ALIMONY: PEONAGE OR INVOLUNTARY SERVITUDE?

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Unfortunately, divorce is now the tragic end result of over forty-percent of all marriages.[2] Divorcing spouses have many things to consider. One major consideration is money. Most spouses contemplating divorce must be prepared for economic suicide. The income that marginally maintained one middle-class household will most surely not be able to maintain two. This is especially so where one spouse is not yet or never has been in the workforce. Nevertheless, though at least one judge has stated that he views divorce as a *luxury*,[3] as applied to the division of spousal economic resources, it is often a *necessity* before one or the other spouse breaks down mentally, emotionally, or physically. In any event, this article does not deal with the most important issue facing divorcing spouses, that of child custody[4], support[5] and visitation,[6] but with an almost equally important issue, the determination of alimony or spousal support or maintenance.[7] For such a determination may result in one spouse actually supporting the other for a period of time, and even for a lifetime,[8] and sometimes resulting in the supporting spouse's inability to sustain such support and be held in contempt,[9] or coupled with child support result in the inability to provide properly for the child or children when in his or her care. No wonder, for many, an award of maintenance, and especially of lifetime maintenance, may smack of peonage or involuntary servitude.[10]

ALIMONY[11]

Alimony is an English common law development. At first, in order to separate from the "marital bed and board," one had to petition the ecclesiastical courts. In doing so, the process provided for the husband's total control of the marital property. But it also imposed a duty requiring him to continue to support his wife.[12] Later, when actual divorce was allowed, alimony continued. It was buttressed by the fact that the courts found marriage to be a contract, *fault* to be a breach of contract, and that most women were without monetary means.[13] Though today such rationales have been eroded by no-fault divorce, and the blurring of gender roles, the practical reality is that women remain financially dependent in many marriages.[14] Alimony is now used ostensibly to not only support a spouse, but in many cases to allow him or her to become financially independent, or to live in the style he or she was accustomed to in the marriage.[15] Of course, the latter seldom occurs.

At least one state court, however, has had the courage to set forth the problem that exists when trying to determine and furnish proper alimony, and is worthy of note here. In two back to back alimony cases in Oklahoma in the late 1970's, this court stated that "[i]n Oklahoma, as in most states the law relating to alimony is unclear, requiring judges and lawyers to speculate as to what the ultimate award of alimony, if any, will be." It added that "[t]he cases relating to alimony in Oklahoma are numerous. Support can be found in the cases for absolutely any argument or position one wants to pursue."[16] In the second Oklahoma case involving the same court a year later, it set forth the history of alimony in Oklahoma, which is similar to most other jurisdictions.[17]

> Originally, alimony was ordered paid upon a showing of need to keep the person from becoming a charge upon the public… As the cases were handed down over the years numerous criteria were added until in Oklahoma in excess of 22 factors can be considered. Support can be found in the cases for absolutely any argument or position one wants to pursue. That is attorneys search the cases for only those criteria most favorable to their side of the case and ignore the rest. The trial bench, the bar, and the litigants, more often than not, after considering these criteria, are still left in the dark as to what the ultimate award of alimony will be, if indeed any is given at all. In one case the trial court's guess was off over $100,000…

The Oklahoma court then marshaled the criterion most used to fashion an alimony award in its state.

> (1) the wife's loss of the right of inheritance from the husband… (2) the expectation of a future inheritance of the husband; (3) the husband's future earning capacity; (4) the husband's present ability to pay; (5) the wife's contribution to the husband's accumulation; (6) whether the marriage was one of affection or convenience; (7) the earning capacity of the husband; (8) the wife's condition and means; (9) duration of the married life and the ages of the parties; (10) the wife's health; (11) any future increase in the value of land; (12) the wife's expectancy of a future inheritance; (13) the wife's opportunity for employment; (14) the wife's ability to obtain gainful employment; (15) the mode of living to which the wife had become accustomed during the marriage; (16) the probability of the husband's ability to progress financially; (17) the earning capacity of the wife; (18) the wife's ability to make a living before the marriage; (19) the conduct of the parties; (20) the wife's education; (21) the age of the children, and the need to maintain a home for them; (22) the parties' station in life before the divorce.

But, as it noted, in numerous Oklahoma cases the courts granted or substantially modified alimony without any reason being given at all. This led, the court stated, to an eventual "widespread assumption…that divorce automatically involved alimony and that the wife was entitled to it regardless of the circumstances until it is being referred to as 'a judicially imposed system of involuntary servitude,' no longer based upon need, or 'lifetime peonage,' or 'private welfare (versus public welfare),' or 'a judicially mandated system of lifetime serfdom.'"[18]

And, to make matters worse the Oklahoma court stated, often the recipient spouse is not unable to work, but unwilling. For instance, in one case it examined the wife was a doctor who had not practiced medicine for several years. Even with having to catch up on new medical procedures, she could still earn upwards of $40,000, and she was healthy and able to work. The court found it "difficult to see, with appellant wife's earning capacity, why the trial court awarded any alimony." It concluded that "the time has long since passed when the state and its judiciary should cease its unwarranted, unnecessary, irrational intrusion into the lives of its citizens simply because at one time they occupied a marital status."[19]

PEONAGE

So, what is peonage? Simply stated, peonage means "compelling a person to perform labor for one to whom a debt is owed in order to pay off the debt."[20] The U.S. Supreme Court has defined it "as a condition of enforced servitude by which the servitor

is compelled to labor against his will in liquidation of some debt or obligation, either real or pretended."[21] As an example, the Court declared unconstitutional an Alabama statute directed at sharecroppers that had imposed criminal liability and imprisonment should they breach their contracts or abandon their employment, and/or enter into new employment of a similar nature with a third party. The Court viewed the Alabama statute as clear coercion.[22] Later in *Bailey v. Alabama,*[23] the Court struck down another Alabama statute that effectively compelled one to labor for another to whom a debt was owed or face imprisonment. Congress has also spoken on this issue by abolishing peonage and prohibiting anyone from "holding, arresting, or returning, or causing or aiding in the arresting or returning, of a person to peonage."[24]

INVOLUNTARY SERVITUDE

Involuntary servitude is prohibited by the 13th Amendment to the U.S. Constitution,[25] and by many state Constitutions.[26] And, while the term is easily definable,[27] the "exact range of conditions it prohibits" is not so evident.[28] In a fairly recent case, *United States v. Kozminski*,[29] the Supreme Court defined the term as a compulsory condition "in which a person lacks liberty especially to determine one's course of action or way of life," a condition very much akin to slavery.[30] The Court held that involuntary servitude "necessarily means a condition…in which the victim is forced to work for [another] by the use or threat of physical restraint or physical injury, or by the use or threat of coercion through law or the legal process."[31] And the 13th Amendment bar is applicable to individuals as well as states, and to private as well as public discriminatory acts.[32]

MAIN ISSUE

Is then, the ordering of a divorcing spouse to pay for the future living expenses of the other by way of alimony either peonage or involuntary servitude? [33]The U.S. Supreme Court has not yet had occasion to directly address this issue.[34] It has held, however, that peonage is involuntary servitude, as is coerced labor by threat of criminal punishment. So also is forced labor after receiving an advance payment. The *Bailey* [35]court's rationale was that "the State could not avail itself of the sanction of the criminal law to supply the compulsion [to enforce labor] anymore than it could use or authorize the use of physical force.[36] And, at least one state court did not mince words in regard to permanent alimony, "the question facing the Court is whether a judicially imposed system of involuntary servitude is to be continued wherein one human being is placed in bondage to another for what is effectively the remainder of his natural life."[37]

However, not all forced labor by physical coercion or force of law involves the 13th Amendment. The U.S. Supreme Court has held that involuntary servitude may be imposed as legal punishment for a crime, and for certain civic duties, such as jury duty and military service.[38] It has also held that the 13th Amendment does not apply to exceptional and well-established common law cases prior to its adoption, such as the rights of parents and guardians to the custody of their minor children or wards,[39] and in order to prevent sailors from deserting ships.[40] More recently, it has been held that requiring workfare for those on public assistance, and mandatory community service as a

condition for receiving a high school diploma is not involuntary servitude as in either case the recipient can choose not to receive welfare assistance or a diploma.[41]

Nor does providing alimony or spousal support voluntarily, by agreement or stipulation in a divorce action, rise to a 13th Amendment claim, the key word being *voluntarily*.[42]

NEW YORK LAW

In New York, spousal support is authorized under §236 of the Domestic Relations Law. DRL §236 reads in pertinent part:

> Maintenance. a. Except where the parties have entered into an agreement pursuant to subdivision three of this part providing for maintenance, in any matrimonial action the court may order temporary maintenance or maintenance in such amount as justice requires, having regard for the standard of living of the parties established during the marriage, whether the party in whose favor maintenance is granted lacks sufficient property and income to provide for his or her reasonable needs and whether the other party has sufficient property or income to provide for the reasonable needs of the other and the circumstances of the case and of the respective parties. Such order shall be effective as of the date of the application therefor, and any retroactive amount of maintenance due shall be paid in one sum or periodic sums, as the court shall direct, taking into account any amount of temporary maintenance which has been paid.

As can readily be seen, the amount and duration of maintenance is left to the sound discretion of the court, and each case must be determined on its own merits. A court may order no maintenance,[43] some maintenance,[44] substantial maintenance, and even lifetime maintenance[45] after consideration of the pre-separation standard of living.[46] Should the court determine that maintenance is proper, it must then consider the reasonable needs of the recipient spouse in the context of several other factors set out in the statute.[47]

> (1) the income and property of the respective parties including marital property distributed pursuant to subdivision five of this part;
> (2) the duration of the marriage and the age and health of both parties;
> (3) the present and future earning capacity of both parties;
> (4) the ability of the party seeking maintenance to become self-supporting and, if applicable, the period of time and training necessary therefor;
> (5) reduced or lost lifetime earning capacity of the party seeking maintenance as a result of having foregone or delayed education, training, employment, or career opportunities during the marriage;
> (6) the presence of children of the marriage in the respective homes of the parties;
> (7) the tax consequences to each party;
> (8) contributions and services of the party seeking maintenance as a spouse, parent, wage earner and homemaker, and to the career or career potential of the other party;
> (9) the wasteful dissipation of marital property by either spouse;
> (10) any transfer or encumbrance made in contemplation of a matrimonial action without fair consideration; and
> (11) any other factor which the court shall expressly find to be just and proper.

Importantly, New York appellate courts have held that the trial court must "set forth the factors it considered and the reasons for its decision."[48] However, the

"matrimonial court is not required to analyze and apply every factor set forth" in the statute, nor articulate or specifically cite them.[49] Clearly, this can be problematic, especially in light of factor number 11, which appears open-ended in its import. Further, New York provides for severe enforcement of spousal support.

> **Enforcement by contempt proceedings of judgment or order in action for divorce, separation or annulment**. Where a spouse, in an action for divorce, separation, annulment or declaration of nullity of a void marriage, or for the enforcement in this state of a judgment for divorce, separation, annulment or declaration of nullity of a void marriage rendered in another state, makes default in paying any sum of money as required by the judgment or order directing the payment thereof, and it appears presumptively, to the satisfaction of the court, that payment cannot be enforced… the aggrieved spouse may make application … to punish the defaulting spouse for contempt, and where the judgment or order directs the payment to be made in installments, or at stated intervals, failure to make such single payment or installment may be punished as therein provided, and such punishment, either by fine or commitment, shall not be a bar to a subsequent proceeding to punish the defaulting spouse as for a contempt for failure to pay subsequent installments, but for such purpose such spouse may be proceeded against under the said order in the same manner and with the same effect as though such installment payment was directed to be paid by a separate and distinct order, and the provisions of the civil rights law are hereby superseded so far as they are in conflict therewith. Such application may also be made without any previous sequestration or direction to give security where the court is satisfied that they would be ineffectual. No demand of any kind upon the defaulting spouse shall be necessary in order that he or she be proceeded against and punished for failure to make any such payment or to pay any such installment; personal service upon the defaulting spouse of an uncertified copy of the judgment or order under which the default has occurred shall be sufficient.[50]

Worse, after the recipient spouse's durational period has ended, even if the duration was agreed to by the parties, a court may extend it for a lifetime. A fairly recent New York decision in this regard shocks one's sensibility, holding that the recipient spouse is entitled to a modification of the durational period where he or she has become gravely ill, a public charge, or unable to become financially independent, even in a case where the parties have been divorced for over ten years.[51]

There can be no doubt that the contributing spouse faced with such a circumstance will feel that he or she is being placed under a system of peonage, or is being subjected to involuntary servitude.[52] But under current New York law, he or she will have almost nowhere to turn.[53] Not only has it been held that a spouse's duty "to support his wife is continued in the form of alimony which is subject to recalculation to fulfill that duty," but New York courts have blamed the legislature for the imposition by holding that it was legislative intent under the *Equitable Distribution Law*[54] to freely allow for such recalculation of maintenance, not to prohibit it.[55]

As a result, the only assistance that a contributing spouse may find, with a stroke of blind luck,[56] is a sympathetic court that realizes that it can deny such a modification, or even modify downwards when such circumstances warrant.[57] Or better yet, a court that will find maintenance to be a direct violation of the 13th Amendment.

However, New York is extremely tough towards modification petitions. A court[58] may annul or modify any prior order or judgment as to maintenance only upon a showing of a *substantial change of circumstances*, including financial hardship.[59] And, if it is to

be an upward modification a *clear and convincing* showing of a *substantial change of circumstances* is required.[60] It is well settled, though, that even an obligor's retirement may not be a *substantial change of circumstances*,[61] nor does conviction of a crime and loss of job necessarily qualify.[62] And, if one blatantly manages to continue to live in the style accustomed during the marriage, that in and of itself may preclude a downward modification.[63] And, New York may even require the obligor spouse to purchase or maintain life insurance to secure future maintenance payments and make the recipient spouse the irrevocable beneficiary.[64] However, the court must limit the duration for life insurance to the duration of the maintenance payments.[65]

CALIFORNIA LAW

This article, highlighting mainly New York law, does not claim to be an exhaustive national review of the issue being discussed,[66] but it is worthwhile to mention the current state of the law of spousal support in another large, heavily populated state, and compare the two. First, California does oblige a person to support a spouse after a divorce, and for an amount and period of time that it deems "just and reasonable," and "based on the standard of living established during the marriage."[67]

Interestingly, unlike New York, the California code allows a judge to advise a recipient to "make reasonable efforts to assist in providing for his or her support needs, taking into account the particular circumstances considered by the court…unless, in the case of a marriage of long duration…this warning is inadvisable."[68]

Further, again unlike New York, a court may order a vocational examination, but only by a "vocational training counselor." The court may also direct the supporting spouse to foot the bill.[69] The examination "shall include an assessment of the party's ability to obtain employment based upon the party's age, health, education, marketable skills, employment history and the current availability of employment opportunities." However, the focus is an assessment "of the party's ability to obtain employment that would allow the party to maintain herself or himself at the marital standard of living." And, further, the "vocational training counselor" must have "sufficient knowledge, skill, experience, training, or education in interviewing, administering, and interpreting tests for analysis of marketable skills, formulating career goals, planning courses of training and study, and assessing the job market, to qualify as an expert in vocational training"[70]

The court shall then "make specific factual findings with respect to the standard of living during the marriage, and, at the request of either party, the court shall make appropriate factual determinations with respect to other circumstances."[71]

Like New York, the California courts can make spousal support retroactive to the filing of the motion or order to show cause, or to "any subsequent date, and for any contingent period of time."[72] Unless the parties agree, or upon court order, the court retains jurisdiction "where the marriage is of long duration." However, unlike New York, "long duration" is defined as a marriage over ten years.[73]

Finally, the California courts have "discretion to terminate spousal support later on a showing of changed circumstances."[74] And they can enforce an order for spousal support, and require security for payment.[75] However, unlike in New York, enforcement through a contempt proceeding is problematic.[76]

The important factors governing a spousal support award are found in the California Family Code, §§4320-4325. Many are the same as found in New York.

> In ordering spousal support under this part, the court shall consider all of the following circumstances:
> (a) The extent to which the earning capacity of each party is sufficient to maintain the standard of living established during the marriage, taking into account all of the following:[77]
> (1) The marketable skills of the supported party; the job market for those skills; the time and expenses required for the supported party to acquire the appropriate education or training to develop those skills; and the possible need for retraining or education to acquire other, more marketable skills or employment.
> (2) The extent to which the supported party's present or future earning capacity is impaired by periods of unemployment that were incurred during the marriage to permit the supported party to devote time to domestic duties.
> (b) The extent to which the supported party contributed to the attainment of an education, training, a career position, or a license by the supporting party.
> (c) The ability of the supporting party to pay spousal support, taking into account the supporting party's earning capacity, earned and unearned income, assets, and standard of living.
> (d) The needs of each party based on the standard of living established during the marriage.
> (e) The obligations and assets, including the separate property, of each party.
> (f) The duration of the marriage.
> (g) The ability of the supported party to engage in gainful employment without unduly interfering with the interests of dependent children in the custody of the party.
> (h) The age and health of the parties.
> (i) Documented evidence of any history of domestic violence, as defined in Section 6211, between the parties, including, but not limited to, consideration of emotional distress resulting from domestic violence perpetrated against the supported party by the supporting party, and consideration of any history of violence against the supporting party by the supported party.
> (j) The immediate and specific tax consequences to each party.
> (k) The balance of the hardships to each party.
> (l) The goal that the supported party shall be self-supporting within a reasonable period of time. Except in the case of a marriage of long duration as described in Section 4336, a "reasonable period of time" for purposes of this section generally shall be one-half the length of the marriage. However, nothing in this section is intended to limit the court's discretion to order support for a greater or lesser length of time, based on any of the other factors listed in this section, Section 4336, and the circumstances of the parties.
> (m) The criminal conviction of an abusive spouse shall be considered in making a reduction or elimination of a spousal support award in accordance with Section 4325.
> (n) Any other factors the court determines are just and equitable.

Although, as in New York, there is a paucity of cases discussing peonage and involuntary servitude in the context of alimony, some hold that a contempt order is prohibited under federal and state laws against involuntary servitude.[78] As early as 1897, the California Supreme Court ruled in *Ex parte Todd*[79] that an obligor who "had wholly failed and neglected to make any effort to obtain employment" in order to pay alimony could not be imprisoned by a contempt order.[80] It reasoned that to do so would be "clearly in excess of the power of the court, which cannot compel a man to seek employment in order to earn money to pay alimony, and punish him for his failure so to do."[81] And, *In re Jennings*,[82]decided eighty-five years later, the California Supreme Court

noted that *Todd* "has not been disapproved in any later case and we do not question it as a correct statement of the law."[83]

However, *Todd* and its progeny primarily involved alimony and the ban against enforcement by *contempt*. California Courts may still use ordinary judgment remedies and liens to force alimony payments, and they do.[84] For defaults more than thirty days, the California Family Code[85]provides for a writ of execution,[86] and for a six percent per month penalty assessment up to seventy-two percent of the late payments.[87] Further, if an obligor has acted in bad faith and fails to satisfy a default, a trustee may be appointed to liquidate the obligor's assets to satisfy back support and stay current.[88]

But, at least one fairly recent California case questioned *Todd*, and invited the California Supreme Court "to reconsider the holding of *Ex parte Todd*, at least in the context of child support."[89] In 1998, the California Supreme Court answered in *Moss v. Moss*,[90] holding that there is no constitutional impediment to the imposition of a contempt sanction for a willful violation of a child support order when the parent's financial inability to comply is a result of the a willful failure to seek and accept available employment that is commensurate with his or her skills and ability. Left for another day was the issue of alimony and contempt.[91]

THE NATURE OF MARRIAGE

So far, the nature of *marriage* has not been discussed in terms of whether it is and remains some sort of sacred obligation[92], or merely a contract,[93] or both, and whether or not such a distinction should make a difference in the law, especially in the law of spousal support.[94]

From early on the institution of marriage has been judicially perplexing. It has religious roots, and for some still carries religious connotations. [95] It also requires contractual assent, and has been defined by one court as "a civil institution, beyond the control or caprice of the parties to it, to be governed and regulated by law. This law, and not contract, regulates and prescribes the rights of the parties in the property of each other, and until these become vested interests, the legislative power may modify them time to time, to suit the convenience and wants of society, or to promote the relation or to protect the parties to it."[96]

As a result, some courts found a way out of the sterile contract dilemma by holding marital contracts *void for lack of consideration*[97] and therefore unenforceable on public policy grounds. As one commentator noted, judges "deemed themselves incompetent to interpret contracts that governed intimate interspousal affairs, such as who would do the laundry, how many children, if any, a couple planned to have, or where a couple would spend holidays." They also feared that "if they agreed to interpret and enforce interspousal contracts, an avalanche of such contract disputes would overwhelm the courts."[98]

Another problem is that most people who marry do not have attorneys representing them in the negotiation of an *arm's length* pre-nuptial agreement. Marriage, usually involving powerful emotions, is more delicate than forming a business entity. Also, historically women were in a poor bargaining position, and, some believe, [rightly or wrongly] more concerned about child custody and support matters when divorcing. Most importantly to some, "viewing marriage as a matter of private contractual

agreements ignores both the non-economic components of marriage and the effects a marriage contract may have on non-contracting third parties, such as children and other family members." [99]

However, others believe differently. It has been suggested that Congress could preempt the courts and take the view that marriages are *arms-length* contracts, thereby concluding that a spouse owes another nothing unless contracted for. But, as noted

> [t]his approach has not yet been fully explored because traditionally, at common law, marriage was defined by both the State and the Church, and courts were loath to view a relationship as venerable as marriage as a "mere" contract. Further, because the separate "existence of the woman" was legally erased during marriages at common law, husbands could not enter into legally enforceable contracts with their wives, even if they chose to do so. Modern judges feared that recognizing market-like contracts, such as those releasing a husband from obligation to provide economic support to his wife or enforcing an obligation on the husband's part to pay his wife for domestic services, would cause married couples to approach marriage strategically rather than as a venerable institution.[100]

But, times are rapidly changing, and the traditional view of marriage is changing as well.[101] Some scholars believe that despite tradition, marriage should be viewed primarily as a contract. They suggest that "because modern couples seek an emotionally fulfilling relationship governed by their own private preferences and choices, they should be allowed to order all aspects of their personal relationship, including selecting the grounds and process for terminating the relationship."[102]

In this respect, it has been argued that marriage is a contractual relationship[103] that

> involves the obligations that spouses undertake voluntarily, thus restricting their freedom in the future. Such obligations include foregoing career opportunities to stay at home to rear children or foregoing time spent with small children in order to earn money outside the home. Under such a characterization, the spouses invest jointly in "specific assets" available only within the context of a long-term marriage. Spouses willingly make such sacrifices because they believe that the aggregate benefit produced by the marital arrangement will exceed the "combined benefit each [spouse] could attain on his or her own." As a result, the marital relationship contributes to each spouse's personal fulfillment and the spouses' mutual sacrifices create a high level of trust between the spouses, reinforcing the belief that they have made a binding commitment to one another concerning their rights both during and after the marriage. [104]

Further, modern courts have increasingly recognized the validity of prenuptial or postnuptial contracts, due in part to rising divorce rates.[105] Such contracts are now routinely held to be valid, though some commentators and judges remain concerned that such agreements promote "an alienated, cynical view of marriage that debases its intimate nature."[106] That having been said, we now find ourselves back where we started regarding the nature of marriage. How then is the main issue to be resolved? Or can it ever be?

SOME NEW YORK POTENTIAL HORROR STORIES (Contributing spouse)[107]

1. Jill is a successful arbitrageur and businesswoman, educated, and earning on average $700,000 per year. Jack is a househusband. They lived a luxurious life before

separating, with Jack spending on the average, $30,000 per month, much of it gambling. They have two children, and have agreed on shared custody, with Jack not having to pay child support. Jill has also agreed to quitclaim her interest in the marital residence to Jack but still be responsible for the mortgage payments. Jack will nonetheless be awarded lifetime maintenance between $12,000 and $17,000 monthly, though the court will determine that it is nearly impossible for the parties to maintain their pre-separation standard of living after a divorce. Since Jack will have to pay taxes on his maintenance earnings, his disposable income will be significantly less than the amount awarded. Jill may obtain a tax break by being able to deduct her maintenance payments and claiming her two children as exemptions.[108]

2. Jack and Jill, both practicing attorneys in New York, graduated in the same law school class. They have been married five years and have a four year old daughter. They separated in 2002 and settled the custody and visitation issues by stipulation. They did not stipulate as to child support. They did agree to a *shared time allocation*, whereby the father has the child with him from Wednesday evening to Sunday evening one week, and Wednesday evening to Thursday morning the following week. Neither party pays child support to the other, but Jill has instituted a Family Court proceeding for child support. She earns $76,876 per year and Jack earns $83,118 per year. Under current New York law, *shared custody* is irrelevant. Here, Jack will most likely pay a full .17 percent of his gross income (minus FICA payments) for child support, unless it can be determined to be *unjust* or *inappropriate*. The state's highest court has refused to adopt a proportional offset formula in child support cases.[109] Luckily, neither party will pay maintenance to the other as the earning differential is minor, and it is a *short term* marriage.

3. Jack and Jill were married in 1983, and have three children. Jack has many years of experience working in the hotel industry. His employment history includes six years as the general manager of the St. Moritz Hotel, for which he received an annual salary starting at $60,000 and rising to approximately $80,000. In 1996 Jill commenced a divorce action. At that time, Jack was employed as general manager of the Dorset Hotel at an annual salary of $70,000. Jack lost this position in August 1996 when the Dorset Hotel closed, and he subsequently took a temporary position at a cooperative apartment building at an annual salary of $ 60,000. Following this temporary employment, Jack obtained a job at a resort hotel in 1998, which paid him a salary ranging from $700 to $950 per week. However, he was subsequently laid off from this position, and by1999, Jack was employed as a guard in a Pennsylvania jail at a weekly salary, including overtime, of approximately $340 per week. The parties divorced in 1999 and Jill was awarded child custody and support, and title to the marital residence with some equity. However, unsatisfied, she now seeks to have her divorce judgment modified to award her maintenance. After she and Jack separated in 1995, Jill was able to obtain a position as a medical assistant. By 1999, she was employed as an assistant teacher for 30 hours per week. In New York, the ability to be self-supporting is an important maintenance issue. Here Jack will most likely luck out and the court will deny Jill a modification due to the fact that she is self supporting, has received title to the marital residence, and is receiving child support[110]

4. Jack and Jill have been married for ten years, and have two minor children. Jack is a practicing attorney and earns $80,000 per year. Jill is a housewife who has never worked outside of the home. The parties agree to a *shared custody* arrangement that virtually gives both parties equal time with the children. In New York, again the issue as to *shared custody* is irrelevant for child support purposes. Here Jack will pay .25 of his gross income (minus FICA payments) to Jill for child support simply because he makes more money.[111] He will also pay maintenance to her, as this is deemed more than a *short term* marriage but not exactly one of *long term*. Jill will perhaps be imputed income in the sum of anywhere from $15,000 to $20,000. Even so, Jack will still be liable for what is often termed *rehabilitative maintenance* for a durational period of approximately one-third to one-half the length of the marriage, to allow Jill to enter or re-enter the workforce. In this case it is estimated that Jack will pay between $500 to $600 per week for combined maintenance and child support.[112] He may get a tax break by claiming both children and having as much of the weekly amount as the IRS will allow to be designated as maintenance.[113] Also, if Jill helped Jack get through law school, she is entitled to a portion of the future earnings from the law degree.

5. Same facts as number 4 above, except that the parties have been married for twenty-years and Jill is an invalid. Jack might as well kill himself. He will pay huge maintenance for a very long period at best or *lifetime maintenance* to Jill at worst.[114]

THE CALIFORNIA HORROR STORY (Recipient spouse)[115]

No matter how long Jack and Jill have been married, nor how many children they have, nor what their standard of living is, no contempt proceeding may be brought against the obliging spouse who fails to pay alimony. California courts are limited to imposing judgments for arrears and liens. If the obligor has no living wage, assets, or property, then judgments and liens are worthless. However, should the obliging spouse fail to pay child support, a contempt proceeding may now be brought, and will succeed if the obliging parent's financial inability to comply with the child support order is a direct result of his or her willful failure to seek and accept available employment that is commensurate with his or her skills and ability. However, this may be difficult to prove, even though the evidentiary standard is low, proof by *a preponderance of the evidence*.[116]

CONCLUSION

Surely, in regard to some of the above fact patterns, other considerations are necessary or appropriate. For example, while holding that the parent who makes the most money in a *shared custody* case is to be designated as the non-custodial parent for child support purposes, the New York State Court of Appeals in *Bast*[117] alluded to the fact that in such cases there may be situations where strict adherence to the child support standards, and requiring a contributing spouse to pay full child support even though he or she has the children half of the time, will be *unjust* or *inappropriate*. It stated that in such situations the trial court "can resort to the 'paragraph (f)" factors[118] and order payment of an amount that is just and appropriate."[119] A situation requiring long term and heavy maintenance, along with full child support though sharing in custody, might just be *unjust*

or inappropriate. So, a court may be willing to forgo any maintenance award. Certainly, this would avoid the issue of *involuntary servitude*. Also, distributive awards, and the equal or unequal division of personal property may factor into the equation. And, marital fault may be a factor, to limit or even deny alimony. As one court put it "[the] wife [or husband] may have made the marriage and the household a living hell for her husband [or his wife] and children."[120] Again, this avoids the *involuntary servitude* problem.

In any event, the main issue of whether or not an award of maintenance is *peonage* or *involuntary servitude* appears to be much more elusive[121] than fashioning creative spousal support remedies.[122] The U.S. Supreme Court has never addressed the issue directly, and neither have most of the state high courts.[123] It appears that in most instances the right case has not presented itself, as appellants who might have been aggrieved have generally voluntarily settled below for a specific maintenance amount, thereby failing to trigger 13th Amendment *involuntary* servitude restrictions. And while at least one state high court, the Supreme Court of California, has addressed the problem, and invoked the 13th Amendment, that case is well over a hundred years old, and being challenged today.[124]

Nevertheless, as 21st century courts determine marriage to be more secular than sacred, and divorce rates keep rising,[125] future maintenance in the event of a marital breakdown might best be left to be contracted for by the parties beforehand.

However, at the moment in New York State maintenance is treated almost as a god-given right, without consideration of the 13th amendment, and is highly problematic. While truly invalided spouses, especially those with catastrophic injuries may require future spousal support, the whole economic burden even in such a case should not fall squarely on an innocent spouse who is desirous of a divorce. Society, in the form of Social Security and other benefits should step into the breach.

Further, indolent spouses, especially, should not be rewarded. For example, the divorcing housewife who actually obtains an education, or enters the workforce voluntarily, is penalized by the fact that she may be or will become self-supporting, thereby obtaining only a minimal amount of maintenance for a short period of time, or none at all. A truly lazy spouse may be rewarded by obtaining a greater amount of maintenance, and for a longer period of time, simply by the fact that she cannot at the time, or refuses at all, to support herself.

Without doubt an obligor spouse who challenges a maintenance award on 13th Amendment grounds may seem to some, at first blush, a bit cracked,[126] and to others as perhaps debasing the original purpose of the 13th amendment, to end slavery.[127] However, several state courts have grappled seriously with this problem, and others, as well as the U.S. Supreme Court, should do so now as well.[128] The issue, procedurally postured in the right manner, is ripe for review in New York and elsewhere. The final decision, though, must go only one of two ways. Realizing that spousal support is now an essential social and legal mainstay, either it is involuntary servitude and against the law, and therefore should be banned, or it should be carved out as an exception by the weight of authority and uniformly enforced fairly.[129] Until such time, however, it remains risky for attorneys to assist their clients in drafting voluntary spousal support agreements, thereby negating 13th amendment protection. And courts will continue to make a mockery of a serious, perplexing constitutional issue.

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[2] See: Americans for Divorce Reform page: http://www.divorcereform.org/rates.html. Divorce rates remained constant between 1991 and 2001 at over 40%.

[3] A rather insensitive and flippant remark made during a pretrial conference in the presence of the parties and their attorneys. He also threatened that if there was not a settlement, a trial would be necessarily costly and he would appoint a law guardian for the children at the rate of $5000, an amount to be paid upfront so that bankruptcy would provide no relief. He further stated that law professors don't really work, as he played with a calculator behind the bench, inattentive to opposing counsel arguing their positions.

[4] See: *Dennis v. Dennis*, 117 Wis 2d 249 (1984) (Wisconsin Supreme Court stating that the "the public might well wonder by what legal legerdemain one can equate a court order 'directing [a] parent to take alternative employment' to support his children to 'involuntary servitude'…To compare the enforcement of the obligation of a parent to support a child with slavery lacks appreciation for the social desirability of the former and the social monstrousness of the latter.") However not allowing a putative father to challenge paternity if he later discovers that the child is not his, and requiring the father to continue paying child support may be involuntary servitude of the worst kind. *See*: *Griffin v. Marshall*, 294 AD2d 438 (2nd Dept., 2002) (court holding that the doctrine of equitable estoppel precluded the father's challenge to paternity of the child given that the child's best interests are of paramount concern).

[5] However, see*: Dads by Default*, People Magazine, November 25, 2002, p. 78. This article should send chills down the spine of those representing fathers who, through DNA testing, later learn that they are not the biological father, yet still ordered to pay child support. This truly is *involuntary servitude*. The article goes on to state that "[a]ccording to a survey by the American Association of Blood Banks, of 300,626 men tested in the year 2000 - almost all, presumably, with reason to be doubtful about their children's paternity – some 30 percent found out they were not related by blood to children they had thought were theirs."

[6] There can be no doubt that sound social policy requires that parents support their minor children who cannot support themselves. See: *McKenna v. Steen*, 422 So.2d 615 (Ct. App. Louisiana, 3rd Cir., 1982) (court holding against dentist who sold his dental practice to enroll in law school and seek a reduction in child support claiming that the order to pay child support "amounts to an imposition of involuntary servitude by forcing him to work as a dentist against his will, and likewise suppresses his right to pursue a profession of his choice.") (The court went on to state that "[t]hese allegations are so ludicrous that they hardly dignify a response. There is nothing in the judgment which forces [the doctor] to continue practicing dentistry or quit law school. The judgment merely imposes on [him] his inherent obligation to support his minor children. The means by which he achieves these ends are of no consequence. We find no constitutional impingement." This article is concerned primarily with alimony and the legal ramifications facing a contributing spouse who cannot meet such an obligation.

[7] M. Imbalzano, *Spousal Support; The Treatment of Alimony/Maintenance by Statute in 11 Key States*, The Matrimonial Strategist, June 2001. (an overview of the key elements of the alimony/maintenance/spousal support statutes in these major states, including their distinctive features.) ("The statutory law of the different states across the country treat spousal support differently. In some jurisdictions, it is called alimony; in others it is referred to as maintenance. A survey of the alimony/maintenance/ spousal support statutes in 11 major states reveals that most of them make no distinction between different types of spousal support, allow a court the discretion to award alimony in an amount and for such duration as the court deems just and provide a list of factors the court should consider in awarding spousal support. New Jersey…for example]…now recognizes four different types of alimony.")

[8] New York allows for lifetime maintenance in the proper case. Although the court is required to consider the pre-separation standard of living in determining the appropriate amount and duration of maintenance, a pre-separation "high-life" standard of living does not guarantee a per se entitlement to an award of lifetime maintenance. Rather, the court must consider the reasonable needs of the recipient spouse and the pre-separation standard of living in the context of the other factors enumerated in *Domestic Relations Law § 236(B)(6)(a). Chalif v. Chalif*, 2002 N.Y. App. Div. LEXIS 9395 (2nd Dept., 2002)

[9] *See*: *McAteer v. McAteer, Jr*., 294 AD2d 783 (3rd Dept., 2002) (one may be held in contempt for noncompliance).

[10] U.S. Const. amend. XIII.

[11] Alimony is termed *maintenance* in New York State. *Domestic Relations Law §236*, hereinafter referred to as DRL. The words *alimony, support, spousal support* and *maintenance* are interchanged throughout here.

[12] See: *Stansberry v. Stansberry*, 1977 Okla. Civ. App. LEXIS 154 (Ct. Appeals, Div. 2, 1977) ("the original purpose of alimony…was to prevent the wife from being destitute and becoming a charge on the public.")
[13] See: *Stansberry*, supra. ("Times have changed, women have become self-supporting and independent, but the law of alimony lags a century behind.")
[14] See: National Law Journal, June 3, 2002, MASTER CLASS; Vol. 24; No. 38; Pg. B9, *A shift from divorce 'fault' to economic 'need' Laws are gender-neutral, but males treated differently Vows are valid-paperwork or not.*
[15] New York State does not have standard maintenance guidelines, though there are statutory factors to consider. See*: New York State Domestic Relations Law § 236 (B) (6) (a).* It does, however, have child support guidelines under the *Child Support Standards Act* that is problematic. See: Barrett v. Barrett, 281 A.D.2d 799 (3rd Dept., 2001) (The Family Court Act sets forth the factors to be considered in setting the basic child support obligation and the noncustodial parent's pro rata share of that obligation…Family Court may deviate from the formula when strict application of the guidelines will produce unjust results, as long as it sets forth its reasons for the deviation" See, *New York Family Ct Act § 41.*
[16] *Stansberry*, supra.
[17] *Rogers v. Rogers*, Jr., 1978 Okla. Civ. App. LEXIS 117 (Ct. of Appeals, 1978).
[18] *Stansberry*, supra. ("In…[one case]…after a 10-year marriage, a husband was ordered in 1977 to continue paying alimony that he had been paying for 30 years since 1946 to an ex-wife who was earning in excess of $14,000 per year!")
[19] *Stansberry*, supra. See also: American Law Institute's *Principles of the Law of Family Dissolution: Analysis and Recommendations, chap.5 (2001) (Spousal Support)*. This effort seems to redefine alimony as compensatory, recommends even more intrusion by society and the courts, and does not discuss the issue of *involuntary servitude*.
[20] *Black's Law Dictionary*, 5th edition. *See*: *Kronman, Paternalism and the Law of Contracts*, 92 Yale L.J. 763, n.7; *See also Pollock v. Williams*, 322 U.S. 4, 7-13 (1944) for a history of peonage statutes.
[21] U.S. Constitution: Thirteenth Amendment, annot.2, http://supreme.lp.findlaw.com/constitution/amendment13/02.html
[22] *See*: *Peonage Cases*, 123 F. 671 (M.D. Ala., 1903)
[23] 219 U.S. 219 (1911).
[24] Ch. 187, Sec. 1, 14 Stat. 546, now in 42 U.S.C. Sec. 1994 and 18 U.S.C. Sec. 1581.
[25] "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." The primary purpose of the statute was to abolish slavery as it had existed in the U.S. until the Civil War. But the Supreme Court has held that it is not limited to that purpose and intended to cover conditions akin to slavery. *Butler v. Perry*, 240 U.S. 328, 332 (1916). See also: *United States v. Kozminski*, 487 U.S. 931, 942 (1998) (O'Conner, J.).
[26] See for example: Section 6, Article I, of the Ohio Constitution, which forbids involuntary servitude except as a punishment for crime and Section 15, Article I, of the Ohio Constitution, which prohibits imprisonment for debt; the Wis. Const. art. 1, sec. 2; and Cal. Const. art. 1 6.
[27] Not necessarily. There may be something *almost* involuntary servitude! See : *Capps v. Capps*, 216 Va. 378 (1975) (Virginia Supreme Court stated "[i]n holding this agreement void as against public policy, the chancellor reasoned that it would discourage the wife from filing a suit for divorce or separate maintenance. He also reasoned that the provision requiring the wife to relinquish her interest in the property in the event either party instituted "legal proceedings affecting the marital relationship" would place her in "almost involuntary servitude" and even prevent her from securing a criminal warrant against her husband for physical abuse, if such occurred. We do not agree with the chancellor's conclusion that the agreement is invalid."
[28] *Kozminsk*i, supra. at 942.
[29] *Kozminski*, supra. at 937
[30] *Kozminski*, supra.

[31] *Kozminski*, supra. (However, the Court did not forbid psychological coercion.)
[32] *The Civil Rights Cases*, 109 U.S. 3 (1833).
[33] *Simmons v. Simmons*, 244 Conn. 158 (1998). (In an interesting twist the Connecticut Supreme Court held that payment of alimony is not involuntary servitude but valuating and distributing future proceeds of a medical license is: "Sound public policy militates in favor of using an alimony award rather than a property settlement in these circumstances. To conclude that the plaintiff's medical degree is property and to distribute it to the defendant as such would, in effect, sentence the plaintiff to a life of involuntary servitude in order to achieve the financial value that has been attributed to his degree. The plaintiff may become disabled, die or fail his medical boards and be precluded from the practice of medicine. He may choose an alternative career either within medicine or in an unrelated field or a career as a medical missionary, earning only a subsistence income. An award of alimony will allow the court to consider these changes if and when they occur." *Also see*: *Severs v. Severs*, 426 So.2d 992 (Ct. of Appeal, Florida, 5th Dist., 1983) ("wife's claim to a vested interest in the husband's education and professional productivity, past and future, is unsupported by any statutory or case law. Indeed, such an award by the trial court would transmute the bonds of marriage into the bonds of involuntary servitude contrary to Amendment XIII of the United States Constitution." *See also*: *Olson v. Olson*, 98 Idaho 10 (1996) (Supreme Court of Idaho stating "that the facts…emphasize the need for re-examination of the entire concept of alimony and the continuing viability of that concept in contemporary society. Put in different words, the question facing the Court is whether a judicially imposed system of involuntary servitude is to be continued wherein one human being is placed in bondage to another for what is effectively the remainder of his natural life." In New York a court may not only award alimony but also value a medical license, or any license and/or degree obtained during the marriage for that matter, and distribute a future share of its income to the other spouse.
[34] *See*: *Kozminski*, supra. at 943. See also: *D. Wiese*, 11 J. Contemp. Legal Issues 419. (Narrowing the discussion to California, and focusing on the obligor who refuses to earn income, rather than the income earning obligor who refuses to pay.) Also, most cases that have been appealed have to do with the petitioner voluntarily settling on a fixed amount of spousal support, thereby negating the issue of *involuntary servitude.* See also: *Broyles v. Broyles*, 573 So. 2d 357 (Ct. of appeal 5th Dist., 1990) ("a law degree does not constitute 'property' for the purpose of property distribution in a dissolution of marriage, even if earned during the course of the marriage, and that future earnings were likewise not subject to division or distribution as lump sum alimony or the like…no court could decree the same because it would amount to involuntary servitude by the degree holder spouse for the benefit of the non-degree holder."
[35] *Bailey*, supra.
[36] *Bailey*, supra. at 244; See also: *Kozminsk*i, supra. at 805.
[37] *Stansberry*, supra.
[38] *Butler v. Perry*, supra. at 333; *Klubnikin v. United States*, 227 F.2d 87 (9th. Cir. 1955) cert. den. 350 U.S. 975; *Reese v. United States*, 225 F.2d 799 (9th Cir., 1955).
[39] Consider this: Parents however do not have the sole right to dispose of their children. At least one court, in a case involving a couple who attempted to sell their two month old son to an undercover agent for $3500, has opined that since the 13th Amendment abolished involuntary servitude, it also abolished the corresponding commercial buying and selling of people as chattel…and would prohibit something so fundamentally repugnant and socially unacceptable as the commercial selling of babies." See: *Runkles v. State*, 87 Md. App. 492 (Ct. of Appeals of Maryland, 1991)
[40] *Wiese*, supra at 425.
[41] *Coker v. City of Lewiston*, 1997 Me. Super. LEXIS 152 (Sup.Ct. of Maine, 1997)
[42] *Wolters v. Wolters*, 1981 U.S. Dist. LEXIS 11897 (N.D. Ill. East. Div., 1981) (holding that entering into a divorce agreement in the state courts that provides alimony based on the individual's financial status and subject to judicial review "cannot provide the basis of a claim of peonage or involuntary servitude.")
[43] Even in a case of no maintenance, a court can award the payment of a spouse's medical expenses. See: *Pearlman v. Pearlman*, 288 AD2d 13 (1st Dept., 2001)
[44] *See*: *Sterling v. Sterling*, 2001 N.Y. Misc. LEXIS 476 (Sup. Ct. NY County, 2001) (court stating that an award of rehabilitative maintenance is intended to allow a spouse the opportunity to achieve economic independence).

[45] "The court may award permanent maintenance, but an award of maintenance shall terminate upon the death of either party or upon the recipient's valid or invalid marriage, or upon modification …"

[46] *But see*: *Match v. Match*, 179 AD2d 124 (1st Dept., 1992) (lower court focused too narrowly on the prior standard of living factor without considering the fairness of the award) There are a plethora of cases involving the pre-separation standard of living. Most trial court decisions are upheld in this regard. However, recently there has been some erosion of this primary standard. See: *Carr v. Carr*, 291 AD2d 672 (3rd. Dept., 2002).

[47] *See*: *Chalif*, supra.; and *New York State DRL §236(B)(6)(a).* See also *Mullin v. Mullin*, 187 AD2d 913 (3rd Dept., 1992 (a combined child support and maintenance obligation reaching 50% of the contributing spouses income is inappropriate)

[48] *See*: *McAteer v. McAteer*, 294 AD2d 783 (3rd Dept., 2002). "In any decision made pursuant to this subdivision, the court shall set forth the factors it considered and the reasons for its decision and such may not be waived by either party or counsel."

[49] Id. See also: *Rosenkranse v. Rosenkranse*, 290 AD2d 685 (3rd Dept., 2002).

[50] *DRL §245*.

[51] *Sass v. Sass*, 276 AD2d 42 (2nd Dept., 2000). It is true that this case deals with a former marriage of long duration (29 years), but long duration is not defined under New York State law. Can it be as little as ten years? Fifteen? Twenty-five? Also, Mrs. Sass was diagnosed with cirrhosis of the liver. See: *Mullin v. Mullin*, 187 AD2d 913 (3rd Dept., 1992) (16 years is of long duration); *Lew v. Lew*, 289 AD2d 538 (2nd Dept., 2001) (eight years considered relatively brief duration).

[52] See: *Russell v. Russell*, 878 S.W.2d 24 (Ct. Appeals, Kentucky, 1994) (trial court did not abuse its discretion in awarding permanent maintenance to a spouse unable to support herself)

[53] Luckily, maintenance ends upon the death of either party, the recipient spouse's marriage, and can be terminated at a certain set time with respect to the ages, health, schooling, and financial standing of the parties. *See*: *Fruchter v. Fruchter*, 288 AD2d 942 (4th Dept., 2001.

[54] DRL§236 (B)(9)(b). *See*: *Sterling*, supra. (citing *O'Brien v. O'Brien*, 66 NY 2d 576, 585 (1985), the *Sterling* court stating that Equitable Distribution "is based on the premise that marriage is economic partnership to which both parties contributed as a spouse, wage earner or homemaker and that the marital assets should be appropriately distributed, based on various specified criteria, upon the dissolution of the partnership.")

[55] *Sass*, supra.

[56] New York State is under the individual assignment system (IAS) for judges, making forum shopping extremely difficult.

[57]*Dowd v. Dowd*, 178 AD2d 330 (1st Dept., 1991) (court may annul or modify any prior order or judgment as to maintenance or child support, upon a showing of…a *substantial change in circumstances*…including financial hardship). See also *DRL §§246-248* which allows someone unable later to pay such maintenance to petition the court for relief. It might seem to the reader, at this point, that the commentators have little or no sympathy for the plight of a recipient spouse, even one who is in dire straits. Not true. However, it is our belief that before lifetime or even long term maintenance should be awarded, the recipient spouse should indeed be in dire straits through no fault of his or her own, and have exhausted all avenues of support, private and public, including the seeking of an education or job. And, the contributing spouse should have the disposable income to continue maintenance, most especially where asked to do so long after the initial maintenance durational period.

[58] The Family Court as well as Supreme Court may modify maintenance. See: *Family Court Act, article* 4.

[59] *Dowd v. Dowd*, 178 AD2d 330 (1st Dept., 1991). *See also DRL §§246-248* which allows someone unable later to pay such maintenance to petition the court for relief.

[60] *Flynn v. Rockwell*, ___AD2d _____ (3rd Dept., 2002).

[61] *Fox v. Fox*, 294 AD2d 652 (3rd Dept., 2002) (retirement from law practice insufficient).

[62] *Fruchter v. Fruchter*, 288 AD2d 942 (4th Dept., 2001.

[63] *Dunnan v. Dunnan*, 293 AD2d 345 (1st Dept., 2002)

[64] *See*: *Kushman v. Kushman*, ___ AD2d _____ (2nd Dept., 2002)

[65] *See*: *Kushman*, supra., and *DRL §236[B][8]*.

[66] Though all U.S. jurisdictions have been surveyed, and some cases from other states are sprinkled within.

[67] *California Family Code §§4330 - 4339.*
[68] *California Family Code §4330 (b).*
[69] *California Family Code §4331 (a).*
[70] Requirements are stringent. (e) A vocational training counselor shall have at least the following qualifications: (1) A master's degree in the behavioral sciences. (2) Be qualified to administer and interpret inventories for assessing career potential. (3) Demonstrated ability in interviewing clients and assessing marketable skills with understanding of age constraints, physical and mental health, previous education and experience, and time and geographic mobility constraints. (4) Knowledge of current employment conditions, job market, and wages in the indicated geographic area. (5) Knowledge of education and training programs in the area with costs and time plans for these programs.
[71] *California Family Code §4332.*
[72] *California Family Code §§4333-4335: 4333.* An order for spousal support in a proceeding for dissolution of marriage or for legal separation of the parties may be made retroactive to the date of filing the notice of motion or order to show cause, or to any subsequent date. 4334. (a) If a court orders spousal support for a contingent period of time, the obligation of the supporting party terminates on the happening of the contingency. The court may, in the order, order the supported party to notify the supporting party, or the supporting party's attorney of record, of the happening of the contingency. (b) If the supported party fails to notify the supporting party, or the attorney of record of the supporting party, of the happening of the contingency and continues to accept spousal support payments, the supported party shall refund payments received that accrued after the happening of the contingency, except that the overpayments shall first be applied to spousal support payments that are then in default. 4335. An order for spousal support terminates at the end of the period provided in the order and shall not be extended unless the court retains jurisdiction in the order or under Section 4336.
[73] *California Family Code §4336.* (a) Except on written agreement of the parties to the contrary or a court order terminating spousal support, the court retains jurisdiction indefinitely in a proceeding for dissolution of marriage or for legal separation of the parties where the marriage is of long duration.
(b) For the purpose of retaining jurisdiction, there is a presumption affecting the burden of producing evidence that a marriage of 10 years or more, from the date of marriage to the date of separation, is a marriage of long duration. However, the court may consider periods of separation during the marriage in determining whether the marriage is in fact of long duration. Nothing in this subdivision precludes a court from determining that a marriage of less than 10 years is a marriage of long duration.
[74] *California Family Code §4336 [c].*
[75] *California Family Code §4338.* In the enforcement of an order for spousal support, the court shall resort to the property described below in the order indicated: (a) The earnings, income, or accumulations of either spouse, while living separate and apart from the other spouse, which would have been community property if the spouse had not been living separate and apart from the other spouse. (b) The community property. (c) The quasi-community property. (d) The other separate property of the party required to make the support payments. Also under California Family Code §4339, the court may order the supporting party to give reasonable security for payment of spousal support.
[76] As it is in other states. *See for instance: Hopp v. Hopp*, 279 Minn. 170 (1968) (Minnesota Supreme Court holding in an alimony contempt case that "in any event, subject to constitutional limitations forbidding involuntary servitude and the imposition of criminal sanctions in civil proceedings, we think it proper for the trial judge in civil contempt proceedings to give consideration, in determining a defendant's ability to comply with an order for payment, to his earning capacity as well as his financial status and earnings history."), and *Johnson v. Johnson*, 1957 OK 333 (1957), the Oklahoma Supreme Court in accord with *Ex parte Todd*, 119 Cal. 57, 58, (1897) (jailing for contempt cannot be indefinite and it must be shown that the obligor at the time of commitment did not make an effort at employment or has the means to pay).
[77] See however, *Atkinson v. Atkinson*, 289 AD2d 907 (3rd Dept., 2001) (significant income disparity as a factor alone is insufficient to justify an increase in maintenance.)

[78] *Wiese*, supra. at 422. See however: *Wohlfort v. Wohlfort*, 116 Kan. 154 (1924) (Supreme Court of Kansas holding that while forcing a man to work to pay alimony is involuntary servitude, such is justified in regard to payment of alimony.)
[79] 119 Cal. 57, 58, (1897)
[80] In New York a court may hold a contributing spouse who does not pay in contempt. *Burns v. Burns*, 289 AD2d 358 (2nd Dept., 2001) While Judges in many of the California appellate cases surveyed seem to find enough procedural irregularities to circumvent the *contempt* issue without having to review 13th amendment claims, or find that the lower courts did not consider the obligor's ability to pay. *See*: *Application of Myer*, 131 Cal. App. 41, and *In re Cowden*, 139 Cal 244.
[81] *Id*. See however: *Smith v. Smith*, 77 Ill. App. 3d 858 (App. Ct. Ill. 2d Dist., (1979) (husband's contention "that requiring a man to support his ex-wife is 'peonage' and is therefore violative of the thirteenth amendment of the United States Constitution which prohibits slavery and involuntary servitude…is completely without merit. Purely monetary obligations, whether based on ordinary commercial contracts or upon a relationship such as marriage or parenthood cannot be equated with peonage or slavery."
[82] 133 Cal. App. 3d 373 (1982)
[83] *Id*. at 385.
[84] See: *Dimon v. Dimon*, 40 Cal. 2d 516 (1953) (California Supreme Court citing Ex parte Todd, "in this proceeding we are not concerned with problems that might arise if defendant should refuse to pay the amounts ordered by the trial court. Under an early decision of this court a deliberate refusal to work could not be punished by contempt …but ordinary judgment remedies would be available and the judgment could be satisfied if defendant should inherit or otherwise obtain property. Moreover, the threat of execution upon any subsequently acquired property might be sufficient to induce defendant to work.")
[85]*See: Cal. Fam. Code §4303 (a*): "The oblige spouse, or the county on behalf of the oblige spouse, may bring an action against the obligor spouse to enforce the duty of support."
[86] *Cal. Fam. Code §5100* (child support), *§5101* (spousal support).
[87] *Cal. Fam. Code §4722.*
[88] *Cal. Fam. Code §4600; 4630*.
[89] *Moss v. Superior Court of Riverside County*, 49 Adv. Cal. App. 5th 871, 882 (1996) See also: *Wiese*, supra. at 422, 423. California courts appear to be totally unsympathetic to those not meeting child support obligations.
[90] 17 Cal. 4th 396 (1998) (California Supreme Court recites history of *Ex parte Todd*, cited supra.)
[91] *Todd* is distinguishable from *Moss* because it involved alimony and not child support. Therefore the majority and dissent are clear that *Moss* only changes the law regarding child support, not alimony. *See also*: Klein, *Article: Moss v. Superior Court: Enforcing Child Support Orders with New Rules for Contempt Actions*, 29 Sw. U. L. Rev. 529 (2000)
[92] The word *sacred* can be used in regard to the eminence given marriage, both religious and secular. For instance, from a Christian religious perspective, "[m]arriage between baptized Christians is a sacrament of grace… much like the sacraments of baptism, eucharist, penance, and others. The temporal union of body, soul, and mind within the marital estate at once symbolizes the eternal union between Christ and the Church and confers sanctifying grace upon the couple, their children, and the community. Viewed as a spiritual institution, Aquinas wrote, 'sacrament is in every way the most important of the three marriage goods, since it belongs to marriage considered as a sacrament of grace; while the other two belong to it as an office of nature; and a perfection of grace is more excellent than a perfection of nature.' A sacramental marriage, once properly contracted between Christians in accordance with the laws of nature and of the Church, is an indissoluble union, a permanently open channel of grace. For marriage partakes of the quality that it symbolizes, namely, the indissoluble bond between Christ and the Church." J. Witte, Jr., *Propter Honoris Respectum: The Goods and Goals of Marriage*, 76 Notre Dame L. Rev. 1019.
[93] From a more secular point of view, "classical sources illustrate that the West has long recognized that marriage has natural goods and benefits for the couple, their children, and the broader community. Particularly perceptive were Aristotle's insights that marriage is a natural institution fundamental and foundational to any republic; that marriage is at once 'useful,' 'pleasant,' and 'moral' in its own right; that it provides efficient pooling and division of specialized labor and resources within the household; and that it serves both for the fulfillment and happiness of spouses, and for the procreation and nurture of children. Also influential was the Stoic and Roman natural-law idea that marriage is a 'sacred and enduring union' that entails a complete sharing of the persons, properties, and pursuits of husband and wife in service of

marital affection and friendship, mutual caring and protection, and mutual procreation and education of children." *Id*.

[94] Further, there are many works that describe marriage in sacred terms. The authors leave it to the reader to consult a religious tract of treatise of choice. Cases in this regard are sometimes amusing in light of 21st Century thought. Take the idea of plural marriage, common in some societies. *In Reynolds v. United States*, 98 U.S. 145 (1878), Chief Justice Waite wrote: "Polygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African people. At common law, the second marriage was always void…. and from the earliest history of England polygamy has been treated as an offence against society. After the establishment of the ecclesiastical courts, and until the time of James I., it was punished through the instrumentality of those tribunals, not merely because ecclesiastical rights had been violated, but because upon the separation of the ecclesiastical courts from the civil the ecclesiastical were supposed to be the most appropriate for the trial of matrimonial causes and offences against the rights of marriage, just as they were for testamentary causes and the settlement of the estate of Deceased persons." *Id*. at 164, 165.

[95] See: E. Taylor, *Across the Board: The Dismantling of Marriage in Favor of Universal Civil Union Laws*, 28 Ohio N.U.L. Rev. 171. (dealing with issue of homosexual marriage or "civil union")

[96] The judge went on to construe it more narrowly. "In my judgment the constitution should be construed, as applicable to marriages in existence when the constitution went into force, so far as the after acquired property of the wife is concerned." See also: *Taylor*, supra. at 179. "[w]hile marriage laws are directly influenced by religion, courts have never held them to violate the Establishment Clause because the purposes of marriage laws are sufficiently secularized." This includes "the fostering of procreation within secure homes, and positively promoting the public health." *Id*. *See also*: *Starr v. Hamilton*, 22 F. Cas. 1107 (Cir. Ct. Oregon, 1867)

[97] Obviously overlooking the fact that mutual promises are consideration.

[98] Dickerson, *To Love, Honor, and (OH!) Pay: Should Spouses be forced to pay each other's debts*? 78 B.U.L. Rev. 961 (1998).

[99] *Id*.

[100] *Id*.

[101] It is beyond the scope of this article to discuss gay marriages, and other marriage-like unions between members of the same sex and/or opposite sex. *However for example see: Gill v. Dist. of Columbia*, 653 A.2d 307 (Dist. of Columbia Ct. Appeals, 1995) (regarding homosexual marriage "the outcome…turns on the definition of 'marriage.' Shakespeare in his 116th Sonnet wrote of 'the marriage of true minds.' In the game of pinochle, the king and queen of the same suit are referred to as a 'marriage' when those cards are held by the same player; if that suit is trump, the combination of king and queen is a 'royal marriage.' But these and similar expressions are only metaphors, figures of speech derived from the literal meaning of the word that…when used to denote a legal status, refers only to the mutual relationship between a man and a woman as husband and wife, and therefore that same-sex 'marriages' are legally and factually -- i.e., definitionally –impossible." *See also*: *Garcia v. Garcia*, 2002 UT App 381 (Ct. of Appeals, 2002) (Court held that state statue ending alimony when former spouse cohabits with another person of the opposite sex is applicable to same sex cohabitation.)

[102] *Dickerson*, supra at

[103] *See*: *Sterling*, supra. ("marriage is an economic partnership")

[104] *Id*.

[105] *See however*: *Heilbut v. Heilbut*, 746 N.Y.S.2d 294 (1st Dept. 2002) (With respect to equitable distribution, the 1971 pre-nuptial agreement was properly found to be invalid since it was premised upon a scheme to circumvent immigration laws and was also contrary to public policy since it purported to eliminate essential aspects of every marriage, viz. spousal duties, responsibilities and rights, citing *Hartman v Bell*, 137 A.D.2d 585; and, *Bloomfield v Bloomfield*, 97 N.Y.2d 188.

[106] *Id*.

[107] A myriad of possibilities exist in regard to enforcement of maintenance awards in New York State.

[108] See: *Greenfield v. Greenfield*, 287 AD2d 332 (1st Dept., 2001).

[109] *Bast v. Rossoff*, 91 NY2d 723 (1998).
[110] *Bittner v. Bittner*, ___AD2d _____ (2nd Dept., 2002)
[111] *Bast*, supra.
[112] See: *Kushman v. Kushman*, ___AD2d ____ (2nd Dept., 2002) (husband's income of $70,000 three times that of wife, an award of $400 per week not excessive). See also *Weiss v. Weiss*, 213 AD2d 542
[113] *Maintenanc*e is deductible from income, *child support* is not.
[114] See: *Mazzone v. Mazzone*, 290 AD2d 495 (2nd Dept., 2002) (The plaintiff established that she was disabled to the extent that she collected Social Security Disability and was unable to sit or stand for long periods of time. The Supreme Court factored in her future ability to be self-supporting. And, the plaintiff adequately demonstrated that she was disabled to the extent that she was incapable of returning to her previous profession as a legal secretary in the foreseeable future, if at all.
[115] While as in New York many problems exist with fashioning and enforcing alimony and child support awards, the main problem is how to enforce either, and that problem may be represented generically.
[116] *Moss v. The Superior Court of Riverside County*, 17 Cal. 4th 396 (1998) (ending long historical confusion regarding *contempt* in alimony and child support proceedings)
[117] *Bast*, supra.
[118] *DRL §240 [1-b] [f]*.
[119] *Bast*, supra. See also: *DRL §240 [1-b] [f] [g]*.
[120] *Stansberry*, supra., citing a Utah case where the wife was found to be "a chronic alcoholic who precipitated the break up of the marriage and the family. On the other hand she may have been faithful, loving, tolerant, courteous, kind, obedient, thrifty, industrious and God fearing. We can hardly depend on the parties for an objective evaluation of the wife's contribution to a marriage and any attempted outside evaluation can be nothing but farcical. As John Steinbeck observed in 'Cannery Row,' people may be very different depending upon the peephole through which they are viewed. There is too little, if any, objective evidence for courts to blandly announce that alimony should be awarded to women because everyone knows that they contribute faithfully to the well being and stability of the marriage. Beatification and canonization should be granted on an individual rather than a class basis and in any event only by an ecclesiastical court. Obviously, times have changed but the law of alimony has not. As far as I can glean from the law of this jurisdiction, and giving due deference to arguments from other jurisdictions, alimony exists because it has always existed and this alone appears to be its sole justification."
[121] See for example: *Morgan v. Morgan*, 27 Pa. D. & C.3d 554 (Com. Pleas Ct., 1982) (Pennsylvania court desiring to order alimony but not wanting to put defendant into involuntary servitude.)
[122] *See*: *Stuczynski v. Stuczynski*, 238 Neb. 368 (1991) (inexplicably the court declining to even address husband's contention "that the award of alimony and child support constituted an abuse of discretion because it equals 75 percent of his income…and the court based the award on his working 70 hours per week. Thus, he claims, he will be forced to work 70 hours per week for the next 7 years and is "in effect reduced to a form of bondage or involuntary servitude to his former wife from which he cannot escape."
[123] *See for example*: *Warwick v. Warwick*, 438 N.W.2d 673 (Ct. of Appeals of Minnesota, 1989) ("Minnesota courts have not addressed the issue of whether ordering a party to find employment for payment of support or maintenance constitutes involuntary servitude. [but stating] However, other jurisdictions have concluded that such an order does not violate prohibitions against involuntary servitude…[t]he court finding "the rationale of these foreign cases consistent with the present state of Minnesota law and therefore applicable here." See: *Freeman v. Freeman*, 397 A.2d 554, 557 n.2 (D.C. App. 1979) (reviewing court rejected as meritless appellant's argument that the trial court's order directing him to seek "gainful employment commensurate with his abilities and educational background" violates the constitutional prohibition against involuntary servitude); *see also*: *Hicks v. Hicks*, 387 So.2d 207, writ denied 387 So.2d 209 (Ala. 1980) ("A court order in a divorce judgment directing one party to pay alimony to the other party does not impose involuntary servitude upon the payor"); *In re Marriage of Smith*, 77 Ill.App.3d 858, 864, 396 N.E.2d 859 (Ill. App. 1979) (court holding that husband's argument that requiring him to support his ex-wife constitutes involuntary servitude found to be "completely without merit. Purely monetary obligations, whether based on ordinary commercial contracts or upon a relationship such as marriage or parenthood cannot be equated with peonage or slavery.").
[124]Many courts raise the issue without addressing it directly. *See: Miller v. Miller*, 1984 Ohio App. LEXIS 11815 (Ct. of Appeals, 1984) ("Appellant's assertion that appellee's need for continued alimony payment

has vanished because of her present employment has not been demonstrated from the record in this case. Nor has he demonstrated his requirement to continue to pay such alimony involves either involuntary servitude or deprivation of his property without due process of law. One who is accorded an opportunity to present his case before a competent and fair court as is abundantly evident in this case cannot claim a violation of his constitutional rights. While one spouse may have no right to share in the improved circumstances attained by the other spouse after the divorce, the financially dependent spouse may well have the right to economic support sufficient to maintain his or her standard of living prior to the divorce to the extent that financially supportive spouse has economic ability to provide that support. We find no constitutional issue is manifested in this case by appellant maintaining payments to a former spouse, payments he has agreed to make." *See also: Clark v. Clark*, 152 Tenn. 431 (1925)(Tennessee Supreme Court holding in 1925 that "[t]here is no merit in the contention made by the defendant that to compel him to pay the monthly sums of alimony fixed in the decree of divorcement, provided he has ability to do so, would have the effect to impose upon him involuntary servitude in violation of article 13, section 1, of the Federal Constitution, which is to the effect that neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party has been duly convicted, shall exist within the United States, and no argument or authority is cited by defendant in support of this ground of his demurrer.") *Franks v. Franks*, 189 Colo. 499 (1975) (Colorado Supreme Court holding that order for payment of attorneys fees is not involuntary servitude, stating that the "involuntary servitude argument is based upon the assertion that one may be forced to work for the benefit of the other spouse's attorney, despite the fact that the burdened party is without 'fault.' We do not believe, however, that this burden, even if onerous, can be equated with slavery or involuntary servitude within the meaning of Article II, Section 26 of the Colorado Constitution. That provision was intended primarily to echo the language of the Thirteenth Amendment to the federal constitution and to ensure that the practice of African slavery as it existed in portions of this country until the middle of the last century would never find root in Colorado.")

[125] *See*: http://www.religioustolerance.org/chr_dira.htm (facts also show that in America divorce rates among Christians is higher than other religions).

[126] See: *McCarthy v. McCarthy*, 150 Ind. App. 640 (Ct. of Appeals of Indiana, 1971) (Ct. upholding *full faith and credit clause*, while stating that the appellant "suggests that to force him to pay alimony is to subject him to involuntary servitude. Appellant argues with great zeal that the so-called Women's Liberation movement has led to many changes in law, bringing into focus the proposition of complete civil equality for women. Appellant urges that a natural adjunct of such progression is the abolition of alimony." *See also*: *Commonwealth v. Pouliot*, 292 Mass. 229 (1935), decided during the great depression, and a precursor to workfare. In *Pouliot*, the Supreme Judicial Court of Massachusetts stated that it is not involuntary servitude to be required to work for the welfare department as a condition to being furnished aid, and added that "[m]anifestly, it is not slavery or involuntary servitude, as thus authoritatively defined, to sentence this [father] if he fails to perform his duty to support his family. The obligation of a husband and father to maintain his family, if in any way able to do so, is one of the primary responsibilities established by human nature and by civilized society. The [criminal] statute enforces this duty by appropriate sanctions. A reasonable opportunity is afforded to the defendant by the city to provide for the support of his wife and children. The statutes require that support at the public expense be provided for the poor and indigent residing or found in the several towns…. In a period of depression like the present, it is reasonable to require one in the position of the [father] to work under the conditions shown in the case at bar in order to meet his obligation to his family. If occasion arises, the officers of the city can be compelled to perform their functions with respect to the [father] in a lawful way and without oppression."

[127] Recently, reparations petitions have raised the ugly spectrum of slavery.

[128] *See*: *Washburn v. Washburn*, 101 Wn.2d 168 (1984) (Washington Supreme Court worrying about doing the right thing. "We wish to emphasize that by permitting the supporting spouse to be compensated with an award of maintenance, we are not subjecting the student spouse to some form of involuntary servitude by requiring him or her to work at the chosen profession against his or her will. The ability of the student spouse to pay maintenance is a relevant factor which must be considered in making an award to the supporting spouse. If the student spouse permanently abandons his or her profession, and his or her ability to pay is substantially impaired as a result, this change of circumstances might justify a modification of the maintenance awarded to the supporting spouse.") *See also*: *McFerran v. McFerran*, 55 Wn.2d 471 (1960) (husband ordered to make repairs to the marital residence. The Supreme Court of Washington this time, holding that in regard to contempt proceedings "[t]he trial court…has transformed into a money judgment

that portion of the divorce decree that requires that a specific act be done; hence, the question of involuntary servitude has become moot and we do not discuss it.")

[129] See: *Wiese*, supra.