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Toward a Unified Field Theory of the Family:  
The American Law Institute's  
*Principles of the Law of Family Dissolution*

James Herbie DiFonzo\*

I. INTRODUCTION: THE CONSOLIDATION OF FAMILY LAW

The American Law Institute (“ALI”) recently approved the *Principles of the Law of Family Dissolution: Analysis and Recommendations* (the “*Family Dissolution Principles*” or “*Principles*”), proposing a wide range of regulations for the legal termination of domestic unions.<sup>1</sup> These standards and rules apply to traditional divorce actions between wives and husbands, as well as in proceedings stemming from the dissolution of nonmarital domestic partnerships. The task of bringing coherence and consistency to family law is truly daunting. Traditional domestic relations jurisprudence, confronted with the brisk pace of cultural and technological change, has resulted in such startling and uneven change to the legal landscape that the ALI’s most well-known product, a Restatement, is unthinkable. It will prove difficult enough to agree whether the *Principles* have properly described the present shape and tendencies of the emerging

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1. At its Annual Meeting in May 2000, the ALI gave final approval to the entire PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS, as contained in *Proposed Final Draft, pt. I* (Feb. 14, 1997); *Tentative Draft No. 3, pt. I* (Mar. 20, 1998); *Tentative Draft No. 3, pt. II* (Apr. 8, 1998); and *Tentative Draft No. 4* (Apr. 10, 2000). The whole work will be integrated into a coherent final text, and is expected to be published in 2001. Unless otherwise specified, all references to sections of the Principles cited herein will be to the most recent draft. See PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS & RECOMMENDATIONS (Tentative Draft No. 4, Apr. 10, 2000) [hereinafter PRINCIPLES (Tentative Draft No. 4)].

legal constructs in the field.<sup>2</sup> This article provides an early assessment of the *Principles'* efforts both to reflect and reframe family dissolution law.

In several areas, the *Principles* summarize the majority view; in others, they craft a model statute.<sup>3</sup> The *Family Dissolution Principles* thus constitute the latest embodiment of a recurring tension in the ALI between its aim to harmonize the diversity of extant laws and an equal focus on the “better adaptation [of the law] to social needs.”<sup>4</sup> These conflicts arise regularly over the concept of a Restatement.<sup>5</sup> The *Principles'* “bold attempt”<sup>6</sup> to redefine and bring uniformity to the consequences of dissolution will prove no less controversial.<sup>7</sup>

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2. See Geoffrey C. Hazard, Jr., *Foreword* to PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS & RECOMMENDATIONS (Proposed Final Draft, pt. I Feb. 14, 1997), at xiii [hereinafter PRINCIPLES (Proposed Final Draft, pt. I)] (“The idea of Principles gives greater weight to emerging legal concepts than does a Restatement. Given the current disarray in family law—the unparalleled volume of litigation and legislation—this approach seems more appropriate.”).

3. See J. Thomas Oldham, *ALI Principles of Family Dissolution: Some Comments*, 1997 U. ILL. L. REV. 801, 802 (observing that while the property proposals generally constitute a restatement of prevailing law, the spousal support recommendations often stake out new ground).

4. AM. LAW INST., Certificate of Incorporation, *reprinted in* 74 A.L.I. PROC. 517 (1997); see also Geoffrey C. Hazard, Jr., *The American Law Institute Is Alive and Well*, 26 HOFSTRA L. REV. 661, 665 (1998) (noting that harmonization of extant legal principles is part of the *raison d'être* of the ALI).

5. See Charles W. Wolfram, *Bismarck's Sausages and the ALI's Restatements*, 26 HOFSTRA L. REV. 817, 818 (1998) (“[T]he ALI perennially witnesses struggles over the concept of a Restatement.”).

6. Oldham, *supra* note 3, at 802; see also CARL E. SCHNEIDER & MARGARET F. BRINIG, AN INVITATION TO FAMILY LAW 107 (2000) (“The ALI Principles are ambitious and range even more broadly than the [Uniform Marriage and Divorce Act].”).

7. Few fields are legitimately as rife as family law for intellectual disputation. After all, “there is no consensus even as to what family law is,” and basic issues abound as to the proper composition of the family itself. Jennifer Wriggins, *Marriage Law and Family Law: Autonomy, Interdependence, and Couples of the Same Gender*, 41 B.C. L. REV. 265, 269 (2000). See Jane C. Murphy, *Rules, Responsibility and Commitment to Children: The New Language of Morality in Family Law*, 60 U. PITT. L. REV. 1111, 1112–15 (1999) (discussing different scholarly views on the construction of families). The ALI *Principles* have already generated adverse comment. See, e.g., Lynn D. Wardle, *Divorce Reform at the Turn of the Millennium: Certainties and Possibilities*, 33 FAM. L.Q. 783, 783 n.2 (1999) (criticizing the ALI for “utterly refus[ing]” to consider the divorce counterrevolution seeking to roll back the excesses of no-fault divorce by altering the grounds and methods for obtaining dissolution); Oldham, *supra* note 3, at 802–14 (criticizing several provisions of the ALI *Principles*). See generally Julie Shapiro, *De Facto Parents and the Unfulfilled Promise of the New ALI Principles*, 35 WILLAMETTE L. REV. 769 (1999) (criticizing the limited scope of the ALI de facto parent provision).

This article discusses the overarching, if unarticulated, premise of the *Family Dissolution Principles*. Fundamentally, the *Principles* conceive of family law as entering a *consolidation* phase, in which scattershot judicial discretion is displaced by delimiting rules.<sup>8</sup> In an effort to ensure the success of this consolidation, the ALI has blueprinted an architectonic design in the construction of the rules of domestic dissolution. This new legal structure showcases three features. First, the generative entities of family law, parents and other domestic unions, are undergoing a utilitarian metamorphosis. Parenthood is in the process of discarding its biological chrysalis and emerging in a more functional form. Second, the financial aftershocks of marital dissolution, traditionally termed alimony (or maintenance) and property division, have virtually melded into one integrated financial schema governing all domestic fractures. Third, despite the ongoing societal reconsideration of the ease of divorce, the ALI *Principles* exclude consideration of fault or any other dissolution-delaying mechanism. Considered together, these features fuse to form the backbone of a unified field theory of the family, one whose unspoken aim is finally to consolidate the no-fault divorce revolution.<sup>9</sup>

The substitution of discrete rules for the “largely limitless discretion . . . common in family law”<sup>10</sup> sounds a leitmotif throughout the *Principles*, and it serves to leverage the drive toward the unification

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8. In a sense, the ALI proposals may also be seen as responding to scholarly plaints that “[f]amily law has always been longer on practice than on theory.” Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy—Balancing the Individual and Social Interests*, 81 MICH. L. REV. 463, 489 (1983).

9. This article examines the central concerns of the ALI *Principles*. Certain aspects of the *Principles* receive only cursory consideration herein, including the changed calculus of child support (ch. 3), the increased role of private agreements in family law (ch. 7), and the practical equivalence of domestic partnerships to marriages (ch. 6). These provisions also reflect the overall themes of the *Principles*. Briefly noted, the ALI child support provisions advance the trend substituting discrete guidelines for broad discretion. The increased role afforded couples’ agreements enhances private ordering as another tool to further diminish the scope of judicial review, and the domestic partnership provisions promote the aim of theoretical consolidation by establishing default rules which mimic the law’s treatment of marital dissolution.

10. Ira Mark Ellman, *Brigitte M. Bodenheimer Memorial Lecture on the Family: Inventing Family Law*, 32 U.C. DAVIS L. REV. 855, 871 (1999). See Murphy, *supra* note 7, at 1197 (“Standards in family law for allocating family assets, deciding child custody and visitation, child support and alimony have traditionally been characterized by broad discretion.”); Mary Ann Glendon, *Fixed Rules and Discretion in Contemporary Family Law and Succession Law*, 60 TUL. L. REV. 1165, 1167 (1986) (“Family law . . . is characterized by more discretion than any other field of private law.”). A nuanced summary of the conflicting claims of rules and of discretion in family law is provided in Carl E. Schneider, *The Tension Between Rules and Discretion in Family Law: A Report and Reflection*, 27 FAM. L.Q. 229 (1993).

of family law. The attack on the excessive leeway afforded domestic relations courts is itself not new. As Chief Reporter Ira Ellman has noted, “over the past three decades, one theme that emerges is the movement from broad judicial discretion toward more certain rules of adjudication.”<sup>11</sup> The nationwide adoption of child support guidelines provides the clearest example of this trend, both consolidating and increasing child support enforcement.<sup>12</sup>

However, the *Principles* do not merely attempt to further attenuate the scope of judicial authority; rather, they trumpet a finale to most forms of traditional judicial discretion. The sharp shrinking of the scope of discretion is essential to the consolidation and rationalization of the rules for dissolution. In their contemporary crusade to “[i]nvent[] [f]amily [l]aw,”<sup>13</sup> the ALI reformers must have realized that the effort to radically reorient the operant paradigms of the field would be jeopardized unless strict guidelines enforced uniformity. The ALI transmutation of alimony is emblematic of this twin goal of enacting substantive law while extracting judicial discretion. The new alimony regime features two components: (1) a paradigm switch from spousal need to compensable loss, and (2) an equally pivotal shift from broad discretion to fixed rules.<sup>14</sup> Professor Ellman’s encomium for the ALI alimony provisions is telling: “[W]e end up with a

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11. Ira Mark Ellman, *Chief Reporter’s Preface* to PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS & RECOMMENDATIONS (Tentative Draft No. 3, pt. II, Apr. 18, 1998), at xiii [hereinafter PRINCIPLES (Tentative Draft No. 3, pt. II)]. The penchant for fixed margins has, of course, had its dissenters:

[The] leading virtue [of discretion] is that it gives a judge authority to respond to the full range of circumstances a case presents and thus to do justice in each individual case . . . . [T]he need for individualized justice in family law is particularly pressing. People organize and conduct their family lives in a burgeoning and bewildering variety of ways. And a court’s resolution of a family dispute will matter to the parties more deeply and durably than in perhaps any other kind of civil litigation.

Schneider, *supra* note 10, at 234–35; *see also* Seymour v. Seymour, 433 A.2d 1005, 1007 (Conn. 1980) (commending the legislature for “acting wisely in leaving the delicate and difficult process of fact-finding in family matters to flexible, individualized adjudication of the particular facts of each case without the constraint of objective guidelines”).

12. *See* Grace Ganz Blumberg, *Reporter’s Memorandum* to PRINCIPLES (Tentative Draft No. 3, pt. II), *supra* note 11, at xxvi–xxvii (discussing the adoption of child support guidelines and the benefits of formulaic awards); Elizabeth Scott, *The Legal Construction of Norms: Social Norms and the Legal Regulation of Marriage*, 86 VA. L. REV. 1901, 1904 n.7 (2000) (“Beginning in the mid-1980s, a complex network of federal and state legislation has contributed to more effective child support enforcement.”).

13. Ellman, *supra* note 10, at 855.

14. *See generally* PRINCIPLES (Tentative Draft No. 4), *supra* note 1, ch. 5.

system quite similar to that used for the child support guidelines.”<sup>15</sup> Moreover, the ALI *Principles* not only seek to change the legal lens through which we view spousal support and, to a lesser extent, child support; in both arenas, the *Principles* also aim generally to increase the transfer payments, sometimes markedly so.<sup>16</sup> In this regard, fixed rules might be needed in fending off any rearguard action to revert to the lower standards currently in effect. Uniformity of standards also facilitates enforcement. The two decades between 1978 and 1998, roughly coinciding with the initial period of support guidelines, witnessed a fourteenfold increase in child support collections.<sup>17</sup>

In Part II, this article explores the ALI paradigm shift in the legal treatment of parents. America is well into the era of the postnuclear family, fueled by explosions in the number of children raised in households with a stepparent and in families with a single parent or with same-sex coparents.<sup>18</sup> However, the legal system, which traditionally gave rights only to natural or adoptive parents, has only fitfully adjusted to the protean family. Part II concludes that the ALI *Principles*, which give rights to people who could be considered “equitable parents” or “parents by estoppel,” constitute a major—and largely successful—effort to adapt the law to the emerging social reality of functional families.

Part III considers the ALI resolution of the economic consequences of dissolution. In their most significant departure from extant law, the *Principles* have reformulated alimony from a focus on spousal need to one considering the financial losses stemming from

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15. Ellman, *supra* note 10, at 880.

16. *See id.* at 882 (ALI alimony awards “are more generous than the alimony awards that many courts would now order”); Ira Mark Ellman, *The Maturing Law of Divorce Finances: Toward Rules and Guidelines*, 33 FAM. L.Q. 801, 808 (1999) (ALI child support guidelines are higher than current norms in the “more common case in which the custodial parent has significantly less income than the noncustodial parent.”).

17. *See* Marygold S. Melli, *Whatever Happened to Divorce?*, 2000 WIS. L. REV. 637, 640.

18. *See, e.g.*, Frank Furstenberg, Jr., *The New Extended Family: The Experience of Parents and Children after Remarriage*, in REMARRIAGE AND STEPPARENTING: CURRENT RESEARCH AND THEORY 42–43 (1987) (documenting the rapid growth of modern stepfamilies); Kim A. Feigenbaum, *The Changing Family Structure: Challenging Stepchildren’s Lack of Inheritance Rights*, 66 BROOK. L. REV. 167, 173 (2000) (noting that more Americans live in stepfamilies than in traditional families); John Leland, *O.K., You’re Gay. So? Where’s My Grandchild?*, N.Y. TIMES, Dec. 21, 2000, at F1 (noting increase in gay parents); Joseph P. Shapiro & Stephen Gregory, *Kids With Gay Parents*, U.S. NEWS & WORLD REPORT (Sept. 16, 1996), available at <http://www.usnews.com/usnews/issue/16gay.htm> (reporting that “many thousands of homosexuals already are living in virtual marriages and parenting children”).

the divorce. However, changes in the rules for property division suggest that the ALI is tending toward a reinterpretation and integration of the entire financial question, whether deemed “spousal compensation”<sup>19</sup> or the “allocation of marital property.”<sup>20</sup> Certain features of the analysis, such as the virtual fungibility of these concepts as articulated in the *Principles* and the terms provided for re-characterizing separate property as marital, suggest that the ALI has produced the blueprints for a new order of economic organization following dissolution. As the text points out, however, these blueprints, while suggestive, fall short of erecting a coherent final structure.

Finally, Part IV asks the question the ALI drafters declined to address: Should the rules governing legal dissolution aim at reforming no-fault divorce? Reaction against the perceived excesses of the no-fault revolution has spawned a contemporary “divorce counter-revolution” whose aim is to strengthen marriage by making divorce more difficult. By contrast, the ALI *Principles* sustain the irreversibility of no-fault divorce and maintain that marital misconduct should generally play no role in dissolution proceedings. Moreover, their rejection of the present challenge to the hegemony of no-fault divorce also furthers the *Principles*’ overarching goal of theoretical consolidation. By forestalling a comeback for culpability, the ALI succeeds in eliminating the judicial role in evaluating fault claims, which had traditionally supplied one of the fountains of overflowing discretion in divorce law. This refusal to reconsider the no-fault debate is thus essential in preserving the conceptual integrity of the ALI *Principles*.

## II. THE FUNCTIONAL PARENT

### *A. The Traditional View of Child Custody Favoring Natural or Custodial Parents*

Traditionally, an adult could never intervene in a custody dispute absent a showing that the child’s biological or adoptive parents were unfit or unavailable.<sup>21</sup> The rationale was so clearly understood that it

19. See PRINCIPLES (Proposed Final Draft, pt. I), *supra* note 2, *Introduction*, at 10.

20. *Id.*

21. See, e.g., Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives when the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879, 879 (1984) (“The law recognizes only one set of parents for a child at any one time, and

often went unstated: only natural birth or an adoption could convert an adult-child relationship into that of parent and child.<sup>22</sup> The parental rights doctrine held that fit biological or adoptive parents have a right to custody and decisionmaking with regard to their child, even if the child's interests would be better served by a third party.<sup>23</sup> As is evident from its formulation, the parental rights doctrine foreclosed any best-interests-of-the-child analysis.<sup>24</sup> Constitutional protections have buttressed parents' rights to privacy<sup>25</sup> and to raise their children as they see fit.<sup>26</sup> These rights may not be terminated absent the opportunity for a hearing<sup>27</sup> and convincing proof of parental unfitness.<sup>28</sup> In other words, "those two persons identified as mother and father should have all the rights and responsibilities of parenthood, whereas nonparents should have none."<sup>29</sup>

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these parents are autonomous, possessing comprehensive privileges and duties that they share with no one else."); *Petersen v. Rogers*, 445 S.E.2d 901 (N.C. 1994) (refusing visitation to the acting adoptive parents of a child where the child was not eligible for adoption because the biological parents were not deemed unfit and stating the right of the parents to determine with whom the child associates).

22. See, e.g., *In re Custody of Townsend*, 427 N.E.2d 1231, 1235 (Ill. 1981) ("The right and correlative responsibility of a parent to care for his or her child is fundamental and as ancient as mankind."); ARIZ. REV. STAT. ANN. § 25-415(G)(2) (West Supp. 1998) ("Legal parent" means a biological or adoptive parent whose parental rights have not been terminated."). As recently as 1981, the White House Conference on Families adopted the National Pro-Family Coalition's definition of family, limited to "persons who are related by blood, marriage or adoption." Elizabeth Weiss, *Nonparent Visitation Rights v. Family Autonomy: An Abridgment of Parents' Constitutional Rights?*, 10 SETON HALL CONST. L.J. 1085, 1090 (2000).

23. See John Lawrence Hill, *What Does It Mean to Be a "Parent"? The Claims of Biology as the Basis for Parental Rights*, 66 N.Y.U. L. REV. 353, 363 (1991); see also Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401, 2406-14 (1995) (summarizing parental rights' "deep historical roots" as well as the current policy debates).

24. See Hill, *supra* note 23, at 363. Nor is this doctrinal incompatibility new. See Irma S. Russell, *Within the Best Interests of the Child: The Factor of Parental Status in Custody Disputes Arising from Surrogacy Contracts*, 27 J. FAM. L. 587, 620-27 (1988-89) (discussing tension between these two doctrines); Lucy S. McGough & Lawrence M. Shindell, *Coming of Age: The Best Interest of the Child Standard in Parent-Third Party Custody Disputes*, 27 EMORY L.J. 209, 212-14, 230-44 (1978) (reviewing the changing balance between these two doctrines).

25. See *Smith v. Org. of Foster Families*, 431 U.S. 816, 842 (1977).

26. See *Troxel v. Granville*, 530 U.S. 57, 66 (2000) ("[I]t cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.>").

27. See *Stanley v. Illinois*, 405 U.S. 645, 657-58 (1972); *Santosky v. Kramer*, 455 U.S. 745, 758-68 (1982).

28. See *Santosky*, 455 U.S. at 758-68.

29. Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J.



*B. The Shift to More Liberal Child Custody Laws*

The common law rules treating the biological family as a bastion have for some years struggled with the contention that the nuclear family has “failed”<sup>30</sup> and that legal rules need to accommodate the burgeoning segment of nontraditional families.<sup>31</sup> Courts are slowly<sup>32</sup>—and legislatures more slowly still<sup>33</sup>—recognizing the pervasiveness of alternative family forms. Commentators have criticized the parental rights doctrine<sup>34</sup> and called for a speedier legal acknowledgment of operational parenthood.<sup>35</sup> To date, the success of non-traditional families in seeking legal recognition, both of their formation and of the consequences of their dissolution, has been mixed.<sup>36</sup>

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459, 468 (1990).

30. Bartlett, *supra* note 21, at 882; *see also id.* at 880–82.

31. *See, e.g.*, cases cited in PRINCIPLES (Tentative Draft No. 4), *supra* note 1, § 2.03, Reporter’s Notes cmts. b–c, at 228–32.

32. *See, e.g., id.*

33. *See, e.g.*, OR. REV. STAT. § 109.119 (1999) (detailing the rights of a “person who establishes emotional ties creating child-parent relationship”); VT. STAT. ANN. tit. 15, § 1201 (2000) (statute providing same-sex couples the opportunity to obtain the same benefits and protections afforded by Vermont law to married opposite-sex couples). *See generally* Greg Johnson, *Vermont Civil Unions: The New Language of Marriage*, 25 VT. L. REV. 15 (2000) (discussing impact of Vermont civil union statute).

34. *See, for example*, McGough & Shindell, *supra* note 24, at 244–45 (footnote omitted):

[T]he parental rights doctrine as it exists in the United States . . . often operates to the detriment of the child and creates confusion in the law by forcing a court to strain the doctrine in order to achieve the desired result. Moreover, the doctrine is psychologically unsound and seems to present constitutional difficulty.

35. *See* Polikoff, *supra* note 29, at 468–527; Kristine L. Burks, *Redefining Parenthood: Child Custody and Visitation when Nontraditional Families Dissolve*, 24 GOLDEN GATE U. L. REV. 223, 255–58 (1994). The debate has not, of course, been one-sided. *See, e.g.*, Karen Czapanskiy, *Interdependencies, Families, and Children*, 39 SANTA CLARA L. REV. 957 (1999); John DeWitt Gregory, *Interdependency Theory: Old Sausage in a New Casing: A Response to Professor Czapanskiy*, 39 SANTA CLARA L. REV. 1037 (1999); John DeWitt Gregory, *Blood Ties: A Rationale for Child Visitation by Legal Strangers*, 55 WASH. & LEE L. REV. 351 (1998); *see generally* Laurence C. Nolan, *Legal Strangers and the Duty of Support: Beyond the Biological Tie—But How Far Beyond the Marital Tie?* 41 SANTA CLARA L. REV. 1 (2000); Bartlett, *supra* note 21, at 882–83. Professor Gregory, a major opponent of this ballooning of the definition of parenthood, castigates as improper invasions of parental prerogatives the approaches sanctioned by judicial opinions and scholarly commentary that, “perhaps influenced by the Humpty Dumpty school of linguistics, are replete with references to psychological parents, coparents, functional parents, de facto parents, and parents by estoppel, all of whom may enjoy judicially bestowed rights that may be equal to or superior to those of a child’s natural parents.” John DeWitt Gregory, *Whose Child Is It, Anyway: The Demise of Family Autonomy and Parental Authority*, 33 FAM. L.Q. 833, 840 (1999) (footnote omitted).

36. *See* Polikoff, *supra* note 29, at 468–73; Burks, *supra* note 35, at 224–25.

While some courts have adapted equitable remedies to grant nontraditional parents functional equivalence, others have refused to stretch the statutes to encompass these new family units.<sup>37</sup> The problem will not—and cannot—remain unresolved for very long. Increasing numbers of nontraditional parents are raising children, and when those unions dissolve, the law must decide by whom and how those children will continue to be cared for.

Statutory authority generally does not contemplate “third party” custody awards absent the unavailability or unfitness of the legal parents. Washington’s statute is typical in this regard:

[A] child custody proceeding is commenced in the superior court by a person other than a parent, by filing a petition seeking custody of the child in the county where the child is permanently resident or where the child is found, but only if the child is not in the physical custody of one of its parents or if the petitioner alleges that neither parent is a suitable custodian.<sup>38</sup>

Similarly, the linchpin for “nonparent” standing to initiate a custody action under the Uniform Marriage and Divorce Act (“UMDA”) is that the child is not in the physical custody of the parent.<sup>39</sup> As between traditional and nontraditional parents, child custody is usually portrayed as unitary and indivisible: if the natural par-

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37. See, e.g., cases cited in PRINCIPLES (Tentative Draft No. 4), *supra* note 31, Reporter’s Notes cmts. b–c, at 228–232.

38. WASH. REV. CODE ANN. § 26.10.030(1) (1997); see also CAL. FAM. CODE § 3041 (West 1994) (providing that a nonparent may be awarded custody upon a finding that “granting custody to a parent would be detrimental to the child and that granting custody to the nonparent is required to serve the best interest of the child”).

39. UNIF. MARRIAGE AND DIVORCE ACT § 401(d)(2), 9 U.L.A. 263–64 (1998) [hereinafter UMDA] (authorizing a “person other than a parent” to commence a child custody proceeding “only if [the child] is not in the physical custody of one of his parents”). See, e.g., *Olvera v. Sup. Ct.*, 815 P.2d 925 (Ariz. Ct. App. 1991) (stating that a nonparent may bring custody action only if child’s parent does not have physical custody). The UMDA does not require that a nonparent show unfitness of the natural parent in order to petition for child custody. UMDA § 401(d)(2), 9A U.L.A. 282. See *In re Custody of Peterson*, 491 N.E.2d 1150 (Ill. 1986) (stating that once nonparents show that the child is not in the physical custody of one of the child’s parents, the custody issue is to be decided under the best interests of the child standard without the necessity of establishing the unfitness of the natural parents); *In re Custody of C.C.R.S.*, 872 P.2d 1337 (Colo. Ct. App. 1993) (same). Once the necessary lack of physical custody is shown, the court must award custody solely in the best interests of the child, including a consideration of “the interaction and interrelationship of the child with . . . any other person who may significantly affect the child’s best interest.” UMDA § 402(3), 9A U.L.A. 282.

ents have it, nonparents may not even ask for it.<sup>40</sup> Far greater legislative liberality may be seen in an Oregon statute that dramatically expanded the right of nontraditional parents to petition for child custody.<sup>41</sup> It provides that “any person . . . who has established emotional ties creating a child-parent relationship or an ongoing personal relationship with a child” may petition for custodial rights.<sup>42</sup> The statute authorizes a court to determine if “a child-parent relationship exists” and whether awarding custody to the person “*in loco parentis*” is in the best interests of the child.<sup>43</sup> A child-parent relationship, which must either currently exist or have existed within the six preceding months prior to the filing of the action, is defined in both psychological and physical terms:

[A] [c]hild-parent relationship . . . [is one] in which . . . a person having physical custody of a child or residing in the same household as the child supplied, or otherwise made available to the child, food, clothing, shelter and incidental necessities and provided the child with necessary care, education and discipline, and which relationship continued on a day-to-day basis, through interaction, companionship, interplay and mutuality, that fulfilled the child’s

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40. *See, e.g., In re Custody of R.R.K.*, 859 P.2d 998, 1003 (Mont. 1993) (noting that proper inquiry is whether the parent actually relinquished custody to a nonparent and how long parent and child were separated); *In re Custody of McCuan*, 531 N.E.2d 102, 106 (Ill. App. Ct. 1988) (finding that grandparents lacked standing to seek custody because mother had not relinquished it). Nor may a traditional parent unilaterally shift legal custody of the child to a third party. *See Naylor v. Kindred*, 620 N.E.2d 520, 528 (Ill. App. Ct. 1993) (noting that traditional parents possess an equal right to custody but that neither has the right to transfer custody to a nonparent).

41. OR. REV. STAT. § 109.119 (1999). *See In re Marriage of Sleeper*, 982 P.2d 1126 (Or. 1999) (if the best interests of the child call for custody to the nonbiological parent, the court must make such an award, unless to do so would violate some supervening right belonging to the biological parent). Hawaii’s statute also contravenes the parental preference doctrine, providing that “[c]ustody may be awarded to persons other than the father or mother whenever the award serves the best interest of the child.” HAW. REV. STAT. § 571-46(2) (Supp. 1995). Hawaii even prefers the “person who has had de facto custody of the child in a stable and wholesome home” over a noncustodial parent. *Id.*

42. OR. REV. STAT. § 109.119(1).

43. *Id.* § 109.119(3)(a). The determination of the appropriateness of a custodial grant is to be made by a preponderance of the evidence. *Id.* The statute does not specify a standard for the court’s determination that a child-parent relationship exists, although it provides that a petition may be dismissed for failing to state “a prima facie case of emotional ties creating a child-parent relationship or . . . facts that the intervention is in the best interests of the child.” *Id.* § 109.119(5)(a). The statute provides for the awarding of guardianship and visitation rights under specified circumstances. *Id.* § 109.119(3)(a)–(b).

psychological needs for a parent as well as the child's physical needs.<sup>44</sup>

Significantly, courts have interpreted this statute as sanctioning the award of custodial rights to “psychological” parents, even when both traditional parents continue to maintain custody. The “existence of two biological parents who are fit and who successfully share joint custody” has no bearing on whether another person has established a psychological child-parent relationship between herself and the child.<sup>45</sup>

### 1. “Equitable Parent” doctrine

However, similar statutory authority is rare across the American legal landscape. In order to accommodate the best interests of the children of these nontraditional unions, courts have begun re-commissioning and adapting doctrines from equity practice in order to adjust the statutory definition.<sup>46</sup> For example, some jurisdictions recognize as an “equitable parent” someone who, in the role of a parent, has served as a child's residential caretaker.<sup>47</sup> One early decision announcing the doctrine laid out its scope:

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44. *Id.* § 109.119(6)(a). A relationship between a child and a person who is the nonrelated foster parent of the child is not a child-parent relationship under the statute unless the relationship continued over a period exceeding eighteen months. *Id.* Visitation rights for non-traditional parties are conditioned upon proof of an “ongoing personal relationship,” defined as one “with substantial continuity for at least one year, through interaction, companionship, interplay and mutuality.” *Id.* § 109.119(6)(d).

45. *In re Marriage of Sorensen*, 906 P.2d 838, 841 (Or. Ct. App. 1995). The court noted that the statute neither stated nor implied that a child's psychological needs for a parent “can be met by only two individuals.” *Id.* Nor need the intervenor seeking custody show that he or she “‘substituted’ for the biological parent.” *Id.*

46. Some scholars suggest that, through its *parens patriae* doctrine, Chancery practice in England at the time of colonization had already made inroads into the common law parental rights doctrine by granting equitable relief in a variety of custodial situations. See McGough & Shindell, *supra* note 24, at 217–21. Apparently, the exercise of these equitable powers by American courts has lain dormant until recent times.

47. See, e.g., *In re Marriage of Gallagher*, 539 N.W.2d 479 (Iowa 1995) (involving a husband who had developed a parent-child relationship with his wife's two-year-old child, whom he had treated as his own, who was deemed an equitable parent for custody purposes at the time of dissolution of the marriage). A similar concept is expressed by holdings that nonparents served *in loco parentis*. See, e.g., *Bupp v. Bupp*, 718 A.2d 1278 (Pa. Super. Ct. 1998) (describing how ex-boyfriend of child's mother, who lived with both mother and child and, with the mother's encouragement, acted as a parent to the child is deemed *in loco parentis* for purposes of custody determination). See Polikoff, *supra* note 29, at 483–86, 502–08 (describing equitable parent and *in loco parentis* doctrines).

[W]e adopt the doctrine of “equitable parent” and find that a husband who is not the biological father of a child born or conceived during the marriage may be considered the natural father of that child where (1) the husband and the child mutually acknowledge a relationship as father and child, or the mother of the child has cooperated in the development of such a relationship over a period of time prior to the filing of the complaint for divorce, (2) the husband desires to have the rights afforded to a parent, and (3) the husband is willing to take on the responsibility of paying child support.<sup>48</sup>

Some courts, of course, have refused to tunnel around the statutory scheme, preferring to allow the legislature to solve the inconsistencies of the law’s application to nontraditional families.<sup>49</sup> Other courts have employed the doctrine of equitable estoppel to bar a biological or adoptive parent from objecting to the conferral of parental status upon someone who, with that parent’s inducement or acquiescence, had established a parent-child relationship.<sup>50</sup> Equitable estoppel has also been applied in cases in which a parent failed to object in a timely fashion to a nonparent’s standing to petition for custody. For instance, in *In re Marriage of Hodge*,<sup>51</sup> the court held that the wife was estopped from denying the husband’s paternity of their child when she had stated on the child’s birth certificate that

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48. *Atkinson v. Atkinson*, 408 N.W.2d 516, 519 (Mich. Ct. App. 1987); *see also* *V.C. v. M.J.B.*, 748 A.2d 539 (N.J. 2000) (describing same-sex partner of a biological mother who had assumed a parental role in helping to raise the biological mother’s child had established a “psychological parenthood” with respect to the child and thus had a legal right to petition for custody and visitation).

49. *See, for example, Cotton v. Wise*, 977 S.W.2d 262, 265 (Mo. 1998), which states: The problem with a court-fashioned “equitable parent” doctrine is that the court has to improvise, as it goes along, substantive standards and procedural rules about when legal custody may be modified, what terms and conditions may be set, and other matters that already have well-charted passageways under state statutes and related court decisions.

*See also* *E.N.O. v. L.M.M.*, 711 N.E.2d 886, 898 (Mass. 1999) (Fried, J., dissenting) (“Only the Legislature is in a position to deal systematically and comprehensively with [the subject of children raised by same-sex partners]. Our imprecise, indirect, and piecemeal entry into this field can only cause confusion.”)

50. *See, e.g., Jean Maby H. v. Joseph H.*, 676 N.Y.S.2d 677 (N.Y. App. Div. 1998) (finding mother estopped from denying her husband’s right to seek custody when she had publicly held out her husband as the child’s father, and the husband had accepted this role, despite the fact that both knew that husband was not the child’s biological father). *See also* Polikoff, *supra* note 29, at 491–503 (analyzing the role of equitable estoppel in child custody cases).

51. 733 P.2d 458 (Or. Ct. App. 1987).

her husband was the father of the child, she had represented him as the father, and she had not raised the issue of paternity until after he sought to obtain custody in the dissolution proceeding. "Having allowed husband to establish the emotional ties of a child-parent relationship, wife cannot at this late date deny him and the child the benefits of the relationship."<sup>52</sup>

## 2. *Legal principles applied to stepparents*

Stepfamilies constitute another "important emerging family configuration"<sup>53</sup> which has been buffeted by the inconsistent application of equitable principles, such as equitable adoption and *in loco parentis*.<sup>54</sup> The latter doctrine is particularly inapt, as it inaccurately implies that a stepparent necessarily replaces a natural parent.<sup>55</sup> Although the legal principles attending the relationships between stepparents and stepchildren remain unsettled, membership in stepfamilies now outnumbers that in biological families,<sup>56</sup> and the cultural norm is shifting to a recognition that "[c]hildren will benefit from having more responsible adults in their lives rather than fewer."<sup>57</sup>

52. *Id.* at 459–60; *see also In re Marriage of Sleeper*, 929 P.2d 1028 (Or. Ct. App. 1996), *aff'd on other grounds*, 982 P.2d 1126 (Or. 1999) (applying equitable estoppel). Courts have also relied on the related doctrine of waiver to effect the same result as under estoppel analysis. *See, e.g., In re Marriage of Sechrest*, 560 N.E.2d 1212 (Ill. Ct. App. 1990) (finding that although nonparents lacked standing to seek custody, mother waived this issue by failing to raise it, under circumstances in which prejudice would result from removing a young child from the custodial relationship he had enjoyed with nonparents for three years); *In re Custody of Gonzalez*, 561 N.E.2d 1276 (Ill. Ct. App. 1990) (same rule).

53. Mary Ann Mason & David W. Simon, *The Ambiguous Stepparent: Federal Legislation in Search of a Model*, 29 FAM. L.Q. 445, 450 (1995); *see also* David L. Chambers, *Stepparents, Biologic Parents, and the Law's Perceptions of "Family" After Divorce*, in *DIVORCE REFORM AT THE CROSSROADS* 102–29 (Stephen D. Sugarman & Herma Hill Kay eds., 1990).

54. *See* MARGARET M. MAHONEY, *STEPFAMILIES AND THE LAW* 16–27, 60–63 (1994); Susan M. Silverman, Note, *Stepparent Visitation Rights: Toward the Best Interest of the Child*, 30 J. FAM. L. 943 (1991–92).

55. *See* Mason & Simon, *supra* note 53, at 470 ("The stepparent is not actually standing in the place of the parent since the divorced noncustodial parent still possesses rights and obligations with respect to the child."); *see also* Marcy Goldstein, *The Rights and Obligations of Stepparents Desiring Visitation with Stepchildren: A Proposal for Change*, 12 PROB. L.J. 145, 146–47 (1995) (noting the unpredictable results in courts' application of the *in loco parentis* to stepparent cases).

56. *See* Feigenbaum, *supra* note 18.

57. Mason & Simon, *supra* note 53, at 467. *See Stepparent Rights*, (Feb. 25, 2000), available at <http://stepparenting.about.com/parenting/stepparenting/library/weekly/aa02-2500a.htm> ("[M]any stepparents today are more than just 'Mommy's husband' or 'Daddy's

However sinuous the path of the law, its direction seems relatively clear: we are in a transitional stage along the continuum from sanctioning only biologically based families to legally recognizing functional families.<sup>58</sup> The passage is by no means smooth or uniform. Indeed, the legal and cultural fluctuations during this intermediate stage suggest unresolved ideological clashes. Note, for example, the ironic twist at the heart of litigation in which biological parents have sought to terminate the relationship between their child and their former coparent. In some of the cases involving lesbian coparents, the biological mother has endeavored to defeat the custodial or visitation claims of her former partner by reverting to parental rights discourse to exalt the biological link above all others, in contravention of her prior agreements and her behavior in jointly raising the

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wife' . . . they are parents in every way to their stepchildren, yet they are unrecognized by the courts as family members." See generally Naomi R. Cahn, *Reframing Child Custody Decisionmaking*, 58 OHIO ST. L.J. 1, 44-47 (1997) (discussing legal issue in recognizing multiple parents for a child). Some legal recognition has been afforded to the stepparent-child relationship, often in curious, indirect ways. For example, a Washington family expense statute designed to protect creditors who provide goods and services includes stepchildren among the designated family members. WASH. REV. CODE ANN. § 26.16.205 (West 1997). A Nebraska criminal nonsupport law covers stepchildren. NEB. REV. STAT. § 28-706 (Supp. 1988). Several states impose a duty to support stepchildren who are, or are likely to become, recipients of public assistance. See, e.g., N.Y. SOC. SERV. § 101 (1992). The New Jersey Supreme Court estopped a divorcing stepparent from denying a postdivorce obligation to support his stepchildren based upon his pre-divorce rejection of support from the children's natural father. *Miller v. Miller*, 478 A.2d 351 (N.J. 1984).

58. See, e.g., MARY ANN MASON, *THE CUSTODY WARS* 119-42 (1999) (favoring model of de facto parenthood); *Rubano v. DiCenzo*, 759 A.2d 959 (R.I. 2000) (same); *V.C. v. M.J.B.*, 748 A.2d 539 (N.J. 2000) (same); *In re Custody of H.S.H.-K.*, 533 N.W.2d 419 (Wis. 1995) (same); Polikoff, *supra* note 29 (same); Bartlett, *supra* note 21 (same). These evolving family forms have received a great deal of popular attention. See, e.g., Debra Rosenberg, *Gays: A Place of Their Own*, NEWSWEEK, Jan. 15, 2001, available at <http://www.msnbc.com/news/512598.asp#BODY>; Jane Gross, *A Quiet Town of Potlucks, Church Socials and Two Dads: Gays Find Warm Welcome in a New Jersey Suburb*, N.Y. TIMES, Dec. 4, 2000, at B8; Leland, *supra* note 18; *Same-Sex Dutch Couples Gain Marriage and Adoption Rights*, N.Y. TIMES, Dec. 20, 2000, available at <http://www.nytimes.com/2000/12/20/world/20DUTC.html>; Herbert A. Glibberman, *Should De Facto Parents Have Visitation Rights?*, USLaw.com Library, available at <http://www.uslaw.com/library/article/TNPFamily-Coll024defacto.html> (last visited Dec. 13, 2000); E. J. Graff, *Equal Rights: When Heather's Mommies Share Custody*, BOSTON GLOBE, Sept. 12, 1999, at E1; Jason M. Fields & Charles L. Clark, *Unbinding the Ties: Edit Effects of Marital Status on Same Gender Couples*, U.S. Census Bureau, Population Division Working Paper No. 34 (April 1999), available at <http://www.census.gov/population/www/documentation/twps0034.html> (last visited Feb. 6, 2001); Frank Bruni, *A Small-But-Growing Sorority is Giving Birth to Children for Gay Men*, N.Y. TIMES, June 25, 1998, at A12.

child with a lesbian coparent.<sup>59</sup> The legal position taken by the biological parent in a 1995 case decided by the Wisconsin Supreme Court is illustrative of this rhetorical recrudescence.<sup>60</sup> Two women shared a “close, committed relationship for more than ten years,” a union solemnized by an exchange of vows and rings.<sup>61</sup> They made a joint decision that one of them would be artificially inseminated, and both fully participated jointly in all aspects of parenting, from attending the childbirth classes together to giving the child a surname formed by combining their last names to discharging together the actual parenting responsibilities. When their domestic union dissolved, the nonbiological parent sought to continue her role in child rearing. The biological mother’s response did not consist of a claim that her former coparent was unfit, or that custody or visitation by her would be detrimental to the best interests of the child. Rather, the birth mother sought to deny (successfully as to custody and unsuccessfully as to visitation) the other’s standing to petition for *any* role in the child’s life. Assertion of the parental rights doctrine under these circumstances is troubling. It illustrates the legal system’s reluctance to address even the possibility of substantial harm to a child of a nontraditional union when one of the child’s parents is allowed legally to convert the other into a nonparent and deprive the child of a nurturing parental influence.<sup>62</sup>

59. *See, e.g.*, cases cited *supra* note 58.

60. *In re* Custody of H.S.H.-K., 533 N.W.2d 419 (Wis. 1995).

61. *Id.* at 421.

62. Reactions to a 1999 California appellate case that rebuffed the claims of a nonbiological lesbian coparent suggest the divisiveness of this issue. *See Z.C.W. v. K.G.W.*, 71 Cal. App. 4th 524 (1999) (declining to grant visitation rights not authorized by statute even though the nonbiological parent had “exhibited the characteristics of a *de facto* parent”). Counsel for the prevailing birth mother in *Z.C.W.* claimed that the court’s ruling represented “a victory for parents—and in particular for parents who are lesbians—in renewing the decision that they are entitled to the same rights as other parents.” Mike McKee, *Court Rules in Lesbian Mother’s Favor*, *The Recorder/Cal Law*, April 20, 1999, at <http://www.lawnewsnet.com/stories/A796-1999Apr19.html> (quoting Carol Amyx). Such an assertion employs transparent rhetorical legerdemain, in declaring that “parents” have won when one parent has utilized a hiatus in the formal law to deprive her child and her former coparent of an established parent-child relationship. On the other side of the argument, the legal director of the National Center for Lesbian Rights, who filed an amicus curiae brief in *Z.C.W.*, protested that the court failed “to recognize the reality of our families and provide our children with the same rights and protections that children of heterosexuals are able to take for granted.” *Id.* (quoting Kathryn Kendell).

Some commentators have suggested a different approach to the issues posed by nontraditional families: that the state abandon the business of regulating marriage and focus only on



*C. The ALI Position: Legal Parents, Parents by Estoppel,  
and De Facto Parents*

Where, on this scale, do the ALI *Principles* fall? They acknowledge that the law at present reflects a “conflicted stance” on the issue of redefining parenthood.<sup>63</sup> They aim at resolving the tension between society’s allocation of full legal recognition to traditional parents and the dawning reality that disallowing the interests of functional parents “ignores child-parent relationships that may be fundamental to the child’s sense of security and stability.”<sup>64</sup> Accordingly, the *Principles* suggest a compromise: “What is needed is a rule that allows continued contacts by de facto parents whose participation in the child’s life is important to the child’s welfare, without unnecessarily intruding on the autonomy of parents that is essential to the meaningful exercise of their responsibility.”<sup>65</sup> In thus suggesting a relatively fixed rule rather than the equity-based discretion on which some courts had relied to address the issue of functional parenting, the *Principles* here recapitulate in miniature the overall ALI policy of replacing discretionary justice with bright lines.

The proposed structure consists of a tripartite division of parents into “legal parents,” “parents by estoppel,” and “de facto parents.”<sup>66</sup> Briefly described, a “legal parent” is one already recognized as a par-

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ensuring fair treatment of adults and children. *See, e.g.*, Harry D. Krause, *Marriage for the New Millennium: Heterosexual, Same-Sex—Or Not At All?*, 34 FAM. L.Q. 271 (2000) (suggesting that marriage be delegalized in order to equalize heterosexual and gay/lesbian domestic unions); MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* 228–29 (1995) (same). *But see* Katharine T. Bartlett, *Cracking Foundations as Feminist Method*, 8 AM. U. J. GENDER SOC. POL’Y & L. 31, 45 (2000) (“Ideally, the state should recognize the benefits of two-parent families to children, and pursue appropriate measures to support the institution still preferred by many couples, without undermining the ability of unmarried couples who choose to have families to do so.”).

63. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS & RECOMMENDATIONS, *Introduction*, at 6 (Tentative Draft No. 3, pt. I, Mar. 20, 1998) [hereinafter PRINCIPLES (Tentative Draft No. 3, pt. I)].

64. *Id.*

65. *Id.* at 7; *see* Shapiro, *supra* note 7, at 774 (stating that in addressing the scope of parenthood, ALI drafters “have chosen a middle ground that expands the definition of parent but still employs a sharp limitation”).

66. PRINCIPLES (Tentative Draft No. 4), *supra* note 31, § 2.03. An earlier version of this section lacked the “de facto parent” category. *See* PRINCIPLES (Tentative Draft No. 3, pt. I), *supra* note 63, § 2.03.

ent by state law.<sup>67</sup> A “parent by estoppel” is an adult not currently identified as a legal parent, but who “has acted as a parent under certain specified circumstances which serve to estop the legal parent from denying the individual’s status as a parent.”<sup>68</sup> Such an individual is “afforded all of the privileges of a legal parent.”<sup>69</sup> The parental triptych is completed by a “de facto” parent, an individual who performed the functions of a child’s primary parent without meeting all the requirements of a parent by estoppel, and without obtaining the panoply of parental rights afforded legal parents or parents by estoppel.<sup>70</sup> The designation of parent by estoppel constitutes a codification of the equitable estoppel arguments described above. The *Principles* identify the elements of functional parenthood as arising from an equitable defense rather than an affirmative right.<sup>71</sup> Section 2.03(1)(b) attempts to legitimate (or, technically, to preclude objections to legitimate) the parental status of individuals who, for a substantial period of time, lived their lives, relative to their domestic partner and the child in question, *as if* they were traditional coparents.<sup>72</sup> In their

67. PRINCIPLES (Tentative Draft No. 4), *supra* note 31, § 2.03(1)(a) & cmt. a.

68. *Id.* at cmt. b. An individual who is liable for child support under chapter 3 of the *Principles* is also deemed a parent by estoppel. *Id.* § 2.03(1)(b)(i). The facts of *H.S.H.-K.*, described above and typical of many coparenting cases, provide a prototype of the equitable estoppel claim which readily translates into the ALI “parent by estoppel.” Under the *Principles*, and so long as the court found that recognition as a parent to be in the child’s best interests, the nonbiological parent would in these circumstances be deemed a “parent by estoppel”: an individual who “lived with the child since the child’s birth, holding out and accepting full and permanent responsibilities as a parent, as part of a prior co-parenting agreement with the child’s legal parent . . . to raise a child together each with full parental rights and responsibilities . . . .” PRINCIPLES (Tentative Draft No. 4), *supra* note 31, § 2.03(1)(b)(iii).

69. PRINCIPLES (Tentative Draft No. 4), *supra* note 31, § 2.03(1)(a), at cmt. b.

70. *Id.* § 2.03(1)(c). A de facto parent is viewed as someone who falls short of the guidelines of a parent by estoppel:

Occasionally, an individual who is not a legal parent under state law and who does not have a child-support obligation, did not have the good-faith belief that he was the child’s parent, . . . did not have an agreement with the legal parent to serve as a co-parent, or otherwise does not meet the requirements of a parent by estoppel, may nonetheless have functioned as the child’s primary parent.

*Id.*

71. *Cf.* *Rubano v. DiCenzo*, 759 A.2d 959, 968 (R.I. 2000) (stating that “generally speaking, the estoppel doctrine acts as a legal shield rather than a sword”); *Burks*, *supra* note 35, at 256–57 (proposing statutory recognition of “functional parents” and granting them “the status of legal parents”).

72. A *parent by estoppel* is an individual who, though not a legal parent:

(i) is liable for child support under [the ALI child support guidelines]; or

(ii) lived with the child for at least two years and

(A) over that period had a reasonable good-faith belief that he was the child’s

legal taxonomy, the *Principles* thus seek to reinforce the perimeter of the doctrinal expansion which is already evident in some quarters of the common law, while also staking out an independent ground for the concept of functional parenthood.<sup>73</sup> On this score, the ALI *Principles* keep pace with the changing domestic dynamic and attempt to bridge the “dangerous disconnect”<sup>74</sup> between the formal law and the way people live their lives and construct their families.<sup>75</sup>

biological father, based on marriage to the mother or on the actions or representations of the mother, and fully accepted parental responsibilities consistent with that belief, and

(B) thereafter continued to make reasonable, good-faith efforts to accept responsibilities as the child’s father, even if that belief no longer existed; or

(iii) lived with the child since the child’s birth, holding out and accepting full and permanent responsibilities as a parent, as part of a prior co-parenting agreement with the child’s legal parent (or, if there are two legal parents, both parents) to raise a child together each with full parental rights and responsibilities, when the court finds that recognition as a parent is in the child’s best interests; or

(iv) lived with the child for at least two years, holding out and accepting full and permanent responsibilities as a parent, pursuant to an agreement with the child’s parent (or, if there are two legal parents, both parents), when the court finds that recognition as a parent is in the child’s best interests.

PRINCIPLES (Tentative Draft No. 4), *supra* note 31, § 2.03(1)(b).

73. See Wriggins, *supra* note 7, at 298 (“‘Familistic’ relationships and relationships of mutual dependence and support between coupled adults are good for society, as well as the members of the relationship, and should be recognized and supported by law.”).

74. *Id.*; see also Alison H. Young, *Reconceiving the Family: Challenging the Paradigm of the Exclusive Family*, 6 AM. U. J. GENDER SOC. POL’Y & L. 508, 533 (1998) (arguing that, although “[f]amilies are working out a multiplicity of relationships and roles for all the parent-figures and extended family members . . . [o]ur legal framework remains detached from reality”) (footnote omitted).

75. See Hill, *supra* note 23, at 419–20, which states,

[T]he biological conception does not square with a number of other, equally deep, intuitions. It is not consistent with the modern understanding that parenthood is as much a social, psychological, and intentional status as it is a biological one . . . . [M]ost fundamentally, the biological conception of parenthood cannot be reconciled with the belief that other moral considerations sometimes may override claims predicated upon the biological relationship. In essence, the claims of biology cannot be deemed to trump invariably the moral claims of those who entertain no biological connection with the child.

Arguments from estoppel principles dovetail with this moral argument, particularly when a biological parent has cooperated in forming and upholding a child-parent relationship between that parent’s child and that parent’s coparent. See *Rubano*, 759 A.2d at 976 (“[T]he fact that [the biological parent] not only gave birth to this child but also nurtured him from infancy does not mean that she can arbitrarily terminate [her coparent’s] de facto parental relationship with the boy, a relationship that [the biological parent] agreed to and fostered for many years.”). The moral core of this estoppel principle serves to prevent a parent who gives birth to a child and joins in creating parental rights in a coparent from later denying the existence of the latter when the coparental union has dissolved.

A recent opinion by the Rhode Island Supreme Court demonstrates both the creative reach of equitable doctrines and statutory interpretation techniques and the need for adoption of the ALI determinate rule.<sup>76</sup> In the course of its divided opinion, the court explored most of the issues at play in the question of deciding the parental status of nontraditional parents.<sup>77</sup> An extended look at this case illustrates the successes—and limitations—of this approach. Maureen Rubano and Concetta DiCenzo are two women who “agreed to become the parents of a child.”<sup>78</sup> They planned for DiCenzo to be artificially inseminated, and after the child’s birth, they jointly raised him “for four years while living together as domestic partners in the same household.”<sup>79</sup> After their “committed relationship” dissolved, their dispute about child custody and visitation reached the courts. Upon certification from the family court, the supreme court declared that the statute conferring jurisdiction upon the family court over “equitable matters arising out of the family relationship” required a necessary trigger of a petition for divorce, bed and board, or separate maintenance, a prerequisite absent in this case.<sup>80</sup> However, the court found that a different statute entitled Rubano to bring an action to have the family court

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Of course, equity was born of a tension between statutory limits and the courts’ obligation to provide justice to the parties. In *Alison D. v. Virginia M.*, 572 N.E.2d 27 (N.Y. 1991), the New York Court of Appeals refused to interpret the statutory term “parent” to include a functional parent who had established her child-parent relationship in the context of a lesbian coparenting agreement. *Id.* at 30. Recently, a family court in New York relied on equitable estoppel to outflank the *Alison D.* precedent. See *J.C. v. C.T.*, 711 N.Y.S.2d 295 (N.Y. Fam. Ct. 2000) (allowing the former same-sex partner of the children’s biological mother to petition for visitation under equitable estoppel principles). One commentator opined that such equitable estoppel cases in New York are “well-intentioned, but intentionally badly reasoned,” a problem that he attributed to the need to circumvent the restrictive *Alison D.* holding. Robert Z. Dobrish, *No Final Word on ‘Alison D.’*, N.Y. L.J. Jan. 9, 2001, at Letters to the Editor. “Thank goodness for the concept of equitable estoppel. It is being used to achieve equity in the face of outdated legal precedents that otherwise would stand in the way of doing the right thing.” *Id.*

Whether society’s acceptance of homosexual parents is the “right thing” is the subject of another intense debate. See, e.g., Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. ILL. L. REV. 833; Carlos A. Ball & Janice Farrell Pea, *Warring with Wardle: Morality, Social Science, and Gay and Lesbian Parents*, 1998 U. ILL. L. REV. 253; Lynn D. Wardle, *Fighting with Phantoms: A Reply to Warring with Wardle*, 1998 U. ILL. L. REV. 629.

76. *Rubano*, 759 A.2d at 968–70.

77. The *Rubano* court divided 3-2 on the central issues of the case. See *id.*

78. *Id.* at 961.

79. *Id.*

80. See *id.* at 963–65 (interpreting R.I. GEN. LAWS § 8-10-3(a) (1956)).

Rubano to bring an action to have the family court determine “the existence or nonexistence of a mother and child relationship” between herself and the child, because her visitation agreement with DiCenzo and her alleged de facto parental relationship with the child rendered her an “interested party” within the meaning of that statute.<sup>81</sup> Additionally, the court determined that Rubano had available a remedy to seek enforcement of the parties’ visitation agreement, which had been entered as a consent order, pursuant to a statutory grant of jurisdiction to the family court to hear matters relating to adults “who shall be involved with paternity of children born out of wedlock.”<sup>82</sup> The court’s rationale for linking Rubano to the child’s “paternity” was twofold. Initially, the court took heed of the state legislature’s guide to statutory construction, which declared that “[e]very word importing the masculine gender only, may be construed to extend to and to include females as well as males.”<sup>83</sup> The court held that Rubano was “involved with [the child’s] paternity” in that DiCenzo’s alternative insemination occurred only pursuant to the parties’ joint decision to bear and raise a child together.<sup>84</sup> Secondly, the court relied upon facts asserted by Rubano in her petition to bolster its conclusion that she was an interested party in the child’s paternity: Rubano not only helped to plan and arrange the child’s conception, but was primarily responsible for the financial costs of the procedure; her name appeared on the child’s birth certificate, which listed his surname as “Rubano-DiCenzo”; she and DiCenzo sent out birth announcements identifying themselves as the child’s parents; and she coparented the child for four years, thereby becoming his de facto parent.<sup>85</sup> Next, the court addressed federal constitutional considerations, acknowledging the fundamental right of parents to make “decisions concerning the care, custody, and control of [their] children.”<sup>86</sup> However, the court also recognized that “persons outside the nuclear family are called upon with in-

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81. *See id.* at 965–66 (interpreting R.I. GEN. LAWS § 15-8-26). The court indicated that the statute did not require that the “interested party” allege that she was the biological parent of the child. *Id.*

82. *Id.* at 970 (interpreting R.I. Gen. Laws § 8-10-3(a)).

83. *Id.* (interpreting R.I. GEN. LAWS § 8-10-3(a)).

84. *Id.* at 971 (quoting R.I. GEN. LAWS § 8-10-3(a)).

85. *See id.*

86. *Id.* at 976 (quoting *Troxel v. Granville*, 530 U.S. 57, 66 (2000)).

creasing frequency to assist in the everyday tasks of child rearing,”<sup>87</sup> and that “the importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association.”<sup>88</sup> Under certain circumstances, even the existence of a developed relationship between the biological parent and the child will not prevent others from acquiring parental rights as a result of establishing de facto child-parent relationships.<sup>89</sup> Finally, the court noted the harmonic convergence of its ruling with the recently adopted ALI *Principles*.<sup>90</sup> Accordingly, the court avowed that “children have a strong interest in maintaining ties that connect them to adults who love and provide for them,’ an interest that ‘lies in the emotional bonds that develop between family members as a result of shared daily life.’”<sup>91</sup> The court affirmed the emerging legal rule, consistent with the ALI position, that “a person who has no biological connection to a child but who has served as a psychological or de facto parent to that child may, under [certain specified] limited circumstances . . . establish his or her entitlement to parental rights vis-a-vis the child.”<sup>92</sup>

87. *Id.* at 973 (quoting *Troxel*, 530 U.S. at 64).

88. *Id.* at 973 (quoting *Smith v. Org. of Foster Families*, 431 U.S. 816, 844 (1977)).

89. *See id.* at 974. In this regard, the court favorably cited *V.C. v. M.J.B.*, 748 A.2d 539 (N.J. 2000) (involving same-sex partner of a biological mother who had assumed a parental role in helping to raise the biological mother’s child had demonstrated “psychological parenthood” and thus a right to petition for custody and visitation). In that case, the New Jersey Supreme Court applied a four-part test to ascertain the existence of a “psychological parenthood”:

[T]he legal parent must consent to and foster the relationship between the third party and the child; the third party must have lived with the child; the third party must perform parental functions for the child to a significant degree; and most important, a parent-child bond must be forged.

*V.C. v. M.J.B.*, 748 A.2d at 551.

90. *See Rubano*, 759 A.2d at 974–75 (referring to Sections 2.03–2.21 of the *Principles*, dealing with the allocation of custodial and decisionmaking responsibility for children).

91. *Id.* at 975 (quoting *V.C. v. M.J.B.*, 748 A.2d at 550).

92. *Id.* Two justices strongly disagreed with most of the majority’s statutory interpretations and application of equitable doctrines. *See id.* at 977 (Bourcier, J., concurring and dissenting). At virtually every turn, the concurring and dissenting justices indicated their preference for a narrower interpretation of both the statutes and equitable principles in order to retain the primacy of biological parenthood. More fundamentally, however, these justices could not conceal their aversion at the protean nature of the modern family. A rhetorical parade of horribles was displayed, including the *reductio ad absurdum* that the majority’s ruling would result in legal recognition “that a man can become pregnant after intercourse with a woman and then require the woman to pay for his hospital and delivery expenses.” *Id.* at 978.

The three-to-two division in the Rhode Island Supreme Court bespeaks the contemporary predicament of functional parenthood. Dependence on the willingness of courts to adapt equitable principles, often in the face of statutes that never anticipated the present shape of family evolution, may have been a necessary prelude to codification of a new legal standard. However, the *ALI Principles* represent a declaration that experimentation should now yield to consolidation. In the contested terrain of modern parenthood, the ALI has shaped a clear and functional path.<sup>93</sup>

### III. UNIFYING THE FINANCIAL CONSEQUENCES OF DISSOLUTION

The *ALI Principles* consider the interspousal financial aftermath of dissolution in two separate chapters, but the thrust of the ALI treatment virtually merges these financial consequences. Chapter 4 allocates spousal property at dissolution, while chapter 5 recasts the rules for what was traditionally termed “alimony.” In general, the ALI preserves the distinction between marital and separate property, with a presumption that marital property would be divided equally between the spouses.<sup>94</sup> The ALI treatment of alimony, on the other

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The concurring and dissenting opinion ended with a stunning mischaracterization of the issue presented in the case, describing it as “a petition for visitation by a person who neither has an adoptive nor blood relationship to the child . . . based solely upon a prior homosexual relationship with the biological mother.” *Id.* at 990.

93. See John C. Sheldon, *Anticipating the American Law Institute’s Principles of the Law of Family Dissolution*, 14 ME. B. J. 18, 28 (1999) (expressing a trial judge’s view that “[t]he number of cases in which a judge wants—and, frankly, ought—to award more than the right of contact to a *de facto* parent is increasing daily”). Nor is this insight new. See, e.g., *Looper v. McManus*, 581 P.2d 487, 488–89 (Okla. Ct. App. 1978) (“Those involved with domestic relations problems frequently see situations where one who is not a natural parent is thrust into a parent-figure role, and through superior and faithful performance produces a warm and deeply emotional attachment.”). Evidence from the social sciences suggests that “forms of nonmarital living arrangements may replace marriage in the future.” Dennis K. Orthner, *The Family Is in Transition*, in *THE FAMILY IN AMERICA* 25, 27 (David L. Bender & Bruno Leone eds., 1992); see also STEVEN MINTZ & SUSAN KELLOGG, *DOMESTIC REVOLUTIONS: A SOCIAL HISTORY OF AMERICAN FAMILY LIFE* xiii–xiv (1988) (“Today the term ‘family’ is no longer attached exclusively to conjugal or nuclear families comprising a husband, wife, and their dependent children. It is applied to almost any grouping of two or more people domiciled together.”); John Bradshaw, *Family*, in *IMAGINE: WHAT AMERICA COULD BE IN THE 21ST CENTURY* 213 (Marianne Williamson ed., 2000) (anticipating new family configurations, including communal marriages, gay and lesbian marriages, “family cooperatives,” and “legally sanctioned childless or open marriages where people agree to their own kinds of sexual contracts”).

94. See *PRINCIPLES* (Proposed Final Draft, pt. I), *supra* note 2, §§ 4.03–4.08; Herma Hill Kay, *From the Second Sex to the Joint Venture: An Overview of Women’s Rights and Family*

hand, constitutes a thorough revision of the legal principles mandating the continuation of financial exchanges between ex-spouses, with the objective of “compensation for losses rather than meeting needs.”<sup>95</sup> The treatment of both sets of financial consequences is interwoven to such an extent that it seems fair to ask if the ALI has virtually merged them into one category, and what might be the consequences of such a unified approach.

*A. Traditional View: Property Division and Alimony  
Considered Separately*

That property division and spousal compensation are considered separately is a historical fortuity, due to their emergence during different historical epochs.<sup>96</sup> At common law, wives surrendered their property rights at the altar in exchange for their husbands’ commitment to support them during the marriage, which was supposed to last until death.<sup>97</sup> Alimony arose as a way for the law to enforce the

*Law in the United States During the Twentieth Century*, 88 CAL. L. REV. 2017, 2070 (2000) (“The [ALI] property division sections offer a redefinition of ‘marital’ and ‘separate’ property for use at dissolution that generally follows community property concepts.”). One significant—if not startling—innovation results in a gradual transmutation of separate property into marital property over the course of a relatively lengthy marriage. PRINCIPLES (Tentative Draft No. 4), *supra* note 31, § 4.18. (“Recharacterization of Separate Property as Marital Property at the Dissolution of Long-Term Marriages”); *see infra* notes 128–30 and accompanying text (analyzing this provision).

95. PRINCIPLES (Proposed Final Draft, pt. I), *supra* note 2, § 5.02 cmt. a (emphasis omitted). The ALI reconceptualization of alimony tracks the outlines laid out in Ira Mark Ellman, *The Theory of Alimony*, 77 CAL. L. REV. 1 (1989); *see, e.g., id.* at 12 [hereinafter Ellman, *Theory of Alimony*] (proposing “an alternative theory of alimony designed to encourage socially beneficial sharing behavior in marriage by requiring compensation for lost earning capacity arising from that behavior”). Ellman’s reformulation of alimony has spawned an outpouring of commentary, some of it quite critical of his underlying theory. *See, e.g.,* June Carbone, *Economics, Feminism, and the Reinvention of Alimony: A Reply to Ira Ellman*, 43 VAND. L. REV. 1463 (1990); John C. Sheldon & Nancy Diesel Mills, *In Search of a Theory of Alimony*, 45 ME. L. REV. 283 (1993); Joan Williams, *Is Coverture Dead? Beyond a New Theory of Alimony*, 82 GEO. L.J. 2227 (1994); Allen M. Parkman, *Reform of the Divorce Provisions of the Marriage Contract*, 8 BYU J. PUB. L. 91 (1993); Cynthia Starnes, *Applications of a Contemporary Partnership Model for Divorce*, 8 BYU J. PUB. L. 107 (1993).

96. *See* PRINCIPLES (Proposed Final Draft, pt. I), *supra* note 2, *Introduction*, at 10. For an account of the origins of equitable distribution, *see* BRETT R. TURNER, *EQUITABLE DISTRIBUTION OF PROPERTY* 2–18 (2d ed. 1994). An account of alimony’s beginnings may be found in Chester G. Vernier & John B. Hurlbut, *The Historical Background of Alimony Law and Its Present Statutory Structure*, 6 LAW & CONTEMP. PROBS. 197 (1939).

97. *See* NANCY F. COTT, *PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION* 7 (2000); Murphy, *supra* note 7, at 1145–46.



husband's support obligation after a divorce *a mensa et thoro*, which today we would call a legal separation, since the spouses were still considered married although separately domiciled.<sup>98</sup> In modern times, the issue of postmarital property in the United States divided in two, with community property principles in several jurisdictions, while the great majority evolved from a title scheme to one of equitable distribution.<sup>99</sup> Alimony, on the other hand, became a fluid doctrine whose consistency conformed to the shape of the rationale into which it was poured: spousal need, maintenance of marital living standards, support at subsistence level, punishment for sexual transgression, reward for fidelity, contractual right, and partnership duty.<sup>100</sup>

The conceptual domains of property division and alimony are each now severely contested.<sup>101</sup> In search of a justifiable rationale for both, the ALI *Principles* have practically fused them. Domestic relations practice has long considered both aspects as fungible in seeking a resolution of a dissolution case.<sup>102</sup> Particularly with its reformulation of the rationale for alimony, the ALI *Principles* have now limned a theoretical basis for considering property division and alimony as subsets of a unitary decision.

*B. The ALI View: Property Division and Alimony Practically Fused*

The *Principles* state that the rules for property division are intended to “respect both spousal ownership rights in their property and the equitable claims that each spouse has on the property in consequence of their marital relationship.”<sup>103</sup> While this formulation mirrors prevailing law, the concept of equitable claims stemming from the marital relationship also constitutes one pillar of the revamped alimony structure, as may be seen from the treatment of spousal earning capacity. Gains during the marriage in spousal earning capacity and skills are deemed “not property divisible on divorce.”<sup>104</sup> Yet relative earning capacity can generate a claim for

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98. See Vernier & Hurlbut, *supra* note 96, at 198.

99. See TURNER, *supra* note 96, at 2–18.

100. See Ellman, *Theory of Alimony*, *supra* note 95, at 3–7.

101. See, e.g., articles cited *supra* note 95.

102. See PRINCIPLES (Proposed Final Draft, pt. I), *supra* note 2, *Introduction*, at 10.

103. *Id.* § 4.02(1).

104. See *id.* § 4.07 cmt. a, at 146–47.

spousal compensatory payments.<sup>105</sup> Section 5.05(1) explains the rationale:

A person married to someone of significantly greater wealth or earning capacity is entitled at dissolution to compensation for the reduced standard of living he or she would otherwise experience, if the marriage was of sufficient duration that equity requires the loss, or some portion of it, be treated as the spouses' joint responsibility.<sup>106</sup>

The interplay of these sections demonstrates the interlocking nature of the ALI *Principles*, particularly with regard to the financial consequences of dissolution.<sup>107</sup> The *Principles* make transparent both the interdependence of these provisions and their fundamental interchangeability.<sup>108</sup> Although the commentary averts to the "different procedural and substantive traditions" of alimony and property claims, it admits that the two are "financially fungible."<sup>109</sup> The comments also suggest that the "historical unreliability" of alimony led to the pitching of earning capacity claims as matters for property division.<sup>110</sup> With the greater consistency and predictability of ALI-style compensatory payments, presumably these claims will revert to the

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105. *See id.* § 5.05(1)

106. *See id.* § 5.03 (detailing which earning capacity losses are recognized under sections 5.05–5.12). Reimbursable earning capacity losses are further delineated in section 5.06, "Compensation for Primary Caretaker's Residual Loss in Earning Capacity," and section 5.12, "Compensation for the Residual Loss of Earning Capacity Arising from the Care of Third Parties."

107. The official commentary makes this linkage explicit:

Chapters 4 and 5 reflect a common policy of recognizing the validity of spousal claims on one another's earning capacity by compensatory payments rather than by characterizing that earning capacity as marital property. The two Chapters are thus interdependent. The rationale for each depends in part on the other's resolution of this common policy question.

*Id.* § 4.07 cmt. a, at 147.

108. *Id.*; *see also* Ellman, *Theory of Alimony*, *supra* note 95, at 12 ("There is a link between spousal claims for alimony and those for a share in the property accumulated during the marriage: both are financial claims against one's former spouse based on the spousal relationship, and are in that sense fungible.")

109. PRINCIPLES (Proposed Final Draft, pt. I), *supra* note 2, § 4.07, cmt. a, at 147. As the commentary notes, some recent court decisions treat earning capacity as property rather than alimony, and the decision on where to locate this component of dissolution finances within the larger scheme depended primarily on a balance of complexity and conceptual clarity, which the ALI reformers believed tilted toward compensatory payments rather than toward property division. *Id.* at 147–51.

110. *Id.* at 147.

alimony side of the ledger.<sup>111</sup> Whatever merit this reasoning derives from an accurate reading of history,<sup>112</sup> it serves to emphasize the contingency of categorization in all financial reallocations between ex-spouses.<sup>113</sup> The *Principles* nearly extinguish the boundary separating these two remedies by authorizing the trial court to make an award of compensatory payments by “an enhancement of the obligee’s share of the marital property.”<sup>114</sup>

In dimming any bright line demarcating property rights from alimony concerns, the ALI is expounding on a theme found in many contemporary judicial decisions. Most cases involving the “diploma dilemma,”<sup>115</sup> for example, have struggled with a problem that cuts across the traditional borders between the two remedies. The issue presented when a newly minted doctor or lawyer divorces the spouse whose labor paid for the professional education is nearly insoluble under traditional legal analysis. But courts have ingeniously manufactured remedies that transcend the doctrinal barriers. The New York Court of Appeals found a professional license to be divisible property, despite its lack of the ordinary attributes of property, and ordered “an award in lieu of its actual distribution.”<sup>116</sup> Most courts have rejected so plastic a property definition, and some have resolved the dilemma by discovering an extraordinary suppleness to alimony law, even when statutory spousal support criteria were ostensibly limited to need and employability.<sup>117</sup> Some courts crafted “reimburse-

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111. *Id.*

112. On the historical friability of alimony rights, as well as the meager sums traditionally awarded, see J. HERBIE DIFONZO, *BENEATH THE FAULT LINE: THE POPULAR AND LEGAL CULTURE OF DIVORCE IN TWENTIETH-CENTURY AMERICA* 62–64, 107–11 (1997) (describing “[t]he most striking aspect of alimony [as] its scarcity”); Murphy, *supra* note 7, at 1148–49 (same).

113. As Professor Melli has pointed out, except for community property states, until the equitable distribution revolution property division also provided relatively little post-marital financial shifting for most couples. Melli, *supra* note 17, at 640; see also Marsha Garrison, *Good Intentions Gone Awry: The Impact of New York’s Equitable Distribution Law on Divorce Outcomes*, 57 *BROOKLYN L. REV.* 621, 739 (1991) (empirical study detailing the “confused, inconsistent, and unexpected results” of New York’s equitable distribution law).

114. *PRINCIPLES* (Proposed Final Draft, pt. I), *supra* note 2, § 5.11(2)(b) (emphasis omitted).

115. *Stevens v. Stevens*, 492 N.E.2d 131, 132 (Ohio 1986).

116. *O’Brien v. O’Brien*, 489 N.E.2d 712, 717 (N.Y. 1985).

117. See, e.g., *In re Marriage of Olar*, 747 P.2d 676 (Colo. 1987) (expanding the definition of the support level required for alimony from subsistence to reasonable in light of the expectations generated by the professional degree). For other rationales enlarging alimony provisions in these circumstances, see cases cited in *TURNER*, *supra* note 96, at 407 n.501.

ment alimony” to suit the task at hand.<sup>118</sup> Reimbursement alimony often does not terminate on remarriage, may not be modifiable for changed circumstances, and may be ordered as a lump sum payable in installments.<sup>119</sup> Thus reconstituted, alimony bears a strong resemblance to an award of property. The ALI follows suit, resolving the diploma dilemma by declaring that such licenses are not divisible property, but instead relevant to a claim on spousal earning capacity, to be treated under the rubric of compensable losses.<sup>120</sup>

Once alimony lost its medieval connection to the husband’s continuing obligation to support his wife during a legal separation, it floated from one conceptual mooring to another, as evidenced by the modulations from alimony to spousal support to maintenance to the ALI version, compensatory payments.<sup>121</sup> The awkwardness of any of the legal constructs, even the ALI’s, suggests a fundamental disorientation which may not be adequately redirected by yet one more turn. Some commentators have called for alimony and all its synonyms to be “abolished from the lexicon,” since financial payments to spouses after dissolution are better approached as a subset of the overall property issue.<sup>122</sup> Professor June Carbone, whose formulation differs from that of the ALI and its Chief Reporter, has argued that “[u]nder a true restitution system,” alimony would be replaced by a “reaffirmation of both spouses’ obligations to contribute to the benefits that the marriage made possible.”<sup>123</sup>

The need to make alimony awards modifiable presents the principal hurdle to a full merger of alimony and property division. Traditionally, property awards were viewed as permanent, while periodic interspousal payments could be altered or ended as material circumstances changed.<sup>124</sup> However, as we have seen,<sup>125</sup> the walls between

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118. See, e.g., *In re Marriage of Francis*, 442 N.W.2d 59 (Iowa 1989); *Mahoney v. Mahoney*, 453 A.2d 527 (N.J. 1982); *Hoak v. Hoak*, 370 S.E.2d 473 (W. Va. 1988). But see *Martinez v. Martinez*, 818 P.2d 538 (Utah 1991) (refusing to apply the concept of “equitable restitution,” a concept similar to “reimbursement alimony”).

119. See TURNER, *supra* note 96, at 407–08.

120. PRINCIPLES (Proposed Final Draft, pt. I), *supra* note 2, § 4.07.

121. See Mary E. O’Connell, *Alimony After No-Fault: A Practice in Search of a Theory*, 23 NEW ENG. L. REV. 437, 456 (1988) (suggesting that alimony in a sense became obsolete after divorces *a vinculo* widely replaced those *a mensa et thoro*).

122. Carbone, *supra* note 95, at 1464 n.4.

123. *Id.* at 1500–01.

124. See PRINCIPLES (Proposed Final Draft, pt. I), *supra* note 2, *Introduction*, at 7–8.

125. See *supra* notes 94–109 and accompanying text.

these distinctions have for some time been crumbling. The ALI *Principles* themselves provide the basis for a solution to this dilemma. When alimony was enforced as a private welfare measure, obliging a husband to continue to care for a wife in need, the necessity for monitoring an award was based on the wife's capacity to transfer the burden of support from her first husband to her second. Moreover, need-centered spousal payments, for historical reasons, are incapable of consistent measure. If the rationale becomes a compensation for loss, however, we may more feasibly discuss at least the possibility of a more accurate, fixed assessment, payable in a lump sum, periodically, or a combination of both.<sup>126</sup> Conversely, if the need for modifiability remains significant for policy reasons, we may question the wisdom of a once-for-all-time property division. Particularly if the theoretical principles underlying post-dissolution finances will now be closing ranks behind lawyers' almost invariable practice of negotiating the two basic remedies in tandem, we may at least challenge the rationale for nonmodifiability of property judgments.<sup>127</sup> Whether or not the ultimate policy decision leaves all financial questions subject to reopening, the present system allowing only one of the two components of the pecuniary judgment to be modifiable has lost whatever historical validity it might once have had.

The ALI drive to consolidate and willingness to transcend traditional financial categorization is otherwise amply demonstrated in the highly controversial proposal contained in section 4.18, "Recharacterization of Separate Property as Marital Property at the Dissolution of Long-Term Marriages." As the caption denotes, this section

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126. See PRINCIPLES (Proposed Final Draft, pt. I), *supra* note 2, § 5.11. Note, however, that the ALI provides for termination of compensatory payments upon the remarriage or cohabitation of the payee spouse. *Id.* §§ 5.08, 5.10. Since the traditional—and now invalidated—rationale for ending alimony upon remarriage was the transfer of a woman's dependence from one husband to another, it is disconcerting that the ALI revives this notion, so inconsistent with its fundamental rationale that alimony should only represent compensation for financial losses. The official commentary's explanation that remarriage or cohabitation should operate to terminate alimony because of the importance of dissolution's *nonfinancial* losses is thus unconvincing, as is the unsupported claim that continued support by the first spouse "would cast doubt on the second marriage's authenticity." *Id.* § 5.08 cmt. a, at 351(remarriage); PRINCIPLES (Tentative Draft No. 4), *supra* note 31, § 5.10 cmt. a, at 63 (cohabitation). Both these arguments are redolent of alimony's discredited dependence rationale that the ALI purportedly condemns.

127. See generally Suzanne Reynolds, *The Relationship of Property Division and Alimony: The Division of Property to Address Need*, 56 *FORDHAM L. REV.* 827 (1988) (discussing blurring of the line between alimony and property division in order to remedy spousal need).

calls for a fundamental alteration of the legal character of property individually held by the spouses. The percentage of separate property so recharacterized is to be determined by a formula of statewide application, as is the duration of marriage that will justify the metamorphosis of all spousal assets into marital property.<sup>128</sup> This proposal is linked to chapter 5's determination of a long-term spouse's presumptive right to the other spouse's greater post-dissolution earnings.<sup>129</sup> The rationale for such a basic recharacterization is an assumption about spousal expectations. Particularly in a longer marriage, "spouses typically do not think of their separate-property assets as separate, even if they would be so classified under the technical property rules."<sup>130</sup> No empirical support is supplied for this proposition.<sup>131</sup> Whatever the wisdom of this transmutation provision, it clearly furthers the ALI consolidation agenda by facilitating the creation of a joint marital pot whose contents will be divided at dissolution according to the relatively fixed rules of chapter 4.

The metamorphosis of alimony from loss to need is similarly intended to push the law in the direction of unifying this complex area. "[T]he shift to *loss* as the primary explanatory concept allows development of rules of adjudication that are more predictable in application than are rules grounded upon a single but ill-defined goal of relieving need."<sup>132</sup> The turn from discretion to rules is thus as prominent a shift as the underlying reconfiguration of the financial category.<sup>133</sup> Still, for a revision of legal principles so oriented to the clearing out of a conceptual labyrinth and the purging of historical detritus, it seems curious that the ALI *Principles* provide all the groundwork for the fusion of the financial decisions in the wake of dissolution, but then fail to propose their actual unification, particularly when a restitution-centered analysis lends itself so well to a more precise calculus. Nevertheless, on balance, the *Principles* pro-

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128. See PRINCIPLES (Proposed Final Draft, pt. I), *supra* note 2, § 4.18(1).

129. See *id.* § 4.18 cmt. a, at 241.

130. *Id.* at 240.

131. Cf. Oldham, *supra* note 3, at 810–12 (criticizing this ALI provision and observing that spouses "frequently have emotional attachments to valuable property given or devised by family members and would be quite upset . . . if a divorce court would divide it or order a sale"). *Id.* at 811.

132. PRINCIPLES (Proposed Final Draft, pt. I), *supra* note 2, *Introduction*, at 9.

133. See Penelope E. Bryan, *Reasking the Woman Question at Divorce*, 75 CHI.-KENT L. REV. 713, 718 n.24 (2000) (noting that the ALI *Principles* encapsulate "more determinate" property division and spousal maintenance provisions).

vide a major step forward in the consolidation and resolution of the economic consequences of dissolution.

#### IV. THE SECOND DEATH OF MARITAL FAULT

##### *A. Overview of the ALI View of Marital Fault: The Acceptance of No-Fault Divorce*

The ALI *Principles* accept the no-fault divorce revolution as final and irreversible.<sup>134</sup> Consequently, they deny a role for fault as an “agent of morality,” and find culpability irrelevant to family dissolution proceedings, either in assessing responsibility for the dissolution itself or in awarding punitive damages.<sup>135</sup> Legal claims stemming from marital misconduct are, in this view, not the proper focus of family dissolution. Such proceedings should only allocate financial losses, while “punishment of bad conduct . . . is better left to the criminal law, . . . [and] compensation for the nonfinancial losses imposed by the other spouse’s battery or emotional abuse[] is better left to tort law.”<sup>136</sup> The focus of the ALI discussion of marital fault is to negate the potential impact of such misconduct on the economics of dissolution: “[E]ntitlements to postdivorce financial remedies [that] arise without regard to the spouse’s relative marital fault.”<sup>137</sup> The ALI *Principles* entirely omit discussion of the role of fault in the

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134. See Kay, *supra* note 94, at 2069 (“The ALI did not plan to revisit the grounds for divorce. Instead, it accepted the nationwide adoption of no-fault divorce, and undertook to complete that reform by drafting provisions dealing with the process of dissolution and the substantive standards relevant to child support, spousal support, property division, and custody of children.”).

135. PRINCIPLES (Proposed Final Draft, pt. I), *supra* note 2, ch. 1, at 23–26.

136. *Id.* at 49.

137. Ira Mark Ellman, *The Place of Fault in a Modern Divorce Law*, 28 ARIZ. ST. L.J. 773, 785 (1996) [hereinafter Ellman, *Place of Fault*]. One sense in which the ALI *Principles* allow fault to affect the result is the universally recognized rule accounting for the extent to which marital misconduct has resulted in a diminishment of the marital estate. *Id.* at 776–77 (observing that “all states recognize the power of dissolution courts to consider, in allocating marital property, misconduct that has affected directly the amount of property available for allocation”). This financial cost exception to the no-fault *Principles* is set forth in section 4.16, “Financial Misconduct as Grounds of Unequal Division of Marital Property.” Professor Woodhouse has criticized the concern with marital fault only in terms of its adverse economic impact as reflecting “a certain reductionist materialism” that ignores “value judgments about the misuse of power within marriage.” Barbara Bennett Woodhouse, *Sex, Lies, and Dissipation: The Discourse of Fault in a No-Fault Era*, 82 GEO. L.J. 2525, 2529 (1994).

larger context of the “divorce counterrevolution.”<sup>138</sup> This movement to reverse the perceived evils of unilateral no-fault divorce has garnered wide popular and scholarly attention and generated numerous proposals to reinforce marital commitment and make divorce more difficult.<sup>139</sup> These legal experiments reflect the larger cultural shift away from irresponsible marital behavior, particularly in families with children.<sup>140</sup> No-fault divorce has been criticized for eroding “the idea of marriage as a presumptively permanent relationship—as a structure of incentives for individuals to contribute to the well-being of the family, and a framework of reasonable expectations of reciprocal benefits over the lifetime of the partnership.”<sup>141</sup> Both law and popular culture are, from this perspective, engaged in refocusing the issue of family dissolution from one of achieving an easy divorce to one of maintaining a good marriage.<sup>142</sup>

138. See James Herbie DiFonzo, *Customized Marriage*, 75 IND. L.J. 875, 905–34 (2000) (analyzing the “divorce counterrevolution”); Oldham, *supra* note 3, at 818–20 (reviewing proposals to limit unilateral divorce omitted from the ALI *Principles*); Wardle, *supra* note 7, at 783 n.2 & 784 (criticizing the *Principles* for ignoring the “significant, widespread, and growing social movement to reform unilateral no-fault divorce laws”).

139. See Katherine Shaw Spaht, *Beyond Baehr: Strengthening the Definition of Marriage*, 12 BYU J. PUB. L. 277, 279 (1998) (“To strengthen the definition of marriage it is essential that we ‘The People’ enact laws that make divorce more difficult.”). A sampling of the voluminous popular and legal literature on the divorce counterrevolution includes the following: BARBARA DAFOE WHITEHEAD, *THE DIVORCE CULTURE* (1997); MAGGIE GALLAGHER, *THE ABOLITION OF MARRIAGE: HOW WE DESTROY LASTING LOVE* (1996); Laura Bradford, *The Counterrevolution: A Critique of Recent Proposals to Reform No-Fault Divorce Laws*, 49 STAN. L. REV. 607 (1997); Laura Gatland, *Putting the Blame on No-Fault*, 83 A.B.A. J., Apr. 1997, at 50; Robert M. Gordon, *The Limit of Limits on Divorce*, 107 YALE L.J. 1435 (1998); Pia Nordlinger, *The Anti-Divorce Revolution*, WKLY. STANDARD, Mar. 2, 1998, at 25; Wardle, *supra* note 7.

140. See Gordon, *supra* note 139, at 1438 (describing the “Child-Centered Case Against No-Fault Divorce”).

141. William A. Galston, *Divorce American Style*, PUB. INT. L. REV., Summer 1996, at 12–13; see also Margaret F. Brinig & June Carbone, *The Reliance Interest in Marriage and Divorce*, 62 TUL. L. REV. 855, 883 (1988) (stating that no-fault represents “rebellion against the propriety of specific performance of marital obligations”).

142. See generally LINDA WAITE & MAGGIE GALLAGHER, *THE CASE FOR MARRIAGE: WHY MARRIED PEOPLE ARE HAPPIER, HEALTHIER AND BETTER OFF FINANCIALLY* (2000). The Council on Families in America emphasized this counterrevolutionary aspiration to move the debate from contemplating the end of marriage to generating its revival:

The divorce revolution—the steady displacement of a marriage culture by a culture of divorce and unwed parenthood—has failed. It has created terrible hardships for children, incurred unsupportable social costs, and failed to deliver on its promise of greater adult happiness. The time has come to shift the focus of national attention from divorce to marriage and to rebuild a family culture based on enduring marital relationships.



*B. Movements Against No-Fault Divorce*

The measures proposed to reform no-fault divorce have included the introduction of myriad legislative bills designed to resurrect marital fault as the heart of divorce litigation.<sup>143</sup> Another cluster of recommendations counsels couples to engage in pre-commitment bargaining designed to allow them to contractually bind themselves to each other more tightly than the law currently allows.<sup>144</sup> Covenant marriage laws, according couples the right to renounce recourse to the state's no-fault divorce law, enshrine one pre-commitment option.<sup>145</sup> These statutes not only define covenant marriage as a "life-

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COUNCIL ON FAMILIES IN AMERICA, MARRIAGE IN AMERICA: A REPORT TO THE NATION 293 (David Popenoe et al. eds., 1995). This transformation of the focus of the "counterrevolution" is nicely evidenced in the titles of noted social researcher Judith Wallerstein's three volumes reporting her study of the impact of divorce on children: from JUDITH S. WALLERSTEIN & JOAN BERLIN KELLY, SURVIVING THE BREAKUP: HOW CHILDREN AND PARENTS COPE WITH DIVORCE (1980) to JUDITH S. WALLERSTEIN & SANDRA BLAKESLEE, SECOND CHANCES: MEN, WOMEN, AND CHILDREN A DECADE AFTER DIVORCE (1989) to JUDITH S. WALLERSTEIN & SANDRA BLAKESLEE, THE GOOD MARRIAGE: HOW AND WHY LOVE LASTS (1995).

143. See DiFonzo, *supra* note 138, at 916–17, 927–28, 949–54 (analyzing proposals re-introducing fault divorce).

144. See Eric Rasmusen & Jeffrey Evans Stake, *Lifting the Veil of Ignorance: Personalizing the Marriage Contract*, 73 IND. L.J. 453, 464–65 (1998) (calling for the enforcement of a wide range of private agreements regarding divorce grounds and the terms of an ongoing marriage); Elizabeth S. Scott, *Rational Decisionmaking About Marriage and Divorce*, 76 VA. L. REV. 9, 38 (1990) (outlining a "framework for legal transformation of the conception of marriage from a 'nonbinding' and transitory bond to a more enduring relationship"). *But see* Brian Bix, *Bargaining in the Shadow of Love: The Enforcement of Premarital Agreements and How We Think About Marriage*, 40 WM. & MARY L. REV. 145, 197 (1998) ("At a minimum, society should be skeptical about the ability of the earlier self to judge the interests and preferences of the later self.").

145. Covenant marriage has developed into a commodious cottage industry among academics. See, e.g., Allen M. Parkman, *Reforming Divorce Reform*, 41 SANTA CLARA L. REV. 379 (2000); Margaret F. Brinig, *Economics, Law, and Covenant Marriage*, GENDER ISSUES, Winter/Spring 1998; Jeanne Louise Carriere, "It's Déjà Vu All Over Again": *The Covenant Marriage Act in Popular Cultural Perception and Legal Reality*, 72 TUL. L. REV. 1701 (1998); DiFonzo, *supra* note 138, at 949–56; Lynne Marie Kohm, *A Comparative Survey of Covenant Marriage Proposals in the United States*, 12 REGENT U. L. REV. 31, 41–51 (1999–2000); Melissa Lawton, *The Constitutionality of Covenant Marriage Laws*, 66 FORDHAM L. REV. 2471 (1998); Samuel Pyeatt Menefee, *The "Sealed Knot": A Preliminary Bibliography of "Covenant Marriage,"* 12 REGENT U. L. REV. 145 (1999–2000); Gary H. Nichols, *Covenant Marriage: Should Tennessee Join the Noble Experiment?*, 29 U. MEM. L. REV. 397 (1999); Scott, *supra* note 12, at 1958–68; Katherine Shaw Spaht, *Louisiana's Covenant Marriage: Social Analysis and Legal Implications*, 59 LA. L. REV. 64 (1998) [hereinafter Spaht, *Louisiana's Covenant Marriage*]; Katherine Shaw Spaht, *For the Sake of the Children: Recapturing the Meaning of Marriage*, 73 NOTRE DAME L. REV. 1547, 1565–78 (1998); Amy L. Stewart, *Covenant Mar-*

long relationship”;<sup>146</sup> they explicitly require the spouses making such a commitment to “solemnly declare that marriage is a covenant between a man and a woman who agree to live together as husband and wife for so long as they both may live.”<sup>147</sup> To date, only Louisiana and Arizona have enacted covenant marriage laws,<sup>148</sup> but similar legislation has been introduced in many states, and one prominent sociologist has opined that “we are on the front end of a covenant marriage boom that could sweep across the nation.”<sup>149</sup> Other proposals counsel mandatory waiting periods before divorce actions may be filed; delays ranging from two to five years have been specified.<sup>150</sup> Requiring mutual consent of the parties has also been advocated as a brake on unilateral divorce.<sup>151</sup> Schedules of obligatory pre-divorce counseling sessions have been proposed.<sup>152</sup> Finally, legislators and commentators have urged making divorce more difficult or even unavailable to couples with minor children.<sup>153</sup>

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*riage: Legislating Family Values*, 32 IND. L. REV. 509 (1999).

146. See LA REV. STAT. ANN. § 9:272(A) (West 1997 & Supp. 2000).

147. See LA REV. STAT. ANN. § 9:273(A)(1).

148. LA REV. STAT. ANN. §§ 9:272–275.1; ARIZ. REV. STAT. §§ 25-901 to 25-906 (Supp. 1998).

149. H. J. Cummins, *Covenant Vows Would Make Parting Harder*, MINNEAPOLIS STAR TRIB., June 5, 2000, at 1A (quoting Steven Nock).

150. See Galston, *supra* note 141, at 22 (proposing a five-year delay); Scott, *supra* note 144, at 44 (positing that “a two- or three-year waiting period [before dissolution] . . . would discourage impulsive divorce and provide sufficient opportunity for reconciliation”). Professor Scott has more recently proposed a minimum “multi-year” commitment period for marriages, combined with a “notification requirement—such as a two year waiting period from the time of notification before divorce.” Elizabeth S. Scott & Robert E. Scott, *Marriage as Relational Contract*, 84 VA. L. REV. 1225, 1263 n.91 & 1282 (1998). *But see* DiFonzo, *supra* note 138, at 945–49 (arguing that extended waiting periods have historically failed to deter divorce).

151. See generally Parkman, *supra* note 95. Note that the Arizona covenant marriage law (but not its Louisiana counterpart) contains a mutual consent divorce ground. ARIZ. REV. STAT. § 25-903(8) (“The husband and wife both agree to a dissolution of marriage.”).

152. See DiFonzo, *supra* note 138, at 927–28, 950–53 (providing examples).

153. See *id.* at 927–30 (detailing proposed legislation prohibiting or severely limiting the dissolution of marriages with minor children); WHITEHEAD, *supra* note 139, at 188 (calling for a “change [in] the way we think about the meaning and purpose of divorce, especially divorces involving children”); William A. Galston, *Braking Divorce for the Sake of Children*, AM. ENTERPRISE, May–June 1996, at 36 (calling for the elimination of unilateral no-fault divorce in families with minor children); Symposium, *Who Owes What to Whom? Drafting a Constitutional Bill of Duties*, HARPER’S, Feb. 1991, at 48 (detailing Christopher Lasch’s call for a constitutional amendment forbidding divorce for “couples with children under the age of twenty-one”); Judith T. Younger, *Marital Regimes: A Story of Compromise and Demoralization, Together with Criticism and Suggestions for Reform*, 67 CORNELL L. REV. 45, 90 (1981) (proposing a marital scheme in which a domestic union with children could not be dissolved until the

*C. The Principles Ignore the Impact of Dissolution Law  
on the Survival of Marriages*

What these proposals feature—and the ALI *Principles* disregard—is a focus on the marriage whose dissolution is at issue. The ALI assumes that divorce law can have no impact upon the continued existence of the marriage.<sup>154</sup> The *Principles* decline to address the clear legal signaling that, after a generation of no-fault divorce, “marriage is a transitory commitment, one that is easily set aside.”<sup>155</sup> Indeed, the ALI begins with the premise of dissolution, oblivious to the channelling and hortatory functions of law.<sup>156</sup> Interested only in fairly apportioning the consequences of the domestic breakup, the *Principles* also administer a *coup de grace* to the notion that the state has a stake in preserving marriage, or even “any litigable interest in divorce.”<sup>157</sup> In a sense, this critique of the *Principles* is directed not at the text, but at the subtext; not at the terms of engagement with dissolution law, but at the ALI’s disengagement with the effort to consider the deterrent effect of its dissolution provisions.

This criticism is, perhaps, more properly focused on the ALI decision to tailor the *Principles* narrowly so as to sidestep any consideration of the grounds for divorce, despite the Chief Reporter’s claim that the *Principles* would present a “comprehensive examination of dissolution law.”<sup>158</sup> The final position of the ALI *Principles* to avoid

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children were emancipated).

154. See Scott, *supra* note 144, at 21 (observing that courts interpret no-fault divorce to mean that “no barrier should seriously hinder a decision at any time by either party that the marriage should end”).

155. Scott, *supra* note 12, at 1903. On the application of market signaling theory to the norms of marriage, see *id.* at 1902–03; Michael J. Trebilcock, *Marriage as a Signal*, in THE FALL AND RISE OF FREEDOM OF CONTRACT 245 (F. H. Buckley ed., 1999) [hereinafter THE FALL AND RISE OF FREEDOM OF CONTRACT]; Eric A. Posner, *Family Law and Social Norms*, in THE FALL AND RISE OF FREEDOM OF CONTRACT 256, 259–62; William Bishop, *Is He Married?: Marriage as Information*, 34 U. TORONTO L.J. 245 (1984).

156. See Carl E. Schneider, *The Channelling Function in Family Law*, 20 HOEFLER L. REV. 495, 496 (1992) (noting that “in the channelling function the law recruits, builds, shapes, sustains, and promotes social institutions”); Woodhouse, *supra* note 137, at 2526 (identifying “a dual function of family law, both as a mechanism for meeting the needs of family members and as a vehicle for expressing our values and aspirations about family life to ourselves and to our children”).

157. Sheldon, *supra* note 93, at 29.

158. Ellman, *Place of Fault*, *supra* note 137, at 776. Ellman has been described as being “particularly vehement about the restoration of fault to divorce proceedings for any purpose.” Spaht, *Louisiana’s Covenant Marriage*, *supra* note 145, at 81 n.80. Spaht has maintained that Ellman’s “strong aversion to fault explains why the American Law Institute’s project, Principles

any challenge to the dominant no-fault ideology was apparently achieved after some turbulence. Chief Reporter Ellman acknowledged that the decision to disallow consideration of fault was initially obtained by a “divided vote” of the Institute’s Council, and that the subsequent draft enshrining the *Principles’* no-fault treatment was provisionally approved by the membership of the ALI in 1996 “after defeat of two separate motions to restore consideration of fault.”<sup>159</sup>

#### *D. Ignoring Marital Fault Has Some Redeeming Virtues*

By contrast, another wing of the legal academy “challenges the assumption that no-fault divorce . . . signaled a retreat from either a moral vision or moral discourse in family law,”<sup>160</sup> and contends instead that “fault-based proposals ultimately are destructive and counterproductive to divorcing individuals and families.”<sup>161</sup> According to this view, the cultural meanings of marriage and marital failure are too complex to yield easily to the universal solvents of culpability or enforced delay. Historically, fault has not functioned as an effective barrier to divorce,<sup>162</sup> nor have extended waiting periods succeeded in diverting divorce or in improving marriage.<sup>163</sup> That the views of these opponents of the divorce counterrevolution are in the ascendancy in the ALI may be shown by the absence of the issue from the

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of the Law of Family Dissolution, does not include fault as a relevant factor for purposes of marital property distribution or compensation payments at divorce.” *Id.* Ellman has indeed consistently argued the inappropriateness of applying fault norms to the dissolution process. See Ira Mark Ellman, *The Misguided Movement to Revive Fault Divorce, and Why Reformers Should Look Instead to the American Law Institute*, 11 INT’L J. L. POL’Y & FAM. 216 (1997) [hereinafter Ellman, *Misguided Movement*]; Ira Mark Ellman & Sharon Lohr, *Marriage as Contract, Opportunistic Violence, and Other Bad Arguments for Fault Divorce*, 1997 U. ILL. L. REV. 719; see generally Ellman, *Place of Fault*, *supra* note 137.

159. Ellman, *Place of Fault*, *supra* note 137, at 776.

160. Murphy, *supra* note 7, at 1115.

161. Jane Biondi, *Who Pays for Guilt?: Recent Fault-Based Divorce Reform Proposals, Cultural Stereotypes and Economic Consequences*, 40 B.C. L. REV. 611, 611 (1999). See generally Ellman & Lohr, *supra* note 158.

162. See Lawrence M. Friedman, *A Dead Language: Divorce Law and Practice Before No-Fault*, 86 VA. L. REV. 1497, 1499 (2000).

163. See DiFonzo, *supra* note 138, at 945–49; see also Ellman, *Misguided Movement*, *supra* note 158, at 225 (footnote omitted) (“I am skeptical that very many people now casually destroy their happy marriages, or that the introduction of prolonged waiting periods would be likely to preserve many unhappy ones. Its effect will rather be to increase the number of marriages that are, at any given time, legally intact but factually dead, to keep many victims of failed marriages from building new lives for themselves and their children, and perhaps to increase the proportion of children born out of wedlock.”)

text of the *Principles*.

At bottom, the ALI *Principles'* refusal to countenance a role for proposals to limit divorce serves to cement the no-fault revolution and to further the consolidation of family law that is the ALI's larger theme.<sup>164</sup> The elimination of culpability concerns advances the new theoretical unification by markedly reducing the discretionary power of trial judges. Traditionally, ascertaining the contours of relevant marital misconduct was an exercise wild with discretion.<sup>165</sup> Thwarting the revival of fault and the other steps intended to delay or deny dissolution results in a less trammled path for the application of the substantive rules at play in the *Principles*, such as those relating to the allotment of child support as well as of custodial and decision-making responsibility, the allocation of the economic repercussions of dissolution, the encouragement of marriage-like domestic unions, and the liberal allowance of domestic agreements. Introducing issues of fault, whether marital or quasi-marital, could seriously distort the impact of the *Principles'* substantive rules in all these areas. The same concern with culpability that symbolizes a barricade for those intending to deter divorce would operate as an escape hatch for those seeking equitable release from the ALI's new rules. Thus, the denial of culpability's relevance to dissolution critically serves to reinforce the conceptual integrity of the ALI *Principles*. Given the historical failure of marital fault as a screen for rational divorce, the ALI position appears justified on policy grounds as well.

## V. CONCLUSION

It is too early to tell whether we are on the verge of a unified field theory of the family. Even so, the goal of theoretical consolidation has received a powerful boost by the ALI *Family Dissolution Principles*. This article has focused on three key aspects of the effort to streamline the dissolution process and amalgamate the various elements of family law. First, in moving the legal system closer to ac-

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164. The Proposed Final Draft notes that "the position taken by the *Principles* on this question [excluding consideration of marital fault] follows from both the goal of improving the consistency and predictability of dissolution law, and the core tenet that the dissolution law provides compensation for only the *financial* losses arising from the dissolution of marriage." PRINCIPLES (Proposed Final Draft, pt. I), *supra* note 2, *Introduction*, at 14.

165. See Friedman, *supra* note 162, at nn.25, 57 & 130; Biondi, *supra* note 161, at 611 (footnote omitted) (noting that "fault-based divorce laws ultimately rely on inconsistent and subjective family court judges to define fault").

cepting a functional definition of parenthood, the *Principles* aim to eliminate the current jurisprudential dissonance caused by the frequent—but far from invariable—resort to inventive equitable doctrines in the effort to achieve coherence in nonbiological parent-child relations. Second, by coming within striking distance of full integration of alimony and property division in a global financial calculus, the ALI has served notice that legal doctrine will follow legal practice in adopting a unified approach to post-dissolution economics. Finally, by marshaling the considerable powers of the ALI in opposition to the divorce counterrevolution, the *Principles* declare the second death of marital fault as a limitation upon the freedom to divorce. In each of these aspects, as in the unified whole, the role of judicial discretion has been reduced. The latitude traditionally accorded courts has yielded, in the ALI reconstruction of family law, to a more schematic reliance on substantive standards.

The interlocking nature of the ALI *Principles* provides the strength of a coherent whole, but it also exposes a potential weakness. Hitherto, state legislatures and courts generally could pick and choose their preferred selections from the legal banquets served up by the American Law Institute. The logical interdependency of the provisions of the *Family Dissolution Principles* may make selective adoption extremely difficult.<sup>166</sup> Whether their solid-state wiring will make the *Principles* more broadly accepted or widely ignored will be revealed in time. In any case, the ALI's faithfulness to the evolving realities of American family life suggests that the emerging legal rules will continue in the direction put forward by these *Principles of the Law of Family Dissolution*.

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166. See Sheldon, *supra* note 93, at 23 (noting that “there is a formidable, logical framework behind the *Principles* that makes it impossible to accept some portions of it and reject others”); Merle H. Weiner, *Domestic Violence and Custody: Importing the American Law Institute's Principles of The Law of Family Dissolution into Oregon Law*, 35 WILLAMETTE L. REV. 643, 645 (1999) (“Adopting the Principles in their entirety would be a large systemic change in most states . . .”).

