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## THE RELIANCE INTEREST IN MARRIAGE AND DIVORCE

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### INTRODUCTION

The legal regulation of marriage and divorce, as with the legal regulation of most other subjects, has followed a generation behind social changes. As the role of marriage and the family has changed, eventually the rules governing the union and its dissolution had to catch up. In the period of rapid social change in which we live, the traditional provisions for marriage and divorce have long ceased to conform to the emerging social conventions governing these most intimate of relationships. The result is a period of debate and not inconsiderable confusion

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about what role the law ought to play in a system where couples are free to marry and divorce at will. What provisions should the law make for winding up a couple's formerly indivisible affairs? What interests need to be protected?

In stepping back for a moment from the modern fray, the larger pattern which emerges is that the law of domestic relations—like the law governing many other consensual relationships—has always protected the “reliance interest,” that is, the parties’ change of position in reliance on the joint enterprise.<sup>1</sup> In traditional societies, the family served as the most important source of wealth and status. In entering marriage, men and women gave up their opportunity to marry others. If the marriage “failed,” divorced women had few opportunities for either remarriage or other sources of livelihood, and the law accordingly awarded an “innocent” wife the support she would have received had she remained married. For men, the prospects for remarriage were more promising. Upon divorce, an “innocent” husband was released from his marital obligations, freeing him to remarry and to make other use of his financial resources. Thus, in determining the continuation or release of marital obligations for husband and wife, the law compensated for the loss of opportunity to marry others.<sup>2</sup>

In modern marriages, the foregone opportunities may be different. In a traditional long-term marriage, the parties have still primarily foregone other opportunities to marry. Spousal support or freedom from marital obligations therefore remain important remedies. But with women increasingly pursuing their own careers and requiring their husbands to make corresponding adjustments, economic losses independent of the lost marital opportunities may exist. When a working wife leaves a lucrative position to care for the children or her husband forgoes a career enhancing transfer because she would be unable to relocate, the economic consequences transcend the traditional notions of support and the division of marital property. If the marriage ends shortly after one party makes such a substantial sacrifice in the expectation of a future return from the other, there is no opportunity to recoup the investment.

The law governing the financial allocations made upon

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1. We think it telling that the “reliance interest” concept retains its vitality more than fifty years following publication of Fuller and Perdue’s seminal article, *The Reliance Interest in Contract Damages* (pts. 1 & 2), 46 YALE L.J. 52, 373 (1936).

2. See *infra* text accompanying notes 75-89.

divorce<sup>3</sup> has been changing in response to both the adoption of no fault grounds for divorce and the changing nature of the reliance interest in marriage. In the process, the older rules tying spousal support to the determination of fault required for the divorce have given way to a multiplicity of rules without any clear explanation of the role of spousal support in a no fault era. We believe that the time has come for a re-examination of the entire area and that the reliance interest offers a framework for analysis.

The first part of this article examines the changing nature of reliance on marriage as the relationship between the spouses and the role of the family has changed. The second section defines the "reliance interest," as that term has been used to describe contract damages, discusses its application to marriage, and examines the implications for the role of "fault" in the financial allocations to be made upon divorce. The third section describes the varying state reactions to the adoption of no fault divorce and assesses the ability of existing law to protect the reliance interest in marriage. Finally, this article concludes that the changing nature of the reliance interest—from one involving lost opportunities to marry to one more concerned with lost career opportunities—frames, but does not ultimately determine, the policy choices concerning the nature of marriage and the interests to be protected upon divorce.<sup>4</sup>

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3. We believe the phrase "the financial allocations to be made upon divorce" best describes the subject of this article, and we believe that spousal support provisions should not be made independently of property settlements. In most cases, however, the issue that arises is whether spousal support—that is, some financial allocation above and beyond the property distribution—is appropriate. For ease of discussion, this article has therefore primarily focused on spousal support. We recognize, however, that similar ends could be accomplished through an expanded definition of marital property, and we hope to compare the two lines of analysis in a future article.

For an excellent discussion of the distinctions between the terms "alimony" and "spousal support," see *Clayton v. Clayton*, 231 Md. 74, 188 A.2d 550 (1963); Holt, *Support v. Alimony in Virginia: It's Time to Use the Revised Statutes*, 12 U. RICH. L. REV. 139, 139-40 (1977).

4. To make this discussion manageable, we are considering the relationship between the spouses only. We believe that the issues raised by child custody and child support involve considerations well beyond the scope of this article. In addition, while we have tried to use gender neutral language in developing the article, we wish to note that the major issues concerning the financial allocations to be made at the time of divorce are shaped by the fact that women are much more likely to sacrifice their own career potential for the benefit of the family. See *infra* text accompanying notes 65-67.

## I. FROM FAMILY TO INDIVIDUAL: THE TRANSFORMATION OF MARRIAGE AND DIVORCE

In considering the role of marriage and divorce, one must examine the fundamental changes in the nature of the institutions.<sup>5</sup> During the centuries in which land continued to be the principal source of wealth, the family operated as the basic unit in society.<sup>6</sup> Marriage functioned as a highly structured, indissoluble, hierarchical institution,<sup>7</sup> responsible for not only the affairs of its members but also the management of the major source of wealth and productivity—land.<sup>8</sup>

During this period, society treated the family as an irreducible

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5. Our review does not purport to be a comprehensive history of the family. Rather this article provides a broad brush treatment of the major developments affecting the nature of each spouse's stake in marriage and divorce. The most original examination of the relationship between these developments and the law has been Mary Ann Glendon's work, particularly M. GLENDON, *THE NEW FAMILY AND THE NEW PROPERTY* (1981); see also Friedman, *Rights of Passage: Divorce Law in Historical Perspective*, 63 OR. L. REV. 649 (1984); Minow, "Forming Underneath Everything That Grows:" *Toward a History of Family Law*, 1985 WIS. L. REV. 819; Vernier & Hurlbut, *The Historical Background of Alimony Law and its Present Statutory Structure*, 6 LAW & CONTEMP. PROBS. 197 (1939); Zainaldin, *The Emergence of a Modern American Family Law: Child Custody, Adoption, and the Courts, 1796-1851*, 73 NW. U.L. REV. 1038 (1979). For a critique of modern developments, see L. WEITZMAN, *THE DIVORCE REVOLUTION* (1985).

Traditional historians have also rediscovered the family as a subject of study. See generally P. ARIES, *CENTURIES OF CHILDHOOD: A SOCIAL HISTORY OF FAMILY LIFE* (1962); J. FLANDRIN, *FAMILIES IN FORMER TIMES* (1979); P. LASLETT, *HOUSEHOLD AND FAMILY IN PAST TIMES* (1972); E. SHORTER, *THE MAKING OF THE MODERN FAMILY* (1978); Demos, *The American Family in Past Time*, 43 THE AM. SCHOLAR 422 (1974); Laslett, *The Family as a Public and Private Institution: An Historical Perspective*, 35 J. MARR. & FAM. 480 (1973); Smelser & Halpern, *The Historical Triangulation of Family, Economy and Education*, in *TURNING POINTS: HISTORICAL AND SOCIOLOGICAL ESSAYS ON THE FAMILY* 288 (J. Demos & S. Boocock eds. 1978).

Economists have recently discovered the family as a subject of study in terms of both changes over time and its contemporary characteristics. See generally G. BECKER, *TREATISE ON THE FAMILY* (1981); J. KREPS, *SEX IN THE MARKETPLACE: AMERICAN WOMEN AT WORK* (1971); V. FUCHS, *HOW WE LIVE* (1983); Becker, Landes & Michael, *An Economic Analysis of Marital Instability*, 85 J. POL. ECON. 1141 (1977); Ben-Porath, *The F-Connection: Families, Friends, and Firms and the Organization of Exchange*, 6 POP. DEV. REV. 1 (1980); Gronau, *The Intrafamily Allocation of Time: The Value of the Housewives' Time*, 63 AM. ECON. REV. 634 (1973); Landes, *Economics of Alimony*, 7 J. LEGAL STUD. 35 (1978); Pollack, *A Transaction Cost Approach to Families and Households*, 23 J. ECON. LITT. 581 (1985).

6. See Krauskopf & Thomas, *Partnership Marriage: The Solution to an Ineffective and Inequitable Law of Support*, 35 OHIO ST. L.J. 558, 558 (1974); Demos, *supra* note 5, at 424.

7. J. FLANDRIN, *supra* note 5, at 118-30; Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1563 (1983); E. SHORTER, *supra* note 5, at 72.

8. J. FLANDRIN, *supra* note 5, at 85-88; Smelser & Halpern, *supra* note 5, at 293; see also R. KANTER, *WORK AND FAMILY IN THE UNITED STATES, A CRITICAL REVIEW AND*

ble unit, led by the husband.<sup>9</sup> Upon marriage, the wife lost any independent legal existence. The family assets were held in the husband's name; only he had the capacity to sue, be sued, own property, and enter into contracts.<sup>10</sup> He was responsible for the family finances, care of dependents, and education of the children.<sup>11</sup> The bride, frequently a teen-age virgin marrying an established stranger twice her age,<sup>12</sup> promised to love, honor, and *obey*.<sup>13</sup> She was financially, psychologically, and practically dependent on her husband. The law reinforced male authority in the name of marital indivisibility; there would be no piercing of the marital veil to correct abuses in the conduct of marital responsibilities.<sup>14</sup>

For both men and women, marriage was the major determinant of wealth and status. For men, marriage secured the legitimacy of their offspring, and with legitimacy and primogeniture, the right of succession and authority over the family's hold-

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AGENDA FOR RESEARCH AND POLICY 65 (1977); A. MACFARLANE, *THE ORIGINS OF ENGLISH INDIVIDUALISM* 14-15 (1978).

9. But why is the man to be the governor? Because he is the stronger. In his hands power sustains itself. Place the authority in the hands of the wife, every moment will be marked by revolt on the part of the husband. This is not the only reason: it is also probable that the husband, by the course of his life, possesses more experience, greater aptitude for business, greater powers of application.

Johnston, *Sex and Property: The Common Law Tradition, The Law School Curriculum, and Developments Toward Equality*, 47 N.Y.U. L. REV. 1033, 1049 (1972) (citing J. Bentham, *Principles of the Civil Code*, in 1 WORKS OF JEREMY BENTHAM 355-56 (J. Bowring ed. 1838)); see also *Virginia Ry. & Power Co. v. Gorsuch*, 120 Va. 655, 91 S.E. 632 (1917); J.S. MILL, *The Subjection of Women*, in ON LIBERTY AND OTHER ESSAYS 189, 194 (1926); J. FLANDRIN, *supra* note 5, at 118-29. M. GLENDON, *supra* note 5, at 111.

10. See E. SHORTER, *supra* note 5, at 72; Johnston, *supra* note 9, at 1045-46; Krauskopf & Thomas, *supra* note 6, at 563.

11. See L. WEITZMAN, *THE MARRIAGE CONTRACT* 2 (1981). Before this time, the husband was responsible for rearing the children. See, e.g., 1 W. BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 446-54 (T. Cooley ed. 1899); Comment, *The Custody of Children*, 2 IND. L.J. 325 (1927); Zainaldin, *supra* note 5, at 1045-51; see also E. SHORTER, *supra* note 5, at 67; Krauskopf & Thomas, *supra* note 6, at 562.

12. See Berkner, *Recent Research on the History of the Family in Eastern Europe*, 35 J. MARR. & FAM. 395, 398 (1973); P. LASLETT, *supra* note 5, at 52.

13. "[N]otwithstanding the advances made by modern women towards political and economic independence of man, it still remains true that the normal woman married to the normal man recognizes the obligation of obedience contained in the marriage vow, and observes the Pauline injunction to remain subject to her husband . . ." *Virginia Ry. & Power Co. v. Gorsuch*, 120 Va. 655, 661-62, 91 S.E. 632, 634 (1917); see also J. FLANDRIN, *supra* note 5, at 118-23; W. BLACKSTONE, *supra* note 11, at 444-45 (1803); Johnston, *supra* note 9, at 1048; Demos, *supra* note 5, at 426-27; Perry, *The Canonical Concepts of Marital Consent: Roman Law Influences*, 25 CATH. LAW. 228, 230 (1980).

14. See generally Krauskopf & Thomas, *supra* note 6, at 558-59; Olsen, *supra* note 7, at 1521-23; see also *McGuire v. McGuire*, 157 Neb. 226, 59 N.W.2d 336 (1953); *Commonwealth v. George*, 358 Pa. 118, 56 A.2d 228 (1948).

ings.<sup>15</sup> For women, marriage provided the only available form of support and the only socially sanctioned role outside the convent. Women had few opportunities for an independent economic existence, and in societies that prized virginity,<sup>16</sup> little opportunity for remarriage once the union was consummated.

This combination of economic and social factors produced an enormous dependence on the stability of marriage both for the individuals involved and for society. The law responded by refusing to recognize "divorce" at all. The ecclesiastical courts recognized only divorce *a mensa et thoro*, effectively providing for a legal separation.<sup>17</sup> The marital obligations apart from cohabitation remained unchanged.<sup>18</sup> The husband continued to support the family and manage its affairs. He retained ownership and control of the family's assets and authority over the children.<sup>19</sup> The wife's entitlement to support continued only "*vixerit dum sola et casta*,"—that is, only so long as she

15. J. FLANDRIN, *supra* note 5, at 173.

16. *Id.* at 165. For an indication of the importance of virginity, see Atkinson, "Precious Balsam in a Fragile Glass:" *The Ideology of Virginity in the Later Middle Ages*, 8 J. FAM. HIST. 131 (1983). For a discussion on the cause of action for seduction, see *infra* note 82.

Most of the available historical studies indicate a correlation between wealth and remarriage for widows. Diefendorf, *Widowhood and Remarriage in Sixteenth-Century Paris*, 7 J. FAM. HIST. 379, 389-94 (1982); Griffith, *Economy, Family and Remarriage: Theory of Remarriage and its Application to Preindustrial England*, 1 J. FAM. ISSUES 479, 489 (1980); Grigg, *Toward a Theory of Remarriage: A Case Study of Newburyport at the Beginning of the Nineteenth Century*, 8 J. INTERDISC. HIST. 183, 194 (1977). A study of remarriage in colonial America indicated, however, that while wealth increased the attractiveness of widows to available men, it also strengthened the resolve of many widows not to remarry. Grigg, *supra*, at 195-96. In France, the ability of wealthier widows to attract second husbands caused the enactment of an edict in 1560 designed to protect children of the first marriage from being disinherited. Diefendorf, *supra*, at 389-90.

17. "*A mensa et thoro*" translates as "from bed and board." *Courson v. Courson*, 213 Md. 183, 188, 129 A.2d 917, 919 (1957); see also M. RHEINSTEIN, *MARRIAGE STABILITY, DIVORCE AND THE LAW* 198 (1972); Setaro, *A History of English Ecclesiastical Law*, 18 B.U.L. REV. 102, 121-23 (1938); Younger, *Marital Regimes: A Story of Compromise and Demoralization, Together with Criticism and Suggestions for Reform*, 67 CORNELL L. REV. 45, 46 n.5 (1981). See generally 2 J. BISHOP, *NEW COMMENTARIES ON MARRIAGE, DIVORCE AND SEPARATION* § 471, at 213 (1891); Vernier & Hurlbut, *supra* note 5, at 198 & n.10.

18. See, e.g., *Courson v. Courson*, 213 Md. 183, 188, 129 A.2d 917, 919 (1957); *Proctor v. Proctor*, 9 Hag. Con. 292, 296-97, 161 Eng. Rep. 747, 749 (1819) ("The obligations of marriage might be suspended, but could not be extinguished, the parties might be released in certain cases from personal cohabitation, but the relation of husband and wife still subsisted. . . . No breach of the marriage duties affected the sacred vinculum.").

19. Johnston, *supra* note 9, at 1045-46; Krauskopf & Thomas, *supra* note 6, at 563; Chused, *Married Women's Property Law: 1800-1850*, 71 GEO. L.J. 1359, 1361 (1983); Zainaldin, *supra* note 5, at 1052-74.

remained "chast and single."<sup>20</sup> However long the separation continued, the husband and wife remained part of the same family.<sup>21</sup> The law protected those arrangements that depended on the continuation of the marriage—the indivisibility of family property, the legitimacy and inheritance rights of the children, the authority over family holdings, and the support of dependents.

Recognition of absolute divorce primarily affected the possibility of remarriage. Henry VIII notwithstanding, it was the spectacle of the faithful spouse remaining bound to the marriage while the other spouse flouted its obligations that guaranteed the obsolescence of divorce *a mensa et thoro*.<sup>22</sup> With divorce *a vinculo matrimonii*, the innocent spouse who could establish that his or her mate had engaged in adultery, cruelty, or desertion (namely, unilateral activity incompatible with the continuation of the marriage) was entitled to release from his or her own marital obligations.<sup>23</sup> Fault was central to this determination. If both parties were at fault, no divorce could be granted because neither party could justify release from the marriage.<sup>24</sup>

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20. For a discussion of the historical foundation of alimony, see *Courson v. Courson*, 213 Md. 183, 188-89, 129 A.2d 917, 919-20 (1957); *G. v. G.*, 67 N.J. Eq. 30, 41, 56 A. 736, 740 (N.J. Chan. 1903). For an example of what was meant by the requirement of fidelity to marital vows after separation, see *Proctor v. Proctor*, 2 Hag. Con. 291, 296-97, 161 Eng. Rep. 747, 749 (1819); see also 2 J. BISHOP, *supra* note 17, at §§ 861-868, at 350-53.

21. See, e.g., *DiMarzio v. DiMarzio*, 2 Mass. App. 174, 309 N.E.2d 520 (1974) (no property division); *Adair v. Adair*, 258 Ala. 293, 62 So. 2d 437 (1952) (does not effect an estate by the entirety nor change its essential characteristics); see also *supra* note 18. Breach of the marital obligations after the award of a divorce *a mensa et thoro* will entitle the nonbreaching party, even if the defendant in the original proceeding, to an absolute divorce. See, e.g., *Hermes v. Hermes*, 327 So. 2d 639 (La. Ct. App. 4th Cir. 1976); *Bishop v. Bishop*, 18 Ohio Misc. 177, 248 N.E.2d 641 (Ohio Com. Pl. 1969); *Leutoff v. Leutoff*, 47 Misc. 2d 458, 262 N.Y.S.2d 736 (1965); *Courson v. Courson*, 213 Md. 183, 187-88, 129 A.2d 917, 920 (1957); *G. v. G.*, 67 N.J. Eq. 30, 41, 56 A. 735, 740 (1903); *Haskins v. Haskins*, 188 Va. 525, 50 S.E.2d 437 (1948); see generally Wadlington, *Sexual Relations After Separation or Divorce: The New Morality and the Old and New Divorce Laws*, 63 VA. L. REV. 249 (1977); Annotation, *Divorced Woman's Subsequent Sexual Relations or Misconduct as Warranting, Alone or with Other Circumstances, Modification of Alimony Decree*, 98 A.L.R. 3d 453 (1980).

22. See 2 J. BISHOP, *supra* note 17, § 1452.

23. Divorce *a vinculo matrimonii* translates as divorce from the bonds of matrimony. See 2 J. BISHOP, *supra* note 17, § 469, at 213; Neuner, *Modern Divorce Law—The Compromise Solution*, 28 IOWA L. REV. 272, 276 (1943); Vernier & Hurlbut, *supra* note 5, at 197-98 & n.5; see also M. GLENDON, *supra* note 5, at 53. For some of the problems arising from desertion, see *Thomas v. Contractor's Nat'l Co.*, 213 Miss. 672, 57 So. 2d 494 (1952); *In re Moorehead's Estate*, 289 Pa. 542, 137 A. 802 (1927); *Stegall v. Stegall*, 2 Brock 256, 22 F. Cas. 1226 (C.C. Va. 1825) (No. 13,351).

24. See, e.g., *Conant v. Conant*, 10 Cal. 249, 258 (1858) (Adultery "was a *par delictum*, subject to the same rule of compensation which leaves the parties to find their



The determination of fault secured the release of the innocent spouse's marital obligations while legally confirming the other's continuing obligations. Thus, if a husband succeeded in divorcing his wife, he was released from his duty to support her while retaining ownership of the family property and custody of the children.<sup>25</sup> Correspondingly, if a wife successfully divorced her husband, she was released from her marital obligations of obedience, chastity, and service to her husband. He retained ownership of all property in his name, which ordinarily included all jointly acquired property, subject to a duty to support her from the proceeds.<sup>26</sup> Thus, the "innocent husband" returned to the unencumbered position he had been in before marriage, freeing him—both legally and financially—to marry again. The "innocent wife" secured continuation of the support she expected from the marriage and needed to avoid becoming a ward of the state.<sup>27</sup>

By the end of the nineteenth century, a wholesale change had occurred in the role of marriage and divorce.<sup>28</sup> Commercial ventures had replaced land as the primary source of wealth.<sup>29</sup> Men worked increasingly outside the home, with their wives

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common remedy in common humiliation and mutual forgiveness."); see also *Proctor v. Proctor*, 2 Hag. Con. 292, 298, 161 Eng. Rep. 747, 749 (1819).

25. Through the mid-twentieth century, a man in a common law state retained title to all property held in his name. Since most jointly acquired property was held in the husband's name alone, he received the lion's share of family property even after passage of the Married Women's Property Acts. Chused, *supra* note 19, at 1409-10; Johnston, *supra* note 9, at 1066.

26. M. GLENDON, *supra* note 5, at 53; *Kempe v. Kempe*, 1 Hag. Ecc. 532, 162 Eng. Rptr. 668 (1828); *Wallingsford v. Wallingsford*, 6 H. & J. 398, 400-01, 10 Md. 485, 488 (1823) (cited in *Courson v. Courson*, 213 Md. 183, 186, 129 A.2d 917, 919 (1957)); *Smith v. Smith*, 2 Phill. Ecc. 235, 161 Eng. Rptr. 1130 (1814); *Cooke v. Cooke*, 2 Phill. Ecc. 40, 161 Eng. Rptr. 1072 (1812); see also Atkin, *Spousal Maintenance: A New Philosophy?*, 9 NEW ZEALAND U. L. REV. 336, 340 (1981); Chused, *supra* note 19, at 1405-06, n.244; Johnston, *supra* note 9, at 1036; see generally Vernier & Hurlbut, *supra* note 5, at 198.

27. See *Graves v. Graves*, 108 Mass. 314, 318 (1871) (The wife should not be driven onto the street while her husband is permitted to continue in a life of vice.). Because support was tied to the continuation of marital obligations rather than to compensation for the arrangements made during the marriage, there was no provision for alimony after annulment. See 2 J. BISHOP, *supra* note 17, § 855, at 348; Vernier & Hurlbut, *supra* note 5, at 201. For a relatively modern annulment case denying alimony on that ground, see *Denberg v. Frischman*, 24 App. Div. 2d 100, 264 N.Y.S.2d 114 (1965), *aff'd*, 17 N.Y. 2d 778, 270 N.Y.S.2d 627, 217 N.E.2d 675, *cert. denied*, 385 U.S. 884 (1966).

28. One of the most important changes was the discontinuation of legislative divorce. By the time of the civil war, the judiciary had been assigned responsibility for the dissolution of marriages. 3 G. HOWARD, A HISTORY OF MATRIMONIAL INSTITUTIONS 31-50, 96-101 (1904); see also Younger, *supra* note 17, at 47 & n.11.

29. Chused, *supra* note 19, at 1362; Pollock, *supra* note 5, at 603-04.

assuming a greater role in running the household in their absence.<sup>30</sup> Children, now less important as heirs to the indivisible family estate or as economic assets adding to the family income, were raised far more by their stay-at-home mothers.<sup>31</sup> Single women enjoyed increased opportunities for employment outside the home, and married women acquired a measure of control over their separately acquired property.<sup>32</sup>

The result of these economic changes was increasing recognition of men and women's individual identity within the family while marriage continued as a highly specialized, hierarchical (if no longer authoritarian) and not quite so indissoluble institution. Confirming the wife's increasingly independent identity, the Married Women's Property Acts granted married women the capacity to own property, to sue and be sued, and to enter into contracts.<sup>33</sup> Upon divorce, women could recover their separately held property and pay for separately incurred debts.<sup>34</sup> As the responsibility for child rearing shifted from father to mother during the marriage, custody presumptions shifted in favor of the mother at the time of divorce.<sup>35</sup>

At the same time, however, the law confirmed male domination over the family's commercial ventures. Upon marriage, women were expected to give up any outside employment to attend to family affairs.<sup>36</sup> The husband's domicile controlled that of his wife; she could be divorced for desertion if she did not

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30. Olsen, *supra* note 7, at 1499; Smelser & Halpern, *supra* note 5, at 5307-09; see also K. SKLAR, CATHERINE BEECHER, A STUDY IN AMERICAN DOMESTICITY (1973); Demos, *Images of the American Family, Then and Now*, in CHANGING IMAGES OF THE FAMILY 43, 51 (Tuft and Myerhoff eds. 1979); Welter, *The Cult of True Womanhood, 1820-1860*, 18 AM. Q. 151-74 (1966).

31. See, e.g., J. DEMOS, A LITTLE COMMONWEALTH: FAMILY LIFE IN PLYMOUTH COLONY 71 (1970) (discussion of the practice of "putting out" of children); J. KETT, RITES OF PASSAGE: YOUTH AND ADOLESCENCE IN AMERICA, 1790-PRESENT (1975); Demos, *supra* note 5, at 441; see generally Stern, Smith & Doolittle, *How Children Used to Work*, 39 LAW & CONT. PROBS. 93 (1975).

32. See C. DEGLER, AT ODDS: WOMEN AND THE FAMILY IN AMERICA FROM THE REVOLUTION TO THE PRESENT 8-9, 28 (1980); J. KREPS, *supra* note 5, at 28-30; Younger, *supra* note 17, at 68 & n.169.

33. For the history of the adoption of these laws, see 3 C. VERNIER, AMERICAN FAMILY LAWS § 173, at 192 (1935); Johnston, *supra* note 9, at 1066; Younger, *supra* note 5, at 62-63 & nn.111-19; see generally Chused, *supra* note 19.

34. 2 J. BISHOP, *supra* note 17, § 1644, at 623 (1891).

35. Chused, *supra* note 19, at 1406; Glendon, *Family Law Reform in the 1980's*, 44 LA. L. REV. 1553, 1585 (1984); Zainaldin, *supra* note 5, at 1070-72.

36. J. KREPS, *supra* note 5, at 17; Demos, *supra* note 5, at 434; Shultz, *Contractual Ordering of Marriage: A New Model for State Policy*, 70 CALIF. L. REV. 207, 207 (1982); see also Atkin, *supra* note 26, at 338.

follow him.<sup>37</sup> Commercial enterprises in which both spouses participated were subject to the husband's control.<sup>38</sup> A wife was entitled neither to compensation for assistance given to her husband's business, nor to restitution for goods and services supplied.<sup>39</sup> Upon divorce, since the husband retained ownership of all jointly held property,<sup>40</sup> the wife remained entitled to and dependent upon his support.<sup>41</sup>

Thus, marriage remained an institution governing the relationship between two parties performing highly specialized and—at least financially—unequal roles.<sup>42</sup> But neither economic productivity nor individual well-being depended to the same degree on the indissolvability of the institution. Even a small measure of economic independence persuaded more women to end unhappy marriages.<sup>43</sup> With increasing life expectancies and declining social stigma, the prospects for remarriage increased for both spouses.<sup>44</sup> Rules against collusion proved ineffective in

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37. See, e.g., DEL. CODE ANN. tit. 13, §§ 1701, 1702 (1953); GA. CODE ANN. § 19-2-3 (1982); see also *Hildebrand v. Hildebrand*, 105 Ill. App. 261, 244 N.E.2d 866 (1969); *Yohey v. Yohey*, 205 Pa. Super. 329, 208 A.2d 902 (1965); *Graves v. Graves*, 193 Va. 659, 70 S.E.2d 339 (1952).

38. See generally *Johnston*, *supra* note 9.

39. See, e.g., *Leatherman v. Leatherman*, 297 N.C. 618, 256 S.E.2d 793 (1979); *Matthews v. Matthews*, 2 N.C. App. 143, 162 S.E.2d 697 (1968); *Youngberg v. Holstrom*, 252 Iowa 815, 108 N.W.2d 498 (1961); *Sprinkle v. Ponder*, 233 N.C. 312, 64 S.E.2d 171 (1951); *Frame v. Frame*, 120 Tex. 61, 36 S.W.2d 152 (1931); *Miller v. Miller*, 78 Iowa 177, 35 N.W. 464 (1887); *Johnston*, *supra* note 9, at 1066, 1071-73; *Krauskopf & Thomas*, *supra* note 6, at 562; *Shultz*, *supra* note 36, at 326-27 & n.462; Note, *Domestic Relations—The Presumption of Gratuitous Services—Must a Wife Work for Free?*, 16 WAKE FOREST L. REV. 235, 237 (1980). Indeed, even if the husband had promised to pay, the promise would be unenforceable. See *Porter v. Dunn*, 131 N.Y. 314 (1892); *Whitaker v. Whitaker*, 52 N.Y. 368 (1873).

40. See, e.g., *Chapman v. Mitchell*, 23 N.J. Misc. 358, 359-60, 44 A.2d 392, 393 (N.J. Super. 1945); see generally *Johnston*, *supra* note 9, at 1089; *Krauskopf & Thomas*, *supra* note 6, at 563; *Younger*, *supra* note 17, at 48 n.15.

41. See generally *Johnston*, *supra* note 9, at 1071. Of course, for women, the continuation of support depended on a determination that the husband's "fault" justified termination of the marriage. See *supra* text accompanying note 25.

42. The roles were economically unequal in the sense that the husband's role provided a basis for self support and probably enhanced his ability to remarry, while the wife's role did not necessarily provide either. However, one of the major changes occurring during the nineteenth century was a change in the view of the women's role from an inherently inferior one to a separate but potentially equal one. See C. DEGLER, *supra* note 32, at 8-9; *Chused*, *supra* note 19, at 1420; *Demos*, *supra* note 5, at 422-35; *Smelser & Halpern*, *supra* note 5, at 289; see also *Olsen*, *supra* note 7, at 1499.

43. See generally *Friedman*, *supra* note 5, at 651-54. Divorce rates rose further following World War I, reaching a high of 610,000, or 4.3 per 100 population, in 1946. The postwar years brought a brief respite in the trend. Davis, *Statistical Perspective on Marriage and Divorce*, 272 ANNALS 9, 18 (1950).

44. Indeed, Glendon suggests that high mortality rates in earlier societies meant that

divorce suits. With less draconian consequences, the parties became more willing to collaborate in establishing fault, and the courts more willing to grant divorces.<sup>45</sup> Nonetheless, the allocations made upon divorce were still tied to findings of fault and still designed to protect the major interests at stake: the indivisibility of commercial ventures, support for the dependent spouse, and custody for the wife as the parent most directly involved in the children's upbringing.

If the nineteenth century produced major changes in marriage and divorce, the twentieth century witnessed a wholesale revolution. By the last part of the twentieth century, the major source of wealth had long since ceased to be land or family held ventures. Large organizations, whether public or private, determined productivity.<sup>46</sup> Entitlements to jobs, earning power, pensions, and government benefits have become the major sources of income.<sup>47</sup> Families no longer govern the major sources of wealth

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most marriages were of short duration even without divorce. M. GLENDON, *supra* note 5, at 30.

With respect to social attitudes toward divorce, see Kelso, *The Changing Social Setting of Alimony Law*, 6 LAW & CONTEMP. PROBS. 186 (1939):

It would seem, further, to be a reasonable consequence of the changed social position of woman that attitudes toward divorce would show decreasing disapproval. People generally realize the economic strain that now attends family life. They see the wife forced to carry on a tour of labor or of professional work outside the home. They find the husband harassed by the struggle for means of support of himself and his family. Hence they look with some leniency upon the parties when quarreling and discontent arise in the home. They are less prone to condemn the wife for seeking divorce or the husband for failing to provide adequate support. Divorce is no longer followed by social ostracism. That which formerly was looked upon as fault and sin, tends nowadays to be viewed as misfortune calling for sympathy.

*Id.* at 193.

Lenore Weitzman reported in 1981 that remarriage by women was largely a function of the women's age at the time of divorce. Women under 30 had a 75% chance of remarrying, while women over 40 had only a 28% chance of remarrying. Weitzman, *The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards*, 28 UCLA L. REV. 1181, 1228-29 (1981) (citing Nat'l Center for Health Statistics, U.S. Department of Health, Monthly Vital Statistics Report (Supp. Sept. 12, 1980)). At ages of 25-44, remarriage rates are almost twice as high for men as for women. V. FUCHS, *supra* note 5, at 152. *But cf.* Survey of Economic Opportunity, Series P-20, no. 223, U.S. Bureau of the Census, *cited in* Becker, Landes & Michael, *supra* note 5, at 1172-77. This data, which is taken from records from the 1960s, shows somewhat higher rates of remarriage generally though it, too, shows greater remarriage by men than women, and a stronger (negative) correlation between age and remarriage for women than for men.

45. See, e.g., *Reed v. Reed*, 138 Colo. 74, 329 P.2d 633 (1958). See generally M. RHEINSTEIN, *supra* note 17, at 247-60; Note, *A Survey of Mental Cruelty as a Ground for Divorce*, 15 DE PAUL L. REV. 159, 163 (1965).

46. See M. GLENDON, *supra* note 5, at 91-96.

47. Glendon, *Marriage and the State: The Withering Away of Marriage*, 62 VA. L.

nor necessarily determine their members' lifelong financial prospects.

As dependence on the family generally has decreased, the division of labor within the family has become less specialized.<sup>48</sup> Employment outside the home has become increasingly common for women of all ages and marital status.<sup>49</sup> During the same period, life expectancy has increased, the number of children per family has fallen, nuclear families have become more common, and labor saving devices have made household chores less onerous.<sup>50</sup> Childrearing, housekeeping, and care of older or infirm relatives no longer take up the overwhelming part of an adult woman's lifespan. Women are accordingly freer to pursue other activities and, with their own income, are less dependent on the support of their husbands.

With the family no longer the exclusive determinant of status and wealth, the justification for marriage has changed from social obligation to mutual affection.<sup>51</sup> Societal norms no longer

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REV. 663, 710 (1976); Reich, *The New Property*, 73 YALE L.J. 733 (1963); see also Krauskopf, *Recompense for Financing Spouse's Education: Legal Protection for the Marital Investor in Human Capital*, 28 KAN. L. REV. 379, 411 (1980); Weitzman, *Legal Regulation of Marriage: Tradition and Change*, 62 CALIF. L. REV. 1169, 1185 n.82 (1974).

48. See Becker, Landes & Michael, *supra* note 5, at 1146 & n.5 (1977); L. WEITZMAN, *supra* note 11, at 168-69; Garrison, Book Review, 131 U. PA. L. REV. 1039, 1043 (1983). The economics of the family literature, particularly that by Becker, Landes & Michael, *supra* note 5, adopts the theory of comparative advantage to argue that men and women should perform specialized roles and that women, for biological reasons, should assume the greater responsibility for childcare and housekeeping. Specialization within the family, however, is only part of the story. Most studies show that, in spite of greater labor force participation by women, the assignment of responsibilities within the family remains highly specialized, with women continuing to assume the primary responsibility for children and the home. See *infra* note 66. The major changes stem not from less specialization within the family but from greater specialization among women. While men share child care and homemaking responsibilities only to a small degree more than they did before, women are now increasingly hiring other women to help provide domestic services. Thus, much of the economics of the family literature advocating specialized roles and especially that by Becker, *supra* note 5, at 14-37; Landes, *supra* note 5, at 40-44; Becker, Landes & Michael, *supra* note 5, at 1152-53, is simply beside the point. Indeed, their use of the theory of comparative advantage would support more, not less, labor force participation by women, since increased specialization among women would presumably result in many of the same benefits as specialization between men and women.

49. See generally C. BIRD, *THE TWO-PAYCHECK MARRIAGE* (1979).

50. See *id.* at 13; J. FLANDRIN, *supra* note 5, at 153; V. FUCHS, *supra* note 5, at 133; J. KREPS, *supra* note 5, at 78; E. SHORTER, *supra* note 5, at 17, 24, 26, 31, 33; Johnston, *supra* note 9, at 1066.

51. E. SHORTER, *supra* note 5, at 5. See also Demos, *supra* note 5, at 425-26; Grossberg, *Guarding the Altar, Physiological Restrictions and the Rise of State Intervention in Matrimony*, 26 AM. J. LEGAL HIST. 197, 208 (1982); Model & Furstenberg, *The Timing of Marriage in the Transition to Adulthood: Continuity and Change, 1860-1975*, in

regard it as a sufficient reason to marry that the spouse has parental approval, that he or she come from a "good family," that he be able to support her "in the style to which she has been accustomed," or that she be able to promote his well-being through her ability as a homemaker or entertainer.<sup>52</sup> The basis of modern marriage is love. And when love disappears, when there is no longer mutual affection, society dictates no reason to stay married.<sup>53</sup>

In modern society, divorce plays an altogether different role. Divorce is a matter of individual choice, following not from the abdication or breach of marital duties, but from the end of mutual affection. Where each spouse has the right to leave, the identification of "fault" is meaningless.<sup>54</sup> Divorce is no longer the unilateral release of a spouse from his or her marital obligations justified by the breach of the other spouse. It is a determination—precipitated perhaps by the actions of one spouse, but nonetheless applicable to both—that marital differences have become irreconcilable. Modern divorce law eventually followed this social transformation, with all states now recognizing "no fault" divorce.<sup>55</sup> Even where fault grounds are still available, most couples agree to the dissolution of their union without a pro forma assignment of blame.<sup>56</sup>

With these changes in the nature of marriage and divorce, the allocations made at the time of the divorce serve different purposes. Without a societally imposed duty to continue the marriage, modern divorce courts emphasize the severance of

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TURNING POINTS 133 (J. Demos & S. Boocock eds. 1978); Smelser & Halpern, *supra* note 5, at 307.

52. E. SHORTER, *supra* note 5, at 6; Skolnick, *The Social Contexts of Cohabitation*, 29 AM. J. OF COMP. L. 339, 348 (1981).

53. The one remaining reason is children, and there is no longer a clear societal consensus that an unhappy couple should stay together solely for the sake of the children. See generally K. KENNISTON, ALL OUR CHILDREN: THE AMERICAN FAMILY UNDER PRESSURE 21 (1977).

54. That is, fault is meaningless as a prerequisite for divorce. It may still be relevant for the financial awards made at the time of divorce. See *infra* text accompanying notes 85-89.

55. South Dakota became the last to adopt no fault grounds on March 14, 1985, with the signing of H.B. 1169, which added irreconcilable differences to S.D. CODIFIED LAWS §§ 25-42, 25-4-17.1 (Michie Co. 1985); see generally L. WEITZMAN, *supra* note 5, at 15-51; Friedman, *supra* note 5, at 664-69.

56. Indeed, the "trivialization" of the fault requirement may have provided a major impetus for no fault divorce. See, e.g., Madox, *Who Pays for No-Fault Divorce?*, 283 THE ECONOMIST 75 (1982); Mnookin & Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 951 n.3 (1979).

marital bonds rather than the identification of which obligations are to continue.<sup>57</sup> With less specialization in marital roles, the husband is no longer given ownership of the property while the "innocent" wife receives alimony. Most states allow each spouse to reclaim the property he or she brought into the marriage, and to retain gifts or bequests, while providing approximately equal division of property acquired during the marriage.<sup>58</sup> With both spouses presumed independent upon divorce,<sup>59</sup> and with no determination of culpability for the marital breakup,<sup>60</sup> the courts intervene primarily to resolve the division of jointly held property.<sup>61</sup> They are reluctant to impose any continuing relationship on the couple once the divorce has become final. Formerly indivisible family ventures are not included in the property settle-

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57. See, e.g., *Pratt v. Pratt*, 23 Pa. D. & C. 673 (1982); O'Kelly, *Entitlements to Spousal Support After Divorce*, 61 N.D.L. REV. 225 (1985).

58. See generally ARIZ. REV. STAT. ANN. § 25-318 (1980); ARK. STAT. ANN. § 9-12-315 (1987); CAL. CIV. CODE § 4800 (West 1986); IDAHO CODE § 32-712 (1980); ILL. REV. STAT. ch. 40, para. 503(a)(1) (1977); LA. REV. STAT. ANN. § 9:2801 (West 1982); NEV. REV. STAT. § 125.150 (1985); N.J. REV. STAT. § 2A: 34-23 (1983); N.Y. DOM. REL. LAW § 236B (1980); N.M. STAT. ANN. § 40-4-7 (1973); PA. CONS. STAT. § 23:401 (1980); WASH. REV. CODE § 26.09.080 (1973); WIS. STAT. § 766.31 (1985); VA. CODE ANN. § 20-107.3 (1986); L. WEITZMAN, *supra* note 5, at 70-73; see also Kay, *Equality and Differences: A Perspective on No-Fault Divorce and its Aftermath*, 56 U. CINN. L. REV. 1, 49-51 (1987).

59. This presumption emphasizes short term support orders tied to a demonstration of "need." See L. WEITZMAN, *supra* note 11, at 41-46; Atkin, *supra* note 26, at 342; Fineman, *Implementing Equality: Ideology, Contradiction and Social Change*, 1983 WIS. L. REV. 789, 829, 835; McGraw, Sterin & Davis, *A Case Study in Divorce Law Reform and its Aftermath*, 20 J. FAM. L. 443, 462-73 (1981-82); Weitzman & Dixon, *The Alimony Law Myth: Does No-Fault Divorce Make A Difference?*, 14 FAM. L.Q. 141, 148-49 (1980); see also UNIF. MARRIAGE AND DIVORCE ACT § 308, 9A U.L.A. 347 (1973) [hereinafter cited as UMDA]; see also *infra* text accompanying notes 105, 133 & 150; see generally Temple, *Freedom of Contract and Intimate Relationships*, 8 HARV. J.L. & PUB. POL'Y 121 (1985).

60. That is, divorce no longer requires a determination of fault as a prerequisite for dissolution of the union. Many states still permit consideration of marital misconduct in the award of spousal support. See *infra* notes 111, 125 & 129 and accompanying text.

61. "With the bitterness that frequently follows a dissolution, the ideal situation would be to put the parties' economic differences to rest with the property division. Where possible, each party should be given his or her own separate assets." Sackett & Munyon, *Alimony: A Retreat From Traditional Concepts Of Spousal Support*, 35 DRAKE L. REV. 297, 302 (1985-86). See *In re Marriage of Mentel*, 359 N.W.2d 505, 506 (Iowa App. 1984). So long as husbands tended to hold jointly acquired property solely in their own name, and to retain that property after divorce, alimony served to redress—at least to some degree—the unequal property division. See Atkin, *supra* note 26, at 340; M. GLENDON, *supra* note 5, at 53; Neuner, *supra* note 23, at 282 & n.29. With relatively more equal property divisions, modern spousal support is no longer necessary to balance generous property awards to the other spouse. This is consistent with the modern emphasis on termination rather than reaffirmation of marital responsibilities. See UMDA, § 102, 9A U.L.A. 158 (1973); *McArdle v. McArdle*, 55 Ill. App. 3d 829, 370 N.E.2d 1309 (1977); *In re Rislove*, 31 Or. App. 305, 570 P.2d 403 (1977).

ment while the most important sources of modern wealth—entitlements to future income—remain the province of individuals.<sup>62</sup>

The result is an uneasy coexistence of two systems that together, describe only a minority of modern marriages. In traditional marriages where the wife continues to depend upon her husband's income, modern divorce law keeps open the possibility of permanent alimony justified by dependence.<sup>63</sup> When both spouses are capable of self-support, the law provides for an approximately equal property division.<sup>64</sup> But in an increasing majority of marriages, wives are neither dependent nor equal.

Whether because of sex discrimination, the division of marital responsibilities, or individual differences in ability, ambition, education, training, or social encouragement, husbands are likely to earn more than their working wives.<sup>65</sup> For their part, women continue to assume a large share of the family's domestic responsibilities, a share compounded with the arrival of children.<sup>66</sup> The longer the marriage, the more likely even working women are to be dependent on their husband's income to maintain their standard of living, the more likely they are to have sacrificed to some degree their own financial future to further the marriage, and the less likely their prospects for remarriage become.<sup>67</sup> In addition, men are, perhaps for the first time, making similar sacrifices to support their wives' careers or to participate in raising the children. The existing system of marriage and divorce provides no scale for balancing these sacrifices, and

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62. See M. GLENDON, *supra* note 5, at 60; Sackett & Munyon, *supra* note 61, at 302-03. See generally Reich, *supra* note 47.

63. See generally Fineman, *supra* note 59, at 801-10; O'Kelly, *supra* note 57, at 227; Comment, *For Richer or Poorer—Equities in the Career Threshold, No Asset Divorce*, 58 TUL. L. REV. 791, 796 (1984); *infra* note 132.

64. See *supra* note 58.

65. M. GLENDON, *supra* note 5, at 130; J. KREPS, *supra* note 5, at 2; Blumrosen, *Wage Discrimination, Job Segregation and Women Workers*, 6 WOMENS RTS. L. REP. 19, 24 (1980); Frug, *Securing Job Equality for Women: Labor Market Hostility to Working Mothers*, 59 B.U.L. REV. 55, 57 (1979); Weitzman, *supra* note 44, at 1238.

66. C. BIRD, *supra* note 49, at 95, 97; G. GAIN, *MARRIED WOMEN IN THE LABOR FORCE* 7 (1966); J. KREPS, *supra* note 5, at 43; A. SKOLNICK, *THE INTIMATE ENVIRONMENT* 245 (1978); Fineman, *supra* note 59, at 858 & n.194; Frug, *supra* note 65, at 102.

67. Frug, *supra* note 65, at 100; Maddox, *supra* note 56, at 84; Weitzman, *supra* note 44, at 1228-29. After a relatively short marriage, especially if there are no children, a wife's opportunities to remarry, and to take advantage of available career prospects, should be relatively unaffected. See generally Rubin, *Are Working Wives Hazardous to Their Husband's Mental Health?*, 17 PSYCHOLOGY TODAY 70, 72 (1983).



while modern commentators have decried the resulting inequities,<sup>68</sup> there has been no comprehensive analysis of the interests at stake.

## II. AN EXAMINATION OF THE RELIANCE INTEREST IN MARRIAGE AND DIVORCE

In examining the historical developments underlying marriage and divorce, a consistent theme emerges: the protection of the reliance interest in marriage. In traditional societies where women had few prospects for support, remarriage, or an independent existence apart from the family, the law did not recognize divorce at all. As the consequences of marital dissolution became less catastrophic, the emphasis on fault still made divorce difficult and provided often generous support for a dependent spouse subject to desertion, cruelty, or adultery. Throughout its evolution, the law has protected male investment in the sources of family income, freeing "innocent" men from the financial burdens that might otherwise have restricted their prospects for remarriage, while requiring culpable men to support their former wives from their uninterrupted income. In the modern realm, where divorce is more frequent and both spouses are increasingly independent, the nature of the reliance interest itself needs to be reexamined.

When used to describe damages in contract, the "reliance interest" is the position the parties would have been in had the contract never been created.<sup>69</sup> In its broadest sense, this position

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68. Weitzman has been the leading critic, insisting that divorce leaves most men financially better off and most women worse off than they were when married. Weitzman arrives at this conclusion by assuming that during marriage, each spouse has access to half the family income, and after divorce, each spouse has access only to his or her own income and spousal support if provided. Since men generally earn more than their former wives, and since support awards do not come close to making up the difference, men are by definition "better off." This somewhat overstates the case, however, since both parties' expenses after divorce are likely to be higher than they were during the marriage, and since Weitzman does not take into account the loss of non-income producing contributions to the marriage, such as housework. Nonetheless, there is relatively little dispute that women are often in financially worse shape after a divorce than they were in the marriage and that divorced women are relatively worse off than divorced men. See Weitzman, *supra* note 44; see also Fineman, *supra* note 59, at 826-30; Krauskopf, *supra* note 47, at 392; O'Kelly, *supra* note 57, at 246; Sharp, *The Partnership Ideal: The Development of Equitable Distribution in North Carolina*, 65 N.C.L. REV. 195, 197-201 & n.3 (1987); Wishik, *Economics of Divorce: An Exploratory Study*, 20 FAM. L.Q. 79, 99 (1986). For an excellent review of Weitzman's work and subsequent developments, see Kay, *supra* note 58, at 59-77.

69. In defining the "reliance interest," we are using the term in the sense developed originally by Fuller and Perdue, *supra* note 1. That definition has now been incorporated in

includes opportunities foreclosed by the contract, activities which would not have been undertaken but for the contract, and performance required by the contract. The reliance interest has been defined in contrast to the "expectation interest," which is the position the parties would have been in had the contract been performed, and the "restitution interest," which requires disgorgement of any benefit conferred in partial performance of the contract.<sup>70</sup> Fuller and Perdue saw, however, that in a competitive market, expectation and reliance tended to converge.<sup>71</sup> In a market with many buyers and sellers exchanging similar products, the opportunity chosen (namely, the return expected from the contract) ought to be all but identical to the next best alternative, assuming a substantial array of choices.<sup>72</sup> Fuller and

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the RESTATEMENT (SECOND) OF CONTRACTS § 344 (1981). See Hudec, *Restating the Reliance Interest*, 67 CORNELL L. REV. 704 (1982). The "reliance interest" should not be confused with "detrimental reliance" or "promissory estoppel" as a separate theory of liability. See RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981). Fuller and Perdue developed the principle of reliance, in its broadest sense, to explain the entire range of contract damages, not just those associated with the type of nonbargain promises at issue in § 90.

70. See RESTATEMENT (SECOND) OF CONTRACTS § 344 (1981); Fuller & Perdue, *supra* note 1, at 53-54. Thus, in a construction contract which Owner A breaches after Builder B completes the basement and orders, but does not install, custom designed windows, protection of the expectation interest would give Builder B the benefit of the bargain. In order to put Builder B in the position he would have been in had the contract been performed, he would receive compensation for any work performed before the breach, money lost purchasing the windows, and any lost profits on the contract. A restitution award would require Owner A to pay only for any benefit he had received, that is, compensation for construction of the basement. Protection of the reliance interest would require compensation for any expenses incurred before the breach, including payment both for the basement *and* the custom made windows, if the builder were unable to resell them.

71. Fuller & Perdue, *supra* note 1, at 55-56, 60-63. The idea that the expectation measure and the reliance measure ought to be almost identical for most contracts is the major contribution of the piece and the one most often overlooked. Fuller and Perdue's article led to greater recognition of reliance in those areas where expectation and reliance diverged. "Reliance" is still used in many contexts to refer only to expenses incurred, not opportunities foregone. See generally Hudec, *supra* note 69.

72. Fuller & Perdue, *supra* note 1, at 60. Using the example in note 70 *supra*, if Builder B had not entered into the contract with Owner A, he not only would have been spared the expenses on the basement and the windows, but he also would have entered into another contract. His profit from the other contract would presumably have been no greater, since if the other job paid more, he would have chosen it over the contract with Owner A. Fuller and Perdue also note, however, that the profit would presumably be no less. They reasoned that if Owner A were paying above market rates, other contractors would bid down the price. If Owner A could have hired a different contractor at a lower price both he and the other owner would presumably have done so. So long as the services offered by Builder B are approximately the same as those offered by other builders, and there are many competing builders and owners, one would expect both the contract with Owner A and any alternative contracts to reflect the market price. Accordingly, any effort to put Builder B in the position he would have been in had he never entered into the

Perdue accordingly concluded that the major justification for award of an expectation measure of contract damages was in fact to protect reliance. They reasoned that, given the difficulty of proving foregone opportunities with any certainty, the benefits expected from the contract provided the most workable estimation of the full reliance loss; furthermore, only protection of the expectation interest would encourage reliance on contract.<sup>73</sup> Where expectation and reliance diverged, however, contract law tended to protect only the reliance interest.<sup>74</sup>

We believe that many of the changes in marriage stem from changes in the nature of the reliance interest and its relationship to the expectation interest in marriage. In traditional societies, the reliance interest and the expectation interest in marriage tended to converge. For women, marriage provided the most certain (and for some the only) source of income and status.<sup>75</sup> Virtually all women married, and those marriages were frequently within their own social class and to the man who offered the greatest material advantages.<sup>76</sup> If they did not marry, women were primarily dependent on the lesser support likely to be received from their families and the little money earned on their own.<sup>77</sup>

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contract with Owner A should include the profit lost from alternative contracts. Proving the amount of that profit is inherently problematic, but economists would expect the lost profit to approximate that profit expected from the contract with Owner A. The expectation interest (including the profit on contract with Owner A) would thus equal the full reliance interest.

73. Fuller and Perdue reasoned that in order to protect reliance, it was necessary to "dispense with its proof":

[T]he rule measuring damages by the expectancy may also be regarded as a prophylaxis against the losses resulting from detrimental reliance. Whatever tends to discourage breach of contract tends to prevent the losses occasioned through reliance. Since the expectation interest furnishes a more easily administered measure of recovery than the reliance interest, it will in practice offer a more effective sanction against contract breach.

Fuller & Perdue, *supra* note 1, at 61.

74. *Id.* at 79.

75. See M. GLENDON, *supra* note 5, at 31-32. For a discussion of changing attitudes on this score during the nineteenth century, see E. CRAIK, *MARRIAGE AND PROPERTY* 166-67 (E. Craik ed. 1984).

76. See generally E. CRAIK, *supra* note 75; L. TERMAN, *GENETIC STUDIES OF GENIUS* (1925); see also Becker, Landes & Michael, *supra* note 5, at 1151, on the tendency to marry within one's own social class.

77. The ability of women to hold property varied with time. During the period dominated by primogeniture, it was rare for women to inherit at all. See, e.g., Kettle, *My Wife Shall Have It: Marriage and Property in the Wills and Testaments of Later Medieval England*, in E. CRAIK, *supra* note 75, at 89-103. Women who did acquire property of their own ceded control to their husbands during marriage. See, e.g., J. BISHOP, *MARRIAGE*,

In entering marriage, then, a traditional woman's most important loss was the opportunity to have married another. While the value of these other possible mates is impossible to measure, it is reasonable to assume that, so long as she married within her own social class, another man would have offered advantages similar to those provided by the groom she chose.<sup>78</sup> With the failure of a first marriage, however, women have rarely had the opportunity for as advantageous a second marriage.<sup>79</sup> Accordingly, for traditional women, the expectation interest (defined in terms of the level of support provided by the marriage)<sup>80</sup> tended to be the best measure of the reliance loss

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DIVORCE AND SEPARATION § 1144 (1891); 3 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 526-27 (6th ed. 1903); 2 POLLOCK & MAITLAND, THE HISTORY OF ENGLISH LAW 404-05 (2d ed. 1894).

Until a woman married, her father was responsible for her support. See, e.g., *Suire v. Miller*, 363 So. 2d 945 (La. Ct. App. 3d Cir. 1978) (discussion of the concept of emancipation and its limitation).

78. See *supra* note 76.

79. P. ENGLAND & G. FARKAS, HOUSEHOLDS, EMPLOYMENT AND GENDER 54-59 (1986). Even before the twentieth century, the ability of women to remarry has varied greatly over time and in different societies, and comprehensive data is unavailable. The popular literature and modern marital data suggests a strong negative correlation for women between age and marital opportunities, so that simply the passage of time during the course of the marriage is likely to have had a negative effect. See Becker, Landes & Michael, *supra* note 5, at 1151-77; Cohen, *Marriage, Divorce and Quasi Rents*; or, "I Gave Him The Best Years of My Life," 16 J. LEG. STUDIES 267, 268 (1987); Weitzman, *supra* note 44, at 1229. Of course, so long as divorce was difficult or carried a strong stigma, it would be impossible to determine to what degree the marriage itself, as opposed to the manner of its termination, foreclosed other opportunities. See *supra* note 44; see also Book Review, Wallis and Edward, *Letters 1931-1937, The Intimate Correspondence of the Duke and Duchess of Windsor*, THE WASHINGTON POST BOOK WORLD 5 (1986) ("In the court of Queen Victoria, for most of her reign, divorced women, even when innocent parties, could not be received.").

80. Defining this expectation interest in terms of the level of support at the time of divorce is at best an imperfect compromise. To the extent the expectation interest and the reliance interest coincide, it is the expectation interest at the time of the marriage which one would expect to mirror the opportunities foreclosed by the marriage. But that measure—the expected value of the failed marriage at the time of its inception—is almost as difficult to determine as the reliance interest itself. The level of support enjoyed at the time of the divorce is easier to ascertain.

The expectation interest at the time of divorce, however, should normally be defined to include not only the support received during the marriage but also any changes expected thereafter or, in more technical terms, the present value of the projected earnings stream. This measure, while still somewhat speculative, could be estimated at the time of divorce or, where permanent alimony is awarded, it could be adjusted as circumstances change. This, however, is rarely done.

One suspects that the courts, eager to terminate the union between the parties, are more serious about reliance than expectation. However egregious the husband's "fault," there seems to be little enthusiasm for requiring him to share the good fortune he enjoys after the marriage ends. See, e.g., *Cole v. Cole*, 44 Md. App. 435, 409 A.2d 734 (1979). At

(defined in terms of the lost opportunity to be married to another).<sup>81</sup> This type of reliance could be tremendously important in societies that provide limited opportunities for remarriage or self-support, and it could be protected effectively only through recognition of the expectation interest in marriage.

Although for different reasons and with different consequences, the traditional man's major form of reliance on marriage was also the foregone opportunity to have married another. After entering marriage, men, like women, necessarily gave up their opportunity to have married someone else. But since society has never valued male youth or virginity as much as male status and income,<sup>82</sup> their prospects for as favorable a second

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the same time, however, there is recognition that the wife's position has changed not only because of the opportunities she forewent as a teenage bride but because of the changes in lifestyle she experienced during the years of affluence. The hardship Joe Theisman's wife suffered upon divorce would not be any less if, at the time of their marriage, she had not anticipated his success as an NFL quarterback. Nor would it be any less if she could not have expected to marry another man earning as much as Joe Theisman did at the time of their divorce. So even if the courts are more interested in protecting foregone opportunities than in enforcing promises, they are still responsive to changes in lifestyle over the course of the marriage.

81. For these purposes, it is not important that the level of support during the marriage and the level of support possible from foregone marital prospects be identical. Even if they are not, Fuller and Perdue argue that (1) "the impossibility of subjecting this type of reliance [the foregoing of other opportunities] to any kind of measurement may justify a categorical rule granting the value of the expectancy as the most effective way of compensating for such losses," and (2) that the "difficulties in proving reliance and subjecting it to pecuniary measurement are such that . . . [t]o encourage reliance, we must therefore dispense with its proof." Fuller & Perdue, *supra* note 1, at 60, 62. In marriage, even more than in other contracts, imperfect information, transaction costs, and the absence of a perfectly competitive market may prevent any certain equation between the opportunities chosen and those foregone. For our purposes, the important thing is that the level of support provided during the marriage affords the only available measure of the interests at stake, and it is therefore enough that there is some reason to believe that the level of support approximates the financial value of the foregone opportunities.

The greater the disparity in income, ability and/or social standing between the two spouses, however, the more unlikely it becomes that the poorer spouse, in fact, enjoyed other opportunities to marry as well. Here, the expectation interest exceeds the reliance interest and modern courts, at least, appear reluctant to order a level of support truly equal to the relatively lavish standard of living enjoyed during the marriage. *See, e.g., In re Marriage of Carney*, 122 Ill. App. 3d 705, 462 N.E.2d 596 (1984); *Bahr v. Bahr*, 107 Wis. 2d 72, 318 N.W.2d 391 (1982); *In re Marriage of Johnson*, 106 Ill. App. 3d 502, 436 N.E.2d 228 (1982). In cases where the wife's income exceeds that of the husband's, it is also less likely that he forewent other opportunities to marry as well and that may justify lower awards for men than for women in the same circumstances. *See, e.g., Pfohl v. Pfohl*, 345 So. 2d 371, 376-77 (Fla. Dist. Ct. App. 1977).

82. For an indication of the importance of virginity for women, see discussion of the common law action for seduction in *Davidson v. Abbott*, 52 Vt. 570 (1880); *Blagge v. Iisley*, 127 Mass. 191 (1879); *Dain v. Wycoff*, 18 N.Y. 45 (1858); *Kendrick v. McCrary*, 11 Ga. 603 (1852). The cause of action was abolished in most states beginning in the 1950s.

marriage depended primarily on their ability to retain control of whatever wealth they possessed.<sup>83</sup> Unencumbered by the stigma of fault or financial burdens from a failed first marriage, men primarily surrendered their ability to secure an alternative line of succession.<sup>84</sup>

Society could protect both men and women's interests in marriage only by discouraging divorce. Traditional societies did this initially by refusing to recognize divorce<sup>85</sup> and later by using the concept of fault to make divorce difficult and expensive for the wrongdoer.<sup>86</sup> But once divorce occurred, the law had to choose between men's and women's competing claims. To award women the support they had enjoyed during the marriage undermined the ability of divorced men to mitigate their losses by remarrying well. Fault provided a basis for that choice. Since fault justified only the release of the innocent party's marital obligations, a guilty husband remained obligated to support his wife in the style to which she had become accustomed during the marriage, while an innocent husband regained control of the wealth he needed to mitigate his losses.<sup>87</sup> In either case, the law protected the legitimacy of the children and the right of succession.<sup>88</sup> Thus, protection of the expectation interest in marriage

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*See generally* Note, *Breach of Promise of Marriage: California Civil Code Section 43.5*, 4 UCLA L. REV. 114 (1956).

On the relatively greater handicap age poses for women than for men, see *supra* note 79 and *infra* note 83.

83. See Berkner, *supra* note 12, at 398; see also V. FUCHS, *supra* note 5, at 152; Becker, Landes & Michael, *supra* note 5, at 1173, contending that even in modern times a man's ability to remarry is directly proportional to his wealth upon divorce. See generally NATIONAL CENTER FOR HEALTH STATISTICS, U.S. DEP'T OF HEALTH, EDUCATION, AND WELFARE, 100 YEARS OF MARRIAGE AND DIVORCE STATISTICS UNITED STATES, 1867-1967 (Vital and Health Statistics Series 21 No. 24 1973).

84. M. GLENDON, *supra* note 5, at 31-32.

85. In most states the judiciary did not acquire authority to enter final divorce decrees until at least the nineteenth century. See, e.g., Act of 1785, [1785] Mass. Acts ch. 69, § 5; Act of March 15, 1815, 2 Smith's Laws (Pa.) 343; Act of March 18, 1848, [1847-48] Va. Acts ch. 122, § 4; see also Friedman, *supra* note 5, at 651-54.

86. Indeed, as Fuller and Perdue's general analysis of contract damages suggests, the major purpose of much of divorce law may have been to protect reliance on marriage by discouraging divorce. See *supra* note 72. The emphasis on fault and the fear of a substantial financial burden should have acted as a deterrent to those considering termination of their marriages. For the continuing social stigma associated with divorce, see *supra* notes 44 & 79.

87. See *supra* notes 23-27 and accompanying text.

88. In fact, even if the marriage was annulled as void, the children were legitimated. See, e.g., Kasey v. Richardson, 331 F. Supp. 580 (W.D. Va. 1971), *aff'd*, 462 F.2d 757 (4th Cir. 1972); VA. CODE ANN. § 20-31.1 (1978); UNIF. PARENTAGE ACT § 4(9)(1)-4(9)(2), 9B U.L.A. 298-99 (1987).

and reliance in the form of lost opportunities to marry another depended on fault.<sup>89</sup>

In modern society, the reliance interest in marriage is more varied, with different implications for the type of protection the law should afford. In entering today's marriages, men and women continue to forego the opportunity to marry others. These foregone opportunities remain more important for women than for men because women are more likely to marry mates earning more than the women could earn on their own, and the prospects for remarriage remain better for men than for women.<sup>90</sup> Nonetheless, due to the expansion of employment opportunities for women, wives are less likely to be completely dependent on their husbands' income for support upon divorce.<sup>91</sup> With women contributing to the family income, the husband's ability to remarry no longer depends to the same degree upon his financial resources. Moreover, for both men and

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89. It should be emphasized that fault is important to protect this interest because of the choice required between men and women's competing reliance interests, and not because of the form of the divorce proceeding. The choice required remains the same whether the remedy is characterized as specific performance of the marital duty of support, damages for breach of marital vows, or compensation for detrimental reliance on the other spouse to provide support.

We emphasize this because some courts have advanced a theory of detrimental reliance upon lifelong support as though it were independent of the reasons for the termination of the marriage. Professor Krauskopf, for example, has recently cited a Missouri case employing the language of detrimental reliance. In *Jamison v. Churchill Truck Lines*, 632 S.W.2d 34, 35-36 (Mo. Ct. App. 1982), the court wrote:

Marriages involve long term commitments. Spouses often detrimentally rely on these commitments . . . .

Maintenance is awarded when one spouse has detrimentally relied on the other spouse to provide the monetary support during the marriage. If the relying spouse's withdrawal from the marketplace so injures his marketable skills that he is unable to provide for his reasonable needs maintenance may be awarded.

Maintenance provides a remedy for a spouse's reliance.

See also Krauskopf, *Maintenance: A Decade of Development*, 50 MO. L. REV. 259, 293 (1985). We agree that maintenance can provide a remedy for a party's reliance on the spouse's lifelong promise of support, but only if the spouse has breached that promise by wrongfully causing the end of the marriage. Detrimental reliance requires breach of the promise as an element of the cause of action. See RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981). Otherwise, as we have observed above, the paying spouse's reliance on the marriage must also be protected.

90. V. FUCHS, *supra* note 5, at 135-36; Weitzman, *supra* note 44, at 1229; see also notes 79 & 83. For these reasons as well, men married to women earning more than they could have earned on their own are less likely than similarly situated women to have foregone other opportunities to have married similarly wealthy spouses. See *supra* note 78.

91. WOMEN'S BUREAU, OFFICE OF SECRETARY, U.S. DEPT. OF LABOR, LEAFLET VOL. 20, FACTS ON WOMEN WORKERS (1982); BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, AMERICAN WOMEN: THREE DECADES OF CHANGE (1983); P. ENGLAND & G. FORKAS *supra* note 79 at 147-77.

women, the expectation value of marriage (and of any foregone opportunities to marry) must be discounted by higher rates of divorce.<sup>92</sup> Accordingly, while many women continue to rely on marriage to secure a standard of living greater than they could provide on their own, and many men continue to rely on wealth in securing more favorable marriages,<sup>93</sup> the value of marriage is less than in societies where divorce is rare, and divorcing couples are better able to mitigate their losses than they were in more traditional societies.<sup>94</sup>

At the same time that the lost opportunity to marry another (and with it the expectation interest in marriage) has grown less important, the importance of another aspect of the reliance interest in marriage—the loss of career opportunities—has correspondingly increased. In times of old, women's income opportunities were limited, and thus the career opportunities foregone in the interests of marriage were relatively unimportant. Today, those opportunities are substantial. Virtually all women could work outside the home if they chose and, increasing numbers of women work during long periods of their marriage. To the extent marriage persuades women (and some men) to forego career opportunities, they are more likely to do so to further the other spouses' career or to participate in child rearing and other household activities.<sup>95</sup> Upon divorce, the benefiting spouse

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92. This means that given two identical couples, one in a society where divorce is common and the other in a society where divorce is rare, the expected duration of the marriage *at the time of its inception* would be less in the first society. The expected value of any alternative marriage would also be less. Accordingly, to the extent spousal support is intended to compensate for foregone opportunities to marry, one would expect support levels to become much lower as the value of the foregone opportunities decline. Even using expectation measures, one would expect shorter term support awards as the incidence of divorce increases and the expected duration of the marriage decreases. See generally Cooter & Eisenberg, *Damages for Breach of Contract*, 73 CALIF. L. REV. 1432, 1445 (1985).

This does not necessarily mean, however, that if divorce is common, no compensation can be awarded. Higher divorce rates may reflect laws which impose no penalty for divorce. Higher levels of compensation may be justified by a societal decision to discourage divorce. See *supra* note 73 and *infra* note 173.

93. Becker, *A Theory of Marriage*, in *ECONOMICS OF THE FAMILY: MARRIAGE, CHILDREN, AND HUMAN CAPITAL* 307, 314 (T. Schultz ed. 1974).

94. Indeed, one suspects that the ability of women to support themselves and the societal insistence that they do so is the single biggest change underlying alimony awards. L. WEITZMAN, *supra* note 5, at 33.

95. See, e.g., Prager, *Sharing Principles and the Future of Marital Property Law*, 25 UCLA L. REV. 1 (1977); Weitzman, *supra* note 44, at 1211. "Even though both spouses may have worked during the marriage, it is likely that, as a marital unit, they have chosen to give priority to one spouse's career in the expectation that both will share in the benefits of that decision." *Id.*; see also Olsen, *supra* note 7, at 1533 & n.132 (citing Gillespie, *Who*



retains the advantages of an enhanced career or properly raised children, while the contributing spouse suffers a unilateral loss.<sup>96</sup>

Lost career opportunities, however, unlike lost opportunities to marry, do not necessarily mirror the expectation interest in marriage. While married couples necessarily forego opportunities to marry others, they need not forego career opportunities. To the extent that one spouse chooses to make such a sacrifice, he or she presumably does so because the additional benefits for the children, the expected advances in the other spouse's career, or an enhanced family life justifies the loss.<sup>97</sup> It is the value of

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*Has the Power? The Marital Struggle*, in *FAMILY, MARRIAGE, AND THE STRUGGLE OF THE SEXES* 121-50 (H. Dreitzel ed. 1972)); Atkin, *supra* note 26, at 342; see generally Younger, *supra* note 17.

96. See Benham, *Benefits of Women's Education Within Marriage*, in *ECONOMICS OF THE FAMILY: MARRIAGE, CHILDREN AND HUMAN CAPITAL* 375 (T. Schultz, ed. 1974). Another way of viewing this change is to focus on the nature of wives' interest in their husbands' careers. So long as women had few opportunities to pursue careers of their own, their access to any substantial career—and the income associated with it—came through marriage. With women now enjoying the opportunity to pursue careers of their own, those who choose to forego such opportunities often do so as part of a conscious decision that the husband's career is sufficient to support the family. Even though the woman's contribution to her husband's career may be the same in both cases, there is a greater inclination in modern cases, where women have foregone opportunities of their own, to view the husband's career as "theirs," rather than "his." We believe that it is the change in the nature of the reliance that is primarily responsible for this, and that (more so than in earlier societies) these career investments may generate the most important forms of wealth. See generally Krauskopf, *supra* note 47.

97. Indeed, the basis for compensation in these cases can be best explained in terms of the family's investment decisions. As Professor Krauskopf explained (drawing on the economics of the family literature) the family may be viewed as a firm, making investment decisions in a manner designed to maximize family utility. See Krauskopf, *supra* note 47, at 386. When husband and wife decide, for example, that the wife will support the husband through medical school, the couple presumably concludes that the expected return from the husband's medical education is more valuable to them than the alternative uses of the wife's time or money. If the divorce occurs shortly after his graduation from medical school and no compensation is awarded, he will reap the full benefit of an investment they jointly undertook and jointly paid for.

Similarly, if the couple decides that the wife will forego her career opportunities to raise the children, and the divorce occurs when the children have reached the age of majority, if no compensation is provided, both spouses will continue to enjoy the benefits from having had children, but the cost of that endeavor will be borne only by the wife.

In this sense, spousal support—or property adjustments—should be primarily designed to compensate for accidents of timing. If the family decides to enjoy a benefit during the present, financed by costs borne in the future, or to endure sacrifices in the present in order to reap benefits in the future, divorce may arbitrarily reassign who will bear the costs and who will reap the benefits the couple originally expected to share. Professor Krauskopf has made a major contribution to the discussion by using the concept of human capital to describe the career decisions involved. Within this framework, spousal support would then serve to correct the resulting inequities in much the same way courts assign responsibility for more traditional factors such as car payments.

these additional benefits, not the total value of the marriage or the level of support provided,<sup>98</sup> that corresponds most closely to this form of reliance.<sup>99</sup>

Protection of lost career opportunities, therefore, creates different implications for the allocations made at divorce. Although both spouses forego the opportunity to marry others, requiring a choice between their competing reliance losses, typically only one spouse forgoes career opportunities for the benefit of the other. Compensation for these foregone opportunities, therefore, does not depend on a lifelong commitment to marriage,<sup>100</sup> or on a determination of responsibility for the marital breakup. Rather, the compensation depends on the nature of each spouse's contribution to the marriage,<sup>101</sup> with the best mea-

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98. After a longer term marriage with a permanent career sacrifice, however, the appropriate measure of compensation may become the level of support enjoyed during the marriage. If he temporarily interrupts his career to facilitate her transfer to a higher paying job in another city, the exchange will involve his delayed career advancement in return for the higher standard of living he anticipates from her transfer. After twenty years of marriage, he will have enjoyed that return and will have been able to resume his career. If, however, he permanently foregoes his career opportunities to contribute to her career and the children, after twenty years of marriage, the loss will be a continuing one for which he will not have been fully compensated, and the level of support he enjoys during the marriage may be the easiest measure to employ.

99. Fuller and Perdue justified use of the expectation measure as a surrogate for reliance principally because in most contracts expectation is easier to calculate. See *supra* notes 73-74 and accompanying text. For many of the calculations involved here, however, reliance may be easier to calculate. Foregone career opportunities, for example, may be much easier to value than a particular child rearing practice or children generally and presumably the couple will value the benefit—children raised by a parent—at least as much as the foregone income. The supporting spouse's financial contribution to a medical degree may also be a more certain measure than the determination of his or her share of the income made possible by the degree. If the legal principle to be employed is disgorgement of the benefit retained beyond the end of the marriage, reliance may be a surrogate for restitution in this context. See *infra* note 104.

100. If marriage does not involve a lifelong commitment, and the parties are obliged to remain together only so long as they are both in love, see *supra* text accompanying note 53, then it is difficult to claim reliance on the hope that the marriage will endure. Similarly, the concept of "fault" depends on a commitment to stay married absent activity by one spouse incompatible with the continuation of the marriage. If either spouse has a right to leave, then it is difficult to characterize the decision to seek the divorce as breach of the marital agreement. See *infra* note 166.

Some of the difficulty in determining fault stems from the fact that the behavior necessary, in a popular sense, to justify a decision terminating the marriage is not so egregious—and therefore not so clear cut—as it once was. This difficulty is compounded by laws which continue to impose terms on couples choosing to marry which may or may not reflect their individual agreements. See *infra* discussion at notes 115-16.

101. The principle of compensation for contributions to the marriage does not require a tally of every marital service performed. See *Cornelius v. Cornelius*, 382 So. 2d 710, 714-15 (Fla. Dist. Ct. App. 1979) (rejecting such a principle). As Professor Kay points out, the original proposals made for the recognition of homemakers' contributions to the family

sure for the loss being not the level of support enjoyed during the marriage, but some lesser amount, generally tied to the extent of the sacrifice.<sup>102</sup> In addition, this compensation should not terminate upon remarriage since the opportunity lost (career advancement) is not recaptured upon remarriage.<sup>103</sup> The loss, however, should be subject to mitigation through subsequent employment. While valuation is inherently problematic,<sup>104</sup> "rehabilitative" alimony, which was designed primarily to compensate for this type of loss, sidesteps the issue by characterizing the amount of alimony as that necessary to secure appropriate education or

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concerned contributions to the acquisition of marital property, not a claim of compensation for services rendered. Kay, *supra* note 58, at 50-51. Rather, the issue arises when one spouse has made a significant contribution to the marriage in expectation of a future return which will not be realized because of the divorce. The doctor's spouse who contributed to medical training twenty years ago has presumably enjoyed the benefits from the family's enhanced income. See, e.g., Martin v. Martin, 358 N.W.2d 793, 799 (S.D. 1984). The doctor divorcing a supporting spouse upon graduation from medical school is depriving that spouse of any opportunity to enjoy the fruits of what may have been a considerable investment. See, e.g., O'Brien v. O'Brien, 66 N.Y.2d 576, 489 N.E.2d 712 (1985). But see Hodge v. Hodge, 513 Pa. 264, 520 A.2d 15 (1986); Drapek v. Drapek, 399 Mass. 240, 503 N.E.2d 946 (1987).

102. There is no reason to assume that, but for marriage, both spouses would have earned comparable incomes. But see *supra* note 98 and *infra* notes 134-36, 141-50 and accompanying text. For a discussion of the "extent of sacrifice" valuation, see *infra* note 104.

103. As Sackett and Munyon have observed, "[i]f a wife's alimony award is to make her a productive person and compensate her for the years she devoted to the marriage and did not advance in her career, then what valid reason is there for termination of the award on remarriage?" Sackett & Munyon, *supra* note 61, at 309. See, e.g., *In re Marriage of Orgren*, 375 N.W.2d 710 (Iowa Ct. App. 1985).

This should be subject, however, to the principle that spousal support is not designed to put the divorced spouse in a position better than the position possible if the marriage had continued. See Fuller & Perdue, *supra* note 1, at 75-80. As a practical matter, where rehabilitative alimony is being used to pursue further education or training, it should continue irrespective of remarriage until the education or training is completed. Where the spouse is not pursuing such "rehabilitation," and the support from the second marriage replaces that from the first, the spousal support should end. See *infra* note 178 and accompanying text. Cf. BÜRGERLICHES GESETZBUCH [BGB] art. 1575 (1976), cited in Erickson, *Support Toward the Realization of Educational Goals: How the Law Can Ensure Reciprocity*, 1978 WIS. L. REV. 947, 948 & n.6; O'Kelly, *supra* note 63, at 260.

104. A major question exists, of course, of whether the determination should focus on disgorgement of the benefit conferred or compensation for the change in position in reliance on the continuation of the marriage. Although we intend to pursue this issue further in a subsequent article, for present purposes we have concluded only that (1) it is enough that some benefit has been conferred, (2) valuation of both the benefit and loss are problematic, and (3) the ability of the other spouse to pay imposes a limit in any event. We believe that, in making the decisions, the initial inquiry should be on whether further education or training will enable the spouse to earn a living commensurate with the standard of living enjoyed during the marriage. If not, then long term alimony may be appropriate. See *infra* notes 105, 135-36, 177-78, 185-87; see also Krauskopf, *supra* note 47, at 391-93, 397-98.

employment for the recipient spouse.<sup>105</sup>

In modern marriages the reliance interest has become more complex. It embraces a lost opportunity to marry someone else, valued differently for different people during different times during the marriage,<sup>106</sup> together with sacrifices in career development that would never have been an issue in a society of single career families.<sup>107</sup> In response to these two different forms of

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105. Indeed, the response in some states has been to eliminate permanent alimony altogether. *See, e.g.*, DEL. CODE ANN. tit. 13, § 1512 (1981 & Supp. 1987); IND. CODE ANN. § 31-1-11.5-11 (Burns 1987), imposing limits on the duration of alimony awards; *see also infra* note 177 for a discussion of lump sum alimony. We believe this is inappropriate. Even if spousal support is intended only to compensate for lost career opportunities, there will be many women, divorced after long term marriages, who cannot realistically expect to support themselves in a manner commensurate with the career opportunities they forewent in their youth. *See, e.g.*, *Forster v. Forster*, 436 So. 2d 966 (Fla. Dist. Ct. App. 1983); *In re Marriage of Hitchcock*, 309 N.W.2d 432, 437-38 (Iowa 1981); *infra* note 178. This is particularly true for older women and those who have become disabled over the course of the marriage. Even if they would have become disabled anyway, they may have enjoyed substantially greater disability benefits if they had been employed. *See* discussion in Sackett & Munyon, *supra* note 62, at 317-19; L. WEITZMAN, *supra* note 5, ch. 7, *passim*.

In addition, some states award "transitional alimony" to ease the change in lifestyles. *See, e.g.*, *Murray v. Murray*, 374 So. 2d 622, 624 (Fla. Dist. Ct. App. 1979). Transitional alimony, in its purest form, compensates for change in lifestyle over the course of the marriage. *See supra* note 80.

106. The opportunity costs after a short marriage are likely to be small since any career sacrifice is likely to be remedial, and the marriage itself is unlikely to have had a significant impact on the prospects for remarriage. Women under thirty, for example, have a 75% chance of remarriage. L. WEITZMAN, *supra* note 5, at 204.

107. Modern marriages present three possible patterns. In a two career family in which the husband and wife share household responsibilities at least to the degree that neither career has suffered from those responsibilities, both spouses experience the same reliance loss—the lost opportunity to be married to someone with an income similar to that of their mate. The opportunity cost for the woman, however, while identical in nature to her husband's, is likely to be higher in degree because the income she has foregone from other marriages is likely to be greater than the income he forewent, and her prospects for remarriage will be poorer than his. *See supra* notes 79, 83.

In a traditional marriage where the wife does not work outside the home, both spouses will have experienced the same lost opportunity to marry described above, but the wife also will have foregone whatever career opportunities she possessed. So long as women generally earn less than men and the particular woman's career prospects are speculative, the financial value of her foregone marital prospects will ordinarily be greater than her foregone career prospects.

In those marriages where both spouses work but she interrupts her career to take care of the children or he foregoes a career enhancing transfer that would interfere with her career development, there may be substantial opportunity costs. Both spouses forego the opportunity to marry described above, with this effect again being greater the longer the marriage and, on average, a greater loss for women than for men. In addition, spouses foregoing their own career advancement to further the marriage are in a worse financial position than they would have been in had they never married. Women continue to be statistically more likely to sacrifice career development to care for children or to advance their husband's careers, though not to the same degree as in more traditional societies. In

reliance, two different, though potentially overlapping, systems of compensation emerge. One is tied to compensation for breach of a lifelong commitment to marriage; the other only requires recognition of the contributions made.<sup>108</sup> One form of compensation terminates with remarriage; the other continues.<sup>109</sup> Either can be expanded to include many of the elements of the other, but neither could ever completely replace the other without doing violence to its underlying rationale.<sup>110</sup> Since the advent of no fault divorce, states have been groping toward one system or the other, often losing sight of the road not taken.<sup>111</sup> The next section of the article will examine the allocations currently made upon divorce, charting the coexistence of the two systems and the interests that become lost in between.

### III. TWO ROADS DIVERGE: THE TRANSITION TO NO FAULT

The movement toward no fault divorce occurred contemporaneously with these changes in the nature of the reliance interest in marriage.<sup>112</sup> So long as a determination of fault was a necessary part of divorce and lost opportunities to marry consti-

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addition, women continue to be more likely to perform the major share of housework, limiting their time for other pursuits. See V. FUCHS, *supra* note 5, at 127; M. GLENDON, *supra* note 5, at 130, 132; Frug, *supra* note 65, at 57; Karst, *Women's Constitution*, 1984 DUKE L.J. 447, 459; O'Donovan, *Should All Maintenance be Abolished?*, 45 MOD. L. REV. 424, 430 (1982); Schultz, *supra* note 36, at 271; see also Project, *Law Firms and Lawyers with Children: An Empirical Analysis of Family/Work Conflicts*, 34 STAN. L. REV. 1263, 1274-75 (1982).

108. See *supra* notes 85-88, 101-02, and accompanying text.

109. Remarriage, of course, recaptures the opportunity lost so long as the second marriage offers advantages similar to the opportunities available at the time of the first marriage (and we have concluded that, in most cases, those opportunities can be estimated by the advantages offered by the first marriage). See *supra* note 72. When alimony was tied to a reaffirmation of marital obligations, it terminated upon remarriage because the new marriage was incompatible with the continuation of the old obligations. To the extent modern alimony is designed to compensate either for the benefits lost with the end of the marriage or for the lost opportunity to marry well, it should terminate with remarriage only if the second marriage provides support comparable to that provided by the first marriage. See *supra* note 103 and *infra* note 178.

110. See *infra* text accompanying notes 125-27, 133-36 & 184.

111. There are, in fact, three possible roads. The first is to require proof of fault as a precondition for alimony. See, e.g., *Dyer v. Tsapis*, 249 S.E.2d 509 (W. Va. 1978); see also *infra* note 125. The second is to preclude consideration of fault. See, e.g., *In re Marriage of Peterson*, 227 N.W.2d 139, 142 (Iowa 1975); *In re Marriage of Williams*, 199 N.W.2d 339, 345 (Iowa 1972); see also *infra* note 132. The third is to permit, but not require, consideration of fault. See, e.g., *F.C. v. I.V.C.*, 300 S.E.2d 99, 101 (W. Va. 1982); see also *infra* note 129.

112. For a discussion of the movement toward no fault divorce, see generally L.

tuted the most important part of reliance, the allocations made upon divorce were logically tied to the determination of fault.<sup>113</sup> With the advent of no fault divorce, however, states had to consider anew whether consideration of marital conduct (or misconduct) continued to serve the interests at stake upon divorce, and if it did, whether the role of such considerations was sufficiently important to outweigh the administrative costs involved.<sup>114</sup> The states have split in answering that question. In the process, any reevaluation of the role of alimony has been obscured as changes in the theory and process of divorce have become confused with changes in the nature of wives' dependence on their husbands.

In examining the course states have followed since adopting no fault divorce, it is important to emphasize that the introduction of no fault grounds for granting divorces changed the rationale for alimony and other forms of support without necessarily precluding consideration of marital conduct altogether. "No fault" divorce represented, as much as anything else, rebellion against the propriety of specific performance of marital obligations. In traditional societies, the vow "until death do us part" was made first to God, then to the state, and only tertiarily to the other spouse.<sup>115</sup> The couple could not terminate the marriage or vary its terms.<sup>116</sup> The determination of fault necessary

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WEITZMAN, *supra* note 5; Friedman, *supra* note 5; see also *supra* notes 55-56 and accompanying text.

113. See *supra* notes 23-27, 85-89 and accompanying text; see also M. GLENDON, *supra* note 5, at 53; Krauskopf, *supra* note 47, at 396; Ploscowe, *Alimony*, 383 ANNALS 22 (1969); Comment, *The Fault Preclusion to Post-Divorce Alimony in Louisiana*, 57 TUL. L. REV. 351, 352-53 (1982). For a discussion of the impact of no fault divorce on alimony, see *Wallace v. Wallace*, 46 Md. App. 213, 416 A.2d 1317 (1980); Clark, *Divorce Policy and Divorce Reform*, 42 U. COLO. L. REV. 403, 410 (1971).

114. The administrative costs involved in the determination of fault are substantial and they provided a major impetus toward no fault divorce. See generally Friedman, *supra* note 5; Neuner, *supra* note 23; see also *infra* notes 157-67 and accompanying text.

115. For a discussion of the centrality of God in Catholic marriage, see Robinson, *Unresolved Questions in the Theology of Marriage*, 43 JURIST 69 (1983). For a discussion of state regulation of marriage, see *Maynard v. Hill*, 125 U.S. 190 (1887):

[B]ut when the contract to marry is executed by the marriage, a relation between the parties is created which they cannot change. Other contracts may be modified, restricted, or enlarged, or entirely released upon the consent of the parties. Not so with marriage. The relation once formed, the law steps in and holds the parties to various obligations and liabilities.

*Id.* at 211; see also *Walton v. Walton*, 28 Cal. App. 3d 108, 104 Cal. Rptr. 472 (1972); *Fearon v. Treanor*, 272 N.Y. 268, 272-73, 5 N.E.2d 815, 816 (1936), *appeal dismissed*, 301 U.S. 667 (1937); Clark, *supra* note 108, at 407 n.23. See generally Shultz, *supra* note 36, at 268 & n.224.

116. See generally *supra* notes 17, 115 and *infra* note 171.

to justify dissolution of the marriage served to release the innocent spouse from his or her marital obligations without absolving the mate.<sup>117</sup> The allocations made upon divorce thus involved a form of specific performance: continuation of the guilty husband's obligation of support, the innocent wife's care for the children, and the husband's rights over jointly acquired property.<sup>118</sup>

"No fault" divorce resulted from the transformation of marriage from an indissoluble union consecrated by God to an exchange of promises primarily involving the two individuals and their children. Assignment of responsibility for the marital breakup became unnecessary when the state no longer mandated that the union last forever in order to protect societal interests transcending the particular family.<sup>119</sup> With a societal judgment that divorce was preferable to unhappy or involuntary unions, specific performance of marital rights and duties became inappropriate. No fault divorce requires recognition of the right of either party to terminate the union.<sup>120</sup> The allocations made upon such divorces must therefore flow from the cessation, not the reaffirmation of marital responsibilities.

While no fault divorce thus rendered the traditional rationale for alimony incompatible with the new grounds for divorce, it supplied no alternative rationale to guide the financial allocations made upon divorce. "No fault" grounds altered only the view of marriage as indissoluble; it did not preclude compensation for abdication of marital responsibilities nor mandate a particular balance between the parties' competing interests.

In deciding whether to permit consideration of marital misconduct, then, the states had to first define the interests they were trying to protect. West Virginia provides one of the most considered opinions for the retention of fault as a prerequisite for alimony. In *Dyer v. Tsapis*,<sup>121</sup> the state supreme court, wrestling with the role of fault in West Virginia's recently adopted no fault system, observed:

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117. See *supra* notes 23-27 and accompanying text.

118. See *supra* notes 25-27, 35, 40-41 and accompanying text.

119. Compare L. WEITZMAN, *supra* note 5, at 4, with L. WEITZMAN, *supra* note 5, at 26-28; see also Neuner, *supra* note 23. See generally *supra* note 115.

120. M. GLENDON, *supra* note 5, at 4; L. WEITZMAN, *supra* note 5, at 26-28; Clark, *The New Marriage*, 12 WILLIAMETTE L. REV. 441, 444 (1976). In this sense, marriage has become very much like a contract or a partnership. Either party is free to terminate the agreement. The legal issue is limited to one of damages. See *infra* note 159.

121. 249 S.E.2d 509 (W. Va. 1978).

Once all divorces, like all tort actions, were predicated upon a legal wrong; alimony, like tort damages, served both punitive and compensatory purposes. Now, increasingly, divorces are awarded on no-fault grounds and awards of alimony, like contract damages, increasingly emphasize restitution to the exclusion of punishment. The law which once saw marriage as a sacrament now conceptualizes it as roughly analogous to a business partnership. As might be expected in the midst of such change, there is tension between the old and new approaches. On the one hand there is a powerful incentive to punish a wrongdoer and an even more powerful aversion to rewarding one. On the other hand, there is an appreciation of the value of a wife's sacrifice of the opportunity to obtain skills, advancement, and retirement benefits. In addition, a woman of advanced age is likely to experience difficulty in finding another suitable partner. Reluctantly, and possibly because of the difficulty of determining fault in the context of a complex interpersonal relationship, we have shifted the focus of the divorce inquiry from fault evidence to more dignified and reliable economic evidence. Nonetheless, the more modern approach must be alloyed with the more ancient.<sup>122</sup>

In line with that "more ancient approach," the court required the spouse seeking alimony to show that the other spouse was guilty of "a significant wrong supported by a preponderance of the evidence in the record."<sup>123</sup> While the opinion acknowledged the compensatory purposes of alimony and the difficulty of proof, the court emphasized that "[t]o exclude consideration of misconduct altogether . . . would convert this statute to a pure no-fault procedure, with an attendant inequitable redistribution of wealth."<sup>124</sup> It concluded that "a totally blameless party can never be charged with alimony."<sup>125</sup>

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122. *Id.* at 510-12.

123. *Id.* at 512.

124. *Id.*

125. *Id.* at 513. West Virginia appears to have been the last state to require proof of fault as a prerequisite for alimony. In some states, however, fault on the part of the recipient spouse precludes alimony. *See* GA. CODE ANN. § 19-6-1 (1987); IDAHO CODE § 32-705 (1983); LA. CIV. CODE ANN. art. 160 (West Supp. 1987); N.C. GEN. STAT. § 50-16.6 (1987) (adultery only); S.C. CODE ANN. § 20-3-130 (Law Co-op. 1976 & Supp. 1986) (adultery only); VA. CODE ANN. § 20-107.1 (1983 & Supp. 1987). In practice, the fault required to disqualify the recipient spouse must be sufficient to constitute fault grounds for divorce. *See, e.g.,* Wallace v. Wallace, 1 Va. App. 183, 187, 336 S.E.2d 27, 29 (1985):

The trial court did not err in denying Mr. Wallace's motion to require Mrs. Wallace and Rogers to answer the questions posed to them regarding adultery. The record amply supports the court's opinion that it was Mr. Wallace's own fault and misconduct that caused the termination of the marriage. Assuming



The West Virginia court, in defining the role of fault, effectively embraced a system designed to protect lost opportunities to marry at the expense of a system capable of protecting lost career opportunities. As we explained above, both parties necessarily forego other possible partners in entering marriage; yet, there is no way to establish whether another marriage would have occurred at all, lasted as long, or provided the same material advantages. Protection of this form of reliance, therefore, requires both a choice between the spouses' divergent interests and recognition of a right to continue enjoying the benefits promised by the marriage.<sup>126</sup> The West Virginia Supreme Court correctly concluded that without an obligation to remain married and a determination of responsibility for the breakup of the marriage, there was no basis for long-term alimony based on one spouse's superior earning capacity.<sup>127</sup> What the decision overlooked was the increasing need to protect other forms of reliance as well.

In many ways, the most important aspect of the *Dyer* rule may be that it lasted little more than three years. In *F.C. v. I.V.C.*,<sup>128</sup> the West Virginia Supreme Court modified *Dyer* to hold that "[a] voluntary separation alimony award is not *conditioned* on a finding of fault, but the court *may* inquire into fault to decide whether alimony is appropriate. . . . Concrete financial realities of the parties must be a court's primary inquiry in any alimony award."<sup>129</sup> Subsequent West Virginia decisions have

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*arguendo* that her answers would have been incriminatory, Mr. Wallace, nonetheless, could have asserted the doctrine of recrimination and prevented her husband from obtaining a fault divorce. The questions posed were simply immaterial. With neither party entitled to a fault divorce, the obligation to support a spouse continues.

126. This is consistent with a "contract" approach, awarding expectation damages as compensation for breach. The court's use of the word "contract" is, however, unclear since it appears to equate consideration of "fault" with "punishment," and with tort principles rather than contract principles. See *infra* note 166.

127. If both parties are free to leave, there is no basis for alimony designed solely to compensate for the lost opportunity to marry someone with a larger income. See *supra* text accompanying notes 95-105 for a discussion of the other possible bases for spousal support.

128. 300 S.E.2d 99 (W. Va. 1982).

129. *Id.* at 101 (emphasis in original). State statutes which appear to permit, but not require, consideration of fault, include: ALA. CODE § 30-2-51 (1975 & Supp. 1987); CONN. GEN. STAT. § 46b-82 (1987); FLA. STAT. ANN. § 61.08 (West 1985) (must be considered for adultery); MD. FAM. LAW CODE ANN. § 11-106B (1984); MASS. GEN. LAWS ANN. ch. 208, § 34 (West Supp. 1987); MO. REV. STAT. § 452.335(2)(7) (1986); MISS. CODE ANN. § 93-5-23 (1973 & Supp. 1987); N.J. REV. STAT. ANN. § 2A:34-23 (1987) (except in no-fault divorces, when impermissible); 23 PA. CONS. STAT. ANN. § 507 (Purdon 1955 & Supp. 1986); R.I. GEN. LAWS § 15-5-16 (1981 & Supp. 1986); TENN. CODE ANN. § 36-5-

implemented the modification, tying alimony to the parties' finances unless the wife's responsibility for the divorce makes such an award inequitable.<sup>130</sup> While the courts have not addressed the rationale underlying these awards, the effect of their allocations is to supplement a system designed to protect lost opportunities to marry with one capable of recognizing career sacrifices. Unless both parties have worked without restriction or interruption throughout the marriage, most marriages will involve some form of career sacrifice inuring to the benefit of the spouse with the higher income at the time of the separation. Accordingly, at divorce, the sacrificing spouse should be compensated *unless* there is an offsetting injury to the mate. Alimony should not be conditioned on a finding of fault because the reasons for the marital dissolution are irrelevant to the principle of restitution for the sacrifice made or benefit conferred. Rather, courts may consider fault in determining whether the paying spouse has suffered an injury which should be offset against the restitution owed. The West Virginia courts have arrived at the conclusions suggested by this analysis without acknowledging any rationale capable of justifying the outcomes. The result is poorly articulated decisions that provide little guidance for the future.<sup>131</sup>

The courts in states precluding any consideration of fault have had to justify spousal support more directly. Oregon is characteristic of these states in declaring that "[t]he most significant factor . . . is whether the supported spouse is employable at an income that will allow enjoyment of a standard of living not overly disproportionate to that which would have been enjoyed had the marriage not been dissolved."<sup>132</sup> Where the spouse is

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101 (1984 & Supp. 1987); *see also* Sweet v. Sweet, 190 Conn. 657, 462 A.2d 1031 (1983) (court must consider the causes for the dissolution of the marriage); Cornelius v. Cornelius, 382 So. 2d 710, 714 (Fla. Dist. Ct. App. 1979) (consideration of fault only allowed in some circumstances); Cole v. Cole, 384 N.W.2d 312, 316 (S.D. 1986); Courie v. Courie, 341 S.E.2d 646 (S.C. Ct. App. 1986); Bangs v. Bangs, 59 Md. App. 350, 475 A.2d 1214, 1223 (1984); Massey v. Massey, 621 S.W.2d 728 (Tenn. 1981); Hanks v. Hanks, 296 N.W.2d 523, 527 (S.D. 1980); Peterson v. Peterson, 242 N.W.2d 103, 108 (Minn. 1976); Chapman v. Chapman, 498 S.W.2d 134 (Ky. Ct. App. 1973); Kay, *supra* note 58, at 72-74 n.363; *see also supra* note 125.

130. *See* Nutter v. Nutter, 327 S.E.2d 160 (W. Va. 1985); Crutchfield v. Crutchfield, 302 S.E.2d 76, 77 (W. Va. 1983); *see also* Duncan v. Duncan, 686 S.W.2d 568, 571 (Tenn. Ct. App. 1984); Hanks v. Hanks, 296 N.W.2d 523, 527-28 (S.D. 1980).

131. *See infra* discussion at note 151.

132. *See* Kitson v. Kitson, 17 Or. App. 648, 655-57, 523 P.2d 575, 579 (1974) (cited in *In re Marriage of Auld*, 72 Or. App. 747, 697 P.2d 220 (1985)); *see also* De Cenzo v. De Cenzo, 433 So. 2d 1316, 1318 (Fla. Dist. Ct. App. 1983) ("The two primary elements to be

not, the Oregon courts have been willing to award spousal support regardless of fault, with the amount and the duration of the support varying with the length of the marriage and the respective financial positions of the parties.<sup>133</sup>

In justifying spousal support in these cases, the Oregon courts have, in effect, adopted a compensatory theory of support, tying alimony to the loss of career opportunities caused by the marriage without providing protection for the losses associated with the foregone opportunities to marry others.<sup>134</sup> In articulating such a theory, however, the courts have had to acknowledge that many women, had they fully pursued the careers available in their youth, would have been able to earn no more than a fraction of the income enjoyed by their husbands. The Oregon courts sidestepped this difficulty, explaining:

[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

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considered when determining permanent periodic alimony are the needs of one spouse for the funds and the ability of the other spouse to provide the necessary funds.”); *accord In re Marriage of Hitchcock*, 309 N.W.2d 432, 436-37 (Iowa 1981); *see also infra* note 137. Other state statutes precluding consideration of fault are: ALASKA STAT. § 25.24.160(3) (1983); ARIZ. REV. STAT. ANN. § 25-319(B) (1976 & Supp. 1987); COLO. REV. STAT. § 14-10-114(2) (1987); DEL. CODE ANN. tit. 13, § 1512(c) (1981 & Supp. 1987); ILL. STAT. ANN. ch. 40, para. 504(b) (Smith-Hurd 1980); MONT. CODE ANN. § 40-4-203(2) (1987); WASH. REV. CODE ANN. § 26.09.090(1) (1986); *see also Kay, supra* note 58, at 72-74 n.363.

133. *See, e.g., Hayner v. Hayner*, 58 Or. App. 324, 329, 648 P.2d 379, 381 (1982) (“In the dissolution of a marriage of substantial duration, the objective is that the parties separate on as equal a basis as possible.”).

In shorter term marriages, courts are reluctant to award alimony, irrespective of differences in income, unless a spouse can show that the marriage itself significantly affected earning capacity. *See In re Marriage of Auld*, 72 Or. App. 747, 697 P.2d 220 (1985); *In re Marriage of Koch*, 58 Or. App. 252, 648 P.2d 406 (1982); *In re Marriage of Lemke*, 289 Or. 145, 149, 611 P.2d 295, 297 (1980) (alimony denied because “there is no indication and no reason to infer that the wife’s earning capacity was adversely affected by the marriage.”). For an example of an intermediate length marriage, *see In re Marriage of Bevers*, 326 N.W.2d 896, 900 (Iowa 1982) (ten year marriage, rehabilitative alimony awarded for two years); *Murray v. Murray*, 374 So. 2d 622 (Fla. Dist. Ct. App. 1979); *see also L. WEITZMAN, supra* note 5, at 168-71.

134. *See, e.g., In re Marriage of McRight*, 52 Or. App. 785, 788, 629 P.2d 865, 867 (1981).

married, must as a matter of principle be limited to the standard of living they can provide for themselves if "employed in a job commensurate with [their] skills and abilities." The marriage itself may well have prevented the development of those skills and abilities.<sup>135</sup>

The Oregon courts thus premise spousal support in longer term marriages on compensation for lost career opportunities even where there is no evidence that the career foregone would have resulted in as much income as the support award.<sup>136</sup>

The West Virginia and Oregon courts have rejected the traditional fault based system without completing the new analytical framework. They agree that fault—and the principle of compensation for the injuries flowing from breach of marital obligations—is no longer sufficient to protect the interests implicated in marriage and divorce. Both, therefore, declare that financial need should be the primary consideration in granting spousal support.<sup>137</sup> But need alone is of little value in assessing support awards. If it were, the almost universal importance of the length of the marriage on the amount and duration of the award would be difficult to explain<sup>138</sup> and fault would indeed be

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135. *Grove v. Grove*, 280 Or. 341, 351-52, 571 P.2d 477, 485 (1977) (cited in *In re Marriage of Yantis*, 52 Or. App. 825, 629 P.2d 883 (1981)). The Florida courts, which consider fault only in limited circumstances, have arrived at a similar conclusion. See *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); see also *Erickson*, *supra* note 103, at 957.

136. Florida provides the clearest example of such reasoning. In *Stiff v. Stiff*, 395 So. 2d 573 (Fla. App. 1981), a labor market analyst appearing for the husband "testified that if the wife had gone to work 25 years ago and was good in her career, she would be making approximately \$17,000 per year at the present time." *Id.* at 574. The trial court concluded, however, that the wife needed \$25,000 a year to maintain the standard of living she enjoyed during the marriage, and that the husband, who had earned \$87,200 in 1979, could afford to pay that much support. The appellate court, while using compensatory language, emphasized the wife's inability to maintain her standard of living and reversed the lower court award of rehabilitative alimony, substituting an award of permanent periodic alimony.

137. See *supra* notes 129, 132.

UMDA § 308, 9A U.L.A. 347 (1973) suggests that the court shall award maintenance only when necessary to meet "reasonable needs" of the person seeking maintenance; see also *Sullivan v. Sullivan*, 134 Cal. App. 3d 484, 184 Cal. Rptr. 796 (1982); *In re Marriage of McVey*, 641 P.2d 300, 301 (Colo. App. 1981); CAL. CIV. CODE § 4801(a) (Deering 1984); COLO. REV. STAT. § 14-10-114(1) (1987); ILL. ANN. STAT. ch. 40, para. 504(2) (Smith-Hurd 1980). See generally M. GLENDON, *supra* note 5, at 55; Atkin, *supra* note 26, at 336; Note, *Domestic Relations: Consideration of Enhanced Earning Capacity of Recently Educated Spouse in Divorce Settlements*, 17 SUFFOLK U.L. REV. 901 (1981).

138. Let us take, for example, two women, both age 40 at divorce, both working as secretaries earning \$16,000 per year, both with former spouses earning \$80,000 a year. If need alone were the criterion for spousal support, one would expect equal awards. Nonetheless, if one had been married for 20 years, and the other for 2 years, one would

irrelevant.<sup>139</sup>

In West Virginia and other states that permit but do not require consideration of marital misconduct, the issue of redefining the role of fault is critical. If his misconduct does not guarantee alimony, while her fault does not preclude it, how much emphasis is placed on such evidence? Is the definition of marital misconduct the same as that necessary to justify divorce? Where fault is not established or both parties share responsibility for the marital breakup, what is the justification for the award? Is the justification the same in states that preclude consideration of fault? West Virginia is only just beginning to answer these questions.<sup>140</sup>

In Oregon and the other states that preclude consideration of fault, the issues are more fundamental. What is the jurisprudential basis for awards of alimony divorced from consideration of marital misconduct?<sup>141</sup> In articulating a theory of compensa-

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expect major differences in the awards. We believe the differences can be explained by the fact that opportunities foregone over the course of a 20 year marriage are much greater than those foregone during a two year marriage. See *supra* note 133. The following statutes require consideration of the duration of marriage as a factor in awards of spousal support: ARIZ. REV. STAT. ANN. § 25-319(b)(2) (1976 & Supp. 1987); COLO. REV. STAT. § 14-10-114(2)(d) (1987); CONN. GEN. STAT. § 46b-82 (1987); DEL. CODE ANN. tit. 13, § 1512(c)(4) (1981 & Supp. 1987); FLA. STAT. ANN. § 61.08(2)(b) (West 1985); GA. CODE ANN. § 19-6-1 (1987); HAW. REV. STAT. § 580-47 (1987); IDAHO CODE § 32-705(2)(c) (1983); ILL. ANN. STAT. ch. 40, para. 504(b)(4) (Smith-Hurd 1980); IOWA CODE § 598.21(1)(a) (1985); KY. REV. STAT. ANN. § 403.200(2)(d) (Baldwin 1983); MD. FAM. LAW CODE ANN. § 11-106(b)(4) (1984); MASS. GEN. LAWS ANN. ch. 208, § 34 (West Supp. 1987); MINN. STAT. ANN. § 518.552(2)(d) (West Supp. 1987); MO. ANN. STAT. § 452.235(2)(4) (Vernon 1986); MONT. CODE ANN. § 40-4-203(2)(d) (1987); N.J. STAT. ANN. § 2A:34-23 (West Supp. 1987); OHIO REV. CODE ANN. § 3105.18(b)(5) (Baldwin 1983); OR. REV. STAT. § 107.105(d)(A) (Supp. 1986); 23 PA. CONS. STAT. § 752 (1985 & Supp. 1986); VA. CODE ANN. § 20-107.1(4) (1983 & Supp. 1987); WASH. REV. CODE ANN. § 26.09.090(1)(d) (1986); W. VA. CODE § 48-2-16(b)(1) (1986); WIS. STAT. ANN. § 767.26(1) (1981).

139. For states continuing to permit consideration of marital misconduct in the award of spousal support, see *supra* notes 125, 129. For a discussion of the role fault can be expected to play, see *infra* notes 179-84 and accompanying text.

140. In *Crutchfield v. Crutchfield*, 302 S.E.2d 76 (W. Va. 1983), for example, the court reversed a lower court decision which based a denial of alimony on the fact that the husband was guilty of no inequitable conduct. The appellate court then recited the parties' respective financial circumstances, noting that the wife had not worked outside the home during the twenty-seven years of marriage. Yet, the court failed to suggest a framework for determining the amount of alimony other than pointing out the wife's obvious need. See also *Nutter v. Nutter*, 327 S.E.2d 160 (W. Va. 1985).

141. After all, if marriage is terminable at will, and marital support obligations end upon divorce, what is the justification for imposing a continued financial relationship upon the parties? The two major justifications involve either the idea of compensation for the poorer spouse's sacrifices and contributions to the marriage, see, e.g., *supra* note 135, or the idea that both spouses should share increases in earning capacity acquired throughout the

tion for lost career opportunities, Oregon has gone farther than most states, but the answers supplied are still far from satisfactory.

The most troubling question in such a compensatory scheme is whether the lost career rationale in fact offers a comprehensive basis for alimony. Consider this stereotyped hypothetical:

Dental hygienist and dentist marry at age 28. Both continue in their jobs throughout their twenty-three year marriage and have no children. At the time of the divorce, he, the dentist, is making \$110,000 and she is making \$22,000 as a hygienist.<sup>142</sup>

Without spousal support, she will be unable to maintain the standard of living to which she has been accustomed, and she may have few prospects to increase her earnings sufficiently to compensate for the loss of a share in his income. Yet, she has made no apparent career sacrifice<sup>143</sup> or other uncompensated contributions to the marriage.<sup>144</sup>

If the Oregon courts decide that she is not entitled to support, she will suffer a significant hardship. On the other hand, if the courts assume that, but for her expectation of spousal support, she would have pursued a different career, the courts may impose a hardship upon him. Let us assume the worst. Suppose she leaves him for an affair with an investment banker that has ended by the time of the divorce. He marries a widow whose pension benefits terminate with the remarriage. Long-term alimony permitting the dental hygienist to enjoy the standard of living experienced during the marriage would reduce the stan-

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marriage. See generally L. WEITZMAN, *supra* note 5, at 110-13, 139-42; Krauskopf, *supra* note 47, at 379; Prager, *supra* note 95, at 6-11. The implications of these theories have yet to be fully worked out, and judicial acceptance of either notion is as yet unclear.

142. For these purposes, we assume that his dental practice was established at the time of the marriage, that there is no reason to believe that his practice benefitted from the marriage, and no reason to believe that she would have pursued a different career had she not married. We realize that in most cases she will have made some contribution to his practice, and that it will be impossible to predict what she would have done had she not married. For the moment, however, we proceed with these assumptions.

143. Her most obvious loss would be the greater opportunities she enjoyed at age 28 than at age 51 to marry a man earning more than she could earn on her own. See generally *supra* notes 79 & 83 (statistics on remarriage).

144. Indeed, if we change the hypothetical and make the woman the dentist and the man the dental hygienist, we suspect that the number of those believing the alimony is due would decrease dramatically. This may be because a man in that situation is less likely to have given up other opportunities to marry as well, or it may be because we assume that a female dental hygienist gave up the opportunity to pursue more lucrative careers whereas a male hygienist did not. See *supra* note 78.

dard of living available to the dentist and his new wife. If the court assumes, without requiring proof, that the first wife's career has suffered because of the marriage,<sup>145</sup> if she has not made a significant contribution to his career and her responsibility for the marriage failure is not considered, the inequity of such an award would be self-evident.<sup>146</sup>

One suspects that Oregon has chosen a compromise. It has decided that continuing to permit consideration of marital misconduct exacts too high a cost because of its problematic nature and the hostility the process itself may engender.<sup>147</sup> To compensate for the elimination of fault grounds—and the ability to redress the lost opportunity to be married—the Oregon courts have expanded the no fault grounds for spousal support and softened the evidentiary requirements.<sup>148</sup> In return, we would expect either modest support awards, with a heavy emphasis on transitional or rehabilitative payments, or surreptitious consideration of marital misconduct.<sup>149</sup> At this point, we lack the empirical data to prove our suspicions, but there is some evidence

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145. The Oregon analysis suggests that such an assumption would be fairly automatic because of the impossibility of determining what career path a woman would have chosen had she not relied on marriage for her principal source of support. See *supra* note 135. If, on the other hand, the emphasis is on "need" alone, her career sacrifice should be irrelevant.

146. The inequities arise, in part, because he too, has suffered some losses from the marriage. If he remarries, he has recaptured the opportunity to marry. But if he is required to pay support, he will presumably be financially worse off than if he had never married or had married only his second wife. See generally *supra* text accompanying notes 82-84, 87.

147. One goal of the divorce reform in Iowa was to limit the bitter presentation of those details of married life that culminate in marital failure. If this is a worthy goal, then the restraint involved in withholding from the court facts that *arguendo* go to the question of fairness is not an intolerable sacrifice.

Note, *Dissolution of Marriage in Iowa: Collateral Determinations Under the No-Fault Concept*, 22 DRAKE L. REV. 584, 597 (1973). See also L. WEITZMAN, *supra* note 5, at 12-14, 23-24.

148. Indeed, the effect of any declaration that the primary consideration will be "need" is to do precisely that. See *supra* notes 132, 136.

149. One would expect lower alimony awards for two reasons: first, where evidence of marital misconduct is barred, lower awards discount for the possibility that the paying party has been injured by the other spouse's decision to end the marriage. Second, where the career opportunities lost are assumed to have been sufficient to sustain the standard of living enjoyed during the marriage, lower awards discount for the possibility that the assumption is untrue. In addition, where both spouses are presumed "innocent," one would expect the courts to be more reluctant to impose a hardship on the paying spouse. See *infra* text accompanying note 182.

Transitional alimony is discussed in Atkin, *supra* note 28, at 342; Weitzman & Dixon, *supra* note 59, at 148-49; Comment, *The Fault Preclusion to Post-Divorce Alimony in Louisiana*, 57 TUL. L. REV. 351 (1982).

from Iowa and California to indicate both are taking place.<sup>150</sup>

In the meantime, what sets apart West Virginia and Oregon from other states is their articulation of a basis for alimony. As a whole, alimony decisions are characterized by ad hoc decision making, with few clearly articulated principles and only occasional disclosure of the reasoning.<sup>151</sup> The continued use of this

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150. Weitzman reports that the greatest change in the pattern of support awards following the introduction of no-fault divorce law has been the change in the duration of the awards. Between 1968 and 1972 open-ended support awards dropped from 62 to 32 percent of the support awards in Los Angeles County. L. WEITZMAN, *supra* note 5, at 167. Some states have eliminated permanent alimony altogether. See *supra* note 105.

Sackett and Munyon concluded that, in Iowa,

[e]xcluding fault evidence at the trial court level is difficult. Dissolutions in Iowa are tried in equity and subject to de novo review. Objections are not ruled upon, and the evidence goes into the record even if it is clearly inadmissible. The problem is whether the courts can and do truly disregard the fault evidence in their consideration of awarding alimony.

Sackett & Munyon, *supra* note 61, at 304. In addition, while consideration of fault is precluded in the alimony determination, it is relevant to child custody proceedings and other issues that may be before the court awarding alimony. *Id.* at 304-05. See, e.g., *In re Marriage of Janssen*, 348 N.W.2d 251, 253-55 (Iowa 1984); *In re Marriage of Orgren*, 375 N.W.2d 710, 712-13 (Iowa Ct. App. 1985); *In re Marriage of Estlund*, 344 N.W.2d 276, 280 (Iowa Ct. App. 1983).

151. The most common statutory prescription for spousal support is to list a set of appropriate considerations—length of the marriage, relative financial position of the parties, etc.—without any guidance as to the relative importance of the factors or their purpose in being considered. See, e.g., ARIZ. REV. STAT. ANN. § 25-319(b) (1976 & Supp. 1987); COLO. REV. STAT. § 14-10-114(2) (1987); CONN. GEN. STAT. § 46b-82 (1987); DEL. CODE ANN. tit 13, § 1512(c) (1981 & Supp. 1987); FLA. STAT. ANN. § 61.08(2) (West 1985); GA. CODE ANN. § 19-6-(5)(a) (1982); HAW. REV. STAT. § 580-47 (1987); IDAHO CODE § 32-705(2) (1983); ILL. ANN. STAT. ch. 40, para. 504(b) (Smith-Hurd 1980); IOWA CODE § 598.21(1) (1985); KY. REV. STAT. ANN. § 403.200(2) (Baldwin 1983); MD. FAM. LAW CODE ANN. § 11-106(b) (1984); MASS. GEN. LAWS ANN. ch. 208, § 34 (West Supp. 1987); MINN. STAT. ANN. § 518-552(2) (West Supp. 1987); MO. ANN. STAT. § 452-335(2) (Vernon 1986); MONT. CODE ANN. § 40-4-203(2) (1987); N.J. STAT. ANN. § 2A:34-23 (West Supp. 1987); N.Y. DOM. REL. LAW § 236(B)(6) (McKinney 1986); N.C. GEN. STAT. § 50-16.2 (1987); OHIO REV. CODE ANN. § 3105.18(b) (Baldwin 1983); OR. REV. STAT. § 107.105(1)(d) (Supp. 1987); 23 PA. CONS. STAT. § 501(b) (1986); R.I. GEN. LAWS § 15-5-16 (1981 & Supp. 1987); VT. STAT. ANN. tit. 15, § 752(b) (Supp. 1987); VA. CODE ANN. § 20-107.1 (1983 & Supp. 1987); WASH. REV. CODE ANN. § 26.09.090(1) (1986); W. VA. CODE § 48-2-16(b) (1986); WIS. STAT. ANN. § 767.26 (1981). In determining spousal support, the courts then recite the appropriate list of considerations and announce a result, again without reference to any rational ordering of the factors or explaining their importance. See, e.g., *Vaiksneras v. Vaiksneras*, 341 S.E.2d 637, 637 (S.C. 1986). Almost totally absent from these decisions is an explanation of the role spousal support is intended to play.

To illustrate the problem, let us take the almost universal emphasis on the duration of the marriage. There are three possible justifications for considering this factor. First, the longer the marriage, the more likely the parties are to have foregone opportunities to enter into other favorable marriages. Second, in cases where career sacrifices are involved, the longer the marriage, the less likely the sacrificing spouse will be able to resume the interrupted career. Third, the longer the marriage and the greater the disparity in income,



seemingly arbitrary pattern of decision making is inevitable, absent judicial understanding of the purposes of alimony and the rationale underlying the inquiry.

#### IV. PROTECTING THE RELIANCE INTEREST: A ROADMAP FOR THE FUTURE

In developing this Article, we have tried to identify the central interests in marriage that the law ought to protect upon dissolution of the union. We have used the concept of the "reliance interest" to describe each spouse's change of position in reliance on the expectation that the marriage would continue long enough to realize a return on the individual adjustments undertaken. In the process, the most striking conclusion of our work may be the continuing changes in the nature of reliance and the policy choices those changes present. While our analysis of the reliance interest cannot in itself resolve those policy issues, we believe that it will provide a framework for the debate.<sup>152</sup> Accordingly, in assessing the future role of alimony, our examination of the reliance interest allows us to begin with the following conclusions:

1. *Some concept of fault, breach of marital obligations, or responsibility for the divorce is necessary to protect the lost opportunity to marry.* So long as men generally have the opportunity to earn substantially more than women, and many women marry men earning substantially more than they could earn on their own, wives' access to their husbands' income will continue to affect their financial position in a manner which is independent

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the more likely an increase in earning capacity occurred during the marriage, due (at least to some degree) to the contributions of the supporting spouse. For further discussion of these rationales, see *infra* notes 191-93 and accompanying text. Returning to the problem posed by the dentist and the dental hygienist, if the issue is lost opportunities to marry well, then the length of the marriage is clearly relevant. However, if the issue is lost career opportunities, then the length of the marriage should not matter since no career opportunities have been lost. Similarly, if the focus is on her interest in his dental practice, then since the major investments were made before marriage, she has contributed little to his career; thus, the duration of the marriage is unimportant. The failure to distinguish between these possible rationales—indeed, the failure to articulate any rationale—makes spousal support statutes and case law singularly obscure.

152. Our examination of the reliance interest does not necessarily address the jurisprudential basis for any award of alimony. See *supra* note 141. As we mentioned above, the abolition of fault grounds for divorce makes it inappropriate to base alimony on the reaffirmation of marital obligations. In those states that permit consideration of marital misconduct, "alimony" may be appropriate as a remedy for breach of marital obligations. When marital misconduct is not at issue, however, the basis for spousal support remains to be fully articulated.

of any career sacrifice or contribution to their husbands' career.<sup>153</sup> Moreover, as women earn more, many men will also choose mates earning more than they could earn on their own. Protection of the interest in the other spouse's income requires recognition of a right to have the marriage endure.<sup>154</sup> Thus, where the husband earns more than his wife and chooses to leave—or to abdicate his marital responsibilities to a degree which justifies his wife's decision to leave—alimony is justified by his obligation to compensate his wife for her right to have the marriage continue.<sup>155</sup> When the wife elects to leave or is otherwise responsible for the divorce, she forfeits her right to continue enjoying the benefits of her husband's greater income. Thus, some determination of responsibility for the divorce is necessary to a system of alimony designed to protect disparity in income alone.<sup>156</sup>

2. *A fault based system cannot adequately protect lost career opportunities or other contributions to their marriage.* Now that both men and women enjoy access to the labor market, and both are ordinarily expected to be self supporting, a spouse foregoing career advancement to benefit the family will have made a major, uncompensated contribution to the marriage irrespective

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153. See *supra* notes 65-67. The importance of this interest is magnified because opportunities for remarriage are greater for men than for women. See *supra* notes 79 & 83.

154. See *supra* text accompanying notes 84-89 and notes 100 & 127.

155. The same is true for men married to women who earn more than they could earn on their own. These men are, however, less likely to have foregone opportunities to have married as well. See *supra* note 76. If the purpose of recognizing a right to have the marriage continue is simply a surrogate for protecting reliance, one would expect less compensation in these cases. See, e.g., *Pfohl v. Pfohl*, 345 So. 2d 371 (Fla. Dist. Ct. App. 1977). If, however, the purpose is to encourage reliance on marriage or to make a societal statement about the lifetime nature of marital commitments, one would expect men to receive the same protection as women. See *infra* notes 171-72.

156. See *supra* text accompanying notes 86-89, noting that this is true in part because both parties sacrificed other opportunities to marry and the protection of one spouse's interest is at the expense of the other's.

We should also note, however, that this does not necessarily mean that support awards will be higher in states that permit consideration of fault. We would expect that awards would be higher for some, especially women in long term marriages where the husband is responsible for the divorce, and lower for others, especially those found responsible for the end of a longer term marriage.

Further, we would expect that where the basis for spousal support is clearly defined and consistent with community expectations, judges should be more willing to order support awards that impose a hardship on the paying spouse. Nonetheless, we would still expect the overall level of support ordered to be less than in more traditional societies so long as virtually all recipient spouses are expected to mitigate the losses from the divorce by working, and so long as relatively high divorce rates make it inappropriate to value marriage in terms of a lifelong commitment. See *supra* notes 92-94.

of the reasons for the divorce. A wife who puts her husband through medical school or a husband who gives up his promising career as an advertising executive to care for the children will have a claim for compensation even if she or he decides to end the marriage. To protect these contributions, even a fault based system must contain some provision for a set off against fault based claims or for relief where responsibility for the divorce is shared or impossible to prove.<sup>157</sup>

3. *The determination of responsibility for marital discord imposes substantial costs upon the system.* So long as fault was a prerequisite for divorce, the financial allocations made could be linked to the marital misconduct which justified the divorce. A significant reason for the adoption of no fault divorce was the difficulty of determining fault, and the hostility the process generated in what otherwise could have been amicable separations.<sup>158</sup> There is considerable fear that permitting consideration of marital misconduct in the award of alimony would reintroduce the recriminations which bedeviled the fault model of divorce.<sup>159</sup>

While consideration of marital misconduct is inherently troublesome for the courts, *permitting* consideration of marital misconduct in the award of alimony is very different from *requiring* proof of fault as a prerequisite for divorce. Fault based divorce rested on a societal consensus that couples were morally obligated to remain married unless the conduct of one spouse was so incompatible with the continuation of the marriage that it released the other spouse from his or her marital obligations.<sup>160</sup> When that societal consensus gave way to the view that the parties could end their union, the fault requirement failed to serve any purpose, and courts trivialized the requirement in an effort

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157. See *supra* notes 99-105. The issue has been most directly raised in the context of professional degrees. See *DeLa Rosa v. DeLa Rosa*, 309 N.W.2d 755 (Minn. 1981); *Hubbard v. Hubbard*, 603 P.2d 749, 751-52 (Okla. 1979); *Erickson*, *supra* note 103, at 957, 974; *Krauskopf*, *supra* note 47, at 394. See generally *Comment*, *supra* note 63. But see *Church v. Church*, 96 N.M. 388, 396, 630 P.2d 1243, 1250 (1981). See also *infra* notes 176 & 186.

158. See, e.g., Report of the California Governor's Commission on the Family 28 (1966); *Clark*, *supra* note 113, at 407; *Wadlington*, *Divorce Without Fault Without Perjury*, 52 VA. L. REV. 32 (1966); Note, *Untying the Knot: The Course and Patterns of Divorce Reform*, 57 CORNELL L. REV. 649, 653-54 (1972).

159. See *supra* note 147.

160. See, e.g., *Massey v. Massey*, 621 S.W.2d 728, 730 (Tenn. 1981); *McLaughlin v. McLaughlin*, 346 S.E.2d 535, 537 (Va. Ct. App. 1986); see also *supra* notes 23-24.

to circumvent it.<sup>161</sup> So long as proof of fault is not required for the award of alimony, neither party need introduce such evidence, the courts need not find one party's conduct superior to the other, and thus the abuses which stemmed from trivialization of the requirement need not occur.<sup>162</sup>

Moreover, to the extent marital misconduct continues to play an important role in the determination of alimony, it does so because the party choosing to end the marriage is required to pay for the consequences of that decision.<sup>163</sup> That means that fault should come into play only after the termination of a relatively long term marriage,<sup>164</sup> and the determination of fault should focus on conduct sufficiently egregious to be clearly responsible for the divorce.<sup>165</sup> A spouse's peccadillos would become relevant only if they were incompatible with the continuation of the marriage.<sup>166</sup> Accordingly, the required judicial

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161. See, e.g., *Reed v. Reed*, 138 Colo. 74, 329 P.2d 633 (1958); Friedman, *supra* note 5, at 659-64; Note, *A Survey of Mental Cruelty as a Ground for Divorce*, 15 DE PAUL L. REV. 159 (1965).

162. This does not, however, eliminate the possibility of other types of abuse. See sources cited *infra* at note 167.

163. See *supra* notes 71-73 and *infra* notes 171-73.

164. After short term marriage, it will be less likely that the marriage itself significantly foreclosed other opportunities for marriage and more likely that the divorce reflects the incompatibility or immaturity of the couple.

165. See, e.g., *Cole v. Cole*, 384 N.W.2d 312, 316 (S.D. 1986); *McLaughlin v. McLaughlin*, 346 S.E.2d 535, 537-38 (Va. Ct. App. 1986); *Nutter v. Nutter*, 327 S.E.2d 160, 162-63 (W. Va. 1985); *Massey v. Massey*, 621 S.W.2d 728, 730 (Tenn. 1981); *Wallace v. Wallace*, 46 Md. App. 213, 416 A.2d 1317 (1980); *Dyer v. Tsapis*, 249 S.E.2d 509 (W. Va. 1978).

166. In this sense, the inquiry should be more like the determination of "breach" in contract cases than "fault" in the tort sense. The law imposes no absolute obligation to perform contractual obligations. There is no moral approbation associated with the decision to terminate contracts; thus the law disfavors punitive damages and specific performance. See O. HOLMES, *THE COMMON LAW* 234-38 (M. Howe ed. 1963); R. POSNER, *ECONOMIC ANALYSIS OF LAW* §§ 55-58 (1973); Farnsworth, *Legal Remedies for Breach of Contract*, 70 COLUM. L. REV. 1145, 1147-48 (1970); *RESTATEMENT (SECOND) OF CONTRACTS*, §§ 355, 357 (1981). For a somewhat different view, see generally C. FRIED, *CONTRACT AS PROMISE* (1981). Rather, emphasis is on the need for the breaching party to compensate the other for the consequences of the breach. See generally Fuller & Perdue, *supra* note 1.

In practice, this means the primary determination is the identification of the party choosing to end the marriage. The focus of inquiry would then shift to whether the other spouse's conduct was sufficient to justify that decision, thereby triggering compensation. For a list of cases dealing with this topic see *supra* note 165. So long as a societal consensus continues to recognize a right to have the marriage endure, misconduct should be defined in terms of activity incompatible with the continuation of the marriage. The traditional categories of desertion, adultery, and extreme cruelty would therefore retain their vitality, although the older cases should give way to interpretations more compatible with the modern role of women. Furthermore, the categories should reflect the understanding of the

determinations, while not necessarily pleasant, need not be onerous. Nonetheless, anything less than a complete bar to the consideration of marital misconduct would permit embittered couples to use divorce proceedings to seek revenge on their former mates.<sup>167</sup> The question as to whether it is worthwhile to risk such abuse depends on the strength of the other interests at stake.

4. *In defining the reliance interest in marriage, the primacy of the lost opportunity to marry is giving way to the interest in lost career opportunities, but the process is not, and may never be, complete.* So long as women had few opportunities to enter the labor market, they were primarily dependent on marriage for their support. The more equal the access to employment opportunities women enjoy, the more important become their claims to compensation for career sacrifices made to benefit the family.<sup>168</sup> Nonetheless, where there was once a single model of marriage, there are now many. Many men and women enjoy greater opportunities to marry well than to pursue successful careers.<sup>169</sup> Many wealthy men and women and many of those pursuing demanding careers would prefer to marry spouses whose income potential is less than their own, but who bring other assets to the marriage.<sup>170</sup> Finally, with opportunities to remarry continuing to be better for men than for women, the loss of opportunities to "marry well" will be more important than lost career opportunities for some part of the population.

5. *Whether lost opportunities to marry remain sufficiently important to outweigh the administrative costs of determining responsibility for the divorce is a policy question which turns on society's view on the nature of marriage.* We can say with certainty that full protection of lost opportunities to marry requires

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couple. Nonetheless, courts should still be encouraged to find, in appropriate cases, that responsibility for the end of the marriage was shared or impossible to prove. See *supra* text accompanying note 162. Spousal support would then be available if justified on no fault grounds. See *infra* notes 176, 180 and accompanying text.

167. See *Peterson v. Peterson*, 242 N.W.2d 103, 108 (Minn. 1976); Clark, *supra* note 113, at 405; O'Kelly, *supra* note 57, at 257; Wadlington, *Sexual Relations After Separation or Divorce: The New Morality and the Old and New Divorce Laws*, 63 VA. L. REV. 249 (1977); Comment, *supra* note 113, at 375.

168. See, e.g., L. WEITZMAN, *supra* note 5, at 12-14. The lost support from their husbands also became less important to the extent they could mitigate that loss by working after the divorce.

169. G. BECKER, *supra* note 5, at ch. 4; Becker, *A Theory of Marriage*, in *ECONOMICS OF THE FAMILY* 306-07 (T. Schultz, ed. 1974).

170. Becker, Landes & Michael, *supra* note 5, at 1146; see also Gronau, *supra* note 5, at 635.

consideration of "fault"—by this or any other name. Whether consideration of fault *should* be permitted, however, turns on the existence of a societal consensus that marriage continues to involve a lifelong commitment,<sup>171</sup> that financial reliance on that commitment is appropriate and should be protected,<sup>172</sup> and that these concerns are sufficiently important to outweigh the transaction costs involved.<sup>173</sup>

Once the policy questions are resolved, however, the outlines of a rational alimony system are reasonably clear. In those states which, like West Virginia, decide to permit (but not require) consideration of marital misconduct in the financial allocations made upon divorce, two different systems of compen-

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171. Legally, marital vows continue to impose a lifetime commitment. *See, e.g., In re Marriage of Higgason*, 10 Cal. 3d 476, 110 Cal. Rptr. 897, 516 P.2d 289 (1973); OHIO REV. CODE ANN. § 3105.06 (Baldwin 1983). *See generally* Krauskopf & Thomas, *supra* note 6, at 568; RESTATEMENT (SECOND) OF CONTRACTS § 190 (1981). Whether there continues to be a societal consensus that the decision to terminate the marital union gives rise to an obligation to compensate the disappointed expectation of the other spouse that the marriage would continue remains an open question, and one which may be resolved differently in West Virginia than in Oregon. Full resolution of this issue involves consideration of the effect of divorce on children and on the evolution of gender differentiated roles and it is thus beyond the scope of this article.

172. It is increasingly apparent that a societal consensus is forming to support compensation for sacrifices made to benefit the family or the other spouse. *See supra* text accompanying notes 94-105, 128-31, 134-36. The unresolved question is whether the higher standard of living made possible by the marriage should be protected even where no such sacrifices were made.

173. *See supra* notes 114, 157-67 and accompanying text.

Related to these issues is the additional question of whether spousal support should be designed to discourage divorce. Becker, Landes & Michael, *supra* note 5, at 1156-57, argue that the greater the financial penalty for the behavior that ends the marriage, the less frequent divorce will become. Accordingly, they advocate tying spousal support to determinations of fault. *See generally* Landes, *supra* note 5. There is an argument, however, that men are relatively more responsible for divorce than women, and that the variety of restraints described above have traditionally served to encourage men to stay married. Under this theory, if a consequence of no fault divorce has been to lower the frequency and amount of spousal support, divorce rates would increase as the weaker disincentives for men would not be offset by the higher disincentives for women. *See, e.g., Olsen, supra* note 7, at 1537. On the other hand, if no fault alimony were to increase the presumption in favor of spousal support, divorce would be discouraged as the weaker financial disincentives for women would be more than offset by the higher financial disincentives for men. Under this theory, then, a renewed emphasis on fault would be unnecessary to discourage divorce. Increasing the presumption in favor of spousal support or expanding the definition of marital property would be more effective.

The major problem with this argument is that, even if the analysis is correct, there will still be cases where the wife is responsible for the divorce. Convincing male dominated legislatures and courts to expand spousal support at the expense of occasionally innocent husbands may be difficult, and may well account for the relatively low level of spousal support. *See generally* L. WEITZMAN, *supra* note 5; *see also supra* note 68.

sation will co-exist.<sup>174</sup> One will be concerned primarily with protecting the expectation interest in the marriage, and it will turn on a determination of responsibility for the divorce. Where there is a disparity in income, and the more financially secure spouse is responsible for the termination of a long-term marriage, alimony will be appropriate unless the other spouse remarries or increases his or her earnings to a level commensurate with the standard of living enjoyed during the marriage.<sup>175</sup> If the less financially secure spouse is responsible for the divorce, or if the parties share responsibility, alimony will not be appropriate unless it is justified on another basis.

The fault based compensation would then be offset by the sacrifices, if any, made during the marriage. The burden of proving such sacrifices, however, should not be onerous. If the divorce occurs shortly after she graduates from medical school or if a working spouse begins a pattern of sporadic labor force participation with the birth of the couple's first child, one could reasonably assume that he had contributed to her medical degree or that she forewent better career opportunities to care for the children.<sup>176</sup> Emphasis should then be placed on lump sum, short term or rehabilitative payments tailored to the sacrifices made.<sup>177</sup>

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174. See *supra* note 129.

175. See *infra* note 181; see also *Yannas v. Frondistou-Yannas*, 395 Mass. 704, 481 N.E.2d 1153 (1985); *In re Marriage of Carney*, 122 Ill. App. 3d 705, 462 N.E.2d 596 (1984); *D.E.W. v. M.W.*, 552 S.W.2d 280 (Mo. Ct. App. 1977).

176. For examples of cases recognizing career sacrifices as a basis for financial adjustments at divorce, see *In re Marriage of Elgin*, 58 Or. App. 94, 647 P.2d 941 (1982); *In re Marriage of Lundberg*, 107 Wis. 2d 1, 318 N.W.2d 918 (1982); *DeLa Rosa v. DeLa Rosa*, 309 N.W.2d 755 (Minn. 1981); *DeWitt v. DeWitt* 98 Wis. 2d 44, 296 N.W.2d 61 (1980); *Morgan v. Morgan*, 81 Misc. 2d 616, 366 N.Y.S.2d 97, *aff'd in part, rev'd in part*, 52 App. Div. 2d 804, 383 N.Y.S.2d 343, *appeal dismissed*, 40 N.Y.2d 843, 387 N.E.2d 839, 356 N.E.2d 292 (1976).

In addition, even short term marriages may involve some unrecoverable loss such as pension benefits. See *Wilson v. Wilson*, 101 A.D.2d 536, 542, 476 N.Y.S.2d 120, 124 (1984) (The spouse "is entitled at the least, to be restored to the extent possible, to the economic situation which pre-existed the marriage."). Cf. *Duttenhofer v. Duttenhofer*, 474 So. 2d 251, 254 (Fla. 1985) (distinguishing between the sacrifice of employment possibilities, a sacrifice which contributes to the marriage, and the loss of widow's benefits, which does not).

177. See, e.g., *In re Marriage of Elgin*, 58 Or. App. 94, 647 P.2d 941 (1982); *In re Marriage of Lundberg*, 107 Wis. 2d 1, 318 N.W.2d 918 (1982). For a discussion of lump sum alimony, see *In re Marriage of Feeman*, 106 Ill. 2d 290, 478 N.E.2d 326 (1985); *Cornelius v. Cornelius*, 382 So. 2d 710, 712-15 (Fla. Dist. Ct. App. 1979). A major difference between lump sum alimony and periodic alimony is that lump sum alimony does not terminate upon remarriage. This is appropriate if, as we have suggested, lump sum alimony is designed to compensate for sacrifices or other contributions made to benefit the marriage. See discussion of rehabilitative alimony, *supra* note 105. Where rehabilitation is

So long as it remains short term, the awards would not terminate with remarriage.<sup>178</sup>

These determinations will never be made with mathematical precision. Moreover, they will be limited by the needs of the one spouse and the ability of the other to pay.<sup>179</sup> In practice, therefore, the fault based inquiry and the compensation based

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not possible, and where permanent alimony would be inappropriate because the sacrificing party's decision to end the marriage imposed a hardship on the other spouse, some transitional alimony may still be appropriate. See *Murray v. Murray*, 374 So. 2d 622 (Fla. 1979). See generally Erickson, *supra* note 103, at 949, 974.

178. In general, awards intended for rehabilitative purposes should continue until the rehabilitation is completed or abandoned, regardless of remarriage. See, e.g., *In re Marriage of Stephens-Tiley*, 50 Or. App. 503, 506, 623 P.2d 1105, 1106-07 (1981) (While wife's remarriage alone might not justify termination of spousal support, her remarriage, "coupled with her decision not to pursue a career at this time, is a sufficient change in circumstances to justify modification of the original decree."); see also *In re Marriage of Elgin*, 58 Or. App. 93, 647 P.2d 941 (1982).

After longer term marriage, however, especially if the spouse is older or in ill health, rehabilitation may be impossible. Compensation for career sacrifices made might then appropriately take the form of long term alimony. See, e.g., *O'Neal v. O'Neal*, 410 So. 2d 1369, 1371-72 (Fla. Dist. Ct. App. 1982); *In re Marriage of Yantis*, 52 Or. App. 825, 629 P.2d 883 (1981); see also *supra* note 110. These payments should be subject to the principle that, in the event of remarriage, alimony should not allow the remarrying spouse to enjoy a standard of living greater than that possible if the marriage had continued. See *supra* note 103; see also formulation in *In re Marriage of Orgren*, 375 N.W.2d 710, 713 (Iowa Ct. App. 1985) (Alimony does not terminate upon remarriage "unless lack of need is established."). In addition, where the sacrificing party is responsible for the termination of the marriage, the amount and duration of the payments should be relatively more circumscribed by the other spouse's ability to pay.

179. No matter how egregious the marital misconduct, the courts are unlikely to leave the party at fault destitute when the other party is able to pay. Conversely, if the sacrificing spouse is able to mitigate those sacrifices through a high paying job or favorable marriage, spousal support is unlikely. Most of the states listing factors for awarding alimony consider the defendant's ability to pay. See, e.g., ARIZ. REV. STAT. ANN. § 25-319(B)(b) (Supp. 1987); COLO. REV. STAT. § 1410-10-114(2)(f) (1987); DEL. CODE ANN. tit. 13, § 1512(c)(6) (1981 & Supp. 1987); FLA. STAT. ANN. § 61.08(2)(d) (West 1985); GA. CODE ANN. § 19-6-5(a)(4) (1982); HAW. REV. STAT. § 580-47(11) (1987); IDAHO CODE § 32-705(2)(e) (1983); ILL. ANN. STAT. ch. 40, para. 504(b)(6) (Smith-Hurd 1980); IOWA CODE § 598.21(1)(f) (1985); Ky. Rev. Stat. Ann. § 403.200(2)(f) (Baldwin 1983); ME. REV. STAT. ANN. tit. 19, § 721 (1981 & Supp. 1987); MD. FAM. LAW CODE ANN. § 11-106(b)(11) (1984); MASS. GEN. LAWS ANN. ch. 208, § 34 (West Supp. 1987); MICH. STAT. ANN. § 25.103 (Callaghan Supp. 1987); MINN. STAT. ANN. § 518.522(2)(g) (West Supp. 1987); MO. ANN. STAT. § 452.335(2)(6) (Vernon 1986); MONT. CODE ANN. § 40-4-203(2)(f) (1987); N.J. STAT. ANN. § 2A:34-23 (West Supp. 1987); N.Y. DOM. REL. LAW § 236(B)(6) (McKinney 1986); OHIO REV. CODE ANN. § 3105.18(b)(j) (Baldwin 1983); OR. REV. STAT. § 107.105(1)(d)(D) (Supp. 1987); 23 PA. CONS. STAT. ANN. § 501 (1955 & Supp. 1986); R.I. GEN. LAWS § 15-5-16 (1981 & Supp. 1987); VA. CODE ANN. § 20-107.1(1) (1983 & Supp. 1987); WASH. REV. CODE ANN. § 26.09.090(1)(f) (1986); W. VA. CODE § 48-2-16(b)(14) (1986); WIS. STAT. ANN. § 767.26(5) (1981); see also *Colabella v. Colabella*, 86 App. Div. 2d 643, 477 N.Y.S.2d 26 (1982); *Williamson v. Williamson*, 84 App. Div. 2d 606, 444 N.Y.S.2d 487 (1981); *Pettit v. Pettit*, 85 Ill. App. 3d 280, 406 N.E.2d 899 (1980); *In re Marriage of Mason*, 93 Cal. App. 3d 215, 155 Cal. Rptr. 350 (1979).



inquiry are likely to be combined. Where, for example, he makes more money than she, and neither party is at fault or both share responsibility for the break up of the marriage, the award should be designed to encourage her self sufficiency without unduly undermining his style of living.<sup>180</sup> Where he is at fault, the award should maintain the standard of living she enjoyed during the marriage even if it imposes some hardship upon him.<sup>181</sup> When she is at fault, alimony should compensate her for lost career opportunities with the amount limited by his ability to pay.<sup>182</sup> There is some evidence that the states are already moving in this direction.<sup>183</sup> The courts, however, need to make the basis for their decisions far more explicit and to keep distinct the different purposes of alimony.<sup>184</sup>

In states which bar consideration of marital misconduct, the courts are still struggling to refine the theory on which alimony is based. So long as these states follow Oregon's lead and tie alimony to lost career opportunities, one would expect the trade-offs described at the end of the last section (that is, relatively weak evidentiary requirements together with relatively

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180. See, e.g., *Nutter v. Nutter*, 327 S.E.2d 160 (W. Va. 1985). This means, in part, that awards are likely to be shorter in duration. Indeed, even "permanent" alimony is likely to be terminated eventually, even if the spouse receiving support will never live at the standard enjoyed during the marriage. See e.g., *Ward v. Ward*, 41 Or. App. 447, 599 P.2d 1150, 1153-54 (1979).

181. See, e.g., *In re Marriage of Janssen*, 348 N.W.2d 251, 253, 254 (Iowa 1984); *Massey v. Massey*, 621 S.W.2d 728, 730 (Tenn. 1981) (where the court raised the amount of alimony from \$250 to \$750 per month after reversing a lower court ruling that the wife was at fault); *Williamson v. Williamson*, 367 So. 2d 1016, 1019 (Fla. 1979); *Forster v. Forster*, 436 So. 2d 966, 967 (Fla. Dist. Ct. App. 1983); *Hurtado v. Hurtado*, 407 So. 2d 627, 629 (Fla. Dist. Ct. App. 1981).

182. See, e.g., *Flood v. Flood*, 24 Md. App. 395, 400, 330 A.2d 715, 718 (1974) ("The greater the degree of fault on the part of the wife demonstrated, the greater the need which she must show to entitle her to an award of alimony appropriate to the circumstances otherwise existing."); *Flanagan v. Flanagan*, 270 Md. 335, 311 A.2d 407 (1973).

183. See *supra* notes 181-82; see also MASS. GEN. LAWS ANN. ch. 208, § 34 (West Supp. 1987); NEB. REV. STAT. § 42-365 (1984); N.Y. DOM. REL. LAW § 236(B)(6) (McKinney 1986).

184. There is, for example, the danger in states that continue to permit consideration of marital misconduct that the determination of "fault" will inappropriately overwhelm the other bases of alimony, see, e.g., *In re Marriage of Orgren*, 375 N.W.2d 710, 713 (Iowa Ct. App. 1985), or that the emphasis on compensation for lost career opportunities will persuade courts to award rehabilitative alimony where permanent alimony would be more appropriate. See, e.g., the debate between the majority and the dissent over the appropriate role of rehabilitative alimony in *Walter v. Walter*, 464 So. 2d 538 (Fla. 1985) (reversing trial court presumption in favor of rehabilitative alimony); *Martin v. Martin*, 358 N.W.2d 793 (S.D. 1984). More common, however, are the decisions, like those in West Virginia, which fail to articulate a rationale for alimony at all. See *supra* note 151.

modest, shorter term awards) to continue.<sup>185</sup> One would also expect compensation for contributions to the marriage, such as the expense involved in putting a spouse through medical school.<sup>186</sup>

As career sacrifices no longer become an automatic part of marriage for many women, however, one wonders whether these states will decrease alimony awards further or expand the rationale on which they are based.<sup>187</sup> The larger problem is that most states continue to justify alimony awards in terms of need without systematically examining the basis for their decisions.<sup>188</sup> As we have pointed out above, need (defined by an inability to maintain the standard of living enjoyed during the marriage) justifies alimony only if we accept the principle that marriage imposes a continuing obligation to support the financially weaker spouse regardless of the length of the marriage, the parties' respective contributions to the family, and the reasons for the divorce.<sup>189</sup> Whatever the appellate opinions say, there is no

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185. Given the identical career sacrifice, in other words, one would expect a smaller or shorter term award in Oregon than in a state where the paying party was found at fault, and a larger payment than if the party requesting alimony had been at fault. This would be one way of discounting the possibility that the paying party had been injured by the other party's decision to end the marriage. See Sharp, *supra* note 68, at 196 n.3; *supra* notes 148-49.

In theory, however, economists argue that lost career opportunities can be calculated with some degree of precision. See Beninger & Smith, *Lost Career Opportunities*, 16 FAM. L.W. 201 (1982).

186. See *supra* notes 97-98; see also *In re Marriage of Lundberg*, 107 Wis. 2d 1, 318 N.W.2d 918 (1982); *Church v. Church*, 96 N.M. 388, 630 P.2d 1243 (1981); *Wisner v. Wisner*, 129 Ariz. 333, 631 P.2d 115 (1981); *Moss v. Moss*, 639 S.W.2d 370, 373 (Ky. Ct. App. 1982); *Erickson*, *supra* note 103, at 974; *Krauskopf*, *supra* note 47, at 394; *Loeb & McCann, Dilemma v. Paradox: Valuation of an Advanced Degree Upon Dissolution of a Marriage*, 66 MARQ. L. REV. 495, 497 (1983); *Mullenix, The Valuation of an Education Degree at Divorce*, 16 LOY. L.A.L. REV. 227 (1983).

187. In other words, as more women work throughout their marriages, it will become harder to argue that, but for their reliance on marriage, these women would have pursued careers as lucrative as those of their mates. See *supra* dental hygienist example at text accompanying note 142. In those cases, spousal support to compensate for lost career opportunities will be inappropriate, and the courts will have to face the issue of lost marital opportunities directly.

188. See *supra* note 151.

189. See, e.g., *In re Marriage of Auld*, 72 Or. App. 747, 751, 697 P.2d 220, 222 (1985). The court, after articulating need as the "most significant factor," denied spousal support after a nine year marriage despite the fact that the wife was unlikely to earn anywhere near as much as the husband. We believe that the better explanation for the outcome is that the wife sacrificed opportunities to develop her own income potential not by raising children or contributing to the marriage, but by pursuing activities of her own. If need were as important a consideration as the judicial pronouncements suggest, support should have been awarded.

evidence that any state is implementing such an expansive theory of alimony.<sup>190</sup> Rather, one suspects that these states are: (1) acting to protect the lost opportunities to marry others—in which case responsibility for the divorce should be a factor;<sup>191</sup> (2) compensating lost career opportunities or other contributions to the marriage—in which case the focus should more clearly be on the extent of the sacrifice made;<sup>192</sup> or (3) enacting a poorly articulated partnership theory in which each spouse acquires a share in the other's income—in which case the basis for the partnership share should be made explicit.<sup>193</sup>

Whatever the truth behind modern alimony decisions, they have long been characterized more by their obscurity and confusion than by any clear articulation of the basis for the awards. The changing nature of the reliance on marriage has contributed to lack of clarity. A unitary model of marriage in which every wife relied on her husband's income has given way to a multiplicity of arrangements.<sup>194</sup> Divorce jurisprudence premised on fault has given way to a no fault system without consideration of the implications for spousal support.<sup>195</sup> A status model is giving ground to contractual notions without conceding that the agree-

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190. See L. WEITZMAN, *supra* note 5, at 143-46, 163-80, 182-83.

191. See *supra* text accompanying notes 84-89 and notes 100, 127.

192. See *supra* text accompanying notes 78-84, 97-105, & 176.

193. This "partnership" theory does not introduce a third form of reliance. Rather, it provides an alternative theory which, depending on how it is defined, may protect lost career opportunities and lost opportunities to marry. Presumably, such a theory would imply an agreement that spouses share changes over the course of the marriage which affect their earning potential. Upon divorce, a court's task would be to effect an appropriate division of assets, treating income potential or "human capital" like other marital property. While the theory is different, the effect is much like that adopted in Oregon: both parties are entitled to continue enjoying the standard of living attained during the marriage regardless of the reasons for the divorce. For a discussion of partnership theory, see *O'Brien v. O'Brien*, 66 N.Y.2d 576, 489 N.E.2d 712 (1985); Fineman, *supra* note 59, at 834; Freed & Foster, *Marital Property Reform in New York: Partnership of Co-Equals?*, 8 FAM. L.Q. 169, *passim* (1974); Glendon, *Marriage and the State: The Withering Away of Marriage*, 62 VA. L. REV. 663, 706 (1976); Krauskopf & Thomas, *supra* note 6, at 558; Sharp, *supra* note 68, at 198-201; Younger, *supra* note 17, at 69-77; UMDA § 307, 9A U.L.A. 142-43 (1973); see also Krauskopf's discussion of human capital, *supra* note 47. But see M. GLENDON, *supra* note 5, at 65-66, suggesting:

[I]t does not seem fair to say, as one so often reads, that persons entering marriage, or living in a functioning marriage, normally intend and practice a partnership-like relationship or, more accurately, a sharing of goods from each according to ability, to each according to need. The unrealistic partnership approach to divorce, as distinct from the realistic partnership approach to the functioning marriage, merely serves to rationalize the imposition of a result.

194. See Fineman, *supra* note 59, at 841-84; *supra* text accompanying notes 48-65.

195. See *supra* text accompanying notes 112-21.

ment of the couples alone can guide modern marriages.<sup>196</sup> Whatever the course of future developments, redefinition of the interests at stake in marriage and divorce is long overdue.

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196. There is a major discussion underway of the contractual nature of marriage. *See generally* L. WEITZMAN, *supra* note 11; Glendon, *supra* note 47, at 708; Krauskopf, *supra* note 47, at 399; O'Kelly, *supra* note 57, at 235; Schultz, *supra* note 36, at 270; Comment, *The Development of Sharing Principles in Common Law Marital Property States*, 28 UCLA L. REV. 1269, 1310 (1981). The focus of much of this discussion has been on giving greater force to the parties' individual arrangements. This emphasis on individual arrangements results, at least in part, from the changes in the treatment of women from dependent and inferior to equal and self supporting. Lost in the shuffle, however, is the issue of whether the parties' agreement itself is sufficient to give legitimacy to the union, and the definition of the societal interests which transcend the couple, such as provisions for children. Resolution of these issues is central to any final determination of the "contractual" nature of marriage.

