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## Whither/Wither Alimony?

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## Book Reviews

### Whither/Wither Alimony?

THE MARRIAGE BUYOUT: THE TROUBLED TRAJECTORY OF U.S. ALIMONY LAW. By Cynthia Lee Starnes. New York, New York: NYU Press, 2014. 235 pages. \$45.00.

June Carbone\* & Naomi Cahn\*\*

#### Introduction

Kristen and Derek divorce after ten years of marriage.<sup>1</sup> At the time of the divorce, Derek makes \$120,000 per year and Kristen works part-time, earning \$22,000 per year. Kristen has degrees in nursing and dance, but she quit working to care for the couple's two children and had only recently gone back to work part-time. Should she be entitled to alimony? Should it matter that she left Derek after she discovered that he was having an affair, even though he told her that the affair was over and he wanted to stay married?

Greg and Sharon have also been married for about ten years. Sharon is a teacher and the artistic director of a Brooklyn dance company.<sup>2</sup> Greg is an actor. After their son was born, Greg's acting jobs dried up. Sharon increased her hours, effectively working two jobs to keep them afloat. To save money, Greg took care of the boy rather than send him to day care and has been a stay-at-home dad for the last five years. Sharon's income is about \$120,000 per year. If they were to part, should Greg be entitled to alimony? Would it matter if Sharon left Greg because she felt that they no longer had anything in common and Greg is devastated by the divorce?

Marriages like these may be over. The question is whether, in the context of such relationships and subsequent divorce proceedings, alimony can be saved. This is the issue that Cynthia Starnes addresses in *The Marriage Buyout: The Troubled Trajectory of U.S. Alimony Law*.<sup>3</sup> Starnes argues that whatever else has changed about marriage, the one thing that

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1. Kristen and Derek are based on the parties in *Berger v. Berger*, 747 N.W.2d 336, 351 (Mich. Ct. App. 2008).

2. Greg and Sharon are loosely based on Susan Gregory Thomas, *When the Wife Has a Fatter Paycheck: Female Breadwinners Can Make for Frustrated Husbands—Unless the Man Holds His Own with Income*, WALL ST. J., July 27, 2012, <http://online.wsj.com/news/articles/SB10000872396390444873204577537161203859878>, archived at <http://perma.cc/4WPS-EVKT>.

3. CYNTHIA LEE STARNES, *THE MARRIAGE BUYOUT: THE TROUBLED TRAJECTORY OF U.S. ALIMONY LAW* 4–6 (2014).

hasn't is the impact of caretaking on income. She observes that in 2011, over 40% of women with a child under six were not in the paid labor market<sup>4</sup> and workers who take time off experience a significant lifelong drop in income.<sup>5</sup> *The Marriage Buyout* suggests that in an era of no-fault divorce and greater female independence (if not equality), marriage should be understood as a partnership, and it should address the possibility of dissolution the same way other partnerships do. Business entities often provide that where remaining parties wish to continue what had been the partners' joint undertaking, they arrange for a "buyout."<sup>6</sup> That is, to the extent the partnership holds title to the enterprise's accumulated capital and ongoing income stream, the party continuing the business must buy out the other. In a similar fashion, Starnes suggests that when one spouse leaves the relationship with an earnings stream accumulated over the course of a marriage, the other spouse should be credited with contribution to that earnings stream, and the party who "keeps" the higher income must buy out the other.<sup>7</sup> The analogy to partnership law is evocative. She emphasizes that married parties are engaged in a joint enterprise<sup>8</sup> and that the modern employment literature shows that an "ideal worker," who has a supportive spouse, earns more than a similarly situated worker who does not.<sup>9</sup> Marriage is thus about gains as well as losses, and absent some type of an accounting at divorce, one party may keep a disproportionate share of the gains while the other party is accorded most of the losses.<sup>10</sup>

The book, which builds on two decades of her past scholarship, ends with detailed proposals for alimony guidelines.<sup>11</sup> Unlike child support or most state property approaches,<sup>12</sup> alimony remains subject to a great degree of judicial discretion, discretion that has largely been used to scale back awards.<sup>13</sup> Starnes's proposals draw on the history of alimony, its historic

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4. *Id.* at 54.

5. *Id.* at 22–23.

6. *See, e.g.*, UNIF. P'SHIP ACT § 701, 9C U.L.A. 175 (1997). The Uniform Partnership Act has been adopted by more than half of the states, including Delaware. *Legislative Fact Sheet—Partnership Act*, UNIFORM L. COMMISSION (2014), [http://perma.cc/H6V5-ZAAS](http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Partnership%20Act%20%281997%29%20%28Last%20Amended%202013%29, archived at <a href=).

7. STARNES, *supra* note 3, at 156.

8. *Id.* at 155.

9. *See id.* at 131, 138–39 (describing the "gain theory" principle that having a supportive spouse allows the working spouse to dedicate less time to household duties and more time to earnings).

10. *Id.* at 130.

11. *Id.* at 161–68.

12. Starnes discusses the Indiana statute presuming an equal property division. *Id.* at 42–43. For a discussion of the move away from discretionary standards, see generally Katharine K. Baker, *Homogenous Rules for Heterogeneous Families: The Standardization of Family Law When There Is No Standard Family*, 2012 U. ILL. L. REV. 319.

13. *See* STARNES, *supra* note 3, at 40–42, 69–73 (reporting that this broad discretion often hinges on the claimant's need for alimony).

justifications and contradictions, and contemporary realities to make the best possible case for its continuation and to link the rationale she advances to a detailed framework for implementation.

The case Starnes makes is the most convincing case that can be made for the retention of alimony awards at divorce, and we admire her advocacy. Is her case enough? We are not entirely persuaded, in part, because the invocation of partnership law obscures as well as illuminates.

At its core, Starnes's partnership proposal is contractual. That is, it rests on the spouses' presumed consent to partnership principles at the time of the nuptials. The partnership notion sounds reasonable. It describes marriage as "a mutual commitment to pool labor, time, and talent in the expectation that these contributions will generate shared value in the form of income and a family home."<sup>14</sup> Yet, applying this definition to Greg and Sharon, the couple we described at the beginning of this Review, raises as many, if not more, questions than the ones it is intended to resolve. When Greg and Sharon married, they may well have assumed that they would "pool labor, time, and talent." And, if they are like many young couples today, at the time they married they both had jobs, expected to stay employed, and assumed that each spouse would work in accordance with the family's needs. That changed when Greg lost his job and could not quickly find another one, something neither anticipated at the time of the marriage. If fifteen years later Greg has still not returned to paid employment, can we still say that he has "pooled his labor, time, and talent" in support of the marital enterprise? Or has he breached his promise to do so? Starnes's assertion, that the commitment to pool resources defines the marital partnership, avoids several important questions.

First, in an era in which almost all employment has become less secure and wages have stagnated for much of the population, does marriage today rest on dual-earner families? We believe that it is entirely plausible that most couples today enter marriage believing that neither will or should assume a full-time caretaking role and that even if a spouse does, he or she must be prepared to resume paid employment in fairly short order in accordance with the family's needs.

Second, to the extent that a spouse does leave the labor market because of illness, involuntary unemployment, or a decision to concentrate more time and attention on the children, when do the consequences become the responsibility of the other spouse? Starnes assumes that disparities in income arise largely because of the advantages the higher earning spouse enjoys through the contributions of the other spouse, but in many cases the disparities arise because of misfortune. The promise to remain married is a promise to share not only gains but losses. Do Starnes's buyout proposals

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14. *Id.* at 156.

extend to disparities caused by misfortunes that may be random or unpredictable?

Finally, can we say that any single model describes the majority of American marriages? As we have documented elsewhere, American couples may not necessarily share the same assumptions about what will happen to their families. For the upper ten percent or so of the public, evidence points toward a neotraditional path,<sup>15</sup> in which marriage precedes childbearing, husbands continue to earn more than wives, and wives are more likely to cut back on work hours in the interest of the children. For the middle and the bottom, public sentiment is moving in the opposite direction, with growing distrust of marriage and a majority of births outside of marriage.<sup>16</sup> Male employment is more unstable outside the elite, and in these groups wives are more likely to out earn husbands at some point in the marriage; yet, this group also remains more committed to a traditionally gendered division of family responsibilities. Do Starnes's proposals span the class divide? We suspect that the answer is no. Alimony, both in Starnes's book and elsewhere, remains associated with a traditional division of family responsibilities that no longer describes the majority of American marriages dependent on two incomes or the increasing complexity of family arrangements in a time of economic insecurity.<sup>17</sup>

In this Review, we will explore Starnes's book, assess the current state of American marriages, and propose separating the developments at the top from those affecting everyone else. This Review highlights the book's strengths in developing a sophisticated and insightful perspective on alimony and a persuasive justification for ongoing payments after divorce, even as it questions the meaning of the caretaker role in today's families.

## I. Justifying Alimony

Starnes considers the history of alimony, primarily to reject it in providing an adequate basis for alimony today—and for good reason. The

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15. See JUNE CARBONE & NAOMI CAHN, *MARRIAGE MARKETS: HOW INEQUALITY IS REMAKING THE AMERICAN FAMILY* 19 (2014) (stating that the prosperous and highly educated have “reembraced marriage”).

16. See *id.* at 16–19 (showing that the least educated are far more likely to divorce within ten years and have children outside of marriage).

17. Moreover, in a society where the majority of American households no longer consist of marital partners, alimony—which was never awarded in most divorces anyway—is increasingly less relevant. See GORDON H. LESTER, U.S. DEP'T OF COMMERCE, U.S. CENSUS BUREAU, P60-173, *CHILD SUPPORT AND ALIMONY: 1989*, at 13 (1991) (showing that alimony was awarded to only 15.5% of the over 20 million women who in 1990 were currently separated or had ever been divorced); JONATHAN VESPA ET AL., U.S. DEP'T OF COMMERCE, U.S. CENSUS BUREAU, P20-570, *AMERICA'S FAMILIES AND LIVING ARRANGEMENTS: 2012*, at 3 (2013) (reporting that of 115 million households in the United States only 56 million were married-couple households); Lyudmila Workman, *Alimony Demographics*, 20 J. CONTEMP. LEGAL ISSUES 109, 109 (2012) (“[A]ccording to Census Bureau data, from 1887 to 1906, alimony was awarded in 9.3% of all cases. During the next twenty years, its frequency increased somewhat to 15.4% in 1916 and 14.7% in 1922.”).

history of alimony is deeply rooted in the inferior status of women, and even considering its role in protecting vulnerable women, it has been the subject of claims of incoherence in every generation.<sup>18</sup> Indeed, in 1880, Frederic William Maitland commented: “The law of Husband and Wife is in an awful mess (I don’t think that a layman would readily believe how bad it is) . . . .”<sup>19</sup> More than a century later, the American Law Institute’s *Principles of the Family Dissolution* would introduce the project by again referring to “the current disarray in family law.”<sup>20</sup>

The sources of the disarray, at least as it applies to alimony, are threefold. The first problem is the nature of the divorce proceeding itself. Legal coherence comes from judicial resolution of lawsuits through a focus on one cause of action at a time. If, for a given claim, the plaintiff prevails, the courts tailor a remedy designed to address the precise wrong inflicted. If Kristen, for example, brought a breach of contract action against Derek because of his adultery, the measure of damages would be tied to the harm his infidelity inflicted on her.<sup>21</sup> Divorce actions, however, are not so pristine. They more closely resemble the distribution of an estate because of death or bankruptcy, a corporate reorganization, or, as Starnes argues, a partnership dissolution.<sup>22</sup> These actions are necessarily different because they do not address one legal claim at a time. Instead, they combine a number of potentially conflicting assertions in a single proceeding that unwinds the entangled finances of former intimates, with the financial issues relating not just to the partners but to their children. In doing so, the courts are necessarily limited by the parties’ income and assets, as they attempt to leave both ex-spouses with a post-divorce financial foundation.<sup>23</sup> Precision inevitably suffers.

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18. For a modern example, see Ira Mark Ellman and Sanford L. Braver, *Lay Intuitions About Family Obligations: The Case of Alimony*, 13 THEORETICAL INQUIRIES L. 209, 211–12 (2012) (questioning the role of law in the emotional realm of family).

19. Mary Moers Wenig, *The Marital Property Law of Connecticut: Past, Present and Future*, 1990 WIS. L. REV. 807, 808 (internal quotation marks omitted).

20. Geoffrey C. Hazard, Jr., *Foreword* to AM. LAW INST., THE PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS, at xiii (Proposed Final Draft 1997).

21. See June Carbone, *Economics, Feminism, and the Reinvention of Alimony: A Reply to Ira Ellman*, 43 VAND. L. REV. 1463, 1472–76 (1990) (considering how expectation damages for a breach of contract claim are victim oriented and only consider the nonbreaching party’s loss by imposing that loss on the wrongdoer).

22. STARNES, *supra* note 3, at 154–55.

23. As Carbone has argued previously:

In family dissolutions, the financial awards proceed as though the court combined all of the distributable assets, and all of the claims against them into a large pot and stirred. The resulting portions need bear no necessary relationship to any single theory of distribution. . . . The goal is not to do justice in the precise sense of vindicating any particular claim, but to put family members in a position to untangle their comingled affairs and move on.

June Carbone, *The Futility of Coherence: The ALI’s Principles of the Law of Family Dissolution, Compensatory Spousal Payments*, 4 J.L. & FAM. STUD. 43, 43–44 (2002).

The second factor that contributes to the disarray is the relationship between the purpose of alimony and the status of women. The justification for alimony has been debated in every era, but in almost every era that debate has intermingled claims of property ownership with discussion of the vulnerabilities associated with women and childbearing. As the status of women changes, so do the assumptions that underlie the debate, sometimes in subtle ways.

The historically dependent status of women and their presumed capacity for financial management informed the assumptions underlying alimony. Women were not just considered vulnerable because of their assumption of the caretaking role, they were considered vulnerable because of the fact of the marriage itself.<sup>24</sup> Women, who needed to marry to raise children, were expected to be virgins at the altar; a marriage followed by a divorce made a woman damaged goods and not just because divorce itself carried a considerable stigma.<sup>25</sup> As a result, marriage was expected to last a lifetime and it generally did. Divorce was rare, and some states, such as New York, only recognized divorce *a mensa et thoro* (from bed and board), in effect, a legal separation in which neither party could remarry.<sup>26</sup> Since the marriage continued, there was no property division, and the husband, who in accordance with the law of coverture administered the parties' combined assets, kept all of the property, including the wife's separate property.<sup>27</sup> And since the marriage continued, the husband owed the wife continued support.<sup>28</sup> Alimony in this context constituted specific performance of the continued duties of the marriage. The radical part of the determination lay in the courts' willingness to specify an amount, and this reflected, in part, the husband's fault. If he had not acted egregiously enough to justify the separation, he would still have had to support his wife, but the courts typically deferred to the husband's view of what level of support was appropriate.<sup>29</sup>

Yet even historically, questions about the amount of alimony reflected an underlying disagreement as to whether alimony was just support or

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24. STARNES, *supra* note 3, at 33.

25. Indeed, over the first half of the nineteenth century, the shotgun marriage declined precipitously. See JUNE CARBONE, FROM PARTNERS TO PARENTS: THE SECOND REVOLUTION IN FAMILY LAW 90–96 (2000) (indicating that both African-American and white shotgun-wedding rates fell before or as abortion was legalized).

26. Rhonda Wasserman, *Parents, Partners, and Personal Jurisdiction*, 1995 U. ILL. L. REV. 813, 828–29; Starling Thomas Morris, Comment, *Full Faith and Credit in the Enforcement of Alimony Decrees*, 24 TEXAS L. REV. 491, 491 (1946).

27. STARNES, *supra* note 3, at 33; see also Chester G. Vernier & John B. Hurlbut, *The Historical Background of Alimony Law and Its Present Statutory Structure*, 6 LAW & CONTEMP. PROBS. 197, 198–99 (1939) (describing that a husband retained control over all property and was required to only pay a permanent alimony after a divorce *a mensa et thoro*).

28. STARNES, *supra* note 3, at 33.

29. See, e.g., *McGuire v. McGuire*, 59 N.W.2d 336, 342 (Neb. 1953) (“The living standards of a family are a matter of concern to the household, and not for the courts to determine . . .”).

concerned notions of property ownership. In 1843, for example, in the context of an alimony award that exceeded the combined salaries of the chancellor, the secretary of state, the attorney general, and the comptroller,<sup>30</sup> the highest court in New York debated whether alimony should be understood as maintenance for a wife who could not be expected to earn enough to support herself or her just share of a grand estate that included the property she brought into the marriage.<sup>31</sup> Ordinarily the difference between the two did not matter, but the dispute between the Burrs made the assumptions visible. The court resolved the case by finessing the issue, holding only that the wife was “entitled to a support corresponding to her rank and condition in life, and the fortune of [her] husband.”<sup>32</sup>

The tension in cases like *Burr*<sup>33</sup> lay in how to determine the amount.<sup>34</sup> A trial court had awarded the wife an amount comparable to the life estate she would have been accorded at her husband’s death,<sup>35</sup> while a dissenting opinion objected that “[a]t her age it would be unsuitable, even ludicrous, to lavish the revenues of a principality in the adornment of her person, and she will not require to be fed like the profligate Egyptian courtesan [sic] with pearls dissolved in acid.”<sup>36</sup> Alimony is arguably coherent during this period, as it reinforces the indissoluble nature of marriage, women’s inability to manage their own property, and the husband’s ongoing duty of support, but those serving on the New York high court of the 1840’s still found the distinction between distribution of an estate and support unresolved—and

30. *Burr v. Burr*, 7 Hill 207, 233 (N.Y. 1843) (opinion of Bockee, Sen.).

31. Compare *id.* at 209–12 (opinion of Nelson, C.J.) (discussing what portion of the estate was suitable “for the support and maintenance of the wife during separation” and finding that an alimony of one-fifth to one-sixth of the husband’s income was appropriate), with *id.* at 244 (opinion of Root, Sen.) (finding that a \$6,000 alimony was sufficiently “suitable [for] support and maintenance”).

32. *Id.* at 211 (opinion of Nelson, C.J.).

33. *Burr v. Burr*, 7 Hill 207 (N.Y. 1843).

34. Indeed, even among those supporting the award, some noted that the largest alimony awards tended to come in cases where the wife contributed a substantial part of the marital estate. *Id.* at 219–22 (opinion of Strong, Sen.). The opinion by Senator Strong also embraced something close to a partnership analysis:

Whatever increases his fortune is regarded by the law of civilized life as adding also to her prosperity. If he becomes rich, she is not to continue poor. . . . If a great abundance of wealth is thought so desirable by the husband that he has devoted a life of toil and perplexity to its accumulation, a just and fair proportion of it . . . is supposed to be equally desirable and necessary for her, who has traveled with him for a long period in the same path of acquisition, whose mind has been bent and moulded constantly and for years towards the same objects of pursuit which have engrossed his thoughts and invited his energies, and whose domestic economy, directed to the same purposes, has been, if not the starting point, at least a leading auxiliary of his success.

*Id.* at 215–16.

35. *Id.* at 208.

36. *Id.* at 233 (opinion of Bockee, Sen.). The couple had been married for over thirty years. *Id.* at 212 (opinion of Nelson, C.J.).



therefore the type of precision that constitutes coherence in other parts of the legal system to be lacking.

Today, the first two tensions that produce incoherence (the pragmatic complexities that distinguish cases involving resolution of a single claim and divorce cases, and between ownership claims grounded in desert-versus-need-based claims based on policy considerations) persist. At the same time, a third reason for the incoherence of alimony comes into play: the changing meaning of marriage in an era of economically independent women. In the marriages of today, the solo bread earner and permanent homemaker of the traditional model are anachronisms, and “shared financial and domestic contributions [serve] as the foundation for marriage in the post-industrial economy.”<sup>37</sup> This new model rests on a changed social script: one that replaces women’s dependence on their husbands with spousal interdependence.<sup>38</sup> “The new script assumes commensurate contributions, but it does not distinguish between financial and domestic ones.”<sup>39</sup> “Perhaps most critically, though, it assumes joint responsibility—for the family’s finances and [if babies arrive] for any resulting children.”<sup>40</sup> In this new world, many families depend on two incomes and few jobs are secure; both spouses must therefore be prepared to contribute financially and domestically.<sup>41</sup> Moreover, two incomes do not just cushion the impact of layoffs. They also create the flexibility necessary to retool if new opportunities require new degrees or children’s needs require cycling in and out of the workplace.<sup>42</sup> In this script, women have finally become fully autonomous adults, and both men and women believe it is only worth marrying if they find a true partner who can make the new marital script work.<sup>43</sup>

Starnes is more willing than we are to find coherence in the history of alimony and ties the disappearance of that coherence to the complicated role of fault in determining awards. She suggests that the real problem for alimony comes with the “appearance of absolute divorce and the supposed end of coverture [which] meant the end of caregivers’ lifetime support ticket and also the end of a clear rationale for alimony.”<sup>44</sup> That is, she ties the initial rationale for alimony to specific performance of the husband’s duty of support during a period of separation in which the marriage nonetheless

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37. CARBONE & CAHN, *supra* note 15, at 93.

38. *Id.* at 110.

39. *Id.*

40. *Id.* at 111.

41. *Id.* at 95–97.

42. See generally HANNA ROSIN, *THE END OF MEN AND THE RISE OF WOMEN* 47–77 (2012) (explaining that couples’ roles have become increasingly fluid and interchangeable and that division of earnings may “flip-flop,” allowing each partner a chance to be the primary provider).

43. See KATHLEEN GERSON, *THE UNFINISHED REVOLUTION: HOW A NEW GENERATION IS RESHAPING FAMILY, WORK, AND GENDER IN AMERICA* 11–12, 126–28 (2010) (noting that young adults express wariness about partners who expect to be supported).

44. STARNES, *supra* note 3, at 34.

continued and questions its role once the states authorized true divorce.<sup>45</sup> By the end of the nineteenth century, many of the American states permitted judicial divorce actions and adopted the Married Women's Property Acts, which allowed women to retain control of their separate property during the marriage and ownership at divorce.<sup>46</sup> The women thus regained control of the property they owned and the husband's duty of support presumably ended with dissolution of the marriage. Still, the mothers of young children did not typically work outside the home if their husbands could support them, and even with return of their separate property, they risked impoverishment at divorce. Starnes argues that the principal justification for alimony in this era became fault; that is, "a husband who committed adultery, for example, would be required to pay alimony to an injured caregiver" as damages for breach of the marital contract.<sup>47</sup> With adoption of no-fault divorce, the fault justification disappeared, leaving no apparent basis for the continuation of support.<sup>48</sup>

In fact, no state treated alimony as a true system of damages, attempting to measure the "innocent" spouse's loss with precision,<sup>49</sup> and by the time no-fault reforms were adopted, the insistence on a showing of fault by one, and only one, party had become a farce. As Starnes acknowledges, many couples colluded to establish that fault existed.<sup>50</sup> The result for these couples more closely approximated a system of divorce through mutual consent. Moreover, with erosion of the barriers to divorce, relatively few states banned alimony altogether on the basis of a dependent spouse's transgressions,<sup>51</sup> and those

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45. She can conclude that alimony during this period was "coherent," however, only by overlooking the tensions between its role in distributing the estate versus providing basic maintenance.

46. Carbone, *supra* note 23, at 49; *see also* STARNES, *supra* note 3, at 34 (noting that by the end of the nineteenth century, every state had at least allowed for some form of absolute divorce).

47. STARNES, *supra* note 3, at 35. In fact, the role of fault in divorce is more complex. Fault, as grounds for divorce, never served the same purpose as breach of contract, which has traditionally allowed parties to renege on contractual obligations so long as they compensated the other parties for their expectation losses. Instead, it reinforced the permanence of marriage. Neither party, nor both parties jointly, had the power to end a marriage without a showing of fault. Margaret F. Brinig & June Carbone, *The Reliance Interest in Marriage and Divorce*, 62 TUL. L. REV. 855, 861 (1988); *see also* Carbone, *supra* note 21, at 1474-75 (emphasizing that expectation damages that allow one spouse to enjoy a certain standard of living at the other's expense makes no sense when there is no obligation to stay married and no way to determine fault). Within this system, fault served to free an innocent spouse from the bonds of a union that could be shown to no longer exist due to the adultery, desertion, or extreme cruelty of the other party. Brinig & Carbone, *supra*, at 861. It thus justified not just a legal separation but the end of the union, which was necessary to permit the innocent spouse to remarry. *Id.* at 862.

48. STARNES, *supra* note 3, at 36.

49. *See, e.g.*, *Lyon v. Lyon*, 21 Conn. 185, 196-97 (Conn. 1851) (rejecting the characterization of alimony as damages).

50. STARNES, *supra* note 3, at 34.

51. Carbone, *supra* note 23, at 53.

states (Starnes mentions North and South Carolina)<sup>52</sup> tended to be concentrated in the more conservative parts of the country. Other states allowed consideration of fault in determining the amount of an award but still seemed reluctant to adopt an absolute rule that might leave a dependent spouse penniless and dependent on the public fisc.<sup>53</sup>

Even when the woman claiming alimony was the innocent spouse, the courts continued the debate in *Burr v. Burr* and disagreed as to whether it made more sense to characterize alimony as a distribution of the marital estate that remained titled primarily in the husband's name or as a continuation of support justified by the combination of the husband's fault and the wife's need.<sup>54</sup> This debate had two consequences. First, it affected the issue of whether an alimony award ended upon remarriage. If it were a distribution of the estate, it would not; if it constituted continuation of the marital duty of support, it would.<sup>55</sup> Second, courts expressed concern about the effect on the divorce rate. A Massachusetts court in 1835 observed, for example, that "the doctrine, which no one will doubt, that a wife is not to be encouraged to leave her husband in violation of the marriage contract, by the expectation of enjoying a separate maintenance, and that in such cases a court of equity may interfere."<sup>56</sup> If alimony were in fact a distribution (or buyout) of the jointly owned marital estate, either party, as Starnes argues later, ought to be able to end the union with his or her share of the marital estate intact.<sup>57</sup> Few courts were willing to grant women that much independence.<sup>58</sup>

The adoption of no-fault divorce did nothing to resolve the debate over the nature of alimony, though it did contribute to a changing understanding of the nature of marriage. Implementation of divorce reform over the course of the seventies and eighties coincided with the large-scale entry of women, including the married mothers of young children, into the labor market; skyrocketing divorce rates that reflected in part the changing nature of women's roles; and changing legal treatment of marriage, which became

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52. STARNES, *supra* note 3, at 35.

53. See Carbone, *supra* note 23, at 52–53 (explaining that courts did not often exercise their discretion against guilty wives).

54. *Id.* at 52–54 (summarizing nineteenth-century cases).

55. Indeed, even if the awards were viewed as damages, remarriage might be characterized as mitigation of damages, but then, of course, a true contract award would be reduced to a liquidated sum that took the likelihood of mitigation into account.

56. *Ayer v. Ayer*, 33 Mass. (16 Pick.) 327, 333–34 (Mass. 1835).

57. June Carbone has argued elsewhere that the problem with this approach is not necessarily the principle of ownership but the failure to recognize the offsetting interests. A wronged husband, for example, also has a loss from the end of a marriage. The larger the share of marital assets he retains, the better his prospects for remarriage in an era that places a premium on male income. See Carbone, *supra* note 23, at 64–65 (describing how alimony obligations take away from a man's ability to support a new family).

58. For a discussion of the practical effect of such restrictions, see Betsey Stevenson & Justin Wolfers, *Bargaining in the Shadow of the Law: Divorce Laws and Family Distress*, 121 Q.J. ECON. 267, 269–70 (2006).

effectively terminable at will.<sup>59</sup> Marital property reform, which often accompanied adoption of no-fault divorce, changed what had been title systems to marital property or equitable distribution regimes. In accordance with these systems, the courts acquired the power to divide the marital estate to recognize homemaker contributions and to address the need of a lower earning spouse following divorce.<sup>60</sup> Divorce awards tended overwhelmingly to become fifty-fifty divisions, but scholars disagreed as to whether these awards reflected women's contributions to accumulation of the marital estate (and thus recognition of their ownership claims to property accumulated during the marriage) or allocation of a larger portion of the "husband's property" to address the wife's need (and thus use of the marital estate to provide support or compensation for caretaking).<sup>61</sup> Precisely because divorce courts do not need to justify the basis for their awards with precision, the basis for the fifty-fifty awards has never been definitely resolved.<sup>62</sup>

The core of Starnes's critique is focused here. No-fault divorce ended the insistence, however unconvincing it had become by the seventies and eighties, that marriage was a life-long relationship. All states now recognize no-fault grounds for divorce, either allowing an immediate divorce if one party alleges irreconcilable differences or similar grounds, or if the parties live apart for a period of time.<sup>63</sup> In a large number of jurisdictions, divorce reforms precluded any consideration of fault, and in other states the subsequent judicial decisions moved away from fault (in the breach of contract sense) as a major factor in divorce awards.<sup>64</sup> Women were no longer dependent solely as a result of their gender or even necessarily because of caretaking responsibilities. And with greater economic and legal

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59. CARBONE & CAHN, *supra* note 15, at 112–13. For discussion of the changes associated with no-fault divorce, see generally Stéphane Mechoulan, *Divorce Laws and the Structure of the American Family*, 35 J. LEGAL STUD. 143, 149–51 (2006) and Betsey Stevenson & Justin Wolfers, *Marriage and Divorce: Changes and their Driving Forces*, J. ECON. PERSP., Spring 2007, at 27, 46. The economists maintain generally that the parties bargain around the legal changes. Mechoulan, for example, shows a change in divorce patterns following adoption of pure no-fault statutes, with the rates peaking in the years immediately after adoption but then leveling off as the parties adjust their expectations. Mechoulan, *supra*, at 165. In particular, Mechoulan shows that traditional couples experienced the greatest increase in divorce following adoption of no-fault reforms but that the rates level off for couples married later. *Id.*

60. STARNES, *supra* note 3, at 68–73.

61. Compare Suzanne Reynolds, *The Relationship of Property Division and Alimony: The Division of Property to Address Need*, 56 FORDHAM L. REV. 827, 849–52 (1988) (finding that most equitable division statutes result in approximately equal property division and concluding that property division is therefore not being used to address need), with Joan M. Krauskopf, *Theories of Property Division/Spousal Support: Searching for Solutions to the Mystery*, 23 FAM. L.Q. 253, 273–75 (1989) (arguing that award of 50% of the property may in fact be intended to redress need if the court remains unconvinced that the wife's contribution to the marital estate equals the husband's).

62. See Baker, *supra* note 12, at 329–31, 333–35, on the courts' increased preference for mechanical rules of division rather than normative standards or discretion.

63. STARNES, *supra* note 3, at 36; Stevenson & Wolfers, *supra* note 58, at 273.

64. STARNES, *supra* note 3, at 73–74.

independence, women came to initiate two-thirds of marital dissolutions.<sup>65</sup> The Uniform Marriage and Divorce Act dealt with these changes by advocating a “clean break.”<sup>66</sup>

Starnes argues that these reforms shortchange homemakers—and they do. She correctly observes that the assaults on alimony often rest on inaccurate assumptions that understate the impact of caretaking on both the caretaker’s income and family well-being, overstate the degree of gender equality in either the workplace or the assumption of family responsibilities, and fail to recognize the societal stake in children and those who care for them.<sup>67</sup> The move away from fault-based divorce and the equal division of marital property eliminated the two principal historic justifications for alimony. Moreover, most couples have few assets outside of the family home,<sup>68</sup> and as Starnes documents, legislatures and courts are increasingly concluding that case-by-case judgments create too much uncertainty and potential for political backlash.<sup>69</sup> The result is a move away from discretion towards guidelines<sup>70</sup> that, as Starnes also suggests, are designed to limit the length and duration of alimony.<sup>71</sup>

This disproportionately affects long-term homemakers, who typically married in an earlier era, whose employment skills have long since atrophied, who will reach retirement age before the investment necessary to begin a new career begins to pay off, and who enjoy relatively fewer opportunities to remarry than younger women or men of the same age. Indeed, as Starnes acknowledges, many states cut back on clean break provisions to ensure more support precisely because of the plight of long-term homemakers,<sup>72</sup> and even

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65. Margaret F. Brinig & Douglas W. Allen, “*These Boots Are Made for Walking*”: *Why Most Divorce Filers Are Women*, 2 AM. L. & ECON. REV. 126, 128 tbl.1 (2000) (stating that two-thirds of those filing for divorce are women).

66. STARNES, *supra* note 3, at 36.

67. *Id.* at 26–31.

68. *Id.* at 69. Of course, this is true in part because most couples divorce relatively early in the marriage and, even in longer marriages, those with fewer assets are more likely to divorce. See ALISON AUGHINBAUGH ET AL., U.S. BUREAU OF LABOR STATISTICS, MARRIAGE AND DIVORCE: PATTERNS BY GENDER, RACE, AND EDUCATIONAL ATTAINMENT 17 (2013), available at <http://www.bls.gov/opub/mlr/2013/article/pdf/marriage-and-divorce-patterns-by-gender-race-and-educational-attainment.pdf>, archived at <http://perma.cc/GE6T-SH68> (stating that as marriages age the possibility of divorce decreases); Jeffrey Dew et al., *Examining the Relationship Between Financial Issues and Divorce*, 61 FAM. REL. 615, 624–26 (2012) (indicating that financial conflict acted as a predictor of divorce among an older data set).

69. STARNES, *supra* note 3, at 76, 88–90.

70. As an example, consider MASS. GEN. LAWS ANN. ch. 208, § 53 (West Supp. 2014).

71. STARNES, *supra* note 3, at 76.

72. See *id.* at 50–51 (explaining that Minnesota enacted legislation to protect awards of permanent alimony and that other state courts also intervened to protect long-term alimony awards in the face of hostile statutes).

the new more restrictive divorce legislation currently in vogue typically leaves open the possibility of support after longer term marriages.<sup>73</sup>

She nonetheless stacks the deck by starting the book with “Casey’s story.” Casey had been a full-time homemaker through years of marriage.<sup>74</sup> After the children were grown, her husband, a professor at a major university, came home and announced that he had fallen in love with someone else and wanted a divorce.<sup>75</sup> Casey, in her fifties, was left with almost nothing—no employment history, no skills, no significant property settlement, no child support and no alimony.<sup>76</sup> She “ran away” to another city, a small apartment and a minimum wage job at Starnes’s law firm.<sup>77</sup> Starnes reports that “[o]ne day Casey didn’t show up for work. . . . She had traveled back to her hometown, to her old house, to her old garage, where she sat in a car and took her life.”<sup>78</sup>

While Starnes is right that women like Casey still exist, Casey herself was the product of a different era.<sup>79</sup> Starnes met Casey while she was a paralegal,<sup>80</sup> presumably before Starnes graduated from law school. If Casey had fully grown children, she had probably married twenty to thirty years earlier, in the fifties or early sixties. If she is characteristic of the women of that era, she would have married at a younger age than the comparable group of women today and done so before completing a college degree or shortly after graduation. And not only would she have had a difficult time staying employed during her marriage, her husband might have forbidden it. When her husband came home and told her he was leaving her for someone else, he was ending a marriage that reflected the rules of another era.<sup>81</sup>

Alongside Casey’s story, however, is another tale from the same time period that raises the same issues: Doonesbury’s Joanie Caucus.<sup>82</sup> In the seventies, Joanie felt trapped in the homemaker’s role. In a manner that shocked some and resonated with others, she walked out on her husband and

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73. See *id.* at 79 (noting that the restrictive alimony statutes in Maine and Texas still allow alimony payments for long-term marriages).

74. *Id.* at 2.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. For reflections from popular culture of women’s role in that era, see Sara Boboltz, *Awful ‘50s Marriage Advice Shows What Our Mothers and Grandmothers Were up Against*, HUFFINGTON POST (Sept. 26, 2014, 2:30 AM), [http://www.huffintonpost.com/2014/09/26/can-this-marriage-be-saved-advice\\_n\\_5829870.html](http://www.huffintonpost.com/2014/09/26/can-this-marriage-be-saved-advice_n_5829870.html), archived at <http://perma.cc/Y35H-DYX5>.

80. STARNES, *supra* note 3, at 2.

81. Mechoulan, *supra* note 59, at 147, documents the increase in divorce rates that followed adoption of no-fault divorce and suggests that the increase disproportionately affected marriages such as Casey’s. In contrast, he shows the leveling off of divorce rates with adjustment to the new regime as couples recognized the lack of protection for long-term homemakers. *Id.* at 165.

82. *Joanie Caucus*, WASH. POST, <http://doonesbury.washingtonpost.com/strip/cast/member/13>, archived at <http://perma.cc/U9HE-2WKE>.

young daughter.<sup>83</sup> She too ran away, in her case to escape a traditional marriage and ultimately to recreate her life, which she did, becoming a lawyer, working as a legislative aide, and then moving into private practice.<sup>84</sup> Should she have been able to walk out and still be entitled to a buyout of her share of her distraught husband's income? And, today, if Rick Redfern, Joanie's blogger husband who lost his job with the Washington Post,<sup>85</sup> walked out on her, would he be entitled to alimony on the basis of Joanie's presumably higher earning capacity as a lawyer? To answer these questions requires asking how we understand marriage, gender, and homemaking today.

## II. Can Alimony Be Justified?

The strongest part of the book is Starnes's effort to revitalize alimony for the modern era. After surveying other theories that seek to justify alimony, Starnes offers her own: "[A]n enriched partnership model that analogizes alimony to a buyout."<sup>86</sup> The concept of a partnership, Starnes argues, recognizes the equality of each spouse's contributions to the marriage. As she notes, marriage, like partnerships, typically begins with trust and without a written agreement that sets out precise expectations.<sup>87</sup> In the absence of an express agreement, the law supplies default terms that govern partnerships.<sup>88</sup> Starnes, however, is elusive on the question of whether the parties can contract around these terms,<sup>89</sup> and indeed, suggests that her proposed partnership terms come from the state rather than the presumed intent of the parties. As in business partnerships, "the state determines the economic price of exit," and in marriage, "it is important that the state fix this price, for if the marriage promise matters, it must have consequences."<sup>90</sup>

To establish such consequences, Starnes revisits the marital exchange of promises and defines them as "a mutual commitment to pool labor, time, and talent in the expectation that these contributions will generate shared value in the form of income and a family home."<sup>91</sup> Once the marriage is

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83. See *id.* (describing her liberation "from a disastrous marriage").

84. *Id.*

85. *Id.*

86. STARNES, *supra* note 3, at 147.

87. *Id.* at 150.

88. UNIF. P'SHIP ACT § 103(a), 6 U.L.A. 73 (1997).

89. For example, she describes her proposals as "default rules" which implies that the parties can contract around them, STARNES, *supra* note 3, at 160, and she notes that the terms apply "[a]bsent an agreement otherwise" but says nothing in either place about the extent of the parties' ability to negate her proposed terms. *Id.* at 155. She does say, however, that couples who want an "every man for himself" relationship can opt into one. *Id.* at 161. For a discussion of such terms, see, for example, UNIF. PREMARITAL & MARITAL AGREEMENTS ACT, 9C U.L.A. 15 (2012).

90. STARNES, *supra* note 3, at 155.

91. *Id.* at 156.

underway, particularly in marriages with children,<sup>92</sup> the parties seek to optimize the family combination of income and services, and couples often choose to trade off labor-market participation and homemaking. These decisions often “generate a higher income stream and enhanced human capital for the spouse who invests more extensively in paid employment.”<sup>93</sup> A divorce may terminate the relationship, but in a marriage like Casey’s,<sup>94</sup> the earnings stream made possible by the couple’s joint contributions continues, with her husband reaping all of the benefits they would have shared had the marriage continued. Starnes argues that this is not a partnership dissolution.<sup>95</sup> Instead, it is the equivalent of one partner deciding to terminate the involvement of the other in what had been their joint enterprise.<sup>96</sup> To be able to do so, the partner who reaps the benefit of the continuing earning stream should have to “buy out” the other.<sup>97</sup> Over the last part of the book, Starnes develops a detailed proposal for doing so.<sup>98</sup>

Starnes’s partnership rationale captures the sense of modern relationships as relatively egalitarian commitments premised on sharing.<sup>99</sup> Both the law and popular culture portray marriage as an unconditional commitment in which the parties form an interdependent relationship in which they pool income, assets, efforts, and children;<sup>100</sup> describing it as “a mutual commitment to pool labor, time, and talent”<sup>101</sup> therefore makes sense. The more difficult challenge is to give content to the terms in a way that justifies Starnes’s buyout proposals, which presume that this pooling enterprise lasts after the marriage ends. This requires unpacking a number of underlying concepts.

Starnes eliminates the need to discuss ownership of human capital by positing a partnership ideal that includes a commitment to pool resources over the course of the marriage. A partnership is a specialized form of

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92. Starnes does discuss the applicability of a buyout to marriages without children, drawing on a Canadian alimony guideline project. *Id.* at 159.

93. *Id.* at 156.

94. *Id.* at 2.

95. *See id.* at 155 (“A spouse’s decision to leave the partnership does not necessarily trigger a winding up of any shared marital enterprise.”).

96. *Id.* at 154–55, 160.

97. *Id.* at 160.

98. *Id.* at 149–68.

99. *See id.* at 149 (describing the partnership model of marriage as espousing “egalitarian principles” that also “infuse family norms if not all family realities”).

100. Indeed, poorer women often describe their failure to marry in exactly such terms; they take the commitment to marriage very seriously and are therefore reluctant to commit unless they feel that their partner merits such commitment. *See generally* Kathryn Edin & Joanna M. Reed, *Why Don’t They Just Get Married? Barriers to Marriage Among the Disadvantaged*, 15 MARRIAGE & CHILD WELLBEING, Fall 2005, at 117 (examining a number of barriers to marriage among disadvantaged Americans, including perceived expectations about marital relationships, aversions to divorce, and economic barriers).

101. STARNES, *supra* note 3, at 160.



contract that includes default terms that apply in the absence of an agreement to the contrary.<sup>102</sup> These default terms can come from two sources. Most typically, they reflect terms that can be assumed to be those to which the parties might agree if they were to write an explicit contract.<sup>103</sup> Such terms presumably reflect either common assumptions about how to conduct such a relationship or basic principles of fairness.<sup>104</sup> Alternatively, the terms may reflect provisions imposed by law or public policy. The parties are ordinarily free to contract around the former, but not the latter. In a prenuptial agreement, for example, the parties may ordinarily specify that particular pieces of property will remain separately owned by one of the spouses, but they may not use a prenuptial agreement to eliminate a child's right to support or to leave either spouse entirely dependent on the public fisc.<sup>105</sup>

The cornerstone of Starnes's proposal is the view that each party's respective income is the product of investment during the course of the marriage.<sup>106</sup> She thus proposes that marriage be seen as a partnership that rests on the agreement to pool investments.<sup>107</sup> At divorce, parents continue to share children,<sup>108</sup> and they should similarly be required to share income. That agreement is premised on a contractual perspective of what a fair exchange should look like.

Yet, Starnes does not fully work through either the assumptions that might underlie a mutual consent theory or the alternative public policy justification. She would presume that each spouse contributed equally, and although she would build in the length of the marriage as a factor, she would make no provision for tallying individual contributions, for taking into account the circumstances that led to the break-up, or to the accumulation of

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102. See *supra* note 88 and accompanying text.

103. One way to justify default terms, however, is to pick the terms that favor the party with less bargaining power. The other party is more likely, in any event, to initiate a premarital agreement, and premarital agreements more commonly seek to eliminate responsibility for spousal support than to augment it. See J. Thomas Oldham, *With All My Worldly Goods I Thee Endow, or Maybe Not: A Reevaluation of the Uniform Premarital Agreement Act After Three Decades*, 19 DUKE J. GENDER L. & POL'Y 83, 89–90 (2011) (describing the “stereotypic” premarital agreement scenario as a situation where the wealthier party “instructs his or her lawyer to draft an agreement and limits the claims of the other party . . . if the parties divorce”).

104. Fairness typically involves notions of reciprocity. Standard contract measures such as expectation and restitution depend on measures of reciprocal exchange, which in turn come from the nature of the exchange of marital promises (expectation) or the relationship of a benefit conferred on one party that corresponds to a loss suffered by the other party (restitution). See Brinig & Carbone, *supra* note 47, at 870–72 (discussing the nature of the reliance and expectation interest in marriage).

105. See, e.g., UNIF. PREMARITAL & MARITAL AGREEMENTS ACT § 10, 9C U.L.A. 27 (2012).

106. See STARNES, *supra* note 3, at 140 (“As an equal stakeholder in the marriage, the primary caregiver is entitled to an equal share of the financial fruits of marriage.”).

107. *Id.* at 160.

108. See *id.* at 169–70 (stating that contemporary norms emphasize coparenting after divorce).

capital in a particular spouse's earning capacity.<sup>109</sup> While we agree that in cases like Casey's alimony is justified,<sup>110</sup> we doubt that the proposals fit the myriad of modern cases likely to arise.

First, Starnes needs to say more about whether couples would in fact agree that the lower earning spouse can decide to end the marriage and take a substantial share of the other spouse's income. Most scholars, like Starnes, reject fault principles as a basis for divorce allocations in part because there is no agreement on what fault entails, and we agree with that conclusion.<sup>111</sup> Yet, it is important to acknowledge the tradeoffs: there may simply be some interests that cannot be protected in the absence of fault, and the lack of confidence in the permanence of marriage necessarily changes the parties' expectations about the nature of marriage itself.<sup>112</sup> Starnes states that "it is important that the state fix [the buyout] price, for if the marriage promise matters, it must have consequences"<sup>113</sup> without discussing the most important marital promise, the one to stay married. Indeed, the gendered division of labor that lies at the core of the Starnes partnership model makes little sense in the absence of a conviction that the marriage will last. The poster child for Starnes's defense of alimony—full-time homemaker Terry Hekker whose husband left her for another woman after forty years of marriage—admits that she is a relic from a different era.<sup>114</sup> Hekker states that if she had to do it over again, she would still have married the same man and had the same

109. *See id.* at 140 (noting that gain theory is "generally not interested in relative spousal contributions").

110. Of course, one of the reasons Casey's case is so compelling is that her husband left her for someone else. So he gets the benefits of his higher earnings and the ability to remain married to what he views as a better wife, while Casey gets neither a share in the income the marriage made possible nor similar opportunities to remarry. If she had left him for a higher earning spouse, however, the fairness of Starnes's proposals would seem quite different. Although the data is sparse, there is some indication that while women initiate the majority of divorces, they are less likely to do so in precisely these circumstances: that is, after a long-term marriage with a traditional division of labor where the husband earns substantially more than the dependent wife. Casey's case is more typical than that of a long-term homemaker seeking to end a marriage for a new partner. *See Carbone, supra* note 23, at 73, 75 (describing a case where a husband divorces his wife after thirty-five years so he can marry his mistress as "typical").

111. The difficulty with fault in the breach of contract sense lies with the absence of agreement on what constitutes justification for the decision to leave. Starnes's example of the brief affair with the tennis pro is a good example. STARNES, *supra* note 3, at 73. Infidelity has long been associated with a double standard for men and women, but without that, there is no agreement on when infidelity creates irreconcilable differences and when it should be forgiven. For a more complete discussion of this issue, see Carbone, *supra* note 23, at 64–65 (discussing the role of gender in allocating fault in the context of marriage and divorce).

112. *See Carbone, supra* note 21, at 1472–76 (discussing the need for fault in order to award expectation damages, thereby protecting incentives to avoid inefficient marital breaches and encouraging beneficial specialization within marriages).

113. STARNES, *supra* note 3, at 155.

114. Terry Martin Hekker, *Paradise Lost (Domestic Division)*, N.Y. TIMES, Jan. 1, 2006, <http://www.nytimes.com/2006/01/01/fashion/sundaystyles/01LOVE.html?pagewanted=all>, archived at <http://perma.cc/G7HA-DRMM>.

number of children.<sup>115</sup> But she would not have permanently given up a career. She quotes with approval her niece's determination to stay in the workforce so that she doesn't "end up like Aunt Terry."<sup>116</sup>

Second, Starnes's pooling principle looks at the parties' combined post-divorce income,<sup>117</sup> yet Starnes also insists that the policies that justify sharing gains are not identical to those that require sharing losses.<sup>118</sup> The argument she makes for sharing gains rests on the assumption that post-divorce income reflects marital contributions that increase over the course of the marriage,<sup>119</sup> though she also acknowledges that a commitment to pooling resources that combines gains and losses better addresses an era of stagnating incomes.<sup>120</sup> Do losses rest on the same principle? If a full-time homemaker has suffered a loss in earning capacity as a result of contributions to the marital enterprise, it does.<sup>121</sup> Losses, however, may also reflect layoffs or economic downturns; the illness or personal limitations of the individual (with economic downturns often compounding factors such as substance abuse);<sup>122</sup> or continuing discrimination in the workplace.<sup>123</sup> Greg, in the example at the beginning of this Review, has become a full-time homemaker because he lost his job and could not easily find another. In these circumstances, the disparity in spousal incomes does not necessarily reflect either his lost income (which may be practically zero if he cannot find another job at the height of a financial recession) or his contributions to his wife's income, which may reflect her willingness to work longer hours because of the family's dependence on her

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115. *Id.*

116. *Id.*

117. STARNES, *supra* note 3, at 164–65.

118. *Id.* at 145.

119. *Id.* at 156–57.

120. *Id.* at 157.

121. *Id.* at 157, 160. It does in part because the value of the homemaker's contribution to the marital enterprise can be presumed to be at least as great as their opportunity cost—the value of the foregone earnings.

122. See Clifford L. Broman et al., *The Impact of Unemployment on Families*, 2 MICH. FAM. REV. 83, 88–99 (1996) (surveying workers at a closing industrial plant and finding that plant closings led to increased financial hardship, increased tension and conflict among family members, and deteriorating family relationships overall); Tony Dokoupil, *Lifestyle: Laid-Off Men Don't Do Dishes*, NEWSWEEK, Feb. 20, 2009, <http://www.newsweek.com/lifestyle-laid-men-dont-do-dishes-82201>, archived at <http://perma.cc/PF7J-MT42> (describing the effects of economic downturns and increases in unemployment on men, including potentially contributing to increases in domestic violence or alcohol abuse).

123. See, e.g., JOAN C. WILLIAMS & RACHEL DEMPSEY, WHAT WORKS FOR WOMEN AT WORK 299 (2014) (identifying gender bias against women in the workplace and describing its negative effects); Joan C. Williams, *Double Jeopardy? An Empirical Study with Implications for the Debates over Implicit Bias and Intersectionality*, 37 HARV. J.L. & GENDER 185, 202–03 (2014) (discussing the "Maternal Wall," in which mothers' career commitments are questioned by their employers, both benevolently and with hostility, after giving birth or adopting a child).

income.<sup>124</sup> The implied agreement to pool resources seems to resurrect the “for better or for worse” aspect of marriage vows without a corresponding agreement either to stay together or on what constitutes shirking of partnership responsibilities.

Finally, the partnership analogy itself may be flawed. One problem is that a partnership typically has a clear goal: as the Uniform Partnership Act proclaims, a “partnership” involves “an association of two or more persons to carry on as co-owners a business for profit.”<sup>125</sup> Starnes does not spell out precisely how she conceives of the remade marital enterprise. The buyout remedy she proposes means that “the higher-income spouse should buy out the other spouse’s interest in the financial arm of the marital partnership.”<sup>126</sup> This meets her goal of compensating a spouse who has assumed caregiving responsibilities and is, consequently, not a full participant in the workforce. It leaves out, however, spouses who have assumed a role as primary caregiver and breadwinner, or even marriages where, say, one spouse works full-time for the government and has a limited wage scale, while the caregiving spouse works in the legal or financial world, albeit part-time, but with a higher salary. When Kathy Edin and Tim Nelson describe the break-up of fragile relationships, they often describe men who, pressed to contribute financially, take up drug dealing while the mothers of their children engage in less remunerative, but more stable, employment.<sup>127</sup> Are either of these activities—the drug dealing or the support of the drug dealer on parole—part of the marital partnership? And if they are, do the obligations to share profits really continue after divorce?

Moreover, Starnes’s proposal rests on the proposition that any time a marriage ends, the higher earning spouse, by continuing to earn money in the same way he or she did during the marriage, is continuing a portion of the partnership enterprise. Buyouts are only appropriate, of course, when the partnership continues; ending a partnership involves winding it up.<sup>128</sup> Consider how the partnership principle might work for George Clooney and

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124. Indeed, individuals may vary widely as to whether they view longer work hours, necessitated by the other spouse’s loss of income, as a net advantage in achieving career goals or as a burden they would prefer to forego. PAUL AMATO ET AL., *ALONE TOGETHER: HOW MARRIAGE IN AMERICA IS CHANGING* 123–24 (2007).

125. UNIF. P’SHIP ACT § 101(6), 6 U.L.A. 61 (1997).

126. STARNES, *supra* note 3, at 156.

127. KATHRYN EDIN & TIMOTHY J. NELSON, *DOING THE BEST I CAN* 74–76 (2013).

128. *See* Baker, *supra* note 12, at 338 (“[W]hen partnerships dissolve, the partners do not have any ongoing obligation to each other . . .”). Indeed, Starnes repeatedly emphasizes that the buyout she is proposing is not a partnership dissolution. She states that “[a] spouse’s decision to leave the partnership does not necessarily trigger a winding up of any shared marital enterprise.” STARNES, *supra* note 3, at 155.

Amal Alamuddin, who were married in September 2014.<sup>129</sup> If they divorce six years later, with no children born to the marriage and no change in their work activities, then Starnes would consider Clooney's acting income for a period after the divorce as a continuation of the partnership enterprise, and he must buy out his wife's share, even though his earning capacity was established before the marriage and continued unchanged through the marriage and subsequent divorce. Starnes softens the conclusion that the partnership enterprise continues by limiting the duration of the buyout payments,<sup>130</sup> but the principle remains: all personal income is treated as jointly owned irrespective of the source of the investment that produced it, and therefore simply continuing to earn money in the same job one had before the marriage becomes continuation of the partnership enterprise. Of course, in George Clooney's case, this might simply trigger a much more complex premarital agreement, but for others we suspect it would come as quite a surprise.

### III. Can Alimony Really Be Saved?

Alimony, whether serving as liquidation of a marital estate that remained in the husband's control, compensation for the fault that ended the marriage, or Starnes's proposal to pool human capital, has always been about the status of women.<sup>131</sup> The most fundamental challenge for its continuation therefore rests on reconciling alimony with an era in which the majority of women, including 71% of mothers with children under eighteen, are in the labor market.<sup>132</sup>

This requires reconsideration of the nature of marriage, not just as a partnership ideal, which arguably it has long been, or as a relationship between equals, which has emerged more recently, but as an integrated part of a new economic model. We have argued at length elsewhere that the dismantling of the traditional family took place in two stages tied to the development of today's capitalist economy. The first involved the

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129. Bob Woletz, *Celebrity Weddings 2014: Costly and Captivating*, N.Y. TIMES, Dec. 12, 2014, <http://www.nytimes.com/2014/12/14/fashion/weddings/celebrity-weddings-2014-costly-and-captivating.html>, archived at <http://perma.cc/7CVR-FW7W>.

130. STARNES, *supra* note 3, at 164–66.

131. It wasn't until 1979 that the Supreme Court struck down the gendered basis of alimony. *Orr v. Orr*, 440 U.S. 268, 283–84 (1979). Even today, a very small percentage of alimony recipients are men. See STARNES, *supra* note 3, at 27 (noting that the majority of alimony recipients are female).

132. EILEEN PATTEN & KIM PARKER, PEW RESEARCH CTR., A GENDER REVERSAL ON CAREER ASPIRATIONS: YOUNG WOMEN NOW TOP YOUNG MEN IN VALUING A HIGH-PAYING CAREER 6 fig. (2012), available at <http://www.pewsocialtrends.org/files/2012/04/Women-in-the-Workplace.pdf>, archived at <http://perma.cc/GMU7-3XYZ>; see also News Release, Bureau of Labor Statistics, U.S. Dep't of Labor, Employment Characteristics of Families—2013, at 2 (2013), available at <http://www.bls.gov/news.release/pdf/famee.pdf>, archived at <http://perma.cc/43N9-8A6A> (showing that approximately 65% of married mothers worked outside the home in 2013).

transformation of an agricultural economy into an industrial one. In this era, husbands, who had previously overseen the farm or the shop next door to the family home, entered the paid labor force while wives took over supervision of a remade domestic realm shorn of productive activities such as clothes making or bean picking.<sup>133</sup> While economist Gary Becker described this as specialization between husbands and wives,<sup>134</sup> in fact, it is more accurately described as increased specialization among men, with reorganization of the middle-class household to funnel greater investment in children, education, and the delayed marriages that became the hallmark of the new industrial-age professional and managerial classes.<sup>135</sup> With time, these families set the standard for working-class households that, with a “family wage” for working-class men, became able to afford a similarly gendered division of family labor.

The industrial era is over and the information economy has dissolved the sharp separation between workplace and family, men and women. This new system involves greater demand for women’s paid labor and opportunities for greater specialization among women, as the most successful women hire other women—and buy fast food and wrinkle-free fabrics—to help meet the families’ domestic needs.<sup>136</sup> Investment in children, education, and later marriage pay off even more than in the industrial age. Moreover, over the last quarter century, the high-paying union jobs that paid a family wage to blue-collar men have largely disappeared.<sup>137</sup> As a result, the full-time homemaker role has become perilous, not just because the higher earner spouse may choose to end the relationship, but because family well-being increasingly depends on two incomes, both to stay afloat in an era of wage stagnation and to cushion the impact of layoffs, downturns, and underemployment.<sup>138</sup> Any remade theory of marriage and alimony therefore

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133. See CARBONE, *supra* note 25, at 63 (noting how, with industrialization, a woman “withdrew from family economic production” and focused instead on raising children); NAOMI CAHN & JUNE CARBONE, *RED FAMILIES V. BLUE FAMILIES: LEGAL POLARIZATION AND THE CREATION OF CULTURE* 34–36 (2010) (sketching the implications of industrialization for the family).

134. GARY S. BECKER, *A TREATISE ON THE FAMILY* 21–25 (1981).

135. See CARBONE, *supra* note 25, at 60–61, 110, 114 (examining Western tendency to delay marriage until surprisingly late in life, comparing the advantages of male specialization and female specialization in marriage, and pointing out increased investment in childrearing and education by the middle class when compared to the working poor).

136. CAHN & CARBONE, *supra* note 133, at 36–37.

137. See, e.g., ARNE L. KALLEBERG, *GOOD JOBS, BAD JOBS: THE RISE OF POLARIZED AND PRECARIOUS EMPLOYMENT SYSTEMS IN THE UNITED STATES, 1970S TO 2000S*, at 103–04, 193 (2011) (documenting the loss of stable, higher paying blue-collar jobs).

138. See CHARLES MURRAY, *COMING APART: THE STATE OF WHITE AMERICA, 1960–2010*, at 175–78 (2012) (documenting changes in working patterns, particularly in white working-class communities); ROSIN, *supra* note 42, at 87–88 (describing women who have been taking over the wage-earner roles in the face of layoffs and lower male earnings).

must address the issue: is the full-time homemaking role something that any spouse should perform or more critically, one that society should encourage?

A. *Norms about Marriage, Norms about Caretaking*

The new model of marriage implicitly rests on the new social script that replaces specialized marital roles, including women's dependence on their husbands, with spousal interdependence. Marriage takes place, within this model, between relative equals who enter their unions with established earnings and high measures of the trust and flexibility to manage changing financial fortunes.<sup>139</sup> Starnes's partnership model is at the core of this new script, but the "marital ideal is [one of] *interdependence*—marriage has become an institution that encourages the parties to commingle their assets, share responsibility and decision-making, and create intertwined lives."<sup>140</sup> Within this structure, spouses assume joint responsibility—for the family's finances and for any resulting children. To vindicate the balancing act at the cores of these marriages, however, the new model "expects both spouses to retain their capacity for financial independence" in order to meet family exigencies and to prepare themselves for a possible split.<sup>141</sup> After all, within the new regime, both men and women are deemed capable of workforce participation, and with the average family now below the replacement level of two children per family,<sup>142</sup> child care no longer occupies an entire adult lifetime.

Within this model, of course, caretaking still occurs and is still difficult to reconcile with the workplace demands of the "ideal worker" employers prefer.<sup>143</sup> Yet, the patterns that describe modern caretaking do not necessarily strengthen the justification for alimony.

First, the circumstances that best fit the Starnesian model are those of the elite. Yet, the elite are least likely to support assumption of the homemaking role as a matter of principle. For example, Charles Murray reported that the General Social Survey asked whether "it is much better for everyone involved if the man is the achiever outside the home and the woman takes care of the home and family" and that in 1980, the vast majority (approximately 70 percent) of low-income whites agreed.<sup>144</sup> By 2010, however, their support for the traditional model had fallen in half, with around 35 percent still responding in the affirmative.<sup>145</sup> In contrast, only

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139. CARBONE & CAHN, *supra* note 15, at 90–91.

140. *Id.* at 113–14.

141. *Id.*

142. *As U.S. Birth Rate Drops, Concern for the Future Mounts*, USA TODAY, Feb. 13, 2013, <http://www.usatoday.com/story/news/nation/2013/02/12/us-births-decline/1880231/>, archived at <http://perma.cc/NUZ9-58RT>.

143. *See supra* note 9 and accompanying text.

144. MURRAY, *supra* note 138, at 150, 151 & fig.8.1

145. *Id.* at 151 fig.8.1.

about half of higher income whites agreed with the statement in 1980, and by 2010, their support for the statement had fallen to less than 20 percent.<sup>146</sup> African-Americans are even less likely than whites to support such a traditional division of family labor.<sup>147</sup> This leads to a dilemma: the group where men are most likely to out earn women and where divorce is most likely to involve a primary earner with sufficient income to support a primary caretaker is also the group least likely to approve such a division of labor in principle.

Second, even if there were more popular support for the traditional caretaking role, it's not clear that it should receive support as a matter of public policy. The long-term economic changes suggest that investment in men and women's labor-force participation has become increasingly important, and the full-time homemaker role can no longer be justified.<sup>148</sup>

Among elite workers, however, women are still more likely than men to assume that role because of the particular nature of elite competition. The top executive and financial-sector jobs have shown the greatest income growth since 1990, fueling income inequality.<sup>149</sup> These positions in turn have placed greater emphasis on hours worked, routinely exceeding forty hours a week, than have other highly skilled occupations.<sup>150</sup> The result is not just that women have lost ground financially in this top group, though that has happened.<sup>151</sup> It also has made it very hard for two professionals in high-

146. *Id.* at 151 & fig.8.1.

147. STARNES, *supra* note 3, at 28.

148. Moreover, the caretakers themselves have reservations. Judith Warner, *The Opt-Out Generation Wants Back In*, N.Y. TIMES, Aug. 7, 2013, <http://www.nytimes.com/2013/08/11/magazine/the-opt-out-generation-wants-back-in.html?pagewanted=all>, archived at <http://perma.cc/PA R3-WSWZ>. As Judith Warner summarizes:

Many of the women I spoke with were troubled by the gender-role traditionalism that crept into their marriages once they gave up work, transforming them from being their husbands' intellectual equals into the one member of their partnership uniquely endowed with gifts for laundry or cooking and cleaning; a junior member of the household, who sometimes had to "negotiate" with her husband to get money for child care.

*Id.*

149. LAWRENCE MISHEL & NATALIE SABADISH, ECON. POLICY INST., CEO PAY AND THE TOP 1%: HOW EXECUTIVE COMPENSATION AND FINANCIAL-SECTOR PAY HAVE FUELED INCOME INEQUALITY 1-2 (2012), available at <http://s4.epi.org/files/2012/ib331-ceo-pay-top-1-percent.pdf>, archived at <http://perma.cc/4B5L-TD9N>.

150. See Claudia Goldin & Lawrence F. Katz, *The Cost of Workplace Flexibility for High-Powered Professionals*, 638 ANNALS AM. ACAD. POL. & SOC. SCI. 45, 56-57 (2011) (noting business occupations penalize employees for deviating from normal work arrangements to a further extent than other high-paid positions).

151. Indeed, for college graduates as a group, the gendered wage gap has grown during this period in large part because of this phenomenon. See THOMAS D. SNYDER & SALLY A. DILLOW, U.S. DEP'T OF EDUC., NAT'L CTR. FOR EDUC. STATISTICS, NCES 2014-015, DIGEST OF EDUCATION STATISTICS 2012, at 633 tbl.438 (2012), available at <http://nces.ed.gov/pubsearch/pubinfo.asp?pubid=2014015>, archived at <http://perma.cc/7KW7-XLNT> (showing an increasing gap in median annual earnings between college-educated men and women from 1990 to 2011). See



powered jobs, with both facing pressure to work long hours, to stay in the labor market on a full-time basis after the birth of children. This leads to a reinforcing cycle: the most lucrative positions are male dominated and place the greatest emphasis on long hours; the emphasis on hours discourages many women from seeking such careers, reinforcing male domination, and the fact that men are more likely than their wives to be in such positions justifies a gendered division of family responsibilities.<sup>152</sup> These patterns have resurrected neotraditional marriages for a subgroup of the most elite families, even as such arrangements have been disappearing from other parts of the economy, including the majority of college-graduate marriages.<sup>153</sup>

These families—the highest earners with a neotraditional division of family responsibilities—present the best case for Starnes-style alimony. Where there is a significant difference in income between the two spouses, the higher earner can afford to pay spousal support and still afford another household, the higher earners' income is likely to reflect the ability to be an ideal worker at least in part because of the other spouse's contributions,<sup>154</sup>

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generally Francine D. Blau & Lawrence M. Kahn, *The US Gender Pay Gap in the 1990s: Slowing Convergence* (Princeton Univ. Indus. Relations Section, Working Paper No. 508, 2006), available at <http://www.irs.princeton.edu/pubs/pdfs/508.pdf>, archived at <http://perma.cc/9ZPY-25YG> (studying “the slowdown in the convergence of female and male wages in the 1990s compared to the 1980s”).

152. Goldin & Katz, *supra* note 150, at 57–58.

153. Indeed, college-educated women generally enjoy more family-friendly workplaces than other women and are less likely to cut back on their hours after the birth of children than lower earning women. See LYNDIA LAUGHLIN, U.S. DEP'T OF COMMERCE, U.S. CENSUS BUREAU, MATERNITY LEAVE AND EMPLOYMENT PATTERNS OF FIRST-TIME MOTHERS: 1961–2008, at 16 (2011), available at <http://www.census.gov/prod/2011pubs/p70-128.pdf>, archived at <http://perma.cc/FS65-UUCS> (noting that women with bachelor's degrees were more likely to return to working full-time after the birth of their child than women with positions requiring less education); Christine R. Schwartz, *Earnings Inequality and the Changing Association Between Spouses' Earnings*, 115 AM. J. SOC. 1524, 1526 (2010) (stating that high-earning women have become more likely to stay in the labor market). As the text notes, when the price of high income is long hours and little family flexibility, however, the women are more likely than the men to cut back on work-force participation. See Goldin & Katz, *supra* note 150, at 57–58 (describing how career interruptions negatively affect gender gap in earnings). Indeed, it turns out that women who graduated from elite universities are more likely than other women to opt out. Joni Hersh, *Opting Out Among Women with Elite Education* 4–5 (Vanderbilt Univ. Law Sch. Law and Econ., Research Paper No. 13-05, 2013), available at <http://ssrn.com/abstract=2221482>, archived at <http://perma.cc/E2RR-X2UZ>. Upper middle class couples therefore are both more likely to be in successful dual-earner arrangements and to display neotraditional family patterns. See PAUL R. AMATO ET AL., *supra* note 124, at 137–38 (suggesting that middle-class couples where both parties are career-oriented and earn relatively high incomes are insulated from job-related stress and economic insecurity and positing that evasion of economic problems arising from the wife's employment benefits the marriage).

154. Ironically, however, really high earners are likely to have had similar opportunities without spousal contributions. What they could not have, however, are children (or at least not children raised the same way) and the same jobs.

and the lower earning spouse is likely to have made substantial sacrifices in income capacity because of the marriage.<sup>155</sup>

These arrangements, however, also tend to reflect the parts of the economy with the least family flexibility and the greatest discrimination against women. While we agree that alimony is appropriate in these cases, we have considerable reservations about treating these atypical cases as prominent ones either for establishing marital norms or for setting standards that would apply to other families.

### B. *Alimony and Class*

The world that idealizes homemakers is a world that needs alimony. Yet, the vast majority of households need two incomes, and even if one spouse temporarily scales back, the complete dependence of the full-time homemaker role is a luxury few families can afford. Instead, men and women cycle in and out of the labor market because of increasing employment instability, the inflexibility of many non-elite workplaces, and the high cost of child care.<sup>156</sup> These arrangements do not rest on the same foundation as elite marriages. There is often no gain to the higher earner, the lower earner's low income is less likely to be a product of decisions made during the marriage, and the family's child-care arrangements are more likely to reflect an absence of choices rather than conscious sharing decisions made over the course of the marriage.

In 1970, 40% of all mothers with children under the age of 18 were stay-at-home mothers with working husbands; in 2012, that number had fallen by half, and among lower earners, gender does not play the same role in the distribution of family income.<sup>157</sup> In a growing number of households, men and women are equal earners—or women earn more. Almost 70% of women in the bottom quintile of earnings (family earnings up to \$28,894/year)<sup>158</sup>

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155. Carbone, *supra* note 23, at 77 (“The majority of marriages produce children, and childcare almost always entails some sacrifice of career opportunities that extends beyond the end of the marriage.”).

156. See *supra* notes 34–36 and accompanying text. See generally JOAN C. WILLIAMS & HEATHER BOUSHEY, CTR. FOR AM. PROGRESS, *THE THREE FACES OF WORK-FAMILY CONFLICT: THE POOR, THE PROFESSIONALS, AND THE MISSING MIDDLE* (2010), available at <http://www.worklifelaw.org/pubs/ThreeFacesofWork-FamilyConflict.pdf>, archived at <http://perma.cc/73F9-58NR> (cataloguing the myriad challenges faced by parents in non-professional positions).

157. D’VERA COHN ET AL., PEW RESEARCH CTR., *AFTER DECADES OF DECLINE, A RISE IN STAY-AT-HOME MOTHERS* 8 fig. (2014), available at [http://www.pewsocialtrends.org/files/2014/04/Moms-At-Home\\_04-08-2014.pdf](http://www.pewsocialtrends.org/files/2014/04/Moms-At-Home_04-08-2014.pdf), archived at <http://perma.cc/EX7R-3HB6>.

158. U.S. CENSUS BUREAU, U.S. DEP’T OF COMMERCE, TABLE F-1. INCOME LIMITS FOR EACH FIFTH AND TOP 5 PERCENT OF FAMILIES (ALL RACES): 1947 TO 2012, <http://www.census.gov/hhes/www/income/data/historical/families/2013/f01AR.xls>, archived at <http://perma.cc/8Y5E-82AW>.

have the same income, or a higher one, than their husbands.<sup>159</sup> In the top quintile, that is true of approximately one-third of women, albeit a number that has almost tripled since 1967.<sup>160</sup>

Indeed, when we look at women who drop out of the workforce, this is most likely to happen at the bottom of family incomes. These women, who are much less likely to be married in any event, are much less likely to do so in ways that contribute to a partner's earning capacity. Instead, their choices reflect the difficulties they experience combining employment and child-care responsibilities.<sup>161</sup> Almost half of stay-at-home mothers have no education beyond high school (in contrast with women with a bachelor's degree, who are more likely to be working than any other group of women).<sup>162</sup>

Increasingly, the story of divorce, which has fallen for the top group and risen for everyone else, is a story of adjustment to an increasingly unstable employment market. Paul Amato and his colleagues show that among the elite, the marriage quality of dual earners has increased while their divorce proneness has fallen.<sup>163</sup> For those who don't graduate from college, however, wives' workforce participation tends to reflect their husbands' lack of income and greater marital tensions.<sup>164</sup> Hanna Rosin in *The End of Men* presents a portrait of women who, in the face of plant closings and economic downturns, step up to the plate. They take on jobs, invest in careers, receive promotions at work—and still assume the primary responsibility for the house and the children.<sup>165</sup> These women, who are much more likely than the elite to divorce, would in a Starnesian world also face increasing claims for alimony

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159. SARAH JANE GLYNN, CTR. FOR AM. PROGRESS, THE NEW BREADWINNERS: 2010 UPDATE, 3 fig. 2 (2012), <http://cdn.americanprogress.org/wp-content/uploads/issues/2012/04/pdf/breadwinners.pdf>, archived at <http://perma.cc/4WLX-92DM>.

160. *Id.* On an aggregate level, women are the primary breadwinners in almost one quarter of all marriages. Philip N. Cohen, *For Married Mothers, Breadsharing Is Far More Common than Breadwinning*, FAM. INEQUALITY (June 3, 2013, 2:29 PM), <http://familyinequality.wordpress.com/2013/06/03/breadsharer-breadwinner/>, archived at <http://perma.cc/5S9H-GGHJ>. Cohen notes that women in these families earn smaller shares of the overall household earnings than do men who are the primary earners in their households, so the number is somewhat distorting. *Id.* Nonetheless, even when a woman earns only \$1 more, it indicates the movement towards equality in partners' earnings.

161. See WILLIAMS & DEMPSEY, *supra* note 123, at 130–31 (noting that in at least one study, most of the women involved in the study attempted to adjust their work responsibilities to accommodate their family responsibilities prior to leaving the labor force).

162. COHN ET AL., *supra* note 157, at 7, 19.

163. See AMATO ET AL., *supra* note 124, at 137–38 (suggesting that middle-class couples where both parties are career oriented and earn relatively high incomes are insulated from job-related stress and economic insecurity and positing that evasion of economic problems arising from the wife's employment benefits the marriage).

164. *Id.* at 123–24.

165. See generally ROSIN, *supra* note 42, at 79–112 (explaining the rise of women in the “New American Matriarchy,” in which women increasingly outperform men as the primary provider, earner, and caregiver in the face of rising male unemployment and erosion of patriarchal family structures).

from the slacker dudes whom they are leaving behind. While there is not enough income in most of these families to produce much in the way of alimony payments, the principle—that the higher earning spouse who trained for a new job, won promotions, cleaned out the refrigerator, and supervised the children’s homework is responsible for the spouse playing video games—does not sit terribly well in a new egalitarian era. The predictable result, already well underway, is even less marriage.

What Starnes’s concept of alimony fails to acknowledge or shape is the implicit terms of the new lower and working-class relationships—unless Starnes is ready to conclude that such couples should not marry at all and that the class-based division in marriage rates is an appropriate one.

### Conclusion

Family has long been tied to dependency—the reliance of women on their husbands’ income and the importance of marriage in providing for children and their caretakers.<sup>166</sup> The rise of more autonomous women, who *can* thrive on their own earnings, and the decline of marriage—both as the institution for organizing sex and as the exclusive way to provide for children—have rocked family law to its core. In an era in which pundits proclaim “The End of Men”<sup>167</sup> or “The Richer Sex”<sup>168</sup> and others believe that all able-bodied adults should be in the labor market,<sup>169</sup> no agreement exists on a justification for alimony, and many call for its abolition.<sup>170</sup> Starnes has made a compelling attempt to provide just such a justification for alimony. Accepting her argument, however, means agreeing that marriage is an enduring commitment that is not ended by divorce and accepting that one spouse will take primary responsibility for caretaking while the other invests in developing a more stable income stream. At the end of the day, the question is not whether alimony can be justified on the basis of partnership principles because the idea of the interdependent union at the core of marriage is a compelling one. Instead, the questions concern the future of caretaking and the role of marriage in an increasingly class-based society.

The book, reduced to its essentials, still works for the new patriarchy—the group where the men have a higher income potential, where his earnings are greater than hers for gendered reasons, and she stays home for similarly

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166. For a discussion of the relationship between autonomy and vulnerability, see generally Martha Albertson Fineman, Essay, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1 (2008).

167. ROSIN, *supra* note 42.

168. LIZA MUNDY, *THE RICHER SEX* (2012).

169. Indeed, a major shift is that both men and women have become wary of potential partners who wish to be supported. CARBONE & CAHN, *supra* note 15, at 119.

170. Keli Goff, *Is Alimony Anti-Feminist?*, DAILY BEAST (Aug. 25, 2014), <http://www.the-dailybeast.com/articles/2014/08/25/is-alimony-anti-feminist.html>, archived at <http://perma.cc/582-NEHQ>.

gendered ones. The problem is those assumptions are no longer universal, and a theory of alimony must tease out when this makes sense and when it doesn't. While the case can be made that the Caseys of the world, together with the spouses of CEOs and investment bankers, should receive alimony at divorce, we do not wish to cede to these atypical couples the power to define the terms of marriage for everyone else.