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Economics, Feminism, and the Reinvention of Alimony: A Reply to Ira Ellman

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I. INTRODUCTION 1463
II. THE JUSTIFICATION ELLMAN ADVANCES FOR HIS THEORY IS A CONTRACTUAL ONE 1468
III. ALIMONY IN ELLMAN'S THEORY IS A FORM OF RESTITUTION 1471
IV. THE CHOICE OF RESTITUTION: REMAINING IN THE LABOR MARKET AND RETAINING THE PRIMARY RESPONSIBILITY FOR CHILDREARING 1485
A. *The Limits of Efficiency* 1485
B. *The Limits of Contract* 1488
C. *The Normative Implications of* The Theory of Alimony 1491
V. CONCLUSION 1494

I. INTRODUCTION

Divorce reform and gender roles are inextricably linked. When Lenore Weitzman chronicled the devastating consequences of divorce for most women, she described a legal system that, in an effort to be gender neutral in a formal sense, made no allowance for the domestic role women continue to perform.[1] Herma Hill Kay, in reviewing Weitzman-inspired proposals to expand the scope of the financial awards made at divorce, nonetheless warned against encouraging "future couples entering marriage to make choices that will be economically disabling for women, thereby perpetuating their traditional financial dependence upon men and contributing to their inequality with men at divorce."[2]

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1. *See* L. WEITZMAN, THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA 15-51 (1985).

2. Kay, *Equality and Difference: A Perspective on No-Fault Divorce and its Aftermath*, 56

Feminist writers, led by Martha Fineman, decry the poverty of the existing debate, focusing as it does on woman either "as equal" or "as victim" without recognition of the possibility that women could perform without penalty a role that differs from the male model of work force participation.[3] Despite the centrality of these concerns to any modern system of divorce, Ira Ellman sets forth what he terms *The Theory of Alimony* without acknowledging that the debate exists.[4]

Ellman's theory draws on efficiency principles to argue that alimony should be designed to encourage specialization,[5] with the lower earning spouse—today most often the wife, according to Ellman—spending more time on the couple's joint domestic needs so that the higher earning spouse is able to maximize his or her income.[6] He would then tie alimony awards to the lower earning spouse's proof of earning capacity lost for the benefit of the other spouse. Ellman concludes that this "is consistent with the movement toward gender equality, as long as marital roles are not assigned on the basis of gender."[7]

Despite his use of the gender neutral language of efficiency, Ellman's thesis rests on the premise that women *should* specialize in do-

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U. CIN. L. REV. 1, 80 (1987).

3. *See, e.g.*, Fineman, *Implementing Equality: Ideology, Contradiction and Social Change, A Study of Rhetoric and Results in the Regulation of the Consequences of Divorce*, 1983 WIS. L. REV. 789, 814; O'Connell, *Alimony After No-Fault: A Practice in Search of a Theory*, 23 NEW ENG. L. REV. 437 (1988).

4. Ellman, *The Theory of Alimony*, 77 CALIF. L. REV. 1 (1989). Alimony owes it origins to a time when the courts did not recognize true divorce but only separation from bed and board. At that time, alimony was a continuation of the husband's (and only the husband's) legal duty of support, a duty that was not discharged because the marriage had not been terminated. Professor Mary O'Connell argues that alimony in this traditional sense, therefore, became obsolete once the courts willingly recoguized divorce *a vinculo*. *See* O'Connell, *supra* note 3, at 456; *see also* Brinig & Carbone, *The Reliance Interest in Marriage and Divorce*, 62 TUL. L. REV. 855, 858-65 (1988). O'Connell, like Ellman, nonetheless uses tbe term "alimony" to describe modern divorce awards. O'Connell, *supra* note 3, at 456.

In order to remain consistent with tbe terminology Ira Ellman employs, and for lack of a better word, "alimony" is used throughout this Article to describe payments from one spouse to another upon divorce that are not considered part of the property division. *See* Ellman, *supra*, at 10 n.20. At the end of the Article, I argue that these payments should be seen as simply another form of property division and that the terms "alimony," "spousal support," and "maintenance" all should be abolished from the lexicon. *See infra* note 169 and accompanying text. In the meantime, however, the word alimony will be used for the sake of simplicity.

5. Ellman observes:

> Whenever spouses have different earning capacities and want to plan rationally as a single economic unit, tbey will conclude that, where possible, they sbould shift economic sacrifices from the higher earning spouse to the lower earning spouse, because that shift will increase the income of the marital unit as a whole. If they follow that plan, the lower earning spouse (today most likely the wife) will often be pushed toward tbe position of the wife in the traditional marriage, even if they had started out with a different intention.

Ellman, *supra* note 4, at 46.

6. *Id.* at 48.

7. *Id.* at 48 n.141.

mestic matters to the extent they earn less than their husbands, without recognition that women earn less than men *because* they have historically borne the major childrearing role. Although Ellman claims that he wishes only to remove "distorting incentives" that discourage "the kind of marital behavior we want,"[8] he fails to recognize that even economists concede that the type of marital behavior "we" want turns on something more than a desire to maximize the couple's income or utility.[9] A decision to increase specialization within marriage by increasing women's economic dependence on their husbands will ratify existing gender inequalities, and such a decision cannot depend solely on the desire to remove distorting incentives.

Ellman's conclusion, moreover, cannot be defended on the efficiency grounds he develops. In *The Theory of Alimony* Ellman argues for greater specialization between husbands and wives without examining its impact on the specialization among women. While men, particularly middle-class men, have assumed increasingly specialized roles over the course of the last century, women, whether college graduates or high school dropouts, were limited to the largely undifferentiated role of homemaker.[10] The dramatic change in the latter part of the twentieth century has not been, as Ellman claims, a decreasing specialization within the family because men have assumed only a slightly greater share of domestic responsibilities than they did before. Rather, the major shift has been an increasing specialization among women as married

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8. *Id.* at 50, 52. Ellman considers what would happen if the couple "rejects this 'rational' choice of maximizing the marital income, perhaps because the wife insists upon it in order to lower the potential loss she would incur if they ultimately divorce." *Id.* at 47. He concludes:

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

Id. at 47-48 (footnote omitted).

9. Although Ellman purports to maximize utility rather than income, *see id.* at 47 n.140, 50-51, his emphasis on the couple's financial gains from specialization belie that claim. *See id.* at 46-48. Even if one were to concede for purposes of discussion that Ellman's proposals were hased on utility maximization, the issue still needs to be framed in broader terms than the couple's interests alone. *See* M. POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 25-36 (1983); *infra* text accompanying notes 106-17.

10. Although working-class women often worked outside the home during this period, they continued to perform the homemaker role as well, and their work force participation was generally limited to less skilled positions. For a discussion of changes in the work force, see sources cited *infra* notes 112 & 115.

women perform more diversified roles and hire other women to help care for their homes and their children.[11] The same economic analysis that would support specialization within the family supports specialization among women, and no rigorous argument can justify one without examination of the effect on the other.

Despite these limitations, Ellman's proposals merit serious consideration largely because they bear only a tenuous relationship to the rationale he advances to support them. Ellman's rationale, the desire to deter inefficient divorce and encourage reliance over the life of the marriage, is the classic justification for expectation damages.[12] Elisabeth Landes, embracing a call for specialization similar to Ellman's, recognized that the gains Ellman claims for his theory could come only from a contract-like system that enforced marital obligations by tying the financial consequences of divorce to a determination of which party bore responsibility for the breakup of the marriage.[13] Ellman, in contrast, rejects the possibility of defining marital obligations, and his proposals, although dressed in the language of reliance, reinvent alimony as a form of restitution. Standard economic analysis, however, demonstrates that restitution, under its own or any other name, will not achieve the objectives of *The Theory of Alimony*.

An argument, nonetheless, can be made for Ellman's proposals, but it is quite different from the one he advances. Restitution is an attractive basis for the financial allocations made at divorce because, as Ellman recognizes, the principle of compensation for benefits conferred at the other party's expense is powerful. With increasing calls for reevaluation of the marital obligations that survive divorce, restitution provides a way to recognize the contributions married couples are continuing to make, without a return to fault or to lifelong separation of home and market. Although a comprehensive rationale has yet to be articulated, Ellman's proposals describe, at least in broad outline, the modern trend in divorce decisions. To realize the promise restitution offers, however, Ellman and those jurisdictions that would adopt his proposals need to have a clearer vision of the relationship between men and women and between home and market that they wish to encourage.

In an effort to clarify the role restitution principles can play in redesigning divorce awards, this Article provides a critique of *The The-*

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11. *See infra* note 112 and accompanying text.

12. Classic in the sense that those interests are the ones that L.L. Fuller and William R. Perdue set forth in their original effort to justify expectation damages. *See* Fuller & Perdue, *The Reliance Interest in Contract Damages* (pts. 1 & 2), 46 YALE L.J. 52, 373 (1936). Modern economists, however, have a somewhat different view of these interests. *See infra* notes 48 & 98-101 and accompanying text.

13. *See* Landes, *Economics of Alimony*, 7 J. LEGAL STUD. 35 (1978).

ory of Alimony, arguing that the theory can be justified only by a conclusion that married women should be encouraged to remain in the work force *and* continue to bear the primary responsibility for childrearing.[14] Part II of the Article discusses the difference between contractual and noncontractual remedies in the context of divorce and concludes that Ellman's theory, his claims to the contrary notwithstanding, is a contractual one to the extent that it rests on a desire to permit the parties to maximize the return they enjoy from marriage. Part III places *The Theory of Alimony* within the context of the modern law of civil obligation by examining the roles of expectation, reliance, and restitution damages. Part IV examines the source of the inconsistencies in Ellman's theory. This section first observes that even for commercial contracts, efficiency analysis fails to provide a basis for choosing between expectation and restitution; and, second, observes that for marriage, the desire to maximize the couple's investment provides, at best, an incomplete basis for analysis. Part IV concludes that a choice of restitution over expectation or reliance makes sense only to the extent that deterring divorce is less important than deterring over-

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14. Within academic circles, Joan Krauskopf has long advocated use of the concept of lost earning capacity to define the interests that should be protected upon divorce. *See, e.g.*, Krauskopf, *Theories of Property Division/Spousal Support: Searching for Solutions to the Mystery*, 23 FAM. L.Q. 253 (1989) [hereinafter Krauskopf, *Property Division*]; Krauskopf, *Maintenance: A Decade of Development*, 50 MO. L. REV. 259, 261-63 (1985); Krauskopf, *Recompense for Financing Spouse's Education: Legal Protection for the Marital Investor in Human Capital*, 28 U. KAN. L. REV. 379, 391-95 (1980) [hereinafter Krauskopf, *Legal Protection*]. Krauskopf has been among the first to apply the concept of lost earning capacity to define the interests that should be protected upon divorce. For a discussion of the existing case law recognizing the concept of lost earning capacity, see Brinig & Carbone, *supra* note 4, at 877-82, 887-89, 902-03.

Throughout *The Theory of Alimony*, Ellman refers to "the lower earning spouse (today most likely the wife)," recognizing that "[a]lthough most wives now work outside the home, they usually continue to bear primary responsibility for the couple's domestic needs as well" with the result that despite a gender neutral law, alimony claims are most often brought by women against men and the wife rather than the husband is economically dependent. Ellman, *supra* note 4, at 4 n.2, 46. Ellman accordingly notes that "[r]ecognizing this reality, and to avoid tedious language, I often use the term 'wife' and its referent pronoun 'her' as a pronoun for a spouse with an alimony claim." *Id.* at 4 n.2.

Ellman's assumptions are disturbing, not because they are wrong, but because he fails to address the forces producing gender differences and to evaluate the impact his proposals will have in perpetuating those differences. *See supra* text accompanying notes 8-9. Nonetheless, because my primary purpose is to provide a critique of Ellman's proposals as a form of civil obligation, I do not address these assumptions until near the end of this Article. Even then, ironically, I believe that the type of restitution system Ellman proposes, if conceptualized in somewhat different terms, may provide a basis for transforming women's status within marriage in a manner more consistent with a feminist perspective. *See infra* text accompanying notes 166-67. Accordingly, while I have problems with Ellman's conclusion that women should continue to bear the primary domestic role for the reasons given in *The Theory of Alimony*, this critique proceeds, at least at the outset, on Ellman's terms, treating the wife as the "lower earning spouse" and examining the consequences that flow from that assumption.

reliance, which in this context means discouraging married women from devoting too much of their energies to the home rather than the market. A choice of restitution over need, on the other hand, makes sense in exactly the manner Ellman describes: as a way of encouraging married women to continue to bear the primary responsibility for childrearing and for compromise when two careers clash. Accordingly, the case for restitution does not depend, as Ellman claims, on the difficulty of determining when marital obligations have been breached or of calculating the more expansive measures available from expectation or reliance. Finally, the Article concludes that for reasons other than those advanced in *The Theory of Alimony*, restitution, because it focuses on the benefits that survive the divorce rather than on the events that took place during the marriage, offers a basis for reconceptualizing divorce settlements.

II. THE JUSTIFICATION ELLMAN ADVANCES FOR HIS THEORY IS A CONTRACTUAL ONE

The core of the modern debate over marriage is the tension between marriage as a relationship growing out of the agreement of the parties and as a status imposed by the state in order to advance a larger set of societal interests.[15] Which gives the union its legitimacy: The couple's vows to each other or the blessing of the state? Which defines marital obligations: The intentions of the parties or the duties imposed by law? Which individual agreements shall be enforced: Those fairly agreed to or only those that do not contradict societally dictated conventions?

The traditional answer was unequivocal. Marriage was a status, capable of formation and dissolution only with state sanction.[16] The state supplied the status's essential terms, and the couple was powerless to alter any but the most inconsequential of them.[17] The family, an often hierarchical and sometimes involuntary relationship charged with a major role in administering wealth, determining social standing, and providing for the care of dependents, was simply too important to be left to

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15. This debate is argued no less now than at the time Sir Henry Maine wrote in 1864. *See* H. MAINE, ANCIENT LAW 163-65 (1864).

16. *See* Glendon, *Marriage and the State: The Withering Away of Marriage*, 62 VA. L. REV. 663 (1976).

17. *See* H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES §§ 2.8-2.15 (1968) (providing examples of state-imposed restrictions); Shultz, *Contractual Ordering of Marriage: A New Model for State Policy*, 70 CALIF. L. REV. 204 (1982); Temple, *Freedom of Contract and Intimate Relationships*, 8 HARV. J.L. & PUB. POL'Y 121, 124-25 (1985); Weitzman, *Legal Regulation of Marriage: Tradition and Change, A Proposal for Individual Contracts in Lieu of Marriage*, 62 CALIF. L. REV. 1169, 1170 (1974); *cf.* Glendon, *supra* note 16, at 663.

the wishes of its members.[18]

The modern answer is equivocal. With employment replacing inherited wealth as the major determinant of social standing, family law now emphasizes "[i]ndividual liberty and the relative independence and equality of family members."[19] The courts have imposed liability without marriage and have absolved former spouses of responsibility for the events within marriage.[20] Partly in response, feminists have encouraged women to devise their own agreements to replace antiquated or unfavorable legal provisions.[21] Virtually all scholars decry the older opposition to such agreements, and recent decisions indicate a greater judicial willingness to enforce them.[22] But recognition of a larger ambit for individual agreement within and without marriage does not mean that private agreement has replaced public prescription as the primary source of marital obligation. As long as the family remains the major source of provision for children, the state is unlikely to treat family matters as exclusively private affairs.[23] The choice between status and contract remains.

In formulating a theory of alimony, Ellman elects a noncontractual over a contractual approach without confronting these issues. He observes only that express marital agreements are rare, that implied agreements are difficult to prove, and to the extent courts are instructed to base their decisions on the intentions of the parties, that they "will be tempted to impose their own beliefs about appropriate marital conduct under the guise of implying an agreement."[24] Ellman proposes a noncontractual approach so that he can address directly what the rules governing divorce should be, without the pretense that such rules necessarily reflect the intention of the parties.[25] In the process, he misses much of what separates modern contractual and non-

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18. For a discussion of the relationship between the family and the administration of wealth within society, see M. GLENDON, THE NEW FAMILY AND THE NEW PROPERTY (1981). For a discussion of the historical treatment of the family, see J. FLANDRIN, FAMILIES IN FORMER TIMES (1979).

19. M. GLENDON, *supra* note 18, at 41.

20. *See* M. GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 63-111 (1987); Glendon, *supra* note 16, at 663; Temple, *supra* note 17, at 136-39.

21. *See, e.g.*, L. WEITZMAN, THE MARRIAGE CONTRACT (1981); Shultz, *supra* note 17, at 204.

22. *See* Shultz, *supra* note 17, at 207-11 & nn.3-4; Weitzman, *supra* note 17, at 1170-71.

23. *See generally* Temple, *supra* note 17, at 121.

24. Ellman, *supra* note 4, at 21.

25. Ellman summarizes the difference between contractual and noncontractual approaches as follows:

> The theory offered here is fundamentally different from contract analysis. To think of alimony in contract terms is essentially to look backwards: We ask what deals were made and what promises were relied upon, and we fashion a remedy that vindicates reliance on those promises. By contrast the proposed approach looks forward; it generates alimony rules that encourage the kind of marital behavior we want.

Id. at 51-52. *But see* M. POLINSKY, *supra* note 9, at 27; *see also infra* note 45.

contractual analysis.

Many modern contracts involve situations in which the agreement between the parties is a vague, relatively undefined relationship. Employment relationships, franchise agreements, and contract negotiations all give rise to contractual liability without any clearer agreement than that which governs marriage.[26] Even relatively detailed contracts frequently fail to specify remedies in the event of default. Contract law fills in the gaps in these agreements by supplying a set of default rules that govern when the parties fail to make provisions of their own.[27] Uncertainty and risk of personal bias increase the need for a clearly articulated set of default rules; they do not mandate a noncontractual approach. Rather, the difference between contract and noncontract turns on two other considerations: first, to what degree do the rules reflect the interests of the parties to the agreement as opposed to societal or third-party interests, and, second, to what degree will the parties be allowed to opt out of the rules?[28]

In providing for default rules to govern those situations in which the parties have failed to specify agreements on their own, there is no way to know, of course, what provisions the parties would have supplied had they considered the matter. Law and economics scholars solve the problem by assuming that the parties would agree to any terms that maximize their joint return from the contract, that is, that make both parties better off.[29] Mitch Polinsky observes that "this approach is

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26. Indeed, marriage, which for many still involves the traditional exchange of vows to remain married "for better or for worse, for richer or poorer, in sickness and in health, until death do us part," is considerably more definite in its terms than employment relationships, which often involve no express agreements at all. Yet, modern courts have had little difficulty extending contractual liability to the employment setting. *See* M. GLENDON, *supra* note 18, at 151-70.

27. M. POLINSKY, *supra* note 9, at 25.

28. *See* Carbone, *The Role of Contract Principles in Determining the Validity of Surrogacy Contracts*, 28 SANTA CLARA L. REV. 581, 586 (1988). Economists describe these concerns in terms of externalities. When Mitch Polinsky describes the role of contract law in supplying default rules to govern particular transactions, he assumes that no one other than the parties are affected by the contract, and that the appropriate purpose of contract law is to supply the result the parties most likely would have reached on their own, *i.e.*, the result that maximizes their joint interests. *See* M. POLINSKY, *supra* note 9, at 25. It also follows that the parties should be allowed to opt out of the default rules set to the extent that they conclude that they would be better off with an alternative set of rules.

At the point at which other interests become involved, there is no basis for a conclusion that default rules should maximize the parties' interests, as opposed to third-party or societal interests, and to the extent default rules are designed to address those other interests, it would be inconsistent to allow the parties to opt out of the rules set. Once legal rules are designed to advance interests other than those of the parties to the contract, the legal basis for the rules no longer can be purely contractual because it is rooted in a source of legal obligation other than the agreement of the parties. Carbone, *supra*, at 586.

29. M. POLINSKY, *supra* note 9, at 25. "The distinction between tort and contract is well grounded in common law, and divergent objectives underlie the remedies created in the two areas.

equivalent to designing contract law according to the efficiency criterion."[30] The approach remains contractual as long as alimony, or any other default rule, is justified in terms of its ability to maximize the contracting parties' welfare. Use of efficiency analysis becomes noncontractual only when third-party or societal interests, such as concern for children, are allowed to override the interests of the couple.[31]

In designing his noncontractual theory of alimony, Ellman relies on efficiency analysis to propose a set of rules that will increase the couple's return from marriage and "maximize . . . the parties' freedom to shape their marriage in accordance with their nonfinancial preferences."[32] He makes no effort to determine whether consideration of children's interests or societal interests would dictate different outcomes.[33] Accordingly, to the extent he addresses only the couple's interests and leaves open the possibility that they may vary the terms,[34] his theory of alimony is very much a contractual one.

III. ALIMONY IN ELLMAN'S THEORY IS A FORM OF RESTITUTION

The label used, contractual or noncontractual, matters in itself only when the interests of the couple are at odds with the interests of their children or society generally.[35] Ellman does not undertake such an inquiry, and even if he were to do so, he possibly would find the other interests too indeterminate to affect his recommendations. Ellman, nonetheless, uses the conclusion that his approach is noncontractual to justify his decision to discuss alimony only in terms of noncontractual

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Whereas contract actions are created to enforce the intentions of the parties to the agreement, tort law is primarily designed to vindicate 'social policy.' " Foley v. Interactive Data Corp., 47 Cal. 3d 654, 683, 765 P.2d 373, 389, 254 Cal. Rptr. 211, 227 (1988) (citation omitted).

30. M. POLINSKY, *supra* note 9, at 25. Polinsky notes:

> The statement that the parties would have maximized their joint benefits net of their joint costs obviously presumes that they would have bargained cooperatively. Also, the conclusion that the maximization of the parties' joint benefits net of their joint costs is the goal of efficiency presumes that no one else is affected by the contract.

Id. at 25 n.16.

31. *See* Carbone, *supra* note 28, at 586-88; *see also supra* note 29.

32. Ellman, *supra* note 4, at 47-48, 50-51 (footnote omitted).

33. Ellman bases much of his analysis on the conclusion that most couples will be able to maximize their incomes only if the "lower earning spouse (today most likely the wife)" sacrifices her career prospects in order to further those of her husband. *Id.* at 46-48. Although Ellman considers nonfinancial forms of utility such as the wife's psychic gain from doing less housework, *id.* at 47 n.140, he does not consider third-party interests such as the possibility that the benefits to the children from the involvement of both parents in their upbringing might offset any financial gain from their father's specialization in the market, or that societal gains from the changing status of women might offset financial gains possible from women's specialization in the home. *See infra* note 105.

34. *See* Ellman, *supra* note 4, at 64-65.

35. *See supra* note 28 and accompanying text.

remedies. The result is unfortunate because Ellman makes a classic case for expectation damages in order to advance a restitution approach, all under the rubric of reliance. His failure to examine the differences between the expectation, reliance, and restitution interests[36] makes it difficult to untangle the technical issues from the substantive ones at the heart of his theory.

In examining remedies on the basis of efficiency, contract provides the most complete analysis because contract permits consideration of expectation damages, and only expectation damages provide the advantages Ellman claims for his theory. In attempting to craft a modern justification for alimony, Ellman first observes that the primary purpose of marriage law ought to be to "encourage the durability of the relationship."[37] To the extent that "divorce law leaves losses where they fall," it will encourage divorce.[38] Second, Ellman notes that married couples can increase the benefits they receive from marriage through specialization—women in the home and men in the market—but only if their respective investments are protected upon divorce. Without such protection, the results will be distorted, making marriage less profitable.[39]

The need to deter divorce (that is, to deter inefficient breach of marital obligations) and encourage specialization (that is, to encourage surplus enhancing reliance) is the same justification L.L. Fuller and William R. Perdue[40] gave in 1936 for the use of expectation as the standard measure of contract damages.[41] Like Ellman, Fuller and Perdue

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36. *The Restatement (Second) of Contracts* defines remedies in accordance with their ability to serve the following interests of a promisee:

> (a) his "expectation interest," which is his interest in having the benefit of his bargain by being put in as good a position as he would have been in had the contract been performed,
>
> (b) his "reliance interest," which is his interest in being reimbursed for loss caused by reliance on the contract by being put in as good a position as he would have been in had the contract not been made, or
>
> (c) his "restitution interest," which is his interest in having restored to him any benefit that he has conferred on the other party.

RESTATEMENT (SECOND) OF CONTRACTS § 344 (1981).

37. Ellman, *supra* note 4, at 41.

38. *Id.* at 50.

39. Ellman notes:

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

Id.

40. *See* Fuller & Perdue, *supra* note 12, at 52, 373.

41. Ellman's description of the incentives to divorce, *see* Ellman, *supra* note 4, at 50, almost exactly parallels Richard Posner's conception of efficient breach of contract. *See* R. POSNER, ECONOMIC ANALYSIS OF LAW 90 (2d ed. 1977). Robert Cooter and Melvin Eisenberg use the term "surplus enhancing reliance" to describe additional investments, undertaken after the contract is

set out to justify the role of a remedy—expectation damages—and like Ellman, they were heavily influenced by the opportunity cost analysis popular with economists of their day.[42] Fuller and Perdue observed that, in a market economy, expectation, the contract measure of damages, and reliance, the tort measure of damages, would converge. Thus, a complete measure of reliance would include not only out-of-pocket expenditures, but also the lost opportunities to profit from other contracts; and competition would keep the profits from such alternative contracts roughly equal to the profits from the contract at hand.[43] Given the difficulty of calculating those lost opportunities, Fuller and Perdue argued that the only way to compensate for this reliance was to "dispense with its proof"[44] and that the reasons for doing so were to encourage contract compliance[45] and reliance over the course of the contract.[46] Modern economists go even further, arguing that even when expectation and reliance diverge, expectation best serves the purpose of discouraging inefficient breach of contract.[47]

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finalized, that increase the return from the contract. Cooter & Eisenberg, *Damages for Breach of Contract*, 73 CALIF. L. REV. 1432, 1465 (1985). Polinsky gives the example of a buyer of widgets able to buy custom designed equipment that will make the widgets more valuable. The equipment is useless for other purposes, and the buyer will make the investment only if she is convinced that the contract to deliver the widgets as promised will be performed. M. POLINSKY, *supra* note 9, at 29-32.

42. *See* Fuller & Perdue, *supra* note 12, at 56 n.7, 59 n.10 (citing E. DURKHEIM, ON THE DIVISION OF LABOR IN SOCIETY 394 (1934) and A. SCHLOSSMANN, DER VERTAG § 37 (1876)). For a recent discussion of Fuller and Perdue's use of opportunity cost theory, see Katz, *Reflections on Fuller and Perdue's* The Reliance Interest in Contract Damages: *A Positive Economic Framework*, 21 J.L. REFORM 541 (1988).

43. Fuller & Perdue, *supra* note 12, at 55-56, 60-63.

44. *Id.* at 62.

45. *Id.* at 60-63. The policy recommendations are normative and not positive, in part, because the equation between expectation and reliance is an inherently circular one. The benefits from the contract at hand will approximate the benefits from the contracts foregone only (1) in a competitive market in which competition keeps the prices of various alternatives close to each other, and (2) when breach is rare. To the extent that the alternative contracts are also likely to be breached, their value, measured by the expected profit discounted by the probability of breach, would be less than the expectation measure, expressed in terms of expected profit from the contract at hand. At the same time, however, the frequency of breach would in turn depend on the measure of damages, with expectation a more effective deterrent than any lesser measure. In short, expectation will approximate reliance only if breach is rare, and breach is likely to be rare only if expectation and not reliance is used as the measure of damages. Cooter & Eisenberg, *supra* note 41, at 1445-49. Fuller and Perdue broke the cycle by arguing that expectation should be justified only as an incentive to encourage future behavior and not as compensation for what occurred in the past. Fuller & Perdue, *supra* note 12, at 60-63; *cf.* Ellman, *supra* note 4, at 51-52. Accordingly, the use of expectation damages depends on a decision to encourage contract compliance.

46. Fuller & Perdue, *supra* note 12, at 60-63. Modern economists note, however, that expectation will encourage overreliance, not efficient reliance. For a more rigorous economic treatment of these issues, see Cooter & Eisenberg, *supra* note 41, at 1465-68.

47. *See, e.g.*, M. POLINSKY, *supra* note 9, at 31-34; R. POSNER, *supra* note 41, at 142-43; Cooter & Eisenherg, *supra* note 41, at 1462-64.

Despite the conclusion of contract scholars that expectation, not reliance or restitution, best serves the twin goals of deterring inefficient breach (divorce) and encouraging reliance (specialization in homemaking),[48] Ellman did not consider an expectation measure of alimony. Yet, an expectation measure in marriage would resemble the traditional alimony standard—support permitting the lower earning spouse to continue to enjoy the standard of living made possible by the marriage.[49] The traditional standard at its worst is no more difficult to calculate than the lost career opportunity standard Ellman proposes in its stead, and the traditional standard remains good law in theory, if not in practice, in most jurisdictions.[50]

One must assume that Ellman rejected the expectation measure because it is a contract measure and, therefore, must be tied to a determination of breach of promise.[51] If so, he is right about the connection to breach. Expectation is a victim-oriented measure. It looks only at the nonbreaching party's loss and imposes that loss on the wrongdoer.[52] An

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48. Even in traditional contracts, these are not, of course, the only concerns. For a discussion of the importance of deterring overreliance, see *infra* notes 98-100 and accompanying text.

49. *See* Brinig & Carbone, *supra note* 4, at 887 n.132 and cases cited therein.

50. *See id.*

51. Ellman claims to reject contract because there is no way to determine the agreement between the parties. Ellman, *supra* note 4, at 32-33. As explained above, however, contract does not depend on the existence of a detailed agreement. *See supra* note 26 and accompanying text. *The Theory of Alimony* can be read as an effort to supply a set of default rules, including a rule that the parties are free to divorce at any time for any reason, that will govern in the absence of an agreement to the contrary. *See supra* notes 26-31 and accompanying text. When Ellman concludes that contract will not work, he is really saying that he is unwilling to imply a commitment to remain married. *See infra* note 54.

Ellman, nonetheless, does consider the possibility of treating alimony as a form of damages for breach of contract. *See* Ellman, *supra* note 4, at 23-24. He does not subject this possibility to the type of efficiency analysis he uses for his own proposals, however. He also concludes, erroneously I believe, that a contract system necessarily would deny alimony to parties whose conduct was found to be the proximate cause of the divorce. *See id.* at 23. There is, in fact, no reason why a contract system could not coexist with a restitution system. For example, a building contractor found to be in breach of a contract to complete an office building still could offset a claim to be paid for services performed against any expectation award owed the owner. For an explanation of how this would work in marriage, see Brinig & Carbone, *supra* note 4, at 886-87, 899-901.

52. Ellman notes that "fault, as the term is used in these divorce cases, is generally limited to intentional or negligent conduct. Under contract law, however, one can be in breach even where the breach was neither negligent nor intentional." Ellman, *supra* note 4, at 24 (footnote omitted). While this statement may be an accurate definition of the difference between contract and tort, the difference it makes in the context of marriage is unclear. Breach of the marriage contract presumably refers to a decision to end a marriage when that decision is not justified by sufficiently egregious conduct by the other spouse. *See infra* note 54. Fault in traditional divorce cases has been defined in terms of desertion, adultery, or extreme cruelty, *i.e.*, in terms of conduct sufficiently egregious to justify termination of the marriage. *See, e.g.*, 2 J. BISHOP, NEW COMMENTARIES ON MARRIAGE, DIVORCE AND SEPARATION § 469, at 213 (1891); Neuner, *Modern Divorce Law—The Compromise Solution*, 28 IOWA L. REV. 272, 276 (1943); Vernier & Hurlbut, *The Historical Background of Alimony Law and its Present Statutory Structure*, 6 LAW & CONTEMP. PROBS. 197, 197-

expectation measure says in effect that the party to be compensated is entitled to continue to enjoy, at the other's expense, the standard of living made possible by the marriage.[53] To justify this conclusion, there must be a reason to believe that the marriage should have endured, such as an enforceable promise to remain married until "death do us part," and some reason to impose responsibility for the marriage's failure on the paying party.[54] If there is no obligation to remain married or no way to determine which party disappointed the other's expectation that the marriage would continue, expectation damages make no sense.[55]

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98 & n.5 (1939). Employing breach of contract concepts would not change the nature of the determination. The definition of conduct sufficiently egregious to justify termination of marriage, however, would have to be modernized, eliminating the double standard for adultery, redefining cruelty, and emphasizing a pattern of conduct rather than a single immoral act. *See infra* note 144.

The more important difference between the older concept of fault and a modern definition of breach of marital obligations would be the degree of opprobrium attached to the determination. A finding of fault always has implied moral condemnation of blameworthy conduct with implications for nonfinancial consequences of the dissolution, particularly child custody. *See* O'Connell, *supra* note 3, at 468 n.178. Breach of contract need not involve any such disapproval. Indeed, advocates of efficient breach argue that there are circumstances in which the parties should be encouraged to breach contractual obligations, the only limitation being a willingness to pay for damages inflicted as a result of their breach. *See* R. POSNER, *supra* note 41, at 55-58; *cf.* O. HOLMES, THE COMMON LAW, 299-303 (1881). It is possible to imagine a divorce system in which the parties are free to seek a divorce, with no express or implied condemnation of that decision, and at the same time, the party choosing to end the marriage will be required to compensate the other for the consequences of that action.

53. *See* RESTATEMENT (SECOND) OF CONTRACTS § 344(a) (1981) (defining expectation interest).

54. Legally, marital vows continue to involve a lifetime commitment. *See, e.g., In re* Marriage of Higgason, 10 Cal. 3d 476, 516 P.2d 289, 110 Cal. Rptr. 897 (1973); Krauskopf & Thomas, *Partnership Marriage: The Solution to an Ineffective and Inequitable Law of Support*, 35 OHIO ST. L.J. 558, 558 (1974). Accordingly, an expectation measure of damages would look to the benefits the parties would have realized had there been no breach of marital obligations, *i.e.*, if the marriage had endured for a lifetime.

Within this context, breach would mean an unexcused decision to end a marriage. The decision could be justified only by conduct of the other spouse incompatible with the continuation of the marriage; the decision to seek a divorce would be justified if the other spouse breached his or her marital obligations first, giving the nonbreaching spouse the right to call the marriage to an end. Unlike the older fault standard, a finding that marital obligations had been breached would not be a prerequisite for a divorce. Rather, the courts applying such a standard would be allowed to consider the reasons for the divorce in determining the financial allocations to be made, in much the same way that a court considers breach of contract allegations in administering the dissolution of a partnership. California and a number of other states preclude consideration of marital misconduct in any form. *See* Brinig & Carbone, *supra* note 4, at 887-88 n.132 and the states cited therein; Kay, *supra* note 2, at 72-74 n.363 and the states cited therein. Some states that recognize no-fault divorce, however, permit consideration of marital misconduct to influence the resulting awards. For a list of states that do so, see I. ELLMAN, P. KURTZ & A. STANTON, FAMILY LAW: CASES, TEXT, PROBLEMS 265-76 (1986); Brinig & Carbone, *supra* note 4, at 886-87 n.129; Kay, *supra* note 2, at 72-74 n.363.

When Ellman concludes that a contract model will not work, he is saying in effect that the promise to remain married is unenforceable. *See* Ellman, *supra* note 4, at 24.

55. This is true in part because of the impossibility of protecting both parties' expectation

Ellman's mistake is in assuming that by labeling his remedy noncontractual, he automatically circumvents a determination that marital obligations have been breached.[56] If expectation is the quintessential contract remedy, reliance is the quintessential tort remedy;[57] and reliance, whether or not in the form of the lost career opportunities Ellman seeks to compensate, is just as victim oriented as expectation.[58] As a measure of damages, reliance says in effect that one party must pay for the other's loss, whether or not the paying party has suffered corresponding losses or gains of his own.[59] Fault is the traditional justification for such an obligation to pay, that is, a conclusion that the paying party wrongfully caused the other party's loss.[60] Changing the name of the remedy from contractual to noncontractual, from expectation to reliance, and from the standard of living enjoyed during the marriage to compensation for lost earning potential, therefore, does nothing to eliminate a determination of wrongdoing or the difficulties involved in identifying the duty that has been breached.

Nomenclature aside, there are only two ways to abolish consideration of marital misconduct and still provide for an expansive definition of alimony. The first method expands the partnership concept to imply an agreement between the parties not only to share the assets accumulated during the marriage, but also to equalize postdivorce incomes.[61]

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interests. Both parties lose something from the divorce, and one party's interest can be compensated only at the expense of the other. For further discussion of this issue, see Brinig & Carbone, *supra* note 4, at 875-76 & n.89.

56. Ellman labels his theory noncontractual and describes it as designed to compensate lost earning capacity. Ellman, *supra* note 4, at 50-52. Reliance forms the basis of his proposed solution because it focuses on the lower earning spouse, comparing "the claimant's economic situation at the end of the marriage with the situation she would have been in if she had not married." *Id.* at 53; *cf. infra* note 59 (defining reliance).

57. *See* G. GILMORE, THE DEATH OF CONTRACT (1974); *see also* P. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT (1979).

58. *See* O'Connell, *supra* note 3, at 468-69 & n.178, 498-99.

59. A reliance measure of damages attempts to put the injured party in the position he would have been in had he never engaged in the transaction. In a contract setting, this means the position the nonbreaching party would have held had there been no contract. RESTATEMENT (SECOND) OF CONTRACTS § 344 (1981). In torts, it means the position the injured party would have held had there been no wrong. D. LAYCOCK, MODERN AMERICAN REMEDIES 35-45 (1985). Changing the nature of the allegations from contract to tort, from expectation to reliance, and from fault to promissory estoppel, however, does not eliminate the requirement of breach of obligation. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981) (establishing breach of promise as an element of a cause of action for promissory estoppel).

60. O'Connell, *supra* note 3, at 469.

61. For examples of such proposals, see Singer, *Divorce Reform and Gender Justice*, 67 N.C. L. REV. 1103 (1989); Sugarman, *Dividing Financial Interests Upon Divorce*, in DIVORCE REFORM AT THE CROSSROADS 130-65 (S. Sugarman & H. Kay eds. 1990); Kay, *An Appraisal of California's No-Fault Divorce Law*, 75 CALIF. L. REV. 291, 318-19 n.196 (1987).

Consider the following example: An artist marries a school teacher. At the time of their divorce, following 10 years of marriage, the artist earns $15,000 per year and the school teacher earns

Ellman, however, rejects use of the partnership model because no such agreement exists between the parties and he sees no reason to imply consent to such a measure.[62] Moreover, the equalization of postdivorce incomes does not satisfy the efficiency criteria that Ellman advances because compensation would be available independently of specialization.

The second method to circumvent a determination of marital obligations employs a restitution measure of damages, like Ellman's theory does, his assertions to the contrary notwithstanding.[63] Ellman advances a restitution theory not because it serves the ends of efficiency, for it does not,[64] but because it is the only standard he can justify without consideration of marital misconduct. Restitution, unlike expectation or reliance, permits recovery whenever the party to be charged has retained a benefit at the other's expense.[65] While restitution uses the language of unjust enrichment, the determination that the enrichment is *unjust* is no more than a conclusion that the party retaining the benefit ought to contribute to the cost necessary to obtain it.[66] No determina-

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$30,000. They have no children.

Under the Singer proposal, the school teacher would have to pay the artist enough to equalize their postdivorce standard of living for five years. The school teacher's obligation would be the same even if the wife is the school teacher and her husband the artist, his earning potential is greater than it would have been if he had not married the schoolteacher, she did the major part of the housework during the marriage and her earning potential is lower than it would have been as a result, and the divorce is occurring because the artist became physically abusive. Singer, *supra*, at 1117-18.

62. Ellman, *supra* note 4, at 33-40.

63. *See id.* at 24-28. Ellman concludes:

> The doctrine of restitution thus offers no conceptual framework that explains generally why postmarriage payments are appropriate in some cases and not in others. Before the doctrine can be applied coherently, one must first have an established understanding of the social and economic conventions that ordinarily govern the relationship between the parties, against which to test claims that there has been an "unjust" enrichment.

Id. at 27. *The Theory of Alimony*, however, attempts to supply social and economic conventions that require compensation of lost earning potential when that loss results in a benefit to the other spouse in the form of children or enhanced income. *See infra* text accompanying note 137.

64. *See infra* notes 98-101 and accompanying text.

65. For a definition of the restitution interest, see *supra* note 36; *see also* RESTATEMENT OF RESTITUTION § 150 (1937).

Restitution can be used to describe either a remedy for breach of contract or an independent cause of action. D. LAYCOCK, *supra* note 59, at 461. The measure of recovery would be the same in either case, and the distinction between the two is relatively unimportant for purposes of this Article. Nonetheless, I would characterize a restitution remedy contractual as used in the early part of this Article if it can be justified on the grounds of maximizing the couple's, as opposed to a third party's or societal, welfare and if the couple is free to substitute alternative remedies. For a discussion of the distinction between contractual and noncontractual liabilities, see *supra* notes 28-34 and accompanying text.

66. This is another way of saying that there is no necessary moral stigma to a conclusion that restitution is owed. *See, e.g.*, Cotnam v. Wisdom, 83 Ark. 601, 104 S.W. 164 (1907). For a discussion of the role of restitution in supplying appropriate market incentives, see Levmore, *Explaining*

tion of a promise or duty to remain married and no determination of marital misconduct are necessary. Under existing divorce law, for example, if the wife gets to keep the family's thirty thousand dollar sports car, she is also likely to be assessed responsibility for making the payments. While the court may assume that during the marriage the parties shared both use of the car and the cost of the payments, the divorce award ordinarily will assign the remaining cost to the party who retains the benefit.[67] The result has no stigma attached to it and no necessary relationship to the reasons for the breakup of the marriage.

Ellman's theory of alimony, like the allocation of car payments, mirrors his three-part definition of restitution: (1) the defendant must have received a cognizable benefit; (2) the benefit must have been conferred at the plaintiff's expense; and (3) the defendant's retention of the benefit must be unjust.[68] Ellman's first principle, that "a spouse is entitled to alimony only when he or she has made a marital investment resulting in a postmarriage reduction in earning capacity," requires that the party to receive alimony has suffered a loss.[69] His other two principles limit recovery of such losses to situations in which the investment producing the postmarital reduction in income produces either a gain in marital income (principle two) or children (principle three).[70] Ellman's Rules 2.1 and 2.2 define the circumstances in which he finds retention of the benefit unjust, such as when the benefit results in increased marital income or children, but not when the wife sacrifices her career opportunities to enhance the standard of living the couple enjoys during the marriage.[71] The theory in effect encourages women to bear the pri-

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Restitution, 71 VA. L. REV. 65, 69, 121-23 (1985).

67. Conversely, if the car were wrecked before the marriage ended, the remaining payments are more likely to be split. If the car were intact and paid for at the time of divorce, the car would be offset against other marital assets. For an examination of the application of restitution principles to marriage, see Krauskopf, *Legal Protection*, *supra* note 14, at 386.

68. Ellman, *supra* note 4, at 24-28.

69. *Id.* at 53.

70. *Id.* at 58, 71.

71. In other words, the theory would award alimony any time the couple jointly contributes to an undertaking during the marriage that only one party will enjoy after the divorce, *e.g.*, medical degrees, or finance a benefit that both parties will enjoy for a lifetime, *e.g.*, children, through sacrifices only one party will bear after the divorce. For the application of restitution theory to professional degrees, see Batts, *Remedy Refocus: In Search of Equity in "Enhanced Spouse/Other Spouse" Divorces*, 63 N.Y.U. L. REV. 751 (1988); Krauskopf, *Property Division*, *supra* note 14, at 260 & n.18; Krauskopf, *Legal Protection*, *supra* note 14, at 391-93; Schwartz, *Divorce and Earning Ability*, 1982 DET. C.L. REV. 69; *see also* Brinig & Carbone, *supra* note 4, at 878 n.97.

When children are involved, on the other hand, the benefit obviously is unquantifiable, so the award will focus on the extent of the sacrifice necessary to raise children. Most of this discussion focuses on the concept of human capital and the propriety of reimbursing the sacrificing spouse for the loss of earning potential. *See* Beninger & Smith, *Career Opportunity Cost: A Factor in Spousal Support Determination*, 16 FAM. L.Q. 201 (1982); Krauskopf, *Property Division*, *supra* note 14, at 262-66; Krauskopf, *Legal Protection*, *supra* note 14, at 381-88; Landes, *supra* note 13,

mary responsibility for childrearing and to make the sacrifices necessary to permit their husbands' careers to flourish,[72] without encouraging them to look to marriage rather than the market as a lifelong source of support.

Ellman may have chosen to eschew the restitution label in order to concentrate on the lower earning spouse's loss (reliance) rather than the other spouse's gain (unjust enrichment). But like many other categories of restitution, Ellman's theory of alimony permits recovery of losses only when a corresponding gain at least as great as the loss occurs.[73] When a married couple, rational, utility-maximizing adults under efficiency theory, decides to forego the wife's earning potential so that she can be at home with the children, or decides that one spouse will finance the other's medical education, they presumably value the gain of children who are raised by their mother rather than a nanny, or the doctor's expected income at least as much as they value the lost income.[74] Particularly when the benefit is as intangible as it is with children, the sacrificing spouse's lost earning potential may provide the only possible restitution measure of recovery. As long as the theory permits compensation of losses only when they are no greater than the presumed benefits, the theory will be a restitution and not a reliance

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at 35.

While most commentators treat these two categories as independent justifications for alimony, *see, e.g.*, O'Connell, *supra* note 3, at 500-02, they are in fact different aspects of restitution-based awards. Joan Krauskopf recently summarized the debate, concluding that:

> [S]cholarly rhetoric, statutory terminology and appellate holdings and reasoning of the past twenty years indicate the purpose of court-ordered economic settlement at marriage dissolution is to achieve a fair sharing of the benefits and burdens of marriage measurable in dollars. In other words, the purpose of economic settlement is to assure that, at the conclusion of the marriage, one party does not suffer unduly while the other gains because of the marriage experience. In order to encourage marriage as the normative mode for loving personal relationships and for nurturing children, social policy seeks to assure a fair allocation of the gains and losses when the marriage relationship ends. . . .
>
> The two primary goals of fairly allocating benefits and burdens due to the marriage are to achieve a fair sharing of the assets and obligations of the marital partnership and to also achieve a fair sharing of the personal gains and personal losses either spouse has enjoyed or suffered because of service to the family created by their marriage.

Krauskopf, *Property Division*, *supra* note 14, at 256-57 (footnotes omitted).

72. *See* Ellman, *supra* note 4, at 73.

73. Fuller and Perdue in 1936 explained this relationship between reliance and restitution, arguing that many restitution awards in fact used a reliance measure of recovery and that in theory the gain to the promisor should approximate the promisee's loss. Fuller & Perdue, *supra* note 12, at 53-54. For a classic example of restitution using the plaintiff's loss as the measure of recovery, see Vickery v. Ritchie, 202 Mass. 247, 88 N.E. 835 (1909) (the "Turkish bathhouse case").

74. In discussions regarding this point, Fuller and Perdue have stated that "gains by the promisor will be accompanied by a corresponding and, so far as its legal measurement is concerned, identical loss to the promisee, so that for our purposes the most workable classification is one which presupposes in the restitution interest a correlation of promisor's gains and promisee's loss." Fuller & Perdue, *supra* note 12, at 54-55; *see also* Katz, *supra* note 42, at 544-45.

system.

Ellman's choice of a restitution basis for recovery as a way of circumventing a determination of marital obligations explains a number of the anomalies in his theory. First, he is troubled because the theory does not address what he terms "the gender-based differences in the remarriage prospects of divorced men and divorced women."[75] He suggests that, "[a]lthough some remedy is probably necessary, we may conclude that the obligation is society's and not the former husband's."[76] The reason his theory of alimony cannot compensate for the fact that men have greater opportunities for remarriage than do their former wives is that husbands have an obligation to provide compensation to the extent, and only to the extent, that they breach an obligation to remain married.[77] These expectation losses, unlike lost earning capacity, do not correspond to a benefit conferred on the paying party, and restitution theory, therefore, provides no basis for compensation. The losses are real, however, and the type of efficient breach analysis on which the theory otherwise depends suggests that his failure to compensate for these losses means that Ellman's theory cannot solve the problem he describes as "distorting incentives" that encourage divorce.[78]

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75. Ellman, *supra* note 4, at 80.

76. *Id.* at 81.

77. For a discussion of the relationship between lost marital prospects and the expectation measure of damages, see Brinig & Carbone, *supra* note 4, at 873-76, 894-95. To the extent that young women enjoy many opportunities to marry and those opportunities decline more precipitously with age for women than for men, the type of economic analysis on which Ellman relies suggests that the solution is a long-term contract, *i.e.*, a commitment to remain married until "death do us part." *See* Ellman, *supra* note 4, at 41-44. Gary Becker, the University of Chicago economist who pioneered the literature on economics of the family, concluded:

> Since married women have been specialized to childbearing and other domestic activities, they have demanded long-term "contracts" from their husbands to protect them against abandonment and other adversities. Virtually all societies have developed long-term protections for married women; one can even say that "marriage" is defined by a long-term commitment between a man and a woman.

G. BECKER, A TREATISE ON THE FAMILY (1981).

78. Ellman states that "[s]ome spouses who would terminate their marriage under a divorce law that leaves losses where they fall, would not seek divorce under a law that reallocated those losses. These spouses are for the most part husbands." Ellman, *supra* note 4, at 50. This is a restatement of Posner's theory of efficient breach that requires compensation of expectation losses to achieve efficient deterrence. *See* R. POSNER, *supra* note 41, at 90.

Cooter and Eisenberg explain:

> The effect of expectation damages on the promisor's calculations can be stated in terms of externalities. Economists say that an externality exists when one person imposes a cost upon another without paying for it. Incentives for performance are efficient if they compel a promisor to balance the cost to him of performing against the losses to himself and to others that will result if he does not perform. If the promisor does not perform, the promisee loses his share of the value of the contract. If the promisor is liable for that loss, he internalizes not only his own loss but the losses to the promisee that result from his failure to perform. In contrast, if the promisor is liable only for reliance damages, he will not internalize the full

Second, Ellman's unwillingness to recognize benefits other than children or enhanced income is otherwise inexplicable. Ellman argues that the law should be structured to encourage utility maximization during marriage, not wealth maximization, and that the couple will fail to make investments that increase the benefits from marriage if, upon divorce, those investments are not compensated.[79] This reasoning, however, applies with equal force to financial and nonfinancial benefits. It is not difficult to posit a traditional, gender-stereotyped marriage in which the couple derives greater utility from the wife's homemaking services than from her income, even when there are no children and no enhancement of the husband's career. The wife, however, cannot be expected to make these utility-enhancing investments unless her sacrifice is protected in the event of divorce.[80] The problem with compensating such investments cannot be, as Ellman claims, that they are economically irrational, for to the extent that they in fact maximize the parties' utility, they are quite rational.[81] Rather, the difficulty arises either because

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value of performance to the promisee. Thus, expectation damages create efficient incentives for the promisor's performance, while reliance damages do not, unless they are identical to expectation damages.

Cooter & Eisenberg, *supra* note 41, at 1463. If Ellman were serious about deterring older men from running off with younger women and leaving their wives with few prospects for remarriage, he would propose an expectation system of damages that would enable the wife to enjoy the financial position she would have had had the marriage continued, whether or not she had suffered a loss of earning potential. This system would, in Ellman's terms, reallocate the losses imposed by the divorce, requiring the husband to consider the wife's loss as well as his own gains in deciding whether to seek a divorce. As explained above, however, Ellman can do this only if he recognizes marriage as a lifelong commitment and ties such an award to a determination that the husband breached the obligation to remain married. *See supra* notes 51-55 and accompanying text.

79. Ellman, *supra* note 4, at 49, 50-51. For a debate on the difference between utility maximization and wealth maximization, see Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV. 487 (1980) and Coleman, *Efficiency, Utility, and Wealth Maximization*, 8 HOFSTRA L. REV. 509 (1980).

80. Even if Donald and Ivana Trump had not had children, Donald almost certainly would have valued Ivana's nonfinancial contributions to the marriage more than any income she could have earned had she pursued a career. Ivana, if she acted *rationally*, would have weighed the benefits from those activities against the foregone income. Given her $25 million antenuptial agreement, the marginal value of additional income should have been relatively low even if she took into account the possibility of divorce. Accordingly, a decision by Donald and Ivana to have her forego her earning possibilities in order to enhance the couple's lifestyle could have been quite rational, whether viewed in terms of the couple's joint interests or each spouse's individual interests. For an excellent discussion of the search for marital partners and the utility for particularly wealthy individuals of finding a partner who brings noneconomic assets to the marriage, see P. ENGLAND & G. FARKAS, HOUSEHOLDS, EMPLOYMENT AND GENDER 34-36, 182 (1986).

81. Economic rationality extends to any decision designed to maximize utility. *See* A. ALCHIAN & W. ALLEN, EXCHANGE AND PRODUCTION: COMPETITION, COORDINATION & CONTROL 13, 38 (3d ed. 1983); M. FRIEDMAN, *The Methodology of Positive Economics*, in ESSAYS IN POSITIVE ECONOMICS 34 (1953). A decision for the wife not to work when the result will be to lower the family's aggregate income may be economically rational but financially irrational. Compare Ellman's discussion of this issue, *supra* note 4, at 63-64.

Ellman does not approve of these couples' lifestyle preferences[82] or because protection of these intangible benefits[83] comes perilously close to protecting expectation losses.[84] Nonetheless, if Ellman were serious about removing distorting incentives that prevent married couples from

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82. Ellman's proposals are far too limited to promote the degree of intrafamily specialization that he purportedly favors. The more likely explanation for his proposals is a desire to encourage greater specialization among women and still provide for children and for trade-offs in two-career families. *See infra* text accompanying note 140.

83. During the marriage, both parties share the loss of the wife's income and benefit from the enhanced lifestyle her activities make possible. At divorce, the benefits will disappear while the wife will continue to suffer a loss in earning potential. In these cases, compensation can be justified on a restitution basis to the extent the husband enjoyed a benefit during the marriage equal to or greater than half of his wife's lifetime loss of earnings. The benefit, however, cannot he precisely calculated. To apply Ellman's lost earning potential measure will require a presumption that the couple shared the benefits equally and that the couple believed at the time they made the decision that the benefits (enhanced lifestyle during the marriage) would at least equal the cost (the wife's lifetime loss of earning potential). This presumption is less automatic than in the case of children or enhanced careers because there is less societal interest in promoting this particular exchange. *See infra* text accompanying notes 138-39.

84. Lost earning potential, the measure of recovery on which Ellman's proposals depend, always will be problematic given the impossibility of determining the path the lower earning spouse would have pursued had she not married. This difficulty is compounded because society, until recently, has encouraged women to look to marriage rather than the market for their financial well-being. For example, in the case of a woman who marries at 20, drops out of college, works briefly as a secretary, and then stays home to care for her two children, what is the appropriate measure of lost earning potential: (1) her income if she had continued working as a secretary; (2) her income as a college graduate, calculated in accordance with tables that show the income of female graduates to be substantially lower than that of male graduates; or (3) her income if she had pursued the opportunities open to a similarly talented male?

To persuade the lower earning spouse to specialize in the home in a way that will have a lifetime impact on earning potential, Ellman needs a relatively expansive measure of recovery. The Oregon courts supply an example of such a measure when they assume that divorcing women, but for their societally encouraged reliance on marriage, would earn enough to enjoy the standard of living made possible by their spouse's income. *See, e.g.*, Grove v. Grove, 280 Or. 341, 351-52, 571 P.2d 477, 485 (1977). Using such a standard, the expectation measure (the standard of living enjoyed during the marriage) is presumed equal to the reliance measure (the lost income potential of the lower earning spouse), and Ellman's proposals presume in turn that the reliance measure is equal to the restitution measure (the benefit conferred by the lower earning spouse's contributions to homemaking).

The more traditional the marriage, however, the less likely these measures are to be equal. In marriages in which wives look to their husbands' incomes for their financial well-being, irrespective of the presence of children or of the husbands' career needs, the wives likely have invested more in the search for attractive marital partners than in their careers. With less career investment, the benefit from their homemaking efforts need not be so great to persuade them to forego the career opportunities they do have. For these women, the expectation loss will be considerably greater than the benefit conferred by their homemaking services; and if an expansive measure of lost income potential is employed, the recovery may become disproportionate to the benefit the paying spouse enjoyed. This is true because a decision to specialize in homemaking at the expense of other opportunities is not a decision women make only after they enter a particular marriage. Rather, it often reflects a lifetime course of conduct in which the most important source of lost income potential will be premarital decisions such as not completing college or not entering management training programs.

maximizing their utility, he should recognize this as another benefit.[85]

Restitution, under any name, offers the possibility of meeting Ellman's challenge to supply a rationale for alimony in the age of no-fault divorce. It also requires that Ellman directly confront the problems that arise from a restitution approach. One problem is that the older precedents find all services within marriage to be gratuitous.[86] While the older cases are distinguishable, convincingly establishing the distinctions requires recognition of the changes in the nature of marriage.[87]

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85. Ellman also mischaracterizes the role of opportunity cost analysis because be fails to recognize the restitution nature of his proposals. Ellman claims that his compensation of lost income potential is not an opportunity cost measure because he does not offset gains from the other spouse's income during the marriage against any income lost. Ellman, *supra* note 4, at 54-55. This misstates the nature of the transaction. The opportunity cost Ellman describes is not the cost of acquiring access to the other spouse's income because modern marriages do not ordinarily require either spouse to forego their earning potential. The lower earning spouse would have enjoyed the benefits of the marriage even if she made no career sacrifices at all. Rather, these lost income opportunities are the costs of having children, enhancing the other spouse's career, or enjoying the lifestyle a full-time homemaker makes possible. Moreover, the fact that the lower earning spouse may value the benefits she has received (*e.g.*, her children) more than the income potential she forewent is irrelevant to the need for compensation. Restitution requires only that the other spouse retain a benefit without paying his full share of the cost, and that cost, under Ellman's proposals, will he measured by the sacrificing spouse's lost income potential. Despite his protestations, Ellman's proposals employ a classic lost opportunity cost measure of recovery. For a more extended discussion of the difference between the opportunity cost of marriage and the opportunity cost of children and other optional benefits, see Brinig & Carbone, *supra* note 4.

86. *See, e.g., In re* Barnet's Estate, 320 Pa. 408, 182 A. 699 (1936); Annotation, *Right, on Annulment of Marriage, to Allowance for Services*, 111 A.L.R. 348 (1937); *see also* Krauskopf, *Legal Protection*, *supra* note 14, at 394 nn.90-91.

87. In the classic case giving restitution a bad name, Husband marries Wife 2 and they live together for twenty years. Wife 2, who has no outside income of her own, assists her husband in running his business. Husband dies, leaving a substantial estate entirely in his name. Wife 2 then discovers that Husband never divorced Wife 1 and that, legally, he is still married to her. Wife 1 will be entitled to dower rights, a forced share of the estate, or whatever other rights are accorded widows. Wife 2 may be left witb nothing. She accordingly claims restitution for services performed during the putative marriage. The courts rule against her on the ground that her services were gratuitously rendered. *See supra* note 86 and sources cited therein. *See generally* W. WADLINGTON, CASES AND OTHER MATERIALS ON DOMESTIC RELATIONS (1984).

While the outcome is obviously unjust, the conclusion that no compensation can be awarded for services performed during the marriage is correct. In earlier eras, the wife exchanged her dowry for dower rights, and her services for the husband's support. *See* Donohue, *What Causes Fundamental Legal Ideas? Marital Property in England and France in the Thirteenth Century*, 78 MICH. L. REV. 59 (1979). If the marriage proved invalid, restitution principles would give her a right to return of her dowry. *See* H. CLARK, *supra* note 17, §§ 3.5, 14.8. The support she received during the marriage, however, in theory at least, already had compensated her for services performed. Even in modern marriages, recognition of a right to compensation for services performed during the marriage would give rise to claims for reimbursement for support provided, whether by the husband or the wife. Restitution can be awarded in these cases only if the courts are willing to abandon the presumption that both spouses contribute equally to an ongoing marriage and, instead, total up and compare their individual contributions. The solution in the cases of putative second marriages lies in property and family law reform, not an expansion of restitution claims. *See generally id.* §§ 14.6-14.8.

The examples discussed in this Article are distinguishable because they rest not on the princi-

Ellman may have avoided the restitution label in order to make his proposal easier to sell to the courts.

Another problem with a restitution approach is the intangible nature of the benefit retained. Ellman sidesteps the issue by using lost earning capacity as the measure of recovery and then limiting recovery to those cases in which one would expect the benefit at least to equal the earning capacity lost.[88] If the restitution basis of these proposals were made explicit, however, Ellman would have to define more directly the benefit retained. While focusing on the benefits, however intangible, has certain advantages, the results of such an analysis are by no means certain.[89]

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ple of compensation for services performed during the marriage, but on the unequal division of costs and benefits at the time of the divorce. Nonetheless, to use restitution as an explicit basis for compensation, the courts may need to circumvent the precedents that label all marital contributions as gratuitously rendered.

88. *See supra* notes 63-72 and accompanying text.

89. There are two main considerations. First, what is the benefit from having had children or from having children raised by their mother rather than a nanny? If the children are adults at the time of the divorce, it is easy to assume that any benefit is shared equally by both parents, and that tbe couple believed, at the time they decided to have children or to raise them in a particular way, that the benefits would be worth the income foregone. If, on the other hand, the divorce occurs when the children are young and the mother is granted custody, is it appropriate to continue to assume that the parents share the benefits equally? If not, can the earning potential the mother lost in the interests of childrearing be compensated to the same degree?

The solution to this must be normative rather than positive. It is impossible to know with certainty the value parents place on their children, although recent literature suggests that women may place greater value on children than men do. *See, e.g.*, V. FUCHS, WOMEN'S QUEST FOR ECONOMIC EQUALITY 71 (1988); C. GILLIGAN, IN A DIFFERENT VOICE (1982); N. CHODOROW, THE REPRODUCTION OF MOTHERING: PSYCHOANALYSIS AND THE SOCIOLOGY OF GENDER (1978). To the extent that we as a society wish to encourage women to invest in children, or to the extent that we do not wish women's stronger preference for children to be a source of disadvantage, we will elect a presumption that men and women share equally in those benefits and then use lost earning capacity as a surrogate measurement.

A second issue concerns professional degrees and other forms of enhanced earnings. Here, the benefit is more tangible, but the division of that benefit into appropriate shares is not. Suppose, to take a classic gender-stereotyped case, a woman puts her husband through medical school and they divorce shortly after graduation. The benefit retained could be calculated either (1) in terms of the projected earning stream made possible by her contributions less his postdivorce expenses divided in accordance with their respective contributions (her income and encouragement versus his industry and talents), or (2) in terms of her direct financial contributions plus an appropriate rate of return. In this case, a 50/50 division of his lifetime earnings is almost certainly inappropriate, and any other division is likely to be arbitrary. *See* Krauskopf, *Property Division*, *supra* note 14, at 260 n.18, 262 n.26, and sources summarized therein. At the same time, many writers oppose mere reunbursement of her contributions as inadequate. *See, e.g.*, *id.* at 262 n.26.

Focusing on the benefit retained, *i.e.*, thinking of recovery in terms of restitution rather than reliance, does nothing to resolve the question of which method to choose. A possible solution, however, lies in attempting to equate the wife's interest in the husband's medical degree with an appropriate return on her investment. Simply reimbursing the wife for her direct financial contribution at a legal or nominal rate of interest is unfair because her investment in the husband's medical degree was riskier than putting the money into a bank account. Similarly, the market value of the benefit the husband received is equal to the repayment of a loan that only had to be

The final and ultimately most serious issue is that acknowledging the restitution nature of Ellman's proposals underscores, rather than cures, his failure to supply a rationale capable of justifying them. The choices Ellman makes—the choice of restitution over expectation and reliance; protection of contributions to childrearing, but not the quality of life within the marriage; the decision to encourage women to continue to specialize in homemaking without encouraging them to rely on marriage itself for their economic welfare—all are veiled under the unsatisfying claim that he is merely removing "distorting incentives." In fact, however, the justifications he supplies—the need to discourage divorce and encourage specialization—are inconsistent with the solution he advocates. If restitution is to supply the basis for a reinvigorated system of alimony, the explanation lies outside Ellman's theory.

IV. The Choice of Restitution: Remaining in the Labor Market and Retaining the Primary Responsibility for Childrearing

A. The Limits of Efficiency

To the extent that Ellman supplies a justification for his theory, he does so on the basis of efficiency alone. Although he argues at one point that divorce law should encourage marriages to endure, the main thrust of his argument is his call for the removal of distorting incentives.[90] Presumably this means that to the extent one set of rules produces incentives which encourage "the optimal allocation of marital roles and duties"[91] and another does not, the law should impose the rules that encourage optimal results.[92] Ellman fails to acknowledge, however, that there is no single set of efficient rules.

Since the days of Fuller and Perdue, modern analysts have refined their analysis of contract damages to argue that only expectation and not reliance, however broadly defined, can provide efficient incentives for breach.[93] Economists define efficient breach as breach that makes

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repaid if he succeeded as a doctor. The result should be reimbursement calculated at interest rates that ordinarily will be much higher than the nominal or legal rate. If the rate of return is sufficiently high, it will become equivalent to a share of the degree. As long as a restitution approach is used, however, the focus should remain on where the parties would have been if they had not married, not how they would have divided the earnings if the marriage had continued.

In cases in which the husband's enhanced earnings are less easily calculated than the benefits of a professional degree and the wife's contribution took the form of lost earning potential rather than a direct financial contribution, that lost earning potential would again become the best measure of a restitution recovery. *See supra* notes 73-74 and accompanying text.

90. Ellman, *supra* note 4, at 50.

91. *Id.* at 49.

92. Optimal is defined "in the sense of maximizing spousal utility if the marriage remains intact." *Id.*

93. *See, e.g.*, M. Polinsky, *supra* note 9, at 34-35; Cooter & Eisenberg, *supra* note 41, at

some parties better off without making any parties worse off, and they argue that breach should be encouraged only when the parties' net welfare will be enhanced.[94] To encourage breach only when it will be efficient, these analysts argue for imposing the nonbreaching party's losses on the breaching party.[95] Only then will the breaching party have an obligation to weigh the advantages to all parties from continuing the arrangement against the individual advantages from breaching. When Ellman observes that "[s]ome spouses who would terminate their marriage under a divorce law that leaves losses where they fall, would not seek divorce under a law that reallocated those losses,"[96] he is describing the economic theory of efficient breach. Economists are uniform in their conclusion that only an expectation measure of damages, not reliance or restitution, can remove the "distorting incentives" that encourage divorce.[97]

Economists also argue, however, that only restitution, not expectation or reliance, can supply efficient incentives for reliance over the

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1462-64; Katz, *supra* note 42, at 558 (stating that the conventional law and economics theory is that optimal contract damages only incidentally protect the reliance interest).

94. *See, e.g.*, M. POLINSKY, *supra* note 9, at 29-34; R. POSNER, *supra* note 41, at 90.

95. Mitch Polinsky gives the following example: Suppose Seller agrees to supply Buyer with a widget for $175, payable in advance. Buyer 1 expects to realize a $25 profit from the widget and spends $10 in preparation for delivery. Buyer 2 also would like the widget and offers to buy it from Seller.

Suppose now that Buyer 2 values the widget at $190 and offers that much for it. If Seller is liable only for the return of the purchase price (restitution damages), Seller then would have an incentive for breach because the sale would realize an additional $15 dollar profit. If Seller is liable for reliance damages, he still will have an incentive to breach because he would realize an additional $5 profit even if he reimburses Buyer 1 for his $10 reliance expenditure as well as return of the contract price. Only if an expectation measure is used, awarding Buyer 1 $200 in damages (without breach, Buyer 1 would have a widget he values at $200), would Seller have an incentive to comply with the contract. In this case, economists argue that breach, *i.e.*, the most likely result of the restitution and reliance approaches, is inefficient because, while Seller is indifferent between the two buyers, Buyer 1 values performance more than Buyer 2 does. Breach in favor of Buyer 2 will lower the parties' combined profits. The law, therefore, supplies efficient incentives only when it forces Seller to take into account the value Buyer 1 places on performance. M. POLINSKY, *supra* note 9, at 27-31.

96. Ellman, *supra* note 4, at 50. He notes further that these spouses are usually husbands. *Id.*

97. *See, e.g.*, M. POLINSKY, *supra* note 9, at 31-34; R. POSNER, *supra* note 41, at 143-44; Cooter & Eisenberg, *supra* note 41, at 1462-64; Katz, *supra* note 42, at 558. As noted above, an expectation measure of damages in divorce would be enough money to permit the lower earning spouse to continue to enjoy the standard of living made possible by the marriage. *See supra* note 53 and accompanying text. If the higher earning spouse is seeking the divorce, he or she then would have to weigh the advantages of the divorce against the cost of maintaining the other spouse's standard of living. Even if expectation damages were ruled out because the agreement of the two parties was indeterminate, reliance damages still would be preferable to restitution in terms of deterring divorce. M. POLINSKY, *supra* note 9, at 31. A true reliance theory of alimony would compensate lost earning potential whenever it occurred in reliance on the marriage, not just when it resulted in a benefit to the other spouse. The second and third principles of Ellman's theory accordingly would be inappropriate. *See supra* text accompanying note 70.

course of the contract. Precisely because breach will sometimes be efficient, economists argue that surplus enhancing reliance[98] should be encouraged only when it is justified by the expected return on the investment *discounted by the probability of breach.*[99] In a case in which breach may be both efficient and probable, it makes no sense to encourage investments that will be valueless if the expected event comes to pass.[100] Restitution, not expectation or reliance, is the only remedy that can encourage the nonbreaching party to weigh the advantages of the investment against the possibility that the investment will be rendered worthless by the actions of the other party.[101]

Economists conclude that no single efficient solution exists, but rather that the choice between expectation and reliance turns on which concern is more important—deterring inefficient breach or deterring overreliance.[102] A desire to remove distorting incentives provides no ba-

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98. Surplus enhancing reliance is defined in terms of investments made after parties enter into a contract, which are not required by the contract, but which may increase the return the parties can realize from the undertaking. *See* Cooter & Eisenberg, *supra* note 41, at 1465.

99. In the case discussed *supra* at note 95, Buyer 1 may be able to spend $24 on custom designed equipment that will permit him to earn an additional $30 in profits once the widget arrives. Because the widgets are perishable, the equipment must be ordered before the widgets are delivered, but without the widgets, the equipment will be worthless. If breach is likely and only restitution damages are available, Buyer 1 will not make the expenditure. Under either an expectation or reliance measure, on the other hand, the buyer will have an incentive to make the investment even if breach is probable. Economists view surplus enhancing reliance as inefficient whenever the expected surplus discounted by the probability of breach is less than the cost of the investment, and they conclude that both expectation and reliance damages encourage inefficient reliance. *See, e.g.*, M. POLINSKY, *supra* note 9, at 31-34; Cooter & Eisenberg, *supra* note 41, at 1465-67.

100. Within marriage, people normally take such factors into account. Consider these two real-life examples: (1) Sixteen year old marries 19 year old plumber, drops out of high school, and has three children within five years. The marriage is rocky from the start. She gets her high school equivalency diploma and a nursing certificate, explaining that she expects that the marriage eventually may fail and she wants to be in a position to support herself and the children when it does. (2) Partner at a major corporate firm marries another lawyer and has three children in less than five years. She resigns from the partnership shortly after the birth of the first child in order to stay home with the children. Her decision to leave the practice of law is based on confidence that the marriage will last.

101. This is true because restitution, unlike reliance or expectation, provides compensation only if there is a benefit conferred on the other party. In the case of the widgets described *supra* at note 95, no benefit is conferred, and hence, the party making the expenditure has to internalize the risk that breach will render the investment worthless. *See* M. POLINSKY, *supra* note 9, at 34-37; Cooter & Eisenberg, *supra* note 41, at 1466; Katz, *supra* note 42, at 559. For a more rigorous treatment of these issues, see Polinsky, *Risk Sharing Through Breach of Contract Remedies*, 12 J. LEGAL STUD. 427 (1983) and Shavell, *Damage Measures for Breach of Contract*, 11 BELL J. ECON. 466 (1980).

102. *See, e.g.*, M. POLINSKY, *supra* note 9, at 36; Cooter & Eisenberg, *supra* note 41, at 1467-68 (comparing expectation and reliance damages only); Katz, *supra* note 42, at 560. Polinsky concludes:

> [I]n general, there does not exist a breach of contract remedy that is efficient with respect to both the breach decision and the reliance decision. With respect to breach, the expectation

sis for that choice.

B. The Limits of Contract

Ellman limits his efforts to justify alimony not only to efficiency considerations, but to the interests of the married couple alone.[103] His diagnosis of the *problem* alimony is designed to solve almost exclusively is concerned with allowing the couple to maximize their income,[104] with a passing reference to the benefits the couple reaps from children and from the wife's psychic satisfaction from having her husband perform a larger share of household tasks.[105] Altogether missing from the analysis is any reference to externalities, that is, to a set of societal interests that goes beyond those of the particular couple.

In discussing the implications of Ellman's theory, even in resolving the more technical conflict between efficient incentives for breach and for reliance, the central issue is not the ability of the couple to maximize their income, but the provisions that we, as a society, wish to make for childrearing and for the relationship between men and women.[106] Any discussion of efficient breach, when applied to marriage, becomes a discussion of the degree to which marriage continues to require a lifelong commitment and of the impact on children if it does not. When couples divorce, their separation may exact a higher finan-

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remedy is ideal, whereas with respect to reliance, the restitution remedy is ideal. Thus, which remedy is best overall depends on whether the breach decision or the reliance decision is more important in terms of efficiency.

M. POLINSKY, *supra* note 9, at 36.

103. Ellman, *supra* note 4, at 47-48, 50-51.

104. Although Ellman purports to be concerned with utility maximization rather than income maximization, *see id.* at 50-51, his decision to limit compensation to "financially rational sharing behavior" belies that claim. *Id.* at 58, 63; *see supra* notes 79-81 and accompanying text. His claim also is questionable because in setting forth his theory of alimony, his prime attention is focused on explaining why the lower earning spouse, *i.e.*, the wife, should forego her career prospects in order to ensure that her husband can fully realize his, when virtually all other economists concerned with specialization and utility maximization concentrate on the trade-offs necessary to accommodate childrearing, not dual-career families. It is instructive that Ellman devotes only 3 of 81 pages to childrearing. *See* Ellman, *supra* note 4, at 71-74; *cf.* G. BECKER, *supra* note 77, at 14-15; Landes, *supra* note 13, at 35.

105. The only interest Ellman recognizes in having spouses pursue similar roles, rather than having the wife specialize in domestic chores, is her psychic satisfaction in having her husband perform more housework. Ellman, *supra* note 4, at 48 n.140. Missing altogether from Ellman's analysis is the fact that many women prefer their jobs to remaining at home, that society accords greater prestige to paid employment, and that economic independence has a dramatic effect on the power relationships within marriage and on women's status within society generally. *See* Brown, *Home Production for Use in a Market Economy*, in RETHINKING THE FAMILY: SOME FEMINIST QUESTIONS 164 (B. Thorne & M. Yalom eds. 1982); V. FUCHS, *supra* note 89, at 67-73; Kay, *supra* note 2, at 85-86; Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797, 831 (1989).

106. Other writers of the law and economics school address the issue primarily in terms of childrearing, not income maximization. *See* sources cited *supra* note 104; *see also* Brown, *supra* note 105, at 154-56.

cial and emotional toll on their children and on the society that has to deal with their children than it does on the couple themselves.[107] Moreover, to the extent that higher divorce rates lead to less specialization within marriage, the primary consequence is fewer children, not lower income. The consequences of fewer children, positive and negative, transcend the value that their parents place on childrearing.[108] Any discussion of divorce policy, therefore, must consider a broader array of interests than simply the couple's desire to maximize their income.

Similarly, any discussion of surplus enhancing reliance will turn on the desired balance between women's work force participation and their retention of the primary childrearing role. Consideration of women's work force participation solely in terms of maximization of the couple's income, or even utility, misstates the issue both in efficiency and fairness terms. Ellman, much like Gary Becker before him,[109] presents the issue in terms of a choice between specialization in the market and the home or a sharing of domestic tasks. He concludes that:

> In the end, marital "specialization" makes sense for most couples, with one spouse concentrating more heavily on the market while the other focuses more heavily on domestic matters. If the spouses view their marriage as a sharing enterprise, they will usually conclude that they are both better off if the lower earning spouse spends more on their joint domestic needs, and allows the higher earning spouse to maximize his or her income.[110]

Specialization, however, is not a two-party affair. In the nineteenth century, specialization meant that married middle-class women did not work outside the home after marriage and the husband's role in childrearing was virtually eliminated.[111] In the late twentieth century, specialization involves women specializing among themselves to provide childcare so that many mothers work outside the home, entrusting care

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107. *See* A. CHERLIN, MARRIAGE, DIVORCE, REMARRIAGE 74, 79 (1981); J. WALLERSTEIN & J. KELLY, SURVIVING THE BREAKUP: HOW CHILDREN AND PARENTS COPE WITH DIVORCE 206-34 (1980); Furstenberg, *The Life Course of Children of Divorce*, 48 AM. SOC. REV. 667 (Oct. 1983).

108. *See* P. ENGLAND & G. FARKAS, *supra* note 80, at 74-83; V. FUCHS, *supra* note 89, at 104, 107; Cohen, *Marriage, Divorce and Quasi-Rents; Or, "I Gave Him the Best Years of My Life,"* 16 J. LEGAL STUD. 267 (1987).

109. G. BECKER, *supra* note 77, at 14-32. Becker originated the use of economic analysis as a basis for promoting specialization within the family. Curiously, though, Ellman does not cite Becker, relying instead on the works of Elisabeth Landes and Lloyd Cohen. *See* Ellman, *supra* note 4, at 41 n.128, 42 n.130; *see also* Cohen, *supra* note 108, at 295; Landes, *supra* note 13. Landes, however, worked directly with Becker and was strongly influenced by his conclusions. *See* Landes, *supra* note 13, at 35-39. Cohen also cites Becker, although his work focuses less on the importance of specialization. *See* G. BECKER, *supra* note 77, at 291 n.54, 296 n.63.

110. Ellman, *supra* note 4, at 48.

111. For a discussion of the "cult of true womanhood" and other nineteenth century developments, see N. COTT, THE BONDS OF WOMANHOOD: "WOMAN'S SPHERE" IN NEW ENGLAND, 1780-1835 (1977); Thorne, *Feminist Rethinking of the Family: An Overview*, in RETHINKING THE FAMILY: SOME FEMINIST QUESTIONS 7 (B. Thorne & M. Yalom eds. 1982); Welter, *The Cult of True Womanhood: 1820-1860*, 18 AM. Q. 151 (1966); Williams, *supra* note 105, at 806-13.

of their children to other women paid for caring for more children than just their own.[112] The same arguments that justify specialization between men and women justify specialization among women, and some men, in the provision of childcare. Yet, the incentives necessary to encourage specialization within the home may inhibit specialization among women in providing childcare.[113]

The problem is compounded because incentives encouraging specialization within the home may perpetuate existing patterns of discrimination in employment and in the socialization of boys and girls. Girls, encouraged from birth to specialize in the home, tend to invest less in their own education and in the acquisition of skills marketable in the workplace.[114] Employers, accustomed to the idea, whether borne out by empirical evidence or not, that women workers are more likely than men to place family ahead of job, pay women less and are less likely to hire them for the positions that offer the greatest opportunities for advancement.[115] Women are most likely to be the lower earning spouse in a marriage *because* they historically have been primarily responsible for childcare. Yet Ellman argues, in effect, that women *should* bear the primary responsibility for childcare *because* they cannot earn as much as their husbands. A rational divorce policy necessarily entails a choice about whether to perpetuate or dismantle the existing gender-based division of marital responsibilities.[116] A conclusion that the lower earning

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112. *See* P. ENGLAND & G. FARKAS, *supra* note 80, at 147-77; V. FUCHS, *supra* note 89 *passim*; Brown, *supra* note 105, at 151-67; Williams, *supra* note 105, at 832.

113. This is particularly true if the issue is viewed not only in terms of economic incentives necessary to encourage women's work force participation, but also in terms of ideological changes necessary to encourage women to look to their careers rather than to marriage as their primary source of financial security, to make the investments in education, training, and experience necessary to realize their earning potential, and to empower women to challenge the obstacles to their success. *See* Kay, *supra* note 2, at 80, 85-86; Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1567-78 (1983); Williams, *supra* note 105, at 831-32.

114. G. BECKER, *supra* note 77, at 24-27; P. ENGLAND & G. FARKAS, *supra* note 80, at 153-59; V. FUCHS, *supra* note 89, at 49-56.

115. P. ENGLAND & G. FARKAS, *supra* note 80, at 159-68; V. FUCHS, *supra* note 89, at 32-57; *see also* Dowd, *Work and Family: The Gender Paradox and the Limitations of Discrimination Analysis in Restructuring the Workplace*, 24 HARV. C.R.-C.L. L. REV. 79 (1989); Williams, *supra* note 105, at 822-30.

116. Gary Becker, while making an argument for specialization almost identical to Ellman's, argues explicitly that women should specialize in the home and men in the market for biological reasons. G. BECKER, *supra* note 77, at 21-29; *cf.* P. ENGLAND & G. FARKAS, *supra* note 80, at 88-89. In contrast, many feminists emphasize the close connection between the ideology of the modern nuclear family with a particular sexual division of labor and the oppression of women. *See, e.g.*, Thorne, *supra* note 111, at 13; *see also* Kay, *supra* note 2, at 80 (stating that we should not encourage future couples entering marriage to make decisions that will he economically disabling for women and thus continue their traditional economic dependence upon men and their inequality at divorce); Williams, *supra* note 105, at 845.

spouse should be the one to specialize in the home because she earns less begs the question.

The choice between expectation and restitution accordingly rests on more than the ability of married couples to maximize their incomes within the existing social framework. Any comprehensive divorce theory must take into account externalities such as the importance that society places on children, married women's participation in the work force, and a greater degree of sexual equality. Ellman, therefore, correctly concludes that a modern theory of alimony should be a noncontractual one. His failure to consider interests that transcend those of the parties to the marriage, however, means that his theory necessarily fails to provide a comprehensive basis for the proposals he advocates.[117]

C. *The Normative Implications of* The Theory of Alimony

Ellman's analysis does not acknowledge the tension between efficient breach and efficient reliance, and between advancing a couple's interests within society as it now exists and the societal interest in providing for a different future. His theory, dependent as it is on the neutral-sounding language of efficiency, fails to provide a basis for choosing between those concerns. Ellman does make a choice, however, and his choice of restitution over reliance or expectation is defensible only to the extent that overreliance presents a bigger risk than inefficient breach.[118]

Translated into ordinary English, concern about inefficient breach becomes an argument that the divorce rate is too high and that the party responsible for the breakup of the marriage should bear the costs that the divorce imposes on the other party.[119] Imposing this obligation should deter divorce when the costs of the breakup exceed the benefits and should vindicate the reliance the parties have placed on the marriage.[120] It also would reinforce traditional sexual stereotypes.[121]

Historically, women have enjoyed greater opportunities to enhance their standards of living by marrying well rather than by developing their own careers.[122] Women, therefore, have invested less than men in education and training, and they have been more willing than their hus-

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117. Ellman's failure to consider interests that go beyond those of the couple also means that his theory, as it stands, is a contractual one, his claims to the contrary notwithstanding. *See supra* notes 31-34 and accompanying text.

118. *See supra* note 102 and accompanying text.

119. *See supra* notes 38-41 and accompanying text.

120. *See* M. POLINSKY, *supra* note 9, at 29-32; Cooter & Eisenberg, *supra* note 41, at 1463; Ellman, *supra* note 4, at 50.

121. *See infra* notes 122-28 and accompanying text; *see also* Landes, *supra* note 13.

122. *See* M. GLENDON, *supra* note 18, at 31-32.

bands to interrupt or forego promising employment opportunities.[123] Indeed, until recently the ability to forego employment outside the home enhanced a woman's social standing. The mothers of young children were encouraged to stay home if they possibly could.[124] Cultural and social stereotypes celebrated the dichotomy between home and market, and sexual discrimination limited the return women could expect from their forays into the market.[125]

Before the no-fault revolution, divorce law reinforced these social mores. The law sought to deter not only inefficient breach, but all divorce, even in cases in which both parties agreed that they would be better off apart.[126] With divorce rare, expectation and reliance coincided; and overreliance, the possibility that women could devote too much of their energies to the home, was unthinkable.[127] Symbolically and practically, women were encouraged to look to marriage for their primary sources of economic well-being.[128]

The elimination of fault as a prerequisite for divorce occurred contemporaneously with the large-scale entry of married middle-class women into the labor market.[129] While the elimination of fault as a prerequisite for divorce did not necessarily mean that the reasons for the divorce were irrelevant to the financial determinations to be made, many states followed California's lead and abolished consideration of marital conduct altogether.[130] Spousal support was to be awarded on the basis of need, a standard interpreted to provide relatively short-term awards designed to do little more than ease the transition from married life.[131] The modern need standard not only fell short of protecting the standard of living enjoyed during the marriage; it also failed to guarantee the return of an appropriate share of the benefits the other

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123. *See supra* text accompanying note 114.

124. *See* Williams, *supra* note 105, at 832 and sources cited at n.152.

125. N. COTT, *supra note* 111, at 67-68; Olsen, *supra* note 113; Williams, *supra* note 105, at 811-12.

126. Brinig & Carbone, *supra* note 4, at 860-64, 870.

127. *See* N. COTT, *supra* note 111, at 67-68, 73 and sources cited at nn.197-206; Olsen, *supra* note 113, at 1499-1500; Williams, *supra* note 105, at 811-12.

128. Until recently, young women planning to marry were encouraged, either expressly by their future husbands or implicitly by the entire culture in which they had grown up, that they did not need to develop any special skills or abilities beyond those necessary for homemaking and childcare because their husbands would provide their financial support and security. *See* Grove v. Grove, 280 Or. 341, 351-52, 571 P.2d 477, 485 (1977). Cohen observes that "[t]he fact that, unlike their grandmother, my daughters will not be told that in order 'to change diapers you don't need a college degree' is at least in part a reflection of the fact that their job changing diapers will be less secure than was their grandmother's." Cohen, *supra* note 108, at 295 n.62.

129. P. ENGLAND & G. FARKAS, *supra* note 80, at 147-52; Williams, *supra* note 105, at 832.

130. *See* Brinig & Carbone, *supra* note 4, at 887-88 n.132; Kay, *supra* note 2, at 72-74 n.363.

131. *See generally* L. WEITZMAN, *supra* note 1; *see also* Brinig & Carbone, *supra* note 4, at 889 n.137 and sources cited therein.

spouse retained after the divorce.[132] The new system does not recognize expectation, reliance, or restitution.

With neither moral stigma nor financial disincentives to deter divorce, divorce rates soared.[133] With high divorce rates and minimal financial protection in the event of divorce, women no longer could be assured of marriage as a lifelong source of financial security.[134] Fewer marriages occurred, middle-class women who did marry had fewer children, and even the mothers of small children were more likely to remain in the labor force.[135] The new system effectively encouraged divorce, whether efficient or not, and discouraged reliance, whether efficient or not.[136] Women who failed to pursue careers or who sacrificed their opportunities for their families did so at their peril.[137]

Restitution provides a way to acknowledge the contributions married women are continuing to make to childrearing and the accommodations inevitable in two-career families without a return to a system of lifelong separation of home and market.[138] Under a restitution system, at least one designed along the lines set forth in *The Theory of Alimony*, the prototypical award will go to a woman who interrupts a promising career to care for her children. The woman who fails to develop her earning potential before the children are born or her husband's transfer takes effect, the woman without children who marries a man with an established career, and the man who marries a higher earning woman will remain financially at risk from divorce.[139]

A restitution system, unlike one based on expectation or reliance, encourages women to look to their own earnings rather than to marriage for their financial security. Reliance on marriage that does not result in gains that survive the divorce will remain unprotected. But unlike the present need-based system, a restitution theory of alimony also will encourage women to continue to bear the primary responsibility for childrearing and to make sacrifices that will enhance their husbands' careers. The normative basis of *The Theory of Alimony* rests on a conclusion that overreliance on marriage is a greater risk than ineffi-

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132. Ellman, *supra* note 4, at 3-4, 52, 55.

133. *See* P. ENGLAND & G. FARKAS, *supra* note 80, at 59-65; Williams, *supra* note 105, at 824.

134. *See generally* L. WEITZMAN, *supra* note 1, at 337-56; Williams, *supra* note 105, at 824-27 and sources cited at n.119.

135. *See supra* note 108 and authorities cited therein; *see also* Williams, *supra* note 105, at 824 n.109, 832 n.149.

136. Ellman, *supra* note 4, at 49-50.

137. *See supra* text accompanying note 132; *see also* Kay, *supra* note 2, at 80.

138. *See* Prager, *Shifting Perspectives on Marital Property Law*, in RETHINKING THE FAMILY: SOME FEMINIST QUESTIONS 125 (B. Thorne & M. Yalom eds. 1982).

139. Ellman, *supra* note 4, at 73. Of course, restitution principles could be used without Ellman's insistence on individualized proof of earning loss. *See infra* notes 155-57 and accompanying text.

cient divorce, but to the extent women's contributions produce gains that survive the marriage—children, medical degrees, the other person's enhanced career—they should be protected and encouraged.

V. CONCLUSION

Ellman's *The Theory of Alimony* rests on the unsatisfying conclusion that divorce law should deter divorce and encourage specialization, but that the remedies that would best advance those objectives must be rejected because of the difficulty of establishing responsibility for the divorce.[140] The real issue turns on something more than the indeterminacy of marital obligations in the modern era. To begin with, Ellman's claim that changing social mores make it impossible either to define marital obligations or to determine if they have been breached must be subject to greater scrutiny.[141] Nineteenth century judges displayed little hesitation in judging marital conduct amidst the changing social mores of those times,[142] and modern judges in the states that permit consideration of marital misconduct to continue to influence financial awards similarly demonstrate their ability to reach principled conclusions.[143] The issue is not so much whether such determinations are possible as whether they are worth the effort.[144]

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140. *See* Ellman, *supra* note 4, at 13-40.

141. Susan Westerbrook Prager observes:

> One question that needs greater exploration is whether it is appropriate to discard the concept of responsibility in divorce law. Certainly we would not want fault in its previous incarnation, which focused on isolated selected behavior such as adultery and acts thought to be cruel. Yet perhaps the fact that often one person wants to continue the marriage ought to be relevant to considerations of property division and spousal support. The difficulty in addressing this question is whether some greater fairness based upon expectations can be established without reintroducing the evils of the earlier fault-based law. One way to reconcile these goals is to retain the concept of divorce at the option of one partner but emphasize that there may well be continuing responsibility based not simply on the agreement to marry but on actual reliance during the ongoing marriage.

Prager, *supra* note 138, at 125-26.

142. *See, e.g.*, Russell v. Russell, 4 Greene 26 (Iowa 1853); Peckford v. Peckford, 1 Paige Ch. 274 (N.Y. Ch. 1828); Proctor v. Proctor, 2 Hag. Con. 292, 161 Eng. Rep. 747 (1819). For a particularly insightful discussion of the role of changing social mores in the determination of divorce decisions, see Cott, *Divorce and the Changing Status of Women in Eighteenth Century Massachusetts*, 33 WM. & MARY Q. 586 (1976).

143. Fault fell into disrepute not because it became indeterminate, but because it became irrelevant to the permissibility of divorce. Its role in the financial dispositions made upon divorce has never really been examined independently of its role as a prerequisite for divorce. *See* Brinig & Carbone, *supra* note 4, at 867, 883-84, 896-98.

144. Ellman's primary argument is that breach of marital obligations cannot be a basis for financial decisions because such obligations are too difficult to determine, and he gives several examples of "hard cases." *See* Ellman, *supra* note 4, at 19. It is not impossible, however, to imagine a divorce system in which proof that marital obligations have been breached is irrelevant to the granting of the divorce, but allowed as a basis for adjustment to the financial allocations made. Under such a system, the party seeking to benefit from the showing of breach would have the

Because Ellman dismisses the possibility of such an inquiry from the outset, we do not know whether he would conclude that the interests he identifies—deterring divorce and encouraging specialization—would be worth the cost.[145] It is possible, however, that even if Ellman conceded that marital obligations could be determined with some certainty and that the costs of such an inquiry were manageable, he still would conclude that his restitution proposals are preferable. Although Ellman and the writers from whom he draws his inspiration embrace specialization, there is no reason to believe that they would endorse greater specialization within the family at the expense of greater specialization among women.[146] The modern challenge, as Fran Olsen argues, is to transcend the dichotomy between home and market, support women in their efforts to participate in the labor force, and contribute to the care of their families.[147] Restitution accomplishes those goals better than does expectation, both in terms of fairness and efficiency.[148]

Ellman, moreover, should favor expectation remedies tied to a determination of marital misconduct, even if he were to conclude that these remedies would better serve the interests of efficiency. Tying the financial consequences of divorce to a finding of marital misconduct would have a dramatically greater impact on the lower earning spouse, and the whole point of specialization is to ensure that women remain the lower earning spouses.[149] A 100,000 dollar a year husband married to a wife able to earn 15,000 dollars a year on her own may be able to afford a substantial alimony award as the price for initiating a divorce, while his wife may face virtual impoverishment for making the same decision. Her problems will be compounded if she hopes to have custody of the children and needs to consider their financial well-being in addition to her own. Even if marital misconduct were defined in a way

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burden of proof. If that burden could not be met because the obligations were uncertain, as they are in Ellman's hard cases, then the court could deny a financial adjustment in those cases while still awarding the restitution-type award Ellman recommends. For a discussion of how this might work, see Brinig & Carbone, *supra* note 4, at 886-87, 899-902.

145. Ellman does acknowledge, however, that claims based on lost marriage prospects may have to be addressed. Ellman, *supra* note 4, at 80-81.

146. *See* authorities cited *supra* note 109.

147. Olsen, *supra* note 113, at 1560-78; *see also* Fineman, *supra* note 3, at 814-20; Kay, *supra* note 2, at 80; O'Connell, *supra* note 3, at 506-08.

148. *See supra* text accompanying notes 138-39; *infra* text accompanying notes 166-69.

149. *See supra* notes 114-16 and accompanying text (concluding that the effect of continuing societal support for specialization within the family will be to perpetuate the existing gender division of responsibility); *see also* G. BECKER, *supra* note 77, at 21-29 (arguing that specialization within the family necessarily involves women specializing within the home); *cf.* Kay, *supra* note 2, at 80 (arguing that specialization may perpetuate traditional financial dependence upon men and contribute to the inequality of women at divorce).

that, on average, increased alimony awards for women, as long as they earned less than their husbands, women still would have more to lose from such a determination than men. The result would be an adverse impact on women's bargaining positions within many marriages.[150] A restitution system, however, particularly one that guaranteed a comfortable settlement to most women otherwise dependent on their husbands' incomes, would impose a lesser price for a lower earning spouse's decision to end the marriage and would enhance her bargaining power in an ongoing marriage.[151]

Even if Ellman were to undertake a rigorous comparison of expectation, reliance, and restitution remedies, there is no reason to believe that he would change his conclusions. Expectation and reliance measures are likely to remain unattractive because they require a determination that marital obligations have been breached, and the purposes such a determination would serve are questionable in themselves and most likely are not worth the costs that an inquiry into marital conduct

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150. Determination of the effect on bargaining power requires a comparison of the different systems and the relative positions of the parties. In a need-based system in which awards generally are low, the party with the least bargaining power within the marriage will be dependent on the other spouse's income. If the higher earning spouse threatens to leave, has flagrant affairs, or physically or psychologically abuses the other spouse, the lower earning spouse will have little recourse. A divorce, irrespective of which party initiates it or which is at fault, will be a financial disaster. *See generally* L. WEITZMAN, *supra* note 1.

A system that ties expectation awards to findings of marital misconduct will give the financially dependent spouse relatively more bargaining power as, most likely, she can threaten divorce in response to the higher earning spouse's misdeeds. It leaves the dependent spouse vulnerable, however, if she wishes to leave, or threatens to leave, in the face of less clearly egregious conduct by her mate. *See generally* Mnookin & Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

A restitution system that guarantees a comfortable level of support irrespective of the reasons for the divorce gives the lower earning spouse significantly more ability to end, or threaten to end, an unhappy marriage. Indeed, the higher the likely award, the greater the financial penalty divorce will impose on the higher earning spouse, enhancing the lower earning spouse's position generally. For a discussion of the effect of such a rule on divorce rates, see Brinig & Carbone, *supra* note 4, at 899 n.173. Proposals to equalize standards of living for some period after the marriage will have similar effects on bargaining power. *See, e.g.*, Singer, *supra* note 61, at 1117-20. Such a system may make marriage less attractive for higher earning individuals or may encourage them to enter into antenuptial agreements. To the extent the parties' positions are financially comparable during the marriage, alimony laws will have less of an impact on their respective positions. Consideration of marital misconduct still will have an impact on the party wishing to leave, but that impact will be closer to gender neutral.

These effects would soften somewhat if the different systems were combined. For example, in a system of expectation damages tied to a determination of breach of marital obligations, there still could be restitution or need-based awards to the party found to be in breach. *See* Brinig & Carbone, *supra* note 4, at 901-02. A lower earning spouse would be less disadvantaged by the decision to end the marriage if guaranteed a certain level of support.

151. For a discussion of the impact of divorce rules on bargaining power, see Mnookin & Kornhauser, *supra* note 150, at 950 and V. FUCHS, *supra* note 89, at 71-72.

would impose on the judicial system.[152] Given these conclusions, restitution offers an attractive alternative to the present need-based system, and Ellman has performed a valuable service in working through the details of this system.

As a restitution system, the major limitation of his proposals is the one Ellman acknowledges—that restitution awards require difficult calculation of lost earning potential.[153] In insisting on precise calculations, however, Ellman falls into a trap. Once he identifies lost earning potential as the basis for his theory of alimony, he concludes that alimony awards, like any other award of restitution damages, must be based on specific proof of loss in individual cases.[154] The result is a system that appears to be designed with only young urban professionals in mind. Well-educated women who postpone marriage and childbearing until they have started up the corporate ladder, or at least graduated from law school, can point with some certainty to the opportunities they forewent when they had children or left Wall Street to follow their husbands to the hinterlands. Women who marry at eighteen or who follow a sporadic pattern of labor market participation will be unable to point to specific proof of loss, although they, too, may have sacrificed some earning potential for their husbands and children.[155] Because individualized proof of earning loss will be impossible for many women to produce, the courts will be faced with a choice of surreptitiously circumventing these requirements or imposing even greater hardships on many women than does the current need-based system. Ellman's proposals, even if theoretically sound, may be impossible to implement.

An examination of existing judicial methods and other proposals in this area offers some alternatives. First, need and restitution are not two mutually exclusive alternatives. Ellman's analysis focuses only on

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152. For a discussion of the costs of determining marital misconduct, see Brinig & Carbone, *supra* note 4, at 896 nn.158-59 and the sources cited therein.

153. *See* Ellman, *supra* note 4, at 78-80.

154. Ellman relies on analogies to the determinations made in tort cases in which statistical evidence is used widely. *Id.* at 78-79. He mentions that "the gap between men and women is largely a product of women's larger share of parental responsibilities," but does not explain how that is to be taken into account. *Id.* at 79 n.187. Under Ellman's proposals, the courts will need to determine the particular earnings a lower earning spouse lost because of her child care responsibilities, but data on women's earnings generally, which are already reduced because of their child care responsibilities, presumably are meaningless.

155. *See id.* at 78. Of course, to the extent *The Theory of Alimony* is designed to discourage reliance on marriage, this may be intentional. *See supra* text following note 139. Women with established careers are the only ones certain of protection in this system. Women who fail to develop their earning potential do so at their peril.

To the extent that Ellman is serious about specialization, however, the result is curious. Many women have better opportunities for marriage than for employment. Why encourage these women to invest in their careers if they are to be encouraged to abandon them later?

the obligation of one spouse to another. An argument can be made, however, that a married couple has an obligation to society to see that the other party to the marriage is provided for before a divorce is granted.[156] Need, therefore, could serve as a residual category establishing a floor below which support will be not be allowed to fall.

Second, the burden of proof could be adjusted to facilitate such awards. In Oregon the courts assume that, but for their reliance on marriage, women would be able to enjoy a standard of living commensurate with that provided by the marriage.[157] Professors Jana Singer and Stephen Sugarman, writing separately, eschew any pretense of precision in making such awards, advocating instead that income, like property, be equalized for a period after the divorce.[158] While all of these proposals can be justified by the need to compensate for lost earning potential, they trade unattainable precision for certain and eas-

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156. For example, suppose an electrician marries a hospital administrator. Her career flourishes. He is disabled by diabetes. He will have suffered no loss of earning potential due to the marriage, but if he lacks disability insurance, he may become dependent on welfare or other benefits if she does not support him. There is arguably a societal interest, independent of the relationship between the two parties, in ensuring that the divorce does not result in placing an added burden on societal resources. For a discussion of the need standard, see L. WEITZMAN, *supra* note 1. For a discussion of the role of need in property divisions, see Reynolds, *The Relationship of Property Division and Alimony: The Division of Property to Address Need*, 56 FORDHAM L. REV. 827 (1988). Ellman, too, acknowledges need as a societal obligation, but, by that, means that society, not the former spouse, must provide it. *See* Ellman, *supra* note 4, at 52.

157. *See, e.g.*, Grove v. Grove, 280 Or. 341, 351-52, 571 P.2d 477, 485 (1977); *In re* Marriage of Yantis, 52 Or. App. 825, 629 P.2d 883 (Ct. App. 1981); *see also* Stiff v. Stiff, 395 So. 2d 573, 574 (Fla. Dist. Ct. App. 1981); Lash v. Lash, 307 So. 2d 241, 243 (Fla. Dist. Ct. App. 1975).

In *Stiff*, 395 So. 2d at 574, a labor market analyst appearing for the husband testified that had the wife gone to work 25 years previously and been good in her career, she would have been making about $17,000 per year at the time of the divorce. The court, however, concluded that the wife needed $25,000 per year to maintain her current standard of living and that her husband, who earned $87,200 per year at that time, could afford to pay that amount. *Id.* While the *Stiff* court did not use the restitution standard Ellman advocates here, the case illustrates the pitfalls. If the court had focused solely on the issue of what the wife would have earned had she not married, the labor market analyst's testimony might have been compelling. But the $17,000 figure almost certainly reflects the fact that women earn less than men, that they are more likely to choose lower paying occupations, and that they are less likely to invest in their own education and training—all because women are more likely than men to rely on marriage. As the *Grove* court explained:

> [A]t least until recent years, young women entering marriage were led to believe—if not expressly by their husbands-to-be, certainly implicitly by the entire culture in which they had come to maturity—that they need not develop any special skills or abilities beyond those necessary to homemaking and child care, because their husbands, if they married, would provide their financial support and security. We cannot hold that women who relied on that assurance, regardless of whether they sacrificed any specific career plans of their own when they married, must as a matter of principle be limited to the standard of living they can provide for themselves if "employed at a job commensurate with [their] skills and abilities." The marriage itself may well have prevented the development of those skills and abilities.

Grove, 280 Or. at 351-52, 571 P.2d at 485.

158. *See* Singer, *supra* note 61, at 1117; Sugarman, *supra* note 61.

ily administered awards.[159]

In deciding whether these trade-offs are worthwhile, indeed, in finally deciding whether restitution, as opposed to expectation, reliance, need, or some other standard, offers a comprehensive basis for alimony, the role of marriage in modern society must be examined with some rigor. Ellman has made a useful start in exploring the trade-offs married couples make in arranging their affairs and the interest society has in encouraging them to continue to do so. To reach any final conclusions in articulating a truly comprehensive theory, alimony, as Ellman acknowledges, cannot be examined in isolation.[160] In the future, the role of marriage will be defined in terms of gender justice and provision for children, as well as in terms of the couple's economic relationship.[161] The incentives that alimony provides will be determined only in conjunction with the incentives supplied by property divisions and child support.[162]

On *The Theory of Alimony*'s own terms, moreover, it is impossible to critique alternative proposals without clarifying the contradictions at the core of the analysis. If Ellman is serious about deterring divorce, the logic of his position suggests that he *should* consider a system of expectation damages. If his primary concern is encouraging specialization within marriage, his insistence on individualized proof will be counterproductive.[163] If, as suggested, Ellman is more concerned with

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159. The Oregon courts expressly base their standard on the need to compensate for lost earning potential. *See, e.g.*, Grove v. Grove, 280 Or. 341, 571 P.2d 477 (1977). Sugarman argues, instead, that the spouse's interests merge over time, *see* Sugarman, *supra* note 61, at 61-63, and Singer relies on the extension of partnership principles. Singer, *supra* note 61, at 1117-18. Nonetheless, the Singer and Sugarman proposals also could be justified as surrogates for the inherently uncertain calculations Ellman proposes. Singer states:

> The requirement of post-divorce income sharing is designed to equalize the financial consequences of these gender-linked marital investment decisions. The income-sharing requirement thus compensates both traditional homemakers and the much larger percentage of divorcing women who have held both domestic and market jobs and whose investments in their families and in their husbands' careers have enhanced their husbands' earning power at the expense of their own.

Id. at 1118.

160. Ellman observes:

> [A] comprehensive examination of existing law would have to consider the division of marital property as well. There is a link between spousal claims for alimony and those for a share in the property accumulated during the marriage: both are financial claims against one's former spouse based on the spousal relationship, and are in that sense fungible. A complete prescription for a revision of the law therefore requires a theory of property division as well as a theory of alimony.

Ellman, *supra* note 4, at 12.

161. *See* text accompanying notes 116-17.

162. *See supra* note 160.

163. *See* Prager, *supra* note 138, at 121 (stating that the establishment of dependency relationships can be discouraged through an absence of sharing principles).

deterring overreliance on marriage, he should reject the Singer and Sugarman proposals and give serious attention to Herma Hill Kay's endorsement, albeit qualified, of the existing need-based system.[164] To justify the particular form of restitution he has advanced, Ellman will have to go beyond *The Theory of Alimony* and explain how specialization within the home will coexist with market specialization among both men and women in the marriages of the future.[165]

Finally, Ellman's proposals would be strengthened if he recognized the restitutional nature of his proposals outright. Feminist writers have decried the poverty of the existing debate focusing on "woman as equal" and presumably, therefore, able to proceed on her own after a divorce, or "woman as victim," damaged by her failure to conform to the male model of full work force participation.[166] Feminist writers argue that a woman-centered perspective is missing. Such a perspective would include a view of marriage in which financial and nonfinancial contributions are equally valued, in which women's decisions on how to combine labor force participation with care for their families are viewed not as defective versions of the male model, but as valuable in their own right.[167] By focusing on the benefits rather than the debits of marriage, restitution offers the possibility of a different approach in symbolic as well as monetary terms. Under a true restitution system, alimony as a continuation of the guilty husband's duty of support, as a form of welfare for needy spouses, even as damages for injury inflicted or reliance misplaced[168] would disappear.[169] In its place would be a reaffirmation of

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164. *See* Kay, *supra* note 2, at 85; *see also* Thorne, *supra* note 111, at 13.

165. A complete explanation must examine the issue both in terms of efficiency, that is, which combination will maximize utility, and fairness, which combination will allow both men and women to develop fully satisfying and valued roles.

If Ellman is able to clarify his position on these issues, he also will be in a better position to establish guidelines for the calculations to be made. Given the inherently imprecise nature of the calculations, he needs to decide whether he is more concerned about a standard that overcompensates or one that undercompensates. If his primary desire is to deter divorce and encourage specialization, he should favor a broader standard, such as the one suggested by the Oregon courts, and relax his insistence on individualized proof of earning loss. *See supra* note 157. If, on the other hand, Ellman is more interested in encouraging married women to remain in the work force, his insistence on proof of loss will be more appropriate.

166. *See, e.g.*, Fineman, *supra* note 3, at 789; O'Connell, *supra* note 3, at 498-500.

167. O'Connell, *supra* note 3, at 500; *see also* Williams, *supra* note 105, at 830-31.

168. Ellman, in attempting to use lost earning capacity as a comprehensive basis for alimony, embraces what Fineman and O'Connell describe as a "woman as victim" approach. *See* Ellman, *supra* note 4, at 40-48; Fineman, *supra* note 3, at 789; O'Connell, *supra* note 3, at 500.

169. Calculated in this way, the terms "alimony," "spousal support," and "maintenance" all should disappear, leaving only the division of property, separated, perhaps, into lump sum and periodic awards for tax purposes. *See* H. CLARK, *supra* note 17, § 14.12.

Moreover, the terms need, spousal support, and maintenance *should* disappear because they are at least as offensive and outdated as the term alimony. These words suggest that divorce awards separate from the division of property are a form of welfare, justified by the dependence of

both spouses' obligations to contribute to the benefits that the marriage made possible. Those benefits—children and, to a lesser degree, enhanced earning capacity or lifestyle—often will be intangible, and a substitute calculation such as the one Ellman proposes often will be appropriate. Nonetheless, recognizing that the benefit conferred and retained after the divorce gives rise to the obligation will place divorce payments on a different footing. Such awards will be *obligations*, not charity, installment payments for benefits retained, not punishment and not antiquated remnants of an otherwise severed relationship. Recognition that the obligation arises from the intangible benefit, rather than from the more quantifiable sacrifice, also will eliminate any illusion of certainty. The inability to achieve precise calculations should not stand in the way of substantial justice.

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one spouse on the earning capacity of the other. Any new proposal, whether it embraces restitution or partnership as its rationale, should recognize such payments as obligations, not charity.