Introduction

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The family has undergone almost revolutionary reconfigurations over the past generation. In the space of a few decades, we have seen the universal recognition in the United States of no-fault divorce, the legal recognition of nonmarital fathers, the establishment of registration schemes and other claims between cohabitants, both heterosexual and homosexual, and the recognition as parents of adults who have neither a biological tie to a child nor an adoptive one.[1] Recently, the pace of these changes has become almost frenetic. Just this year, Canada legalized same-sex marriage through national legislation, as South Africa did by judicial opinion; New Zealand's Law Commission has recommended major changes to the legal rules that determine status as a parent so that certain egg or sperm donors could become a child's third parent; and Belgium formally recognized its first polygamous marriage.[2]

Family law is red hot. These subjects – divorce, cohabitation, same-sex relationships, and the nature of parenting and parenthood – are now the subject of intense public debate in newspaper articles, editorials, television talk shows, and legislation, at the federal, state, and local levels.

In this volume, you will find the first major critique of the intellectually formidable and influential PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS ("PRINCIPLES")[3] developed by the American Law Institute ("ALI") over an eleven-year period, ending in 2002. In the PRINCIPLES, the ALI carefully considers many of the significant and very controversial questions raised by these changing family forms. The ALI, the most prestigious law reform organization in the United States, is a collection of judges, lawyers, and academics established in 1923 "to promote the clarification and simplification of the law and its better adaptation to social needs."[4] The ALI has been

[1] Section of Family Law, American Bar Ass'n, *10 FAQs About Family Law,* http://www.abanet.org/family/faq.html (last visited Dec. 1, 2005); Leslie J. Harris, *Same-Sex Unions Around the World*, PROB. & PROP., Sept./Oct. 2005, at 31; Lehr v. Robertson, 463 U.S. 248 (1983); Leslie Joan Harris, *Reconsidering the Criteria for Legal Fatherhood*, 1996 UTAH L. REV. 461.

[2] Civil Marriage Act, 2005 S.C., ch.33 (Can.); Michael Wines, Same-Sex Unions To Become Legal In South Africa, N.Y. Times, Dec. 2, 2005, at A6; NEW ZEALAND LAW COMMISSION, REPORT NO. 88, NEW ISSUES IN LEGAL PARENTHOOD, at xxv (2005), *available at* http://www.lawcom.govt.nz/UploadFiles/Publications/Publication_91_315_R88.pdf (Recommendation R10, describing "Legal parenthood for 'known' donor as a child's third parent"); Paul Belien, *First Trio "Married" in the Netherlands*, BRUSSELS J., Sept. 27, 2005, http://www.brusselsjournal.com/node/301.

[3] AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS (2002) [hereinafter PRINCIPLES].

[4] American Law Institute, http://www.ali.org/ (last visited Dec. 1, 2005).

tremendously influential in the development of American law through its publications and Restatements of Law.[5] The PRINCIPLES promise to be no exception.[6] Indeed, because of their breadth, depth, and novelty, the PRINCIPLES are arguably the most sweeping proposal for family law change attempted in the United States over the last quarter century.

Published after four preliminary drafts, the PRINCIPLES represent a massive scholarly effort – 1,187 pages in total – which, if enacted, would leave few areas of family law untouched. They address fault, the division of property, alimony payments, child custody, child support, domestic partnerships, and private agreements between adults who cohabit or marry. Many of the proposals contained in the PRINCIPLES would change current law dramatically, as the contributors to this volume observe again and again. Many are extremely controversial. For example, the PRINCIPLES propose, as one of the drafters explains, to treat both heterosexual and homosexual couples who cohabit "as though they were married" when "their long-term stable cohabitations come to an end."[7] The PRINCIPLES also propose to award custodial responsibility according to past caretaking practices of the adults in the relationship – a proposal first made by Professor Elizabeth Scott, a contributor to this volume[8] – rather than according to the loosely-defined "best interests of the child" standard. The PRINCIPLES would also redefine spousal support and alter the division of marital property. They would greatly reduce judicial discretion in some areas of family law and greatly expand it in others. In short, the PRINCIPLES represent a major reworking of the law of marital dissolution and are, and will surely be long into the future, a major influence on the field.

Plainly, the subject matter of the PRINCIPLES is of enormous significance and, for this reason, the PRINCIPLES deserve what scholars call a "comprehensive examination;" that is, a lively, illuminating dialogue among some of the nation's foremost legal experts on the future direction of family law. Although a few law journals have published symposia examining aspects of the PRINCIPLES,[9] no one has examined them critically in a systematic, book-length effort. This volume fills that void. Here, some of the nation's leading intellectuals in family law provide an in-depth analysis of the principles and policy choices the ALI endorses and offer a fundamentally different vision for resolving the challenges facing state courts and legislators. For example, the PRINCIPLES seek in some areas to sharply limit judicial discretion with detailed rules, commentary, and illustrations. Professor John Eekelaar notes in his chapter that while "[c]ourts, and couples, do need principles to follow," those principles "need not be very elaborate. Arrangements for children should aim to sustain a

[5] Marygold S. Melli, *The American Law Institute Principles of Family Dissolution, the Approximation Rule and Shared-Parenting*, 25 N. ILL. U. L. REV. 347, 347–48 (2005) (observing that the ALI's "Restatements of the Law have been enormously influential in the development of American law"). It is difficult to overstate the degree of the ALI's influence. As of March 1, 2004, state and federal courts have cited the Restatements 161,486 times. AMERICAN LAW INSTITUTE, PUBLISHED CASE CITATIONS TO RESTATEMENTS OF THE LAW AS OF MARCH 1, 2004, *available at* http://www.ali.org/ali/AM04_07-RestatementCitations04.pdf (last visited Dec. 1, 2005).

[6] Robert Pear, *Legal Group Urges States to Update Their Family Law*, N.Y. TIMES, Nov. 30, 2002, at A1 ("The findings are likely to have a major impact, given the prestige of the [ALI].").

[7] Grace Ganz Blumburg, a drafter of the PRINCIPLES and professor at the University of California, Los Angeles. *Talk of the Nation, New Principles for Family Law* (National Public Radio broadcast, Jan.) ("These people live like they're married, even if they're not formally married. They share a life together as though they were married. Therefore, when their long-term stable cohabitations come to an end, we should treat them as though they were married.").

[8] Elizabeth S. Scott, *Pluralism, Parental Preference, and Child Custody*, 80 CAL. L. REV. 615 (1992).

[9] *See* Symposium, *ALI Principles of the Law of Family Dissolution*, 2001 BYU L. REV. 857; Symposium, *Gender Issues in Divorce: Commentaries on the American Law Institute's Principles of the Law of Family Dissolution*, 8 DUKE J. GENDER L. & POL'Y 1 (2001); *Symposium on the American Law Institute's Principles of the Law of Family Dissolution*, 4 J.L. & FAM. STUD. 1 (2002).

stable environment, reduce conflict and maintain, as far as possible, the child's beneficial relationships with parents or parent-figures, whose independent interests should be recognized as far as possible, but as being subordinate to those of the children." Although such principles "should provide sound guides for separating parties, their advisers, mediators and lawyers . . . , [s]ometimes decisions will need to be made which require the exercise of judgment on the application of the principles: the courts are there to make them."

The ALI's proposals did not emerge in a vacuum. They reflect similar developments in family law in the United Kingdom, Europe, Australia, and elsewhere. Several scholars in this volume adopt a deliberately comparative structure that highlights the very different policy decisions that have been made by jurisdictions outside the United States. The PRINCIPLES provide a rich substratum for exploring the merits of these competing visions about what makes a family, the nature of parenthood, and the basis for the obligation to support one's child and the duty, if any, to support a person with whom one has lived in an intimate relationship.

Because of the prestige of the ALI, judges will undoubtedly rely on the PRINCIPLES as they have relied on the ALI's Restatements. Legislators are also likely to turn, rightly or wrongly, to the PRINCIPLES for guidance because, in contrast to the Restatements, this work was designed to stimulate legislative reform. In the words of the ALI's Director, Lance Liebman, "much of the relevant law is statutory, and what seemed to be needed was guidance to legislators as well as to courts."[10] As the definitive scholarly appraisal of the ALI's proposals, this volume is intended to be on the shelf side-by-side with the PRINCIPLES to be consulted as a source of critical perspectives. Any judge or policymaker confronted with the adoption of a specific reform in the PRINCIPLES, and any organization seeking to defend or challenge the PRINCIPLES, will want to consult this volume as a first step.

In fact, the impact of the PRINCIPLES is already being felt. West Virginia statutorily adopted the proposed "past caretaking standard" as a substitute for the "best interests" standard that now prevails everywhere else.[11] In Florida, an intermediate appellate court attempted to adopt the "past caretaking standard" judicially, but was overruled.[12] Supreme Courts in Rhode Island and Massachusetts have looked favorably upon the PRINCIPLES' definition of "de facto parent" in justifying an award of custodial rights to long-time caregivers who lacked formal legal ties to a child.[13] Even those who disagree with the ALI's proposed reforms, as this volume argues they frequently should, will likely feel obliged to consider them and explain the basis of their disagreement.[14]

[10] Lance Liebman, *Director's Forward, in* PRINCIPLES, at xv.

[11] W. VA. CODE ANN. § 48-11-106 (LexisNexis 2004).

[12] A judicial advisor to the ALI's work on the PRINCIPLES purported to adopt the "approximate the time" standard for custody dispositions following divorce as a matter of common law. Young v. Hector, 740 So. 2d 1153 (Fla. Dist. Ct. App. 1999). At rehearing *en banc,* the District Court of Appeal of Florida withdrew the panel decision and rejected the ALI standard. *See* Young v. Hector, 740 So. 2d at 1158.

[13] *See, e.g.*, Rubano v. DiCenzo, 759 A.2d 959, 974–75 (R.I. 2000) (drawing support from PRINCIPLES for holding that "a person who has no biological connection to a child but has served as a psychological or de facto parent to that child may . . . establish his or her entitlement to parental rights vis-à-vis the child."); E.N.O. v. L.M.M., 711 N.E.2d 886, 891 (Mass. 1999) (relying in part on PRINCIPLES in holding that "the best interests calculus must include an examination of the child's relationship with both his legal and de facto parent[s]"), *cert. denied*, 528 U.S. 1005 (1999); Youmans v. Ramos, 711 N.E.2d 165, 167 n.3 (Mass. 1999) (adopting the ALI's definition of "de facto parent" in holding that child's former guardian was entitled to seek court-ordered visitation).

[14] For example, although the Maine Supreme Judicial Court recently refused to adopt the PRINCIPLES' conception of parenthood, it acknowledged that the PRINCIPLES will be extremely influential. C.E.W v. D.E.W., 845 A.2d 1146, 1152 & n.13 (Me. 2004) (declining to adopt the ALI's definition of parenthood).

The questions the ALI tackles are sufficiently weighty and complicated that they must be discussed broadly, from multiple perspectives. Perhaps the most remarkable aspect of this volume is the rich and deep diversity of views contained within it. Among our contributors are feminists and child advocates, social conservatives, liberals, and moderates. We have utilized a wide range of analytical tools including economic theory, constitutional law, social science data, and linguistic analysis.

We are privileged to have scholars in this collection who are extraordinarily well-respected in the field of family law to provide much-needed context for and commentary on the ALI's reform proposals. Many of our contributors have written in this area for decades and bring that depth of knowledge and expertise to bear in evaluating the PRINCIPLES, especially the ALI's more novel proposals. For instance, Professor David Westfall's chapter on property division upon divorce both demonstrates the depth of innovation that the ALI would have judges and legislatures embrace, and provides a critical evaluation of the ALI's approach.

The rising stars in family law are also well represented among our contributors. For example, Professor David Meyer's chapter on the new forms of parenthood proposed by the ALI provides fresh insight to this area of the law, as well as a helpful assessment of the proposal's constitutionality. This chapter should give lawmakers much-needed assurance when deciding whether or not to adopt the PRINCIPLES, provide judges confidence in rejecting the PRINCIPLES or applying laws based upon them, and give legal scholars and scholars of the family new food for thought.

Importantly, this volume includes reflections from "end-users" of the PRINCIPLES, the judges and legislators who will decide whether and to what extent to adopt the ALI's proposed reforms. Precisely because so much about the family is in flux, judges and legislators are obliged to reexamine rules that no longer neatly fit the constantly changing familial arrangements that people are forming and disbanding. How the old rules ought to apply, and whether they need to be reformulated, are unavoidable questions today. Because the PRINCIPLES are directed to both "rulemakers" and "decisionmakers,"[15] we thought it was essential to have them weigh in. Included in this volume are the immediate past Chief Justice of the Michigan Supreme Court, Maura Corrigan, who oversaw the wholesale revamping of Michigan's child support enforcement system, and the sitting Chief Justice of the South Carolina Supreme Court, Jean Toal, who served as a legislator for more than a decade. Both emphasize how removed the PRINCIPLES are from the everyday realities of legal decision-making and judicial administration. Chief Justice Toal argues, for instance, that the PRINCIPLES' domestic partnership scheme "is significantly weakened by some fundamental assumptions involving the formation of legal obligations. . . . , [and] would impose legal obligations in a highly unorthodox manner, significantly run afoul of concepts of freedom of contract, [and] restrict individual autonomy. . . . " She concludes that "[t]he law is ill-served by creating classes of unmarried cohabitants who, for reasons of 'fairness,' have to bear greater financial responsibility for a 'break-up' than others."

Many of our other contributors are not strangers to the difficulties posed by law reform and legal change. Three of our contributors acted as advisors to the drafters of the PRINCIPLES, and another six were members of the ALI's Consultative Group. Professor

[15] Ira Mark Ellman, *Chief Reporter's Forward*, *in* PRINCIPLES, at xvii (stating that some sections "are addressed to rulemakers rather than decisionmakers").

Robert Levy served as the Reporter for the Uniform Marriage and Divorce Act and Professor Lynn Wardle is the immediate past president of the International Society of Family Law.

Despite their stellar academic credentials, our contributors are not confined to the "ivory tower." Many of our authors provide in-depth academic reflections while remaining cognizant of real world pressures and influences. Professor Katharine Baker, for example, discusses the ALI's asymmetrical approach to parental rights and obligations, which would give a broad range of individuals the ability to assert parental rights to a child without recognizing a corresponding responsibility to financially support that child. Although she unmasks a considerable shortcoming of the PRINCIPLES, Professor Baker acknowledges that the ALI may have struck an appropriate balance between rights and obligations in light of the political realities in the United States today.

To better inform policy makers, this volume also offers comparative perspectives missing in many academic volumes on family law. Included here are the views of leading family law scholars in the United Kingdom, Europe, and Australia, jurisdictions that have experimented to varying degrees with the subjects of the PRINCIPLES' proposals. For example, every state in Australia has extended marital property rights to cohabitants who live together for at least two years or have a child in common.[16] France has adopted Civil Solidarity Pacts that permit couples to receive marriage-like benefits under the law.[17] And on July 3, 2005, Spain became the first European state to allow both same-sex marriage and adoption.[18] Each nation offers an experimental laboratory in which to test the ALI's assumptions and to evaluate the success and wisdom of efforts to reconceive the family. The reflections of Professors John Eekelaar, Patrick Parkinson, and Tone Sverdrup on the experiences of and very different policy decisions made by these jurisdictions should prove invaluable to policy makers in the United States and elsewhere.

Although each chapter in this volume grapples with a different aspect of the PRINCIPLES and elucidates the assumptions underlying the ALI's policy recommendations, a number of themes emerge independently from these critiques. Several contributors ask whether the ALI's attempts at wringing discretion out of the system will be successful. Professor Levy observes that "[f]or parents and for those anxious to increase doctrinal determinacy, the PRINCIPLES pose even more troubling problems. The exceptions to the rigid 'approximate the time spent' doctrine seem to give judges as much discretion as the 'best interests' test does." Echoing this, Professor Eekelaar believes the ALI's "quest for certainty [may have] been subverted by complexity of application."

But the problem of discretion goes deeper than this. To use an analogy from physics, like energy in a system, discretion cannot be removed entirely from these difficult decisions – we can only move it around between parents, judges, legislators, or others. A number of contributors suggest we should place it in the hands of the people who have the most information on the ground, closest to the circumstances: in some instances, the adults who

[16] *See* Lindy Wilmott et al., *De Facto Relationships Property Adjustment Law – A National Direction*, 17 AUSTL. J. FAM. L. 1 (2003) (describing differences in state rules).

[17] Law No. 99–944 of Nov. 15, 1999, Journal Officiel de la République Française [J.O.] [Official Gazette of France], Nov. 16, 1999, p. 16959; Daniel Borrillo, *The* "Pacte Civil de Solidarité" *in France: Midway Between Marriage and Cohabitation*, *in* LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW 475 (Robert Wintemute & Mads Andenæs eds., 2001).

[18] Law to Amend the Civil Code on the subject of the right to contract marriage (B.O.E. 2005, 157), *available at* http://www.boe.es/boe/dias/2005/07/02/pdfs/A23632–23634.pdf. *See also* Al Goodman, *First Gay Couple Marries in Spain*, CNN.COM, July 11, 2005, http://www.cnn.com/2005/WORLD/europe/07/11/ spain.gay/.

are involved themselves and in others, judges. Thus, Professor Katharine Baker faults the PRINCIPLES' fluid definition of parenthood for encroaching on parents: "By increasing the number of people who can assert relationship rights, the PRINCIPLES necessarily increase the likelihood that courts, not parents, will be deciding what is in a child's best interest." The ALI's domestic partnership proposals raise a similar concern for Professor Marsha Garrison: "[T]he ALI approach . . . eliminates choice by forcing those who are unprepared to make marital commitments to shoulder the very responsibilities that they have avoided; it discriminates by cramming relationships of many contours into a 'one-size-fits-all' marital mold, . . . [and it] deeply intrudes into relational privacy." She concludes that "[d]espite the liberal rhetoric that cloaks its illiberal character, the ALI proposal offers nothing more – or less – than a dramatic expansion of state paternalism and coercion."

Of course, to foreclose the use of judgment by parents and judges, we should have good reasons or data. Yet, numerous contributors ask "where's the evidence?" In her chapter on the ALI's domestic partnership scheme, Chief Justice Toal asks whether there is "any evidence that cohabitating couples, as a general rule, do not provide for a fair and equitable distribution of [their] losses when their relationship dissolves?" Without such evidence, she believes "it would seem a tremendous waste to, with one broad brushstroke, paint legal obligations on a group of people 'after the fact,' based simply on their 'status' while in a relationship." Similarly, in his chapter on child support, Professor Mark Strasser notes that "one would expect the justification [for the PRINCIPLES' irrebuttable presumption that residential parents will make correct child care decisions for the first six years of a child's life] to include studies indicating why six years of age is an important milestone developmentally or, perhaps, some other justification for giving the residential parent of a young child such great leeway." Professor June Carbone questions the PRINCIPLES' "source of authority for the imposition of particular terms on warring couples," a crucial concern, she argues, because the family acts as a buffer between individuals and the State.

Our contributors return repeatedly to the novelty of the ALI's recommendations. In Professor John Gregory's view, the PRINCIPLES' "radical application of [property] characterization rules and by extension the rules of property division to domestic partners, for the most part rejects prevailing law, which rarely applies equitable distribution rules to the property of unmarried cohabitants." Similarly, several authors discuss the PRINCIPLES' unprecedented proposal to recharacterize separate property as marital when a long-term marriage dissolves. The novelty of the PRINCIPLES did not escape the ALI's attention. Professor Barbara Stark's chapter examines the PRINCIPLES' attempt to define "piecemeal" the responsibilities that should survive a relationship's termination. Although the ALI premises these responsibilities on "an inchoate national or local consensus," the drafters "conced[e] that in fact such a consensus may not exist."

A surprising number of chapters revisit questions of fault that, as Professor Katharine Silbaugh notes, the ALI has largely "side-lined." Professor Silbaugh wonders whether there can be justice when fault is not considered "either as a ground for divorce or in financial settlements." As Professor Lynn Wardle aptly observes, "[i]f marital misconduct is not *the* prime motivating, behavior-shaping, legal-proceeding influencing factor in marital dissolution proceedings, it certainly is one of the most important, especially when the misconduct is serious." Professor Wardle urges that it "is both irrational and impractical . . . [f]or the law to simply ignore . . . a factual reality that is . . . so integral to why, when and how [individuals] initiate and pursue such proceedings, and that manifests itself in so many ways in the tactics, claims and defenses" they assert. Professor Brian Bix speculates

that the ALI's "basic antagonism towards – or fear of – anything that seems to require a judicial finding of fault" explains its proposal to not enforce any agreement that would make fault a ground for divorce or the basis for penalizing the bad actor.

In closing, although the PRINCIPLES have begun to filter into American law, they are only beginning to receive the attention they will ultimately garner. In its monumental undertaking in the PRINCIPLES, the ALI asks all the big questions: among them, what entitles an adult to parental rights to a child; whether we should erase distinctions that have always been important in American family law, but are perhaps now outdated, between couples who marry and those who do not; and whether we can trust judges to make decisions affecting children and adults after a family fractures. Until this volume, there has been no resource to consult for a serious, comprehensive examination of the very controversial answers the ALI proffers to those questions. We hope that this volume will generate a robust discussion of the ALI's recommendations and the choices embedded within them.

PART ONE. FAULT

1 Beyond Fault and No-Fault in the Reform of Marital Dissolution Law

Lynn D. Wardle

For such a massive production, there are surprising gaps in the PRINCIPLES. Some of the most curious of these occur in Chapter 1. The ALI's vigorous repudiation of "fault" as a valid principle to be applied at dissolution and dissolution-related issues occupies the largest portion of Chapter 1. Yet there is no discussion or consideration of the numerous recently developed, ameliorative procedures and programs in marital dissolution cases. These two inconsistent decisions are in fact related to each other, reflecting a decades-old and perhaps worn-out generational perspective favoring the elimination of all obstacles, especially moral condemnation or social disapproval, to the exercise of individual autonomy in exiting marriage.

This chapter examines "fault" and "no-fault" in marital dissolution conceptually (asking whether "fault" is relevant to marital dissolution), jurisprudentially (asking how well the notions of "fault" and "no-fault" fit the premises of our legal system), and practically (asking whether rigid no-fault rules reflect the concerns of litigants in dissolution proceedings). Part I of this chapter reviews the discussion in the PRINCIPLES of marital misconduct, identifies several specific and general flaws, and argues that the "fault/no-fault" language utilized in the PRINCIPLES is dated, distorting, and inadequate conceptually as well as practically. It proposes that the language of accountability and responsibility be substituted for "fault" and "no-fault."

Part II of this chapter suggests that society, families, and individuals, including divorcing parties, have compelling interests in promoting alternatives to divorce, and that such policies can be implemented as a part of marital dissolution proceedings, without severely restricting access to divorce. A vibrant marriage revitalization movement is alive and well in the United States, led primarily by mental health professionals who are convinced that many effective alternatives to divorce are available for most, but not all, married individuals who are dissatisfied with their marriages. The failure of the PRINCIPLES to recognize and consider any possible legal tools to give couples in crisis the opportunity and encouragement to explore non-divorce options is an enormous and inexcusable hole in the scope and value of the PRINCIPLES.

Part III presents an alternative to the ALI's "fault or no-fault" paradigm. It proposes judicial recognition of clearly established community standards regarding minimally acceptable behavior of spouses in marriage, and suggests that violation of those standards should be considered in determining alimony and property awards. Such violations not only damage a unique relational interest of the other spouse, but they also injure the

community. Legal compensation for such loss appropriately protects and deters further injury to both public and private interests.

I. The ALI's Faulty Critique of Fault

A. The Drafters' Critique of Fault in Chapter 1 of the Principles

The drafters begin their explanation in Chapter 1, Topic 2, of why marital misconduct should not be considered in property allocation and alimony (which the drafters label "spousal compensation") awards by acknowledging that "American law is sharply divided on the question of whether 'marital misconduct' should be considered in allocating marital property or awarding alimony."[1] Historically, consideration of such "'fault' was almost universally allowed." But by 1970, when the Uniform Marriage and Divorce Act ("UMDA") rejected marital misconduct as a consideration in both contexts, a trend against considering fault in making such financial awards had begun, a position that now has been adopted by approximately half of the states.[2] The Principles also adopt the no-marital-misconduct position primarily for three reasons, because of (1) "the goal of improving the consistency and predictability of dissolution law;" (2) "the core tenet that the dissolution law provides compensation for only the *financial* losses arising from the dissolution of marriage[;]"and (3) tort reforms limiting inter-spousal immunity now permit separate tort claims between former spouses for some marital misconduct and reduce the need to have those claims asserted in property and alimony contests.[3] The conclusion reached by the drafters is not surprising. The Principles' primary drafter, Professor Ira Mark Ellman,[4] appears to have written more law review articles criticizing fault in dissolution proceedings than any other living legal commentator.[5]

The Principles explain that only two kinds of marital misconduct are universally considered in property and alimony award claims in all states: (1) when one spouse engaged in the misconduct of "waste or dissipation of marital assets," and (2) when spousal misconduct directly affects the "need" of a spouse, as when domestic violence leaves a spouse with increased medical expenses.[6] The Principles adopt both of these exceptions, which impact financial awards upon divorce.[7]

[1] Principles § 1, Topic 2, at 42.
[2] Principles § 1, Topic 2, at 43.
[3] Principles § 1, Topic 2, at 43.
[4] *See* Principles, at vii (Ira Mark Ellman is identified as Chief Reporter, with Katharine T. Bartlett and Grace Ganz Blumberg as Reporters. Professor Marygold S. Melli was an original Reporter from 1989–94, but was designated "Consultant" instead of "Reporter" in 1995.)
[5] *See generally* Ira Mark Ellman, *The Misguided Movement to Revive Fault Divorce, and Why Reformers Should Look Instead to the American Law Institute*, 11 Int'l J. L. Pol'y & Fam. 216 (1997); Ira Mark Ellman & Sharon Lohr, *Marriage as Contract, Opportunistic Violence, and Other Bad Arguments for Fault Divorce*, 1997 U. Ill. L. Rev. 719, 772; Ira Mark Ellman, *Should The Theory of Alimony Include Nonfinancial Losses and Motivations?*, 1991 BYU L. Rev. 259, 304 ("One piece of wisdom contained in the no-fault reforms was a skepticism about our ability to decide who was really at fault for marital failure. In the first case, for example, perhaps the husband's infidelity was bred by his wife's coldness. But then, perhaps her coldness resulted from his insensitivity. Can we tell which came first? Can we even tell whether he was really insensitive, or she was really cold? One might reasonably doubt whether there are accepted standards for judging such things."); Ira Mark Ellman, *The Place of Fault in a Modern Divorce Law,* 28 Ariz. St. L.J. 773 (1996) (arguing that fault should not be considered in alimony determinations); Ira Mark Ellman & Stephen D. Sugarman, *Spousal Emotional Abuse as Tort?*, 55 Md. L. Rev. 1268 (1996). Another Reporter, Katharine T. Bartlett, has also voiced similar concerns. *See* Katharine T. Bartlett, *Saving the Family From the Reformers*, 31 U.C. Davis L. Rev. 809, 815 & 825–26 (1998) (arguing that revival of no-fault divorce would harm women and children).
[6] Principles § 1, Topic 2, at 43.
[7] Principles § 1, Topic 2, at 43.

The drafters explain that the states' use of marital misconduct in awarding alimony and property upon dissolution falls into six categories:[8]

(1) Twenty states are described as *pure no-fault states* and "exclude consideration of marital misconduct entirely, subject to the two universal (financial cost) exceptions."
(2) Five states reportedly have *pure no-fault property*, [and] *almost pure no-fault alimony*.
(3) Three states are described as *almost pure no-fault* because the controlling law does not absolutely forbid consideration of marital misconduct, but it almost does, and few recent cases consider such fault.
(4) Seven states are described as *no-fault property*, [but] *fault in alimony*, giving courts broad discretion to consider marital misconduct in determining alimony awards.
(5) Fifteen states are described as *full-fault states*, in which courts have discretion to consider marital misconduct in both property and alimony contests.
(6) No state allows consideration of fault only in property division; twenty-eight states have embraced wholly or in large part the no-fault principle.[9]

In general, the drafters agree that "the states are divided evenly" on whether to allow consideration of marital misconduct in settling the adult financial consequences of divorce.[10] The community-property idea of joint ownership underlying marital property principles seems to influence property division and may underpin the rejection of marital misconduct, but alimony claims are based on equity rather than ownership, which may explain why consideration of misconduct continues to be common with alimony. In contrast, the PRINCIPLES suggest establishing "a presumption of entitlement to compensatory payments" and acceptance of that ownership-like notion should reduce support for considering misconduct in making alimony awards.[11]

The drafters examine two potential justifications for considering marital misconduct in dissolution and look to tort law as a source for guiding principles.[12] The first justification is the role of fault "as an agent of morality: rewarding virtue and punishing sin." However, the drafters assert that punishing misconduct is more appropriate for criminal law than dissolution law, and criticize that "many fault states [that] apply rules that cannot be explained as anything but punitive . . . [such as] the rule that inflexibly bars alimony awards to every adulterous spouse, without regard to any other facts of the case." The inflexibility of an absolute rule produces unjust results, while a vague rule fails to establish "clear behavioral standards" and gives too much discretion to the judge to determine what he or she personally considers "appropriate behavior in intimate relationships."

The drafters criticize the notion that "a fault-based award is justified because it allocates more of those costs to the spouse whose conduct caused them, by causing the dissolution," and because for marital misconduct "no losses are identified beyond the financial consequences present in nearly every dissolution." This seems to be "providing compensation, rather than imposing punishment, but "relies on slight of hand in application." "In the context of marital failure . . . the word 'cause' has no such [objective] meaning . . . . " It is not "a prior event (such as infection, or rust) without which the later event would not have occurred." Divorce for drunkenness or adultery is no different than divorce because a spouse grows fat or spends too much time at the office – in either case the offended spouse

[8] These categories are based on research that was done in 1996. PRINCIPLES § 1, Topic 2, at 44–48.
[9] PRINCIPLES § 1, Topic 2, at 46.
[10] PRINCIPLES § 1, Topic 2, at 47.
[11] PRINCIPLES § 1, Topic 2, at 48.
[12] PRINCIPLES § 1, Topic 2, at 49–51.