RODRIGUEZ V. RODRIGUEZ: FAULT AS A DETERMINATIVE FACTOR IN ALIMONY AWARDS IN NEVADA AND OTHER COMMUNITY PROPERTY JURISDICTIONS

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I. INTRODUCTION

Prior to 1960, divorce law reflected the idea that the state had, "a profound interest in the institution [of marriage], and therefore could closely regulate its formation, organization, and dissolution."[1] As a result, a party seeking divorce had to demonstrate that his or her spouse was guilty of marital fault.[2] Initially, fault grounds were limited to transgressions such as adultery, physical or mental cruelty, and desertion.[3] In the early 1900s, however, many states expanded their fault statutes to include grounds such as convictions for certain crimes, homosexuality, insanity, and drug or alcohol addiction.[4]

In the early 1960s, as society began to view marriage as a partnership, rather than as a contract between individuals, the fault-based regime began to deteriorate.[5] This movement was supported by the fact that couples would often forum shop for more lenient jurisdictions, or simply manufacture evidence of fault to obtain divorces.[6] The women's liberation movement, and the developing notion of the family as a tightly knit group of independent individuals, furthered the trend.[7] Finally, in 1970, California became the first state to enact a no-fault law, removing marital fault as a consideration in the grounds for divorce.[8]

While all fifty states eventually enacted no-fault statutes relating to the grounds for divorce,[9] only a handful of jurisdictions included provisions pre-

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[1] Laura Bradford, *The Counterrevolution: A Critique of Recent Proposals to Reform No-Fault Divorce Laws*, 49 STAN. L. REV. 607, 609 (1997).

[2] *See id.* at 610.

[3] *See id.*

[4] *See id.*

[5] *See id.* at 611.

[6] *See id.*

[7] *See* Jane Biondi, *Who Pays for Guilt?: Recent Fault-Based Divorce Reform Proposals, Cultural Stereotypes and Economic Consequences*, 40 B.C. L. REV. 611, 613 (1999).

[8] *See* Herma Hill Kay, *An Appraisal of California's No-Fault Divorce Law*, 75 CAL. L. REV. 291 (1987).

[9] *See* Bradford, *supra* note 1, at 614. Fifteen jurisdictions have enacted strict no-fault laws, which abolish fault-based grounds entirely and rely on marital breakdown as the basis for

cluding the consideration of fault in determining property distribution or alimony.[10] Where no express reference has been made, courts differ as to whether to take fault into account.[11] Some courts have held that, in the absence of an express provision, fault may be considered.[12] On the other hand, some courts have concluded that the respective legislatures could not have intended for fault to remain a factor after it was eliminated from the dissolution statutes.[13] This debate has recently been revived with the widespread eradication of interspousal tort immunity, the increasing need for legal remedies to abused spouses, and the volumes of domestic relations scholarship that favor a legal vindication of moral values.[14]

This Note will use the recent Nevada Supreme Court decision in *Rodriguez v. Rodriguez*[15] to illustrate the importance of eliminating fault from consideration, especially in the context of alimony awards. First, this Note will outline the facts and holding in *Rodriguez*. Second, this Note will discuss the history and development of property division and alimony statutes, and the role of fault in these statutes. Third, this Note will evaluate the property allocation and alimony statutes in Nevada's fellow community property states, including those that remain on the opposite end of the spectrum with regard to the consideration of fault. Finally, this Note will evaluate several proposals for less discretionary, more uniform alimony laws, and present another alternative.

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divorce. *See id.* Twenty-one states have simply added no-fault provisions to their existing fault-based statutes. *See id.* Fourteen states and the District of Columbia have merged fault grounds with no-fault provisions, thus creating grounds for divorce such as voluntary separation or incompatibility. *See id.*

[10] *See* Kristine Cordier Karnezis, J.D., 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.

[11] *See id.*

[12] *See, e.g.*, Huggins v. Huggins, 331 So. 2d 704 (Ala. 1976) (reading fault into alimony statute regardless of grounds for divorce); Peterson v. Peterson, 242 N.W.2d 103 (Minn. 1976) (noting that no-fault grounds are limited to divorce and do not extend to property or alimony); Hegge v. Hegge, 236 N.W.2d 910 (N.D. 1975) (stating that no-fault grounds for divorce are not controlling on the issue of alimony); Clay v. Clay, 550 S.W.2d 730 (Tex. App. 1977) (finding no provision regarding the role of fault in property division that corresponded with the no-fault grounds for ending the marriage).

[13] *See, e.g.*, Heilman v. Heilman, 610 So. 2d 60 (Fla. Dist. Ct. App. 1992) (refusing to consider adultery as a factor in awarding alimony); Anderson v. Anderson, 230 S.E.2d 272 (Ga. 1976) (reasoning that since no-fault grounds precluded a finding that fault caused the breakdown of the marriage, evidence on the fault of a spouse would also be irrelevant on the issue of alimony); Marriage of Williams, 199 N.W.2d 339 (Iowa 1972) (eliminating "guilty party" concept from alimony determinations to satisfy the legislature's intent); Campbell v. Campbell, 276 N.W.2d 220 (Neb. 1979) (holding that the issue of whether one party was responsible for the breakdown of the marriage was not a proper factor for the court to consider when dividing property).

[14] *See generally* Carl E. Schneider, *Moral Disclosure and the Transformation of American Family Law*, 83 MICH. L. REV. 1803 (1985); Carl E. Schneider, *Rethinking Alimony: Marital Decisions and Moral Discourse*, 1991 BYU L. REV. 197 (1991); Ira Mark Ellman, *The Place of Fault in Modern Divorce Law*, 28 ARIZ. ST. L.J. 773 (1996); Jane C. Murphy, *Rules, Responsibility and Commitment to Children: The New Language of Morality in Family Law*, 60 U. PITT. L. REV. 1111 (1999).

[15] 13 P.3d 415 (Nev. 2000).

II. *RODRIGUEZ v. RODRIGUEZ*

Rodriguez presented the Nevada Supreme Court with an appeal from the trial court's decision to deny an award of alimony based on marital misconduct.[16] Antonio Rodriguez filed for divorce from his wife of twenty-one years in September 1994.[17] When the trial began in January 1996, Antonio earned a salary of $75,000.00 per year, while his wife Glenda earned $14,000.00.[18] Despite the duration of the marriage, and the disparity in income, the trial court refused Glenda's request for maintenance because she engaged in an extra-marital affair, and "initiated the parties' separation by leaving the family to pursue the extra-marital relationship."[19]

The trial court based its decision on the Nevada Supreme Court's ruling in *Heim v. Heim*,[20] where the court's dictum suggested that marital misconduct may be considered in determining a maintenance award.[21] When *Heim* was decided, the Nevada dissolution statute instructed that a court might award alimony and community property, "having regard to the respective merits of the parties."[22] The *Heim* court construed this to mean that courts could divide property and award alimony in a just and equitable manner, and suggested that "[w]hen examining the 'merits' of the parties the courts might look at the parties' good actions or good behavior or lack thereof in determining what either husband or wife justly deserves."[23]

The trial court's reliance on *Heim* caused it to ignore the amendments made to section 125.150 of the Nevada Revised Statutes in 1993. The Nevada legislature, recognizing the conflict between the concept of no-fault divorce, and the consideration of fault in alimony awards and property division, deleted the phrase "having regard to the respective merits of the parties" from the statute.[24] In 1997, the Nevada Supreme Court reviewed the statute with regard to property division, concluding that the 1993 amendment reflected the Nevada legislature's desire to safeguard the concept of no-fault divorce.[25] Consequently, marital misconduct is not considered in the disposition of community

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[16] *See id.*

[17] *See id.* at 415-16.

[18] *See id.* at 416. Glenda Rodriguez worked as a hall monitor for the Clark County School District and earned $10.11 per hour, during the nine-month school year. *See id.*

[19] *Id.*

[20] 763 P.2d 678 (Nev. 1988).

[21] *See Rodriguez*, 13 P.3d at 416.

[22] NEV. REV. STAT. 125.150(1) (1988).

[23] *Heim*, 763 P.2d at 681.

[24] NEV. REV. STAT. 125.150(1) (1991). The statute now reads as follows:

> In granting a divorce, the court:
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> (a) May award such alimony to the wife or to the husband, in a specified principle sum or as specified by periodic payments, as appears just and equitable; and
>
> (b) Shall, to the extent practicable, make an equal disposition of the community property of the parties, except that the court may make an unequal disposition of the community property in such proportions as it deems just if the court finds a compelling reason to do so and sets forth in writing the reasons for making the unequal disposition.

[25] *See* Wheeler v. Upton-Wheeler, 946 P.2d 200, 203 (Nev. 1997).

property.[26] The court carved out an exception, however, to allow consideration of the economic consequences associated with the misconduct.[27]

The *Rodriguez* case was the Nevada Supreme Court's first opportunity to review the amended statute with respect to alimony awards.[28] The court reiterated the legislative intent behind the 1993 amendment, stating that the questionable language was omitted in response to judicial decisions suggesting that fault might be a determining factor in alimony and property distribution.[29] Because the legislature specified that there are different considerations for property distribution and alimony, the court chose not to apply the economic consequence exception to maintenance awards.[30] Instead, the court referred to *Buchanan v. Buchanan*,[31] where "an inexhaustive list of . . . common sense considerations" was provided by the court.[32] These considerations, commonly referred to as the "*Buchanan* factors," include:

> [t]he financial condition of the parties; the nature and value of their respective property; the contribution of each party to any property held by them as tenants by the entirety; the duration of the marriage; the husband's income, his earning capacity, his age, health and ability to labor; and the wife's age, health, station and ability to earn a living.[33]

While acknowledging the archaic language, in addition to the unnecessary distinctions between husband and wife, the *Rodriguez* court concluded that the *Buchanan* factors are the appropriate guidelines for determining an alimony award.[34] And, although other factors may be considered, depending on the facts of each case,[35] the court declared that the trial court should not consider fault or marital misconduct when evaluating the just and equitable principles dictated by the statute.[36] Consequently, the trial court's denial of Glenda Rodriguez's request for spousal maintenance was reversed, and the case was remanded back to the trial court to determine an alimony award in accordance with the *Buchanan* factors, without reference to Glenda's perceived misconduct.[37]

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[26] *See id.*

[27] *See id.*

[28] Rodriguez v. Rodriguez, 13 P.3d 415 (Nev. 2000).

[29] *Id.* at 417.

[30] *Id.* at 418.

[31] 523 P.2d 1 (Nev. 1974).

[32] See Heim v. Heim, 763 P.2d 678, 680 (Nev. 1988).

[33] *Buchanan*, 523 P.2d at 5.

[34] *See Rodriguez*, 13 P.3d at 419.

[35] *See id.* at 419 n.5. The court suggested that other considerations might include education, training, or marketable skills possessed by a spouse. *See id.*

[36] *See id.* at 420.

[37] *See id.* The Nevada Supreme Court recognized that, under the *Buchanan* guidelines, Glenda was entitled to maintenance. *See id.* "Glenda, a middle-aged woman with health problems, was forced to survive on a meager income after enjoying a comfortable lifestyle within a marriage of lengthy duration. It is not anticipated that she will ever be able to earn more." *Id.*

III. The Role of Fault in Property Distribution and Alimony Award

Property distribution and alimony (or spousal maintenance) are the two mechanisms used to resolve the inequities between spouses at the time of divorce.[38] They are distinguishable in that property claims involve assets acquired during the marriage, while maintenance involves post-divorce income.[39] Each of the fifty states has enacted no-fault divorce statutes, and at least half have adopted portions of the Uniform Marriage and Divorce Act, which continues to allow consideration of fault in both property division and alimony.[40]

A. Fault in Property Division

It seems unnecessary to use fault as a determinative factor in property distribution, especially since property division recognizes the parties' contributions to the marriage, rather than what they have done to cause its deterioration.[41] Nevertheless, some equitable distribution states expressly consider fault when distributing marital property,[42] while others expressly disregard the issue.[43] A no-fault rule seems to be developing, however, based on the concept of joint ownership.[44] This theory makes property claims legal, rather than equitable, and results in the division of property between two owners, thus making the fault of the parties largely irrelevant.[45]

B. Fault in Alimony

Alimony statutes have no underlying theory that is similar to the joint ownership view in the property regime.[46] Alimony originated as a punishment for guilty conduct on the part of one spouse, and a reward for innocent conduct on the part of the other.[47] As the trend in divorce law moved away from fault and punishment, and toward individual independence and reduced animosity between the parties, the role of alimony became based on need and ability to

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[38] *See* Barbara Bennett Woodhouse (with comments by Katharine T. Bartlett), *Symposium on Divorce and Feminist Legal Theory: Sex, Lies, and Dissipation: The Discourse of Fault in a No-Fault Era*, 82 Geo. L.J. 2525, 2532 (1994).

[39] *See id.*

[40] *See id.*

[41] *See id.* at 2533.

[42] *See* Ira Mark Ellman, *The Place of Fault in Modern Divorce Law*, 28 Ariz. St. L.J. 773, 824-30 (1996). These states include Connecticut, Maryland, Massachusetts, New Hampshire, Rhode Island, South Carolina, Vermont, and Wyoming.

[43] *See id.* at 810-18. A majority of states follow this approach. They include Alaska, Arizona, Colorado, Delaware, Idaho, Illinois, Indiana, Kentucky, Maine, Minnesota, Montana, Nebraska, Nevada, New Jersey, New Mexico, Ohio, Oregon, Washington, and Wisconsin. *See id.*

[44] *See id.* at 783.

[45] *See id.* In community property states, the joint ownership view would imply that community property principles would apply "to the management of assets during the marriage, and to their distribution after a spouse's death." *Id.* The common law states have yet to venture that far. *See id.*

[46] *See id.*

[47] *See* Woodhouse, *supra* note 38, at 2535-36.

pay.[48] As such, maintenance claims remain discretionary in entitlement, as well as amount, and fault is often included in the lists of factors that courts may consider.[49]

C. *The Uniform Marriage and Divorce Act*

The Uniform Marriage and Divorce Act (UMDA), first introduced in 1970, blurs the line between property division and alimony with the suggestion that judges should use property to accommodate economic need.[50] The UMDA provides an extensive list of factors to guide judges in distributing marital property, including the duration of the marriage, the age, health, and occupation of each party, vocational skills and employability, prior marriages, and custodial provisions.[51] Further, the UMDA instructs judges to consider whether the property is being apportioned in addition to, or in lieu of alimony, indicating not only that property is intended to serve a support function, but that a preference exists for property allocation over alimony.[52] This preference is expressed in the provision stating that maintenance should not be awarded unless, "the spouse seeking maintenance . . . lacks sufficient property to provide for his reasonable needs."[53]

The UMDA does not promote the consideration of fault in either property division or maintenance awards.[54] In fact, it specifically provides that such determinations be made "without regard to marital misconduct."[55] The UMDA has been implemented, at least in part, by approximately half of the states, yet jurisdictions remain divided as to whether fault should play a role in property and alimony decisions.[56] This dilemma is further complicated by the fact that, even in no-fault jurisdictions, marital misconduct can affect these determinations in two ways.[57] First, nearly all states recognize what are referred to as "financial cost" exceptions to no-fault statutes.[58] This exception allows judges to consider misconduct that has directly affected the amount of property available for distribution.[59] Second, marital misconduct potentially affects property and alimony decisions by increasing the economic need of one party.[60] The classic example is domestic violence, which often leaves a party with increased costs, and fewer financial resources.[61]

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[48] *See id.* at 2536.

[49] *See* Ellman, *supra* note 42, at 784.

[50] *See* Suzanne Reynolds, *The Relationship Between Property Division and Alimony: The Division of Property to Address Need*, 56 FORDHAM L. REV. 827, 830-32 (1988).

[51] *See id.* at 839.

[52] *See id.* at 839-40.

[53] *Id.* at 840-41 (quoting UNIF. MARRIAGE & DIVORCE ACT § 308 cmt. 9A U.L.A. 348 (1973)).

[54] *See* Ellman, *supra* note 42, at 776.

[55] *Id.* (quoting UNIF. MARRIAGE & DIVORCE ACT §§ 307, 308(b), 9A U.L.A. 147 (1987)).

[56] *See id.*

[57] *See id.*

[58] *Id.*

[59] *See id.* at 776-77.

[60] *See id.* at 777.

[61] *See id.* at 777 n.10.

These theories were exemplified in *Rodriguez*, when the court recognized that repeated acts of physical or mental abuse create expenses and decrease chances of employment.[62] The court concluded that misconduct of this sort could result in an unequal distribution of property.[63] Moreover, the court, when applying the *Buchanan* factors to determine alimony, could consider the physical and mental condition of the abused spouse with regard to his or her financial condition, health, and employability.[64] This type of analysis is permitted in no-fault states because the primary basis for an award of alimony is a disparity in post-divorce living standards.[65] Therefore, the judges "can respond . . . without explicit consideration of the misconduct that has altered the disparity."[66]

IV. FAULT AND ALIMONY IN OTHER COMMUNITY PROPERTY JURISDICTIONS

The *Rodriguez* decision solidifies Nevada's position as one of the twenty states[67] that forbids the consideration of fault in both property distribution and alimony awards.[68] In addition, Nevada is one of five community property states with such a scheme.[69] Eliminating marital misconduct from alimony statutes makes sense in light of the policy underlying the principle of community property. Community property laws presume joint ownership of assets, existing from the time the marriage begins.[70] This format recognizes the philosophy that a marriage consists of two individuals that, together, create a partnership.[71] As such, when property is divided at dissolution, using a fifty-fifty starting point, the discretion of the court is greatly limited.[72] An unequal division of property is only permitted when the court finds and articulates a compelling reason.[73] Similarly, Nevada's statutory construction, combined with the judiciary's interpretation, has successfully limited the factors considered by dissolution courts with regard to alimony. After *Rodriguez*, courts must refrain from considering fault or misconduct, and must decide whether to award maintenance based on the parameters set forth in *Buchanan*.

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[62] *See* Rodriguez v. Rodriguez, 13 P.3d 415, 419 (Nev. 2000).

[63] *See id.*

[64] *See id.*

[65] *See* Ellman, *supra* note 42, at 777.

[66] *Id.*

[67] *See* Ellman, *supra* note 42, at 810-15. The remaining spelling states are: Alaska, Arizona, California, Colorado, Delaware, Florida, Hawaii, Illinois, Indiana, Iowa, Maine, Minnesota, Montana, Nebraska, New Mexico, Oklahoma, Oregon, Washington, and Wisconsin. *See id.*

[68] *See id.* at 813. Prior to *Rodriguez*, there were no modern Nevada cases addressing the role of fault in alimony, and prior Nevada Supreme Court decisions (such as *Heim*) indicated that an evaluation of marital misconduct might be permissible. *See id.*

[69] *See id.* at 810-15. The remaining states are Arizona, California, New Mexico, and Washington. *See id.*

[70] *See* GRACE GANZ BLUMBERG, COMMUNITY PROPERTY IN CALIFORNIA 6 (3d ed. 1999).

[71] *See* Kay, *supra* note 9, at 302.

[72] *See* Ellman, *supra* note 42, at 783.

[73] *See* NEV. REV. STAT. 125.150(1)(b) (2000).

A. *Jurisdictions with No-Fault Alimony Statutes*

A survey of other community property jurisdictions reveals that many have adopted an approach to alimony similar to that in Nevada. These states include Arizona, California, New Mexico, and Washington.

1. Arizona

Arizona's property allocation statute incorporates language from the Uniform Marriage and Divorce Act, instructing that a court must distribute marital property "without regard to marital misconduct."[74] The state's maintenance law reads similarly.[75] Interestingly, the statute also reflects the UMDA's preference for property distribution, with marital property allocated to each party listed as one of the many factors to be considered by the court.[76]

2. California

In California, an equal division property regime completely eliminates judicial discretion when allocating marital property. In fact, the code provides 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."[77] Accordingly, courts are also prohibited from considering fault in alimony awards.[78]

As the first no-fault divorce statute in the nation, California's Family Law Act of 1970 sparked the development of no-fault laws in other jurisdictions, and worked to reform state statutes in other areas of family law.[79] Perhaps the most significant change was the requirement that property be divided equally between the parties at the time of divorce.[80] Although the Act's drafters did not intend to do so, this provision promoted gender equality in dissolution law by treating spouses as equal partners without regard to sex.[81] The equality theme also resulted in the legislative expansion of the factors to be taken into account when awarding alimony.[82] The Act initially stated two factors, and that number has now increased to eight.[83] In addition, the code allows judges to make factual findings with respect to each factor.[84]

3. New Mexico

New Mexico's dissolution statutes are silent as to the use of fault, since fault is not included in the list of factors for a court to consider in making a determination with regard to property or alimony.[85] Further, there are no deci-

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[74] ARIZ. REV. STAT. § 25-318 (2000).
[75] *See id.* § 25-319(B) (2000).
[76] *See id.* § 25-319(B)(9).
[77] CAL. FAM. CODE § 2335 (West 1995). *See also* Ellman, *supra* note 42, at 810.
[78] *See* Ellman, *supra* note 42, at 810-15.
[79] *See* Kay, *supra* note 8, at 297.
[80] *See id.* at 301.
[81] *See id.*
[82] *See id.* at 306-07.
[83] *See id.*
[84] *See id.* at 307.
[85] *See* N.M. STAT. ANN. § 40-4-7(E) (Michie 1999).

sions addressing fault as a factor in divorce proceedings. The case that comes closest indicates that the state is "not concerned with 'fault' of the spouse in determining a right to support . . . . An award of alimony is not dependant upon the fault of a spouse."[86]

4. Washington

Like Arizona, Washington follows the UMDA, requiring that property and alimony decisions be made "without regard to marital misconduct."[87] However, the legislature does allow the physical and emotional condition of the spouse seeking support to be a factor for the court, along with that party's financial obligations.[88] As such, circumstances that traditionally indicate fault, such as spousal abuse, can be considered to the extent that they diminish the party's ability to adequately function in these areas. *In re Foran*[89] reflects this philosophy. There, the court admitted evidence of physical abuse during the marriage to decide the wife's employability and future earning capacity based on post-traumatic stress disorder resulting from the abuse.[90]

B. Jurisdictions with Fault-Based Alimony Statutes

Despite the majority of community property states that have consistent no-fault provisions for property distribution and alimony, three jurisdictions continue to allow consideration of marital misconduct. Application of the *Rodriguez* facts to their respective statutes reveals the vast disparity between the no-fault and fault based approaches.

1. Idaho

The Idaho Code does not provide for the consideration of fault in property allocation,[91] yet it allows fault to be a factor in alimony decisions.[92] Prior to 1990, innocence was the threshold requirement to establish eligibility for alimony.[93] In at least one instance, however, the court upheld a maintenance award when the wife's fault, while enough to grant divorce on the husband's behalf, was not so significant to justify a denial of alimony.[94] Amendments to the statute in 1990 eliminated fault as a prerequisite, relegating it to one of several factors for the court's consideration.[95] In its place, need and ability to pay became the primary basis for alimony awards.[96] There are few relevant

[86] Ellman, *supra* note 42, at 814 (quoting Lauderdale v. Hyord Conduit Corp., 555 P.2d 700, 705 (N.M. Ct. App. 1976)).
[87] WASH. REV. CODE ANN. §§ 26.09.080, 26.09.090 (West 1999).
[88] *See id.* § 26.09.080(1)(e).
[89] 834 P.2d 1081 (Wash. App. 1992).
[90] *See id.* at 1083.
[91] *See* IDAHO CODE § 32-712(1)(b) (Michie 2000) (instructing that the court divide community property "substantially equally").
[92] *See id.* § 32-705(2)(g).
[93] *See* Marmon v. Marmon, 825 P.2d 1136, 1138 (Idaho Ct. App. 1991); Tisdale v. Tisdale, 900 P.2d 807, 810 (Idaho Ct. App. 1995).
[94] *See* Shepard v. Shepard, 497 P.2d 321 (Idaho 1972).
[95] *See Tisdale*, 900 P.2d at 810.
[96] *See Marmon*, 825 P.2d at 1139.

cases following the amendment but it seems as though Idaho courts have let fault fall by the wayside.[97]

2. *Louisiana*

Louisiana is classified as a "pure" no-fault property state.[98] As such, the state does not consider fault, or any other factor, in allocating property to divorcing spouses. Rather, it makes an equal division of the community property.[99] It would seem to follow that fault would be eliminated from consideration in maintenance decisions as well, but the Louisiana Civil Code provides for a fault-based determination in cases of final alimony awards.[100] An award of interim periodic spousal support, on the other hand, does not require a finding of fault.[101] The Louisiana Supreme Court, after noting that several attempts to eliminate fault from the statute failed in the legislature,[102] defined fault as "serious misconduct, which is a cause of the marriage's dissolution."[103] Transgressions included in this definition are adultery, felony convictions, cruel treatment, public defamation, abandonment, attempted murder, and intentional failure to support.[104]

3. *Texas*

Although a no-fault divorce statute was adopted in 1970, Texas law allows litigants to plead fault based on traditional grounds such as mental cruelty, adultery, or abandonment.[105] The law provides for the consideration of fault in both property division and alimony awards, regardless of whether the divorce was granted under the fault provision, on a no-fault basis, or according to both fault and no-fault grounds.[106] The relevant property statute provides that community property be divided as is "deem[ed] just and right."[107] Fault may be considered in the property distribution to make a just division, but not to punish a spouse.[108] While the court never distinguished between the two, it did go on to state that the trial court has extremely broad discretion in these instances.[109]

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[97] *See, e.g.*, Mulch v. Mulch, 867 P.2d 967, 973 (Idaho 1994) (citing to amended statute to award an abused wife alimony, and stating that if the innocent spouse requirement applied, wife would also be entitled because any behavior that may have provoked her husband was part of the abuse cycle that he created).

[98] *See* Ellman, *supra* note 42, at 821.

[99] *See* LA. CIV. CODE ANN. art. 112(A) (1) (West 1996).

[100] *See id.* at art. 111 (stating that the court may "award final periodic support to a party free from fault . . . .").

[101] *See id.* at art. 113.

[102] *See* Allen v. Allen, 648 So. 2d 359, 362 nn. 2-3 (La. 1995).

[103] *Id.* at 362.

[104] *See* Guillory v. Guillory, 626 So. 2d 826, 829 (La. Ct. App. 1993).

[105] *See* Barbara Ann Kazen, *Division of Property at the Time of Divorce*, 49 BAYLOR L. REV. 417, 426 (1997).

[106] *See id.*

[107] TEX. FAM. CODE ANN. § 7.001 (Vernon 2000).

[108] *See* Young v. Young, 609 S.W.2d 758, 762 (Tex. 1980).

[109] *See id.*

Texas is unique among the fifty states when it comes to alimony because the state's alimony statute was enacted in 1995,[110] nearly 150 years after most other jurisdictions.[111] The hesitancy to enact an alimony law stemmed from the fact that, since 1841, alimony had been contrary to public policy in Texas.[112] In that year, the Texas Supreme Court evaluated the state's second divorce statute, which called for permanent divorce, and alimony pending divorce.[113] The statute neglected to provide for alimony after divorce, and the courts therefore reasoned that what was not expressly stated was prohibited.[114] Today, alimony in Texas is awarded on a limited basis. Claimants must have been married for at least ten years, except in cases of family violence.[115] In addition, the maintenance is always temporary, with no award lasting longer than three years.[116] Finally, in determining the duration and size of the award, a court must consider all relevant factors, including "the marital misconduct of the spouse seeking maintenance."[117]

C. *Application of the* Rodriguez *Facts to Fault Based Statutes*

Application of the *Rodriguez* facts to the aforementioned statutory schemes reveals the inconsistent results yielded by the varied divorce statutes throughout the United States. Had the Rodriguez divorce been in Idaho, for example, there is some debate as to whether Glenda would be entitled to alimony. Prior to the 1990 statutory amendments, she would be denied support because she was not an innocent spouse. Now that the statute reflects the legislature's desire to make need and ability to pay the primary concerns,[118] it appears that Glenda has a greater opportunity to receive support. Nevertheless, Idaho has not entirely eliminated fault from the alimony provision; it is still a factor for the court to consider.[119] And since Glenda's affair led to her abandonment of the marital home,[120] an Idaho court could very well deny her request, despite her economic need.

Under the Louisiana statute, Glenda's request would be flatly denied because her affair would render her at fault. In Louisiana, only innocent spouses can request alimony.[121] In fact, since Louisiana courts define adultery as the type of serious misconduct that entitles an innocent spouse to a mainte-

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[110] *See* Denise Causey Haugen, *Texas and Alimony: The Possibility of a Constitutional Attack*, 34 HOUS. L. REV. 477, 492 (1997). In efforts to align it with the other forty-nine states, the Texas legislature introduced alimony bills in every session since 1971. *See id.* Until 1995, they were all defeated. *See id.*

[111] *See* James W. Paulsen, *Symposium Remark: The History of Alimony in Texas and the New "Spousal Maintenance" Statute*, 7 TEX. J. WOMEN & L. 151 (1998).

[112] *See id.*

[113] *See id.* at 152.

[114] *See id.*

[115] *See* TEX. FAM. CODE ANN. § 8.002 (Vernon 2000).

[116] *See id.* §8.005(a)(1).

[117] *Id.* § 8.003.

[118] *See* IDAHO CODE § 32-705(1) (Michie 2000).

[119] *See id.* § 32-705(2)(g).

[120] *See* Rodriguez v. Rodriguez, 13 P.3d 415, 416 (Nev. 2000) (stating that the trial court denied Glenda's request for support because she participated in an extra-marital affair and left the family home).

[121] *See* LA. CIV. CODE art. 111 (West 2000).

nance award,[122] a Louisiana judge could feasibly force Glenda to pay support for her husband. The only way Glenda could receive support under this statute is on a temporary basis. The facts of the case indicate that this would not prove beneficial because of Glenda's minimal earning capacity, and her ailing health.[123]

Glenda's request would also be denied were this case tried in Texas. Although Texas' alimony statute is relatively new, it is very restricted. While the Rodriguez marriage meets the threshold duration of ten years,[124] the fault of the spouse seeking maintenance is a factor for courts to consider,[125] and as such, Glenda's case would fail. Even if the court were to award alimony to Glenda, Texas' requirement that support payments last no longer than three years does not allow for the financial support that a woman with a low earning capacity and poor health needs to sustain her for the remainder of her life.

V. PROPOSALS FOR A MORE UNIFORM APPROACH TO MAINTENANCE AWARDS

While the trend in most jurisdictions is to eliminate marital fault from consideration in property allocation, the alimony statutes reflect a patchwork of different policies.[126] Legislative reform in this area is becoming increasingly important, and some have suggested that the best solution is the reinstitution of fault-based dissolution laws.[127] These efforts are supported by the fundamental belief that fault-based statutes will preserve the family unit.[128]

A. *Fault v. No-Fault: The Age Old Debate*

Many states have attempted to reform their divorce laws by reintroducing the notion of fault.[129] Louisiana's legislature introduced fault into that state's divorce laws by adopting the Covenant Marriage Act in 1997.[130] The Act allows couples to contract for a covenant marriage, rather than a traditional one, and imposes both pre-marital and post-marital criteria for the couple to fulfill.[131] Before the couple weds, they must complete three requirements set forth in the Act.[132] First, they must provide full disclosure of anything "which may adversely affect the decision to enter into this marriage."[133] Second, the couple must receive pre-marital counseling from a religious leader or professional counselor.[134] Finally, the couple must vow to seek marital counseling

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[122] *See* Guillory v. Guillory, 626 So. 2d 826, 829 (La. Ct. App. 1993).
[123] *See Rodriguez*, 13 P.3d at 420.
[124] *See id.* at 415-16. The couple was married for twenty-one years. *See id.*
[125] *See* TEX. FAM. CODE ANN. § 8.003(11) (Vernon 2000).
[126] *See* Woodhouse, *supra* note 38, at 2535-36.
[127] *See* Biondi, *supra* note 7, at 619 (citing Laura Gatland, *Putting the Blame on No-Fault*, 83-APR A.B.A. J. 50, 52 (1997)).
[128] *See id.*
[129] *See id.* at 620.
[130] *See id.*
[131] *See id.* at 619-20.
[132] LA. REV. STAT. ANN. § 9:273(A) (West 2000).
[133] *Id.* § 9:273(A)(1).
[134] *See id.* § 9:273(A)(2).

when they experience trouble in their relationship.[135] The Act also restricts divorce grounds to fault-based transgressions such as adultery, commission of a felony with a sentence of death or hard labor, abandonment, physical or sexual abuse of the spouse seeking the divorce, or of a child, and living apart.[136]

Proponents of fault-based dissolution statutes also argue that fault functions as leverage for the economically disadvantaged spouse.[137] The spouse, usually the wife, may bargain for a fair divorce settlement by threatening a trial where her husband's misgivings will be broadcast to the public.[138] In addition, if a faultless wife demonstrates to a court that her husband was at fault, she immediately strengthens her case and increases her chances for a greater share of property, and a significant maintenance award.[139]

Although reformers favoring fault-based legislation have the good intention of preserving the family unit, reverting to a fault-based regime is not the answer. Fault-based proposals add unnecessary strain to the divorce process, proving counterproductive to the parties.[140] Most significantly, these provisions leave much of the statute open to interpretation, thereby broadening judicial discretion.[141] With no objective guidelines, a spouse's behavior is left to the prudence of the court, virtually encouraging divorcing couples to seek the specific courtrooms and jurisdictions that best fit their dissolution needs.[142] Forum shopping based on the "wildly divergent standards in different courtrooms"[143] is a factor that greatly contributed to the advent of no-fault divorce in the first place. Moreover, when judges are left to interpret a fault-based statute (Louisiana's Covenant Marriage Act, for example), they have limitless discretion in deciding what constitutes faulty behavior and to what extent that behavior should be punished.[144]

Reintroducing fault into divorce law also allows for unjust results based on cultural assumptions, particularly about women.[145] For instance, a faultless wife who is employed outside the home may receive a smaller financial settlement than her homemaker counterpart, simply because she appears to be less victimized, or less deserving.[146] In contrast, a wife who stays at home and is at fault is entitled to nothing under the fault-based philosophy, despite her severe economic need.[147] Her divorce would thus leave her, and most likely her children, in poverty because her husband's duty to provide financial support would be alleviated.[148]

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135 *See id.*
136 *See* Biondi, *supra* note 7, at 620.
137 *See id.*
138 *See id.* at 620-21.
139 *See id.* at 621.
140 *See id.* at 611.
141 *See id.* at 623.
142 *See id.*
143 *Id.*
144 *See id.* at 625.
145 *See id.*
146 *See id.*
147 *See id.* at 628.
148 *See id.*

Advances in Tort Law

With advances in the area of tort law, alimony laws that take fault into account become even less necessary. As the doctrine of interspousal tort immunity continues to deteriorate, victimized spouses need no longer rely on dissolution statutes to provide remedies.[149] For example, a spouse that is physically abused by his or her partner now has the ability to bring a battery claim.[150] A spouse may also have a viable claim of intentional infliction of emotional distress (IIED), arising from an incident where there was no physical altercation, but verbal or psychological abuse.[151] Critics fear that relying on tort law will lead to additional claims, but the pressing issue is not the number of claims, but rather, the tort law's ability to handle these claims and provide adequate remedies.[152] Assuming it does, an abused spouse will seek redress under the tort law and courts will no longer be required to provide a remedy at the time of divorce. Opponents also argue that victims of spousal abuse may be physically or psychologically unable to bring a battery claim before the statute of limitations expires.[153] Whether tort law should manage these cases differently, by tolling the statute for example,[154] is a question beyond the scope of this Note. This proposal, however, presents a more preferable alternative to joining the battery and dissolution claims.[155]

B. *Reformation of Alimony Statutes*

Without reverting back to a fault-based regime, how can alimony statutes be reformed to create a more uniform and consistent system that satisfies the policy concerns of state legislatures? There is no steadfast solution, but several sensible proposals lead us in the right direction.

1. The American Law Institute

The 1998 draft of the American Law Institute's (ALI) Principles suggests reform in all aspects of divorce law, including alimony.[156] The ALI proposes the elimination of need as a basis for alimony awards and its replacement with an inquiry as to a spouse's loss after a divorce.[157] Accordingly, alimony becomes "a remedy for unfair loss allocation, rather than for relief of need."[158] The Principles even go so far as to replace the term "alimony" with the phrase

[149] *See* Ellman, *supra* note 42, at 792.
[150] *See id.*
[151] *See id.* at 794. IIED claims are not as clearly defined as battery claims, often because there is no physical touching. *See id.* Courts generally entertain IIED claims when accompanied by a battery, but pure IIED claims are less successful because without a physical attack, it is difficult to prove a defendant's outrageous behavior. *See id.* at 793-94.
[152] *See id.*
[153] *See id.* at 793.
[154] *See id.*
[155] *See id.* ("Consideration [of the tort claim] 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.").
[156] *See generally* Ira Mark Ellman, *Brigitte M. Bodenheimer Memorial Lecture on the Family: Inventing Family Law*, 32 U.C. DAVIS L. REV. 855 (1999).
[157] *See id.* at 879.
[158] *Id.*

"compensatory payments."[159] The ALI draft contains explanations of five different losses, distinguishable primarily by the length of the relationship.[160] The proposal works to reach a post-divorce point where the parties share the economic loss equally.[161] To accomplish this task, the Principles award compensatory payments in proportion to the length of the marriage and the caretaking duration.[162] Similar to child support statutes in many states, the maintenance awards in this case are allocated in periodic payments, although the court can order a lump sum payment as well.[163]

The ALI Principles are revolutionary in that they provide for appellate review. A spouse is entitled to an award under this format unless the trial court judge finds that the facts of his or her case differ substantially from the majority of cases, in a manner not contemplated by the presumption, thereby making adherence to the Principles unjust to one of the parties.[164] Upon appellate review, the questions become whether the case does in fact differ substantially from the facts of other cases, and whether an award in accordance with the presumption would actually be unjust.[165]

More importantly, the ALI's approach reduces the vast discretion afforded to trial judges under a fault-based system. While the size of the awards may prove more than what some courts would normally require, they are reliable, predictable, and consistent.[166]

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159 *Id.*

160 *See id.*

> The two key losses are the loss of the marital living standard at the dissolution of a marriage of significant duration, incurred by the spouse who has less wealth or earning capacity, and the loss in earning capacity incurred during the marriage, and continuing after divorce, arising from a spouse's disproportionate share during marriage of the responsibility to care for the couple's children. Note also that the chapter does not recognize these two losses on an all or nothing basis, but in proportion to the length of the marriage or child care period. The loss of marital living standard, for example, is fully recognized only in relatively lengthy marriages. Note also that the chapter does not call for full compensation for the loss even then, but rather equal sharing of the loss by the uninjured party. The Principles find no basis for shifting an entire loss from one party to the other within the context of a no-fault system . . . The third recognized loss is modeled on the loss incurred on account of the spouse's care of "a sick, elderly or disabled third party, in fulfillment of a moral obligation of the other spouse or both spouses jointly." The two remaining recognized losses do not depend upon duration for their full recognition, and thus can have importance in shorter marriages. They are "[t]he loss either spouse incurs when the marriage is dissolved before that spouse realizes a fair return from his or her investment in the other spouse's earning capacity," and "[a]n unfairly disproportionate disparity between the spouses in their respective abilities to recover their pre-marital living standard after the dissolution of a short marriage."

Id. at 879-80 n.54.

161 *See id.* at 881.

162 *See id.*

163 *See id.*

164 *See id.* at 881-82.

165 *See id.* at 882.

166 *See id.*

2. The Income-Sharing Model

Jana B. Singer's proposal for alimony reform rests in her income-sharing model.[167] Under this theory, the spouses, as equal contributors to the marriage, should share equally any benefit or loss resulting from their divorce.[168] The key to Singer's approach is that the incomes of the parties after divorce remain jointly, rather than individually, owned.[169] In a marriage of long duration, for example, this method would work to allow divorced spouses to share their income for a specific number of years, possibly one year for every two years of marriage.[170]

The effects of this proposal are very encouraging. For instance, a spouse with an earning capacity much more significant than that of his or her spouse is no longer able to threaten that spouse with "economic abandonment" when the marriage ends.[171] In addition, Singer argues that this method persuades men to increase their participation in domestic life.[172] This not only benefits the children, but initiates gender equality in the workplace, a change.[173] Like the ALI model, the income sharing approach is also effective in eliminating judicial discretion with respect to alimony awards by reducing the vague standards often associated with a fault-based regime.[174]

3. A Middle-Ground Approach

While the aforementioned proposals offer refreshing suggestions for alimony reform, state legislatures do not yet seem ready to abandon their fault-based philosophies in favor of a no-fault regime, especially one that eliminates need-based alimony, or one that requires shared income even after the end of the relationship. Perhaps a middle ground approach, incorporating provisions from both no-fault and fault-based statutes, would meet the need for uniformity and consistency while still appeasing proponents on each side of the debate.

An acceptable statutory scheme would restrict a court's consideration of fault without necessarily eliminating it altogether. First, the statute must articulate the exact behavior that constitutes fault. Simply stating that marital misconduct is an appropriate ground for denying alimony is unacceptable because it allows for immeasurable judicial discretion, with varied and inconsistent results.[175]

Second, the middle ground statute would not look at fault to determine whether a maintenance award is justified, but rather to adjudicate the size and duration of the award. Even then, the consideration of fault would be coupled

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[167] *See* Jana B. Singer, *Symposium on Divorce and Feminist Legal Theory: Alimony and Efficiency: The Gendered Costs and Benefits of the Economic Justification for Alimony*, 82 GEO. L.J. 2423, 2454 (1994).

[168] *See id.* at 2455.

[169] *See id.*

[170] *See* Bradford, *supra* note 1, at 636.

[171] *See* Singer, *supra* note 167, at 2455.

[172] *See id.*

[173] *See id.*

[174] *See id.* at 2456.

[175] *See* Ellman, *supra* note 42, at 784.

with an evaluation of each spouse's need for alimony.[176] This is consistent with the policies underlying no-fault divorce in that the actual grounds for ending the marriage remain fault-free.[177] Marital misconduct would be used merely as one of many factors to gauge how much a spouse is entitled to and for how long. This would serve an especially important function in jurisdictions where, after the adoption of no-fault grounds for dissolution, the legislative histories remain silent as to the role of fault in property division and alimony.[178]

The idea of a statute that affects only the size and duration of an alimony award is present in Texas's maintenance provision,[179] yet the law remains problematic because this element is combined with two other stipulations. When applied as a whole, the statute proves severely restricted, making compliance by the spouse seeking support nearly impossible. For instance, the second element in Texas's statute requires that the couple be married for ten years before a party can request alimony.[180] This provision forces courts to reject legitimate claims for support simply because the relationship did not last a decade. One envisions a deserving spouse being denied maintenance simply because his or her marriage ended after nine years and six months.

The third Texas provision limits alimony awards to a term of no longer than three years.[181] Short-term, or rehabilitative, maintenance developed after the introduction of no-fault legislation, and aimed to provide temporary support to wives until they could supplement their education and become self-sufficient in the workforce.[182] This type of award presents serious problems, however, because it fails to consider the significant difference in the earning potentials for men and women.[183] Even after a wife takes the time to further her education and training, she remains unable to secure a salary comparable to her male counterpart.[184] Moreover, statutes similar to that in Texas are detrimental to

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[176] A separate evaluation, using the same format, would be done to determine the distribution of community property.

[177] *See id.* at 776.

[178] *See, e.g.*, Huggins v. Huggins, 331 So. 2d 704 (Ala. 1976) (reading fault into alimony statute regardless of grounds for divorce); Peterson v. Peterson, 242 N.W.2d 103 (Minn. 1976) (noting that no-fault grounds are limited to divorce and do not extend to property or alimony); Hegge v. Hegge, 236 N.W.2d 910 (N.D. 1975) (stating that no-fault grounds for divorce are not controlling on the issue of alimony); Clay v. Clay, 550 S.W.2d 730 (Tex. App. 1977) (finding no provision regarding the role of fault in property division that corresponded with the no-fault grounds for ending the marriage); Heilman v. Heilman, 610 So. 2d 60 (Fla. Dist. Ct. App. 1992) (refusing to consider adultery as a factor in awarding alimony); Anderson v. Anderson, 230 S.E.2d 272 (Ga. 1976) (reasoning that since no-fault grounds precluded a finding that fault caused the breakdown of the marriage, evidence on the fault of a spouse would also be irrelevant on the issue of alimony); Marriage of Williams, 199 N.W.2d 339 (Iowa 1972) (eliminating "guilty party" concept from alimony determinations to satisfy the legislature's intent); Campbell v. Campbell, 276 N.W.2d 220 (Neb. 1979) (holding that the issue of whether one party was responsible for the breakdown of the marriage was not a proper factor for the court to consider when dividing property).

[179] *See* TEX. FAM. CODE ANN. § 8.002(2) (Vernon 2000).

[180] *See id.*

[181] *See id.* § (a)(1).

[182] *See* Biondi, *supra* note 7, at 616.

[183] *See id.*

[184] *See id.*

homemakers and wives that have just ended lengthy marriages, because their age, combined with the amount of time spent outside of the labor market, increase their need for financial assistance beyond the point where rehabilitative maintenance is beneficial.[185]

Community property states are presented with another alternative for keeping their property distribution statutes aligned with their alimony statutes. By dividing community property equally instead of equitably, state legislatures successfully eradicate the consideration of fault.[186] Legislatures could base alimony statutes on the same presumption of equality, eliminating the role of fault and enabling the use of another scheme, such as the ALI Principles, to balance the equities between the parties. This approach would eliminate, at least in part, the discretion of divorce courts, and may even encourage couples to settle amicably, sparing them the cost, publicity, and emotional turmoil associated with a trial.

Of course, couples always have the option of entering into pre-nuptual agreements to avoid the current statutory schemes in their states. Valid agreements allow the parties to indicate in writing their desires should their marriage terminate and, unless they violate public policy, the contracts trump the statutory requirements. This allows parties to take into account their earning capacities and assets, and encourages them to "create their own incentives, whether financial or otherwise, to stay in the marriage."[187]

VI. CONCLUSION

There is no doubt that current dissolution laws, statutes regarding spousal support in particular, are in desperate need of reform. The advent of no-fault divorce resulted in no-fault provisions in all fifty states, but it did not resolve the question of whether fault should continue to play a role in property allocation and alimony awards.[188] States are divided on this issue, and some reformers suggest that the most efficient way to solve the problem is to reintroduce fault-based criteria into dissolution laws.[189] However, this solution only exac-

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[185] *See id.* at 616-17.

[186] *See* BLUMBERG, *supra* note 70, at 6. California, Louisiana, and New Mexico are all equal division jurisdictions. *See id.* Nevada is also an equal distribution state, but the relevant statute goes one step further, allowing for an unequal division of community property when the court finds a compelling reason. *See* NEV. REV. STAT. 125.150(1)(b) (1993).

[187] Bradford, *supra* note 1, at 636. Historically, premarital agreements addressing spousal support and property division upon divorce were deemed unenforceable for several reasons. It was believed that the agreements were against public policy because they encouraged divorce, that alimony was a state-imposed obligation and thus not subject to private contract, and that enforcement of such agreements would result in the disadvantaged spouse relying indefinitely on public assistance. *See* Nora J. Lauerman, *Feminist Moral, Social, and Legal Theory: A Step Toward Enhancing Equality, Choice, and Opportunity to Develop in Marriage and at Divorce*, 56 U. CIN. L. REV. 493, 511-12 (1987). The current trend, however, is to uphold valid antenuptial agreements defining support and property rights, provided the agreement was entered into in good faith, and there was full and fair disclosure of the nature and extent of each spouse's assets. *See id.* at 513 (citing Posner v. Posner, 233 So. 2d 381 (Fla. 1970)).

[188] *See* Ellman, *supra* note 42, at 775.

[189] *See id.*

erbates the problem because fault-based laws allow for limitless judicial discretion, and needs a variety of statutory interpretations, often overlooking the parties' abilities to pay.

Nevada is one of several states that forbid consideration of fault in all aspects of dissolution law.[190] The *Rodriguez* case demonstrates the importance of a no-fault approach to alimony awards, and an application of the facts to fault-based provisions in other community property states illustrates the financial disaster facing a faulty spouse under a fault-based regime.

Several viable alternatives have been suggested that will determine maintenance awards without reference to marital misconduct. Most state legislatures, however, seem somewhat hesitant to discard their fault-based provisions entirely. Tension between proponents on both sides of this issue may be eased with the adoption of statutes that incorporate workable provisions from both fault-based and no-fault policies. This would address the two most common concerns with current laws: inconsistent application and vast judicial discretion.[191] If nothing else, this statutory scheme indicates to state legislatures that marriage is much more than a status relationship.[192] Expanding notions of partnership and family are constantly redefining marriage, and legislatures should structure divorce laws in a manner that encourages individual choices, rather than dictates family values.[193]

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[190] *See id.* at 813-14.
[191] *See id.* at 784.
[192] *See* Bradford, *supra* note 1, at 636.
[193] *See id.*