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The Theory of Alimony

Ira Mark Ellman

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The Theory of Alimony

Ira Mark Ellman†

Although alimony has long been a feature of divorce law, there is no theory explaining why either spouse should have a financial obligation to the other that survives their marriage. Explanations based on gender roles, or assessments of blame for the marriage's failure, are inconsistent with modern attitudes. More recently, commentators and courts have suggested that contract or partnership concepts explain alimony obligations. In Part I of this Article, Professor Ellman demonstrates the inadequacy of theories that use analogies to contract or partnership to explain or justify the imposition of alimony obligations. In Part II he offers a new theory of alimony based on a societal policy of encouraging sharing behavior in marriage by requiring compensation, at divorce, for the loss in earning capacity arising from such sharing behavior. Employing three basic principles, subsidiary rules, and numerous examples, Part II develops this general policy into a comprehensive theory.

INTRODUCTION

In case of divorce, if one party has maintenance difficulties, the other party should render appropriate financial assistance. Both parties should work out an agreement with regard to the details; in case an agreement cannot be reached, the people's court should make a judgment.


The court may grant a maintenance order for either spouse only if it finds that the spouse seeking maintenance: 1) lacks sufficient property to provide for his reasonable needs; and 2) is unable to support himself through appropriate employment . . . . The maintenance order shall be in amounts and for periods of time the court deems just, without regard to marital misconduct . . . .


Why do we have alimony? The two provisions quoted above, though drawn from countries with very different cultures and political systems, are remarkably similar: Both allow a court to require support of

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a former spouse in need, but neither defines need or explains why need is an appropriate basis for such an order. American cases elaborate upon the statutory rules, but actual alimony awards as well as their rationales vary from jurisdiction to jurisdiction and from case to case. Even the definition of "need"—the most fundamental issue created by such statutes—is hopelessly confused. Is the wife "in need" only when she is unable to support herself at a subsistence level? A moderate middle class level? The level to which she was accustomed in the marriage, no matter how high? The courts have used all of these approaches. Without an articulated theory, we cannot argue that any of these definitions is correct. In short, no one can explain convincingly who should be eligible to

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1. This section of the Uniform Marriage and Divorce Act, unlike the Chinese provision, includes factors which the court can take into account. But these factors are general in tone, nonexclusive, and need only be "considered" by the court. The Chinese provision is identical to the U.M.D.A. in substance, but considerably more concise.

2. Modern alimony rules must be gender neutral. Orr v. Orr, 440 U.S. 268, 281-83 (1979). This formal equality, however, does not alter the economic and social realities that usually make the wife economically dependent rather than the husband. Although most wives now work outside the home, they usually continue to bear primary responsibility for the couple's domestic needs as well, especially child care. See I. Ellman, P. Kurtz & A. Stanton, Family Law: Cases, Text, Problems 260-61 (1986). This domestic burden has been estimated to account for 70% of the difference in earnings between married men and women. Riche, All About Working Women, Am. Demographics 6 (Oct. 1981). The result is that although the law is gender neutral, alimony claims are in fact overwhelmingly brought by women against men. Data from Britain illustrates the point. The British alimony system, like the American, is formally gender neutral. Yet Eekelaar and Maclean did not find a single case in which a woman was paying alimony to a man, even though their sample did include cases in which men had custody of the couple's children. J. Eekelaar & M. Maclean, Maintenance After Divorce 88 (1986).

Recognizing this reality, and to avoid tedious language, I often use the term "wife" and its referent pronoun "her" as a shorthand for the spouse with an alimony claim. Of course, the genders could usually be reversed without affecting the analysis, and the text employs some examples in which the husband is the claimant. There are points in the analysis, however, where I discuss gender-specific factors in alimony. There I use the feminine forms with their gender-based meaning. See, e.g., infra note 132 and accompanying text. These differing usages should be clear from the context.

3. Compare, e.g., Neal v. Neal, 116 Ariz. 590, 592, 570 P.2d 758, 760 (1977) (divorced wife of retired Air Force sergeant with custody of two children capable of supporting herself adequately as a cleaning lady and therefore not "in need") with Mori v. Mori, 124 Ariz. 193, 195-96, 603 P.2d 85, 87-88 (1979) (52-year-old divorced wife of successful attorney, with no children to care for, found to be in need due to her age and lack of employment history, and therefore entitled to $1000 a month alimony); compare also McDermott v. McDermott, 129 Ariz. 76, 77, 628 P.2d 959, 960 (Ct. App. 1981) (after partially supporting husband through undergraduate and graduate school, wife who now desires to attend graduate school ineligible for alimony since she is employed) with In re Marriage of Angerman, 44 Colo. App. 298, 299, 612 P.2d 1166, 1167 (1980) (reaching the opposite result of McDermott on very similar facts and an essentially identical statute). For other cases illustrating the completely elastic nature of "need" in modern alimony statutes, see In re Marriage of McNaughton, 145 Cal. App. 3d 845, 852, 194 Cal. Rptr. 176, 179 (1983) (divorced wife with property worth $3 million entitled to alimony of $3500 per month in light of of the parties' "lavish" lifestyle); In re Marriage of Simmons, 87 Ill. App. 3d 651, 659, 409 N.E.2d 321, 327 (1980) (divorced childless wife with monthly income of $1754 still entitled to alimony of $250 per month, since wife's reasonable needs are "measured by the standard of living the party seeking [alimony] previously enjoyed").
receive alimony, even though it remains in almost every jurisdiction.  

None of this denies that many divorced women confront difficult financial circumstances. But the financial need of one spouse at the termination of a marriage does not lead inevitably to the conclusion that the other spouse must meet that need. A theory of alimony must explain why spouses should be liable for each other's needs after their marriage has ended. Why should the needy person's former spouse provide support rather than his parents, his children, or society as a whole?

One might question how alimony could have survived thus far without a satisfactory explanation for its existence. The answer is that alimony's form has remained the same while its function has changed. Originally, alimony was a remedy of the English ecclesiastical courts which accompanied a legal separation—divorce "from bed and board"—at a time when complete divorces were available only by special legislative action, and gender roles in marriage were rigid and unquestioned. The husband had a legal and customary duty to support his wife. This duty continued after "divorce" because there was no divorce in the modern sense, only legal separation. When judicial divorce became available in the eighteenth and nineteenth century, alimony remained as a remedy. Courts and legislatures still viewed alimony as proper because women remained dependent and society expected husbands to support

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4. The commonwealth countries have had no less difficulty settling on an uncontroversial, consistent definition of "need" as the basis for alimony. See J. EKKELAAR & M. MACLEAN, supra note 2, at 38-43.


6. Critics and commentators have focused much of their attention on custodial mothers. In those cases, the real issue often is child support, not alimony. Child support claims require a different rationale than spousal claims, although to a certain extent one can ground alimony upon the duty to support one's child: children require a custodian, who in turn requires support. Few commentators, though, would limit spousal support to those who are the primary custodians of minor children. Those cases not complicated by child support issues therefore require an independent rationale. This Article attempts to provide that rationale.

7. Judicial divorce was not available in England until 1858, nor originally in the American colonies. Divorce's religious heritage permeated American laws until well into the twentieth century; even after judicial divorces became available, state laws often made them difficult to obtain and sometimes provided that the spouse who was "guilty" of causing the divorce could not remarry. See I. ELLMAN, P. KURTZ & A. STANTON, supra note 2, at 167-72 (quoting L.M. Friedman, A History of American Law, 181-84, 430-40 (1973)); see also, H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 420-21 (1968).

8. Reviewing the American history, Clark found no clear explanation for the continuation of alimony awards. He observed that alimony was carried over from legal separation—to absolute divorce even though "its purpose became less clear" and was "harder to justify." H. CLARK, supra note 7, § 14.1, at 421. Eekelaar & Maclean describe a similar situation in England. The Matrimonial Causes Act of 1857, which removed ecclesiastic jurisdiction and introduced judicial divorce, gave courts discretion to grant the wife maintenance "even after the obligations of marriage had been dissolved by judicial divorce, and the courts needed to find justification for creating such obligations." J. EKKELAAR & M. MACLEAN, supra note 2, at 8.
their wives. It was believed that the “innocent” wife gained “the apparent right to perpetual support as if the marriage had remained intact.”

Indeed, following this rationale, some jurisdictions allowed alimony claims only by “innocent” wives divorcing “guilty” husbands. But any justification such a system might have provided for an alimony remedy has been undermined completely by the modern divorce reform movement of the last twenty years, which makes fault irrelevant and rejects gender roles. A new rationale is therefore required.

The modern reforms that left the law of divorce with no rationale for alimony also altered the negotiating environment for divorcing spouses so that the divorced wife today often has much less leverage than she once had in pressing her financial claims. The story is well known. Prior to the “no-fault” reforms of the past two decades, divorce was formally available only when fault was shown; even mutual consent was inadequate without proof of fault. This absurd legal rule was largely ignored in practice, as it had to be, and most divorces were in fact obtained by consenting parties who cooperated in producing the required

9. J. Eekelaar & M. Maclean, supra note 2, at 14. This rule was fueled by the belief that such a remedy would deter people from immoral conduct. Eekelaar & Maclean quote from an important English case that explains its award of alimony with the observation that “[t]hose for whom shame has no dread, honourable vows no tie, and violence to the weak no sense of degradation, may still be held in check by an appeal to their love of money.” Id. at 15 (quoting Sidney v. Sidney, 4 Sw. and Tr. 178 (1965)). When no-fault divorce was finally adopted in England in 1971, “the only rationale for [established alimony rules] collapsed.” Id.

10. Under the traditional American rule, still in effect at least as late as 1968, the guilty wife received no alimony. This rule reflected ecclesiastical precedent. H. Clark, supra note 7, at 421. Some American jurisdictions still follow this rule, even though they allow the parties to dissolve their marriage without showing fault. See, e.g., Lagars v. Lagars, 491 So. 2d 5, 8 (La. 1986) (where spouse is guilty of conduct that would justify divorce under state’s fault grounds for divorce, she is ineligible for alimony); Marble v. Marble, 457 So. 2d 1342, 1343 (Miss. 1984) (wife denied separate maintenance because, inter alia, she admitted that she was partially to blame for marital problems). In others, fault may be a consideration but not necessarily a complete bar. See, e.g., Williamson v. Williamson, 367 So. 2d 1016, 1019 (Fla. 1979) (“court may then consider, as an equitable circumstance . . . any conduct which may have caused” economic hardship upon divorce, since alimony is an equitable remedy).

The ecclesiastical courts originally excluded an adulterous wife from support, but the law ultimately “settled in favour of permitting an order in favour of a guilty wife ‘so that she may not be turned out destitute on the streets’ or be led into ‘temptation’.” Id. at 9 (footnote omitted). The courts assumed that women were limited to domestic skills and could not support themselves by employment. Under this view, support protected women from dire need. Id. at 14.

There were pleas to bar consideration of fault in the award of alimony long before the general movement toward no-fault divorce existed; these arguments assumed women’s economically dependent status. They rested on the fact that “a guilty wife may starve as quickly as an innocent one” and thus assumed that the husband had a lifetime obligation to keep his wife from need, at least until that obligation was assumed by another. Vernier & Hurlbut, The Historical Background of Alimony Law and its Present Statutory Structure, 6 Law & Contemp. Probs. 197, 199 (1939) (describing laws that denied alimony to the guilty wife as “unenlightened”). As women increasingly acquire the ability to support themselves, some commentators have recently argued for returning to considerations of fault. See Golden & Taylor, Fault Enforces Accountability, 10 Fam. Advoc. 11 (Fall, 1987).
proof of fault in a sham proceeding before a forum chosen for its hospitality to this strategy.\textsuperscript{11}

The real impact of the formal rule was on the negotiations leading to the decree. The fault rules gave great bargaining leverage to the spouse who felt no urgency to end the marriage, especially if it would be difficult to prove that spouse guilty of “fault.” Knowing the difficulty of obtaining a divorce in a truly contested proceeding in which her fault would have to be shown, the innocent spouse might offer to cooperate with a “consent” decree if certain financial demands were met. So, for example, the older married man who abandoned his long-term wife for a younger woman could not obtain his “freedom” to remarry without buying it from his first wife. In such a system, the laws governing property division and alimony often did not matter, since in many cases the wife had leverage regardless of their content. This is not to say that the system necessarily produced equitable results. Although it protected the marital investment of an “innocent” spouse, or one whose “fault” would be tricky to prove, it failed entirely to protect the “guilty” spouse who had invested a great deal in her marriage, while giving bargaining leverage to the “innocent” one who had invested very little.

No-fault reform created a sea-change in this legal environment. Although motivated in large part by a desire to end the charade of perjured testimony and falsified residency that permeated consent divorces under the fault system,\textsuperscript{12} its effects went considerably further. The no-fault reform effectively recognized unilateral divorce. The man who wants to end his marriage now simply files a petition alleging that it is irretrievably broken; there is no defense against such an allegation.\textsuperscript{13} The wife seeking alimony, property division, or child support has no leverage to demand such compensation as the price of her husband’s “freedom,” but must rely instead on the substantive law governing these issues.\textsuperscript{14}

\textsuperscript{11} A wonderful literature developed documenting the absurd charades that were regularly carried out in court for the purpose of “complying” with the proof of fault requirement. The height of absurdity was reached in New York, where adultery was the only ground for divorce. See, e.g., Jarvis, \textit{I Was the Unknown Blonde in 100 New York Divorce Cases}, \textsc{Sunday Mirror Mag.}, March 11, 1934. Some divorces, of course, were obtained in a truly contested proceeding in which genuine fault was actually shown, but this route was less common even where such proof could be had, since many preferred to avoid the more onerous burden of a truly contested proceeding.

\textsuperscript{12} A participant in both the pioneering California no-fault reform and the original no-fault model act adopted by the Commissioners on Uniform State Laws recently described the elimination of “hypocrisy and perjury” from the divorce process as one of the “major goals” and “most enduring achievements” of no-fault reform. Kay, \textit{An Appraisal of California’s No-Fault Divorce Law}, 75 \textsc{Calif. L. Rev.} 291, 299 (1987).

\textsuperscript{13} See I. \textsc{Ellman, P. Kurtz & A. Stanton}, supra note 2, at 201-06.

\textsuperscript{14} In recent years many have pointed out that the adoption of no-fault divorce significantly reduced the bargaining leverage of the innocent spouse who resists the divorce. See, e.g., L. \textsc{Weitzman}, supra note 5, at 26-28 (arguing that the elimination of fault and consent from divorce proceedings has shifted power away from the spouse who previously was able to resist divorce, to the
Thus, the law of alimony and property division now count in a way neither did before. This effect of the no-fault reform apparently was not appreciated at the time the laws were changed, but today some writers maintain that the no-fault reforms have been a disaster for women because they allow men easy exit from marriage without provision for ensuring a sufficient financial obligation to their former wives. In


15. Herma Hill Kay, a Co-Reporter of the Uniform Marriage and Divorce Act and a member of the Governor's Commission that inspired the pioneering California reforms, has referred to the adverse financial impact of no-fault divorce on women as “an unanticipated cost” of the removal of fault from the divorce laws. Kay, supra note 12, at 292-93. She has said elsewhere that while the California and Uniform Act reformers wanted to take “blackmail” out of the divorce negotiations, they did not intend “that the shift to a no-fault approach should itself deprive either women or men of the capacity to negotiate a fair agreement.” Kay, Equality and Difference: A Perspective on No-Fault Divorce and Its Aftermath, 56 U. CIN. L. REV. 1, 62-63 (1987); see also Prager, Shifting Perspectives on Marital Property Law, in RETHINKING THE FAMILY: SOME FEMINIST QUESTIONS 111, 123 (B. Thorne & M. Yalom eds. 1982) (“none of us who heralded California's 1970 no-fault divorce reform foresaw its ramifications, particularly for many homemakers”).

16. The most well-known proponent of this view is Lenore Weitzman. She has collected data showing a decline in the number and amount of alimony awards within California, following adoption of no-fault divorce. L. WEITZMAN, supra note 5, at 163-80. Her conclusions are supported in a recent study by Elizabeth Peters, which divides American states into two groups: “unilateral divorce” states and “mutual consent” states. Peters, Marriage and Divorce: Informational Constraints and Private Contracting, 76 AM. ECON. REV. 437, 446 (1986).

While unilateral divorce is universally available in theory, many states, ambivalent about the prevailing no-fault trend, hedged their adoption of the modern no-fault reform by placing hurdles before the spouse who seeks a no-fault divorce. The most common hurdle is to require that spouse to show that the parties have lived apart for some period of years. See I. ELLMAN, P. KURTZ & A. STANTON, supra note 2, at 185-195, 205. In such states, which Peters classifies as “mutual consent” states, the spouse who is anxious to obtain a divorce more quickly can still do so, but only with the other spouse’s cooperation. The precise technique employed for cooperative divorces depends upon the details of state law. Some states retain fault grounds for divorce, which allow cooperating spouses to speed the process by collaborating on proof of fault—the very same strategy that predominated before the no-fault reforms. In other states, the required period of spousal separation is shorter if the spouses separate by mutual consent. Id.

Peters found that the average amount of alimony awards is higher in mutual consent states than in unilateral divorce states. Peters, supra, at 449. Because there is no consistent difference between the alimony laws of these two groups of states, one can infer that in mutual consent states some spouses, unwilling to wait for a no-fault divorce, buy their way out. This echoes the common practice under the old fault laws.

This inference is strengthened by another of Peters’ findings, that the size of awards varies more in mutual consent states than in unilateral divorce states. Id. at 450. In unilateral states, the amount of alimony is determined largely by prevailing law and judicial practice, which influence settled cases as well as litigated ones. In mutual consent states, however, there is a group of cases—those in which one spouse buys the other’s consent to speedy divorce—where the amount of alimony is determined by a bargaining process that does not depend on alimony law as the primary basis of the claimant spouse’s bargaining position. Nonetheless, the assertion that no-fault has seriously reduced the bargaining leverage of the average wife or even reduced the average award has been challenged.
response, reform efforts have now focused on the law of alimony and property division rather than on the grounds for divorce.\textsuperscript{17} Yet there is still no general understanding of why we have alimony at all.

In recent years courts have often made analogies to contract and partnership law in order to justify alimony awards.\textsuperscript{18} Some commentators have suggested reconceptualizing marriage entirely in contract terms.\textsuperscript{19} The purpose of this Article is to debunk that approach and out-
line an alternative theory of alimony.  

Part I of this Article examines the contract analogy in detail, including the related doctrines of restitution and partnership often found in discussions of alimony. Part I demonstrates that contract and partnership concepts do not help our understanding of alimony at all. It

Reflections on Status and Freedom, in ESSAYS IN JURISPRUDENCE IN HONOR OF ROSCOE POUND (R. Newman ed. 1962); Comment, Marriage as Contract: Towards a Functional Redefinition of the Marital Status, 9 COLUM. J.L. & SOC. PROBS. 607 (1973). The contractual view of marriage is not new. As Professor Frances Olsen points out, this analytic tradition goes back at least to 1860, when Elizabeth Cady Stanton urged the New York legislature to treat marriage the same as "all other contracts." Olsen, The Family and the Market: A Study of Ideology and Legal Reform, 96 HARv. L. REV. 1497, 1518-19 (1983). A recent piece that probably goes the furthest along this road is Brinig & Carbone, The Reliance Interest in Marriage and Divorce, 62 TULANE L. REV. 855 (1988). They urge the application of Fuller and Perdue's classic analysis of contract damages to the question of alimony. However, while they embrace a contract analysis of damages as providing a "framework" for the alimony "debate," they concede that under a modern statute making marital misconduct irrelevant, "the basis for spousal support remains to be fully articulated." Id. at 894, 894 n.152.

Many writers, some of them feminists, have welcomed contract in the context of cohabitation, where the law has rapidly come to accept contractual ordering. See Hunter, An Essay on Contract and Status: Race, Marriage and the Meretricious Spouse, 64 VA. L. REV. 1039, 1095-96 (1978) ("Treating marriage as status and cohabitation as contract can legally preserve those elements of each relationship that led a couple to adopt either form of relationship."); Kay & Amyx, Marvin v. Marvin: Preserving the Options, 65 CALIF. L. REV. 937, 973, 977 (1977) (recognizing contracts between unmarried cohabitants gives "increased dignity . . . to persons experimenting with new lifestyles").

20. "Alimony" is the traditional term for what is now more often called "spousal maintenance." Both Professor Carol Bruch and Professor Herma Hill Kay have urged me to use a different name for this remedy, correctly pointing out that my proposed compensation for lost earning capacity is entirely different from the kind of claim known traditionally as "alimony." I resist this suggestion because I suspect that the creation of a new label for this claim would not assist in the communication of my ideas. I believe that our intuition favoring spousal claims under certain facts is correct, even if we have never had a clear understanding of why, and "alimony" is the traditional label given this claim. I do not propose to abolish "alimony" so much as to reconceptualize (or perhaps, to conceptualize) it. If I believed the term "alimony" implied some particular theoretical explanation for the claim, at odds with my own, I would have more difficulty with it. As a very consequence of the theoretical confusion of current law, however, "alimony" has no such clear implication. In this way it is unlike the more modern term, "spousal maintenance," initially coined in the no-fault reform of the early seventies with the apparent purpose of connoting a gender- and fault-neutral claim based on "need."

21. The idea of marriage as a "partnership" has appealed both to writers concerned with the vulnerable position of homemaker wives under traditional marriage laws, see, e.g., Sharp, The Partnership Ideal: The Development of Equitable Distribution in North Carolina, 65 N.C.L. REV. 195, 198-201 (1987), and to courts construing modern marital property law, see, e.g., O'Brien v. O'Brien, 66 N.Y.2d 576, 585, 489 N.E.2d 712, 716, 498 N.Y.S.2d 743, 747 (1985) (New York's reformed marital property law is "based on the premise that a marriage is, among other things, an economic partnership"). Courts use the principle of restitution to explain results which may not fit cleanly within statutory alimony rules. See infra notes 61-75 and accompanying text.

22. Both Blumberg, Cohabitation Without Marriage: A Different Perspective, 28 UCLA L. REV. 1125, 1161-67 (1981), and Chambers, The Legalization of the Family: Toward a Policy of Supportive Neutrality, 18 U. MICH. J.L. REPF. 805, 820-23 (1985), have also suggested some of the arguments developed in Part I.

Some writers have made a more general objection to the standard assumptions about contract, see, e.g., Sunstein, Legal Interference with Private Preferences, 53 U. CHI. L. REV. 1129 (1986). Sunstein applies some of his arguments specifically to gender relations. He argues that women may
shows that their disutility is not the product of needlessly technical or crabbed applications of the traditional doctrines, but rather a reflection of the basic conflict between fundamental contract concepts and lingering societal understandings about the nature of intimate relationships, both in and out of marriage. Contract concepts base remedies on the parties’ mutual preferences, previously expressed or implied by conduct, but Part I shows that such preferences will rarely be known, so that in fact remedies that are purportedly contractual in nature are actually based on unarticulated judicial notions of fairness. In addition, we will see that in fact we do not wish the remedies available to a spouse at the termination of marriage to be governed exclusively by prior agreement, for the result would be at once too narrow and too expansive: It is too narrow because we often will want to provide remedies even when no credible claim exists that they follow from spousal agreements, and it is too expansive because when there is a good basis for finding breach of a spousal agreement, we often will not want to provide the nonbreaching spouse with the full remedy that contract principles would allow. Although Part I focuses principally upon the disutility of contract concepts in adjudicating the obligations of divorcing spouses, many of its points apply equally to the use of contract in resolving nonmarital cohabitation disputes, suggesting that the use of contract concepts in such cases is often wrong there, as well.23

form “adaptive preferences”—preferences molded by their experiences within a social system that restricts their opportunities—under which they do not seek greater equity in spousal relations. According to Sunstein, women follow this path because such preferences reduce the frustration that would result from seeking goals that are as a practical matter effectively closed to them. Id. at 1145-48. One could argue that a true understanding of liberty interests would call for rules which refuse to honor agreements based on these distorted preferences, and which insist upon more equitable spousal relations. Of course, there are problems in distinguishing “adaptive preferences” from “true preferences.” These problems are important in deciding whether to override individuals’ expressed preferences because such a reordering is so potentially intrusive. Id. at 1148-50. This Article does not directly consider Sunstein’s points. I argue here that even assuming individual preferences as expressed by contract are a proper basis for resolving marital disputes, many of its points apply equally to the use of contract in resolving nonmarital cohabitation disputes, suggesting that the use of contract concepts in such cases is often wrong there, as well.23

23. There is of course considerable diversity among the states on the treatment of financial claims arising from the termination of cohabitation. The broadest line of authority is based upon Marvin v. Marvin, 18 Cal.3d 660, 684, 557 P.2d 106, 122, 134 Cal.Rptr. 815, 831 (1976), which explicitly endorses reliance upon principles of implied contract and quantum meruit in cases where there are no express contracts. It is especially this line of authority which the arguments of this paper call into question. Some jurisdictions have accepted contract analysis, but have limited the application of contract to express contracts, e.g., Morone v. Morone, 50 N.Y.2d 481, 487-88, 413 N.E.2d 1154, 1156-57, 429 N.Y.S.2d 592, 595-96 (1980), or written contracts, e.g., Minn. Stat. Ann. §§ 513.075, 513.076 (West 1988). These more limited applications of contract analysis are less vulnerable to the arguments of this paper, although they will also leave the great majority of postcohabitation disputes unresolved, since express or written contracts are relatively unusual. See infra
Part II of this Article outlines an alternative theory of alimony designed to encourage socially beneficial sharing behavior in marriage by requiring compensation for lost earning capacity arising from that behavior. This Part develops a set of principles based on that policy and examines a number of significant changes in prevailing law that would result from adopting them. Of course, a comprehensive examination of existing law would have to consider the division of marital property as well. There is a link between spousal claims for alimony and those for a share in the property accumulated during the marriage: both are financial claims against one’s former spouse based on the spousal relationship, and are in that sense fungible. A complete prescription for a revision of the law therefore requires a theory of property division as well as a theory of alimony.

Alimony and property claims could sensibly yield different results if the governing law for each has a different rationale. A few decades ago they clearly did. Many states then had fairly rigid rules governing the division of property, based on long established principles of title and ownership; unlike in alimony law, notions of need, equity, or fairness simply had no important function. In one of the important reforms of recent years, however, almost all states have adopted some form of “equitable distribution” of marital property. Equitable distribution laws give trial judges great discretion to allocate the spouses’ accumulated property according to their own notions of fairness, just as do the traditional provisions on alimony.

The theory developed in Part II would apply to the division of property as well as alimony if we believed accumulated marital property should be distributed according to some principle of equity or fairness, but it would have no application to a regime that divided property by principles of ownership or title. In actual operation, most divisions of property in “equitable distribution” states today probably involve an unarticulated blend of title and equity principles. Certainly, any theory of property division would have to generate principles for balancing...
I

THE FUTILITY OF CONTRACT AND PARTNERSHIP CONCEPTS

A. The Failure of the Contract Analogy

1. The Appeal of Contract Concepts

Although marriage is occasionally described by the metaphor of contract, in fact the law has never treated marriage like contract. Marriage has been treated instead as a status relation, in which statutory rules fix the legal relationship of the parties in ways they themselves cannot change by agreement. Despite this traditional view, the ordinary marriage appears to have many attributes of contract. Marriage is a joint enterprise, voluntarily entered into by two people with expectations of each other and with a general view that there will be an exchange that will enhance both parties' interests. Thus, although formal marital contracts are not common, and while traditional marriage and divorce laws are not written in contract terms, perhaps the marriage relationship is enough like contract that concepts borrowed from that field could assist in explaining why alimony is appropriate in some cases but not in others.

The appeal of the contract analogy is understandable. It flows in part from the collapse of the societal consensus concerning the nature of marriage; the range of "normality" in spousal relations is broader today than it once was, in part because of changing gender roles. In the absence of clear societal norms governing marriage and dissolution, many commentators look to the spouses' intentions to govern the relationship. An approach based on the parties' intentions fits within contract but not within rules based on status. In a tradition that dates back at least to Sir Henry Maine, it is often argued or assumed that the ordering of private relationships according to contract concepts is inherently more compatible with modern notions of liberty than basing these relations on status rules. Thinking about marriage in contract terms is also

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27. In a subsequent paper I hope to deal more directly with questions of marital property and to develop more precisely the extent to which its division should be governed by the theory advanced here.

28. See, e.g., L. WEITZMAN, supra note 19, at xxi; Shultz, supra note 19, at 328-29; Temple, supra note 19, at 152-53 (new law of cohabitation affords unmarried couples freedom to structure their relation; married couples must be given same freedom).

29. See, e.g., L. WEITZMAN, supra note 19, at xix (quoting Maine); Mnookin, Divorce Bargaining: The Limits of Private Ordering, 18 U. Mich. J.L. Ref. 1015, 1017-18 ("core justification
consistent with the decline of moral thinking about familial relations: Marriage and family obligations today are seen less in terms of right and wrong and more in terms of personal choice and personal fulfillment. If we want spouses to do what is "right," we make a law that lays out the rules. If we want them to be happy, we ask what they want, or at least what they have told each other they want. That inquiry defines contract. Society's acceptance of contract cohabitation, another manifestation of this same social trend, also fuels the movement toward contract in marriage. Finally, contract has been viewed favorably by some feminist writers who see it as an opportunity to move dispute resolution in marriage from an informal private sphere in which male domination is pervasive to a public one, in which disputes are resolved by gender-neutral rules.

a. Contracts Concerning the Termination of the Marriage

The most straightforward application of contract arises when the parties have made an express agreement concerning the termination of their marriage. A premarital (or "antenuptial") agreement is a contract made prior to the marriage in which the parties specify the financial consequences of divorce. Courts are increasingly willing to enforce such agreements. Nonetheless, their significance is limited by their numbers: Only a tiny minority of spouses make express agreements concerning dissolutions. Moreover, despite the trend toward contractual freedom,
significant restrictions are still common. Procedural requirements are typically stricter than those imposed on ordinary commercial agreements; disclosure requirements are common, and independent counsel may be necessary. In many states the terms of the agreement may also be set aside for substantive unfairness—especially terms relating to alimony—even when they are not unconscionable under ordinary contract standards. Moreover, there is no authority permitting spouses to set the terms under which divorce will be available to them, or allowing them to tie the financial consequences of their divorce to the reasons for dissolution.

One might argue that premarital agreements would be more common if the restrictions upon them were relaxed, and that contract would thus become important in marital dissolutions. There is good reason to doubt that prediction, however. People generally enter and conduct marriages on the assumption that they will endure, and this expectation may be the most important reason why express prenuptial agreements concerning the consequences of dissolution are relatively uncommon. For the same reason, implied contracts addressing the financial consequences of divorce will also be rare because spouses do not often engage in conduct evidencing an explicit understanding of the terms of divorce when they are not even considering the possibility of divorce. This is not to deny that the parties often have expectations concerning what would happen if they were to divorce. Indeed, as the marriage heads for dissolution, they may think about the issue quite directly. But unarticulated expectations do not themselves create an agreement. Even articulated expectations do not create an agreement unless they are expressed by both parties, verbally or by conduct, and are consistent with each other. Most settlement agreements, of course, are negotiated after the spouses have already decided upon divorce. But the focus of this Article is not the case in which the parties present the court with an agreement setting the terms of their divorce, worked out after the marriage has come to an end. My focus is the case in which the parties do not agree at

\begin{footnotesize}
33. See I. Ellman, P. Kurtz & A. Stanton, supra note 2, at 653-69.
34. Id. at 669-71.
35. During this period, the parties may even take joint action to deal with the possibility of divorce. In such cases, some kind of joint understanding might be inferred, something in the nature of an implied-in-fact separation agreement. Separation agreements generally are not recognized by the courts unless they are in writing. See, e.g., Unif. Marriage and Divorce Act, § 306 (1970). In theory, courts might nonetheless consider evidence of the parties' intentions in applying statutory standards of equity in adjudicating the dispute, but the statutory standards—and not the parties' agreement—would be the courts' ultimate criteria.
\end{footnotesize}
the time of the divorce, but where contract principles are nonetheless thought to be relevant because of the suggestion that the parties had earlier developed an understanding that should govern their present dispute.

b. Contracts Concerning the Conduct of the Marriage

i. Applying Ordinary Contract Rules

The scarcity of express or implied agreements concerning the termination of the marriage does not by itself render contract principles irrelevant. In ordinary commercial relations governed by contract, the parties often have no understanding about the termination of their relationship. Their contract speaks rather to the conduct of their relationship. Nonetheless, the contract is relevant when the relationship ends and one party seeks damages for the other's breach. Thus, even without a spousal agreement addressing the terms of divorce, contract principles could govern a divorce dispute in the same way if the facts supported the existence of a contract concerning the conduct of the marriage. Although express contracts for the conduct of a marriage are, if anything, even more rare than premarital contracts, we might think that implied contracts concerning the conduct of marriage would be more common. Indeed, most of the cases that use contract language in their analysis assume precisely this kind of implied agreement.

In grounding alimony on an agreement for the conduct of the marriage, however, we necessarily conceptualize it as an award of damages to one spouse for the other spouse's breach. In the absence of breach, the parties do not normally leave a contractual relationship with claims against one another. Of course, the claimant spouse will not be able to show breach of the agreement without first establishing sufficiently definite terms.

36. Contracts for the conduct of a marriage may not be enforceable during the marriage whether they are about economic or noneconomic matters. See Shultz, supra note 19, at 231-36; Temple, supra note 19, at 125-26. This discussion focuses on whether these contracts can be enforced when the parties file for divorce, in the sense that one party could receive damages for the other's breach of the agreement.

37. See supra note 18.

38. The important exception is where the parties have a partnership. Their agreement for the conduct of the relationship may be relevant if they end it by joint agreement but nonetheless dispute the proper distribution of their jointly owned resources. The potential analogy between the dissolution of marriage and the dissolution of a partnership is treated in Section B of this Part. Sometimes the breaching party has a valid damages claim under contract laws. It is a limited claim, however: a breaching party may sometimes be able to recover in restitution for the value of any benefits conferred upon the other party, but only to the extent those benefits exceed the loss imposed upon the other party as a result of the breach. RESTATEMENT (SECOND) OF CONTRACTS § 374 (1981). This principle could conceivably apply in the marriage context. Restitution claims are treated in the next section of the Article.

39. The core requirement of definiteness in a contract is that the parties' obligations to one another are described with sufficient clarity for the court to determine whether there has been a
Let us consider some typical cases to see whether that burden can be met. Many current claims for alimony or property arise from variations of two basic fact patterns:40

*Pattern 1: The Long-Term Homemaker.* The wife has performed domestic services during the course of a long-term marriage, and has never seriously sought employment opportunities. Her employment prospects at dissolution are therefore poor, and perhaps, depending upon her particular abilities or training, considerably diminished from what they might have been had she not relied upon her husband for support and instead pursued her own career. She seeks support or some other remedy to improve her financial situation after divorce, without which her standard of living will fall considerably below that which she has enjoyed during the marriage.

*Pattern 2: The Foregone Career Opportunity.* The wife has foregone specific training or employment opportunities during the marriage in order to accommodate the requirements of her husband's career. This may have occurred in a variety of ways: foregoing education in order to support him while he obtained training for a profession, leaving a promising job to move with him to a new home so that he could pursue his own job opportunities, or contributing free labor to his business or profession. At dissolution she seeks support, a share of his enhanced earning capacity, or some other remedy that would improve her financial condition.

Many claims for alimony or property division are elaborations or variations of these two basic types. Courts and commentators generally agree that such wives have a valid claim, even though there are different views as to the appropriate size of the claim. These discussions sometimes contain vague references to contract concepts, although a formal contract analysis is rarely attempted.

By this point in the discussion, the essential problem with a contract analysis should be clear: The wife expects that the marriage itself will compensate her economic sacrifice, by providing not only personal satisfaction but also a share in her husband's financial success. This expectation presumably lies at the heart of any contract claim she may have, and is frustrated only because the marriage has ended. A formal contract breach. If the terms are so vague that the fact of a breach cannot be established, then there can be no contract remedy. E. Farnsworth, Contracts § 3.27 (1982); Restatement (Second) of Contracts § 33(2) (1981); U.C.C. § 2-204(3) (1978).

40. Neither of these Patterns explicitly mentions children, although either Pattern could and often does arise in marriages in which there are children. Custodial parents have stronger alimony claims, and even property division claims, under current law than noncustodial parents. Indeed, custodial responsibilities may alone justify alimony, and some commentators have even suggested that alimony is appropriately regarded as a form of child support. See infra note 178. Nonetheless, current law does not limit alimony to claims by custodial parents. This section focuses on whether alimony claims can be justified on contract principles without reference to child custody.
claim would therefore require, as its basis, an allegation that the marriage's termination is due to the husband's breach.

What would it mean to show such a breach? Two possibilities emerge, which differ from each other in their understanding of the marriage "contract." The first possibility assumes a very simple contract—probably too simple—in which the parties have agreed unconditionally to marry and remain married. If one party moves for divorce while the other party wishes to continue the marriage, the moving party is in breach. The second possibility is more complex but more realistic, and will therefore be the focus of this discussion. In this situation, the marriage agreement is not only a commitment to remain married, but also includes some understanding about the nature of the marital relation. This more realistic understanding of the marital contract would allow one party to end the formal, legal marriage without breaching the marriage contract. Divorce would be justified by the other party's refusal to conduct the marriage in accordance with the agreement. Indeed, the spouse who sought to terminate the marriage would now have a claim for breach, rather than vice-versa.

Such a contract claim for breach of marital duties would require proof of an agreement concerning the conduct of the marriage, either express or implied, and evidence of the other party's breach. We have already observed that express agreements are rare. Proving the existence of an implied agreement is likely to be impossible. Neither of the two Patterns supports a contract claim. Even though in each case the wife can surely demonstrate that the dissolution will cause her disproportionate hardship, this alone is insufficient to make out a contract claim. She needs additional facts that establish that she and her husband had a contract concerning the conduct of the marriage, and that he breached a material term of that agreement. In short, she must show that the separation resulted from the husband's failure to comply with the marital understanding.

Additional facts could be offered in many cases to prove breach. For example, even today one might guess that in most marriages the spouses have either expressly or implicitly promised sexual fidelity. So if we add to either Pattern the further fact that the husband committed adultery, then the wife could terminate their relationship and sue for breach. It might also be easy to imply a commitment to live together, providing a contract-based claim to the wife whose husband abandons her.\(^41\) Although there are surely other mutual commitments in any given

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41. Even identifying a breach of such relatively simple terms will not necessarily end the case. For example, the husband's departure may have been prompted by the wife's breach. If so, then he is entitled to raise her breach as a defense, putting the other terms of the contract at issue. As discussed below, these terms will be more elusive. See infra text at note 45.
marriage, it is difficult to identify all the contract terms implied by the parties' conduct with sufficient definiteness to determine whether those terms have been breached. Problems of definiteness may be particularly troublesome when courts attempt to imply contracts from conduct as opposed to construing an express agreement. In marriage cases the difficulty will be exacerbated.

We now see how basing alimony upon contract would alter the kind of inquiry that courts now make in deciding whether an alimony claim should be sustained. Awards would not be based on statutory standards of "need"; rather, they would turn upon the establishment of a contractual obligation that the defendant had breached. Making such a showing would be difficult. Furthermore, a true contract analysis would not only revise considerably the criteria for relief, but it would also change the amount of awards. Both of these points are well illustrated by a third fact pattern:

Pattern 3: Change of Living Standard. Husband and Wife live on the Upper East Side in Manhattan, where he has just been made partner in a major law firm. They have been married ten years, during which time she has focused on volunteer work, society work, and decorating their home. He now decides to chuck everything, move to Ithaca, and teach law. She wants no part of Ithaca or of the professor's life. She refuses to join him. As a consequence they divorce. She is unable to earn more than a clerical worker's income; she claims that she is entitled to support at the level of a successful Manhattan attorney's wife. This is clearly the life they lived in for the first ten years of their marriage.

Under most modern divorce statutes one would approach this case by asking whether the divorce puts the wife in "need." The cases come out differently depending upon whether her "social" need counts. Some courts would also award rehabilitative alimony, giving her time to make the transition from marriage to single life. The fact is, however, that few homemakers, divorced after ten years of marriage, will ever be able to secure the kind of employment necessary to recover their lost financial standing; for most, the only chance to recover lies in finding another equally successful husband. Thus, under current law, while the wife will get some alimony so that she may not have to work, her standard of living will decline considerably.

42. Section 33 of the Restatement states that the terms of a contract are reasonably certain if they provide a basis for determining the existence of a breach and for giving an appropriate remedy. RESTATEMENT (SECOND) OF CONTRACTS § 33(2) (1981). The comments point out that the amount of certainty required varies with the context and with the remedy requested. Where the court is certain that the parties intended a bargain, it should fill any gaps in their agreement if at all possible. Id. comment a.

43. See I. ELLMAN, P. KURTZ & A. STANTON, supra note 2, at 284-91.

44. See infra note 51 and accompanying text for a fuller discussion of rehabilitative alimony.
Under a contract analysis, on the other hand, the entire focus would be on determining whether the husband had breached an agreement. In Pattern 3, the wife might argue that the parties agreed to pursue a particular lifestyle in their marriage, and the husband's decision to teach is a breach of that agreement. If the court finds such a breach, the wife presumably would be entitled to her full expectation interest, requiring a level of support the husband surely could not provide on a law professor's salary. If no breach is found, she would be entitled to nothing. Indeed, perhaps the husband could show she breached their agreement by failing to accompany him to Ithaca, allowing him to recover damages for that loss.

But did they really agree that the husband had a lifetime commitment to the fast lane? Or was that just the path they happened to start out on because it seemed comfortable at the time? In the absence of an explicit written agreement one doubts a court will be able to tease apart the complex motivations that originally led to their marriage and pinpoint the terms of their understanding with sufficient clarity to decide whether a "breach" has occurred. More fundamentally, even if a breach of agreement can be shown, is that the basis upon which we want a court to decide whether the wife is entitled to some form of relief?

Indeed, one might well argue that couples divorce precisely because they discover, as specific issues arise after some years of marriage, that in fact there never was a clear contract, that they do not have the same understanding of their mutual commitment. Although they had an agreement of sorts, it was at a level of great generality. Mutual love, mutual support, mutual respect, are all commitments newlyweds might readily agree they undertook, even though they differ later in their understanding of the concrete consequences of those commitments. A court would typically have no basis for deciding which understanding was correct. The spouses' "agreement" was simply too vague to provide a court with sufficient guidance to determine whether it has been breached. This problem also affects claims based upon narrow "terms" such as infidelity or abandonment, since the spouse charged with either breach could reply that the relationship had already ended on account of prior breaching conduct by the other spouse.45

ii. Extending Implied Contract Principles

One might suggest that this problem of incomplete or indefinite agreements could be dealt with by allowing courts more leeway to imply

45. One way to deal with vague terms might be to ignore them—to put aside the less concrete terms of the implied agreement but enforce the more explicit ones. This may not produce a satisfactory result either, since neither party is likely to consider those more specific commitments as having a meaning independent of the more complete relationship contemplated by the marriage.
agreements from the facts. But this approach is also problematic. In an arena like marriage, in which personal values are so pervasive, judges will be tempted to impose their own beliefs about appropriate marital conduct under the guise of implying an agreement. At a time when understandings and expectations about marriage and family have become much less uniform, courts seeking to imply an agreement will in fact often be imposing one, even if unintentionally.

This potential for judicial contract making can be seen today in the Marvin cohabitation cases, where contract is the principal doctrinal basis for relief. Written Marvin agreements almost never appear in reported cases. Rather, these cases usually involve claims based upon implied contract or allegations of an express oral agreement, which can amount to the same thing because conflicting testimony concerning the existence or terms of the alleged oral contract is often resolved by implying the contract from the circumstances. The claimant is typically the woman, and she usually alleges that her partner has reneged on his agreement either to support her or to share his earnings with her. He usually defends the claim by denying the existence of the agreement, but sometimes he claims instead that the woman herself has failed to comply with their understanding.

Kozlowksi v. Kozlowski illustrates the latter defense. The couple lived together for nearly fifteen years, nine of which occurred after he promised her that he "would take care of her and provide for her for the rest of her life." When he left her for a younger woman, she sought to enforce that promise. He defended with evidence that he left her because she was habitually drunk, but the court found "there was no indication that the understanding of the parties required plaintiff to abstain from drinking alcoholic beverages." "Her end of the agreement was, in general terms, to take care of defendant, his children and his home; to cook and keep house for him, and to help entertain his friends and business associates." Since she had complied with the agreement as the court defined it, she was entitled to relief. The court does not say how it concluded that entertaining business guests was part of her obligation under their agreement, but sobriety was not. It appears that for the most part the court merely extrapolated from very general facts about their relationship to reach what it believed to be the fair result, rather than the one which the parties had actually agreed upon. A woman who gives up

46. In an exhaustive Swedish study of cohabitation, only 1 couple out of 111 was found to have an express agreement regulating the economic aspects of their relationship. J. TROST, UNMARRIED COHABITATION 8-9, 160 (1979).
47. 80 N.J. 378, 403 A.2d 902 (1979).
48. Id. at 384-85, 403 A.2d at 906.
49. Id. at 388, 403 A.2d at 908.
50. Id.
fifteen years of her life to keep house for a man is entitled to something when he abandons her for a younger woman, and a contract can be implied to reach that result, if one is needed.

Having framed the case in contract terms, the court feigned consistency when it came to providing a remedy. It purported to award the woman the benefit of her bargain under the contract—that she be taken care of for the rest of her life. In a divorce proceeding, her remedy might have been more limited in time.\textsuperscript{51} Many courts, exercising the equitable discretion granted them by statute, have developed the concept of “rehabilitative alimony,”\textsuperscript{52} under which the abandoned wife is given a small kitty to tide her over while she learns to get by on her own. Yet while the Kozlowski court purported to award the woman the benefit of her bargain, the judgment was inexplicably low: although Mrs. Kozlowski was sixty-four years old at the time of the judgment, she received a lump sum payment of only $55,000 as “the present value of the reasonable future support defendant promised to provide.”\textsuperscript{53} Thus, although the court

\textsuperscript{51} If the wives in our Pattern cases were successful claimants in breach-of-contract actions, their awards would probably exceed the remedy typically provided under current law. In the ordinary contract case the party proving breach is entitled to expectation damages. The wife would thus be entitled to an award that put her in as good a position as she would have been had her husband “performed”—that is, had the husband complied with their agreement concerning their marital conduct and thereby preserved the marriage. The result seems to echo the classic formulation of the alimony standard, that the wife is entitled to be supported “at the level to which she is accustomed.” This analysis might even support a more generous award, because a true measure of her expectation interest might give her a claim to participate in her ex-husband’s future financial success even if it exceeds the level at which the marriage was conducted. In fact, however, wives today are fortunate even to receive an award consistent with the classic formulation. Most get less. See I. Ellman, P. Kurtz & A. Stanton, supra note 2, at 269-70 (noting that most women receive no alimony at all); Weitzman, The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards, 28 UCLA L. REV. 1181, 1249-53 (1981) (citing two studies which conclude that the economic status of women declines dramatically after divorce).

Under facts like those in our first Pattern, many courts provide only “rehabilitative alimony,” allowing the wife some time to establish herself in employment that provides her with an income above some minimal threshold, after which she has no further claims. See Or. Rev. Stat. § 107.412 (1983) (if, after receiving ten years of alimony, the court finds that a spouse has not made a reasonable effort to become financially self-supporting, the court shall order the support terminated); I. Ellman, P. Kurtz & A. Stanton, supra note 2, at 283-91 (reviewing decisions providing only rehabilitative alimony). In cases like those in our second Pattern, courts commonly allow the wife an award that roughly returns her investment to her, and there are almost no cases in which she is allowed the full value of her expectation, a share in her former husband’s future income. See id. at 296 (listing literature in the area). The only exception is O’Brien v. O’Brien, 66 N.Y.2d 576, 489 N.E.2d 712, 498 N.Y.S.2d 743 (1985) (holding that a professional license is marital property, and awarding the contributing wife a distributive award based on the husband’s future earnings).

\textsuperscript{52} For a fuller discussion of rehabilitative alimony and other judicial remedies, see supra note 51.

\textsuperscript{53} 80 N.J. at 388, 403 A.2d at 908. Even assuming that Mrs. Kozlowski would only live to be 75—probably an unrealistically low figure for a woman who has already reached 64—at an interest rate of 10%, $55,000 represents the present value of an annual income of only $8,468. Apparently this was the full award, as all of the property jointly used by the couple, including their home, was owned by him and retained by him after their separation.
ostensibly based its award upon contract, it actually tried to provide the kind of rehabilitative alimony award it might have given to an older, divorced woman with no dependent children.

Kozlowski illustrates three major points. First, courts using contract concepts to adjudicate Marvin claims are likely to find significant ambiguities or omissions in the parties’ purported agreement. Second, the court can exploit those ambiguities to attribute to the parties a result that is actually based upon what seems fair to the court. Third, the courts will hesitate to measure the appropriate relief in contract terms because that relief will either be zero, if no breach is found, or too large if breach is found. Even courts anxious to provide a remedy to the wife will often not want to give her the full benefit of the bargain she ostensibly struck. In sum, because contract principles do not produce an acceptable outcome in most cases, unarticulated equity notions actually govern the results even when they are packaged in contract terms.

2. Is Contract Just a Means for Reintroducing Fault?

While “no-fault” divorce is now available in some form in every state, a minority of states retain fault concepts in their alimony or property division rules.\(^\text{54}\) A perusal of their cases might suggest that the search for “breach” in the application of contract concepts to alimony resembles a search for “fault.” Although courts in these fault states do not ordinarily characterize their decisions as based upon contract,\(^\text{55}\) their reasoning often has a contract flavor. For example, in some jurisdictions, a wife is not entitled to alimony where her violation of her marital responsibilities is a proximate cause of the marriage separation;\(^\text{56}\) such a rule treats alimony as an equivalent to damages for breach of contract. Sometimes one finds contract principles not in the court’s analysis but in its tone.\(^\text{57}\)

\(^{54}\) See I. ELLMAN, P. KURTZ & A. STANTON, supra note 2, at 265-76.

\(^{55}\) In most cases, courts rely on statutory language that directs them to set the financial terms of divorce equitably. See, e.g., Williamson v. Williamson, 367 So. 2d 1016, 1019 (Fla. 1979) (citing FLA. STAT. § 61.08(2) (1975)). In others, the court is directed to “consider the merits of the respective parties,” Grosskopf v. Grosskopf, 677 P.2d 814, 819 (Wyo. 1984) (citing WYO. STAT. § 20-2-114 (1977) (amended 1982)), or the “conduct of the parties during the marriage,” D.L.L. v. M.O.L., 574 S.W.2d 481, 485 (Mo. Ct. App. 1978) (quoting MO. REV. STAT. § 452.330.1 (Supp. 1975)).

\(^{56}\) See Pearce v. Pearce, 348 So. 2d 75, 77 (La. 1977); Fulmer v. Fulmer, 301 So. 2d 622, 629 (La. 1974).

\(^{57}\) See, e.g., Robinson v. Robinson, 187 Conn. 70, 72, 444 A.2d 234, 236 (1982):

[A] spouse whose conduct has contributed substantially to the breakdown of the marriage should not expect to receive financial kudos for his or her misconduct. Moreover, in considering the gravity of such misconduct it is entirely proper for the court to assess the impact of the errant spouse’s conduct on the other spouse.

The court found that the "humiliation and mental anguish" which the husband suffered due to the wife's adultery could be considered in apportioning the marital property. Id. at 71, 444 A.2d at 235.
Despite the occasional contract tone, these courts are necessarily following an independent tradition, based upon their state's divorce law, which employs rules that do not necessarily track contract analysis. For example, where both parties are without fault, and the divorce is granted on a no-fault ground like "living apart," the court may allow alimony if need is shown. This result is apparently inconsistent with contract principles because it awards "damages" where the relationship dissolves by mutual consent rather than by the defendant's breach. Moreover, fault, as the term is used in these divorce cases, is generally limited to intentional or negligent conduct. Under contract law, however, one can be in breach even where the breach was neither negligent nor intentional. Thus, while fault-based divorce law may bear some similarity to contract analysis, the principles are, in fact, different.

Nonetheless, "fault" and "contract" share a common difficulty as bases for adjudicating marital dissolutions. Because most alleged contracts will be vague and implied, the lesson of cases like Koslowski is that contract will do little more to direct the outcome than the general principles of "equity" or "merit" that underlie adjudications of fault. If contract theory offered a more principled method of determining alimony, then it might be preferable for those who find traditional fault cases no more than vehicles for imposition of judicial values. Reformers of the traditional fault divorce laws argued persuasively that marriages fail because parties turn out to be incompatible for reasons not sensibly thought of in terms of "fault." Judgments of "breach" share the same burden. Because contract is designed to aid the party whose losses result from another's broken promise, it is useless where we cannot reliably define the promise.

3. The Failure of the Restitution Analogy

The principle of restitution requires repayment by one who is unjustly enriched at another's expense. Courts sometimes use restitution to allow recovery where some benefit was conferred under an agreement that is not enforceable for reasons including indefinite terms, or to return to the breaching party benefits he conferred under a valid contract. Restitution offers a solution falling in between equity and contract. As an established doctrine under which money judgments can be ordered on the basis of the parties' prior transactions—even though those

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60. One modern effort to conceptualize alimony in contract terms concludes that preservation of fault concepts is necessary, apparently as an analogy to breach. Brining & Carbone, supra note 19, at 894-95. The authors, however, do not address the differences between breach and fault.
62. Id. § 8.14. The breaching party's recovery is reduced by the other party's loss. Id. at 600.
transactions did not give rise to a valid contract—restitution seems to offer a principled basis for ordering alimony. Restitution provides a doctrinal basis for relief in appealing cases in which the court may feel it otherwise lacks the authority to act because of statutory requirements, such as "need," which must be met before alimony can be ordered.

_Pyeatte v. Pyeatte_ offers a recent example of the use of restitution principles in the context of marriage. In what is by now a familiar pattern, the parties had agreed that the wife would support her husband through three years of law school, after which he would support her while she sought a master's degree. At his instigation, they divorced a year after his graduation and before she had begun to pursue her degree. The court rejected the wife's contract claim as too indefinite even though her husband conceded the contract's existence. It was indefinite, the court felt, because it left the timing of the wife's studies entirely open, put no limit on the length or cost of her master's degree program, and did not address the question of the location of her studies or whether he was obliged to relocate with her if she chose an out-of-town university. Because the contract did not fix the husband's liability with certainty it could not be enforced. Nonetheless, the court found a basis for giving the wife an award under restitution principles.

There are three elements to a restitution claim in modern law: First, the defendant must have received a cognizable benefit; second, the benefit must have been conferred at the plaintiff's expense; and third, the defendant's retention of the benefit must be unjust. There is ordinarily no difficulty in cases like _Pyeatte_ in establishing the first two elements of restitution, that the defendant benefited at the plaintiff's expense. The only real question becomes whether the defendant's gratuitous retention of the benefit is "unjust." The general rule is that there is no unjustness where the benefit was originally conferred with "donative intent." Conversely, retention of a benefit is unjust where there was "an expectation of payment or compensation for services at the time they were rendered." The existence of a contract, even one that fails for indefiniteness, suggests that both parties understood that some compensation would be due—that the benefit was not conferred as a gift. Precisely this reasoning led the court in _Pyeatte_ to conclude that the

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64. Id. at 351, 661 P.2d at 201.
65. Id. at 350-51, 661 P.2d at 200-01.
66. Id. at 352-57, 661 P.2d at 202-07.
68. Casad, supra note 67, at 53.
69. Pyeatte, 135 Ariz. at 353, 661 P.2d at 203.
requirement of unjustness was met. Thus Pyeatte's precedential force is limited: Even though it provides a remedy without requiring a breach of contract, it necessarily relies heavily on the incomplete agreement whose existence was conceded by both parties.

Because other claimants are unlikely to have an agreement to rely upon, they will have considerably more difficulty showing that the other spouse's retention of the benefit is unjust. In Pyeatte the agreement dealt with a specific and rather limited aspect of the marriage, the immediate educational plans of each party. While all of the terms were not spelled out in detail, there was no difficulty establishing what benefit had been conferred on the husband (support during school), and the nature of the compensation both parties agreed upon in return. We know both that the wife's intent was not donative and that she did not receive the expected compensation. We could therefore conclude that the husband's retention of his benefit without some payment to the wife was unjust.

It is harder to find nonpayment in the case of the long-term homemaker. The benefit she conferred is presumably her many years of companionship and homemaking service. Perhaps the parties expected the wife to receive lifetime support in return, even if the marriage dissolved. In that case, the wife remains without full compensation, so that the husband has been unjustly enriched. Yet just as plausibly, the quid pro quo might have been the companionship and financial support that she has already received over the years in which they lived together. Or perhaps the parties had no defined expectations, but simply gave to each other out of love—that is, with a donative intent rather than with an expectation of repayment. If a court can determine which set of motivations accurately describes the particular case before it, then it can determine whether one spouse "unjustly" retains a benefit conferred by the other. In many cases, however, the court will find no unjustness using traditional criteria, and in many others the facts simply will not be clear enough to allow any conclusion. In the end, as we saw in the discussion of contract, the court attempting a restitution analysis will inevitably be drawn to its own understanding of the marital relation to test whether there was "unjust" enrichment. The parties' own expectations or understandings, having been expressed unclearly (or else they would have a valid contract) will be less important.

70. Id.
71. "[T]he parties . . . probably contemplated that the benefits they would receive—material and nonmaterial—would offset the burdens they undertook. Neither party anticipated paying for the material benefits received from the other except by contributing to the relationship. Each understood that the material benefit received would depend upon what the other chose to contribute." Casad, supra note 67, at 55. Although the case involved an unmarried cohabiting couple, the same argument could often apply to the married couple as well.
This can be seen from the Pyatte case itself. The court took pains to distinguish the facts before it from the kind of homemaker case we have just been discussing: "Where both spouses perform the usual and incidental activities of the marital relationship, upon dissolution there can be no restitution for performance of these activities."\(^7\) Restitution, the court felt, is appropriate only where "the facts demonstrate an agreement between the spouses and an extraordinary or unilateral effort by one spouse which inures solely to the benefit of the other by the time of dissolution."\(^7\) Traditional marital roles cannot constitute such "extraordinary or unilateral effort":

In each marriage . . . the couple decides on a certain division of labor, and while there is a value to what each spouse is doing, whether it be labor for monetary compensation or homemaking, that value is consumed by the [marital] community in the on-going relationship and forms no basis for a claim of unjust enrichment upon dissolution.\(^7\)

Some will agree with the Pyatte court's description of the marital relation; others will undoubtedly find it too narrow or unrealistic. But it is precisely this debate that ultimately dooms restitution as a workable solution to the problem of alimony, for it demonstrates that a court can resolve a restitution claim only by referring to its own unguided conception of marriage. In the end, restitution principles do no more than direct the court to order repayment where it feels that to do otherwise would be "unjust." Since directives from the parties themselves are absent, the court can only employ its own sense of the marital obligations and claims necessarily flowing from marriage in deciding what justice requires.

The doctrine of restitution thus offers no conceptual framework that explains generally why postmarriage payments are appropriate in some cases but not in others.\(^7\) Before the doctrine can be applied coherently, one must first have an established understanding of the social and economic conventions that ordinarily govern the relationship between the parties, against which to test claims that there has been an "unjust" enrichment. In the business and employment relations in which the doctrine is ordinarily applied, such conventions exist. In marriage they once did, but do not any longer. The doctrine of unjust enrichment cannot

\(\text{72. Pyatte, 135 Ariz. at 353, 661 P.2d at 203.}\)
\(\text{73. Id.}\)
\(\text{74. Id. at 354, 661 P.2d at 204 (quoting Wisner v. Wisner, 129 Ariz. 333, 341, 631 P.2d 115, 123 (Ct. App. 1981)).}\)
\(\text{75. Furthermore, the remedy resulting from a successful unjust enrichment claim may be much less than many would feel is due. As illustrated by Pyatte, the ordinary unjust enrichment remedy is the return of the benefit: The lawyer-husband had to repay his wife the support she provided him during law school. See id. at 357, 661 P.2d at 207. The doctrine offers no basis for giving her a share in the earning capacity he acquired by his legal education, or compensating for her lost expectation that she would share in the financial success of a lawyer-husband.}\)
replace these conventions, because its application requires their prior existence.

4. The Failure of the Relational Contract Analogy

Everyone appreciates that all contracts are necessarily "incomplete" in that they cannot speak explicitly to every possible development that might affect the parties' ability or motivation to perform. The classic contract doctrine of excuse is intended to resolve some of the disputes that arise when an unforeseen development alters the performance environment in an arguably relevant way. But a literature has grown up around one particular kind of incompleteness problem that arises when, from the outset, the nature of the contracting parties' relationship precludes precision in specifying their obligations. Precise specification may be difficult because the parties intend a long-term relationship during which details of the required performance are likely to change, or because the task contracted for, although short term, is complex, or requires allowing the performing party flexibility in determining the details of the performance. The resulting contract must therefore define the required performance in general language. An agent is required to use his "best efforts" on the principal's behalf, but exactly what he is supposed to do is not spelled out. A contract for services between lawyer and client, doctor and patient, and even, as Goetz and Scott point out, homeowner and caretaker, necessarily involve similar duties that can only be described in general terms. The literature refers to these as "relational contracts". Perhaps one could think of marriage as a relational contract also. If the analogy is apt, then the insights offered by those writing about relational contracts in the commercial setting may have application to marriage as well.

Certainly, many of the difficulties we found in applying contract principles to marriage also arise in applying classic contract concepts to commercial "relational" arrangements. In commercial relational contracts, as in marriage, the parties' mutual commitments can be described only in very general terms. Classic contract doctrine is not hospitable to


78. Cf. Goetz & Scott, supra note 77, at 1092 (noting that the typical response of relational contracts is to define the parties' obligations in "unusually general terms").

79. The homeowner who hires a gardener to care for his garden during a summer absence cannot predict "in advance the climatic conditions, incursions of the gypsy moth, wind-borne powdery mildew, etc." Id. at 1092. Moreover, the possible responses are too complex for one to specify in advance: "How much to spend on sprays, whether to water, when a diseased plant should be cut down to prevent infection of adjacent ones." Id.
contracts providing for such generalized duties, and their enforcement often involves "costly litigation over the [contracts'] meaning and enforceability . . . ." 80

Businesses often develop special mechanisms for assuring proper performance in such relational agreements. One adaptation is reliance on standards of performance set by sources outside the contract. 81 When the law imposes fiduciary obligations on actors in certain kinds of contracts, it superimposes external performance standards on the contract. For example, a detailed set of ethical obligations govern the lawyer's relationship with his client. Whether or not these standards effectively protect the client, we develop and maintain them because we assume that the client will be unable to ensure satisfactory performance through contractual arrangements. 82 Similarly, although substandard performance by physicians is likely to cause physical injury, a patient is hardly capable of detailing her physician's required performance in a contract. Standards therefore are supplied by the tort system through malpractice suits—abandoning contract altogether as a source of the duty. 83

Adaptations involving reliance on noncontractual standards suggest an insight into the use of contract to govern the marital relation: If contract law alone will not work, perhaps statutory rules are required. Because the mutual obligations of the marital partners can be described only in very general terms, we may want to rely upon performance standards set outside the marital contract to test claims of breach. However, the only available "outside source" is state divorce law, which provides no performance standard. Statutory rules are no more capable of unambiguously filling every gap than are the parties in providing for every possibility in their initial agreement, and cannot offer other advantages that external rules may provide in business relations. 84

80. Id. at 1091.
81. Id. at 1092-94. Other adaptations include bonding requirements, provisions for close monitoring, or avoidance of contract altogether by vertical integration of the commercial enterprise so that the service in question can be performed in-house. Id. These adaptations have little application in the marriage context, however, and this branch of the relational contract literature thus offers us no assistance.
82. See id. at 1092-93. Consider as well that heightened fiduciary obligations for managers of charities have been defended as necessary to compensate for their contributors' inability to monitor the use of their funds through ordinary contractual arrangements. See Ellman, Another Theory of Nonprofit Corporations, 80 Mich. L. Rev. 999, 1008-12 (1982).
84. While reliance on external standards may be helpful in the ordinary commercial setting, these reasons will not apply in divorce. An important feature of many external standards is that they carry with them additional avenues of relief beyond the lawsuit for breach of contract. For instance, the client complaining about the defalcating lawyer may in theory obtain relief through complaints to the discipline committee of the state bar; or, a state agency may be available to enforce the charitable directors' fiduciary duties. When the external standard is supplied by a third party, that party may also have authority to determine whether the performance has complied with the
There is a more fundamental point. In a relational contract, as conceptualized by leading writers like Macneil, particular promises no longer define the kinds of expectation and reliance that are worthy of protection. Almost by definition, the relational contract does not contain precise statements of mutual obligation that fully define the parties' intended duties. Instead, in the absence of external performance standards, one asks what expectations and reliance reasonably arise from the relation itself. Macneil uses McGrath v. Hilding as an example of the application of relational contract concepts to a divorce proceeding.

In McGrath, the wife contributed half the funds needed to build an addition to the husband's home, in part so that she and her children by a former marriage would be more comfortable living there. In return, the husband promised "'to put her name' on the deed to his home." The marriage lasted only three months, during which he never conveyed any interest in the property to her. After the divorce she brought an equitable action to establish a constructive trust in her favor. She won in the trial court because the promise was uncontested, but the court had refused to hear the husband's proffered evidence that the wife had "grievously breached the marital relationship" and the husband appealed on this basis. The New York Court of Appeals found that the trial court "abrogated its responsibility to view the transaction realistically in its human setting" when it refused to hear the husband's evidence. Macneil suggests that this is a "relational" treatment of the parties' dispute, as contrasted with a classical contract treatment. The court, of course, did not describe itself as following relational contract principles. Rather, it characterized the case as one involving a claim of unjust enrichment, and concluded that it could not determine whether the husband had been unjustly enriched "from a limited inquiry confined to an isolated transaction."

This case illustrates both the advantages and dangers of treating marriage as a relational contract. In many marriage disputes it would surely distort the parties' real expectations, and upset their reasonable reliance based upon those expectations, to single out one discrete, specific agreement for enforcement without examining the larger relationship in...
which it arose. Avoiding such distortion is the advantage of the relational approach. It seems intuitively correct to think this way when deciding whether, in Pattern 3, the husband should reasonably expect the wife to move to Ithaca, or whether “Mrs. Kozlowski” had a responsibility to remain sober. On the other hand, as one moves from specific, discrete understandings to broader, less explicitly defined “relationships” to guide in resolution of these disputes, the parties’ perceptions necessarily yield to the decisionmaker’s in determining the outcome. When the lower court in New York revisits McGrath to determine whether the husband has been “unjustly” enriched, the court’s notions of justice and of marriage will shape the outcome much more than when it was limited to asking simply whether a specific promise has been made and broken.

Thus, the concept of “relational contract” fails to solve the basic problem that arises in the application of classical contract concepts and restitution principles to marital disputes. Because the parties’ intentions alone will be inadequate to guide the court’s decision, it will employ its own standards—standards that it need not articulate or clarify if it packages the decision in relational-contract terms.92 There is in the end a fundamental difference between marriage and commercial relations that renders relational-contract concepts inadequate to resolve marital disputes. In the commercial arrangements on which the relational-contract literature focuses, the parties’ relationship, no matter how long term or informal, is a means toward an understood end: making money. Conflicts can be evaluated in light of that external purpose. But in marriage it is the relationship itself that is the goal and purpose. When conflict arises, there is no common, external goal to guide its resolution, only subjective expectations of one another’s conduct and feelings.

Nonetheless, the relational-contract analogy may offer some insight into the function of the classic premarital agreement. Such an agreement may be seen as a rational solution to the relational contract problem—a solution in the marriage context that is similar to one sometimes adopted by commercial actors. A marriage contract could specify the consequences of termination rather than the standard of performance (which, by definition, cannot adequately be specified in the relational-contract situation). This same approach might be used, for example, by a corporate

92. Other problems of contract identified in the prior sections may also remain under a relational contract approach. If the divorce action is akin to a breach of contract claim, we still must find a breach to provide any alimony award, and thus we still operate in an “all or nothing environment” in which the claimant spouse will receive either her full expectation interest (often more than we would want to grant) or nothing at all. See supra notes 51-53 and accompanying text. Perhaps if “breach” means breach of the entire relationship rather than breach of a particular, discrete promise, we would find this less objectionable. Yet this kind of inquiry may exacerbate another problem mentioned earlier, that the search for breach uncomfortably resembles the search for fault. See supra notes 46, 56-60 and accompanying text.
board hiring a company president. The board may find it impossible to specify precisely what it expects her to do, yet it may also want to monitor her performance closely and retain an option to terminate the relationship at will. In effect, like most employers, the board prefers to maintain flexibility in the demands it places upon its employee, and to be the sole judge of whether the employee meets these changing demands. A prospective employee with bargaining power, such as a well-qualified candidate for company president, may have the leverage to resist or restrict employer discretion. One contractual solution is to impose a price upon the employer's exercise of the termination right by providing for generous severance pay or continued employment in another lucrative position. In speaking to the consequences of divorce rather than the conduct of the marriage, the classic premarital agreement, adopted today in a legal environment, that allows either party unilaterally to end the marriage, follows precisely the same strategy. But of course only very few couples make such an agreement, and the fact that some do gives us little assistance in thinking about the default alimony rules that should apply to the rest.

5. Conclusion

We began by searching for a rationale to explain why one spouse should meet the financial needs of the other after their marriage has ended. We have seen that contract concepts offer no help, except perhaps for the small minority of couples who enter into explicit premarital agreements. Without such an agreement, any effort to fashion the outcome according to the parties' intentions by employing contractual prin-

93. The analogy is not perfect, however, for the typical premarital agreement limits rather than creates financial claims for the divorcing spouses. It is the divorce law itself that creates claims, such as the right upon divorce to postmarital support or the right to a share in property accumulated through the spouse's business.

Because the point of most premarital contracts is to limit otherwise valid legal claims, for many years courts refused to enforce them. Even today, courts sometimes say an agreement is unenforceable because it "encourages divorce," presumably by reducing the cost of divorce to the husband. See I. Ellman, P. Kurtz & A. Stanton, supra note 2, at 657. One recent case turned these traditional facts around, however. In re Marriage of Noghrey, 169 Cal. App. 3d 326, 215 Cal. Rptr. 153 (1985). The agreement in question obliged the husband to pay the wife $500,000 in the event of divorce. The court apparently concluded that the amount in question was greater than the amount to which the wife would ordinarily be entitled. Therefore, since the agreement was not a reasonable compromise of the property claims the wife would have had under law, the court found the agreement unenforceable because it created an incentive for her to seek a divorce. At other times, courts have found that the agreement, by effectively relieving a husband of his duty to support his wife, was invalid because it altered the essential incidents of marriage. E.g., In re Marriage of Higgason, 10 Cal. 3d 476, 487, 516 P.2d 289, 110 Cal. Rptr. 897 (1973) disapproved on other grounds in In re Marriage of Dawley, 17 Cal.3d 342, 551 P.2d 323, 131 Cal.Rptr. 3 (1976). Such decisions are inconsistent with a policy of encouraging contractual ordering of marital relations.

94. There is good reason to believe that even couples desiring to make such an agreement will rarely be able to establish satisfactory terms. See supra notes 32-34 and accompanying text.
The principles is doomed, and is no more than a concealed way of vindicating the court’s own preferences regarding the nature of marriage. If the resolution of marital disputes requires the decisionmaker to employ a particular view of marriage, then the law should adopt those views openly, rather than sub silentio in judicial opinions purporting to follow the parties’ intentions. Commercial actors already use a system of default rules which sometimes has been offered as a model for the law of divorce: the law of partnership. That analogy is addressed in the next section.

B. The Failure of the Partnership Analogy

Marriage is often colloquially referred to as a partnership, and courts and commentators sometimes allude to the partnership analogy in justifying a particular result. Nonetheless, it is of course clear that marriage is not treated as a partnership in any formal sense, nor could it be under the conventional partnership law. A partnership must be established for the carrying on of a “business,” and the mere co-ownership of property is not sufficient to create a partnership. Furthermore, under the traditional definition used in the partnership law, a “business,” though broadly defined, must be “profit-seeking.” While many marriages are “profit-sharing” in the sense that the parties intend to share their economic success, they are not “profit-seeking” in the sense that financial gain is the primary purpose of their joint endeavor. It is “profit-seeking” in this more narrow sense that is the definitional requirement of the partnership law. If profit-sharing in the broader sense were sufficient, then one might conclude that an unincorporated association of individuals, joining together in a social club, constituted a partnership under the law, since they intend to share club assets equally among them. Such a result is clearly not contemplated by the Uniform Partnership Act.

Of course, to concede that the formal partnership law does not cur-

95. “[E]ven in dealing with standard commercial transactions the law will use, and has probably always used, collective ideas of justice and fairness to fill in many of the gaps in the relationship of the parties, to interpret the express contractual terms they have used, and to fashion the appropriate remedies when there is a breach.” P. Atiyah, Essays on Contract 9 (1986). However it should be clear by now that there is a difference between the use of contract in ordinary commercial arrangements, and in marriage, as to the extent to which such gap filling is or would be necessary.

97. Id. at 63.
98. Some might argue that marriage is a profit seeking venture, but this argument must rely on a broader meaning of the term “profit” than is employed by partnership law, where profit means exclusively financial gain.
99. J. Crane & A. Bromberg, supra note 96, at 63-64; Unif. Partnership Act § 13 (1969). Professional associations are also excluded on the grounds that although they seek profits for their individual members, they do not seek profits for the entity itself. J. Crane & A. Bromberg, supra note 96, at 64.
rently extend to marriages or social clubs is not necessarily to conclude that it should not. We might well question whether “profit” motivation should be essential to the definition of partnership. The explanation for this requirement probably lies not so much in any profound theoretical point but rather in the nature of the task facing the draftsman of a partnership act. The purpose of such an act is in large part to provide a set of “default rules”—rules that will govern the rights and obligations of the parties in the absence of an explicit agreement among them.\textsuperscript{100} In writing these rules, the drafter must first make some assumptions about the nature of the parties’ relationship from which to determine what rules are reasonable. These assumptions are then expressed in the provisions defining the kind of organization or entity to which the code will apply.\textsuperscript{101} For someone drafting a partnership act, the critical “defining provision” traditionally has been the parties’ profit-seeking motivation for entering and conducting the relationship. By assuming such a motivation—as opposed, for example, to a charitable motivation, or a motivation to increase the welfare of one’s partners—legislators and courts have been able to draw appropriate conclusions about what the parties probably would have intended regarding the governance or dissolution of their relationship. Because partnership law rests on this foundation, it may be ill-suited to relationships that stem from entirely different motivations; at the very least, its extension merits careful consideration.

Thus understood, it must certainly be conceded that the motivation with which people enter marriage is usually quite different than the motivation with which they enter business relationships, and the notion of “profit-seeking” described above therefore properly excludes marriage from the partnership law as it was originally conceived. There is no reason to think that rules designed for a true profit-seeking venture would also apply sensibly to marriage.

Nonetheless they might. It could happen either fortuitously, or because actually the motivations with which people enter marriage are not really all that different from business motivations after all. Earlier we concluded that contract was not the appropriate model for dissolution law because its application would produce unacceptable results. They were unacceptable in part because the divorcing spouse often would be

\textsuperscript{100} While partnership law sets out default rules regarding the relationships of the partners \textit{inter se}, it also establishes prescriptive rules regarding some aspects of the partnership’s relations with third parties. That aspect of partnership law is of course not relevant to our discussion. The general references to the default nature of partnership law should be understood to refer exclusively to the rules that govern the relations between partners.

\textsuperscript{101} In another article, I have developed this point more fully in the context of nonprofit corporation laws. In that piece I distinguish between “gap-filling” rules, a major purpose of the nonprofit code, and “defining rules”, rules describing the kind of organizations to which the code should apply. Ellman, \textit{supra} note 82, at 1001-04.
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unable to show a contract with sufficient specificity, and would therefore receive nothing in situations in which we would not find that acceptable. That problem, at least, might be solved by partnership law, since its very purpose is to provide the terms that govern a partnership where the partners themselves have not. Partnership law supplements contract law; it is an elaborate system for filling gaps, providing fixed default rules where the parties have not provided for their own rules by agreement. Using partnership would allow us to rely on contract in the small number of cases in which contracts in fact existed, while replacing the traditional marriage and divorce rules with partnership law in the remaining cases.

Let us examine the results when partnership law is applied to marriage. For our purposes, the most important provisions are those governing dissolution. In the absence of an agreement to the contrary, partnerships are terminable at the will of any partner, and partners divide the net partnership assets equally upon dissolution, after first returning to each partner his capital contribution. Once the partnership liquidation is completed, the partners have no further continuing obligations to one another. If these principles were applied to marriage, the result would be a system of unilateral divorce—much as we now have in most no-fault states—coupled with a general rule disallowing alimony claims. Although property would be divided equally, this division would apply only to that property available for distribution after doing something equivalent to returning to each partner his "capital" contribution.

Probably the most ready equivalent is the rule traditionally applied in some community property states, under which each spouse receives his "separate" property, and the community property is divided equally. Separate property is essentially that property which the spouse brought into the marriage with him, as well as any property he received by devise or bequest. One could analogize the property "brought into the marriage" to the business partner's capital contribution. For example, the partnership dissolution provisions described here are quite similar to the marital property laws in California, a community property state in which the statute divides community property "equally." There is, however, one significant difference: Partnership makes no provision for alimony.

The complete elimination of alimony probably alone renders the partnership model unacceptable. In any event, partnership concepts certainly offer no assistance in puzzling out a theoretical explanation for

102. We also concluded that where a contract was shown, it might require a much more generous award than we ordinarily are willing to approve. See supra note 51. Partnership law would not affect that result in cases in which a contract is shown, and thus that problem would remain.

103. J. CRANE & A. BROMBERG, supra note 96, at 489, 506.
alimony payments. Yet, although nothing in the law of partnership provides for periodic payments following dissolution, the partnership law does, in some circumstances, require lump-sum payments from one partner to the other, in addition to the equal distribution of property. There are three circumstances that have potential application to the marriage situation. These are worth examining, with the thought that we might well want to consider moving to a model in which additional lump sum payments substituted for alimony.\textsuperscript{104}

First, one partner can receive compensation from the other for "wrongful dissolution." A partner always has the \textit{power} to dissolve his partnership with others, but he may not always have the \textit{right}, and when he exercises that power without the right he becomes liable to pay damages for "wrongful dissolution."\textsuperscript{105} However, if the partnership was "at will," then there can be little basis for a finding of wrongful dissolution since such a partnership can by definition be terminated unilaterally "whatever the motive and whatever the injurious consequences to copartners who have neglected to protect themselves by an agreement to continue for a definite term."\textsuperscript{106} A partnership is "at will" unless the parties have agreed otherwise. Thus the question in a claim for wrongful dissolution is whether the parties had some agreement circumscribing the right of the partners to terminate the partnership at will.

The application of wrongful dissolution principles to marriage highlights an important societal ambivalence. On the one hand, modern divorce laws effectively permit either spouse to terminate the relationship at will; on the other hand, the law rarely recognizes this fact explicitly.\textsuperscript{107} We hope that marriages will last until dissolved by the death of one of the spouses. But at the same time, we are reluctant to impose rules that bind parties to remain with each other if one wants a divorce. We resolve our ambivalence with a law that in form expresses our hopes, but in practice recognizes our reluctance. Thus, although under existing divorce law parties can always terminate the marriage—they have the "power" to dissolve, as in partnership—they are not thereby relieved of all responsibilities to their former spouse. In effect, then, existing divorce law operates with a "default rule" that is the opposite of partnership law: The parties are presumed to have entered a relationship that is not "at will," so that when one spouse terminates the relationship, financial liabilities do result.\textsuperscript{108} Existing law may allow premarital agreements that exclude

\textsuperscript{104} As a practical matter, the parties may wish to substitute smaller periodic payments for a lump sum payment.

\textsuperscript{105} J. CRANE & A. BROMBERG, supra note 96, at 422.

\textsuperscript{106} Id.

\textsuperscript{107} I. ELLMAN, P. KURTZ & A. STANTON, supra note 2, at 201-15.

\textsuperscript{108} Liabilities may still not result, depending upon whether the rules governing alimony and child support call for an award. By the same token, a partner who dissolves a partnership
alimony, but even jurisdictions that permit such contracts sometimes refuse to enforce them. In partnership law, on the other hand, it is the party seeking damages who must show an agreement since without breach of such agreement by the terminating partner, he is not liable for damages.

The principle of “wrongful dissolution” therefore offers us little assistance. To the extent that it provides a basis under which alimony-equivalent awards might be justified, the claim would have to be based upon contract, and we would then return to the difficulties of contract reviewed in the preceding section.

The remaining two partnership doctrines of potential relevance are related to each other. First, partnership law assumes the partners have a duty to serve the firm, and on dissolution a partner who failed to serve the firm can be required to pay compensation to the others. In fact, failure to perform may be a ground for dissolving a partnership that is not “at will.” Because of this presumed duty to serve, in the absence of an agreement to the contrary, a partner is not ordinarily entitled to compensation from other partners for the services she performed on the firm’s behalf but remains entitled only to her pro rata share of the partnership assets. This leads to the second doctrine we need to examine, that courts may imply an agreement from the partners’ conduct that one partner is to be compensated for his services where those services went beyond those normally performed by a partner. In short, the two remaining doctrines are really different sides of the same basic concept, that on dissolution those who did much more or much less than the ordinary partner may be compensated or charged for their disproportionately great or meager efforts.

Let us first examine claims based on compensation for extraordinary services. In partnership law such claims are not lightly honored, although they apparently are common in disputed dissolutions. Courts usually require convincing evidence to overcome the noncompensation
rule in order to avoid double recovery. An agreement to pay compensation might be implied, or compensation allowed on an unjust enrichment basis, where the services were of a kind not normally performed by a partner, or where some partners devoted full time to the business while others were entirely inactive, and there was no agreement to share profits in a manner that reflected this disproportionate effort. Furthermore, in deciding whether an agreement can be implied or unjust enrichment found, the court will judge the parties' expectations in light of the accepted customs in the partners' line of business.

Principles governing compensation for extraordinary services fail to explain alimony for many of the same reasons that implied contract and unjust enrichment principles fail. A court's determination of whether extraordinary services have been rendered depends entirely upon its view of the ordinary duties of marriage, and nothing in partnership law will assist the court in working that out. Has the wife who has sacrificed for her husband's career provided an extraordinary service beyond the ordinary requirements of marriage? As with restitution, this doctrine's application to marriage would require prior consensus on the social conventions governing the marital relationship—conventions which vary from couple to couple and year to year. Moreover, the doctrine requires as a core principle that no alimony be granted unless the recipient had performed some unusual service analogizing to this aspect of partnership law. The partnership analogy thus implies a principle that alimony entitlement comes not from marriage itself, but from efforts and sacrifices going beyond marriage. Such a doctrine would not appeal to most who favor alimony. Finally, the principle would surely work to disallow many awards which would be granted under current law, and which we would want to allow.

The companion partnership principle, that the partner who has failed to perform may be required to pay damages to those who have fulfilled their obligations, yields even more troublesome results. Under this principle, alimony would turn on the court's evaluation of the claimant's performance of his or her role in the marriage "partnership," (that is, wage-earner, homemaker, or a combination of the two). Presumably, the court would look to principles of implied contract to establish the parties' understandings of their intended roles, against which we would measure performance. Even assuming we could do this without difficulty, the results might be rather startling. This doctrine would return us to the old cases that hold that the wife who was at fault for the divorce

116. Id.
117. Id. at 376-77.
118. Id. at 377 n.67.
can have her alimony claim reduced or eliminated.\textsuperscript{119} Indeed, this partnership principle would go even further, since under it the husband who hired domestic help because the homemaker wife maintained the house poorly could on divorce seek reimbursement from his wife for these costs.\textsuperscript{120}

The principle of compensation for the other partner's failure to perform also share with its companion principle, and with restitution, the more fundamental flaw that it assumes the existence of accepted conventions regarding marital duties against which to test a spouse's performance. Since such conventions in fact do not exist, the court would be free to reward and penalize spouses according to its own standards, except in cases in which the spouses have established their expectations by explicit agreement. To accept this partnership principle would be, in most cases, to accept limitless judicial discretion to determine postmarital payments. This problem can be illustrated by examining cases that refer loosely to partnership concepts in reaching inconsistent results.

Two examples will suffice. In \textit{D.L.L. v. M.O.L.},\textsuperscript{121} the court gave the husband only one-third of the marital property, effectively awarding the wife a bonus payment. It had the authority to make such an adjustment under state law, which authorized the court, in dividing the property, to consider the "'conduct of the parties during the marriage.'"\textsuperscript{122} Nonetheless, the court also justified the result with casual reference to partnership concepts: "[T]he husband's longstanding penchant for hard liquor and infidelity had placed an unfair share of the marital load on the wife and, when equated with the prevailing concept of marriage as a partnership, entitled the wife to a greater share of the partnership assets, i.e., the marital property."\textsuperscript{123}

On the other hand, in \textit{Blickstein v. Blickstein},\textsuperscript{124} where the trial court awarded all of the marital property to the wife because of the husband's abandonment—a total "failure to perform"—the appellate court reversed, finding that the concept of marriage as partnership required it to ignore such behavior. The court found fault "irrelevant to the basic assumptions underlying the equitable distribution law, i.e., that each party has made a contribution to the marital partnership and that upon

\textsuperscript{119} Many of these old cases are collected in Annotation, Misconduct of Wife to Whom Divorce is Decreed as Affecting Allowance of Alimony, or Amount Allowed, 9 A.L.R. 2d 1026 (1950).
\textsuperscript{120} J. CRANE & A. BROMBERG, supra note 96, at 380. For the analogous result in a true partnership, see the cases collected in Annotation, Liability of Partner for Failure to Perform Personal Services, 165 A.L.R. 981 (1946).
\textsuperscript{121} 574 S.W.2d 481 (Mo. Ct. App. 1978).
\textsuperscript{122} Id. at 485 (quoting Mo. REV. STAT. § 452.330.1 (1986)).
\textsuperscript{123} Id. at 486 (emphasis added).
its dissolution each is entitled to his or her fair share of the marital estate.\textsuperscript{125} The court agreed, however, that fault should count where it would "involve situations in which the marital misconduct is so egregious or uncivilized as to bespeak of a blatant disregard of the marital relationship."\textsuperscript{126}

In short, partnership principles have no content that actually directs a court to emphasize or ignore marital misconduct, although some courts dress up their preferences in partnership language. Partnership law works in business relationships because courts can safely assume that the partners' primary purpose is to maximize profits, that their expectations of one another can be evaluated in light of this common motivation, and that established business customs and conventions apply when questions arise about the parties' obligations to one another. These assumptions not only result in sensible "default rules," but also guide judgments about whether particular business partners fulfilled their duties or were within their rights. When applied to marital "partnerships," the default rules of business partnership law often make no sense. In rendering judgments about the duties and rights of spousal "partners," the courts would have no compass of customs and conventions beyond their own preferences. Partnership is thus no more helpful than contract in providing principles to guide or explain alimony.

II

TOWARD A NONCONTRACTUAL THEORY OF ALIMONY

A. The Function of Alimony in Encouraging Marital Investment

1. Identifying the Problem that Contract Can't Solve: What Is the Wife's Loss?

If contract does not work, then what principles can we look to in fashioning alimony rules? The question is fundamental, for by shifting away from contract we necessarily shift away from a conception of alimony as a claim based on promise or commitment, to one grounded in some other policy. What should that policy be? Examination of analogous commercial arrangements may be instructive. Of course, the parties to a commercial agreement can employ contract to define their relationship; as we have seen, the parties to a marriage usually cannot. By looking at the commercial use of contract, however, we can identify the issues that commercial actors use contract to resolve—issues that in marriage are left to alimony. In making these commercial analogies, the following discussion focuses on the traditional marriage as a pure exam-

\textsuperscript{125} Id. at 292, 472 N.Y.S.2d at 113.
\textsuperscript{126} Id.
ple of the problem, but we will see that the analysis eventually developed below also applies to marriages in which both spouses are breadwinners.

The first goal is to encourage the durability of the relationship. Marriage is usually intended to be a long-term arrangement. The typical commercial arrangement is not; although it may in fact continue over many years, in most cases there is no agreement legally binding the parties over a long term. In some cases, however, parties make a long-term commitment. One reason they do is relevant here: A contracting party might seek a long-term commitment because the relationship requires that party to make an investment that he cannot otherwise justify.

For example, the owner of a building might be willing to modify it for a prospective tenant only if that tenant signs a long-term lease; a supplier to IBM might be willing to invest the capital necessary to produce a part only if it is assured that IBM will not change suppliers the next year. A demand for a long-term commitment is especially likely if the modifications do not increase the rental value of the building to anyone but this particular tenant, or if the part has no potential buyer other than IBM. In negotiating such a long-term agreement, the landlord or supplier must insist upon a price or rental payment sufficient to compensate her for this capital investment. This price will be higher than what the landlord or supplier could obtain in the market for the same building or part, if the tenant or IBM were to renege. That is because the market price will be determined by buyers who, by hypothesis, have no need for the building's customized features or the part's particular specifications.

127. As the preceding discussion of relational contracts demonstrates, see supra text accompanying notes 76-94, this analysis may be simplistic. Certainly businessmen will engage in long-term strategic behavior in the course of negotiating and completing a series of short-term agreements. But that does not disturb the observation that no legally imposed contractual obligation ordinarily arises to constrain or penalize the party who chooses, upon completion of a discrete transaction, to take his business elsewhere.

128. This portion of my discussion borrows heavily from the excellent article by Lloyd Cohen, Marriage, Divorce, and Quasi Rents; or, "I Gave Him the Best Years of My Life," supra note 32.

129. This price increment over the general market value of the building or part would be called "rent" in an economist's terms. See E. Mansfield, Microeconomics 370-73 (2d ed. 1975). That is, economists do not use the term "rent" in its ordinary colloquial sense, but rather as a special term referring to those payments for inputs that are above the minimum required to make those inputs available to the general economy. Where an input is in temporarily fixed supply—where an increase or decrease in its price will not affect the short-run supply of it—then payments for that input are called "quasi-rent". Because our customized building or part has a short-run fixed supply—there is only one supplier or one such building in the short run—any payment is rent to the extent it reflects the unique nature of the building or part. The function of the long-term contract is to ensure that the owner will be able to capture such rents. If only a one-year contract were signed, the tenant might refuse to renew his lease after that year was up, unless the owner lowered the price to general market value, or IBM might drop the supplier unless it lowered its price. Because the building modifications are of value only to that tenant, and the part's particular specification suit only IBM,
The traditional marriage bears many similarities to this arrangement. It is a relationship in which the wife makes many initial investments of value only to her husband, investments a self-interested bargainer would make only in return for a long-term commitment. Her investments may be obvious, such as supporting him through a degree or training program, or they may be more subtle, such as providing him with the emotional support or domestic services that allow him to enhance his earning capacity. Her bearing and raising of children, while of value to him, also provides value to her, but—as with the commercial investors—give her no prospects for a return in the open market commensurate with her investment. The traditional marriage thus involves considerable up-front investment by the wife which, like the idiosyncratic improvements in the building or the purchase of equipment needed for the production of a unique part, has little general market value even though it has value to the one person for whom it was made. Like the owner or part supplier, she risks great loss if her husband stops buying.\(^\text{130}\)

In contrast, the husband's investment in the traditional marriage is not idiosyncratic. His tangible contribution, financial support, is achieved through investment in his own earning capacity. The market value of that earning capacity is unaffected by the wife's preferences and ordinarily would survive a divorce unimpaired. Moreover, the husband's financial contribution is generally modest at the outset, but increases during the course of the marriage as his earning capacity increases. When that earning capacity is at its greatest, in the husband's peak earning years, much of the traditional wife's contribution to the marriage has been completed. She has already borne and raised children, and provided her husband with the supportive domestic environment that furthered his market success.

In sum, the traditional wife makes her marital investment early in the expectation of a deferred return: sharing in the fruits of her husband's eventual market success. The traditional husband realizes his gains from the marriage in its early years, in the form of increased earning capacity and the production of children; his contribution is deferred until the marriage's later years when he shares the fruits of his enhanced

\(^{130}\) In an analysis consistent with this point, Elisabeth Landes has suggested that the function of alimony is to provide the traditional wife with a contingency claim made necessary by the delay in the realization of the husband's enhanced earning capacity: At the outset of the marriage he does not earn enough to pay her all she is entitled to for her domestic efforts, and so she must rely on his promise to pay in the future. If he cannot make such a promise credible, she will "underspecialize"; that is, put insufficient effort into her domestic duties. The existence of an alimony claim helps make the commitment credible. Landes, Economics of Alimony, 7 J.L. STUD. 35, 46 (1978).
earning capacity with his wife. In any relationship in which the flow of payments and benefits to the parties is not symmetrical over time, there is a great temptation to cheat. The party who has already received a benefit has an incentive to terminate the relationship before the balance of payments shifts. The traditional marriage, like the machinery necessary for production of a customized part, is a risky investment in the absence of an enforceable long-term contract.\textsuperscript{131}

Noneconomic factors exacerbate the wife's difficulty. The spouses' respective marriageability, if they divorce and seek new partners, follows a different pattern as they age. Prevailing social mores, relatively universal and apparently intractable, cause the woman's appeal as a sexual partner to decline more rapidly with age than does the man's. Moreover, even though the man's appeal as a sexual partner also declines with age, the financial assets he brings to a marriage typically increase, somewhat softening the decline in his marriageability. The more precipitous decline in the woman's sexual appeal, on the other hand, is worsened by another social convention: In general women marry men who are of the same age or older, but do not marry men significantly younger than themselves.\textsuperscript{132}

The woman seeking a second husband thus operates in a constricted marriage market that largely excludes younger men. Accordingly, the tradi-

\textsuperscript{131} Of course, if the loss is a failed marriage, then the risk of this loss is always equal for husband and wife, since by "risk" we usually mean the likelihood that a loss will occur. The real difference between husband and wife in our analysis lies in the probable magnitude of their loss, not in the likelihood they will suffer one. This Article's discussion of the wife's heightened risk refers to this difference in magnitude rather than to the likelihood of loss.

\textsuperscript{132} While the median age at first marriage fluctuated in the United States between 1890 and 1986, the median age at first marriage for women remained consistently between two and three years less than for men. \textit{Bureau of the Census, U.S. Dept of Commerce, Current Population Reports, Series P-20, No. 418, Marital Status and Living Arrangements: March, 1986}, at 6 (1986). This Pattern is consistent with the common perception that wives are generally younger than their husbands. In March 1986, there were approximately 11.9 million American husbands between 25 and 34 years of age, but only 700,000 of them were married to women older than 34 years. On the other hand, there were approximately 13.4 million American wives between 25 and 34 years old, and 3.9 million of them were married to men older than 34. While more than half the wives under 25 were married to men older than 25, only 15\% of the husbands under 25 were married to women over 25. \textit{Bureau of the Census, U.S. Dept of Commerce, Current Population Reports, Series P-20, No. 419, Household and Family Characteristics: March, 1986} 105 (1987) (hereinafter \textit{Family Characteristics}).

Economists have pointed out that "marriage squeezes"—difficulties in finding a mate—result from the interaction between changing demographic patterns and the custom that men marry younger women. When birth rates rise, women face marriage squeezes. For example, women who are members of the early baby boom faced a marriage squeeze, because there were more of them than were eligible men born before them. In the 1930s, when birth rates were falling, men faced a marriage squeeze. Grossbard-Schectman, \textit{Marriage Squeezes and the Marriage Market}, in \textit{Contemporary Marriage} 375, 382-84 (K. Davis ed. 1985). Grossbard-Schectman offers an economic model that predicts that women facing a marriage squeeze will cohabit more often and will enter the labor market in greater proportions. She also suggests that such women will need to rely on statutory rights in marriage, because their bargaining position will be too weak to negotiate acceptable contract terms. \textit{Id.} at 380-82, 384-90.
tional woman's contribution—the supportive domestic environment she provides—may have less value to the older man who has already built his career and does not seek new children. The older woman may also be unable to offer child-bearing services. If she has children already by a previous marriage, they may well have a negative value for prospective mates. In other words, the divorced older woman finds the "price" she can get for her domestic services relatively depressed in the marriage market segment in which she operates.

These gender differences in the impact of age on marriageability further increase the risk of traditional marriage for women. Ending the marriage becomes even less expensive for men, while a wife's probable loss increases as the parties age. Thus, the traditional wife not only makes substantial investments early in expectation of a deferred return, but she depletes her capital assets while making those investments. She gives him "the best years of her life"—the years in which her sexual appeal is highest, her fertility greatest, and her domestic services are most in demand—and she can never get those years back. At the same time, the man realizes gains from the marriage during its early years, in the form of increased earning capacity as well as the production of children, and his earning capacity has general value both in the marriage market and the commercial world. He can take much of the gain realized from his first marriage into a second, and he can more easily find a replacement mate.

The part supplier or building owner can refuse to go forward with the deal without a long-term agreement, and each can look to contract law to enforce the agreement. The prospective bride cannot because of the indefinite nature of the parties' marital obligations. This indefiniteness defeats ex post judicial efforts to reconstruct implied contracts, as we have already seen. It also prevents most spouses from working out express agreements ex ante. The long-term commercial relation has an external purpose—profit. In a marriage, on the other hand, a central purpose is the maintenance of the relationship itself, and the parties begin that relationship with only general notions of how it should be conducted. Prospective spouses will usually be unable to specify the

133. Of all women who divorce, approximately three-fourths eventually remarry, compared to about five of six men. A. Cherlin, Marriage, Divorce, Remarriage 29 (1981). These overall data almost surely understate the older woman's relative disadvantage, however, since many divorces occur when the parties are still relatively young and have no children. The average age at divorce is about 30. Id. at 123. Of divorced or widowed women who were less than twenty when first married, 57 percent remarry within 5 years; of those who were more than twenty when first married, only 36 percent remarry within 5 years. Bureau of the Census, U.S. Dep't of Commerce, Statistical Abstract of the United States: 1987 41 (1986). The National Center for Health Statistics recently reported that in 1983 14% of divorced men remarried, while only 9% of divorced women did so. Both these rates had declined since 1970. Decline Discerned in Remarriage for the Divorced, N.Y. Times, Jan. 10, 1989, at A7.
details of their marital obligations sufficiently to permit objective determinations of breach. The lesson of the relational contract literature is that parties contemplating this kind of long-term agreement, in which the parties rely upon one another’s personal qualities and judgment, generally cannot fix their obligations by contract. Similar difficulties explain why the law abandoned rather than refined fault-based adjudications.

We have identified the wife’s problem and have discovered that it is not amenable to a contractual solution. Are there other solutions she might try? The businessman who cannot reach an agreement that reduces risk to a satisfactory level will not go forward with the deal. The woman who perceives the risk of traditional marriage might attempt the same approach. Rather than seek some means to ensure receipt of the deferred return on her marital investment, she can reduce or eliminate investment in assets specific to that marriage that are without general market value. She can spend less time on her husband and her children and more time on her job. If she has an entirely egalitarian marriage, in which she and her husband are devoting equivalent efforts to their domestic needs and their children, any sacrifices made for the benefit of the other’s career eventually cancel out. If this egalitarian marriage dissolves, there may still be a net loss in the parties’ total utility, but that loss would fall equally upon each of them, and each spouse could leave the marriage with his or her earning capacity intact, making no payment to the other.

Yet even this arrangement will not leave the divorcing spouses in equal situations if the marriage ends, for at least two reasons: the likelihood that the spouses will have different earning capacities, and the differential decline over time in their marriageability. We have already observed that upon divorce the woman will usually have more difficulty finding a satisfactory substitute spouse. This gender-based difference in the price of divorce cannot be altered by a reallocation of domestic

134. This is discussed supra, in Part I, Section A(4).

135. To the economist, this is an example of a “moral hazard” problem. By failing to perform her traditional role, the wife in effect “self-insures” against the possibility that the husband will never make the promised payoff. See Peters, supra note 16, at 443-44. In a more formal economic demonstration of essentially the same point made here, Peters argues that a system of unilateral divorce, coupled with uncertain compensation for the traditional wife if divorce occurs, leads either to reduced wifely efforts or to a reduced marriage rate (assuming this “moral hazard” problem is anticipated). Id.

136. A preliminary question that arises when a couple chooses to pursue this strategy is how to arrange such a marriage. The problem lies in defining more clearly what is meant by the parties’ making equal sacrifices in their careers. If their earnings are completely equal at the outset, then there is no problem. If their earnings are not equal, the principle of equality could arguably lead to at least two different results: time-equivalent or dollar-equivalent sacrifices. The difficulties created by this complication are discussed at length below.
duties. The second source of postmarriage inequality, the problem of

differences in the spouses’ respective earning capacity, requires fuller

explanation.

Although marital partners generally come from similar socioeco-
nomic groups, spousal earning capacities usually are not the same.

Today, husbands usually earn more than their wives. In an egalitarian society, in which men and women had congruent earnings and occupational distributions, one would expect to find as many higher earning wives as husbands, but it would still be unlikely that most people would be married to someone whose earnings were identical to their own. It turns out that a truly egalitarian marriage is difficult to maintain when the spouses have different earning capacities. Although this may now be viewed as largely a problem that affects women, since today it is wives who disproportionately earn less, the problem would in principle be no different even in a model society that was entirely gender-neutral. Let us see why.

Whenever spouses have different earning capacities and want to plan rationally as a single economic unit, they will conclude that, where possible, they should shift economic sacrifices from the higher earning spouse to the lower earning spouse, because that shift will increase the income of the marital unit as a whole. If they follow that plan, the lower earning spouse (today most likely the wife) will often be pushed toward the position of the wife in the traditional marriage, even if they had started out with a different intention. In fact, many if not most marriages in which the wife is employed are still traditional in orientation; she continues to carry a disproportionate share of the domestic responsibilities, burdening her career advancement, and it is her job which yields when there is a conflict between spousal jobs. Where the husband’s work is more

137. As of 1982, there were nearly 26 million married couples in the United States in which both husband and wife had earnings. In a bit more than 4 million of these couples (15.9% of the total), the wife earned more than the husband. In an additional 2.1 million (8.1%) the wife earned from 80 to 100% of what her husband earned. Thus, in more than three-fourths of all couples in which both spouses worked, the wife’s earnings were less than 80% of the husband’s. BUREAU OF THE CENSUS, U.S. DEP’T OF COMMERCE, CURRENT POPULATION REPORTS, SPECIAL STUDIES SERIES P-23, No. 133, EARNINGS IN 1981 OF MARRIED COUPLE FAMILIES, BY SELECTED CHARACTERISTICS OF HUSBANDS AND WIVES 29 (1984).

138. This problem is exacerbated by the fact that most wives often have less formal education than their husbands. Recent census data on relative educational attainment of husbands and wives suggest that their educational levels are similar. Among less well-educated spouses, the wife is often the better educated one. However, the balance changes if one looks at marriages in which at least one of the spouses has gone beyond high school. Among such marriages, the number in which the husband has more years of education exceeds those in which the wife has more. The number of marriages in which the husband has more years of education also exceeds those in which the spouses have the same education. FAMILY CHARACTERISTICS, supra note 132, at 106.

139. Even very recent studies suggest that less than 20% of women see their primary role in terms of their job, rather than as a wife and mother. See, e.g., Bryant, Women and the 59-Cent Dollar, AM. DEMOGRAPHICS, August 1983, at 28. Some have estimated that at least 70% of the
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lucrative than the wife's, this arrangement is economically rational. Nevertheless, the wife's position is then similar to that of the classic home-maker-wife. She has not abandoned a market career, but she has sacrificed some career prospects to invest instead in her marriage. If the marital unit dissolves, she no longer shares in her husband's enhanced income and, absent some contractual or statutory remedy, the husband leaves the marriage with the benefit of her investment in his earning capacity.

Suppose, however, a couple rejects this "rational" choice of maximizing the marital income, perhaps because the wife insists upon it in order to lower the potential loss she would incur if they ultimately divorce. The investment-banker husband and public interest lawyer wife each would spend the same amount of time on their domestic needs. Suppose, compared to an arrangement in which the wife took primary responsibility for their domestic life, this more egalitarian marriage results in an $X increase in the wife's income, but a $4X decline in the husband's. That is, the strategy the spouses have adopted to reduce the financial loss flowing from marital failure also reduces the financial benefits arising from the intact marriage. Part of the husband's higher earning potential goes unrealized, to both his detriment and his wife's.

Because this marriage is less profitable than a more traditional marriage, some parties might choose not to enter it in the first place, even though they would enter a traditional marriage. The restructuring not only reduces total marital income, a loss which the parties presumably share equally, but also reduces the income of the higher earning spouse. Today, men are especially likely to be deterred, given the earnings advantage they currently have over their wives. The man's personal loss is likely to leave residual effects on his earning capacity that will survive the marriage, if it fails. It also seems likely that more of these marriages will end in divorce since, other things being equal, the level of satisfaction in such marriages will be lower. So for both parties, but especially for

earnings gap between men and women arises from this difference in the relative importance they place on their respective domestic roles, as opposed to their job. See Richie, All About Working Women, AM. DEMOGRAPHICS, October 1981, at 6; see also Beninger & Smith, Career Opportunity Cost: A Factor in Spousal Support Determination, 16 FAM. L.Q. 201 (1982) (citing other studies demonstrating and discussing the continuation of traditional domestic patterns and arguing that this wifely career sacrifice must be taken into account in fixing spousal support). In an important new book, Victor Fuchs has shown that it is women's domestic role—especially that of the primary parent—that is the principle source of women's lower earnings, and that employer discrimination is, in comparison, a minor contributor to the earnings gap between genders. V. FUCHS, WOMEN'S QUEST FOR ECONOMIC EQUALITY 42-74 (1988).

140. This conclusion is subject to some quibble. While it is clear that the income of the marital unit is reduced by this strategy, it is arguable that its total utility is not. The claim would be that the reduction in marital income is offset by the increase in the wife's psychic satisfaction that arises from her reduced share of domestic duties. Of course, the reduction in the wife's domestic burden is matched precisely by an increase in that of the husband. If the disutility of such tasks is equal for
men, this restructured marriage offers a lower return and a higher risk.

We thus see that while a wife's strategy of reducing marriage-specific investment may protect her from some financial loss if divorce occurs, it also increases the chance that divorce will occur and reduces the chance of marriage in the first place. In the end, marital "specialization" makes sense for most couples, with one spouse concentrating more heavily on the market while the other focuses more heavily on domestic matters. If the spouses view their marriage as a sharing enterprise, they will usually conclude that they are both better off if the lower earning spouse spends more on their joint domestic needs, and allows the higher earning spouse to maximize his or her income.\footnote{141} A problem arises only if their mutual commitment to share breaks down, in which case the spouse who has specialized in domestic aspects of the marriage—who has invested in the marriage rather than the market—suffers a disproportionate loss.

each of them, then the shift of duties from wife to husband yields no net change in aggregate marital utility, leaving the reduced marital income as its only effect. It is true that the wife's total satisfaction may increase as a result, if for her the increased psychic satisfaction is more weighty than the reduction in income. Although this is undoubtedly the case sometimes, it does not alter the conclusion in the text. While the wife's total utility gains, the husband's utility surely declines by a greater amount, as he must perform the same domestic duties which burden the wife, as well as suffering the reduced income. As a result, one would expect fewer men to agree to such a marriage, and of those who find themselves in one, an increase in the number who seek divorce. Moreover, if the average decrease in the husband's utility is greater than the average increase in the wife's, then the increase in the number of men who avoid or exit such a marriage should be greater than the increase in the number of women who seek to enter and stay in one. Thus, as the text concludes, we would expect net marital stability to decline with this arrangement.

There are basically two reasons why the wife's psychic gain might offset her share of the marriage's income loss when domestic duties are shifted from her to her husband. One possible reason is that the net reduction in marital income is small. That will occur when the difference in earnings between wife and husband is small, in which case the husband's net loss in utility is also likely to be small. The conclusion is that as the earning capacity of husband and wife approaches equality, egalitarian rearrangements of their domestic duties will have a relatively smaller impact on their marital stability. Thus, the pessimistic analysis offered here will not apply in the relatively unusual marriage in which wife and husband have virtually equal earning capacity.

The second case in which the wife's increase in psychic satisfaction more than offsets reduced income arises when the domestic tasks in question have for her such a strong disutility that the shift produces a net gain for her even when the lost earnings are great. This has no effect on the analysis if we continue to assume that the psychic disutility of the domestic tasks in question is equal for each of them. Of course, interpersonal comparisons of utility are generally impossible, D. \textsc{Moffat}, \textsc{Economics Dictionary} 311-12 (2d ed. 1983), and this assumption may be false. If the husband enjoys doing the same domestic tasks that the wife will pay heavily to avoid, then the analysis shifts considerably. Indeed, the stability of the traditional marriage is based upon the converse assumption, that the wife in fact enjoys being a homemaker. Whatever the continuing validity of this assumption, contented househusbands are today still rare, leaving one with the suspicion that there are few marriages in which aggregate utility could be significantly increased by shifting domestic labors from wife to husband. Where they are able, spouses usually substitute hired help for the wife's domestic labor, rather than replace her efforts with her husband's.

\footnote{141} For a more formal economic demonstration of this point, see Landes, \textit{supra} note 130, at 40-41. This conclusion is consistent with the movement toward gender equality, as long as marital roles are not assigned on the basis of gender.
2. Reconceptualizing Alimony as the Solution to the Problem

We have now seen that divorce typically burdens the wife more than her husband for two reasons: She has more difficulty finding a new spouse, and she suffers disproportionate financial loss because of her domestic role. Not only is there no contractual solution to her problems, but it is unlikely she will be able to avoid them through a reallocation of marital roles. Marriage thus poses unavoidable risks for the wife, risks that are different and greater than those assumed by her husband. These unavoidable risks do not matter if the marriage endures, because they are then never realized. They are realized only on divorce, when the same accommodations to marital roles that were rational within the marriage now leave her disproportionately burdened.

This Article began by pointing out that alimony was a remedy to a problem that had not been clearly identified. We cannot explain how alimony claims should be measured or why former spouses should even be liable to pay them, until we specify why we allow them at all—until we identify the loss that alimony is intended to compensate for. We have now identified that loss: It is the "residual" loss in earning capacity that arises from the kind of economically rational marital sharing behavior we have just seen. This is a residual loss in the sense that it survives the marriage. The theory developed below requires one spouse to compensate the other for that loss. When one conceives of alimony as compensation for a particular kind of loss, rather than as a general claim to relieve need, it is much more possible to explain why liability should fall on the former spouse.

Nonetheless, spouses are not necessarily liable for every loss their former mate incurs, and the main burden of the rest of this Article lies in identifying the compensable losses more precisely. This Article leaves unresolved the question of whether the wife should also have a claim (against her husband or anyone else) for the gender-specific component of any loss in marriageability. If divorced wives should have claims against their husbands for their gender-based loss in marriageability, the explanation would lie in additional arguments not offered in this Article.

The theoretical argument for alimony that is developed below starts from the following premises, some of which have been established by prior sections of this Article:

1. The optimal allocation of marital roles and duties ("optimal" in the sense of maximizing spousal utility if the marriage remains intact) has financial consequences on divorce that are not the same for each spouse.

2. The main residual financial consequence of a failed marriage is a reduction in one spouse's earning capacity (usually the wife's) compared to the earning capacity she would have had if she had not married. Her
earning capacity usually declines because she has invested more time than her husband in the domestic labors necessary for a successful marriage. Sometimes these efforts are also responsible in part for an increase in the earning capacity of her husband that accrues during the marriage and continues after divorce.

3. For most marriages, there is no contractual solution that may be devised at the outset to reallocate these contingent effects on spousal earning capacity if divorce occurs.

4. In the absence of a reliable legal rule to reallocate these losses on divorce, husbands and wives typically would expect different magnitudes of loss if their marriage ends.

5. Some spouses who would terminate their marriage under a divorce law that leaves losses where they fall, would not seek divorce under a law that reallocated those losses. These spouses are for the most part husbands.

6. Other spouses, who might otherwise adopt suboptimal marital patterns in order to reduce the magnitude of their potential loss in earning capacity, might not do so if they know the law will reallocate some of their loss in the event of divorce. These spouses are for the most part wives.

7. To the extent actual marital conduct follows the possible patterns suggested in statements 5 or 6, we can conclude that marital conduct is distorted by a legal environment that does not reallocate lost earning capacity on divorce.  

The function of alimony is now clear. Its purpose is to reallocate the postdivorce financial consequences of marriage in order to prevent distorting incentives. Because its purpose is to reallocate, it is necessarily a remedy by one spouse against the other. While such a theory of alimony might seem excessively economic, its rationale does not assume that wealth maximization is in fact the only purpose of marriage. To the contrary, by eliminating any financial incentives or penalties that might

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142. It has been distorted in the economic sense, since spouses are less satisfied than they would be under an alternative regime. A similar point is made more formally by Landes, supra note 130, at 44-49.

143. Such a reallocation gives each spouse an appropriate economic stake in the survival of that marriage, thereby reducing the incentive to terminate it as the marriage ages and the "balance of payments" shifts. Under modern divorce laws, a marriage will end if either spouse wishes, regardless of the other's desires. (For the history of the change to unilateral divorce and its significance to the theory of alimony, see supra notes 11-17 and accompanying text. For a fuller discussion, see I. Ellman, P. Kurtz & A. Stanton, supra note 2, at 188-222.) In such a regime, it is particularly important that the law not create incentives to divorce by offering one spouse an economic advantage over the other that can be achieved by ending the marriage. By requiring the husband to compensate the wife for her marital investment, we allocate the financial cost of failed marriage appropriately between the parties. See Landes, supra note 130, at 44-49. The marriage may still end, of course, but at least—if our measurement methods are correct—neither party will reap a windfall or suffer a disproportionate loss, as a consequence of divorce. Section B of this Part grapples with some of the details that must be resolved in working out such a system.
otherwise flow from different marital lifestyles, this theory maximizes the parties' freedom to shape their marriage in accordance with their nonfinancial preferences. They can allocate domestic duties according to these preferences without putting one spouse at risk of a much greater financial loss than the other if the marriage fails.

In the detailed explication of this theory, set forth below in Section B, I use the term "marital investment" for claimworthy conduct giving rise to a compensable loss in earning capacity. A system of alimony that compensates the wife who has disproportionate postmarriage losses arising from her marital investment protects marital decisionmaking from the potentially destructive pressures of a market that does not value marital investment as much as it values career enhancement.

The system of alimony generated by this theory is also consistent with equitable notions: It protects the spouse who has made a marital investment, thinking that her marriage was a shared enterprise, from a unilateral decision by her partner to cease sharing. Nonetheless, an intuitive appeal to equity is not the principal argument in support of this approach. We rely more on the proposition that marital investment decisions should be free from potentially distorting penalties and incentives.

A rational spouse will pause before making a marital investment if the legal system allocates all of its benefits to the other spouse in the event of divorce. Unless society wants to discourage sharing behavior in marriage, its law cannot penalize the spouse who shares. Speaking to the differences between community and common law marital property rules, Dean Prager once observed:

By dictating that a married person behave as if unmarried with respect to certain choices or suffer the consequences of subsequent property disadvantage for not doing so, the individually oriented model works to reward self-interested choices which can be detrimental to the continuation of the marriage. At the same time it punishes conduct of accommodation and compromise so important to furthering and preserving the relationship. From a social engineering standpoint, an individualistic property system will begin to produce behavior that is at cross-purposes with other values, such as stability and cooperation in marital relationships.

The theory offered here is fundamentally different from contract analysis. To think of alimony in contract terms is essentially to look backwards: We ask what deals were made and what promises were

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144. We will see below that not all domestic labor necessarily will qualify as marital investment giving rise to an alimony remedy, but for now we must postpone consideration of such details.

145. Prager, Sharing Principles and the Future of Marital Property Law, 25 UCLA L. Rev. 1, 12 (1977). Prager was concerned with the division of tangible property accumulated during the marriage. But the point she makes applies equally to the use of alimony to adjust for the division of the human capital—the parties' earning capacity—that exists upon divorce.
relied upon, and we fashion a remedy that vindicates reliance on those promises. By contrast the proposed approach looks forward; it generates alimony rules that encourage the kind of marital behavior we want.

The law of divorce necessarily allocates the financial risks of marital failure. We might choose to leave the parties to their own devices upon divorce, with no divorce-based claims at all, and thus leave the loss where it falls. We might limit a needy party’s claim to some transitional assistance and then leave her to fend for herself whether she recovers or not. Or we might seek to ensure that any economic loss arising from marital failure falls equally on both parties, and provide a remedy based upon this principle. Because we are talking about equalizing losses arising from sharing behavior in the failed marriage, and not simply equalizing postdivorce income without regard for how the inequality came about, this last approach is the most defensible. It is defensible not merely on grounds of equity or by appeal to some intuitive notion of unjust enrichment. It is defensible because it frees marital decisionmaking from market pressures that might distort it in ways that reduce marital satisfaction and perhaps even marital stability. This theory does not rely on a formal spousal agreement, or on speculation about the spouses’ intentions, to justify alimony.

This conception of alimony differs fundamentally from prevailing law. It casts alimony as an entitlement earned through marital investment, and as a tool to eliminate distorting financial incentives, and not as a way of relieving need. An alimony law based upon this conception would therefore ask whether the wife invested in her marriage and is thereby economically disadvantaged upon divorce; it would not inquire into need per se. The wife who invested little or whose need arose from events unrelated to her marriage would have no claim against her former husband. Her relief, if she was in need, would be a societal obligation. By the same token, the wife who suffers economically from the divorce as a result of her marital investment would have a claim even if her financial situation did not place her “in need.”

The next section presents and explains the basic principles of an alimony system that protects marital investment, so that sharing behavior is

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146. Of course decisions to subordinate one’s individual prospects for the good of the marriage as a whole may vary with the spirit in which they are initially made. The spouse who moves to accommodate the other’s career needs, and thereby gives up important prospects of her own, may feel she has made a sacrifice, but some spouses who leave the marketplace to become full-time homemakers will be doing exactly what they want. But these attitudes have no bearing on the question of whether the adjustment should be considered marital investment and thereby potentially requiring compensation upon divorce. Even those inclined toward a domestic life might pause if they view it as risky, and a policy of protecting marital investment may therefore affect their behavior as well. In any event, restricting compensation to those with initial doubts about making any marital investment is no more sensible than giving wages only to those with some distaste for their work.
not discouraged under the modern law allowing unilateral divorce. I first state each principle and rule and then provide its rationale. Although this theory differs from current law, it too would inevitably leave much to the rough justice of trial judge discretion. There is no way to develop precise measures of the theoretically relevant criteria. But while theoretically defensible principles of alimony cannot be translated into self-executing adjudicative rules, they can give judges more guidance than they now have in following a coherent approach.

B. Redefining Alimony as Compensable Marital Investment: Basic Principles

I. Principle One: A Spouse is Entitled to Alimony Only When He or She Has Made a Marital Investment Resulting in a Postmarriage Reduction in Earning Capacity.

Marital failure undoubtedly imposes many different kinds of losses that do not necessarily fall equally on the former spouses. Alimony cannot remedy all of them. We have no basis for treating alimony as an all purpose civil action encompassing every tort or contract claim for losses arising from a failed marriage. Adjudication of such claims would require examining the reasons for the divorce—who is at fault, who “breached.” Part I demonstrated that we cannot usefully inquire into contract or breach. Its conclusion is consistent with the analysis underlying modern reforms that reduce or eliminate the inquiry into “fault.” Principle One therefore excludes such expansive claims, limiting alimony’s function to compensating for postdivorce financial losses resulting from marital investment.

To identify these losses, we compare the claimant’s economic situation at the end of the marriage with the situation she would have been in if she had not married. This comparison reveals that lost earning capacity is the only continuing financial loss. Principle One therefore requires a showing of lost earning capacity to establish entitlement to alimony. Principle One also requires that the lost earning capacity result from investment by the claimant spouse in the marriage. Principles Two and Three establish the kind of effort that will constitute such “marital investment,” and Rule 2.2 addresses the question of measuring the amount of the wife’s claim.

The rationale for tying compensation to lost earning capacity is

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147. There may also be a difference in the property accumulated by the end of the marriage and that which the claimant would have accumulated on her own. Such a comparison first requires a theory of marital property, both to tell us what share each spouse is entitled to receive, and to tell us whether the spouse’s probable accumulation had she not married is relevant to her claim to the marital property. Resolution of this issue must await a more thorough inquiry into the theory of marital property.
based on the economic analysis developed in the first section of this Part. Just as the building owner might have invested in making his building larger rather than in customizing it for a particular tenant, the wife might have invested in her own market earning capacity rather than in her marriage. The building owner can protect himself with a long-term agreement, ensuring that the investment made in specialized improvements will provide at least the return of alternative investments with more general market value. We have shown that the wife cannot employ contract rules to obtain similar assurance. Therefore, to protect her marital investment and thereby encourage her to make it, we must provide the wife with an equivalent noncontractual remedy. In general, the equivalent remedy is an alimony award based upon the value of the alternative investment she might have made in her earning capacity. We must thus compare the wife’s actual earning capacity when the marriage ends with the earning capacity she would have achieved if she had remained single. The difference equals our general measure of the alimony claim against her husband, which is explained more fully below in the discussion of Rule 2.2.

While the wife’s lost earning capacity bears some relation to the familiar economic notion of “opportunity cost,” it is not the same. A measure of the opportunity costs of marriage would have to compare the theoretical income a spouse would have earned during the time of the marriage, if she had not married, with the “income” she received as a spouse, in addition to examining the impact of her marriage on her earning capacity at the time of divorce. The total of these economic consequences of her marriage—income differences during it as well as residual differences in earning capacity after marriage—would be its opportunity

148. Actually, the building owner might not make the specialized alterations in his building unless he thought they would yield more than other, less risky, investments. He might demand this higher yield in the belief that a specialized investment attractive to only one buyer has a higher risk. The value of the alternative investment is thus at best a measure of the minimum he would have expected. Contract principles, of course, would entitle him to recover the full benefit of his bargain, which is likely to be higher.

If our analogy is apt then, the value of the wife’s lost earning capacity—her alternative investment—is also a minimum measure of what she expected. This is in part because that expectation almost certainly involves some nonfinancial returns—such as love, companionship, family life, et cetera—that investment in her career would not provide, making the added risk worthwhile. The problem, of course, is the impossibility of calculating the value of her full “expectation.” In any event, Part I demonstrated the unworkability of applying contract principles. Most importantly, our purpose is not to enforce promises but to encourage marital investment. That purpose is probably served adequately by guaranteeing the wife a remedy equivalent to her alternative market investment. The nonfinancial returns of marriage are surely sufficient to motivate marital investment so long as we ensure that the investment does not involve an unreasonable risk of financial loss.

149. The “opportunity cost” of an expenditure is the most valuable benefit forgone by that use, where the resource cannot then be used in a different way. R. POSNER, ECONOMIC ANALYSIS OF LAW 6 (3d ed. 1986).
Whether the wife's opportunity costs would be greater or less than her lost earning capacity would vary depending in part upon our assessment of her marital "income." That assessment would be tricky at best, but her marital income would presumably increase with her husband's income. The wealthier her husband, the higher her marital income and thus the lower the marriage's opportunity costs. The use of opportunity cost as the measure of her claim would therefore produce perverse results. A wife would receive a smaller alimony award the wealthier her husband and, if her husband was wealthy enough, she would have no claim at all.

Such a result is both the opposite of current law and counterintuitive, for most people, who would give the wife a greater claim the wealthier her husband. It is also inconsistent with our theory, which calls for an award that reflects marital investment, without regard to the marital lifestyle. We might argue that a woman who lives lavishly enough during her marriage does not need compensation for her marital investment if her marriage ends, because her marital lifestyle compensates her for the risk of divorce. But to discount the wife's claim as the marriage ages on the ground that she is receiving her compensation "currently" would exacerbate rather than remedy the husband's incentive to terminate the marriage, an incentive that otherwise develops as the marriage ages. The conclusion that the wealthy man's wife has already been compensated for her marital investment also assumes an unrealistically accurate measure of the total give-and-take of marriage, of which the wife's investment is just one part. Perhaps her large marital income is merely proper compensation for her wifely services and companionship, which are unusually valuable; perhaps her husband offers less than most in companionship, a shortcoming which was balanced by his larger income. Trying to assess all the nuances of the spouses' bargain to determine whether each has received full value during the marriage is impossible, and resembles nothing so much as the contract thinking we rejected in Part I.

Our policy purpose of compensating marital investment does not require such an impossible inquiry. Instead this policy leads to a rule requiring compensation for lost earning capacity in every case. The theory developed here ignores the exchange that takes place during the marriage, focusing instead on the parties' situation when the marriage ends. That is why the wife is only compensated for marital investment that leaves her with a residual postmarriage loss. Whether "current accounts" from "exchanges" during the marriage are "balanced" is irrel-

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150. Landes' analysis apparently concludes that the most efficient measure of alimony would be the wife's opportunity cost, tempered by some consideration of fault contributing to the divorce. Landes, supra note 130, at 44-49. She does not address the difficulties involved in assessing fault.
evant to the claim. Modern divorce law is committed to the proposition that a marriage should end if either spouse so desires. The remedy, if either spouse believes the current exchange is unfair, is to end the arrangement. This theory of alimony accepts that proposition, seeking only to make sure that on divorce neither spouse is left with residual effects that would distort marital decisionmaking. No other course is possible in any event, since Part I demonstrates that it would rarely be possible to look at the entire marriage and tell what either spouse bargained for, or even what he or she received.

This approach of course reduces only the husband’s economic incentives to terminate the marriage. It does not deal with the wife’s more rapid decline in marriageability, which is created largely by social customs favoring younger women, not the conduct of her marriage. We earlier noted that this theory would not reach those burdens. But it does respond directly to the marriage’s impact on the spouse’s respective earning capacity, an impact that is created by the decisions these spouses made about the conduct of their marriage. Compared to the result if no remedy were available, the theory proposed here reduces the wife’s economic stake in the marriage’s survival, and increases the husband’s in proportion to the extent their respective stakes were initially altered by changes in their earning capacity flowing from their allocation of marital duties. A more detailed examination of how the claim allowed here will affect economic incentives in marriage is offered below, in the discussion of Rule 2.2 on the measurement of the claim.

Admittedly, this remedy is unlikely to prevent the termination of a great many marriages. Indeed, in some cases the availability of a financial remedy will encourage women to seek divorce and this is appropriate. Some marriages should be dissolved. But in the modern legal regime of unilateral divorce we want to avoid an unequal distribution of the dissolution’s financial burdens, which would give the financially favored spouse additional incentives to terminate the marriage. This is particularly true if these unequal burdens have their source in the marriage relationship itself, as will always be the case when a spouse qualifies for alimony under the Principle adopted here.

Rule 1.1. There Is No Compensation on Divorce For the Lost Opportunity To Have Chosen a Different Spouse, Or For the Nonfinancial Losses Arising from the Failed Marriage.

Rule 1.1 follows from Principle One, since the losses it excludes do not qualify as a reduction in earning capacity.

151. See supra text accompanying note 131.
152. See supra text accompanying notes 131-132.
A primary nonfinancial loss of marital failure is the dashed hope of companionship and emotional satisfaction that most expect to derive from marriage. This loss does not always fall equally upon both parties, and especially when they leave a marriage with unequal prospects of finding a substitute mate, we might argue that such a loss should be compensated. The woman whose own earning capacity losses are small might nonetheless argue that for her the real cost of marital failure is her now lost opportunity to have chosen a different husband whose fidelity might have been more enduring or whose financial success might have been greater. In foregoing that opportunity she incurred both monetary losses (because another husband would have been financially more successful) and nonmonetary losses (because she would not have suffered the emotional cost of divorce, since by hypothesis that marriage would have lasted). Such a claim derives increased plausibility from its apparent similarity to more conventional financial applications of the concept of opportunity cost.

The claim is flawed, however. We want a law of divorce that allows the spouses to develop the marital arrangement they find most comfortable without fear that the chosen solution could put either spouse in additional financial jeopardy if the marriage fails. Foregone gains the wife might have realized from some other marriage do not fall within the zone protected by this principle. If we honor such a claim, we are not protecting the wife from the risk of investing in her marriage rather than the market; we are protecting her from the risk that she will have invested in the wrong marriage. Her losses do not arise from the way in which the spouses conducted their marriage, but from their decision to marry. Protection from losses arising from an unfortunate choice of spouse is not a proper function of alimony under the theory advanced here. The logic of alimony does not suggest that the law should protect the wife from this risk any more than it should protect the husband, much less that it should protect the wife by creating an obligation payable by the husband.

Both spouses enter a marriage hoping it will endure and knowing that it might not. Each has chosen a mate and rejected other mates or lifestyles. Each must bear responsibility for his or her choice, and no legal rule can insulate either from all the costs of mistake. The emotional and personal burdens of marital failure may exceed the financial ones, and in some cases they will fall more heavily on the husband than the wife. There are no principles by which to measure these losses or balance them against the wife's claim of lost earning capacity. The law of divorce cannot possibly take all the losses of marital failure into account, reduce them to a cash value, and apportion them by some plan designed to achieve ultimate fairness, especially since we are unable to assess fault or breach. Making adjustments between the spouses to compensate for
sharing behavior that leads to disproportionate effects on postmarriage earning capacity is a useful if modest goal, and one that will be difficult enough to achieve reliably. Ensuring that all spouses end up in the same place they would have been, if only they had made the best possible choice of mate or lifestyle, is not possible.

2. **Principle Two: Except as Provided in Principle Three, Only Financially Rational Sharing Behavior Qualifies As Marital Investment Giving Rise to a Compensable Loss in Earning Capacity.**

Principle One allows recovery for lost earning capacity when that loss arises from marital investment. Principle Two specifies that only financially rational sharing behavior can qualify as such marital investment. Lost earning capacity is thus not compensable if it arises from financially irrational behavior, with the one major exception set out in Principle Three. Principle Three’s exception applies to losses resulting from the care of children. The limitation on recovery created by Principle Two thus falls primarily on claims arising from spousal accommodations that do not involve the care of children. While Principle Two allows many such claims, it does create a significant limitation.\(^\text{153}\)

The rationale for Principle Two is best explained in the context of specific examples. We begin with two examples of the general principle, and then go on to consider other examples in the context of two rules that follow from Principle Two.

**Example 2(a). Typical Two-Career Couples.** Two-career couples may face many problems resulting from the need to balance their careers. One familiar dilemma is the couple’s choice of home. For example, do they move to where the wife has her most appealing job offer, even though it provides less opportunity for the husband, or does the wife accept her second- or third-choice of employment because its location promises reasonable opportunities for her husband as well? That conflict may be replayed in later years, when one spouse has opportunities to advance that require a move, and thus a dislocation of the other spouse’s career. Should these costs be taken into account if their marriage dissolves?

Consider the case of the professor-husband who accepts a university presidency in another city. To join him, his schoolteacher-wife must give up her prospect of becoming a principal in the school system in which she has worked. For the marriage as a whole, it is financially rational for her to make this sacrifice. The expected increase in the husband’s

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153. Even rational marital investment might produce no gain in the end; not every sensible investment turns out well. While Principle Two requires only a rational investment, not a successful one, we will eventually conclude that there is no claim if there was no gain. See Rule 2.2, and the accompanying analysis.
income is greater than the expected value of the wife's foregone opportunity, so this choice should yield their marriage a net gain. But after divorce he would receive the entire gain from his job change, while she would incur the entire loss from hers, unless the law makes some adjustment. A law designed to avoid penalizing sharing behavior in marriage, to encourage spouses to think of themselves communally rather than individually, would therefore consider this history in fixing the spouses' postmarriage obligations.

**Example 2(b). Claim by Higher Earning Spouse.** Principles One and Two may allow a claim against the spouse with lower earnings when the spouse who forfeited opportunities for the other's benefit (and therefore has a claim) nonetheless retains a higher income. This is not a gender-based possibility; in practice as well as theory, we might find claims being made by higher earning husbands as well as wives. Although implausible under current law, such a regulation does make sense within certain limits.

Claims by a higher earning spouse will not be troublesome so long as the spouse against whom the claim is made actually benefited financially from the other's foregone opportunity. Consider a corporate-executive husband married to a lawyer-wife. He declines an offer from a company headquartered in Pittsburgh because his wife cannot find employment there comparable to her partnership in a Los Angeles law firm. He keeps his current post, paying $100,000 annually; the Pittsburgh post would have paid $125,000. His wife continues to earn $75,000 in her law firm, with prospects for further increases as the firm prospers. The best she could have done in Pittsburgh was $38,000, with uncertain prospects for advancement.

Under these facts, the couple's decision was financially rational, since their aggregate income in Los Angeles, $175,000 and rising, is better than the Pittsburgh total of $163,000. But if spouses separate, the wife retains her $37,000 benefit from their decision to remain in Los Angeles, while the husband retains his $25,000 loss. Because the husband incurred a reduction in earning capacity as a consequence of economically rational sharing behavior, Principles One and Two require the wife to pay the husband alimony, even though her postmarriage income is less than his. The higher marital income resulting from the locational decision is a benefit that is improperly distributed once the parties

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154. This example shamelessly ignores many ordinary facts of life, one of which is that the cost of housing in the two cities may in fact make the Pittsburgh offer more lucrative. Others include the obvious fact that these numbers have little meaning to most people, and that many people would have strong feelings as to the city in which they would prefer to live. None of these defects reduces the usefulness of the example to illustrate the limited point made in this portion of the text (the significance of decisions based on geographical preferences is discussed below).

155. Of course, his claim is only for the amount by which his post-marriage earning capacity is
divorce, absent some postmarriage remedy. The alimony claim only requires the wife to share with her husband some of the gain in her income that resulted from their decision to remain in Los Angeles—a gain that was purchased with the husband’s foregone opportunity to earn more himself.

We might fear that this principle could require a needy spouse to make payments to a wealthy one. In practice, however, this is unlikely to occur. Principle Two’s requirement that the spousal career accommodation be “financially rational” means that the spouse asked to pay usually will have gained more than the recipient spouse lost. In such cases, it is unlikely that the recipient’s income is very high and the paying spouse’s low, and a special principle to protect the needy is probably unnecessary.

Rule 2.1. A Loss of Earning Capacity Incurred to Accommodate a Spouse’s Lifestyle Preferences, Yielding a Reduction in Aggregate Marital Income, Is Not Compensable.

This rule follows from Principle Two, because the claims it excludes would arise from financially irrational behavior. Two examples of the application of this Rule will illustrate its rationale.

Example 2.1(a). Geographical Accommodations to Homemaker Spouse. People often sacrifice income to other values. When this is done within marriage, we might argue that an alimony claim arises. Consider the corporate-executive husband offered a major promotion requiring a move from San Francisco to Houston. The promotion promises a substantial raise within a few years. His homemaker-wife considers Houston uninhabitable and opposes the move, even at the cost of giving up the promotion. They do not go, the promotion is lost, and a year later the couple divorces. Should he have an alimony claim based on his lost promotion? The question appears to be entirely theoretical in nature, since surely any claim he might have could never be realized against a long-term homemaker wife. On the other hand, if we believe that the law should somehow recognize his claim, we might at least use it to offset any claim for support that the wife might have. Most people would surely reject this result, as does Rule 2.1. Rule 2.1 follows from the general theory.

This case is different from Examples 2(a) and 2(b), involving two-career couples weighing moves that are favorable for one spouse’s career but not for the other’s. In those examples, the spousal decision is financially rational, because the couple expects one spouse’s earnings gain to exceed the other spouse’s earnings loss. A claim is therefore allowed.
But in this example, the couple's rejection of the San Francisco-Houston move is not financially rational; it results from nonfinancial preferences in matters such as geography, lifestyle, and climate. For most people, these preferences will have a strong influence on their decisions when the differences in income are relatively small. People sometimes indulge such preferences even where the income differences are great. When a couple foregoes economic opportunity to satisfy their nonfinancial preferences, little adjustment is required if they later divorce. Divorce does not distribute the benefit of their decision inequitably; both still retain the advantage of living in San Francisco. The real question is whether we should permit the husband in our example to establish a claim by proving that he gave up Houston entirely to accommodate his wife, that he, unlike she, had no special fondness for San Francisco.\footnote{Apart from theory, we might reject such an approach because it would not, as a practical matter, be workable, for it would depend too much on proof of an individual's personal preferences. By making the financial outcome of a divorce turn in part on the parties' state of mind at some earlier time, we would invite self-serving recollections and fraudulent assertions as to a question about which objective evidence will be scarce. This is too high a price to pay for theoretical purity, particularly if we believe that the resulting process would not establish the facts reliably anyway. Although such observations are probably correct, I prefer if possible to ground the argument on the more basic theoretical points made in the text.}

When one spouse cedes a market opportunity in favor of the other spouse's we must provide a remedy. Otherwise, a marital decision made on the assumption that the spouses are a single economic unit will burden the sharing spouse disproportionately when divorce renders them financially separate. In contrast, when one spouse foregoes a market opportunity to accommodate a lifestyle preference, both spouses know that lower income will result. On divorce, the spouse who made the financial sacrifice suffers no additional financial burden as a result, beyond that already incurred during the marriage. Even if the sacrifice was made entirely to accommodate the other spouse's lifestyle desires, the real complaint on divorce is not the economic sacrifice itself, which the spouse would have borne even if the marriage had remained intact. The real complaint is that the marriage did not remain intact despite the economic sacrifice. That complaint, though real, is simply beyond the scope of the alimony remedy, which can never compensate marital partners for the personal loss of marital dissolution.

A broader principle of recovery would be impossible to contain within reasonable bounds. Alimony is based upon our desire to encourage sharing behavior in marriage, or at least not to penalize it. But the law cannot evaluate every aspect of marital behavior in fixing the divorcing parties' financial obligations. If we do not impose a limit, we would have to consider every sacrifice one makes for one's mate, and this would extend to nonfinancial losses as well. Suppose an attorney gives
up his prospects for a faculty position to accommodate his wife; would she have to compensate him for his lost chance at the professor's life if that was what he really wanted, despite the lower income? Allowing compensation for financial losses incurred for nonfinancial reasons is no less troublesome. If she had a change of heart and sought divorce, would the Duchess of Windsor then owe the Duke for his throne?

Marriage necessarily involves much give and take that the law cannot address or equalize upon divorce. This theory assumes that we can sensibly isolate decisions that a couple rationally expects will enhance their aggregate income, and ensure that in making such a decision neither takes a risk of disproportionate loss if divorce then occurs. Although not repairing every unfair marital loss, this approach yields a principled alimony rule that tends to encourage sharing behavior. Moreover, economic theory provides some basis for a policy to encourage marital sharing behavior that maximizes aggregate spousal income: We may believe that by engaging in those activities which maximize their joint income, the spouses are probably making the use of their talents that is most valued by society at large. Although such a conclusion is not always justified, we have no basis at all for a social policy that encourages one spouse to agree to reduce marital income to accommodate the other's nonfinancial values. Spouses may make such a choice but the law need not create a claim upon divorce in an effort to reduce its risk. (Nor, of course, would there be any basis to discourage such an arrangement.) And in any event, a legal entitlement to a financial remedy is most likely to influence spousal judgments that have an important financial component.

As a general matter, the theory therefore allows claims only for losses arising from financially rational accommodations. Ordinarily this means that claims are limited to the spouse whose losses were incurred to accommodate his partner's opportunities as a breadwinner—opportunities that are expected to yield a net gain to both spouses so long as the marriage is intact. In the increasingly common two-career marriage in which either party may make accommodations to the other's career

157. There are several reasons why we may doubt this is always the case. In general, of course, economic theory assumes that with free markets, relative price reflects the relative balance of supply and demand, so that spousal efforts that command the greatest price are those for which there is the greatest societal demand. See R. Posner, supra note 149, at 6-9. But in some cases the true value to society is not reflected in price because markets are distorted. In other cases we will believe that demand is artificially depressed by unfair distributions of income. For example, it is difficult to maintain that the social utility of practicing medicine in Appalachia is lower than the social utility of practicing medicine in New York, even though doctors may earn more in New York. See R. Dworkin, A MAT=TER OR PRINCIPLE 242-46 (1985).

158. A spouse could bargain for an express agreement adjusting the financial consequences of divorce that would otherwise result, in recognition of his sacrifice. Nothing in the theory presented here would require us to deny enforcement to such an express agreement.
needs, alimony claims might go in either direction. In the traditional marriage, claims cannot be made by the breadwinner spouse against the homemaker spouse for economically irrational accommodations.

Example 2.1(b). Claims by Homemakers in Childless Marriages. More often than not, the homemaker in the childless marriage will have no claim for alimony. Her decision to remain at home rather than enter the market may well leave her with a reduced earning capacity. But in most cases it will also be a decision that predictably yields a reduction in aggregate marital income: That is, to remain a homemaker in a childless marriage is not ordinarily an economically rational decision, but instead reflects a lifestyle preference. Under Rule 2.1, the wife makes such a decision at her own risk.

There are a few cases in which the wife in a childless marriage might make a financially rational decision to stay out of the regular labor market. Rule 2.1 allows her to recover her lost earning capacity in such cases. For example, the couple might rationally decide that the wife can make a substantial contribution to her husband's business by assisting him in some unpaid capacity rather than entering the labor market. That wife is certainly entitled to alimony. Those same facts might give rise to a claim for a share in the value of such a business; the claim's success depends, of course, on state marital property law. Where a portion of the business is in fact allocated to the wife in recognition of her unpaid efforts, we may need to refine the basic alimony principles to take this into account, in order to avoid double counting. In the absence of double counting, it is appropriate to provide an alimony remedy. If her decision to forego market opportunities in order to help him was

159. The same might be said of the homemaker with children, but that case involves special problems that are treated under Principle Three.

160. In most states today, the wife would have a claim to share in the value of the business or practice without regard to whether that value was the product of her efforts. In an equal division community property state like California, she is entitled to half the value of the property accumulated during the marriage; in an equitable division state (common law or community property), her entitlement depends upon the judgment made by the trial judge, guided by principles of equity that vary from state to state. See I. ELLMAN, P. KURTZ & A. STANTON, supra note 2, at 235-61. To the extent her efforts enhance the share of property to which she is otherwise entitled, it may be double counting to provide her with an alimony remedy on the basis of the same contribution. Whether this double counting is unfair will depend in part upon which policies should govern the division of the marital property in the first place, an inquiry that is beyond the scope of this Article.

161. A property claim may well be the better remedy in such a case, but analysis of that problem awaits a fuller examination of property principles. A famous New York case with facts tracking the example in the text, in which the wife's efforts yielded neither property nor alimony claims, is Saff v. Saff, 61 A.D.2d 452, 402 N.Y.S.2d 690 (1978), appeal dismissed, 46 N.Y.2d 969, 389 N.E.2d 142, 415 N.Y.S.2d 829 (1979). That case was decided under traditional common law marital property rules, which are no longer in force in New York. See I. ELLMAN, P. KURTZ & A. STANTON, supra note 2, at 234-35.
economically rational, she should receive compensation for her lost earning capacity as alimony on divorce.

In some cases, even a traditional homemaker may have a claim under Rule 2.1. The classic executive wife, although a dying breed, is an ideal example of this case. She was thought to enhance her husband's opportunities for significant corporate advancement through social graces and strategic entertaining. In such cases, it may well be an economically rational use of her labor to be a homemaker. A more familiar modern example might be the political wife. Perhaps it was financially rational in 1976 for Rosalind Carter to devote herself to her husband's campaign for president; she may then have had no other opportunities that offered her a return with nearly the same expected value.

In sum, Rule 2.1 creates no blanket exclusion of alimony claims by homemaker wives. Some cases will be financially rational. But by the same token, homemaker wives in childless marriages have no automatic claim for their lost earning capacity, and most would probably be unable to show that their decision to forego the market was financially rational. This may appear unfair in those cases in which the wife stayed at home because both she and her husband preferred it. One can easily imagine the case in which the wealthy man wants his wife to forego the market in order to focus more effectively on maintaining a congenial domestic environment, and actively encourages her to make that choice. On the other hand, providing an automatic claim to the homemaker wife without regard to the financial rationality of her choice may give her an undeserved windfall in other cases, in which the husband reluctantly acquiesced to the reduced marital income resulting from his wife's refusal to enter the market. Adoption of a case-by-case rule would require the kind of impractical inquiry into spousal understandings that we have previously rejected. In adopting a general rule excluding claims for financially irrational decision by childless wives to remain at home, we nonetheless

162. It was apparently the style at one time for corporations openly to consider the social strengths of the wives of candidates for major executive posts. See, e.g., Honor, Help Your Husband Get Ahead, Cosmopolitan, Feb. 1958, at 44, 45. Of course, at that time there were no women candidates whose husbands might have been subjected to the same scrutiny. Until last year, promotions of Air Force servicemen officially depended in part on the effort their wives put into "local Air Force base activities and charities," and servicemen's wives who worked outside the home were "warned that their husbands' careers would suffer if they did not quit working." Air Force Says Wives' Jobs Are Up To Them, N.Y. Times, Mar. 20, 1988, § A at 23. The same policy did not apply to the husbands of women with Air Force careers. This was changed by a new Air Force policy adopted in March, 1988, upon the recommendation of a special study group appointed by the Air Force, which recognized that "subtle changes in the nation's family structure" rendered the policy obsolete. Id.

163. "Expected value" is the return one will get if the investment is successful multiplied by the probability of success. Cf. J. KMENTA, ELEMENTS OF ECONOMETRICS 63 (1986).
do not exclude the enforcement of express agreements by the spouses to deal with such cases. Although such agreements are relatively uncommon, the adoption of clear rules might encourage such agreements by spouses who intend a different result.

Rule 2.2. The Claimant Spouse Is Ordinarily Entitled to Recover the Full Value of Her Lost Earning Capacity. Where, However, No Increase in Marital Income in Fact Resulted From Her Marital Investment, She Has No Claim Under Principles One and Two.

a. The Ordinary Rule of Full Value

Assuming the wife has a claim, how shall we measure it? We must answer that question in light of our reason for giving her a claim: to free spousal decisions about the conduct of marriage from distorting market pressures. The wife's marital investment has no financial value if the marriage ends. Her alternative investment possibility—her own earning capacity—would have benefited her in the general market. In financial terms, she should not invest in her marriage unless the expected return on her marital investment (the return discounted by the probability of divorce) exceeds the expected return on an investment in her earning capacity. She must make this analysis because, unlike the businesswoman facing an analogous commercial decision, she usually cannot negotiate a contract to protect her if her partner terminates the relationship. She therefore should resist making a marital investment unless the expected return is so high that the investment makes sense even though she will have no remedy if the marriage ends early. This inability to negotiate risk allocation may suppress marital investment below optimal levels. Alimony can provide the reallocation that contract cannot, and thus avoid the problem of suppressing marital investment. By giving her a claim measured by the alternative use she could have made of her efforts—investment in her own earning capacity—we prevent market pressures from distorting her choice between marital and market investment.

Although alimony thus fills the legal gap that arises from the inabil-

164. Women who sign premarital agreements waiving any rights they might have in the estate of their future husband, or to his support, if they ultimately divorce, might have essentially made this calculation. That would explain why such agreements are made mostly with men who are very wealthy, where the return (if the marriage does succeed) is so high that the investment is worth making for the woman even though she assumes all the risk of divorce.

165. This problem arises only where women have market opportunities. The risk of marital investment was less important in the days when women had no other possible investment—when they could not, regardless of their efforts, generate much earning capacity. In today's world, the man offering marriage must compete with the market as well as with other men. A man must be able to offer his wife some assurance against undue risk if he hopes to encourage marital investment.
ity of contract principles to deal with this problem, the remedy is not the same one which contract would provide. Contract would provide the wife with the benefit of her bargain, just as it would the businesswoman who had made a supply agreement requiring her investment in capital equipment. The businesswoman would be entitled to the profits she would have earned if her buyer breached his agreement to buy. Likewise, contract would award the wife her expected share in the marital profit if the marriage had continued. We would calculate that amount by looking at the husband's expected gain from his wife's marital investment—his enhanced earning capacity—and subtracting the amount of her investment—her lost earning capacity. The difference equals the total gain in marital earning capacity resulting from her investment, in which she presumably would share equally if the marriage continued. Her share of this gain might, in some cases, considerably exceed the value of her investment. If contract applied, she would receive this share as expectation damages.

Contract does not apply, however, and neither does this expectation measure. The difference in remedy flows from the different bases for relief in alimony and in contract. A contract claimant receives nothing without first establishing that the other party breached; in alimony we will not ask why the marriage ended or whether the claimant bears some fault for the divorce. The modern law of marriage is committed to unilateral divorce without inquiry into fault, and—as Part I has already shown—that it would be futile to try to ground alimony claims on assessments of "breach" or its cousin, fault. Every divorcing spouse who can show lost earning capacity in compliance with Principles One and Two therefore has a valid alimony claim, without regard to why the marriage ended. Moreover, to measure that claim by the spouse's lost expectation might induce one spouse to terminate the marriage since she would receive the expected financial gain from her marital investment without remaining married. No similar problem arises in contract, since the party who terminates a contract without justification is in breach, and has no claim for damages at all.166 Surely many more contracts would be broken—if any were made—if one could end the relationship unilaterally and still require the other to pay the profits one expected to make.167

166. Talk of "efficient breach" refers to the notion that it is sometimes economically efficient for a party to pay damages for breach rather than perform, and the law allows that result. We do not want to set damages so high that a party will be deterred from breaching in all cases. See R. POSNER, supra note 149, at 106-14; Birmingham, Breach of Contract, Damage Measures, and Economic Efficiency, 24 RUTGERS L. REV. 273, 284 (1970). The case of alimony is different from the efficient breach situation. In contract, we never allow a party to breach and collect damages. We provide alimony, however, without inquiry into fault.

167. Existing divorce law, in which spouses may end their marriage unilaterally, is like the doctrine that a contract can be avoided if there was mutual mistake. The ordinary remedy in such a case is rescission: Each party is returned to the position in which he would have been had no
b. No Claim Where There Is No Gain

Consider the case in which the spouse's marital investment was financially rational, but in fact no gain resulted. Some investments, though rational, turn out badly. Such a case apparently satisfies Principle Two and seems, therefore to yield a valid claim. Yet Rule 2.2 specifies that in such cases no claim exists. This result may seem both counterintuitive and inequitable. It is also inevitable.

Alimony aims to protect the spouse against a particular kind of risk that she cannot avoid through contract: the distorted allocation, at divorce, of the cost of her marital investment. Its purpose is not to protect her against any risk of loss in the investment itself, regardless of how it arose. Every investment carries some risk, including an investment in one's own earning capacity. She might have invested her savings by putting herself or her husband through law school. Either of them might flunk out, or fail the bar examination. If she invests in herself and does poorly, she has no one else to cover her loss. There is no reason why someone else should cover it if she invests in her husband instead and he does poorly. In addition, when the spouses decide whose earning capacity to invest in, they ought to pick the one with the best prospects. We certainly do not want the wife, or the husband, to have their judgment influenced by an alimony system which makes an investment in one's spouse riskless, but not an investment in oneself. The wife who invests in her husband's earning capacity, only to see him become disabled, or flunk out, is like the businesswoman who invests in a customized building after obtaining a long-term agreement, and then discovers that the building needs costly repairs which render the investment a losing proposition after all. She invested in the wrong building. For that loss she can have no claim against her tenant.

When the wife has a claim, Rule 2.2 puts her where she would have been if she had not married, in terms of her earning capacity. This measurement eliminates distorting market pressures when employed in contract been made. E. Farnsworth, supra note 39, at 662. Neither party has a claim for the benefit of his bargain. That approach is consistent with Rule 2.2, under which the wife simply recovers the value of her investment. But the analogy to rescission is not perfect and does not serve as the principal explanation for this measure of the alimony claim. The principal justification is that this measure protects each spouse's investment in the marriage, while the more generous measure—full expectation damages—not only provides a larger claim than necessary to protect the investment, but itself introduces distorting incentives. Moreover, the analogy to rescission is not entirely apt, since in marriage we assume that the husband derived a benefit—enhanced earning capacity—from the wife's investment which he will retain. In contract, rescission ordinarily leaves the parties without either the benefit they sought or the cost they expected to pay. However the husband cannot be put back into the position he would have been in, if they had not married, without both reducing his earning capacity and returning to him the value of the investment he made in his own earning capacity. Because both are impossible, we simply leave the husband with his gain but require him to reimburse the wife for her full cost.
appropriate cases. If allowed here, however, such an award would introduce distorting incentives rather than avoid them. Some spouses would invest in their partner when they should instead invest in themselves because the investment in their partner would be risk-free. After the fact, when the investment has soured, the existence of a claim would encourage divorce, because the spouse could then recover her loss, while, if she remained married, she could not. This last result seems particularly unfair to the spouse whose earning capacity went sour. He already has incurred a loss in income which is unchanged by divorce, and now he also shares in the reduction in his wife's earnings. Unlike his wife, he has no opportunity to shift his loss to his spouse by exiting the marriage entirely.  

The limitation set out by the second sentence of Rule 2.2, excluding claims where there is no gain, applies only to claims made under Principles One and Two. This limitation does not cover claims made under Principle Three, involving losses incurred for the care of children; Principle Three operates under its own damages rule.

Example 2.2(a). Application to Prior Examples. Rule 2.2 applies generally to all of the prior examples in which a claim arises under Principles One and Two. By definition, every economically rational accommodation of one's spouse is expected to yield a gain in aggregate marital income. If that expectation is realized, Rule 2.2 allows a claim. Thus, the schoolteacher-wife who relocates to allow her professor-husband to become a university president (Example 2(a)), and suffers a loss in earning capacity as a result, may claim the full amount of her loss; provided, of course, it is less than his gain. So may the executive wife, or the wife who donates labor to her husband's enterprise (Example 2.1(b)), if the gain he realizes from her efforts exceeds her loss.

Example 2.2(b). Marriages Involving Spousal Support for School. Recent years have seen repeated litigation, numerous commentaries, and specific legislation directed at the case of the wife who supports her husband while he attends graduate or professional school and is divorced when he graduates. Courts and commentators have been more united in their sympathy for such claims than coherent in their analysis of them.  

168. Intuitively this result may well seem unfair to the wife: Where the investment goes well she does not share in the gain, but can recover only the value of her lost earning capacity. Where the investment goes badly, she shares in the loss and recovers nothing. I initially sought to justify an award for the wife, but could develop no principled defense of such an award, and eventually concluded that the argument in the text was persuasive. In addition, allowing a claim against a husband with little earning capacity himself, as might otherwise occur, generates its own counterintuitive results. For example, should the wife have a claim for her lost earning capacity against the husband whose business fails as a result of his unforeseen illness and who now has difficulties supporting even himself?

169. Legislation, cases, and commentaries are gathered, excerpted, and described in I. ELLMAN, P. KURTZ & A. STANTON, supra note 2, at 291-300.
One approach that attracted considerable attention redefined the husband’s professional degree or license as “property” which could then be “divided” upon divorce. The very oddity of the idea made it fashionable for a while, but the appellate court’s burden of providing a reasoned explanation for its decisions ultimately did the idea in. The only surviving authority for the “license as property” approach, the decision of the New York Court of Appeals in O’Brien v. O’Brien, is more a testimony to the archaic tradition that drives New York’s domestic relations law than to any merit in the basic proposition. By any modest definition degrees and licenses are not property. Unfortunately, our existing law is so inflexible that some courts thought it necessary to pretend they were, in order to provide a remedy for the woman who was treated like a scholarship.

This kind of case illustrates the basic rules of eligibility following from Principles One and Two, as well as the rule of damages set out in Rule 2.2. The basic inquiry is whether the woman leaves the marriage with less earning capacity than she otherwise would have had. In some cases she will and in other cases she will not. The woman who delayed her own educational plans in order to support her husband, and who is then divorced at his graduation, will have a clear claim equal to the added earning capacity she would have had at the time of divorce, if only she had pursued her own education rather than supporting his. Her initial decision was presumably rational, based upon their expectation that their marital income would rise at least as fast if he finished training first as if she did.

The woman who was not divorced at graduation presents a more complex case. If she did not return to school, but instead had children and became a homemaker after her husband completed his education, she has a claim under Principle Three, as we shall see, but this claim arises from her role as primary caretaker of their children, and not from her support for his education. The woman who returned to school, and divorced only after she also completed her training, may have a claim. The delay in the completion of her education probably put her behind in her professional advancement and, especially in the early years, in her


171. In O’Brien, the court must have assumed that the legislature, having just reformed the state’s traditional marital property system, intended to throw out common sense along with the common law. The legislature’s “entirely new theory” of equitable distribution, 66 N.Y.2d at 585, 489 N.E.2d at 716, 498 N.Y.S.2d at 747, merely enacted a rule similar to that which had been in force in most other American states for quite some time. Such a law gives courts discretion in dividing property, not in defining it. See the discussion in I. ELLMAN, P. KURTZ & A. STANTON, supra note 2, at 298-300. New York is now alone, among the dozens of states that have considered the issue, in holding that a degree is property. Cook, Mass. Rejects Degree as Marital Property, Nat’l L.J., Mar. 16, 1987, at 3, 38.
earning capacity. If the marriage had continued, the spouses would have shared both her loss and his gain. Although he is no longer obliged to share his income with her after divorce, he must compensate her for her loss.

Because Principle One makes lost earning capacity essential, some student’s wives will have no claim. The woman who supported her student-husband while holding the same job she intended to keep anyway has suffered no loss in her earning capacity, even though she expected to share in his. Her lost expectation is not compensable and she has no claim. For the same reason, the wife with a claim is limited to recovering her lost investment and does not share in her student-husband’s enhanced earning capacity. Although these results may seem ungenerous, there is little alternative.\[172\]

We could justify awarding expectation damages to wives who support their student-husbands if we took a contractual approach. However, the commentary to Rule 2.2 has already explained why expectation damages would overcompensate the wife. In fact, an expectation measure of damages would often exceed any claim we might be willing to allow on more intuitive notions of equity. The woman who supports her husband through medical school and then finds herself dumped when he runs off with a classmate presents an appealing case. The woman who left her caring husband for the next-door neighbor presents a less appealing claim for a lifetime share in her physician-husband’s earning capacity. If we allow expectation damages, we will also want to allow defenses based on fault, requiring precisely the kind of inquiry into the conduct of the marriage that both Part I of this Article and the modern divorce reform movement have rejected.

Nonetheless, it is unfair for the spouse who benefited from the other’s lost earning capacity both to leave the marriage with all the finan-

172. The cases that allow alimony claims based on one spouse’s support for the other’s schooling often sink into a confused morass when they come to the question of how to measure damages. Some cases use contract language to explain why an award should be allowed, see supra note 18, yet provide only restitution when explaining how to measure it, without explaining why their contract analysis does not justify the ordinary contract measure of lost expectations. See Mahoney v. Mahoney, 91 N.J. 488, 502-03, 453 A.2d 527, 535 (1982) (“monetary contributions made with the mutual and shared expectation that both parties to the marriage will derive increased income and material benefits should be a basis” for reimbursement alimony, but not expectation damages); see also DeLa Rosa v. DeLa Rosa, 309 N.W.2d 755 (Minn. 1981). The Wisconsin Supreme Court has managed to issue two opinions on the general question of damages without giving its lower courts any useful guidance. In one case the court simply listed all of the possible ways one might measure the claim of the spouse who supported her partner through school without indicating any preference among them, even though they yield dramatically different results and are based on very different rationales. The choice was left explicitly to the trial court’s discretion. See Haugan v. Haugan, 117 Wis. 2d 200, 211-15, 343 N.W.2d 796, 802-03 (1984). Likewise, in In re Marriage of Lundberg, 107 Wis. 2d 1, 318 N.W.2d 918 (1982), the court left the ultimate weighing of various factors provided by statute to the trial court.
cial gain the parties had initially expected to share, and to leave the wife with her loss. Rule 2.2 provides a partial remedy for this dilemma. Without inquiring into fault, it compensates the wife in such cases for all of her lost earning capacity.

3. Principle Three: *Notwithstanding Principle Two and Rule 2.2, The Homemaker Spouse May Claim Half the Value of Her Lost Earning Capacity, Even Though It Exceeds the Market Value of Her Domestic Services, When These Services Included Primary Responsibility for the Care of Children.*

Consider a marriage between two top students at a leading law school. Three years into practice at a major Los Angeles firm they decide to have children. She now takes the next ten years away from full-time practice to be a mother and homemaker. She takes some part-time work on special projects, but gives up her place on the partnership track. Then they divorce. Her lost earning capacity equals the difference between what she can earn now and what she would be earning had she stayed full-time at the firm and perhaps made partner. That sum might be a few hundred thousand dollars annually, perhaps ten or twenty times the market value of her services as cook, nanny, and housekeeper. Should he really be liable for that amount, as Principle One seems to require? Should he be liable even if he can show that her domestic services did not increase his earning capacity nearly as much as it reduced hers?

The husband opposing her claim can plausibly argue that her decision to stay home was not economically rational. Principle Two allows claims only for "economically rational" accommodations to one's spouse's career, and Rule 2.1 excludes losses incurred to accommodate the spouses' economically irrational lifestyle preferences. If these principles apply, she has no claim. Child care services could have been purchased for considerably less than her foregone income. Her decision to stay at home therefore resulted partly from the spouses' lifestyle preference—a preference for parental care over purchased care despite the dramatic difference in cost.

Nonetheless, Principle Three rejects this argument. Specific policy rather than broad theory justifies distinguishing this case from the earlier ones governed by Principle Two. The couple's decision to have children is financially irrational in the first place; no matter what arrangement they make for their child care, they would have been financially better off without children. But society relies for its continued existence on couples who make just this financially irrational choice.\(^{173}\) Moreover,
society has an interest in ensuring that children, once born, are properly cared for. Parental care is valued in our culture; it is not merely a lifestyle preference but a traditional ideal. Because of the policy favoring the continued production of children and parental care of them—a policy entirely independent of the theory of alimony advanced here—we do not want to impose a disproportionate risk of loss on the spouse who cares for the couple's children. We must instead ensure that the costs of having children are shared equally after the marriage ends, just as they were during marriage. A mother's decision to give up her legal career for domestic life may seem unwise or unreasonable to some, but similar decisions are repeated daily. The high cost of her foregone partnership presumably reflects the high value the couple attaches to parental child care. Her reduced earning capacity is a sunk cost of child care which they cannot now recover. Termination of the marriage cannot terminate the responsibility of either party to pay his or her equal share of the child care bill.

Because it is a shared cost, however, the husband is liable to the wife for only half of her loss. In addition, the husband is entitled to a credit for any loss in earning capacity he may have incurred as a consequence of his parental responsibilities. He may have no such loss, if the marriage followed the traditional pattern, but in many marriages today the spouses share those duties, even if not equally. Where both have a loss in earning capacity arising from the care of children, alimony should equalize that loss on divorce by giving the spouse with the larger loss an award for one-half the difference in their respective losses. Principle Three therefore creates, for this case, an exception to both the economic rationality requirement of Principle Two and Rule 2.2's exclusion of claims for losing investments.

Of course, there are limits to such claims. Because Principle Three in domestic affairs will be just the amount that maximizes "household production," defined as the sum of domestic activities contributing to family welfare (e.g., child care and meal preparation) and spousal earnings. Landes, supra note 130, at 40, 43-44. Her assumption is not met in any marriage in which the wife can hire domestic help for less than she can earn in the market, but stays home nonetheless.

Substantial majorities of both divorced men and divorced women questioned in a 1978 Los Angeles survey agreed that "[a] woman deserves alimony if she has young children and wants to stay home to care for them." Weitzman & Dixon, The Alimony Myth: Does No-Fault Divorce Make a Difference?, 14 Fam. L.Q. 141, 150 (1980) (emphasis omitted). As market opportunities open to women, the opportunity cost of domestic work increases, and that is undoubtedly one reason why patterns of child care are changing and parental care is on the decline. Today most women with children, including preschool children, work in the market. Family Characteristics, supra note 132, at 106.

This assumes that there is also a child support remedy which properly allocates between the spouses the current costs of raising their children. The alimony remedy provided here is designed only to compensate the wife for the excessive share in lost earning capacity that she might otherwise incur on divorce.
protects a parent's investment of time in her children, it can apply only when there are children in which to invest. The woman who remains a homemaker in a childless marriage cannot rely on Principle Three for a claim against her husband; her claim would be governed by Rule 2.1, as explained in Example 2.1(b). For the same reason, the woman who remains a homemaker even after her children are grown ceases to benefit from Principle Three. She can recover only half the earning capacity she would have lost assuming she had gone back to work when the children were grown, whether or not she actually did.176

4. Summary of the Theory's Effects

The theory advanced here yields results that differ from traditional alimony awards in two ways. First, those who have an alimony claim would find their claims measured by their loss in earning capacity, rather than by other factors that courts sometimes use, such as “need,” former spouse’s income, standard of living during marriage, contribution made to the spouse’s education, or increase in the spouse’s earning capacity.

Second, the class of spouses with valid claims will change somewhat, and will fall largely into two groups. The first group will consist of spouses with losses in earning capacity arising from their care of children. This group probably has a valid claim under current law as well, although it would be measured differently. The second group consists of those who have made sacrifices in their careers and earning prospects in order to accommodate more lucrative possibilities in their spouse’s careers. Many in this group would have no claim under current law because they are not “in need.” On the other hand, some claims that might be allowed under current law, such as claims by homemaker wives in childless marriages, would not be valid under this theory because any loss would have been incurred as a result of financially irrational behavior. Finally, some spouses would have no claim under this theory because they would have suffered no loss in earning capacity, but they would have a claim under current law because they would be adjudged “in need.”

176. Principle Three leaves unresolved more detailed issues of child care. One unresolved issue is deciding when children become old enough that parental care is no longer sufficiently important to override other values, such as the economically rational use of the wife’s talents and time. Nothing in the general theory of alimony can decide when the children are “grown” for the purpose of applying Principle Three. Ultimately, it must be a legislative policy choice based on values independent of those considered by this theory.
C. The Theory's Problems: Real and Imagined

1. Three False Problems

a. Shouldn’t the Divorced Custodial Mother Who Stays Home to Care for Young Children Be Entitled to Alimony On That Basis Alone?

Where the interests of the children require that the custodial parent forego work to care for them, that parent will, of course, need support. When a support payment is based on the children’s needs, it is child support and not alimony, regardless of who receives it. This is why payments to the child’s doctor or his school can be child support. Current law does not follow this formal principle, but instead treats the custodial mother of small children as if she has a separate alimony claim. As applied, however, there is no difference, because current law also provides that alimony for the stay-at-home custodial parent only continues so long as the children’s needs require it.\(^\text{177}\) Calling such payments to the custodial parent “alimony” only confuses thinking on the subject.\(^\text{178}\) The custodial spouse who stays at home with her children might also be entitled to true alimony for other reasons, but that claim would be based on the principles developed here and not on her status as a custodial parent.\(^\text{179}\)

b. Shouldn’t the Standard of Living During the Marriage, and the Length of the Marriage, Influence the Amount of Alimony?

Current law typically considers both the standard of living during the marriage and the length of the marriage in fixing the amount of alimony.

\(^{177}\) See I. ELLMAN, P. KURTZ & A. STANTON, supra note 2, at 277-83.

\(^{178}\) The conceptual and practical problems that result from treating the custodial parent’s needs as establishing a claim that is separate from the child support obligation are well set forth in J. EEKALAAR & M. MACLEAN, supra note 2, at 25-28. Like me, Eekalaar and Maclean would include the custodian’s needs in a more general claim for family maintenance, available only when there is a custodial parent. Id. at 105-07. They remain skeptical, however, of spousal claims apart from those arising from the care of children. They are most comfortable with claims based on benefits conferred by one spouse on the other. While suggesting the possibility of claims based on “disadvantages undergone,” they view this as a very small category. Id. at 141-42. They reject altogether claims based on lost earning capacity. Id. at 145-46.

\(^{179}\) This principle helps avoid the theoretical confusion in the current law. While some custodial parents currently get some alimony because of their custodial obligations, fixing the exact amount can raise a peculiar puzzle. It is sometimes said that the children are entitled to share in their father’s economic success, even though it occurs after the marriage has ended, while the mother has no claim on her former husband’s new wealth. See, e.g., Colizoli v. Colizoli, 15 Ohio St.3d 333, 336, 474 N.E.2d 280, 283 (1984). Yet it is an illusion to expect the mother to live at a different economic level than the children in her custody. Since the custodial parent and her children are one economic unit, the amount of child support must be fixed on the basis of the needs of all of them. In calculating the amount of the father’s obligation to meet those needs, one would also take into account the mother’s resources, including any entitlement to alimony she may have on the basis of her reduced earning capacity.
mony.\textsuperscript{180} Judges often consider the length of the marriage in deciding whether the claimant is entitled to alimony at all.\textsuperscript{181} On the other hand, there is no accepted theory explaining why these factors should count, and their treatment is hardly consistent.\textsuperscript{182} Although the theory advanced here does not separately consider the length or luxury of the marriage, these factors will often influence the outcome, and in a more predictable, principled fashion than under current law.

Where the wife's claim is based on a loss in earning capacity arising from her performance of domestic obligations, the amount of her loss will typically increase with the length of the marriage. In a two-career marriage in which the wife has incurred no loss in earning capacity arising from sharing behavior, there will be no claim even though the marriage lasted for a long time. These results follow from the theory, and probably accord with most people's instincts regarding the relative merits of the two claims. Current law, which simply makes the length of the marriage a factor to consider, offers no explanation for enhancing the claim in one case but not the other.

The standard of living during the marriage is not directly relevant under the theory offered here, but may be reflected nonetheless if enhancement in the husband's income results from the wife's investment. The two categories might be correlated: That is a wife might be more likely to sacrifice her earning prospects to enhance her husband’s when he has good earning potential. But this is sheer speculation and any correlation will be far from perfect. A broader rule, in which the wife's claim would always grow with her husband's income, would be difficult to justify. The wife presumably benefited from her husband's higher income during the marriage, and we have no basis for giving her a continuing claim to it without making a judgment that the divorce is his fault.

We allow the wife a claim when she sacrifices her earning capacity to advance her husband's. But where one spouse enters the marriage with a great fortune or a lucrative talent, and the other has no similar asset, we have a different situation. Divorce law cannot remedy all of life's inequalities, and it is perfectly reasonable for such a couple to leave their marriage as unequally endowed as they entered it. This principle means that divorce will have far graver financial consequences for the

\textsuperscript{180} See, e.g., UNIF. MARRIAGE AND DIVORCE ACT § 308(b)(3), (4) (1970).

\textsuperscript{181} See, e.g., Lindsay v. Lindsay, 115 Ariz. 322, 328, 565 P.2d 199, 205 (Ct. App. 1977); see also cases collected in Annotation, Excessiveness or Adequacy of Amount of Money Awarded as Permanent Alimony Following Divorce, 28 A.L.R. 4TH 786, 813-14 (1984).

\textsuperscript{182} For example, while some cases allow the homemaker wife permanent alimony where the marriage is long term, others allow her only transitional assistance.Compare In re Marriage of Morrison, 20 Cal.3d 437, 573 P.2d 41, 143 Cal. Rptr. 139 (1978) with Mori v. Mori, 124 Ariz. 193, 603 P.2d 85 (Ariz. 1979).
less affluent spouse, who will cease to benefit from the fruits of the other's fortune or talents, which were presumably shared during the marriage. But nothing in our analysis suggests that the less affluent spouse should have a lifetime claim upon the other's assets regardless of whether the marriage survives.

The theory advanced here ensures that the wife suffers no loss compared to the standard of living she could have provided for herself, when her efforts enhance her husband's income. This right to recover the full amount of her lost earning capacity may yield a substantial claim in a long-term marriage in which the impact on earning capacity is great but it will provide a smaller claim the shorter the marriage. The theory thus explains the interaction between the length of the marriage and the husband's income. The same interaction sometimes occurs under current law without explanation when courts allow the wealthy man's wife a greater claim to the marital standard of living in a long-term marriage.\footnote{Although statutes do not require this result, they usually allow the court to consider both the length of the marriage and the standard of living during it.}

c. Shouldn't Wives Without Talent Get More Support Than Those With Talent?

Under this theory, the spouse who never had significant earning potential to lose will inevitably have a smaller claim than the spouse who did. The high school dropout will receive less alimony than the law school graduate who stayed home with the children, because the dropout's earning capacity would not have advanced as much if she had spent the same time in the market. The result is perverse if one continues to believe that a purpose of alimony is relieving need, without regard to the source of that need, because the high school dropout, other things being equal, will undoubtedly be in greater need. This result, however, is no surprise because the theory advanced here rejects the proposition that everyone has a lifetime obligation to insure his or her former spouse against need.

This result for untalented spouses is unfair only if one believes that income differentials themselves are unfair, that the lawyer really should not be better off than the high school dropout. The lawyer-wife invested more in the marriage and is therefore entitled to higher compensation. If one thinks that those with the talent to pursue more lucrative work reap a windfall they do not deserve, then one will object to this result as well. But no more windfall results from compensating the lawyer and the high school dropout in proportion to their lost earning capacity than if each had entered the market rather than domestic work and earned their different incomes directly. Each now receives compensation only for what
she gave up, and that can be unfair only if one believes that the lawyer-wife never had a real entitlement in the first place to her larger earning capacity.

In any event, even if one sympathizes with economic egalitarianism, traditional alimony rules are a poor tool to achieve it. Consider two women, divorced at thirty, neither of whom ever had ambitions or talent beyond clerking or waitressing. Both can now go back to such work with little loss in their earning capacity resulting from their ten years of domestic labors. The theory advanced here would give neither a significant claim. Current law usually provides a larger claim to the woman whose former spouse has more means. If one of these women had married a physician and the other a factory worker, the first would receive a substantial award and the second very little. This is hardly an egalitarian result.

Nor is that result easy to justify on other grounds. Why should the woman who has already benefited from ten years of marriage to a wealthy husband continue to share his income when they divorce, if that is unnecessary to compensate her for her own lost earning capacity? Why especially, given that we will not attempt to assess fault for the divorce? The former physician’s wife made a more fortunate financial choice of mate than her sister, and benefitted from it during the marriage. Her allocation of marital property will almost surely exceed her sister’s on divorce, but current law really provides no explanation for why she should also continue to receive a share of her former husband’s income. Any effort to assist the needy but untalented must be general in scope, not limited to giving the recently divorced a claim against their former spouses.

Directing attention away from the husband’s wealth not only rejects claims of “need” that cannot be justified, but also offers some positive results. Requiring the primary wage-earner to pay his former spouse according to her lost earning potential may lead him to value her labor more rationally than under the current system. Current law, which ties the alimony claim more to the husband’s resources than the wife’s losses, has the perverse result of making the value of her labor depend on his earning potential rather than hers. A man married to a lawyer or doctor should pause more before expecting her to tend to his domestic needs, than if he had married a high school dropout. But there is certainly no reason to charge the factory worker a lower price than the physician for the domestic labors of his lawyer-wife. Regardless of his own earning power, the greater the opportunity a husband expects his wife to forego for their marriage, the greater a stake he ought to have in its success. Thus the theory’s treatment of claims by talented and untalented spouses is in fact not a weakness but a strength.
2. Two Real Problems

a. The Required Calculations Will Be Difficult

The most important determination under this theory is the difference between the earning capacity the claimant would have achieved if she had invested her time in marketable skills, and her actual earning capacity upon divorce. Actual current earning capacity is relatively easy to establish, but determining the earning capacity she would have had may be very difficult. In fact, in some sense it is impossible even in theory, as is any "might have been."\footnote{\textsuperscript{184}}

Consider a relatively easy case. The claimant wife was a twenty-five year-old schoolteacher at the beginning of the marriage; when they divorce fifteen years later, they live in a different state as an accommodation to her husband’s career, where her teaching certificate is not recognized. She has not taught for twelve years. The only teaching jobs available to her are substitute positions of uncertain tenure and relatively low pay. It is easy to determine what she would now be earning if she had remained in her original school system and worked her way up in its civil service seniority ladder. But is this really the correct number to look at? She might claim she would have obtained a principal’s position if she had remained at her original work. Her husband might claim she would have been one of the many teachers to “burn out” and wouldn’t be in the schools at all. Either or neither might be right and it will never be possible to say with certainty. Other cases will be even harder. Consider the girl who marries right out of high school and divorces fifteen years later when she is thirty-three. If she had never married, would she now be a waitress, a movie star, or a law professor? We can guess of course, and usually we can confidently establish a somewhat narrower range of possibilities than that. But we can never be very sure. We can never establish what a particular individual would actually have done. Of course, no adjudication is ever entirely certain, but perhaps there is a difference between the residual uncertainty that usually remains in establishing an historical fact, and the uncertainty inherent in determining a “what if.” The first uncertainty results entirely from limitations in the factfinding process: a real “fact” exists out there, if we can find it. The second seems more fundamental because we are not trying to establish what the real fact is, but what it would have been if the world had been different.

Nonetheless, rules of law often call for speculative measurements although they may also reject them when they are too speculative. For

\footnote{\textsuperscript{184} Other writers have rejected making this difference part of an alimony claim on the grounds that this kind of lost earning capacity is beyond calculation. J. Eekalaar & M. Maclean, supra note 2, at 145-46}
example, the standard measure of contract damages calls for putting the successful plaintiff in the position he would have been in had the defendant performed—a “what if” measure that the law sometimes then rejects as too speculative to provide the basis of an award. We may worry that the measure of alimony suggested here would often fail an analogous test, a problem if we have no defensible substitute measure.

In seeking to determine what earning capacity the alimony claimant would have if she had not married, we can combine statistical data suggesting average outcomes in like cases with evidence particular to the claimant. Any such system will inevitably be off the mark in some cases, but the use of statistical data to approximate probable results—and its attendant risk of error—is commonly accepted in other fields of law. Our confidence in such data depends in part on the quality and quantity of the statistical evidence available, and in part on how closely the case at hand resembles the cases for which we have good data.

The difficulties involved in proving lost earning capacity are significant but not fatal. Even crude approximations of theoretically defensible criteria are probably better than intuitive estimates of what is “fair” under a system lacking established principles of “fairness” in the first place. Moreover, the establishment of rules clearly specifying the facts that are relevant in judging alimony claims, and the precise impact of

185. See E. Farnsworth, supra note 39, § 12.15, at 881-88. For a fascinating discussion of such “counterfactual” hypotheses, as they arise in the context of establishing causation in the criminal law, see L. Katz, Bad Acts and Guilty Minds 226-35 (1987).


187. A major issue is whether one can find data specific enough to be meaningful. For example, data on the average earnings of high school graduates across the nation will be less useful in particular cases than data on the average earnings of B students graduating from a particular high school in a particular year. This will sometimes require educated guesses which rely on the statistics that are available. For example, it has been estimated that women who remain out of the labor market to care for their children see their earning capacity depreciate approximately 1.5% per year. Mincer & Polachek, Family Investments in Human Capital: Earnings of Women, in Economics of the Family 397, 411, 415 (T. Schultz ed. 1974). Victor Fuchs has recently assembled most of the data available on this subject to show that the gap between men and women is largely a product of women's larger share of parental responsibilities. V. Fuchs, supra note 139, at 42-74.

188. Actually, that is not quite how the current system operates in practice. Judges, themselves concerned about the inconsistency that can result from legal rules which effectively grant them broad discretion to do what is “right,” have increasingly adopted rules of thumb that in practice supplant the statutory criteria that supposedly govern such cases. Trial courts now often use detailed charts setting forth the appropriate award, based largely on the obligor spouse's income, to determine the amount of alimony. See I. Ellman, P. Kurtz & A. Stanton, supra note 2, at 277-79. However, while these judicial solutions have the virtue of consistency, they provide no principled explanation of their result.
these facts on the amount of the claim may itself motivate studies that increase the amount of relevant data. In the end, precision is not obtainable. The determination of alimony claims, even more than most legal questions, will necessarily depend, at least in part, upon the rough justice of trial judge discretion. That is, in fact, one of the lessons of this inquiry. But we are still better off knowing what we should be doing, even if we cannot do it perfectly, than not knowing at all.

b. Claims Based on Lost Marriage Prospects May Have To Be Addressed

Current law, with its vague and flexible standards, gives trial judges the ability to adjust the parties' financial relations in a way that sometimes operates to relieve the extraordinary financial problems that one of the spouses might otherwise face. A new set of rules based on our theory would limit this power, directing decisions more narrowly. In general, the results would be more defensible as well as more consistent. Some cases in which alimony is eliminated or reduced will be problematic, however. These cases derive largely from the gender-based differences in the remarriage prospects of divorced men and divorced women.

The theory focuses on losses in earning capacity that result from sharing behavior in marriage, and does not allow recovery for losses resulting from the more general societal patterns that leave many divorced women with poorer prospects for remarriage than their former husbands. These gender-based losses are significant for women whose talents and preferences are consistent with the traditional wifely role. The woman who wants to be a traditional wife—a homemaker, a mother, a nurturer, a helper—has a great deal to lose from divorce that the theory does not make claimworthy. She never sought to develop market talents, and any effort to describe her loss in terms of earning capacity will not ring true. Her real loss is the marriage itself. That loss is significant because she may never again have as good a chance to attract a suitable mate. At least some of these women will be without fault in the breakup, except in their poor choice of husband.

The seventeen-year-old girl who marries straight out of high school might be one example of this pattern. The difficulty in establishing the amount of her lost earning capacity may not be entirely a problem of proof. Where she really never sought or considered a market career because she preferred the traditional wifely role, examining her claim purely in earning capacity terms may be conceptually flawed. Her real loss is her severely reduced prospects for making a successful marriage. We may believe that such women will constitute an increasingly smaller percentage of the population, but they will remain a significant group for some time, and their situation surely cannot be ignored by the law of
alimony. In fact, it is unlikely they will disappear. For women in higher socioeconomic classes, career opportunities will always offer attractive alternatives to a domestic life. For less well-educated women that is less true. This means that gender-based differences will be more important for women in the lower economic classes, and the theory’s failure to deal with this source of postmarriage difficulty will leave them disproportionately burdened. We might therefore conclude that the theory has serious shortcomings.

The solution to this problem is not easy, and requires a different theoretical exercise than the one advanced here. Although some remedy is probably necessary, we may conclude that the obligation is society’s and not the former husband’s. Beyond that, there are difficult questions in establishing the amount of such claims, and in determining which wives should be entitled to them. If all divorced women are not equally burdened by this problem, then presumably all should not have the same claim.

This Article establishes that alimony claims against one’s former spouse can be justified on the basis of the loss of earning capacity that derives from the way in which the spouses conducted their marriage, and it offers a theory setting forth the contours of such claims. Additional claims based on women’s differential decline in marriageability will not be alimony claims unless one can establish a basis for making the women’s former husbands, rather than society in general, liable to meet them. If a theory justifying this result is developed, it will supplement rather than supplant the one offered here.

III

Conclusion

Modern law has no theory of alimony to explain why someone should be obligated to help support a former spouse. Contract and partnership principles, although appealing on many grounds, ultimately cannot fill this gap by providing a coherent rationale. An alternative theory, based on a larger societal policy to encourage sharing behavior in marriage, provides a basis for making alimony awards that compensate a spouse for losses in earning capacity flowing from the allocation of marital duties. This alternative theory explains why one spouse may have a claim against the other, and yields a more systematic and certain set of rules for adjudicating claims of alimony than that provided by existing law. It does not address whether the law should also recognize alimony awards against former spouses grounded on the special harms that women may suffer as a result of gender differences in the prospects for remarriage following divorce.