

SPOUSAL SUPPORT IN AN ERA OF INEQUALITY

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I. THE ORIGINS OF SPOUSAL SUPPORT	371
II. CANADIAN RATIONALITY	375
III. DISCRETION OR GUIDELINES?	384
IV. CONCLUSION	386

Volume 41, Issue 3 surveys spousal support developments across the globe, and underscores the extent to which agreement on the purposes and form of spousal support remains a work in progress. Tom Oldham begins the volume emphasizing that, at least with respect to American developments, Homer Clark’s words of 50 years ago remain “surprisingly relevant.”¹ Clark wrote, “If we do not know what we are trying to accomplish by [awarding alimony], we will not easily be able to decide whether it should be granted in a particular case, or, if so, in what amount.”² The volume ends with Rollie Thompson who, in providing an overview of Canadian law, shows us what a rational, transparent, support law looks like where the potential

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1. J. Thomas Oldham, *An Overview of the Rules in the USA Regarding the Award of Post-Divorce Spousal Support in 2019*, 41 HOUS. J. INT’L L. 525, 541–42 (2019).

2. *Id.*

justifications and the conflict between them are made explicit.³ In between, accounts from Germany, France, Scotland and Japan describe how modern family law has struggled to reconcile spousal support with each of the divorce systems in those countries.⁴

The fact that countries across the globe have yet to adopt coherent spousal support laws⁵ suggests that the difficulties arise from something more than doctrinal failures and inconsistencies. Instead, they involve the question of how to reconcile changing women's roles with increasing economic inequality and the unresolved question of how to provide care for dependents such as the young, the disabled and the elderly.⁶ At one time, the answers were easier. In earlier eras, men had a monopoly on access to the major sources of wealth and income, women were viewed as intrinsically in need of male support, and marriage served as an institution designed to address the fact that heterosexual activity inevitably bore the risk of pregnancy.⁷ Within such systems, dissolving a marriage was difficult, and men owed their wives a lifetime duty of support by virtue of the marriage.⁸

Today, these assumptions have been dismantled, but no comprehensive alternative premises have replaced them. Women

3. See Rollie Thompson, *Spousal Support Eh? Sorry, Not Your American Alimony*, 41 HOUS. J. INT'L L. 641, 641–44 (2019) (providing an overview of Canadian support laws and comparing the justifications and conflicts between the two primary bases for entitlement).

4. See generally Christine Bidaud-Garon, *Compensatory Allowance After Divorce in French Law: La Prestation Compensatoire*, 41 HOUS. J. INT'L L. 581 (2019); Katharina Kaesling, *Spousal Support After Divorce in Germany*, 41 HOUS. J. INT'L L. 543 (2019); Marcelo de Alcantara, *Award of Post-Divorce Spousal Support in Japan*, 41 HOUS. J. INT'L L. 629 (2019); John M. Fotheringham, *Spousal Maintenance in Scots Family Law*, 41 HOUS. J. INT'L L. 601 (2019) (describing how spousal support is integrated into the divorce systems in France, Germany, Japan, and Scotland).

5. See Marshall S. Willick, *A Universal Approach to Alimony: How Alimony Should be Calculated and Why*, 27 J. AM. ACAD. MATRIM. LAW. 153, 160 (2015).

6. See, e.g., Martha A. Fineman, *Contract and Care*, 76 CHI.-KENT L. REV. 1403, 1405–06 (2001) (describing the need to comprehensively address such vulnerability as a societal rather than solely a private responsibility).

7. See June Carbone & Naomi Cahn, *Whither/Wither Alimony?*, 93 TEX. L. REV. 925, 930 (2015) (reviewing Cynthia Lee Starnes, *The Marriage Buyout: The Troubled Trajectory of U.S. Alimony Law* (2014)) (describing alimony's origins).

8. *Id.* at 931–32.

have achieved a measure of economic independence, but substantial gender disparities remain.⁹ Childrearing still affects income capacity, whether done by traditional female homemakers or couples who trade off domestic responsibilities.¹⁰ In addition, countries vary in the degree to which they privatize dependence, that is, the extent to which they depend on the nuclear family to assume responsible for the young, the old and the infirm without state assistance.¹¹ This means that the relationship between intimate partners is not just about what they owe each other, but rather involves an obligation, which may differ from society to society, to provide for the members of their households who may otherwise become a burden for the state. These issues worsen with greater societal inequality.¹² When that happens, families may have less in common with each other, and a single approach to spousal support, designed to be fair for some, may seem radically unfair to others.

In looking over global developments, the Canadian example, with its transparency and rationality, frames the issues at stake. First, it clearly lays out the twin purposes of spousal support and the tensions between them.¹³ Canadian law starts with ““compensatory”” rationales that use spousal support to address the differences in living standards that arise because of the couples’ arrangements during the relationship and treats post-divorce support in that context as an obligation owed by one partner to another.¹⁴ It also recognizes, however, ““non-compensatory”” justifications that arise from the existence of a relationship between a partner with substantial assets and one with unmet needs, concluding that the wealthier spouse has an obligation to prevent the dependent one from becoming a burden

9. See JUNE CARBONE & NAOMI CAHN, *MARRIAGE MARKETS: HOW INEQUALITY IS REMAKING THE AMERICAN FAMILY* 64–65 (2014) (describing increasing gender differences with greater inequality).

10. *Id.* at 164–65.

11. *Id.* at 165–66.

12. *Id.*

13. Thompson, *supra* note 3, at 644 (comparing the two primary bases for entitlement to spousal support).

14. See *id.* at 646 (arguing that the ““clean break”” model left women economically disadvantaged after divorce due to familial sacrifices made during marriage).

on society.¹⁵ Canadian law acknowledges the tensions between the two rationales and considers the consequences for the amount, duration and modifiability of support.¹⁶

Second, Thompson explores how Canadian law addresses the impact of judicial discretion and the impact of guidelines in cabining that discretion.¹⁷ The movement in family law over the last half century has been one from discretion to rules in many countries.¹⁸ The property division has become more formulaic, tending toward a 50/50 division of property acquired during marriage.¹⁹ Child support, within or outside of marriage, has become more associated with guidelines tied to parental income and circumstances.²⁰ Spousal support, in contrast, has remained something of a clean up doctrine, awarded only after the property division and child support are in place.²¹ The Canadian example models the role of guidelines in providing greater predictability while many of the other countries in the volume continue to give greater discretion to the courts.

Finally, Thompson demonstrates how different national cultures and legal traditions can produce different results, even when the issues are remarkably similar.²² Indeed, perhaps the most illustrative account in the volume involves Quebec, which has rejected solutions adopted in the rest of Canada.²³ Although Rollie Thompson does not quite say so, it is easy to suspect that the Quebecois are simply contrarians, riven by the internal

15. *Id.* at 648.

16. *See id.* at 669–70.

17. *See id.* at 650–51 (explaining the unpredictability and confusion surrounding entitlement under judicial discretion and the adoption of guidelines in hope for clarity).

18. *See generally* Bidaud-Garon, *supra* note 4; Kaesling, *supra* note 4; de Alcantara, *supra* note 4; Fotheringham, *supra* note 4 (outlining the laws France, Germany, Japan, and Scotland have implemented in an attempt to standardize family law).

19. Thompson, *supra* note 3, at 649.

20. *Id.* at 649–50.

21. *See* June Carbone, *The Futility of Coherence: The ALI's Principles of the Law of Family Dissolution, Compensatory Spousal Payments*, 4 J.L. & FAM. STUD. 43, 43–44 (2002) (explaining how spousal support does not serve as a vindication of individual claims but as a foundation for unwinding the parties' affairs).

22. *See generally* Thompson, *supra* note 3, at 670 (noting how the rationales for spousal support in Canadian law produce different outcomes on similar issues in other countries).

23. *Id.* at 654.

clashes that characterize much of the rest of the world.²⁴ Canadian rationality may be too much to ask of the law of spousal support.

This essay will first examine the tensions underlying the origins of spousal support. Second, it will consider the contemporary rationales that justify spousal support. Third, it will weigh the role of discretion versus guidelines in different regimes. Finally, it will suggest that, as in Quebec, the ability to resolve tensions between different interest groups may affect the ability to adopt workable approaches.

I. THE ORIGINS OF SPOUSAL SUPPORT

Despair at the lack of coherence in family law is nothing new. Frederic Maitland wrote in 1880 that “[t]he law of Husband and Wife is in an awful mess (I don’t think that a layman would readily believe how bad it is)”²⁵ Alimony, however, once did have an established role in Anglo-American law: it constituted specific performance of the husband’s marital duty of support.²⁶ In England and many American states in the early part of the nineteenth century, it took an act of Parliament (or the state legislature) to obtain a true divorce.²⁷ Most divorces in these jurisdictions were *a mensa et thoro* (from bed and board), in effect, a legal separation in which neither party could remarry.²⁸ The

24. See *id.* (“There are a number of explanations for Quebec’s limited use of the SSAG: theoretical, judicial, political and practical. None is entirely satisfactory, alone or collectively.”) (describing various reasons why Quebec rejected solutions adopted by the rest of Canada, including resistance of a government idea by the Quebec Ministry of Justice).

25. Mary Moers Wenig, *The Marital Property Law of Connecticut: Past, Present and Future*, 1990 WIS. L. REV. 807, 808 (1990).

26. See Carbone & Cahn, *supra* note 7, at 931 (describing alimony’s origins).

27. Russell M. Coombs, *Interstate Child Custody: Jurisdiction, Recognition, and Enforcement*, 66 MINN. L. REV. 711, 717 (1982) (observing that until the mid-19th century, “the legislatures rather than the courts granted the few divorces that occurred before that time”); Rhonda Wasserman, *Parents, Partners, and Personal Jurisdiction*, 1995 U. ILL. L. REV. 813, 818, n.21 (1995) (stating that only Parliament could grant an absolute divorce).

28. See Chester G. Vernier & John B. Hurlbut, *The Historical Background of Alimony Law and its Present Statutory Structure*, 6 LAW & CONTEMP. PROBS. 197, 198–99 (1939) (observing that a husband retained control over all property and was required to only pay a permanent alimony after a divorce *a mensa et thoro*).

separation allowed the parties to live apart, but the marriage continued and the husband retained control of the couples' property, including any separate property that the wife brought into the marriage.²⁹ The wife received "alimony," that is, the support to which she was entitled by virtue of the ongoing marriage.³⁰ Alimony reflected the husband's marital duty to his wife and the community to insure that he would provide her so long as the marriage lasted.³¹

The spousal support system became less coherent with the adoption of true divorce,³² ending the spouse's legal relationship to each other (and thus the justification for continuing support).³³ In an era in which divorce could be granted only on fault grounds,³⁴ a husband's breach of his marital obligations constituted the primary justification for continuing support.³⁵ Nonetheless, the courts never administered the divorce system as an exercise in contract liability, tying the outcome with precision to a breach of marital obligation claim.³⁶ Instead, alimony in the fault era, like today, served multiple purposes: provision for a

29. See Wasserman, *supra* note 27, at 829 (observing that only a true divorce could grant a married woman return of her property or the ability to enjoy the legal rights of a *femme sole*).

30. *Id.* (describing alimony as "the allowance made to the wife out of the husband's estate or income, upon a decree of separation"); the courts, however, still disagreed as to how to calculate the amount. See, e.g., *Burr v. Burr*, 7 Hill 207 (N.Y. 1843) (discussing different theories).

31. Vernier & Hurlbut, *supra* note 28, at 198.

32. See CYNTHIA LEE STARNES, *THE MARRIAGE BUYOUT: THE TROUBLED TRAJECTORY OF U.S. ALIMONY LAW* 34 (2014) (noting that by the end of the nineteenth century, every state had switched to some form of fault-based divorce regime, which authorized absolute divorce only for an innocent spouse).

33. *Id.* (suggesting that the real problem for alimony comes with the "appearance of absolute divorce and the supposed end of coverture [which] meant the end of caregivers' lifetime support ticket and also the end of a clear rationale for alimony").

34. Indeed, divorce could be granted only if one – and only one – of the parties were at fault. See, e.g., *DeBurgh v. DeBurgh*, 250 P.2d 598, 599, 605 (Cal. 1952) (discussing and overruling doctrine of recrimination).

35. See Carbone, *supra* note 21, at 53 (observing that "rationales for alimony routinely recited fault as integral to the justification for support").

36. See Carbone & Cahn, *supra* note 7, at 933 (observing that "no state treated alimony as a true system of damages, attempting to measure the 'innocent' spouse's loss with precision" and indicating that alimony was not a result of breach of contract liability, but instead a measure of the harm caused to the "innocent" spouse).

dependent spouse, vindication of the duties one spouse owed the other on the basis of their marital obligations, and satisfaction of the public obligation to avoid imposing burdens on the larger society as a result of the divorce.³⁷ The system's incoherence came partly from its competing purposes and partly because of its failure to distinguish clearly between the property division and alimony.³⁸ The common law states divided the spouses' property, typically but not inevitably in accordance with the title in which it was held.³⁹ As a practical matter, this often meant that a husband, as the family's breadwinner, owned the bulk of the family's resources in his name alone.⁴⁰ Nonetheless, the states did not necessarily distinguish between the property division and alimony.⁴¹ In addition, relatively few jurisdictions banned support for a guilty wife entirely.⁴² And where a guilty husband

37. See Carbone, *supra* note 21, at 43–44 (concluding that spousal support law often seems incoherent because of the co-existence of competing rationales, the lack of a clear distinction between the property division and support, and the judicial interest in “put[ting] family members in a position to untangle their comingled affairs and move on” rather than vindicate any single claim issue at the expense of others).

38. *Id.* at 44–45.

39. *Id.* at 49 (describing impact of the Married Women's Property Acts and divorce a vinculo or true divorce in allowing return of wives' separate property).

40. Community property states, in contrast, treated property acquired during the marriage as jointly owned. Texas, perhaps at least partly as a result, made no provision for alimony after the property settlement became final. *Id.*; See, e.g., James W. Paulsen, *The History of Alimony in Texas and the New “Spousal Maintenance” Statute*, 7 TEX. J. WOMEN & L. 151, 151–52 (1998) (observing that the Texas Supreme Court ruled in 1841 that alimony is incompatible with the community property system and that Texas law did not authorize it.); see also Eichelberger v. Eichelberger, 582 S.W.2d 395, 402 (Tex. 1979) (referring to “the long-standing public policy against alimony in this state and the general incompatibility of the principle of spousal support after divorce with the community property system as it has existed in Texas since the Republic of Texas”); cf. James W. Paulsen, *Remember the Alamo(Ny)! The Unique Texas Ban on Permanent Alimony and the Development of Community Property Law*, 56 L. & CONTEMP. PROBS. 7, 8 (1993) (stating “Contrary to commonly held beliefs, the analysis that follows suggests that the time-honored Texas prohibition of permanent alimony may be nothing more than a turn-of-the-century invention of Texas courts, coinciding with a generally conservative judicial attitude, a skyrocketing divorce rate, and the heyday of the women's suffrage movement.”).

41. Carbone, *supra* note 21, at 52 (describing disagreement in the common law states about the courts ability to award a portion of the husband's estate, whether as a life interest or an interest in fee, as part of the “alimony” given to a wife at divorce).

42. *Id.* at 53.

had relatively little in the way of assets or income, the courts often did not award alimony even where the husband's breach of his marital duties was clearly established.⁴³ Nonetheless, where alimony was awarded, it almost always served to protect dependent spouses, who would otherwise have lacked means of support.⁴⁴

The no-fault era corresponded with women's increasing economic independence.⁴⁵ No-fault divorce eliminated what remained of the breach of contract rationale for alimony.⁴⁶ And wives no longer automatically assumed a homemaking role nor were necessarily viewed as dependent because of it.⁴⁷ At the same time, husbands still typically earned more than their wives, and mothers continued to assume more domestic responsibilities than fathers, limiting their income capacity in the process.⁴⁸ And, as courts encouraged use of the property award to effect a "clean break" between the spouses, the dividing line between the property division and spousal support became even more muddled than before.⁴⁹ The time had come to consider new

43. See Jana B. Singer, *Divorce Reform and Gender Justice*, 67 N.C. L. REV. 1103, 1106–07 (1989) (observing that fewer than 20% of California divorces resulted in alimony awards under fault standards). But cf. Marsha Garrison, *Good Intentions Gone Awry: The Impact of New York's Equitable Distribution Law on Divorce Outcomes*, 57 BROOK. L. REV. 621 (1991) (describing how couples' limited assets and income often produce limited divorce awards even in the modern era).

44. See, e.g., *Wright v. Wright*, 6 Tex. 29, 30 (Tex. 1851) (stating "[w]here the wife has a separate income, adequate to her maintenance, the husband is not liable for alimony, either under the Common or our Statute law.").

45. Carbone & Cahn, *supra* note 8, at 934 (commenting that "[i]mplementation of divorce reform over the course of the seventies and eighties coincided with the large-scale entry of women, including the married mothers of young children, into the labor market").

46. Starnes, *supra* note 33, at 36 (explaining that no-fault regimes functionally changed the injury required for a divorce because it was no longer only one spouse's fault that allowed for the remedy of divorce).

47. Carbone & Cahn, *supra* note 7, at 932 (quoting a past observance that "shared financial and domestic contributions [serve] as the foundation for marriage in the post-industrial economy").

48. See Starnes, *supra* note 32, at 54, 23 (observing that in 2011, about 40% of women with a child under six were not in the paid labor market, and that workers who take time off experience a significant lifelong drop in income).

49. Carbone & Cahn, *supra* note 7, at 936 (describing the effects of property division by a "clean break").

rationales for spousal support; rationales no longer tied to fault or to intrinsically gendered marital roles.⁵⁰ This volume assesses how different nations around the world have devised solutions.

II. CANADIAN RATIONALITY

Rollie Thompson, in describing Canadian developments, describes the principal rationales for alimony that have emerged over the last thirty years.⁵¹ Canada – in contrast with the United States – has a unitary court system, with its Supreme Court able to address family law issues on a national basis.⁵² It is also a common law country with judicial decisions explaining the rationale underlying cases in ways that go beyond delineation of statutory authority.⁵³

Canada, which bans consideration of fault in the award of support, had moved toward a preference for a “clean break,” that is, a severance of the spouses’ relationship with each other following separation.⁵⁴ Such an approach might award “rehabilitative alimony” for a period following divorce to allow a dependent spouse to go back to school, receive additional training or find a job, but it disfavored permanent support.⁵⁵ A 1992 Supreme Court decision, *Moge v Moge*,⁵⁶ revisited that approach. The couple in the case had three children over the course of a 17-18-year marriage.⁵⁷ The had wife received custody of the children after the divorce, and the husband, after paying support for 17 years, sought to terminate the payments.⁵⁸ At the time of the

50. *Id.* at 935 (referencing the move away from fault-based regimes and the growing economic independence of women).

51. Thompson, *supra* note 3, at 642–43.

52. *Id.* at 644.

53. Indeed, Thompson observes with respect to some of the leading cases that they did not turn on statutory language and included consideration of social science data. *Id.* at 645–46.

54. Carol Rogerson, *The Canadian Law of Spousal Support*, 38 FAM. L. Q. 69, 72, 76 (2004).

55. *Id.*; see also Thompson, *supra* note 3, at 645 (stating that Canada has moved toward a “clean break” model rather than a “rehabilitative alimony” favored by other countries, like the United States).

56. See *Moge v. Moge*, [1992] 3 S.C.R. 813, 814 (Can.).

57. *Id.* at 813.

58. *Id.* at 813–14.

husband's application, the wife was 52-years-old, and the husband, a welder, earned almost three times as much as his former spouse, who worked part-time cleaning houses.⁵⁹ *Moge* articulated a compensatory approach that tied permanent spousal support to the parties' arrangements during the marriage.⁶⁰ The Court found that "most compensatory support orders should not be time limited, but should assess the individual recipient's real ability to become self-sufficient over time;"⁶¹ and that "the longer a relationship endures, the closer the economic union, the greater will be the presumptive claim to equal standards of living upon its dissolution."⁶² Thompson indicates that, in applying the standard, the Canadian courts have taken into account such factors as whether a spouse cuts back on work force participation to care for children during the relationship or after separation, to support the other spouse's career, or to contribute to a family business in ways that involve a long term reduction in earning capacity that continues after the separation.⁶³ Thompson emphasizes that the compensatory rationale, however, did not necessarily provide precise guidelines for support amounts, but did justify maintaining the standard of living enjoyed during the relationship.⁶⁴

The *Moge* decision did not rule out consideration of other support rationales, however, and the Court came back to that issue seven years later in *Bracklow v. Bracklow*.⁶⁵ *Bracklow* involved a disabled spouse.⁶⁶ Susan Bracklow had earned more than her husband, Frank, during part of their seven-year

59. *Id.* at 825-26.

60. *Id.* at 849.

61. Thompson, *supra* note 3, at 646 (referring to the guidance on amount and duration laid out in *Moge*, 3 S.C.R. 813).

62. *Id.* (citing *Moge*, 3 S.C.R. 813 for its second guiding factor, "the longer a relationship endures, the closer the economic union, the greater will be the presumptive claim to equal standards of living upon its dissolution.").

63. *Id.* at 646-47.

64. *Id.* at 646 (discussing how although the lower courts in Canada struggled to determine the amount and duration of spousal support payments, the compensatory approach in *Moge* supports the maintenance of living standards commensurate with the length of the marital relationship).

65. See *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420, para. 1 (Can.).

66. *Id.* at para. 4.

marriage, and the couple had no children.⁶⁷ At the time of separation, however, she was disabled, earning \$10,000 per year in disability benefits while Frank earned \$45,000 per year.⁶⁸ The Court found that non-compensatory support could be justified by need alone, and that support obligations could also flow from the nature of marriage and the interdependence that typically accompanies it.⁶⁹ Thompson described the non-compensatory rationale as quite broad, extending to any case that involved a substantial drop in a spouse's standard of living after separate and economic hardship or need, with the longer the marriage, the greater the justification for support.⁷⁰ He nonetheless emphasizes that the decision provided little guidance about the amount or duration of the payments.⁷¹

These two rationales, taken together, justify support without consideration of fault in almost every case involving a substantial disparity in post-separation income. And Thompson emphasizes that the Canadian courts have been willing to award permanent alimony in cases like *Moge*.⁷² The two decisions, however, gloss over the distinction between obligations spouses owe each other because of their union and the obligation they owe not to impose one partner's burdens on the larger society. *Bracklow* primarily involved the latter.⁷³ Without support, Susan Bracklow would have experienced a substantial hardship because of her disability rather than because of the parties' arrangements during the marriage.⁷⁴ Yet, the references to the nature of the marriage and the parties' interdependence can also be expressed in contractual terms; that is, in terms of marriage as a partnership ideal in which the partners share their fortunes (good and bad) for a post-separation period commensurate with the length of the

67. *Id.* at para. 3.

68. Thompson, *supra* note 3, at 647.

69. *Id.* at 648.

70. *Id.*

71. *Id.* at 647 (discussing how the Supreme Court of Canada sent the case back for rehearing with no guidance on amount or duration of spousal support payments).

72. *Id.* at 656–57.

73. See *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420, para. 31.

74. See generally *id.*

relationship.⁷⁵ Many cases are in between *Moge* and *Bracklow*, with no way to determine with any certainty whether the parties' circumstances would have been more equal but for the marital circumstances.⁷⁶ The Canadian rationales suggest that post-separation support should be the norm in any case with a substantial disparity in income, without necessarily distinguishing the different possible bases for support.

Tom Oldham's description of the law in the United States could be reconciled with Canadian law: most awards are in fact justified by compensation or need expressed in terms that are not so different from the Canadian cases.⁷⁷ It is just that American law cannot be stated with such clarity and conviction. First, family law is state law, and the 50 states differ in how they express the justification for spousal support, and, indeed, whether they have a clear statement of rationales at all.⁷⁸ Second, Oldham suggests that the cultures are different.⁷⁹ It is not only that American cases do not express as clear an embrace of the compensatory entitlement as the Canadian cases, it is also that researchers have found that "'a significant number of women who might be eligible for support do not make a claim for support, due to feelings of guilt or shame.'"⁸⁰ Oldham does not explain why that may be the case.⁸¹ It could reflect the fact that he describes the majority rule as one based on whether claimants can meet their "'reasonable needs'" determined in accordance with the standard of living enjoyed during the marriage.⁸² Would-be claimants may feel that they should be able to support themselves. Although Oldham does not mention it, it may also be

75. See generally Starnes, *supra* note 32 (arguing that a partnership model provides the clearest justification for alimony).

76. See Thompson, *supra* note 3, at 644–45 (referencing how most cases fall somewhere in between the compensatory approach of *Moge* and the non-compensatory approach of *Bracklow*).

77. See Oldham, *supra* note 2, at 527 (listing common factors U.S. courts consider when determining whether to award alimony).

78. See *id.* at 526 (showing how the discretion afforded to U.S. state judges creates inconsistent rationales).

79.

80. Oldham, *supra* note 1, at 529.

81. See *id.* (arguing that Oldham does not give an explanation in the article).

82. *Id.* at 527.

because women, who are the most likely claimants, initiate two-thirds of divorces⁸³ and may be reluctant to seek support from a spouse who did not want the divorce.

Instead, American law is moving toward a distinction between long-term and short-term marriages, a distinction that also tends to correspond with the compensatory factors in the *Moge* decision – and *Bracklow*'s notion of interdependence.⁸⁴ This emphasis on marital duration can be hostile to spousal support – some jurisdictions make spouses ineligible for spousal support unless the marriage has lasted a certain length of time⁸⁵ – and some supportive.⁸⁶ Oldham mentions that once a marriage has lasted the minimum duration necessary to qualify as a long-term marriage, the length beyond that period may not matter further.⁸⁷

The other factor that may be influencing the awards is the greater number of ultra-high earners that exist in an era of greater economic inequality.⁸⁸ Oldham mentions, for example, that an Iowa case where the husband in the 28 year marriage made over \$1 million a year and the wife did not work outside the home,⁸⁹ and a New Jersey case, in which the court awarded the wife \$23,000 a month in support after a ten year marriage.⁹⁰ Even without a legal change, these cases help to lock in the principle that support should be available after a long-term marriage with a substantial difference in earnings and in the assumption of family responsibilities, even if the jurisdictions differ about what ““long-term”” means.

Spousal support in other countries follows similar principles.⁹¹ In Germany, a civil law country, statutory

83. See Margaret F. Brinig & Douglas W. Allen, ““These Boots Are Made for Walking””: Why Most Divorce Filers Are Women, 2 AM. L. & ECON. REV. 126, 128 tbl.1 (2000) (stating that two-thirds of those filing for divorce are women).

84. Oldham, *supra* note 1, at 528–29.

85. See, e.g., 19 ME. STAT. tit. 19, § 951-A (2017) (creating a rebuttable presumption against an award of spousal support in a marriage of less than 10 years).

86. Oldham, *supra* note 1, at 534.

87. *Id.* at 531.

88. See *id.*

89. *Id.* at 530.

90. *Id.* at 531.

91. See generally Bidaud-Garon, *supra* note 4; Kaesling, *supra* note 4; de Alcantara, *supra* note 4; Fotheringham, *supra* note 4 (describing the evolution of French, German,

authorization for support extends to maintenance to care for a child, by reason of old age, for illness or infirmity, for professional training, in case of unemployment and ““topping-up maintenance,”” *i.e.* support for a claimant who is gainfully employed, but does not earn enough to maintain the standard of living enjoyed during the marriage.⁹² The laundry list, however, does not provide overarching principles to govern support.⁹³ Katharina Kaesling explains that German law had been governed principally by perceived children’s needs, and the circumstances of other dependents.⁹⁴ Current law specifically authorizes maintenance to provide full time care for a child under the age of three, pursuant to the country’s strong support for the principle that parents should provide personal care for young children.⁹⁵ She explains, however, that while earlier law rigidly tied maintenance to a child’s age, the law has changed to give courts greater flexibility to consider the parties’ arrangements during the marriage as well as the child’s needs.⁹⁶

French developments have also been remarkably similar to American and Canadian developments despite the different legal systems.⁹⁷ French law treated the duty of support as ending with the divorce, and fault (and the dependence of women) as originally justifying the award of alimony at divorce.⁹⁸ The liberalized divorce legislation adopted in 1975 favored a clean break with lump sums capital awards or fixed, unreviewable payments that would limit the parties’ post-divorce contact and opportunities for conflict.⁹⁹ 2004 legislation liberalized spousal awards, giving the courts greater flexibility.¹⁰⁰ Christine Bidaud-Garon explains

Japanese, and Scottish family law to allow for spousal support with compensatory systems based on public policy concerns).

92. Kaesling, *supra* note 4 at, 547.

93. *Id.*

94. *Id.* at 548–50.

95. *Id.* at 549.

96. *Id.* at 550–51.

97. *Cf.* Oldham, *supra* note 1, at 526 (describing the theories of spousal support prevalent in the American court system); *see also* Thompson, *supra* note 3, at 642–43 (listing the characteristics of the Canadian spousal support law).

98. Bidaud-Garon, *supra* note 4, at 582.

99. *Id.* at 585.

100. *Id.*

that the reforms underscore the compensatory nature of the payments, making them independent of fault and need.¹⁰¹ She describes the ““compensatory benefit”” as ““a public policy institution,”” addressing factors such as ““the consequences of the professional choices made by one spouse during their living together for educating the children and the time which must still be devoted to this education, or for favoring his or her spouse”’s career to the detriment of his or her own.””¹⁰² Because of the public policy purposes of the benefit, it cannot be waived nor can an amount be stipulated in a premarital agreement but the parties can resolve the issue on their own in a divorce settlement.¹⁰³

John Fotheringham reports that the Scots so approved of their 1985 law addressing spousal support that they have seen no need to revisit it since.¹⁰⁴ He explains, “[m]odern Scots Family Law loves certainty, but it adores the Clean Break.””¹⁰⁵ That principle drove the 1985 legislation.

If Canadians demonstrate the greatest commitment to a partnership-based approach to marriage, the Scots may well demonstrate the least. Before 1964, the Scots, like Texans,¹⁰⁶ made no provision for alimony.¹⁰⁷ The courts treated divorce like death; they divided the family’s property, ending the relationship.¹⁰⁸ The 60s reforms permitted alimony but tied the result to the determination of fault.¹⁰⁹

The 80s reforms continued to privilege final orders, providing that periodic payments could be ordered only if the court determined that ““payment of a capital sum or for transfer of property, or a pension sharing order”” would be insufficient.¹¹⁰ In

101. *Id.* at 587.

102. *Id.* at 588.

103. *Id.* at 587.

104. Fotheringham, *supra* note 4, at 601.

105. *Id.* at 602.

106. It took Texas until the 1990s to authorize permanent alimony. See Paulsen, *supra* note 40, at 151.

107. Fotheringham, *supra* note 4, at 602.

108. *Id.*

109. *Id.* at 602–03.

110. *Id.* at 605.

determining the sufficiency of awards, Scottish courts consider “any economic advantage derived by either party from contributions by the other, and of any economic disadvantage suffered by either person in the interests of the other of the family.”¹¹¹ Nonetheless, Scottish law emphasizes that those who have become dependent on a partner’s financial support should be awarded support for a period allowing them time to adjust of “not more than 3 years from the date of decree of divorce” and those likely to suffer financial hardship are entitled to support for “a reasonable period.”¹¹² Thus, the portions of the law that unequivocally embrace the principle of support limit its duration.¹¹³ The principal provision for a dependent spouse therefore remains the division of marital property, and a dependent spouse can be awarded 100% of the property if appropriate, though compensatory awards of 55 to 60% are more common.¹¹⁴

Fotheringham explains that the purposes of Scottish law “is not compensation, nor any intention to keep the claimant in the same station of life, but rather to enable her to adjust to that loss of support.”¹¹⁵ He concludes that if a dependent spouse fails to adjust, the Scottish attitude is tough, the ex-spouse bears “the consequences of that failure.”¹¹⁶ It is not the responsibility of the other spouse.¹¹⁷

Japan also treats spousal support as a clean-up doctrine, designed to fill in only after other parts of the divorce decree are taken into consideration.¹¹⁸ Japan, however, has three ways to address the parties’ circumstances: the property division, compensatory damages, and spousal support.¹¹⁹ Marcelo de Alcantara explains that courts “will usually award compensatory damages for emotional distress in cases of marital misconduct

111. *Id.* at 606.

112. *Id.*

113. See Fotheringham, *supra* note 4, at 606.

114. *Id.* at 612.

115. *Id.* at 616.

116. *Id.*

117. *Id.*

118. De Alcantara, *supra* note 4, at 630.

119. *Id.* at 630–31.

such as adultery, abandonment, abusive behaviors, or domestic violence).¹²⁰ They also have flexibility to structure the property division to meet the parties' needs; for example, in one case, where the court concluded that the husband's pension was too uncertain to be divided, it ordered that the wife could rent the husband's share of the marital residence (titled solely in the husband's name) at a rate she could afford through their daughter's graduation from high school.¹²¹ de Alcantara observes that spousal support is usually awarded only "when one spouse is still unable to become economically independent and self-sufficient" after the rest of the decree is taken into account.¹²² Nonetheless, Japanese courts do order support where a dependent spouse has difficulty reentering the workplace because of age or disability after a long period as a homemaker.¹²³

These articles use the terms "compensatory" and "public policy" in inconsistent ways.¹²⁴ They nonetheless all describe the principal rationales for support the same way the Canadians do: either in terms of an assumption that disparities in income at the end of a long term marriage reflect the parties' arrangements during the marriage or in terms of a public obligation to address the needs of a lower earning spouse who would face substantial hardship without support, even if the hardship does not arise from the marriage itself.¹²⁵ In practice, the rationales blur. It is rarely possible to determine with certainty what a spouse would have earned but for the marriage,¹²⁶ and given increasing gender differences among high earners, it is unlikely that the parties'

120. *Id.* at 630 n.9.

121. *Id.* at 635.

122. *Id.* at 630–31.

123. *See id.* at 631.

124. *See generally* Thompson, *supra* note 3; Oldham, *supra* note 1; Kaesling, *supra* note 4; Bidaud-Garon, *supra* note 4; Fotheringham, *supra* note 4; De Alcantara, *supra* note 4 (describing spousal support remedies based on compensation and policy but measuring compensation and policy differently).

125. Thompson, *supra* note 3, at 645–48.

126. *See* June Carbone, *Economics, Feminism, and the Reinvention of Alimony: A Reply to Ira Ellman*, 43 VAND L. REV. 1463, 1473 (1990) (describing how theories of alimony depend on assumptions about the parties' earnings and contributions to the marriage).

incomes would have been equal but for the marriage.¹²⁷ The bigger distinctions therefore come from the jurisdiction's treatment of marriage.¹²⁸ Does it see the union as a partnership that intermingles the parties' fortunes in ways that justify equal consequences following a divorce or, like the Scots,¹²⁹ does it see divorce as a transition point that allows former spouses to unwind their affairs and go their separate ways?

III. DISCRETION OR GUIDELINES?

In many jurisdictions, the move toward no-fault divorce and toward greater recognition of equal rights for women has also involved limits on judicial discretion. Some jurisdictions equally divide marital property and prescribe child support guidelines strictly tied to parental income.¹³⁰ Jurisdictions like Scotland, on the other hand, that prefer use of the property division to address the parties' post-divorce needs may give courts greater discretion in the crafting of the property decree.¹³¹ At the same time, jurisdictions like Japan treat the property division and support as part of an integrated award may not draw a clear distinction between the two.¹³² Where spousal support plays such a residual or complementary role, the courts are likely to enjoy greater discretion in fashioning awards.¹³³

127. CARBONE & CAHN, *supra* note 9, at 64–65.

128. Compare Bidaud-Garon, *supra* note 4, at 583 (discussing French law's movement towards compensatory allowance to account for economic disadvantage among women after divorce), with Fotheringham, *supra* note 4, at 602 (explaining that Scottish law prefers a clean break method in granting a divorce rather than continuing a relationship among divorced individuals through spousal payments).

129. *Id.*

130. See, e.g., Thompson, *supra* note 3, at 649 (observing that “[s]pousal support in Canada is a residual financial remedy. Under provincial property statutes, family property is divided upon marriage breakdown, with a strong presumption of equal division in every statute. Child support is determined under the Federal Child Support Guidelines, and the statutes are clear that child support takes priority over spousal support). Scottish law ““applies a mathematical formula to a restricted number of factors in order to produce a calculation of liability. There is no consideration of ‘all the circumstance of the case’ as there is in aliment for a spouse pending divorce.”“ Fotheringham, *supra* note 4, at 613.

131. *Id.* at 608, 610–11.

132. De Alcantara, *supra* note 4, at 630.

133. See, e.g., *id.* at 630–31, 633 (explaining that Japan's supplementary use of spousal support awards allows for greater discretion in comprising the awards).

Some jurisdictions have nonetheless moved toward spousal support guidelines that provide greater predictability in the amount and duration of awards.¹³⁴ These guidelines tend to emphasize the relationship between the length of the marriage and the duration of the award.¹³⁵

Canada provides the clearest example. The guidelines primarily reflect the length of the marriage and the disparities in the parties' incomes, though they also distinguish between cases with and without child support and they prescribe support ranges rather than precise amounts.¹³⁶ The result, while preserving some judicial discretion, makes awards more predictable; it also tends to lock in presumptions that support will be awarded after a longer marriage with substantial disparities in the parties' incomes.¹³⁷ In the United States, there are no national guidelines but a growing number of jurisdictions have adopted them at the state or local levels, sometimes by the courts and in other cases through legislation.¹³⁸ The guidelines tie the duration of the awards to the length of the marriage, reserving permanent awards to long term marriages (most commonly more than 20 years).¹³⁹ What neither the Canadian or the American guidelines do, however, is provide clear distinctions between the compensatory purposes of alimony linked to one spouse's loss of income potential for the benefit of the other and public policy oriented rationales that place more weight on need.¹⁴⁰

Moreover, not all of Canada has embraced either the guidelines or the principles that underly them. One of the issues that separates Quebec from the rest of Canada is the former's refusal to extend support to unmarried couples living in marriage-like relationships.¹⁴¹ And even among married couples, the limited empirical work that exists suggests that support awards in Quebec may be 80% lower than the guideline

134. See Thompson, *supra* note 3, at 651, 653.

135. *Id.* at 651.

136. *Id.* at 651–52.

137. *Id.* at 653.

138. See Oldham, *supra* note 1, at 536–37.

139. *Id.* at 539–41.

140. *Id.* at 540.

141. Thompson, *supra* note 3, at 654.

amounts.¹⁴² Quebec, refusing to adopt the guidelines, has chosen to go its own way, preserving greater judicial discretion without articulating an alternative basis to guide support.¹⁴³

German guidelines, on the other hand, adopt a stronger presumption in favor of the award of support – and less judicial discretion in the administration of the award.¹⁴⁴ Kaesling observes that the ““claimant is generally entitled to half of the income defining the marital standard of living to the extent he or she cannot cover it with appropriate gainful employment and the debtor is able to pay without endangering his or her own maintenance.””¹⁴⁵ The German guidelines, however, include incentives for the claimant to seek employment and they may limit the period of time in which support is available.¹⁴⁶

IV. CONCLUSION

These snapshots of the evolving law of spousal support capture a system in transition. Wives are no longer viewed as intrinsically dependent because of marriage or childrearing, and spousal property and income are no longer viewed as a product of the husband’s efforts alone.¹⁴⁷ Over the course of the last half of the 20th century, spousal support was accordingly refashioned as an exception to the clean break, an exception generally designed to complement a more equal property division and to fashion awards tailored to the specific circumstances of individual relationships.¹⁴⁸

142. *Id.* at 655.

143. *See id.* at 654–55.

144. Kaesling, *supra* note 4, at 578.

145. *Id.* at 555.

146. *Id.* at 555, 557.

147. *See* Oldham, *supra* note 1, at 527 (describing that the majority spousal support rule in the United States considers whether the claimant will be able to satisfy their reasonable needs regardless of gender); *see* PAUL R. AMATO, ET AL., *ALONE TOGETHER: HOW MARRIAGE IN AMERICA IS CHANGING* 101 (2007).

148. *See* Carbone & Cahn, *supra* note 7, at 936 (describing the effects of property division by a ““clean break””); *see* Fotheringham, *supra* note 5, at 612 (describing different circumstances that Scotland takes into account when awarding dependent spouses); *see* De Alcantara, *supra* note 5 at 635; (providing an example on how property division in Japan must meet parties’ needs according to the circumstances); *see* Bidaud-Garon, *supra* note 5, at 588 (describing different factors that determine awards in France

These developments, however, only hint at the new developments on the horizon. Income inequality has been increasing globally.¹⁴⁹ As a result, there are more ultra-high-income spouses married to someone who earns substantially less than they do. This does not just increase the number of relationships with substantial income disparities – it increases the number of relationships where one spouse can support the other and where the second income becomes expendable.¹⁵⁰ However talented CEO Facebook Mark Zuckerberg’s wife, Dr. Priscilla Chan is, their family is unlikely to need her income.¹⁵¹

At the same time, a higher percentage of working-class families do not marry at all.¹⁵² The husbands in *Moge* and *Bracklow*, for example, were a welder and a heavy equipment mechanic respectively, who each earned substantially more than their wives.¹⁵³ Today, male blue collar wages have eroded and working class wives have become more likely to be in the labor market.¹⁵⁴ Such couples have also become less likely to marry

such as professional choices made by a spouse); see Kaesling, *supra* note 5, at 550-51 (citing changes to German law that give courts flexibility to consider marriage-specific arrangements concerning the parties and their children).

149. See Asrian Mirza, *Pay Packet Inequality Growing Worldwide, Says New U.N. Report*, U.N. NEWS (July 4, 2019), <https://news.un.org/en/story/2019/07/1041862> (documenting increasing inequality globally); see also *Just 10 Per Cent of Workers Receive Nearly Half of Global Pay*, INT’L LABOUR ORG. (July 4, 2019), https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_712234/lang=en/index.htm (stating ““at the national level, pay inequality is actually increasing””).

150. See, e.g., Robert VerBruggen and Wendy Wang, *The Real Housewives of America: Dad’s Income and Mom’s Work*, INST. FOR FAM. STUD. (Jan. 23, 2019), <https://ifstudies.org/blog/the-real-housewives-of-america-dads-income-and-moms-work> (indicating that the mothers least likely to be in the labor market are those paired with the highest earning and lowest earning fathers).

151. See *id.*; see Ernesto Soliven, *Priscilla Chan Net Worth: Mark Zuckerberg’s Wife Worked as a Doctor Despite her Billions*, INT’L BUSINESS TIMES: TECHNOLOGY (May 17, 2020, 7:55 PM), <https://www.ibtimes.com/priscilla-chan-net-worth-mark-zuckerbergs-wife-worked-doctor-despite-her-billions-2976916>.

152. W. Bradford Wilcox & Wendy Wang, *The Marriage Divide: How and Why Working Class Families are More Fragile Today*, INST. FOR FAM. STUD. (September 25, 2017), <https://ifstudies.org/blog/the-marriage-divide-how-and-why-working-class-families-are-more-fragile-today>.

153. Thompson, *supra* note 3, at 645, 647.

154. Between 1980 and 2000, the percentage of wives employed outside the home rose from 58% to 75%. Amato, *supra* note 147 at 101. During the same period, marital

and, if they do marry, more likely to divorce, and repartner.¹⁵⁵ This alters the equities underlying spousal support.¹⁵⁶ The justification for continuing support after a marriage in which both parties worked and one earns only slightly more than the other is substantially different from the equities in a relationship where one party makes several times what the other can earn.

These patterns clearly differ across the globe.¹⁵⁷ Japan, for example, has seen a much smaller growth in income inequality, mothers' labor force participation, and nonmarital births than North American or European countries.¹⁵⁸ These patterns also suggest, however, that the meaning of marriage – and corresponding support obligations – may differ within countries.¹⁵⁹ The marriages of the well-off have become more likely to resemble the patterns in *Moge*: longer term marriages between a higher earner and a lower earner who gave up career opportunities to care for the family. At the same time, unions between welders and housekeepers have become less likely to result in stable relationships, much less divorces litigating the terms of support. These changes may increase the pressure to recognize more generous grounds for the award of support, without necessarily increasing the availability of spousal support more generally.

The result suggests the varying descriptions in this volume may in fact reflect greater convergence than the formal law would suggest. The countries surveyed vary considerably in their descriptions of the terms of spousal support and the extent to which the respective legal systems separate support awards from

tensions increased dramatically more for working class than middle class couples. *Id.* at 123–24.

155. Wilcox & Wang, *supra* note 152.

156. *See id.*; *see* Oldham, *supra* note 1, at 540.

157. *See, e.g.*, James M. Raymo & Akihisa Shibata, *Unemployment, Nonstandard Employment, and Fertility: Insights From Japan's "Lost 20 Years"*, 54 *DEMOGRAPHY* 2300–01 (2017) (discussing strong association between marriage and fertility in Japan and the continuing treatment of women's earnings as supplemental).

158. *See, e.g., id.* (discussing strong association between marriage and fertility in Japan and the continuing treatment of women's earnings as supplemental).

159. *See generally* Thompson, *supra* note 3, at 670 (noting how the rationales for spousal support in Canadian law produce different outcomes on similar issues in other countries).

other aspects of the divorce decree. Some of the apparent differences, however, may also reflect the nature of the cases arising in each jurisdiction. The high end cases may present so compelling a case for support that the decisions appear to embrace a generous support principle, while, today, courts may be more likely to conclude that the welder and housekeeper should just go their own ways. Whether this is in fact a change in legal doctrine or in the circumstances that give rise to the opinions remains to be seen.

