"Fault" in Divorce: Its History and Current Role (and a Recommendation for the Future)

by
India A. Butler*

I. Introduction

Throughout U.S. history marital fault has played a distinct role in the determination of divorce judgments in one way or another. In early laws that even permitted a divorce, a finding of marital fault was required for a court to have jurisdiction over two divorcing spouses, and proof of that fault was a prerequisite to a judgment of divorce.[1] The underlying public policy considerations were firmly rooted in the nation's historical views of religion, cultural norms, and societal expectations.[2] That is, marriage was valued and there was a high societal priority placed on the "nuclear family."[3] The issue of fault was technical, in that the presence of fault, largely irrespective of the nature and extent of the fault, was sufficient in and of itself to allow the court to grant a divorce.[4] The jurisdictional nature of the consideration made it such that the court did not need to determine in dollars and cents how the innocent spouse could be compensated, or the at-fault spouse punished, for the wrongdoing in order to grant the divorce.[5] If there was not

---

* India A. Butler is an attorney with the law firm Rutkin, Oldham & Griffin, LLC of Westport, CT. Many thanks and appreciation to David Griffin for his invitation to contribute to this issue as well as his helpful input throughout the drafting process.

1 Lynn D. Wardle, *No-Fault Divorce and the Divorce Conundrum*, 1991 BYU L. Rev. 79, 79.

2 Peter Nash Swisher, *Reassessing Fault Factors in No-Fault Divorce*, 31 Fam. L.Q. 269, 276-77 (Summer, 1997).

3 *Id.* at 277.

4 *Divorce: Statutory Abolition of Marital Fault*, 35 Cal. L. Rev. 99, 99 (1947).

5 Instead, this analysis took place in the context of alimony and property division. *Id.* at 107.

a "check" in the box indicating a finding of fault, no divorce would occur. This sort of check-the-box nature of fault during the early years of divorce was determinative of the outcome.

As cultural norms and societal expectations have shifted over the years, so too has the treatment of marital fault in divorce actions. Whether and to what extent those trends are connected are explored below. As a general matter, divorce law throughout the nation has trended away from the rigid structure that required a finding of fault in all divorce actions, and in many instances has removed fault as a jurisdictional requirement altogether.[6] This does not mean that divorce actions are completely without inquiry into marital fault. Modern-day fault considerations typically arise in the context of financial orders such as alimony and property division and tend to have an eye towards equity based upon the parties' pre-divorce conduct throughout the marriage.

This article will examine the role of fault in divorce actions across the country, its historical treatment across jurisdictions, its original and changing purpose, whether any historical vestiges remain, and where society has removed or abandoned the idea that fault should be a consideration in divorce judgments. Part II explores the history of divorce law, focusing in large part on its removal from the law as a jurisdictional requirement and the increased influence it has had on the financial components of divorces. Part III compares the modern-day treatment of fault in financial orders across several jurisdictions, while Part IV considers the appropriate application of fault in divorce law, noting the practical consequences of such.

II. A Look Through History

There was a time when marital fault, no matter how impactful or damaging, was insufficient for spouses to get a divorce.[7] In fact, in England pre-1857, there were rarely a set of facts that warranted a divorce.[8] During that time, the government, the church, and society generally, placed great value on the sanctity of marriage

---

6 Wardle, *supra* note 1, at 88.

7 J.D. Sumner Jr., *The South Carolina Divorce Act of 1949*, 3 S.C. L. Rev. 254 (1951).

8 *Id.* at 254.

and viewed it as indissoluble.[9] Marriage was viewed as a religious contract between two spouses, and therefore, the exclusive right to grant a divorce was reserved only for ecclesiastical courts.[10] In those instances in which there was certainly post-nuptial marital misconduct, the ecclesiastical courts would allow "judicial separation" which permitted spouses to live separately only upon a showing that the marital misconduct made further cohabitation impossible.[11]

The other alternative available to incompatible spouses was an annulment. As is the case today, an annulment did not dissolve the marriage, and instead declared the marriage null and void as a matter of law.[12] Further, there were factual limitations on who might qualify for an annulment. Parties to a dissolution action were required to demonstrate that an impediment existed which made the marriage invalid.[13]

The underlying belief that marriage was a permanent contract and could not be dissolved, for any reason, was transposed from England to the United States following the American Revolution.[14] Divorces, though technically permitted, were virtually impossible to obtain in most states until nearly the late 1800s.[15]

In South Carolina, as was the case in many of the remaining states, the courts did not have the power or authority to grant a divorce, thereby making it an impossibility.[16] At the time of the state's inception, the legislature provided that the courts would not have the power or authority to grant divorces, given that such authority was reserved for the church.[17] The conundrum that arose was that there were no ecclesiastical courts established in South Carolina, and therefore no process by which spouses could receive a divorce in that state.[18] It was not until the Act of 1872 that two spouses were entitled to a divorce in South Carolina.[19] Even with

---

9 *Id.*
10 *Id.* at 253.
11 *Id.*
12 *Id.*
13 *Id.* at 254.
14 *Id.* at 255.
15 *Id.* at 257
16 *Id.* at 255.
17 *Id.* at 254-55.
18 *Id.* at 255.
19 *Id.* at 257.

the grant of authority to the court, there were no divorces granted by the state under the Act of 1872.[20] Though the early divorce laws clearly disfavoring divorce, making it a near-impossibility, loosened over time, they remained structured in a way that placed limitations on the ability to get divorced, thereby favoring and encouraging lasting marital partnerships. Across all jurisdictions, divorce laws placed jurisdictional requirements on the court's ability to grant a divorce. This involved not only age and residency requirements, but also the ability to plead and prove marital fault.

Marital fault as a jurisdictional element to divorce frequently arose in the earliest cases within the context of "matrimonial domicile" seen in the early divorce laws. When two spouses lived in the same state, there was little question whether the judicial authority within that state had the jurisdiction to grant them a divorce.[21] In instances where only one spouse resided in the jurisdiction, the question became less clear. The presence of one spouse in a particular jurisdiction was insufficient to give that state jurisdiction over the non-resident spouse.[22] To solve that tension, the law looked to the "matrimonial domicile," which was the place where the parties last lived as husband and wife.[23] When neither husband nor wife lived in the "matrimonial domicile" at the time of the divorce, often the determining factor was the fault or innocence of the parties.[24] In Texas, the Court of Appeals held that it was the innocent party who was able to establish their new domicile as the "matrimonial domicile" for jurisdictional purposes.[25] The impact of this had tangible consequences – first, on which state's law applied for property division and support.[26] Second, it impacted whether and to what extent neighboring states were required to give "full faith and credit" of a divorce ordered in a different jurisdiction.[27]

---

20 *Id.*

21 Henry L. McClintock, *Fault as an Element of Divorce Jurisdiction*, 37 Yale L.J. 564, 564 (1928).

22 *Id*.

23 *Id.* at 568.

24 *Id.*

25 Montmorency v. Montmorency, 139 S.W. 1168, 1172 (Tex. Civ. App. 1911); McClintock, *supra* note 21, at 586.

26 Herbert F. Goodrich, *Matrimonial Domicile*, 27 Yale L.J. 49, 50 (1917).

27 *Id*. at 62.

A. *Fault as a Jurisdictional Requirement*

Before the "no fault" reform, courts would deny spouses a divorce, even if both of them wanted one, unless one of them proved, or they conspired to prove, that one spouse was guilty of wrongful conduct during the marriage sufficient enough to warrant a divorce.[28] All jurisdictions spelled out exactly what conduct would rise to that level.[29] The most common grounds for divorce were adultery, cruelty, abandonment, and mental illness or incarceration.[30] Plaintiffs to a divorce action were required to plead which ground applied and later prove all the necessary statutory elements to prevail in obtaining a divorce similar to the way prosecuting authorities are required to prove all elements of a crime to obtain a conviction.[31]

The concept that a court must find some marital misconduct to grant a divorce mirrors the sentiment reflected in the early annulment statutes.[32] That is, a marriage should only be dissolved in instances where some significant flaw exists, and without such a defect, the state lacks authority to grant a divorce or an annulment.[33] Anyone who has been a party to a divorce, or represented either side, knows how challenging it is, and usually impossible, to pin down exactly when the marriage broke down and who is to blame for it.[34] Further, the statutory framework requiring a finding of fault ignored the reality that marriages break down for a variety of different reasons, and typically do not fit squarely within the fault-based grounds for divorce.[35]

---

28 Robert Raphael, Frederick N. Frank & Joanne R. Wilder, *Divorce in America: The Erosion of Fault*, 81 Dick. L. Rev. 719, 719 (1977).

29 *Id.* at 720.

30 *Id.* at 729.

31 *See id.* at 721.

32 *Id.*

33 *Id.*

34 An Act Concerning the Dissolution of Marriage, Bill #8235 (1973) (Statement of Samuel Schoonmaker at Connecticut Joint Standing Committee, Feb. 20, 1973); McClintock, *supra* note 21, at 572.

35 Connecticut Joint Standing Committee Hearings, Judiciary Part 1, *supra* note 34, at 212-13.

B. *The Erosion of Fault as a Jurisdictional Requirement*

Opponents of the jurisdictional fault requirement often argued that such a change would make it easier for people to get divorced, and therefore result in an increase in divorce rates.[36] Though there are regional differences in divorce rates,[37] the United States generally experienced a steady increase in divorce rates for nearly one hundred years between 1860 and 1960.[38] Thereafter, for about nineteen years, there was a dramatic spike in divorce rates, before they began to level out and, at times, decline.[39] Researchers have yet to find a causal connection between no fault divorce and the increase in divorce rates.[40]

On the other side, proponents of eliminating the fault requirement disputed any causal link between removal of fault considerations and ease of divorce and argued that the shift away from the traditional grounds for divorce and towards a more progressive approach was a result of the already increasing divorce rates.[41] This side maintained that the no fault reform was implemented in part as a reaction to the increasing divorce rates. A reasonable conclusion to draw is that people were getting divorced if and when they wanted, regardless of the jurisdictional and evidentiary hurdles presented by the traditional fault-based grounds and irrespective of whether the specific facts of their case actually satisfied those jurisdictional requirements. Though it can be said that no fault reform theoretically made it "easier" for people to divorce by removing a jurisdictional requirement and eliminating the need to plead certain facts and later prove them with evidence, it did not necessarily follow that this "ease" in process translated into more divorces than otherwise would have occurred.

---

36 *See id.* at 218-19.

37 Norval D. Glenn & Beth Ann Shelton, *Regional Differences in Divorce in the United States*, 47 J. Marriage & Fam., 641 (1985).

38 Donna S. Hershkowitz & Drew R. Liebert, *The Direction of Divorce Reform in California: From Fault to No-Fault…And Back Again?*, Assembly Judiciary Committee, California State Legislature 3 (1997).

39 Connecticut Joint Standing Committee Hearings, *supra* note 34, at 221-22.

40 *Id.* at 222.

41 *Id.* at 221-22.

The Uniform Marriage and Divorce Act of 1970 (the "UMDA"),[42] though not explicitly adopted in its entirety in all jurisdictions, reflected two modern trends in divorce law. The first was recognition of the concept of no-fault divorce, and the second was the idea that the division of property at divorce should no longer prioritize form over substance, birthing the idea of "equitable division" of property without regard for how the property is formally titled.[43] Arriving on the heels of several women's movements and soon after the passage of important anti-sex discrimination laws, the UMDA was aimed at not only creating harmony across states, but also toward reducing the perceived disparate impact that divorce historically appeared to have on women.[44]

While the disparity of impact is empirically supported, the UMDA's approach to alimony and maintenance awards could be said to accomplish the opposite.[45] The UMDA eliminated the consideration of marital misconduct in determining alimony awards, even in instances where misconduct undoubtedly impacted the financial and economic aspects of the marriage and the divorce. Instead, under the UMDA scheme, courts were limited to considering a series of factors, all of which focused largely on the financial resources of the parties, and the recipient's employment prospects.[46] Similarly, the UMDA preferred the phraseology "maintenance" over "alimony," arguably in an attempt to highlight the temporary and rehabilitative nature of financial support.[47]

California became the trailblazer for the shift in trend from fault-based divorce to what today is commonly referred to as "no fault" divorce, which came after years of unsuccessful attempts to replace fault grounds with no-fault grounds. In 1970, the Family Law Act of 1969 became effective in California and provided

---

42 Unif. Marriage & Divorce Act (Unif. L. Comm'n 1970).

43 Robert J. Levy, *A Reminiscence About The Uniform Marriage and Divorce Act – and Some Reflections About Its Critics and Its Policies*, 1991 BYU L. Rev. 43, 44 (1991).

44 President John F. Kennedy signed the Equal Pay Act into law on June 10, 1963. President Lyndon B. Johnson signed the Civil Rights Act into law on July 2, 1964.

45 Levy, *supra* note 43, at 52-53.

46 Suzanne Reynolds, *The Relationship of Property Division and Alimony: The Division of Property to Address Need*, 56 Fordham L. Rev. 827, 839-40, n. 62 (1988).

47 *See* Unif. Marriage & Divorce Act (Unif. L. Comm'n 1970).

couples the ability to obtain a divorce based upon the ground of "irreconcilable differences, which have caused the irremediable breakdown of the marriage."[48] In doing so, the law eliminated the traditional fault grounds and deemed evidence of marital misconduct to be "improper" and "inadmissible."[49] Before this, the closest that any of the states got to no-fault divorce was New York in 1966 with the passage of legislation that permitted divorce for spouses living separate and apart for a period of two or more years pursuant to a decree of separation or a written separation agreement.[50] The practical effect of this lengthy waiting period was that parties were forced to choose a fault ground that did not fit the facts of their circumstances, or that spouses who elected the no-fault route were unable to untangle their lives as quickly as they could in true no-fault states.[51] Prior to 1966, New York's sole ground for divorce for nearly two centuries was proof of adultery.[52]

Almost immediately following California in removing fault from consideration was Texas, which adopted the state's first no-fault ground for divorce in 1970. The new statute required either the agreement of the parties or a showing that the marriage had become insupportable.[53] The concept of "insupportability" was derived directly from the prior fault-based statutory framework which remained intact and required not only "excesses, cruel treatment, or outrages," but also a showing that living together was untenable as a result.[54]

---

48 Cal. Fam. Code § 2310.

49 Wardle, *supra* note 1, at 83 n.13.

50 *Id.* at 86 n.25. This statute, which became effective on September 1, 1967, also added cruel and inhumane treatment that threatened the physical or mental well-being of the plaintiff. Earl Phillips, *Divorce Law Reform in New York*, 43 Catholic Law. 52 (1967); N.Y. Sess. Laws 1966 ch. 254 § 15.

51 *See* Rhona Bork, *Taking Fault with New York's Fault-Based Divorce: Is the Law Unconstitutional?*, St. John's J. Legal Commentary 189, 189-91(Winter 2002); *See also* Delmar David Steinbock, Jr., *The Case for No-Fault Divorce*, 10 Tulsa L. J. 427, 429 (1975); *See also* Wardle, *supra* note 1, at 86.

52 From 1787 through 1966 proof of adultery was the only ground permitted for divorce. The law remained unchanged from the time of Alexander Hamilton. New York adopted no-fault grounds for divorce in 1970 when it reduced the term of separation from two years to one year, making it much more practical and reflective of the way in which people lived.

53 Tex. Fam. Code § 6.001; Austin v. Austin, 586 S.W.2d 937 (Tex. Civ. App. 1979).

54 Bippus v. Bippus, 246 S.W.2d 502, 503 (Tex. Civ. App. 1952).

While permitting some evidence of marital fault, the new statute significantly lowered the burden, and allowed the possibility of a divorce where general unhappiness and incompatibly were to blame.[55] The divorce ground of "insupportability," which differs from the later widely adopted ideas of "irreconcilable differences" and "irretrievable breakdown," stood for the very same idea – that was, spouses could divorce without needing to prove, or fabricate, fault.[56]

Given that the dissolution opinions in the years leading up to the adoption of the no-fault ground placed a clear emphasis on the permanency of marriage, it was somewhat unexpected that Texas was among the early adopters of no-fault grounds in the United States. The historical emphasis on the permanency of marriages seemed to favor the denial of divorce petitions, and required litigants to remain married despite their joint desire not to. It was well-established, and commonly referenced in court opinions that incompatibility or generally unhappiness alone was insufficient to meet the statutory requirements of a divorce pre-1970.[57] In a 1969 opinion, just one year prior to the adoption of no-fault grounds in Texas, the court in *Shankles v. Shankles* commented on the wife's failure to call upon her husband to change his actions to preserve the marriage and the decision provides invaluable insight into the social mores of that time.[58]

Despite the widespread dissatisfaction with the fault-based jurisdictional requirements, it took nearly thirty years for every jurisdiction in the United States to implement some form of no-fault divorce. By 2010, the state of New York stood as the sole remaining jurisdiction without an easy unilateral fault-less option for divorcing spouses. The closest that New York had come in the preceding years was in the year 2000 when the state allowed divorcing spouses to sidestep the fault requirement so long as they mutually agreed upon the terms of a separation agreement, lived separate and apart for an entire year, and exhibited substantial performance under the agreement for the period of separation.[59]

---

55 Matter of Marriage of Glaze, 605 S.W.2d 721, 725 (Tex. Civ. App. 1980).

56 Tex. Fam. Code § 6.001.

57 Shankles v. Shankles, 445 S.W.2d 803, 807 (Tex. Civ. App. 1969).

58 *Id.*

59 Bork, *supra* note 51, at 165-66; N.Y. Dom. Rel. Law § 170(6).

Thereafter, the court would be permitted to grant the parties' divorce without requiring a finding of fault.[60] At that time, the newly introduced ground for divorce presented somewhat of a false sense that the state was offering litigants a no-fault option. This was simply not the case. Instead, it failed to solve for instances in which one spouse contested the divorce and the two were not in agreement on the terms of their separation, nor did it appreciate the reality that prolonging the finalization of a divorce over the required extended period of time could have adverse mental and emotional effects on the parties.

Despite New York's reluctance to remove marital fault as a jurisdictional requirement, the state had long since lessened the impact that marital fault would have on financial orders in matrimonial actions. In 1980, the New York legislature reworked the spousal maintenance statutory framework to no longer expressly provide for the punishment of adultery in issuing spousal maintenance, and instead gave the court discretion to do so when it found that egregious conduct had occurred in connection with the adultery.[61] Before then, divorce laws in New York penalized adulterous conduct in a similar way that the penal code in New York criminalized adultery, and still does.[62] The penalty usually was in the form of denying the receipt of spousal maintenance to the adulterer spouse.[63]

The post-1980 spousal maintenance framework in New York is similar to child support guidelines implemented in most jurisdictions, in that it provides parties with clear calculations, expectations, and guidelines. Despite this framework, courts have the freedom, in certain circumstances, to deviate from these guidelines based on certain statutory factors. The statutory framework and supporting case law in New York seem to draw a distinction between traditional forms of marital misconduct, such as adultery,

---

60 Bork, *supra* note 51, at 165-66 N.Y. Dom. Rel. Law § 170(6).

61 *See, e.g.,* O'Brien v. O'Brien, 66 N.Y.2d 576 (N.Y. 1985); Blickstein v. Blickstein, 99 A.D.2d 287 (N.Y. App. Div. 1984). Both of these cases held that marital fault may be considered in egregious cases which shock the conscience of the court. This exception is to be applied only in extreme cases. Compare these cases with *Pagan v. Pagan*, 138 A.D.2d 685 (N.Y. App. Div. 1988) (declining to consider the unintentional shooting of one spouse by the other as an equitable distribution factor).

62 N.Y. Penal Code § 255.17; N.Y. Dom. Rel. Law § 236(A)(1).

63 N.Y. Dom. Rel. Law § 236 practice comment. (McKinney 1999).

and forms of marital misconduct that are economic in nature. The spousal maintenance statute specifically allows the court to consider the wasteful dissipation of assets by one spouse, as well as marital misconduct that has inhibited the other spouse's earning capacity, which is mirrored by the case law.[64] While there also remained a catchall provision that provided the court with discretion to consider "any other fact which the court shall expressly find to be just and proper," the relevant case law reflects a trend away from considering traditional marital fault, such as adultery, in issuing financial awards.[65]

New York took a similar approach with the equitable division statute, which does not expressly permit the court to consider marital fault in dividing the marital estate.[66] Instead, the court is permitted to consider a series of factors, which included those related peripherally to marital fault, such as wasteful dissipation of assets and acts of domestic violence.[67]

III. Fault in the Modern World

A. *Instances in Which the Legislature Is Silent on the Issue of Fault*

Even as fault disappeared from the jurisdictional landscape, in certain instances, state legislatures chose to be silent on the issue of whether fault would or should be considered in determining financial orders, such as property division or alimony.[68] Where there is no clear directive from the legislature, the courts are left to decide.[69]

The judiciary in Nevada struggled to balance this in the matter of *Rodriquez v. Rodriguez*.[70] In *Rodriguez*, the trial court

---

64 N.Y. Dom. Rel. Law §§ 236(B)(5)(d), 236(B)(6)(e), (g).

65 N.Y. Dom. Rel. Law. § 236.

66 N.Y. Dom. Rel. Law § 236(B).

67 N.Y. Dom. Rel. Law § 236(B)(5)(d)(12); N.Y. Dom. Rel. Law § 236(B)(5)(d)(14).

68 *See* Nev. Rev. Stat. § 125.150(1) (1991); *See also* N.M. Stat. Ann. § 40-47(E) (Michie 1999).

69 *See* Kristine Cordier Karnezis, Annotation, *Fault as Consideration in Alimony, Spousal Support, or Property Division Awards Pursuant to No-Fault Divorce,* 86 A.L.R.3d 116, 119-20 (2002).

70 13 P.3d 415 (Nev. 2000).

denied alimony to Ms. Rodriguez based upon her extramarital affair, despite the fact that her husband of twenty-one years earned five times more than she did.[71] There, the court determined that it was proper to consider marital misconduct in entering financial orders.[72] At that time, the law provided that alimony awards may be ordered "having regard to the respective merits of the parties."[73] Prior to *Rodriguez*, in the case of *Heim v. Heim*,[74] the Nevada Supreme Court had determined that inquiry into the "merits of the parties'" was akin to considering "the parties' good actions or good behavior or lack thereof" in determining financial outcomes in a divorce.[75]

The wife appealed. Ultimately, the Nevada Supreme Court in *Rodriguez* determined that courts were not permitted to consider marital fault in assessing the merits of the parties in issuing financial orders, absent a clear directive from the legislature to the contrary.[76]

A similar structure exists in New Mexico. There, the dissolution statutes list the specific factors a court must consider in issuing financial orders in a divorce action.[77] The factors include those that are seen across many states that utilize individual and specific factors, such as the income and expenses of each party, each party's employment history and educational background, the material contributions of each party during the marriage, each party's respective access to other financial resources, as well as the age, health, and station of the parties.[78] The dissolution statutes in New Mexico do not include any factors that implicate marital misconduct.[79] The case law in New Mexico appears to support this idea and has not created a loophole for litigants to insinuate the consideration of fault into divorce proceedings.[80]

---

71 *Id.* at 416.

72 *Id.*

73 Nev. Rev. Stat. § 125.150(1) (1991).

74 763 P.2d 678 (Nev. 1988).

75 *Id.* at 681.

76 *See Rodriguez*, 13 P.3d at 420.

77 *See* N.M. Stat. Ann. § 40-4-7(E) (1999).

78 *See* Conn. Gen. Stat. § 46b-82; Colo. Rev. Stat. § 14-10-114; Mass. Gen. Laws 208, § 34; 19-A Me. Rev. Stat. Ann. § 951-A.

79 N.M. Stat. Ann. § 40-4-7(E) (Michie 1999).

80 *See* Ira Mark Ellman, *The Place of Fault in Modern Divorce Law*, 28 Ariz. St. L.J. 773, 814 (1996); Lauderdale v. Hyord Conduit Corp., 555 P.2d 700, 705 (N.M. Ct. App. 1976).

Many other states provide a series of factors which include fault considerations that must be weighed by the court in issuing financial orders, in one way or another.[81]

B. *Instances in Which Fault Is an Improper Consideration in Divorce*

While not universally adopted, the UMDA takes a clear stance on fault, providing that property division and alimony shall be determined "without regard to marital misconduct."[82] Similarly, California dictates that "evidence of specific acts of misconduct is improper and inadmissible" in any pleading or proceeding for dissolution of marriage or legal separation.[83] Further, California courts are bound by an equal property division regime that does not allow for judicial discretion.[84] Consequently, fault is neither a consideration for alimony nor property division, also resulting in a limitation precluding it as a proper and permissible area of inquiry in discovery.[85] An equal division property regime which affords zero judicial discretion further limits the ability of litigants to pursue claims of marital fault.[86]

Louisiana too employs an equal property division mandate, therefore not allowing fault to factor into the division of property.[87] However, fault-based determinations are not prohibited in the context of final alimony orders in Louisiana.[88] There, the statutory language states that a court "may award final periodic support to a party free from fault," which largely mirrors South Carolina's statutory prohibition on awarding alimony to a spouse who has engaged in an extramarital affair.[89]

---

81 19-A Me. Rev. Stat. Ann. § 951-A; Conn. Gen. Stat. § 46b-82.

82 Unif. Marriage and Divorce Act § 307.

83 Cal. Fam. Code § 2335 (West 1995).

84 *See* Catherine Mazzeo, Rodriguez v. Rodriguez: *Fault as a Determinative Factor in Alimony Awards in Nevada and Other Community Property Jurisdictions*, 2 Nev. L.J. 177, 184 (2002).

85 Cal. Fam. Code § 2335; *See also* Ellman, *supra* note 80, at 810.

86 *See* Herma Hill Kay, *An Appraisal of California's No-Fault Divorce Law*, 75 Calif. L. Rev. 291, 301 (1987).

87 *See* La. Civ. Code. Ann. Art. 112(A) (West 1996).

88 *See id.*

89 *Id.*

C. *Instances Permitting a Limited Consideration of Fault*

Some states have tried to resolve the tension between equity, fairness, and the cost-benefit challenge that litigants experience by narrowly tailoring the consideration of fault to specific instances.[90] The state of Washington mirrors the UMDA's property division and alimony language, with the exception that the physical and emotional condition of the potential alimony recipient may be considered, as may be their financial obligations, which tends to implicate marital fault.[91] A typical example of how the Washington alimony statute provides a loophole for some fault consideration is seen in the matter of *In re Foran*.[92] There, a husband's physically abusive behavior towards the wife during the marriage and her resulting post-traumatic stress disorder directly implicated the wife's employability and future earning capacity and therefore was considered by the court in making an alimony determination.[93]

D. *Fault and the Division of Property*

In Texas, the legislature has decided that fault is not a ground upon which a court may base property division awards in the context of no-fault divorce.[94] Instead, the court need only determine that the property division is "just and right" under the circumstances, and is barred from making punitive property division awards.[95] An exception exists for cases in which divorce is sought on one of the fault-based grounds when evidence of fault may be considered in making a disproportionate distribution of

---

90 *See* 19-A Me. Rev. Stat. Ann. § 951-A(5). "The court shall consider the following factors when determining an aware of spousal support…(M) Economic misconduct by either party resulting in the diminution of marital property or income; (M-1) Economic abuse by a spouse." *Id.; See also* S.C. Code. § 20-3-130 (2022).

91 Wash. Rev. Code Ann. §§ 26.09.080, 26.09.090, 26.09.080(1)(e) (West 1999).

92 834 P.2d 1081 (Wash. Ct. App. 1992).

93 *See id.* at 1083.

94 *See* Tex Fam. Code § 7.001 (providing special circumstances for the court to consider in the division of property, none of which relate to marital fault or misconduct).

95 *See* Matter of Marriage of Collinsworth, 598 S.W.3d 357, 365 (Tex. App. 2020).

the marital estate.[96] In instances where the basis for the divorce is insupportability (no-fault) alone, the court need not hear evidence relating to fault beyond that which is required to make a finding of insupportably, which is a surprisingly low burden in the contemporary world.[97] The result was that the wronged spouse often lost the bargaining power to argue for a disproportionate share of the marital estate in the context of insupportability.[98]

E. *Child Support and Custodial Determinations*

Almost universally, child support is a math question.[99] States have implemented guidelines or some other formula that considers the financial resources of the parents, the financial resources of the child, and the needs of the child in determining child support obligations.[100] Many states, like Connecticut, allow parents to deviate from the presumptive child support amount based upon certain deviation criteria.[101] In Connecticut, those include: (1) additional financial resources available to a parent; (2) extraordinary expenses for the care and maintenance of the child; (3) extraordinary expenses for either of the parents; (4) the needs of the parent's other dependents not subject to the child support order; (5) coordination of total family support; and (6) special circumstances such as shared physical custody, extraordinary disparity in parental income, best interests of the child, and other equitable

---

96 Lynch v. Lynch, 540 S.W.3d 107, 128 (Tex. App. 2017).

97 *See* Joanna L. Grossman & Elicia Grilley Green, *No-Fault Divorce: The Case Against Repeal*, SMU Scholar 2 (2018).

98 Joseph W. McKnight, *Texas Community Property Law: Conservative Attitudes, Reluctant Change*, 56 Law & Contemp. Probs. 72, 93 n. 144 (Spring 1993).

99 *See* Robert G. Williams, *Guidelines for Setting Levels of Child Support Orders*, 21 Fam. L.Q. 281 (1987-1988).

100 *Id.*

101 Reasons for deviating from the Alabama child support guidelines include, without limitation, an order of shared physical custody, extraordinary transportation costs, college education expenses, assets or income received by or on behalf of the child or children, and childcare costs incurred on behalf of the children as a result of the parent's employment. Ala. R. Jud. Admin. 32(A)(1). Georgia permits deviation from the presumptive child support amount for, *inter alia*, high income families, health related insurance costs, life insurance costs, travel expenses, alimony obligations, mortgage expenses, and extraordinary expenses. Ga. Code Ann. § 19-6-15.

factors.[102] Nowhere in Connecticut's child support guidelines, or statutes pertaining to child support, is there an exception that allows parents to deviate one way or another from the presumptive child support award based upon the misconduct of either party.[103] Of course, it is possible that the fault of one spouse impacts the consideration of the factors set forth above. For example, if a spouse's repeated domestic violence and abuse of another spouse has substantially reduced the victim's ability to be gainfully employed, the factors considered in child support are inherently impacted. That said, marital misconduct as a separate and distinct consideration is improper in the determination of child support.[104]

This is consistent with the policy underpinnings that child support awards serve, which include: (1) protecting the well-being of the children; (2) ensuring that both parents have a financial responsibility to their children, regardless of the custodial arrangement; and (3) reducing the disparity in financial resources available to the child support payor compared to their child.[105]

IV. Conclusion and a Recommendation for the Future

Fault no longer plays the role it did in England and during the early years of the United States. As the nation gained its independence and developed its own legal framework, it distanced itself from the "what God has joined, let no man put asunder" biblical thinking that had been prevalent for many years. As the trend in the United States has been to move away from the traditional fault-based jurisdictional requirements, and each state has adopted its own specifically tailored and unique statutory framework for issuing financial orders in divorce matters and courts have interpreted and applied those statutes, the line demarcating when, how, and the degree to which fault factors into divorce outcomes has become blurred.

The question becomes – *should* fault be considered at all? As this article documents, a finding of fault is no longer required for

---

102 Conn. Gen. Stat. § 46b-215a-5c.

103 *See id.*

104 *See* Conn. Gen. Stat. §§ 46b-215a-2b, 46b-215a-5c.

105 Ira Mark Ellman & Tara O'Toole Ellman, *The Theory of Child Support*, 45 Harv. J. Legis. 107, 129 (2008).

a court to have subject matter jurisdiction in a dissolution action. There is certainly a trend away from considering fault in the division of property, even in instances where fault remains a proper consideration on the question of alimony or spousal support.[106] Alimony statutes across the country continue to maintain at least a tenuous grasp on the historical concept that there should be fairness and equity in the financial outcomes of a divorce, and fairness and equity dictate that positive behavior should be rewarded (and bad behavior punished).[107]

A. *Intended Goal of Financial Outcomes in a Divorce*

The first and most logical place to look for answers to the question of whether fault should be removed entirely from divorce cases is to examine the intended goal of divorce laws. The second consideration is whether other laws better serve those goals, or unintentionally undermine them.

Traditionally, divorce laws were intended to reflect societal expectations and enforce the moral underpinnings relative to marriage. With the erosion of fault as a jurisdictional requirement, some scholars argue that the intent behind our divorce laws shifted.[108] That is, rather than reflecting how spouses should conduct themselves in a marriage, or the value that society should place on marriage, laws should instead promote fairness, equity, expediency, and autonomy in the dissolution of marriage.[109]

Comparing those goals with those of criminal laws, which are inherently punitive in nature, there is no question that criminal laws are intended to discourage bad behavior, which is based upon societal expectations of acceptable behavior.[110] In the context of criminal law, society frames what is and is not acceptable and therefore theoretically forces conformity therewith.[111]

---

106 *See* Ar. Code 9-12-315 (2023); La. Rev. Stat. 9:281 (2023); Id. Code 32-712 (2023).

107 *See* Ira Mark Ellman, *The Theory of Alimony*, 77 Cal. L. Rev. 1, 5-7 (1989).

108 *See* Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 Mich. L. Rev. 1803, 1809 (1985).

109 *See id.*

110 Swisher, *supra* note 2, at 298.

111 *Id.*

The questions remain whether divorce laws should be engaged in social tinkering by encouraging and discouraging behaviors based on what is socially acceptable or repugnant, or whether spouses should be entitled to conduct themselves in their private lives as they jointly deem appropriate, and financial outcomes of dissolutions should simply be need-based?

To remove fault considerations entirely, without providing some other equitable remedy, would undermine the personal importance to litigants and the emotional impact that marital fault has on the wronged spouse. One possible solution to this dilemma is to remove fault as a consideration from dissolution actions, including in the determination of property division and alimony, and replacing it with equitable remedies in another area of the law, such as a tort action.[112] Tort law blends the concepts of equity and punishment, which allows aggrieved parties to seek monetary compensation for wrongs inflicted upon them.[113] The concept is that a person wronged should be made whole for suffering some loss that they did not cause (equity) and that there should be some accountability for socially unacceptable behavior (punitive).[114]

Though imperfect, and utilized infrequently in recent years, Mississippi, for example, attempted such a structure by implementing the common law tort of alienation of affection.[115] A successful claim for alienation of affection in Mississippi requires proof of: (1) wrongful conduct by the defendant; (2) loss of affection or consortium; and (3) the causal connection between the wrongful conduct and the loss.[116] While the common law tort action is wide-reaching and covers any set of facts that fit the elements, the traditional scenario is seen in instances where a divorcing spouse sues their soon-to-be ex-partner's paramour for contributing to the breakdown of the marriage.[117] It cannot be said, though, that the Mississippi legislature provided alienation of affection as a means to remove fault as a consideration in divorce actions.[118]

---

112 *Id.*

113 *Id.* at 298-99.

114 *Id.*

115 David Neil McCarty, *Love in Vain: The Societal Value of Mississippi's Alienation of Affection*, 31 Miss. C. L. Rev. 107, 107 (2013).

116 *Id.* at 113-14.

117 *See id.*

118 *See id.* at 107.

Quite the opposite is true.[119] In fact, Mississippi provides litigants with twelve fault-based grounds to choose from and only allows a divorce to be granted on the basis of no-fault if the two divorcing spouses agree to it.[120] Practically speaking, this means that fault-based grounds are necessary in Mississippi where one party contests the divorce entirely.[121]

Though Mississippi, and five other U.S. jurisdictions[122] continue to allow the "heart balm" tort, its utilization has declined over the years. Some argue that tort law is not properly suited to handle the intimate, private, and emotional issues that were often raised in the context of alienation of affection claims.[123] Instead, personal family matters appear to be best reserved for the area of family law, where all such claims, many of which will overlap, can be addressed together.[124]

B. *Practical Considerations*

Absent a clear formula, as in child support, where proof of certain behaviors results in clear and identifiable consequences, it becomes extremely challenging to know the extent to which fault will factor into the overall outcome of a case. Connecticut, for example, provides that the court "shall" consider the reasons for the breakdown of the marriage in dividing property and awarding alimony, but provides no guidance on the degree to which that consideration should influence financial outcomes.[125] Most of the case law also fails to provide clear guidance on the issue.[126] The trend is

---

119 *See id.*

120 *Id.* at 108.

121 *Id.*

122 Hawaii, New Mexico, North Carolina, South Dakota, and Utah allow lawsuits for alienation of affection. Illinois previously recognized claims for alienation of affection, which was banned in or about 2016. 740 Ill. Comp. Stat. § 5/1.

123 Fernanda G. Nicola, *Intimate Liability: Emotional Harm, Family Law, and Stereotyped Narratives in Interspousal Torts*, 19 Wm. & Mary J. Women & L. 445, 472 (2013.

124 *Id.* at 448.

125 Conn. Gen. Stat. §§ 46b-81, 46b-82.

126 *See* Ingles v. Ingles, 216 Conn. App. 782, 803 (2022) (holding: "While the trial court must consider the delineated statutory criteria [when allocating property], no single criterion is preferred over others, and the court is accorded wide latitude in varying the weight placed upon each item under the particular circumstances of each case. . . .In dividing up property, the court must take many

for judges to simply indicate that all of the factors have been considered, without breaking down the weight given to each.[127] Clearly, fault must be considered according to the statute, but there is no real sense of the degree to which it is considered. This creates a practical challenge in advising clients about potential outcomes, as well as the degree to which they should expend resources pursuing discovery on the issue of fault.

Completely removing fault from the statute does not necessarily solve these issues. Instead, the practical concern in that instance would be attempting to balance the strong and justified desire on the part of wronged spouses for justice, vindication, and equity in the dissolution of their marriage.

Finally, modern social science has properly begun to focus on the impacts of both domestic violence and coercive control in relationships – marital and otherwise. Claims that are grounded in these concepts are appearing with far greater frequency on court dockets, many of which maintain separate "domestic violence" procedural pathways for processing such claims, protecting victims and punishing perpetrators. Should these important considerations be more overtly brought into the realm of divorce, custody and financial orders? For example, should a party who has engaged in highly-controlling financial coercive control, or in a pattern of threatening and abuse, be subjected to consequences as a court enters custodial or financial orders? The answers to these questions may become more apparent over the next several years as societal expectations change and continue to influence the legal framework, in both the legislature and the courtroom.

---

factors into account. . . . A trial court, however, need not give each factor equal weight . . .or recite the statutory criteria that is considered in making its decision or make express findings as to each statutory factor.")

127 *See* Marshall v. Marshall, 224 Conn. App. 45, 54-55 (2024) (stating "the trial court does not need to give each factor equal weight or make express findings as to each factor, but it must consider each fact").