ALIMONY AND ALIMONY SURROGATES AND THE IMPUTATION OF INCOME IN AMERICAN FAMILY LAW
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A. Introduction

The concept of imputing income is familiar to American family lawyers. The process involves attributing income to an individual for one or both of two purposes. First, the goal may be to establish the existence and extent of a financial obligation on the part of that individual who we will describe from this point on as the obligor. Second, imputation may be used to determine that an obligor whose obligation was previously established should be deemed to have the wherewithal to meet that obligation.

Routinely, the mind’s eye conceptualization of the income imputation involves determining that a parent, the dictionary’s exemplar is a “deadbeat dad”, who has voluntarily withdrawn from the labor market, should be ordered to pay. Yet, closer examination reveals that income imputation is not the exclusive preserve of the idle and feckless. It also sweeps in the prosperous and productive. And the identification of the paradigm non-performer on a gender specific basis, while an accurate reflection of the bulk of defaulters, obscures more deep-seated tensions involving gender-based family role assignments that pervade the process of income imputation.

Examining the legitimacy of imputation involves exposing the core values and premises of parenting, marriage and divorce. This exposure occurs because the process of imputation demands the ability to answer a variety of questions which are bound up with ideas of self and community, obligation and autonomy, and other material and philosophical values and concerns. Should the interests of someone one used to know determine whether one should work or what that employment should be? Should they dictate whether income received should be saved or spent, or appreciation on investments liquidated or preserved for future use? How might the answers change if the question is framed not simply with reference to someone from the past but rather as involving someone the obligor was married to or who is the other parent of the obligor’s child? Does the analysis differ if these questions are framed with reference to a relationship between parent and child rather than as the outcome of an interaction between autonomous adults?

The imputation of income arises in a variety of contexts. The first involves the use of imputation to establish and quantify awards classically described as “alimony”. The second attributes a future income stream to identify or assign a value to an “asset” in a process conventionally described as property division. A third scenario imputes income to establish child support obligations. Finally, the process may be relevant to determine whether an individual with previously established obligations can be required to satisfy them. In each of these situations the justificatory premises may differ. The position can be complicated further because in each locus within the legal framework the role of imputation may differ. Thus, in the first two instances,

imputation can be required to both establish the existence and the extent of the obligation. In the third we are primarily concerned with the level at which the burden should be set, although as a boundary condition, in fact, a parent obligor unable to generate income may be said to have no obligation to pay. The fourth context concerns itself with identifying resources able to be considered “income”. Within these contexts, justifications for imputing income may be neither appropriate nor sufficient when it comes to establishing the extent of the obligation. In a nutshell, even if we can demand that an obligor work, what is there in the conceptual framework that authorizes insisting upon a particular class of employment? Or, from another perspective, can we justify overriding an obligor’s choice of investment strategy for his or her resources?

An important parenthetical piece of information is necessary to understand why the present topic has particular urgency in American law. Alimony, and alimony surrogate awards are not like conventional debts. Alimony awards themselves are not dischargeable in bankruptcy, and even if the surrogate award is characterized as in the nature of property division, in bankruptcy property awards are much more difficult to discharge than a debt to a routine creditor.\(^2\) Furthermore, because these awards generally are contained in orders of court, non-compliance results in a finding of contempt, which exposes the contemnor to incarceration to compel performance. These are serious consequences where the underlying performance standard is premised on hypothetical behavior.

The paper attempts to expose analytical tensions as American family law jurisprudence wrestles with the concerns just raised in the context of alimony awards or awards that more recent theory sees as a replacement for an award that classically would have been characterized as alimony. Given space constraints little beyond superficial illumination can be attempted, and not all themes will be touched on. No attempt will be made to analyze whether it is appropriate to impute resources to discharge a previously identified obligation.

B. Imputation and Alimony or Alimony-Like Obligations

1. Fault and Blame

The roots of alimony are embedded in blame. Alimony could be characterized either as a damages award for breach of a state imposed marriage contract, or in a fault based divorce system as compensatory damages for the defendant’s wrongful conduct.\(^3\) The premise for the blame is destruction of the marital unit.\(^4\) For our purposes two things flow from this analysis. The blameworthy potential obligors of the world had no footing for an argument that an alimony


\(^4\) It is possible to tease out some sub-threads. The law may seek to advance morality, reward virtue and punish sin; it may seek to punish a spouse who “caused” the dissolution, or it may seek through a punitive award to compensate for harms caused whether material or emotional. See ALI, *PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS*, ch.1, topic 2 III, 49-54 (2002) [hereinafter PRINCIPLES].
award was inappropriate in the circumstances, either as to the fact of imposition or as to the
amount. Any objection to imputation readily could be overwhelmed by blame. After all, why
should a home-wrecking adulterer be free to assert the reasonableness of a proposed career
change, investment choice, or any other activity that might adversely impact an income stream?
Moreover, the fact that the blameworthy conduct had destroyed a functioning marriage made it
possible to demand that the obligor perform to preexisting levels. In short, blame and fault
justified both the fact and extent of imputation. Such imputation easily filled in the blanks for an
award based on the payee’s needs, given the marital lifestyle, balanced against the obligor’s
ability to pay. This process was assisted by the fact that awards were gender specific and based
on an almost uniformly acceptable normative model of social behavior. If a husband’s socially
imposed responsibility was to support his wife (and any children) how could he argue against any
imputation that sought to achieve this objective in a post-divorce world?

So, historically, imputation was easy and defensible. Some of these original threads spun by
historical doctrine are still found in contemporary cloth. Even as the divorce arena shifted to no-
fault grounds, fault lingered on in some jurisdictions with regard to either alimony or property
division or both. Also, gender specific social roles mutated into gender neutral social roles.
Accordingly, although we now operate in universe somewhat removed from the one we started
out in, a potential obligor resisting imputation can still find himself, or herself, arguing against the
ghosts of the past with little or no defensive position available. Actually, any punishment may
be compounded. The process of income imputation, based as it is on potentially non-
materializing future circumstances, itself may become an instrument of additional punishment.

Imputation may be less inappropriate where the “fault” is economic in character. After all, if the
roots of this fault lie in a model of an economic partnership premised on efficient specialization,
then in remedying any breaches of the partnership understanding it may be necessary to include in
the model devices designed to discourage “shirking”, a concept which might cover a
multitude

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5 See Barbara Bennett Woodhouse, Sex, Lies, and Dissipation: The Discourse of Fault in a No-Fault Era, 82 Geo.

6 See Margaret F. Brinig, Comment on Jana Singer’s “Alimony and Efficiency”, 82 Geo. L.J. 2461, 2470 n.58
(1994).
of sins, such as misuse, waste, or dissipation of assets.\footnote{See Woodhouse, \textit{supra}, n. , at 2533.} The understanding itself will have to be mined, however, to determine whether any proposed imputation is appropriate. For example, the understanding may not justify imputation to establish an obligation. Thus, where the potential obligor allegedly literally shirked economic responsibilities during the marriage, the acceptance of the alleged non-performance during the relationship’s subsistence may be indicative of the fact that performance was not expected, that is there was no “fault”. But, the roots of the “shirking” may lie in other forms of conduct such as gambling, drug addiction, or alcoholism which under classic doctrine in their own right will lay a foundation for a fault based claim justifying the imputation of income – that is imputation to which the miscreant can mount no defense. And, about half the states in America still attach significance to “classical” fault as well as destructive economic behavior,\footnote{Woodhouse, \textit{supra}, n. , at 2538.} so that in these jurisdictions challenging imputation may be an exercise in futility. And in any event, imputation still may be used to determine that an obligor has the means to satisfy this obligation.

The difficulty with a fault rooted imputation structure is that, while fault justifies the entitlement, intrinsically it does not quantify the extent of the obligation or the degree to which the obligor can be imposed upon to meet that obligation. Accordingly, the way the marriage worked is the only source of benchmarks, so the fault-based premise has the effect of perpetuating the “marriage” even after its termination.

Notionally, for the most part, the system has moved away from fault. Ultimately this move hugely confuses protocols for any imputation process. Initially, however, the analysis as far as imputation of income was concerned appeared to have been simplified by changes in the law.

\begin{enumerate}
\item \textbf{2. No-fault and Rehabilitation}
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If bringing the marriage to an end was not blameworthy and the termination of the marital unit was legitimate, why should a post-divorce financial obligation continue at all, never mind continue on a basis that imposes on the obligor financial performance standards either as to character or extent that are contrary to the obligor’s wishes? Fortunately for the theoreticians this conundrum, for the most part, could be avoided following a switch to no-fault divorces because this period saw the widespread embrace of rehabilitative alimony awards. These short-term transitional awards were designed to make a dependent spouse economically self-sufficient as soon as possible.\footnote{Singer, \textit{supra} n. , at 2425.} Indeed, the whole process of rehabilitation was just a way-station en route to the goal of a “clean break” between the former spouses.\footnote{Singer, \textit{supra} n. , at 2425 (citing various sources).}

In such an environment, the concept of imputation of income seems less problematic. After all, evaluating relative burdens, impositions flowing from imputation would be designed to achieve a
short term goal. The extent of the imputation, both as to time and quantum, becomes driven by an objective external benchmark, rather than the subjective determination of the relative merits of generalized patterns of social behavior. Of course, in the individual case, the legitimacy and viability of the transitional plan had to be determined, and here the underlying value systems could creep in. But, for the person opposing imputation, the windmills to tilt at are for the most part concrete and the consequences of imputation mostly contained. This containment would be reinforced by the idea that the target of a clean break demanded that the least possible intrusion be placed on the obligor. Put another way, a claimant could only argue for performance to the level necessary to facilitate the rehabilitation, not for performance matching lifestyle and life duration expectations—“entitlement” based on prior performance behavior of the obligor or the obligee would not justify imputation. Instead, the model just deals with the consequences of that behavior. Thus the obligor’s performance at optimum capacity is not an axiom of the model. Such performance can be required only if it is necessary to achieve the requisite rehabilitation in the identified time frame.

Unfortunately, the rehabilitation model tended to produce adverse financial outcomes for a significant number of former wives. Accordingly, wheels were set in motion to conceptually re-engineer financial awards on divorce generally and alimony awards in particular, to try to address this problem.\textsuperscript{11} This reconceptualization takes various forms, each of which may react with the process of income imputation in a different way. It is to these analyses that we now turn.

3. Alimony Mutates Into a Property Claim

One vision posits a claim on post-divorce income streams that is analogous to a property entitlement and which is reflected in a post-divorce equalization of incomes.\textsuperscript{12} This theory is premised on a model of a worker parent supported by a flow of services from a primary caretaker who has a claim justified by virtue of these services, or by virtue of the argument that children of divorced parents are entitled to the same claim on family wealth as those in intact families. Indeed, one of the principal authors of this theory takes the position that in the absence of children the operating social ecology is not apparent enough to justify a premise of entitlement supported by a grand theory.\textsuperscript{13} Accordingly, in the absence of children there is no broad-based premise justifying imputation and so imputation without an independent justification should be suspect.

The basic model justifies a claim to the income stream that equalizes the standard of living of the post-divorce households.\textsuperscript{14} Framing the claim this way suggests that as far as imputation is concerned the claimant cannot make a demand as to how any income should be generated, nor as

\textsuperscript{11} Singer, \textit{supra} n. , at 2425-26.


\textsuperscript{13} Williams, \textit{supra} n. , at 2263.

\textsuperscript{14} Williams, \textit{supra} n. , 2258.
to the amount that should be generated – at least assuming good faith actors. Precisely what is meant by “good faith” in this context does have ramifications for imputation purposes. Can our claimant legitimately enhance a demand, i.e. justify imputation, by virtue of dropping his or her own contribution to a standard of living? After all, the obligor who is required by the underlying theory to maintain a standard of living would be obligated to increase production to cover the claimant’s decrease. Is the premise for imputation an entitlement whose quantum is what would have been achieved if both spouses performed optimally? Underperforming by a claimant seems to be an ill-suited foundation for imposing demands on an obligor by imputation. But, imputation in this context does seem to be justified if the model is one of entitlement. Or does the model’s good faith standard demand optimum performance from the claimant, but only discretionary performance from the producer? Or, is the model’s entitlement a claim against capacity rather than actual production? Parenthetically, it would seem that at some point a claim against capacity becomes a claim for compensation for frustrated expectations. But a frustrated expectations premise demands a different analysis with respect to imputation and this will be tackled in due course.

In any event, in the absence of a consensual underpinning, an analysis of “good faith” performance has to be based on normative constructs – an approach that may aggravate the consequences of imputation. Furthermore, analyzing the legitimacy of behavior in a context where the imputation of income is sought as a post-divorce property entitlement is complicated by virtue of the parental role that is the premise for the claim. If the claim arises not by virtue of the claimant’s personal entitlement, but in the guise of a fiduciary for a child’s post-divorce financial needs, the analysis of “good faith” has to be re-grounded in terms of both parties post-divorce obligations vis-a-vis the child rather than the relative merits of their positions with respect to each other. Interestingly, the theory associated with the basic model permits a possible exception is the case where a childless claimant supported the spouse through professional education. This justifies support at a professional level of income for the period for which support was provided. Here both the premise for the quantum and duration of imputation are predetermined, essentially on the basis of some notional “understanding” between the spouses during the marriage, as distinct from any socially imposed normative benchmark.

Another author sees an income sharing model as involving the idea of the joint ownership of the income. It is not clear from her analysis whether this is ownership of only actual or also possible income, that is, whether the claimant has an ownership interest in capacity. Because such capacity entitlement supported analyses enable the claimant to reach beyond the divorce, arguably, the justification needs to be compelling, at least if the claimant is not supposed to be acting in the interests of a child. For one thing, claims to capacity potentially impinge upon the dynamics of any potential remarriage behavior of the obligor. Any constraint on remarriage flowing from imputed income demands, might be seen as a perfectly legitimate outgrowth of the

15 Williams, supra n. , at 2278-79.

16 Williams, supra n. , at 2264.

17 Singer, supra, n. , at 2544.
commitments made in the initial marriage, or they might be seen as undermining a policy of not
discouraging non-custodial former spouses from remarrying.\(^{18}\) But, any understanding of this
choice has to exist before any imputation occurs.

As was indicated, it is easy for a justification for imputation to elide from one based on a property
entitlement to one grounded on a compensation theory. Accordingly, it is to such theories that we
will now devote some attention.

4. Imputation and Compensation Based Constructs

a) Human Capital Theory

The premise for a human capital based analysis is that during the marriage each spouse’s earning
power is an asset that can be enhanced or diminished in value. This premise may justify post-
divorce payments from one spouse to another, and as a result justifies overriding any “clean
break” goal.\(^{19}\)

A human capital analysis can be conducted from two perspectives. In one, the claimant is
compensated for contributions made during the marriage that preserves or enhances the other
spouse’s human capital. In the second, the claimant is entitled to claim for reductions in her own
earning capacity resulting from these contributions. These two approaches will be considered in
turn.

i) Compensation for Human Capital Enhancement

Krauskopf\(^{20}\) and Starnes\(^{21}\), both explore a compensation based analysis. Their analyses
respectively deal with one spouse’s contribution to the other’s education, and efforts expended in
homemaking while the other spouse concentrates on the labor market.

In the Krauskopf model, a spouse will be denied a “fair” return on her investment unless she is
entitled to participate in the discounted present value of the after cost difference between
anticipated post-education future earnings and anticipated pre-education future earnings of the
obligor.\(^{22}\) Conceptually, this model opens up the possibility of income imputation in one of its

\(^{18}\) Singer, supra, n. , at 2460.

\(^{19}\) Milton C. Regan, Jr., Spouses and Strangers: Divorce Obligations and Property Rhetoric, 82 Geo. L. J. 2303,
2306, 2320 (1994).

\(^{20}\) Joan M. Krauskopf, Recompense for Financing Spouse’s Education: Legal Protection for the Marital Investor in

\(^{21}\) Cynthia Starnes, Divorce and the Displaced Homemaker: A Discourse on Playing with Dolls, Partnership

\(^{22}\) Krauskopf, supra note , at 380.
most aggressive forms. It lays the foundation for a claim based on an anticipated, i.e. imputed, future income stream. Moreover, and here the dangers of the process may multiply, the form in which the obligation may be imposed could be by way of a non-modifiable property division award grounded on a present value calculation of the future income stream. Apart from any concern about the reliability of the result itself, the concern should be compounded where the award is embodied in a non-modifiable property division order, since this form of order itself raises a question of the fairness of such an order where the foundation of the award is imputation.

Suppose we seek to avoid the issue of the non-modifiability by structuring the payout in the form of alimony. This could avoid the issue of imputation all together, if the award only embraced a share of actual earnings produced. But, such an award would seem to be inappropriate, since what we are really valuing is the contributor’s investment, rather than trying to meet a claimant’s expectation as such. Thus, any recovery should be unaffected by failure to produce the anticipated returns, at least if the valuation model is intrinsically sound. After all, if the investee outperforms the model, does the human capital approach justify upward adjustment of the award—an action that is not even possible if the award is takes the form of property division. So, when the obligor in fact fails to generate the income stream anticipated, it would seem that, if the original award takes the form of alimony, modifiability should be restricted to restructuring the period of the payout of an already determined capital sum. Somewhat ironically, this opens up the possibility of imputing income twice, once with the initial award and once in the restructuring process—although we might have more confidence with the result at the latter stage.

Suppose, instead, we decide to allow the alimony form of the award to be used to adjust the substantive amount to reflect actual returns on the “investment”—perhaps for better as well as worse. What would be a “fair” claim when the expected income does not materialize? After all, if the marriage had endured the claimant at best would only have participated in actual receipts. Bad faith under-performance aside, to some extent our comfort with the Krauskopf model must depend on how it deals with the issue of risk assumption during the marriage. While it is tempting to argue that the issue of adjustment for risk is buried in the use of an average figure for post-education income performance, in reality that is not the risk structure that any specific couple is exposed to. The volatility of their risk exposure is not damped by averaging the performance of the total pool of like-skilled workers. Rather, at best, a couple’s risk-damping mechanism lies in the pooling of their joint resource’s. So, regardless of whether the conceptual model post-divorce is that of “spouse” or “stranger” the contributor cannot be said, in a universe that acknowledges assumed risks, to be “fairly” entitled to anything more than a share of what actually materializes— at least where the obligor does what he said during the marriage he was going to do.

Before moving on, it is worth noting that one of the problems that drives us to these modeling attempts is the need for issue resolution at a given moment in time, either driven by desires for a “clean break” or because of foreclosed access to the courts in the future. This reflects a broader problem. The interest adjustment takes place not only within a social and economic framework, but also in a legal framework that imposes its own constraints. It is for this reason that Krauskopf
suggests that human capital compensation theory does not inherently demand treatment as a property claim, but legitimately can be reflected in a lump-sum alimony award.\footnote{Krauskopf, supra note , at 401. Her concern is that jurisdictional preferences for equal property awards will deprive the courts of the flexibility needed to address the claimant’s actual “investment” in the defendant’s human capital.}

When it comes to human capital enhancement by virtue of efforts expended in homemaking, under the Starnes analysis marriage is construed as a commercial partnership that endures beyond the divorce. During the post-divorce period, one spouse is seen as buying out the other’s interest in a post-marriage enhanced income stream flowing from the claimant’s human capital investment made during the marriage.\footnote{Starnes, supra note , at 72.} The amount of the buyout is premised on a consideration of the difference in the earning power of each spouse at marriage and at the moment of the divorce, calculated by discounting their anticipated future earnings to present value. If this analysis reveals an increase in earning power during the marriage that is not distributed equally, the spouse with lesser earning power will be entitled to a buyout of some percentage of the difference.\footnote{Starnes, supra note , at 135.}

For our purposes, imputation of income both generates the obligation and quantifies it. The use of a partnership analog also give us some insight into the answering the question of the extent to which an obligor can be compelled to actually meet the obligations imposed by the analysis, in the sense that he or she should be exposed to sanctions for failing to produce income at an imputed level. Because the concept of a partnership imports a fiduciary duty between partners,\footnote{Starnes, supra note , at 120.} and because the model envisages the partnership continuing during the period of the buyout, we can demand that the obligor make a good faith effort to generate an income stream to satisfy the determined obligation. In other words, we do have an argument for treating the claimant as someone other than an unsecured creditor who has to face the hazards of choices reflecting an obligor’s personal preferences. Arguably this analysis can be used to justify the quantified obligation imposed in the first place. We could contemplate that it is “fair” to impose on about-to-be former spouses the fiduciary duty to optimize the return on any enhancement in human capital that each received during the marriage. That is to say, we may use notional earning capacity rather than actual earnings to establish the obligation.

The use of commercial model would seem to suggest that, at least in abstract, a child care function that continues after the divorce in and of itself would not excuse imputation of income to that spouse – at least if analysis suggests that the yield from market participation would exceed the transaction costs (shared between both spouses) of using a surrogate child caretaker. Nevertheless, the “commercial” nature of the analysis could provide the opportunity to look at the “deal” the “partners” actually struck. For example, one might contemplate scenarios where a spouse’s contribution led to an enhancement in marital capital. But the facts of the marriage may

\footnote{Starnes, supra note , at 401. Her concern is that jurisdictional preferences for equal property awards will deprive the courts of the flexibility needed to address the claimant’s actual “investment” in the defendant’s human capital.}

\footnote{Starnes, supra note , at 72.}

\footnote{Starnes, supra note , at 135.}

\footnote{Starnes, supra note , at 120.}
demonstrate an agreement between the spouses to the effect that the marriage did not demand an optimum return on that contribution. Thus, where during the marriage the neurosurgeon turns homemaker to raise the children, as between the spouses income imputation based on a model of a continuing career in neurosurgery would be inappropriate. A similar result should follow where during the marriage the partnership permitted a neurosurgeon to turn innkeeper, even if the other spouse contributed to the costs of the medical education. In both instances the spouse-partners agreed on a non-optimized deal during the marriage. On a divorce they should not be permitted to blow hot and cold for the purposes of determining whether imputation was appropriate, and if so on the extent to which imputation should occur. However, a determination based on the anticipated returns of a latter day innkeeper would be justified. A footnote to this analysis does seem to be required. Even if the “deal” between the spouse-partners does not require an optimum return on human capital capacity as between the spouses themselves, this does not foreclose the possibility that when it comes to the determination of child support optimization should be demanded.

ii) Compensation for Human Capital Losses

In this section we concern ourselves with an analysis premised on a loss of human capital by virtue of non-market work engaged in by the claimant during the marriage.

An economic analysis provides the foundation for a claim based on human capital losses. This analysis assumes that a married couple engages in a search for economic efficiency. In particular, they attempt to maximize individual welfare by the joint production of “commodities”. These include not just conventional assets but also items valued within the domestic household such as time spent with children. It also includes assets personal to each spouse such as the ability to produce income and commodities in the future, that is, a goal is to make investments in human capital. Efficiency drives the couple to select courses of conduct which uses the spouses’ relative efficiencies to allocate responsibility for tasks.27

This theory can be applied on a gender neutral basis. However, because the market tends to compensate women at a lower levels than men, rational behavior dictates that non-market work will be engaged in by women.28 Whether this compensation differential is attributable to a pre-marriage lower level of investment in human capital capable of enhancing a market return, or due to discriminatory forces at work in the market place, is of some interest to our present concerns. Where one spouse benefits from discriminatory forces in the market to the detriment of the other spouse, the justification for the imputation of a burden on the benefitting spouse will differ from those justifying the imposition of a burden by virtue of choices made prior to the marriage. This does not mean to say that there is no justification, only that it is different. For example, “reliance” to one’s advantage on an “undercapitalized” spouse might ground the claim. But the measure of the recovery should be linked to the benefit gained by the party doing the relying upon. In contrast, if the foundation for the claim is economic discrimination, justice might dictate giving the

27 Singer, supra, note , at 2429.

28 Singer, supra, note , at 2431.
claimant a choice between a claim founded on detriment suffered or one founded on the obligor’s benefit, unless one takes the view that because the market discrimination cannot be attributed to the beneficiary, this decouples any possible claims from gains enuring to the advantaged spouse.

The economic analysis suggests that in the absence of alimony or “a similar transfer of assets” the spouse specializing in household production may be disadvantaged either by foregoing development of her own capital or by investment in capacities that the general market does not recognize. To avoid discouraging efficient specialization, the spouse investing in household commodities must know that in the event of a divorce she (or he) will receive alimony (or under a Parkman analysis discussed below, property division) measured by the market opportunities forgone by the investment in the marriage. The measure of the recovery is the difference in earning capacity that exists at the end of the marriage and that which would have been enjoyed if the claimant had invested in marketable skills instead of marriage related “commodities” – discounted to present value. If the income differential does not flow from the marriage but from choices made prior to the marriage a claim is foreclosed.

Parkman’s position is that in most instances an individuals’ basic human capital will be established prior to marriage but that a supporting spouse will lose human capital by virtue of the supporting role and this loss ought to be compensated. While this claim essentially is a property claim, quantifying the claim is premised on an imputation of income. It is the difference in earnings that the spouse could have anticipated if contributions had not been made during the marriage and what the anticipated earnings actually might be (query are) when the marriage comes to an end. The reduction reflects a “debt” of the marriage and an asset of the claimant. In this context, imputation of income is used to establish the obligation, but the analysis does not itself suggest whether we should be able to impute income in the course of any process of attempting to satisfy the “creditor’s” claims. That is, it does not tell us whether the ex-spouse is indeed like any other creditor, that is a conceptual “stranger”. Certainly, as was mentioned in the introduction, the enforcement laws do not treat the former spouses as mere creditors, so “overburdening” the obligor can have serious consequences.

Where one spouse contributes to the others’ education, on the premise that the student’s human capital essentially was already established, the effect of the contribution is simply to reduce the burdens incurred in acquiring the education. The characterization of the obligation thus becomes one of a loan repayable at market interest rates and is quantified by considering actual contributions to living expenses, costs of education and one half the income forgone while the

29 Singer, supra, note, at 2431.

30 Singer, supra, note, at 2433-34.


32 Allen M. Parkman, Good Intentions Gone Awry: No-Fault Divorce and the American Family 56 (2000).
student is in school.\textsuperscript{33} It is only in this last regard that imputation legitimately may be used to determine the fact and the amount of the obligation. And, the contributor certainly emerges from the analysis looking just like a creditor.

Another compensation for losses human capital theorist is Ellman.\textsuperscript{34} Ellman theorizes that rational spouses will use a potentially lower earning spouse as the person primarily responsible for household tasks. This spouse then makes investments in the marriage that are so specialized that the market will not recognize them, that is, she depletes her “capital assets”. In contrast, the other spouse’s contributions during the marriage will result in an enhancement of that spouse’s earning capacity. However, Ellman’s rational spouses do acknowledge the prospect of divorce. Accordingly, the lower earner still remains in the market to some extent to hedge against that risk and the higher earner’s potential will not be realized because of the need to engage in some domestic activities.\textsuperscript{35} Compensation in the form of alimony will be due for the loss of earning capacity arising from the investments made in the marriage. This will be measured by the difference between a spouse’s actual earning capacity when the marriage ends and the capacity that would have been achieved if the claimant had remained single. Ellman does not allow a measure to be linked to the other spouse’s potential for performance in the sense that the other spouse will have an obligation only when the claimant’s contribution actually resulted in a gain.\textsuperscript{36} Because we are not entitled to impute to an obligor a benefit merely because the claimant made a contribution, when it come to the satisfaction of the claim the contributor should be forced to carry the risks of the contribution beneficiary’s failure – that is satisfaction should flow from an actual income stream not an imputed stream.

In Ellman’s analysis, compensation is required only when the behavior triggering the entitlement is financially rational, so reductions in capacity due to lifestyle choices would not be compensable (so much for a neurosurgeon turned carpenter). In this regard, if the cost to provide child-care is less than an amount foregone by a parent to provide child-care, the behavior would not be financially rational. Nevertheless, Ellman exempts this conduct because the decision to assume the parental responsibility is a “traditional ideal”. So we must live with the claims of the neurosurgeon turned homemaker. Ellman’s analysis of this irrational scenario is that we are entitled to assume that both spouses participate in this conduct choice so that the level of compensation would be one half of the claimant’s losses in human capital that the spouse suffered, assuming that the non-claimant spouse received no gain from the claimant’s loss.\textsuperscript{37} Why this sort of model is not acceptable in the context of other manifestations of “irrational” behavior that apparently was acceptable during the marriage is not clear.

\textsuperscript{33} Parkman, \textit{supra} note , at 55.

\textsuperscript{34} Ira Mark Ellman, \textit{The Theory of Alimony}, 77 Cal. L. Rev.1 (1989).

\textsuperscript{35} Ellman, \textit{supra} note , at 65.

\textsuperscript{36} Ellman, \textit{supra} note , at 67.

\textsuperscript{37} Ellman, \textit{supra} note , at 72.
In the Ellman model, imputation is permissible, and indeed essential, to determine both the fact of entitlement to compensation as well as the quantum of recovery. The model, however, does not in and of itself supply a rationale for attempting through imputation to regulate the obligor’s post-divorce conduct with respect to the fulfillment of those obligations. Finally, imputation is not justified to remedy any market discrimination as such. The most that is recoverable is linked to the income differential of the discriminated against spouse, that is, what the claimant could have earned without the marriage and what she can earn after it – neither measure being linked to what a market actor who is not discriminated against should be able to earn.

5. Imputation and the ALI Compensation Theories

The American Law Institute (ALI) recently attempted to articulate a comprehensive set of Principles to govern the divorce arena. The Principles seek to encompass a number of the analytical frameworks outlined above. Nevertheless, because of the broad reach of the ALI analysis, as well as because of the novelty of aspects of its proposals, a discrete treatment is justified. While the Principles raise issues of imputation both in connection with property division orders as well as in making provision for child support, we will restrict our attention to certain compensatory awards whose roots lie in anticipated income flow.

The Principles recognize two classes of compensatory award relevant to our concerns. The first is available in marriages of long duration. The recipient must be someone who is married to another with significantly greater wealth or earning capacity. The compensation is designed to cover the loss of standard of living the claimant would otherwise experience but for the award. The premise for the award is that equity requires it because the duration of the marriage leads to the conclusion that the anticipated loss is a matter of joint responsibility. The award is to reflect the duration of the marriage and the value (not amount) of the award is to be based on the difference between the incomes the spouses are expected to have after the dissolution. It is this last phrase that impacts our concern with imputed income. The second compensatory award is compensation for earning capacity losses arising from shouldering a disproportionate share of child care responsibilities during the marriage. The duration of the award is to be some function of the period for which the child care is provided. The value is based upon the difference in incomes the spouses are expected to have at dissolution. Again it is the last phrase which needs our attention. We will consider each of these classes in turn.

38 Principles, supra note .

39 PRINCIPLES, supra note , § 5.04(1), at 804.

40 PRINCIPLES, supra note , § 5.04(3), at 805.

41 PRINCIPLES, supra note , § 5.05(1), at 833.

42 PRINCIPLES, supra note , § 5.06(1)(b), at 849.

43 PRINCIPLES, supra note , § 5.05(4), at 834.
a) Compensation Arising from Long Duration

The Principles acknowledge that while some claims could be founded on an enhancement of the other spouse’s earning capacity during marriages of long duration – a human capital theory – this will not be true in all marriages.44 Accordingly, the Principles see the roots of this award as a duty arising by virtue of the relationship of husband and wife, and one which arises regardless of whether the parties expressly assume the duty.45 The roots of the award primarily are seen as the loss of earning capacity and increasing dependency of the claimant as the marriage endures.46 However, the Principles stress that it is not the reason for the income disparity that is important, rather it is the disparity itself that over time “enlarges the spouse’s financial stake in the marriage”.47 Within this analytical framework, the issue of income is critical as far as the justification for the award is concerned as well as with respect to establishing the amount or value of the award. Thus, the extent to which imputation plays a role in fixing the income is something that requires our attention.

The ALI treatment does not deal adequately with the treatment of the amount of the award. Notionally, the amount is a function of the incomes the parties are expected to have after dissolution.48 However the comments then go on to make the point that post-divorce increases in the obligor’s income above the level of the marriage are normally not relevant because the provision seeks to redress a loss that is based on the standard of living during the marriage.49 Then, having made this point, the comments go on to say that, where the obligor’s expected income at the time of dissolution is much larger than at any time during the marriage, a different measure may be appropriate.50 The significance of this statement is not made clear. If the basis for the award is the parties’ expectations, then participation in anticipated future income might be appropriate, and thus imputation of this income might be justified. If, on the other hand, the basis for the award is the actual standard of living that is put at risk by the divorce, then imputation of future earnings for the purpose of calculating the award is inappropriate. The relevant comment in the Principles also alludes to another comment which says that a court might be justified in departing from the presumptive size of the award if “substantial injustice” might result if atypical

44 PRINCIPLES, supra note, § 5.04, cmt. b, at 808.
45 PRINCIPLES, supra note, § 5.04 , cmt. c, at 808-09.
46 PRINCIPLES, supra note, § 5.04, cmt. c, at 810.
47 PRINCIPLES, supra note, § 5.04, cmt. c, at 810.
48 PRINCIPLES, supra note, § 5.04(3), at 805.
49 PRINCIPLES, supra note, § 5.04, cmt. f, at 814.
50 PRINCIPLES, supra note, § 5.04, cmt. f, at 814.
facts render the income measure inapt. For our purposes, apart from a failure to establish a clear premise for entitlement to enhancements in future income, what also remains unresolved is the extent to which the “injustice” to the claimant by virtue of non-participation in future increases, may be offset by a conceptual “injustice” arising from imposing a burden on the obligor based on what might happen in the future. At least, where the basis for the award is restricted to income at the time of dissolution and the premise for the award is lifestyle maintenance, the imputation process is grounded theoretically, and the risk is reduced that any imputed amount will constitute an unmanageable burden.

The Principles do try to alleviate some of the consequences flowing from making a prospective order. Modification is permitted if the income of either the obligor or the obligee turns out to be substantially less than was contemplated, or if the loss that is being compensated for is substantially smaller than expected, or if the obligor’s income has increased and at the time of the original order the obligor was earning less than had been earned earlier in the marriage. For the purpose of modification, the Principles deal expressly with the issue of imputing income. Income may be imputed to either the obligor or the obligee if he or she is voluntarily unemployed or underemployed. In this regard, the Principles do not require that the individual pursue the most lucrative work. Divorce is not to be seen as depriving individuals of the freedom to vindicate personal preferences. However, the structure of the award allowed by the Principles raises particular problems for the obligee. Since the amount of the award is a function of the income differential between the incomes of both the obligor and obligee, a less than optimal performance by either increases the burden on the other. While in a universe not governed by the Principles this scenario routinely was a consequence of the obligor’s under-performance, unless the obligee’s claim was based on “need” enhanced by under-performance, the obligee’s conduct could escape scrutiny. The Principles now require that the performance choices of both parties be evaluated against a standard of what is reasonable.

However, it is not clear whether the benchmark is a legal standard of reasonableness or normative social conduct. A court’s discretion is not totally unfettered. Certain modes of behavior are prescribed. Even if the obligor was underemployed during the marriage he or she is to be treated as available for full-time work – though nobody can be required to work more than full-time. Demanding availability for full-time work is required even though the Principles take the position that in the generality of cases the obligor’s work patterns during the marriage may inform the judgment of what is reasonable, since these patterns will establish the expectations made during

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51 PRINCIPLES, supra note , § 5.04, cmts. f, h, at 814, 819-20.

52 PRINCIPLES, supra note , § 5.08(1), at 864.

53 PRINCIPLES, supra note , § 5.08, cmt. c, at 867.

54 PRINCIPLES, supra note , § 5.08, cmt. c, at 867.

55 PRINCIPLES, supra note , § 5.08, cmt. c, at 868.
the marriage which are the premise for the award.56 The rationale for overriding prior patterns of behavior is that apparently, in all instances, reasonableness has to be evaluated in the context of the impact of the obligor’s choice on the obligee (and the parties children).57 Given the significance attached to conduct during the marriage and to the impact of choices on the other former spouse, the model employed by the Principles is hardly one of a clean break or viewing spouses as strangers. Indeed, the Principles suggest that few post-divorce choices producing a decrease in income will be acceptable, absent necessity, or perhaps where the choice reflects a short term detriment to achieve longer term enhancements.58

The Principles make the point that the actor’s “bad faith” is only half the story. If the party voluntarily created the new financial situation to justify a modification, the modification should be denied. But, even if the actor is in good faith, that is he or she genuinely desires the lifestyle change that gives rise to the reduced income, this, of itself, will not justify a downward modification, that is, the income will be imputed, by analogy with the proposition that such conduct would be insufficient to justify requiring the actor’s other creditors to forgive the debt. Thus, the actor’s wishes, even if genuine, have to be weighed against the former spouses’ obligations to one another.59

The analogy that treats former spouse’s as creditors for the purposes of imposing obligations or imputing income becomes markedly strained in one context. The Principles dictate that imputation is inappropriate if the underemployed party is the residential parent having care of the spouses’ child under the age of six. Thereafter, income may be imputed provided that the process takes into account the parent’s responsibilities to the child.60 Presumably this means that we may not demand optimal performance from the former spouse, just reasonable performance. Neither the exemption from any performance nor from optimal performance would be permitted if the relationship truly was one with a “creditor”. One might be comfortable with this posture if it was one adopted by the Principles in all instances to advance the interests of all children, but this is not the case. The residential parent cannot escape imputation by virtue of having post-divorce care of children who are not the issue of the obligor.61 Indeed, the artificiality of the approach is further evidenced by the fact that the normal exemption from imputation is available regardless of what the arrangements during the marriage were. Clearly, here the imputation analysis shifts from what is rational to what is ideological.

56 PRINCIPLES, supra note , § 5.08, cmt. c, at 868-69.

57 PRINCIPLES, supra note , § 5.08, cmt. c, at 869. Courts are easily split over the “reasonableness” of career choices, or desires for further education. PRINCIPLES, supra note , Reporter’s Notes, § 5.08, cmt. c, at 873-74.

58 PRINCIPLES, supra note , § 5.08, cmt. c, at 869-70.

59 PRINCIPLES, supra note , § 5.08, cmt. c, at 870.

60 PRINCIPLES, supra note , § 5.08, cmt. c, at 868.

61 PRINCIPLES, supra note , § 5.08, cmt. c, at 868.
The Principles do make an important distinction when it comes to the extent of the imputation. Imputation is permissible only to the level of the obligor’s usual marital income level. Ordinarily, post-divorce income levels beyond this are of no concern of the obligee since the roots of the claim lie in the loss sustained by the obligee, and the obligor’s income merely determines the extent to which it is equitable to require the obligor to share that loss. However, a “substantial injustice” exception potentially knocks a huge hole in this analysis, since in one illustration provided in the Principles the implication is that if the post-divorce situation emerges on a foundation of sacrifice made during the marriage, this situation may be taken into account. At best, it may be that the limits of a claim based on this sacrifice would be what the parties might reasonably have expected would emerge from it, not necessarily what did emerge from it – the advantaged spouse would only be charged with the consequences of a reasonable career choice and income from an optimum career choice could not be imputed.

b) Compensation Arising From A Child-Care Function

The Principles also seek to compensate a claimant for a loss in earning capacity arising from shouldering a disproportionate share of child care during the marriage. The compensation is a function of the difference in incomes the spouses are expected to have at dissolution. Why this measure is used, and its extensive dependency on income imputation is set out below. Also to be explored is the issue of whether the benchmark is the obligor’s expected actual earnings or imputed earnings.

The justification for the award is that caring for a child produces a loss in earning capacity, that is a human capital loss, which is incurred in the expectation that the marriage will endure so that the primary caretaker will continue to share in the income of the other parent. The idea is that the caretaker spouse is shouldering a burden that is a joint responsibility. Accordingly, the costs of doing so also are appropriately considered to be a joint responsibility. Of course, the justification for the obligation does not itself necessarily provide a foundation for establishing the amount of the burden. Such a foundation has to be supplied by the theory relating to human capital losses.

The inference that child-care responsibilities adversely affect earning capacity is not rebuttable. This posture is adopted on the pragmatic basis that while losses of this type are demonstrable in a generality of cases they may not be demonstrable in a specific case. Thus, to ground the claim it

62 PRINCIPLES, supra note , § 5.08, cmt. c, illus. 5, at 871.
63 PRINCIPLES, supra note , § 5.08, cmt. c, illus.8, at 872.
64 PRINCIPLES, supra note , § 5.05(1), at 833.
65 PRINCIPLES, supra note , § 5.05(4), at 834.
66 PRINCIPLES, supra note , § 5.05, cmt. c, at 835.
67 PRINCIPLES, supra note , § 5.05, cmt. d, at 837.
is only necessary to demonstrate that at divorce there is an anticipated income differential between
the child-care provider and the other spouse. True, the compensation payment provided for by the
Principles does not present us with a claimant devoid of merit. A child care function must have
been performed. A spouse who withdrew from the market simply to lead a more appealing
derivative lifestyle based on the other spouse’s income would have no claim.68

The Principles do attempt to supply a partial justification for the award. The argument is that on
average spouses are of a more similar socioeconomic status69 at the time of marriage than
randomly chosen individuals. Accordingly, the measure of what was lost by the claimant is more
accurately determined by the income differential between the claimant and the other spouse when
the marriage comes to an end, than by comparing the claimant’s position with the population
generally.70 If we accept the premise of this analysis, arguably it is appropriate to use what the
obligor could earn, not is earning, i.e. an imputed amount, as the benchmark of what the claimant
lost. After all, we should not allow choices made by the obligor to restrict the extent of the claim.
But, the Principles do not totally explain why the obligor should be required to pay a claim
calculated off an imputed level of earnings rather than actual earnings. The Principle’s argument
is that the claimant undertook the caretaker role on the assumption that the marriage would
continue and that the spouses therefore would continue to share their income, that is, that there is a
legitimate expectation to benefit from a measure linked to the other spouse’s future income.71
What this proposition does not justify is a claim linked to the other spouse’s optimum income,
unless we can run the claim back to the argument that this measure reflects what the claimant lost.
That is, given the spouses’ supposed similar initial socioeconomic positions, where the obligor
could get to is where the claimant would have arrived at but for the child-care function
performed.72 But, given that the benchmark of what the claimant lost is at best an approximation,
it is not clear that a claim based on an optimum level of performance should be recognized. After
all, assuming a good faith choice to earn at less than the optimum level, isn’t that a choice which if
the marriage had endured legitimately might have been made anyway. Can the claimant insist that
the original deal was for a marriage conditioned on an indefinite career as a neurosurgeon? The
unpleasantness of this argument seems to suggest that a claim based on an estimate of actual
earnings, not imputed earnings is to be preferred.

This analysis raises the possibility of an award at a level where the premise for the award is
flawed. The obligor may be required to perform at an imputed level simply because, as a matter of
pragmatics, the system cannot do better, and the implicit judgment is that, put at a rudimentary

68  PRINCIPLES, supra note , § 5.05, Reporter’s Notes, cmt. a, at 846. But, ultimately, the mere duration of the
marriage would justify a claim under § 5.04, no matter how parasitic the relationship.

69  PRINCIPLES, supra note , § 5.05, Reporter’s Notes, cmt. e, at 848.

70  PRINCIPLES, supra note , § 5.05, cmt. e, at 840.

71  PRINCIPLES, supra note , § 5.05, cmt. e, at 840.

72  The analysis for the claimant presumes that the claimant in his or her own right would have performed optimally,
but for caring for the child. See PRINCIPLES, supra note , § 5.05, Reporter’s Notes, cmt. e. at 848.
level, it is better that some innocents hang, lest most guilty escape. Any uneasiness with this position should be heightened since we cannot even be sure of the rationality of the amount of the award. This is because we cannot realistically determine to what extent the loss in earning capacity is a function of life choices made a long while back, and requiring actual proof of a loss occasioned by the child-care function would result in “the frequent rejection of meritorious claims.” Against this background, is it appropriate to use imputed income levels to establish the level of the burden imposed?

The conclusion that a claim based on an estimate of actual earnings, rather than imputed earnings, is to be preferred also seems to be supported by another of the Principles’ justifications. The Principles argue that for some claimants marriage does not reflect a lost career. Instead, what was lost was the opportunity to have children with someone with whom the claimant would have had an enduring relationship. Although the most direct measure of this loss would be to compare her situation on divorce to what it would have been if the claimant had married someone else, such an analysis essentially is impossible. The Principle’s approach is seen as just a “reasonably equitable substitute”. But, fixing the level of the award by reference to what a hypothetical spouse could do, rather than what the actual spouse is doing, would seem to somewhat flawed. After all, the claimant chose this particular spouse not the “other” and a non-optimum performance seems to be part of that choice. Of course, this element of our analysis may be of diminishing utility, since there is evidence of a decline in under-investment in their human capital by women, which suggests that expectations with respect to a their role in a domestic relationship may be changing.

A third rationale for the claim is one that puts the claimant on the soundest footing to demand imputation. The argument is that the claimant fulfilling the child-care function enabled the other spouse to enhance his or her earning capacity. This benefit remains with the other spouse after the marriage dissolves. Here the question becomes whether the beneficiary of the claimant’s efforts should be left free to reject an optimum return on the enrichment flowing from the other spouse’s efforts. Arguably the answer is not. But, one argument is that the bulk of the investment in human capital is made before marriage. From this perspective the potential obligor should be free to make of that earning capacity whatever he or she wishes. To rebut this, it would seem to be possible to make a determination whether or not there had been enhancement of the spouse’s earning capacity during the marriage, even if the other leg of the analysis, namely whether the claimant had contributed to that enhancement may be somewhat unappetizing.

Interestingly, since this bears on the issue of the appropriateness of relying on imputed income, the child-care that justifies the compensatory award need not involve the care of a child of the

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73 PRINCIPLES, supra note , § 5.05, cmt. d, at 837.

74 PRINCIPLES, supra note , § 5.05, cmt. e, at 833.

75 PRINCIPLES, supra note , § 5.05, Reporter’s Notes, cmt. d, at 848.

76 PRINCIPLES, supra note , § 5.05, cmt. e, at 841.
marriage. Care of a child of either spouse will do. The Principles point out that the claim is particularly justified if the claimant was caring for a child of the obligor, since the claimant essentially met an obligation of the other spouse. It hardly lies at the mouth of the obligor to suggest that he should not have to look to resources that are within reach to meet a claim of someone who did what he should have done, and manifestly was something that must have been done by the claimant with his acquiescence. Furthermore, there is the possibility that at least portion of the resource pool that might be utilized would not have been available had not the claimant’s actions freed the obligor to generate that resource pool or enhanced earning potential. Where the foundation for the claim is care that the claimant rendered to a child who is the claimant’s alone, the situation is less clear. The base model of a joint burden arising from a joint obligation breaks down in this context. The Principles posit two standard models relating to the support obligations of step-parents. One suggests that the introduction of a step-parent by marriage does not shift existing support obligations. The second suggests that remarriage produces a joint economy from which the child benefits and, more importantly, one which enables the custodial parent to withdraw from the labor market. The Principles consider it inappropriate to leave a loss of earning capacity flowing from the labor market withdrawal at the door of the child’s non-custodial parent when the remarriage dissolves. Given a choice between leaving this loss with the non-custodial parent, or sharing it between the this person and the step-parent, the Principles opt for the latter. The rationale seems to be some rather awkward form of acquiescence by the stepparent. What is not clear is why this rationale should then require the extent of the obligation to be determined by imputed post-marriage income levels. If imputation involves a loss of autonomy does this rationale justify such a loss?

C. Conclusion

What the above analysis suggests is that the appropriateness of using imputed income to establish the existence and/or extent of an alimony or alimony surrogate based obligation is highly dependent on the underlying theory. At one end of the spectrum would be fault based regimes where the potential obligors of the world have few, if any, defenses to efforts to impose an obligation relying on income imputation. At the other end, the justificatory regime may strive for rationality and justify the claim on losses suffered or advantages gained. In the former instance imputation may be used to establish the obligation, though not necessarily to justify the extent of the resources to be made available to satisfy the claim. On the other hand, where the foundation for the claim is a human capital benefit conferred on the obligor, imputation seems to be justifiably used to establish both the existence and extent of the obligation – reaching well beyond the

77 PRINCIPLES, supra note , § 5.05(2)(a), at 833.

78 PRINCIPLES, supra note , § 5.05, cmt. b, at 835.

79 PRINCIPLES, supra note , § 5.05, cmt. b, at 836.

80 “These stepparents are more likely to have assumed many of the burdens of parenthood during the marriage, to have shared many of the benefits, and to have developed a relationship with the stepchildren that will continue after the dissolution.” PRINCIPLES, supra note , § 5.05, cmt. b, at 836.
obligors’s actual performance, unless the marriage itself embodied an “understanding”, by way of risk assumption or otherwise, that under-performance was part of the “deal”.