court domestic relations proceeding than to any other kind of state court civil litigation.³⁸ In many divorces the parties' assets and incomes are not great, and it will not be sensible or even possible to devote significant legal resources to the divorce proceedings. Expeditious settlement with a minimum of legal process is the preferred result. Rebuttable presumptions that decide the majority of litigated cases facilitate this goal by making the results of potential litigation more predictable. It has the second effect of requiring the development of a consistent statewide policy on the matter addressed by the presumption. Current law often avoids such policy choices, in practice if not in theory, by reli-

37. A different analysis would be necessary if the law allocated an enhanced share of the marital property to a spouse who had made a disproportionate contribution to its acquisition, because that "contribution" consideration would not be reflected in the alimony or "compensable loss" determination. However, the traditional community property rule, increasingly followed in the common-law marital property states, does not give an enhanced share of the marital property to the spouse who earned the funds from which it was bought. The *Principles* also adopt this approach. See § 4.09, Comment c.

38. An admittedly partial count found about five million domestic relations cases filed in state courts in 1999. NATIONAL CENTER FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS, 1999-2000—A NATIONAL PERSPECTIVE FROM THE COURT STATISTICS PROJECT 42 (Brian J. Ostrom et al. eds. 2001). In comparison, there were about 7.1 million other civil cases of all kinds filed in 1999 in state courts of general jurisdiction. *Id.* at 16.

ance on the exercise of trial court discretion. But that approach devolves policy to the predispositions of individual judges. Statewide rules provide consistency across parties in the policies applied to their dissolutions. The presumptions established under such rules must nonetheless be rebuttable, to allow trial courts to respond to the unusual case presenting factual variations no governing statute could anticipate.

The approach of rebuttable presumptions is taken throughout the *Principles*. In applying it to Property Division and Compensatory Payments, the *Principles* extend reforms that in the past decade were successfully applied to the law of child support and that in many states already apply to the division of marital property. While the use of presumptions in determining alimony is currently less common, they are used in local rules adopted by some domestic relations courts. For more on the use of statewide rules establishing presumptive results, see § 1.01.

III. An Organizational Overview of Chapters Four and Five

a. Chapter 4. Chapter 4 addresses the allocation of spousal property at dissolution. It adopts the majority view and distinguishes marital from separate property. See § 4.03, Comment *a*. It follows prevailing law in recognizing as marital property many important intangible assets, such as goodwill (§ 4.07) and pensions (§ 4.08), while excluding earning capacity (§ 4.07). It recognizes the presumption that marital property is divided equally between the parties at dissolution, § 4.09, as well as the usual rule that separate property is assigned to its spousal owner, § 4.11.³⁹ At the same time it vindicates the most persuasive rationale for a unitary property system, the claims of the long-term spouse, with a rule that over the course of a long marriage recharacterizes separate property as marital property for the purpose of dividing property at divorce. See § 4.12.

b. Chapter 5. The scope and objectives of Chapter 5 are set forth in Topic 1. Section 5.03 provides an overview by listing all the compensable losses recognized in the Chapter, and identifying for each the subsequent section that treats it in detail. The Comment to § 5.03 includes Illustrations that show how these sections would apply to common situations. The Comment also demonstrates how later sections of Chapter 5, which address each compensable loss in detail, contain provisions that ensure that multiple awards will not yield double-counting, and that the entire design, taken as a whole, should produce a reasonable result. These later sections are set out in Topics 2 and 3. These Topics separate the compensable losses between those that give rise to a claim measured by the post-dissolution disparity in spousal incomes (Topic 2), and those for fixed amounts (Topic 3).

Topic 2 addresses the loss of the marital living standard experienced by the person whose income after dissolution is less than his or her former spouse's. It recognizes this loss as compensable in two situations primarily: when the marriage exceeds a duration threshold (§ 5.04), and when the less-well-off spouse gave up opportunities to develop his or her earning capacity in order to serve as

39. The only exception arises when a judgment against separate assets is employed to reimburse one spouse for the other's improper or fraudulent disposition of the marital property.

the primary caretaker of the marital children (§ 5.05).⁴⁰ The amount of the claim is presumptively proportional to the spousal income disparity and, generally speaking, to the duration of either the marriage (§ 5.04) or the childcare period (§ 5.05). At any given marital duration the spouse who has cared for marital children, by virtue of the combined effects of both sections, will have a larger claim than the spouse who has not. However, even a spouse in a childless marriage may be entitled to a large claim if the marital duration is sufficiently long and the income disparity sufficiently great. Topic 2 awards are framed as periodic payments the duration of which is set under § 5.06, and which may be modified as provided under §§ 5.07, 5.08, and 5.09. But in appropriate cases the court may make offsetting adjustments in the amount and duration of the award, and may substitute an enhanced share of the marital property for all or part of the Compensatory Payment (§ 5.10), thus establishing a basis for an unequal division of the marital property. Topic 3 addresses claims for fixed amounts that are not based on the spouses' post-dissolution income disparity. An example is the claim a spouse may have for restitution of the costs that spouse incurred to finance the other spouse's education (§ 5.12). Such claims are available primarily in shorter marriages, and may often be satisfied through an enhanced share of the marital property (§ 5.14).

An important objective of Chapter 5 is to replace current alimony law with principles that are "consistent and predictable in application" (§ 5.02). This is accomplished primarily through rules that set forth circumstances under which a presumption arises that a spouse is entitled to a particular compensatory award. Other rules establish presumptive amounts for these awards. This approach emulates reforms of the past decade, prodded by federal requirements in the law of child support. Child support awards were once left nearly entirely to trial judge discretion, but are now typically governed by detailed tables that set forth presumptive award levels that apply unless the trial court makes specified findings that justify another amount. An analogous approach is taken in this Chapter.

The presumptions employed in Chapter 5 are typically rebuttable, and awards may also be given in cases in which no presumptive entitlement arises. In many cases the required presumption necessarily addresses a level of detail whose precise content is left each jurisdiction's policy-making body (see Part II(c) of this Topic). Similar language is used throughout both Chapters in describing the findings required to rebut the presumption. Ideally, rebuttable presumptions will achieve substantial consistency and predictability, while preserving the ability of trial courts to deal appropriately with the special cases that no statute can fully anticipate.

40. Other comparable situations which are also recognized in Topic 2 include claimants whose earning capacity loss arises from the care of children who are not the children of both spouses (see § 5.05, Comment b), or from the care of certain other persons, § 5.11.

Chapter Six

During the final quarter of the twentieth century all western countries experienced extraordinary growth in the rate of nonmarital cohabitation.⁴¹ All responded with legal regulation, much of which substantially differs from American law.⁴² In addition to providing legal contrast, a comparative perspective reveals the extent to which the American family (whether marital or nonmarital) serves vital economic functions that in other countries are more often assumed by society at large. A comparative perspective illuminates the relative importance of American private law in assuring the welfare of children and fairness to adults at family dissolution.⁴³

In view of the scope of these *Principles*, Chapter 6 is limited to the following question: What are the economic rights and responsibilities of the parties to each other at the termination of their nonmarital cohabitation?⁴⁴ Although the three trends are distinct, they are also interrelated. For example, § 6.03 takes into account domestic partnership registration and declaration as some evidence that the parties are domestic partners for purposes of Chapter 6. Chapter 6 does not create any rights against the government or third parties.⁴⁵

Chapter 6 begins with the premise that if both parties desire, they may join together and explicitly contract for the terms of their relationship. Thus the role of Chapter 6 is to provide an appropriate set of default rules, that is, the rules that govern when the parties have not otherwise provided. Accordingly,

41. See § 6.03, Reporter's Note to Comment a.

42. See § 6.03, Reporter's Note to Comment b.

43. See MACCOBY & MNOOKIN, *supra* note 10.

44. A survey of recent developments in the American treatment of nonmarital cohabitation points up what Chapter 6 does and, equally importantly, what Chapter 6 does not do. There have been several distinct trends.

Some jurisdictions have created a new legal status that falls short of marriage, but entails some of the public rights and benefits of marriage. This status is often called "domestic partnership." Although largely intended for same-sex partners, who are not legally entitled to marry each other, in some instances the opportunity has also been extended to opposite-sex couples. This trend is embodied in state and municipal registration statutes, which allow couples to register and which define the incidents of registration. The first comprehensive domestic partnership legislation was enacted by Denmark in 1989. In the United States, domestic partnership legislation has been relatively modest, except in Vermont and Hawaii, where broad-sweeping legislation was required by, or responsive to, equal protection litigation. See § 6.03, Reporter's Note to Comment g.

A second trend, which has considerable strength in the United States, is the extension to nonmarital cohabitants of private rights and benefits historically enjoyed only by married persons. This has been most noteworthy in the employer-employee relationship, where many employers have extended family health and pension benefits to the domestic partners of their employees. For this purpose, employers generally require some sort of declaration that the parties live together and assume mutual responsibility for each other. Data on Fortune 500 companies, colleges and universities, and state and local government are collected at www.hrc.org.

A third trend is legal regulation of the rights and obligations that one nonmarital partner may have against the other at the dissolution of their relationship by inter vivos separation or death. The inter vivos aspect of this third area is the topic of Chapter 6. (In view of the scope of these *Principles*, they treat only dissolution by inter vivos separation.)

45. Thus, Chapter 6 should not be understood to revive the doctrine of common law marriage in jurisdictions that have abolished it. See § 3.01, Comment a.

Chapter 6 provides equitable rules that apply at the termination of qualifying domestic relationships unless one of the parties proves an inconsistent agreement. Chapter 6 could alternatively have required that a nonmarital claimant affirmatively prove an agreement specifying the claims available at permanent separation. Chapter 6 declined to do so and instead chose the former course for many reasons.⁴⁶ Those reasons can be organized in two categories. The first relates to the intentions of the parties. The second is normative.

Chapter 6 takes the view that the parties' failure to marry should not be understood to signify that the parties agreed that they would have no economic obligations to each other. As the incidence of cohabitation has dramatically increased and cohabitation has become socially acceptable at all levels of society, it has become increasingly implausible to attribute special significance to the parties' failure to marry.⁴⁷ Domestic partners fail to marry for many reasons. Among others, some have been unhappy in prior marriages and therefore wish to avoid the form of marriage, even as they enjoy its substance with a domestic partner. Some begin a casual relationship that develops into a durable union, by which time a formal marriage ceremony may seem awkward or even unnecessary, for many Americans entertain the widespread, albeit erroneous, belief that the mere passage of time transforms cohabitation into common law marriage.⁴⁸ Failure to marry may reflect group mores. Some ethnic and social groups have a substantially lower incidence of marriage and a substantially higher incidence of informal domestic relationships than do others. Failure to marry may also reflect strong social or economic inequality between the partners, which allows the stronger partner to resist the weaker partner's preference for marriage. Finally there are domestic partners who are not allowed to marry each other under state law because they are of the same sex, although they are otherwise eligible to marry and would marry one another if the law allowed them to do so. In all of these cases, the absence of formal marriage may have little or no bearing on the character of the parties' domestic relationship and on the equitable considerations that underlie claims between lawful spouses at the dissolution of a marriage.

Normatively, Chapter 6 takes the view that family law should be concerned about relationships that may be indistinguishable from marriage⁴⁹ except for the legal formality of marriage. The more frequent such relationships become, the more the law should be concerned. Chapter 6 assumes as its foundation Chapters 4 and 5, which define and rationalize the economic claims that one spouse has upon another at the termination of a marriage. The equitable concerns that

46. For fuller discussion, see the comment to §§ 6.02 and 6.03.

47. Jan Trost, the Swedish sociologist, first observed this when he did empirical work in Sweden, which has long had the highest cohabitation rate in the world. Trost concluded that the more people cohabit, the less it means. JAN TROST, UNMARRIED COHABITATION 185-87 (1979).

48. In the United States, this belief is expressed in the popular myth that cohabitants become common law spouses after 7 years of cohabitation.

49. Of course many cohabiting relationships do not endure for a significant period time and, of those that do, many culminate in the parties' marriage. See § 6.03, cmt. a. Chapter 6 has no application in either case. It applies only when cohabitation does endure for a significant period of time. When cohabitation culminates in marriage, Chapter 6 has no application because a prior period of unmarried cohabitation is taken into account in the remedies available at the dissolution of marriage. See § 4.03(6) and § 5.04(6).

are expressed there apply equally to marriage-like cohabitation. Chapters 4 and 5 do not rely upon a conception of marriage as a contract whose terms require the equitable remedies contained in those chapters. They instead see those remedies and obligations as arising over time from the parties' conduct in sharing their lives.

With some notable exceptions, for the last 25 years American law has applied the rubric of contract, rather than family law, to the rights and obligations of nonmarital cohabitants. This rubric has generally proven unsatisfactory. Some courts reach harsh and undesirable results by applying contract law strictly, while other courts, to avoid harsh results, play havoc with contract law, distending it beyond recognition. Additionally, the rubric of contract tends to be difficult and time-consuming to administer. American contractual treatment of nonmarital cohabitation is unusual in that no other country approaches cohabitation solely as a matter of contract law. Other countries primarily ask the question: Does this nonmarital family look like a marital family? If so, they apply some or all of their family law to the dissolution of the nonmarital family. In other words, other countries look to the character of the relationship as it developed over time, and not just to the statements the parties may have made, or not made, to one another at its inception.⁵⁰ Chapter 6 adopts this approach. In its operative provisions, Chapter 6 draws inspiration from Canada, and also from Australia and New Zealand. Domestically, Chapter 6 looks to the case law of Washington and Oregon.⁵¹

The operative provisions of Chapter 6 are designed to distinguish relationships that are marriage-like from those that are not. They are designed to be readily administrable, but also to allow for individualized treatment, that is, to dispose easily of run-of-the-mill cases, but also to permit persons to show that they should not be covered by the rules. The provisions are also designed to give due weight to the economic interests of children born in nonmarital relationships. Chapter 6 generally defines domestic partners as "two persons of the same or opposite sex, not married to one another, who for a significant period of time share a primary residence and a life together as a couple." However, few cases will require significant factual inquiry because Chapter 6 uses out an absolute rule and a presumption to identify most relationships that would satisfy this definition.

When parties have lived together in a common household for a specified uniform period of time with a child of both of them, they are domestic partners. These *Principles* do not specify any particular period of time. That decision is

50. In other western countries, both less and more is at stake. If cohabitation goes unrecognized by the legal system, their more highly developed welfare states will avoid more of the social welfare harms that would otherwise accrue at family dissolution. On the other hand, they have more of a public purse interest in establishing inter se obligations, for the state operates as the guarantor of last resort. In the United States, the vital interest is less the public purse, which is frequently held harmless in any event due to paucity of public welfare provision, but rather the public interest in insuring the well-being of all family members, particularly children. To the extent that the United States does not have a well-developed welfare state, it should be more concerned about establishing inter se rights at family dissolution, for the family serves basic social welfare functions that are elsewhere undertaken by the state.

51. See § 6.03, Reporter's Note to Comment b.

left to the enacting state. When parties are not the co-parents of a child, but have shared a common household for a specified period of time, they are presumed to be domestic partners. Again, these *Principles* do not specify a period, but the period adopted by a jurisdiction should be longer when the parties do not have a child together. For example, if two years were used when the parties have a child together, three years would be appropriate when they do not. The presumption requires that the parties share a common household, which in most cases is one that is occupied exclusively by the parties and their relatives. The purpose of this requirement is to make the presumption unavailable to persons who merely share a group residence, such as college students. When the presumption arises, it may be rebutted by a showing that the parties did not in fact share life together as a couple, as that term is defined in the guidelines for determining whether parties shared life together as a couple. If neither the absolute rule nor the rebuttable presumption applies, the claimant bears the burden of showing that: (i) for a significant period of time (ii) the parties shared a primary residence and (iii) a life together as a couple within the meaning of the guidelines. Such cases are likely to be rare.

Once the parties are determined to be domestic partners, they are generally subject to the compensatory payments and property distribution chapters of these *Principles*, unless they have made an inconsistent agreement setting different terms. Only relatively long-term cohabitation can give rise to compensatory payment claims, for they have a minimum vesting period. Thus, domestic partnership status alone will ordinarily be insufficient to generate compensatory payment claims. Similarly, in most relationships, the amount of marital property is proportionate to the duration of the marriage. Thus, the duration of cohabitation is likely to be the main determinant of cohabitation claims. It is the long-term cohabitation cases that are the most troubling under existing American law, and they are the ones most likely to be effectively reached by Chapter 6, in conjunction with Chapters 4 and 5.⁵²

Chapter Seven

Chapter Seven addresses the agreements between parties concerning the consequences of the dissolution of their relationship. Topics One, Two and Three of Chapter Seven set forth common principles governing premarital agreements, agreements made during marriage, and analogous agreements between persons who are domestic partners within the meaning of Chapter 6. Topic Four sets out principles governing separation agreements, which are agreements made by parties who have already decided to dissolve their relationship.

The recommendations and analysis adopted in this chapter with respect to agreements concerning the consequences of divorce do not assume acceptance of the recommendations contained in the remaining Chapters of these *Principles*. This chapter's recommendations stand on their own and could appropriately be followed by jurisdictions with rules concerning property allocation, compensa-

52. See *supra* note 9.

tory payments or alimony, child support, or child custody, that do not conform to the *Principles*.

I. Premarital and marital agreements.

A. Background

At one time, the law did not enforce agreements between prospective or current spouses that “contemplated divorce,” as contrasted with agreements that applied only if the parties’ marriage ended by death. This bar followed from the rule of fault divorce which then prevailed, which disallowed divorce by mutual consent. The spouses’ agreement concerning the terms of divorce could be seen as in conflict with this policy. The nationwide abandonment of traditional fault divorce by the 1970’s eliminated this barrier to premarital agreements. Most courts, however, did not move to a system in which such agreements were enforced on the same basis as other contracts. Lingering concerns over premarital agreements remained, expressed by rules that gave such agreements heightened procedural and substantive scrutiny. The intuition was that premarital agreements raised issues of public policy, fairness, and bargaining integrity that distinguished them from ordinary commercial contracts. But while most courts still decline to enforce premarital agreements on precisely the same basis as commercial contracts, no clear consensus emerged on the appropriate rules to apply, much less on the rationale that might be offered to explain them. These questions are the principal topic of this Chapter. They are not answered by the Uniform Premarital Agreement Act, which neither grapples with nor resolves these concerns, leaving the question of enforceability largely up to courts in their construction of the Act’s undefined requirement that agreements must be “voluntary” to be enforceable.

In addition to more general concerns about premarital agreements, the nearly universal rule is that with respect to matters of child custody and child support, no agreement of the parties can bind the court. This chapter is therefore largely about the claims between divorcing spouses concerning that financial consequences of the relationship’s dissolution. Agreements concerning custodial arrangements are treated in Chapter 2 (see § 7.07 of Chapter 7), which allows them some weight. Agreements that adversely affect a child’s support are on the basis entirely unenforceable. See § 7.06.

B. General approach

This chapter necessarily recognizes the benefits to allowing parties to make agreements about the consequences of family dissolution. Two benefits deserve specific mention. First, contractual autonomy encourages parties about to enter into family relationships to think realistically about that relationship, anticipate contingencies, and plan for them. In some cases, the process of planning for contingencies will help parties to make better decisions about the relationships they form, including the decision whether or not to marry. Agreements also give parties greater certainty about the future, and about the consequences of their actions.

Second, contractual autonomy allows parties to form relationships that do not fit the patterns contemplated in the otherwise applicable law. For example, two previously married older persons contemplating marriage may wish to ensure that in the event of divorce (or death), their property will go to their own children rather than to the spouse. Freedom to make an enforceable agreement along these lines not only facilitates the marriage of this couple, but may also improve the quality of the marriage, providing assurance to their respective children, for example, that the new marriage will not interfere with their own expectations, and providing each spouse the security of control over their own individual assets. Even without special circumstances, young adults entering first marriages may be able to negotiate the terms of a possible, future dissolution that is more in keeping with their own mutual aspirations and values than the consequences of marital dissolution provided for by law.

While Chapter Seven thus recognizes the virtues of private agreements, it must also recognize that formal contracts can never be the exclusive source of the rights and obligations that arise between persons who live in a family relationship. Legal duties arise from relationships alone, without contract, in many fields, including torts and employment law, and they do so in family relationships as well. The legal obligations of parents to their children do not depend upon contract. Intimate partners who forge a life together over many years also acquire obligations to one another that do not depend upon their having been set forth in an agreement that meets the legal tests of an enforceable contract. Relational duties that do not arise from agreement cannot always be shed by agreement. Duties toward children are the most obvious example, but the principle also has application to duties between spouses. Chapter Seven therefore provides for the enforcement of agreements within the limits of constraints arising from the family context that supplement the rules of contract applicable to commercial arrangements.

These constraints are of two kinds. The first are procedural requirements, which are addressed primarily by Section 7.04. Their purpose is to provide added assurance of the integrity and reality of the spouses' consent to an agreement that alters the mutual obligations which the law would otherwise impose upon them. It therefore requires the person seeking to enforce a premarital agreement to show that the other parties' consent to it was both informed, and not given under duress. The section facilitates a party's ability to make this showing by establishing a rebuttable presumption that it has been made when the agreement is executed at least 30 days before the wedding, both parties had a reasonable opportunity to consult independent counsel, and (if either party did not in fact have counsel) the agreement contains plain language explaining how it alters rights otherwise arising at dissolution. There is also a separate disclosure requirement. One effect of this section is to give meaning to the otherwise vague requirement of "voluntariness" that pervades much caselaw in this area.

The second set of constraints implement a particular kind of fairness concern that applies with special force in the family context. Ordinary contract law also responds to fairness concerns under the doctrine of unconscionability. That doctrine considers the agreement's terms as of the time of execution. It seems likely that a party consenting to an unfavorable and extremely one-sided agree-

ment has done so in consequence of problematic bargaining tactics, and the doctrine of unconscionability is therefore responsive to both substantive and procedural norms. This standard contract doctrine may have important application to agreements that spouses conclude during the marriage. See § 7.01, Comment *e*. Premarital agreements, with potential long-term application, raise a different kind of fairness concern, however, which is not addressed by the unconscionability doctrine. A premarital agreement which at the time of execution is fair on its face, and is entered into by parties whose consent is truly mutual, may have a very different significance in the parties' lives when enforcement is sought fifteen years later, after they have borne and nurtured children. The law's usual assumption that contracting parties are capable judges of their own self-interest is put in doubt when the judgment is so distant in time and circumstance from the consequences it had to assess. This capability problem is exacerbated by another uncommon feature of premarital agreements: its principal terms speak exclusively to a marital dissolution which the parties do not expect to occur, and so the agreement has no expected application. Finally, agreements are static, but relationships are not. The agreement may have contemplated a relationship very different than the one that the parties in fact later lived. As couples share a life together for many years they develop mutual interdependencies and obligations, and one may question whether an agreement entered into years before these obligations develop can effectively disavow them.

These special fairness concerns are addressed primarily by Section 7.05, which establishes circumstances under which a court should ask whether enforcement of an agreement would work "a substantial injustice." That inquiry is made when, since the time of execution, the parties have had children (when they did not before). It is also made, whether the parties had children or not, if enforcement is sought more than a fixed period of years since the agreement's execution. While the length of that period is not set by this section, ten years is suggested as reasonable by the commentary. Section 7.05 also allows such a fairness inquiry in the limited number of cases that might arise in which neither of these two objective triggers is present, if nonetheless "there has been a change in circumstances that has a substantial impact on the parties or their children, but when they executed the agreement the parties probably did not anticipate either the change, or its impact." If the person resisting an agreement's enforcement cannot show any of these three triggers, then the court should not inquire into the fairness of the agreement's enforcement. Thus, parties to a premarital agreement who divorce five or eight years after its execution, without having had children, and in circumstances that are not dramatically different than those they likely contemplated, cannot avoid the agreement under this section. Because half of all divorces occur by the seventh year of marriage, this section may have no application in most cases. This result is intentional, for the section's purpose is to permit a substantial injustice inquiry in a subset of cases in which there is special reason to test the parties' capacity to assess their self-interest, without casting doubt generally on the enforceability of premarital agreements. Section 7.05 also provides specific guidance concerning the determination of whether enforcement of an agreement would work a substantial injustice.

II. Agreements between domestic partners

Chapter Six of the *Principles* recognizes certain unmarried couples as “domestic partners” to whom most of the provisions of these *Principles* apply. Persons who would be recognized as domestic partners under Chapter 6 may wish to enter into an agreement avoiding or altering the application of these rules to them. In this regard they are in a position no different than that of married persons entering an analogous agreement. Chapter Seven therefore provides that as a general matter it applies equally to such agreements by persons who are domestic partners within the meaning of Chapter Six. Of course, if a jurisdiction does not follow Chapter Six’s recommendations with respect to domestic partners, it will have no occasion to apply Chapter Seven in that context.

III. Separation Agreements

Separation agreements are contracts made by parties at the dissolution of their relationship. The law has traditionally treated separation agreements differently from premarital and marital agreements. These *Principles* adhere to that tradition, because separation agreements differ significantly from premarital and marital agreements. The *Principles* also follow the traditional distinction between terms of a separation agreement that concern the parties’ economic rights and obligations to each other, and terms that directly affect the interests of a child. The enforceability of terms that directly affect a child is regulated by Chapter 2 (child custody)⁵³ or Chapter 3 (child support).⁵⁴ The separation agreement sections of Chapter 7⁵⁵ are addressed to the enforceability of agreement terms concerning property disposition and compensatory payments. The separation agreement sections of Chapter 7 treat (i) the enforceability of a separation agreement and its particular terms (§ 7.09); (ii) incorporation of the terms of a separation agreements in a decree of dissolution (§ 7.10); (iii) setting aside the terms of a judgment incorporating an unenforceable agreement (§ 7.11); and subsequent modification of the incorporated or unincorporated terms of a separation agreement (§ 7.12).

Separation agreements resolving the terms of dissolution are favored, both under existing law and these *Principles*. Agreements between parties dissolving a family relationship are desirable because the parties have accrued rights and obligations that must be ascertained and settled, if not by the parties then by a court. In negotiating a separation agreement in the shadow of state default rules that set the standard for fairness, the parties can often settle their affairs more efficiently and more to their satisfaction than a court can. The greater favor shown to separation agreements than to premarital agreements may also reflect the different negotiating context. The parties to a premarital agreement are contracting about a speculative future event, dissolution, in a setting dominated by a quite different and immediate event, marriage. In contrast, at dissolution the parties are contracting for events that are already upon them. They are better

53. § 2.07

54. § 3.13

55. §§ 7.09-7.12.

able to comprehend the circumstances in which the agreement will be enforced and thus to grasp the significance of the terms of the agreement. Given the demise of their relationship, the parties may generally be expected to bargain at arm's length. Although parties making agreements before or during marriage may assume that the other party is acting for their common good, parties bargaining about the terms of an impending dissolution are more likely to appreciate that each party has individual interests to advance and safeguard.

Thus the law should enforce separation agreements unless the rules of contract, viewed in the context of family dissolution, have been violated, or the terms of the agreement would frustrate some important policy of the law of family dissolution. Under either circumstance, the law should decline to enforce the parties' agreement. Unlike premarital agreements, which may be understood as a term of, or even as a precondition to, the parties' marriage, and thus to give rise to reliance and expectation interests, a separation agreement comes to the court as a freshly made settlement of accrued rights and obligations. Reliance and expectation interests may arise as a separation agreement ages and forms part of the parties' dissolution decree and post-dissolution experience, but time limitations for the reopening of judgments afford adequate protection for those reliance and expectation interests. Additionally, the law's unwillingness to enforce oppressive separation agreements should serve to discourage overreaching and unfair bargaining practices.

The *Principles* impose few formal requirements for the enforceability of separation agreements. Recognizing that parties may not settle until the hour of trial, separation agreements may either be in writing or stipulated by the parties before the court. The party seeking enforcement need only show the prima facie existence of an agreement, that is, a signed writing or a stipulation. The party resisting enforcement bears the burden of showing that the agreement should not be enforced.

Usually, the material terms of the parties' separation agreement are, pursuant to the agreement, incorporated by the court as the terms of the dissolution decree, with little or no judicial oversight of the negotiation or substance of those terms. In most cases, the agreement or decree will appear before the court again only for enforcement⁵⁶ or subsequent modification, due to changed circumstances,⁵⁷ of its otherwise uncontested terms. In relatively few cases, however, a party may challenge the terms of the separation agreement by resisting enforcement of the agreement⁵⁸ or incorporation of its terms in the decree of dissolution,⁵⁹ or by moving to set aside an incorporated term of the decree.⁶⁰ Judicial economy is better served by limiting court oversight to those relatively few cases in which a term of an agreement is ultimately contested than by requiring courts to examine all separation agreements, including those that are unproblematic or may never be contested. In any event, these *Principles* acknowledge the reality that most courts do not have the resources to exercise meaningful oversight of

56. § 7.09

57. § 7.12.

58. § 7.09

59. § 7.10

60. § 7.11.

all separation agreements. Therefore these *Principles* do not require judicial approval of agreements regulating property disposition or compensatory payments,⁶¹ and instead require judicial inquiry only when one party objects to the terms of an agreement.

A party may successfully resist enforcement or incorporation of the terms of an agreement that does not satisfy the ordinary requirements of an enforceable contract. Enforcement or incorporation of terms concerning property disposition or compensatory payment may also be denied if, prior to accepting the agreement, a party did not have full and fair opportunity to be informed of the existence and value of the parties' separate and marital property, each party's current earnings and prospects for future earnings, and the significance of the terms of the agreement. Finally, enforcement of the property distribution and compensatory payment terms may be denied if they substantially limit or augment property rights or compensatory payments otherwise due under state law, and enforcement of those terms would substantially impair the economic well-being of a party who has (i) primary or dual residential responsibility for children or (ii) substantially fewer economic resources than the other party. The "economic well-being of a party" contemplates mere adequacy of economic resources and freedom from economic privation. Thus this ground for resisting enforcement is unavailable when the moving party is well-off or comfortable under the agreement, or despite the agreement. This ground is not intended generally to limit the parties' power to deviate from statutory norms of property distribution or compensatory payments. Nor is it intended to disallow bargaining tactics that some may find unsavory. Its sole purpose is to safeguard interests of great concern to the law of family dissolution. When a residential parent's economic well-being is substantially impaired by the contractual relinquishment of legal rights, the interests of the children with whom that parent resides are equally compromised. When the economic well-being of a spouse with substantially fewer resources than the other spouse is similarly impaired, the public policy purposes underlying the law of property distribution and compensatory payments may be completely frustrated. Under such circumstances, contractual relinquishment of substantial economic rights may suggest a process defect, such as lack of informed consent or duress, in the negotiation of the agreement. However, this ground does not require proof of such defect. Rather than require the court to undertake a factual inquiry into the parties' negotiations, the *Principles* allow the court, in an appropriate case, to base its determination on the more readily available and apparent terms of the agreement and the economic circumstances of the parties. Subject to time limitations on the reopening of judgments, a party may similarly set aside those portions of a dissolution decree incorporating unenforceable contract terms.

61. Compare Model Marriage and Divorce Act § 306, which requires the court to examine the economic circumstances of the parties and determine whether the agreement is "not unconscionable as to disposition of property or maintenance, and not unsatisfactory as to support" before the court may incorporate the terms of the parties' agreement in the decree of dissolution.

Topic 2

Whether Marital Misconduct Should Be Considered in Property Allocations and Awards of Compensatory Payments

I. Introduction

American law is sharply divided on the question of whether “marital misconduct” should be considered in allocating marital property or awarding alimony. Prior to 1968, consideration of such misconduct, or “fault,” was almost universally allowed. The two decades that followed saw considerable change in the law. The Uniform Marriage and Divorce Act (UMDA), initially approved in 1970, provides unambiguously that both allocation of marital property and determinations of spousal maintenance be made “without regard to marital misconduct.” Published surveys typically report that approximately half the states now share the Uniform Act’s position. The *Principles* do as well. As the division amongst the states illustrates, however, the question is not without difficulty. Nonetheless, the position taken by the *Principles* on this question follows from both the goal of improving the consistency and predictability of dissolution law, and the core tenet that the dissolution law provides compensation for only the *financial* losses arising from the dissolution of marriage. Moreover, the rationale for excluding fault from the dissolution law has been strengthened since adoption of the UMDA by changes in the tort law, which in most states now recognizes claims between former spouses that might once have been excluded by blanket rules of spousal immunity. In consequence the debate over fault in dissolution must be reframed; the question now is not whether the law should provide a remedy for certain forms of spousal misconduct, but whether that remedy should be provided in the tort law or in the law of marital dissolution. This Topic addresses these questions in some detail, thus providing a foundation upon which the appropriate sections of Chapters 4 and 5 rely.

II. Summary of Existing Law

Two categories—fault and no-fault—are inadequate to describe the major variations in state policy. The tables that follow place states in one of five categories. Some preliminary comments are necessary to explain these classifications.

There are two senses in which marital misconduct affects property disposition and alimony orders in even the most thoroughly no-fault jurisdictions. One might call them the two “financial cost” exceptions to the no-fault principle. First, it appears that all states allow divorce courts to adjust the allocation of marital property to compensate one spouse for the other’s financial misconduct, often referred to as the waste or dissipation of marital assets. There are of course variations in the nature of the financial misconduct made subject to this principle. The *Principles* also accept this general principle, however, and Section 4.10 treats the question in detail. Second, because under existing law relative need is the dominant factor in alimony orders, and in most states an important factor in property allocations, misconduct affects both alimony and property allocations to the extent it enlarges either spouse’s need. Courts in no-fault states have ob-

served that domestic violence which leaves one spouse with increased medical costs or a reduced earning capacity may for this reason enlarge the victim's financial claims under no-fault principles.⁶² Because Chapter 5 of the *Principles* also emphasizes disparities in post-dissolution living standards as primary basis for compensatory payment awards, it also can respond to such facts without explicit consideration of the misconduct that has altered the disparity.⁶³

Categorization of state law is also complicated by the variation among the fault states in their definition of the relevant misconduct and the financial issues to which it applies. Some leave the matter almost entirely to trial court discretion, while others specify explicitly particular forms of misconduct that may be considered. A middle group attempts to contain the trial court's exercise of discretion through rules that limit the kind of conduct that may be considered, but only in general terms. It is particularly difficult to characterize the law of this last group because of the hortatory nature of governing authority. Perhaps the problem is even greater. Experienced practitioners in some of these states have suggested that trial courts do not always honor the "official" limitations on consideration of fault. On the other hand, some from fault states with broad rules suggest that their courts are rarely willing to consider evidence of misconduct even though they may do so under local law. It is difficult to make use of such anecdotal reports of discrepancies between the formal law governing fault and a jurisdiction's actual practice.⁶⁴ In any event, this discussion is necessarily limited to describing the law insofar as it can be discerned from the governing statutes and published cases.

The classifications of state law employed here are based upon a comprehensive survey prepared for the Council of the Institute in 1996. It adopts the following conventions.⁶⁵

1. *Pure no-fault (20 states)*

These states exclude consideration of marital misconduct entirely, subject to the two universal "financial cost" exceptions. Many employ the language of the Uniform Marriage and Divorce Act in their statutes, stating clearly that both property allocations and spousal maintenance adjudications are made "without regard to marital misconduct." This is the language adopted in Chapter 5.

62. *E.g.*, *Burt v. Burt*, 386 N.W.2d 797, 800 (Minn. App. 1986) ("The statutory prohibition against considering marital misconduct does not foreclose a judge from considering the financial needs resulting from a chronic health problem that in turn was caused by physical abuse during the marriage."). *See also* *Marriage of Foran*, 834 P.2d 1081 (Wash. App. 1992).

63. The system will respond appropriately without regard to whether the victim of the spousal violence was the financially dependent spouse or the primary wage earner. In either case adjustments in the financial calculations that arise from the altered costs or earning capacity will favor the victim of the violence. This is true of both Chapter 5 of the *Principles* and of traditional alimony awards authorized in existing law.

64. There is some systematically collected data on this point. In England, where the governing statute permitted the courts to take "conduct" into account in property allocations and alimony orders, interviews with the "registrars" charged with administering the law found that they rejected suggestions to consider marital misconduct "almost with one voice". Apparently the only instances they could think of which might call for application of this rule were "financial misconduct" of the sort which American no-fault states routinely consider. JOHN EEKELAAR, *REGULATING DIVORCE* 87 (1991).

65. For a list of the states in each category and supporting authorities, see Reporter's Note a.

2. *Pure no-fault property, almost pure no-fault alimony (5 states)*

The states in this category all adopt a pure no-fault position with regard to property, but may allow some very limited consideration of misconduct with respect to alimony. In one state in this group, it appears that the state supreme court is gradually retreating from a 1973 decision allowing consideration of fault with respect to alimony, and in 1995 came within one vote of excluding it altogether.⁶⁶ In the second there is case law that allows consideration of misconduct in alimony adjudications but few reported decisions that actually do so.⁶⁷ In the third a 1990 amendment deleted the requirement that alimony claimants be free from fault, establishing instead need and ability to pay as the primary basis for the awards; it is not yet clear whether any consideration of fault survives this amendment.⁶⁸ In the fourth there are a handful of 20-year-old cases from intermediate appellate courts considering fault in fixing alimony awards. While these have never been formally overruled, more recent practice seems identical to states in Category 1.⁶⁹ In the fifth very recent legislation allows but does not require courts to consider fault in alimony adjudications. While established case law in that state strongly suggests that its courts will not embrace this invitation,⁷⁰ there is not yet an authoritative interpretation of the new provision.

3. *Almost pure no-fault (3 states)*

These states seem very much like those in Category 1, but the slight possibility of considering fault that exists under their law applies to both alimony and property allocation. Two of the three could easily be placed in Category 1. In one, the governing state supreme court decision establishes a no-fault rule with language that is nearly absolute, and in fact there have been no reported decisions in that state allowing consideration of misconduct since that case was decided.⁷¹ In the second, there is a single decision of the state supreme court that allowed an exception (to the state's otherwise complete no-fault approach) in a case of murder.⁷² The third state in this group has an apparently unique rule that in practice excludes fault from consideration except in cases of serious violent assault.⁷³

66. The state is Kentucky. See Reporter's Note a.2.b.

67. The state is Ohio. See Reporter's Note a.2.d.

68. The state is Idaho. See Reporter's Note a.2.a.

69. The state is New Jersey. See Reporter's Note a.2.c.

70. The state is Utah. The state's no-fault tradition can be seen in *Noble v. Noble*, 761 P.2d 1369 (Utah 1988), in which the Utah Supreme Court allocated to a tort claim rather than to the divorce action the nonfinancial losses suffered by a spouse who was disabled by the other spouse's attempt to murder her. For further information on Utah law, see Reporter's Note a.2.e.

71. The state is Kansas. See Reporter's Note a.3.b.

72. In *Stover v. Stover*, 696 S.W.2d 750 (Ark. 1985), the Arkansas Supreme Court allowed an unequal division of marital property where the wife was convicted of conspiring to kill the husband, the court concluding that the no-fault rule was not meant "to preclude a chancellor from considering such bizarre facts as those in this case." *Id.* at 752. The court cautioned, however, that "the extent of our holding" is to allow consideration "of the fact that one spouse has been convicted of conspiring to kill the other." *Id.* Subsequently, the same court held in *Burns v. Burns*, 847 S.W.2d 23, 27 (Ark. 1993), that "fault is not a factor in deciding whether to award alimony unless it relates to need or the ability to pay." For treatment of interspousal murder in Category 1 states, see Reporter's Note c.

73. The state is New York. Its rule as stated is to allow consideration of only "egregious misconduct." Because New York reports many of its trial court decisions it is easier there than in some

4. *No-fault property, fault in alimony (7 states)*

These states have a pure no-fault position with regard to marital property allocations, but give their trial courts considerable discretion to consider fault in alimony awards.

5. *Full-fault (15 states)*

These are true fault states. They give their courts discretion to consider the parties' marital misconduct in both alimony adjudications and property allocations. In some, authoritative appellate opinions have on occasion attempted to describe the range of misconduct that trial courts should consider, or suggest restraint in the weight to be accorded misconduct. These states are nonetheless classified as "full-fault" because their appellate opinions also embrace the importance of trial judge discretion, and the pattern of reported cases suggests that the hortatory language in the more cautious fault opinions has little impact on the decisions in others.⁷⁴

Many surveys would classify the 28 states in Categories 1, 2, and 3 as no-fault jurisdictions. A more careful count that distinguishes property and alimony yields a more complex picture. On the allocation of property at least 32 states have a pure no-fault system.⁷⁵ Every American jurisdiction that bars consideration of fault in alimony awards also bars it in property allocations. On the other hand, at least seven states (Category 4) permit consideration of fault in alimony awards even though they bar it in the allocation of property.⁷⁶ It thus appears that 25 states (32-7) are properly described as no-fault in alimony as well, although there is some question concerning the proper classification of the five states in Category 2, in which the governing rule cannot be definitely established by examination of the reported decisions. The conclusion, however, is that the states are divided evenly—approximately, if not precisely—on whether fault can be considered in alimony, and that among those that allow fault there is some variation in practice. One can also observe that these alignments have in recent years been relatively stable. Essentially all the American states moved to laws that allowed divorce on no-fault grounds in the 1970s and early 1980s, and as they did so they made choices about whether to apply the no-fault principle to property and alimony as well. Few have revisited those choices.⁷⁷

states to see how its rule is applied in practice, and the pattern seems fairly clear. Minor batteries, for example, are not considered, even when they cause injury. See Reporter's Note a.3.c.

74. There is one state in this group, Rhode Island, which may in fact largely be a no-fault state in practice, but that could not be determined with certainty.

75. The 32 states in Categories 1, 2, and 4 follow a pure no-fault approach to property allocations. Two of the three states in Category 3, Kansas and Arkansas, probably do as well.

76. Recent authority suggests that an eleventh, South Carolina, should possibly be added to this group, although it is placed above with the full-fault states in Category 5. See Reporter's Note a.5.1.

77. Kansas did not adopt an unequivocal no-fault position on alimony and property until its 1990 decision in *Sommers*; Michigan did not adopt an unequivocal fault position until its decision in *Sparks* in 1992. Nevada and New Jersey appear to have gradually solidified their no-fault inclinations over the past two decades. Utah may be reconsidering its traditional no-fault position with regard to alimony, while the Idaho legislature recently deleted fault language from its alimony statute. There has been little new law on the matter in other states. See Reporter's Notes.

The dominant position of no-fault rules in property allocation, as compared to the even division in alimony, appears to reflect a difference in the underlying rationale for each of them, at least in many states. As common-law states moved from the traditional title system to the modern system of equitable distribution of marital property, some also internalized the community property view that the spouses jointly own property acquired during marriage through the labor of either of them. Under this view spousal claims on the property at divorce are legal rather than equitable: The court is not transferring assets from the true owner to his or her spouse, in recognition of the claimant's compelling equitable claims, but is rather dividing the property between its two joint owners, an exercise in which the marital misconduct of the parties seems largely irrelevant.⁷⁸ Complete transformation to a joint ownership view would also imply application of community property principles to the management of assets during marriage, and to their distribution after a spouse's death. Because the common-law states have not generally gone that far,⁷⁹ those that take a joint ownership view at divorce seem somewhat schizophrenic (since they do not take that view during marriage or at death). It is nonetheless the law of many common-law states, and their adoption of the joint ownership at dissolution has apparently encouraged a no-fault approach to its allocation. There seems to be overlap between the 15 states that allow consideration of fault in the allocation of property at divorce and those common-law states that have been most resistant generally to moving from the common-law marital property system to the marital property idea of joint ownership.⁸⁰

The idea of joint ownership has no presence in the law of alimony, and as explained in Topic 1, alimony has not experienced any widespread reforms in basic theory analogous to the marital property movement in common-law states. Its frequent change of name, from alimony to maintenance or spousal support, was intended by many reformers to signal the law's movement away from divorce laws based on fault and gender roles, but the idea of "need" upon which the reformed support claim was to be based did not always carry enough weight to complete this transition. Unlike marital property, the alimony claim remained largely discretionary in entitlement as well as amount. In a system with few bright lines, or even dim ones, it is not surprising that spousal conduct would often be included, along with everything else, among the open-ended list of factors that a court may consider. In that sense fault's continued presence in the alimony law of these states reflects, more than anything else, the primitive state of alimony law generally.

78. If marital property is jointly owned, then ordinary property principles would bar alterations in the spousal shares for misconduct in the marital relationship. Murder is a dramatic example. See Reporter's Note c.

79. The exception is Wisconsin, which has adopted community property rules during marriage and at death.

80. The 15 states that allow consideration of fault in allocating property are predominantly in the northeast and south, which were generally the last bastions of the traditional common-law title system for allocating property at divorce. Fault is irrelevant in the allocation of community property in all the community states but Texas, whose system is heavily idiosyncratic in other ways as well. (Texas was, until this year, the only American jurisdiction to have no provision for alimony, and even its recently enacted statute adopts only a very limited remedy.) See Reporter's Notes a and a.5.m.

Chapter 5 of the *Principles* establishes a firmer footing for claims traditionally considered under the alimony rubric, and in particular claims at the dissolution of a long marriage by the spouse whose employment opportunities were burdened by having fulfilled most of the couple's responsibilities for the routine care of their children. The Chapter establishes a presumption of entitlement to compensatory payments for such spouses in an amount proportional to both the length of the marriage and the disparity in spousal incomes. If the soundness of that basic system is accepted, the question then is whether the entitlement it recognizes should be affected by assessments of misconduct. Marital misconduct, as defined in states which continue to consider it, would typically have no logical connection to the factual foundation upon which Chapter 5's presumptions of entitlement are based. That is, the misconduct would itself cast no doubt on the existence and size of the financial loss recognized by the presumption, or on the basis for presuming joint responsibility for it, given the duration of the marriage and the period of foregone employment opportunity. Reliance upon misconduct to enlarge or reduce the entitlement must therefore be based upon the vindication of other interests that require a concurrent financial award that is, in effect, added to, or offset against, the award based upon the compensatory payment rationale. An examination of the policy question must therefore begin by identifying these other interests to determine whether they should in fact be considered in the dissolution action.

III. The Possible Functions of Fault

A justifying rationale for considering marital misconduct at dissolution must identify some important interests not recognized by a no-fault system and must show how the finding of misconduct can, at least in principle, explain some particular dollar adjustment of the award. Any such justifying rationale must at bottom be based on either punishment of the misconduct or compensation for the harm it has caused. The obvious model for such a system is the tort law. A tort model would understand marital misconduct as relevant primarily because of the harm it imposes on the other spouse, and would measure its dollar consequence by the extent of that harm. Tort law also permits punitive damages in certain circumstances.

a. *A fault rule as an agent of morality: rewarding virtue and punishing sin*

1. *General difficulties with punitive awards*

Punishing the wrongdoer has been a persistent but troubled theme in the law of fault states. Punishment is more usually the function of the criminal law. The use of tort law for this purpose, through punitive damage awards, is often controversial, particularly if the plaintiff has suffered relatively little harm. The punitive use of matrimonial law is yet more problematic. It is thus not surprising that even in fault states, punitive awards are ordinarily condemned—when they are recognized as such. On the other hand, many fault states apply rules that cannot be explained as anything but punitive. The clearest example is the rule that inflexibly bars alimony awards to every adulterous spouse, without re-

gard to any other facts of the case.⁸¹ The case law's oft-stated rejection of punitive awards⁸² seems preferable to these silent impositions of them.

A rule allowing punitive awards must either set clear behavioral standards—as with the rules barring alimony awards to an adulterous spouse—or must rely upon trial judge discretion. The inflexibility of the first approach virtually ensures some indefensible results. The vagueness of the second approach does as well, because the moral standards by which blameworthy conduct will be identified and punished will vary from judge to judge, as each judge necessarily relies on his or her own vision of appropriate behavior in intimate relationships. The discretion seems inherently limitless if no finding of economic harm to the claimant is required to justify the award or its amount. In that case the effect is to empower each judge to employ the matrimonial law to punish conduct that society is unwilling to reach explicitly, as in the criminal law.⁸³

2. *Punishing the spouse who “caused” the dissolution*

Some courts appeal to a rationale that seems at first to avoid the punitive nature of a fault award by casting it as compensation for the financial costs of splitting one household in two, costs that necessarily arise in most dissolutions. These courts argue that a fault-based award is justified because it allocates more of those costs to the spouse whose conduct caused them, by causing the dissolution.⁸⁴ Framing the rule this way thus casts it as compensation rather than punishment even though no losses are identified beyond the financial consequences present in nearly every dissolution.

81. The potential recipient's adultery is a complete bar to alimony, without regard to any other facts of the case, in Georgia, North Carolina, South Carolina, and West Virginia. In Virginia it is a complete bar unless the court finds that its denial “would constitute a manifest injustice based upon the respective degrees of fault during the marriage and the relative economic circumstances of the parties.” In Mississippi it is generally a bar, but not after a long marriage if the adulterous spouse would otherwise be “destitute,” in which case a reduced award may be allowed. The Mississippi rule was applied to limit the alimony that would otherwise have been allowed the wife in the dissolution of a 25-year marriage, even though the husband in that case also committed adultery. Adultery is an “appropriate consideration” in many other fault states; decisions sustaining its consideration without any apparent important limitation on the trial court's discretion include Alabama (trial court reversed for failing to consider husband's adultery in allocating marital property); Connecticut; Kentucky (wife's adultery may reduce alimony award, but husband's adultery cannot be the basis for increasing it); Louisiana; South Dakota (husband's adultery may also be considered); Maryland (trial court reversed for refusing to hear testimony of wife's adultery); New Hampshire; North Dakota (trial court properly allocated 83% of property to husband after 19-year marriage, where wife guilty of adultery); Tennessee; Texas; and Vermont. See the Reporter's Notes.

82. This sentiment is expressed even in full-fault states, *Young v. Young*, 609 S.W.2d 758, 762 (Tex. 1980) (court should use fault to make “a just and right division” of the community property, not to “punish” the guilty spouse); *Paul v. Paul*, 616 P.2d 707, 712 (Wyo. 1980) (court should not use its discretion to reward one party and punish the other).

83. One reason for reluctance to apply the criminal law is the absence of a sufficient consensus concerning appropriate marital conduct. Another is the concern that evaluation of marital misconduct requires too nuanced an understanding of the marital relationship. The uncertainties fueled by these two concerns exacerbate another—that in practice these evaluations will not be gender-neutral. This is certainly true even today in many states that attach far more consequence to a wife's adultery than a husband's. See *supra* note 29. These concerns apply just as forcefully in the dissolution context.

84. For an example of this approach, see Reporter's Note b.2.

Closer examination suggests, however, that this principle, while appealing in the abstract, necessarily relies on sleight of hand in application. The problem is the principle's reliance on being able to establish which spouse "caused" the dissolution. Inquiring into the cause of marital dissolution is different from inquiring into the cause of chicken pox, or of a plumbing failure. In those contexts the word "cause" has an objective meaning; it is a prior event (such as infection, or rust) without which the later event would not have occurred. In the context of marital failure, however, the word "cause" has no such meaning, and its use simply masks a moral inquiry with a word pretending a more objective assessment. Some individuals tolerate their spouse's drunkenness or adultery and remain in their marriage. Others may seek divorce if their spouse grows fat, or spends long hours at the office. Is the divorce "caused" by one spouse's offensive conduct, or by the other's unreasonable intolerance? In deciding that question the court is assessing the parties' relative moral failings, not the relationship between independent and dependent variables. And the complexity of marital relations of course confounds the inquiry. The fading of affective ties makes spouses less tolerant of one another. So of course the decisionmaker inquiring into "cause" should ask about the reason for the loss of affection in order, for example, to determine whether it is the complainant's apparently unreasonable intolerance that is the cause of the marital failure, rather than conduct of the other spouse that prompted the complainant's loss of affection (and which in turn encouraged the intolerance). Perhaps courts in fault states sometimes engage in such tracing, although surely many do not. But in any event such courts are not inquiring into the conduct that caused the dissolution, but into the misconduct that can be assigned the blame for it. Was the marital breakdown in Marriage One caused by one spouse's adultery or the other's emotional insensitivity? In Marriage Two, by the first's adultery or the second's failure to keep fit? The court's answer tells us which conduct it finds more blameworthy, not which functioned as the cause of the other.

This analysis does not itself suggest, of course, that it is wrong to assign the costs of dissolution to the spouse whose conduct was more blameworthy. It only reveals that the objective language of causation has concealed that this is what the court is in fact doing. Once that is revealed, however, a problem is uncovered: by dressing up its conclusion in the neutral language of causation, the court can assign such blame without identifying the standards under which it does so. Much mischief can result from allowing courts to assign liability to nontortious conduct by application of unarticulated—and effectively unreviewable—standards of blameworthiness.⁸⁵ Nor is such sleight of hand necessary to allow the law to respond to serious misconduct. Offensive conduct in marriage that violates the norms of tort or criminal law will normally be actionable whether or not it is the "cause" of the actor's marital dissolution.⁸⁶

85. For example, a spouse may be held at fault for the breakup of the marriage because she prefers to live in a more urban setting than is available in the forum state preferred by her husband. *Grosskopf v. Grosskopf*, 677 P.2d 814 (Wyo. 1984).

86. To be actionable in tort, conduct need only have caused some loss or harm, even mental distress. The financial costs that arise from the dissolution could, however, be an element of the tort damages in such a case, if they were found to have been caused by the tortious conduct. *See infra* Part IV.

In sum, courts that purport to allocate the unavoidable costs of dissolution by assessing the cause of the marital failure are in fact rewarding virtue and punishing sin. They are not compensating one spouse for a harm “caused” by the other. If the behavior they punish is tortious, it ought to give rise to damages on those grounds. If not, the language of “cause” serves only to conceal, perhaps from the court itself, that the judgment’s true function is to punish behavior that may not be blameworthy under familiar and accepted standards of tort law.

The *Principles* are allied with a substantial majority of modern American decisions in rejecting punishment as a proper basis for adjusting property or alimony awards at divorce. They adhere to that view whether the purpose of punishment is made overt, or is concealed under the rubric of causation.

b. Fault law as a source of compensation for harms caused by wrongful conduct. Compensation is a more palatable rationale than punishment for fault-based adjustments in alimony awards, and promises a more certain basis for fixing the amount of the adjustment, which would presumably reflect the loss imposed on the claimant by the other spouse’s misconduct. But just what kind of loss would the fault-based rule provide compensation for? No-fault principles already recognize *financial* losses traceable to spousal misconduct, under the two mechanisms identified in Part II. The first, exemplified in Chapter 4 by § 4.10, allows the allocation of marital property to reflect misconduct that had a direct impact on the amount of property available at divorce. The second, inherent in both Chapter 5 and any modern no-fault rule, arises from the centrality of earning capacity in setting the alimony or compensatory payment award: The impact of one spouse’s misconduct on the other’s earning capacity is thus necessarily reflected in the award. What additional losses would a fault system recognize, beyond these losses of property and earning capacity? The answer is nonfinancial losses.

A proposal to add a compensation-based fault rule to the *Principles* could therefore be understood as revisiting Chapter Five’s determination that the law of marital dissolution should provide compensation only for nonfinancial losses. (See § 5.02, Comment *b.*) Recognizing this does not imply that the existing law in fault states currently provides such compensation, for its standards of recovery and for measuring damages are simply too vague to identify that purpose, which is in any event sometimes even disavowed.⁸⁷ Any proposal to consider marital misconduct at dissolution must do better. The first step is a more explicit

87. Courts in full-fault states do sometimes describe their consideration of fault as serving this compensation function. *E.g.*, *Robinson v. Robinson*, 444 A.2d 234, 235-36 (Conn. 1982) (in considering the “gravity” of the wife’s adultery as it applies to the allocation of property, the court may consider the “humiliation and mental anguish” that it imposed on the husband). And it seems clear that in exercising the wide discretion typically allowed them in full-fault jurisdictions, trial judges often think of themselves as awarding damages in the guise of alimony or property allocations. Whether those damages are compensatory or punitive in nature is typically difficult to ascertain, however, because of the fault law’s disinclination to acknowledge either purpose overtly. For a telling illustration, see *Martone v. Martone*, 611 A.2d 896 (Conn. App. 1992). There, the trial judge initially referred to an award of \$15,000 to wife as “damages” for husband’s conduct in “brutally causing the breakup of this marriage,” but subsequently recharacterized it as alimony. *Id.* at 899. The award was affirmed on appeal, the court reasoning fault was a valid factor in awarding alimony and the trial court’s “later characterization” of its award should control. *Id.* at 901.

identification of purpose. There are in principle two possibilities, each of which has a tort analog. They are:

1. Compensation for emotional losses arising from the other spouse's misconduct. (Analogous to tort claims for intentional or negligent infliction of emotional distress.)

2. Compensation for the pain and suffering arising from the other's misconduct. (Analogous to general damages in battery or assault actions.)

In short, a fault rule would serve compensation functions that may already be served by the tort law. Such duplication is inadvisable. There is no reason to reinvent compensation principles under the rubric of fault adjudications, nor to incorporate tort principles into divorce adjudications. A jurisdiction that wants concurrent consideration of tort claims and dissolution remedies may permit their joinder. Whether it should do so requires consideration of procedural issues beyond the scope of the *Principles*.⁸⁸ What the *Principles* must consider, however, is whether the existing tort law is adequate to provide spouses compensation for nonfinancial losses arising from one another's misconduct. If there are large groups of worthy claims for which tort law cannot in fact provide an effective remedy, then the *Principles* must consider offering one. Part IV reviews the relevant tort law in some detail, for the limited purpose of deciding whether it is adequate to this task.

In comparing the virtues of recognizing certain interspousal claims for misconduct in tort or in dissolution, it might seem natural to assume that their incorporation into dissolution law would have the advantage of facilitating such claims by lowering the procedural or transactional hurdles that confront them. But whether a fault-regarding dissolution law would actually have this effect, as compared to a rule allowing the joinder of the dissolution and tort actions, is hardly clear. Even more importantly, however, one cannot in fact assume that sound policy favors the encouragement of such claims. Daily life is full of acts that meet the formal elements of battery, or of intentional infliction of emotional distress, but which are not pursued to judgment by their victims. Both inside and outside the family, people do not sue over every shove, punch, or outrageously mean and hurtful act. Their reticence is usually regarded as a good thing, not as a problem to be solved.

Because the judicial system administers the state's monopoly on dissolving marital status, those wishing to end their marriage must file a lawsuit. But neither policymakers nor legal commentators have sought generally to encourage more tort suits by allowing those otherwise disinclined to sue to add their possible claims to forms that the state requires them to file for other reasons. Interspousal tort claims present no reason for a different view. To the contrary, the encouragement of spousal claims for misconduct could easily, if unintentionally, tap the anger and bitterness often present at divorce, so that the additional suits resulting from such a policy would be disproportionately of the sort that should not be brought. In addition, some misconduct claims might be made for tactical

88. The procedural problems involved in joinder are complicated by the fact that dissolution actions are ordinarily heard by a judge, while tort claims may be heard before a jury.

advantage in the divorce settlement negotiations. In short, a conclusion that fault-oriented property or alimony rules encourage more people to charge their spouses with misconduct, as compared to a system in which misconduct claims must be brought in tort, may be reason to oppose rather than support such fault rules. The question is whether the tort law provides an adequate opportunity to obtain a remedy for worthy claims of misconduct that the victim wants to pursue. If it does, then inviting additional claims in the dissolution action is a problem, not a solution.

Does tort law provide that adequate opportunity? We now turn to that question.

IV. Tort Claims for Marital Misconduct

a. *Battery*. With the general demise of interspousal tort immunity,⁸⁹ battery claims between spouses face no special legal obstacles. There are many appellate decisions dealing with such claims, concerned primarily with their procedural relationship to the financial claims that arise in dissolution actions.⁹⁰ There is no important dissent from the proposition that a battery claim should be available to the individual who suffers physical injury at the hands of his or her spouse.

Despite the general absence of special legal barriers to interspousal battery claims, one may fear that some victims of spousal abuse will be psychologically unable to seek redress, at least before the applicable statute of limitations has

89. For a description and endorsement of the modern trend to abolish interspousal tort immunity, see generally, Fowler Harper, et al., *The Law of Torts* § 8.10 (2d ed. 1986) and Restatement, Second, *Torts* § 895F (1964) (rejecting inter-spousal immunity). Writing in 1988, Clark reported that interspousal tort immunity has been abolished fully in 36 states, and abolished for intentional torts in four others. H. Clark, *1 Law of Domestic Relations in the United States* 631-36 (1988). Additional states that have followed the trend after Clark wrote include Florida, *Waite v. Waite*, 618 So.2d 1360 (Fla. 1993); Mississippi, *Burns v. Burns*, 518 So.2d 1205, 1208-09 (Miss. 1988); and Texas, *Price v. Price*, 732 S.W.2d 316 (Tex. 1987). There are undoubtedly others as well.

90. *Coleman v. Coleman*, 566 So.2d 482 (Ala. 1990) (barring post-divorce tort action where wife relied on husband's fault to obtain relief on same claims in divorce action, decided under state law allowing consideration of fault); *Windauer v. O'Connor*, 485 P.2d 1157 (Ariz. 1971) (wife can bring tort action after divorce against husband who fired bullet at her; res judicata does not apply); *Cater v. Cater*, 846 S.W.2d 173 (Ark. 1993) (prior divorce action created no res judicata bar to wife's tort award against husband of compensatory and punitive damages for battery); *Waite v. Waite*, 618 So.2d 1360 (Fla. 1993) (interspousal battery action allowed); *McCoy v. Cook*, 419 N.W.2d 44 (Mich. App. 1988) (wife's tort action for battery and emotional distress not barred by prior divorce judgment that provided wife an enhanced share of the marital property based on husband's fault, but husband may raise prior compensation as an affirmative defense to specific damage claims); *Townsend v. Townsend*, 708 S.W.2d 646 (Mo. 1986) (interspousal battery action allowed); *SAV v. KGV*, 708 S.W.2d 651 (Mo. 1986) (wife may bring tort claim against husband for giving her herpes); *Brennan v. Orban*, 678 A.2d 667 (N.J. 1996) (decision whether wife's separate tort claim, consolidated with divorce action over wife's objection, should be heard by a jury is within the trial court's discretion to decide; dissent argues that all victims of domestic violence are entitled to a jury trial for marital tort claims); *Maharam v. Maharam*, 510 N.Y.S.2d 104 (App. Div. 1986) (wife may bring tort claim against husband for giving her herpes); *Noble v. Noble*, 761 P.2d 1369 (Utah 1988) (discussing method for allocating claims between divorce action and wife's concurrent tort suit, where husband had shot wife); *Stuart v. Stuart*, 421 N.W.2d 505 (Wis. 1988) (Abrahamson, J.) (Because fault is completely barred as a consideration in property division and alimony, prior divorce decree does not operate as a res judicata bar on subsequent tort claim for assault, battery, and emotional distress; joinder of tort and divorce claims permissible, but better avoided).

run. Whether the law should treat such cases differently, for example by tolling the statute, is a difficult policy choice. Marriage alone does not present adequate grounds for tolling, but tolling may well be justified by factual findings in a particular case. There may be concern as to whether the courts can sort the cases adequately. In any event, resolution of this problem would not be aided by incorporating the battery claim into dissolution law. To the contrary, its consideration under some general and highly discretionary rubric of marital fault would merely obscure the policy issue presented by old claims, which could still be pressed. Tort law has a rich body of precedent on these tolling questions to which it can look in working out a solution.⁹¹

In sum, there seems no reason to duplicate the battery law in the *Principles*. The *Principles* need not address the procedural question of whether, or under what rules, to permit the joinder of battery actions and divorce petitions.

b. Intentional infliction of emotional distress. Claims between spouses for intentional infliction of emotional distress (IIED) present a more complicated picture than does battery. The IIED action in most states is based upon § 46 of the Restatement, Second, of Torts, which recognizes a cause of action where the defendant, through “outrageous” conduct, intentionally or recklessly causes the plaintiff severe emotional distress.⁹² No physical contact is required; the tort can be committed through words or other non-touching acts alone. Moreover, the Restatement formulation does not require the victim to prove any particular physical consequences arising from the distress (although such consequences are often alleged).

IIED claims often accompany battery actions, and in that context are typically permitted. But they are also typically superfluous, because they usually do not enlarge the damages available once battery is shown.⁹³ Pure emotional distress claims, in which the plaintiff-spouse alleges no physical attacks, but emotional distress alone, are less often successful. A few cases bar them entirely,⁹⁴

91. *E.g.*, *Giovine v. Giovine*, 663 A.2d 109 (N.J. Sup. App. Div. 1995) (allowing wife to include claims for battering incidents that would ordinarily be time-barred, where she can show she was a victim of “battered woman’s syndrome” who was rendered incapable of bringing an earlier action).

92. Professor Givelber, in an excellent article on the subject, describes the tort as “widely recognized.” Daniel Givelber, *The Right to Minimum Social Decency and the Limits of Evenhandedness: Intentional Infliction of Emotional Distress by Outrageous Conduct*, 82 *Colum. L. Rev.* 42 (1982). Two important earlier articles were critical to The American Law Institute’s recognition of this tort and, in turn, its broad embrace in decisions around the nation. See Calvert Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 *Harv. L. Rev.* 1033 (1949); William Prosser, *Insult and Outrage*, 44 *Cal. L. Rev.* 40 (1956). In a recent opinion recognizing the tort, the Texas Supreme Court counted itself as the 47th to follow the Restatement’s lead. *Twyman v. Twyman*, 855 S.W.2d 619, 621-22 (Tex. 1993).

93. *E.g.*, *Stuart v. Stuart*, 421 N.W.2d 505 (Wis. 1988) and *Caron v. Caron*, 577 A.2d 1178 (Me. 1990), both battery cases in which the plaintiffs also included an IIED claim to which the courts paid no real attention. An odd exception is *Henriksen v. Cameron*, 622 A.2d 1135 (Me. 1993), in which state law imposed a shorter limitation period on battery claims than on emotional distress actions. In that context, the Maine Supreme Court allowed a distress claim grounded largely on the same incidents that would have supported the time-barred battery action.

94. *Weicker v. Weicker*, 237 N.E.2d 876, 22 N.Y.2d 8, 290 N.Y.S.2d 732 (1968) (rejects distress claims for marital misconduct); *Pickering v. Pickering*, 434 N.W.2d 758 (S.D. 1989) (husband claims emotional distress as well as other torts where wife had covert affair and allowed husband to think, erroneously, that he was the father of her child; summary judgment for wife sustained because pub-

while a few others have allowed them.⁹⁵ Most often, however, the court rejects the particular claim before it as legally inadequate, on the ground that the defendant's conduct was not sufficiently "outrageous," without excluding the possibility that the hurdle might be overcome by different facts. Claims based on the defendant's adultery have often been rejected, as courts conclude that unfaithfulness in all its variations is inadequate to support recovery under the outrageousness standard.⁹⁶ Apparently closer to the line are claims for what might be called psychological bullying, on which two leading cases divide. Close examination of these two cases illuminates the question of whether divorce courts should consider similar conduct in adjudicating claims for compensatory payments. It suggests that the gingerly approach taken by most courts to spousal IIED claims is quite sensible, and that this experience supports leaving these claims in tort law, rather than incorporating them into the dissolution rules. Some brief observations about the general law of IIED are necessary, however, before examining these interspousal cases.

Despite the tort's four "official" elements—(1) an intentional or reckless act that is (2) extreme and outrageous, and (3) causes (4) severe emotional distress—in practice the action boils down to the one element of "outrage."⁹⁷ The tort has never been thought to require actual intent to cause the distress, but only to commit the act that produced it.⁹⁸ Where intentional outrageous conduct is proven, courts seem ready to credit the plaintiff's claim that it caused severe distress, and where outrage is not proven the tort fails, even if the defendant meant to cause the plaintiff severe emotional distress and succeeded. Thus the tort is somewhat misnamed. It seems designed less to protect an interest in emotional tranquility from intentional invasion, than to condemn and punish bad behavior.⁹⁹ To establish liability, everything turns on the standard of "outrageous" conduct employed in judging the defendant's conduct. But at the same time, plaintiffs often detail their emotional upset in order to maximize the amount of their recovery. So in that important sense, a showing of distress is

lic policy forbids tort claims based on conduct leading to dissolution). This is consistent with the most common treatment of related third-party claims. *E.g.*, *Speer v. Dealy*, 495 N.W.2d 911 (Neb. 1993) (husband's emotional distress claim against his boss, wife's lover, thrown out as barred by heartbalm statute).

95. *Whelan v. Whelan*, 588 A.2d 251 (Conn. Super. 1991) (allows wife's IIED claim against husband who falsely told her he had AIDS); *Twyman v. Twyman*, 855 S.W.2d 619 (Tex. 1993) (subsequently confirming Texas's acceptance of IIED in context of spousal claim); *Massey v. Massey*, 807 S.W.2d 391 (Tex. App. 1991) (sustaining jury verdict for \$362,000 based on distress claim for husband's emotional bullying of wife).

96. There have been numerous twists on the basic argument that the defendant's adultery caused the plaintiff emotional distress, but none of them have gotten the plaintiff over the outrageousness hurdle. *E.g.*, *Strauss v. Cilek*, 418 N.W.2d 378 (Iowa App. 1987) (wife's affair with husband's close friend not outrageous as a matter of law); *Ruprecht v. Ruprecht*, 599 A.2d 604 (N.J. Super. Ch. Div. 1991) (wife concealed affair for years); *Poston v. Poston*, 436 S.E.2d 854 (N.C. App. 1993) (wife's exposure of her mind, body, and spirit to sexual advances of another man not outrageous); *Alexander v. Inman*, 825 S.W.2d 102 (Tenn. App. 1991) (in suit by husband against wife's lover, fact that wife's lover was himself married and that lover perjured himself in his own divorce proceedings by denying the affair not sufficiently outrageous).

97. *Givelber*, *supra* note 44, at 46-50.

98. *Id.* at 46.

99. *Id.* at 54, 59.

central in the tort's application. We can thus see that IIED poses policy problems quite similar to those involved in recognizing fault at divorce. The key question is defining the actionable conduct, but it is also important to require the showing of a loss upon which the "damages" may be based.

On the threshold issue—defining the culpable conduct—the authorities are remarkably vague. The tort has most often been used to police relations between actors in a commercial context, enforcing a minimal requirement of decency and fair procedure as between landlords and tenants, creditors and debtors, and employers and employees.¹⁰⁰ One leading writer concludes that distress claims involving parties not previously bound by contract "are fewer, the results more unpredictable, and doctrine virtually nonexistent."¹⁰¹ The existence of a previously established commercial relationship with a well-understood purpose gives the court a context for establishing the limits of decency by which to judge the defendant's conduct. It is thus apparent why the tort's application in the marital context has proven problematic. Regulation of commercial interactions can rely on established conventions of public behavior as well as the understanding that the actors enter the relationship with a financial purpose that both bounds and explains the range of acceptable conduct. But neither a financial purpose nor conventions of public conduct provides a compass to guide the tort's application to private marital behavior. What then is available? This is the problem confronted by *Massey* and *Hakkila*, two cases that reach conflicting results in IIED claims based on psychological bullying. In order to appreciate the issues that arise in these cases, and that would necessarily arise as well in a dissolution law that permitted consideration of marital misconduct, one must examine the facts in some detail—as must the courts themselves, in applying such rules.

In *Hakkila*,¹⁰² the spouses separated in 1985 after 10 years of marriage. When the husband filed a petition for dissolution, the wife, who had a history of depression, counterclaimed for IIED. It appears the divorce and tort cases were tried together before a judge, who made factual findings to support his award of tort damages to the wife.¹⁰³ Although she apparently made no separate claim for battery, the trial court supported the IIED verdict in part with a general finding that the husband had "assaulted and battered" her. The appeals court concluded that this finding was supported in the record by evidence of "several" incidents. In 1984, when the wife was pushing her finger at her husband's chest, he grabbed her wrist and twisted it severely. In 1981, four years before their separation, during another argument, he grabbed her and "threw her face down across the room, into a pot full of dirt." In 1978, while the wife was putting gro-

100. *Id.* at 53.

101. *Id.* at 63. One well-known exception to this principle allows recovery when cruel practical jokes are played on those with known weaknesses. See *Wilkinson v. Downton*, 2 Q.B. 57 (1897); Re-statement, Second, Torts § 46, Comment d, Illustration 1.

102. *Hakkila v. Hakkila*, 812 P.2d 1320 (N.M. App. 1991).

103. The trial court allowed the wife an alimony award of \$1,050 monthly in the divorce action, and then provided that, as damages on the tort claim, she should receive \$5,000 in medical expenses plus the marital residence, worth \$136,000, "free and clear" of her "husband's one-half community property interest and existing mortgage." The apparent intent was that existing mortgages be retired from her husband's assets. The effect was thus a judgment for at least \$73,000 (\$5,000 plus her husband's \$68,000 half-share of the home), and perhaps more if there were existing mortgages on the home for which the husband assumed sole liability. 812 P.2d at 1329.

ceries in their camper, he slammed part of the camper shell and trunk lid on her head and hands. In 1976, “and sometimes thereafter,” the husband used “excessive force” during consensual sex when “attempting to stimulate the wife with his hands.” The court also found that during another argument, she grabbed his shirt and popped all its buttons off. When she then stepped outside their home, he closed and locked the door. Neighbors let her in. He threw his clothes in their camper and drove off for the night. He returned the following morning, they made up and made love.

The trial court also found additional instances of “outrageous” acts “so extreme in degree as to be beyond all possible bounds of decency and . . . atrocious and utterly intolerable.” At a Christmas party the husband screamed an obscenity at the wife in front of others when she suggested, at 11 p.m., that they go home. There was no other evidence of his public screaming, but the wife did testify that the husband would scream at her when the couple was alone. At various times he told her “you’re just plain sick, you’re just stupid, you’re just insane,” and on several occasions the husband said to the wife that “you prefer women to men.” He testified that he meant only that she preferred women’s company, and she did not testify that his remarks had any sexual connotations. Finally, the trial court found that the husband refused to engage in normal sexual relations with the wife, and the wife testified that he blamed his sexual inadequacies on her.¹⁰⁴ The appellate court cautiously concluded that while spousal IIED claims might be valid in other settings, the facts of this case were inadequate as a matter of law to demonstrate such a tort.¹⁰⁵ Hence it reversed the tort judgment for the wife. Indeed, the court expressed concern that the husband was subjected to a six-day trial on these claims, and urged trial courts to make more liberal use of summary judgments if similar IIED cases arise in the future.

In *Massey*,¹⁰⁶ the wife claimed that her husband, a bank president, denied her any independent access to funds and doled out money to her in small amounts, belittled her in front of others, had temper tantrums that sometimes included property destruction and that caused her to experience intense anxiety and fear, and threatened to tell her children and friends of her extramarital affair, and to take custody of her youngest daughter from her. The wife’s psychologist testified that the wife dealt with the husband by “walking on egg shells” so as not to trigger his rage. The wife made no claim of personal physical violence, and the jury ultimately found that the husband “had not assaulted [the wife] by threat of imminent injury nor acted with malice.” Although the husband portrayed most facts differently than his wife, he conceded that he often used threats in both his business and his marriage “to get his way.” The husband claimed that the wife was an alcoholic, and that he had been devastated by her extramarital affair. The parties had been married for 22 years. The distress claim was tried with the divorce action, and resulted in a jury verdict against the husband for \$362,000 in compensatory damages. There was no punitive damage

104. The trial court also found that the husband had refused to allow the wife to pursue schooling and hobbies, but the appeals court held that the record did not support these findings.

105. The court certainly did not suggest that the alleged batteries were appropriate marital conduct, but rather found that “there was no evidence that [this] conduct caused severe emotional distress, as opposed to transient pain or discomfort.” 812 P.2d at 1327.

106. *Massey v. Massey*, 807 S.W.2d 391 (Tex. App. 1991).

award. (There was also a division of property unfavorable to the husband, but other than rejecting the husband's claim that this uneven allocation was based on fault, the opinion provides no details.) The appeals court affirmed the award.

In rejecting the husband's arguments that as a matter of law his conduct was not outrageous, the *Massey* appeals court approved the following instruction that the trial judge had given the jury:

The bounds of decency vary from legal relationship to legal relationship. The marital relationship is highly subjective and constituted by mutual understanding and interchanges which are constantly in flux, and any number of which could be viewed by some segment of society as outrageous. Conduct considered extreme and outrageous in some relationships may be considered forgivable in other relationships. In your deliberation on the questions, definitions and instructions that follow, you shall consider them only in the context of the marital relationship of the parties to this case.¹⁰⁷

In short, by accepting the proposition that the "bounds of decency vary" among marital relationships, the court seems drawn to the conclusion that the same acts could be found "outrageous" in the context of one marriage but not in another. Put differently, the court approved a jury instruction that seeks to avoid imposing fixed societal standards of conduct on intimate personal relationships by asking the jury to apply the couple's own standards. The instruction tells the jurors not to focus on what they would find outrageous in their own marriage nor to search for some community consensus as to what marital behavior is completely out of bounds. Rather, they should decide whether the complaining spouse can fairly label the other spouse's behavior "outrageous" in the context of their own marriage.

The policy issue here—shall the outrageousness of spousal conduct be judged by external or internal standards—seems fundamental to fault adjudications in divorce as well as in spousal IIED claims. The apparent justification for *Massey's* choice is that the imposition of external standards on an intimate relationship may risk inappropriate, and possibly even unconstitutional, intrusion on marital privacy. But one can agree that such intrusion should be avoided, while doubting that a resort to internal standards offers a promising solution.

Presumably the relevant internal standard would be found in the couple's common understanding when their marriage began, or as they mutually adjusted it at some later time, rather than in the unilateral expressions of one spouse after the marriage has fallen apart. Consider, then, some of the many different possible interpretations of the *Massey* facts. Perhaps, as suggested by the opinion, the husband is an insensitive, domineering bully whose conduct nicely fits the classic fault-divorce standard of mental cruelty. Or perhaps, considering that their marriage lasted over 20 years, close scrutiny would show that for two decades or more their relationship, even if "unhealthy," functioned to meet both their needs, and was the best that either was capable of. In that case it would seem that the couple's marriage complied with their "mutual understanding" so that the jury instruction would require a verdict for the defendant-husband.

107. 807 S.W.2d at 400.

There are of course other possible variations. Perhaps his behavior became more extreme later in the marriage than it was initially, or perhaps when they first married both were poorly socialized and incapable of “normal” relationships, but the wife later matured and wanted something better. Note, too, the husband’s claim that he had been devastated by her extramarital affair. Although other cases reject IIED claims based upon adultery, the *Massey* jury instruction might itself suggest that her adultery provides a context (combined perhaps with her excessive drinking, if he proved that claim as well) in which his behavior should not be found “outrageous”?¹⁰⁸ Indeed, if the parties’ “mutual understanding” at the outset of their marriage defines the standard, one might wonder whether her adultery might not be more outrageous than his bullying behavior.

These factual speculations may or may not be true, but the approved instruction would seem to require the jury to consider if they are. Yet the opinion suggests no such close examination of the couple’s marital history.¹⁰⁹ That is not surprising. Indeed, on reflection the difficulties with such an inquiry explain why it is neither realistic nor desirable to require the court to identify and apply the marital standards the parties had set for themselves. To do so would require a great deal of nuanced detective work into the parties’ initial understanding at a time when they both have every incentive to cast earlier words and actions in an altogether false light. Moreover, to successfully make the inquiry requires a deep intrusion into the spouses’ intimate affairs, thereby flying in the face of a central argument in favor of the internal standard in the first place—that they will respect the couple’s privacy (by avoiding the imposition of outside standards on them).

It appears, then, that despite the approved jury instruction, neither the jury, nor the reviewing judges, sought to test the wife’s claim against the couple’s “mutual understanding.” Instead, the jurors were permitted to deem the husband’s conduct unacceptable for whatever reasons of their own they might have had.¹¹⁰ The affirmance probably means that the appeals court, applying its own

108. Under the old fault law a “divorce on the ground of cruelty will not be granted if the ill treatment has been caused by the misconduct of the plaintiff,” thus barring claims by women whose conduct was “incompatible with the duty of a wife” or who “justly provoke[d] the indignation of the husband.” J. Madden, *Handbook of the Law of Persons and Domestic Relations* 274 (1931). “[C]ruelty may exist in systematic abuse, humiliating insults and annoyances, causing mental suffering and consequent ill health,” *id.* at 271; cases granting divorce on grounds of harsh or humiliating language or demeanor are collected at 272 n.78. Although today the rule would surely be phrased differently, it seems inevitable that a similar defense would necessarily be allowed to a claim of outrageous conduct, since the context of the conduct is necessary to evaluating its outrageousness.

109. Note, too, that a rule applying internal standards to marital IIED claims creates liability as well as avoids it. If at the time of their marriage both *Massey* spouses were staunch believers in a religion whose sacred texts viewed adultery as an outrage, the court might be bound to give Mr. *Massey* an IIED judgment, even though, as a general matter, courts reject IIED claims based upon adultery.

110. The dissenting judge was also concerned that the jury, despite the instruction that it should consider the alleged conduct “within the context of the marital relationship” before it, would in fact “resort to its own view of propriety.” 867 S.W.2d at 767. This is apparently what the wife’s attorney invited them to do in his closing argument. According to the dissent in *Massey*:

values, agreed with the jury that the husband's behavior was outrageous despite the wife's adultery and drinking. Or perhaps the court's endorsement of an internal standard makes it all but impossible for it to overturn the factfinder's decision, because to do so would have required determining and announcing its own conclusions concerning these details of the couple's understanding. The central problem here is not very different if the factfinder is the trial judge in a dissolution action. The pretense of reliance upon an internal standard frustrates review of the external standard that is inevitably, if silently, applied, for that standard need not (indeed, may not) be articulated. Such a system gives factfinders enormous discretion to apply whatever standard of marital behavior they choose, promising uneven justice and unpredictable outcomes, and thus inviting any discontented, divorcing spouse to try his or her chance at the lottery. The risk is the same whether the factfinder is a judge in a dissolution action or a tort action.

This problem is especially troublesome because *Massey* identified an important problem, even though it did not solve it. Because marital relationships do vary, important privacy norms can be violated if the law imposes liability after the marriage for conduct that was within the bounds of the marriage as the spouses then understood it. This means that an external standard should only reach conduct that is highly unlikely to have been part of any couple's mutual understanding, or that is sufficiently malevolent to justify overriding these privacy norms.

The preeminent example of such conduct is battery: in holding spouses liable for the physical injuries they intentionally inflict on one another, a court has no occasion to remind the jury that "bounds of decency vary from marital relationship to marital relationship." We normally do not believe that couples meaningfully agree that one may batter the other in return for, say, providing financial support; and the social norm against spousal beating is sufficiently strong that we are prepared to condemn it anyway, notwithstanding any alleged understanding of the couple to the contrary. We are willing to tell batterers that they act at their peril.

It is more problematic to say this to Mr. Massey, for it is a different matter to establish standards that identify when emotional mistreatment is completely out of bounds. People often remain in marriages that others consider unhealthy, and not only from coercion or delusion. Different couples arrive at different accommodations in their relationship, and some depart from the social conventions. Intimate relationships often involve complex emotional bargains that make no sense to third parties with different needs or perceptions. Those who sufficiently dislike their spouse's behavior can seek a divorce. In a no-fault system with appropriate financial remedies to protect either spouse from shouldering a disproportionate share of the financial burden of dissolution, his or her choice not to do so for many years makes it difficult to conclude that the marital

In his closing . . . argument to the jury, Gayle's attorney urged them: Show him. Show him that you're sensitive. Show him by your verdict that you mean business. Tell this community by your verdict that we, these 12 people, don't sanction this type of conduct in this country. We want to speak up for the people similarly situated as Gayle Massey and say, take notice. We're not going to sanction this type of conduct and only you people can do that. You can only do it through your verdict.

relationship was in fact so uncivilized and one-sided as to justify damages, whether in tort or as part of the dissolution.

The conclusion that the law cannot provide unhappy spouses with compensation for the emotional losses arising in their failed marriage does not require blindness to the reality of those losses. No one would deny the reality of the emotional harm inflicted when one spouse honestly tells the other that he no longer loves her (or vice-versa), but no one would suggest that the statement should be actionable. Everyone knows that marriage in an emotional enterprise with high returns and high risks. One reason the Restatement of Torts denies recovery for emotional injury intentionally caused by wrongful conduct that is not "outrageous" is the disparity between our aspirations and our conduct: few of us always avoid violating the norms of sensitive social conduct that we endorse. The gap between societal aspiration and individual ability may be especially great in marital relations, and the range of wrongful behavior that the law can sensibly address is correspondingly small. Small is not nonexistent, and there may be highly unusual cases of conduct causing no physical injury which is nonetheless so extreme that the cautions just surveyed are overcome. The difficulty is in writing a legal standard that limits recovery to such unusual cases. No model for that standard can be found in existing fault laws despite many decades of experience. For tort law the problem is new, and perhaps it can construct a workable solution by building upon precedent interpreting the outrageousness standard, although success is hardly assured.

Claims for emotional loss are far easier to plead than claims for physical injury. Most marriages that dissolve may involve emotional loss, and almost certainly, a far higher percentage of estranged spouses see their former mates as perpetrators of outrageous, emotionally abusive conduct than see them as perpetrators of physical battery. The subjective lens of spousal bitterness can easily transform nasty conduct into outrageous conduct, but is less likely to create recollections of a physical attack that never actually took place. And uncertainty in the emotional distress liability standard will make such claims more difficult to defend against. The claimant's lawyer may thus see more strategic advantage in making such claims, and the lawyer for the innocent but accused spouse may feel unable to assure the client that the risk of significant exposure is low. While these difficulties are exacerbated if the claim is raised in the dissolution action itself, they exist even if such claims are only allowed in a separate tort suit. The tort law may invite dubious claims whose settlement will distort the concurrent divorce process. The risk is that a rule adopted to respond to the small proportion of cases with valid claims would distort the results in the far larger group of cases without them. In sum, the difficulties with interspousal claims for emotional losses may caution against their recognition in any forum. Certainly, there is no reason for the dissolution law to invite the kind of claims with which the tort law has had such difficulty.

V. The Alternative of Forfeiture

There is reason to consider a rule that would specify acts that forfeit the actor's entitlements under the *Principles*. A forfeiture rule's blunt approach avoids the difficulty of placing a dollar value on misconduct. Such a drastic penalty would require narrow and explicit definitions of the conduct that would trigger it, but if implemented such language would avoid the difficulties associated with a discretionary fault system. Forfeiture is not unprecedented. The handful of states which bar alimony awards to a spouse who has committed an act of adultery effectively apply a forfeiture rule. The approach might be more palatable if it were limited to more serious misconduct. For example, a forfeiture rule could apply only to the claimant who has attempted to murder his or her spouse.

Consider first how a forfeiture rule would apply to property allocations. It would deny the actor his or her presumptive half-share of the marital property. Compare this result to the one that most jurisdictions reach when one joint tenant murders the other. The dominant rule in common-law states appears to allow the murderer to retain his or her half-interest, while barring the murderer's accession to the victim's half-interest.¹¹¹ A similar principle is applied in community property states.¹¹² Because the *Principles*, in accord with the pervasive trend in marital property law over the past several decades, treat the spouses as joint owners of the marital property at the time of dissolution,¹¹³ analogy to joint tenancy law and community property law is appropriate. The murder attempt should not, therefore, forfeit the actor's own half share of the marital property. If it did, the attempted murder would yield a more severe penalty than the successful one who retains his or her own half share even though barred from succeeding to the victim's.

For spousal property not held in joint tenancy, a different but no less troubling incongruity would arise in the common-law states. In most of them the dissolution law's concept of joint ownership does not apply at death to property not held in joint title. The result is that the impact of a forfeiture rule would depend upon the spouses' relative wealth. Assume, for example, a marriage in which all property was earned by the husband, who did not place it in joint title. The probate law assesses no penalty on him for murdering her; he retains his property. While it might deny his inheritance of her property, under these facts she has no property for him to inherit in any event. However, if she murders him, the probate penalty is substantial under the common rule that a murderer cannot inherit from her victim. Thus, a dissolution rule forfeiting the attempted murderer's marital property share would, under facts like these, treat the mur-

111. See Reporter's Note c.

112. *E.g.*, *In re Estates of Ruth Ann Spear*, 845 P.2d 491 (Ariz. App. 1992).

113. That is why departures from an equal division are permitted only to satisfy a claim allowed under Chapter 5 (Compensatory Spousal Payments), or to ensure that one spouse's share of the property is not compromised by misconduct of the other spouse that squandered a portion of the assets during the marriage's final years (§ 4.10). Allocation of the marital property is not governed by a vague rule of equity, any more than the allocation of joint tenancy property, if partition becomes necessary, is so governed. Rather, a transfer of some portion of either spouse's half-share to the other requires establishment of a legal claim that the transfer serves to satisfy.

derous husband more severely if he failed in his attempt than if he succeeded: if he fails the forfeiture rule would, at dissolution, allocate all property to her, but if he succeeded the probate law would leave his property to him. The murderous wife, in contrast, would be treated the same whether she failed or succeeded: in both cases she would receive nothing.

Different but equally anomalous results arise from application of a forfeiture rule to claims for compensatory payments. The most serious problem is that a forfeiture rule only imposes a penalty on the spouse who would otherwise have a compensatory payment claim—the financially more vulnerable spouse. It imposes no penalty on the wealthier spouse, who would have no claim for compensatory payments in any event. The less affluent spouse who is victimized must depend upon the criminal law and the tort law for punishment and compensation. It seems reasonable to place the same burden on the wealthier spouse, if that spouse is the victim. This is particularly true because the law of crime and tort has the advantage of adjusting the legal consequences to respond to the facts of the case in ways that a forfeiture rule cannot. The penalty assessed by a forfeiture rule equals the lost compensatory payment, reflecting neither the degree of the actor's culpability nor the amount of the victim's loss. The largest dollar forfeitures are imposed on those who are, relative to their spouses, the least wealthy, not on those who are the most blameworthy or who have caused the most harm.

It is once again important to emphasize that rejection of a forfeiture rule does not imply that the victim of attempted murder has no recourse against the person who committed it. It is merely to conclude that the appropriate recourse is the same whether or not the perpetrator is the victim's spouse: the remedies provided by the tort law and the criminal justice system. They are designed to serve this purpose, while the dissolution law is not.

VI. Summary and Conclusion

Approximately half the states follow no-fault principles in awarding alimony; considerably more than half do so in allocating marital property. The reason is that the potentially valid functions of a fault principle are better served by the tort and criminal law, and attempting to serve them through a fault rule risks serious distortions in the dissolution action. One possible function of a fault rule, punishment of bad conduct, is generally disavowed even by fault states. It is better left to the criminal law, which is designed to serve it, and in doing so appropriately reaches a much narrower range of marital misconduct than do the marital-misconduct rules of fault states. The second possible function, compensation for the nonfinancial losses imposed by the other spouse's battery or emotional abuse, is better left to tort law. With the general demise of interspousal immunity, tort remedies for spousal violence are readily available. Most courts have been more cautious in recognizing interspousal claims for emotional abuse unaccompanied by physical violence, but the grounds for their caution apply equally to consideration of emotional distress claims in a dissolution action under the rubric of a marital misconduct standard.

Where valid compensation claims arise, whether for physical violence or emotional abuse, the tort law provides principles to measure and satisfy them, and to determine when they are too stale to entertain. The property allocation

and alimony rules of the dissolution law, in contrast, are designed for an entirely different purpose. In the dissolution of a short marriage, the dominant principle is to return the spouses to the premarital situations. As the marriage lengthens the *Principles* provide increasingly generous remedies to the financially more vulnerable spouse in recognition of their joint responsibility for the irreversible personal consequences that arise from investing many years in the relationship. In a system of no-fault divorce in which either party can end the relationship—by far the dominant American rule—its duration provides a valid benchmark for assessing the extent of this joint responsibility. In the context of this regime especially, it will be the unusual case in which the fairness of the result will be improved by a judicial inquiry into the relative virtue of the parties' intimate conduct. In some the result will become less fair. And the rules that invite such misconduct claims will surely increase the cost and degrade the process in many other cases, even those in which the claim is ultimately cast aside.

Surely the law must provide a remedy for cases of harm caused by serious misconduct even if they are unusual, but those are the cases to which tort law applies. The alternative of using divorce remedies to provide compensation for tortious injury through the application of a fault principle provides a doubly unsatisfactory result: the dissolution remedies still remain inadequate as a tort substitute, while the introduction of fault impairs their utility in serving their primary purpose. Fault makes the outcome of litigation less predictable, and gives parties an incentive to raise claims of misconduct as leverage in the negotiation process. A limited fault rule under which dissolution remedies are forfeited by serious violence would be less unpredictable in operation, but has its own difficulties. Because it would provide an incomplete compensation structure, tort remedies would still be necessary to obtain adequate compensation for many victims. At the same time it would yield a perverse pattern in those cases to which it applied, as it apportions penalties whose harshness increases with the tortfeasor's relative poverty, rather than with his blameworthiness or the damage he inflicted.

Reliance on the tort system to provide a satisfactory result where one spouse's wrongful conduct has injured the other requires attention to rules establishing the relationship between interspousal tort claims and the financial remedies available in an action for marital dissolution. While this relationship has been addressed by many courts,¹¹⁴ it may be that further attention to this matter is necessary. These questions, however, are largely procedural in nature, and are not within the scope of this project.

REPORTER'S NOTES

a. *Current Law.*

The following table lists the states included within each of the categories described in the main body of the essay. These classifications are based upon

114. See *supra* note 36.

supporting authorities gathered for the comprehensive study of this question completed in 1996.

Group 1: Complete No-Fault, Property and Alimony (20)

Alaska	Illinois	New Mexico
Arizona	Indiana	Nevada
California	Iowa	Oklahoma
Colorado	Maine	Oregon
Delaware	Minnesota	Washington
Florida	Montana	Wisconsin
Hawaii	Nebraska	

Group 2: Pure No-Fault Property, Almost Pure No-Fault Alimony (5)

Idaho	New Jersey	Utah
Kentucky	Ohio	

Group 3: Almost Pure No-Fault, Property and Alimony (3)

Arkansas	Kansas	New York
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Group 4: No-Fault Property, Full-Fault Alimony (7)

Louisiana	Tennessee	West Virginia
North Carolina	South Dakota	Virginia
Pennsylvania		

Group 5: Full-Fault, Property and Alimony (15)

Alabama	Michigan	Rhode Island
Connecticut	Mississippi	South Carolina
Georgia	Missouri	Texas
Maryland	New Hampshire	Vermont
Massachusetts	North Dakota	Wyoming

The following lists provide the authorities relied upon for the preceding classifications, with the states listed alphabetically, by category.

1. Pure no-fault, property and alimony (20)

a. *Alaska*. Both property and alimony sections of the governing statute refer to the “conduct of the parties, including whether there has been unreasonable depletion of assets” but also specify that the judgment should be made “without regard to which of the parties is at fault.” Court has interpreted this language in property section to mean that only post-separation conduct with a financial impact can be considered—otherwise strict no-fault. *Oberhansley v. Oberhansley*, 798 P.2d 883 (Alaska 1990). No cases on alimony, but since statutory language is identical the same result presumably follows.

b. *Arizona*. Follows UMDA. Property division and spousal maintenance are determined “without regard to marital misconduct.” ARIZ. REV. STAT. § 25-318 to -319.

c. *California*. California courts have no discretion in their allocation of property. The court “shall. . .divide the community property estate of the parties equally.” CAL. FAM. CODE § 2550. Thus, California courts may not consider marital misconduct, or anything else, for that matter. In addition, California Family Code § 2335 provides (with exceptions for child custody or child abuse) that in any “pleading or proceeding for dissolution of marriage or legal separation. . .including depositions and discovery. . .evidence of specific acts of misconduct is improper and inadmissible.” Misconduct is thus also excluded from consideration in spousal maintenance determinations. *See also* BLUMBERG’S CAL. FAM. CODE ANN. (1995) (commentary to § 2250). However, in 1995 the California legislature adopted 1995 Cal. Stat. 364, adding sections 782.5 and 4324 to the Family Code. These sections bar any award of spousal support, insurance benefits, or of a share in pension benefits, to a spouse who has been convicted of attempting to murder the other spouse. Entitlement to other forms of community property are not affected by these provisions.

d. *Colorado*. Follows UMDA. Property division and spousal maintenance are determined “without regard to marital misconduct.” COLO. REV. STAT. §§ 14-10-113 to -114.

e. *Delaware*. Follows UMDA. Property division and spousal maintenance are determined “without regard to marital misconduct.” DEL. CODE ANN. tit. 13, §§ 1512(c), 1513(a).

f. *Florida*. By statute, adultery can be considered, but the Florida courts have held that this single statutory exception to the no-fault rule can be relied upon only insofar as the adultery caused a depletion of marital assets. *See Noah v. Noah*, 491 So.2d 1124, 1127 (Fla. 1986) (“counsel for petitioner intimated that. . .pleadings in marital dissolution cases are regressing to the point where the fault of the parties is once again playing a prominent role. In response. . .we repeat our admonition. . . . For a trial court to perform routinely a balancing act with testimony of alleged marital misconduct of the parties would be a step backward to the days of threats and insinuations which plagued our courts before our no-fault system was enacted and would be directly contrary to express legislative policy.”); *Heilman v. Heilman*, 610 So.2d 60, 61 (Fla. Dist. App. 1992) (trial court reversed for denying wife alimony and marital property on basis of her adultery, which under *Noah* may be considered only insofar as it depleted marital assets; husband’s argument that the adultery caused the family emotional devastation that had financial consequences “is not persuasive”). *See also Mosbarger v. Mosbarger and De Castro v. De Castro*, *infra* Reporter’s Note c (holding that attempted murder is irrelevant).

g. *Hawaii*. Statute, which governs both alimony and property division, lists as a factor to consider, “the respective merits of the parties,” but it appears that the Hawaiian courts have long limited this language to conduct that bore on the accumulation or dissipation of property. *Horst v. Horst*, 623 P.2d 1265, 1270-71 (Haw. App. 1981) (“Fault pertaining to personal conduct of the spouses to-

ward each other has no bearing on the question as to which spouse has a better claim to the property sought to be divided in a divorce proceeding. . . . A spouse's contribution to, or assistance in the accumulation or preservation of, the separate property of the other spouse are appropriate considerations. . . .") (*citing* *Richards v. Richards*, 355 P.2d 188 (Haw. 1960)); *Lewis v. Lewis*, 747 P.2d 698, 700 (Haw. App. 1986) (the statutory phrase "relative merits of the parties' is pertinent only in connection with division of property. We do not think that it has any reference to personal conduct of the spouse."), *aff'd in part and vacated in part on other grounds*, 748 P.2d 1362 (Haw. 1988). A recent case reaffirming this interpretation is *Markham v. Markham*, 909 P.2d 602 (Haw. App. 1996).

h. Illinois. Follows UMDA. Property division and spousal maintenance are determined "without regard to marital misconduct." ILL. REV. STAT. ch. 40, para. 5-503 to -504.

i. Indiana. Neither alimony nor property statutes make reference to fault. The property provision does say that the allocation should be "just and reasonable" but Indiana courts have made clear that this does not allow consideration of fault. *R.E.G. v. L.M.G.*, 571 N.E.2d 298, 301 (Ind. App. 1991) (chastises trial court for giving wife 60% of property based on her claim that husband's homosexual affairs put her at risk for AIDS, since she didn't have AIDS and "we will not tolerate the injection of fault into modern dissolution proceedings."). The alimony statute does not even contain the phrase "just and reasonable," seeming to eliminate any argument for including fault. It is quite directive as to the relevant considerations (basically, need) and has no open-ended list of factors.

j. Iowa. Statute silent, but after adoption of Iowa's no-fault divorce law its supreme court considered the question and concluded that "fault for the marriage breakdown. . . must. . . be rejected as a factor in awarding property settlement or an allowance of alimony. . ." *In re Williams' Marriage*, 199 N.W.2d 339, 345 (Iowa 1977).

k. Maine. Statutory list of factors does not mention fault, although it does mention economic misconduct. The deletion of fault from the statute has been read as meaning that "marital fault leading to the breakdown of the marriage (adultery, cruel and abusive treatment, nonsupport, etc.) may not be considered by the court in dividing property." *Delano v. Delano*, 501 A.2d 1287, 1289 (Me. 1985). Because the amendments "eliminated the fault provision from the alimony statute. . . the sole purpose of the statute [is] the provision of financial support. . . when necessary," since "[a]limony is intended to fill the needs of the future, not to compensate for the deeds of the past." *Skelton v. Skelton*, 490 A.2d 1204, 1207 (Me. 1985).

l. Minnesota. Follows UMDA. Property division and spousal maintenance are determined "without regard to marital misconduct." MINN. STAT. §§ 518.58(l), .552(b).

m. Montana. Follows UMDA. Property division and spousal maintenance are determined “without regard to marital misconduct.” MONT. CODE ANN. §§ 40-4-202(1), -203(2). *See also* *In re Marriage of Bultman*, 740 P.2d 1145, 1146 (Mont. 1987).

n. Nebraska. Neb. Rev. Stat. § 42-365 governs both property division and alimony. Fault and marital conduct are omitted from the factors to be considered in allocating property and granting alimony, and the section states that the purpose of alimony “is to provide for the continued maintenance and support of one party by the other when the relative economic circumstances and the other criteria enumerated in this section make it appropriate.” In *Else v. Else*, 367 N.W.2d 701 (Neb. 1985), the court stated that in enacting this section, “the Legislature had ample opportunity to retain misconduct of a spouse. . . as a factor to be considered. . . . However, misconduct. . . was not retained. . . . Were § 42-365 to be interpreted. . . that misconduct. . . was determinative of spousal support, such interpretation would reinsert fault as a factor. . . regarding alimony, in derogation of the clearly indicated legislative intent to the contrary.” *Id.* at 704.

o. Nevada. Property is divided equally unless the court finds a “compelling reason” for an unequal division that it “sets forth in writing.” NEV. REV. STAT. § 125.150(1)(b). Even prior to its adoption of this equal division presumption, Nevada decisions appear to mention only economic circumstances in identifying acceptable rationales for an unequal division. *E.g.*, *McNabney v. McNabney*, 782 P.2d 1291 (Nev. 1989). In a number of decisions the Nevada Supreme Court noted that the statute allowed consideration of the “respective merits of the parties,” and observed, without deciding, that such language might permit consideration of fault. *Rutar v. Rutar*, 827 P.2d 829, 831 n.2 (Nev. 1992) (“we have not, and do not now express any opinion as to the meaning of the term ‘respective merits of the parties’”); *Heim v. Heim*, 763 P.2d 678, 681 n.6 (Nev. 1988) (noting that courts interpreting statutes that were otherwise no-fault had taken varying positions on whether fault could be considered in alimony). There were, in fact, never any modern Nevada decisions that considered marital misconduct in alimony, so far as our search could find. In any event, an October 1993 amendment of the statute deleted the references to the parties’ “respective merits,” thus eliminating the only basis upon which the Nevada courts ever even contemplated allowing consideration of fault, and consideration of fault is now clearly excluded. *Rodriguez v. Rodriguez*, 13 P.3d 415 (Nev. 2000).

p. New Mexico. Statute does not include fault among the factors that may be considered, and reported decisions even addressing the issue of fault at divorce are virtually nonexistent. The clearest language on the question appears in a worker’s compensation case that involved conflicting claims to benefits by the decedent’s three wives. In resolving that question the court observed that in “New Mexico we are not concerned with ‘fault’ of the spouse in determining a right to support. . . . An award of alimony is not dependent upon the fault of a spouse.” *Lauderdale v. Hyord Conduit Corp.*, 555 P.2d 700, 705 (N.M. App. 1976). In *Brister v. Brister*, 594 P.2d 1167, 1171 (N.M. 1979), the court held that in evaluating husband’s claim to reduce wife’s alimony where she had taken a “live-in lover,” the only question was economic—whether support from the

lover reduced her need. The court's analysis assumes, without explicitly stating, that fault or misconduct are irrelevant in resolving the issue.

q. Oklahoma. The statutes are silent on the question of fault, stating only that property should be divided as the court may think "just and reasonable" and alimony awarded as the court may think "reasonable." OKLA. STAT. ANN. tit. 43, § 121. However, case law authority establishes that misconduct is not relevant to either the allocation of property or the granting of alimony except as the misconduct may have affected the accumulation of assets or the financial need of the parties. *Smith v. Smith*, 847 P.2d 827, 830 (Okla. App. 1993) (affirming trial judge's refusal to hear the wife's proffered evidence of the husband's repeated affairs during marriage because it had no "relevancy" to property or alimony, as it did not "dissipate marital assets," nor did she offer any "link" between the husband's "misconduct and her 'need' for alimony.").

r. Oregon. Or. Rev. Stat. § 107.036 provides that in allocating property and in fixing the amount of spousal support, "the court shall not consider the fault, if any, of either of the parties in causing grounds for the . . . dissolution . . . or . . . separation." See *Matter of Marriage of DeVille*, 607 P.2d 228 (Or. App. 1980), *amended*, 615 P.2d 1177 (Or. App. 1980).

s. Washington. Follows UMDA. Property division and spousal maintenance are determined "without regard to marital misconduct." WASH. REV. CODE ANN. § 26.09.080 (property), § 26.09.090 (alimony). But court can consider the effect of physical and emotional abuse on the spouse's economic circumstances in determining her need for alimony. *Matter of Marriage of Foran*, 834 P.2d 1081 (Wash. App. 1992).

t. Wisconsin. Property provision follows UMDA. Property is allocated "without regard to marital misconduct." WIS. STAT. ANN. § 767.255(3). Alimony provision silent, but an opinion by Justice Abrahamson holds that "the legislature did not intend to allow the circuit court to consider marital misconduct a relevant factor in granting maintenance payments." *Dixon v. Dixon*, 319 N.W.2d 846, 853 (Wis. 1982), *aff'd*, *Hefty v. Hefty*, 493 N.W.2d 33, 39 (Wis. 1992) (although husband "refers to *Dixon* as the general rule, *Dixon* is, in fact, the only rule in this area of law [and] expressly prohibits a court from considering marital misconduct when awarding maintenance. . . ."). *But see* *In re Marriage of Brabec*, 510 N.W.2d 762 (Wis. App. 1993) (affirming trial court's refusal to apply *Dixon* where wife convicted of attempting to hire someone to kill husband during the pendency of the divorce proceedings).

2. Pure no-fault property, almost pure no-fault alimony (5)

a. Idaho. Relevant statutes include fault as a factor for alimony but not for property, which is presumptively divided "substantially equally." The only case on fault explains that prior to 1990, innocence was an eligibility requirement for alimony, but that 1990 statutory reforms eliminated this requirement and established that need and ability to pay were the "primary" basis for alimony awards. *Marmon v. Marmon*, 825 P.2d 1136, 1139 (Idaho App. 1992). The extent to which consideration of fault survives this amendment remains to be seen.

b. *Kentucky*. Follows UMDA in property, *Dowell v. Dowell*, 490 S.W.2d 478 (Ky. App. 1973), but the maintenance statute is silent. Kentucky courts initially decided that the legislative intent was to exclude fault from determining eligibility for alimony, but not from determining its amount. *Chapman v. Chapman*, 498 S.W.2d 134 (Ky. App. 1973). This decision has been both limited and severely criticized by later opinions, *Platt v. Platt*, 728 S.W.2d 542, 543 (Ky. App. 1987) (*Chapman* opinion “disfigured the statute” by allowing consideration of fault; fault may not be considered where wife sought to augment her claim with evidence of husband’s adultery) and only barely survives in the state supreme court, *Tenner v. Tenner*, 21 Fam. L. Rep. 1419, 1995 Ky. LEXIS 80 (Ky. 1995) (agrees with *Platt* that obligor’s fault may not be considered, but continues to allow consideration of the claimant’s fault; three dissenters would overrule *Chapman* and exclude fault altogether).

c. *New Jersey*. N.J. Stat. Ann. § 2A:34-23.1 governs the distribution of property. Marital misconduct is not among the factors the statute directs the court to consider, although the court is empowered to consider “any other factor it deems relevant.” Soon after New Jersey’s adoption of no-fault divorce, however, the New Jersey Supreme Court reversed a trial court that considered the wife’s adultery in its allocation of marital property. While recognizing that the statutory factors were intended to be illustrative and not exhaustive. . . we are satisfied that the concept of ‘equitable distribution’ requires that fault be excluded as a consideration. . . . The spouse who . . . gives cause . . . for divorce may not be responsible for the breakdown of the marriage . . . [but] may merely be reacting to a situation which is not of his or her making. Marriage is such an intricate relationship that often it is difficult, if not impossible, to ascertain upon whom the real responsibility for the marital breakup rests.

The court also quoted with approval the Uniform Marriage and Divorce Act language directing that property allocations be made “without regard to marital misconduct.” *Chalmers v. Chalmers*, 320 A.2d 478, 482-83 (N.J. 1974). A 1980 lower court decision ignored *Chalmers* and denied any share of the marital property to a husband who had tried to have his wife murdered. *D’Arc v. D’Arc*, 421 A.2d 602 (N.J. Super. App. Div. 1980). New Jersey is one of several states which retained fault grounds for divorce when it added no-fault grounds to its statute. Litigants may therefore continue to seek a divorce on fault grounds. If they do, N.J. Stat. Ann. § 2A:34-23.1 permits the court to consider the “proofs made in establishing such ground in determining an amount of alimony,” and a number of decisions during the 1970s denied or reduced alimony awards to wives found guilty of adultery. See *Lynn v. Lynn*, 398 A.2d 141 (N.J. Super. App. Div. 1979). There appear to be no cases since *Lynn*, however, that consider fault in an alimony adjudication. In a 1991 tort action between former spouses, a trial court noting the fault rule cited these 1970 opinions. *Ruprecht v. Ruprecht*, 599 A.2d 604, 608 (N.J. Super. Ch. Div. 1991). Yet more recently another trial court deciding an interspousal tort case observed that “a trial judge is under the specific direction that the resolution of the financial aspects of the marriage—whether support or equitable distribution—are to be resolved without regard to fault.” *Tweedley v. Tweedley*, 649 A.2d 630, 633 (N.J. Super. Ch. Div. 1994). The impression is that, while older authority permitting considera-

tion of fault in alimony adjudications has never been overruled, it is now rarely if ever relied upon, and may no longer be considered authoritative.

d. Ohio. The statute does not mention misconduct in its treatment of either alimony or property allocation, but does for both allow the court to consider “all relevant factors.” *Cherry v. Cherry*, 421 N.E.2d 1293, 1298 (Ohio 1981). In the case of property, however, consideration of fault seems very rare. A search in Lexis for Ohio family law cases that contained the word “property” within eight words of “misconduct” or “fault” yielded almost no cases of true marital misconduct—they were all financial misconduct. The single exception is a peculiar case involving whether to require wife to return wedding and engagement rings given her by husband at the dissolution of a brief marriage. In ordering their return the trial court relied on evidence of wife’s repeated intimacies with a former husband. In affirming the order, however, the appellate court cautioned that it did not “intend for the use of fault in this property hearing to be read as opening the door to fault issues in all property hearings. We hold only that under the facts and circumstances of this particular case, the use of fault in ordering the return of the engagement and wedding rings to husband was not an abuse of discretion.” *Schwartz v. Schwartz*, No. C-930592, 1994 Ohio App. LEXIS 4578 (Oct. 5, 1994). In alimony the governing authority seems more open to consideration of fault. *Zimmie v. Zimmie*, 464 N.E.2d 142, 145 (Ohio 1984) (despite statute’s omission of fault as a factor, it may be considered, but court’s refusal to hear additional evidence of fault not improper). However, most of the cases found in a Lexis search (alimony within 10 words of fault or misconduct) either caution against consideration of fault or sustain a lower court decision over objections that it failed to consider misconduct evidence. *Labor v. Labor*, 1992 Ohio App. LEXIS 838 (court must state its reasons for alimony award and should not give greater weight to fault than to other statutory factors; \$100 per month alimony for wife at fault held insufficient); *Lemon v. Lemon*, 537 N.E.2d 246, 250 (Ohio App. 1988) (governing statute “does not require a trial court to consider fault or marital aggression in its division of marital assets or award of alimony. It appears from that language that the legislature did not intend marital misconduct to be a definitive factor in the division of marital assets. . . . The trial court did not abuse its discretion in failing to consider marital fault or aggression in determining the division of property and alimony award between the parties.”); *Groom v. Groom*, 1990 Ohio App. LEXIS 4583 (declines to alter trial court’s award of alimony to wife admittedly guilty of numerous and blatant infidelities; weight need not be given to misconduct); *Kelecava v. Kelecava*, 1990 Ohio App. LEXIS 4213 (similar). But there is clearly some undefined range of tolerance for trial courts that do consider marital misconduct. *E.g.*, *Young v. Young*, 1989 Ohio App. LEXIS 2800 (“without findings and conclusions disclosing that the trial court predicated its award of alimony on consideration of defendant’s marital misconduct, we do not presume it did so. However, to the extent it may have done so, we do not find consideration of such matter to be error as it may bear upon plaintiff’s physical and emotional condition, for example, or otherwise.”).

e. *Utah*. Utah has largely been a no-fault state. This is illustrated by the decision in *Noble v. Noble*, 761 P.2d 1369 (Utah 1988), in which husband shot wife in the head before unsuccessfully attempting to commit suicide. (Husband was acquitted of attempted murder in a jury trial.) Wife brought a battery and emotional distress claim against husband which had not yet been tried at the time of the divorce decree. The issue in *Noble* was whether the divorce court had improperly considered matters that should have been reserved for the tort action. The Utah Supreme Court drew a careful line, making clear that the divorce court could consider wife's "increased living expenses and decreased earning capacity resulting from the disabilities caused by the shooting" in fashioning the alimony and property portions of the divorce decree. *Id.* at 1370. Since such disabilities could be taken into account "regardless of their cause," consideration of them should not be precluded when they result from the other spouse's tortious acts. *Id.* at 1372. The court found that the trial court's substantial property award was appropriate in light of these factors and of husband's inability to pay an alimony award adequate to meet wife's needs, and therefore rejected husband's claim that the trial court's real rationale—concededly improper—was "to punish Glen for the shooting and to compensate Elaine for her injuries." At the same time the supreme court allowed the tort action to go forward, presumably because the wife could there recover for losses not recognized in the divorce action. (The court was also careful to note, however, that special damages ordinarily allowed in tort—lost earning capacity and medical expenses—could be duplicative of the divorce recovery, and should therefore be barred in the tort action.) *Id.* at 1373.

There are nonetheless threads of fault occasionally appearing in Utah law. Fault grounds for divorce are available to the spouse who chooses to pursue them, and at one point the *Noble* opinion itself says that "because Elaine's counterclaim for divorce was based on Glen's cruelty to her, it was proper [for the trial judge] to consider. . .Glen's fault in causing [her] injuries," an odd statement not elaborated upon nor consistent with the remainder of the opinion. *Id.* at 1371. Most significantly, a 1995 amendment to Utah law allows, but does not require, the divorce court to consider "the fault of the parties" in its decision on alimony. Utah Code § 30-3-5(7)(b). (Subsection (7)(a) contains a list of factors that must be considered, but this fault provision is set aside in a separate subsection as a factor that the court "may consider.") It remains to be seen whether, or to what extent, Utah courts accept the invitation to consider fault. The Utah Supreme Court has previously held that "alimony is not intended as a penalty against the husband nor a reward to the wife." *English v. English*, 565 P.2d 409, 411 (Utah 1977).

3. Almost pure no-fault, property and alimony (3)

a. *Arkansas*. Under § 9-12-315 marital property is divided equally at divorce unless the court makes finding that one of nine statutory factors requires an unequal division. Fault is not on that list. The Arkansas Supreme Court nonetheless allowed an unequal division where the wife was convicted of conspiring to kill the husband, concluding that the omission of fault from the list was not meant by the legislature "to preclude a chancellor from considering such bizarre facts as those in this case." *Stover v. Stover*, 696 S.W.2d 750, 752

(Ark. 1986). The court cautioned, however, that “the extent of our holding” is to allow consideration “of the fact that one spouse has been convicted of conspiring to kill the other.” *Id.* Subsequently, the same court held that “fault is not a factor in deciding whether to award alimony unless it relates to need or the ability to pay.” *Burns v. Burns*, 847 S.W.2d 23, 27 (Ark. 1993).

b. *Kansas. In re Marriage of Sommers*, 792 P.2d 1005, 1009 (Kan. 1990), adopts an essentially complete no-fault position, although leaving open the possibility that fault might be considered in “extremely gross and rare situations.” Since *Sommers*, no reported decision in Kansas has allowed consideration of fault. *Sommers* itself noted that “It is difficult to conceive of any circumstances where evidence of marital infidelity would be a proper consideration in the resolution of the financial aspects of a marriage.” *Id.* at 1010. The financial impact of conduct can be considered, of course. For example, where “the husband’s mental abuse of the wife [made her] so emotionally impaired that her earning capacity is affected,” the court can fix the financial awards in light of that reduced earning capacity. *Id.*

c. *New York.* Marital fault is excluded from consideration in equitable distribution except for “egregious cases that shock the conscience.” *O’Brien v. O’Brien*, 498 N.Y.S.2d 743, 750 (N.Y. 1985) (except for such extreme cases, misconduct is not a “just and proper” consideration because it is inconsistent with the equitable distribution premise of economic partnership and entitlement to fair share of accumulated property, difficult to determine, and “would involve courts in time consuming procedural maneuvers relating to collateral issues.”). Most lower court decisions apply the same rule to alimony determinations. *Wilson v. Wilson*, 476 N.Y.S.2d 120, 125 (App. Div. 1984). At least one lower court, however, has stated that fault was still a “proper consideration” in alimony. *Sarafian v. Sarafian*, 528 N.Y.S.2d 192, 196 (App. Div. 1988). The facts of *Sarafian* in fact meet New York’s egregious misconduct standard, however (husband, then 64, received permission from wife’s parents to marry her at 16 by buying a house for them; he had, since she was 13, “regularly” taken her from her New York home to his abandoned chicken farm where he engaged in sexual relations with her). That standard, as it appears to operate in practice, allows consideration of fault only in cases in which the alleged misconduct amounted to a serious violent felony. It is well-established in New York that “verbal harassment, threats and several acts of minor domestic violence” is not egregious misconduct under this rule, *Kellerman v. Kellerman*, 590 N.Y.S.2d 570, 571 (App. Div. 1992), nor is the husband’s refusal to have children in violation of an explicit promise, *McCann v. McCann*, 593 N.Y.S.2d 917 (Sup. 1993) (discussing the rule at length), nor the combination of the wife’s open adultery, physical abuse (scratching, biting, and pulling hair of husband), verbal abuse (repeatedly berating him in front of coworkers and friends), and wounding of her husband with a knife while breaking into his locked briefcase, *Stevens v. Stevens*, 484 N.Y.S.2d 708 (App. Div. 1985), nor necessarily the husband’s verbal and physical abuse of wife, which may not be sufficiently extreme or outrageous to allow reduction in his share of marital property, *Orofino v. Orofino*, 627 N.Y.S.2d 460 (App. Div. 1995). Attempted murder is egregious misconduct, *Brancovenanu v. Brancovenanu*, 535 N.Y.S.2d 86 (App. Div. 1988) and *Wenzel v. Wenzel*, 472

N.Y.S.2d 830 (Sup. Ct. 1984); as is rape, *Thompson v. Thompson*, N.Y. L.J., Jan. 5, 1990, at 22 (rape of stepdaughter egregious misconduct in dissolution of marriage between mother and stepfather); and repeated physical abuse in which, over a 20-year period, the husband slapped defendant's face weekly; broke her foot by stamping on it; broke her finger, leaving it permanently deformed; pushed her, causing a broken arm with a permanent 40 percent loss of use, and punched her so that she sustained dental damage requiring caps and root canal work. *Debeny v. Debeny*, N.Y. L.J., Jan. 24, 1991 at 21. Even egregious conduct has been held irrelevant to the property division, however, where both spouses were guilty of it. *Valenza v. Valenza*, 16 Fam. L. Rep. 1155 (N.Y. Sup. 1990) (wife hired hit men who attempted to beat husband to death after husband had raped wife at gunpoint; relative fault held irrelevant). New York commentators have concluded that egregious misconduct requires either attempted murder or the actual commission of "serious violence." Russell Marnell, *Marital Fault in New York*, N.Y. L.J., June 16, 1994, at 1.

4. No-fault property, full fault in alimony (7)

a. *Louisiana*. Divides community property equally, without regard to fault (or anything else). Article 112(A)(1) of the Louisiana Code allows alimony only to a spouse who is not at fault, which the state supreme court defines as "serious misconduct" or "cruel treatment or excesses which compel a separation because the marriage is insupportable." *Allen v. Allen*, 648 So.2d 359, 363 (La. 1994). Lower courts have held that the statutory standard includes adultery, conviction of a felony, habitual intemperance, cruel treatment or outrages, public defamation, abandonment, attempted murder, and intentional nonsupport. *Guillory v. Guillory*, 626 So.2d 826, 829 (La. App. 1993).

b. *North Carolina*. North Carolina's traditional rule was unusual in making misconduct of the obligor a requirement for alimony, in addition to providing that the adultery of the obligee was a bar, and allowing consideration of fault generally as a factor in setting the award's amount. *Williams v. Williams*, 261 S.E.2d 849 (N.C. 1980). A very recent revision of the governing statute retains these basic sentiments, but drops the fault of the obligor as an alimony eligibility requirement. It bars alimony awards to a spouse guilty of "illicit sexual behavior," or adultery, requires that alimony be awarded where the supporting spouse is guilty of "illicit sexual behavior," leaves the matter to the court's discretion when both are guilty of illicit sexual behavior, and requires the court to consider, in fixing any award, "the marital misconduct of either of the spouses," which is elsewhere defined as any one of nine separate offenses including "illicit sexual behavior," "abandonment," "excessive use of alcohol or drugs," "indignities," and a "malicious turning out-of-doors." N.C. GEN. STAT. §§ 50-16.1(A), -16.3(A)(a), -16.3(A)(1). In contrast, fault has been held relevant in the allocation of marital property only where it is "related to the economic condition of the marriage," such as dissipation. *Smith v. Smith*, 331 S.E.2d 682, 687 (N.C. 1985); *Smith v. Smith*, 438 S.E.2d 457, 458 (N.C. App. 1994); *Smith v. Smith*, 433 S.E.2d 196, 221 (N.C. App. 1993). This rule has also been applied to parties with other

names. *Shoffner v. Shoffner*, 371 S.E.2d 749, 751 (N.C. App. 1988); *Spence v. Jones*, 348 S.E.2d 819, 821 (N.C. App. 1986).

c. *Pennsylvania*. “Marital misconduct may not be considered by the court in determining an order of equitable distribution.” *Perlberger v. Perlberger*, 626 A.2d 1186, 1195 (Pa. 1992). One lower court allocated all of the marital estate to the wife where the husband had been convicted of soliciting someone to murder her, but this was affirmed on the ground that the husband’s conduct, which also included questionable business dealings, had dissipated marital assets. *Holub v. Holub*, 583 A.2d 1157 (1990), appeal denied, 596 A.2d 158 (Pa. 1991). The “marital misconduct of either of the parties during marriage” may be considered in alimony awards under Pa. Cons. Stat. Ann. § 3701(14). It has been held proper for a court to treat the husband’s affairs during marriage as “misconduct” within the meaning of this provision, in fashioning an alimony award in favor of the wife. *Schneeman v. Schneeman*, 615 A.2d 1369, 1378 (Pa. Super. 1992). An Adviser from Pennsylvania tells the Reporter, however, that it is rare for fault to be considered by trial courts.

d. *South Dakota*. Statute excludes consideration of fault in property. S.D. CODIFIED LAWS § 25-4-45.1 (“Fault shall not be taken into account with regard to the awarding of property.”). The South Dakota Supreme Court has indicated that it should be considered in alimony, where there is no statutory bar, *Hanks v. Hanks*, 296 N.W.2d 523, 527 (S.D. 1980), and there seems to be very little limitation on its consideration. *E.g.*, *Temple v. Temple*, 365 N.W.2d 561, 568 (S.D. 1984); *Kanta v. Kanta*, 479 N.W.2d 505, 508 (S.D. 1991) (husband’s extramarital affair “appropriate for consideration in an alimony award but not in a property award”).

e. *Tennessee*. Statute requires no-fault allocation of property, Tenn. Code Ann. § 36-4-121 (court shall “assign the marital property between the parties without regard to marital fault”) but the alimony statute expressly authorizes the court to consider “the relative fault of the parties . . . where the court, in its discretion, deems it appropriate to do so.” TENN. CODE ANN. § 36-5-101-(d)(1)(K). And they do, considering things like adultery. *Wilder v. Wilder*, 863 S.W.2d 707, 715 (Tenn. App. 1992).

f. *Virginia*. Va. Code Ann. § 20-107.1 bars alimony to a spouse guilty of conduct that would provide the basis of a fault divorce 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 decrees of fault during the marriage and relative economic circumstances of the parties.” As if the point were not clear, two sentences later the section reiterates that in determining whether to award alimony the court “shall consider the circumstances and factors which contributed to the dissolution of the marriage, specifically including adultery and any other ground for divorce. . . .” The fault grounds for divorce cross-referenced by this section are adultery, imprisonment for more than one year upon conviction of a felony, cruelty, desertion, or having caused “reasonable apprehension of bodily hurt.” VA. CODE ANN. § 20-91. The consequences of these provisions is that fault can bar or reduce the amount of alimony, but can almost never increase it. The obligor’s fault would seem rele-

vant only as a defense to the claim that the obligee's fault should bar or reduce a support order. See *Dukelow v. Dukelow*, 341 S.E.2d 208, 210 (Va. App. 1986), explaining that alimony decisions are a "two-step" process in which the court first determines whether a spouse is barred by fault from claiming alimony, and then, if "no fault ground [for divorce] exists," it may go on to consider the relative needs and abilities of the parties. Va. Code Ann. § 20-107.3(E)(5) includes in the list of factors that the court should consider in its allocation of marital property "the circumstances . . . which contributed to the dissolution of the marriage, specifically including any ground for divorce under the provisions of § 20-91. . . ." It is unclear the extent to which fault is thought relevant in property allocation, however. In *Aster v. Gross*, 371 S.E.2d 833, 836 (Va. App. 1988), the court, construing this language, says that "circumstances that lead to the dissolution of the marriage but have no effect upon marital property, its value, or otherwise are not relevant [and] need not be considered." It should be noted that in rejecting, on this basis, the wife's claim that the trial court did not give sufficient weight to the husband's adultery, the court affirmed an award of 65 percent of the marital property to the husband, on the apparent basis that he had earned most of it as an orthopedic surgeon. Later decisions rely on *Aster's* apparent exclusion of traditional fault factors to favor other husbands who might otherwise suffer an unfavorable allocation of property they had earned. *E.g.*, *Donnell v. Donnell*, 455 S.E.2d 256 (Va. App. 1995) (trial court's property allocation favorable to wife reversed where it appears to have been improperly based on husband's conviction for sexually molesting parties' daughters, citing *Aster*); *Gamer v. Gamer*, 429 S.E.2d 618 (Va. App. 1993) (husband's adultery irrelevant to property allocation under *Aster*).

g. West Virginia. Statute requires that property be allocated "without regard to any attribution of fault," W. Va. Code § 48-2-32, but in alimony the court is directed, in determining both eligibility and amount, to "consider and compare the fault or misconduct of either or both of the parties and the effect of such fault or misconduct as a contributing factor to the deterioration of the marital relationship" and to deny alimony altogether to someone guilty of adultery, conviction of a felony, or "actual" abandonment. W. VA. CODE § 48-2-15(I).

5. Full-fault, property and alimony (15)

a. Alabama. Trial court even reversed for not considering husband's adultery in connection with property division. *O'Daniel v. O'Daniel*, 515 So.2d 1250 (Ala. 1987).

b. Connecticut. Statutes permit consideration of fault in both property and alimony. Although in one opinion the state supreme court cautioned that fault should not be overemphasized, being only one factor to be considered, *Sands v. Sands*, 448 A.2d 822 (Conn. 1982), most appellate decisions emphasize the wide discretion allowed trial courts in property allocations and alimony decisions. See Reporter's Note *b*.

c. *Georgia*. Fault is relevant to alimony by statute, Ga. Code Ann. § 19-6-1; test is quite open-ended except that adultery and desertion are a bar to alimony. See *Davidson v. Davidson*, 257 S.E.2d 269 (Ga. 1979). For property division the statute is silent, but *Peters v. Peters*, 283 S.E.2d 454, 455 (Ga. 1981), held that “the conduct of the parties. . . is relevant and admissible” in equitable distribution.

d. *Maryland*. Relevant statutes make “the circumstances that contributed to the estrangement of the parties” relevant in both property, Md. Code Ann. § 8-205(b)(4), and alimony, § 8-106(b)(6). A trial judge was reversed for refusing to allow testimony concerning the wife’s adultery, since that was relevant to the award. *Ohm v. Ohm*, 431 A.2d 1371, 1381 (Md. Ct. Spec. App. 1981).

e. *Massachusetts*. Mass. Gen. L. Ann. § 208-34 includes among the factors applicable to both alimony and property division “the conduct of the parties during the marriage.” It is difficult to fathom much more of a rule from the reported cases. In *Putnam v. Putnam*, 389 N.E.2d 777, 778 (Mass. App. 1977), a trial court was reversed for allocating the marital property one-third to the wife and two-thirds to the husband, where wife had been involved in an “improper relationship” with a “teenage neighbor,” in part because it took little evidence on other issues such as the parties’ noneconomic contributions to the marriage and their economic contributions to it apart from specific contributions to acquisition of their house, the major property at issue. Court “caution[s] against the view that either alimony or a transfer of property may be justified purely on the basis of the blameworthy conduct of one of the spouses.” But in *Loud v. Loud*, 436 N.E.2d 164 (Mass. 1982), the court sustained a one-third/two-third distribution in the wife’s favor that was based in part on the husband’s adulterous affairs. In *Denninger v. Denninger*, 612 N.E.2d 262, n.4 (Mass. App. 1993), the court, in reversing an allocation of only 15 percent of the marital property to husband, observed merely that the husband’s dietary fetishes “hardly resembled the abusive conduct given weight” in certain prior cases. In the end, it appears that the primary rule is that trial judges possess “broad discretion” in their weighing of the various statutory factors, *Dalessio v. Dalessio*, 570 N.E.2d 139 (Mass. 1991), and that treatment of marital misconduct is “an aspect of the exercise of [the trial judge’s] broad discretion.” *Ross v. Ross*, 430 N.E.2d 815, 819 (Mass. 1982).

f. *Michigan*. *Sparks v. Sparks*, 485 N.W.2d 893 (Mich. 1992), allows consideration of fault in allocating property, although it cautions that it is only one of several factors, and reverses trial court which gave wife only 25 percent of property and no alimony because of her adultery, concluding that the trial court gave this factor excessive weight and did not give adequate consideration to other factors. *Sparks* technically addresses property only, but clearly fault is also relevant in alimony. *Thames v. Thames*, 477 N.W.2d 496, 502 (Mich. App. 1991). In applying *Sparks* there seem to be few guidelines, although the state supreme court seems cautious about counting claims of misconduct heavily. See *McDougal v. McDougal*, 545 N.W.2d 537 (Mich. 1996).

g. *Mississippi*. Fault can bar or reduce, but apparently not increase, alimony. The wife’s fault should not bar alimony after a long marriage where husband can pay and the wife would otherwise be destitute, but it may be the basis for reducing the amount of alimony in that case. “[T]hese awards have been

made not to enable the wife to maintain the lifestyle to which she has been accustomed, but to prevent her from destitution.” *Hammonds v. Hammonds*, 597 So.2d 653, 654 (Miss. 1992) (wife should be allowed such a limited alimony award at dissolution of 25-year marriage during which she raised three children and did little work outside the home; note that court finds it nonetheless appropriate to limit her award on account of her adultery, where husband also committed adultery during the marriage). This is thought to be an enlightened advance from “a long line of older cases [that] unequivocally denied periodic alimony where the husband was granted a divorce on grounds of the wife’s adultery.” *Id.* Mississippi has only recently adopted equitable distribution; fault could not previously come up. *Ferguson v. Ferguson*, 639 So.2d 921, 928 (Miss. 1994) (adopting equitable distribution and setting forth guidelines). While some of the language of *Ferguson* suggests that fault could be considered (“contribution to the stability and harmony of the marital and family relationships”), it is ambiguous and the issue was not expressly addressed.

h. Missouri. Unpredictable discretion appears to be the rule. *E.g.*, *Barth v. Barth*, 800 S.W.2d 127 (Mo. App. 1990) (award to the wife of 55% of the substantial marital property at the termination of the parties’ 11-year marriage could be justified by the husband’s affair, begun shortly before they broke up; court observes merely that each case must be decided on its own facts). Some Missouri cases cite an “undue burden” standard but it appears to add little, as there is no logical pattern to the cases. *E.g.*, *Burtscher v. Burtscher*, 563 S.W.2d 526, 527 (Mo. App. 1978) (“the conduct factor becomes important when the conduct of one party to the marriage is such that it throws upon the other party marital burdens beyond the norms to be expected in the marital relationship” but also “it is unnecessary and probably impossible to lay down any precise guidelines for the weight to be given to the conduct factor”). In *Burtscher*, wife complained that the trial court had erred in not counting the affair she claimed husband had near the end of their 24-year marriage, but the appeals court found no error, observing that wife played bingo four nights a week over husband’s objection, which “was also detrimental.” Compare this to *In re Marriage of Gustin*, 861 S.W.2d 639 (Mo. App. 1993) (wife’s chopping through door of marital residence after parties’ separation did not place burdens on the marital relationship) and *Divine v. Divine*, 752 S.W.2d 76 (Mo. App. 1988) (husband’s failure to communicate with wife, as well as his physical abuse, telephone harassment, and false accusation of her, placed undue stress on wife during marriage).

i. New Hampshire. N.H. Stat. Ann. § 458:19 governs alimony, and explicitly allows the court to consider “the fault of either party as defined in RSA 458:a6-a, II(l),” which is part of the section governing property division. The cited provision, thus apparently applicable to both alimony and property division, allows consideration of fault where it caused the breakdown of the marriage as well as “substantial physical or mental pain and suffering” or an economic loss. This limiting language has been construed broadly enough, however, as to rob it of any important impact. *Yergeau v. Yergeau*, 569 A.2d 237, 240 (N.H. 1990) (husband’s adultery properly considered in fixing alimony award to wife; statutory standard met where wife testified not only to her “tears” but also to her “obsessive conduct in surveillance of [husband’s] and co-respondent’s comings and

goings.”). Fault is excluded from consideration in property division if the divorce is granted on no-fault grounds, but where different grounds are alleged by the parties, the “master must grant the divorce on the ground which was the ‘primary cause of the marital breakdown.’” *Boucher v. Boucher*, 553 A.2d 313, 315 (N.H. 1988).

j. North Dakota. See *Davis v. Davis*, 458 N.W.2d 309, 316 (N.D. 1990) (fault may be considered in property allocation; affirms trial court’s allocation of 83% of property to husband at end of 19-year marriage, where the unequal allocation is based upon wife’s adulterous affairs). See also *Hegge v. Hegge*, 236 N.W.2d 910 (N.D. 1975) (fault considered in alimony).

k. Rhode Island. Statute permits the court to consider “the conduct of the parties during the marriage” with respect both to alimony, R.I. Gen. Laws § 15-5-16, and property division, R.I. Gen. Laws § 15-5-16.1(a). With respect to alimony, however, the Rhode Island Supreme Court has cautioned that the “traditional” concept of alimony that was based on protection of the innocent spouse has been replaced by a “modern concept” that is “based on need” and that “the primary focus must be on the economic situation of the parties viewed in light of the financial exigencies of one spouse and the ability of the other spouse to meet those needs.” *Fisk v. Fisk*, 477 A.2d 956, 957 (R.I. 1984) (trial court’s denial of alimony to wife because of her “association with her business associate” reversed as based on the “traditional view,” unduly emphasized a single statutory factor, and failed to appreciate that conduct within the meaning of the statute include good as well as bad). Similar language in *Rochefort v. Rochefort*, 494 A.2d 92 (R.I. 1985), where court affirmed trial court’s equal division of property over husband’s objection that her misconduct was worse than his, saying that trial judge properly considered all factors and did not give controlling importance to one factor as husband urged.

l. South Carolina. S.C. Code Ann. § 20-3-130(B)(10) includes, among the 10 factors the court “must” consider in awarding alimony, “the marital misconduct or fault of either or both parties, whether or not used as a basis for a divorce or separate maintenance decree if the misconduct affects or has affected the economic circumstances of the parties, or contributed to the breakup of the marriage.” The court is to weigh the various factors “in such proportion as it finds appropriate.” S.C. CODE ANN. § 20-7-472(2) contains essentially identical language permitting consideration of fault in allocating the marital property. However, a provision contained only in the alimony section bars any alimony award to “a spouse who commits adultery” before the execution of a separation agreement or the entry of an order of separate maintenance. S.C. CODE ANN. 20-3-130(A). (A case apparently decided under an earlier version of this section found that it barred any alimony award to wife, a 51-year-old waitress, against dentist husband earning \$90,000 annually, because she had committed “numerous acts of adultery” after the decree of separate maintenance had been entered. *Morris v. Morris*, 367 S.E.2d 24, 25 (S.C. 1988)). Conspiracy to murder one’s spouse, unlike adultery, is not an absolute bar to an alimony award. *Sharpe v. Sharpe*, 416 S.E.2d 215 (S.C. App. 1992) (wife, whose conspiracy to murder husband failed when he learned of the plan, awarded alimony in the form of health insurance husband required to provide for her; adultery cases distinguished as

based upon statutory bar). Some recent courts of appeal opinions suggest limiting consideration of fault in the allocation of marital property to "its impact on the economic circumstances of the parties during the marriage." *Peirson v. Calhoun*, 417 S.E.2d 604, 606 (S.C. App. 1992).

m. Texas. Tex. Fam. Code Ann. § 3.63 directs the court to divide marital property as it "deems just and right." In divorces granted on fault grounds, the divorce court may consider fault in its allocation. *Young v. Young*, 609 S.W.2d 758 (Tex. 1980). *Young* states that the court should use fault to make "a just and right division" of the community property, not to "punish" the guilty spouse, but offers no explanation of the distinction between these, and in the same paragraph emphasizes the trial court's "broad discretion" in the matter. *E.g.*, *Smith v. Smith*, 836 S.W.2d 688, 693 (Tex. App. 1992) (appeals court "unable to say" that trial court abused discretion by relying on husband's adultery to justify unequal division of property where trial court explained its ruling with comment that "an unequal division is mandated . . . because of the large disparity in the earning capacities of the parties, and because of the admitted and unrepentant fault" of husband). Until mid-1995, Texas did not allow alimony at all, the only state with such a rule. A newly enacted statute allows it but limits claims to spouses married at least 10 years, except where the other spouse was recently convicted of family violence; and in any event the maintenance order may not ordinarily last more than three years, and in determining its duration and size the court may consider "the marital misconduct of the spouse seeking maintenance." 1995 TEX. GEN. LAWS 655, adding Subchapter G to Chapter 3 of the Family Code, § 3.9601 et seq.

n. Vermont. The statute governing allocation of property includes among the factors to be considered "the respective merits of the parties," VT. STAT. ANN. § 751(b)(12). There is no similar provision in the alimony statute, § 752, but the broad discretion permitted under that section could be construed to include fault even though it is not expressly mentioned among the list of relevant factors. The actual practice is difficult to discern from the few reported cases on the matter, which emphasize, sometimes inconsistently, both the special facts of each case and the importance of trial court discretion. In *Cleverly v. Cleverly*, 513 A.2d 612, 613-14 (Vt. 1986), the trial court's fault finding, upon which it based its property allocation, was reversed, the supreme court holding that the husband's leaving the homestead without warning, and later moving in with a woman he had visited during the marriage, was not properly considered fault or abandonment for the purpose of the property allocation statute. Yet the court also observed that its ruling "should not be construed as a holding that . . . post-separation conduct of parties . . . may never be considered" as its "ruling is based on the facts presented by the record in the case at bar." In *Victor v. Victor*, 453 A.2d 1115, 1117 (Vt. 1982), the court rejected the husband's claim that the trial court's one-sided property allocation was implicitly grounded on an unwarranted finding that he was solely at fault for the marital failure, observing only that fault is but "one factor among many which 'may' be considered" and that "the disposition of property . . . is a matter of broad discretion for the trial court." There are very few later cases on fault. It is difficult to know whether this

reflects the infrequency with which it is relied upon or the effectively unreviewable discretion of trial courts who in fact employ it in unreported decisions.

o. Wyoming. The relevant statute provides that in allocating property the court may consider “the respective merits of the parties.” In *Paul v. Paul*, 616 P.2d 707, 712 (Wyo. 1980), the court affirmed a trial judge who refused to consider evidence of fault in allocating a relatively large marital property estate in which there were “adequate assets to comfortably provide for both of the parties,” since “the trial judge has great discretion in dividing the property and he is not to use the property division to punish one of the parties.” But in the later case of *Grosskopf v. Grosskopf*, 677 P.2d 814, 819 (Wyo. 1984), the court sustained the denial of alimony to a wife who had been found at fault for the marital dissolution, the trial court having concluded that “dissolution of the marriage was caused primarily by the Defendant’s insistence upon removing herself and her children to the state of Wisconsin instead of remaining with her husband in Cody, Wyoming.” It reaffirmed that trial courts could consider fault in both alimony and property division, distinguishing *Paul* with the observation that it “stands for the principle that in certain circumstances the court may, in its discretion, refuse to hear evidence of fault; and that, in any event, such evidence may not be considered by the court to punish one of the parties, but only to insure that the property division is just and equitable under all of the facts and circumstances of the case.” It thus appears that whether fault is considered, as well as the weight to be given it, is largely a matter of trial court discretion.

b. Discretion and Fault

The traditional marital fault rule requires extraordinary reliance on trial court discretion. Neither the standard of misconduct, nor its dollar consequences, are much bounded by any rule. While in principle the trial court’s decision can be reviewed for “abuse of discretion,” reversals are rare. Such a system fits most comfortably in a dissolution law which relies on trial court discretion for the entire adjudication, not only for the fault aspects. The traditional fault rule is thus inconsistent with a major theme of the *Principles*, an effort to improve the consistency and predictability of trial court decisions. Appellate decisions and statutory rules sometimes provide parameters that are supposed to contain the exercise of discretion in fault adjudications, but for the most part these have little effect. A brief survey of the approaches taken in full fault states follows.

1. States which make no real effort to contain discretion.

In many fault states there are appellate decisions that seem to recognize and accept a rule of largely limitless trial court discretion in judging fault. *E.g.*, *Ross v. Ross*, 430 N.E.2d 815, 819 (Mass. 1982) (treatment of marital misconduct is “an aspect of the exercise of [the trial judge’s] broad discretion”); *Beede v. Beede*, 440 A.2d 283, 285 (Conn. 1982) (“as has been repeatedly stated by this court, judicial review of a trial court’s exercise of its broad discretion in domestic relations cases is limited to [whether] the court could reasonably have concluded as it did”); *Sunbury v. Sunbury*, 553 A.2d 612, 614 (Conn. 1989) (trial courts have “wide discretion” and “wide latitude in varying the weight placed upon each item” in the long and nonexclusive list of relevant criteria for alloca-

tion of property and fixing of alimony). It would seem almost inevitable that such discretionary systems would yield at least some questionable decisions. Consider, for example, *Hammonds v. Hammonds*, 597 So.2d 653, 654 (Miss. 1992) (allows the wife only a limited alimony award at dissolution of 25-year marriage, during which she raised three children, because of her adultery, where husband also committed adultery during the marriage) and *Grosskopf v. Grosskopf*, 677 P.2d 814, 819 (Wyo. 1984) (governing rule allows the trial court to consider the “merits” of the parties, defined as their relative “deservedness” or “goodness”; trial judge properly denied alimony to the wife where the marital breakup was caused in part by her preference for living in Wisconsin rather than Cody, Wyoming).

2. Guiding discretion by a rule allocating the costs of dissolution to the spouse who caused it.

The text explains why this rule does little in practice to limit or guide discretion, particularly as part of a system that also emphasizes deference to the trial court. For example, Connecticut, whose reliance on trial court discretion is described *supra*, provides that in allocating property and awarding alimony a court may consider “the causes of the . . . dissolution of the marriage.” CONN. GEN. STAT. ANN. § 46b-82 and § 46b-81; *see also* *Robinson v. Robinson*, 444 A.2d 234 (Conn. 1982). *Compare* *Grimmeisen v. Grimmeisen*, 1993 W.L. 268412 (Conn. Super.) (during 20-year marriage husband had two homosexual affairs and has been in therapy; wife is obese, spends one-third of year away from husband at parties’ vacation home, and spends too much money; court concludes the dissolution is mostly her fault) *with* *Bachman v. Bachman*, 1995 W.L. 9259 (Conn. Super.) (husband’s cruelty and infidelity, rather than wife’s obesity and spend-thrift practices, were the cause of the dissolution of parties’ 25-year marriage).

3. Ineffective efforts to contain discretion by other standards.

The problem of creating standards by which to determine the dollar consequences of a fault finding is particularly intractable. Appellate decisions in fault states sometimes caution that fault is only one factor relevant to the allocation of property or granting of alimony, and should not be given disproportionate weight. *E.g.*, *Sparks v. Sparks*, 485 N.W.2d 893 (Mich. 1992). But the meaning of such cautionary language is at best obscure. For example, in *Sparks* itself, the trial court had awarded the husband 75 percent of the marital property after finding that the wife’s adultery was the principal cause of the marital failure. The Michigan Supreme Court held that the trial court had given the wife’s fault disproportionate weight in this disposition, but was unable to state any rule by which judges in later decisions might determine the proportionate weight to accord such misconduct. Later cases seem no more helpful. *See* *McDougal v. McDougal*, 545 N.W.2d 537 (Mich. 1996), in which the court reaffirms the *Sparks* language investing the trial court with considerable discretion, but then reverses its judgment allowing the wife a large proportion of the property on the basis of the husband’s fault without doing more than providing a long list of factors.

In a number of fault states appellate courts have attempted to establish rules that explain when findings of fault may appropriately affect the award, but such guidelines do not seem to create effective bounds on trial court discretion. For example, Missouri opinions specify that “the conduct factor becomes im-

portant . . . when the conduct of one party to the marriage is such that it throws upon the other party marital burdens beyond the norms to be expected in the marital relationship.” *Burtscher v. Burtscher*, 563 S.W.2d 526, 527 (Mo. App. 1978). Even in laying down this rule, the court observed that “it is unnecessary and probably impossible to lay down any precise guidelines for the weight to be given to the conduct factor.” So in *Burtscher* itself the appeals court declined to reverse the trial court’s conclusion that husband’s adultery was counterbalanced by wife’s insistence on playing bingo four nights a week over husband’s objection. Cases vary wildly in the importance they attach to adultery. In *Barth v. Barth*, 800 S.W.2d 127 (Mo. App. 1990), the court justified its award to the wife of 55 percent of the substantial marital property by reference to the husband’s affair, begun shortly before the spouses broke up. Did the adultery justify for the wife a five percent bonus, or some other number because the division would have been unequal even without the adultery? One can’t tell, nor does the court feel obliged to explain, observing merely that each case must be decided on its own facts, a proposition which it supports by citing other cases that reached very different results in weighing the importance of adultery. *Cook v. Cook*, 706 S.W.2d 606 (Mo. App. 1986) (repeated adultery justifies 86/14 split); *D’Aquila v. D’Aquila*, 715 S.W.2d 318 (Mo. App. 1986) (60/40 split of marital property disproportionate despite adultery); *Marriage of Ballay*, 924 S.W.2d 572 (Mo. App. 1996) (wife’s adultery justifies reducing her share of the marital property despite rule allowing consideration of misconduct only where “it places extra burdens on the non-errant spouse ‘in the partnership endeavor’”; court provides no explanation of why adultery qualifies under this rule); *Schwarz v. Schwarz*, 631 S.W.2d 694 (Mo. App. 1982) (85/15 split sustained). These opinions are equally unhelpful. For example, *Schwarz* affirms the trial court with only the observation that it made no error, and that “an extended opinion would have no precedential value.” 631 S.W.2d at 695. Similar reasoning in other jurisdictions yields similarly inconsistent results. *Compare, e.g., Woodside v. Woodside*, 350 S.E.2d 407, 412 (S.C. App. 1986) (husband’s adultery doesn’t affect property allocation because it did not put on wife burdens “beyond the norms expected in marital relationship”) *with Robinson v. Robinson*, 444 A.2d 234 (Conn. 1982) (in apportioning marital property, court may consider the “humiliation and anguish” that wife’s adultery caused husband).

In New Hampshire the statute permits consideration of misconduct only where it both caused the breakdown of the marriage as well as “substantial physical or mental pain and suffering” or an economic loss. This limiting language has been construed broadly enough, however, as to rob it of any important impact. *Yergeau v. Yergeau*, 569 A.2d 237, 240 (N.H. 1990) (husband’s adultery properly considered in fixing alimony award to W; statutory standard met where wife testified not only to her “tears” but also to her “obsessive conduct in surveillance of [husband’s] and co-respondent’s comings and goings.”).

c. No-fault States and Attempted Murder

The ultimate test of a state law excluding all consideration of fault in property and alimony adjudications is an alimony claim by a spouse guilty of attempting to murder the potential obligor. While hardly common, such cases have arisen. In none of the states included in Category 1 has such a case been

faced by the state's highest court. (Arkansas is placed in Category 2 because its high court declined to apply its no-fault rule to a case of murder. See Note 19 in the main text.) The results in the intermediate courts of appeal have been mixed.

Courts in two no-fault states—Florida and Illinois—have held that a spouse cannot be denied alimony or his share of the accumulated property as punishment for attempted murder of the other spouse. In Illinois the holding might be thought fudged, as the opinion relied upon the financial consequences of the attempt to justify an unequal award. *Marriage of Cihak*, 416 N.E.2d 701 (Ill. App. 1981). Husband murdered wife after the court had dissolved their marriage but prior to its entry of a property division order. Under state law the assets were divided by the divorce court rather than the probate court. It allocated the parties' \$60,000 of marital property to wife's estate. In affirming, the appellate court emphasized that wife had provided all the family's support for last five years of marriage, while husband had dissipated some property, and that husband had little need for the assets given his 30-year jail term. But "the fact that [husband] murdered [wife] should not operate to take anything away from him." It analogized to an earlier Illinois case on joint tenancy, *Bradley v. Fox*, 129 N.E.2d 699 (Ill. App. 1955), to conclude that husband should retain his entire half of the property even though he could not enlarge his half-interest through the killing.

Florida has had several cases. In *Mosbarger v. Mosbarger*, 547 So.2d 188 (Fla. App. 1989), wife shot twice at husband six months after the parties separated, after seeing him with another woman. She subsequently pled guilty to second degree murder. The trial court divided their property equally except for husband's military pension, and awarded her \$500/month permanent alimony. Husband's military pension paid \$819 monthly, and he earned \$47,000 annually as a Honeywell program manager. The appeals court actually increased wife's award because of her poor earnings prospects and uninsured psychiatric bills, and held that the trial court erred when it considered her attempted murder of husband in apportioning their marital property. "Since adultery, as a statutorily recognized act of marital misconduct, is only considered when it translates into a greater financial need of the spouse or a depletion of family resources, we are not inclined to believe that Mrs. Mosbarger's criminal conduct, which is not a statutorily recognized act of marital misconduct, should be treated more severely in this domestic proceeding." *Id.* at 191. *See also* *De Castro v. De Castro*, 334 So.2d 834 (Fla. App. 1976) (husband required to pay alimony to wife of 26 years even though she shot and wounded him during pendency of dissolution action; award properly based on need alone). *Cf.* *Taylor v. Taylor*, 378 So.2d 1352, 1353 (Fla. App. 1980) (alimony award to wife excessive and improperly based on husband's physical abuse of wife during their marriage; alimony award cannot be employed "as a means of punishing the spouse . . . or . . . as a substitute for a money judgment in a personal injury case").

Lower court decisions in two other states have declined to apply their state's apparently inflexible no-fault rule to cases involving murder, but their position was not reviewed by the state's high court. In *Marriage of Brabec*, 510 N.W.2d 270 (Wis. App. 1993), the court affirmed a trial court decision denying wife maintenance because she was convicted of attempting to hire someone to kill husband during the pendency of the divorce proceedings. It explicitly re-

fused to apply *Dixon*, the state supreme court's no-fault decision (see Wisconsin entry in Reporter's Note a). In *D'Arc v. D'Arc*, 395 A.2d 1270 (N.J. Super. Ct. Ch. Div. 1978), *aff'd*, 421 A.2d 602 (N.J. Super. App. Div. 1980), the trial court considered husband's attempted murder of wife without even acknowledging the state supreme court's earlier decision in *Chalmers v. Chalmers*, 320 A.2d 478 (N.J. 1974), which barred consideration of fault. At least one fault state has allowed alimony to a spouse guilty of attempted murder. In *Sharpe v. Sharpe*, 416 S.E.2d 215 (S.C. App. 1992), the court held that conspiracy to murder one's spouse, unlike adultery, is not an absolute bar to an alimony award, and in fact made an alimony award to wife, whose conspiracy to murder husband failed when he learned of the plan. The award consisted of the requirement that husband provide health insurance to wife, who was seriously ill; the court distinguished the adultery cases as based upon a statutory bar.

As *Cihak*, the Illinois case, points out, consistency with the dominant rule applied to the murder of one joint tenant by the other would suggest denying the spouse who attempted to murder the other any claim upon the other spouse's share of the property, while allowing him his own share. In addition to the old Illinois case of *Bradley v. Fox*, upon which *Cihak* relies, many other courts have also held that the murder of one joint tenant by another does not deprive the killer of his half-share of the joint tenancy property, even though it bars the killer's succession to the entire estate. *Kempaner v. Thompson*, 394 So.2d 918 (Ala. 1981) (wife retains her half of joint tenancy property owned with husband, whom she killed); *Duncan v. Vassaur*, 550 P.2d 929 (Okla. 1976) (same); *Estate of Shields*, 574 P.2d 229 (Kan. App. 1978) (husband retains his half interest in joint tenancy property owned with wife, whom he killed); *Heuser v. Cohen*, 655 S.W.2d 9 (Ky. App. 1982) (same).

Topic 3 General Provisions

§ 1.01 Rules of Statewide Application

(1) A rule of statewide application is a rule that implements a Principle set forth herein and that governs in all cases presented for decision in the jurisdiction that has adopted it, with such exceptions as the rule itself may provide.

(2) A rule of statewide application may be established by legislative, judicial, or administrative action, in accord with the constitutional provisions and legal traditions that apply to the subject of the rule in the adopting jurisdiction.

Comment:

a. The function of rules of statewide application. Modern divorce rates mean that a large proportion of the population will at some point be a party to a marriage dissolution action. In many such cases the parties' assets and incomes are not great. A large investment of legal resources to divorce proceedings is not often sensible, or perhaps even possible. Expeditious settlement with a mini-

num of legal process is the preferred result. A rule of statewide application establishing presumptions that decide most litigated cases facilitates this goal by making the results of potential litigation more predictable. It also requires the development of a consistent statewide policy on the matter addressed by the presumption. Current law often avoids such policy choices, in practice if not in theory, by reliance on the exercise of trial court discretion. But that approach devolves policy to the predispositions of individual judges. Statewide rules provide consistency across parties in the policies applied to their dissolutions. Such consistency is an important goal of the *Principles*. See Parts I(b) and II(a) of the Introductory Essay that forms Topic 1 of this Chapter.

While uniform statewide rules thus serve important goals, the particular formulation of a rule is not always an appropriate subject for resolution in the black-letter *Principles*. Policy choices are necessarily made at more than one level of generality. In many cases, implementation of a Principle requires policy choices at a more detailed level than the Principle itself resolves. In such cases the Principle typically requires the adoption of statewide rules that address the matter on a more detailed level. For example, §§ 5.04 and 5.05 of Chapter 5 establish the Principle that the duration and amount of income sharing the law should require between former spouses is, in the ordinary case, proportional to the disparity in their incomes, the duration of their marriage, and the duration of any period during which the obligee provided the majority of parental care for minor children of the marriage. These sections also require a system of rebuttable presumptions that implement these *Principles* by resolving more detailed questions: What precise level of income disparity requires a remedy? Must the remedy provide complete equalization of living standards at the dissolution of lengthy marriages, or may it leave some disparity, and if so, in what amount? The same approach is used in other sections and other Chapters. *E.g.*, § 4.12.

Because no single resolution of these subsidiary policy choices is compelled by the analysis supporting the basic *Principles*, none is asserted by the black letter. The *Principles* thus require statewide rules but do not specify their precise content. Such specification is not necessary to satisfy the primary purpose for the requirement of statewide rules, which is achievement of predictability and policy consistency in the law's application. However, the commentary to the *Principles* offers guidance on the criteria that should govern the policy choices to be made and suggests boundaries for the rulemaker. These boundaries ensure that the policy choices reflected in the rule adopted by a jurisdiction are consistent with the basic Principle that the rule is intended to implement.

b. Exceptions to statewide rules. A statewide rule required by these *Principles* will ordinarily create a presumption that will control the result in a particular case in the absence of written findings establishing that the presumed result would constitute "a substantial injustice." (For the meaning of the requirement of written findings, see § 1.02.) Clearly, the presumptions established under the required statewide rules must be rebuttable, to allow the trial court or other decisionmaker to respond to the unusual case presenting factual variations no governing statute could anticipate. The approach of rebuttable presumptions taken in these Chapters borrows from the reforms that in the past decade were successfully applied to the law of child support, and that in many states already

apply to the division of marital property. While presumptions for determining alimony are currently less common, they are used by local rules in some domestic relations courts.

c. Adoption of statewide rules. The method by which each jurisdiction adopts a statewide rule depends upon the constitutional principles, legal traditions, and governing statutes that bear on the subject matter of the rule in that jurisdiction. In some cases the adoption of a rule consistent with these *Principles* will require legislative action, while in other cases the required rule might be adopted by administrative action or by judicial decision in the adjudication of a particular case. In some cases the highest court of the state may have rulemaking authority, separate from its authority to adjudicate individual cases, that extends to the topic of the statewide rule. The appropriate procedure will thus vary with both the particular jurisdiction and the particular rule, and is beyond the scope of these *Principles*. Even where a statewide rule has not yet been adopted, trial courts may find that the *Principles* provide useful guidance in the adjudication of particular cases. A trial court's authority to rely on these *Principles* in deciding cases will necessarily depend upon the governing law in the jurisdiction.

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Comment b. Federal law requires the states to employ a system of setting child support awards that relies upon guidelines establishing rebuttable presumptions, and thus such a system is in effect in every state. 42 U.S.C. § 667. The child support guidelines provide a model for the operation of the rebuttable presumptions established in Chapters 4 and 5.

Comment c. It is common for child support guidelines to be promulgated by the highest court of the state under rulemaking authority expressly granted it for this purpose by state law. *E.g.*, ARIZ. REV. STAT. § 25-320.

§ 1.02 Written Findings Required to Explain Exceptions

(1) When a statewide rule allows the decisionmaker in a particular case to render a judgment that departs from the result the rule would ordinarily require, the decisionmaker should set forth the basis for the departure in written findings sufficient to establish the grounds for departure required under the governing Principle or statewide rule.

(2) The requirement of written findings is met by any method that makes the findings accessible to someone who consults the physical record in the case.

Comment:

a. The reason for the requirement of written findings. Many provisions of the *Principles* require rules of statewide application that specify a result once particular facts in the case have been found, unless written findings establish the justification necessary under the rule for departure from it. Fidelity to the policies set forth in the governing law is encouraged by requiring the decisionmaker to articulate findings that explain why those policies require a result that is different from the one the rule itself would ordinarily impose. The additional re-

quirement that the findings be written facilitates appeals grounded on those policies. Appellate courts of course ordinarily defer to the trial court's factual findings, and appeal on grounds of factual error ordinarily requires incurring the cost of a transcript of the trial court proceedings. In contrast, only the findings themselves are required for appellate review of whether they are, as a matter of law, adequate to justify an exception to the general rule. Not only is meaningful appellate review more likely in that case, it is also essential to the creation of the body of precedent necessary for the system of rebuttable presumptions to produce consistent and predictable results. Finally, any effort to study and evaluate the operation of a system of rebuttable presumptions is feasible only if the physical record of cases in which the decisionmaker found a governing presumption rebutted contains the findings upon which the rebuttal was based. Such studies are necessary to determine whether the applicable rule is consistent and predictable in application, or whether amendment of the rule or its application is in order.

b. Method for compliance with the requirement of written findings. The most straightforward method for complying with the requirement of written findings is an opinion or memorandum decision issued by the decisionmaker, ordinarily a judge in a judicial proceeding. That is not, however, the exclusive method for compliance. In some jurisdictions trial judges may dictate findings to a court reporter whose transcript of them is then included in the court's case file without charge to the parties, and without regard to whether a more complete transcript of the proceedings is later prepared. Such a system satisfies the requirement of written findings imposed by these *Principles*. It does so because it requires the decisionmaker to articulate the specific factual findings relied upon to justify departure from the rule, and it produces an accessible record for study and for appellate review of whether the findings satisfy the substantive standard required for exceptions to the rule.

The requirement of this section is not satisfied by oral findings made "on the record" unless the findings are actually transcribed and placed in the physical record of the case. Oral findings that have not been transcribed cannot provide the basis of an appeal and are not accessible to investigators studying the operation of the system.

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Comment b. Federal law requires states to have child support guidelines. It also requires state law to compel courts to follow the guideline in the absence of written findings that justify departure from them. 42 U.S.C. § 667(b)(2); 45 C.F.R. § 302.56. Examples of state implementations of this requirement include Ariz. Rev. Stat. § 25-320(A) (The amount of child support determined by application of the guidelines "shall be the amount of child support ordered unless a written finding is made, based on criteria approved by the supreme court, that application of the guidelines would be inappropriate or unjust in a particular case"); Cal. Fam. Code § 4056 (similar). Some states apply a similar rule to the division of marital property. *E.g.*, Florida Statutes § 61.075 creates a presumption of equal division of marital assets and requires the trial court to enter written findings of

facts supporting the property division ordered by the court. *See Segall v. Segall*, 708 So.2d 983 (Fla. App. 1998).