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IN SEARCH OF A THEORY OF ALIMONY

John C. Sheldon*

Nancy Diesel Mills**

Foreword

It took us a year to research and write this article. As we were putting the finishing touches on our final draft, however, the Maine Supreme Judicial Court issued its decision in Henriksen v. Cameron. That decision at once legitimized an ex-spouse’s damage suit against the other ex-spouse for an interspousal tort, and rendered our discussion of the same subject moot.

Henriksen held principally that res judicata does not prevent one ex-spouse from suing the other for personal injury the latter caused during the marriage. Such a suit is cognizable independent of the divorce. In the process, the majority of the court decided that alimony cannot be used to compensate a spouse for such injury. A dissent argued that it can.

We agree with the majority’s position on alimony, but we dispute their reasoning. For that reason, we have decided not to revise the body of our Article, and we have left in place the arguments that the majority in Henriksen mooted. Instead, we use those arguments as a basis for a separate comment on Henriksen that appears after the conclusion of the main article.

I. INTRODUCTION

Maine’s alimony statute is full of good advice. It directs judges who hear requests for alimony to “consider” all kinds of things, from the parties’ individual wealth to their individual health, from their respective ages to their respective wages, from the length of their marriage to the strength of their educations. And, as if to subdue

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1. In this Article, the term “alimony” refers to post-divorce payments by one ex-spouse for the support of the other ex-spouse. The term is therefore intended as a synonym for “maintenance,” “support,” and “support and maintenance,” to the extent that those terms refer to financial support paid after divorce. See Chester G. Vernier and John B. Hurlbut, The Historical Background of Alimony Law and its Present Statutory Structure, 6 LAW AND CONTEMP. PROBS. 197, 202 (1939).
   1. Factors. The court shall consider the following factors when determining an award of alimony:
      A. The length of the marriage;
      B. The ability of each party to pay;
      C. The age of each party;
      D. The employment history and employment potential of each party;
any doubt about the breadth of this assignment, the statute then invites judges to take into account "any other factors the court considers appropriate." In short, the statute grants judges almost unlimited discretion in awarding alimony.

Power notwithstanding, however, anyone who reads the statute looking for a reason for awarding alimony will search in vain. Having effusively advised judges on what to consider in contemplating an award of alimony, the statute is silent on the greater issue: why award alimony at all? What theoretical purpose is alimony supposed to serve; for what theoretical end is alimony a means?

The Maine Legislature's failure to define the purpose of alimony shifts the obligation to do so to the courts. By giving trial judges broad discretion to award alimony while leaving unstated alimony's ultimate purpose, the alimony statute implicitly assigns judges the responsibility for discovering and articulating the justification for

E. The income history and income potential of each party;
F. The education and training of each party;
G. The provisions for retirement and health insurance benefits of each party;
H. The tax consequences of the division of marital property, including the tax consequences of the sale of the marital home, if applicable;
I. The health and disabilities of each party;
J. The tax consequences of an alimony award;
K. The contributions of either party as homemaker;
L. The contributions of either party to the education or earning potential of the other party;
M. Economic misconduct by either party resulting in the diminution of marital property or income;
N. The standard of living of the parties during the marriage; and
O. Any other factors the court considers appropriate.

2. Costs and attorney's fees. The court may order either party to pay the costs and attorney's fees of the other party in the defense or prosecution of a divorce.

3. Real Estate. The court may order any part of the obligated party's real estate and, if necessary, the rents and profits from that real estate to be assigned and set out to the other party for life.

4. Alternative to alimony. Instead of alimony, the court may order either party to pay a specific sum to the other party, as the court may direct.

5. Modification. The court, at any time, may alter or amend a decree for alimony or specific sum when it appears that justice requires it, except that a court shall not increase the alimony if the original decree prohibits an increase. In making any alteration or amendment, the court shall consider the factors listed in subsection 1.

6. Enforcement. The court may use all necessary legal provisions to enforce its decrees.

7. Limitations. This section does not limit the court, by full or partial agreement of the parties or otherwise, from awarding alimony for a limited period, from awarding alimony which may not be increased regardless of subsequent events or conditions or otherwise limiting or conditioning the alimony award in any manner or term that the court considers just.

4. Id. § 721(1)(O).

5. This problem is not unique to Maine: "[N]o one can explain convincingly who should be eligible to receive alimony, even though it remains in almost every jurisdiction." Ira Mark Ellman, The Theory of Alimony, 77 Cal. L. Rev. 1, 4-5 (1969).
their use of such power. The benefit of assigning this analysis process to judges is that a reasoned, informed consensus about the purpose of alimony ought to emerge, without the distorting influence of partisan politics. The disadvantage, on the other hand, is that the consensus will not emerge quickly or efficiently. Rather, the courts will grope and feel their way in a glacially-paced, stop-and-go, case-by-case effort to formulate social policy without appearing to legislate.

Our aim in this Article is to reduce the grooping by providing some illumination. We believe that a nationwide consensus about the purpose of alimony, in broad outline, may be emerging, and we propose here to report our interpretation of it.

As it is presently understood, the purpose of alimony is the prevention of unfairness by forcing ex-spouses to share all of the economic gains and losses that have been produced by the marriage but that are realized after the divorce.

Alimony, therefore, serves a purpose that is distinct from that served by splitting up the parties' real and personal property in the divorce order. Statutes that provide divorce courts with this latter power are, to be sure, usually designed to promote fairness between the parties. Thus, a court may award to the homemaker spouse a share of the wage earner spouse's pension in order to recognize and protect the homemaker's contribution to the marital enterprise.

However, the scope of such statutes (or the interpretation of that scope by the courts) is often too narrow, and the remedies they authorize are often too few, to do ultimate fairness to divorcing spouses in all cases. This is because there are economic consequences to a marital relationship that have nothing to do with property or that may not appear until well after the divorce court has


[L]egislatures are often unwilling or unable to be specific about the precise nature of the social or economic ills which they wish to control, the degree of control which they wish to be exerted, or precisely how the costs and burdens involved are to be borne. Instead they leave the precise formulation of administrative rules and standards to officials who are allocated substantial discretion both to make policy and to enforce that policy . . . .


9. "Courts which adhere rigidly to what they perceive to be the legal definition of marital property prevent themselves from using the equitable powers granted them in many equitable distribution statutes; their vision is too narrow." Deborah A. Batts, Remedy Refocus: In Search of Equity in "Enhanced Spouse/Other Spouse" Divorces, 63 N.Y.U. L. Rev. 751, 798 (1988).
lost the authority to distribute property. For example, the wage earner may have improved his or her own earning power during the marriage while the homemaker did not; increased earning power is not a property issue, but it is a palpable economic consequence of the marital relationship of which the homemaker cannot fairly be denied a share. Similarly, a post-divorce custodial parent's employment options may be severely limited by the very inconvenience of custody; not only is this not a property issue, but it is a consequence that may not materialize for years after the divorce. Absent alimony, there may be no statutory remedy for inequities such as these. In the end, we conclude that alimony is a vehicle, peculiar to divorce, by which courts may prevent the variety of forms of unjust enrichment that are the peculiar consequences of marriage.

This characterization of alimony as preventing unjust enrichment facilitates a variety of interesting discoveries about the nature of our subject. Perhaps the least surprising is this one: alimony has nothing to do with the historically affirmative duty of men to support women. More subtle is this point: the only post-divorce economic need that alimony addresses is that created by the termination of the marriage; alimony is not available as a panacea for post-divorce need in general. And Maine's droll apothegm on alimony, "[a]limony is intended to fill the needs of the future, not to compensate for the deeds of the past," is misleading.

Our discussion of these and other issues about alimony follows the general outline of this introduction. We begin with a brief discussion about the difference between considerations in awarding alimony and the purpose of alimony in general, illustrating that difference with references to historical views on the subject. We then proceed with an attempt to isolate and identify the purpose of alimony by the use of factual hypotheticals. The process is fact intensive, because the ultimate goal of alimony, the prevention of unfairness, is fact intensive. To be sure, we will not begin to define unfairness; we will illustrate it, and offer to define its remedy.

Finally, we will examine recent Maine Law Court decisions on alimony in an effort to discover how far along the trail toward defining the purpose of alimony the Law Court has gotten. If the answer is, not very far at all, it is because the inquiry itself into the nature of alimony is brand new, intimidatingly complex, and nowhere near

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10. Maine's Marital Property Act applies to tangible and intangible assets that have market value. No Maine caselaw—or caselaw from any other state that we know of—defines earning power as "property."

11. Lenore Weitzman, one of this country's leading authorities on divorce and its aftermath, refers to such things as professional training, job seniority, employment security and future earning capacity as "career assets." See Lenore J. Weitzman, The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America 111 (1985).

completion. Defining the purpose of alimony involves profound debate about the very nature of divorce itself. Salient issues in the debate would be whether marriage alone justifies post-divorce support, \(^\text{13}\) whether post-divorce support is a personal or a societal obligation, \(^\text{14}\) whether the once-revolutionary clean break theory of divorce remains viable, \(^\text{15}\) what the theoretical relationship is between

\(\text{13.} \quad \text{"[T]he fact of marriage itself is not reason to justify placing any obligation on an ex-spouse." Joan M. Krauskopf, Theories of Property Division/Spousal Support: Searching for Solutions to the Mystery, 23 Fam. L.Q. 252, 262 (1989). Our experience, however, is that judges frequently require at least temporary alimony whenever the means of divorcing spouses are substantially unequal; the only explanation for these decisions is that the divorce (and, necessarily, the marriage it ends) justifies alimony.}

\(\text{14.} \quad \text{Professor Ira Ellman argues that need } \text{per se} \text{ is not a basis for alimony. Under his version of alimony theory, the issue is "whether the wife invested in her marriage [by working as a homemaker rather than by pursuing a career outside of the home] and is thereby economically disadvantaged upon divorce; . . . not . . . need per se. The wife who invested little or whose need arose from events unrelated to her marriage would have no claim against her former husband." Ellman, supra note 5, at 52. See infra text following note 39.}

On the other hand, Sally Goldfarb, a staff attorney for the National Organization of Women, argues that alimony should be available after marriage in order to compensate women for their inferior opportunities in the marketplace for jobs. She argues:}

\(\text{[W]here it is impossible for both parties to maintain the marital standard of living because of the added expenses of supporting two households instead of one [after divorce], basic fairness requires that this reduction in standard of living be shared between the two parties rather than allowing all of the disadvantages to accrue to the wife. Equalizing the two parties' postdivorce standards of living when awarding alimony is a crucial tool for achieving this result.}

Sally F. Goldfarb, Marital Partnership and the Case for Permanent Alimony, 27 J. Fam. L. 351, 365 (1988-89) (citations omitted). She then notes the "limited employment opportunities for women" after divorce, arguing that "[t]he majority of women in the labor force are concentrated in traditionally female occupations with low pay and little opportunity for advancement." Id. at 367. This being so, she argues for permanent rather than rehabilitative alimony. This, of course, is a theory of alimony that places the financial onus of women's post-divorce need on individual men, regardless of the fact that that need is generated by cultural factors beyond the individual man's ability to control. See infra discussion accompanying note 57.

Professor Stephen Sugarman has observed that "one of the important controversies about divorce law is why it ought to serve to reduce inequalities between the sexes arising from forces outside the marriage relationship." Stephen D. Sugarman, Dividing Financial Interests on Divorce, Divorce Reform at the Crossroads 130, 154 (Stephen D. Sugarman & Herma H. Kay, eds.).

\(\text{15.} \quad \text{Commenting on the divorce reforms that swept the country in the late 1960s and early 1970s, Professor Suzanne Reynolds has observed that "commentators involved in the reform movement apparently assumed that property awards would remain nonmodifiable and extolled the virtues of property division as the superior means of making economic adjustments at divorce largely on the basis of its nonmodifiable." Suzanne Reynolds, The Relationship of Property Division and Alimony: The Division of Property to Address Need, 56 Fordham L. Rev. 827, 834 (1988). As a result, she argues, "[t]he judiciary appears to have concluded that the availability of no-fault divorce has redefined marriage so that spouses no longer as-}
awards of alimony and of marital property, and how to cope with the pervasive concern for the “feminization of poverty.” Thus, we conclude that our own thesis about alimony is only a first step, for as quickly as we think that we have an answer to one question about alimony, another more difficult one pops up. There is a great deal of thinking yet to be done about the subject and the arguments we set forth here are just a first step.

II. “Considerations” Versus Purpose

Alimony is the court-ordered financial support of one ex-spouse by the other. It is derived from the unwritten Ecclesiastical law of nineteenth century England. Prior to 1857, Ecclesiastical courts in England commonly granted what was called divorce a mensa et thoro, on the ground of either adultery or cruelty. Such divorces did not terminate the marriage; instead, the marriage continued with the parties living apart. Because the marriage continued, the husband's common law obligation to support his wife also continued, and it was the custom that the support payments from the former to the latter be periodic.

In form, alimony today remains the same as it was under the Ecclesiastical courts: customarily, periodic payments of support after a divorce. In theory, however, the concepts are unrelated. Alimony under a divorce a mensa et thoro was supposed to be a substitute for the common law duty of support—a substitute that was justified by the fact that the marriage continued after the “divorce.” Thus, alimony under Ecclesiastical law was an incident of the marriage. Modern alimony, on the other hand, exists independent of the marriage.
riage, because a spouse's eligibility for alimony arises only if and when the marriage actually ends. Thus, in modern usage, alimony is an incident of the divorce, not of the marriage.

This distinction has important consequences for the study of alimony theory. Historically, the theory of alimony was indistinguishable from this theory of marriage:

The doctrine of alimony springs up necessarily out of the soil of our law, by reason of the peculiar property relation which it establishes between husband and wife. Upon the marriage, the husband has vested in him all the present available means of the wife, together with the right to claim her future earnings and acquisitions. At the same time, the law casts upon him the duty suitably to maintain his wife, according to his ability and condition in life . . . . The husband cannot abandon his duty to support his wife; therefore, when the law in any case judges that she may live apart from him, for her protection, in consequence of his wrong doing, it must also judge that he shall maintain her while doing so.24

The purpose of alimony in the nineteenth century, then, was to enforce the husband's incontrovertible duty to support his wife. On the other hand, there were "considerations" that could affect an alimony award. One was the wife's means:

[W]here, in consequence of a settlement, or otherwise, the property of the wife has been kept in her hands, and has not vested in her husband, and her own estate is fully equal to what she can justly demand from the common fund, the reason for allowing her this kind of support fails, and she is not entitled to it. If her estate is partly adequate, it goes so far to reduce her claim.25

Another issue was the husband's means: "There are circumstances in which, she having means, and he being destitute and unable to earn money, it may be her legal duty to support herself."26 Yet another consideration was the respective moralities of the parties: if the wife was an adulterer, she forfeited all claim to alimony, whereas if the husband was the wrongdoer the price he had to pay in alimony might go up.27 The husband's alimony obligation might also wander upward if he had acquired wealth from his wife by virtue of their marriage.28 Such considerations as these could increase, decrease, or cut off alimony, but they were plainly distinct from the purpose of alimony, which derived from society's view of the relationship between men and women in marriage.

25. Id. § 375, at 300 (footnote omitted).
26. Id. § 369, at 295 (footnote omitted); Vernier and Hurlbut, supra note 1, at 202.
27. Vernier and Hurlbut, supra note 1, at 199.
28. Id.
Historically, then, alimony was a function of marriage, and its purpose was interrelated with the purpose of marriage. Nowadays, on the other hand, alimony exists independent of marriage, so its theoretical purpose must be independent of any intra-marital obligation of one spouse to the other. Identifying that purpose, however, is a mercurial task. Consider this statement about alimony by the Maine Supreme Judicial Court, sitting as the Law Court:

The purpose of alimony is to provide maintenance and support for the payee spouse. While traditionally an alimony award “sought to continue the parties' financial relations to 'maintain the wife in the station in life to which she belongs,'” current law requires the court to consider the “payee's training, experience, and capacity for self-support . . . as well.”

But this does not define alimony's purpose. The first sentence merely describes alimony's effect. The court's subsequent statement of the traditional objective of alimony, to “maintain the wife in the station in life to which she belongs,” is true enough, but it ignores the fact that, in the most traditional sense, alimony had nothing to do with the kind of complete and final divorce that the court was reviewing in that case. Furthermore, the discussion of this tradition devolves into a recitation of facts “to consider,” without overt reflection on the shift in focus that has occurred in the middle of the second sentence: The first phrase focuses on the reason for the existence of the alimony remedy, whereas the second focuses narrowly on the facts of the case.

Of course, the theory of alimony has changed since the days of the divorce a mensa et thoro. So have theories of marriage, the relationship between spouses, divorce, and ultimately, the relationship between men and women. These issues, in fact, continue to change, and will probably remain unsettled for the foreseeable future. We

30. See quotation in text accompanying note 24, supra.
31. See Goldfarb, supra note 14, at 354 (footnotes omitted) (“In sharp contrast to Blackstone's famous common law formulation that 'the husband and wife are one person in law' and that the woman's legal existence is merged into the man's at marriage, the modern view is that marriage is a partnership of equals.”).
33. Consider this statement as evidence of how much things have changed in the last 20 years:

Proponents of the ERA in the 1970s shared a common vision of equality between women and men that was premised on their equal treatment before the law. Except where sex-specific traits were involved, they wished to prohibit the use of sex as a basis for classification. The vision of equality held by feminists in the 1980s is no longer a unified one, nor is it limited to the achievement of formal equality of treatment. The focus has shifted from a recounting of the similarities between women and men to an exami-
live in a world in which the principle of gender equality and the fact
of male domination in business, politics, and education (to name a
few fields) produce a constantly changing, and persistently roiled,
social riptide. The historical basis for alimony has long disappeared,
but it has not been replaced with any identifiable constant. This fact
provokes our inquiry into the present purpose of alimony. We as-
sume—we intuit—that the justification for alimony is derived from
some element or aspect of the relationship between the spouses.\textsuperscript{34}

III. IN SEARCH OF A THEORY OF ALIMONY

If the justification of alimony derives from the spousal relation-
ship, hypotheticals illustrating that relationship will aid in the
search for a theory of alimony. We begin the search with a factual
hypothetical that first brought the question of the purpose of ali-
mony to our attention.

The Diabetic Schoolteacher: Gender-Based Alimony and Need-
Based Alimony.

Husband and Wife were married in 1968, just after they both
graduated from college. Husband's military draft status was 4-F,
ineligible because of his diabetes, a condition that had been diag-
nosed while he was in high school and before the parties ever met.
They moved to Maine in 1971 and became schoolteachers at a pri-
ivate boarding school. Because they were able to live in school-
owned quarters as dorm-parents, they never bought their own
home. Nor did they ever have any children.

In 1987 Husband, then a Latin teacher, lost his job when the
administration dropped Latin from the school curriculum. In 1991
Wife sued for divorce on the ground of irreconcilable differences.
At that time, both parties owned vested pensions, but Wife's was

\textsuperscript{34} See infra text accompanying note 57.
bigger than Husband's because of her longer employment; neither
pension was yet adequate for retirement, however. Husband has
since found a job teaching English in another school. Wife now
earns $28,000 per year, and Husband $25,000.

By the time of the divorce hearing, Husband's diabetic condition
had worsened. His doctor has told him that he may lose his sight
within five years, and may by then suffer the amputation of one or
both legs. His eligibility for Social Security remains uncertain be-
cause he is not yet disabled. He is thus unqualified to apply for
benefits, and the Social Security Administration refuses to specu-
late about his eligibility absent a bona fide application.

Both parties are forty-five. Aside from their pensions, neither
party has any significant property. Neither has remarried or has
any plans to do so in the near future. Husband wants one dollar
per year alimony against the possibility of his total disability.

This example presents a variety of issues. The first is the issue of
gender. Does it make any difference that the party seeking alimony
is male rather than female? Constitutionally, it should not; statutes
that limit alimony to women are unconstitutional. On another
plane, however, the issue becomes murkier. It has recently been ar-
ued by Sally Goldfarb, Staff Attorney for the National Organiza-
tion for Women, that permanent alimony should be available to
women for the reason, in part, that women are disadvantaged in the
marketplace. In our example, therefore, and at least according to
that theory, the husband's greater market advantage—he can teach,
he can sell shoes, he can make out income tax returns for H. & R.
Block, whereas she presumably lacks that variety of op-
tions—diminishes his claim for alimony. We consider that thesis, as
a general theory of alimony, flawed because its rationale is indistin-
guishable from the archaic duty of men to support women; whereas
formerly the husband's duty to support the wife derived from the
individual man's ownership of the woman's property, now it is sup-
posed to derive from men's institutional control of the marketplace.
Since the marketplace is the source of property for most people,
Goldfarb's argument sounds like a clone of the nineteenth century
text quoted above: that male domination of property creates in the
male the obligation to pay alimony. We do not reject Goldfarb's

36. Sally F. Goldfarb, Marital Partnership and the Case for Permanent Alimony,
27 J. Fam. L. 351 (1988-89). “In the absence of adequate long-term alimony, the eco-
nomic facts of life for divorced women are grim. . . . The majority of women in the
labor force are concentrated in traditionally female occupations with low pay and
little opportunity for advancement.” Id. at 387.
37. Ms. Goldfarb denies that her theory of alimony is akin to the traditional obli-
gation of men to support women. Id. at 364. She maintains that when a woman mar-
rries and leaves employment to raise the couple's family, she “transfers” to her hus-
band her employment capacity and thus her earning capability; his subsequent
increase in income, salary, benefits, marketability—all of the incidents of a successful
theory as a consideration in awarding alimony, but only as a general pretext for alimony's availability as a remedy in divorce.

Gender, therefore, is unavailable as a foundation for alimony either constitutionally or culturally. As far as we have been able to determine, there is no other current argument that gender should control the theory of alimony. We conclude that the fact that the Diabetic Schoolteacher is male creates neither theoretical support for, nor a theoretical bar to, his request for alimony. In the search for a theoretical basis for alimony, gender proves immaterial.

The second obvious issue that our example raises is post-divorce need. If the husband loses his eyesight, his legs, or any combination thereof, he may become unemployed, at least temporarily unemployed, and non-self-sufficient. If that happens, he could turn to his former wife for support, provided that the divorce decree has career—are partially the result of this “transfer of human capital.” Id. at 359, 362. Thus, Goldfarb argues, “[t]he wife increases her husband’s earning capacity at the expense of her own.” Id. at 359 (italics omitted). When the parties divorce, the ex-wife is left in a permanent financial hole, since she can never recover the years of employability she lost. Id. at 371. Therefore, the ex-wife should be eligible for permanent alimony from the ex-husband, since it is up to her former husband to transfer back to her, forever, the marketability she permanently forsook.

Goldfarb’s ideas about alimony frequently sound like our notion of preventing unjust enrichment. We are uncomfortable with her “transfer” analysis, however, because it seems to be a fiction: for example, when a female nurse marries a male surgeon and retires from nursing to raise a family, absolutely nothing of the surgeon’s future professional success is due to the former nurse’s transfer to him of her employment capacity.

Furthermore, Goldfarb blames the permanency of the ex-wife’s financial hole in part on the nature of the marketplace: not only is the ex-wife years behind in career development because of the sacrifice during the marriage, but she is gender-disadvantaged as well. “At divorce, limited employment opportunities for women compound the effect of the transfer of earning potential from one spouse to the other.” Id. at 367 (citation omitted). Thus, “[t]he realities of divorced women’s economic condition dictate that permanent alimony awards should be made available to equalize the postdivorce standards of living of the parties.” Id. at 372. To the extent that Goldfarb relies on the disadvantageous nature of the marketplace to justify permanent alimony (and it is hard to tell how much she relies on it because she does not break down her analysis quantitatively) she is arguing that men should support women.

We reiterate that Goldfarb’s argument is for permanent alimony, rather than temporary, or “rehabilitative,” alimony. She claims that rehabilitative alimony—alimony designed to last as long as it takes women to get the training necessary to give them the career advantages they lost while serving as homemakers—doesn’t work, because women are at such a disadvantage ab initio.

See also Mary Jo Frug’s x-rated discussion of the issue of employment disadvantage in Mary Jo Frug, A Postmodern Feminist Legal Manifesto (An Unfinished Draft), 105 HARV. L. REV. 1045, 1072 (1992). But see Jane Ellis, Surveying the Terrain: A Review Essay of Divorce Reform at the Crossroads, 44 STAN. L. REV. 471, 501 (1992) (“The evidence that market discrimination is not the most significant cause of women’s relatively low earning capacities is as strong, however, if not stronger, than the evidence that it is.”).
awarded him at least some—even nominal—alimony. Does need provide a theoretical justification for alimony?

Some argue that it does not. Professor Ira Ellman has recently proposed that the purpose of alimony is to encourage spouses to maximize their economic potential, by “reallocating the postdivorce financial consequences of marriage in order to prevent distorting incentives.” Ellman believes that most married couples allocate their contributions to the marriage on an economic basis: husbands, who generally can earn more, work out of the home and earn, while wives, who generally cannot earn as much, do housework and earn little or nothing. During the marriage, this works to the benefit of both spouses (especially where the husband has a much greater earning potential) because it maximizes income, something that Ellman thinks should be encouraged. Unfortunately for the wife, however, such an arrangement works to her disadvantage if the spouses divorce, because the husband leaves the marriage with the earning power he amassed during the marriage, while the wife has nothing of the sort. Ellman argues that she should be compensated with alimony for that fact, which he calls her “marital investment.”

If alimony exists for that purpose alone, then it has nothing to do with post-divorce need, according to Ellman. If the wife has made a “marital investment” like the one described above, she receives alimony to compensate her for that investment, whether she needs it or not. If she is independently wealthy, she is entitled to the alimony anyway. If she did not make a “marital investment” then she receives no alimony, even if she is not self-sufficient; her support in such a case is a societal obligation, not a personal one to the ex-husband.

Ellman’s theory of alimony contradicts Maine caselaw primarily because the former is entirely retrospective, whereas the latter limits alimony to prospective purposes only. According to the Law Court’s 1985 decision in Skelton v. Skelton, spouses receive compensation for contributions to the marital enterprise through a division of

38. Under the alimony provisions of most state statutes, alimony cannot be awarded initially in a post-divorce proceeding. An alimony award, however small, can be increased after divorce, but a divorce decree that denies or fails to provide for alimony may not be amended later to add alimony (unless the omission was some sort of oversight or clerical error). Plummer v. Plummer, 137 Me. 39 (1940); see also Annotation, Domestic Divorce Decree Without Adjudication as to Alimony, Rendered on Personal Service or Equivalent, as Precluding Later Alimony Award, 43 A.L.R.2d 1387 (1992).
39. Ellman, supra note 5, at 50.
40. Id. at 51.
41. Id. at 52.
42. 490 A.2d 1204 (Me. 1985).
marital assets; alimony may only serve post-divorce need. In Skelton, the parties were divorced after nine years of marriage. They then lived together for six years, remarried, and divorced again after a two and one-half year second marriage. After awarding custody of the parties' three children to Mrs. Skelton and dividing marital property, the trial court awarded alimony to Mrs. Skelton because "the only way [she] can be compensated for her many years as mother and homemaker is by the award of alimony." The Law Court remanded the case for reexamination of the alimony award because the trial judge erroneously awarded alimony to compensate the wife for, essentially, eighteen years of marriage. The court concluded that: "Alimony is intended to fill the needs of the future, not to compensate for the deeds of the past."

But consider this example:

**The Sacrificing Nurse: Alimony Entitlement Absent Need.**

Husband and Wife were married in 1980, when he was earning $85,000 per year as an anaesthesiologist and she was earning $21,000 as a registered nurse on a ward of the local hospital—the only such institution in the vicinity. Soon after the marriage, she was offered the job of assistant chief of nursing at the hospital, which would have entitled her to a starting annual salary of $35,000. (No nepotism was involved.) However, Husband and Wife wanted children soon, and in anticipation of the demands of her new family, Wife declined the offer.

After twelve years of marriage and two children, now eleven and nine, Husband sued for divorce. The superior position offered Wife in 1981 was then no longer available, and she had lost her seniority on the nursing staff, so if she were to return to nursing at the hospital where she used to work she would have to accept a starting salary of $22,000. (Had she remained a nurse on a ward throughout her marriage she would now be earning $33,000 per year.) Husband is now earning $270,000 annually. Wife will get custody of the children.

43. 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.

[T]he extent of the wife's contribution to the marriage is relevant not to an award of alimony . . . but to a disposition of property under 19 M.R.S.A. § 722-A (1981).


45. *Id.* at 1207.
Plainly, the wife here is entitled to substantial child support. Assuming that there is insufficient marital property available to rectify the financial inequities this marriage has produced, it would also appear beyond dispute that she is entitled to alimony. If Skelton is correct, her entitlement to alimony depends entirely on her post-divorce need. There is, however, no indication that she needs anything; the child support payments alone may adequately supplement her own income, and she may, of course, be independently wealthy. Yet the case cries out for alimony, because the economic arrangement the parties entered into at the inception of the marriage cost her substantial earning power while permitting him to augment his. Alimony is the only recourse. But that result contradicts Skelton; if alimony is justified in this hypothetical, it must be because the wife deserves compensation for her “deeds of the past,” specifically, her sacrifice of her career and the diminution of her earning power.

The example of the Sacrificing Nurse illustrates what Ellman means when he speaks of “marital investment,” and it would appear that he has capitalized on the inadequacy of Skelton-like analyses of alimony. Yet Ellman’s theory suffers a fundamental inadequacy of its own: His concept of “marital investment” is too narrow. Consider this example:

The Frustrated Writer: Alimony Based on Unjust Enrichment.

Husband and Wife met in college at Yale, where they were classmates. Husband had majored in journalism, had graduated magna cum laude, and upon graduation had immediately landed a well-paying job with a Chicago-based magazine. Wife, on the other hand, had immediately entered the Chicago Law School, where she served as an editor on the Law Review. After her graduation from law school the parties married and settled in Chicago. Wife began employment soon thereafter as an associate in a major Chicago firm for the then-astronomical sum of $40,000 per year.

Seven years later Wife became a partner at the same firm, and


47. Skelton wrongly assumed that “need” can be defined easily. It cannot:

Are we to focus on what sum, if any, is necessary to keep the spouse in question out of poverty, as defined by the official poverty level or by the Bureau of Labor Statistics’ budget for a low-income household? Or is need more of an “opportunity” or “transitional” notion, such as what is needed for someone to take steps to become reasonably self-sufficient (such as to go to school, or to have job training, or to have time to pull one’s life together)? Or does need have psychological overtones that make it important for people not to descend to a significantly lower income/social class? On this latter view, because people become accustomed to certain life-styles, they soon “need” more money than they might otherwise.

Sugarman, supra note 14, at 153.
her annual income then exceeded $250,000. Meanwhile, Husband had tired of his job, but had no alternative job prospects with any Chicago-based publications. He had generous offers from the staffs of two different New York-based magazines (one for $125,000 per year, the other for $112,000), but he would have had to move there and Wife did not want to leave her Chicago firm. Because of Wife's substantial income, the parties decided instead that this was the time for Husband to complete and attempt to publish the novel that he had been working on in his spare time for several years. Therefore, he quit his job and began writing on his own, full time, in Chicago.

Wife has now filed for divorce. She is earning about $650,000 per year. Husband, on the other hand, has failed to find a publisher for his now-completed novel, and has published only occasional articles in the ten years since he went out on his own. His annual income over the past five years from his publications has averaged $12,500, and he has no present, significant prospects for publication. In early 1991 he began looking for work in the Chicago area, but the recession had hit his industry hard and he was unable to find anything paying over $30,000 per year. He took what he could find, and now lives in a $500 per month apartment twelve miles south of the city.

Wife, on the other hand, continues to live in downtown Chicago in the parties' $14,000 per month high-rise apartment overlooking the shore of Lake Michigan. They own two BMWs, which cost a total of $75,000 per year to insure and garage. They own no real estate. They have a wine collection worth about $10,000. They each own a complete and expensive wardrobe. Because they had invested heavily in junk bonds, their total investment portfolio is now worth only about $50,000. Wife had begun speculating on paintings about five years ago, and has about twenty works of art in her collection; their value may range from a low of $15,000 to a high of $60,000, depending on how sanguine the appraiser is. The parties are both forty years old, and they have no children.

If Ellman is right, then Husband is not entitled to any alimony from Wife because there is simply no "marital investment" here; the parties never had a mutual, interrelated plan for the maximization of their family wealth. By staying home and writing, Husband was not making a "marital investment;" he was taking advantage of Wife's affluent employment to develop an independent career. Nor can his fling at freelance writing be fairly called an investment; if

48. See Ellman, supra note 39, at 51:
I use the term "marital investment" for the claimworthy conduct giving rise to a compensable loss in earning capacity. A system of alimony that compensates the wife who has disproportionate postmarriage losses arising from her marital investment protects marital decisionmaking from the potentially destructive pressures of a market that does not value marital investment as much as it values career enhancement.

Id.
anything, it was a gamble.

Yet the fact remains that it was Wife's gamble as well as Husband's—if he had succeeded she would have benefitted substantially. Even if this scheme does not fit Ellman's theory precisely, and even if Ellman would not award this husband any alimony, there seems to be an intuitive call for alimony here. This is not simply because Husband needs Wife's support in order to get back on his financial feet after a decade of unemployment (the argument of his need may be diluted by an award of marital property to him).49 More compelling are the facts that the Wife pursued her career and developed enormous earning power during the marriage; that she gained this benefit at least partially at Husband's expense because he accommodated her career by agreeing to stay in Chicago, where his employment prospects were poorer than they were elsewhere; and that it seems unjust to disallow him compensation for his Wife's financial gain under such circumstances.

The argument for Husband's alimony is essentially the contract theory of unjust enrichment. In fact, it has been suggested that unjust enrichment is the foundation for modern theories of alimony in general,50 and Ellman's theory of alimony in particular.51 Indeed, it seems that a theory of unjust enrichment—reliance by one party, creating a benefit to one party and a detriment to the relying party, resulting in circumstances suggesting injustice—may provide a solution to all of the factual problems we have postulated above. In the last of the three hypotheticals, the Frustrated Writer, we have already proposed why this is so. And in the case of the Sacrificing Nurse, the issue of detrimental reliance is so strong that the uncertainty of the wife's need hardly rises to a debatable issue.

This brings us back to the Diabetic Schoolteacher. Analyzed under the unjust enrichment theory that we have been exploring, the facts do not present a case for alimony. Although Wife developed an independent career during the marriage, she did not do so

49. The availability of marital property to satisfy Husband's post-divorce need is uncertain in this case, because most of it is not in liquid (in the fiscal sense) form, and its value is uncertain. Illinois has the same marital property statute as Maine and shares Maine's preference, derived from the "clean-break theory" of divorce, for an inequitable division of marital property over an award of alimony. See Sheldon, supra note 46, at 47.

50. See Krauskopf, supra note 13, at 260 ("In its broadest sense, the theory justifying a goal of fairly sharing personal gains and losses due to the marriage is prevention of unjust enrichment."). (Footnote omitted.)

51. See June Carbone, Economics, Feminism and the Reinvention of Alimony: A Reply to Ira Ellman, 43 VAND. L. REV. 1463, 1479-80 (1990):

Ellman may have chosen to eschew the restitution label in order to concentrate on the lower earning spouse's loss (reliance) rather than the other spouse's gain (unjust enrichment). . . . [A]s long as the theory permits compensation of losses only when they are no greater than the presumed benefits, the theory will be a restitution and not a reliance system.
at the expense, or to the detriment, of Husband. Absent his detrimental reliance, he is not eligible for alimony.

If this seems harsh, it is because the Schoolteacher's potential need is compelling. We acknowledge that, under similar facts, the Law Court has found such need an appropriate basis for at least nominal alimony. We hesitate to embrace the court's decision in that case, however, because the court did not discuss the theory of alimony which led to its decision. If the court based its decision on a theoretical standard, it reversed the trial court for a deviation from that standard. If there was no theoretical standard, the court may have substituted its own opinion about an appropriate result for the trial court's. That the court is empowered to do that cannot be

52. In Pongonis v. Pongonis, 606 A.2d 1055 (Me. 1992), the parties were divorced after 17 years of marriage, at a time when their children were 16 and 11. For the previous 15 years the wife had been working at a hospital, and was earning about $18,500 at the time of the divorce hearing. The husband then had 12 years in with the state department of transportation, and was earning about $23,500. Both parties had vested pensions, and the wife had been a regular contributor to Social Security.

For the nine years prior to the divorce the wife had been suffering a panic disorder and major depression, requiring her hospitalization. Despite present remission, her symptoms and her hospitalization were expected to return. Apparently, this fact led to an award of custody to the husband (whether through agreement or after contested hearing the decision does not say), along with an order that the wife pay child support of $75 per week. The parties were awarded their respective pensions, and the wife had been a regular contributor to Social Security.

The trial court denied the wife any alimony, finding:

[T]he evidence was clear and convincing that neither the marriage or [the husband] exacerbated [the wife's] medical condition. Furthermore, the Court finds that [the wife] has always been able to work, and has lost no income over the term of this marriage, as a result of her medical condition. In light of the substantial debt this Court has ORDERED [the husband] to pay, I find it would be unjust to ORDER payment of alimony. Therefore, alimony shall not be awarded to either party.

Id. at 1059.

On appeal, the superior court reversed the trial court's ruling on alimony, ordering $1 per year, and the Law Court affirmed. The court held, in part, that there was ample evidence in the record concerning [the wife's] serious medical condition that could again require extended hospitalization. The undisputed evidence before the court was that during her previous hospitalizations she lost no income because of her accumulated sick leave. Given her medical history, an uninterrupted flow of income in the past is not a dependable indicator of an uninterrupted flow of income in the future. Nor can it be said that Joseph's present inability to pay alimony justifies the preclusion of this issue from future review by the court should Lois on proper motion be able to establish her need and Joseph's then ability to pay.

Id.

53. The court approached identifying the theory of alimony upon which it was relying in this sentence: "We have previously stated that we do not view an award of one dollar a year alimony as establishing the recipient's continuing need; however, it
doubted, but if the court did so, the decision offers no persuasive precedential effect.

Nevertheless, we recognize that the issue of post-divorce need is a staple in alimony law, and it is not easily dismissed. If, as we have suggested, need is an inadequate theoretical basis for alimony awards, is our proposal really better? We explore that question through a couple of other hypotheticals.

*The Classic Homemaker: Detrimental Reliance as an Element of Unjust Enrichment.*

Husband and Wife are fifty-eight. They were married in 1953, right after their mutual graduation from high school. Husband immediately went to work at the local paper mill, where he has worked ever since. Wife, on the other hand, stayed home, because she gave birth to their first child ten months after their wedding. Four more children followed, the last born in 1965. She has never worked out of the home, but instead raised the children and attended to homemaking chores. Husband now earns $68,000 as foreman on the mill’s Number One paper machine. He has a vested pension now worth about $250,000 (he is eligible to retire now, but admits that he will continue working at least until age sixty-two). The parties have a home with a net worth of $90,000, a vacation cabin on four acres near a ski area, with a net worth of $60,000, three vehicles and a camper trailer. Their total mortgage debt is $45,000: $32,000 on the home, none on the cabin, and $13,000 on two of the cars. They seek a divorce on the ground of irreconcilable differences.

At first blush, Wife’s post-divorce need is the obvious basis for the inevitable alimony award in this case. Yet we can befog that issue somewhat if we inject the following facts: Wife inherited $220,000 from her mother last year. Should this change the result? If need is the governing standard, it must, because Wife’s income from the inheritance (cautiously invested to produce a reasonable rate of return) plus her share of the marital property should produce a satisfactory standard of living for her.

But that result is essentially unfair. It was her reliance on the strength of her marriage that kept her at home and deprived her of the opportunity to build a career that would support her after divorce, and her husband benefitted from that reliance because she kept the parties’ household and tended their children for him. Now that her reliance has turned out to be potentially detrimental to her, it would seem unfair to deny her a remedy. Furthermore, it seems odd to assert that she should have to depend on her family’s assets to support her when her marital relationship produced an asset—her does permit the trial court to modify the award on an appropriate showing of a change of circumstances.” *Id.* It appears from this language that post-divorce need was the principle upon which the court’s decision turned. *See supra* note 52 and accompanying text.
husband's earning power\textsuperscript{54}—that is sufficient to do so. Ultimately, it seems unjust to allow Husband to walk away from this marriage with sole possession of its greatest economic product.

We emphasize that we are not advocating an award of alimony to Wife in this case; whether she is awarded any alimony, and in what amount, will depend on many considerations, including the relative financial needs of the parties. The marital relationship in this case does present, however, a theoretical case for alimony. We believe that unjust enrichment offers a better theoretical basis for discriminating between those cases that present alimony issues and those that do not, than does need.

Nor does need satisfactorily address the issues in this case:

\textit{The Sightless Welder: Need and Detrimental Reliance Compared.}

Husband and Wife met on the job at the Bath Iron Works, where both were employed as welders. They married in late 1988, and moved into the home she was awarded in a previous divorce. Their marriage proved a rocky one, however, and he had moved out (and back in) twice before the marriage was two years old.

In February, 1991, Wife was diagnosed as suffering from brain tumors that left her with this dilemma: submit to surgery that endangered her sight, or undergo a radiation therapy that had no certain chance of success. Wife opted for the latter, but after two months' treatment the tumors were worse, so she submitted to the surgery. The tumors, diagnosed as malignant, were removed, but the surgery cost her all of her sight in her right eye and all but peripheral vision in her left. She cannot resume her job as a welder, and since she only has a high school degree her employment prospects, even with retraining, are poor. Her doctors place her chances for non-recurrence of the tumors at fifty percent. The doctors do not believe that the tumors are work-related.

Husband continues to earn $28,000 a year at BIW. He has sued for divorce because Wife's prolonged, post-surgery depression has rendered their ever-fragile relationship intolerable. There are no significant marital assets.

Since the relationship of these spouses lacks any indicia of detrimental reliance, Wife's claim for alimony in this case can only be based on her post-divorce need. Unfortunately for her, however, the only theoretical justification for requiring her husband of such a short duration to share her sudden financial misfortune is something resembling the tort doctrine of assumption of the risk:\textsuperscript{55} Persons

\textsuperscript{54} Calling earning power an asset does not mean that it is "property." Rather it is a recognition of the economic significance of the employment status of spouses at the end of their marriage. Professor Krauskopf, supra note 13, at 288, distinguishes earning power from property by referring to the former as "personal gains" and to the latter as "assets." Goldfarb, supra note 14, at 360, calls the husband's earning power "often the couple's only substantial asset at the time of divorce." (Footnote omitted).

\textsuperscript{55} See Restatement Second of Torts § 496A (1965): "A plaintiff who volun-
who marry run the risk that their spouses' sudden incapacity may commit them to heavy and lengthy support obligations, irrespective of the length of their marriage or the strength of their bond. As sad as Wife's predicament is here, wouldn't it be unfair to Husband to force him to share it, even temporarily, through an award of rehabilitative alimony? Nor would it make any difference if we altered the facts to give Wife a permanent means of support. For example, we could say that her loss of sight was work-related, and she is a candidate for substantial, prolonged workers' compensation. That fact does not alter the nature of the parties' relationship, however, and since we doubt that alimony (or denial of alimony) should ever be based on matters alien to the parties' relationship, we conclude that it makes no difference whether she is self-sufficient or not: alimony should not be available to her.

rily assumes a risk of harm arising from the negligent or reckless conduct of the defendant cannot recover for such harm. The analogy of alimony liability to assumption of the risk is imperfect for a variety of reasons, among them (1) the defendant must act negligently or recklessly, whereas the alimony payee need not, and (2) the plaintiff cannot assume a risk of which he is unaware (§ 496D) whereas the alimony payor can.

Another analogy is to the contract axiom, pacta sunt servanda. See infra note 124 and accompanying text.

56. Rehabilitative alimony is temporary alimony intended to last as long, and cost as much, as it takes for the payee to develop self-sufficiency. Maine's alimony statute apparently recognizes such an alimony award. See Me. Rev. Stat. Ann. tit. 19, § 721 (1)(D) & (E) (West Supp. 1992-1993). Others have criticized rehabilitative alimony as a futility. See Goldfarb, supra note 14. Such criticism is especially compelling for older, long-term homemakers: "One lesson from this research is that a woman who is divorced after fifteen or twenty or thirty years of marriage can not recapture the years she has lost in the labor force." Weitzman, supra note 11, at 390.

Our objection to rehabilitative alimony is that it is pure need-based alimony; we object to any such award, be it temporary or permanent. See Krauskopf, supra note 13, at 262 (footnotes omitted):

Some persons interpreted even traditional alimony to serve only as protection of the public purse from supporting economically dependent ex-spouses, but the fact of marriage itself is not reason to justify placing any obligation on an ex-spouse. Even courts that in the first decade of reform characterized maintenance as only "rehabilitative," for the purpose of avoiding great disruption while the dependent spouse developed a modicum of earning capacity and adjusted to a vastly lower standard of living, seldom stated a theory for obliging the other ex-spouse to meet that need.

A related problem is the duration of rehabilitative alimony. As Professor Sugarman states, at some point the obligation to support an ex-spouse ought to pass from the alimony payor, but it is never clear when that point arrives:

[I]t is ambiguous how long a necessity-based claim ought to last. Certainly at some point—but when is rather difficult to say—after the intimate connection between the parties is long over and there has been time for the dependent one to make choices about his or her future, it no longer seems justified to single out the former spouse as the responsible party, even if the other remains in dire need. Sugarman, supra note 14, at 155.
This is the ultimate problem with a need-based alimony theory. For an award of alimony to be fair, it must derive from the nature of the parties' relationship, not from things outside of it. This is why we rejected Sally Goldfarb's thesis that alimony should be available to compensate women for their disadvantage in the marketplace for jobs. The individual husband rarely has anything to do with the marketplace (an exception might be an influential politician or an industrial executive). It is unfair to make people financially responsible for problems they did not create or worsen. Thus we disagree with Goldfarb because she wants to make individual men, be they captains of industry or sculptors, bus drivers or nurses, pay for a problem that they may have little or nothing to do with.

An alimony theory based on need suffers the same inadequacy: it is blind to the source of the need. Where post-divorce need is a product of the marital relationship, alimony may be considered as a remedy. But where the need is the product of causes that are external to the marital relationship, forcing one person to pay the other is the same as forcing the one to pay for something he or she is not responsible for causing. That is unjust, and a theory of alimony that promotes or even permits that injustice is as unacceptable in domestic relations law as it is in tort law and criminal law.

For these reasons, we disagree with the Law Court's assignment in Skelton v. Skelton of need as the theoretical basis for alimony. Instead, a fairer basis for alimony in a far broader range of cases is the contract theory of unjust enrichment. We do not apply a contract theory to divorce because we believe that divorce has anything to do with the law of breach of contracts. It does not, any more than the fact that marriage has been called a partnership means that it has anything to do with partnership law. Instead, we borrow the con-

57. See supra note 37 and accompanying text.

58. "In order that the actor become liable to another, it is necessary, among other things, that his conduct be the legal cause of the invasion of the other's interest." RESTATEMENT OF TORTS, SECOND, § 9 cmt. (a) (1964).

59. Criminal responsibility rests on the dual premise of voluntary conduct and causation. See ME. REV. STAT. ANN. tit. 17-A, § 31(1) (West 1983) ("A person commits a crime only if he engages in voluntary conduct."). See also ME. REV. STAT. ANN. tit. 17-A, § 31 (West 1983) ("[W]hen causing a result is an element of a crime, causation may be found where the result would not have occurred but for the conduct of the defendant . . . ."). For a discussion of "voluntary" conduct and responsibility, see Meir Dan-Cohen, Responsibility and the Boundaries of the Self, 105 HARV. L. REV. 959 (1992).

60. The Law Court has expressly referred to marriage as a partnership. See Tibbetts v. Tibbetts, 406 A.2d 70, 76 (Me. 1979) ("The shared enterprise or partnership theory of marriage is a major guiding principle in the separation and division of property at divorce."). Unfortunately, however, marriage is a partnership that has nothing to do with partnership law. To begin with, a partnership is an association of persons intended "to carry on as co-owners a business for profit." UNIFORM PARTNERSHIP ACT, ME. REV. STAT. ANN. tit. 31, § 286 (West 1983). Anyone who marries "for profit"
cept of unjust enrichment from quasi-contract and apply it to divorce because it pivots and functions on the fulcrum of detrimental reliance, which we believe adequately addresses the problem of doing equity in cases of post-divorce need.

Nevertheless, there is one important aspect of unjust enrichment that is common to both contract law and divorce theory: the unjust consequence to be avoided is financial. Thus, for example, the Sacrificing Nurse, whose husband left her with two young children to raise by herself, is not eligible for alimony on the ground that raising children can be a social inconvenience. Yet she may have another ground for alimony, one not explored above. Earlier, we discussed the possibility that by sacrificing her career (or at least part of it) for her new family, the Nurse had established the prerequisite reliance that, upon divorce, would turn detrimental and qualify her for an alimony claim. Another financial issue, which we did not mention, arises under these facts.

The Sacrificing Nurse, Epilogue: Other Financial Consequences of Detrimental Reliance.

Six years after her divorce, her children are now seventeen and fifteen years of age. The older child, Mary, is about to enter her senior year in high school, where she is president-elect of the Student Council and co-captain-elect of the girls’ soccer team. In her junior year, Mary scored in the ninety-eighth percentile in her Preliminary Scholastic Aptitude Tests. She ranks third in her class of 125. Her principal college choices are Cornell and Princeton.

would immediately earn suspicion as a mercenary, a prostitute, or a fraud.

The comparison of marriage with partnership suffers even more if one tries to extend the analysis to alimony. As Professor Ellman has pointed out, a partner may not expect payment of compensation from a former business partner except in unusual circumstances—for example, where one partner had unexpectedly performed extraordinary services for the partnership without proportionate contribution by any other partner. If one extends this analysis to alimony, one must conclude that “alimony entitlement comes not from marriage itself, but from efforts and sacrifices going beyond marriage.” Ellman, supra note 5, at 38.

61. See Restatement of the Law of Restitution § 1, cmts. (a), (b) and (c):
   a. A person is enriched if he has received a benefit . . . . A person is unjustly enriched if the retention of the benefit would be unjust . . . .
   b. . . . A person confers a benefit upon another if he . . . performs services beneficial to or at the request of the other . . . or in any way adds to the other’s security or advantage. He confers a benefit not only where he adds to the property of another, but also where he saves the other from expense or loss . . . .
   c. . . . Even where a person has received a benefit from another, he is liable to pay therefor only if the circumstances of its receipt or retention are such that, as between the two persons, it is unjust for him to retain it.

62. We also, therefore, reject the notion that there should be some sort of credit against alimony allowed a husband who loses custody of his children, as if emotional deprivation carried the same sort of monetary value that financial support does. But see Jed H. Abraham, “The Divorce Revolution” Revisited: A Counter-Revolutionary Critique, 9 N. Ill. U. L. Rev. 251, 268 (1989).
Nurse is Chief of Nursing at the local hospital, earning $38,000 per year, and has not remarried. She has been solicited to apply for the job of Chief of Nursing at the Central Maine Medical Center, at a salary of $75,000. To take the job, she would have to move, since she now lives 110 miles, one way, from the Medical Center. If she were to move, Mary would forfeit her elected positions, which are of importance if she realistically intends to seek admission to the colleges of her choice. As a result, Nurse has decided that she cannot apply for the Medical Center position.

Nurse's financial dilemma is acute: in a little less than a year, she will lose the child support payments she has been receiving for Mary and, at exactly the same time, watch Mary matriculate to a college where room, board, tuition and other costs can exceed $25,000 per year. While there are abundant possibilities to avoid financial disaster—Mary's father may voluntarily contribute to the costs of Mary's higher education or, if he does not, Mary may be eligible for financial aid (and, in the Catch-22 of modern financial aid programs, if Nurse takes the higher-paying job she might render Mary ineligible for any financial aid, and have to pay all of Mary's college expenses herself)—the fact remains that it would be in Nurse’s long-term financial interest to take the higher paying job. Yet she cannot do so, because of entanglements created by her custody of her children.

This is another financial consequence of Nurse's marriage, and one that is common enough that it could have been foreseen at the time of divorce. She was then eligible to argue for alimony on the basis both of her marriage's immediate detriment to her career (she had given up a promotion to Deputy Chief of Nursing and had lost seniority) and of this long-term detriment as well. The fact that she might not have been able to prove at the time of the divorce that she would suffer from this Hobson's choice means only that she might have to return to the divorce court at a later date and take advantage of one of the premier characteristics of an award of alimony: it is subject to change.64

In fact, it is this characteristic that uniquely offers a solution to a frequently encountered problem.

The Doctor's Wife: Marital Property Distinguished from Detrimental Reliance.

The parties were married for more than thirteen years. While Husband went to medical school, Wife worked as an elementary school teacher. The income she earned went towards paying the couple's living expenses as well as Husband's school expenses. During this period Wife obtained a master's degree in education as well as a reading specialist certificate. Upon Husband's graduation, Wife continued to work as Husband completed his internship and

63. Krauskopf, supra note 13, at 265.
residency. Upon his entry into private practice, Wife resigned her position to assume the responsibility of caring for the couple’s home. Husband is now an internist completing his third year of practice, and he is grossing about $150,000 per year. His partners, who are longer in the professional tooth, gross about twice that much. Wife has been unemployed for three years. The parties agree that divorce is necessary; they have no children.

Husband’s medical degree is not marital property in the value of which the Wife may share—because it is not property at all.66 The Law Court so held, on facts virtually identical to these, in part because the valuation of Wife’s interest, based on Husband’s future earnings, “would be entirely speculative . . . [and] would be property acquired after the marriage . . . .”66

One can quibble over whether the Law Court meant that the professional license is not “property” (which is what the court said), or whether it meant that the license is not property capable of valuation at the time of divorce, or whether the court meant the property to be valued is the doctor’s income which, acquired after the divorce, could not be “marital” property.67 In any event, on facts such as these, Wife should be eligible for alimony for the reason that Husband leaves the marriage with enhanced earning power that he developed during the marriage as the substantial result of Wife’s effort, and it would be unfair to her to deny her some of that benefit.68 The fact that her share of entitlement cannot be evaluated until after the doctor’s earning capacity stabilizes means only that one of the parties may have to petition the divorce court after the divorce for an amendment of the original alimony award.

IV. ALIMONY AND INTERSPOUSAL TORTS

It is one thing to analyze how spouses should share marital benefits realized after marriage. It is quite another thing, however, to figure out what to do about the harm that one spouse has caused the other. The former issue, as we suggested in the Introduction, is preventative: using alimony to preclude a particular form of harm that we have called unfairness. The latter issue, on the other hand, arises after the harm has occurred.

66. Id. at 1291 (quoting Mahoney v. Mahoney, 453 A.2d 527 (N.J. 1982)).
When we speak of “harm,” we could be talking of two different species of detriment: economic detriment, and injury to the person. The former is the prodigal spouse syndrome: one spouse has wasted assets to the economic disadvantage of the other. The latter is the abusive spouse syndrome: one spouse has committed a tort against the other. Alimony is currently available as a remedy for the former: Maine’s alimony statute expressly permits the divorce court to “consider,” in addressing the question of alimony, whether “[e]conomic misconduct by either party resulting in the diminution of marital property or income” has occurred.69 (Presumably, by authorizing the court to “consider” such an issue, the statute intends to authorize the court to do something about it too, through an award of alimony.)70

The relationship between alimony and interspousal torts, however, is more complex. On a theoretical plane, the concepts of unjust enrichment and remedying economic misconduct derive from an entirely different social objective than does the concept of compensation for tort. The former seem akin to the principle in contract law that seeks to enforce the intentions of the parties to an agreement and that provides default remedies when the agreement breaks down.71 The latter, on the other hand, is designed to vindicate a variety of social policies none of which the individual has the power to define.72 Alimony and tort seem like strange bedfellows from the outset, and using the former as a vehicle to remedy the latter looks


70. The text here represents a tacit concession that our thesis on alimony is not perfect. We acknowledge this, in that the statute defines a purpose of alimony (correction of economic misconduct) that does not fit neatly into our larger view of alimony as a vehicle for preventing unjust enrichment. Compensation for economic misconduct bears a resemblance to compensation for a tort: the restitution serves as a deterrent and, to a lesser degree, a retribution. See discussion, infra note 72.

There is a reason why the current alimony statute tells judges to “consider” the variety of factors it lists, rather than telling them to award alimony on any one or a combination of those factors. We have learned from interviews with several participants that the present § 1 of the statute was enacted in 1989 in response to a single divorce case in which a trial judge’s meager alimony award offended many members of that particular Maine community, who worried that the trial bench did not understand divorce law. They responded with an amendment that was intended to remind trial judges of the variety of issues that can lead to an award of alimony. The amendment made no pretense of defining the purpose of alimony, and this explains the statute’s modesty—and its strength: it tells judges what to “consider,” but not what to do.

71. See Carbone, supra note 51 (quoting M. Polinsky, An Introduction to Law and Economics 25 (1983)).

72. Id. When alimony is awarded on a restitution theory it carries no moral stigma; “the determination that the enrichment is unjust is no more than a conclusion that the party retaining the benefit ought to contribute to the cost necessary to obtain it.” Id. at 1477. On the other hand, alimony awarded to compensate for economic misconduct or for a tort carries an unmistakable opprobrium.
more like a union of convenience than of principle. The peculiarities of divorce law exacerbate this apparent incompatibility. The following hypothetical illustrates the problem.

_The Anxious Wife: Alimony as Compensation for Tort._

Husband and Wife are both fifty-five and have been married for twenty-five years. Their children are married adults. At the time of the marriage, Husband had just finished his residency in surgery and Wife was a registered psychiatric nurse. Since their honeymoon, Husband has been obsessive in reminding Wife of her inferiority and basic worthlessness. He occasionally emphasized his contempt for her with physical violence, which always stopped just short of her requiring medical attention. His drinking only clarified in his mind his wife's faults. Wife has endured all for the children, for his career and for their position in the community.

By mutual choice, Wife has not worked outside of the home since the marriage. The parties have enjoyed a very comfortable lifestyle.

Husband finally left Wife and filed for divorce. The marital estate totals close to $1 million. The parties have agreed, so far, that Wife will get the marital home, which is paid for, and one-half of the parties' investments, which will provide a substantial stream of income.

Wife is emotionally ruined. She leaves her home only to see her analyst five days per week. Her analyst doubts that she will ever work as a nurse again as a result of the effect on her of the abuse by her Husband. Indeed, the analyst believes it would be malpractice for any hospital to hire Wife, assuming that she could present herself at a hospital and interview convincingly; the analyst doubts that she could.\(^73\)

That Wife has a claim for alimony from her husband is plain from our previous analysis: she provided the homemaking while Husband developed his career, and she deserves to share in his income after the divorce. What is not clear is whether she should be awarded alimony to compensate her for what might reasonably be deemed his intentional infliction upon her of emotional distress—a tort.

The argument that he should compensate her for her injury is compelling. Using alimony as a vehicle for making him do so, however, is less attractive.

If the focus of alimony is the sharing of burdens and benefits of the marriage, an alimony award based on personal injury that one spouse causes the other makes no sense, because no sensible spouses ever contemplate personal injury as an objective or liability of their union. As Professor Joan Krauskopf has stated,

> Spousal support compensates for the inevitable economic effect of socially desirable functions, homemaking and child care. In con-

\(^73.\) For similar facts, but with no contribution by the husband to the wife's disability, see Dunning v. Dunning, 495 A.2d 821, 822-24 (Me. 1985).
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In short, unless and until injury emerges as a conventional consequence of marriage, there will exist no ground for using alimony to redress interspousal torts. Returning to our last hypothetical, the Anxious Wife cannot seek alimony for her husband's tortious conduct, even if he caused her lost earning power, because there is no corresponding economic benefit that the husband gained at her loss. Certainly, facts could be developed at hearing to suggest that Husband has, somehow, benefitted by his behavior, but absent those facts there has been no enrichment for which Husband should have to pay. Wife gets no alimony for her loss because the vindication of a tort by exacting damages from the wrongdoer is not an appropriate basis for an award of alimony.

If that conclusion leaves us somewhat dissatisfied, we should remember that the Anxious Wife ought to have an alternative remedy available to her: she ought to be able to sue her husband for personal injury damages.75 There is, however, a theoretical bar to such a suit, one that causes some76 to prefer alimony, for all its theoretical inapplicability, as a means for her redress. The potential bar is the combined consequence of res judicata77 and collateral estoppel.78 In the Anxious Wife's case, if she raises her tort claim against him in

74. Krauskopf, supra note 13, at 267.
75. The doctrine of interspousal tort immunity has been thoroughly abrogated. See Krauskopf, supra note 13, at 267 n.13, and text, infra, accompanying notes 137-39.
77. See RESTATEMENT (SECOND) OF JUNIOR MARRIAGE § 17 (1982):
   A valid and final personal judgment is conclusive between the parties, except on appeal or other direct review, to the following extent:
   (1) If the judgment is in favor of the plaintiff, the claim is extinguished and merged in the judgment and a new claim may arise on the judgment. . . .
   (2) If the judgment is in favor of the defendant, the claim is extinguished and the judgment bars a subsequent action on that claim. . . .
   (3) A judgment in favor of either the plaintiff or the defendant is conclusive, in a subsequent action between them on the same or a different claim, with respect to any issue actually litigated and determined if its determination was essential to that judgment. . . .

The Law Court has recently declared that a divorce judgment is not res judicata in a subsequent lawsuit between the parties alleging an interspousal tort. See infra notes 140-46 and accompanying text.
78. See id., § 27: "When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim."
the divorce either as a marital property issue or as a basis for a request for alimony, and the court decides that her claim is worthless, she may be barred from suing him separately in tort by res judicata. On the other hand, if she fails to raise the issue at all, she may be estopped from suing him separately.

A majority of states that have considered this issue has concluded that the divorce and tort claims are separate and independent causes of action, need not be joined, and are essentially exempt from the principles of res judicata and collateral estoppel. The salient basis for this result is the difference in purpose between a divorce action and a personal injury action:

The purpose of a tort action is to redress a legal wrong in damages; that of a divorce action is to sever the marital relationship between the parties, and, where appropriate, to fix the parties' respective rights and obligations with regard to alimony and support, and to divide the marital estate.

A minority of state courts applies the "same transaction" test and requires the divorce and the tort claim to be litigated in one proceeding. Justification for this position includes judicial economy, a reduction in legal fees, and the policy of repose underlying the application of the principles of res judicata. This view seems artless: tort claims hardly lie at the cutting edge of judicial economy, for they invariably get bogged down in bickering about discovery and

79. "[Choses in action are property within the meaning of section 722-A(2) and fall within the divorce court's broad power to divide marital property." Moulton v. Moulton, 485 A.2d 976, 978 (Me. 1984) (citation omitted). See also Van De Loo v. Van De Loo, 346 N.W.2d 173, 177 (Minn. App. 1984).

80. See Restatement (Second) of Judgments § 17 cmts. (a)-(b) (1982):

When a valid and final personal judgment is rendered in favor of the plaintiff, the claim is generally merged into the judgment. This means that the claim, whether it was valid or not, is extinguished, and the judgment with new rights of enforcement thereof is substituted for the claim. . . . If the original claim was valid, it is extinguished by the judgment; if it was not valid, the effect of the judgment is conclusively to establish its invalidity.

81. Id. § 27, cmt. j: "The appropriate question, then, is whether the issue was actually recognized by the parties as important and by the trier as necessary to the first judgment. If so, the determination is conclusive between the parties in a subsequent action . . . ."

This rule is not immutable. It may be avoided if, among other things, "[a] new determination of the issue is warranted by differences in the quality or extensiveness of the procedures followed in the two courts or by factors relating to the allocation of jurisdiction between them . . . ." Id. § 28 (3). See also Note, Interspousal Torts and Divorce: Problems, Policies, Procedures, 27 J. Fam. L. 489, 500 (1988-89).

82. Schepard, supra note 76, at 130. See infra notes 140-46 and accompanying text for recent Maine case law adopting the majority view.


84. Schepard, supra note 76, at 131.

85. Id. at 131-32.
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are notoriously slow-moving. Given the importance of concluding many divorces quickly for the sake of the parties' children, and the expectations of many younger divorce litigants to remarry soon after their divorce, it seems counterproductive to delay any divorce until the tort claim has weaved its cumbersome way through the court system. Furthermore, in these days of malpractice sensitivity, the fact that the joinder of a tort claim with an action for divorce is merely permissive actually necessitates it. This problem is particularly insidious in states, like Maine, where the emerging tort of negligent infliction of emotional distress is enjoying increasing vogue. By permitting parties to pursue interspousal torts in divorce actions, courts would guarantee mutual claims for at least the intentional or negligent infliction of emotional distress (as well as every other tort clever counsel can allege subject only to the toothless requirement of good-faith pleading) in virtually every contested divorce. That is not the path to judicial economy and the reduction of legal fees.

86. See Weitzman, supra note 11, at 204 (footnotes omitted):

The likelihood of a woman's remarriage is largely a function of her age at the time of divorce. If she is under thirty, she has a 75 percent chance of remarrying. But her chances diminish significantly as she grows older: between thirty and forty, the proportion is closer to 50 percent, and if she is forty or older, she has only a 28 percent chance of remarriage.

Weitzman goes on to say that "few divorced women remarry immediately . . . ." Our almost daily experience in divorce court persuades us either that she is incorrect on this issue or that she is too concerned about it: a woman's significant other is a common issue in divorce these days, which means that many women quickly regain the economies of cohabitation soon after divorce, irrespective of whether they remarry or not.

Goldfarb, relies on U.S. Department of Health and Human Services statistics to conclude that "men are far more likely than women to remarry . . . ." Goldfarb, supra note 14, at 369.

87. Divorces, being equitable actions, are heard by judges alone. Torts, on the other hand, are legal actions for which trial by jury is available. Me. Const., art. 1, § 20; Cyr v. Cote, 396 A.2d 1013, 1016 (Me. 1979). It is common knowledge that it takes longer to get a case heard by a jury than by a judge. Except in those cases in which the parties waive their right to jury trial on the tort issue, therefore, mixing tort with divorce guarantees a delay in the outcome of the case.

Another source of delay is the forum in which such cases are heard. In Maine, the District Court is usually considered the preferred forum for divorces because in most such courts the dockets are less lengthy and the cases can be heard sooner. However, the Maine District Court lacks the authority to conduct jury trials, and its jurisdictional limit in ordinary civil cases is $30,000. Me. Rev. Stat. Ann. tit. 4, § 152 (West 1989 & Supp. 1992-1993). Thus the joinder of tort with divorce forces the case into the Superior Court, and in most counties this guarantees delay.


89. See Vicnire v. Ford Motor Credit Co., 401 A.2d 148 (Me. 1979).

90. Me. R. Civ. P. 11.

91. Unless the party charged with the tort has insurance, there will rarely be any
As for the policy of repose, it is a worthy concept that cannot, standing alone, justify the exponential increase in the complexity and duration of divorce litigation that would occur if torts became a regular passenger. Counsel fearful of finding their clients’ tort claims barred by *res judicata* and collateral estoppel will understandably attempt to join their tort claims with the divorce they file, and will raise such claims as property in the affidavits of assets they file. Judges faced with such pleadings and property claims should order the tort claims severed and, if fearful of the Law Court’s still-unrefined doctrine that divorces are not final until all property issues are resolved, should award or set aside to each party his or her tort claim, as yet unvalued, to be addressed at a later time.

Ordinary homeowner’s insurance policies do not insure for intentional torts, such as assault. At the time of this writing, such policies in Maine contained no exclusion for the negligent infliction of emotional distress on a spouse. We predict that it will not be long before they do.

92. Maine Rule of Civil Procedure 80 prohibits the joinder of any other claim for relief in the divorce complaint. It does not, however, bar such joinder in the answer, or in the plaintiff’s answer to the defendant’s counterclaim.

93. Maine Rule of Civil Procedure 80(c), in conjunction with Me. Rev. Stat. Ann. tit. 19, § 314 (West Supp. 1992-1993), requires the filing of an affidavit of assets and liabilities prior to mediation in all cases that have to be mediated, and prior to trial in all others.

94. Tibbetts v. Tibbetts, 406 A.2d 70 (Me. 1979). The problem that interspousal torts poses to the divorce practice is recent. It is unlikely that the legislature that passed the Marital Property Act in 1973 foresaw it and crafted the Act to require the resolution of interspousal tort suits before divorces could be final. It is equally unlikely that the Law Court of 13 years ago foresaw the issue and, therefore, it is unlikely that *Tibbetts*—which is based on the court’s interpretation of the Marital Property Act—intended the same thing. Perhaps the Law Court will clarify this issue soon.


96. If either party’s tort claim produces a substantial judgment against the other, the result will upset the divorce court’s presumed careful award of assets and/or alimony. THEREAFTER, the parties will certainly return to the divorce court for reconsideration of its previous award. An award of alimony is statutorily susceptible of amendment. Me. Rev. Stat. Ann. tit. 19, § 721 (West Supp. 1992-1993). An award of property is not; the moving party must request that the court set aside the judgment under Maine Rule of Civil Procedure 60(b). That rule, with its ossified good cause and excusable neglect standards, is no sure-fire means to a new trial. It will take a Law Court decision to make it one in the context of this problem.
V. The Law Court’s Theory of Alimony

As suggested above97 the Law Court’s recent cases involving alimony have not discussed the purpose of alimony. The court’s declaration that “[t]he purpose of alimony is to provide maintenance and support for the payee spouse”98 identifies only alimony’s effect, not its purpose. And the court’s often relied-upon observation, that alimony “is intended to fill the needs of the future, not to compensate for the deeds of the past,”99 is misleading. If the typical homemaker spouse is to be awarded alimony, it will usually be because that spouse stayed home and contributed less marketable skills while the other spouse traded on a more valuable skill. Upon divorce, the former’s “needs of the future” are the direct product of his or her “deeds of the past;” the alimony award does “compensate” for those deeds.

A coherent theory of alimony is essential if uniformity is ever to be attempted and divorce litigation is to be minimized. A consistently applied theory of alimony allows a competent divorce attorney to advise his or her client concisely, to settle cases regularly, and to forecast the outcome of litigation confidently. An inconsistent theory, on the other hand, not only befogs the conscientious attorney and magnifies the risks of trial, but it also encourages appeals because every stage of the appeal offers an opportunity to relitigate the alimony issue. Much is made of the deferential standard of appellate review of alimony awards:100 the granting of alimony is addressed to the sound discretion of the trial judge and is supposed to be reviewed only for an abuse of that discretion.101 Yet appeals of alimony awards have recently been frequent and successful. If this is the result of the Law Court’s piecemeal dispensation of a theory of alimony, we applaud, confident this appellate practice will be reduced when the theory is received and understood. But this theory is, as yet, difficult to discern.

In an attempt to analyze the Law Court’s recent decisions on alimony, we have found the analogy to contract law irresistible. Since alimony, as we view it, is a remedy for the payee spouse, we have used the outline of remedies found in the Restatement (Second) of Contracts as a basis upon which to categorize the Law Court decisions. The Restatement classifies contract remedies by the different interests that they protect for the promisee:

1. Expectation interest: The promisee’s interest in having the bene-
fit of his/her bargain by being put in as good a position as he/she would have been in had the contract been performed;
2. Reliance interest: The promisee's interest in being reimbursed for loss caused by his/her reliance on the contract by being put in as good a position as he/she would have been had the contract not been made;
3. Restitution interest: The promisee's interest in having restored to him/her any benefit that he/she has conferred on the other party.\[102\]

Our review of Law Court decisions on alimony indicates that the Court has relied on each of these interests in fashioning a result.

A. The Restitution Cases

In Bonnevie v. Bonnevie, a 1992 decision, the parties had been married for twenty-eight years. At the time of the divorce, the husband was earning $45,000 per year, and his earnings were likely to increase. The wife expected to earn no more than $12,500 per year. The trial court had divided the marital property, including the husband’s pension, equally. The wife won temporary alimony until the sale of marital home.\[103\]

The Law Court vacated the judgment and remanded the case to the trial court for reconsideration of the “fairness of the economic provisions” of the judgment, indicating that “the [trial] court’s alimony award is based on the erroneous premise that [the wife] should rely on her marital assets to maintain her standard of living.”\[104\]

As in Bonnevie, the Law Court also remanded Bayley v. Bayley\[105\] for reconsideration of the economic provisions of the judgment, including alimony. In Bayley, the trial court had allocated the marital property in approximately equal shares. The husband had received assets, including the family business, worth $501,000, whereas the wife had received about $481,000 in property, including the family home. No alimony was awarded. The Law Court concluded that al-

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102. See Restatement (Second) of Contracts, § 344 (1981).
Professor Ellman argues that contract law fails as a basis for adjudicating marital dissolutions because the underlying promise cannot reasonably be defined. Ellman, supra note 5, at 24. We agree, but also agree with the criticism that Ellman makes “a classic case for expectation damages in order to advance a restitution approach, all under the rubric of reliance.” Carbone, supra note 51, at 1472. When a promise is unenforceable, perhaps because there was no meeting of the minds to define the promise, a claim in quantum meruit is allowed (A.F.A.B., Inc., v. Town of Old Orchard Beach, 610 A.2d 747 (Me. 1992)), and the measure of recovery is, literally, what the payee deserves for the benefit conferred on the payor. Belanger v. Haverlock, 537 A.2d 604, 606 (Me. 1988). Ellman might better have argued that express contract fails as a basis for adjudicating marital dissolutions.
104. Id. at 95.
105. 611 A.2d 570 (Me. 1992).
though the assets were of equal value, the business was a source of income and the home was an expense; thus the Court sent the case back to the trial court with instructions to consider an award of alimony.

Although these brief decisions offer sparse facts, it is clear that in each case the husband left the marriage with higher earning capacity than the wife, and that in each case the husband had developed that higher earning capacity during the marriage. The wife in *Bonnevie* could earn little over minimum wage, which was probably due to the fact that, with the parties’ four children to care for, she had not worked outside of the home during the marriage. The wife in *Bayley* probably worked, if at all, in the family business, which was now her former husband’s, and may after the divorce have had few employment prospects at all. If these assumptions about these cases are correct, then the husbands had built up their earning capacities at least to some degree at their wives’ expense. The Law Court’s decisions to require alimony appear to have been based on its concern for unjust enrichment.

### B. The Expectation Case

In *Pongonis v. Pongonis*, the parties were married in 1973 and divorced in 1990. They had children aged eleven and sixteen. The wife had worked since 1975 in a clerical position at a local medical center and was earning a little over $18,000 per year at the time of the divorce. She had been contributing to social security and had vested rights in a pension plan. The husband had worked for the State of Maine since 1978 and was earning about $24,000 at the time of the divorce. He had vested rights in the state retirement system.

At the divorce hearing, the wife’s treating psychiatrist testified that she had been under medical care since 1981 for a panic disorder and major depression. She was hospitalized for forty-four days in 1987 and for thirty-six days in 1989. In the doctor’s opinion, she would suffer future severe episodes of panic disorder and depression and would again require hospitalization.

The divorce judgment required the husband to provide the primary physical residence for the children and the wife to pay him $75 per week as child support. The husband received the $60,000 house and $10,000 in other valuables, and was ordered to pay a debt

106. 606 A.2d 1055 (Me. 1992). This case is discussed at note 62, supra.
107. Id. at 1057.
108. Maine law does not permit the usual awards of custody and visitation. In Maine, parties may share parental rights and responsibilities, or the court may allocate certain parental rights and responsibilities to one party (which excludes the other from sharing in those rights and responsibilities), or the court may award sole parental rights and responsibilities to one parent (to the absolute exclusion of the other parent). Me. Rev. Stat. Ann. tit. 19, § 752 (West 1981 & Supp. 1992-1993).
of $68,500. The wife received a $6,000 car and was ordered to pay a
debt of a little more than $11,000.\textsuperscript{109} The court awarded no alimony,
for the reason that neither the husband nor the marriage had exac-
erbated the wife’s medical condition, that she had always been able
to work, and that she had not lost income during the marriage due
to her medical condition. Because of the substantial debt the hus-
band had to pay, the trial judge decided that it would be unfair to
order him to pay alimony too.\textsuperscript{110}

On appeal, the Superior Court affirmed the division of marital
property, including the allocation of debt, but ordered an alimony
award of $1 per year.\textsuperscript{111} The Law Court affirmed and decided that
the fact that neither the husband nor the marriage had exacerbated
the wife’s medical condition did not “mitigate” evidence that her
medical condition could again require hospitalization. The Law
Court concluded that the fact that she had not lost income in the
past because of her medical condition did not mean that she would
not do so in the future, just as her husband’s current inability to pay
alimony would not preclude his ability to pay in the future.\textsuperscript{112}

If this marriage had continued and the wife’s condition later re-
quired her renewed hospitalization, the husband presumably would
have continued to support her. The alimony award that the Law
Court ordered enabled the wife to request the same support. It fol-
lows that the court ordered alimony in order to permit the wife to
achieve the same level of support she would have enjoyed had the
marriage continued. The court awarded the wife her expectation in-
terest in the marriage.

C. The Reliance Case

In \textit{Prue v. Prue}\textsuperscript{113} the wife had won alimony at trial because she
had no capacity to support herself. The Law Court affirmed, and
observed not only that she had no “employable skills” but also that
“[d]uring their marriage her husband refused to let her work outside
the home.”\textsuperscript{114}

This might have been a restitution case had the court devoted any

\textsuperscript{109} Other personal property, including the retirement benefits, was divided
\textsuperscript{110} Id. at 1059.
\textsuperscript{111} Id. Maine law requires at least a nominal award of alimony at the time of the
divorce if the alimony is ever to be increased in the future. See Plummer v. Plummer,
137 Me. 39, 40-41 (1940) (“The general rule is that apart from statute the question of
alimony cannot be raised after a decree of divorce is granted, if it . . . was omitted
from the decree without fraud or mistake.”); ME. REV. STAT. ANN. tit. 19, § 721(6)
(West Supp. 1992-1993) (allowing modification of “a decree for alimony or specific
sum” that appears in the original decree).
\textsuperscript{112} Pongonis v. Pongonis, 606 A.2d at 1058.
\textsuperscript{113} 420 A.2d 257 (Me. 1980).
\textsuperscript{114} Id. at 259.
attention to the benefit the husband had received from his wife's single-minded contribution to the household. The court failed to mention any such benefit, however, and without that element the court cannot have been granting restitution. Instead the court emphasized only the wife's sacrifice—the negative. The wife had relied on her husband's decision that she stay home, and her reliance proved detrimental at the divorce. The court seems to have been using alimony to reimburse her for that reliance.

D. The Expectation/Restitution Case

Gray v. Gray considered the wife's lifestyle during the marriage as well as the benefits she had conferred on her husband. At the time of the divorce, the husband was earning about $300,000 annually from his business enterprises and the wife about $55,000-$60,000 from her executive position at UNUM. The trial court had calculated the value of the husband's businesses at $900,000, $400,000 of which was marital. It awarded $100,000 of the marital estate to the wife and the remainder to the husband, and it awarded the wife $1,500 per month alimony. The Law Court affirmed the alimony award because of the disparity in the parties' earning powers, the property distribution, and the "very high life style" that the parties had enjoyed during the marriage and that the husband continued to enjoy after their separation. The court concluded that although alimony was not necessary for the wife's "bare support," alimony would allow her to maintain the standard of living she had enjoyed during the marriage. In other words, the wife got her expectation interest.

The court also noted, however, that the wife had helped the husband "get a start" in his businesses, and "thus contributed to his earning potential." This sounds as though the court was awarding her restitution. In addition, the court mentioned the husband's economic misconduct: he had lost $57,000 gambling. This was also restitution, of a sort.

In sum, we have found the Law Court awarding alimony to meet the expectation interests of one spouse, the reliance interests of another, the restitution interests of two others, and some combined

115. In tort, the wrongdoer need not have received any benefit in order to be liable for restitution to the victim. It seems unlikely that the Law Court intended to grant Mrs. Prue alimony under a tort theory of restitution, however, in view of the court's well-established disavowal of fault as a basis for alimony. See Skelton v. Skelton, 490 A.2d 1204, 1207 (Me. 1985).
117. Id. at 696.
118. Id. at 698.
119. Id.
120. Id. at 699 n.7.
121. See supra text accompanying note 69.
derivative to a fifth. The court seeks to achieve fairness on the particular facts of each case, but there is no continuity in the court's decisions because there is no apparent theory of alimony upon which the court relies. What this means for parties to divorce is that, if they can afford to do so, they may relitigate alimony at every stage of the appeal.

VI. CONCLUSION I

Just prior to his selection of his fourth wife, Anna of Cleves, in 1538, Henry VIII sent this message:

His Grace, prudently considering how that marriage is a bargain of such nature as must endure for the whole of life of man, and a thing whereof the pleasure and quiet, or the displeasure and torment of the man's mind doth much depend. . . .

Henry married Anna on January 6, 1540. The marriage was dissolved by convocation on July 9, 1540; Parliament approved the dissolution on July 13, 1540.123

Henry was prescient to the extent that he believed that his "bargain" could be broken: his early divorce of Anna of Cleves, shocking to the sixteenth century mind, is commonplace today. This historical digression illustrates why we shun a contract theory of marriage. Contract law imposes strict liability on the parties to a contract: *pacta sunt servanda*—contracts are to be kept.124 Thus the obligor under a contract is liable in damages for breach of contract even if he or she is without fault for the breach, and even if the circumstances have made the contract far more burdensome or far less de-

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123. Id. at 327. Anna of Cleves was 24 years of age when brought from the Rhineland to marry Henry VIII. Henry needed a wife for a variety of personal and diplomatic reasons. When told of Henry's plan for a "divorce," she fainted, then submitted and cooperated. Anna did not contest the "divorce" and agreed never to leave England. In return, Henry gave her the following lifetime award: precedence over all the ladies in England, except for his next Queen and his daughters, and manors and estates worth the then-enormous sum of £3000 per year. Anna outlived Henry and his next Queens, Katherine Howard and Catherine Parr. Id. at 326-27, 353, 407, 412-13, 428.
124. RESTATEMENT (SECOND) OF CONTRACTS, introductory note to Section 261 (1979):

Contract liability is strict liability. It is an accepted maxim that *pacta sunt servanda*, contracts are to be kept. The obligor is therefore liable in damages for breach of contract even if he is without fault and even if circumstances have made the contract more burdensome or less desirable than he had anticipated. . . . The obligor who does not wish to undertake so extensive an obligation may contract for a lesser one by using one of a variety of common clauses: he may agree only to use his "best efforts"; he may restrict his obligation to his output or requirements; he may reserve a right to cancel the contract . . . .
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sirable than he or she had expected.125

Marriage “contracts,” on the other hand, are easily rescinded. A complaint of irreconcilable differences provides a perfect antidote to whatever circumstances have made the marriage “the displeasure and torment of the man’s mind.” Thus modern divorce law departs dramatically from contract theory: the former guarantees the right to rescind, which is anathema to the latter. There is no liability in damages for breach of the marriage contract.

Or is there? The husband of the Sightless Welder126 would argue that there is, if he has to pay her alimony: his continued payment of support after failure of the contract, without regard to the circumstances of the breach, is indistinguishable from damages for breach based on a theory of strict contract liability. He and the Welder agreed to a shared existence, “for richer and for poorer, in sickness and in health,” and he still has to share irrespective of the intolerably burdensome and patently undesirable terms of the contract. In short, when alimony is based strictly on need, it is strict liability damages right out of the Restatement of Contracts.

This illustrates the inadequacy of a theory of alimony based strictly on need. Such an alimony theory is anachronistic, a throw-back to times before no-fault, clean-break divorce. If no-fault divorce is deemed fair—and its widespread enactment suggests it is127—it is because the right to back out of marriage is broadly accepted. It is theoretically inconsistent to recognize the free right of rescission as a fundamental tenet of divorce law and, at the same time, to apply a concept of strict liability to one incident of divorce, alimony.128 Hence, our search for another theory of alimony.

Use of alimony as a vehicle for the prevention of unjust enrichment seems more consistent with the current theory of divorce. Viewed in this way, alimony addresses the needs of the future if those needs are a function of the deeds of the past: decisions made

125. Id.
126. See supra text accompanying notes 54-55.
127. Criticisms of no-fault divorce notwithstanding (see Weitzman, supra note 11 at 400-401), it is probably here to stay. See, e.g., Kay, supra note 32, at 4:
If the social and cultural norms that once supported the traditional model of marriage are giving way to a new consensus that supports more egalitarian partnerships, the no-fault reform, although not itself the result of a search for equality between women and men, may yet serve to stimulate a more substantive approach to that goal.
128. Professor Ellman has much the same objection:
Reformers of the traditional fault divorce laws argued persuasively that marriages fail because parties turn out to be incompatible for reasons not sensibly thought of in terms of “fault.” Judgments of “breach” share the same burden. Because contract is designed to aid the party whose losses result from another’s broken promise, it is useless where we cannot reliably define the promise.
Ellman, supra note 5, at 24.
by two people during their marriage, which have economic ramifications that emerge at the time of their divorce when the economic unit divides. The inquiry must not be solely prospective; rather it must combine the past with the future, and it is only fair to award alimony when the future needs turn out to be the unfair result of the spouses' past acts. In this way, alimony is a result, a burden, of the marriage of two particular people and derives from the specific relationship that those people chose to pursue.

Thus, we also oppose awarding alimony to women solely because they are disadvantaged in the workplace—a reality not caused by the dynamics of a particular marriage. We propose awarding alimony to women who are now disadvantaged in the workplace because they and their husbands decided, twenty years ago, that the women would work inside the home, raise children, and promote their husbands' careers. That decision works well for both parties until divorce, where the wives' continuing need turns out to be a function of their role in the past and where that role contributed to the husbands' current ability to pay alimony.

The subject is complicated. We acknowledge other, plausible approaches to the problem of achieving fairness through alimony awards. Even if one accepts this theory of alimony—restitution to prevent unjust enrichment—we have no doubt that one judge's concept of what enrichment is unjust and what is not will differ from another's, or that judges will disagree about how to calculate restitu-

129. One such approach would "grant an equal share of future earnings to both spouses"—the so-called "marital equality norm." Ellis, supra note 37, at 492. Ellis describes this theory this way:

The case for applying a marital equality norm to divorced spouses for the remainder of their lives is a strong one for the long-term marriage. A long-term marriage means that the spouses have committed themselves to, and invested their energies in, the marital unit and its sharing of economic resources. For many women, whether or not they also work outside the home, marriage and family come first and are the true "career."

... Measuring [the older wife's] "pension" by the values of the open market (where women's work does not have a value equal to that of men's work) rather than by the values of marriage (where a wife's work is considered to be of equal value to that of her husband) seems nonsensical and unjust when the investment of many years has been in the marriage as career and not in the marketplace.

... Were it not for the divorce, however, the husband would have shared his market investment equally with his wife. In short, he would continue to live, as he always had, in accord with a marital equality norm. Allowing him to retain more than half of his future earnings after a long marriage would mean that divorce has resulted in an economic windfall for him and a lower than reasonable return on investment for her.

Id. at 492-93 (footnote omitted). To us, that sounds like a theory of unjust enrichment specifically adapted to long-term marriages. Because, on a theoretical plane, the marital equality norm approach to alimony is identical to what we urge, we have not addressed it more fully.
A THEORY OF ALIMONY

But the inquiry has begun, the focus has narrowed, and the possibility of a decrease in both disparate caselaw and, eventually, appellate litigation is offered.

**POSTSCRIPT: HENRIKSEN V. CAMERON**

After a rare second oral argument and at least eleven months of deliberation, the Law Court decided in March of 1993 that actions for damages from interspousal torts should be tried separately from actions for divorce. The case was *Henriksen v. Cameron*. The parties had divorced in 1988 with an agreement, which the court had endorsed in judgment, that prescribed the division of their marital property and that denied each alimony from the other. Nine months later, Henriksen sued Cameron for the intentional and negligent infliction of emotional distress—the result, the wife claimed, of her husband's physical and psychological abuse during their marriage. She accused him, among other things, of causing her emotional distress by raping and battering her, of shattering fixtures in their home while calling her a “lying, whoring bitch,” of swaying over her bed and threatening to “get” her, and of threatening to beat her as his father had beaten his mother. The trial court directed a verdict for the defendant on the issue of the negligent infliction of emotional distress, but sent the claim based on intentional infliction of emotional distress to the jury. The jury awarded the plaintiff $75,000 in compensatory damages and $40,000 in punitive damages.

The defendant's appeal attacked the verdict on several grounds, only two of which concern us here. First, he argued that the doc-

130. Restitution could be measured as a percentage of the payor spouse's income, or as the value of the payee's opportunity costs, or as the cost of boosting the payee's future earning capacity. See Sugarman, supra note 14, at 156. Some states, like California, have alimony guidelines, similar to child support guidelines, which incorporate income, child support, and tax considerations; in such states, the incorporation of restitution theories in alimony awards might prove difficult absent statutory amendment.


132. Id. at 2.

133. Id.

134. Id. at n.1 and at 13-14.

135. Id. at 2-3.

136. Id. at 3.

137. The appellate issues that we do not discuss in this Article are the question of the statute of limitations (Cameron argued that since the two year statute of limitations barred the plaintiff's claim for assault and battery, she should not be permitted to enjoy a six year limit for her "underlying" claim of the infliction of emotional distress; id. at 13); the admissibility of evidence of physical abuse for which her cause of action was time-barred (id. at 13-15); and the admissibility of certain expert testimony (id. at 15-18).
trine of spousal immunity, first adopted in Maine in 1877, barred a tort suit by one spouse, or ex-spouse, against the other. This argument the Law Court dismissed because “[n]o valid public policy suggests making the intentional infliction of emotional distress through physical violence and accompanying verbal abuse during the marriage privileged conduct.” In other words, spousal immunity from tort has outlived its usefulness.

A second issue provided the Law Court with a more substantial challenge. The defendant argued that, because the parties had had the opportunity to litigate the plaintiff's tort claim in their divorce, the finality of that action barred her present claim in tort under the doctrine of res judicata. A majority of the court disagreed. Because divorce and tort are "fundamentally different" kinds of proceedings—the one triable to a judge alone in equity, and the other triable to a jury; the one designed to sever marriages and the other "to redress a legal wrong in damages"—joining them is "impracticable." Furthermore, compensation for such torts is unavailable through divorce, because "courts are not allowed to consider fault in the distribution of property on divorce" and "'[a]limony is intended to fill the needs of the future, not to compensate for the deeds of the past.'" Thus, the plaintiff could not have litigated her tort claim in the divorce; res judicata was no bar.

Writing for herself and Justice Rudman, Justice Glassman dissented from the majority's position on res judicata. It is incorrect to assume, she argued, that alimony is unavailable to compensate for

139. Henriksen v. Cameron, No. 6461, slip op. at 9.
140. The court stated the rule this way:
   A prior civil action will bar a subsequent civil claim if:
   1) the same parties, or their privies, are involved; 2) a valid final judgment
      was entered in the prior action; and 3) the matters presented for decision
      were, or might have been, litigated in the prior action.
   Id. (quoting Beegan v. Schmidt, 451 A.2d 642, 644 (Me. 1982) and Kradoska v. Kipp,
      397 A.2d 562, 565 (Me. 1979)).
141. Henriksen v. Cameron, No. 6461, slip op. at 10 (quoting Aubert v. Aubert,
      529 A.2d 909, 911 (N.H. 1987) (emphasis added by the Law Court)).
142. Henriksen v. Cameron, No. 6461, slip op. at 10 (quoting Heacock v. Heacock,
      520 N.E.2d 151, 153 (Mass. 1988)).
143. Henriksen v. Cameron, No. 6461, slip op. at 11.
144. Id. at 7-8 (quoting Skelton v. Skelton, 490 A.2d 1204, 1207 (Me. 1985)).

The majority's discussion of the marital property issue is virtually as brief as our discussion of it in the text accompanying this note. The subject is also beyond the theoretical scope of this Article. It might be useful, however, for practitioners to consider that the majority's decision implies that interspousal torts are (1) marital property that (2) lie beyond the subject matter jurisdiction of divorce courts (3) irrespective of language in the Marital Property Act, Me. Rev. Stat. Ann. tit. 19, § 722-A (West 1981 & Supp. 1992-1993), to the contrary. If so, we adhere to the procedure we recommended in the text, supra accompanying notes 92-96, for addressing this issue in divorce.
A THEORY OF ALIMONY

A tort injury; the alimony statute "vests the trial court with broad powers to order one spouse to pay alimony to the other," and the plaintiff’s continuing need for psychiatric therapy in this case is the kind of need for which alimony may be precisely tailored. On a broader basis, Justice Glassman took the majority to task for legislating: the majority's "sweeping embellishment of the existing law governing the marriage relationship should be left to the Legislature."  

COMMENTARY

For the reasons that are found in the text above, we agree with the result the majority reached. However, we disagree with the position that both the majority and the dissenters took on alimony. Our primary concern is the fact that neither opinion attempted to anchor its discussion of alimony to any theoretical ground. We know now that the majority thinks that alimony should not be used to compensate for tort, and that the dissenters think it should. But we don't know why.

The majority relied exclusively on Skelton v. Skelton for their conclusion that alimony could not be used to compensate for tort. That reliance was unfortunate for three reasons.

First, the precise holding in Skelton upon which the majority relied was eviscerated by a subsequent amendment of the alimony statute. Skelton, a 1985 decision, prohibited judges from awarding alimony to a homemaker "to compensate a divorcing spouse for her 'years of service' in the past . . . . Alimony is intended to fill the needs of the future, not to compensate for the deeds of the past." The 1989 amendment to the alimony statute, however, expressly required judges to consider either spouse's "contributions . . . as homemaker" when evaluating a request for alimony. Thus, the majority's specific authority for its position on alimony was not persuasive.

145. Id. at 10 (Glassman, J., dissenting).
146. Id. at 15.
147. 490 A.2d 1204 (Me. 1985).
148. Id. at 1207.
149. Me. Rev. Stat. Ann. tit. 19, § 721(1)(K) (West Supp. 1992-1993). We assume, of course, that when the alimony statute directs judges to "consider" something, it implicitly authorizes them to award alimony on the precise basis of whatever the judge considered—including, in this instance, the homemaker's contributions to the household.
150. When Henriksen and Cameron were divorced in 1988, the alimony statute had not been recently amended, and read, in pertinent part:

The court may decree to either spouse reasonable alimony out of the estate of the other spouse, having regard to that spouse's ability to pay . . . . The court may order instead of alimony, a specific sum to be paid or to be payable in such manner and at such times as the court may direct. The court may at any time alter, amend or suspend a decree for alimony or specific

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The majority's reliance on *Skelton* is not our only concern, however. Equally disturbing is the fact that *Henriksen*’s facts perfectly illustrate our complaint, voiced earlier in the text, that the rule of *Skelton* is superficial and unreliable.

We start with the observation that while *Skelton* prohibited courts from awarding alimony on the basis of the recipient’s deeds of the past, *Henriksen* barred awards of alimony based on the payor’s deeds of the past. That the majority cited the former rule as authority for the latter proposition is anomalous. In order to justify excluding the recipient’s deeds of the past from its alimony theory, *Skelton* drew upon a long line of caselaw, some of which suggested that “fault” had been dropped from the alimony statute in the past. To conclude from such precedent that alimony could not be awarded for “fault” is to interpret it incorrectly. What was dropped from the statute was the provision that created a formula for determining the alimony award for a wife when “a divorce is decreed for the fault of the husband.” This deletion left “as the sole purpose of the statute the provision of financial support to the former wife when necessary.” Nothing in that statutory amendment, or in the subsequent caselaw interpreting it, suggested that alimony might not be necessary, or ought to be prohibited, if the wife continued to suffer from having been battered or terrorized by her former husband. Yet that is precisely the interpretation that the *Henriksen* majority adopted.

Furthermore, in *Henriksen* at least some of the plaintiff’s future

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151. See supra text accompanying note 47.

152. See, e.g., *Beal v. Beal*, 388 A.2d 72, 74 (Me. 1978) (“Section 1 of chapter 399 of the Public Laws of 1971 eliminated the fault provision from the alimony statute, thereby leaving as the sole purpose of the statute the provision of financial support to the former wife when necessary.”).

153. The pertinent language, deleted from the alimony statute in 1971, read:

> When a divorce is decreed for impotence, the wife’s real estate shall be restored to her, and the court may enter judgment for her against her husband for so much of her personal property as came to him by the marriage, or its value in money, as it thinks reasonable; and may compel him to disclose, on oath, what personal estate he so received, how it has been disposed of and what then remains. When a divorce is decreed to the wife for the fault of the husband for any other cause, she shall be entitled to 1/3 in common and undivided of all his real estate, except wild lands, which shall descend to her as if he were dead; and the same right to a restoration of her real and personal estate, as in case of divorce for impotence.


needs were indistinguishably interwoven with the defendant's past wrongs: there was substantial testimony about her need for continuing psychotherapy to recover from the effects of his behavior. If the plaintiff had presented this testimony to the divorce court to support a claim for alimony, it would have been impossible for the court to have considered what the plaintiff would have needed in the future without considering exactly what the defendant had done to her. No court could conscientiously have pondered her request for alimony without evaluating whether the defendant's past acts really justified her continuing psychotherapy. Thus the plaintiff could only have received alimony to address her future psychological needs if the defendant's past behavior warranted it.

Thus when the Henriksen majority relied on Skelton for its position on alimony, the majority depended on caselaw that was not only no longer law, but was unpersuasive authority for a proposition that the caselaw probably did not support in any event. Yet the dissent did not object to the majority's argument for any of these obvious reasons, and in fact the dissent's discussion of the alimony issue is almost as theoretically sparse as the majority's.

The dissent focused on the language of the alimony statute as it existed at the time of the parties' divorce and as it exists now, and on abundant caselaw that both preceded and succeeded the 1989 amendment, to conclude that there was "considerable doubt" about the majority's position. Yet the dissent fell victim to the same slippery slope that caught the entire Law Court in Lee v. Lee: the dissent failed to distinguish between the considerations to which the amended alimony statute directs trial judges' attention, and the theoretical basis for alimony. Thus while it is true, as the dissent argues, that alimony may be awarded to a spouse whose medical condition at the time of the divorce suggests prospective need, that is not the same thing as explaining why alimony should be available to address that need. Nor is there any discussion in the dissent about why alimony should be available as a remedy for personal injury.

155. Henriksen v. Cameron, No. 6461, slip op. at 13 (Glassman, J., dissenting).
156. See supra note 150.
157. Henriksen v. Cameron, No. 6461, slip op. at 11 (Glassman, J., dissenting).
158. See supra text accompanying notes 29-30.
159. Henriksen v. Cameron, No. 6461, slip op. at 11 (Glassman, J., dissenting) (citing Dunning v. Dunning, 495 A.2d 821, 823 (Me. 1985) and Pongonis v. Pongonis, 606 A.2d 1055, 1059 (Me. 1992)).
160. A thorough consideration of the distinction between "fault" as that term is used in the phrase "no-fault divorce" and "fault" as it is used in tort is beyond the scope of this Article, but it is worth mentioning briefly. "No-fault" divorce was an antidote to the flawed procedures that accompanied divorce in the era when spouses frequently had to fabricate accusations against each other in order to obtain divorces.
In fact, neither the majority nor the dissent offers any theoretical support for the position either takes on alimony. This fact suggests that the battle among the justices must have been fought on different grounds—for example, pragmatic ones. The majority was plainly concerned with the effect that joining tort with divorce would have on such time-sensitive issues as child custody and support. The dissent never parried that argument per se, but responded by accusing the majority of legislating.

If it is true that the justices were concerned with broader—or at least other—issues than alimony, that would explain the majority's truncated discussion of the alimony issue, and the dissent's failure to strike at the obvious deficiencies in that portion of the majority's

“No-fault” divorce ended the obligation to prove that either spouse was to blame for the fact that the parties had grown unhappy. See generally Weitzman, supra note 11, at 1-20. As we argued in the principal Conclusion of our Article, “no-fault” divorce theoretically implies that neither spouse has a duty to the other to make the marriage work.

The tort concept of “fault,” on the other hand, is indistinguishable from the concept of duty—in the context of this discussion, the duty one person has not to harm another. See Restatement (Second) of Torts § 4 cmt. (c) (1965) (“Duty,” as the word is used in all the Subjects of the Restatement, is a duty to conduct one's self in a particular manner . . . whereby the interest protected by the duty can be made secure.”).

There is no theoretical inconsistency between saying that, while neither party has a duty to make the marriage work, both parties have the duty not to harm each other. Thus, there appears to be no theoretical support for the majority's conclusion that “requiring a party to raise tort claims in a divorce action . . . would undermine the policy premises of no-fault divorce.” Henriksen v. Cameron, No. 6461, slip op. at 11.

Had the dissent approached the majority's position on a more theoretical plane, this argument—which Justice Glassman did not employ, at least in her published opinion—might have proven helpful.

161. See Henriksen v. Cameron, No. 6461, slip op. at 11: “[R]equiring joinder of tort claims in a divorce action could unduly lengthen the period of time before a spouse could obtain a divorce and result in such adverse consequences as delayed child custody and support determinations.” (quoting Stuart v. Stuart, 421 N.W.2d 505, 508 (Wis. 1988)).

162. At least since 1939, Maine's alimony statute has never defined the purpose of alimony. Until the statute was revised in 1989, all it said was that “[t]he court may decree . . . reasonable alimony . . . .” (In 1939, the alimony statute read, in pertinent part, “The court may also decree to her reasonable alimony out of his estate.” See Babar v. Plant, 141 Me. 407, 409 (1945); a 1977 amendment extended eligibility to both spouses. See Me. Rev. Stat. Ann. tit. 19, § 721, Historical Note (West 1981)). Thus, whenever the Law Court has attempted to define the purpose of alimony in the past 50 years, it has had to fill in a blank in the statute and, thus to a certain degree, it has had to legislate.

Because the Maine Legislature has, for more than 50 years, chosen not to fill in that blank itself, one may conclude that it is satisfied with the Law Court's assumption of that duty. Thus we disagree with Justice Glassman to the extent that she criticizes the majority for legislating about alimony. It would appear that the Legislature may expect the Law Court to define the purpose of alimony. The reason may be that the legislators appreciate how complex a theory of alimony is. See supra text accompanying notes 13-17.
argument. From this perspective, alimony was a speck on a large-scale map, and was bypassed as the justices pursued more valuable objectives.

VII. CONCLUSION II

If issues other than alimony were paramount in *Henriksen*, we are relieved because *Henriksen* is not, then, the Law Court’s final word on the theory of alimony. The majority embraced *Skelton* not because *Skelton* was ultimately persuasive of anything, but because it was a means to an end—a vehicle to avoid whatever stumbling block alimony represented. Likewise, Justice Glassman ignored the gaping opportunities that *Skelton* offered her because there were more important things at stake.

This offers reassurance to those who may have interpreted *Henriksen* as the Law Court’s attempt to turn back the clock to the *Skelton* era and to undo the 1989 amendment to the alimony statute. *Skelton* is irretrievably flawed and was statutorily buried. The Law Court resurrected it, albeit unpersuasively, for the sole purpose of severing interspousal torts from divorce. That matter decided, *Skelton* may again be relegated to history, while we all await the Law Court’s next contemplation of the theory of alimony.