One More Time: Alimony, Intuition, and the Remarriage-Termination Rule†

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Here we go again
She'll break my heart again
I'll play the part again
One more time.[1]

INTRODUCTION

Marriage has a powerful attraction. Sooner or later, for the long or the short haul, the vast majority of Americans will marry. In 2003, 72% of men and women had been

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1. RAY CHARLES, *Here We Go Again*, *on* MODERN SOUNDS IN COUNTRY AND WESTERN MUSIC (Rhino Records 1988).

married by age thirty-four, 96% by age sixty-five.[2] In 1996, more than two million couples exchanged marital vows,[3] an amazing devotion to an institution with a near 50% failure rate.[4] Perhaps even more surprisingly, failure of a first marriage does not usually deter spouses from marrying again. Roughly 75% of divorcing women remarry within ten years; 54% remarry within five years.[5] Unfortunately, these second marriages are at least as likely to fail as first ones.[6]

For some who marry a second time, marriage demands a hefty admission price[7] not imposed on first-timers: any alimony[8] claim against a former spouse will likely

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2. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS, AMERICA'S FAMILIES AND LIVING ARRANGEMENTS: 2003, at 12 (2004), *available at* http://www.census.gov/prod/2004pubs/p20-553.pdf. Data collected in 1996 revealed that only about 5% of White non-Hispanics, Asians, and Pacific Islanders age forty-five and older had never been married, as compared with 7% of Hispanics and 10% of Blacks. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS, NUMBER, TIMING, AND DURATION OF MARRIAGES AND DIVORCES: 1996, at 6 (2002), *available at* http://purl.access.gpo.gov/GPO/LPS18539 [hereinafter CENSUS 1996].

3. CENSUS 1996, *supra* note 2, at 10.

4. *Id.* at 17–18 (projected divorce rate for people in their forties in a first-time marriage). This 50% figure is up from a 1976 estimate, which projected a divorce rate of one-third. *Id.* at 19. In 1996, 40% of ever-married White and Hispanic women were divorced from their first spouse, as compared with 48% for Black women and 24% for Asian and Pacific Islander women. *Id.* at 18. *See also* MATTHEW BRAMLETT & WILLIAM MOSHER, FIRST MARRIAGE DISSOLUTION, DIVORCE, AND REMARRIAGE: UNITED STATES, ADVANCE DATA FROM VITAL AND HEALTH STATISTICS, NO. 323, NATIONAL CENTER FOR HEALTH STATISTICS: 2001 (43% of first marriages end in separation or divorce within fifteen years).

Marriages entered later in the twentieth century are more likely to end in divorce than marriages entered earlier. Of women who first married from 1945 to 1949, 90% reached their tenth wedding anniversary, 81% reached their twentieth anniversary, and 70% reached their thirtieth anniversary. CENSUS 1996, *supra* note 2, at 3. By contrast, 73% of women first married from 1980 to 1984 reached their first anniversary, 56% of women first married from 1970 to 1974 reached their twentieth anniversary, and 55% of women first married from 1950 to 1964 reached their thirtieth anniversary. *Id.* The figures are generally lower for Black and Hispanic women than for White non-Hispanic women. *Id.* at 10.

5. U.S. Dep't of Health & Human Serv., *Cohabitation, Marriage, Divorce, and Remarriage in the United States*, VITAL AND HEALTH STATISTICS, July 2002, at I, 22, *available at* http://purl.access.gpo.gov/GPO/LPS22381.

6. Based on 1996 data, the Census Bureau reports that women who entered second marriages in 1975 through 1984 were less likely to reach their tenth anniversary than women entering first marriages during the same period. CENSUS 1996, *supra* note 2, at 3. The average duration of a first marriage that ends in divorce is about eight years; for second marriages the duration is about seven years. *Id.* at 9.

7. Because most divorcing couples have few significant assets, the alimony award may have been the only judicial tool available for achieving spousal economic equity. Consequently, termination of alimony may significantly affect an alimony recipient and upset the court's plan for interspousal equity. *See* Marsha Garrison, *Good Intentions Gone Awry: The Impact of New York's Equitable Distribution Law on Divorce Outcomes*, 57 BROOK. L. REV. 621, 662–63 (1991) (stating that divorcing couples in New York usually had less than $25,000 in divisible assets); Ilene E. Shapiro & Barry A. Schatz, *Has the Illinois Equitable Distribution Statute Advanced the Cause of the Homemaker?*, 74 ILL. B.J. 492, 500 (1986) ("[M]ost estates are too small to support anyone.").

terminate, often automatically and without regard to financial impact. The intuition of most observers is that this is the right result: an ex-husband should not pay alimony to a former wife who has married someone else.[9] Indeed, the vast majority of states, by case law or by statute, provide that a recipient's remarriage either automatically terminates alimony or creates a prima facie case for termination.[10] Notwithstanding the near-universality of this remarriage-termination rule,[11] and its recent endorsement by the American Law Institute (ALI),[12] the rule has no conceptual basis in contemporary

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8. The term "alimony" is used here to refer to payments out of income that are not part of the division of property. "Alimony" is used interchangeably with "maintenance" and "spousal support." While a more precise definition of alimony and property might be desirable, it does not seem to be possible. As Professor Clark observed: "[I]t is obvious that some attempt should be made to formulate principles which would define the distinction between alimony awards and property distributions. Few of the state court cases discuss the question. Those which do frequently increase rather than reduce one's uncertainty concerning the rationale for characterizing awards." HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES §16.1 (practitioner's ed., 2d ed. 1987). For a critique of the limitations of divorce law's three little boxes—property division, alimony, and child support—see Joan C. Williams, *Married Women and Property*, I VA. J. SOC. POL'Y & L. 383, 396–402 (1994).

9. Although alimony is available to both men and women, *see* Orr v. Orr, 440 U.S. 268 (1979), this article will refer to an alimony recipient as "she" and an alimony payor as "he" for convenience and because the vast majority of alimony recipients are women. *See* IRA MARK ELLMAN, PAUL M. KURTZ, ELIZABETH S. SCOTT, LOIS A. WEITHORN & BRIAN BIX, FAMILY LAW: CASES, TEXT, PROBLEMS 367 (4th ed. 2004) ("[A]limony awards go disproportionately to women, at least in part because wives make alimony claims far more often than husbands.").

10. As the American Law Institute summarized this view:

> A substantial number of states, perhaps a majority, provide for automatic termination of an alimony award upon the remarriage of the obligee. Others typically provide that it be terminated at remarriage except in extraordinary circumstances. While a few examples do exist of courts finding such circumstances, they are overwhelmingly the exception among cases dealing with support alimony.

ALI, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 5.07, at 864 (2002) [hereinafter ALI PRINCIPLES]; *see* ELLMAN ET AL., *supra* note 9, at 413 ("[R]emarriage . . . ends alimony nearly everywhere without regard to financial consequences for the obligee."). For a comprehensive survey of state law, see Keller v. O'Brien (*Keller I*), 652 N.E.2d 589 (Mass. 1995), *appeal after remand*, Keller v. O'Brien (*Keller II*), 683 N.E.2d 1026 (Mass. 1997).; Gary L. Young, Jr., Annotation, *Alimony as Affected by Recipient Spouse's Remarriage in Absence of Controlling Specific Statute*, 47 A.L.R.5TH 129 (1997). State termination laws are discussed in more detail in Part I of this Article.

11. "Remarriage-termination rule" is used here to describe a rule that marks remarriage as a significant or dispositive indicator for termination of alimony. The term thus encompasses automatic-termination rules, prima facie rules, and rules that count remarriage as a changed circumstance in itself. Such rules of course may be more or less draconian to the extent they allow evidence of the financial impact of remarriage to affect the outcome. An alimony modification rule that affords no special treatment to remarriage except as it affects a recipient's current financial status is not counted as a remarriage-termination rule. For an example of this latter approach, see Fouts v. Fouts, 779 P.2d 145, 146 (Or. Ct. App. 1989) ("[N]othing in the [modification] statute suggests that the economic effects of remarriage should be treated differently than any other change of circumstances."). For a discussion of the various types of remarriage-termination rules, see *infra* Part I.

12. *See* ALI PRINCIPLES, *supra* note 10, § 5.07.

understandings of alimony. As the ALI acknowledges, the underlying rationale for the remarriage-termination rule is "remarkably unclear."[13]

Intuition is not enough to sustain a rule with such a brutal impact. Consider, for example, the case of Helen and Anthony, who divorce after a twenty-six year marriage.[14] During marriage, Helen worked as a full-time homemaker and caretaker of the couple's children while Anthony pursued a career.[15] At divorce, Anthony earned $158,000 annually as a bank executive while Helen "qualified for only unskilled, entry level positions at minimum wage."[16] A divorce decree divided the couple's marital property; ordered Anthony to pay $500 per week in alimony and $300 per week in child support;[17] and set Helen and Anthony free to begin new lives as single persons.[18] Helen soon found work as a part-time medical assistant earning $90 per week.[19] One and one-half years later, Helen married again,[20] and upon Anthony's petition, a court terminated her alimony.[21]

If this scene sounds no equitable alarms, it may be because the frame has been artificially frozen in time. But of course Helen's story does not end with her remarriage. Suppose that her second marriage, sadly, also ends in divorce, as very many remarriages do.[22] Unable to qualify for alimony based on a short second

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13. *Id.* § 5.07, at 859.

14. The facts in this paragraph are taken from *Keller I*, 652 N.E.2d at 590. The case of Helen and Anthony clearly involves both significant income and significant spousal income disparity. This is exactly the kind of case most likely to be appealed, both because the stakes are high for the alimony recipient with a sizeable alimony order and because the financial resources necessary to appeal alimony termination are more likely to be available than in lower-income cases. Of course, these high-income appellate cases tell us little about the number of lower-income alimony recipients who are losing their alimony but lack the resources necessary to appeal termination. These low-income cases may be the ones in which the remarriage-termination rule is most brutal, plunging an alimony recipient from poverty to destitution, and giving her no realistic legal opportunity to protest that outcome.

15. *Id.*

16. *Id.*

17. Anthony's child support obligation ended approximately two years after the divorce when he took temporary custody of the couple's minor child. *Id.* at n.1.

18. *Id.* at 590.

19. *Id.*

20. *Id.* Helen's new husband earned $28,000 annually, $7,800 of which he paid in child support. *Id.*

21. The probate court initially refused to grant Anthony's petition, reasoning that Helen still needed support and that Anthony was still able to pay support. *Id.* On appeal, the Supreme Judicial Court of Massachusetts vacated the probate court's dismissal, explaining that "remarriage makes a prima facie case which requires the court to end alimony, absent proof of some extraordinary circumstances," and remanded for determination of whether Helen had shown extraordinary circumstances warranting continuation of alimony. *Id.* at 593–94. "The mere fact," added the court, "that, without alimony, the defendant would not be able to live with her second husband in the way in which she lived prior to her marriage to him is not a valid reason to continue alimony." *Id.* So gnided, the probate court terminated Helen's alimony on remand and the Supreme Judicial Court affirmed. Keller v. O'Brien (*Keller II*), 683 N.E.2d 1026, 1027 (Mass. 1997). For a discussion of the prima facie remarriage-termination rule, see *infra* Part I.B.

22. *See supra* note 6.

marriage,[23] Helen is left to fend for herself, armed with two years of undergraduate education, $90 per week in earnings, and a twenty-six-year history as a caretaker for the family she and Anthony once shared. Helen's brief remarriage has freed Anthony to enjoy all the career rewards of his role as family breadwinner and left Helen alone to bear all the career costs of her role as family caretaker.[24] It is not much of a stretch to suppose that Helen feels mistreated by a law that evidences such indifference to her past contributions and her present economic straits.

What is the answer to Helen's sense of unfairness? Can the law honestly tell her that termination of Anthony's alimony obligation is actually fair to her, painful as it may be? Or, if not fair to her, that the remarriage-termination rule is a necessary part of the way things must be—part of a broader scheme of social justice?[25] Helen and other alimony recipients deserve an explanation.[26] It is hardly sufficient to point out that if Anthony's payments had been part of the division of property—perhaps installments on a buyout of Helen's interest in the marital home—rather than alimony, her remarriage would have had no effect on Anthony's obligation.[27] Why is Helen's right

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23. Marriage duration is often included in a statutory list of factors relevant to the amount and duration of alimony. For a discussion of no-fault alimony statutes, see *infra* Part II.C.

24. For a discussion of the human capital costs of caretaking, see Cynthia Starnes, *Divorce and the Displaced Homemaker: A Discourse on Playing with Dolls, Partnership Buyouts and Dissociation Under No-Fault*, 60 U. CHI. L. REV. 67, 78–85 (1993) [hereinafter Starnes, *Displaced Homemakers*]; Cynthia Lee Starnes, *Mothers as Suckers: Pity, Partnership, and Divorce Discourse*, 90 IOWA L. REV. 1513 (2005) [hereinafter Starnes, *Mothers*].

25. This question draws on John Rawls's principles of distributive justice. Rawls reasons that principles of justice chosen by one who does not know his "situation in society" or "natural assets" will be fair since one in such an "original position" cannot "tailor principles to his advantage." JOHN RAWLS, A THEORY OF JUSTICE 139 (1971). Simply put, individuals in the "original position" will choose to maximize the minimal advantages available to all—what Rawls calls the "maximin rule"—and thereby fashion "a workable theory of social justice." *Id.* at 150–57; *see also* Susan Moller Okin, *Justice and Gender: An Unfinished Debate*, 72 FORDHAM L. REV. 1537, 1545 (2004). In the case of Helen and Anthony, the question is whether someone who could not predict whether she or he would be Helen or Anthony, female or male, caretaker or breadwinner, alimony recipient or payor, would consider the remarriage-termination rule fair.

Although Rawls initially omitted sex from the list of veiled personal characteristics of those in the original position, he later referenced sex as such a characteristic. *See* Okin, *supra*, at 1548. While Rawls resists application of political principles of justice to the *internal* life of the family, he also states that these principles do impose *external* restraints on families. JOHN RAWLS, *The Idea of Public Reason Revisited, reprinted in* COLLECTED PAPERS 573, 597–98 (Samuel Freeman ed., 1999). For a compelling response to feminist criticism of Rawls, see generally Okin, *supra*.

26. The number of alimony recipients may actually be quite small. In 1990, the Census Bureau reported that only 16.8% of the 19.3 million women who were ever divorced or currently separated (as of 1987) were entitled to receive alimony under a divorce decree. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS—CHILD SUPPORT AND ALIMONY: 1987, at 11 (1990). It would be a mistake to fail to take seriously the potential injustice of the remarriage-termination rule simply because the pool of affected persons is small, or worse, because the rule does not impact most of us personally.

27. Remarriage has no impact on the division of property. Unpaid installments are not cancelled upon a beneficiary's remarriage. *See* CLARK, *supra* note 8, § 16.1 ("Alimony . . .

to a buyout of her interest in a house, a Mercedes, or a yacht more deserving of protection than her right to a buyout of her interest in the marital partnership, or at least to compensation for her lost career opportunities?[28] If the remarriage-termination rule is to persist, it must have some legitimate, articulable basis in justice, some underlying rationale consistent with contemporary views of gender equality, no-fault divorce, and alimony—a rationale that neither the courts nor the American Law Institute have been able to provide.

Part I of this Article describes the remarriage-termination rule as it appears in statutory and case law. Part II searches for a rationale for the remarriage-termination rule in the underlying rationales for alimony—from historical notions of husbandly support obligations to feminist reform proposals; from no-fault's need-based models to the American Law Institute's loss-sharing model—and concludes that only historical rationales grounded in coverture explain the rule. Part III looks for a better explanation for the remarriage-termination rule from the courts that enforce it, but uncovers only a disappointing collage of conclusory rhetoric, circular reasoning, and troubling visions of husbands as necessary providers and wives as incapacitated dependents. The absence of any coherent rationale for the remarriage-termination rule consistent with contemporary understandings of alimony, together with the rule's harsh impact on the economically vulnerable, demonstrates an injustice that the law should not tolerate.

I. THE REMARRIAGE-TERMINATION RULE

The remarriage-termination rule begins with the general principle that an alimony award, unlike a division of property, is modifiable.[29] Often, judicial authority to modify alimony is specifically granted by statute.[30] The Uniform Marriage and Divorce Act (UMDA), for example, allows modification "only upon a showing of changed circumstances so substantial and continuing as to make the terms unconscionable."[31] Ordinarily, the changed circumstances that trigger modification involve economics—a

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usually ends on the remarriage of the recipient, while the division of property (for example when payable in installments) does not."); UNIF. MARRIAGE & DIVORCE ACT § 316(a) (1974) [hereinafter UMDA] (recognizing modifiability of alimony, but stating that the property division "may not be revoked or modified, unless the court finds the existence of conditions that justify the reopening of a judgment under the laws of this state"). Not surprisingly, alimony recipients sometimes attempt to convince courts that alimony awards are actually property awards and therefore not subject to the remarriage-termination rule. *See generally* CLARK, *supra* note 8, § 16.5. Professor Clark maintains that the "alimony-property distinction" is nothing more than a "judicially designed device . . . based on the fiction that there is some perceptible difference between awards of alimony and of property." *Id.*

28. The lost earning ability associated with family caretaking has been widely documented. *See* Starnes, *Mothers, supra* note 24, at 1519–27.

29. *See, e.g.*, UMDA § 316(a) (recognizing modifiability of alimony, but stating that the property division "may not be revoked or modified, unless the court finds the existence of conditions that justify the reopening of a judgment under the laws of this state").

30. *See* Keller v. O'Brien (*Keller I*), 652 N.E.2d 589, 592 nn.7–8 (Mass. 1995) (citing twelve state statutes). Where no statute specifically authorizes modification, modifiability may depend on the terms of the divorce decrec. For a discussion of the power to modify awards in the absence of a statute, see CLARK, *supra* note 8, § 17.6.

31. UMDA § 316(a). Many states require a less significant showing of changed circumstances. *See* ELLMAN ET AL., *supra* note 9, at 411.

reduction in the payor's resources, for example, or an improvement in the recipient's financial status—that warrant a decrease in alimony.[32] When an alimony recipient remarries, however, a different rule applies—alimony is not merely modified, but *terminated*, with no possibility of revival[33] and usually without regard to the financial impact of the recipient's new marriage. Remarriage alone is thus the termination trigger. Whether it appears in statutory or case law, the remarriage-termination rule is a baseline of contemporary divorce law.

A. Statutory Termination Rules

The majority of states provide by statute that alimony terminates automatically upon a recipient's remarriage.[34] One court's survey[35] classified automatic termination statutes into three rough categories: (1) immediate termination on remarriage,[36] (2)

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32. As Professor Clark explained, "[a]limony awards may be burdensome to the paying spouse and crucial to the welfare of the receiving spouse, so that changes in the situation of either can produce hardship if the decree is not modifiable." CLARK, *supra* note 8, § 16.5. Classic examples of facts warranting modification include the alimony recipient who obtains a job enabling her to become self-supportive and the alimony payor who becomes incapacitated and is no longer able to meet alimony obligations. Modification based on a payor's improved financial position is more difficult to obtain since alimony is based primarily on the needs of the recipient. For a discussion of need-based alimony statutes, see *infra* Part II.C.

33. Failure of a second marriage does not usually revive an alimony award. *See, e.g.*, Harding-Moyer v. Harding, 616 N.W.2d 899, 902 (S.D. 2000) ("[O]nce terminated, [the husband's] obligation could not be revived whatever the outcome of [the wife's] second marriage."). If the second marriage is annulled rather than terminated through divorce, some courts have been willing to revive alimony. For a discussion of whether annulment of a remarriage constitutes an extraordinary circumstance warranting revival of alimony, see *infra* notes 52–53 and accompanying text. In cases of a recipient's cohabitation rather than remarriage, alimony may be suspended rather than terminated, and so revive when cohabitation ends. *See* ALI PRINCIPLES, *supra* note 10, § 5.09, at 877–78 (stating that a recipient's cohabitation may trigger a suspension of alimony subject to later reinstatement).

34. *Keller I*, 652 N.E.2d at 591–92 n.6 (counting twenty-nine states with statutory provisions for automatic termination of alimony upon a recipient's remarriage). For a categorical listing of state statutes see *infra* notes 36–38.

A few statutes authorize but do not require termination of alimony upon a recipient's remarriage, leaving the termination decision to trial court discretion. A Michigan statute, for example, provides that "alimony may be terminated by the court as of the date the party receiving alimony remarries unless a contrary agreement is specifically stated in the judgment of divorce." MICH. COMP. LAWS ANN. § 552.13(2) (West 2005). An Oklahoma statute requires a court to terminate alimony on remarriage unless the recipient: (1) petitions for continuance within ninety days of remarriage and (2) demonstrates that "support is still needed and that circumstances have not rendered payment . . . inequitable." OKLA. STAT. ANN. tit. 43, § 134(b) (West 2001). As one Oklahoma court explained, however, even this language "envisions termination after remarriage in ordinary circumstances." Mathis v. Mathis, 91 P.3d 662, 666 (Okla. Civ. App. 2004).

35. *Keller I*, 652 N.E.2d at 591–92 n.6.

36. *See, e.g.*, LA. CIV. CODE ANN. art. 115 (1999); N.J. STAT. ANN. § 2A:34-25 (West 2000); N.C. GEN. STAT. ANN. § 50-16.9(b) (West 2000); 23 PA. CONS. STAT. ANN. § 3701(e) (West 2001); R.I. GEN. LAWS § 15-5-16(c)(2) (2003); S.C. CODE ANN. § 20-3-150 (Supp. 2004);

termination upon petition and proof of remarriage,[37] and (3) termination unless an agreement or decree provides otherwise.[38] A typical statute in the last category, which is the most common, might thus provide: "Unless otherwise agreed in writing or expressly provided in the decree, the obligation to pay future maintenance is terminated on the death of either party or the remarriage of the party receiving maintenance."[39]

Such statutory language leaves little room for equitable entreaties that alimony should survive remarriage in the absence of an agreement or decree requiring it.[40] Moreover, establishing such a continuation provision may be no easy matter, as some courts require exceedingly explicit language to avoid termination. A California court, for example, determined that an agreement making alimony "non-modifiable for any reason whatsoever" did not prevent termination of alimony upon the wife's remarriage since, in the court's view, "non-modifiable" does not mean "nonterminable."[41]

B. Judicial Termination Rules

In the absence of a statute specifically addressing the effect of remarriage on alimony awards, courts have generally adopted one of three views:[42] (1) remarriage automatically terminates alimony, (2) remarriage creates a prima facie case for termination, or (3) remarriage is a factor to consider in determining whether modification is warranted. Clearly, the impact of remarriage is most dramatic under the first view and least significant under the last.

A few courts have endorsed the hard-line rule that alimony terminates automatically upon a recipient's remarriage without regard to financial impact. Alaska courts, for example, have held that a recipient's remarriage "requires the termination of alimony as a matter of law."[43] The Alaska Supreme Court applied this newly fashioned

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TENN. CODE ANN. § 36-5-101(a)(2)(B) (Supp. 2004).

37. *See, e.g.*, N.Y. DOM. REL. LAW § 248 (McKinney 1999); WIS. STAT. ANN. § 767.32(3) (West 2001 & Supp. 2004).

38. *See, e.g.*, ARK. CODE ANN. § 9-12-312(a)(1)(A) (2002); CAL. FAM. CODE § 4337 (West 2004); COLO. REV. STAT. ANN. § 14-10-122(2) (West 2005); DEL. CODE ANN. tit. 13, § 1519(b) (1999); GA. CODE ANN. § 19-6-5(b) (2004) (alimony terminates "unless otherwise provided"); HAW. REV. STAT. § 580-51(a) (1993); 750 ILL. COMP. STAT. ANN. § 5/510(c) (West 1999 & Supp. 2005); KY. REV. STAT. ANN. § 403.250(2) (LexisNexis 1999); MD. CODE ANN. FAM. LAW § 11-108 (LexisNexis 2004); MO. ANN. STAT. § 452.370(3) (West 2003); MONT. CODE ANN. § 40-4-208(4) (2005); NEB. REV. STAT. ANN. § 42-365 (1999 & Supp. 2004); NEV. REV. STAT. ANN. § 125.150(5) (LexisNexis 2004); UTAH CODE ANN. § 30-3-5(9) (Supp. 2005); VA. CODE ANN. § 20-109(D) (2004); WASH. REV. CODE ANN. § 26.09.170(2) (West 2005).

39. This language appears in both UMDA § 316(b) and ARIZ. REV. STAT. ANN. § 25-327(B) (2000 & Supp. 2005).

40. An Arizona court applied this language to terminate alimony payments to a wife whose remarriage was annulled soon after it began. *See* Hodges v. Hodges, 578 P.2d 1001 (Ariz. Ct. App. 1978). Some states recognize revival of alimony following an annulment. *See infra* notes 52–53.

41. *In re* Marriage of Glasser, 226 Cal. Rptr. 229, 230 (Cal. Ct. App. 1986).

42. *See generally* Young, *supra* note 10.

43. Voyles v. Voyles, 644 P.2d 847, 849 (Alaska 1982); *see also* Kelley v. State Dep't. of Revenue, 796 So. 2d 1114 (Ala. Civ. App. 2000); McHan v. McHan, 84 P.2d 984 (Idaho 1938); Hubbard v. Hubbard, 656 So. 2d 124 (Miss. 1995).

automatic-termination rule to cut off alimony to a wife who had remarried, notwithstanding a provision in the divorce decree that alimony "remain in full force and effect until such time as [the wife] gets in a position to support herself."[44]

The majority of courts operating outside the confines of a statute have taken a less draconian position, adopting a rule that remarriage creates a prima facie case for termination but allowing alimony to continue in extraordinary circumstances.[45] In a significant departure from general alimony modification principles, which require a party dissatisfied with the status quo to prove that circumstances justify change,[46] this prima facie rule requires the party resisting change to prove that extraordinary circumstances justify the status quo. This evidentiary shift places a heavy burden indeed on the alimony recipient,[47] "affirm[ing] the general principle that alimony should terminate on the recipient spouse's remarriage."[48]

Courts do not always agree on what constitutes "extraordinary circumstances." Many courts have determined that a second spouse's inability to support an alimony recipient at the standard of living of the first marriage is not enough to establish the extraordinary circumstances necessary to avoid termination,[49] although a few courts have reached contrary conclusions under extreme facts.[50] Proof that the first marriage was very long, or that the recipient's caretaking contributions were extensive, is also

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44. *Voyles*, 644 P.2d at 848–49.

45. Keller v. O'Brien (*Keller I*), 652 N.E.2d 589, 592 (Mass. 1995); *see, e.g.*, Wolter v. Wolter, 158 N.W.2d 616, 620 (Neb. 1968) (holding that remarriage establishes a "prima facie case which requires the court to terminate [alimony] in the absence of proof of some extraordinary circumstance justifying its continuation"); *see also generally In re* Marriage of Von Glan, 525 N.W.2d 427 (Iowa Ct. App. 1994); Beck v. Beck, 490 P.2d 628 (Kan. 1971); Williams v. Williams, 531 A.2d 351 (N.H. 1987); Chavez v. Chavez, 485 P.2d 735 (N.M. 1971); Pearson v. Pearson, 606 N.W.2d 128 (N.D. 2000); Harding-Moyer v. Harding, 616 N.W.2d 899 (S.D. 2000). Oklahoma appears to have adopted a variation of the prima facie rule by statute. *See* Mathis v. Mathis, 91 P.2d 662, 666 (Okla. Civ. App. 2004) (statute appears closest to a prima-facie regime since it "envisions termination after remarriage in ordinary circumstances . . . places the burden on the recipient to demonstrate grounds for continuation . . . and thus reflect[s] Oklahoma's strong public policy favoring support by the current husband"). For a discussion of the Oklahoma statute, *see supra* note 34.

46. *See, e.g.*, UMDA § 316(a) (authorizing modification of alimony "only upon a showing of changed circumstances so substantial and continuing as to make the terms unconscionable").

47. *See* Nastrom v. Nastrom, 262 N.W.2d 487, 491 (N.D. 1978) ("The proponent of the continuance of alimony payments following remarriage carries a considerable burden.").

48. *Keller I*, 652 N.E.2d at 593.

49. *See, e.g.*, *Keller I*, 652 N.E.2d at 594 ("The mere fact that, without alimony, the defendant would not be able to live with her second husband in the way in which she lived prior to her marriage to him is not a valid reason to continue alimony."); Nugent v. Nugent, 152 N.W.2d 323, 328 (N.D. 1967) (wife's contention that she could not live with second husband in way she lived with first husband insufficient to show extraordinary circumstance justifying continuance of alimony); *Mathis*, 91 P.3d at 667 ("spouse does not show extraordinary circumstances . . . simply by showing she cannot continue the same life style in her new marriage that she experienced as a result of receiving support alimony").

50. *See, e.g.*, *In re* Marriage of Gillilland, 487 N.W.2d 363, 366 (Iowa Ct. App. 1992) (wife established extraordinary circumstances justifying continuance of alimony where former husband's net earnings were $220,000, as compared with $30,000 earnings of current husband).

not likely to establish "extraordinary circumstances."[51] Some courts have treated the annulment of a recipient's remarriage as an extraordinary circumstance justifying continuation of alimony, especially if the second "marriage" was very brief,[52] though other courts have disagreed.[53]

Finally, in the absence of a controlling statute, a few courts have taken the position that remarriage is simply a changed circumstance to be considered, along with other factors, in determining whether termination is appropriate.[54] Of the three judicial approaches to remarriage, this final approach is clearly most consistent with general alimony modification rules, which require the party seeking modification to bear the burden of proving changed circumstances.[55] Of course, the result of any inquiry into whether changed circumstances warrant modification may depend ultimately on a particular court's attitude toward the baseline view that alimony should not survive a recipient's remarriage. Given the dominance of the remarriage-termination rule, one might expect that even judges applying general modification principles will terminate alimony on remarriage, though not every court goes this far.[56]

One developing distinction in the termination cases requires mention. Some courts have held that non-traditional alimony, such as reimbursement alimony, is not modifiable and thus not subject to the remarriage-termination rule.[57] The willingness of

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51. *See, e.g.*, *In re* Marriage of Shima, 360 N.W.2d 827, 829 (Iowa 1985) (fact that wife of eighteen years "devoted her life" to her husband and children does not constitute an extraordinary circumstance justifying continuation of alimony after wife's remarriage).

52. *See, e.g.*, Peters v. Peters, 214 N.W.2d 151 (Iowa 1974); Sleicher v. Sleicher, 167 N.E. 501 (N.Y. 1929).

53. *See, e.g.*, Sefton v. Sefton, 291 P.2d 439 (Cal. 1955) (annulment of second marriage does not revive alimony rights). Annulment might alternatively be viewed not as an extraordinary circumstance justifying an exception to the remarriage-termination rule, but rather as a definitional failure to trigger the rule at all, on the ground that if the remarriage did not legally occur, the remarriage-termination rule is inapplicable. The modern view, however, is that, at least for purposes of the economics of divorce, an annulment should be viewed as a divorce. *See* CLARK, *supra* note 8, § 16.5 (arguing against revival on this theory).

54. *See, e.g.*, Burns v. Burns, 677 A.2d 971, 976 (Conn. App. Ct. 1996); *In re* Marriage of Bock, 15 P.3d 609, 611 (Or. Ct. App. 2000); Coor v. Coor, 580 A.2d 500, 502 (Vt. 1990); Maher v. Maher, 90 P.3d 739, 743 (Wyo. 2004) (citing Beck v. Beck, 490 P.2d 628 (Kan. 1971).

55. *See, e.g.*, *Maher*, 90 P.3d at 743 (party seeking termination must "bear the burden of proving that there had been a material and substantial change of circumstances").

56. Applying a general changed-circumstances standard, a Wyoming court, for example, affirmed a lower court's refusal to terminate fixed-term alimony based on the recipient's remarriage. *Id.* at 745. The parties were married for twenty-five years, and their settlement agreement did not mention the consequence of remarriage, on which they had been unable to agree. *Id.* at 740.

57. As the name implies, reimbursement alimony is intended to reimburse a spouse for past financial contributions made to the other spouse, often to finance education. *See, e.g.*, *In re* Marriage of Francis, 442 N.W.2d 59 (Iowa 1989); Reiss v. Reiss, 500 A.2d 24 (N.J. Super. Ct. App. Div. 1985); Petersen v. Petersen, 737 P.2d 237 (Utah Ct. App. 1987); *see generally* ELLMAN ET AL., *supra* note 9, at 411. More rarely, courts have exempted rehabilitative alimony from general modification rules. *See, e.g.*, Frye v. Frye, 385 So. 2d 1383, 1389–90 (Fla. Dist. Ct. App. 1980) ("[T]he ultimate purpose of rehabilitative alimony is rehabilitation, and the question upon the recipient's remarriage should be whether that event alone has served the

these courts to consider the rationale for alimony rather than reflexively applying the remarriage-termination rule is surely a good sign.[58] Unfortunately, "reimbursement alimony" describes only a small subset of alimony awards, and even when reimbursement plays some role in an alimony award, the reimbursement rationale may not be clearly identified or otherwise distinguishable from the remainder of the award.[59]

C. The ALI Termination Rule

In its recent *Principles of the Law of Family Dissolution*, the American Law Institute endorses the majority statutory rule that alimony should end automatically upon a recipient's remarriage.[60] Like many automatic-termination statutes, the Institute

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rehabilitative purpose."). Other courts, however, have declined invitations to recognize multiple alimony termination rules. *See, e.g.*, Peterson v. Peterson, 434 N.W.2d 732, 736 (S.D. 1989) (rejecting wife's claim that her rehabilitative alimony survives remarriage since prima facie termination rule "applies to all alimony, regardless of its classification"); Bryan v. Leach, 85 S.W.3d 136 (Tenn. Ct. App. 2001) (in a change from prior law, 1993 statute makes rehabilitative alimony modifiable).

58. North Dakota cases provide one example of such a judicial willingness to link termination to the underlying rationale for an alimony award. In a much-cited 1967 case, the Supreme Court of North Dakota stated that "remarriage of a divorced wife makes out a prima facie case which requires the court to end alimony payments in the absence of proof of some extraordinary circumstance," explaining that to allow continuance of alimony ordinarily "is so illogical and unreasonable that a court of equity should not tolerate it." Nugent v. Nugent, 152 N.W.2d 323, 327–28 (N.D. 1967) (quoting Cary v. Cary, 152 A. 302, 303–04 (Conn. 1930)). The same court later emphasized that termination of alimony upon remarriage is not automatic in North Dakota, "especially for rehabilitative support." Lohstreter v. Lohstreter, 623 N.W.2d 350, 353 (N.D. 2001). So guided, the court refused to terminate support upon a wife's remarriage, reasoning that the wife's rehabilitation expenses were not equitably shared during marriage and that the support was thus intended to help the wife "retire her educational debt and to embark on employment." *Id.* at 353–54. This seems a far cry indeed from a traditional remarriage-termination rule. *See also* Mahoney v. Mahoney, 567 N.W.2d 206 (N.D. 1997) (rehabilitative support continued after remarriage to enable spouse to complete two-year internship as psychiatric nurse); Bullock v. Bullock, 376 N.W.2d 30 (N.D. 1985) (support continued after remarriage to enable spouse to obtain teaching recertification).

59. Even when a label is attached to an alimony award, it may accurately reflect not the actual purpose of the award, but rather poor drafting or tax incentives, as the cases attempting to distinguish property and alimony demonstrate. *See, e.g.*, Zullo v. Zullo, 613 A.2d 544 (Pa. 1992) (payments labeled "alimony" are actually allocation of debt and therefore part of property division); *see generally* ELLMAN ET AL., *supra* note 9, at 411 ("[J]udicial decrees and separation agreements do not always distinguish explicitly the financial elements of an award.").

60. The ALI remarriage-termination rule provides:

> An obligation to make periodic payments imposed under § 5.04 [alimony based on duration of marriage and disparity in spousal earnings] or § 5.05 [alimony based on duration of caretaking and disparity in spousal earnings] ends automatically at the remarriage of the obligee or at the death of either party, without regard to the award's term as fixed in the decree, unless either
>
> (1) the original decree provides otherwise, or
>
> (2) the court makes written findings . . . establishing that termination of the award would work a substantial injustice because of facts not present in most

recognizes that parties may contract out of this rule.[61] In an apparent concession to the judicial prima facie rule,[62] the ALI also authorizes continuation of alimony after a recipient's remarriage where termination "would work a substantial injustice because of facts not present in most cases . . . ."[63] The ALI intends an exceedingly narrow definition of the unusual facts necessary to avoid termination, however, noting that only "rare cases" will fall within this exception and giving a decidedly peculiar example of such a case: after a thirty-year marriage a wife "marries" a bigamist who dies one month later.[64] If these facts are any indication of the frequency of the fact patterns that will justify continuation of alimony beyond remarriage, the ALI's exception will be rarely invoked indeed.

Following developing case law on reimbursement awards,[65] the ALI also recognizes that the small proportion of alimony orders based on principles of restitution should be non-modifiable.[66] These awards will generally involve short marriages and unusual circumstances.[67]

The persistence of the remarriage-termination rule in statutes, in case law, and now in the ALI's *Principles* does not of course itself justify the rule. But neither does the rule's harsh impact on alimony recipients necessarily make it inconsistent with principles of social justice. If the remarriage-termination rule is to continue as a baseline of divorce law, however, it must have an articulable, legitimate rationale. The search for such a rationale begins with identification of the underlying rationale for alimony itself.

II. UNRAVELING INTUITION: ALIMONY RATIONALES AND THE REMARRIAGE-TERMINATION RULE

If alimony has served its purpose, it should end; if that purpose has not been served, however, the case for termination becomes more difficult. Identifying alimony's underlying rationale is thus an essential first step in assessing the legitimacy of the remarriage-termination rule.

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cases to which this section applies.

ALI PRINCIPLES, *supra* note 10, § 5.07. For a brief critique of this provision, see Cynthia Lee Starnes, *Victims, Breeders, Joy, and Math: First Thoughts on Compensatory Spousal Payments Under the Principles*, 8 DUKE J. GENDER L. & POL'Y 137 (2001).

61. Automatic termination does not occur if "the original decree provides otherwise." ALI PRINCIPLES, *supra* note 10, § 5.07(1). As the ALI observes, such a provision will ordinarily appear in the divorce decree because the parties have agreed to it. *Id.* § 5.07 cmt. d.

62. *See supra* Part I.B.

63. ALI PRINCIPLES, *supra* note 10, § 5.07(2).

64. *Id.* § 5.07 illus. 4.

65. *See supra* notes 57–59 and accompanying text.

66. ALI PRINCIPLES, *supra* note 10, §§ 5.07 cmt. a, 5.12(5), 5.13(5).

67. *See id.* § 5.12 (one spouse finances the other's education or training within a specified number of years of divorce and that education or training substantially enhanced the other spouse's earning capacity); *id.* § 5.13 (short, childless marriage in which one spouse is disparately and unfairly unable to regain a pre-marital living standard). For a brief discussion of these awards, see *infra* note 130. *See also* Starnes, *supra* note 60.

A. Historical Alimony Rationales: Lifetime Support and Fungible Husbands

Prior to the English reforms of 1857, the rationale for alimony was simple enough: upon marriage a husband undertook a lifetime obligation to support his wife.[68] Although he could obtain a legal separation from her (divorce *a mensa et thoro*), rarely could he fully sever marital ties (divorce *a vinculo*).[69] Accordingly, a husband's duty of support continued throughout his wife's life, whether or not they lived together. Alimony was the mechanism, designed by the English ecclesiastical courts, for enforcing the husband's lifetime obligation to support and sustain his wife.[70] Indeed, the word "alimony" derives from the Latin "*alimonia*," which means sustenance.[71]

Underpinning the husband's support obligation was an assumption that married women should not be expected to support themselves.[72] Employment opportunities for women were limited, and a married woman's property was subject to her husband's control.[73] Indeed, at common law a married woman's identity merged into that of her husband, who bore a moral and legal obligation to provide for her. As Blackstone observed, "[T]he very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband; under whose wing, protection, and cover, she performs everything . . . ."[74]

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68. *See generally* ALI PRINCIPLES, *supra* note 10, at 23–24.

69. Until 1857, absolute divorce was unavailable in England except by special act of Parliament. HARRY D. KRAUSE, LINDA D. ELROD, MARSHA GARRISON & J. THOMAS OLDHAM, FAMILY LAW: CASES, COMMENTS, AND QUESTIONS 552–55 (5th ed. 2003). For a discussion of the distinction between divorce *a vinculo* (divorce terminating the marital relationship) and divorce *a mensa et thoro* (legal separation), see Chester G. Vernier & John B. Hurlbut, *The Historical Background of Alimony Law and Its Present Statutory Structure*, 6 LAW & CONTEMP. PROBS. 197 (1939). For a history of English divorce law, see LAWRENCE STONE, ROAD TO DIVORCE: ENGLAND 1530–1987 (1990). For a history of divorce law in the United States, see LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 204–08, 498–504 (2d ed. 1985).

70. *See* ALI PRINCIPLES, *supra* note 10, at 23–24.

71. BLACK'S LAW DICTIONARY 73 (6th ed. 1990) (emphasis added).

72. Twila L. Perry, *The "Essentials of Marriage": Reconsidering the Duty of Support and Services*, 15 YALE J.L. & FEMINISM 1, 11 (2003) (observing that the common law support/services dichotomy stemmed from "a combination of moral precepts based on religious teaching, stereotypes about the natural proclivities of men and women, and practical realities") (citation omitted).

73. CLARK, *supra* note 8, § 17.1. For a discussion of the system of coverture, existing primarily before the nineteenth century, see Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings, 1860–1930*, 82 GEO. L.J. 2127 (1994). *See also* Williams, *supra* note 8 (tracing women's property rights in the historical agrarian, domesticity/wage labor, and contemporary gender systems).

74. WILLIAM BLACKSTONE, 1 COMMENTARIES *442 (emphasis omitted). In return for her husband's protective cover, a married woman properly provided services to her family. *See* Perry, *supra* note 72, at 3 (common law "duty of support requires one spouse to provide the other with a minimum level of material support so as to prevent homelessness or starvation and to meet other basic human needs" while the "duty of services generally requires spouses to provide for the care of the home and the family and to provide companionship, including sexual companionship, to each other").

These visions of limited divorce and lifetime support obligations, of course, do not satisfactorily explain alimony after the advent of absolute divorce. If marital ties are fully severed, it is difficult to see how a husband's duty of support can survive. That alimony did not disappear with the appearance of absolute divorce, or with the supposed abandonment of coverture, is a conceptual mystery. A partial explanation for alimony's endurance may lie in Reva Siegel's observation that the law of coverture, so starkly described by Blackstone in 1765,[75] continued to influence judicial thinking well into the twentieth century.[76] Notions of a husband's legal and moral responsibility for his dependent wife—developed prior to absolute divorce—may have continued to provide an instinctual, if not a logically defensible, basis for alimony even after absolute divorce. A more pragmatic explanation is judicial concern that if an ex-wife were cut off from her source of support, she would become a public charge.

Dubious as the rationales for alimony beyond absolute divorce may be, lingering principles of coverture made one thing clear: whatever husbandly responsibility survived divorce certainly ended when a wife remarried. Upon remarriage, a new man became the ex-wife's protector and provider, taking her under his wing and finally releasing the first husband from responsibility for her. This concept was simple: a "husband has a lifetime obligation to keep his wife from need until the obligation [is] assumed by another."[77] The logic was neat enough: a wife requires a husband's support, and although the law does not much care *which* husband supports her, a woman can only have one husband at a time, please.[78] Under this reasoning, a husband's support obligation has less to do with the individual circumstances of his marriage than with the general proposition that a woman needs some man to provide for her. The remarriage-termination rule thus seems historically grounded in an unsettling view of husbands as necessary, if fungible, providers.

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75. *See supra* note 74 and accompanying text.

76. Siegel, *supra* note 73, at 2128. As Professor Siegel explains, courts may have modified the language of coverture, but they did not wholly abandon it. To illustrate, Professor Siegel cites a 1922 Kentucky court, which described its vision of marriage as: "At common law the husband and wife are under obligation to each other to perform certain duties. The husband is to bring home the bacon, so to speak, and to furnish a home, while on the wife devolved the duty to keep said home in a habitable condition." *Id.* at 2129 (quoting Lewis v. Lewis, 245 S.W. 509, 511 (Ky. 1922)). One possible interpretation of this attachment to coverture-like notions of proper gender roles, is that judicial decision making has been quietly influenced by the historical notion that a husband, being responsible for his wife's economic dependency, is morally bound to provide for her. Of course, the diminution of moral discourse in family law and the gender neutrality of current alimony laws make such a link to coverture an unsatisfactory rationale for alimony. *See* Orr v. Orr, 440 U.S. 268 (1979) (alimony must be available to men as well as women); Carl E. Schneider, *Marriage, Morals, and the Law: No-Fault Divorce and Moral Discourse*, 1994 UTAH L. REV. 503 (1994) (identifying a retreat from moral discourse in the law).

77. ALI PRINCIPLES, *supra* note 10, at 24 (quoting Vernier & Hurlbut, *supra* note 69, at 199).

78. To take this reasoning a step further, allowing a woman to benefit from two husbandly duties of support would amount to polyandry, or at least to prostitution. For suggestions of this view in judicial thought, see *infra* Part III.A.

B. Fault-Based Alimony Rationales: Damage Awards and the Ultimate Betrayal

If absolute divorce undercut alimony's rationale, fault-based divorce sometimes offers a new one.[79] Cast as the remedy of an innocent spouse against a guilty one, divorce under a fault-based regime depends upon proof of marital wrongdoing, such as adultery, cruelty, or abandonment.[80] The no-fault reforms of the 1970s[81] did not entirely eliminate fault from judicial decision making. Many states simply added a no-fault ground to their existing fault-based laws.[82] Even among states that disallow fault as a ground for divorce, marital fault may affect the economic consequences of divorce.[83]

Marital fault may indeed explain alimony—at least in some states and in some cases.[84] An adulterous spouse, for example, might be required to pay alimony as damages for breach of the marriage contract.[85] Of course, such a fault-based rationale would require only guilty spouses to pay alimony to innocent spouses: that is, no innocent spouse would ever pay alimony and no guilty spouse would ever receive alimony.[86] Because such a limitation does not describe the law of alimony, fault can at best provide a partial rationale.

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79. Consideration of fault in alimony decision making is not new. Even the English ecclesiastical courts considered a husband's fault in quantifying his alimony obligation. Conversely, a wife who was at fault was denied alimony. *See* CLARK, *supra* note 8, § 17.1. For a description of fault-based divorce laws, see Lawrence M. Friedman, *A Dead Language: Divorce Law and Practice Before No-Fault*, 86 VA. L. REV. 1497 (2000).

80. As an example of a fault-based divorce law, consider Michigan's pre-1971 statute, which authorized a court to grant a divorce in the following cases:

> 1. Whenever adultery has been committed by any husband or wife;
> 2. When 1 of the parties was physically incompetent at the time of the marriage;
> 3. When 1 of the parties has been sentenced to imprisonment in any prison, jail or house of correction for 3 years or more . . . ;
> 4. When either party shall desert the other for the term of 2 years;
> 5. When the husband or wife shall have become an habitual drunkard . . . .

MICH. COMP. LAWS ANN. § 552.6 (West 2005) (repealed 1971).

81. *See infra* Part II.C.

82. ELLMAN ET AL., *supra* note 9, at 218–19.

83. Ira Mark Ellman, *The Place of Fault in a Modern Divorce Law*, 28 ARIZ. ST. L.J. 773, 778 (1996) (counting only twenty states as "pure no-fault" states that preclude consideration of marital misconduct in both property and alimony determinations).

84. Nothing in this Part is intended to endorse the view that damages are an apt metaphor for alimony. Actually, while a general analogy to contract principles may be helpful, the analogy to contract *damages* is unconvincing for many reasons—among them the fact that a damage award is ordinarily a fixed sum, due upon calculation, while alimony is a modifiable sum, payable over time. The point here is that, even assuming arguendo that damages provide a conceptual explanation for alimony, contract doctrine does not explain the remarriage-termination rule.

85. *See* CLARK, *supra* note 8, § 17.1.

86. Some jurisdictions in the eighteenth and nineteenth centuries so limited alimony, although other jurisdictions focused on wives' economic dependency. *See* ALI PRINCIPLES, *supra* note 10, at 23–25.

If alimony is cast as a damage award against a guilty spouse, what explains the remarriage-termination rule? Drawing further on the contract analogy, alimony might be designed to give an injured wife the benefit of her bargain,[87] that is, to put her in the position she would have occupied had her husband shared his income with her—for life according to traditional views of marriage. Nothing in this analogy to contract law explains why alimony should terminate upon a wife's remarriage. Certainly, in contract law generally, a party's good fortune subsequent to a damage award does not require her to forfeit her damages. Even when a wife's remarriage amounts to good fortune, it is difficult to see why her improved financial footing should absolve a former husband of liability for the wrongdoing that triggered the alimony award.

An analogy to contract rules on availability of damages is unhelpful. The mitigation principle ensures that a court "ordinarily will not compensate an injured party for loss that party could have avoided by making efforts appropriate, in the eyes of the court, to the circumstances."[88] If applied to alimony termination, mitigation principles would suggest the peculiar conclusion that a wife should remarry—and remarry as well as possible—in order to mitigate her losses and save her ex-husband money. Moreover, the timing is wrong. Opportunities to mitigate loss will ordinarily serve to decrease a damage calculation before it is reduced to judgment. In the case of divorce, however, a wife ordinarily cannot avoid loss through remarriage at the time alimony is initially calculated, since she is usually not yet divorced. While it is true that alimony is modifiable—and thus theoretically capable of repeated recalculation—mitigation principles would, at most, support a reduction in alimony commensurate with a wife's improved financial status. Yet the remarriage-termination rule usually applies without regard to financial consequence and completely eliminates, rather than proportionately reduces, alimony.[89]

Neither can principles of novation or renunciation explain the remarriage-termination rule. Novation occurs when a creditor (the ex-wife) takes a third party's promise to pay (the new husband's support obligation) in satisfaction of a debt (the ex-husband's alimony obligation).[90] Under this analogy, the new husband's support obligation would substitute for the ex-husband's alimony obligation, thus discharging the ex-husband. The difficulty with this analogy is that novation requires the agreement of the original parties, that is, both the ex-husband *and* the ex-wife. Novation thus explains the remarriage-termination rule only if the wife's remarriage constitutes her implicit agreement to give up alimony—a strained interpretation of remarriage given

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87. In contract law, the basic measure of damages is "the injured party's expectation." E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS §12.8 (3d ed. 2004).

88. *Id.* § 12.12. The purpose of the rule is clearly to encourage an injured party to minimize the costs of breach. *See id.*

89. This is not to say that, under the contract analogy, a wife would have a duty to mitigate, but only that if she does not mitigate, she will face reduced alimony. As Professor Farnsworth has explained, to say that a party has a "duty" to mitigate is misleading, for an injured party is not liable for failure to mitigate. Rather, the injured party who fails to mitigate is simply denied damages that could have been avoided. *Id.*

90. Novation describes a "substituted contract that discharges a duty by adding a party who was neither the obligor nor the obligee of that duty." *Id.* § 4.24. The effect of novation is "to discharge the original duty and to replace it with a new duty based on the substituted contract." *Id.* For a suggestion of this analogy in judicial thinking, see *infra* Part III.B.

the negative economic consequences of termination and, in the end, an interpretation that begs rather than answers the question of why alimony terminates on remarriage. The likelihood that an alimony recipient, if asked, would refuse to renounce her right to alimony similarly undercuts any rationale for termination based on renunciation.[91] Principles of contract law simply cannot explain the remarriage-termination rule.

Is it possible that this analogy to contract law disappoints because it fails to consider *all* the contracts between the ex-spouses? Has the wife breached some unarticulated post-divorce contract with her ex-husband that entitles him to an offset against his alimony obligation? If this is the theory that explains alimony termination, it is difficult to identify the precise nature of the ex-wife's broken promise: Is it a promise of loyalty and good faith? Of sexual fidelity? A promise to remain unattached to another man? Does a wife's remarriage thus constitute the ultimate betrayal of her former husband and therefore justify termination of alimony? Surely not.

If fault-based alimony rationales provide no satisfactory explanation for the remarriage-termination rule, perhaps no-fault divorce laws can do better.

C. No-Fault Alimony Rationales: Handouts and Masked Need

Whatever role fault plays in explaining alimony has been compromised by the sweeping no-fault divorce reforms of the 1970s.[92] Shunning views of divorce as a remedy for an innocent spouse, the no-fault movement advocated access to divorce merely upon a showing of "irretrievable breakdown."[93] Unlike the fault-based laws before them, no-fault reforms view divorce not as the consequence of one spouse's fault, but rather as the product of complex spousal dynamics beyond the understanding, and the appropriate inquiry, of a court of law. Under this view, no one spouse's conduct could or should be singled out as the cause of divorce. No-fault laws thus make divorce available largely without reference to spousal conduct and typically, though unofficially, upon the request of only one spouse.[94] While the no-fault movement did not eliminate fault from divorce proceedings,[95] its compelling philosophy makes analogies to breach of contract much less appealing.

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91. Renunciation describes "the obligee's surrender of its rights against the obligor after breach." FARNSWORTH, *supra* note 87, § 4.25. For a suggestion of this analogy in judicial thinking, see *infra* Part III.B.

92. In 1970, California became the first state to entirely eliminate fault as a ground for divorce. ELLMAN ET AL., *supra* note 9, at 203. By 1974, forty-five states had adopted no-fault grounds for divorce. HERBERT JACOB, SILENT REVOLUTION: THE TRANSFORMATION OF DIVORCE LAW IN THE UNITED STATES 80 (1988). By 1985, every state allowed divorce without a showing of fault. *Id.* Most states simply added a no-fault ground to their fault-based divorce statutes, thus making divorce available on either a no-fault or a fault ground. ELLMAN ET AL., *supra* note 9, at 218–19.

93. *See, e.g.*, UMDA, *supra* note 27, § 305 (emphasis omitted).

94. *See* ELLMAN ET AL., *supra* note 9, at 221–22.

95. As previously noted, some states retain fault as an alternative ground for divorce and about half the states make fault relevant to the economics of divorce. *See supra* notes 82–83 and accompanying text.

Undercutting fault-based rationales was only the beginning of no-fault's assault on alimony. Central to the no-fault movement was a new vision of divorce as an opportunity for a fresh start and a clean break. Since no one was to blame for the marital breakup, no one should suffer unnecessarily. At least in principle, no-fault divorce aims to provide eacb spouse with an opportunity to begin life anew, as free as possible from any lingering marital entanglements—emotional *or* financial.[96] With this goal came final abandonment, at least in principle, of any shreds of the old English view of a husband's lifetime legal and moral responsibility for his wife.

That alimony survived no-fault laws is almost as mysterious as its survival of absolute divorce.[97] Without much explanation, no-fault alimony laws typically permit (but do not require) a court to award alimony upon a finding that a spouse is needy—that is, without sufficient property and unable to support herself.[98] Once need is established, the amount and duration of alimony depend on broad judicial discretion, often guided by a list of relevant statutory factors that again reference a recipient's need.[99] These factors may include, for example, the claimant's "financial resources," "age," and "physical and emotional condition."[100] Another significant factor in quantifying alimony is the "standard of living established during the marriage,"[101] which establishes the comparative baseline for measuring need. Spousal need thus serves both as an eligibility requirement and as a primary factor in quantifying the size and duration of an alimony award. Need alone, however, provides a poor rationale for alimony, since it fails to "explain wlıy a needy person's former spouse should be liable for his or her support rather than the needy person's parents, children, or society as a

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96. Starnes, *Mothers*, *supra* note 24, at 1539.

97. *See supra* Part II.A.

98. For example, the UMDA provides:

> [T]he court *may* grant a maintenance order for either spouse only if it finds that the spouse seeking maintenance:
>
> (1) lacks sufficient property to provide for his reasonable needs; and
>
> (2) is unable to support himself through appropriate employment or is the custodian of a child whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside the home.

UMDA, *supra* note 27, § 308(a) (emphasis added).

99. The UMDA provides:

> The maintenance order shall be in amounts and for periods of time the court deems just, without regard to marital misconduct, and after considering all relevant factors including:
>
> (1) the financial resources of the party seeking maintenance . . . ;
>
> (2) the time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment;
>
> (3) the standard of living established during the marriage;
>
> (4) the duration of the marriage;
>
> (5) the age and the physical and emotional condition of the spouse seeking maintenance; and
>
> (6) the ability of the spouse from whom maintenance is sought to meet his needs while meeting those of the spouse seeking maintenance.

Id. § 308(b).

100. *Id.*

101. *Id.*

whole."[102] Need thus serves as an alimony trigger rather than an alimony rationale, suggesting a view of alimony as a handout rather than an earned entitlement.

Since alimony decision making under no-fault is hugely discretionary,[103] one might have predicted that no-fault's clean-break philosophy would influence courts to reduce the alimony eligibility pool by magnifying the degree of the "need" necessary to qualify for alimony. "Need," for example, might be defined to include only those alimony claimants on the brink of poverty or destitution, a definition that would certainly limit the number of eligible claimants.[104] It is not clear, however, that no-fault had this effect. Notwithstanding popular conceptions to the contrary, alimony has never been widely awarded,[105] and the number of awards seems not to have decreased under no-fault. Studies indicate that less than 20% of divorced women have ever received alimony.[106]

No-fault's fresh-start philosophy may nonetheless have shortened the duration of alimony awards.[107] If a claimant's "need" can be cast as a temporary rather than a permanent phenomenon, alimony can be limited to a short period necessary for rehabilitation. Unlike longer-term alimony, rehabilitative alimony will thus delay, but not defeat, clean-break aspirations. Indeed, no-fault alimony statutes often include educational or training opportunities among the factors relevant to alimony quantification.[108] Case law suggests early no-fault courts were mightily persuaded by visions of spousal rehabilitation.[109] In some notorious cases, courts exercised their broad discretion to limit alimony to very short periods, even for long-term homemakers

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102. ELLMAN ET AL., *supra* note 9, at 364.

103. Note use of the word "may" in the UMDA's alimony authorization section. UMDA § 308(a) ("court may grant a maintenance order for either spouse only if . . ."). For a discussion of the discretionary nature of alimony decision making under no-fault divorce statutes, see Starnes, *Mothers*, *supra* note 24, at 1538–40.

104. A court less inclined toward clean breaks might define "need" as loss of the marital standard of living, however luxurious that standard may have been.

105. Joan Williams cites a study in which 80% of women assumed they would get alimony if they needed it, even though only about 8% of women are actually awarded alimony today. JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 122 (2000).

106. U.S. BUREAU OF THE CENSUS, CHILD SUPPORT AND ALIMONY, 1989, CURRENT POP. REP., SERIES P-60, NO. 173, at 13, tbl.K (1990) (An average of about 14% of divorced women reported receiving alimony during the late seventies and early eighties, while about 17% reported receiving alimony in 1987.).

107. Professor Marsha Garrison reports a substantial decrease in the proportion of indefinite-term alimony awards under no-fault divorce. In the 1970s, approximately 80% of alimony awards in New York were permanent, but ten years later only about 40% were permanent. Marsha Garrison, *Good Intentions Gone Awry: The Impact of New York's Equitable Distribution Law on Divorce Outcomes*, 57 BROOK. L. REV. 621, 701 (1991). Speaking in 2000, Joan Williams observed that "today two-thirds of alimony awards are temporary." WILLIAMS, *supra* note 105, at 122.

108. *See, e.g.*, UMDA § 308(b)(2) (providing that a relevant factor in calculating an alimony order is "the time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment").

109. *See* Starnes, *Displaced Homemakers*, *supra* note 24, at 97–99 (describing the "rehabilitation illusion").

with few job skills and little realistic hope of recapturing more than a small fraction of the earning ability lost through years of family caretaking.[110] Cut off from spousal support, and entering the job market with depreciated human capital, many of these homemakers were plunged into poverty virtually overnight, exposing the cruel reality that a "displaced homemaker is just a man away from poverty."[111] Slowly, word of the dreary fate of homemakers under no-fault alimony statutes spread. In an early and particularly poignant commentary, one California court objected that no-fault laws, "heralded as a Bill of Rights for harried former husbands who have been suffering under prolonged and unreasonable alimony awards," should not serve "as a handy vehicle for the summary disposal of old and used wives."[112] "A woman," said the court, "is not a breeding cow to be nurtured during her years of fecundity, then conveniently and economically converted to cheap steaks when past her prime."[113] If implementation of the clean-break principle exacted a huge price from homemakers, it was at least a conceptually honest recognition that need is a dubious rationale for alimony.

Even if a need-based model could convincingly explain alimony, it cannot explain the remarriage-termination rule. If need triggers an alimony handout, then termination of alimony should depend on the elimination of need (or on a payor's inability to meet need). Yet the remarriage-termination rule commonly applies without regard to need. Under the automatic-termination rule and, except in extraordinary cases, also under the prima-facie rule, alimony terminates upon a recipient's remarriage whether or not her financial position has improved.[114]

Of course, even when an alimony recipient marries someone whose earnings or assets allow her to maintain or improve her standard of living, this situation may be only temporary. Should her second marriage also end,[115] an alimony recipient may be just as needy as she was prior to her remarriage. Yet if her second marriage is short, she will likely qualify for little or no new alimony.[116] This is an especially serious concern for older women who remarry after a long first marriage. Advanced age is an inescapable impediment to a long second marriage and, since significant alimony is rare after short marriages, it is a counter-indicator of significant alimony the second time around. Moreover, the job or career opportunities available before a first marriage may not spontaneously reappear when a second marriage ends. The education, career and personal life choices available at age twenty-five may simply not be available ten, fifteen, or twenty years later. The point is that remarriage may merely mask need rather than remove it. At most, a need-based alimony model supports suspension or reduction

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110. *See, e.g.*, Otis v. Otis, 299 N.W.2d 114 (Minn. 1980) (awarding four years of alimony to a forty-five year old woman who had not worked outside her home for twenty-three years). Ms. Otis's husband explicitly forbade her to work, insisting that he was "not going to have any wife of mine pound a typewriter." *Id.* at 118.

111. NATIONAL DISPLACED HOMEMAKERS NETWORK, THE MORE THINGS CHANGE . . . A STATUS REPORT ON DISPLACED HOMEMAKERS AND SINGLE PARENTS IN THE 1980S, at 1 (1990).

112. *In re* Marriage of Brantner, 136 Cal. Rptr. 635, 637 (Cal. Ct. App. 1977).

113. *Id.*

114. *See supra* Part I.B.

115. Second marriages are at least as likely as first marriages to end in divorce. *See supra* note 6.

116. Marriage duration is typically included in the list of factors relevant to alimony and plays a significant role in alimony quantification. *See, e.g.*, UMDA § 308(b)(4) (1998).

of alimony during remarriages that improve a recipient's financial status, but such a model provides no basis for, and in fact clearly contradicts, a rule that terminates alimony on remarriage without regard to financial consequence.

D. Postmodern Alimony Rationales: Entitlements and the Rhetoric of Embarrassment

Commentators have offered an array of divorce reform models that provide a conceptual basis for alimony lacking in historical and no-fault models of divorce. The American Law Institute has recently drafted its own alimony model as part of a broader rethinking of the economics of divorce. Each of these proposed models shares a common theme: alimony is an entitlement rather than a handout. This language of entitlement offers no easy explanation for the remarriage-termination rule.

1. Reform Models

Many feminist proposals for reform of the economics of divorce have included conceptual rationales for alimony. Jana Singer, for example, advances an investment partnership theory of marriage that casts spouses as equal investors who are equally entitled to share the financial rewards of marriage.[117] Drawing on commercial law, Martha Ertman reasons that a homemaker extends credit to her spouse by specializing in domestic labor and advocates use of premarital security agreements to ensure collection of this spousal debt in the event of divorce.[118] Twila Perry analogizes to strict tort liability and views alimony as a remedy that compensates a spouse for disproportionate economic losses suffered as a result of the "accident" of divorce.[119]

Elsewhere I have proposed an expanded analogy to partnership and a model of alimony based on partnership buyouts.[120] In order to limit judicial discretion, I have offered a mathematical model that quantifies alimony by reference to the duration of the marriage and the disparity in spousal earnings. An integral part of this buyout formula is the Uniform Probate Code's sliding scale, which bases a spouse's elective share of an augmented estate on the length of the marriage.[121]

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117. Jana Singer, *Divorce Reform and Gender Justice*, 67 N.C. L. REV. 1103, 1114 (1989). Professor Singer suggests one year of post-divorce income sharing for each two years of marriage. *Id.* at 1117. For an insightful inquiry into application of partnership principles to marriage, see Alicia Brokars Kelly, *Rehabilitating Partnership Marriage as a Theory of Wealth Distribution at Divorce: In Recognition of a Shared Life*, 19 WIS. WOMEN'S L.J. 141 (2004).

118. Martha M. Ertman, *Commercializing Marriage: A Proposal for Valuing Women's Work Through Premarital Security Agreements*, 77 TEX. L. REV. 17 (1998).

119. Twila L. Perry, *No-Fault Divorce and Liability Without Fault: Can Family Law Learn from Torts?*, 52 OHIO ST. L.J. 55, 66–67 (1991).

120. Starnes, *Displaced Homemakers*, *supra* note 24, at 119–38. I have also proposed a complementary partnership model for income sharing during the minority of minor children based on an analogy to unfinished partnership business. *See* Starnes, *Mothers*, *supra* note 24, at 1544–52.

121. Starnes, *Displaced Homemakers*, *supra* note 24, at 136 & n.309 (citing UNIF. PROBATE CODE § 2-201, 8 U.L.A. 88–89 (West 1983 & Supp. 1992)).

None of these feminist rationales for alimony—from partnership to secured transactions to torts—offers a reasoned basis for termination of alimony on a recipient's remarriage. If alimony is an entitlement based on gender-neutral principles, it is difficult to explain why a wife must forfeit that entitlement simply because she has begun a new life relationship. Even if she wins the lottery, a dissociated partner need not return her buyout; a creditor need not cancel a debt; a tort victim need not give back her damage award. And of course not every remarriage is a winning lottery ticket. Yet the remarriage-termination rule cuts off alimony, good fortune or not. If the remarriage-termination rule is "obviously" right,[122] it is surprisingly difficult to articulate its obvious basis under these proposed models.

2. The ALI Alimony Model

In its *Principles of the Law of Family Dissolution*, the ALI proposes a dramatic recharacterization of alimony as "compensation for loss rather than relief of need."[123] As the ALI explains, "[t]he intuition that the former spouse has an obligation to meet [the other spouse's] need arises from the perception that the need results from the unfair allocation of the financial losses arising from the marital failure."[124] Declaring its loss-sharing model a "principal conceptual innovation,"[125] the ALI "transforms" an alimony petition from a "plea for help" to a "claim of entitlement."[126]

To ensure "equitable reallocation" of the financial losses arising from divorce,[127] the ALI urges states to replace the need-based, discretionary standard of no-fault alimony laws with more narrowly defined presumptive rules. Models for these rules appear in two detailed Topics. Topic 2 identifies three types of compensable loss: (1) loss of the marital standard of living, (2) earning capacity loss resulting from primary caretaking of children, and (3) earning capacity loss resulting from the care of identified third parties in fulfillment of a moral obligation.[128] Topic 3, which applies to a limited number of short-term marriages,[129] seeks to restore "the claimant to the position he or she would have been in had the marriage not taken place."[130]

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122. *See* CLARK, *supra* note 8, § 17.6, at 283 (observing that "[t]he change in circumstance which most obviously calls for a modification of alimony is the remarriage of the recipient").

123. ALI PRINCIPLES, *supra* note 10, § 5.02 cmt. a. Elsewhere I have questioned the ALI's rejection of other rationales, including partnership, as well as the practicality of its proposal. *See* Starnes, *supra* note 60; Starnes, *Mothers*, *supra* note 24. The issue here, however, is not the viability of the Institute's proposal, but rather its efficacy in explaining the remarriage-termination rule.

124. ALI PRINCIPLES, *supra* note 10, § 5.02 cmt. a.

125. *Id.*

126. *Id.* As part of its effort to escape prejudices based on historical concepts of alimony, the Institute renames "alimony," preferring the term "compensatory spousal payments." *Id.* While the Institute shuns a contract model for alimony, its focus on loss has much in common with contract remedies based on reliance.

127. *Id.*

128. *Id.* §§ 5.04, 5.05, 5.11.

129. *Id.* § 5.07, cmt. a.

130. *Id.* These restitutionary-based awards will be available where: (1) divorce occurs before a spouse receives a "fair return" on an investment in the other spouse's education or training, or (2) a spouse is disparately unable to recover a premarital standard of living after a brief,

Whether or not a loss-allocation model is the best the ALI could have done,[131] its rigorous rethinking of alimony is a critical step toward understanding the proper role of alimony in a gender-neutral, no-fault regime. Yet the ALI's careful crafting of a rationale for alimony and healthy scrutiny of current law abruptly end as it confronts the remarriage-termination rule. Without much fanfare and without much discussion, the ALI endorses a version of the automatic termination rule for its primary Topic 2 awards.[132] recognizing, however, that the uncommon Topic 3 awards should be nonmodifiable given their restitutionary basis.[133]

What explains the automatic termination of compensatory payments under Topic 2? Elimination of a recipient's loss is clearly not the answer, since alimony ends automatically and almost always without regard to the financial impact of remarriage.[134] Acknowledging that "[t]he modern explanation for the traditional remarriage rule is remarkably unclear given its universality,"[135] the ALI half-heartedly casts about for an explanation and comes up with three possibilities.

First, says the ALI, although the recipient's loss may not end on remarriage, the payor's responsibility for that loss does end. This statement of course rephrases but does not answer the question of *why* the payor's responsibility ends.

Protecting the integrity of the second marriage is the ALI's next rationale. Noting that personal and financial exclusivity are essential parts of marriage, the ALI claims that termination of alimony is necessary to protect the integrity of a recipient's new marriage.[136] "To require support of the second marriage by the first spouse," says the ALI, "would cast doubt on the second marriage's authenticity."[137] This reasoning sounds suspiciously like historical rationales for alimony termination: a wife can belong to only one husband at a time.[138] A married woman needs a former husband's support only until she finds a new husband to support her—one husband at a time please. To allow a wife to benefit from two husbandly support obligations would smack of bigamy, and since bigamy is forbidden, the second "marriage" would be void. Is this what the ALI means by "cast[ing] doubt on the second marriage's authenticity"?[139]

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childless marriage, as where one spouse relocates to further the other's career and divorce occurs soon thereafter. *See id.* §§ 5.12–5.13.

131. For a critique of the ALI's alimony proposals, see Starnes, *supra* note 60, and Starnes, *Mothers*, *supra* note 24.

132. ALI PRINCIPLES, *supra* note 10, § 5.07. The Institute recognizes an exception in cases "establishing that termination of the award would work a substantial injustice because of facts not present in most cases . . . ." *Id.* § 5.07(2). The Institute concedes, however, that cases qualifying for continuation of alimony beyond remarriage are "overwhelmingly the exception." *Id.* § 5.07 rep. notes, cmt.c.

133. *Id.* § 5.07 cmt. a; *see also supra* notes 65–67 and accompanying text.

134. *Id.* The Institute concedes as much, observing that "[r]emarriage may or may not cause a change in the need upon which the modern alimony award is formally based, but the award ends in either event." *Id.*

135. *Id.*

136. *Id.* ("The new personal and financial obligations that follow from [remarriage] necessarily exclude third persons, and must therefore terminate the prior spouse's obligation.").

137. *Id.*

138. *See supra* Part II.A.

139. ALI PRINCIPLES, *supra* note 10, § 5.07 cmt. a.

Equally perplexing is the ALI's failure to consider the gender-neutral implications of its second-marriage-authenticity principle. If termination of alimony is necessary to ensure the authenticity of an alimony recipient's (a wife's) remarriage, why isn't it also necessary to ensure the authenticity of a payor's (a husband's) remarriage? That is, why doesn't alimony terminate automatically upon a payor's remarriage? Just as a wife can have only one husband, a husband can have only one wife. Under this reasoning, no husband should be required to support two wives at one time. While suggestions of this view do indeed appear in anti-alimony rhetoric that seeks to preserve an ex-husband's opportunity for remarriage,[140] alimony obligations do not terminate automatically upon a payor's remarriage.

Finally, and most curiously, the ALI suggests a rationale for termination based on recovery of psychic loss. "The most important loss on divorce," observes the ALI, "may be the failed expectation of having a close and caring lifetime companion."[141] Because such loss ordinarily cannot be measured, it is necessarily disregarded at divorce.[142] "Remarriage presumptively solves this measurement problem," claims the ALI, "for the inference naturally arises that the obligee derives great nonfinancial rewards from the new relationship overall, whatever its financial component."[143] The ALI then reaches the dubious conclusion that "[c]ontinuing compensatory payments after the obligee's remarriage would make overcompensation likely because the obligee could combine the first spouse's earnings with both the personal and financial qualities of the second spouse."[144] The message is that an alimony recipient's presumed joy on remarriage should trigger financial loss in order to avoid her overcompensation. What? In the end, the ALI's rhetoric is an embarrassing effort to explain intuition rather than an uncompromising attempt to provide a compelling rationale for the remarriage-termination rule. Perhaps the courts enforcing the rule have done better.

III. DRESSING UP INTUITION: JUDICIAL REASONING AND THE REMARRIAGE-TERMINATION RULE

Judicial attempts to provide a rationale for the remarriage-termination rule are few in number and disappointing in substance. Efforts to explain termination come disproportionately from early courts, contemporary courts being more prone to enforce

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140. *See, e.g.*, Voyles v. Voyles, 644 P.2d 847, 849 (Alaska 1982) ("[O]nly the rule requiring automatic termination can provide some certainty to an independent spouse who might also wish to enter into new marital relationships, raise a family, or take on new financial responsibilities."); Marquardt v. Marquardt, 396 N.W.2d 753, 755 (S.D. 1986) (Henderson, J., concurring specially) (supporting a rule that alimony terminates automatically upon the recipient's remarriage partly on the ground that an ex-husband might have a new wife to support).

141. ALI PRINCIPLES, *supra* note 10, § 5.07 cmt. a.

142. *Id.* § 5.02 cmt. b ("The pains and joys that individuals find from divorce are not commensurable with its financial costs, so that there is no method for determining the extent to which compensation for a financial loss should be reduced or enlarged to reflect nonfinancial gains or losses.").

143. *Id.* § 5.07 cmt. a.

144. *Id.*

the rule than to justify it.[145] Judicial rationales for the remarriage-termination rule fall roughly into three categories: (1) unseemliness, (2) election, and (3) untidiness.

A. Unseemliness

By far the most common explanation for the remarriage-termination rule is the conviction that to allow a woman to collect support from two men—her ex-husband and her current husband—would be positively unseemly. In a much-cited 1930 case, a Connecticut court explained that to continue alimony beyond a wife's remarriage "would offend public policy and good morals. It is so illogical and unreasonable that a court of equity should not tolerate it. Well has it been characterized as *legally and socially unseemly*."[146] In a much-quoted passage from 1968, a Nebraska court agreed: "[I]t is against public policy that a woman should have support or its equivalent during the same period from each of two men. . . . '*Aside from positive unseemliness, it is illogical* and *unreasonable* . . . .'"[147] Other courts have opted for language of distaste and repugnance. As a Kansas court explained in 1967:

> It is *distasteful* to permit a divorced wife to hold both her former husband under a decree of alimony and her present husband under the marital duty of support which inheres in every marriage contract. . . . It is *repugnant* to a sense of justice for one man to be supporting the wife of another who has recently assumed the legal obligation for her support.[148]

While more contemporary courts have sometimes taken up the rhetoric of unseemliness,[149] more often they have softened their prose, opting for the less disdainful and less colorful language of unreasonableness. "To permit a spouse to elicit the support of two spouses simultaneously," said the Alaska Supreme Court in 1982, "would be *unreasonable*."[150] The Massachusetts Supreme Court agreed, explaining in 1995 that ordinarily it is "'*illogical and unreasonable*' that a spouse should receive support from a current spouse and a former spouse at the same time."[151] Also in 1995,

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145. *See* ELLMAN ET AL., *supra* note 9, at 473.

146. Cary v. Cary, 152 A. 302, 303 (Conn. 1930) (emphasis added).

147. Wolter v. Wolter, 158 N.W.2d 616, 619 (Neb. 1968) (quoting Bowman v. Bowman, 79 N.W.2d 554, 560 (Neb. 1956)) (emphasis added) (citation omitted). "The essential keystone," said the court in *Wolter*, "that supports a decree for 'true' alimony payable in the future for support and maintenance of a divorced wife is the continued unmarried status of the wife." *Id.* The ALI cites *Wolter* but quotes only *Wolter*'s public policy language, avoiding the prose of unseemliness. *See* ALI PRINCIPLES, *supra* note 10, § 5.07 rep. notes, cmt. a.

148. Herzmark v. Herzmark, 427 P.2d 465, 470 (Kan. 1967) (emphasis added). Curiously, the court thought "it would be even *more repugnant* for a man to receive support from both wife and former wife." *Id.* (emphasis added).

149. *See, e.g.*, *In re* Marriage of Shima, 360 N.W.2d 827, 828 (Iowa 1985); Nugent v. Nugent, 152 N.W.2d 323, 328 (N.D. 1967). Surprisingly, the origin of this much-quoted passage seems to be an old volume of American Jurisprudence. *See* 17 AM. JUR. *Divorce and Separation* § 610, at 475 (1938).

150. Voyles v. Voyles, 644 P.2d 847, 849 (Alaska 1982) (emphasis added).

151. Keller v. O'Brien (*Keller I*), 652 N.E.2d 589, 594 (Mass. 1995) (quoting Marquardt v. Marquardt, 396 N.W.2d 753, 754 (S.D. 1986)) (emphasis added). The Massachusetts

the Kansas Supreme Court opined that it is "*against public policy* to allow a payee to hold a claim against his or her former spouse for maintenance and hold a claim against his or her current spouse for the marital duty of support."[152] Speaking in 1981, an Alabama court seemed more alarmed by the possibility of continuation of alimony after a recipient's remarriage. "Such is *unconscionable*," said the court. "It is *very inequitable*."[153]

What explains this judicial intuition that continuing alimony beyond a recipient's remarriage would be unseemly, repugnant, unconscionable, or at least unreasonable? While dramatic adjectives signal a conclusion rather than an explanation, the sense of impropriety evident in judicial prose hints at a familiar theme: a virtuous woman cannot have two husbands at once, and since alimony evidences a husband's support obligation, it must end when a woman takes a new husband. Under this historical model of alimony, a wife needs and deserves her husband's protective cover only until a new man takes on the obligation to support her.[154] No woman can or should have the support of two men at the same time, for this would amount to polyandry, or at least to prostitution, both of which are positively unseemly. The problem with such reasoning of course is that it reflects nineteenth-century views of alimony that have virtually nothing in common with contemporary understandings of alimony as an entitlement to compensation for loss or to a buyout of an interest in the marital partnership.

B. Election

Another popular explanation for the remarriage-termination rule is that the wife who remarries thereby elects to relinquish alimony. As the Nebraska Supreme Court explained in 1968, an alimony recipient has a "privilege to abandon the provision made by the decree of the court for her support . . . and when she has done so, the law will require her to abide by her *election* . . . ."[155] "If the dependent spouse has entered into a new marital relationship," said the Alaska Supreme Court, "we think that the remarriage should serve as an *election* between the support provided by the alimony

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termination rule applies in the absence of extraordinary circumstances. *See supra* Part I.B; Peterson v. Peterson, 434 N.W.2d 732, 736 (S.D. 1989) (quoting "illogical and unreasonable" rationale of *Marquardt* and stating that prima facie rule applies to all alimony, rehabilitative or otherwise). More recent South Dakota courts have continued their references to unreasonableness. In 2002 the South Dakota Supreme Court observed that "[t]his Court has consistently stated that it is *unreasonable* for a dependent spouse to receive financial support from a former spouse and a present spouse at the same time." Amundson v. Amundson, 645 N.W.2d 837, 839 (S.D. 2002) (continuing alimony after annulment of wife's five-month second marriage) (emphasis added).

152. Pfeifer v. Quint, 907 P.2d 818, 821 (Kan. 1995) (citing *Herzmark*, 427 P.2d 465) (emphasis added).

153. Tillis v. Tillis, 405 So. 2d 938, 940 (Ala. Civ. App. 1981) (emphasis added).

154. *See supra* Part II.A.

155. Wolter v. Wolter, 158 N.W.2d at 616, 619 (Neb. 1968) (quoting Bowman v. Bowman, 79 N.W.2d 554 (Neb. 1956)) (emphasis added) (citation omitted); *see also In re* Marriage of Shima, 360 N.W.2d 827, 828 (Iowa 1985) (quoting *Wolter*'s "election" rationale); *Keller I*, 652 N.E.2d at 594 ("[R]emarriage should serve as an election between the support provided by the alimony award and the legal obligation of support embodied in the new marital relationship.") (quoting *Voyles*, 644 P.2d at 849).

award and the legal obligation of support embodied in the new marital relationship."[156] "The policy behind terminating sustenance alimony after remarriage is that the wife has *elected* to be supported by a new husband," reasoned the Ohio Supreme Court.[157]

The election rationale does not depend on whether a second spouse is actually able to provide meaningful support, as the court acknowledged in terminating alimony upon the recipient's remarriage to a man whose income consisted of social security and minimal retirement benefits.[158] The low income of the wife's new husband "in no way diminishe[d] the choice she voluntarily made to share her living expenses with him."[159]

Closely tied to the election rationale is the proposition that upon remarriage the second husband substitutes for the first.[160] As a Nebraska court explained in 1956, "[t]he reason for the discontinuance of alimony allowance upon the recipient contracting another marriage is that, in that event, the legal obligation of the second husband supplants that of the first."[161] "Absent extraordinary circumstances," said the Massachusetts Supreme Court in 1995, "the former spouse should not be required to pay alimony when another person has assumed the support obligation."[162]

At the core of the election rationale is the dubious assumption that remarriage necessarily implies a choice to forego alimony. What explains this assumption? Is it the historical view of alimony as a husband's obligation to sustain his wife, from which it must naturally follow that only one man at a time can owe a woman this obligation? Contemporary views of alimony do not explain *why* an alimony recipient must choose

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156. *Voyles*, 644 P.2d at 849 (emphasis added). The court in *Voyles* added that "[f]or support to continue to a dependent spouse when he or she has *chosen* to form a new marital relationship is, in our judgment, unsound as a matter of public policy." *Id.* (emphasis added); *see also Keller I*, 652 N.E.2d at 594 (quoting *Voyles*'s election language).

157. Dunaway v. Dunaway, 560 N.E.2d 171, 175 (Ohio 1990) (emphasis added). An Ohio statute now limits judicial authority to terminate alimony to cases in which a divorce decree contains an express reservation of jurisdiction. *See* OHIO REV. CODE ANN. § 3105.18(E) (LexisNexis 2003). Applying this statute, the Ohio Supreme Court recently reversed a trial court's termination of alimony upon the recipient's remarriage on the ground that the trial court failed to reserve jurisdiction over alimony issues. Kimble v. Kimble, 780 N.E.2d 273 (Ohio 2002).

158. *Dunaway*, 560 N.E.2d at 176.

159. *Id.* The court in *Dunaway* expressly acknowledged that the wife's new husband might not be "wholly able" to support her. *Id.* "To hold a first spouse responsible for continued support of a former spouse who has remarried," reasoned the court, "is tantamount to imposing a legal obligation to support another couple's marriage." *Id.*

160. The election rationale has much in common with novation, under which a "substituted contract . . . discharges a duty by adding a party who was neither the obligor nor the obligee of that duty." FARNSWORTH, *supra* note 87, § 4.24.

161. Bowman v. Bowman, 79 N.W.2d 554, 560 (Neb. 1956); *see also Voyles*, 644 P.2d at 849 ("Because there is a legal obligation of support embodied in the new marital relationship, the obligation of support from the past marital relationship should end.").

162. Keller v. O'Brien (*Keller I*), 652 N.E.2d 589, 594 (Mass. 1995). In 2004, the Supreme Judicial Court of Massachusetts expressly adopted the ALI's automatic remarriage-termination rule of ALI PRINCIPLES § 5.07, although the facts of that case presented only the issue of whether alimony survives the payor's death. Cohan v. Feuer, 810 N.E.2d 1222, 1228 (Mass. 2004).

between remarriage and alimony.[163] Why can she not choose remarriage *and* alimony? Rather than offering a reasoned explanation for this forced choice, the election rationale merely describes the consequence of the remarriage-termination rule. It is thus the remarriage-termination rule, rather than any reasoned rationale for it, that forces the recipient to choose between remarriage and alimony. The circularity of the election rationale makes it wholly unconvincing.

C. Untidiness

A final termination rationale comes from courts concerned with the possibility of multiple divorces and multiple alimony awards. As one judge described the problem:

> Jane Doe is married to John Doe; they are divorced and he is required to pay alimony. Jane then marries John Smith; he must support her by state law and the trial judge, when they are divorced, orders alimony. Jane now receives alimony from two different men. Enter Fred Smith. He marries Jane but, alas, alack, this third marriage goes awry and they are divorced. Yes, the trial court orders alimony as Fred is very well-to-do and is convinced Jane should have support (alimony) money. Where will this cycle of repetitive alimony (support) end? It should end with the first remarriage.[164]

"[G]ood housekeeping," said another court, "would suggest that when a recipient of alimony remarries, an appropriate order recognizing that fact, and the cessation of the alimony obligation, should be entered."[165]

This concern for tidiness surely overstates the risks and costs of multiple alimony awards. Alimony is only rarely ordered, and long-term awards are the exception rather than the rule.[166] Moreover, a significant factor in determining the amount and duration of an alimony award is the length of the marriage.[167] How many significant-term marriages can one spouse have?

Assuming arguendo that multiple, long-term alimony orders are likely, the question becomes whether the costs of such untidiness outweigh the benefits of continued alimony. If alimony is an entitlement rather than a handout—as contemporary alimony models suggest[168]—and an entitlement of significant economic importance to those who receive it, a concern for tidiness will rarely outweigh the benefits of continuing alimony beyond remarriage.

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163. If alimony is based on a recipient's need that arises from her first marriage, for example, it is unclear why a recipient must choose between alimony and a remarriage that does not improve her financial status. Moreover, if alimony is an entitlement based on contributions to marriage or rights as an equal stakeholder in marriage, it is unclear why an alimony recipient must choose between alimony and remarriage.

164. Marquardt v. Marquardt, 396 N.W.2d 753, 755 (S.D. 1986) (Henderson, J., concurring specially) (supporting an automatic termination rule).

165. Greene v. Greene, 643 P.2d 1061, 1067 (Idaho 1982) (denying wife's claim to unpaid alimony that accrued after her remarriage but before husband's modification motion).

166. *See supra* notes 105–06 and accompanying text.

167. *See, e.g.*, UMDA § 308(b)(4) (1998) (listing duration of marital relationship as relevant factor in quantifying alimony). *See generally* ELLMAN ET AL., *supra* note 9, at 386–87.

168. *See supra* Part II.D.

CONCLUSION

The search for a rationale for the remarriage-termination rule begins and ends with historical models of alimony that are starkly inconsistent with modern understandings of gender equality and no-fault divorce. More contemporary alimony rationales—from fault-based damage awards to no-fault need-based models, from partnership models to the American Law Institute's loss-sharing scheme—provide no explanation for termination of alimony upon remarriage and, in fact, provide compelling arguments against termination. The sense of impropriety and indignation that infuse occasional judicial efforts to explain the rule only confirm the suspicion that the roots of the remarriage-termination rule lie in archaic principles of coverture, which cast a wife not as a marital partner, but rather as a man's burden, dependent on her husband for protection and survival until the next man comes along to relieve him of the task. This vision of burdened men and incapacitated women makes a dispiriting statement about husbands and wives and about the institution of marriage itself. If the remarriage-termination rule can be explained only in such pejorative terms, it should not endure.