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A Human Capital Theory of Alimony and Tax

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INTRODUCTION

The taxation of alimony is broken. As a regime, it creates compliance burdens for taxpayers and administrative challenges for the Internal Revenue Service (the "Service" or "IRS"), and it may give rise to significant equity concerns. In short, the taxation of alimony is in need of reform.

The rule is simply stated: alimony is income to the recipient and deductible by the payor. Yet the seeming simplicity of this rule—found in section 71 of the Internal Revenue Code (the "Code")—belies the fact that it has a complex history and is markedly difficult to enforce.[1] A few elements of the

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+ As this Article entered final production at the close of 2017, Congress enacted significant changes to the Internal Revenue Code in the form of an act colloquially known as the Tax Cuts and Jobs Act of 2017. Among other things, the Act repealed the current tax treatment of alimony, adopting instead, for taxable years beginning after 2018, the proposed no-deduction/inclusion regime advocated in this Article. It is always pleasing to see one's policy proposals enacted into law, even where Congress does so without explanation and right before publication. Notwithstanding that the reform advocated herein has been accomplished before the presses started to run, the arguments of the Article are now particularly timely. The legislative history provides little discussion as to Congress's rationale for the change. Stating only that "the intent of the provision is to follow the rule of the United States Supreme Court's holding in *Gould v. Gould*," the Conference Report leaves tax practitioners and commentators to speculate on the motivating rationale for the change. The most obvious immediate purpose is that the new regime raised revenue: Because the act was passed via the reconciliation process, supporters of the bill were eager to find revenue gains where possible, and the Conference Report assumed repeal would raise $6.9 billion over a ten-year budget window. This Article fills the gap left by Congress as it provides holistic consideration of the various rationales for the changes to the taxation of alimony hastily adopted by Congress.

1 This Article uses the term *alimony* as tax law uses that term. However, many jurisdictions have replaced the term with "maintenance" or "support." Alabama law, for example, uses the term *alimony* to represent two conceptually distinct concepts. Alimony may be either "alimony in gross" or "periodic alimony," where alimony in gross is "the present value of the wife's inchoate marital rights—dower, homestead and distributive share, which are being terminated by the divorce." Periodic alimony is meant "to provide for the current and continuous support of the wife." Dees v. Dees, 390 So. 2d 1060, 1064 (Ala. Civ. App. 1980). Ohio, in contrast, describes payments that are substantively similar to Alabama's periodic alimony as "spousal support." OHIO REV. CODE ANN. § 3105.18 (West 2017). This difference in terminology may or may not represent a difference in the supposed rationale for why the payment is made.

provision itself give rise to interpretive and computational complexity.[2] For example, it has proved persistently challenging to determine whether payments under a divorce decree end at the death of the recipient former spouse.[3] Some computational complexity arises in subsection (f) as well, which recaptures property settlements in alimony's clothing so such transfers receive their proper tax treatment.[4] But the roots of the regime's complexity stem from the fact that the theory and substance of the tax concept of alimony ("tax alimony") are detached from the alimony of family law. A solution to the current challenges lies in rationalizing the understandings between alimony tax and family law.

Tax law has drawn a costly line in the sand in its treatment of transfers at or incident to divorce, and that line undermines the efficacy of the tax alimony regime. A transfer may be characterized as child support, property settlement, or alimony with the former excluded from the recipient's income and nondeductible to the payor and the latter included by the recipient and deductible to the payor.[5] With three potential classifications and two differing

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When this Article uses the term *alimony*, it is used to encompass any payments made with intent to provide support to a spouse for his life that are not conceived as a property division. The tenuousness of the conceptual distinction between these two categories, and its import for tax law, will be explored in the Article, however.

2 Section 71 defines alimony in a seemingly uncomplicated fashion. 26 U.S.C. § 71(b)–(e) (2012). To be alimony, a payment must satisfy each of seven elements: (1) The payment must be in cash to or on behalf of the payee spouse; (2) the payment must be made per a divorce decree or other qualifying instrument; (3) the payor and payee must not designate the payment as not being alimony; (4) the payor and payee must not share a household; (5) the payments must not continue after the payee dies; (6) the payor and payee must file separate returns; and (7) the payments must not be child support. *Id. See also* discussion *infra* Part I.A.3.

3 Doing so is essential to classifying a transfer as alimony under federal income tax law, however, because the termination-at-death requirement is one of the defining features of the contemporary tax definition of alimony ("tax alimony"). For examples of courts struggling with this task, see Wolens v. United States 125 Fed. Cl. 422, 429–31 (2016) (addressing the applicable law for determining whether payments cease at death where the instrument is silent); Iglicki v. Comm'r, T.C.M. (RIA) 2015–80 (2015) (discussing whether payments made pursuant to a judgment entered after default satisfied the "terminate at death" requirement of section 71(b)).

4 Section 71(f) defines and recaptures "excess alimony." 26 U.S.C. § 71(f) (2012). The concept of excess alimony and the different treatment it will receive once it is deemed to be a disguised property settlement will be discussed further *infra* Part I.B.2.a. In brief, property transfers during marriage and incident to divorce are governed by 26 U.S.C. § 1041, which is a nonrecognition provision.

5 26 U.S.C. §§ 71, 215, 262, 1041 (2012). For example, assume a woman transfers $1,000 per month to her former spouse. If that transfer meets the requirements of section 71 and is categorized as alimony, it will give rise to a $1,000 above-the-line deduction per section 215. The recipient's former spouse then must include the $1,000 as income per sections 61 and 71. If the payment is instead classified as a property settlement, the $1,000 remains in the woman's tax base (i.e., does not give rise to a deduction) and is excluded from the recipient's income. If the $1,000 is classified as child support, it is pulled out of the alimony definition by 26 U.S.C. § 71(c)(1), meaning it remains taxable to the payor and excluded by the recipient. 26 U.S.C. § 215 (2012). By operation of 26 U.S.C. § 62(a)(10), the deduction for alimony is classified as "above the line," meaning the deduction is taken as the taxpayer winnows her gross income down to her adjusted gross income. Taxpayers typically prefer above-the-line deductions to

tax treatments, individuals continue to (either inadvertently or intentionally) misclassify transfers as alimony that are, in fact, property transfers or child support payments. Yet current law is the product of a congressional attempt to remedy the very complexity that leads to such misclassification.[6]

Individuals continue to find themselves in conflict with the Service over the classification of alimony. Perhaps such conflicts are the inevitable cost of properly classifying a given transfer. Such a position may be reasonable but is undercut by the fact that current law is only superficially concerned with properly identifying whether a payment is, in substance, alimony, a property settlement, or child support. Stated differently, a payment that is understood to be alimony under family law doctrine can be classified as a property settlement for tax law purposes. Indeed, circuit court opinions on the tax treatment of a transfer steer clear of attempting to determine whether the payment is, in fact, alimony under state law.[7]

The current regime also gives rise to enforcement challenges. A recent empirical study suggests that misclassification of alimony is more common and costly than prior estimates supposed. The study, conducted by the Treasury Inspector General for Tax Administration ("TIGTA") discovered that, in the tax year studied, noncompliance with section 71 resulted in $2.3 billion in alimony deductions for which there was no corresponding income inclusion by the recipient.[8] Of the more than half-million returns claiming an alimony deduction in the taxable year studied, 47 percent had a deduction/inclusion mismatch.[9] The study also found systemic problems with the

itemized deductions (also known as "below-the-line") because above-the-line deductions are not subject to the same limitations as itemized deductions. *See* 26 U.S.C. § 67 (2012) (providing for a 2% haircut on miscellaneous itemized deductions and the list of regular itemized deductions that are not subject to the haircut) and 26 U.S.C. § 68 (2012) (a provision reinstituted by the American Taxpayer Relief Act of 2012 that reduces itemized deductions as a taxpayer's adjusted gross income increases. Section 68 is known as the Pease limitation). Section 1041 was a congressional response to the Supreme Court case *United States v. Davis*, 370 U.S. 65, 70–71 (1962), which held that a transfer of stock between a husband and wife pursuant to a separation agreement was a taxable event. *See also* Polone v. Comm'r, 505 F.3d 966, 971 (9th Cir. 2007) ("These divorce settlements determined that divorce transactions were taxable events in the first instance; the cases were later legislatively overruled by enactment of section 1041 of the Internal Revenue Code." (citation omitted)).

6 *See* discussion *infra* Part I.A.

7 "[W]hen state family law is ambiguous as to the termination of payments upon the death of the payee, a federal court will not engage in complex, subjective inquiries under state law; rather, the court will read the divorce instrument and make its own determination based on the language of the document." Hoover v. Comm'r, 102 F.3d 842, 846 (6th Cir. 1996); *see also* Johanson v. Comm'r, 541 F.3d 973, 974–75 (9th Cir. 2008); Kean v. Comm'r, 407 F.3d 186, 191–93 (3d Cir. 2005) (declining to delve into the "intricacies" of state family law).

8 U.S. DEP'T OF THE TREASURY, TREASURY INSPECTOR GEN. FOR TAX ADMIN., REFERENCE NO. 2014-40-022, SIGNIFICANT DISCREPANCIES EXIST BETWEEN ALIMONY DEDUCTIONS CLAIMED BY PAYERS AND INCOME REPORTED BY RECIPIENTS 4 (2014) [hereinafter TREASURY INSPECTOR]. The study examined tax returns from taxable year 2010.

9 *Id.* The study goes on to analyze whether the recipient filed a return or, whether properly or improperly, failed to file a return. In 84% of the discrepancy cases, the recipient filed a return but failed

Service's procedures for identifying and addressing the "alimony reporting compliance gap" as well as repeated failures by the Service to assess applicable penalties for failing to identify the alimony recipient.[10] In short, current law results in regular noncompliance and revenue loss.

Compliance and administrative complexity could alone justify reform, yet the tax alimony regime also creates equity concerns. First, the complexity of the regime itself may undermine the equity of the tax system as individuals lose faith in a system that seems unintelligible or cannot be (or is not) uniformly enforced. Second, the tax alimony regime promotes inequity by its own terms. Well-advised taxpayers can, with the blessing of the current regime, enlist the help of the federal government in subsidizing the costs of their alimony payments. If the alimony payor is in a higher tax bracket than the recipient (as is likely), the couple can use the availability of the deduction and difference in rates to their advantage as follows. A $10,000 alimony payment from a 39.6 percent bracket taxpayer to a 25 percent bracket taxpayer costs the payor only $6,040.[11] The recipient will then pay $2,500 in tax on the alimony received.[12] The difference in tax saved by the payor and collected from the recipient—$1,460—is the government subsidy for alimony paid. Because well-advised taxpayers whose divorce places them in separate brackets are the ones who are best situated to use the subsidy built into section 71, the availability of such a subsidy inures to the benefit of those least likely to require it. And inequity follows such outcomes.

That designing a regime to tax alimony is a challenge should not come as a surprise. Where tax law and cultural institutions such as the family collide, complexity is rarely far behind. The deep and fascinating literature on the joint return and the relevance of marriage to tax law provides a ready example of such complexity.[13] Alimony represents a similar collision of tax

to claim alimony income. In 14%, the recipient improperly failed to file a return, and in the remaining 2%, the author could not determine whether the income had been claimed because the recipient's tax identification number was incorrect or not provided. *Id.*

10 *Id.* at 5–11.

11 The $10,000 deduction saves the payor $3,960 in tax (assuming the deduction does not move her from the 39.6% to the 35% bracket). Thus, her net cost is only $6,040.

12 Her tax reflects the inclusion of the $10,000 in income that is then taxed at a 25% rate. This simplified example also assumes that the additional income does not move the recipient into a new tax bracket.

13 For a discussion of the relevance of the family to tax, *see* Tessa R. Davis, *Mapping the Families of the Internal Revenue Code,* 22 VA. J. SOC. POL'Y & L. 179 (2015); Anthony C. Infanti, *Decentralizing Family: An Inclusive Proposal for Individual Tax Filing in the United States*, 2010 UTAH L. REV. 605, 609, 645 (2010); Marjorie E. Kornhauser, *Love, Money, and the IRS: Family, Income-Sharing, and the Joint Income Tax Return*, 45 HASTINGS L.J. 63, 104–09 (1993); James E. Maule, *Tax and Marriage: Unhitching the Horse and the Carriage*, 95 TAX NOTES TODAY 82-35 (Apr. 27, 1995). For a discussion of how the tax code differentially treated unmarried and same-sex couples pre–*Windsor*, see, e.g., Patricia A. Cain, *Taxing Families Fairly*, 48 SANTA CLARA L. REV. 805, 805–06 (2008); Patricia A. Cain, *Heterosexual Privilege and the Internal Revenue Code*, 34 U.S.F. L. REV. 465, 465–67 (2000); Lily Kahng, *One Is the Loneliest Number: The Single Taxpayer in a Joint Return World*, 61 HASTINGS L.J. 651, 651 (2010); Nancy J. Knauer, *Heteronormativity and Federal Tax Policy*, 101 W. VA. L. REV. 129, 130–34

law and cultural concepts of family, duty, and support. As such, the tax treatment of alimony faces similar complexity. In recent years, however, alimony has received little scholarly attention. Professor Deborah Geier's excellent 2002 *Tax Lawyer* article is the most authoritative scholarly call for change since the 1984 congressional reforms that gave us our transformed current legal framework.[14] Yet sixteen years have passed since Professor Geier's call to unify the tax treatment of transfers at divorce, and the area remains hard to administer and inequitable. Such a broken tax scheme should not continue to govern an area of law that impacts so many taxpayers.[15]

A change is needed to remedy the problems of the current tax alimony regime. Family law provides a solution. Though family law has never settled on a unified theory of alimony,[16] the diverse modern literature shares a common thread: investments of and in human capital create a right to alimony.[17] Alimony theory, alongside family law doctrine and practice, together suggest that what is labeled alimony can be better understood as one of three events: (1) a return on investment in human capital; (2) compensation for lost or damaged human capital; or (3) a property settlement.[18] Respecting the third insight, if alimony and property settlements are largely indistinguishable, tax law should learn from family law and dissolve its own costly line in the sand.

(1998); Theodore P. Seto, *The Unintended Tax Advantages of Gay Marriage*, 65 WASH. & LEE L. REV. 1529, 1529 (2008); Lawrence Zelenak, *Doing Something About Marriage Penalties: A Guide for the Perplexed*, 54 TAX L. REV. 1, 1–3 (2000).

14 Deborah A. Geier, *Simplifying and Rationalizing the Federal Income Tax Law Applicable to Transfers in Divorce*, 55 TAX LAW. 363, 363–66 (2002).

15 For U.S. Census Bureau data on marriage and divorce, see ROSE M. KREIDER & RENEE ELLIS, NUMBER, TIMING, AND DURATION OF MARRIAGES AND DIVORCES: 2009 1–2 (2011), https://www.census.gov/prod/2011pubs/p70-125.pdf. However alimony rationales and awards have shifted, alimony persists. *See, e.g.*, Laura W. Morgan, *Where Are We Now? Current Trends in Alimony Law*, 34 FAM. ADVOC. 8, 8–9 (2012) ("The economic, social, and cultural factors that have changed our views of marriage have shattered our once cohesive understanding of alimony. Some courts and commentators, and even a few legislatures, have reasoned that since women now work, alimony should be curtailed drastically or even abolished. This trend was most recently exhibited in Massachusetts, where on September 26, 2011, the governor signed legislation, ending alimony when the payor retires, and generally limiting alimony to a number of years based on the length of the marriage[.] Most states have not yet taken such a drastic step: alimony continues to stumble along, based on habit and precedent as much as logic, as part of the modern divorce case. . . . Our reluctance to abolish alimony entirely shows that at some level, in some cases, it must serve a very important purpose."). Further, practitioner-focused materials emphasize the importance of the tax treatment of alimony in structuring divorce agreements, suggesting that the tax tail frequently wags the dog. *See, e.g.*, Christopher C. Melcher, *Simple Answers to Complex Alimony Questions*, 27 J. AM. ACAD. MATRIM. LAW. 61, 61–62 (2015) ("Every time an alimony agreement or order is made, the attorneys are doing a form of tax planning. . . . When the payor is in a higher tax bracket than the payee, the IRS ends up subsidizing part of the alimony payment.").

16 Cynthia Lee Starnes, *Alimony Theory*, 45 FAM. L.Q. 271, 291 (2011) ("Family law has operated for too long without a satisfactory and consistent theory of alimony. Over the last thirty years, numerous commentators have offered rationales for alimony, but none has won the day.").

17 *See* discussion *infra* Part II.B.

18 *See, e.g.*, Starnes, *supra* note 16, at 272 (discussing how alimony serves as a substitute for settling and dividing nonexistent property holdings).

The first two insights help answer a question that prior reform attempts have largely avoided: to whom is alimony income? Specifically, this Article argues that family law theory supports recognizing a limited, theoretical concept of basis in and of human capital—alimony basis—the existence of which calls into doubt whether alimony is clearly income to the recipient.

This Article proposes unifying the tax treatment of transfers incident to divorce[19] by repealing the deduction/inclusion regime of sections 71 and 215. The sections would be replaced by model statutory language for a no-deduction/exclusion regime. Under the new regime, all transfers, whether of cash or property, would remain in the tax base of the transferor and be excluded from the tax base of the recipient. Such unified treatment would boost compliance, reduce inequities of the current law, and bring tax law more in line with substantive family law, creating a fairer, more coherent, more principled, and more administrable tax alimony regime.

Part I provides background on the evolution of the tax treatment of alimony and tax scholarship on alimony, making the case that a new approach to reform is necessary. Part II then explores family law theory, doctrine, and practice of alimony, identifying unifying themes and their import for tax law. Part III concludes by proposing the repeal of the current deduction/inclusion regime and setting forth multiple rationales for the suggested reform.

I. A PERSISTENT CHALLENGE

Arguments regarding the current tax treatment of alimony are as numerous and varied as those on alimony itself. Doctrine varies from state to state, and just as family law scholars cannot agree on the justifications for alimony payments, tax scholars similarly debate the proper tax treatment of those payments. States are not alone in this challenge; many other countries, such as

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19 In doing so, this Article is in line with earlier reform proposals in the literature. Though not based in human capital theories of alimony, those proposals will be explored *infra* Part II.B. The House Ways and Means Committee also proposed repealing the alimony deduction in 2014. STAFF OF H. COMM. ON WAYS & MEANS, 113TH CONG., TAX REFORM ACT OF 2014 DISCUSSION DRAFT SECTION-BY-SECTION SUMMARY 25–26 (Comm. Print 2014) ("Under the provision, alimony payments would not be deductible by the payor or includible in the income of the payee. The provision would be effective for any divorce decree or separation agreement executed after 2014 and to any modification after 2014 of any such instrument executed before such date if expressly provided for by such modification. . . . The provision would eliminate what is effectively a 'divorce subsidy' under current law, in that a divorced couple can often achieve a better tax result for payments between them than a married couple can. The provision recognizes that the provision of spousal support as a consequence of a divorce or separation should have the same tax treatment as the provision of spousal support within the context of a married couple, as well as the provision of child support. . . . According to JCT, the provision would increase revenues by $5.5 billion over 2014-2023."). *See* STAFF OF JOINT COMM. ON TAX'N, 113TH CONG., TECHNICAL EXPLANATION OF THE TAX REFORM ACT OF 2014, DISCUSSION DRAFT 63–64 (Comm. Print 2014) (stating a desire to return to *Gould v. Gould*, 245 U.S. 151 (1917)).

Canada, Australia, and Germany, similarly struggle with the taxation of alimony.[20] Alimony, it seems, frustrates more than just those who must pay it.[21]

Within the United States, the taxation of alimony has seen an evolution in fits and starts since the seminal Supreme Court case of *Gould v. Gould*.[22] Congress made significant changes first in 1942[23] and then again in 1984,[24] and legislative interest in the tax treatment of alimony persists. Former Republican Chair of the House Ways and Means Committee David Camp advocated repealing the alimony deduction as part of the proposed Tax Reform Act of 2014.[25] As recently as June 2016, Republican Congressman Lloyd Dodgett from Texas discussed reforming how alimony is reported,[26] suggesting legislation that would impose a Form 1099–type regime[27] for alimony

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20 Prior to 1995, Canadian law allowed a deduction to the payor for both alimony and support payments but then switched its regime to mirror the United States' differing treatment of alimony and child support. Australian law, in contrast to that of the United States, keeps both alimony and child support in the tax base of the payor. Germany takes a slightly different tack, denying a deduction for both types of payments but providing limited tax breaks for the payor via credits. For further discussion of the taxation of alimony in these and other countries, see HUGH J. AULT & BRIAN J. ARNOLD, COMPARATIVE INCOME TAXATION: A STRUCTURAL ANALYSIS 323–28 (3d ed. 2010).

21 Campaigns to abolish specific types of alimony or alimony entirely arise in many states. *See, e.g.*, L.J. Jackson, *Alimony Arithmetic: More States Are Looking at Formulas to Regulate Spousal Support*, ABA J. (Feb. 2012), http://www.abajournal.com/magazine/article/alimony_arithmetic_more_states_are_looking_at_formulas_to_regulate_spousal. In South Carolina, an entire organization exists to modernize South Carolina's alimony laws. SOUTH CAROLINA ALIMONY REFORM (2018), http://www.scalimonyreform.com/. The organization's website states: "We are a state of South Carolina non-profit association dedicated to modernizing the outdated alimony laws of South Carolina. We are looking for people just like you that would like to join us in our effort. If you feel that the alimony laws in South Carolina are unfair and unjust in today's society, please join us and help us update these archaic laws. We are seeking to change permanent alimony to limited duration alimony with a safety valve for those that really need it due to physical or mental disabilities." *Id.*

22 245 U.S. 151 (1917).

23 Revenue Act of 1942, Pub. L. No. 77-753, § 120, 56 Stat. 798 (1942) (codified as amended at 26 U.S.C. §§ 22(k), 23(u) (1942)).

24 Deficit Reduction Act of 1984, Pub. L. No. 98-369, 98 Stat. 494 (1984).

25 *See* STAFF OF H. COMM. ON WAYS & MEANS, 113TH CONG., TAX REFORM ACT OF 2014 DISCUSSION DRAFT SECTION-BY-SECTION SUMMARY 25–26 (Comm. Print 2014); STAFF OF JOINT COMM. ON TAX'N, 113TH CONG., TECHNICAL EXPLANATION OF THE TAX REFORM ACT OF 2014, DISCUSSION DRAFT 63 (Comm. Print 2014); Simplified USA Tax Act of 2001, H.R. 86, 107th Cong. (2001) (Rep. English introduced legislation that would leave alimony deductible and make child support deductible.). Rep. English introduced similar legislation until he left the House in 2008.

26 Currently, the individual claiming an alimony deduction must provide the recipient's Social Security number or ITIN. The recipient must then report alimony received on his Form 1040. IRS PUBLICATION 504, DIVORCED OR SEPARATED INDIVIDUALS (2017), https://www.irs.gov/publications/p504/ar02.html#en_US_2016_publink1000175944.

27 Form 1099 is part of what is known as information reporting. For a discussion of information reporting, see Leandra Lederman, *Reducing Information Gaps to Reduce the Tax Gap: When Is Information Reporting Warranted?*, 78 FORDHAM L. REV. 1733, 1736 (2010) ("Information reporting is a prime example of a technique used to solve both types of information asymmetries at the prefiling stage. Withholding is well known to be highly effective in ensuring payment, but IRS data show that information reporting in the absence of withholding is almost as effective. With information reporting, the government

income.[28] However, no reform proposal has gained much traction since the more comprehensive reforms of the 1980s.[29] A brief introduction to the path toward the current regime provides the background necessary to evaluate the current regime and reforms proposed by this Article.

A. *A Timeline of the Tax Treatment of Alimony*

Tracking the development of the tax treatment of alimony since 1913 helps illustrate the muddled relationship between tax and family law concepts of alimony. At points, Congress, the courts, and the Service have looked to family law to define alimony to understand how the payments should be classified under tax law—specifically, to answer the question of to whom an alimony payment is income.[30] At other times, Congress reformed the tax

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obtains information about the taxpayer's tax situation from a third party and—equally important—the taxpayer knows that the government has the information.").

28 The details of Rep. Dodgett's proposal were, as of this writing, unclear. *See* Alan K. Ota, *How Improving Tax Filings on Alimony Could Help Foster Kids*, CQ ROLL CALL (June 6, 2016), https://doggett.house.gov/media-center/press-releases/how-improving-tax-filings-alimony-could-help-foster-kids.

29 The Trump Administration has not signaled interest in reviewing or reforming the tax treatment of alimony, instead focusing its (albeit limited) proposals on tax rates and the corporate tax. However, the Administration's proposed lowering of the highest marginal rate from 39.6% to 33% and compression of the rate schedule from seven rates to three further distances the current law from historic justifications for a payor deduction. *See infra* Part III.A.3.

30 Professor Geier discusses this substantive inquiry, ultimately advancing the idea that we can concede that alimony is income and need only determine to which of the former spouses it should be taxed. This approach views the divorced couple as a unit, rather than two separate individuals. She writes:

Notice that this form of analysis focuses on whether alimony comes within some notion of "income." If the analysis is viewed this way, each party is analyzed independently, and a payment of alimony could conceivably be taxable to both the payor and the recipient. For example, if we view the matter from the recipient's side alone, and if alimony is considered within the [*Comm'r v.*] *Glenshaw Glass* [*Co.*, 348 U.S. 426 (1955)] notion of "income" as an undeniable accession to wealth, *etc.*, then it would be includable by the recipient. At the same time, the payor earning wages from which the alimony was paid would have to include the wages in gross income, since compensation for services rendered is specifically listed as "income" in section 61(a)(1). Moreover, the payor would arguably be denied a deduction for the payment under a strict definition of "income" in the familiar Schanz-Haig-Simons sense, under which only outlays incurred to produce includable income are properly deductible (with personal consumption outlays being nondeductible, and thus taxed). . . .

[T]here is another way to view this issue, which was also hinted at by the *Gould* Court and which is, I think, the more appropriate way to think about the payment. Rather than analyzing the tax consequences to each of these taxpayers independently of the other, *i.e.*, determining whether the receipt qualifies as "income" to the recipient and whether the payment qualifies as a deductible one to the payor under an "income" analysis because it does not purchase discretionary personal consumption, we could view both taxpayers *together*. In an intact marriage, by analogy, amounts earned by one spouse and paid to another are ignored for tax purposes (*i.e.*, they are neither includable by the recipient nor deductible by the payor), whether or not the couple files a joint return or files separate returns using the rate schedule for married couples filing separately. Therefore, the amounts are taxed only once between the two. We could reason that the amounts should continue to be taxed only once, even though the family is no longer intact, because of the clear and direct relationship of the payments to the former legal relationship of the parties (or the treatment of alimony in ways that seemed unconcerned with understanding the proper tax treatment of the payments in favor of advancing other goals.[31] In vacillating between aspiring to have tax alimony track the family law understanding of what alimony *is*, and letting such substantive consistency lose out to other goals, Congress has created an area of tax law that does a poor job of being either coherent or administrable.

1. *Gould v. Gould*

The Supreme Court opinion in *Gould v. Gould*[32] set early precedent on the tax treatment of alimony. The case also made clear the influence of social norms and expectations on the interpretation of laws governing marriage and divorce.[33] In *Gould*, the Court considered whether monthly payments Mrs. Gould received from her husband, pursuant to a 1909 divorce decree, qualified as income under the then-new income tax.[34] Citing its own precedent from a 1901 bankruptcy discharge case, the Court stated:

> Alimony does not arise from any business transaction, but from the relation of marriage. It is not founded on contract, express or implied, but on the natural and legal duty of the husband to support the wife. The general obligation to support is made specific by the decree of the court of appropriate jurisdiction. . . . Permanent alimony is regarded rather as a portion of the

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continuing legal relationship, in the case of a paternity payment to support a child after a divorce or otherwise outside of marriage). . . . Viewed this way, the question is not whether the amount conceptually constitutes "income" to both but rather *who* should be taxed on what is concededly income to someone? That is to say, the question can be viewed not as "what is income?" but rather as "to whom should the income be taxed?"

Geier, *supra* note 14, at 368–70.

31 For example, legislative history shows that Congress was motivated, at least in part, by ability-to-pay concerns for payers of alimony when marginal rates were much higher than under current law. *See* H.R. REP. NO. 77-2333, at 46 (1942) ("The existing law does not tax alimony payments to the wife who receives them, nor does it allow the husband to take any deduction on account of alimony payments made by him. He is fully taxable on his entire net income even though a large portion of his income goes to his wife as alimony or as separate maintenance payments. The increased surtax rates would intensify this hardship and in many cases the husband would not have sufficient income left after paying alimony to meet his income tax obligations.").

32 245 U.S. 151 (1917).

33 The thrust of the *Gould* case is that the woman is essentially incapable of caring for herself. In an era when less than 25% of women participated in the workforce, it is not surprising that the Court would view a man's support of his wife as "natural" and persisting after marriage. *Gould*, 245 U.S. at 153. *See also* Carol Boyd Leon, *The Life of American Workers in 1915*, BUREAU OF LABOR STATISTICS (2016), https://www.bls.gov/opub/mlr/2016/article/the-life-of-american-workers-in-1915.htm ("The 1920 census shows that, among people ages 14 and older, the proportion of the population that was in the total labor force was 85 percent for men and 23 percent for women in January of that year. (Civilian labor force data by gender are not available for 1915.)"). When women participated in market work, their wages were only 63% of men's wages. James P. Smith & Michael P. Ward, *Women's Wages and Work in the Twentieth Century*, RAND viii (1984), https://www.rand.org/content/dam/rand/pubs/reports/2007/R3119.pdf.

34 *Gould*, 245 U.S. at 152.

> husband's estate to which the wife is equitably entitled, than as strictly a debt; alimony from time to time may be regarded as a portion of his current income or earnings.[35]

In the Court's view, alimony was a husband's payment of a financial responsibility owed to the wife—essentially, payment of a wife's vested interest in support.[36] Because such support would not have been taxed to the wife during the marriage, it remained untaxed after divorce.[37] The Court also appealed to the property settlement rationale. By stating that alimony is a "portion of the husband's estate," the Court suggested that alimony is not only a share of earnings owed to the wife by the husband but also akin to marital property in which the wife has a vested interest.[38] Alimony, then, was not merely a pure transfer of earned income from husband to wife but also a divvying up of property.[39] Importantly, this muddled sense of what alimony is echoed in family law scholarship and subsequent court cases.[40] Ultimately,

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35 *Id.* at 153. As Professor Geier notes, the Court was operating with a different canon of interpretation in deciding whether Ms. Gould had income. In contrast to the broad interpretation of "income" advanced in *Comm'r v. Glenshaw Glass Co.*, 348 U.S. 426 (1955), the *Gould* Court stated that "[i]n case of doubt [tax laws] are construed most strongly against the Government, and in favor of the citizen." *Gould*, 245 U.S. at 153; Geier, *supra* note 14, at 367. In *Glenshaw Glass*, the Supreme Court articulated the still-dominant judicial definition of gross income, defining it as "accessions to wealth, clearly realized, and over which the taxpayers have complete dominion." *Glenshaw Glass*, 348 U.S. at 431. In that same case, the Court also established that the definition of income should be broadly construed. *Id.* at 431–33.

36 *See Gould*, 245 U.S. at 153.

37 The income tax in force at the time did not tax transfers between spouses. *See* Underwood Tariff Act, Pub. L. No. 63-16, 38 Stat. 114 (1913).

38 *Gould*, 245 U.S. at 153.

39 *Id.* at 153–54.

40 Courts frequently consider the totality of the agreement in evaluating the sufficiency of a property settlement or alimony, suggesting that the line between property division and alimony is not firm in courts' views. *See, e.g.*, Haldeman v. Haldeman, 21 Cal. Rptr. 75, 82 (Cal. Ct. App. 1962), where a California court found that the property division seemed inadequate to justify increasing alimony. "She was awarded the custody of the 16-year-old daughter and with the responsibility of caring for her appellant should not be compelled to seek outside employment." *Id.* (citing Mueller v. Mueller, 301 P.2d 90 (Cal. Ct. App. 1956)).

Appellant was awarded community property of a value of $144,964.57, of which approximately $110,000 is now, or can be diverted into, income-earning property. How this compares with the value of the property ultimately to be awarded to the husband depends upon the ultimate determination of the value of the community interest in the pharmacy business. An alimony award is a comparative matter. For emphasis we quote again from Civil Code section 139 that it should be a 'suitable allowance . . . having regard for the circumstances of the respective parties[.] . . .' The financial position of each of the parties before and after the divorce should be compared and contrasted.

Id. (citing Huntington v. Huntington, 262 P.2d 104 (Cal. Ct. App. 1953)).

If the husband (who is here the guilty spouse) is to be awarded the pharmacy business, which presently without his too constant services nets him $41,000 a year, plus the income . . . from property worth $81,423.71 (or so much thereof as may be income producing) his circumstamces [sic] will be rather good. The circumstances of the wife (who is the innocent spouse) suffer by comparison. The property heretofore awarded to her is unlikely to yield, safely invested, more than $5,500 a year—appoximately [sic] $460 a drawing on both understandings of the substance of alimony, the Court held that such payments were nondeductible to the payor and excludible by the recipient.[41]

2. Pre-1984 Law

Gould and its no-deduction/exclusion regime remained law until 1942. In that year, Congress overruled *Gould* in the Revenue Act of 1942, which made alimony payments deductible to the payor and included in income by the recipient.[42] Tax rates, rather than a considered analysis of what alimony is in substance, drove the change.[43] In that year, the highest marginal tax rate was 88 percent on taxable income over $200,000.[44] Such high marginal rates drove the concern, articulated in the legislative history of the Act, that payment of alimony without a deduction could effectively bankrupt the man who paid it:

> He [the payor] is fully taxable on his entire net income even though a large portion of his income goes to his wife as alimony or as separate maintenance payments. The increased surtax rates would intensify this hardship and in many cases the husband would not have sufficient income left after paying alimony to meet his income tax obligations.[45]

Tax alimony shifted then, in part, because of congressional concern for the payor's ability to pay.[46] However, the desire to reduce the tax burden of high marginal rates gave rise to complexity.[47] Though Congress felt shifting the tax liability for alimony payments to the recipient was proper, it kept child

month. This does not seem 'suitable.' All of these are matters which should be considered by the trial court.

Id. at 82–83 (citing Brawman v. Brawman, 19 Cal. Rptr. 106 (Cal. Ct. App. 1962)).

41 *Gould*, 245 U.S. at 153–54.

42 Revenue Act of 1942, Pub. L. No. 77-753, § 120, 56 Stat. 798, 816–17 (1942) (codified as amended at 26 U.S.C. §§ 22(k), 23(u) (1942)).

43 *See* H.R. REP. NO. 77-2333, at 1–2 (1942); Geier, *supra* note 14, at 371–72; Note, *Alimony Taxation of Indirect Benefits: A Critique and a Proposal*, 66 COLUM. L. REV. 1118, 1118 (1966) ("The unfairness of denying a deduction for this substantial expense became evident during the first years of World War II when alimony payments and increased taxes threatened to exceed the annual income of some husbands.").

44 *SOI Tax Stats—Historical Table 23*, IRS.GOV, https://www.irs.gov/uac/soi-tax-stats-historical-table-23 (follow "Table 23" hyperlink) (last visited May 1, 2018).

45 Geier, *supra* note 14, at 371–72 (citing and discussing H.R. REP. NO. 77-2333 (1942)).

46 Ability to pay is the idea that as an individual's income increases, so too does her ability to pay taxes. The concept undergirds our system of progressive taxation. For a discussion of the concept of ability to pay, see LIAM MURPHY & THOMAS NAGEL, THE MYTH OF OWNERSHIP: TAXES AND JUSTICE 20–30 (2002).

47 *See, e.g.*, Geier, *supra* note 14, at 363–64.

support payments under the old no-deduction/exclusion regime.[48] In so doing, it created the need to differentiate between child support and alimony, which led to potential gaming.[49]

Distinguishing between child support and alimony thus became a significant challenge. Section 22(k) (a predecessor to parts of current section 71) stated that any amounts "fixed" for child support remained in the tax base of the payor.[50] Disputes then arose over whether an amount was or was not fixed as child support, leading to the Supreme Court's opinion in *Commissioner v. Lester*.[51] The Court articulated the "*Lester* rule," holding that unless the divorce agreement expressly stated that an amount paid was for child support, then that amount could not be treated as child support.[52] Even

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48 *See id.* at 372 ("The legislative history is silent with respect to why Congress chose to shift the tax incidence to the recipient only with respect to alimony and not child support. Yet, we can perhaps guess the predominant thinking of the time. In this more traditional era—when it was, indeed, only husbands who paid alimony and child support—it might have been thought that, while shifting the tax obligation with respect to alimony would help to alleviate the immediate and quite practical problem of a husband being unable to satisfy both his alimony and tax liability if alimony were not deductible, shifting the tax obligation with respect to the man's children would be going too far. A man's financial obligation to his children—including the obligation to pay the income tax on amounts spent to support them—might have been considered to be stronger than that to his ex-wife. In any event, this new distinction between alimony and child support necessarily required line-drawing for the first time.").

49 Though the Eleventh Circuit was not considering current law, its opinion in *Strealdorf v. Comm'r*, 726 F.2d 1521 (11th Cir. 1984) illustrates this lack of substantive division that taxpayers used to their advantage. "Strealdorf was able to take advantage of an IRS rule which *treats* mixed payments as all alimony regardless of the true nature of the payments." *Strealdorf*, 726 F.2d at 1522 (citing Brock v. Comm'r, 566 F.2d 947 (5th Cir. 1978) (emphasis added)).

50 Revenue Act of 1942, Pub. L. No. 77-753, § 120, 56 Stat. 798, 816–17 (1942) (codified as amended at 26 U.S.C. § 22(k) (1942)) ("[P]eriodic payments . . . received [by the wife] subsequent to [a decree of divorce] . . . in discharge of . . . a legal obligation which, because of the marital or family relationship, is imposed upon or incurred by such husband . . . under a written instrument incident to such divorce . . . shall be includible in the gross income of such wife . . . . This subsection shall not apply to that part of any such periodic payment which the terms of the . . . written instrument fix, in terms of . . . a portion of the payment, as a sum which is payable for the support of minor children of such husband.").

51 366 U.S. 299 (1961).

52 *Id.* at 303–04 (quoting Corliss v. Bowers, 281 U.S. 376, 378 (1930)) ("This language leaves no room for doubt. The agreement must expressly specify or 'fix' a sum certain or percentage of the payment for child support before any of the payment is excluded from the wife's income. The statutory requirement is strict and carefully worded. It does not say that 'a sufficiently clear purpose' on the part of the parties is sufficient to shift the tax. It says that the 'written instrument' must 'fix' that 'portion of the payment' which is to go to the support of the children. Otherwise, the wife must pay the tax on the whole payment. We are obliged to enforce this mandate of the Congress. One of the basic precepts of the income tax law is that '[t]he income that is subject to a man's unfettered command and that he is free to enjoy at his own option may be taxed to him as his income, whether he sees fit to enjoy it or not.'")). "Under the type of agreement here, the wife is free to spend the monies paid under the agreement as she sees fit." *Lester*, 366 U.S. at 304. "'The power to dispose of income is the equivalent of ownership of it.'" *Id.* (quoting Helvering v. Horst, 311 U.S. 112, 118 (1940)). "Including the entire payments in the wife's gross income under such circumstances, therefore, comports with the underlying philosophy of the Code. And, as we have frequently stated, the Code must be given 'as great an internal symmetry and consistency as its words

reducing the payment amount when a child reaches the age of majority would fail the *Lester* rule and, as such, be deductible to the payor and included by the recipient,[53] despite the reduction suggesting that the pre-reduction payment was, at least in part, for the child.[54]

With the *Lester* rule, the Court traded substance for simplicity, creating a strong dividing line between child support and alimony based on form. This gave taxpayers the option to determine the tax consequences of their divorce payments and to plan accordingly.[55] A taxpayer needed only to "fix" a payment to elect the no-deduction/exclusion if that regime better suited his tax goals. The *Lester* rule no longer applies, but such private ordering remains in current law, as discussed below.

3. Current Section 71

Current law classifies payments as alimony if they satisfy five requirements.[56] "Tax alimony"[57] is "any payment:" (1) made in cash; (2) to or for a spouse;[58] (3) provided for in a divorce or separation agreement; (4) not specifically designated as being nondeductible to the payor and excludable by the recipient; and (5) for which there is no requirement that payments be made after the death of the recipient.[59] There is no requirement that the payments be substantively classified as alimony by the family law of the governing state.[60] There is an affirmative requirement, however, that the

permit.'" *Lester*, 366 U.S. at 304 (quoting United States v. Olympic Radio & Television, 349 U.S. 232, 236 (1955)).

53 *Lester*, 366 U.S. at 304–06.

54 Under current law, such a change in the amount of the payment would lead to section 71(c)(2) classification as child support.

55 Geier, *supra* note 14, at 375.

56 26 U.S.C. § 71 (2012). Subsection (b) provides the substantive requirements. Those requirements are then subject to further qualification by subsequent subsections.

57 This Article uses the term *tax alimony* to underscore that whether a set of payments is treated as alimony for tax purposes is not wholly dependent on whether it is viewed substantively as alimony under the relevant state's law. As such, tax has created its own concept of alimony.

58 *See, e.g.*, 26 C.F.R. § 1.71-1T Q6 ("[C]ash payments of rent, mortgage, tax, or tuition liabilities of the payee spouse made under the terms of the divorce or separation instrument will qualify as alimony or separate maintenance payments. Any payments to maintain property owned by the payor spouse and used by the payee spouse (including mortgage payments, real estate taxes and insurance premiums) are not payments on behalf of a spouse even if those payments are made pursuant to the terms of the divorce or separation instrument.").

59 26 U.S.C. § 71(b) (2012). Subsections (c), (e), and (f) impose further limitations and requirements, but the five elements of subsection (b) make-up the core of the definition.

60 The fact that federal income tax law classification differs from state law classification is not, itself, remarkable. There is no requirement that federal tax law and state law be always in agreement. This Article argues that it is, however, problematic herein. Professor Joseph Dodge engages in a similar project in discussing a potential rationale for the section 104(a)(2) personal injury exclusion. Joseph M. Dodge, *Taxes and Torts*, 77 CORNELL L. REV. 143, 144–55 (1992) ("This Article deals only tangentially with current doctrinal issues under section 104. Its main purpose is to examine whether tax policy, alone or in

payments be neither formally, *nor substantively*, child support.[61] The *Lester* rule, which required formal "fixing" of a payment as support, has been exchanged for a test that looks to whether a payment *seems* to be child support. For example, if a payment is reduced upon a child turning eighteen, the amount of the reduction may be classified as child support rather than alimony.[62] Lastly, subsection (f) attempts to root out payments that are, in substance, property settlements through its mechanical "excess alimony" test.[63] Taken together, the "tax alimony" requirements illustrate that the tax concept of alimony is only loosely moored to the family law concept of alimony.

Despite this loose mooring to state family law, determining whether a payment is alimony frequently relies on applying state law. Individuals still regularly find themselves in court disputing the tax classification of a payment based on one factor: whether the payments in question end upon the death of the recipient.[64] Thus, when disputes arise over the characterization of support payments, state law, not federal tax law, will frequently be the deciding factor. The taxation of alimony both embraces and rejects the idea of getting it "right"—where "right" means that a payment's tax classification tracks the relevant state law's understanding of the substance of the payment.

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conjunction with policies of tort law, justifies the exclusion of any component of a personal injury recovery. Past attempts to justify the exclusion have been insufficient, leading some commentators to call for its repeal. This Article argues that the inclusion-exclusion dichotomy is a misleading way to frame the issue. Resolution of this issue should be sensitive to both federal tax policy and state tort policies.").

61 26 U.S.C. § 71(c) (2012).

62 *Id.* Note that the language of "fix[ing]" payments remains, but the section itself provides examples of facts that suggest fixing even in the absence of express language.

For purposes of paragraph (1), if any amount specified in the instrument will be reduced (A) on the happening of a contingency specified in the instrument relating to a child (such as attaining a specified age, marrying, dying, leaving school, or a similar contingency), or (B) at a time which can clearly be associated with a contingency of a kind specified in subparagraph (A), an amount equal to the amount of such reduction will be treated as an amount fixed as payable for the support of children of the payor spouse.

Id.

63 26 U.S.C. § 71(f) (2012). The IRS provides a helpful example of the computation of excess alimony in Publication 504 (2016). The mechanistic rule seeks out reductions in alimony payments over the first three years of payments. If, for example, an individual pays $50,000 of alimony in postseparation year one, followed by $39,000 in year two, and $28,000 in year three, $1,500 will be recaptured as excess alimony, which will then be included by the payor spouse and deductible by the recipient spouse. Internal Revenue Service, Publication 504: Divorced or Separated Individuals 18 (2016), https://www.irs.gov/pub/irs-pdf/p504.pdf.

64 *See infra* Part II.A. The termination-at-death requirement is understood as a key point of distinction between support payments and property settlements. This article accepts that the termination-at-death requirement has served that purpose but focuses more on the nature of the behavior that gives right to the continued support payments. Termination at death has a clear correlation to support statements—once deceased, an individual requires no further support—but is not and need not be determinative. A savvy taxpayer may include the termination-at-death requirement for payments that are known to all parties to be property settlements in alimony's clothing. For a critique of alimony termination rules, see Cynthia Lee Starnes, *One More Time: Alimony, Intuition, and the Remarriage-Termination Rule*, 81 IND. L.J. 971, 976 (2006). As will be addressed *infra* Part II.B, close examination of alimony theory further reveals that the distinction between alimony and property settlement is hard to define.

Straddling this line results in a code provision that is subject to abuse, generates unnecessary complexity, and results in reduced compliance and revenue loss.[65]

Sections 215 and 1041 act alongside section 71 to complete the statutory scheme governing transfers at and incident to divorce. Section 215 authorizes the payor's deduction for alimony payments paid,[66] cross-referencing section 71 for the definition of alimony payments.[67] Section 1041 governs transfers of property during marriage and incident to divorce, setting up what is known in tax law as a nonrecognition rule.[68] In effect, any transfers made by one former spouse to another former spouse that are "incident to the divorce" are ignored.[69] The result of the rule is that such transfers are nondeductible to the payor and excludible by the recipient.[70] Because section 71 is the lynchpin of the tax alimony regime, it is the point of focus for reform.

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65 *See infra* Part II.A.3.d; *IRS Releases New Tax Gap Estimates*, IRS.GOV, https://www.irs.gov/newsroom/irs-releases-new-tax-gap-estimates-compliance-rates-remain-statistically-unchanged-from-previous-study (last visited Mar. 30, 2018).

66 26 U.S.C. § 215(a) (2012) ("In the case of an individual, there shall be allowed as a deduction an amount equal to the alimony or separate maintenance payments paid during such individual's taxable year.")

67 *Id.* § 215(b) ("For purposes of this section, the term 'alimony or separate maintenance payment' means any alimony or separate maintenance payment (as defined in section 71(b)) which is includible in the gross income of the recipient under section 71."). A payor is also required to include the Social Security or tax identification number of the recipient on his or her Form 1040.

68 *Id.* § 1041. Section 1041 will govern if a transfer fails to meet the definition of tax alimony or the couple exercises the elective aspect of section 71 by stating that the alimony paid is nondeductible/excludible. Simply stating that a payment is not tax alimony removes it from the alimony regime even if, in substance, that payment is alimony. *See also* 26 U.S.C. § 71(b)(1)(B) (2012) ("[T]he divorce or separation instrument does not designate such payment as a payment which is not includible in gross income under this section and not allowable as a deduction under section 215.").

69 26 U.S.C. § 1041(c) (2012) ("For purposes of subsection (a)(2), a transfer of property is incident to the divorce if such transfer (1) occurs within 1 year after the date on which the marriage ceases, or (2) is related to the cessation of the marriage."); *see also* 26 C.F.R. § 1.1041-1T ("A transfer of property is treated as related to the cessation of the marriage if the transfer is pursuant to a divorce or separation instrument, as defined in section 71(b)(2), and the transfer occurs not more than 6 years after the date on which the marriage ceases. A divorce or separation instrument includes a modification or amendment to such decree or instrument. Any transfer not pursuant to a divorce or separation instrument and any transfer occurring more than 6 years after the cessation of the marriage is presumed to be not related to the cessation of the marriage. This presumption may be rebutted only by showing that the transfer was made to effect the division of property owned by the former spouses at the time of the cessation of the marriage. For example, the presumption may be rebutted by showing that (a) the transfer was not made within the one- and six-year periods described above because of factors which hampered an earlier transfer of the property, such as legal or business impediments to transfer or disputes concerning the value of the property owned at the time of the cessation of the marriage, and (b) the transfer is effected promptly after the impediment to transfer is removed.").

70 26 U.S.C. § 1041 (2012). If a former spouse transfers property rather than cash, section 1041 sets out basis rules that place the recipient spouse in the payor's shoes. For example, assume Laura and Angela are married. Pursuant to their divorce agreement, Angela transfers Blackacre, worth $80,000, which she holds with a basis of $50,000. Section 1041 gives Laura Angela's $50,000 basis.

B. *Analyzing the Current Regime*

The current deduction/inclusion regime is a reasonable scheme to endorse. Taxing the recipient appeals to the sense that alimony seems to be income to the recipient. After all, the recipient, who ultimately controls the disposal of the received alimony, seems to have realized an accession to wealth.[71] The dominant definition of income, articulated in *Glenshaw Glass*,[72] views control as a defining aspect of income itself—a taxpayer must have "dominion" over an "accession to wealth" to have income .[73] Severing the definition of tax alimony from any required coherence with the family law concept of alimony also keeps the Service within its area of expertise. When the Code requires only a superficial resemblance to alimony, the Service need not enter the business of analyzing the substance of a payment using family law principles. Scholars have appealed to these and other rationales supporting the current regime or different iterations of that regime. Though many of the proposals have merit, this Article argues that reconciling tax and family law alimony provides the best solution to the challenges of the current regime because doing so helps address one of key weaknesses of prior reform proposals: the tendency to avoid the question of to whom alimony is income.

1. Proposed Reforms

In perhaps the most comprehensive discussion of the tax treatment of transfers at and incident to divorce, Professor Deborah Geier articulates the common themes of calls for reform: unification, assumption of the unit, and private ordering. Specifically, Geier argues that all cash payments made incident to divorce should be deductible to the payor and included by the recipient.[74] Adopting Geier's new section 71 would remove the line in the sand separating alimony, child support, and property settlements satisfied with cash, thereby unifying the tax treatment of payments incident to divorce.[75] The new section 71 would be only a default rule because Geier would expressly allow private ordering by permitting taxpayers to elect into a no-deduction/exclusion regime if they prefer.[76]

Geier's proposal relies on understanding the government as a "mere stakeholder" with no vested interest in to whom the income is taxed.[77] Geier

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71 Comm'r v. Glenshaw Glass Co., 348 U.S. 426, 431 (1955).

72 *Id.*

73 *See id.*; Helvering v. Horst, 311 U.S. 112, 119 (1940).

74 Geier, *supra* note 14, at 439. An earlier proposal by Professor Laurie Malman also allowed for a degree of private ordering. Professor Malman noted the difficulty of line-drawing in this area and appealed to family law principles for guidance. Laurie Malman, *Unfinished Reform: The Tax Consequences of Divorce*, 61 N.Y.U. L. Rev. 363 (1986).

75 Geier, *supra* note 14, at 439.

76 *Id.* at 431.

77 *Id.*

adopts this position by viewing the couple as a unit rather than two separate individuals.[78] By adopting the unit view, Geier argues, we need not "query whether the amounts paid out constitute 'income' to the payor and payee."[79] Describing this approach as a "pragmatic paradigm," Geier states that the payment is "concededly income to *someone*," thereby avoiding the complicated question of to whom it is most appropriately taxed.[80]

The relevance of the unit view at this point is twofold. First, it supports the view that the income should be taxed only once.[81] Because interspousal transfers are ignored for tax purposes, income, while shared in a marriage, is taxed only once.[82] Second, continuing to view the divorced couple as a unit enables the couple to capture some of the value of the rate disparity between the now-separate filers.[83] Both outcomes play a role in supporting the proposed no-deduction/exclusion regime, as will be explored in Part III.[84]

Other scholars draw on these same themes. Some would tax alimony to the payor spouse by default, but only if the payor is in a higher tax bracket.[85] Others would unify the treatment of child support and alimony but provide a credit rather than a deduction, thereby attempting to limit the benefits of the de facto election in current law.[86] Still other scholars want similar unification but ground their rationales in the argument that the payments are most clearly

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78 *Id.*

79 *Id.*

80 *Id.*

81 Geier, *supra* note 14, at 370 ("We could reason that the amounts should continue to be taxed only once, even though the family is no longer intact, because of the clear and direct relationship of the payments to the former legal relationship of the parties (or the continuing legal relationship, in the case of a paternity payment to support a child after a divorce or otherwise outside of marriage). These payments would not have been made but for the prior legal relationship. Unless the government wishes to discourage divorce affirmatively via the tax laws (a very unwise choice, in my view), there does not seem to be a persuasive reason to tax such payments more onerously outside marriage (by taxing them twice) than within it (by taxing them once).").

82 *Id.* As Geier notes, the assertion is true whether the couple files jointly or separately.

83 *Id.* at 364–65 ("I would argue that such tax arbitrage is built into the current system already, that people do not get divorced in order to engage in income-shifting for tax purposes, and that the income-shifting that can occur is likely a good and defensible outcome on public policy grounds in most situations in which it can occur. Such income-shifting encourages the higher-bracket spouse to transfer funds to the lower-bracket spouse (presumably the more needy spouse), often leaving the lower-bracket spouse with more after-tax income than she would otherwise have if income-shifting were disallowed. Unlike other situations in which income-shifting is deemed to be inappropriate, such as in the intact family or in the case of a closely held corporation, divorce is not a transaction that can be entered into lightly, and often, in order to shift income to another in a lower tax bracket and thus reduce overall taxes on a routine basis while retaining effective control over the shifted income. Indeed, '[f]ollowing divorce, the chances of filing bankruptcy triple.' To the extent that some additional income-shifting would occur under the proposed *simplifications* that does not already occur under the current rules, so be it.") (emphasis added).

84 *See infra* Part III.

85 Emily Cauble, *Tax Elections: How to Live with Them If We Can't Live Without Them*, 53 SANTA CLARA L. REV. 421, 470–71 (2013).

86 Wendy Gerzog Shaller, *On Public Policy Grounds, a Limited Tax Credit for Child Support and Alimony*, 11 AM. J. TAX POL'Y 321, 321–22 (1994).

income to the recipient.[87] While the specific solutions may differ, the consistencies that underlie the different proposals are important. All call for some degree of unification in the treatment of transfers incident to divorce; all agree that distinguishing among property settlements, child support, and alimony is extremely difficult; and all adopt some form of the unit view.[88] Scholars are right to call for unification and to adopt the unit view of a divorced couple. The proposed reform detailed in Part III shares both aspects with earlier reform proposals. Where the current literature errs, however, is in permitting private ordering and either assuming alimony payments are clearly income to the recipient or altogether avoiding the question of to whom alimony is income.

2. Failings of Current Law and the Need for New Action

A complex tax provision or regime such as that of sections 71, 215, and 1041 is not inherently bad policy. Often, complexity arises or is required to achieve accuracy in classifying a given transaction or to achieve some desired sense of fairness in tax outcomes.[89] The complexity of the tax alimony regime is unwarranted and unproductive. It is also costly to taxpayers who attempt to comply with the regime, courts whose time is spent on similar cases year after year, and the fisc, whose coffers are lower from extensive noncompliance with the regime.[90] Lastly, it is a regime that results in inequity on multiple fronts. In short, the current taxation of transfers tied to divorce remains ripe for reform, and a new approach is needed to achieve that reform. What follows is greater detail on the weaknesses of the current regime, providing the necessary background to illustrate how the proposed reform improves on current law.

a. Unprincipled Complexity and Its Compliance Costs

Thirty years after the last reform effort, individuals continue to find themselves in court over whether the payments they made or received are tax

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87 Laura Bigler, *A Change Is Needed: The Taxation of Alimony and Child Support*, 48 CLEV. ST. L. REV. 361, 363–65 (2000).

88 *See* Geier, *supra* note 14, at 431; Roland L. Hjorth, *Divorce, Taxes, and the 1984 Tax Reform Act: An Inadequate Response to an Old Problem*, 61 WASH. L. REV. 151, 155–56 (1986); C. Garrison Lepow, *Tax Policy for Lovers and Cynics: How Divorce Settlement Became the Last Tax Shelter in America*, 62 NOTRE DAME L. REV. 32, 34–35 (1986); Shaller, *supra* note 86, at 321–22. Adopting the unit view may be correct, as taxing alimony is, in large part, a compliance concern. *See* Davis, *supra* note 13, at 185–86.

89 *See, e.g.*, the ownership attribution rules of 26 U.S.C. § 318 (2012). While they create a maze of relationships to track, they do so to support the section 302 redemption test, which requires knowing a shareholder's actual and constructive ownership interests in the corporation.

90 *See infra* Parts I.B.2.b & III.

alimony.[91] Most commonly, courts must determine whether the payments made pursuant to the agreement terminate at death.[92] Courts may find that state law operates to end payments at the death of the recipient, even if the divorce agreement does not so provide.[93] Or the courts may have to address cases in which the divorced spouses take inconsistent positions, creating a potential whipsaw situation for the federal government.[94] Whatever the source of the confusion, the simple fact that individuals continue to be forced into court to determine the nature of their divorce-related payments more than thirty years after "simplifying" reform suggests those old goals may not yet be met.[95]

Importantly, the time spent litigating the tax classification of a payment does little to reveal the true substance of the payment. Guided by the 1984 reforms, courts have turned away from efforts to properly characterize a payment, stating that the reforms were meant to "eliminate the subjective inquiries into intent and the nature of payments that had plagued the courts."[96] Indeed, Congress clearly expressed its choice for simplicity over substance by allowing taxpayers to elect out of section 71 by its own terms.[97] Though subsection (f) re-characterizes some ostensible alimony payments as property settlements, it does so in a mechanistic fashion—assuming payments that decrease too quickly are, in fact, property settlements rather than true alimony

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91 A survey of the family law practice literature makes clear the consensus that technical expertise is required to ensure individuals do not end up with negative or unexpected tax consequences after divorce. *See, e.g.*, Daniel J. Jaffe & Lorna A. Riff, *The Tax Traps of Alimony*, 25 FAM. ADVOC. 24, 29 (2003) (advancing the principle that individuals, even those who seek counsel, still fail to comply or realize the tax consequences they intended) ("Too many preventable mistakes are still being made with unforeseen consequences."); Stephen P. Comeau, *An Overview of the Federal Income Tax Provisions Related to Alimony Payments*, 38 FAM. L.Q. 111, 125–26 (2004) ("Settlement or adjudication of any divorce or legal separation proceeding should be undertaken only after a thorough analysis of the tax consequences of the various inter-spousal payment scenarios."); Melanie James, *Tax Ramifications of Separation and Divorce*, PRACTICAL TAX STRATEGIES, July 2016, at 4 ("The correct wording of a separation or divorce agreement is crucial.").

92 *See, e.g.*, Muniz v. Comm'r, T.C.M. (RIA) 2015–125 (2015) (holding that "[l]ump-sum alimony" is not tax alimony because Florida law would require satisfaction of the amount owed even after the death of the recipient).

93 *See*, *e.g*., Leslie v. Comm'r, T.C.M. (RIA) 2016–171 (2016) ("The requirement that any liability to make payments terminates upon the death of the payee spouse is central in distinguishing between alimony and property settlements. . . . Its presence here by operation of state law means the contingent Enron payments were alimony taxable to Leslie.").

94 *See, e.g.*, Kean v. Comm'r., 407 F.3d 186, 189 (2005). The potential for whipsaw—spouses taking inconsistent positions over the tax treatment of a given item—drove response to the *U.S. v. Davis* case and enactment of 26 U.S.C. § 1041 (2012). *See* Katherine D. Podris & Gary J. Podris, *Section 1041 Was the Cure for* U.S. v. Davis*: Now How to Fix the Cure*, *TAXES,* Aug. 1990, at 581.

95 *Cf.* Lynne C. Halem, *Change Is Coming: Tax Reform Act Punishes Divorcing Couples*, MEDIATE.COM (Mar. 2018), https://www.mediate.com/articles/halemlalimony.cfm.

96 Hoover v. Comm'r, 102 F.3d 842, 845 (6th Cir. 1996).

97 26 U.S.C. § 71 (2012).

payments.[98] Alternatively, a payment may have all the facial trappings of alimony—paid in cash for support of the spouse and incident to a divorce—but by stating simply that the payments are nondeductible/excludable, the couple chooses its own tax classification.[99] This private ordering option could be justified on other grounds, but it weakens any argument that current tax law improved the accuracy of tax classifications for payments incident to divorce.

b. Costly Noncompliance

Noncompliance, whether deliberate or inadvertent, comes at significant cost. In May 2014, the *Wall Street Journal* reported that the Service would "devot[e] more scrutiny to taxpayers' claims about alimony."[100] The increased scrutiny came on the heels of a March 2014 report by the TIGTA.[101] In that report, the TIGTA analyzed all 567,887 returns for taxable year 2010 that had alimony deductions.[102] It found that 47 percent of those returns claimed a deduction "for which income was not reported on a corresponding recipient's tax return, or in which the amount of alimony income reported did not agree with amount of the deduction taken."[103] In total, those returns claimed $2.3 billion in alimony deductions.[104]

The TIGTA reported that the discrepancies suggest there may be a significant alimony tax gap caused by noncompliance with the tax alimony regime.[105] Importantly, the discrepancies cannot be largely attributed to recipients whose income did not give rise to a filing requirement.[106] Ninety-eight percent of the stated recipients of the payments claimed as deductions filed or would have been required to file an income tax return.[107] Estimating the foregone revenue of such discrepancies is challenging because the discrepancies may be due to different causes—one taxpayer may have overstated her deduction, whereas another taxpayer may have failed to include her

98 *Id.* The result of section 71 requires excess alimony to be treated as a property settlement: excluded by the recipient and nondeductible to the payor. 26 U.S.C. §§ 71(f), 1041 (2012). *See also* Craig D. Bell, *Need-to-Know Divorce Tax Law for Legal Assistance Officers*, 177 MIL. L. REV. 213, 214 (2003) (stating that excess alimony rules try to prevent individuals from disguising property settlements as alimony).

99 26 U.S.C. § 71 (2012).

100 Laura Saunders, *The IRS Cracks Down on Alimony*, WALL ST. J. (May 23, 2014), https://www.wsj.com/articles/the-irs-cracks-down-on-alimony-1400880352.

101 *See generally* TREASURY INSPECTOR *supra* note 8.

102 *Id.* at 1.

103 *Id.* at 4.

104 *Id.*

105 26 U.S.C. §§ 71, 215 (2012). See *supra* Part I for a full discussion.

106 TREASURY INSPECTOR *supra* note 8 at 4. See 18 U.S.C. § 6012 (2012) for details on who is required to make a return and IRS PUBLICATION 501, EXEMPTIONS, STANDARD DEDUCTION, AND FILING INFORMATION (2018) for inflation adjusted amounts.

107 TREASURY INSPECTOR, *supra* note 8, at 4

alimony received.[108] The TIGTA estimates, however, that more than $350 million in tax revenue may have been lost to the taxable year 2010 tax compliance gap.[109] While $350 million is a small portion of the nearly $300 billion tax gap,[110] and an even smaller portion of the approximately $1.6 trillion in anticipated total revenues from the individual income tax, it is not insignificant.[111] Further, such revenue loss estimates do not account for the costs to the legal system of continuing to litigate whether payments are alimony under section 71. Though a specific figure is not known, it is clear that the current regime gives rise to significant monetary costs.

c. An Undercurrent of Inequity

A systemic weakness of the current regime is the inequity that flows from both the substance of the regime itself and its demonstrated challenges. By permitting individuals to shift income from a higher to lower bracket taxpayer, the tax alimony regime accepts some degree of revenue loss.[112] But the potential horizontal inequity of the permitted income shifting is exacerbated by the fact that the benefit of the arbitrage inures to higher bracket taxpayers who are wealthy enough to be well-represented in divorce. When legal fees can quickly enter five figures[113] and the need for skilled practitioners is high, the benefits of the "free money" found in section 71 are likely unevenly distributed.[114] Further, revenue loss estimates do not account for the soft impacts of a code that is seemingly capricious, burdensome, or inconsistently enforced.[115] To the extent the tax alimony regime is perceived as such, it may

108 Because individuals tax consequences will vary based on their unique circumstances, no one rate would have applied to the alimony wrongfully deducted or excluded. For example, the revenue impact of an overstated alimony deduction of $5,000 to a 39.6% bracket is greater than the same amount overstated by a 25% bracket taxpayer.

109 TREASURY INSPECTOR, *supra* note 8, at 8, App. IV (detailing how the foregone revenue amount was calculated).

110 The tax gap is the difference between the amount of tax owed and the amount of tax the IRS actually collected over a given period. *See IRS Releases New Tax Gap Estimates; Compliance Rates Remain Statistically Unchanged from Previous Study*, IRS.GOV (Jan. 6, 2012), https://www.irs.gov/uac/irs-releases-new-tax-gap-estimates-compliance-rates-remain-statistically-unchanged-from-previous-study.

111 *Revenue Projections for FY 2018*, CBO.GOV (2018), https://www.cbo.gov/topics/taxes (last visited July 21, 2018).

112 See *infra* Part III.A.2.a.i for a specific example. *See also* Geier, *supra* note 14, at 431–32 (discussing arbitrage).

113 Al Baker, *Confronting the High Cost of Divorce*, N.Y. TIMES (Sep. 10, 2000), http://www.nytimes.com/2000/09/10/nyregion/confronting-the-high-cost-of-divorce.html.

114 Christopher C. Melcher, *Simple Answers to Complex Alimony Questions*, 27 J. AM. ACAD. MATRIM. LAW. 61, 62 (2014–15) ("The payor of alimony may take a deduction for those payments, and the payee is required to report the payments as income. From this simple concept flows an opportunity to create 'free money' between the parties. When the payor is in a higher tax bracket than the payee, the IRS ends up subsidizing part of the alimony payment.").

115 TREASURY INSPECTOR, *supra* note 8, at 5–6.

engender further noncompliance through a decrease in faith in the fundamental fairness of the Code.[116] Whatever the total revenue, efficiency,[117] and equity costs may be, the sum of those costs seems significant.

As this Part makes clear, the taxation of alimony is in need of change. The scholarly consensus is that the current regime requires reform, with frequent and costly noncompliance, losses to the fisc, persistent litigation, equity concerns, and a largely arbitrary distinction between tax and family law alimony. The combination of these factors creates a strong case for change. But a new approach is needed to address the weaknesses of the current regime, and reconciling the tax and family law concepts of alimony provides that approach. Before tax can incorporate the lessons of family law, it is necessary to have a grounding in the family law doctrine, theory, and practice of alimony awards.

II. ALIMONY IN FAMILY LAW: COMPLEXITY AND CONSISTENCY

Using family law as a guide for reforming the current tax treatment of alimony may seem frustrating because its scholars are divided on what alimony is and why it exists. But understanding what alimony is assists in crafting a better tax alimony regime. Importantly, family law theories of alimony, while very diverse, have instructive threads of continuity.

The diversity of thought on alimony is both unsurprising and instructive—unsurprising, because a concept of alimony depends on how we, as a society, understand marriage. How any society understands marriage is neither constant nor uniform.[118] Alimony is thus built on an ever-shifting

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116 Leandra Lederman, *The Interplay Between Norms and Enforcement in Tax Compliance*, 64 OHIO ST. L.J. 1453, 1468–70 (2003) ("With respect to tax compliance, empirical evidence supports the role of other factors, particularly the influence that other members of society have. For example, a study of the Tax Reform Act of 1986 found that 'those who encountered others who expressed *positive* attitudes toward the Tax Reform Act displayed greater commitment to complying with it themselves, whereas those who encountered others who expressed *negative* attitudes displayed less commitment.' Similarly, '[o]ne of the most consistent findings in survey research about taxpayer attitudes and behaviors is that those who report compliance believe that their friends (and taxpayers in general) comply, whereas those who report cheating believe that others cheat.' Of course, that insight does not reveal whether taxpayers who report that they do not cheat do so because they believe others do not cheat, or the reverse, and even whether taxpayers who state that they do or do not cheat are honest in those assertions. However, there are psychological explanations for why the perception that others do not comply would lessen one's own inclination to comply. For example, observing others' noncompliance might change the observer's moral standard so that he or she might feel less guilt in failing to comply.").

117 Though there could be an efficient level of noncompliance, the analysis herein does not attempt to determine that level and is focused more on equity and administrability concerns.

118 There is an extensive literature on marriage, scholarly and otherwise. *See, e.g.*, STEPHANIE COONTZ, MARRIAGE, A HISTORY: HOW LOVE CONQUERED MARRIAGE (2005); MAURICE GODELIER, THE METAMORPHOSES OF KINSHIP (Nora Scott trans., 2011); Sally Brown Richardson, *Privacy and Community Property*, 95 N.C. L. REV. 729, 737–44 (2017) (discussing marriage in the context of privacy and community property states); Elizabeth S. Scott & Robert E. Scott, *From Contract to Status: Collaboration*

foundation. The fact that family law doctrine cannot settle on one concept or theory is instructive, because it is the very area of law that constructs alimony. In light of that fact, tax law should question the wisdom of creating its own, rigid definition of a fluid concept.

Despite not settling on one view of alimony, family law doctrine and theory on alimony yield important insights. First, many theories of alimony base the right to alimony on investments in and of human capital.[119] Second, both scholarship and doctrine suggest that the line between payments to satisfy property settlements and alimony payments is hard to define. These two insights can guide tax law's interpretation of alimony and its proper tax consequences.

A. *The Many Forms of Alimony*

State law varies on specifics, but four general types of alimony[120] consistently emerge in a survey of law and practice: permanent or indefinite periodic alimony; rehabilitative alimony; restitutionary or reimbursement alimony; and lump sum alimony.[121] While the rationale for each varies, a working understanding of the nature of and justification for each type lays the foundation for the reform proposals detailed in Part III.

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and the Evolution of Novel Family Relationships, 115 COLUM. L. REV. 293, 301–13 (2015); *see also* Obergefell v. Hodges, 135 S. Ct. 2584 (2015); *Goodridge v. Dept. of Public Health*, 798 N.E.2d 941 (2003).

119 Human capital, as a concept, is not without controversy. Alimony theorists rely on the conventional economic definition; however, that defines human capital as the sum of an individual's talents, capacities, and knowledge. *See, e.g.*, Amanda E. Matzek et al., *Spousal Capital as a Resource for Couples Starting a Business*, 59 FAM. REL. 60, 60 (2010); Brian Keeley, *Human Capital: How What You Know Shapes Your Life*, OECD INSIGHTS, at 29 (2007) ("But that gradually changed, and since the early 1960s, there's been increasing agreement on one key part of the growth puzzle, namely, the importance of people – their abilities, their knowledge, and their competences – to economic growth. Or, in other words, human capital."); GARY S. BECKER, A TREATISE ON THE FAMILY ch. 2 (1993) (discussing specialized investments in market and nonmarket capital within the family). A close look at human capital discussions in the tax literature suggests that a more nuanced concept of human capital in tax may need to be embraced. Pierre Bourdieu, for example, discusses a range of forms of capital, such as social, economic, and cultural capital. The social science literature explores the impact of these different forms in fascinating ways. Pierre Bourdieu, *The Forms of Capital*, *in* READINGS IN ECONOMIC SOCIOLOGY 280–91 (Nicole Woolsey Biggart ed., 2002). Developing a different concept of capital in tax is a project for another time.

120 Some states no longer use the term *alimony* but favor *maintenance* or *support*. *See, e.g.*, Lucia B. Whisenand, *From Father Knows Best to New Rights for Women and Children*, 73 N.Y. ST. B. ASS'N J. 49, 50 (2001) ("Alimony no longer exists. Maintenance is available in some cases, but is usually 'rehabilitative,' with the expectation that the spouse seeking maintenance will upgrade job skills and assist in becoming economically self-sufficient. Of course, maintenance is now gender neutral. It may be awarded to either the husband or the wife as the facts of the case dictate.").

121 Deborah H. Bell, *Family Law at the Turn of the Century*, 71 MISS. L.J. 781, 799–806 (2002). The labels may vary slightly from state to state, but this Article's description of changes in Mississippi law provides a helpful description of the four types of alimony and trends in awards.

Permanent or indefinite periodic alimony is likely the type of alimony that most people envision when they hear the term.[122] This type of alimony, which encompasses long-term payments, strongly aligns with the view of the Court in *Gould*: that alimony is the necessary provision of support from a husband to a wife who cannot support herself.[123] Under current law, this form of alimony is less commonly awarded.[124]

Rehabilitative alimony arose with the shift toward no-fault divorce.[125] A primary goal of rehabilitative alimony is to provide a spouse with support until he or she becomes self-supporting.[126] This type of alimony is paid for a

122 Willard H. DaSilva & Steven J. Eisman, *Gray Divorce and Remarriage*, 83 N.Y. ST. B. ASS'N J. July–Aug. 2011, at 26, 27–28 ("Generally, long-term marriages go hand in hand with long-term support."); Joanne Hughes Burkett, *Myths About Marriage & Divorce in South Carolina*, S.C. LAW., Sep. 2005, at 14, 17 ("[Myth:] Nobody pays alimony anymore. Actually, the award of alimony has been both extended and narrowed as American society has changed. Historically the justification for alimony, based on a duty to support one's spouse, was to punish the husband's marital misconduct and to protect the wife's standard of living. But, as American families changed, especially in the late 20th century, women achieved more income parity within the marriage and were less likely to receive alimony upon divorce. . . . Under § 20-3-130(B), either permanently or temporarily, courts may award different types of spousal support. Periodic alimony is usually monthly or bi-monthly payments in cash. Lump sum alimony is a single amount sometimes paid in installments. Rehabilitative alimony is paid for a period to assist the supported person in achieving self-sufficiency. Reimbursement alimony compensates for contributions to the marriage that increased the spouse's earning potential. Separate support and maintenance may be ordered, if requested, when the parties are living apart, regardless of whether a divorce is pending. Finally, the court may award any other support for which it finds justification under the circumstances and may also grant more than one type of alimony. *South Carolina courts prefer permanent periodic alimony. When awarding another type of alimony, the court must find special circumstances and specify the type awarded in its order*. Alimony generally terminates upon death of either spouse or remarriage of the supported spouse. Importantly, adultery affects one's ability to receive alimony. South Carolina law bars alimony to anyone who commits adultery before signing a property or marital settlement. Under *Nemeth v. Nemeth*, this bar is not removed when both parties commit adultery." (emphasis added) (citations omitted)).

123 Mary Kay Kisthardt, *Re-thinking Alimony: The AAML's Considerations for Calculating Alimony, Spousal Support or Maintenance*, 21 J. AM. ACAD. MATRIM. LAW. 61, 66 (2008) ("The initial rationale appeared [to] be premised on the fact that women . . . were without the means to support themselves.").

124 DOUGLAS E. ABRAMS ET AL., CONTEMPORARY FAMILY LAW 523 (2006) ("An award of permanent alimony is the exception, not the rule."); *see also* David H. Kelsey & Patrick P. Fry, *The Relationship Between Permanent and Rehabilitative Alimony*, 4 J. AM. ACAD. MATRIM. LAW. 1, 1 (1988) (noting as early as the early 1970s the shift away from permanent alimony); Elizabeth S. Scott & Robert E. Scott, *Marriage as Relational Contract*, 84 VA. L. REV. 1225, 1310 (1998) ("Contemporary law discourages long-term alimony, on the grounds that neither spouse has a lifelong duty to support the other after divorce.").

125 *See* Joan M. Krauskopf, *Rehabilitative Alimony: Uses and Abuses of Limited Duration Alimony*, 21 FAM. L.Q. 573, 573 (1988) (describing and critiquing the rise of rehabilitative alimony alongside no-fault divorce).

126 Texas, for example, limits the availability of alimony and expressly states the rehabilitative aim. TEX. FAM. CODE ANN. § 8.054(a) (West 2017) ("[A] court . . . (2) shall limit the duration of a maintenance order to the shortest reasonable period that allows the spouse seeking maintenance to earn sufficient income to provide for the spouse's minimum reasonable needs, unless the ability of the spouse to provide for the spouse's minimum reasonable needs is substantially or totally diminished because of: (A) physical

more limited, defined period than permanent or indefinite periodic alimony.[127]

Restitutionary or reimbursement alimony encompasses payments made with the express intent to compensate a spouse for particular contributions made during the marriage.[128] This class of alimony is not provided for in all states but, importantly, may be encompassed in considerations for the division of property.[129] For example, in New York, courts consider whether one spouse contributed to the other's pursuit of an educational degree when evaluating settlements.[130] The fact that alimony and property division determinations consider contributions to degree attainment relevant[131] is a fact that hints at the thin dividing line between the two concepts.

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or mental disability of the spouse seeking maintenance; (B) duties as the custodian of an infant or young child of the marriage; or (C) another compelling impediment to earning sufficient income to provide for the spouse's minimum reasonable needs.").

127 ABRAMS, *supra* note 124, at 522; *see also* John C. Williams, Annotation, *Propriety in Divorce Proceedings of Awarding Rehabilitative Alimony*, 97 A.L.R.3d 740, § 2[a] (1980) ("Rehabilitative alimony has been defined as alimony payable for a short, but specific and terminable period of time, which will cease when the recipient is, in the exercise of reasonable efforts, in a position of self-support.").

128 *See, e.g.*, Sanford v. Sanford, 694 N.W.2d 283, 290 (S.D. 2005) ("A third type of alimony is restitutional or reimbursement alimony, which 'has as its purpose to reimburse one spouse's contribution during the marriage to advance training or education of the other spouse.'") (quoting Saxvik v. Saxvik, 544 N.W.2d 177, 180 (S.D. 1996)).

129 ABRAMS, *supra* note 124, at 522–23; *see also, e.g.*, N.J. STAT. ANN. § 2A:34-23(b) (West 2017) ("(9) The history of the financial or non-financial contributions to the marriage or civil union by each party including contributions to the care and education of the children and interruption of personal careers or educational opportunities.").

130 *E.g.*, O'Brien v. O'Brien, 489 N.E.2d 712, 716 (N.Y. 1985) ("The determination that a professional license is marital property is also consistent with the conceptual base upon which the statute rests. As this case demonstrates, few undertakings during a marriage better qualify as the type of joint effort that the statute's economic partnership theory is intended to address than contributions toward one spouse's acquisition of a professional license. Working spouses are often required to contribute substantial income as wage earners, sacrifice their own educational or career goals and opportunities for child rearing, perform the bulk of household duties and responsibilities and forego the acquisition of marital assets that could have been accumulated if the professional spouse had been employed rather than occupied with the study and training necessary to acquire a professional license. In this case, nearly all of the parties' nine-year marriage was devoted to the acquisition of plaintiff's medical license and defendant played a major role in that project. She worked continuously during the marriage and contributed all of her earnings to their joint effort, she sacrificed her own educational and career opportunities, and she traveled with plaintiff to Mexico for three and one-half years while he attended medical school there. The Legislature has decided, by its explicit reference in the statute to the contributions of one spouse to the other's profession or career that these contributions represent investments in the economic partnership of the marriage and that the product of the parties' joint efforts, the professional license, should be considered marital property." (citation omitted)).

131 *See, e.g.*, Haugan v. Haugan*,* 343 N.W.2d 796, 796–98 (Wis. 1984); Lundberg v. Lundberg*,* 318 N.W.2d 918, 919–24 (Wis. 1982). Both cases discuss Wisconsin alimony law and whether it permits compensating a spouse for an investment in another spouse's degree. The cases consider the fairness of the maintenance and property division alongside one another, signaling that either may be used to balance an insufficient award of the other. The opinions mix reimbursement and loss theory, alimony theories addressed in Part II.B.

Lastly, lump sum alimony is a non-modifiable transfer made in limited circumstances.[132] Some states, such as Alabama, view lump sum alimony as a mixed payment of support and property settlement. Considering the nature of lump sum alimony (therein "alimony in gross"), the Supreme Court of Alabama wrote:

> But, on principle, there is no escape from the conclusion that a decree for alimony in gross, if without reservation, becomes a vested right from the date of its rendition and survives the death of the husband. Differing from a mere periodic allowance for current and continuous support, it is intended to effect a final termination of the property rights and relations of the parties, and is an approximate appraisal of the present value of the wife's future support, and, in a measure, a compensation for her loss of inchoate property rights in her husband's homestead and other estate, given to her by statute in case of her survival."[133]

Like reimbursement or restitutionary alimony, lump sum alimony weakens the conceptual distinction between alimony as a payment of support and property settlements as an allocation of interests in property.[134] With a basic understanding of the different types of alimony established, examining the theories that define a right to alimony is now appropriate.

B. *Variations on a Theme: Alimony Theory*

Alimony began as an expression of the continuing duty of support owed to a wife by a husband in divorce.[135] English law acknowledged legal divorce but not a full severance of the marital relationship.[136] While a divorce meant that a couple no longer lived together, the husband's "legal and customary duty to support his wife" remained.[137] The notion of duty progressively faded into one of need.[138] Even if a husband had no moral duty to support his former

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132 ABRAMS, *supra* note 124, at 523 (noting that lump sum alimony is awarded only in circumstances in which periodic payments cannot be implemented and/or rehabilitative support cannot be awarded); 24A AM. JUR. 2D *Divorce and Separation* § 668 (2018) ("Alimony in gross in lieu of a periodic allowance is an award of a definite sum of money that becomes vested property from the day of judgment. As a general rule, alimony in gross must be paid in full, regardless of future events such as the death of the paying spouse or the remarriage of the recipient spouse, and it is not subject to modification.").

133 Smith v. Rogers, 112 So. 190, 192 (Ala. 1927).

134 *See id.* The vesting of the interest and the nonmodifiable nature of lump sum alimony lend it its property hue.

135 *See* Gould v. Gould, 245 U.S. 151, 153 (1917).

136 Ira Mark Ellman, *The Theory of Alimony*, 77 CAL. L. REV. 1, 5–6 (1989); Danielle Morone, *A Short History of Alimony in England and the United States*, 20 J. CONTEMP. LEGAL ISSUES 3, 4–5 (2011–12).

137 Ellman, *supra* note 136, at 5; *see also* Scott, *supra* note 124, at 1309 ("Under traditional law, the husband's obligation to pay alimony was a logical extension of the lifelong duty to support his wife."). This view is also found in the rationale for nondeductibility in *Gould.* 245 U.S. at 153.

138 24A AM. JUR. 2D *Divorce and Separation* § 672 (2018) ("The factors to consider in awarding alimony under a no-fault divorce statute include the ability of one party to pay and the need of the other party. The threshold test for determining whether to award alimony requires a court to consider whether

wife, the reality of her economic insecurity compelled payment of alimony, particularly when it was the husband's fault that drove the divorce.[139] Further, contract theory could justify such awards.[140] Alimony in a fault-based world of divorce "functioned as a sort of damages remedy for breach of the state-imposed marriage contract."[141] Because the breach of a duty created a needy spouse, alimony was the means of meeting that need through privatized support rather than public dependency.[142]

Yet the advent of no-fault divorce undermined the rationale for financial support from a husband, even in the face of need.[143] What theory justifies one spouse continuing to support another after the marriage has ended?[144]

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the party seeking maintenance lacks sufficient property, including property apportioned during the dissolution proceeding, to provide for his or her reasonable needs and, if this is so, whether the party's reasonable needs can be met through appropriate employment. Other factors usually include the parties' ages, health, education, duration of marriage, and their standard of living during the marriage."); *see also* Rieffel v. Rieffel, 644 S.E.2d 140, 141–42 (Ga. 2007) ("'In the absence of any mathematical formula, (fact-finders) are given a wide latitude in fixing the amount of alimony . . . , and to this end they are to use their experience as enlightened persons in judging the amount necessary for support under the evidence as disclosed by the record and all the facts and circumstances of the case.' [GA. CODE ANN.] § 19–6–5(a) requires the fact-finder to consider several specific factors[: the standard of living established during the marriage; the duration of the marriage; the age and the physical and emotional condition of both parties; the financial resources of both parties; where applicable, the time necessary for either party to gain sufficient education or training to find appropriate employment; the contribution of each party to the marriage, including services rendered in homemaking and child care; and the financial condition of the parties.]" (citation omitted) (quoting Farrish v. Farrish, 615 S.E.2d 510 (Ga. 2005))).

139 Ellman, *supra* note 136, at 5–6 ("When judicial divorce became available in the eighteenth and nineteenth century, alimony remained a remedy. Courts and legislatures still viewed alimony as proper because women remained dependent and society expected husbands to support their wives.").

140 Scott, *supra* note 124, at 1311–13 (discussing a contractual framework for alimony awards).

141 Jana B. Singer, *Alimony and Efficiency: The Gendered Costs and Benefits of the Economic Justification for Alimony*, 82 GEO. L.J. 2423, 2424 (1994). *Cf.* Scott, *supra* note 124, at 1312–15 (discussing how alimony awards are not wholly consistent with contract theory and noting that need continues to play an outsized role, despite human capital justifications for the right to alimony).

142 Starnes*, supra* note 16, at 271 ("In extreme cases, the pragmatic justification for alimony is easy enough: alimony protects the state from the job of supporting a divorced spouse who, without alimony, would be thrust into poverty. Indeed, state statutes typically identify a claimant's 'need' as an alimony trigger. But trial courts are given broad discretion to define 'need' and state-interest does not explain cases in which alimony is awarded to a divorcing spouse who faces a decline in standard of living short of poverty. Nor does pragmatism answer the many questions to which alimony demands answers: How much? How long? To what end? On what grounds—modification or termination?").

143 Ellman, *supra* note 136, at 6.

144 Need remains a relevant factor in determining alimony. That fact does not undermine the argument that human capital theories of alimony call into doubt whether alimony is income to the recipient, however. The recipient's need is created, at least in part, by lost human capital or foregone accumulation of human capital caused by the recipient spouse's investment in the marriage. Need is a symptom of an unequal shifting of human capital from the recipient to the payor spouse. The proposed reform can resolve the inequity by keeping alimony in the tax base of the payor spouse. For the idea that alimony is interested in remedying an imbalance between spouses, see June Carbone, *Economics, Feminism, and the Reinvention of Alimony: A Reply to Ira Ellman*, 43 VAND. L. REV. 1463, 1466 (1990). For commentary on the

Scholars have offered many possible rationales that share a common thread: investments in and of human capital give rise to a right to alimony.

Consider the work of influential scholar Professor Ira Ellman. In *The Theory of Alimony*, Professor Ellman offers an economic efficiency argument in support of alimony.[145] Rejecting contract analogies, Professor Ellman argues that the availability of alimony encourages efficient specialization of labor within a marriage.[146] Rather than "a way of relieving need," alimony is "an entitlement earned through marital investment, and . . . a tool to eliminate distorting financial incentives."[147] Professor Ellman assumes a specialization of labor within marriage in which one spouse focuses on market work and one prioritizes domestic work.[148] He recognizes, however, that such specialization puts the lower-earning spouse at risk that, without the prospect of compensation, she could encourage the spouse whose energies would be best devoted to "marital investment" to instead remain in market work to protect against potential reduced earning capacity.[149] Alimony is the payment for "a compensable loss in earning capacity" due to the benefits provided to the spouse in market work by the spouse who invests a larger part of (or entire) effort in domestic work.[150] The amount of alimony awarded is keyed to the recipient's diminished earning capacity or, stated differently, her lost or damaged human capital.[151]

Accepting Professor Ellman's economic efficiency argument requires accepting his assumption that the state should encourage such specialization, which is not uncontroversial.[152] But his conceptualization of the behavior that gives rise to a right to alimony need not be tied to his prescriptive goal and is, indeed, reflected in the alimony factors of many states.

Professor Jana Singer offers a different rationale for alimony that attempts to encourage and reflect more equal investment in the marital relationship.[153] Professor Singer argues that economic efficiency alimony

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search for a theory of alimony, see Joan Williams, *Is Coverture Dead? Beyond A New Theory of Alimony*, 82 GEO. L.J. 2227, 2227–29 (1994).

145 *See* Ellman, *supra* note 136, at 40–73.

146 *Id.* at 48.

147 *Id.* at 52.

148 *Id.* at 48.

149 *Id.* at 50–52.

150 *Id.* at 51.

151 Ellman, *supra* note 136, at 40–53 ("To identify these losses, we compare the claimant's economic situation at the end of the marriage with the situation she would have been in if she had not married. This comparison reveals that lost earning capacity is the only continuing financial loss.").

152 Nor is it an assumption with which the author agrees. For a critique of Professor Ellman's approach that is consistent with the proposed reform, see Carbone, *supra* note 144, at 1501 ("Such awards will be *obligations*, not charity, installment payments for benefits retained, not punishment and not antiquated remnants of an otherwise severed relationship. Recognition that the obligation arises from the intangible benefit, rather than from the more quantifiable sacrifice, also will eliminate any illusion of certainty. The inability to achieve precise calculations should not stand in the way of substantial justice.").

153 Singer, *supra* note 141, at 2453–56 (offering an "alternative vision of marriage [that] would combine the equal partnership ideal that underlies current equitable division schemes with the economist's

theories fail to recognize that lost earning capacity does not account for the human capital gains and losses of *each* spouse.[154] Instead of privileging market work as the primary source of increasing human capital, Professor Singer argues that alimony law should view both spouses, regardless of their comparative investments in market or nonmarket work, as "equal contributors to the marriage."[155] Alimony payments, in Professor Singer's view, are a sharing of the payor's income justified by the recipient's investment of his or her human capital in the marriage.[156] The rationale is simple, though not necessarily easy to empirically prove: the higher-earning spouse owes his or her higher-value human capital, at least in part, to the marriage.[157] As such, the lower-earning spouse has some claim to that capital.[158]

Professors Ellman and Singer are prominent examples of contemporary alimony theorists who find human capital as a foundation for alimony in a no-fault divorce world. The concepts they discuss—*human capital, need, economic efficiency, loss, contractual damages*—arise in reform proposals and works agreeing with and critiquing their views.[159] Though no one theory has universal approval, there is great fluidity of the boundaries separating the many rationales for alimony, suggesting that the most productive search is for unifying themes of the various theories. And underlying similarities do emerge. Professor Cynthia Starnes synthesizes the continuities in the alimony theory literature into three broad categories: "(1) Gain Theory (emphasizes expected returns on marital investments)[;] (2) Loss Theory (emphasizes compensation for loss experienced at divorce)[; and] (3) Contribution Theory (emphasizes reimbursement for marital contributions)."[160]

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recognition of enhancements in human capital as the most valuable asset produced during most marriages").

154 *Id.* at 2444.

155 *Id.* at 2454 ("As equal contributors to the marriage, each spouse should be presumptively entitled to benefit equally from it in the event of divorce; if divorce produces a net economic loss, each spouse should bear an equal portion of that loss. This alternative vision would reject specialization as a goal and would instead focus on encouraging *both spouses* to invest substantially in their marriage. It would do so, in part, by reducing the portability of a primary wage-earner's investment in market-oriented human capital.").

156 *Id.*

157 *See id.* at 2444 ("[M]arriage not only depletes a wife's stock of human capital, it also significantly enhances a husband's."); Ellman, *supra* note 136, at 46 (noting that married couples think "shift[ing] economic sacrifices from the higher earning spouse to the lower earning spouse . . . increase[s] the income of the marital unit as a whole").

158 Singer, *supra* note 141, at 2454–60.

159 *See, e.g.*, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS (AM. LAW INST. 2002). *Cf.* Kisthardt, *supra* note 123, at 78–79 (describing how the American Academy of Matrimonial Lawyers' ALI Commission argued against the ALI principles and its focus on human capital and how the Commission views factors such as career sacrifice and age, both of which are tied to damaged or lost human capital, as relevant to its own proposal).

160 Starnes, *supra* note 16, at 279. For a discussion of Professor Starnes's work, see Naomi Cahn & June Carbone, *Whither/Wither Alimony,* 93 TEX. L. REV. 925 (2015).

Professor Starnes persuasively argues that the various modern theoretical justifications for alimony distill down to three basic understandings of what occurs at divorce.[161] Most importantly for tax reform, she frames those understandings in terms with which tax is intimately familiar: gain, loss, and contributions to and of capital.[162]

Gain theorists tend to view spouses as equals and, as did Professor Singer,[163] view marriage as an inherently productive endeavor achievable only because of the combined work of both spouses.[164] The language of different gain theorists proposals may differ—one may characterize alimony as a repayment of a loan of support, another as a divvying of interests in or earnings from human capital—but they share the common view that both spouses have a claim to the shared endeavor.[165] Summarizing the similarities between gain theorists' views, Starnes writes:

> There is much common ground among gain theorists. Most obvious is their focus on collaboration, teamwork, and partnerships between spouses who join together to produce mutual benefits which they expect to share—income and a home with children. If their marriage ends, divorce law must impose an exit price on the spouse *who takes the larger share of marital returns with him*. This price will usually take the form of income sharing, and is gain theorists' rationale for alimony.[166]

The distinction in gain theory between marital returns and marital capital is not always clear, a fact that is addressed in Part III. Most important, however, is the fact that gain theorists give equal weight to investments of human capital regardless of whether those investments were market or nonmarket oriented.[167]

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161 *See* Starnes*, supra* note 16, at 278–79. *Cf.* Robert Kirkman Collins, *The Theory of Marital Residuals: Applying an Income Adjustment Calculus to the Enigma of Alimony*, 24 HARV. WOMEN'S L.J. 23, 49–54 (proposing a formula-based methodology for determining alimony awards that does not appeal to a human capital rationale). Interestingly, however, the author argues against a tax deduction for the payor. *See id.* at 60–61.

162 *See* Starnes, *supra* note 16, at 278–79.

163 Professor Starnes classifies Professor Singer as one of a number of gain theorists. *Id.* at 281.

164 Singer, *supra* note 141, at 2454; *see also* Marjorie E. Kornhauser, *Theory Versus Reality: The Partnership Model of Marriage in Family and Income Tax Law*, 69 TEMP. L. REV. 1413, 1449 (1996).

165 Starnes, *supra* note 16, at 281–83 (discussing different versions of gain theory).

166 *Id.* at 283 (emphasis added). Professor Starnes uses the term "exit price." The punitive aspect of a penalty could point to a deduction/inclusion regime akin to the treatment of punitive damages under section 104 (26 U.S.C.A. § 104 governs, in part, the tax treatment of compensation for account of personal injury). This language should not be viewed in isolation, however, but read in the context of gain theory as a whole. Specifically, gain theorists argue that alimony is necessary to prevent enrichment of the payor spouse and make whole the recipient spouse. Absent alimony, the payor spouse would leave the marriage enriched because of the investment of the recipient spouse. Thus, when viewed in context, the exit price is really a repayment of invested human capital.

167 *Id.* ("A key feature of gain theory is its general disinterest in relative spousal contributions. Gain theorists tend to assume, sometimes as a default rule drawn from visions of contemporary marriage, that spouses are equals. Equality is an assigned status that does not depend on the type or size of each spouse's

In contrast to gain theorists, loss theorists view alimony payments not as a sharing of mutually created gain but instead as compensation for a loss suffered.[168] Loss of earning capacity—the focus of loss theorists—is the symptom of a loss of human capital.[169] Gain theory and loss theory are therefore "flip sides of the same coin."[170] Because courts and state law frequently look to a lost earning capacity rationale to justify both rehabilitative and periodic or permanent alimony, it is an important rationale.[171]

Lastly, contribution theory is a narrower but related approach that sees alimony as a payment for benefits conferred by the recipient to the payor spouse.[172] Contribution theory most closely aligns with rationales for reimbursement or restitutionary alimony.[173] Under contribution theory, which typically focuses on the recipient spouse's investment in the payor spouse's human capital, the recipient spouse has a right to recover her investment upon divorce.[174]

C. *Lessons for Tax Law*

Alimony theory yields an important insight for tax law: that the right to alimony derives from investments in and of human capital. A second insight

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contribution. As equals, spouses are entitled to equal returns on communal, joint investments—no matter who brought home the bigger paycheck and no matter who was the better cook.").

168 *Id.* at 284–85.

169 *Id.*; Ellman, *supra* note 136, at 49.

170 Starnes, *supra* note 16, at 285. Professor Starnes argues that loss theory is less preferable because it relies on describing the alimony recipient as a victim, rather than an "equal stakeholder." *Id.*

171 *See supra* Part II.A.

172 Starnes, *supra* note 16, at 286.

173 *See id.* For a representative discussion of the right to reimbursement that may arise from one spouse's contribution to the human capital acquisition of another, see *In re Marriage of Watt*, 262 Cal. Rptr. 783, 789 (Cal. Ct. App. 1989) ("We agree that section 4801, subdivision (a)(2), should be interpreted broadly to require consideration of *all* of the working spouse's efforts to assist the student spouse in acquiring an education and enhanced earning capacity. Where the nonstudent helped the student through school and into a higher earning career position, that spouse's contributions should be given weighty consideration by the trial court in deciding the propriety and extent of a spousal support award. Nothing in the statutory language indicates that one spouse's contribution to the attainment of the other's education or career is limited to direct education expenses. The notion of 'contributing to the attainment' of an education is broader than the section 4800.3 concept of 'payments made for' education or training. Common sense tells us that more goes into contributing to the attainment of an education than the mere cost of tuition, books and supplies. Many students who seriously pursue education or training forego full-time or even part-time remunerative employment, relying instead on other sources to provide for their necessities of life. Certainly, these other sources contribute to the student's attainment of an education. We thus hold that in the case of a career-threshold marriage where the working spouse provided a far greater share of living expenses while the student spouse acquired a professional degree, section 4801 requires the trial court to consider the totality of the nonstudent's contributions and efforts toward attainment of that degree, including contributions for ordinary living expenses.").

174 *E.g.*, *Watt*, 262 Cal. Rptr. at 789. Importantly, courts may conceive of the nature of that investment broadly. *Id.*

follows from the first and is further supported by both doctrine and practice: alimony is not clearly distinguishable from settlements of property. That insight is the focus of this Part. Taken together, these insights provide guideposts for reforming the tax alimony regime.

Neither alimony doctrine nor practice supports a strong dividing line between alimony and property settlements.[175] Both trends in alimony and the law that governs the process by which alimony is awarded demonstrate the weakness of the supposed boundaries. First, consider alimony law itself. Pennsylvania provides a representative example.[176] Section 3701 of Title 23 of the Pennsylvania Consolidated Statutes directs courts to consider the sufficiency of the alimony award alongside the property award.[177] If alimony is increased because a property award is insufficient, alimony becomes a stand-in for property rather than a wholly distinct concept.[178]

Even when courts accept the idea of a clear line between alimony and property settlement, they regularly struggle to distinguish between the two.

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175 Though not expressly focused on tax, Professor Singer calls into question the strength of the division between alimony and property settlement. Jana B. Singer, *Divorce Obligations and Bankruptcy Discharge: Rethinking the Support/Property Distinction*, 30 HARV. J. LEGIS. 43, 50 (1993) (finding the division weak even in early precedent: "Viewed against this background, a wife's entitlement to alimony in the event of a divorce represented more than mere judicial enforcement of the husband's legal duty of support. Alimony also functioned as a means of reallocating property interests—a way of restoring to a virtuous wife at least some of the access to material wealth that she had lost by virtue of her marriage. The Supreme Court in *Audubon* explicitly recognized this 'property division' aspect of alimony when it stated—in support of the nondischargeability of alimony obligations—that '[p]ermanent alimony is regarded rather as a portion of the husband's estate to which the wife is equitably entitled, than as strictly a debt.'" (quoting Audubon v. Shufeldt, 181 U.S. 575, 578 (1901))).

176 23 PA. STAT. AND CONS. STAT. ANN. § 3701 (West 2017) lists seventeen factors for determining whether alimony is necessary as well as the nature, amount, duration, and manner of payment. Those factors include:

(6) The contribution by one party to the education, training or increased earning power of the other party . . .

(16) Whether the party seeking alimony lacks sufficient property, including, but not limited to, property distributed under Chapter 35 (relating to property rights), to provide for the party's reasonable needs . . . .

177 *Id.*

178 For an example of a court granting reimbursement alimony, see Bold v. Bold, 574 A.2d 552, 556 (Pa. 1990) ("With a view to balancing the extremes, we hold, therefore, that separate and apart from the equitable distribution of marital property, *consistent with fairness*, the supporting spouse in a case such as this should be awarded equitable reimbursement to the extent that his or her contribution to the education, training or increased earning capacity of the other spouse exceeds the bare minimum legally obligated support as reflected in the guidelines promulgated by this Court." (footnotes omitted)). Though the court stated that the award was separate from property division, it directed the lower court to reconsider the award because of a perceived insufficiency of the property division, undermining its claim that reimbursement alimony was wholly separate from property settlement. *Id.* ("Because there was insufficient marital property to compensate Mrs. Bold for her financial contributions to the marriage in excess of those made by Mr. Bold, the master and the trial court awarded Mrs. Bold a cash amount which the master called 'reimbursement alimony' and which the trial court called 'equitable reimbursement.'").

In the South Carolina case of *Miles v. Miles*,[179] for example, the issue before the court was whether health insurance payments made by a husband on behalf of his ex-wife were modifiable support or non-modifiable property settlement.[180] The South Carolina Court of Appeals held that the payments "unambiguously did not create a support obligation."[181] The lower court reasoned that because the divorce agreement specifically eschewed alimony, the health insurance payments must not be alimony and, therefore, not support.[182] Correcting the lower court, the state supreme court stated that the lower court "placed too much emphasis on the language that the parties 'waive[d] alimony,'" noting that "[s]uch semantic distinctions have been abolished in family law."[183] The substance of the nature of the transfer, not terms of art, would govern. Considering the substance of the insurance payments, the court stated that "the maintenance of health insurance has the hallmark of spousal support: it provides the receiving spouse a benefit which is normally incident to the marital relationship."[184] That such a case still, in 2011, had to go to the state supreme court before the line between property settlement and alimony could be drawn makes clear that distinguishing the two is no easy task.

Second, the trend in alimony away from permanent, periodic payments further blurs the line between property settlement and alimony. Though other states have not followed, New York holds that support given toward one spouse pursuing an advanced degree makes the degree marital property.[185] Acquired human capital has, then, some characteristics of property. Though New York is an outlier on this issue, human capital theories of alimony are in line with New York's rationale.[186] Even states that do not characterize a degree as marital property consider contributions to such human capital in alimony awards, which suggests that though these states stop short of formally classifying acquired human capital as property, they are sensitive to the fact that it is a valued asset in which both spouses may invest.[187] Further, as courts shift toward awarding restitutionary or rehabilitation alimony[188]

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179 711 S.E.2d 880 (S.C. 2011).

180 *Id.* at 882.

181 *Id.* at 883.

182 *Id.*

183 *Id.* at 884.

184 *Id.* at 883–84.

185 *Cf.* O'Brien v. O'Brien, 489 N.E.2d 712, 715–16 (N.Y. 1985) ("[M]arital property encompasses a license to practice medicine to the extent that the license is acquired during marriage.").

186 *See* discussion *infra* Part III.A.2.

187 *See, e.g.*, discussion of Pennsylvania's law *supra* note 176.

188 Noting that statistical analysis of alimony is scant, scholars have described the shift from long-term alimony to rehabilitative alimony. Judith G. McMullen, *Alimony: What Social Science and Popular Culture Tell Us About Women, Guilt, and Spousal Support After Divorce*, 19 DUKE J. GENDER L. & POL'Y 41, 47 (2011) ("The case law has evolved in a way that allows spousal maintenance payments to be used for rehabilitation or restitution. . . . [P]ermanent alimony [is] becoming more and more exceptional." (footnotes omitted)); Morone, *supra* note 136, at 7 ("The recent trend towards 'rehabilitative alimony'—an award of support for a brief, usually fixed period of time post-divorce—was encouraged in the Uniform

rather than permanent or indefinite periodic alimony, alimony practice steers alimony away from its long-term support moorings of the early twentieth century. This shift moves alimony into property settlement territory, making it, as Professor Jana Singer observed, less about support and more about recovery of investment—a classic function of property division.[189]

The lessons of family law for tax are compelling. That the doctrine of, judicial approach to, and trends in alimony awards undermine a clear dividing line between alimony and property law should shake tax law's confidence in the wisdom of maintaining a clear line with differing tax consequences for alimony and property settlement. Similarly, the very theoretical foundations of alimony call into question whether tax law should view alimony as income to the recipient, casting it instead as return of or compensation for human capital. The following Part details the import of key insights from family law to tax law.

III. TOWARD MORE ACCURATE, ADMINISTRABLE, AND EQUITABLE TAXATION OF ALIMONY

Tax law could ignore insights from family law and cling to the current tax alimony regime. After all, it replaced an unwieldy subjective test with a more objective rule, and federal tax law is not bound by state law.[190] To maintain the status quo would, however, be error, as the weaknesses of the current regime make clear. Tax law should instead adopt a new approach to the taxation of alimony that is more substantively accurate, easier to administer, and, ultimately, more equitable. This Part details the Article's proposed change in law and sets out its justifications.

Marriage and Divorce Act. By formally rejecting fault-based divorce models and economic dependency as grounds for alimony, the UMDA proposed a 'clean break' for the termination of the marital union."); Constance L. Shehan et al., *Alimony: An Anomaly in Family Social Science*, 51 FAM. REL. 308, 310 (2002) ("Although it has not been empirically documented, rehabilitative alimony seems to be emerging as the predominant judgment."); Singer, *supra* note 141, at 2425 (noting the same trend); Starnes, *supra* note 16, at 272 (suggesting that the economy makes property settlements a rarity and that alimony takes its place) ("In these difficult economic times, with home equity disappearing and retirement savings diminishing, divorcing couples increasingly have few, if any, significant assets, which renders property distribution a useless tool, and makes income sharing, i.e., alimony, the only available economic remedy for the primary family caretaker.").

189 Singer, *supra* note 175, at 45 (noting that a shift toward reimbursement alimony moves alimony into property settlement territory) ("These changes in marital property law have been paralleled by a fundamental rethinking of the nature and functions of alimony, more commonly referred to today as maintenance or spousal support. This rethinking has deemphasized the role of alimony as a status-based obligation designed to alleviate future need and has emphasized instead its compensatory and restitutionary functions—functions that have traditionally been associated not with alimony, but with the division of marital property." (footnote omitted)).

190 For an interesting discussion of the interplay of federal tax law and state law, see Boris I. Bittker, *The Federal Income Tax and State Law*, 32 SW. L.J. 1075, 1075 (1979).

The analysis that undergirds the proposed reforms differs in a significant way from prior critiques of the taxation of alimony.[191] Much of the existing scholarship takes the position that alimony payments are clearly income to someone but either avoids deciding to whom the payments are income or asserts, without much analysis, that payments are income to the recipient.[192] In lieu of addressing the income question, scholars focus on administrability, fairness, or compliance concerns.[193] Administrability, fairness, and compliance are important considerations and, this Article argues, support the proposed no-deduction/exclusion regime. But family law doctrine and theory can advance the debate by providing a framework for answering the income question. Specifically, this Part argues that applying family law's human capital theory of alimony at least calls into doubt whether alimony is clearly income to the recipient and at best establishes that alimony is not income to the recipient.

A. *Unified Treatment of All Transfers at Divorce*

Congress should repeal the current deduction/inclusion regime of sections 71 and 215 in favor of taxing all transfers at and incident to divorce under a no-deduction/exclusion approach. Doing so would bring the taxation of alimony in line with contemporary alimony theories and trends in alimony awards. It also would limit opportunities for costly noncompliance, reduce litigation on the proper tax classification of items in divorce proceedings, and reduce the equity costs of disparate levels of tax planning at divorce.[194]

1. *Details of the Proposal*

Repeal of sections 71 and 215[195] should occur alongside adoption of two new Code provisions specifically setting out the tax treatment of payments at divorce. Section 1041 encompasses cash payments that are not alimony under section 71, but a new exclusion would provide a degree of clarity that

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191 *See* sources cited *supra* note 88.

192 *See supra* Part I.

193 *See, e.g.*, Hjorth, *supra* note 88, at 188. Critiquing the 1984 reform, Professor Hjorth writes, "What is needed is a relatively simple change to solve what was essentially an administrative and compliance problem." *Id.* He then goes on to propose repeal of the alimony recapture rules and requirement that payments terminate at the death of the recipient. *Id.*

194 One might challenge the proposed reform on the grounds that alimony is too rare to justify such a significant tax change. However, because tax consequences play a significant role in divorce and separation agreements, a shift in the taxation of alimony will have ripple effects in divorce practice and planning. Further, an ineffective, unfair, and inefficient rule should not persist simply because it will not impact broad swaths of citizens.

195 26 U.S.C. §§ 71, 215 (2012). Note that sections 61(a)(8) (requiring the inclusion of alimony in income) and 62(a)(10) (identifying the section 215 deduction as an above-the-line deduction) would also need to be repealed. *Id.* §§ 61(a)(8), 62(a)(10).

may be desirable in light of the significance of the proposed change and tumultuous history of the area.[196] Accordingly, Congress should draft a new provision to add to part III of subchapter B. Such a provision could read as follows:

26 U.S. Code §___

a) General rule—Gross income does not include support payments received pursuant to a divorce or separation agreement.

b) Support payments defined—A support payment is any cash payment, whether periodic, lump sum, or otherwise, received by (or on behalf of) the taxpayer with regard to the marital relationship of the payor and the taxpayer and/or the care of the payor's child.

c) "Divorce or separation instrument—The term 'divorce or separation instrument' means—

1) a decree of divorce or separate maintenance or a written instrument incident to such a decree,

2) a written separation agreement, or

3) a decree (not described in subparagraph (A)) requiring a spouse to make payments for the support or maintenance of the other spouse."[197]

d) Cross reference—for the treatment of in-kind transfers, see § 1041.

If Congress desires an abundance of clarity, it can also enact a new deduction disallowance provision in Part IX of Subchapter B. However, because deductions are a matter of "legislative grace"[198] and permitted only when expressly allowed, a new provision is not truly required. Further, section 262 should be construed to disallow alimony, as it does child support payments, because it expressly disallows deductions for "personal, living, or family expenses."[199]

Such a marked change in law requires a transitional rule. Because some, though likely not all, individuals structure their divorce agreements in light of current law, current law should continue to apply to such individuals. Assuming, for example, the proposed reform is adopted[200] and goes into effect

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[196] In the alternative, section 1041 could be modified to specifically include cash transfers within its definition of property. However, the marked clarity of a separate exclusion provision is preferable.

[197] This language is drawn from the current language defining divorce and separation instruments in section 71(b)(2).

[198] New Colonial Ice Co. v. Helvering, 292 U.S. 435, 440 (1934).

[199] 26 U.S.C. § 262 (2012).

[200] If Congress were to adopt such a transition rule, an alternate reform plan would be to add language to sections 71 and 215 stating that the inclusion applies only to payments made pursuant to a decree or

as of January 1, 2019, any agreements completed prior to that date should be governed by current law.[201]

2. *A Human Capital Theory Rationale*

Human capital—investments thereof or therein, or losses thereof—is the concept that unifies the many variations of modern alimony theory.[202] Tax law should take note of this unifying theme and rationalize the taxation of alimony accordingly. Taken together, alimony theory—whether gain, loss, or contribution—suggests that alimony should be treated as (1) nontaxable compensation for lost or damaged human capital or (2) a return of an investment in human capital. Essential to both treatments is the recognition of what this article terms "alimony basis." Alimony basis is a modified concept of conventional tax basis that derives from monetary *and* human capital investments in another's human capital within the limited context of marriage and that becomes relevant only upon divorce. Rather than a standalone concept, this Article introduces 'alimony basis' as tool to highlight how human capital theories of alimony call into question to whom alimony should be income. To ensure that the analysis that follows is accessible to tax and nontax scholars alike, an introduction to basis is necessary.

Basis is a foundational concept in tax law. It is one that is simple in principal—it is an accounting tool—but that can be hard to manage in practice. Suppose you purchase an acre of land for $17,000. Some years later, you sell that same land for $25,000 cash. In the year of the sale, you must be able to determine the amount of taxable income generated by the sale. The intuitive (and correct as a matter of law) amount of gain is $8,000. Basis is the reason why.

Determining the amount of gain or loss in a given transaction requires knowing how much consideration a person received ("amount realized") and the amount she already invested in the property ("adjusted basis").[203] Adjusted basis is, quite simply, your initial cost investment[204] in an asset

agreement first executed prior to the cutoff date. A cross reference to the new exclusion provision also could be added to section 71.

201 Whether a modification after the effective date of the new regime would trigger application of that regime would need to be addressed. Factors such as the substance and materiality of the modification would be relevant in determining whether the agreement is so significantly changed as to be effectively new.

202 *See supra* Part II.

203 Section 1001 defines gain and loss: "The gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the adjusted basis provided in section 1011 for determining gain, and the loss shall be the excess of the adjusted basis provided in such section for determining loss over the amount realized." 26 U.S.C. § 1001(a) (2012).

204 This amount is, in tax jargon, cost basis as defined by section 1012. *Id.* § 1012. Other special basis rules govern in different circumstances (e.g., section 1014 determines the basis of property received from a decedent), but cost basis is the core concept of basis to which adjustments are made. *Id.* § 1012(a) ("The basis of property shall be the cost of such property, except as otherwise provided in this subchapter

tweaked to reflect changes such as additional investment or, as in the case of depreciation, progressive cost recovery.[205] Returning, then, to the example, the taxpayer's basis in property was $17,000; that amount was her cost to acquire the acre. Thus, when she received $25,000 in cash for the property, her realized gain was $8,000.[206] Her initial investment of financial capital is recovered at the sale, but she also received something over and above that investment. Tax accounts for both by allowing her to recover her initial investment tax free while taxing her newfound gain.[207]

Alimony basis is a heuristic device that works at the intersection of basis and human capital. When human capital and basis meet, however, conflict ensues. Historically, tax law holds that investments in or of human capital neither create basis nor give rise to deductible costs.[208] Stated differently, investments in human capital are ignored for tax purposes.[209] Yet family law theories of alimony respect investments of, investments in, injury to, or loss of human capital as true costs, likening alimony and human capital to property.[210] Alimony basis bridges the space between these two understandings—a challenging maneuver, but not one without precedent.

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and subchapters C (relating to corporate distributions and adjustments), K (relating to partners and partnerships), and P (relating to capital gains and losses).").

205 Section 1011 defines adjusted basis: "The adjusted basis for determining the gain or loss from the sale or other disposition of property, whenever acquired, shall be the basis (determined under section 1012 or other applicable sections of this subchapter[)] . . . adjusted as provided in section 1016." 26 U.S.C. § 1011(a).

206 Per section 1011, the calculation of her gain is as follows: $25,000 amount realized (cash and the fair market value of any property received) less the adjusted basis of $17,000 equals $8,000. This simple example assumes that the taxpayer engaged in no activities that would increase the basis, such as investing in improvements to the property.

207 Section 1001(c) requires recognition of realized gains unless another provision changes that default result.

208 Many discussions of tax and human capital arise in one of three areas: taxation of educational costs, personal injury awards, and optimal tax theory. To gain a sense of the discussions (which overlap in many pieces), see generally J. Martin Burke & Michael K. Friel, *Tax Treatment of Employment-Related Personal Injury Awards: The Need for Limits*, 50 MONT. L. REV. 13 (1989); David S. Davenport, *The 'Proper' Taxation of Human Capital*, 52 TAX NOTES 1401 (1991); Paul A. David, *Reforming the Taxation of Human Capital: A Modest Proposal for Promoting Economic Growth*, *in* ECONOMICS FOR AN IMPERFECT WORLD: ESSAYS IN HONOR OF JOSEPH E. STIGLITZ 439 (Richard Arnott et al. eds., 2003); Dodge, *supra* note 60, at 147; Mary L. Heen, *An Alternative Approach to the Taxation of Employment Discrimination Recoveries Under Federal Civil Rights Statutes: Income from Human Capital, Realization, and Nonrecognition*, 72 N.C. L. REV. 549 (1994); Patrick E. Hobbs, *The Personal Injury Exclusion: Congress Gets Physical but Leaves the Exclusion Emotionally Distressed*, 76 NEB. L. REV. 51, 55 (1997); Morgan L. Holcomb, *Taxing Anxiety*, 14 FLA. TAX REV. 77 (2013); Louis Kaplow, *Human Capital Under an Ideal Income Tax*, 80 VA. L. REV. 1477 (1994); Michael Simkovic, *The Knowledge Tax*, 82 U. CHI. L. REV. 1981 (2015); Paul B. Stephan III, *Federal Income Taxation and Human Capital*, 70 VA. L. REV. 1357, 1389–97 (1984) (discussion of basis and human capital); Lawrence Zelenak, *The Reification of Metaphor: Income Taxes, Consumption Taxes and Human Capital*, 51 TAX L. REV. 1, 2–3 (1995).

209 *See* sources cited *supra* note 209. See also 226 U.S.C. § 162 (2012) and 6 C.F.R. § 1.162-5 (2017) on the issue of when educational costs are recoverable.

210 *See supra* Part II.

Consider the example of personal injury damage awards. Section 104(a)(2) excludes from income qualifying compensatory damage awards.[211] The rationale for section 104 is controversial but is a useful point of entry to human capital and taxation.[212] However contested the provision may be, it is and has historically been fundamentally concerned with the taxation of compensation for lost or damaged human capital.[213] As such, it shares a foundation with modern alimony theory.[214]

One recent case encapsulates both the concerns of those who advocate excluding compensation for lost or damaged human capital and the grounds for its criticism: *Murphy v. I.R.S.*[215] In 2006, the D.C. Circuit considered acknowledging the concept of basis in human capital as it considered the boundaries of section 104(a)(2).[216] The opinion was criticized[217] and ultimately vacated, but the court's discussion of basis and human capital provides a clear example of the complexity of acknowledging basis, *or something like it*, in and of human capital, just as it also articulates why doing so seems appropriate in certain circumstances.[218]

The facts in *Murphy* are relatively straightforward. Martina Murphy received compensatory damages after alleging that she had been wrongfully terminated from her New York Air National Guard position.[219] Murphy originally included the $70,000 worth of damages in her gross income but then filed an amended return seeking a refund of the taxes paid on the damages on the grounds of one of two alternative arguments: first, that the damages were

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211 26 U.S.C. § 104(a)(2).

212 *See, e.g.*, Dodge, *supra* note 60 (providing a useful point of entry into the discussion of the rationales for section 104).

213 *Id.* ("At the core of section 104 is the issue of recoveries for injuries to 'human capital,' i.e., damages for lost wage-earning capacity, including recoveries for lost past wages. Both historic and present-day theories of exclusion (or inclusion) ultimately derive from a conception of human capital. Human capital is the key to distinguishing personal from commercial injuries in situations where they might be seen to overlap; thus, it holds the key to defining the proper scope of section 104."). Professor Dodge rejects the idea of basis in human capital for the usual reasons such as administrability and valuation concerns, but he carves out a space in which personal injury awards that compensate for lost earning capacity (i.e., lost human capital) can be excluded if the awards are net of tax. *Id.* at 150–60.

214 A distinction may be made between qualifying recoveries for lost or damaged human capital under section 104, which requires a physical origin, and the nonphysical trigger for lost or damaged human capital upon divorce. Scholars debate whether section 104 should encompass nonphysical injuries (as held in the past). For examples of both sides of the debate, see Burke & Friel, supra note 209, at 13 (providing a history of section 104 and arguing against a broad exclusion) and F. Patrick Hubbard, Making People Whole Again: The Constitutionality of Taxing Compensatory Tort Damages for Mental Distress, 49 Fla. L. Rev. 725, 727 (1997) (writing in favor of exclusion).

215 460 F.3d 79, 85–87 (D.C. Cir. 2006), vacated, No. 05-5139, 2006 WL 4005276 (D.C. Cir. Dec. 22, 2006), opinion after reinstatement of appeal, 493 F.3d 170 (D.C. Cir. 2007).

216 Murphy, 460 F.3d 79.

217 E.g., Joseph M. Dodge, Murphy and the Sixteenth Amendment in Relation to the Taxation of Non-Excludable Personal Injury Awards, 8 Fla. Tax Rev. 369, 370 (2007).

218 Murphy, 460 F.3d at 88.

219 Id. at 81.

excludable as compensation for personal injury under section 104(a)(2),[220] or second, that the damage award was not income under section 61 and, therefore, any application of section 104(a)(2) that led to inclusion would be unconstitutional.[221]

The court held against the taxpayer on her section 104(a)(2) exclusion argument.[222] Because that aspect of the opinion does not come to bear on the concept of alimony, it need not be addressed here. As the court considered Ms. Murphy's second argument—whether the damages even qualified as income[223]—it ran headlong into the concept of basis in human capital.

In its discussion of the constitutionality of taxing damage awards, the court gave some credence to the idea that human capital may create basis. Though Judge Ginsburg did not expressly accept the idea, he favorably cited a 1918 attorney general's opinion on the taxability of accident insurance proceeds:

> Without affirming that the human body is in a technical sense the "capital" invested in an accident policy, in a broad, natural sense the proceeds of the policy do but substitute, so far as they go, capital which is the source of future periodical income. They merely take the place of capital in human ability which was destroyed by the accident. They are therefore "capital" as distinguished from "income" receipts.[224]

This concept of income articulated in early precedent was ultimately expanded, culminating in the famous *Glenshaw Glass* definition of "undeniable accessions to wealth, clearly realized, and over which the taxpayer[] ha[s] complete dominion."[225] Critics of *Murphy* focus on the fact that such

220 Section 104(a) expressly excludes standalone emotional distress from its concept of qualifying damages:

For purposes of paragraph (2), emotional distress shall not be treated as a physical injury or physical sickness. The preceding sentence shall not apply to an amount of damages not in excess of the amount paid for medical care (described in subparagraph (A) or (B) of section 213(d)(1)) attributable to emotional distress.

26 U.S.C. § 104(a) (2012).

221 Murphy, 460 F.3d at 80–81.

222 The first argument was, in Judge Ginsburg's view, easier to resolve. Section 104(a)(2) excludes from gross income "the amount of any damages (other than punitive damages) received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal physical injuries or physical sickness." 26 U.S.C. § 104(a)(2). Judge Ginsburg writes: "Murphy no doubt suffered from certain physical manifestations of emotional distress, but the record clearly indicates the Board awarded her compensation only 'for mental pain and anguish' and 'for injury to professional reputation.' The Board thus having left no room for doubt about the grounds for her award, we conclude Murphy's damages were not 'awarded by reason of, or because of, . . . [physical] personal injuries.' Therefore, § 104(a)(2) does not permit Murphy to exclude her award from gross income." Murphy, 460 F.3d at 84 (citations omitted).

223 Murphy, 460 F.3d at 88.

224 Id. at 86.

225 Comm'r v. Glenshaw Glass Co., 348 U.S. 426, 431 (1955). The opinion addressed two separate cases, Glenshaw Glass Co. v. Commissioner, 18 T.C. 860 (1952) and William Goldman Theatres, Inc. v. Commissioner, 19 T.C. 637 (1953). Taxpayers in both cases argued that potential items of income—fraud and treble damages and solely treble damages, respectively—were not income, relying heavily on the 1920 Supreme Court decision in Eisner v. Macomber, 252 U.S. 189 (1920). In Macomber, the Court maintained a narrower definition of income as "gain derived from capital, from labor, or from both combined." Macomber, 252 U.S. at 207 (quoting Doyle v. Mitchell Bros. Co., 247 U.S. 183, 185 (1918)). Seeing the damages as neither, the taxpayers in Glenshaw Glass and Goldman Theatres argued that the

early precedent, in addition to utilizing a narrower definition of income, was operating with a still-developing concept of basis.[226] While it is true that damage awards may compensate an individual for lost human capital, following strict doctrine, the damage award is income because basis in human capital is zero.[227] By favorably citing precedent that relied on now-outdated notions of income and return of capital, the *Murphy* court opened the opinion to swift criticism.[228]

Ultimately, the court did not decide whether Murphy had basis in her own human capital that would offset any taxable gain from the damage award. In a footnote, Judge Ginsburg wrote:

> [T]he Government's quarrel with Murphy's analogy, based upon *Glenshaw Glass,* of "human capital" to financial or physical capital is not persuasive. To be sure, the analogy is incomplete; personal injuries do not entail an adjustment to any basis, nor are human resources, such as reputation, depreciable for tax purposes. But nothing in Murphy's argument implies a need to account for the basis in or to depreciate anything. Her point, rather, is that as with compensation for a harm to one's financial or physical capital, the payment of compensation for the diminution of a personal attribute, such as reputation, is but a restoration of the status quo ante,

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damages were not taxable as income. The Court in Glenshaw Glass did not overrule Macomber but expanded on it, turning it into a correct but limited decision. Glenshaw Glass, 348 U.S. at 431 ("In that context—distinguishing gain from capital —the definition served a useful purpose. But it was not meant to provide a touchstone to all future gross income questions.").

226 Dodge, supra note 217, at 407 ("The circa-1913 notion of 'capital' was taken to mean something like 'starting point.' However, it took a relatively short time for 'capital' to be equated with income tax basis." (footnote omitted)); Dodge, supra note 60, at 151 (noting that the fact that something compensates for lost capital does not mean a payment is not income, rather "[r]eplacement of capital is now dealt with explicitly by the 'basis' mechanism"); Burke & Friel, supra note 208, at 15–16 (noting the expansion of the concept of income). The Glenshaw Glass Court noted the replacement of capital theory of early precedent but only to distinguish it from punitive damages, writing:

The long history of departmental rulings holding personal injury recoveries nontaxable on the theory that they roughly correspond to a return of capital cannot support exemption of punitive damages following injury to property. Damages for personal injury are by definition compensatory only. Punitive damages, on the other hand, cannot be considered a restoration of capital for taxation purposes.

Glenshaw Glass, 348 U.S. at 432 n.8 (citations omitted). For further discussion of the import of this footnote, see Dodge, supra note 217, at 414–15, and Burke & Friel, supra note 208, at 18–19.

227 Dodge, supra note 217, at 418–19 ("The inescapable conclusion is that a receipt of cash is income unless a basis offset is available. In order to obtain a basis offset, it is necessary both (1) that the item in question possess a basis and (2) that the item be 'disposed of' so as to entitle the taxpayer to offset the basis against the cash receipt. There is no basis in personal attributes generally, and in the Murphy case there was no 'disposition' of any personal attribute." (footnote omitted)); Hobbs, supra note 208, at 64 ("Although the Attorney General's human capital approach to accident recoveries may have had merit in the abstract, the theory was unsupported by existing tax doctrine. It was clearly established that a person's capital was measured by his dollar investment or cost. The cost to the owner of 'human capital' is zero . . . ." (footnote omitted)).

228 Criticisms such as those of Professor Dodge are of a strict concept of basis—one that must have broad applicability. Alimony basis is not intended to have such broad applicability but rather to draw attention to a limited scenario in which investments of or in human capital may create something like basis to offset what seems like illusory gain.

> analogous to a "restoration of capital,"; in neither context does the payment result in a "gain" or "accession[] to wealth."[229]

Thus, the court wrestled itself as it searched for a rationale to exclude Ms. Murphy's damage award from income. In the same breath, it toed the party line—declining to allow basis in human capital—but then de facto permitted it by finding that, despite a lack of basis, Ms. Murphy was simply brought back to zero; she had no income from the damage award.[230]

The court's opinion in *Murphy* surprised the tax world and was widely criticized.[231] As a matter of doctrine, the criticism was justified. In his new opinion on rehearing, however, Judge Ginsburg quelled any concerns that the courts were moving toward recognizing basis in human capital.[232] He also more accurately characterized the role of basis in determining the amount of income.[233] Holding that section 61 includes damage awards by implication, the court did not address the question of basis in human capital, finding the entirety of the award taxable.[234]

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229 Murphy, 460 F.3d at 88 (citations omitted) (first quoting Glenshaw Glass, 348 U.S. at 432 n.8; then quoting id. at 430–31).

230 Id. at 81.

231 See, e.g., Dodge, supra note 217, at 390–425. But see Erik M. Jensen, Murphy v. Internal Revenue Service, the Meaning of "Income," and Sky-Is-Falling Tax Commentary, 60 Case W. Res. L. Rev. 751, 753 (2010).

232 Murphy v. I.R.S., 493 F.3d 170, 178 (D.C. Cir. 2007).

233 Though he ultimately did not reach the question of calculating gain from the damage award, Judge Ginsburg gave more time to clarifying the role basis plays in current law, writing:

Finally, the Government argues that even if the concept of human capital is built into § 61, Murphy's award is nonetheless taxable because Murphy has no tax basis in her human capital. Under the IRC, a taxpayer's gain upon the disposition of property is the difference between the "amount realized" from the disposition and his basis in the property, 26 U.S.C. § 1001, defined as "the cost of such property," adjusted "for expenditures, receipts, losses, or other items, properly chargeable to [a] capital account." The Government asserts, "The Code does not allow individuals to claim a basis in their human capital"; accordingly, Murphy's gain is the full value of the award.

Id. (citations omitted).

234 In the 2007 opinion, Judge Ginsburg held that by drafting an exclusion from income of certain damage awards in section 104, Congress implicitly amended section 61 to include damage awards as gross income. Id. at 179–80 ("As noted above, in 1996 the Congress amended § 104(a) to narrow the exclusion to amounts received on account of 'personal physical injuries or physical sickness' from 'personal injuries or sickness,' and explicitly to provide that 'emotional distress shall not be treated as a physical injury or physical sickness,' thus making clear that an award received on account of emotional distress is not excluded from gross income under § 104(a)(2). As this amendment, which narrows the exclusion, would have no effect whatsoever if such damages were not included within the ambit of § 61, and as we must presume that '[w]hen Congress acts to amend a statute, . . . it intends its amendment to have real and substantial effect,' the 1996 amendment of § 104(a) strongly suggests § 61 should be read to include an award for damages from nonphysical harms. Although it is unclear whether § 61 covered such an award before 1996, we need not address that question here; even if the provision did not do so prior to 1996, the presumption indicates the Congress implicitly amended § 61 to cover such an award when it amended § 104(a)." (citations omitted) (quoting Stone v. INS, 514 U.S. 386, 397 (1995))); see also Stephan, supra note 208, at 1388 ("When federal tax authorities first tried to interpret the ancestor of these provisions, they relied on an unsophisticated concept of human capital to identify those instances when compensation would produce tax liability. In the early years of the federal tax the government had difficulty treating any type of capital recovery as income, especially in cases where segregating the portion of gain accrued before adoption of the sixteenth amendment was impracticable. Characterization of the human body as a 'kind of capital,' albeit based more on analogies

The court's struggle with the idea that damages represent a taxable gain is instructive. Even after vacating its original opinion, the court continued to resist the idea that damages represent an accession to wealth. In both opinions, the court expressed the sense that Murphy *should* not be taxed because the apparent gain of the damage award merely compensates for lost human capital.[235] The resilience of the idea that certain damages should not be taxable merits attention. As the Ninth Circuit noted in 1983, section 104 may be understood as congressional recognition that, even if an individual cannot technically have basis in her human capital, taxing damages that compensate for that loss seems inappropriate.[236] Noting that personal injuries have been excluded from income since 1918, the court wrote:

> It was thought that there was no gain and therefore no income as income was then defined by the Supreme Court. The Supreme Court later made it clear that the *Eisner* definition of income was not exclusive and that other realized accessions to wealth may be taxable income. Since there is no tax basis in a person's health and other personal interests, money received as compensation for an injury to those interests might be considered a realized accession to wealth. Nevertheless, Congress in its compassion has retained the exclusion (now codified at I.R.C. § 104(a)(2)).[237]

Thus, while neither Congress nor the courts have expressly allowed investments in or of human capital to create basis, both have engaged with the idea when taxpayers suffer losses of or injuries to human capital.[238] This desire to recognize something like basis—to find some way to get around the outcome required by current doctrine—may speak to the limits of the analogy of human capital to more traditional forms of capital.[239] If human capital is meaningfully distinct from physical capital, there may be room to carve out a different, limited concept of something like basis. Alimony basis plays that

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to physical goods than on any abstract notion of future income flows, thus led to exclusion of proceeds from the conversion of any part of this asset. When the Revenue Act of 1918 ratified this result by expressly excluding personal injury compensation from taxation, the Solicitor of Internal Revenue explained that Congress meant to endorse the analogy of the human body to a tangible capital asset." (footnotes omitted)).

235 The earlier opinion makes clear its discomfort with finding taxable income in a damage award. That discomfort seems to persist in the new opinion as, on multiple occasions, the court distances the concept of income from accession to wealth, writing:

Principles of statutory interpretation could show § 61(a) includes Murphy's award in her gross income regardless whether it was an 'accession to wealth,' as Glenshaw Glass requires. . . . Accordingly, rather than ask whether Murphy's award was an accession to her wealth, we go to the heart of the matter, which is whether her award is properly included within the definition of gross income in § 61(a), to wit, "all income from whatever source derived."

Murphy, 493 F.3d at 179.

236 See Roemer v. Comm'r, 716 F.2d 693, 696 (9th Cir. 1983).

237 Id. at 696 n.2 (citing, inter alia, Eisner v. Macomber, 252 U.S. 189, 207 (1920) and Comm'r v. Glenshaw Glass Co., 348 U.S. 426, 431 (1955)).

238 See, e.g., Dotson v. United States, 87 F.3d 682, 685 (5th Cir. 1996) ("Congress first enacted the personal injury compensation exclusion in 1918 at a time when such payments were considered the return of human capital, and thus not constitutionally taxable 'income' under the 16th amendment. The concept of a return of human capital lost through injury continues to support the exclusion. The recipient of personal injury damages is in effect forced to sell some part of her physical or emotional well-being in return for money." (citations omitted)).

239 See generally Zelenak, supra note 208.

role in theorizing the tax treatment of alimony. Family law theory suggests that alimony is a tool to compensate for or prevent loss of human capital, not unlike personal injury awards. Alimony basis provides a means of tracking investments in and of human capital—investments that are then recouped via alimony payments. The following Part explores the human capital theory justification for keeping alimony in the base of the payor.

a. Human Capital, Alimony Basis, and the Tax Treatment of the Recipient

Applying the concept of alimony basis to the tax treatment of the alimony recipient illustrates how alimony theory calls into doubt whether alimony is clearly income to the recipient. If, in turn, alimony is not income to the recipient, the foundation of the current regime is on shaky ground. What follows are descriptions of three sets of taxpayers whose marriages give rise to awards of reimbursement, periodic, and rehabilitative alimony, respectively. Each scenario illustrates slightly different investments of and in human capital, providing the opportunity to flesh out the concept of alimony basis and its relevance to the proposed reform.

i. Contribution Theory and Reimbursement Alimony—Hans and Gagan[240]

Gagan and Hans met in college. Both wanted to pursue graduate degrees, but Hans had already been admitted to his MBA program when the couple decided to marry, so both decided it best to simply delay Gagan's degree (which likely would require a move) until after Hans completed his program. Gagan accepted a job as an admissions counselor at a local college to support himself and Hans. Three years after the couple married and a year after Hans completed his MBA, the couple divorced. A New Jersey court awarded Gagan reimbursement alimony to compensate him for the support provided to Hans during his degree program.[241]

Contribution theory and reimbursement alimony may be the least controversial scenario in which to recognize alimony basis. Contribution theory grounds Gagan's right to alimony in equity; he invested in Hans's human capital acquisition via a combination of financial capital (paying Hans's tuition and fees and providing for his support) and human capital (delaying the enhancement to his own earning capacity). Alimony theory holds that to allow Hans to benefit from that investment would enrich Hans and violate

240 Each of these examples is crafted with facts which suggest that the type of alimony awarded would be appropriate based on those facts. Alimony awards are, however, very inconsistent, so the outcome could vary from state to state or even within a given state. See McMullen, supra note 188, at 45–47, 49–50. This uncertainty should not cut against the proposed reform, however. See discussion supra note 188.

241 See N.J. Stat. Ann. § 2A:34-23 (West 2017).

notions of fairness.[242] By keying the amount of reimbursement alimony to the extent of the investment by the recipient in the payor's human capital, contribution theory casts reimbursement alimony as a simple repayment of capital.[243] There is, in such a case, no real gain. Gagan is instead returned, as best as possible, to his status before he supported Hans.

If the family law theory characterization of reimbursement alimony is correct, then tax can respect the substance of such alimony by allowing Gagan something like basis—alimony basis—in Hans's newly acquired human capital. As alimony theory instructs, Gagan's financial and human capital investments represent real costs. As such, Gagan has alimony basis in Hans's new human capital: his MBA degree. Gagan's basis in Hans's newly acquired human capital then offsets any potential income when, after divorce, Hans repays Gagan the value of his investment.

To be clear, current tax doctrine does not permit basis in or of human capital. Thus, the proposed concept of alimony basis is analogous to, but distinct from, the basis of current doctrine. However, allowing something like basis—alimony basis—to offset gain from alimony payments in this context best supports the goal of alimony itself: the making whole of Gagan and recognition of enrichment of Hans. Because reimbursement alimony is keyed to the amount invested by the recipient spouse, taxing the award leaves Gagan less than whole. Consider the simplest case in which Gagan paid Hans $80,000 of tuition and fees and the court awards $80,000 of reimbursement alimony. Assuming every dollar is taxable at a 15 percent rate, taxation would reduce the award by $12,000, frustrating the goal of reimbursement alimony. If instead we see Gagan's investment as creating $80,000 of alimony basis, he will incur no tax because alimony basis offsets his alimony award, and the goal of reimbursement alimony—making Gagan whole—is achieved.

With this comparatively uncomplicated test case in mind, it is appropriate to discuss a potential challenge to and the proper scope of the concept of alimony basis. Allowing alimony basis in human capital in all but the

242 For an early example of the concept, see Mahoney v. Mahoney, 453 A.2d 527, 534 (N.J. 1982) ("To provide a fair and effective means of compensating a supporting spouse who has suffered a loss or reduction of support, or has incurred a lower standard of living, or has been deprived of a better standard of living in the future, the Court now introduces the concept of reimbursement alimony into divorce proceedings."); for another example, see Gnall v. Gnall, 119 A.3d 891, 902 (N.J. 2015) ("Reimbursement alimony is awarded appropriately to a spouse who has made financial sacrifices, resulting in a temporarily reduced standard of living, in order to allow the other spouse to secure an advanced degree or professional license to enhance the parties' future standard of living."). Gnall provides the interesting statement that New Jersey adopted reimbursement alimony to resist a push to recognize degrees as marital property, perhaps in recognition of the potential validity of that view. Note that in both cases, the New Jersey law limits the amount to financial contributions—a narrower approach than that of alimony theory but one that strengthens the position that the recipient experiences no real gain.

243 New Jersey state law expressly provides for the possibility of reimbursement alimony when one spouse supports another's acquisition of a degree (i.e., acquisition of human capital). See N.J. Stat. Ann. § 2A:34-23 (West 2017) ("Reimbursement alimony may be awarded under circumstances in which one party supported the other through an advanced education, anticipating participation in the fruits of the earning capacity generated by that education. An award of reimbursement alimony shall not be modified for any reason.").

simplest of cases may raise valuation concerns.[244] In the example above, Gagan incurred a clear $80,000 cost. If the court instead awards $100,000 of reimbursement alimony, then how should the additional $20,000 be treated? It is cost that creates basis, not value.[245] Where, however, the cost incurred is human capital, valuation and cost may be assumed to be the same.[246] Alimony theory counsels that Gagan's right to $100,000 derives from his investment of a mix of financial and human capital. Herein, then, the excess $20,000 is the value of his human capital investment. It should also be his alimony basis.[247]

Tax law need not be defeated by the challenge of valuing human capital in the alimony context.[248] Instead, tax law should accept the family law determination of the value of the lost or damaged human capital as its cost.[249] The statement is likely anathema to fellow tax scholars.[250] However, it also is

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244 Other scholars have considered this challenge. Noting that tax accepts approximations in areas such as depreciation, Professor Paul B. Stephan III writes:

> Mechanical difficulties in calculating the value of changes in human capital, however, should not dissuade acknowledgment that the changes exist. Although similar measurement problems have prevented comprehensive taxation of unrealized changes in the value of physical capital, they have not barred the use of rules that provide some offsets or approximations.

Stephan, supra note 208, at 1363.

245 For example, a bathroom remodel that costs $5,000 but increases the value of the home by $8,000 still creates only $5,000 of basis.

246 This was essentially the approach in United States v. Davis, 370 U.S. 65, 66 (1962). Section 1041 of the Internal Revenue Code overruled the case in response to different policy concerns, making transfers between spouses nonrecognition events. Nevertheless, there are and have been limited situations in which tax accepts basis equal to value. On valuation, see, for an example, Dodge, supra note 60, at 153 n.62 and Davenport, supra note 208.

247 Valuing human capital is difficult. See, e.g., Davenport, supra note 208 (discussing foregone earnings and their role in cost and valuation of human capital: "That figure as to any particular student is, of course, unknowable, since the actual future earnings will depend on many variables and contingencies, including economic conditions, the student's motivation and intelligence, fortuitous circumstances, and her own preferences and choices that guide her down a career path. One could indulge in statistical averages, but even then the future earnings attributable to education as opposed to other factors cannot be readily isolated."). Human capital is valued by wages but distinct therefrom. See Dodge, supra note 60.

248 Cf. Dodge, supra note 60, at 153 (challenging the idea that valuation is possible).

249 Inconsistency in awards should not undermine the proposed reform. The concern that may arise is that if courts regularly undervalue or overvalue lost capital, then the recipient might remain uncompensated or receive taxable gain. The prospect of the recipient remaining undercompensated is less troubling for tax purposes. True, she may have an unrecoverable loss, but requiring tax law to look over the shoulder of family law would work against an advantage of this proposal: that it keep tax law in its area of expertise. The opposite error—overvaluing the lost human capital—is more concerning because it raises the specter of the recipient avoiding tax on what is a true gain (not unlike punitive damages in section 104(a)(2)). Accepting family law's valuation of rights to alimony creates this risk, but deferring to that valuation is a key part of making the taxation of alimony more administrable. And the concern should not be inflated. If the proposed reform is accepted, spouses would have little reason to shift property settlements to alimony as the latter would no longer give rise to a deduction.

250 See, e.g., Dodge, supra note 217, at 420–21 ("Human capital simply does not possess basis as a matter of law. Basis represents a taxpayer's cost expressed in dollars that have previously been taxable to that taxpayer. The principal component of human capital is a person's body and its attendant capabilities. Other components result from the acquisition of learning, culture, social skills, and the like. However, none of these items is considered 'income' (an accession to wealth) upon acquisition. In addition, any costs incurred by third parties (parents, relatives, friends, government) in

a necessary simplifying assumption that points to the proper scope of the proposed concept of alimony basis.

Alimony basis is not intended to track conventional tax basis. Rather, it is a concept introduced to support the proposed exclusion by illustrating that alimony theory recognizes loss, damage, and investment of human capital as true, recoverable costs. Just as human capital resembles but is distinct from conventional capital, so too is alimony basis distinct from conventional basis. The concept of alimony basis does not map cleanly onto conventional basis, but it does provide a mechanism for tracking the investment of the recipient spouse in the payor spouse's human capital *for the purposes of considering whether alimony should be viewed as clearly taxable income*. Where the presence of alimony basis seems clear, the view that alimony is without a doubt taxable income to the recipient becomes harder to accept. In turn, excluding alimony payments from income gains theoretical footing. With the role of alimony basis in mind, the following two examples further flesh out how alimony theory points to the proposed reform of tax alimony.

ii. Loss Theory and Long-Term Periodic Alimony—Carlos and Jean

Carlos and Jean have been married thirty years. Though Carlos trained as a linguist, when Jean received a professorship at the University of Montana School of Law, the couple decided to move to Missoula, knowing it meant Carlos would not be able to work in his chosen profession. Shortly after moving to Missoula, Jean and Carlos decided to have a child. Carlos remained at home with the child until he was five years old, at which point he took a part-time position teaching English to native Spanish speakers. Some years later, when both Carlos and Jean were sixty-five, the couple decided to separate. A Montana family court awarded Carlos alimony until his death or remarriage.[251]

Assume the Montana court that awards the alimony places a great deal of emphasis on the duration of the marriage and Carlos's lost earning capacity.[252] Stated differently, the court articulates a strong loss theory rationale for

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providing a person with human capital do not transfer to the taxpayer, the Supreme Court having held that third-party contributions to the capital of a corporation have a zero basis to the corporation. Finally, most costs incurred by the taxpayer with her own funds that result in the acquisition of human capital (living costs) are treated as expenses, not capital expenditures. About the only item that might create basis (in theory, at least) would be self-paid education that qualifies one for a new trade or business. However, it appears that such costs do not create basis as a matter of positive law, on the theory that inherently personal costs (that cannot be deducted as expenses) cannot be deducted indirectly through capitalization and depreciation or basis offset. In any event, most people incur no human-capital expenditures, and none were alleged to have been incurred in Murphy. Note, however, that such a discrete category of cost is capable of accurate accounting. In sum, human capital is similar to self-created goodwill in having a zero basis (or close to it) as a matter of law." (footnotes omitted)).

251 See Mont. Code Ann. § 40-4-203 (West 2017).

252 This is a reasonable assumption based on these facts. The Montana code states, in pertinent part:

the alimony paid.[253] Unlike Gagan, Carlos did not invest any monetary capital. He did, however, invest his human capital in the marriage. Loss theorists fix the value of that contribution in the decline in Carlos's earning capacity.[254] Loss alimony theorists understand Carlos's progressive decline in earning capacity over the years of the marriage as a cost,[255] an investment in the marriage, and, to some degree, Jean's human capital.

To a loss theorist, Carlos's situation upon divorce may seem very familiar to that of a taxpayer who uses section 104(a)(2) to exclude damages. The divorce is simply a different type of triggering event that prompts the compensation for the lost human capital. The two scenarios are similar in that both involve compensation for lost human capital. But the alimony context may differ in a way that leaves Carlos in an even stronger position than the tort victim. In a loss theory view of alimony, lost human capital justifies the alimony award not simply because it was lost but rather because it was invested incrementally in the marriage and, often, in the human capital of the payor spouse. Thus, a loss theory of alimony strengthens the return of capital analogy beyond that in section 104.

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

(a) lacks sufficient property to provide for the spouse's reasonable needs; and

(b) is unable to be self-supporting through appropriate employment or is the custodian of a child whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside the home.

(2) The maintenance order must be in amounts and for periods of time that the court considers just, without regard to marital misconduct, and after considering all relevant facts, including:

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

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

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

(d) the duration of the marriage;

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

(f) the ability of the spouse from whom maintenance is sought to meet the spouse's own needs while meeting those of the spouse seeking maintenance.

Id.

253 In practice, no one theory likely controls a court's rationale. However, to simplify the analysis, this Article analyzes each class of alimony theory independently. Duration of the marriage and lost earning capacity are relevant factors under Montana law. See, e.g., In re Marriage of Rudolf, 164 P.3d 907, 912 (2007) ("Maintenance is interrelated with and supplements a property division. If, after an equitable division of the marital assets, one party lacks sufficient property to fulfill his or her reasonable financial needs, maintenance may be appropriate. The duration of the marriage is one of the factors to be considered in fixing the duration of maintenance. During the course of a marriage, a spouse, by contributing to the marriage over time, may have lost the ability to support himself or herself independently. If the marriage ends, maintenance may be necessary to allow that spouse to acquire and develop skills to support himself or herself in the accustomed manner and, perhaps, even to acquire an estate." (citation omitted)).

254 See discussion supra Part II.C.A.2.ii.

255 See supra Part II.C.A.2.ii. Such a shift undoubtedly impacts Carlos's earning capacity.

In loss alimony theory, unlike in the section 104 context, human capital is lost or damaged *due to its investment in something external*. Because loss theory gives equal weight to market and nonmarket investments and monetary and nonmonetary costs, it respects investments of human capital in the marriage or the human capital of another. The marriage itself and the human capital of the payor spouse are viewed as separate, discernable assets. Loss theory, then, gives alimony a strong, property-like hue. And in tax, property can have basis.

iii. Gain Theory and Rehabilitation Alimony—Susan and Sarah

Susan and Sarah were married five years before Susan filed for divorce. Susan owns a small engineering firm in which Sarah worked as an office manager. When Susan opened the firm, Sarah intended to assist her for a limited period of time before returning to her CPA studies. Despite that intention, both decided the firm needed more than just a few months of assistance and agreed it was best to delay Sarah's continuing studies until the firm could support a full-time, nonfamily employee. In divorce proceedings, an Arizona court awarded Sarah alimony for three years, at which point Sarah would have had time to complete her CPA.[256]

Gain theory holds that Sarah's investment of human capital gives her a right to alimony because her investment is either: (1) a loan of human capital that creates a debtor/creditor relationship; (2) a contribution that gives rise to new marital capital; or (3) a contribution that gives the recipient spouse an interest in the payor's human capital.[257] Situation three closely tracks the reimbursement alimony analysis previously discussed and need not be addressed again. Situations one and two require further discussion.

If Sarah's human capital investment is construed as a loan,[258] it should create alimony basis in the loan that could offset repayment of the loan principal, herein the alimony award itself.[259] If instead, Susan and Sarah are seen as creating a wholly new form of marital capital, the question of whether alimony is a *return of* invested capital or a *return to* that capital arises. If, for example, marriage is akin to a business entity, where the marital capital formed by both parties' investments gives rise to taxable dividends or

256 Ariz. Rev. Stat. Ann. § 25-319 (2017).

257 See supra Part II.

258 See Starnes, supra note 16, at 281–82.

259 When an individual takes out a loan, the loan proceeds are not viewed as income because they come with an equal and offsetting obligation to repay. Interest received and interest paid, however, may be income or may give rise to a deduction. 26 U.S.C. §§ 61 & 163 provide a starting point for determining the tax consequences of interest. If an alimony award includes something like interest on the "loaned" human capital, that interest should be taxable. However, parsing principal and interest in this context may stretch the loan–human capital analogy too far.

distributive share-like returns to that capital, both such payments are taxable under current law.[260]

But even if marriage is akin to a partnership and divorce is a buyout, an analogy advanced by some gain theorists, the recipient is still entitled to a return of her basis.[261] The question then becomes: is rehabilitative alimony a distributive share (taxable) or a return of basis?[262] Deciding on an answer is no easy task when the strength of the partnership analogy, or how rigorously nontax scholars meant it to apply, is itself at issue. Strictly applying precedent to hold that alimony is clearly a guaranteed payment, because the value is set by agreement and will be paid regardless of earnings, or a distributive share, because it is keyed to future earnings that would have been shared, may stretch the analogy too far.[263]

By awarding rehabilitative alimony, the court allows Sarah to recover the human capital she invested in Susan and her business with the express purpose of allowing her to reinvest in her own human capital.[264] The simplest approach would be to assume that Sarah's recovery is first and only a return of her human capital investment in the marital capital or Susan's increased human capital.[265] Doing so is consistent with the gain theory view of alimony, which sees alimony as ensuring that the payor spouse does not leave the marriage with marital capital exceeding her investment.[266] The return of that investment should be cost-free to Sarah because her investment should be understood to create alimony basis. Characterizing the transaction this way—

260 See Kornhauser, supra note 164, at 1440 (for a tax-specific discussion of analogizing marriage to a business entity).

261 For an opposing view, see id. Professor Kornhauser challenges the utility of the partnership model of marriage. ("Are they like section 736(b) payments in exchange for a partnership interest and therefore non-taxable under section 1041? Or are they like section 736(a) payments, creating taxable income under section 71? These payments for human capital appear to be more akin to sections 736(a) and 71 alimony payments because they relate to the pretax expected return of future earnings. If the couple had stayed married, the joint return would have split this future income as jointly theirs when earned. The payment on divorce, in effect, is doing the same thing. Thus, the payments are analogous to guaranteed payments if the amount of the payment is determined at the time of the settlement (by reference to the present value of the expected return on the medical degree, for example) or to a distributive share if future payments to be made will be tied to actual earnings of the payor spouse.").

262 26 U.S.C. § 736 (2012) distinguishes between payments made in liquidation of a partner's interest.

263 Kornhauser, supra note 164, at 1440 (highlighting that the model may not account for the complexity of partnership rules: "Unless the model is expanded to include the complex partnership tax rules regarding special allocations, however, it cannot take into account the unequal contributions, benefits and control that occurred during the marriage.").

264 An analogy may be made here to an involuntary conversion. Dodge, supra note 60, at 162–63.

265 Indeed, there is reason to believe court alimony awards systematically undervalue the lost or damaged human capital, settling for only partial compensation. Scott, supra note 124, at 1310–11 ("Although some modern law reform proposals advocate fully compensating the homemaker for loss of earning capacity or for her continuing interest in her former spouse's human capital, courts currently do not pursue either goal. Rather, alimony generally provides support so that the formerly dependent spouse can 're-tool,' acquiring the necessary education and training to become self-sufficient. A relatively small percentage of divorces include alimony awards, suggesting that the ability to obtain even modest employment disqualifies a former homemaker from support." (footnote omitted)). As such, accepting the court's valuation of human capital as its basis may err on the side of understating costs.

266 See Starnes, supra note 16, at 281.

respecting investments of human capital as true costs—is consistent with the gain theory view of alimony. Gain theory focuses on ensuring that Sarah does not leave the marriage enriched by Susan's human capital investment. Thus, the award is keyed toward allowing Susan to recover her investment. As in the case of contribution theory and reimbursement alimony as well as periodic alimony and loss theory, gain theory suggests that Sarah's human capital investment should create something like basis to allow her to recover her full investment—undiminished by tax.[267]

By tracing the proposed concept of alimony basis through different types of and rationales for alimony, these three examples help illustrate the core contribution of alimony theory for tax: alimony payments do not indisputably give rise to income in the form of taxable gain. Though current doctrine does not permit basis in human capital or basis created by human capital, alimony theory grounds the very right to alimony in the idea that such investments are *very real costs*. It also gives a property-like hue to alimony, human capital, and marital capital. The concept of alimony basis points to a compromise between current tax law and family law theory: Investments in and of human capital do not create conventional basis, but alimony theory pushes us to recognize them as costs. Divorce triggers a potential loss that alimony seeks to prevent by requiring a return of those costs. By thus characterizing alimony, alimony theory pushes tax law to consider whether alimony *should* create taxable gain or whether it is, in fact, closer to a return of something like basis. Rather than overhaul basis entirely, we can respect alimony theory and its views on human capital in marriage and divorce by letting the theoretical concept of alimony basis enter the Code in a more limited and less controversial fashion—namely, as a ground for supporting the proposed exclusion of alimony from the tax base of the recipient. Stated differently, where alimony is awarded, tax law can defer to family law and assume the presence of equal and offsetting alimony basis.

b. A Note on the Unit View and the Tax Treatment of the Payor

The prior discussion focused on the implications of alimony theory for the tax treatment of the alimony recipient. But alimony and human capital theory applied to the tax treatment of the payor provides a related but distinct rationale for the proposed reform.

Recall that the current tax treatment of alimony continues to view the divorced couple as a unit, taxing the alimony only once.[268] The proposed reform maintains this approach. Enforcing any alimony regime that allows a deduction to the payor creates significant compliance concerns, and where compliance concerns are significant, a circumscribed notion of the family as

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266 Singer, *supra* note 141, at 2435–36.

268 *See supra* Part I.

a unit is frequently appropriate.[269] Assuming the validity of the unit view and adopting *arguendo* the proposed reform, two options emerge for the tax treatment of the payor: (1) continuing to allow the payor to deduct alimony paid, or (2) keeping alimony in the base of the payor by denying a deduction. The latter is both the most coherent and easily administrable choice.[270]

Just as human capital theories of alimony suggest that tax should recognize investments in and of human capital as true costs that create alimony basis, the same theories hold that the payor received a true benefit from the recipient spouse's investments. Keeping alimony in the base of the payor provides an opportunity to tax that benefit as income.[271] Had the couple remained married, the benefit conferred might have been viewed as imputed income, a gift, or an accumulation of human capital.[272] Conventionally, such gains are not taxed, but it does not follow that they are not income. Imputed income, for example, remains untaxed not because we cannot identify it as income but, instead, because it is too difficult to tax.[273] Indeed, scholars have

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269 Geier, *supra* note 14, at 431. The author has argued elsewhere that Congress and the Service utilize a relatively circumscribed notion of the family when matters of compliance arise. *See* Davis, *supra* note 13, at 199–200.

270 Taxing individuals on income that is not ultimately at their disposal can quickly give rise to debates over endowment taxation. *See generally* Kirk J. Stark, *Enslaving the Beachcomber: Some Thoughts on the Liberty Objections to Endowment Taxation*, 18 CAN. J.L. & JURIS. 47 (2005). The proposed disallowance of a deduction for alimony paid falls far short of taxing individuals on income they *could* earn but for those interested in endowment taxation.

271 Herein, human capital theories of alimony provide a response to a potential challenge to the argument that alimony is not clearly income to the recipient. Critics may contend that rather than a nontaxable return of capital, alimony is delayed payment for services rendered and, as such, is still income to the recipient. But consider the lessons of alimony theory in conjunction with the unit view. Loss, gain, and contribution theories all seek to (a) respect the recipient's human and financial capital investments as true costs and (b) prevent the payor spouse from leaving the marriage enriched by the recipient's investments. But even if alimony is construed as delayed wages paid to the recipient, an alimony deduction remains improper because the deduction results in the payor spouse being untaxed on at least some of the benefit conferred by the recipient spouse. A spouse who pays $20,000 in alimony has been enriched to the tune of $20,000 but, after taking a deduction for alimony paid, will have paid only $12,080, assuming a 39.6 percent tax rate. Though she paid $20,000 in alimony, the deduction saves her $7,920, making her out-of-pocket cost substantially less than the extent to which she was enriched. Such enrichment violates the very theories that give rise to a right to alimony. By keeping the alimony in the tax base of the payor, the proposed reform upholds the idea that the payor spouse should not leave the marriage enriched at the cost of the recipient spouse's human capital. Of course, alimony could be income to both the payor and the recipient, but the unit view counsels against taxing alimony to both parties.

272 *See* Mary Louise Fellows, *Rocking the Tax Code: A Case Study of Employment-Related Child-Care Expenditures*, 10 YALE J.L. & FEMINISM 307, 358 (1998) (acknowledging and critiquing this approach to imputed income in the family).

273 *Id.* ("The first reason for its exclusion from the definition of the ideal income is that it is administratively difficult to value. The second reason for its exclusion is that it is viewed as inconsequential for determining taxpayers' ability to pay. Its trivial importance is based on the presumption that imputed income, most especially imputed income from services, varies 'with considerable regularity, from one income class to the next, along the income scale.' The third reason for its exclusion is that to include imputed income in the tax base would be inconsistent with American values that require limited

suggested that taxing imputed income from the benefits created by, for example, stay-at-home spouses could create a more equitable tax system.[274] Alimony could function, then, as a delayed tax on the imputed income of the payor spouse.[275]

Ultimately, the truth of the substance of alimony may elude us or may not be susceptible to ready tax classification. Asking one spouse to continue to support another may be the result of multiple policy goals that are sometimes in tension.[276] At the very least, the concerns advanced by contemporary alimony theorists—that absent alimony one spouse would be enriched because of the other's investments in and of human capital—suggest that the income question of alimony is not easily answered. Family law theory of alimony calls into question whether the recipient spouse truly has a taxable gain, while it also identifies untaxed income in the hands of the payor spouse. Though there are compelling reasons to support this argument—reasons similar to those invoked by scholars who argue for an expansion of the section 104 exclusion or the reform of tax treatment of educational costs—human capital theory is not the only justification for the proposed reform. What follows are supporting rationales for a no-deduction/exclusion alimony regime.

3. Administrability, Compliance, and Equity to Boot!

Family law gives tax law tools with which to evaluate to whom alimony *should* be taxed, and this Article has argued that reconciling tax and family law concepts of alimony is the best path to reform. However, independent of analyzing what alimony is in substance and the tax treatment that should follow, administrability, compliance, and equity concerns all also point toward the wisdom of taxing alimony to the payor rather than the recipient. For those unwilling to accept that alimony is a nontaxable return of alimony basis in or of human capital, the following parts provide strong alternative rationales for

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governmental interference with an individual's private life. Although many policymakers might argue that, without unduly sacrificing administrative ease or individual privacy, more imputed income, especially from property, should be included in the tax base to more accurately measure each taxpayer's ability to pay, no one seriously argues that all imputed income could or should be included in the tax base." (footnotes omitted)).

274 *See, e.g.*, Nancy C. Staudt, *Taxing Housework*, 84 GEO. L.J. 1571, 1623–24 (1996) (a highly influential article in the area).

275 The divorce provides the moment that fixes the value of the imputed income. Critics may argue that taxing the imputed income of some couples creates an inequity insofar as other married couples' imputed income continues to elude taxation. The intersection of taxation and marriage is a fraught area, and this Article makes no attempt to solve all its policy challenges. Indeed, the author supports proposals that seek to acknowledge the differently situated nature of, for example, dual-earner couples and single-earner households. For a recent excellent example of this, see Shannon Weeks McCormack, *Overtaxing the Working Family: Uncle Sam and the Childcare Squeeze*, 114 MICH. L. REV. 559 (2016). Such proposals would, indirectly, account for the greater imputed income of some couples in a way similar to the reform advanced by this Article.

276 *See* Scott, *supra* note 124, at 1242–44.

the proposed reform. For those in agreement with the human capital rationale articulated above, the following discussions bolster the argument that the weight of theory, practice, and policy concerns is on the side of a no-deduction/exclusion regime.

a. Alimony of One, Property Settlement of Another

As discussed in Part II, family law doctrine and practice blur the line between alimony and property settlement.[277] Where couples have little or no property, alimony is awarded in lieu of a property settlement.[278] The alimony factors adopted by many states push courts to consider the totality of the award, tweaking alimony as necessary to account for insufficient property awards to a recipient spouse.[279] As rehabilitative or reimbursement awards rise,[280] the dividing line between property settlement and alimony further weakens.[281] Doctrinally, both types of alimony run the risk of being categorized as property settlements under the recapture rules of section 71(f).[282] Theoretically, both forms of alimony cast their respective payments as payments for lost human capital or investments in the human capital of the payor (or a mix thereof), giving each a property-like hue. Yet current tax law still pretends there is a clear line between support and property settlement. Tax law simply should not enter the morass with its own definition of alimony that erects a wall between alimony and property settlement that family law doctrine, practice, and theory do not support.

b. A Meaningful Change in Rates

In adopting the current regime, Congress cited high marginal rates that left alimony payors with little disposable income after alimony and taxes as a key motivator of the change in law.[283] Current law dramatically weakens that justification. The highest marginal rate for ordinary income is now 39.6 percent,[284] less than half of the 88 percent rate in place when lawmakers were concerned with payors' disposable incomes.[285] The argument that the rate

277 *See* Singer, *supra* note 175, at 45; *supra* Part II.

278 *See, e.g.*, Bold v. Bold, 574 A.2d 552, 556 (Pa. 1990).

279 *See supra* notes 175–77 and accompanying materials.

280 Morgan, *supra* note 15, at 74.

281 *See* Carbone, *supra* note 144, at 1499; discussion *supra* Part II.

282 Melcher, *supra* note 15, at 78 ("Recapture is more of a trap than a rule.").

283 *See supra* Part I.

284 26 U.S.C. § 1 (2012) (providing the rate schedules for different filing statuses). For schedules indexed for inflation, see REV. PROC. 2017-58. This rate does not account for payroll or state and local taxes.

285 For a comparison of historic rates, see *Historic Highest Marginal Income Tax Rates*, TAX POLICY CENTER, http://www.taxpolicycenter.org/statistics/historical-highest-marginal-income-tax-rates (last

concern should no longer apply is not new; it was first made by Professor Donald Berman after the 1984 reforms aimed at simplifying the tax treatment of alimony.[286] Importantly, at the time Professor Berman wrote, the highest marginal rate was 50 percent, still higher than in current law.[287] Stripped of the concern that without a deduction, alimony payors would be taxed into poverty, Professor Berman finds little to recommend the deduction.[288] Lower rates on ordinary income are not, in isolation, sufficient to justify taxing income to one party over another. However, when high rates—rather than a principled view of alimony as more properly income of the recipient—were a primary justification for shifting the tax burden of alimony to the recipient, then a significant reduction in those rates should change the discussion.[289] The current rate schedule thus places another thumb on the scale in favor of the proposed reform.[290]

c. Tax Planning, Equity, and the Social Safety Net

Though rarely the primary rationale, some scholars have posited that recipient spouses may receive more income after tax in a deduction/inclusion world.[291] A simple example clarifies how: Assume a payor in the 28 percent

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visited Mar. 16, 2018). As alimony shifts from long-term to short-term forms, this concern is further mitigated. *See* Shehan, et al., *Alimony: An Anomaly in Family Social Science*, 51 FAM. RELATIONS 308 (2002) (noting that though the data are scant, rehabilitative alimony is on the rise).

286 Donald H. Berman, *The Alimony Deduction: Time to Slaughter the Sacred Cow*, 5 AM. J. TAX POL'Y 49, 49–50 (1985).

287 *Id.* at 49. Professor Berman argues, in no uncertain terms, that the current tax treatment of alimony "results solely from provisions enacted to give relief to taxpayers burdened by both high alimony payments and the high income tax rates imposed during World War II. The original reason for these provisions has disappeared . . . . Since the law governing the deduction of payments to a former spouse is inequitable, complex, and arbitrary, I argue that all payments to and from divorced taxpayers should be treated as nondeductible by the payor and not includible in the income of the recipient." *Id.* (footnotes omitted). Professor Berman goes on to argue that the degree of planning section 71 would permit (Professor Berman wrote before the 1986 change to child support) created vertical and horizontal equity concerns because it benefited sophisticated taxpayers who structured agreements to achieve their preferred tax classification and make the best use of any rate disparities between recipient and payor. *Id.* at 56–58. Finding a thin line separating alimony, child support, and property settlements and finding the inequities and complexities significant, Professor Berman finds no strong reason to preserve a deduction. *Id.* at 49, 76–79.

288 *See id.*

289 *See* Berman, *supra* note 286, at 49.

290 *See* Shehan, *supra* note 188, at 310 (noting that the data are scant, but rehabilitative alimony is on the rise).

291 Hjorth, *supra* note 88, at 187–88; *see also* Geier, *supra* note 14, at 365 ("[T]ax arbitrage is built into the current system already, that people do not get divorced in order to engage in income-shifting for tax purposes, and that the income-shifting that can occur is likely a good and defensible outcome on public policy grounds in most situations in which it can occur. Such income-shifting encourages the higher-bracket spouse to transfer funds to the lower-bracket spouse (presumably the more needy spouse), often leaving the lower-bracket spouse with more after-tax income than she would otherwise have if income-shifting were disallowed.").

bracket and a recipient in the 15 percent bracket.[292] The recipient spouse wants $20,000 a year after tax. The couple could decide to bust section 71 by agreeing that the payments are not alimony and are not deductible.[293] But doing so would leave money on the table. The payor should instead offer an additional $3,500 annually but require that amount to satisfy the section 71/215 regime. After paying federal taxes at 15 percent, the recipient still has approximately $20,000, and the payor's out-of-pocket cost is less because of the value of the deduction.[294] A savvy recipient could push to share in the tax savings, thereby receiving more after tax than might be feasible without the prospect of arbitrage.

Accepting *arguendo* that encouraging such planning is appropriate, a compressed rate schedule makes such planning harder to accomplish.[295] More importantly, however, such planning is not so clearly good policy that it alone justifies deduction/inclusion treatment. Indeed, by permitting private ordering and arbitrage, the current law may give rise to inequity. Those who are sophisticated enough to engage in planning may lower their effective tax rates when compared to those who do not understand the arbitrage potential in sections 71 and 215, making the government subsidize their alimony payments.[296]

Further, the fact that some spouses may have more income after-tax if they plan correctly should not justify a largely ineffective tax regime. If we are concerned about the financial situation of divorced couples,[297] we should not comfort ourselves with the idea that well-advised individuals can exploit progressive tax rates to their advantage. Indeed, the individuals most likely to engage in such planning may be the least likely to be at risk, while lower-income couples, whose standard of living suffers post-divorce, are both unlikely to be well advised or be able to utilize such arbitrage to their advantage.

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292 *See* REV. PROC. 2017-58 (relevant tax brackets).

293 Recall that the couple can do so by the terms of section 71 itself.

294 This is so because of the rate differential between the spouses. The payor's after-tax cost of a $23,500 alimony payment is $16,920, and the recipient retains $19,975 after tax.

295 *See* Jaffe & Riff, *supra* note 91, at 29 (noting that arbitrage is unavailable when both spouses are in the same tax bracket).

296 *See, e.g.*, *supra* note 63. This critique may be particularly salient in the current climate of marked wealth inequality. Recent tax return data support the argument that the alimony deduction inures to the benefit of the wealthy, with more than 34 percent of alimony deduction for taxable year 2011 taken by those with AGI of $500,000 or more. *SOI Tax Stats – Individual Income Tax Returns*, IRS.GOV, https://www.irs.gov/statistics/soi-tax-stats-individual-income-tax-returns (last visited May 1, 2018).

297 Such concern might be warranted. For a discussion of the financial impacts of divorce, see Amelia Hill, *Men Become Richer After Divorce*, THE GUARDIAN (Jan. 24, 2009, 7:01 PM), https://www.theguardian.com/lifeandstyle/2009/jan/25/divorce-women-research. *See also* Darlena Cunha, *The Divorce Gap*, THE ATLANTIC (Apr. 28, 2016), https://www.theatlantic.com/business/archive/2016/04/the-divorce-gap/480333/; Jonathan D. Fisher & Angela C. Lyons, *Till Debt Do Us Part: A Model of Divorce and Personal Bankruptcy*, 4 REV. ECON. HOUSEHOLD 35 (2006) (noting the need for further study to determine if divorce causes financial strain or results from it); Jay L. Zagorsky, *Marriage and Divorce's Impact on Wealth*, 41 J. SOC. 406 (2005).

In short, we should not weakly encourage exploiting the progressive rate structure in the hopes that the recipient spouse and/or child are in a better after-tax position.

d. Making Compliance and Enforcement Easier

Setting aside all the previously discussed rationales, compliance concerns strongly support the proposed no-deduction/exclusion regime. Scholarship on compliance and IRS data establish that the compliance rate where there is neither withholding nor information reporting is 44 percent, markedly lower than the overall compliance rate of 83.1 percent.[298] Keeping alimony in the tax base of the payor is simpler than and should boost compliance above that of the current regime.[299] Because no deduction would be allowed and no inclusion required by the recipient under the proposed reform, there is no risk of mismatch or overstated deduction. Gone too would be the complexity of the excess alimony rules. Though the proposed reform would not eliminate the need for representation in divorce, it would take the problem of tax planning out of consideration.

CONCLUSION

Tax law has long struggled with the proper treatment of alimony, and taxpayers, courts, the Service, and the fisc continue to wrestle with the current regime. This Article draws on the insights of family law theory to reform the tax alimony regime. Because family law theory respects investments in and of human capital as true costs, it challenges tax to find a means of respecting those costs so as not to frustrate the purpose of alimony itself. Alimony basis provides the solution. It enables tax law to respect the key contribution of family law theory of alimony: that alimony is not taxable income to the recipient. Alimony basis provides a theoretical offset to any potential alimony income—a way to treat alimony as what family law theory believes it to be in substance: a nontaxable return of or compensation for lost or damaged human capital. Dispelling the idea that alimony is clearly income to the recipient removes this common objection to the reform advocated by this Article: unifying the tax treatment of transfers at or incident to divorce. Rationalizing the tax alimony regime with family law in this way simplifies tax administration and compliance and reduces opportunities for tax planning

298 *Problems at the Internal Revenue Service: Closing the Tax Gap and Preventing Identity Theft: Hearing Before the H. Comm. on Oversight and Gov't Reform, Subcomm. on Gov't Org., Efficiency, and Fin. Mgmt*, 112th Cong. 4 (2012) (statement of Hon. J. Russell George, Treasury Inspector General for Tax Admin.); *see* Lederman, *supra* note 27, at 1736; *IRS Releases New Tax Gap Estimates*, IRS.GOV, https://www.irs.gov/newsroom/irs-releases-new-tax-gap-estimates-compliance-rates-remain-statistically-unchanged-from-previous-study (last visited March 30, 2018).

299 *See* Geier, *supra* note 14, at 434–35 (arguing against the no-deduction/exclusion in the name of simplicity).

that benefit high-income individuals. Rather than persist in its adherence to a now hard-to-defend view that alimony and property settlements are clearly distinguishable, tax law should embrace contemporary theories of alimony and erase the line in the sand between transfers at or incident to divorce.