Mapping Alimony: From Status To Contract And Beyond

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Mapping Alimony: From Status to Contract and Beyond

GAYTRI KACHROO *

I. INTRODUCTION

What is marriage? Where did the institution come from and where is it going? In today’s changing family culture and relation-scape of gender-bending, role-reversing, single-parenting, techno-family, and financial independence for all attitude, these questions are particularly relevant and worth contemplating. The law throughout the United States is grappling with difficult issues of privacy, and public determination and promotion of some forms of intimate relationships and discouragement of others. This article examines these issues by reviewing various branches of scholarship on the concept of alimony to clarify what we mean by marriage and co-habitation, economic duties of support and contribution within such relationships, and the theoretical basis for such duties within the law.1

Alimony is awarded seldom to an ex-spouse (mostly women nowadays), and even less seldom actually paid or collected.2 Many commentators think the concept of alimony is outdated and that women can be self-sufficient because of their hard fought access to market opportunities.3 However, alimony has not disappeared from legal discourse, from court battles, or from our cultural views on marriage and divorce because it helps us explain, or at least question, a key aspect of our social lives: marital status.

Alimony is a corollary to the intimate relationship sanctioned by the state called marriage. Constructions of marriage and the meanings attributed to marital status are keys to helping scholars figure out whether and what duties of financial support do and should exist between spouses and others in intimate relationships.

This article classifies alimony scholarship along two major axes: status to contract; and property to personhood. Along these axes fall two theories

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1. I use the term “alimony” interchangeably with maintenance, and spousal support, to mean court ordered financial support between spouses following a divorce. I realize that many scholars have thought “alimony” to be a troubling term.


3. See generally Fineman, infra note 246; Krauskopf, infra note 283; Weitzman, infra note 40.
authored respectively by Ira Ellman and Sir Henry Maine. In Parts I and II, this article begins by examining both theories and analyzing them along the matrix between status and contract. Then, the article develops the second property to personhood matrix and the analyses of Ellman and Maine, mapping current alimony scholarship along the intersection of these two axes: status to contract; and property to personhood.

Along the matrix from status to contract, there are arguments for and against alimony as a viable duty between ex-spouses in the future, either in support of the family generally, and in Part V in support of individual self-sufficiency, or women’s rehabilitation, or as compensation for loss incurred due to a contribution that is undervalued in the marketplace. This article’s outline of alimony scholarship includes an examination of Status Theorists, Communitarians, and Economists in Part IV; and Contract Theorists—who are labeled as Individualists and Contractarians—in Part VI.

Although promotion of family stability may be a commendable goal, status constructions of marriage are problematic. Status brings with it the baggage of conformity and state-dictated obligations. This has historically resulted in confining social roles and inequalities. Any analysis of alimony that solely deals with market valuation of family contributions is weak because it excludes the real constraints of social roles and inequalities based on gender, race, and class. In effect, such an analysis does not consider the concurrent genealogical matrix: from property to personhood.

Therefore, at Part VII, this article juxtaposes the scholarship on alimony with this other intersecting property to personhood perspective. This revisionist matrix provides changing substance to the notion of status. Even if not overtly, this backdrop matrix is often the basis of the feminist critique that the law and economics discourse on alimony is acontextual given the history and reality of gender inequality in our society. The first part of the intersection between status to contract and property to personhood is uncovered in the equation of status and property. The intersection between status to contract and common property to individual property is highlighted through scholarship that discusses the historical and current uses of notions such as coverture to conflate husbands’ and wives’ property and earnings. Status carries the historical root of this conflation between status and property. Even after reform statutes that have given married women property rights in their market labor, status has continued to

4. Although parallel and perpendicular may be antonyms, in this case the reference is to a convergence of concepts which provide substance and definition to each other because of their social, legal, and political constructions.

5. See generally Siegel, infra note 18.
protect “wifely” labor as belonging to the husband and maintaining the separation between the “private” family and “public” market spheres.

At Part VII.G, we see that significant in this overlap between status and property are the developments of no-fault divorce that highlight the possible oversight of abuse within marriage due to unequal power relationships between spouses. Also important is the attribution of marriage “status” through state-sanctioned union only to heterosexual couples. In this regard, the article reviews the judicial application of alimony type remedies in cohabitation, and in same-sex partnership.

Parts VII and VIII seek to demonstrate that the current conception of marital status continues to restrict women’s property interests. Courts exclude market analyses of marital exchanges in the context of remarriage, and in the domain of bankruptcy. From common property to individual property, the limitations on women’s full capacity to own property is patent in the archaic view that a spouse’s remarriage (usually the ex-wife) leads to loss of the spousal support she was entitled to from the first marriage. The wife loses spousal support because she is treated as the property of her ex-husband until her remarriage. When she has a new husband to provide for her, she no longer needs support from her ex-husband. Similarly in the context of bankruptcy, an ex-spouse’s right to support is subordinate to other creditors’ rights to the patrimony of the debtor spouse. This legal rule denies the personhood and separate individuality of the husband and wife. The article analyzes this reality in relation to various areas of the law.

II. ALIMONY AND ELLMAN’S THEORY

A. Overview of Alimony Law

“The divorce rate rose from eight per thousand married women in 1920 to 22.6 per thousand married women in 1980 before declining to 20.9 per thousand in 1990.” Between 1980 and 1994 there were approximately 2.3 million marriages per year in the United States. During this period, there

6. I am likening “property capacity,” the full circle of one’s possible opportunities and rights in property, to contractual capacity, which we note is denied to minors and incapables.


were also more than 1.1 million divorces. Consequently, financial arrangements required at dissolution of a marriage are now as likely to occur upon divorce as they are upon death of a spouse. At divorce, financial arrangements between spouses can typically consist of child support, interspousal maintenance, and property division. However, due to the ad hoc development of a legal framework for such arrangements, there has been a general lack of consistency in their formulation and implementation. Therefore, an attractive financial package could be offered to a spouse initially opposing a divorce petition, thereby improving the bargaining position of the opposing party. In such self-negotiated divorces, spouses could often ignore the prevailing statutory regimes, including those regulating the separation of property for non-pecuniary gains.

With the introduction of no-fault divorce, one spouse could unilaterally petition for divorce, in most states, by demonstrating a period of separation or the impossibility of reconciliation. The possibility that a marriage can be dissolved without a showing of fault has obliterated the need to seek consent from the other spouse contesting it. This can preclude the need for a mutually designed financial arrangement. Courts now play a greater role in such financial arrangements and are more likely to conform such financial arrangements to statutory standards.

9. Id.
10. Standards for these financial arrangements have traditionally been set and, to some extent, still are set by statutes. These statutes previously required evidence of fault in order to grant a divorce. Spouses with substantial assets were pressured by the fault model to negotiate the dissolution of their marriages by themselves in order to better control and manage their own finances. Under fault grounds for divorce, it was very difficult to win a contested divorce. Negotiated settlements in which the parties fabricated testimony necessary to establish fault grounds were common practice.
be greatly inconsistent and uncertain.\textsuperscript{15} “Even when the couple negotiated, they were often limited by courts to trading off more predictable property for less predictable spousal support within the overall range of outcomes expected under the law.”\textsuperscript{16}

The more frequent application of nebulous statutory standards such as “need” has resulted in greater inconsistency as courts attempt to define the basis for spousal support, and disparately apply statutory standards to marital property.\textsuperscript{17} Property division has also posed increasing problems. “Although a marriage was based on the voluntary union of two people who committed themselves to applying their skills and efforts toward their common welfare, the property acquired during the marriage often was not attributed to both spouses.”\textsuperscript{18} Even after divorce, “the Bankruptcy Code permitted the discharge of property settlement obligations while continuing


\textsuperscript{16.} Parkman, supra note 7, at 52.

\textsuperscript{17.} The primary criterion used to determine the application of alimony has been “need.” However, “need” has become increasingly difficult to define, and the basis for the supporting ex-spouse’s responsibility to provide for such need also has become highly debated. Id. at 52-53.

\textsuperscript{18.} Id. at 53; see generally Reva Siegel, The Modernization of Marital Status Law: Adjudicating Wives’ Rights to Earnings, 1860-1930, 82 Geo. L. J. 2127 (1994). In many states, despite the efforts of both spouses in the interest of the household, only the spouse with title to the property, usually the husband, would be attributed the asset. Parkman, supra note 7, at 53. Similarly, often pensions were only attributed to the person earning an income. Moreover, inconsistencies also remained in the area of an ex-spouse filing for bankruptcy. Id.
support obligations.”

Even so, many scholars question any basis for awarding alimony even in such limited situations. The American Law Institute’s (ALI’s) Principles of Law of Family Dissolution appeared on the scene to clarify and schematize situations in which it was appropriate to award alimony. These principles embody the rule that alimony not be based on need but instead should be viewed as a form of compensation for a loss in living standard due to lower earning capacity consequent to an investment in the other spouse’s earning capacity. Alimony would thereby constitute a form of compensation for the loss in ability to recover the premarital living standard after dissolution of a short marriage. In longer marriages, the sharing of post-dissolution incomes is supposed to compensate the recipient spouse for a loss in earning capacity, but often there is a very limited link to the actual loss suffered. Although these compensatory spousal payments are to end with remarriage or death under the principles enunciated by the ALI, the actual losses incurred do not terminate, and are not modifiable upon remarriage or death. These principles lack consistency mostly because they do not provide a sufficiently supported proposal for the sharing of income by ex-spouses. Compensation for lost earnings, or loss in living standard, is not necessarily complete just because a spouse remarries or dies.

For example, a woman who made numerous sacrifices before marriage to acquire important income-earning skills, such as medical education, will be forced to share her income with a man who did not make similar sacri-

19. Id.; see generally Mechele Dickerson, To Love, Honor and (Oh!) Pay: Should Spouses Be Forced to Pay Each Other’s Debts?, 78 B.U. L. REV. 961 (1998). The closer application of judicial and statutory standards to divorce has resulted in concrete changes in the norms governing alimony or spousal support. Parkman, supra note 7, at 54. Under the Uniform Marriage and Divorce Act, alimony can only be granted when two conditions are met: the ex-spouse has too little property to meet his/her needs, and he/she is unable to support himself or herself or has custody of children which makes employment difficult. Id.

20. Unif. Marriage & Divorce Act § 308(a), 9A U.L.A. 446 (1973); see Parkman, supra note 7, at 54 n.15.


22. PRINCIPLES, supra note 21, § 5.08, at 350.

23. Id. § 5.05, at 280.

24. Id. § 5.17, at 406.
fices either before or during marriage. On the other hand, if a spouse limits her career to provide important services in the home and that loss is recognized at dissolution, the loss will not disappear even if the person remarries. However, upon remarriage, the ALI principles would normally terminate compensation.\textsuperscript{25}

To some extent, inconsistencies in post-divorce spousal economics persist because of the ambiguous role of alimony. In general, scholarship addressing this ambiguity represents a range of feminist and other perspectives, including formal equality, communitarian, contractarian, and law and economics schools.\textsuperscript{26} Ellman has been at the helm of the principles adopted by the ALI’s proposed reforms for the law of alimony. His scholarship like that of many others is a reaction to the inconsistency prevalent in alimony law and to the inchoate or tenuous position occupied by spousal support in a culture steeped in equality and self-sufficiency rhetoric.\textsuperscript{27} Along with some scholars occupying communitarian, feminist, and individualist camps, Ellman chooses to apply the policy rhetoric of law and economics to alimony.\textsuperscript{28} Despite the incorporation of many of Ellman’s ideas in the ALI principles, the most complete rendition of his new basis for alimony appears in his \textit{The Theory of Alimony}. After reviewing Ellman’s theory, this article sets it off against the backdrop of Sir Henry Maine’s much referenced “Status to Contract” narrative.

B. \textit{Ellman’s Theory of Alimony}

In his article entitled \textit{The Theory of Alimony}, Ellman\textsuperscript{29} attempts to provide the missing consistent basis for recognizing a financial obligation between spouses upon divorce. He finds “need” is not enough. Although “need” is the most fundamental rationale deployed for post-divorce maintenance as provided in the Uniform Marriage and Divorce Act, it is either not defined or it is confused with other rationales.\textsuperscript{30} Despite the continued

\begin{footnotes}
\item[25] Parkman, supra note 7, at 55.
\item[26] Some discussion of these various schools is presented below. See discussion infra Parts IV-VI.
\item[27] Consider the following self-sufficiency rhetoric of a New Jersey Court: “The law should provide both parties with the opportunity to make a new life on this earth. Neither should be shackled by the unnecessary burdens of an unhappy marriage. This is not to suggest that women of no skills, or those who suffer a debilitating infirmity, or who are of advanced age should be denied alimony for as long as needed. But such is the exception not the rule.” Turner v. Turner, 385 A.2d 1280, 1282, (N.J. Super. Ct. Ch. Div. 1978).
\item[28] See infra Part IV.B.
\item[29] Ellman, supra note 21.
\item[30] He wishes to identify at what level, the spouse in need, who he determines is predominantly the wife due to economic and social realities, is in fact in need. He asks whether she is in need when she is unable to support herself at subsistence level, at a middle class level, or at whatever level she was accustomed to within the marriage. \textit{Ibid}. at 3-4.
\end{footnotes}
use of alimony in all these diverse characterizations, there is no single explanation for its use. Ellman concludes: just because many divorced women meet financial difficulties upon divorce is no reason to assume that in some way the other former spouse should be liable for this financial need rather than parents, other family, or society generally.31

Under English Ecclesiastical law, divorce from bed and board, or legal separation, was the only available remedy for terminating marriage, or cohabitation. Since the spouses technically remained married, the duty of support of the husband toward the wife logically continued.32

Judicial divorce was not available in England until 1858, nor originally in the American colonies. Divorce’s religious heritage permeated American laws until well into the twentieth century: Even after judicial divorces became available, state laws often made them difficult to obtain and sometimes provided that the spouse who was “guilty” of causing the divorce could not remarry.33

With the inclusion of judicial divorce, alimony continued as a proper remedy in view of women’s dependent position within marriage as long as they remained innocent.34 The modern reform of no-fault divorce leaves us with the requirement for a new rationale or basis for alimony.35

Ellman claims no-fault divorce has changed the negotiating power of divorcing wives so that they now have less leverage in pressing for financial claims.36 Whereas within the fault model, over time, the innocence of the petitioner (usually the wife) was no longer a requisite to obtain alimony, a demonstration of fault was required. This requirement would result in sham proceedings where parties were cooperating to meet artificial legal constructions of marriage liquidation.37 However, bargaining leverage was retained by “the spouse who felt no urgency to end the marriage,

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31. As opposed to “must be” or “in fact is.”
32. Ellman locates the foundational basis for alimony in the historical prohibition of divorce within English Ecclesiastical courts. Ellman, supra note 21, at 5.
33. Id.
34. Ellman documents that the English tradition of unavailability of divorce was replicated in America. Id. at 5 n.7. Courts and legislatures in providing for alimony were merely continuing husbands’ legal and customary duty to support their wives. Id. at 5.
35. As late as 1968, some jurisdictions reflecting ecclesiastical precedent allowed alimony only to the innocent wife divorcing a “guilty” husband. Id. at 6 & n.10.
36. Id. at 6.
37. Prior to the reforms, divorce would only be available upon a showing of fault of the spouse being divorced and the innocence of the petitioning spouse. Ellman, supra note 21, at 6.
especially if it would be difficult to prove that spouse guilty of ‘fault.’”

In this system, the normative framework regulating marital property and finances was irrelevant, as the wife might have leverage regardless. However, the result may have been less than equitable in the case of a guilty spouse who had greatly invested in the marriage without financial return. 

No-fault reform normatively grants divorce to either party upon a showing that the marriage is irretrievably ruptured, and alters this bargaining leverage of the innocent wife seeking financial support in whatever form from her ex-husband. Reform efforts, Ellman points out, have now tended to focus on the law of alimony and property division rather than on the grounds for divorce which have lost their relevance. Nevertheless, alimony still appears to lack a foundation. 

In his description of the current trends in rationalizing awards of alimony, Ellman points out that courts have conceptualized marriage as a contract or as a partnership to justify awards of alimony. Ellman, himself, rejects both contract and partnership constructions of marriage. With regard to contract, he finds that parties’ preferences as expressed or implied by conduct will rarely be determinable and thus any construction of the relationship as contract will be “based on unarticulated judicial notions of fairness.” Further, if contract governs the relationship, “we” may want to provide remedies to the spouses in some circumstances not available to the spouses under the contract. Thus, in Part I of his work, Ellman focuses on the “disutility” of contract principles to obligations of divorcing spouses and possibly also to non-marital cohabitation.

In his argument against contractual or partnership frameworks to resolve marital and cohabitational disputes, Ellman concedes first that despite the use of contractual forms to interpret marriage relations, it remains

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41. Ellman, supra note 21, at 7. This reform signifies a shift from the negotiating dynamic between spouses to the normative framework which makes the substantive law of alimony and property division increasingly significant. Id. at 8-9.
42. Id.
43. Id. at 9. It is this that I agree with and think that Ellman veers toward status as opposed to the individualist scheme of contract. Maine’s status to contract progression is the backdrop to Ellman’s and others’ scholarship on alimony and consequently provides us with food to entertain the formative nature of this scholarship on our views on marriage.
44. Id. at 9-10.
45. Ellman, supra note 21, at 11.
46. In other circumstances “we” may not want to make full contract remedies available to spouses. Id.
47. Id. at 10-11.
a status relation. It is therefore important to review what Maine describes as the ancient roots of this status construction. A status relation for Ellman is one in which the legal relationship of the parties is fixed by statutory rules which cannot be altered by private agreement. Nevertheless, Ellman finds that marriage is much like a contract in that it is a “joint enterprise, voluntarily entered into by two people with expectations of each other and with a general view that there will be an exchange that will enhance both parties’ interests.” Any consideration of the expansive notion of “parties’ intentions” likely slants toward contractual ordering of marriage which is more “compatible with modern notions of liberty” than status. Ellman also believes that a contractual rendering of marriage is morally averse. To Ellman, right and wrong can be enforced through normative measures by society, i.e., through status, while personal choice and fulfillment remain possible in contract. “[I]f we want [the parties] to be happy,” society must turn to contractual intentions and choices made by the couple. The legal supports for a move toward contract prevail in the acceptance of cohabitation contracts and feminist visions of shifting private informal dispute resolution within marriage to public contract-based and gender neutral resolution of such conflicts.

Moreover, procedural requirements may be stricter for spousal agreements than other agreements. In many states, substantive terms may also be set aside when unfair, i.e., terms regarding alimony may be disallowed. Substantive terms linking divorce to predetermined financial consequences are impermissible in all states. Most couples do not articulate eventualities upon divorce even in their own minds before or upon marriage, because

48. Id. at 13. This is Ellman’s clearest articulation of status.
49. For an overview of Maine’s genealogy, see infra Part III.
50. Ellman, supra note 21, at 13. I understand this to mean rules which are prescribed by the state including judicial determinations.
51. Moreover, the trend toward a contractual rendition of the marriage relation is likely due to the relaxation of “societal consensus concerning the nature of marriage” and therefore less a possibility of fixation of normative terms concerning the marriage relation. Id.
52. Id. at 13-14. This is where Ellman actually speaks to the moral relations in marriage. Yet as Carl Schneider comments, Ellman refrains from accepting his own moralizing by taking the “economic” stance. Carl Schneider, Rethinking Alimony: Marital Decisions and Moral Discourse, 1991 BYU L. Rev. 197, 252 (1991). Today, marriage is “seen less in terms of right and wrong and more in terms of personal choice and personal fulfillment.” Ellman, supra note 21, at 14.
53. Id.
54. Id. Yet Ellman still refuses to acknowledge the real possibility of a solution through contract. Id. at 14-15. With regard to express agreements concerning the termination of marriage, i.e., premarital or antenuptial agreements, Ellman intimates that despite a court’s willingness to enforce such contracts, only a tiny minority of spouses make such allowance. Id. at 14. Ellman doubts that contract would become more pervasive if some of these restrictions were relaxed. Id. at 15.
55. Id. For instance, disclosure requirements and independent counsel may be necessary.
they hope the relationship will last. Settlement agreements occur upon separation, but Ellman does not focus on these in his article.56

In attempting to apply general contract rules to marital relationships, Ellman finds there may be some analogy between commercial contracts where no understanding between the parties exists about the termination of the relationship, but there are understandings about the conduct during the relationship.57 Even without express agreements between the parties, “we” could imply such understandings between the spouses. In the context of an agreement for particular conduct by the spouses during marriage, alimony is necessarily conceptualized as an award of damages for a spouse’s breach.58

In order to prove breach, the claimant spouse must establish sufficiently definite terms. In order to assess whether this burden of definiteness can be met, Ellman considers two “typical” fact patterns.59 In the first case, a long-term homemaker has predominantly performed “domestic services” during a lengthy marriage and not sought employment outside the home. She has few employment prospects at dissolution due to her reliance on her husband for support, instead of pursuing her own career. Without support from her ex-spouse, her financial situation after divorce will fall considerably below the standard of living she enjoyed during marriage.60 In the second scenario, the wife has “foregone specific training or employment . . . during marriage in order to accommodate the requirements of her husband’s career.”61

Ellman indicates that there is general agreement amongst courts and commentators that wives within the above two scenarios have a valid claim resting on some “vague reference to contract concepts,” although the size of the claims may be disputed.62 Ellman finds, however, that there is a fundamental problem with such contract analyses. He believes, “[t]he wife expects that the marriage itself will compensate her economic sacrifice,” because it provides both personal satisfaction and a share in her husband’s financial success.63 Her expectation is frustrated only due to the termination of the marriage. “A formal contract claim would therefore require, as

56. Id.
57. Id. at 16. He calls these relational contracts. Id. at 28.
58. Id. at 16.
59. Id. at 16-17.
60. Id.
61. After divorce, the wife may then seek some share of the husband’s enhanced earning capacity, or other remedy to improve her financial situation. Id.
62. Id. For reliance and expectation damages, see Carbone, infra note 242.
63. Ellman, supra note 21, at 16-17. As Schneider explains, during the marriage this would make perfect sense. It is only the eventuality of divorce that throws a wrench in such thinking. Schneider, supra note 52, at 210.
its basis, an allegation that the marriage’s termination is due to the husband’s breach.”64 However, Ellman finds that neither of the two “typical” scenarios supports a contract claim because the terms cannot be demonstrated clearly. The fact that the wife will surely suffer disproportionate hardship due to the dissolution is insufficient to assert a contract claim. “She needs additional facts that establish that she and her husband had a contract concerning the conduct of the marriage and that he breached a material term of that agreement.”65

Further, a contract analysis would entail revision of criteria for deciding both alimony cases and the amount of awards. To demonstrate this point, Ellman provides the “change of living standard” example, as follows: During a ten year marriage, the wife has worked in the home and done volunteer work, while the husband has provided a home on the Upper East Side in Manhattan and has just been made partner in a major law firm. He decides he wants to change his work situation, and teach law in Ithaca instead. She does not want to move to Ithaca or to join him as a professor’s wife. After divorce she claims support at the level of a “successful Manhattan attorney’s wife” because she would not be able to earn more than a clerical worker’s salary. Depending on the invocation of her “social need,” she may get more or less spousal support. Rehabilitative alimony, to allow her transition time to gain some employment, would be granted as well by some courts. The problem as Ellman sees it is that the wife’s only “chance to recover [her lost financial standing after ten years out of the work force] lies in finding another equally successful husband.”66 Under a contract analysis in the change of living standard example, the wife would have to show that the pursuit of a particular lifestyle by the parties was a specific term of marriage or that the parties had agreed that the husband would become and stay a partner at a major law firm. The husband’s unilateral decision to shift professions would result in a breach of this term. The wife could thus insure support at “her full expectation interest.”67 The husband may have trouble providing such support on a law professor’s salary. However, the husband may also show that the marital term with

64. Ellman, supra note 21, at 17-18.
65. Id. at 18. To demonstrate “how basing alimony upon contract would alter the kind of inquiry that courts now make” in deciding alimony claims, Ellman provides examples of the type of breaches that may result from implicit promises or terms of the marriage relationship like sexual fidelity or a commitment to live together. He also indicates that “problems of definiteness may be particularly troublesome when courts attempt to imply contracts from conduct as opposed to construing an express agreement.” Id. at 19.
66. Id. There are many critiques of this particular statement by feminists. It is similar to Posner’s assertion of the economic model on marriage. See POSNER, infra note 220.
67. Ellman, supra note 21, at 20. This statement smacks of a contract remedy of reliance or restitution. Note the critique by Carbone, infra note 242.
precedence was that she was to do domestic work while he earned according to the profession of his choice. 68

Ellman points to the difficulty of ascertaining marriage contract terms when they must be inferred by conduct, as opposed to an explicit undertaking from the parties. In fact, the third pattern of change of living standard, which Ellman presents as an example, implies that divorce may result from the lack of a clear understanding of the parties’ mutual commitment. Although newlyweds may have an agreement, it would be too general to provide sufficient guidance for the court to imply specific duties in order to find a breach. 69

Ellman further asserts that extending implied contract principles to an arena in which personal values pervade would result in judges imposing their own beliefs in the guise of implying an agreement, when specific and explicit terms don’t exist. 70 As understandings between parties and expectations of marriage diversify, it becomes increasingly likely that courts will be imposing an agreement as opposed to finding one. Ellman directs us to cohabitation agreements as a good case in point. Ellman describes “Marvin agreements” named after Marvin v. Marvin. 71 The claimant, “usually the woman,” alleges that her partner promised to support her in case of break up, or to share his earnings, the partner denies the existence of such an agreement, and sometimes asserts the woman’s non-compliance with terms of their agreement. 72

To support this argument, Ellman cites Kozlowski v. Kozlowski, 73 in which the couple lived together for about fifteen years. In that case, the cohabiting male promised the cohabiting female that “he ‘would take care of her and provide for her for the rest of her life.’” 74 The cohabiting female sought to enforce the agreement after he left her for a younger woman. He asserted that he left her because of her drinking. “[T]he court found ‘[t]here was no indication that the understanding of the parties required plaintiff to abstain from drinking alcoholic beverages.’ ‘Her end of the agreement was . . . to take care of defendant, his children and his home; . . . .’” 75 She had complied with her end of the bargain and therefore could

68. In such a case, the wife would be in breach, and he could recover damages for loss of her companionship and domestic services. Ellman, supra note 21, at 20.
69. Id.
70. Why this makes a difference is hard to understand given that today, even without an implied contract, judges appear to use their discretion “willy nilly” and in the most inconsistent of fashions, as per Ellman’s own words. Id. at 20-21.
71. 557 P.2d 106 (Cal. 1976). In that case, conflicting testimony regarding the existence of terms of an alleged oral contract was resolved by implying them. Ellman, supra note 21, at 21.
72. Id.
73. 403 A.2d 902 (N.J. 1979).
74. Ellman, supra note 21, at 21 (quoting Kozlowski, 403 A.2d at 906).
75. Id. (quoting Kozlowski, 403 A.2d at 908).
obtain relief. To Ellman, “the court merely extrapolated from very general facts about their relationship to reach what it believed to be the fair result, rather than the one which the parties had actually agreed upon.”76 Moreover, “having framed the case in contract terms, the court feigned consistency when it came to providing a remedy.”77 Although the court purported to award Mrs. Kozlowski the benefit of support for the rest of her life, the award was only a lump sum payment of $55,000, rather low despite her current age of sixty-four years.78 Ellman ventures that the court was providing a type of rehabilitative alimony, despite the purported contract basis of its award. Thus, Ellman concludes that where contract analysis is deployed in disputes over alimony, ambiguities in the agreement likely will be used by the court to invoke what seems fair to the court. The appropriate relief in contract terms will either be zero or too large, and therefore the court will often not give the claimant the full benefit of the bargain. In reality, Ellman concludes “unarticulated equity notions” will actually govern the result.79

Contract can serve as a means of reintroducing fault. In states that still employ fault in their alimony or property division determinations, courts usually are directed by statute either to set the financial terms of divorce equitably, or to consider the merits of the respective parties, or the conduct of the parties during the marriage. The tone or flavor of alimony decisions rests on contract principles, even though the court’s analysis may not be characterized as contract-based.80 However, Ellman finds that fault-based divorce law differs in principle from contract analysis, because fault would be limited to intentional or negligent conduct, whereas under contract, breach can occur without the appearance of such conduct.81 Thus, Ellman points out, in some jurisdictions a wife may not obtain alimony where violation of her marital responsibilities is found to be a proximate cause of the marriage break-up. Alimony effectively becomes a form of damages for breach of the marital contract.82 However, Ellman does not find that the basis of such court decisions is contract. He finds that courts are following an independent tradition of that particular state’s divorce law under which

76. Id. at 21.
77. Id. at 22.
78. Id.
79. Id. at 23.
80. As stated, fault is still used in many states. Id.
81. Id. at 24.
82. Id. at 23. Ellman provides Robinson v. Robinson, 444 A.2d 234 (Conn. 1982), in which the court states: “A spouse whose conduct has contributed substantially to the breakdown of the marriage should not expect to receive financial kudos for his or her misconduct. Moreover, in considering the gravity of such misconduct it is entirely proper for the court to assess the impact of the errant spouse’s conduct on the other spouse.” Id. at 236.
breach of the marital agreement can result even where there exists no intentional or negligent breach, and the relationship dissolves by mutual consent. Applying contract analysis, Ellman claims alimony or damages would be granted on the basis of need and not based on fault. On this basis, Ellman finds that fault and contract are equally problematic bases for the adjudication of issues corollary to marital dissolution. Lack of ability to define the promise as broken makes it equally difficult to attribute losses or damages arising from the breaking of this ill-defined promise.83

Ellman moves on to address the doctrine of restitution or unjust enrichment as a possible vehicle to allow recovery in the form of alimony. Ellman confirms that restitution is an equitable remedy designed to find damages where a benefit was conferred under an unenforceable agreement, often due to indefiniteness or vagueness of terms.84 In *Pyeatte v. Pyatte*,85 the parties agreed that the wife would support the husband through a program to obtain a master’s degree. The husband sought a divorce a year after his graduation and before she began to pursue the master’s program. The court would not enforce the contract and the husband’s burden under it because of indefiniteness. It was unclear exactly when, for how long, and where she was to undertake these studies. However, the court allowed the wife recovery on the basis of restitution. Ellman aptly points out that in order to prove a restitution claim, the defendant’s retention of the benefit must be unjust.86 Where the benefit is conferred with donative intent, it would surely not be unjust to retain it. The reasoning in *Pyeatte*, however, is based on the contract, no matter how indefinite, which makes it clear there was some understanding that donative intent did not exist in the case and some reciprocation was the basis of the benefit conferred.87

Ellman maintains that generally it would be difficult to determine which “set of motivations” lead to the conferring of the “unjust” benefit.88 In the case of a traditional homemaker, the expectation may simply have been that support through companionship and homemaking was to be a lifetime endeavor as was the continued financial support of the homemaker. Anything short of full lifetime compensation for this service may be found to constitute an “unjust” enrichment. In the end, it will be the court’s own conception of the marital relation which will constitute the test

83. Ellman, supra note 21, at 24.
84. Id. at 24-25; see generally Robert C. Casad, Unmarried Couples and Unjust Enrichment: From Status to Contract and Back Again, 77 Mich. L. Rev. 47 (1978).
86. Ellman, supra note 21, at 25.
87. Id. at 25-26.
88. Id. at 26.
of “unjust enrichment” of the benefit conferred. In Pyatte, Ellman elaborates, the court distinguished the facts from this traditional homemaker scenario in order to find “unjust enrichment.” The court found restitution to be appropriate only when an agreement exists between the spouses and the facts show “an extraordinary or unilateral effort by one spouse which inures solely to the benefit of the other by the time of dissolution.” In the end, this limitation of the restitution analysis to certain well-described scenarios where it may be feasible is rejected by Ellman because he finds that there will be a debate about the “Pyeatte court’s description of the marital relation,” because that conception of marriage is unguided. Ellman finds the Pyatte court’s rationale tautological, simply providing a remedy for unjust enrichment where it feels to find otherwise would be “unjust.” Ellman concludes from this that there is no conceptual framework provided by the doctrine of restitution to explain why post-marriage payments are appropriate in some cases but not others. This is debatable, as his demonstration seems to point to the fact that, in some cases, restitution is apt otherwise the result would be unjust.

Next, Ellman tackles the possibility of employing “relational contracts” as an analogy to marital contracts, to help us find a terrain upon which to map post-marriage payments from one ex-spouse to the other. This too, he finds, fails to adequately describe and frame the variety and intangible intricacies of an intimate relationship entailed by marriage. Although commercial relationships like lawyer-client, doctor-patient, homeowner-caretaker are akin to marriage in that the parties’ commitments can only be described in general terms, the need for specificity arises in business transactions for guidance. This need is satisfied by the imposition of performance standards set by statute or other regulation in the context of lawyers and doctors. In marital contexts, “[s]tatutory rules are no more capable of unambiguously filling every gap than are the parties in providing for every possibility in their initial agreement, and cannot offer other advantages that external rules may provide in business relations.”

89. Id. The court will in each case have discretion to look into the facts of the case and determine if the particular aspects of the case or injury are made out.
90. Id. at 27. One would think this was to limit the application of the concept to only some contexts of marital dissolution.
92. Id.
93. Id. at 27-28; see, e.g., Carbone, infra note 242 (demonstrating that Ellman’s theory of alimony proposes a restitution remedy).
94. Ellman, supra note 21, at 28.
95. Id. at 29.
96. Id.
Ellman points out the advantages of the relational approach as follows: by looking at the entire relationship, the court can avoid the distortion of the parties’ real expectations and their reasonable reliance on those expectations which may occur if it singles out one discrete specific agreement for enforcement.\footnote{\textit{Id}. at 30-31.} The disadvantage, however, remains that as one moves away from the consequence of a single specific understanding or agreement to general perceptions and expectations of the spouses, the parties’ perceptions must yield to the decision-makers in determining the outcome. Further, Ellman definitively rejects this analogy, because the parties’ intentions alone will be inadequate to guide the court’s decision, thus enabling the court to use its own standards instead.\footnote{\textit{Id}. at 31.} The “fundamental difference” between the commercial and the marriage relationship breaks down the applicability of this analogy. Whereas the goal of the relationship in commercial enterprises—to make money—aids in specifying the parties’ reasonable financial intentions and expectations, in the family context it makes matters that much more difficult.\footnote{\textit{Id}.} Aside from the few couples that fashion pre-marital agreements, applying contract principles to determine parties’ intentions upon the marriage dissolution is doomed according to Ellman.\footnote{\textit{Id}. at 31-32.}

However, Ellman goes on to explore the possible application of partnership law, despite its origin in commercial activity and application to commercial actors, to disputes arising at marriage dissolution. This exploration is logical given the frequent allusion to marriage as a partnership relation. Ellman initially clarifies for us that this allusion is in no way a formal legal application of partnership law as applied to businesses which are “profit seeking.”\footnote{\textit{Id}. at 33.} Whereas the contract model appeared to be inappropriate for divorcing spouses because it would be difficult to prove the contract terms with sufficient specificity, partnership law seems to be useful to define terms to govern a partnership where the partners themselves have not specified such terms. Although hopeful initially, Ellman concludes that the application of partnership law would “result . . . [in] unilateral divorce . . . coupled with a general rule disallowing alimony claims. Although property would be divided equally, this division would apply only to that property available for distribution after doing something equivalent to returning to each partner his ‘capital’ contribution.”\footnote{\textit{Id}. at 34-35.}
dissolution. There is, however, no provision under partnership law for
alimony, a form of continued income. This renders partnership law unac-
ceptable to marriage dissolution as a model for Ellman. 103

Ellman nevertheless looks at the closest equivalent to alimony in part-
nership doctrine, the lump-sum payment and its possible applicability. The
chief result of this application is an understanding of societal ambivalence
about the ability or right of each spouse to dissolve the relationship at
will. 104 Whereas a partner always has the power to dissolve the partner-
ship, he may not always have the right and in fact may be liable to pay
damages for “wrongful dissolution” of the partnership, Ellman tells us.
Modern legislators, however, permit either spouse to terminate the relation-
ship at will, but hope this will not occur. Similarly whereas “it is the
party seeking damages who must show an agreement since without breach . . . by the terminating partner, he is not liable for damages” in partnership
law. With marriage dissolution, however, courts will refuse to enforce
agreements between spouses that preclude the possibility of alimony. 105
Ellman rejects other partnership rules as well. The underlying difference
of maximization of profits simply cannot be employed by courts to form a
uniform basis for parties’ obligations to one another in marriage, rendering
default rules in business partnerships futile. 106

The failing of partnership law according to Ellman again falls on the
“extraordinary services” rendered by one partner or spouse to the benefit of
another. 107 Like unjust enrichment, or implied contract principles, “ex-
traordinary” services are defined by a preliminary determination of “ordi-
nary” services to be rendered in a marriage. A consensus on social con-
ventions governing the marital relationship required in the application of
partnership or restitution principles, according to Ellman, will vary from
court to court, couple to couple, and from year to year. 108

In his non-contractual theory of alimony, Ellman stresses goals. First,
he wants “to encourage the durability of the relationship.” Ellman’s ex-
namination of the commercial transaction leads him to conclude that con-
tract is deployed to address issues in commercial contexts, the way that
alimony is analogously used to address issues in the marital context. 109
The first distinction Ellman highlights between commercial and marital
transactions is that marriage usually is intended to be a long-term commit-

103. Id. at 35-36.
104. Id. at 36.
105. Ellman, supra note 21, at 36-37.
106. See id. at 37-40.
107. Id. at 38.
108. Id.
109. Id. at 41.
ment usable in the commercial context to justify an investment, and such an investment would not commercially be justifiable or even possible for a short span of time.\(^\text{110}\)

The traditional marriage thus involves considerable up-front investment by the wife which, like the idiosyncratic improvements in the building or the purchase of equipment needed for the production of a unique part, has little general market value even though it has value to the one person for whom it was made. Like the owner or part supplier, she risks great loss if her husband stops buying.\(^\text{111}\)

The husband, on the other hand, invests in his own earning capacity during the marriage. He reaches his peak earning capacity when the homemaking wife’s contribution to the marriage is traditionally completed. “The traditional wife [thus] makes her marital investment early in the expectation of a deferred return: sharing in the fruits of her husband’s eventual market success.”\(^\text{112}\) According to Ellman, under this perspective, the husband has great incentive to cheat and end the relationship before the balance of payment shifts.\(^\text{113}\) Alimony would be the only guarantee of a long-term return for the traditional wife—a sort of enforcement of a long term contract.

Further, Ellman finds that non-economic factors, social conventions, and mores exacerbate the wife’s problem of gaining a return on her investment.\(^\text{114}\)

\[\text{A} \] woman’s sexual appeal as a sexual partner [declines] more rapidly with age than does the man’s . . . . The more precipitous decline in the woman’s sexual appeal, . . . is worsened by another social convention: In general women marry men who are of the same age or older, but do not marry men significantly younger than themselves.\(^\text{115}\)

Under this perspective, Ellman also points out that the “impact of age on marriageability further increase[s] the risk of traditional marriage for women. Ending the marriage becomes even less expensive for men, while a wife’s probable loss increases as the parties age.”\(^\text{116}\) On the other hand,

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\(^{110}\) Id. at 41-42; see also Lloyd Cohen, *Marriage, Divorce, and Quasi Rents; or “I Gave Him the Best Years of My Life*”, 16 J. LEGAL STUD. 267, 297-99 (1987) (indicating that spouses cannot negotiate such sensible compensation at the time of marriage).

\(^{111}\) Ellman, * supra* note 21, at 42.

\(^{112}\) Id.

\(^{113}\) Id. at 42-43.

\(^{114}\) Id. at 43.

\(^{115}\) Id.

\(^{116}\) Id. at 44.
the man, “can take much of the gain realized from his first marriage into a second, and he can more easily find a replacement mate.”117

According to Ellman, the different earning capacities of husband and wife and the disparate decline in marriageability after dissolution of the first marriage leads to some very narrow conclusions as to what makes sense for the couple economically.118 For most couples, Ellman finds that the “rational” choice would be to maximize the marital income. If the couple puts a premium on equal domestic responsibilities and earning potential, the marriage will be less “profitable.”119 “The restructuring not only reduces total marital income, a loss which the parties presumably share equally, but also reduces the income of the higher earning spouse.”120 Because the marriage will be less profitable, “more of these marriages will end in divorce . . . since the level of satisfaction121 in such marriages will be lower.”122 The wife will end up the loser in this scenario, regardless of the satisfaction she may gain in the marriage.

Under Ellman’s re-conceptualization, alimony is a solution to the problem of the wife’s loss, gaining significance in the event of a break down of the mutual commitment to share.123 Alimony is a form of compensation for the “residual loss” in earning capacity that survives the marriage and results from an economically rational marital sharing behavior through which the couple seeks to maximize profit. According to Ellman, the rationale behind a necessary policy of providing an alimony remedy upon divorce is the allowance of a pattern of sharing in marital behavior.124 There can be a reallocation of post-divorce financial consequences of marriage to prevent distorting incentives. “[By] eliminating any financial incentives or penalties that might otherwise flow from different marital lifestyles, this theory maximizes the parties’ freedom to shape their marriage in accordance with their non-financial preferences.”125

Ellman sets out certain basic principles relating to his new theory of alimony. One principle is that a “spouse is entitled to alimony only when

117. Id.
118. Id. at 45-46; see also Amyra Grossbard-Shectman, Marriage Squeezes and the Marriage Mar- ket, in CONTEMPORARY MARRIAGE 375 (K. Davis ed., 1985) (asserting that women facing a marriage squeeze (difficulty in finding a mate) will cohabit more often and enter the labor market in greater proportions).
119. Ellman, supra note 21, at 46-47.
120. Id. at 47.
121. For Ellman, as for other law and economics scholars, satisfaction within marriage is determined only according to financial criteria; emotional and other benefits and supports of marriage are ignored. See generally infra Part IV.B.
122. Ellman, supra note 21, at 47.
123. Id. at 50.
124. Id.
125. Id. at 50-51.
he or she has made a marital investment resulting in a post-marriage reduction in earning capacity."\(^{126}\) Necessarily then, he excludes many other claims and types of disputes as to investments that may have been envisioned by a particular couple’s agreement to marry and which may have been reneged upon by one or both of them. Ellman covers and defends the non-expansive nature of his theory because it would entail a perspective on marriage based wholly on contract, a framework he has previously rejected. “We have no basis for treating alimony as an all-purpose civil action encompassing every tort or contract claim for losses arising from a failed marriage. Adjudication of such claims would require examining the reasons for the divorce—who is at fault, who ‘breached’.”\(^{127}\)

Under his first principle, losses must be identified by comparing the claimant’s economic situation at the end of the marriage with her situation had the marriage not taken place. The claimant must demonstrate or prove lost earning capacity to establish entitlement to alimony. This lost earning capacity is distinguished from the economic concept of “opportunity cost” on the basis that it would provide absurd results in a marital situation. As the rise in a wife’s marital income depends upon the income of her husband, his wealth and her consequent higher income during marriage may compensate her for her opportunity cost in marrying. Thus, “[a] wife would receive a smaller alimony award the wealthier her husband and, if her husband was wealthy enough, she would have no claim at all.”\(^{128}\) Ellman’s theory, however, does not use this concept of opportunity cost because he chooses to employ alimony as a remedy to reflect marital investment irrespective of marital lifestyle.

For Ellman, the chief purpose of framing a theory utilizing alimony as a remedy in modern divorce law is to ensure that either spouse may terminate the marriage for any reason if they so desire without being left with economic consequences adversely influencing marital decision-making when they are dissatisfied.\(^{129}\) The approach reduces the husband’s economic incentives to terminate the marriage, and reduces the wife’s economic stake in the marriage’s survival. Additionally, there is no compensation on divorce for the lost opportunity to choose a different spouse, for

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126. Id. at 53.
127. Id.
128. Id. at 55.
129. This of course gives carte blanche to the spouse with greater power in the relationship which Ellman does not take into account. The psycho-social relevance of power dynamics between spouses within the marriage is not addressed by Ellman, except in relation to the economic consequences suffered. The notions of grounding divorce in fault and penalizing abuse of power within the marriage have been raised as incentivizing the spouses to not act in abusive ways within the marriage, and to provide spouses in such situations with a clear way out without strictly being deterred by the economic consequences of getting out.
bad spousal selection, or for non-financial losses arising from the failed marriage. In other words, there is no protection from the risk of entering the wrong marriage.

There are also conditions on the type of marital investment that qualifies under Ellman’s theory as compensable loss. Under Ellman’s second principle, only financially rational sharing behavior qualifies as marital investment, except as set out in principle three. Typically, with two career couples the one who loses the possibility of higher earning would be entitled to a share of the gain furnished to the other spouse at dissolution. This would include the lower earning spouse who sacrifices her higher earning potential or opportunity for the common good and greater profit of the couple. On the other hand, a loss of earning capacity incurred to accommodate a spouse’s lifestyle preferences, resulting in a reduction in aggregate marital income, is not compensable. The motivation for non-financial preferences, raising of children, or residence location, may be less profitable for the couple, and, more often than not, according to Ellman, can be attributed to a decision and preference of both spouses. Thus, the resulting lower income has been suffered by both during the marriage.

Ellman entertains the proposition that “[m]arriage necessarily involves much give and take that the law cannot address or equalize upon divorce.” He acknowledges the many assumptions made within his theory that “we can sensibly isolate decisions that the couple rationally expects will enhance their aggregate income, and ensure that in making such a decision neither takes a risk of disproportionate loss if divorce then occurs.” As such, most claims by homemakers in childless marriages will have no alimony remedy. Sometimes, if the decision is to remain at home or aid a working spouse in business or in some other way contribute financially to the household, such a spouse may in fact have an alimony claim. Ellman provides examples of the executive wife who entertains and the political wife as spouses who would have valid alimony claims.

Further, the measure of the claim is the full value of the lost earning capacity. One would look at the alternative use the claimant could have made of her efforts—investment in her own earning capacity—without judging the fact that risk allocation would normally economically make her resist making the decision to marry, thereby encouraging her to make the

130. Ellman, supra note 21, at 56.
131. Id. at 58-60.
132. Id. at 61.
133. Id. at 62.
134. Id.
decision to marry nevertheless.\textsuperscript{135} However, there would be no alimony claim when the risk incurred did not result in a gain for the other spouse or the marital unit as a whole. The risk taken which results in a loss will be borne by both spouses and does not provide a valid alimony claim.\textsuperscript{136} “By definition, every economically rational accommodation of one’s spouse is expected to yield a gain in aggregate marital income.”\textsuperscript{137} If that expectation is met, Rule 2.2 of Ellman’s theory allows a claim.

Similarly, marriages involving spousal support for school mostly provide a clear claim equal to the added earning capacity the supporting spouse would have at the time of divorce. In cases where the supporting spouse did not return to school to then pursue her educational and career goals, but instead stayed home to take care of the couple’s children, the supporting spouse would have a claim under Ellman’s third principle, as principle caretaker of the children.\textsuperscript{138}

Under principle three, Ellman states that, “the homemaker spouse may claim half the value of her lost earning capacity, even though it exceeds the market value of her domestic services, when these services included primary responsibility for the care of children.”\textsuperscript{139} Ellman points out that although the couple’s decision to have children is financially irrational,\textsuperscript{140} society relies on this irrationality for its continued existence. If parental care is valued in this culture, Ellman’s policy would not impose a “disproportionate risk of loss on the spouse who cares for the couple’s children.”\textsuperscript{141} In this case, where the wife stays home foregoing a high paying job, “her reduced earning capacity is a sunk cost of child care which they cannot now recover.”\textsuperscript{142} “Termination of the marriage will not eradicate the responsibility of either party to pay her equal share of the child care bill.”\textsuperscript{143} Because both spouses are equally responsible for the child care bill, the husband would be liable to the wife for only half of her loss. The husband would equally be entitled to a credit for loss he has incurred due to parental responsibilities he has assumed. “Where both have a loss in earning capacity arising from the care of children, alimony should equalize

\textsuperscript{135} This is problematic because of the variety of relationships and the infinite possibility of this alternative use of her efforts. To see it as not being so expansive a possibility is to bias the analysis based on traditional marital schemes within society as opposed to non-traditional arrangements.

\textsuperscript{136} Ellman, \textit{supra} note 21, at 67.

\textsuperscript{137} \textit{Id.} at 68.

\textsuperscript{138} \textit{Id.} at 69.

\textsuperscript{139} \textit{Id.} at 71.

\textsuperscript{140} Again, it is clear that rationality is defined only economically. The nature of human existence as including the creation and upkeep of family is omitted.

\textsuperscript{141} Ellman, \textit{supra} note 21, at 72.

\textsuperscript{142} \textit{Id.}

\textsuperscript{143} \textit{Id.}
that loss on divorce by giving the spouse with the larger loss an award for one-half the difference in their respective losses.\textsuperscript{144}

In addressing the effects of his theory, Ellman further exposes the rationale he applies to marriage relationships. He makes assumptions about economic inequities in society, equality of opportunity for all, and his support of individualistic pursuit of career and other gains. Ellman states that the standard of living during marriage is not directly relevant under his theory, although he wishes not to consider lifestyle preferences as a factor in alimony attribution or application. The right to recover “the full amount of her lost earning capacity may yield a substantial claim in a long-term marriage in which the impact on earning capacity is great but it will provide a smaller claim the shorter the marriage,” and the lower the earning capacity.\textsuperscript{145} The spouse who initially did not have significant earning potential to lose will not fare as well. “The high school dropout will receive less alimony than the law school graduate who stayed home with the children, because the drop-out’s earning capacity would not have advanced as much if she had spent the same time in the market.”\textsuperscript{146}

According to Ellman, the lawyer-wife invests more in the marriage and is therefore entitled to higher compensation. Each wife is compensated only for what she gave up. This directs away from the wealth or earnings of the husband and from the needs of the claimant. Ellman’s hope is that, “requiring the primary wage-earner to pay his former spouse according to her lost earning potential may lead him to value her labor more rationally than under the current system.”\textsuperscript{147} Ellman considers this the strength of his theory. However, he admits it has weaknesses too. The calculations required to establish lost earning potential will be difficult. He admits claims based on lost marriage prospects may be compensated despite his initial hesitation to consider the possibility of making a different marital investment than the one made.\textsuperscript{148}

\textsuperscript{144} Id.
\textsuperscript{145} Id. at 76.
\textsuperscript{146} Id.
\textsuperscript{147} Id. at 77.
\textsuperscript{148} Id. at 78-80.
III. CONSTRUCTING MARRIAGE: MAINE’S “FROM STATUS TO CONTRACT”
GENEALOGY

A. Maine

As background to this scholarship and its roots in the status to contract narrative, this article will review Maine’s theory on the subject. However, commentary on Maine has cautioned us “to resist the temptation to detach his jurisprudential arguments from his Victorian concerns,” and to keep in mind that Maine “believed that in seeking to understand law the best results could be achieved by making constant references to non-legal topics.” 149 This in short means that Maine understood law to be constructed in a context and was himself writing for a particular context. Further, his emphasis upon such concepts as “sovereignty” and “command” met Maine’s particular need to explain and justify social and political concerns of industrial societies in the West. “It followed that such terms were inappropriate for the analysis of, say the ancient laws of India.” 150

Maine elucidated historical antecedents for the development of law and the interconnection of various legal systems to educate us as to how law serves the course of human progress. As such, this progress narrative presents itself as a sheath which is susceptible to be pierced by the blade of reality for which it was originally conjured or conceived.

In Chapter Five of his tome Ancient Law, Maine sets out to find commonalities in the general relations between people in various societies to examine the connection between law and society, where that connection has come from, where it is in Maine’s era, and where it is headed. 151 In the course of this examination, Maine posits a genealogical accumulation of individual rights. Maine terms this examination or narrative, “from status to contract.” 152

Initially, Maine submits the subject of jurisprudence and its history to the scrutiny of different cultural backgrounds to uncover the thread of commonality in legal thinking and law making. 153 This exercise leads him to conclude that the law of contract, in its embryonic state, encompassed a particular relation between people, which was understood to incur group rights and responsibilities for the individual participants and members of that society. The very fact of being born into a particular group resulted in

150. Id.
153. Id. at 825-26.
membership, invoking specific rights and obligations. Maine labels this membership a “status.”

Through “scientific” examination of comparative jurisprudence, Maine observes the significance of male lineage or “patriarchy” in the ordering of group members. Under patriarchy, some individuals had greater rights and responsibilities than others. Maine describes society under this patriarchal model and its importation as a complete theory from the institutions of Romans, Hindus, Selavonians, and those chiefly belonging to Indo-European stock. The patriarchal order within the family upon which status was based stood initially as the highest form of ordering of rights until the germ of state or nationhood claimed its place as an “order of rights superior to the claims of family relation.”

The characteristics of ancient patriarchal rights and obligations generally followed a line of ascendancy based on the eldest male parent, considered supreme in his household. The eldest male parent held dominion over the life and death of his wives, his children and their houses, and over his slaves. Although the male sons possessed the potential to one day be heads of their own houses, as children, they differed little from slaves and female children in their status vis-à-vis their father. The property belonging to the children was automatically the property of the father, although he held such property more in a representative way than in a proprietary way as this property would be divided at his death among his sons in the first degree. The eldest son, however, would be entitled, at times, to a double share and also to an honorary precedence to the household.

Law, at this stage in history, was the parent’s word—especially that of the male parent who was head of the household. In this rudimentary form of the family, the parent’s word held the power of commands of a head of state or a sovereign ruler. Moreover, Maine states that there was a presupposition that a union of family groups existed in some wider organization, making his word, “law.” Maine concludes that society in earliest times was not a collection of individuals, but instead a collection of families. Thus, the “unit” of ancient society was “the family” as the unit of modern society is “the individual.” Consequently, ancient law differed in that it addressed families, analogous to “a system of small independent corporations.”

154. MAINE, supra note 151, at 164.
155. Id. at 118-19.
156. Id. at 120.
157. Id. at 119.
158. Id.
159. Id. at 121.
160. Id.
161. Id. at 121-22.
“ceremonious.” It was scanty because the word held by the household head supplemented it. It was ceremonious because like international law, it chiefly governed the slow transactional moves between large corporations or families.  

Ancient law was based on assumptions completely anomalous to modern jurisprudence. The first such assumption is that its constituents never die. Like corporations, the patriarchal family group was perpetual and inextinguishable. An individual’s wrong-deeds were absorbed by the group to which she belonged, and became the wrongs of the group. “If . . . the individual is conspicuously guilty, it is his children, his kinsfolk, his tribesmen, or his fellow-citizens who suffer with him, and sometimes for him.” If the group or community sins, “its guilt is much more than the sum of the offences committed by its members; the crime is a corporate act.” Fusing ideas of moral responsibility and retribution, ancient law carries with it the full burden of a sin committed by anyone within the family group, which is immortal and thereby perpetually condemned. Resonating early notions of an inherited curse, Maine intimates that future generations experienced this curse as a liability to commit fresh offenses with serious penalty. The change in thinking to its individualist incarnation—limiting the consequences of crime to the actual delinquent—was thus not hard to understand.

Maine further surmises that the origin of communities lay in a particular dismemberment of families at the death of the “patriarchal chieftain,” when within the loss incurred they found a sense of belonging and togetherness. Signs of this prevail in Greek and Roman states according to Maine. He graphically accounts for the family, the aggregation of families in the house, and the aggregation of the houses in the tribe of Romans as a series of concentric circles evincing this expansion into community living and connectivity. He describes the aggregation of tribes as the commonwealth, although he is less certain whether the leap is so direct from family to commonwealth. He thus interrogates: “Are we at liberty to follow these indications, and to lay down that the commonwealth is a collection of persons united by common descent from the progenitor of an original family?”

162. Id. at 122.
163. Id.
164. Id.
165. Id.
166. Id. at 123.
167. Id.
168. Id. at 123-24.
169. Id. at 124.
Central to understanding the history of political ideas and community for Maine is the idea that all societies hold themselves together by adhering to a notion of one common stock. However, this idea of common lineage, as key as it appears to community connection, seems constantly subverted by community preservation of records and traditions undermining its centrality. According to Maine, the constant adoption of some exotic or foreign elements added to the original stock and constantly adulterated the primary or original group. The assumption of natural homogeneity by artificial expansion was notorious. Moreover, this legal fiction allowed the creation of artificial family connections. To Maine, this particular legal fiction was significant in later, modern ideas of community union. Whereas we may contemplate that people living within geographical proximity should vote together, ancient societies could not think this way and needed to have foreign or incoming people “feign themselves to be descended from the same stock as the people on whom they were engrafted.” Ways in which the adoption of incoming people may have been conducted were the performance of common rituals such as sacrifices in which they were allowed to participate. They could also partake in the customs of the community and in the communal way of life.

Maine describes family organization in this ancient society and one of its chief doctrines, the *Patria Potestas*, or “Power of the Father.” He maintains that there is evidence this practice originated in Roman, German, and Indian concepts and practice. More benign forms of the *Patria Potestas* may be visible where the power is actually attached to the father while he retains superior strength and wisdom, but disappear where the power is relinquished as these qualities wane, as in Greek and Hellenic practices. Although the *Patria Potestas* prevailed in the family, it was not a usage of the *jus publicum*. In public matters, father and son were equal citizens. However, under private law, the son lived under the legal despotism of his father.

Under private law, the *Patria Potestas* extended over persons and property. According to it, the father would have the power of life and death over his children. He could marry them, give his daughter in marriage, or give a wife to his son and divorce his children of either sex.
could also sell his children or transfer them by adoption to another family. As for responsibilities, the father was answerable for the delicts or torts of his children and slaves. In both cases, however, he could offer the delinquent child or slave in full satisfaction of any damage incurred. The children or slaves could not sue the father or vice-versa. This established a unity of personhood, which balanced the rights and duties of the Paterfamilias.  

In the case of the female, the father’s power was much greater. Maine describes the authority of the Patria Potestas as devolving a perpetual guardianship to which the female would be subject all her life. Unlike the son or grandson, a daughter could not one day become head of a new family. Under the Roman legal doctrine of Perpetual Tutelage of Women, the female was in the bondage of the family for life. Although she would no longer be subject to her father’s power or authority upon his death, she would continue to be subject to that of the nearest male kin or to her father’s nominees. Maine alludes to evidence of complete application of this doctrine in India, in the guardianship of a widowed mother by her sons. It was also prevalent in Scandinavia and the western world till recently, although it had disappeared from “mature Roman jurisprudence.”

Whereas ancient law subsumed women to their blood relations, modern jurisprudence, according to Maine, subordinated the wife to the husband. This change is evident within the three forms of marriage covenant possible under ancient law. By Confarreation, a religious marriage, or Coemption, a higher form of civil marriage, or Usus, a lower form of civil marriage, the husband acquired rights over the person and property of his wife, in the place of “her father,” i.e., In Manum Viri. The wife became the daughter of her husband and was included in his Patria Potestas. “All her property became absolutely his, and she was retained in tutelage after his death to the guardian whom he had appointed by will.”

Christianity, however, saw this marital tie as lax and narrowed this liberty of the female. According to Maine, the vestiges of canon law and the prevalent state of religious sentiment fused Roman jurisprudence and patriarchal usage. During the rudimentary stages of “modern history,” “the

179. Id. at 140.
180. Id. at 147-48.
181. Id. at 148.
182. Id. The Roman jurisprudence of Gaius described various mechanisms to circumvent these restrictions upon women applying the principle of equality of the sexes under the Roman code of equity. “The restrictions which [Roman jurists] attacked were . . . restrictions on the disposition of property, for which the assent of the woman’s guardians was still formally required. Control of her person was apparently quite obsolete.” Id.
183. Id. at 149.
184. Id. at 149-50.
women of the dominant races are seen everywhere under the various forms of archaic guardianship, and the husband who takes a wife from any family except his own pays a money-price to her relations for the tutelage which they surrender to him. With the fusion of the two systems in the Middle Ages, unmarried females were generally “relieved from the bondage of the family,” but the position of married women was fixed such that the husband retained all the powers which once belonged to the wife’s male kin, except that now he no longer had to purchase the privilege.

Summing up his thesis, Maine asserts that the primitive, or ancient, ideas of “mankind” could not or did not fathom any basis for the connection of individuals as such, unless it was within the context of relations between families. In its infancy then, “the Civil laws of States are first [formed through the dictates] of a patriarchal sovereign, [which were] developed from the irresponsible commands . . . [that a] head of each isolated household may have addressed to his wives, children and his slaves.” However, these laws of the patriarchal sovereign still have a limited application and retain their primitive character because they are not binding on individuals but on families.

Maine proceeds to analogize ancient law to international law, in as much as both fill only the interstices between “great groups which are the atoms of society.” But this atomistic sphere of civil law slowly expands as “legal change, fictions, equity and legislation, are brought in turn to bear on the primeval institutions, and at every point of the progress, a greater number of personal rights and a larger amount of property are removed from the domestic forum to the cognizance of the public tribunals.”

Gradually, government laws became as significant in private matters as in matters of state and no longer threatened to be overridden by the dictates of the family patriarch. Maine relied heavily on the history of Roman jurisprudence to describe the design by which the individual slowly replaces the family. In expounding upon this “movement of progressive societies,” which Maine proclaims to have been uniform, family dependency gradu-

185. Id. at 150-51.
186. Id. at 151-52.
187. Id. at 161-65.
188. Id. at 161.
189. Id.
190. Id. I do not think nation-states are atoms of society in the same way as families are, if at all. But I understand Maine to use the atom to describe the separation of entities which make up a whole, whereas in molecular science atoms refer to the smallest, self-contained, physical component of matter, as individuals may be perceived in the social realm.
191. Id. at 161-62.
ally dissolves, and civil laws target the individual as opposed to families or family heads.\textsuperscript{192}

Maine also qualifies his thesis with the divergent manifestation of this evolution. The connection occasioned by the dissolution of ties or relations between families is replaced by contract, “the free agreement of individuals.”\textsuperscript{193} Thus, Maine narrates the movement from a condition in which “all the relations of Persons are summed up in the relations of family,” to a position of freedom of contract for slaves, sons, and daughters.\textsuperscript{194} Minor children, orphans under guardianship, and the lunatic are, however, treated differently under civil law because they “do not possess the faculty of forming a judgment on their own interest,” thus lacking an essential criterion for the capacity to form a contract.\textsuperscript{195}

Finally, “status,” as Maine construes it, “was derived from . . . and to some extent still [is] colored by the powers and privileges ancienly residing in the Family.”\textsuperscript{196} For Maine, status signifies the personal condition affecting persons residing in families, as opposed to conditions affecting individuals through an engagement in agreements, and denotes the movement from status to contract.\textsuperscript{197}

\textbf{B. Status to Contract on Alimony}

Maine describes a progress narrative into which much of the scholarship this article has reviewed on alimony theory, its origins, and continuity can fit. Maine takes his readers from a point in time, he names as the origin, to the late nineteenth-century which he suggests falls somewhere along the progress to complete individual freedom. At the origin, Maine suggests family is pre- eminent and headed by a male patriarch, who is instrumental in authorizing activity and male lineage within the family. This male patriarch is also instrumental in perpetuating the rules that govern the amalgam of families in concert with other patriarchs. This he terms the “status” origins of relationships between family members. Maine’s narrative culminates in the domain of “contract.” This is an environment in which all individuals, except lunatics and minors, are able to exercise a choice in whom, when, how, and if they associate or engage with another person, including the possibility of engaging with members of the opposite

\begin{itemize}
\item \textsuperscript{192} Id. at 163. This is clearly debatable as is his definition of primitive/progressive.
\item \textsuperscript{193} Id.
\item \textsuperscript{194} Id. Except for the tutelage of their husbands.
\item \textsuperscript{195} Id. at 164.
\item \textsuperscript{196} Id. at 164-65. Many scholars have documented this evolution in their work on alimony, but also generally as an aspect of family law. See Elizabeth Scott, \textit{Rehabilitating Liberalism in Modern Divorce Law}, 1994 UTAH L. REV. 687, 687 n.1 (1994).
\item \textsuperscript{197} MAINE, supra note 151, at 164-65.
\end{itemize}
sex in an intimate way. This state of contract necessarily has an impact on the choice and possibility of owning property in one's own name.

Ellman accepts Maine's narrative as the backdrop for his thesis on alimony. He suggests that present day relationships between individuals of the opposite sex require the mediation of a "status" construction of marriage condoned and regulated by the state as opposed to allowing a multiplicity of individual contractual regimes. While rejecting contract, Ellman pours substance into "status" in order to create a "status" construction of marriage that is in the economic interest of the couple and of the marriage. For the losses sustained by the lower income earning spouse in staying home, he suggests that she be compensated for any such loss she sustains in the event the spouses choose to dissolve their marriage, which they should be allowed to do freely. The ready availability and uniformity of such alimony relief would deter the husband who otherwise could easily marry again when he is at the height of his financial prowess leaving his ex-wife in an otherwise tragic financial state given her sacrifice of market employment in order to conduct domestic labor.

The role of the state within the narrative from status to contract, or from lack of choice to choice and greater rights for the individual, is central to Maine and Ellman, as it is to scholars of alimony theory. The state is a constant player. Within Maine's genealogy, the family holds the origins of community and today it is the state. The state has a governing role in establishing a normative framework for marriage. Against the dictates of the family or the state, the extent of individual choice is determining in the formulation of a theory of alimony adopted by the particular proponents involved.

Both Maine and Ellman tend to maintain that more choice is better than, more modern than, an improvement or progress over individuals having less choice. Nevertheless, Ellman wants to curtail individual freedom in moving toward "status" through a profit-maximizing traditional marriage. While Maine purports to document the way things were, are, and will be, Ellman purports to theorize alimony as a tool to help the state decide ahead of time what is in the best interest of the individuals being governed by expounding upon the most economically profitable solution for marrying couples. He would like to convince state governments that the best solution is to create a "status" norm governing marriage, divorce, and the financial arrangements necessarily invoked upon dissolution of this marriage. In making assumptions about what is profit maximizing, Ellman

198. Ellman admits that, more often than not, this would be the wife. Ellman, supra note 21, at 7.
199. Allowing a partial contractarian regime in order to oppose a fault regime. Ellman, supra note 21, at 15-18.
retains the status quo in social marital roles for husbands and wives. Ellman perpetrates a “status” construction by “inventing” a modern economic basis for it.

C. Classifying Scholarship

Within the rubrics they deploy, Maine and Ellman repeat the following categories: “status,” “contract,” “community,” “economic,” and “individual.” In these words, we meet the labels for all the various categories upon which current scholars strive to frame their particular theories perpetuating or ending the notion of alimony as a continuing duty of financial support between ex-spouses upon divorce. This article categorizes these scholars and their scholarship vaguely based on their promotion of a status or contract or some hybrid construction of marriage. It also categorizes them on where they stand on the alimony debate raised above in the review of Ellman and to the extent possible within the review of Maine’s narrative.

Some scholars argue for greater stability in marriages, citing the high divorce rate, and call for construing marriage as a “status” predetermined by the community to which a couple belongs. These scholars find that the evolution from status to contract has gone too far toward contract and away from the status construction of marriage that once assured a stability of conditions that no longer exists. Contract, such scholars claim, comes much nearer to accurately classifying the nature of today’s marriage, and a step back is necessary. Within this category fall various scholars propounding communitarian, religious, and other virtues of marriage. Marriage provides the couple’s connection to its community in a different way from an individual’s supply of identity partly furnished by his or her sense of belonging to a community. This article labels the brunt of these scholars “Communitarians.”

Communitarians espouse strong family ties and fall within two camps: those who wish to bring fault grounds back to dissolve marriages, and thus stress the “status” construction of marriage; and those who want to maintain the no-fault regime, but would provide couples with the option of a markedly stronger commitment format to their marriages, including fault grounds for divorce. There are various groupings among the Communitarians as well; some are religious, some feminist, and some are socialist. One group does not necessarily exclude another. All support some doctrine of alimony, or post-dissolution support for an ex-spouse. These scholars also condone the use of family as an institution to promote stabil-

200. See infra Part IV.A.
201. See infra Part IV.B.
ity for adults and children alike, and the growth of bonds or connections between family members, as opposed to generally between people in society.\footnote{Which may be more akin to the classic socialist stance.} In encouraging a view of family and marriage that is state ordained, sanctioned, and perpetuated, these scholars promote a status construction of marriage.

Scholars like Ellman argue for a more pragmatic view of marriage and call upon their readers to view marriage as partly state regulated and partly open to the variation of the individual pact. They would like that pact generalized into some normative framework that takes into account their own views as to what types of marital and post-marital financial arrangements spouses should make. This article labels these scholars the “Economists.” Economists of the Ellman school use economic profitability and efficiency as the generalized guidelines by which states should regulate marriage.

Finally, there are scholars that choose to wholeheartedly succumb to Maine’s progress narrative and see the emancipating ideal for both men and women as contract and discourage state intervention completely. First, this article addresses the scholarship of Individualists who find solace in the rhetoric of self-sufficiency and equality. According to these scholars, spousal support is necessary only to rehabilitate an ex-spouse who has been out of market labor for an extended period.

Contractarians, on the other hand, leave the provision of alimony to the spouses themselves. A man and a woman, or spouses regardless of gender, should be able to enter whatever contract they choose prior to, or at dissolution of, their marriage. Contractarians do not readily seek to find a basis for alimony in the current divorce regime. In the interest of allowing some duty of support to continue where spouses agree to it, they encourage a move toward the individual ability of spouses and ex-spouses to dictate their own financial arrangements. In keeping with a segment of self-sufficiency rhetoric, they urge spouses to record their commitment in writing addressing such issues as alimony. Moreover, those promoting a self-sufficiency model appear to hang their hats on the benefits of no-fault divorce and are inclined to accept contractual constructions of marriage more readily. These scholars appear to face two major critiques: (1) existing culturally-based inequalities in bargaining power\footnote{Due to social, physical, ethnic or racial, and economic conditioning.} at marriage and at divorce; and (2) unequal child bearing and rearing burdens for women.

Feminist critiques and formulations of the role of alimony in marriage and divorce are in many different camps. This article also places feminist normativists in the “Economists” camp because they partly adopt Ellman’s pragmatic approach, although they reject strongly a “status” or traditional
model for the marital couple and seek to provide sufficient safeguards for those women who do not share Ellman’s efficiency goal of staying at home while their husbands go to work. Some of these pragmatic scholars take a more utilitarian economic perspective. They maintain that “the ideal worker’s salary reflects the work of two adults: the ideal worker’s market labor and the marginalized-caregiver’s unpaid labor.”

IV. COMMUNITARIANS AND ECONOMISTS: THE STATUS THEORISTS

A. Communitarians

Theoretically, Communitarians highly value the importance of community membership in the shaping of human identity and experience. They contend that individual identity is constructed socially, at least in large part, and that individual goals are greatly shaped by the cultural environment of the individual. Communitarians argue that liberal theory exaggerates the extent to which individuals choose their goals by putting primacy on individual freedom, and that liberalism cannot retain the neutral values it professes to harbor in the interest of society. Thus, Communitarians believe that as human beings are socially constructed, “the good life involves membership in social communities—the family, the neighborhood, or the state. Altruism, commitment, cooperation, connection to others, and responsibility—moral values that are implicit in community membership—have intrinsic and primary importance to human happiness.”

What are communitarian views about the status-based construction of marriage and what are the various strains of communitarianism espousing? How are they different with respect to the construction of marriage and alimony? With regard to the family, a number of scholars write from a communitarian perspective. Some are relational feminists and others

204. Williams, supra note 38, at 2229.
whose work is discussed below. If they do, how do they deploy Maine’s genealogical narrative?

Most communitarian scholars appear to adopt an evolutionary narrative with regard to the family similar to Maine’s. However, this narrative is accelerated and usually set forth as regressive, not progressive. To many communitarian scholars the history of family law is a story as to how the law has “increasingly come to deal with the family not as an organic unit bound by ties of relationship, but as a loose association of separate individuals.” Communitarians believe this treatment undermines the family in a way that ultimately is costly to society and to individuals themselves. Whereas family ties used to be fixed by status and defined by duty, family members are now treated as atoms with individual rights. The legal relationship of family members to each other and to the state is couched in liberal traditions of autonomy and equality.

Both traditional and modern communitarian scholars appear uneasy with this development. Communitarians generally position their scholarship on the premise that individual liberty resists connections and stresses the autonomous nature of individuals. This undermines the family in a way that is costly to society and to individuals themselves. Communitarians hold that the law’s ostensible neutral stance ignores the reality of dependency and ties created by the social role family plays in individuals’ lives.

Communitarian scholarship can take various forms: religious, feminist, and socialist. All appear to be pro-alimony and want to allow bonds to grow, whether through traditional religious or modern feminist cultural channels. Some find a basis exists within the unbreakable bond between spouses even after divorce, especially where children are shared; and Communitarians espousing strong family ties wish to bring fault back and thereby share status-based constructions of marriage. Of these scholars, this article examines the work of Milton Regan and Margaret Brinig below as an example of communitarian thought on marriage and alimony.

207. Scott, supra note 205, at 687.
208. Id. “Moreover, the attributes and values associated with family—altruism, shared commitment, stable enduring relationships, and mutual bonds of caring and responsibility—continue to be important to many people in their vision of the good life. These values tend to be discounted under a legal regime that seems directed toward maximizing personal freedom.” Id. at 688.
209. See, e.g., Carbone, infra note 242. Those who wish to stabilize the family see fault as a grounding for divorce. Fault provides incentives to keep the marriage together on the one hand, disincentivizing divorce, and penalizing the one allegedly causing the discontent and therefore the divorce.
Both Regan\textsuperscript{210} and Brinig\textsuperscript{211} state that a nexus of contracts presents a partial picture of family law because it precludes a consideration of interdependence, intimacy, and responsibility suggested or created by family relationships. In order to balance individuality with the intimacy shared in family, Regan advocates a return to a contract and status model, wholly proposing the advantages of a return to status as he defines it. Alternatively, Brinig proposes the term “covenant” to describe this status-based contract bond between husband and wife, or parent and child.\textsuperscript{212}

The content of the term “status” as Regan employs it, and the proposed “covenant” that describes this status-based bond as Brinig denotes it, is a model of relationship which captures the security, permanence, and intimacy of family as it looked in the “golden age,” while discouraging the hierarchy and inequality associated with Victorian attitudes.\textsuperscript{213} Regan’s status is suggested as an alternative vision of a person in context or relationship making it much more difficult to “extricate” oneself from such family relationships.\textsuperscript{214}

Brinig finds that Regan’s construct attempts to defend against criticism from feminist and gay camps. She consequently strides forth to develop “covenant” as a more aggressive borrowing of the status model in the modern context.\textsuperscript{215} Brinig’s covenant proposal then attempts a reassessment of the permanence of family bonds as negotiated through contract without the baggage of inequality and hierarchy suggested by status. “The covenant concept lacks the sexist connotations of status, but even more than status it links two individuals unconditionally and permanently.”\textsuperscript{216} Thus, status places the husband or wife in the context of relationships to which he or she is already bound, and which, like “a promise ‘running with the land,’ cannot ever completely dissolve.”\textsuperscript{217}

Brinig and Regan, in effect, both reject two consequences of a contractual model of marriage and family. First, they reject that involvement in family is a matter of personal choice without regard to the consequences or

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\textsuperscript{211}. See generally Margaret Brinig & Steven M. Crafton, Marriage and Opportunism, 23 J. Legal Stud. 869 (1994); Margaret Brinig, Comment on Jana Singer’s Alimony and Efficiency, 82 Geo. L.J. 2461 (1994).
\textsuperscript{212}. Brinig, \textit{supra} note 210, at 1595.
\textsuperscript{213}. Milton Regan, Family Law and the Pursuit of Intimacy 89-117 (1993) (describing the evolution from status to contract as a legal basis for family relationships).
\textsuperscript{214}. Brinig, \textit{supra} note 210, at 1576.
\textsuperscript{215}. Id. at 1574.
\textsuperscript{216}. Id. at 1595.
\textsuperscript{217}. Regan, \textit{supra} note 213, at 186.
\end{flushleft}
ramifications of that choice. Second, they both reject the possibility that permanent links devolving through marriage, especially when there are children, can be negotiated away through an exercise of choice through agreement.

B. Economists and Their Critiques

Law and economics analysis is used by pro- and anti-alimony scholars. Ellman stands squarely pro-alimony, and also pro-status and anti-contract. Like Richard Posner, Ellman wishes to see a price imposed and a cost allocated to the caregiver’s labor, or the human capital invested in the marriage, as if he/she were an employee of the market wage-earning spouse.

Economists have drawn a sharp distinction between positive and normative economic theory. In the area of family law, however, it may be difficult to be clear-cut about this distinction. With regard to family, economic theory has been primarily descriptive and developed explanations for patterns of family behavior with regard to marriage and divorce. One significant aspect is the deployment of household work as productive and value producing within economic methodology. This recognition of home economics can fill certain gaps and possibly remedy legal practices which have, till now, been harmful to the interests of women who have been chiefly responsible for doing this unvalued household work.

Yet, this accounting of work and life in the family may be sterile, incomplete, and even inaccurate. All aspects of family life cannot be commodified as many feminists have stated, nor valued in money. “This social reality creates problems for all but the most theoretical economic analysis, for although most family economists speak in terms of ‘utility’ rather than money, the models they have used have depended upon the universal ‘measuring rod of money.’”

218. Id. at 2; Brinig, supra note 210, at 1577.
219. REGAN, supra note 213, at 4; Brinig, supra note 210, at 1580.
221. Id. at 28.
Economists tend to describe only some of the gender-based division of labor, that which makes the household efficient, allowing the family to generate the maximum level of utility. The omission of context and complexity may make the conclusions of Economists inadequate. Further, economic analysis may assume exactly those features of family life that feminists wish to question, and the very tensions that require further exploration. It has been suggested that we should ask whether Economists “have done anything more than describe the status quo in a society where sex roles are ‘givens’—defined by culture, biology, or other factors not specified in the economic model.”

It is easier to understand the conclusions of Economists such as Ellman that the most efficient family model is the traditional and gender-structured one, resulting in women’s longstanding disadvantage in the market, when we recognize that these “givens” must be assumed in that model.

Although positive economics is principled on objective science, and free of any ethical or normative position, it uses models that abstract common and often complex experience to explain and predict behavior. Many subjective judgments and assumptions, required in the name of efficiency, are achieved using status quo models. As Estin explains, “a hypothesis must be descriptively false in its assumptions.” This methodology has led to many critiques of Posner, to the effect that “he has a tendency to mix normative judgments liberally in his positive analysis.”

Thus, throughout Economists’ work relating to family describing the efficiencies of certain social roles within the family, it is often difficult to figure out which meaning of “efficiency” is operative.

The model used by Economists asserts that individuals decide for themselves whether to marry, have children, or divorce based on the direct and indirect benefits and costs of different actions. It is assumed that people in family relationships are rational, utility-maximizing, facing a range of options but limited by time, energy, wealth, or other resources. As well, it considers that most goods have substitutes and are replaceable, and that people choose freely how they want to act. With respect to a family in particular, this model can treat it as a single unit, which would consolidate the choices, options, and property of husband and wife, if not also the chil-

223. Sawhill, supra note 220, at 120.
224. See Estin I, supra note 220, at 7.
225. Frank I. Michelman, Norms and Normativity in the Economic Theory of Law, 62 MINN. L. REV. 1015, 1038-40 (1978) (“[W]e can carelessly slip from an approximate empirical Is to a definite ideal Must or Ought to Be . . . .”); see Estin I, supra note 220, at 9-10 (indicating that efficiency is used as a normative standard as well as a technical one).
The model can also apply to individuals to assess and promote specific behavior in each person as Ellman does.226

Gary Becker has studied altruism within the family.227 Becker develops a model that looks at the effects of altruistic behavior on resource allocation within the family.228 The model effectively describes the role of the benevolent head of household in allocating resources, ensuring cooperation, and maximizing the preferences of all household members.229 Other scholars have criticized this model for its naiveté, because the reality of social roles within families means this is a reference to the patriarch as per Maine’s model. The husband/father can effectively ignore the preferences of other family members when he has power to do so, because he has the power to act out of self-interest. Normally, the family members with the least power are more apt to behave altruistically.230

On the other hand, the model of family as “firm” or “corporation” devised by other Economists focuses on individual decision making.231 This model recognizes the differential access of family members to financial and other resources. This difference affects their bargaining power within the marriage. It envisions marriage as a cooperative venture influenced by parties’ awareness of opportunities outside of marriage in case of marital rupture. This model leads us to recognize that the possibility of greater opportunity outside of marriage for a party will translate into greater power within the marriage.

Economists will explain that the contract model may inherently present greater problems because of the legal regime of contracts.232 Contracts bring problems of fraud, duress, and unequal bargaining power which complicate the context of close family relationships. Feminists have critiqued Economists’ contract models, based on rational maximizing behavior, because of the harsher aspects of family behavior and the presence of many types of force or coercion directed at women both inside and outside the family.233 Where force or coercion regulate a particular exchange within family, it is not useful to conclude that the relations within that family

226. Estin I, supra note 220, at 11-12; see, e.g., BECKER, supra note 220; POSNER, supra note 220.
227. BECKER, supra note 220, at 277-306. See the work of Olsen on this, who tells us that the family was the abode of altruism while the market has been conceived as the place of individual self-interest and motivation. Frances Olsen, The Family and the Market: A Study of Ideology and Legal Reform, 96 HARV. L. REV. 1497, 1520-22 (1983).
228. This model is based on the notion of cooperation, and working together characteristic of a corporation with members who have different functions and work for the good of the whole. See BECKER, supra note 220, at 278-89.
229. Id.
231. BECKER, supra note 220, at 300-03.
232. POSNER, supra note 220, at 143-44.
233. Estin I, supra note 220, at 11-12.
emanate from a contract between parties for which no contractual remedy exists, i.e., where the absence of fault reigns.

However, feminists also are attracted to economic doctrines, attempting to expand them to include the particularities of family and marriage relationships. Feminists seek to respond to lacunae regarding the effects of discrimination against women and empirical research suggesting that women generally bear the heavier burden of family and household work. Jana Singer, for instance analyzes the relationship between efficiency, gender inequality, and household specialization. She asserts that traditional household roles have been greatly problematic for women because they perpetuate gender inequalities through social role-making and power differentials in society.

Certain problems may be generated in divorce because the wife has borne a disproportionate share of the costs; part of the burden which may be considered “efficient” behavior in the pre-divorce family. While other Economists may suggest that alimony fills the gap in such scenarios, Singer is not certain this is useful or valuable in the long term. Given the potential negative consequences to women from household specialization, Singer thinks it unwise to plead and decree incentives which would “encourage women to abandon their careers . . . in exchange for a promise to ‘hold them harmless’ financially in the event of divorce.”

Singer proposes instead an income-sharing model that “would combine the equal partnership ideal that underlies current equitable division scheme with the economist’s recognition of enhancements in human capital as the most valuable asset produced during most marriages.” She seeks to diminish existing power differentials during marriage and to encourage husbands to increase their share of family and household work.

Brinig critiques Singer on some of these issues and suggests that family life is more complex still than allowed under the investment partnership model espoused by Singer. Marital decisions generate externalities not completely within the spouses’ control because they can “affect children, and these decisions are not easily reversed at the time of divorce.”

236. Id.
237. Id., at 2442; see Estin I, supra note 220, at 16.
238. Id., at 2454.
239. Id., supra note 220, at 16.
240. Id.; see Brinig, supra 211, at 2463, 2470-73; Singer, supra note 235, at 2455.
Brinig questions the assumption that the division of labor must occur between husband and wife only because, in fact, others may perform household work. Further, there are always proportionate returns on a choice to perform additional home or market work.

June Carbone, as we have previously reviewed, describes a restitution-based system to “encourage women to look to their own earning rather than to marriage for their financial security, . . . [while] continu[ing] to bear the primary responsibility for childrearing and to make sacrifices that will enhance their husbands’ careers.” Joan Williams adopts a scholarship that generates an income equalization model of home economics after divorce. She asserts a scheme whereby husband and wife would have equal claims to wages earned by either of them during the time their children are dependent and for some time after divorce. She rearticulates this interest in property as an entitlement to the “family wage.”

Finally, the economic approach does not apply to, or support alimony in cases of premarital or separation agreements between the parties, short marriages with little specialization of labor or where no significant human capital changes have occurred in the marriage, or in cases where the spouses seeking a divorce would also have an alimony claim.

V. FOSSILIZING ALIMONY: FORMAL EQUALITY, INDIVIDUALISM, AND OTHER ERASURES OF THE DUTY

A. Individualism and Self-Sufficiency

There is a great deal of rhetoric surrounding divorce and alimony that focuses on the ideology of formal equality and self-sufficiency of spouses. This discourse situates alimony discourse and the construction of marriage further toward the contract end of the spectrum and heavily steers away from post-divorce financial “dependence” between the spouses. Judges and lawyers handling divorce matters often prefer solutions which fail to accurately address financial needs at divorce because of a culture which

242. Id. at 17; see June R. Carbone, Economics, Feminism and the Reinvention of Alimony: A Reply to Ira Ellman, 43 VAND. L. REV. 1463, 1493 (1990).
243. Williams, supra note 38, at 2250-53; see also Deborah L. Rhode & Martha Minow, Reforming the Questions, Questioning the Reforms: Feminist Perspectives on Divorce Law, in DIVORCE REFORM AT THE CROSSROADS 191 (Stephen D. Sugarman & Herma Hill Kay eds., 1990).
244. Williams, supra note 38, at 2250-53.
245. Estin I, supra note 220, at 18.
encourages them to perceive wives as the formal and self-sufficient equals of their husbands.

The perception that the wife usually sacrifices her career for child rearing and social responsibilities connected to her husband’s job is no longer held. The perception today is that more and more women are choosing to have professional careers as opposed to stepping into the role of full-time housewife or mother.

In line with this perception, the public policy goal of self-sufficiency has been codified in a number of states. For example, in California as in many other states, spousal support is decided based on a balancing of a number of factors that may be particular to each case in order to achieve an equitable result. In 1996, an amendment to this existing method of assessment of spousal support was effected in order to bring the law in line with current cultural trends because it encouraged dependency and discouraged self-sufficiency. It codified the public policy goal that an ex-spouse become self-supporting within a reasonable time. A reasonable period for spousal support was set out as half the duration of the marriage. Additionally, courts gained the discretion to consider a spouse’s failure to make good faith efforts to become self-supporting (within the rubric of change of circumstance warranting modification or termination of the support).

A number of groups sought to have this codification revised to be less burdensome to the supported spouse. The Coalition for Family Equity, the National Organization for Women, and California Women Lawyers joined to redefine “self-supporting” to exclude marriages of long duration, and to provide courts with the discretion to warn a supported spouse to become self-sufficient. These proposals were rejected by the California Assembly and the Senate as they “incorrectly assumed the . . . amendments required courts to automatically terminate spousal support after half the duration of the marriage.”


249. *Id.* at 1389-90.

250. *Id.*

251. *Id.*

252. *Id.* at 1390.

253. *Id.* at 1391.
Feminists such as Nicole Catanzarite explore and argue in favor of the self-sufficiency rhetoric of California’s public policy and its progressive backdrop reminiscent of Maine’s narrative. She attributes the social changes culminating in divorce reforms and the changed concept of the family in the second half of the last century to the influence of the feminist movement and women’s growing participation in market labor. She outlines the women’s movement of the sixties and seventies to gain legal equality with men and certain legislative gains toward gender equality and the less apparent “trickle down effect on the family ideal and the traditional women’s role within society.” Albeit replicated in a more speeded up fashion, the status to contract story is told by scholars of the formal equality school, or “Individualists.”

The feminist rhetoric of equality played a large part in reforming the concept of marriage into a partnership of equals rather than a lifetime contract premised on the traditional male-dominated view. . . . [T]he feminist mantra of independence translated into economic terms, or the need for women to take responsibility for their own financial independence. . . . With regard to divorce, feminists saw little problem with transitional, or rehabilitative, alimony as a way of assisting women in the transition from housewife to working woman without strapping her to an unsavory stereotype.

California’s elimination of fault as a prerequisite for divorce falls squarely within this story on women’s altered role in society. Regardless of disparate expectations, reformers share the view that “eliminating marital fault was necessary for the good of the public.” Reforming divorce law reflected “the realities of married life,” and the creation of laws that no longer assessed the financial needs of divorced “dependent” spouses based on fault but, instead, on each spouse’s needs and abilities.

In an almost complete shift to a contract construction of marriage, we can note the argument against fault-based divorce. Catanzarite finds, in no-fault divorce, the key to altering the gender hierarchy in marriage espe-
cially with respect to finances. She states: “Fault-based divorce law was rooted in gender-specific terms wherein the husband provided financial support and the wife furnished domestic support.” Ex-spouses were still treated as if they were married, that is, the law obligated the husband to provide for his wife during marriage and therefore also after marriage. This conception of divorce was rooted in women’s social status and subservient role, and the notion that when a husband breaches a marital duty, his punishment is continued support of his ex-wife.

Catanzarite finds that the changed construction of marriage evidenced in divorce reform is a shift from contract to partnership:

Rather than the contractual relationship emphasized in the fault-based divorce system, marriage is now perceived as an economic partnership, a partnership based on the theory that each spouse contributes “equally valuable resources toward the acquisition of assets, and therefore is entitled to a portion of the fruits of this labor.” Stretching this metaphor to its logical conclusion, upon dissolution of the partnership—here, dissolution of the marriage—assets are divided to enable each spouse to go his or her separate way. However, spousal support supplements accumulated assets where necessary.

Joan Krauskopf and others discuss how some judges began to see permanent alimony as negative, providing wives with perpetual pensions or fostering a stereotype of wives as “alimony drones.” Self-sufficiency scholars support the shift toward transitional or rehabilitative support because self-sufficiency is the goal. They explain that rehabilitative alimony recognizes both the contributions of the supported spouse and the disadvantages many such spouses suffer following divorce.

In response to the criticism that rehabilitative alimony does not take into consideration the sacrifice made by older wives who have been long term homemakers, Catanzarite states that we need not assume that all divorced women can become self-sufficient. We need to instead curb the self-sufficiency standard and take into account the four factors set forth by Weitzman, something which she indicates supports the vocational exams

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261. Id. at 1396 (quoting Milton C. Regan, Jr., Spouses and Strangers: Divorce Obligations and Property Rhetoric, 82 GEO. L.J. 2303, 2314 (1994)).
262. Id. at 1396.
263. Krauskopf, infra note 283, at 574.
264. Catanzarite, supra note 248, at 1397.
265. Id.
currently administered to supported spouses in order to determine their needs and abilities.\footnote{266} The four factors are as follows:

- (1) evaluate the supported spouse’s salable skills and interests;
- (2) assess the state of the job market for those particular skills;
- (3) consider any additional training the supported spouse may need to hone these skills; and
- (4) recognize the long-term benefits to both parties when the supported spouse is engaged in a profitable and rewarding career.\footnote{267}

The codification of the public policy goal of self-sufficiency is particularly crucial to lower earning households, according to Catanzarite.\footnote{268} The 1996 enactment of SB 509 into section 4320 of the Family Code in California expanded its subsection (j) to direct judges to consider the hardships to each party. Although this provision was to be reviewed in terms of the marital standard of living, it also implicates the realities of maintaining two households after divorce. According to data relied upon in the formulation of this reform, 80.3\% of divorced mothers were employed.\footnote{269} However, even though the standard of living presupposes that both ex-spouses are working, self-sufficiency in the single income household becomes critical as there is clearly not as much money, or enough money sustaining the two separate households.

If only the husband works to sustain the family, upon divorce that single-income would have to maintain two households. If the husband is not a high earner, self-sufficiency becomes even more important. In this situation, such scholars ask the supported spouse to become self-sufficient even if he/she is a displaced homemaker.\footnote{270} Individualists may consider it somewhat draconian for any spouse to continue to receive alimony without making a good faith effort to become self-sufficient. Although a balance must be struck between husband and homemaker in the face of divorce, this balance they believe is effected by the enactment of a reasonable time line within which self-sufficiency must be sought, without any interpretation of this provision implying that alimony must absolutely be terminated within half the duration of the marriage.

Catanzarite, for instance, responds to allegations that these enactments are overly harsh and causing the impoverishment of divorced mothers and children with statements which support the malleable application of the

\footnote{266} These exams are ordered pursuant to section 4331 and the results are considered in light of section 4320(1) of the California codification. \textit{See CAL. FAM. CODE §§ 4320(1), 4331 (West 1994).}
\footnote{267} Catanzarite, \textit{supra} note 248, at 1397; \textit{see} Weitzman, \textit{supra} note 40, at 207-08.
\footnote{268} Catanzarite, \textit{supra} note 248, at 1399.
\footnote{269} \textit{Id.} at 1398.
\footnote{270} \textit{Id.} at 1399.
legislation.\textsuperscript{271} Half the duration of the marriage, she states, is just a rule of thumb and judges are by no means obligated to automatically terminate spousal support for any marriage, regardless of duration.

If a supported spouse is indeed incapable of self-sufficiency, either within the objective time or at all, this will be considered, and failure to do so could be an abuse of discretion. As for the discretion judges now have to warn supported spouses, Catanzarite asks,

\[\text{[W]hy should a middle-aged, college-educated female be exempted from the self-sufficiency guideline simply because her marriage happens to be classified as one of long duration?. . . . By completely insulating long-term marriages from ever receiving the self-sufficiency warning, we would adopt an inflexible standard inconsistent with the public policy goal.}\textsuperscript{272}

The factors to be considered by a court in ascertaining whether self-sufficiency is possible include: a supported spouse’s contribution to a professional degree or license of the other spouse, a proper assessment of the supported spouse’s abilities by vocational exam, a homemaker’s absence from the work force, and the possibility of future earnings. Moreover, in assessing the needs of a supported spouse, “need” does not mean merely the bare necessities of life. Consideration will be appropriately given by the court to “the ability of the supported party to engage in gainful employment without unduly interfering with the interests of dependent children in the custody of the party.”\textsuperscript{273}

Support to cover household and child care expenses while working toward training or a college degree has been granted in accordance with these guidelines.

Other scholars have simply questioned the validity of a continued concept of alimony when no current rationale appears to be grounding it. We have above noted Ellman’s scrambling for some basis for alimony because there doesn’t appear to be one. He indicates that any traditional basis has disappeared. There are authors who indicate that the abolition of alimony is not unthinkible.\textsuperscript{274}

If there is no satisfactory rationale for alimony, alimony should be abolished. At least in modern times, alimony has never been abolished. Similarly, at least in modern times, alimony has not been awarded fre-

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\textsuperscript{271} Id. Lenore Weitzman’s dramatic claims that ex-husband’s post-divorce income increased by more than forty percent while ex-wives’ income decreased by up to seventy percent have been refuted. However, there is still a good deal of discrepancy in the two incomes. Weitzman, supra note 40, at 1241.
\textsuperscript{272} Catanzarite, supra note 248, at 1403.
\textsuperscript{273} CAL. FAM. CODE § 4320(g) (West 1994).
\textsuperscript{274} See, e.g., Schneider, supra note 52, at 217-27.
\end{flushleft}
quently. Its scope is currently being restricted, as doctrines like rehabilitative alimony signify. Its scope will always be limited in many cases by the inability of either spouse to contribute to the support of the other. And some of alimony’s functions would still be served (and probably are now served) through the divorce court’s power to divide the spouses’ property (and, for that matter, to order child support).  

B. Formal Equality

Some feminists whose work is rooted in both contract and formal equality between men and women urge a partnership perspective on marriage instead. These scholars want us to revisit our traditional conception of family and marriage in view of the changes that the women’s movement has brought to it. Since the sixties, women have entered the workforce in far greater numbers than before. This evolution in women’s lives has changed the marital dynamic as well. Today’s perception of women as homemakers sacrificing their careers for the good of the family has also undergone change. Courts today can see that “more and more women are seeking their own professional careers rather than stepping into the role of full-time housewife or mother.”

In sum, these scholars believe “[t]he feminist rhetoric of equality played a large part in reforming the concept of marriage into a partnership of equals rather than a lifetime contract premised on the traditional male-dominated view.” The independence sought by feminists has translated into a need for women to take responsibility for their financial independence. Feminists adopting formal equality see transitional or rehabilitative alimony as assisting women through their transition from housewives to workingwomen without labeling them with “unsavory stereotype[s].” As women have increasingly sought financial independence, their economic and general dependence on men has eroded.

The social changes altering women’s role in society and their entrance into the labor market also led to key divorce reforms and greatly contributed to germinating the debate over alimony. The no-fault divorce reform emanated from a diverse group with varying agendas. Where some thought that removal of fault would reduce the divorce rate and reinforce

275. Id. at 256.
276. Catanzarite, supra note 248, at 1388.
277. Id. at 1392.
278. Id. at 1388.
the family, others believed that removal of fault would clean the divorce process of much intrigue and hypocrisy.\textsuperscript{279}

The effect of no-fault divorce laws for such scholars is that they reflect the realities of married life, and make it possible to assess the financial needs of divorced dependent spouses.\textsuperscript{280} No-fault divorce law spelled little change in the financial bond or arrangement between husband and wife. The law treated the ex-spouses as if they remained married, and after divorce this status seemed to change little because the roles and obligations stemming from marriage remained the same. As such, fault-based laws were criticized for being rooted in gender-specific norms, obligating the husband to provide financial support during the marriage as the wife had to provide domestic services and play a dependent role. The social status of the husband and wife remained the same as the husband continued to financially support the wife.

The changed roles envisaged by these reforms implicated a change in the basis for alimony. As the status model of alimony no longer furnished appropriate support in a non-role based relationship, a new rationale was required. The wage-earning husband could no longer be penalized for breaching the marital duty of a lifelong financial obligation of support. Rather than the contractual relationship emphasized in the fault-based divorce system, marriage is now perceived as an economic partnership, a partnership based on the theory that each spouse contributes “equally valuable resources toward the acquisition of assets, and therefore is entitled to a portion of the fruits of this labor.”\textsuperscript{281}

This combination of women’s social and economic “advancement” and the construction of marriage as a partnership of equals, according to such authors, taints permanent alimony with a negative connotation. Alimony can be seen only as a transitory remedy assisting the financially dependent spouse through the transition necessary to get on his/her financial feet and become self-supporting. Alimony thus provides the recipient spouse with time to retrain or educate him/herself, recognizing both the marital contri-

\textsuperscript{279}. Herma Hill Kay, a chief proponent of no-fault divorce stated: “One of [the reform’s] major goals, and its most enduring achievement, was to free the administration of justice in divorce cases from the hypocrisy and perjury that had resulted from the use of marital fault as a controlling consideration in divorce proceedings.” Herma Hill Kay, An Appraisal of California’s No-Fault Divorce Law, 75 CAL. L. REV. 291, 298-302 (1987); see Peter Nash Swisher, Reassessing Fault Factors in No-Fault Divorce, 31 FAM. L.Q. 269, 276-78 (1997); see generally Elaine Tyler May, Myths and Realities of the American Family, in 5 A HISTORY OF PRIVATE LIFE: RIDDLES OF IDENTITY IN MODERN TIMES 539 (Antoine Prost & Gerard Vincent eds., Arthur Goldhammer, trans., 1991) (proposing no-fault divorce).

\textsuperscript{280}. Self-sufficiency scholars are the primary supporters of no-fault divorce. See, e.g., HERBERT JACOB, SILENT REVOLUTION: THE TRANSFORMATION OF DIVORCE LAW IN THE UNITED STATES 16-29 (1988); Cynthia L. Greene, Alimony Is Not Forever: Self-Sufficiency and Permanent Alimony, 4 J. AM. ACADEMY OF MATRIMONIAL LAW. 9, 10 (1988).

\textsuperscript{281}. Catanzarite, supra note 248, at 1396.
butions of the recipient spouse and the disadvantages sustained by him/her post-divorce.

The rhetoric adopted by this group of scholars is very relevant to lower income couples where there may simply not be enough income to sustain two households, underscoring the need for the dependent ex-spouse to earn his/her own income. The marital standard of living clearly falls with the creation of two separate households on the same income previously sustaining one. While two-thirds of adult women work ensuring that many households enjoy a combined income, it is crucial to understand the difficulties of maintaining two households where only one spouse is the wage-earner. “If there is not enough money to support both spouses, it seems only just that a housewife make efforts to become self-supporting. Or, where circumstances indicate an inability to be self-sufficient, a wife should at least contribute something to her support.”

Although this line of thinking may make sense in low-income families, it may make little to no sense in longstanding marriages with one very high wage earner.

In response to criticism that this view unduly penalizes long term homemakers by imposing arbitrary cut-off dates on support, scholars alude to the highly detailed provisions in law reforms allowing great latitude to judges to consider all circumstances before cutting off support.

VI. CONTRACT IN THE NAME OF DIVERSITY

A. Contractarians

In common parlance, contract is usually understood to mean a writing containing terms on which parties have agreed. More technically, contract has been defined to be “a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.” The most significant aspect of the law of contracts is its confinement to promises that the law will enforce. However, promises will only be enforced by courts if the promisor has given

282. Id. at 1399.
283. There are several critics, and indeed all of the following schools of thought on the subject would voice some reluctance to adopt wholly this self-sufficiency model. See Joan M. Krauskopf, Rehabilitative Alimony: Uses and Abuses of Limited Duration Alimony, 21 Fam. L.Q. 573, 583-84 (1988) (“Self-sufficiency connotes more than subsistence or partial support. The dependent recipient is declared self-sufficient when it is fair to require her alone to bear the entire remaining gap between income and reasonable needs.”); see also Singer, supra note 235; Starnes, infra note 306.
something in return for the promise, consideration—something more than a bare or naked promise by the promisee.\textsuperscript{285}

This exchange of promises captured in contract thus relates to a future exchange. A promise is a commitment by a person to particular future behavior.\textsuperscript{286} Farnsworth in his text on contracts couches his definitions and explanations of contract within the public free enterprise market where cooperation and exchange are the hallmarks and self-sufficiency the exception.\textsuperscript{287}

Exchange is the mainspring of any economic system that relies as heavily on free enterprises as does ours. Such a system allocates resources largely by direct bilateral exchanges arranged by bargaining between individuals. In these exchanges each gives something to the other and receives in return something from the other.\textsuperscript{288}

Farnsworth does admit that there are other bases for distribution of resources including sharing, invoking notions of generosity,

rather than . . . bargaining, [which is] based on notions of self-interest—a person’s obligation to share rest[s] on that person’s status\textsuperscript{289} and was reinforced by pressure from peers and from religion. Furthermore, all contemporary developed societies rely to some extent on indirect exchanges that are channeled through the state.\textsuperscript{290}

Many scholars have put forward proposals to broaden the purview of both family and contract laws. They believe that the diversity of relationships as they currently exist in American culture warrants an openness to partners in varying relationships coming to terms of their own making to govern those relationships. This article will detail such proposals below.

\textsuperscript{285} Id. at 4.
\textsuperscript{286} Id. at 5; see id. at 5 n.5 ("Restatement Second § 2(1) defines a promise as ‘a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made.’” (emphasis in original)).
\textsuperscript{287} This resonates with Gary Becker’s altruist model. See BECKER, supra note 220, at 277-306.
\textsuperscript{288} FARNSWORTH, supra note 284, at 6-7.
\textsuperscript{289} See FARNSWORTH, supra note 284, at 7 ("determined by factors such as kinship and age, over which the person had no control").
\textsuperscript{290} Id. Farnsworth explains this through Adam Smith:

People, he reasoned, cannot gain the help of others by relying on their “benevolences.” A person must “interest their self-love in his favour, and shew them that it is for their own advantage to do for him what he requires of them.” One does this by bargaining in this way: “Give me that which I want, and you shall have this which you want.” [We address ourselves] not to their humanity but to their self-love, and never talk to them of our own necessities but of their advantages.

Id. at 8.
A different self-sufficiency approach, as in the self is sufficient to de-
cide, comes from Contractarian's who espouse the view that if couples and
individuals within the marital unit are truly self-sufficient, then they are
entitled to decide for themselves the type of regime they want to institute
to regulate their married, and in the event of divorce, their post-divorce
lives. Feminists such as Lenore Weitzman and Barbara Stark have har-
bored this view.\textsuperscript{291}

More recently, scholars have rejected the "paternalism" implicated by
a "status" construction of marriage and other family relationships. Some,
like Jeffrey Stake and Eric Rasmusen, claim that Maine’s progress narra-
tive is not hinged in reality. The historical shift in family relationships and
in the marriage relationship particularly has not traveled from "status" to
"contract" but from "status" to "status." It is useful to consider, however,
that Stake and Rasmusen might in fact define status differently from
Maine. Family relationships might well be qualified as status, as they were
in ancient law as Maine describes it, but the meaning of status, given the
changes in environment, circumstance, customs, and law, has also
changed.

While underscoring that marriage has remained the exception, Stake
and Rasmusen explain in support of Maine’s thesis, "we have seen the
number of written agreements, warnings, and warranties increase vastly, a
classic example being the movement in commercial leases from tenurial
relationships to contractual agreements. . . ."\textsuperscript{292} In fact, except for mar-
rriage licenses, most couples do not have marriage contracts binding them
to state marriage laws. Moreover, these laws have gained significance as
social and religious norms have relaxed their hold. Yet neither state laws,
nor the Uniform Marriage and Divorce Act allow couples the "legal free-
dom to arrange their marriages as they wish within the much broader social
boundaries" as being against public policy.\textsuperscript{293}

Nevertheless, currently marital law is coming under a different influ-
ence. The terms of marriage have not significantly changed and such
things as the allocation of financial resources during marriage remain in
the hands of the couple. Dramatic change has occurred in the area of
grounds for dissolution of marriage with no-fault divorce reform in most
states, allowing unilateral filing for divorce without a requirement of prov-
ing fault of the other spouse. Significant change has also occurred in the

\textsuperscript{291} See generally Barbara Stark, \textit{Marriage Proposals: From One-Size-Fits-All to Postmodern Mar-
rriage Law}, 89 \textit{Cal. L. Rev.} 1479 (2001) (arguing that one-size-fits-all marriage fails to recognize
individual needs).

\textsuperscript{292} Eric Rasmusen & Jeffrey Evans Stake, \textit{Lifting the Veil of Ignorance: Personalizing the Mar-

\textsuperscript{293} Id. at 455.
terms of dissolution. Here, “[w]omen have been granted fewer privileges special to their sex such as child custody or alimony.”

However, these scholars assert that marriage remains a status as opposed to contract. Rasmussen and Stake push for contractual marriage based on the assumption that Maine’s genealogy from status to contract does not apply to marriage and the relationship between the spouses. They recount that the change from status to contract has taken place in certain spheres outside of marriage. “The large majority of marrying couples have no written agreement beyond the marriage license, which binds them to state marriage laws.”

A contract between the spouses is left open to non-enforcement by courts. Rasmussen and Stake admit that marriage is in fact a contract of adhesion. It is a matter of status, despite the progressively greater ambiguity in the substance of that status. The terms of the marital agreement are set out by the state, and could be enforced in a specific way during the fault era, and still can be so enforced in some states. With social liberation, “no-fault” has appeared, but marital rules are still confining. Personal freedom to make marital arrangements has still not blossomed, they bemoan.

The marital contract, as outlined by Stake and Rasmussen, is comprised of terms applying during the marriage, the grounds for dissolution, and the terms of dissolution. The terms during marriage prohibit adultery, but

294. Id. at 457. So what is this changed definition of status employed by Stake and Rasmussen and can we really say that we have not progressed in Maine’s narrative?

295. Id. at 454-57; Siegel, supra note 18, at 2133-34. My reading of scholars who frame marriage as a partnership or contractual relationship locates these scholars as veering toward a status to contract matrix. See, e.g., Joan Krauskopf & Rhonda C. Thomas, Partnership Marriage: The Solution to an Ineffective and Inequitable Law of Support, 35 Ohio St. L.J. 558 (1974); Marjorie Maguire Schultz, Contractual Ordering of Marriage: A New Model for State Policy, 70 Cal. L. Rev. 204 (1982); Stark, supra note 291 (discussing post-modern perspective on marriage necessarily being contractually based because of the variety of relations and peoples who want such relationships); Amy L. Wax, Bargaining in the Shadow of the Market: Is There a Future for Egalitarian Marriage?, 84 Va. L. Rev. 509 (1998); see Richard W. Bartke, Marital Sharing—Why Not Do It by Contract?, 67 Geo. L.J. 1131, 1134 (1979) (proposing model of statutory framework that would permit couples to elect a community-property arrangement for their marriage); Theodore F. Haas, The Rationality and Enforceability of Contractual Restrictions on Divorce, 66 N.C. L. Rev. 879, 894-98 (1988); Elizabeth S. Scott, Rational Decision-making About Marriage and Divorce, 76 Va. L. Rev. 9, 42-44, 79-81 (1990); see also 2 Max Weber, Economy and Society 671 (Guenther Roth & Claus Wittich eds., 1978) (“[T]he farther we go back in legal history, the less significant becomes contract as a device of economic acquisition in fields other than the law of the family and inheritance.”); Roscoe Pound, The End of Law as Developed in Juristic Thought, 30 Harv. L. Rev. 201, 218-19 (1917) (“[T]he whole course of English and American law today is belying it unless, indeed, we are progressing backward.”).

296. Rasmussen & Stake, supra note 292, at 454.

297. Id. at 455. This is their clearest adherence to Maine’s progress narrative. In effect, Maine himself can be interpreted as saying that with respect to marriage, women’s personhood has not been perfected, since status has remained a fixed aspect of that relationship.

298. Id. at 454-55.
leave other issues to the day-to-day relationship between the spouses. Courts have generally refused to intervene in spousal behavior during marriage, especially after the introduction of no-fault. The grounds for dissolution have been the terrain for the greatest change. Prior to no-fault and even now in states with fault regimes either with or without no-fault, if one spouse seeks a divorce, the petitioner must demonstrate fault by the other spouse, such as adultery or desertion. Under no-fault, the innocent spouse cannot veto the divorce, and the petitioning spouse can obtain a divorce against the wishes of the other spouse without a showing of fault.

With regard to the terms of dissolution, including custody and division of property and future income, changes have also occurred. Alimony has diminished and fault has less impact on the terms of dissolution. “Women have been granted fewer privileges special to their sex such as child custody or alimony.”299 Yet the reforms had a sweeping impact according to Stake and Rasmusen:

> Few legal changes in twentieth-century America have generated such large wealth transfers between private individuals. Which spouse benefitted [sic] from the change depended on the particular marriage. The new law gave new freedom to spouses wanting out of marriage . . . and made it possible for the poorer spouse to gain control of some existing financial assets by divorcing the richer spouse against his or her wishes.300

The authors assume that the impact of these reforms chiefly benefited men, who had more market-income potential, and that the balance of power and wealth probably shifted from the more devoted and dependent to the less devoted and dependent. Regardless of these shifts, there is a peculiar absence of contracts between spouses, or partners in intimate relationships. This absence is attributable to public policy obstacles to their enforcement.301

B. Other Contract Theories for Alimony

There are a number of scholars that find contractual grounding for spousal support within the current cultural and legal atmosphere, including restitution, reliance, and expectation. These contract-based theories are

299. Id. at 458.
300. Id.
301. Id. This assertion makes little sense. If the balance of power has shifted to the more independent and powerful, namely men, who could name the terms of the contract, what difference is there between this and status in which the same hierarchy exists between the spouses? The problem is clearly abuse and lack of equal bargaining power to make such a contract valid.
important advances into ways in which existing frameworks, in large part quasi-contractual, can fit onto the terrain of marital economics in order to find adequate basis for support even within the rhetoric of individualism and contract.

The restitution model is based on the contract remedy of restitution. It protects a promisee’s interest by restoring to him any benefit that he has conferred on the other party. It prevents unjust enrichment of the party in breach, who must be disgraced of any benefit conferred by the other party. With regard to the marital relationship, restitution would apply to reimburse a spouse for the financial contributions he or she has made to the other.

The reliance model seeks to put the “promisee back in the position in which the promisee would have been had the [contract] not been made.” The party in a changed position due to his/her reliance on the marriage contract, or one who has incurred expenses in preparation or in performance of the contract would be able to recover in such a case. It is unclear in contract law whether recovery on the basis of reliance can include damages based on opportunities lost because of reliance on the other party’s promise. The issue of lost opportunities also can be applied to marriage.

Finally, Krauskopf and others theorize the wife’s investment in the human capital of her husband in terms of her expectation interest. Expectation, another quasi-contractual remedy, protects a person’s “interest in having the benefit of his bargain by being put in as good a position as he would have been in had the contract been performed.” Expectation would be measured in the context of marriage by a spouse’s return on his/her investment in the human capital of the other spouse. Investments in human capital are expenditures to acquire or increase a person’s skills or knowledge leading to increased future productivity. When a wife supports her husband while he obtains a professional education, such an investment in human capital has been made. Both wife and husband invest in the hus-

302. Farnsworth, supra note 284, at 147-50. Restitution can be found in its more limited form as applying a compensatory mechanism in marital situations or in a more expanded form as well. A professional education can be worth much more than tuition and books purchased for class, and so a more expanded version of restitution has also been put forward. Such a model would include intangible, non-market contributions associated with caretaking which in themselves may raise questions as to their valuation.

303. Id. at 60-61. Farnsworth explains this through Adam Smith. See Farnsworth, supra note 284, at 5 n.5, 8. The case of a homemaker who foregoes market employment and thereby incurs a loss at divorce because she has relied on her husband’s promise to sustain her instead would come into play here. Damages would attempt to put the injured party, the homemaker, in the position in which she would have been had she made the best alternative contract to the one broken; that is, if she had instead taken the job way back when.

304. Krauskopf, supra note 283, at 590.

305. Id.
band's human capital if the wife is foregoing opportunities to do home-making and childcare in the home. The spouses expect a return on the investment made by the marital unit, but only the husband recognizes an enhanced earning capacity. At divorce in this scenario, the wife should receive a return on her investment according to the expectation model. Expectation is contractually based and the focus is on the future return.

It has been suggested that none of these contract-based theories adequately addresses the basis for support provision for the ordinary homemaker whose primary caretaking responsibilities limit her participation in the job market outside of the home, and restrict the development of her human capital. On the other hand, these creative quasi-contractual remedies have been better received by courts and scholars alike as a theoretical basis for alimony than the straightforward contractual model proposed by other scholars. Proponents of contract find that contract is as valid as any construction of marriage because it is a consensual exchange of promises and provides legal protection to the parties’ expectations as opposed to compelling performance of promises.

This would protect financial expectations of the spouses upon dissolution while allowing divorce at will. Similarly, notions of equity may allow courts to impose spousal support where no-fault exists either statutorily or by contract between the spouses. In the current climate of scholarship, specificity is required to encourage and foster a theoretical basis for awards of spousal support because, by all accounts, its absence is causing a great deal of suffering and uncertainty for most women, men, and children upon divorce.

C. The Partnership Contract: Applying Partnership to Marriage

Cynthia Starnes adopts the partnership model for marriage. In the current culture and reality of no-fault divorce amidst equality rhetoric, Starnes warns “the homemaking wife will be catapulted into financial independence, and probably financial ruin. Such is the 1990s price tag for choosing to play with dolls.” Touched by the unequal impact of the “divorce revolution” and the implementation by divorce courts of the “fashionable rhetoric that men and women are equal,” Starnes chides judges who ignore “the scant property and limited earning potential and

307. Id. at 69-70. Starnes explains that this is the risk faced by more than sixteen million homemaking wives who have never worked outside their homes, either as non-wage earning mothers of young children or many wage-earning wives whose responsibilities as primary caregivers will limit their career choice and advancement. Id. at 70.
adopt the legislative assumption that homemakers need minimal, if any, maintenance.”

She responds with a model of marriage based on partnership laws in response to the exacerbating effects of no-fault divorce laws which have made divorce easier to obtain and increased the number of financially vulnerable women who lose their “male buffer.”

Starnes traces the constructions of marriage as evolving from status not just based upon Blackstone’s commentaries, but from the views of the U.S. Supreme Court in 1888 to the years following World War I. These constructions emphasized individual fulfillment and led to the current tensions surrounding equality rhetoric. She finds that the Uniform Marriage and Divorce Act suggests “a view of marriage as a consensual relationship, the dissolution of which, in the absence of an agreement to the contrary, should be governed by statutorily-supplied rules similar to those of partnership law.”

According to the model of the Revised Uniform Partnership Act (RUPA), divorce would be available at will, and would terminate the parties’ mutual responsibilities, providing the spouses with a clean emotional and financial break. Starnes believes that divorce has become a financial disaster for homemakers because these principles are applied without heeding partnership law. She finds partnership to have a conceptual appeal because of the aspiration that marriage be a partnership of equals who share resources, responsibilities, and risks while promoting commitment, gender equality, and caretaking of children by and between the spouses.

Business partnership is similar to marriage. Both relationships involve an exchange of commitments without explicit agreement or legal counsel. The two relationships also are profit-seeking according to Starnes, although in the case of marriage, the profit may be other than financial as well as financial. In both cases, there may be a specialized contribution. “Commonly, one partner contributes capital primarily or exclusively, while another contributes services primarily or exclusively.” Similarly, often in a marriage there is a specialization of labor, with the husband earning income and the wife providing homemaking services.

Partnership laws under the Uniform Partnership Act (UPA) and RUPA also support a partnership analogy. Starnes considers useful the UPA recognition of the consensual nature of partnership while deferring to party autonomy. Mandatory provisions include a broad fiduciary duty among partners, consistent in marriage with “the social norm of reciprocal trust

308. Id.
309. Id. at 108.
310. Id. at 119-20.
and love between spouses.” The UPA recognizes the broad authority of partners to bind the partnership, in line with the common law duty of spouses to support each other, through which spouses could be bound to repay the merchant who supplies necessaries. The UPA recognizes the right of partners to dissolve the partnership at any time, which aligns with the no-fault divorce language allowing divorce at will upon a finding that marital ties are irretrievably broken.

At will dissolution appears to be the rule in business partnerships and typifies the clean-break concept of no-fault divorce statutes. Business partners can seek a judicial wind-up, which includes completion of unfinished partnership business, liquidation of assets, payment of debts, and distribution of any remaining proceeds to the partners, similar to the settlement of spousal property rights upon divorce. Business partners’ capital property is returned to each partner also, much like the return of spouses’ separate property before distribution of marital property.

Finally, upon dissolution, business partners often buyout the share or interest of the retiring or wrongfully departing partner. This buyout right can be more valuable than the right to wind-up because of the speed with which it can be effected, avoiding judicial intervention and judgment. Starnes deploys this buyout analogy to put forward her thesis that “the dissociated spouse should receive a buyout of her investment.” To answer the key questions as to who should buy out whom, and what exactly is the shared enterprise that continues, Starnes draws from “human capital theorists.” She presents us with a number of scenarios to which her buyout proposal can be tailored.

Starnes applies broadly the theory already used by the Economists that a contribution to the professional education or training of a spouse is considered an investment of the entire marital unit in the human capital of that spouse. Investment in this realm can occur through the time and effort put into the job market resulting in experience and seniority, as well as through time spent earning a particular degree or training in college. The return on this joint investment is enjoyed by both, at least by expectation. The buyout analogy works because “although dissociation terminates the parties’ relationship, it usually does not terminate this income-generating marital enterprise—which continues to function in the marketplace, exclusively or primarily in the hands of the husband.”

311. Id. at 120-21.
312. Id. at 122-23.
313. Id. at 124.
314. Id. at 125.
In the scenario of a traditional marriage, with a husband working outside the home and the wife working in the home full-time, the marital partnership has an investment in the husband’s “human capital.” At divorce, the husband has an enhanced earning capacity, which is the product of the partnership’s investment. He thus effectively leaves with the marital enterprise. Therefore, the wife should be able to obtain a buyout of her interest in this continuing marital enterprise, i.e., his enhanced earning capacity.315

In what Starnes terms the hybrid marriage, the wife may assume the predominant extent of homemaking and childcare responsibilities while also working outside the home, possibly part-time, part-year, or full-time. The wife’s career opportunities and advancement will probably be limited. There will probably be an income disparity between husband and wife, with the marriage partnership investing primarily in the husband’s human capital, and secondarily in the wife’s. In this case, the wife takes with her a part of the marital enterprise; that is, her own enhanced earnings attributable to marital investment. If her enhanced earning is less than her husband’s, she should receive a buyout.316

Finally, in the egalitarian marriage partnership, where both spouses work full-time and perform fifty percent of the household chores and childcare, there would be two equal investments in the human capital of the wife and the husband. This does not mean, however, that no buyout would result. “Valuation of a continuing enterprise is not based on the size of various investments, but rather on the returns on those investments. In marriage, as in a commercial partnership, one investment may generate more income than another.”317 In the case of a differential, whatever loss or gain is incurred would be borne by both partners individually. The wife or the husband would be able to receive a buyout if one of the enhanced earnings is less than the other.318 The real issue in this case, Starnes reminds us is “not the identity of contribution, but the return to the marital unit on joint investments.”319

Ellman critiques partnership and contract constructions of marriage and the consequent impact of such constructions on alimony theory on a number of grounds. As for contract, Ellman indicates that few couples

315. Id. at 124-26. “Human capital” investment is thus chiefly applied to the enhanced earning capacity generated by a homemaker, irrespective of licenses or degrees. Id. This should be distinguished from the family wage entitlement theory of Joan Williams which is not located in partnership. See, e.g., Williams, supra note 38.
316. Starnes, supra note 306, at 126.
317. Id. at 126-27.
318. Id.
319. Id. at 68-74; see also Cynthia Starnes, Victims, Breeders, Joy, and Math: First Thoughts on Compensatory Spousal Payments Under the Principles, 8 DUKE J. GENDER L. & POL’Y 137 (2001).
actually enter into contracts in anticipation of marriage and that the law limits the application of the few contracts couples do enter. Second, it is difficult to imply a contract in the complex and fluid circumstances of a marriage. Contract terms cannot be read into the will of the parties generally without the court imposing its own views on marriage. Third, most contracts with regard to marriage address the couple’s relations during, not after, the marriage. The court thus has little information to infer whether to award alimony. Breach pursuant to the terms of such contracts would basically be an inquiry into marital fault which Ellman rejects because he favors no-fault divorce. Fourth, Ellman finds that expectation damages from contract produce awards exceeding all ordinary understandings of reasonable alimony. Finally, quasi-contractual remedies such as restitution are rejected by Ellman because they would require courts to decide when the benefit conferred by the claimant was unjustly retained by the defendant and require a decision about fault.  

With regard to partnership, Ellman sets out that partnership law is best suited to businesses and profit-seeking enterprises. Marriage is not an enterprise in any ordinary sense and partnership law does not provide any recourse like alimony. Partnership law requires a court to consult normative standards of behavior which are available for partnerships. These standards would apply to analogous situations like remedies for wrongful dissolution, for breaching the duty to serve the partnership, or failing to compensate a partner who has provided extraordinary services to the partnership. For marriage, no universally accepted normative standards exist.

VII. PROBLEMATIZING STATUS: EARNINGS UNDER A MARITAL COVER

This article has surveyed and categorized scholarship relating to alimony, especially as it connects with constructions of marriage. This survey demonstrates that the chief construction of marriage with current influence is one based in status.

Ellman, whose ground-breaking work has spawned much debate and scholarship, himself has been highly influential with the ALI’s project on marriage dissolution. His economic efficiency model assumes a traditional model of marriage to root an award of alimony. Another influential author

320. Ellman, supra note 21, at 14.
321. Id. at 15. Curiously, for his own purposes, he feels free to employ the economic model of efficiency.
322. See generally Weitzman, supra note 40 (noting the general inconsistencies in the sharing of marital assets, due to state-based regulatory frameworks and otherwise).
has been Brinig. Her communitarian, open, and connective arguments suggest a move to engage couples and stabilize marriage as a lifetime “covenant.” Yet what does status mean with regard to marriage and with regard to the property interests of those who enter the institution? Below this article examines in some detail the relationship between marital status and property and between personhood and property.

A. Status to Contract/Property to Personhood

Maine raises certain issues about the relationship between contract and property law, and the social institutions and ideas that prevail in our society at a particular historical time. The genealogy regarding contract law, from status to contract, is paralleled in his history of property, from co-ownership to individual property. The definition of social relationships through status existed at a time when property also was co-owned and held together in common by all the patriarchs of the community. As the economic market required more convenient forms of transfer, and property became subdivided, increased individualized ability or capacity to effectuate such transfers by way of contract also emerged. The relevant parallel in Maine’s thesis as it applies to constructions of marriage is the one between status/co-owned property and contract/individual property where the people involved retain the capacity to voluntarily contract, that is where their property and identities are not subsumed or owned by a patriarch. Maine’s discussion of collective family membership as the root of a “status” attributable to marriage and to individuals engaged in this social institution has been the basis of a rethinking of the role of law in the history of “marital status” in America. Further revision of his genealogy by

323. Cocks describes this genealogy: Although he never indicates what, if any universal forces prompt the shift from one stage of legal development to another, Maine does suggest that such changes occur very slowly because human nature, being constant, resists alteration in moral and social beliefs, and because social attachments, being of long duration, are often strengthened by a number of political and economic institutions. Natural law scholars, Rousseauian romanticists, and utilitarian reformers see humanity as comprised of free individuals who have been forced to give up their total freedom as society itself is born and develops. Maine, however, argued that the course of human history, as revealed by comparative legal studies, is one in which the collectivity came first and the gradual freeing of the individual came later. Indeed, so much was the collectivity the basic unit of society than an individual’s identity, position, and property were wholly subsumed in his status as a member of the group. Far from being a collection of individuals, primitive society was, says Maine, composed of a number of families each of which operated like a corporation inasmuch as its organization and resources endured irrespective of the movement or death of any of its members.

COCKS, supra note 149, at 2.
authors such as Siegel, Stanley, and others uncovers that status to contract is integrally connected to a property to personhood matrix. Although Maine explores and outlines this latter matrix in a separate genealogical exercise, he does not connect the two. Later scholars visiting the issues of alimony which are the subject of this article, also hint at a connection, but leave confused the intersection between status to contract and property to personhood. However it is only in connecting status to its property counterpart in specific periods of reform that we can come to understand the systemic repercussions to which feminists ordinarily attribute gender inequalities evident in family and other social institutions as they are articulated by courts, legislators, and legal scholars. This article characterizes such scholars as Siegel as making exactly such an attempt.

This Part seeks to set forth Maine’s history of property, which it locates within the property to personhood matrix, and which revises the initial and dominant theme of status to contract. It will relate the detailed revision of the history of “marital status” set forth by Siegel against the backdrop of this intersection. Parsing out or deconstructing the theoretical discourse on alimony in this way will make clearer that any discussion of alimony as a corollary to the construction of marriage is steeped in status and property. It will also enable scholars to find spaces in which status may be freed from property and vice versa. Further, this is a terrain on which other significant aspects of family can infuse any discussion of alimony in the future. The content of “status” that we are left with today as constructive of marriage and descriptive of the legal and social obligations imposed by the state through case law and the judicial system on spouses is that the treatment of women in the family sphere still hints at one of two permutations of proprietary connection between husband and wife, either (a) with the wife’s identity and property subsumed in that of her father and then husband so that she was incapable of her own separate contractual relationships, or (b) as a joint, or common proprietary enterprise rooted in the laws of coverture which denied property rights to women but increasingly provided the possibility and capacity for wives to enter contracts outside of marriage. It is this movement from (a) to (b)


325. To make a full argumentation demonstrating the validity of this parallel matrix, more such studies specific to property are required. Here, given time and space constraints, I attempt to merely revise existing scholarship on the status construction of marriage.

326. Freedom of contract, or freedom from being treated as property or chattel, does not mean that all of your means of livelihood are not owned by someone else, this can still put you in a state similar to slavery.
which Siegel sets out a movement from status to a new formulation of status that displayed within the property to personhood matrix as a movement casting wives as subsumed in their husbands to being co-owners within the marital enterprise.

In order to demonstrate the common proprietary scheme as subsuming of identities or joining of property supported by a status construction of marriage in this and the next Part, this article reviews scholarship with the following themes: (1) historically, and still today, women furnish household labor as a part of their marital status,\(^\text{327}\) (2) compensation for human capital expended for a spousal professional license; and (3) a gulf is placed between cohabitation and marriage.

Scholarship in this area also demonstrates that the content of status is gender biased in terms of capacity to marry. Wives have historically been females. Under Maine’s genealogy, sons were also subsumed in the identity of their fathers and did not have the capacity to contract or to marry without the father’s consent. There appears to be a carrying forth of this incapacity in the case of non-heterosexual unions.\(^\text{328}\) Thus, despite the cultural openness in some states to the concept, there is a general resistance to same-sex marriage and allowance of alimony in such contexts. Despite many attempts through contract law and cohabitation agreements, courts have refused to allow alimony in same-sex relationships, raising the gender card to resist entry into marital status. Women alone can occupy the role of wives. The social roles within marital status are forcibly gendered. The area of fault within marriage is important to address because it has historically played a key role within the regime of coverture and so links property rights and status. This article will address this in the final portion of this Part.

B. **Marital Status as a Property-Held-in-Common Scheme**

1. **Maine’s Early History of Property**

In a parallel to the movement from status to contract, Maine sets out a progressive story of property law. Like the collective root of contractual relations which applied to patriarchs only, relations of property Maine proposes were also rooted in a collective which also applied to patriarchs only. In ancient societies, Maine asserts it was not possible to transmit property

\(^{327}\) See generally FEMINISM IN OUR TIME: THE ESSENTIAL HISTORICAL WRITINGS, WORLD WAR II TO THE PRESENT (Miriam Schneir ed., 1994) [hereinafter FEMINISM IN OUR TIME].

\(^{328}\) Within the subsuming of identity model, there is also an incapacity to contract, as we see above with regard to females. The same is true with regard to the homosexual male.
individually because one’s goods belonged to the group as a whole. Instead, all that was passed was one’s social position or status.

Property was also based on the control of common resources by the patriarchal family, and only the extension of individual powers through the application of legal change could bring property within the control of freely contracting persons. Although contract is crucial as Maine traces it from the formality of direct exchange of goods and property to the true contract, “rather than remaining an impersonal duty to adhere to the strict formalities of ritualized exchange,”329 in some cases such as the inner sanctum of family and marriage, where the shackles of ownership remained in the hands of the now smaller family group, it was the law of property that restricted the extension of free contract to others within that smaller group.

Although Maine does not connect status and property overtly, he does state: “It would soon be seen that the separation of the Law of Persons from that of Things has no meaning in the infancy of law, that the rules belonging to the two departments are inextricably mingled together, and that the distinctions of the later jurists are appropriate only to the later jurisprudence.”330 What is more, he clarifies that the early history of property will more likely lead us to find joint ownership. “The forms of property which will afford us instruction will be those which are associated with the rights of families and of groups of kinred.”331 Although he says that Roman jurisprudence would lead us astray in thinking that individual ownership is the normal state of ownership, Maine points us east to India if we care to see the original condition of property.

The Village Community of India is at once an organized patriarchal society and an assemblage of co-proprietors. The personal relations to each other of the men who compose it are indistinguishably confounded with their proprietary rights. . . . Conquests and revolutions seem to have swept over it [the Village Community] without disturbing or displacing it, and the most beneficent systems of government in India have always been those which have recognized it as the basis of administration.332

In consequence, although we may find separate ownership, it is on its way to becoming ownership in common.333 What Maine describes is the

330. MAINE, supra note 151, at 251.
331. Id.
332. Id. at 252-53.
333. Id. at 253.
village brotherhood, with each man owning a part of the whole domain but willingly submitting it to the will of the common.\footnote{334}{Id. at 253-54 (“As soon as a son is born, he acquires a vested interest in his father’s substance, and on attaining years of discretion he is even, in certain contingencies, permitted by the letter of the law to call for a partition of the family estate. As a fact, however, a division rarely takes place even at the death of the father, and the property constantly remains undivided for several generations, though every member of every generation has a legal right to an undivided share in it. The domain thus held in common is sometimes administered by an elected manage, but more generally, and in some provinces always, it is managed by the eldest agnate, by the eldest representative of the eldest line of the stock. Such an assemblage of joint proprietors, a body of kindred holding a domain in common, is the simplest form of an Indian Village Community . . . .”)}

Maine also details the adoption of those outsiders that are accepted into the fold of the community through the purchase of a share, as he had spoken of adoption into the family within his discussion of status. “[I]n the North of India, . . . men of alien extraction have always, from time to time, been engrafted on it, and a mere purchaser of a share may generally, under certain conditions, be admitted to the brotherhood.”\footnote{335}{Id. at 254-55.} Even in cases where difference in caste could be fatal to the aggregation of men, the brotherhood tradition is preserved, “or the assumption made, of an original common parentage.”\footnote{336}{Id. at 255.}

Maine next turns to the development of distinct proprietary rights inside the groups. Maine conjectures that it was the head of household who was accorded a share according to the rules applicable to such division of harvest or land. The gradual disintegration of the larger village common into separate family units and then further individual severance of rights of ownership appears again to be a matter of conjecture as to the basis of “what were the motives which originally prompted men to hold together in the family union?”\footnote{337}{Id. at 262.}

Maine supposes that the answers to this disintegrative manifestation of property rights rest in the weighty burden of carrying out the variety of symbolical and ceremonious acts required by the contractual conveyance of the patrimony of a group.\footnote{338}{Id. at 262-63 (“This phenomenon springs, doubtless, from the circumstance that the property is supposed to become the domain of a new group, so that any dealing with it, in its divided state, is a transaction between two highly complex bodies. . . . They require a variety of symbolical acts and words intended to impress the business on the memory of all who take part in it; and they demand the presence of an inordinate number of witnesses.”).} The impossibility of doing away with the consent of a large number of persons to the transfer, and no small part of the ceremony neglected, posed a great obstacle to the free circulation of property. This freer circulation of property would be required as soon as a society became somewhat active and certain “expedients” were created to deal with the particular obstacle of free circulation. “Of such expedients
there is one that takes precedence. . . . The idea seems to have spontaneously suggested itself to a great number of early societies, to classify property into kinds [i.e., personalty and realty] . . . .”

Maine highlights the *Res Mancipi* and *Res Nec Mancipi* which place property into different classes under Roman law, releasing the lower kinds of property and personalty from burdensome ceremonies.

But in some societies, the trammels in which Property is tied up are much too complicated and stringent to be relaxed in so easy a manner. Whenever male children have been born to a Hindoo, the law of India, . . . gives them all an interest in his property, and makes their consent a necessary condition of its alienation. In the same spirit, the general usage of the old Germanic peoples—it is remarkable that the Anglo-Saxon customs seem to have been an exception—forbade alienations without the consent of the male children; and the primitive law of the Scavonians even prohibited them altogether.

In such cases the classification of property as personalty or realty would not be as helpful because the difficulty would extend to property of all sorts; accordingly, another distinction was suited to classify in this scenario, namely the difference between inheritances and acquisitions. “The inherited property of the father is shared by the children as soon as they are born; but according to the custom of most provinces, the acquisitions made by him during his lifetime are wholly his own, and can be transferred by him at pleasure.”

Similarly, under Roman law, the distinction was deployed in the form of “a permission given to the son to keep for himself whatever he might have acquired in military service.”

Finally, Maine embarks upon a distinction which if all things were held equal could become both a useful handle to establish equality within the home and an incisive tool to understand the injury sustained by married women who are deprived of the property they have held during their marriages but must surrender upon divorce. This is the distinction between possession and property:

Possession . . . must have originally denoted physical contact or physical contact resumeable [sic] at pleasure; but as actually used, without any qualifying epithet, it signifies not simply physical de-

339. *Id.* at 264.
340. *Id.* at 271.
341. *Id.* at 272.
342. *Id.*
343. For wives, after all, have historically tended the home and its possessions, even the possessions of their husbands, but like slaves they could not retain ownership in such property.
tention, but physical detention coupled with the intention to hold the thing detained as one’s own.\footnote{Id. at 281.}

The patriarchal landholder, the property owner was under Roman law originally the holder of a benefice, and under feudal times transformed into a lord of that fief. As such, he owed certain duties and had full rights as the property owner:

The duty of respect and gratitude to the feudal superior, the obligation to assist in endowing his daughter and equipping his son, the liability to his guardianship in minority, and many other similar incidents of tenure, must have been literally borrowed from the relations of Patron and Freedman under Roman law, that is, of quondam-master and quondam-slave. But then it is known that the earliest beneficiaries were the personal companions of the sovereign, and it is indisputable that this position, brilliant as it seems was at first attended by some shade of servile debasement. The person who ministered to the Sovereign in his court had given up something of that absolute personal freedom which was the proudest privilege of the allodial proprietor.\footnote{Id. at 293-94.}

So the relationship of sovereign property owner to the patriarchal head of household who possessed the benefice, emphyteutically, was one of ownership versus possession. And in turn, the relationship of the patriarchal head of household when he became the property holder of the fief and all that was a part of the household and the others, like his wife, children, and slaves who may actually have employed the things, was of ownership versus possession, perhaps even a lesser form, as they themselves were owned early on.

One of Maine’s arguments about the history of property is that landholding is indistinguishable from personal status in many pre-industrial societies and that succession is not to particular goods but to a social role that affects control over those goods. And elsewhere, Maine pursued the argument that collective ownership of property whether under feudalism in the West or territorial aggregates in the East, is an integral step on the uneven way toward the development of private ownership.\footnote{See generally Henry S. Maine, Village-Communities in the East and West (1872).} Maine saw a historical process at work in the gradual loosening of the ties that groups of men formed in relations to the collective property they held. These ties were profoundly affected by the moral and religious lives of these groups of men. Others have shown that Maine’s ideas have been foundational to
the argument that private property is undesirable to a system of social relations in which dominant control over goods is based on a lack of respect for the positive fulfillment of obligations to others.347

2. Critique of Maine’s Thesis

Maine’s thesis can serve as a possible backdrop or explanation to the continued proprietary consolidation of marital assets. The idea that scarcity of resources and common benefit and labor sustained common ownership of land and other assets does not seem like such a foreign concept. Despite flaws in Maine’s methodology and progressionist perspective, it would seem to generally make sense that in agrarian cultures, people found it valuable to share resources and labor as he suggests. Marital unions on the same basis are also not far-fetched. It is common knowledge that marriage was originally conceived as an economic process to unite families. Importantly, Maine does not leave out the story of dominance, patriarchy, and the holding of persons, slaves, women, and children as property. Interestingly, the distinction between ownership and possession is used against those who may in fact provide more labor and association with certain property because they do not have the status to own, and hence, the capacity to contract; contractual capacity and ownership status thus being integrally related.

Despite the general appeal of his thesis, scholars have raised a number of critiques based on Maine’s “progress” narrative.348 It is unclear to many scholars that shared ownership was necessarily the primitive form, and individual property the advanced form. In fact, it would appear that private and communal property rights have co-existed for a long time.349 Thus, Maine’s simplistic story of a time when private property did not exist, then to a time of economic development, to the advent of private property rights, which was “as inevitable as it was beneficial,”350 may appear self-

348. Eric T. Freyfogle, Ethics, Community, and Private Land, 23 ECOLOGY L.Q. 631 (1996); see also Philbrick, supra note 347, at 692 (“Wherever man is found, we find both individual ownership and ownership by family groups, large or small, and other associations; with rarer instances of what appears to be true community ownership of particular things.”); Carol M. Rose, Property as the Keystone Right?, 71 NOTRE DAME L. REV. 329, 363 (1996) (“Virtually all people of whom we have any knowledge have invented property regimes for themselves in order to manage the resources they find important.”).
350. Freyfogle, supra note 348, at 633.
serving. At the very least, it makes obvious sense that the progression is a particular construction of property rights at a particular time.\textsuperscript{357}

However, the claims of Maine fit well with the theories of John Locke, asserts Freyfogle. Maine’s thesis is that property norms moved from shared rights to individual ownership, with ownership becoming more precisely defined and concentrated over time. Locke maintained that as populations increased, people asserted private claims to land. Their right to ownership came from the law of nature as opposed to social convention. Pursuant to natural law, a person could mix his labor with the land, add value to it, and thereby become its lawful owner.\textsuperscript{352} Property then was an individual right, originating in individual action, independently of any community action.\textsuperscript{353}

Thus, scholars maintain private property has always existed and Maine was mistaken in his evolutionary scheme of property regimes.\textsuperscript{354} Societies have been able to mix individual and communal ownership in lasting ways. Freyfogle aptly points out that even in today’s individualistic, self interest driven market, there has been a resurgence of common ownership in cooperatives, condominiums, and planned unit developments.\textsuperscript{355} “To the extent there is movement today, it is from individual to group-owned property, and from rights aggregated in a single landowner to disaggregated rights that are separately held. By Maine’s Victorian gauge, we have become less civilized.”\textsuperscript{356} Scholars today are writing that private property does not transcend human community but is, in fact, a product of it.\textsuperscript{357} Property

\textsuperscript{351} Postmodernism is, after all, the rejection of any historically “evolutionary” scheme, or any narrative for that matter which does not take account of one’s subject “position,” and the subject position of the discourse being considered.

\textsuperscript{352} Freyfogle, supra note 348, at 634.

\textsuperscript{353} Id. at 635. Despite this thesis, Freyfogle also admits that Maine and Locke differ on many points. See id. at 633 n.5. It should also be noted that scholars have cited Maine on the idea of communal sharing previously. “So long as humans do not enclose the land and assert ownership of it, each ‘is still a tenant in common.’” Id. at 633 n.6. Henry George’s idea of communal sharing was based on the conclusion that “historically, as ethically, private property in land is robbery.” HENRY GEORGE, PROGRESS AND POVERTY 370 (1979).

\textsuperscript{354} See, e.g., John T. Sanders, Justice and the Initial Acquisition of Property, 10 HARV. J.L. & PUB. POL’Y 367, 380 (1987) (writing of Locke’s propositions that the initial acquisition of property is justified only where it does not limit similar opportunities for others is self-defeating because “if the Proviso were dropped, there would effectively be more and better resources left for others.”); see also Douglas Kmiec, The Coherence of the Natural Law of Property, 26 VAL. U. L. REV. 367 (1991).

\textsuperscript{355} Freyfogle, supra note 348, at 635-36.

\textsuperscript{356} Id. at 636.

\textsuperscript{357} Judicial failure to understand the social and political construction of property rights by private actors and governmental policies is addressed and critiqued in Joseph William Singer & Jack M. Beermann, The Social Origins of Property, 6 CANADIAN J.L. & JURIS. 217 (1993); see also Carol M. Rose, Property as Wealth, Property as Propriety, in NOMOS XXXIII: COMPENSATORY JUSTICE 223-41 (John W. Chapman ed., 1991) (maintaining that private property plays a crucial role in maintaining social and political order). This use of property as propriety underscores the responsibility to promote the good
norms are a reflection of the circumstances, hopes, and ethical values of the community. The way scholars theorize over alimony can be said to be an example of this.

However, Freyfogle partly misinterprets Maine. Maine does not say that individual ownership did not exist early on as well. Instead, he states that it was common holding of land which was given precedence because it made sense in terms of the resources needed to till it. Sharing of labor to use the land and distribute profits made sense. Maine indicates that individual ownership co-existed but became voluntarily worked on and held in common, while title was still retained by the individual patriarch in question.358 One can argue that the advent of condominiums and cooperatives in today’s urban environment is the product of economic necessity and lack of space, which typify certain urban centers, much like the sharing in common of individually owned land in Indian villages.359

Interestingly, Freyfogle makes the connection between property and personhood as it is understood within the status to contract matrix. “[T]he very word used to describe what a person owns—one’s ‘property.’ The cognates of this word are several and revealing: ‘proper,’ ‘appropriate,’ ‘propriety.’”360 These words refer to how community members ought to live, and what is proper to them, belonging to them. In sum, what is proper to you, and belonging to you also defines you.361 “To do something properly, to act appropriately, to accept or claim something as your property, is to take responsibility for what you do. It is to be a person to whom the community can look for compliance with its expectations.”362 Personhood then is an integral aspect and inclusive class of property.

Thus, within Maine’s genealogical rhetoric from status to contract and from common to individual property, the notion of personhood is unequivocally one which is based on extent of proprietary interest. A person

358. MAINE, supra note 151, at 155.
359. This is not to say, as I have commented earlier, that Maine had all his facts right. Maine’s argument was clearly that land was individually held and then given up in common ownership which is misconstrued by Freyfogle.
360. Freyfogle, supra note 348, at 638; see also Wendell Berry, Whose Head is the Farmer Using? Whose Head is Using the Farmer?, in MEETING THE EXPECTATIONS OF THE LAND: ESSAYS IN SUSTAINABLE AGRICULTURE 19-30 (Wes Jackson et al. eds., 1984).
can be or become the property of someone else if his or her status warrants. Through status the personhood, i.e., the identity and property of the wife, daughter, son, or slave, is subsumed in that of the patriarch, who can do with them what he likes. Thus, at its origins, only the patriarchs, rulers of their domain, households, and property, can transfer goods, property by way of contract, and enter into any such agreements which invoke the proprietary domain they may hold in common. They have such contractual capacity because they are the subjects of ownership. The objects of ownership, women, children, and slaves, exhibit no such contractual capacity. Their identities and possessions are subsumed in that of the master patriarch. Through the progression from status to contract, more individuals are freed from the chains of being regarded as property so that they may hold property and transact with others transferring or purchasing property within the domain of common or individual property holding. Property and personhood are conflated to such a point that personhood is defined in terms of proprietary notions alone. A person is comprised of that which belongs to him or her or what is “proper” to that person.

C. Earnings Under a Marital Cover

Siegel states that marital status law is that law described by Blackstone which enshrines feudal and patriarchal traditions and gives husbands rights in their wives’ property and earnings, and prohibits wives from contracting, filing suit, drafting wills, or holding property in their own names. As she states, it was the husband’s duty to “bring home the bacon . . . while on the wife devolved the duty to keep said home in a habitable condition . . . . [Further,] an agreement by the husband to pay his wife for performing the ordinary household duties was . . . against public policy.”

Reform of the law of coverture was an attempt to have marital “status” accord with the mores of the industrial era. Siegel calls marital “status” the common law doctrine of marital “service,” which through earnings statutes gave women rights in their market labor. Despite this reform, the common law of marital status has continued in effect. Siegel points to the court in Lewis, which despite this reform, decided that by presumption, a married woman owned the product of her labor as long as that labor was separate from the labor a wife owed her husband by reason of marriage. Thus, outside of marriage, a wife could contract. Marital status shifted from the complete subsuming of a wife’s identity into that of her husband, to the

364. Siegel, supra note 18, at 2127 (quoting Lewis v. Lewis, 245 S.W. 509, 511 (Ky. 1922)).
possibility of her independent identity outside of marriage. In the case of Mrs. Lewis, she worked in the family business and in the household, raising, clothing, and feeding her family.\footnote{Siegel, supra note 18, at 2130.}

Courts effectively, according to Siegel, reformulated “a putatively feudal body of status law” imposing upon the wife, the doctrine of marital service, i.e., the duty to perform work necessary to reproduce the labor force in a modern industrial economy.\footnote{Id. at 2131.} The household labor wives performed was perhaps crucial to the modern functioning of the economy. In consequence, in applying the new earnings statutes, courts consistently insulated a “wife’s work” from market exchange. The earnings statutes left open the possibility for wives to contract with their husbands for compensation for household labor.

The evolution of status which Siegel outlines presents the premeditated judicial intervention in the creation of public market and private family spheres. As earnings claims arising from interspousal contracts for household labor began to be litigated in the late nineteenth and early twentieth centuries, courts uniformly refused to enforce them. They construed the earnings statutes to prohibit market relations in the family setting. Ensuring that wives’ work was to be performed subject to a different mode of exchange than husbands,’ courts employed marital status doctrines to differentiate the family and labor market in law, thereby creating separate public and private spheres.\footnote{Id.}

Siegel correctly asserts that it is the status to contract story which continues to shape scholarship on family law. However, she states that a changed perspective has sprung in recent scholarship on the institution of coverture. This changed perspective is that coverture is now viewed not just within its feudal model but also or more so from its patriarchal aspect. Clearly there is a changed revisionist perspective including Siegel’s, which emanates from this scholarship on coverture. However, this changed perspective requires inclusion of the manifestations of a history of group ownership in which the patriarchal aspect is rooted. It is group or common ownership on the one hand, and the patriarchal representation of the parts of the group on the other hand which combine to root gender hierarchy within the family and to insulate family economics from the public or,
shall we say, common market sphere. In plain language this means that men were the heads of households and supposedly each of them volunteered to hold their parcel in common with other men who were respectively heads of their own households. The distinction between any co-ownership of property in the household and in the common public sphere is that in the common public sphere, each patriarch had originally volunteered his parcel.

Siegel suggests that the reform of coverture did not ultimately substantiate a true progression from status to contract as family law scholarship generally maintains or, under which, the general discourse is engaged without contest. In many respects then, status was stagnant and the progression frustrated by tradition-bound judicial interpretation. This constituted a repudiation of feminist demands for emancipation of wives’ household labor. Siegel states that this was tantamount to legislatures preserving and modernizing the doctrine of marital service and sustaining marital status within the context of an industrialized market economy. Siegel admits that family and market evolved as interdependent institutions historically. This contention implies that the property to personhood matrix is an integral, intersecting, or interdependent aspect of the status to contract matrix. She states, “changes in the law governing ownership of wives’ labor [property vs. personhood] occurred in conjunction with the evolution of the modern labor market [contract vs. status].” The matrices represent a spectrum of possibilities as opposed to binaries. Siegel concludes that the doctrine of marital service reformed by the earnings statutes was an integral part of the capitalist industrial economy, not an archaic remnant of ancient feudal society. She therefore rejects the genealogical progression from status to contract as she finds that status has remained only to be transfigured in a modernized form to make it palatable as a means to continue its regulation of gender relations in the new economy. The movement from subsuming of property and identity in marriage to true voluntary co-ownership is mythic as wives are still working on gaining and asserting true and complete contractual and property rights within marriage.

1. *Married Women’s Property Acts*

Siegel outlines two waves of reform, namely the Married Women’s Property Acts and those that came about with the Earnings Statutes. Inter-

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368. *Id.* at 2138-39.

369. *Id.* at 2139.

es tingly, these two reforms and their treatment by the judiciary underscore how courts confronted questions about modifying the structure of the marriage relationship. Although the first would impact property distribution more, the second would touch upon the fundamental construction of marriage and thereby the theory underlying the concept of alimony. The passing of the Married Women’s Property Acts puts into effect a hybrid property regime, ostensibly providing wives with limited dispositional power over the property over which they held legal title. The limitations over this power combined with the uses often made of these new legal rights by husbands, who could now insulate assets from their creditors by putting property in their wives’ names, made this regime unstable. Where a wife conveyed or encumbered the property, her legal incapacity could still be pleaded in defense to third parties. Creditors’ frustration sometimes led courts to pierce the family veil over such arrangements, and sometimes the family retained protection over its assets, leaving the market in a confusion over its relationship with family assets. Further reform was thus necessary to carve out wives’ rights to contract outside of the confines of husbands’ rights.

2. Earnings Statutes

An attempt to deal with this confusion led, Siegel deems, to the passage of the Earnings Statutes. This second reform was very different from the first because now feminists had become increasingly vocal in the reform process. Feminists during this second wave combined their pleas for both women’s rights in their property and in their wages and asked for both economic and political autonomy for women. In particular, Siegel points to the words of Elizabeth Cady Stanton who specifically criticized the doctrine of marital unity for being a doctrine of oneness based in subordination of the wife as opposed to a doctrine of oneness based in equality in which property was jointly held by husband and wife. The joint property right in family assets demanded by feminists was to secure for wives the value of their household labor. This oneness is akin to the subsuming of the wife’s property and identity in that of the husband, as opposed to the holding of property in common in which the patriarch voluntarily engages

371. Id. at 2141.
372. Id. at 2142.
373. See generally FEMINISM IN OUR TIME, supra note 327.
374. Siegel, supra note 18, at 2143 ("[S]ince the economy of the household is generally as much the source of family wealth as the labor and enterprise of man, therefore the wife should, during life, have the same control over the joint earnings as her husband, and the right to dispose at her death of the same proportion of it as he." (citation omitted)).
in Maine’s property genealogy. The marital entity did not own or hold in common the labors and products of the marital unit, as the wife’s household labor was “voluntarily” conceded to the husband and ownership of the husband’s income was retained by him. In effect, then as now, the predominant asset or property held by the family was the husband’s income, while the wife accomplished and tended to most, if not all, of the productive labor in the family setting, that is “the economically valuable but uncompensated work of raising, feeding and clothing a family, as well as income-earning activities such as industrial piecework, dairying, keeping boarders, and taking in laundry and sewing.”

Next, Siegel describes the eventual moderation of these demands by feminists in order to gain some ground. In New York, this moderation went from seeking a joint property regime, to simply the right of wives to their wages on protectionist grounds in order to “assist the poor wife whose drunken or profligate husband was by law entitled to appropriate her earnings,” depriving the family of its only means of support. When New York adopted such a statute, it did not explicitly exclude from coverage wives’ labor for their families as did some other statutes.

Similarly, in other states, feminists attempting to break ground did not press joint property claims trying merely to get something, that is a right to wages. Many states enacted the rights to earnings, and a good number excluded coverage to labor performed for the family or in fulfilling wifely duties. Nevertheless, earnings statutes gave married women the right of ownership of their own labor and the contractual capacity to act as legal agents for themselves. These changes, as Siegel states, implicated a revision of the structure and construction of the marital relation which in turn raised concerns that a wife may leave her children for her husband to tend, and leave him to prepare his own meals while going out to work on her own account to accumulate money.

From the legislators, this reform and its incidents were to be constructed next by the courts, who took these concerns to heart. The courts chose to specify the interrelationship of common law, equity, and statutory reform with full cognizance of the possible impact that contractual market relations may pose for the marriage relation via the earnings statutes. The overarching threat to the status quo of marriage was that earnings statutes

375. Id. at 2144.
376. Id.
378. Seigel, supra note 18, at 2145.
379. Siegel details the interventions of Professor Hitchcock in 1880, and this is something which is considered absolutely normal for the husband to do. Id. at 2145-46.
could be deployed to impinge if not abrogate a husband’s common law right to his wife’s services. “Ironically, by emancipating wives’ labor in the form of a separate property right—rather than the joint property right in marital assets that feminists initially demanded—legislatures had statutorily created the possibility of interspousal market transactions for household labor.”

Freedom of contract, as it was applied by judges of the day, was meant to protect “the patrimony of the poor man” and the property which all men have in their own labor. What became clear over the course of interpreting the earnings statutes was that judges drew boundaries around their construction of separate spheres of family and market, and genderized these spheres. Judges saw family as the social and economical sphere of female labor and service, and the sphere of male rights to that voluntary service. They applied the earnings statutes to separate this family sphere from market relations in law. Family exchanges were thus to be governed and structured by status duties of wifely support and service of husband and family.

Siegel describes the struggle courts underwent in explaining common law traditions through the new reforms or maintaining marital status given social and economic conditions with each new phase of statutes and transactions that came before them. Courts, Siegel admits, did not merely “frustrate” the reforms legislated, they came to define the limits of such reform. The chief transactions Siegel analyzes are wives’ claims to earnings arising from contracts with third parties, and those from interspousal contracts for labor performed in the family business, and still later simply performed for consideration contracted between the spouses.

This description and analysis Siegel provides is a snippet in the midst of the progression from status to a new formulation of status giving marital status new substance. It is a demonstration that status within the private sphere did not change, only the contractual freedom of women in the market place shifted. Since this time, few changes have occurred, i.e., changes in husbands and wives testifying against each other, and are pitted against areas in which property interests of husbands and wives are still inconsistently consolidated vis-à-vis the outside world, such as in the bankruptcy context.

380. Id. at 2147.
381. We know, however, that not all men had equal opportunity to support themselves through their labor after slavery. So, this freedom of contract, even after the era of ownership of men, did not embrace in full the ability and opportunity for “all” men to use contract to the benefit of themselves and their families. Yet this was the ideal which judges of the day pronounced.
382. Siegel, supra note 18, at 2131.
383. Spousal immunity against compelling testimony of husband and wife against each other in criminal cases was previously extended to civil cases. See generally id.
Siegel starts with interpretation of New York’s 1860 Earnings Statute. The 1860 Statute and its incidents scrutinized by Siegel led her to conclude that the court of appeals was instrumental in selectively bringing about both acceleration and delay in the pace of marital status reform. The legislature appears receptive to such guidance from the court’s decisions on various fronts of marital status reform. The result of this collusive delineation of the limits of marital status reform ensured that wives’ rights vis-à-vis third party actors in the marketplace were regularized while maintaining their subordination to husbands who continued to be invested in the property rights they held over the person and services of wives.  

The 1860 Earnings Statute granted a wife enumerated powers in “relation to her property” but did not declare that a wife possessed the same legal capacity as her husband or an unmarried woman. The language employed by legislators begged courts to interpret these words through equity. This interpretation according to equitable traditions in line with the wife’s capacity created by the trust governing her separate estate “rendered a wife’s commitments unreliable at best.”

However, Siegel traces a development of this doctrinal formulation in the 1870s when the court of appeals “moved in the direction of recognizing in wives full promissory capacity at law.” The three incidents leading to the extension of free contractual capacity to the wife were the power to carry on a separate trade or business, the power to borrow money and to purchase, upon credit, the fixtures, implements, real or personal property necessary or convenient to commence such a business, and finally the power to contract debts in its prosecution after it has been established. ‘By translating wives’ dealings with third parties from an equitable to a legal basis, the 1884 statute finally recognized wives as sui juris—having

384. Siegel, supra note 18, at 2149-52.
385. Specifically, it provided that “[a] married woman may bargain, sell, assign and transfer her separate personal property, and carry on any trade or business, and perform any labor or services on her sole and separate account, . . . sue and be sued in all matters having relation to her property,” and relieved her husband from liability on any bargain or contract made by her concerning her sole and separate property. Id. at 2150.
386. Id. at 2151.
387. Id. at 2152.
388. Siegel specifically demonstrates her points with Frecking v. Rolland, 53 N.Y. 422 (1873), in which the Court of Appeals of New York recognized that the wife’s note was enforceable when it was used to initiate a business even though the note was signed with her husband and they initiated the business together, which was ultimately transferred to her. Id. Next, Siegel offers Cashman v. Henry, 75 N.Y. 103 (1878), in which the wife’s liability on a mortgage was at issue. Id. There, the Court of Appeals of New York reversed the decision of the lower courts in finding that the wife had general capacity to enter into an executory contract to pay for property because the Legislature had added the word “purchase” to the amending statute of 1862 and this was one of the property types regarding which a wife might sue without rendering the husband liable. “[T]he new legislation assumes that she is capable of managing her own interests.” Cashman, 75 N.Y. at 113.
personal capacity to contract with third parties—and so regularized their market dealings.\(^{389}\)

However, the earnings provisions of the 1860 Earnings Statute opened the door to significantly change the complexion of the marital relation and the structure of both private and public economies.\(^{390}\) The court of appeals initially liberally construed the wife’s right to her earnings to include all she earns when laboring outside the home or for a third party. It soon backed away from this stance.\(^{391}\) In *Birkbeck v. Ackroyd*,\(^{392}\) the court of appeals found that a husband could bring suit against a mill owner for wages and compensation due him and to his wife, his minor children, and by assignment those of his two adult sons and their wives. According to the court, the wife’s and husband’s interests could still be considered identical allowing him a claim over the fruits of her labor. The fact that a wife performs labor for a third person does not mean that she is doing so on her own separate account. She may be doing so for her family or husband. In the absence of a specific election “that she intended to avail herself of the privilege and protection conferred by the statute, the husband’s common law right to her earnings remains unaffected.”\(^{393}\) Marital status had thus barely evolved from the identity rhetoric to the co-ownership rhetoric of volunteered rights by two individuals of equal capacity within the market sphere. Within the domestic relationship between husband and wife, this evolution is even less clear.

D. *Compensation in Case of a License to Practice a Profession*

The discussion about the ownership rights in a professional license or degree is one about property, alimony, and valuation. Williams tells us that the value of a law degree is zero because there is no absolute standard only a variant determined out of the background of each individual “man, layman, legislator, and judge. . . .”\(^{394}\) In the context of “post-divorce impoverishment” many scholars, including Ellman, choose to use alimony to address this valuation given the statistics on the disparate financial circumstance of women and children *vis-à-vis* men upon divorce. In a more re-

\(^{389}\) Siegel, *supra* note 18, at 2153-54.

\(^{390}\) Id. at 2154 (“When the legislature granted the wife property rights in her ‘labor or services,’ it necessarily encroached upon a husband’s common law right in his wife’s services. Yet the legislature did not explain whether or how the 1860 statute abrogated, modified, or preserved a husband’s traditional property rights in his wife’s labor.”).

\(^{391}\) Id. at 2154-55 (noting the court of appeals’ interpretation of the 1860 statute in *Brooks v. Schwerin*, 54 N.Y. 343 (1873)).

\(^{392}\) 74 N.Y. 356 (1878).

\(^{393}\) Id. at 358.

\(^{394}\) Williams, *supra* note 38; see also Emily Field Van Tassel, *Rebinding the Sticks: A Comment on Is Coverture Dead?*, 82 GEO. L.J. 2291 (1994).
cent article, Williams asserts that Americans are confused about who owns what in a family and that this influences courts’ distribution of assets and grants of support payments between spouses. The pattern which Williams traces in property division is that of the “he who earns it, owns it rule,” which reflects the traditional bent of Connecticut courts to find that “wives do not ‘need’ half of, say a billion dollars.” The result is that in property division cases where substantial property is in issue, the non-propertied spouse will inevitably and proportionally receive a smaller percentage. This need-based rationale is all the more applied in alimony cases where support of the lesser-earning and lesser-propertied spouse is “conceptualized as a sort of privatized welfare system at the expense of the husband.”

Commercial metaphors are being applied across the board to family life in order to create a firm theoretical grounding for financial obligations that survive divorce. Because these analogies “send the message that to justify entitlements for wives we must commodify the marital relationship in ways most people find distasteful,” Williams instead requires us to revisit the intersection of property law and family life.

Williams notes that the language of property is no longer in vogue when addressing issues concerning spousal support after divorce. But, as she suggests, this is ironic because conclusions about ownership are inevitable. Moreover, she attempts to demonstrate that the rejection of property rhetoric is linked with arguments deployed by human capital theorists and that the property theory used is outdated. Current property theory on the other hand vindicates the aptness of joint property rhetoric. She argues that courts have in fact rejected “specific entitlement” in professional license or degree cases.

Typically, professional license or degree cases involve a wife who supported her husband through professional school and claims “property in his degree” when he divorces her shortly after graduation and after being set up in some sort of practice. Generally, courts have rejected that the degrees constitute marital property “using broad language to the effect that human capital does not have the attributes traditionally associated with property.” This rejection, however, is based on a conception of property based in the traditional definition by Blackstone “of property rights as the absolute dominion of people over things.” Williams states this to be an

395. See, e.g., Williams, supra note 2.
396. Id. at 250.
397. Id. at 251.
398. Id. at 253.
399. Id. at 255-65.
400. Williams, supra note 38, at 2268.
inaccurate conception of property initially and certainly antiquated by the First Restatement of Property in 1936.\textsuperscript{401}

Under Hohfield’s view “property rights defined the relationships among people with respect to some valuable interest.”\textsuperscript{402} Along the genealogy traced by Maine, one can see the evolving relationships between patriarchs and all others. The relationships between the patriarchs and the others were the principal factor in the intersection of the status/contract and property/personhood matrices.

The conception of property put forth by Hohfield is not one of absolute dominion but of an evolving set of claims, with property being ascribed to the attachment of a claim over a particular interest. Williams finds that the application of the Hohfieldian notion of property would facilitate acceptance of the joint property proposal and redefine family relationships “away from coverture’s hierarchical allocation of ownership exclusively to the husband, to reflect the more egalitarian expectations of the modern era.”\textsuperscript{403} This is closer to the initial common ownership paradigm Maine reflects in his analysis of ancient societies as a deliberately consensually shared set of claims over a greater whole. It is also the reflection of the end point of a contract/individual property set of claims as they currently exist in the market sphere in the sense that common ownership is replaced by a set of contractual linkages. Neither the links of status created by common ownership of ancient societies described by Maine, nor the links created of contract to bind individual property claims, has been extended to the private sphere of the marital family.

Williams asserts that case law dealing with professional degrees projects a conception of property which is vastly different. She quotes from a recent case in which the court states:

An educational degree, such as an M.B.A. . . . does not have an exchange value or any objective value on an open market. It is personal to the holder. It terminates on death of the holder and is not inheritable. It cannot be assigned, sold, transferred, conveyed or pledged. An advanced degree is a cumulative product of many years of previous education, combined with diligence and hard work. It may not be acquired by the mere expenditure of money. It is simply an intellectual achievement that may potentially assist in the future acquisition of property. In our view, it has none of the attributes of property in the usual sense of that term.\textsuperscript{404}

\textsuperscript{401} Id. at 2268-69.
\textsuperscript{402} Id. at 2269.
\textsuperscript{403} Id.
\textsuperscript{404} Id. (quoting \textit{In re} Marriage of Graham, 574 P.2d 75, 76 (Colo. 1978) (en banc)).
Similarly, she indicates, other courts use the reasoning that a professional license cannot be property in the classical sense, even a medical license has been characterized as not qualifying for property status under divorce laws.\(^{405}\) The court in such cases defines its conception of property and then proceeds to find that degrees and licenses do not fit into that conception.

Further, if the interest in question, the degree, does not fit within the court’s conception of property, such an interest could not be property and no property right or interest can be claimed by the wife in such cases. The stance adopted by courts is one of a static notion of property, which is reified in the conception of the court. From this stance, it is difficult to foresee the court flexing its conclusions to accord with Williams’ analysis of Hohfield’s view “that property reflects evolving relationships between people . . . .”\(^{406}\) The inadmission by courts of their own roles in determining and structuring a particular conception of property testifies not so much that they do not play such a role, but that their bias in framing the issues includes some stake or interest which they do not care to share.\(^{407}\) Judges do play an active role in determining entitlements, as Williams notes. “Conclusions about property are legal conclusions, made in a context where the court has to allocate the asset to someone.”\(^{408}\)

Both Regan and Williams entitle this monolithic conception of property by courts the “mythology of property”\(^{409}\) which “projects . . . property rights as absolute, alienable, inheritable, and exchangeable on the open market.”\(^{410}\) This marginalizing of wives’ claims has been called nonsensical by some, as courts have stated that a wife’s claim in a degree would constitute an interest in something which has never existed in any real sense. Similarly, tautological assertions that a medical license can be used and enjoyed by the licensee as a means to earn a livelihood but cannot constitute joint property because it cannot be subject to joint ownership are

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405. Id. at 2270.
406. Williams, supra note 38, at 2270.
407. See Martha Minow, Making All The Difference: Inclusion, Exclusion, And American Law 238 (1990) (“Some existing modes of argument offer points of entry to new claims while limiting the scope of those claims, once made. For example, legal rules couched in the language of universal applicability invite claims that they apply to women. Yet if the doctrines use white middle-class men as their reference point—as rules about the legitimate expectations of privacy are likely to do—experiences that do not fit those preexisting terms may be resoundingly excluded and sealed off from criticism in the guise of neutral application of the law. A judicial decision that a person has no legitimate expectation of privacy in a paper bag, for example, neglects groups of people who may treat a paper bag the way others treat a suitcase.”).
408. Williams, supra note 38, at 2270.
410. Williams, supra note 38, at 2271.
blatant evidence of self-serving bias in assessing entitlement between husband and wife.

However, as both these scholars point out, there are many property rights that do not fit within the rubrics of these courts’ property paradigm. Among these less cut and dry versions of property are goodwill, pensions, trademarks, and trade secrets. Pensions and goodwill have been recognized as property, though they cannot be inherited, because they are income streams. Inalienable rights include stock in private companies, partnership interests, and pensions. Williams and Regan ask why it is that courts refuse to recognize property rights in educational degrees and professional licenses in the family context.

The answer clearly is that courts make assumptions about who is entitled to what, based apparently on the allocation of contributions to the acquisition of that particular asset. These assumptions are in large part inextricably linked to conceptions of dependence. Husbands cannot be seen to rely or depend upon the contributions of wives to make the gains they do in the interest of the providing for their families. Instead, self-sufficiency rhetoric divorces the couple at divorce from the context, the motivations, and the emotions which led them to engage in the pursuits best suited to providing for and improving their family and home life.

Williams also points to the common reference to degrees and licensees as “intangible” and thereby eluding characterization as property. Courts have evaded assigning monetary value to degrees and licenses because they are intangible and cannot have a monetary value placed on them for purposes of division between the spouses. However, as Williams points out, after Maine’s genealogical exploration of property, between the eighteenth and early twentieth century, property rights have expanded to include intangibles such as goodwill, trademarks and trade secrets, and pensions.

Williams further explores the self-interest driving the conclusions of family court judges. She indicates that most family court judges are successful lawyers and men “who have conformed to an ideal worker pattern in a profession notorious for long hours.” They have thus lived in a workaholic culture which breeds ideal worker status for themselves and marginalization for their wives who assume greater family responsibilities to their own career detriment and to allow for their husbands’ success. Even though it is in this economic echelon that gender equality is most touted as an aspiration, it is these judges who are most invested in the “po-

411. Regan, supra note 409, at 2318-19; Williams, supra note 38, at 2271.
412. Regan, supra note 409, at 2318-19; Williams, supra note 38, at 2271-72.
413. Williams, supra note 38, at 2272.
414. Id. at 2274.
lite fiction . . . that the husband’s career success and the wife’s marginalization both result not from a system that privileges ideal workers who can command a flow of domestic services from women, but from the idiosyncrasies of two individuals residing in the republic of choice.\footnote{415}

Further, these judges are invested in the ownership of their own degrees. The cases reflect the sense that they have worked long and hard to earn their degrees. Their struggle and hard work predominate their mind set and ignores the hard work at often boring, dead-end jobs or at home caring for their young and their homes. In the end, Williams concludes it is only men’s hard work that judges identify with which gives rise to entitlements. However, judges do not elaborate their rationale for doing so in their decisions.\footnote{416}

Courts’ decisions have instead been based upon the emphasis placed by attorneys of defining entitlement through wives’ investments, and in a way more burdensome to husbands. Specifically, Economists like Ellman have defined wives’ entitlement as the “present value of the difference between what the husband would have earned without the degree, and his projected earnings with the degree.”\footnote{417}

The endpoint of this economic analogy is a rationality which is wholly irrational and inapplicable to the context of family life. Like Krauskopf, Ellman also sees the family as a firm seeking to maximize its profits and welfare.\footnote{418} If her husband does poorly, Ellman asserts the wife cannot complain anymore than someone who invests in the wrong building. However, this commercial jargon sends judges the message that wives’ entitlement is based upon a commodification of intimate relations, which they find undesirable akin to public policy barriers against contractual compensation for wifely duties or marital relations.\footnote{419} Similarly, scholars have indicated that “analogizing marital educational financing to investing in a commercial enterprise ignores the personal basis behind the institution of marriage by reducing the marital relationship to an arm’s length commercial transaction.”\footnote{420} Translating family relationships into commercial ru-
brics produces “commodification anxiety.” This “commodification anxiety,” as Williams calls it, is based upon the economic strategizing involved in order to create a just allocation of family resources, and the speculative aspect of projecting husbands’ earning potential based on a degree. The terminology of economic theory used by Economists bridges over the public/private divide structured to separate family and market. Judges can thus point to some incoherence in the popular understanding of family and market relations proposed by such analysis. There is in this model an implication that the only way to resolve the divisive unbalanced distribution of family assets is through market analogies which would threaten the emotional and intimate integration of family relationships. Secondly, courts appear to find computations in degree cases too speculative; possibly because they impinge on husbands’ freedom to not use their degree in the most lucrative way, and “holding that a degree is marital property would forbid courts from making any adjustment if the husband did not in fact earn the income a court projected he would earn.”

Williams suggests, however, that her joint property proposal cuts through this anxiety in order to institutionalize the altruism “necessary” to sustain family life. Applying a different property theory to notions of marital-sharing can help us devise a family wage which is jointly owned, entitling the wife to her half of this asset. Additionally, Williams points out that the issue of ownership within the family has been “transmuted into a question of whether ownership is appropriate at all in this context.” Yet ownership is inevitably allocated one-sidedly to the husband. Instead of this one-sided distribution, recognition that a joint allocation is possible forces us to rethink the intersection between property and family and the persons who comprise that family.  

421. *Id.* at 2278.
422. *Id.* at 2280.
423. Williams, *supra* note 38, at 2253.
E. Cohabitation and Alimony

The current challenge revolving around cohabitation agreements and alimony is a salient example of the relationship between the construction of marriage as status and contract. Although common law marriage is currently recognized in a number of states, proof necessary to establish its validity varies from state to state. Generally a holding out as husband and wife is required as well as a mutual agreement to be married, which is difficult to prove. In the absence of such an agreement, a valid common-law marriage does not exist and the spouses are not eligible for all the benefits of matrimony such as property distribution, alimony, or maintenance. Cohabitation, unlike common law marriage, is the mutual assumption of rights and duties usually manifested by married people, including, but not necessarily dependent on, sexual relations. Generally, courts have been reluctant to extend alimony and property distribution rights to unmarried couples without an agreement between the parties. Courts have thus construed such relationships chiefly through the contractual arrangement as opposed to status.

424. The word “cohabitation” is defined in a number of ways, but for purposes of this article, cohabitation is “[t]he fact or state of living together, esp[ecially] as partners in life, usu[ally] with the suggestion of sexual relations.” BLACK’S LAW DICTIONARY 254 (7th ed. 1999). It has also been defined as “the sharing of living quarters with a sexual partner without a formal marriage agreement.” DAVID B. LARSON ET AL., THE COSTLY CONSEQUENCES OF DIVORCE: ASSESSING THE CLINICAL, ECONOMIC, AND PUBLIC HEALTH IMPACT OF MARITAL DISRUPTION IN THE UNITED STATES 31 (1995). In 1992, census reports indicate there were a little more than six million unmarried, opposite-sex partners that were living together. Id. at 31. “[N]early half of women 25 to 34 years of age had cohabitated. The majority of women who had cohabitated had done so before marriage. Almost all of the younger women had cohabited before marriage, whereas more of the older women had cohabitated later (i.e., after a divorce or separation.” Id. at 18. The authors also assert that attitudes toward cohabitation are changing, and cohabitation has consistently enjoyed high acceptance rates throughout the eighties and nineties. Negative feelings toward cohabitation appear to be declining as well. “[I]n 1992, only 4 percent of women agreed . . . that ‘a man and a woman living together without being married are living in a way that could be destructive to society.’ In contrast, more than twice this amount of women (9 percent) agreed with this statement in 1980.” Id. at 31.


426. Id.


428. Cohabitation is still illegal in a number of jurisdictions, including: Arizona, Arkansas, Florida, Idaho, Michigan, Mississippi, New Mexico, North Carolina, and Virginia. Such laws, including those making fornication unlawful, are now seldom enforced.

Courts are increasingly willing to enforce premarital contracts as well as cohabitation agreements. In the case of \textit{Hewitt v. Hewitt}, the cohabitants had been living together for fifteen years and had three children together, and the issue was whether Victoria Hewitt could recover from her live-in partner, Robert Hewitt, an equal share of the properties acquired by the parties during that time. The plaintiff alleged an express oral agreement that they would live together as husband and wife and that Robert would “share his life, his future, his earnings and his property” with her. In addition to raising their three children, Victoria helped Robert obtain a professional education and practice. The Illinois Supreme Court reversed the appellate court’s adoption of the reasoning in \textit{Marvin}.

The issue of whether property rights accrue to unmarried cohabitants can not, however, be regarded realistically as merely a problem in the law of express contracts. Plaintiff argues that because her action is founded on an express contract, her recovery would in no way imply that unmarried cohabitants acquire property rights merely by cohabitation and subsequent separation. However . . . if common law principles of express contract govern express agreements between unmarried cohabitants, common law principles of implied contract, equitable relief and constructive trust must govern the parties’ relations in the absence of such an agreement.

The court saw the issue as one of attributing cohabitation, “a private arrangement” with the “status,” i.e., the public, state, and legal regulatory standing and approval which society reserves for marriage. The court was not willing to step in to provide the stamp of approval symbolized by marital “status” in the case of cohabitation without explicit legislative intervention. In addition, the court did not want to undermine the legislative policy of “strengthening and preserving the integrity of marriage . . . .” The court

\footnotesize{\begin{itemize}
  \item 430. Ellman, \textit{supra} note 21, at 14.
  \item 431. 557 P.2d 106 (Cal. 1976).
  \item 432. 394 N.E.2d 1204, 1205 (Ill. 1979).
  \item 433. \textit{id.}
  \item 434. \textit{id.}
  \item 435. In \textit{Marvin}, the first “palimony” suit, the California Supreme Court ruled that recovery could be based on an explicit or implicit contract or on equitable principles. 557 P.2d at 123.
  \item 436. \textit{Hewitt}, 394 N.E.2d at 1207. In all probability the latter case will be much the more common, since it is unlikely that most couples who live together will enter into express agreements regulating their property rights. The increasing incidence of nonmarital cohabitation referred to in \textit{Marvin} and the various legal remedies therein sanctioned seem certain to result in substantial amounts of litigation, in which, whatever the allegations regarding an oral contract, the proof will necessarily involve details of the parties’ living arrangements. \textit{id.}\
\end{itemize}}
underscored that Illinois is strongly pro-marriage given its stance on “no-fault” divorce. 437

Further, in enacting the Illinois Marriage and Dissolution of Marriage Act, the Legislature considered and rejected the “no-fault” divorce concept that has been adopted in many other jurisdictions, including California. Illinois appears to be one of three states retaining fault grounds for dissolution of marriage. Certainly, a significantly stronger pro-marriage policy is manifest in that action, which appears to reaffirm the traditional doctrine that marriage is a civil contract between three parties—the husband, the wife, and the state. The policy of the Act gives the state a strong continuing interest in the institution of marriage and prevents the marriage relation from becoming in effect a private contract terminable at will. 438

The gist of the public policy to which the Supreme Court refers is that a cohabitational relationship which has an implicit or express contract with a term for the provision of marriage-like services, i.e., sexual relations, previously termed “companionship and society,” 439 would be illegal. This public policy is predicated on the illicit or meretricious nature of sexual relations outside of marriage. To maintain the status of marriage, the re-

437. Id. at 1211.

438. Illinois has since modified its divorce laws to include an “irreconcilable differences” ground for divorce, provided parties live separately for two years or sign a waiver after living apart for six months. 750 ILL. COMP. STAT. ANN. 5/401(a)(2) (West 1999).

439. In Graham v. Graham, 33 F. Supp. 936 (E.D. Mich. 1940), the district court relates the traditional status model of marriage as constructed by state courts. It brings back the wife’s duty to reside with her husband and take his domicile. This duty was implied in the terms of the marriage contract condoned by a public policy which promoted the hierarchy of the male over the female in marriage and favored the doctrine of non-intervention in private non-contractual marital interactions under the doctrine of family privacy. The court writes:

Under the law, marriage is not merely a private contract between the parties, but creates a status in which the state is vitally interested and under which certain rights and duties incident to the relationship come into being, irrespective of the wishes of the parties. As a result of the marriage contract, for example, the husband has a duty to support and live with his wife and the wife must contribute her services and society to the husband and follow him in his choice of domicile.

Id. at 938. The court further explains “even in the states with the most liberal emancipation statutes with respect to married women, the law has not gone to the extent of permitting husbands and wives by agreement to change the essential incidents of the marriage contract.” Id. at 939.

Companionship and society were, however, within the ambit of the doctrine of family privacy recompensed. In McGuire v. McGuire, 59 N.W.2d 336 (Neb. 1953), the Supreme Court of Nebraska, confronted with a husband’s failure to support his wife in the necessities of life, reversed a district court judgment and refused to allow the wife any remedy. The court considered evidence of the substantial assets and income of the husband, and the fact that the wife was obedient and dutiful and did all the work on the farm and in the house. The court, however, gave no relief because the couple was still living together and there was no legal separation. The wife, the court reasoned, had known that her husband was frugal when she married him, and the standard at which the household decided to live was not any concern of the court’s, despite the fact that the wife patently disagreed with the decision. Id. at 342-46.
productive aspect to that relation is again sanctified as being beyond any value and in its priceless sense, valuable above any other.

In a similar case, the contract between the parties targeted the improvement of real estate and sharing of expenses and assets, without any showing that “[anything] in the contract casts upon either of the parties the responsibility to perform any illegal activity.”

In the face of support for the treatment of cohabitation through a contractual conduit which avoids any illegal transaction, i.e., the exchange of property or services for sexual relations, Ellman rejects the possible application of contract to cohabitation agreements as well. He postulates that contract concepts “base remedies on the parties’ mutual preferences, previously expressed or implied by conduct . . . [which] will rarely be known . . . [thus] remedies that are purportedly contractual in nature are actually based on unarticulated judicial notions of fairness.”

Ellman’s rationale is that there are bound to be significant ambiguities in the parties’ agreement which can be exploited by the courts to reach a result which seems just to the court. It is unclear how such a contract determination is different from other contracts with vague or missing terms, or from doctrines of unjust enrichment or quantum meruit, to a large extent employed by Ellman himself, in his loss of earning capacity analysis. Ellman is also unable to recognize an adequate remedy in the claimant’s expectation damages.

The possibility of reformulating income in property terms would have the same impact of converting current and future earned income into property to be shared by the spouses especially in cases where the earning capacity was gained during the marriage, a kind of community of property and income scheme. This seems fair albeit inconsistent with the restitutary proposal made by Ellman. While Ellman’s theory compensates the sacrificing spouse who bears the reproductive burden and less marketable potential, he fails to coalesce the market undertaking represented by the sacrifice and thereby, to value it. A proposal to pool all resources

441. Many writers, some of them feminists, have welcomed contract in the context of cohabitation, where the law has rapidly come to accept contractual ordering. See, e.g., Howard O. Hunter, An Essay on Contract and Status: Race, Marriage and the Meretricious Spouse, 64 VA. L. REV. 1039, 1095-96 (1978) (“Treating marriage as status and cohabitation as contract can legally preserve those elements of each relationship that led a couple to adopt either form of relationship.”); Herma Hill Kay & Carol Amyx, Marvin v. Marvin: Preserving the Options, 65 CAL. L. REV. 937, 973 (1977) (recognizing contracts between unmarried cohabitants gives “increased dignity . . . to persons experimenting with new lifestyles”); see also Ellman, supra note 21, at 10.
442. Ellman, supra note 21, at 11.
443. See generally Carbome, supra note 242.
would effectively change any traditional marriage into an equal enterprise and equally value both reproductive and productive contributions.

Since the Marvin case, scholars have had ample time to think about and feel the influence of “consciousness raising,” which redefined what it means to cohabit, share housework, and wages. That same influence is evident in the adoption by the ALI of its project on family dissolution in spring of 2000. Ellman, as the chief reporter of the ALI, proposed that in domestic arrangements closely resembling marriage, the financial distributions should be the same as for marriage. Given that the basic assumptions still remain the same, the status construction of marriage is here retained while expanding it to a wider population. Thus, a traditional model of labor and social roles is promoted no less through this condoning of cohabitation. The ALI suggests such financial accounting should be measured by the extent of the career loss of the spouse (or partner) making sacrifices in the relationship. Statutes remain strong in this interpretation of cohabitation.

We can note the influence of this interpretation in the extension of the benefits of marriage to same-sex couples given the traditional model of marriage used. The kind of sacrifice alleged by Michelle Marvin would now be compensated by the ALI principles. However, this is not the law. While it is not the law, Brinig provides us with some reasons why it should be. In line with her communitarian origins of covenants and rewarding commitments to such ties, she presents incentives that would keep couples together. She proposes two incentives: the first is joint custody statutes that would benefit both spouses upon divorce and encourage both parents’ relationships with children. Second, she recommends guaranteed income sharing (not unlike the proposals set out at the end of this article). These would keep marriages together discounting unverifiable accounting and valuation of men’s and women’s work.


Section 6.04(1) defines domestic-partnership property, subject to distribution “if it would be marital property under Chapter 4, had the domestic partners been married to one another during the domestic-partnership period.” Id. § 6.04(1) (emphasis in original). Section 6.06(1)(a) provides that unless stated otherwise “a domestic partner is entitled to compensatory payments on the same basis as a spouse under Chapter 5 . . . .” Id. § 6.06(1)(a).

445. Section 6.03(1) defines domestic partners as “two persons of the same or opposite sex, not married to one another, who for a significant period of time share a primary residence and a life together as a couple.” ALI Principles (Tentative Draft 2000) § 6.03(1)(a).

446. See Brinig, supra note 429, at 1317-27.

447. Id. at 1320.

448. Id. at 1323.

449. Brinig, supra note 429, at 1323 (noting fewer divorces in such jurisdictions).
F. Gender Bias Within Marital Status and Same-Sex Couples

1. Same-Sex Relationships Historically

In his article, *Law and Construction of the Closet: American Regulation of Same-Sex Intimacy, 1880-1947*, William N. Eskridge, Jr., provides us with the story of how marriage has been construed to exclude same-sex relationships. Relationships with any sexual content or context, including marriage, could not include a number of sexual acts and activities. However, new social developments, as Eskridge details them, broadened areas of privacy and increased both the individual’s and a couple’s power over their own relationships, both in kind and in content. Although he does not broaden his subject area to the development of marital status, Eskridge’s narrative can be seen to affect constructions of marriage, and marriage-like relationships generally.

The social developments of which he speaks affected the law of intimacy generally and also changed the nature of sex within marriage or the relationship between sex and the construction of marriage as a forum for solely procreative activity between persons of different genders. Through early sodomy laws, the state was able to harass same-sex intimacy through anti-prostitution and general morals laws more effectively, Eskridge maintains. This development, as he details it, clinches the degeneracy status for same-sex relationships in direct parallel to the pedestal quality retained or garnered for marital status and the extreme masculine and feminine roles ascribed to the partners in that relationship. Further, the construction of homosexual identity was substantiated with parallels or projections of other unsavory and extremely negative phenomena. The homosexual was projected as pervert and child molester.

Finally, any homosexual socialization was suppressed through overt police enforcement of social activity as degenerate, much in the same way as raids on prostitutes, state liquor licensing, the military exclusion of homosexuals, and the regulatory construction of homosexuality as deviant from the normal “heterosexual” orientation. Eskridge adopts Siegel’s thesis and resonates the familiar argument that the legal regulation of same-sex intimacy historically reveals shifting regimes of normalization.
which adjust and adapt to maintain engrained prejudice, moving in order to make space for the status quo.\textsuperscript{455}

2. \textit{Current Situation}

Posner recognizes that there are many costs to recognizing same-sex marriage. He does think, however, that a lower status can be accorded to same-sex marriage as was done in Denmark and Sweden, with marital partnership acts.\textsuperscript{456} These provide some semblance of contractual rights to same-sex couple. In the United States, Vermont has experimented with this regime under its “Act Relating to Civil Unions.”\textsuperscript{457}

Pursuant to this Act, same-sex couples can enjoy many benefits similar to ones enjoyed by heterosexual couples. The union must be a monogamous one, subject to modification by the parties, and dissolvable. The parties must also be competent to enter into such a union. The only provision which sets such a union apart from marriage is that the parties must “be of the same-sex and therefore excluded from the marriage laws.”\textsuperscript{458} The statute therefore creates a less perfect, albeit similar status for homosexuals.

Recent scholarship has prompted proposals for alternate definitions of family and couplehood to fit lifestyles of those denied formal marital sanction. Claims for spousal support based in cohabitation arrangements, such as in \textit{Marvin}, have been asserted by some as a good first ground to establish rights to family resembling the needs of same-sex couples. The actual experience of gay men and lesbians may, however, be more connective and networked in response to cultural alienation and not accurately fit the cohabitation requirements.\textsuperscript{459} Historically, a strong public policy in favor of common domicile does exist in marriage construction. Bridges between heterosexuals and between homosexuals will necessarily spawn further discussion of intimate bonds and a revision of status which is domicile free.

\textsuperscript{455} Id. at 1051.
\textsuperscript{456} RICHARD A. POSNER, SEX AND REASON 256 (1992).
\textsuperscript{457} VT. STAT. ANN. tit. 15 § 1202 (2002).
\textsuperscript{458} Id.
G. Marital Status, Alimony, and the Role of Fault in Divorce

1. Marital Status

The legal system’s practices of (1) non-intervention into family or household matters as a public policy, and (2) refusal to accept contractual transactions between spouses to regulate marital conduct, instantiate and institutionalize underlying power relations between the spouses. In so doing, both also supply the content for the construction of marriage as “status.” “Status” veils the family within a private sphere supported by state regulation. Non-intervention scaffolds status and the power relations promoted by it. Any abuse of power within the status relation, especially outside of the criminal context, could not be remedied except for separation or dissolution based on that abuse. The name for that abuse within the status construction of marriage is “fault.”

2. Alimony

Historically, alimony was accorded only in cases where fault of the husband could be established, a form of damages for the breach of implied terms of marital status which could not be enforced during the spouses’ life together.460 If the wife was at all guilty, she could not obtain any support in case of divorce. The wife was thus subordinated in case of transgression. The husband could sue for divorce and not be liable for any support. Additionally, if the husband was granted a divorce, the wife would no longer be entitled to her part of the property settlement in case of the husband’s death. As women often outlived men, this was incentive to remain married even in cases of abuse.

3. No-Fault Divorce

The hope of no-fault divorce reform was to alleviate some of the dislocation and suffering associated with unnecessary adversarial litigation within the divorce process and to promote marital stability and prevent marital disruption.461 These were laudable goals, and at the outset at least shockingly short-changed by the real consequences they incurred. Liberal divorce laws or no-fault divorce laws that manifest the intent to convert the

460. See, e.g., Ellman, supra note 21, at 16-17; see also Ira Mark Ellman & Sharon Lohr, Marriage as Contract, Opportunistic Violence, and Other Bad Arguments for Fault Divorce, 1997 U. ILL. L. REV. 719 (1997).

traditional “status” construction of marriage to one of “contract” in fact do the opposite. Where as fault is the enforcement of the implied status construction of marriage, no-fault buttresses notions of a transactive relation between equals. As such, no-fault divorce laws would promote a contract construction of marriage. However, marriage has historically been lived as a status obliging men and women to retain traditional roles and divisions of labor within it. The two parties, due to this distribution of labor, do not hold the same economic power in the marketplace or over their future lives. Thus no-fault divorce, by ignoring the realities of its premise, effects a practical replication of the very construction it hopes to change.462

In very real terms, no-fault divorce makes the consequences of the “status” legacy come to life. We see the very real impact on women and children from the construction of marriage as “status” with all its implications. If the realities of the premise were different, and women and men enjoyed equality of opportunity in real terms, and were socialized to feel free to take on a variety of roles equally valued and remunerated in their lives, whether homemaking, child rearing, corporate management, nursing, etc., giving them equality of bargaining power upon entrance into and exit from the marriage contract constructed by no-fault divorce, that idea and its application may well succeed. No-fault divorce laws can simultaneously shackle the disempowered in their vulnerability, free them from the person who has bound them, and in effecting the divorce, throw the keys away. Scholars who favor fault-based regimes and those who find them problematic illustrate the vast focus of reform and the ensuing gender implications.463

VIII. CURRENT STATUS: MARRIAGE AND BANKRUPTCY

In the bankruptcy context, courts routinely apply the extraordinary remedy of substantive consolidation to married and divorced debtors as mandatory in the marital sphere as an aspect of marital status and thereby circumvent state laws. Substantive consolidation aggregates assets and liabilities of separate persons into one pool. Under the laws of coverture, married women were generally not capable of owning property or retaining their own earnings. With the Married Women’s Property Acts, women could own property in their own names. Separate earnings statutes allowed them to retain legal ownership over their earnings. The separation of property resulting from these statutes was supposed to ensure that creditors of

462. See id.
463. See generally id. (outlining the various causes and arguments behind divorce law reform).
one spouse could not use the property of the other spouse to satisfy their claims.\textsuperscript{464}

The federal bankruptcy rules can, however, get around this mechanism. The 1978 Bankruptcy Code and its amendments have been employed by courts to blur separate ownership and obligations of spouses begun under this prior legislative action.\textsuperscript{465} Bankruptcy courts, in effect, limit the gains women have made on their trajectory from property in common (as wives having their property subsumed into that of their husbands) to individual property (as wives owning property in their own right), by acquiring increased rights to individual property after divorce. These rights to property include the conclusive determinations made by family courts to award property settlements, child support, and alimony to the ex-spouse, usually women.\textsuperscript{466}

In both marriage and divorce cases, family expenses are varyingly treated by courts. Sometimes household expenses will be divided according to the net income of spouses, and sometimes they are simply divided in half.\textsuperscript{467} Even legal orders for spousal support are ignored in order to give precedence to repayment of creditors. This all leads to the non-debtor spouse or ex-spouse having to subsidize the debtor’s portion of household expenses creating a hierarchy of creditors, with the creditor spouse occupying the lowest rung, or not even appearing on the ladder. According to many scholars, bankruptcy courts often condition bankruptcy relief on the participation of the spouse, thereby creating a federal family common law for low to middle income classes which ignores interspousal relations under state family law. Many such cases refuse to provide bankruptcy relief without the spouse’s willing financial participation. The federal family law and state family law have patent differences. State family law does not recognize income imputation as do federal courts in the context of bankruptcy.\textsuperscript{468} Non-community property and community property states for the most part either attribute ownership of income to the earning spouse or at least vest sole management of these earnings to that spouse.\textsuperscript{469} Similarly, state family law keeps separate property rights separate, with no access to

\textsuperscript{464} Catherine E. Vance, \textit{Till Debt Do Us Part: Irreconcilable Differences in the Unhappy Union of Bankruptcy and Divorce}, 45 BUFF. L. REV. 369, 371 (1997) (“Even though the mechanics of the bankruptcy process, including determinations regarding the effect on divorce decrees, apply equally to women and men, a cursory glance at the case law reveals that this is profoundly a woman’s issue because all too frequently the creditor spouse is female.”).


\textsuperscript{466} Vance, supra note 464, at 371; see also Robert B. Chapman, \textit{Coverture and Cooperation: The Firm, the Market, and the Substantive Consolidation of Married Debtors}, 17 BANKR. DEV. J. 105, 113 (2000).

\textsuperscript{467} Vance, supra note 464, at 384.

\textsuperscript{468} Chapman, supra note 466, at 113 n.31.

\textsuperscript{469} Id. at 117.
the other spouse’s income during marriage. The remedy for sharing in such property or income is in the court’s discretion and, as this thesis attests, any basis for such sharing is hotly debated. Spouses also are not liable for each other’s debts and usually the property and income of the spouse of the debtor are out of creditors’ reach under state family law. Attachment is limited to the debtor’s property or income, and the debtor’s spouse’s property and income if not transferable cannot be attached by a creditor.\footnote{470} With respect to the payment of alimony to a creditor ex-spouse from a previous marriage, states vary widely as to whether a new spouse’s income can be imputed to the paying spouse.\footnote{471}

Federal law differs substantially from this state law and supersedes it generally. State family law, however, is allowed to preempt federal law. Federal law can override state family law only if “Congress . . . positively required by direct enactment that state law be preempted and where state family law damage[s] the federal policy in “a clear and substantial” manner.”\footnote{472} Bankruptcy law does not preempt state property law, but in fact relies on state law to determine property rights and debt liabilities. Substantive bankruptcy law may determine disposable income, but the legal and economic relationship between the debtor and spouse would be determined by state law. Bankruptcy law, can, however, have impact on property rights through transfer avoidance, lien avoidance, plan confirmation, discharge, subordination and limitations on claims allowance, and finally by substantive consolidation.\footnote{473}

There is another reason for the breadth of this definition of property: the problem invoked by jointly owned properties. Previously, property of the estate was limited to that which the debtor could alienate or which the creditors could attach.\footnote{474} This was problematic in estates held in tenancy by the entireties by married persons, and defined by legal unity of the spouses. The debtor could not alone transfer the property. Separate petitions by the husband and the wife were required in order to consolidate the property and then to have the property administered by the trustee of the consolidated estate.

Gone are the days when marriage can be acknowledged as an arrangement having both economic and intimate aspects to it. However, market and family have been demonstrated to have fluid repercussions. Husbands’ greater earning power in the market translates to greater bargaining power within their marriages and the household as well. Similarly, most

\footnote{470. Id.}
\footnote{471. Id.}
\footnote{472. Id. at 121.}
\footnote{473. Id.}
\footnote{474. Id. at 126-28.}
higher echelon professional husbands will have stay at home wives to support them and take care of the household, also translating into their greater success in the market.

The repercussions for wives has been greater. Women’s or wives’ work within and without the home has been negated or erased through the impact of spherical division of family and market. The economic value of women’s household work, which once was recognized in a variety of legal contexts, at a time when fathers’ ownership of the labor of their wives and children ruled, ended with the need to make this rule more palatable as it became more unofficial. “The erasure of family work served to evade the need to explain why husbands still owned their wives’ domestic services.” If wives’ work was no longer considered work, it could not still be owned by their husbands.

Further, the spherical divide promotes the gendered division between wives’ and mothers’ selfless devotion to family, which if not carried out can penalize mothers at or after divorce. Mothers who have aggressively pursued a career and contributed through market activities have often been penalized by losing custody of their children because they have “prioritized” work. Statements demonstrating that mothers cannot have it all ignore still that fathers have been able to have a job and children through the silent contribution of their wives.

IX. TOWARD PERSONHOOD

A. Differentiating Status/Contract and Property/Personhood

This article has shown that the predominant construction of marriage is located in status within the status to contract matrix. It has related that such opposing socio-political schools as Communitarians and Economists can stand on common status ground in their construction of marriage. The reigning model of marriage, however, sits on both the status/contract and property/personhood matrices. The tensions between the Communitarians and Economists, for example, can be explained through this second property/personhood aspect of the construction.

This Part will explore how the circumscribing of personhood, both in its connective form and as individual agency, only by its relation to owner-
ship and material advantage as a way of asserting contract rights and duties, limits human interaction within marriage, and applies only to certain powerful constituencies within the population. There are three key differences between the status to contract matrix and the property to personhood matrix. (1) The property to personhood matrix makes it possible for us to track various conceptions of personhood unlike status to contract, a genealogy which only tracks one specific model of personhood. (2) Whereas status to contract traces the relationship between individuals and others in tracing the acquisition of rights similar to the original patriarch by a greater number of individuals, property to personhood tells us something about how the person/individual is being regarded in those relationships. (3) Whereas status to contract only deploys the liberal individual property model of the person, property to personhood makes it possible to deploy the model from various socio-political schools to critique or offer alternatives to that particular model. Models can be situated on a spectrum from a conception of personhood closer to property to one totally free of property links.

Status to contract is a progression used by scholars to construct the marital entity, that is, status to contract seeks to explain construction of the relationship itself between the individuals within that entity. Property to personhood on the other hand, seeks to uncover and traces the conception of personhood at use in a particular construction of marriage, whether status, contract, or in between. Whereas the status to contract matrix is rooted in a liberal individualist property model of the individual and follows the progression from community to individual property, property to personhood follows a variety of socio-political analyses of personhood with regard to individual autonomy and describes instead a spectrum of definitions for a person. This spectrum can range from a definition of personhood solely based within the notion of people as property or being defined by what or how much property they hold, to a conception of people as being completely free or separate of any property links whatsoever. Status to contract, as conceived by Maine, necessarily involves an a priori notion of the entity and the relational basis for exchange between individuals, and so it restricts the scope of communal manifestations of entities and the intra-relationships within such entities. In fact, the a priori notion of material entity invoked within alimony scholarship is one of a property holding entity and thus is limited to classes who must divide or distribute their wealth at divorce.

The property to personhood matrix provides the basis for constructing a vision of a relationship between the individual and his/her community. As such, each spouse as an individual can be seen as variably constructed. This may be different from the ties and identity of the other spouse or co-
habitee in the relationship. In this way, it is possible to provide an analysis of difference within the marital entity precluded by a merely status- to contract-based construction. It is also possible to entertain the impact of mainstream discourse on portions of the population which do not fit within the inherent notion of middle, upper class, and propertied marital units on those who have not shared this construction and to be informed by those different constructions based on race, class, and gender.

1. Status/Property: The Reigning Construction of Marriage

This article uses the frameworks of status/contract and property/personhood to organize discussions of alimony and marriage as constructs to attempt to explain the complexity of family relationships. Constructions, by definition, are like buildings. They hold or contain the possibility of complex interaction. Buildings, by definition, are raised to keep out certain possibilities and to retain others. Therefore, the very work of putting up walls is the exercise of power over worlds and people. This article uses the status/contract and property/personhood matrices to categorize alimony scholarship in the hopes not of creating walls, however, but instead to provide a clearer understanding of the uses of this power as constructive of marriage and its incidents.

2. Contract/Property Conflates Equality and Personhood

In parallel, the debate over the valuation of enhanced earning capacity has also implicated the relationship between property/personhood and status/contract. It has been asserted that “[h]uman capital is property and property is power. Like other forms of property, human capital can be alienated, possessed, and used by its owner.”\textsuperscript{478} Enhanced earning capacity can thus fall comfortably under the legal definition of property.\textsuperscript{479} Suffice it to say here that it has been argued “[p]roperty has important implications for autonomy, personhood and dignity. . . . [I]t gives one control over one’s life, provides a means of expressing oneself, and of protecting oneself from the power of others, individual or collective.”\textsuperscript{480}

Property can also provide key ingredients to power, namely control and privacy. With property comes the ability to command a thing or terrain, restrain others from the use of it, and the power to act upon it, all aspects of control. Ownership also implicates the ability to keep people in

\textsuperscript{478} See Davis, supra note 363, at 109.
\textsuperscript{479} Id.
\textsuperscript{480} Id. at 110.
and out of the thing owned, and ensure privacy over the terrain. Control and privacy have been linked in theoretical scholarship to the assertion of individuality and personhood, allowing a person to develop the separate and special attributes that enable a person to become a reflective human being.\textsuperscript{481}

The draw of property to defining ourselves and our independence through it, as Jennifer Nedelsky, Regan, and others have stated, is the concept of boundary contained in it. It attracts those who wish to see divorce as a possibility for women to break the shackles of their domestic gendered and subjugated roles to become self-sufficient agents in private and public realms. Thus property/independence has been a powerful argument against governmental intrusion. Yet, Nedelsky, in her analysis demonstrates that property, because of its aura of a natural bounded and pre-political right has constrained the redistribution of property and has been used by the powerful property holding classes to maintain the status quo which a redistribution of property would undermine. Although property ownership requires state intervention to enforce it, people assume it is freestanding and independent from the state. And it protects those who have it against those who don’t.\textsuperscript{482}

The relationship between property and autonomy reflects the premise of social contract, which accepts individual independence and boundedness (like property) as the primal state, as if human beings are like a piece of land, a terrain that cannot be entered except for certain necessary reasons. Any relationship is then based on the exercise of individual will by way of consent. In domains where consent is not possible or not given but where the relationship is pre-existing, consent must be assumed to be voluntarily given, because individual freedom is assumed. Yet this relationship of exchange does not exist everywhere. The family is different. Social contract, for instance excludes children whose rights develop from their vulnerabilities and needs.\textsuperscript{483} Children certainly do not choose to enter one family as opposed to another, and it is difficult to argue that a child would prefer more difficult to easier circumstances for growth, including emotional, financial, and other family circumstances.

Discussion of autonomy through property rights has also been held in arguments over alimony. The acquisition and assertion of rights of property between spouses within constructions of marriage and marital status argued by the various categories of scholarship has been determinative in

\begin{footnotesize}
\textsuperscript{481} Id.
\textsuperscript{482} Regan, supra note 409, at 2344-50 (discussing Jennifer Nedelsky, \textit{Law, Boundaries, and the Bounded Self}, in \textit{Law and the Order of Culture} 162 (Robert Post ed., 1991)).
\textsuperscript{483} Id. (discussing \textit{Nancy J. Hirschmann, Rethinking Obligation: A Feminist Method for Political Theory} 8 (1992)).
\end{footnotesize}
large part of their respective conceptions of personhood. In a discussion confusing personhood with property and power, scholars have applied the relationship between property and power to the assessment of whether or not human capital is property. The denial of this property interest to women has been asserted as a denial of equitable treatment of women, their autonomy, and personhood. Joyce Davis asserts that property is a source of power and a mechanism through which power is articulated and maintained against women. Acknowledging and recognizing women’s labor in the home and market as a source of wealth and their right to be compensated for this value would serve to empower them as full persons. This assessment of property interest in the capacity is “similar to a contractual duty to pay a certain sum of money.” Denying women a right in the human capital to which they have contributed, even though it has long been so defined in economic theory, reinforces a view of women’s dependence on men.

3. **Reviewing the Scholarship Conflating Property and Personhood**

The first step to relating where along property to personhood each of these schools of scholarship comes in, is to make clearer the liberal conception of property which permeates marital status and legal rules that apply to it. The overall current legal regime constructs marriage according to the status/property paradigm despite the formal equality stance of much recent state legislation governing financial and other consequences for former spouses upon divorce. A variety of legal rules affect and engender such a construction: rules regarding the distribution of property, including income between ex-spouses, the maintenance of joint property laws particularly affecting married persons such as the tenancy by the entirety, federal bankruptcy rules which ignore state property laws in favor of a property in common stance toward married persons in garnishing assets including income which may be directed to an ex-spouse as alimony, spousal immunity laws and their impact upon domestic violence, no-fault divorce

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484. Davis, supra note 363, at 112 (“At this time, only New York clearly and consistently treats human capital as marital property. Michigan’s policy is unsettled, with some panels of the court treating it as property; others not. Some states have dealt with the issue statutorily; other courts, while refusing to acknowledge human capital as property, have used a variety of other theories to provide some form of compensation to the wife. These theories include reimbursement, equitable restitution, quasi-contract, reimbursement support, reimbursement alimony, classic maintenance, maintenance recognizing future earning capacity, lump-sum alimony, alimony-in-gross, rehabilitative alimony, or whatever the court deems equitable.”).

485. Id. at 113.

486. Id. at 139 (quoting Catherine Valcke, *Locke on Property: A Deontological Interpretation*, 12 *HARV. J.L. & PUB. POL’Y* 941, 994 (1989)).

487. Id. at 144.
in the face of this impact, the impossibility of retaining financial support from an ex-spouse upon remarriage, and the application of marital benefits only to heterosexual couples who solemnize their union in a formal public way.

Status to contract as set out by Maine is a matrix which seeks to organize the structure through which people in their capacity as individuals gained greater rights over their property and greater access to the public market to transfer and acquire that property without the intermediary of an organization like the family, or “house” to which they belonged.

Maine’s status to contract work and his genealogical review of property constructs marriage at its origins as a domain of joint property or property held in common or one that subsumes the identity and property of the wife in the patriarch/husband. According to Maine, from these origins, status and property develop to a point of individual ownership linked directly to the individual’s ability to deal with property through contract. Maine links the two, status/contract and the genealogy of property only in his discussion of ownership of the patriarch or father of his children, wife, slaves, and also his unmarried daughter and then the transfer of that ownership to her husband. In doing so, Maine links status/contract with property by restricting marriage as a domain in which the wife’s property and identity is subsumed in that of the husband.

Through the work of Siegel and others discussing the particular resonance of property in status, this article has also presented a second matrix, property to personhood, which develops and describes status to contract. Although Maine studies the origins of contract in status and of individual property in the joint property scheme of ancient patriarchs, he does not describe a non-proprietary notion of personhood. Siegel asserts the myth of status to contract by tracing the development of what she terms the doctrine of marital service. She rejects the progression of status to contract, finding that status has only been transfigured in a modern form to make it palatable as a way of regulating gender relations under status in the new economy. Even in her development of this thesis through the history of the Married Women’s Property Acts and the Earnings Statutes, it is apparent that marital status is integrally related to extension of property rights between spouses. Similarly, the work of Williams and others on ownership of human capital resources within the family, via the development of legal doctrine on professional licenses, makes clear the relationship between property notions and family life. The argument she forwards urges a consideration of licenses as common marital property as opposed to being solely owned by the spouse who earns it, thereby reconceiving the way property has been ruled to affect marriage as status. Again, the notion of divorced spouses is related either to individual ownership rights or joint
property rights through marriage. Bankruptcy rules fall under this rubric of regarding spousal property as property in common or joint property because it is affected at some point in time by marital status. In considering the community property regime within marriage, and even to divorced spouses, bankruptcy rules protect rights of creditors over those of the other spouse or ex-spouse thus sustaining status/property.

The second rubric of wives’ identity and property being subsumed in that of the husband appears to be the doctrine which impacts a second set of rules, ones affecting the capacity to marry, a formal heterosexual union between spouses as opposed to cohabitation, and also as opposed to same-sex marriage, and finally in the case of spousal support after divorce, a remarriage penalty which removes any such support. The status/property construction of marriage limits the benefits of marriage to the married. Cohabitants engaged in a respectful contractual union of their own making cannot enjoy the benefits of marital status. Such marital benefits include spousal support upon rupture of the relationship even if these were the terms of their own bargain, or property distribution, taxation, and other benefits which their children may enjoy as a result. Only validly bargained for options within the reasoning of the court will be permitted for cohabiting couples.

Moreover, gender bias in the formalizing of marital status denies the benefits of marriage to same-sex unions. Only heterosexual unions are permitted and there is a long history of violent discrimination enforcing this wall that subsumes male and female identity in the unity of marital status, by definition gender biased. Finally, this same unity of one man and one woman present in marital status precludes the possibility that spousal support emanating traditionally from the ex-husband to the ex-wife can be continued when she remarries. Her re-attachment in marriage breaks the financial dependence on her earlier husband with finality because she now can depend on this new husband. Spousal support then is conceived as a form of dependence—not interdependence—inherent in marriage. It also conveys the message that marital status is a form of attachment in which the spousal identities are subsumed. When a woman remarries, she has no identity or the equivalent of a property right left to collect the old alimony. Her identity and property rights are subsumed in that of her new husband.

In accordance with these “ruling” checkpoints, this article would categorize the predominant construction of marriage within the various categories of scholarship on the subject to fall within the status/property model. Specifically, the Economists clearly fall within status/property. Ellman, for instance, seeks to eliminate fault with the goal of seeking economic efficiency in marriage and divorce. Similarly, he encourages perpetuation
of traditional gender roles with the same goal of retaining and building up more property for the married couple. Additionally, neither he nor Posner move status/property toward personhood by any flexible approach toward same-sex marriage or acceptance of cohabitation.

The Individualists fall somewhere between status and contract but closer to contract/property in their construction of marriage. They prefer to create formal equality between men and women in terms of their access to property in the home and the market and choose to respect the present legal property regime including its preconceptions of autonomy and equality. Partnership scholars similarly frame marriage in terms of partnership shares, of which any financial support at divorce would consist of a buy out. Contractarians clearly construct marriage as contract/individual property as per Maine’s genealogy. There is always room to alter the property conception via individual will pursuant to this construction. However, the initial construction is one which is geared to permit each individual to regulate his or her property rights through assertion of an isolated and autonomous individual will and so is still linked to property.

The Communitarians, most interestingly, construct marriage as status—somewhere between property and personhood but closer to personhood. Regan, for instance, seeks to find a basis for spousal connections through marriage which are retained even after marriage and to disengage status from personhood through the work of Nedelsky. Yet despite his challenge to the traditional subordination of women, he does not shift his sense of gender within marriage and so retains a status/property model that moves toward personhood. Brinig, on the other hand, appears to go furthest toward a status/personhood model of marriage by making such a gender shift.

X. CONCLUSION

Alimony, spousal support, and maintenance, all interchangeable terms, connote payments made between ex-spouses on a regular, periodic basis for purposes of support. This definition places any discussion on the issue of alimony squarely within the context of marriage. It begs the examination of what marriage is meant to signify, and how a society wants to treat all those who marry or cohabit, or those who want to marry or cohabit.

488. I say they are interchangeable because to those seeking it, it is money they need to live by. Women and men who need such payments do not overly analyze what to call it as long as they can collect it.
Any discussion about the construction of marriage involves a discussion of the parties to it, of the social roles which it promotes or discourages, of its historical and community roots, and of the socio-political context in which it is being constructed. Marriage itself is comprised of incidents, such as the labor shared and divided, of children, of earning(s), of household work, and of moral, spiritual, and financial support possible in such an intimate relationship. In all, the topic of organizing a discussion on alimony, making sense of the most significant issues implicated by the complexity which it invites, and the closeness with which such issues touch society seems daunting.

Ellman asks why we have alimony. Williams retorts that the question itself characterizes the debate and places it in a context of Ellman’s own choosing, which taints the interests of spouses and ex-spouses in marital property and family income. Regan, for his part, would respond that Ellman’s question skews the relationship between ex-spouses, promotes a clean break and makes them into strangers so that in the end any argument he makes in favor of alimony is a justification for any claim an ex-spouse may have rather than the presentation of an entitlement. Ellman himself responds that as a member of an economic and efficient marital unit, a spouse who has sacrificed her own earning potential over the course of years has a legitimate claim to compensation for the losses she has incurred. Weitzman, Stark, or Rasmusen, each for slightly different reasons, would say that the whole debate is outdated. There is no reason not to let spouses decide for themselves what they want to do in case of marriage breakdown, write it down, and be bound by the terms of the writing.

Since the above is but a snippet of the detail entailed in the argumentation, it is evident that any student mired in such scholarship can get lost and find she has nothing to add; hence, the importance of organizing and categorizing the scholarship. The commonalities and differences which thread particular positions can tell something, not only about the positions themselves but about aspects of the entire inquiry which may remain absent from scrutiny.

One matrix deployed to organize this scholarship has been Maine’s status to contract narrative. Despite scholars’ critiques of Maine’s own biases and flawed methodologies, some of which this article presents, his thesis remains influential.
argument on alimony on the basis of adopting a status or contract position as
determinative of the author’s views on the debate about spousal support. 
Maine’s genealogical narrative “from status to contract” is therefore a sig-
nificant and pertinent aspect of this scholarship.

An application of this matrix helps to define the differences within the 
 scholarship and classify it as rooted in various socio-political or jurispru-
dential realms. Each set of authors chooses to veer their position on the 
construction of marriage to status or contract, and their stance on the actual 
distribution of marital assets or support in function of the slant of a particu-
lar socio-political doctrine. Communitarians, who espouse stronger recog-
nition of ties and connections between individuals and their communities, 
deploy a status construction of marriage and seek to find a basis both to 
ensure ex-spousal entitlement to support payments and to counter the pro-
gression to individualist contractual relationships between spouses and 
others. Some Communitarians limit marital status to its traditional compo-
sition save the subordination of women, and don’t seek to extend its ben-
efits to those who cohabit or to same-sex couples. Other Communitarians 
find this inhibition to extend benefits inconsistent with communitarian 
philosophy, and so they change the modern meaning of marital status to 
enshrine a wider ambit of relationships and gender.

Economists, despite their ostensible contract orientation, either using a 
“firm” based model of efficiency, or an altruistic model of marriage and 
family, construe marriage as status. The altruistic model is curiously re-
niscent of Maine’s description of status with a benevolent head of house-
hold leading a cooperative household. Ellman’s and Posner’s efficiency 
model, on the other hand, makes a list of assumptions about the possibility 
of maximizing profit through a household where traditional social roles 
govern the marital relationship. These assumptions tilt the balance for this 
latter model in the direction of status as well.

Individualists come in different doctrinal packages, but all skew their 
analyses toward contract. Scholars of the formal equality, self-sufficiency 
school prefer to view women as equals of men, with similar opportunities 
for market participation and therefore adhere to a contract construction of 
marriage, many favoring a clean break approach. As such, spousal support 
appears to them to label a claimant or recipient as dependent, the duration 
of which state they would minimize and limit to rehabilitation. Any cri-
tique regarding the effects of such awards on women and children would 
be met with the reply that the award and the period of its duration is still 
within the court’s discretion to assess. Other scholars would expand the 
individualist contractual approach to envisage treating marriage as a part-
nership, of which one spouse could buy out his/her share upon dissolution 
depending upon his/her contribution.
Contractarians, although also Individualists, are more focused on the will of the parties and listening to it, as opposed to foisting their individualist ideology on the general public. In a somewhat more honest fashion, they believe individuals, given their varied cultural and other backgrounds, are in the best position to determine how they want to govern their relationships. An example is the work of Rasmusen and Stake who reiterate a part of the present thesis and state that the progress from status to contract is an illusion. Status does in fact reign because marriage is currently constructed by the state and that construction is enforced by the state as well. In classic liberal fashion, they urge a progression toward contract, willing to allow anyone to marry and set the terms of such a union.

However, despite the benefits of the status construction of marriage, there are distinct disadvantages to such a construction emanating from issues concerning gender equality and exclusivity of the marital institution. In defining and problematizing the notion of status, which becomes imperative with the recognition of its pervasive and influential deployment in construing marriage, one notices that it is mixed up in a parallel concept, property. In formulating his thesis, Maine had conveniently also recounted the story of property ownership, from a point of ownership-in-common to the point of individual property rights. The parallel created between the two is that of status/property in common and contract/individual property.

Yet the conception of personhood, its inclusions and exclusions, cannot be readily culled merely by examining status to contract alone. To uncover the relationship, the analysis of alimony scholarship can be invoked along another matrix—property to personhood of status/contract to a particular and fixed genealogy of personhood rooted in property, both webbed in property at the status stage, and atomized in contract at that latter stage. The unveiling of this relationship is significant because its articulation is absent from much of the discussion on alimony.

Through a review of the scholarship of Siegel, it is learned that the notion of property is significant to status because status has historically been regulated through a management of property interests. She effectively demonstrates the historical shifts in increasing property rights for women through the Married Women’s Property Acts and Earnings Statutes in the market sphere as a way of sustaining the hold of status/property within the family and their incidents of unequal power relations, differential social, family, and market roles, as well as gender exclusivity. The conflation of status and property are evident in this examination of these incidents.

490. The status construction of marriage at the very least promotes family stability, continuity, and connection, all important benefits in our social lives.

491. Such as adults of the age of majority hold in the United States.
through scholarship on the entitlements created by supporting a spouse while he/she obtains a professional license and the possibility of dividing the family wage as proposed by Williams; the exclusion of cohabitation from marital benefits; a brief review of the historical treatment of same-sex relationships by Eskridge; a current response to Posner’s stance against same-sex marriage; and a historical review of the fault regime.

Understanding the relationship between property and personhood as it relates to or impinges on women’s property interests during marriage and upon divorce becomes increasingly pivotal as the links between status and property are uncovered. The key aspects of the manner in which this link is sustained that surface are as follows: the restrictions placed on receiving or claiming a right to spousal support upon remarriage; the consolidation of spousal and even ex-spousal assets by bankruptcy courts; and the division of public and private spheres of human experience. The remarriage penalty that restricts support upon remarriage evidences the current legal regime’s insistence on constructing marriage as status. It connects an ex-spouse’s entitlement to support to her attachment to a particular spouse as opposed to relating it to a valuation of her contributions. As such, this penalty inhibits an ex-spouse’s full use of a property interest or right judicially awarded to her. The consolidation of spousal income and assets pursuant to the Bankruptcy Code has been demonstrated by scholars to forge further links between marital status and ex-spousal property rights, despite women’s current ability to hold separate property under state and statutory law and even in cases where the spouses are divorced.

In the final Part of this article, the relationship between status/contract and property/personhood was developed further. It was argued that status/contract, that is, both status and contract and the parts in between, implicate a conception of personhood based in property, common property in status, and individual property in contract. The matrix property to personhood is then a very different matrix which intersects with status/contract at property but then goes off on its own to provide a spectrum of conceptions of personhood infused more or less with notions of property, which can be brought back into reform status or contract into a different bettered model. Although status clearly creates within marriage at its origin one identity, that of the patriarch/husband, between status and contract women have gained more rights to their property; as such, to some, they have moved toward autonomous and equal personhood. We have not ventured far from the property roots of status. We have just come closer to individuation of property rights. We can adopt instead a stance toward personhood without excluding oneness and continuity or complexity offered by family life. In so doing, we can aspire to learn lessons from the scholarship studied to best redress inequities between spouses perpe-
trated both by the status/contract dynamic and by valuation of contribu-
tions through the property/personhood debate. 492

492. Although I raise the point, there is insufficient space within the confines of this article to ade-
quately address and argue this point at length.