THE ECONOMIC CONSEQUENCES OF DIVORCE: WOULD ADOPTION OF THE ALI PRINCIPLES IMPROVE CURRENT OUTCOMES?

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I. INTRODUCTION

A decade ago, I reviewed the economic consequences of divorce under prevailing legal standards. After describing the available evidence, I concluded that:

> The economic consequences of divorce today are the "equitable" division of property worth too little to matter; no or short-term alimony; child support that fails to ensure a standard of living for the children and their mother equivalent to that of the father; outcomes that are inconsistent and often unpredictable, and that, for women and children, do not appear to be getting better; and economic hardship that often could have been lessened through more equitable rules.
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> Divorce law cannot cure the feminization of poverty or the problems of single parent families, but it can ensure outcomes that impose the burden of divorce fairly upon all family members. That is the goal for which divorce reform should strive.[1]

Would adoption of the American Law Institute's *Principles of the Law of Family Dissolution* significantly alter the results of current law? If so, would those altered results ensure that "the burden of divorce [is imposed] fairly upon all family members?" This commentary addresses these important questions.

II. CURRENT LAW AND ITS RESULTS

The need for divorce law reform flows from the structure and content of current legal standards. My earlier review noted two major reasons why those standards have failed to achieve outcomes that fairly distribute the burden of divorce.

First, in most states, the rules governing property distribution and alimony are "vague, complex, and highly discretionary."[2] New York's Domestic Relations Law, for example, requires courts to distribute marital property "equitably between the parties," after reviewing twelve separate, often conflicting, considerations plus "any other factor which the court shall expressly find to be just and

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1. Marsha Garrison, *The Economic Consequences of Divorce*, 32 FAM. & CONCILIATION CTS. REV. 10, 22 (1994).

2. *Id.*

proper."[3] Divorcing couples have great difficulty using standards like this one to determine what decision a judge would make in their own case. The outcome that such a couple achieves thus is often unpredictable; like cases simply do not produce like results. While judicial decision making and lawyer assistance appear to improve the consistency of case outcomes,[4] even full litigation—two-party representation and trial before an experienced judge—often produces highly disparate decisions. Indeed, in my survey of judicial decision making in New York, one decision—the length of a durational alimony award—was significantly related to *none* of the factors enumerated in the alimony statute. The permanence of alimony awards was somewhat more predictable, but one of the case factors significantly related to outcome was the political party of the judicial decision-maker![5] The vague, discretionary standards that characterize much of current divorce law thus invite the substitution of personal for public values. They are also "ill-suited to the volume of divorce cases filed and their generally routine characteristics. . . [C]lear, simple, and universal rules [are needed]. . . ."[6]

A second problem with current divorce law lies in its failure to provide a fairness metric that comports with familial expectations and public values. Areas of divorce law that rely on a multiplicity of conflicting factors fail in this regard because they provide, in essence, no metric at all. But even child support law, which now relies on numerical guidelines instead of discretionary standards, evidences this problem.

All state child support guidelines now in effect base the support obligation on the marginal cost of maintaining the parental living standard when a new child joins the family.[7] This "continuity-of-expenditure" approach has no basis in the discretionary standards which it replaced; those standards universally specified that the support award should reflect the resources currently available to both segments of the divided family, the child's reasonable needs, and the living standard the child would have enjoyed had the family not dissolved.[8] Public opinion surveys suggest continued reliance on these factors in measuring the fairness of child support, but the continuity-of-expenditure model largely ignores them.[9] The states have struggled to adapt the model to typical post-dissolution scenarios such as joint custody or the birth of additional children to

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3. N.Y. DOM. REL. LAW. § 236 B(5)(c) (McKinney 1999).

4. *See* Marsha Garrison, *Good Intentions Gone Awry: The Impact of New York's Equitable Distribution Law on Divorce Outcomes*, 57 BROOK. L. REV. 621, 710-11 (1991); Marsha Garrison, *How Do Judges Decide Divorce Cases? An Empirical Analysis of Discretionary Decision Making*, 74 N.C. L. REV. 401, 480-94 (1996); *see also* Nancy Thoennes et al., *The Impact of Child Support Guidelines on Award Adequacy, Award Variability, and Case Processing Efficiency*, 25 FAM. L.Q. 325, 340-41 tbl.10 (1991).

5. *See Garrison, Discretionary Decision Making, supra* note 4, at 488 tbl.29, 489-90.

6. *See Garrison, Economic Consequences, supra* note 1, at 22.

7. As of 1999, all states but three employed continuity-of-expenditure guidelines; Delaware, Hawaii, and Montana utilized guidelines based on the "Melson" formula, which aims at poverty prevention as well as continuity-of-expenditure. For a state-by-state comparison of guideline models, see Jane C. Venohr & Robert G. Williams, *The Implementation and Periodic Review of State Child Support Guidelines*, 33 FAM. L.Q. 7, 11 tbl.1 (1999).

8. *See, e.g.*, UNIF. MARRIAGE & DIVORCE ACT § 309, 9A U.L.A. 400 (1987).

9. *See* Marsha Garrison, *Autonomy or Community? An Evaluation of Two Models of Parental Obligation*, 86 CAL. L. REV. 41, 98-102 (1998) (reviewing survey evidence on public attitudes towards child support determination).

the obligor. But because a past-focused methodology provides little guidance in such cases, it is not surprising that state rules are inconsistent and controversial.[10] More importantly, parents and children typically measure the fairness of a support award in relation to their *current* circumstances; if a support award leaves the smaller segment of the divided family with the lion's share of the income, the other segment is likely to feel aggrieved. In the typical case where the custodial mother earns less than the support-obligor father, this is exactly the result the continuity-of-expenditure model produces. Researchers have consistently reported that in such cases the guidelines produce awards that improve the living standard of the support obligor, while that of his child significantly declines.[11] But guidelines employing a continuity-of-expenditure methodology invariably "penalize children for being in the custody of a parent who has less income, and reward them for living with the parent who has more."[12] Thus, in atypical families where the custodial parent earns as much or more than the noncustodial parent, and in the extremely common case in which the noncustodial parent marries a new spouse who does so, continuity-of-expenditure guidelines comparatively disadvantage the noncustodial parent. Current guidelines thus produce cries of unfairness from advocates for both mothers and fathers, and both groups can point to cases in which the charge seems justified.

The continuity-of-expenditure model has not even proven itself capable of significantly increasing the level of awards, or decreasing their variability. Congress mandated guidelines expecting that they would achieve these aims. But in some states award levels did not increase at all after guidelines were introduced and in others award levels increased only within one or another income group.[13] Support awards also remain highly variable; indeed, in some jurisdictions, researchers have reported that the *majority* of support awards deviate significantly from those the guidelines suggest.[14] Parental agreement is the most important

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10. *See* Robert G. Williams, *An Overview of Child Support Guidelines in the United States, in* CHILD SUPPORT GUIDELINES: THE NEXT GENERATION 1, 12-13 (Margaret Campbell Haynes ed., 1994) (describing state responses to "perplexing" and "emotion-laden" issues of joint custody and additional dependents); Marygold S. Melli, *Guideline Review: Child Support and Time Sharing by Parents*, 33 FAM. L.Q. 219, 221 (1999) (finding that "time sharing beyond traditional visitation is more complex than present guidelines recognize").

11. *See* G. DIANE DODSON & JOAN ENTMACHER, WOMEN'S LEGAL DEFENSE FUND, REPORT CARD ON STATE CHILD SUPPORT GUIDELINES 94, 97-98 (1994) (finding that, on average, awards under 1989-90 U.S. guidelines caused children's living standards to decline by 26% while noncustodial parents' improved by 34%).

12. David Betson et al., *Trade-offs Implicit in Child-Support Guidelines*, 11 J. POL'Y ANALYSIS & MGMT. 1, 19 (1992).

13. *See* Thoennes et al., *supra* note 4, at 336 (in Illinois, guidelines did not significantly increase award levels among any income group when differences in employment status of pre and post guideline samples were taken into account). A significant proportion of the increase in average child support values that researchers have noted may also be due to the imposition of token, rather than zero-dollar, awards in cases of unemployed or female noncustodial parents. P. BUSHARD, TIME SERIES ASSESSMENT OF CHILD SUPPORT GUIDELINES: SUPPORT AWARDS IN SHARED CUSTODY DIVORCES (1988) (Ph.D. dissertation, Arizona State University), *cited in* Thoennes et al., *supra* note 4, at 343 (15% increase in support levels in shared custody cases after adoption of Arizona child support guidelines was entirely due to a reduction in zero-dollar awards).

14. *See* 1 A.B.A. CENTER ON CHILD. AND THE LAW, EVALUATION OF CHILD SUPPORT GUIDELINES: FINDINGS AND CONCLUSION (1996) (support award was not within 2% above or below the guideline value in from 10% to 45% of cases across 21 surveyed counties); David Arnaudo, *Deviation from State*

reason for deviation from the guideline support values,[15] and some deviations undoubtedly represent appropriate trade-offs—support-for-property, for example, or extraordinary visitation expenses. But the resources and attitudes of each parent toward the divorce also play important roles in determining child support outcomes and produce trade-offs that bear little relationship to those lawmakers intended.[16] Because federal law does not mandate explanation for variation, we have little evidence on how much is justifiable, and how much is not.

Federal policy-makers assumed that the continuity-of-expenditure approach would significantly raise award levels, without carefully evaluating its likely results and comparing them with solid data on past award levels. They assumed that clear rules would achieve consistent results, without investigating the reasons for award variation. And, most fundamentally, they assumed that the continuity-of-expenditure model would achieve fair results, without developing criteria for measuring award fairness that reflected either prior legal principles or current public values. As a result of these various failures, the support guidelines have failed to achieve many of the goals that motivated their enactment.

The support guidelines example is instructive, but it is certainly not unique. California replaced its equitable property distribution regime with a rule requiring equal division of marital property on the assumption that equitable distribution typically produced relatively equal awards for husband and wife. The change was expected to curb case variation without altering overall outcomes. But researchers later determined that wives had typically received more than half of the marital property under the old law, and they also discovered that deferred distribution of the marital home in cases involving minor children declined dramatically under the new one. The change in legal standards thus had an unexpected—and entirely unwanted—negative impact on wives and children.[17]

Unintended effects may also occur when rules are replaced with discretionary standards. New York replaced a title-based property distribution rule with an equitable distribution principle in order to benefit divorced wives, who were thought to receive considerably less property than husbands under the old regime. The new law also permitted judges to award durational instead of permanent alimony, but increased property awards were expected to more than offset any alimony loss occasioned by the new law. Later research revealed,

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Child Support Guidelines, *in* NEXT GENERATION, *supra* note 10, at 88-94 (summarizing state studies); MARILYN L. RAY, NEW YORK STATE CHILD SUPPORT STANDARDS ACT EVALUATION PROJECT REPORT 1993 54 (1994) (only 22% of sample child support orders followed guidelines).

15. A.B.A. CENTER ON CHILD. AND THE LAW, *supra* note 14, at §§ 2.5-2.6.

16. *See* Marygold S. Melli et al., *The Process of Negotiation: An Exploratory Investigation in the Context of No-Fault Divorce*, 40 RUTGERS L. REV. 1133, 1168-71 (1988) (finding that the parties' attitudes toward the divorce was a factor "of some significance" in determining child support outcomes. Custodial parents who were reluctant to end the marriage and/or whose spouses were impatient to do so obtained significantly better child support awards than the mean of the group; couples also consistently expressed concern about legal fees and sometimes settled in order to avoid additional expense.).

17. *See Garrison, Discretionary Decision Making*, *supra* note 4, at 423 (citing the negative impact of California's adoption of an equal marital property division rule on "wives and children").

however, that wives had actually received, on average, slightly more net property than had husbands under the old law, while under the new one both the rate and permanence of alimony awards declined markedly.[18] Once again, the rule change did not achieve what its proponents had hoped for.

These various examples make it clear that the achievement of equitable outcomes when families break up cannot be achieved either through broad grants of discretion, or even through the substitution of rules for discretionary standards. Changes in the law of family dissolution will not produce equity improvements unless two preliminary criteria are met: legal change must reflect public values and familial expectations, and it must also reflect a detailed understanding of current outcomes and the process by which they are produced.

III. THE ALI PRINCIPLES

The Project on Family Dissolution has had every advantage for which a law reform effort might hope. Although the American Law Institute is best-known for its Restatements of the Law, "the current disarray in family law" led the Institute to opt, in this Project, for principles that would "give greater weight to emerging legal concepts" than would a Restatement.[19] Drafters of the *Principles* thus were free to fashion novel legal rules. They were also free to ignore the political pressures that may compromise the integrity of real-world legislation. Drafters of the *Principles* also had the benefit of expertise; all Reporters chosen by the Institute were highly-respected academic experts with years of experience teaching family law and investigating the problems of family dissolution. And given their expertise, the drafters of the *Principles* immediately recognized that "family dissolution today ordinarily is a negotiated process;" they thus sought to "control negotiation . . . [with] appropriate presumptions and formulas [that can] also provide benchmarks to aid courts in their review."[20] They also understood that a new approach "needs a justification that can support a law operating more consistently, more reliably, and more predictably."[21] In sum, the *Principles of Family Dissolution* were crafted by experts who had a sophisticated understanding of the problems, and a free hand to devise new laws capable of solving them.

With all of these advantages, the Project on Family Dissolution had every prospect of developing *Principles* capable of producing results much fairer than those achieved under current law. Have the *Principles* met their promise?

A. Property Division

With respect to property division, the *Principles* rely heavily on concepts drawn from prevailing law. Definitions of the various forms of property subject to division are typically much sharper than are those contained in current di-

18. *See Garrison, Good Intentions, supra* note 4, at 674 tbl.19, 697 tbl.36, 698 tbl.37.

19. Geoffrey C. Hazard, Jr., ALI PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS, Foreword (Proposed Final Draft Part I, 1997) [herinafter ALI PRINCIPLES 1997].

20. *Id.* at xiii-xiv.

21. *Id.* at 8.

vorce statutes,[22] but they almost invariably reflect judicial precedents in the majority of American jurisdictions. These definitional provisions could easily have been contained in a Restatement; their value lies in the clarity with which widely accepted principles are defined and the detailed examples that are provided, rather than in the development of a novel approach.

While the equal division norm adopted by the *Principles* at first blush exhibits novelty rather than restatement—only a handful of states have statutory provisions establishing equal division as a presumptive outcome—a larger number have judicial precedents that establish such a presumption or posit equal division as an analytical starting point.[23] Moreover, as the *Principles* note, "the equal division rule also follows from the sharing premise that necessarily underlies the choice of a marital rather than common-law (i.e., title-based) property system" and "offers a rough compromise between the competing claims of contribution and need."[24] Judges thus appear to gravitate strongly toward an equal division norm even in states that have no statutory or case law preferring such an outcome.[25] The equal division norm thus follows the pattern of the definitional provisions and evidences the same merits.

The property distribution provisions exhibit more novelty in their attempt to cabin the various factors now lumped together as bases for "equitable" property allocation within black-letter rules governing deviation from the equal division norm. Like the California equal distribution statute, these rules should tend to reduce the unpredictability and inconsistency that arise from current vague, discretionary standards. But their adoption would also pose the same risks as did the California law: unless such a shift is based on a solid understanding of current outcomes, it risks unintended effects; unless its results comport with public values, it risks the substitution of results that are unfair for results that are unpredictable.

The experts who drafted the *Principles* were not, of course, unaware of the California experience. Nor did they imagine the possibility of drafting "reasonable rules that unambiguously resolve every factual variation . . . [and] eliminate all need for judicial discretion."[26] The *Principles* thus were designed to "[permit] well-defined departures from an otherwise dispositive equal division presumption."[27]

The *Principles* permit deviation from an equal division of marital property in only three situations:

> The spouses are allocated net shares of the marital property and debts that are unequal in value if, and only if,

22. *Id.* § 4.03.

23. *Id.* § 4.15 cmt. a.

24. *Id.* § 4.15 cmt b.

25. *See Garrison, Discretionary Decision Making*, *supra* note 4, at 452-54, 500; Suzanne Reynolds, *The Relationship of Property Division and Alimony: The Division of Property to Address Need*, 56 FORDHAM L. REV. 827, 854-55 (1988).

26. ALI PRINCIPLES 1997, *supra* note 19, § 4.15 cmt. a.

27. *Id.*

(a) the court concludes . . . that it is equitable to compensate a spouse for a loss [that would otherwise result in an alimony award under] Chapter 5 . . . with an enhanced share of the marital property; or

(b) the court concludes under 4.16 that one spouse is entitled to an enhanced share of the marital property because the other spouse previously made an improper disposition of some portion of it; or

(c) marital debts exceed marital assets, and it is just and equitable to assign the excess debt unequally, because of a significant disparity in the spouses' financial capacity, their participation in the decision to incur the debt, or their consumption of the goods or services that the debt was incurred to acquire.[28]

Unequal property division is thus allowed only when property is substituted for alimony, when one spouse is guilty of financial misconduct, and when marital debts exceed assets. Both Chapter 5, governing alimony, and section 4.16, governing financial misconduct, contain detailed rules that the decision maker must apply except where "substantial injustice" would result.[29] For fact patterns falling within these stated exceptions, discretion is thus cabined and channelled, but it is not eliminated; in each category of cases, litigants and judges can easily determine typical results, but remain free to alter those results in atypical cases. Like the equal division norm itself, these stated exceptions are supported by current law and the available evidence on current outcomes. All equitable distribution regimes require consideration of relative need and many specify the award of alimony as an additional factor for consideration. Virtually all states mandate consideration of financial misconduct, and the evidence suggests that this is an important but not always predictable factor determining deviation from an equal outcome.[30] The evidence also suggests that net debt typically is not divided equally;[31] indeed, California ultimately adopted a rule like that contained in the *Principles* because of the equity concerns noted in section c.[32] These property distribution provisions thus do appear to "steer a middle course" that both captures the values contained in current law and channels discretion so as to curtail unpredictable and inconsistent outcomes.[33]

However, the debt exception could be substantially improved if it were expanded: it is not simply net debt that tends to be disproportionately distributed to the higher-earner spouse, but all debt.[34] Because average husband earnings continue to be higher than average wife earnings, this tendency typically benefits low-wage women and often results in skewed distribution of marital net worth in their favor. Such cases are by no means infrequent. Reflecting the dis-

28. *Id.* § 4.15(2).

29. *Id.* §§ 4.16(5), 5.05(4).

30. *See* Linda D. Elrod et al., *A Review of the Year in Family Law: Children's Issues Dominate*, 32 FAM. L.Q. 661, 716 tbl.5 (1999).

31. *See Garrison, Discretionary Decision Making, supra* note 4, at 453 tbl.6; *Good Intentions, supra* note 4, at 672 tbl.17.

32. CAL. FAM. CODE §§ 2627, 2641.

33. *See Garrison, Discretionary Decision Making, supra* note 4, at 464 tbl.13.

34. *Id.* at 453 tbl.6; *see also Garrison, Good Intentions, supra* note 4, at 672 tbl.17.

proportionate incidence of divorce among the young and the poor,[35] as many as half of divorcing couples have $30,000 or less in net assets to divide. Moreover, asset values for these property-poor couples are typically concentrated in nonliquid goods—household furniture, the family car, and perhaps some minimal equity in the family home—that are difficult to utilize for debt payment.[36] The frequency of these cases explains why the average share of marital property obtained by women under equitable distribution regimes is typically greater than 50%[37] and why that share declined when California adopted a mandatory equal division principle. Given that current debt distribution patterns conform with the current law's emphasis on need as a distributive factor and the "significant disparity in financial capacity" rationale for disproportionate net debt distribution urged in the *Principles* themselves, there is every reason to expand the net debt exception to include cases in which marital assets are minimal and largely nonliquid.

The *Principles*' treatment of separate property could also be improved. A significant minority of states permit the distribution of such property to the spouse who does not hold title, and states that do not permit such distributions typically specify the ownership of separate property as a consideration in dividing marital property.[38] The available evidence also suggests that the existence of separate property significantly affects judicial property awards.[39] This evidence offers support for the addition of another exception to the equal division norm for cases in which separate property represents a major portion of the spouses' total assets, perhaps accompanied by a provision permitting the award of separate property to a spouse without title in appropriate circumstances. Instead, the *Principles* require the gradual recharacterization of separate property as marital, based on a statewide formula "that takes into account both the marital duration and the holding period of the property in question."[40] This formula must be applied unless the separate property was received pursuant to a will or deed of gift specifying that recharacterization should not be given effect, or the property owner has given his or her spouse a written notice specifying that recharacterization should not be given effect. While the *Principles* permit the trial court to preserve the property's "separate character [when] . . . necessary to avoid substantial injustice,"[41] they do not permit the court to unequally distribute marital property or reach separate property unilaterally placed off limits when necessary to avoid substantial injustice. Nor do the *Principles* permit the court to take account of an expected inheritance or gift upon which the spouses have relied, but which has not yet been received. The result is that in many cases where the nonpropertied spouse has justifiably and detrimentally relied on the expectation of sharing in the propertied spouse's separate assets, the

35. *See Garrison, Discretionary Decision Making, supra* note 4, at 439 (citing sources).
36. *See Garrison, Good Intentions, supra* note 4, at 660 tbl.9, 666.
37. *Id.* at 675 tbl.20.
38. *See* Elrod et al., *supra* note 30, at 717 chart 5.
39. *See Garrison, Discretionary Decision Making, supra* note 4, at 463-64 tbl.13.
40. ALI PRINCIPLES 1997, *supra* note 19, § 4.18(2)(a).
41. *Id.*

court's hands are tied.[42] Given that the *Principles*' separate property provisions are based in part on the premise that parties to a long marriage often rely on the expectation that one or the other's separate assets will be available to them jointly during retirement or in an emergency[43]—a premise that also seems evident in the cases decided under current law—the separate property provisions seem too narrow to effect an improvement in outcomes. Couples with significant separate property represent a tiny fraction of the divorce population,[44] but for that group more flexibility is necessary in order to meet fairness goals.

Who would benefit from adoption of the *Principles*' property distribution rules? All couples who avoid litigation because of the greater precision of the *Principles* would benefit from reduced legal fees. Spouses who would have settled for a disproportionately low property award under current law would also benefit. This could be a sizeable group because the little evidence that is available suggests that, while judges strongly gravitate toward an equal division norm, litigants do not.[45] Disproportionate awards and settlements appear to be particularly common when there is considerable disparity in the value of the assets to which each spouse holds title and when the value of net assets is either very high or very low.[46] Reflecting the much greater likelihood that husbands will own valuable marital assets, these tendencies typically benefit husbands in wealthy families even though, as we have seen, they typically benefit needy wives in poor ones. As presently structured, the *Principles* thus would primarily benefit wives in wealthy marriages; the *Principles* would largely preclude awards favoring title-holder husbands in such cases and the value of the assets at stake would make litigation threats worthwhile and credible. This shift would represent an improvement in the fairness of divorce outcomes because title is an illegitimate divisional factor even under current equitable distribution standards.

But it is important to keep in mind that the gains wives in wealthy marriages should obtain under the *Principles* would likely be offset by losses suffered by their counterparts in poor families; without expansion of the existing net debt exception, poor wives should shoulder a higher percentage of debt than is typical under existing standards and thus receive lower percentages of net property than are now typical. Because litigation is much less likely in these cases, it is possible that this shift in outcomes would not occur. But it is a real risk, a risk made more notable both by the higher incidence of divorce among the poor and the fact that, under current law, divorce imposes the greatest eco-

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42. One obvious example is the spouse (Husband, for example) who expects to rely on Wife's expected inheritance during retirement and thus forgoes investment in a pension; after twenty years of marriage, Wife receives the inheritance and promptly hands Husband a disqualifying notice or files for divorce. Under the *Principles*, the Court would be required to divide the marital property equally, and could not divide Wife's inheritance. For cases involving similar facts, *see In re* Marriage of Bekooy, 846 P.2d 1183 (Or. Ct. App. 1993); Zeh v. Zeh, 618 N.E.2d 1376 (Mass. App. Ct. 1993) (both cited in the *Principles*).

43. ALI PRINCIPLES 1997, *supra* note 19, § 4.18 cmt. a.

44. *See Garrison, Good Intentions, supra* note 4, at 660-62.

45. *Id.* at 686.

46. *See Garrison, Discretionary Decision Making, supra* note 4, at 459-60, 464-66; *see also Garrison, Good Intentions, supra* note 4, at 696 tbl.35.

nomic hardship on low-income women and the children in their custody. Because smaller debt awards for this group are typically justified both by the need criteria of current law and the *Principles*' proposed "significant disparity in financial capacity" criterion for disparate net debt distribution, the diminished prospects of wives in poor families would appear to represent an equity loss.

As currently drafted, the ALI property distribution principles thus likely would produce an equity gain for one group, offset by an equity loss for another. In terms of dollar value, the equity gains of wives in wealthy marriages would probably offset the losses of the wives in poor ones. But because of the disproportionate numbers of poor couples among the divorce population, it is likely that more women would suffer losses than would experience gains. And those losses would be experienced by those who can least afford it, and who already experience the greatest financial hardship following family dissolution.

B. Alimony and Child Support

Because of the relative infrequency of valuable assets among the divorce population, alimony and child support entitlements are far more important to the typical divorcing couple than is property distribution law. As we have seen, today's child support law tends to achieve results that improve the living standard of the support obligor while reducing that of his children. This living standard loss is not generally offset by alimony awards. Nationally, alimony is awarded in approximately 15% of divorce cases; its duration is typically very limited.[47]

Theoretically, revised alimony and child support principles could alter these patterns in a way that would more than offset the equity losses that the property distribution principles would likely produce. But it is important to note that current patterns are long-standing patterns. The discretionary standards which current numerical support guidelines replaced did not produce markedly higher support values or a lower living-standard gap.[48] Nor did traditional alimony law, which emphasized fault over need, produce a higher incidence of alimony awards.[49] The patterns we see today have endured for generations and have survived significant changes in legal standards. Altering these patterns thus poses a considerable challenge.

1. Alimony

With respect to alimony, the *Principles* take up this challenge by reconceiving spousal support as a compensatory entitlement instead of a need-based remedy. This is a significant shift, indeed the most notable divorce law innovation contained in the *Principles*. So transformed, alimony would represent a "compensatory award . . . for financial losses incur[red] . . . when the family is divided into separate economic units."[50] More traditionally, the *Principles* do not

47. *See* HARRY D. KRAUSE ET AL., FAMILY LAW: CASES, COMMENTS, AND QUESTIONS 793 (4th ed. 1998); *see also Garrison, Good Intentions*, *supra* note 4, at 698.

48. *See Garrison, Good Intentions*, *supra* note 4, at 633 nn.42-43 (citing studies).

49. It did, however, produce a much higher incidence of permanent awards. *Id.* at 634 n.44 (citing studies).

50. ALI PRINCIPLES 1997, *supra* note 19, § 5.03(1).

mandate compensation for every such loss. Alimony would be available only for:

> (a) in a marriage of long duration, the loss of living standard experienced at dissolution by the spouse who has less wealth or earning capacity;
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> (b-c) an earning capacity loss . . . arising from one spouse's disproportionate share, during marriage, of the care of the marital children or of the children of either spouse . . . or arising from the care provided by one spouse to a sick, elderly or disabled third party in fulfillment of a moral obligation of the other spouse or of both spouses jointly;
>
> (d) the loss either spouse incurs when the marriage is dissolved before that spouse realizes a fair return from his or her investment in the other spouse's earning capacity; and
>
> (e) an unfairly disproportionate disparity between the spouses in their respective abilities to recover their pre-marital living standard after the dissolution of a short marriage.[51]

Like the proposed property distribution rules, these various bases for an alimony claim all have a source in current law. Virtually all state alimony statutes recognize marital duration, need, and child care responsibilities as important factors in alimony determination; although factor (d) is less traditional, many now recognize unreimbursed contribution as well. Judges and litigants also appear to place great weight on these factors; indeed, the evidence suggests that income disparity and marital duration are among the most important alimony determinants.[52]

In contrast to current law, the *Principles* would establish, for each type of alimony claim, percentage-based presumptions governing both the duration and value of the alimony award. These presumptions would unquestionably curb both the variation and reliance on private values currently evident in judicial alimony decisions.[53] In many cases, the alimony entitlements established by the *Principles* should also be sufficiently valuable to produce credible litigation threats. Given this fact, the new rules would also stand a good chance of reducing the variability of alimony outcomes in settled cases. Moreover, while the concept of an alimony entitlement is novel, the specified bases for alimony all have a foundation in current legal standards.[54]

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51. *Id.* § 5.03.

52. *See Garrison, Discretionary Decision Making, supra* note 4, at 483-85.

53. One example of such intrusion is the class bias often evident in alimony outcomes. In my survey of alimony decision making, for example, the husband's job status was a more powerful predictive variable than was his income both for judicially decided and settled cases. *Id.* at 485-86.

54. One relatively unusual case in which the *Principles* may not be consistent with public values is that of the spouse who is guilty of a serious marital offense. Although the *Principles* preclude all consideration of fault, in more than half of the states fault remains a relevant factor in alimony decision making. *See* Elrod et al., *supra* note 30, at 712 chart 1. The impact of marital fault on alimony decision making appears to be slight but significant. *See Garrison, Discretionary Decision Making, supra* note 4, at 482-83. Nor is it obvious that public values would give typical alimony treatment to the alimony claim of a wife who had hired a contract killer to murder her husband, Valenza v. Va-

However, the Reporter's decision not to offer appropriate percentages makes it impossible to predict whether the outcomes produced would ultimately be fairer than those achieved under current law.[55] For example, both the award and value of alimony for living standard loss in a long marriage is determined by applying a "specified percentage to the difference between the incomes the spouses are expected to have after dissolution," while the duration of such an award is to be fixed by "the length of the marriage multipled by a factor specified in the rule . . . ."[56] But different percentages will produce different results. Today's numerical child support guidelines again offer an instructive example. While the majority of the states adopted the same "income shares" support model, they have implemented it utilizing different percentages and income definitions. The result is highly disparate outcomes; for example, children entitled to $1,054 per month in Nebraska, one midwest income-shares state, would obtain only $660 in Oklahoma, another such state.[57]

The alimony provisions would be vastly improved if appropriate percentages were offered. The Uniform Probate Code provisions on the spousal right of election—which also utilize percentages based on marital duration—take this approach.[58] So, indeed, do the child support provisions of the ALI draft. There is no obvious reason why the alimony rules should not do so as well. Without such detail, it is not altogether clear who would win under the *Principles*, and who would lose.

While the *Principles* lack of specificity makes it difficult to precisely determine who would benefit, under any reasonable implementational percentages, the alimony award rate should go up quite dramatically: while the most typical alimony recipient is a long-married, low-income wife married to a high-income husband, alimony is not awarded in many cases exhibiting all of these characteristics.[59] Thus the "living standard disparity" provision thus should increase the frequency of alimony awards among long-married women. This increase would represent an equity gain as current law posits this type of case as the "ideal" alimony situation, and judges rarely deny alimony in such circumstances.[60] Mothers in short marriages should, under the *Principles*, experience an

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lenza, N.Y.L.J. 1/6/90, at 16, col. 1, or to that of a wife who had both borne children that were the product of a nonmarital relationship and lied to her husband about his paternity, Doe v. Doe, 712 A.2d 1323 (1998). Under current discretionary standards, courts need not rely explicitly on fault grounds to deny alimony in such a case. But under the *Principles*, they would be required to award alimony if durational and other requirements had been met. The *Principles* similarly eschew all consideration of fault in property division, giving rise to similar issues of fairness. A larger group of states preclude consideration of fault in property division, however. *See* ALI PRINCIPLES 1997, *supra* note 19, at 50-51.

55. Examples contained in the comments to the alimony provisions do employ a maximum percentage of either .4 or .5, but the *Principles* nonetheless "contain no recommendation as to the proper maximum or minimum value of the durational factor." *Id.* § 5.05 cmt. g.

56. *Id.* §§ 5.05(3), 5.07(1)(b).

57. *See* Laura W. Morgan & Mark C. Lino, *A Comparison of Child Support Awards Calculated Under States' Child Support Guidelines with Expenditures on Children Calculated by the U.S. Department of Agriculture*, 33 FAM. L.Q. 191, 192 n.5, 209 tbl.4 (1999).

58. UNIF. PROBATE CODE § 2-202, 8 U.L.A. 101 (1998).

59. *See Garrison, Good Intentions*, *supra* note 4, at 707-08 tbl.46.

60. *See Garrison, Discretionary Decision Making*, *supra* note 4, at 468-69.

even much more dramatic improvement in their alimony prospects. The "earning capacity loss" provision is applicable to women married for brief as well as long periods of time, and does not require a showing of actual earning capacity loss; such loss is instead conclusively presumed from a showing of disproportionate child care responsibilities.[61] Because disproportionate child care responsibilities are typical but current law rarely produces alimony awards when the marriage was brief, the "earning capacity loss" provision should logically create large numbers of new alimony entitlements. Indeed, given prevailing child care and income patterns, the *Principles* should ensure that alimony becomes the *norm* among divorcing couples with children, even if the marriage is short.

Without information on the "child care durational factor" that would govern the value of "earning capacity loss" alimony awards, it is impossible to determine the value of these new entitlements. But there is reason for considerable skepticism about the likelihood that any real legislature would create such entitlements if coupled with robust percentages; legislatures have repeatedly curtailed alimony prospects over the past few decades but have rarely expanded them. Moreover, in my survey of alimony decision making by judges, the alimony award rate was fourteen percentage points higher at the beginning of the survey period than it was at the end; indeed, the year of decision was a significant negative predictor of an alimony award.[62] Nor is there evidence of popular support for a major expansion of alimony entitlements; surveys conducted during the decade between the mid-1970s and mid-1980s how a majority of American women reporting that the divorced woman who can earn a "reasonable income" should not receive alimony under *any* circumstances.[63] But theoretically the ALI *Principles* would vastly increase the number of alimony awards among low-income parents with the custody of minor children, entitlements that might

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61. Under the *Principles*, a parent whose job and work hours did not shift after assuming disproportionate child care responsibilities is entitled to alimony as long as her earning capacity at dissolution is "substantially less than that of the other spouse." *See* ALI PRINCIPLES 1997, *supra* note 19, § 5.06(2)(c) cmt.d.

62. *See Garrison, Discretionary Decision Making, supra* note 4, at 468-70 tbl.14.

63. *See* Virginia Slims American Women's Poll 1985 Question ID: USROPER 85VASL Q37 (reporting that 54% of 3000 adult American women responded "no" and 20% "it depends" when asked: "If a divorced woman has or can earn a reasonable income, do you think she shoul receive alimony from her ex-husband or not?"); Virginia Slims American Women's Poll 1979 Question ID: USROPER 79VASL Q34 (reporting that 59% of 2960 adult women responded "no" and 19% responded "it depends" when asked: "If a divorced woman has or can earn a reasonable income, do you think she should receive alimony from her ex-husband or not?"); Virginia Slims American Women's Poll 1974 Question ID: USROPER 74VASL Q40A (reporting that 67% of 2922 adult women responded "no" and 10% responded "it depends" when asked: "If a divorced woman has or can earn a reasonable income, do you think she should receive alimony from her ex-husband or not?"); American Women Today and Tomorrow 1975 Survey Question ID: USMOR 75WOMN R50 (reporting that 70% of 1522 adult American women responded "no" and 17% responded "it depends" when asked: "If a couple are divorced, do you think the woman should get alimony even if she is able to support herself?").

It is intriguing that the surveys suggest somewhat more support for alimony during the 1980s than during the 1970s; continuation of this trend would suggest more public enthusiasm for alimony than I have posited. But the fact that there are no recent surveys also suggest that pollsters do not believe that alimony is a topic timely enough to continue asking questions about it.

more than offset the equity losses this needy group would experience under the property division provisions of the *Principles*.

2. Child Support

While the ALI child support provisions improve on the alimony rules in their specificity, they lack the conceptual clarity of the alimony rules. This failing flows from the Reporter's decision to tinker with the continuity-of-expenditure model rather than replace it with one that is more consistent with traditional support standards and public values. Although the "enhanced" model outlined in the *Principles* produces outcomes that represent a considerable improvement over those achieved under most existing guidelines, it remains difficult to apply in common cases like joint custody or a change in family composition.[64] Moreover, because the tinkering introduces elements foreign to the continuity-of-expenditure model itself, the net result, in the words of the Reporter herself, is a "basic measure of child support [that is] . . . not . . . susceptible to easy definition."[65]

The decision to retain the continuity-of-expenditure model is puzzling. The ALI report makes it clear that an approach focused on achieving equal living standards for noncustodial parents and their children is the one "most likely to protect children from poverty and to enable them to enjoy a relatively high standard of living."[66] It stresses that "in view of the importance of the child's claims and the availability of an equal living standards measure that would fully satisfy those claims, the choice of a more modest measure [such as the one the *Principles* propose] requires persuasive justification."[67]

Unfortunately, the report devotes little space to explaining what factors were found persuasive. In the few paragraphs allocated to the alternative equal living-standards model, it notes that:

> The . . . model, which would generally respond more amply to the interests of children, presents two difficulties. First, it gives no weight to the primacy of the earner's claims to his own earnings. . . . Whether or not this treatment is ethically sound, it would seem culturally unacceptable and hence politically unrealizable. If this were the only objection to the equal living standards model, it might be appropriate to resist the objection. . . . Yet the equal living standards model suffers from a more serious defect: It would create substantial work disincentive for the residential parent. . . An equal living standards, as compared to a marginal expenditure model, would reduce total family income by about 11%.

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64. The ALI enhanced model deviates from a typical continuity-of-expenditure guideline in two important respects: it provides a self-support reserve for the child's household and it includes a supplement explicitly designed to enhance the likelihood that the supported child will enjoy a both a "minimum decent standard of living" and a living standard "not grossly inferior" to that of the nonresidential parent. The supplement is expressed as an income percentage and added to the base, marginal expenditure percentage. As the income of the residential parent rises, the supplement declines. *See* AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 3.04 cmt. g (Tentative Draft No. 3 Part II, 1998).

65. ALI PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 3.04 cmt. d(iii) (Preliminary Draft No. 7, 1997).

66. CHILD SUPPORT RECOMMENDATIONS, *supra* note 64, § 3.04 cmt. d(i).

67. *Id.* § 3.03 cmt. i.

> Almost all of the reduction would be attributable to reduced residential parent labor force participation."[68]

While rejection of an equal outcomes model thus appears to rest primarily on concerns about its impact on work incentives, and secondarily on the assumption that equal living standards for parents and children is "culturally unacceptable," neither of these objections make much sense in light of the ALI's own recommendations. First, the drafters of the ALI recommendations clearly understood that any and all guidelines can be modified to take account of work disincentives. In fact, an important feature of the enhanced model is an "imputed" income provision designed to do just that.[69] An equal outcomes approach—or any support model—can be similarly modified. Second, if equal living standards for parents and their children are "culturally unacceptable," it would appear that the enhanced model proposed by the ALI should also be unacceptable. As I have demonstrated in detail elsewhere, the enhanced model produces remarkably similar awards to those that would be obtained under an equal outcomes model in many cases.[70] Third, even assuming that a model requiring *equal* living standards does not comport with public values, it is still possible to focus on living standard—which everyone can understand and which is the result claimants and obligors care about—as a guiding principle. This is the approach taken in the alimony provisions, which for long-married spouses require compensation for the reduced standard of living that will result from divorce, without requiring equalization.[71] Indeed, reflecting the fact that the continuity-of-expenditure model is extremely difficult to apply in such situations, the *Principles* do require a comparative evaluation of living standards in joint and split custody cases.[72] It is not obvious why such an evaluation is appropriate in these cases and not in others.

The general child support provisions are explicitly aimed at "the dual objectives of [income] adequacy and avoidance of gross disproportion [of living standards]."[73] But it is far from obvious why a long-married spouse should be entitled to compensation for any significant living standard loss when a child of the relationship, who played no role in its dissolution, should be entitled only to the "avoidance of gross disproportion."[74]

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68. *Id.* § 3.05A cmt. j. The 11% figure is derived from the calculations of Betson et al., *supra* note 12.

69. CHILD SUPPORT RECOMMENDATIONS, *supra* note 63, § 3.06B.

70. Marsha Garrison, *Child Support Policy: Guidelines and Goals*, 33 FAM. L. Q. 157 (1999)

71. The *Principles* suggest alimony that, at its maximum value, would equal 40% of the difference in the post-divorce spousal incomes. AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS 173 (Council Draft No. 6, 1999).

72. *Id.* § 3.15 .

73. *Id.* § 3.05B cmt c.

74. Nor is it obvious why the interests of higher-income obligors should have greater weight than those of their low and moderate-income counterparts. Of course, at very high-income levels, expenditures are less likely to benefit children than they will at lower socioeconomic levels. But this concern is not likely to arise within the $24,000 to $36,000 net annual income range at which the model begins to offer obligors a break. The result is that the enhanced model comparatively disadvantages lower income obligors.

The disparity in compensation standards for former wives and children is not supported by traditional divorce law, which focused on (although it failed to achieve) maintenance of the intact family's standard of living in both cases. Nor is it supported by recent legal trends. During the same period in which both the states and federal government were enacting measures aimed at raising the frequency and value of child support awards, legislatures were curtailing wives' alimony prospects with the durational award, designed to limit alimony payments to a fixed period of economic "rehabilitation."[75] Many observers view the recent divergence in alimony and child support law as an important reason for policymakers' preference for the continuity-of-expenditure model over one based on equal living standards, noting suspicions that "some policy makers. . . find the possibility of what they term 'hidden alimony' onerous enough to justify abandoning efforts to protect fully the child's standard of living;" indeed, this view is cited as a prime reason for the ALI claim that equal living standards for parents and their children would be "culturally unacceptable."[76] But if "hidden alimony" is the root of opposition to a living-standard based approach to child support, it seems particularly ironic that an important category of alimony cases would be governed by this very approach.

It is possible that rejection of a living-standard approach to child support is disingenuous: the extraordinarily complex ALI formula—comprised of a base award, a "minimum decent living standard" supplement, a reduction factor, income exemptions, and special hardship deductions—produces results close to those of the equal living standards model in cases of relatively equal parental incomes and in cases of disproportionate income where total income is low or moderate. Perhaps the Reporter has concluded that murky principles which achieve relatively equal living standards "by accident" are politically more acceptable than clear principles that do so on purpose. But the same happy accident is not achieved in higher-income (i.e., $24,000 or more net annual income) families, and the ALI standards offer no clear metric by which to test the fairness of such a pattern.

Despite its conceptual murkiness, however, it is important to keep in mind that the enhanced support model urged by the ALI would produce awards that are higher than those achieved under current guidelines and which would at least reduce living-standard disparity between noncustodial parents and their children. Moreover, it would appear that the largest benefits would be obtained by low-income children, the group for whom divorce poses the greatest risks and whose basic needs often cannot be met at current support levels. Because minor children are invariably the blameless victims of divorce and because higher support awards appear to be supported both by public opinion and Congressional policy, this shift represents a considerable equity improvement over the outcomes suggested by current support guidelines.

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75. *See, e.g.*, Joan M. Krauskopf, *Rehabilitative Alimony: Uses and Abuses of Limited Duration Alimony*, 21 FAM. L.Q. 573 (1988); Sally F. Goldfarb, *Marital Partnership and the Case for Permanent Alimony*, 27 J. FAM. L. 351 (1988-89); Ann Laquer Estin, *Maintenance, Alimony, and the Rehabilitation of Family Care*, 71 N.C. L. REV. 721 (1993).

76. *See Garrison, Autonomy or Community*, *supra* note 9, at 70 n.147 (citing sources).

The proposed guidelines are not more precise than current guidelines, however. Nor do they offer new mechanisms to curb award variation. Existing levels of award noncomformance thus would likely continue unabated.

In sum, the *Principles*' alimony and child support provisions both promise equity gains. These gains are particularly significant because they would tend to improve the economic circumstances of those who are most disadvantaged by family dissolution under current law. But the proposed *Principles* also fail in important, though opposite, respects. The alimony provisions provide a clear concept without adequate implementational detail, while the child support rules provide detail without a clear guiding principle.

IV. CONCLUSION

The *Principles* offer what is almost certainly an improvement over current law. They create entitlements that are more certain and, at least with respect to property and alimony, conceptually much clearer than the broad equitable standards that currently govern these awards. In many, if not all, case categories the *Principles* should enhance the equity of divorce outcomes.

While these are notable achievements, the *Principles* could—and should—achieve more. We expect flaws in enactments drafted hurriedly in backrooms by legislators who are dependent on outside experts to make up for their own ignorance of the relevant field. But from *Principles* crafted by experts over more than a decade, we expect more.