THE ALI PRINCIPLES' APPROACH TO DOMESTIC PARTNERSHIP

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I. INTRODUCTION

In the film *The Wizard of Oz*, Dorothy meets up with Glinda the Good Witch when her house drops out of the tornado into Oz. When Glinda asks Dorothy "are you a good witch or a bad witch?" Dorothy responds, "Why, I'm not a witch at all."[1] When the American Law Institute's *Principles of the Law of Family Dissolution*[2] in their final form are published, we will face new possibilities of understanding domestic relations law just as Dorothy faced new possibilities when she landed in Oz. To explore whether Chapter 6, providing rules governing domestic partnerships, is a good switch from current law, a bad switch, or not a switch at all, we could paraphrase the exchange between Dorothy and Glinda. Glinda implies that Dorothy is either a good witch or a bad witch, and Dorothy denies being a witch at all. Despite this denial, Dorothy does use some magical powers toward the laudable end of helping her friends and getting home. We do not know whether the *Principles* will achieve the family law version of *The Wizard of Oz*'s cult status, but it is safe to say that some rules governing domestic partners are a good switch from current doctrine, others might be a bad switch, and still others suggest that the *Principles* are not a switch at all.

II. THE PRINCIPLES' APPROACH TO DOMESTIC PARTNERSHIP

The *Principles* recognize cohabiting relationships, calling them domestic partnerships, and provide that partners equitably divide gains and losses accrued during the partnership when they separate. There are three ways of becoming a domestic partner, two of which arise by presumption and the third which arises by proving that the relationship complies with factors listed as indicative of a domestic partnership. Section 6.03 of the *Principles* defines domestic partners as "two persons of the same or opposite sex, not married to one another, who for a significant period of time share a primary residence and a life together as a couple."[3] People are presumed to be in a domestic partnerships in two situations: (1) if "[t]hey have maintained a common household . . . with their common child. . . for a continuous period that equals or exceeds a duration, called the *cohabitation parenting period*, set in a uniform rule of statewide applica-

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1. THE WIZARD OF OZ (Metro-Goldyn-Mayer 1939).

2. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS (Tentative Draft No. 4, 2000) [hereinafter ALI PRINCIPLES 2000].

3. *Id.* § 6.03(1).

tion,"[4] or (2) if "[p]ersons not related by blood or adoption . . . have maintained a common household . . . for a continuous period that equals or exceeds a duration, called the *cohabitation period*, set in a uniform rule of statewide application. The presumption is rebuttable by evidence that the parties did not share life together as a couple, as defined by Paragraph (7)."[5] Paragraph 7 provides a list of thirteen factors that determine whether partners who do not fit into either of these presumptions (i.e., have lived together as parents of a child for less than the cohabitation parenting period, or lived together without a common child for less than the cohabitation period).[6] These factors are:

(a) The oral or written statements or promises made to one another, or representations jointly made to third parties, regarding their relationship;

(b) The extent to which the parties intermingled their finances;

(c) The extent to which their relationship fostered the parties' economic interdependence, or the economic dependence of one party upon the other;

(d) The extent to which the parties engaged in conduct and assumed specialized or collaborative roles in furtherance of their life together;

(e) The extent to which the relationship wrought change in the life of either or both parties;

(f) The extent to which the parties acknowledged responsibilities to one another, as by naming one another the beneficiary of life insurance or of a testamentary instrument, or as eligible to receive benefits under an employee benefit plan;

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4. *Id.* § 6.03(2) (emphasis in original). Paragraph 4 provides that partners "maintain a common household" when "they share a primary residence only with each other and family members or when, if they share a household with other unrelated persons, they act jointly, rather than as individuals, with respect to management of the household." *Id.* The length of the cohabitation period and cohabitation parenting period are both left to the discretion of legislatures or courts:

> The required durations do need to be long enough to establish a likelihood that the relationship has affected the parties' behavior, perceptions, and sense of emotional commitment sufficiently that they can be said to have established a life together as a couple and that their life together as a couple has had some significant impact on the circumstances of one or both parties. A cohabitation period of three years has been employed by Canadian jurisdictions that follow an approach similar to that expressed in Paragraph (3) of this section. The parties' procreation or adoption of a child with whom they share a household is itself sufficiently persuasive of this likelihood that the duration required under Paragraph (2) need not be as long as that required under Paragraph (3). If a jurisdiction sets the Paragraph (3) *cohabitation period* at three years, a reasonable choice, a Paragraph (2) *cohabitation parenting period* of two years would be appropriate.

Id. § 6.03 cmt. d (emphasis in original).

5. *Id.* § 6.03(3) (emphasis in original).

6. Paragraph 7 also provides the basis for a person presumed to be a domestic partner to rebut this presumption by showing, for example, that the parties did not intermingle their finances, or that the relationship did not cause change in their lives. ALI PRINCIPLES 2000, *supra* note 2, § 6.03(7).

(g) The extent to which the parties' relationship was treated by the parties as qualitatively distinct from the relationship either party had with any other person;

(h) The emotional or physical intimacy of the parties' relationship;

(i) The parties' community reputation as a couple;

(j) The parties' participation in some form of commitment ceremony or registration as a domestic partnership that, under applicable law, does not give rise to the rights and obligations established by this Chapter;

(k) The parties' participation in a void or voidable marriage that, under applicable law, does not give rise to the economic incidents of marriage;

(l) The parties' procreation of, adoption of, or joint assumption of parental functions toward a child; and

(m) The parties' maintenance of a common household.[7]

Being designated domestic partners is significant because domestic partnership property is divided under the same principles as marital property, and domestic partners are entitled to compensatory payments—to reimburse partners for losses sustained due to the relationship such as a primary caretaker's loss of earning capacity--on the same basis as spouses.[8] The remainder of this commentary explores ways that these rules are a good switch from current law, a bad switch, or not a switch at all.

III. THE PRINCIPLES AS A GOOD SWITCH

The *Principles* represent a good switch in the law governing intimate affiliations in that they remedy inadequacies and inconsistencies in current doctrine, and also go some distance toward alleviating power imbalances among and within couples. They serve these functions in at least four ways: (1) formally recognizing many nonmarital affiliations (between both same and opposite sex partners); (2) shifting the burden of proving a contract to the person denying financial ramifications of cohabitation; (3) recognizing non-sexual affiliations as domestic partnerships; and (4) authorizing equitable property division and post-dissolution income sharing.

Both the partnership metaphor and doctrinal recognition are important contributions to domestic relations law that predate the *Principles*. The *Principles*, however, standardize and universalize domestic partnership. The partnership metaphor departs from naturalized models of family, substituting an idealized model of equal participation in decision making and asset control for older coverture models of family that justified hierarchy within the family on

7. *Id.*
8. *Id.* §§ 6.05, 6.06.

divine, moral, or biological grounds.[9] Moreover, the very existence of marriage and domestic partnership as parallel affiliations, both legally recognized, undermines the status of marriage (which is currently limited to opposite sex couples) as the one natural affiliation, rendering all others unnatural and inferior in comparison.

The *Principles'* further the salutary influence of the partnership model by making the model an integral, standardized part of domestic relations doctrine. Doing so remedies a considerable defect in existing family law, which regulates nonmarital affiliations with a patchwork of rules that often differ considerably among jurisdictions. For example, Hawaii and Vermont both recognize a nonmarital affiliation between people they call reciprocal beneficiaries, but they do not define reciprocal beneficiary the same way nor accord them the same rights.[10] Similarly, while most states follow the *Marvin v. Marvin* rule that cohabitation contracts are enforceable as long as the relationship is not meretricious (denoting a relationship of or relating to prostitution and connoting any relationship contract in which sex is consideration supporting the contract),[11] the state of Washington calls the cohabiting partnerships that give rise to many of the rights associated with marriage "meretricious relationships" and defines that term as "a stable, marital-like relationship where both parties cohabit with knowledge that a lawful marriage between them does not exist."[12] Moreover, while most jurisdictions enforce same sex cohabitation contracts to the same extent that they enforce opposite sex cohabitation contracts,[13] Washington has held that "meretricious relationships" can only be between opposite sex partners.[14] This inconsistent application of doctrines and terminology causes confusion and incoherence, not to mention injustice. The *Principles*, if widely adopted, could go some distance toward remedying these problems, just as the Uniform Commercial Code has standardized the patchwork of doctrines that used to govern commercial transactions.[15]

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9. For further critique of the naturalized model of the family and support for its replacement by business-related models such as the partnership model, see Martha M. Ertman, *Marriage as a Trade: Bridging the Private/Private Distinction*, 36 HARV. C.R.–C.L. L. REV. 79, 85-98 (2001).

10. In Hawaii, reciprocal beneficiaries are any two people barred from marrying, and can include both relatives and same-sex romantic partners. HAW. REV. STAT. §§ 572C-2 to –6 (1997). In Vermont, reciprocal beneficiaries must be barred from marrying and also from entering civil unions (thus precluding same-sex romantic partners from being reciprocal beneficiaries). VT. STAT. ANN. tit. 15, §§ 1301-06 (2000). Reciprocal beneficiaries in Hawaii enjoy a broader ranger of rights than they do in Vermont, and couples joined in civil union in Vermont enjoy all of the state law rights of married couples. *Id.*

11. 557 P.2d 106, 116 (Cal. 1976).

12. Connell v. Francisco, 898 P.2d 831, 834 (Wash. 1995).

13. ALI PRINCIPLES 2000, *supra* note 2, § 6.03 cmt. a.

14. Vasquez v. Hawthorne, 994 P.2d 240, 243 (Wash. Ct. App. 2000), *review granted*, 11 P.3d 825 (Wash. 2000). The *Vasquez* case is one where the denial of recognition is particularly striking, as Frank Vasquez and Robert Schwerzler had lived together for 28 years (two of which they resided in different apartments in the same building), and Vasquez, who sought an intestate share of Schwerzler's estate, depended heavily on Schwerzler because Vasquez could not read. Daniel B. Kennedy, *Til Death Do Us Part*, 87 A.B.A. J. 22 (2001).

15. JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 21-1(a) (5th ed. 2000) (describing the way that U.C.C. Article 9 standardized the myriad of secured financing devices into a single one, calling it a "security interest").

In addition to remedying some of the inadequacies of existing doctrine governing nonmarital affiliations, the *Principles* remedy inequality among and within various types of affiliations in a number of ways. First, they accord domestic partnerships protections that they do not enjoy in many jurisdictions, such as equitable distribution of assets and compensatory payments for financial losses due to the relationship when the partners separate. Second, they counteract heterosexual privilege by explicitly providing that the members of the couple can be either the same or opposite-sex.[16] Finally, they include non-sexual couples in the definition of domestic partnership, as long as the relationship satisfies the other requirements of section 6.03(7), such as intermingling finances or "joint assumption of parental functions toward a child."[17]

While most affiliations that qualify as domestic partnerships are likely to be sexual or romantic (evidenced by the presumption of domestic partnership in section 6.03(3), providing that "persons not related by blood or adoption are presumed to be domestic partners when they have maintained a common household . . . for a continuous period that equals or exceeds a duration called the *cohabitation period*"),[18] the *Principles* explicitly allow for the possibility that nonsexual unions can be domestic partnerships:

> [t]he phrase "not related by blood or adoption" appears only in the Paragraph (3) presumption. It is not part of the basic definition of domestic partners in Paragraph (1). Its inclusion in Paragraph (3) is not intended to exclude partners related by blood or adoption from the coverage of this Chapter. Instead, the phrase is merely intended to withhold the Paragraph (3) presumption from such relationships because maintaining a common household with a relative is not alone indicative that the parties share life together as a couple. Thus, when parties are related by blood or adoption and do not have a common child together, the claimant bears the burden of satisfying the proof requirements of Paragraph (6).[19]

Paragraph (6) authorizes people who are not presumed to be domestic partners because they are neither romantic nor both legal parents of a child to prove a domestic partnership based on elements set out in Paragraph (7).[20] As already discussed, these elements can include economic interdependence or dependence, collaborative roles in furtherance of their life together, naming one another as beneficiaries on wills or life insurance policies, being emotionally intimate, assuming joint parenting responsibilities, and maintaining a common household. Certainly, two sisters or long-time friends who are emotionally intimate and organize their lives together could be domestic partners even though neither relationship was sexual. By recognizing non-sexual affiliations, the *Principles* further equality among various types of affiliation, refusing to cabin off some intimate affiliations as superior to all others.

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16. ALI PRINCIPLES 2000, *supra* note 2, § 6.03(1).
17. *Id.* § 6.03(7)(l).
18. *Id.* § 6.03(3) (emphasis in original).
19. *Id.* § 6.03 cmt. d.
20. *See supra* note 6 and accompanying text for a list of the factors listed in Paragraph 7.

This expansion undermines naturalized understandings of family by providing a range of legitimate affiliations (marriage and domestic partnership, same sex and different sex, sexual and nonsexual). Doing so is key to reducing inequality among various types of affiliation. However, as discussed below, the *Principles* could go further in recognizing domestic partners: the provisions of Chapter 6 apply only to disputes between the partners, and do not accord any rights as to third parties or the state.[21] For example, the *Principles* do not make a domestic partner eligible to inherit through intestacy, nor to receive public benefits such as social security or workers' compensation.

Perhaps the most important effect of the *Principles* is the way that they remedy inequality within relationships. First, they remedy inequality within many affiliations by shifting the burden of proof for establishing the right to equitable distribution of assets upon dissolution from the person trying to establish agreement between the parties to share assets to the person trying to prevent the sharing of assets.[22] In short, the *Principles* shift the default rule from being no financial obligations between cohabitants to financial obligations in the form of property distribution and post-divorce income sharing. This change in the default rule, in many situations, will effectively shift the burden of proof from the economically and socially weaker party (where it currently rests) to the more powerful one. Illustration 5 to section 6.03 sets out a factual situation where the new default rule will balance power in a relationship:

> Cliff and Nancy lived together intermittently during college. After graduation, they lived together continuously for eight years in one half of a duplex that Cliff purchased in his own name, using money he earned as a down payment. The other half of the duplex was rented out, and Nancy helped to maintain and manage it. Nancy and Cliff had joint savings and checking accounts, into which they both deposited all earnings. Mortgage payments as well as household purchases were made from these accounts. During their relationship, Nancy gave birth to a child, of whom Cliff acknowledges paternity. The parties owned a number of automobiles during the period, all of which were registered solely in Cliff's name. Nancy purchased a car, but when she stopped working after giving birth, she transferred title to Cliff, who took over the payments. Cliff later sold that car and used the proceeds to purchase a truck, in his own name. At various times during their cohabitation, Nancy asked Cliff to put her name on the title of the duplex or the cars, but he always refused. She asked him to marry her on several occasions but he would not. She was hospitalized under his name on one occasion, and his health insurer paid her bills. Nancy claims that Cliff assured her that, if he died, all his property would go to her and the child.[23]

Current law generally requires Nancy to establish a contract (express, implied, or quasi) between herself and Cliff in order to obtain part of the property she and Cliff acquired and improved during their relationship, and also to justify post-dissolution income sharing to reimburse her for losses she sustained

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21. ALI PRINCIPLES 2000, *supra* note 2, § 6.02 cmt. b.
22. *Id.*
23. *Id.* § 6.03 cmt. d, illus. 5.

by foregoing wage labor to take care of their child.[24] In contrast, the *Principles* require Cliff to establish a contract not to share property acquired during the partnership, and/or to reimburse her for losses due to her taking on the responsibilities as primary caretaker of their child.[25] The provisions in sections 6.02(b) and 6.06 that authorize a court to order one partner to pay the other "compensatory payments" as described in Chapter 5 of the *Principles* are particularly innovative as they equalize losses due to the relationship rather than merely equalizing the gains. These payments reimburse the party who has suffered an economic loss that occurs when "the parties conduct themselves in ways appropriately conducive to maintenance of the marital relationship but which leave the parties differently circumstanced if the marital relationship ends."[26] Typically, these payments recognize losses in earning capacity by the person who engages in primary childcare.

In sum, the *Principles* significantly intervene in the social and economic power imbalance that would otherwise allow Cliff to benefit from Nancy's financial and other contributions to the relationship without fairly dividing the wealth they accumulated together.[27] Thus, the *Principles*' domestic partnership rules increase coherence and decrease inequities in domestic relations law. However, they fall short of a utopian ideal.

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24. Illustration 5 is based on the facts of Rissberger v. Gorton, 597 P.2d 366 (Or. Ct. App. 1979). Comment d of section 6.03 explains how the *Principles* alter the outcome of that case: "The court there found an implied contract that the household items were owned jointly, but found no implied contract with respect to any other items, thereby denying any other claims on the assumption that contract was the only basis for relief." ALI PRINCIPLES 2000, *supra* note 2, § 6.04 cmt. f. Nancy could also make equitable claims such as constructive trust, bearing the burden of proof on this claim as she would on the contract claims.

25. ALI PRINCIPLES 2000, *supra* note 2, § 6.01 (establishing the scope of the chapter as governing "the financial claims of domestic partners against one another at the termination of their partnership" and providing that parties can contract around the provisions of the chapter); *id.* § 6.02 (articulating the objectives of the chapter as achieving "fair distribution of the economic gains and losses incident to termination of the relationship" and secondarily protecting "society from social welfare burdens that should be borne, in whole or in part, by individuals."); *id.* § 6.03(1) (defining domestic partnership in part as "two persons of the same or opposite sex, not married to one another, who for a significant period of time share a primary residence and a life together as a couple."). *See id.* § 6.03 cmt. d, illus. 5 (providing that "An agreement by the parties that they would not share their earnings would apply, if such an agreement were made and were enforceable under Chapter 7. However, Cliff's refusal to marry Nancy or to put her name on the title to various items of property does not evidence any agreement of the parties.").

26. *Id.* § 6.06 cmt. a.

27. Comment a of section 6.02 of the *Principles* explains that, as in the illustration above, failure to marry may "reflect strong social or economic inequality between the partners, which allows the stronger partner to resist the weaker partner's preference for marriage." *Id.* § 6.02 cmt. a. Applying the same rules regarding property distribution and compensatory payments to marriage and domestic partnership thus alleviates the inequality in the relationship by taking away from the stronger party the option of leaving the alliance with most of the gains and fewest of the losses merely by refusing to marry. The stronger party does, retain the right to contract out of the *Principles*' default rules. But I suspect that both the power of inertia and many people's discomfort with explicitly contracting within an intimate affiliation would result in fewer people formally contracting than the number of people who obtain the same result under current law by refusing to marry.

IV. THE PRINCIPLES AS A BAD — OR LESS THAN OPTIMAL — SWITCH

While these alterations and standardizations in the current law are salutary, there are elements of the *Principles'* approach to nonmarital affiliations that suggest the switch is not entirely good. First, they leave undisturbed the current rule that marriage is normatively preferable to domestic partnership. Second, they fail to recognize affiliations with more than two adults (polyamorous).[28] Finally, they limit domestic partnership's relevance to disputes between the partners, refusing to recognize domestic partnership's relevance for third parties or the state.[29] In making these decisions, the *Principles* miss some important opportunities to remedy non-uniformity among jurisdictions or inequality among and within relationships.

An alternative approach would be to create a system in which intimates could select from a range of legal regulations to pick one that suited their particular needs, a range free of normative bias for any particular affiliation. I have argued elsewhere that we could and should view intimate affiliations along a morally neutral continuum, just as we view business associations along a morally neutral continuum.[30] Such an approach would render the difference among marriage, cohabitation, and polyamory as morally neutral as the difference among incorporation, partnership, and limited liability companies. However, the *Principles* explicitly retain a preference for marriage, adding the domestic partnership provisions of Chapter 6 only to remove disincentives to marriage by increasing the financial rights and responsibilities of domestic partnership and protect "society from the social welfare burdens that should be borne, in whole or in part, by individuals."[31] On a discursive level, the *Principles* retain the most traditional form of marriage as "normal" by requiring a high level of economic interdependence, specialization of labor within the couple, or joint parenting to define a legally cognizable domestic partnership.[32]

Given this strong preference for traditional marriage as a baseline for determining what kinds of relationships merit legal recognition, it is not surprising that the *Principles* do not recognize polyamorous affiliations. Polyamorous affiliations take many different forms, some sexual and others nonsexual. Literally meaning "many love," it includes polygamy (in which a number of women are sexual with one man but not with one another), polyandry (in which a num-

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28. I use the term polyamory to refer to any affiliation with more than two adults, sexual or not. For further discussion of the term, and justification for including polyamorous affiliations in domestic relations law, see Ertman, *supra* note 9, at 125.

29. In addition, the *Principles*' post-divorce income sharing rules account for only losses, failing to account for gains due to the relationship, such as the primary wage-earner's increased income due to specialization of labor by each partner or spouse. However, as this rule applies equally to spouses and domestic partners, critiquing it is beyond the scope of this commentary. For further analysis of the advisability of considering gains as well as losses when determining post-divorce income sharing rules, see June R. Carbone & Margaret F. Brinig, *Rethinking Marriage: Feminist Ideology, Economic Change, and Divorce Reform*, 65 TUL. L. REV. 953 (1991).

30. Ertman, *supra* note 9.

31. ALI PRINCIPLES 2000, *supra* note 2, § 6.02(2), cmts. a & b.

32. For the elements of domestic partnership, see *id.* § 6.03(7) cmt. e (explaining that these elements "are intended to ascertain whether the parties conducted themselves as spouses *normally* do in the course of family life") (emphasis added).

ber of men are sexual with one woman but not with one another), group marriage (in which any group of three or more men and women are all sexual with one another), and affiliations of a lesbian couple and the gay male donor of sperm for their child (in which the lesbian couple is sexual and the donor is involved as a co-parent rather than as a sexual or romantic partner).[33] While the *Principles* account for changing social patterns by recognizing nonmarital cohabitation, they stop there. Yet polyamory in its myriad variations also is increasingly common, particularly if one includes as polyamorous the new family constellations that are possible in open adoption, reproductive technology, and alliances of step parents and non-custodial parents.

Perhaps for pragmatic purposes, the *Principles* stay close to conventional understandings of the couple as the cornerstone of family life. In illustration 17 to section 6.03, for example, a couple's nonmonogamy "makes it unlikely" that their affiliation will qualify as a domestic partnership:

> Harry, Sally, Mary Ann, Fernando, and Maria worked together at All American Airlines and shared a large house in their base city, Dallas. They shared expenses *per capita*, all five having signed the lease. Harry and Sally often shared a bedroom, but due to both their schedules and their preferences, they also slept apart. Over a four-year period, Harry also developed a relationship with Mildred, a co-worker based in Denver, and usually spent the night with her when they were both in Denver. Sally also had a relationship with Ricardo, a high-school friend who lives in Dallas. She often spent the night at Ricardo's house when she was in Dallas and Harry was away, and sometimes when he was not. After five years, Harry moved to a different house in Dallas. Under these facts, the Paragraph (3) presumption does not arise because the parties did not "maintain a common household" for at least three years, even though they often shared a bedroom. Harry and Sally are not domestic partners unless one of them can show that they shared life together as a couple for a significant period of time. Such a showing is unlikely under these facts.[34]

This illustration points out both the conventionality of the *Principles*' requirements that people both share a life together as a couple and a common household for a particular period of time, and the difficulties faced by the drafters in distinguishing between the kind of relationship that gives rise to financial responsibilities upon dissolution and the kind that does not. The drafters labored long and hard over this issue, and it is beyond the scope of this commentary to fully articulate an alternate scheme. However, one other way of defining domestic partnerships might include a focus on financial losses, gains, and other interminglings. In any case, if sexuality is not central to defining a domestic partnership, I see no reason to make monogamy relevant. A marriage, after all, is valid regardless of whether either or both spouses engage sexually with others. If there is some reason to impose more rigid codes of sexual conduct on cohabitation than on marriage (which would be odd, since cohabitation is more

33. For further elaboration on polyamory, see Ertman, *supra* note 9, at 123-27.

34. ALI PRINCIPLES 2000, *supra* note 2, § 6.03 cmt. i, illus. 17.

informal in its entry and exit than marriage), the *Principles* do not say what that reason is.

Refocusing the family away from monogamous couples is not a new idea. Martha Fineman has persuasively contended that the sexual dyad is extraordinarily fragile, so that families could be and should be organized around other social relationships, such as relations of dependency.[35] Also, courts in some circumstances are willing to recognize affiliations of more than two adults, as when a sperm donor and a lesbian couple contractually agreed that all three would be involved in raising a child.[36] At least one municipality has considered extending domestic partnership provisions beyond couples to include polyamorous affiliations, reasoning that intimate partnerships sometimes have more than two partners just as business partnerships do.[37] These examples support my suggestion that we define affiliation more broadly than a couple, focusing on money instead of sexual conduct.

A third reason to suspect that the *Principles*' approach to nonmarital affiliations is not as good a switch from current law as it could be is that its provisions only relate to disputes between the partners—declining to make the partnership relevant for purposes of the partners' relationships with third parties such as insurers or the state. The *Principles* make much of treating domestic partnerships as a status rather than a contract, relying on Ira Ellman's well-known repudiation of contractual analysis to determine rights between intimates.[38] However, the *Principles* do treat domestic partnerships more like contracts than statuses by making them relevant only to the partners and not to third parties or the state. Contract involves private ordering, binding only the parties to the agreement, while status-based doctrines bind the state and third parties as well as participants to a particular transaction. It is not surprising that domestic partnerships as recognized in the *Principles* include elements of both status and contract, for a rich body of literature has amply demonstrated that marriage is legally and socially treated as both a status and a contract.[39] However, this mixture of status and contract merits third party and state recognition, or at least a better explanation of why the *Principles* withhold that recognition. The comments refer to other regimes that recognize domestic partnerships for third party and state purposes, but do not say why they refrain from doing so. Perhaps pragmatically, the drafters anticipated political opposition to perceived incursions on the special status of marriage, or to favorable treatment of same sex couples.

In sum, the *Principles* are not perfect. They define couples in traditional ways, and seem to impose norms of sexual fidelity and continuous cohabitation that are not imposed on marriage. They are, of course, a vast improvement on current law, which rarely recognizes domestic partnerships at all unless the

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35. *See* MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES (1995).

36. LaChappelle v. Mitten, 607 N.W.2d 151 (Minn. Ct. App. 2000).

37. Jan Battles, *Cork Opens Door to Gay Couples*, SUNDAY TIMES (LONDON), Feb. 6, 2000 (describing how Cork considered domestic partnership bill that would recognize affiliations with more than two partners).

38. *See* ALI PRINCIPLES 2000, *supra* note 2, § 6.03 cmt. b.

39. *See, e.g.*, MARGARET F. BRINIG, FROM CONTRACT TO COVENANT: BEYOND THE LAW AND ECONOMICS OF THE FAMILY (2000).

parties can prove a contract. However, the *Principles* do not improve these inadequacies and inequalities in current law as much as they could.

V. THE *PRINCIPLES* AS NOT A SWITCH AT ALL

Having discussed a few ways in which the *Principles*' treatment of nonmarital affiliations is a good switch and others in which they may represent a less than optimal switch, this commentary now briefly considers whether there are ways in which their treatment of domestic partners is not a switch at all. The very ambition of the *Principles*, unifying the widely divergent rules governing family law in various jurisdictions, itself suggests that the *Principles* are indeed a considerable switch from existing doctrine. However, since the *Principles* compile existing law in addition to unifying it, there are some ways in which the *Principles*' domestic partnership provisions are not a switch at all.

First, most jurisdictions already recognize cohabitation, albeit upon the showing of a contract of equitable theory, as discussed already.[40] Second, the kinds of relationships that are recognized are the ones that comply with traditional domestic arrangements (monogamous, continuously cohabiting, and engaging in the specialization of one partner in wage labor and the other in homemaking labor). Third, the principle underlying Chapter 6 is widely recognized as valid in a wide variety of legal contexts: "that legal rights and obligations may arise form the conduct of parties with respect to one another, even though they have created no formal document or agreement setting forth such an undertaking."[41] In these ways, the *Principles* perform as other ALI *Restatement* projects, merely compiling existing doctrine in a coherent format.

VI. CONCLUSION

In conclusion, the *Principles* are mostly a good switch from existing law, falling short of what they could be only in retaining the status of marriage as normatively superior to domestic partnership. If they are widely adopted, then perhaps that adoption will nudge the doctrine governing intimate affiliations toward recognizing a wider range of relationships, thus increasing consistency and decreasing inequality in family law. The difficulties will always involve distinguishing informal, temporary affiliations from those that rise to the level of creating financial and other implications. But these difficulties are present in other areas of law, such as contract law that distinguishes between enforceable and unenforceable promises.[42] If the domestic partnership provisions of *Principles* bring to domestic relations law an increased measure of uniformity and fairness, those things alone will mark the project as a resounding success.

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40. ALI PRINCIPLES 2000, *supra* note 2, § 6.03 cmt. b.

41. *Id.* § 6.02 cmt. a.

42. *See, e.g.*, U.C.C. § 2-201 (2000) (requiring a signed writing for sales of goods over $500, but providing safe harbors if a merchant has not objected to a confirmation, goods are specially manufactured, agreements are admitted, or goods are paid for or accepted); RESTATEMENT (SECOND) OF CONTRACTS §§ 17 & 71 (1979) (defining enforceable agreements as those supported by consideration and defining consideration as a bargained for exchange).