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Should *The Theory of Alimony* Include Nonfinancial Losses and Motivations?

*Ira Mark Ellman**

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* Professor of Law, Arizona State University. I am grateful for the assistance of my colleagues David Kaye, Jeffrie Murphy, Janet Smith, and Laurence Winer.

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I. INTRODUCTION

I am flattered by Professor Schneider's careful critique¹ of *The Theory of Alimony*² (*The Theory*). He raises some important points, which allows me both to refine and to clarify *The Theory's* arguments. My plan, however, is not to deal here with Professor Schneider's criticisms one by one. I will instead focus on some basic conceptual questions Professor Schneider raises—important questions that share a single broad theme.

In an echo of his well-known article on the decline of moral discourse in family law,³ Professor Schneider suggests that a central conceptual flaw in *The Theory* is its acceptance of the modern view that divorce remedies ought not depend upon our moral assessments of the spouses' marital conduct.⁴ Consequently, an adequate theory must, as he would put it, consider the parties' "moral relations" in fashioning the remedies available upon divorce.⁵ This theme appears to animate many of his more specific criticisms: that financial incentives have little to do with marital behavior, that the parties' nonfinancial motivations should matter in assessing an alimony claim, that the exchange during the marriage must be considered, that nonfinancial gains and losses must be taken into account, and, that by compensating only for losses arising from financially rational choices, *The Theory* undervalues other, equally important marital motivations and thereby encourages a "materialistic" attitude toward marriage.⁶

In his critique, Professor Schneider fully exploits the luxury

1. Schneider, *Rethinking Alimony: Marital Decisions and Moral Discourse*, 1991 B.Y.U. L. REV. 197.

2. Ellman, *The Theory of Alimony*, 77 CALIF. L. REV. 1 (1989).

3. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803 (1985).

4. Traditional law made fault relevant both to whether a spouse could terminate a marriage, and to the financial remedies available upon divorce. Fault, in this sense, meant responsibility for the breakdown of the marriage. When Professor Schneider talks of the moral relations of the parties, he refers to a wider inquiry, I believe, than would be made under this traditional concept of fault. But some of the spousal conduct he might take into account would also fall within the more narrow and traditional definition of fault. See Schneider, *supra* note 1, at 243-55.

5. *Id.* at 253.

6. *Id.* at 217-25, 243-55.

allowed critics to suggest problems without offering solutions. While arguing that the exclusion of moral factors leads *The Theory* to embrace unjust results in particular cases, he never tells us how to fashion defensible principles that take such assessments of fault into account. I will emulate his model. I will agree that a more perfect theory would consider the parties' nonfinancial relations, even though I will not offer any hope of devising such a theory.

Part II of this paper summarizes both *The Theory* and Professor Schneider's critique. It discusses the role of incentives, highlights *The Theory's* core assumptions, and explains why much of Professor Schneider's critique follows from *The Theory's* exclusive focus on financial losses and motivations. Part III concedes that *The Theory's* exclusive focus on financial losses and motivations necessarily results in an occasional failure to provide adequate incentives for the behavior it intends to encourage. But it also shows that *The Theory* avoids a more serious flaw that Professor Schneider's analysis suggests it may make: that of creating disincentives for that behavior. Lastly, part III examines in detail both the rationale for, and the effect of, *The Theory's* exclusion of nonfinancial factors.

II. SUMMARY OF *The Theory* AND PROFESSOR SCHNEIDER'S CRITIQUE

A. The Theory's Main Points

Professor Schneider has done an excellent job of summarizing *The Theory*,⁷ but clarity nevertheless requires me to restate some of *The Theory's* central points. First, modern divorce law provides no satisfactory explanation for the existence of an alimony remedy even though almost everyone agrees such a remedy is necessary. The Uniform Marriage and Divorce Act's⁸ requirement that the claimant be in need was originally adopted in many states,⁹ but almost every jurisdiction has since held, implicitly if not explicitly, that alimony awards should be made in at least some cases even when there is no need.¹⁰ At the same

7. Schneider, *supra* note 1, at 198-202.

8. UNIF. MARRIAGE AND DIVORCE ACT § 308, 9A U.L.A. 347 (1987).

9. *Id.* at 147.

10. *E.g.*, *In re Marriage of Francis*, 442 N.W.2d 59, 64 (Iowa 1989) ("reimbursement" alimony should be granted on basis other than need); *De La Rosa v. De La Rosa*, 309 N.W.2d 755, 758 (Minn. 1981) ("reimbursement" alimony should be granted on basis

time, courts have recognized that need alone cannot justify imposing a lifetime obligation to support one's former spouse.¹¹

"Need" has never been a satisfactory explanation for alimony, since it begs the question of why the needy person's former spouse, rather than friends, parents, children, or society at large, should be liable to meet that need. This is especially true where the law allows either spouse unilaterally to end the marriage, as it does under the Uniform Act and in the great majority of American states.¹² While some have offered "contract" or "partnership" concepts to explain alimony, these concepts also prove unsatisfactory. Careful examination shows that basic contract or partnership principles simply do not yield an alimony remedy when applied to the facts of many divorces in which alimony is thought appropriate by nearly all observers. Professor Schneider does not appear to take issue with these observations.¹³

When *The Theory* moves from exposing the conceptual gaps in current law to filling them, however, Professor Schneider clearly has doubts. *The Theory* accepts as a given that assessments of marital fault should not bear on the financial arrangements upon divorce. Only a small minority of states today allow fault generally to enter into the determination of whether and how much alimony should be due, even though a greater number (but still a minority) allow one particular form of marital misconduct—adultery—to affect the outcome in any one of a variety of ways.¹⁴ This rejection of fault is part of the puzzle of modern alimony law, for we must explain how one can justify requiring one spouse to pay the other alimony in the absence of any fault assessment, especially since, as *The Theory* shows, analogies to contract or partnership concepts cannot provide an explanation. What then is the explanation?

The method *The Theory* adopts to solve this problem has

other than need).

11. *E.g.*, *In re Marriage of Wilson*, 201 Cal. App. 3d 913, 247 Cal. Rptr. 522 (1988) (alimony terminated for disabled former spouse in need since her former husband is not responsible for her need).

12. I. ELLMAN, P. KURTZ & K. BARTLETT, *FAMILY LAW: CASES, TEXT, PROBLEMS* ch. 2, sec. C (2d ed. 1991).

13. While he would not reject the "possibility that contract might be a basis for a reformed law of alimony," he finds "much to agree with" in my criticisms of it, Schneider, *supra* note 1, at 202 n.11, and never offers any defense of it himself. As for the inadequacy of "need" as an explanation, see *infra* note 16.

14. See I. ELLMAN, P. KURTZ & K. BARTLETT, *supra* note 12, at ch. 3, sec. C2a.

two essential attributes that survive even Professor Schneider's scrutiny. The first is that any theory of alimony must start by requiring a finding of *loss*, not a finding of *need*. That need cannot work as the foundation of alimony should be obvious to anyone who reads the cases.¹⁵ But can *loss* work?

Certainly *loss* has a more reassuring history as a legal concept central to findings of liability. To go the full distance, of course, we must define what kind of *loss* is compensable, and we must explain why the claimant should be entitled to shift that *loss* onto his or her former spouse. But explication of *loss*-shifting rules is surely a familiar exercise to the law. Most of *The Theory* is an effort to complete this exercise. It is a first effort—and some of it is undoubtedly imperfect—but I see nothing in Professor Schneider's critique that casts doubt on the basic point that our thinking on alimony will be advanced if we shift the inquiry from *need* to *loss*.¹⁶

15. See *supra* notes 10 & 11 and accompanying text.

16. Professor Schneider seems to agree that "[i]t is not . . . need [that] gives rise to obligation." Schneider, *supra* note 1, at 248. He does briefly suggest, however, that traditional law provides an explanation for alimony in that the obligation arises from having entered a "special relationship"—marriage—and then "behaving in some kinds of ways." What I assume he refers to here by "traditional law" is the law prior to the modern no-fault reform. As to that law, he is, of course, correct, as *The Theory* itself agrees. The puzzle *The Theory* seeks to solve, however, is to find an explanation for alimony in the more modern no-fault world—a world in which the alimony claim in theory does not depend upon either spouse having behaved "in some kinds of ways." Perhaps he means to suggest that even in the no-fault world the success of alimony claims should depend upon the parties' conduct, so that, for example, a claim would be good only if the spouses "have come by mutual consent to rely on each other in special ways." *Id.* at 248. Such an approach, of course, would make the parties' conduct during the marriage, not their need after it, the determinative fact in establishing an alimony claim. To evaluate this suggestion one would have to have a more complete proposal as to the kind of conduct that would give rise to a claim, and why it should matter. No guidance on this point can be had from modern no-fault laws modeled on the Uniform Marriage and Divorce Act, which does not contemplate any inquiry into spousal conduct in evaluating alimony claims. The suggestion has the sound of contract to it, but Professor Schneider seems to share much of my skepticism about the value of the contract analogy. Schneider, *supra* note 1, at 202 n.11. *The Theory* provides an explanation for making certain forms of spousal conduct the basis for judging alimony claims, but presumably Professor Schneider means to suggest an alternative to *The Theory*. Without more to go on, it is hard to know just what to make of Professor Schneider's suggested alternative, but surely it is clear, despite the implication of his comments, that *existing law* does, in fact, fail entirely to explain when and why one spouse should be liable to meet the other's post-marriage need, even if Professor Schneider is correct that an explanation (other than *The Theory*) can be developed.

Part III of this paper will revisit some of *The Theory*'s conclusions about the kinds of losses that should be compensable by a remedy against one's former spouse, and the ways in which they should be measured.

The second essential attribute of *The Theory's* method for avoiding fault inquiries or flawed contract analogies is in deciding how losses should be allocated. *The Theory* asks about the kind of behavior society wishes to encourage in marriage and attempts to fashion an alimony remedy that eliminates the disincentives that would otherwise arise for such behavior. This contrasts with the usual inquiry which asks about what is "fair." Unlike *The Theory's* approach, assessments of fairness lead inevitably to traditional inquiries into marital fault or to flawed claims that one party has breached an agreement with the other.

The Theory's approach may seem rather directive, but any system of alimony, to the extent it provides financial consequences knowable by the parties, will provide incentives for some behavior and disincentives for other. In that sense, *The Theory's* approach merely acknowledges reality by overtly directing our attention to behavior we wish to encourage. Nonetheless, the principle could be rather expansive. Do we wish to encourage home cooking? sharing housework? frequent sex? Some method for narrowing the inquiry obviously is needed. The method followed by *The Theory* emulates a conventional economic analysis of law. It asks what would happen if we had no alimony remedy at all, but instead left the losses where they fell at the time of divorce. In asking this question, *The Theory* makes one crucial definitional decision: only *financial* losses are examined.

The Theory observes that there are cases in which one party would be at a financial disadvantage at divorce, in the form of reduced earning capacity, as a result of behavior during marriage that was for the benefit of the marital community. For example, a wife might forego earning opportunities during the marriage by moving to a new city so that her husband can increase his earnings by a larger amount. Or she might forego earning opportunities in order to care for the couple's children. When such "marital sharing behavior"—behavior that yields an aggregate benefit for the entire marital community so long as the marriage remains intact—leaves one spouse with a continuing financial loss (in the form of reduced earning capacity), *The Theory* calls for a remedy in alimony if the marriage ends, so as to eliminate this potential penalty for sharing behavior.¹⁷

17. There are obviously many questions that can be raised about the definition of marital sharing behavior. That question, discussed at length in *The Theory*, is also revis-

Thus, the purpose of alimony under *The Theory* is to eliminate the financial disincentives for marital sharing behavior that would be present in the absence of a remedy, rather than to provide positive incentives.¹⁸ If the law provides that the claimant be "made whole"—put back in the position she would have been in had she not engaged in marital sharing behavior—the disincentive that would otherwise be present is eliminated.

The principle is actually rather modest in scope. The policy upon which it is based would seem, at least at first, to be broadly acceptable: spouses otherwise inclined to conduct themselves during the marriage in a manner that benefits the marital community ought not be discouraged from acting that way for fear that, if the marriage were to dissolve, they would be left with all of the financial loss arising from their decision. This is especially true when, for example, the wife has a loss while her husband has no loss, or even reaps a gain (as would be the case where the wife gives up her employment to advance her husband's).¹⁹ Having acknowledged that the purpose of alimony under *The The-*

ited below. See *infra* sec. III(D).

18. This is one reason it is not quite right for Professor Schneider to describe *The Theory* as providing "rewards" for financially rational behavior but not for other behavior. Schneider, *supra* note 1, at 242. It eliminates a financial penalty that would be imposed on the spouse who sacrifices earning capacity for the marriage, if there were no alimony remedy. But while it removes this penalty that would otherwise arise, the claim allowed by *The Theory* does not make that spouse better off for having made the sacrifice, as compared with the outcome if the sacrifice had not been made. Thus, *The Theory* offers no rewards of its own; it merely eliminates a possible loss. The only financial reward a spouse might achieve from this financial sharing behavior is the reward that would arise within the marriage whether or not there was an alimony remedy.

Moreover, the loss made compensable by *The Theory* is one that would be incurred by the sharing spouse as a result of divorce, and only in the case where the other spouse has a financial gain attributable to the claimant's sacrifice. The whole point is to free the spouse who contemplates a financial sacrifice that is beneficial to the marriage from the concern that she alone will pay the price for the beneficial behavior if the parties divorce. This allows the spouses to focus on the impact of their decisions on the intact marriage.

In this sense, *The Theory* does not "reward" any behavior. Of course, Professor Schneider is correct if what he means is that *The Theory* does differentiate between different kinds of losses, since some losses are compensable and others are not. Part III of this paper reviews in some detail the rationale employed by *The Theory* in defining compensable losses. It is worth noting here, however, that Professor Schneider's paper may leave some readers with the misunderstanding that *The Theory* compensates only losses that were financially rational. Yet the most important claim allowed by *The Theory* is for earning capacity losses incurred to care for the couple's children, a claim allowed even though the financial sacrifice is not financially rational. See, e.g., *infra* sec. III(D)(1).

19. Obviously, the appeal of such a theory will turn in part on precisely how it defines "marital sharing behavior" (a loss which is compensable in alimony) and precisely how it measures the loss, both of which are reexamined in part III.

ory is to eliminate financial disincentives for marital sharing behavior, we must ask whether financial incentives have any impact on marital behavior.

B. Are Financial Incentives Relevant to Marital Behavior?

1. The incentive rationale

Professor Schneider suggests that because people's marital behavior is largely influenced by nonfinancial preferences and by assumptions that their marriage will endure, financial incentives play too small a role to matter.²⁰ He also suggests that the system of alimony advanced by *The Theory* is too complex for people to understand it well enough to influence their behavior anyway.²¹

These concerns are overstated. The incentive rationale does not require a belief that the potential financial consequences of divorce dominate marital decisionmaking or a detailed spousal understanding of *The Theory* any more than a deterrent rationale for criminal law requires a belief that legal consequences are the dominant reason most people do not steal, or that most people know the difference between theft by false pretenses and larceny by trick. The required assumption is much more modest.

Consider whether people's behavior would be affected at all if no alimony were available upon divorce. In other words, would any substantial number of wives²² be influenced in their decision whether to sacrifice their earning capacity, in reliance on their husband's sharing his earnings with them, if the law provided such a wife no remedy in the event of divorce? Without data we can only speculate. But given the high divorce rate, it seems unlikely that these wives would give the chance of divorce no weight at all in deciding whether to sacrifice some of their financial independence. The weight they do give it will, of course,

20. Schneider, *supra* note 1, at 202, 209-14.

21. *Id.* at 206.

22. As in *The Theory*, most of my examples employ female claimants and male obligors, in recognition of current social reality, in which alimony claims are overwhelmingly claims by wives against husbands. Clearly, any set of alimony rules must be gender-neutral, and nothing in the analysis offered here would be affected by a reversal of the genders used in the examples. See Ellman, *supra* note 2, at 4 n.2. This point is critically important, since the incentive structure envisioned by *The Theory* does not, of itself, encourage different marital roles for men and women. On the other hand, it would simply be inaccurate to fail to observe that, on average, men and women today have different stakes in rules governing alimony, given the existing social realities. Examples that reflect this reality, therefore, help to illuminate the impact of any proposed rule.

vary from case to case. The perceived risk as well as the wife's tolerance of risk will vary, and other motivations also will play an important role.

None of this means, however, that *The Theory's* underlying incentive premise is wrong, for it would still be true that in the absence of any alimony remedy—if the law simply left losses where they fell—the risk of financial loss upon divorce would be a disincentive to sharing behavior in marriage. Even though that disincentive would be overcome by other motivations in many individual decisions, it would necessarily be enough to tip the balance against sharing in others. A spouse with a developed career that would suffer from an interruption would probably weigh the possible loss more heavily than one who had only vague career plans. The spouse who harbors doubts about the long-term prospects of her marriage would weigh it more than the spouse who did not. An incentive rationale for alimony hardly requires that all, or even any, spouses treat the contingent consequences upon divorce as determinative of their marital decisions. It is enough that the remedy will avoid distorting disincentives that discourage spouses from engaging in sharing behavior in marriage, even if such distorting incentives would matter more in some marriages than in others.

We may soon learn something about the effects of financial incentives in family law from our ongoing experience with child support. It was once thought that child support was either impossible to collect effectively, or that the cost of compelling compliance would be so great as to make effective collection impractical. David Chambers' pioneering work²³ taught us that neither assumption is true. Fathers complied with support orders far more reliably when confronted with aggressive enforcement policies. Indeed, the additional support collected far exceeded the cost of enforcement.²⁴ Federal policy has now prodded the states into adopting aggressive child support enforcement programs,²⁵ and these efforts have taken place alongside scientific developments that make it fairly simple, in most cases, to establish paternity.²⁶

The consequences of this progress are interesting to contemplate. Imagine a world in which every man knows that he will be

23. D. CHAMBERS, *MAKING FATHERS PAY* (1979).

24. *Id.* at 79-104.

25. See I. ELLMAN, P. KURTZ & K. BARTLETT, *supra* note 12, at ch. 4, sec. C2.

26. Kaye, *DNA Paternity Probabilities*, — FAM. L.Q. — (forthcoming, 1991).

financially responsible for any child he fathers—that, as a practical matter, it will be virtually impossible for him to escape financial responsibility for the child, whether or not he marries the child's mother. Would that make men more careful about birth control? Might it even reduce the incidence of out-of-wedlock births? I find such consequences entirely plausible, even though nonfinancial motivations ordinarily drive the relevant acts.

2. *Limits on The Theory's incentive rationale*

While I believe that financial incentives do, in fact, influence marital behavior, I also recognize the limits of *The Theory's* incentive rationale. The certainty of consequence is important to its incentive effect.²⁷ The potential effect of incentives is seen most easily by comparing a system with no alimony to one in which clear criteria for awarding alimony are consistently applied and alimony is in fact collected in every case meeting those criteria. If existing alimony law invests great discretion to trial judges to apply very fuzzy criteria for both eligibility and amount, or is unreliable in collecting awards, we might expect it to have little impact on behavior. Perhaps we are not used to the idea of alimony awards having an impact on people's behavior because our present alimony system is so uncertain that it may have very little impact. Any set of legal rules intended to implement *The Theory* should, therefore, attach considerable weight to certainty of results.²⁸

Another limit, as Professor Schneider correctly observes, is that people are generally ignorant of the details of the law. However, as previously observed, this is unlikely to matter to the basic proposition, for people will still distinguish between a system which provides no alimony and one which does. Even with today's foggy no-fault laws, most people still seem to have the idea that marriage may create financial obligations to one's spouse

27. The analogous principle in criminal law has been shown by Ehrlich, *The Deterrent Effect of Capital Punishment: A Question of Life or Death*, 65 AM. ECON. REV. 397 (1975), who concludes that the deterrent effect of a criminal sanction is related to the certainty with which it will follow from the crime. See also Lempert, *Organizing for Deterrence: Lessons from a Study of Child Support*, 16 LAW & SOC'Y REV. 513, 516 (1982).

28. This observation also suggests caution in resolving the difficulty in making the measure of loss suggested by *The Theory*. For example, resolving it by relying on trial judge discretion might undermine the incentive rationale that justifies *The Theory* in the first place.

that are not easily avoided, even upon divorce, and people sometimes resist marriage as a result.

On the other hand, Professor Schneider's observation would surely be relevant to any effort to fill in the details necessary to implement *The Theory*. My original paper tries to work out the details in a manner consistent with *The Theory's* basic rationale: the elimination of disincentives to sharing. But clearly, the further into the details we get, the more attenuated is the incentive rationale, and therefore the more weight should be given to other policies, such as ease of administration. Theoretical purity must yield at the margins to other considerations in the process of transforming *The Theory* into law.

Finally, the fact that financial incentives are only one kind of incentive affecting marital behavior, and usually not the most important kind, means that the behavioral effects of the law are necessarily limited. This observation is hardly unique to family law; no part of the law succeeds in controlling all of the factors that influence human behavior. Legal rules can encourage or discourage acts, but they cannot effectively compel or suppress them in every case, and this may be just as well.

The law of alimony shares this general impotence. A wife may have an emotional revulsion against being financially dependent. She may therefore insist on remaining in the market even though the marriage would benefit if she withdrew and even though alimony rules reliably protected her upon divorce against the risk of financial loss that her withdrawal might produce. Another wife may have a strong personal preference for being a homemaker. She might therefore willingly leave the market to care for the couple's children or to accommodate a move necessitated by her husband's career, even if she were not protected against the divorce-related financial risk of her decision, or even if the decision yielded a financial loss to the marriage itself.

In some sense, a more perfect theory would take these non-financial preferences into account, because it then could create an even more effective incentive structure, just as a more perfect law designed to discourage men from fathering children out-of-wedlock would do more than make sure they supported them if they did. *The Theory* is imperfect, even when judged against its own incentive rationale, as is the law generally.

Professor Schneider suggests that nonrational and nonfinancial factors matter so much in marriage that *The Theory's*

failure to consider them is very significant.²⁹ In considering whether this is correct, however, one must also consider the alternatives. The question is whether it is in fact possible to devise a functional law of alimony that takes proper account of the nonrational and nonfinancial goals and motivations involved in marriage, while avoiding determinations of fault. I suspect it is not. This impossibility appears to explain precisely why alimony law has no coherent rationale. On one hand, we are unable to devise defensible rules of alimony which allow us to consider the parties' "moral relations;" on the other hand, any system of financial remedies that excludes such relations necessarily produces many results that conflict with our intuitive sense of fairness. In evaluating *The Theory*, we must therefore ask two questions: 1) Is this as good as we can do if we exclude the parties' "moral relations" from the principles of alimony? 2) If it is, is that good enough—or must we accept Professor Schneider's invitation to rethink this fundamental trend in modern family law?

Part III tries to shed light on both questions. It shows that, for the most part, Professor Schneider's specific concerns about the way by which *The Theory* measures loss cannot be answered without considering nonfinancial motivations and goals—that is, that the answer to the first question may be "yes." Part III also works out more precisely just how extensive *The Theory's* "imperfections" are, to provide a basis for answering the second question. In this exercise, part III proceeds largely in terms of *The Theory's* own rationale, by asking whether *The Theory's* failure to consider nonfinancial motivations, gains and losses yields important flaws in the incentive structure it produces. Although *The Theory's* narrow focus results in an occasional failure to provide adequate incentives for the behavior it intends to encourage, it also avoids a more serious flaw, that of creating disincentives for that behavior.

III. DEFINING THE COMPENSABLE LOSS

This part is divided into four sections, which deal in turn with the four most important criteria employed by *The Theory* to define the compensable loss: it is a *reliance loss*, it is the *residual loss* a spouse is left with after the marriage has ended (without credits or debits from inequities in the exchange during

29. Schneider, *supra* note 1, at 214.

marriage), it is a *financial loss*, and it is a loss arising from *marital sharing behavior*, which is in turn defined as either child care or behavior that allows one's spouse to realize a financial gain.

A. *Only Reliance Losses are Compensable*

To identify compensable losses, *The Theory* requires that we compare each spouse's situation at the time of divorce to our best estimate of how that spouse would have done financially had there been no marriage. This comparison identifies the gain or loss that each spouse experienced from the marriage³⁰ and follows from the principle that we must look at relative *loss*, rather than relative *need*.

Once the spouses' gain or loss from the marriage has been measured, they can be compared against one another to determine if one spouse has a loss that should be reallocated to the other. Clearly all losses cannot be compensable, for the simple reason that the claim is against the other spouse, and both spouses may have suffered a loss from their marriage. A loss is compensable, in whole or part, only if the other spouse's loss is smaller, or if the other spouse has achieved a gain. Working out precisely which losses should be reallocated is dealt with under the rubric of defining marital sharing behavior, which is reexamined below.³¹ For now we focus on defining "loss" rather than on defining "compensable loss."

30. A simpler measure of gain or loss would compare each spouse's earning capacity at the end of the marriage with his or her earning capacity at its beginning. While this measure would avoid the difficult problems inherent in gauging the hypothetical earning capacity that would exist if the parties had not married, it would not actually measure the correct thing, which is the impact that the marriage had on a spouse's earning capacity. One simple example will show why. Consider the wife who leaves business school at the time of her marriage so that she can work to support her husband's education, and then never returns because she remains home with her new child when her husband commences work. When they divorce, her earning capacity may be approximately the same (in constant dollars) as it was when they married. Perhaps she worked as a secretary at the beginning of their marriage, and could return to that kind of work now. Under the simpler measure, then, she has no loss. Yet if she had not married, she would have continued in school and earned her M.B.A. and then gone on to work as a financial analyst with three times a secretary's income. So, in fact, her "marital sharing behavior"—supporting her husband's education and providing full-time care to their children—required a significant sacrifice in earning capacity. The measure employed by *The Theory* would recognize this sacrifice as a compensable loss.

31. See *infra* sec. III(D).

1. *Loss vs. need*

The Theory defines loss with a very different frame of reference than that used by existing law when it examines "need." Existing law, in order to give meaning to the concept of "need," typically compares each spouse's financial situation upon divorce to the other's; when the disparity is too large, the less fortunate spouse may be defined as "in need."³² In contrast, *The Theory* does not make a simple comparison of one spouse's income to the other's; it instead compares a spouse's outcome to an alternative (if hypothetical) outcome *for that same spouse*. This change in frame of reference follows necessarily from the shift in inquiry from "need" to "loss," since a measure of an individual's loss is necessarily a comparison between that individual's situation at two different times or under two different sets of circumstances. It should thus be clear that the two measures can produce very different results. One can be in need at the end of the marriage even though one suffered no loss from it, as loss is measured by *The Theory*. Thus, someone with little potential for increasing their earning capacity at the beginning of a marriage, for example, may have no loss if his earning capacity is still low when the marriage ends, even though he may be in need as judged against the middle-class lifestyle that his former spouse is capable of providing. One can also suffer a loss from the marriage even though one is not in "need" at the end of it. The wife who gives up a partnership at a successful law firm so that she can give more time to her children, for example, may suffer a loss in earning capacity from her marital conduct, even though she may still be able, at the end of the marriage, to earn enough as an attorney to afford a comfortable middle-class life.

We can see immediately that the shift from need to loss may have important consequences in terms of who receives alimony and who does not. Current law offers no explanation why anyone should be legally obligated to meet the needs of a former spouse when that spouse has suffered no loss from the marriage. *The Theory* finds no explanation either and therefore rejects the claim. Nor is there any reason why a loss should be left uncom-

32. Courts using this approach sometimes conclude that financially comfortable claimants are in need because they are accustomed to sharing the even greater income of their former spouse. *E.g.*, *Simmons v. Simmons*, 87 Ill. App. 3d 651, 657-61, 409 N.E.2d 321, 326-29 (1980); *In re Marriage of McNaughton*, 145 Cal. App. 3d 845, 850-51, 194 Cal. Rptr. 176, 179 (1983).

pensated just because the spouse who incurred the loss is still financially able to get by.

2. *The proper measure of the reliance loss*

Need is thus different from loss, but there are also different ways to measure loss. We wish to measure only the *financial* loss the claimant incurred from her *marital sharing behavior* (e.g., caring for the couple's children or giving up her job so that the family could move to a new location where the husband obtains more lucrative work). These two criteria, assumed for now, are reexamined below.³³ Here, we ask how to measure a loss based upon these criteria.

The Theory measures this loss by comparing the claimant's situation at divorce with the situation she would have been in had she not sacrificed part of her earning capacity for the benefit of the marital unit. That is, we ask what earning capacity she would have but for this sacrifice. This is a reliance measure of the spouse's loss.³⁴ The claimant would receive the value of this loss in money, since it is impossible to actually restore her earning capacity to her and thus eliminate her specific reliance loss.

Reliance is a better measure than expectation, which is the ordinary measure of damages for breach of contract.³⁵ To calcu-

33. See *infra* secs. III(C) & (D).

34. Compare, for example, the analogous way in which we would measure the reliance interest in the case of a builder who had incurred various costs in purchasing materials and hiring labor when the owner refuses to go forward with the contract. To protect the reliance interest we would require the owner to make good the builder's loss on these expenses, thus putting the builder in the same position he would have been in had he not acted in reliance on the contract. This contrasts with a remedy allowing him his expectation interest, which would require the owner not only to make good this loss, but, in addition, to cover the profit that the builder would have made on the project had it gone forward. E. FARNSWORTH, *CONTRACTS* 844 (2d ed. 1990).

Note also, however, that the reliance measure employed in the case of the builder covers his out-of-pocket expenses only. It does not, for example, allow him to recover for opportunities he lost—jobs he turned down—because of the contract. *The Theory*, in contrast, does include this opportunity cost in its measure of reliance. It must, if the claimant is to receive anything, because opportunity costs are typically a wife's only costs. Unlike the builder, the wife does not lay out funds as part of her reliance; she instead leaves the market and forgoes opportunities to enhance her earning capacity. Although a wife incurs this opportunity cost during the marriage, it becomes important only upon divorce, when she again becomes financially separate from her husband, no longer shares in his earning capacity, and must therefore reenter the market. While reliance damages in contract are usually limited to out-of-pocket costs, there are exceptions in which opportunity costs are also allowed. See *id.* at 843; *Dialist Co. v. Pulford*, 42 Md. App. 173, 399 A.2d 1374, 1381-82 (1979).

35. E. FARNSWORTH, *supra* note 34, at 840-41.

late the expectation measure, we would take the difference between the wife's situation at the time of divorce and the situation she could expect to be in if the marriage had continued. But of course the marriage has not continued; why then should she continue to share in her former husband's income as if it had? Expectation damages are usually allowed in contract actions in order to give the plaintiff the benefit of her bargain against a breaching promisor. We justify the remedy on the grounds that the innocent plaintiff is entitled to get what she was promised, and the breaching promisor is being required to do no more than that which he promised to do. The same justification could be given upon divorce if we had a true breach of contract action upon which to base the claimant's remedy, but *The Theory* demonstrates quite clearly that we almost never do.³⁶ The point is that we do not wish to require the alimony claimant to prove contract and breach, for few could meet such a test. In the absence of proof of breach, there can be no basis for requiring the defendant, or the former spouse, to pay expectation damages.³⁷

36. See Ellman, *supra* note 2, at 13-32.

37. This is why I believe Professor Schneider is wrong in suggesting that expectation damages are a defensible basis for calculating the claimant's loss under *The Theory*. Schneider, *supra* note 1, at 215-16. His argument is based entirely on the appropriateness of the expectation measure for breach of contract, but the contract analogy simply cannot work when you do not know which party breached, or even whether a breach occurred at all. Nor is it correct that *The Theory* should adopt an expectation measure because it seeks to "assure [the wife] an adequate return" to induce her sacrifice in earning capacity. *Id.* at 215. Such a purpose would be pointless, for as Professor Schneider himself observes, "we have no way of knowing what kind of return she would regard as minimally adequate." *Id.* The financial return required to induce such behavior will vary from spouse to spouse given the potential range of nonfinancial factors that will bear on the spouse's decision. More fundamentally, inducing spousal sacrifices in earning capacity is not *The Theory's* goal. It would really be quite mad, both theoretically and practically, to assume that this result would be the best for every couple and that therefore *The Theory* should provide for whatever financial reward it takes to induce every couple to adopt it.

The Theory's rationale is much more limited. It is simply that alimony is necessary because, in the absence of any remedy, one spouse, upon divorce, will bear all the cost of a decision made during the marriage to sacrifice earning capacity—a decision that benefitted both spouses so long as the marriage was intact. Putting the entire burden on one spouse creates a distorting disincentive for a possible decision that would yield benefit to both. Alimony can serve the function of reallocating this particular loss between the spouses in order to avoid this distorting disincentive. The behavior of some spouses will be affected when this distorting disincentive is removed, but surely the behavior of many others will not. In particular, many will choose not to sacrifice earning capacity because of other factors that Professor Schneider is concerned with, such as the nonfinancial satisfactions that may be derived from continuing on the job full bore. *The Theory* nowhere suggests that this result is troublesome. To the contrary, *The Theory* explicitly disavows any assumption "that wealth maximization is . . . the only purpose of

How then can we justify even a reliance claim? We might analogize the divorce to the rescission of a contract, which can occur when a party is allowed to "avoid" his or her promise.³⁸ Since the no-fault divorce rules that govern in almost all states allow either party unilaterally to end the marriage,³⁹ divorce does seem to resemble contract rescission. In contract rescission, the parties may be obligated to return to each other any benefits that were conferred upon them by virtue of partial performance, but where such restitution is not practical, reliance is an alternative remedy that may be ordered.⁴⁰ Because the analogy between no-fault divorce and contract rescission has a certain appeal, so therefore does the reliance remedy. Having already rejected the contract analogy, however, *The Theory* does not rely on the analogy to rescission either. Rather, the justification employed by *The Theory* follows from its underlying rationale: a reliance measure of loss is simply the measure that follows from the incentive rationale that *The Theory* employs to justify alimony in the first place.

Recall that rationale. The core idea is simple: in the absence of any remedy, a spouse may have a disincentive to engage in behavior that benefits the marital community, because that spouse would bear all the risk of loss from that behavior if the marriage were to end in divorce. The reason there is a risk of loss upon divorce is that the spouses then cease to be a single economic unit. If the claimant's behavior during the marriage allows her spouse to increase his earnings, she shares in that increase, and this may offset the reduction in her own earnings. A choice that might disadvantage her as an individual might, therefore, advantage her and her family so long as the family is intact. But after divorce she keeps the loss, while her spouse keeps the offset, in the absence of a remedy.

Divorce thus poses the risk that the wife will eventually lose

marriage. . . . [Rather], by eliminating [distorting disincentives, *The Theory*] maximizes the parties' freedom to shape their marriage in accordance with their nonfinancial preferences." Ellman, *supra* note 2, at 50-51. See also *infra* note 63 and accompanying text.

38. E. FARNSWORTH, *supra* note 34, at 472.

39. See I. ELLMAN, P. KURTZ & K. BARTLETT, *supra* note 12, at ch. 2.

40. Although he does not favor the term rescission, Farnsworth gives examples of cases in which courts allow restitution—the return of a benefit. One example is where the vendor of land who avoids a contract on grounds of misrepresentation is allowed to have the deed cancelled and the land returned. E. FARNSWORTH, *supra* note 34, at 948. But where restitution is not practical, as it would not be in the case of divorce, damages may be measured by reliance. RESTATEMENT (SECOND) OF CONTRACTS § 371(a) (1981).

from her behavior even though she will gain if the marriage endures. If she is sensitive to this risk it will reduce her inclination to choose the course that benefits the intact marriage. We eliminate this disincentive by providing a remedy that makes good that loss, which is in fact a reliance loss as defined above: the difference between her actual earning capacity at the time of divorce, having chosen the course that benefits the marital community, and the earning capacity she would have had had she not chosen that course—if she had acted as if she were not married. Give her less and she still bears the risk; give her more, and we give her more than is necessary to eliminate the disincentive.⁴¹

The example just given assumes the pure case in which the claimant's loss is more than offset by her spouse's gain. Other possibilities exist: the loss might be partially offset, or it might not be offset at all. Do we want to give the wife a claim in such a case as well, perhaps for something less than her full reliance loss? Professor Schneider's comments persuade me that this question did not get the attention it deserved in *The Theory* as originally set out. Some further reflections are offered below on defining marital sharing behavior.⁴²

3. *Difficulties in measuring reliance losses*

Professor Schneider correctly observes that measuring loss under *The Theory* will be difficult. *The Theory* concedes this point.⁴³ The calculation asks one to compare the situation the spouse is in upon divorce with the situation in which she would have been had she not married. But of course she did marry, and so we are asked to make a calculation employing a hypothetical value which may be impossible to calculate with confidence.

41. This is not precisely correct because of two reasons that point in opposite directions. On one hand, she will have transaction costs in recovering the alimony claim, and thus one might think we will have to give her more than her loss, as measured here, so that she would be compensated for those transaction costs as well. On the other hand, she probably believes it likely that she will not be divorced, and thus she will discount the potential loss upon divorce. If she is risk-neutral, she will discount the loss to its "expected value"—the loss if divorce occurs, multiplied by her assessment of the probability that divorce will occur, which is less than one. A pure theory would take both of these factors into account in setting the amount of her claim. I have not attempted here or in *The Theory* to do this fine tuning, and I doubt that there is any practical way to calculate how to adjust the award to reflect each claimant's particular discount rate at the time the decision in question was made.

42. See *infra* sec. III(D).

43. Ellman, *supra* note 2, at 78-80.

This kind of calculation is not unprecedented in the law, however. A contract claim for expectation damages, for example, may involve calculating the profits the plaintiff would have made had the enterprise gone forward as planned, when in fact it did not go forward. Contract law employs a fallback rule, under which a different measure is employed if the expectation measure is too speculative.⁴⁴ We may need a similar rule here, and certainly any effort to transform *The Theory* into working law would require a resolution of this problem.

I have not chosen to undertake that task. My goal in working out *The Theory* was to fill a *conceptual* gap in current law: the absence of any coherent rationale for alimony. It may be that, in clarifying the conceptual basis for alimony, we identify an important practical problem in implementing it. That certainly does not cast doubt on the soundness of the theoretical rationale, even though it may mean that significant compromises would be necessary to transform it into working law.⁴⁵

*B. Only Residual Post-Marriage Losses Are Compensable,
Not Inequities in the Exchange During Marriage*

The only compensable loss under *The Theory* is the residual loss which occurs after a marriage ends. What, then, of the exchange during the marriage? Do we need to provide a remedy upon divorce for imbalances in those exchanges as well, to generate the proper incentives? Professor Schneider suggests that *The Theory's* omission of this intra-marriage exchange from consideration may be a problem. This section shows that, if we were to take the exchange during the marriage into account, we would necessarily have to expand *The Theory* to take into

44. E. FARNSWORTH, *supra* note 34, § 12.16 at 928. The fallback rules allow the injured party to recover their reliance damages where their expectation is too difficult to calculate. Here, of course, our problem may be that the reliance interest may be too difficult to calculate. The problem arises here, but not ordinarily in contract, because *The Theory* measures the reliance interest by the claimant's opportunity costs, while contract ordinarily limits the reliance interest to out-of-pocket costs. See *supra* note 34.

45. Although I believe that Professor Schneider and I are in basic agreement on this question, I do think he overstates the difficulties with the measurement contemplated by *The Theory*. Many of the questions Professor Schneider raises, see Schneider, *supra* note 1, at 232-33, if not answered in *The Theory* already, are easily answered either because the answer flows clearly from *The Theory's* principles or because the answer does not much matter. While the problem of measuring a "counterfactual" gain remains, Professor Schneider himself points out that a very similar exercise is required by tort law when it seeks to measure the lost earnings of a child in a wrongful death action. *Id.* at 232 n.37.

account nonfinancial gains and losses as well. *The Theory* also argues that facilitating exit from the marriage is a better solution to the problem of unfair exchange during it, than would be any effort to gauge this exchange and provide compensation for any existing imbalances.

In comparing a claimant's earning capacity at the end of a marriage with that which she would have had had she not married, we benefit from one simplifying fact: at both times, the claimant is an economic unit unto herself. To capture the exchange during the marriage, however, we would have to take into account the larger economic unit of which she is then a part: the entire marital community. We might observe, for example, that the claimant left the market and did not work during the marriage and therefore lost significant income. On the other hand, she also shared her spouse's income. We must therefore consider her spouse's income before concluding whether she had a gain or loss. Perhaps her spouse was a physician who made far more money than she lost by giving up her employment as a public school teacher. Perhaps she therefore has a net gain during the years of marriage, since the spousal income she shared was much greater than the individual income she lost—and perhaps then her husband has a claim against her rather than the other way around. Is that in fact the case?

We cannot tell—at least not without first determining how much of her spouse's income she really shared. The spouses will have many joint consumption items—homes, vacations, automobiles, entertainment, meals—but perhaps some were really bought for their value to the husband, others for their value to the wife. It will be less than obvious how to determine the most basic fact: what *was* the allocation of income between the spouses? To measure the value received by each spouse, we would have to compare their personal preferences and utility functions for each of these items; a difficult, if not impossible, task.⁴⁶ If she would have preferred a vacation in the mountains

46. One comprehensive economic effort to consider the allocation of income among family members concludes that nothing can be learned about the distribution of income within the family from the family's spending patterns without first specifying something about the family members' utility functions. Finding no basis for such a specification, it concludes that analytical compromises are necessary. E. LAZEAR & R. MICHAEL, *ALLOCATION OF INCOME WITHIN THE HOUSEHOLD* 65 (1988). While one can determine an individual's relative preferences (his "ordinal utilities"), older economic theory also assumed one could measure the utility an individual derived from some good or service so that, for example, we could conclude that a vacation at the mountains was worth "5 utils" to

and he a vacation at the beach, and they chose the beach, then who got what? She did enjoy the beach after all, although not as much as the mountains. But they also purchased the station wagon she wanted instead of the sports car he would have preferred. Are they therefore even? Is there any way to tell, even in theory? I think not.

Moreover, the allocation of resources within the household surely involves important tradeoffs of material goods for nonmaterial goods (like leisure time) or nonmarket labor (like domestic services). We thus need to measure all these to evaluate whether there were any imbalances in the exchange. And what of the utility one spouse gets from the other's pleasure? A husband truly enjoys giving his wife a diamond ring; must we then add the value of that pleasure to his account when we add the ring to hers? An economist might say the value of the husband's pleasure at least equals the cost of the ring, or else he would not have given it to her—so perhaps we can eliminate both from the accounts, or perhaps he still owes her for the excess pleasure. Economic analysis often assumes away such interdependent utility functions; but in marriage, especially, one might expect that they have important effects.

Gain or loss, as defined in *The Theory*, does not require these kinds of calculations because it does not consider the intra-marriage exchange between the spouses. We do not need to examine the intra-marriage exchange in order to eliminate troublesome disincentives for sharing behavior.⁴⁷ Although Professor Schneider suggests that the exchange during marriage should be considered, he does not appear to think it necessary in order to implement *The Theory's* incentive rationale. Rather, he believes that considerations of equity require its inclusion. This kind of equity, however, is not generally thought to be a purpose

the husband. Modern economic theory ordinarily forgoes this assumption, having concluded that such measurements were not ordinarily possible. E. MANSFIELD, *MICROECONOMICS: THEORY AND APPLICATIONS* 32-33 (2d ed. 1976). Once this constraint is accepted, we can see that it is also impossible to make interpersonal utility comparisons, since we have no common scale on which to measure both individuals' utilities. For a more general discussion of the difficulties resulting from the impossibility of comparing individuals' personal preferences, see J. COLEMAN, *MARKETS, MORALS AND THE LAW*, 95-132 (1988).

47. Of course, *The Theory* does not provide compensation for financial losses that did not arise from marital sharing behavior, and there remains the separate question of whether the criteria for marital sharing behavior are correct. If they are too narrow, then additional losses should be compensable. The criteria adopted by *The Theory* for marital sharing behavior are reexamined *infra* sec. III(D).

of alimony.⁴⁸ *The Theory* excludes it not only for this reason, but also because nonfinancial gains and losses would have to be included in any assessment aimed at achieving this kind of equity, probably rendering the assessment impossible. Instead, *The Theory* ultimately adopts a position that is more compatible with modern no-fault law: a spouse who finds the intact marriage unsatisfactory, because the "current exchange" seems unfair or for any other reason, has the option of leaving the marriage. For our purposes, we assume the wife takes with her an equitable share of the property accumulated during the marriage and under *The Theory* is entitled, in addition, to have her husband make good for any loss in her earning capacity arising from her efforts to benefit the marriage when it was intact. Because these remedies make exit from the marriage a more realistic option than it would otherwise be, they also strengthen "exit" as a remedy for an unfair marital exchange.

Attempting at divorce to even out one spouse's lavish vacation expenditures by an award to the other would serve no purpose in terms of *The Theory's* incentive rationale. But suppose one made a different incentive argument that a remedy for unfair exchanges during the marriage was necessary to eliminate the incentive to engage in such expropriations of the marital assets. The answer to this argument is that facilitating exit from marriage ensures such expropriation cannot continue very long without the other spouse's acquiescence. When financial expropriation does continue, one wonders whether it really is expropriation, or whether instead the apparent victim is receiving some compensating financial or nonfinancial benefits from the marriage. It is precisely because we cannot determine when expropriation occurs that we should rely on exit, rather than compensation, as the solution to this problem. This, in turn, means that we should want to ensure that exit is reasonably available. *The Theory* itself is important to that goal, for it ensures that a wife is not burdened, upon exiting the marriage, with a loss in earning capacity that was incurred to benefit the marriage.⁴⁹

The availability of exit eliminates coercion as an effective

48. Of course, current conceptions of alimony may not be a useful guide. Nonetheless, I think it is fair to assume that alimony alone need not deal with every claim of equity that might arise out of a marriage, and that therefore *The Theory* need not deal with every possible claim, including those that alimony has not historically remedied.

49. The availability of exit is also important to *The Theory's* approach to defining "marital sharing behavior." See *infra* sec. III(D).

long-term strategy within the marriage. A wife will leave rather than remain in a marriage that yields her less overall utility—nonfinancial as well as financial—than she would achieve unmarried. Because continuation of the marriage requires mutual consent, each spouse has a veto power over any marital decision. Neither will exercise that veto so long as the marriage yields him more utility than a single life, but neither will have the ability to force the other to acquiesce in a decision that makes the marriage a net loss for the other.

In short, for a marriage to endure, both spouses must see the marriage as yielding a benefit to them.⁵⁰ This is why *The Theory* need not worry about the overall impact of spousal decisions on the *intact* marriage. However we define “benefit”—to include financial factors or not—both spouses derive a benefit from the intact marriage, or it will not remain intact. This is another reason we need not worry about imbalances in the exchange during the marriage, including even imbalances arising from nonfinancial aspects of the intra-marriage exchange. It is only when one or both want to end the marriage that we need to focus on the allocation of benefits between them.

Nonetheless, a sensible policy must recognize the potential transition problems in a marriage moving toward divorce. Abuse can take place in the waning days of a marriage when one spouse has already decided he would be better off divorced. For example, a husband may seek to take advantage of the last months of the couple's marriage to seize marital assets for his own use. There is certainly no reason why a remedy for such abuse cannot be provided in addition to the remedy allowed under *The Theory*. In fact, many states already have explicit provisions allowing courts to take such conduct into account in dividing the property accumulated during the marriage.⁵¹

50. Of course, they might not think the marriage yields as much benefit as it could, just more than they could achieve unmarried. For example, a husband might reluctantly move with his wife to a new location that he dislikes, rather than refuse to go with her and exit the marriage, because he prefers life with her in the new city over life alone in the old. But at the same time he loses his first choice: life with her in the old city. The point is this: a husband might go along with a decision that reduces the utility he derives from the marriage, but only if it does not reduce it to a level below that which he can obtain as a single person.

51. See *Booth v. Booth*, 7 Va. App. 22, 371 S.E.2d 569, 571-72 (1988) (husband's dissipation of assets in stock market losses and post-separation living expenses considered in making an equitable distribution of the property); ARIZ. REV. STAT. ANN. § 25-318(A) (1976) (in division of property, a court may consider a spouse's “excessive or abnormal expenditures, destruction, concealment, or fraudulent disposition” of assets);

C. Only Financial Losses Are Compensable

Professor Schneider suggests *The Theory* is flawed because in evaluating alimony claims it considers only the parties' *financial* gains and losses at divorce. Consider, for example, the wife who leaves the marriage with custody of her children, children who would not exist had there been no marriage. Maybe she also has some lost earning capacity, but how can we really say whether she's worse off without considering the burdens and benefits of parenthood? Indeed, perhaps the net value of the children give her a gain from the marriage rather than a loss, and the husband's estrangement from the children gives him a net loss from the marriage rather than a gain, despite his superior financial outcome. Perhaps then he should have a remedy against her.

Making such comparisons requires measuring and comparing each spouse's nonfinancial as well as financial gains and losses. However, measuring nonfinancial gains and losses may be conceptually as well as practically impossible. The problem is not just that measuring the joys of parenthood or the pain of estrangement are difficult, or that different people place different values on close bonds with their children, even though both observations are true. It is also that such a comparison requires a common scale upon which to measure the financial outcomes, the burdens and benefits the wife derives from the children, and the pain of estrangement suffered by the husband. Does the wife derive more pleasure from her children than the husband derives pain from his estrangement from them? Such questions may not even make sense, regardless of whether we ask them for the purpose of reallocating losses to insure a proper incentive structure or simply to achieve some kind of equity.⁵²

The inability to consider nonfinancial gains and losses affects *The Theory's* ability to generate the best incentive structure. These imperfections do not seem serious, however. In one group of cases, the alimony remedy allowed by *The Theory* will eliminate financial disincentives even though the marital sharing behavior would have occurred anyway because of nonfinancial gains. This is the case where the wife values children so highly that she would leave the market to care for them even if she

CAL. CIV. CODE § 4800 (West 1983).

52. Modern economic thinking accepts the constraint that cardinal interpersonal utility comparisons are not possible. See *supra* note 44.

alone would bear the financial risk of her choice. Although the alimony award in such cases is unnecessary as an incentive, an unnecessary incentive is not nearly as great a problem as one which encourages the wrong behavior.⁵³

In the other group of cases, eliminating the potential financial loss on divorce is not sufficient to generate sharing behavior because the uncompensated nonfinancial loss is too great. Consider, for example, the spouse who derives so much nonfinancial satisfaction from her work that she will not leave the market even though her financial loss would be made good if she did, and even though her marriage would benefit financially if she did (as where it would allow her husband to move to more lucrative work). In this case it is unclear that we have a problem at all, for given the nonfinancial rewards of the wife's work we cannot actually be sure that the marriage would benefit if she gave it up.⁵⁴

The preceding paragraphs address the possible effect of nonfinancial gains and losses on the incentive structure for marital sharing behavior. Other nonfinancial gains and losses exist, which derive from the divorce itself, rather than from decisions made during the marriage, and which are therefore irrelevant to the incentive structure for marital decisionmaking. For example, one spouse may suffer great emotional pain from the sense of abandonment and loss of self-esteem created by divorce. Obviously, this loss would not have occurred had the parties not married, and is thus a loss under *The Theory*. It is not a compensable loss, however, since it does not arise from sharing behavior in marriage.

Such emotional losses are properly excluded from *The Theory* even if one believes they should be compensable, since the rationale for allowing recovery would necessarily be quite different than that developed by *The Theory*. Any new theory one might develop to allow recovery for the emotional pain one spouse inflicts upon the other would surely require a finding that the claimant's emotional loss flowed from some conduct of the defendant's that one is prepared to label as blameworthy. Appropriate remedies allowed under any new theory developed to

53. Most people would probably object to a divorce remedy that compensated only the reluctant mother for her lost earning capacity, excluding the enthusiastic mother; better to include both than exclude both.

54. It is also the case that she has no loss at all on divorce, financial or nonfinancial, and so there is hardly anything inequitable about denying her claim.

deal with such cases would be in addition to any claim for alimony allowed under *The Theory*. Such remedies would not really be "alimony;" they would be more like tort claims for the infliction of emotional distress. While the older, traditional law often made spousal conduct relevant to claims for alimony, it never conceived of alimony as compensation for such conduct. Alimony was for support, even though the claimant's misconduct might provide a basis for a court to conclude that the right to support had been lost.⁵⁵

Unfortunately, the reformed law of alimony may be so muddled that this is no longer as clear as it ought to be. Modern law, to the extent it has any theory at all, purports to allow recovery for "need" rather than "loss." In general, however, only financial need counts, even though social factors might be taken into account to determine the amount of financial need. For example, a wife might be found in "need" because without a remedy she would be left after divorce in a lower social class than the one to which she has become accustomed. One might think of this as allowing recovery for a loss of social status, but courts usually say instead that the purpose of considering social status is to set the standard by which to determine whether the claimant is in financial need.⁵⁶ Recovery for social losses themselves—for ex-

55. Or perhaps, that the right to support continued after the marriage ended only where the end of the marriage resulted from the obligor's misconduct, and not the claimant's. Most states do not today allow consideration of fault in determining an alimony award, even though a few decades ago most did. A recent survey concluded that 29 states excluded marital misconduct entirely in making alimony awards; those that do consider marital misconduct, often limit consideration of fault either substantively (e.g., the only fault that can be considered is adultery) or procedurally (e.g., the claimant's fault can be a bar, but the obligor's fault is not relevant). Many states combine both approaches. Freed & Walker, *Family Law in the Fifty States: An Overview*, 23 FAM. L.Q. 495, 546-47 (1990).

56. E.g., *Simmons v. Simmons*, 87 Ill. App. 3d 651, 657-62, 409 N.E.2d 321, 326-29 (1980). Note, however, that this same spouse may have suffered no loss from the marriage, financial or social, when loss is measured by comparing her post-marriage situation with the situation she would have been in had the marriage not been entered. Her reliance claim is zero. To compensate her for her lowered social status is really to allow her recovery for what, in contract, would be called expectation damages. Although she leaves the marriage with the same social status she would have had if she had never entered it, courts following this approach allow her a claim for the social status she expected the marriage to continue providing her. This is equivalent, in fact, to a claim of financial loss, but the financial loss involved is not measured by the reliance conception employed by *The Theory* but rather by a method relatively analogous to that used in contract to figure expectation damages. If Part I of *The Theory* is correct in concluding that the contract analogy does not work to explain alimony, then of course there is no reason why the claimant should be allowed expectation damages.

ample, the wife who, as a result of divorce, has become estranged from her former friends and is lonely—are not typically treated as compensable through alimony. Perhaps they should be. But that is not a question that *The Theory* addressed, much less resolved. Working out a rationale for recovery of financial losses was job enough to start with.

In sum, *The Theory's* exclusion of nonfinancial losses is not a problem because a) it causes no serious difficulty with the incentive rationale underlying *The Theory*, and b) if we wish to allow recovery for nonfinancial losses on some rationale apart from incentives, our purpose would be so distinct from the purpose for having alimony that the allowed claims would supplement rather than supplant those recognized under *The Theory*.

D. Only Losses Arising From Marital Sharing Behavior Are Compensable

1. Why The Theory compensates losses arising from child care and financially rational sacrifices

Under *The Theory* only lost earning capacity arising from “marital sharing behavior” is compensable. Our definition of “marital sharing behavior” thus becomes crucial. *The Theory* treats homemaking as marital sharing behavior if it includes primary responsibility for the care of minor children.⁵⁷ Beyond that, *The Theory* treats only financially rational sacrifices in earning capacity as marital sharing behavior.

One spouse makes a financially rational sacrifice in earning capacity when the sacrifice is incurred to allow the other spouse to achieve an even greater increase in his earning capacity. This sacrifice is financially rational from the perspective of the marriage, since it produces a net gain. It will yield a loss to the spouse who makes the sacrifice, however, if the couple separates,

57. The point is to capture the situation in which one spouse suffers a loss in earning capacity because she has “primary” childcare responsibility, as opposed to the situation in which spouses divide that responsibility evenly. A wife may work but still suffer an earning capacity loss from childcare responsibilities, as where, for example, she forgoes a promotion that would require working hours incompatible with her childcare duties. Such a loss would be compensable under *The Theory*. Where a wife has primary responsibility for childcare, *The Theory* makes no effort to allocate her homemaking time between childcare and other matters; the full earning capacity loss arising from her homemaking is compensable. Finally, *The Theory* makes no attempt to resolve the question of when children are old enough that this policy should not apply. Any implementation of this policy would need to include such an age rule.

and therefore, the sacrificing spouse will have an alimony claim under *The Theory*. This principle is illustrated by a couple that moves to a new location so that one of them can accept more lucrative employment, even though the move requires the other one to sacrifice his or her work. If the first spouse's increase in earning capacity is greater than the second spouse's loss, then the move was financially rational.

The Theory provides a different measure of recovery depending upon whether the marital sharing behavior consists of a financially rational sacrifice in earning capacity or an earning capacity loss due to child care. Where the loss arises from a financially rational sacrifice in earning capacity, the claimant is entitled to recover the full amount of the loss. Since the other spouse necessarily has an even larger gain, there is no reason the rule should not provide for the full payment required to eliminate the disincentive. On the other hand, where the loss arises from childcare, the other spouse may have no earning capacity gain resulting from the sharing behavior (keeping in mind that gain and loss are measured by comparing a spouse's situation at the end of the marriage with the situation he or she would have been in had there been no marriage). In this case, it is difficult to justify shifting the entire loss to the other spouse. As opposed to the measure of recovery for financially rational sacrifices, *The Theory* provides that for claims based on childcare, recovery shall be for one-half of the loss, thus ensuring that the spouses share the loss equally.

The argument favoring recovery in both cases seems clear enough. When spouses make basic decisions affecting marital finances, they should not be discouraged from thinking of the marital community as a single economic unit. But a spouse might be discouraged from taking that view if the decision, although favorable for the marital community as a whole, burdens her alone with a loss in earning capacity that would be realized if the marriage were dissolved and she no longer shared in the spousal gain made possible by her loss. By protecting her from that contingent loss, the alimony remedy eliminates the disincentive to take advantage of opportunities that are beneficial to the marital community as a whole.

Professor Schneider simultaneously raises two conflicting objections to this rule. On one hand, he suggests that *The Theory* errs in limiting recovery to losses incurred through child care or financially rational behavior because recovery should also be

allowed for losses arising from financially irrational behavior apart from child care.⁵⁸ Section D2, below, examines this objection at length. In the same portion of his paper, however, Professor Schneider also says that *The Theory* is “problematic” in *allowing* a spouse to recover at all for losses in earning capacity she incurs from marital sharing behavior, since this chance of recovery “steer[s] a spouse, usually the spouse with the lower earning potential, away from a ‘complete’ career.”⁵⁹ This is especially troublesome because in “today’s world” this would have the effect of channeling women away from “demanding careers” that “can be intellectually, socially and emotionally rewarding.” This second objection can be put to rest rather quickly, and not merely because *The Theory*, to the extent it does any “channeling,” obviously does not do so in gender terms. There are two more important points. First, Professor Schneider himself points out that “it would seem strange to try to encourage women to pursue careers by denying wives compensation for the marital sacrifice of giving up careers.”⁶⁰ Perhaps “strange” is too restrained a characterization. I have some trouble imagining anyone proposing that we deny compensation on divorce to the person who gives up a potential career to allow his or her spouse to pursue a more lucrative opportunity, in order to discourage women from making that choice in the first place. The reality, of course, is that women would be the main victims today of such a punitive approach to social policy.

But second, in an important and nonpunitive way the incentive structure offered by *The Theory* encourages the very goal that Professor Schneider applauds. It does so because it makes the wife’s loss the measure of her husband’s alimony obligation. The more talented the wife the greater will be the alimony claim she will have for sacrificing her career prospects to fulfill the couple’s domestic needs or to accommodate her husband’s career. To put it another way, the greater the career sacrifice the husband asks of his wife, the greater his potential liability to her. Because the wife who forgoes a “demanding career” will thereby have a “demanding” claim if the parties divorce, her husband will be less inclined to seek such a sacrifice from her. The greater the opportunity outside the home that a woman has,

58. Schneider, *supra* note 1, at 220-21.

59. *Id.* at 219.

60. *Id.* at 220.

the more *The Theory* will discourage her husband from asking her to abandon it; in that way *The Theory* encourages rather than deters the movement of women into the market.⁶¹ This point was also made in *The Theory*.⁶² It bears repeating here because it apparently received inadequate emphasis in *The Theory*, as Professor Schneider has not been the only one to overlook it.⁶³

2. *Why The Theory does not compensate losses arising from financially irrational sharing behavior*

We turn now to Professor Schneider's first objection: that *The Theory* should not require that successful claims, other than those based on child care, arise from "financially rational" sharing behavior.⁶⁴ In evaluating the importance of this concern,

61. Existing law, with its emphasis on need as the criteria for alimony, has precisely the opposite result. The woman who gives up professional opportunities for her marriage has a greater loss than the woman who never had them, but she also will probably be in less "need" when the marriage ends, because even her reduced earning capacity will be greater than her less talented or less educated sister's.

62. "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. . . . A man married to a lawyer or doctor *should* pause more before expecting her to tend his domestic needs. . . ." Ellman, *supra* note 2, at 77.

63. Professor June Carbone recently argued that I designed an alimony system "based on the premise that women *should* specialize in domestic matters to the extent they earn less than their husbands. . . ." Carbone, *Economics, Feminism, and the Reinvention of Alimony: A Reply to Ira Ellman*, 43 VAND. L. REV. 1463, 64-65 (1990) (emphasis in original). Her point not only ignores the effect of *The Theory's* incentives on the husband, described *supra* text accompanying note 62, it also ignores the fact that *The Theory* provides no *positive* incentives for spousal specialization in domestic labors. It merely ensures that earning capacity losses are not left entirely with the spouse who incurred them—a result even Professor Carbone concedes is appropriate, despite the fact that it may lessen the "punishment" imposed on women who forego the market for the home.

In other words, *The Theory* merely eliminates an inappropriate disincentive that would follow in the absence of a remedy: the allocation of the earning capacity loss entirely to the spouse who incurred it for the marriage's benefit. See *supra* note 37 and accompanying text. One can surely assume that even with the knowledge that this loss would be shared, many women would choose not to incur it. Each woman (or man) will reach her or his own decision about the relative benefits, both financial and nonfinancial, of domestic and market labor, as each should. I am not troubled by the fact that all will not make the same decision. I am troubled by a system which might distort incentives by allocating to one spouse all of the loss recognized on divorce from a decision that benefited that spouse's entire family when it was intact.

There is more in Carbone (which appeared as this article went to press) that I am tempted to comment on, but here I must keep my focus on Professor Schneider!

64. Actually, in portions of his paper Professor Schneider appears to forget that the requirement of financial rationality does not apply to childcare. He says, for example,

we must keep in mind that the largest group of alimony claims undoubtedly arise in long-term marriages in which the wife sacrificed earning opportunities to care for the couple's children, the very fact pattern in which the requirement of financial rationality would not apply.

Put another way, the question raised by Professor Schneider is whether cases exist in which the childless spouse should recover in alimony for an earning capacity loss she incurred as a result of financially irrational conduct that necessarily conferred no financial benefit on the spouse from whom this payment is now sought. Perhaps there are such cases, but thus understood we might not expect them to arise very often. Nonetheless, *The Theory's* rule that, childcare apart, only financially rational losses are compensable bears some reexamination. Certainly there are choices a childless couple makes that are not financially beneficial to the marriage but are nonetheless beneficial in some other sense, and perhaps we would wish to eliminate disincentives for making those choices as well.

Notice that this question is related to, but different than, the question addressed in part III, section C. There we examined why recovery cannot be allowed for nonfinancial losses. Here we examine whether we should allow recovery for financial losses that were incurred to achieve some nonfinancial gain, and were therefore not *financially* rational, even though they might be rational in light of the spouse's nonfinancial preferences. *The Theory* allows such claims in one special case, where the nonfinancial purpose is caring for children, but that rule is based on strong cultural norms favoring parental childcare. Are there other nonfinancial purposes that should count as well, to allow recovery for a financial loss?

that *The Theory* "singles out one . . . marital decision—a spouse's financially rational sacrifice of earning capacity" and provides that losses arising from "that particular decision and that decision only shall be repaired on divorce." Schneider, *supra* note 1, at 217. This is, of course, simply wrong as a description of *The Theory*; as Professor Schneider himself explains earlier in his paper, *id.* at 201, *The Theory* allows recovery for half of the earning capacity lost as a result of a spouse's domestic labors, when those labors include primary responsibility for care of the couple's children, without regard to whether this sacrifice of earning capacity is financially rational. Yet he later relies on this mischaracterization to portray *The Theory* as excessively materialistic. He criticizes *The Theory*, for example, as encouraging "only one kind of sharing—giving up a career in order to maximize family income," *id.* at 220, and for having "adopt[ed] the goal of optimizing family income." *Id.* at 218. *The Theory* is not so limited. Indeed, it seems likely that the great majority of claims that would be allowed under it would arise from childcare and would thus be valid even if family income had suffered as a result.

If we reformulate this question to use the language of *The Theory*, it comes out this way: When we allow recovery for any financial loss incurred to benefit the marriage, should we redefine "benefit" to include not only financial benefits, but also any increase in total utility? To measure "total utility" we would have to be able to calculate the combined value of financial and nonfinancial benefits, which requires us to have some common scale on which both can be measured. This is probably impossible, but let us set that problem aside for the moment and assume a magical world in which it could be done. An example will help us to see the problem that would result.⁶⁵

a. Compensating such losses may create distorting disincentives. Suppose a couple moves to the country from the city, suffering a significant loss in income in exchange for the nonfinancial benefits of country life. The husband has a small gain in earning capacity, but it is offset by the wife's larger loss. Nonetheless, the move "benefitted" the marital community in terms of total utility, since the nonfinancial gains to the marriage were larger than the financial loss. Should we require the husband to make good some of the wife's financial loss if they divorce, since the wife sacrificed her earning capacity in order to achieve a gain for the marriage in overall utility? It turns out that, if we adopted this rule, we risk *creating* a disincentive to sharing, rather than eliminating one. This can happen because, while on one hand, our reformulated rule gives the wife compensation for

65. Professor Schneider suggests that in *The Theory's* own terms there is no principled basis for excluding financially irrational sacrifices, and that by doing so *The Theory* necessarily is seriously flawed in its incentive structure. See Schneider, *supra* note 1, at 217-25. This section is meant to respond to those arguments. On another level, however, one can agree that additional reasons for sacrificing earning capacity might be accepted as "marital sharing behavior." That is, assume that one agrees with the basic argument in the text in that nonfinancial benefits cannot be calculated and weighed against financial ones, and that therefore the analytical framework developed by *The Theory* does not speak to (and therefore does not support) including the achievement of these nonfinancial benefits as a purpose that qualifies this behavior as marital sharing behavior. One might still argue that on other grounds, completely apart from those developed in *The Theory*, some particular purpose, though financially irrational, should qualify behavior as "marital sharing behavior." This is essentially the approach that *The Theory* itself took to justify an alimony remedy for earning capacity sacrifices incurred to allow a spouse to provide primary care for the couple's children. One could perhaps add to this list: what about, for example, earning capacity losses derived from a husband's leaving work to care for his parents—or his wife's parents? *The Theory* includes care for the couple's children because of the broad consensus that exists as to appropriateness of sacrificing earning capacity for this purpose; I have doubts that any other purpose would find similar support. But if it did, that purpose could be molded into *The Theory*, on that rationale, without requiring any fundamental alteration to it.

a financial sacrifice necessary to increase *total* utility, on the other hand, we look only at financial losses in calculating whether the wife in fact has a loss. It turns out that this schizophrenic version of *The Theory* simply does not work because it can produce disincentives to sharing. Whether it will actually generate such a distorting incentive in a particular case depends on the distribution between the spouses of the nonfinancial gains and losses from the move. The following discussion shows why.

Suppose the spouses do not value the benefits of country life equally. Rather, she loves the country, but he does not. For her, then, the move is worth even more than her individual sacrifice in earning capacity, while for him it is barely worth more than the smaller loss that the marriage suffers in the aggregate. Therefore, if we provide no remedy at all, both will be inclined to make the move, since both will benefit from it. Indeed, not only will marital utility increase if they make the move, but absent a loss-shifting remedy, the move will still yield an increase for each of them individually, were they to divorce after moving.⁶⁶ But if we allow the wife a remedy against her husband on divorce, for some portion of her loss in earning capacity, we change the calculus so that the move is a net loss for him if they divorce. Knowing that possibility at the time of decision, he might oppose it.⁶⁷

Thus, the result of providing a remedy would be to discourage the couple from moving to the country, even though it is better for the marriage and better for both parties individually (in the absence of a loss-shifting rule). This warped result can be avoided only by counting, as part of the calculation of the gains and losses realized on divorce, the nonfinancial as well as the financial gains and losses. If we did so, we would see that the

66. While the move to the country produces only a limited nonfinancial gain for him, it also produces a financial gain, and so he is better off. While it produces a larger financial loss for her, it also produces an even larger nonfinancial gain, and so she too is better off.

67. Whether or not he would oppose it depends on a rather complicated calculation. We assume he is still better off married to her, in the country, than single in either location (or else he would not want to stay married). The problem is that if they move to the country and then divorce, he is worse off (assuming she has a remedy against him in alimony) than if they divorce without having moved to the country. He must therefore weigh the possibility of a larger loss if they move to the country against what may be a higher probability of a smaller loss if he refuses to move. (It would be a higher probability if he believes that his refusal to go to the country would itself precipitate a divorce.)

wife actually has no loss and thus is entitled to no compensation. But then, of course, we run into one of the problems that section C sought to avoid by eliminating claims for nonfinancial losses—the problem of weighing and balancing financial and nonfinancial losses against each other. Ultimately, we cannot avoid this problem in calculating loss, even though we mean to, if we decide to allow claims for earning capacity losses that were incurred to achieve some nonfinancial gain.⁶⁸

b. Why The Theory does not create distorting disincentives. The problem of creating destructive disincentives does not arise if we limit *both* the loss, and the definition of marital benefit necessary to allow a claim for loss, to the financial. We sometimes may fail to eliminate disincentives that we ideally should eliminate, but at least we don't create new ones. To see that *The Theory* does not create distorting disincentives requires working through the four various possible distributions of nonfinancial utilities that can follow from any marital decision. A chart will help us do this. But first, let us summarize the assumptions of the analysis.

First, we are looking only at marital decisions which produce an earning capacity gain for the marriage as a whole, since *The Theory* does not otherwise allow a claim except in the case of childcare. In the absence of a potential claim, *The Theory* can have no incentive impact at all and thus could create no distorting incentives.

Second, we are looking only at decisions that yield a loss in earning capacity for one spouse, since again there would otherwise be no claim. We must therefore also assume the decision yields a gain for the other, an arithmetic necessity if the marriage as a whole is to gain despite one spouse's loss.

Third, recall from section B that the availability of exit means that either spouse would veto any decision about the conduct of the marriage that would reduce that spouse's overall utility below the utility he or she would derive as a single per-

68. Of course, the same problem can arise in connection with claims based on childcare if the potential obligor derived much less utility from children than the spouse who sacrificed earning capacity to care for them. In that case, the potential alimony liability might deter the potential obligor from agreeing to this childcare arrangement. We might expect this will not happen too often, especially as *The Theory* allows a claim of only half of the amount of the earning capacity loss, where the claim is based on childcare. And in some cases the potential liability might deter the obligor spouse from having children in the first place, which might be the best result where the obligor is reluctant to contribute to the opportunity cost of raising them.

son. Thus, we need only consider those possible distributions that would produce a net positive total utility for each spouse (financial and nonfinancial), as compared to this baseline of single life, since otherwise the marriage will be dissolved before the decision takes place, so there will again be no occasion for compensation.⁶⁹

Finally, we must assume, for the purpose of this discussion, that we can measure each spouse's nonfinancial utilities from any decision on the same scale as financial utilities. Such measurements of nonfinancial utilities are in fact probably impossible, which is one reason why *The Theory* excludes their consideration. But if we are to consider whether *The Theory's* exclusion of nonfinancial utilities creates problems, we must assume, for the purpose of this discussion, that we can measure them.

Keeping all this in mind, then, four possible distributions of nonfinancial utilities follow from any decision. These are labelled by the numbers one through four in the following matrix:

69. While this assumption should generally be correct, I am ignoring for this analysis an additional complication. A husband might agree to a course of conduct that reduces his utility below this baseline in the short term, because he believes it will increase his overall utility in the long run. For example, the husband might agree to support his wife through medical training, even though his overall utility will be lower during the course of that training than if he were single and did not share his earnings, because in the long run he would benefit. What, then, if the wife ends the marriage after completion of the training? The husband has in fact suffered a loss, although not one that *The Theory* recognizes: he has lost his expected share of his wife's earnings as a physician. He may nonetheless have no award under *The Theory*, because he may have no reliance loss, as where he continued to work, during her training, at the same job that he would have worked in anyway. Thus, here the husband did not veto the decision to support the wife through medical school because he expected his overall utility to increase in the long run, even though he knew it would be negative (as compared to the single baseline) in the short run. But he has been deprived of his long run gains.

While this may be another imperfection in *The Theory*, the problem, again, is not one of creating an improper disincentive, but perhaps one of failing to offer an incentive that we might want to offer. That is, perhaps, for lack of a protective remedy in the case of divorce, the husband will not provide the support that is necessary for overall marital benefit. Solving this problem is not as easy as one might think, however. For in the absence of any fault assessment for the breakup of the marriage, it is difficult to provide a remedy without incurring a problem analogous to that of "adverse selection" in insurance. Suppose, for example, that under these facts it is the husband who breaks up the marriage when the wife completes her training, to marry another woman whose financial prospects are not nearly so good as those of his current physician wife. Considerations of equity as well as of incentives may counsel against providing a remedy in this case, yet it can be distinguished from the case in which we do want to provide a remedy only by inquiring into which spouse is responsible for the breakup of the marriage—the very inquiry modern law seeks to avoid.

Nonfinancial Consequences of Decision

H		WIFE	
U		Benefit	Loss
S	Benefit	1	2
B			
A	Loss	3	4
N			
D			

Now let us assume the case in which the decision in question is one in which the wife would incur an earning capacity loss, but her husband would enjoy a larger gain. (These financial gains and losses, like the nonfinancial ones, are measured against a baseline of that spouse's situation as a single person.)⁷⁰ We can assign the various gains and losses illustrative values:

Thus: $FG_w = -3$ (Financial gain for the wife)
 $FG_h = +5$ (Financial gain for the husband)
 $FG_m = +2$ (Financial gain for the marriage)

Under *The Theory*, if the parties go forward with the decision, the husband would be liable, upon divorce, to make good the wife's loss. She would therefore receive an award of + 3, leaving her even, while he would be left with a residual financial gain of + 2. For each box, we must now ask the following questions: 1) Would the spouses go forward with the decision if there were no alimony remedy? 2) If they would, might the availability of a remedy provide either spouse with a disincentive for proceeding?⁷¹ If the answer to both questions were yes, then *The Theory* would have created an inappropriate disincentive.

70. For further discussion of the appropriate baseline, see *infra* text accompanying notes 74-76.

71. Of course, we are also concerned with the converse question: would the spouses not proceed in the absence of an alimony remedy, and if so, are there cases in which they would proceed if a remedy is available? In fact, our discussion will show that there will be some such cases, and these are examples of cases in which *The Theory* effectively encourages appropriate sharing behavior that would not otherwise occur. They are not the focus of our discussion here, however, since we are looking for problem incentives that might be created.

Box 1. In *Box 1*, both parties reap nonfinancial gains from their decision. Each also reaps a financial gain so long as the marriage remains intact. Thus, the marriage is clearly better off if the parties go forward with the decision, which they presumably will, since both gain unless one party is concerned about potential losses on divorce. The only potential loss is the wife's financial loss, and so the possibility of an alimony award encourages the appropriate behavior—the wife's financial disincentive is removed, while the husband still has an incentive to go forward. *The Theory* operates as intended.

Box 2. Here, the wife would have a nonfinancial loss from the decision while the marriage remains intact. If that loss is greater than her share of the couple's financial gain (remember, we are in a magical world in which such comparisons can be made), the couple would not act since she would veto the decision, as it would make her worse off than if she were single. Perhaps that is not the best decision for the marriage, and thus perhaps a perfect rule would somehow encourage her to agree, but this is the kind of imperfection that cannot be overcome.⁷²

If the nonfinancial loss is smaller than her share of the marital financial gain, then both the wife and her husband would gain by the decision (the husband, since he has both a financial and nonfinancial gain). In the absence of any alimony remedy, we might therefore expect them to go forward. However, she might still oppose the decision because the financial gain she relies on, to overcome the nonfinancial loss, changes upon divorce to a financial loss. *The Theory* would neutralize this potential financial loss and might therefore reduce the disincentive suffi-

72. If one could make interpersonal utility comparisons, one might conclude that acting was in the best interests of the marriage if the wife's loss in overall utility was smaller than the husband's gain. Presumably, if that were the case, then the husband could induce the wife's agreement by promising her other benefits. For example, if you move, then I will stop drinking (thus yielding her a utility gain in the intact marriage). The effectiveness of such inducements depends upon their credibility. A more complex and realistic theory would attempt to capture this kind of spousal bargaining in its calculations, which *The Theory* has not done. We can observe, however, that there is no reason why, consistent with *The Theory*, the law could not recognize and enforce explicit spousal contracts of this kind. *The Theory* rejects the use of "contract talk" to justify remedies where there has been no actual contract; it does not reject the enforcement of explicit contracts that have been made. Making such promises enforceable would have the benefit of increasing their credibility, but it might also have costs. For example, would we want a court to determine whether one spouse had kept a promise to stop "nagging" the other? Can such promises be made definite enough to be properly enforceable in contract without distorting their impact on the marriage? I do not attempt to resolve such questions here.

ciently to allow them to go forward after all, which would be another example of *The Theory* working as intended. We must also observe, however, that *The Theory* offers her no compensation for any residual nonfinancial loss that might remain upon divorce. *The Theory* may, therefore, be inadequate to eliminate the disincentive for her to proceed, another example of *The Theory's* imperfection of omission.

We will save Box 3 for last.

Box 4. Here both parties derive a nonfinancial loss from the decision. They will not make such a decision unless, for each of them, the nonfinancial loss is less than their share of the marriage's financial gain— + 1 apiece, in our example, if they divide the financial gain evenly. In that case, they might proceed, unless the wife were deterred by the contingent financial loss to her in the case of divorce. *The Theory* would eliminate this financial loss and might thereby eliminate a disincentive to sharing. But again, *The Theory* might provide too small a remedy to be effective. If the wife's nonfinancial loss were residual—if it continued after divorce—then she would have a contingent loss that *The Theory* would not cover.

Box 3. Box 3 presents the most interesting case, in which the wife derives a nonfinancial benefit but the husband derives a nonfinancial loss. It might arise by the following facts. The husband is offered a very lucrative promotion requiring him to move. He doesn't particularly like the new location and isn't really interested in working as hard as the promotion would require. To move requires his wife to incur a loss in earning capacity, but her loss would be smaller than his gain, so that the marriage would realize a net financial gain from the move.

Further assume the wife could not find suitable work in the new location, but this does not bother her. In fact, she would not mind leaving the market and would be content to let her husband support them with his newly enhanced income, so that she can devote herself more to her real passion, painting. Thus, the proposed move has nonfinancial benefits for her but nonfinancial costs for him. This example, in fact, follows closely one of the hypotheticals Professor Schneider uses to suggest difficulties in *The Theory*.⁷³ Let us examine it closely to see whether, as he

73. See Schneider, *supra* note 1, at 212-13.

suggests, *The Theory* may create disincentives for sharing in a case like this.⁷⁴

Professor Schneider's discussion of this hypothetical characterizes the husband as making a sacrifice because his married life is worse off after the decision than before it—he is someone “from whom something was extracted that he did not want to give.”⁷⁵ The implication is that the husband should therefore pay no alimony. But this conclusion assumes an inappropriate baseline for gauging whether there has been a sacrifice: the pre-decision marital arrangement. While the post-decision allocation of burdens and benefits in the marriage may be less advantageous to the husband than the pre-decision allocation, it still yields him a net benefit as compared to the baseline of a single life, or he would exit the marriage rather than accept the decision. *Staying in the marriage* thus entails no sacrifice for him, even though the marriage does not yield him as large a net benefit as it once did, or as he hoped it would. Perhaps he may feel that he has sacrificed for the marriage, but clearly he has not, because the marriage in fact still provides him more overall utility than he would achieve single.

Of course, at the time they are making their decision, both spouses are likely to compare its expected consequences to the status quo, not to the alternative of exiting the marriage, which is why the husband might have some sense of sacrifice even though he is better off than if he left the marriage. But there is no reason his sense of sacrifice at the time of the move should shield him from an alimony claim at the time of divorce. We have already seen that *The Theory* cannot and should not ad-

74. *Id.* at 214. Professor Schneider also uses this hypothetical to suggest that *The Theory* is flawed for providing a remedy in this case because it would seem that the wife is not actually “sacrificing” anything, and is thus unlike the parts supplier in the commercial analogy drawn in *The Theory*. *Id.* at 213. I am puzzled by this point, for I have never understood a sense of sacrifice to be important in any theory of recovery and certainly not in contract. To the contrary, one ordinarily assumes that both parties entering into a consensual relation like contract or marriage expect to benefit from the relationship, since they otherwise would refrain from entering it. A party who begins a relationship with no sense of sacrifice can still end it with a loss when things do not turn out as expected. Contract allows recovery in such cases to the claimant who shows that the loss flowed from the other party's failure to keep his promise. *The Theory* avoids this contract approach since it wants to avoid inquiries into which party “breached,” but allows a smaller recovery than contract in order to encourage parties who might otherwise decline to act for fear that they will bear the full loss if things turn out differently and the parties divorce. Neither contract nor *The Theory* require a subjective sense of sacrifice as a necessary element of recovery.

75. Schneider, *supra* note 1, at 213.

dress the incentives operating on exchanges during the marriage, and *The Theory* already properly accounts for problems arising from the consequences such decisions might have on divorce. Nor does concern over fairness suggest giving much weight to such subjective feelings of sacrifice. The husband who once performed no housework may have a sense of sacrifice when he performs twenty-five percent of it, but that should hardly immunize him from an alimony claim if his marriage later dissolves. *The Theory* does not address marital decisions that leave a spouse worse off *in the marriage* than if he were single, since (apart from short-term transition problems mentioned earlier⁷⁶) it assumes neither spouse will in fact remain in such a marriage.⁷⁷ *The Theory* is concerned instead with marital decisions whose advantages (for one spouse) evaporate at divorce, thus leaving that spouse worse off than if he had never married in the first place. These are the decisions addressed by *The Theory* because these decisions do produce real losses incurred for the marriage (although only realized on divorce) which will go uncompensated if they are not addressed by an alimony remedy.

Let us then return to the facts of Box 3 to determine whether *The Theory* would create a disincentive for sharing in this case. We first ask whether the parties would move if there were no alimony.⁷⁸ For the wife the consequences of the move

76. *Supra* note 51 and accompanying text.

77. Obviously, this assumption will not be correct in every case. Coercion is possible. For an extreme example, see *In re Marriage of Weintraub*, 167 Cal. App. 3d 420, 213 Cal.Rptr. 159 (1985) (allegation that wife was abducted "by force, physical beatings, and threat of physical harm and taken [to another state] where . . . against her will and as the result of coercion, physical beatings, intimidation and threats upon the safety of her family, [she] went through a marriage ceremony"). Losses incurred as a result of such coercion surely ought to be compensable, but the remedy would not be in alimony but in some other action, probably tort. A theory of alimony need not therefore address this kind of case.

In the more usual case, we assume that a spouse who believes he would be better off single would be filing for divorce rather than planning his future married life. The spouse who does not believe himself better off single has no veto over a change in the marital circumstance that reduces his utility, since he will ultimately concede rather than exit if the other spouse insists on the change. He obtains a veto only when the change not only reduces his utility, but reduces it below the value he would enjoy if divorced. Of course, that point may soon be reached if his partner repeatedly presses her advantage.

78. When we ask this question we must compare the move's expected results with the status quo as well as with the alternative of divorce. Each spouse's initial assessment will turn on whether the proposed change will improve or worsen his or her current situation; if both believe it will improve they will proceed, and if both believe it will worsen, they will not. The more difficult cases arise when the change will improve one spouse's life but worsen the other's. Where one spouse sees sufficient benefit to himself in such a

(as compared to the status quo) all appear positive, so one would expect her to favor it. For him they are negative, if, as Professor Schneider seems to hypothesize, his nonfinancial losses outweigh his share of the financial gains.⁷⁹

Why would the husband agree to the move if its immediate consequences are negative for him? In fact he may not. After all, he can stay put and stay married too, unless his wife will exit if he does not move. A move can thus occur only if the husband believes both that his wife will exit the marriage if he does not move, and that he is better off moving with her than staying without her.⁸⁰ Presumably, we want the parties to move in this case, since if they do not they will divorce, and if they divorce both will be worse off than if they had moved.⁸¹ Presumably the

case to press for the change, the other must then decide whether to concede or exit. This last decision must be made by comparing the marital outcome if she concedes with the outcome she will have as a single person if she exits. If she would be better off single, she will refuse to concede.

79. Of course, if his share of the financial gain is greater than his nonfinancial loss, he too will favor the move. Indeed, this is an easy case, since both parties are better off moving whether we compare the outcome to a baseline of single life or a baseline of the marital status quo. It is really the other case that Professor Schneider finds troubling—the case in which the overall immediate consequences of the move seem negative for the husband—and that is therefore the case I focus upon in the text. In the easy case the wife has a financial loss if the parties later divorce (in the absence of an alimony remedy), since she no longer shares her husband's income. (The husband would keep all the financial benefits of the move, clearly outweighing, in this case, his nonfinancial costs, since we have assumed in this case that his share of the financial benefits during the marriage outweigh his nonfinancial loss.) Because the wife has a financial loss on divorce as measured against the situation she would have been in if single, (and the husband has gained from the same event that caused her loss, the move) she would be entitled to an alimony remedy under *The Theory*. This result should not be counterintuitive, or at least, less so than the case addressed in the text.

80. If he believes himself better off exiting he will not make the move whether or not there is a potential alimony remedy, so we need not consider that possibility any further.

81. Actually, of course, marital decisionmaking is considerably more complex than this example can possibly capture. For example, the husband might believe the move will yield him nonfinancial gains, despite his distaste for the increased workload and the new location, because it may yield changes in the internal conduct of the marriage (for example, that his wife will be more available to help him because she is not working), or because he will derive pleasure from her enjoyment of their new life. On the other hand, he may feel that "staying put" will not really preserve the status quo because even if his wife does not exit the marriage, her attitudes and feelings will be affected by his decision to stay put in a way which will reduce his overall marital satisfaction. These complications simply illustrate further the difficulties of making any assessment of the intra-marital exchange between spouses, and particularly the allocation of the marriage's nonfinancial burdens and benefits, which is why as a general matter *The Theory* avoids them altogether. I discuss them here only to respond to Professor Schneider's assertion that in this particular case the nonfinancial considerations render *The Theory's* results unfair.

parties are capable of perceiving this and will in fact move. The question then is this: would *The Theory* allow the wife alimony if they move and then divorce, such that the husband who otherwise would have moved will decide not to. If so, then *The Theory* would have created an inappropriate disincentive, since the parties are better off moving. That is, in effect, what Professor Schneider suggests might happen when he posits that in this case *The Theory* may impose on the husband an inappropriate alimony obligation if the parties divorce after moving.

To answer this question requires a more complicated model of the parties' behavior. We have thus far assumed that if they move they will not divorce, but if the parties feel certain of that, then alimony rules will have no effect on their behavior, and clearly they will move (as it seems they should). On the other hand, if the husband believes the marriage will end even if he does move with his wife, then he will not move whether or not there was alimony, since he is better off staying put and divorcing than moving and divorcing.

What should he do if he is virtually sure they will divorce if he does not move, but that the outcome is uncertain if they do? If he thought about this possibility entirely rationally, he would weigh the relative benefits of moving and staying married according to his assessment of the probability that they would stay married. Thus he would compare the overall utility of staying put (and presumably divorcing) not against the overall utility of moving but rather against the "expected value" of that utility. That expected value would be calculated by first multiplying the utility of moving and remaining married by the probability of this result, then multiplying the utility of moving and divorcing by the probability of that result, and then adding the two products. The sum is the expected value of moving, which can be compared to the expected value of refusing to move. By choosing the course with the highest expected value, parties will, on average, achieve the best results, even though their choice in a particular case may in retrospect turn out less well than would another choice. Although people obviously do not think of themselves as employing technical terms of probability analysis like "expected value," they in fact do tend to weigh the benefits and burdens of particular decisions by some seat of the pants feeling about the probability of the outcome. The husband who thinks his wife will probably divorce him in any event is less likely to agree to move with her than if he believed the move

would probably preserve their marriage. Looking at expected values is simply a more formal rendering of this process. In our case it might be illustrated as follows:

Staying put and staying married	+5
Moving and staying married	+3
Staying put and divorcing	+2
Moving and divorcing	+1

Suppose the husband's assessment of the overall utility of various outcomes to him is as follows: he believes that his first choice is essentially unavailable because he is ninety-nine per cent certain his wife will leave him if he does not move. Ergo, the value of staying put equals $(5) (.01) + (2) (.99) = 2.03$. He believes the chance of their remaining married if he moves is fifty percent. Ergo, the value of moving equals $(3) (.50) + (1) (.50) = 2$. Here the outcomes are close, but his best prospects lie in declining to move. If he thought moving were a bit more likely to preserve the marriage (say, .55 instead of .50) or if the utility value of moving and divorcing was a bit closer to staying put and divorcing (say, + 1.2 and + 2, instead of + 1 and + 2), then the outcome would be different, and the expected value of moving would be greater than the expected value of staying put.

How then will his decision be affected by an alimony rule under which he may have to make good the wife's financial loss from moving, if he moves to the promotion and they divorce anyway? (*The Theory* would allow the wife a claim against the husband, because she has a financial loss from the very move which allowed him to make a financial gain.) Clearly the rule will reduce the relative utility of moving and divorcing; whether that would alter the decision he otherwise would make depends upon the values assigned to the other variables in this analysis (the various utility values of other outcomes and probabilities). For example, the wife's potential claim for the financial loss she suffers at divorce from the move might lead the husband to require more assurance before moving than he otherwise would need that the move will successfully preserve the marriage. In some sense, then, *The Theory* creates a disincentive for sharing to the extent it leads a smaller proportion of spouses in these cases to take the chance that things will work out well.

What then to do? It surely seems unlikely that the incentive structure of the law could be improved by taking nonfinancial gains and losses into account. In this case, for example, the law

would have to balance the husband's financial gain from the move against his claims of a nonfinancial loss, either as a defense against the wife's alimony claim or perhaps even as the basis of a claim of his own. Such careful gauging of nonfinancial gains and losses is implausible, and any attempt to do so is more likely to create problems than to solve them. We might handle such cases better by restricting the default legal rule to examination of the financial outcome, while allowing or even encouraging parties to make their own bargains that depart from the default rule, if they wish. While *The Theory* concludes contract analogies are not helpful in understanding the largely noncontractual conduct that forms the basis of most alimony claims, it does not bar enforcement of true contracts between the parties in the rare cases when they are made. In fact, contract is a more promising tool for dealing with a specific marital decision than for organizing the entire marital relationship. The husband could say, for example, that he will move and try out the new job only if his wife agrees to waive or limit her alimony claim if things do not work out. If she is confident their marriage will prosper from the move, she should agree to such an offer. If she shares his worry that the marriage will dissolve in any event, then little may be lost if her refusal to agree leads the parties to separate rather than move together.

The analysis offered in this section is necessarily sketchy, and can hardly capture the actual complexity of the decision-making process.⁸² It surely suggests that *The Theory*, standing alone, does not deal adequately with every case. A more detailed model of marital decisionmaking may shed further light on useful refinements.⁸³

IV. CONCLUSION

Not surprisingly, the preceding analysis reveals limits to an incentive theory, as well as strengths. *The Theory of Alimony* is not perfect, even when tested against its own rationale of eliminating disincentives to marital sharing behavior. Some disincentives will remain and, in many other cases, nonfinancial motiva-

82. See also *supra* note 72.

83. One issue not addressed in the textual analysis, for example, is the question of risk preference. People vary in their willingness to risk a bad outcome in a particular case in order to achieve the best chance at the highest average outcome, and this will clearly affect their choices.

tions will swamp the financial considerations with which *The Theory* deals. But *The Theory's* shortcomings arise largely from fundamental problems which may defeat any effort to generate a defensible set of principles for awarding alimony: we have no effective measures of the spouse's nonfinancial preferences that will allow us to compare them to each other, and thus no way to assess the relative nonfinancial gains and losses realized by the spouses upon divorce or in the marriage. We also have no way to balance a spouse's financial gains or losses against the same spouse's nonfinancial gains and losses. *The Theory* avoids this problem by focusing exclusively on the financial gains and losses flowing from marital decisions and on eliminating distorting financial disincentives. Incompleteness is the price of this solution.

But although all is not loss, surely also all is not lost. While imperfect, *The Theory's* imperfections are ones of omission, rather than of commission. It therefore still offers an advance over a system without alimony, or over alimony without a system, which is how one might describe the current law. And we may also observe that the shortcomings *The Theory* exhibits are not uncommon in the law.

The law of contract, for example, which has for many been the most promising way out of alimony's conceptual dilemma, in fact shares many of the same problems: contract theory provides no remedies for nonfinancial losses, nor does it consider, in fashioning remedies, the nonfinancial motivations of the contracting parties. While it might seem troubling, for example, that *The Theory* allows an alimony remedy for lost earning capacity to the wife who wanted to be a homemaker anyway, who enjoyed being a homemaker, and who would have been one even without an alimony remedy, the result would be the same under contract. "He wanted to do it anyway" is no defense to an action for breach alleging nonpayment. Contract damages are awarded, or denied, without regard to the nonfinancial motivations, gains, or losses enjoyed or suffered by the parties in the course of their transaction.

Most people, however, are more comfortable with focusing exclusively on financial considerations in a law governing commercial transactions than they are in a law governing family relations. For me, many of the intractable problems in this area are captured by a hypothetical I sometimes use in class. I start with the now classic case of the wife who supports her husband

through medical school, abandoning her own professional training while working in a job she does not particularly like. Perhaps she bears a child as well, the birth well timed to coincide with her husband's completion of his training. But at that point he announces his intention to leave her for another woman he has taken a fancy to. Many students—and many law professors—find this an appealing case in which to require the husband not only to make good her lost earning capacity, but to share with her some of the gain in his as well. They may have such a case in mind in criticizing *The Theory*, which would grant only her reliance loss in her own earning capacity, but none of her expectation loss in his.

Suppose then that we were to change the rule to allow her this expectation loss. Consider now a shift in the nonfinancial facts of this case: the same marriage ends, at the same time, but now because the wife announces her long-standing passion for a poet she met when her husband was studying late in the library at the beginning of his training. Perhaps the child of the marriage is really the poet's. The poet cannot support her or her child very well, but the wife believes she can solve that problem by the share she expects to receive in her husband's future income as a physician. Some might now feel that *The Theory's* award to her of her reliance loss is too generous, and surely most are uncomfortable with the suggestion that she receive a lifetime share in his earnings.

It is not possible, however, to devise a system of alimony that distinguishes these two cases unless it incorporates findings of fault in its criteria for an award. But do we really want to do this? One piece of wisdom contained in the no-fault reforms was a skepticism about our ability to decide who was really at fault for marital failure. In the first case, for example, perhaps the husband's infidelity was bred by his wife's coldness. But then, perhaps her coldness resulted from his insensitivity. Can we tell which came first? Can we even tell whether he was really insensitive, or she was really cold? One might reasonably doubt whether there are accepted standards for judging such things.

It is one matter to render a judgment in a hypothetical where the facts are both supplied and constrained; it is another matter to render a judgment in an actual case in which further nuances are discoverable and the perceptions of the spouses—often the only parties who could possibly know—differ dramatically. One can tell the spouses do not love each other at

the time of divorce, but surely the no-fault reformers were correct in concluding that courts would rarely be able to assign blame for that state of affairs.⁸⁴ It seems unlikely that justice would be served by asking them to try. But that leads us to conclude that we must develop principles of alimony that exclude nonfinancial considerations and treat these two cases alike. That is the task I set for myself in *The Theory*.

The difficulties Professor Schneider identifies with *The Theory* seem largely to be elaborations of the more fundamental difficulty revealed by this hypothetical: we want to distinguish these two cases, but we really don't know how to do it. If we accept this limitation on our ability, then we may also need to reconsider what we mean by "fairness." Professor Schneider's work suggests that judging post-divorce remedies on criteria of fairness leads inevitably to inquiries into the "moral relations" of the parties, including inquiries into their relative responsibility for the marital failure and into the nonfinancial benefits and burdens the parties derived from their relationship. Yet, if we concede that we are not in fact capable of gauging these things, then we must ask a second question: what is the fairest way to proceed when we cannot fully gauge parties' "moral relations"? An effort to critique *The Theory* on fairness grounds must confront this question. If Professor Schneider had, I am not sure what he would have concluded. Although Professor Schneider is correct that *The Theory* is grounded primarily on an incentive rather than a fairness rationale, *The Theory* may also be a reasonable approximation of a fair system once we accept that fairness must be judged without reference to qualities of the marital relationship that we cannot measure.

There is a field of law more friendly to the kind of concerns Professor Schneider raises, and it is called tort. One can recover in tort for all kinds of things that no one knows how to measure: emotional distress, pain and suffering, and the loss of dignity involved in an "offensive" touching. Perhaps therein lies the real arena for adjusting imbalances in the nonfinancial gains and losses of marriage, or providing recovery for outrageous or im-

84. The problem is even more complicated than the text suggests. Perhaps, in fact, the mistake was in ever thinking they loved one another; who is responsible for that? Suppose the husband tried to make the marriage last even after it seemed that mutual affection had been lost, but was not able to make his emotions follow this determination. Is he then liable for his coldness or insensitivity? More examples can be given; the point is simply that human relations are too complex to be susceptible to such inquiries.

proper spousal conduct. I am not sure I favor that solution myself; the problems do not go away by labelling them tort—they just seem more tolerable.⁸⁵ But that debate I must save for another day.

85. Some recent cases attempt to deal with this problem through the rubric of a tort claim for "emotional distress." For my preliminary thoughts on these cases, see I. ELLMAN, P. KURTZ & K. BARTLETT, *supra* note 12, at ch. 3, sec. D2.