GENDER AND NONFINANCIAL MATTERS IN THE ALI PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION

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I. INTRODUCTION

The question for this issue is gender issues in the American Law Institute's *Principles of the Law of Family Dissolution*. Overall, the *Principles* are an impressive effort to create clarity and coherence, given the disorganized and evolving state of family law. This commentary raises a few questions about the *Principles*' treatment of nonfinancial issues, and suggests that this treatment should raise concerns about women's interests upon divorce. First, I will briefly review the ALI's position on nonfinancial matters. Second, I will discuss why the limitation to financial losses should matter to women; that is, I will investigate the costs of excluding nonfinancial losses. Finally, I will consider the two reasons given for this limitation in the *Principles*' section on compensatory losses, where the issue is most directly addressed. Those reasons are incommensurability (or the problem of valuation), and avoiding fault determinations. Neither is sufficient to sustain the exclusion of nonfinancial matters, once their importance is understood.

II. THE ALI'S POSITION ON NONFINANCIAL MATTERS

The ALI *Principles* take the general view that courts should only be authorized to settle financial matters.[1] This view is reflected in numerous provisions of the *Principles*, but three examples should suffice.

A. Compensatory Payments

Section 5.02 sets out the purpose of the compensatory payments: "to allocate financial losses that arise at the dissolution of a marriage . . . . Losses are allocated under this Chapter without regard to marital misconduct . . ."[2] The use of the term "financial losses" is explicitly intended to limit the relevant inquiry so as to exclude nonfinancial losses. Comment b to Section 5.02 is devoted to explaining this omission, and contrasts financial losses and gains with "emo-

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1. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS §§ 5.02, 5.06 (Proposed Final Draft Part 1, 1997) [hereinafter ALI PRINCIPLES 1997]. The largest exception, of course, is that courts are also authorized to decide child custody matters.

2. *Id.* § 5.02.

tional losses and emotional gains."[3] There are two reasons given for the exclusion. First, Comment b tells us that financial losses and emotional losses are "not commensurable" and therefore "there is no method for determining the extent to which compensation for financial loss should be reduced or enlarged to reflect nonfinancial gains or losses." Second, Comment b reminds us that looking at marital conduct might draw us into the fault inquiry that the *Principles* disavow.[4]

B. Fault

In the introduction to the *Principles*, Topic 2 discusses the ALI's position on the role of "marital misconduct" in assessing property and maintenance awards.[5] Acknowledging that state law actually varies on this point, the *Principles* opt not to stay neutral, but seek to eradicate any evaluation of marital conduct from dissolution proceedings.[6] The *Principles* argue that the most extreme forms of misconduct are compensable in tort, though they caution that the use of this remedy should be rare.[7] The mainstream financial settlement at divorce, according to the *Principles*, should not reflect any evaluation of the particular marriage exchange.[8] The *Principles* defend this position, in brief, in the following manner: "The position taken by the *Principles* on this question follows from both the goal of improving the consistency and predictability of dissolution law, and the core tenet that the dissolution law provides compensation for only the *financial* losses arising from the dissolution of marriage."[9]

Notice that ignoring fault is justified in part on the basis of the principle of compensation only for *financial* losses. In Section 5.02 Comment b, the limitation to financial losses is justified as consistent with the desire to eradicate fault from the inquiry.[10] This is a circle in justification that requires more excavation. Fault, based as it is in *mis*conduct, need not be entirely identical to nonfinancial losses and gains. More will be said about this below.

C. Premarital Agreements

One more example will suffice. Chapter 7, governing Marital Agreements, effectively limits premarital agreements to financial issues.[11] While it allows for enforceable premarital agreements generally, subject to common state law concerns over fairness, it has several provisions addressing the terms that are negotiable. Section 7.12 prevents couples from gaining enforcement of agreements that hinge financial settlements on marital conduct, unless state law already ef-

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3. *Id.* § 5.02 cmt. b.
4. *Id.*
5. *Id.* Introduction at 14.
6. *Id.* at 28.
7. ALI PRINCIPLES 1997, *supra* note 1, at 30-31.
8. *Id.* at 14.
9. *Id.*
10. *Id.* § 5.02 cmt. b.
11. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS, § 7 (Tentative Draft No. 4, 2000) [hereinafter ALI PRINCIPLES 2000].

fectively provides fault-based distributions of wealth.[12] That is to say, a couple may not reach an enforceable agreement on the price of the exchange of nonfinancial benefits within their marriage. Under Section 7.12, a couple may not restrict their access to divorce by agreement, or financially penalize a spouse who seeks a divorce.[13] Through these restrictions, the *Principles* reflect the notion that nonfinancial issues will not receive legal rights within dissolution law, even when the couple desires otherwise. One of the reasons expressed in the Comments is the general policy of eliminating inquiries into fault.[14] In effect, this means that even consensual premarital agreements will govern property settlements and alimony only—the financial issues—and cannot lead to an investigation and settlement of nonfinancial issues, such as those reflected in the prohibited terms in Section 7.12.

III. THE GENDER PROBLEM WITH THE TREATMENT OF NONFINANCIAL LOSSES AND GAINS

Financial issues cannot be isolated from nonfinancial issues. This problem is of particular concern to women.[15] The family economy is constructed out of the exchange of numerous financial and nonfinancial contributions, including but extending far beyond the care of dependents.[16] Women's contributions are systematically not valued or undervalued when it comes time to decide what is legally relevant and compensable in family law. There are significant and constant exchanges within marriage of love, counseling, sex, emotional support, entertainment, money, and unpaid labor. It is a particular theory to posit, as the *Principles* seem to do, that the financial and the nonfinancial operate in separate negotiations, and law can only effectively be concerned with the financial issues.

In the nineteenth century, the provision of services, including both labor *and* affection, was an explicit exchange for financial support.[17] These were the complimentary obligations of marriage, and it would have been unthinkable to believe they were not interrelated. The *Principles* excise the financial from the nonfinancial.[18] Here, the financial and the nonfinancial exchanges in marriage have taken on entirely different forms. Their separation seems to rest on the ease of legal intervention to settle scores on the financial front, contrasted with the supposed impossibility of settling scores on the nonfinancial front. The meaning of this distinction is that financial contributions and losses give rise to legal rights, and nonfinancial ones cannot. If nonfinancial incidents of marriage are not legally relevant, contrasted with the legal relevance afforded financial ones, nonfinancial contributions are higher risk investments and there is legal bias

12. *Id.* § 7.12.

13. *Id.*

14. *Id.* at cmt. b.

15. For a fuller exposition of this point, see Katharine B. Silbaugh, *Marriage Contracts and the Family Economy*, 93 NW. U. L. REV. 65 (1998).

16. The *Principles* allow a limited payment for the care of dependents, but it is not measured against the benefits conferred by the care, only the earning capacity losses resulting from it. ALI PRINCIPLES 1997, *supra* note 1, § 5.06.

17. Reva B. Siegel, The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings, 1860-1930, 82 Geo. L. J. 2127 *passim* (1994).

18. ALI PRINCIPLES 1997, *supra* note 1, § 5.02 cmt. b.

against them. Those who contribute more of them (on average women) will find their contributions unrecognized by the law. This bias is compounded by the *Principles*' insistence on settling only post-divorce losses, leaving untouched any inequalities occurring during the marriage.[19]

Ignoring nonfinancial losses might not matter to a gender analysis if we assume that the nonfinancial give-and-take is equal as between men and women—that there is nothing systematic about it. If that assumption turns out to be wrong, then leaving nonfinancial issues out of the equation has a potential gender bias in it (in one direction or the other). In fact there is reason to think that nonfinancial investments by women are greater, *on average*. The *Principles* do admit that there is a potential systemic impact in that they provide for earning capacity losses associated with the care of children and the elderly.[20] Here the ALI recognizes in a limited sense that there is sex role division of some kind in most marriages, or in enough marriages to warrant attention. To take no account of unpaid caregiving labor within the family would systematically affect women, and the *Principles* reflect the recognition courts have given to this truth.[21]

Caregiving labor is the only nonfinancial issue the ALI addresses. But, the ALI expresses even this issue as though its only relevance is its effects on finances; the only legally recognizable result of caring for dependents is an earnings capacity loss.[22] Put another way, caregiving labor's only legally relevant effect is its impact on the caregiver's ability to earn money in the wage labor market. That loss of the all important wage-earning ability requires compensation under the ALI.[23] But doesn't caring for the family produce gains and losses to individuals other than the loss it admittedly inflicts on the caregiver's wage-earning capacity? Gains are conferred by caregiver-spouses to wage-earner spouses through parenting as well; the opportunity to parent gives great pleasure, whether a child is absent or present,[24] a minor or an adult. That benefit continues to be enjoyed post-divorce by both parties. Thus if the contributions of effort to achieve that benefit are not equal (and the reader will have to accept that, on average, women contribute more here), a benefit is conferred post-divorce. Such a benefit requires some settling, just as an advanced degree, for example, requires settling.

More significantly, care of children and the elderly is not the only nonfinancial aspect of the marital exchange, though it is the only one that the ALI recognizes.[25] Other aspects include counseling and emotional support of spouse and family, and entertainment. Perhaps we should assume that the ALI leaves these out on the principle that once you remove caregiving work *per se*, the rest of the emotional exchanges within marriage are equal, and require no account-

19. *Id.* § 5.02 cmt. c.

20. *Id.* § 5.06.

21. *Id.*

22. *Id.*

23. *Id.*

24. Though ordinarily parents do not experience equal pleasure in the case of a present versus and absent child, this does not undermine the point; most parents experience some benefit from the existence and care of an absent child as well.

25. ALI PRINCIPLES 1997, *supra* note 1, § 5.06.

ing. This equal flow assumption is expressed in the *Principles*' "give-and-take" terminology.[26] However, this may be a dubious assumption for several reasons.

First, there is a case to be made that women provide more counseling support during marriage, based on the (admittedly controversial) work of Carol Gilligan[27] and similar sociologists. More concretely, there is evidence that a man's emotional well-being improves when he is married, while a woman's declines when she is married.[28] Finally, increasingly sound evidence suggests that women seek divorce more often than men, suggesting that something about the exchange is more often unsatisfactory to women than it is to men. It is hard to get a concrete read on how each or any of these facts reflect on the exchange of losses and benefits within or after marriage. But this gender correlation suggests that we need to investigate the systemic effects of ignoring them in divorce settlements. We cannot safely chalk up nonfinancial gains and losses to the give-and-take of marriage. My suspicion is that the rise in male psychological well-being within marriage and the decline in female well-being indicates that the flow of benefits is unequal, including all things financial and nonfinancial, and that, on average, women are contributing more and receiving less during marriage. This suspicion is bolstered by the information that women, more often than men, leave marriage.[29]

If gender is the issue, my observation can be turned on its head; men suffer greater nonfinancial losses from divorce (losing the male psychological well-being that results from marriage) while women suffer greater financial losses. Therefore, compensating financial but not nonfinancial losses from divorce benefits women, on average. However, that conclusion only follows if you accept another tenet of the *Principles*, expressed in Section 5.02 Comment c; the only legally cognizable losses are those that arise from dissolution itself, not from the marriage. The ALI justifies this approach with the following words:

> [The remedies] are not meant to provide compensation for inequities in the spousal give-and-take during the marriage. Divorcing individuals are likely to believe that the allocation of resources and responsibilities during their marriage was unfair. It would seem certain that some are correct. But the divorce law cannot provide general relief for unfair conduct in marriage. . .The no-fault di-

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26. *Id.* § 5.02 cmt. c.

27. CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982).

28. *E.g.*, Nadine F. Marks, *Flying Solo at Midlife: Gender, Marital Status, and Psychological Well-Being*, 58 J. MARRIAGE & THE FAM. 917, 930 (1996).

29. Women are remarrying at a lower rate than their ex-husbands. *See* Margaret F. Brinig and Douglas W. Allen, *These Boots are Made for Walking: Why Most Divorce Filers are Women*, 2 AM. L. & ECON. REV. 126, 128 (2000). This has often been presented as evidence to support the injustice done to the wife by the divorce; her prospects for remarriage must be worse given the gendered social significance of age in our culture. It is plausible, however, that women's lower remarriage rate is a reflection of their preference. In the abstract, women may wish to remarry, but in light of the experience of their first marriage, are unwilling to accept many potential mates. Given the differential data on marital happiness for men and women, it is hard to know whether to characterize that state of affairs as a loss or a gain. Except where there has been violence in the household, the scenario of women choosing and significantly benefiting from remaining unmarried or divorcing has not been adequately investigated in the literature addressing marital dissolution, and its implications are not well fleshed out in the *Principles of Family Dissolution*.

> vorce law of most states gives spouses the legal power to terminate the marriage unilaterally. In principle this power makes it impossible for either spouse to impose an inequitable arrangement on the other, at least in the long term.[30]

This passage is dependent on several questionable assumptions. First, there is a belief in he-said, she-said fatalism; the truth about equities is not susceptible to investigation. There is room for women to be skeptical of that position, just as women have been skeptical of it in the context of sex offenses and domestic violence. This is not an exception; the presumptive fairness (or equality) of gains and losses within marriage is the very basis for ignoring them in divorce settlements. This fairness is proved to the ALI by the power each spouse has, "in principle," to prevent inequitable arrangements using divorce. Thus, the emotional score sheet becomes one of who benefits from the divorce, or loses and gains from it, not who benefited from the marriage.

The power to exit should not satisfy women as a safeguard against inequitable flow of benefits during marriage. It is inaccurate as an expression of what is expected from contracting parties generally. Inequitable arrangements, measured as a fair divide of the surplus created by the alliance, can be and often are sustained in long-term contracts. Even if exit were easy, the proper comparison is not between the benefits received by each party, but between the benefits received by one party and her alternatives outside the marriage. These will not be the same thing where the marriage produces a surplus of benefits to be divided between two people. The benefits can be persistently divided unequally, "inequitably,"—ninety-five percent to one party and five percent to the other, so long as that five percent represents an improvement over the alternative outside the marriage. In other words, there must be a surplus over singleness created by the marriage. Thus there is no reason to assume, as a starting point, that the exchange within marriage must be equitable (on some plausible meaning of that term[31]) because it is policed by the exit power. This claim is identical to the claim that the employment at-will doctrine ensures that employment arrangements are fair, and the claim is subject to the same normative and practical criticisms. Moreover, even if the alternatives outside marriage are better, an inequitable marriage can hold together where the actual barrier to exit—the legal and psychological process of divorce—is great enough. This can be compounded where an assessment of the interests of third parties, such as children, influences the exit decision and it is not simply a question of personal utility.

These may sound like unrealistic rational theory niceties, but they are potentially significant to the justice of the divorce system. Under the *Principles*, the nonfinancial incidents are not to be measured at all because they are ephemeral, stripping someone who contributes more nonfinancial benefits of an accounting of her contributions to the marriage.[32] The give-and-take exchanges during marriage, as distinct from the losses created by divorce, are not to be measured because they are a presumptively balanced wash. I would posit that the give-and-take within marriage is not presumptively balanced, and that this imbalance

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30. ALI PRINCIPLES 1997, *supra* note 1, § 5.02 cmt. c.

31. The most that could be said is that the distribution within marriage is sure to be "efficient," as distinct from fair, but even this claim is questionable.

32. ALI PRINCIPLES 1997, *supra* note 1, § 5.02 cmt. b.

needs to be addressed. The drafters of the *Principles* might at this point argue that this analysis drifts too close to the shores of fault determinations. However, it is not clear that nonfinancial losses need to be equated entirely with fault; they need not arise solely from "misconduct" of any sort, cognizable in tort or more mundane. While I am not an advocate of moralistic determinations of fault, the possibility that fault can be a mechanism for evaluating inequities in nonfinancial give-and-take must be considered.

IV. INCOMMENSURABILITY

The *Principles* argue that nonfinancial losses are excluded in part because they cannot be translated onto the scale of financial losses and traded-off against them. Specifically, Comment b to Section 5.02 says:

> The reasons for this exclusion are pragmatic as well as principled. The pains and joys that individuals find from divorce are not commensurable with its financial costs, so that there is no method for determining the extent to which compensation for a financial loss should be reduced or enlarged to reflect nonfinancial gains or losses.[33]

As an initial matter, one must agree that translating non-monetary suffering into dollars is problematic. However, we should look harder before disposing of the issue on that ground alone. First, is it harder to translate nonfinancial marital losses into dollars than in a multitude of other areas, such as pain and suffering in tort law? The legal system does this translation routinely, and therefore it cannot stand alone as a reason to deny a remedy for nonfinancial losses. The reason the difficult translation to dollars is undertaken in tort is because to do otherwise would be unjust and the effect would be to ignore genuine wrongful suffering because there are imperfections and limitations in our ability to address the suffering. In tort, the course of overcoming the imperfections frankly acknowledges that the suffering is too great to ignore. Therefore, implicit in a decision that the valuation is too difficult here is a political decision—the pain isn't worth the gain. When incommensurability is translated into eliminating one side of the equation from consideration, a political move is made in labeling a loss incommensurable. What is meant is that the loss is not worthy of addressing. In the ALI context, we need to view the decision to ignore nonfinancial losses as an assessment that they are not terribly important. However, this perspective on the exchanges within marriage should be rejected because it may have gender-biased implications.

The ALI's resolution of this problem is to offer up the regular tort system as an alternative to the divorce proceeding itself,[34] but it is very hard to conceive of a principled reason to delegate that function. Rather it appears to be delegated as a part of the process of minimizing its significance. The Introduction to the *Principles*, in Topic 2, Section III, says as much. The *Principles* concede that putting tort litigation within the marital dissolution would "facilitate such claims by lowering the procedural or transactional hurdles that confront them."[35] Never-

33. *Id.*
34. *Id.* § 5.02.
35. *Id.* Introduction at 28.

theless, the *Principles* go on to explain that, in effect, having the tort option is a way of getting rid of the problems raised here as a conceptual matter only; in practice, these tort claims will, by and large, not be brought. In the further discussion of how the tort of intentional infliction of emotional distress would work for ordinary marital losses, the *Principles* praise the extent to which there would usually *not* be a remedy for such losses.[36] In other words, the *Principles* at first appear to point to a forum for nonfinancial losses to be investigated—tort law—but note approvingly that tort law will only apply to outrageous behavior.[37] Thus, the ALI makes the conclusion that the ordinary *financial* losses are in fact the important ones, or the ones worthy of legal relevance.

In any event, tort is not the right avenue for examining nonfinancial losses precisely because they are not extraordinary; they are a significant part of marriage and marital dissolution. This is because the marriage bargain itself thoroughly intertwines financial and nonfinancial obligations, and the attempt to disentangle them at divorce in order to achieve neatness does not do a service to the reality of the marriage relationship. When thinking about gender questions and the *Principles*, women should at least be concerned that the *Principles* have effectively created property rights in earning capacity and goods, and not created property rights in other sacrifices made on behalf of the marriage.[38]

If it is not harder to translate nonfinancial matters of marriage into financial awards in theory than it is in tort law, then the objection is misstated in Comment b to Section 5.02. Rather than being about the difficulty of translating dollars into non-dollar values, the real concern is about ascertaining the comparative suffering between spouses. It is the he-said, she-said concern, the no-fault value. Put differently, it is about the desire not to ask and not to investigate, rather than about the actual question of remedial translation into dollars. The difference may seem obscure, but imagine that one party had suffered far more than the other—pick a clear case (Spouse A philanders constantly, drinks, does nothing for the marriage, does not work, and Spouse B is long-suffering and generally a compromising person to live with). The real difficulty—deciding whose lot is worse—would not be as hard as in most divorces. Thus, the further act of translating Spouse B's greater suffering into dollars (i.e. onto a different metric) would be a difficult task, but one well within the regular practice of the legal system. It is the closer case of comparative suffering that raises concern. However, I believe that the actual concern in this situation is more about deciding whose losses are greater—evaluating the content of the give-and-take—and less about translating that evaluation onto a financial metric.

That is not to say the ALI is wrong to worry about assessing the comparative losses. But the issue should not be stated as an incommensurability problem. Rather, it collapses into the desire to avoid fault adjudication.

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36. *Id.* at 29, 42, 49-50.

37. *Id.* at 32, 42, 49-50.

38. For a complete discussion of this problem, see Silbaugh, *supra* note 15, at 65.

V. FAULT

There is now a reasonable consensus that fault-based grounds for divorce are not sound, to the extent they purport to limit the availability of divorce. However, the problems presented by nonfinancial issues suggest why fault in the context of financial resolutions is not as easily shaken off as the *Principles* would like. The *Principles* are deeply committed to eradicating any last vestiges of a fault role in deciding anything at the time of divorce. For example, Comment b to Section 5.02 says that a primary reason for not considering nonfinancial losses is that "to include consideration of emotional losses and gains would require a more general examination of marital misconduct, which this section rejects."[39] The reason for not permitting marrying spouses to sign enforceable agreements limiting their own divorce options to fault grounds is that courts would then have to "polic[e] the details of intimate relationships," a task the *Principles* avoid with the rejection of all fault inquiries.

Maybe the investigation into fault can be richer and more reasoned than the *Principles* claim when they call fault issues questions of "morality, virtue, and sin."[40] Inquiries into marital fault need not be inquiries into morality, virtue, and sin. By using these concepts, the *Principles* have turned concrete nonfinancial items of reciprocal exchange into abstractions. Nonfinancial aspects of marriage, rather than representing the concrete flow of welfare-enhancing services, become the two-dimensional material of moral judgment and, in the process, become conceptual, not actual. This is the mistake of conflating nonfinancial contributions and losses with misconduct.

At times, the *Principles* express concern that inquiries into fault are standardless and leave room for dangerous evaluations on the part of individual judges. This seems a valid concern. But are we certain that consideration of conduct cannot be a vehicle for capturing legitimate inequities in nonfinancial exchanges? Given the valid concern over creating standards for judging nonfinancial losses and gains, the conclusion that nonfinancial losses and concerns are therefore incompensable is not the only one available. The *Principles* have very carefully created a language of compensable losses to rid the legal air of concepts such as need, for example. Perhaps the *Principles* could have crafted some concrete language to take nonfinancial losses seriously. Perhaps fault could have been re-labeled and similarly refocused, from morality and *misconduct* to an evaluation of the entire marital balance sheet, both financial and nonfinancial, in exchange terms. These questions are unanswerable, because all the evidence suggests that the justice import of the nonfinancial losses goes unappreciated throughout the *Principles*. Maybe there could not be a reworking of fault to take account of the interaction of financial and nonfinancial gains and losses within marriage. If so, must nonfinancial gains and losses be left out of court altogether? Maybe the ALI should have pressed harder on whether avoiding inquiries into virtue and sin necessarily forecloses inquiries into ordinary nonfinancial incidents of marriage.

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39. ALI PRINCIPLES 1997, *supra* note 1, § 5.02 cmt. b.

40. *Id.* Introduction at 28-29.

VI. AN ADDITIONAL MATTER

The ALI has acknowledged the unusual challenge of putting together the *Principles* given the degree of inconsistency in the law over time, from state to state and from judge to judge.[41] The difficulty of articulating the *Principles* at a time of extraordinary transition in family life is even more striking. Marriage rates are down, and marriage is no longer a societal pre-condition of having children; roughly one third of children are born to unmarried mothers. Marriage is not necessary to oblige parents (fathers) to their children. It is not necessary as a condition of liberal access to sexual activity. It no longer provides financial security. The *Principles* acknowledge that there is little consensus about what the meaningful content of marriage is at this time.[42] Yet the *Principles* in general seem to reflect on and organize the major debates and changes of the past 30 years as if we are nearing the end of the period of change. This does not seem obvious. Signs that change has slowed significantly are not apparent. A leveling of the divorce rate does not necessarily reveal much about the content of newly negotiated family arrangements. Instead, the *Principles* may be poorly timed in this process of family change.

41. *Id.* Introduction at 1-8.

42. *Id.* at 22-26.