UNPRINCIPLED FAMILY DISSOLUTION: THE AMERICAN LAW INSTITUTE'S RECOMMENDATIONS FOR SPOUSAL SUPPORT AND DIVISION OF PROPERTY

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I. INTRODUCTION

Principles of the Law of Family Dissolution: Analysis and Recommendations (the "*Principles*")[1] reflects eleven years' work by a massive team of reporters, advisors, and consultative groups.[2] A former director of the ALI described the project as "among the most important that the Institute has ever undertaken."[3] The task took on Herculean dimensions. Unfortunately, the final result is profoundly disappointing, particularly in contrast to the ALI's outstanding work in the Restatements, which have often exerted a strong positive influence on major areas of law.[4]

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1. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS (2002) [hereinafter PRINCIPLES].

2. My own minuscule role, both in the "Members Consultative Group" for the *Principles* and as a member of the Institute, had no effect on the final result. After one meeting, it became clear that both the Group and the Reporters were marching to a very different beat and that my efforts to alter their views would be futile. I tried again at the May, 2000, Annual Meeting, introducing three motions to amend chapters 6 and 7, but they were all defeated by voice votes. *See* 77 A.L.I. PROC. 67, 88 (2000).

3. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS, at xi (Tentative Draft No. 3 Part II, 1998).

4. As of April 1, 2002, the number of published case citations to the Restatements was just under 155,000. Over forty percent of the citations were to the particularly influential Restatement of Torts. *See* 2002 A.L.I. ANN. REP. 15.

My concern is that the *Principles*, published with the prestigious imprimatur of the ALI, may impede much needed reforms and even lead the legislators, judges, and rule makers to whom they are addressed to adopt unsound policies. In seeking to ward off these potentially harmful effects, I want first to analyze exactly what the Institute's imprimatur on the *Principles* really means and then to demonstrate why their uncritical acceptance as guideposts would be unwise. They contain serious deficiencies that should be corrected.

At the outset, I have concerns about the procedures under which the *Principles* were passed. Although its bylaws require authorization by the membership and approval by the Council for publication of any work as the Institute's position,[5] the bylaws also provide that "[a] quorum for any session of a meeting of the members is established by registration during the meeting of 400 members . . . ."[6] Thus a quorum is conclusively deemed to be present for *all* sessions of a meeting as soon as a little over 10% of the approximately 3800 members[7] have *registered*, even though the number *present* and *voting* at a given session may be minimal. "A majority of the members voting on any question during any meeting or session is effective as action of the membership,"[8] and there is no proxy voting. As a result, fundamental matters of policy may be decided by a handful of votes,[9] and may reflect the views of only a tiny fraction of the membership. Yet the *Principles* are published as the position of the Institute, with no indication of the number of members who actually voted on any given portion or the narrow margin by which it was adopted. Even a careful reader of the Proceedings of the Institute's Annual Meeting may learn no more than that a given motion was adopted (or defeated) by a voice vote, with no way of

5. *See* 2002 A.L.I. ANN. REP. app. 1, at 56.

6. *Id.* § 3.02.

7. First Vice President Harper referred to the former quorum requirement of one fifth of the voting members as approximately 760. *See* 78 A.L.I. PROC. 14 (2001).

8. *See* 2002 A.L.I. ANN. REP. app. 1, at 54.

9. For example, at the 1995 Annual Meeting, a member moved to recommit a highly controversial proposed provision—not presently the law in any state—that would change the character of a spouse's individual property to marital property based merely on the passage of time since the property was acquired, thereby causing the recharacterized property to be equally divided between them on dissolution of their marriage. By a vote of only 101 to 95, the motion to recommit was defeated. *See* 72 A.L.I. PROC. 128, 142 (1995). This challenged section is, therefore, included in the *Principles*, *see* PRINCIPLES, *supra* note 1, § 4.12, thus bearing the Institute's imprimatur, even though a change of only four votes—just over one tenth of one percent of the membership—would have caused the section to be recommitted.

knowing how many voices were heard.

If the *Principles* are to guide legislative action or judicial decision, it should be either because of their inherent merit or the reputations of the Reporters themselves,[10] rather than the eminence of the many distinguished lawyers, judges, and academics listed as members but largely absent from the meetings at which the *Principles* were approved. To emphasize their source, I will often refer here to "the Reporters," rather than to "the *Principles*."

A. Why Serious Reform of Family Law Is Needed

This comment will deal with only two aspects of divorce, as well as those "domestic partnerships" between unmarried cohabitants whose termination the Reporters would generally treat like divorce:[11] alimony (increasingly referred to as maintenance) and division of property. These are both areas in which family law cries out for serious reform. The economic consequences of divorce in a given state are often highly unpredictable because of statutes and court decisions that accord trial judges a large measure of discretion in allocating property between the spouses and in setting the amount and duration of any alimony payments,[12] as well as the lengthy lists of factors that judges often are either directed or authorized to consider in deciding these matters.[13]

Because of the unpredictability this judicial discretion creates, spouses and their lawyers may have little guidance in negotiations for settlement of their claims, and the more risk averse party may suffer a substantial disadvantage as a result.[14] In addition, the negotiating

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10. Chief Reporter Professor Ira Mark Ellman was identified by the Director of the ALI as being responsible for drafting chapters dealing with division of property and "compensatory spousal payments" (presently known as alimony or maintenance). Geoffrey C. Hazard, Jr., *Foreword* to PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS, at xiii, xv (Proposed Final Draft, 1997). Dean Katharine T. Bartlett was Reporter for the chapter dealing with "residential responsibility" (child custody) and Professor Grace Ganz Blumberg was Reporter for the chapter dealing with child support. Geoffrey C. Hazard, Jr., *Foreword* to PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS, at ix, xi (Tentative Draft No. 3, 1998).

11. *See* PRINCIPLES, *supra* note 1, ch. 1, introductory cmt. at 39. *See also id.* § 6.03 (setting forth criteria to determine whether couples are "domestic partners"). For a discussion of these criteria, see David Westfall, *Forcing Incidents of Marriage on Unmarried Cohabitants: The American Law Institute's Principles of Family Dissolution*, 76 NOTRE DAME L. REV. 1467, 1478-80 (2001).

12. *See infra* text accompanying notes 44-45.

13. *See infra* note 54.

14. *See* Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the*

process is likely to be more time-consuming and expensive because of the large number of factors to be considered and the parties' uncertainty as to how they will be viewed by the particular judge who hears the case. And if the spouses do not settle, a trial may be even more costly if the parties seek to introduce relevant evidence for all of the factors that the judge may consider.

A further result of this unpredictability is that both the parties and the general public often may perceive the results to be unfair, with couples who appear to be similarly situated experiencing vastly different economic consequences from divorce. The inevitable result is diminished respect for the legal system and reduced confidence that justice will be done in family law cases, which constitute one-third of the civil actions filed in state courts.[15]

Even if the rules were clear in each state, wide variations in state law would produce major disparities in results for married couples divorced in different states. And the consequences of the end of the kind of cohabitation that the *Principles* treat as dissolution of a "domestic partnership" are even more unpredictable, because of the absence of relevant statutes,[16] as well as the paucity of judicial decisions dealing with claims of former cohabitants after the end of their relationship.[17]

The quest for a uniform law of marriage and divorce goes back at least as far as the formation of the National Conference of Commissioners on Uniform State Laws in 1892,[18] but did not lead to the promulgation of the Uniform Marriage and Divorce Act (UMDA) until 1970.[19] Although the Act was adopted by only eight states,[20] it

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Law: The Case of Divorce, 88 YALE L.J. 950, 979 (1979) (discussing risk aversion in the context of custody disputes).

15. *See* COURT STATISTICS PROJECT, EXAMINING THE WORK OF STATE COURTS, 2001, at 16, 23 (Brian J. Ostrom et al. eds., 2001) (indicating that domestic relations cases comprise 5.2 million of the nearly fifteen million cases filed).

16. Notable exceptions are those statutes that deny enforcement of agreements between cohabitants that are not in writing. *See, e.g.*, MINN. STAT. §§ 513.075-513.076 (2002) (stripping the state's courts of jurisdiction over claims rooted in cohabitation, absent a written agreement); TEX. FAM. CODE ANN. §1.108 (Vernon 1998).

17. The best known decision recognizing cohabitants' capacity to contract with each other and offering them a variety of remedies for claims relating to the incidents of their relationship is of course *Marvin v. Marvin*, 537 P.2d 106 (Cal. 1976). For decisions in other states, see Westfall, *supra* note 11, at 1472-73, 1475 nn.51-54 (2001).

18. *See* UNIF. MARRIAGE AND DIVORCE ACT prefatory note (amended 1973), 9A U.L.A. 160 (1998).

19. *See id.*

20. The adopting states are Arizona, Colorado, Illinois, Kentucky, Minnesota, Missouri, Montana, and Washington. *See id.* at 159 tbl. There have been no more adoptions since 1977, when Illinois was added to the list. *See* 750 ILL. COMP. STAT. §§ 5/101-5/102

embodied fundamental changes that are now reflected in the laws of many other states. It "totally eliminated the traditional concept that divorce is a remedy granted to an innocent spouse, based on the marital fault of the other spouse which has not been connived at, colluded in, or condoned by the innocent spouse."[21] That principle is now generally accepted with the widespread adoption of provisions for no-fault divorce, although many states merely added a no-fault alternative to existing fault-based grounds,[22] with New York a prominent exception that stands by the old rule.[23]

B. Basic Flaws in the Reporters' Response

The Reporters' effort at family law reform falls short in three major respects:

> (1) it fails to promote interstate uniformity, so that under the proposed system the economic consequences of divorce would continue to vary greatly depending upon which state granted the divorce;
>
> (2) it would curtail the autonomy of prospective spouses, domestic partners, and divorcing couples to structure the economic consequences of their relationship or its termination to meet their individually perceived needs; and
>
> (3) it would make only a limited attempt to reign in the role of judicial discretion in determining those consequences.

Unlike the UMDA, the Reporters' objective is not uniformity (except within a state).[24] Rather, it is "to promote . . . the law's 'clarification,' its 'better adaptation to social needs,' and its securing 'the better administration of justice.'"[25] They do recommend rules that would make some issues clearer, but often leave to the rule-

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(2002).

21. UNIF. MARRIAGE AND DIVORCE ACT prefatory note (amended 1973), 9 U.L.A. 161 (1998).

22. *See* Herma Hill Kay, *Equality and Difference: A Perspective on No-Fault Divorce and its Aftermath*, 56 U. CIN. L. REV. 1, 5-6 & n.20 (1987).

23. *See* N.Y. CONSOL. LAW ANN. §170 (1)-(4) (McKinney 1999) (requiring proof of a specified kind of fault, or that the parties have lived separate and apart for a year or more, pursuant either to a decree or a separation agreement, and that the plaintiff has substantially performed the terms of the decree or agreement). The latter provision for a so called "conversion divorce" in effect authorizes divorce by mutual consent. *See id.* § 170(5)-(6).

24. *See* PRINCIPLES, *supra* note 1, ch. 1, introductory cmt. at 29 (discussing "the value of statewide rules establishing presumptive results").

25. Ira Mark Ellman, *Chief Reporter's Foreword* to PRINCIPLES, *supra* note 1, at xvii, xvii (quoting from the Institute's charter).

making authority the determination of both the requisite threshold for a rule's application and the rate at which its effect increases.[26] In addition, they sometimes offer no guidance at all as to the choice between contrasting rules.[27] While complete unanimity among the states on the economic consequences of divorce is not a realistic goal, the Reporters should have done more to guide policymakers and to encourage conformity, rather than inviting individual variations.

The law of family dissolution could serve another important goal: confirming that spouses, prospective spouses, and domestic partners may, if reasonable requirements to protect the parties' interests are satisfied, structure the terms of their divorce to meet their individually-perceived needs. Instead, the *Principles* would curtail the increased autonomy granted to prospective spouses and divorcing couples by the Uniform Premarital Agreement Act[28] and the UMDA.[29] This unhappy consequence follows from provisions in the *Principles* for more intrusive judicial review of the parties' agreements when enforcement is sought.[30] A far better alternative would be to protect the more vulnerable party by requiring independent advice when the agreement was made in order for it to be

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26. *See, e.g.*, PRINCIPLES, *supra* note 1, § 5.04(2)-(3) (suggesting that the rule making authority specify both the duration of marriages and the degree of spousal income disparity under which a spouse would qualify for a presumption of entitlement to compensation for loss of the marital living standard).

27. See, e.g., *id.* §5.04 cmt. f., incorporating for determination of compensatory spousal payments the definition of spousal income for child-support awards in § 3.14, which, "may be based on pretax or after-tax income." *Id.* § 3.14(7).

28. *See* UNIF. PREMARITAL AGREEMENT ACT § 3(a)(3)-(4), 9C U.L.A. 43 (2001). Section 3(a)(3) authorizes the parties to contract, *inter alia*, with respect to the disposition of property upon marital dissolution and, under § 3(a)(4), with respect to "the modification or elimination of spousal support." However, if such provisions dealing with support cause one party "to be eligible for support under a program of public assistance at the time of separation or marital dissolution, a court . . . may require the other party to provide support to the extent necessary to avoid that eligibility." *Id.* § 6(a).

29. *See* UNIF. MARRIAGE AND DIVORCE ACT § 306(a)-(b) (amended 1973), 9A U.L.A. 248-49 (1998). Section 306(a) authorizes the parties to provide in a written separation agreement, *inter alia*, for the disposition of property and for maintenance, and section 306(b) makes such provisions binding on the court unless it finds "that the separation agreement is unconscionable."

30. *See* PRINCIPLES, *supra* note 1, § 7.05. In contrast, RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 9.04 cmt. k (2003), treats a premarital or marital agreement as "unenforceable if it was unconscionable when it was executed." But see Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L .REV. 211, 254 (1995), endorsing a second-look approach to prenuptial agreements because of the parties' "limits of cognition." Eisenberg, however, fails to acknowledge that increased uncertainty about the enforceability of such agreements may prevent marriages from taking place despite the belief of both prospective spouses that marriage on the proposed terms is preferable to not marrying.

enforceable against her, without creating continuing uncertainty about its validity.[31]

In contrast, section 9.04 of the just-published *Restatement (Third) of Property—Wills and Other Donative Transfers*[32] makes no provision, when enforcement of a premarital or marital agreement is sought after the death of a spouse, for judicial review either of its fairness or of the various other factors that may be taken into account in states that provide for equitable distribution of property on divorce. As one of the Reporters pointed out, "the idea of extending the equitable distribution system into the area of elective-share law was rejected because of the discretionary and unpredictable nature of the results under that system."[33]

The appropriate role of judicial discretion, and the persistent failure of the Reporters to recommend needed limitations on its exercise in the context of any of the four major aspects of their recommendations discussed below, is sufficiently pervasive to merit consideration here as a separate topic. But before doing so, it is important to note that in addition to these lost opportunities to move the law forward, the *Principles* are plagued with three recurring deficiencies:

> (1) they are internally inconsistent, at times to the point of incoherence;[34]
>
> (2) they rely on the comforting but inaccurate assumption that no-fault divorce is freely available to spouses everywhere;[35] and

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31. *See* Michael Trebilcock & Steven Elliott, *The Scope and Limits of Legal Paternalism: Altruism and Coercion in Family Financial Arrangements*, *in* THE THEORY OF CONTRACT LAW 45, 64-67 (Peter Benson ed., 2001).

32. *See* RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 9.04 (2003).

33. Lawrence W. Waggoner, *Marital Property Rights in Transition*, 59 MO. L. REV. 21, 51 (1994).

34. *Compare* PRINCIPLES, *supra* note 1, § 5.02 cmt. a (endorsing "[c]ompensation for losses rather than relief of needs" as a basis for interspousal payments after divorce), *with id.* § 5.09 cmt. a (referencing "the policy purpose of an alimony award, which is relief of need"); *compare id.* § 4.12 reporter's notes cmt. a (noting that an award under that section will reduce the award under chapter 5, based on disparity of income,), *with id.* § 5.04 cmt. f ("[s]pousal income from marital property allocated at dissolution between the spouses should not be considered").

35. *See, e.g.*, *id.* §4.10 cmt. b (noting that "[t]he legal remedy available to a spouse who finds a marriage unacceptably burdensome or inequitable is exit. Modern divorce law allows either spouse to end the marriage."). *But see supra* note 23 (the unavailability of no-fault divorce in New York). In *Principles*, *supra* note 1, § 5.02 cmt. c, a more realistic view is taken of the possibility that nonlegal ties may "keep persons in unhappy relationships." It is a matter of common knowledge that religious beliefs may also have that effect.

(3) the treatment of business and economic matters and income tax considerations is surprisingly uninformed and incomplete.[36]

It is important to bear in mind that, in recommendations for division of property and "compensatory spousal payments" (commonly known as alimony or maintenance), the *Principles* embody dramatic departures from the mainstream of American family law.[37] The departures are at least as striking in their treatment of non-marital partners' rights against each other, as well as agreements by cohabitants and prospective spouses to modify those rights.[38] The Reporters also would revolutionize currently prevailing law governing child custody, renamed "custodial responsibility,"[39] and child support,[40] but these are topics for another day.

After exploring the appropriate role of judicial discretion in determining the economic consequences of divorce, this comment will analyze four major aspects of the Reporters' recommendations that fall seriously short of advancing much needed reform of family law:

(1) Initial Awards of Compensatory Payments After Divorce (currently referred to as Alimony or Maintenance);

(2) Duration, Judicial Modification, and Termination of Such Payments;

(3) Characterization and Division of Property on Divorce;

(4) Judicial Review and Enforcement of Separation Agreements.

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36. The absence of any recognition of the special factors involved in determining whether, and to what extent, stock options granted to corporate executives and other employees are to be treated as marital property is the most prominent example. *See infra* Part IV.B.2. Similarly, the treatment of goodwill as divisible marital property does not adequately reflect the relevance of post-divorce services of a spouse in estimating the value attributable to goodwill of a business or professional practice. *See infra* Part IV.B.1. And the discussion of the relationship between property division and compensatory payments ignores the difference in their treatment for income tax purposes. *See infra* note 74.

37. *But see* J. Thomas Oldham, *ALI Principles of Family Dissolution: Some Comments*, 1997 U. ILL. L. REV. 801, 802 (asserting that the property proposals generally restate prevailing law).

38. *See generally* Westfall, *supra* note 11.

39. *See generally* PRINCIPLES, *supra* note 1, § 2.03 cmt. e.

40. *See id.* § 3.01 cmts. a-c.

C. The Reporters' Failure to Reign In Judicial Discretion

The Reporters extol the virtues of statewide rules establishing presumptive results as insuring consistency and predictability,[41] but would impair their effectiveness by unjustified and unnecessary authorization of judicial departures from presumptive results to avoid "a substantial injustice."[42] The Reporters assert: "Clearly, the presumptions established under the required statewide rules must be rebuttable, to allow the trial court or other decisionmaker to respond to the unusual case presenting factual variations no governing statute could anticipate."[43] The prevalence of broad judicial discretion in determining the economic consequences of divorce is all too familiar. It is said, for example, that in the vast majority of states today, the normal approach is "to give broad discretion . . . to trial courts to assign to either spouse property acquired during the marriage, irrespective of title, taking into account the circumstances of the particular case and recognizing the value of the contributions of a nonworking spouse or homemaker to the acquisition of that property."[44] Although greater use is being made of guidelines and rules of thumb in determining alimony, the former often are limited to one or more counties in a state.[45]

Arguments for firm rules or discretionary standards in the context of divorce have been extensively explored by Professor Marsha Garrison from both analytical and empirical perspectives.[46] She notes that "[d]iscretionary standards will typically, through the development of informal rules of thumb and formal precedents, become more rule like. In contrast, rules tend to produce exceptions."[47] Professor Mary Ann Glendon has pointed out that "[f]amily law . . . is characterized by more discretion than any other field of public law."[48]

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41. *See id.* § 1.01 cmt. a.

42. *Id.* § 1.01 cmt. b.

43. *Id.*

44. JOHN HARVEY GREGORY, THE LAW OF EQUITABLE DISTRIBUTION § 1.03 (1989).

45. *See* Virginia R. Dugan & Jon A. Feder, *Alimony Guidelines: Do They Work?*, 25 FAM. ADVOC., Spring 2003, at 20, 20-22.

46. *See* Marsha Garrison, *How do Judges Decide Divorce Cases? An Empirical Analysis of Discretionary Decision Making*, 74 N.C. L. REV. 401 (1996).

47. *Id.* at 513. Garrison also states that the costs of discretionary and rule based decision making are quite different, with the former imposing greater information costs on private parties and the latter burdening the rule making authority with costs in searching for the right rule and costs on all of the affected parties if the search is unsuccessful. *Id.* at 516-18.

48. Mary Ann Glendon, *Fixed Rules and Discretion in Contemporary Family Law and*

In contrast, the intestacy statutes, including provisions for an elective share for the surviving spouse, are a clear illustration of reliance on fixed shares. Another is the generally mandated equal division of community property on divorce or on death in California, Louisiana, and New Mexico.[49] Indeed, the 1990 revision of Article II of the *Uniform Probate Code* (UPC), already adopted in nine states,[50] retains the traditional rule that neither intestate shares nor the elective share of the surviving spouse is subject to discretionary modification by the probate court.[51] Similarly, UPC section 2-202[52] implements a partnership or marital-sharing theory of marriage by increasing the elective-share percentage of the augmented estate so that it gradually reaches the maximum level of 50% after a marriage has lasted 15 years.[53]

The UPC could have followed the Reporters' approach and treated intestate and elective shares as merely rebuttable presumptions. The court could have been authorized to modify these shares to take into account such factors as (1) the size of the decedent's transfers to others, (2) the wealth and anticipated needs of the surviving spouse, (3) the needs of children and other dependents of the decedent, (4) the opportunity of each claimant to acquire assets and income in the future, and (5) the conduct toward the decedent of all potential claimants, by analogy to many state statutes dealing with alimony and distribution of property on divorce.[54] Courts could also be given discretion to deal with more unusual cases, such as the groom who

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Succession Law, 60 TUL. L. REV. 1165, 1167 (1986).

49. The Reporters do refer to the three community property states that generally divide community property equally on divorce, but they understandably treat division at death as being beyond the scope of Chapter 4, Division of Property on Dissolution. PRINCIPLES, *supra* note 1, § 4.02 cmt. a.

50. *See* UNIF. PROBATE CODE table of jurisdictions, 8 U.L.A. 1 tbl. (Supp. 2003).

51. The provision in UPC § 2-404 for a "reasonable allowance" for support of the "surviving spouse and minor children whom the decedent was obligated to support and children who were in fact being supported by the decedent" during the period of administration of the estate does allow for some judicial discretion, but it is likely to be of minor importance in an estate of more than modest size. Wisconsin, a non-UPC state, authorizes the court to provide for the support and education of dependent minor children and for support of the surviving spouse in some cases. *See* WIS. STAT. ANN. § 861.35 (2002). Oregon likewise has limited statutory provisions for the support of the spouse and dependent children of a decedent. *See* OR. REV. STAT. § 114.01-114.055 (2001).

52. *See* UNIF. PROBATE CODE § 2-202 (amended 1990), 8 U.L.A. Pt. I 102-03 (1998).

53. "Augmented estate," as defined in UPC § 2-203 includes not only the decedent's probate estate, but also his nonprobate transfers to others, *see id.* § 2-205, and to the surviving spouse, *see id.* § 2-206, as well as her own property and similar transfers.

54. *See, e.g.*, MASS. GEN. LAWS ch. 208, § 34 (1998) (listing 14 mandatory factors that must be taken into account in assigning property, and, in addition, two discretionary factors that courts may take into account).

drops dead minutes before the minister pronounces the couple man and wife.[55]

But the cost of doing so would be high, and the Joint Editorial Board for the UPC rejected extending equitable distribution into elective-share law "because of the discretionary and unpredictable nature of the results under that system."[56] Today the public accepts the use of fixed rules in determining the elective share of the surviving spouse, as well as shares on intestacy,[57] and the UPC responds to unusual situations by express provision, as in the denial of benefits to the felonious and intentional slayer of the decedent.[58] If distribution of intestate estates were controlled by rebuttable presumptions, rather than fixed rules, the application of judicial discretion to vary the rules would surely lead to a large measure of popular discontent.

In contrast to the *Principles*' grant of broad judicial discretion, there is good reason to believe that the public prefers the prevailing regime of specified shares on intestacy and the generally firm rules of state probate codes. Succession law is "the traditional stronghold of fixed rules."[59] This system, which in almost all of the non-community property states provides a defined share for the surviving spouse who elects against the decedent's will, has generally withstood calls for reform by several different constituencies. Some favor forced shares for children; others favor free testation, with no minimum for the surviving spouse; and a third group would allow a judge, in her discretion, to increase the share of an applicant who "has not received a reasonable provision" out of the estate.[60]

In opposing the creation of such discretionary power, Professor Glendon concludes that the current body of law "functions well on a day-to-day basis, facilitating private planning, producing little unnecessary litigation and operating in accordance with the needs and

55. *See* Neiderhiser Estate, 2 Pa. D. & C.3d 302 (1977). In the case described, the court held the bride to be the deceased groom's widow, entitling her to letters of administration on his estate.

56. *See* Waggoner, *supra* note 33, at 51. *See also supra* text accompanying note 33.

57. A plausible explanation for the emphasis on rules in probate law is that having been derived from property law, its focus is on rights, their protection, and their clarification to provide greater certainty, *see* Garrison, *supra* note 46, at 418, whereas divorce law in modern times originated as an equitable remedy and hence relied on discretion. *Id.* at 419.

58. *See* UNIF. PROBATE CODE § 2-803 (amended 1990), 8 U.L.A. 211 (1998).

59. *See* Glendon, *supra* note 48, at 1185.

60. *Id.* at 1185-86.

desires of most of the persons it affects."[61] She contends that judicial discretion in probate "ignores the intent of the testator, promotes intrafamily litigation, depletes estates, and brings disarray into a relatively smooth functioning area of the law."[62] Indeed, "ease of administration and predictability of result are prized features of the probate system,"[63] according to the Commissioners on Uniform State Laws.

Other reform efforts have sought to change the identity, rather than the shares, of claimants on intestacy, seeking to ameliorate the allegedly harmful effects of probate's traditional focus on "blood, marriage, and adoption."[64] Some of these efforts have been aimed at including step-children and same-sex partners (and de facto partners to take the place of a spouse if none exists) as heirs in intestacy.[65] Most critics of fixed shares in probate focus on the adequacy of the share of the surviving spouse rather than on the manner in which it is determined.[66]

In view of this broad public acceptance of fixed shares in probate, it is unclear why the Reporters nevertheless endorse conduct-based rewards after divorce, implemented by rebuttable presumptions that are highly dependent on judicial fact-finding. After the court has found the facts on which application of the presumption depends, it nevertheless would have authority to reject the result to avoid substantial injustice.[67] The overall effect would be to deny in divorce the advantages of the fixed rules that the public has shown it prefers in probate.

State family law generally is constitutionally required to be gender-neutral.[68] Thus, men cannot be barred from eligibility for alimony,

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61. *Id.* at 1186.

62. *Id.* at 1191.

63. UNIF. PROBATE CODE art. II, pt. 2, cmt. (amended 1990), 8 U.L.A. 96 (1998) (explaining the decision to use a mechanically determined elective share rather than one that would require the exercise of judicial discretion to determine whether property held by the spouses was marital property or separate property).

64. *See* Susan N. Gary, *Adopting Intestacy Laws to Changing Families*, 18 LAW & INEQ. 1, 57-58 (2000).

65. *Id.* at 59-66.

66. Thus the author understands that the present position of Professor Lawrence W. Waggoner, one of the architects of the 1990 revision of the UPC, is that the elective share percentage should always equal 50% of the "augmented estate," which he would define as twice the amount computed under the nuanced schedule provided by UPC § 2-202.

67. *See* PRINCIPLES, *supra* note 1, § 5.05(6) (stating that the presumed value of an award for child care should govern unless the presumption's application "would yield a substantial injustice").

68. *See* Orr v. Orr, 440 U.S. 268 (1979) (holding state statute authorizing alimony for

although the number who actually receive it is relatively small.[69] The Reporters conscientiously follow constitutional and state law requirements of formal gender neutrality, but this comment will reflect social reality by often assuming that the dependent spouse or domestic partner in a heterosexual relationship is female.

II. THE REPORTERS' RATIONALES FOR "COMPENSATORY PAYMENTS"

At the outset, the Reporters summarize the evolution of existing law governing alimony (renamed "compensatory payments") and division of property and then purport to derive three "lessons from this history:"[70]

> (1) The importance of establishing a coherent justification for alimony;
>
> (2) Recognizing the relationship between property allocation and alimony; and
>
> (3) The value of statewide rules establishing presumptive results.

However, their recommendations actually reflect only the last of the three.

In place of the present miscellany of factors that courts now refer to as bases for alimony awards, of which "need" is probably the most common along with the length of the marriage and expected difference in spousal incomes after divorce,[71] the Reporters would generally substitute other rules, although they continue to refer to "need" as the rationale for compensatory payments; hence the presumptive termination of compensatory payments after an obligee remarries or establishes a domestic partnership.[72] They treat the relationship between property allocation and alimony as "appropriately decided by rules that rely more on practical

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women and not for men violates the Equal Protection Clause).

69. In 2001, an estimated 4,000 men received alimony, but almost none received more than $5,000, and 3,000 received $2,499 or less. *See* U.S. BUREAU OF LABOR STATISTICS & U.S. BUREAU OF THE CENSUS, ANNUAL DEMOGRAPHIC SURVEY (2002), http://ferret.bls.census.gov/macro/032002/perinc/new08_051.htm (last modified Sept. 23, 2002). In contrast, an estimated 449,000 women received alimony, with 80% exceeding $2,500 and 4,000 getting $97,500 or more. *See id.*, http://ferret.bls.census.gov/macro/032002/perinc/new08_101.htm (last modified Sept. 23, 2002).

70. *See* PRINCIPLES, *supra* note 1, ch. 1, introductory cmt. at 27.

71. *See id.* at 23-25.

72. *See infra* Part III.A.

considerations and less on basic principle."[73]

The discussion that follows this surprising statement makes no reference to the important differences in income tax treatment of property transfers incident to divorce and alimony payments: the former is neither includible in income by the recipient nor deductible by the transferor, but the latter generally has both characteristics.[74] Moreover, to find no principled difference between the two major spousal claims on divorce is to ignore their sharply contrasting non-tax characteristics. Property division is a disposition of spousal assets, often limited to those acquired during marriage,[75] and ordinarily is final. In contrast, alimony, which the Reporters would rename as "compensatory payments,"[76] premised on an otherwise unequal sharing of losses from dissolution of the marriage, is both today and under their recommendations subject to automatic suspension,[77] termination,[78] or judicial modification.[79]

The UMDA provided that both the disposition of property[80] and maintenance[81] should be determined "without regard to marital misconduct." However, the Reporters' survey of state law found that only twenty states are "pure" no-fault both in dividing property and in determining maintenance.[82] Fifteen states authorize courts to take marital misconduct into account for both purposes,[83] and the remainder do so in varying degrees.[84] The Reporters concluded that

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73. PRINCIPLES, *supra* note 1, ch. 1, introductory cm. at 28.

74. *See* I.R.C. §§ 71, 215 (2003). *See generally* DAVID WESTFALL & GEORGE P. MAIR, PLANNING LAW & TAXATION ¶ 12.08 (4th ed. 2001).

75. In a minority of states, the divorce court also has authority to assign property individually owned at the time of marriage. *See, e.g.*, MASS. GEN. LAWS ch. 208, § 34 (1998).

76. PRINCIPLES, *supra* note 1, ch. 1, introductory cmt. at 27-28.

77. *See id.* § 5.09(3) (generally providing for suspension of periodic payments "when the obligee shares living quarters with another person, in a relationship substantially equivalent to marriage" for a specified minimum continuous period).

78. *See id.* § 5.07 (generally providing for automatic termination of compensatory payments on the death of either party or the remarriage of the obligee).

79. *See id.* § 5.08.

80. UNIF. MARRIAGE & DIVORCE ACT § 307 (amended 1973), 9A U.L.A. 288-89 (1998) (Alternatives A and B). Alternative B was added in 1973 because commissioners from community property states represented that their states "would not wish to substitute, for their own systems, the great hotchpot of assets created by Alternative A. . . ." *See id.* cmt. at 289. Under Alternative A, all assets of either spouse are distributable, rather than being limited to community property or assets acquired during marriage.

81. *Id.* § 308(b), 9A U.L.A. 446 (1998).

82. *See* PRINCIPLES, *supra* note 1, ch. 1, introductory cmt. at 45.

83. *See id.* at 46.

84. *See id.* at 45-46.

all states, including those classified as "pure" no fault, allow misconduct to be taken into account if it "has directly affected the property available for allocation . . . [or] enlarges either spouse's need."[85]

Like the UMDA, the Reporters would generally eliminate fault as a factor in awarding alimony and determining property division, with exceptions for specified forms of financial misconduct, including unilateral gifts of marital property.[86] The Reporters' rejection of marital behavior as a relevant factor includes all forms of misbehavior (with the exception just noted), including those which today may in over half the states cause a spouse's claims to be reduced or denied, or the claim of the other spouse enhanced.

The Reporters would provide rewards for two forms of favored conduct: child care[87] and care of certain third parties.[88] They would also provide compensation for certain contributions to the other spouse's education or training,[89] and, in short marriages, for certain expenditures made or opportunities foregone.[90] Only one basis for compensatory payments, those grounded on the duration of the marriage and the difference in the spouses' expected post-divorce incomes,[91] is not based on the claimant's conduct.

The Reporters would have served far better their stated goals of consistency and predictability in determining the right to and amount of compensatory payments[92] if they had focused exclusively on duration of marriage and expected difference in post-divorce incomes, which they acknowledge are (other than "need") the factors most consistently relied on by the courts today.[93] Because they did not, the

85. *Id.* at 43.

86. *See id.* § 4.10; *see also infra* text accompanying note 201.

87. *See* PRINCIPLES, *supra* note 1, § 5.05.

88. *See id.* § 5.11.

89. *See id.* § 5.12.

90. *See id.* § 5.13.

91. *See id.* § 5.04.

92. *See id.* ch. 1, introductory cmt. at 29-30.

93. *See id.* § 5.04 cmt. d. For an innovative approach that would be far more consistent with the Reporters' goals of achieving uniformity and predictability with respect to compensatory payments, see 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 (2001). Drawing on the analogy of statutory guidelines for child support, he proposes a parallel treatment of post-marital income adjustments between former spouses. Starting "from the premise that there should be some degree of sharing of post-divorce incomes to reflect the returns flowing from efforts made while the marital joint venture was operational," *id.* at 49, he would measure both past contributions and future needs by the length of the marriage and the disparity in postmarital incomes.

three rationales for compensatory payments that merit extensive analysis are:

(1) Compensation for loss of the marital living standard;

(2) Back pay for child care; and

(3) Back pay for morally obligated care of third parties.

The Reporters' recommendation that courts recognize claims for restoration of the premarital living standard after a short marriage is important chiefly because of its high degree of dependence on the exercise of judicial discretion, part of a larger issue discussed above. The recommendations relating to back pay demand scrutiny because of the weak reasoning underlying the recommendations and the perverse outcomes that would follow their adoption. The recommendation for compensation of spouses for education or training of the other spouse, on the other hand, merits briefer treatment, as it is a relatively straightforward aspect of division on divorce of property acquired during marriage and should have been dealt with in that context.

A. Compensation for Loss of Marital Living Standard Under Section 5

Courts often respond to women's diminished prospects after divorce with awards based on "need."[94] The Reporters point out that the concept is highly imprecise and that the applicant for a need-based award is a suppliant, rather than a claimant asserting an entitlement.[95] Thus a change from "need" to a claim based on marital duration and difference in expected spousal incomes after divorce is long overdue, and the Reporters' recommendations would provide a formulaic substitute in determining both the amount and duration of such claims.

The Reporters identify the long-term homemaker in particular as deserving compensation for loss of the marital standard of living,[96]

Unlike the Reporters, Collins's focus is not on the *loss* stemming from marital dissolution, *see* PRINCIPLES, *supra* note 1, § 5.02, but rather on the residual *gains* that accrue after the marriage has ended "because postmarital income results, at least in part, from efforts made during the marriage." Collins, *supra*, at 49. He would base the duration of the sharing on the length of the marriage, and its amount would be "an ever-decreasing percentage of the differences in the former spouses' incomes." *Id.* at 50.

94. *See* PRINCIPLES, *supra* note 1, § 5.02 cmt. a.

95. *Id.*

96. *Id.*

but they would provide partial compensation for such a loss after a marriage as short as five years, if the higher income spouse was expected to have an income just 25% more than that of the other spouse.[97] They would increase the degree of income equalization at the rate of 1% of the difference for each year of marriage, starting with 5% after five years and capped at 40% after a forty-year marriage.[98] Of course, this formula gives the spouse with the lower expected income equalization to the extent of twice the amount of her claim; an award of 50% of the difference would constitute complete equalization, as it both increases the income of the recipient spouse and reduces the income of the obligor spouse by that amount. Whether or not the five years and 25% income difference are appropriate thresholds does not affect the validity of the Reporters' basic premise that after a marriage of some minimum duration, a sufficient expected income differential after divorce should trigger some degree of income equalization. If the Reporters had relied on this basic income equalization principle alone, instead of favoring two kinds of conduct during marriage to the exclusion of all others that may have been contributing causes of the post-divorce difference in incomes, they could have offered a coherent rationale for alimony.

The Reporters' view of tort claims, both in and outside the family, is surprisingly negative.[99] Their premise that only financial misconduct during marriage or domestic partnership should be taken into account favors spouses and domestic partners who injure their mates either physically or emotionally or engage in adultery, relegating the victims of these injuries to such remedies as are offered by tort law.[100] With the decline of interspousal immunity,[101] tort remedies may be adequate in most states for serious physical injury, but are less likely to be provided for adultery[102] or other sources of

97. *Id.* § 5.04 cmt. a, illus. 1.

98. *Id.*

99. *See id.* ch. 1, introductory cmt. at 53 ("Daily life is full of acts that meet the formal elements of battery, or of intentional infliction of emotional distress, but which are not pursued to judgment by their victims. . . . Their reticence is usually regarded as a good thing, not a problem to be solved.").

100. *Id.* at 66-67.

101. *See, e.g.*, DAN B. DOBBS, THE LAW OF TORTS 752 (2000).

102. *See, e.g.*, Perkins v. Dean, 570 So.2d 1217 (Ala. 1990) (extramarital affair not normally outrageous conduct); Ruprecht v. Ruprecht, 599 A.2d 604 (N.J. Super. Ct. Ch. Div. 1991) (rejecting IIED claim in divorce action based on wife's extramarital affair); DOBBS, *supra* note 101, at 758; Craig W. Dallon, *The Likely Impact of the ALI Principles of the Law of Family Dissolution on Property Division*, 2001 BYU L. REV. 891, 918 ("Generally, tort law does not—and probably should not—cover adultery, desertion, or

emotional distress.[103] Yet the Reporters seemingly regard adultery—a clear-cut breach of the marital contract—which may cause the other spouse to be exposed to a sexually transmitted disease and, in about half the states, is a criminal offense as well,[104] as of no greater relevance in determining the economic consequences of divorce than emotional insensitivity or failure to keep fit.[105]

Paradoxically, the Reporters would suspend a former spouse's obligation to make compensatory payments "when the obligor shows that the obligee maintains a 'common household,' as defined in section 6.03 with another person" for a specified period, unless the obligee shows that they "do not share 'a life together as a couple,' as defined. in section. 6.03(7)."[106] Under that section, whether they share such a life depends on all the circumstances, including, *inter alia*, "the emotional or physical intimacy of the parties' relationship."[107] Unless one of them is married, sexual intimacy between them would constitute fornication, rather than adultery—a criminal offense in only about one quarter of the states.[108] Yet in this situation where a

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alleged purely emotional abuse in marriage."). For a contrary view, see Neal v. Neal, 873 P.2d 871 (Idaho 1994) (sustaining battery claim based on intercourse with spouse after nondisclosure of extramarital affair). *Contra* DOBBS, *supra* note 101, at 233 (describing the case as "very unusual"). Successful actions against third parties for "criminal conversation" (intercourse by a third party with a spouse) are comparatively rare. *But see* Jones v. Swanson, 341 F.3d 723 (8th Cir. 2003) (affirming judgment under South Dakota law for alienation of affections, conditioned on the husband's accepting a remittitur judgment of $150,000 compensatory damages and $250,000 punitive damages); Hutelmyer v. Cox, 514 S.E.2d 554 (N.C. Ct. App. 1999) (sustaining an award of $500,000 compensatory and $500,000 punitive damages in action by ex-wife against ex-husband's current wife for alienation of affections and criminal conversation.) *Hutelmyer* includes a detailed discussion of requirements for a plaintiff's claim for alienation of affections to survive a motion for directed verdict. *Id.* at 558-62.

103. For a discussion of actions between spouses for intentional infliction of emotional distress, see PRINCIPLES, *supra* note 1, ch. 1, introductory cmt. at 55-64. The Reporters conclude that the authorities are remarkably vague as to whether or not it is good policy to award such damages. *Id.* at 57-58. For a recent case sustaining such an action, see *Feltmeier v. Feltmeier*, 798 N.E.2d 75 (Ill. 2003).

104. *See, e.g.*, N.Y. PENAL LAW § 255.17 (Consol. 2000); 4 VA. CODE ANN. § 18.2-365 (Michie 1996). At least one statute applies only if either "the behavior is open and notorious . . . or the person is not married and knows that the other person involved in such intercourse is married." 720 ILL. COMP. STAT. ANN. 5/11-7 (West 1993). The laws are rarely enforced. *See* Deborah W. Denno, *Sexuality, Rape, and Mental Retardation*, 1997 U. ILL. L. REV. 315, 351.

105. *See* PRINCIPLES, *supra* note 1, ch. 1, introductory cmt. at 50-51.

106. *Id.* § 5.09(3).

107. *Id.* § 6.03(7)(h).

108. One source lists thirteen states and the District of Columbia as having such statutes. *See* Juhi Mehta, Note, *Prosecuting Teenage Parents Under Fornication Statutes: A Constitutionally Suspect Legal Solution to the Social Problem of Teen Pregnancy*, 5 CARDOZO WOMEN'S L.J. 121, 125 n.36 (1998). However, at least one statute applies only if the behavior is performed "lewdly and lasciviously." N.C. GEN. STAT. § 14-184 (1997).

household is shared with a third party, the Reporters would subject the obligee to a financial sanction.

It seems highly ironic that the Reporters would not subject a spouse who has an adulterous relationship during marriage to financial consequences, but would suspend or terminate her right to receive compensatory payments altogether if the relationship continues after divorce and ripens into a domestic partnership or marriage. Yet the Director of the ALI asserts that "the Principles are sensitive to both the traditional value systems within which most families are formed and the nontraditional realities and expectations of other families."[109]

Surely if a relationship after divorce that may include fornication can lead to suspension of compensatory payments, there should be some financial sanction for adultery during marriage.[110] One possible solution would be to shorten the duration of any compensatory payments by the number of months during which the claimant was engaged in an adulterous relationship and by excluding that period in determining the length of the marriage on which such payments are based.

The Reporters' premise that what today in many states is disfavored conduct of spouses should not affect the financial results of divorce is rigorously applied—even to murder and attempted murder of one spouse by the other![111] This is in contrast to statutory and case law in well over half the states denying specified benefits to one responsible for the felonious and intentional killing of another.[112] The rationale for the Reporters' conclusion that murder should not

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Note however that "[p]rosecutions for fornication have become rare due to modern acceptance of this conduct." Mehta, *supra*, at 125.

109. Lance Liebman, *Director's Foreword* to PRINCIPLES, *supra* note 1, at xv, xv.

110. Commentators who believe that marital misconduct should not affect alimony claims sometimes quote Chester G. Vernier & John B. Hurlbut, *The Historical Background of Alimony Law and Its Present Statutory Structure*, 6 LAW & CONTEMP. PROBS. 197, 199 (1939), "a guilty wife may starve as quickly as an innocent one," without acknowledging the far greater vocational opportunities that are available to women today than in 1939.

111. *See* PRINCIPLES, *supra* note 1, ch. 1, introductory cmt. at 64-66. *See also Actions Taken with Respect to Drafts Submitted at 1996 Annual Meeting*, 19 A.L.I. REP., Fall 1996, at 1, 4.

> A motion to give the court the power to deny compensatory spousal payments and a share of marital property to a spouse who committed a violent felony against the other spouse or a child of the other spouse was rejected . . . [as was the addition of a provision making] violent felony a ground for unequal division of marital property, and increased compensatory payments for the victim of a violent crime.

Id.

112. *See* RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 8.4 reporters' note cmt.

affect division of property or claims to compensatory payments is a distaste of forfeitures, and the incongruity they perceive in allowing a murderer to keep his separate property while denying a murdering spouse her claim to a share of the marital property they own together.[113]

A provision analogous to UPC section 2-803 denying benefits to someone who feloniously and intentionally kills the decedent would seem highly appropriate.[114] If financial misconduct, including certain gifts to third parties, affects the division of property on divorce,[115] surely the attempted slayer does not merit more favorable treatment.

B. Back Pay for Child Care Under Section 5.05

Although Comment A to *Principles* section 5.05 is intended to "compensate[] a spouse whose earning capacity at divorce is less than it would have been had he or she not been the primary caretaker of the couple's children during their marriage," Comment D expressly excludes from consideration any "individualized inquiry into whether the parental duty in fact led to a loss of earning capacity."[116] In order to establish a presumption of entitlement, the claimant need merely show that (1) her earning capacity at dissolution of the marriage is substantially less than her husband's, and (2) that for a specified minimum period,[117] there were marital children, or children of either spouse, who, while they were minors, lived with the claimant (or lived with both spouses, if the claim is against a stepparent).[118] The presumption is rebuttable only by proof that the claimant did not provide substantially more than half of the *total* care that both spouses together provided for the children. That the bulk of such care was provided by other family members or hired nannies does not matter.

A literal application of section 5.05 could lead to surprising results. For example, the claimant may have cared for her child from a previous relationship only on Sundays from 1 p.m. to 9 p.m., relying

113. PRINCIPLES, *supra* note 1, ch. 1, introductory cmt. at 65.

114. *See* UNIF. PROBATE CODE § 2-803 (amended 1990), 8 U.L.A. 211-13 (1998).

115. PRINCIPLES, *supra* note 1, § 4.10.

116. *Id.* § 5.05 cmt. d.

117. Unlike section 5.04(2), which provides compensation based on expected differences in spousal incomes after divorce in marriages of specified duration and spousal income disparity, for which the Reporters suggest a five year minimum duration, *see id.* § 5.04 cmt. a, illus. 1, the comments following section 5.05 do not suggest a minimum child-care period. Thus a claimant may qualify under that section for back pay for childcare in a marriage too short to qualify for compensation under section 5.04.

118. *See id.* § 5.05(1)-(3).

on her mother-in-law or on nannies on the other six days. The mother-in-law or nanny is directed by the claimant on her way out the door to work, but is paid for by the claimant's husband. If he took responsibility for his stepchild only on Sunday mornings, from 9 a.m. to 1 p.m., while she read the papers, she provided more than two-thirds of the total care that both spouses together provided when her direction of the nannies and her mother-in-law is added in, which clearly is "substantially more than one-half." Yet for this modest extra effort, the Reporters would reward her with back pay for caring for *her* child, at the rate of 3% of the difference in the former spouses' expected incomes after divorce for each year of the child care period.[119] Although her time spent directing her mother-in-law and the nannies counts as child care,[120] her husband's paying the latter does not, nor would his shopping, cooking, cleaning, and yard work during his time off from child care Sunday afternoon and evening.[121]

Equally irrelevant would be evidence that the claimant's reduced earning capacity followed her discharge for illegal or unprofessional conduct, or that her work place productivity was limited by the distraction of an extramarital affair. I am not criticizing the Reporters for excluding such evidence. Instead, I suggest that the reason for a difference in the income of former spouses should be irrelevant altogether.

The Reporters give two rationales for providing extra compensation for a conclusively presumed earning capacity loss due to child care, yet they ignore the myriad other activities that may either limit women's work outside the home or take them out of the job market altogether and thereby limit their earning capacity after divorce. The Reporters point out that child care is a joint parental obligation, although not necessarily so for stepchildren, and that the primary care giver has made it possible for the other spouse to have

119. Section 5.05, illustration 5, suggests a durational factor of .015 (equivalent to 12%), which, because it is subtracted from the former husband's income and added to the former wife's, constitutes income equalization to the extent of 3% of the difference in their incomes. Whether the claimant would also have a claim under section 5.04 depends on whether the required minimum period to qualify under section 5.05 is less than the five years the Reporters suggest should be required to qualify under section 5.04. If the claimant is entitled to an award under both sections, her claim cannot exceed in combination the maximum allowed under the latter section. *See id.* § 5.05(5). However, the Reporters suggest that maximum should be 40%, which amounts to equalization at the rate of 80% of the expected difference in incomes. *See id.* 5.04 cmt. a, illus. 1.

120. *See id.* § 2.03(5)(h).

121. See *id.* § 2.03(6)(c)-(d), characterizing these activities of her husband as parenting functions but not caretaking functions. *See also id.* § 2.03, illus. 29-30.

both a family and a career.[122] Neither is a persuasive reason to distinguish child care from other activities of a wife that may have greatly enhanced the quality of her husband's life, or may have been socially useful, or both. Although the legal obligation of parents to care for their children does distinguish it from such other activities, the Reporters brush aside any principled distinction between activities that satisfy legal obligations and those that do not by including care of stepchildren without regard to whether the stepparent's conduct is sufficient to satisfy the Reporters' relaxed definition of the requirements for legal parenthood by estoppel,[123] and by providing back pay for care of certain third parties "in fulfillment of a *moral* obligation."[124]

The most important objection to the provision of back pay for child care provided by section 5.05 is neither the Reporters' refusal to require evidence connecting child care with a reduction in the claimant's earning capacity nor their refusal to admit evidence to rebut that connection. Proof of both the fact and the amount of loss of earning power from child care would be difficult.[125] What is so clearly unsound about section 5.05 is that it rewards a particular kind of conduct during marriage that is favored above all others, with the limited exception of similarly rewarded care for certain third parties under section 5.11. Neither the corporate wife who energetically advances her husband's career nor the socially conscious woman who labors diligently in a day care center or a children's hospital to respond to the vast unmet needs of children of other women gets a similar reward. Indeed, the Reporters apparently perceive no difference between her situation and that of the wife who spends her days on golf courses and tennis courts, in shopping malls, or at home pursuing her hobbies or watching soap operas.

Moreover, in today's two-career households, proof of the manner in which child care was shared over a long period of time may be far from easy, and spouses' memories can be notoriously fallible. It is the unusual couple that records time spent on child care, and even more unusual for such records to accurately quantify time spent on the more esoteric activities the Reporters include in such care, such as

122. *See id.* § 5.05 cmt. b.

123. *See id.* § 2.03(1)(b). For a critical comment on the section as it appeared as 3.02A in Tentative Draft No. 4, see Theresa Glennon, *Expendable Children: Defining Belonging In A Broken World*, 8 DUKE J. GENDER L. & POL. 269 (2001).

124. *See* PRINCIPLES, *supra* note 1, § 5.11(1) (emphasis added).

125. *See id.* § 5.05 cmt. d.

"helping the child to develop and maintain appropriate interpersonal relationships with peers, siblings, and adults,"[126] or "providing moral and ethical guidance."[127]

C. Back Pay for Morally Obligated Care Under Section 5.11

Much of the previous discussion of child care under section 5.05 applies to back pay under section 5.11 for "an earning-capacity loss arising from the care provided during marriage to a sick, elderly, or disabled third party, in fulfillment of a moral obligation of the other spouse or of both spouses jointly."[128] Comment A states that "[c]are of the parents of the spouses is perhaps the most likely application of this section," although it warns that "[t]his section does not permit compensation to every spouse who has lived with in-laws."[129]

Unlike a claimant seeking back pay for child care under section 5.05, under section 5.11(2) "[t]he claimant . . . has the burden of persuading the factfinder that an earning-capacity loss has been incurred, that it arose from such care, and that it has not been substantially restored by the time of dissolution."[130] But the reason given in section 5.05, Comment D, that "the inference that child care responsibilities adversely affected the claimant's earning capacity is not rebuttable"[131] surely is equally applicable to care of third parties: "the difficulty of establishing what an individual's earning capacity would have been had the individual made different life choices years earlier."[132] The Reporters give no rationale for placing an additional burden of proof on claimants who provided care for third parties. Comment A attempts to explain the meaning of "moral obligation" by saying that

> community norms must provide the benchmark for judging whether there was a "moral obligation" to provide the care . . . [and] [s]ome spouses may be members of a cultural community whose norms impose a moral obligation to provide care for a more extended group of individuals than would be imposed by the larger society.[133]

126. *Id.* § 2.03(5)(e).
127. *Id.* § 2.03(5)(g).
128. *Id.* § 5.11(1).
129. *Id.* § 5.11 cmt. a.
130. *Id.* § 5.11(2).
131. *Id.* § 5.05 cmt. d.
132. *Id.*
133. *Id.* § 5.11 cmt. a. For alternative ethical bases for a filial support obligation, see

In a lengthy marriage, care may have been provided while the parties lived in a number of vastly different cultural communities (one pictures the contrast between a rural Mormon town and Manhattan's upper east side), with varying "community norms" about the provision of such care. Extensive testimony may be needed to prove (or disprove) the existence of such norms at various earlier dates and in different localities from the place in which the dissolution action is brought.

D. Claims for Restoration of Premarital Living Standard After A Short Marriage Under Section 5.13

Section 5.13(1) provides for an award in short, childless marriages "to correct an inequitable disparity that would otherwise exist in the extent to which the spouses are able at dissolution to recover their respective premarital living standards."[134] The presumptive award, of "half the amount necessary to allow the obligee to recover his or her premarital living standard,"[135] is available if the disparity arises because one spouse made "significant expenditures from separate assets, or gave up specific educational or occupational opportunities," for specified reasons.[136] The Reporters' Notes assert that the section "adopts the general outlook of cases that . . . [seek] to return the parties to the position they were in before they were married,"[137] and Comment A contains seventeen illustrations of instances in which an award under the section either would or would not be appropriate. The highly fact-specific nature of potential claims under section 5.13 makes the section appear inconsistent with the Reporters' effort to reduce the role of judicial discretion in determining the economic consequences of divorce.

E. Claims for Contributions to the Other Spouse's Education or Training

Section 5.12 allows reimbursement for financial contributions to the other spouse's education or training under specified circumstances. This is consistent with the Reporters' refusal to treat educational degrees and professional licenses as marital property for

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Lee E. Teitelbaum, *Intergenerational Responsibility and Family Obligation: On Sharing*, 1992 UTAH L. REV. 765, 775-84.

134. PRINCIPLES, *supra* note 1, § 5.13(1).

135. *Id.* § 5.13(3).

136. *Id.* § 5.13(2)(a).

137. *Id.* § 5.13 reporters' notes cmt. a.

purposes of division on dissolution,[138] and belongs in Chapter 4, Division of Property on Dissolution, as the reimbursement is an offset to the asset that the educated or trained spouse will possess after the divorce.

Surprisingly, the section refers to education or training that was "completed" within a specified period prior to divorce. This may mean that the Ph.D. candidate can receive support from his spouse for an almost interminable period without becoming subject to a claim for reimbursement if they divorce, and the fourth year medical student may similarly avoid liability if her divorce is granted before she receives her degree. It would seem to be more appropriate to take into account periods of education or training aggregating a year or more, even though no degree was received, if section 5.12(1)(8)'s requirement that earning capacity was substantially enhanced as a result were satisfied.

III. THE REPORTERS' RECOMMENDATIONS FOR DURATION, JUDICIAL MODIFICATION, AND TERMINATION OF AWARDS OF COMPENSATORY PAYMENTS

The Reporters' treatment of the duration, modification, and termination of awards of compensatory payments continues to incorporate reliance on the exercise of judicial discretion and fact-finding to create exceptions to otherwise clear rules. For example, payments under sections 5.04 and 5.05, based on expected differences in incomes, may continue to be required even though the claimant has remarried.[139] She may even have established a serious relationship and a common primary household with another person. But if her relationship with a cohabitant does not ripen into marriage, or a domestic partnership as defined by the Reporters, her cohabitation causes only suspension and not termination of the obligation of her former spouse.[140]

A. Termination of Awards

Section 5.07 presumptively terminates awards under sections 5.04 or 5.05 (based on disparity of expected post-divorce income) on the remarriage of the obligee or the death of either party. The Reporters

138. *See id.* § 4.07(2).
139. *See id.* § 5.07.
140. *See id.* § 5.09(1); *see also* 77 A.L.I. PROC. 69 (2000).

justify presumptive automatic termination on the death of either party on the ground that "[t]he deceased obligee no longer incurs a loss of the marital living standard . . . [and that] standard assumes the obligor's continued survival."[141]

Remarriage of the obligee or her establishment of a domestic partnership relationship can be viewed as mitigating the loss of income she sustained on her divorce, and the Reporters treat both events as presumptively having that effect without regard to the resources of the new spouse or partner. As Comment A dryly observes: "Continuing compensatory payments after the obligee's remarriage would make overcompensation likely because the obligee could combine the first spouse's earnings with both the personal and financial qualities of the second spouse."[142]

Nevertheless, section 5.07(2) allows the court to base an exception to the general rule on a finding "that termination of the award would work a substantial injustice,"[143] and Illustration 4 gives a voidable remarriage as an example.[144] The Reporters offer no persuasive reason for placing the risk of voidability of her remarriage on the obligor. The obligee is more likely to know the facts that cause voidability, and the obligor may have relied on the validity of the obligee's remarriage in making other commitments.

B. Duration and Judicial Modification of Awards Made Under Sections 5.04 and 5.05

Sections 5.04 and 5.05 may give the spouse whose income is expected to be lower after divorce a share of any subsequent increase in the financial capacity of the other spouse but at the same time may insulate her from some decreases in that capacity. Section 5.08(1) provides for judicial modification of periodic payments under sections 5.04 or 5.05 because, *inter alia*, of changes in the financial capacity of either party. Comment C acknowledges that:

> [T]he court is not bound to assume that an individual must choose the most lucrative work available to him or her. People often prefer to vindicate other personal preferences, and divorce should not entirely deprive an individual of this freedom . . . [which], however, is necessarily constrained by the actor's financial

141. PRINCIPLES, *supra* note 1, § 5.07 cmt. b.
142. *Id.* § 5.07 cmt. a.
143. *Id.* § 5.07(2)
144. *Id.* § 5.07 cmt. d, illus 4.

obligations.[145]

However, the comment points out ominously that "the cost of either's choice of less lucrative work is partially shifted to the other."[146] Might a divorced lawyer find himself chained to his desk on Wall Street in order to support his former wife's affluent life style in a Manhattan penthouse? If he is forced to forego a career change to a less lucrative but more satisfying—and possibly more socially useful—job in teaching or public service, the Reporters imply that his obligations to his former spouse should remain unchanged, as the comment, unlike many courts in cases dealing with reductions sought when the obligor retired,[147] expressly rejects a "good faith" test for job changes: "In deciding whether to accept the actor's preference for less lucrative employment, the court cannot escape the need to weigh the actor's desires, however genuine, against the former spouses' obligations to one another."[148]

The only illustration that acknowledges reduced financial capacity as a basis for reduction of an award is the case of a corporate executive who resigns to become a high school history teacher after receiving medical advice to find less stressful employment.[149] Absent such advice, his change of occupation does not justify a reduction in his obligation to his former spouse.[150] Despite this insulation from any possible downturn in the economic prosperity of the obligor, the obligee is expressly made a potential participant in the obligor's post-dissolution good fortune. Section 5.08 provides that "[t]he size of the periodic payments. . . should be modified if . . . at the time of the prior order, the obligor's income, upon which the prior award was based, was less than it had been earlier in the marriage, but has since increased substantially."[151]

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145. *Id.* § 5.08 cmt. c.

146. *Id.*

147. For an extensive discussion of different judicial perspectives on the effect of retirement on the retiree's support obligations, see *Deegan v. Deegan*, 603 A.2d 542 (N.J.App. 1992).

148. *See* PRINCIPLES, *supra* note 1, § 5.08 cmt. c.

149. *Id.* § 5.08 illus. 3.

150. *Id.* § 5.08 illus. 2.

151. *Id.* § 5.08(1)(c). In Illustration 8, in which the couple was divorced after 15 years, it was the income of the obligee wife that rose three years after divorce, so that it was five times her former husband's and ten times the highest it had been while they were married. In that situation, the Reporters suggest that the court may modify the awards under section 5.04 and replace the existing award requiring the husband to pay the wife with an award requiring her to make payments to him. In effect, the Reporters are willing to treat each spouse after a 15-year marriage as having a potential claim to a share in any substantial

The obligor may remain liable to share his good fortune with his former spouse for many years after the divorce. Section 5.06(1)(a) presumes that the term of the award "is indefinite when the age of the obligee, and the length of the marriage, are both greater than a minimum value . . . ."[152] A 55-year-old claimant after a 30 year marriage presumptively qualifies, but a 40-year-old claimant after 20 years of marriage does not.[153] The Reporters do not indicate where the line should be drawn between the two cases. Thus the obligee in the former case continues to enjoy, apparently with no time limit, the chance to share in any substantial improvement in her former spouse's fortunes, even if it results from his winning the lottery long after the divorce and not from work done or skills acquired during the marriage.

Section 5.05 suggests that in marriages not long enough to qualify for an award for an indefinite term, the duration of the award should be based on the length of the marriage multiplied by a factor. In Illustration 2,[154] the factor is .6, so that after a 15-year marriage a 40-year-old woman might get an award for 9 years under section 5.04. But even if the award is for a fixed term, it can be extended under section 5.08(4)(b) and can even be reinstated after it has been terminated, although Comment B indicates that extending the duration of a fixed term award is less often appropriate than shortening it under section 5.07.[155] Thus the obligor may have the risk of extension or reinstatement of an award hanging over him for a long time after the divorce.

C. Effect of Obligee's Cohabitation

In a refreshing but all too rare note of realism, the Reporters acknowledge that "[c]hanging social mores that increasingly accept nonmarital cohabitation facilitate the obligee's postponement of marriage as a strategic response to a rule favoring unmarried cohabiting obligees over married ones."[156] Nevertheless, the Reporters immediately proceed in section 5.09[157] to facilitate

increase in the earnings of the other spouse that restores such earnings to its usual marital level, and section 5.08(1) could support a claim that even exceeds the marital income level.

152. *Id.* § 5.06(1)(a).

153. *See* PRINCIPLES, *supra* note 1, § 5.06 cmt. c.

154. *Id.* § 5.06 illus. 2.

155. *Id.* § 5.08 cmt. b.

156. *Id.* § 5.09 cmt. a.

157. *Id.* § 5.09(2).

precisely such strategic behavior by providing that an obligation to make payments under section 5.04 or 5.05 is merely suspended, and not terminated, if the obligee maintains a "common household," as defined in section 6.03,[158] with another person for at least three months. The obligee can avoid suspension of the obligation by proving that they do not share "a life together as a couple," as defined in section 6.03(7).[159] Unless the relationship continued long enough to become a domestic partnership, as defined in section 6.03, when it ends the suspended obligation is reinstated for any remaining portion of its original term.[160] Even if the relationship does qualify as a domestic partnership, section 5.09(1)(b) authorizes the court to avoid the award's termination by finding "that termination of the award would work a substantial injustice."[161] As section 6.03 generally requires sharing a primary residence for three years (two years with a common child), the obligee could have a series of relationships with different cohabitors without losing her ability to qualify periodically for payments based on disparity of incomes after divorce.[162]

The Reporters acknowledge in Comment A that "the obligee's sexual or personal relationship with a third party would seem irrelevant, of itself, to the policy purpose of an alimony award, which is relief of need."[163] However, the reference to "need" as the policy purpose of an alimony award is wholly at odds with the Reporters' convincing demonstration, in the introduction to Chapters 4 and 5, that "need" is an unsatisfactory basis for alimony awards because of its highly subjective nature and the wildly disparate results that it generates.[164]

IV. CHARACTERIZATION AND DIVISION OF PROPERTY ON DISSOLUTION

Having asserted that "recognizing the relationship between property allocation and [alimony]"[165] is one of the three lessons

158. *Id.* § 6.03(4).

159. *Id.* § 6.03(7).

160. *Id.* § 5.09(4).

161. A motion by Professor Robert Levy to delete section 5.09(1)(b) (then designated as § 5.10(1)(b)) was defeated. *See* 77 A.L.I. PROC. 76-78 (2000).

162. Comment B would ignore brief interruptions in cohabitation by the same parties in applying section 5.10. *See id.* at 68-69.

163. *See Principles*, *supra* note 1, § 5.09 cmt. a.

164. *See id.* ch. 1, introductory cmt. at 23-27.

165. *Id.* at 27.

derived from history, the Reporters favor a choice of remedy based on "rules that rely more on practical considerations and less on basic principle."[166] Nevertheless, they analyze property claims separately. The starting point in section 4.03 is the definition of marital and separate property.[167] This definition follows the uniformly held principle in community property states[168] and in the majority of common law states[169] that property either acquired before marriage or as gifts (or inheritances) from third parties during marriage is the separate property of the acquiring spouse and hence not subject to division on divorce. Under section 4.04, income and appreciation in the value of separate property is also separate unless it is recharacterized either because of its enhancement by spousal labor or under the provision in section 4.12 for gradual recharacterization of such property in marriages that last a minimum of five years.

The general rule contained in section 4.09(1), mandating an equal division of marital property[170] and marital debts, is eminently reasonable, as are the provisions in section 4.09(2)(b) and section 4.09(2)(c), permitting under specified circumstances an unequal division of debts where they exceed the marital assets, and section 4.09(2)(d), requiring that educational loans be treated as the separate obligation of the spouse whose education they financed.

Section 4.10 appropriately makes specified kinds of financial misconduct that occur within some period prior to divorce grounds for an unequal division of marital property, but is seriously flawed in its failure to provide sound guidance to govern that period. The comment suggests that "only transactions during a period immediately preceding the commencement of a dissolution action should ordinarily be considered," and that "a fixed time period can be drawn from a statute of limitations applicable to a comparable transaction, such as misfeasance by a trustee."[171] The last statement

166. *Id.* at 28.

167. *Id.* § 4.03.

168. *See* ANN OLDFATHER ET AL., VALUATION & DISTRIBUTION OF MARITAL PROPERTY § 20.03[1][a] (2003).

169. *See id.* § 18.05[1].

170. A troubling qualification of the general rule requiring equal division is the authorization in section 4.09(2)(c) for the court to award an enhanced share of marital property as compensation for a loss recognized in chapter 5. This is inappropriate with respect to losses recognized because of a disparity of expected post-divorce incomes under sections 5.04, 5.05, and 5.11, as awards under these sections are subject to modification under section 5.08 in light of subsequent changes in the financial capacity of the parties, but an award of marital property is not.

171. PRINCIPLES, *supra* note 1, § 4.10 cmt. c.

ignores the fact that the more flexible doctrine of laches often applies to such claims.[172]

The Reporters correctly state the principle that should determine whether property is marital, and hence divisible on divorce:

> [M]arriage alone should not affect the ownership interest that each spouse has over property possessed prior to the marriage or received after the marriage by gift or inheritance . . . [but] marriage alone *is* sufficient to support a spousal claim to shared ownership at divorce of property earned by . . . (labor performed during marriage by a spouse).[173]

However, there are serious flaws in the ways they would determine

> (1) the extent to which the value of a spouse's separate property has been enhanced by either spouse's labor and hence is marital;
>
> (2) the extent to which property at divorce was either derived from earnings before marriage or represents future earnings and hence is separate; and
>
> (3) the extent to which separate property should be recharacterized as marital because of the passage of time since it was acquired.

In dealing with these issues, courts, spouses, and their counsel need rules that are reasonably clear and at the same time even-handed in their treatment of the spouses' competing claims. The Reporters' recommendations are neither.

A. Enhancement of Separate Property by Spousal Labor

Section 4.05(1) provides that "a portion of any increase in the value of separate property is marital property whenever either spouse has devoted substantial time during marriage to the property's management or preservation."[174] Obviously, the controlling factors are the definition of "substantial time," and, if that threshold is crossed, how the resulting "portion" that constitutes marital property is determined.

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172. *See* 3 AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, THE LAW OF TRUSTS § 219 (4th ed. 1987).

173. PRINCIPLES, *supra* note 1, § 4.03 cmt. a.

174. *Id.* § 4.05(1).

1. The Definition of "Substantial Time"

Usually, cases dealing with enhancement of separate property, whether from community property or common law states,[175] involve a spouse's full time service managing either a business which was his separate property[176] or his investment portfolio.[177] In those cases, the question is merely whether, and in what form, the interest of the community or marital estate should be recognized, either by an award of an interest in the business or by recognition of a dollar claim for the value of the owner's services. However, the Reporters would take this sound principle to extremes by applying it in cases where this amount of spousal labor on separate property was quite small but is nevertheless deemed to be substantial. They reason that:

> [T]he marital community has a dominant claim on the labor of the spousal owner of separate property. If time spent tending separate property intrudes on that commitment, then the marital labor is substantial . . . It is a different case when that tending time merely takes the place of the few hours each week that the spousal owner might otherwise spend on nonremunerative activities.[178]

Illustration 4 indicates that three hours a week by the owner spouse is not substantial, and hence does not result in a portion of the increase in value being treated as marital property.[179] However, the threshold is "relaxed" (i.e., lowered) if the work is performed by the non-owner spouse, so that a smaller amount of time expended by her would result in the creation of marital property. If she "reads several books on investing" and solicits the advice of knowledgeable friends before purchasing mutual funds with her spouse's money, Illustration 7 treats a portion of their increase in value as marital property.[180]

This treatment of minor amounts of spousal time is a vast and unwarranted expansion of the case law dealing with marital labor that enhances separate property. It is an open-ended invitation to

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175. Many of the cases are collected in the Reporter's Notes. *See id.* § 4.06 reporters' notes.

176. *See, e.g.*, Jensen v. Jensen, 665 S.W.2d 107, 110 (Tex. 1984) (remanding for a determination of the reimbursement due the community for the services of the husband toward enhancement of the stock of a holding company in whose operation he was the key man).

177. *See, e.g.*, Beam v. Bank of Am., 490 P.2d 257, 267 (Cal. 1971) (finding that, although the husband spent the major part of his time managing his investment portfolio, any resulting community property had been absorbed by family expenses).

178. PRINCIPLES, *supra* note 1, § 4.05 cmt. d.

179. *Id.* § 4.05 cmt. d, illus. 4.

180. *Id.* § 4.05 cmt. d, illus. 7.

interrogatories and discovery to determine exactly how many hours a week were spent by either spouse tending to investments over the course of a marriage. Ultimately, the exercise of judicial discretion would be required to determine both the extent that the market value of the property increased during the marriage and the amount by which that exceeded the increase in value of "assets of relative safety requiring little management."[181]

The Reporters refer to a comparison of the market value of the separate property at the beginning of the marriage, or when acquired if that date is later, with its value when sold or at the end of the marriage if later, as if such values are readily capable of proof.[182] It is common knowledge that valuation is often highly controversial, particularly in the case of small businesses, such as close corporations. To prove many years later the value of any kind of property (other than listed securities) that a spouse owned at the time of marriage may be challenging, but often is inevitable in property allocation on divorce. However, a more realistic definition of "substantial time" would reduce the frequency with which those challenges must be faced and would more adequately reflect the fact, as the Reporters point out, that "all capital requires some minimum amount of management."[183]

2. *The Determination of the Marital Property Portion*

Analytically, the increase in the value of separate property may have three components: (1) the return on the separate property itself, (2) the labor of either or both spouses, and (3) the synergetic gains from the combination of the other two factors.[184] The Reporters are far from even-handed in their allocation of these elements of gain. Under section 4.05(3), marital property includes all gain in excess of "the amount by which capital of the same value would have increased over the same time period if invested in assets of relative safety requiring little management."[185] The Reporters add that the standard just described "does not specify a particular benchmark investment . . . . No fundamental principle compels the choice between

181. *Id.* § 4.05 cmt. b.
182. *See id.* § 4.05 cmt. h.
183. *Id.* § 4.05 cmt. d.
184. *See id.* § 4.05 cmt. b.
185. *Id.* § 4.05(3).

intermediate-term Treasury bonds and an indexed mutual fund."[186] This surprising *ipse dixit* is followed by an even more startling assertion: "The returns on capital invested in comparable businesses, or in aggressive growth funds, would not be appropriate because these are not assets 'of relative safety requiring little management.'"[187]

Both statements are wholly at odds with the realities of financial markets and the choices participants in those markets make among alternative investments. The return on capital in the real world is higher for risky investments that are profitable, not solely because they require more management than assets "of relative safety," although they may, but also because making such an investment requires willingness to assume a greater risk of loss, for which investors demand a premium. If the value of a spouse's separate property declines, the loss is suffered by him alone and is not shared with the marital estate.[188] Indeed, the Reporters do not foreclose the possibility that gains and losses from separate property on which a spouse labored are to be treated item by item, with the marital estate sharing gains but not suffering losses. Therefore, the risk premium, in the form of the additional return an investor demands because of the greater risk of loss, should inure solely to the owner of the property.[189]

The price of Treasury securities, although it is affected by market participants' expectations about the future course of interest rates, as well as by the supply and demand for such securities and other factors, does not include a risk premium. The price of indexed mutual funds presumably does, so the latter would seem to be clearly a more valid benchmark in determining the portion of appreciation allocable to the separate property interest.

With respect to the marital interest derived from spousal labor, the Reporters explicitly reject any comparison, in the case of separate property held in corporate form, with "compensation of other

186. *Id.*

187. *Id.*

188. *Id.* § 4.05 cmt. c.

189. Cases in other contexts have recognized this principle. *See, e.g.*, First Nat'l Bank of Chi. v. Standard Bank & Trust, 172 F.3d 472, 480 (7th Cir. 1999) (holding that the lower court abused its discretion to award prejudgment interest at treasury bill rate because it does not reflect the true cost of capital); Fishman v. Estate of Wirtz, 807 F.2d 520, 580-81 (7th Cir. 1986) (Easterbrook, J., concurring in part and dissenting in part) (arguing that when calculating damages in an antitrust case, "[i]t is a fantastic assumption" that the "cost of . . . capital was the rate available on T-Bills, a riskless investment").

executives in comparable posts."[190] Thus the entire synergetic portion of gain resulting from the combination of separate capital and marital labor is attributed to the labor component. A more even-handed treatment would be to divide that portion between the separate and marital interests.

In any event, the Reporters rationalize allocating the higher return on higher-risk investments to the marital interest on the ground that "[s]uccess in higher-risk investments may be derived . . . from insights or information gained through the application of the investor's labor or talent. . . ."[191] Section 4.05(3) treats as marital property the return in excess of that offered by "assets of relative safety requiring little management,"[192] and the Reporters assert that this "is consistent with the commonly accepted principle that when separate and marital property are irreversibly commingled, the entire amount is treated as marital. . . ."[193] This *ipse dixit* is at odds with the Reporters' recognition in section 4.06(1)(b) that property acquired for marital and separate property consists of proportionate shares of each.

B. Property Derived from Earnings Before Marriage or After Divorce

Spousal earning capacity, skills, post-dissolution labor, occupational licenses, and educational degrees should not be subject to division on divorce, and section 4.07 so provides. Two important kinds of property which may be derived from earnings before marriage or reflect anticipated earnings after divorce are goodwill and employee stock options.

1. Goodwill

The Reporters' treatment of goodwill in section 4.07(3) is troublesome because it often is difficult to differentiate and measure an increase in value during marriage of a marketable business or the professional goodwill of a spouse. In view of the provision for compensatory payments under section 5.04, which already takes into account any substantial disparity in post-dissolution spousal incomes, treatment of professional goodwill as community or marital property is likely to give the other spouse an interest in post-divorce earnings

190. *See* PRINCIPLES, *supra* note 1, § 4.05 cmt. g, illus. 12.
191. *Id.* § 4.05 cmt. b.
192. *Id.* § 4.05(3).
193. *Id.* § 4.05 cmt. b.

of the professional.[194] Although some courts nevertheless treat "nonmarketable goodwill" as property to be valued and considered, to do so does violence to the principled exclusion of earning capacity and skills.[195]

A theoretical argument can be made for an exception, as Comment D suggests,[196] for a professional practice whose nonmarketability is derived from regulatory restrictions. Individual law practices are common examples because ethical rules in most states bar their sale. The comment suggests that "[i]f market data is available by which to fix a value for the practice that is distinct from the value of the seller's personal skills and future labor, then that value is marital property."[197] No guidance is provided, however, as to the nature of the required data. In its absence, recognition of the exception creates the risk that it will become merely another bargaining chip in negotiations between the parties, and another ambiguity for lawyers to exploit. There may be no persuasive way to quantify a claim based on professional goodwill that may not legally be transferred,[198] and hence for which there cannot be market data.

2. *Employee Stock Options*

Employee stock options may take an almost infinite variety of forms, and employers' motivations in granting them may be quite complex. The Reporters do not discuss the treatment of this kind of property, which presumably is encompassed by the general discussion in section 4.07, Comment B, of intangible assets. Analytically,

194. *But cf., e.g.*, Nail v. Nail, 486 S.W.2d 761, 764 (Tex. 1972) (arguing that the goodwill of the husband's medical practice was not property because its value depends upon his survival and future work).

195. Courts refusing to recognize professional goodwill as marital property frequently express concern that its value will be counted twice. If it only represents future earning capacity, it will be taken into account in maintenance and child support awards. *See* Helga White, *Professional Goodwill: Is It a Settled Question or Is There "Value" in Discussing It?*, 15 J. AM. ACAD. MATRIMONIAL LAW. 495, 503 (1998).

196. PRINCIPLES, *supra* note 1, § 4.07 cmt. d.

197. *Id.*

198. The time-honored way in which a lawyer "sells" his practice without violating ethical rules is to admit to partnership or to employ as an associate a younger lawyer who is in effect the "buyer," with the understanding that she will do a disproportionately large share of the work in relation to her compensation for a period of time while the "seller" introduces her to the clients. Over time, the "seller's" share of both work and compensation will gradually decrease. In order to establish a value for the "seller's" goodwill, it would seem to be necessary to establish the value at the time of divorce of the amount by which the "seller's" compensation while his arrangement continues exceeds what he is able to personally bill clients for during this period. But how to determine this amount with even plausible accuracy is elusive.

however, an option may be granted both as compensation for current or past services and as an inducement for future services, which may include a period after the divorce. For example, a corporate executive may be granted an option to buy the company's stock at any time within the next five years at a price of $10 a share. Even if the stock is selling for less than $10 at the time of divorce, the option obviously has value as a call on the stock for the remainder of its term. However, whether all of that value should be treated as earnings during marriage is debatable, as the option may have been granted in part to motivate the employee both to continue working for the employer for five years and to work harder to increase the value of the stock.

Since a case-by-case analysis of employer motivation would not be feasible, an even-handed approach might treat the value of the option on the relevant date for valuing property on divorce as being marital in proportion to the time period covered by the option during marriage. But a full treatment of the varied forms of options in the context of division of property on divorce is beyond the scope of this essay.[199] The fact that the Reporters ignore this vital subject altogether leaves an important gap in the *Principles*.

Treatment of stock options upon divorce is an important subject that should be addressed in order to provide guidance to courts in responding to arguments that options should be dealt with by the court's retaining jurisdiction until the options are exercised or expire, by otherwise assuming a more definite value, or by imposing a constructive trust on the options in lieu of distributing them in kind.[200] These solutions are said to avoid the unfairness of a particularly low or high valuation of the options at the time of dissolution, which does not correspond to the value the options eventually assume. If the value at the time of dissolution is high, the holder may be forced to exercise the options early or sell other property in order to pay the other spouse her share of the marital property. When the valuation at dissolution is low, the other spouse may lose out on subsequent

199. For a comprehensive discussion of the valuation of options, see generally RICHARD A. BREALEY & STEWART C. MYERS, PRINCIPLES OF CORPORATE FINANCE (7th ed. 2003). For specific applications in the context of divorce, see David S. Rosettenstein, *The ALI Proposals and the Distribution of Stock Options and Restricted Stock on Divorce: The Risks of Theory Meet the Theory of Risk*, 8 WM. & MARY J. WOMEN & L. 243 (2002); David S. Rosettenstein, *Exploring the Use of the Time Rule in the Distribution of Stock Options on Divorce*, 35 FAM. L.Q. 263 (2001).

200. *See* Charles P. Kindregan, Jr. & Patricia A. Kindregan, *Unexercised Stock Options and Marital Dissolution*, 34 SUFFOLK U. L. REV. 227, 234 (2001).

appreciation merely because of a temporary downturn in the market or for other seemingly arbitrary reasons.

This argument, however, would apply to all risky assets, as well as others that may not appear to be risk-laden but, with the omniscience of hindsight, may prove to have been. It also fails to take into account the desirability of separating the spouses' financial interests. Use of an appropriate formula to value the option at the time of divorce should provide even-handed treatment for the spouses, just as use of the market price for a stock does so, even though the price may thereafter change dramatically.

C. Financial Misconduct as Grounds for Unequal Division of Marital Property

The Reporters depart from the general principle that marital conduct should be irrelevant in determining financial consequences of divorce in the case of three forms of financial misconduct occurring during the waning days of the marriage: (1) certain gifts made without the other party's consent, (2) property lost, expended, or destroyed through intentional misconduct, and (3) property lost or destroyed through negligence after the service of the dissolution petition.[201] The suggested time period in the Illustrations during which the conduct described is relevant is either six months—in the case of (1) or (2)—or a year prior to the service of the dissolution petition, which limits the retrospective assessment of the fairness of the financial arrangements of the marriage.[202]

The reason given for the general rule excluding retrospective accounting, to which this is a very limited exception, is that "[t]he legal remedy available to a spouse who finds a marriage unacceptably burdensome or inequitable is exit. Modern divorce law allows either spouse to end the marriage."[203] New York, with its refusal to adopt no-fault divorce, remains a prominent exception to this generalization,[204] as are other states which may require separation for as much as two years in order to secure a no-fault divorce.[205] In states

201. PRINCIPLES, *supra* note 1, § 4.10(1)-(3).

202. *Id.* § 4.10, illus. 8-9. Compare Comment C, suggesting that "a fixed time period can be drawn from a statute of limitations applicable to a comparable transaction, such as misfeasance by a trustee." Id. § 4.10 cmt. c. However, the more flexible doctrine of laches often applies to such claims. *See supra* note 172 and accompanying text.

203. PRINCIPLES, *supra* note 1, § 4.10 cmt. b.

204. *See supra* note 23.

205. *See, e.g.*, TENN. CODE ANN. § 36-4-101 (2003) (requiring married couple to live in

with a lengthy waiting period, the fact that spouses do not have an unqualified unilateral right to a reasonably prompt divorce may justify an accounting period that is no shorter than the minimum waiting period for a no-fault divorce.

D. Recharacterization of Separate Property as Marital Property Under Section 4.12

As noted above, a motion to recommit an earlier version of section 4.12 was narrowly defeated.[206] The supporting rationale is based on the subjective expectations of the spouses: "After many years of marriage, spouses typically do not think of their separate-property assets as separate. . . . Both spouses are likely to believe . . . that such assets will be available to provide for their joint retirement, for a medical crisis of either spouse, or for other personal emergencies."[207] Although the Reporters refer to "many years," section 4.12 is not so limited and provides partial recharacterization in marriages that lasted no more than five years.

The Reporter's Notes acknowledges that their supporting premise remains untested,[208] but point out that courts in the minority of states in which all property of the spouses, not merely marital property, is divisible on divorce[209] are more likely to allocate inherited or premarital property to the other spouse on dissolution of a lengthy marriage. At present, no state explicitly provides for such recharacterization.

With respect to separate property owned at the time of marriage, the Reporters' argument for its gradual recharacterization as marital property would have some force if its admittedly untested premise as to the spouses' expectations is accurate and if this were truly a default rule. But the parties' freedom to contract out of it is seriously constrained by the Reporters' strict procedural and substantive regulation and extensive judicial review of premarital agreements.[210]

Additional problems arise with the Reporters' treatment of gifts

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separate residences, without any cohabitation, for two years before permitting no-fault divorce).

206. *See supra* note 9.

207. PRINCIPLES, *supra* note 1, § 4.12 cmt. a.

208. *Id.* § 4.12 reporter's notes cmt. a.

209. *See supra* notes 167-69 and accompanying text.

210. *See* PRINCIPLES, *supra* note 1, §§ 7.04-7.05. *See generally* Westfall, *supra* note 11, at 1480-90. *But see* Brian H. Bix, *Premarital Agreements in the ALI Principles of Family Dissolution*, 8 DUKE J. GENDER L. & POL'Y, 231, 244 (2001) ("[T]he Principles will block and deter some of the more egregious forms of procedural unfairness . . . .").

and bequests during marriage, which are subject to recharacterization at an accelerated rate "that takes into account both the marital duration and the holding period of the property in question."[211] The Reporters suggest that for such property, the rate should be 4% for each year after five years from the date the property is acquired, plus half the number of years that passed between the fifth year of marriage and the year it was acquired.[212] If Spouse A acquires $100,000 by gift at the end of the 20th year of marriage and files for dissolution at the end of 30 years of marriage, the rate would be 20% (4% x 10 years between acquisition of the gift and filing for dissolution, minus 5 years) plus 30% (4% x 20 years of marriage prior to the gift, again minus 5 years, with the resulting percentage divided by 2), for a total of 50%. Thus, $50,000 of the gift would be treated as marital property.

The Reporters provide no persuasive justification for recharacterization of gifts and bequests received by a spouse during marriage. As with property owned at the time of marriage, it is expressly stated as a default rule. Section 4.12(5) provides: "The provision of a will or deed of gift specifying that a bequest or gift is not subject to claims under this section should be given effect."[213] A donor or testator who wished to make a gift to both spouses could readily say so, by transferring the property to "John and Mary," rather than simply "Mary," and one might expect that the latter form would keep section 4.12 from applying to the gift. However, the Reporters make clear that such plain words should not be given their ordinary effect, as section 4.12(5) requires an explicit reference barring claims under the section. The result is to create a trap for the unwary donor or testator whose lawyer does not make such a reference because of oversight, because it has not been enacted in her state when she draws the will or deed of gift, or because she does not anticipate that Mary will be divorced in another state that has enacted the section. It creates a similar trap for donors who make gifts of cash or other property to a married child without a lawyer's help.

211. PRINCIPLES, *supra* note 1, § 4.12(2)(a).
212. *Id.* § 4.12 cmt. b.
213. *Id.* § 4.12(5).

Lawyers would have to advise their clients that whenever such a gift is made, an accompanying letter should specify that it is not subject to section 4.12 if that is the client's intention. Absent such notice from the donor, the recipient can give the notice provided for in section 4.12(4), although she may be reluctant to do so because of the possible adverse effect on her relationship with her spouse.

Of course, intestate shares would be subject to section 4.12 unless the recipient spouse gave the requisite notice within the specified time period that her share was not to be subject to recharacterization. Distributions from a trust would be similarly recharacterized unless the trust provided otherwise or the recipient gave notice. Trusts already in existence when section 4.12 was enacted are unlikely to refer to the section. Compensation during marriage for services performed before marriage and personal injury awards, both of which are separate property under section 4.08, would also be subject to recharacterization in the absence of such notice by the recipient.

In addition to the computational complexities involved in applying section 4.12 to a series of gifts and distributions from trusts, another cogent objection is the pall it could cast over relationships within a family. Unless the spouses or domestic partners make a premarital agreement that effectively negates its application, the requirement of notice by the recipient or specific exclusion of the section by the donor may serve as a continuing reminder of the possibility that either a spouse or a donor has doubts about the durability of the marriage or domestic partnership, or the completeness of her commitment to the relationship. Being required to express those doubts may hasten the relationship's demise.

V. SEPARATION AGREEMENTS

The Reporters' treatment of separation agreements is puzzling. Under section 306(b) of the UMDA, the terms of a separation agreement, except those providing for support, custody, and visitation of children, are binding unless the court finds such terms to be unconscionable.[214] The Reporters initially assert that such agreements are more favored than are premarital agreements and give the following persuasive reasons for such treatment:

> (a) "[I]n the shadow of the state's default rules . . . the parties can often settle their affairs more efficiently than

214. *See supra* note 29.

courts can."[215]

(b) The event is at hand, rather than being the "speculative contingent future event" addressed by a premarital agreement.[216]

(c) "It may also generally be assumed that each party is less naive about the beneficent intentions of the other party and . . . is bargaining at arm's length."[217]

Nevertheless, apparently unmoved by their own arguments in favor of recognition of such agreements, the Reporters insist that the law should not defer to the parties' agreement if "the ordinary rules of contract, viewed in the context of family dissolution, have been violated, or the terms of the agreement frustrate a critical policy of the law."[218]

The Reporters then proceed to erect, in section 7.09, a formidable series of barriers to the enforcement of separation agreements. First is the requirement that "each party had full and fair opportunity to be informed of the existence and value of the parties' marital and separate assets, each party's current earnings and prospects for future earnings, and the significance of the terms of the agreement."[219] The problems in valuing assets have already been noted in connection with section 4.12,[220] and predicting future earnings is at least as difficult. Together this requirement would inevitably make enforcement of the agreement more doubtful in cases in which those problems arose.

More ominous is the general invitation for intrusive judicial review in section 7.09(2), which makes the terms of a separation agreement unenforceable

> if they substantially limit or augment property rights or compensatory payments otherwise due under law, and enforcement of those terms would substantially impair the economic well-being of a party who has or will have (a) primary or dual residential responsibility for a child or (b) substantially fewer economic resources than the other party.[221]

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215. PRINCIPLES, *supra* note 1, § 7.09 cmt. b.
216. *Id.*
217. *Id.*
218. *Id.*
219. *Id.* § 7.09(1)(c).
220. *See supra* Part IV.D.
221. PRINCIPLES, *supra* note 1, § 7.09(2).

Although the Reporters assert that this language is "not intended generally to limit the parties' power to deviate from statutory norms of property division or compensatory payments," or "to entirely disallow bargaining tactics . . . such as the relinquishment of residential responsibility and custody claims in exchange for property rights," it obviously does cast a pall of uncertainty over whatever agreement the parties reach.[222] A more appropriate basis for judicial review would be the failure of a party to obtain independent advice when the agreement was executed.[223]

VI. CONCLUSION

The *Principles* are a failed effort at family law reform and may not even enjoy the support of most of the members of the ALI. They fall short of providing for divorce the predictability of economic consequences that the public has shown it prefers in probate by making results overly dependent on detailed judicial fact finding and the extensive exercise of judicial discretion. And the Reporters skew the effects of spousal conduct during marriage by rewarding child care, without regard to its effect on post-divorce incomes, but denying to courts the ability to take into account such serious marital offenses as adultery or even attempted murder. Moreover, the *Principles* are plagued with internal inconsistencies and are seriously uninformed in their treatment of business and economic matters and tax considerations. Finally, they would curtail the ability of spouses, prospective spouses, and nonmarital cohabitants to structure the terms of their relationship to meet their individually perceived needs.

Although the *Principles* are too seriously flawed to serve as guideposts for the reform of family law, they are useful in highlighting many of the issues that potential reforms should address. For this purpose, the Reporter's notes can serve as research tools. And perhaps someday a revised edition of *Principles* may be more successful in serving the purposes that the present version fails to achieve.

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222. PRINCIPLES, *supra* note 1, § 7.09 cmt. h.

223. *See* Trebilcock & Elliott, *supra* note 31, at 64-67.