

3-1-1991

## Rethinking Alimony: Marital Decisions and Moral Discourse

Carl E. Schneider

Follow this and additional works at: <https://digitalcommons.law.byu.edu/lawreview>



Part of the [Family Law Commons](#)

---

### Recommended Citation

Carl E. Schneider, *Rethinking Alimony: Marital Decisions and Moral Discourse*, 1991 BYU L. Rev. 197 (1991).  
Available at: <https://digitalcommons.law.byu.edu/lawreview/vol1991/iss1/3>

This Symposium Article is brought to you for free and open access by the Brigham Young University Law Review at BYU Law Digital Commons. It has been accepted for inclusion in BYU Law Review by an authorized editor of BYU Law Digital Commons. For more information, please contact [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu).

# Rethinking Alimony: Marital Decisions and Moral Discourse

Carl E. Schneider\*

## I. INTRODUCTION

The riddle of alimony is why one former spouse should have to support the other when no-fault divorce seems to establish the principle that marriage need not be for life and when governmental regulation of intimate relationships is conventionally condemned. Perhaps the most intelligent and probing recent attempt to solve that riddle is Ira Ellman's *The Theory of Alimony*.<sup>1</sup> In this article, I have two purposes. The first is to ask some questions about Professor Ellman's admirable inquiry into this intricate and intractable problem. These questions are not intended to disprove "the theory."<sup>2</sup> Professor Ellman has, at the least, identified a number of ideas which should influence our thinking about alimony, and he has shown why a number of others probably should not. As he notes, in trying to solve the alimony riddle he has taken on a large project, a project which *The Theory of Alimony* only begins. I would like to contribute to that project by showing where the theory's rationale for alimony falters and by proposing profitable directions for the inquiry Professor Ellman has so incisively begun. More generally, I

---

\* Professor of Law, University of Michigan.

For the reasons given in Richard A. Posner, *Goodbye to the Bluebook*, 53 U. Chicago L. Rev. 1343 (1986), I use the University of Chicago Manual of Legal Citation, id. at 1353. As a great man once said, "Faites simple." I am enthusiastically grateful to the editors of the B.Y.U. Law Review for the uncommonly generous way in which they have accommodated my wish to strike a blow for freedom from the inanities and insanities of the Bluebook.

This paper was originally presented at a Brigham Young University Symposium on Family Law. I wish to thank the participants in that symposium for their helpful comments. I owe a particular debt of gratitude to Edward H. Cooper, Joan W. Schneider, Kent D. Syverud, Carol Weisbrod, and Barbara B. Woodhouse for their careful reading of an earlier draft of this article.

1. Ira Mark Ellman, *The Theory of Alimony*, 77 Calif. L. Rev. 1 (1989).

2. In order to avoid ceaseless incantations of Professor Ellman's name, I will henceforth frequently refer simply to "*The Theory*" or "the theory."

hope my investigation will identify some of the core difficulties any theory of alimony must confront.<sup>3</sup>

My second purpose in writing this article arises from the fact that perhaps solipsistically, I interpret Professor Ellman's project in light of an observation of my own. A few years ago, I argued that American family law has experienced "a diminution of the law's discourse in moral terms about the relations between family members, and the transfer of many moral decisions from the law to the people the law once regulated."<sup>4</sup> Professor Ellman's enterprise speaks to this hypothesis in two ways. First, it centrally considers how far courts must undertake moral discourse in order to apply the currently popular approaches to alimony. Second, it attempts to develop a theory of alimony which is justifiable in other than moral terms and which tries to relieve courts of the burden of moral discourse in deciding whether to award alimony.<sup>5</sup> In my earlier article, I reached no conclusion about the ultimate practicality, much less the ultimate desirability, of the trend away from moral discourse. While I cannot fully answer those two questions here, Professor Ellman's inquiry is an intriguing test case. The second half of this article thus explores in some detail the role of moral thinking in the law of alimony. During that exploration, I will express doubts about the success of any attempt to base a theory of alimony on morally "neutral" terms and of any attempt to bar courts from considering the moral relations of the parties in awarding alimony.

## II. PROFESSOR ELLMAN'S THEORY OF ALIMONY

Professor Ellman begins by arguing that alimony has lost its rationale. The idea that divorced wives were entitled to alimony was sustained for generations by the belief that marriage committed a man to supporting his wife for the rest of her life. He

---

3. I am delighted that Professor Ellman has agreed to respond in this symposium to this article. To avoid giving him a constantly moving target, and because I hope my comments will stand on their own, I have generally not tried to answer the points he makes in his response. I thus refer to his remarks only to help make my reasoning clearer.

4. Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 Mich. L. Rev. 1803, 1807-08 (1985).

5. I am not suggesting that Professor Ellman approves of the trend; I don't know if he does. I am only saying that he seems to accept it for the purposes of trying to develop a theory of alimony which fits American family law as it now is. It seems to me that Professor Ellman has left himself entirely free to argue that the trend is incomplete and still leaves room for some kinds of moral discourse or even that the trend is undesirable.

could not escape that commitment by divorcing his wife, unless she seriously breached her marital responsibilities to him. However, as our ideas about what spouses promise each other and about gender roles have changed and as no-fault divorce has proliferated, the traditional rationale for alimony has crumbled. Today, "no one can explain convincingly who should be eligible to receive alimony, even though it remains in almost every jurisdiction" (pp. 4-5).<sup>6</sup>

Professor Ellman of course knows that modern defenders of alimony try to solve the riddle with either the law of contract or partnership. But he rejects both solutions. Contract law fails for several reasons. First, few couples actually enter express marital contracts, and even those couples that wish to do so often find that the law constrains them. Second, implied contracts are usually too partial and vague to be enforceable. And Professor Ellman sees a further drawback of looking to implied contracts. Because it is hard to imply a contract in the complex and fluid circumstances of a marriage, and because there are no generally accepted social standards which could be used in filling out the contract's terms, a court would be hard pressed to identify those terms without consulting its own views of marriage. Third, most implied contracts speak to the couple's relations during their marriage, not to their life afterwards. Thus those contracts can tell a court little about whether to award alimony. And, given the ambiguity of most such contracts, a court could not define "breach" without an inquiry which essentially resembled the inquiry into marital fault which no-fault divorce rejects. Fourth, contract's measure of damages—expectation—produces awards which exceed all ordinary understandings of reasonable alimony. Fifth and finally, the semi-contractual analogy of restitution fails because it requires courts to inquire into highly ambiguous facts and to decide when a defendant's retention of the benefit the plaintiff conferred is unjust, which once again compels courts to inquire into "fault."

Professor Ellman also rejects partnership law as an analogic basis for alimony. First, partnership law is designed only for businesses, that is, profit-seeking enterprises. But marriage is not in any ordinary sense such an enterprise, and it is generally organized on importantly different principles. Second, partner-

---

6. All references to page numbers are, of course, to *The Theory of Alimony* (cited in note 1).

ship law does not provide for anything like alimony. Third, while partnership law provides remedies for wrongful dissolution, for breaching the duty to serve the partnership, and for failing to compensate a partner who has provided the partnership extraordinary services, each of these remedies requires the court to consult some normative standard of behavior which is available for partnerships (because they are businesses undertaken for profit) but which are not available for marriages (as to which there are no universally accepted normative standards).

Having dispatched all the standard rationales for alimony, Professor Ellman turns to constructing his own. He begins by "looking at the commercial use of contract" in order to "identify the issues that commercial actors use contract to resolve—issues that in marriage are left to alimony" (p. 40). He suggests that when a supplier would have to make special capital expenditures in order to sell parts to IBM, the supplier will insist on a long-term contract in order to protect those expenditures. He argues that a wife<sup>7</sup> may find herself in the same situation as the supplier, but may not be able to take advantage of the protections commercial law offers the supplier. That is, a wife may make investments which benefit the couple while they are together, but which deprive her of earning power after they divorce. Examples of such investments include abandoning a career in order to keep house or to bring up children or giving up some of her career opportunities so that her husband may take fuller advantage of his. During the marriage these choices will often be economically rational, since they may increase the couple's joint income more than any alternative allocation of their efforts. But after divorce, they may leave the wife with diminished, and the husband with increased, earning capacity. In analogous circumstances, the parts supplier would protect its investment contractually. But the "indefinite nature of the parties' marital obligations" (p. 44) prevents the wife from devising a contract which would similarly protect her investment.

The wife's inability to protect herself through such a contract is the problem alimony solves: the "loss that alimony is

---

7. Professor Ellman writes, "Recognizing this reality [that "alimony claims are in fact overwhelmingly brought by women against men"], and to avoid tedious language, I often use the term 'wife' and its referent pronoun 'her' as a shorthand for the spouse with an alimony claim" (p. 4, n.2). For Professor Ellman's reasons, and for the sake of clarity and consistency, I will follow his practice.

intended to compensate for . . . is the 'residual' loss<sup>8</sup> in earning capacity that arises from . . . economically rational marital sharing behavior" (p. 49). By assuring the wife that her economically rational investments will be protected, alimony protects her from a loss of earning power arising out of such investments in the marriage. Alimony thus prevents "distorting incentives" (p. 50) from skewing marital decisions and "maximizes the parties' freedom to shape their marriage in accordance with their nonfinancial preferences" (p. 51). That is, "[a] system of alimony that compensates the wife who has disproportionate post-marriage losses arising from her marital investment protects marital decisionmaking from the potentially destructive pressures of a market that does not value marital investment as much as it values career enhancement" (p. 51). Under this theory, alimony is "an entitlement earned through marital investment, and . . . a tool to eliminate distorting financial incentives, . . . not a way of relieving need" (p. 52).

Professor Ellman proffers several rules for implementing his theory. First, alimony is to be awarded only where the wife suffered a loss in her post-marriage earning capacity because of an investment in the marriage. Second, "only financially rational sharing behavior can qualify as such marital investment," (p. 58) and the wife may obtain alimony only where the investment was successful. Third, the wife may recover half her lost earning capacity even though her investment was not financially rational where the investment included primary responsibility for bringing up the couple's children, since "[p]arental care is . . . not merely a life-style preference but a traditional ideal" (p. 72) and since "society relies for its continued existence on couples who make just this financially irrational choice" (p. 71).

### III. EXAMINING THE THEORY

*The Theory of Alimony* is rich in virtues, and it contributes abundantly to our understanding of alimony. First, it argues forcefully what is painfully true—that we need a theory of alimony before we can devise sensible rules for it<sup>9</sup> and that we quite lack one. Second, Professor Ellman convincingly demon-

---

8. "This is a residual loss in the sense that it survives the marriage" (p. 49).

9. For a general argument in favor of just such theory-building, see Carl E. Schneider, *The Next Step: Definition, Generalization, and Theory in American Family Law*, 18 U. Mich. J. L. Reform 1039 (1985).

strates some of the drawbacks of both contract and partnership law as a basis for such a theory. He accurately points out many of the weaknesses of the ideas about implied contract which undergird much current thinking about alimony (and about *Marvin* remedies);<sup>10</sup> he neatly shows that partnership law's repertoire is too small and too closely tailored to profit-making to solve the alimony riddle.<sup>11</sup> Third, *The Theory* identifies a kind of marital investment which seems a genuinely attractive candidate for alimomial protection: major changes of economic position which after divorce benefit one spouse and disadvantage the other. Fourth, Professor Ellman's attitude is entirely attractive: he seems refreshingly interested in following his ideas wherever they may lead him; he does not merely try to justify conclusions he has already reached on unrevealed grounds. Consequently, his arguments are carefully stated and honestly explored.

However, it would be startling indeed if anyone could solve so challenging a riddle in one attempt. I will now explore some of the problems I see with Professor Ellman's theory. My exploration will be in two stages. In the first stage (Part III of the article), I will analyze the theory on its own terms. That is, I will ask how well the theory serves its purpose of creating incentives that correctly influence marital decisions and of removing incentives that "distort" them. I will find reason to fear that the theory's incentives will in fact not affect marital behavior at all. I will argue that the structure and functioning of the theory's incentives are flawed because the theory isolates one transaction from the whole range of marital decisions, and I will question whether courts could satisfactorily make the calculations the theory calls for. Behind these specific arguments lie two general ones. First, Professor Ellman's solution is problematic because it relies so heavily on economic reasoning, while people do not view marriage entirely in terms of economic advantage, and we do not want them to. Second, Professor Ellman's solution to the riddle of alimony is problematic even as an economic theory because his effort to create a manageable justification for alimony forces

---

10. *Marvin v. Marvin*, 557 P.2d 106 (Calif. 1976). *Marvin* held that unmarried couples could contractually decide how their property was to be allocated and what support obligations might exist after their relationship had ended (at least to the extent that the contract was not explicitly based on meretricious services). It also held that courts might make such decisions for the couple where equitable grounds existed for doing so.

11. While I find much to agree with in Professor Ellman's criticisms of contract as a sole and complete rationale for our present alimony regime, I would not reject the possibility that contract might be a basis for a reformed law of alimony and marital property.

him to ignore too many concerns that are as much economic as those the theory relies on.

However, I will postpone until the second stage (Part IV of the article) my comments on the theory's desirability. And even there I will not try to propose my own global theory of alimony. Rather, I will contend that Professor Ellman's theory seems to award alimony in one important category of cases where alimony should be awarded, but that it fails to award alimony in a number of cases that seem just as meritorious and that it could award alimony in some cases that seem unmeritorious. And I will argue that, in order to succeed either in creating the right incentive structure for marital decisions or in settling alimony disputes fairly, a theory of alimony must take into account the moral relations of the parties.

In Part IV, I will also use the theory as a vehicle for evaluating the trend toward a diminution in moral discourse in family law. I will argue first that it is not possible to justify a theory of alimony in morally neutral terms. And, I will argue, courts resolving disputes over alimony need to be able to take the moral relations of the parties into account, since those relations will often be central to understanding the parties' behavior and to doing justice in resolving their dispute. As I will say later, "[T]he people the law seeks to affect think in moral terms. A law which tries to eliminate those terms from its language will both misunderstand the people it is regulating and be misunderstood by them." I will acknowledge that there are reasons we might want to restrict judicial inquiries into the parties' moral relations, but I will suggest that these reasons are not dispositive.

A. *Alimony and the Hortatory Function: Or, Who Listens to the Law?*

Some years ago, Professor P. S. Atiyah said that the judicial process serves

two main functions. In the first place it provides a means of settling disputes by fair and peaceful procedures, a function which may be variously termed that of conflict-adjustment or dispute-settlement. In the second place the judicial process is part of a complex set of arrangements designed to provide incentives and disincentives for various types of behaviour . . . .



There is no simple or agreed term for this aspect of the judicial function which I propose to call the hortatory function.<sup>12</sup>

Alimony has ordinarily been considered part of the dispute-settlement function of law. Divorcing spouses disagree about who owes what to whom, and a court resolves the dispute by ordering or not ordering alimony. The court seeks to do justice between the parties by examining their present situation and their relationship during the marriage. The court has commonly not been expected to calculate how its decision might affect the behavior of married couples generally.<sup>13</sup>

Although Professor Ellman does not quite say so, perhaps *The Theory of Alimony's* most original contribution is to propose that alimony should instead be seen primarily in terms of the hortatory function. At the theory's core is the principle that the "function of alimony . . . is to reallocate the post-divorce financial consequences of marriage in order to prevent distorting incentives" (p. 50). While *The Theory* argues that its system is "consistent with equitable notions," it rests principally not on those notions, but rather on the "proposition that marital investment decisions should be free from potentially distorting penalties and incentives" (p. 51). *The Theory* emphasizes this point by insisting that its system "is fundamentally different from contract analysis," since contract analysis looks backward to fashion a remedy for violated promises, while the theory "looks forward; it generates alimony rules that encourage the kind of marital behavior we want" (pp. 51-52).

If the theory of alimony is essentially hortatory, if it seeks primarily to alter the incentives which affect marital decisions rather than to arrange the affairs of a divorced couple as equitably as possible (or to carry out the couple's contractual agreements), then we need first to ask whether the theory can effectively serve the hortatory function. Will the theory's incentives

---

12. P.S. Atiyah, *From Principles to Pragmatism: Changes in the Function of the Judicial Process and the Law*, 65 *Iowa L. Rev.* 1249, 1249 (1980). In my own work, I have called this function of law the "channelling" function. The law performs the channelling function by creating or (more often) supporting social institutions and practices which are thought to promote desirable ends and then by channelling people into using those institutions or practices. See Carl E. Schneider, *Family Law* (forthcoming).

13. Because this is an article about the principles that ought to govern alimony, I have been talking in terms of what courts do. In fact, however, it is conventionally believed that the large majority of divorce disputes (perhaps as many as 90 percent) are not litigated. Rather, they are thought to be negotiated by the parties and rubber-stamped by courts that are too busy to examine divorce settlements closely.

have the intended effect on the spouses' behavior? Will they have *any* effect on it?

In gauging the hortatory effect of a system of alimony, I think we must begin with a skepticism born of our accumulating knowledge about how well people know the civil law and how far they consider it in making decisions. There is a growing body of evidence that people live in (to a lawyer) dismaying ignorance of and indifference to the incentives and penalties legal rules strive to create. Even businessmen, who would seem to have the sophistication and incentives to learn and use the law's tools, apparently ignore them startlingly often. Indeed, people often seem actively and deliberately to resist the law's norms, particularly when, as regularly happens, those norms conflict with other social norms.<sup>14</sup>

Not only should we generally question legal reforms that assume that people shape their behavior in response to legal incentives, but we should be particularly skeptical of reforms that seek to affect marital decisions of the kind *The Theory* treats. There are several reasons such marital decisions may be particularly impervious to the law's incentives. One reason is that couples don't know what the law's incentives are. Direct evidence of this comes from an empirical study of knowledge about the law of alimony, marital property, and child support which finds

the ordinary person to have scant knowledge of the terms of the marriage contract as defined by the statutory laws regulating divorce. Even individuals with substantial rational incentives to know those laws well, in fact know little. Thus, marriage appears to be a contract whose statutory terms are typically "discovered" by the parties (if at all) only when things begin to go wrong, and whose full import is revealed only after a judge has spoken at divorce or the parties have settled in the light of their guess about how a judge would decide contested issues.<sup>15</sup>

---

14. The locus classicus of this view is Stewart Macaulay, *Non-contractual Relations in Business: A Preliminary Study*, 28 *Am. Soc. Rev.* 55 (1963). Another fine statement of it is Robert C. Ellickson, *Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County*, 38 *Stan. L. Rev.* 623 (1986). See generally, Carl E. Schneider, *Social Structure and Social Control: On The Moral Order of a Suburb*, 24 *Law & Society Rev.* 875 (1990).

15. Lynn A. Baker & Robert Emery, *When Homo Economicus Marries: An Empirical Study* 7 (unpublished manuscript).

And even couples who know what the law of divorce is often will ignore it because they believe that they will never get divorced and thus will never be subject to it.<sup>16</sup> As Professor Ellman points out, "[p]eople generally enter and conduct marriages on the assumption that they will endure . . ." (p. 15).<sup>17</sup>

Nor are couples who ignore the law regulating the economics of divorce necessarily foolish. For one thing, even on the bleakest view of divorce statistics, half the couples who believe they will never be divorced are right. For another thing, it is far from safe for couples to rely on the law of divorce. Where one or both of the spouses moves out of the state in which the relevant decision was made, the couple may find themselves subject to a new (and possibly quite different) divorce law. Even if the spouses never move, their own state legislature or courts may alter—radically—that state's law of divorce.<sup>18</sup> Even if the law remains stable, the couple's situation at that point in the indefinite future when the law would be applied to them is likely to be so unpredictable that they could not adequately anticipate how the law would affect them.<sup>19</sup> In addition, couples may rationally conclude that, given the plenitude of factors that will affect decisions about their economic affairs, the information costs of getting reliable (and regularly updated) advice about what their state's law might be at an uncertain time in the future would be unjustifiably high.

There is yet a further reason why couples might not want to consider the law of alimony in making marital decisions and even why the law might not want to encourage them to do so.

16. Professors Baker and Emery write,

By systematically viewing themselves as unrepresentative of the population at large, that is, by ignoring base rates, young adults preserve a romantic view of marriage that makes knowledge of the law personally irrelevant. Perhaps because individuals believe that they have found "true love" or are confident that they will "work harder" at their marriage, divorce does not matter and the statutory terms of the marriage contract can be ignored.

Id. at 90.

17. This is why, Professor Ellman suggests, couples have not widely taken advantage of the expanded scope of marital contracting.

18. This is a lesson which any couple watching the no-fault revolution and its accompanying changes in the law of alimony, marital property, child custody, and child support should have learned well. Indeed, as Carol Weisbrod observed to me, the central (and popularly recognized) lesson of no-fault divorce is probably that the rules of divorce can change drastically at any moment.

19. *The Theory* itself makes something like this point when it argues that a wife cannot protect her investment "because of the indefinite nature of the parties' marital obligations" (p. 44).

Couples might well feel that getting advice about how each would fare individually in a divorce would represent a kind of betrayal of their commitment to their marriage. Getting such advice might seem to say that they did not regard their marriage as genuinely permanent and did not trust each other to reach a just settlement of their financial affairs if it ever ended. Getting such advice might seem to imply that they were thinking of themselves as separate individuals, even as self-interested bargainers, rather than as a marital entity. One spouse's suggestion that such information be acquired might thus dismay the other spouse and even disconcert the spouse who made the suggestion. For all these reasons, then, spouses might rationally prefer simply not to inquire into the law of alimony.

Even if spouses know the law of alimony, it is unlikely to govern their behavior, since it is apt to be swamped by so many other things. When husbands and wives make decisions, they are surely affected by their personal long- and short-term economic interests. But they are also influenced, and usually more importantly influenced, by their family's economic interests, by the economic interests of each other and their children (as many purchases of life insurance attest). They think about things besides money: How will our decision affect our careers, our plans to have children, our chances to spend time with our children, our children's education, our love for each other, our ability to go back to school, our choice of where to live, our religious obligations, our social status, our relations with our friends, our duties to our aging parents, our promises to each other in the past, our hopes for each other in the future? Husbands and wives brood about the exigencies of the quotidian: How will a decision affect getting to work in the morning, picking up the children at daycare in the evening, or playing softball with the team at night? They are influenced by things unseen: *Le coeur a ses raisons que la raison ne connaît point*. Thus spouses are swayed by their shifting moods, by their emotional natures, by their pulling and tugging for power, by their yearning to avoid decisions, by the habits, traditions, sympathies, spites, irritations, understandings, accommodations, and affections of a life long lived together. All these and much else besides influence a family's decisions. It is a bold thing to suppose that the law of alimony will figure largely among them.<sup>20</sup>

---

20. As I argue in Part IV, we might want to provide alimomial relief for marital

In short, our first problem with *The Theory* is that its primary purpose is to create incentives, yet its incentives seem likely to go unnoticed or unheeded by the people they are intended to influence. Let us for the moment assume, however, that the theory will have *some* effect on incentives. Will it have the *intended* effects? To have the intended effects, the theory must be fully and accurately communicated to spouses. Further, if they are to act in reliance on the theory, spouses must be confident that courts will apply it correctly. But the theory on its face is not simple, and as I will argue later, it would be hard to apply. These facts would impair both communication of the theory and confidence in its application. Particularly since most people learn about the law of divorce from colorful but misleading reports in the press and from equally unreliable war stories from friends, couples would easily be led to misunderstand or mistrust the theory. For example, one might readily imagine a wife making a sacrifice she otherwise would not have made because she thought she would be reimbursed when in fact she would not be because the sacrifice was not economically rational. One might equally well imagine a wife refusing to make a sacrifice that would benefit her and her family because she lacked confidence that a court would recognize her sacrifice as an "investment" and would accurately calculate the value of her lost earning capacity. Similarly, a husband might refuse to accept his wife's sacrifice, on the (in principle erroneous) view that the family's extra income would not be justified by the risk he perceived he was running of high life-long personal liability.<sup>21</sup>

In sum, then, there is a vital difficulty with a law of alimony whose purpose is hortatory: The law cannot affect behavior unless it can make itself heard and understood and can offer incentives or disincentives strong enough to compete with the other incentives people face. My first doubt about Professor Ellman's theory is whether it meets this test. This is not to suggest that the law of alimony can never affect marital behavior, though I suspect it will always have difficulty in doing so. It is to say that

---

investments even if people make those investments without incentives because fairness between the parties requires it. But *The Theory* is not based (at least primarily) on such an argument. Rather, it rests on the arguments about incentives which we are investigating.

21. Some of these results might be socially desirable, but they are not desirable under the theory.

this particular theory is so narrow in its effects and so complex in its workings that I doubt it will change the way couples act.<sup>22</sup>

### B. *The Supplier and the Wife*

#### 1. *Is the analogy accurate?*

Even if *The Theory's* incentives would be detected, heeded, understood, and believed, we still need to ask whether they are necessary. The theory rests on the need to eliminate "distortions" in particular marital decisions. But to the extent those distortions are not presently occurring, the theory's new incentives are presumably less necessary. Are marital decisions in fact being distorted by the present law of alimony in the way *The Theory* assumes? This is, of course, a question that cannot be answered without empirical evidence which we lack. However, the anecdotal evidence of the cases and, I suspect, the experience of most of the people reading this article suggest that husbands and wives already do invest greatly in their marriages without the theory's incentives.<sup>23</sup> Indeed, I would suppose that one spur to alimony reform might be the sense that wives particularly have too often invested in that way and then been left impoverished after divorce.

The possibility that couples may be making the investments which *The Theory* seeks to encourage even without the benefit of the theory's incentives invites us to look more closely at the

---

22. I have been expressing doubts that the theory's law of alimony would greatly affect the behavior of most spouses. I have not, of course, been arguing that the law can never have any effect on human behavior. Surely it can and does. Professor Ellman's article in this symposium notes that David Chambers has shown that the law can enhance the willingness of fathers to pay child support. *Making Fathers Pay: The Enforcement of Child Support* (1979). But that example seems to me to confirm the law's weakness rather than to demonstrate its strength: Litigants and courts trying to collect child support are working under relatively favorable circumstances. They are trying to make specific, identifiable individuals do a specific, concrete thing in the immediate present. They are able to use the law's strongest sanctions—issuing orders diverting income from employee-obligors and sending them to jail. Yet even with these powerful advantages, the law fails to obtain its money in a troubling proportion of cases. And for the reasons I have just canvassed, the law is trying to do something exceedingly more difficult in using alimony hortatorily.

23. Of course, there is no way of knowing how many more spouses would invest in their marriages given the theory's incentives. And, of course, it is possible to argue that such investments should be recompensed even though they were made without any expectation of compensation. But, again, this is an argument about fairness in dispute settlement, not an argument about the hortatory function of alimony on which the theory rests.

incentive structure *The Theory* sees in the present law of alimony and the ones it seeks to establish. The key to understanding those incentives lies in *The Theory's* central example of the company that supplies specialized parts to IBM and that cannot supply those parts without making capital investments that will be lost if IBM stops buying the parts too soon. Professor Ellman compares the supplier's situation with that of a wife who wishes to invest in her marriage by sacrificing her own earning power in ways that increase the couple's total income while they are married but that will leave the wife with only her reduced earning power after a divorce. *The Theory* argues that both the wife and the parts supplier are making "investments a self-interested bargainer would make only in return for a long-term commitment" (p. 42). However, while the parts supplier can protect itself through a long-term contract, the wife cannot do so because the "indefinite nature of the parties' marital obligations . . . defeats ex post judicial efforts to reconstruct implied contracts" and "prevents most spouses from working out express agreements ex ante" (p. 44).<sup>24</sup>

How compelling is the analogy of the parts supplier? It seems to me to present two problems. First, *The Theory* may not accurately describe the situation of the parts supplier. Second, the wife's situation may not be wholly similar to the parts supplier's.

As to the first point, *The Theory* assumes that the supplier would not invest the capital necessary to provide parts to IBM without a long-term contract which would ensure it of recouping its investment. However, the supplier might be willing to invest the capital without such a contract if the return on its investment were high enough to justify the extra risk. That return might be of two kinds. First, it could be the high price per unit which IBM might pay in order to avoid a long-term commitment and to do business with a particularly attractive supplier. Second, it might be the supplier's chance (even if not the guarantee) of developing a good relationship with a new customer. That is, the supplier's risk would buy it a chance it might otherwise not have to develop a highly (perhaps uniquely) desirable customer which was tied to the supplier by an established track rec-

---

24. Professor Ellman notes that "[s]imilar difficulties explain why the law abandoned rather than refined fault-based adjudications" (p. 45).

ord and by the mutual reliance, understanding, and comfort which can grow between a customer and a supplier over time.

The wife might well calculate that she could get returns on her investment that would be analogous to the two kinds of returns to the supplier I just described. First, her sacrifice of earning power might so much increase her husband's income that she might conclude that the economic benefits to her during the marriage outweighed her possible loss in the event of divorce. She might also calculate that the economic benefits of the sacrifice would result in an accumulation of marital property great enough that her share on divorce would recompense her for her investment. And she might feel that the immediate non-financial rewards of the marriage were great enough to recompense her for the risk of reduced earning power should the marriage end. Second, the wife might feel that the risks of her investment were justified by the possibility that it would help build a marriage with a particularly desirable partner which would ultimately be lasting and rewarding.

My first point about the analogy to the supplier has been that the supplier might not need to protect itself in the way *The Theory* supposes. My second point about it is that the wife may be differently situated from the supplier. For instance, the supplier in *The Theory* must make all its investment up front; the entire investment immediately becomes a sunk cost. This is not true of most of the investments *The Theory* contemplates the wife making. Those investments are typically decisions not to pursue a career or not to pursue it ambitiously. The less time that expires between the sacrifice and the divorce, the easier it will presumably be for the wife to resume her career without major loss. The wife will often not make a single, fixed-cost investment. Rather she will gradually decide not to start law school this year, but to put it off until next year, or perhaps the year after, or maybe the year after that. One might conclude from this that, if the divorce occurs soon after the sacrifice, the wife will usually have lost little; if it happens long after the sacrifice, she will have had the advantage of the increased familial earnings during the marriage. Neither of these situations may provide the wife a fully satisfactory remedy, but both differ from the bleaker picture drawn in the contrast between the wife and the supplier, and both call into question the need to avoid the "distorting" incentives which the theory hypothesizes.

There may be other important differences between the wife



and the supplier. For instance, while the supplier is, as Professor Ellman says, a "self-interested bargainer" (p. 42), the wife may not be. Indeed, perhaps she ought not be. She will be interested in the welfare of her husband for his own sake, because she loves him, and for the sake of her children, because she loves them. She may therefore want to make a sacrifice for her husband or her children that is in the nature of a gift. She might even say that, for the law to hold her harmless for that gift changes the nature of the gift in a way that makes it less meaningful both to her that gives and them that take. Or the point can be put differently. One might say that her utility is immediately increased by giving her husband or children a gift, so that the wife is getting an immediate return on her investment in the form of the gratification that comes from giving the gift.

Even if the wife is a "self-interested bargainer," she differs from the supplier in another important way. *The Theory* assumes that the supplier is interested solely in economic profit. Even if this is true of the supplier (and there is reason to think that business managers are motivated by many things besides economic profit, like the size and prestige of their firms), it is unlikely to be true of the wife. All the wife's choices about working and its alternatives will have important non-economic aspects. This creates a number of difficulties for the theory. For example, *The Theory* generally assumes that working at a job is something that people want to do (since it produces income), and that they would give up well-paying jobs only for some other way of earning income (as by increasing a spouse's earning power so that the family's wealth is maximized). But for many people the assumption is, for a variety of reasons, false. Many people dislike many kinds of work. They may be glad not to work, particularly if they have alternatives they regard as more gratifying, even if not more lucrative.

Consider a couple who both feel this way about employment. Suppose that the wife does not enjoy her job, that she finds rewards in being a housewife, and that she enjoys the cultural activities that she can pursue when she is not employed outside the house. Suppose that the husband does enjoy his job as a law professor and that he is offered a position in a New York law firm which will immeasurably increase his income but which will also require him to do disagreeable work, to work harder and longer, to be away from home a good deal more, to move to a city he detests, and to run the risk that he may be

unable to return to teaching after too many years away from it. Suppose further that the wife is intensely anxious to move to New York, her childhood home and the city of her dreams. Suppose finally that it would be economically rational for her to give up her job to stay home and take care of the house so that her husband could take the job in New York. The wife's agreement to do so stops looking like a sacrifice by the wife that benefits the husband and might even begin to look like a sacrifice by the husband that benefits the wife.<sup>25</sup>

Professor Ellman, of course, knows that "some spouses who leave the marketplace to become full-time homemakers will be doing exactly what they want" (p. 52, n. 146). But he argues that the wife's reason for leaving the marketplace has "no bearing on the question of whether the adjustment should be considered marital investment . . ." (p. 52, n. 146). This argument seems to fit awkwardly with Professor Ellman's justification for his theory. There are two reasons for this.

First, the theory's rationale for alimony rests on the analogy to the situation of the supplier. And in the hypothetical I have just posed, that analogy looks weak. The supplier's immediate motive for making its special capital investment is to increase its earnings by selling parts to IBM. In my hypothetical, the wife's motive may be partly to increase the family income, but it seems awkward to say that she "has sacrificed some career prospects to invest instead in her marriage" (p. 47). Rather, she is getting something she immediately wants—to be able to leave the job market and spend time in cultural pursuits. She may be gambling that the benefit of not having to work and of being able to spend her time in other ways will not have been bought at the cost of later wanting but lacking enhanced earning ability. Further, it seems awkward to think of the husband as being in the position of IBM--of extracting something from the supplier that it does not want to give (the capital investment necessary to meet IBM's specifications) for IBM's own profit. He may rather have been the person from whom something was extracted that he did not want to give (moving to a job and city he disliked).

Second, the theory's rationale for alimony rests on the desire to eliminate "distorting" incentives and penalties. But to

---

25. Let me repeat that, as I said in note 6, I am for the sake of clarity and consistency following Professor Ellman's practice of referring to the claimant for alimony as the wife.

say that we have to create an incentive to marital sharing (in the form of giving up working) to encourage people like the wife in the hypothetical to feel safe in giving up a job seems unsatisfactory. Far from encouraging marital sharing, it seems to encourage its opposite. It allows the wife to follow her inclination not to work while requiring the husband to insure that she not be injured by her choice, even though the husband did not want to take on the extra burdens needed to enhance his earning power (and might even want to give up that enhanced power to return to teaching if the couple divorced).

My criticisms of the analogy to the supplier are not intended to show that the theory which rests on that analogy is wholly misconceived. But they suggest that the situations of both the supplier and the wife are importantly more complicated than *The Theory* allows and that the analogy provides a weaker base for alimony than *The Theory* supposes. More specifically, the supplier might be willing to enter into the relationship with IBM without the contract which *The Theory* assumes would be necessary, and thus the wife might also rationally invest in her marriage without the incentive *The Theory* would create. In addition, the wife is differently situated from the supplier in ways that may sometimes make it less necessary that she be given an incentive for marital sharing through some substitute for a contract. In short, seen in terms of the law's hortatory function, the theory seems to overstate the need for the kind of alimony it would allow.<sup>26</sup>

## 2. *Is the measure of damages correct?*

Despite what I have argued so far, let us assume *arguendo* that couples will know and heed the law of alimony, that the analogy to the supplier works, and that spouses need an alimomial incentive to allow them to sacrifice their earning potential to maximize their family's income. What ought that incentive be? *The Theory's* answer, of course, is that spouses should recoup their lost earning capacity. Is that the incentive that best accords with the theory's logic?

To answer this question, we must return to *The Theory's*

---

26. In addition, seen in terms of the law's dispute-settlement function, the theory leads to results whose fairness seems at least disputable, since the theory calls for compensation where it is the husband rather than the wife who apparently made the sacrifice.

central analogy to the parts supplier. *The Theory*, as we have seen, reasons that the supplier would protect itself with a long-term contract before making the capital investment necessary to enable it to supply parts to IBM, but that a wife investing in her husband's career cannot similarly protect herself. Alimony's purpose, then, is to imply by law a contract the wife cannot make for herself. "[T]o protect her marital investment and thereby encourage her to make it, we must provide the wife with an equivalent noncontractual remedy" (p. 54). All this seems to suggest that the wife's remedy should be the same as the supplier's—the traditional contract measure of damages, which is of course expectation.

*The Theory* rejects that measure on the ground that "a contract claimant receives nothing without first establishing that the other party breached; in alimony we will not ask why the marriage ended or whether the claimant bears some fault for the divorce" (p. 66).<sup>27</sup> Let us postpone until Part IV the conclusion that we are barred from asking why the marriage ended. Given the purpose of alimony—to prevent the distortion of decisions about investments in marriages—is expectation the correct measure of damages? On one view, it seems to be. To see why, let us look again at the case of the supplier. The supplier will not sell parts to IBM unless it is assured an adequate return. How do we know what that adequate return is? We could require courts to decide that question for themselves case by case. But the difficulty and inefficiency of such a method have (in part) led to the irrebuttable presumption that the adequate return is whatever the parties bargained for. Hence expectation is the standard measure of damages in contract law.

Similarly, *The Theory* assumes that the wife will not sacrifice her earning capacity for the sake of a larger family income unless she is assured an adequate return. We have no way of knowing what kind of return she would regard as minimally adequate. Thus, on the analogy to the supplier, we would ask what her actions suggest she regarded as adequate, and look to what she bargained for, i.e., her expectation.

It might seem that the wife ought to regard as yielding an adequate return any investment that *The Theory* considers eco-

---

27. *The Theory* also argues that "to measure that claim by the spouse's lost expectation might induce one spouse to terminate the marriage since she would receive the expected financial gain from her marital investment without remaining married" (p. 66).

nomically rational, that is, any sacrifice of earning capacity that yields her a dollar more than she could earn by refusing to sacrifice her earning capacity. This is because the wife is presumably economically better off after any such investment. Since it ought to take no more than such a gain to induce the wife to make the sacrifice, one might conclude that she need be given no more than an equivalent amount—a restoration of her lost earning capacity plus one dollar—in damages. But even if the wife were thinking in purely economic terms, she might not regard the dollar as an adequate inducement to make the investment, if only because she might regard the return as too small to justify the risks associated with the investment. In addition, of course, the wife will inevitably be influenced by a host of non-economic considerations (including, for example, her reluctance to sacrifice the personal and social rewards she receives from her career), many of which may induce her to require a large return on her investment. Both the economic and the non-economic factors may loom large in the wife's calculations. But they will do so in complex ways that will differ from person to person. Thus, if our goal is to make it as safe for the wife as the supplier to make a long-term investment, it would seem we should offer both the same return—what each expected. Because the theory would only restore to the wife her lost earning capacity and would not assure her the economic gains she expected from her investment, the theory seems likely to undercompensate her in terms of its own rationale.

On the other hand, *The Theory's* method of calculating damages could also sometimes give the wife a greater return than the theory calls for—i.e., a return great enough to induce the wife to make the investment. To see why, let us return to the analogy to the supplier. The wife's implied contract should do no more than the supplier's contract would do—allow her to recoup her investment and receive a reasonable return on it. In what form would the supplier expect to recoup its investment? In the form of regular payments for the parts supplied. And in what form does the theory assume the wife expects to recoup her investment? In the form of the extra income brought in from the husband's increased earning power. If the increase in earning power is great, the wife may fully recoup her investment and her reasonable return on her investment even before the divorce. She would then, on the analogy to the supplier or in terms of what it would take to induce her to make the investment, not be

entitled to or require the further compensation the theory contemplates. In the theory's terms, the wife's loss would no longer be "a residual loss in the sense that it survives the marriage" (p. 49).

In short, *The Theory's* method of calculating alimony could overcompensate a claimant because, by excluding benefits accruing to her from the sacrifice during marriage, it ignores a standard way she is compensated for that sacrifice. To put the point in terms of the theory's central analogy, its method is akin to allowing the supplier to sue IBM on their long-term contract but barring IBM from introducing into evidence the payments it had made on that contract.

*The Theory's* method of calculating damages may, certainly, sometimes yield a rough measure of what it would take to make the wife's investment safe. But I have argued that, considered in terms of the law's hortatory function, the method seems susceptible to two kinds of errors—first, that it may in some cases offer too little to create an incentive to marital sharing, second that it may in some cases offer more than would be necessary to create such an incentive.

Professor Ellman's theory of alimony rests primarily on the need to create a system of incentives which would encourage a certain kind of marital investment. Thus far, we have raised several questions about those incentives. We have suggested reasons to be concerned about whether the incentives would be recognized, whether they would be heeded, and whether they would be correctly understood. We have found infirmities in the analogy on which the argument for the incentives rests. And we have wondered whether the remedies the theory proposes accurately serve alimony's hortatory function. We now need to ask whether the theory's incentive structure is socially and normatively desirable.

### C. *Evaluating the Theory's Incentive Structure*

Most readers of *The Theory of Alimony* are likely to be immediately surprised at the narrow scope of alimony under its rules. It singles out one of the many kinds of marital decisions—a spouse's financially rational sacrifice of earning capacity—and provides that inefficiencies arising out of that particular decision and that decision only shall be repaired on divorce.<sup>28</sup> On

---

28. As I noted in summarizing the theory, it also awards alimony in one class of

further reflection, readers may also be struck by the way in which that decision is abstracted from the context in which it is made and treated in isolation from the entirety of the marriage. In what follows, I will ask whether the theory's goal is appropriate, why the theory gives relief on divorce for only one kind of investment, and whether that relief can be properly calculated outside of the larger context of the marriage.

*The Theory's* purpose is to remove "distorting" incentives and penalties from marital decisions. But what is being distorted? The answer seems to be decisions to maximize family income where the wife has an economic incentive (the fear of lost earning power after divorce) to refuse to make the "'rational' choice of maximizing the marital income" (p. 47) by sacrificing some of her career interests.<sup>29</sup> Thus when Professor Ellman speaks of "adopt[ing] suboptimal marital patterns" (p. 50), he is speaking of failing to maximize the family's income. But why is optimizing family income so crucial a goal that it ought to be the only basis (along with recompensing some kinds of sacrifices by a parent caring for children) for alimony? As *The Theory* properly acknowledges in criticizing the analogy of alimony law to partnership law, "[w]hile many marriages are 'profit-sharing' in the sense that the parties intend to share their economic success, they are not 'profit-seeking' in the sense that financial gain is the primary purpose of their joint endeavor" (p. 33).

Nor is it clear how *The Theory's* goal of optimizing family income fits with its argument that social dissensus bars divorce law from consulting any view about the goals of marriage. Perhaps *The Theory* assumes that optimizing family income is so uncontroversial a goal that no one could object to it. In fact, however, I think that many people would feel that thus singling

---

financially irrational sacrifices—those where the spouse assumes primary responsibility for child care.

29. Professor Ellman also suggests that, in the absence of the kind of alimony he proposes, husbands whose wives made the kind of sacrifices which the theory will recompense have an incentive to divorce, since the "party who has already received a benefit has an incentive to terminate the relationship before the balance of payments shifts" (p. 43). Professor Ellman assumes that if the husband stays married, he must at least share his added earning power with his wife, while if he divorces her he can keep it all for himself. How true this is will vary from marriage to marriage and will depend, among other things, on the rules governing the division of marital property and child support. That the husband will often have an incentive to leave the marriage large and evident enough actually to affect his behavior seems to me uncertain. It seems less uncertain that a failure to reallocate the loss of the wife's earning power may give her an incentive to stay in the marriage.

out the optimization of family income sends an improper message about the purpose of marriage. Such people could reasonably argue that doing so is part of what they could regard as *The Theory's* larger error of conceptualizing marriage so largely in economic terms. But even if this goal were quite uncontroversial, there would remain a further problem: It may be impossible to create a system of incentives for optimizing family income that does not simultaneously create collateral incentives whose effects are less clearly desirable. To see how this might be so, let us examine two of *The Theory's* justifications for its incentive structure.

First, *The Theory* suggests that its alimony regime "maximizes the parties' freedom to shape their marriage in accordance with their nonfinancial preferences" (p. 51). In fact, however, the theory has the (clearly unintended) effect of valuing marital investment at the expense of investments in careers and of putting what would seem to be "distorting pressures" on career decisions. The theory's alimony regime would tend to induce the wife to abandon her career, since it allows her to do so without financial risk when she is confronted with the incentives of increasing family income or staying home to take care of the children and, possibly, accommodating her husband and pleasing herself. The theory's system thus seems to steer a spouse, usually the spouse with the lower earning potential, away from a "complete" career. This result is especially problematic since in today's world that spouse is likely to be the woman. After all, the great changes in women's participation in the job market of the last two decades have been urged not just because they give women more earning power, although that of course is important. They have also been urged on the grounds that a career can be intellectually, socially, and emotionally rewarding, can give women the sense and reality of autonomy, and can give women greater social power. To put the point a little differently, a theory of alimony that chose as its goal encouraging women to pursue demanding careers would not be self-evidently less justifiable than one whose goal was maximizing family income.

The problem here, of course, is not that Professor Ellman has wickedly preferred a bad goal to a good one. It is that he has chosen a good goal, and that the necessary but unintended consequence of the means he has chosen for promoting it is to interfere with reaching another good goal. Yet there may well be no good way of serving both good goals at once. There is an element



of perversity in the result I am describing. While the theory seems likely to have the effect of inducing women to abandon careers, it would seem harsh to try to encourage women to pursue careers by denying wives compensation for the marital sacrifice of giving up careers. The difficulty here arises out of the clumsiness of the law's hortatory function: It may always be difficult to structure the law so that its incentives have the intended effects; it may be impossible to do so in areas of life as complex as marital decisions.

Professor Ellman not only justifies his theory in terms of its liberating effect on spouses' decisions, he also justifies it in terms of its promotion of marital sharing. He writes, "Unless society wants to discourage sharing behavior in marriage, its law cannot penalize the spouse who shares" (p. 51). But his system of alimony encourages only one kind of sharing—giving up a career in order to maximize family income. And that kind of sharing is problematic in two ways. First, calling such a decision "sharing behavior" seems imprecise, since it can be thought of as self-serving: it seems designed to maximize the welfare of the sharer, with possibly only the incidental effect of maximizing the welfare of the family. Second, this is only one, and perhaps not the most desirable, kind of sharing. Another kind of sharing, for example, would be that of a wife who gave up her own career opportunities so that her husband could promote his, even if that meant some loss of family income.<sup>30</sup> Yet the theory conspicuously declines to promote such sharing on the grounds that it is economically irrational.

This last point leads us to ask whether other kinds of transactions fit the rationale for alimony just as well as the transaction the theory favors. As we have just seen, Professor Ellman suggests, "Unless society wants to discourage sharing behavior in marriage, its law cannot penalize the spouse who shares" (p. 51). Ought we not then refrain from penalizing any spouse who shares in any important way? Ought we not compensate spouses who have made any kind of financial sacrifice for each other? In particular, ought we not compensate spouses who have sacrificed earning capacity in economically "non-rational" ways? And ought we not compensate spouses who have made non-economic

---

30. Let me once again repeat that, as I said in note 6, I am for the sake of clarity following Professor Ellman's practice of referring to the claimant for alimony as the wife.

sacrifices, at least where those sacrifices can reasonably be put in economic terms?

One form of marital sharing which the theory entirely excludes from consideration is the income which the wife receives from the husband as a result of her investment. As I argued earlier, the wife might well receive from her husband a full return on her investment during the marriage. But the theory "ignores the exchange that takes place during the marriage" (p. 55). Professor Ellman writes that under modern divorce law, "[t]he remedy, if either spouse believes the current exchange is unfair, is to end the arrangement. [My] theory of alimony accepts that proposition, seeking only to make sure that on divorce neither spouse is left with residual effects that would distort marital decisionmaking" (p. 56). Divorce is surely one remedy for unfair exchanges, but is it, should it be, the only one? It seems an unsatisfactory remedy here, because the spouses will not view the exchange as unfair during the marriage. That is, the parties will see the wife's sacrifice and the husband's contribution of income to his wife as reciprocal sacrifices, and even if the wife receives more than the husband, the husband is likely to believe that he, like the wife, is making a good investment in the marriage. The unfairness only arises when the marriage ends and the wife receives a second compensation in the form of alimony for her investment.

Making divorce the only remedy for unfair marital exchanges seems additionally problematic in two ways. First, doing so may create an incentive for divorce: If a spouse knows that the law will if necessary provide some remedy for an unfair exchange during marriage, that spouse can afford to stay with the marriage in the hope of improving the exchange and the marriage. If the spouse knows that the law will not provide such a remedy, the spouse has an incentive to leave the marriage as quickly as possible to escape the effects of the unfair exchange. Second, spouses who are on the short end of an unfair exchange during marriage may have excellent reasons for not abandoning the marriage. They may, for example, be doing their best to make the marriage work, or they may feel that staying in the marriage is best for the children. Why should such spouses be taken to have waived their only remedy for the unfair exchange?

More basically, why should not an unfair exchange be considered when settling the financial affairs of the parties? Why should alimony be confined to "residual" losses? Why should a

continuing economic sacrifice by one spouse for the other during the marriage be less worthy of compensation than an economic sacrifice whose effects are felt only after divorce? For that matter, how realistic is it to say that "lost earning capacity is the only continuing financial loss" (p. 53). While that may be true in some senses, it seems false in others. Suppose that a wife contributes disproportionately to the family income and that the husband consumes the family income disproportionately. The wife might have emerged from the marriage with "more" if she hadn't been involved in the unbalanced exchange during the marriage; she might suffer the continuing economic loss of owning less of the things that made life more comfortable for her. One might even say that, had the exchange been better balanced, she might have had more earning power, in the sense that she might have had larger income-generating assets.

Of course, this kind of disproportion could be rectified (assuming that rectification is desirable) through that other remedy the law provides for marital misallocations, namely, the law regulating the division of property on divorce. Reasonably enough, Professor Ellman has not yet developed a theory to govern property division nor worked out how property division and alimony interact. He is of course aware of the need for a theory of marital property and hints that one is in the works (p. 53, n.147). We may hope that he will soon turn to creating one, if only because property division and alimony cannot be adequately treated separately and perhaps should be analyzed under the same principles, since both answer a single question: how should the economic assets (broadly understood) of the spouses be allocated on divorce?

Given the theory's imperative of encouraging "sharing behavior in marriage," it is also hard to see why alimony is not available in a particularly common and consequential kind of marital sharing—the kind where a "financially irrational" sacrifice was made. In this category fall cases in which one spouse accommodates the other's "lifestyle preferences," as where a wife, at her husband's behest, makes a financially irrational decision to be a housewife. Here we have a potentially severe loss of earning capacity that will (as the theory insists a loss must in order to be a basis for alimony) continue after divorce. But despite the size of the loss, under the theory, it is not compensable because the sacrifice was not economically rational. (Indeed, the worse the loss of earning capacity, the less compensable it is be-

cause the less economically rational it is.) Professor Ellman explains that "when one spouse foregoes a market opportunity to accommodate a lifestyle preference, both spouses know that lower income will result. On divorce, the spouse who made the financial sacrifice suffers no additional financial burden as a result, beyond that already incurred during the marriage" (p. 61). But why should this make any difference? The housewife seems to be in the same position as the IBM supplier and indeed as the spouse who sacrificed her earning power in order to maximize the family's income. All made a decision with lasting financial consequences. All will suffer the consequences of that decision alone if the relationship ends. All will more readily make the decision if contractual protection is available. It is available for the supplier; the theory would provide an alimomial substitute for contractual protection for the spouse whose sacrifice increases family income. Why is the same substitute unavailable to the spouse whose sacrifice does not increase family income? Why is her decision not "marital sharing behavior" which we want to protect on divorce?<sup>31</sup>

A possible difference between the cases of the two sacrificing wives is that where the wife's sacrifice maximized family income, the husband's earning power will often have been increased by the sacrifice, while where the wife's sacrifice did not maximize family income, the husband's earning power will often not have been increased. Should this difference matter? On the theory's principles, it is hard to see why. As I argued in the preceding paragraph, alimony seems necessary if the housewife who makes the non-rational sacrifice is not to face a "distorting" incentive. Further, the husbands' situations in the two cases we

---

31. Is the answer that we only want to encourage marital sharing of a financial kind? As I have been suggesting (and as *The Theory* itself seems to say), it is hard to see why we should not want to encourage all kinds of marital sharing. But even if we want to (or, as *The Theory* suggests, as a practical matter must) limit ourselves to encouraging only financial sharing, isn't an "economically irrational" sacrifice financial sharing, since it represents a gift of the wife to the husband of some of her earning power?

Professor Ellman suggests that "we have no basis at all for a social policy that encourages one spouse to agree to reduce marital income to accommodate the other's non-financial values" (p. 62). Professor Ellman helps justify encouraging financially rational sacrifices on the theory that the market rewards socially desirable behavior, and it is true that that policy cannot justify encouraging financially irrational sacrifices. But, first, that policy seems to me particularly weak applied to marital decisions, since marriage is surely one of the areas of life least well evaluated in market terms. And, second, why is not the policy in favor of marital sharing itself an adequate basis for encouraging even financially irrational sacrifices?

have been discussing do not necessarily differ. The husband of the wife who sacrificed to increase the family's income will not always have gained an increase in earning power from her sacrifice. For example, if the wife left a poorly paying part-time job in order to do housework which the couple would otherwise have had to pay someone to do, the sacrifice may be financially rational without increasing the husband's income. And a financially irrational sacrifice might increase the husband's income (because, for instance, of the wife's help with his business entertaining) since the wife might be able to earn more working outside their home than helping her husband in it.

Some insight into *The Theory's* refusal to recompense financially irrational sacrifices may be found in its explanation of why the wife receives no alimony where the investment yields no gain. *The Theory* reasons, "If she invests in herself and does poorly, she has no one else to cover her loss. There is no reason why someone else should cover it if she invests in her husband instead and he does poorly" (p. 67). But this argument seems dangerous to the theory, since it suggests the question why someone else should cover the wife's loss if she invests in her marriage and it does poorly. Professor Ellman further explains, "We certainly do not want the wife, or the husband, to have their judgment influenced by an alimony system which makes an investment in one's spouse riskless, but not an investment in oneself" (p. 67). However, isn't that close to being the practical effect of the theory's rule? The only risk the sacrificing wife runs is the risk that the investment in her husband won't pay off at all. But as long as there is *some* gain from the sacrifice, then the wife is guaranteed the full value of her lost earning capacity. She is thus relieved of the many risks that her investment in herself might otherwise have run.

I have been finding problems in the fact that the theory gives relief on divorce only for one kind of investment. I now want to raise the question whether that relief can be properly calculated outside of the larger context of the marriage. We have already encountered one problem with calculating relief on the narrow base the theory requires: I have argued that the wife will sometimes be overcompensated because the theory does not take into account the return she receives on her investment during the marriage and that she will sometimes be under-compensated because the theory does not give her expectation damages.

But the problem is larger than the failure to consider the

wife's immediate return on her investment in calculating alimony. None of the husband's "marital sharing behavior" can be taken into account to reduce what he owes his wife. Spouses engage in marital sharing partly because they expect and get reciprocal sharing. Sometimes this reciprocal sharing is given in direct response to the other spouse's sacrifice. But it does not necessarily obey the Aristotelian unities of action, time, and place. There may not be an immediately evident logical connection between one transaction and another. The two transactions may be widely separated in time. One transaction may be an economic one, while its reciprocal may be non-economic. Sometimes one transaction is expressly exacted as the price of the other, sometimes not. But, in a good marriage and sometimes even in a bad one, these transactions may roughly balance out. By singling out one kind of transaction from this stream of transactions, we may exaggerate the need for legally provided incentives of the kind the theory contemplates. We may also compel compensation where compensation has already been paid in terms satisfactory to the spouses while they were married, and that she will sometimes be undercompensated because the theory does not give her expectation damages.

One of the theory's justifications for singling out a single marital transaction among many seems to be that calculating the net effects of all the possibly relevant transactions would be too difficult: "Trying to assess all the nuances of the spouses' bargain to determine whether each has received full value during the marriage is impossible" (p. 51). And later, "[T]he law cannot evaluate every aspect of marital behavior in fixing the divorcing parties' financial obligations. If we do not impose a limit, we would have to consider every sacrifice one makes for one's mate, and this would extend to nonfinancial losses as well" (p. 61). Part of the argument here is that "[a]djudication of such claims would require examining the reasons for the divorce—who is at fault, who 'breached'" (p. 53), an examination the theory takes to be essentially impossible and outside the law's purview in an era of no-fault divorce.

The question of the law's purview I wish to postpone until Part IV. The arguments about the difficulty of making the required calculations seem to me genuinely weighty. But they raise two questions. First, the calculations the theory itself requires are, as I am about to argue, themselves greatly complex, speculative, and inexact. It is not clear why the theory accepts those

drawbacks in one context but rejects them in others. Second, while it may be impossible to reach a fair result when so many complicated and obscure facts must be considered, is it not also impossible to reach a fair result without considering them? However difficult it is to weigh all the transactions between spouses, isn't it equally difficult to single out one sacrifice from all the rest when in the minds of the couple that sacrifice was part of a larger context? Will it not at least sometimes be unfair to do so?

In its discussion of marital contracting, *The Theory* recognizes the problem with singling out one kind of transaction from all the rest. Professor Ellman writes, "In many marriage disputes it would surely distort the parties' real expectations, and upset their reasonable reliance based upon those expectations, to single out one discrete, specific agreement for enforcement without examining the larger relationship in which it arose" (pp. 30-31). And he observes that "neither party is likely to consider . . . more specific commitments as having a meaning independent of the more complete relationship contemplated by the marriage" (p. 20, n.45).<sup>32</sup> This seems to me quite right. But when Professor Ellman comes to his theory of alimony, he discounts this kind of argument and says that his "theory assumes that we can sensibly isolate decisions that a couple rationally expects will enhance their aggregate income, and ensure that in making such a decision neither takes a risk of disproportionate loss if divorce then occurs" (p. 62). Yet it is not clear why the theory makes that assumption or that it is correct. Nor is it clear that a theory that rests on the need to adjust the law to affect marital decisions properly can safely ignore so much of the incentive structure of marriage.

In this section, I have asked why the kind of marital sharing the theory seeks to promote ought to be promoted at the expense of other marital goals. I have also asked why some kinds of marital sharing are protected but other kinds are not. And I have questioned whether one marital transaction can properly be isolated from the rest. All these points present problems for

---

32. Indeed, at one point Professor Ellman recruits the "singling out" argument to reject a criticism of his alimony theory which I advanced a version of above, namely, that "the wealthy man's wife has already been compensated for her marital investment." Professor Ellman responds that this argument "assumes an unrealistically accurate measure of the total give-and-take of marriage, of which the wife's investment is just one part" (p. 55). So it does. But Professor Ellman's theory seems just as open to this response.

the theory as an exercise of the law's hortatory function, since they raise questions about kinds of behavior the law can and should properly encourage. These points also present problems for the theory as an exercise of the law's dispute-settlement function, since they raise questions about the theory's fairness. Those questions I will postpone until Part IV, because first we need to ask whether, even on the theory's own terms, alimony can be calculated with enough precision to make the theory workable.

#### D. *Calculating Alimony Under the Theory*

*The Theory of Alimony* is a long article on a hard topic. Quite reasonably, therefore, it does not show with any specificity how alimony would be calculated under its principles. Since such a demonstration is a crucial next step, I will try to sketch some of the problems it may encounter. Those problems seem to me numerous and serious.

To receive alimony, the wife must show that her "sacrifice" or "investment" was "financially rational." First, how is she to show that there was a "sacrifice" or an "investment"? *The Theory* says that the couple need not have intended an investment for the wife to receive alimony. This may create some uncertainties about whether there has been an "investment." Sometimes, of course, the investment will be amply clear: the parties will have made a deliberate decision in which both of them realized that the wife was giving up a career opportunity so that her husband could increase his income. But what if no such decision occurs? *The Theory* calls for alimony even when the "investment" is not a "sacrifice" (that is, when the wife wanted to give up the career opportunity because of her own preferences about spending her time and not in order to enhance marital income). But what if the "investment" is not an investment at all? What if it was not made with the intention of allowing or helping the husband to increase his earning power? What if the husband can show that he would have been able to increase his earning power whether or not his wife had made the "investment"?

As these questions suggest, it will often be difficult to tell whether a "compensable event" has occurred. Is it enough that the wife gives up a career at the time the husband takes a higher paying job? Does she also have to show that her decision was necessary to make his possible? Suppose the two decisions are significantly separated in time? Suppose that rather than quit-



ting a high paying job, the wife refused a promotion? Suppose that she simply didn't seek a promotion? Suppose that she simply never sought a high paying job? That she never sought employment? That she never sought training for employment? Suppose that the couple were married while the wife was still in school and that the question of the wife's working simply never arose?

In this last case, it would seem that the theory would not call for alimony, since the couple never made a decision which needed to be protected from distorting influences and since the wife never changed her position. Yet upon divorce the wife in that case might be economically and socially in exactly the same position as a wife who had made a decision during her marriage to abandon a career in order to maximize her family's income. Why should the happenstance of the timing and explicitness of her decision matter, and matter so dispositively?

The second question the requirements for alimony raise is what "financially rational" means. If the husband is offered a job that would immediately pay less but eventually pay more, is it financially rational for him to take it? What if it would immediately pay more but would eventually pay less? What if he is offered a job that offers the possibility of high gains but also the substantial risk of high losses? What if he thinks the new job will be financially more rewarding than his old job, but that conclusion is objectively incorrect?

In order to qualify for alimony, the wife must show not just that her investment was financially rational, but that it in fact resulted in a "gain." How is that gain to be measured? The gain is presumably the gain acquired by the wife's having sacrificed her career to benefit her husband's. To discover whether that sacrifice was economically worthwhile, one presumably has to figure out how much each of them did in fact earn and compare it with how much each of them would have earned had the wife not made the sacrifice. Over what period are these earnings to be calculated? Over the period foreseeable when the sacrifice was made? Over the life of the marriage? What if the divorce takes place fairly soon after the sacrifice and no gain has yet developed, but the sacrifice was a serious and permanent one? Can the wife argue that a gain would have developed had the marriage lasted? And even if we are confident that there has been a gain in family income, how are we to know whether that gain is attributable to the wife's sacrifice?

The wife's measure of damages is her "loss in earning capacity" (p. 73). This apparently means that the measure is the difference between her earning capacity as it actually is and her earning capacity as it would have been had she not made the sacrifice. But "is" and "would have been" at what point? Since we are talking about a loss that survives the marriage, "is" presumably means for the rest of her working life, and "would have been" presumably means for the rest of her working life had she not made the sacrifice. How, then, are we to determine the wife's earning capacity as it is and as it might have been over those long reaches into the future? The easier inquiry is surely into the wife's earning capacity as it is. But even this inquiry has its perplexities. For example, is it enough to ask what the wife is presently earning and to call that her earning capacity? Suppose she could be making large sums practicing law but is in fact (for reasons unconnected with an economically rational investment in the marriage) making small sums teaching it? Or suppose that the reason for the wife's sacrifice of earning capacity has passed (or eventually will pass) and that she could work her way back to the earning capacity she had sacrificed. If she failed to do so, would she be treated as having that higher earning capacity? *The Theory* seems to suggest that she should be, for, in discussing the analogous claims to alimony of wives who cared for children, it says that "the woman who remains a homemaker even after her children are grown ceases to benefit from Principle Three. She can recover only half the earning capacity she would have lost assuming she had gone back to work when the children were grown, whether or not she actually did"<sup>33</sup> (p. 73). This calculation may be relatively easy to make where the issue is taking care of children, since there will be a particular children's age at which we might reasonably ask whether the mother could go back to work. In other cases, however, it will be harder to identify the time when she could, or should, have returned to a higher-paying job.

These difficulties, however, are as nothing compared with the difficulties of calculating what her earning capacity would have been but for the sacrifice. Suppose, for instance, that the wife sacrificed one career and took a less lucrative one that al-

---

33. Principle Three states that "The Homemaker Spouse May Claim Half the Value of Her Lost Earning Capacity, Even Though It Exceeds the Market Value of Her Domestic Services, When These Services Included Primary Responsibility for the Care of Children" (p. 71).

lowed her to keep house and to help her husband with his career. In calculating alimony, do we have to ask whether she actually had the ability to achieve the higher earning power that might have come from the sacrificed career? Whether she would have been willing to pursue the better-paying career as it became more onerous? Suppose that the sacrificed career had many branches, some more lucrative than others. Are we to assume that she would have taken the most lucrative route? If she gave up a career as a teacher, would we have to gauge the possibility that she would have gone into administration and thus earned more?<sup>34</sup>

How well could we even determine what career she gave up? If a wife sacrificed going to college to support her husband through college and medical school, should we simply compensate her for her forsaken college degree? Or should we speculate about whether she would herself have gone to medical school after college? And done post-graduate work in microbiology? And gone to work for Warner-Lambert? And become a senior research scientist? And won a Nobel Prize?

One might try to answer such questions by looking at the sacrificing spouse's ambitions and abilities. However, that method seems likely to founder on the unreliability of people's ambitions as predictors of their actual behavior and of estimates of people's abilities as predictors of their worldly success. Further, using ambition in this way might systematically advantage men over women in calculating alimony. At present, at least, men more than women are socialized to have large ambitions for their careers. If ambition is used in calculating alimony awards, sacrificing husbands will on average be better compensated than sacrificing wives.

All this raises an important question about the social function of alimony. Alimony has long worked to help protect women from some of the economic (and social) consequences of their weak position in the marketplace. While Professor Ellman's theory of alimony protects women who have a career to sacrifice from the consequences of one kind of sacrifice, it does nothing to protect women in other circumstances. Perhaps alimony ought not do so. As Professor Levy observes, there is an argument to

---

34. This is Professor Ellman's own example. *The Theory* acknowledges the general difficulty of calculating alimony under the theory and provides some instances of that difficulty (p. 78). But the acknowledgment seems to me too sanguine and the examples seem to me too few to convey fully the scope of the difficulty.

be made that individual divorced men should not bear the burden of ameliorating a problem that is more properly society's.<sup>35</sup> But I do not think this function of alimony should be jettisoned without a more prolonged and considered inquiry.

In calculating the wife's hypothetical earning capacity, we will not only need to look at the wife's career. We will also need to look at the social circumstances that would have affected her career. For instance, we might want to ask whether there would have come a time when it would have been economically irrational for her to further pursue the forsaken career, given a conflict with her husband's career. Should we have to ask whether she would have abandoned the career at that point? Ought we say, for purposes of calculating alimony, that she should have abandoned it at that point even if we don't think she would have?

Do we need to ask not just what career the wife would have pursued had she not made the sacrifice, but also what it would have cost her to do so? Should the saved expenses of starting and maintaining a career be subtracted from the earning capacity she would have had but for the sacrifice? If she gave up college in order to support her husband through his medical school, do we subtract from the differences in earning capacity the expenses of college? Some of these expenses will of course be financial. But do we also subtract the value of the labor which a wife would have had to expend in a sacrificed career but which was not expended given the sacrifice? If the wife gave up a career in a law firm in favor of keeping house, and if she would have had to work harder as a lawyer than she did keeping house, do we subtract the value of the work she did not do from the amount of her recovery, since some of the difference in earning power is attributable to the extra work she would have done, not to the sacrifice?<sup>36</sup>

It is worth noting that, when courts began to decide whether professional degrees are "property" divisible on divorce, they realized that valuing that kind of property would require courts to ask questions very much like the ones I have been asking. The impossibility of answering such questions with confi-

---

35. Robert J. Levy, *Reminiscence About the Uniform Marriage and Divorce Act—and Some Reflections Abouts Its Critics and Its Policies*, 1991 B.Y.U. L. Rev. 43.

36. There may also be an argument for subtracting from the award of alimony any expenses to which the husband was put in pursuing the more lucrative career made possible by his wife's sacrifice.

dence helped deter courts from treating degrees as property (although courts have sought other means of compensating people who supported spouses through professional school).

*The Theory's* way out of many of these quandaries is to "combine statistical data suggesting average outcomes in like cases with evidence particular to the claimant" (p. 79). But this solution seems partial and problematic. Many of these questions cannot be solved simply by looking to average outcomes for cases, because those cases have not yet occurred. We are, after all, projecting the wife's hypothetical "non-sacrifice" earning power into the future, possibly for as long as thirty or forty years or even more. And as we saw, it will sometimes be hard even to know what career she would have been pursuing. Thus there will often be quite baffling questions about what a "like case" would be. And there will often be no adequate evidence about any truly "like" case, as *The Theory* acknowledges (p. 79, n.187).

Not only does using statistical data seem technically problematic, but there will also be major questions of fairness in relying on averages. In roughly half the cases the wife will get too much, in roughly half too little. Even though she presumably gets something close to the correct amount in the middle range of cases, the scope for error seems great. Professor Ellman rightly says that "rules of law often call for speculative measurements . . ." (p. 78). But, as he acknowledges, "they may also reject them when they are too speculative" (p. 78). It is hard to think of many rules of law that call for as many measurements that are as brutally speculative as those the theory calls for. And it is hard to justify expanding that unattractive category.<sup>37</sup>

In sum, there is a danger that the wife will be recompensed in a large amount (where the sacrifice was dramatic and where the difference in earning power matters for a prolonged period) even though she has already drawn more than the benefit of the sacrifice during the marriage (where she worked relatively little during the marriage but drew on the extra income her husband made because of her sacrifice) and even though she might not in fact have come close to earning the amount her "earning power" would theoretically have entitled her to, all on a calculation

---

37. As my colleague Kent Syverud commented to me, wrongful death cases involving minors can call for remarkably problematic calculations of lost earnings. But as he also noted, "it is distasteful speculation there as well."

based on highly uncertain suppositions about what might have happened and on far from certain calculations about what did happen. There is also a danger that the wife will not be recompensed at all despite a great disparity in her earning power and her husband's, despite her great need, and despite her great sacrifice, because she cannot demonstrate that she would have succeeded in the career she sacrificed or because the sacrifice was not economically rational.

One way of summing up the points I have made in Part III is to say that the theory seems problematic even when it is considered just as an economic model. The model's shortcomings are suggested by the fact that it must be narrowed in so many ways. First, all transactions except financial transactions are excluded from the model. Second, all financial transactions except those between one or both of the spouses on one hand and outsiders on the other are excluded. Even financial transactions with outsiders seem to be limited to wage-earning and entrepreneurial activities. Within this small world, the theory applies a test of maximizing joint financial wealth. Yet economists regularly deal, for example, with trade-offs between wealth and leisure, with psychic income in numerous forms, and so on.

Even narrowed as it is, the model is probably unmanageable in practice. As I have tried to show, it seems unlikely that the theory would be noticed and heeded widely and accurately enough to serve the hortatory function which is its justification. And it seems likely that the theory would involve courts (and divorcing spouses and their lawyers) in impossibly speculative calculations.

#### IV. THE THEORY AND MORAL DISCOURSE

##### A. *Stating the Issues*

I am interested in *The Theory of Alimony* not just for its answers to the riddle of alimony, but also because of what it reveals about the diminution in moral discourse that I believe has recently characterized family law. By a diminution in moral discourse, I mean that courts and other lawmakers are less likely to discuss legal problems in moral language (and are more likely to try to transfer moral decisions to the parties the law is regulating). This does not, of course, mean that lawmakers' decisions are necessarily less moral, that family law is necessarily deprived of a moral basis, or that lawmakers may not have moral reasons

for avoiding moral discourse. It simply means that the terms lawmakers use in explaining (and presumably in thinking about) their work are decreasingly drawn from the vocabulary of morals and are increasingly drawn from the discourse of economics, psychology, public policy studies, medicine, or from those aspects of legal doctrine which speak in other than moral terms.<sup>38</sup>

In my earlier article, I tried only to describe, and not to evaluate, the trend toward diminished moral discourse. An article on alimony is hardly the place for a full-dress evaluation of the language of family law, but *The Theory* provides a useful test case of the trend. And I hope that in the course of evaluating the trend, we can also deepen our understanding of the theory of alimony, for I will conclude that many of the theory's drawbacks arise from its attempt to justify alimony in morally neutral terms and to keep courts from asking what the moral relations of the spouses are.

As should by now be clear, questions about the moral justification for alimony and the need for and worth of inquiries into the moral relations of the divorcing spouses are central to *The Theory of Alimony*. Professor Ellman's starting point in devising a theory is the belief that the triumph of no-fault divorce stands for the principle that courts ought not investigate the moral relations between the spouses when making any of the decisions associated with divorce. Professor Ellman also reasons that the disintegration of a social "consensus" about the normative content of marriage confirms the need for that principle. He rejects analogies to contract and partnership as bases for alimony in large part because both would require courts to undertake just such investigations. As he reasonably argues, both contract and partnership law smuggle fault (broadly understood)<sup>39</sup> back into divorce law by requiring courts to ask what the initial agreement between the parties was and what constitutes a breach of it. In sum, the law of alimony which Professor Ellman describes is a

---

38. I describe the trend at length in Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 Mich. L. Rev. 1803 (1985). There I say, "A decision made on moral grounds turns on whether particular conduct is 'right' or 'wrong,' whether it accords with the obligations owed other people or oneself." *Id.* at 1827.

39. Technically, marital fault refers only to behavior which constitutes grounds for divorce in a fault-based system. But Professor Ellman uses the term more broadly, to refer to any kind of misbehavior which might be taken into account in making decisions about awarding alimony and dividing marital property. For the sake of convenience, I will follow his practice.

law in which moral discourse has become increasingly inappropriate.

Professor Ellman's own theory of alimony, while "consistent with equitable notions," is not principally based on equitable ideas, but rather rests "on the proposition that marital investment decisions should be free from potentially distorting penalties and incentives" (p. 51). Whether or not Professor Ellman set out to do so, he has developed a theory one of whose attractions will be that it may be essentially justified in other than moral terms. It is a theory which, in other words, basically takes a normally functioning market as its guide and asks how such a market can be achieved within marriages so that husbands and wives can make decisions free of "distorting" influences.<sup>40</sup> It is, in addition, a theory which strives to allow courts to resolve alimony disputes without evaluating the spouses' moral relations and which is repeatedly contrasted with alternative theories which would require such evaluations. Because the theory is carefully justified in non-moral terms and because it sedulously seeks to allow courts to avoid moral inquiries, I see the theory as embodying the trend toward diminished moral discourse.<sup>41</sup>

Despite the insight and ingenuity which *The Theory* devotes to constructing a theory of alimony which does not rely on moral discourse for its justification or application, its success is limited by several obstacles. The nature and number of these obstacles suggest to me that removing moral discourse from the law of alimony has serious drawbacks. More specifically, a morally neutral justification for alimony probably cannot be constructed, and legislatures and courts cannot easily exclude the moral relations of the parties from their decisions about alimony.

### B. *Can There Be a Morally Neutral Justification for Alimony?*

We will look first at *The Theory's* attempt to find a morally

---

40. I am not, of course, suggesting that Professor Ellman's approach is without a possible moral foundation, much less that it is immoral. I am suggesting that it avoids describing that foundation and that it tries to take divorce courts out of the business of evaluating the moral relations of the parties.

41. I see it as embodying that trend in its most admirable form. The theory is driven away from moral discourse by the most serious kinds of problems with such discourse in family law, and the theory is free of the shallow psychological ideas which have hastened the abandonment of moral discourse.



neutral justification for alimony. I will wind up arguing that that attempt does not succeed. But in order to make my position clear, it will be necessary to digress slightly to distinguish that position from a more general view about the impossibility of moral neutrality in family law.

We begin, then, with the banal but relevant observation that (in some but not all important senses) the law cannot escape affecting the way people behave in life generally and in marriages particularly. Whatever alimony rules we write (even if we write none) will affect the incentive structure of marital decisions and thus will (potentially) affect the moral relations of the parties. Therefore any position the law of alimony takes must have moral consequences, even if none are explicitly intended.

But this crude statement of the problem needs to be refined. There is indeed a sense in which the law cannot be truly neutral toward any important aspect of human life. If people aren't influenced by the law, they will be influenced by something else. That is, even when the law doesn't regulate people in some respect, they will still face socially created incentive structures. These structures include the market, the network of psychological relationships in which people find themselves, the social institutions to which people belong, and the systems of values—religious, philosophical, and cultural—to which people adhere. By deciding not to impose its own incentive structures, the law is in some sense deciding to leave people to be influenced by those alternative incentive structures alone.<sup>42</sup> Not to decide is to decide, as the cliché goes. In any important area of life, these alternative incentive structures will have different moral consequences, consequences the government could have tried to affect if it had chosen to. Thus the law cannot be morally neutral.

This line of reasoning has led some commentators to conclude that it is inapt or even meaningless to talk about government neutrality or to distinguish between government intervention and non-intervention in the family.<sup>43</sup> However, that conclusion is misleadingly strong, and it obscures a good deal of

---

42. And of course these institutions themselves cannot easily escape being influenced by the state, so that even when the government does not directly regulate individuals, it may affect them through its influence on those institutions.

43. See Lee E. Teitelbaum, *Family History and Family Law*, 1985 *Wisc. L. Rev.* 1135; Frances E. Olsen, *The Myth of State Intervention in the Family*, 18 *U. Mich. J. L. Ref.* 835 (1985).

complexity. It seems to me that there are often senses in which it is useful to talk about government neutrality and distinguish between intervention and non-intervention. Some of the obscured complexity can be gotten at by asking why we care whether the government is neutral or whether it is intervening in the family. One reason we care is because of the effect governmental action can have on people's lives and because of our preference for individual autonomy. But the fact that the law cannot be morally neutral in the sense I described in the preceding paragraph does not mean that the law's decisions (whether to act or not to act) always significantly affect people's lives. For instance, governmental abstention will often leave family members with the sense and even the reality of greater control over their lives than direct governmental regulation of families. When the government does not act, and sometimes even when it does, the incentive structures which remain may be weak, and they may conflict, so that people have some important degree of choice about how to behave. This, I think, helps account for the almost universal sense that there is a meaningful difference between government intervention and non-intervention.

In addition, it is too simple to see people as simply responding to the incentive structures of the government or of the social institutions which are left free to act when the government doesn't. It is too simple because many people will not see themselves as subject to those social institutions, but rather will feel that those institutions are part of their own social and moral personalities. For that matter, many people will not see the government as an entity entirely separate from themselves, but rather will see the government acting as their own agents.

In addition, if we are evaluating the government's neutrality it will often matter *why* the government has not acted. It is one thing for the government to try to regulate an area of life with the intention of promoting a moral view. It is another thing for the government to decline to regulate that area of life for reasons other than a desire to promote a moral view by not acting and thereby allowing other social institutions to operate unhindered by the government. There are a number of reasons the government might choose not to act. It might simply conclude that it lacked the economic resources to act, that it could not make decisions as efficiently as another social institution, that it could not enforce its decisions effectively, that it could not identify a goal it wished to reach, or that it lacked the legal authority

to act. Often, the government may wish to promote some social value or purpose but will be inhibited from acting because it cannot act without impairing some other social value or purpose. This is virtually a generic problem in family law. The government wants to protect family members from all kinds of harms. However, it also wants to promote both the autonomy of families and family members. It will often be impossible for the government simultaneously to promote the autonomy of families and of their members and impossible to promote either kind of autonomy while protecting family members from harm.

When the government fails to act for reasons of this kind, its decision may have moral consequences, but it will often be imprecise to say that the government intended them. Sometimes the government will have been truly indifferent—that is, it will have concluded that all the likely outcomes were equally desirable or undesirable. Sometimes it will have preferred one outcome but found itself barred (for the kinds of reasons I sketched above) from acting to effectuate that outcome. Sometimes it will simply not have realized that there was an issue to resolve.

The idea of governmental neutrality has another component. It is sometimes thought that it is better for the government not to try to affect the “socially created incentive structures” of which I spoke earlier. The reason given for this view may be that those structures operate more efficiently and make better decisions than the government could. This is of course the classic rationale for *laissez-faire* in economic policy, and it too is part of the rationale for the doctrine of “family autonomy.” The reason may also be that those structures serve important social purposes and that they would be weakened if the government actively regulated them.<sup>44</sup> This is of course a classic rationale for the separation of church and state, and it too is part of the rationale for the doctrine of family autonomy. Or the reason may be that it is thought that government “neutrality” gives those structures leeway to operate and allows people more autonomy than governmental supervision would. Here again we encounter another rationale for the doctrine of family autonomy. The fact that the government in some sense allows these institutions to function and even that it in some ways promotes them does

---

44. For such an argument, see Peter L. Berger and Richard Neuhaus, *To Empower People* (1977), and Bruce C. Hafen, *The Family as an Entity*, 22 *U. Cal. Davis L. Rev.* 865 (1989).

not mean that they are simply the government's agents or that they are not in basic ways independent of the government.

For all these reasons, it will often mean little to say that the government cannot be morally neutral. Sometimes the government will not in any useful sense be pursuing any moral goal, will not be seen to be doing so, and will be having little effect. On the other hand, *The Theory's* alimony regime is not intended to be such a circumstance. That regime has what we have been calling a hortatory purpose—it seeks to affect people's behavior, and seeks to do so in the service of a set of moral goals. It seeks, that is, to promote a particular kind of marital sharing and a "traditional ideal" (p. 72) of child-care. It is true that *The Theory* is framed in the apparently neutral terms of the market. However, as Professor Ellman would no doubt acknowledge, market principles rest on their own moral ideas and have their own moral consequences.

But even if the particular theory we are analyzing were not "hortatory," it would still have trouble finding a morally neutral basis. Alimony itself is a legal doctrine. The spouses' very dispute over alimony exists because the law makes alimony possible. Not only has the law created alimony, having created it, it must set rules for it. As we have seen, if alimony has a hortatory purpose, the law must decide which goals to promote. If, on the other hand, its purpose is to resolve disputes, it still must decide which rules will resolve disputes most fairly. For all these reasons, the government cannot achieve any genuine neutrality.

More specifically, there are two kinds of reasons it will be hard to write morally neutral rules for alimony. The first is that there are many goals we may reasonably want marriages to attain and that these goals as a practical matter often conflict. To put the conflict in the most general terms, we may want to promote a conception of the couple as an indivisible entity and yet also to promote the personal autonomy of both spouses. It is probably impossible to write rules that will reliably accomplish both these goals for most of the people to whom the rules will apply.

The second problem returns us to Professor Atiyah's distinction between the hortatory and dispute-settlement functions of the law. As we have seen, the law of alimony has to operate in two different contexts: first, it establishes rules that affect the decisions of couples while they are married; second, it establishes rules to govern the marriage's dissolution. But, as Profes-

sor Atiyah observes, "the desire to settle a present dispute by imposing a decision which does justice in all the circumstances of the case is often likely to conflict with the desire to encourage or discourage particular types of behaviour in the future."<sup>45</sup> This conflict infects the law of alimony in a way that reiterates the conflict I discussed in the preceding paragraph. In its hortatory function, the law is centrally concerned with encouraging the spouses to be concerned for each other; in its dispute-settlement function, the law is primarily interested in resolving a dispute between the two individuals and in disentangling their affairs so that they need not deal with each other.

Spouses will always find themselves torn between the values of the marketplace and the values of the family, between their ambitions for themselves and their hopes for each other. The law of alimony may make some of those choices easier, but at the expense of making others harder. As I argued above, *The Theory's* attempt to remove "distorting" influences so as to "free" marital decisions failed. The theory would remove the wife's risk that her investment would go unrewarded because of divorce, but it would impose on the husband almost the full risk that the wife's investment in her own career would to some degree have failed. This dilemma appeared as well in *The Theory's* efforts to develop a model of undistorted marital decisions. The theory, as we saw, turned out to favor marital sharing intended to increase the family's income at the expense of other kinds of marital sharing and to promote maximizing the family's income instead of maximizing women's pursuit of careers in the marketplace.

To make clearer and more concrete the potential number and scope of the often-irreconcilable goals of alimony, let me suggest some of the plenitude of goals we might rationally want to reach. One might believe, on a variety of theories, that alimony should be awarded to alleviate the economic need of a spouse after divorce. One might seek, as *The Theory* does, to affect marital behavior through alimony rules. More specifically, one might wish to foster mutual trust, concern, and generosity. Or one might, on several grounds, strive to promote the autonomy of the two spouses after, or even while they are married. One might construct alimony law to maximize the degree of

---

45. P.S. Atiyah, From Principles to Pragmatism: Changes in the Function of the Judicial Process and the Law, 65 Iowa L. Rev. 1249, 1250 (1980).

equality between the spouses after divorce. One might want a law of alimony that optimized the predictability of the law, so that at least the spouses could know what to expect if they got divorced and could plan accordingly and so that judicial decisions could be made more accurately and efficiently. One might seek an alimony law that brought the relations of the parties to as complete an end as possible (which of course might mean no alimony at all or only something like rehabilitative alimony). One might write alimony rules that recompensed each spouse for any sacrifice he or she had made for the other. One might devise a law of alimony that prevented the disappointment of the financial expectations one spouse had of the other. One might prefer a law of alimony which encouraged or even required spouses to enter into pre-divorce contractual agreements governing the handling of their financial affairs on divorce. One might want the law to award alimony according to the marital fault (traditionally understood or otherwise) of the parties. One might wish, for any number of reasons, to eliminate alimony altogether. Obviously, not all these goals are by themselves sufficient bases for a complete theory of alimony. But all of them are plausible and substantial goals. And it does not take much examination to see that they are far from being mutually compatible (even though they are not all mutually incompatible).<sup>46</sup>

In sum, alimony rules must affect marital decisions of the kind with which we are concerned, and those decisions have important moral dimensions. We thus must choose which kinds of decisions to promote, and thus we must ask what moral views of marriage we prefer. If we must choose between approaches with different moral consequences, better that we should consider those consequences as carefully as possible. *The Theory* does not profess to escape choices of this kind entirely. Indeed, at one point it claims to "generate[] alimony rules that encourage the kind of marital behavior we want" (p. 52). But it is half-hearted and ambivalent about doing so, and thus never asks what "kind of marital behavior we want" with enough persistence to yield persuasive and useful answers. Thus, while *The Theory* cogently argues in favor of making it safe for spouses to maximize their family's income, its desire for a morally neutral justification for

---

46. I explore each of these possible goals in my forthcoming casebook—Carl E. Schneider, *Family Law*.

alimony deters it from sufficiently considering other desirable goals and from fully justifying the goal it does choose.

That desire for a morally neutral justification for alimony also leads the theory into some uncomfortable if unintended results. Suppose that the theory were adopted and that it achieved the prominence a hortatory law must have to work well. What inferences might people draw from it? People seem likely to assume that the theory rewards with alimony the behavior which the law particularly values and that it refuses thus to reward apparently similar behavior which it does not value.<sup>47</sup> The theory in fact rewards only "economically rational" behavior. It rewards only investments a "self-interested" bargainer would make. It expressly declines to reward otherwise identical sacrifices which a self-interested bargainer would not make. An investment made with an eye to getting something for yourself is protected; an investment made only to benefit someone else is not. I suspect, then, that people who had not read *The Theory of Alimony* would conclude that the law conceived of families in exclusively economic terms (rather than in a combination of economic, social, psychological, and moral terms), that the law thought of spouses as separate bargainers and not as part of a marital entity, and that the law valued self-interest more than altruism. In these ways, the theory seems conducive to readings which I think many people would join me in regretting. Indeed, even the fact that the theory seems to suggest that sacrifices must be recompensed on divorce may undercut the sense that spouses ought to have of obligation to the family and each other and of love for each other which may itself be a sufficient basis for sacrifice.<sup>48</sup>

The theory obviously does not set out to send any such messages. Professor Ellman can reasonably say that the law of alimony surely ought not penalize spouses for their generosity to each other by refusing to take that generosity into account when setting alimony. It may be perverse that a theory designed to recompense a spouse for sacrifices should also seem to undercut an important basis for making sacrifices. But that perversity

---

47. In fact, this is not the articulated basis for the theory. But as I argued earlier, that basis seems to me far too complex, sophisticated, and delicate ever to penetrate the public consciousness.

48. For a thoughtful discussion of the problems with deploying the law's expressive function, see Carol Weisbrod, *On the Expressive Functions of Family Law*, 22 U.C. Davis L. Rev. 991 (1989).

suggests once again how hard, even impossible, it is to find a morally neutral basis for the law of alimony. It also suggests again the complexities with which a theory of alimony based on the hortatory function must cope.

C. *Should Courts Be Barred from Considering the Spouse's Moral Relations in Awarding Alimony?*

I have been exploring some of the difficulties with the theory's attempt to find a morally neutral basis for alimony. We will now examine its attempt to relieve courts of the burden of examining the moral relations of the parties in making alimony awards. Of course the extent to which a court needs to look at the moral relations of the parties will vary according to the theory of alimony that is adopted. I cannot specify exactly what kind of moral discourse courts ought to undertake in alimony disputes until I present my own theory of alimony (and also of marital property), which I am not yet prepared to do. Here, I wish to argue against *The Theory's* position that courts should be barred from considering the spouses' moral relations in awarding alimony and in favor of the position that such an inquiry may sometimes be desirable. I will advance several reasons for these arguments. Centrally, I will observe that the people the law seeks to affect themselves think in moral terms. A law which tries to eliminate those terms from its language will both misunderstand the people it is regulating and be misunderstood by them.

*The Theory* seeks to influence the way husbands and wives make decisions which have important economic consequences, and it seeks to analyze those decisions in economic terms. But husbands and wives do not make those decisions in purely economic terms. They often take into account, sometimes very centrally into account, the moral environment and consequences of their choices. As I have argued at some length, *The Theory's* economic analysis is repeatedly led astray by its attempt to exclude these non-economic considerations from its calculus. In consequence, the theory is based on hortatory goals that cannot be met, on principles that cannot be wholly reconciled, and on calculations that cannot be satisfactorily made.

Reducing moral discourse in alimony decisions not only leads the law to misunderstand families. It also leads families to misunderstand the law. Family law generally, and the law of alimony and marital property particularly, try to regulate two of



the most intimate, complex, and consequential things in people's lives—their closest personal relations and their money. People want, and perhaps expect, such a law to make its decisions individually and meticulously, giving its full attention to the whole situation in which the specific parties were acting and to the differences between the specific parties and the rest of the world. Because morality matters deeply to most people, they will consider their moral relations a central part of that full situation and those differences. In other words, the theory establishes a bright-line rule for deciding disputes over alimony. But that rule inhibits courts from making individualized decisions and taking the complete circumstances of the case into account in a category of cases in which those circumstances will seem specially relevant to the litigants.

The point is not just that people legitimately expect that their deepest relationships will not be dissolved and their life's assets will not be distributed in so procrustean a fashion. It is that, in a world in which most people cannot be persuaded to study the law of alimony closely while they are married, the law should stay in touch with the concerns of the people it affects so that their reasonable expectations about the law are not disappointed. Spouses are likely to assume that the law of alimony will attempt to do some kind of justice among the parties, taking their full situation into account. Insofar as spouses take law into account in making decisions, they are likely to shape their marital behavior according to such a view of the law. Where there are not strong indications to the contrary, there is much to be said for accommodating those views.

Another obstacle to eliminating moral discourse from family law is that there are important reasons for wanting to retain it. The family is a central social institution which affects people in many of the most basic aspects of their lives. The obligations family members assume to each other, then, will have important social consequences, consequences in which the law has a legitimate interest. The legitimacy of that interest is testified to by the fact that, although both sides of the political spectrum vigorously assert that families have a basic claim to freedom from government regulation, both sides also regularly find occasions when that claim should yield to social interests. Thus some people on the right argue in favor of traditional alimony rules partly on the ground that they strengthen the family by enforcing the obligations and the sense of obligation family members are

taken to owe each other. And thus some people on the left argue in favor either of restricting alimony (for example, by making alimony available only for rehabilitative purposes) or of expanding alimony (for example, by making alimony available in the kind of ways advanced by *The Theory*) as a means of promoting women's moral claims to autonomy and self-sufficiency. Indeed, at several points *The Theory* itself defends its alimony rules on the ground that they "encourage the kind of marital behavior we want" (p. 52). Thus the theory seeks to promote "marital sharing" (of some kinds), and it specially rewards investments in child rearing partly on the grounds that it is "not merely a life-style preference but a traditional ideal" (p. 72).

The social interest in alimony which has traditionally had special weight has to do with another of the law's functions—the protective function.<sup>49</sup> It is a basic function of law to protect citizens against harms done them by their fellows. Because spouses do and should be able to depend on each other, and because spouses are for that and other reasons peculiarly vulnerable to each other, spouses can easily and severely injure each other in many ways. Alimony has traditionally been understood to be one way in which the law protects former spouses from the financial component of such injuries. Since those financial injuries can be devastating, this social purpose ought not be easily discarded. And it is a purpose which can be best served where the law undertakes the moral inquiry into whether such an injury has been done.

I have been principally suggesting that we must consider the moral relations of the parties if the law of alimony is to serve the hortatory and protective functions satisfactorily. I now wish to suggest that those moral relations must be considered when the law of alimony performs the dispute-settlement function. It is the heart of that function to settle disputes fairly. The moral relations between the spouses will be an important factor in thinking about what is fair, and therefore should be considered by courts. Suppose, for example, that a wife makes an investment of the kind the theory protects, and that in return she exacts important non-economic concessions from her husband. Suppose further that the wife subsequently divorces her husband for reasons that cannot be attributed to him. Under the theory, a court could consider only the wife's investment; it

---

49. I analyze this function in detail in Carl E. Schneider, *Family Law* (forthcoming).

could not consider what the husband gave in return or that he was not responsible for the wife's failure to receive the long-term economic benefit from her investment. But under these circumstances, is it fair to require the husband to protect her investment after divorce in the form of alimony? The unfairness of the result in this hypothetical is suggested by the extent to which it shows how the theory departs from its own rationale. The theory seeks to provide the wife the contract she would have negotiated had it been practical for her to do so. Yet the theory denies the husband the benefits that contract would have provided him—protection for the consideration he supplied and freedom from paying damages where he did not breach the contract.

One indication of the drawbacks of analyzing alimony in non-moral terms is that Professor Ellman's theory itself is more persuasively stated and its drawbacks are better understood in moral terms. Much of what makes that theory attractive is that it accords with some widely held moral ideas. The theory is appealing because it summons to mind and appropriately resolves a paradigm case in which the wife has powerful moral claims on her husband. This paradigm case has a number of features. In it, the wife makes a genuine, deliberate, irreparable sacrifice of her interest in pursuing a career and of her earning power. She also provides services (especially child-rearing and housekeeping) which she does not wholly relish and which are socially less prestigious than her husband's employment. She makes the sacrifice partly because of social pressures to do so, social pressures which both encourage her to "serve" her family and discourage her from pursuing a career. The husband does not just acquiesce in this decision; he at least expects and perhaps demands it. The husband's interest in pursuing a career and his earning power are directly, deeply, and indelibly benefitted by the sacrifice. The wife sacrifices in the belief that the marriage is permanent, or at least in the expectation that both parties will earnestly strive to make it so.

When the divorce comes, it is (in this paradigm case) the husband's "fault," if only in the sense that the husband, as the more powerful spouse, had greater responsibility for the success of the marriage. When the couple is divorced, the woman bears the heavier burdens of raising the children, with less ability to enter the job market because of those burdens, with less earning ability because of the sacrifice she made, with less ability than she once had and than her husband presently has to find a

spouse,<sup>50</sup> with little property (if only because most divorcing couples have little property to divide), with child-support payments which are set low and which are hard to collect, and with, in consequence of all this, a diminished social and economic position which will seem hard to improve. Her husband, on the other hand, is freed of the daily drudgeries of parenthood, retains the advantages in pursuing a career and earning a living which his wife's sacrifice gave him, and experiences little diminution and perhaps even an improvement in his social and economic position. The wife is in need, in several senses. She may be in absolute need—she may have fallen below the poverty line. She will at least be in need relative to her former social position. And she will be in need relative to her husband. Relatively, the husband is less likely to be in need and may be able to help his (former) wife supply her needs.

The force of the paradigm case largely arises from the personal and moral relationship between the husband and wife. It arises from the belief that she was weak and he was strong and that he took advantage of her weakness and his strength. It arises from the belief that she made a sacrifice for him and he made none for her. It arises from the sense that the parties had made a life-long commitment to love and care for each other, and that the wife kept that commitment while the husband evaded it. The legal terms in which the paradigm case is most appealingly resolved are some of those that are most charged with moral ideas and that reflect the kinds of concerns about the paradigm case that I have just described—ideas like unjust enrichment, restitution, reliance, and possibly even contract. And the best explanation for why the husband might owe the wife alimony will arise from the moral consequences of their moral relations.

It is then not surprising that *The Theory* is most persuasive where it does not require us to ignore the moral relations of the parties. Thus *The Theory* succeeds best where it explores the financial relations between the husband and wife in something like the paradigm case and where it shows in careful detail the economic consequences of the wife's sacrifice and the analysis she would undertake were she only a rational economic actor.

---

50. This is a point which Professor Ellman develops with some care. I have not dealt with it, however, because Professor Ellman concludes that any remedy for a loss of marriage prospects "requires a different theoretical exercise than the one advanced here" (p. 81).

When it does this, *The Theory* does much to help us understand what the moral relations of the parties are and thus what the legal relations of the parties should be.

Correspondingly, *The Theory* is less successful in two other circumstances. The first is where it attempts to justify denying alimony in something like the paradigm case. For example, its explanation of why a wife who makes a financially irrational sacrifice does not receive the same protection as a wife who makes an identical but economically rational sacrifice seems unpersuasive, and it seems so in part because it ignores the moral reasons we might want to require the husband to pay alimony. We might want to require him to do so because he has induced his wife to enrich him at her expense where the "confidential" relationship between husband and wife made that behavior morally dubious. In some circumstances we might want to require the husband to do so because of the wife's need. Professor Ellman says, and he is right, that we cannot require one person to support another simply because that person can afford to provide support and the other needs it. But people who have taken on obligations to live together for life (or at least to struggle to do so), whose lives have become intertwined, and who have come by mutual consent to rely on each other in special ways, may also become responsible for each other after marriage.

I want to dwell on this point for a moment. In his article in this symposium, Professor Ellman says that "[n]eed' has never been a satisfactory explanation for alimony, since it begs the question of why the needy person's former spouse . . . should be liable to meet that need . . ." <sup>51</sup> But the traditional law of alimony was not so mindless that it failed to answer that question. Nor ought that answer be understood simply in terms of gender roles or of marital fault narrowly understood. Rather, that answer, put in gender neutral terms, was the explanation I articulated in the preceding paragraph: One spouse may come to owe the other support after marriage because of the moral relationships between spouses that are generally part of marriage. In short, the riddle of alimony has a traditional answer. It is not that need gives rise to obligation. It is that entering into the special relationship that is marriage and behaving in some kinds of

---

51. Ira Mark Ellman, *Should Nonfinancial Losses and Motivations be Included in the Theory of Alimony?*, 1991 B.Y.U. L. Rev. 259, 262.

ways in that relationship can give rise to an obligation to a former spouse who is in need.

I have been saying that the first circumstance in which *The Theory* is least convincing is where it attempts to justify denying alimony in something like my paradigm case. The second such circumstance is where it attempts to justify requiring alimony in something unlike the paradigm case. I have asked a number of questions about the theory based on significant variations on the paradigm: I have, for instance, asked why the wife whose "investment" was neither a sacrifice nor even what we would ordinarily recognize as an investment should receive alimony and why the wife who received a full return (or even more than a full return) on her investment in the form of enhanced family income or reciprocal sharing should receive alimony. These questions suppose that the moral relations between the parties are more complicated than *The Theory* assumes. To some extent, these questions even raise the possibility that to impose alimony on the husband would be morally problematic. *The Theory's* answers to these questions are crucially limited by its desire to escape moral issues.

*The Theory* proffers several reasons for excluding inquiries into the moral relations between the parties. These reasons are substantial and deserve attention. The first is that the "modern divorce reform movement" has rejected all fault reasoning. But it is not so clear that it has or that it should. Historically, there was probably never a considered decision to reject all fault reasoning in all aspects of divorce law. When no-fault divorce was presented to legislatures, it was treated to a surprising degree as an issue primarily of interest to lawyers and even as an almost technical problem in judicial administration. Thus the full implications of no-fault divorce were not explored even by those who were involved in the adoption of the reform, and the public at large was hardly aware even of the limited debate that did occur.<sup>52</sup>

---

52. Herbert Jacob, *A Silent Revolution: Routine Policy Making and the Transformation of Divorce Law in the United States* (1988). (For a précis of Professor Jacob's themes, see Carl E. Schneider, *Legislatures and Legal Change: The Reform of Divorce Law*, 86 Mich. L. Rev. 1121 (1988)). As Professor Wardle writes,

The adoption of no-fault divorce grounds was intended primarily to reduce the acrimony of divorce proceedings, eliminate a major incentive for perjury, close the 'gap' between the written divorce law and the law as actually enforced and reflect the modern notion that charging and proving marital misconduct should not be necessary to obtain a divorce when the parties have mutually agreed to

Quite apart from what may historically have been intended in the move toward no-fault divorce, present practice does not in fact wholly abandon "fault" reasoning. Some jurisdictions today expressly allow fault to be taken into account in considering alimony and child custody. Many jurisdictions directly require courts to ask what is "equitable" when dividing the spouses' property, a requirement which seems expressly to invite some kind of inquiry into their moral relations. For that matter, a number of jurisdictions retain fault grounds for divorce along with no-fault grounds.

Nor does it logically follow from the adoption of no-fault divorce that fault cannot be taken into account in setting alimony. As I recently wrote,

Fault was eliminated as a basis for divorce partly because it was thought that people could not usefully be made to live together if they did not want to, whatever their moral relationship. However, in deciding what financial obligations the parties continue to have to each other after the marriage is ended, enforcement problems become less severe and the moral relationship may well be relevant. Indeed, that relevance seems to be conceded by the usual direction to the court to make whatever distribution of property and income may be thought to be "right," or "justifiable," or "equitable." It may be true that another reason for no-fault divorce was legislative reluctance to exacerbate the tensions between the parties by discussing painful subjects, but such discussions as to alimony should have fewer consequences, given that divorce has already been decided on. Indeed, to ignore the moral relationship between the parties in setting alimony awards can itself exacerbate tensions. Further, as Professor Müller-Freienfels points out, "there are more possibilities, in practice, of mitigating fault, and reducing its impact, so as to permit compromises" when dealing with alimony.<sup>53</sup>

Even if no-fault divorce was intended to mean all that *The Theory* takes it to mean, we may still ask whether that is what it ought to mean. We need not restore the status quo ante; sufficient unto that day was the evil thereof. But it may be profitable

---

divorce.

Wardle, No-Fault Divorce and the Divorce Conundrum, 1991 B.Y.U. L. Rev. 79, 80.

53. Schneider, Moral Discourse and the Transformation of American Family Law, 83 Mich. L. Rev. 1803, 1810-11, n.12 (1985), quoting Müller-Freienfels, The Marriage Law Reform of 1976 in the Federal Republic of Germany, 28 Int'l & Comp. L.Q. 184, 195 (1979).

to do what we have not yet done—to look carefully and critically at the implications of interpreting no-fault divorce as reading moral discourse out of each area of divorce law.

*The Theory's* second reason for excluding inquiries into the moral relations of the parties is that there is so much social disagreement about modern marital relations that we have no standards by which to judge them. There is plainly something to this argument. The point is not just that groups in society will disagree with each other about those standards; it is also that even a particular individual will often want conflicting things of marriage. But I do not think this argument should be taken too far. For one thing, it is not clear to me that there is in fact as much conflict about what marriage should be as *The Theory* seems to suggest, or that the conflict about marriage that exists would necessarily cripple attempts to take moral problems into account in writing alimony rules. In any event, there is social disagreement about *all* important areas of public policy. The processes of democratic government exist to resolve those disagreements. They are available to resolve uncertainties about the moral obligations of spouses.<sup>54</sup>

*The Theory's* third justification for avoiding moral discourse (and, of course, one of the justifications for no-fault divorce) is that it “would require [an] . . . impractical inquiry into spousal understandings . . .” (p. 64). This is no doubt true and no doubt important. Yet I have been arguing that it can also be impractical and unjust not to make those inquiries. Which evil ought we prefer? There may not be a really good way of deciding. But the law's usual resolution of this quandary (which is hardly unique to family law) is probably to rely on the parties and the adversary system to illuminate the evidence as fully as possible and to rely on the fact-finder to reach the best decision it can. That best decision will often be imprecise and inelegant, but it may also more regularly work a better justice than any of the alternatives. Although I am not firmly convinced, I am inclined to think that, all things considered, this may be a better solution for the law of alimony than such procrustean rules as *The Theory* advocates.

That solution is also, I suspect, likely to be what, in princi-

---

54. I discuss the problem of social dissensus and standards for resolving family-law disputes at length in Carl E. Schneider, *Discretion, Rules, and Law: Child-Custody Decisions and the UMDA's Best-Interest Standard*, 89 Mich. L. Rev. \_\_\_\_ (1991).



ple, at least, most parties to divorce actions would want. As I argued above, husbands and wives think of their relations partly in moral terms, and they will find it hard to understand a law which ignores so important an aspect of their relations. And all litigants want courts to take the particular facts of their situation into account. The effect of approaches like *The Theory's* is that individualized justice is denied and that bright-line rules are substituted for it. The theory's is a bright-line rule for two reasons. First, a wife is entitled to alimony as long as she has made a particular kind of marital investment, even though awarding her alimony would not be necessary to promote the ends of alimony and even though there might be strong equitable arguments against awarding her alimony. Second, a wife who has not made that kind of investment is not entitled to alimony even though awarding her alimony would promote the ends of alimony and even though there might be strong equitable arguments for awarding her alimony.

To be sure, there are powerful arguments for bright-line rules, but I doubt that they apply forcefully in this context. Bright-line rules may usually be desirable where the law's purpose is hortatory, since they will often communicate the law's intent and content more clearly than more complicated and less emphatic alternatives. However, bright-line rules will often be less suitable where the law's purpose is to resolve disputes, since, even more than most rules, they will prevent the decision-maker from considering factors that are relevant to a fair decision. This drawback will be specially pronounced where, as in alimony, the dispute is between people whose relations are intricately complex and whose whole lives and fortunes seem so nearly at stake.

I think it is probably true that my broader view of alimony could not be reduced to a few rules, that it would require courts to exercise some significant (but not unfettered) degree of discretion. I suspect that that exercise of discretion is part of what Professor Ellman seeks to avoid. And I sympathize with that impulse. Whether it is safe to confide decisions about alimony importantly (but not exclusively) to judicial discretion seems to me a question which deserves its own article, since I believe that the choice between rules and discretion is both intricately complex and context-specific. Here I can only say that I am led by my investigation of judicial discretion in child-custody cases to doubt that the risks of discretion are as uniformly and over-

whelmingly great as is often supposed.<sup>55</sup> Allowing discretion to guide decisions is at least not a radical position. The traditional standards for alimony were vague enough to allow a good deal of judicial discretion. And although the Uniform Marriage and Divorce Act limits judicial discretion to grant alimony, it accords lavish discretion to judges in the related (on some views almost identical) question of deciding how the spouses' property should be divided.<sup>56</sup>

I should stress that *The Theory's* arguments for rejecting moral discourse are weighty. But for the reasons I have just presented, I do not believe they are dispositive or that they clearly outweigh the countervailing arguments in favor of such discourse in alimony law. As I have argued, no morally neutral basis for alimony law can be found, the behavior of spouses cannot be understood without looking to their moral relations, spouses expect that courts will take those relations into account in making decisions about alimony, there are social reasons we might not want a morally neutral law of alimony, and courts resolving disputes between divorcing couples should attempt to do so individually and justly.

In any event, moral discourse in the law of alimony has been made less problematic by recent developments in family law. The conventional means by which the law attempts to avoid dealing with the moral relations of parties is to allow people to enter into contracts and thereby to settle their moral relations for themselves. Family law has become increasingly receptive to contract as a mode of ordering marital relations. Thus couples who do not wish to have courts consult their moral relations in awarding alimony might be allowed to write their own contracts specifying what economic obligations they would have to each other on divorce. While I agree with Professor Ellman that marital contracts generally present serious problems,<sup>57</sup> I wonder

---

55. *Id.*

56. It will no doubt be said that judicial discretion in awarding alimony was abused. This is a question that can be answered only with empirical information which we now lack. However, I would ask whether discretion was in fact being abused or whether it was simply being exercised in ways that were once acceptable but no longer are. I would also ask whether undesirable kinds of decisions about alimony can be identified and specifically prohibited, thereby preserving the advantages of some degree of discretion while preventing some of the most serious and systematic misuses of it. For more such questions, see *id.*, *passim*.

57. I treat some of these problems and a host of the other drawbacks of contractualizing family law in Carl E. Schneider, *Family Law* (forthcoming).

whether they are as acute in the context of the theory as he assumes. Professor Ellman believes the wife cannot protect herself contractually as the parts supplier can. He reasons that, because of the "indefinite nature of the parties' marital obligations," the "[p]rospective spouses will usually be unable to specify the details of their marital obligations sufficiently to permit objective determinations of breach" (pp. 44-45). But this seems to assume that any contract would be one which tried to regulate *all* the couple's affairs. Might not the couple, for example, contract at the time of the marriage or of the sacrifice to a private version of Professor Ellman's alimony scheme, thereby protecting the wife at least as fully as judicial adoption of Professor Ellman's theory of alimony would? It may be hard for the couples to foresee how the theory's kind of alimomial relief would work in their own future situation, but *The Theory* is already willing to impose such relief on *every* couple. That seems to suggest that the foreseeability problem is not, in this particular instance, forbiddingly great. If it is acceptable to have the state provide alimomial relief of the kind the theory contemplates in every case, would it not also be acceptable to have couples adopt that form of relief for their own particular case? If the wife's interest in protecting the kind of investment *The Theory* treats is great enough to be the only basis for alimony, is it not also great enough for couples to make it the basis for a contractual agreement either before the marriage or at the time of the investment?

Finally, moral discourse in the law of alimony may also seem somewhat less troublesome if we recall that most divorce cases are settled by the parties. (The usual estimate is that only about ten percent are actually litigated.) For those couples who settle their disputes out of court, the formal inquiry into their moral relationship need never happen. True, they may negotiate "in the shadow of the law." But it is far from clear just how much that shadow actually affects negotiations. And any such effect will be diminished where, as seems likely in the case of alimony, the message of the law's shadow cannot be interpreted with any real certainty. And if I am right that moral issues will be relevant to whether alimony should be awarded and that the parties themselves will have moral issues centrally in mind, it will not take the law's shadow to lead the parties to those issues.<sup>58</sup>

---

58. I discuss the law's effect on bargaining at divorce at some length in my forth-

## V. CONCLUSION

In the end, I wonder whether *The Theory of Alimony* in fact answers the riddle of alimony. The riddle is why one spouse owes the other support after divorce. *The Theory's* answer is that one spouse (let us continue to call her the wife) has suffered a loss. But why is the husband responsible for repairing that loss? *The Theory* does not find the reason in the fact that he in some sense caused the loss or that he benefitted from it and should have to disgorge that benefit. On the contrary, the theory rejects any such inquiry into the relations of the spouses. Rather, the theory finds its reason for alimony in the law's hortatory function, in the need to remove disincentives to a particular kind of marital sharing.

But is this justification for alimony persuasive? Why should one spouse be singled out to pay perhaps considerable sums in order to support a general system of incentives? In the criminal law, we do something that may be analogous. That is, we justify punishment partly on the grounds of its contribution to general deterrence. But thus singling out one person to bear the disproportionate costs of a social program seems less problematic in the criminal law (although it is hardly unproblematic even there), since the person being singled out has done something wrong and has subjected himself to punishment. But whether the spouse who is made to pay alimony under the theory has done anything at all to justify using him in this way is a question the theory prevents us even from asking. In other words, I have the same problem with the theory's focus on loss that the theory has with the law's focus on need: Why is the former spouse singled out to bear the burden?

If *The Theory* does answer the riddle, I wonder whether it does so by changing the question the riddle asks. Alimony is conventionally understood to mean the support one spouse provides another after divorce. But *The Theory* strips away from alimony all payments except those necessary to restore to the wife any loss of earning capacity she may have suffered from a sacrifice of earning capacity made as a rational means of maximizing the family's wealth. The theory may be correct, but is what it justifies alimony? Not in our conventional understanding of that term, at least.

I almost wonder something else. I almost wonder whether what Professor Ellman has done is not so much to expound a theory of alimony but rather to destroy all theories of alimony. He attacks all the standard rationales for alimony: the traditional, the contractual, and the partnership explanations all fall beneath his sword. He can justify only one very narrow form of alimony, a form which hardly seems like alimony at all. And, as I have tried to show, even that form of alimony is multipliciously problematic: it is hard to see how it will have a real effect on incentives, it is not clear that its incentives will operate as they are intended to, it involves cruelly complex and speculative calculations, and it will regularly produce (too many?) unfair results. Essentially, Professor Ellman argues that there is no judicially manageable market measure for most marital transactions. I have argued that the one kind of marital transaction which Professor Ellman is willing to see consulted in setting alimony is subject to that same criticism and that that transaction cannot in any case be fairly evaluated without evaluating the kinds of transactions Professor Ellman would exclude. Thus I think it is reasonable to ask whether the game is worth the candle, to ask whether so diminished and distorted a form of alimony is worth the many costs it would impose.

The abolition of alimony is certainly not unthinkable. If there is no satisfactory rationale for alimony, alimony should be abolished. At least in modern times, alimony has never been awarded frequently. Its scope is currently being restricted, as doctrines like rehabilitative alimony signify. Its scope will always be limited in many cases by the inability of either spouse to contribute to the support of the other. And some of alimony's functions could still be served (and probably are now served) through the divorce court's power to divide the spouses' property (and, for that matter, to order child support).

The abolition of alimony could be conceived of yet more sweepingly. Divorce courts could be directed to do nothing more than to allocate the property of the spouses to the spouse who had title to the property and to enforce any contracts into which the spouses had entered. Every time the spouses acquired property and decided whose name to put it in, they would be making a decision about its disposition on divorce. Spouses could make gifts to each other of property. They could dictate the allocation of their property on divorce through ante-nuptial agreements, through express contracts made during the marriage, or in set-

tlement agreements negotiated during divorce proceedings. This would have the effect of maximizing the spouses' freedom to arrange their affairs and of reducing judicial power to a probable minimum. In an important sense, then, this is probably the most "neutral" system which could be adopted.

This already over-long disquisition on Professor Ellman's theory of alimony is hardly the place to advance a fresh solution to the alimony riddle.<sup>59</sup> And I have more ambivalences than solutions to offer. But I am dubious about the abolition of alimony. I am dubious first because I am reluctant to see the law promote the view of marriage that I think most people would associate with the abolition of alimony. That view of marriage would emphasize the separateness of the spouses rather than their unity. It would emphasize their autonomy from each other rather than their obligations to each other. I am also dubious because I think that there will too often be times when fairness between the parties will demand that one of them assume some continuing responsibility for the support of the other. To put the point differently, I think there will be times when the law's protective function demands that spouses be guarded against the financial injuries to which they are specially vulnerable.

In sum, I suspect that the riddle of alimony already has an answer. That answer lies in the traditional justification for alimony which I described earlier—that people who marry take on special responsibilities for each other because of the commitment that defines marriage and because of the commitments that grow out of a shared life. That answer is hardly a complete answer. It remains to be said what commitments are instinct in marriage, what commitments made during marriage should have legal consequences, and what responsibilities those commitments give rise to. The task before us, then, is to ask what we want of marriage as a social institution. For we cannot adopt a theory of alimony until we construct a theory of marriage.

---

59. I explore the possible rationales for alimony in some detail in Carl E. Schneider, *Family Law* (forthcoming).