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Abstract: *In this Article, Professor Starnes surveys a collection of alimony theories, grouping them into three categories: gain theory, loss theory, and contribution theory. She concludes that gain theory offers the most satisfactory theoretical basis for alimony, not only for the clarity of its quantification model, but also for the status it assigns alimony claimants, who are cast as equal partners in marriage rather than as victims of marriage.*

Key Words: *alimony, divorce, marriage, family, caretakers, guidelines, no-fault*

Family law offers no answer to the question of why anyone should be forced to share income with a former spouse. For over thirty years, commentators have struggled to explain why alimony has survived the demise of coverture and the advent of no-fault divorce, but there is still no consensus on a contemporary rationale for alimony. The broad discretion vested in judges to determine alimony eligibility and quantification, together with the absence of a theory to guide decision-making, has produced an alimony regime marked by unpredictability, uncertainty, and confusion. The one thing that is predictable about alimony is that it is not likely to be awarded, a fact that is not surprising in a society that applauds independence and self-reliance.

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Some legal actors have responded to the dysfunction of current alimony law by endorsing alimony guidelines, but the absence of an underlying theory of alimony confounds efforts to identify a mathematical formula for generating the numbers that populate these guidelines. As a consequence, guidelines may make alimony more predictable within an adopting jurisdiction, but they do not necessarily make alimony more equitable or more consistent among jurisdictions.

So why not just get rid of alimony? The problem with this "solution" is that alimony is often the only available tool for addressing cases in which marital roles have left divorcing spouses with disparate earning capacity at divorce. In these economic times, divorcing couples increasingly have few if any significant assets, which renders property distribution a useless tool and makes income sharing, i.e., alimony, the only available economic remedy for the primary caretaker.

It is easy enough to identify distinctions among the many theories of alimony. But it is also possible and important to identify common ground, which can provide a basis for more consistent, predictable and equitable alimony guidelines. This Article seeks to further that goal by surveying and critiquing an illustrative assortment of alimony theories. This task begins with a closer look at the problem theorists believe alimony should address.

I. The Problem

Alimony theorists are remarkably consistent in their description of the problem alimony aims to address. In 2002, the American Law Institute ("ALI") summarized this problem in its *Principles of the Law of Family Dissolution* ("*Principles*"). The ALI noted that "wives continue in the great majority of cases to care for their children, in reliance upon continued market labor by their husbands,"[2] and that these caretaking responsibilities "typically result . . . in a residual loss in earning capacity that continues after the children no longer require close parental supervision."[3] In such cases, the caretaker has fulfilled the couple's "joint responsibility for their children's care," allowing the other parent "to have a family while also developing his or her earning capacity." In the absence of any remedy, at divorce "the primary wage earner retains both that earning capacity and the parental status, while in the absence of any remedy the primary caretaker loses any claim upon the other spouse's earnings."[4]

The peril faced by divorcing primary caretakers is exacerbated by circumstances that provide distorting incentives for men to divorce their wives. As Lloyd Cohen explained, while marriage promises gains to both parties at the time they marry, these gains are not "symmetrical," i.e., they are realized at different times in the relationship.[5] "As a rule, men tend to obtain gains early in the relationship, when their own contributions to the marriage are relatively low and that of their wives relatively great. Similarly, later on in marriage women tend as a general rule to obtain more from the contract than do men." This imbalance

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[2] AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS (2002) [hereinafter ALI PRINCIPLES] § 5.05 reporter's notes cmt. c.

[3] *Id.* § 5.05 cmt. a. "Whether or not women actually leave full-time employment after the birth of their children," the ALI observed, "studies consistently show that they usually perform far more than half of the married couples domestic chores. For this reason, the birth of children usually affects the earning capacity of women who continue to work full time as well as those who do not." *Id.* § 5.05 reporter's notes cmt. d.

[4] *Id.* § 5.05 cmt. e. The ALI further reasons that "[t]o leave the financially dependent spouse in a long marriage without a remedy would facilitate the exploitation of the trusting spouse and discourage domestic investments by the nervous one." *Id.* § 5.04 cmt. c.

[5] Lloyd Cohen, Marriage, Divorce, and Quasi Rents; Or, "I Gave Him the Best Years of my Life," 16 J. LEG. STUD. 267, 278-303 (1987).

"provides the opportunity for strategic behavior whereby one of the parties, generally the man, might find it in his interest to breach the contract unless otherwise constrained."[6]

It is difficult to dispute the point, or perhaps the intuition, that if marital roles diminish a primary caretaker's earning capacity, divorce law should not allow her husband to shed her at will, setting her "free" to alone bear the costs of family labor. As a California court observed long ago:

> A woman is not a breeding cow to be nurtured during her years of fecundity, then conveniently and economically converted to cheap steaks when past her prime . . . This has nothing to do with feminism, sexism, male chauvinism, or any other trendy social ideology. It is ordinary common sense, basic decency and simple justice.[7]

II. Theories of Alimony

Once upon a time the rationale for alimony was easy enough: at marriage a husband undertook a lifetime obligation to support his wife; alimony was the judicial tool for enforcing this husbandly duty during any periods of spousal separation. Contemporary visions of marriage and divorce are very different. Today, divorce is normatively cast as the end of spousal ties, an opportunity for a fresh start and a clean break, no matter who or what caused the marital breakdown. And marriage is no longer viewed as the union of a dominant male and a dependent female, but rather as a partnership of equals. Can such egalitarian visions yield a theory of alimony?

Most modern reform theories focus primarily on one of three interests: a

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[6] *Id.* at 287. *See also* Elizabeth S. Scott & Robert E. Scott, *Marriage as Relational Contract*, 84 VA. L. REV. 1225, 1312-13 (1998) (noting "the failure of contemporary legal rules governing divorce to protect marital investment adequately and to discourage opportunistic defection").

[7] In re Marriage of Branter, 136 Cal. Rptr. 635, 637 (1977).

claimant's expected gain; a claimant's loss; or a claimant's contributions to the other spouse. These foci are familiar to any student of contracts, for they suggest the three classic contract interests of expectation, reliance, and restitution.[8] This section thus classifies reform theories into three categories:

(1) Gain Theory (emphasizing expected returns on marital investments)

(2) Loss Theory (emphasizing compensation for loss experienced at divorce)

(3) Contribution Theory (emphasizing reimbursement for marital contributions)

A. Gain Theory

An understanding of gain theory begins a look at early human capital[9] theorists who argued that a spouse who finances her mate's education is entitled to compensation if the marriage ends. In these cases, the marital unit makes an investment in the student's human capital, both parties expecting that this joint investment will generate a return – the student's enhanced earnings -- that the *marital unit* will enjoy. If the parties divorce, the non-student is thus entitled to a share of her expected gain, i.e., to a return on her marital investment.

Most alimony claimants, however, have not supported their spouse through school. If gain theory is to offer a satisfactory rationale for alimony, it must also address more ordinary cases. Some contemporary theorists have built on human

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[8] The expectation interest protects a party's "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." RESTATEMENT (SECOND) OF CONTRACTS § 344(a) (1979). The reliance interest protects a party who has "changed position in reliance on the contract by incurring expenses in preparation or in performance." *Id.* § 344(b) (1979). The restitution interest protects a party's "interest in having restored to him any benefit that he has conferred on the other party." *Id.* § 344(c) (1979).

[9] *See, e.g.,* Joan M. Krauskopf, *Recompense for Financing Spouse's Education: Legal Protection for the Marital Investor in Human Capital*, 28 U. KAN. L. REV. 379, 381 (1980); and Deborah A. Batts, *Remedy Refocus: In Search of Equity in "Enhanced Spouse/Other Spouse" Divorce*, 63 NYU L. REV. 751 (1988).

capital theory to offer more expansive versions of gain theory. Jana Singer provides a good example. Although she does not label her income-sharing proposal "alimony," her model is pure gain theory. Singer reasons that each spouse makes "an equal (although not necessarily identical) investment in a marriage." At divorce, each spouse is thus entitled to "an equal share of the fruits of the marriage." Singer stresses that "the emphasis of such an investment partnership model is not on formal *equal treatment* of the spouses at the time of divorce, but on each spouse receiving *equal benefits* from the marriage."[10]

I have proposed a gain-based rationale for alimony built on a loose analogy to partnership buyouts:

> Like commercial partners, spouses commonly pool their labor, time, and talent to meet responsibilities and to generate income that they expect to share. . . . Often, the spouses' combined efforts generate enhanced human capital primarily for the husband who has invested more extensively in paid employment than his primary caretaker spouse. In such a case it is the marital partnership, rather than the husband alone, that has produced the husband's enhanced human capital. Although divorce terminates the parties' relationship, it usually does not terminate the husband's income stream, which continues to reflect the enhanced value produced through joint marital efforts. Such a husband should therefore buy out the interest of his wife at divorce.[11]

Another version of gain theory comes from Stephen Sugarman, who suggests a merger of spouses' human capital over time. Sugarman reasons that the longer parties are married, "the more their human capital should be seen as

[10] Jana Singer, *Divorce Reform and Gender Justice*, 67 N.C. L. REV. 1103, 1114 (1989).

[11] Cynthia Lee Starnes, *Mothers as Suckers: Pity, Partnership, and Divorce Discourse,* 90 IA. L. REV. 1513, 1543-44 (2005). *See also* Cynthia Starnes, *Divorce and the Displaced Homemaker; A Discourse on Playing with Dolls*, *Partnership Buyouts and Dissociation under No-Fault*, 87 U. CHI. L. REV. 87, 70 (1993) [hereinafter Starnes, *Displaced Homemakers*].

intertwined rather than affixed to the individual spouse in whose body it resides."[12] Under this reasoning, each spouse's interest in the other's human capital entitles each to a share of any enhanced earning capacity fostered by the marital division of labor.

Robert Kirkman Collins's theory of "marital residuals" also evidences gain theory. Collins calls for "an equitable sharing of the residual economic benefits from work done during the marriage."[13] By way of example, he offers the vision of a couple pedaling a tandem bicycle:

> [The bicycle] will not come to a screeching halt the moment that one or both riders stops pedaling; while current efforts may cease, the momentum from their prior work continues to carry the pair forward at a gradually decreasing pace until the effects of friction (of the sort known to physicists, as opposed to that found in disintegrating marriages) eventually cause the bicycle to stop. How long the two riders will continue to coast forward will be a direct function of how fast they were going – that is, how great their momentum had been when the joint efforts stopped.[14]

Collins thus characterizes alimony as "a decreasing share of marital residuals."

Gain theorists' vision of marriage focuses on collaboration, and teamwork, as partnerships between spouses who join together to produce mutual benefits which they expect to share – income and a home with children. If their marriage ends, divorce law must impose an exit price on the spouse who takes the larger

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[12] Stephen D. Sugarman, *Dividing Financial Interests on Divorce*, in DIVORCE REFORM AT THE CROSSROADS 130, 159-60 (1990).

[13] Robert Kirkman Collins, *The Theory of Marital Residuals: Applying an Income Adjustment Calculus to the Enigma of Alimony*, 24 HARV. WOMEN'S L. J. 23, 49 (2001).

[14] Collins himself identifies his theory as gains based: "Rather than an attempt to share the *loss* stemming from marital dissolution, this approach seeks to establish a fair allocation of the residual *gains* accruing after the fact from the marital venture." *Id.* at 49.

share of marital returns with him. This price will usually take the form of income sharing, and is gain theorists' rationale for alimony.

A key feature of gain theory is its general disinterest in relative spousal contributions. Gain theorists assume that spouses are equals -- an assigned status that does not depend on the type or size of each spouses' contribution. As equals, spouses are entitled to equal returns on communal, joint investments, no matter who brought home the bigger paycheck, no matter who was the better cook.

Gain theory does not depend on an expectation that marriage will last forever. No marriage lasts forever; all marriages end in either death or divorce. The expectation at the heart of gain theory is that each spouse will realize a return on marital investment before the marriage ends. As Lloyd Cohen as so vividly described, marital gains are often not symmetrical for spouses; wage-earners tend to obtain gains early on in the marriage, while homemakers tend to reap gains later in the relationship. If the timing of divorce leaves spouses asymmetrically positioned, the marriage ends prematurely from the perspective of the spouse who has not yet realized expected gain.[15] This disparately impacted spouse, often a primary caretaker, is thus entitled to compensation.

B. Loss Theory

Loss theorists focus on the reliance costs of participating in a "failed" marriage. Their aim is to put the injured spouse "in as good a position as he would have been in had the contract not been made."[16] In his 1989 article, *The Theory of Alimony*, Ira Mark Ellman argues that "[t]he main residual financial consequence of a failed marriage is a reduction in one spouse's earning capacity (usually the

[15] Cohen, *supra* note 5, at 287.

[16] *See* RESTATEMENT OF CONTRACTS (SECOND) § 344(b).

wife's) compared to the earning capacity she would have had if she had not married." "Alimony," Ellman reasons, "should compensate a spouse for the "residual" loss in earning capacity arising from "economically rational marital sharing behavior," since without such protection a "rational spouse will pause before making a marital investment." The purpose of alimony, concludes Ellman is thus "to reallocate the postdivorce financial consequences of marriage in order to prevent distorting incentives."[17]

The ALI offers a similar view, conceptualizing alimony as compensation for loss and recognizing two primary types of compensable loss: (1) loss of the marital standard of living in a marriage of "sufficient duration"[18] and (2) a residual loss in earning capacity that results from primary caretaking.[19] While the ALI goes to some trouble to identify the parameters of compensable loss, it has been criticized for its failure to explain convincingly why these losses are compensable.

Other loss theorists include Twila Perry, who analogizes to strict liability in tort, arguing that alimony should compensate a spouse for disproportionate economic loss caused by the "accident" of divorce.[20]

Loss theory and gain theory sometimes recognize flip sides of the same coin, as for example where a primary homemaker has lost career opportunities, which leave her with a smaller share of returns on marital investments, i.e., lower earning

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[17] Ira Mark Ellman, *The Theory of Alimony*, 77 CAL. L. REV. 1, 50, 51 (1989).

[18] *See* ALI PRINCIPLES, *supra* note 2 § 5.04 (1).

[19] Id. § 5.05 (1).

[20] Twila L. Perry, *No-Fault Divorce and Liability Without Fault: Can Family Law Learn from Torts?*, 52 OHIO ST. L. J. 55, 66-67 (1991). Perry suggests that economic losses resulting from divorce might be spread over a large number of people through public or private insurance programs that compensate spouses injured by divorce, though she expresses doubt that private companies would find this venture profitable or that public social insurance for divorce would be a viable alternative. *Id.* at 81.

capacity than her spouse. Loss theory and gain theory differ significantly, however, in the roles they assign alimony claimants. If the need-based approach of current alimony law casts alimony claimants as beggars, a loss-based model casts them as victims. Gain theory, on the other hand, casts a claimant as an equal stakeholder in marriage. Moreover, as we shall see, loss theory poses difficult quantification problems that often lead loss theorists to resort to the more straightforward measurement models of gain theory. One might thus reasonably question whether loss theory offers any advantages over gain theory.

C. Contribution Theory

Contribution theory protects a promisee's "interest in having restored to him any benefit that he has conferred on the other party."[21] Such an interest is compensated to the extent necessary to prevent unjust enrichment. If benefits are conferred gratuitously, there is no unjust enrichment and hence no compensation due. By way of analogy, an alimony theory based on restitution measures the contributions a claimant made to her spouse and then asks whether that sum must be reimbursed in order to prevent unjust enrichment.

In its narrowest form, contribution theory provides a rationale for requiring a student spouse to reimburse his/her mate for sums contributed to the student's education or training – for example, tuition, books, lab fees, and perhaps living expenses. Contribution theory, however, supports only a limited recovery – reimbursement of contributions. Moreover, contribution theory limits alimony to extraordinary cases.

Contribution theory might broaden its reach by expanding the concept of

[21] *See* RESTATEMENT (SECOND) OF CONTRACTS § 344(c) (1979).

contribution to include family labor, but this approach is problematic for several reasons. First, "ordinary" marital benefits are usually conferred with donative intent and so may not unjustly enrich the other spouse. Determining whether a spouse's contributions are ordinary or extra-ordinary, and so compensable, invites value judgments that depend on the judge's personal view of marital roles. Additionally, contribution theory implicitly rejects a view of spouses as equal contributors to marriage, instead requiring spouses to identify, value, and compare their individual contributions in a process that is difficult to reconcile with contemporary visions of marriage as a partnership of equals.

III. The Mathematics of Alimony

Alimony theorists have offered an array of formulae to quantify the value and duration of alimony. These formulae vary widely, drawing on their underlying theory of alimony, and on the drafters' intuition about how generous alimony awards should be. A satisfactory quantification model will answer two questions about any alimony award: (1) How much? (2) How long?

The most straightforward and workable quantification models come from gain theorists. Jana Singer, for example, suggests couples should equally share their combined income after divorce for a period based on the length of the marriage. As a starting point for discussion, she suggests "one year of post-divorce income sharing for each two years of marriage."[22]

To implement my buyout model for alimony, I have suggested presumptively calculating the buyout price through a two-step formula: (1)

[22] Singer, *supra* note 10, at 1117. *See also* Jane Ellis, *New Rules for Divorce: Transition Payments,* 32 U. LOUISVILLE J. FAM. L. 601 (1993-94) (suggesting transition payments for a period equal to one-half the length of the marriage). Jane Rutherford proposes lifetime income sharing for homemakers based on their expectation to share income for life. Jane Rutherford, *Duty in Divorce: Shared Income as a Path to Equality*, 58 FORDHAM L. REV. 539 (1990).

calculate the disparity in the spouses' enhanced earnings; and (2) multiply that sum by a percentage based on the length of the marriage. This percentage might be patterned after the Uniform Probate Code provision for a spouse's elective share of an augmented estate, a percentage that gradually increases with the length of the marriage.[23]

Drawing on his theory of marital residuals, Robert Kirkman Collins proposes a series of postmarital income adjustments, each with a presumptive calculation formula. During the first period (immediately following separation) – the couple would share equally all disposable income; thereafter, they would share a decreasing percentage of the disparity in disposable income, declining by 10% in each period. The "length of each period – and hence the angle of the decline in transfers -- is set as a function of the length of the marriage." At the end of the "economic phase-out period," the parties would be "financially independent."[24]

In his merger over time variant of gain theory, Stephen Sugarman suggests each spouse should take "a percentage interest in the other's human capital/future earnings based upon the duration of the marriage." By way of example, he suggests 1.5% to 2% per year, after perhaps a minimum vesting period of 3 to 5 years, and with a cap of 40%.[25]

Loss theory does not offer such straightforward quantification mechanisms. How can lost opportunities be measured? As Ellman explains, "[t]o identify these losses, we compare the claimant's economic situation at the end of marriage with the situation she would have been in had she not married . . . The difference equals our general measure of the alimony claim against her husband." But how are we to

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[23] Starnes, *Displaced Homemakers, supra* note 11, at 130-38 & n. 309.

[24] Collins, *supra* note 13, at 51.

[25] Sugarman, *supra* note 12, at 160.

know what she might have become but for her marriage? As Ellman admits, answering this question is "in some sense impossible even in theory, as is any 'might have been.'" "In the end," says Ellman, "precision is not obtainable" and so alimony will depend on "the rough justice of trial court discretion."[26] Not much of a "solution" to the current problems of alimony.

The ALI finds a way to quantify its loss theory, which is very similar to Ellman's – it borrows a formula from gain theory. To presumptively value awards under its two primary sections, 5.04 and 5.05, the ALI proposes a two step process: (1) calculate the disparity in the spouses's income at divorce, and (2) multiple that disparity by a percentage based on the length of the marriage (§ 5.04) or the length of the child care period (§ 5.05).[27] To presumptively calculate the duration of a fixed-term award, the ALI suggests multiplying the length of the marriage (§ 5.04) or child care period (§ 5.05) by a percentage set out in a rule of statewide application.[28] By way of example, the ALI suggests the duration of an award under section 5.04 might equal half the length of the marriage.[29] The ALI quantification model makes sense, but it does not derive from loss theory, which requires measurement of an alimony claimant's lost opportunity to remain single.

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[26] Ellman, *supra* note 17, at 54, 78, 80.

[27] ALI PRINCIPLES, *supra* note 2, § 5.04(3) (presumptive value of award "calculated by applying a specified percentage to the difference between the incomes the spouses are expected to have after dissolution."); (§ 5.05(4) (presumptive value of payments calculated "by applying a percentage, called the *child-care durational factor*, to the difference between the incomes the spouses are expected to have at dissolution." (emphasis in original))

[28] *See id*. § 5.04 (3). By way of example, the ALI suggests a durational factor equal to the number of years of marriage multiplied by .01. A marriage of 5 years would thus produce a presumptive alimony payment of 5% of any disparity in spousal earnings, 10% after 10 years, 20% after 20 years, 40% after 40 years. The ALI suggests payments should not exceed 40% of the earnings disparity, no matter how long the marriage or child care period. *See id.* § 5.04 cmt. a.

[29] *Id*. § 5.06 cmt b.

Rather, the formula is based on the gain theory principle that a marital investor is entitled to share returns (enhanced income) generated by marital investments.

A final quantification model, one not linked to a theory of alimony, comes from the American Academy of Matrimonial Lawyers ("AAML"). Based on a survey of alimony guidelines throughout the U.S., the AAML identified two common denominators: income of the spouses and duration of the marriage. Drawing on these factors, the AAML in 2007 approved a simple formula that quantifies alimony in the absence of specified deviation factors.[30] The value of an award is calculated "by taking 30% of the payor's gross income minus 20% of the payee's gross income," capped at 40% of the combined gross income of the parties." The duration of an award is a function of the length of the marriage, and in the absence of deviation factors is calculated "by multiplying the length of the marriage by the following factors: 0-3 years (.3); 3-10 (.5); 10-20 years (.75), over 20 years, permanent alimony." This model is attractive for its simplicity and for its similarity to quantification models based on gain theory.

IV. Conclusion

For too long family law has operated without a satisfactory, consistent answer to the question of why alimony persists in an age of egalitarian visions of marriage and no-fault divorce. Over the last thirty years, numerous commentators have offered rationales for alimony, but none has carried the day and the current law of alimony remains dysfunctional. While the plethora of reform theories differ

[30] Mary Kay Kristhardt, *Re-thinking Alimony: The AAML's Considerations for Calculating Alimony, Spousal Support or Maintenance*, 21 J. AM. ACAD. MATRIMONIAL LAW. 61 (2008). Their review of alimony guidelines revealed two common denominators: income of the spouses and duration of the marriage. *Id.* at 78. The Commission Recommendations list ten deviation factors, two of which were added after lengthy discussion upon presentation of the Commission Recommendations to the Board of Governors, which ultimately approved the recommendations at its March 2007 meeting. *Id.* at 79-80.

in many ways, at bottom, they tend to focus on one of three interests: a claimant's expected gain (gain theory); a claimant's loss linked to divorce (loss theory) or a claimant's contributions to the other spouse (contribution theory). While each of these theories has something to offer, only gain theory offers a helpful model for quantifying alimony. Indeed, loss theory tends to borrow its quantification model from gain theory. In the end, gain theory offers the most satisfactory theoretical basis for alimony, not only for the clarity of its quantification model, but also for the status it assigns alimony claimants, who are cast as equal partners in marriage rather than as victims of marriage.