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## COMMENTS

### Contracting for Security: Paying Married Women What They've Earned

Katharine K. Baker<sup>†</sup>

[W]e do not have promises because we have a law of contracts; we have a law of contracts because we have promises.<sup>1</sup>

Divorce is an economic disaster for women.<sup>2</sup> The latest census figures reveal that only 15 percent of divorced women in this country are awarded any alimony or maintenance payments. Of that 15 percent, only a small percentage receive any of the awarded money. The mean annual alimony income for those who do receive money is only \$3,733.<sup>3</sup> A recent California study found that the standard of living for men increases 42 percent after divorce, while the standard of living for women decreases by 73 percent.<sup>4</sup> A similar study in Vermont showed men's per capita income rising by 120 percent and women's decreasing by 33 percent.<sup>5</sup> Divorce always has

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<sup>1</sup> Harold C. Havighurst, *The Nature of Private Contract* 10 (Northwestern, 1961).

<sup>2</sup> James B. McLindon, *Separate But Unequal: The Economic Disaster of Divorce for Women and Children*, 21 Family L Q 351 (1987).

<sup>3</sup> Bureau of the Census, *Child Support and Alimony: 1985*; Current Population Reports (Advance Data from March-April 1986 Current Population Surveys), Series P-23, No 152 at 14 (1987).

<sup>4</sup> Lenore J. Weitzman, *The Divorce Revolution* 338-39 (Free Press, 1985). One significant cause of the economic disparity between divorced men and women is men's consistent failure to pay what courts order them to pay. A recent study found that one of every six men was in arrears on alimony payments within six months of the divorce decree, owing an average of over \$1,000. *Id.* at 192. The notoriously difficult problem of enforcement is beyond the scope of this comment.

Weitzman also notes that there is no reason to presume that lack of alimony might be compensated for by greater child support payments. Alimony is tax-deductible for the man; child support is not. Both are taxable to the woman. Thus, if anything, one should be wary of men's incentive to inflate alimony figures at the expense of accurate child-support awards. *Id.* at 186.

<sup>5</sup> Heather Ruth Wishik, *Economics of Divorce: An Exploratory Study*, 20 Family L Q 79, 97 (1986).

been economically difficult for women, but recent changes in alimony and maintenance laws seem to have made things worse, not better.<sup>6</sup> The divorce reform laws, instituted throughout the 1970s, were meant to eliminate outmoded gender stereotypes within the law and were seen as an outgrowth of the movement for women's equality; yet they do not appear to have helped women at all. Several commentators have attributed women's worsened position to the decreased bargaining power that resulted from the elimination of divorce based on fault.<sup>7</sup> Previously, a woman could manipulate the fault standard when her husband had to induce her cooperation in staging a fault divorce or she could make her alimony demand seem more compelling by painting her husband as the culpable party. Yet, even assuming this theory is correct, reinstituting fault-based divorce proceedings would be inappropriate given the now almost universally accepted notion that marriages can disintegrate without one party being more blameworthy than the other. The present system may not be compensating women fairly, but that does not mean that we should return to the past.

There are many possible ways of categorizing the marriage relationship. Two legal paradigms, partnership and contract, are potentially applicable, though the law has been extremely reluctant to fully cognize marriage as either. This reluctance stems, no doubt, from the nature of marriage. Marriage is a legal relationship, but it is a personal, sexual, and often religious relationship as well. Regulating or legally defining such a relationship is invasive, difficult, and easily discriminatory. Nonetheless, the law does impose some matrimonial obligations.

The purpose behind alimony in this country until the early 1970s was to require the male to fulfill his lifelong support obligation.<sup>8</sup> As divorce became more commonplace and as more women of all classes began to participate in the paid labor force, the con-

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<sup>6</sup> See Weitzman, *The Divorce Revolution* at xi-xiv (cited in note 4) and McLindon, 21 Family L Q 351 (cited in note 2). See also Robert E. McGraw, Gloria J. Sterin and Joseph M. Davis, *A Case Study In Divorce Law Reform and Its Aftermath*, 20 J Family L 443, 473 (1982) (finding that the number of alimony awards went down between 1965 and 1978, but noting that this decline is not necessarily attributable to statutory changes).

<sup>7</sup> Martha L. Fineman, *Implementing Equality: Ideology, Contradiction and Social Change: A Study of Rhetoric and Results in the Regulation of Divorce*, 1983 Wisc L Rev 789, 801. See also McLindon, 21 Family L Q at 395 (cited in note 2).

<sup>8</sup> The male obligation to support had been a part of marital law since the Middle Ages. Complete divorce, at that time, was non-existent; alimony was an ecclesiastical court order that insured that a husband continued to fulfill his legal and religious obligation of lifelong support to his wife following a judicial separation. Homer H. Clark, *The Law of Domestic Relations in the United States* 420 (West, 1968).

cept of lifelong support began to grow anachronistic.<sup>9</sup> Many states, eager to abandon the idea of support, replaced the term "alimony," which means support or sustenance,<sup>10</sup> with "spousal maintenance."<sup>11</sup> What "maintenance" is remains unclear.

Almost all states provide for some form of alimony or maintenance payment, but a dependent spouse is not automatically entitled to a monetary award upon divorce. The factors that now go into determining a maintenance award vary between states and often within states. State statutes give courts some guidelines, but statutes differ and courts often disregard them or apply them inconsistently.

This comment offers a way to determine spousal compensation that will both compensate woman appropriately without encouraging dependency, and will provide firm, unambiguous guidance to courts. Section I discusses the distinction between monetary payments and property division and analyzes the appropriateness of a marriage-as-partnership paradigm in light of that distinction. Section II briefly outlines the current state statutory alimony standards and the ways in which some courts stray from these standards. Section III examines why the current standards leave women undercompensated. Finally, after a discussion of previously suggested solutions in Section IV, Section V offers its own solution, rooted in contract theory, to the problem of structuring marital compensation.

## I. PROPERTY DIVISION AND THE PARTNERSHIP PARADIGM

### A. Property Division

Before evaluating alimony or maintenance standards, it is necessary to distinguish between two important concepts in the law of marriage dissolution: monetary compensation, called alimony or maintenance, and property division. Most states provide for an equitable division of marital property at marriage dissolution.<sup>12</sup> All

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<sup>9</sup> Most women affected by regulation or a requirement of alimony are members of the middle and upper class. When these women began to earn their own money, the need for lifelong support became less compelling.

<sup>10</sup> *Black's Law Dictionary* 67 (West, 5th ed 1983).

<sup>11</sup> Uniform Marriage and Divorce Act (UMDA) § 308, 9 Unif L Annot 347 (West, 1987).

<sup>12</sup> What constitutes marital property varies from state to state. In community property states, all property acquired during the marriage is owned jointly by both spouses and must be evenly divided. In equitable distribution states (i.e., non-community property states), courts have more discretion in determining what constitutes joint property. The UMDA encourages the use of property division as the means of providing for the financial needs of the parties. *Id* (notes accompanying the Act).

property accumulated during the marriage must be divided between the spouses. This is property division. Monetary compensation involves paying an ex-spouse money in addition to any property that she has received pursuant to an equitable division.<sup>13</sup> If the definition of property could be infinitely expanded, provisions for equal property division might be an effective way of equitably compensating dependent spouses. The problem is that courts are very reluctant to expand the definition of property, and when that which the law currently calls property is divided, women are left severely undercompensated.

When two people marry they usually agree to share their economic wealth forever.<sup>14</sup> At marriage dissolution, courts attempt to divide a couple's valuable assets, but many commonly recognized sources of wealth, even if labelled as property, are very difficult to divide. Business goodwill, education, employment promotion, and future income streams are but a few examples of sources of wealth that courts are either reluctant to define as property or are unable to divide. These sources of wealth provide much of the economic security in the majority of marriages, and it is precisely these intangible benefits which women are deprived of at marriage dissolution. This deprivation is particularly crippling because most women reasonably rely on sharing the intangible benefits accumulated during the marriage.

Some states have attempted to alleviate this problem somewhat by classifying professional degrees as property. Michigan put a monetary value on a law degree<sup>15</sup> and New York did the same for a medical license.<sup>16</sup> Yet many more states, even when confronted with situations in which there appears to be very little property that can be equitably divided, have strongly resisted the trend of expanding the definition of property to include professional

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<sup>13</sup> For convenience and because it is unquestionably grounded in reality, I will use female pronouns when referring to dependent spouses and male pronouns when describing primary bread-winners.

<sup>14</sup> People are, of course, free to shape their economic marital agreements differently, but the law and most people assume that the economic resources will be shared equally and for the duration of the parties' lives.

<sup>15</sup> *Woodworth v Woodworth*, 126 Mich App 258, 337 NW2d 332, 334 (1983). The court ruled that Mrs. Woodworth had a property interest in her husband's law degree.

<sup>16</sup> *O'Brien v O'Brien*, 66 NY2d 576, 580, 498 NYS2d 743 (1985). But see *Cronin v Cronin*, 131 Misc 2d 879, 502 NYS2d 368 (1986) (refusing to quantify a non-professional degree.) Recently, a New York Supreme Court judge ruled that *O'Brien* compelled finding that the increase in value of a spouse's acting and modelling career is marital property. *Golub v Golub*, 139 Misc 2d 440, 527 NYS2d 946, 950 (March 1988). However, no award was made on this basis because the judge found no evidence regarding the value of the acting career.

degrees.<sup>17</sup>

Even if courts consistently treated professional degrees as property, however, there are other intangible benefits more resistant to division. For instance, many women contribute significantly to their husbands' careers by doing clerical work, making important business contacts, and doing extensive entertaining.<sup>18</sup> Often these efforts greatly enhance the husband's potential for career advancement. This property can be defined as the husband's promotion potential to which the woman directly contributed. Dividing that property is very difficult. One solution is to define all of the man's future income stream as property and allocate an equitable share of that to the woman. Yet this solution would require invasive, on-going court evaluation to adjust and enforce the mandated payments.<sup>19</sup> Furthermore, dividing a future income stream would create a permanent debt relationship between two people trying to dissolve their relationship. Any post-divorce monetary payment will involve some kind of debt relationship, but given the often uncomfortable relations between ex-spouses, all attempts should be made to limit that debt relationship. These problems make pure property division, even with an extraordinarily expanded definition of property, a problematic means of equitably dissolving a marital agreement.

## B. The Partnership Paradigm

The distinction between property and monetary compensation reveals the flaws in the popular but misguided marriage-as-partnership analogy.<sup>20</sup> Partnership remedies are inapplicable in open-

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<sup>17</sup> See, for example, *In Re Marriage of Rubinstein*, 145 Ill App 3d 31, 495 NE2d 659, 664-665 (1986); *Archer v Archer*, 303 Md 347, 493 A2d 1074, 1079 (1985); *Hodge v Hodge*, 337 Pa Super 151, 486 A2d 951, 953 (1984), *aff'd* 513 Pa 264, 520 A2d 15 (1986).

<sup>18</sup> This kind of spousal contribution appears to be the rule, not the exception, at least among college graduates. In a 1976 survey of married male college graduates, only 14% replied that their wives had no involvement in their careers. Another study concluded that a woman's college education did more to raise her husband's income than it did to raise her own earning level. These surveys can be found in Barbara F. Reskin and Heidi I. Hartmann, eds, *Women's Work, Men's Work: Sex Segregation on the Job* 70 (National Academy Press, 1986) ("*Women's Work*").

<sup>19</sup> Alternatively a court could simply award a portion of the present value of the husband's future income stream, avoiding the problems of continual readjustment. Yet determining the present value of a man's "promotion potential" would be difficult enough; determining the woman's share of that present value would be nearly impossible.

<sup>20</sup> For cases treating marriage as a partnership, see *Dyer v Tsapis*, 162 W Va 289, 249 SE2d 509, 511 (1978). ("The law which once saw marriage as a sacrament now conceptualizes it as roughly analogous to a business partnership." (footnote omitted)); *O'Brien*, 66 NY2d at 585 ("Marriage is, among other things, an economic partnership to which both

ended, highly diversified agreements like marriage because partnership analogies fail to capture the security interest that is an inherent part of married life.

A partnership paradigm for alimony analogizes a husband's net worth and earning potential to a profitable business. When a profitable business partnership must be dissolved due to a death or other unforeseen contingency, there is almost always a contractual provision in the partnership agreement that defines how the interests in the future profits should be allocated.<sup>21</sup> The law has recognized that the ex ante expectations of the parties themselves, as expressed in a dissolution contract, are the appropriate tools to use when deciding how to dissolve a business agreement. Thus, the courts rarely get involved in deciding how the future assets, like income streams and good will, should be divided. Absent an explicit allocation provision, courts simply dissolve the partnership.<sup>22</sup>

In the marital realm, antenuptial agreements are subject to strict judicial scrutiny, particularly in the case of traditional marriages.<sup>23</sup> These agreements do not exist in the vast majority of marriages, even when the courts would enforce them. Thus, the far greater problem is what to do in their absence.

Marriage involves an agreement to share profits and liabilities in all enterprises forever. This agreement entails far more economic interdependency, division of labor, and lost opportunities than business relationships ever contemplate. Married people often rely on lifelong commitment. If a woman did not believe that she and her husband would be sharing their economic resources for-

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parties contribute"). See also, Lenore Weitzman, *The Marriage Contract* 88 (Free Press, 1976).

<sup>21</sup> Robert W. Hamilton, *Cases and Materials On Corporations, Including Partnerships and Limited Partnerships* 97 (West, 3d ed 1986).

<sup>22</sup> The widely followed Uniform Partnership Act requires that in the absence of a dissolution provision, all affairs be wound up and the profitable business be dissolved. Uniform Partnership Act § 30, 6 Unif L Annot 367 (West, 1969). Thus, when the court must get involved, it solves the problem of how to divide future assets by eliminating those assets.

<sup>23</sup> Weitzman, *The Marriage Contract* at 341 (cited in note 20). Traditionally, these agreements have been voided as against public policy because any such agreement necessarily contemplates divorce. Some states have begun to enforce them, however. See *id.* at 347-351, and cases cited therein. These jurisdictions do not hold that antenuptial agreements are per se against public policy, but they ordinarily require that there be full and fair disclosure and that both parties have had an opportunity to consult with counsel prior to signing such an agreement. See *Friedlander v Friedlander*, 80 Wash 2d 293, 300, 494 P2d 208 (1972) and Minn Stat § 519.11 (1980).

Even if such agreements were more common, one can readily see why courts should be hesitant to enforce them. The unforeseen circumstances inherent in all marriages, and particularly in marriages of any significant duration, would make ex ante attempts to distribute future assets fairly appear highly suspect.

ever, it is unlikely that she would be willing to make the economic sacrifices that staying at home entails. Business people do not rely as much on their business partner and rarely make decisions that look completely irrational on an objective economic scale.

Moreover, from an economic perspective, married people make seemingly irrational decisions, such as a woman's decision to stay home with the children or to do unpaid housework, all the time. This is because the marketplace fails to capture the value that most of society places on spouses staying at home. If the marketplace accurately assessed the demand for women to stay home, the monetary value of the services she performed there would go up to reflect people's desires.

Alternatively, a mother staying at home with her children may provide a unique service that the market is incapable of valuing. If no one can replace a natural mother, then the market cannot provide any replacement value for her services. Either theory for why the market fails to capture the true value of a spouse staying at home belies the adequacy of a partnership analogy.

Partnership models are effective and equitable when there is a way to measure objectively both parties' commitments. When a monetary scale can capture how parties to a business agreement value their resources, the remedies at dissolution are likely to be fair to all parties. In marriage, sacrifices for non-monetary reasons are common, and, if marriage is a desirable institution, necessary. Partnership law, which only provides for a division of assets and liabilities within specific, defined business endeavors, cannot adequately compensate for these sacrifices. Marriage is too complex an entity for the relatively simplistic partnership paradigm to provide appropriate relief.

This comment, therefore, looks to contract paradigms and the theory of restitution and reliance remedies, as a way to provide equitable relief at marriage dissolution. Under the solution proposed in this comment, the dependent spouse is awarded restitution for any measurable contribution that she made to the marriage. If the husband has been enriched at her expense, she is compensated. Additionally, the dependent spouse is awarded reliance compensation for the loss she has suffered due to her household contribution. The reliance award is based on the amount of paid work the dependent spouse forwent in expectation of the economic security that her husband would provide. She is awarded a percentage of her husband's earnings for all the years in which she did a disproportionate amount of household work. If both restitu-

tion and reliance are applicable, both should be awarded.<sup>24</sup>

## II. CURRENT STATUTORY LAW

Current statutory standards fare little better than the partnership analogy in attempting to resolve the economic hardships of divorce. At first glance, the wide variety of statutory guidelines appears to offer alternative standards under which to award monetary compensation, but in reality, most courts look at substantially similar factors when determining an appropriate award. The Uniform Marriage and Divorce Act, adopted in part or in whole by many states, awards maintenance in accordance with a need standard.<sup>25</sup> States that have not adopted the Uniform Act's maintenance provisions usually follow one of two paths. Their statutes either list a number of factors to be considered, regardless of whether there is established need, or they give the courts complete discretion to consider whatever criteria the courts feel appropriate.<sup>26</sup> The effect of these approaches is essentially the same, however, because the courts simply adopt through case law criteria that are not written into the statute.<sup>27</sup> Without question, the most important of these criteria is a determination of what the dependent spouse needs to rehabilitate herself.

This section will briefly describe both how the Uniform Act's need standard and rehabilitative maintenance operate. It will also offer a quick survey of the alternative factors on which courts have based awards when straying from their standard guidelines.

### A. The Uniform Act - Need

Section 308 of the Uniform Marriage and Divorce Act of 1970 defines when spousal maintenance should be awarded and what

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<sup>24</sup> See section V.B. for a complete description of the proposed model.

<sup>25</sup> UMDA, § 308, 9 Unif L Annot at 347 (cited in note 11).

<sup>26</sup> Examples of states that enumerate factors to be considered are Washington (Wash Rev Code Ann § 26.09.090 (West 1973)), New York (NY Dom Rel Law § 236, Part B, (6)(a) (McKinney 1986)), and Pennsylvania (23 Pa Stat § 501 (Purdon 1980)). The number of factors enumerated ranges from six (Washington) to fourteen (Pennsylvania). States that leave the factors to be considered to the court's discretion include New Jersey (NJ Stat § 2A:34-23 (1984)), and North Dakota (ND Cent Code § 14-05-24 (1981)).

<sup>27</sup> New Jersey generally awards rehabilitative maintenance, for example, though the statute does not mention it. *Lepis v Lepis*, 83 NJ 139, 416 A2d 45, 53 (1980). Washington has looked at maintenance as a way to equitably distribute the overall reduction in a couple's joint standard of living when one spouse attends school, even though the statute does not express that standard. *Washburn v Washburn*, 101 Wash 2d 168, 677 P2d 152, 159 (1984). The case law in Oklahoma has developed twenty-two factors to be considered. 49 J Okla Bar Assoc 492, 496-97 (1978).

factors should be taken into consideration when making such an award. The Uniform Act states that "the court may grant a maintenance order for either spouse only if it finds that the spouse seeking maintenance: (1) lacks sufficient property to provide for his reasonable needs; and (2) is unable to support himself through appropriate employment or is the custodian of a child whose condition or circumstances makes it appropriate that the custodian should not be required to seek employment outside the home."<sup>28</sup> The purpose of these need stipulations is to discourage maintenance awards and provide for the financial needs of the parties through property division.<sup>29</sup> If the two above conditions are met, the Act then outlines various factors for the court to consider in determining an award, such as the financial resources of the party seeking maintenance, the time necessary for that person to find appropriate employment and the standard of living established during the marriage.<sup>30</sup> The court cannot consider any of these modifying factors unless sufficient need has first been established.

For instance, the Uniform Act's need standard prevented a

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<sup>28</sup> UMDA § 308, 9 Unif L Annot at 347 (cited in note 11), states in full:

(a) In a proceeding for dissolution of marriage, legal separation, or maintenance following a decree of dissolution of the marriage by a court which lacked personal jurisdiction over the absent spouse, the court may grant a maintenance order for either spouse only if it finds that the spouse seeking maintenance:

(1) lacks sufficient property to provide for his reasonable needs; and  
(2) is unable to support himself through appropriate employment or is the custodian of a child whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside the home.

(b) The maintenance order shall be in amounts and for periods of time the court deems just, without regard to marital misconduct, and after considering all relevant factors including:

(1) the financial resources of the party seeking maintenance, including marital property apportioned to him, his ability to meet his needs independently, and the extent to which a provision for support of a child living with the party includes a sum for that party as custodian;

(2) the time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment;

(3) the standard of living established during the marriage;

(4) the duration of the marriage;

(5) the age and physical and emotional condition of the spouse seeking maintenance; and

(6) the ability of the spouse from whom maintenance is sought to meet his needs while meeting those of the spouse seeking maintenance.

Some states, such as Arizona, Colorado, Illinois, Kentucky, Montana, Missouri and Minnesota, have adopted the entire Act. *Id.* at 149. Others have adopted parts of the Act. For the purposes of this analysis, all states using the Act's maintenance provisions will be treated similarly.

<sup>29</sup> *Id.* at 348 (comments accompanying the Act).

<sup>30</sup> See note 28.

Missouri woman who had not worked at all during her twenty-four year marriage from getting any compensation. Her husband earned \$2,444 a month after taxes; she had started working for minimum wage in a nursing home. The appellate court upheld the trial court's finding that the woman was capable of supporting herself adequately.

Although ordinarily we would be something less than sanguine about the prospect that a woman of forty-nine with virtually no outside employment experience in twenty-three years, educated only to the extent of a no-longer-adequate teaching license, 'obviously' has the ability to improve her earnings, the trial court had the advantage of observing her at trial, and found her 'bright and responsive.'<sup>31</sup>

Because she was bright and responsive and appeared to be capable of earning more than her current salary, she did not establish need and hence was denied all maintenance.<sup>32</sup>

## B. Rehabilitation

In both Uniform Act and non-Uniform Act states, the overwhelming majority of alimony payments are awarded as rehabilitation. The Uniform Act provides rehabilitative maintenance for women who have met the threshold need test. Most states that have not adopted the Uniform Act have established very strong rehabilitative trends.<sup>33</sup> The purpose of the rehabilitative standard is to allocate enough money to the dependant spouse for her to rehabilitate the job skills that have been dormant or underutilized during her marriage. The most important factor in the rehabilitative award is the amount of time the woman needs to acquire sufficient training to enable her to find appropriate employment. Thus, rehabilitative maintenance awards are temporary; the court determines how long it will take the dependent spouse to rehabilitate herself and awards maintenance only for that period of time.<sup>34</sup>

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<sup>31</sup> *Roberts v Roberts*, 652 SW2d 325, 330 (Mo App 1983).

<sup>32</sup> *Id.* See also *In Re Marriage of Donovan*, 122 Ill App 3d 803, 462 NE2d 9, 12 (1984).

<sup>33</sup> See, for example, New York (NY Dom Rel Law § 236 (McKinney 1986)), California (Cal Family Law Code § 4801 (West 1986)), and Florida (Fla Stat § 61.08 (1986)).

<sup>34</sup> The pejorative connotations of the word "rehabilitate" reveal one of the major problems with divorce law in general. The homemaker's job is not respected. Homemakers, therefore, must be "rehabilitated," not compensated or made whole. The term "rehabilitation" implies that the woman has been doing something of very little value. Yet, presumably, a married couple would not choose to have the wife assume household duties unless they valued the work done in the home. They would pay someone else to perform the work

In *Dahlberg v Dahlberg*,<sup>35</sup> a Minnesota appeals court upheld an award of rehabilitative alimony for a woman who had been married twenty-five years and worked as a traditional housewife, spending a significant amount of time with the couple's retarded daughter. Prior to the marriage, Mrs. Dahlberg had been a secretary, an assembler, an inspector, and a switchboard operator. Her husband was an executive vice-president of a large company earning \$92,500 a year plus bonuses ranging from \$200 to \$14,000. Mrs. Dahlberg was awarded \$1300 a month for seven years. Two of the children were still minors and there was expert testimony that it would take her two to four years to re-enter the work force.<sup>36</sup> Thus, five years after the divorce, at age 49 (after her children had reached majority), she had two years of \$1300 per month to enable her to start a new career.<sup>37</sup>

### C. Other Standards

Courts do occasionally rely on factors other than need or rehabilitation. Often, these factors are not listed in the statute, and even when they are listed, it is not clear when they should be invoked. It is important to mention these alternatives, however, because the courts' occasional reliance on them demonstrates the extent to which both the need and rehabilitation standards fail.<sup>38</sup>

#### 1. Restitution.

Restitution as a basis for maintenance awards has had a mixed reception. Many courts have been hesitant to award any kind of restitution remedy because of a belief that alimony ought to focus

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with the money the wife could earn in the wage market.

<sup>35</sup> *Dahlberg v Dahlberg*, 358 NW2d 76 (Minn App 1984).

<sup>36</sup> *Id* at 82.

<sup>37</sup> The appeals court implied that this amount of maintenance was higher than necessary. Yet, it found that this "substantial" award was justified because the lower court awarded a small amount of child support. *Id* at 82. See also *Wilhelm v Wilhelm*, 688 SW2d 381 (Mo App 1985). A Missouri court awarded a divorced woman \$400 a month for two years after a twenty-one year marriage. She had held various part-time jobs for the last ten years of their marriage and her income following the separation was just over \$14,000. The husband had an income of roughly \$33,000 a year. Given her part-time work experience, the wife was deemed able to support herself appropriately after a payment of \$400 a month for two years. Similarly, in *In Re Marriage of Pekar*, 218 Cal Rptr 823, 173 Cal App 3d 367 (1985), the court awarded an eighteen year housewife five years of alimony at \$650 per month. Three years before the marriage, she had begun working temporarily in a clerical job and had since found a job as a secretary earning \$1,730 a month. Her husband was the vice-president of a bank, earning \$4,327 a month.

<sup>38</sup> The problems with need and rehabilitation are developed more fully in section III.

on the future, not the past.<sup>39</sup> Some have referred to "reimbursement alimony" as a "contradiction in terms."<sup>40</sup>

Other courts and statutes have found it necessary to look back at the woman's contribution, however. The Pennsylvania divorce statute, for example, lists "the contribution of a spouse as homemaker" as a factor to be considered in awarding support.<sup>41</sup> New York requires the consideration of the "contributions and services of the party seeking maintenance . . . to the career or career potential of the other party."<sup>42</sup> Washington has twice awarded maintenance based on the woman's contribution, both times specifically rejecting a rehabilitative standard, despite the fact that the statute mentions rehabilitation but not restitution.<sup>43</sup> A Wisconsin court ordered the trial court to consider the possibility of a maintenance award, even though the wife received 70 percent of the proceeds from the sale of the family home: "[The] working spouse was entitled to be fairly compensated for her costs of support," and the proceeds from the house were "insufficient compensation for her significantly greater contributions to the marriage."<sup>44</sup> This criterion is particularly relevant in cases where women have worked and economically supported the marriage while husbands obtained further education.

## 2. *Foregone opportunities.*

Related to the concept of compensation for previous contribution is the notion of compensation for foregone opportunities. Theoretically, a foregone opportunity award should compensate a woman for the opportunity costs she incurred by remaining in the home and out of the workforce. She could have gone to work. She

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<sup>39</sup> *Skelton v Skelton*, 490 A2d 1204, 1207 (Me 1985). The court wrote, "Is alimony properly awarded to compensate a divorcing spouse for her 'years of service' in the past, or does it look to the future, acting as a substitute for the loss of support enjoyed during the preceding years. . . . The answer is clearly the latter." It concluded that the woman's contribution should only be considered in the property distribution, not in an alimony award. *Id.* at 1207-1208.

<sup>40</sup> *Reiss v Reiss*, 200 NJ Super 122, 490 A2d 378, 379 (1984), *aff'd in part and rev'd in part*, 205 NJ Super 41, 500 A2d 24 (1985).

<sup>41</sup> 23 Pa Stat § 501(b)(12) (Purdon 1980).

<sup>42</sup> NY Dom Rel Law § 236, Part B, (6)(a)(8) (McKinney 1980).

<sup>43</sup> See *Washburn*, 677 P2d at 158 and *Fernau v Fernau*, 39 Wash App 695, 706, 694 P2d 1092 (1984). When awarding the alimony, the court looked to the degree to which the woman had contributed to and enhanced the man's career.

<sup>44</sup> *Roberto v Brown*, 107 Wisc 2d 17, 318 NW2d 358, 360 (1982). See also *In Re Marriage of Lundberg*, 107 Wisc 2d 1, 318 NW2d 918 (1982). The *Roberto* decision shows that when there is not enough property to divide, the woman can be severely undercompensated even when she gets 70 percent.

did not. A foregone opportunity award compensates her for what she gave up in terms of wages and career development.

Wisconsin, though apparently basing awards on the women's actual contribution, has referred to the importance of foregone opportunities.<sup>45</sup> The New York statute lists "reduced or lost lifetime earning capacity of the party seeking maintenance as a result of having foregone or delayed education, training, employment, or career opportunities during the marriage" as a factor to be considered.<sup>46</sup> One commentator has relied heavily on this theory of compensation<sup>47</sup> and though neither courts nor legislatures are very confident in their use of this standard, its theoretical appeal makes it attractive to some.

### 3. *Equitable distribution of reduced standard of living.*

North Dakota courts have developed another factor to be considered in awarding maintenance. In *Weir v Weir*,<sup>48</sup> the appellate court awarded \$1,600 a month for three years and \$1,500 a month for the twenty years after that or until re-marriage. The parties had been married twenty-three years; the husband was earning over \$80,000 a year, but there was minimal property. "The awarding of spousal support in this case is an attempt to provide an equitable sharing of the overall reduction in the parties' separate standards of living, and properly recognizes [the woman's] role in contributing to [the man's] earning capacity which was developed and enhanced during the course of the marriage."<sup>49</sup> Again, the criterion of sharing the reduced standard of living is not well developed, but it illustrates the courts' desire to break out of restrictive statutory guidelines.

### 4. *Expectation.*

Finally, many divorce courts feel the need to address the eco-

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<sup>45</sup> *Roberto*, 318 NW2d at 360 (1982) and *In Re Marriage of Lundberg*, 318 NW2d at 924 (1982). In each case, the court appears to be using restitution as a proxy for foregone opportunities. The assumption that a restitution remedy is equal to a foregone opportunity remedy is unfounded, but the courts' expressed concern for foregone opportunities reveals judicial recognition of the importance of and need to compensate for women's marital sacrifices.

<sup>46</sup> NY Dom Rel Law § 236, Part B, (6)(a)(5) (McKinney 1980).

<sup>47</sup> Elisabeth Landes, *Economics of Alimony*, 7 J Legal Stud 35 (1978). This piece is discussed fully in section IV.

<sup>48</sup> 374 NW2d 858 (ND 1985).

<sup>49</sup> *Id* at 864 (emphasis in original). A Washington court has also referred to equalizing the reduced standard of living. *Washburn*, 677 P2d at 158 (1984).

conomic expectations of the parties. The well-known "lifestyle to which she's grown accustomed" standard is simply a means of satisfying expectations. Obviously, this consideration necessitates abandoning the need and rehabilitative standards.

When courts emphasize expectation they are more likely to award permanent alimony.<sup>50</sup> Even states that follow the Uniform Act's need standard sometimes award permanent alimony.<sup>51</sup> In 1987, a Minnesota court found that a woman who was earning \$640 a month in a department store was still entitled to permanent alimony. Despite the fact that she was capable of providing something for herself, "her education, skills, and experience ha[d] become outmoded, and her earning capacity ha[d] become permanently diminished."<sup>52</sup> The court recognized that this woman could not rehabilitate herself to a level of earnings that would reflect her expectations. Thus, although expectation considerations are not consistently applied, most statutes mention the expectation of the parties and courts periodically look to expectations when calculating awards.

### III. CRITIQUE OF THE PREVAILING SYSTEM OF MAINTENANCE

As the restitution, foregone opportunities, and expectation strands make clear, courts do not rely solely on the Uniform Act or rehabilitation theory, despite what may be legislatively mandated. The inadequacy of those guidelines forces courts to look beyond the statutes. This section analyzes the problems with the Uniform Act, rehabilitation, and permanent alimony.

Need and rehabilitation inevitably fail as standards because they ignore a woman's contribution in the home. To award something on the basis of need presupposes a level of dependency. If society truly respects the homemaker's role it must compensate the woman for her services, not reduce her to a level of dependency because she has performed them.

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<sup>50</sup> See, for example, *In Re Marriage of Duke*, 161 Cal Rptr 444, 101 Cal App 3d 152, 159 (1980).

<sup>51</sup> Indeed, some courts may award permanent alimony precisely because the Uniform Act is so strict. Permanent alimony provides a way of bypassing the strict need calculations when equity seems to demand higher compensation for the woman.

<sup>52</sup> *Lunde v Lunde*, 408 NW2d 888, 892-93 (Minn App 1987). The permanent award in this case may be attributable to the Minnesota Legislature's decision to amend its adaptation of the Uniform Act so that "nothing in [the Act] should be construed to favor a temporary award of maintenance over a permanent award." 31 Minn Stat § 518.552(3) (1986).

### A. The Uniform Act's Need Standard

The first two prongs of the Uniform Act, which require that the dependent spouse lack sufficient property and be unable to support herself through appropriate employment, impose a need standard that leaves women severely undercompensated. The need standard is extraordinarily difficult for divorcing women to meet, and often results in denial of maintenance altogether. For example, Missouri courts denied any maintenance to a wife who was not employed during most of a twenty-four year marriage<sup>53</sup> and to the wife in a ten year marriage who worked, but earned less than half of what her husband earned.<sup>54</sup> Neither woman had sufficient need.

Unless the mandatory need standard is met, the courts will not even look at the secondary factors that the statute's drafters thought might be appropriate in determining maintenance. Thus, if the wife lacks sufficient need, a court cannot take into account factors such as the duration of the marriage, the standard of living established during the marriage, or the age and physical and emotional condition of the spouse seeking maintenance.<sup>55</sup>

Furthermore, the need standard requires evaluations of property that lead to inconsistent results. In determining whether there is sufficient property to meet a woman's financial needs, courts must speculate and sometimes prescribe how a woman should use her property. A woman is generally not required to "use up" her property in order to support herself, but the court can decide that a more efficient use of property would produce more income and eliminate the need for maintenance.<sup>56</sup> For instance, what happens to the woman who has valuable family heirlooms, but few liquid resources and no way to adequately support herself? The need standard appears to require the woman to sell those heirlooms, despite what her husband of however many years might have earned and be capable of paying in maintenance.

The need standard also reinforces the harsh treatment women receive under rehabilitative maintenance guidelines. The problems with rehabilitation are developed fully in part B of this section,

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<sup>53</sup> *Roberts v Roberts*, 652 SW2d 325, 330 (Mo App 1983).

<sup>54</sup> *Satterfield v Satterfield*, 635 SW2d 80 (Mo App 1982).

<sup>55</sup> UMDA § 308, 9 Unif L Annot at 347 (quoted in full in note 28).

<sup>56</sup> For an example of inconsistency within one state, compare *Ruskin v Ruskin*, 153 Ariz 504, 738 P2d 779, 781 (1987), where the wife was not required to exhaust her property award in order to support herself, with *Deatherage v Deatherage*, 140 Ariz 317, 681 P2d 469, 472 (1984), where the court offset the need for maintenance against "property capable of producing income or otherwise transformed in order to provide for the reasonable needs of the spouse."

but it is important to emphasize that the Uniform Act's need standard does not avoid and indeed exacerbates all of the problems with rehabilitation. Even when courts make a finding of need and award rehabilitation under the Act, they undercompensate women by emphasizing the strictness of the need standard.

For example, Karen Novick was married for twenty-two years to a securities broker with an annual income of \$140,000. After their separation, she began to work part time in a book store. She had earned \$1,500 the previous year and borrowed \$59,000 from her parents. She continued to take care of two of the couple's three children, one of whom was mentally retarded. A Minnesota appeals court upheld a ruling that the loan from Mrs. Novick's parents was a gift and permitted a maintenance award of \$2,000 a month for two years and \$1,000 per month for an additional three years.

Although the statute lists seven factors to be considered in determining a maintenance award, the essential consideration is the financial need of the spouse receiving maintenance, and the ability to meet that need, balanced against the financial condition of the spouse providing the maintenance . . . . Karen was awarded a substantial amount of property. The child support payments she receives are adequate [though lower than the state guidelines]. She has one and a half years of college and has demonstrated an ability to hold down part time jobs.<sup>57</sup>

Mrs. Novick met the threshold need test, but because the essential consideration was financial need, she was only given enough to rehabilitate herself out of need, not to rehabilitate herself into appropriate employment. Thus, need pervades all determinations under the Uniform Act, even once courts have determined that threshold need has been established.

## B. The Rehabilitation Standard

Even without the Uniform Act's need standard, rehabilitation leaves women undercompensated. Rehabilitation often requires women to get retrained or newly educated at an age when many men will soon enjoy pension plans and retirement. Forcing women to start new jobs at advanced ages makes the rehabilitative concept appear highly inequitable.

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<sup>57</sup> *Novick v Novick*, 366 NW2d 330, 331-334 (Minn App 1985). See also *Otis v Otis*, 299 NW2d 114, 117 (Minn App 1980), stressing the importance of the need standard in justifying a low maintenance award.

Other equally important aspects of the rehabilitative scheme's harshness can be attributed to its failure to take important criteria into account. Rehabilitation looks at what the dependent spouse needs to rehabilitate herself. Essentially this is another need standard and hence the same criticisms apply. Thus, in states following the Uniform Act, courts actually use an explicit primary need standard and an implicit secondary need standard. In states that have adopted rehabilitative alimony without the Act's explicit threshold need test, courts must still find that need is established before considering a plethora of other relevant factors.<sup>58</sup>

As it stands, the only recognition of the standard of living sustained during the marriage is captured in the concept of allowing the wife to find "suitable" employment. However, the court's view of what is "suitable" often bears no relation to the couple's station in life at the time of divorce, or to the wife's contributions in establishing that position.<sup>59</sup> In addition to being intuitively fair, factors such as the woman's contribution, the time spent raising children and the relative earning capabilities are often explicitly listed in the statutes,<sup>60</sup> and yet are regularly ignored.

The problems with rehabilitation are not limited to the small awards milked out of the implicit need test, however. The rehabilitative standard operates as an incentive for a woman to avoid economic self-reliance during marriage and just after separation. A

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<sup>58</sup> See, for example, *Wilhelm*, 688 SW2d 381 (disregarding the length of the marriage); *Otis*, 299 NW2d 114 (disregarding the wife's contribution to the husband's career and the husband's ability to pay); *Shurtliff v Shurtliff*, 112 Idaho 1031, 739 P2d 330 (1987) (disregarding the contribution of the woman in the home, despite the fact that her husband did not want her to work or go to school).

Some courts, however, have tried to consider other factors in conjunction with rehabilitation. See *Kulakowski v Kulakowski*, 191 NJ Super 609, 468 A2d 733 (1983) (considering the woman's contribution to the man's career); *Hanson v Hanson*, 378 NW2d 28 (Minn App 1985) (considering the man's ability to pay when he went to Taiwan to find a wife, found one, brought her back to this country and proceeded to divorce her less than two years later).

<sup>59</sup> See, for example, *Otis*, 299 NW2d 114. Mr. Otis earned \$120,000 a year, plus bonuses. Mrs. Otis had entertained extensively for her husband's company and even had been interviewed for her husband's last promotion. *Id.* at 118. Because she had been an executive secretary prior to the marriage and there was testimony that after a few years of reintegration, she should be able to earn between \$12,000 and \$18,000 a year, she was awarded only an average of \$1,500 a month for four years. *Id.* at 115. The husband's ability to pay more was expressly rejected as a criterion to be considered. *Id.* at 117. Neither did the court consider the nature of her contribution to the marriage, her expectation of a relatively high standard of living, or what careers besides that of executive secretary she might choose for herself.

<sup>60</sup> See, for example, New York (NY Dom Rel Law § 236(B)(6)(a) (McKinney 1986)), Florida (Fla Stat § 61.08(2) (1986)), and Pennsylvania (23 Pa Stat § 501(a)(2) (Purdon 1980)).

woman who has worked outside the home and raised the children during the marriage is awarded less than a woman who only raised the children.<sup>61</sup> The woman who has worked outside the home has the highest chance of being denied all maintenance and the full-time housewife has the highest chance of getting permanent alimony or a substantial rehabilitative award.<sup>62</sup> The working woman probably has relied less on her husband's earning potential than her homemaker counterpart, but the smaller amount of compensation she receives is often highly disproportionate to her actual ability to achieve financial independence. Courts do not look to the degree to which a woman's demonstrated earning ability actually enhances her ability to provide for herself appropriately. The analysis often stops when a court sees that the woman can earn anything at all.<sup>63</sup>

The cases reflect this problem. A woman who has the wherewithal to establish an IRA for herself is seen as less deserving than the woman who lacks such financial resources.<sup>64</sup> Women who are lucky enough to be able to rely on their parents in the desperate times right after the separation are penalized for so doing.<sup>65</sup> Thus, maintenance awards based on need encourage spouses to appear as helpless and dependent as possible up until the time that the award is made. This incentive undermines the theoretical purpose of rehabilitative alimony — to encourage women to become self-sufficient and not to rely on the traditional notions of male support.

In addition, the rehabilitative maintenance standard has been extremely difficult to apply. The standard definition is "the time necessary to acquire sufficient education or training to find appropriate employment."<sup>66</sup> "Sufficient" education or training and "appropriate" employment are very ambiguous terms, subject to a great deal of inconsistent application by the courts. "Appropriate" can mean very different things to different judges and the woman's desires are often completely disregarded.

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<sup>61</sup> See, for example, *Snell v Snell*, 205 Mont 359, 668 P2d 238 (1983).

<sup>62</sup> Other commentators' data support this. In McLindon's study, 45% of the housewives, but only 20% of the working women received alimony awards in the 1980's. McLindon, 21 Family L Q at 363 (cited in note 2). In marriages that lasted more than 10 years, Weitzman found housewives more than twice as likely as working women to be awarded maintenance. Weitzman, *The Divorce Revolution* at 176 (cited in note 4).

<sup>63</sup> See *Manbeck v Manbeck*, 339 Pa Super 493, 498 A2d 748 (1985); *Wilhelm*, 688 SW2d 381; *Otis*, 299 NW2d 114 (Minn 1980); *Novick*, 366 NW2d 330.

<sup>64</sup> *In Re Marriage of Donovan*, 122 Ill App 3d 803, 462 NE2d 9, 12 (1984).

<sup>65</sup> See *Cannon v Cannon*, 723 P2d 951 (Mont 1986).

<sup>66</sup> UMDA § 308(b)(2), 9 Unif L Annot 348 (cited in note 11).

For instance, an Idaho court allowed a woman to seek a five-year microbiology degree,<sup>67</sup> but a New York court overturned a lower court award that would have allowed a woman to pursue a medical degree. The New York appellate court found that "appropriate" employment meant a \$10,000 a year job that the woman could get at the time, not a medical degree that she desired but that would have taken several years to secure.<sup>68</sup>

When courts do look at what women want, they often fail to understand critical differences between choices made while married and desires once divorced. One court overturned as excessive a lower court's award to a college-educated mother who had a job as a typist during the marriage. The court noted that her salary appeared modest but that she chose to retain her present job for personal reasons.<sup>69</sup> This determination fails to recognize that a woman, particularly the mother of a small child, might "choose" a lower paying job while married. If she does, and subsequently gets divorced in a rehabilitative maintenance jurisdiction, a court will penalize her for this choice by assuming that she already has appropriate employment. A woman who chooses a high powered career despite her motherhood will fare better because she has "chosen" lucrative employment. Yet, the factors that go into choosing employment will be very different if there is another breadwinner in the household. Satisfaction with a lower paying job when another spouse is earning money concurrently is not likely to translate into satisfaction with a lower paying job when that spouse is no longer contributing. Courts simply ignore the difference between appropriate employment in single parent households and appropriate employment in two income households.<sup>70</sup>

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<sup>67</sup> *Shurtliff*, 739 P2d at 333-34 (Shepard dissenting).

<sup>68</sup> *Morgan v Morgan*, 52 NY2d 804, 383 NYS2d 343 (1976). Other examples abound. A Minnesota appellate court found secretarial work to be appropriate work for a corporate vice-president's wife. The wife's potential desire to pursue a different career was not considered by the court. *Otis*, 299 NW2d at 115. A New York court ordered a lower court to award the reasonable cost of the woman's post-graduate education, but as the dissent pointed out, the record was devoid of any indication that the woman expressed a desire to return to school: "[I]f [this woman] refuses to return to school, is she left without a remedy?" *O'Brien v O'Brien*, 106 App Div 2d 223, 485 NYS2d 548, 559, 560 (Thompson concurring in part and dissenting in part).

<sup>69</sup> *Shanahan v Shanahan*, 80 App Div 2d 738, 437 NYS2d 169, 170 (1981).

<sup>70</sup> This problem may be exacerbated by traditional notions of appropriate spousal earning levels. One study shows 30% of female magazine readers suggesting they would turn down a job that paid more than their husband earned. In a different study, 25.7% of white men and 38.8% of black men said men should feel inadequate if their wives earn more than they do. Reskin and Hartman, *Women's Work* at 69 (cited in note 18). In light of this strong social pressure for women to take lower paying jobs while married in order not to offend

This problem is compounded by the parental demands in a divorced, one-parent household. Inescapable parental duties, such as staying home with a sick child or picking up children from day-care, can no longer be split between two wage-earners. Simultaneously, the income from the non-custodial parent's earnings and the economies of scale involved in sharing basic necessities are gone. Thus, the need for a higher income increases as the ability to take a more demanding job decreases.

In sum, the rehabilitative standard prohibits courts from considering most of the factors that statutes list as relevant because the rehabilitation concept effectively only looks at what a woman needs. If need is not apparent, other factors are ignored. The standard also excludes any consideration of what women may choose to do and denies the real differences between "appropriate" income in two and one parent households. Rehabilitation encourages women to become either completely dependent on their spouses, thus making need obvious, or in contrast, completely independent, thus making need truly non-existent. Encouraging women to exist at either of these two extremes destroys any theoretically desirable notion of equitably sharing inevitable marital sacrifices.

### C. Permanent Alimony

Permanent alimony, based on a duty to support, attempts to reduce the harshness of the need standard and is still awarded on occasion.<sup>71</sup> Unlike either the Uniform Act or the rehabilitative standard, permanent alimony addresses a woman's future security interest by providing her with lifelong support. This is most important in long marriages where a woman's contributions to the marriage are likely to be quite significant, her foregone opportunities are likely to be numerous, and her ability to re-enter the work force is likely to be particularly difficult. After a twenty year marriage, both parties have a reasonable expectation of continuing to live at the standard that they have jointly worked to establish.

However, the rationale for permanent alimony is outdated and its implementation is infeasible. The idea that men have an automatic responsibility to support women is rooted in a concept of female dependency destructive to gender equality. Men as men should not have a duty to support the women they marry. Such a

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notions of masculinity, it hardly seems correct to presume that lower paying jobs are appropriate or would be chosen after these women are divorced.

<sup>71</sup> See section II.C.4.

duty assumes that our genders, not our voluntary agreements, prescribe our obligations. This flaw is most obvious when one considers how inappropriate permanent alimony seems at the end of a short term marriage or after a marriage where both spouses have worked outside the home in comparable jobs and have contributed to the marriage in exactly the same ways.

Furthermore, permanent alimony locks parties who are seeking to terminate their legal relationship into a continuing economic relationship. Ideally, maintenance or alimony awards should act as a way of settling the legal obligations, not perpetually continuing them. As mentioned in section I, on-going financial relationships with an ex-spouse, though inevitable, should be minimized to the extent that the court can compensate the dependent spouse all at once. Thus, though permanent alimony may prevent some of the hardships of a need standard, its theoretical and practical flaws make it an unacceptable alternative.

#### IV. ALTERNATIVE SOLUTIONS - THE CONTRACT PARADIGM

Many of the problems with need and rehabilitation result from the absence of any coherent concept of what alimony is or should be. One of the more appealing aspects of permanent alimony is its logical relationship to its underlying rationale, i.e., the man's obligation to support. But the support obligation rationale is incompatible with modern notions of gender roles. Two fairly recent and important economic commentaries that have tried to refine the modern concept of alimony have focused on contract as the appropriate paradigm for awarding maintenance.

In a 1978 article, Elisabeth Landes presented a description and economic model for alimony, suggesting that alimony compensates a woman for her foregone opportunities—the cost she incurred by investing in the marriage.<sup>72</sup> Landes makes several important points regarding the specialization of labor within the marriage and the need to compensate for that specialization. However, some of her assumptions are flawed, and because she suggests measuring foregone opportunities in terms of potential future income, she does not accurately calculate the costs women have incurred in the past.

Landes assumes that the degree of a woman's household specialization correlates positively with the likelihood of a permanent

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<sup>72</sup> Elisabeth M. Landes, *Economics of Alimony*, 7 J Legal Stud 35, 44-49 (1978).

marriage.<sup>73</sup> That is, the more likely a woman is to divorce, the less likely she is to specialize in household services. As a consequence, the length of marriage becomes relevant in calculating the extent of a woman's household contribution.

Of course, the extent of contribution is a function of the length of marriage, simply because in a longer marriage the woman has been contributing for more years. Yet, contrary to Landes's contention, this is not true on a per year basis. Landes does not support her assumption that the extent of a woman's household contribution correlates negatively with the likelihood of divorce. She offers two assertions that she claims are consistent with the assumption. First, she notes that divorcing couples have fewer children, which implies a reduced level of household specialization. Second, she contends that black women are more likely than white women to participate in the labor force because they recognize that their chances of divorce are higher.<sup>74</sup>

That divorced couples have fewer children and that black women participate more in the labor market are certainly empirical facts, but they hardly prove that the amount a woman invests in a marriage is contingent on her reasonable expectation of divorce. One reason divorced couples may have fewer children is that they get divorced before they have more children. This does not necessarily show that divorced couples chose not to invest as highly in household specialization because their chances of divorce were high. The woman's household specialization may be just as great in a two child marriage as it is in a six child marriage. What determines a woman's level of household specialization is a function of numerous economic, personal, religious, and cultural factors that may have nothing to do with the likelihood of her divorce.

This point is made even more clear in the case of black women. Black women work because, on the whole, black families are poor and black women need to earn money.<sup>75</sup> There is no proof that black women work because they realize that their chances of divorce are high. Landes's desire to compensate women for the amount of their investment in a marriage is appropriate, but the assumption that a woman's chances of getting divorced influence her decision to invest in the marriage is unfounded.

A more fundamental problem with Landes's analysis is her

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<sup>73</sup> Id at 44.

<sup>74</sup> Id.

<sup>75</sup> See Bureau of the Census, *Statistical Abstract of the United States* 429-434, (GPO, 103d ed 1982-83).

methodology for evaluating opportunity costs. While the idea of trying to compensate women for the opportunity costs incurred is very appealing, it is almost impossible to truly measure foregone opportunities. There is simply no way to know what a woman's potential life might have been like had she not provided household labor for ten, twenty or thirty years.

Landes suggests looking at the difference between the earning capacity of the divorcing wife and that of the divorcing husband as a measure of loss of the woman's earning potential.<sup>76</sup> Using this difference as a proxy for foregone opportunity is probably valid in theory. The problem is that in the frequent instances when the husband-wife earnings gap is very large, Landes suggests looking to the future for a more accurate assessment.<sup>77</sup> For instance, she suggests that a woman's re-marriage or change of job should alter the amount of alimony to which she is entitled.<sup>78</sup> Yet, if alimony is rooted in the idea of what she gave up in the past, it is hard to see why the future should matter. A true evaluation of foregone opportunities should focus on the past. Under Landes's paradigm, a woman will be penalized (by not getting alimony) for doing well after the marriage has dissolved, even though performance after the marriage has little to do with the opportunities she forewent in the past.

Landes's model also fails to take into account the nature or duration of the woman's contribution. For instance, it does not compensate a woman who paid for her husband's professional education and then left the work force. The woman who paid for her husband's legal training during their three year marriage and got divorced shortly thereafter is not treated any differently than the woman who contributed nothing to her husband's education. Heavy investments in short term marriages are severely undercompensated.

Thus, while Landes's theory remains attractive and her recognition of the importance of household specialization is very important, the mechanism she offers for measuring the cost of household specialization is inadequate. It is based on several flawed assumptions, it does not compensate for heavy short-term investments, and it measures past costs in terms of the future potential of both husband and wife, thus leaving the courts with a standard that is highly speculative, discretionary and difficult to enforce.

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<sup>76</sup> Landes, 7 J Legal Stud at 50 (cited in note 71).

<sup>77</sup> *Id.* at 51.

<sup>78</sup> *Id.*

More recently, Lloyd Cohen has written that women fare less well than men in divorce proceedings because women depreciate more readily in the marriage market than do men.<sup>79</sup> Alimony, he argues, should theoretically try to compensate for the fact that women have a harder time re-contracting. He suggests, however, that legal determinations cannot ever fully capture the depreciation factor and emphasizes the need to rely on informal and social sanctions and the "good moral sense of the parties."<sup>80</sup>

Cohen may be right in asserting that the law is not capable of addressing a problem of female depreciation in the marriage market, but his basic thesis is flawed. Cohen assumes that because women do not re-marry as much as men do, women depreciate more.<sup>81</sup> Yet many women, particularly divorced women, may choose to remain single. The absence of re-marriage may reflect not depreciation but conscious choices to withdraw from the marriage market.

Cohen also assumes that spousal compensation should act as sustenance until a woman re-marries. This is a limited, anachronistic view of alimony. The role of alimony is not to sustain a woman until she can find a new person with whom to enter into a marriage agreement. It is to compensate a woman for the economic hardship incurred because of the joint marital decisions that precluded her from adequately providing for her own financial well-being. It is with this compensation rationale in mind that the following solution is offered.

## V. A FORMULA FOR SPOUSAL COMPENSATION

Both Landes and Cohen rely on some notion of contract; the following proposed model expands on that notion. Marriage is a unique contract. Rarely are there written terms and the expected length of the relationship means that assigned responsibilities and expectations can change drastically over time. Still, economic relationships are an undeniable part of most marriages. Contract models may not be a perfect way of viewing marriage, but contract remedies can provide a helpful and equitable paradigm to solve the economic problems of marriage dissolution.

One criticism of the contract paradigm is that contract reme-

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<sup>79</sup> Lloyd Cohen, *Marriage, Divorce, and Quasi Rents; or, "I Gave Him the Best Years of My Life"*, 16 J Legal Stud 267, 278 (1987).

<sup>80</sup> *Id* at 303.

<sup>81</sup> Cohen never fully describes what he means by depreciation, but the mere use of the word conveys a disturbing perspective.

dies involve evaluating breach and breach has traditionally been associated with fault. Modern divorce law has recognized that divorce is not necessarily anyone's fault, and few would want to reintroduce fault considerations. It should be emphasized, however, that the concept of fault has never been a legally recognized basis for contract damages.<sup>82</sup> In fact, many argue that contracts can and should be broken when it is efficient to do so, without one party assuming the blame.<sup>83</sup> Whether one accepts the notion of a blameless breach in pure contract theory or not, however, the proposed pseudo-contract model emphatically does not involve fault.

#### A. Costs and Benefits of Marriage

As discussed in section I, monetary awards are necessary because the courts do not define economic security as property and hence do not equitably divide it at marriage dissolution. Neither of the current terms for monetary compensation following a divorce—alimony and maintenance—appropriately describes what this comment proposes: spousal compensation. The compensation called for in this comment is awarded separately and in addition to an equitable division of marital property. It recognizes that the nature of the marital agreement includes an expectation of future economic security. By failing to evaluate that security interest, courts have failed to consider one of the key terms of the marital contract.

The proposed model reimburses a woman for the intangible benefits she is precluded from receiving because of divorce. When a marriage stays intact, the intangible benefit, i.e., future security, represents the payment or consideration from husband to wife, for the wife's contribution to the marriage. This contribution, the consideration from wife to husband, includes household chores, but it also involves the value of the union itself. The husband gained

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<sup>82</sup> One indication of this is that contract remedies do not include punitive damages.

<sup>83</sup> See, for example, Richard A. Posner, *Economic Analysis Of Law* 88-89, (Little, Brown, 2d ed 1977). Some might argue that breaching a promise of marital fidelity cannot be morally neutral and that therefore the faithful spouse (i.e., the non-breaching party) should be awarded more compensation. Not all marriages involve promises of fidelity, however, and infidelity does not inevitably dissolve the marital contract. Thus, the courts need not necessarily evaluate how the contract was breached or who breached. The unavoidable problems attendant upon assigning fault in divorce proceedings are well documented. See Max Rheinstein, *Marriage, Stability, Divorce and the Law* 62-63 (Chicago, 1973) and Clark, *Domestic Relations* at 419 (cited in note 8). The divorce proceeding should only be concerned with equitably resolving the economic hardship caused by the dissolved economic agreement.

from the existence of the marriage; the woman needs to be compensated for that contribution.

To a certain extent, both men and women gain from the existence of the marriage itself. However, for men, and not for women, that gain often translates into measurable economic benefit. Solomon Polacheck has found that "wages at any point in time are related to the amount and continuity of *past as well as expected* future labor market experience."<sup>84</sup> He also found that although never-married men and women have roughly the same labor market participation rate, married men have by far the highest participation rate and married women the lowest.<sup>85</sup> Thus, because it is likely that a married man will have worked more in the past and will work more in the future, he will earn more money than single men, single women, and married women. Similarly, of course, married women will earn the least of all.

Another study found that marriage increased the earnings of professional men by 12 percent, but had no effect on the earnings of professional women.<sup>86</sup> Thus, a man's benefit from marriage includes measurable market compensation in addition to any gain in unpaid household work. Whether this gain is the result of sex discrimination or women's choices to participate less in the paid labor force, the relevant point for this analysis is that part of what a married woman contributes and part of what future security compensates her for is the gain her husband has realized and the gain that she has not realized.<sup>87</sup> The proposed model uses specific percentages to value a woman's security interest. Before evaluating these percentages in detail, it will be helpful to explore the theory behind the detailed evaluation.

A wife's equitable share of economic security will depend both on the total amount her husband has earned and on the portion of that income the wife has earned. The proposed model assumes that the more a woman has worked in the home, the more marriage-based security she has earned. If a woman has never worked

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<sup>84</sup> Solomon William Polacheck, *Women in the Economy: Perspectives on Gender Inequality* in US Commission on Civil Rights, *Comparable Worth: Issue for the 80's* 34, 43 (1984)(emphasis in original).

<sup>85</sup> Id at 42.

<sup>86</sup> Paul Osterman, *Sex Discrimination in Professional Employment: A Case Study*, 32 *Indus & Labor Rel Rev* 451, 458 (1979).

<sup>87</sup> For a discussion of the choice/discrimination debate see id at 458-462. Even if one adopts a choice theory, a married woman's choice to stay home should be seen as a joint decision. Since the husband is part of the economic unit that made the decision, he should be equally responsible for any negative economic consequences of that choice.

outside the home, it is logical to assume that she has done more household work, invested more in terms of foregone opportunities, relied more on the marriage and thereby earned more of the security her husband can provide than the woman who has also been a wage earner. The full-time homemaker is thus entitled to more compensation.

This calculus relies heavily on the actual numbers of hours a woman has spent working in the home; it does not directly capture the value the woman gave to the union itself. Still, it is a reasonable approximation. Measuring a woman's contribution involves evaluating how the two parties in question have valued the woman's work. In dividing labor, couples presumably try to maximize the value of the union. If both spouses work outside the home and share equally in the household tasks, the model assumes that they have received equal economic benefit from the union. If the woman has disproportionately contributed to the household, the model assumes that the man, to that point, has received more economic benefit from the union. He has reaped the economic benefits that married men enjoy in the wage market and his wife has suffered and will continue to suffer the economic hardship that the wage market imposes on married women. If the division of labor is to be value-maximizing for both of them, it must be assumed that much of the value of the union for the woman was to come in the economic security she had been earning. Spousal compensation will ensure that upon divorce the woman will get paid for the benefit that the couple chose for her to defer.

Capturing the future security she has earned is problematic, however. Her interest is a function of what her husband would be capable of providing if they continued to share all wealth. But, as has been discussed, the problems with looking to the future are paramount. Thus, the proposed model looks backward to find how much future security the wife earned each year during the marriage.<sup>88</sup>

A contrast with the Landes approach is illustrative. Landes proposes looking to the future as a way of approximating what the woman gave up in the past. This model looks to the past to approximate what the woman has earned in terms of the future. The proposed model does not look at what the woman gave up, but at the security that she earned while working for her husband in the

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<sup>88</sup> The ordinary remedy for a contract breach is expectation damages, but it is unrealistic in a divorce setting to attempt to compensate a woman to the extent of her true expectations, without impoverishing the man.

home. The amount of security the woman has earned, and hence the amount of unpaid compensation she is entitled to at divorce, is a function of what her husband was earning while she was working for him.

This comment's formulaic proposal can be seen as part of the effort to come up with a legal definition of marriage that incorporates modern theories of gender roles without denying the modern reality of women's sacrifices. The theoretical imperfections inherent in strict formulas often make them unappealing to legal scholars. Yet, it is clear from the post-divorce impoverishment of women and children that judicial discretion is an unacceptable alternative to theoretical imperfection. Furthermore, courts have already used formulas in another area of family law, child-support.<sup>89</sup> Judges and legislatures do not pretend that child-support formulas are perfect, but formulas are used because they are relatively successful at alleviating much of the economic hardship that divorce imposes on children. The exact figures in this model may need to be refined by an accountant or economist, but the basic structure, rooted in contract theory, provides an equitable and clear way to remedy the economic damage incurred at marriage dissolution.

## B. The Proposed Model

### 1. *Restitution.*

As a preliminary matter, all courts should evaluate the degree to which the dependent spouse has monetarily enriched the other spouse. The wife should be compensated automatically for her monetary contribution to her husband because he has been enriched at her expense. This restitution remedy, where appropriate, should be given regardless of length of marriage, number of children, or division of labor within the marriage. The most straightforward example of this would arise when a wife paid for all or part of her husband's education. If the wife contributed \$20,000 to her husband's education, she should, at an absolute minimum, be awarded the present value at the time of divorce of \$20,000.<sup>90</sup> Sev-

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<sup>89</sup> See Caleb Foot, Robert J. Lévy and Frank E. Sander, *Cases and Materials on Family Law* 702-704 (Little, Brown, 1985).

<sup>90</sup> One court has commented that "[i]t is only fair that [the wife] be compensated for her costs and foregone opportunities resulting from her support of [her husband]." *In Re Marriage of Lundberg*, 107 Wisc 2d 1, 318 NW2d 918, 924 (1982). Mrs. Lundberg contributed \$30,000 more to the marriage than the husband did. She was awarded \$25,000. Though the Court referred to the \$25,000 as compensation for foregone opportunities, the sum actually represents only a restitution remedy and does not capture her additional opportunity

eral courts have already begun to do this,<sup>91</sup> although this proposal would legitimate and clarify use of restitution as a remedy by all courts.<sup>92</sup>

Restitution is not a complete remedy, but is rather a floor — a minimum compensation payment to be awarded in all divorce settlements if the husband has been enriched by his wife's contribution. It can only be awarded in marriages where the extent of the wife's monetary contribution is capable of determination. Where the wife made a determinable monetary contribution only, she would be entitled only to a restitution remedy. Where, as in most cases, the wife also made non-monetary contributions in the home, she would be entitled to restitution and reliance.

## 2. *Reliance.*

The far more problematic calculation is the extent of economic security earned by the wife because of her non-monetary contributions to the marriage. In the rare marriage involving only a restitution remedy, the wife does not rely on the husband's future earning potential. Her contribution is monetary. It is easy to label, quantify and return to her. In any marriage where there is a disproportionate division of household labor, or household specialization,<sup>93</sup> however, a woman relies on the security her husband can provide and she earns a future share of that security as she works in the home. The wage-earning husband owes his wife for that future security because he has not yet fully paid for the benefit he has reaped and the loss she has suffered by their joint decision to assign her more household labor.<sup>94</sup>

Because of the inherent difficulties in calculating the value of household services, the man's earnings serve as an approximation

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costs. Any tabulation of a woman's foregone opportunities should be in addition to her direct monetary outlay and not part of a restitution calculation.

<sup>91</sup> See section II.C.1.

<sup>92</sup> One court has rejected the term "unjust enrichment" for fear that the term "unjust" would re-introduce allegations of fault into divorce proceedings, yet that court instructed the lower court to consider the amount of money the wife contributed to her husband's education. *Washburn v Washburn*, 101 Wash 2d 168, 677 P2d 152, 157-159 (1984). In the future, courts need not let fears of fault determinations hinder their evaluations of how husbands are enriched at their wives' expense. If it is clear that fault is irrelevant, the term unjust enrichment is far less problematic.

<sup>93</sup> "Household specialization" is Elisabeth Landes's term for uncompensated household work. Landes, 7 J Legal Stud at 40-41 (cited in note 72).

<sup>94</sup> The model would not require that this decision be a documented, or even conscious, agreement. As long as the dependent spouse has done more household work, the court can imply a joint decision to divide labor in that way.

of the economic security owed to the woman. Assuming a value-maximizing couple, this approximation makes sense: the wife would not "give up" economic security unless the couple expected a comparable gain by the husband.

The burden of proof to establish or refute a presumption of a disproportionate division of labor could be on either party, but if the wife has to prove household specialization, the court should make it an easy burden to meet.<sup>95</sup> Evidence regarding the number of hours a day or week spent on household chores would be the appropriate means of establishing that the woman performed more labor in the household than did her husband. Once the division of labor has been established, a court could then evaluate the extent of the woman's contribution by looking at the amount of monetary compensation the woman forewent. This would require the court to evaluate the degree to which the woman worked outside the home.

The proposed formula involves three general categories. The full-time outside worker (40 hours or more per week) who also performed most of the household chores; the part-time outside worker, who most probably spent more time on household chores than the full-time worker; and the full-time housewife, who presumably did the most household work. Each woman would be awarded a percentage of her husband's earnings during the years in which she disproportionately contributed to the household.<sup>96</sup> This comment suggests the following figures: for the full-time worker, 10 percent of her husband's income for all the years in which she earned money outside the home; for the full-time housewife, 30 percent of her husband's earnings for the years in which she stayed at home;<sup>97</sup> for the part-time worker, 20 percent if she

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<sup>95</sup> There is certainly a valid argument that, given the status quo in the division of household labor, a certain division should be presumed and it would be the husband's burden to refute the presumption of disproportionate labor division. Most women do much more household labor than do their husbands. Assuming the existence of a disproportionate division unless the man can prove that he contributed equally may utilize judicial resources more efficiently.

<sup>96</sup> Data from U.S. time-budget studies lend credence to these categories. In 1975-76, married women holding full-time jobs spent 25 hours a week on work in the household. Married men working full time spent 13 hours a week. Married, part-time female wage-earners spent 33 hours working in the home and full-time housewives averaged 41 hours of work in the home. June O'Neill, *Earning Differentials: Empirical Evidence and Causes*, in Gunther Schmid and Renate Weitzel, eds, *Sex Discrimination and Equal Opportunity: The Labor Market and Employment Policy* 69, 75 (St. Martin's Press, 1984).

<sup>97</sup> The ceiling at 30 percent, not 50 percent, is explained by the fact that a woman has already been compensated to a certain extent with the food, clothing and shelter that her husband has provided during the course of the marriage. Again, these figures may be more

worked twenty hours a week, or proportionally more or less than 20 percent depending on the actual number of hours she worked. A woman who worked thirty hours a week outside the home would be awarded 15 percent of her husband's earnings for those years, and a woman who worked ten hours a week would be awarded 25 percent of her husband's earnings.

It is important to emphasize that the reliance remedy does not compensate the woman for the fair market value of her services; her compensation is measured in terms of her husband's earnings because she worked for nothing in expectation of her husband's future security.<sup>98</sup> The husband's earnings were part of the marriage contract. In this sense, the economic commitments of marriage provide dependent spouses with a pension plan. What they pay in is their services. What they get out, however, is not the fair market value of those services, because the market does not value those services appropriately.<sup>99</sup> A woman's future benefits are determined, instead, by what her husband can provide. By failing to capture the security interest for which dependent spouses work, contemporary alimony and maintenance provisions rob women of the pension they earn.

In theory, all maintenance awards should be due when they are determined or a very short time thereafter. The monthly payment practice is rooted in the concept of support, not compensation. Once maintenance is viewed as compensation for a failed contract, the amount owed should be viewed as any other debt due on demand. Of course, if the maintenance award is sizable, one-time payments will not be feasible and the court will need to determine a payment schedule that is fair to both parties.<sup>100</sup> Whatever the payment schedule, however, the full debt should be incurred at the time of the award. No future contingency (re-marriage, co-habitation) should alter the amount of the payment because it is a debt owed for services given. The amount of maintenance has nothing to do with the future, so the future should not effect the award.

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or less appropriate in different situations. But workable fixed approximations will end up being far more equitable than the judicial discretion inherent in case-by-case adjudication.

<sup>98</sup> There are some marital arrangements that will not fall neatly into this model. For instance, if the husband has paid his wife all along, by giving her money that she keeps separately and does not spend on family necessities and expenses, this money would have to be subtracted from the formula determination.

<sup>99</sup> See section II.B.

<sup>100</sup> In making the payment schedule, the courts must recognize that the standard of living for both parties will go down. It is cheaper to live together than apart, and both parties must bear this overall reduction in living standard.

### 3. Examples.

Hypothetical examples may help illustrate how the calculations would work. Mrs. A contributed \$4,000 to her husband's medical education. After her husband was through with school, they both worked at full time jobs for three years, though she did more of the household labor because Dr. A spent more hours in the work place than she did. The couple divorced after these three years, having been married for eight years. Under a rehabilitative regime, Mrs. A might get the money she contributed to her husband's education<sup>101</sup>, but that is far from certain and she would definitely not get anything in addition. Under the proposed regime, she would get the present value of the \$4,000 plus 10 percent of Dr. A's income for the three years that he earned it. If Mrs. A also had done more household work during the years her husband was in school, there would be no husband's income for those years from which she would be entitled to 10 percent. In that case, the formula would determine his average annual earning level for the course of the marriage and give her 10 percent of that for the number of years she worked full-time while he was a student. She is entitled to the 10 percent reliance remedy for those years because she was working in the home in expectation of what he could provide.

Mrs. B did not contribute anything to her husband's education. During the marriage, Mr. B moved up through the management positions at a bank. For the first five years of the marriage, both spouses worked full-time, though Mrs. B performed more of the household work. When their first child was born, Mrs. B stopped wage-earning work completely. After five years at home, however, she returned to work on a part-time basis, and worked twenty hours a week for five years. Under the Uniform Act's need standard, Mrs. B might very well get no monetary compensation.<sup>102</sup> Under a rehabilitative regime, she would probably get about \$650 a month for several years.<sup>103</sup> Under the proposed regime, Mrs. B would get the present value of 10 percent of her husband's earn-

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<sup>101</sup> See, for example, *In Re Marriage of Lundberg*, 107 Wisc 2d 1, 318 NW2d 918, 924 (1982).

<sup>102</sup> See, for example, *Roberts v Roberts*, 652 SW2d 325 (Mo App 1983).

<sup>103</sup> See, for example, *In Re Marriage of Pekar*, 173 Cal App 3d 367, 369, 218 Cal Rptr 823 (1985). Of course, if Mr. B's income was not substantial enough, Mrs. B could get even less than \$650 a month. On the other hand, a more substantial salary on Mr. B's part would not mean a greater award. Under a rehabilitative regime, a dependent spouse is given what she needs, without regard to how much more than that the other spouse can comfortably pay.

ings for the years in which they both worked full-time, 30 percent of her husband's earnings for the years in which she was not working outside the home, and 20 percent of her husband's earnings for the years in which she worked part-time. All of this would be in addition to child support payments.

Finally, suppose that Mrs. C was married to Mr. C for thirty years at the time of their divorce. After working and contributing \$4,000 to her husband's education, she left the paid work force and worked in the home, raising three children. Under a rehabilitative regime, Mrs. C would probably get maintenance to support her until her children had reached majority, and then two to three years of maintenance for her to find suitable employment.<sup>104</sup> Her contribution to her husband's education would probably be irrelevant, as would any expectation of future security to which she might reasonably feel entitled after thirty years of marriage. Under the proposed model, Mrs. C would automatically get the present value of the \$4,000 she contributed to her husband's education. In addition, she would be entitled to the present value of 30 percent of what her husband had earned during all the years that she stayed in the home.

In Mrs. C's case, the court might have to do an additional calculation. It is possible that this formula would require the husband to pay far more than the wife's reasonable expectation of security because the marriage lasted long enough for her to have already consumed a significant amount of security. In that case, courts would need to look to the future for an alternative figure. The court should determine 50 percent of all of the man's expected income for the rest of his working life (assuming an appropriate rise in his current salary to age sixty-five or the likely age of retirement). Mrs. C would be entitled to that figure plus half of the marital property, including pension plans. If this alternative figure is lower than the standard formula, it should be awarded instead. Theoretically, one needs to account for consumed security in every case; thus, this calculation should be done in each instance. As a practical matter, however, the alternative figure will only be lower in a marriage of significant duration.<sup>105</sup>

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<sup>104</sup> See, for example, *Dahlberg v Dahlberg*, 358 NW2d 76, 82 (Minn App 1984).

<sup>105</sup> In determining this future calculation, a court should be particularly wary of husbands' assertions that they were planning a career change which would reduce their future earnings level. If the court found such testimony credible, it could compensate the woman for the future security she expected by awarding her a disproportionate amount of marital property.

### C. Advantages of the Proposed Model

The proposed model does not simply give women more money; it eliminates many of the current problems with the rehabilitation standard. First, the contract paradigm eliminates the problems involved in defining the dependent spouse's "choice," which were so recurrent in rehabilitative maintenance cases. It does not and should not matter whether the woman chooses to pursue a more or less high paying job. She is compensated for the amount that she enriched her husband and that amount is measured in terms of his salary or other compensation. Second, the proposed model does not ordinarily require speculating about the future. Since the award is determined by looking at behavior during the marriage, it does not matter whether the dependent spouse wants to pursue an education after the divorce or when she decides what she wants to do.

The reliance paradigm also eliminates many of the perverse incentives that rehabilitative alimony creates. Women who work at all get less under a rehabilitative regime because they are seen as less needy. Under this formula, a woman is compensated for what she has earned while in the home instead of in the work-place; there are no disincentives to work.<sup>106</sup> If a woman chooses to go back to work, she has spent less time earning security and requires less compensation than a woman who stayed at home the whole time. Still, one need not have left the work force completely in order to be entitled to a reliance remedy. The working woman may have earned security by foregoing opportunities available to her during the time she stayed at home or the times in which she subordinated her career. Thus, the formula incorporates the foregone opportunity theory used by both courts and commentators.

Finally, the formula eliminates the need for permanent alimony, which is essentially an expectation remedy. As has been discussed, expectation is inappropriate because, like a rehabilitation award, it requires speculative evaluations about the future and it perpetuates a relationship that the two parties are trying to dis-

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<sup>106</sup> Because the percentage of her husband's earnings that a woman is entitled to depends on the extent to which she forewent paid wages herself, this formula treats the woman who did extensive volunteer work the same as the woman who spent all her time in the home. By foregoing their own careers, both women were making contributions to the marriage and hence need to be compensated. The woman who does volunteer work usually enhances the social and professional status of her husband. He benefits from her work in the local charity just as he would benefit from her work in the home, and she is doing the unpaid work in expectation of what he can provide in the future.

solve. The courts' continued use of expectation may be explained by the apparent harshness of the rehabilitative scheme, particularly in long-term marriages<sup>107</sup> When permanent alimony is awarded, it is usually justified as the only equitable solution.

Such a retreat to discretionary equity is unnecessary under the proposed model. A woman's reasonable expectation of economic security grows as the marriage grows. As the example of Mrs. C shows, an equitable solution is ensured under the proposed formula because the longer a woman is married, the larger her compensation award and the closer that award is to full economic security.

### CONCLUSION

The proposed model should be adopted by legislatures to help alleviate the hardships created when marriage's economic promises are broken. Existing guidelines do not work. The need standard, explicit in the Uniform Act and implicit in the concept of rehabilitative maintenance, denies women any compensation for what they have contributed, what they have foregone and how much they have relied. It creates perverse incentives for women to refrain from self-sufficiency while married and to forego any notion of career advancement. It also requires courts to focus on the future and to analyze and define what a dependent spouse can choose and what she should consider adequate.

The proposed formula focuses on the past. It incorporates the contributions of dependent spouses beyond the contribution that entitles women to half of the marital property. Marriage almost always involves economic commitment, contribution, reliance, and expectation. When the law ignores the extent of the economic contract that marriage entails, it imposes severe hardships on dependent spouses. Contract remedy paradigms such as this one provide guidelines that help alleviate those hardships.

Women's contributions may continue to be undervalued and, though a contract model encourages payment in full at the time of the award, if continuing payments are necessary, nothing insures that the non-dependent spouse will pay what he owes. Still, the proposed remedy provides a theoretical basis and a practical framework for properly considering the scope of the damage rendered by the dissolution of the economic agreements implicit in marriage.

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<sup>107</sup> See section II.C.4.

